LEXNET
EUROPEAN INFORMATION SIA

PUBLIC PROCUREMENT

EU CASES MEMBER STATES 2008-2024

Revised 10 January 2025

LEXNET SIA
Kalna Viboni, Straupes pagasts
LV-4152 Cesu rajons, Latvia

Skype: gjortler
Mobile: +371-2616-2303
VAT: LV 40003655379

E-Mail: pgj@lexnet.eu
Website: www.lexnet.eu
Member: www.eurolex.com

Search criteria

Eur-Lex database

Relations with other legal acts

32014L0024, 32014L0025, 32014L0023, 32004L0018, 32004L0017, 32009L0081, 31993L0036, 31993L0037, 31992L0050, 31993L0038, 31977L0062, 31971L0305, 31990L0531, 31989L0665, 31992L0013, 32022R2560

Updated to: 14 January 2025

ORDONNANCE DE LA COUR (septième chambre)

26 septembre 2024 (*)

« Renvoi préjudiciel – Article 99 du règlement de procédure de la Cour – Directive 2014/24/UE – Procédures de passation des marchés publics de travaux, de fournitures et de services – Pouvoir adjudicateur – Notion d'"organisme de droit public" – Application à un marché public dont la valeur estimée est inférieure aux seuils d'application de la directive »

Dans l'affaire C-550/23,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Sofiyski rayonen sad (tribunal d'arrondissement de Sofia, Bulgarie), par décision du 20 août 2023, parvenue à la Cour le 30 août 2023, dans la procédure

NV

contre

Agentsia za darzhavna finansova inspektsia,

LA COUR (septième chambre),

composée de M. F. Biltgen, président de chambre, M^me^ A. Prechal (rapporteure), présidente de la deuxième chambre, faisant fonction de juge de la septième chambre, et M. N. Wahl, juge,

avocat général : M. M. Campos Sánchez-Bordona,

greffier : M. A. Calot Escobar,

vu la procédure écrite,

considérant les observations présentées :

– pour NV, représenté par lui-même,

– pour le gouvernement bulgare, par M^mes^ T. Mitova et T. Tsingileva, en qualité d'agents,

– pour la Commission européenne, par MM. G. Wils et I. Zaloguin, en qualité d'agents,

vu la décision prise, l'avocat général entendu, de statuer par ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 4 de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE, telle que modifiée par le règlement délégué (UE) 2017/2365 de la Commission, du 18 décembre 2017 (JO 2017, L 337, p. 19) (ci-après la « directive 2014/24 »).

2 Cette demande a été présentée dans le cadre d'un litige opposant NV, en sa qualité de directeur général de la société Montagi EAD, à l'Agentsia za darzhavna finansova inspektsia (Agence de l'inspection financière de l'État, Bulgarie) au sujet d'une infraction aux règles régissant les marchés publics,

commise par NV, lors de la conclusion d'un contrat de fourniture entre Montagi et Reyr Studio BG EOOD.

Le cadre juridique

Le droit de l'Union

3 Le considérant 1 de la directive 2014/24 énonce :

« La passation de marchés publics par les autorités des États membres ou en leur nom doit être conforme aux principes du traité sur le fonctionnement de l'Union européenne, notamment la libre circulation des marchandises, la liberté d'établissement et la libre prestation de services, ainsi qu'aux principes qui en découlent comme l'égalité de traitement, la non-discrimination, la reconnaissance mutuelle, la proportionnalité et la transparence. Toutefois, en ce qui concerne les marchés publics dépassant un certain montant, des dispositions devraient être élaborées pour coordonner les procédures nationales de passation de marchés afin de garantir que ces principes soient respectés en pratique et que la passation des marchés publics soit ouverte à la concurrence. »

4 L'article 1er de cette directive, intitulé « Objet et champ d'application », prévoit, à son paragraphe 1 :

« La présente directive établit les règles applicables aux procédures de passation de marchés par des pouvoirs adjudicateurs en ce qui concerne les marchés publics, ainsi que les concours, dont la valeur estimée atteint ou dépasse les seuils établis à l'article 4. »

5 L'article 2 de ladite directive, intitulé « Définitions », dispose :

« 1. Aux fins de la présente directive, on entend par :

1. "pouvoirs adjudicateurs", l'État, les autorités régionales ou locales, les organismes de droit public ou les associations formées par une ou plusieurs de ces autorités ou un ou plusieurs de ces organismes de droit public ;

[...]

4. "organisme de droit public", tout organisme présentant toutes les caractéristiques suivantes :

   a) il a été créé pour satisfaire spécifiquement des besoins d'intérêt général ayant un caractère autre qu'industriel ou commercial ;

   b) il est doté de la personnalité juridique ; et

   c) soit il est financé majoritairement par l'État, les autorités régionales ou locales ou par d'autres organismes de droit public, soit sa gestion est soumise à un contrôle de ces autorités ou organismes, soit son organe d'administration, de direction ou de surveillance est composé de membres dont plus de la moitié sont désignés par l'État, les autorités régionales ou locales ou d'autres organismes de droit public ;

[...] »

6 L'article 4 de la même directive, intitulé « Montants des seuils », est libellé comme suit :

« La présente directive s'applique aux marchés dont la valeur estimée hors taxe sur la valeur ajoutée (TVA) est égale ou supérieure aux seuils suivants :

a) 5 548 000 [euros] pour les marchés publics de travaux ;

b) 144 000 [euros] pour les marchés publics de fournitures et de services passés par des autorités publiques centrales et pour les concours organisés par celles-ci ; en ce qui concerne les marchés

publics de fournitures passés par des pouvoirs adjudicateurs qui opèrent dans le domaine de la défense, ce seuil ne s'applique qu'aux marchés concernant les produits visés à l'annexe III ;

c) 221 000 [euros] pour les marchés publics de fournitures et de services passés par des pouvoirs adjudicateurs sous-centraux et pour les concours organisés par ceux-ci ; ce seuil s'applique également aux marchés publics de fournitures passés par des autorités publiques centrales opérant dans le domaine de la défense, lorsque ces marchés concernent des produits non visés à l'annexe III ;

d) 750 000 [euros] pour les marchés publics de services portant sur des services sociaux et d'autres services spécifiques énumérés à l'annexe XIV. »

Le droit bulgare

7 Le Zakon za obshtesvenite porachki (loi sur les marchés publics) (DV n^{o} 13, du 16 février 2016), dans sa version applicable au litige au principal, prévoit, à son article 5 :

« (1) Les pouvoirs adjudicateurs sont responsables de la prévision adéquate, de la planification, du déroulement, de l'achèvement et de la prise en compte des résultats des marchés publics. Les pouvoirs adjudicateurs sont publics et sectoriels.

(2) Constituent des pouvoirs adjudicateurs publics :

[...]

14. les représentant des organismes de droit public ;

[...] »

8 L'article 17, paragraphe 1, de cette loi dispose :

« En présence de motifs le justifiant, les pouvoirs adjudicateurs sont tenus d'appliquer les modalités de passation de marchés publics prévues par la loi. »

9 L'article 18, paragraphe 1, de ladite loi dispose :

« Les procédures au sens de la présente loi sont :

[...]

12. le concours public ;

13. la négociation directe. »

10 L'article 20, paragraphe 2, de la même loi est libellé comme suit :

« Les pouvoirs adjudicateurs appliquent les procédures prévues à l'article 18, paragraphe 1, points 12 ou 13, lorsque le marché public a une valeur estimée

1. dans le cas de travaux : de 270 000 [leva bulgares (BGN)] à 10 000 000 BGN ;

2. dans le cas de fournitures et de services, y compris les services visés à l'annexe 2 : de 70 000 BGN jusqu'au seuil pertinent du paragraphe 1, en fonction du type de pouvoir adjudicateur et de l'objet du marché. »

11 L'article 256, paragraphe 1, de la loi sur les marchés publics prévoit :

« Lorsqu'un pouvoir adjudicateur qui attribue un marché public conclut un contrat ou effectue des dépenses ou prend un engagement d'effectuer des dépenses et, de la sorte, atteint ou dépasse le seuil de valeur minimale visé à l'article 20, paragraphe 1, ou 2, sans appliquer l'une des procédures prévues à

l'article 18, paragraphe 1, en fonction de la valeur de l'opération lorsqu'il existe des motifs pour l'appliquer, il est passible d'une amende s'élevant à deux pour cent de la valeur du contrat conclu, TVA comprise, et, s'il n'y a pas de contrat écrit, de la valeur de la dépense effectuée ou de l'engagement de dépense, dans la limite de 50 000 BGN. »

12 Les dispositions supplémentaires de la loi sur les marchés publics prévoient, à leur paragraphe 2, point 43, que, au sens de cette loi :

« L'"organisme de droit public" s'entend d'une personne morale qui remplit les conditions suivantes :

a) elle a été créée pour satisfaire spécifiquement des besoins d'intérêt général ayant un caractère autre qu'industriel ou commercial ;

b) elle est financée à plus de 50 % par des autorités étatiques, territoriales ou locales ou par d'autres organismes de droit public ; ou sa gestion est soumise à un contrôle de ces autorités ou organismes ; ou elle est dotée d'un organe de direction ou de surveillance dont plus de la moitié des membres sont nommés par un pouvoir adjudicateur public au sens de l'article 5, paragraphe 2, points 1 à 14.

Les besoins d'intérêt général sont de nature industrielle ou commerciale lorsque la personne agit dans des conditions normales de marché, poursuit un but lucratif et supporte elle-même les pertes liées à l'exercice de ses activités.

[...] »

Le litige au principal et la question préjudicielle

13 NV est le directeur général de Montagi, une société dont l'unique actionnaire est la société Darzhavna konsolidatsionna kompania EAD. Cette dernière société est entièrement détenue par l'État bulgare et ses droits sont exercés par le ministre de l'Économie bulgare.

14 L'Agence de l'inspection financière de l'État a contrôlé la légalité de la conclusion et de l'exécution de contrats conclus par Montagi au cours de la période allant du 1er janvier 2017 au 30 avril 2021. Elle a considéré que Montagi était un « organisme de droit public », au sens du paragraphe 2, point 43, des dispositions supplémentaires de la loi sur les marchés publics, et que NV, en tant que directeur général de cette société, était un « pouvoir adjudicateur », au sens de l'article 5, paragraphe 2, point 14, de la loi sur les marchés publics.

15 À la suite de cette inspection, cette agence a imposé à NV une amende administrative de 2 140,69 BGN (environ 1 120 euros) pour avoir attribué le 15 juin 2020, par l'intermédiaire de Montagi, un marché à Reyr Studio BG d'un montant de 89 195,66 BGN hors TVA (environ 44 600 euros) pour la fourniture de pierres concassées, de gravier et de gravats pour la réparation et la restauration du barrage de Zlati Voivoda 3, situé dans la municipalité de Sliven (Bulgarie), en violation de l'article 17, paragraphe 1, de la loi sur les marchés publics, lu en combinaison avec l'article 20, paragraphe 2, point 2, de celle-ci, qui imposent d'attribuer les marchés de fournitures et de services d'un montant de plus de 70 000 BGN (environ 35 000 euros) au moyen d'une procédure de concours public ou d'une procédure de négociation directe.

16 NV a contesté cette amende devant le Sofiyski rayonen sad (tribunal d'arrondissement de Sofia, Bulgarie), qui est la juridiction de renvoi.

17 Cette juridiction estime que, pour résoudre ce litige, il convient de déterminer si Montagi était un « organisme de droit public » au sens de la loi sur les marchés publics à la date des dépenses effectuées dans le cadre du marché en cause avec Reyr Studio BG, auquel cas son représentant NV aurait la qualité de « pouvoir adjudicateur » au sens de cette loi et serait passible de sanctions administratives pour non-respect des exigences de l'article 17, paragraphe 1, de ladite loi, lu conjointement avec l'article 20, paragraphe 2, point 2, de la même loi.

18 La juridiction de renvoi doute toutefois que la loi sur les marchés publics ait correctement transposé la directive 2014/24 en ce que cette loi prévoit que la notion d'« organisme de droit public » s'applique également aux marchés publics inférieurs aux seuils minimaux établis dans cette directive et étend ainsi le champ d'application matériel de ladite directive.

19 Dans ces conditions, le Sofiyski rayonen sad (tribunal d'arrondissement de Sofia) a décidé de surseoir à statuer et de poser à la Cour la question préjudicielle suivante :

« Une réglementation nationale en vertu de laquelle les dispositions de la directive [2014/24] – en particulier la définition légale de l'"organisme de droit public" figurant à l'article 2, paragraphe 1, point 4, de [cette] directive – s'appliquent également aux marchés publics dont la valeur estimée hors [TVA] est inférieure aux seuils minimaux fixés à l'article 4 de [ladite] directive, est-elle licite ? »

Sur la question préjudicielle

20 En vertu de l'article 99 du règlement de procédure de la Cour, lorsque, notamment, la réponse à une question posée à titre préjudiciel ne laisse place à aucun doute raisonnable, la Cour peut, à tout moment, sur proposition du juge rapporteur, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée.

21 Il y a lieu de faire application de cette disposition dans la présente affaire.

22 Par sa question, la juridiction de renvoi demande, en substance, si la directive 2014/24 doit être interprétée en ce sens qu'elle s'oppose à une réglementation nationale en vertu de laquelle les règles de cette directive et, en particulier, la définition d'« organisme de droit public », figurant à l'article 2, paragraphe 1, point 4, de ladite directive s'appliquent aux marchés publics dont la valeur estimée est inférieure aux seuils d'application prévus à l'article 4 de la même directive.

23 À cet égard, il y a lieu d'observer que, en vertu de son article 1er, paragraphe 1, la directive 2014/24 établit les règles applicables aux procédures de passation de marchés par des pouvoirs adjudicateurs en ce qui concerne les marchés publics, ainsi que les concours, dont la valeur estimée atteint ou dépasse les seuils établis à l'article 4 de cette directive.

24 L'article 2, paragraphe 1, points 1 et 4, de ladite directive qualifie de « pouvoirs adjudicateurs », notamment, les « organismes de droit public » qui sont définis comme étant tout organisme qui présente certaines caractéristiques cumulatives, à savoir, premièrement, avoir été créé pour satisfaire spécifiquement les besoins d'intérêt général ayant un caractère autre qu'industriel ou commercial, deuxièmement, être doté de la personnalité juridique et, troisièmement, soit être financé majoritairement par l'État, les autorités régionales ou locales ou par d'autres organismes de droit public, soit voir sa gestion soumise à un contrôle de ces autorités ou organismes, soit voir son organe d'administration, de direction ou de surveillance composé de membres dont plus de la moitié sont désignés par l'État, les autorités régionales ou locales ou d'autres organismes de droit public.

25 L'article 4 de la directive 2014/24 énumère les valeurs estimées hors TVA des marchés qui constituent les seuils à partir desquels cette directive s'applique. Pour les marchés autres que ceux relevant du domaine de la défense, ces seuils s'élèvent, premièrement, à 5 548 000 euros pour les marchés publics de travaux, deuxièmement, à 144 000 euros pour les marchés publics de fournitures et de services passés par des autorités publiques centrales et pour les concours organisés par celles-ci, troisièmement, à 221 000 euros pour les marchés publics de fournitures et de services passés par des pouvoirs adjudicateurs sous-centraux et pour les concours organisés par ceux-ci et, quatrièmement, à 750 000 euros pour les marchés publics de services portant sur des services sociaux et d'autres services spécifiques énumérés à l'annexe XIV de ladite directive.

26 Le marché à l'origine du litige au principal est un marché de fourniture de pierres concassées, gravier et gravats dont le montant hors TVA s'élevait à environ 44 600 euros, soit un montant inférieur aux seuils d'application prévus à l'article 4 de la directive 2014/24, de sorte que celle-ci ne s'applique pas à ce litige.

27 Pour des marchés qui, eu égard à leur valeur, ne relèvent pas de la directive 2014/24, les États membres sont, en principe, libres d'adopter leurs propres règles de passation. Ils restent cependant tenus de respecter les règles fondamentales et les principes généraux du traité FUE, en particulier les principes d'égalité de traitement et de non-discrimination en raison de la nationalité ainsi que l'obligation de transparence qui en découle, lorsque ces marchés présentent un intérêt transfrontalier certain (voir, en ce sens, arrêt du 4 avril 2019, Allianz Vorsorgekasse, C-699/17, EU:C:2019:290, point 49, et ordonnance du 12 novembre 2020, Novart Engineering, C-170/20, EU:C:2020:908, point 33 ainsi que jurisprudence citée).

28 Ainsi qu'il ressort du considérant 1 de la directive 2014/24, les règles énoncées dans cette directive constituent un instrument de coordination des procédures nationales de passation de marchés afin de garantir que les principes du traité FUE, notamment la libre circulation des marchandises, la liberté d'établissement et la libre prestation des services, ainsi que les principes qui en découlent comme l'égalité de traitement, la reconnaissance mutuelle, la proportionnalité et la transparence soient respectés en pratique.

29 Il s'ensuit qu'une réglementation nationale, telle que celle en cause au principal, qui rend applicables des règles de ladite directive à des marchés dont les montants estimés n'atteignent pas les seuils d'application fixés par la même directive, d'une part, résulte de l'exercice de la liberté dont dispose chaque État membre d'adopter des règles en matière de passation de marchés et, d'autre part, contribue à ce que la passation de ces marchés respecte les principes du traité TUE.

30 De surcroît, une telle réglementation nationale ne contrevient pas aux règles relevant du champ d'application de la directive 2014/24 et partage l'objectif principal de cette directive, à savoir l'ouverture des marchés publics à la concurrence la plus large possible au bénéfice non seulement des opérateurs économiques, mais également des pouvoirs adjudicateurs (voir, en ce sens, arrêts du 8 mai 2014, Datenlotsen Informationssysteme, C-15/13, EU:C:2014:303, point 22, ainsi que du 27 novembre 2019, Tedeschi et Consorzio Stabile Istant Service, C-402/18, EU:C:2019:1023, point 39).

31 Il s'ensuit que la directive 2014/24 doit être interprétée en ce sens qu'elle ne s'oppose pas à une réglementation nationale en vertu de laquelle les règles de cette directive et, en particulier, la définition d'« organisme de droit public », figurant à l'article 2, paragraphe 1, point 4, de ladite directive, s'appliquent aux marchés publics dont la valeur estimée est inférieure aux seuils d'application prévus à l'article 4 de la même directive.

Sur les dépens

32 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (septième chambre) dit pour droit :

La directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE, telle que modifiée par le règlement délégué (UE) 2017/2365 de la Commission, du 18 décembre 2017,

doit être interprétée en ce sens que :

elle ne s'oppose pas à une réglementation nationale en vertu de laquelle les règles de cette directive et, en particulier, la définition d'« organisme de droit public », figurant à l'article 2, paragraphe 1, point 4, de ladite directive, s'appliquent aux marchés publics dont la valeur estimée est inférieure aux seuils d'application prévus à l'article 4 de la même directive.

Signatures

* Langue de procédure : le bulgare.

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

26 September 2024 (*)

(References for a preliminary ruling – Public procurement – Directive 2004/18/EC – Article 47(3) – Article 48(4) – Exclusion of a tenderer from the tender procedure – Exclusion of the possibility to reduce the initial membership of a temporary group of undertakings which has submitted a tender – Not compatible – Period of validity of a tender – Tender does not lapse at the end of its term – Obligation under the case-law to expressly withdraw that tender – Loss of the provisional security accompanying that tender – Automatic application of that measure – Article 2 – Principles relating to public procurement – Principle of proportionality – Principle of equal treatment – Obligation of transparency – Infringement)

In Joined Cases C-403/23 and C-404/23,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 16 June 2023, received at the Court on 30 June 2023 and 3 July 2023, in the proceedings

Luxone Srl, acting on its own behalf and as agent of the temporary group of undertakings to be formed with Iren Smart Solutions SpA (C-403/23),

Sofein SpA, formerly Gi One SpA (C-404/23)

v

Consip SpA,

interveners:

Elba Compagnia di Assicurazioni e Riassicurazioni SpA,

Sofein SpA, formerly Gi One SpA (C-403/23),

Iren Smart Solutions SpA,

Consorzio Stabile Energie Locali Scarl,

City Green Light Srl,

Enel Sole Srl,

Luxone Srl (C-404/23),

THE COURT (Eighth Chamber),

composed of N. Piçarra, President of the Chamber, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Luxone Srl, acting on its own behalf and as agent of the temporary group of undertakings to be formed with Iren Smart Solutions SpA, and Sofein SpA, by P. Leozappa, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by A. De Curtis, L. Fiandaca and D.G. Pintus, avvocati dello Stato,

– the European Commission, by G. Gattinara and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114 and corrigendum OJ 2004 L 351, p. 44), Article 6 TEU, Articles 49, 50, 54 and 56 TFEU, Articles 16, 49, 50 and 52 of the Charter of Fundamental Rights of the European Union ('the Charter'), and Article 4 of Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Strasbourg on 22 November 1984.

2 The requests have been made in two sets of proceedings between, respectively, Luxone Srl, in its own name and as agent of the temporary group of undertakings to be formed with Iren Smart Solutions SpA, in Case C-403/23, and Sofein SpA, formerly Gi One SpA, in Case C-404/23, on the one hand, and the same contracting authority, Consip SpA, on the other, concerning decisions by which Consip SpA (i) excluded the temporary group of undertakings, of which Luxone and Sofein formed part, from a public procurement procedure and (ii) enforced the provisional security provided by the members of the group for their participation in that procedure.

Legal context

European Union law

Directive 2004/18

3 Recitals 2 and 32 of Directive 2004/18 stated:

'(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

…

(32) In order to encourage the involvement of small and medium-sized [enterprises (SMEs)] in the public contracts procurement market, it is advisable to include provisions on subcontracting.'

4 Article 2 of that directive, entitled 'Principles of awarding contracts', provided:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

5 Article 4 of that directive, entitled ‘Economic operators’, provided, in paragraph 2 thereof:

‘Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.’

6 Article 45 of that directive, entitled ‘Personal situation of the candidate or tenderer’, provided, in paragraph 2 thereof:

‘Any economic operator may be excluded from participation in a contract where that economic operator:

…

(c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

…

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.’

7 Article 47 of Directive 2004/18, entitled ‘Economic and financial standing’, provided, in paragraphs 2 and 3 thereof:

‘2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.’

8 Article 48 of that directive, entitled ‘Technical and/or professional ability’, provided:

‘1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

…

3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

4. Under the same conditions a group of economic operators as referred to [in] Article 4 may rely on the abilities of participants in the group or in other entities.’

9 Entitled ‘Information which must be included in public contract notices’, Annex VII A to that directive provided, in points 14 and 21 of the section dealing with ‘Contract notices’, that a contract notice had to state, respectively, ‘where appropriate, [the] deposit and guarantees required’, and the ‘time frame during which the tenderer must maintain its tender (open procedures)’.

Directive 2004/17

10 It follows from Articles 3 to 9 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) that that directive applied to public contracts which relate to one or more activities in the following fields: gas, heat and electricity; water; transport services; postal services; exploration for, or extraction of, oil, gas, coal or other solid fuels.

11 Article 11(2) of Directive 2004/17 was worded in the same terms as Article 4(2) of Directive 2004/18, except that the expression ‘contracting authorities’ was replaced by a reference to ‘contracting entities’.

Italian law

12 Decreto legislativo n. 163 – Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 adopting the Code on public works contracts, public service contracts and public supply contracts and transposing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (GURI No 100 of 2 May 2006, Ordinary Supplement No 107) (‘the previous Public Procurement Code’) contained Article 11, entitled ‘Stages of the public procurement process’, which provided, in paragraph 6 thereof:

‘No tenderer may submit more than one tender. The tender shall be binding on the tenderer for the period specified in the notice or invitation to tender or, if no period is specified, for 180 days from the expiry of the deadline for submission of the tender. The contracting entity may ask the tenderers to extend that period.’

13 Article 37 of the previous Public Procurement Code, entitled ‘Temporary groups and ordinary consortia of tenderers’, provided, in paragraphs 8 to 10, 18 and 19 thereof:

‘8. The persons referred to in Article 34(1)(d) and (e) may submit a tender, even if they have not yet been formed. In such cases, the tender must be signed by all the economic operators making up the temporary groups or ordinary consortia of tenderers and those operators shall undertake, if the contract is awarded, to grant a special collective power of attorney to one of the tenderers, identified in the tender as the agent, who will enter into the contract in its name and on its behalf, as well as on behalf of the principals.

9. … Without prejudice to paragraphs 18 and 19, it shall be prohibited to make any change to the composition of temporary groups and ordinary consortia of tenderers compared with the composition submitted in the tender.

10. Failure to comply with the prohibitions laid down in the preceding paragraph shall entail the annulment of the award or the nullity of the contract and the exclusion of groups or ordinary consortia of tenderers at the same time as or subsequent to the award of the same tender.

…

18. In the event of the bankruptcy of the agent or, in the case of an individual contractor, in the event of death, disqualification, incapacity or bankruptcy, or in the cases provided for by the anti-mafia regulations, the contracting authority may continue the procurement relationship with another economic operator that has been appointed as agent in accordance with the procedure laid down in this Code, provided that it meets the qualification requirements for the provision of the outstanding works or services or supplies; if those requirements are not met, the contracting authority may terminate the contract.

19. In the event of the bankruptcy of one of the principals or, in the case of an individual contractor, in the event of death, prohibition, disqualification or bankruptcy, or in the cases provided for by the anti-mafia regulations, the agent shall, if he or she does not identify another economic operator that fulfils the suitability requirements to take over, be required to perform the contract, directly or through the other principals, provided that the other principals meet the qualification requirements for the provision of the outstanding works or services or supplies.'

14 Article 38 of that code, entitled 'General requirements', contained paragraph 1(f), worded as follows:

'The following persons shall be excluded from participation in procedures for the award of concessions and public works contracts, supply contracts and service contracts and may not be awarded subcontracts or conclude any related contract:

…

(f) any person who, in the reasoned assessment of the contracting authority, has been guilty of serious negligence or bad faith in the performance of any contract awarded to that person by the contracting authority which published the contract notice or any person who has been found guilty of grave professional misconduct proven by any means which the contracting authority can demonstrate;'

15 Article 48 of that code, entitled 'Verification of compliance with the requirements', provided, in paragraph 1 thereof:

'Before opening the tenders submitted, the contracting authorities shall ask a number of tenderers not less than 10% of the tenders submitted, rounded up to the next unit, chosen by the public drawing of lots, to provide proof, within 10 days of the date of that request, that they meet the conditions as to economic and financial standing and technical and organisational capacity, which may be required in the contract notice, by submitting the documentation indicated in that notice or in the letter of invitation. The contracting authorities shall verify, during the review, that the tenderers satisfy the qualification requirement for the execution of works by means of the electronic register referred to in Article 7(10) or by means of the website of the Ministry of Infrastructure and Transport in the case of contracts awarded to general contractors; in the case of suppliers and service providers, the verification of compliance with the requirement referred to in Article 42(1)(a) of this Code shall be carried out by means of the national public procurement database referred to in Article 6bis of this Code. If such proof is not provided, or if it does not confirm the statements contained in the request to participate or in the tender, the contracting authorities shall exclude the tenderer from the invitation to tender, enforce the provisional security relating thereto and report that fact to the authority responsible for the measures referred to in Article 6(11). The authority shall also suspend [the right to participate] in tendering procedures for one to twelve months.'

16 Under Article 75 of that code, entitled 'Securities accompanying the tender':

'1. The tender shall be accompanied by a security, equal to two per cent of the basic price specified in the notice or invitation to tender, in the form of a deposit or guarantee, chosen by the tenderer. …

…

6. The security shall cover the failure to sign the contract owing to the contractor, and shall be automatically released upon signing the contract.

…

9. The contracting authority, when notifying unsuccessful tenderers of the award of the contract, shall at the same time release the security referred to in paragraph 1 to them without delay and in any event within a period not exceeding 30 days from the date of the award of the contract, even if the security is still valid.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

17 By a notice published on 21 December 2015, Consip launched an open call for tenders for the award of a contract divided into 12 lots for the provision of lighting services together with related and optional services.

18 A temporary group of undertakings (TGU) to be formed, of which Luxone was the lead undertaking ('the Luxone TGU'), submitted a tender for 4 of those 12 lots. That group also included Consorzio Stabile Energie Locali Scarl ('CSEL'), Iren Servizi e Innovazione SpA (now Iren Smart Solutions), Gestione Integrata Srl and Exitone SpA.

19 By letter of 28 September 2018, Gi One, now Sofein, requested Consip to take note of the fact that it succeeded Exitone and Gestione Integrata 'in all their rights and obligations'.

20 Although Consip reserved the right, when the procedure for the review of irregularities in the tendering procedure was initiated, to verify whether Exitone had continuously complied with the general requirements laid down in Article 38 of the previous Public Procurement Code, it did not initiate any subsequent procedure.

21 The tendering procedure at issue in the main proceedings, which was due to be completed by 18 April 2017 at the latest, was extended eight times 'in order to ensure that Consip had the time necessary to complete the procedure'. Each of those extensions required the confirmation of the tenders that had expired in the meantime and the extension of the provisional securities accompanying those tenders.

22 Following the seventh request for confirmation of those tenders on 2 March 2020, the members of the Luxone TGU informed Consip, by letter of 30 March 2020, that Luxone and Iren Smart Solutions wished to confirm their earlier tenders, but that Sofein and CSEL did not. In essence, Sofein and CSEL stated that, having regard to the length of time taken to prepare the award of the contract at issue in the main proceedings, the tenders submitted in the course of 2016 '[would] no longer [be] viable from a commercial point of view or from the point of view of sound and prudent business management'.

23 By letter of 9 June 2020, Consip requested all the members of the Luxone TGU to confirm the expired tender for the eighth time and to extend the validity of the related provisional security until 30 November 2020.

24 By letter of 18 June 2020, to which Consip did not respond, Luxone and Iren Smart Solutions repeated their tenders and reiterated that Sofein and CSEL did not wish to confirm their tenders.

25 By letter of 30 September 2020, Consip initiated a procedure in order to establish whether the requirement laid down in Article 38(1)(f) of the previous Public Procurement Code had been complied with and to assess whether the withdrawal of Sofein and CSEL was lawful. Consip argued that, since they failed to confirm their tenders, those two companies had unlawfully 'withdrawn' from the Luxone TGU.

26 By decision of 11 November 2020 ('the exclusion decision of 11 November 2020'), Consip excluded the Luxone TGU from the tendering procedure at issue in the main proceedings.

27 In the first place, Consip claimed that Article 11(6) of the previous Public Procurement Code granted the tenderer alone, that is to say, in the present case, the Luxone TGU as a whole, the right to free itself from the tender after a certain period had elapsed. Consequently, that right cannot be exercised by only some of the members of that group.

28 In the second place, Consip complained, more specifically, that Sofein had withdrawn from that group in order to circumvent Article 38(1) of that code. Under that provision, Sofein should have been excluded from the tendering procedure at issue in the main proceedings on account of the conduct of the two companies it had succeeded, which could have affected its reliability and for which it was responsible. Consip also accused Sofein of criminal conduct.

29 In the third place, Consip alleged ‘poor professional conduct’ on the part of Luxone, as evidenced by the indictment for obstruction of the public tendering procedures and the judgment delivered on 14 July 2020 by the Tribunale di Messina (District Court, Messina, Italy) against the chairman, until 22 July 2019, of Luxone’s predecessor.

30 In the fourth place, Consip complained that CSEL withdrew from the Luxone TGU essentially in order to conceal the fact that that company did not meet the requirements laid down and that it did not have the necessary resources to perform the contract at issue in the main proceedings.

31 By decision of 12 November 2020, Consip ordered the forfeiture of the provisional securities, totalling EUR 2 950 000, which had been provided for the four lots for which the Luxone TGU had submitted a tender.

32 In response to Consip’s decisions of 11 and 12 November 2020, CSEL claimed, by letter of 20 November 2020, that it had continuously met all the requirements laid down for participation in the procedure at issue in the main proceedings. Moreover, CSEL’s failure to confirm the tender, which could not be classified as a withdrawal from the Luxone TGU, was in the context of an overall reorganisation of the company.

33 By letter of 10 December 2020, Consip confirmed the exclusion decision of 11 November 2020.

34 Luxone, acting on its own behalf and as agent of the Luxone TGU, and Sofein, in two separate actions, unsuccessfully challenged the exclusion decision of 11 November 2020 and the decision of 12 November 2020 before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy). For that reason, they appealed against the judgments of that court before the Consiglio di Stato (Council of State, Italy), which is the referring court.

35 The Consiglio di Stato (Council of State) states that it ordered the suspension of the operation of the provisional securities, due in particular to the significant sum at stake.

36 That court considers it appropriate, even before examining the actions in so far as they are directed against the exclusion decision of 11 November 2020, to assess the compatibility with EU law of Article 11(6) of the previous Public Procurement Code which is interpreted by the Italian administrative courts as meaning that the failure to confirm a tender, or only partial confirmation of a tender, at the time when that tender expires and ceases to be binding on the tenderer concerned, is treated in the same way as a withdrawal from the temporary group of undertakings which submitted it.

37 In the case of withdrawal by some of the members of such a group, that court holds that Articles 11(6), 37(8) to (10), (18) and (19), and 38(1)(f) of that code required the contracting authority to exclude the operators belonging to that group in view of the prohibition on changing its composition. The only exceptions to the principle that a temporary group of undertakings is unalterable were set out in Article 37(18) and (19) of that code.

38 The purpose of the rule in Article 11(6) of the previous Public Procurement Code was to ensure that the tender submitted was maintained throughout the foreseeable period of the public procurement procedure and not to limit its effect in time. In the view of the Consiglio di Stato (Council of State), that provision did not mean that that tender automatically lapsed once the period had elapsed, but only that the tenderer concerned could free itself from the tender, subject to expressly availing itself of that option. Furthermore, the principle that a temporary group of undertakings is subjectively unalterable applied even in cases where that group had not yet been formally established.

39 Moreover, in the present case, the exclusion of the Luxone TGU from the tendering procedure at issue in the main proceedings is also justified by the conduct of Sofein, which attempted, by withdrawing from that group, to avoid the planned review of its ‘moral reliability’. It is clear from the case-law of the Consiglio di Stato (Council of State) that the withdrawal of one of the members of a group must be dictated by organisational requirements specific to the temporary group of undertakings or to the consortium.

40 The referring court considers that the contested provisions of the previous Public Procurement Code are compatible with Article 4(2) of Directive 2004/18, and with Article 11(2) of Directive 2004/17, which is worded similarly.

41 Luxone and Sofein, however, criticise the case-law of the Consiglio di Stato (Council of State) in that, in practice, it requires the members of a temporary group of undertakings to remain bound by their tender for an indefinite period, even when that binding tender has expired several times. Such an interpretation runs counter to the principle of freedom to conduct a business guaranteed in Article 16 of the Charter, the principles of proportionality and competition, as well as the freedom of establishment and the freedom to provide services enshrined in Articles 49, 50, 54 and 56 TFEU.

42 The referring court recognises that, particularly in the case of lengthy procedures, a prohibition which prevents a member of such a group from freeing itself from a tender after the expiry of the extended deadline, under penalty of the entire group being excluded, appears disproportionate as a means of ensuring that that tender is genuine, not least where the economic operators which have confirmed that tender are themselves still capable of satisfying all the requirements for participation in the procurement procedure. In accordance with Article 2 of Directive 2004/18, read in conjunction with recital 2 thereof, the measures adopted by the Member States must not go beyond what is necessary to achieve that objective.

43 Moreover, Luxone and Sofein submit that the unlawfulness of the decision of 12 November 2020 enforcing the provisional securities stems from that of the exclusion decision of 11 November 2020 and from defects specific to that decision. Those securities can be enforced only in the two situations provided for in Article 48(1) and Article 75(6) of the previous Public Procurement Code respectively, namely where the tenderer being verified did not prove that it met ‘the conditions as to economic and financial standing and technical and organisational capacity’ and where a contract was not signed ‘owing to the contractor’. However, the disputes in the main proceedings do not fall within either of those two situations.

44 Although the Corte costituzionale (Constitutional Court, Italy) held, in judgment No 198 of 26 July 2022, that the enforcement of a security did not have the nature of a criminal penalty, the referring court considers, like Luxone and Sofein, that, in view of the magnitude of the ‘economic burden’ imposed on those companies, the automatic enforcement of the provisional securities would have the characteristics of such a penalty in relation to those companies.

45 In that regard, Article 49(3) of the Charter states that ‘the severity of penalties must not be disproportionate to the criminal offence’. Similarly, Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952, and Article 17 of the Charter were interpreted as seeking to ensure respect for proportionality between the conduct engaged in and the penalty imposed, by prohibiting the right to property from being restricted without reason and, therefore, by avoiding an ‘excessive and disproportionate burden’ in relation to the objective pursued. The principle of proportionality is also expressed in general terms in recital 2 of Directive 2004/18.

46 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Do Directive [2004/18], Articles 16 and 52 of the [Charter] and the principles of proportionality, competition, freedom of establishment and freedom to provide services laid down in Articles 49, 50, 54 and 56 … TFEU preclude national rules (Articles 11(6), 37(8), (9), (10), (18) and (19), and 38(1)(f) of [the previous Public Procurement Code]) which exclude, in the event of the expiry of the validity period of the tender originally submitted by a [temporary group of undertakings] to be established, the possibility of reducing the original membership of the [temporary group of undertakings] when the validity period of that tender is extended? In particular, are those national provisions compatible with the general principles of EU law of freedom of economic initiative and effectiveness, and with Article 16 of the [Charter]?

(2) Do Directive [2004/18], Articles 16, 49, 50 and 52 of the [Charter], Article 4 of Protocol No 7 to the European Convention on Human Rights (ECHR), Article 6 TEU, and the principles of

proportionality, competition, freedom of establishment and freedom to provide services laid down in Articles 49, 50, 54 and 56 TFEU preclude national rules (Articles 38(1)(f), 48 and 75 of [the previous Public Procurement Code]) which provide for the application of the penalty of forfeiture of the provisional security, as an automatic consequence of the exclusion of an economic operator from a procedure for the award of a public service contract, irrespective of whether or not that economic operator has been awarded the contract?'

Consideration of the questions referred

The first question

47 As a preliminary point, it should be recalled that, according to the Court's settled case-law, in the procedure provided for in Article 267 TFEU, which provides for cooperation between national courts and the Court, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court may find it necessary to take account of provisions of EU law to which the national court has not referred in its questions. The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing the national court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (see, to that effect, judgments of 12 December 1990, *SARPP*, C-241/89, EU:C:1990:459, paragraph 8 and of 5 December 2023, *Nordic Info*, C-128/22, EU:C:2023:951, paragraph 99 and the case-law cited).

48 In the present case, the tendering procedure at issue in the main proceedings does not relate to one or more of the activities referred to in Articles 3 to 9 of Directive 2004/17 to which the directive applies. It must therefore be held that that procedure falls within the scope of Directive 2004/18.

49 In those circumstances, it must be held that, by its first question, the referring court asks, in essence, whether Article 47(3) and Article 48(4) of Directive 2004/18, read in conjunction with the general principle of proportionality, must be interpreted as precluding national legislation which excludes the possibility for original members of a temporary group of tendering undertakings to withdraw from that group where the period of validity of the tender submitted by that group elapses and the contracting authority seeks to extend the validity of the tenders submitted to it.

50 At the outset, it should be recalled that Article 47(2) and Article 48(3) of Directive 2004/18 give an economic operator the right to rely on the economic and financial standing of the participants in the group or of other entities, as well as their technical and/or professional abilities, provided that it proves to the contracting authority that the group will have at its disposal the necessary resources to perform the contract. That directive thus permits the combining of the capacities of more than one economic operator for the purpose of satisfying the minimum capacity requirements set by the contracting authority, provided that the candidate or tenderer relying on the capacities of one or more other entities proves to that authority that it will actually have at its disposal the resources of those entities necessary for the execution of the contract. Such an interpretation is consistent with the objective pursued by the directives in this area of attaining the widest possible opening-up of public contracts to competition to the benefit of not only economic operators, but also contracting authorities. That interpretation also facilitates the involvement of small- and medium-sized undertakings in public contracts, an aim also pursued by Directive 2004/18, as stated in recital 32 thereof (see, to that effect, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 29, 33 and 34, and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraphs 25 to 27).

51 It is also apparent from Article 47(3) and Article 48(4) of that directive that a group of economic operators as referred to in Article 4 of that directive may, under the same conditions, rely on the capacities of participants in the group or of other entities.

52 That said, neither Article 47(3) nor Article 48(4) of Directive 2004/18 lay down specific rules concerning alterations to the composition of a group of tendering economic operators, with the result that the regulation of such a situation falls within the competence of the Member States (see, by analogy, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 35).

53 In the present case, it follows from Article 37(9), (10), (18) and (19) of the previous Public Procurement Code that, except in the event of bankruptcy of the lead undertaking or a member of a temporary group of undertakings, any alteration affecting the original composition of such a group was prohibited, otherwise all the members of that group would be excluded from the public procurement procedure.

54 That prohibition on altering the composition of a temporary grouping of undertakings must, however, be assessed in the light of the general principles of EU law, in particular the principle of equal treatment, the obligation of transparency which flows from that principle and the principle of proportionality (see, to that effect, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 36).

55 The principle of proportionality, which is recalled in recital 2 of Directive 2004/18, requires that the rules laid down by the Member States or the contracting authorities in implementing the provisions of that directive must not go beyond what is necessary to achieve the objectives of that directive (see, to that effect, judgments of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 48, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 155).

56 The principle of equal treatment affords tenderers equality of opportunity when formulating their tenders, which implies that all tenders must be subject to the same conditions. The obligation of transparency, which is its corollary, is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted fulfil the criteria applying to the contract in question (see, to that effect, judgments of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44, and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36).

57 The principles of transparency and equal treatment which govern all procedures for the award of public contracts require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates (see, to that effect, judgments of 9 February 2006, *La Cascina and Others*, C-226/04 and C-228/04, EU:C:2006:94, paragraph 32, and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 37).

58 In that regard, point 21 of Annex VII A to Directive 2004/18 provides that the 'time frame during which the tenderer must maintain its tender (open procedures)' forms an integral part of the information which must be included in the contract notices.

59 In the first place, it follows from the judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347, paragraphs 44 and 48) that Article 47(3) and Article 48(4) of Directive 2004/18 must be interpreted as meaning that members of a temporary group of undertakings may, without infringing the principle of equal treatment, withdraw from that group, provided that it is established, first, that the remaining members of that group meet the conditions for participation in the public procurement procedure provided for by the contracting entity and, secondly, that the continuation of its participation in that procedure does not mean that other tenderers are placed at a competitive disadvantage.

60 Therefore, by imposing a strict requirement to maintain the legal and substantive identity of a temporary group of undertakings, Article 37 (9), (10), (18) and (19) of the previous Public Procurement Code manifestly infringes the principle of proportionality.

61 That is all the more so since no derogation is provided for where the contracting authority repeatedly requests the postponement of the date of validity of the tenders. Such a postponement requires all the members of a temporary group of undertakings, first, to immobilise certain resources, both in staff and in equipment, with a view to the possible award of the contract at issue and, secondly, to extend the provisional security provided, which may represent a significant burden, especially for an SME.

62 In the second place, it is apparent from the request for a preliminary ruling that the referring court interpreted Article 11(6) of the previous Public Procurement Code as meaning that the tender did not automatically lapse once the period indicated in the tender had elapsed. Therefore, the tenderer had to expressly avail itself of the right to free itself from the tender. It is also apparent from the request for a preliminary ruling that the specification that the withdrawal of a member of a temporary group of undertakings had to be dictated by organisational needs specific to that group results solely from the case-law of the referring court.

63 The Court has held, on several occasions, that a situation in which the conditions for participating in a procedure for the award of a public contract resulting from the judicial interpretation of national law is particularly disadvantageous for tenderers established in other Member States, inasmuch as their level of knowledge of that national law and the interpretation thereof cannot be compared to that of tenderers from the Member State concerned (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 46, and order of 13 July 2017, *Saferoad Grawil and Saferoad Kabex*, C-35/17, EU:C:2017:557, paragraph 22).

64 Lastly, in so far as the two companies which refused to renew their tender were also criticised for having sought to circumvent the review of compliance with the selection criteria and, therefore, to avoid exclusion from the tendering procedure at issue in the main proceedings, it should be added that, although the contracting authority may, at any time, verify the reliability of the members of a temporary group of undertakings and, on that basis, satisfy itself that those members are not covered by one of the grounds for exclusion from a tendering procedure listed in Article 45 of Directive 2004/18, it must ensure, in the context of that assessment, that it complies with the principle of proportionality, as defined in paragraph 55 above.

65 Therefore, when applying optional grounds for exclusion from a public procurement procedure, a contracting authority must pay even greater attention to that principle where the exclusion provided for by the national legislation affects the entire group of economic operators not for a failure attributable to all its members, but for a failure merely on the part of one or more of them, where the lead undertaking of that group does not have any control over the economic operator or operators with which it intended to form such a group (see, by analogy, judgments of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 48, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 156).

66 The principle of proportionality requires the contracting authority to carry out a specific and individual assessment of the conduct of the entity concerned (see, to that effect, judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 31). On that basis, the contracting authority must have regard to the means available to the tenderer for establishing whether there was a failure on the part of the entity on whose capacities it intended to rely (judgments of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 40, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 157).

67 In those circumstances, Article 47(3) and Article 48(4) of Directive 2004/18, read in conjunction with the general principle of proportionality, must be interpreted as precluding national legislation which excludes the possibility for original members of a temporary group of tendering undertakings to withdraw from that group where the period of validity of the tender submitted by that group elapses and the contracting authority seeks to extend the validity of the tenders submitted to it, provided that it is established, first, that the remaining members of that group meet the requirements laid down by the contracting authority and, secondly, that their continued participation in the tendering procedure in question does not place other tenderers at a competitive disadvantage.

The second question

68 By its second question, the referring court asks, in essence, whether the principles of proportionality and of equal treatment, and the obligation of transparency, as set out in Article 2 and recital 2 of Directive 2004/18, must be interpreted as precluding national legislation which provides for the automatic forfeiture of the provisional security provided by a tenderer following its exclusion from a procedure for the award of a public service contract, even though the service in question has not been awarded to it.

69 In that regard, as is apparent from paragraphs 61 and 62 of the judgment of 28 February 2018, *MA.T.I. SUD and Duemme SGR* (C-523/16 and C-536/16, EU:C:2018:122), the setting in advance by the contracting authority of the amount of the provisional security to be provided in the contract notice does indeed meet the requirements arising from the principles of equal treatment of tenderers, transparency and legal certainty, in that it objectively makes it possible to avoid any discriminatory or arbitrary treatment of those tenderers by that contracting authority. Nevertheless, the automatic forfeiture of that security thus set in advance, irrespective of the nature of the rectifications which might be made by the errant tenderer and, therefore, in the absence of any specific reasons, does not appear to be compatible with the requirements deriving from the principle of proportionality.

70 Similarly, although the forfeiture of that security is an appropriate means of achieving the legitimate objectives pursued by the Member State concerned, relating to the need, first, to place responsibility on the tenderers in submitting their tenders and, secondly, to offset the financial burden on the contracting authority for checking that tenders are in order, the amount of that security in a situation such as that at issue in the main proceedings appears manifestly excessive in the light of the conduct of the contract procedure in question (see, to that effect, judgment of 28 February 2018, *MA.T.I. SUD and Duemme SGR*, C-523/16 and C-536/16, EU:C:2018:122, paragraphs 63 and 64).

71 Therefore, it must be held that the principles of proportionality and of equal treatment, and the obligation of transparency, as set out in Article 2 and recital 2 of Directive 2004/18, must be interpreted as precluding national legislation which provides for the automatic forfeiture of the provisional security provided by a tenderer following its exclusion from a procedure for the award of a public service contract, even though the service in question has not been awarded to it.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **Article 47(3) and Article 48(4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read in conjunction with the general principle of proportionality,**

   must be interpreted as precluding national legislation which excludes the possibility for original members of a temporary group of tendering undertakings to withdraw from that group where the period of validity of the tender submitted by that group elapses and the contracting authority seeks to extend the validity of the tenders submitted to it, provided that it is established, first, that the remaining members of that group meet the requirements laid down by the contracting authority and, secondly, that their continued participation in the tendering procedure in question does not place other tenderers at a competitive disadvantage.

2. **The principles of proportionality and of equal treatment, and the obligation of transparency, as set out in Article 2 and recital 2 of Directive 2004/18,**

must be interpreted as precluding national legislation which provides for the automatic forfeiture of the provisional security provided by a tenderer following its exclusion from a procedure for the award of a public service contract, even though the service in question has not been awarded to it.

[Signatures]

---

* Language of the case: Italian.

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

13 June 2024 (*)

(Reference for a preliminary ruling – Award of public works, public supply and public service contracts – Directive 2014/24/EU – Article 18 – Principles of equal treatment and transparency – Article 46 – Division of a contract into lots – Opportunity for the tenderer which submitted the second most economically advantageous tender to be awarded a lot on the terms of the most economically advantageous tender)

In Case C-737/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (High Court of Eastern Denmark, Denmark), made by decision of 11 November 2022, received at the Court on 1 December 2022, in the proceedings

Staten og Kommunernes Indkøbsservice A/S

v

BibMedia A/S,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot, S. Rodin and L.S. Rossi, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Staten og Kommunernes Indkøbsservice A/S, by J. Bødtcher-Hansen and R. Holdgaard, advokater,

– BibMedia A/S, by H. Holtse, advokat,

– the Estonian Government, by M. Kriisa, acting as Agent,

– the Spanish Government, by I. Herranz Elizalde, acting as Agent,

– the Austrian Government, by A. Posch and J. Schmoll, acting as Agents,

– the European Commission, by G. Gattinara, C. Vang and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Staten og Kommunernes Indkøbsservice A/S ('SKI') and BibMedia A/S concerning the award of a public contract relating to the provision of library materials and related preparatory services.

Legal context

European Union law

3 Article 18 of Directive 2014/24, headed 'Principles of procurement', provides in paragraph 1:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.'

4 Article 27 of that directive, entitled 'Open procedure', provides in paragraph 1:

'In open procedures, any interested economic operator may submit a tender in response to a call for competition.

…'

5 Article 28 of that directive, entitled 'Restricted procedure', states:

'1. In restricted procedures, any economic operator may submit a request to participate in response to a call for competition … by providing the information for qualitative selection that is requested by the contracting authority.

…

2. Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender. …

…'

6 Article 46 of that directive, entitled 'Division of contracts into lots', provides:

'1. Contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject matter of such lots.

…

2. Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots.

Contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest. Contracting authorities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

3. Member States may provide that, where more than one lot may be awarded to the same tenderer, contracting authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.

…’

Danish law

7 Paragraph 2 of the Udbudsloven (Law on Public Procurement) provides:

‘1. In public procurement procedures …, a contracting authority shall comply with the principles of equal treatment, transparency and proportionality.

2. An open procedure may not be designed with the intention of excluding it from the scope of this law or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging one or more specified economic operators.’

8 As set out in Paragraph 49(3) of that law:

‘A contracting authority shall state the following in the contract notice:

(1) whether the tenderer may submit tenders for one, for several or for all of the lots,

(2) whether the tenderer can be awarded one, several or all lots and, as the case may be, the lots or groups of lots that may be combined, and

(3) the objective and non-discriminatory criteria or rules for determining the award of lots, including how the lots will be awarded where the application of the criteria or rules would result in one tenderer being awarded more lots than the maximum number which the tenderer may be awarded.’

9 Paragraph 56 of that law provides:

‘In open procedures, any interested economic operator may submit a tender in response to a contract notice. …’

The dispute in the main proceedings and the question referred for a preliminary ruling

10 SKI is a central purchasing body owned by the Danish State and Kommunernes Landsforening (Association of Danish Municipalities). That entity was set up to streamline public procurement through the award and implementation of framework agreements on behalf of the State and municipalities.

11 On 4 February 2020, SKI launched a tendering procedure with a view to concluding a framework agreement relating to the provision of library materials and preparatory services. The award criterion was the lowest price.

12 That contract was divided into eight lots. Lots 1 and 2, comprising the subject matter of the main proceedings, were titled ‘Danish books and sheet music (East)’ and ‘Danish books and sheet music (West)’, and had an estimated value of 253 million Danish kroner (DKK) (approximately EUR 34 million) and DKK 475 million (approximately EUR 63 million), respectively.

13 Paragraph 3.1 of the tender specifications relating to that call for tenders provided:

‘Lots 1 and 2 are interdependent (see paragraph 3.1.1) and, if a tenderer submits a tender for one of those lots, that tender will automatically be deemed to have been submitted for both lots. …

Subject to the above, there are no restrictions on how many or how few of the lots a tenderer may/should submit tenders for.

SKI expects to award a contract to one supplier per lot. The same supplier may be awarded several lots.

The market for library materials is characterised by there being only a few specialised suppliers and potential tenderers. Danish books and sheet music constitute the largest product area in terms of turnover and are commercially important for the potential tenderers. In order to safeguard competition in the market in the future, the contracts relating to Danish books and sheet music are divided geographically into two lots. The affiliated customers are accordingly divided into two categories, namely “East” and “West”, respectively. …’

14 Paragraph 3.1.1 of those tender specifications provided:

‘The contracts relating to Danish books and sheet music are being put out to tender according to an “East/West model”, which means that the intention is to designate one supplier in Eastern Denmark and another supplier in Western Denmark, but that the same proposed prices will apply for all customers regardless of whether the customers are located in Eastern or Western Denmark.

…

The tenderer who submits the most economically advantageous tender will be awarded the contract to be the supplier of Lot 2 – Danish books and sheet music (West).

The tenderer who submits the second most economically advantageous tender will be awarded the contract to be the supplier of Lot 1 – Danish books and sheet music (East). However, that tenderer must accept that the award of the contract as the supplier in Eastern Denmark shall require the tenderer to supply the products and services covered by the framework agreement to customers in Eastern Denmark at exactly the same prices as those that have been offered and will be applied in Western Denmark by the tenderer with the most economically advantageous tender.

If the tenderer with the second most economically advantageous tender does not agree to be the supplier in Eastern Denmark, the opportunity shall pass to the tenderer with the third most economically advantageous tender, which must likewise accept that the award of the contract as the supplier in Eastern Denmark shall require the tenderer to supply the products and services covered by the framework agreement to customers in Eastern Denmark at exactly the same prices as those which have been offered and will be applied in Western Denmark by the tenderer with the most economically advantageous tender.

If that tenderer likewise does not agree to be the supplier in Eastern Denmark, the opportunity shall pass to the next tenderer on the list, and so on. If the list of tenderers with tenders satisfying the tender conditions is exhausted and no supplier for Eastern Denmark is found from among them, the supplier who is awarded the contract for Western Denmark shall also be awarded the contract for Eastern Denmark. …

…’

15 As at the end of the period for submitting tenders, SKI had received tenders from Audio Visionary Music A/S (‘AVM’) and from BibMedia which each submitted tenders for all of the lots.

16 Taking the view that BibMedia had submitted the most economically advantageous tender, SKI awarded Lot 2 (West) to BibMedia and proposed to award Lot 1 (East) to AVM, on the condition that AVM accept to deliver the supplies and perform the services provided for in that lot at the price offered by BibMedia, of which AVM had been informed.

17 AVM accepted, whereupon SKI sent a communication of the contract award decision on 21 April 2020.

18 On 30 April 2020, AVM lodged a complaint with Klagenævnet for Udbud (Public Procurement Complaints Board, Denmark; ‘the Complaints Board’).

19 On 14 January 2021, the Complaints Board found that SKI had infringed Paragraph 2(1) of the Law on Public Procurement by applying a procedure for the award of Lots 1 and 2, the terms of which meant, in essence, that the tenderer which had submitted the second most economically advantageous tender could modify its tender after the period for submitting tenders had expired in order to be awarded Lot 1 (‘the decision of 14 January 2021’).

20 The Complaints Board justified that decision by stating that that tenderer had had the opportunity to amend an essential term of its tender, namely the price, in a way which is favourable to the contracting authority and gives the tenderer the opportunity to improve its tender in order to be awarded one of the lots of the contract. Such an approach is contrary to the ban on negotiations, which derives from the principles of equal treatment and transparency.

21 On 9 July 2021, SKI brought an action before the Retten i Glostrup (Glostrup District Court, Denmark) against the decision of 14 January 2021.

22 On 7 December 2021, that action was remitted to the Østre Landsret (High Court of Eastern Denmark, Denmark), sitting as the court of first instance, which is the referring court.

23 The referring court considers that, while the Court has previously clarified the scope of the ban on negotiation resulting from Article 18 of Directive 2014/24 as regards reservations contained in a tender, subcontracting and the possibility of taking additional information into account, the Court has not yet clarified whether, in an open procedure for a contract divided into lots in accordance with Article 46 of that directive, the ban on negotiation precludes a tenderer which has not submitted the most economically advantageous tender from being awarded a lot on the condition that it accepts to deliver the supplies and perform the services forming the subject matter of the contract at the same price as that offered by the tenderer which submitted the most economically advantageous tender.

24 In those circumstances, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do the principles of transparency and equal treatment in Article 18 of Directive 2014/24 and the consequent ban on negotiations preclude a tenderer who has submitted the second most economically advantageous tender in connection with an open procedure for separate lots (see Articles 27 and 46 of that directive) from being given the opportunity, after the deadline for submission of the tender has expired, and in accordance with the predetermined terms in the specifications, to supply the proposed services within a lot under the same terms as a tenderer who has submitted the most economically advantageous tender and who, therefore, is awarded another lot put out to tender at the same time?’

Admissibility of the request for a preliminary ruling

25 The Court has repeatedly pointed out that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them and that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute (judgment of 9 January 2024, *G. and Others (Appointment of judges to the ordinary courts in Poland)*, C-181/21 and C-269/21, EU:C:2024:1, paragraph 62 and the case-law cited). The Court has also held that it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless a case is pending before it in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 46 and the case-law cited).

26 In the present case, on 13 October 2023, the Court sent the referring court a request for information, asking it to clarify whether, despite the fact, referred to in BibMedia's written observations, that the tendering procedure at issue was not resumed following the decision of 14 January 2021, but was replaced by a new tendering procedure, SKI retains, under Danish law, a legal interest to bring proceedings in the case in the main proceedings.

27 On 27 November 2023, the referring court answered that request for information in the affirmative, referring in particular to Danish case-law on the legal interest to bring proceedings in administrative law.

28 Since that court has explained that, under national law, there continues to be a legal interest in the resolution of the dispute in the main proceedings in which that court is called upon to give a decision which is capable of taking account of the preliminary ruling, the question asked is not hypothetical and must be regarded as admissible.

Consideration of the question referred

29 By its question, the referring court asks, in essence, whether Article 18(1) of Directive 2014/24 must be interpreted as meaning that the principles of equal treatment and transparency set out in that provision preclude, in a procedure for the award of a public contract divided into lots, the tenderer which has submitted the second most economically advantageous tender from being awarded, in accordance with the terms set out in the procurement documents, a lot on the condition that that tenderer accepts to deliver the supplies and perform the services relating to that lot at the same price as that offered by the tenderer which submitted the most economically advantageous tender and which has therefore been awarded another, larger lot of that contract.

30 The objective of the principle of equal treatment, set out in Article 18(1) of Directive 2014/24, is to encourage the development of healthy and effective competition between undertakings taking part in a public procurement procedure and lies at the very heart of the EU rules on public procurement procedures. In accordance with that principle, tenderers must be on an equal footing both when they formulate their tenders and when those tenders are being assessed by the contracting authority (see, to that effect, judgment of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 43 and the case-law cited).

31 The principle of transparency, also enshrined in Article 18(1), is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That principle requires that all the conditions and detailed rules of the award procedure be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract (see, to that effect, judgment of 14 September 2017, *Casertana Costruzioni*, C-223/16, EU:C:2017:685, paragraph 34 and the case-law cited).

32 Those principles of equal treatment and of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer (judgments of 14 September 2017, *Casertana Costruzioni*, C-223/16, EU:C:2017:685, paragraph 35, and of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 43).

33 A method of awarding public contracts such as that set out in the tender specifications for the call for tenders at issue in the main proceedings, according to which the contract is divided into lots, the largest of which will be awarded to the tenderer which has submitted the most economically advantageous tender, while a lot of lower value will, with the aim of maintaining competition in the economic sector concerned, preferably be awarded to the tenderer which has submitted the second most economically advantageous tender, on the condition that it accepts to perform that lot at the price of the tenderer which submitted the most economically advantageous tender, does not contain any element of negotiation, within the meaning of the case-law cited above.

34 In this respect, it should be noted that such a method for awarding public contracts guarantees, for the award of all lots, that the criterion of the lowest price is fulfilled, without the possibility for the contracting authority to derogate from that criterion or to ask a tenderer to amend its tender, since the contracting authority must base its decision on the prices offered before the expiry of the period for submitting tenders and to observe, throughout that procedure, the order of ranking resulting from those tenders.

35 In such a public procurement procedure, it is the prices offered before the expiry of the period for submitting tenders which directly and definitively determine the ranking of tenderers. In that ranking, the tenderer which offered the lowest price takes first place and that tenderer's price is that at which the entirety of the contract will be concluded.

36 The opportunity, provided by the tender specifications to the tenderer submitting the second most economically advantageous tender, of being awarded one lot of the contract results solely, as is expressly stated in the contract documents, from the fact that it takes second place in the ranking resulting from the prices offered in the tenders.

37 Whether use is made of that opportunity depends on the decision of that tenderer whether or not to accept to perform the lot in question at the price of the tenderer which submitted the most economically advantageous tender. That condition forms part of the detailed terms of the award procedure set out in the tender specifications. Where the tenderer which has submitted the second most economically advantageous tender does not agree to match that price, it falls to the tenderer which is third in the ranking resulting from the prices offered in the tenders to define its position on that point, and so on in the order of ranking of the tenders for as long as none of the tenderers agrees to match the price of the tender submitting the most economically advantageous tender. If all the tenderers ranked from second place to last place refuse to perform that lot at that price, the tenderer which submitted the most economically advantageous tender is to be awarded all of the lots of the contract.

38 None of the decisions which may be taken by the tenderers ranked from second place to last place involves amending the tenders submitted prior to the expiry of the period prescribed for that purpose or negotiation with the contracting authority. No tenderer has the possibility of changing, by amending its tender or by any negotiation, its position in the ranking or the price at which the contract relating to a given lot will be concluded.

39 It is apparent from the above considerations that a contract award procedure such as that at issue in the main proceedings comes, without breaching the principles of equal treatment and transparency, within the scenario referred to in Article 46 of Directive 2014/24, namely that in which a contracting authority decides to award a contract in the form of separate lots, specifying in the procurement documents whether a tender may be submitted for a single lot, for several lots or for all of the lots and indicating which objective and non-discriminatory criteria will be applied to determine the award of lots.

40 In that respect, it is irrelevant that, in the present case, the procurement procedure is open, within the meaning of Article 27 of that directive, since the considerations set out in paragraphs 33 to 38 above may equally apply in restricted procedures, with the meaning of Article 28 of that directive, once the economic operators invited to submit a tender have submitted their respective tenders.

41 In light of the foregoing considerations, the answer to the question referred is that Article 18(1) of Directive 2014/24 must be interpreted as meaning that the principles of equal treatment and transparency set out in that provision do not preclude, in a procedure for the award of a public contract divided into lots, the tenderer which has submitted the second most economically advantageous tender from being awarded, in accordance with the terms set out in the procurement documents, a lot on the condition that that tenderer accepts to deliver the supplies and perform the services relating to that lot at the same price as that offered by the tenderer which submitted the most economically advantageous tender and which has therefore been awarded another, larger lot of that contract.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 18(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

must be interpreted as meaning that the principles of equal treatment and transparency set out in that provision do not preclude, in a procedure for the award of a public contract divided into lots, the tenderer which has submitted the second most economically advantageous tender from being awarded, in accordance with the terms set out in the procurement documents, a lot on the condition that that tenderer accepts to deliver the supplies and perform the services relating to that lot at the same price as that offered by the tenderer which submitted the most economically advantageous tender and which has therefore been awarded another, larger lot of that contract.

[Signatures]

---

* Language of the case: Danish.

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

6 June 2024 (*)

(Reference for a preliminary ruling – Review procedures in respect of the award of public supply and public works contracts – Directive 89/665/EEC – Article 2(1)(c) – Compensation awarded to a tenderer unlawfully excluded from a procedure for the award of a public contract – Scope – Loss of opportunity)

In Case C-547/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Okresný súd Bratislava II (District Court, Bratislava II, Slovakia), made by decision of 22 July 2022, received at the Court on 17 August 2022, in the proceedings

INGSTEEL spol. s r. o.

v

Úrad pre verejné obstarávanie,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, Z. Csehi, M. Ilešič, I. Jarukaitis and D. Gratsias (Rapporteur), Judges,

Advocate General: A.M. Collins,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 20 September 2023,

after considering the observations submitted on behalf of:

– the Úrad pre verejné obstarávanie, by V. Országhová,

– the Slovak Government, by E.V. Larišová and S. Ondrášiková, acting as Agents,

– the Czech Government, by L. Halajová, M. Smolek and J. Vláčil, acting as Agents,

– the French Government, by R. Bénard and A. Daniel, acting as Agents,

– the Austrian Government, by J. Schmoll, M. Fruhmann and M. Winkler-Unger, acting as Agents,

– the European Commission, by G. Gattinara, R. Lindenthal and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 December 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1)(c) and Article 2(6) and (7) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations

and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665 and 92/113/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31) ('Directive 89/665').

2 The request has been made in proceedings between INGSTEEL spol. s r. o. and the Slovak Republic, acting through the Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority, Slovakia), concerning an action for damages brought by that company following the unlawful exclusion of the association of which it was a member ('the tendering association') from procedure for the award of a public contract initiated by Slovenský futbalový zväz (Slovak Football Association; 'the contracting authority').

Legal context

European Union law

Directive 89/665

3 The sixth recital of Directive 89/665 is worded as follows:

'Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement.'

4 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [(OJ 2004 L 134, p. 114)], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…'

5 Article 2 of that directive, entitled 'Requirements for review procedures' states:

'1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

…

6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

…’

Directive 2007/66

6 Recital 36 of Directive 2007/66 states:

‘This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.’

Slovak law

7 Under Paragraph 3(1)(a) of Zákon č. 514/2003 Z. z. o zodpovednosti za škodu spôsobenú pri výkone verejnej moci (Law No 514/2003 on liability for damage caused in the exercise of public authority) of 28 October 2003 (Zbierka zákonov No 215/2003, p. 3966), in the version applicable to the dispute in the main proceedings (‘Law No 514/2003’), the State is liable for damage caused by an unlawful decision adopted by public bodies in the exercise of public authority.

8 According to Paragraph 5(1) of that law, a party to a procedure that suffered damage as a result of an unlawful decision issued in that procedure has a right to compensation.

9 In accordance with Paragraph 6(1) of that law, that right to compensation may be invoked only where such a decision has been annulled or amended, on the ground that it is unlawful, by a competent authority. The court ruling on compensation for such damage is bound by the decision of that authority.

10 Under Paragraph 15(1) of that law, the right to compensation for damage caused by an irregular administrative procedure must be the subject of a preliminary examination on the basis of a written application by the injured party requesting a preliminary examination of his or her right before the competent authority.

11 It is apparent from Paragraph 16(4) of Law No 514/2003, first, that if that authority does not grant that request or if it informs the injured party, in writing, that it will not grant it, that party may bring an action before a court for a ruling on that request and, secondly, that, in the context of its legal action, that party may claim compensation only to the extent of the claim and the title which were the subject of the preliminary examination.

12 Paragraph 17(1) of that law provides that compensation is to be paid for actual loss and loss of profit, unless otherwise specifically provided.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 By a notice published on 16 November 2013, the contracting authority launched a call for tenders for the award of a public contract for works for the reconstruction, modernisation and construction of 16 football stadiums. The tendering association took part in that call for tenders.

14 Taking the view that that association had not satisfied the requirements of the contract notice relating, in particular, to its economic and financial standing, the contracting authority decided to exclude it from the contract in question. That exclusion decision was confirmed by a decision of the defendant in the main proceedings of 9 May 2014 and subsequently by a decision of its Board of Governors of 7 July 2014. The Krajský súd v Bratislave (Regional Court, Bratislava, Slovakia) having dismissed the action brought against that decision by judgment of 13 January 2015, that association brought an appeal against that judgment before the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic).

15 After making a request for a preliminary ruling to the Court that gave rise to the judgment of 13 July 2017, *INGSTEEL and Metrostav* (C-76/16, EU:C:2017:549), the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) annulled those decisions of 9 May and 7 July 2014. On 3 April 2018, the defendant in the main proceedings adopted a new decision ordering the contracting authority to cancel the exclusion of the tendering association from the procedure for the award of the public contract at issue.

16 Since that procedure had in the meantime been closed by the conclusion of a framework agreement with the only tenderer that had remained in the competition following the exclusion of that association, the applicant in the main proceedings brought an action before the referring court, the Okresný súd Bratislava II (District Court, Bratislava II, Slovakia), seeking damages for the loss allegedly suffered as a result of the unlawful decisions of the defendant in the main proceedings and its Board of Governors.

17 Before that court, the applicant in the main proceedings claims that that damage is the result of the unlawful exclusion of the tendering association from the public contract at issue, the successful tenderer having been awarded the contract only because of that exclusion. It takes the view, in essence, that if that association had not been excluded from the contested award procedure at issue, that association would have obtained that contract, since its tender was more advantageous than that of that successful tenderer and satisfied all the conditions of the contract notice concerned.

18 In order to determine the amount of the damage allegedly suffered, the applicant in the main proceedings commissioned an expert's report to quantify the loss of profit under the contract thus lost. On the basis of that expert's report, it claims a loss of profit under the contract lost in the amount of EUR 819 498.10, excluding value added tax, and damages in the amount of EUR 2 500, corresponding to the costs incurred in preparing that expert report.

19 Before the referring court, the defendant in the main proceedings states that the tendering association was excluded at the end of the first stage of the procedure for the award of the contract concerned and that its reinstatement in that procedure would not have led automatically to the award of that contract to that association, since the contracting authority would have had to assess its tender in greater detail and, in particular, determine whether the price of that tender constituted an abnormally low tender.

20 Furthermore, the defendant in the main proceedings takes the view, relying in that regard on the judgment of 17 March 2005, *AFCon Management Consultants and Others* v *Commission* (T-160/03, EU:T:2005:107), that the claim of the applicant in the main proceedings is purely hypothetical. The expert report submitted by the applicant is based on fictitious data, given, in particular, that the quantity of construction work provided for in the invitation to tender at issue would not necessarily be carried out in reality.

21 In that context, the applicant in the main proceedings points out that a claim which, for objective reasons, is not established with certainty cannot be classified from the outset as hypothetical. Unlike actual damage, the loss of profit does not consist in a reduction in the assets of the injured party, but in a loss of the expected profit, which must be reasonably foreseeable, in the normal course of events, in the absence of the unlawful act in question. As regards the performance of the public contract, the

applicant in the main proceedings states that, if the contracting authority issues a call for tenders, it may be assumed that it has an interest in the performance of the contract at issue and that it intends to conclude a contract with the successful tenderer, as indeed is the case here, since the contracting authority concluded a contract with the successful tenderer for all the works provided for in the call for tenders at issue.

22 In the light of the arguments of the parties to the main proceedings, the referring court asks whether Paragraph 17 of Law No 514/2003 is compatible with Directive 89/665. It states that, during the proceedings before it, the applicant in the main proceedings claimed compensation for a missed opportunity by using the concept of 'loss of profit', which was closest to the right to compensation for damage resulting from the loss of opportunity on which it relied. Slovak law does not distinguish between the various categories of damage for which compensation may be awarded, so that the loss of an opportunity falls within the category of loss of profit. The applicant in the main proceedings adds that the Court has long and consistently held that, in the event of the unlawful exclusion of a tenderer from a public procurement procedure, that tenderer has the right to claim compensation for the damage which it has suffered as a result of the loss of an opportunity, which cannot be equated with loss of profit and which does not require such a high degree of probability of obtaining an economic advantage. It is compensation for a lost opportunity to make a profit and not compensation for the profit itself.

23 In those circumstances, the Okresný súd Bratislava II (Bratislava II District Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the practice of a national court hearing a dispute involving a claim for compensation for damage caused to a tenderer who was unlawfully excluded from a public procurement procedure, pursuant to which compensation for loss of opportunity is denied, compatible with Article 2(1)(c) [of Directive 89/665], read in conjunction with Article 2(6) and (7) of [that directive]?

(2) Is the practice of a national court hearing a dispute involving a claim for compensation for damage caused to a tenderer who was unlawfully excluded from a public procurement procedure, pursuant to which a claim for lost profits caused by the loss of opportunity to participate in a public contract is not part of the claim for compensation, compatible with Article 2(1)(c) [of Directive 89/665], read in conjunction with Article 2(6) and (7) of [that directive]?'

Consideration of the questions referred

Admissibility

24 The defendant in the main proceedings disputes the admissibility of the questions referred for a preliminary ruling, arguing, in essence, that they are not relevant for the purposes of assessing the action in the main proceedings, since neither the admissibility of that action nor even the *locus standi* of the applicant in the main proceedings has been established by the referring court. Furthermore, the Court does not have jurisdiction to answer the questions referred for a preliminary ruling, in so far as, by those questions, the referring court seeks, in reality, a re-examination, by the Court, of the dispute in the main proceedings or directions concerning the procedure to be followed in the event that it decides not to award damages for loss of opportunity.

25 In that regard, it is clear from settled case-law that, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 12 October 2023, INTER Consulting, C-726/21, EU:C:2023:764, paragraph 32 and the case-law cited).

26 It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for

the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual and legal material necessary to give a useful answer to the questions submitted to it (judgment of 12 October 2023, INTER Consulting, C-726/21, EU:C:2023:764, paragraph 33 and the case-law cited).

27 In the present case, the referring court is asking the Court not to apply the provisions of EU law referred to in the questions referred for a preliminary ruling to the dispute in the main proceedings, but rather to interpret them. In addition, that court, which must, according to the case-law, assume responsibility for the subsequent judicial decision (judgment of 13 January 2022, *Regione Puglia*, C-110/20, EU:C:2022:5, paragraph 23 and the case-law cited), has set out with sufficient clarity the reasons why it considers that an interpretation of those provisions is necessary in order to resolve that dispute.

28 Furthermore, it should be borne in mind that, according to equally settled case-law, while it may be advantageous, depending on the circumstances, for the facts of a case to be established and for questions of national law to be settled at the time the reference is made to the Court, national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, necessitating a decision on their part (judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C-5/14, EU:C:2015:354, paragraph 31 and the case-law cited). Accordingly, the argument of the defendant in the main proceedings that the action brought by the applicant in the main proceedings does not satisfy the conditions for admissibility laid down by Slovak law cannot establish that the questions referred for a preliminary ruling are inadmissible.

29 In those circumstances, the questions referred must be held to be admissible.

Substance

30 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(1)(c) of Directive 89/665 must be interpreted as precluding national legislation or a national practice which excludes the possibility, for a tenderer who has been eliminated from a procedure for the award of a public contract because of an unlawful decision of the contracting authority, of being compensated for the damage suffered as a result of the loss of the opportunity to participate in that procedure with a view to obtaining the contract concerned.

31 It is apparent from the request for a preliminary ruling that the referring court is asking the Court, more specifically, to clarify whether that provision must be interpreted as meaning that persons harmed by an infringement of EU public procurement law and who are thus entitled to be compensated include not only those who have suffered loss as a result of not having obtained a public contract, namely their loss of profit, but also those who have suffered loss linked to the lost opportunity to participate in the procedure for the award of that contract and to make a profit as a result of such participation.

32 In accordance with the Court’s settled case-law, in interpreting a provision of EU law, it is necessary to consider not only the wording of that provision but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 20 April 2023, *DIGI Communications*, C-329/21, EU:C:2023:303, paragraph 41 and the case-law cited).

33 As regards, first, the wording of Article 2(1)(c) of Directive 89/665, it should be noted that that provision, which is worded in broad terms, provides that the Member States are to ensure that damages are awarded to persons harmed by an infringement of EU law on the award of public contracts, which, in the absence of any indication to distinguish different categories of damage, may cover any type of damage suffered by those persons, including that arising from the loss of the opportunity to participate in the procedure for the award of a contract.

34 That finding is supported, secondly, by the context of that provision.

35 According to settled case-law, individuals harmed by a breach of EU law attributable to a Member State have a right to compensation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the damage sustained by those individuals (judgment of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, EU:C:2019:630, paragraph 35 and the case-law cited). Furthermore, the Court has repeatedly held that compensation for loss or damage caused to individuals as a result of infringements of EU law must be commensurate with the loss or harm sustained, in that it must, where appropriate, enable the loss or harm actually sustained to be made good in full (judgment of 28 June 2022, *Commission* v *Spain (Breach of EU law by the legislature)*, C-278/20, EU:C:2022:503, paragraph 164 and the case-law cited). Article 2(1)(c) of Directive 89/665 gives concrete expression to those principles, inherent in the EU legal order (see, to that effect, judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, C-568/08, EU:C:2010:751, paragraph 87).

36 In that regard and in accordance with Article 1(3) of Directive 89/665, the review procedures provided for by that directive must be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. Moreover, as is apparent from recital 36 of Directive 2007/66, the system of legal remedies established by Directive 89/665 seeks to ensure full respect for the right to an effective remedy and to a fair trial, in accordance with the first and second paragraphs of Article 47 of the Charter of Fundamental Rights (see, to that effect, judgment of 14 July 2022, *EPIC Financial Consulting*, C-274/21 and C-275/21, EU:C:2022:565, paragraph 88 and the case-law cited).

37 No possibility of limiting that access is established by that directive. On the contrary, Member States may provide, under the second subparagraph of Article 2(7) of that directive, that, after the conclusion of a contract subsequent to its award, the powers of the body responsible for those review procedures are to be limited to awarding damages to any person harmed by an infringement. The action for damages provided for in Article 2(1)(c) of that directive was thus envisaged by the EU legislature as being the legal remedy of last resort, which must remain available to persons harmed by an infringement of EU law where they are de facto deprived of any possibility of benefiting from the effectiveness of one of the other remedies provided for in that provision.

38 That is, in particular, the case of an unlawfully excluded tenderer who, having requested and obtained the annulment of its exclusion from a procedure for the award of a public contract such as that at issue in the main proceedings, is, however, no longer able, on account of the closure of that procedure in the meantime, to benefit from the effects of that annulment.

39 While damage may result from the failure to obtain, as such, a public contract, it must be held that, in a case such as that identified in the preceding paragraph, it is possible for the tenderer who has been unlawfully excluded to suffer separate damage, which corresponds to the lost opportunity to participate in the procedure for the award of a public contract concerned in order to obtain that contract (see, to that effect, judgment of 21 December 2023, *United Parcel Service* v *Commission*, C-297/22 P, EU:C:2023:1027, paragraph 69). In the light of the considerations set out in paragraph 37 above, such damage must be recoverable under Article 2(1)(c) of Directive 89/665.

40 Thirdly, the broad interpretation of Article 2(1)(c) of Directive 89/665 is supported by the objective pursued by that directive, of not excluding any type of harm from the scope of that directive.

41 It should, in particular, be borne in mind that, although Directive 89/665 cannot be regarded as providing for complete harmonisation and, therefore, as envisaging all possible remedies in public procurement matters (judgment of 26 March 2020, *Hungeod and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 73), the fact remains that, as stated in the sixth recital of that directive, the directive stems from the intention of the EU legislature to ensure that, in all Member States, adequate procedures permit not only the annulment of decisions taken unlawfully but also the compensation of persons harmed by an infringement of EU law.

42 That objective would be jeopardised if Article 2(1)(c) of Directive 89/665 were to be interpreted as meaning that it makes it possible, as a matter of principle, to exclude the possibility, for the persons

referred to in Article 1(3) of that directive, of obtaining damages for harm which they claim to have suffered as a result of an infringement of EU public procurement law.

43 As the Court has held with regard to loss of profit, the total exclusion, in respect of the damage for which compensation may be granted, of the loss of the opportunity to participate in a procedure for the award of a public contract in order to obtain that contract, cannot be accepted in the event of an infringement of EU law since, especially in the case of economic or commercial disputes, such total exclusion of that loss of opportunity would be such as to make it practically impossible to make good the damage suffered (see, by analogy, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 87; of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 96 and the case-law cited; and of 17 April 2007, *AGM-COS.MET*, C-470/03, EU:C:2007:213, paragraph 95).

44 Therefore, Article 2(1)(c) of Directive 89/665 must be interpreted as meaning that the damages which persons harmed by an infringement of EU public procurement law may claim under that provision may cover the loss or damage suffered as a result of the loss of opportunity.

45 It should, however, be noted that, although Article 2(1)(c) requires that damages may be awarded to persons harmed by an infringement of EU public procurement law, it is, in the absence of EU provisions in that field, for the legal order of each Member State to determine the criteria by reference to which damage resulting from the loss of an opportunity to participate in a procedure for the award of a public contract in order to obtain that contract must be established and assessed, provided that the principles of equivalence and effectiveness are observed (see, to that effect, judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, C-568/08, EU:C:2010:751, paragraph 90 and the case-law cited).

46 In the present case, it is apparent from the request for a preliminary ruling that Article 17 of Law No 514/2003 expressly refers, as recoverable damage, only to ‘actual damage’ and ‘loss of profit’. At the hearing, the Slovak Government stated that, according to the settled case-law of the Slovak courts, a ‘loss of profit’ must be made good where it is highly probable, or even close to certain, that, having regard to the existing circumstances of the case, the person concerned would have made a profit. However, referring to the European Commission’s position that the Slovak courts should use all national means to enable a tenderer unlawfully excluded from a public contract to effectively claim damages for a lost opportunity, that government stated at the hearing that there is nothing to prevent a claimant from making use of the remedies available to it to assert its right and from adducing evidence to prove it.

47 In that regard, it therefore suffices to recall that, according to the case-law of the Court, in order to ensure the effectiveness of all provisions of EU law, the principle of primacy requires, inter alia, national courts to interpret, to the fullest extent possible, their national law in conformity with EU law (judgment of 4 March 2020, *Bank BGŻ BNP Paribas*, C-183/18, EU:C:2020:153, paragraph 60 and the case-law cited) and that that obligation to interpret national law in conformity with EU law requires national courts to change established, and even settled, case-law if it is based on an interpretation of domestic law that is incompatible with the objectives of a directive (see, to that effect, judgment of 3 June 2021, *Instituto Madrileño de Investigación y Desarrollo Rural, Agrario y Alimentario*, C-726/19, EU:C:2021:439, paragraph 86 and the case-law cited).

48 In the light of the foregoing considerations, the answer to the questions raised is that Article 2(1)(c) of Directive 89/665 must be interpreted as precluding national legislation or a national practice which excludes the possibility, as a matter of principle, for a tenderer excluded from a procedure for the award of a public contract because of an unlawful decision of the contracting authority, of being compensated for the damage suffered as a result of the loss of the opportunity to participate in that procedure with a view to obtaining the contract concerned.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting

observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007,

must be interpreted as precluding national legislation or a national practice which excludes the possibility, as a matter of principle, for a tenderer excluded from a procedure for the award of a public contract because of an unlawful decision of the contracting authority, of being compensated for the damage suffered as a result of the loss of the opportunity to participate in that procedure with a view to obtaining the contract concerned.

[Signatures]

---

* Language of the case: Slovak.

EU:C:2023:967

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 7 December 2023 (1)

Case C-547/22

INGSTEEL spol. s. r. o.
v
Úrad pre verejné obstarávanie

(Request for a preliminary ruling from the Okresný súd Bratislava II (District Court, Bratislava II, Slovakia))

(Reference for a preliminary ruling – Public procurement – Review procedures – Directive 89/665/EEC – Non-contractual liability of Member States – Action for damages for breach of EU law by an unsuccessful tenderer – Quantification – Loss of profit – Loss of opportunity)

I. Introduction

1. Does EU law require Member States to admit a claim in damages for loss of opportunity by a tenderer unlawfully excluded from a procedure for the award of a public contract where that procedure has concluded and a contract entered into with the successful tenderer? The answer to that question requires the Court of Justice to determine whether the laws of the Member States regulate the award of damages to which Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (2) refers. If so, the Court must examine the consequences of the requirement that those laws must comply with the principle of effectiveness.

II. Legal framework

A. European Union law

2. The preamble of Directive 89/665 contains the following text:

‘Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation;

…

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement.'

3. Under the fourth paragraph of Article 1(1) of Directive 89/665:

'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU, decisions taken by contracting authorities may be reviewed effectively …'

4. Article 1(3) of Directive 89/665 provides:

'Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

5. Under Article 2(1) of Directive 89/665:

'Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

…

(c) award damages to persons harmed by an infringement.'

B. Slovak law

6. Paragraph 3(1)(a) of Zákon č. 514/2003 Z. z. o zodpovednosti za škodu spôsobenú pri výkone verejnej moci (Law No 514/2003 on liability for damage caused in the exercise of public authority; 'Law No 514/2003') provides that the State is liable for damage caused by public authorities as a result of an unlawful decision.

7. Under Paragraph 5(1) of Law No 514/2003, a party to a procedure which suffered damage as a result of an unlawful decision issued in that procedure has a right to compensation.

8. Paragraph 17(1) of Law No 514/2003 establishes that compensation shall be awarded for actual damage and loss of profits, unless otherwise stipulated by special provisions.

9. Paragraph 442(1) of Zákon č. 40/1964 Zb. Občiansky zakonnik (Law No 40/1964 on the Civil Code; 'the Civil Code') provides that, in actions for damages, compensation shall be awarded for actual damage and loss of profits.

10. Zákon č. 25/2006 Z. z. o verejnom obstarávaní (Law No 25/2006 on public procurement) does not appear to contain any specific provisions that govern actions for damages arising from the award of public contracts.

III. The dispute in the main proceedings, the request for a preliminary ruling and the procedure before the Court

11. In 2013, the Slovak Football Federation published a call for tenders for the award of a contract for the construction, restructuring and modernisation of football stadiums. INGSTEEL spol s.r.o. ('Ingsteel'), an undertaking active in the building sector, participated in that award procedure. The Slovak Football Federation excluded Ingsteel from that procedure on the ground that it failed to satisfy the economic and financial requirements in the call for tenders. Ingsteel brought an action to challenge the legality of that decision, in the course of which the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) sought a reference for a preliminary ruling from the Court of Justice.

12. In its judgment of 13 July 2017 in *INGSTEEL and Metrostav* (C-76/16, EU:C:2017:549), the Court held that Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and

public service contracts (3) must be interpreted as meaning that, where a call for tenders requires the provision of a statement from a bank undertaking to grant credit to a tenderer and the banks approached by that tenderer refuse to provide such a statement, that tenderer may be permitted to prove its economic and financial standing by other appropriate means. In view of the Court's judgment, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) concluded that the decision to exclude Ingsteel was unlawful and annulled it. It then referred the case to the Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority, Slovakia) to take appropriate measures.

13. Since the procedure for the award of the public contract had concluded and the contracting authority had entered into a framework agreement with the successful tenderer, Ingsteel brought an action against the Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) in which it claimed, inter alia, damages for the loss of opportunity to win the tender. It argued that loss of opportunity and loss of profit are two different heads of claim. It appears that, under Slovak law, the standard of proof to show that damage is sufficiently foreseeable is lower with respect to claims for loss of opportunity than with respect to claims for loss of profit.

14. The Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) is of the view that Ingsteel's claim for damages is hypothetical. There was no guarantee that Ingsteel would have been selected as the successful tenderer or that, had it been selected, the contracting authority would have concluded a contract with it.

15. The Okresný súd Bratislava II (District Court, Bratislava II, Slovakia) wonders whether Directive 89/665 requires it to admit a claim for an award of damages for loss of opportunity by a tenderer where a court has set aside a decision to exclude it from a procedure that led to the award of a public contract and the contracting authority concluded a contract with another tenderer. It decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the practice of a national court hearing a dispute involving a claim for compensation for damage caused to a tenderer who was unlawfully excluded from a public procurement procedure, pursuant to which compensation for loss of opportunity is denied, compatible with Article 2(1)(c), read in conjunction with Article 2(6) and (7), of [Directive 89/665]?

(2) Is the practice of a national court hearing a dispute involving a claim for compensation for damage caused to a tenderer who was unlawfully excluded from a public procurement procedure, pursuant to which a claim for lost profits caused by the loss of opportunity to participate in a public contract is not part of the claim for compensation, compatible with Article 2(1)(c), read in conjunction with Article 2(6) and (7), of [Directive 89/665]?'

16. The Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority), the Czech, French and Slovak Governments and the European Commission submitted written observations. At the hearing of 20 September 2023, the Czech and Austrian Governments and the Commission presented oral argument and replied to the Court's questions.

IV. Assessment

A. Admissibility

17. The Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) presents two reasons as to why the Court should declare the request for a preliminary ruling inadmissible. First, since Ingsteel participated in the award procedure jointly with Metrostav a.s., which is not a party to the proceedings before the referring court, it does not have standing to bring a damages claim. Second, since Ingsteel originally claimed damages for loss of profit, not loss of opportunity, it cannot make that claim at this stage of the proceedings before the referring court.

18. The Slovak Government also has doubts as to the admissibility of the questions in so far as the referring court appears to ask the Court of Justice whether Ingsteel's damages claim ought to be allowed. Both the Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) and the

Slovak Government point out that it is for the referring court alone to adjudicate on the merits of Ingsteel's claim.

19. According to settled case-law, in the context of the cooperation for which Article 267 TFEU provides, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions that it submits to the Court of Justice. Where questions submitted by a national court concern the interpretation of EU law, the Court is thus, in principle, bound to give a ruling. (4) The Court of Justice may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted. (5)

20. The referring court's questions seek an interpretation of Article 2(1)(c) of Directive 89/665. In the light of the facts of the case, the issues the order for reference raises as regards the availability of a damages action for a loss of opportunity to enter into a public contract do not appear to be hypothetical. It is a matter for the referring court to determine whether, as a matter of national law, Ingsteel has standing to bring an action for damages for loss of opportunity and what consequences, if any, may flow from the manner in which it prosecuted its claim. For those reasons, I advise the Court to dismiss the objections taken to the admissibility of the questions referred.

B. Substance

1. The parties' observations

21. The Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) and the Austrian, Czech, French and Slovak Governments submit that it is for the internal legal order of each Member State to determine the criteria for the assessment of damages that flow from an infringement of EU law in a procedure leading to the award of a public contract. Those parties also accept that such national rules must comply with the principles of equivalence and effectiveness. Since Directive 89/665 provides for minimum harmonisation only, it contains no guidance on the criteria national courts are to take into account when they make that determination. It follows that Directive 89/665 does not oblige Member States to provide a remedy in damages for loss of an opportunity to obtain an award of a public contract.

22. The Czech Government suggests that the concept of damage under Directive 89/665 is not an autonomous concept of EU law. The French Government agrees with that suggestion. It submits that its approach is consistent with the case-law on Member State non-contractual liability for a breach of EU law, whereby the laws of each Member State determine the extent of compensation and the rules relating to the assessment of any loss or harm caused by such a breach.

23. The Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) agrees with Ingsteel that loss of profit and loss of opportunity are distinct concepts, the latter consisting in the loss of an opportunity to obtain a public contract. (6) It submits that, as a matter of Slovak law, an unlawfully excluded tenderer that can show that it had a real and sufficiently high chance of obtaining a public contract may be awarded damages for the loss of that opportunity. In contrast, the Czech Government and the Slovak Government consider that loss of opportunity may be considered as a type of loss of profit. The main difference between the two concepts lies in the standard of proof required to establish the existence of damage and the compensation that may be awarded.

24. The Austrian, Czech and Slovak Governments argue that, although it may provide some guidance, the case-law on the European Union's non-contractual liability in the area of public procurement cannot be transposed to the application of Directive 89/665. While the EU Courts have, in some cases, awarded damages for loss of opportunity to tenderers that the EU institutions unlawfully excluded from award procedures, the EU Courts rejected such claims in most instances, holding that, in order to receive an award of damages, any loss of opportunity must be real and not hypothetical.

25. The Commission observes that although Article 2(1)(c) of Directive 89/665 requires Member States to provide for the award of damages to persons harmed by an infringement of the EU public procurement rules, it does not contain any detailed conditions as to how that requirement is to be satisfied. Since Directive 89/665 provides for minimum harmonisation, Member States remain free to afford a higher degree of protection to persons harmed by an infringement of the public procurement rules. It is for each Member State, in accordance with the principle of the procedural autonomy, to lay down detailed rules governing actions for safeguarding rights that individuals derive from EU law, subject to those rules being compliant with the principles of equivalence and effectiveness. Since Directive 89/665 seeks to ensure the existence of effective review procedures to guarantee respect for the principles underlying the public procurement rules and, ultimately, the internal market, the principle of effectiveness is central to the resolution of this reference.

26. According to the Commission, because the contracting authority entered into a framework contract with another tenderer, in the proceedings before the referring court it is no longer possible to correct the illegality that afflicted the award procedure. In those circumstances, an award of damages is the only effective remedy available to a tenderer who suffered loss as a consequence of that illegality. National laws that do not afford the possibility to claim damages for a loss of opportunity to obtain a contract caused by that illegality deprive Ingsteel of access to an effective remedy, which is contrary to Directive 89/665.

2. Analysis

27. The parties to the proceedings before the Court agree that the referring court's questions should receive a single answer. Since there is merit in that suggestion, I propose that the Court rephrase the referring court's questions as asking whether it is contrary to Article 2(1)(c) of Directive 89/665 for a national court to adopt a practice whereby a tenderer unlawfully excluded from a procedure for the award of a public contract governed by that directive is precluded from claiming damages for a loss of opportunity to obtain that contract. Although the referring court asks the Court to read Article 2(1)(c) of Directive 89/665 in conjunction with Article 2(6) and (7) thereof, the order for reference does not indicate what impact, if any, the latter provisions have for the resolution of the questions referred. Nor does the order for reference indicate whether the Slovak Republic exercised the option, in Article 2(6) of Directive 89/665, whereby a court must set aside an allegedly unlawful decision before an award of damages can be sought. (7) Article 2(7) of Directive 89/665, which provides that national law determines the effects on a contract concluded subsequent to its award of the exercise of the powers Article 2(1) thereof refers to, appears to be of tangential relevance. (8) None of the parties that made written or oral observations before the Court referred to Article 2(6) or (7) of Directive 89/665 or made any argument by reference thereto. I am therefore of the view that the rephrased question loses none of its pertinence by the omission of those provisions.

28. In accordance with the Court's settled case-law, the need for a uniform application of EU law normally requires that, save where a provision of EU law describes a legal concept by reference to the laws of the Member States, that concept is to be given an independent and uniform interpretation. That interpretation is to be arrived at having regard to the text of the provision in question, the context in which it appears and the objective pursued by the legislation of which it forms part. (9)

29. It is important to point out that this approach does not apply in all cases. Here, several Member States submit that the concept of damage under Directive 89/665 is not an autonomous concept of EU law. I agree with that submission for the following reasons.

30. Article 2(1)(c) of Directive 89/665 makes it clear that Member States are required to ensure that review procedures include a power to award damages to persons harmed by an infringement. It does not describe what those damages consist of, nor does it offer any guidance as to how they might be assessed. (10) It neither provides for the conditions by reference to which a contracting authority may be liable to pay damages nor indicates how that award may be calculated. (11)

31. The context in which Article 2(1)(c) of Directive 89/665 appears includes its preamble, which states that it is for the Member States to rectify any absence or inadequacy in the remedies available in their legal systems. The fourth paragraph of Article 1(1) thereof provides that Member States shall take the measures necessary to ensure that contracting authorities' decisions are reviewed effectively.

Article 1(3) of Directive 89/665 represents that Member States shall ensure the availability of review procedures under detailed rules that those States may establish. Those provisions demonstrate that Directive 89/665 establishes a system of minimum harmonisation whereby the Member States are responsible for the form and nature of the remedies that must be available in the context of a review of the award of public contracts. (12) The parties that submitted observations agree that the case-law supports that conclusion. (13) Directive 89/665 therefore requires the Member States to provide certain remedies, which must be effective, but does not purport to define what those remedies are. (14)

32. As far as the objectives of Directive 89/665 are concerned, Article 1(1) of Directive 89/665, read in combination with the preamble thereof, indicates that that directive seeks to ensure the availability of effective procedures for the review of public procurement decisions. Persons affected by infringements of national rules implementing EU public procurement directives must have available effective remedies under national law so as to give tangible effect to the opening up to EU-wide competition of procedures for the award of public contracts.

33. It follows that the award of damages for the purposes of Directive 89/665 is not intended as an independent and uniform concept of EU law, but rather one that the laws of the Member States define. Directive 89/665 emphasises the result that that process is to attain, not the content of the rules to be adopted for that purpose, which will inevitably differ between the Member States. In that context, I observe that the EU legislature has refrained from amending Article 2(1) of Directive 89/665. (15) In addition, the case-law has not sought to set out any detailed criteria to determine the existence of damage and its assessment in the context of breaches of the rules governing the award of public contracts.

34. In the absence of any provisions in EU law for that purpose, it is thus for the legal order of each Member State to determine the criteria by reference to which damage caused by an infringement of EU law in the procedures leading to the award of public contracts is to be assessed. (16) As several of the parties to the present reference for a preliminary ruling have, in my view correctly, pointed out, those matters fall within the scope of the procedural autonomy of the Member States. (17) It is well established that detailed procedural rules governing actions to safeguard EU law rights must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). (18)

35. Two further considerations support the conclusion that the assessment of damages awards under Article 2(1)(c) of Directive 89/665 is to be addressed within the scope of the procedural autonomy of the Member States. First, that autonomy is a practical expression of the principle of subsidiarity in Article 5 TEU, according to which, in areas that do not fall within its exclusive competence, the European Union shall act only if and in so far as the Member States cannot achieve sufficiently the objectives of the proposed action. The second paragraph of Article 19(1) TEU, which states that Member States must provide remedies that ensure effective legal protection in the fields covered by Union law, implicitly acknowledges the relevance of that principle. Second, legal traditions, procedures and remedies can and do vary considerably between Member States. At the present stage of the development of EU law, it is difficult to envisage a homogeneous regime of remedies that would function equally effectively in all Member States in the field of public procurement law. (19) It thus comes as no surprise to me that, as point 33 of the present Opinion observes, the EU legislature has, to date, not sought to design such a system.

36. In its written and oral observations, the Commission referred to the judgments of the EFTA Court in *Fosen-Linjen I* (20) and in *Fosen-Linjen II*, (21) which examined the nature of the award of damages under Directive 89/665 in the context of a claim for loss of profit. The EFTA Court held that although the review procedures that Directive 89/665 requires ought to be as uniform as possible for all undertakings in the internal market, they are required to be neither homogeneous nor identical, since Directive 89/665 provides for minimum harmonisation. (22) It observed that an award of damages has a threefold objective: (i) to compensate for losses suffered; (ii) to restore confidence in the effectiveness of the applicable legal framework; and (iii) to deter contracting authorities from acting illegally, thereby improving compliance. (23) Since Directive 89/665 does not lay down conditions for the award of damages, it is for the legal order of each EEA State, in principle, to determine criteria by

reference to which harm caused by an infringement of the law on public contracts may be assessed. (24) In that context, the legal order of each EEA State must lay down rules, including those governing causation and the burden of proof. (25) Such national rules must always comply with the principles of equivalence and effectiveness. (26) Whilst it is preferable that breaches of public procurement law be corrected prior to entry into a public contract, in some cases an award of damages is the only remedy for such breaches. (27) For those reasons, although Directive 89/665 does not mention any specific heads of damage, the EFTA Court interpreted it as requiring EEA States to allow persons harmed by an infringement of public procurement law in the course of an award procedure to obtain damages for loss of profit. (28) Those judgments indicate that the principle of effectiveness may operate so as to prevent the laws of a Member State from excluding claims under certain heads of damage *in limine*.

37. Since the Court has held that Article 2(1)(c) of Directive 89/665 expresses the principle of liability for loss and damage caused to individuals as a result of breaches of EU law for which a Member State is responsible, which is inherent in the legal order of the European Union, (29) it is also necessary, as the French Government suggests in its written observations, to examine the Court's case-law on the general conditions under which Member States incur non-contractual liability for breaches of EU law.

38. Since the seminal judgment in *Francovich*, it is well established that individuals harmed by a breach of EU law by a Member State or one of its emanations have a right to reparation provided that they meet three conditions: (i) the rule of EU law infringed is intended to confer rights on those persons; (ii) the breach of that rule is sufficiently serious; and (iii) there is a direct causal link between the breach and the alleged loss or damage. (30) In that judgment, the Court also ruled that, although the right of individuals to obtain reparation is founded directly on EU law, it is by reference to national law rules on liability that a Member State makes reparation for the consequences of any loss and damage caused as a result of its breach. (31) It is for the laws of the Member States to lay down the substantive and procedural conditions for the reparation of loss and damage, subject always to compliance with the principle of effectiveness. (32)

39. In the judgment in *Brasserie du pêcheur*, the Court further examined the criteria that govern reparation. (33) It concluded that EU law imposes no specific criteria as to the various heads of damage that the referring courts had identified, (34) which are a matter for domestic law subject to compliance with the principles of equivalence and effectiveness. (35) It added that EU law does not accept the total exclusion of loss of profit as a head of damage, since such an exclusion would be contrary to the principle of effectiveness. (36) In another case involving Member States' non-contractual liability for breaches of EU law, Advocate General Léger suggested that recoverable damage may consist not only in loss of profit but also in loss of opportunity, provided that the latter is a sufficiently certain consequence of the alleged breach. (37) In the field of employment law, the Court has held that a right to claim damages for loss of opportunity may be adequate to nullify the consequences of a breach of EU law and consonant with the principle of effectiveness. (38) Those considerations demonstrate that the scope of the Member States' procedural autonomy is not limitless since the Court may lay down specific obligations to ensure that individuals harmed by an infringement of EU law obtain a minimum standard of protection.

40. The Austrian, Czech and Slovak Governments submit that the EU Courts' case-law on a loss of opportunity as a consequence of illegalities in the award of public contracts by the EU institutions is not automatically applicable to the circumstances in which this reference arose. I agree with that submission. For whatever reason, the rules governing the review of the award of public contracts by the EU institutions and those governing the award of public contracts by contracting authorities differ. (39) Although the General Court has held that a tenderer that has been unlawfully excluded from a procedure for the award of a public contract by an EU institution may claim damages for loss of opportunity, (40) that case-law relates to the non-contractual liability of the European Union, not that of its Member States. (41) It should be kept in mind that the role the EU Courts play in those circumstances is similar to the one the Member States' courts play when they apply their respective national procedural rules. It is in that specific context that EU law is called upon to regulate all aspects of the law governing the award of public contracts by EU institutions, including the matter of such non-contractual liability as may arise. The case-law on damages for breaches by the EU institutions of the

law governing the award of public contracts tends to show that loss of profit and loss of opportunity are different concepts. Whereas loss of profit is assessed by reference to compensation for the loss of a contract, loss of opportunity consists of compensation for a loss of an opportunity to conclude a contract. (42) The concept of loss of opportunity also appears to be recognised in actions for damages in the context of the EU staff regulations and the European Union's non-contractual liability. (43)

41. From both the terms in which Article 2(1)(c) of Directive 89/665 is expressed, and the objectives that directive pursues, viewed in the context of the general principles governing the non-contractual liability of Member States for breaches of EU law, one can conclude that it is for the laws of the Member States to define the heads of damage under which a tenderer unlawfully excluded from a procedure for the award of a public contract may claim compensation, provided that those national rules comply with the principles of equivalence and effectiveness.

42. There is no indication from the material before the Court that the present case involves any infringement of the principle of equivalence. The question remains as to whether a judicial interpretation of national legislation that does not envisage the award of damages for loss of opportunity is compliant with the principle of effectiveness, as defined in point 34 of the present Opinion. In that context, neither the effectiveness of Directive 89/665 nor the rights that it confers on individuals may be undermined. (44) The Court has held that national rules that make the award of damages subject to proof of fault or fraud on the part of the contracting authorities infringe Directive 89/665, since such rules impair the full effectiveness of the European Union's policy in the field of public procurement. (45)

43. Where a tenderer obtains a court decision to the effect that it has been unlawfully excluded from a procedure for the award of a public contract, and the contracting authority has concluded that contract with another tenderer, to exclude any possibility to claim damages for the loss of an opportunity to obtain that contract appears to infringe the principle of effectiveness. That situation is inconsistent with the aim of Directive 89/665, which is to guarantee effective remedies against contracting authorities' decisions made in breach of EU law, since a person so harmed would be deprived of the supplemental remedy for which Article 2(1) of Directive 89/665 provides, namely an award of damages. It is for the laws of the Member States to lay down the conditions under which that claim may be made out, including the burden and standard of proof, causation and the calculation of the amount of any award. (46)

44. Paragraph 442(1) of the Civil Code provides that, in actions for damages, compensation shall be awarded for actual damage and loss of profits. The order for reference appears to suggest that the case-law of the national courts does not envisage the award of damages for loss of opportunity to obtain a public contract. The Slovak Government submitted at the hearing that, under the law of that Member State, loss of opportunity is part of the concept of loss of profit capable of grounding an award of damages, provided that the person harmed can demonstrate that it had a very high chance of being awarded the public contract.

45. Since the referring court alone has jurisdiction to interpret and apply its national legislation, it falls to that court to interpret, as far as possible, the rules governing damages claims in such a way as to ensure compliance with the principle of effectiveness. When applying domestic law, the national court must, as far as is at all possible, interpret it in conformity with EU law. Such an interpretation is subject to compliance with recognised limits, notably the prohibition on a *contra legem* interpretation of national law. Where a national court cannot arrive at such an interpretation, it must fully apply EU law so as to protect rights that it confers on individuals, if necessary by disapplying any provision in so far as it would lead to a result contrary to EU law, provided that the relevant provision of EU law has direct effect. (47) In that context, the Court has already held that the obligation to interpret domestic law in conformity with EU law may require national courts to change established case-law where it is based on an interpretation that is incompatible with EU law. (48)

V. Conclusion

46. I propose that the Court answer the questions referred for a preliminary ruling by the Okresný súd Bratislava II (District Court, Bratislava II, Slovakia) as follows:

Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts is to be interpreted as meaning that

it is for the laws of the Member States to determine the conditions under which a national court may adjudicate upon a claim for the award of damages by a tenderer unlawfully excluded from a procedure for the award of a public contract governed by that directive. Those conditions include the burden and standard of proof, causation and the calculation of the size of any award. Member State laws for that purpose must comply with the principles of equivalence and effectiveness. The principle of effectiveness requires that a national court may not rely upon a practice whereby a tenderer unlawfully excluded from a procedure for the award of a public contract is precluded from claiming damages for a loss of an opportunity to obtain that contract.

---

1 Original language: English.

---

2 OJ 1989 L 395, p. 33, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) and by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1).

---

3 OJ 2004 L 134, p. 114.

---

4 See judgment of 13 January 2022, *Regione Puglia* (C-110/20, EU:C:2022:5, paragraph 23 and the case-law cited).

---

5 Ibid., paragraph 24 and the case-law cited.

---

6 See, to that effect, judgments of 21 May 2008, *Belfass* v *Council* (T-495/04, EU:T:2008:160, paragraph 124); of 20 September 2011, *Evropaïki Dynamiki* v *EIB* (T-461/08, EU:T:2011:494, paragraph 210); and of 28 February 2018, *Vakakis kai Synergates* v *Commission* (T-292/15, EU:T:2018:103, paragraph 187).

---

7 It is apparent from the order for reference that the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) set aside the decision to exclude Ingsteel from the procedure to award the relevant public contract.

---

8 Save in the situations contemplated in Articles 2d, 2e and 2f of Directive 89/665, which have no bearing upon the present case: judgment of 11 September 2014, *Fastweb* (C-19/13, EU:C:2014:2194, paragraph 52). See also Opinion of Advocate General Campos Sánchez-Bordona in *INGSTEEL and Metrostav* (C-76/16, EU:C:2017:226, point 69).

---

9 Judgment of 25 October 2018, *Anodiki Services EPE* (C-260/17, EU:C:2018:864, paragraph 25 and the case-law cited).

---

10 Opinion of Advocate General Cruz Villalón in *Combinatie Spijker Infrabouw* v *De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:515, point 106).

---

11 See, to that effect, judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751, paragraph 86).

---

12 See, to that effect, judgments of 21 October 2010, *Symvoulio Apochetefseon Lefkosias* (C-570/08, EU:C:2010:621, paragraph 37); of 26 March 2020, *Hungeod and Others* (C-496/18 and C-497/18, EU:C:2020:240, paragraph 73); and Opinion of Advocate General Bobek in *Marina del Mediterráneo and Others* (C-391/15, EU:C:2016:651, point 38).

---

13 See, to that effect, judgments of 30 September 2010, *Strabag and Others* (C-314/09, EU:C:2010:567, paragraph 33), and of 7 August 2018, *Hochtief* (C-300/17, EU:C:2018:635, paragraph 35).

---

14 Judgment of 18 June 2002, *HI* (C-92/00, EU:C:2002:379, paragraph 58). See also, by analogy, judgment of 11 July 1985, *Foreningen af Arbejdsledere i Danmark* (105/84, EU:C:1985:331, paragraph 26), where the Court found that a concept included in a directive effecting partial harmonisation could not constitute an autonomous concept of EU law because that directive did not intend to establish a uniform level of protection on the basis of common criteria.

---

15 See Directive 2007/66 and Directive 2014/23.

---

16 Judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751, paragraph 90).

---

17 Judgment of 30 September 2010, *Strabag and Others* (C-314/09, EU:C:2010:567, paragraph 34).

---

18 Judgments of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751, paragraph 91 and the case-law cited), and of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 37).

---

19 That circumstance may in part explain why the rules on the award of public contracts in Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1; 'the Financial Regulation') are not identical to those in Directive 89/665. See, to that effect, judgment of 23 May 2014, *European Dynamics Luxembourg* v *ECB* (T-553/11, EU:T:2014:275, paragraph 110), where the General Court held that the regime established by Directive 89/665 could not be transposed by analogy to awards of public contracts by the EU institutions.

---

20 Judgment of the EFTA Court of 31 October 2017, *Fosen-Linjen* v *AtB* (E-16/16, EFTA Court Report 2017, paragraph 90; 'the judgment in *Fosen-Linjen I*').

---

21 Judgment of the EFTA Court of 1 August 2019, *Fosen-Linjen* v *AtB* (E-7/18, EFTA Court Report 2019; 'the judgment in *Fosen-Linjen II*').

---

22 See, to that effect, judgments of the EFTA Court of 31 October 2017, *Fosen-Linjen* v *AtB* (E-16/16, EFTA Court Report 2017, paragraph 67) and of 1 August 2019, *Fosen-Linjen* v *AtB* (E-7/18, EFTA Court Report 2019, paragraph 109).

---

23 Judgment of the EFTA Court of 31 October 2017, *Fosen-Linjen* v *AtB* (E-16/16, EFTA Court Report 2017, paragraph 76).

---

24 Ibid. (paragraphs 69 and 70).

25 See, to that effect, ibid. (paragraphs 89 and 108).

26 Judgments of the EFTA Court of 31 October 2017, *Fosen-Linjen* v *AtB* (E-16/16, EFTA Court Report 2017, paragraph 70) and of 1 August 2019, *Fosen-Linjen* v *AtB* (E-7/18, EFTA Court Report 2019, paragraph 114).

27 Judgment of the EFTA Court of 31 October 2017, *Fosen-Linjen* v *AtB* (E-16/16, EFTA Court Report 2017, paragraph 73).

28 Judgments of the EFTA Court of 31 October 2017, *Fosen-Linjen* v *AtB* (E-16/16, EFTA Court Report 2017, paragraph 90) and of 1 August 2019, *Fosen-Linjen* v *AtB* (E-7/18, EFTA Court Report 2019, paragraphs 115 and 116).

29 Judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751, paragraph 87).

30 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 40; 'the judgment in *Francovich*') and judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51; 'the judgment in *Brasserie du pêcheur*').

31 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 42). See also judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 67), of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 58), and of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 123).

32 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 43). See also, to that effect, judgment of 17 April 2007, *AGM-COS.MET* (C-470/03, EU:C:2007:213, paragraph 89), and Opinion of Advocate General Geelhoed in *GAT* (C-315/01, EU:C:2002:573, point 64).

33 Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 81).

34 The national court explicitly referred to expenses, loss of profit, loss of income and losses consequent on sales at an undervalue in that context (ibid., paragraph 14).

35 Ibid., paragraphs 83, 84 and 88.

Academic literature on the non-contractual liability of Member States for breach of EU law appears to take the unanimous view that, while EU law establishes a right to reparation, the precise content of any remedy is a matter for Member State legal systems, subject to compliance with the principles of equivalence and effectiveness. It has also been observed that, by not seeking to define the concept of damage, the Court has left that matter over to national laws. See Van Gerven, W., 'Of rights, remedies and procedures', *Common Market Law Review*, Vol. 37, Issue 3, 2000, pp. 511 and 512. See also Christ, H., 'Compensation for damage:

The non-contractual liability of Member States and EU institutions for breaches of EU law', in Colcelli, V. and Arnold, R. (eds), *Europeanization Through Private Law Instruments*, Universitätsverlag Regensburg, 2016, p. 213; Biondi, A. and Farley, M., *The Right to Damages in European Law*, Kluwer Law International, 2009, pp. 76 to 83; Gutman, K., 'Liability for breach of EU law by the Union, Member States and individuals: Damages, enforcement and effective judicial protection', in Lazowski, A. and Blockmans, S. (eds), *Research Handbook on EU Institutional Law*, Edward Elgar Law, 2016, p. 460.

Various authors on the topic of damages in the field of public procurement consider, similarly, that the definition of damage is best left to the laws of the Member States on the basis of the principle of national procedural autonomy, subject to compliance with the principles of effectiveness and equivalence. See Treumer, S., 'Basis and conditions for a damages claim for breach of the EU public procurement rules', in Fairgrieve, D. and Lichère, F., *Public Procurement Law: Damages as an Effective Remedy*, Hart, 2011, p. 150. See also Caranta, R., 'Damages for breaches of EU public procurement law: Issues of causation and recoverable losses', in Fairgrieve, D. and Lichère, F., *Public Procurement Law: Damages as an Effective Remedy*, Hart, 2011, pp. 167 to 184; Schebesta, H., *Damages in EU Public Procurement Law*, Springer International Publishing Switzerland, 2016, pp. 52 to 60.

---

36 Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 87). See also judgment of 17 April 2007, *AGM-COS.MET* (C-470/03, EU:C:2007:213, paragraph 89). The Court reached the same conclusion with regard to the non-contractual liability of individuals for breaches of EU law (judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraphs 95 and 96).

According to certain authors, the Court's case-law on the non-contractual liability of Member States reflects the delicate balance (and tension) between unity and diversity, through the interaction between national procedural autonomy and the principles of equivalence and effectiveness. See Gutman, K., 'Liability for breach of EU law by the Union, Member States and individuals: Damages, enforcement and effective judicial protection', in Lazowski, A. and Blockmans, S. (eds), *Research handbook on EU institutional law*, Edward Elgar Law, 2016, p. 465.

---

37 Opinion of Advocate General Léger in *Hedley Lomas* (C-5/94, EU:C:1995:193, point 183).

---

38 Judgment of 7 March 2018, *Santoro* (C-494/16, EU:C:2018:166, paragraph 50).

---

39 See, to that effect, judgments of 21 May 2008, *Belfass* v *Council* (T-495/04, EU:T:2008:160, paragraph 43); of 3 March 2011, *Evropaïki Dynamiki* v *Commission* (T-589/08, EU:T:2011:73, paragraphs 22 and 23); and of 12 July 2012, *Evropaïki Dynamiki* v *Frontex* (T-476/07, EU:T:2012:366, paragraphs 39 to 41).

---

40 See, for instance, judgments of 20 September 2011, *Evropaïki Dynamiki* v *EIB* (T-461/08, EU:T:2011:494, paragraph 66); of 28 February 2018, *Vakakis kai Synergates* v *Commission* (T-292/15, EU:T:2018:103, paragraphs 186 to 193); of 14 December 2018, *East West Consulting* v *Commission* (T-298/16, EU:T:2018:967, paragraph 176); and of 12 February 2019, *Vakakis kai Synergates* v *Commission* (T-292/15, EU:T:2019:84, paragraph 53).

---

41 The Financial Regulation governs the award of public contracts by the EU institutions. It does not apply to the award of public contracts by Member States' contracting authorities, which are, in substance, regulated by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

42 Judgment of 28 February 2018, *Vakakis kai Synergates* v *Commission* (T-292/15, EU:T:2018:103, paragraph 188).

---

43 In the context of staff cases, see judgments of 21 February 2008, *Commission* v *Girardot* (C-348/06 P, EU:C:2008:107, paragraph 55), and of 27 October 1994, *C* v *Commission* (T-47/93, EU:T:1994:262, paragraphs 54 and 55). See also Opinion of Advocate General Cruz Villalón in *Giordano* v *Commission* (C-611/12 P, EU:C:2014:195), which explains that the concept of loss of opportunity in the law of damages is linked to the emergence of 'risk theory', which makes it possible to quantify the degree of probability of future events. As for the general non-contractual liability of the European Union for breaches of EU law, see judgment of 8 May 2007, *Citymo* v *Commission* (T-271/04, EU:T:2007:128, paragraphs 180 to 182).

---

44 See, to that effect, judgment of 7 August 2018, *Hochtief* (C-300/17, EU:C:2018:635, paragraph 38).

---

45 Judgment of 10 January 2008, *Commission* v *Portugal* (C-70/06, EU:C:2008:3, paragraph 42).

---

46 According to Schebesta, the loss of opportunity theory could provide a solution to the recurrent problem of the hypothetical nature of the unsuccessful tenderer's losses. Schebesta, H., *Damages in EU Public Procurement Law*, Springer International Publishing Switzerland, 2016, p. 205.

---

47 See, to that effect, judgments of 27 February 2003, *Santex* (C-327/00, EU:C:2003:109, paragraphs 62 to 64), and judgment of 11 October 2007, *Lämmerzahl* (C-241/06, EU:C:2007:597, paragraphs 62 and 63). See also judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraphs 55, 61 and 62).

---

48 Judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 78).

ORDER OF THE COURT (Eighth Chamber)

16 March 2023 (*)

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Public Procurement – Directive 2009/81/EC – Article 55(4) – Article 57(2) – Interest in bringing proceedings – Access to the review procedures – Tenderer excluded from a public procurement procedure by a decision of the contracting authority that has become final – National regulation depriving such a tenderer of access to a means of appeal – No interest in bringing proceedings)

In Case C-493/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania), made by decision of 28 June 2022, received at the Court on 22 July 2022, in the proceedings

Armaprocure SRL

v

Ministerul Apărării Naţionale,

BlueSpace Technology SRL,

THE COURT (Eighth Chamber),

composed of M. Safjan, President of the Chamber, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to rule by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 55(4), Article 56(3), Article 57(2), Article 60(1)(b) and Article 61 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76).

2 The request has been made in proceedings between Armaprocure SRL, on the one hand, and Ministerul Apărării Naţionale (Ministry of National Defence, Romania) and BlueSpace Technology SRL, on the other, concerning the decision of that ministry to reject Armaprocure's offer and to award a public contract for the acquisition of firing ranges to a consortium consisting of BlueSpace Technology and the national company Romarm SA ('the Consortium').

Legal context

European Union law

Directive 2009/81

3 Recital 72 of Directive 2009/81 states:

‘Compliance with transparency and competition obligations should be ensured by an efficient review system, based on the system which [Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66 EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 89/665’), and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66], provide for contracts covered by [Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), and Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)]. In particular, the possibility of challenging the award procedure before the contract is signed should be provided for, as should the guarantees necessary for the efficiency of the review, such as the standstill period. The possibility of challenging illegal direct awards or contracts concluded in violation of this Directive should also be provided for.’

4 Article 55 of Directive 2009/81, which is entitled ‘Scope and availability of review procedures’, provides as follows in paragraphs 2 and 4:

‘2. Member States shall take the measures necessary to ensure that decisions taken by the contracting authorities/entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 56 to 62, on the grounds that such decisions have infringed [EU] law in the field of procurement or national rules transposing that law.

…

4. Member States shall ensure that the review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.’

5 Article 56 of that directive, entitled ‘Requirements for review procedures’, provides in paragraph 3:

‘When a body of first instance, which is independent of the contracting authority/entity, reviews a contract award decision, Member States shall ensure that the contracting authority/entity cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 57(2) and Article 60(4) and (5).’

6 Article 57 of that directive, entitled ‘Standstill period’, is worded as follows in the second subparagraph of paragraph 2:

‘Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and either has been considered lawful by an independent review body or can no longer be subject to a review procedure.’

7 Article 60 of Directive 2009/81, entitled ‘Ineffectiveness’, provides, in paragraph 1(b):

‘Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority/entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

…

(b) in the case of an infringement of Article 55(6), Article 56(3) or Article 57(2), where this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with another infringement of Titles I or II, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract'.

8 Under Article 61 of that directive, entitled 'Infringements of this Title and alternative penalties':

'1. In the case of an infringement of Article 55(6), Article 56(3) or Article 57(2) which is not covered by Article 60(1)(b), Member States shall provide for ineffectiveness in accordance with Article 60(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority/entity shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

…'

Directive 89/665

9 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides as follows in paragraph 3:

'Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

10 Article 2a of that directive, entitled 'Standstill period', is worded as follows in the second subparagraph of paragraph 2:

'Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.'

Romanian law

Emergency Ordinance No 114/2011

11 Article 137 of the Ordonanța de urgență a Guvernului nr. 114/2011 privind atribuirea anumitor contracte de achiziții publice în domeniile apărării și securității (Government Emergency Ordinance No 114/2011 on the award of certain public contracts in the defence and security sectors), of 21 December 2011 (*Monitorul Oficial al României*, part I, No 932 of 29 December 2011) (the 'Emergency Ordinance No 114/2011'), provides in paragraphs 1 and 2:

'1. The contracting authority shall inform the economic operators involved in the award procedure of decisions concerning the result of the selection process, the outcome of the public contract award procedure or the conclusion of a framework agreement or, where appropriate, the cancellation of the award procedure and the possible subsequent initiation of a new procedure, in writing and as soon as possible, but no later than three working days after the decision in question has been issued.

2. For the purposes of paragraph 1, any candidate/tenderer whom the contracting authority has not yet informed of decisions directly concerning his candidacy/tender and any candidate/tenderer whose candidacy/tender has not been finally rejected by the contracting authority shall be deemed to be an economic operator involved in the award procedure. A rejection shall be deemed final once it has been communicated to the economic operator concerned and either it has been held to be lawful by the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Complaints[, Romania]) seised of the matter or it has not been and can no longer be the subject of an appeal.'

12 Article 138 of that emergency ordinance provides, in paragraph 2(c):

‘In the communication referred to in Article 137(3), the contracting authority shall inform tenderers/candidates who have been rejected or whose tender has been unsuccessful of the reasons for that decision, and shall communicate the following:

…

(c) to every tenderer that has submitted an acceptable and compliant, and therefore admissible tender, but has not been successful, the characteristics and the relative advantages of the successful tender(s) in relation to his tender, the name of the tenderer to whom the public contract is to be awarded or, as appropriate, the names of the tenderers with whom a framework contract is to be concluded’.

Law No 101/2016

13 Legea nr. 101/2016 privind remediile și căile de atac în materie de atribuire a contractelor de achiziție publică, a contractelor sectoriale și a contractelor de concesiune de lucrări și concesiune de servicii, precum și pentru organizarea și funcționarea Consiliului Național de Soluționare a Contestațiilor (Law No 101/2016 on remedies and review procedures relating to the award of public procurement contracts, sector-specific contracts and works and services concession contracts and on the organisation and operation of the National Council for the Resolution of Complaints), of 19 May 2016 (*Monitorul Oficial al României*, part I, No 393 of 23 May 2016), in the version applicable to the main proceedings (‘Law No 101/2016’), provides in Article 3:

‘1. The expression:

…

(f) persons who consider that their rights or legitimate interests have been infringed means any economic operators that satisfy the following cumulative conditions:

(i) they have or have had an interest in a procurement procedure; and

(ii) they have suffered, are suffering or risk suffering harm as a result of an act of a contracting authority capable of producing legal effects
or a failure to respond to a request relating to a procurement procedure within the period prescribed by law.

…’

3. For the purposes of paragraph 1(f)(i), persons shall be deemed to have or to have had an interest in a procurement procedure if they have not yet been definitively excluded from that procedure. Exclusion shall be definitive if it has been communicated to the candidate/tenderer in question and if it has been found lawful by the National Council for the Resolution of Complaints or by a court or if it can no longer be the subject of a review procedure.’

14 Article 58 of Law No 101/2016 provides:

‘1. Any interested person may apply to the court for a declaration of invalidity of a contract or addendum to a contract concluded in infringement of the conditions laid down in the legislation relating to public procurement, the legislation relating to sector-specific procurement and the legislation relating to works and services concessions, as appropriate, for the valid conclusion of such a contract or addendum or for the parties to be restored to their previous positions.

2. The court shall establish the total/partial invalidity of the contract or its amendment and restore the parties to their previous situation, in accordance with Article 1254(3) of [Legea nr. 287/2009 privind Codul civil (Law No 287/2009 on the Romanian Civil Code)], republished, as amended, in the following cases:

…

(c) the contract or amendment to that contract was concluded on less favourable terms than those set out in the technical and/or financial proposals which constituted the successful tender;

(d) the qualification and selection criteria and/or evaluation factors laid down in the contract notice on the basis of which the tender was declared successful were not respected, leading to a change in the outcome of the procedure by way of the competitive advantages being annulled or reduced;

(e) the contract was concluded before receipt of the decision of the [National] Council [for the Resolution of Complaints] or the court deciding on the complaint or in disregard of that decision;

…

6. In the event of infringement of the provisions relating to the statutory waiting period for the conclusion of the contract, the court, after analysing all the relevant aspects, shall declare the total or partial invalidity of the contract or its amendment and restore the parties to their previous situation or, if this is sufficient, order alternative sanctions, such as those provided for in paragraph 3.’

The dispute in the main proceedings and the question referred for a preliminary ruling

15 On 12 December 2019, the Ministry of National Defence launched a public procurement procedure on the basis of Emergency Ordinance No 114/2011 transposing Directive 2009/81, which comprises two lots:

– Lot 1 – Type 2 firing range, estimated value: 14 405 042 Romanian lei (RON) exclusive of value added tax (VAT) (approximately EUR 2 920 000);

– Lot 2 – Type 3 firing range, estimated value: 29 500 000 RON exclusive of VAT (approximately EUR 5 980 000);

16 The total estimated value of the contract was 43 905 042 RON (approximately EUR 8 900 000); the award was based on the single criterion of ‘lowest price’.

17 By letter of 9 March 2020, the contracting authority informed Armaprocure, first, that its tenders for both lots had been rejected, having been found to be non-compliant for lot 1 and non-compliant and unacceptable for lot 2. Second, the contracting authority informed it of the award of the contract to the Consortium.

18 On 19 March 2020, Armaprocure brought the first action before the National Council for the Resolution of Complaints, challenging the legality of the decision to reject its tender, the decision to admit other tenders, and the decision to award the contract to the Consortium.

19 By decision of 10 April 2020, the National Council for the Resolution of Complaints partially upheld Armaprocure’s claim, in particular by ordering the contracting authority to re-evaluate Armaprocure’s tender for lot 1 as well as the Consortium’s tenders and those of other tenderers, namely Electro Optic Components SRL and Stimpex SA for both lots. The Council, however, rejected Armaprocure’s complaint regarding the decision to reject its tender for lot 2.

20 After the Curtea de Apel București (Court of Appeal, Bucharest, Romania), seised by the Ministry of National Defence and by Electro Optic Components and the Consortium, partially amended the decision of the National Council for the Resolution of Complaints by decision of 30 June 2020, the contracting authority proceeded to re-evaluate the tenders. By letter of 10 November 2020, it informed Armaprocure that its tender for lot 1 had been rejected as non-compliant while the Consortium’s tender for that lot had been successful. Armaprocure’s tender for lot 2 was finally rejected.

21 By document registered on 25 November 2020, Armaprocure referred to the National Council for the Resolution of Complaints a second time to challenge the result of the re-evaluation of the tenders.

22 By decision of 24 May 2021, the Council annulled the report on the procedure, drawn up by the contracting authority, only in so far as it concerns the financial evaluation of the tenders submitted by

the Consortium and Electro Optic Components (‘the decision of 24 May 2021’).

23 On 14 June 2021, after further evaluation of these tenders, the contracting authority informed Electro Optic Components that its tender had been declared unacceptable. In accordance with the provisions of Article 137(2) and Article 138(2)(c) of Emergency Ordinance No 114/2011, the outcome of the re-evaluation was not communicated to Armaprocure, as the tender submitted by it had been previously rejected and this rejection had been considered lawful by the National Council for the Resolution of Complaints.

24 On 8 June 2021, Armaprocure lodged an administrative appeal against the decision of 24 May 2021. As that action was dismissed as unfounded by the Curtea de Apel București (Court of Appeal, Bucharest) by decision of 27 October 2021, Armaprocure brought an appeal on a point of law against that decision, which was dismissed by the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) on 25 May 2022.

25 At its request, Armaprocure was informed by the contracting authority, by letter of 11 November 2021, that the tenders of the Consortium and Electro Optic Components had been re-evaluated on 14 June 2021, pursuant to the decision of 24 May 2021.

26 At the end of November 2021, the contract for the supply of the ‘Type 2 firing range’ and ‘Type 3 firing range’ products was signed between the contracting authority and the Consortium. The notice of the award of the contract to the Consortium was published on the online platform ‘public procurement electronic system’ on 31 December 2021.

27 In its third complaint brought on 10 January 2022, Armaprocure asked the National Council for the Resolution of Complaints, inter alia, to annul all of the acts of the contracting authority adopted to implement the decision of 24 May 2021 in so far as concerned lot 1, to restore the parties to their previous position, to annul the procurement procedure and to suspend performance of the contract concerning that lot.

28 By decision of 28 January 2022, the National Council for the Resolution of Complaints dismissed Armaprocure’s complaints, which, therefore, brought the matter before the Tribunalul București (Regional Court, Bucharest, Romania).

29 By judgment of 29 March 2022, that court dismissed Armaprocure’s action, noting that its tender for lot 2 had been rejected by the decision of the National Council for the Resolution of Complaints of 10 April 2020, which had not been challenged before the Curtea de Apel București (Court of Appeal, Bucharest). The Tribunalul București (Regional Court, Bucharest) also pointed out that the decision of 24 May 2021 had rejected the claim submitted by Armaprocure seeking, first, annulment of the procedure and the decision declaring its tender for lot 1 non-compliant, and, second, re-evaluation of its tender by the contracting authority.

30 The Tribunalul București (Regional Court, Bucharest) also noted that the action brought by Armaprocure against the decision of 24 May 2021 had been dismissed by judgment of the Curtea de Apel București (Court of Appeal, Bucharest) of 27 October 2021. The Tribunalul București (Regional Court, Bucharest) therefore held that Armaprocure no longer had an interest in raising objections relating to the tender that had won the contract or to the acts of the procurement procedure for lot 1, because the non-conformity of the tender it had submitted had been established once and for all and become definitive.

31 Armaprocure appealed against the judgment of the Tribunalul București (Regional Court, Bucharest) of 29 March 2022 to the Curtea de Apel Bucureşti (Court of Appeal, Bucharest), which is the referring court. Armaprocure argued, inter alia, that the contracting authority had infringed Directive 2009/81 in that it had signed the contract for the supply of the products referred to in lots 1 and 2 with a tenderer that had submitted an unacceptable and non-compliant tender. Armaprocure also argued that it had brought an action before the Tribunalul București (Regional Court, Bucharest) for a declaration of invalidity of the public procurement contract resulting in that contract, based on Article 58(1) of Law No 101/2016. Consequently, it suffices for it to demonstrate that it is an ‘interested person’, within the meaning of that provision, to be able to challenge that contract, without having to establish that it is an

'injured' person, within the meaning of Article 3(1)(f) of that law. Therefore, it is not necessary for it to have the status of a tenderer or a candidate.

32 The referring court observes that Directive 2009/81 provides for a right to appeal only for the interested tenderer or candidate, where the interest of the tenderer or candidate in the procedure for the award of public procurement contracts arises from the participation of the interested party in such a procedure. However, in the present case, on the date the contract was signed by the successful tenderer, at the end of November 2021, Armaprocure had been definitively excluded from the procurement procedure resulting in that contract. By reasoning by analogy with the judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988), which related to Directive 89/665, that court asks whether Directive 2009/81 precludes a tenderer that has been excluded from a public procurement procedure by a decision of the contracting authority that has become final from having access to a means of appeal against, or review of the contract concluded with the successful tenderer.

33 In those circumstances the Curtea de Apel București (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are [Article 55(4), Article 56(3), Article 57(2), Article 60(1)(b) and Article 61] of Directive [2009/81] to be interpreted as precluding a tenderer, that has been excluded from a public procurement procedure by a decision of the contracting authority that has become final, from having access to a means of appeal against, or review of the contract concluded with the successful tenderer?'

The request for an expedited procedure

34 The referring court requested the Court of Justice to deal with the present reference for a preliminary ruling under the expedited procedure pursuant to Article 105(1) of the Rules of Procedure of the Court of Justice.

35 However, in view of the decision of the Court to rule by reasoned order in accordance with Article 99 of the Rules of Procedure, there is no need to adjudicate on that request (see, to that effect, order of 10 January 2023, *Ambisig*, C-469/22, EU:C:2023:25, paragraph 19 and the case-law cited).

Consideration of the question referred

36 In accordance with Article 99 of the Rules of Procedure, where the reply to the question [illegible] preliminary ruling may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

37 It is appropriate to apply that provision in the context of the present reference for a preliminary ruling.

38 By its question, the referring court asks, in essence, whether Article 55(4) and Article 57(2) of Directive 2009/81 must be interpreted as precluding a tenderer, that has been excluded from a public procurement procedure by a decision of the contracting authority that has become final, from having access to a means of appeal against, or review of the contract concluded with, the successful tenderer.

39 As a preliminary point, it should be noted that it is apparent from the order for reference that, by its decisions of 10 April 2020 and 24 May 2021, in which it ruled on Armaprocure's first two complaints, the National Council for the Resolution of Complaints rejected the challenge to the decision rejecting Armaprocure's tender for lots 1 and 2, respectively, in view of the fact that, according to the explanations provided by the referring court, those decisions became final before the contract concluded with the successful tenderer was signed. After lodging a third complaint, Armaprocure brought an action before the referring court seeking annulment of the procurement procedure at issue and, accordingly, that it be awarded the contract.

40 At the outset, it should be noted that it follows from recital 72 of Directive 2009/81 that, by adopting this directive, the EU legislature intended to establish an efficient review system, inspired by the system provided for by Directive 89/665.

41 In that respect, it should be noted that, first, under Article 1(3) of Directive 89/665, whose wording is repeated in Article 55(4) of Directive 2009/81, the Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In so doing, those provisions do not oblige the Member States to make those review procedures available to any person wishing to obtain a public contract but allows them to require, in addition, that the person concerned has been or risks being harmed by the infringement it alleges (see, to that effect, judgment of 19 June 2003, *Hackermüller*, C-249/01, EU:C:2003:359, paragraph 18, and order of 17 May 2022, *Estaleiros Navais de Peniche*, C-787/21, not published, EU:C:2022:414, paragraph 22).

42 Called upon to interpret Article 1(3) of Directive 89/665, the Court has held that, in a procedure for the award of a public contract, tenderers whose exclusion is requested have a legitimate interest in the exclusion of the tenders submitted by other tenderers for the purpose of obtaining the contract, irrespective of the number of participants in the procedure for the award of the public contract concerned, the number of participants who have brought actions or the differing legal grounds which they have raised. The exclusion of one tenderer may lead to another tenderer directly being awarded the contract in the same procedure. Furthermore, if both tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly (see, to that effect, judgments of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33; of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraphs 24, 27 and 29; of 24 March 2021, *NAMA and Others*, C-771/19, EU:C:2021:232, paragraph 31; and order of 17 May 2022, *Estaleiros Navais de Peniche*, C-787/21, not published, EU:C:2022:414, paragraph 23).

43 Second, the case-law principle recalled in the preceding paragraph applies only on condition that the exclusion of the tenderer has not become final, in particular after having been confirmed by a decision which has become definitive (see, to that effect, judgments of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich*, C-355/15, EU:C:2016:988, paragraph 36; of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 57 and 58; of 24 March 2021, *NAMA and Others*, C-771/19, EU:C:2021:232, paragraph 42; and order of 17 May 2022, *Estaleiros Navais de Peniche*, C-787/21, not published, EU:C:2022:414, paragraph 24).

44 However, under the second subparagraph of Article 57(2) of Directive 2009/81, which is worded in the same way as Article 2a(2) of Directive 89/665, the exclusion of a tenderer is final if it has been notified to the tenderer and has been found to be lawful by an independent review body or can no longer subject to a review procedure. It follows that the fact that the exclusion decision is not yet definitive determines, for those tenderers, the standing to bring proceedings against the award decision (judgment of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraph 74, and order of 17 May 2022, *Estaleiros Navais de Peniche*, C-787/21, not published, EU:C:2022:414, paragraph 25).

45 The legal interest of an unsuccessful tenderer in a public procurement procedure in bringing proceedings against the decision awarding that contract is thus intrinsically linked to the continuing interest in bringing proceedings against the decision excluding it from that procedure. Therefore, in the absence of an interest in bringing proceedings against the decision excluding its tender, an unsuccessful tenderer cannot claim to continue having an interest in bringing proceedings against the decision awarding the contract. Such an interest in bringing proceedings cannot be inferred from the fact that that tenderer could potentially be awarded the contract in the case if, following the annulment of that decision, the contracting authority were to decide to launch a new award procedure (order of 17 May 2022, *Estaleiros Navais de Peniche*, C-787/21, not published, EU:C:2022:414, paragraphs 26 and 27).

46 The interest of an unsuccessful tenderer in a procurement procedure in bringing proceedings against the decision awarding that contract is thus clearly lacking where the exclusion of that tenderer is the result of a decision that has become final, either because it is no longer open to challenge before the

courts because it has not been challenged within the time limits laid down by the national procedural rules, or because the remedies available at national level have been exhausted.

47 Having regard to the foregoing considerations, the answer to the question referred is that Article 55(4) and Article 57(2) of Directive 2009/81 must be interpreted as precluding a tenderer, that has been excluded from a public procurement procedure by a decision of the contracting authority that has become final, from having access to a means of appeal against, or review of, the contract concluded with the successful tenderer.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action before the referring court, the decision on costs is a matter for that court.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 55(4) and Article 57(2) of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC,

must be interpreted as precluding a tenderer, that has been excluded from a public procurement procedure by a decision of the contracting authority that has become final, from having access to a means of appeal against, or review of, the contract concluded with the successful tenderer.

[Signatures]

---

* Language of the case: Romanian.

JUDGMENT OF THE COURT (Tenth Chamber)

23 November 2023 (*)

(Reference for a preliminary ruling – Public contracts – Review procedures relating to the award of public contracts – Directive 2014/25/EU – Article 57(3) – Contracting entity having its head office in a Member State other than that of the head office of a central purchasing body acting in its name and on its behalf – Access to the review procedures – Applicable procedural rules and jurisdiction of review bodies)

In Case C-480/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 23 June 2022, received at the Court on 18 July 2022, in the proceedings

EVN Business Service GmbH,

Elektra EOOD,

Penon EOOD,

THE COURT (Tenth Chamber),

composed of Z. Csehi (Rapporteur), President of the Chamber, M. Ilešič and D. Gratsias, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– EVN Business Service GmbH, by W. Schwartz, Rechtsanwalt,

– Elektra EOOD, by O. Radinsky, Rechtsanwalt,

– the Austrian Government, by A. Posch, J. Schmoll and M. Winkler-Unger, acting as Agents,

– the European Commission, by G. Gattinara and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns, inter alia, the interpretation of Article 57(3) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

2 The request has been made in several actions brought by EVN Business Service GmbH (‘EBS’), a company incorporated under Austrian law with its head office in Austria, and by two companies

established in Bulgaria against decisions of the Landesverwaltungsgericht Niederösterreich (Lower Austria Regional Administrative Court, Austria) whereby that court declares that it lacks jurisdiction as a review body in relation to the award of public contracts.

Legal context

European Union law

Directive 92/13

3 Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1) ('Directive 92/13'), includes Article 1, entitled 'Scope and availability of review procedures', which provides, in the first and fourth subparagraphs of paragraph 1:

'This Directive applies to contracts referred to in Directive 2014/25/EU … unless such contracts are excluded in accordance with Articles 18 to 24, 27 to 30, 34 or 55 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/25/EU or Directive 2014/23/EU, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of procurement or national rules transposing that law.'

Directive 2014/25

4 Recitals 78 and 82 of Directive 2014/25 state:

'(78) Centralised purchasing techniques are increasingly used in most Member States. Central purchasing bodies are responsible for making acquisitions, managing dynamic purchasing systems or awarding contracts/framework agreements for other contracting authorities or contracting entities, with or without remuneration. The contracting entities for whom a framework agreement is concluded should be able to use it for individual or repetitive purchases. In view of the large volumes purchased, such techniques may help increase competition and should help to professionalise public purchasing. Provision should therefore be made for a [European] Union definition of central purchasing bodies dedicated to contracting entities and it should be clarified that central purchasing bodies operate in two different manners.

Firstly, they should be able to act as wholesalers by buying, stocking and reselling or, secondly, they should be able to act as intermediaries by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting entities.

Such an intermediary role might in some cases be carried out by conducting the relevant award procedures autonomously, without detailed instructions from the contracting entities concerned; in other cases, by conducting the relevant award procedures under the instructions of the contracting entities concerned, on their behalf and for their account.

Furthermore, rules should be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, also in the case of remedies, as between the central purchasing body and the contracting entities procuring from or through it. Where the central purchasing body has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting entity conducts certain parts of the procedure, for instance the reopening of competition under a

framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.

…

(82) Joint awarding of contracts by contracting entities from different Member States currently encounters specific legal difficulties concerning conflicts of national laws. Despite the fact that Directive 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)] implicitly allowed for cross-border joint public procurement, contracting entities are still facing considerable legal and practical difficulties in purchasing from central purchasing bodies in other Member States or jointly awarding contracts. In order to allow contracting entities to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting entity, those difficulties should be remedied. Therefore new rules on cross-border joint procurement should be established in order to facilitate cooperation between contracting entities and enhancing the benefits of the internal market by creating cross-border business opportunities for suppliers and service providers. Those rules should determine the conditions for cross-border utilisation of central purchasing bodies and designate the applicable public procurement legislation, including the applicable legislation on remedies, in cases of cross-border joint procedures, complementing the conflict of law rules of Regulation (EC) No 593/2008 of the European Parliament and of the Council [of 17 June 2008, on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6)]. In addition, contracting entities from different Member States should be able to set up joint legal entities established under national or Union law. Specific rules should be established for such form of joint procurement.

However, contracting entities should not make use of the possibilities for cross-border joint procurement for the purpose of circumventing mandatory public law rules, in conformity with Union law, which are applicable to them in the Member State where they are located. Such rules might include, for example, provisions on transparency and access to documents or specific requirements for the traceability of sensitive supplies.’

5 Entitled ‘Definitions’, Article 2 of Directive 2014/25 provides:

‘For the purposes of this Directive, the following definitions apply:

…

(10) “centralised purchasing activities” means activities conducted on a permanent basis, in one of the following forms:

(a) the acquisition of supplies and/or services intended for contracting entities,

(b) the award of contracts or the conclusion of framework agreements for works, supplies or services intended for contracting entities;

…

(12) “central purchasing body” means a contracting entity within the meaning of Article 4(1) of this Directive or a contracting authority within the meaning of point 1 of Article 2(1) of Directive 2014/24/EU [of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)] providing centralised purchasing activities and, possibly, ancillary purchasing activities.

Procurement carried out by a central purchasing body in order to perform centralised purchasing activities shall be deemed to be procurement for the pursuit of an activity as described in Articles 8 to 14. Article 18 shall not apply to procurement carried out by a central purchasing body in order to perform centralised purchasing activities;

…’

6 Entitled ‘Contracting entities’, Article 4 of Directive 2014/25 provides:

‘1. For the purpose of this Directive contracting entities are entities, which:

(a) are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 8 to 14;

(b) when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 8 to 14, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

2. “Public undertaking” means any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

…’

7 Entitled ‘Procurement involving contracting entities from different Member States’, Article 57 of that directive provides, in paragraphs 1 to 3 thereof:

‘1. Without prejudice to Articles 28 to 31, contracting entities from different Member States may act jointly in the award of contracts by using one of the means provided for in this Article.

Contracting entities shall not use the means provided in this Article for the purpose of avoiding the application of mandatory public law provisions in conformity with Union law to which they are subject in their Member State.

2. A Member State shall not prohibit its contracting entities from using centralised purchasing activities offered by central purchasing bodies located in another Member State.

In respect of centralised purchasing activities offered by a central purchasing body located in another Member State than the contracting entity, Member States may, however, choose to specify that their contracting entities may only use the centralised purchasing activities as defined in either point (a) or in point (b) of point (10) of Article 2.

3. The provision of centralised purchasing activities by a central purchasing body located in another Member State shall be conducted in accordance with the national provisions of the Member State where the central purchasing body is located.

The national provisions of the Member State where the central purchasing body is located shall also apply to the following:

(a) the award of a contract under a dynamic purchasing system;

(b) the conduct of a reopening of competition under a framework agreement.’

Austrian law

8 Entitled ‘Joint cross-border procurement by several sectoral contracting entities’, Paragraph 180 of the Bundesvergabegesetz 2018 (Federal Law of 2018 on the award of public contracts) of 20 August 2018 (BGBl. I, 65/2018) (‘the BVergG 2018’) provides, in subparagraph 2:

‘Where a centralised purchasing activity is carried out for a sectoral contracting entity by a central purchasing body as referred to in Article 2(12) of [Directive 2014/25] which has its head office in another Member State of the Union or in another Contracting Party to the EEA Agreement

1. the conduct of the procurement procedure is governed

…

by the rules of the State in which the central purchasing body has its head office.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 By a notice published in the *Official Journal of the European Union* on 22 May 2020, a public contract award procedure for a framework agreement was launched with a view to carrying out electrical installation work as well as related construction and demolition work. The contract was (territorially) divided into 36 lots for which the place of performance was in Bulgaria. The value of the contract exceeded the threshold above which the procedural and advertising rules on the award of public contracts under EU law apply.

10 Elektrorazpredelenie YUG EAD (‘ER Yug’), a public limited company incorporated under Bulgarian law with its head office in Bulgaria, was the contracting entity in the context of that contract award procedure.

11 EBS, a company incorporated under Austrian law whose head office is in Austria, acted in that contract award procedure as the central purchasing body, as the representative of ER Yug.

12 Both ER Yug and EBS are indirectly wholly owned by EVN AG, which in turn is 51% owned by Land Niederösterreich (Province of Lower Austria, Austria).

13 As provided in the call for tenders, EBS was responsible for the conduct and performance of that tender, while the contract relating to the services requested was to be concluded with ER Yug as the sectoral contracting entity. In that call for tenders, the Landesverwaltungsgericht Niederösterreich (Lower Austria Regional Administrative Court) was designated as the body responsible for review procedures. It was also provided that Austrian law was the law applicable ‘to the procurement procedure and all claims arising therefrom’ and that Bulgarian law applied to ‘the performance of the contract’.

14 Elektra EOOD and Penon EOOD, two Bulgarian undertakings, submitted tenders for various lots under the framework contract. By decisions of 28 and 30 July 2020, they were informed that their tenders had not been accepted.

15 Their applications for annulment of those decisions were dismissed, on 23 September 2020, by orders of the Landesverwaltungsgericht Niederösterreich (Lower Austria Regional Administrative Court), which declared that it lacked jurisdiction in that regard.

16 That court held that the question before it was whether a Bulgarian undertaking could conclude with a contracting entity established in Bulgaria a contract to be performed in that Member State and governed by the law of that State. According to that court, to accept that it has jurisdiction in such circumstances would seriously encroach on the sovereignty of the Republic of Bulgaria and would create a conflict with the principle of territoriality recognised by international law. Moreover, the fact that the Province of Lower Austria exercises control over ER Yug in no way prejudges the jurisdiction of that court in relation to the award of contracts with undertakings having their head office abroad.

17 Furthermore, like Article 57(3) of Directive 2014/25, Paragraph 180(2) of the BVergG 2018 lays down a rule relating to centralised purchasing activities carried out on behalf of a sectoral contracting entity by a central purchasing body established in a Member State other than that in which that entity is situated. Nonetheless, that rule merely lays down the substantive law which applies to the contract award procedure without specifying the procedural law applicable to a possible review procedure. It is true that recital 82 of Directive 2014/25 refers to the designation of the applicable legislation ‘on remedies’, although that was not reproduced in the actual wording of that directive. In addition, the concept of ‘centralised purchasing activities’ in Article 57 of that directive does not refer to the review procedure.

18 Elektra, Penon and EBS brought appeals on a point of law before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) against the abovementioned orders. They produced a certified translation of a decision of the highest administrative court of the Republic of Bulgaria confirming the decision of the Bulgarian Public Procurement Agency as to its lack of competence in the case in question relating to the award of public contracts.

19 Those parties submit that, having regard to its objective of providing uniform rules for centralised cross-border purchases, Article 57(3) of Directive 2014/25 and, in consequence, Paragraph 180(2) of the BVergG 2018, should be interpreted as meaning that they do not refer solely to the contract award procedure in the strict sense, but also to the review procedure which may possibly follow such an award. Since a central purchasing body should apply Austrian substantive procurement law, the review procedure should be conducted before an Austrian appeal body under Austrian procedural law. Thus, the decisive territorial connecting factor is the head office of the central purchasing body.

20 In those circumstances the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 57(3) of [Directive 2014/25] be interpreted as meaning that the provision of centralised purchasing activities by a central purchasing body located in another Member State exists where the contracting entity – irrespective of the question as to the attribution of the control exercised over that contracting entity – is located in a Member State other than that of the central purchasing body?

(2) If Question 1 is answered in the affirmative:

Does the conflict-of-law rule of Article 57(3) of [Directive 2014/25], according to which the “provision of centralised purchasing activities” by a central purchasing body located in another Member State is to be conducted in accordance with the national provisions of the Member State where the central purchasing body is located, also cover both the legislation applicable to review procedures and the competence of the review body for the purposes of [Directive 92/13]?

(3) If Question 1 or Question 2 is answered in the negative:

Must [Directive 92/13], and in particular the fourth subparagraph of Article 1(1) thereof, be interpreted as meaning that the competence of a national review body to review decisions of contracting entities must cover all contracting entities located in the Member State of the review body, or must the competence be determined on the basis of whether the dominant influence over the contracting entity (for the purposes of Article 3(4)(c) and Article 4(2) of [Directive 2014/25]) is exercised by a federal, regional or local authority or by a body governed by public law which is to be attributed to the Member State of the review body?’

The first question

21 By its first question, the referring court asks, in essence, whether Article 57(3) of Directive 2014/25 must be interpreted as meaning that a centralised purchasing activity, in the context of the joint award of contracts by contracting entities in different Member States, is carried out by a central purchasing body ‘located in another Member State’ where the contracting entity, irrespective of the control exercised over it by a body governed by public law of the Member State in which the central purchasing body is established, has its head office in a Member State other than that of the central purchasing body.

22 According to Article 57(3) of Directive 2014/25, the provision of centralised purchasing activities by a central purchasing body located in another Member State is to be conducted in accordance with the national provisions of the Member State where the central purchasing body is located. The national provisions of the Member State where the central purchasing body is located are also to apply to the award of a contract under a dynamic purchasing system and to the reopening of competition under a framework agreement.

23 The concept of ‘central purchasing body’ is defined in Article 2(12) of Directive 2014/25 as a contracting entity, within the meaning of Article 4(1) of that directive, or a contracting authority, within the meaning of point 1 of Article 2(1) of Directive 2014/24, providing centralised purchasing activities and, possibly, ancillary purchasing activities.

24 It is apparent from the request for a preliminary ruling that the referring court’s main doubt relates to the manner in which the Member State where the contracting entity has its head office is to be distinguished from the Member State where the central purchasing body has its head office. In other words, it raises the question of the criterion connecting the contracting entity to a Member State for the purposes of the application of Article 57 of Directive 2014/25.

25 The parties to the main proceedings and the other interested parties agree that the criterion of connection must be the place where the contracting entity is located and that it is irrelevant in that context whether, or even how and to what extent, that entity is owned by another entity located in a different Member State. Thus, the rule laid down in Article 57(3) of Directive 2014/25 applies where the central purchasing body and the other contracting entity are located in different Member States, such as Austria and Bulgaria in the present case.

26 In that regard, it should be recalled that both the central purchasing body and the entity conducting the contract award procedure are contracting authorities within the meaning of Directive 2014/25, so that the criterion of connection to a Member State cannot be different for one or other of those entities.

27 In addition, Article 57(1) of that directive provides that contracting entities may not use the cross border joint procurement in order to avoid the application of binding provisions of public law in conformity with EU law to which they are subject ‘in their Member State’. Paragraph 2 of that article refers to centralised purchasing activities offered by a central purchasing body ‘located in another Member State than the contracting entity’.

28 Notwithstanding the fact that Directive 2014/25 thus uses, for the purposes of determining whether a contracting entity is connected to a Member State, expressions that are sometimes different, including in its various language versions, the fact remains that those expressions suggest that the criterion of connection adopted by the EU legislature is territorial in nature, which, moreover, corresponds to the general rule, which is apparent, in essence, from the second subparagraph of Article 57(1) of that directive, according to which any contracting entity is to comply with the rules in force in the Member State in which it is established.

29 Therefore, where, in a case such as that in the main proceedings, the central purchasing body and the contracting entity are located in different Member States, it must be held that what is at issue is the award of a cross-border contract carried out through a central purchasing body.

30 In that regard, it is important to note that it is not apparent from that directive and, in particular, from Article 57 thereof, that the fact that a regional authority or a body governed by public law exercising control over the contracting entity belongs to a particular Member State constitutes a relevant criterion connecting such an entity to that Member State. Where the EU legislature intended to use the criterion of the existence of a connection between a contracting entity and another entity, it used it expressly, as in Article 4(2) of that directive.

31 In the light of the foregoing considerations, the answer to the first question is that Article 57(3) of Directive 2014/25 must be interpreted as meaning that a centralised purchasing activity, in the context of the joint award of contracts by contracting entities of different Member States, is carried out by a central purchasing body ‘located in another Member State’ where the contracting entity has its head office in a Member State other than that in which the central purchasing body is established, irrespective, as the case may be, of the location of the head office of a third entity controlling one or other of those entities.

The second question

32 By its second question, the referring court asks, in essence, whether Article 57(3) of Directive 2014/25 must be interpreted as meaning that the conflict-of-law rule laid down in that provision, under which the centralised purchasing activities of a central purchasing body are to be provided in accordance with the national provisions of the Member State where the central purchasing body is located, covers review procedures, within the meaning of Directive 92/13, relating to those activities.

33 As the referring court has pointed out, Article 57(3) of Directive 2014/25 does not expressly establish whether the national provisions of the Member State in which the central purchasing body is located also govern the review procedures and the jurisdiction of the review body, within the meaning of Directive 92/13.

34 The ‘centralised purchasing activities’, to which that provision refers, are defined in Article 2(10) of Directive 2014/25 as activities conducted on a permanent basis, in the form of the acquisition of supplies and/or services intended for contracting entities, or in the form of the award of contracts or the conclusion of framework agreements for works, supplies or services intended for such entities.

35 While it is true that, on the basis of a literal interpretation, Article 57(3) of Directive 2014/25 appears to refer only to the substantive law on the award of contracts, its wording does not preclude that provision from extending both to the legislation on review procedures and to the jurisdiction of the review body, within the meaning of Directive 92/13.

36 In those circumstances, according to settled case-law, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part (judgment of 29 June 2023, *Interfel*, C-501/22 to C-504/22, EU:C:2023:531, paragraph 53 and the case-law cited).

37 Furthermore, it is also settled case-law that, where a provision of EU law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness (judgment of 29 June 2023, *Interfel*, C-501/22 to C-504/22, EU:C:2023:531, paragraph 54 and the case-law cited).

38 In that regard, it should be recalled that, in accordance with recital 78 of Directive 2014/25, rules should be laid down for allocating responsibility for the observance of the obligations pursuant to that directive, also in the case of remedies, as between the central purchasing body and the contracting entities procuring from or through it.

39 That recital envisages two situations, the first characterised by the fact that the central purchasing body alone assumes responsibility for the conduct of contract award procedures, and the second characterised by the fact that a contracting entity assumes responsibility for certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system. In the first case, the central purchasing body should be solely and directly responsible for the legality of the procedures; in the second case, it should continue to be responsible for the stages it conducts.

40 In addition, recital 82 of Directive 2014/25 states that new rules on cross-border joint procurement should be established and that those rules should determine the conditions for cross-border utilisation of central purchasing bodies and designate the applicable public procurement legislation, including the applicable legislation on remedies, in cases of cross-border joint procedures.

41 It is apparent from those recitals that the EU legislature intended not only to determine the substantive law applicable to cross-border contracts and central purchasing bodies, but also the law relating to the review procedures to which those contracts and those activities may give rise.

42 Consequently, preference must be given to an interpretation of the provisions of Directive 2014/25 governing such contracts and activities which makes it possible to encompass both substantive law and review procedures.

43 Thus, it should be considered that Directive 2014/25 refers to the law of the Member States not only for the provisions of that law which govern the conduct of the cross-border contract award procedures

but also for those which govern review procedures, including judicial review procedures, which are likely to follow such a contract award procedure.

44 Such an interpretation is, moreover, consistent with the objective of Directive 2014/25, which is to establish a uniform system for centralised cross-border purchases. In so far as a central purchasing body is called upon to provide its centralised purchasing activities in accordance with the national provisions of the Member State in which it is located, it appears coherent that the review procedure, which may be initiated, is conducted in accordance with the law of that Member State and that the jurisdiction of the review body concerned is determined in accordance with that law.

45 In addition, the principle that it is the provisions of the Member State in which a contracting entity is situated which govern the review procedures concerning the measures taken by those entities underlies the rule laid down in the fourth subparagraph of Article 1(1) of Directive 92/13, according to which the Member States are to take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/25 or Directive 2014/23, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible, on the ground that such decisions have infringed EU law in the field of procurement or national rules transposing that law.

46 As the European Commission has observed, that does not preclude a distinction being drawn, where appropriate, between the law applicable to the contract award procedure and that which may apply to contracts subsequently concluded.

47 It is also for the national courts, hearing a dispute arising from a cross-border contract award procedure, to pay particular attention to the allocation of the responsibilities incumbent on the parties involved in the conduct of that procedure and to the limits of their powers which, where appropriate, result therefrom, while taking into account the rule set out in Article 57(1) of Directive 2014/25, recalled in paragraph 27 of the present judgment.

48 In the light of the foregoing considerations, the answer to the second question is that Article 57(3) of Directive 2014/25, read in the light of recitals 78 and 82 of that directive, must be interpreted as meaning that the conflict-of-law rule laid down in that provision, under which the provision of centralised purchasing activities of a central purchasing body is to be conducted in accordance with the national provisions of the Member State where that central purchasing body is located, extends to review procedures, within the meaning of Directive 92/13, relating to those activities, in so far as that central purchasing body is responsible for the conduct of the contract award procedure.

The third question

49 In the light of the answers given to the first and second questions, there is no need to answer the third question referred by the referring court if the first or second question was answered in the negative.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

1. Article 57(3) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

must be interpreted as meaning that a centralised purchasing activity, in the context of the joint award of contracts by contracting entities of different Member States, is carried out by a central purchasing body ‘located in another Member State’ where the contracting entity

has its head office in a Member State other than that in which the central purchasing body is established, irrespective, as the case may be, of the location of the head office of a third entity controlling one or other of those entities.

2. Article 57(3) of Directive 2014/25, read in the light of recitals 78 and 82 of that directive,

must be interpreted as meaning that the conflict-of-law rule laid down in that provision, under which the provision of centralised purchasing activities of a central purchasing body is to be conducted in accordance with the national provisions of the Member State where that central purchasing body is located, extends to review procedures, within the meaning of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, relating to those activities, in so far as that central purchasing body is responsible for the conduct of the contract award procedure.

[Signatures]

---

* Language of the case: German.

ORDER OF THE COURT (Eighth Chamber)

10 January 2023 (*)

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Public procurement of service, supply and works contracts – Directive 2014/24/EU – Conduct of the procedure – Choice of participants and award of contracts – Article 63 – Economic operator relying on the capacities of another entity in order to meet the requirements of the contracting authority – Obligation of that economic operator to submit the qualification documents of a subcontractor after the tender has been awarded – Incompatibility)

In Case C-469/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 23 June 2022, received at the Court on 13 July 2022, in the proceedings

Ambisig – Ambiente e Sistemas de Informação Geográfica SA

v

Fundação do Desporto,

ANO – Sistemas de Informática e Serviços Lda,

Link Consulting – Tecnologias de Informação SA,

THE COURT (Eighth Chamber),

composed of M. Safjan, President of the Chamber, N. Piçarra and M. Gavalec (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to rule by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 63 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Ambisig – Ambiente e Sistemas de Informação Geográfica SA (‘Ambisig’) and the Fundação do Desporto, concerning its decision to exclude Ambisig from participating in a public procurement procedure for the award of a service contract and to award the contract concerned to Link Consulting – Tecnologias de Informação SA (‘Link’).

Legal context

European Union law

3 Recital 84 of Directive 2014/24 states:

‘Many economic operators, and not least [small and medium-sized enterprises (SMEs)], find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example through use of a European Single Procurement Document (ESPD) consisting of an updated self-declaration, could result in considerable simplification for the benefit of both contracting authorities and economic operators.

The tenderer to which it has been decided to award the contract should, however, be required to provide the relevant evidence and contracting authorities should not conclude contracts with tenderers unable to do so. Contracting authorities should also be entitled to request all or part of the supporting documents at any moment where they consider this to be necessary in view of the proper conduct of the procedure. This might in particular be the case in two-stage procedures – restricted procedures, competitive procedures with negotiation, competitive dialogues and innovation partnerships – in which the contracting authorities make use of the possibility to limit the number of candidates invited to submit a tender. Requiring submission of the supporting documents at the moment of selection of the candidates to be invited could be justified to avoid that contracting authorities invite candidates which later prove unable to submit the supporting documents at the award stage, depriving otherwise qualified candidates from participation.

It should be set out explicitly that the ESPD should also provide the relevant information in respect of entities on whose capacities an economic operator relies, so that the verification of the information regarding such entities can be carried out together with and on the same conditions as the verification in respect of the main economic operator.’

4 Article 57 of that directive lists the various grounds for exclusion of an economic operator from a public procurement procedure.

5 Article 59 of Directive 2014/24, entitled ‘European Single Procurement Document’, provides:

‘1. At the time of submission of requests to participate or of tenders, contracting authorities shall accept the [ESPD], consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:

(a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;

(b) it meets the relevant selection criteria that have been set out pursuant to Article 58;

(c) where applicable, it fulfils the objective rules and criteria that have been set out pursuant to Article 65.

Where the economic operator relies on the capacities of other entities pursuant to Article 63, the ESPD shall also contain the information referred to in the first subparagraph of this paragraph in respect of such entities.

The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority. The ESPD shall further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

…

4. A contracting authority may ask tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of

the procedure.

Before awarding the contract, the contracting authority shall, except in respect of contracts based on framework agreements where such contracts are concluded in accordance with Article 33(3) or point (a) of Article 33(4), require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents in accordance with Article 60 and, where appropriate, Article 62. The contracting authority may invite economic operators to supplement or clarify the certificates received pursuant to Articles 60 and 62.

5. Notwithstanding paragraph 4, economic operators shall not be required to submit supporting documents or other documentary evidence where and in so far as the contracting authority has the possibility of obtaining the certificates or the relevant information directly by accessing a national database in any Member State that is available free of charge, such as a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system.

…'

6 Article 60 of Directive 2014/24, entitled 'Means of proof', provides, in paragraph 1:

'Contracting authorities may require the certificates, statements and other means of proof referred to in paragraphs 2, 3 and 4 of this Article and Annex XII as evidence for the absence of grounds for exclusion as referred to in Article 57 and for the fulfilment of the selection criteria in accordance with Article 58.

Contracting authorities shall not require means of proof other than those referred to in this Article and in Article 62. In respect of Article 63, economic operators may rely on any appropriate means to prove to the contracting authority that they will have the necessary resources at their disposal.'

7 Article 63 of Directive 2014/24, entitled 'Reliance on the capacities of other entities', is worded as follows:

'1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

The contracting authority shall, in accordance with Articles 59, 60 and 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57. The contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

Under the same conditions, a group of economic operators as referred to in Article 19(2) may rely on the capacities of participants in the group or of other entities.

2. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly

by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 19(2), by a participant in that group.’

Portuguese law

8 It is apparent from the order for reference that, under Article 77(2)(a) and (c) of the Código dos Contratos Públicos (Public Procurement Code), read in conjunction with Articles 81, 92 and 93 of that code, when an economic operator relies on the capacities of a third party for the performance of relevant services and unless the contract notice provides otherwise, the qualification documents of that third party and the declaration of commitment it has made must be required only after the relevant public contract has been awarded. Consequently, it is only in the context of a restricted procedure with prior selection that such a requirement is necessary at the time when the application is submitted, pursuant to Article 168(4) of the code.

The dispute in the main proceedings and the question referred for a preliminary ruling

9 On the basis of the written observations submitted by Ambisig in support of its appeal, as reproduced in the request for a preliminary ruling, it appears that the Fundação do Desporto organised a public procurement procedure for the award of service contracts. The contract concerned was awarded to Link.

10 Ambisig lodged an administrative-law action in connection with public procurement with the Tribunal Administrativo e Fiscal de Leiria (Administrative and Tax Court, Leiria, Portugal) challenging its exclusion from participation in the public procurement procedure and the award of that contract to Link.

11 Ambisig complained, in essence, that the Fundação do Desporto considered that its tender had been submitted by a group of tenderers, even though it intended to use a subcontractor and that, for that purpose, it was not required to include in its tender a declaration of commitment made by that subcontractor. In that connection, according to Ambisig, the application by analogy of Article 168(4) of the Public Procurement Code, which transposes Article 63 of Directive 2014/24 into Portuguese law, to the procedure at issue in the main proceedings is unlawful, since the exclusion of Ambisig from the tender procedure, pursuant to Article 70(2)(a) and (b) of the Public Procurement Code, constitutes an error of law.

12 By judgment of 28 September 2021, the Tribunal Administrativo e Fiscal de Leiria (Administrative and Tax Court, Leiria) dismissed Ambisig’s action. That court held that, admittedly, the requirement for commitments by third parties was not expressly provided for in the contract notice and it was a condition of performance of the contract which could be satisfied following the award of the tender. Nevertheless, the reference made by Ambisig to the subcontracting part of the services concerned came within Clause 12 of the tender specifications, which stipulated that subcontracting was subject to prior authorisation by the contracting authority. Ambisig’s failure to submit that type of prior authorisation was grounds for its exclusion from the public procurement procedure. The exclusion also resulted from the application by analogy of Article 168(4) of the Public Procurement Code.

13 That judgment was upheld on appeal by the judgment of the Tribunal Central Administrativo Sul (Central Administrative Court – Southern Division, Portugal) of 3 February 2022. That court observed that subcontracting was subject to prior authorisation by the contracting authority, pursuant to Clause 12 of the tender specifications, and that the submission by the economic operator concerned of its potential subcontractor’s qualification documents was an indispensable prerequisite for such authorisation to be granted.

14 Ambisig, which considers that judgment incorrect on three grounds, brought an appeal against the judgment before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal). First, the submission of qualification documents of the third party concerned cannot be required, given that such requirement was not apparent from the contract notice or under the Public Procurement Code; Article 168(4) of that code was not applicable to the dispute in the main proceedings. Second, Clause 12 of the tender specifications was not applicable at the pre-contract stage of the public

procurement procedure at issue. Third, Article 63 of Directive 2014/24 did not require the tenderer to include the declaration of commitment made by its subcontractors upon submission of its tender.

15 The Supremo Tribunal Administrativo (Supreme Administrative Court), which refers to the facts as established in the judgment of 3 February 2022 and the statement of which is regarded as having been reproduced in its entirety, pursuant to Article 663(6) of the Código de Processo Civil (Code of Civil Procedure), takes the view that Ambisig's first two arguments set out in the previous paragraph are well founded.

16 The question that remains to be decided is whether, when, in the context of a public procurement procedure for the award of a service contract, a tenderer presents a third party on whose technical capacities that tenderer intends to rely in order to perform part of the contract, Article 63 of Directive 2014/24 requires the tenderer to submit, together with its tender, the qualification documents of the third party and the declaration made by that third party that it will undertake to perform that part of that contract.

17 In those circumstances, the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it consistent with EU law, in particular with Article 63 of Directive [2014/24], for national law to provide that, in public tender procedures where the capacities of other entities are used in order to perform the contract, the subcontractor's qualification documents and the commitment given by the subcontractor must be required only after the tender has been awarded?'

Consideration of the application for an expedited procedure

18 The referring court has requested that the present reference for a preliminary ruling be dealt with under the expedited procedure under Article 105(1) of the Rules of Procedure of the Court of Justice.

19 However, in view of the decision of the Court to rule by reasoned order in accordance with Article 99 of the Rules of Procedure, there is no need to adjudicate on that request (order of 17 May 2022, *Estaleiros Navais de Peniche*, C-787/21, not published, EU:C:2022:414, paragraph 17 and the case-law cited).

Consideration of the question referred

20 Pursuant to Article 99 of the Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, give its decision by reasoned order.

21 That provision should be applied in the present case.

22 By its question, the referring court asks, in essence, whether Article 63 of Directive 2014/24, read in conjunction with recital 84 of that directive, must be interpreted as precluding national legislation under which an economic operator which intends to use the capacities of another entity in order to perform a public contract is required to submit the qualification documents of that entity and the declaration of commitment it has made only after the contract in question has been awarded.

23 In that regard, it must be noted that Article 63(1) of Directive 2014/24 provides for the right of an economic operator to rely, for a particular contract, on the capacities of other entities, regardless of the legal nature of the links which it has with them, with a view to satisfying both the criteria relating to economic and financial standing set out in Article 58(3) of that directive and the criteria relating to technical and professional ability referred to in Article 58(4) of that directive (see, to that effect, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646,

paragraphs 29 and 33, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 150).

24 An economic operator wishing to exercise its right may, pursuant to the second subparagraph of Article 60(1) of Directive 2014/24, rely on any appropriate means to prove to the contracting authority that they will have the necessary resources at their disposal. In that connection, the third sentence of Article 63(1) of that directive sets out, by way of example, the possibility for that economic operator to produce a commitment by those entities to that effect. An economic operator may also, in accordance with the second and third subparagraphs of Article 59(1) of that directive, read in conjunction with the third paragraph of recital 84 thereof, send an ESPD to the contracting authority when submitting its request to participate or its tender, stating, inter alia, first, that neither itself nor the entities on whose capacities it intends to rely are in one of the situations referred to in Article 57 of that directive which must or may lead to an economic operator's exclusion and, second, that the selection criteria are fulfilled. In any event, any economic operator wishing to rely on the capacities of other entities must prove to the contracting authority that it will have at its disposal the resources necessary to satisfy the selection criteria set out in Article 58 of Directive 2014/24.

25 It is then, under the second subparagraph of Article 63(1) of Directive 2014/24, for the contracting authority to ascertain, first, whether, in accordance with Articles 59 to 61 of that directive, the entities on whose capacities the economic operator intends to rely fulfil the relevant selection criteria and, second, whether there are grounds for exclusion, as set out in Article 57 of that directive, in respect of those entities.

26 It must be possible for the contracting authority to carry out those verifications before awarding the contract. In that connection, recital 84 of Directive 2014/24, which clarifies the scope of Article 63 of that directive, states expressly, in its second and third paragraphs, that requiring the supporting documents to be submitted at the time of selection of the candidates to be invited could be justified in order to avoid contracting authorities inviting candidates which later prove unable to submit the supporting documents at the award stage, depriving otherwise qualified candidates from participation.

27 It thus follows from the foregoing considerations that Article 63 of Directive 2014/24, read in conjunction with Article 59 and recital 84 of that directive, must be interpreted as precluding national legislation under which an economic operator which intends to use the capacities of another entity in order to perform the contract is required to submit the qualification documents of that entity and the declaration of commitment it has made only after the contract in question has been awarded.

Costs

28 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 63 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, read in conjunction with Article 59 and recital 84 of that directive,

must be interpreted as precluding national legislation under which an economic operator which intends to use the capacities of another entity in order to perform the contract is required to submit the qualification documents of that entity and the declaration of commitment it has made only after the contract in question has been awarded.

[Signatures]

* Language of the case: Portuguese.

STA judgments

Judgment of the Supreme Administrative Court

Process:	025/21.2BEPRT
Date of the Judgment:	09/02/2023
Court:	1 SECTION
Rapporteur:	SUZANA TAVARES DA SILVA
Descriptors:	PUBLIC PROCUREMENT QUALIFICATION EXCLUSION OF PROPOSALS
Summary:	Article 63 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, read in conjunction with Article 59 and recital 84 of that directive, must be interpreted as precluding: it precludes national legislation under which an economic operator wishing to rely on the capacities of another entity for the performance of A public contract must transmit the qualification documents of that entity and the declaration of its commitment only after the contract in question has been awarded.
Conventional Number:	JSTA00071664
Document No.:	SA120230209025/21
Date of Entry:	10/05/2022
Recurring:	A..., S.A.
Defendant 1:	S..., LDA AND OTHERS
Voting:	UNANIMITY
Addition:	

Full Text

Full Text:

The Administrative Litigation Section of the Supreme Administrative Court agrees:

I – Report

1 – S....., LDA., with the signs of the case file, filed a pre-contractual litigation action before the Administrative and Fiscal Court of Porto (TAF do Porto), on 4 January 2021**,** against the Sports Foundation, also with the signs in the case file, in which it made the following request: *"[...]* ***In these terms and in the best of the Law, always with Your Excellency's learned supply, the following is requested:***
1) *The present action must be fully upheld as proven and the award to L....., SA, legal person no. .... and the respective act that supports it be revoked due to their nullity, and the proposal is excluded.*
2) *The proposal of the competitor herein Plaintiff S...., LDA., legal person ...., must be classified and ranked in 1st place, since it is valid and has a higher score, according to the award criterion defined in the documents of the procedure, being awarded the maximum score in the evaluation subfactor "IC – Suitability of the Proposed Team", without prejudice to being classified in 2nd place, it must always be the one awarded.*
3) *Otherwise, there will be a clear defect of violation of law and nullity of the award, as well as violation of the principles of free competition, legality and equal treatment;*
4) *More should S..... the company be awarded and the services awarded within the scope of the procedure under analysis, under penalty of nullity of the procedure due to violation of law;*
5) *It must be concluded according to the pronouncement of the plaintiff S... above.*
6) *The contract that may be awarded under the null award should be*

considered null and void, if it has been awarded in the meantime, because it is found that legal rules and general principles of law, not only applicable to public procurement, but also to other existing law, namely those referred to in the previous paragraphs, are being violated, which generates the invalidity of the acts performed and inherently the nullity of the award and the contract, if legality is not restored.
7) *Finally, Your Excellency. In accordance with the law, you are required to confirm with the defendant Fundação do Desporto, legal person no. 503596744, alerting it to the automatic legal suspension of the effectiveness of the contested award act and the suspension of the execution of the contract eventually awarded, all under the terms of article 103-A of the CPTA, and the defendant must inform whether the contract has already been awarded and/or, is in execution, because if this occurs, it will have to immediately stop the execution of the same, because the continuity could generate serious damage to the plaintiff S...., as a result of the illegal award act. [...]'.*

2 - By decision rendered on 8 March 2021, that TAF of Porto considered itself territorially incompetent to hear the claim and the case was referred to the TAF of Leiria.

3 – A....., S.A., with the documents in the case file, filed a pre-contractual litigation action against the Sports Foundation before the Administrative and Fiscal Court of Leiria (TAF de Leiria), which is under number 6/21.6BELRA, in which it made the following request: *"[…] Terms in which the present action should be judged to be fully upheld, as proven, and, consequently:*
a) *The administrative act that approved the final report of the jury and determined the exclusion of the Plaintiff's proposal and the award of the Counter-Interested Party's proposal (Doc. 1) be annulled;*
b) *The Respondent Entity is ordered to approve a new procedure programme, without relapsing into the illegalities detected and to carry out all subsequent acts and steps provided for in the legal course of the public tender procedure;*
c) *A period of 20 days be set for compliance with the determinations contained in the judgment.*
To this end, it is requested that Your Excellency order the summons of the Respondent Entity and the Counter-Interested Party to contest, if they wish, within the time limit and under the legal penalty, following the other terms until the end.
It is further requested that those entities be warned in the summons letter of the need to comply with the duties that emanate from the automatic suspensive effect of the present action [...]"

4 – By order of the TAF of Leiria of 25.05.2021, the joinder of case no. 6/21.6BELRA to the case file no. 25/21.2BEPRT was granted.

5 - By judgment of 28 September 2021, the two actions were dismissed and the Respondent Entity was acquitted of the claim.

6 – Dissatisfied with the decision rendered, **A..., S.A.,** and **S....., LDA.,** both appealed against the judgment to the TCA Sul, which, by judgment of 3 February 2022, dismissed the appeals.

7 – Dissatisfied with the judgment, **A...., S.A.** filed an appeal on a point of law before this Supreme Administrative Court, which, by judgment of 21 April 2022, admitted the review.

8 - A....., S.A., concluded its arguments with the following conclusions:
'...
59. In the present pre-contractual litigation action (Case No. 6/21.6BELRA, attached), the Plaintiff, now the appellant, challenged the act that approved the final report of the jury and determined the exclusion of its proposal and the award of the procedure to the Counter-Interested Party L...., issued in the public tender procedure for "Provision of services for the development of project No. 044029 – FdD + Together for Efficiency", requesting the annulment of that act and the condemnation of the Respondent Entity to approve a Program of the Procedure, without relapsing into the illegalities detectedand to carry out all subsequent acts and diligences provided for in the legal course of the contracting procedure.
60. As an essential basis for its claim, the Plaintiff argued that the contested act is invalid, since the selection board considered that its tender had been submitted in the form of a grouping of competitors, when there is not and never has been a grouping, also considering the analogous application of the provisions of Article 168(4) to be illegal, of the PPC to the procedure in question, incurring in an error of law by rejecting the proposal under the provisions of article 70(2)(a) and b) of the PPC.
61. On the other hand, the Plaintiff also argued that the rules relating to the award criterion and the evaluation model set out in the programme of the procedure that were applied and which resulted in the evaluation and ordering of the tenders contained in the final report of the selection board and the award of the Counter-Interested Party's tender, are also vitiated by illegality, since the sub-factors "IA – Adequacy to Functional Requirements", "IB – Adequacy to Technical Requirements and Solution Architecture", "CI – Adequacy of the Proposed Team" and "ID – Adequacy of Methodologies and Project Plan" are manifestly illegal.
62. The judgment under appeal dismissed any of the claims, holding that, under Article 168(4) of the PPC, the appellant was required to submit with its tender a declaration of commitment by the subcontractor and that the valuation model does not infringe Article 139 of the PPC, nor the principles of transparency and competition, because it is a legitimate criterion within the scope of the technical discretion granted by the program to the jury of the procedure.
63. However, as has been shown here, the *national* court made a serious error of judgment.
64. First, the *referring* court applies Article 63 of the Directive directly to the present case, which is contrary to the decision of the Court of Justice of the European Union (CJEU) in the judgments in *Van Duyn* of 4 December 1974 and *Ratti,* and April 5, 1979. As is well known, the Directive was fully transposed into the national legal order through the PPC and, in the judgment under appeal, the Court invokes its application against the defendant here. Thus, it is undeniable that the appealed judgment contradicts the case-law of the CJEU, and Article 63 of the Directive cannot be applied to the present procedure (or to any other), by means of direct effect.
65. The *referring* court also decided to apply Article 168(4) of the PPC analogously to the present case, which is a perfectly clear rule, which the legislator transposed into the Portuguese legal system in the exact terms of the provisions of the Directive (*i.e.*, providing for its application only and only to procedures of restricted competition by prior qualification). In fact, the lower court's understanding that Article 63 of the Directive and, consequently, Article 168(4) of the PPC, apply to allThe type of procedures provided for, constitutes a violation of the principles of separation of powers and legal certainty, provided for, in particular, in

Article 2 of the Constitution of the Portuguese Republic and in the Treaty on European Union. Moreover, it prevents the application of the principle of conforming interpretation, according to which national courts must interpret the national law transposing a directive in the light of its wording and purpose, and is subject to the limits of general principles of law.
66. Thus, Articles 63 and 58 of the Directive and Article 168(4) of the PPC apply only to the procedure for a restricted procedure by prior qualification, in which the contracting authority lays down a series of technical capacity requirements on which the access of economic operators to the tender stage depends. In other words, by virtue of the characteristics of the contract to be concluded, the contracting authority understands that the public interest underlying the purchasing need can only be adequately satisfied by economic operators who demonstrate that they have certain requirements, which may be experience, organisation, technical or human resources, etc. (cf. Article 165 of the PPC).
67. And since the law opens up the possibility for the economic operator to use third parties to demonstrate compliance with such requirements, it is natural that access to the tender stage should depend on the submission of a document in which those third parties undertake to perform certain contractual services. None of this is the case in the public tender procedure, in which access to the possibility of submitting tenders is free, and is not dependent on the fulfilment of any technical (or financial) capacity requirements that the contracting authority considers essential for the proper pursuit of the public interest underlying the contract to be concluded.
68. Therefore, the invocation and analogous application of Article 168(4) of the PPC to the present case is absolutely meaningless. In the public tender procedure, as we have shown, there is no obligation to instruct the proposal with documents signed by the third parties to whom the tenderer intends to use through subcontracting.
69. Finally, but also wrongly, the referring court states that *"It is a common understanding that the provision of Article 168(4) of the PPC must be applied analogously in any tender procedure".* With all due respect to this Court, which is a great deal, but this statement is not true. Neither the courts have decided in this sense, nor is this understanding even mentioned in the doctrine. The excerpt from the work of Prof. PEDRO COSTA GONÇALVES transcribed in the sentence does not make any reference to the analogous application of paragraph 4 of article 168 to another type of tender procedure. In addition, it is an excerpt that is inserted in the part of the work relating to the minimum requirements of technical and financial capacity required of candidates in procedures of restricted competition by prior qualification, by virtue of its exclusive application to this type of procedure.
70. Thus, and contrary to what is apparent from the final report of the selection board, which constitutes the reasoning *of ther relationem* of the contested act, the grounds provided for in Article 70(2)(a) and (b) of the PPC for the exclusion of the applicant's tender, for violation of Article 168(4) of the PPC, are not met. Precepts that the contested act, the judgment and the judgment under appeal wrongly applied, thus incurring that act in violation of law, which invalidates it and entails its annulment, under the terms of Article 163(1) of the CPA.
71. The judgment under appeal is also erroneous, in that it decided that the evaluation model does not infringe the provisions of Article 139 of the PPC, nor the principles of transparency and competition, as it is a legitimate criterion within the scope of the technical discretion granted by the programme to the selection board,
LIFE 72. In this case, the lower court completely refrained from analysing and assessing the descriptions of the evaluation model and the award

criterion, opting instead to take refuge in the reasoning used by the selection board in the preliminary report, to conclude that, *"although the terms provided for in the sub-factors may intuit a merely formalistic evaluation of the tender as a document in itself"*, what was evaluated were the true attributes of the proposal and not the formal aspects of them.
73. Both in its Statement of Claim and in its Statement of Appeal, the appellant has fully demonstrated that the defendant blatantly disregarded Articles 74(1), 75(1) and 139(3), all of the PPC, in the construction of the award criterion and the evaluation model, confessing its sin when it states from the outset that *"It is intended to evaluate the quality of the competitor's proposal, according to the level of detail and information contemplated [...]".*
74. Because the sub-factor IA – Adequacy to Functional Requirements is invalid. As stated in the provision of the procedure program mentioned above, in this sub-factor the fulfillment of the functional requirements or sub-requirements is (supposedly) evaluated, and a value is assigned to each one. However, according to the established model, the attribution of a value is dependent not on the fulfilment of each requirement, but on the detail of the description contained in the tender of each tenderer regarding the way in which it proposes to comply with it. This is what is unequivocally clear from the descriptors in which reference is made to the clear or unclear way in which the proposal demonstrates compliance with the requirements and especially from the "Notes" where it is stated that if the requirement is described in detail, a point is awarded and instead *"If the requirement or sub-requirement is not presented in detail and/or the competitor simply says that it complies [...] The value 0" will be assigned*.
75. In that sub-factor, the contracting authority establishes a direct link between the detail and clarity of the description contained in the tender and its quality and potential and susceptibility to meet or exceed the functional requirements requested in the tender specifications, but what is truly assessed is the detail and clarity of the description and not the actual compliance with the requirements.
76. Also the sub-factor IB – AdequacyThe Technical Requirements contain several illegal aspects, the first of which is that it is impossible to identify which attribute is truly subject to evaluation in this subfactor. It is not possible to understand whether the corresponding score, 0, 30, 70 or 100 points, is obtained by complying with the mandatory and non-mandatory requirements, the clarity of the presentation of the architecture, or the tools used, whether standard, non-standard, proprietary or not, or whether or not they are discontinued.
77. On the other hand, and with regard to the architecture of the solution, once again, this sub-factor evaluates and values the level of detail of the presentation. Here, too, an association is made between the level of clarity and detail of the presentation and the "adequacy to technical requirements". But what is truly evaluated, in this aspect, is only the level of clarity and detail of the presentation of the architecture and not its quality or suitability.
78. In the sub-factor IC – Suitability of the Proposed Team, the level of detail of the presentation of the Team, or, more precisely, of each of the members corresponding to the various types of functions, namely, Project Manager, Senior Analyst, Senior Architect, and Document Management Consultants, is evaluated. In fact, in the descriptors contained in the evaluation table, we find that the attribution of the score is dependent on the demonstration in a detailed and complete way of the requirements of the subfactor, requirements that are not clear, but which seem to correspond to adequate training (which is also not indicated) and experience in similar projects.
79. Finally, the sub-factor ID – Adequacy of the Methodologies and the

proposed Project Plan is also illegal. A first dimension of the illegality of this sub-factor is related to the reference to compliance with the "requirements of the evaluation sub-factor", if in the previous sub-factor they were not clear, in this one it is not even possible to know what they are, thus making it impossible to truly identify what was intended to be evaluated. On the other hand, in this sub-factor, the contracting authority insists on weighing the detail and completeness of the demonstration contained in the proposal, establishing a relationship between these aspects of a purely formal nature and the adequacy of the project plan, the methodologies, the training plan and the documents and deliverables to the project to be executed.
LIFE 80. From the jury's reasoning contained in the preliminary and final reports, it is clear that, objectively, what was valued was the detail, clarity and completeness of the presentation of the proposals presented.
81. Therefore, in addition to the extreme vacuity, it is clear that aspects of a formal nature, relating to the merely documentary content of the tender, are weighed to the detriment of true attributes, that is, aspects of the performance of the contract itself. In view of the above, it is clear that the sub-factors IA, IB, IC, and ID of the factor "Technical and functional quality of the proposed solution" of the award criterion do not assess true attributes of the tenders, i.e. aspects of the performance of the contract submitted to competition.
82. Even if it was its intention to evaluate such components, the truth is that this was not what the defendant included in the evaluation model, establishing descThe sub-factors mentioned above that make the score depend not on the characteristics and technical values of the products and solutions proposed, but on the level of clarity, detail and quality with which the functional and technical requirements, the experience and training of the technical team members, and the methodology and the Project Plan are described.
83. Taking these data into consideration, it must be concluded that, in fact, the valuation model defined for the sub-factors under analysis violates the provisions of Articles 74(1), 75(1) and 139(3), all of the PPC.
84. In view of the above, this venerable Supreme Administrative Court should correct the appealed judgment and order the defendant to approve a new Procedure Programme, without relapsing into the illegalities detected, and to carry out all subsequent acts and steps provided for in the legal course of the contracting procedure.
Terms in which this Court should admit the present Appeal on a Review, grant it, revoke the Judgment under appeal and hear the merits of the appeal filed by the Appellant.
As it is of Law and Justice.
[...]'.

9 – The defendant Fundação do Desporto and L...., S.A. [a counter-interested party in the proceedings and the "successful tenderer" in the context of the public tender in question] counter-claimed, arguing for the inadmissibility of the review and, failing that, for the dismissal of the appeal.

10 – The Honorable Deputy Attorney General at this Court, notified under the terms and for the purposes of Article 146 of the CPTA, issued an opinion in which she concluded that the appeal was partially well founded.

11 – The contradictory was ensured in view of the content of the MP's opinion.

12 - By judgment of this STA of 23 June 2022, a reference for a

preliminary ruling was made to the CJEU, suspending the proceedings, and proceedings were heard in that Court under No. C-469/22, a case concluded by the order of 10 January 2023, whose decision was sent to this Supreme Court and subject to an adversarial procedure, and did not merit any pronouncement [*cfr.* fls. 5768/5780, 5974/5988 and 5991 et seq. of the case file].

It is necessary to assess and decide.

II – GROUNDS

1. In fact

, reference is made to the facts established in the judgment under appeal, which are hereby reproduced in full, pursuant to Article 663(6) of the CPC.

2. By law

2.1. The issues that are raised in the present appeal as *errors of judgment of the courts* are, essentially, two: *i)* whether it is legally correct to exclude the Appellant on the basis ofArticle 70(2)(***a)*** of the PPC by "analogous" application of the provisions of Article 168(4) of the PPC; and *ii)* whether the contested decision is also correct in so far as it reiterates the decision at first instance regarding the finding that the factors and sub-factors relating to the technical assessment criterion did not infringe the provisions of Article 139 of the PPC.

2.2. ***The legal conformity of the decision to exclude the Applicant***

The Applicant was excluded from the tender because the Selection Board considered that, although it had stated that it *"did not participate in the procurement procedure jointly with other operators",* it indicated in the document relating to the "terms and conditions of the tender" that *"the proposal was prepared by you, A....., but in partnership with the company .... - Consulting on a subcontracting basis for the development of all services related to the "Survey, Reengineering and Dematerialization of Processes",* and, as such, the proposal would have to qualify as *"submission of proposals in a group"*. Now, a proposal submitted in a grouping must, in accordance with the provisions of paragraph 5 of article 75 of the PPC, *be signed by the common representative of the members that make up the grouping or by all the members or representatives of the grouping,* which did not occur in this case and led to the exclusion.

The jury also considered that the provisions of paragraphs 3 and 4 of article 168 of the PPC also applied here, by analogy, which also resulted in the obligation of signature of all the members of the grouping or, in the case of mere recourse to third parties to provide part of the object of the contract, regardless of the link established between the tenderer and them, It would always be necessary to submit a declaration by which those third parties unconditionally undertook to perform the said contractual services.

In the judgment of the TAF of Leiria, it was argued that the requirement of commitments from third parties, as it was not expressly provided for in the Procedure Program, and being an element relating to the performance of the contract in the post-award phase, did not constitute grounds for excluding A. and herein the Appellant from the tender. However, this reference made by the Applicant to the subcontracting of part of the services fell within the scope of the provisions of clause 12 of the tender

specifications, according to which that type of subcontracting required authorisation from the contracting authority, and it being inferred from this clause that the failure to present prior authorisation from the contracting authority was grounds for exclusion. A solution – that of exclusion from the tender – that was also the result of the analogous application of paragraph 4 of article 168 of the PPC.
The TCA, in the judgment under appeal, reaffirms the thesis of exclusion under Article 70(2)(a). *(a)* of the PPC, based on the argument of violation of paragraph 4 of article 168 of the PPC. And it adds that the same solution is dictated by Article 318(3)(a). *a)* of the PPC, since prior authorisation of subcontracting was required (clause 12 of the tender specifications); and for the validity of this authorisation, it was necessary to previously present the qualification documents required of the contractor, also in relation to the potential subcontractor.

2.2.1. The Appellant alleges that the contested decision constitutes an error of judgment, essentially because: *i)* it requires the presentation of qualification documentation from the third party when this requirement is not included in the tender program and is not removed from the PPC, since Article 168(4) of that Code is not applicable in this procedure, as concluded in the judgment of this STA of 18.11.2021 (proc. 0452/20.2BEALM); *(ii)* clause 12 of the tender specifications is not applicable at the pre-contractual stage; and *(iii)* Article 63 of Directive 2014/24/EU does not require that at the time of submission of the tender the tenderer must attach a declaration of commitment from the subcontractors.

2.2.1.1. The Appellant is right in relation to the first two arguments, since, in fact, as stated in the judgment of this Supreme Administrative Court of 18.11.2021, of Articles 77(2)(a). *(a)* and *c),* 81, 92 and 93 of the PPC, as well as Article 2(2) of Ordinance No. 372/2017 seem to be extracted that *"except in the case of a different requirement contained in the documents of the procedure or at the request of the Contracting Authority,* [the third party's qualification document] *only has to be presented at the time following the award, and not at the time of submission of the tender"*element.
And, in this case, it is also true that Article 12 of the tender specifications does not derive a different solution, in view of the following content of the rule:
Final Provisions
Clause 12
Subcontracting
1. *Subcontracting in the course of the performance of the contract requires the authorization of the Contracting Authority.*
2. *In cases of subcontracting, the supplier remains fully responsible to the Contracting Authority for the exact and timely fulfilment of all contractual obligations, and does not imply the transfer of responsibility to any of the subcontractors*
. It follows from the wording of the clause that the obligation to present those documents at an earlier time cannot be withdrawn.

2.2.1.2. In essence, the question will be resolved on the basis of the answer formulated last above, which relates to the problem of whether a tenderer, **in the context of a public tender (and not a restricted procedure by prior qualification)** presents a third party (auxiliary company) whose technical capabilities it intends to use to provide part of the service, whether or not it is obtainableto present, **together with the proposal,** the qualification documents of that (future) subcontractor and

the declaration of the respective subcontractor that it is bound to the execution of that part of the service.
The question is relevant and doubtful in the light of national law. It is true that, on the one hand, as highlighted in the judgment of this Supreme Administrative Court of 18.11.2021 (proc. 0452/20.2BEALM), the contracting authority should not be able to demand requirements that are not included in the law – read the PPC – or in the tender programme. This means, according to that paragraph, that, if nothing to the contrary is apparent from the tender programme, either the subcontractor's qualification or its declaration of commitment to the performance of the part of the service *can only be required after the award*, as is apparent from Article 2(2) of Ministerial Order No 372/2017 and Articles 77(2). Als. *a)* and *c),* 81, 92 and 93 of the PPC. The requirement at the time of submission of the application thus seems to be reserved, in the light of national law – the rules of the PPC – for cases of restricted competition by prior qualification, as provided for in paragraph 4 of article 168 of the PPC.
However, Article 63 of Directive 2014/24/EU *appears to impose a different rule* in that it considers that the economic operator's reliance on the capacities of other entities, irrespective of the type of procedure concerned, requires the economic operator to prove to the contracting authority that it will have the necessary resources to do so, for example, by submitting a declaration of commitment from those auxiliary or subcontracted entities (Article 63(1), paragraph 1 *in fine*).
And the RAD judgment of the CJEU, of 3.6.2021, issued in case C-210/20, seems to also point in the same direction, which, invoking the *principle of proportionality*, highlights that the presentation of the elements relating to the subcontractors together with the initial proposal constitutes an outcropping of the principles of equal treatment and transparency, essential to the correct operation of competition in the evaluation of the tenders, and then concludes that, if the subcontractor does not satisfy the conditions required by law to be a party to a public contract, it must be excluded. The CJEU ruling also adds that the tenderer will be able to replace the said third party assistant in the performance of the contract, at the invitation of the contracting authority, provided that this replacement does not alter the content of the proposal submitted, which may be harmed by "subcontracting" at a later time.
In the context of that case-law, it seems to us that an interpretation of the rules of national law – the rules of the PPC – according to which, in public procurement procedures, both the subcontractor's qualification document and its commitment to the performance of the part of the service contained in the tender are only required after the award has been awarded, may contravene either with the rule in Article 63 of Directive 2014/24/EU, or with the principles ofequal treatment and transparency, as dimensions of the implementation of the principle of competition in the evaluation of tenders, as they were configured by the European legislator of public procurement.
For this reason, before proceeding, if there are doubts about the correct interpretation of the provisions of Articles 77(2)(a). *(a)* and *(c)*, 81, 92, 93 and 168(4) of the PPC, this STA decided to stay the proceedings and to put the following question to the CJEU:
Is it consistent with Union law, in particular Article 63 of Directive 2014/24/EU, for the solution of national law whereby, in public procurement procedures where the capacities of other entities are used to perform the service, Do both the subcontractor's qualification documents and the submission of a declaration of commitment by the subcontractor have to be required only after the award has been awarded?

2.2.2. By decision of 10.01.2023 of the Court of Justice of the European

Union, Case C-469/22, it was clarified that: *"Article 63 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, read in conjunction with Article 59 and recital 84 of that Directive, must be interpreted as precluding national legislation under which an economic operator wishing to rely on the capacities of another entity for the performance of a public contract must transmit the qualification documents of that entity and the undertaking of that entity only after the contract in question has been awarded*".
The parties were notified of the decision and did not allege anything.
There is therefore no doubt that the decision adopted by the courts is correct. Indeed, it is apparent from the CJEU's decision set out above that Article 70(2)(a) *(a)* of the SPC has to be *interpreted in accordance with Article 63 of Directive 2014/24/EU* and, in this sense, a tender where the economic operator intends to rely on the capacities of another entity for the performance of a public contract and does not submit, together with the tender, the qualification documents of that entity and the declaration of commitment of that entity, shall be excluded; i.e. it does not provide proof that *it "will have the necessary resources to meet the selection criteria set out"* and does not allow the contracting authority to verify (in accordance with Articles 59 to 61 of Directive 2014/24/EU) whether those entities to which the economic operator intends to have recourse comply with the relevant selection criteria and whether or not there are grounds for their exclusion (under Article 57 of that Directive). These checks must *necessarily* be carried out prior to the award of the contract.
In fact, the CJEU's decision clarifies that this requirement is not even a complex bureaucratic procedure, so its enforceability as an element of admissibility of the proposalsis neither disproportionate nor unreasonable in terms of ensuring the principle of competition, since the economic operator may submit a European Single Procurement Document (ESPD), consisting of an updated self-declaration in order to verify compliance with the requirements of Article 57 of Directive 2014/24/EU, without prejudice to the contracting authority, at any time, you may require the supporting documents you consider relevant.

2.3. The Appellant also alleged that the judgment under appeal erred in its judgment in that it did not find the model for evaluating the tenders adopted to be unlawful on the grounds of infringement of the provisions of Article 139 of the PPC and of the principles of transparency and competition.
It should be recalled that the contested decision supported the interpretation conveyed by the decision of first instance by legitimizing the evaluation criteria of the proposals (the sub-factors *"IAAdadequacy to the Functional Requirements", "IB - Adequacy to the Technical Requirements and Architecture of the Solution", "CI - Adequacy of the Proposed Team"* and *"ID-Adequacy of the Methodologies and the Project Plan"*), considering that, despite using indeterminate concepts, they concerned the evaluation of formal aspects related to the technical aspects (types of methodologies to be used, training of people, etc.) and not to the attributes of the proposals themselves, so that this allegedly vague nature of the evaluation grid and its sub-factors turned out to be adequate and sufficient (and not arbitrary), when analysed in its concrete application in relation to the elements to be evaluated and not only in a decontextualised way.
However, we also agree with the contested decision in this assessment, since, in fact, taking into account the "analysis grids" and the results of their application, it is clear that, since the assessment of essentially formal and external elements is at stake, the use of the "classifiers" adopted for

the formation of the multifactorial judgment regarding the quality-price ratio is "sufficient" and appropriate.
Accordingly, this ground of appeal must also be rejected.

III – DECISION
In view of the above, the judges of the Administrative Litigation Chamber of the Supreme Administrative Court agree to dismiss the appeal.
Costs for the Appellant.
This decision is to be communicated to the CJEU with a copy of it [*cf.* §32 of the Recommendations for the attention of national courts on the submission of preliminary ruling proceedings to the CJEU (OJEU of 08.11.2019 – 2019/C 380/01)).

Lisbon, 9 February 2023. – Suzana Maria Calvo Loureiro Tavares da Silva (rapporteur) - Carlos Luís Medeiros de Carvalho - Ana Paula Soares Leite Martins Portela.

ARRÊT DE LA COUR (dixième chambre)

7 décembre 2023 (*)

« Renvoi préjudiciel – Marchés publics – Fonds structurels et d'investissement européens – Exécution du marché – Directive 2014/24/UE – Article 72 – Modification de marchés en cours – Modification du délai d'exécution – Modification substantielle – Circonstances imprévisibles »

Dans les affaires jointes C-441/22 et C-443/22,

ayant pour objet deux demandes de décision préjudicielle au titre de l'article 267 TFUE, introduites par le Varhoven administrativen sad (Cour administrative suprême, Bulgarie), par décisions du 21 juin 2022, parvenues à la Cour le 5 juillet 2022, dans les procédures

Zamestnik-ministar na regionalnoto razvitie i blagoustroystvoto i rakovoditel na Upravlyavashtia organ na Operativna programa « Regioni v rastezh » 2014-2020

contre

Obshtina Razgrad (C-441/22),

en présence de :

Varhovna administrativna prokuratura,

et

Zamestnik-ministar na regionalnoto razvitie i blagoustroystvoto i rakovoditel na Natsionalnia organ po Programa INTERREG V-A Rumania-Bulgaria 2014-2020

contre

Obshtina Balchik (C-443/22),

en présence de :

Varhovna administrativna prokuratura,

LA COUR (dixième chambre),

composée de M. Z. Csehi, président de chambre, M. E. Regan (rapporteur), président de la cinquième chambre, et M. D. Gratsias, juge,

avocat général : M. M. Campos Sánchez-Bordona,

greffier : M. A. Calot Escobar,

vu la procédure écrite,

considérant les observations présentées :

– pour l'Obshtina Balchik, par M^e A. Atanasov, advokat,

– pour le gouvernement tchèque, par M^me L. Halajová, MM. M. Smolek et J. Vláčil, en qualité d'agents,

– pour le gouvernement estonien, par M^me M. Kriisa, en qualité d'agent,

– pour la Commission européenne, par M. G. Gattinara, M^me^ C. Georgieva et M. G. Wils, en qualité d'agents,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Les demandes de décision préjudicielle portent sur l'interprétation de l'article 72, paragraphe 1, sous e), et paragraphe 4, sous a) et b), de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE (JO 2014, L 94, p. 65), telle que modifiée par le règlement délégué (UE) 2017/2365 de la Commission, du 18 décembre 2017 (JO 2017, L 337, p. 19) (ci-après la « directive 2014/24 »).

2 Ces demandes ont été présentées dans le cadre de deux litiges opposant, dans le premier (affaire C-441/22), le Zamestnik–ministar na regionalnoto razvitie i blagoustroystvoto rakovoditel na Upravlyavashtia organ na Operativna programa « Regioni v rastezh » 2014-2020 (vice-ministre du Développement régional et des Travaux publics, en sa qualité de chef de l'autorité de gestion du programme opérationnel « Régions en développement » 2014-2020, Bulgarie) et, dans le second (affaire C-443/22), le Zamestnik-ministar na regionalnoto razvitie i blagoustroystvoto i rakovoditel na Natsionalnia organ po Programa INTERREG V-A Rumania-Bulgaria 2014-2020 (vice-ministre du Développement régional et des Travaux publics, en sa qualité de chef de l'autorité nationale pour le programme INTERREG V-A Roumanie-Bulgarie 2014-2020, Bulgarie) (ci-après, indifféremment dans chacune des deux affaires, le « chef de l'autorité de gestion ») respectivement au Obshtina Razgrad (commune de Razgrad, Bulgarie) et au Obshtina Balchik (commune de Balchik, Bulgarie) au sujet de décisions prises par le chef de l'autorité de gestion par lesquelles celui-ci a appliqué à ces deux communes une correction financière de 25 % sur les coûts éligibles au titre des fonds européens structurels et d'investissement (ci-après les « fonds ESI ») dans le cadre de marchés publics de travaux qu'elles avaient organisés.

Le cadre juridique

Le droit de l'Union

3 Les considérants 58, 107 et 109 de la directive 2014/24 énoncent :

(58) Si les aspects essentiels d'une procédure de passation de marché tels que les documents de marché, les demandes de participation, les confirmations d'intérêt et les offres doivent toujours revêtir une forme écrite, il devrait néanmoins rester possible de communiquer oralement avec les opérateurs économiques, pour autant que le contenu de ces communications soit consigné d'une manière suffisante. Cette mesure est nécessaire pour garantir un niveau satisfaisant de transparence qui permet de vérifier si le principe de l'égalité de traitement a été respecté. Il est en particulier essentiel que les communications orales avec les soumissionnaires, qui sont susceptibles d'avoir une incidence sur le contenu et l'évaluation des offres, soient consignées d'une manière suffisante et par des moyens appropriés tels que des notes écrites ou des enregistrements audio ou des synthèses des principaux éléments de la communication.

[...]

(107) Il est nécessaire de préciser les conditions dans lesquelles des modifications apportées à un marché en cours d'exécution imposent une nouvelle procédure de passation de marché, en tenant compte de la jurisprudence de la Cour de justice de l'Union européenne en la matière. Il y a lieu d'engager une nouvelle procédure de passation de marché lorsque des modifications substantielles sont apportées au marché initial, notamment en ce qui concerne l'étendue et le contenu des droits et obligations réciproques des parties, y compris l'attribution de droits de

propriété intellectuelle. Ces modifications attestent l'intention des parties de renégocier les conditions essentielles du marché. C'est notamment le cas de conditions qui, si elles avaient été incluses dans la procédure initiale, auraient influé sur son issue.

Il devrait toujours être possible d'apporter au marché des modifications entraînant une variation mineure de sa valeur jusqu'à un certain montant, sans devoir recourir à une nouvelle procédure de passation de marché. À cet effet, et afin de garantir la sécurité juridique, la présente directive devrait prévoir des seuils minimaux, en dessous desquels une nouvelle procédure de passation de marché n'est pas nécessaire. Il devrait être possible d'apporter au marché des modifications allant au-delà de ces seuils sans devoir recourir à une nouvelle procédure de passation de marché, pour autant que lesdites modifications respectent les conditions pertinentes énoncées dans la présente directive.

[...]

(109) Les pouvoirs adjudicateurs peuvent se trouver confrontés à des circonstances extérieures qu'ils ne pouvaient prévoir au moment de l'attribution du marché, notamment lorsque l'exécution de celui-ci s'étend sur une plus longue période. Dans un tel cas, une certaine marge de manœuvre est nécessaire pour pouvoir adapter le marché à ces circonstances sans engager de nouvelle procédure de passation de marché. Les circonstances imprévisibles sont celles que le pouvoir adjudicateur, bien qu'ayant fait preuve d'une diligence raisonnable lors de la préparation du marché initial, n'aurait pu prévoir, compte tenu des moyens à sa disposition, de la nature et des caractéristiques du projet particulier, des bonnes pratiques du secteur et de la nécessité de mettre en adéquation les ressources consacrées à la préparation de l'attribution du marché et la valeur prévisible de celui-ci. Toutefois, cette définition ne saurait s'appliquer en cas de modification altérant la nature de l'ensemble du marché, par exemple lorsque les travaux, fournitures ou services faisant l'objet du marché sont remplacés par une commande différente ou que le type de marché est fondamentalement modifié, puisque l'on peut, dans ce cas, présumer que cette modification serait de nature à influer éventuellement sur l'issue du marché. »

4 L'article 2 de cette directive, intitulé « Définitions », dispose, à son paragraphe 1 :

« Aux fins de la présente directive, on entend par :

[...]

5. "marchés publics", des contrats à titre onéreux conclus par écrit entre un ou plusieurs opérateurs économiques et un ou plusieurs pouvoirs adjudicateurs et ayant pour objet l'exécution de travaux, la fourniture de produits ou la prestation de services ;

[...]

18. "écrit(e)" ou "par écrit", tout ensemble de mots ou de chiffres qui peut être lu, reproduit, puis communiqué, y compris les informations transmises et stockées par un moyen électronique ;

[...] »

5 L'article 4 de ladite directive, intitulé « Montants des seuils », prévoit, à son point a), qu'elle s'applique aux marchés publics de travaux dont la valeur estimée hors taxe sur la valeur ajoutée (TVA) est égale ou supérieure à 5 548 000 euros.

6 L'article 72 de la même directive, intitulé « Modification de marchés en cours », est libellé comme suit :

« 1. Les marchés et les accords-cadres peuvent être modifiés sans nouvelle procédure de passation de marché conformément à la présente directive dans l'un des cas suivants :

a) lorsque les modifications, quelle que soit leur valeur monétaire, ont été prévues dans les documents de marchés initiaux sous la forme de clauses de réexamen, dont des clauses de

révision du prix ou d'options claires, précises et univoques. Ces clauses indiquent le champ d'application et la nature des éventuelles modifications ou options ainsi que les conditions dans lesquelles il peut en être fait usage. Elles ne permettent pas de modifications ou d'options qui changeraient la nature globale du marché ou de l'accord-cadre ;

[...]

c) lorsque toutes les conditions suivantes sont remplies :

i) la modification est rendue nécessaire par des circonstances qu'un pouvoir adjudicateur diligent ne pouvait pas prévoir ;

[...]

e) lorsque les modifications, quelle qu'en soit la valeur, ne sont pas substantielles au sens du paragraphe 4.

[...]

4. Une modification d'un marché ou d'un accord-cadre en cours est considérée comme substantielle au sens du paragraphe 1, point e), lorsqu'elle rend le marché ou l'accord-cadre sensiblement différent par nature de celui conclu au départ. En tout état de cause, sans préjudice des paragraphes 1 et 2, une modification est considérée comme substantielle lorsqu'une au moins des conditions suivantes est remplie :

a) elle introduit des conditions qui, si elles avaient été incluses dans la procédure initiale de passation de marché, auraient permis l'admission d'autres candidats que ceux retenus initialement ou l'acceptation d'une offre autre que celle initialement acceptée ou auraient attiré davantage de participants à la procédure de passation de marché ;

b) elle modifie l'équilibre économique du marché ou de l'accord-cadre en faveur du contractant d'une manière qui n'était pas prévue dans le marché ou l'accord-cadre initial ;

[...]

5. Une nouvelle procédure de passation de marché conformément à la présente directive est requise pour des modifications des dispositions d'un marché public ou d'un accord-cadre en cours autres que celles prévues aux paragraphes 1 et 2. »

Le droit bulgare

7 L'article 107 du zakon za obshtestvenite porachki (loi sur les marchés publics, DV n^{o} 13, du 16 février 2016), dans sa version applicable aux litiges au principal (ci-après la « loi sur les marchés publics »), qui a transposé la directive 2014/24 dans l'ordre juridique bulgare, dispose :

« Outre que pour les motifs visés aux articles 54 et 55, le pouvoir adjudicateur exclut :

1. un candidat ou un soumissionnaire qui ne satisfait pas aux critères de sélection fixés ou ne remplit pas toute autre condition spécifiée dans l'avis de marché, l'invitation à confirmer l'intérêt ou l'invitation à négocier ou dans la documentation ;

[...] »

8 Aux termes de l'article 116 de la loi sur les marchés publics :

« (1) Les contrats d'attribution de marchés publics et les accords-cadres peuvent être modifiés lorsque :

[...]

2. en raison de circonstances imprévisibles, il s'avère nécessaire d'effectuer des fournitures, des services ou des travaux supplémentaires non prévus dans le marché initial si le remplacement du contractant :

a) est impossible pour des raisons économiques ou techniques, y compris des exigences d'interchangeabilité ou d'interopérabilité avec les équipements, services ou installations existants imposés par le contrat initial, et

b) entraînerait d'importantes difficultés d'entretien, d'exploitation et de service ou des coûts redondants pour l'agent contractant ;

3. en raison de circonstances que le pouvoir adjudicateur, dans l'exercice de sa diligence, ne pouvait pas prévoir, il est apparu nécessaire de procéder à une modification qui n'entraîne pas un changement de l'objet du contrat ou de l'accord-cadre ;

[...]

7. des modifications non substantielles sont nécessaires.

[...]

(5) La modification d'un contrat d'attribution de marché public est considérée comme substantielle au sens du paragraphe 1, point 7, lorsqu'une ou plusieurs des conditions suivantes sont remplies :

1. la modification introduit des conditions qui, si elles avaient fait partie de la procédure d'attribution du marché, auraient incité des soumissionnaires ou des candidats supplémentaires à participer, auraient permis l'admission de soumissionnaires ou de candidats autres que ceux initialement sélectionnés, ou auraient conduit à l'acceptation d'une offre différente de celle initialement retenue ;

2. la modification entraîne des avantages pour l'adjudicataire qui n'étaient pas connus des autres participants à la procédure ; »

9 Le paragraphe 2, point 27, des dispositions complémentaires de la loi sur les marchés publics prévoit que les « circonstances imprévisibles » sont des circonstances qui sont survenues après la conclusion du contrat, qui n'auraient pas pu être prévues avec la diligence requise et qui ne résultent pas d'un acte ou d'une omission des parties, mais qui rendent impossible l'exécution dans les conditions convenues. Le paragraphe 3, point 1, de ces dispositions prévoit que ladite loi transpose les exigences de la directive 2014/24.

10 L'article 20a du zakon za zadalzheniyata i dogovorite (loi relative aux obligations et aux contrats, DV n^{o} 275, du 22 novembre 1950) dispose :

« Les contrats tiennent lieu de loi entre les parties contractantes.

Les contrats ne peuvent être modifiés, résiliés, annulés ou révoqués que d'un commun accord entre les parties ou pour des motifs prévus par la loi. »

11 L'article 1er, paragraphe 2, du zakon za upravlenie na sredstvata ot Evropeyskite strukturni i investitsionni fondove (loi relative à la gestion des [fonds ESI], DV n^{o} 101, du 22 décembre 2015, ci-après la « loi relative à la gestion des fonds ESI ») définit les dépenses éligibles au titre des ESI en droit national.

12 L'article 2, paragraphe 1, annexe 1, point 23, de l'ordonnance relative à l'identification des irrégularités justifiant l'application de corrections financières et aux pourcentages applicables en vue de déterminer le montant des corrections financières dans le cadre de la [loi relative à la gestion des fonds ESI] (DV n^{o} 27, du 31 mars 2017), prévoit :

« Modifications illicites d'un marché public.

(a) il y a des modifications du marché (y compris une réduction de l'étendue du marché) qui ne sont pas conformes à l'article 116, paragraphe 1, [de la loi sur les marchés publics] [...] [lorsque]

Il y a une modification substantielle des éléments du contrat (tels que le prix, la nature de l'ouvrage, le délai d'exécution, les modalités de paiement, les matériaux utilisés) lorsque la modification rend le contrat exécuté substantiellement différent, dans sa nature, de celui initialement conclu. Dans tous les cas, une modification sera considérée comme substantielle lorsqu'une ou plusieurs des conditions énoncées à l'article 116, paragraphe 5, [de la loi sur les marchés publics] sont remplies.

[...] »

13 L'article 15, paragraphe 1, de la loi sur l'aménagement du littoral de la mer Noire (DV n° 48, du 15 juin 2007), en vigueur depuis le 1er janvier 2008, dispose :

« Il est interdit d'effectuer des travaux de construction et d'installation dans les stations balnéaires nationales de la côte de la mer Noire, du 15 mai au 1er octobre. »

Les litiges au principal et les questions préjudicielles

L'affaire C-441/22

14 Le 3 juillet 2018, afin de mettre en œuvre les activités financées par les fonds ESI, la commune de Razgrad, en sa qualité d'entité publique adjudicatrice, a lancé une procédure ouverte d'attribution d'un marché public ayant pour objet la construction d'une salle de sport dans un lycée professionnel de cette commune. Une seule offre a été soumise, à savoir celle émanant de « SAV – Razgrad » OOD.

15 Par contrat du 13 septembre 2018, la commune de Razgrad a attribué le marché public à cette société. En vertu de l'article 5, paragraphes 1 et 2, de ce contrat, la période d'exécution des travaux de construction était de 235 jours et ne pouvait s'étendre au–delà du 30 novembre 2019.

16 En cours d'exécution du marché, le 29 novembre 2019, les parties sont convenues d'un avenant n° 1 au contrat, remplaçant la date initiale du 30 novembre 2019 prévue pour la fin des travaux par celle du 30 janvier 2020. La justification de cette modification avancée par les parties était la survenance de circonstances imprévues donnant lieu à la nécessité d'adapter le projet d'investissement.

17 Au cours de la période d'exécution, six constats de suspension des travaux ont été dressés, dont cinq en raison de conditions météorologiques défavorables et un en raison de la nécessité de remanier le projet d'investissement.

18 Un constat attestant de la conformité de la construction a été établi le 24 février 2020.

19 Après déduction de la durée de la période d'exécution effective de 525 jours, des périodes de suspension des travaux de construction pour lesquelles un constat avait été dûment établi sans être contesté par l'autorité de gestion, un délai d'exécution de 264 jours a été retenu.

20 Pour ce qui concerne la période de retard allant du 30 janvier au 24 février 2020, aucune justification n'a été avancée et le pouvoir adjudicateur n'a pas calculé de pénalités de retard.

21 Faisant état, notamment, des considérations exposées aux points 14 à 20 du présent arrêt, le chef de l'autorité de gestion a décidé d'appliquer une correction financière de 25 % à la commune de Razgrad sur les dépenses éligibles au titre des fonds ESI, au sens de l'article 1er, paragraphe 2, de la loi relative à la gestion des fonds ESI, en raison de la violation de la loi sur les marchés publics. Selon le chef de l'autorité de gestion, la durée d'exécution du contrat est un élément essentiel de ce dernier. En effet, le pouvoir adjudicateur aurait prévu, dans les documents de marché, une durée maximale et une date à ne pas dépasser pour l'exécution du contrat, ces éléments constituant par ailleurs des critères d'attribution en vue de l'évaluation des offres. Dès lors, un dépassement de ces délais non objectivement justifié et

accepté par le pouvoir adjudicateur sans remarques et sans pénalité de retard serait constitutif d'une modification illicite des conditions du marché public en cause.

22 La commune de Razgrad a introduit un recours contre cette décision devant l'Administrativen sad – Razgrad (tribunal administratif de Razgrad, Bulgarie). Ce dernier a considéré qu'une modification du contrat d'attribution d'un marché public ne peut être réalisée que moyennant la conclusion d'un accord écrit, ce qui n'avait pas été le cas en l'occurrence s'agissant de la dernière période de retard. Dès lors, un tel cas de figure ne serait pas constitutif d'une modification des conditions du marché, en violation de l'article 116, paragraphe 1, de la loi sur les marchés publics, mais d'une exécution non conforme du contrat d'attribution du marché public. Quand bien même ce dernier aurait-il contenu une clause prévoyant des pénalités de retard, la question de savoir si le pouvoir adjudicateur a réclamé celles-ci à l'adjudicataire serait sans pertinence. L'Administrativen sad – Razgrad (tribunal administratif de Razgrad) a, partant, jugé que le chef de l'autorité de gestion avait considéré à tort que la situation en cause au principal était constitutive d'une modification illicite des conditions du marché, de telle sorte que sa décision en ce sens devait être annulée.

23 Le Varhoven administrativen sad (Cour administrative suprême, Bulgarie), la juridiction de renvoi, est saisi d'un pourvoi en cassation formé par le chef de l'autorité de gestion contre ce jugement.

24 Selon la juridiction de renvoi, la question de savoir si une situation telle que celle en cause au principal est constitutive d'une modification illicite des conditions du marché fait débat au sein des juridictions nationales. Selon une première approche, cette question devrait être examinée à la lumière de toutes les circonstances pertinentes, ce qui inclurait, outre un accord écrit, les déclarations et le comportement des parties lors de l'exécution du contrat. Selon une seconde approche, pour qu'il y ait modification du contrat, il serait nécessaire que les parties parviennent à un accord, qui soit consigné par écrit. En l'absence d'un tel accord, dans le cas où le retard dans l'exécution du marché public est imputable à l'adjudicataire, il s'agirait plutôt d'une situation d'exécution non conforme du marché.

25 La juridiction de renvoi se demande, partant, quelle est l'interprétation de l'article 72, paragraphe 1, sous e), de la directive 2014/24, lu en combinaison avec le paragraphe 4, sous a) et b), de celui-ci, qu'il convient de retenir afin de déterminer, en particulier, si une modification substantielle du contrat de marché public, au sens de ces dispositions, ne peut être constatée que s'il existe un accord écrit en ce sens entre les parties ou si elle peut également être déduite d'agissements de celles-ci.

26 Dans ces conditions, le Varhoven administrativen sad (Cour administrative suprême) a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes :

« 1) L'article 72, paragraphe 1, sous e), de la directive 2014/24, lu en combinaison avec son paragraphe 4, sous a) et b), [s'oppose-t-il] à une réglementation nationale, ou à une jurisprudence nationale portant sur l'interprétation et l'application de cette réglementation, selon laquelle une violation des règles relatives à la modification substantielle du contrat de marché public ne peut être retenue que dans le cas où les parties ont signé un accord écrit/une annexe dont l'objet est la modification du contrat ?

2) En cas de réponse négative à la première question : l'article 72, paragraphe 1, sous e), de la directive 2014/24, lu en combinaison avec [l'article 72,] paragraphe 4, sous a) et b), de celle-ci, [s'oppose-t-il] à une réglementation nationale ou à une jurisprudence nationale portant sur l'interprétation et l'application de cette réglementation, selon laquelle une modification illégale des contrats de marchés publics peut avoir lieu non seulement du fait de la signature d'un accord écrit par les parties, mais aussi du fait de leurs agissements conjoints effectués en violation des dispositions relatives à la modification des marchés, ces agissements se manifestant par une communication et des traces écrites établies au cours de cette communication (comme celles du litige au principal), desquelles on peut déduire une volonté commune de procéder à la modification en question ?

3) Des dispositions nationales ou une jurisprudence nationale relative à l'interprétation et à l'application de ces dispositions, en vertu desquelles, dans une situation telle que celle en cause au principal (où les documents de marché fixaient une durée maximale et une date limite pour l'exécution ; le délai constituait également un paramètre dans la méthode d'évaluation des offres ;

l'exécution effective du marché a dépassé la durée maximale et la date limite prévue par les documents de marché, en l'absence de circonstances imprévisibles ; le pouvoir adjudicateur a accepté l'exécution sans remarque et n'a pas réclamé de pénalités de retard), l'exécution du marché en violation des termes des documents de marché et du marché lui-même en ce qui concerne les délais, en l'absence de circonstances imprévisibles et sans opposition du pouvoir adjudicateur, doit être interprétée uniquement comme une forme d'exécution non conforme du marché et non comme une modification substantielle illégale du marché en ce qui concerne les délais d'exécution, sont-elles compatibles avec l'article 72, paragraphe 1, sous e), de la directive 2014/24, lu en combinaison avec son paragraphe 4, sous a) et b) ? »

L'affaire C-443/22

27 Le 2 janvier 2019, la commune de Balchik a lancé une procédure ouverte d'attribution d'un marché public dans le cadre de projets financés par les fonds ESI, ayant pour objet l'aménagement de la promenade côtière de cette commune. Deux offres ont été soumises, dont celle émanant de Infra Expert AD.

28 Le marché ayant été attribué à cette dernière, les parties ont signé un contrat en date du 19 avril 2019, déterminant notamment le délai d'exécution conformément à la proposition technique de l'adjudicataire, à savoir à 45 jours calendaires.

29 Pendant l'exécution du contrat, des actes suspendant le délai d'exécution sont intervenus en raison, d'une part, de mauvaises conditions météorologiques et, d'autre part, de l'interdiction, en vertu de l'article 15, paragraphe 1, de la loi sur l'aménagement du littoral de la mer Noire, d'effectuer des travaux de construction et d'installation dans les stations balnéaires nationales de la côte de la mer Noire durant la saison touristique, entre le 15 mai et le 1er octobre.

30 La durée effective d'exécution du contrat a, de ce fait, été portée à 250 jours. Le pouvoir adjudicateur n'a pas réclamé de dommages-intérêts pour défaut d'exécution dans les délais.

31 S'appuyant notamment sur des motifs analogues à ceux en cause dans l'affaire C-441/22, le chef de l'autorité de gestion a appliqué, par décision du 26 octobre 2020, une correction financière de 25 % à la commune de Balchik au titre des dépenses éligibles aux fonds ESI, au sens de l'article 1er, paragraphe 2, de la loi relative à la gestion des fonds ESI, en raison de la violation de la loi sur les marchés publics. Selon le chef de l'autorité de gestion, conformément à l'article 107, paragraphe 1, de la loi sur les marchés publics, le délai d'exécution des travaux est fixé dans les documents de marché d'une manière et dans des limites qui, si elles ne sont pas respectées, entraînent l'exclusion du soumissionnaire. Compte tenu de la suspension répétée des travaux, alors qu'il s'agissait de conditions météorologiques défavorables habituelles et d'une interdiction réglementaire raisonnablement prévisible, conformément à l'article 116, paragraphe 1, point 3, de cette loi, le chef de l'autorité de gestion a considéré que le dépassement du délai d'exécution initialement convenu était constitutif, dans les faits, d'une modification substantielle du contrat de marché public, en violation de ladite loi.

32 La commune de Balchik a introduit un recours contre cette décision du chef de l'autorité de gestion devant l'Administrativen sad Dobrich (tribunal administratif de Dobrich, Bulgarie). Ce dernier a jugé, en substance, que, en vertu de l'article 20a de la loi relative aux obligations et aux contrats, les contrats entre les parties peuvent être modifiés du commun accord de celles–ci ou pour les motifs prévus par la loi. En outre, la seule forme autorisée pour que des modifications du contrat de marché public soient valides serait l'accord écrit. En l'occurrence, le contrat aurait été modifié par un accord tacite, ce qui constituerait non pas une modification de celui-ci, mais une exécution inadéquate du marché, laquelle permettrait uniquement au pouvoir adjudicateur d'imposer la pénalité convenue expressément et préalablement dans le contrat. Il ne serait pas pertinent en droit de savoir quels étaient les motifs de la suspension des travaux et s'ils étaient ou non prévisibles pour les parties.

33 Le Varhoven administrativen sad (Cour administrative suprême), la juridiction de renvoi, a été saisi d'un pourvoi en cassation formé par le chef de l'autorité de gestion contre le jugement de l'Administrativen sad Dobrich (tribunal administratif de Dobrich).

34 Outre ce qui a déjà été exposé au point 24 du présent arrêt, la juridiction de renvoi estime que la résolution du litige au principal dans l'affaire C-443/22 nécessite que soit précisée la portée des notions de « diligence raisonnable lors de la préparation du marché initial », de « circonstances imprévisibles » et de « circonstances qu'un pouvoir adjudicateur diligent ne pouvait pas prévoir », au sens de la directive 2014/24.

35 Il serait ainsi souhaitable d'interpréter l'article 72, paragraphe 1, sous c) et e), ainsi que paragraphe 4, sous a) et b), de la directive 2014/24, lu en combinaison avec son considérant 109, afin de déterminer, en particulier, d'une part, si une modification substantielle du contrat de marché public requiert un accord écrit ou si elle peut également être déduite des agissements conjoints des parties et, d'autre part, si la définition de la notion de « circonstances imprévisibles » figurant à l'article 116, paragraphe 1, points 2 et 3, de la loi sur les marchés publics constitue une transposition correcte en droit bulgare des dispositions pertinentes de la directive 2014/24.

36 Dans ces conditions, le Varhoven administrativen sad (Cour administrative suprême) a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes :

« 1) L'article 72, paragraphe 1, sous e), de la directive 2014/24, lu en combinaison avec [l'article 72,] paragraphe 4, sous a) et b), de celle-ci, [s'oppose-t-il à] une réglementation nationale, ou une jurisprudence nationale portant sur l'interprétation et l'application de cette réglementation, selon laquelle une violation des règles relatives à la modification substantielle du contrat de marché public ne peut être retenue que dans le cas où les parties ont signé un accord écrit/une annexe dont l'objet est la modification du contrat ?

2) En cas de réponse négative à la première question : l'article 72, paragraphe 1, sous e), de la directive 2014/24, lu en combinaison avec [l'article 72,] paragraphe 4, sous a) et b), de celle-ci, s'oppose-t-il à une réglementation nationale ou une jurisprudence nationale portant sur l'interprétation et l'application de cette réglementation, selon laquelle une modification illégale des contrats de marchés publics peut avoir lieu non seulement du fait de la signature d'un accord écrit par les parties, mais aussi du fait de leurs agissements conjoints effectués en violation des dispositions relatives à la modification des marchés, ces agissements se manifestant par une communication et des traces écrites établies au cours de cette communication (comme celles du litige au principal), desquelles on peut déduire une concordance de volonté pour procéder à la modification en question ?

3) La notion de "diligence lors de la préparation du marché" – au sens du considérant [109] de la directive 2014/24 – dans la partie de l'offre relative au délai d'exécution des activités, inclut-elle également l'évaluation des risques de conditions météorologiques habituelles qui pourraient nuire à l'exécution du marché public dans le délai, ainsi qu'une évaluation des interdictions réglementaires d'exécution de travaux au cours d'une certaine période qui est incluse dans la période d'exécution du marché ?

4) La notion de "circonstances imprévisibles", au sens de la directive 2014/24, comprend-elle uniquement des circonstances survenues après que le contrat a été conclu (à l'instar de la loi nationale, notamment le paragraphe 2, point 27, des dispositions complémentaires de la loi sur les marchés publics), qui n'ont pas pu être prévues malgré la diligence requise, qui ne sont pas dues à des actes ou omissions des parties mais rendent l'exécution impossible dans le cadre des conditions convenues ? Ou bien la directive [2014/24] n'exige-t-elle pas que ces circonstances soient survenues après la conclusion du contrat ?

5) Des conditions météorologiques habituelles qui ne constituent pas des "circonstances imprévisibles", au sens du considérant [109] de la directive 2014/24, et l'interdiction réglementaire – publiée avant la passation du marché public – d'exécuter des travaux de construction au cours d'une certaine période, constituent-elles une justification objective de l'exécution du contrat en dehors du délai contractuel ? Dans ce contexte, le soumissionnaire est-il tenu, lors du calcul du délai qu'il proposera, d'inclure (avec diligence et bonne foi) dans sa proposition les risques habituels pertinents pour l'exécution du contrat dans les délais ?

6) L'article 72, paragraphe 1, sous e), de la directive 2014/24, lu en combinaison avec [l'article 72,] paragraphe 4, sous a) et b), de celle-ci, [s'oppose-t-il] à une réglementation ou une jurisprudence nationale portant sur l'interprétation et l'application de cette réglementation, selon laquelle une modification illégale d'un contrat de marché public peut intervenir dans une situation telle que celle en cause au principal, dès lors : que l'exécution du marché dans les limites d'un certain délai est une condition de participation à la passation du marché (le non-respect de ces limites entraînant l'exclusion du soumissionnaire) ; que l'exécution du marché dépasse ce délai en raison de conditions météorologiques habituelles et d'une interdiction réglementaire – déjà connue avant la passation du marché – d'effectuer des travaux relevant de l'objet et de la période d'exécution du contrat, ces motifs de dépassement ne constituant pas des circonstances imprévisibles ; que l'exécution du contrat a été acceptée sans aucune réserve relative au délai ; qu'aucune pénalité contractuelle n'a été réclamée au titre du retard ; et que, en conséquence, une condition substantielle figurant dans les documents de marché, et déterminante pour le milieu concurrentiel, a été modifiée et l'équilibre économique a été faussé en faveur du contractant ? »

37 Par décision du président de la Cour du 10 août 2022, les affaires C-441/22 et C-443/22 ont été jointes aux fins des phases écrite et orale de la procédure ainsi que de l'arrêt.

Sur les questions préjudicielles

Considérations liminaires

Sur l'applicabilité de la directive 2014/24 aux marchés publics en cause au principal

38 Ainsi qu'il découle des demandes de décision préjudicielle, la valeur estimée de chacun des marchés en cause au principal est inférieure au seuil d'applicabilité de la directive 2014/24, fixé à 5 548 000 euros par son article 4, sous a), en ce qui concerne les marchés publics de travaux, de sorte que ces marchés ne relèvent pas du champ d'application de cette directive.

39 Néanmoins, ainsi qu'il ressort d'une jurisprudence constante de la Cour, lorsqu'une législation nationale se conforme, de manière directe et inconditionnelle, pour les solutions qu'elle apporte à des situations non couvertes par un acte du droit de l'Union, à celles retenues par cet acte, il existe un intérêt certain de l'Union à ce que les dispositions reprises dudit acte reçoivent une interprétation uniforme. Cela permet en effet d'éviter des divergences d'interprétation futures et d'assurer un traitement identique à ces situations et à celles relevant du champ d'application desdites dispositions (arrêt du 31 mars 2022, Smetna palata na Republika Bulgaria, C-195/21, EU:C:2022:239, point 43 et jurisprudence citée).

40 À cet égard, la Cour a déjà eu l'occasion de constater, au point 44 de l'arrêt du 31 mars 2022, Smetna palata na Republika Bulgaria (C-195/21, EU:C:2022:239), que la loi sur les marché publics, qui a transposé la directive 2014/24 dans l'ordre juridique bulgare, s'applique plus généralement à toutes les procédures de passation de marchés publics subventionnées par des fonds européens, indépendamment de la valeur des marchés concernés.

41 Or, il ne ressort pas du dossier dont dispose la Cour que, depuis le prononcé de cet arrêt, le champ d'application de la loi sur les marchés publics aurait été modifié. Au contraire, il ressort des demandes de décision préjudicielle que ladite loi transpose en droit interne l'article 72, paragraphe 1, sous e), de la directive 2014/24, lu en combinaison avec l'article 72, paragraphe 4, sous a) et b), de celle-ci, de telle sorte que les règles énoncées à ces dispositions ont été rendues applicables aux marchés publics en cause au principal, qui échappent normalement au champ d'application de cette directive.

42 Dans ces conditions, la valeur estimée de chacun des marchés en cause au principal ne fait pas obstacle à ce que la Cour réponde aux questions préjudicielles.

Sur la recevabilité des troisième à cinquième questions dans l'affaire C-443/22

43 Dans ses observations écrites, la commune de Balchik soutient que les troisième à cinquième questions dans l'affaire C-443/22 sont dénuées de pertinence pour le litige au principal. Selon cette partie, les

faits, tels que constatés par la juridiction de renvoi, sont inexacts, dès lors que l'autorité de gestion a défini de manière erronée le délai du contrat. La durée des travaux serait stipulée dans le contrat, mais elle ne serait pas soumise à une exigence de continuité. Il n'y aurait pas eu d'exigence d'exécution pendant une période ou une saison annuelle spécifique.

44 À cet égard, il convient de rappeler la jurisprudence bien établie selon laquelle les questions relatives à l'interprétation du droit de l'Union posées par le juge national dans le cadre réglementaire et factuel qu'il définit sous sa propre responsabilité, et dont il n'appartient pas à la Cour de vérifier l'exactitude, bénéficient d'une présomption de pertinence. Le rejet par la Cour d'une demande formée par une juridiction nationale n'est possible que s'il apparaît de manière manifeste que l'interprétation sollicitée du droit de l'Union n'a aucun rapport avec la réalité ou l'objet du litige au principal, lorsque le problème est de nature hypothétique ou encore lorsque la Cour ne dispose pas des éléments de fait et de droit nécessaires pour répondre de façon utile aux questions qui lui sont posées (arrêt du 12 janvier 2023, Nemzeti Adatvédelmi és Információszabadság Hatóság, C-132/21, EU:C:2023:2, point 24 et jurisprudence citée).

45 Or, il ressort de la demande de décision préjudicielle dans l'affaire C-443/22 que le litige au principal trouve son origine dans le dépassement du délai d'exécution des travaux fixé tant dans les documents de marché que dans le contrat de marché public en cause au principal et que ce délai constituait un critère déterminant lors de l'évaluation des offres, les soumissionnaires dont les propositions étaient supérieures au délai maximum étant exclus de cette procédure. Il ne saurait, dès lors, être considéré que des questions relatives aux circonstances éventuelles dans lesquelles un tel délai peut être dépassé sans nécessiter une nouvelle procédure de passation de marché puissent être considérées comme n'ayant aucun rapport avec la réalité ou l'objet de ce litige ou comme hypothétiques pour les motifs avancés par la commune de Balchik.

46 Par conséquent, les troisième à cinquième questions dans l'affaire C-443/22 sont recevables.

Sur la compétence de la Cour pour répondre à la sixième question dans l'affaire C-443/22

47 La commune de Balchik soutient que la sixième question dans l'affaire C-443/22, telle que formulée par la juridiction de renvoi, revient, en substance, à demander à la Cour non pas une question d'interprétation du droit de l'Union, mais à régler directement le litige au principal.

48 Certes, selon une jurisprudence constante, l'article 267 TFUE habilite la Cour non pas à appliquer les règles de droit de l'Union à une espèce déterminée, mais seulement à se prononcer sur l'interprétation des traités et des actes pris par les institutions de l'Union européenne (arrêt du 13 juillet 2017, Ingsteel et Metrostav, C-76/16, EU:C:2017:549, point 25 et jurisprudence citée).

49 Toutefois, il convient de considérer que, par sa sixième question dans l'affaire C-443/22, lue à la lumière des motifs de la demande de décision préjudicielle dans cette affaire, la juridiction de renvoi vise, tout comme par sa troisième question dans l'affaire C-441/22, non pas à ce que la Cour applique elle–même les dispositions de l'article 72 de la directive 2014/24 aux circonstances de l'affaire au principal, mais à interroger la Cour sur le point de savoir si cet article doit être interprété en ce sens qu'une modification du délai d'exécution des travaux convenu dans le contrat conclu à la suite de l'attribution d'un marché public, qui est intervenue postérieurement à cette attribution pour des raisons qui n'ont pas été prévues dans les documents de marché, peut être considérée comme une forme d'exécution non conforme du marché public concerné à laquelle les règles prévues à cet article ne s'appliquent pas, alors qu'une telle modification relève de la notion de « modification substantielle », au sens du paragraphe 4 dudit article.

50 Par conséquent, il convient de considérer que la Cour est compétente pour répondre à la sixième question dans l'affaire C-443/22.

Sur la prémisse des questions préjudicielles

51 Il y a lieu de rappeler que l'article 72, paragraphes 1 et 2, de la directive 2014/24 énumère les situations dans lesquelles les marchés et les accords-cadres peuvent être modifiés sans qu'il soit pour autant nécessaire de lancer une nouvelle procédure de passation de marché conformément à cette

directive. Selon les dispositions du paragraphe 5 de cet article, le lancement d'une nouvelle procédure est requis lorsqu'interviennent des modifications autres que celles visées aux paragraphes 1 et 2 dudit article.

52 Ainsi, conformément à l'article 72, paragraphe 1, sous e), de la directive 2014/24, une nouvelle procédure n'est pas requise lorsque les modifications apportées ne sont pas « substantielles », au sens de l'article 72, paragraphe 4, de cette directive. Selon le libellé même de cette dernière disposition, sans préjudice des paragraphes 1 et 2 de cet article, une modification d'un marché en cours est considérée comme substantielle, en tout état de cause, lorsqu'une au moins des conditions prévues aux points a) à d) de ce paragraphe 4 est remplie.

53 En l'occurrence, il ressort des demandes de décision préjudicielle que les modifications en cause au principal remplissent tant la condition prévue à l'article 72, paragraphe 4, sous a), de la directive 2014/24 – en ce que, si un délai d'exécution plus long, correspondant au délai initial augmenté du dépassement finalement accusé, avait été déterminé d'emblée par le pouvoir adjudicateur concerné au cours de la phase d'attribution du marché, davantage de participants auraient été attirés par celui-ci – que la condition prévue à l'article 72, paragraphe 4, sous b), de cette directive – en ce que ce dépassement a modifié l'équilibre économique du marché en faveur du contractant d'une manière qui n'était pas prévue dans le marché initial.

54 Par conséquent, aux fins de répondre aux questions posées, il convient à la Cour de se fonder sur la prémisse, qu'il incombe en dernier ressort à la juridiction de renvoi de vérifier, selon laquelle à tout le moins l'une des conditions prévues à l'article 72, paragraphe 4, de la directive 2014/24 est remplie dans chacune des affaires au principal.

Sur les premières et deuxièmes questions dans les affaires C-441/22 et C-443/22

55 Par ses premières et deuxièmes questions dans les affaires C-441/22 et C-443/22, qu'il convient d'examiner ensemble, la juridiction de renvoi demande, en substance, si l'article 72, paragraphe 1, sous e), et paragraphe 4, de la directive 2014/24 doit être interprété en ce sens que, aux fins de qualifier une modification d'un contrat de marché public de « substantielle », au sens de cette disposition, les parties au contrat doivent avoir signé un accord écrit ayant pour objet cette modification ou s'il suffit qu'existent d'autres éléments écrits émanant de ces parties et établissant une volonté commune de procéder à ladite modification.

56 Il convient de faire observer que, dans chacune des situations ayant donné lieu aux litiges au principal, la date effective de fin des travaux n'a pas fait l'objet d'un accord écrit signé par les parties au contrat de marché public.

57 La juridiction de renvoi s'interroge ainsi sur le point de savoir si l'absence d'accord écrit portant modification du délai d'exécution des travaux tel que fixé dans le contrat initial de marché public fait obstacle à ce que la prolongation de fait de ce délai résultant de retards dans l'exécution de ces travaux soit considérée comme constituant une modification « substantielle » du marché concerné, au sens de l'article 72, paragraphe 4, de la directive 2014/24.

58 À cet égard, il est vrai que l'article 2, paragraphe 1, de la directive 2014/24 définit, d'une part, à son point 5, un « marché public » comme étant un contrat à titre onéreux conclu par écrit entre un ou plusieurs opérateurs économiques et un ou plusieurs pouvoirs adjudicateurs et, d'autre part, à son point 18, les termes « écrit(e) » ou « par écrit » comme visant tout ensemble de mots ou de chiffres qui peut être lu, reproduit, puis communiqué, y compris les informations transmises et stockées par un moyen électronique. Par ailleurs, le considérant 58 de la directive 2014/24 énonce, en particulier, que, si les aspects essentiels d'une procédure de passation de marché tels que les documents de marché, les demandes de participation, les confirmations d'intérêt et les offres doivent toujours revêtir une forme écrite, il devrait néanmoins rester possible de communiquer oralement avec les opérateurs économiques, pour autant que le contenu de ces communications soit consigné d'une manière suffisante.

59 En revanche, l'article 72 de la directive 2014/24 ne prévoit pas, s'agissant d'une modification d'un contrat de marché en cours d'exécution, qu'une telle modification ne pourrait être qualifiée de

« substantielle », au sens du paragraphe 1, sous e), et du paragraphe 4, de celui-ci, que si elle est constatée par un accord écrit portant modification du contrat, et que pareil constat ne pourrait, partant, pas être déduit d'éléments écrits établis au cours de communications entre les parties.

60 Cette interprétation de l'article 72 de la directive 2014/24 est corroborée par les objectifs poursuivis par cette disposition et le contexte dans lequel celle-ci s'inscrit.

61 En particulier, en encadrant les conditions dans lesquelles les marchés publics en cours peuvent être modifiés, l'article 72 de la directive 2014/24 vise à assurer le respect des principes de transparence des procédures et d'égalité de traitement des soumissionnaires. En effet, ces principes font obstacle à ce que, après l'attribution d'un marché public, le pouvoir adjudicateur et l'adjudicataire apportent aux dispositions de ce marché des modifications telles que ces dispositions présenteraient des caractéristiques substantiellement différentes de celles du marché initial (voir, en ce sens, arrêts du 13 avril 2010, Wall, C-91/08, EU:C:2010:182, point 37 et jurisprudence citée, ainsi que du 3 février 2022, Advania Sverige et Kammarkollegiet, C-461/20, EU:C:2022:72, point 19 ainsi que jurisprudence citée). Le respect de ces principes s'inscrit, à son tour, dans l'objectif plus général des règles de l'Union en matière de marchés publics consistant à assurer la libre circulation des services et l'ouverture à la concurrence non faussée dans tous les États membres (voir, en ce sens, arrêts du 19 juin 2008, pressetext Nachrichtenagentur, C-454/06, EU:C:2008:351, points 31 et 32 ainsi que jurisprudence citée ; du 13 avril 2010, Wall, C-91/08, EU:C:2010:182, point 37 et jurisprudence citée, ainsi que du 12 mai 2022, Comune di Lerici, C-719/20, EU:C:2022:372, point 42 et jurisprudence citée).

62 Or, ainsi que l'ont fait valoir, en substance, les gouvernements tchèque et estonien ainsi que la Commission européenne dans leurs observations écrites, afin de garantir l'effet utile des règles prévues à l'article 72 de la directive 2014/24 et, partant, le respect des principes que cette disposition vise à assurer, la qualification d'une modification d'un marché public en tant que « modification substantielle » de celui–ci ne saurait dépendre de l'existence d'un accord écrit signé par les parties au contrat de marché public et ayant pour objet une telle modification. En effet, une interprétation selon laquelle la constatation d'une modification substantielle serait conditionnée par l'existence d'un tel accord écrit faciliterait le contournement des règles relatives à la modification de marchés en cours, prévues à ladite disposition, en permettant aux parties au contrat de marché public de modifier, à leur gré, les conditions d'exécution de ce contrat, alors que ces conditions auraient été énoncées de manière transparente dans les documents de marchés publics et étaient censées s'appliquer de manière égale à tous les soumissionnaires potentiels afin de garantir une concurrence équitable et non faussée sur le marché.

63 S'agissant du contexte dans lequel s'inscrit l'article 72 de la directive 2014/24, le considérant 107 de cette directive indique que les modifications apportées au contrat sont considérées comme substantielles lorsqu'elles « attestent l'intention des parties de renégocier les conditions essentielles du marché ». Il s'ensuit que, comme la Cour a déjà eu l'occasion de le préciser, par principe, une modification substantielle, au sens de l'article 72 de la directive 2014/24, revêt un caractère consensuel (voir, en ce sens, arrêt du 17 juin 2021, Simonsen & Weel, C-23/20, EU:C:2021:490, point 70).

64 Or, l'intention de renégocier les conditions du marché peut être révélée sous d'autres formes qu'un accord écrit portant expressément sur la modification concernée, une telle intention pouvant notamment être déduite d'éléments écrits établis au cours de communications entre les parties au contrat de marché public.

65 Par conséquent, il convient de répondre aux premières et deuxièmes questions dans les affaires C-441/22 et C-443/22 que l'article 72, paragraphe 1, sous e), et paragraphe 4, de la directive 2014/24 doit être interprété en ce sens que, aux fins de qualifier une modification d'un contrat de marché public de « substantielle », au sens de cette disposition, les parties au contrat ne doivent pas avoir signé un accord écrit ayant pour objet cette modification, une volonté commune de procéder à la modification en question pouvant également être déduite, notamment, d'autres éléments écrits émanant de ces parties.

Sur les troisième à cinquième questions dans l'affaire C-443/22

66 Par ses troisième à cinquième questions dans l'affaire C-443/22, qu'il convient d'examiner ensemble, la juridiction de renvoi demande, en substance, si l'article 72, paragraphe 1, sous c), i), de la directive

2014/24, lu à la lumière du considérant 109 de celle–ci, doit être interprété en ce sens que la diligence dont doit avoir fait preuve le pouvoir adjudicateur pour pouvoir se prévaloir de cette disposition exige notamment que celui-ci ait pris en considération, lors de la préparation du marché public concerné, les risques que font peser sur le respect du délai d'exécution de ce marché les conditions météorologiques habituelles ainsi que des interdictions réglementaires d'exécution de travaux publiées à l'avance et applicables durant une période incluse dans la période d'exécution dudit marché. Cette juridiction demande, en outre, d'une part, si les « circonstances qu'un pouvoir adjudicateur diligent ne pouvait pas prévoir », au sens de ladite disposition, comprennent uniquement celles survenues après l'attribution du marché en question et, d'autre part, si, même dans le cas où de telles conditions météorologiques et interdictions réglementaires devaient être considérées comme prévisibles, elles constitueraient néanmoins une justification objective de l'exécution du contrat au-delà du délai fixé dans les documents qui régissent la procédure d'attribution et dans le contrat initial de marché public.

67 À cet égard, il y a lieu de rappeler que, conformément à l'article 72, paragraphe 1, sous c), i), de la directive 2014/24, il est possible de modifier un marché sans nouvelle procédure de passation de marché lorsque « la modification est rendue nécessaire par des circonstances qu'un pouvoir adjudicateur diligent ne pouvait pas prévoir » et que certaines autres conditions prévues à ce paragraphe 1 sont également remplies, lesquelles ne font pas l'objet des questions posées dans les présentes affaires.

68 Ainsi qu'il découle du libellé même du considérant 109 de la directive 2014/24, les circonstances imprévisibles sont des circonstances extérieures que le pouvoir adjudicateur, bien qu'ayant fait preuve d'une diligence raisonnable lors de la préparation du marché initial, ne pouvait prévoir au moment de l'attribution du marché, compte tenu des moyens à sa disposition, de la nature et des caractéristiques du projet particulier, des bonnes pratiques du secteur et de la nécessité de mettre en adéquation les ressources consacrées à la préparation de l'attribution du marché et la valeur prévisible de celui-ci.

69 Il découle ainsi de l'article 72, paragraphe 1, sous c), i), de la directive 2014/24, lu à la lumière du considérant 109 de celle-ci, que, ainsi que l'ont fait valoir, en substance, tant les gouvernements tchèque et estonien que la Commission dans leurs observations écrites, des conditions météorologiques habituelles ainsi que des interdictions réglementaires d'exécution des travaux publiées à l'avance et applicables à une période incluse dans la période d'exécution du marché ne sauraient être considérées comme des circonstances qu'un pouvoir adjudicateur diligent ne pouvait pas prévoir, au sens de ces dispositions.

70 Il s'ensuit nécessairement que de telles conditions météorologiques et interdictions réglementaires ne sauraient pas non plus être considérées, à un autre titre, comme justifiant le dépassement du délai clair d'exécution des travaux fixé dans les documents qui régissent la procédure d'attribution et dans le contrat initial de ce marché.

71 En outre, lorsqu'il existe des circonstances qui sont prévisibles pour un pouvoir adjudicateur diligent, il peut se prévaloir de la possibilité, conformément à l'article 72, paragraphe 1, sous a), de la directive 2014/24, de prévoir expressément dans les documents qui régissent la procédure d'attribution et dans le contrat initial de marché public des clauses de réexamen en vertu desquelles les conditions d'exécution de ce contrat pourront être adaptées, en cas de survenance de telle ou telle circonstance spécifique, ce qui permet d'apporter des modifications qui autrement nécessiteraient une nouvelle procédure de passation de marché au titre de cet article 72. En effet, en prévoyant explicitement la faculté de modifier ces conditions et en fixant les modalités d'application de celle-ci dans lesdits documents, le pouvoir adjudicateur garantit que tous les opérateurs économiques souhaitant participer audit marché en aient connaissance dès le départ et soient ainsi sur un pied d'égalité au moment de formuler leur offre (voir, en ce sens, arrêts du 29 avril 2004, Commission/CAS Succhi di Frutta, C-496/99 P, EU:C:2004:236, point 118, et du 7 septembre 2016, Finn Frogne, C-549/14, EU:C:2016:634, points 30, 36 et 37).

72 Étant donné que des circonstances telles que celles qui ont été avancées par la commune de Balchik dans l'affaire C-443/22 afin de justifier le dépassement du délai d'exécution initialement convenu avec l'adjudicataire ne sauraient être regardées comme figurant au nombre de celles qu'un pouvoir adjudicateur diligent ne pouvait pas raisonnablement prévoir au moment de la préparation du marché

public concerné, il n'est pas nécessaire de répondre à la question de savoir si la notion de « circonstances qu'un pouvoir adjudicateur diligent ne pouvait pas prévoir », au sens de l'article 72, paragraphe 1, sous c), i), de la directive 2014/24, lu à la lumière du considérant 109 de celle-ci, vise uniquement des circonstances survenues après la conclusion du contrat.

73 Eu égard à l'ensemble des considérations qui précèdent, il y a lieu de répondre aux troisième à cinquième questions dans l'affaire C-443/22 que l'article 72, paragraphe 1, sous c), i), de la directive 2014/24 doit être interprété en ce sens que la diligence dont doit avoir fait preuve le pouvoir adjudicateur pour pouvoir se prévaloir de cette disposition exige notamment que celui-ci ait pris en considération, lors de la préparation du marché public concerné, les risques de dépassement du délai d'exécution de ce marché induits par des causes de suspension prévisibles, telles que les conditions météorologiques habituelles ainsi que les interdictions réglementaires d'exécution de travaux publiées à l'avance et applicables durant une période incluse dans la période d'exécution dudit marché, de telles conditions météorologiques et interdictions réglementaires ne pouvant justifier, lorsqu'elles n'ont pas été prévues dans les documents qui régissent la procédure d'attribution de marché public, l'exécution des travaux au-delà du délai fixé dans ces documents ainsi que dans le contrat initial de marché public.

Sur la troisième question dans l'affaire C-441/22 et la sixième question dans l'affaire C-443/22

74 Eu égard aux réponses apportées aux première et deuxième questions dans l'affaire C-441/22 et aux première à cinquième questions dans l'affaire C-443/22, il n'y a pas lieu de répondre à la troisième question dans l'affaire C-441/22 et à la sixième question dans l'affaire C-443/22.

Sur les dépens

75 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (dixième chambre) dit pour droit :

1) L'article 72, paragraphe 1, sous e), et paragraphe 4, de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE, telle que modifiée par le règlement délégué (UE) 2017/2365 de la Commission, du 18 décembre 2017,

doit être interprété en ce sens que :

aux fins de qualifier une modification d'un contrat de marché public de « substantielle », au sens de cette disposition, les parties au contrat ne doivent pas avoir signé un accord écrit ayant pour objet cette modification, une volonté commune de procéder à la modification en question pouvant également être déduite, notamment, d'autres éléments écrits émanant de ces parties.

2) L'article 72, paragraphe 1, sous c), i), de la directive 2014/24, telle que modifiée par le règlement délégué 2017/2365,

doit être interprété en ce sens que :

la diligence dont doit avoir fait preuve le pouvoir adjudicateur pour pouvoir se prévaloir de cette disposition exige notamment que celui-ci ait pris en considération, lors de la préparation du marché public concerné, les risques de dépassement du délai d'exécution de ce marché induits par des causes de suspension prévisibles, telles que les conditions météorologiques habituelles ainsi que les interdictions réglementaires d'exécution de travaux publiées à l'avance et applicables durant une période incluse dans la période d'exécution dudit marché, de telles conditions météorologiques et interdictions

réglementaires ne pouvant justifier, lorsqu'elles n'ont pas été prévues dans les documents qui régissent la procédure d'attribution de marché public, l'exécution des travaux au-delà du délai fixé dans ces documents ainsi que dans le contrat initial de marché public.

Signatures

---

* Langue de procédure : le bulgare.

JUDGMENT OF THE COURT (Fourth Chamber)

18 January 2024 (*)

(Reference for a preliminary ruling – Procedures for the review of the award of public supply and public works contracts – Directive 89/665/EEC – Access to review procedures – Articles 2(3) and 2a(2) – Obligation for Member States to provide for a review procedure with suspensive effect – Review body of first instance – Review relating to a contract award decision – Article 2(9) – Body responsible for review procedures of a non-judicial character – Conclusion of a public contract before lodging of a judicial action against a decision by that body – Article 47 of the Charter of Fundamental Rights of the European Union – Effective judicial protection)

In Case C-303/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajský soud v Brně (Regional Court, Brno, Czech Republic), made by decision of 5 May 2022, received at the Court on 9 May 2022, in the proceedings

CROSS Zlín a.s.

v

Úřad pro ochranu hospodářské soutěže,

intervening party:

Statutární město Brno,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot, S. Rodin and L.S. Rossi, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Lamote, Administrator,

having regard to the written procedure and further to the hearing on 25 May 2023,

after considering the observations submitted on behalf of:

– CROSS Zlín a.s., by M. Šimka and L. Vaculínová, advokáti,

– the Úřad pro ochranu hospodářské soutěže, by P. Mlsna and I. Pospíšilíková, acting as Agents,

– the Czech Government, by L. Halajová, M. Smolek and J. Vláčil, acting as Agents,

– the Cypriot Government, by N. Ioannou, D. Kalli and E. Zachariadou, acting as Agents,

– the European Commission, by G. Gattinara, P. Ondrůšek and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(3) and Article 2a(2) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) (‘Directive 89/665’), and of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in proceedings between CROSS Zlín a.s. and the Úřad pro ochranu hospodářské soutěže (Office for the Protection of Competition, Czech Republic) (‘the Office’) concerning the confirmation, by the President of the Office, of the rejection of CROSS Zlín’s action against the decision of the Statutární město Brno (City of Brno, Czech Republic) to exclude that company from a tender procedure for the award of a public contract relating to the expansion of the functions of the traffic control centre (concerning the traffic light system) of that city.

Legal context

European Union law

3 The fifth recital of Directive 89/665 is worded as follows:

‘… since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorised to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority; whereas the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently’.

4 Recitals 3, 4 and 36 of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31) state:

‘(3) Consultations of the interested parties and the case-law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms established by [Directive] 89/665/EEC and [Council Directive] 92/13/EEC [of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14)] do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. Consequently, the guarantees of transparency and non-discrimination sought by those Directives should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by Directives 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)] and 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)]. …

(4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not.

…

(36) This Directive respects fundamental rights and observes the principles recognised in particular by [the Charter]. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.'

5 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'1. …

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU [of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)] or Directive 2014/23/EU [of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1)], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…

5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

…

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.'

6 Article 2 of Directive 89/665, entitled 'Requirements for review procedures', states:

'1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.

6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. …

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

…

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU] and independent of both the contracting authority and the review body.

…’

7 Under Article 2a of the directive, entitled ‘Standstill period’:

‘1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive [2014/24] or Directive [2014/23] before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered

lawful by an independent review body or can no longer be subject to a review procedure.

…

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

– a summary of the relevant reasons …, and

– a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.'

8 Article 2d of Directive 89/665, entitled 'Ineffectiveness', provides:

'1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

…

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive [2014/24] or Directive [2014/23], if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

…

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).'

Czech law

9 It is apparent from Paragraphs 241 and 242 of Zákon č. 134/2016 Sb., o zadávání veřejných zakázek (Law No 134/2016 on the award of public contracts), in the version applicable to the dispute in the main proceedings ('Law No 134/2016'), that an objection against the procedure carried out by the contracting authority may be lodged within 15 days of the date on which the complainant learns of a breach of law by the contracting authority.

10 Under Paragraph 245(1) of that law, the contracting authority is to send a decision on the objection to the complainant within 15 days of service of that objection, stating whether it upholds the objection or rejects it. That decision must include reasoning in which the contracting authority makes a detailed and comprehensible statement concerning all the facts set out in the complainant's objection. If the contracting authority upholds the objection, it is also to state in its decision what remedial measures it will take.

11 According to Paragraph 245(4) of that law, if the contracting authority rejects the objection, it is to inform the complainant, in the decision on the objection, about the possibility of submitting to the Office, within the period laid down in Paragraph 251(2) of that law, an application for the initiation of proceedings to review the actions of the contracting authority and about the obligation to deliver a copy of that application to the contracting authority within the same period.

12 Paragraph 246(1) of Law No 134/2016 provides that the contracting authority may not conclude a contract with a supplier:

'(a) before the expiry of the time limit for lodging an objection against a decision to exclude a tenderer from a tendering procedure, to select a supplier, or against an act of voluntary

notification of an intention to conclude a contract;

(b) until delivery to the complainant of a decision on an objection, if an objection has been lodged;

(c) before the expiry of the time limit for submitting an application for the initiation of proceedings to review the actions of the contracting authority, if the latter has rejected the objection that was lodged;

(d) within 60 days of the initiation of proceedings to review the actions of the contracting authority, if the application for initiation of such proceedings was lodged within the time limit. However, the contracting authority may conclude the contract, even within that period, if the Office has dismissed that application or if the administrative proceedings concerning that application have been closed and that decision of dismissal or to close the proceedings has become final in those administrative proceedings.’

13 Under Paragraph 246(2) of that law, the contracting authority may likewise not conclude a contract with a supplier within 60 days of the date of initiation of the proceedings to review the actions of the contracting authority if the Office initiates those proceedings of its own motion. The contracting authority may, however, conclude a contract, even within that period, if the administrative proceedings have been closed and such a decision has become final in those administrative proceedings.

14 In accordance with Paragraph 254(1) of that law, an application to impose a prohibition on the performance of a public contract may be made by an applicant who claims that the contracting authority has concluded the contract, inter alia, without prior publication, despite a prohibition on its conclusion laid down by that law or by an interim measure, or on the basis of a procedure other than the tendering procedure.

15 Paragraph 257(j) of Law No 134/2016 provides that the Office is to close the proceedings by means of an order where the contracting authority has concluded, during the administrative proceedings, an agreement for the performance of the contract which is the subject matter of the review.

16 Paragraph 264(1) of that law provides that the Office, in proceedings based on an application pursuant to Paragraph 254 of that law, is to impose a prohibition in respect of the performance of a contract on a contracting authority if the public contract or framework agreement was concluded in the manner referred to in Paragraph 254(1). A contract in respect of which the Office has imposed a prohibition on performance, without proceeding pursuant to subparagraph 3, is to be void *ab initio*. In accordance with Paragraph 264(2), an agreement for the performance of a public contract is to become void for infringement of that law only in cases where the Office imposes a prohibition on performance of that contract pursuant to Paragraph 264(1).

The dispute in the main proceedings and the question referred for a preliminary ruling

17 On 27 September 2019, the City of Brno launched a procedure for the award of a public contract for the expansion of the functions of the traffic control centre (concerning the traffic light system) of that city. The estimated value of that public contract was 13 805 000 Czech koruny (CZK), excluding value added tax (VAT) (approximately EUR 560 000).

18 As contracting authority, the City of Brno received two bids, one from CROSS Zlín, the lowest, and one from Siemens Mobility, s.r.o. By a notice of 6 April 2020, that contracting authority excluded CROSS Zlín due to failure to meet the tender conditions. On 7 April 2020, the contract was awarded to Siemens Mobility.

19 Cross Zlín lodged an objection to the notice of exclusion, which the contracting authority dismissed by decision of 4 May 2020. That company subsequently lodged an application with the Office for review of the contracting authority’s actions, seeking annulment of the notice of exclusion and of the decision to award the contract in question to Siemens Mobility.

20 During the administrative proceedings before it, the Office adopted of its own motion, on 3 July 2020, an interim measure prohibiting the contracting authority from concluding the public contract at issue until those administrative proceedings had been closed with final effect.

21 By a decision of 5 August 2020, the Office dismissed CROSS Zlín's application. The latter then lodged an administrative appeal against that decision, which the President of the Office, as second-instance administrative body, dismissed by decision of 9 November 2020. On 18 November 2020, the contracting authority concluded the public contract in question with Siemens Mobility.

22 On 13 January 2021, CROSS Zlín brought an action before the Krajský soud v Brně (Regional Court, Brno, Czech Republic), the referring court, against that decision of the President of the Office. In parallel to that action, CROSS Zlín lodged an application for the action to be recognised as having suspensive effect in relation to conclusion of the contract and for the adoption of an interim measure prohibiting the contracting authority from concluding or performing that public contract.

23 On 11 February 2021, that court dismissed the application on the ground, in essence, that where a public contract has already been entered into, it is not appropriate to prohibit the contracting authority concerned from concluding that contract. As Czech law currently stands, even if such a judicial action were upheld and the contested decision annulled, with referral of the case back to the Office, the latter would close the proceedings on the basis of Paragraph 257(j) of Law No 134/2016, without assessing the case on the merits.

24 That court also declined to prohibit the contracting authority from performing the contract since Czech legislation does not preclude the conclusion of a public contract after the decision of the President of the Office has become final in the framework of the administrative proceedings.

25 In that context, the referring court questions whether Directive 89/665 and the requirement to ensure effective judicial review deriving from Article 47 of the Charter preclude legislation of a Member State which enables a contracting authority to conclude a public contract before expiry of the period prescribed for bringing a judicial action against the decision of the second-instance administrative body or before the court hearing the case can rule on an application seeking the adoption of an interim measure prohibiting the contracting authority in question from concluding that contract until the ruling on that action has become final.

26 It is apparent from the case-law of the Czech courts that if a public contract has been concluded before the court hearing the case has ruled on such an action or application, that court no longer makes a ruling on interim measures, given that, in such a case, it is no longer necessary to regulate the situation of the parties on an interim basis.

27 Accordingly, were the court hearing the case to find that the Office had erred in its assessment of the lawfulness of excluding the tenderer concerned, it would have to annul as unlawful the decision of the President of the Office, referred to in paragraph 21 above, and refer the case back to that administrative authority. In that case, if the public contract at issue was concluded before that court gives its decision, the Office, once the case has been referred back to it, will not carry out a fresh examination of the merits of the application for review of the actions of the contracting authority in accordance with the findings of that court and will close the proceedings on the basis of Paragraph 257(j) of Law No 134/2016.

28 In such a situation, the excluded tenderer would only be able to turn to the civil courts in a claim for compensation for the damage caused by the contracting authority's unlawful conduct; however, according to the referring court, the conditions for obtaining such compensation are difficult to satisfy.

29 That court adds that, under Czech legislation, the Office is a 'review body' within the meaning of Directive 89/665. In that regard, Paragraph 246 of Law No 134/2016 lays down the time limits during which the contracting authority is prohibited from concluding a contract during the proceedings before the Office. However, that latter body cannot be considered to be a court or tribunal.

30 Consequently, if, as is apparent from the judgment of 21 December 2021, *Randstad Italia* (C-497/20, EU:C:2021:1037, paragraph 73), it should be held that the independent review body, under Article 2(3)

or Article 2a(2) of Directive 89/665, must be a court or tribunal for the purposes of Article 47 of the Charter, the Czech legislation which allows a public contract to be concluded immediately after the decision of the President of the Office infringes that directive and does not ensure an effective judicial review for tenderers excluded from a public procurement procedure.

31 Lastly, were the Court to find that Directive 89/665 has not been transposed properly into the Czech legal order, the referring court considers that it would be required, where a finding is made that the decision of the contracting authority is unlawful, to oblige the Office to disapply the provisions of Czech law giving rise to such an infringement of that directive.

32 In those circumstances the Krajský soud v Brně (Regional Court, Brno) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is it compatible with [Article] 2(3) and [Article] 2a(2) of Directive [89/665], interpreted in the light of Article 47 of [the Charter], for Czech legislation to permit a contracting authority to conclude a public contract before an action is brought before a court competent to review the legality of a second-instance decision of the [Office] to exclude a tenderer?’

The application to reopen the oral part of the procedure

33 Following the delivery of the Opinion of the Advocate General, CROSS Zlín, by document lodged at the Registry of the Court of Justice on 19 September 2023, requested that the Court order the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

34 In support of its request, CROSS Zlín argues that there is a risk, having regard to the Advocate General’s Opinion, that the case may be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union. The Czech legal order does not allow an administrative court, either in fact or in law, to annul a contract, even if it was entered into on the basis of an unlawful decision by the contracting authority. The Opinion does not take account of that factor, which CROSS Zlín would aim to explain in a reopening of the oral procedure.

35 In addition, it states that it wishes in particular to address before the Court the reason why the Krajský soud v Brně (Regional Court, Brno) dismissed its application for the adoption of an interim measure intended to prohibit the performance of the public contract at issue in the main proceedings; the jurisdiction of the Czech administrative courts to rule on the validity of contracts concluded in a tender procedure in connection with the decisions given at first instance by the Office; and the actual effects of the annulment of a decision of the Office by an administrative court and their consequences for the agreement contract for the performance of a public contract that has already been concluded. In that regard, it suggests making additions to the answer which the Advocate General proposed to give to the question referred for a preliminary ruling.

36 It should be observed that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his or her involvement. The Court is not bound either by the Advocate General’s Opinion or by the reasoning on which it is based (judgment of 28 September 2023, *LACD*, C-133/22, EU:C:2023:710, paragraph 22 and the case-law cited).

37 It should also be borne in mind that neither the Statute of the Court of Justice of the European Union nor the Rules of Procedure make provision for the interested parties to respond to an Advocate General’s Opinion. As a consequence, the fact that a party to the main proceedings or an interested party disagrees with the Advocate General’s Opinion, irrespective of the questions examined in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgments of 28 May 2020, *Interseroh*, C-654/18, EU:C:2020:398, paragraph 33, and of 9 November 2023, *Všeobecná úverová banka*, C-598/21, EU:C:2023:845, paragraph 50).

38 CROSS Zlín cannot therefore validly justify its request to reopen the oral part of the procedure by suggesting additions to the answer to the question referred for a preliminary ruling proposed by the Advocate General in his Opinion.

39 In addition, it is true that pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

40 However, CROSS Zlín and the interested parties who participated in the present proceedings have been able to set out, during both the written and oral stages of the procedure, the matters of law which they considered relevant to enable the Court to interpret Directive 89/665, in order to answer the question referred by the referring court. In that respect, the Court considers that it has all the information necessary to rule on the present request for a preliminary ruling and that none of the factors raised by CROSS Zlín in support of its request to reopen the oral part of the procedure justifies such a reopening on the basis of Article 83 of the Rules of Procedure.

41 In those circumstances, the Court considers, after hearing the Advocate General, that there is no need to order that the oral part of the procedure be reopened.

Consideration of the question referred

42 It should be noted as a preliminary point that, according to settled case-law, it is for the Court, in the procedure laid down by Article 267 TFEU providing for cooperation with national courts, to provide the referring court with an answer which will be of use to it and enable it to decide the case before it and, to that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 5 May 2022, *Universiteit Antwerpen and Others*, C-265/20, EU:C:2022:361, paragraph 33 and the case-law cited).

43 The wording of the question refers, inter alia, to an interpretation of Article 2(3) of Directive 89/665 in relation to a Member State's legislation that enables the contracting authority to conclude a public procurement contract before the judicial body with jurisdiction is able to review the legality of a decision by the contracting authority to exclude a tenderer from that contract.

44 However, it should be observed that Article 2(3) does not refer to review of a decision to exclude a tenderer from the contract concerned, but review of a decision to award that contract. Accordingly, since it is apparent from the information in the request for a preliminary ruling that CROSS Zlín sought to have the Office annul not only the notice concerning its exclusion, but also the decision to award the public contract at issue in the main proceedings to the other tenderer, Siemens Mobility, it is necessary to examine the present request for a preliminary ruling with respect solely to that award decision.

45 In those circumstances, it must be held that, by its question, the referring court asks, in essence, whether Article 2(3) and Article 2a(2) of Directive 89/665 must be interpreted as precluding legislation of a Member State which prohibits a contracting authority from concluding a public contract only until the date on which the body of first instance, within the meaning of Article 2(3), which, in that Member State, is not judicial in character, rules on the review of the decision to award that contract.

46 It should be observed at the outset that Directive 89/665 contains detailed provisions laying down a coherent system of review procedures in the field of public contracts which must, in accordance with Article 1(3) of that directive, be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

47 In that regard, it should be observed in the first place that, according to Article 2a(1) of Directive 89/665, Member States are to ensure that the persons referred to in Article 1(3) of that directive have sufficient time for effective review of the contract award decisions taken by contracting authorities, by

adopting the necessary provisions respecting the minimum conditions set out, inter alia, in Article 2a(2).

48 The latter provision lays down the minimum standstill periods during which it is not permitted to conclude the public contract following the decision to award it. Those periods, depending on the circumstances, are 10 or 15 calendar days, with effect from the day following the date on which the contract award decision in question was sent to the tenderers concerned or received by them, depending on the method of sending that decision.

49 Article 2a(2) of Directive 89/665 thus establishes automatic standstill periods in relation to the conclusion of a public contract in order to ensure the effectiveness of the review of such an award decision which may be sought by the persons referred to in Article 1(3) of that directive.

50 In the second place, when those persons apply for such a review, Article 2(3) of that directive applies.

51 In accordance with settled case-law, when interpreting a provision of EU law, account must be taken not only of its wording but also of its context and the objectives pursued by the rules of which it forms part (judgment of 22 December 2022, *Sambre & Biesme and Commune de Farciennes*, C-383/21 and C-384/21, EU:C:2022:1022, paragraph 54 and the case-law cited).

52 In that regard, it is apparent, first of all, from the wording of Article 2(3) of Directive 89/665 that when a body of first instance, which is independent of the contracting authority, reviews a contract award decision, the contracting authority may not conclude that contract before that body of first instance has made a decision on the application either for interim measures or for that review.

53 Accordingly, first, that provision lays down that an application for review of the decision to award a public contract has suspensive effect, with regard to the signing of the contract, during the procedure before the first-instance body carrying out that review or, at the very least, until that body has ruled on any application for interim measures. Second, even though that provision requires the body in question to be independent of the contracting authority, it does not contain any indication to show that that body should be judicial in character.

54 As regards, next, the context of Article 2(3) of Directive 89/665, Article 2(9) explicitly foresees a situation where ‘bodies responsible for review procedures are not judicial in character’, from which it follows that the Member States are able to confer on such bodies the power to hear and determine reviews of decisions to award a public contract. In such cases, Article 2(9) states that any allegedly illegal measure taken by such a review body which is not judicial in character or any alleged defect in the exercise of the powers conferred on it must be capable of being the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 267 TFEU, which is independent of both the contracting authority and of that non-judicial review body that ruled at first instance.

55 Article 2(9) thus allows Member States to choose between two options in organising review procedures for public contracts. The first option consists in vesting the power to determine reviews in judicial bodies. Under the second option, that power is, initially, granted to bodies that are not judicial in character. In such circumstances, all the decisions taken by those bodies must be amenable to judicial review or to a review which should, in essence, be ‘judicial’ for the purposes of EU law, which makes it possible to ensure that an adequate remedy is available (see, to that effect, judgment of 4 March 1999, *HI*, C-258/97, EU:C:1999:118, paragraphs 16 and 17).

56 However, it must be observed that Article 2(3) of Directive 89/665, in laying down an obligation to suspend the conclusion of a public contract, does not make any reference to the judicial review, provided for in Article 2(9) of that directive, of the decisions by the bodies responsible for review procedures which are not judicial in character.

57 In those circumstances, both that lack of reference and the choice afforded to Member States by Article 2(9) of Directive 89/665 to grant jurisdiction to determine procedures for the review of decisions awarding a contract to first-instance bodies that are either judicial or non-judicial in character mean that, when a Member State decides to confer that power on a body of first instance which is not

judicial in character, the words ‘review body’ in Article 2(3) refer to that non-judicial body of first instance. In such circumstances, the Member States must provide for suspension of the conclusion of the public contract concerned, either automatically until that body has ruled on the review or, at the very least, until it has decided on an application for interim measures seeking such a suspension.

58 By contrast, Article 2(3) of Directive 89/665, read in the light of Article 2(9) thereof, does not require that that suspension should remain in place after the end of the procedure before such a non-judicial review body, for example until a body that is judicial in character has ruled on the action that may be brought against the decision of that non-judicial review body.

59 Lastly, that finding is consistent with the objectives pursued by Directive 89/665. That directive is intended to ensure full respect for the right to an effective remedy and to a fair hearing, enshrined in the first and second paragraphs of Article 47 of the Charter (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 128 and the case-law cited).

60 In that regard, it has been held that Article 1(1) and (3) of that directive, which is intended to protect economic operators against arbitrary behaviour on the part of the contracting authority, is thus designed to reinforce the existence, in all Member States, of effective remedies, which are as rapid as possible, so as to ensure the effective application of the EU rules on public procurement, in particular at a stage when infringements can still be rectified (judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 127 and the case-law cited).

61 That said, it should also be observed that the EU legislature sought, by the provisions of Directive 89/665, to accommodate the interests of the tenderer adversely affected and the interests of the contracting authority and of the successful tenderer (see, to that effect, judgment of 11 September 2014, *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 63, and order of 23 April 2015, *Commission* v *Vanbreda Risk & Benefits*, C-35/15 P(R), EU:C:2015:275, paragraph 34).

62 Accordingly, first, Article 2(5) of that directive provides that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such interim measures when their negative consequences could exceed their benefits. The interest in the conclusion of public contracts without excessive delay constitutes such a public interest.

63 Second, the second subparagraph of Article 2(7) of Directive 89/665 states provides that a Member State may provide that, where a contract has been concluded in accordance with Article 2(3), that is to say, that it has been entered into after the end of the standstill on its conclusion, the powers of the body responsible for review procedures are to be limited to awarding damages to any person harmed by an infringement of EU law on public procurement or of national rules implementing that law.

64 Those factors therefore support an interpretation, which arises from reading Article 2(3) of Directive 89/665 in the light of Article 2(9), to the effect that the suspension of the conclusion of a public contract, provided for in Article 2(3), is to remain in place, at the latest, until the date on which the body of first instance rules on an application for review of the decision to award that contract, whether that body is of a judicial character or not. Member States may provide that after that body has delivered its decision a party that has suffered harm may only claim damages.

65 In the third place, that interpretation cannot be called into question by the judgment of 21 December 2021, *Randstad Italia* (C-497/20, EU:C:2021:1037). In paragraph 73 of that judgment, the Court interpreted the expression ‘independent review body’, within the meaning of the second subparagraph of Article 2a(2) of Directive 89/665, as referring to an independent and impartial tribunal previously established by law, within the meaning of Article 47 of the Charter. However, the Court expressly limited that latter interpretation, stating that it applied ‘[for] determining whether the exclusion of a tenderer has become definitive’ for the purposes of that second subparagraph of Article 2a(2).

66 In that regard, the Court stated, in paragraph 74 of that judgment, that the fact that the exclusion decision is not yet definitive determines, for tenderers, their standing to challenge the contract award decision. In paragraph 75 of that judgment, it specified that ‘only the definitive exclusion, within the

meaning of [the second subparagraph of] Article 2a(2) of Directive 89/665, can have the effect of depriving a tenderer of standing to challenge the [contract] award decision'.

67 It may thus happen that a decision by the 'independent review body' referred to in the second subparagraph of Article 2a(2) leads to a tenderer being deprived of standing to challenge a contract award decision. In that context, observance of the right of such a tenderer to effective judicial protection requires that the body ruling on the lawfulness of the exclusion of that tenderer be an independent and impartial tribunal previously established by law, within the meaning of Article 47 of the Charter.

68 However, those considerations do not apply with respect to the review body of first instance referred to in Article 2(3) of Directive 89/665. Where a Member State makes use of the possibility afforded to it by that directive in order to put in place such a body that is not judicial in character, the right to effective judicial protection is ensured by the requirement, laid down in Article 2(9), that all the decisions of such a non-judicial review body can be the subject of judicial review.

69 In the fourth and last place, it is important, however, to observe, as the European Commission has done, that where the legislation of a Member State does not provide for the automatic suspension of the conclusion of a public contract until the date on which the review body of first instance, as referred to in Article 2(3) of Directive 89/665, rules on the review, and where that review body is not judicial in character, the rejection by that body of an application for interim measures seeking to prohibit the conclusion of a public contract until the date on which that body rules on that application must be amenable to judicial review with suspensive effect until the court considering the matter has ruled on those interim measures.

70 That requirement derives from a combined reading of Article 2(3) and Article 2(9) of Directive 89/665. Accordingly, in order to ensure the effectiveness of an action against the decision of a non-judicial body of first instance rejecting an application for interim measures seeking to prohibit the conclusion of a public contract until the date on which that body has ruled, first, the tenderer concerned by that rejection decision must be accorded a reasonable standstill period in order to enable it to bring that action and, second, if that action is brought, the conclusion of that contract must remain suspended until the court considering the matter rules on that action.

71 In the present case, it is apparent from the order for reference that Paragraph 246 of Law No 134/2016 provides that a public contract may not be concluded, first, before expiry of the period for lodging a complaint with the contracting authority against the decision awarding the contract, and then before expiry of the period for submitting an application for review of the acts of the contracting authority to the Office, and, second, during the procedure before the Office, which, according to the referring court, is the review body of first instance, which is independent of the contracting authority, within the meaning of Article 2(3) of Directive 89/665, and which is not judicial in character. In particular, subject to verification, which it is for that court to carry out, in accordance with Paragraph 246(1), the automatic prohibition on concluding a public contract remains in place until the date on which that review body of first instance rules on the review of the decision awarding the contract.

72 In that regard, it follows from the information in the order for reference that, in the main proceedings, first, the Office adopted of its own motion, on 3 July 2020, an interim measure prohibiting the contracting authority from concluding the public contract at issue in the main proceedings until the closure with final effect of the administrative proceedings before the Office. Next, the President of the Office, as second-instance administrative body, rejected, by decision of 9 November 2020, the complaint which CROSS Zlín had lodged against the Office's decision rejecting its application for annulment of the decision awarding the public contract at issue and, lastly, on 18 November 2020, the contracting authority concluded that contract with the successful tenderer. It follows that that contract was concluded only after the Office ruled definitively, at two levels of jurisdiction, on the lawfulness of that award decision, which it is, however, for the referring court to verify.

73 It should thus be found, subject to the checks that that court must carry out, that that national legislation and its implementation in the main proceedings appear to ensure the proper application of Article 2(3) and Article 2a(2) of Directive 89/665, read in the light of the right to effective judicial protection, as provided for in Article 47 of the Charter.

74 In the light of the foregoing considerations, the answer to the question referred is that Article 2(3) and Article 2a(2) of Directive 89/665 must be interpreted as not precluding national legislation which prohibits a contracting authority from concluding a public contract only until the date on which the body of first instance, within the meaning of the aforementioned Article 2(3), rules on the review of the decision to award that contract, it being irrelevant in that regard whether that review body is judicial in character or not.

Costs

75 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 2(3) and Article 2a(2) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014,

must be interpreted as not precluding national legislation which prohibits a contracting authority from concluding a public contract only until the date on which the body of first instance, within the meaning of the aforementioned Article 2(3), rules on the review of the decision to award that contract, it being irrelevant in that regard whether that review body is judicial in character or not.

[Signatures]

---

* Language of the case: Czech.

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 7 September 2023 (1)

Case C-303/22

CROSS Zlín a.s.
v
Úřad pro ochranu hospodářské soutěže,
intervener:
Statutární město Brno

(Request for a preliminary ruling from the Krajský soud v Brně (Regional Court, Brno, Czech Republic))

(Reference for a preliminary ruling – Review concerning public supply and public works contracts – Directive 89/665/EEC – Obligation for Member States to provide for review mechanisms – Access to review – Conclusion of the contract prior to judicial review – Effectiveness of the judgment – Interim measure suspending the effects of the contract)

1. A court in the Czech Republic has asked the Court of Justice whether national rules on review in the area of public procurement are compatible with Directive 89/665/EEC (2) and Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2. The Czech court is unsure, in particular, whether domestic rules permitting public contracts to be concluded before a court has ruled on an action brought by a tenderer challenging his or her exclusion from the procedure and the award of the contract to a competitor comply with Directive 89/665 and Article 47 of the Charter.

I. Legal framework

A. European Union law. Directive 89/665 (3)

3. Article 1 (‘Scope and availability of review procedures’) provides:

‘1. This Directive applies to contracts referred to in Directive 2014/24/EU of the European Parliament and of the Council [of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)] unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/24] …, decisions taken by the contracting authorities may be reviewed

effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

4. Article 2 ('Requirements for review procedures') states:

'1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

…

6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

…

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body.

…'

5. Article 2a ('Standstill period') reads:

'1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive [2014/24] … before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

…'

B. Law of the Czech Republic

1. Zákon č. 134/2016 Sb., o zadávání veřejných zakázek (Law No 134/2016 on the award of public contracts)

6. Under Paragraph 246(1):

'The contracting authority may not conclude a contract with the supplier:

…

(d) within 60 days of commencement of the procedure to review the acts of the contracting authority, provided that the application for review was not submitted out of time; however, the contracting authority may conclude the contract before expiry of that period where the [Úřad pro ochranu hospodářské soutěže (Office for the Protection of Competition; 'the ÚOHS')] has rejected the application for review or where the administrative proceedings related to the review have been discontinued and the decision thereon has become final.'

7. Paragraph 257(j) provides:

'The ÚOHS shall, by order, discontinue proceedings if

…

(j) during the administrative proceedings, the contracting authority concluded a contract for performance of the subject matter of the public contract under review

…’.

2. Zákon č. 500/2004 Sb., správní řád (Law No 500/2004 establishing the Code of Administrative Procedure)

8. Paragraph 61 provides:

‘1. In the proceedings, the administrative body may, by decision, on its own initiative or on the application of a party, before the proceedings have closed, adopt an interim measure where necessary in order to regulate on a temporary basis the position of the parties to the proceedings. … An interim measure may require a party or another person to act, to refrain from acting or to countenance an action, and may secure an item capable of serving as evidence or being the subject of enforcement.

…

3. The administrative body shall, by decision, revoke the interim measure immediately upon the ground which justified its adoption ceasing to exist. Failing that, the interim measure shall expire on the day on which the decision on the merits of the case has become enforceable or has otherwise begun to produce legal effects.

…’.

3. Zákon č. 150/2002 Sb., soudní řád správní (Law No 150/2002 establishing the Code of Procedure before the Administrative Courts)

9. Paragraph 38 provides:

‘1. Where an action has been filed and it is necessary to regulate on a temporary basis the situation of the parties, on account of the risk of serious harm, the court may, by order, adopt an interim measure requiring the parties to act, to refrain from acting or to countenance an action. On the same grounds, the court may also impose such an obligation on a third party, provided there is a legitimate basis for doing so.

…’.

10. According to Paragraph 72(1):

‘An administrative action may be filed within two months of service of the decision on the plaintiff by means of the delivery of a certified copy of the decision or by other means provided for by law, unless a special law lays down a different period.’

11. Under Paragraph 78:

‘(1) If the administrative action is well founded, the court shall annul the contested decision on the ground that it is unlawful or is vitiated by procedural defects. The court shall also annul the contested decision on the ground that it is unlawful if it finds that the administrative body has overstepped the limits, as established by law, of its administrative discretion, or has misused that discretion.

…

(4) If the court annuls the decision, it shall also order that the case be referred back to the defendant for further proceedings.’

II. Facts, proceedings and question referred for a preliminary ruling

12. On 27 September 2019, the Statutární město Brno (City of Brno, Czech Republic) launched a tender procedure for the award of a public contract concerning the expansion of the functions of the traffic control centre – traffic light system. (4)

13. The companies CROSS Zlín a.s. ('CROSS') and Siemens Mobility, s.r.o. participated in the procedure, each submitting a bid.

14. On 6 April 2020, the contracting authority excluded CROSS from the procedure for failing to meet the tender conditions.

15. On 7 April 2020, the contracting authority selected Siemens Mobility as supplier.

16. CROSS challenged the decision of 6 April 2020 before the same contracting authority, which dismissed that challenge on 4 May 2020.

17. CROSS submitted an application for review of the decision of 4 May 2020 before the ÚOHS, seeking the annulment of its exclusion and of the selection of Siemens Mobility as supplier.

18. On 3 July 2020, the ÚOHS – of its own motion – adopted an interim measure prohibiting the contracting authority from concluding the contract before completion of the review procedure.

19. On 5 August 2020, the ÚOHS rejected CROSS's application for review.

20. CROSS brought an administrative appeal against the decision of 5 August 2020 before the President of the ÚOHS.

21. On 9 November 2020, the President of the ÚOHS dismissed the administrative appeal. That decision became final (in administrative terms) (5) on 13 November 2020.

22. On 18 November 2020, the contracting authority concluded the public contract with Siemens Mobility.

23. On 13 January 2021, CROSS brought an administrative action against the decision of the President of the ÚOHS of 9 November 2020 before the Krajský soud v Brně (Regional Court, Brno, Czech Republic).

24. CROSS asked the court to grant suspensive effect to the action and, on a provisional basis, to prohibit the contracting authority from concluding the contract.

25. On 11 February 2021, the Krajský soud v Brně (Regional Court, Brno) dismissed CROSS's applications, holding that:

– as the contract had already been concluded, there were no grounds for prohibiting the contracting authority from concluding it;

– even if the contested decision were annulled, the result would be the referral of the case back to the ÚOHS, which would discontinue the proceedings;

– it would also not be possible to prohibit the contracting authority from performing the contract since there was no legal impediment to its conclusion when it was entered into, the decision of the President of the ÚOHS having become final.

26. On 28 March 2022, the Krajský soud v Brně (Regional Court, Brno) heard the parties to the proceedings on the question of whether a reference for a preliminary ruling should be made, in the light of the concerns as to the compatibility of the national rules with Directive 89/665 and Article 47 of the Charter.

27. In that court's view, those national rules, which allow a public contract to be concluded as soon as the decision of the President of the ÚOHS has become final (in administrative terms), might be at

odds with Article 2(3) and Article 2a(2) of Directive 89/665, as they do not ensure effective judicial protection for tenderers excluded from the selection procedure.

28. After hearing the parties, the Krajský soud v Brně (Regional Court, Brno) decided to refer the following question to the Court of Justice for a preliminary ruling:

‘Is it compatible with [Article 2(3) and Article 2a(2)] of Directive 89/665/EEC, interpreted in the light of Article 47 of the Charter …, for Czech legislation to permit a contracting authority to conclude a public contract before an action is brought before a court competent to review the legality of a second-instance decision of the [ÚOHS] to exclude a tenderer?’

III. Procedure before the Court

29. The request for a preliminary ruling was registered at the Court on 9 May 2022.

30. Written observations were submitted by the ÚOHS, the Czech and Cypriot Governments and the European Commission. All of them, together with CROSS, appeared at the hearing held on 25 May 2023.

IV. Assessment

A. Preliminary remarks

1. Non-judicial character of the ÚOHS

31. According to the order for reference, even though Czech legislation treats the ÚOHS as a ‘review body’ for the purposes of Directive 89/665, it cannot be classified as an independent and impartial tribunal within the meaning of Article 47 of the Charter and paragraph 73 of the judgment of 21 December 2021, *Randstad Italia*. (6)

32. The Court must have regard to the national legal framework as described by the referring court, which is the authoritative interpreter of its domestic law. (7) Accordingly, the referring court’s assessment of the legal nature of the ÚOHS must be taken at face value.

33. The fact of the matter is that, in its written observations before the Court, (8) the ÚOHS does not claim that it is a judicial body, but merely states that it is a ‘body responsible for review procedures’ within the meaning of Article 2 of Directive 89/665.

2. Subject matter of CROSS’s challenge

34. Notwithstanding the concerns expressed by the Commission, (9) CROSS’s challenge was also directed against the award of the contract to Siemens Mobility, as is apparent from the order for reference. (10)

35. That is consistent with the content of the question referred for a preliminary ruling, in which the Court is asked to interpret Article 2(3) of Directive 89/665, that is, the rule governing the suspensive effect of ‘review[ing] a contract award decision’.

B. Interpretation of Article 2(3) of Directive 89/665

36. With regard to the decisions of contracting authorities (in so far as they concern, obviously, contracts falling within the scope of Directive 2014/24), Member States must ensure that the persons concerned have available review mechanisms suitable for determining, quickly and effectively, whether those decisions have infringed EU law on public procurement or national rules transposing EU law into their respective legal systems. That is, ultimately, the purpose of Directive 89/665.

37. Article 1(5) of that directive allows Member States to require a person seeking review of a decision of the contracting authority to do so, in the first place, with that same contracting authority.

38. The procedural autonomy of the Member States thus extends to the – optional – introduction of an initial review (claim) (11) before the contracting authority. That step entails the suspension of the possibility of concluding the contract, as occurred here.

39. Apart from that *claim* before the contracting authority, Directive 89/665 also provides for genuine *review* before 'bodies responsible for review procedures'. Article 2 of that directive refers to those bodies, acknowledging that they may be 'judicial in character' or may not, as confirmed by paragraph 9 thereof (which lays down the applicable rules in the case of non-judicial bodies). (12)

40. In particular, Article 2(3) of Directive 89/665 provides for a review of a contract award decision by 'a body of first instance, which is independent of the contracting authority'. As I will explain below, that provision neither requires the body of first instance to be judicial in character nor prevents it from being so.

1. Concept of 'body of first instance, which is independent of the contracting authority'

41. The term used in Article 2(3) of Directive 89/665 is a broad one. (13) It encompasses the following:

– Non-judicial bodies entrusted with the administrative oversight (review) of decisions of the contracting authority. (14)

– Judicial bodies on which the Member State's procedural rules confer jurisdiction *at first instance* to rule directly on actions against decisions of the contracting authority which have not been challenged before administrative bodies. By definition, those judicial bodies are independent of the contracting authority.

42. The emphasis in the wording of Article 2(3) is on the term 'body of first instance' (and, possibly, on its independence from the contracting authority), but not, I repeat, on the judicial or non-judicial character of that body.

43. Accordingly, a court may, if national legislation so provides (which does not appear to be the case in the Czech Republic), act as a body of first instance under Article 2(3) of Directive 89/665.

2. Suspensive effect of review before a body of first instance

44. Under Article 2(3) of Directive 89/665, Member State law must ensure that the contracting authority does not conclude the contract before the review body of first instance has taken a decision on the application either for interim measures or for review. The suspension is to end no earlier than the expiry of the period established in other provisions of Directive 89/665. (15)

45. Under Article 2(3) of Directive 89/665, the automatic standstill period applies only until the body of first instance (here, the ÚOHS) has taken a decision on the application either for interim measures or for review.

46. Except in the situations envisaged in Article 2(3) (and Article 1(5)), Directive 89/665 does not require review procedures necessarily to have automatic suspensive effect. Article 2(4) of the directive makes that clear.

47. Automatic suspensive effect therefore applies to review procedures which Article 2(3) classifies as reviews before a body *of first instance*. It is that characteristic (together with independence from the contracting authority) which determines whether the provisional prohibition on concluding the contract comes into play.

48. Directive 89/665 does not, I repeat, *necessarily* extend automatic suspensive effect to subsequent judicial reviews of the decision of the body of first instance, if it is an administrative body. The general provision of Article 2(4) of Directive 89/665 applies to such judicial reviews.

49. At a later stage in this Opinion, I will consider whether Article 47 of the Charter requires such judicial reviews (subsequent to the decision of the 'body of first instance') to have the same suspensive effect as that governed by Article 2(3) of Directive 89/665.

3. Different review bodies, under Czech law, and the suspensive effect of applications for review brought before them

50. It follows from the information provided to the Court that, in the Czech Republic, concerned parties have the following means of obtaining a review ('review' in the broad sense) of contract award decisions.

– An initial claim before the contracting authority itself. In the present case, CROSS submitted a claim before the Statutární město Brno (City of Brno), which was the contracting authority. Its claim therefore falls within the scope of Article 1(5) of Directive 89/665 and, in accordance with that provision, the contracting authority refrained from concluding the contract while the claim was pending.

– A subsequent review of the award decision before the ÚOHS, acting as a 'body of first instance … independent of the contracting authority'. That review, which is not judicial in nature, falls within the scope of Article 2(3) of Directive 89/665. That is why the ÚOHS provisionally prohibited the contracting authority from concluding the contract.

– A final review, which is judicial in nature, before the administrative courts, like the review sought in the present case. That review will not necessarily and automatically have the suspensive effect referred to in Article 2(3) of Directive 89/665 if use has previously been made of the 'administrative channel' before the ÚOHS.

51. It should be noted that, in principle, there is nothing in Directive 89/665 to prevent the contract being concluded before or during the judicial review, where such judicial review is preceded by the review conducted and decided on by the ÚOHS.

C. Effective judicial remedies. Article 2(9) of Directive 89/665 and Article 47 of the Charter

52. As regards Directive 89/665, the Court has held that '… the right to an effective remedy and to a fair hearing, enshrined in the first and second paragraphs of Article 47 of the Charter, is relevant, in particular, when the Member States establish, in accordance with that obligation, detailed procedural rules governing the *judicial remedies* which safeguard the rights conferred by EU law *on candidates and tenderers harmed by decisions of contracting authorities*'. (16)

53. Article 1 of Directive 89/665 requires Member States to take the legislative measures necessary to ensure that decisions taken by the contracting authorities may be reviewed *effectively* in accordance with the conditions set out in Articles 2 to 2f of that directive.

54. The requirement of *effectiveness* naturally extends to actions brought before the courts, which are governed by Article 47 of the Charter. That requirement has consequences for the interim stage of those actions.

55. As I have already pointed out, Article 2(3) of Directive 89/665 confers suspensive effect on reviews before bodies *of first instance*. Suspension does not, however, automatically extend to subsequent judicial reviews of the decision of the (administrative) body of first instance. They are governed by Article 2(4) of Directive 89/665.

56. However, it is worth bearing in mind the Court's case-law on the interim protection that must be available in proceedings adjudicating on rights deriving from EU law.

– As a general rule, 'a national court seised of a dispute governed by European Union law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Union law'. (17)

– ‘The principle of effective judicial protection of an individual’s rights under Community law must be interpreted as requiring it to be possible in the legal order of a Member State for interim relief to be granted until the competent court has given a ruling on whether national provisions are compatible with Community law, where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given on the existence of such rights.’ (18)

57. In keeping with the objective of ‘ensur[ing] full respect for the right to an effective remedy …, in accordance with the first and second subparagraphs of Article 47 of the Charter’, (19) the Court partners those guarantees with the protection of the rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities. (20) That is why it has found that interested parties must be afforded ‘a real possibility of bringing proceedings and, *in particular, of applying for interim measures*’ pending conclusion of the contract. (21)

58. If, as here, the bodies responsible for review procedures are not judicial in character (that is, they do not form part of the system of judicial protection *stricto sensu*), the case-law cited immediately above requires it to be possible to apply to a court for a ruling on the decisions of those bodies.

59. That is confirmed by Article 2(9) of Directive 89/665 in the field of public procurement: where Member States opt for review bodies with an *administrative* set-up, it must be possible for the decisions of those bodies to ‘be the subject of judicial review …’.

60. In such cases, Article 2(9) of Directive 89/665 requires judicial review to be available as a means of challenging ‘any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it’.

61. That judicial review must incorporate the *possibility* for the court to adopt interim measures (or to review interim measures already ordered in earlier proceedings), so that the infringement committed by the review body does not become irreversible as a consequence of it not having corrected the contracting authority’s unlawful conduct. (22) That is the only way to ensure that the judicial protection guaranteed by Article 47 of the Charter is effective.

62. It is against that background that the prospect (second subparagraph of Article 2(7) of Directive 89/665) of the judicial response being limited to an award of damages, to which I will refer below, must be understood.

63. Considered in isolation, the second subparagraph of Article 2(7) of Directive 89/665 might suggest (as one of the participants at the hearing argued) that Member States are entitled to provide, without any conditions, that the only response to an unlawful act is limited to an award of damages.

64. It is my view, however, that that proposition is misconceived and that only a combined view of Article 2(7) and (9) of Directive 89/665 respects the right to an effective remedy. Any infringement or allegedly unlawful measure adopted by a non-judicial review body of first instance must be subject to review by a judicial body *stricto sensu* which has had the opportunity to give an interlocutory ruling, before deciding whether annulment of the contract warrants damages alone.

65. Of course, the fact that that possibility exists does not mean that an interim measure must be adopted in every case: it will be for the court, after assessing the interests at stake, to determine whether there is *periculum in mora* and whether the party seeking the measure has, at least, a prima facie case. What is at issue, I repeat, is that the court must have full capacity to decide on the interim measure.

66. In my view, there is no reason to exclude from such interim protection cases in which the contract was concluded prior to the judicial review. It is true that, in such a situation, a court would not be able *to suspend* the conclusion of something which has already been concluded, but it retains the ability to take other types of measures, such as the provisional suspension of the effects of the signed contract.

67. At the hearing, the Czech Government and the ÚOHS argued that, if that possibility were to be accepted, the public interest in expeditious and effective public procurement might be undermined, since judicial proceedings are generally protracted and the delay would be indefensible.

68. I do not think that that objection is insurmountable.

– First, the impact of the delay due to judicial oversight would not extend to the judicial process as a whole, but only to the short period which the court has to adopt or refuse the interim measure. (23) Since the contested decisions are normally enforceable, any delay would be limited to the time needed for the court to give an interlocutory ruling. (24)

– Second, the practical difficulties recorded were based on a comparison between the human resources made available to the ÚOHS and those made available to the Czech administrative courts. In those circumstances, it is for the State with an interest in ensuring that public procurement is flexible to take appropriate procedural measures to avoid delay. That circumstance cannot be relied on to favour an interpretation of the directive which weakens the judicial protection guaranteed by Article 47 of the Charter.

69. My proposed solution is feasible under Czech law because, as acknowledged at the hearing, Paragraph 38 of Law No 150/2002 permits the adoption of 'an interim measure requiring the parties to act, to refrain from acting or to countenance an action'. That provision does not, as such, prohibit the suspension of the effects of a contract which has already been concluded.

70. I share the Commission's view (25) that care should be exercised when making use of that possibility and that vexatious or frivolous applications for interim measures should be rejected. In my view, the court must strictly require, in addition to *periculum in mora*, a body of legal argument which, in itself, suggests that the substantive claim has some likelihood of success (*fumus boni juris*).

71. The court hearing the application for interim measures will also have to consider carefully whether overriding reasons relating to a general interest (which cannot simply be equated with the economic interests directly linked to the contract) (26) require the effects of the contract to be provisionally maintained after it has been concluded.

72. The considerations set out above do not entail extending the *automatic suspension* mechanism provided for in Article 2(3) of Directive 89/665 to court proceedings. To my mind, it is not necessary to force the wording of that provision, stretching the effects of automatic suspension beyond what the legislature intended. Quite simply, if the independent review body is not a judicial body, Article 47 of the Charter provides that the court must retain full jurisdiction to rule on the interim measure, in accordance with the rules of its national law.

73. In those circumstances, two scenarios are possible.

– The contract between the contracting authority and the successful tenderer has not been signed. The decision on the interim measure will focus on the provisional suspension of the possibility of concluding the contract.

– If the contract has been signed, the decision on the interim measure may affect the application of the effects of the contract, which the court has the power to suspend.

D. Effectiveness of judgments annulling the contract

74. The considerations set out above answer the referring court's question concerning the interpretation of Article 2(3) of Directive 89/665.

75. That said, in its request for a preliminary ruling, the referring court raises concerns which, although related to interim measures, fall outside the scope of those measures and instead concern the effectiveness of the judgment bringing the proceedings to a close. In that connection, it makes the following observations.

– If the ÚOHS's decision is annulled by a court, the case will be referred back to it for further proceedings. However, if the contract has already been concluded, the ÚOHS will not re-examine the application for review of the contracting authority's acts, but will discontinue the proceedings.

– Accordingly, the situation may arise whereby an excluded tenderer has no chance of being awarded the contract, despite a court having upheld its claims, since the contract will already have been concluded by the time the administrative action has been conducted and decided on.

– In those circumstances, a plaintiff who has secured a court declaration that the tender procedure is null and void is only entitled to claim, in civil proceedings, compensation for the damage caused by the contracting authority's unlawful acts. (27)

76. I will deal with those concerns in the interests of completeness, although I am not persuaded that it is strictly necessary to do so in order to provide a useful answer to the question which the referring court itself summarises at the end of its request for a preliminary ruling.

77. I have previously argued (28) that the rationale for the system of appeals against the decisions of an authority (such as the ÚOHS) subject to judicial review means, as a rule, that where those decisions are annulled by a court having jurisdiction, their nullity must extend also to the effects they have produced, since these are deprived of the legal foundations from which they derived.

78. In other words, the judgment annulling the award of a public contract should, as a rule, prevent the contract from producing its effects. The annulment of the award would be retroactive (*ex tunc*) to the point in time when the award was made. That is, moreover, the general rule set out in Directive 89/665, following its amendment in 2007, for contracts entailing the most serious infringements of that directive. (29)

79. That general rule is nevertheless subject to exceptions and provision to that effect is made by Directive 89/665 (in particular for public contracts which have already been concluded) due to the problems associated with a declaration that a contract is ineffective. (30) Member States may, for example, where formal requirements have been infringed, 'consider the principle of ineffectiveness to be inappropriate. In those cases Member States should have the flexibility to provide for alternative penalties'. (31)

80. Following its amendment by Directive 2007/66, in the case of contracts which should be declared ineffective in principle on account of their unlawful origin, Directive 89/665 (recitals 21 (32) and 22 (33) of Directive 2007/66 and Articles 2d and 2e of Directive 89/665, as amended) allows for the 'recogni[tion of] some or all of [their] temporal effects', that is to say, the effects of the contract are maintained, without prejudice to the imposition of appropriate penalties and the award of damages.

81. Directive 89/665 therefore envisages the possibility that a judgment upholding an action for annulment may concern a contract which has already been concluded without applying the consequences associated with its nullity in full.

82. In that respect, Directive 89/665 provides for different approaches depending on the circumstances.

– The general rule (Article 2(7)) is that 'except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law'.

– Article 2d(2) confirms that 'the consequences of a contract being considered ineffective shall be provided for by national law'. National law, in turn, 'may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed'. (34)

– Article 2d(3) also allows Member States to provide that 'the review body independent of the contracting authority may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained'.

– Article 2e(1) states that, in certain circumstances, (35) ‘Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties’.

– Under that provision, ‘Member States may provide that the review body independent of the contracting authority shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed’.

83. It follows from all those provisions that, in accordance with Directive 89/665, national rules may, in certain circumstances, provide that a judgment annulling the award of a public contract either: (a) has retroactive effect, affecting *ex tunc* all contractual obligations; or (b) does not inevitably have the result of depriving that contract of its effects.

84. Those provisions of Directive 89/665 seek to strike a balance between the *usual* consequences of an annulment judgment and the protection of other public interests inherent in the provision of the services covered by the contract. In this field, as in others, national law may provide that the judgment declaring the contract null and void be deprived of its ‘natural’ effect, replaced by an obligation to pay compensation or by other alternative measures.

85. The abovementioned provisions of Directive 89/665 (and the national rules transposing them) do not run counter to Article 47 of the Charter, (36) provided that the judicial protection to which all tenderers are entitled enables them, in the event of the subsequent annulment of a contract award not in their favour, to obtain damages for the harm caused to them.

86. The right protected by Article 47 of the Charter does not imply an unequivocal solution to difficulties which may arise in relation to the effects of judgments annulling administrative acts (or contracts). Admittedly, the general rule I have mentioned can be inferred from Article 47, but that rule does not preclude the possibility of making use of the exceptions referred to above. (37)

87. The ineffectiveness of a contract will, however, be maintained if a national court of a Member State (which has made provision to that effect in its legislation) delivers a judgment declaring a contract award null and void, attaching consequences *ex tunc* to its ruling.

88. In the present case, the foregoing considerations may be particularly relevant if, after conclusion of the contract, the court having jurisdiction to adjudicate on the ÚOHS’s decisions does not adopt any interim measures. In those circumstances, if the judgment bringing an end to the administrative action annuls the ÚOHS’s decision (and the contract which it accepted) and national rules require the case to be referred back to that authority for further proceedings, the ÚOHS will have to assess, in accordance with Article 2d of Directive 89/665, what consequences flow from the declaration that the contract is ineffective.

V. Conclusion

89. In the light of the foregoing, I propose that the following answer be given to the Krajský soud v Brně (Regional Court, Brno, Czech Republic):

Article 2(3) and (9) and Article 2a(2) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union,

must be interpreted as not precluding national legislation under which, once proceedings before an independent (non-judicial) review body have been exhausted, a contracting authority may conclude a public contract prior to an administrative action being brought before a judicial body having jurisdiction to review the legality of the decision to exclude a tenderer or to award that contract, provided that, in the context of that administrative action, the court which is to adjudicate on the case has the power to adopt interim measures consisting, where appropriate, in suspending the effects of the signed contract.

1 Original language: Spanish.

---

2 Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

---

3 As amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), and by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

---

4 The notice was published in the Věstník veřejných zakázek (Journal of Public Tenders) under reference Z2019 034002 and in the *Official Journal of the European Union* under reference 2019/S 190 461538. The estimated value of the public contract was 13 805 000 Czech koruny (CZK) (approximately EUR 566 000), excluding value added tax.

---

5 I have construed the decision's final nature 'in administrative terms' as referring to the exhaustion of administrative remedies, that is to say, no further claims could be raised before the authorities.

---

6 Case C-497/20, EU:C:2021/1037; 'judgment in *Randstad Italia*'.

---

7 In proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (judgment of 26 April 2017, *Farkas* (C-564/15, EU:C:2017:302, paragraph 37)).

---

8 In paragraph 22 of those observations, it accepts as undisputed 'the fact that [the ÚOHS], which is part of the executive, is not a court or tribunal'. In paragraph 35, it restates that '… it is not a court or tribunal, but a central authority, which is permitted under Directive 89/665'.

---

9 Paragraph 12 of its written observations.

---

10 Order for reference, paragraph 2: 'CROSS applied to the [ÚOHS] for a review of the contracting authority's acts, seeking annulment of the notice concerning its exclusion and *the selection of Siemens Mobility as supplier*'. Emphasis added.

---

11 I think it preferable to use the term 'claim' in this context. It is, in fact, a request made to the body that adopted the decision, asking it to reconsider.

---

12 Decisions of review bodies that are not judicial in character must always state written reasons and may be the subject of 'judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU]'.

---

13 The different language versions also use broad terms: 'Stelle in erster Instanz', in German; 'órgano de primera instancia' in Spanish; 'instances de premier ressort', in French; 'organo di prima istanza', in Italian.

---

14 These must, of course, be bodies that are separate from the contracting authority. They may be independent authorities, such as competition authorities.

---

15 Article 2a lays down detailed rules governing the standstill period.

---

16 Judgment in *Randstad Italia*, paragraph 49, citing the judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraph 128). Emphasis added.

---

17 Judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 297), citing judgments of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257, paragraph 21), and of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 107).

---

18 Judgment of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraph 77 and operative part, point 2).

---

19 Recital 36 of Directive 2007/66.

---

20 Judgment in *Randstad Italia*, paragraph 49, citing the judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraph 128).

---

21 Order of 23 April 2015, *Commission* v *Vanbreda Risk & Benefits* (C-35/15 P(R), EU:C:2015:275, paragraph 29), citing the judgment of 11 September 2014, *Fastweb* (C-19/13, EU:C:2014:2194, paragraph 60), emphasis added.

---

22 One of the objectives of Directive 2007/66 is precisely to combat the situation whereby ‘contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision [proceed] very quickly to the signature of the contract’ (recital 4).

---

23 In the Czech Republic, an administrative action may be filed within two months of service of the second-instance administrative decision on the plaintiff (Paragraph 72(1) of Law No 150/2002). It may include an application for the adoption of an interim measure prohibiting the contracting authority from concluding the contract while proceedings are ongoing before the court. An application for the adoption of an interim measure may not be made before an administrative action is lodged (Paragraph 38 of Law No 150/2002).

---

24 According to the order for reference (paragraph 18), the court must adjudicate on an application for interim measures within 30 days of the application being made.

---

25 Paragraphs 17 and 18 of its written observations.

---

26 I do not think there is any objection to applying, *mutatis mutandis*, to the interim stage before the courts the provisions of Article 2d of Directive 89/665 on the existence of overriding reasons relating to a general interest and the economic interests at stake, as criteria for adapting declarations that contracts are ineffective.

---

27 Under zákon č. 99/1963 Sb., občanský soudní řád (Law No 99/1963 establishing the Code of Civil Procedure). According to the referring court, that type of claim is rarely successful.

---

28 Opinion in *Polkomtel* (C-231/15, EU:C:2016:440, point 64).

---

29 As in the case of contracts resulting from an 'illegal direct award' (recital 13 of Directive 2007/66) or those 'concluded in breach of the standstill period or automatic suspension' (recital 18 of Directive 2007/66). In those situations, 'the objective to be achieved where Member States lay down the rules which ensure that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed' (recital 21 of Directive 2007/66).

---

30 Judgment of 26 November 2015, MedEval (C-166/14, EU:C:2015:779) paragraph 40: 'Rendering a contract concluded following a public procurement procedure ineffective … constitutes a significant intervention by the administrative or judicial authority in the contractual relations between individuals and State bodies. Such a decision can thus cause considerable upset and financial losses not only to the successful tenderer for the public contract in question, but also to the awarding authority and, consequently, to the public, the end beneficiary of the supply of work or services under the public contract in question. As is apparent from recitals 25 and 27 in the preamble to Directive 2007/66, the EU legislature placed greater importance on the requirement for legal certainty as regards actions for a declaration that a contract is ineffective than as regards actions for damages.'

---

31 Recital 19 of Directive 2007/66.

---

32 'National law may …, for example, provide for the retroactive cancellation of all contractual obligations (*ex tunc)* or conversely limit the scope of the cancellation to those obligations which would still have to be performed (*ex nunc*)'.

---

33 'Member States may grant the body responsible for review procedures the possibility of *not jeopardising the contract or of recognising some or all of its temporal effects*, when the exceptional circumstances of the case concerned require certain overriding reasons relating to a general interest to be respected'. Emphasis added.

---

34 In the latter case, Member States are to provide for the application of other penalties within the meaning of Article 2e(2).

---

35 In the case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) which is not covered by Article 2d(1)(b).

---

36 In the judgment of 11 September 2014, *Fastweb* (C-19/13, EU:C:2014:2194, paragraph 64), the Court held that, 'in providing for the effects of a contract to be maintained, Article 2d(4) of Directive 89/665 is not contrary to the requirements flowing from Article 47 of the Charter'.

---

37 I refer to points 61 to 70 of my Opinion in *Polkomtel* (C-231/15, EU:C:2016:440).

EU:C:2023:1016

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2023 (*)

(Reference for a preliminary ruling – Procedures for the award of public works contracts, public supply contracts and public service contracts – Directive 2014/24/EU – Point (d) of the first subparagraph of Article 57(4) – Award of public contracts in the transport sector – Directive 2014/25/EU – Article 80(1) – Facultative grounds for exclusion – Obligation to transpose – Economic operator entering into agreements aimed at distorting competition – Competence of the contracting authority – Impact of an earlier decision of a competition authority – Principle of proportionality – Article 47 of the Charter of Fundamental Rights of the European Union – Right to an effective remedy – Principle of sound administration – Obligation to state reasons)

In Case C-66/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 13 January 2022, received at the Court on 2 February 2022, in the proceedings

Infraestruturas de Portugal SA,

Futrifer Indústrias Ferroviárias SA,

v

Toscca – Equipamentos em Madeira Lda,

intervening party:

Mota-Engil Railway Engineering SA,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal, K. Jürimäe, C. Lycourgos (Rapporteur), N. Piçarra and O. Spineanu-Matei, Presidents of Chambers, M. Ilešič, P.G. Xuereb, L.S. Rossi, I. Jarukaitis, A. Kumin, N. Jääskinen, N. Wahl and I. Ziemele, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 7 March 2023,

after considering the observations submitted on behalf of:

– Futrifer Indústrias Ferroviárias, SA, by G. Guerra Tavares, A. Magalhães e Menezes and L.M. Soares Romão, advogados,

– Toscca – Equipamentos em Madeira Lda, by N. Cunha Rodrigues and J.M. Sardinha, advogados,

– the Portuguese Government, by P. Barros da Costa, F. Batista, P. Moreira da Cruz and M.J. Ramos, acting as Agents,

– the Czech Government, by L. Halajová, M. Smolek and J. Vláčil, acting as Agents,

– the Hungarian Government, by M.Z. Fehér and K. Szíjjártó, acting as Agents,

– the European Commission, by G. Braga da Cruz, P. Ondrůšek and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of point (d) of the first subparagraph of Article 57(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), and of Article 41(2)(b) and (c) of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in the course of proceedings between, on the one hand, Toscca – Equipamentos em Madeira Lda (‘Toscca’) and, on the other hand, Infraestruturas de Portugal, SA, and Futrifer Indústrias Ferroviárias, SA (‘Futrifer’), concerning the decision of Infraestruturas de Portugal to award a public contract to Futrifer for the purchase of creosoted pine sleepers and rods.

Legal context

European Union law

Directive 2014/24

3 Recital 101 of Directive 2014/24 states:

‘Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. It should be clarified that grave professional misconduct can render an economic operator’s integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.

… [Contracting authorities] should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion.’

4 The second subparagraph of Article 26(5) of that directive provides:

‘Where the contract is awarded by restricted procedure or competitive procedure with negotiation, Member States may provide, notwithstanding the first subparagraph of this paragraph, that sub-central contracting authorities or specific categories thereof may make the call for competition by means of a prior information notice pursuant to Article 48(2).’

5 Under Article 32(1) of that directive:

‘In the specific cases and circumstances laid down in paragraphs 2 to 5, Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication.’

6 Article 55 of that directive, entitled ‘Informing candidates and tenderers’, provides, in paragraph 2(b) thereof:

‘On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

…

(b) any unsuccessful tenderer of the reasons for the rejection of its tender …’

7 Article 56 of Directive 2014/24 is worded as follows:

‘1. Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled:

…

(b) the tender comes from a tenderer that is not excluded in accordance with Article 57 and that meets the selection criteria set out by the contracting authority in accordance with Article 58 and, where applicable, the non-discriminatory rules and criteria referred to in Article 65.

…

(2) …

Member States may exclude the use of the procedure in the first subparagraph for, or restrict it to, certain types of procurement or specific circumstances.’

8 Article 57 of that directive, entitled ‘Exclusion grounds’, provides:

1. Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons [referred to in points (a) to (f) of the present paragraph.]

…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

…

5. …

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts

committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.’

Directive 2014/25

9 Article 1 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), as amended by Commission Delegated Regulation (EU) 2017/2364 of 18 December 2017 (OJ 2017 L 337, p. 17) (‘Directive 2014/25’), provides:

‘1. This Directive establishes rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15.

2. Procurement within the meaning of this Directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 8 to 14 [of this directive].

…’

10 Article 4(1)(a) of Directive 2014/25 provides:

‘For the purpose of this Directive contracting entities are entities, which:

(a) are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 8 to 14’.

11 Article 11 of that directive is worded as follows:

‘This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.’

12 Article 15(a) of that directive states, in essence, that the latter is to apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the threshold of EUR 443 000 for supply and service contracts as well as for design contests.

13 Article 80(1) of Directive 2014/25 provides:

‘The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships may include the exclusion grounds listed in Article 57 of Directive [2014/24] on the terms and conditions set out therein.

Where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 57(1) and (2) of Directive [2014/24] on the terms and conditions set out in that Article.

If so required by Member States, those criteria and rules shall, in addition, include the exclusion grounds listed in Article 57(4) of Directive [2014/24] on the terms and conditions set out in that Article. …’

Portuguese law

14 Article 55(1)(c) of the Código dos Contratos Públicos (Public Procurement Code), in the version applicable to the dispute in the main proceedings (‘CCP’), is worded as follows:

‘Prohibitions on procurement

(1) The following entities may not be applicants, tenderers, nor form part of a grouping:

…

(c) natural persons who have received a penalty for grave professional misconduct and who, in the intervening period, have not been rehabilitated, and legal persons the administrative, management or governing bodies of which have received such an administrative penalty and continue to perform their duties;

…’

15 Article 55(1)(f) of that code provides that, in particular, entities that have been subject to the ancillary penalty, imposed by the Portuguese competition authority, of prohibition from participating in public procurement procedures, may not be applicants, tenderers, or form part of any grouping.

16 Article 55 A of that code concerns the lifting of prohibitions, set out in Article 55(1) thereof, by the contracting authority, and states that it is not to apply to the situations referred to in Article 55(1)(f) of that code.

17 Paragraph 70 of the CCP states:

‘Evaluation of tenders

…

(2) Tenders shall be excluded where their evaluation indicates:

…

(g) the existence of compelling evidence of acts, agreements, practices or information that may distort the competition rules.

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 Toscca brought an action before the Tribunal Administrativo e Fiscal de Viseu (Administrative and Tax Court, Viseu, Portugal) seeking annulment of the decision of Infraestruturas de Portugal of 25 July 2019, consisting in the award to Futrifer of a public contract for the purchase of creosoted pine sleepers and rods intended for use in the railway infrastructure sector, for a base price of EUR 2 979 200. In that action, Toscca also sought to be awarded that public contract.

19 Further to the dismissal of that action by decision of 21 February 2020, Toscca brought an appeal before the Tribunal Central Administrativo Norte (North Central Administrative Court, Portugal). By judgment of 29 May 2020, that court set aside that decision, upheld the appeal brought by Toscca and ordered Infraestruturas de Portugal to award that public contract to that company.

20 By judgment of 22 April 2021, the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) set aside the judgment referred to in the preceding paragraph on grounds of insufficient reasoning, and referred the case back to the Tribunal Central Administrativo Norte (North Central Administrative Court). On 2 June 2021, the latter delivered a fresh judgment yielding the same outcome as that of the judgment of 29 May 2020. Infraestruturas de Portugal and Futrifer each brought an appeal against that judgment of 2 June 2021 before the Supremo Tribunal Administrativo (Supreme Administrative Court), which is the referring court.

21 That court observes that, on 12 June 2019, Futrifer was ordered by the Autoridade da Concorrência (Competition Authority, Portugal) to pay a fine in respect of a breach of competition rules in the context of public procurement procedures, organised in 2014 and 2015, and relating to the provision of services for the maintenance of equipment and tracks forming part of the national rail network, which infrastructure was under the management of a public undertaking that had merged with Infraestruturas de Portugal in the interim.

22 The referring court states, in that connection, that the exclusion of a tenderer on grounds of lack of reliability on account of a breach of competition rules unrelated to a public procurement procedure, may be accepted only pursuant to Article 55(1)(f) of the CCP, that is to say, by the effect of an express decision delivered by the Competition Authority, imposing on that tenderer the ancillary penalty of prohibition from participating in public procurement procedures for a certain period of time. According to that court, that solution is, however, contrary to Directive 2014/24 and, in particular, point (d) of the first subparagraph of Article 57(4) thereof, in that it undermines the independence of the contracting authority in deciding on the reliability of any tenderer.

23 The referring court wishes to ascertain, moreover, whether the decision to award a public contract to a tenderer who has been found to be in breach of competition rules in an earlier public procurement procedure, conducted by the same contracting authority, may be regarded as sufficiently reasoned, particularly in the light of the right to sound administration, provided for in Article 41(2)(c) of the Charter, where that contracting authority has not carried out an independent and reasoned assessment of the reliability of that tenderer.

24 Furthermore, the referring court is uncertain as to whether national legislation under which the contracting authority is not required, in the context of a public procurement procedure, to carry out an independent assessment of the reliability of a tenderer found to be in breach of competition rules is in conformity with EU law in so far as concerns both the examination of the seriousness of that breach as well as the impact thereof on the procedure at issue, and the examination of the appropriateness of the

measures taken by the tenderer in question to remedy, in the context of the latter procedure, the consequences of that breach (self-cleaning measures). In the latter connection, the referring court states that, under national law, the assessment of such corrective measures falls exclusively to the Competition Authority.

25 That court considers that, in the light of the case-law of the Court of Justice, in particular the judgment of 19 June 2019, *Meca* (C-41/18, EU:C:2019:507), a breach by a tenderer of the competition rules which is unrelated to a public procurement procedure must be subject to a duly reasoned assessment by the contracting authority, in the context of the examination of the reliability of such a tenderer.

26 In those circumstances, the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the ground for exclusion provided for in Article 57(4)(d) of Directive [2014/24] constitute a matter reserved for decision [“reserva de decisão”] by the contracting authority?

(2) May the national legislature fully replace the decision that should be taken by the contracting authority under Article 57(4)(d) of Directive 2014/24/EU with a generic decision (with the effects of a decision) from its national competition authority to impose an ancillary penalty consisting of prohibition from participating in public procurement procedures for a certain period, adopted in the context of the imposition of a fine for breach of competition rules?

(3) Should the contracting authority’s decision concerning the “reliability” of the economic operator in view of its compliance (or non-compliance) with the rules of competition law, beyond the scope of the specific tendering procedure, be interpreted as requiring an assessment based on the relative suitability of that economic operator, which constitutes a concrete expression of the right to good administration under Article 41(2)(c) of the [Charter]?

(4) May the solution adopted in Portuguese law under Article 55(1)(f) of the CCP, whereby the exclusion of an economic operator from a tendering procedure on grounds of breach of competition rules unrelated to that specific procurement procedure is subject to a decision from the competition authority in the context of an application of an ancillary penalty consisting of a prohibition from tendering, a procedure in which it is the competition authority itself that assesses the relevance of the self-cleaning measures taken, be regarded as consistent with EU law, specifically, Article 57(4)(d) of Directive 2014/24/EU?

(5) Furthermore, may the solution adopted under Portuguese law in Article 70(2)(g) of the CCP, which limits the possibility of excluding a tender due to significant evidence of acts, agreements, practices or information that are liable to distort competition rules in the specific procurement procedure in which such practices are detected, be regarded as consistent with EU law, and in particular with Article 57(4)(d) of Directive [2014/24/EU]?’

The request for an expedited procedure

27 The referring court requested that the present reference for a preliminary ruling be determined pursuant to an expedited procedure under Article 105 of the Rules of Procedure of the Court of Justice, on the ground that the main proceedings were themselves urgent. It referred, in that regard, to Article 36(1)(c) of the Código de Processo nos Tribunais Administrativos (Code of Procedure before the Administrative Courts) and Article 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EC of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) (‘Directive 89/665’).

28 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may decide, after hearing the Judge-Rapporteur and the Advocate General, that a reference for a preliminary ruling is to be

determined pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time.

29 It should be recalled, in that connection, that such an expedited procedure is a procedural instrument meant for an exceptional situation of urgency, the existence of which must be established in the light of exceptional circumstances specific to the case in connection with which an application for an expedited procedure is made (order of the President of the Court of 25 February 2021, *Sea Watch*, C-14/21 and C-15/21, not published, EU:C:2021:149, paragraph 22).

30 In the present case, on 23 March 2022, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to reject the referring court's request referred to in paragraph 27 above.

31 That court in fact confined itself to stating that the main proceedings were urgent and referring to provisions of national law and EU law whilst failing to indicate the extent to which there may, in the present case, be exceptional urgency, which is nonetheless necessary in order to justify an expedited procedure.

Consideration of the questions referred

Admissibility

32 Futrifer takes the view that the request for a preliminary ruling is inadmissible on the ground that the Court's reply to the questions referred is not necessary in order to resolve the dispute in the main proceedings. It maintains, in that regard, that the Portuguese Republic legitimately chose not to transpose point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 into national law, with the result that those questions are hypothetical.

33 In that regard, it should be noted that, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court of Justice. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see, to that effect, judgments of 16 December 1981, *Foglia*, 244/80, EU:C:1981:302, paragraph 15, and of 28 April 2022, *Caruter*, C-642/20, EU:C:2022:308, paragraph 28).

34 The Court may refuse to give a ruling on a question referred by a national court only where it is obvious that the interpretation of EU law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 61, and of 28 April 2022, *Caruter*, C-642/20, EU:C:2022:308, paragraph 29).

35 In the present case, the questions relate, in essence, to the interpretation of the facultative grounds for exclusion laid down in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, which covers the case in which the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.

36 In the connection, in the first place, it is apparent from the order for reference that the dispute in the main proceedings relates to the lawfulness of the decision to award a public contract to a tenderer who has been ordered by the national competition authority to pay a fine in respect of a breach of the competition rules in the context of earlier public procurement procedures. By questions 1 to 3 and 5 referred for a preliminary ruling, the referring court seeks to ascertain, in essence, the scope of the discretion which point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 confers on the contracting authority where, under Portuguese legislation, the latter authority is bound by the

assessment, carried out by the competition authority, of the reliability of the tenderer who has committed such a breach in the context of a public procurement procedure, irrespective of whether or not that assessment led to an ancillary penalty consisting of prohibition from participating in public procurement procedures.

37 Consequently, it cannot be held that those questions bear no relation to the actual facts of the main action or its purpose or that they are hypothetical. As to the fact, alleged by Futrifer, that the Portuguese Republic legitimately chose not to transpose point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 into national law, that relates to substantive aspects and is in no way such as to affect the admissibility of the questions put to the Court. It follows that Questions 1 to 3 and 5 are admissible.

38 In the second place, in the context of the fourth question, the referring court asks, in essence, whether Article 57(4) of Directive 2014/24 precludes national legislation under which the competition authority alone is competent to assess the relevance of the corrective measures taken by the economic operator who, on account of a breach of competition rules, is subjected to a penalty imposed by that authority, prohibiting that operator from participating in public procurement procedures for a certain period of time.

39 It is not apparent from the information before the Court that Futrifer has relied, at any point in time, on the taking of corrective measures such as those referred to in Article 57(6) of Directive 2014/24.

40 It follows that the fourth question referred is hypothetical and must, accordingly, be ruled inadmissible.

Substance

Preliminary observations

41 In the first place, it should be recalled that, in accordance with settled case-law, under the procedure laid down by Article 267 TFEU, which provides for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. In that regard, the Court may also find it necessary to consider provisions of EU law to which the national court has not referred in its question (see, to that effect, judgment of 22 June 2023, *K.B and F.S. (Raising ex officio of an infringement in criminal proceedings)*, C-660/21, EU:C:2023:498, paragraph 26 and the case-law cited).

42 In the present case, it is stated in the request for a preliminary ruling that the subject matter of the contract at issue in the main proceedings is the purchase, by a public undertaking – namely, Infraestruturas de Portugal – of creosoted pine sleepers and rods intended for use in the railway infrastructure sector, for a base price of EUR 2 979 200.

43 In that connection, it should be observed that, in accordance with Article 1(2) and Article 11 of Directive 2014/25, procurement within the meaning of that directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, for activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, inter alia. Article 4(1)(a) of that directive states that, for the purpose thereof, contracting entities are entities, which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 8 to 14 of that directive.

44 Furthermore, it is clear from Article 1(1) of Directive 2014/25 that the latter establishes rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15 of that directive.

45 In those circumstances, and in the light of the information set out in the order for reference, it is apparent from the information before the Court that the contract at issue in the main proceedings falls within the scope of Directive 2014/25; this is, however, a matter for the referring court to ascertain.

46 In such a situation, Article 80(1) of that directive would be applicable to the dispute in the main proceedings.

47 In the second place, since the questions referred for a preliminary ruling relate, in particular to whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 precludes the national legislation at issue in the main proceedings, it is necessary to determine beforehand whether the Member States are under the obligation to transpose into their national law both the first subparagraph of Article 57(4), in the event that the dispute in the main proceedings should fall within the scope of Directive 2014/24, and the third subparagraph of Article 80(1) of Directive 2014/25, in the event that that dispute should fall within the scope of the latter directive.

48 As regards, first, the first subparagraph of Article 57(4) of Directive 2014/24, that provision states that 'contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a procurement procedure' in any of the situations referred to in points (a) to (i) of that provision.

49 In that connection, it admittedly follows from certain judgments of the Court which interpreted the first subparagraph of Article 57(4) of Directive 2014/24 that the Member States can decide whether or not to transpose the facultative grounds for exclusion referred to in that provision. The Court has in fact held that, in accordance with Article 57(4) and (7) of Directive 2014/24, the Member States are free not to apply the facultative grounds for exclusion set out in that directive or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level (see, to that effect, judgments of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 33; of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraphs 34 and 40; and of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 28).

50 However, an analysis of the wording of the first subparagraph of Article 57(4) of Directive 2014/24, the context into which that provision fits, and the aim that the latter pursues within the framework of that directive, shows that contrary to what is apparent from those judgments, the Member States are under the obligation to transpose that provision into their national law.

51 As regards, first of all, the wording of that first subparagraph of Article 57(4), it is clear that the choice as to the decision whether or not to exclude an economic operator from a public procurement procedure on one of the grounds set out in that provision falls to the contracting authority, unless the Member States decide to transform that option to exclude into an obligation to do so. Accordingly, the Member States must transpose that provision either by allowing or by requiring contracting authorities to apply the exclusion grounds laid down by the latter provision. By contrast, and contrary to the arguments put forward by Futrifer and the Portuguese Government, a Member State cannot omit those grounds from its national legislation transposing Directive 2014/24 and thus deprive contracting authorities of the possibility – which must, at the very least, be conferred on them by virtue of that provision – of applying those grounds.

52 Next, in so far as concerns the context into which the first subparagraph of Article 57(4) of Directive 2014/24 fits, it should be noted that recital 101 of that directive states that 'contracting authorities should … be given the possibility to exclude economic operators which have proven unreliable'. That recital thus confirms that a Member State must transpose that provision in order not to deprive contracting authorities of the possibility referred to in the preceding paragraph and that recital.

53 This interpretation of the first subparagraph of Article 57(4) of Directive 2014/24 is also confirmed *a contrario* by the wording of the provisions of that directive, in respect of the transposition of which the Member States are expressly granted discretion. That is the case, in particular, for Article 26(5) and Article 32(1) of that directive, according to which 'the Member States may provide …', or even the second subparagraph of Article 56(2) of that directive, which employs the terms 'Member States may exclude …'.

54 Article 57(7) of Directive 2014/24 is not such as to call that interpretation into question. That provision confers, generally, on the Member States the power to determine the conditions for application of Article 57 of that directive, be it by legislative, regulatory or administrative provision. That power concerns the manner in which they may implement that article. The choice thus left to the Member States therefore cannot be extended to the question whether or not the facultative grounds for exclusion referred to in Article 57(4) of that directive are to be transposed. It must further be held that Article 57(7) of Directive 2014/24 is also applicable to the mandatory ground for exclusion laid down

in Article 57(1) of that directive. It cannot reasonably be argued that the power provided for in Article 57(7) may be used by the Member States in order not to transpose such exclusion grounds into their national law.

55 Lastly, as to the objective pursued by Directive 2014/24 in so far as concerns the facultative grounds for exclusion, the Court has acknowledged that that objective is reflected in the emphasis placed on the powers of contracting authorities. Thus the EU legislature intended to confer on the contracting authority, and on it alone, the task of assessing whether a candidate or tenderer must be excluded from a procurement procedure during the stage of selecting the tenderers (see, to that effect, judgments of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 34, and of 3 October 2019, *Delta Antrepriză de Construcţii şi Montaj 93*, C-267/18, EU:C:2019:826, paragraph 25).

56 The option, or indeed obligation, for the contracting authority to apply the exclusion grounds set out in the first subparagraph of Article 57(4) of Directive 2014/24 is specifically intended to enable it to assess the integrity and reliability of each of the economic operators participating in a public procurement procedure.

57 The EU legislature thus intended to ensure that contracting authorities have, in all Member States, the possibility of excluding economic operators who are regarded as unreliable by those authorities.

58 It follows from the foregoing considerations that the first subparagraph of Article 57(4) of Directive 2014/24 contains an obligation, for the Member States, to transpose the facultative grounds for exclusion set out in the provision into their national law. In the context of that obligation to transpose, those States must provide for either the option or the obligation for contracting authorities to apply those grounds.

59 In so far as concerns, second, the third subparagraph of Article 80(1) of Directive 2014/25, this provides that, if Member States so request, the objective rules and criteria for the exclusion and selection of candidates and tenderers, inter alia in open, restricted or negotiated procedures, are to include the exclusion grounds listed in Article 57(4) of Directive 2014/24 on the terms and conditions set out in that article.

60 It follows from the wording of the third subparagraph of Article 80(1) that it falls to the Member States to decide whether the facultative grounds for exclusion laid down in Article 57(4) are to be applied, by contracting entities, as criteria for excluding tenderers. In the absence of any decision in that regard, it nonetheless follows from the first subparagraph of Article 80(1) of Directive 2014/25 that the Member States must, when transposing that directive, at the very least make provision for the possibility for contracting entities to include, amongst the rules and exclusion criteria applicable in public procurement procedures which fall within the scope of that directive, the exclusion grounds set out in Article 57(4) of Directive 2014/24.

61 Accordingly, as regards the exclusion grounds set out in Article 57(4) of Directive 2014/24, the Member States must, in accordance with their obligation to transpose the first subparagraph of Article 80(1) of Directive 2014/25, make provision for the possibility for contracting entities to include those exclusion grounds amongst the objective exclusion criteria in procedures which fall within the scope of the latter directive, without prejudice to any decision on the part of those States, taken pursuant to the third subparagraph of Article 80(1) of that directive, and consisting in requiring that those entities include those grounds amongst those criteria.

62 As regards, in the third place, Futrifer's argument that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 cannot be relied upon by an unsuccessful tenderer – such as Toscca, in the present case – it is sufficient to observe, for the purposes of the answer to be given to the present request for a preliminary ruling, that the Court has already ruled that if the right to an effective remedy – as guaranteed by Article 47 of the Charter – is not to be disregarded, a decision by which a contracting authority refuses, even implicitly, to exclude an economic operator from a procurement procedure on one of the facultative grounds for exclusion laid down in the first subparagraph of Article 57(4) of Directive 2014/24 must necessarily be capable of being challenged by any person having or having had an interest in obtaining a specific contract or having been or at risk of being

harmed by a breach of that provision (judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 143).

63 On the very same grounds, an identical assessment must be relied upon in the event of a refusal to exclude an economic operator from a public procurement procedure on one of the facultative grounds for exclusion referred to in the third subparagraph of Article 80(1) of Directive 2014/25.

64 It is therefore appropriate to answer the questions referred for a preliminary ruling while taking the preceding preliminary observations into consideration.

The fifth question

65 By its fifth question, which it is appropriate to examine in the first place, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be interpreted as precluding national legislation which limits the possibility of excluding a tender from a tenderer on account of the existence of significant evidence of conduct on the latter's part liable to distort the competition rules in the public procurement procedure in the context of which that type of conduct has arisen.

66 In interpreting provisions of EU law, it is necessary to consider not only their wording but also the context in which they occur and the objectives pursued by the rules of which they are part (judgment of 16 March 2023, *Colt Technology Services and Others*, C-339/21, EU:C:2023:214, paragraph 39 and the case-law cited).

67 First, it should be observed that, by providing for the scenario in which the contracting authority 'has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition', the wording of point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 does not limit the application of that ground for exclusion to the public procurement procedure in the context of which that type of behaviour has arisen.

68 As regards, second, the context into which that provision fits, that interpretation is supported by the second subparagraph of Article 57(5) of that directive, which permits the contracting authorities, at any time during the procedure, to exclude or be required by the Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4 of that Article 57.

69 Third, that interpretation enables the contracting authority, in accordance with the objective pursued by Directive 2014/24 in so far as concerns the facultative grounds for exclusion set out in the first subparagraph of Article 57(4) of that directive, as recalled in paragraph 56 of the present judgment, to ascertain the integrity and reliability of each of the economic operators participating in the public procurement procedure at issue (see, to that effect, judgment of 15 September 2022, *J. Sch. Omnibusunternehmen and K. Reisen*, C-416/21, EU:C:2022:689, paragraph 42), which integrity and reliability are liable to be cast into doubt not only in the event of the participation of such an operator in anticompetitive conduct in the context of that procedure, but also in the event of that operator's participation in such conduct in the past.

70 In the present case, the referring court observes that Article 70(2)(g) of the CCP limits the possibility for the contracting authority to exclude a tender on account of the existence of compelling evidence of acts, agreements, practices or information that may distort the competition rules solely in the public procurement procedure in the context of which those anticompetitive practices have arisen, with the result that such exclusion may only be decided by the contracting authority if the anticompetitive practices in question occurred prior to that procedure.

71 In that connection, it is clear from paragraphs 51, 58, 60 and 61 of the present judgment that, irrespective of whether the public procurement procedure in question falls within the scope of Directives 2014/24 or 2014/25, the Member States must, at the very least, provide for the possibility for contracting authorities to include the exclusion grounds set out in Article 57(4) of Directive 2014/24 amongst the objective exclusion criteria in public procurement procedures, without prejudice to any

decision by those Member States to transform that option into an obligation to do so. The Member States therefore cannot, in any event, restrict the scope of those exclusion grounds.

72 It follows from the foregoing that the answer to the fifth question must be that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be interpreted as precluding national legislation which limits the possibility of excluding a tender from a tenderer on account of the existence of significant evidence of conduct on the part of that tenderer liable to distort competition rules in the public procurement procedure in the context of which that type of conduct has arisen.

The first and second questions

73 By its first and second questions, which it is appropriate to answer together, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be interpreted as precluding national legislation which confers the power to decide to exclude economic operators from public procurement procedures, on the grounds of a breach of competition rules, solely on the national competition authority.

74 It should be recalled, in that regard, that in accordance with Article 56(1)(b) of Directive 2014/24, the contracting authority is under the obligation to verify, during the public procurement procedure, whether the tender comes from a tenderer that is not excluded in accordance with Article 57 of that directive; that obligation extends to all economic operators who have submitted a tender (see, to that effect, judgment of 30 January 2020, *Tim* (C-395/18, EU:C:2020:58, paragraph 46).

75 As is clear from the case-law cited in paragraphs 55 and 56 of the present judgment, the EU legislature intended to entrust the contracting authority, and only the contracting authority, with the task of assessing whether a candidate or tenderer is to be excluded from a public procurement procedure by determining the integrity and reliability of each of the economic operators participating in that procedure.

76 In particular, the facultative ground for exclusion mentioned in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in conjunction with recital 101 of that directive, is based on an essential element of the relationship between the successful tenderer in question and the contracting authority, namely the reliability of the successful tenderer, on which the contracting authority's trust is founded (judgment of 15 September 2022, *J. Sch. Omnibusunternehmen and K. Reisen*, C-416/21, EU:C:2022:689, paragraph 41 and the case-law cited).

77 According to the case-law of the Court, where contracting authorities apply facultative grounds for exclusion, they must have particular regard to the principle of proportionality, which requires that they carry out a specific and individual assessment of the conduct of the individual concerned, on the basis of all the relevant factors (see, to that effect, judgments of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 40), and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraphs 156 and 157).

78 It follows that, in a situation such as that at issue in the main proceedings, in which there is a specific procedure regulated by EU law or by national law for pursuing certain breaches of competition rules and in which the national competition authority is entrusted with carrying out investigations in this connection, the contracting authority must, within the context of the assessment of the evidence provided, rely in principle on the outcome of such a procedure (see, to that effect, judgment of 24 October 2018, *Vossloh Laeis*, C-124/17, EU:C:2018:855, paragraph 25).

79 The decision of such an authority, finding that such a breach has been committed and, on that ground, imposing a financial penalty on a tenderer, may take on particular significance, and all the more so if that penalty is accompanied by a temporary prohibition on participation in public procurement procedures. Where such a decision may lead the contracting authority to exclude that economic operator from the public procurement procedure in question, conversely, the absence of such a decision can neither prevent nor exempt the contracting authority from carrying out such an assessment.

80 That assessment should be carried out having regard to the principle of proportionality and taking into account all the relevant factors in order to determine whether the application of the ground for

exclusion referred to in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 is justified.

81 In the case in the main proceedings, the referring court states that Article 55(1)(f) of the CCP entrusts exclusively to the national competition authority the assessment of the consequences which a breach of competition rules can have in the context of future public procurement procedures. Thus, that legislation appears, on the one hand, to require that contracting authorities comply with a decision of that authority which imposes a penalty on an economic operator prohibiting the latter from participating in such procedures for a certain period of time and, on the other hand, to prevent those contracting authorities from excluding from those procedures an economic operator who has not been subjected to such a penalty. It follows that a tenderer may be excluded from a public procurement procedure, following a decision of that authority, without the contracting authority being able either to assess the conduct of that tenderer – and, consequently, the latter's integrity and reliability to perform the contract in question – or to decide independently, having regard to the principle of proportionality, whether the exclusion of that tenderer is justified on the ground referred to in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24.

82 Such legislation, which ties the assessment of the integrity and reliability of tenderers to the findings in a decision of the national competition authority in relation to, in particular, future participation in public procurement procedures, undermines the discretion to be afforded to the contracting authority in the context of the first subparagraph of Article 57(4) of Directive 2014/24.

83 The considerations set out in the preceding paragraph also apply in the case where the public procurement procedure at issue in the main proceedings falls within the scope of Directive 2014/25 since, as has been recalled in paragraph 71 of the present judgment, the Member States are required, in accordance with their obligation to transpose the first subparagraph of Article 80(1) of that directive, to provide for the option for those contracting entities to include the exclusion grounds set out in Article 57(4) of Directive 2014/24 amongst the objective exclusion criteria in procedures falling within the scope of Directive 2014/25, without prejudice to any decision on the part of the Member States to transform that option into an obligation to do so. The Member States therefore cannot, in any event, restrict the discretion to be afforded to the contracting authority in that context.

84 It follows from the foregoing that the answer to the first and second questions is that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be interpreted as precluding national legislation which confers the power to decide to exclude economic operators from public procurement procedures, on the grounds of a breach of competition rules, solely on the national competition authority.

The third question

85 By its third question, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in the light of Article 41(2)(c) of the Charter, must be interpreted as meaning that the decision of the contracting authority as to the reliability of an economic operator, adopted pursuant to the ground for exclusion laid down in that provision of Directive 2014/24, must be reasoned.

86 It should be observed, at the outset, that Article 41(2)(c) of the Charter relates exclusively to the obligation to state reasons for decisions which is incumbent on the 'institutions, bodies, offices and agencies of the Union'. That provision is therefore irrelevant in the context of the dispute in the main proceedings.

87 It should, however, be recalled that the contracting authority must comply with the general principle of EU law relating to sound administration, which carries with it requirements which the Member States must observe when implementing EU law. Among those requirements, the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressee in a position to defend its rights and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against those decisions (see, to that effect, judgments of 15 October 1987, *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 15, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraph 120).

88 It follows that, in the context of public procurement procedures, the contracting authority is under that obligation to state reasons. That obligation relates, inter alia, to decisions by way of which the contracting authority excludes a tenderer by applying, in particular, a facultative ground for exclusion, such as that provided for in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24.

89 As is clear from Article 55(2)(b) of Directive 2014/24, on request from the tenderer concerned, the contracting authority is to inform any unsuccessful tenderer of the reasons for the rejection of its tender, as quickly as possible, and in any event within 15 days from receipt of a written request.

90 It should, furthermore, be noted that the contracting authority must also state reasons for its decision when it finds that a tenderer is in one of the situations covered by Article 57(4) of that directive, but it nonetheless decides not to exclude that tenderer, for example, on the ground that such an exclusion would constitute a disproportionate measure. A decision not to exclude a tenderer, where a facultative ground for exclusion appears to apply, affects the legal situation of all the other economic operators participating in the public procurement procedure in question, who must therefore be able to defend their rights and, where applicable, decide, on the basis of the reasons set out in that decision, to bring an action against it. In that connection, the statement of reasons for the decision not to exclude a tenderer may be included in the final decision to award the contract to the successful tenderer.

91 In the light of the foregoing, the answer to the third question is that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in the light of the principle of sound administration, must be interpreted as meaning that the decision of the contracting authority as to the reliability of an economic operator, adopted pursuant to the exclusion ground laid down in that provision, must be reasoned.

Costs

92 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Point (d) of the first subparagraph of Article 57(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC**

   must be interpreted as precluding national legislation which limits the possibility of excluding a tender from a tenderer on account of the existence of significant evidence of conduct on the part of that tenderer liable to distort competition rules in the public procurement procedure in the context of which that type of conduct has arisen.

2. **Point (d) of the first subparagraph of Article 57(4) of Directive 2014/24**

   must be interpreted as precluding national legislation which confers the power to decide to exclude economic operators from public procurement procedures, on the grounds of a breach of competition rules, solely on the national competition authority.

3. **Point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in the light of the general principle of sound administration,**

   must be interpreted as meaning that the decision of the contracting authority as to the reliability of an economic operator, adopted pursuant to the exclusion ground laid down in that provision, must be reasoned.

[Signatures]

* Language of the case: Portuguese.

EU:C:2023:398

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 11 May 2023 (1)

Case C-66/22

Infraestruturas de Portugal, S. A,
Futrifer Indústrias Ferroviárias, S. A
v
Toscca – Equipamentos em Madeira Ldª,
intervener:
Mota-Engil Railway Engineering, SA

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal))

(Reference for a preliminary ruling – Directive 2014/24/EU – Public procurement – Optional grounds for exclusion – Article 57(4)(d) – Exclusion of an economic operator from participation in a tendering procedure – Penalty for anticompetitive practices – Automatic exclusion based on a previous decision of a competition authority – Discretion of the contracting authority to assess the existence of the ground for exclusion – Article 57(6) – Suitability and reliability of the tenderer – Statement of reasons – Anticompetitive practices detected in the tendering procedure itself)

1. In this reference for a preliminary ruling, the Court is called upon to interpret Article 57(4)(d) of Directive 2014/24/EU, (2) under which a contracting authority may exclude an economic operator from participation in a procurement procedure where that operator has entered into agreements with other operators to distort competition.

2. The request for a preliminary ruling has been made in proceedings concerning the award of a contract to an undertaking which had previously been penalised for having colluded with other undertakings to engage in anticompetitive conduct (price and market-sharing agreements).

I. Legal framework

A. European Union law

1. Directive 2014/24

3. Article 56 (‘General principles’) provides:

‘1. Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled:

…

(b) the tender comes from a tenderer that is not excluded in accordance with Article 57 …’

4. Article 57 (‘Exclusion grounds’) states:

‘…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

…

5. …

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.’

2. Directive 2014/25/EU (3)

5. Under Article 80 (‘Use of exclusion grounds and selection criteria provided for under Directive 2014/24/EU’):

‘1. The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships may include the exclusion grounds listed in Article 57 of Directive 2014/24/EU on the terms and conditions set out therein.

Where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 57(1) and (2) of Directive 2014/24/EU on the terms and conditions set out in that Article.

If so required by Member States, those criteria and rules shall, in addition, include the exclusion grounds listed in Article 57(4) of Directive 2014/24/EU on the terms and conditions set out in that Article.

…’

B. Portuguese law

1. Decreto-lei n.º 18/2008, Código dos Contratos Públicos (4)

6. Article 55 (‘Impediments’) provides:

‘The following may not be candidates, tenderers or members of a group:

…

(c) natural persons who have received a penalty for grave professional misconduct and who, in the intervening period, have not been rehabilitated, and legal persons whose administrative, management or governing bodies have received such an administrative penalty and continue to perform their duties.

…

(f) entities which have received the ancillary penalty of prohibition from participating in public procurement procedures, provided for in special legislation, including in penalty systems relating to … competition …, during the period laid down in the decision imposing the penalty’.

7. Article 70 (‘Evaluation of tenders’) provides in paragraph 2:

‘2. Tenders shall be excluded where their evaluation indicates:

…

(g) the existence of compelling evidence of acts, agreements, practices or information that may distort the competition rules.’

2. Lei n.º 19/2012 da Concorrência (Law on competition) (5)

8. Article 71 (‘Ancillary penalties’) provides in paragraph 1(b) that, if justified by the seriousness of the infringement and the degree of fault of the infringer, the Autoridade de Concorrência (the Competition Authority; ‘AC’) may impose, in addition to a fine, the ancillary penalty of deprivation of the right to participate in certain public procurement procedures, provided that the practice constituting the infringement punishable by a fine occurred during or as a result of the relevant procedure.

II. Facts, dispute and questions referred for a preliminary ruling

9. On 18 January 2019, Infraestruturas de Portugal, S. A ('Infraestruturas') launched a procedure for the award of a contract for the supply of creosoted pine sleepers and rods for a base price of EUR 2 979 200. (6)

10. The undertakings Toscca – Equipamentos em Madeira, Lda. ('Toscca') and Futrifer, Indústrias Ferroviárias, S. A. ('Futrifer') participated in the procedure, each submitting a tender.

11. On 12 June 2019, the AC ordered Futrifer to pay a fine for having infringed the competition rules in procurement procedures (7) in 2014 and 2015. (8)

12. In particular, the AC found that Futrifer and other undertakings in the sector had colluded to fix prices and share the market for rail network maintenance services, in breach of Article 9(1) of Law No 19/2012 and Article 101(1) TFEU.

13. In its decision, the AC considered it unnecessary, in view of the circumstances of the case and the settlement proposal submitted by Futrifer, to impose on it the ancillary penalty of prohibition from tendering, provided for in Article 71(1)(b) of Law No 19/2012. (9)

14. On 27 July 2019, Infraestruturas awarded the contract in question to Futrifer.

15. Toscca challenged that decision before the Tribunal administrativo e fiscal de Viseu (Administrative and Tax Court, Viseu, Portugal; 'the TAF Viseu'). It asked that court to annul the award decision, to exclude the tender submitted by Futrifer and to award the contract to Toscca itself. In support of its action, it relied, in particular, on the AC's decision to impose a penalty on Futrifer.

16. The first-instance court dismissed Toscca's action on the ground that Article 70(2)(g) of the CCP applies only where the evidence of distortion of competition arises in the procedure forming the subject matter of the dispute.

17. Toscca appealed against the judgment of the TAF Viseu before the Tribunal central administrativo norte (North Central Administrative Court, Portugal). By judgment of 29 May 2020, that court found that the first-instance court had misinterpreted Article 70(2)(g) of the CCP and, in consequence, it set aside the judgment under appeal and ordered Infraestruturas to award the contract to Toscca.

18. Infraestruturas and Futrifer brought an appeal against the judgment of 29 May 2020 before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), which set that judgment aside on the ground of failure to state reasons and ordered the case to be referred back to the North Central Administrative Court.

19. On 2 June 2021, the Tribunal central administrativo norte (North Central Administrative Court) delivered a judgment in which it again overturned the first-instance judgment and ordered Infraestruturas to award the contract to Toscca.

20. Infraestruturas and Futrifer brought an appeal against the judgment of 2 June 2021 before the Supremo Tribunal Administrativo (Supreme Administrative Court), which has submitted the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the ground for exclusion provided for in Article 57(4)(d) of Directive 2014/24/EU constitute a matter reserved for decision ["reserva de decisão"] by the contracting authority?

(2) May the national legislature fully replace the decision that should be taken by the contracting authority under Article 57(4)(d) of Directive 2014/24/EU with a generic decision (with the effects of a decision) from its national competition authority to impose an ancillary penalty consisting of prohibition from participating in public procurement procedures for a certain period, adopted in the context of the imposition of a fine for infringement of competition rules?

(3) Should the contracting authority's decision concerning the "reliability" of the economic operator in view of its compliance (or non-compliance) with the rules of competition law, beyond the

scope of the specific tendering procedure, be interpreted as requiring an assessment based on the relative suitability of that economic operator, which constitutes a concrete expression of the right to good administration under Article 41(2)(c) of the Charter of Fundamental Rights of the European Union?

(4) May the solution adopted in Portuguese law under Article 55(1)(f) of the CCP, whereby the exclusion of an economic operator from a tendering procedure on grounds of infringement of competition rules unrelated to that specific procurement procedure is subject to a decision from the competition authority in the context of an application of an ancillary penalty consisting of a prohibition from tendering, a procedure in which it is the competition authority itself that assesses the relevance of the corrective measures taken, be regarded as consistent with EU law, specifically, Article 57(4)(d) of Directive 2014/24/EU?

(5) Furthermore, may the solution adopted under Portuguese law in Article 70(2)(g) of the CCP, which limits the possibility of excluding a tender due to significant evidence of acts, agreements, practices or information that are liable to distort competition rules in the specific procurement procedure in which such practices are detected, be regarded as consistent with EU law, and in particular with Article 57(4)(d) of Directive 2014/24/EU?'

III. Procedure before the Court

21. The request for a preliminary ruling was received at the Court on 2 February 2022.

22. Written observations were submitted by Futrifer, Toscca, the Czech, Hungarian and Portuguese Governments and the European Commission.

23. All of them, with the exception of the Czech and Hungarian Governments, took part in the hearing held on 7 March 2023.

IV. Assessment

A. Preliminary remarks

1. The applicable directive

24. The referring court seeks an interpretation only of Directive 2014/24 and does not refer to Directive 2014/25. The latter directive governs public contracts awarded by contracting authorities operating in the water, energy, *transport* and postal services sectors.

25. The subject matter of the contract whose award is at issue here is the supply of infrastructure components in the rail sector, that is to say, in a transport sector. In reply to a question put by the Court, the parties which took part in the hearing unanimously considered that that contract fell within the scope of Directive 2014/25, which applies specifically to 'activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway' (Article 11).

26. In any event, it is for the referring court to determine whether, in the light of its wording, the contract at issue is governed by Directive 2014/24 or, as everything seems to indicate, by Directive 2014/25.

27. It is true that, in practical terms, there is no appreciable difference in the effect of those directives as regards the point at issue: even if Directive 2014/25 were applicable, Article 80 thereof refers to 'the exclusion grounds listed in Article 57 of Directive 2014/24/EU on the terms and conditions set out therein'. (10)

28. However, the application of Directive 2014/25 might have some bearing on the (contested) 'discretion' of Member States to incorporate the optional grounds for exclusion into domestic law, as I will explain below. (11)

29. Having clarified that matter, I will refer below to Article 57 of Directive 2014/24.

2. Incorporation of Article 57(4)(d) of Directive 2014/24 into Portuguese law

30. The Commission's written observations triggered a debate, which continued at the hearing, concerning Member States' discretion not to transpose the optional grounds for exclusion set out in Article 57(4) of Directive 2014/24.

31. The Commission's arguments are as follows:

– Article 57(4) and recital 101 of Directive 2014/24 indicate that the legislature's intention was not to give Member States a free choice in whether or not to transpose the nine exclusion grounds contained in that provision. That choice is given to the contracting authorities, unless Member States require them to apply the exclusion grounds. Conversely, Member States cannot circumvent the transposition of one or more of those grounds.

– The optional ground for exclusion relating to the existence of agreements with other economic operators aimed at distorting competition has not been incorporated into Portuguese law.

32. The issues raised by the Commission could be dealt with in this reference for a preliminary ruling if the second of those assertions were correct: without the transposition into domestic law of an optional ground for exclusion, it would be necessary to reconsider whether the case-law of the Court thus far (12) on Member States' discretion to transpose or not to transpose that category of exclusion grounds requires adjustment or even correction.

33. For the reasons I will set out below, my view is that the Commission's second assertion (supported by some of the written observations submitted in the preliminary ruling procedure) is at variance with the facts.

34. Decree-Law No 111-B/2017 amended the CCP in order to transpose Directives 2014/24 and 2014/25. In Article 1, the Portuguese legislature expressly states that the decree-law 'transposes', inter alia, Directives 2014/24 and 2014/25. (13)

35. The exclusion grounds ('impediments') contained in the CCP as amended are listed in Article 55(1)(a) to (l) thereof and they mirror, with some nuances, the corresponding grounds set out in Article 57(1) and (4) of Directive 2014/24.

36. As regards the exclusion ground at issue, Article 55(1)(f) of the CCP provides: 'The following may not be candidates[;] … entities which have received the ancillary penalty of prohibition from participating in public procurement procedures, provided for in special legislation, including in penalty systems relating to … competition …, during the period laid down in the decision imposing the penalty'.

37. The CCP also contains another provision (Article 70(2)(g)) under which tenders must be excluded where their evaluation reveals 'the existence of compelling evidence of acts, agreements, practices or information that may distort the competition rules'. (14)

38. In view of those two provisions, I have difficulty in understanding some of the statements made in the written observations of Futrifer and in those of the Portuguese Government itself (the latter in ambiguous terms which it did not clarify at the hearing) (15) on the non-transposition of Article 57(4)(d) of Directive 2014/24 into the CCP.

39. The wording of those two provisions of the CCP demonstrates, in my view, that the Portuguese legislature unequivocally intended to introduce into (or to maintain in) (16) its legal order the content of Article 57(4)(d) of Directive 2014/24. Both that provision and the two national provisions mentioned seek to combat, in the field of public procurement, agreements by economic operators designed to distort competition.

40. Quite a different matter is whether, in regulating that exclusion ground in the way it did, the Portuguese legislature strictly complied with Article 57(4)(d) of Directive 2014/24 or whether, on the contrary, its approach distorted that provision, departed from its basic principles or improperly reduced its scope.

41. The Court has recalled that '… once a Member State decides to incorporate one of the optional grounds for exclusion provided for in Directive 2014/24, it must respect the essential characteristics thereof, as expressed in that directive. By stipulating that the Member States are to specify "the implementing conditions for this Article" "having regard to Union law", Article 57(7) of Directive 2014/24 prevents Member States from distorting the grounds for exclusion laid down in that provision or ignoring the objectives or principles underlying each of those grounds'. (17)

42. For the reasons I will set out below, I consider that, when incorporating the content of Article 57(4)(d) of Directive 2014/24 into domestic law, the transposition effected by the Portuguese provisions was not entirely consistent with that directive: in particular, Article 55(1)(f) of the CCP improperly curtails the contracting authority's discretion to exclude tenderers involved in collusive practices, by requiring that their conduct must have previously been the subject of an ancillary penalty of prohibition from participating in public procurement procedures imposed by the AC.

43. The fact that this is the case, as I believe it is, does not mean, however, that there was no transposition at all, but rather that the transposition was defective. Furthermore, that defective transposition could possibly be remedied by a more *expansive* interpretation of Article 70(2)(g) of the CCP, that is to say, in line with Article 57(4)(d) of Directive 2014/24 (consistent interpretation). (18)

44. In short, I do not think that the present reference for a preliminary ruling is the appropriate forum to reopen discussions on Member States' discretion not to include the optional grounds for exclusion in domestic law, precisely when the Portuguese legislature chose the opposite approach (even though that approach is not as satisfactory as it should be, from the point of view of EU law).

45. The case-law of the Court thus far concerning Member States' discretion in this field does not, of course, disregard the fact that directives are binding, as to the result to be achieved, upon each Member State (Article 288 TFEU). Starting from that premiss, the different formations of the Court have found that Directive 2014/24, as regards the optional grounds for exclusion, is correctly implemented in the terms set out above. (19)

46. The reopening of discussions referred to earlier would, moreover, be a particularly delicate exercise as regards its outcome:

– It could result in the conversion of the optional grounds for exclusion into mandatory grounds, without any intervention by the Member States as referred to in Article 57(7) of Directive 2014/24.

– It could fragment the unitary system underlying the reference to Directive 2014/24 in the provisions on exclusion grounds in Directive 2014/25. Under the third subparagraph of Article 80(1) of Directive 2014/25, the criteria and rules applying to the exclusion of candidates are to include the optional grounds listed in Article 57(4) of Directive 2014/24 *if so required by the Member States*.

B. First question referred

47. The referring court enquires whether the exclusion ground set out in Article 57(4)(d) of Directive 2014/24/EU constitutes a matter 'reserved for decision' by the contracting authority.

48. The Court has already answered that question: 'it is clear from the wording of Article 57(4) of Directive 2014/24 that the EU legislature intended to confer on the contracting authority, and on it alone, the task of assessing whether a candidate or tenderer must be excluded from a procurement procedure during the stage of selecting the tenderers'. (20)

49. That statement of the Court is consistent with Article 56(1)(b) of Directive 2014/24: the contracting authority must verify that 'the tender comes from a tenderer that is not excluded in accordance with Article 57'. It is therefore for the contracting authority to decide, in all cases, whether a tenderer should be excluded from the procurement procedure.

50. The categorical statement reproduced above must, however, be qualified where the competent authority, by a prior final decision, has made a finding of conduct incompatible with access to procurement procedures or has banned the tenderer from participating in such procedures.

51. The backdrop against which the question is submitted (that is, in the presence of anticompetitive conduct attributable to a tenderer) gives rise to three possible scenarios:

– If the operator has previously been excluded by final judgment from participating in procurement procedures (last subparagraph of Article 57(6) of Directive 2014/24) for having engaged in anticompetitive conduct, (21) the contracting authority must respect that prohibition. The economic operator subject to the prohibition is not entitled to avail itself of the possibility to demonstrate its reliability (corrective measures or self-cleaning) during the period of exclusion resulting from the judgment in the Member State in which the judgment is enforceable. (22)

– Where the prohibition from participating was ordered not by final judgment but by decision of the AC, the contracting authority is not inevitably bound by it: it may check whether that operator has taken the corrective measures referred to above and may nevertheless allow the operator to participate in the contract award procedure.

– The same would apply a fortiori if the AC did not impose a prohibition from participating in the procurement procedure but did impose a penalty on the economic operator for collusive conduct.

52. I will address the second and third situations which I have just described in my analysis of the other questions referred for a preliminary ruling. To reply to the first question in the broad terms in which it is formulated, an answer which sets out the general rule seems to me to be sufficient, subject to the exceptions arising from Directive 2014/24 itself.

C. Second question referred

53. The referring court seeks to ascertain, in essence, whether, in the context of Article 57(4)(d) of Directive 2014/24, the national legislature may 'fully replace the decision that should be taken by the contracting authority' with a decision of the AC imposing on an operator, as an ancillary penalty, a prohibition from participating in procurement procedures.

54. Law No 19/2012 allows the AC to impose on operators that have engaged in anticompetitive practices, in addition to a fine, the ancillary penalty (23) of prohibition from participating in public procurement procedures for a certain period (Article 71(1)(b)).

55. Nonetheless, as I have already explained, the AC expressly decided that it was not appropriate to impose the ancillary penalty on Futrifer.

1. Inadmissibility

56. Based on that premiss, however interesting, from other angles and in general terms, the issues raised by the referring court may be, the question is hypothetical in relation to the instant case.

57. The question would be meaningful if, in the presence of a decision of the AC imposing a prohibition from tendering, it was necessary to examine – as requested by the referring court – the extent to which that decision would be sufficient to 'replace' the (subsequent) decision of the contracting authority.

58. However, since it is clear that, in the proceedings against Futrifer, the AC purposely did not impose on it the ancillary penalty of prohibition from tendering, I do not see how the present dispute would benefit from a ruling on the consequences of that (non-existent) prohibition.

59. The second question referred for a preliminary ruling is therefore inadmissible. (24)

2. In the alternative, as to the substance

60. If the Court disagrees with me and decides to address the substance of the question referred for a preliminary ruling, my position on the matter is as follows.

61. In my view (leaving aside the cases in which the prohibition from participating was imposed by final judgment), (25) the AC's decision prohibiting an operator from participating in procurement procedures does not bind the contracting authority to the point of 'fully replacing its decision'.

62. The contracting authority may, also in that situation, verify whether the economic operator subject to the penalty has taken the corrective measures referred to in Article 57(6) of Directive 2014/24 and nevertheless allow it to participate in the procurement procedure.

63. I would point out that the economic operator has an unequivocal right to demonstrate its reliability by means of those corrective measures, a right which flows directly from Article 57(6) of Directive 2014/24. (26)

64. My proposed course of action (reserving discretion to verify the corrective measures to the contracting authority, notwithstanding the prohibition from tendering imposed by the competition authority) allows a balance to be struck between two approaches:

– On the one hand, the approach that seeks to preserve the powers of the contracting authority, which must have the freedom to evaluate the candidate's reliability without necessarily being bound by the findings of other public bodies. (27)

– On the other, the approach that is respectful of the duties of the public authorities responsible for pursuing, in particular, anticompetitive conduct. (28) The contracting authority must take account of the decisions of those authorities since, ultimately, 'the existence of conduct restrictive of competition may be regarded as proved only after the adoption of such a decision, which legally classifies the facts to that effect'. (29)

65. It is true, however, that as the Court has held in the light of recital 102 of Directive 2014/24, (30) Member States have 'a broad discretion … when designating the authorities responsible for assessing the appropriateness of the compliance measures. In that regard, … Member States may entrust that task of assessment to any authority other than the contracting authority or contracting entity'. (31)

66. In short, when assessing whether to apply Article 57(4)(d), the contracting authority may either:

– exclude, in the absence of a prior decision by another authority, an economic operator in respect of whom there are sufficiently plausible indications to conclude that the operator has entered into agreements with other operators aimed at distorting competition; or

– where the relevant authority has found that those anticompetitive agreements exist, (32) and whether or not that authority has imposed a prohibition from participating in procurement procedures, assess whether the corrective measures taken by the tenderer or candidate demonstrate its reliability, with the result that the tenderer or candidate should not be excluded from the procurement procedure, pursuant to Article 57(6) of Directive 2014/24. A Member State may, however, entrust the assessment of the corrective measures to an authority other than the contracting authority, in which case the latter must comply with that assessment.

D. Third question referred

67. The wording of the third question referred for a preliminary ruling is actually made up of two questions:

– first, whether 'the contracting authority's decision concerning the "reliability" of the economic operator in view of its compliance (or non-compliance) with the rules of competition law' may be

taken ‘beyond the scope of the specific tendering procedure’; and

– second, whether that assessment of the economic operator’s relative suitability must be ‘sufficiently substantiated’ by an ‘independent appraisal’ by the contracting authority which other competitors may challenge. (33)

68. Again, the starting premiss for this question appears to be that the contracting authority’s decision was preceded by the ancillary measure (prohibition from tendering) ordered by the AC. On that basis, the referring court enquires whether the reasons underlying the ancillary measure are ‘of the same type and nature’ as the ‘reliability assessment’ to be carried out by the contracting authority. (34)

69. Construed in that way, the question comes up against the same problems of inadmissibility (on account of being hypothetical) as those already mentioned in relation to the second question. However, in its arguments, the referring court refers to the possibility of the contracting authority deciding that an economic operator is suitable despite having been penalised for collusive conduct, where the penalty imposed did not include a prohibition from tendering. (35)

70. I will therefore answer both questions in line with the approach taken by the referring court described above.

1. Assessment of reliability or suitability by the contracting authority

71. The answer to this part of the question referred actually follows from my answer to the two previous questions. The contracting authority retains its full discretion to assess the reliability of the tenderer or candidate, following the decision of the competition authority, in the terms set out above.

72. Recital 101 of Directive 2014/24 states that ‘contracting authorities should … be given the possibility to exclude economic operators which have proven *unreliable*, for instance because of … *other forms of grave professional misconduct, such as violations of competition rules*’. (36) The second paragraph of that recital refers to performance in previous contracts ‘that casts serious doubts as to the reliability of the economic operator’. (37)

73. It is no surprise that, in the light of that recital, the Court has stated that ‘the option available to any contracting authority to exclude a tenderer from a procurement procedure is particularly intended to enable it to assess the integrity and reliability of each of the tenderers’. (38)

74. The optional grounds for exclusion enable Member States to satisfy public interest objectives and are, in any event, intended to ensure the reliability, (39) diligence, professional honesty and responsibility of the tenderer. (40)

75. Specifically, the Court has held, as regards ‘the objective underlying Article 57(4) of Directive 2014/24’, that ‘the option, or even the obligation, for the contracting authority to exclude an economic operator from participating in a contract award procedure is intended in particular to enable it to assess the integrity and reliability of each of the economic operators’. (41)

76. Furthermore, on a proper interpretation of Article 57(4)(d) of Directive 2014/24, the verification of the tenderer’s integrity and reliability should cover its *past* anticompetitive conduct, not only collusive arrangements in the ‘specific’ procurement procedure which the contracting authority is to decide on.

77. That follows in particular from the second subparagraph of Article 57(5) of Directive 2014/24, under which contracting authorities may exclude an economic operator where it transpires ‘that the economic operator is, in view of acts committed or omitted either *before* or during the procedure, in one of the situations referred to in paragraph 4’. (42)

78. In addition to the foregoing considerations, it should be noted that the contracting authority may, alternatively, apply Article 57(4)(c) of Directive 2014/24, basing its decision to exclude the tenderer on the fact that the tenderer was guilty of grave professional misconduct.

79. The concept of grave professional misconduct, which is a ground for exclusion under Portuguese law, (43) may also encompass anticompetitive conduct even if such conduct attracts a specific type of exclusion: that is borne out by recital 101 of Directive 2014/24, mentioned above, which (in line with the Court's approach to the preceding directive) (44) considers infringements of the competition rules to be a form of grave professional misconduct. (45)

80. It is true, as was pointed out at the hearing, that that possibility results in a degree of overlap between the two optional grounds for exclusion. However, I think that if it is viewed as being of a complementary nature, it serves to achieve the objectives of Directive 2014/24.

81. Where Article 57(4)(d) of Directive 2014/24 applies, the logical course of action would be for the contracting authority to invoke that ground for exclusion. For all other conduct which infringes the competition rules but does not fall within the scope of 'agreements with other economic operators', the contracting authority may have recourse to the more generic wording of point (c).

82. If the aim is to maximise the contracting authority's ability to assess the reliability of tenderers and candidates, I see no reason to limit its discretion by defining which 'infringements of the competition rules' have been committed. Recital 101 of Directive 2014/24 again permits the use of Article 57(4)(c) and (d) thereof in the terms set out above. It thus gives rise to concurrent rules which the interpreting authority will have to address by applying the rule which is best suited to the circumstances of each case.

2. Obligation to state reasons

83. The contracting authority is obliged to 'carry out a specific and individual assessment of the conduct of the entity concerned'. (46) That assessment must be reflected in a statement of reasons for the measure adopted enabling the addressees, and any competitors, to challenge it before the courts. (47)

84. Where (as here) one of the competitors claims that another falls within the scope of a ground for exclusion under Article 57(4)(d) of Directive 2014/24, the contracting authority must explain, in particular, why it considers that candidate to be reliable. Where appropriate, the statement of reasons must include the assessment of the corrective measures taken by the tenderer. (48)

85. The requirement to state reasons may be satisfied if the contracting authority endorses, directly or by reference, the arguments taken into account by the sectoral authority (here, the AC) when finding that an operator has colluded with others to distort competition.

E. Fourth question referred

86. The referring court entertains doubts as to whether the 'solution adopted in Portuguese law under Article 55(1)(f) of the CCP' is compatible with Article 57(4)(d) of Directive 2014/24.

87. The referring court's interpretation of that provision of the CCP (which the Court must follow, since it originates from the highest administrative court in Portugal) is as follows: where the exclusion of an economic operator is due to the 'infringement of competition rules unrelated to [the] specific procurement procedure', Article 55(1)(f) of the CCP makes that exclusion dependent on the AC's decision 'in the context of an application of an ancillary penalty consisting of a prohibition from tendering'. The referring court adds that, in that procedure, the AC is to assess the suitability of the corrective measures taken.

88. This question is a hypothetical one for the same reasons as those set out in the analysis of the second question referred: (49)

– first, the AC expressly ruled out the ancillary penalty as a response to Futrifer's conduct;

– second, it is not apparent from the documents before the Court that any of the operators concerned relied on the adoption of the corrective measures referred to in Article 57(6) of Directive 2014/24 in order to bypass a (non-existent) prior prohibition from tendering.

89. The referring court's questions therefore overstep the boundaries of the dispute, in the light of the facts at issue, and require, de facto, an advisory opinion from the Court on matters unrelated to those facts.

90. To overcome the objection of inadmissibility, the question could be reformulated so that it is construed as arising where the AC considers the collusive agreement to be proven and punishes it with a fine, but without adding the prohibition from tendering.

91. In any event, either in accordance with that reformulation or in the alternative, the answer I propose is based on my earlier considerations. Thus:

– A national provision (or the interpretation thereof) which requires, as a necessary condition for its application, the prior determination of a competition authority would not be compatible with Article 57(4)(d) of Directive 2014/24.

– Member States may entrust the assessment of corrective measures to authorities other than contracting authorities, such as the AC. It is for the referring court to determine whether that is the case under Portuguese law and, if so, to verify 'that the national rules put in place for that purpose satisfy all the requirements laid down in Article [57(6) of Directive 2014/24]'. (50)

F. Fifth question referred

92. The referring court turns its attention to Article 70(2)(g) of the CCP in order to enquire whether its content is consistent with Article 57(4)(d) of Directive 2014/24.

93. The referring court interprets that article of the CCP as 'limit[ing] the possibility of excluding a tender due to significant evidence of acts, agreements, practices or information that are liable to distort competition rules in the specific procurement procedure in which such practices are detected'.

94. Article 70 of the CCP applies, at least on a literal reading, at a later stage of the procurement procedure: while Article 55 applies at the initial stage (selection of the operator based on qualitative criteria), Article 70 applies to the following phase (evaluation of the tenders submitted). In order to reach that second stage, the tenderer or candidate must naturally have passed the first stage, that is to say, it must not have been previously excluded from the procedure.

95. The national provision is unobjectionable if its interpretation in all cases leaves intact the contracting authority's discretion to find that, prior to the specific procurement procedure it has to decide on, a tenderer engaged in anticompetitive conduct resulting in its exclusion.

96. In other words, no provision of Directive 2014/24 is infringed if Article 70(2)(g) of the CCP merely allows the contracting authority to exclude a tenderer's bid where it finds that the bid was the outcome of collusive conduct in the context of the procurement procedure itself. (51)

97. The wording of Article 57(4)(d) of Directive 2014/24 is sufficiently broad to cover all the possible ways in which the contracting authority may become aware of conduct by a tenderer aimed at distorting competition.

98. In my Opinion in *Vossloh Laeis*, I argued that Article 57 of Directive 2014/24 confers certain functions having investigative connotations on contracting authorities, (52) a position that the Court endorsed in its judgment in that case. (53)

99. In the exercise of those functions, contracting authorities are empowered to detect the existence of agreements by tenderers entered into in connection with the procurement procedure underway which distort competition. It is possible that, as the Commission points out, the contracting authority may encounter difficulties in proving the anticompetitive conduct. In addition to not being insurmountable in practice, those difficulties do not justify limiting the contracting authority's discretion to assess collusive conduct which it has found to exist.

V. Conclusion

100. In the light of the foregoing considerations, I propose that the Court of Justice declare the second and fourth questions referred for a preliminary ruling to be inadmissible and give the following answer to the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal):

Article 57(4)(d) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

must be interpreted as meaning that:

– the optional ground for exclusion set out in that provision is to be assessed by the contracting authority without being bound by decisions of other authorities, unless an operator has been excluded by final judgment from participating in procurement procedures, during the period of exclusion resulting from that judgment in the Member State where the judgment is enforceable;

– the contracting authority must state, directly or by reference, the reasons for allowing a tenderer who has previously been penalised for anticompetitive conduct to participate in the procurement procedure;

– it does not preclude a national provision which permits the contracting authority to exclude a tender due to significant evidence of acts, agreements, practices or information that are liable to distort the competition rules in the specific procurement procedure in which such conduct is detected.

In the alternative, I suggest that the Court of Justice give the following answer to the second and fourth questions referred for a preliminary ruling:

– where a competition authority has imposed on an economic operator an ancillary penalty of prohibition from participating in public procurement procedures for a certain period, the contracting authority retains its discretion not to exclude that operator from the procurement procedure in the circumstances referred to in Article 57(6) of Directive 2014/24;

– the economic operator is entitled to provide evidence that it has taken sufficient measures to demonstrate its reliability under Article 57(6) of Directive 2014/24, which the contracting authority (or the authority empowered for that purpose under national law) must assess, including where a competition authority has imposed an ancillary penalty on the economic operator prohibiting it from participating in procurement procedures.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

3 Directive of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

---

4 Decree-Law No 18/2008, Public Procurement Code (‘CCP’) (*Diário da República* No 20/2008, Series I, of 29 January 2008), as amended by Decreto-lei n.º 111-B/2017 of 31 August 2017 (‘Decree-Law No 111-B/2017’) (*Diário da República* No 168/2017, 2nd Supplement, Series I, of 31 August 2017).

---

5 Lei n.º 19/2012, de 8 de maio, aprova o novo regime jurídico da concorrência (Law No 19/2012 of 8 May approving new legal rules governing competition) (*Diário da República,* Series I, No 89, of 8 May 2012).

6 Procedure 2019/S 015-030671, published in the Supplement to the OJEU of 22 January 2019 (OJ 2019 S 15, p. 1).

7 These were procedures conducted by a public undertaking leading to the award of equipment and track maintenance services on the Portuguese rail network.

8 File PRC/2016/6. So far as concerns Futrifer, the relevant decision is the ‘Final decision in a settlement procedure (non-confidential version)’.

9 Paragraph 231 et seq. of the decision of 12 June 2019.

10 See, by analogy, judgment of 10 November 2022, *Taxi Horn Tours* (C-631/21, EU:C:2022:869, paragraphs 39 and 40).

11 Point 46 of this Opinion.

12 The prevailing view expressed in the judgments of 19 June 2019, *Meca* (C-41/18, EU:C:2019:507; ‘judgment in *Meca*’), paragraph 33, and of 30 January 2020, *Tim* (C-395/18, EU:C:2020:58, paragraph 34), was confirmed in the judgment of 3 June 2021, *Rad Service and Others* (C-210/20, EU:C:2021:445, paragraph 28), as follows: ‘In accordance with Article 57(4) and (7) of Directive 2014/24, the Member States are free not to apply the facultative grounds for exclusion set out in that directive or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level’.

13 The fact that Decree-Law No 111-B/2017 did not amend some of the CCP’s provisions hitherto in force is irrelevant for the present purposes.

14 Toscca relies on that provision in its written observations to argue that ‘the Portuguese legislature *transposed* Article 57(4)(d) of Directive 2014/24, *retaining* the wording of Article 70(2)(g) of the CCP (currently in the version resulting from the 2017 reform)’. Emphasis added.

15 Paragraphs 80 to 84 of its written observations. Read alongside the preceding paragraphs, those paragraphs ultimately show that, by means of Article 70 of the CCP in conjunction with Article 55(1)(f) thereof, the Portuguese legislature incorporated the exclusion ground at issue. The Portuguese Government made this very clear in paragraph 71 of its observations: ‘the provisions of Article 55(1)(f) and Article 70(2)(g) of the CCP are fully in line with Directive 2014/24, in particular Article 57(4)(d) thereof’.

16 For the purposes of complying with the obligation to transpose the provisions of a directive into domestic law, it is sufficient if pre-existing national legislation includes the rules that substantively transpose those provisions. The transposition of a directive into domestic law does not necessarily require the binding content of the directive to be enacted in precisely the same words in a provision *postdating* that directive. See, to that effect, judgment of 10 June 2021, *Ultimo Portfolio Investment (Luxembourg)* (C-303/20, EU:C:2021:479, paragraphs 33 to 36). In particular, in paragraph 35 the Court stated that in order to determine ‘whether national legislation adequately implements the obligations resulting from a given directive, it is important to take into account not only the legislation specifically adopted for the purposes of transposing that directive, but also all the available and applicable legal rules’.

17 Judgment in *Meca*, paragraph 33.

---

18 That appears to have been the view taken by the Tribunal central administrativo norte (North Central Administrative Court) in its judgment of 29 May 2020 upholding Toscca's claim, as is apparent from Infraestruturas' arguments set out in paragraph 7 of the order for reference: according to that court, Article 70(2)(g) of the CCP 'necessarily also encompasses *past instances* of evidence of anticompetitive conduct by competitors not present or mentioned in the competitor's tender' (emphasis added).

---

19 See footnote 12 above.

---

20 Judgment in *Meca*, paragraph 34.

---

21 The prohibition from tendering may have been ordered by final judgment for infringements committed in other areas of the law. I will focus below on those imposed by a competition authority, as that is what occurred here.

---

22 On the interpretation of the analogous rule in Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), see judgment of 11 June 2020, *Vert Marine* (C-472/19, EU:C:2020:468, paragraph 20).

---

23 Law No 19/2012 describes that prohibition as a 'penalty'. It does not therefore give rise to a debate concerning its legal nature, which is at issue in other legal systems.

---

24 Futrifer argues that the reference for a preliminary ruling is inadmissible in its entirety because none of the questions, which it considers to be general and hypothetical, are relevant to the resolution of the dispute. The Commission, more succinctly, criticises the fact that the referring court 'appears to invite the Court of Justice to rule, in a broad and almost abstract manner, on the transposition of Directive 2014/24', but it does not go so far as to challenge the admissibility of the reference for a preliminary ruling. For my part, I consider Futrifer's criticism to be well placed as regards the second and fourth questions referred.

---

25 See points 50 and 51 of this Opinion.

---

26 Judgment of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel* (C-387/19, EU:C:2021:13, paragraph 48).

---

27 I refer to my Opinion in *Delta Antrepriză de Construcţii şi Montaj 93* (C-267/18, EU:C:2019:393, point 30).

---

28 Judgment of 24 October 2018, *Vossloh Laeis* (C-124/17, EU:C:2018:855; 'judgment in *Vossloh Laeis*'), paragraphs 25 and 26.

---

29 Judgment in *Vossloh Laeis*, paragraph 39.

---

30 '[Member States] should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task'.

31 Judgment of 11 June 2020, *Vert Marine* (C-472/19, EU:C:2020:468, paragraph 29).

32 On the relationship between decisions of the competition authority and those of the contracting authorities, see paragraphs 25 to 33 of the judgment in *Vossloh Laeis*.

33 Order for reference, paragraph 2.2.6, third subparagraph.

34 According to the referring court, in the present case 'the contracting authority has shown no interest in conducting its own assessment of the tenderer's "reliability" … On the contrary, it argues that it is not required to do so because the decision taken by the AC already contains such an assessment' (order for reference, paragraph 2.2.6, fifth subparagraph).

35 That seems to be the vague gist of paragraph 2.2.6 of the order for reference.

36 Emphasis added.

37 See judgment in *Meca*, paragraph 30.

38 *Ibidem*, paragraph 29.

39 In my Opinion in *Delta Antrepriză de Construcţii şi Montaj 93* (C-267/18, EU:C:2019:393, point 28), I noted that 'Directive 2014/24 makes reliability a key component of [the] relationship' between the contracting authority and the tenderers.

40 Judgment of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici* (C-358/12, EU:C:2014:2063), paragraphs 29, 31 and 32.

41 Judgment of 30 January 2020, *Tim* (C-395/18, EU:C:2020:58, paragraph 41).

42 Emphasis added.

43 Article 55(1)(c) of the CCP imposes a prohibition from tendering on natural and legal persons who have received an administrative penalty for grave professional misconduct.

44 Order of 4 June 2019, *Consorzio Nazionale Servizi* (C-425/18, EU:C:2019:476), concerning point (d) of the first subparagraph of Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

45 On 'the scope of the collusion-related exclusion ground: coverage of concerted practices and interplay with the exclusion ground due to grave professional misconduct', reference should be made to section 5.2 of the Notice of the European Commission on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (2021/C 91/01).

46 Judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraph 157), citing judgment of 9 November 2017, *LS Customs Services* (C-46/16, EU:C:2017:839, paragraph 39), and the case-law cited therein.

---

47 *Ibidem*, paragraph 120.

---

48 Under the third subparagraph of Article 57(6) of Directive 2014/24, 'where the measures [taken by the economic operator] are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision'. That provision does not, however, preclude the statement of reasons from operating in the opposite direction, where required by another competing operator in order to argue that its opponent should be excluded.

---

49 The difference between this question and the second question referred is that, here, the referring court focuses on the fact that, under Portuguese law, where an ancillary penalty of prohibition from tendering has been imposed, the AC is also competent to decide on the rehabilitation of the economic operator subject to the penalty.

---

50 Judgment of 11 June 2020, *Vert Marine* (C-472/19, EU:C:2020:468, paragraphs 31 and 38) and point 2 of the operative part.

---

51 It is for the referring court to decide whether, in addition, Article 70(2)(g) of the CCP could be interpreted in the manner described in footnote 18.

---

52 C-124/17, EU:C:2018:316, points 46 to 49.

---

53 Judgment in *Vossloh Laeis*, paragraph 24 et seq.

EU:C:2022:973

JUDGMENT OF THE COURT (Tenth Chamber)

8 December 2022 (*)

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 18(1) – Principles of equal treatment, transparency and proportionality – Decision to withdraw an invitation to tender – Tenders submitted separately by two tenderers belonging to the same economic operator and constituting the two most economically advantageous tenders – Refusal of the successful tenderer to sign the contract – Decision of the contracting authority to refuse the tender of the next tenderer, terminate the procedure and issue a new call for tenders)

In Case C-769/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administratīvā rajona tiesa (District Administrative Court, Latvia), made by decision of 13 December 2021, received at the Court on 13 December 2021, in the proceedings

AAS ‘BTA Baltic Insurance Company’

v

Iepirkumu uzraudzības birojs,

Tieslietu ministrija,

THE COURT (Tenth Chamber),

composed of E. Regan (Rapporteur), President of the Fifth Chamber, acting as President of the Tenth Chamber, I. Jarukaitis and Z. Csehi, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– AAS ‘BTA Baltic Insurance Company’, by M. Brizgo, advokāts,

– the Latvian Government, by J. Davidoviča and K. Pommere, acting as Agents,

– the European Commission, by P. Ondrůšek, A. Sauka and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between AAS BTA Baltic Insurance Company (‘Baltic’), on the one hand, and, on the other, the Tieslietu ministrija (Ministry of Justice, Latvia) and the Iepirkumu uzraudzības birojs (Procurement Monitoring Bureau, Latvia), concerning a decision to terminate a public procurement procedure for a health insurance services contract.

Legal context

European Union law

3 Article 18 of Directive 2014/24, entitled ‘Principles of procurement’, provides, in paragraph 1 thereof:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…’

4 Article 55 of that directive, entitled ‘Informing candidates and tenderers’, provides, in paragraph 1 thereof:

‘Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement, not to award a contract for which there has been a call for competition, to recommence the procedure or not to implement a dynamic purchasing system.’

Latvian law

5 Article 2 of the Publisko iepirkumu likums (Law on public procurement) of 15 December 2016 (*Latvijas Vēstnesis*, 2016, No 254) is worded as follows:

‘The purpose of this law is to ensure:

(1) transparency of procurement;

(2) free competition between suppliers, and their equal and fair treatment;

(3) efficient use of the contracting authority’s resources by minimising its risk.’

6 Under Paragraphs 23 and 24 of Ministru kabineta noteikumi Nr.107 ‘Iepirkuma procedūru un metu konkursu norises kārtība’ (Decree No 107 of the Council of Ministers on public procurement procedures and competitions) of 28 February 2017 (*Latvijas Vēstnesis*, 2017, No 45):

‘23. If the tenderer to which the procurement contract has been awarded declines to conclude the said contract with the contracting authority, the procurement committee shall have the power to decide to award the procurement contract to the tenderer which has submitted the next most economically advantageous tender or to terminate the procurement procedure without selecting any tender. Where a decision has been taken to award the procurement contract to the tenderer which has submitted the next most economically advantageous tender, but the tenderer in question declines to conclude the said contract, the procurement committee shall make a decision to terminate the procurement procedure without selecting any tender.

24. Before taking a decision on whether to award the procurement contract to the tenderer which has submitted the next most economically advantageous tender, the procurement committee shall assess whether that tenderer and the tenderer originally selected which declined to conclude the contract in question with the contracting authority must not be regarded together as a single economic operator. Where necessary, the procurement committee shall have the power to require the next tenderer to provide a declaration and, where necessary, evidence that it and the tenderer originally selected must not be regarded together as a single economic operator. If the next tenderer and the tenderer originally selected must be regarded together as a single economic

operator, the procurement committee shall decide to terminate the procurement procedure without selecting any tender.’

The dispute in the main proceedings and the question referred for a preliminary ruling

7 The Ministry of Justice issued, as contracting authority, a call for tenders for the award of a public contract for health insurance for its employees and those of the Valsts zemes dienests (State Land Service, Latvia), the Datu valsts inspekcija (National Data Protection Agency, Latvia), the Maksātnespējas kontroles dienests (Insolvency Control Service, Latvia) and the Patentu valde (Patent Office, Latvia).

8 A number of tenderers, including Baltic and Compensa Life Vienna Insurance Group SE Latvijas filiāle (‘Compensa’), submitted tenders in order to be awarded that public contract.

9 By decision of 19 November 2020, the procurement committee of the Ministry of Justice found that the tender submitted by Compensa was the most economically advantageous tender. However, that company declined to conclude the procurement contract.

10 By decision of 1 December 2020, that procurement committee stated that Baltic was the next most economically advantageous tenderer eligible to be awarded the contract, while requiring, on the basis of Paragraph 24 of Decree No 107 of 28 February 2017, a declaration and evidence that Baltic and Compensa should not be regarded as constituting one and the same economic operator.

11 In response to that request, Baltic stated that it had to be regarded as forming a single economic operator with Compensa, while declaring that it had prepared its tender independently and without coordination with Compensa.

12 In those circumstances, by decision of 9 December 2020, the procurement committee of the Ministry of Justice, relying on Paragraph 23 of Decree No 107 of 28 February 2017, terminated the public procurement procedure.

13 On 16 December 2020, the Ministry of Justice launched a new procurement procedure.

14 By decision of 21 January 2021, the Procurement Monitoring Bureau, hearing a complaint from Baltic, confirmed the decision of 9 December 2020. It noted that Paragraph 24 of Decree No 107 of 28 February 2017 requires the contracting authority, for the purpose of preventing the possibility of a concerted practice between undertakings in the same group once tenders have been submitted, to terminate the public procurement procedure where it finds that the tenderer originally selected, which has declined to conclude the contract with the contracting authority, and the next tenderer, must be regarded as constituting a single market participant. Moreover, according to the Procurement Monitoring Bureau, the contracting authority, in accordance with Paragraph 23 of that decree, is entitled, in any event, to terminate the public contract if the successful tenderer declines to conclude the said contract with the contracting authority, as no other tenderer has the subjective right to require that it be awarded the tender.

15 Baltic then brought an action before the Administratīvā rajona tiesa (District Administrative Court, Latvia), the referring court, seeking to have that decision annulled.

16 In Baltic’s opinion, the contracting authority was under an obligation to evaluate its explanations concerning the nature of the link between the two companies and the preparation of the tenders and thereby strike a fair balance between all of the principles enshrined in Article 2 of the Law on public procurement.

17 The presumption in Paragraph 24 of Decree No 107 of 28 February 2017 that undertakings in the same group will have coordinated their tenders in order to distort competition is disproportionate and infringes the principles laid down both in Directive 2014/24 and in the judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317).

18 The fact that the amount of the tender of the tenderer originally selected was higher than that of its tender proves that the tenders were not coordinated, meaning that the withdrawal of the first tender could not confer any advantage on the companies from the group.

19 The Procurement Monitoring Bureau considers, for its part, that the judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317), refers only to the right of linked undertakings to take part in a public procurement procedure and to submit tenders, which has not been restricted in the present case.

20 That situation must be distinguished from one in which the contracting authority is required to terminate the public procurement procedure where the selected tenderer declines to conclude the public procurement contract in question. In the first case, referred to in the judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317), the contracting authority, after having rejected the tenders of the linked undertakings, selects another tender and the public procurement leads to the award of a contract, whereas, in the second case, the contracting authority terminates the public procurement procedure without selecting any tender, thereby restoring competition and giving all tenderers the chance to take part in a new procedure.

21 The Ministry of Justice further submits that, in any event, Paragraph 23 of Decree No 107 of 28 February 2017 confers on the contracting authority discretionary power over the continuation of the procurement procedure where the successful tenderer declines to conclude the contract in question.

22 According to the Administratīvā rajona tiesa (District Administrative Court), the outcome of the dispute before it depends on the question whether the mere fact that Baltic and Compensa must be regarded as constituting one and the same economic operator – which is not disputed in the present case – has an effect on the right of the contracting authority to decide to terminate the public procurement procedure.

23 That court considers that a Member State does indeed have a wide discretion to provide for the possibility of adopting a decision to withdraw the invitation to tender. In accordance with the case-law of the Court, as is set out in the judgment of 11 December 2014, *Croce Amica One Italia* (C-440/13, EU:C:2014:2435, paragraphs 33 to 35), the grounds for withdrawal may be based, inter alia, on reasons which reflect the assessment as to whether it is expedient, from the point of view of the public interest, to carry an award procedure to its conclusion, having regard, among other things, to any change that may arise in the economic context or factual circumstances, or indeed the needs of the contracting authority concerned.

24 In the present case, however, it is apparent from the account of the facts that, notwithstanding the refusal of the successful tenderer to conclude the public contract, the contracting authority intended to continue with the procurement procedure by awarding the public contract to the tenderer which had submitted the next most economically advantageous tender. The contracting authority's needs did not change, as is confirmed by the launch of a new procurement procedure, and the next tender met the contracting authority's needs and requirements. The contracting authority nevertheless terminated, pursuant to Paragraph 24 of Decree No 107 of 28 February 2017, the public procurement procedure, on the ground that the two tenderers concerned had to be regarded as constituting one and the same economic operator.

25 The referring court has doubts as to whether such national legislation is compatible with the principles of EU law applicable to public procurement procedures.

26 It is true that that legislation does not prohibit participation in the same public contract by undertakings linked by a relationship of control or affiliated to one another. It is therefore consistent with the Court's case-law resulting, in particular, from the judgments of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317, paragraphs 29 and 30), and of 8 February 2018, *Lloyd's of London* (C-144/17, EU:C:2018:78, paragraphs 34 to 36), according to which EU law precludes national legislation which lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate the independence of their tenders, such legislation being contrary to the EU interest in ensuring the widest possible participation by tenderers in a call for tenders.

27 It follows, however, from that same case-law that undertakings linked by a relationship of control or affiliated to one another have the right to be awarded the contract in which they have participated. Paragraph 24 of Decree No 107 of 28 February 2017, however, prohibits the contracting authority from awarding the public contract to the next tenderer where that tenderer and the tenderer originally selected which has withdrawn its tender together constitute one and the same economic operator. Such legislation is therefore based, in essence, on the irrebuttable presumption that the two tenderers have acted in concert and that the successful tenderer withdrew its tender on that ground.

28 The referring court considers, therefore, that the national legislation at issue in the main proceedings, in spite of the wide discretion enjoyed by the Member States to establish the cases in which a public procurement procedure must be terminated in circumstances where the needs of the contracting authority have not changed and the next tender meets the contracting authority's needs and requirements, is incompatible with the principles laid down in Article 18(1) of Directive 2014/24, in particular with the obligation on Member States to treat economic operators equally and without discrimination and in accordance with the principle of proportionality. The stage of the public procurement procedure at issue is of no importance for the purpose of applying the case-law of the Court cited in paragraph 26 above, that case-law also being applicable to a decision to terminate that procedure. That legislation should therefore allow the tenderer concerned the opportunity to demonstrate the independence of its tender.

29 In those circumstances, the Administratīvā rajona tiesa (District Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is national legislation which requires the contracting authority to terminate a procurement procedure in a situation where the tenderer originally selected, which declined to enter into the procurement contract with the contracting authority, must be considered to constitute a single market participant with the next tenderer, whose tender meets the contracting authority's needs and requirements, compatible with the principles of procurement defined in Article 18(1) of Directive [2014/24], in particular with the requirement for Member States to treat economic operators equally and without discrimination, and with the principle of proportionality?'

Consideration of the question referred

30 By its question, the referring court asks, in essence, whether general principles of EU law, such as, in particular, the principles of equal treatment and proportionality, within the meaning of Article 18(1) of Directive 2014/24, must be interpreted as precluding national legislation which requires the contracting authority to terminate a public procurement procedure where, in the event of withdrawal of the tenderer originally selected for having submitted the most economically advantageous tender, the tenderer which submitted the next most economically advantageous tender constitutes with the tenderer originally selected a single economic operator.

31 In that regard, it should be recalled at the outset that, as is apparent from the case-law of the Court, EU law does not preclude Member States from providing for the possibility, referred to in Article 55(1) of Directive 2014/24, of adopting a decision to withdraw an invitation to tender on grounds which reflect, in particular, the assessment as to whether it is expedient, from the point of view of the public interest, to carry an award procedure to its conclusion, having regard, among other things, to any change that may arise in the economic context or factual circumstances, the needs of the contracting authority concerned or the insufficient degree of competition where, at the conclusion of the award procedure in question, only one tenderer was qualified to perform the contract (see, to that effect, judgment of 11 December 2014, *Croce Amica One Italia*, C-440/13, EU:C:2014:2435, paragraph 35).

32 However, such a decision to withdraw an invitation to tender must be adopted in compliance with the rules of EU law, in particular with general principles of EU law such as the principles of equal treatment, transparency and proportionality, which are also referred to in Article 18(1) of Directive 2014/24 (see, to that effect, judgments of 18 June 2002, *HI*, C-92/00, EU:C:2002:379, paragraphs 42 and 45 to 47, and of 11 December 2014, *Croce Amica One Italia*, C-440/13, EU:C:2014:2435, paragraphs 33, 34 and 36).

33 In the present case, it is clear that national legislation such as that at issue in the main proceedings, by requiring the contracting authority to terminate a public procurement procedure in the circumstances referred to in paragraph 30 of the present judgment, seeks to prevent any potential collusion between participants in the same procedure for the award of a public contract and to safeguard the equal treatment of candidates and the transparency of the procedure (see, by analogy, judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 31).

34 In accordance with the principle of proportionality, such legislation must not, however, according to the case-law of the Court, go beyond what is necessary to achieve those objectives (see, to that effect, judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 32 and the case-law cited).

35 It should be recalled, in this connection, that the EU rules on public procurement were adopted in pursuance of the establishment of a single market, the purpose of which is to ensure freedom of movement and eliminate restrictions on competition (judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 33 and the case-law cited).

36 In that context, it is the concern of EU law to ensure the widest possible participation by tenderers in a call for tenders (judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 34 and the case-law cited).

37 It thus follows, according to settled case-law, that the automatic exclusion of candidates or tenderers that are in a relationship of control or association with other competitors goes beyond that which is necessary to prevent collusive behaviour and, as a result, to ensure the application of the principle of equal treatment and compliance with the obligation of transparency. Such an automatic exclusion, in so far as it constitutes an irrebuttable presumption of mutual interference in the respective tenders, for the same contract, of undertakings linked by a relationship of control or of association and accordingly precludes the possibility for those candidates or tenderers of showing that their tenders are independent, is contrary to the EU interest in ensuring the widest possible participation by tenderers in a call for tenders (judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraphs 35 and 36 and the case-law cited).

38 In this regard, the Court has already held that groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts. Relationships between undertakings in the same group may in fact be governed by specific provisions such as to guarantee both independence and confidentiality in the drawing-up of tenders which may be submitted simultaneously by the undertakings in question in the same tendering procedure (judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 37 and the case-law cited).

39 Observance of the principle of proportionality therefore requires that the contracting authority be required to examine and assess the facts, in order to determine whether the relationship between two entities has actually influenced the respective content of the tenders submitted in the same tendering procedure, a finding of such influence, in any form, being sufficient for those undertakings to be excluded from the procedure (judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 38 and the case-law cited).

40 That case-law, developed in relation to national legislation providing for the automatic exclusion of participation in a public procurement procedure, applies in the same way to legislation such as that at issue in the main proceedings requiring the contracting authority, at the latter stage of the tender, to terminate such a procedure.

41 While it is true that such legislation does not automatically exclude tenderers belonging to the same economic entity from participating in the same public procurement procedure, its effects are similar.

42 In that regard, it should be noted that, by providing for the automatic closure of a public procurement procedure where, in the event of withdrawal of the tenderer originally selected for having submitted the most economically advantageous tender, the tenderer ranked in second place, which had submitted the

next most economically advantageous tender, constitutes with the tenderer originally selected a single market participant, national legislation, such as that at issue in the main proceedings, establishes an irrebuttable presumption that those tenderers acted in concert in the preparation of their tenders or after their submission, on the sole ground that they belong to the same economic entity, without their being able to demonstrate the independence of their tenders.

43 Such national legislation, which concerns a stage of the procedure during which the ranking of the tenders and their content were disclosed, is all the more contrary to the EU's interest in ensuring the widest possible participation by tenderers in a call for tenders and to the principle of proportionality.

44 Not only is that legislation liable to deter companies belonging to the same group from submitting competing tenders in a public procurement procedure, since their being ranked in the first two places would automatically have the effect, in the event of withdrawal of the first ranked tenderer, of terminating both that procedure and the subsequent procedures, thereby de facto excluding them from any possibility of competing in the context of such a public contract, but, moreover, the said legislation appears itself likely to increase the risk of distortion of competition, since the disclosure of the ranking of the tenders and their content at the end of the first procedure is liable to facilitate a possible concerted practice between the tenderers in the context of the next procedure.

45 While it is true that the withdrawal of the tenderer originally selected for having submitted the most economically advantageous tender, where the tenderer which has submitted the next most economically advantageous tender constitutes with the tenderer originally selected a single economic operator, might constitute evidence of an anti-competitive concerted practice, such a withdrawal being liable to appear to be motivated by the plan to accept the highest tender submitted by the group as a whole, the fact remains that no irrebuttable presumption to that effect can be established, as otherwise those tenderers will be denied the opportunity to demonstrate the independent nature of their tenders.

46 In those circumstances, the answer to the question referred is that the principle of proportionality, within the meaning of Article 18(1) of Directive 2014/24, must be interpreted as precluding national legislation which requires the contracting authority to terminate a public procurement procedure where, in the event of withdrawal of the tenderer originally selected for having submitted the most economically advantageous tender, the tenderer which submitted the next most economically advantageous tender constitutes with the tenderer originally selected a single economic operator.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action brought before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

The principle of proportionality, within the meaning of Article 18(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC,

must be interpreted as precluding national legislation which requires the contracting authority to terminate a public procurement procedure where, in the event of withdrawal of the tenderer originally selected for having submitted the most economically advantageous tender, the tenderer which submitted the next most economically advantageous tender constitutes with the tenderer originally selected a single economic operator.

[Signatures]

* Language of the case: Latvian.

Machine Translated by Google

Case file No. A42-00050-23/19
ECLI:LV:ADRJRIT:2023:0227.A420134021.6.S

ADMINISTRATIVE DISTRICT COURT
RIGA COURT HOUSE

S P R I E D U

ON BEHALF OF THE LATVIA PEOPLE

Riga, February 27, 2023

The Administrative District Court is composed of:
Judge Aiga Putniņa,
Judge Edgars Biezais,
Judge Marina Romanova,

with the participation of the authorized representative of the applicant AAS "BTABaltic Insurance Company", sworn attorney Mārtiņš Brizgos, as well as the defendant
On the part of the Republic of Latvia, the invited institution, the representative of the Procurement Monitoring Bureau/person A/ and the representative of the Ministry of Justice/person B/,

The administrative case initiated on the basis of JSC "BTABaltic Insurance Company" was examined in an open session via videoconference
application for recognition of the Procurement Monitoring Bureau's decision No. 4-1.2/21-20 of January 21, 2021 as unlawful.

Descriptive part

[1] The Ministry of Justice (hereinafter referred to as the contracting authority) announced an open tender for the purchase of health insurance policies for the Ministry of Justice, State
for the needs of civil servants and employees of the Land Service, the State Data Inspectorate, the Insolvency Control Service, the Patent Office" (id.No.TM 2020/37)
(hereinafter referred to as procurement).

Several bidders submitted bids for the procurement, including the applicant AAS "BTA Baltic Insurance Company" for the total contract price
381,480 *euros,* as well as *the Latvian branch* of one of the group companies Compensa Life Vienna Insurance Group SE for a total contract price of 434,520 *euros.*

With The procurement commission's decision of November 19, 2020, the most economically advantageous offer *of Compensa Life* recognized by the
Vienna Insurance Group SE Latvian branch , awarding it the right to conclude the contract.
On November 26, 2020 , *Compensa Life Vienna Insurance Group SE Latvian branch* refused to conclude the procurement contract due to the procurement process
the rapid rise in the prices of medical services and medicines and the deterioration of the general economic situation.

On December 1, 2020, the Procurement Commission recognized the applicant as the next eligible bidder for the right to conclude the contract, at the same time,
based on the Cabinet of Ministers Regulation No. 107 of 28 February 2017, "Procedures for Procurement Procedures and Design Competitions" (hereinafter –
Procurement Procedure Regulations) Paragraph 24, deciding to request the submission of confirmation and evidence that the applicant is not considered a single market participant
together with the initially selected bidder in the procurement, Compensa *Life Vienna Insurance Group SE Latvian branch.*

The applicant's client indicated in its response that both companies are considered to be one market participant, while at the same time confirming that its offer is
prepared independently and has not been coordinated with *the Latvian branch of Compensa Life Vienna Insurance Group SE.*

Taking into account that the applicant and *the Latvian branch of Compensa Life Vienna Insurance Group SE* are considered to be one market participant, the procurement
On December 9, 2020, the commission returned to the evaluation of the applicant and decided to terminate the procurement procedure based on the Procurement
Paragraph 23 of the Rules of Procedure.

[2] Having examined the applicant's complaint, the Procurement Supervision Bureau (hereinafter – the Bureau) by Decision No. 4?1.2/21-20 of 21 January 2021
The decision was left unchanged, with the following considerations.

[2.1] Clause 24 of the Procurement Procedure Regulations stipulates the obligation of the contracting authority to terminate the procurement procedure if it establishes that initially
The selected tenderer who refused to conclude a procurement contract with the contracting authority and the next tenderer shall be considered as one market participant. This
The aim of the regulation is to prevent the possibility of concerted action between companies of the same group in public procurement after the tenders have been submitted.
In addition, the contracting authority shall, in any case, if the tenderer to whom the procurement contract has been awarded refuses to conclude the procurement contract
with the contracting authority, has the right to terminate the procurement in accordance with paragraph 23 of the aforementioned regulations, and no other bidder has the subjective right to demand that
it would be declared the winner.

[2.2] The findings expressed by the applicant in the aforementioned judgment of the Court of Justice of the European Union of 19 May 2009 in case No. C?538/07 are applicable to the linked
the rights of undertakings to participate in the procurement and submit tenders, which have not been restricted in the present case. This situation is to be distinguished from the situation where
in which the contracting authority must terminate the procurement procedure if the selected tenderer refuses to conclude the procurement contract. In the first case, the contracting authority, by rejecting the related
offers of companies, chooses another offer and the procurement is concluded with the conclusion of a procurement contract. In contrast, in the second case, the contracting authority terminates
procurement procedure without selecting any bid, as a result of which the procurement contract is not concluded and competition is effectively restored, giving
the opportunity for all bidders to participate in the subsequent procurement procedure.

80.89.79.119 13.01.2025. 13:16 Anonymous system user

Machine Translated by Google

[3] The applicant appealed the decision of the Office to the court, stating the following.

[3.1] The contracting authority has based its decision to terminate the procurement procedure not on Clause 24 of the Procurement Procedure Regulations (although the wording of the justification exactly corresponds to the content of the norm), but on Clause 23, thus formally exercising the discretion granted to it and avoiding the obligation to refute the arguments of the applicant, *Compensa Life Vienna Insurance Group SE Latvian Branch.* that offer is prepared by independently from

[3.2] Clause 24 of the Procurement Procedure Regulations provides for an irrebuttable presumption that the applicant and the initially selected tenderer have prepared coordinated tenders with the aim of unfairly influencing competition. Such regulation is disproportionate and contradicts the principles contained in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 (hereinafter – Directive 2014/24/EU), as well as the principles expressed in the judgment of the Court of Justice of the European Union of 19 May 2009 in Case C-538/07, according to which the contracting authority was obliged to assess whether the tender submitted by the applicant in the procurement was not prepared in coordination with the initially selected tenderer.

[3.3] The termination of the procurement violates the principle of fair competition, because when announcing the procurement anew, the bidders were aware of the previously offered price of the bidder, thanks to which they could review their offers and offer a lower price than the bidder. Although formally such a result is financially more advantageous for the contracting authority, it cannot be a reason for violating the principle of fair treatment. In the opinion of the bidder, the authorities were obliged to find a reasonable balance between the simultaneous observance of the principles enshrined in Article 2 of the Public Procurement Law, which should be achieved by assessing the nature of the mutual obligation between the companies in accordance with the explanations of the bidder.

[3.4] The applicant and the initially selected tenderer have not coordinated their tenders, nor is the withdrawal of the initially selected tenderer's tender related to the interests of the group of companies to gain greater benefits. Namely, in the case of "classical" coordination of tenders, the winner would withdraw the tender with the lowest price so that the next tenderer who offered a higher price would be awarded the contract. In contrast, in the specific case, the procurement was based on the principle of the most economically advantageous tender, therefore the initially selected tenderer was awarded the contract not because of the price offered, but because its tender received more points. The initially selected tenderer's tender had the highest price, therefore its withdrawal could not have brought any benefit to the group of companies.

[3.5] Taking into account that Clause 24 of the Procurement Procedure Regulations contradicts the public procurement principles enshrined in Article 2 of the Public Procurement Law, the court, in accordance with Article 104, Part 3 of the Administrative Procedure Law, could not apply this regulation itself or, if necessary, refer the matter to the Court of Justice of the European Union for a preliminary ruling.

[4] In its written explanation to the court, the Office does not recognize the applicant's application based on the considerations mentioned in the appealed decision. In addition, the Office states the following.

[4.1] There is no reason to claim that the regulation of Clause 24 of the Procurement Procedure Regulations would not comply with the procurement principles enshrined in Article 18 of Directive 2014/24/EU and Article 2 of the Public Procurement Law, taking into account its aim of preventively preventing concerted action between companies of the same group (one market participant) in public procurement, which could negatively affect competition.

[4.2] Regarding the applicant's indication that the legal provisions should also be applied in the case of issuing a mandatory administrative act, the legal consequences and proportionality of issuing an administrative act must be assessed, the office explains that a departure from the application of a legal provision is permissible only in atypical cases, and in the presence of special demonstrable and convincing arguments.

[5] In its written explanation to the court, the contracting authority did not accept the applicant's application based on the considerations mentioned in the appealed decision.

In addition, the contracting authority indicated that Clause 23 of the Procurement Procedure Regulations provides for the contracting authority to have the discretion to choose whether, in the event that the tenderer refuses to conclude a procurement contract with the contracting authority, to grant the right to conclude a contract to the next tenderer who has offered the most economically advantageous tender, or to terminate the procurement procedure without selecting any tender. In the specific case, the contracting authority, by making a decision to terminate the procurement procedure, has acted within the scope of the discretion specified in Clause 23, therefore it is irrelevant whether and what information the contracting authority has additionally obtained about the tenderer, since the aforementioned decision was not made on the basis of Clause 24.

[6] In the course of the proceedings, the court referred a preliminary question to the Court of Justice of the European Union, asking whether national regulation that provides for an imperative obligation on the contracting authority to terminate the procurement procedure if it is established that the initially selected tenderer, who refused to conclude a procurement contract with the contracting authority, is considered to be one market participant with the subsequent tenderer who has submitted a tender that meets the interests and needs of the contracting authority is consistent with the procurement principles defined in Article 18(1) of Directive 2014/24/EU, in particular the obligation of the Member States to ensure equal and non-discriminatory treatment of all economic operators and the principle of proportionality.

On 8 December 2022, the Court of Justice of the European Union adopted a ruling in preliminary ruling case No. C?769/21, in which it found that such regulation, insofar as it does not impose an obligation to assess whether the relationship between the two tenderers has influenced the content of the tenders, is contrary to the principle of proportionality contained in the said directive.

[7] In connection with the aforementioned judgment of the Court of Justice of the European Union, the Office indicated that the relevant findings were not applicable to the specific case, since the procurement was terminated on the basis of Article 23 of the Procurement Procedure Rules, and not Article 24. In addition, the Office also indicated in this regard that, when adopting the contested decision, the Office could not have been aware and could not arbitrarily assume that the relevant regulation was contrary to Directive 2014/24/EU, since the right to apply to the Court of Justice of the European Union lies only with the court, and not with the institutions. Moreover, the regulation was found to be contrary to a legal principle enshrined in the Directive, and not to any specific norm.

The contracting authority also maintained the argument that the judgment of the Court of Justice of the European Union does not affect the circumstances of the case, since the procurement was terminated on the basis of paragraph 23 of the regulations. In addition, the Court of Justice of the European Union indicated in paragraph 40 of the judgment that the case law on the issue of automatic exclusion of tenderers applies to cases when the procurement is terminated at a stage after the award of the contract. In contrast, in the specific case, the tenderer was not awarded the contract.

In turn, the applicant indicated that if the contracting authority wanted to exercise the right provided for in Article 23 of the Procurement Procedure Regulations to terminate the procurement, it should have exercised this right immediately, and not started evaluating the tender in accordance with Article 24 of the Procurement Procedure Regulations. Since the contracting authority did not exercise this right and started evaluating the tender, it should have given the applicant the opportunity to prove the independence of its tender before deciding to terminate the procurement procedure.

[8] At the court hearing, the applicant's representative maintained the application based on the arguments set out in the application and explanations. In addition, it was pointed out that the provisions of Directive 2014/24/EU have a higher legal force than the provisions of the Procurement Procedure Rules. Therefore, upon finding contradictions (which were obvious in this case), the institution should either refrain from applying the relevant provision of the Procurement Procedure Rules, or inform the higher authority about it, which was not done in this particular case.

80.89.79.119 13.01.2025. 13:16 Anonymous system user

Machine Translated by Google

On the other hand, the representatives of the institutions invited on the defendant side did not recognize the applicant's application, based on the considerations mentioned in the appealed decision and explanations to the court. In addition, they pointed out that in order to terminate the procurement, based on Paragraph 23 of the Procurement Procedure Regulations, the contracting authority does not have to terminate the procurement immediately and it can step back and return to this issue.

Theme part

[9] The dispute in the case is whether the contracting authority was justified in terminating the procurement.

[10] In accordance with Article 230 of the Procurement Procedure Regulations *(hereinafter the provisions are expressed in the wording that was in force at the time of the adoption of the appealed decision),* the contracting authority shall decide to terminate an announced procurement procedure or design competition in the cases provided for in these Regulations. In other cases, the contracting authority may terminate an announced procurement procedure or design competition at any time if there is an objective justification for doing so.

Clause 23 of the Procurement Procedure Regulations stipulates that if a tenderer who has been awarded the right to conclude a procurement contract refuses to conclude a procurement contract with the contracting authority, the procurement commission is entitled to decide to award the right to conclude a procurement contract to the next tenderer who has offered the most economically advantageous tender, or to terminate the procurement procedure without selecting any tender. If a decision has been made to award the right to conclude a procurement contract to the next tenderer who has offered the most economically advantageous tender, but he refuses to conclude a procurement contract, the procurement commission shall decide to terminate the procurement procedure without selecting any tender.

In turn, Article 24 of the Procurement Procedure Regulations stipulates that before making a decision on awarding the right to conclude a procurement contract to the next tenderer who has submitted the most economically advantageous tender, the procurement commission shall assess whether it is not considered to be a single market participant together with the initially selected tenderer who refused to conclude a procurement contract with the contracting authority. If necessary, the procurement commission is entitled to request from the next tenderer a certificate and, if necessary, evidence that it is not considered to be a single market participant together with the initially selected tenderer. If the next tenderer is considered to be a single market participant together with the initially selected tenderer, the procurement commission shall make a decision to terminate the procurement procedure without selecting any tender.

It follows from the aforementioned legal provisions that the contracting authority has wide discretion in terminating the procurement. The case law of administrative courts has recognized that the task of the court in such a case is to verify whether the contracting authority's decision to terminate the procurement procedure is not arbitrary and does not violate the principles of public procurement law enshrined in Article 2 of the Public Procurement Law – transparency of procurement; free competition of suppliers, as well as equal and fair treatment of them; effective use of the contracting authority's funds, minimizing its risk *(Paragraph 10 of the Senate judgment of 26 March 2015 in case No. SKA-555/2015 (A420215114)).* This means that, to the extent that the contracting authority's considerations are aimed at the efficient use of the contracting authority's funds, minimizing the contracting authority's risk, and at the same time are not aimed at unreasonably restricting competition or otherwise treating suppliers unequally or unfairly, the contracting authority has the right to terminate the procurement in order to mitigate its risks *(Decision of the Senate of 14 May 2021 in case No. SKA-1020 (ECLI:LV:AT:2021:0514.A420145221.6.L) (point 5).*

[11] In the case under consideration, there is no consensus among the participants in the administrative proceedings on the legal basis on which the procurement was terminated. Accordingly, the court will initially address this issue.

As follows from the case materials, after the initially selected bidder refused to conclude the contract, the contracting authority recognized that the bidder's offer met all the requirements for the selection of bidders set out in the open tender regulations and was the next most economically advantageous offer. Accordingly, it was decided to nominate the bidder as the winner of the procurement, having first ascertained whether the exclusion circumstances referred to in the Public Procurement Law do not apply to the bidder *(see the minutes of the procurement commission of 1 December 2020, which are located on pages 164–166 of volume 1 of the case, paragraphs 3.3 and 3.4).* Accordingly, among the mandatory exclusion conditions mentioned by the applicant, it was requested, in accordance with Article 24 of the Procurement Procedure Regulations, to provide confirmation and evidence that the applicant and the initially selected tenderer are not considered to be a single market participant *(see the letter on pages 29–31 of volume 1 of the case).*

There is no dispute in the case that the applicant and the initially selected tenderer are considered to be a single market participant within the meaning of Section 1(9) of the Competition Law, which the applicant also confirmed in the response submitted by the contracting authority *(pages 29–31 of volume 1 of the case).* The contracting authority, having assessed the information provided by the applicant and having consulted with the Competition Council on the concept of a single market participant *(page 48 of volume 1 of the case),* decided to return to the previous evaluation stage and terminate the procurement procedure, based on paragraph 23 of the Procurement Procedure Regulations *(see paragraph 2 of the minutes of the procurement commission of 9 December 2020, which can be found on pages 167–168 of volume 1 of the case).*

It follows from the above that the commissioned party had a desire to continue the procurement and conclude a procurement contract. The commissioning party abandoned the aforementioned intention upon learning that the applicant and the initially selected tenderer are considered to be one market participant, therefore the aforementioned circumstance is considered to be a justification for terminating the procurement. Clause 24 of the Procurement Procedure Regulations provides for the actions of the commissioning party in such a case, therefore the court recognizes as justified the applicant's opinion that the procurement, despite the commissioning party's indication, was actually terminated on the basis of Clause 24 of the Procurement Procedure Regulations, and not Clause 23. This is also specified in the contested decision by the office as a higher authority, analyzing the circumstances for terminating the procurement referred to in Clause 24 of the Procurement Procedure Regulations.

The case law of the Senate has recognized that a certain interpretation of the reasoning of an administrative act and explanation of less significant errors are permissible. For example, in certain cases, the court may recognize that, taking into account the circumstances analyzed by the institution, a certain norm was actually applied, even if it was not directly mentioned in the decision *(Senate judgment of 31 October 2019 in case No. SKA-424/2019 (ECLI:LV:AT:2019:1031.A420125916.5.S) 19 and the case law referred to therein).* Therefore, the fact that the institution has not specifically indicated in the administrative act the legal norm on which it is based, or has also indicated an incorrect legal norm, does not mean that the court cannot refer to the legal norms correctly applicable in the specific situation within the framework of the review of the appealed decision. Unless it is clear from the institution's decision as a whole what legal regulation the institution is based on, the fact that the court specifies this legal regulation in the judgment does not mean that the court has changed the grounds of the appealed administrative act *(see Višÿere I., Savina S. Prohibition of changing the grounds of the administrative act. Jurista Vÿrds, 15.12.2020., No. 50 (1160), pp. 15–18).*

Taking into account the above, the court will further assess the circumstances related to the application of Clause 24 of the Procurement Procedure Regulations, despite the fact that the contracting authority has formally referred to Clause 23 of these Regulations.

[12] During the proceedings, the court had doubts about the compliance of Article 24 of the Procurement Procedure Regulations with the principles of public procurement. Accordingly, the court referred the matter to the Court of Justice of the European Union for a preliminary ruling, asking whether national regulation such as that set out in Article 24 of the Procurement Procedure Regulations, which provides for an imperative obligation on the contracting authority to terminate the procurement procedure if it is established that the initially selected tenderer, who refused to conclude a procurement contract with the contracting authority, is considered to be one market participant with the subsequent tenderer who has submitted a tender that meets the interests and needs of the contracting authority, is consistent with the procurement principles defined in Article 18(1) of Directive 2014/24/EU, in particular the obligation of the Member States to ensure equal and non-discriminatory treatment of all economic operators and the principle of proportionality.

The Court of Justice of the European Union, in its judgment of 8 December 2022, Case No. C?769/21, in response to the preliminary question submitted by the court in this case, stated that

80.89.79.119 13.01.2025. 13:16 Anonymous system user

Machine Translated by Google

that, in order to comply with the principle of proportionality, the contracting authority must be required to examine and assess the facts in order to determine whether the relationship between the two entities has had a specific influence on the content of the tenders submitted in the same procedure for the award of public contracts, since a finding of such influence, in whatever form, is sufficient to enable those undertakings to be excluded from that procedure *(paragraph 39 of the judgment).* The case-law of the Court of Justice, which has been developed in relation to national legislation providing for automatic exclusion from participation in a public procurement procedure, is equally applicable to legislation such as that at issue in the main proceedings, which requires the contracting authority to terminate such a procedure at the stage following the award of the contract *(paragraph 40 of the judgment).*

By providing for the automatic closure of a public procurement procedure where a tenderer initially selected because he had submitted the most economically advantageous tender and who has withdrawn that tender is to be regarded as a single market participant with the tenderer ranked second and who has submitted the next most economically advantageous tender, national legislation such as that at issue in the main proceedings creates an irrebuttable presumption that those tenderers acted in concert in the preparation of their tenders or after the submission of those tenders, solely because they are to be regarded as a single market participant and they are not in a position to demonstrate the independence of their tenders *(paragraph 42 of the judgment).*

Such national legislation, which concerns a stage of the procedure in which the ranking and content of the tenders have already been disclosed, is all the more contrary to both the Union's interest in ensuring the participation of the largest possible number of tenderers in the procurement and the principle of proportionality (paragraph *43 of the judgment).*
Namely, this legal framework is not only one that potentially deters companies belonging to the same group from submitting competing bids in a single public procurement procedure, since ranking these bids in the first two places would automatically result in the termination of both this and subsequent procedures in the event of the withdrawal of the bid ranked first, thus effectively excluding the possibility of competing in such public procurement, but also one that in itself seems to increase the risk of distortion of competition, since the disclosure of the ranking and content of bids after the end of the first procedure may open up the possibility for candidates to act in a concerted manner in the subsequent procedure (paragraph *44 of the judgment).*

Although the fact that a tenderer who was initially selected because he had submitted the most economically advantageous tender and who is considered to be a single market participant with the tenderer who submitted the next most economically advantageous tender, has withdrawn that tender could indeed be evidence of a concerted practice aimed at preventing competition, since such withdrawal could seem to be justified by the desire to ensure that the most expensive tender submitted by that group as a whole is selected, it does not, however, establish an irrebuttable presumption, since those tenderers would otherwise be deprived of the opportunity to demonstrate the independence of their tenders *(paragraph 45 of the judgment).*

In view of the above circumstances, the Court of Justice of the European Union has answered the question referred that the principle of proportionality within the meaning of Article 18(1) of Directive 2014/24 must be interpreted as precluding national legislation which requires the contracting authority to terminate a public procurement procedure where a tenderer who has been selected because it submitted the most economically advantageous tender and who has withdrawn that tender is considered to be a single market participant with the tenderer who submitted the next most economically advantageous tender.

[13] Thus, it follows from the aforementioned judgment of the Court of Justice of the European Union that Article 24 of the Procurement Procedure Rules is contrary to the principle of proportionality contained in Directive 2014/24. This principle is implemented in Article 2 of the Public Procurement Law, and therefore Article 24 of the Procurement Procedure Rules is also contrary to the law.
According to Article 84 of the Administrative Procedure Law, an administrative act is lawful if it complies with legal norms, but unlawful if it does not comply with legal norms. Since the appealed decision is based on a legal norm that does not comply with a legal norm of higher legal force, it must be declared unlawful.

The above is not changed by the arguments of the office that it had no reason to question and not apply the relevant regulation. Namely, in any case, the decision is based on such a legal regulation and such considerations that are incompatible with the principles of public procurement and European Union law. Accordingly, the state as a whole is obliged to acknowledge this fact and take action to prevent the infringement of the rights of a private person.
The question of the institution's ability not to apply the relevant regulation may have legal significance when deciding on compensation for damages, but it is not the subject of this case.

[14] In the opinion of the contracting authority, the aforementioned judgment of the Court of Justice of the European Union is not applicable to the specific case, as paragraph 40 of the judgment indicates that the case law on the automatic exclusion of tenderers applies to cases where the procurement is terminated “at a stage after the award of the contract”. In contrast, in the specific case, the tenderer was not awarded the contract.
The Court points out that the contracting authority has taken the above-mentioned words out of context. First, it should be noted that the judgment of the Court of Justice of the European Union, based on the questions posed by the court and the materials sent, has examined the circumstances of this case and the applicable regulatory framework. Second, it follows from the overall context of the judgment that at no stage of the procurement, and in particular at the stage where the ranking and content of the tenders have already been disclosed, can a person be automatically denied the right to apply for the award of the contract without an assessment of additional circumstances solely because he or she is a single market participant with another tenderer. Third, in the context of the specific court's finding, the words "after the award of the contract" refer to the time after the award of the contract to the initially selected tenderer, and not to the next tenderer, as the contracting authority believes.

[15] The contracting authority has argued that, in accordance with Article 23 of the Procurement Procedure Regulations, it has the right to terminate the procurement in any case if The initially selected bidder refused to conclude the contract.
The Court, as already indicated above, generally agrees that the contracting authority has a wide discretion when deciding to terminate the procurement. At the same time, the decision to terminate the procurement procedure cannot be arbitrary and based on considerations that are contrary to free competition between suppliers, as well as equal and fair treatment of them.

In the present case, the decision to terminate the procurement is based on circumstances that are inconsistent with the principle of proportionality enshrined in both Directive 2014/24 and the Public Procurement Law, and therefore this decision cannot be considered justified and proportionate. In other words, this circumstance can no longer be made unprecedented and hidden behind the justification of another institution.

[16] In summary, the court finds that the applicant's application is satisfactory and the appealed decision is to be declared unlawful. In the rest
The court will not evaluate the arguments of the participants in the administrative proceedings, as they cannot affect the outcome of the case.
At the same time, the court considers it necessary to make a side decision, drawing the attention of the Cabinet of Ministers to the need to amend Article 24 of the Procurement Procedure Regulations.

[17] Since the application is admissible, in accordance with Section 126, Part One of the Administrative Procedure Law, the respondent Republic of Latvia
The applicant is ordered to pay the state fee.
The state fee is refundable in accordance with Cabinet of Ministers Regulation No. 85 of 12 February 2013, "Procedures for the payment, refund and
reimburses the state fee and pays and returns the security deposit" in accordance with the procedures set out in the relevant application *to the institution (Clause 13 of the Regulations).*

80.89.79.119 13.01.2025. 13:16 Anonymous system user

Machine Translated by Google

Operative part

Based on Section 126, Part One, Sections 246–251 and Sections 289–291 of the Administrative Procedure Law, as well as the Public Procurement Law Section 72, Part Two, Administrative District Court

decided

To satisfy the application of AAS "BTABalticInsurance Company".

To declare the Procurement Monitoring Bureau's decision No. 4-1.2/21-20 of January 21, 2021, unlawful as of the date of its adoption.

To order the defendant Republic of Latvia to pay a state fee of 30 *euros* in favor of the applicant JSC "BTABaltic Insurance Company", reg. No. 40103840140 , to be paid from the budget funds of the Ministry of Justice, the institution invited by the defendant.

The judgment may be appealed to the Administrative Cases Department of the Supreme Court within one month from the date of the judgment by submitting: cassation appeal at the Riga Courthouse of the Administrative District Court.

Judge	A.Putniÿa
Judge	E.Biezais
Judge	M.Romanova

80.89.79.119 13.01.2025. 13:16 Anonymous system user

JUDGMENT OF THE COURT (Fourth Chamber)

26 January 2023 (*)

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 57(4)(g) – Optional ground for exclusion linked to deficiencies in the context of a prior contract – Contract awarded to a group of economic operators – Early termination of that contract – Automatic inclusion of all members of the group on a list of unreliable suppliers – Principle of proportionality – Directive 89/665/EEC – Article 1(1) and (3) – Right to an effective remedy)

In Case C-682/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), made by decision of 11 November 2021, received at the Court on 11 November 2021, in the proceedings

‘HSC Baltic’ UAB,

‘Mitnija’ UAB,

‘Montuotojas’ UAB

v

Vilniaus miesto savivaldybės administracija,

intervening parties:

‘Active Construction Management’ UAB, in liquidation,

‘Vilniaus vystymo kompanija’ UAB,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, L.S. Rossi, J.-C. Bonichot, S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Lithuanian Government, by K. Dieninis, V. Kazlauskaitė-Švenčionienė and E. Kurelaitytė, acting as Agents,

– the Czech Government, by L. Halajová, M. Smolek and J. Vláčil, acting as Agents,

– the European Commission, by P. Ondrůšek, A. Steiblytė and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18(1) and Article 57(4)(g) and (6) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) and of Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2017 L 94, p. 1).

2 The request has been made in proceedings between ‘HSC Baltic’ UAB, ‘Mitnija’ UAB and ‘Montuotojas’ UAB of the one part, and the Vilniaus miesto savivaldybės administracija (Municipal Authority of the City of Vilnius, Lithuania; ‘the City of Vilnius’) supported by ‘Active Construction Management’ UAB, in liquidation, and ‘Vilniaus vystymo kompanija’ UAB of the other part, concerning the consequences, for HSC Baltic, Mitnija and Montuotojas, of the early termination of a public contract awarded to a group of economic operators of which they formed part.

Legal context

European Union law

Directive 89/665

3 Article 1 of Directive 89/665, entitled ‘Scope and availability of review procedures’, provides:

‘1. This Directive applies to contracts referred to in Directive [2014/24] …

…

Member States shall take the measures necessary to ensure that … decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…’

Directive 2014/24

4 Recitals 101 and 102 to Directive 2014/24 state:

‘(101) Contracting authorities should … be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, … or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. …

[Contracting authorities] should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. …

(102) Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. …'

5 Article 18 of that directive, entitled 'Principles of procurement', provides in paragraph 1:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…'

6 Article 57 of that directive, entitled 'Exclusion grounds', provides:

'…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

…

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

…

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed … three years from the date of the relevant event in the cases referred to in paragraph 4.'

7 Article 90(1) of that directive states:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016. …'

8 Article 91 of Directive 2014/24 provides as follows:

‘Directive 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)] is repealed with effect from 18 April 2016.

…’

Lithuanian law

The Law on public procurement

9 The Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on public procurement), in the version applicable to the case in the main proceedings (‘the Law on public procurement’), provides, in Article 2(36):

‘“Supplier” – economic operator – means a natural or legal person governed by private or public law, another organisation and its members or a group composed of such persons, including a temporary association of economic operators, which offers on the market to supply goods or services.’

10 Article 46 of that law provides:

‘…

4. The contracting authority shall exclude a supplier from the procurement procedure where:

…

(6) the supplier has failed to perform a contract awarded pursuant to the present law … or a concession contract, or has performed it improperly, and that constitutes a material breach of the contract, as defined by the Civil Code … resulting in the early termination of the contract during the preceding three years, or a final judgment delivered during the preceding three years which has granted the claim for compensation made by the contracting authority, the contracting entity or the awarding authority in respect of the damage suffered as a result of significant or persistent deficiencies by the supplier in the performance of a substantive term of the contract, or the adoption by the contracting authority, during the preceding three years, of a decision finding that the supplier’s performance of a substantive term of the contract was vitiated by significant or persistent deficiencies which gave rise, therefore, to the application of a contractual penalty. …

…

8. Where a supplier does not meet the requirements set out in paragraphs 1, 4 and 6 of the present article, the contracting authority shall not exclude it from the procurement procedure where both of the following conditions are met:

(1) the supplier has provided the contracting authority with information demonstrating that it has adopted the following measures:

(a) it has voluntarily paid or given an undertaking to pay compensation in respect of the damage caused by the offence or infringement referred to in paragraphs 1, 4 or 6 of this Article, as appropriate;

(b) it has cooperated, actively assisted or taken other measures which help to shed light on or clarify the offence or infringement committed by it, as appropriate;

(c) it has taken technical, organisational or staff management measures designed to prevent further offences or infringements;

(2) the contracting authority has evaluated the information submitted by the supplier under paragraph 1 of the present paragraph and has adopted a reasoned decision to the effect that the measures taken by the supplier to demonstrate its reliability are sufficient. …

11 Article 91(1) of that law provides, in the version cited by the referring court:

‘The contracting authority shall publish, at the latest within 10 days, in the central public procurement portal, in accordance with the rules established by the public procurement authority, the information relating to suppliers (in the case of a group of suppliers, relating to all the members of that group) who have not performed the contract or performed the contract improperly, and, where the breach relates to the part of the contract which had been subcontracted to them, information relating to the economic operators whose capacities have been used by the supplier and who had assumed joint and several liability with the supplier for the performance of the contract …’

The Civil Code

12 Article 6.6 of the Lietuvos Respublikos civilinis kodeksas (Civil Code of the Republic of Lithuania) provides:

‘1. Joint and several liability between debtors shall not be presumed, subject to any exception provided for by law. It shall arise only where provided for by law or by agreement between the parties, and where the subject matter of the obligation is indivisible.

…

3. Joint and several liability between debtors shall be presumed where the obligation relates to the provision of services, a joint activity or compensation for damage caused by the acts of a number of persons.

…’

13 Paragraph 1 of Article 6.15 of that code provides:

‘If it is impossible to perform the obligation on account of the fault of one of the jointly and severally liable debtors, the other jointly and severally liable debtors shall not be released from liability for non-performance of the obligation.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 On 7 December 2016, the City of Vilnius published a notice of a procurement procedure valued at EUR 21 793 166.72, excluding value added tax, for works to build a multifunctional wellness centre (‘the contract at issue’).

15 A joint activity agreement concluded on 30 January 2017 between Active Construction Management, HSC Baltic, Mitnija, Montuotojas and ‘Axis Power’ UAB designated Active Construction Management as the lead partner of that group of economic operators, for the purposes of participating in the procurement procedure at issue and executing the works should the contract be awarded to that group. It was also agreed that the respective share of contributions, by value, to the joint activity would be as follows: Active Construction Management 65%, HSC Baltic 15%, Axis Power 10%, Mitnija 5% and Montuotojas 5%.

16 On 5 June 2017, the City of Vilnius awarded the contract at issue to that group. As the deadline for completion of the works was set at 18 months,the contract had to be performed by 5 December 2018 at the latest.

17 As the works were not completed within that period, the deadline was postponed to 28 May 2020. During that additional period, the works did not progress according to the scheduled timetable.

18 By order of 28 October 2019, the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania), following an application by the manager of Active Construction Management, instituted insolvency proceedings relating to that company. On 6 December 2019, the insolvency administrator informed HSC Baltic, Mitnija, Montuotojas and Axis Power, and the City of Vilnius, of those insolvency proceedings and that the lead partner would no longer perform the contract at issue.

19 On 22 January 2020, the City of Vilnius informed HSC Baltic, Mitnija, Montuotojas and Axis Power that it was terminating the contract at issue early, on account of a substantial breach, consisting of having abandoned the building site and having left it unsupervised, having failed to provide a new guarantee, having failed to comply with the schedule for the works and having failed to take out civil liability insurance.

20 Those companies brought an action before the Vilniaus apygardos teismas (Regional Court, Vilnius) seeking a declaration that the early termination of the contract at issue by the City of Vilnius was unlawful and their entry on the list of unreliable suppliers in the central public procurement portal was unlawful.

21 By judgment of 27 August 2020, that court dismissed the action, finding that the City of Vilnius had correctly referred to problems in performing the works on the part of the lead partner and of the other members of the group. Since those companies were jointly and severally liable for the proper performance of the contract at issue and since that contract had been terminated early, the contracting authority had no discretion which would allow it not to have all the members of the group entered on the list of unreliable suppliers. That entry on such list did not prevent those companies from rehabilitating themselves and from, thus, participating in other public procurement procedures.

22 HSC Baltic, Mitnija, Montuotojas and Axis Power appealed against that judgment to the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania). That court dismissed that appeal by judgment of 21 January 2021, adopting the reasoning of the court at first instance.

23 On 22 January 2021, the Viešųjų pirkimų tarnyba (Public Procurement Office, Lithuania), on the initiative of the City of Vilnius, entered the members of the group on the list of unreliable suppliers.

24 HSC Baltic, Mitnija and Montuotojas brought an appeal on a point of law before the referring court, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), against the judgment of 21 January 2021 of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania).

25 On 15 March 2021, HSC Baltic, Mitnija and Montuotojas requested the referring court to order, by way of interim measure, that their names be removed from the list of unreliable suppliers. By decision of 31 March 2021, that court granted that request.

26 On 11 November 2021, that court delivered a judgment in which it ruled in part on the appeal, rejecting the grounds of appeal put forward by HSC Baltic, Mitnija and Montuotojas alleging that the early termination of the contract at issue was unlawful.

27 In order to rule on the entry of those companies on the list of unreliable suppliers, the referring court considers that certain clarifications of the scope of EU law are necessary.

28 In that regard, that court states, as a preliminary point, that the Lithuanian legislature’s transposition of Directive 2014/24 was late, taking effect from 1 July 2017, which post-dates 18 April 2016, the date on which the deadline for transposing that directive expired. It takes the view, however, that that directive could apply to the dispute in the main proceedings.

29 That court is unsure whether the automatic entry, on a list of unreliable suppliers, of any economic operator *de jure* responsible for the breach which resulted in the early termination of a public contract is compatible with the requirement for an individual assessment when applying the grounds for exclusion laid down by Directive 2014/24.

30 It observes that, in the light of the scope of the words ‘decisions taken by the contracting authorities’ in Article 1 of Directive 89/665, the entry of an economic operator on a list of unreliable suppliers could constitute an actionable measure. Lithuanian law does not make it possible to challenge that registration, since it is regarded simply as a legal effect of the early termination of the contract. In the present case, it is true that an action was brought before the Vilniaus apygardos teismas (Regional Court, Vilnius) challenging both such early termination and the entry on the list. However, since that entry was made after the decision of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania)

became final, the courts of first instance and the appeal courts were not, in the view of the referring court, able to resolve the part of the appeal concerning the entry on that list.

31 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Article 18(1) and Article 57(4)(g) and (6) of Directive 2014/24 and the fourth subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 (together or separately, but without limitation to those provisions) to be interpreted as meaning that a decision of a contracting authority to enter the economic operator concerned on the list of unreliable suppliers and thus restrict for a certain period its ability to participate in procurement procedures announced subsequently on the ground that that economic operator has substantially breached a contract concluded with that contracting authority is a measure which may be challenged before a court?

(2) If the answer to the first question is in the affirmative, are the provisions of EU law cited above (together or separately, but without limitation to those provisions) to be interpreted as precluding national rules and the practice for applying them under which (a) the contracting authority, when terminating a public procurement contract on the ground of a substantial breach thereof, does not take any formal (separate) decision concerning the entry of economic operators on the list of unreliable suppliers; (b) an economic operator is not informed in advance about forthcoming entry on the list of unreliable suppliers and is therefore unable to submit relevant explanations and subsequently to contest entry effectively; (c) the contracting authority does not carry out any individual examination of the circumstances of improper performance of a contract, and therefore, if the public procurement contract has been lawfully terminated on the ground of a substantial breach thereof, the economic operator *de jure* responsible for that breach is automatically entered on the list of unreliable suppliers?

(3) If the answers to the first two questions are in the affirmative, are the provisions of EU law cited above (together or separately, but without limitation to those provisions) to be interpreted as meaning that joint-activity partners (entities forming a joint supplier) which performed the public procurement contract lawfully terminated on the ground of a substantial breach may demonstrate their reliability and thus be excluded from the list of unreliable suppliers, inter alia, on the basis of the amount of the share (value) of the contract performed, the insolvency of the lead partner, actions on the part of that partner and the contracting authority’s contribution to non-performance of the contract?’

Consideration of the questions referred

Preliminary observations

32 The second and third questions, which are to be examined before the first question, concern the manner in which economic operators are, following the early termination of a public contract awarded to them, entered on a list of unreliable suppliers in order to exclude them from participating in public procurement procedures.

33 The result of the City of Vilnius’s early termination of the disputed contract was temporarily to prevent the applicants in the main proceedings from participating in other procurement procedures. That early termination, which was notified to them on 22 January 2020, was followed, on 22 January 2021, by their entry on a list of unreliable suppliers. Consequently, the second and third questions must be examined in the light of Directive 2014/24, which was in force on those dates, there being no need to examine whether that directive was applicable during the period between 18 April 2016, the date when the period prescribed for its transposition expired, and 1 July 2017, the date of its transposition in Lithuania.

The second question

34 By its second question, the referring court asks, in essence, whether Article 18(1) and Article 57(4)(g) of Directive 2014/24 must be interpreted as precluding national rules or practice under which, when the contracting authority terminates early a public contract awarded to a group of economic operators on account of significant or persistent deficiencies which have resulted in the non-performance of a substantive requirement in relation to that contract, each member of that group is automatically entered on a list of unreliable suppliers and thereby temporarily prevented, in principle, from participating in new public procurement procedures.

35 In that regard, it must be stated at the outset that Article 57(4)(g) of Directive 2014/24 makes it possible to exclude from participation in public procurement procedures any economic operator in relation to which significant or persistent deficiencies have been recorded in the performance of a substantive requirement incumbent on it under a prior public contract, in particular where those deficiencies have given rise to the early termination of that contract.

36 As is apparent from recital 101 of that directive, the purpose of that optional ground consists in excluding economic operators whose reliability is seriously compromised on account of wrongful or negligent conduct.

37 Where a Member State lays down, in its national legislation, the conditions for the application of that optional ground for exclusion, it must respect the essential characteristics thereof as expressed in Article 57(4)(g) of Directive 2014/24 (see, to that effect, judgment of 19 June 2019, Meca, C-41/18, EU:C:2019:507, paragraph 33).

38 In addition, the application of that optional ground for exclusion must comply with the principle of proportionality, which is a general principle of EU law, which Article 18(1) of Directive 2014/24 restates as far as concerns public procurement. Compliance with that principle warrants particular attention when applying the optional grounds for exclusion referred to in Article 57 of that directive (see, to that effect, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraphs 45 and 48 and the case-law cited).

39 In that regard, that exclusion must, first, be temporary. It follows from recital 101 of Directive 2014/24 that any act of national law laying down the conditions for the application of Article 57(4)(g) of that directive must provide for a maximum exclusion duration. Article 57(7) of that directive states that, where it has not been set by final judgment, that period is not to exceed three years.

40 Second, during that exclusion period, the economic operator concerned must, unless it has been excluded from any participation in a procedure for the award of a public contract by a final judgment, be allowed to participate in such a procedure if it provides, in accordance with Article 57(6) of Directive 2014/24, evidence showing that the measures which it has taken are sufficient to demonstrate its reliability. Economic operators are accordingly encouraged to adopt corrective measures (see, to that effect, judgment of 19 June 2019, Meca, C-41/18, EU:C:2019:507, paragraph 40).

41 Third, the principle of proportionality requires a specific and individual assessment of the attitude of the operator concerned on the basis of all the relevant factors (judgment of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 40 and the case-law cited).

42 In the present case, it is apparent from the request for a preliminary ruling that, in the event of early termination of a public contract on account of significant or persistent deficiencies on the part of the successful tenderer in the performance of a substantive requirement, that early termination results, under the applicable national legislation, in each economic operator which was *de jure* responsible for the proper performance of that contract being entered on a list intended to enable the contracting authorities to ascertain the names of operators which, having failed to perform or having improperly performed a public contract, are therefore considered not to be reliable providers. Entry on that list gives rise to exclusion from all procurement procedure for a period of three years, unless the economic operator concerned shows that it has adopted adequate corrective measures.

43 The referring court states that, in practice, once a judicial decision confirming the lawfulness of the early termination of the contract concerned has been delivered, all economic operators who are *de jure*

responsible for the performance of that contract are automatically entered on that list, without a decision to that effect being formally adopted.

44 As regards whether such a rule or practice observes the essential characteristics of the optional ground for exclusion laid down in Article 57(4)(g) of Directive 2014/24 and the principle of proportionality set out in Article 18(1) of that directive, it should be noted that those provisions do not preclude the temporary registration, in a portal dedicated to facilitating the management of public procurement procedures, of the names of operators in respect of which a record has been made of significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract.

45 As has been stated in paragraphs 35 and 36 of the present judgment, that optional ground for exclusion seeks to ensure that such operators' access to public procurement procedures is restricted by a prohibition in principle on participation in those procedures. Such a restriction is, in the present case, set out in Article 46 of the Law on public procurement. The entry, provided for in Article 91 of that law, of the operators concerned on an electronic list accessible to contracting authorities and other bodies responsible for public procurement appears, subject to verification by the referring court, to be intended to facilitate the application of that restriction.

46 That being so, in order to observe the essential characteristics of the optional ground for exclusion laid down in Article 57(4)(g) of Directive 2014/24 and the principle of proportionality, such a system must be structured in such a way that, before the entry on the list of unreliable suppliers of an economic operator, which is a member of a group to which a public contract had been awarded and that contract was terminated early, it is necessary to conduct a specific assessment of all the relevant factors adduced by that operator in order to demonstrate that its entry on that list is not justified in the light of its individual conduct.

47 It cannot therefore be accepted that such an economic operator, in the event of early termination of that contract on account of significant or persistent deficiencies in the performance of such contract, is automatically categorised as unreliable and is temporarily excluded, without first conducting a specific and individual assessment of its conduct, in the light of all the relevant factors.

48 It is true that it is permissible for a Member State to provide, in the event of laying down the conditions for application of the optional ground for exclusion provided for in Article 57(4)(g) of Directive 2014/24, for a presumption that any economic operator *de jure* responsible for the proper performance of a public contract is deemed to have contributed, in the performance of that contract, to the significant or persistent deficiencies which resulted in the early termination of that contract having arisen or having continued. However, where that contract has been awarded to a group of economic operators whose individual contributions to those deficiencies and any efforts to remedy them are not necessarily identical, such a presumption must, if it is not to adversely affect the essential characteristics of that optional ground for exclusion and the principle of proportionality referred to in Article 18(1) of that directive, be rebuttable.

49 Irrespective of the joint and several liability of the members of such a group, the application of the optional ground for exclusion laid down in Article 57(4)(g) of Directive 2014/24 must be based on the wrongful or negligent nature of that individual conduct.

50 Consequently, in a situation such as that at issue in the main proceedings, each member of the group which is *de jure* responsible for the proper performance of a public contract, must, before its name is entered on the list of unreliable suppliers and therefore becomes subject to temporary exclusion from public procurement procedures, have the opportunity to demonstrate that the deficiencies which led to the early termination of that contract were unrelated to its individual conduct. Where it transpires, following a specific and individual assessment of the conduct of the operator concerned in the light of all the relevant factors, that that operator was not the cause of the deficiencies recorded and it could not reasonably be required to do more than it did in order to remedy those deficiencies, Directive 2014/24 precludes that operator from being entered on the list of unreliable suppliers (see, by analogy, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraphs 157 and 158).

51 That interpretation is not invalidated by the fact that it is possible for the operator concerned to avoid being excluded from participating in public procurement procedures by showing, in accordance with Article 57(6) of Directive 2014/24, that it adopted corrective measures, such as those listed by way of illustration in recital 102 of that directive. Such an operator cannot be required to show that it has adopted corrective measures even though its individual conduct is unrelated to the deficiencies which resulted in the early termination of the contract.

52 In the light of all the foregoing, the answer to the second question is that Article 18(1) and Article 57(4)(g) of Directive 2014/24 must be interpreted as precluding national rules or practice under which, when the contracting authority terminates early a public contract awarded to a group of economic operators on account of significant or persistent deficiencies which have resulted in the non-performance of a substantive requirement in relation to that contract, each member of that group is automatically entered on a list of unreliable suppliers and thereby temporarily prevented, in principle, from participating in new public procurement procedures.

The third question

53 By its third question, the referring court asks, in essence, whether Article 18(1) and Article 57(4)(g) of Directive 2014/24 must be interpreted as meaning that an economic operator which is a member of a group which submitted the successful tender for a public contract may, in the event that contract is terminated early on account of failure to comply with a substantive requirement, rely, for the purpose of demonstrating that its entry on a list of unreliable suppliers is unjustified, both on factors relating to its own situation and factors relating to the situation of third parties, such as the lead partner of that group.

54 As has been pointed out in paragraph 50 of the present judgment, each member of the group which submitted the successful tender must, in the event of significant or persistent deficiencies, have the opportunity, before its name is entered on a list of unreliable suppliers and thereby becomes subject to temporary exclusion from public procurement procedures, to demonstrate that its individual conduct in the performance of that contract was unrelated to those deficiencies.

55 In order to demonstrate that its individual conduct was not the cause of those deficiencies and, furthermore, that it could not reasonably be required to do more than it did in order to remedy those deficiencies, the economic operator concerned must be given an opportunity to put forward any factor which it considers relevant.

56 The words in Article 57(4)(g) of Directive 2014/24 do not clarify the circumstances in which a member of a group of economic operators must be regarded as being involved, or not, in the deficiencies which resulted in the early termination of the contract. Consequently, that provision enables each member of a group which submitted the successful tender to rely on any factor, specific to its situation or that of a third party, which is capable of showing that that ground for exclusion cannot be applied to it.

57 It is for the contracting authority for the contract which was terminated early and, as appropriate, the court before which an action has been brought, to determine, as part of the specific and individual assessment required by reason of the principle of proportionality referred to in Article 18(1) of that directive, the weight to be attributed to each factor relied on.

58 In the light of the foregoing, the answer to the third question is that Article 18(1) and Article 57(4)(g) of Directive 2014/24 must be interpreted as meaning that an economic operator which is a member of a group which submitted the successful tender for a public contract may, in the event that contract is terminated early for failure to comply with a substantive requirement, rely, for the purpose of demonstrating that its entry on a list of unreliable suppliers is unjustified, on any factor, including any factor concerning third parties, such as the lead partner of that group, which is capable of showing that it was not the cause of the deficiencies which resulted in the early termination of that contract and that it could not reasonably be required to do more than it did in order to remedy those deficiencies.

The first question

59 By its first question, the referring court asks, in essence, whether Article 1(1) and (3) of Directive 89/665 must be interpreted as meaning that a Member State which provides, when laying down conditions for the application of the optional ground for exclusion provided for in Article 57(4)(g) of Directive 2014/24, that economic operators to which a public contract has been awarded are, in the event of early termination of that contract for failure to comply with a substantive requirement, entered on a list of unreliable suppliers and accordingly temporarily excluded, in principle, from participating in new public procurement procedures must ensure the right to bring an action against their entry on that list of unreliable suppliers.

60 Article 1(1) of Directive 89/665 provides that Member States must take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible, on the grounds that such decisions have infringed EU law in the field of public procurement or national rules transposing that law. In accordance with Article 1(3) of that directive, those review procedures must be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

61 By those provisions, Directive 89/665 is intended, in the field of public procurement falling under EU law, to ensure full respect for the right to an effective remedy and to a fair hearing enshrined in the first and second paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union (judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 128 and the case-law cited).

62 From that point of view, the concept of ‘decisions taken by the contracting authorities’ in Article 1(1) of Directive 89/665 must be interpreted broadly. Any decision of a contracting authority falling under the EU rules in the field of public procurement and liable to infringe them must be capable of being subject to the judicial review provided for by that directive. That concept therefore refers generally to decisions of a contracting authority without distinguishing between them according to their content or time of adoption and does not lay down any restriction with regard to the nature or content of the decisions to which it refers (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 105).

63 The words ‘any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement’ in Article 1(3) of that directive must also be interpreted broadly, so that the rules contained in that directive apply to all persons whose interest in obtaining such a contract is affected by a decision taken by a contracting authority.

64 Where, as in the present case, the members of a group of economic operators are, on account of the early termination of the public contract which had been awarded to them, entered, by or on the initiative of a contracting authority, on a list of unreliable suppliers and thereby temporarily excluded, in principle, from participating in future public procurement procedures, that entry, which affects the interest of each of those operators in obtaining public contracts falling under EU law, constitutes a decision taken by a contracting authority within the meaning of Article 1(1) of Directive 89/665. That decision must, as is apparent from the examination of the second and third questions, observe the essential characteristics of the optional ground for exclusion laid down in Article 57(4)(g) of Directive 2014/24 and must comply with the principle of proportionality set out in Article 18(1) of that directive. In the event of an alleged infringement of those provisions or any other rule of EU law, the person allegedly harmed must, under Article 1(1) and (3) of Directive 89/665 have an effective remedy available.

65 The possibility of bringing an action against the early termination of the public contract giving rise to their entry on the list of unreliable suppliers does not constitute, for the members of the group which submitted the successful tender, an effective remedy against the decision to enter them on that list and thereby to exclude them, in principle, from future public procurement procedures. The lawfulness under EU law of that early termination, on the one hand, and of such entry and exclusion, on the other hand, may be dependent, as is apparent from the analysis relating to the second question, on different factors.

66 Consequently, where the contract which was terminated early had been awarded to a group of economic operators, each member of that group must be given an opportunity to bring an action against

its entry on the list of unreliable suppliers, from which its exclusion, in principle, from future public procurement procedures arises.

67 In the light of the foregoing, the answer to the first question is that Article 1(1) and (3) of Directive 89/665 must be interpreted as meaning that a Member State which provides, when laying down conditions for the application of the optional ground for exclusion provided for in Article 57(4)(g) of Directive 2014/24, that the members of a group of economic operators which submitted a successful tender for a public contract are, in the event of early termination of that contract for failure to comply with a substantive requirement, entered on a list of unreliable suppliers and accordingly temporarily excluded, in principle, from participating in new public procurement procedures, must ensure the right of those operators to bring an effective action against their entry on that list.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 18(1) and Article 57(4)(g) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC**

   must be interpreted as precluding national rules or practice under which, when the contracting authority terminates early a public contract awarded to a group of economic operators on account of significant or persistent deficiencies which have resulted in the non-performance of a substantive requirement in relation to that contract, each member of that group is automatically entered on a list of unreliable suppliers and thereby temporarily prevented, in principle, from participating in new public procurement procedures.

2. **Article 18(1) and Article 57(4)(g) of Directive 2014/24**

   must be interpreted as meaning that an economic operator which is a member of a group which submitted the successful tender for a public contract may, in the event that contract is terminated early for failure to comply with a substantive requirement, rely, for the purpose of demonstrating that its entry on a list of unreliable suppliers is unjustified, on any factor, including any factor concerning third parties, such as the lead partner of that group, which is capable of showing that it was not the cause of the deficiencies which resulted in the early termination of that contract and that it could not reasonably be required to do more than it did in order to remedy those deficiencies.

3. **Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014,**

   must be interpreted as meaning that a Member State which provides, when laying down conditions for the application of the optional ground for exclusion provided for in Article 57(4)(g) of Directive 2014/24, that the members of a group of economic operators which submitted a successful tender for a public contract are, in the event of early termination of that contract for failure to comply with a substantive requirement, entered on a list of unreliable suppliers and accordingly temporarily excluded, in principle, from participating in new public procurement procedures, must ensure the right of those operators to bring an effective action against their entry on that list.

[Signatures]

---

* Language of the case: Lithuanian.

JUDGMENT OF THE COURT (Eighth Chamber)

10 November 2022 (*)

(Reference for a preliminary ruling – Procedures for the award of public works contracts, public supply contracts and public service contracts – Directive 2014/24/EU – Award of contracts – Article 2(1)(10) – Concept of an 'economic operator' – Inclusion of a general partnership without legal personality – Article 19(2) and Article 63 – Joint undertaking or reliance on the capacities of other entities of persons linked with that undertaking – Article 59(1) – Obligation to submit one or several European Single Procurement Documents (ESPD) – Purpose of the ESPD)

In Case C-631/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch, Netherlands), made by decision of 5 October 2021, received at the Court on 14 October 2021, in the proceedings

Taxi Horn Tours BV

v

gemeente Weert,

gemeente Nederweert,

Touringcars VOF,

THE COURT (Eighth Chamber),

composed of M. Safjan, President of the Chamber, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Taxi Horn Tours BV, by L.C. van den Berg, advocaat,

– gemeente Weert and gemeente Nederweert, by N.A.D. Groot, advocaat,

– the Netherlands Government, by M.K. Bulterman and M.H.S. Gijzen, acting as Agents,

– the European Commission, by P. Ondrůšek and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2, 19, 59 and 63 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) and of Commission

Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ 2016 L 3, p. 16).

2 The request has been made in proceedings between, on the one hand, Taxi Horn Tours BV and, on the other hand, the gemeente Weert and the gemeente Nederweert (municipality of Weert and municipality of Nederweert, Netherlands) (together, 'the municipalities') and Touringcars VOF concerning the award by the municipalities of a public contract for bus transport to Touringcars VOF.

Legal context

European Union law

Directive 2014/24

3 Recitals 14, 15 and 21 of Directive 2014/24 are worded as follows:

'(14) It should be clarified that the notion of "economic operators" should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are "legal persons" in all circumstances.

(15) It should be clarified that groups of economic operators, including where they have come together in the form of a temporary association, may participate in award procedures without it being necessary for them to take on a specific legal form. To the extent this is necessary, for instance where joint and several liability is required, a specific form may be required when such groups are awarded the contract. …

…

(21) Public contracts that are awarded by contracting authorities operating in the water, energy, transport and postal services sectors and that fall within the scope of those activities are covered by Directive 2014/25/EU of the European Parliament and of the Council [of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243]). However, contracts awarded by contracting authorities in the context of their operation of maritime, coastal or river transport services fall within the scope of this Directive.'

4 Article 2 of that directive, entitled 'Definitions', provides:

'1. For the purposes of this Directive, the following definitions apply:

…

(10) "economic operator" means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;

…'

5 Article 18 of that directive, entitled 'Principles of procurement', provides, in the first subparagraph of paragraph 1:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.'

6 Article 19 of that directive, entitled ‘Economic operators’, provides in paragraph 2:

‘Groups of economic operators, including temporary associations, may participate in procurement procedures. They shall not be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.

Where necessary, contracting authorities may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in Article 58 provided that this is justified by objective reasons and is proportionate. Member States may establish standard terms for how groups of economic operators are to meet those requirements.

…’

7 Article 59 of Directive 2014/24, entitled ‘European Single Procurement Document’, provides in paragraph 1:

‘At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:

(a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;

(b) it meets the relevant selection criteria that have been set out pursuant to Article 58;

(c) where applicable, it fulfils the objective rules and criteria that have been set out pursuant to Article 65.

Where the economic operator relies on the capacities of other entities pursuant to Article 63, the ESPD shall also contain the information referred to in the first subparagraph of this paragraph in respect of such entities.

The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority. The ESPD shall further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

Where the contracting authority can obtain the supporting documents directly by accessing a database pursuant to paragraph 5, the [ESPD] shall also contain the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent.

Economic operators may reuse an ESPD which has already been used in a previous procurement procedure, provided that they confirm that the information contained therein continues to be correct.’

8 Article 63 of that directive, entitled ‘Reliance on the capacities of other entities’, provides in paragraph 1:

‘With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required.

Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

The contracting authority shall, in accordance with Articles 59, 60 and 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57. The contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

Under the same conditions, a group of economic operators as referred to in Article 19(2) may rely on the capacities of participants in the group or of other entities.'

Directive 2014/25

9 Under Article 11 of Directive 2014/25, headed 'Transport services':

'This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.'

Implementing Regulation 2016/7

10 Recital 1 of Implementing Regulation 2016/7 states:

'One of the major objectives of Directives [2014/24] and [2014/25] is [to reduce] the administrative burdens of contracting authorities, contracting entities and economic operators, not least small and medium-sized enterprises. A key element of that effort is the European single procurement document (ESPD). The standard form for the ESPD should consequently be drafted in such a manner that the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria is obviated. With the same objective in mind, the standard form should also provide the relevant information in respect of entities on whose capacities an economic operator relies, so that the verification of that information can be carried out together with the verification in respect of the main economic operator and on the same conditions.'

11 Annex 1 to that regulation, entitled 'Instructions', provides:

'The ESPD is a self-declaration by economic operators providing preliminary evidence replacing the certificates issued by public authorities or third parties. As provided in Article 59 of Directive [2014/24], it is a formal statement by the economic operator that it is not in one of the situations in which economic operators shall or may be excluded; that it meets the relevant selection criteria and that, where applicable, it fulfils the objective rules and criteria that have been set out for the purpose of limiting the number of otherwise qualified candidates to be invited to participate. Its objective is to reduce the administrative burden arising from the requirement to produce a substantial number of certificates or other documents related to exclusion and selection criteria.

…

Economic operators may be excluded from the procurement procedure or be subject to prosecution under national law in cases of serious misrepresentation in filling in the ESPD or, generally, in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, or where such information is withheld or the economic operators are unable to submit the supporting documents.

Economic operators may reuse the information that has been provided in an ESPD which has already been used in a previous procurement procedure as long as the information remains correct and continues to be pertinent. The easiest way to do so is by inserting the information in the new ESPD through use of the appropriate functionalities that are provided to that effect in the abovementioned electronic ESPD-service. Of course, reuse of information through other forms of copy-paste of information, for instance information stored in the economic operator's IT-equipment (PCs, tablets, servers …), will also be possible.

…

As mentioned earlier, the ESPD consists of a formal statement by the economic operator that the relevant grounds for exclusion do not apply, that the relevant selection criteria are fulfilled and that it will provide the relevant information as required by the contracting authority or contracting entity.

…

An economic operator participating on its own and which does not rely on the capacities of other entities in order to meet the selection criteria, must fill out one ESPD.

An economic operator participating on its own but relying on the capacities of one or more other entities must ensure that the contracting authority or contracting entity receives its own ESPD together with a separate ESPD setting out the relevant information … for each of the entities it relies on.

Finally, where groups of economic operators, including temporary associations, participate together in the procurement procedure, a separate ESPD setting out the information required under Parts II to V must be given for each of the participating economic operators.

In all cases where more than one person is [a] member of the administrative, management or supervisory body of an economic operator or has powers of representation, decision or control therein, each may have to sign the same ESPD, depending on national rules, including those governing data protection.

…'

Netherlands law

The Law on Public Procurement

12 The Aanbestedingswet (Law on Public Procurement) of 1 November 2012 (Stb. 2012, No 542), in the version applicable to the dispute in the main proceedings ('the Law on Public Procurement'), transposes, into Netherlands law, Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). Certain entities to which that legislation applies are governed by the Besluit van 11 februari 2013, houdende de regeling van enkele onderwerpen van de Aanbestedingswet 2012 (Aanbestedingsbesluit) (Decree of 11 February 2013 governing certain entities to which the Law of 2012 on Public Procurement applies), which provides in Article 2:

'1. The self-declaration referred to in Article 2.84 of the Law [on Public Procurement] shall include at least the following information:

a. information on the contracting authority or special-sector firm and on the procurement procedure;

b. information on the economic operator;

c. a statement concerning the grounds for exclusion;

d. a statement concerning the suitability requirements and a statement concerning the technical specifications and the performance requirements relating to the environment;

e. a statement as to how the selection criteria have been met;

f. a statement concerning the correctness of the completed self-declaration and signing powers of the signatory;

g. date and signature.

…

3. One or more model self-declaration forms shall be issued by ministerial order.’

13 It follows from Article 2.52 of that law:

‘…

3. Associations of economic operators may submit tenders or put themselves forward as candidates.

4. Associations of economic operators shall not be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.’

14 Article 2.84 of the Law on Public Procurement provides as follows:

‘1. A self-declaration is a declaration by an economic operator in which it indicates:

a. whether any grounds for exclusion apply to it;

b. whether it meets the suitability requirements set out in the notice or in the procurement documents;

c. whether it complies or will comply with the technical specifications and implementing conditions relating to the environment and animal welfare or based on social considerations;

d. whether and how it meets the selection criteria.

2. The data and information that may be requested in a declaration and model declaration form(s) shall be laid down by or pursuant to a general administrative order.’

15 Under Article 2.85 of that law:

‘1. The contracting authority shall require the economic operator to provide, in support of its request to participate or its tender, a self-declaration in accordance with the model form that is provided for that purpose, and shall specify in that regard the data and information to be included.

2. The contracting authority shall not require the economic operator to provide, in support of its request to participate or its tender, data and information by any means other than the self-declaration, if they may be requested in that declaration.

3. The contracting authority may only request the economic operator to attach to its self-declaration supporting documents which do not relate to the data and information that may be requested in the self-declaration, except where they are supporting documents referred to in Article 2.93(1)(a), to the extent that they are listed in that provision or in Article 2.93(1)(b).

4. An economic operator as referred to in paragraph 1 of this Article may submit a self-declaration that has already been used, provided that it confirms that the information contained therein is still correct.'

Civil Code

16 According to Article 7A:1655 of the Burgerlijk Wetboek (Civil Code):

'A partnership is an agreement by which two or more persons agree to join something together with the aim of sharing the resulting benefit.'

Commercial Code

17 Article 16 of the Wetboek van Koophandel (Commercial Code) provides:

'A general partnership is a partnership entered into for the purpose of carrying on a commercial activity under a common name.'

18 Under Article 17(1) of that code:

'Unless otherwise precluded from doing so, each partner is authorised to act in the name of the partnership, to spend and receive money and to bind the partnership to third parties and third parties to the partnership.'

19 Under Article 18 of that code:

'In general partnerships, each partner is jointly and severally liable for the obligations of the partnership.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 Up to 1 August 2019, Taxi Horn Tours transported primary school pupils for physical education classes ('transport of the PE class') in performance of a public contract awarded to it by the municipalities.

21 Having decided not to extend that contract, the municipalities initiated a European public procurement procedure for the transport of the PE class in the period from 1 January 2020 to the end of the 2027/2028 school year. The award criterion was that of the most economically advantageous tender.

22 The tender instructions drawn up by the municipalities provided, inter alia, that, in order to guarantee the correctness and validity of the tender, an officer authorised to represent and bind the undertaking was required to sign the ESPD, tender and annexes. In addition, groups of transport undertakings submitting tenders were required to designate a contact person. Each member of such a group was to be jointly and severally liable for the performance of the transport contract. Lastly, those instructions specified that the tender was required to be complete and to contain, inter alia, a duly completed and validly signed ESPD.

23 The municipalities, which had received two tenders, one from Touringcars and the other from Taxi Horn Tours, informed the latter that they intended to award the contract to Touringcars.

24 Taxi Horn Tours then applied to the Rechtbank Limburg (District Court, Limburg, Netherlands) for interim measures seeking, first, rejection of the tender submitted by Touringcars and, secondly, the award of the contract to Taxi Horn Tours.

25 After that application had been dismissed by decision of 12 February 2020, the municipalities concluded contracts with Touringcars for the transport of the PE class from 1 March 2020.

26 Taxi Horn Tours brought an appeal against that decision before the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch, Netherlands), which is the referring court. That court notes that the tender proposed by Touringcars was submitted by F, who also submitted an ESPD in the name of

that firm. The question therefore arose, in its view, as to whether Touringcars was authorised to supply one single ESPD for that general partnership or whether each partner was required to provide its own ESPD.

27 In that regard, Taxi Horn Tours claims that Touringcars is a permanent association between the undertakings of its two partners and, therefore, a group of undertakings. The conduct and statements of the two partners must therefore, it submits, be assessed in the light of their own ESPD.

28 The municipalities submit, by contrast, that a distinction should be drawn between temporary associations and permanent associations. The concept of a 'group of economic operators', within the meaning of EU public procurement law, refers to a temporary association. A general partnership, however, is a partnership as referred to in recital 14 of Directive 2014/24 and is therefore, in its entirety, a single economic operator and not a group of economic operators. Furthermore, according to the municipalities, the assessment of partners can be made on the basis of Part III(A) of the ESPD relating to the grounds for exclusion, which requires economic operators to mention grounds relating to criminal convictions.

29 The referring court states that Touringcars is a general partnership appearing in the commercial register and formed on 1 January 2011 for an indefinite period. It employs 82 people and its activities are 'the occasional carriage of passengers by road, transport by taxi and the trade in and repair of passenger cars and light commercial vehicles'. The partners of Touringcars are K BV, which employs 39 people, and F Touringcars BV, which, for its part, does not employ any staff. F is the managing director of Touringcars and has a general mandate. Each partner operates its own transport undertaking. K is the managing director of K BV, while F is the authorised representative of K BV and holds the title of commercial director. Lastly, the sole director and shareholder of F Touringcars BV is F Beheer BV, whose sole director and shareholder is F.

30 In a letter dated 27 January 2020, K stated that in January 2011 he had given F a general mandate, as a director authorised to act alone and autonomously, to represent K BV. Since then, it was stated, F has been responsible for the management of that firm in its entirety. At the same time, K BV, together with F Touringcars BV, formed a general partnership under the name 'Touringcars VOF'. Within that partnership, F and K consult one another regularly, but F effectively directs the undertaking.

31 The referring court notes that, having regard to the combined provisions of Article 16 of the Commercial Code and Article 7A:1655 of the Civil Code, a general partnership is an agreement by which two or more persons agree to join something together with the aim of carrying on a commercial activity under a common name and achieving a common benefit.

32 That court also refers to a judgment of 19 April 2019 in which the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) held, first, that a general partnership is a contractual legal relationship entered into for the purpose of carrying on a commercial activity under a common name in a long-term association. Although a general partnership does not have legal personality, Netherlands law and case-law grant it, to some extent, an independent position vis-à-vis the individual partners when it acts in legal relations. Thus, a general partnership can institute legal proceedings in its own name or be declared insolvent in its own name. Secondly, the absence of legal personality means that the general partnership does not have individual rights and obligations in its own right. When a partner acts in the name of the general partnership, that partner acts on behalf of all the joint partners of that partnership ('the joint partners') and binds the joint partners. An agreement with a general partnership must therefore be regarded as an agreement with the joint partners in their capacity as partners. Thirdly, since Article 18 of the Commercial Code stipulates that each of the partners is jointly and severally liable for the obligations of the partnership, each partner is liable for the entirety of the obligations of the joint partners. Fourthly, a creditor of the joint partners can enforce his or her claim both against the joint partners and against each partner individually. A creditor of the partnership thus has two concurrent rights of action against each partner: one against the joint partners, which is recoverable from the separated assets of the general partnership, and the other against the partner personally, which may be satisfied by the private assets of that partner.

33 Taxi Horn Tours argues that Touringcars has recourse to resources which are made available to it from the joint partners' own undertakings.

34 The referring court is therefore uncertain whether the assessment of the application for a public procurement procedure for entities which cooperate on a long-term basis in a separate joint undertaking may be limited to the joint undertaking alone or whether it must also be carried out in relation to each person linked with that undertaking. Therefore, in its view, it is necessary to determine whether an economic operator may limit itself to providing one single ESPD in the case where it is made up of the natural and/or legal persons involved.

35 In those circumstances, the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling on the interpretation of Articles 2, 19, 59 and 63 of Directive 2014/24 and of Implementing Regulation 2016/7:

'(1) Where (natural and/or legal) persons operate a joint undertaking (in this case in the form of a general partnership):

– must each person linked with that undertaking submit a separate European Single Procurement Document, or

– must each person linked with the joint undertaking and their joint undertaking submit a separate European Single Procurement Document, or

– does only the joint undertaking need to submit a European Single Procurement Document?

(2) Does the answer to that question vary depending on whether:

– the joint undertaking is temporary or non-temporary (long-term);

– the persons linked with the joint undertaking are themselves economic operators;

– the persons linked with the joint undertaking operate their own undertakings which are similar to the joint undertaking, or are at least active in the same market;

– the joint undertaking is not a legal person;

– the joint undertaking may in fact have its own (recoverable) assets (separate from the partners' assets);

– the joint undertaking is authorised under national law to represent persons linked with the joint undertaking for the purpose of answering questions relating to the European Single Procurement Document;

– under national law, in the case of a general partnership, the partners are responsible for the obligations arising from the contract and are jointly and severally liable for their proper performance (and not, therefore, the general partnership itself)?

(3) If several of the factors mentioned in the second question are significant, how are they related to each other? Are certain factors more significant than other factors, or are they decisive?

(4) Is it correct that, in the case of a joint undertaking, a separate European Single Procurement Document is in any event required from a person linked with that joint undertaking if the execution of the contract will (also) involve the use of resources that belong to that person's own undertaking (such as staff and business assets)?

(5) Must the joint undertaking meet certain requirements in order to be considered a single economic operator? If so, what are those requirements?'

Consideration of the questions referred

Admissibility

36 As is apparent from recital 21 of Directive 2014/24, public contracts that are awarded by contracting authorities operating in the water, energy, transport and postal services sectors and that fall within the scope of those activities are covered by Directive 2014/25.

37 Under its Article 11, Directive 2014/25 also applies to, inter alia, ‘activities relating to the provision or operation of networks providing a service to the public in the field of transport by … bus …’.

38 In that regard, it should be noted that neither the order for reference nor the written observations submitted to the Court make it possible to determine whether the conditions thus imposed by that provision are met and, therefore, whether that directive is applicable to the dispute in the main proceedings.

39 The request for a preliminary ruling must nevertheless be declared admissible since the answer to the questions referred could be formulated identically on the basis of Directive 2014/24 or on that of Directive 2014/25 (see, to that effect, judgment of 20 September 2018, *Rudigier*, C-518/17, EU:C:2018:757, paragraph 44). Recitals 17 and 18 and Article 2(6), Article 37(2), Article 79 and Article 80(3) of Directive 2014/25 correspond, in essence, to recitals 14 and 15 and Article 2(1)(10), Article 19(2), Article 56(3), Article 59(1) and Article 63 of Directive 2014/24.

40 In those circumstances, the fact that the referring court did not determine, before making the reference to the Court for a preliminary ruling, which of Directives 2014/24 or 2014/25 was applicable to the dispute in the main proceedings cannot call into question the presumption that questions referred by national courts for a preliminary ruling are relevant, which may be rebutted only in exceptional cases, in particular where it is quite obvious that the interpretation sought of the provisions of EU law referred to in those questions bears no relation to the actual facts of the main action or to its purpose (see, to that effect, judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 61, and of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others*, C-328/17, EU:C:2018:958, paragraph 33).

Substance

41 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 59(1) of Directive 2014/24, read in conjunction with Article 2(1)(10) and Article 63 of that directive, and with Annex 1 to Implementing Regulation 2016/7, must be interpreted as meaning that a joint undertaking which, although not a legal person, has the form of a firm governed by the national legislation of a Member State, which appears on the commercial register of that Member State, which may have been set up on either a temporary or a permanent basis and whose joint partners are active on the same market as that joint undertaking and are jointly and severally liable for the proper performance of the obligations which it has entered into, must provide the contracting authority with its own ESPD and/or the ESPD of each of the joint partners.

42 It should be noted at the outset that, under the seventeenth to the nineteenth paragraphs of Annex 1 to Implementing Regulation 2016/7:

‘An economic operator participating on its own and which does not rely on the capacities of other entities in order to meet the selection criteria, must fill out one ESPD.

An economic operator participating on its own but relying on the capacities of one or more other entities must ensure that the contracting authority or contracting entity receives its own ESPD together with a separate ESPD setting out the relevant information for each of the entities it relies on.

Finally, where groups of economic operators, including temporary associations, participate together in the procurement procedure, a separate ESPD setting out the information required under Parts II to V must be given for each of the participating economic operators.’

43 In that regard, it follows from Article 2(1)(10) of Directive 2014/24, read in conjunction with recital 14 thereof, that the concept of an ‘economic operator’ must be interpreted broadly so as to include, inter alia, any person or entity offering services on the market, regardless of the legal form in which that person or entity has chosen to operate and whether or not that person or entity is a legal person.

44 It follows that a general partnership, within the meaning of Netherlands law, may be regarded as an ‘economic operator’, as that term is defined in Article 2(1)(10) of that directive.

45 That said, that directive also adopts a broad interpretation of the concept of a ‘group of economic operators’. Under the first subparagraph of Article 19(2) of that directive, groups of economic operators, including temporary associations, may participate in public procurement procedures and are not required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.

46 It is therefore necessary to determine whether a general partnership, within the meaning of Netherlands law, must be regarded as an economic operator or as a group of economic operators within the meaning of Article 2(1)(10) and Article 19(2) of Directive 2014/24, respectively.

47 In that regard, contrary to the claims made by the municipalities, the Netherlands Government and the European Commission in their written observations, the concept of a ‘group of economic operators’ within the meaning of Article 19(2) of that directive cannot be restricted solely to temporary associations, to the exclusion of permanent associations or associations of undertakings. That provision refers to ‘groups of economic operators, including temporary associations’. It follows clearly from that wording that temporary associations are mentioned only by way of illustration. Therefore, the concept of a ‘group of economic operators’ cannot be interpreted as applying solely to temporary associations. There is therefore no need to distinguish between groups of economic operators according to whether they are temporary or permanent.

48 In addition, it follows from Article 59(1) of Directive 2014/24 that an ESPD pursues three aims. That document is a self-declaration updated as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming (i) that the economic operator concerned is not in one of the situations referred to in Article 57 of that directive in which economic operators must or may be excluded, (ii) that it meets the relevant selection criteria that have been set out pursuant to Article 58 of that directive, and, (iii), where applicable, that it fulfils the objective rules and criteria that have been set out pursuant to Article 65 of that directive.

49 An ESPD is thus intended to give the contracting authority a precise and accurate picture of the situation of each economic operator which requests to participate in a public procurement procedure or which intends to submit a tender. In so doing, the ESPD gives concrete expression to the objective pursued by Articles 57 and 63 of Directive 2014/24, which is to enable the contracting authority to satisfy itself that each of the tenderers has integrity and is reliable and, consequently, that the relationship of trust with the economic operator concerned will not be broken (see, to that effect, judgments of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 29, and of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 35).

50 In that regard, it should be noted that the information which an economic operator is required to indicate in the ESPD does not include the resources of the partners in a joint undertaking. Furthermore, it is not relevant that the partners in a general partnership, within the meaning of Netherlands law, operate in the same business area or on the same market as the general partnership, since that information cannot be brought to the attention of the contracting authority by means of the ESPD of the joint undertaking.

51 Furthermore, the existence of joint and several liability between the general partnership and the joint partners is not sufficient to enable the contracting authority to satisfy itself that the qualitative selection criteria are met. When examining the admissibility of applications, the contracting authority carries out a retrospective assessment into whether a tenderer has qualities that indicate that the contract in question can be performed effectively. In those circumstances, the absence of those qualities cannot be overcome by the prospective legal relationship under which the members of a general partnership are legally required to assume joint and several liability for the obligations of that partnership (order of 30 September 2022, *ĒDIENS & KM.LV*, C-592/21, not published, EU:C:2022:746, paragraph 33).

52 Therefore, in order to enable the contracting authority to satisfy itself as to its integrity, a joint undertaking such as a general partnership, within the meaning of Netherlands law, is required to mention any ground for exclusion of any joint partner or any person employed by one of its joint

partners who is a member of the administrative, management or supervisory body of the joint undertaking or who has powers of representation, decision or control therein.

53 Furthermore, in order to demonstrate its reliability, a joint undertaking, such as a general partnership, within the meaning of Netherlands law, must be regarded as intending to participate, on an individual basis, in a public procurement procedure or to submit a tender only if it shows that it is capable of performing the contract in question using only its own personnel and materials, in other words, the resources which its joint partners transferred to it in accordance with the partnership agreement and which are freely available to it. In such a case, it is sufficient for that firm to supply its own ESPD to the contracting authority.

54 In that regard, it is for the referring court to ascertain to what extent such a firm may, having regard to the particular features of its legal form as a partnership and the links between itself and the joint partners, be covered by that situation.

55 By contrast, if, for the performance of a public contract, such a firm considers that it needs to call on the resources of the joint partners, it must be regarded as relying on the capacities of other entities, within the meaning of Article 63 of Directive 2014/24. In such a case, the firm must submit not only its own ESPD, but also that of each of the joint partners whose capacities it intends to use.

56 It is true, as the municipalities, the Netherlands Government and the Commission have argued, that recital 1 of Implementing Regulation 2016/7 states that ‘one of the major objectives of Directives [2014/24] and [2014/25] is [to reduce] the administrative burdens of contracting authorities, contracting entities and economic operators, not least small and medium-sized enterprises. A key element of that effort is the [ESPD]. …’.

57 That objective of reducing the administrative burden is, however, only one of the objectives of those directives. In that respect, it must in particular be reconciled with the objective of promoting the development of healthy and effective competition between economic operators taking part in a public procurement procedure, which lies at the very heart of the EU rules on public procurement procedures and is protected in particular by the principle of equal treatment of tenderers (see, to that effect, judgments of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraph 25, and of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 43).

58 The obligation for a joint undertaking, such as a general partnership, within the meaning of Netherlands law, to submit to the contracting authority an ESPD for itself and an ESPD for each of its joint partners, in the event that, for the performance of a public contract, it considers that it needs to call on the resources of those joint partners, also does not run counter to the principle of proportionality, which is guaranteed by Article 18(1) of Directive 2014/24, particularly since, as is apparent from both the last subparagraph of Article 59(1) of Directive 2014/24 and Annex 1 to Implementing Regulation 2016/7, economic operators may provide an ESPD which has already been used in a previous procurement procedure, provided that they confirm that the information contained therein continues to be correct and remains relevant.

59 Finally, the obligation for a joint undertaking, such as a general partnership, within the meaning of Netherlands law, to submit an ESPD for itself and an ESPD for each of the joint partners whose capacities it intends to use does indeed constitute an administrative burden, but cannot in any event be treated in the same way as an obligation to alter its legal structure.

60 In the light of the foregoing, the answer to the questions referred is that Article 59(1) of Directive 2014/24, read in conjunction with Article 2(1)(10) and Article 63 of that directive, and with Annex 1 to Implementing Regulation 2016/7, must be interpreted as meaning that a joint undertaking which, although not a legal person, has the form of a firm governed by the national legislation of a Member State, which appears on the commercial register of that Member State, which may have been set up on either a temporary or a permanent basis and all the joint partners of which are active on the same market as that joint undertaking and are jointly and severally liable for the proper performance of the obligations which it has entered into, must provide the contracting authority with only its own ESPD when it intends to participate, on an individual basis, in a public procurement procedure or to submit a tender if it shows that it can perform the contract in question using only its own personnel and

materials. If, on the other hand, for the performance of a public contract, that joint undertaking considers that it must seek the own resources of certain partners, it must be regarded as having recourse to the capacities of other entities, within the meaning of Article 63 of Directive 2014/24, and must then submit not only an ESPD for itself, but also an ESPD for each of the partners whose capacities it intends to use.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 59(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, read in conjunction with Article 2(1)(10) and Article 63 of that directive, and with Annex 1 to Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document,

must be interpreted as meaning that a joint undertaking which, although not a legal person, has the form of a firm governed by the national legislation of a Member State, which appears on the commercial register of that Member State, which may have been set up on either a temporary or a permanent basis and all the joint partners of which are active on the same market as that joint undertaking and are jointly and severally liable for the proper performance of the obligations which it has entered into, must provide the contracting authority with only its own European Single Procurement Document (ESPD) when it intends to participate, on an individual basis, in a public procurement procedure or to submit a tender if it shows that it can perform the contract in question using only its own personnel and materials. If, on the other hand, for the performance of a public contract, that joint undertaking considers that it must seek the own resources of certain partners, it must be regarded as having recourse to the capacities of other entities, within the meaning of Article 63 of Directive 2014/24, and must then submit not only an ESPD for itself, but also an ESPD for each of the partners whose capacities it intends to use.

[Signatures]

---

* Language of the case: Dutch.

JUDGMENT OF THE COURT (First Chamber)

7 September 2023 (*)

(Failure of a Member State to fulfil obligations – Public contracts for services contracts – State printing office – Production of identity documents and other official documents as well as systems for managing such documents – National legislation providing for the award of contracts for such production to a public undertaking without first conducting a procurement procedure – Article 346(1)(a) TFEU – Directive 2014/24/EU – Article 1(1) and (3) – Article 15(2) and (3) – Special security measures – Protection of a Member State's essential security interests)

In Case C-601/21,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 28 September 2021,

European Commission, represented initially by P. Ondrůšek, M. Siekierzyńska, A. Stobiecka-Kuik and G. Wils, and subsequently by G. Gattinara, P. Ondrůšek, A. Stobiecka-Kuik and G. Wils, acting as Agents,

applicant,

v

Republic of Poland, represented by B. Majczyna, E. Borawska-Kędzierska and M. Horoszko, acting as Agents,

defendant,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen (Rapporteur), Vice-President of the Court, P.G. Xuereb, T. von Danwitz and A. Kumin, Judges,

Advocate General: N. Emiliou,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 1 December 2022,

after hearing the Opinion of the Advocate General at the sitting on 2 March 2023,

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that, by adding to Polish legislation exemptions not provided for in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), concerning contracts for the production of certain documents, printed matter and stamps and markings, the Republic of Poland has failed to fulfil its obligations under Article 1(1) and (3) and Article 15(2) and (3) of Directive 2014/24, read in conjunction with Article 346(1)(a) TFEU.

Legal context

European Union law

2 Article 1 of Directive 2014/24 provides:

‘1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.

3. The application of this Directive is subject to Article 346 TFEU.

…’

3 Under points 6 and 9 of Article 2(1) of that directive:

‘For the purposes of this Directive, the following definitions apply:

…

(6) “public works contracts” means public contracts having as their object one of the following:

(a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;

(b) the execution, or both the design and execution, of a work;

(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

…

(9) “public service contracts” means public contracts having as their object the provision of services other than those referred to in point 6’.

4 Article 4 of the directive determines the thresholds from which the directive applies.

5 Article 12 of the directive, entitled ‘Public contracts between entities within the public sector’ provides in paragraph 1 thereof:

‘A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

…’

6 Article 15 of Directive 2014/24, entitled ‘Defence and security’, provides, in paragraphs 2 and 3 thereof:

‘2. This Directive shall not apply to public contracts and design contests not otherwise exempted under paragraph 1, to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information which the contracting authority makes available in a contract award procedure as provided for in this Directive.

Furthermore, and in conformity with point (a) of Article 346(1) TFEU, this Directive shall not apply to public contracts and design contests not otherwise exempted under paragraph 1 of this Article to the extent that the application of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security.

3. Where the procurement and performance of the public contract or design contest are declared to be secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State, this Directive shall not apply provided that the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in the first subparagraph of paragraph 2.’

7 Article 28(1) and (2) of that directive, entitled ‘Restricted procedure’, is worded as follows:

‘1. In restricted procedures, any economic operator may submit a request to participate in response to a call for competition …

…

2. Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65.

…’

8 Article 29 of the directive, entitled ‘Competitive procedure with negotiation’, provides, in paragraph 6 thereof:

‘Competitive procedures with negotiation may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document. …’

9 Article 30(4) of that directive provides:

‘Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria laid down in the contract notice or in the descriptive document. In the contract notice or the descriptive document, the contracting authority shall indicate whether it will use that option.’

10 Article 42 of Directive 2014/24 makes provision for contracting authorities to formulate technical specifications and take them into account in selecting tenders. Paragraph 1 of that article provides:

‘The technical specifications as defined in point 1 of Annex VII shall be set out in the procurement documents. The technical specifications shall lay down the characteristics required of a works, service or supply.

Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance, provided that they are linked to the subject matter of the contract and proportionate to its value and its objectives.

The technical specifications may also specify whether the transfer of intellectual property rights will be required.

…’

11 Under Article 58 of that directive, entitled ‘Selection criteria’:

‘1. Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

2. With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as described in Annex XI, or to comply with any other request set out in that Annex.

…

3. With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance.

…

4. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

In procurement procedures for … services …, the professional ability of economic operators to provide the service … may be evaluated with regard to their skills, efficiency, experience and reliability.

…’

12 Entitled ‘Reliance on the capacities of other entities’, Article 63 of that directive provides in paragraph 1 thereof:

‘With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. …

…

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

…’

13 Article 71 of that directive lays down detailed rules concerning subcontracting.

Polish law

14 Article 4(5c) of the ustawa Prawo zamówień publicznych (Law on public procurement) of 29 January 2004 (Dz. U., No 19, item 177), as amended by the ustawa o dokumentach publicznych (Law on public documents) of 22 November 2018 (Dz. U. of 2019, item 53) (‘the Law on public procurement’), provides:

‘This Law shall not apply to:

…

(5c) contracts for the production of:

(a) blank public documents referred to in Article 5(2) of the [Law on public documents], as well as their personalisation or individualisation;

(b) excise stamps,

(c) legal markings and control stickers referred to in the Law establishing the Highway Code [(Dz. U. of 2018, position 1990), of 20 June 1997, as subsequently amended],

(d) ballot papers referred to in Article 40 of the Law establishing the Electoral Code (Dz. U. of 2019, positions 684 and 1504), of 5 January 2011, and Article 20 of the Law on the national referendum (Dz. U. of 2019, positions 1444 and 1504), of 14 March 2003,

(e) holographic signs on certificates of voting rights referred to in Article 32(1) of the [Law establishing the Electoral Code],

(f) microprocessor systems with software for the management of public documents, computer systems and databases necessary for the use of public documents referred to in Article 5(2) of the [Law on public documents], containing an electronic chip, in accordance with their purpose’.

15 The public documents referred to in Article 5(2) of the Law on public documents are:

‘(1) identity cards;

(2) passports;

(3) seaman’s books, referred to in Article 10(1) of the Law on maritime labour of 5 August 2015;

(4) documents issued pursuant to Article 44(1) and Article 83(1) of the Law on civil status records of 28 November 2014;

(5) documents issued to foreign nationals pursuant to Article 37 and Article 226 of the Law on foreign nationals of 12 December 2013;

(6) documents issued to members of diplomatic missions and consular posts of foreign states or any person assimilated to them by virtue of laws, conventions or customary international law, as well

as documents issued to their family members forming part of their household pursuant to Article 61 of the [Law on foreign nationals];

(7) the document issued to EU citizens pursuant to Article 48(1) of the Law on entry to, stay in and exit from the territory of the Republic of Poland of nationals of EU Member States … and their family members, of 14 July 2006;

(8) the document issued to members of the family of an EU citizen pursuant to Article 30(1) and Article 48(2) of the [Law on entry to, stay in and exit from the territory of the Republic of Poland of nationals of EU Member States and their family members];

(9) documents issued to aliens pursuant to Article 55(1) and Article 89i(1) of the Law on granting foreign nationals protection in the territory of the Republic of Poland, of 13 June 2003;

(10) enforceable orders issued by courts or judicial officers;

(11) copies of final judgments establishing the acquisition, existence or extinction of a right or relating to civil status;

(12) copies of judgments or certificates, issued by a court, empowering the representation of a person, the performance of a legal act or the administration of specific property;

(13) copies of orders of courts and judicial officers concerning the affixing of the enforcement formula to an enforcement order other than those listed in Article 777(1)(1) and (1) of the Law establishing the Code of Civil Procedure, of 17 November 1964, if their subject matter is an enforcement order not issued by the court;

(14) copies of and extracts from documents relating to the notarial acts referred to in Article 79(1-1b) and (4) of the Law of 14 February 1991 on the notarial profession, the authorisations referred to in Article 79(2) thereof and the protests referred to in Article 79(5) thereof;

(15) the aircrew member’s certificate;

(16) personal military documents issued to persons entered in the military register pursuant to Article 54(1) of the Law of 21 November 1967 on the general obligation to defend the Republic of Poland;

(17) personal military documents issued pursuant to Article 48(1) of the Law of 11 September 2003 on professional military service;

(18) identity cards issued pursuant to Article 137c(1) of the [Law on professional military service];

(19) identity cards issued pursuant to Article 54a(1) of the [Law on the general obligation to defend the Republic of Poland];

(20) an annotation in a passport referred to in Article 19(1) of the Law of 13 July 2006 on Passports;

(21) the visa sticker;

(22) the “Polish card” *(Karta Polaka)*;

(23) the card certifying disability or degree of disability;

(24) the authorisation to work as a doctor;

(25) the permit to practise dentistry;

(26) the driving licence;

(27) the professional registration certificate and vehicle registration certificate, except for vehicle registration certificates referred to in Article 73(3) of the [Law establishing the Highway Code];

(28) the vehicle booklet *(karta pojazdu)*;

(29) the temporary certificate referred to in Article 71(1) of the [Law establishing the Highway Code];

(30) the tachograph card referred to in Article 2(4) of the Law of 5 July 2018 on tachographs;

(31) the ADR certificate referred to in Article 2(10) of the Law of 19 August 2011 on transport of dangerous goods;

(31a) the registration document referred to in Article 4(1) of the Law of 12 April 2018 on the registration of yachts and other vessels up to 24 metres in length; and

(32) service cards of:

(a) police officers,

(b) border guards,

(c) State security agents,

(d) officers of the Internal Security Agency,

(e) officers of the Intelligence Agency,

(f) officers of the Central Anti-Corruption Bureau,

(g) officers of the Military Counterintelligence Service and professional soldiers appointed to a post in that service,

(h) officers of the Military Intelligence Service and professional soldiers appointed to a post in that service,

(i) officers and staff of the prison administration,

(j) tax and customs officials,

(k) persons employed in organisational units of the national tax administration,

(l) inspectors of the Road Transport Inspectorate,

(m) members of the military police.'

Pre-litigation procedure

16 By a letter of formal notice of 25 January 2019, the Commission expressed doubts to the Republic of Poland, inter alia, as to the compatibility with Directive 2014/24 of the Law on public procurement, transposing that directive into the Polish legal order.

17 In particular, the Commission took the view that that Member State had failed to fulfil its obligations under that directive, since that law excluded from public procurement procedures the document production services, referred to in Article 4(5c) of that law, ('the services at issue'), for excise stamps, legal markings, control stickers, ballot papers, holographic signs on certificates of voting rights and microprocessor systems with software for the management of public documents, computer systems and databases necessary for the use of public documents, containing an electronic chip, in accordance with their purpose, even though such an exclusion was not provided for in that directive.

18 In its reply of 25 March 2019, the Republic of Poland disputed the Commission's complaint.

19 On 5 November 2019, that Member State informed the Commission of the adoption of a new law intended to replace the Law on public procurement from 1 January 2021.

20 The Commission, taking the view that that new law still did not remedy the failure to fulfil obligations under Directive 2014/24, by letter of 28 November 2019, sent a reasoned opinion to the Republic of Poland and called on that Member State to take the necessary measures to comply with that opinion within a period of two months from receipt thereof.

21 In its reply of 28 January 2020, the Republic of Poland challenged, in particular, the Commission's complaint alleging the addition in the Polish legal order of exemptions not provided for in that directive in so far as concerns the services at issue.

22 Since it was not satisfied with the responses provided by the Republic of Poland, the Commission decided, on 9 June 2021, to bring the present action before the Court.

The action

Arguments of the parties

23 The Commission maintains that, when transposing Directive 2014/24 into the Polish legal order, the Republic of Poland infringed that directive by exempting the services at issue in the procurement procedure provided for by that directive. In that regard, that institution observes that such exemptions are neither provided for in Articles 7 to 12 of that directive, nor can be justified on the basis of Article 15 thereof.

24 The Commission recalls that, in accordance with the case-law of the Court, it is the Member State which intends to rely on the derogations provided for in Article 15 which has the burden of proving that the exceptional circumstances justifying those derogations do actually exist.

25 By referring to the judgment of 20 March 2018, *Commission* v *Austria (State printing office)* (C-187/16, EU:C:2018:194), the Commission states that it is for the Member States to define their essential security interests and the security measures necessary for the protection of public security in the context of the printing of identity documents and other official documents, and that the measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of EU law solely because they are taken, inter alia, in the interests of public security or national defence. In particular, it is for the Republic of Poland to establish that the need to protect the interests on which it relies could not be satisfied in the context of a call for tenders. Moreover, economic or industrial interests do not constitute, in principle, such essential security interests.

26 In that regard, the Commission takes the view that the justifications put forward by the Republic of Poland concerning the services at issue, with a view to derogating from the application of the procurement procedures laid down by Directive 2014/24 are insufficient.

27 That institution maintains that the fact that the State is the sole shareholder of the undertaking which has been entrusted with the supply of the services at issue cannot constitute a guarantee either against the possible bankruptcy of that undertaking or of the reliability of the implementation of the contracts at issue. In that regard, the Commission, first, doubts that any bankruptcy of Polska Wytwórnia Papierów Wartościowych S.A. ('PWPW') is impossible, having regard to applicable State aid rules and, second, raises the possibility for PWPW of having recourse to subcontracting.

28 As regards the existence of a possible threat to the security of the Republic of Poland in the event that the successful tenderer is a private operator, on the ground that that operator may be acquired by new shareholders, the Commission submits that the contracting authority may put appropriate guarantees in place, including the termination of the public procurement contract in question.

29 Furthermore, concerning the possibility of leaks of classified or sensitive information, it is argued that the Republic of Poland has failed to demonstrate the link between PWPW's status as a public undertaking and the guarantees intended to avoid such a leak. A State shareholding of 100% in that company does not constitute a guarantee against such leaks, having regard to the possibility of having recourse to subcontractors.

30 Although the Commission does not deny that the need to ensure the security of the information involved in the award of the contract for the services at issue is in the general interest, that interest nevertheless does not systematically correspond to an essential security interest of a Member State.

31 That institution observes that the contracting authority may impose particularly exacting requirements concerning the suitability and reliability of tenderers and change the conditions governing calls for tenders and contracts for the provision of services.

32 In particular, the contracting authority may set out technical specifications, such as those referred to in Article 42 of Directive 2014/24, and/or the setting of selection criteria, such as those referred to in Article 58 of that directive, thus ensuring that the successful tenderer is able to deliver a quality product, in compliance with the conditions and techniques imposed.

33 As to the technical specifications referred to in Article 42 of Directive 2014/24, the contracting authority could, inter alia, impose requirements and specific procedures ensuring the safety of premises, transport and that relating to the handling of material and physical access to those premises, keeping proper records, the protection of personal data or the submission, by the economic operator selected, of ongoing reports. The contracting authority could, moreover, require that operator to permit it to carry out the checks that it considered necessary.

34 According to the Commission, guarantees could be provided through contractual arrangements, such as a bank guarantee or a guarantee for the compensation of possible harm caused in the event of damage, with the assurance that any information leak would be regarded as serious professional misconduct. In addition, consideration could be given to imposing an obligation on the successful tenderer to draw up a detailed report in the event of irregularities, or to including provisions in the contract relating to the protection of intellectual property and the assumption of responsibility for the services at issue by another entity in the event that the successful tenderer is unable to fulfil its obligations.

35 Furthermore, as regards the irreversibility of any harm resulting from the undermining of the essential interests of the Republic of Poland through the leaking of sensitive information, the Commission submits that such irreversibility does not preclude the contractual terms concerning damages having both a compensatory and a deterrent effect.

36 In that connection, the Commission adds that such obligations and requirements may be imposed on the successful tenderer whether its headquarters are in the territory of the Republic of Poland or that of another Member State.

37 When defining the selection criteria, referred to in Article 58 of Directive 2014/24, the Commission points out that a contracting authority may impose certain requirements intended to show relevant experience concerning the production of highly secure documents, the existence of the necessary infrastructure and equipment, the presence of suitably qualified and experienced staff, who also have a clean criminal record, a financial situation allowing the contract in question to be performed securely, or even professional indemnity insurance cover.

38 Furthermore, the Commission submits that the confidentiality of information concerning the services at issue could be ensured by imposing a confidentiality requirement. In that regard, the contracting authority could impose a requirement of national security clearance in respect of access to classified information. Moreover, the contracting authority would still be in a position to amend or terminate the public procurement contract concerned when circumstances arose which the contracting authority could not have foreseen.

39 The Republic of Poland, relying on the requirement of protection of its essential security interests, disputes the claim that it has failed to fulfil its obligations with regard to the services at issue.

40 According to that Member State, it is not possible to make those services subject to the public procurement procedures laid down by Directive 2014/24 without undermining those interests. The exemptions that are the subject of the present action are measures proportionate, appropriate and necessary to achieving the objective of guaranteeing the protection of those interests at a level which the Republic of Poland considers to be appropriate.

41 Concerning, in the first place, the exemption from public procurement procedures of the production of public documents referred to in Article 4(5c), from the Law on public procurement, first, the Republic of Poland, in the pre-litigation procedure, relied on the need to safeguard the security of those documents, which are regarded as essential to the security of that Member State, by preventing the falsification of such documents. However, only the printing of those documents by PWPW would allow that Member State to guard against such risks of falsification.

42 The Republic of Poland emphasises that the security of those documents is closely linked to the fundamental interests of the State, namely both domestic interests including the security, health and freedom of citizens and respect for public order, and cross-border interests including the protection of the life, health and freedoms of citizens, and prevention of terrorism, human trafficking and organised crime.

43 As regards, in particular, the documents referred to in paragraph 32 of Article 5(2) of the Law on public documents, namely, in particular, the service cards of police officers, border guards, State security agents, officers of the Internal Security Agency, officers of the Intelligence Agency, officers of the Military Counterintelligence Service and professional soldiers appointed to a post in that service, officers of the Military Intelligence Service and professional soldiers appointed to a post in that service, and members of the military police, that Member State maintains that the exclusion of those documents from the scope of the procurement procedures is justified by the protection of those fundamental interests.

44 In that connection, the Republic of Poland takes the view that adequate protection of those documents, in particular against the risks of falsification or counterfeiting, is of particular importance for its internal security. In order to ensure the highest level of protection against those risks, the documents in question must be produced by an economic operator that is wholly controlled by that Member State, such as PWPW.

45 Furthermore, as to identity cards and personal military documents, the Republic of Poland takes the view that the exclusion thereof from the scope of procurement procedures laid down by Directive 2014/24 is justified by the requirement, stemming from that Member State’s Constitution, of protection of national security of the State in the area of defence, which also guarantees the independence and integrity of its territory and ensures the security of its citizens.

46 The Republic of Poland maintains, in that regard, that supervision over the production of those documents is part of the wider context of the security and credibility of that Member State concerning defence, having regard to the geopolitical situation of that State, its membership of the North Atlantic Treaty Organisation (NATO), but also the current international context.

47 Moreover, concerning the microprocessor systems with software for the management of public documents, computer systems and databases necessary for the use of those public documents, containing an electronic chip, in accordance with their purpose, referred to in Article 4(5c)(f) of the Law on public procurement, the Republic of Poland submits that, since it is not possible to ensure the security of public documents without guaranteeing an adequate level of security of the electronic components of those documents and the systems and databases used for the purposes of the processing of those documents, similar protection measures must be applied to those components, systems and databases.

48 As regards, in the second place, the excise stamps referred to in Article 4(5c)(b) of the Law on public procurement, the Republic of Poland maintains, in essence, that those stamps are of strategic

importance for its national security. In that regard, the fundamental interests on which that Member State relies are the protection of the life and health of citizens, the security of financial transactions, effective prevention of organised and economic crime, financial security and the making available of an appropriate level of tax revenue.

49 The fact of entrusting the production of those stamps to an economic operator such as PWPW, which has lengthy experience in the design, safe manufacture, storage and supply of such stamps on the territory of that Member State, is an essential measure in order to guarantee the safety of citizens in that area, since no other Polish undertaking is in a position to fulfil orders for excise stamps.

50 The security of production of those stamps is intended to guarantee the monitoring of the collection of taxes and levies and the marketing and registration of means of transport. Entrusting the production of those stamps to an undertaking other than PWPW could have the consequence of reducing the level of security that the Republic of Poland wishes to maintain in that area.

51 In so far as concerns, in the third place, legal markings and control stickers for vehicles, referred to in Article 4(5c)(c) of the Law on public procurement, that Member State notes the importance of documents concerning the entry into service of a vehicle for the security of a State. Inasmuch as the production of those documents requires access to secret information and involves the use of a central personalisation technology with the aid of an electronic system, it is necessary to ensure the protection of the classified information and personal data concerned, which is one of the essential elements of the security of the Republic of Poland.

52 In particular, that Member State observes that the transport of dangerous goods, which might be used in order to commit terrorist attacks, inter alia, requires that the details of the driver and the control sticker of the vehicle concerned are only available to carefully selected entities, such as undertakings wholly owned by the State.

53 As regards, in the fourth place, ballot papers and holographic signs on certificates of voting rights, referred to in Article 4(5c)(d) and (e) of the Law on public procurement, the Republic of Poland relies on public confidence in the proper conduct and security of elections and referendums in that Member State. In particular, the proper conduct of elections is of fundamental importance, both from the point of view of the confidence of citizens in the organs of the State and from that of national security, and requires that a sufficient number of ballot papers be printed in good time.

54 The Republic of Poland maintains that the fact of entrusting the supply of services at issue to an entity such as PWPW over which it has complete control, guarantees its influence on the level of security of the public documents that it classifies as ‘sensitive’, by allowing continuous monitoring of that entity’s situation and a rapid response to any threats.

55 That Member State underscores the fact that it is has complete control over PWPW and it manages both the functioning of the bodies of PWPW and the production process for public documents, which guarantees the protection of the fundamental interest of the security of that Member State.

56 In particular, the State Treasury’s ownership of 100% of PWPW’s shares enables the Republic of Poland to prevent that company being taken over by an entity other than one controlled by the State Treasury. It thus guarantees continuity of production of public documents and avoids the risk of bankruptcy of the economic operator responsible for that production.

57 The risk of bankruptcy of a company such as PWPW is purely theoretical and the Commission, furthermore, has not put forward reasons why, in the event that PWPW was in financial difficulty, it would not be possible to grant State aid to that company.

58 As to the risk of insolvency of that operator, the solution proposed by the Commission does not allow a sudden deterioration in the financial situation of that company to be avoided, whereas, on the contrary, such a hypothesis is precluded in a system such as that put in place by the Republic of Poland.

59 Furthermore, the consequences linked to the absence of essential documents for the functioning of the State, which would stem from a sudden interruption in their production by the chosen economic

operator, would be irreparable.

60 Moreover, according to the Republic of Poland, confining the production of those documents to an entity such as PWPW, without going through a procurement procedure provided for by Directive 2014/24, ensures the authenticity of those documents and, therefore, the security of that Member State, by limiting, furthermore, the group of entities that has access to classified information.

61 As to the possibility for the contracting authority to have recourse to subcontractors, the Republic of Poland takes the view that a situation in which a contract is performed by an undertaking which is wholly owned by the State, even using subcontractors, is not comparable with a situation in which that contract itself is performed by an entity selected in accordance with the procurement procedures laid down by Directive 2014/24. Furthermore, if a subcontractor does not honour the contract, PWPW has the possibility of taking the place of that subcontractor in so far as concerns the entire chain of document production.

62 The Republic of Poland submits that the Commission is wrong to base its argument on the judgment of 20 March 2018, *Commission* v *Austria (State printing office)* (C-187/16, EU:C:2018:194), which is not relevant for the purposes of the examination of the present action for failure to fulfil obligations. In that connection, that Member State contends that the application of the directives on public procurement relied on in the case which gave rise to that judgment ensured a similar level of security to that which would have been attained without the use of the procurement procedures laid down by those directives. However, the same cannot be said for the present case.

63 The Republic of Poland insists that it is not required to align the level of protection of its own essential security interests with the level of protection afforded by another Member State, in particular the Republic of Austria. In that connection, the Republic of Poland submits that, although the measures which, according to the Commission, may be taken so as to ensure the protection of its essential interests whilst submitting the services at issue to public procurement procedures provided for by Directive 2014/24 are sufficient for most contracts, those measures do not allow the level of protection of the essential security issues that it selected to be attained in respect of contracts concerning the services at issue.

64 As regards the protection of the security of information concerning the public documents in question, the opening up of the production services for those documents to competition increases the number of entities which may have access to information concerning the security of the Republic of Poland, which would increase the risk of that sensitive information being leaked. Such an attack to the essential security interests of that Member State would be, in the same way as a disruption of the supply of those documents, irreversible and a threat to the continuity of functioning of that Member State, since the information thus disclosed may be used by third States, organised crime groups or terrorist organisations.

65 As to the measure envisaged by the Commission, consisting of imposing a duty of secrecy by requiring national security clearance in order to access classified information, the Republic of Poland submits that such an obligation only guarantees the security of that sensitive information to a certain extent. The same applies to measures concerning the definition of technical specifications imposing requirements and specific procedures guaranteeing security.

66 Although the Commission argues that threats to the security of the Member State concerned could exist even when the services at issue were entrusted to a public undertaking such as PWPW, it has nevertheless failed to prove that the level of those threats would be as high as where the performance of the contract concerned was entrusted to an entity selected pursuant to that directive.

67 Even if the measures referred to in paragraph 65 of the present judgment allow only a limited number of candidates which have, moreover, demonstrated that they meet high standards concerning the reliability of information protection procedures to have access to that information, the system chosen by the Republic of Poland allows reduction in the number of entities having access to such information.

Findings of the Court

68 The present action concerns whether the Polish legislation providing for a direct award of the contracts relating to the services at issue to PWPW is in conformity with Directive 2014/24.

69 It should be noted at the outset that, as is apparent from the file submitted to the Court, first, the public contracts covered by that legislation are public service contracts, within the meaning of Article 2(1)(9) of that directive and, second, it is not disputed that the estimated value of those contracts exceeds the application thresholds for that directive. Accordingly, in accordance with Article 1(1) of that directive, that legislation must, in principle, provide that the award of those contracts is to be carried out in compliance with the rules laid down by that directive.

70 The only permitted exemptions to the application of Directive 2014/24 are those which are exhaustively and expressly mentioned therein (see, by analogy, judgment of 18 November 1999, *Teckal*, C-107/98, EU:C:1999:562, paragraph 43 and the case-law cited).

71 According to settled case-law relating to the burden of proof in proceedings for failure to fulfil an obligation under Article 258 TFEU, it is for the Commission to determine whether the obligation has not been fulfilled. It is the Commission that must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (judgment of 2 September 2021, *Commission* v *Sweden (Waste water treatment plants)*, C-22/20, EU:C:2021:669, paragraph 143 and the case-law cited).

72 In the present proceedings, the Republic of Poland relies on Article 15(2) and (3) of Directive 2014/24, read in conjunction with Article 346(1)(a) TFEU, with a view to justifying the compatibility with EU law of the Polish legislation providing for a direct award of the service contracts in question to PWPW.

73 In that connection, it should be noted that it is apparent from Article 15(2) of Directive 2014/24 that that directive does not apply to public contracts to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information which the contracting authority makes available in a contract award procedure as provided for by that directive.

74 Furthermore, that provision states that, in accordance with Article 346(1)(a) TFEU, Directive 2014/24 does not apply to public contracts to the extent that the application of that directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security.

75 Under Article 15(3) of that directive, where the procurement and performance of the public contract are declared to be secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State, that directive is not to apply provided that the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures.

76 As regards the derogation contained in Article 15 of Directive 2014/24, it is for the Member States to define their essential security interests and, in the present case, for the Polish authorities to define the security measures necessary for the protection of the national security of the Republic of Poland in the context of the printing of documents such as those at issue in the present case (see, by analogy, judgment of 20 March 2018, *Commission* v *Austria (State printing office)*, C-187/16, EU:C:2018:194, paragraph 75 and the case-law cited).

77 The wording of Article 15(2) and (3) of Directive 2014/24, read in the light of Article 346 TFEU, does not impose an obligation on the Member States as to the level of protection sought for their essential security interests.

78 As the Advocate General notes, in essence, in paragraph 48 of his Opinion, the term ‘security’, referred to in those provisions, includes, inter alia, the safeguarding of national security.

79 It should be recalled that, according to settled case-law, the objective of protecting national security corresponds to the primary interest in protecting the essential functions of the State and the fundamental interests of society through the prevention and punishment of activities capable of

seriously destabilising the fundamental constitutional, political, economic or social structures of a country and, in particular, of directly threatening society, the population or the State itself, such as terrorist activities (judgment of 5 April 2022, *Commissioner of An Garda Síochána and Others*, C-140/20, EU:C:2022:258, paragraph 61 and the case-law cited).

80 However, measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of EU law solely because they are taken in the interests of national security (see, by analogy, judgment of 20 March 2018, *Commission* v *Austria (State printing office)*, C 187/16, EU:C:2018:194, paragraph 76 and the case-law cited).

81 Moreover, it should also be recalled that derogations such as those relied on in the present action must be strictly interpreted (see, by analogy, judgment of 20 March 2018, *Commission* v *Austria (State printing office)*, C-187/16, EU:C:2018:194, paragraph 77 and the case-law cited).

82 Consequently, even though Article 15(2) and (3) of Directive 2014/24 afford the Member States discretion in deciding the measures considered to be necessary for the protection of their essential security interests, those provisions cannot, however, be construed as conferring on Member States the power to derogate from the provisions of the FEU Treaty simply by invoking those interests. Accordingly, a Member State which wishes to avail itself of the derogations provided for in those provisions must establish that the protection of such interests could not have been attained within a competitive tendering procedure as provided for by that directive (see, by analogy, judgment of 20 March 2018, *Commission* v *Austria (State printing office)*, C-187/16, EU:C:2018:194, paragraphs 78 and 79 and the case-law cited).

83 In the present case, although the Republic of Poland has admittedly identified the essential security interests which it considers must be protected and the guarantees inherent in the protection of those interests, it is however necessary to verify whether that Member State has shown that the objectives it pursues could not have been attained within a competitive tendering procedure as provided for by Directive 2014/24.

84 In that regard, the Republic of Poland's argument that the Commission cannot validly rely on the judgment of 20 March 2018, *Commission* v *Austria (State printing office)* (C-187/16, EU:C:2018:194), inasmuch as, unlike the situation at issue in the present case, the national printing office in question in the case which gave rise to that judgment was an undertaking governed by private law, must be rejected from the outset. The legal status of the company responsible, at the national level, for printing official documents, does not relieve the Member State concerned, subject to the applicability of Article 12 of Directive 2014/24, from the obligation to demonstrate that its objectives could not have been attained within a competitive tendering procedure. The Republic of Poland has failed to demonstrate that the public contracts covered by the Polish legislation at issue were subject to an in-house award, falling within the specific cases for exemption from the public procurement rules, referred to in Article 12.

85 As regards, in the first place, the Republic of Poland's argument that the direct award to PWPW of the service contracts at issue meets the objective of ensuring continuity in the supply of official documents, by avoiding the risk of bankruptcy of that undertaking, it should be noted that, whilst most of those documents are closely linked to public order and the institutional operation of a Member State, which require that guaranteed provision be ensured, the Republic of Poland has, however, failed to show that that objective could not be ensured in the context of a call for tenders and that such guaranteed provision would be jeopardised if those services were entrusted to other undertakings, including, as the case may be, undertakings established in other Member States.

86 In particular, that Member State has failed to show that the risk of disruption in the production of the public documents in question resulting from the potential bankruptcy of the economic operator responsible for that production was significantly greater where a public procurement procedure provided for by Directive 2014/24 was used.

87 In order to mitigate such risks, the Polish legislation at issue could have provided for the imposition of other measures, such as, inter alia, an obligation, vis-à-vis the contracting authority, to conclude, where other considerations do not preclude this, contracts with several suppliers.

88 Moreover, that contract could have provided for guarantee requirements as to financial stability of the candidates. Article 58(3) of Directive 2014/24 provides that contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. That provision states that, for that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts and have, where relevant, an appropriate level of professional risk indemnity insurance.

89 The Republic of Poland has failed to demonstrate that the imposition of such requirements is incapable of mitigating the alleged risks regarding the supply of the documents concerned, due, inter alia, to a sudden deterioration in the financial situation of the undertaking responsible for their production. As the Commission observes, although there is a lesser risk that an undertaking such as PWPW be declared bankrupt, that risk cannot be completely ruled out.

90 As regards the need for production in sufficient numbers and in good time of the ballot papers and holographic signs on certificates of voting rights, referred to in Article 4(5c)(d) and (e) of the Law on public procurement, so as to ensure the efficient conduct and security of elections, the Republic of Poland has failed to demonstrate that undertakings other than PWPW necessarily perform worse than that undertaking and that they cannot print those ballot papers and produce those signs in sufficient quantity and in good time. It follows that it has not been established that it is necessary to disapply the provisions on public procurement laid down by Directive 2014/24 in order to attain the objective put forward by that Member State.

91 In so far as concerns, in the second place, the need to ensure, as regards the majority of the services at issue, the protection of the security of the documents concerned and, more specifically, the information that they contain, the Court has previously held that the requirement to impose an obligation of confidentiality does not in itself prevent the use of a competitive tendering procedure for the award of a contract (judgment of 20 March 2018, *Commission* v *Austria (State printing office)*, C-187/16, EU:C:2018:194, paragraph 89).

92 Furthermore, the Court has also held that the confidential nature of data can be protected by a duty of secrecy, without it being necessary to contravene public procurement procedures. There is nothing to prevent the contracting authority from imposing particularly high requirements for the suitability and reliability of contractors, formulating tender specifications and service contracts accordingly and requiring the necessary proof from potential candidates (judgment of 20 March 2018, *Commission* v *Austria (State printing office)*, C-187/16, EU:C:2018:194, paragraphs 90 and 91).

93 In order to ensure the security of the majority of the documents concerned, the contracting authority could, in the context of the procurement procedures laid down by Directive 2014/24, have set out, inter alia, technical specifications, as referred to in Article 42 of that directive, and/or set selection criteria, as referred to in Article 58 of the directive.

94 More particularly, as regards those technical specifications, within the meaning of Article 42 of Directive 2014/24, it is apparent from paragraph 1 thereof that such specifications define the requisite characteristics of the services concerned, and that those characteristics may also refer to the specific process or method for supplying the services sought, provided that these are linked to the subject matter of the contract and proportionate to its value and its objectives.

95 As to selection criteria, referred to in Article 58 of that directive, the Court has held that the contracting authority is afforded broad discretion by the EU legislature when determining selection criteria. Thus, in accordance with paragraph 1 of that article, it has some flexibility in setting those requirements for participation in a procurement procedure which it considers to be related and proportionate to the subject matter of the contract and appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities required to perform that contract. More specifically, according to paragraph 4 of that article, the contracting authority is free to determine which requirements for participation it considers appropriate, from its point of view, to ensure inter alia the performance of that contract to a quality standard which it considers appropriate (see, to that effect,

judgment of 26 January 2023, *Construct*, C-403/21, EU:C:2023:47, paragraph 60 and the case-law cited).

96 In particular, that paragraph 4 allows the contracting authority to impose conditions which guarantee that economic operators have the human and technical resources and the experience necessary to perform the contract concerned by ensuring an appropriate quality standard, which can be assessed in view of their know-how, efficiency, experience and reliability. Economic operators who are regarded as not having the requisite professional capacities may therefore be excluded, including in situations involving conflicts of interests which may have an adverse effect on the performance of that contract.

97 Furthermore, as the Commission maintains, as regards the majority of the services at issue, the contracting authority could grant access to the confidential information concerned only to a limited number of candidates, by having recourse to the restricted procedure referred to in Article 28 of Directive 2014/24 or, where appropriate, to the procedures referred to in Articles 29 and 30 thereof. The contracting authority may, in fact, exercise the option of reducing the number of tenders to be negotiated as provided for in Article 29(6) or of solutions to be discussed as provided for in Article 30(4) of that directive.

98 In those circumstances, first, in so far as concerns the argument put forward by the Republic of Poland that the production of legal markings and control stickers for vehicles, referred to in Article 4(5c)(c) of the Law on public procurement, together with the documents relating to the entry into service of a vehicle, requires access to secret or confidential information and involves the protection of classified information and personal data, it has been recalled, in paragraph 92 of the present judgment, that the confidentiality of data can, in principle, be ensured by means of a duty of secrecy, without it being necessary to contravene the public procurement procedures laid down by Directive 2014/24.

99 In order to prevent leaks of sensitive information, it is permissible for the Polish authorities to insert into the conditions governing calls for tenders clauses obliging the successful tenderer to maintain general confidentiality, and to stipulate that a candidate undertaking which is not in a position to provide sufficient guarantees as regards compliance with that obligation will be excluded from the award procedure. It is also permissible for the Polish authorities to provide for the application of penalties against the successful tenderer, in particular contractual penalties, if there is a failure to comply with such an obligation during the performance of the contract in question (see, to that effect, judgment of 20 March 2018, *Commission* v *Austria (State printing office)*, C-187/16, EU:C:2018:194, paragraph 93).

100 Moreover, while, admittedly, a Member State can take measures with a view to ensuring, in particular, that a driver’s data and the control sticker for a vehicle in the context of the transport of dangerous goods may be accessed only by strictly selected entities, the confidential nature of those data may also be guaranteed by an obligation of confidentiality incumbent on undertakings participating in an award procedure governed by Directive 2014/24.

101 Accordingly, since the Republic of Poland has failed to put forward any elements capable of demonstrating that recourse to a public procurement procedure thus conceived would not make it possible to make access to secret data secure in a manner comparable to the direct award of the contracts concerned to PWPW, it is not established that protection of the security thereof precludes a competitive bidding process for awarding those contracts.

102 As regard, second, excise stamps provided for in Article 4(5c)(b) of the Law on public procurement, although the Republic of Poland can take the measures necessary to ensure, in particular, the safety and security of its citizens, that Member State has, however, failed to demonstrate that only the award of the production of those stamps to an undertaking such as PWPW is such as to ensure the attainment of that objective and that it is appropriate to disapply the provisions on public procurement laid down by Directive 2014/24.

103 It is in fact not clear that that objective could not be attained if such production were entrusted to economic operators other than PWPW, which have sufficient experience in the design, fully secure production, storage and supply of such stamps on the territory of that Member State. Furthermore, there

is nothing to suggest that it would be impossible contractually to impose the necessary confidentiality and security measures on those operators.

104 Third, when the Republic of Poland relies – with regard, in particular, to the production of the public documents referred to in Article 5(1) of the Law on public documents and microprocessor systems with software for the management of public documents, computer systems and databases necessary for the use of public documents, containing electronic chips, in accordance with their purpose, referred to in Article 4(5c)(f) of the Law on public procurement – on the imperative of preventing the falsification or forgery thereof, it should be observed that, as regards the majority of those documents and systems, the guarantees that the contracting authority may require appear to be sufficient to mitigate the risks relied on by that Member State in respect of its essential security interests.

105 Strict compliance, by the economic operator selected, of the award criteria and the continuous monitoring thereof over the course of the performance of the contract awarded are, in principle, such as to prevent potential leaks and internal abuses, which could give rise to such falsification or forgery.

106 It follows that the disapplication of the public procurement procedures laid down by Directive 2014/24 to the contracts relating to the production of the majority of the public documents referred to in Article 4(5c) of the Law on public procurement, but also to the contracts, also referred to in that provision, relating to the production of excise stamps, legal markings, control stickers, ballot papers, holographic signs on certificates of voting rights and microprocessor systems with software for the management of public documents, computer systems and databases necessary for the use of public documents, appears disproportionate in the light of the objectives on which the Republic of Poland relies.

107 By contrast, as regards certain public documents, referred to in points 16 to 19 and 32 of Article 5(2) of the Law on public documents – namely the personal documents of members of the military and their identity cards, the service cards of police officers, border guards, State security agents, officers of the Internal Security Agency, officers of the Intelligence Agency, officers of the Military Counterintelligence Service and professional soldiers appointed to a post in that service, officers of the Military Intelligence Service and professional soldiers appointed to a post in that service, and members of the military police – it must be held that those documents present a direct and close link to the objective of protecting national security, with the result that these may justify additional confidentiality requirements.

108 In that connection, it is clear that the documents set out in the preceding paragraph, in so far as they concern agents and officers whose duties appear to be directly and closely linked to tasks which contribute to safeguarding the national security of a Member State, can render indispensable a limitation on the disclosure of the characteristics of such documents and the information that they contain – including, in particular, the identity of those agents and officers – with the result that such documents must be regarded as having a particularly high level of sensitivity which requires greater protection against, inter alia, leaks and falsification.

109 As the Republic of Poland essentially maintains, without being effectively contradicted by the Commission, any leak of such information could have irreparable consequences for the national security of a Member State, given that such information is liable to be used by third States or, in particular, by criminal gangs or terrorist organisations.

110 Accordingly, although it could admittedly have been envisaged that provision be made for guarantees such as the application of penalties, including contractual penalties, to an economic operator entrusted with the task of producing the documents referred to in paragraph 107 of the present judgment, in the event of a leak of such sensitive information, such guarantees cannot be regarded as sufficiently effective as to ensure the security of that information.

111 As the Advocate General observes in point 95 of his Opinion, the application of disciplinary penalties to the persons responsible for such an information leak or to those who allowed them to do so, or even the inclusion in those contracts of terms providing for financial compensation which would necessarily be paid after the harm has occurred, are not appropriate solutions with a view to safeguarding such information.

112 As to the Commission's argument that an undertaking such as PWPW may use subcontractors and that it would therefore not be justified to award the services at issue exclusively to that undertaking, it should be noted, first, that the Commission has failed to establish that Polish legislation explicitly authorises the subcontracting of the production of the documents referred to in paragraph 107 of the present judgment.

113 Next, it is not disputed that such recourse to subcontracting would constitute, at most, an option open to PWPW and could therefore be envisaged only under the supervision of, and to the extent and under the conditions defined by, that undertaking. Furthermore, the Republic of Poland stated at the hearing, without being contradicted by the Commission, that PWPW relies on subcontractors only in respect of a limited number of services, of which the production of the documents set out in paragraph 107 of the present judgment does not form part.

114 Lastly, in the situation where that production would be performed by an entity selected in accordance with the rules laid down by Directive 2014/24, it should be noted that that entity could itself resort to using subcontractors, as is apparent from Article 63(1) and Article 71 of that directive, without an entity selected by the Member State concerned being able to oversee the activities of those subcontractors or define the terms and conditions of their involvement. It follows that it cannot be considered that eventual recourse by PWPW to subcontracting would mean that the level of security required for that production would not be higher than that which would result from the application of the public procurement procedures laid down by that directive.

115 In those circumstances, it must be held that the Republic of Poland can rely on Article 15(2) and (3) of Directive 2014/24 when it claims that the nature of the documents set out in paragraph 107 of the present judgment is incompatible with the obligation to follow those procedures.

116 Since the Commission has failed to adduce evidence for its claims with regard to those documents, its action must consequently be dismissed in so far as it concerns provisions of Polish legislation providing for the direct award of contracts relating to the production of those documents to PWPW, without following the public procurement procedures laid down by Directive 2014/24.

117 In the light of all of the foregoing considerations, it must be found that, by adding to Polish legislation exemptions not provided for in Directive 2014/24 in so far as concerns the contracts relating to the production, on the one hand, of the public documents referred to in Article 4(5c) of the Law on public procurement, with the exception of the personal documents of members of the military and their identity cards, the service cards of police officers, border guards, State security agents, officers of the Internal Security Agency, officers of the Intelligence Agency, officers of the Military Counterintelligence Service and professional soldiers appointed to a post in that service, officers of the Military Intelligence Service and professional soldiers appointed to a post in that service, and members of the military police and, on the other hand, of excise stamps, legal markings, control stickers, ballot papers, holographic signs on certificates of voting rights and microprocessor systems with software for the management of public documents, computer systems and databases necessary for the use of public documents, also referred to in Article 4(5c), the Republic of Poland has failed to fulfil its obligations under Article 1(1) and (3) and Article 15(2) and (3) of Directive 2014/24, read in conjunction with Article 346(1)(a) TFEU.

118 The action must be dismissed as to the remainder.

Costs

119 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

120 Under Article 138(3) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

121 In the present case, the Commission and the Republic of Poland applied, respectively, for the other party to be ordered to pay the costs.

122 Since the Commission's action has been upheld, except in so far as it concerned the exclusion of the public procurement procedures laid down by Directive 2014/24 in respect of the contracts relating to the production of certain public documents, referred to in point 32 of Article 5(2) of the Law on public documents, to which Article 4(5c) of the Law on public procurement refers, namely the personal documents of members of the military and their identity cards, the service cards of police officers, border guards, State security agents, officers of the Internal Security Agency, officers of the Intelligence Agency, officers of the Military Counterintelligence Service and professional soldiers appointed to a post in that service, officers of the Military Intelligence Service and professional soldiers appointed to a post in that service, and members of the military police, it is appropriate, pursuant to Article 138(3) of the Rules of Procedure, to decide that, in addition to bearing its own costs, the Republic of Poland shall pay two thirds of the costs incurred by the Commission.

123 The Commission must bear one third of its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by adding to Polish legislation exemptions not provided for in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, in so far as concerns the contracts relating to the production, on the one hand, of the public documents referred to in Article 4(5c) of the ustawa Prawo zamówień publicznych (Law on public procurement) of 29 January 2004, as amended by the ustawa o dokumentach publicznych (Law on public documents) of 22 November 2018, with the exception of the personal documents of members of the military and their identity cards, the service cards of police officers, border guards, State security agents, officers of the Internal Security Agency, officers of the Intelligence Agency, officers of the Military Counterintelligence Service and professional soldiers appointed to a post in that service, officers of the Military Intelligence Service and professional soldiers appointed to a post in that service, and members of the military police and, on the other hand, of excise stamps, legal markings, control stickers, ballot papers, holographic signs on certificates of voting rights and microprocessor systems with software for the management of public documents, computer systems and databases necessary for the use of public documents, also referred to in Article 4(5c), the Republic of Poland has failed to fulfil its obligations under Article 1(1) and (3) and Article 15(2) and (3) of Directive 2014/24, read in conjunction with Article 346(1)(a) TFEU.**

2. **Dismisses the action as to the remainder;**

3. **Orders the Republic of Poland to bear its own costs and pay two thirds of the costs incurred by the European Commission;**

4. **Orders the Commission to bear one third of its own costs.**

[Signatures]

---

* Language of the case: Polish.

EU:C:2023:151

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 2 March 2023(1)

Case C-601/21

European Commission
v
Republic of Poland

(Failure of a Member State to fulfil obligations – Public procurement – Article 15(2) and (3) of Directive 2014/24/EU – Derogations – Production of identity documents and other official documents – Protection of the essential security interests of the Member States – Less intrusive measures)

I. Introduction

1. For public authorities, in the European Union and elsewhere, the need to protect the integrity of and the public trust in public documents (such as passports, ballot papers, or service cards of members of the police, military and intelligence services) raises significant security concerns. Especially in today's world, where people are able to travel easily and quickly, and data even more so, those authorities are engaged in a never-ending competition against criminals to develop material and techniques which render the falsification of and tampering with public documents as difficult as possible.

2. Article 15(2) and (3) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (2) and Article 346(1) TFEU allow Member States to, in essence, exclude certain public contracts from the procedures provided for in that directive when the protection of their essential security interests could be undermined, provided no less restrictive measures exist.

3. What public interests can be regarded as being 'essential security interests' for that purpose? What is the margin of manoeuvre of the Member States in that regard? Is a Member State entitled to choose the level of protection that it deems most appropriate in relation to those interests? How far does a Member State's duty go to consider and, if need be, adopt measures that may be less restrictive?

4. These are, in a nutshell, the main legal issues that arise in the present proceedings, in respect of which I will attempt to bring some clarity with this Opinion.

II. Legal background

A. European Union law

5. Under the terms of Article 346(1) TFEU:

‘The provisions of the Treaties shall not preclude the application of the following rules:

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

…’

6. Article 1(1) and (3) of Directive 2014/24, concerning the subject matter and scope of the directive, as amended and currently in force, provides:

‘1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts …, whose value is estimated to be not less than the thresholds laid down in Article 4.

…

3. The application of this Directive is subject to Article 346 TFEU.’

7. Article 2(1)(9) of Directive 2014/24 defines ‘public service contracts’ as ‘public contracts having as their object the provision of services other than those referred to in point 6’. (3)

8. Article 15(2) and (3) of the same directive, concerning ‘defence and security’, states:

‘2. This Directive shall not apply to public contracts … not otherwise exempted under paragraph 1, to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information which the contracting authority makes available in a contract award procedure as provided for in this Directive.

Furthermore, and in conformity with point (a) of Article 346(1) TFEU, this Directive shall not apply to public contracts … not otherwise exempted under paragraph 1 of this Article to the extent that the application of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security.

3. Where the procurement and performance of the public contract … are declared to be secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State, this Directive shall not apply provided that the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in the first subparagraph of paragraph 2.’

B. Polish law

9. Article 11(4) of the ustawa z dnia 11 września 2019 r. – Prawo zamówień publicznych (Law of 11 September 2019 on Public Procurement; ‘the Pzp of 2019’) provides:

‘The provisions of this law shall not apply to contracts for the production of:

1) blank public documents referred to in Article 5(2) of the Law on Public Documents of 22 November 2018 …, as well as their personalisation or individualisation;

2) excise stamps;

3) legal markings and control stickers referred to in the Law of 20 June 1997 establishing the highway code …;

4) ballot papers and Braille ballot papers referred to in Article 40(1) and Article 40a(1) respectively of the law of 5 January 2011 establishing the Electoral Code … and Article 20 of the law of 14 March 2003 on the National Referendum …;

5) holographic signs on certificates of voting rights referred to in Article 32(1) of the law of 5 January 2011 on the Electoral Code;

6) microprocessor systems with software for the management of public documents, computer systems and databases necessary for the use of public documents referred to in Article 5(2) of the law of 22 November 2018 on public documents, containing an electronic chip, in accordance with their purpose'.

10. The following list of public documents is contained in Article 5(2) of the Law on Public Documents of 22 November 2018: 1) identity cards; 2) passports; 3) seaman's books, referred to in Article 10(1) of the Law on Maritime Labour of 5 August 2015; 4) documents issued pursuant to Article 44(1) and Article 83(1) of the Law on Civil Status Records of 28 November 2014; 5) documents issued to foreigners pursuant to Article 37 and Article 226 of the Law on Foreigners of 12 December 2013; 6) documents issued to members of diplomatic missions and consular posts of foreign states or any person assimilated to them by virtue of laws, conventions or customary international law, as well as documents issued to their family members forming part of their household pursuant to Article 61 of the Law on Foreigners of 12 December 2013; 7) the document issued to EU citizens pursuant to Article 48(1) of the Law of 14 July 2006 on entry to, stay in and exit from the territory of the Republic of Poland of nationals of EU Member States and their family members; 8) documents issued to family members of EU citizens pursuant to Article 30(1) and Article 48(2) of that law of 14 July 2006; 9) documents issued to aliens pursuant to Article 55(1) and Article 89i(1) of the Law of 13 June 2003 on granting aliens protection in the territory of the Republic of Poland; 10) enforceable titles issued by courts or judicial officers; 11) copies of final judgments establishing the acquisition, existence or extinction of a right or relating to civil status; 12) copies of judgments or certificates, issued by a court, empowering the representation of a person, the performance of a legal act or the administration of specific property; 13) copies of orders of courts and court officers concerning the affixing of the enforcement formula to an enforcement order other than those listed in Article 777(1)(1) and (1^1) of the Law of 17 November 1964 establishing the Code of Civil Procedure, if their subject matter is an enforcement order not issued by the court; 14) copies of and extracts from documents relating to the notarial acts referred to in Article 79(1–1b) and (4) of the Law of 14 February 1991 on the notarial profession, the authorisations referred to in Article 79(2) thereof and the protests referred to in Article 79(5) thereof; 15) the aircrew member's certificate; 16) personal military documents issued to persons entered in the military register pursuant to Article 54(1) of the Law of 21 November 1967 on the general obligation to defend the Republic of Poland; 17) personal military documents issued pursuant to Article 48(1) of the Law of 11 September 2003 on professional military service; 18) identity cards issued pursuant to Article 137c(1) of that law of 11 September 2003; 19) identity cards issued pursuant to Article 54a(1) of that law of 21 November 1967; 20) an annotation in a passport referred to in Article 19(1) of the Law of 13 July 2006 on Passports; 21) the visa sticker; 22) the 'Polish card' ('*Karta Polaka*'); 23) the card certifying disability or degree of disability; 24) the authorisation to work as a doctor; 25) the permit to practice dentistry; 26) the driving licence; 27) the professional registration certificate and vehicle registration certificate, except for vehicle registration certificates referred to in Article 73(3) of the Law of 20 June 1997 on the Traffic Code; 28) the vehicle booklet ('*karta pojazdu*'); 29) the temporary certificate referred to in Article 71(1) of the Law of 20 June 1997 on the Traffic Code; 30) the tachograph card referred to in Article 2(4) of the Law of 5 July 2018 on Tachographs; 31) the ADR certificate referred to in Article 2(10) of the Law of 19 August 2011 on Transport of Dangerous Goods; 31a) the registration document referred to in Article 4(1) of the Law of 12 April 2018 on the registration of yachts and other vessels up to 24 metres in length; and 32) service cards of: a) police officers, b) border guards, c) State security agents, d) officers of the Internal Security Agency, e) officers of the Intelligence Agency, f) officers of the Central Anti-Corruption Bureau, g) officers of the Military Counterintelligence Service and professional soldiers appointed to a post in that service, h) officers of the Military Iintelligence Service and professional soldiers appointed to a post in that service, i) officers and staff of the prison administration, j) tax and customs officials, k) persons employed in organisational units of the national tax administration, l) inspectors of the Road Transport Inspectorate, m) members of the military police.

III. Background to the case and the pre-litigation procedure

11. According to Article 90 of Directive 2014/24, Member States were required to transpose that directive by 18 April 2016.

12. On 14 July 2016, the European Commission received from the Polish authorities notification of the national measures transposing that directive. Taking the view that the Republic of Poland had failed to fulfil its obligations under that directive, the Commission sent it a letter of formal notice on 25 January 2019.

13. By letter of 25 March 2019, the Polish authorities responded to the letter of formal notice by informing the Commission of their intention to review certain aspects of the transposition measures in order to ensure compliance with, inter alia, Directive 2014/24. The Polish authorities, however, rejected some of the Commission's objections.

14. On 5 November 2019, the Polish authorities informed the Commission of the adoption of a new law, the Pzp of 2019, aimed at replacing, as of 1 January 2021, the national legislation previously in force.

15. On 28 November 2019, the Commission sent a reasoned opinion to the Republic of Poland, pointing out shortcomings in the transposition of Directive 2014/24. In that reasoned opinion, the Commission accepted that, with the new legislation, the Polish authorities had indeed remedied some of the problems previously identified. However, the Commission maintained the other objections raised in its letter of formal notice, which the Polish authorities had contested.

16. In their reply of 28 January 2020, the Polish authorities again disagreed with the Commission's complaints, arguing that the national legislation at issue complied with the provisions of Directive 2014/24.

17. In those circumstances, the Commission decided to bring the present action.

IV. Procedure before the Court and forms of order sought

18. By its application, submitted on 28 September 2021, the Commission claims that the Court should:

– declare that, by adding exemptions relating to the production of certain documents, printed matter and stamps and markings, which are not provided for in Directive 2014/24, the Republic of Poland has failed to fulfil its obligations under Article 1(1) and (3) and Article 15(2) and (3) of Directive 2014/24, read in conjunction with Article 346(1)(a) TFEU; and

– order the Republic of Poland to pay the costs.

19. In its defence, submitted on 17 December 2021, the Republic of Poland contends that the Court should:

– dismiss the action; and

– order the Commission to pay the costs.

20. The Commission lodged a reply on 9 February 2022, the Republic of Poland lodged a rejoinder on 21 March 2022, and both presented oral argument at the hearing on 1 December 2022.

V. Analysis

A. Arguments of the parties

21. In its application, the Commission points out that the Republic of Poland has, when transposing Directive 2014/24 into national law, excluded from the scope of that directive the contracts for the production of a large and diverse series of documents and other objects ('the documents at issue').

Indeed, those contracts have been entrusted directly to Polska Wytwórnia Papierów Wartościowych ('PWPW') – a public undertaking established in Poland and wholly owned by the State Treasury – without any public tenders being organised to that end.

22. The Commission recalls that Directive 2014/24 expressly provides for cases in which its provisions do not apply. The Commission points out that the list of derogations is, according to the case-law of the Court, exhaustive, and that such derogations should be interpreted strictly.

23. In the Commission's view, the Polish Government cannot validly rely on Article 15(2) and (3) of Directive 2014/24 to justify the exclusion of the contracts for the production of the documents at issue from the public procurement rules. In that regard, the Commission refers to the Court's findings in the judgment of 20 March 2018, *Commission* v *Austria (State printing office)*, (4) which are – in its view – applicable *mutatis mutandis* to the present case. In that judgment, the Court stated, inter alia, that Member States' measures cannot be exempted, as a whole, from the application of public procurement rules solely because they were taken in the interest of public security or national defence. It is for the Member State relying on those derogations to establish that the need to protect such interests could not have been achieved through a competitive tendering procedure.

24. The Commission is of the view that some of the interests invoked by the Polish Government are not related to that Member State's security, let alone its *essential* security interests. In addition, even with regard to those interests that can possibly fall within that concept, the Commission contends that the Polish Government failed to show that the objective of protecting such interests cannot be equally protected by means of alternative, less restrictive measures.

25. In particular, the Commission argues that the Polish Government did not explain why PWPW would be the only company with the experience and technical certificates required to produce the documents at issue with the highest safety standards. In that context, the Commission notes that several companies active in the European Union (including some established in Poland) offer similar guarantees in terms of technical capacity, financial stability and security. In fact, PWPW competes against those companies in tenders for the production of documents equivalent to those concerned in the present proceedings for other EU Member States (or, for that matter, for countries outside the European Union).

26. The Commission submits that nothing prevents the contracting authority from imposing particularly high requirements for tenderers (in terms of technical and financial capabilities, moral standing, etc.) and from asking them to provide the necessary evidence in support of their tender. In particular, Articles 42 and 58 of Directive 2014/24 give national authorities, in the Commission's view, ample room for manoeuvre in that respect. For example, an economic operator could be required to agree to appropriate checks by the authorities and to provide guarantees as to the security and punctuality of supply and to solvency. The contract could also include clauses on compensation and financial and disciplinary liability in case of breach.

27. The Commission expresses doubts as to whether the Polish Government's argument concerning the de facto impossibility for PWPW to go bankrupt is correct, since the EU provisions on State aid control may be applicable to financial aid provided to that company by the Treasury.

28. For its part, the Republic of Poland emphasises that it has an extensive system of security of official documents, and that PWPW is an entity entirely controlled and managed by the State. It adds that, under national law, shares or rights attached to shares owned by the Treasury – such as those of PWPW – cannot, in principle, be sold. Exceptionally, a possible sale of those shares could be subject to the condition of approval by the Council of Ministers, but could only be done in favour of other public companies that cannot be sold to private shareholders.

29. According to the Republic of Poland, such a configuration allows the exercise of full control over both the functioning of PWPW's bodies and the process of producing official documents. In those circumstances, entrusting the task of producing such documents to such an entity, without going through a public procurement procedure, would limit the circle of entities that have access to information considered to be classified. Such a solution would also ensure continuity of production

while eliminating the risks associated with the bankruptcy of the producer or the poor execution of a possible public contract.

30. As regards the Commission's arguments concerning bankruptcy of a company such as PWPW, the Polish Government points out that, although bankruptcy of companies owned by the Treasury is obviously possible, that risk is almost nil given their strategic importance. The Republic of Poland contends that the Commission has not put forward any reason why, in the event of PWPW's financial difficulties, it would not be possible to grant State aid to that company.

31. In the Polish Government's view, the factual and legal situation in the present case is not similar to that examined by the Court in the abovementioned judgment in *Commission* v *Austria*. In that regard, it points out that the legal status of the Austrian company responsible for printing official documents was significantly different from that of PWPW, in that it was a private limited company whose shares were listed on the stock exchange and held by private individuals. Furthermore, it considers that the Austrian Government's control over the company was much more limited than in the case here in the Republic of Poland. On that basis, the Polish Government argues that, under Austrian law, the level of protection of the State's essential interests chosen by the authorities was lower than that chosen in Poland, and that it cannot be required to reduce that level of protection to that chosen by other States.

32. The Republic of Poland further submits that the contractual guarantees proposed by the Commission do not make it possible to prevent a threat to its security interests, arising from a possible acquisition of the economic operator in question or from influence on its management bodies by the secret services of a third country or by an organised criminal group. With regard to the risk of insolvency of the producer of the documents, the solution proposed by the Commission – which aims to establish an eligibility criterion in the form of a certificate of financial standing enabling the contract to be performed safely and without hindrance – would not make it possible to avoid a sudden deterioration in the financial situation of the economic operator concerned.

33. The exclusions provided for in national law are thus – in the view of the Polish Government – a proportionate, adequate and necessary measure to achieve the objective of guaranteeing Poland's essential security interests at the level that is considered adequate. In order to demonstrate the proportionality of the use of the derogations, it would not be necessary – according to the Polish Government – to prove that, in the event the directive in question would be applied, the likelihood of a threat to the essential security interests of the Member State concerned would be particularly high. Indeed, even the slightest likelihood of significant harm to the security interests of the State would – in the opinion of that government – constitute grounds for making use of those derogations.

34. More generally, the Polish Government submits, the Commission has not demonstrated that the level of State security that can be achieved by entrusting the production of documents to an entity selected pursuant to Directive 2014/24 would be as high as when that task is entrusted to a company owned by the Treasury.

B. Assessment

35. At the outset, it must be pointed out that – as the Commission claims without it being disputed by the Polish Government – Directive 2014/24 is, in principle, applicable to public contracts for the production of the documents at issue. Indeed, it is common ground that the public contracts in question (i) do not concern the services, sectors and situations for which Articles 7 to 12 of Directive 2014/24 provide exclusions, and (ii) have a value that is no less than the thresholds laid down in Article 4 of that directive. In addition, Article 15(1) of Directive 2014/24 makes it clear that, in principle, that directive applies to the awarding of public contracts 'organised in the fields of defence and security'.

36. However, the Polish Government argues that such contracts could be awarded without making use of the procedures set out in Directive 2014/24 since some of the derogations set out in Article 15(2) and (3) thereof are applicable to the present case.

37. In the following sections, I shall first lay down the relevant analytical framework (1) and then assess the parties' arguments against that framework (2). My conclusion will be that the national

legislation at issue, as it currently stands, cannot be considered to fall entirely within the scope of the derogations discussed in this Opinion and, consequently, infringes the provisions of Directive 2014/24 (3).

1. The relevant analytical framework

(a) Article 15(2) and (3) of Directive 2014/24 and Article 346(1)(a) TFEU

38. Article 15(2) and (3) of Directive 2014/24 provides for four situations in which that directive 'shall not apply'. Those derogations to the application of the directive – which all concern procurement procedures relating to the field of 'defence and security', as the title of that provision makes clear – (5) are the following.

39. First, pursuant to the first subparagraph of Article 15(2) of Directive 2014/24, that directive does not apply to public contracts 'to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures'. Second, under the second subparagraph of Article 15(2), the directive does not apply to the extent that its application 'would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security'. Third, Article 15(3) provides for two additional situations, stating that the directive does not apply when the public contract is (i) 'declared to be secret' or (ii) 'must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State'. Also under this paragraph, that is valid only in so far as 'the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures'.

40. That being said, I should also point out that Article 346(1)(a) TFEU does not appear to add, as regards the situation at issue in the present proceedings, any further (or self-standing) derogation. Indeed, the second subparagraph of Article 15(2) of Directive 2014/24 includes an express reference to Article 346(1)(a) TFEU (6) and the two provisions are worded very similarly. Therefore, the former provision constitutes, in my view, an application of the principle laid down in the latter, within the area governed by Directive 2014/24. Accordingly, once the arguments of the parties are assessed in the light of the provisions of the directive, there is, in my view, no need to carry out a separate and independent assessment under Article 346(1)(a) TFEU. (7) In that respect I note, in passing, that the parties' arguments appear consistent with such an approach.

41. The Polish Government relies on three derogations provided for in Article 15(2) and (3) of Directive 2014/24; that is, all of them except the one concerned with secret contracts ('the derogations at issue'). However, neither in its written nor its oral submissions does that government develop arguments which are specific to one or the other of those derogations; nor are the Commission's arguments any more specific in that regard, which leads me to believe that both parties agree – at least in principle – that the framework of analysis for the three derogations at issue is largely analogous.

42. I am of the same view. Despite some textual differences between the different paragraphs or subparagraphs of Article 15 of Directive 2014/24 (8) and some terminology which may appear puzzling, (9) they share the same key elements and thus require from the Court a relatively similar assessment.

(b) Scope of the derogations at issue

43. In essence, the derogations at issue allow any Member State to exclude procurement of certain services from the procedures laid down in Directive 2014/24 when the following conditions are satisfied: (i) the public interests protected relate to that Member State's 'security interests', (ii) those interests may be considered 'essential', (iii) the application of the directive in question could, in the view of that Member State, prejudice the protection of those interests, and (iv) the protection of those interests cannot be guaranteed by less intrusive measures.

44. I shall now attempt to clarify the meaning of those conditions.

(1) The concept of 'essential security interests'

45. As far as conditions (i) and (ii) are concerned, it is for each Member State to define the specific public interests that constitute its 'essential security interests'. (10) At the same time, however, the Member States' discretion in that regard cannot be unfettered, as otherwise the terms *essential* and *security* would be deprived of all practical effect.

46. I can accept that defining 'security' in a precise and exhaustive manner is an impossible task. What is actually covered by that concept depends, I believe, on a multitude of factors which may vary between different Member States and also over time. The same holds true with respect to the specification that the security-related interests protected by the Member States must be 'essential'. That adjective requires an assessment that is inevitably subjective, at least to some extent: much depends on historical, political and geopolitical considerations which may vary from one State to the other. (11)

47. Nevertheless, unless the conditions set out in Article 15(2) and (3) of Directive 2014/24 are reduced to a mere formality, the Court must be able to verify whether, when relying on the derogations at issue, a Member State has exceeded its margin of discretion, (12) since the exclusion from public tendering is meant to protect interests which either do not relate or are only loosely related to security. (13)

48. In that regard, I think that the term 'security' – appearing in both Article 15 of Directive 2014/24 and Article 346 TFEU – corresponds to the terms 'public security' (14) and 'national security' (15) which can be found in several EU law provisions, and largely overlaps with (but is arguably broader than) the term 'internal security' (16) appearing in a number of other EU law provisions.

49. As the Court stated with regard to the term 'national security', it consists in 'the primary interest in protecting the essential functions of the State and the fundamental interests of society and encompasses the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic or social structures of a country and, in particular, of directly threatening society, the population or the State itself'. (17) In other words, that term refers to matters relating to the *safety* of a Member State's institutions or people from threats of a certain significance stemming from circumstances which may be internal (organised crime, riots, etc.) or external (intelligence or counter-intelligence, cyberwarfare, etc.) to the State. Such threats may be specific to that State (such as paramilitary or armed nationalist groups) or of a global nature (such as a lethal pandemic), man-made (nuclear accidents, environmental disasters, acts of terrorism, etc.) or occurring naturally (earthquakes, tsunamis, floods, etc.).

50. In turn, the term 'essential' necessarily implies some *selectivity* with regard to the public functions and interests that (even if security related) can be covered by the derogations at issue. In my view, that term should be read as limiting those derogations to core components of Member States' security policy, to the exclusion of issues that are only *indirectly* or *loosely* concerned with public security. (18)

51. To be clear, I have no doubt that a variety of situations – connected to, for example, public health, environmental protection, privacy, public finance, etc. – could, when of a systemic or large-scale nature, be possibly regarded as also raising issues of public security. Nevertheless, I would be very hesitant to endorse an interpretation of Article 15(2) and (3) of Directive 2014/24 which would result in widening the ambit of the derogations set out therein beyond any interest that, when affected, has an immediate and manifest impact on the safety of a Member State's institutions or people.

52. This approach appears consistent with the interpretative principle according to which exceptions to EU rules of general application – such as those at issue in the present action – must be interpreted strictly. (19)

(2) Prejudice

53. As regards condition (iii) referred to in point 43 above, three observations, based on the very wording of Article 15(2) and (3) of Directive 2014/24, are in order.

54. First, the text of the provision – which emphasises the Member State's margin of appreciation ('considers', 'has determined') – makes it clear that a Member State need not provide positive and

irrefutable evidence that the application of Directive 2014/24 with regard to certain public contracts would actually prejudice the protection of its essential security interests. It is sufficient that a Member State explain, on the basis of specific and credible elements, (20) why it has reasonable grounds to take the view (21) that the application of public procurement rules in respect of certain public contracts could undermine (22) its essential security interests.

55. Second, it also follows from the above that the threat to the security interests invoked by a Member State need not be actual or certain: potential risks can, to my mind, suffice. (23) However, those risks cannot be purely speculative or hypothetical, but must be *genuine*.

56. Third, the text of Article 15(2) and (3) of Directive 2014/24 ('the protection … cannot be guaranteed', 'disclosure … contrary to', 'interests concerned cannot be guaranteed') also suggests that the (actual or potential) security threats must have a minimum level of gravity. I find it hard to consider the terms of that provision as covering events or situations which, because of their limited scale, magnitude and impact, do not pose any *sufficiently serious* threat to the proper functioning of a Member State's institutions and the general well-being of its people. (24)

57. These are elements that, in my view, can be subject to judicial review. As the Court has consistently held, measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of EU law solely because they are taken, inter alia, in the interests of public security. (25) In particular, neither Article 15(2) and (3) of Directive 2014/24 nor Article 346(1)(a) TFEU can be read in such a way as to confer on Member States the power to depart from the provisions of the directive based on no more than reliance on those interests. (26)

58. Given the significant leeway accorded to the Member States in that respect, (27) however, the Court's standard of review should, in my view, be one of reasonableness or plausibility. (28)

(3) Proportionality of the measure

59. Finally, condition (iv) mentioned in point 43 above consists in the unavailability of 'less intrusive measures'. This means that, in conformity with the principle of proportionality, in order to validly invoke the derogations set out in Article 15(2) and (3) of Directive 2014/24, a Member State must show that the exclusion of tendering procedures for the public contracts in question is a measure that is *suitable* and *necessary* to protect its essential security interests.

60. In this context, a specific point may need clarifying: the Polish Government argues that, under the provisions at issue, Member States are free to set the degree of protection of their security interests at the level they deem most appropriate. As a consequence, the national measures adopted to ensure that level of protection cannot be considered disproportionate, unless any alternative measures available also ensure that level of protection. It would follow from this that a Member State cannot be forced to accept a lower level of protection of that chosen, on the ground that the alternative measures would be less restrictive to intra-Union trade.

61. Asked at the hearing whether it shared that view, the Commission answered in the negative. However, it seems to me that it struggled to explain the reasons for its position and, in any event, it failed to point to any provision of EU law which would give the European Union a power to review the Member States' choices in that regard.

62. In that respect, I tend to agree with the position expressed by the Polish Government. Unless a matter is of such nature and dimension that it affects the *European Union's* security, and thus falls within the common foreign and security policy, (29) the European Union has no specific competence with regard to *Member States'* national/public security. In fact, the relevant Treaty provisions are essentially meant to establish limits to the European Union's action – either in general (30) or when acting in some specific field (such as the internal market (31) and the area of freedom, security and justice (32)) – when that may affect the Member States' security interests. As the Court has consistently emphasised, it follows from Article 4(2) TEU that 'national security remains the sole responsibility of each Member State'. (33)

(c) Burden of proof

63. It is well established that, in the context of an action under Article 258 TFEU, it is incumbent upon the Commission to prove the alleged failure. That institution must provide the Court with the information necessary for it to determine whether the infringement is established, and may not rely on any presumption for that purpose. (34)

64. Once the Commission has adduced sufficient evidence to prove the relevant facts, it is then for the defendant Member State to challenge in substance and in detail the information produced and the inferences drawn. (35) In particular, when a Member State relies on a derogation provided for in EU law – such as in the present proceedings – it is for that Member State to prove that the relevant conditions are satisfied. (36) The burden upon the defendant Member State includes a requirement to analyse the appropriateness and proportionality of the measure adopted by it and to offer specific evidence substantiating its arguments. (37)

65. However, the evidentiary burden placed on that Member State cannot – the Court added – be so extensive as to require it to prove, positively, that no other conceivable measure could enable the public objective to be attained under the same conditions. (38) That means, in my view, that, before adopting derogations from EU law, Member States are required to examine carefully the possibility of using measures that are less restrictive,(39) but cannot be expected to identify each and every alternative measure that could hypothetically be envisaged and explain why they all should be discarded. To that, I would add that a Member State cannot be required to adopt alternative measures, when those measures are of uncertain feasibility or effectiveness or would result in an intolerable (organisational or financial) burden on the Member State in question.

66. It is against this analytical framework that I shall now examine the merits of the parties' arguments.

2. Analysis of the parties' arguments

67. In order to establish whether the Republic of Poland failed to fulfil its obligations under Directive 2014/24 in the present case, it is, in the first place, necessary to verify whether the interests which the national legislation at issue sought to protect may be considered '*essential security interests*' within the meaning of Article 15(2) and (3) of that directive. In the second place, it must be ascertained whether the Member State in question had reasonable grounds to consider that the application of public procurement rules to the public contracts in question could give rise to threats to public security that are real and sufficiently serious. Thirdly, the proportionality of the national legislation at issue should be examined.

68. At this stage, however, some preliminary remarks are in order.

(a) Preliminary remarks

69. I must state, from the outset, that the legal assessment in the present case is, at times, made quite complicated by the fact that both parties mostly developed their arguments in a rather general fashion, whereas the national legislation at issue excludes from public procurement – as the Commission rightly points out – the contracts for the production of a rather large and diverse series of documents and other objects.

70. I do not think that those documents and objects can, for the purposes of these proceedings, be treated as belonging to a homogeneous group. They do not contain similar information and do not fulfil the same function. At least to some extent, they are also produced from different materials and on the basis of different techniques. The reasons for which those documents have been excluded from public tenders vary, and it is undeniable that their sensitivity as well as their capacity to affect the Republic of Poland's security interests differ – significantly even.

71. It is thus hardly surprising that, often, the arguments put forward by one of the parties have a certain force, but only with regard to *some* of the documents at issue. This mismatch between the legal arguments of the parties and the underlying factual situation has, in my view, a significant impact on

the legal assessment that the present case requires the Court to carry out and, more in particular, on the manner in which this dispute can be disposed of. I shall come back to this point at the end of this Opinion.

(b) The protection of essential security interests

72. The Polish Government argues that the production of the documents at issue is an activity that is capable of affecting its essential security interests within the meaning of Article 15(2) and (3) of Directive 2014/24. In essence, the Polish Government's main argument is twofold. First, it refers to the need to ensure the continuity of supply of the documents which are necessary for the correct and ongoing functioning of the public administration. Second, it emphasises that producing the documents in question requires the use of confidential (or secret) information which should not be leaked to unauthorised persons, and of specific technologies and know-how which should not be obtained by such persons. In that regard, the Polish Government refers to the security threats posed by phenomena such as cyberwarfare, terrorism, organised crime, human trafficking and smuggling of migrants.

73. I am of the view that it falls within a Member State's margin of discretion to consider that ensuring the continuity of supply of the documents required by its administrative machinery to function properly constitutes one of its essentials security interests. I also have no difficulty in agreeing with the Polish Government that the fight against cyberwarfare, terrorism, organised crime, human trafficking and smuggling of migrants not only falls squarely within the concept of 'national/public security', but can also be regarded as constituting a core – and therefore an 'essential' – component of its security policy.

74. That said, I must observe that – both in the written submissions and at the hearing – the issue was raised as to whether the exclusion of certain specific documents from the public procurement rules was genuinely linked to the fight against the threats mentioned above. It seems to me that the Polish Government was somewhat vague in its answers on the point and, ultimately, referred to other objectives that the exclusions in question would pursue. It referred, in particular, to the following public interests: (i) to protect consumers and public health with regard to permits to work as a doctor or a dentist, (ii) to protect the public offer with regard to excise stamps, (iii) to guarantee the security of vehicles with regard to the documents concerned with the status thereof, and (iv) to ensure public confidence in the result of the elections with regard to ballot papers and holographic signs on certificates of voting rights.

75. Whereas I agree that ensuring public confidence in the fairness of elections may be regarded as one of the essential security interests of a Member State, I do not find the arguments put forward by the Polish Government in respect of the other interests mentioned in the previous point of this Opinion to be convincing. As mentioned, there may well be circumstances in which threats to public health could be regarded as affecting essential security interests. I would also not exclude that, in very exceptional circumstances, threats to the public finances may be of such a magnitude and seriousness that they could be regarded as having an impact on a Member State's essential security interests. (40) However, it is not easy to envisage the circumstances under which issues of consumer protection or road safety would fit into the concept of 'essential security interests'.

76. Nevertheless, and regardless of the above, I fail to see – nor has the Polish Government referred to – any specific threat or risk to public health, consumer protection, road safety and public finances that, in the present case, could reach the minimum threshold of gravity required to be plausibly considered an 'essential security interest'. For instance, the mere facts – alleged by that government – that the existence of false medical certificates would mean that some individuals would be treated by persons without the proper medical qualifications, and that the existence of false excise stamps would result in losses of receipts for the Polish Treasury are, to my mind, manifestly insufficient to justify the application of the derogations laid down in Article 15(2) and (3) of Directive 2014/24.

77. Among the documents at issue, there are, moreover, some in respect of which the Polish Government did not explain the logical connection with the protection of its security interests. Nor do I see for those documents any such obvious connection. Just to mention a few: legal markings and control stickers referred to in the highway code, seaman's books, documents connected with the civil status records, enforceable titles, judgments or orders issued by courts or judicial officers, aircrew

members' certificates, cards certifying disability, driving licences, vehicle booklets, tachograph cards, and service cards of certain public officials such as tax and customs officials or road transport inspectors.

78. In the light of the above, I take the view that the Republic of Poland may, in the present case, validly invoke the derogations at issue in so far as the exclusions from the rules on public procurement are aimed at: (i) protecting that Member State from the threats posed by cyberwarfare, terrorism, organised crime, human trafficking and smuggling of migrants, (ii) ensuring public confidence in the results of elections, and (iii) ensuring supply of documents that are necessary for the proper functioning of the public administration. Conversely, I am of the view that other alleged risks to the security of the Republic of Poland – such as those to public health, consumer protection, road safety and public finances – are not such as to justify the application of the derogations at issue.

(c) Prejudice to the security interests

79. As regards the likelihood and seriousness of the prejudice to the security interests at stake, I am of the view that the Polish Government can reasonably consider that the activity of production of the documents at issue could, if entrusted to a company that does not comply with high security standards, create threats to its essential security interests which are both real and significant.

80. In some circumstances, the damage which might ensue from leaks could be – as the Polish Government argues and as the Commission acknowledges – of an almost irreversible nature. The damage could indeed be lasting and difficult to repair: the falsified documents could continue to circulate for some time and new ones could be easily produced. It cannot be ruled out that, in extreme circumstances, certain changes to the procedures and techniques used to issue some of the documents at issue may be required to avoid more threats in the future.

81. However, I have doubts that a possible disruption in the production of each and every document among those in the list in question could be regarded as posing a sufficiently serious threat to the proper functioning of the Polish public administration. The need to ensure the continuity of supply can, in my view, be validly invoked only with regard to those documents that are strictly indispensable and irreplaceable to the administration machinery with regard to essential State functions, so that even a relatively small delay in the delivery of those documents could not be tolerated. The vast majority of the documents at issue do not seem to me to fulfil those criteria.

(d) The principle of proportionality

82. Third, it is necessary to determine whether the decision of the Polish Government to exclude the public contracts in question from the application of the rules of public tender is consistent with the principle of proportionality. However, in the light of the very wording of the provisions at issue, (41)in order to respect the Member States' competence in the field of national/public security, it seems to me that only a two-step proportionality test is warranted. (42) This means that the Court is merely required to verify whether the national legislation at issue is suitable to achieve the stated objective and does not go beyond what is strictly necessary to do so.

(1) Suitability of the measure

83. First, as regards the suitability of the exclusion to achieve its stated objective, the assessment can be relatively simple: it is for me rather obvious that the centralisation of the production of the documents at issue in a single entity, fully owned and directly controlled by the State, which operates in the Polish territory, is capable of reducing the risks that (i) unauthorised personnel might have access to sensitive material and confidential (or secret) information and thus falsify the documents in question or replicate the technology and know-how required to do so, (43) and (ii) the company might run into financial difficulties which could threaten the continuity of supply of the documents at issue.

84. Indeed, the public authorities can intervene in – and, possibly, have the final word – all the key choices (operational, commercial, technical, human resources, etc.) made by the entity in question. The powers of control (for example on the premises of the company or over the entity's staff) can also be exercised, if appropriate, by using the powers conferred on police forces. The fact that the contractor is

wholly owned by the Treasury (and that national law provides for certain limitations with regard to the sale of its shares) is also an assurance that the ownership of the contractor may not 'fall in the wrong hands', which could potentially occur for companies whose shares are publicly traded in stock markets. In addition, public control should allow the competent authorities to detect more easily and rapidly situations of financial difficulty of the company, and thus be able to adopt appropriate measures of redress in a timely fashion.

85. Therefore, the national legislation at issue appears capable of giving a meaningful contribution to the protection of the security interests invoked by the Republic of Poland.

(2) Necessity of the measure

86. The second aspect – that of necessity of the measure – raises, in my view, more complex issues.

87. The crucial question is whether the Polish Government has shown that the application of the derogations at issue was *necessary* in order to protect its essential security interests. To that end, that government was required to establish that the protection of such interests *could not have been attained* within a competitive tendering procedure as provided for by Directive 2014/24. (44)

88. In this context, it must be borne in mind that, according to what the Polish Government alleged in this procedure, the level of protection of the interests at stake chosen by that government is particularly high. This is an element that, as mentioned in points 60 to 62 above, must be taken into account when assessing the existence of less restrictive measures.

89. The Commission suggests, essentially, that a combination of stringent technical specifications (under Article 42 of Directive 2014/24) (45) and selection criteria (under Article 58 of Directive 2014/24) (46) would be as effective in protecting the interests invoked by the Polish Government as the exclusion from public tendering. The Commission also points to the provisions which enable the contracting authorities to modify the public contracts (Article 72 of Directive 2014/24) (47) and to terminate them (Article 73 of Directive 2014/24) (48) in specific circumstances.

90. I am of the view that, to a certain extent, the Commission has a valid argument. Indeed, as regards ensuring the continuity of supply, there is no ground to believe that private companies would, by definition, offer lower guarantees. As confirmed at the hearing by the Polish Government, PWPW is a 'public limited company', that is, a limited liability company that – at least formally – is not unlike many other privately owned companies. As such, that company may encounter financial difficulties and, if its financial situation gravely deteriorates, could even go bankrupt.

91. I obviously understand that the Polish Government would do its utmost to keep that company financially viable and, where necessary, save it from bankruptcy proceedings. However, as the Commission rightly points out, there may be some limits to that government's ability to do so. Inter alia, the EU State aid control rules could be applicable. It should not be overlooked, in this context, that PWPW is active in a range of activities (graphic design, production and personalisation of a variety of documents, offer of IT solutions, etc.) and geographic markets (both within and outside the European Union), where it competes against other companies.

92. In my view, a number of measures could easily be envisaged to minimise the risks to the continuity of supply alleged by the Polish Government. For example, nothing precludes that government from requiring tenderers/contractors to, inter alia, (i) meet strict financial criteria for participating in the tender, (ii) periodically transmit detailed financial statements and reports in order to allow the administration to monitor the 'health' of the company, and (iii) engage in the transferral of production in the event of bankruptcy (or the supervening inability to duly perform the contract).

93. Therefore, I take the view that the national legislation at issue, in so far as it aims at securing the continuity of supply of the documents at issue, goes beyond what is necessary to ensure the protection of the essential security interests invoked by the Polish Government. The same level of protection of those interests could be achieved even if the production of the documents in question were to be entrusted to one or more companies via a competitive tender procedure.

94. Conversely, it seems to me that the measures suggested by the Commission are not as effective as the exclusion from public tendering with regard to the need to avoid leaks of information or technology. In other words, those alternative measures would not, in my view, reach the same degree of protection chosen by the Polish Government.

95. To begin with, it is clear to me that the mere introduction in the contract of rules regarding disciplinary or financial liability and compensation in case of leaks or other breaches of the security rules are not of comparable effectiveness: the very rationale of excluding certain contracts from public tenders is to minimise the risk that the damage may occur. An *ex post facto* financial compensation by the contractor, or imposition of disciplinary penalties upon the persons concerned, appears of very little use to the Republic of Poland and, consequently, is no valid substitute for more robust *ex ante* measures that could avert the breaches. I am obviously aware that compensation and liability clauses are also intended to dissuade would-be infringers. However, when it comes to deterring persons that may be connected to, for example, terrorist groups, foreign secret services or powerful criminal organisations from attempting to access highly sensitive information, the preventive effects of such clauses appear rather limited.

96. The Commission suggested that, in order to ensure the capacity of the Polish Government to make use, if necessary, of the public powers of police forces for controls on the company in question and its staff, the contractor could be required to carry out its operations in Poland. In that context, the Commission refers to the fact that other companies established in the country already have the required security certificates to carry out activities such as those carried out by PWPW.

97. Some of the Commission's arguments have a certain force. The contractor could indeed be requested to produce the most sensitive documents in Poland in order to permit a more effective monitoring and, if need be, enforcement by the public authorities.

98. However, the Polish Government may – legitimately, in my view – consider it important to be able to influence or supervise some key decisions made by the company which could have a direct or indirect impact on the security of the activities carried out by that company (hiring of staff, just to give one example). It is hardly disputable that the degree of intervention that the public administration could exercise when dealing with a publicly owned company is greater than that which it could exercise vis-à-vis a privately owned company, irrespective of the clauses and safeguards that could be included in the contract. As repeatedly stated, it is in principle for the Republic of Poland to choose the appropriate level of protection of the interests at stake.

99. The same considerations may apply, *mutatis mutandis*, to the production of ballot papers and holographic signs on certificates of voting rights.

100. Therefore, I am of the view that the Republic of Poland can rely on Article 15(2) and (3) of Directive 2014/24 in so far as the exclusions from public tendering concern documents the falsification of which may have an adverse impact on that State's fight against cyberwarfare, terrorism, trafficking in human beings, smuggling of migrants and organised crime, as well as those that may have an impact on the correctness and fairness of the elections (or the public perception thereof).

3. Conclusions: disposing of the present case

101. The above analysis leads me to the following conclusions.

102. First, some of the interests invoked by the Polish Government in the present procedure can be regarded as being 'essential security interests' within the meaning of Article 15(2) and (3) of Directive 2014/24. I am referring to the needs to (i) fight against cyberwarfare, terrorism, trafficking in human beings, smuggling of migrants and organised crime, (ii) ensure the continuity of supply of the documents that are necessary for the proper functioning of the public administration, and (iii) ensure public confidence in the fair result of elections. By contrast, in the present case I do not find any element which would justify treating interests relating to public health, consumer protection, road safety and the protection of public finances as 'essential security interests' for the purposes of Directive 2014/24.

103. Second, I take the view that the Republic of Poland has reasonable grounds to consider that the threats which it intends to prevent or minimise with the national legislation at issue are real and sufficiently serious. However, I see no such threat where the documents the continuity of supply of which the Republic of Poland intends to ensure are not irreplaceable or indispensable for the proper functioning of the State administration.

104. Third, the national legislation at issue – by centralising the production of the documents at issue in a single entity, fully owned and directly controlled by the State – only partly complies with the principle of proportionality. More specifically, it may be regarded as being necessary to achieve the appropriate level of protection chosen by the Polish Government solely with regard to the documents the falsification of which may actually impair the Republic of Poland's fight against cyberwarfare, terrorism, trafficking in human beings, smuggling of migrants or organised crime, or undermine the public confidence in the result of elections. By contrast, there exist alternative, less intrusive measures to avert the risks, invoked by that government, to the continuity of supply of the documents at issue.

105. All of the above means that – in my view – both the Commission and the Republic of Poland have been partly successful and partly unsuccessful in the present procedure. If that is so, the crucial question becomes, obviously, to what extent this action should be upheld, and to what extent it should be rejected.

106. To address this question, I must now come back to the issue I touched upon in my preliminary remarks: both the Commission and the Polish Government mostly developed their arguments in a rather general fashion, whereas the national legislation at issue excludes from public procurement the production of a rather large and diverse series of documents and other objects.(49)

107. Asked at the hearing whether they considered having duly taken into account the specific features of each document, both parties claimed that they were not required to do so. The Polish Government reiterated the view that all the documents at issue are of crucial importance for the protection of its security interests and, consequently, can be excluded from public procurement. For its part, the Commission stated that, so far, the Polish Government had refused to engage in any meaningful discussion on the point and, at any rate, it should have been for that government to explain to the Court the specificities of each document.

108. I cannot conceal having felt some frustration when receiving those answers. Indeed, because of that approach by the parties, and despite a careful assessment of the Commission's pleas and the Republic of Poland's objections, as well as a review of the evidence submitted by both parties, I am unable to precisely 'draw a line' between the documents that can be legitimately excluded from the public procurement rules, and those that cannot.

109. Usually, in the context of a direct action, a party's failure to substantiate its claims does not give rise to any major procedural problem: the principles on the allocation of the burden of proof (50) may guide the Court to rule on the various issues in dispute. In the present case, however, I find it particularly hard to identify, in respect of some aspects of the dispute, the party on which the burden of proving (or disproving) a certain fact rested. In this sort of procedural ping-pong in which the burden shifts each time a party has made a prima facie case, it may at times be difficult to decide who scored the point – metaphorically speaking.

110. Moreover, I would feel a certain uneasiness in suggesting to the Court to adjudicate on the present dispute on the basis of an automatic (and thus, dare I say, blind) application of the rules on the burden of proof. True, it is for each a party to carefully choose the approach it wishes to adopt as its litigation strategy, given that choices made in that regard are often consequential. When a court or tribunal gives a final ruling on a matter and there is no possibility to appeal that decision, the matter becomes *res judicata* and, as such, cannot be subject to further litigation.

111. Thus, once a judicial procedure is over, procedural reality replaces any other 'alternative' reality.

112. However, whereas that may normally be considered a simple fact of life, I would be hesitant to endorse an extreme application of this approach – which could, *in extremis*, lead the judges to abandon common sense and adopt unreasonable decisions – in the context of infringement proceedings.

113. As the Court has consistently stated, in the context of such proceedings it is its role to verify the alleged infringements, even where the defendant does not contest them. (51) That may be explained, in my view, because of the potentially far-reaching consequences that may flow, for a Member State, from an adverse judgment given under Articles 258 or 259 TFEU: that Member State will be required to amend the challenged national measure. That is also true regardless of whether, with a better defence, it could have shown that that measure was actually in compliance with EU law. (52) A failure to amend the challenged national measure could expose that Member State to financial penalties (53) and to actions for liability. (54)

114. Thus, my view is that, where it is not entirely clear who was required to prove what, because both parties appear to be responsible for the incompleteness of the case file, it may be a sensible approach on the part of the Court to avoid ruling on those issues that are not strictly indispensable for adjudicating the dispute. This seems to me particularly important in a case such as the present one, where upholding one argument of the applicant or of the defendant could have immediate repercussions on the protection of certain essential security interests of a Member State.

115. Against this backdrop, I believe that the Court has, fundamentally, two options.

116. On the one hand, the Court could – as it has done in some early cases in which it considered that the information provided by both parties did not enable it to make a sufficiently accurate appraisal of the issues at stake – deliver an *interim judgment*. In such judgments, the Court ordered the parties to re-examine certain issues arising from the dispute in the light of the guidance contained in those judgments, and to report to it by a certain date, after which the Court would deliver a final judgment. (55)

117. On the other hand, the Court could simply declare that, by excluding the production of certain documents, printed matter and stamps and markings from the rules on public procurement provided for in Directive 2014/24, the Republic of Poland has failed to fulfil its obligations under Article 1(1) and (3) and Article 15(2) and (3) of that directive, read in conjunction with Article 346(1)(a) TFEU. Indeed, my analysis has shown that, undoubtedly, the national legislation at issue excludes from the rules on public procurement a (probably large) number of documents with regard to which the derogations set out in Article 15(2) and (3) of Directive 2014/24 are not applicable.

118. For reasons of judicial economy, I would favour the second option. In that regard, I would emphasise that, in the light of the form of order sought by the Commission, (56) the Court would neither rule *ultra petita* nor *infra petita*. At the same time, the judgment of the Court would give sufficient guidance to the Polish Government as to how the national legislation in question should be amended to achieve compliance with EU law. Indeed, it must be borne in mind that, according to settled case-law, the operative part of the judgment, which describes the failure to fulfil obligations established by the Court in an action under Article 258 TFEU, must be construed in the light of the grounds of the judgment. (57)

119. Furthermore, any disagreement in the future between the Commission and the Republic of Poland as to whether the latter succeeded in achieving full compliance with the judgment of the Court could be resolved, if necessary, (i) in the context of an infringement procedure under Article 260(2) TFEU and, should it persist even after that, (ii) in the context of an action for annulment brought, under Article 263 TFEU, by the Republic of Poland against any decision of the Commission determining the necessity and amount of the penalties due by that Member State. (58)

120. For all those reasons, I take the view that the Court should rule that the national legislation at issue, as it currently stands, does not satisfy the conditions laid down in Article 15(2) and (3) of Directive 2014/24 and, therefore, infringes the provisions of that directive.

VI. Costs

121. In conformity with Article 138(3) of the Rules of Procedure of the Court of Justice, where each party succeeds on some and fails on other heads, the parties are to bear their own costs unless, if it

appears justified in the circumstances of the case, the Court orders that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

122. In this case, both the Commission and the Republic of Poland applied for costs against the other party and have succeeded on some claims and failed on others. Accordingly, I find it correct that each of the parties should be ordered to bear its own costs.

VII. Conclusion

123. In the light of the foregoing, I suggest that the Court of Justice:

– declare that, by excluding the production of certain documents, printed matter and stamps and markings from the rules on public procurement provided for in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, the Republic of Poland has failed to fulfil its obligations under Article 1(1) and (3) and Article 15(2) and (3) of Directive 2014/24, read in conjunction with Article 346(1)(a) TFEU; and

– order the European Commission and the Republic of Poland to each bear their own costs.

---

1 Original language: English.

---

2 OJ 2014 L 94, p. 65.

---

3 Point 6 concerns the definition of ‘public works contracts’.

---

4 C-187/16, EU:C:2018:194; ‘the judgment in *Commission* v *Austria*’.

---

5 Similarly, the title of the subsection of Directive 2014/24 which includes Article 15 is entitled ‘Procurement involving defence or security aspects’.

---

6 Another reference to that Treaty provision can be found in Article 1(3) of the directive.

---

7 See, by analogy, Opinion of Advocate General Kokott in *Commission* v *Austria (State printing office)* (C-187/16, EU:C:2017:578, points 43 and 45; ‘the Opinion in *Commission* v *Austria*’).

---

8 Such as, in particular, the fact that the second subparagraph of Article 15(2) of Directive 2014/24, unlike the first subparagraph of Article 15(2) and Article 15(3) thereof, does not expressly require the absence of ‘less intrusive measures’. However, the lack of such a requirement is, in my view, immaterial, since it follows in any event from the principle of proportionality.

---

9 The second subparagraph of Article 15(2) of Directive 2014/24 starts with the term ‘furthermore’, which would suggest that it supplements what was provided in the first subparagraph thereof. However, it seems to me that the (more broadly formulated) situation provided for in the first subparagraph encompasses also the (more narrowly defined) situation provided for in the second subparagraph.

---

10 See, to that effect, the judgment in *Commission* v *Austria*, paragraph 75.

---

11 Just to give an example, the risks posed by a possible energy crisis may perhaps be regarded as ‘essential security interests’ by a State that is a significant importer of energy (or of the materials used to generate energy), whereas they may not be so for a State that is energy self-sufficient. See, for example, judgment of 10 July 1984, *Campus Oil and Others* (72/83, EU:C:1984:256, paragraphs 34 and 35). That is all the more so in the current geopolitical context.

12 Similarly, Opinion of Advocate General Cosmas in *Albore* (C-423/98, EU:C:2000:158, point 58).

13 See, to that effect, Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *Germany* (C-284/05, C-294/05, C-372/05, C-387/05, C-409/05, C-461/05 and C-239/06, EU:C:2009:76, points 129 to 133).

14 Articles 36, 45, 52, 65 and 202 TFEU.

15 Article 4(2) TEU.

16 Articles 71, 72 and 276 TFEU.

17 Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 135).

18 See, for example, Article 4(2) TEU that speaks of ‘*essential* State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security’. Emphasis added.

19 See the judgment in *Commission* v *Austria*, paragraph 77 and the case-law cited.

20 Emphasising the importance of the Member States’ duty to provide reasons and evidence in that regard are the Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *Germany* (C-284/05, C-294/05, C-372/05, C-387/05, C-409/05, C-461/05 and C-239/06, EU:C:2009:76, points 131, 142 and 160), and the Opinion in *Commission* v *Austria*, point 48.

21 On the need to approach the issue from the Member State’s point of view, see, by analogy, Opinion of Advocate General Jacobs in *Commission* v *Greece* (C-120/94, EU:C:1995:109, point 58).

22 See, by analogy, judgment of 16 September 1999, *Commission* v *Spain* (C-414/97, EU:C:1999:417, paragraph 24).

23 See, to that effect and by analogy, Opinion of Advocate General Cosmas in *Albore* (C-423/98, EU:C:2000:158, point 31).

24 See, to that effect, judgments of 13 July 2000, *Albore* (C-423/98, EU:C:2000:401, paragraph 22), and of 14 March 2000, *Église de scientologie* (C-54/99, EU:C:2000:124, paragraph 17 and the case-law cited).

25 See the judgment in *Commission* v *Austria*, paragraph 76 and the case-law cited.

26 See, by analogy, judgment of 2 April 2020, *Commissio*n v *Poland*, *Hungary* and *Czech Republic (Temporary mechanism for the relocation of applicants for international protection)* (C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 145 and the case-law cited).

27 See judgment of 30 September 2003, *Fiocchi munizioni* v *Commission* (T-26/01, EU:T:2003:248, paragraph 58).

28 On this matter more generally, see my Opinion in *ECB* v *Crédit lyonnais* (C-389/21 P, EU:C:2022:844, points 41 to 74).

29 See, especially, Article 24(1) TEU ('The Union's competence in matters of common foreign and security policy shall cover … all questions relating to the *Union's security*') and Article 42(1) TEU ('The *common security* and defence policy shall be an integral part of the common foreign and security policy'). Emphasis added.

30 As mentioned above, Article 4(2) TEU states, inter alia, that the European Union shall respect the Member States' essential State functions, 'including ensuring the territorial integrity of the State, maintaining law and order and *safeguarding national security*'. Emphasis added.

31 See Articles 36, 45, 52 and 65 TFEU.

32 See Articles 71, 72 and 276 TFEU.

33 See judgment of 5 April 2022, *Commissioner of An Garda Síochána and Others* (C-140/20, EU:C:2022:258, paragraph 57 and the case-law cited).

34 See, inter alia, judgment of 26 April 2018, *Commission* v *Bulgaria* (C-97/17, EU:C:2018:285, paragraph 69 and the case-law cited).

35 See, to that effect, judgment of 24 June 2021, *Commission* v *Spain (Deterioration of the Doñana natural area)* (C-559/19, EU:C:2021:512, paragraph 47 and the case-law cited).

36 See, to that effect, judgment of 21 January 2016, *Commission* v *Cyprus* (C-515/14, EU:C:2016:30, paragraph 54 and the case-law cited).

37 See, to that effect, judgment of 23 January 2014, *Commission* v *Belgium* (C-296/12, EU:C:2014:24, paragraph 33 and the case-law cited).

38 See judgment of 29 July 2019, *Commission* v *Austria (Civil engineers, patent agents and veterinary surgeons)* (C-209/18, EU:C:2019:632, paragraph 82 and the case-law cited).

39 See, to that effect, judgment of 21 December 2011, *Commission* v *Austria* (C-28/09, EU:C:2011:854, paragraph 140 and the case-law cited).

40 The case-law on this point is very restrictive: interests of an economic nature do not, in principle, constitute essential security interests. See, to that effect, judgment of 16 September 1999, *Commission* v *Spain* (C-414/97, EU:C:1999:417, paragraph 22).

---

41 See points 8 and 59 above.

---

42 The full proportionality test would require the Court to check whether the national measure strikes a fair balance between the interests at stake: the interest pursued by the State with the measure in question and the interest of the persons adversely affected by it. See, to that effect, judgment of 6 October 2020, *Commission* v *Hungary (Higher education)* (C-66/18, EU:C:2020:792, paragraphs 178 and 179 and the case-law cited).

---

43 Similarly, the Opinion in *Commission* v *Austria*, point 56.

---

44 See, to that effect, the judgment in *Commission* v *Austria*, paragraphs 78 and 79 and the case-law cited.

---

45 In particular, Article 42(1) of Directive 2014/24 reads: 'The technical specifications … shall be set out in the procurement documents. The technical specification shall lay down the characteristics required of a works, service or supply'.

---

46 Article 58 of Directive 2014/24, entitled 'Selection criteria', provides, in its first paragraph, that the selection criteria may relate to: (a) suitability to pursue the professional activity; (b) economic and financial standing; and (c) technical and professional ability. The third paragraph of that provision provides that 'with regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract'. In turn, the fourth paragraph of that provision states that 'with regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard. Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past'.

---

47 According to point (c) of Article 72(1) of Directive 2014/24, contracts and framework agreements may be modified without a new procurement procedure when, inter alia, a number of cumulative conditions are fulfilled. One of those conditions (point (i)) is that 'the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee'.

---

48 Article 73 of Directive 2014/24 concerns the circumstances in which the contracting authorities have the possibility to terminate a public contract during its term.

---

49 See points 9, 10, 69 and 70 of this Opinion.

---

50 The main principles in this matter have been recalled above, in points 63 to 65 of this Opinion.

---

51 See, for example, judgment of 16 January 2014, *Commission* v *Spain* (C-67/12, EU:C:2014:5, paragraph 30 and the case-law cited).

---

52 In this context, it must not be overlooked that, in the context of infringement proceedings, there is a single level of jurisdiction: the parties thus have only one shot before the EU Courts, so to speak.

---

53 See Article 260(2) TFEU.

---

54 See, in that regard, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 57), and of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 120).

---

55 See, for example, judgments of 27 February 1980, *Commission* v *United Kingdom* (170/78, EU:C:1980:53), and of 17 December 1980, *Commission* v *Belgium* (149/79, EU:C:1980:297).

---

56 See point 18 of this Opinion.

---

57 See, among many others, judgment of 22 October 2013, *Commission* v *Germany* (C-95/12, EU:C:2013:676, paragraphs 37, 40 and 45 and the case-law cited).

---

58 Point (c) of Article 51 of the Statute of the Court of Justice of the European Union – as recently amended – reserves these actions to the jurisdiction of the Court.

ORDONNANCE DE LA COUR (huitième chambre)

30 septembre 2022 (*)

« Renvoi préjudiciel – Article 99 du règlement de procédure de la Cour – Passation des marchés publics – Directive 2014/24/UE – Déroulement de la procédure – Choix des participants – Critères de sélection – Capacités techniques et professionnelles – Article 58, paragraphe 4 – Modes de preuve – Document unique de marché européen – Article 59 – Recours aux capacités d'autres entités – Article 63, paragraphe 1 – Groupement d'opérateurs économiques – Condition tenant à l'expérience professionnelle devant être remplie par le membre du groupement chargé, en cas d'attribution du marché, de l'exécution des activités requérant cette expérience – Condition non prévue par les documents de marché – Absence d'incidence du régime de responsabilité solidaire dans le cadre du statut de société en nom collectif »

Dans l'affaire C-592/21,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par l'Administratīvā rajona tiesa, Rīgas tiesu nams (tribunal administratif de district, section de Riga, Lettonie), par décision du 20 septembre 2021, parvenue à la Cour le 22 septembre 2021, dans la procédure

« ĒDIENS & KM.LV » PS

contre

Ieslodzījuma vietu pārvalde,

Iepirkumu uzraudzības birojs,

LA COUR (huitième chambre),

composée de M. N. Jääskinen, président de chambre, MM. M. Safjan et M. Gavalec (rapporteur), juges,

avocat général : M. M. Campos Sánchez-Bordona,

greffier : M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 63 de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE (JO 2014, L 94, p. 65).

2 Cette demande a été présentée dans le cadre d'un litige opposant « ĒDIENS & KM.LV » PS à la Ieslodzījuma vietu pārvalde (administration pénitentiaire, Lettonie) (ci-après le « pouvoir adjudicateur ») et au Iepirkumu uzraudzības birojs (Office de surveillance des marchés publics, Lettonie) (ci-après l'« Office ») au sujet de l'exclusion de ĒDIENS & KM.LV par le pouvoir adjudicateur d'une procédure de passation de marchés relative aux services de restauration des détenus.

Le cadre juridique

La directive 2014/24

3 L'article 18 de la directive 2014/24, intitulé « Principes de la passation de marchés », prévoit, à son paragraphe 1, premier alinéa :

« Les pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité et sans discrimination et agissent d'une manière transparente et proportionnée. »

4 L'article 19 de cette directive, intitulé « Opérateurs économiques », dispose, à son paragraphe 2 :

« Les groupements d'opérateurs économiques, y compris les associations temporaires, peuvent participer aux procédures de passation de marchés. Ils ne sont pas contraints par les pouvoirs adjudicateurs d'avoir une forme juridique déterminée pour présenter une offre ou une demande de participation.

Si nécessaire, les pouvoirs adjudicateurs peuvent préciser, dans les documents de marché, la manière dont les groupements d'opérateurs économiques doivent remplir les conditions relatives à la capacité économique et financière ou aux capacités techniques et professionnelles visées à l'article 58, pour autant que cela soit justifié par des motifs objectifs et que ce soit proportionné. Les États membres peuvent établir des clauses standard précisant la manière dont les groupements d'opérateurs économiques doivent remplir ces conditions.

Les conditions d'exécution d'un marché par de tels groupements d'opérateurs économiques, qui sont différentes de celles imposées aux participants individuels, sont également justifiées par des motifs objectifs et sont proportionnées. »

5 L'article 58 de ladite directive, intitulé « Critères de sélection », prévoit :

« 1. Les critères de sélection peuvent avoir trait :

a) à l'aptitude à exercer l'activité professionnelle ;

b) à la capacité économique et financière ;

c) aux capacités techniques et professionnelles.

Les pouvoirs adjudicateurs ne peuvent imposer comme conditions de participation aux opérateurs économiques que les critères visés aux paragraphes 2, 3 et 4. Ils limitent ces conditions à celles qui sont propres à garantir qu'un candidat ou un soumissionnaire dispose de la capacité juridique et financière ainsi que des compétences techniques et professionnelles nécessaires pour exécuter le marché à attribuer. Toutes les conditions sont liées et proportionnées à l'objet du marché.

[...]

4. En ce qui concerne les capacités techniques et professionnelles, les pouvoirs adjudicateurs peuvent imposer des conditions garantissant que les opérateurs économiques possèdent les ressources humaines et techniques et l'expérience nécessaires pour exécuter le marché en assurant un niveau de qualité approprié.

Les pouvoirs adjudicateurs peuvent exiger notamment que les opérateurs économiques disposent d'un niveau d'expérience suffisant, démontré par des références adéquates provenant de marchés exécutés antérieurement. Un pouvoir adjudicateur peut considérer qu'un opérateur économique ne possède pas les capacités professionnelles requises lorsqu'il a établi que l'opérateur économique se trouve dans une situation de conflit d'intérêts qui pourrait avoir une incidence négative sur l'exécution du marché.

[...] »

6 Aux termes de l'article 59 de la directive 2014/24, qui s'intitule « Document unique de marché européen » :

« 1. Lors de la présentation de demandes de participation ou d'offres, les pouvoirs adjudicateurs acceptent le document unique de marché européen (DUME) consistant en une déclaration sur l'honneur actualisée à titre de preuve a priori en lieu et place des certificats délivrés par des autorités publiques ou des tiers pour confirmer que l'opérateur économique concerné remplit l'une des conditions suivantes :

[...]

b) il répond aux critères de sélection applicables qui ont été établis conformément à l'article 58 ;

[...]

Lorsque l'opérateur économique a recours aux capacités d'autres entités en vertu de l'article 63, le DUME comporte également les informations visées au premier alinéa, du présent paragraphe en ce qui concerne ces entités.

Le DUME consiste en une déclaration officielle par laquelle l'opérateur économique affirme que le motif d'exclusion concerné ne s'applique pas et/ou que le critère de sélection concerné est rempli et il fournit les informations pertinentes requises par le pouvoir adjudicateur. Le DUME désigne en outre l'autorité publique ou le tiers compétent pour établir les documents justificatifs et contient une déclaration officielle indiquant que l'opérateur économique sera en mesure, sur demande et sans tarder, de fournir lesdits documents justificatifs.

[...] »

7 L'article 63 de cette directive, intitulé « Recours aux capacités d'autres entités », dispose, à son paragraphe 1 :

« Un opérateur économique peut, le cas échéant et pour un marché déterminé, avoir recours aux capacités d'autres entités, quelle que soit la nature juridique des liens qui l'unissent à ces entités, en ce qui concerne les critères relatifs à la capacité économique et financière énoncés à l'article 58, paragraphe 3, et les critères relatifs aux capacités techniques et professionnelles, visés à l'article 58, paragraphe 4. En ce qui concerne les critères relatifs aux titres d'études et professionnels visés à l'annexe XII, partie II, point f), ou à l'expérience professionnelle pertinente, les opérateurs économiques ne peuvent toutefois avoir recours aux capacités d'autres entités que lorsque ces dernières exécuteront les travaux ou fourniront les services pour lesquels ces capacités sont requises. Si un opérateur économique souhaite recourir aux capacités d'autres entités, il apporte au pouvoir adjudicateur la preuve qu'il disposera des moyens nécessaires, par exemple, en produisant l'engagement de ces entités à cet effet.

Le pouvoir adjudicateur vérifie, conformément aux articles 59, 60 et 61, si les entités aux capacités desquelles l'opérateur économique entend avoir recours remplissent les critères de sélection applicables et s'il existe des motifs d'exclusion en vertu de l'article 57. Le pouvoir adjudicateur exige que l'opérateur économique remplace une entité qui ne remplit pas un critère de sélection applicable ou à l'encontre de laquelle il existe des motifs d'exclusion obligatoires. Le pouvoir adjudicateur peut exiger ou peut être obligé par l'État membre à exiger que l'opérateur économique remplace une entité à l'encontre de laquelle il existe des motifs d'exclusion non obligatoires.

Lorsqu'un opérateur économique a recours aux capacités d'autres entités en ce qui concerne des critères ayant trait à la capacité économique et financière, le pouvoir adjudicateur peut exiger que l'opérateur économique et les autres entités en question soient solidairement responsables de l'exécution du marché.

Dans les mêmes conditions, un groupement d'opérateurs économiques visé à l'article 19, paragraphe 2, peut avoir recours aux capacités de participants du groupement ou d'autres entités. »

Le droit letton

8 L'article 46 de la Publisko iepirkumu likums (loi sur les marchés publics) (*Latvijas Vēstnesis,* 2016, n° 254), dans sa version applicable au litige au principal, prévoit, à son paragraphe 1, que le pouvoir adjudicateur peut imposer des exigences relatives aux capacités techniques et professionnelles du fournisseur qui sont nécessaires à l'exécution du marché. De telles exigences peuvent concerner le personnel chargé de l'exécution du marché, l'expérience et les ressources techniques du fournisseur. Aux termes du paragraphe 4 de cet article, un fournisseur peut se prévaloir des capacités techniques et professionnelles de tiers si cela s'avère nécessaire à l'exécution du marché en cause, quelle que soit la nature juridique de leurs relations réciproques. Dans ce cas, il apporte la preuve au pouvoir adjudicateur qu'il disposera des ressources nécessaires pour l'exécution du marché, en produisant des confirmations ou des accords desdits tiers. Un fournisseur ne peut se prévaloir des capacités de tiers pour justifier d'une expérience professionnelle ou de la disponibilité d'un personnel répondant aux exigences du pouvoir adjudicateur que si ces tiers effectuent les travaux ou fournissent les services pour l'exécution desquels les capacités en cause sont nécessaires.

Le litige au principal et la question préjudicielle

9 Le 16 novembre 2018, le pouvoir adjudicateur a publié un appel d'offres ouvert, intitulé « Prestation de services de restauration pour les détenus ».

10 Par décision du 18 janvier 2021, le pouvoir adjudicateur a exclu ĒDIENS & KM.LV de la procédure de passation de ce marché, au motif que, en violation des prescriptions du règlement de l'appel d'offres, elle n'avait pas apporté la preuve de l'exécution, au cours des trois années précédentes, d'au moins un contrat de services de restauration correspondant à l'objet du marché ou à un lot déterminé et portant sur un nombre de portions au moins égal au nombre annuel estimé de portions pour le lot pour lequel elle candidatait (ci-après la « condition d'expérience en cause au principal »).

11 Le marché en cause au principal a été attribué à une société à responsabilité limitée « Aleks UN V », qui avait présenté l'offre économiquement la plus avantageuse pour tous les lots du marché.

12 ĒDIENS & KM.LV a saisi l'Office qui, par décision du 25 février 2021, a confirmé la décision du pouvoir adjudicateur du 18 janvier 2021 et a autorisé ce dernier à passer le marché avec Aleks UN V. L'Office a relevé que, en tant que société en nom collectif, ĒDIENS & KM.LV ne disposait pas du niveau d'expérience requis, raison pour laquelle elle s'est fondée sur l'expérience de ses deux associées, la SIA « Ēdiens.lv » et la PI « Bruneros », pour satisfaire la condition d'expérience en cause au principal. Dans la mesure où la préparation effective des portions devait être effectuée uniquement par Ēdiens.lv tandis que Bruneros devait s'occuper uniquement des questions administratives, l'expérience de cette dernière dans la préparation des portions n'a pas été prise en compte par le pouvoir adjudicateur.

13 ĒDIENS & KM.LV a formé un recours contre la décision de l'Office du 25 février 2021 devant l'administratīvā rajona tiesa, Rīgas tiesu nams (tribunal administratif de district, section de Riga, Lettonie), qui est la juridiction de renvoi. Au soutien de son recours, elle fait valoir qu'elle avait constitué une association de fournisseurs dans le cadre de laquelle ses deux partenaires s'étaient contractuellement engagés à mettre à sa disposition l'intégralité de leurs ressources afin, d'une part, de satisfaire aux exigences du règlement de l'appel d'offres et, d'autre part, en cas d'obtention du marché, de permettre sa pleine exécution. En outre, les associés d'une société en nom collectif étant solidairement responsables à l'égard des tiers, et notamment du pouvoir adjudicateur, la répartition des tâches interne à une telle société au cours de l'exécution du marché n'aurait aucune incidence sur le plan juridique. Par ailleurs, si le pouvoir adjudicateur voulait que la condition d'expérience en cause au principal soit remplie par chacun des deux membres de l'association temporaire d'entreprises formée par ĒDIENS & KM.LV ou uniquement par celui qui serait appelé, en cas d'attribution du marché, à fournir directement le service de restauration proprement dit, il aurait dû mentionner cette condition dans le règlement de l'appel d'offres. Une telle condition aurait, en tout état de cause, été illégale car elle aurait indûment restreint la concurrence.

14 Le pouvoir adjudicateur et l'Office soulignent que, lors de l'audience qui s'est tenue devant la juridiction de renvoi, ĒDIENS & KM.LV aurait elle-même indiqué que Ēdiens.lv serait en charge des

questions opérationnelles tandis que Bruneros s'occuperait des questions administratives.

15 La juridiction de renvoi relève que la possibilité, pour un prestataire de services, de se prévaloir de l'expérience d'un tiers est intrinsèquement liée à la condition que ce tiers exécute lui-même les activités pour lesquelles l'expérience correspondante est requise. Partant, dans une situation où un groupement d'opérateurs économiques s'est référé, dans son offre, à l'expérience antérieure d'un seul de ses membres dans le cadre de la fourniture de prestations déterminées, le pouvoir adjudicateur devrait pouvoir exiger des preuves convaincantes que cet opérateur économique sera effectivement chargé de la prestation de services en cause.

16 Cette juridiction n'exclut toutefois pas que l'existence d'une responsabilité solidaire entre les membres d'une société en nom collectif à l'égard notamment du pouvoir adjudicateur ait une incidence sur l'appréciation du respect de la condition d'expérience en cause au principal. Ladite juridiction se demande également si le pouvoir adjudicateur doit se borner à vérifier si cette condition est satisfaite par le seul membre du groupement qui fournira effectivement le service qui fait l'objet du marché, même si le règlement de l'appel d'offres ne prévoit pas expressément que les membres d'un groupement d'opérateurs économiques doivent satisfaire individuellement à ladite exigence.

17 C'est dans ce contexte que l'administratīvā rajona tiesa, Rīgas tiesu nams (tribunal administratif de district, section de Riga) a décidé de surseoir à statuer et de poser à la Cour la question préjudicielle suivante :

« L'article 63, paragraphe 1, dernier alinéa, de la directive [2014/24] doit-il être interprété en ce sens que, en toute hypothèse (même si le règlement de l'appel d'offres ne le mentionne pas expressément), lorsqu'un soumissionnaire est une association de personnes, il ne peut se prévaloir, dans son offre, que des capacités (expérience acquise) du membre qui, dans l'exécution du marché, exercera effectivement les activités pour lesquelles l'expérience pertinente est requise ? »

Sur la question préjudicielle

18 En vertu de l'article 99 du règlement de procédure de la Cour, lorsque la réponse à une question posée à titre préjudiciel peut être clairement déduite de la jurisprudence ou lorsque la réponse à une telle question ne laisse place à aucun doute raisonnable, la Cour peut, à tout moment, sur proposition du juge rapporteur, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée.

19 Il y a lieu de faire application de cette disposition dans le cadre de la présente affaire.

20 Par sa question, la juridiction de renvoi demande, en substance, si l'article 63, paragraphe 1, de la directive 2014/24 doit être interprété en ce sens que, lorsqu'il est établi que, en cas d'attribution d'un marché public de services à un groupement d'opérateurs économiques, l'exécution des activités pour lesquelles il est requis une expérience sera confiée à un seul membre du groupement, le groupement soumissionnaire peut uniquement se prévaloir, afin de démontrer qu'il satisfait à une condition tenant à l'expérience imposée par le pouvoir adjudicateur conformément à l'article 58, paragraphe 4, de cette directive, de l'expérience dudit membre de ce groupement, et ce même si les documents de marché ne prévoient pas expressément que les membres d'un groupement d'opérateurs économiques doivent satisfaire individuellement à cette condition.

21 Il convient de rappeler que, conformément à l'article 58, paragraphe 4, premier et deuxième alinéas, de ladite directive, les pouvoirs adjudicateurs peuvent imposer des conditions garantissant que les opérateurs économiques possèdent les ressources humaines et techniques ainsi que l'expérience nécessaires pour exécuter le marché en assurant un niveau de qualité approprié. Ils peuvent ainsi exiger notamment que les opérateurs économiques disposent d'un niveau d'expérience suffisant, démontré par des références adéquates provenant de marchés exécutés antérieurement.

22 En outre, le premier alinéa du paragraphe 1 de l'article 63 de la directive 2014/24, qui, conformément au quatrième alinéa de ce paragraphe, est applicable à un groupement d'opérateurs économiques visé à l'article 19, paragraphe 2, de cette directive, prévoit le droit pour un opérateur économique d'avoir recours, pour un marché déterminé, aux capacités d'autres entités, quelle que soit la nature juridique

des liens qui l'unissent à ces entités, en vue de satisfaire notamment aux critères relatifs aux capacités techniques et professionnelles, visés à l'article 58, paragraphe 4, de ladite directive (voir, en ce sens, arrêts du 10 octobre 2013, Swm Costruzioni 2 et Mannocchi Luigino, C-94/12, EU:C:2013:646, points 29 et 33 ; du 3 juin 2021, Rad Service e.a., C-210/20, EU:C:2021:445, point 30, ainsi que du 7 septembre 2021, Klaipėdos regiono atliekų tvarkymo centras, C-927/19, EU:C:2021:700, point 150). En ce qui concerne le critère relatif à l'expérience professionnelle pertinente, l'article 63, paragraphe 1, premier alinéa, de la même directive dispose que les opérateurs économiques ne peuvent toutefois avoir recours aux capacités d'autres entités que lorsque ces dernières fourniront les services pour lesquels ces capacités sont requises. Si un opérateur économique souhaite recourir aux capacités d'autres entités, il apporte au pouvoir adjudicateur la preuve qu'il disposera des moyens nécessaires, par exemple, en produisant l'engagement de ces entités à cet effet.

23 Il ressort ainsi du libellé de l'article 63, paragraphe 1, premier alinéa, deuxième et troisième phrases, de la directive 2014/24 que, dans le cadre d'un marché public de services, un opérateur économique est tenu, afin de pouvoir recourir aux capacités d'autres entités, d'apporter la preuve, d'une part, que ces entités fourniront les services pour lesquels ces capacités sont requises et, d'autre part, qu'il disposera des moyens nécessaires si le marché lui est attribué, de sorte que le marché en cause soit effectivement exécuté.

24 Afin d'apporter cette preuve, l'opérateur économique qui entend se prévaloir du droit de recourir aux capacités d'autres entités doit, en vertu du premier alinéa, sous b), du paragraphe 1 de l'article 59 de cette directive, lu en combinaison avec les deuxième et troisième alinéas de ce paragraphe, transmettre au pouvoir adjudicateur, lors de la présentation de sa demande de participation ou de son offre, un DUME par lequel cet opérateur affirme notamment que lui-même et/ou les entités aux capacités desquelles il entend recourir répondent aux critères de sélection applicables qui ont été établis conformément à l'article 58 de ladite directive.

25 Il appartient alors, en vertu de l'article 63, paragraphe 1, deuxième alinéa, de la directive 2014/24, au pouvoir adjudicateur de vérifier, notamment, que, conformément aux articles 59 à 61 de celle-ci, les entités aux capacités desquelles l'opérateur économique entend recourir remplissent les critères de sélection applicables (arrêt du 3 juin 2021, Rad Service e.a., C-210/20, EU:C:2021:445, point 32).

26 Il résulte ainsi clairement de la combinaison des articles 59 et 63 de cette directive qu'il incombe à un groupement d'opérateurs économiques de démontrer qu'il satisfait aux critères de sélection qualitative énoncés à l'article 58 de cette directive, tels qu'une condition tenant à l'expérience.

27 L'article 63 de ladite directive confère toutefois une grande latitude à un opérateur économique pour s'entourer d'autres entités qui lui permettront de disposer des capacités qui lui font défaut. Par conséquent, cette disposition ne saurait être interprétée comme imposant, par principe, à un opérateur économique de solliciter le concours d'une entité remplissant, à elle seule, un critère de sélection qualitative, telle que la condition d'expérience en cause au principal. En effet, il ne saurait être exclu qu'un tel critère de sélection puisse être rempli en cumulant les capacités de plusieurs membres d'un groupement d'opérateurs économiques.

28 Par conséquent, il serait disproportionné, en l'absence notamment d'un motif objectif, d'exiger qu'un critère de sélection qualitative doive être satisfait uniquement par un seul membre d'un tel groupement. En effet, le principe de proportionnalité, qui est garanti à l'article 18, paragraphe 1, premier alinéa, de la directive 2014/24, impose que les règles établies par les États membres ou les pouvoirs adjudicateurs dans le cadre de la mise en œuvre des dispositions de cette directive n'aillent pas au–delà de ce qui est nécessaire pour atteindre les objectifs visés par ladite directive (voir, en ce sens, arrêts du 16 décembre 2008, Michaniki, C-213/07, EU:C:2008:731, point 48, et du 7 septembre 2021, Klaipėdos regiono atliekų tvarkymo centras, C-927/19, EU:C:2021:700, point 155).

29 Cela étant, dans l'hypothèse où le chef de file d'un groupement d'opérateurs économiques déclare expressément que la fourniture des services faisant l'objet de la procédure de passation de marché public en cause sera assurée par un seul membre de ce groupement ou lorsqu'une telle conclusion peut être tirée du DUME, dès lors que celui-ci fait apparaître que seul un membre dudit groupement dispose d'une expérience dans l'activité de services en cause, le pouvoir adjudicateur est fondé à considérer que ce même groupement peut uniquement se prévaloir de l'expérience du membre de ce groupement

auquel sera confiée, en cas d'attribution du marché, l'exécution des activités pour lesquelles l'expérience est requise.

30 En tout état de cause, il convient de constater que l'article 19, paragraphe 2, deuxième alinéa, de la directive 2014/24 ne saurait être pertinent dans le cadre du litige au principal. En effet, en vertu de cette disposition, les pouvoirs adjudicateurs peuvent, s'ils l'estiment nécessaire, préciser, dans les documents de marché, la manière dont les groupements d'opérateurs économiques doivent remplir les conditions relatives notamment aux capacités techniques et professionnelles visées à l'article 58 de cette directive, pour autant que cela soit justifié par des motifs objectifs et que ce soit proportionné. Partant, l'application de l'article 19, paragraphe 2, deuxième alinéa, de la directive 2014/24 présuppose que le pouvoir adjudicateur ait apporté lesdites précisions dans les documents de marché.

31 Or, en l'occurrence, il ressort du libellé de la question préjudicielle que le règlement de l'appel d'offres ne prévoyait pas expressément que la condition d'expérience en cause au principal devait être satisfaite par le membre du groupement d'opérateurs économiques qui, en cas d'attribution du marché à ce groupement, serait effectivement chargé de l'exécution des activités pour lesquelles l'expérience pertinente est requise.

32 En outre, la circonstance que, en droit letton, les associés d'une société en nom collectif sont solidairement responsables à l'égard des tiers, et notamment du pouvoir adjudicateur, ne saurait avoir d'incidence sur l'appréciation du critère relatif à l'expérience professionnelle pertinente de ces associés au stade de la sélection des soumissionnaires dans le cadre d'une procédure de passation de marché public.

33 En effet, au stade de l'examen de la recevabilité des candidatures, le pouvoir adjudicateur procède à une appréciation rétrospective destinée à évaluer si un soumissionnaire dispose des qualités laissant augurer une exécution effective du marché en cause. Dans ces conditions, l'absence de ces qualités ne saurait être compensée par le lien juridique, d'ordre prospectif, en vertu duquel les membres d'une société en nom collectif sont légalement tenus de répondre solidairement entre eux des obligations d'une telle société.

34 Eu égard à l'ensemble des considérations qui précèdent, il convient de répondre à la question posée que l'article 63, paragraphe 1, de la directive 2014/24, lu en combinaison avec l'article 59 de celle–ci, doit être interprété en ce sens que, lorsqu'il est établi que, en cas d'attribution d'un marché public de services à un groupement d'opérateurs économiques, l'exécution des activités pour lesquelles il est requis une expérience sera confiée à un seul membre du groupement, le groupement soumissionnaire peut uniquement se prévaloir, afin de démontrer qu'il satisfait à une condition tenant à l'expérience imposée par le pouvoir adjudicateur conformément à l'article 58, paragraphe 4, de cette directive, de l'expérience dudit membre de ce groupement, et ce même si les documents de marché ne prévoient pas expressément que les membres d'un groupement d'opérateurs économiques doivent satisfaire individuellement à cette condition.

Sur les dépens

35 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, la Cour (huitième chambre) dit pour droit :

L'article 63, paragraphe 1, de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE, lu en combinaison avec l'article 59 de celle–ci,

doit être interprété en ce sens que

lorsqu'il est établi que, en cas d'attribution d'un marché public de services à un groupement d'opérateurs économiques, l'exécution des activités pour lesquelles il est requis une expérience

sera confiée à un seul membre du groupement, le groupement soumissionnaire peut uniquement se prévaloir, afin de démontrer qu'il satisfait à une condition tenant à l'expérience imposée par le pouvoir adjudicateur conformément à l'article 58, paragraphe 4, de cette directive, de l'expérience dudit membre de ce groupement, et ce même si les documents de marché ne prévoient pas expressément que les membres d'un groupement d'opérateurs économiques doivent satisfaire individuellement à cette condition.

Signatures

---

* Langue de procédure : le letton.

Machine Translated by Google

File No. A42-00247-22/15
ECLI:LV:ADRJRIT:2022:1202.A420136121.12.S

ADMINISTRATIVE DISTRICT COURT
RIGA COURT HOUSE

JUDGMENT

On behalf of the people of Latvia

Riga, December 2, 2022

The Administrative District Court is composed of: Judge
Agnese Patmalniece, Judge Marina
Romanova, Judge Sandija Audzere,

with the participation of the representative of the applicant general partnership "ÿDIENS & KM.LV" /person C/, on the side of the respondent - the Republic of Latvia - invited institutions -
To the representative of the Procurement Monitoring Bureau /person D/ and to the representatives of the Prison Administration /person E/ and /person F/,

In an oral proceeding online, using the Microsoft *Teams application,* the administrative case was examined, which was initiated on the basis of the application of the general partnership "ÿDIENS & KM.LV" regarding the recognition of the decision of the Procurement Supervision Bureau's application review commission of February 25, 2021 No. 4-1.2/21-37 as unlawful.

Descriptive part

[1] On November 16, 2018, the Prison Administration (hereinafter referred to as the contracting authority) announced an open tender for the "Provision of Catering Services" for prisoners" (id. No. IeVP 2018/52) (hereinafter – competition).

At the meeting of the procurement commission of the contracting authority on January 18, 2021 (minutes No. 2018/52/11; hereinafter also – the initial decision), a decision was made to award the contract for parts 1, 2, 3, 4 and 5 of the subject of the tender to the limited liability company "ALEKS UN V", whose offer was recognized as the most economically advantageous. At the same time, the applicant was recognized as not complying with the requirements of subsection 4.1.1 of the tender regulations and was excluded from further participation in the tender.

Disagreeing with the decision of the contracting authority's procurement commission, the applicant submitted an application to the Procurement Supervision Bureau (hereinafter referred to as the Bureau) on January 25, 2021 regarding the tender organized by the contracting authority.

[2] Having examined the applicant's application, the Office, by decision No. 4?1.2/21-37 of 25 February 2021 (hereinafter – the appealed decision), left the initial decision unchanged. The decision is based on the arguments set out below.

[2.1] The experience requirements included in Subsection 4.1.1 of the Tender Regulations are set for the tenderer. Since in this particular case the tender has been submitted by the tenderer as a general partnership, which is considered a tenderer within the meaning of the Public Procurement Law, the general partnership must fulfil the aforementioned experience requirements either independently or also based on the capabilities of third parties in accordance with Section 46, Part Four of the Public Procurement Law.

[2.2] Since the requirement included in Subsection 4.1.1 of the competition regulations requires the applicant to demonstrate their experience in preparing food portions in a certain amount, while it can be concluded from the information submitted in the offer and the case materials that the applicant as a general partnership does not have the relevant experience in the required amount and, accordingly, the applicant relies on the experience of its two members, SIA "ÿdiens.lv" and SI "Bruneros", in fulfilling the aforementioned qualification requirement, the initial decision reasonably assessed whether the involvement of the applicant's members in the performance is sufficient to transfer the necessary experience to the applicant.

[2.3] According to the information provided by the applicant, if the applicant is awarded the right to conclude a contract in the tender, the actual preparation of food portions will be carried out only by SIA "ÿdiens.lv", while the involvement of SI "Bruneros" provides only for the resolution of administrative issues. Thus, since SI "Bruneros" will not be practically involved in the preparation of food portions, SI "Bruneros"'s experience in preparing food portions, taking into account the findings expressed in the judgment of the Court of Justice of the European Union of 7 April 2016 in case C-324/14 and the fact that the experience required in subparagraph 4.1.1 of the tender regulations, taking into account the nature and purpose of the contract, cannot be transferred otherwise than by directly and practically engaging in the performance of the contract in the provision of the relevant service (preparation of food portions), shall not be taken into account when assessing the applicant's compliance with the requirement specified in subparagraph 4.1.1 of the tender regulations.

[2.4] The fact that a general partnership has been established for the purpose of participating in the tender is not decisive, since the establishment of a general partnership cannot be based solely on the formal fulfillment of the qualification requirements set out in the procurement procedure documents. The members of the general partnership shall be bound to the performance of the contract, taking into account the agreement between them, which in the specific case cannot be ascertained from the applicant's offer.

[2.5] Joint and several liability means that the members are jointly and severally liable for the performance of the contract, not that both members will be involved in the performance of specific works, including their work. in the execution of which the customer has set certain experience requirements for participation in the tender.

[2.6] The certificate of experience submitted by the applicant in the tender, which together indicates the experience gained by the general partnership and the members of the general partnership in 30 catering service contracts, without specifically indicating who has fulfilled each of these contracts and acquired the relevant experience (number of portions), as well as without indicating the acquired experience (number of portions) for calendar years, as required by Subsection 4.1.1 of the tender regulations, does not allow for the unambiguous identification of the individual experience gained by the applicant and each of its members.

[2.7] Since the request of the contracting authority's procurement commission to explain the information on experience indicated in the applicant's offer, the applicant has not provided a response in substance, indicating that it does not understand which records should be drawn up more precisely, and this request has been formulated sufficiently clearly and understandably,

80.89.79.119 13.01.2025. 13:25 Anonymous system user

Machine Translated by Google

The action of the contracting authority's procurement commission, upon receiving the applicant's refusal to provide the requested information, to evaluate the applicant's offer based on the information at its disposal in accordance with the provisions of Article 41, Part Seven of the Public Procurement Law, is considered correct.

[3] The applicant appealed the decision of the office to the court, stating the following arguments in the application.

[3.1] The applicant has established a supplier association, for which a contract has been concluded, which stipulates that both members of the applicant fully transfer their resources to meet the requirements of the tender regulations, and as a result of obtaining the right to conclude a procurement contract, will transfer all their resources to the qualitative performance of the procurement contract, as well as be jointly and severally liable to the contracting authority. At the same time, the applicant has submitted the certification and references required by the tender regulations, which prove that the applicant fully meets the requirements of the tender regulations regarding the necessary experience.

[3.2] If the contracting authority wanted to set any special requirements for the members of the supplier association (in this case, a general partnership), for example, that the experience specified in Subsection 4.1.1 of the tender regulations is required for both members or specifically for the member who will directly provide the seating service, the contracting authority was obliged to include this requirement in the tender regulations. At the same time, if the contracting authority had included such a requirement in the tender regulations, it would unreasonably restrict competition and would be contrary to the regulations of the Public Procurement Law.

[3.3] The Office incorrectly refers to the judgment of the Court of Justice of the European Union in Case No. C?324/14, because the members of the applicant are members of a general partnership, not, for example, subcontractors. The above excludes any doubts about the participation and liability of the general partnership members in the performance of the procurement contract.

[3.4] The details of a general partnership entered in the Register of Enterprises indicate the person who is entitled to represent the general partnership. Therefore, there can be no doubt about the participation or representation of the general partnership in the tender framework.

[3.5] The objectivity of the adoption of the appealed decision and the examination of the case is questionable, considering that an official participated in its adoption.
(Chairperson of the Office Procurement Review Commission), which has previously made unfavorable decisions regarding the applicant.

[4] In its explanation to the court, the office does not recognize the applicant's application, based on the arguments mentioned in the appealed decision and additionally indicating that all decisions of the office made in connection with the competition are objective and legal, and none of the members of the application review commission is related to any of the participants in the case or has been interested in any specific outcome of the case.

[5] In its explanation to the court, the contracting authority does not recognize the applicant's application, agreeing with the arguments mentioned in the appealed decision and additionally stating the following.

[5.1] Contrary to what the applicant indicated, the contracting authority's procurement commission did not assess that the applicant's member SI "Bruneros""s experience met the minimum experience required in the tender.

[5.2] The contracting authority is obliged to ensure that prisoners receive regular food in the amount specified in the regulatory enactments. The provision of food is one of the most important areas of ensuring the daily needs of prisoners and any deviations can clearly be assessed as a significant violation of the human rights of prisoners. Accordingly, the contracting authority cannot formally assess the competition requirement for experience.

[5.3] There are several publications available in the public domain indicating that the applicant or its members have not been able to cope with the obligations assumed in the procurement contract, in some of the cases examined this is directly related to the lack of resources and possible formal confirmation of experience to the contracting authorities, as well as to possible dishonest conduct. At the same time, it can be concluded that the applicant's confirmation of experience has also indicated contracts in which the contracting authority has unilaterally withdrawn from the contract because the applicant's member has not fulfilled its obligations towards the contracting authority.

[6] The applicant's supplements to the application repeat the arguments indicated in the application, additionally indicating various violations committed during the procurement procedure (excessively long evaluation of submitted bids, delay in decision-making deadlines, sending unfounded requests to the applicant, failure to initiate an administrative violation case and the office's impartiality in decision-making).

[7]By decision of the Administrative District Court of 20 September 2021, it was decided to refer a question to the Court of Justice of the European Union for a preliminary ruling.
Simultaneously with the aforementioned decision, the proceedings in the case were suspended.

[8] On 3 October 2022, the Administrative District Court received the order of the Court of Justice of the European Union of 30 September 2022 in case C-592/21.

[9] The contracting authority points out in its additional explanations that the Court of Justice of the European Union, in its order of 30 September 2022 in case C-592/21, has provided an interpretation that is consistent with the reasoning set out in the contracting authority's initial decision.

[10] At the court hearing, the applicant's representative maintained the application based on the arguments set out in the application.
The defendant's representatives did not recognize the application based on the arguments provided in the explanations.

Theme part

[11] The dispute in the case is whether the applicant's bid was rightly declared to be non-compliant with the requirements set out in Sub-paragraph 4.1.1 of the tender regulations.

[12] Subsection 4.1.1 of the tender regulations provided that the tenderer must submit a certificate that the tenderer has fulfilled at least one (food preparation) service contract corresponding to the subject of the procurement (or the relevant part) within the last 3 years. A contract corresponding to the subject of the procurement will be considered a contract (or several contracts) within the framework of which the amount of food preparation work has been fulfilled within one year, which is not less than the estimated annual amount (of the relevant part) specified in the technical specifications of the regulations. The tenderer in 2015 or 2016, or 2017, or 2018 until the moment of submitting the offer, has prepared the number of food portions within one calendar year, which is not less than the estimated number of portions per year in the relevant part of the procurement. In the event that a tenderer submits a tender for several or all parts of the procurement, the tenderer's experience will be evaluated (compared) by adding together the number of portions mentioned in the relevant parts with the experience indicated by the tenderer.

Therefore, the aforementioned provision of the regulations essentially included a requirement for the bidder's previous experience in preparing such a volume (number) of food portions within one calendar year as the bidder will have to prepare for persons in prisons during the same period of time during the provisional execution of the procurement contract.

Such a requirement included in the regulations is a requirement that relates to the technical and professional capabilities to fulfill the obligations set out in the contract.

[13] The contracting authority has the right to set requirements regarding the technical and professional qualifications of the applicant necessary for the performance of the procurement contract.

80.89.79.119 13.01.2025. 13:25 Anonymous system user

Machine Translated by Google

capabilities is provided for in Article 46, Part 1 of the Public Procurement Law. Among other things, the aforementioned legal norm directly stipulates that such requirements may also apply to the supplier's experience. It is the tenderer's experience that is one of the main factors that allows the contracting authority to assess the quality of the expected services, therefore, in general, the contracting authority has the discretion to set experience requirements that correspond to the subject matter of the expected procurement contract, the volume of the services to be procured, their complexity and other significant aspects *(cf. see the Senate's decision of 21 May 2018 in case No. SKA-1222/2018 (ECLI:LV:AT:2018:0521.A420171118.5.L) Paragraph 17, Judgment of 27 August 2020 in Case No. SKA-297/2020 (ECLI:LV:AT:2020:0827.A420336717.9.S) (see paragraph 9).*

The requirement that the tenderer has previous experience in the performance of a specific procurement contract is aimed at ensuring that the offer meets the customer's expectations and that it receives performance that is appropriate to the subject of the procurement and of the highest possible quality, thus achieving one of the main objectives of public procurement regulation - the effective use of the customer's funds, minimizing the risk of poor-quality performance. It goes without saying that a tenderer who already has successful previous experience in providing services or supplying goods similar or identical to the subject of the procurement contract will be much more likely than a tenderer who does not have such experience to be able to perform the specific procurement contract in a high-quality and timely manner. Therefore, when assessing whether a particular applicant meets the experience requirements set by the contracting authority, it is important whether the applicant actually possesses the relevant experience, as a formal approach to this issue will not ensure the achievement of the goal for which the specific experience requirement is included in the regulations in the first place *(Decision of the Senate of 30 April 2021 in case No. 983/2021 (ECLI:LV:AT:2021:0430.A420136121.8.L) (paragraph 8).*

[14] The court finds that the applicant submitted a certificate of experience in the tender, indicating that in 2015, 2016, 2017, 2018 (up to the time of submission of the offer), within one calendar year, it has prepared a number of food portions that is not less than the number of portions expected in all five parts of the procurement per year. The certificate also contains a record of the number of portions prepared in the concluded contracts – 5,434,080 portions (summing up the experience of the general partnership and the members of the general partnership), and an indication that the contracts are valid for a period longer than a year. Additionally, the court finds that, when evaluating the applicant's offer, the contracting authority's procurement commission has identified the individual experience of the members of the general partnership (SIA "ÿdiens.lv" has prepared 1,450,240 portions, which is less than the required 2,359,725 portions), which is not in dispute in the case.

[15] The Court concludes that the applicant is a general partnership. A general partnership, according to the first part of Article 77 of the Commercial Law, is a partnership whose purpose is to carry out commercial activities using a common name, and in which two or more persons (members) have joined together on the basis of a partnership agreement, without limiting their liability towards the creditors of the general partnership. Since a general partnership does not have the status of a legal entity, the applicant within the meaning of the Public Procurement Law is considered to be the association of members (legal entities) of the general partnership – in this case, SIA "ÿdiens.lv" and SI "Bruneros" (a group of economic operators within the meaning of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (hereinafter – Directive 2014/24/EU)).

In accordance with the last sentence of Article 63(1) of Directive 2014/24/EU, a group of economic operators may rely on the capabilities of the group members under the same conditions as those applicable to the reliance of tenderers on the capabilities and resources of other persons. The aforementioned regulation is included in the fourth paragraph of Article 46 of the Public Procurement Law, which allows the supplier to rely on the technical and professional capabilities of other persons in the performance of the procurement contract, regardless of the legal nature of the mutual relationship. In such a case, the supplier shall prove to the contracting authority that it will have the necessary resources at its disposal by submitting a certificate from these persons or an agreement on the transfer of the necessary resources to the supplier. With regard to professional experience or the availability of personnel meeting the requirements of the contracting authority, the aforementioned legal provision also specifies that the supplier may rely on such capabilities of other persons only if these persons provide services for the performance of which the relevant capabilities are necessary.

Thus, in the procurement legal framework, the possibility of a service provider to rely on the experience of other persons is inextricably linked to the condition that the entity that has actually acquired the required experience will perform the activities for which the relevant experience is required in the performance of the contract, even despite the fact that such a requirement is not included in the tender regulations. The mere fact that the tender has been submitted by an association of persons cannot be a sufficient reason to believe that it is not essential for it, unlike other tenderers, to prove that the entity that has acquired experience in the course of the performance of the procurement contract will be the one who will provide the relevant services. Therefore, it is reasonable to require that in a situation where the association has referred in the tender to the previous experience of its member in the provision of certain services, convincing evidence be submitted to the contracting authority that the relevant member will actually participate in the provision of the specific services. Otherwise, it would be necessary to conclude that it is sufficient for an association of persons to only formally refer to the previous experience of a member of the association in a procurement, even though only those members of the association will actually participate in a specific part of the performance of the procurement contract, whose ability to perform the procurement contract qualitatively and on time will be verified by the contracting authority. This would be contrary to the basic principles of public procurement regulation and the meaning of setting experience requirements *(Decision of the Senate of 30 April 2021 in case No. 983/2021 (ECLI:LV:AT:2021:0430.A420136121.8.L) 10).* The Court of Justice of the European Union also confirms this, stating that it follows from the second and third sentences of the first subparagraph of Article 63(1) of Directive 2014/24 that, in the context of a public service contract, an economic operator, in order to rely on the capacities of other entities, must provide evidence, first, that those entities will provide the services for the performance of which those capacities are necessary and, second, that it will have at its disposal the necessary resources, if it is awarded the contract, for the actual performance of the contract in question *(order of the Court of Justice of the European Union of 30 September 2022 in Case C-592/21 (ECLI:EU:C:2022:746) (paragraphs 23, 30).*

Therefore, the applicant may refer to the experience of SI "Bruneros" in providing a food service of the appropriate volume (in preparing the number of food portions) in accordance with subparagraph 4.1.1 of the tender regulations, if this experience will be effectively used in the performance of the procurement contract. Namely, if SI "Bruneros" will actually be involved in providing the relevant contract performance work, transferring its relevant experience to the performance of the contract in a practically useful way.

[16] Annex 1 "Division of Responsibilities of the Parties" to the partnership agreement concluded between SIA "ÿdiens.lv" and SI "Bruneros" *(page 120 of the case)* stipulates that the division of work is as follows: SIA "ÿdiens.lv" will carry out employee selection, employee training, on-site work organization, service provision organization, and filing of administrative documents (volume as a percentage of the contract price – 60%), while the description of work of SI "Bruneros" includes supervision and control, financial participation, development and preparation of necessary documents, including technological maps, menus, self-control forms, etc. (volume as a percentage of the contract price – 40%). As indicated by the applicant in the additional explanations provided on October 7, 2020 *(page 38 of the case),* the preparation of food portions will be carried out by SIA "ÿdiens.lv", while SI "Bruneros" will ensure the involvement of its specialists in order to monitor and instruct the activities of SIA "ÿdiens.lv" based on its experience.

In the court's assessment, the information indicated in the aforementioned explanations regarding the involvement of specialists from SI "Bruneros" in the supervision and instruction of the activities of SIA "ÿdiens.lv" in connection with the fact that in fact only SIA "ÿdiens.lv" will prepare the food portions does not give the customer the necessary confidence or security that SI "Bruneros"'s experience in preparing food portions will be specifically and effectively used in the performance of the competitive contract.

The applicant has indicated that the merchants included in the applicant had agreed only on a preliminary process for executing the tender agreement, which could be changed if necessary, but the aforementioned statement is not confirmed by either the decision of the applicant's members or the clarifying letters to the client.
The aforementioned documents do not mention anything about the fact that SI "Bruneros" could, if necessary, be involved in performing work other than administrative work. In this regard, it should also be noted that the applicant itself should know best and be able to explain how the procurement contract award procedure is carried out.

80.89.79.119 13.01.2025. 13:25 Anonymous system user

Machine Translated by Google

in the event of a breach of contract, it must be able to explain how the applicant will ensure, if necessary, that SI "Bruneros" will actually prepare meals in prisons in Latvia. However, the applicant had not explained this to either the contracting authority or the office *(Senate decision of 30 April 2021 in case No. 983/2021 (ECLI:LV:AT:2021:0430.A420136121.8.L) (paragraph 11).*

In circumstances where, according to the applicant's offer, the actual involvement of SI "Bruneros" in the preparation of the food portions referred to in subparagraph 4.1.1. of the tender regulations is not envisaged, the applicant's reference to SI "Bruneros'"s experience (number of food portions) in the relevant field, in the opinion of the court, is to be assessed as solely declarative and inconsistent with the purpose of the specific requirement of the regulations to provide the customer with a guarantee that the work will be performed by a contractor with appropriate experience.

[17] The applicant emphasizes that in this particular case, the decisive factor is that both merchants who are part of the applicant, as members of a general partnership, are jointly and severally liable with third parties – including the customer.

The Court does not consider that the joint and several liability of the two undertakings forming part of the applicant in relations with third parties (which is essentially a characteristic of a general partnership arising solely from the Commercial Law (see *the first paragraph of Article 77, the first paragraph of Article 94 of the Commercial Law))* automatically means that the previously acquired experience of both undertakings will actually be used in the performance of the specific procurement contract. The Court of Justice of the European Union has also indicated that the fact that under Latvian law the members of a general partnership are jointly and severally liable in relation to third parties, including the contracting authority, cannot affect the assessment of the criterion relating to the relevant professional experience of these members at the stage of the selection of tenderers in a public procurement procedure. Namely, at the stage of assessing the admissibility of candidatures, the contracting authority carries out a retrospective assessment in order to assess whether the tenderer has the characteristics that allow one to expect effective performance of the relevant contract. In such circumstances, the absence of those characteristics cannot be compensated for by a prospective legal link under which the members of a general partnership are legally obliged to be jointly and severally liable for the obligations of such a partnership *(Order of the Court of Justice of the European Union of 30 September 2022 in Case C-592/21 (ECLI:EU:C:2022:746) 32, 33. points).*

[18] Since it follows from the case materials (and which is not in dispute in the case) that the applicant as a general partnership does not have its own independent experience, while the individual experience of SIA "ÿdiens.lv" is not sufficient to fulfill the requirement of Sub-clause 4.1.1. of the tender regulations and the relevant experience of SI "Bruneros" in accordance with the information provided in the tender has not been effectively transferred to the applicant for use in the performance of the contract in a manner useful to the applicant, the court concludes that the applicant's tender does not comply with the experience requirement set out in Sub-clause 4.1.1. of the tender regulations.

Additionally, the court points out that it is not possible to clearly identify the experience gained for calendar years from the certificate, considering that The certificate indicates the terms of the contracts (several years), but the number of portions is listed for 1 (unidentifiable) year.

[19] The applicant has also pointed out a number of irregularities committed during the procurement procedure (excessively long evaluation of submitted bids, delaying decision-making deadlines (including office actions without establishing violations in the customer's actions), sending unjustified requests to the applicant).

Initially, the court points out that, in accordance with the established case law of the Senate, decisions taken and actions taken in the course of an administrative violation case are not subject to the control of administrative courts *(cf. see paragraph 5 of the Senate's decision of 24 March 2017 in case No. SKA-938/2017 (670002917), paragraph 7 of the decision of 23 July 2013 in case No. SKA-752/2013 (670008313).* The administrative court does not have the authority to impose an obligation on the institution to initiate administrative violation proceedings. Accordingly, the institution's actions in not initiating administrative violation proceedings are not subject to the control of the administrative court. Consequently, it is not possible to verify within the framework of the case under consideration whether the office was justified in not initiating administrative violation proceedings in connection with the applicant's application.

With regard to the procedural violations indicated by the applicant, the court, having reviewed the contracting authority's tender procedure report *(https:// www.eis.gov.lv/ EKEIS/ Supplier/ Procurement/ 14633),* the following conditions have been established.

[20] The deadline for submitting tenders in the competition was 19 December 2018. The evaluation of tenders began on 21 February 2019 (meeting minutes No. 2018/52/3), when it was decided to request additional information from tenderers (including the applicant) due to the need to verify the exclusion conditions referred to in Article 42 of the Public Procurement Law (the deadline for submitting information is 8 March 2019 at 11:00). Since the information provided by tenderers was received on 7 and 8 March 2019, the evaluation of tenders resumed on 20 March 2019 (meeting minutes No. 2018/52/4).

At the aforementioned meeting, a decision was made to repeatedly request additional information from the bidders to verify that the bidders had no tax debts as of December 19, 2018 (the deadline for submitting information is April 5, 2019 at 11:00). The information was received on March 29, 2019 and April 3, 2019, respectively. In view of the above, the evaluation of the bids resumed on May 10, 2019 (meeting minutes No. 2018/52/5), when it was decided to request additional information regarding the qualification documentation submitted by the bidders (the deadline for submitting information is May 21, 2019 at 11:00; information from one of the bidders was received on June 11, 2019). The evaluation of the offers was resumed at the meeting of the contracting authority's procurement commission on November 29, 2019 (minutes No. 2018/52/6), when a decision was made to award the contract award rights in all five parts of the procurement to the limited liability company "ALEKS UN V". By the decision of the bureau No. 4-1.2/20-6 of January 9, 2020, the decision of the contracting authority on the results of the tender in all five parts of the procurement subject was canceled and the contracting authority was instructed to eliminate the violations identified by the bureau within twenty working days from the date of notification of the decision (the decision was notified on January 14, 2020; Section 71, Part Seven of the Public Procurement Law) by re-evaluating the offers submitted in all five parts of the tender. The contracting authority carried out a repeated evaluation of the tenders on 13 February 2020 (meeting minutes No. 2018/52/7), re-awarding the contract awarding rights in all five parts of the procurement to the limited liability company "ALEKS UN V". By the decision of the bureau No. 4-1.2/20-46/2 of 14 April 2020, the contracting authority's decision on the results of the tender in all five parts of the procurement subject was cancelled and the contracting authority was instructed to eliminate the violations identified by the bureau within thirty working days from the date of notification of the decision (the decision was notified on 16 April 2020) by re-evaluating the tenders submitted in all five parts of the procurement subject. At the meeting of the contracting authority's procurement commission on May 8, 2020 (minutes No. 2018/52/8), it was decided to request additional information from the applicant (an explanation of how and to what extent both members of the general partnership will actually be involved in the execution of each specific contract and the information specified in Subsection 1.9.4 of the tender regulations). The applicant provided the requested information on 14 May 2020, while the evaluation of the bids resumed on 18 September 2020 (meeting minutes No. 2018/52/9), when it was decided to repeatedly request additional information from the applicant (an explanation of the proportion of the applicant's members who will prepare actual portions of food; indicate experience for one calendar year and present the information in such a way that the procurement commission of the contracting authority can identify the individual experience of the applicant and its members; a certificate of compliance of the applicant's member's management with the standards; a list of vehicles involved in the performance of the service, adding information on the facts about vehicle emission standards; confirmation of the involvement of a food technologist in the performance of the contract) (the deadline for submitting information is 2 October 2020 at 11:00). The applicant provided additional information on October 7, 2020 (on October 2, 2020, the applicant requested an extension of the deadline for providing information), additionally submitting a submission regarding the unlawful activities of the contracting authority's procurement commission with a request to initiate a service inspection and indicating that the applicant will, among other things, contact the Administrative Sanctions Department of the Bureau to assess the possible administrative violations of the contracting authority's procurement commission. At the meeting of the contracting authority's procurement commission on October 28, 2020 (minutes No. 2018/52/10), it was decided to inform the head of the contracting authority about the aforementioned submission. The contracting authority's procurement commission resumed the evaluation of the bids on January 18, 2021, having adopted the initial decision.

80.89.79.119 13.01.2025. 13:25 Anonymous system user

Machine Translated by Google

[21] Having assessed the information provided in the contracting authority's tender procedure report, the court does not see any objective reasons why the contracting authority, after receiving additional information on 21 May and 11 June 2019 and 14 May 2020, resumed the evaluation of tenders only on 29 November 2019 (more than 5 months after receiving the information) and 18 September 2020 (almost 4 months after receiving the information), respectively.
The court also finds that, in making the decision on determining the winner of the competition on February 13, 2020, the contracting authority did not comply with the deadline for making the decision specified in the Bureau's decision No. 4?1.2/20-6 of January 9, 2020 (the last date for making the decision was February 11, 2020). Taking the above into account, the court recognizes that the contracting authority has committed violations of procedural law in the case under consideration. At the same time, the court does not find any unjustified delay in the rest of the procurement procedure, taking into account that the evaluation of the tenders has been prolonged because the contracting authority has repeatedly requested information from the tenderers in order to obtain an objective picture of the tenderers' compliance with the requirements included in the regulations, and between the receipt of the additional information provided by the applicant on 7 October 2020 and the resumption of the evaluation of the tenders on 18 January 2021, the tender evaluation procedure was actually suspended due to the application submitted by the applicant regarding the need to initiate an internal inspection, which, among other things, questions the competence of the contracting authority's procurement commission in making decisions in the tender.

A violation of procedural law must be assessed in terms of its impact on the final decision. In relation to a private person, a procedural violation becomes legally significant only if it affected or could have affected the content of the decision. If it could have, it is considered significant *(Paragraph 7 of the Senate judgment of 11 August 2006 in case No. SKA-386/2006).*

In the case under consideration, the applicant has not substantiated the significance of the established violations in the assessment of whether the applicant's bid has been reasonably recognized as non-compliant with the requirements of the tender regulations by the appealed decision. The court also does not establish that the adoption of the appealed decision (as a final resolution of the initial decision) within a shorter period would change its content, namely, the legal consequences of the appealed decision (the applicant's non-compliance with Subsection 4.1.1 of the tender regulations) would be the same even if it were adopted within a procedurally objective period. Consequently, the delay in evaluating the bids and the delay in the procedural period in adopting the decision on determining the winner of the tender (decision of the contracting authority's procurement commission of 13 February 2020 (minutes of the meeting No. 2018/52/7)) are not considered to be significant procedural violations.

With regard to the applicant's indication that the contracting authority has unreasonably sent various types of requests to the applicant, the court, taking into account the information established in this judgment and provided in the tender procedure report, concludes that the information requested by the contracting authority was objectively necessary for the legal assessment of the applicant's offer. Accordingly, the court does not establish a procedural violation in the actions of the contracting authority by repeatedly requesting additional information from the applicant regarding its submitted offer, as permitted by Part 41 of the Public Procurement Law.

[22] In addition, the court notes that, taking into account the considerations set out in this judgment, namely why the appealed decision is lawful and justified, the court has no doubt that the decision was made based on objective criteria. Accordingly, the applicant's considerations regarding the impartiality of the office official in making the appealed decision are also unfounded.

[23] Summarizing the above, the court finds that the appealed decision is lawful.

Operative part

Based on the second part of Article 72 of the Public Procurement Law and the sixth part of Article 251 of the Administrative Procedure Law, the Administrative District Court

decided

to reject the application of the general partnership "ÿDIENS & KM.LV" for the position of the Procurement Monitoring Bureau's application review commission for 2021 The recognition of the February 25 decision No. 4-1.2/21-37 as illegal.

The judgment may be appealed to the Senate Administrative Cases Department within one month from the date of the judgment by submitting a cassation complaint to the Riga Courthouse of the Administrative District Court.

Judge	A.Patmalniece
Judge	M.Romanova
Judge	S.Audzere

80.89.79.119 13.01.2025. 13:25 Anonymous system user

EU:C:2022:868

JUDGMENT OF THE COURT (Eighth Chamber)

10 November 2022 (*)

(Reference for a preliminary ruling – Public system for the rental and shared use of electric cars – Distinction between the concepts of 'services concessions' and 'public supply contracts' – Directive 2014/23/EU – Article 5(1)(b) – Article 20(4) – Concept of 'mixed contracts' – Article 8 – Determining the value of a services concession – Criteria – Article 27 – Article 38 – Directive 2014/24/EU – Article 2(1), points 5 and 8 – Implementing Regulation (EU) 2015/1986 – Annex XXI – Possibility of imposing a condition concerning the registration of a specific professional activity under national law – Impossibility of imposing that condition on all members of a temporary business association – Regulation (EC) No 2195/2002 – Article 1(1) – Obligation to refer exclusively to the 'Common Procurement Vocabulary' in concession documents – Regulation (EC) No 1893/2006 – Article 1(2) – Impossibility of referring to the 'NACE Rev. 2' nomenclature in the concession documents)

In Case C-486/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the Review of Public Procurement Procedures, Slovenia), made by decision of 2 August 2021, received at the Court on 9 August 2021, in the proceedings

SHARENGO najem in zakup vozil d.o.o.

v

Mestna občina Ljubljana,

THE COURT (Eighth Chamber),

composed of N. Piçarra, acting for the President of the Chamber, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mestna občina Ljubljana, by R. Kokalj, odvetnik,

– the Czech Government, by L. Halajová, M. Smolek and J. Vláčil, acting as Agents,

– the Austrian Government, by A. Posch, acting as Agent,

– the European Commission, by U. Babovič, M. Kocjan, A. Kraner, P. Ondrůšek and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(1), Article 5(1)(b), Article 8(1) and (2) and Article 38(1) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), as amended by Commission Delegated Regulation (EU) 2019/1827 of 30 October 2019 (OJ 2019 L 279, p. 23) (‘Directive 2014/23’), of Article 2(1), points 5 and 9, the third subparagraph of Article 3(4), Article 4(b) and (c), Article 18(1) and Article 58(1) and (2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2019/1828 of 30 October 2019 (OJ 2019 L 279, p. 25) (‘Directive 2014/24’), of Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ 2002 L 340, p. 1), of Annex I to Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains (OJ 2006 L 393, p. 1), as well as of Annex XXI to Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011 (OJ 2015 L 296, p. 1 and corrigendum OJ 2017 L 172, p. 36).

2 The request has been made in proceedings between SHARENGO najem in zakup vozil d.o.o. (‘Sharengo’) and Mestna občina Ljubljana (Urban municipality of Ljubljana, Slovenia) (‘Municipality of Ljubljana’) concerning the publication by the latter of a call for tenders intended to select a concessionaire with a view to implementing a project for the establishment and management of a public system for the rental and sharing of electric vehicles in the territory of that municipality.

Legal context

European Union law

Directive 2014/23

3 Recitals 1, 4, 8, 18, 20 and 52 of Directive 2014/23 state:

‘(1) The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the internal market. As a result, economic operators, in particular small and medium-sized enterprises (SMEs), are being deprived of their rights within the internal market and miss out on important business opportunities, while public authorities may not find the best use of public money so that Union citizens benefit from quality services at best prices. An adequate, balanced and flexible legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen. Such a legal framework would also afford greater legal certainty to economic operators and could be a basis for and means of further opening up international public procurement markets and boosting world trade. Particular importance should be given to improving the access opportunities of SMEs throughout the Union concession markets.

…

(4) The award of public works concessions is presently subject to the basic rules of Directive 2004/18/EC of the European Parliament and of the Council [of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)]; while the award of services concessions with a cross-border interest is subject to the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the principles of free movement of goods, freedom of establishment and freedom to provide services, as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. There is a risk of legal uncertainty related to divergent interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of

various Member States. Such risk has been confirmed by the extensive case-law of the Court of Justice of the European Union which has, nevertheless, only partially addressed certain aspects of the award of concession contracts.

…

(8) For concessions equal to or above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives and to ensure a certain degree of flexibility. Member States should be allowed to complete and develop further those provisions if they find it appropriate, in particular to better ensure compliance with the principles set out above.

…

(18) Difficulties related to the interpretation of the concepts of concession and public contract have generated continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union. Therefore, the definition of concession should be clarified, in particular by referring to the concept of operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity. The application of specific rules governing the award of concessions would not be justified if the contracting authority or contracting entity relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset.

…

(20) An operating risk should stem from factors which are outside the control of the parties. Risks such as those linked to bad management, contractual defaults by the economic operator or to instances of *force majeure* are not decisive for the purpose of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession. An operating risk should be understood as the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk. Demand risk is to be understood as the risk on actual demand for the works or services which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand. For the purpose of assessment of the operating risk the net present value of all the investment, costs and revenues of the concessionaire should be taken into account in a consistent and uniform manner.

…

(52) The duration of a concession should be limited in order to avoid market foreclosure and restriction of competition. In addition, concessions of a very long duration are likely to result in the foreclosure of the market, and may thereby hinder the free movement of services and the freedom of establishment. However, such a duration may be justified if it is indispensable to enable the concessionaire to recoup investments planned to perform the concession, as well as to obtain a return on the invested capital. Consequently, for concessions with a duration greater than five years the duration should be limited to the period in which the concessionaire could reasonably be expected to recoup the investment made for operating the works and services

together with a return on invested capital under normal operating conditions, taking into account specific contractual objectives undertaken by the concessionaire in order to deliver requirements relating to, for example, quality or price for users. The estimation should be valid at the moment of the award of the concession. It should be possible to include initial and further investments deemed necessary for the operating of the concession in particular expenditure on infrastructure, copyrights, patents, equipment, logistics, hiring, training of personnel and initial expenses. The maximum duration of the concession should be indicated in the concession documents unless duration is used as an award criterion of the contract. Contracting authorities and contracting entities should always be able to award a concession for a period shorter than the time necessary to recoup the investments, provided that the related compensation does not eliminate the operating risk.'

4 Entitled 'Subject matter and scope', Article 1 of that directive provides:

'1. This Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, whose value is estimated to be not less than the threshold laid down in Article 8.

2. This Directive applies to the award of works or services concessions, to economic operators by:

(a) Contracting authorities; …

…'

5 Under Article 3 of that directive, entitled 'Principle of equal treatment, non-discrimination and transparency':

'1. Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

…'

6 Headed 'Definitions', Article 5 of Directive 2014/23 provides:

'For the purposes of this Directive the following definitions apply:

(1) "concessions" means works or services concessions, as defined in points (a) and (b):

…

(b) "services concession" means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible;

…’

7 Entitled ‘Threshold and methods for calculating the estimated value of concessions’, Article 8 of that directive states:

‘1. This Directive shall apply to concessions the value of which is equal to or greater than EUR 5 350 000.

2. The value of a concession shall be the total turnover of the concessionaire generated over the duration of the contract, net of [value-added tax (VAT)], as estimated by the contracting authority or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.

…

3. The estimated value of the concession shall be calculated using an objective method specified in the concession documents. When calculating the estimated value of the concession, contracting authorities and contracting entities shall, where applicable, take into account in particular:

(a) the value of any form of option and any extension of the duration of the concession;

(b) revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority or contracting entity;

(c) payments or any financial advantage in any form whatsoever made by the contracting authority or contracting entity or any other public authority to the concessionaire, including compensation for compliance with a public service obligation and public investment subsidies;

…’

8 According to Article 18 of that directive, entitled ‘Duration of the concession’:

‘1. The duration of concessions shall be limited. The contracting authority or contracting entity shall estimate the duration on the basis of the works or services requested.

2. For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession.’

9 Entitled ‘Mixed contracts’, Article 20 of that directive provides:

‘…

2. Where the different parts of a given contract are objectively separable, paragraphs 3 and 4 shall apply. Where the different parts of a given contract are objectively not separable, paragraph 5 shall apply.

…

In the case of contracts intended to cover several activities, one of them being subject either to Annex II of this Directive or to Directive 2014/25/EU [of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243)], the applicable provisions shall be established in accordance with Article 22 of this Directive and Article 6 of Directive [2014/25], respectively.

…

4. In the case of mixed contracts containing elements of concessions as well as elements of public contracts covered by Directive [2014/24] or contracts covered by Directive [2014/25], the mixed contract shall be awarded in accordance with Directive [2014/24] or Directive [2014/25], respectively.

…’

10 Entitled ‘Economic operators’, Article 26 of Directive 2014/23 provides, in paragraph 2 thereof:

‘Groups of economic operators, including temporary associations, may participate in concession award procedures. They shall not be required by contracting authorities or contracting entities to have a specific legal form in order to submit a tender or a request to participate.

Where necessary, contracting authorities or contracting entities may clarify in the concession documents how groups of economic operators shall meet the requirements as to economic and financial standing or technical and professional ability referred to in Article 38 provided that this is justified by objective reasons and is proportionate. Member States may establish standard terms for how groups of economic operators are to meet those requirements. Any conditions for the performance of a concession by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate.’

11 Entitled ‘Nomenclatures’, Article 27 of that directive provides, in paragraph 1 thereof:

‘Any references to nomenclatures in the context of the award of concessions shall be made using the “Common Procurement Vocabulary (CPV)” as adopted by Regulation [No 2195/2002].’

12 Entitled ‘Concession notices’, Article 31 of that directive states, in paragraph 2 thereof:

‘Concession notices shall contain the information referred to in Annex V and, where appropriate, any other information deemed useful by the contracting authority or entity, in accordance with the format of standard forms.’

13 Entitled ‘Information to be included in concession notices referred to in Article 31’, Annex V to the same directive provides:

‘…

4. Description of the concession: nature and extent of works, nature and extent of services, order of magnitude or indicative value and, where possible, duration of the contract. Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.

5. CPV codes. Where the concession is divided into lots, this information shall be provided for each lot.

…

7. Conditions for participation, including:

…

(b) where appropriate, indication whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession; reference to the relevant law, regulation or administrative provision;

(c) a list and brief description of selection criteria where applicable; minimum level(s) of standards possibly required; indication of required information (self-declarations, documentation).

…’

14 Entitled ‘Procedural guarantees’, Article 37 of Directive 2014/23 provides:

‘…

2. The contracting authority or contracting entity shall provide:

(a) in the concession notice, a description of the concession and of the conditions of participation;

(b) in the concession notice, in the invitation to submit a tender or in other concession documents, a description of the award criteria and, where applicable, the minimum requirements to be met.

…

4. The contracting authority or contracting entity shall communicate the description of the envisaged organisation of the procedure and an indicative completion deadline to all participants. Any modification shall be communicated to all participants and, to the extent that they concern elements disclosed in the concession notice, advertised to all economic operators.

…’

15 Entitled ‘Selection and qualitative assessment of candidates’, Article 38 of that directive provides:

‘1. Contracting authorities and contracting entities shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of the candidates or tenderers, on the basis of self-declarations, reference or references to be submitted as proof in accordance with the requirements specified in the concession notice that shall be non-discriminatory and proportionate to the subject matter of the concession. The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject matter of the concession and the purpose of ensuring genuine competition.

2. With a view to meeting the conditions for participation laid down in paragraph 1, an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority or the contracting entity that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing a commitment by those entities to that effect. With regard to financial standing, the contracting authority or the contracting entity may require that the economic operator and those entities are jointly liable for the execution of the contract.

3. Under the same conditions, a group of economic operators as referred to in Article 26 may rely on the capacities of participants in the group or of other entities.

…’

Directive 2014/24

16 Entitled ‘Subject matter and scope’, Article 1 of Directive 2014/24 provides:

‘1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.

…’

17 Entitled ‘Definitions’, Article 2 of that directive provides:

‘1. For the purposes of this Directive, the following definitions apply:

…

(5) “public contracts” means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

…

(8) “public supply contracts” means public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations;

(9) “public service contracts” means public contracts having as their object the provision of services other than those referred to in point 6;

…’

18 Under the heading ‘Mixed procurement’, Article 3 of Directive 2014/24 states:

‘…

4. In the case of contracts which have as their subject matter procurement covered by this Directive as well as procurement not covered by this Directive, contracting authorities may choose to award separate contracts for the separate parts or to award a single contract. Where contracting authorities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where contracting authorities choose to award a single contract, this Directive shall, unless otherwise provided in Article 16, apply to the ensuing mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

In the case of mixed contracts containing elements of supply, works and service contracts and of concessions, the mixed contract shall be awarded in accordance with this Directive, provided that the estimated value of the part of the contract which constitutes a contract covered by this Directive, calculated in accordance with Article 5, is equal to or greater than the relevant threshold set out in Article 4.

…’

19 Under the heading ‘Threshold amounts’, Article 4 of that directive provides, in paragraph 1 thereof:

‘This Directive shall apply to procurements with a value net of [VAT] estimated to be equal to or greater than the following thresholds:

…

(b) EUR 139 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;

(c) EUR 214 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities …

…’

20 Article 18 of Directive 2014/24 sets out the ‘principles of procurement’.

21 Entitled ‘Nomenclatures’, Article 23 of that directive provides, in paragraph 1 thereof:

‘Any references to nomenclatures in the context of public procurement shall be made using the Common Procurement Vocabulary (CPV) as adopted by Regulation [No 2195/2002].’

22 Under the heading ‘Form and manner of publication of notices’, Article 51 of Directive 2014/24 provides, in the first subparagraph of paragraph 1 thereof:

‘Notices referred to in Articles 48, 49 and 50 shall include the information set out in Annex V in the format of standard forms, including standard forms for corrigenda.’

23 Entitled ‘Information to be included in notices’, Annex V to that directive includes Part C relating to ‘information to be included in contract notices (as referred to in Article 49)’, which states:

‘…

7. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services. Where the contract is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.

…’

24 Under the heading ‘Selection criteria’, Article 58 of that directive provides, in paragraphs 1 and 2 thereof:

‘1. Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

2. With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as described in Annex XI, or to comply with any other request set out in that Annex.

In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.’

25 Under the heading ‘Registers’, Annex XI to that directive provides:

‘The relevant professional and trade registers and corresponding declarations and certificates for each Member State are:

– …

– in Slovenia, the “sodni register” and the “obrtni register”;

– …’

Implementing Regulation 2015/1986

26 Article 4 of Implementing Regulation 2015/1986 provides:

‘Contracting authorities and contracting entities shall use, for the publication in the *Official Journal of the European Union* of the notices referred to in Articles 31, 32 and 43 of Directive [2014/23], the standard forms set out in Annexes XI, XVII, XX, XXI and XXII to this Regulation.’

27 The standard form set out in points II.1.1 to II.1.4, II.2.1, II.2.2 and II.2.4 of Annex II to that implementing regulation requires the contracting authority to specify, in the contract notice, the title of the contract, the main CPV code, the type of contract, a succinct description, the additional CPV code(s) and the description of the services, respectively.

28 Annex XXI to that implementing regulation contains a standard form relating to ‘concession notice[s]’ within the meaning of Directive 2014/23, point III.1.1 of which reads as follows:

‘Suitability to pursue the professional activity, including requirements relating to enrolment on professional or trade registers[:]

List and brief description of conditions, indication of information and documentation required[.]’

Regulation No 2195/2002

29 Recitals 1 and 3 of Regulation No 2195/2002 state:

‘(1) The use of different classifications is detrimental to the openness and transparency of public procurement in Europe. Its impact on the quality of notices and the time needed to publish them is a de facto restriction on the access of economic operators to public contracts.

…

(3) There is a need to standardise, by means of a single classification system for public procurement, the references used by the contracting authorities and entities to describe the subject of contracts.’

30 Article 1 of Regulation No 2195/2002 lays down, in paragraphs 1 and 2 thereof:

‘1. A single classification system applicable to public procurement, known as the “Common Procurement Vocabulary” or “CPV” is hereby established.

2. The text of the CPV is set out in Annex I.’

Regulation No 1893/2006

31 Under the heading ‘Subject matter and scope’, Article 1 of Regulation No 1893/2006 provides:

‘1. This Regulation establishes a common statistical classification of economic activities in the [European Union], hereinafter referred to as “NACE Rev. 2”. This classification ensures that [EU] classifications are relevant to the economic reality and enhances the comparability of national, [EU] and international classifications and, hence, of national, [EU] and international statistics.

2. This Regulation shall apply only to the use of the classification for statistical purposes.’

Slovenian law

32 The Zakon o nekaterih koncesijskih pogodbah (Law on certain concession contracts) (Uradni list RS, No 9/2019), in the version applicable to the dispute in the main proceedings, governs certain works and

services concession contracts with an estimated value net of VAT equal to or greater than that provided for in Article 8(1) of Directive 2014/23.

The dispute in the main proceedings and the questions referred for a preliminary ruling

33 In 2020, the Municipality of Ljubljana decided to initiate a procedure for the award of a concession for the establishment and management, in its territory, of a rental and sharing service for electric vehicles. The total value of the project was estimated at EUR 14 989 000 net of VAT, the financial contribution of the private partner being assessed at EUR 14 570 000 net of VAT and that of the municipality being assessed at EUR 36 000 net of VAT.

34 The financial contribution of the private partner was to be broken down as follows: existing fleet of electric vehicles: EUR 5 000 000; existing technology: EUR 1 500 000; staff and development: EUR 1 400 000; acquisition of new electric vehicles during the concession: EUR 6 250 000; construction of parking spaces: EUR 180 000; creation of charging stations: EUR 240 000.

35 The documents relating to the project at issue use the main CPV code 60100000. In addition, under the heading ‘Contributions of the grantor and the concessionaire’, it is provided that ‘the proceeds of the taxes for the parking spaces and charging stations as well as the parking taxes are to be considered as the contribution of the grantor for the implementation of the project’.

36 Furthermore, in its ‘Instructions for submitting a tender’, in order to describe the ‘subject matter of the concession relationship’, the Municipality of Ljubljana indicated that the implementation of the project for the establishment and management of a public system for the hiring and sharing of electric vehicles covered:

‘(a) the realisation of the investments necessary for the establishment of a public system of rental and sharing of electric vehicles in the territory of [the Municipality of Ljubljana] and which includes:

– the setting up of a fund of at least 200 electric vehicles for the establishment of a public system for the hiring and sharing of electric vehicles …,

– the design of a public network of spaces for the use of vehicles and charging centres for electric vehicles …,

– the creation of a modern and user-friendly IT solution for the user to provide the service of renting and sharing electric vehicles,

(b) the provision of the electric vehicle rental and sharing service …, including the creation of a centralised electric vehicle rental and sharing system which allows for the monitoring and supervision of the conduct of the project and in particular:

– the obligation to guarantee and manage a fleet of vehicles in perfect working order, which includes in particular regular services and repairs, especially in the event of traffic accidents, registration, insurance and other operating expenses for the normal use of vehicles. … The concessionaire also assumes the obligation to modernise the fleet of vehicles on a regular basis at the pace specified in the contract,

– the obligation to ensure and manage a network of spaces to borrow vehicles and charging points to charge electric vehicles, the obligation to maintain them on a regular basis and the obligation to guarantee charging points in working order on the ground under the conditions and according to the regime to be defined in the contract,

– the guarantee of an adequate system of support for users.

…

Main obligations of the concessionaire:

– …

– the concessionaire assumes, during the period covered by the contract, all the technical, technological and financial risks arising from the implementation of the investment and other measures and in respect of the provision of the electric vehicle rental and sharing service, including the risk as to the profitability of the investments made. The concessionaire also assumes the risk as to the accessibility and availability of the system created, as well as the risk linked to demand;

– …’

37 It also follows from those instructions that the project at issue in the main proceedings is intended to protect the environment and to enhance sustainable development, in particular by adopting concepts of sustainable mobility. Finally, under the heading of ‘grounds for exclusion’, the said instructions include the obligation for an applicant to be registered to pursue, in the national standard classification of activities, activity 77.110 (Renting and leasing of cars and light motor vehicles) (‘activity 77.110’), it being specified that, in the case of a tender submitted in partnership, the condition must be met by each of the partners.

38 On 17, 18 and 19 February 2021, Sharengo raised various questions related to the call for tenders through the public procurement portal and indicated that some of the requirements of the Municipality of Ljubljana were not in line with the Slovenian legislation on public-private partnerships and public procurement.

39 As early as 19 February 2021, and thus even before the expiry of the period available to that municipality to respond to those questions, Sharengo filed a request for review before that municipality. In particular, it argued that, since the subject matter of the contract includes the execution of investments not directly related to the rental and sharing of electric vehicles, the requirement that all partners be registered for activity 77.110 was disproportionate and discriminatory. In Sharengo’s view, such a requirement restricts competition and prevents cooperation with partners established abroad. Sharengo therefore sought annulment of the various conditions, criteria and requirements and, in the alternative, annulment of the entire tendering procedure.

40 By decision of 2 March 2021, the Municipality of Ljubljana rejected that application for review on the ground that it was premature.

41 Sharengo’s questions nevertheless led the Municipality of Ljubljana to specify that the requirement to be registered for activity 77.110 must be met by the candidate and that, in the case of a tender submitted in partnership, it must be met by each of the partners because the conclusion of the partnership contract establishes joint and several liability between them. By contrast, the other economic operators involved in the candidate’s declaration do not need to satisfy the condition. In addition, if the economic operators are not enrolled on the trade or professional register of the Republic of Slovenia, the grantor should take into account the classification which, according to its description, corresponds to the subject matter of the contract.

42 Having rejected Sharengo’s application for review, the Municipality of Ljubljana was required to forward it for examination to the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of procedures for the award of public contracts, Slovenia), which it did on 8 March 2021.

43 At the latter’s invitation, the Municipality of Ljubljana stated, in a letter of 7 April 2021, first, that the Law on certain concession agreements did not apply because the threshold for its application had not been reached, the estimated value of the concession being EUR 3 108 103 net of VAT. Furthermore, according to the municipality, it does not pay consideration directly for the operation of the concession. It confines itself, on the one hand, to waiving the rights to parking on the parking spaces to be used for the service at issue in the main proceedings, the amount of which is EUR 3 430 328 net of VAT and, on the other hand, to covering the costs of the regular maintenance of those spaces, up to an estimated value of EUR 84 375 net of VAT. Finally, according to the municipality, it has revenue in respect of the annual taxes for the parking spaces up to an estimated value of EUR 345 000 net of VAT, and taxes for

the charging stations amounting to an estimated value of EUR 62 000 net of VAT. Secondly, according to the Municipality of Ljubljana, its objective is to create a rental and sharing service for electric vehicles and not to acquire goods. Thirdly, that municipality took the view that, having regard to the proposed risk allocation, the CPV code chosen, which concerns the rental of goods, might be misleading. According to the municipality, an electric vehicle sharing system goes beyond the mere rental of an electric vehicle and includes a complete service for the operation of the sharing system which is, in content and conceptually, broader than the mere rental of a vehicle.

44 As a preliminary point, the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of procedures for the award of public contracts) notes that, in the judgments of 8 June 2017, *Medisanus* (C-296/15, EU:C:2017:431, paragraphs 34 to 38), and of 10 September 2020, *Tax-Fin-Lex* (C-367/19, EU:C:2020:685), the Court of Justice recognised it as a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU. It adds that, where, as in the main proceedings, the application for review relates to the tender specifications, which cover, in addition to the tender specifications themselves, the documentation relating to the award of the contract or concession, it acts as a ‘court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’ within the meaning of the third paragraph of Article 267 TFEU.

45 In the present case, the jurisdiction of the referring court to resolve the dispute in the main proceedings depends on whether the future contractual relationship between the municipality and the economic operator may be classified as a ‘services concession’, within the meaning of Article 5(1)(b) of Directive 2014/23, or as a ‘public contract’, within the meaning of Article 2(1)(5) of Directive 2014/24.

46 From that point of view, the referring court considers that it is faced with three difficulties in interpreting EU law.

47 In the first place, the referring court raises the question of the detailed rules for determining the estimated value of a services concession. It notes, in that regard, that the Municipality of Ljubljana took the view that the private partner’s financial contribution amounts to EUR 14 570 000 net of VAT, whereas its own contribution amounts to EUR 36 000 net of VAT. According to the referring court, that estimate is, however, incorrect since, as is apparent from paragraph 43 of this judgment, the Municipality of Ljubljana accepted that its contribution will amount to EUR 3 108 103 net of VAT. The investment of that municipality therefore exceeds the thresholds laid down in Article 4(b) and (c) of Directive 2014/24, but not the threshold of EUR 5 350 000 set by Article 8(1) of Directive 2014/23.

48 The referring court submits that, that being so, since the estimated value of the private partner’s financial contribution is EUR 14 570 000 net of VAT, it is logical that the revenues of that partner, which seeks to make a profit with the implementation of the project, should amount to at least EUR 14 977 000 net of VAT, in order to cover all investments and the payment of the annual taxes for the parking spaces and the annual taxes for the charging stations. As the case may be, even if it were necessary to exclude from that calculation the investment of EUR 5 000 000 net of VAT in the existing fleet of electric vehicles, the contribution of the private partner would remain above the threshold of EUR 5 350 000 net of VAT.

49 In the second place, the referring court asks (i) whether the project at issue in the main proceedings is intended to provide the Municipality of Ljubljana with supplies or to entrust to its contractor the provision and management of services and (ii) whether the CPV code selected by the contracting authority in the contract or concession documentation may have an influence on the classification as a contract.

50 Since the future contractual relationship between the municipality and the economic operator appears to involve both elements of a public supply contract within the meaning of Article 2(1)(8) of Directive 2014/24 and elements of a services concession within the meaning of Article 5(1)(b) of Directive 2014/23, the referring court asks whether that future contractual relationship should not be classified as a ‘mixed contract’ within the meaning of the third subparagraph of Article 3(4) of Directive 2014/24.

51 In the third place, that court raises the question whether the Municipality of Ljubljana may require each of the partners to meet the condition of registration of activity 77.110 without infringing Article 38(1) of Directive 2014/23 or Article 58(1) and (2) of Directive 2014/24, read in conjunction

with the principles of proportionality, equal treatment and non-discrimination. The consequence of that requirement is, in particular, that a trader cannot commence its activity until it has enrolled with the Agencija Republike Slovenije za javnopravne evidence in storitve (Agency of the Republic of Slovenia responsible for the management of public registers and associated services) on the trade register of the Republic of Slovenia.

52 The referring court notes, in that regard, that, while Article 58(1) and (2) of Directive 2014/24 allows the contracting authority to require economic operators to be enrolled in one of the professional and trade registers which are kept in the Member State of establishment, the concept of 'professional activity' does not appear in Directive 2014/23. That silence in Article 38(1) of that directive could just as easily be interpreted as a prohibition for the contracting authority to set a condition concerning professional activity as a tacit authorisation to include such a condition. Moreover, the latter interpretation appears to be supported by point 7(c) of Annex V to that directive and by point III.1.1 of Annex XXI to Implementing Regulation 2015/1986.

53 The referring court also observes that the Municipality of Ljubljana did not require that the condition of participation linked to 'professional activity' be satisfied by economic operators which are in a relationship of subordination, such as subcontractors, but only by economic operators which are in a relationship of coordination with other economic operators, in the same way as the members of a group of economic operators on the ground that they are bound by joint and several liability. However, according to the referring court, such a requirement is dissuasive for economic operators which are not registered to pursue activity 77.110 or the equivalent activities falling within NACE Rev. 2 nomenclature in Class 77.11, as provided for in Regulation No 1893/2006, but which wish to be associated with one or more other economic operators entitled to carry out that activity.

54 It is against that background that the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of procedures for the award of public contracts) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, it being specified that the second to seventh questions are based on the premiss that Directive 2014/23 is applicable to the dispute in the main proceedings and that the eighth, tenth and eleventh questions are put only in the alternative, in the event that the Court should conclude that Directive 2014/24 is applicable:

'(1) Is Regulation [No 2195/2002] to be interpreted as meaning that the hire of passenger cars without a driver falls not within Group 601 of the Common Procurement Vocabulary (CPV), but instead within Group 341 of the CPV, with the addition of code PA01-7 Hire, from the Supplementary Vocabulary, completing the description, which is unaffected by code PB04-7 Without driver from the Supplementary Vocabulary, the combination of the codes from Group 341 of the CPV with the code PA01-7 Hire from the Supplementary Vocabulary meaning that the hire of passenger cars without a driver should be considered a supply contract, not a service contract and, consequently, where the bulk of the investment from the economic operator in the execution of a project – one to create a public system for the hire and sharing of electric vehicles – consists in the supply of electric vehicles, and where that investment is even greater than the contracting authority's investment in the project, the "services" element referred to in Article 5(1)(b) of Directive [2014/23] is not fulfilled and, therefore, the contract for the execution of such a project is not a "services concession" within the meaning of Article 5(1)(b) of Directive [2014/23]?

(2) Is the concept of "the provision and management of services" in Article 5(1)(b) of Directive [2014/23] to be interpreted as meaning that:

(a) the concept of "the provision of services" in Article 5(1)(b) of Directive [2014/23] has the same meaning as the concept of "the provision of services" in Article 2(1)(9) of Directive [2014/24], such that the concept of "the provision of services" in Article 5(1)(b) of Directive [2014/23] means that, in the case of the creation of a public system for the hire and sharing of electric vehicles, the economic operator provides services ancillary to the hire and sharing of electric vehicles, and carries on activities which go beyond the hire and sharing of electric vehicles,

and

(b) the concept of "the management of services" in Article 5(1)(b) of Directive [2014/23] means that the economic operator exercises the "right to exploit the services", as mentioned further on in Article 5(1)(b) of Directive [2014/23], in order to generate revenue, and therefore the concept of "the management of services" in Article 5(1)(b) of Directive [2014/23] means that, in the case of the creation of a public system for the hire and sharing of electric vehicles, an economic operator, by reason of the provision of services falling within the scope of the hire and sharing of electric vehicles and activities going beyond the hire and sharing of electronic vehicles, has the right to charge users for the provision of the services and is not required to pay parking fees to the municipality or to bear the costs of regular maintenance of parking spaces, such that it is legitimate for it to generate revenue on that basis?

(3) Is the concept of the "total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the contracting entity, in consideration for the … services being the object of the concession", in the first subparagraph of Article 8(2) of Directive [2014/23], to be interpreted as meaning that the "total turnover of the concessionaire" also includes payments made to the concessionaire by users and that, consequently, such payments also constitute "consideration for the … services being the object of the concession"?

(4) Is Article 8(1) of Directive [2014/23] to be interpreted as meaning that Directive [2014/23] applies where the value of the investments or the value of the investments and costs borne by the economic operator in connection with a services concession, or borne by the economic operator and by the contracting authority in connection with a services concession (manifestly) exceeds EUR 5 350 000, excluding VAT?

(5) Is Article 38(1) of Directive [2014/23] to be interpreted as permitting a contracting authority to impose a condition of participation relating to professional activity, and to require economic operators to provide evidence of the fulfilment of that condition, including in accordance with [Implementing Regulation 2015/1986], which sets out, in Annex XXI, the concession notice (standard form 24), which contains a Section III.1.1. Suitability to pursue the professional activity, including requirements relating to enrolment on professional or trade registers?

(6) If [the fifth question] is answered in the affirmative, is Article 38(1) of Directive [2014/23], in the light of the principles of equal treatment and non-discrimination mentioned in Article 3(1) of [that directive], to be interpreted as meaning that, in setting the condition of participation relating to professional activity, a contracting authority may use the national item NACE 77.110 for the description of the activity of Renting and leasing of cars and light motor vehicles, which has the same meaning as in Regulation [No 1893/2006] in Annex I, NACE [Rev.] 2, Class 77.11 Renting and leasing of cars and light motor vehicles?

(7) If [the fifth question] is answered in the affirmative, is Article 38(1) of Directive [2014/23], in particular in so far as it refers to the requirement of proportionality and in the light of the principles of equal treatment and non-discrimination mentioned in Article 3(1) of [that directive], to be interpreted as meaning that a contracting authority may require that the condition of registration for the pursuit of the activity of renting and leasing of cars and light motor vehicles is fulfilled by each of the partners?

(8) Is Article 2(1)(8) of Directive [2014/24] to be interpreted as meaning that it is a "public supply contract" when (in relation to the economic operator's investment) an essential part of the future contractual relationship between the municipality and the economic operator relates to the hire and sharing of electronic vehicles intended for users of a public electronic vehicle hire and sharing system, where the municipality does not invest directly in the implementation of the project for the creation of a public system for the hire and sharing of electronic vehicles by paying money to the economic operator, but instead invests indirectly, through the waiving of parking fees for a period of 20 years and through the provision of regular maintenance of parking spaces, and where the value of that investment exceeds, in aggregate, the value indicated in

Article 4(b) or (c) of Directive [2014/24], and where the investment from the municipality is, however, (substantially) less than both the economic operator's investment as a whole in the project for the creation of a public system for the hire and sharing of electric vehicles, and the economic operator's investment in the part of the project which relates to electronic vehicles, notwithstanding that users will pay the economic operator for the use of the electronic vehicles and that the economic operator's success in generating revenue will depend on user demand, which will be indicative of the financial success of the public system for the hire and sharing of electronic vehicles, for which reason the economic operator bears the operating risk in the implementation of the project, which is a characteristic of a "services concession", within the meaning of Article 5(1)(b) of Directive [2014/23], rather than of a "public contract" within the meaning of Article 2(1)(5) of Directive [2014/24]?

(9) Is the third subparagraph of Article 3(4) of Directive [2014/24] to be interpreted as constituting the legal basis for the application of the regime established by Directive [2014/24] for the purposes of the award of a future contract between the municipality and the economic operator for the project to create a public system for the hire and sharing of electric vehicles, inasmuch as that contract must be considered a mixed contract, containing elements of a public supply and service contract and of a services concession, given that the municipality's investment in the implementation of the project exceeds the threshold set in Article 4(c) of Directive [2014/24]?

(10) Are Article 58(1) and Article 58(2) of Directive [2014/24], in the light of the principles of equal treatment and non-discrimination mentioned in Article 18(1) of Directive [2014/24], to be interpreted as meaning that, in setting a condition of participation relating to professional activity, a contracting authority may use the national item NACE 77.110 for the description of the activity of Renting and leasing of cars and light motor vehicles, which has the same meaning as in Regulation 1893/2006, in Annex I, NACE Rev. 2, Class 77.11 Renting and leasing of cars and light motor vehicles?

(11) Are Article 58(1) of Directive [2014/24], in particular in so far as it refers to the requirement of proportionality, and Article 58(2) of Directive [2014/24], in the light of the principles of equal treatment and non-discrimination mentioned in Article 18(1) of Directive [2014/24], to be interpreted as meaning that a contracting authority may require the condition of registration for the pursuit of the activity of [r]enting and leasing of cars and light motor vehicles to be fulfilled by each of the partners?'

Consideration of the questions referred

The first, second, eighth and ninth questions

55 By its first, second, eighth and ninth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 5(1)(b) of Directive 2014/23 must be interpreted as meaning that an operation whereby a contracting authority intends to entrust the establishment and operation of a service consisting of the hire and sharing of electric vehicles to an economic operator whose financial contribution is mostly allocated for the purchase of those vehicles, and in which the revenue of that economic operator will derive essentially from the fees paid by the users of that service constitutes a 'services concession'.

56 By those questions, the referring court seeks clarification as to the distinction between the concepts of concession and public contract, since their respective scopes are likely to overlap. Moreover, that is one of the objectives pursued by Directive 2014/23, recital 18 of which states that it seeks to clarify the definition of concession.

57 In that regard, both the concept of 'public contract' within the meaning of Article 2(1)(5) of Directive 2014/24 and that of 'concession' within the meaning of Article 5(1)(b) of Directive 2014/23 are autonomous concepts of EU law and must, on that basis, be interpreted uniformly throughout the territory of the European Union. It follows that the legal classification given to a contract by the law of a Member State is irrelevant for the purpose of determining whether that contract falls within the scope of one or other of those directives and that the question of whether a contract is to be classified as a

concession or a public contract must be assessed exclusively in the light of EU law (see, to that effect, judgments of 18 January 2007, *Auroux and Others,* C-220/05, EU:C:2007:31, paragraph 40; of 18 July 2007, *Commission* v *Italy*, C-382/05, EU:C:2007:445, paragraph 31; and of 10 November 2011, *Norma-A and Dekom*, C-348/10, EU:C:2011:721, paragraph 40).

58 Article 2(1)(5) of Directive 2014/24 defines 'public contracts' as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services'. In addition, Article 1(2) of that directive provides that 'procurement … is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose'.

59 The concept of a 'services concession' is defined in Article 5(1)(b) of Directive 2014/23 as 'a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment'. Consequently, and as stated in the second paragraph of that point, 'the award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible'.

60 It follows from a comparison of those definitions that a services concession is distinguished from a public contract by the grant to the concessionaire of the right, possibly together with a price, to operate the services which are the subject matter of the concession, the concessionaire enjoying, in the framework of the contract which has been concluded, a certain economic freedom to determine the conditions for the operation of the services which are granted to it and assuming, at the same time, the risk associated with operating those services (see, to that effect, judgment of 14 July 2016, *Promoimpresa and Others*, C-458/14 and C-67/15, EU:C:2016:558, paragraph 46).

61 Therefore, as stipulated in Article 1(1) of Directive 2014/23, provided that the estimated value of a concession is not less than the threshold laid down in Article 8 of that directive, the mere transfer to the concessionaire of the risk linked to the operation of services is sufficient to constitute a services concession within the meaning of Article 5(1)(b) of that directive. In that regard, it is irrelevant that the financial contribution of the economic operator is not the same as that of the contracting authority.

62 In the present case, as is apparent from the order for reference, the Municipality of Ljubljana does not seek to protect the concessionaire against any risk of losses. It is true that that municipality stated (i) that it would not receive the sum corresponding to the parking fees for the parking spaces to be used for the hire and sharing service for electric vehicles and (ii) that it would bear the costs of regular maintenance of the parking spaces made available to the economic operator.

63 That said, it is apparent from the order for reference that the contribution of the contracting authority referred to in the preceding paragraph cannot eliminate the operating risk for the economic operator. It follows that the operator will be able to recoup the investments made and the costs incurred in operating the service at issue in the main proceedings only if it derives significant revenue from the payment of charges by the users of the service.

64 Moreover, the fact that the financial contribution of the economic operator is predominantly allocated to the purchase of electric vehicles cannot lead to the project of a public system for the hire and sharing of electric vehicles envisaged by the Municipality of Ljubljana being regarded as a 'mixed contract' within the meaning of Article 20 of Directive 2014/23.

65 It is true that Article 20(4) of Directive 2014/23, read in conjunction with Article 20(2) of that directive, provides that, in the case of mixed contracts containing elements of concessions and other elements, which are separable, falling within the scope of public contracts covered by Directive 2014/24, the mixed contract must be awarded in accordance with the provisions of Directive 2014/24. However, for Article 20(4) of Directive 2014/23 to apply, it is still necessary to establish the existence of a public contract within the meaning of Directive 2014/24.

66 As has been observed in paragraph 58 of the present judgment, it follows from Article 1(2) of Directive 2014/24 that a procurement procedure is intended to lead to 'the acquisition[,] by means of a public contract[,] of works, supplies or services by one or more contracting authorities'. Article 2(1)(8) of that directive defines 'public supply contracts' as 'public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products'.

67 It follows that a contracting authority which organises a public supply contract intends itself to benefit from the products which it has purchased, leased or rented.

68 However, that is not so in the present case. As is apparent from the order for reference, in the dispute in the main proceedings, the Municipality of Ljubljana does not wish to acquire electric vehicles for its benefit. On the contrary, that municipality intends to entrust an economic operator with the operation of a service enabling third parties to hire vehicles, without seeking to take over it itself or to hire vehicles for its own use. More broadly, as stated in the instructions referred to in paragraph 36 above, the objective of that system is to contribute to reducing the environmental damage caused by motor traffic and to promote the sustainable development of the Municipality of Ljubljana, in particular by adopting the concept of sustainable mobility. Furthermore, in so far as the electric vehicles appear to be inseparable from the services concession itself, it follows from Article 8(2) of Directive 2014/23 that those vehicles must be regarded as supplies linked to the services under concession.

69 In those circumstances, and subject to the checks to be carried out by the referring court, it does not appear possible to characterise the existence of a public supply contract, within the meaning of Article 2(1)(8) of Directive 2014/24.

70 Finally, it should be noted that the classification of a contract as a concession, within the meaning of Article 5(1) of Directive 2014/23, or as a public contract, within the meaning of Article 2(1)(5) of Directive 2014/24, cannot result from the contracting authority's choice of the CPV codes mentioned in the contract or concession documentation, in particular in Annex V to those two directives. The obligation to use CPV codes under Regulation No 2195/2002 is merely a consequence of the applicability of Directive 2014/23 or of Directive 2014/24, as is apparent from Article 27 of the former directive and Article 23 of the latter directive, respectively.

71 Consequently, it is only after establishing that a concession award procedure falls within the scope of Directive 2014/23 or that a procurement procedure falls within the scope of Directive 2014/24 that a contracting authority is required to identify the relevant CPV code or codes.

72 That being so, although they are intended to make it easier for economic operators to take cognisance of contract notices in their sector of activity, CPV codes represent only one of the elements of the description of the subject matter of the contract, especially since the classification provided by Regulation No 2195/2002 may prove incomplete or outdated, having regard in particular to technological progress.

73 Thus, as a matter of principle, the reference to an incorrect CPV code is of no consequence. The position would be different, however, if such an error were evidence of the contracting authority's intention to undermine the interests of one or more economic operators and, therefore, to distort competition. Such a situation would fall within the scope of the second subparagraph of Article 3(1) of Directive 2014/23.

74 In the light of the foregoing considerations, the answer to the first, second, eighth and ninth questions is that Article 5(1)(b) of Directive 2014/23 must be interpreted as meaning that an operation whereby a contracting authority intends to entrust the establishment and operation of a service consisting of the hire and sharing of electric vehicles to an economic operator whose financial contribution is mostly

allocated for the purchase of those vehicles, and in which the revenue of that economic operator will derive essentially from the fees paid by the users of that service constitutes a ‘services concession’, since such characteristics are such as to establish that the risk linked to the operation of the services under concession has been transferred to that economic operator.

The third and fourth questions

75 By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 8 of Directive 2014/23 must be interpreted as meaning that, in order to determine whether the threshold for applicability of that directive is reached, the contracting authority must estimate the ‘total turnover of the concessionaire generated over the duration of the contract, net of VAT’, taking into account the fees which users will pay to the concessionaire, together with contributions and costs borne by the concessionaire and/or the contracting authority.

76 Under Article 8(1) and (2) thereof, that directive applies to concessions the value of which is equal to or greater than EUR 5 350 000, it being specified that the value of a concession is to be the total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.

77 Since turnover corresponds to the amount resulting from the sale of products and the provision of services, the ‘total turnover of the concessionaire generated over the duration of the contract, net of VAT’, within the meaning of Article 8(2) of Directive 2014/23, necessarily includes the fees paid to the concessionaire by users in consideration for the use of the services which were granted to it. Article 8(3)(b) of that directive also clearly provides that, ‘when calculating the estimated value of the concession, contracting authorities and contracting entities shall, where applicable, take into account in particular … revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority or contracting entity’.

78 Furthermore, it is apparent from Article 8(3)(c) of Directive 2014/23 that that calculation must also take into consideration ‘payments or any financial advantage in any form whatsoever made by the contracting authority … to the concessionaire’. Such payments or financial advantages reduce the investment required of the concessionaire.

79 Nevertheless, the ‘total turnover of the concessionaire generated over the duration of the contract, net of VAT’, is necessarily, as such, prospective and, by definition, uncertain.

80 Thus, the contracting authority may also take the view that the threshold laid down for the application of Directive 2014/23 is reached where the investments and costs to be borne by the concessionaire, alone or with the contracting authority, throughout the period of application of the concession contract manifestly exceed that threshold of applicability. The taking into account of those investments and of those costs indeed contributes to attributing an objective character to the estimate of the value of a concession which the contracting authority must make, as required by Article 8(3) of Directive 2014/23.

81 That interpretation is supported by Article 18(2) of Directive 2014/23. Under that provision, for concessions which, as in the case in the main proceedings, were provided for a period ‘lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives. The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession’.

82 In addition, according to the last sentence of recital 52 of that directive, which clarifies the scope of the latter provision, contracting authorities ‘should always be able to award a concession for a period shorter than the time necessary to recoup the investments, provided [that compensation is provided for and] that the related compensation does not eliminate the operating risk’.

83 It follows that the concessionaire's contribution, namely the investment it has made, and the costs which it will have to bear throughout the period of application of the concession contract may be taken into consideration in order to calculate the estimated value of the concession.

84 It follows from the foregoing considerations that Article 8 of Directive 2014/23 must be interpreted as meaning that, in order to determine whether the threshold for applicability of that directive is reached, the contracting authority must estimate the 'total turnover of the concessionaire generated over the duration of the contract, net of VAT', taking into account the fees which users will pay to the concessionaire, together with contributions and costs borne by the contracting authority. However, the contracting authority may also take the view that the threshold laid down for the application of Directive 2014/23 is reached where the investments and costs to be borne by the concessionaire, alone or with the contracting authority, throughout the period of application of the concession contract manifestly exceed that threshold of applicability.

The fifth question

85 By its fifth question, the referring court asks, in essence, whether Article 38(1) of Directive 2014/23, read in conjunction with point 7(b) of Annex V to and recital 4 of that directive, and with Article 4 and point III.1.1 of Annex XXI to Implementing Regulation 2015/1986, must be interpreted as meaning that a contracting authority may require, as criteria for the selection and qualitative assessment of candidates, that economic operators be enrolled on a trade register or on a professional register.

86 It should be noted that, unlike Article 58(1) of Directive 2014/24, Article 38(1) of Directive 2014/23 does not expressly provide that the contracting authority may impose, as a criterion for participation in a procedure for the award of a concession, selection criteria relating to suitability to pursue a professional activity.

87 The silence observed on that point by Article 38(1) of Directive 2014/23 cannot, however, preclude the contracting authority from imposing, as a criterion for participation in a procedure for the award of a concession, selection criteria relating to suitability to pursue a professional activity.

88 First, the objective of flexibility and adaptability underlying that directive, which is recalled in recitals 1 and 8 thereof, makes it possible to adopt a broad interpretation of the concept of 'professional … ability', as referred to in Article 38(1) of that directive, and to consider that it includes the suitability to pursue a professional activity.

89 Secondly, Annex V to the same directive, which is entitled 'Information to be included in concession notices referred to in Article 31', provides, in point 7(b) thereof, that the contracting authority must, where appropriate, indicate, as a condition of participation, 'whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession'. It must be inferred from that provision that, where the provision of a service is reserved to a particular profession, the contracting authority is entitled to require that the economic operator be enrolled on a trade register or on a professional register.

90 Thirdly, point III.1 of Annex XXI to Implementing Regulation 2015/1986 provides that, in respect of 'Legal, economic, financial and technical information', the contracting authority may impose a condition of participation based on the 'suitability to pursue the professional activity, including requirements relating to enrolment on professional or trade registers'.

91 Nevertheless, in accordance with the principle of mutual recognition, which is referred to in recital 4 of Directive 2014/23, an economic operator must be able to prove its suitability to carry out a concession by means of documents, such as proof of enrolment on one of the professional or trade registers, issued by the competent authorities of the Member State in which it is established. That principle therefore precludes a contracting authority from requiring, as a qualitative selection criterion, that an economic operator be enrolled on the trade or professional register in the Member State in which the concession is performed where that economic operator has already been enrolled on a similar register in the Member State in which it is established (see, by analogy, judgment of 20 May 2021, *Riigi Tugiteenuste Keskus*, C-6/20, EU:C:2021:402, paragraphs 49 and 55).

92 In the light of the foregoing considerations, the answer to the fifth question is that Article 38(1) of Directive 2014/23, read in conjunction with point 7(b) of Annex V to and recital 4 of that directive, and with Article 4 and point III.1.1 of Annex XXI to Implementing Regulation 2015/1986, must be interpreted as meaning that a contracting authority may require, as criteria for the selection and qualitative assessment of candidates, that economic operators be enrolled on a trade register or on a professional register, provided that an economic operator can rely on being enrolled on a similar register in the Member State in which it is established.

The sixth question

93 By its sixth question, the referring court asks, in essence, whether Article 38(1) of Directive 2014/23, read in conjunction with Article 27 of that directive and Article 1 of Regulation No 2195/2002, must be interpreted as meaning that a contracting authority, which requires economic operators to be enrolled on the trade register or the professional register of a Member State of the European Union, may refer not to the Common Procurement Vocabulary made up of CPV codes, but to the NACE Rev. 2 nomenclature, as established by Regulation No 1893/2006.

94 It should be noted that Article 27 of Directive 2014/23 provides that 'any references to nomenclatures in the context of the award of concessions shall be made using the "Common Procurement Vocabulary (CPV)" as adopted by Regulation [No 2195/2002]'.

95 In addition, under Article 1 of Regulation No 2195/2002, 'a single classification system applicable to public procurement, known as the "Common Procurement Vocabulary" or "CPV" is hereby established'. In that regard, recitals 1 and 3 of that regulation state that 'the use of different classifications is detrimental to the openness and transparency of public procurement in Europe', so that 'there is a need to standardise, by means of a single classification system for public procurement, the references used by the contracting authorities and entities to describe the subject of contracts'.

96 It follows from the combination of the provisions referred to in paragraphs 94 and 95 above that the contracting authority is required to refer exclusively to the Common Procurement Vocabulary. Furthermore, it is apparent from Article 1(2) of Regulation No 1893/2006 that that regulation is to apply only to the use of the NACE Rev. 2 nomenclature for statistical purposes.

97 Consequently, the answer to the sixth question is that Article 38(1) of Directive 2014/23, read in conjunction with Article 27 of that directive and Article 1 of Regulation No 2195/2002, must be interpreted as precluding a contracting authority, which requires economic operators to be enrolled on the trade register or the professional register of a Member State of the European Union, from referring not to the Common Procurement Vocabulary made up of CPV codes, but to the NACE Rev. 2 nomenclature, as established by Regulation No 1893/2006.

The seventh question

98 By its seventh question, the referring court asks, in essence, whether Article 38(1) and (2) of Directive 2014/23, read in conjunction with Article 26(2) of that directive, must be interpreted as meaning that a contracting authority may, without infringing the principle of proportionality guaranteed by the first subparagraph of Article 3(1) of that directive, require each of the members of a temporary business association to be enrolled, in a Member State, on the trade register or the professional register with a view to the pursuit of the activity of renting and leasing of cars and light motor vehicles.

99 The first sentence of Article 38(2) of Directive 2014/23 provides for the right of an economic operator to rely on the capacities of other entities, regardless of the legal nature of the links which bind it to those entities, with a view to satisfying the conditions for participation relating both to professional and technical ability and to economic and financial standing set out in paragraph 1 of that provision (see, by analogy, in the field of public procurement, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 29 and 33, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 150). In addition, under the second sentence of that second paragraph, 'where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority or the contracting entity that it will

have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing a commitment by those entities to that effect'.

100 It is thus apparent that Article 38 of that directive gives an economic operator great latitude to associate itself with other entities which will, in particular, enable it to have at its disposal the abilities which it lacks. On that basis, that provision cannot be interpreted as requiring an economic operator to seek assistance only from entities each of which is capable of pursuing the same professional activity. By definition, an economic operator having recourse to the abilities of other entities seeks either to increase the abilities which it already has but, possibly, in insufficient quantity or quality, or to acquire abilities or skills which it lacks.

101 It would thus be disproportionate, particularly in the latter case, to require that all the members of a temporary business association be capable of pursuing the professional activity under concession. The principle of proportionality, which is guaranteed in particular in the first subparagraph of Article 3(1) of Directive 2014/23 and which is a general principle of EU law, requires that the rules laid down by the Member States or the contracting authorities in implementing the provisions of that directive not go beyond what is necessary to achieve the objectives of that directive (see, by analogy, in the field of public procurement, judgments of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 48, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 155).

102 From that point of view, the second subparagraph of Article 26(2) of Directive 2014/23 provides, inter alia, that, 'where necessary, contracting authorities or contracting entities may clarify in the concession documents how groups of economic operators shall meet the requirements as to economic and financial standing or technical and professional ability referred to in Article 38 provided that this is justified by objective reasons and is proportionate'.

103 However, in the present case, the request for a preliminary ruling contains no evidence to suggest that, in accordance with the second subparagraph of Article 26(2) of Directive 2014/23, it would be necessary and justified on objective and proportionate grounds to require each of the members of a temporary business association to be enrolled, in a Member State, on the trade register or the professional register with a view to the pursuit of the activity of renting and leasing of cars and light motor vehicles.

104 In those circumstances, the answer to the seventh question is that Article 38(1) and (2) of Directive 2014/23, read in conjunction with Article 26(2) of that directive, must be interpreted as meaning that a contracting authority may not, without infringing the principle of proportionality guaranteed by the first subparagraph of Article 3(1) of that directive, require each of the members of a temporary business association to be enrolled, in a Member State, on the trade register or the professional register with a view to the pursuit of the activity of renting and leasing of cars and light motor vehicles.

The tenth and eleventh questions

105 In view of the answer given to the first, second, eighth and ninth questions, there is no need to examine the tenth and eleventh questions.

Costs

106 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **Article 5(1)(b) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, as amended by Commission Delegated Regulation (EU) 2019/1827 of 30 October 2019,**

must be interpreted as meaning that an operation whereby a contracting authority intends to entrust the establishment and operation of a service consisting of the hire and sharing of electric vehicles to an economic operator whose financial contribution is mostly allocated for the purchase of those vehicles, and in which the revenue of that economic operator will derive essentially from the fees paid by the users of that service constitutes a 'services concession', since such characteristics are such as to establish that the risk linked to the operation of the services under concession has been transferred to that economic operator.

2. **Article 8 of Directive 2014/23, as amended by Delegated Regulation 2019/1827,**

must be interpreted as meaning that in order to determine whether the threshold for applicability of that directive is reached, the contracting authority must estimate the 'total turnover of the concessionaire generated over the duration of the contract, net of [value-added tax (VAT)]', taking into account the fees which users will pay to the concessionaire, together with contributions and costs borne by the contracting authority. However, the contracting authority may also take the view that the threshold laid down for the application of Directive 2014/23, as amended by Delegated Regulation 2019/1827, is reached where the investments and costs to be borne by the concessionaire, alone or with the contracting authority, throughout the period of application of the concession contract manifestly exceed that threshold of applicability.

3. **Article 38(1) of Directive 2014/23, as amended by Delegated Regulation 2019/1827, read in conjunction with point 7(b) of Annex V to and recital 4 of that directive, and with Article 4 and point III.1.1 of Annex XXI to Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011,**

must be interpreted as meaning that a contracting authority may require, as criteria for the selection and qualitative assessment of candidates, that economic operators be enrolled on a trade register or on a professional register, provided that an economic operator can rely on being enrolled on a similar register in the Member State in which it is established.

4. **Article 38(1) of Directive 2014/23, as amended by Delegated Regulation 2019/1827, read in conjunction with Article 27 of that directive and Article 1 of Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV),**

must be interpreted as precluding a contracting authority, which requires economic operators to be enrolled on the trade register or the professional register of a Member State of the European Union, from referring not to the Common Procurement Vocabulary (CPV) made up of CPV codes, but to the NACE Rev. 2 nomenclature, as established by Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains.

5. **Article 38(1) to (2) of Directive 2014/23, as amended by Delegated Regulation 2019/1827, read in conjunction with Article 26(2) of that directive,**

must be interpreted as meaning that a contracting authority may not, without infringing the principle of proportionality guaranteed by the first subparagraph of Article 3(1) of that directive, require each of the members of a temporary business association to be enrolled, in a Member State, on the trade register or the professional register with a view to the pursuit of the activity of renting and leasing of cars and light motor vehicles.

[Signatures]

* Language of the case: Slovenian.

EU:C:2022:689

JUDGMENT OF THE COURT (Fourth Chamber)

15 September 2022 (*)

(Reference for a preliminary ruling – Public procurement procedures – Directive 2014/24/EU – Point (d) of the first subparagraph of Article 57(4) – Optional grounds for exclusion – Agreements with other economic operators aimed at distorting competition – Directive 2014/25/EU – Article 36(1) – Principles of proportionality and equal treatment of tenderers – Article 80(1) – Use of exclusion grounds and selection criteria provided for under Directive 2014/24/EU – Tenderers which constitute an economic unit and have submitted separate tenders that were neither autonomous nor independent – Need for sufficiently plausible indications to establish an infringement of Article 101 TFEU)

In Case C-416/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bayerisches Oberstes Landesgericht (Bavarian Highest Regional Court, Germany), made by decision of 24 June 2021, received at the Court on 7 July 2021, in the proceedings

Landkreis Aichach-Friedberg,

v

J. Sch. Omnibusunternehmen,

K. Reisen GmbH,

intervener:

E. GmbH & Co. KG,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, S. Rodin, J.-C. Bonichot, L.S. Rossi and O. Spineanu-Matei, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Landkreis Aichach-Friedberg, by R. Wiemann, Rechtsanwalt,

– J. Sch. Omnibusunternehmen and K. Reisen GmbH, by J.R. Eydner and A. Kafedžić, Rechtsanwälte,

– E. GmbH & Co. KG, by H. Holz, S. Janka and U.-D. Pape, Rechtsanwälte,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Santini, avvocato dello Stato,

– the Lithuanian Government, by K. Dieninis, V. Kazlauskaitė-Švenčionienė and E. Kurelaitytė, acting as Agents,

– the European Commission, by P. Ondrůšek and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18(1) and Article 57(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 (OJ 2017 L 337, p. 19) (‘Directive 2014/24’).

2 The request has been made in proceedings between the Landkreis Aichach-Friedberg (District of Aichach-Friedberg, Germany), on the one hand, and J. Sch. Omnibusunternehmen (‘J’) and K. Reisen GmbH, on the other, concerning the award by that district of a public contract for public transport bus services.

Legal context

European Union law

Directive 93/37/EEC

3 The first paragraph of Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) contained a list of the optional grounds for exclusion of any contractor from participation in a procurement procedure.

Directive 2014/24

4 The first paragraph of recital 101 of Directive 2014/24 reads as follows:

‘Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. …’

5 Point 10 of Article 2(1) of Directive 2014/24 provides that, for the purposes of that directive, ‘economic operator’ means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market.

6 According to Article 4(c) of Directive 2014/24, that directive applies to procurements with a value net of value added tax (VAT) estimated to be equal to or greater than EUR 221 000, inter alia, for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities.

7 Article 18 of that directive, entitled ‘Principles of procurement’, provides, in paragraph 1 thereof:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially

narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.'

8 Article 57 of Directive 2014/24, entitled 'Exclusion grounds', provides:

'…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

(e) where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures;

(f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 41, cannot be remedied by other, less intrusive measures;

…

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

…

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. …'

Directive 2014/25/EU

9 Article 11 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), as amended by Commission Delegated Regulation (EU) 2017/2364 of 18 December 2017 (OJ 2017 L 337, p. 17) ('Directive 2014/25'), provides:

'This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.'

10 Article 15(a) of Directive 2014/25 provides:

'Save where they are ruled out by the exclusions in Articles 18 to 23 or pursuant to Article 34, concerning the pursuit of the activity in question, this Directive shall apply to procurements with a value net of [VAT] estimated to be equal to or greater than the following thresholds:

(a) EUR 443 000 for supply and service contracts as well as for design contests’.

11 Article 36(1) of that directive is worded as follows:

‘Contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…’

12 Under the heading ‘Use of exclusion grounds and selection criteria provided for under Directive [2014/24]’, Article 80 of Directive 2014/25 states, in paragraph 1 thereof:

‘The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships may include the exclusion grounds listed in Article 57 of Directive [2014/24] on the terms and conditions set out therein.

…

If so required by Member States, those criteria and rules shall, in addition, include the exclusion grounds listed in Article 57(4) of Directive [2014/24] on the terms and conditions set out in that Article.’

German law

13 Paragraph 1 of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition) of 26 June 2013 (BGBl. 2013 I, p. 1750), in the version applicable to the dispute in the main proceedings (‘the GWB’), provides:

‘All agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition are prohibited.’

14 Paragraph 124(1) of the GWB, which transposes Article 57(4) of Directive 2014/24 into German law, provides, in point 4 thereof:

‘Contracting authorities may, acting with due regard for the principle of proportionality, exclude an undertaking from participation in a public procurement procedure at any time during that procedure where:

…

4. the contracting authority has sufficient indications to support the conclusion that the undertaking has concluded with other undertakings agreements or arrangements having the object or effect of impeding, restricting or distorting competition;

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 On 19 December 2019, the District of Aichach-Friedberg published a contract notice for the award, by open procedure, of a public contract for public transport bus services, the estimated value of which exceeds the threshold laid down in Article 4(c) of Directive 2014/24.

16 J is a trader operating under his company name and K. Reisen is a bus transport company with limited liability of which J is the managing director and sole shareholder.

17 On 27 February 2020, both J and K. Reisen submitted tenders relating to the contract notice through the same person, namely J. Insolvency proceedings were opened in respect of the assets of J on 1 November 2019 and, by decision of 1 December 2019, the insolvency administrator released from the insolvency proceedings the self-employed activity of J. In his tender, J declared that insolvency proceedings had neither been applied for nor opened in respect of his undertaking.

18 On 2 April 2020, J and K. Reisen were informed, first, that their tenders had been excluded for breach of competition rules in so far as they had been prepared by the same person, and, second, that the contract in question would be awarded to E. Gmbh & Co. KG.

19 After unsuccessfully lodging a complaint, J and K. Reisen brought an action before the Vergabekammer Südbayern (Public Procurement Board, Southern Bavaria, Germany). By decision of 12 January 2021, the latter upheld that action and ordered the District of Aichach-Friedberg to reinstate the tenders submitted by those tenderers in the procedure for the award of the contract in question. In particular, according to that board, having regard to the judgment of 17 May 2018, *Specializuotas transportas* (C-531/16, EU:C:2018:324), the conduct of J and K. Reisen does not fall within Article 101 TFEU since they constitute an economic unit.

20 The District of Aichach-Friedberg brought an appeal against that decision before the Bayerisches Oberstes Landesgericht (Bavarian Highest Regional Court, Germany). According to that district, allowing two tenderers that constitute an economic unit to participate in the procurement procedure is not compatible with the interests of the other tenderers and infringes the principle of equal treatment as well as competition rules, in particular in so far as those tenderers are in a position to concert their respective tenders.

21 J and K. Reisen consider that, in the light of the judgment of 17 May 2018, *Specializuotas transportas* (C-531/16, EU:C:2018:324), the exclusion of a tenderer on the ground of infringement of the competition rules is possible only if the situation concerned falls within Article 101 TFEU. Furthermore, they submit that the exhaustive nature of the grounds for exclusion provided for in Directive 2014/24 precludes recourse to the principle of equal treatment of tenderers.

22 In that regard, the referring court states that J and K. Reisen constitute an economic unit within the meaning of the case-law of the Court on Article 101 TFEU. That court asks whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be understood as requiring, for the application of the optional ground for exclusion provided for therein, that the contracting authority have sufficiently plausible indications of an infringement of Article 101 TFEU. It considers that that question should be answered in the affirmative, since an exclusion under that provision of Directive 2014/24 presupposes an infringement of a rule of competition law. In its view, such an infringement cannot be envisaged where the undertakings concerned constitute an economic unit and may therefore rely on ‘group privilege’.

23 Furthermore, the referring court asks whether the listing of optional grounds for exclusion in Article 57(4) of Directive 2014/24 precludes reliance on the principle of equal treatment in order to justify the failure to take into account tenders submitted by two tenderers constituting an economic unit.

24 Specifically, it should be stated whether the case-law stemming from the judgment of 16 December 2008, *Michaniki* (C-213/07, EU:C:2008:731, paragraph 44 et seq.) is capable of being applied to Article 57(4) of Directive 2014/24. In that regard, the referring court considers that, irrespective of the differences between the list of the optional grounds for exclusion provided for in Article 57(4) of Directive 2014/24 and those that are set out in earlier directives relating to public procurement, the principle of equal treatment continues to preclude taking into account tenders that are neither autonomous nor independent submitted by related undertakings.

25 Lastly, it is necessary to determine whether the Court’s case-law on tenders which are neither autonomous nor independent submitted by related tenderers (judgment of 17 May 2018, *Specializuotas transportas*, C-531/16, EU:C:2018:324), is applicable to the tenders submitted by tenderers that constitute an economic unit. The referring court considers that, in the light of that judgment, the

principle of equal treatment precludes, a fortiori, a contract from being awarded to tenderers that constitute an economic unit and are unable to submit autonomous or independent tenders.

26 In those circumstances, the Bayerisches Oberstes Landesgericht (Bavarian Highest Regional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is [point (d) of the first subparagraph of Article 57(4)] of [Directive 2014/24] to be interpreted as meaning that the contracting authority must have sufficiently plausible indications to conclude that the economic operator has infringed Article 101 TFEU?

[If the answer is in the affirmative:]

(2) Is Article 57(4) of [Directive 2014/24] to be interpreted as exhaustively regulating the optional grounds for exclusion in the sense that the principle of equal treatment (Article 18(1) of that directive) cannot preclude the award of a contract where tenders are submitted that are neither independent nor autonomous?

(3) Is Article 18(1) of [Directive 2014/24] to be interpreted as precluding the award of a contract to undertakings which constitute an economic unit and have each submitted a tender?’

Consideration of the questions referred

Preliminary observations

27 By its questions, the referring court seeks an interpretation of Article 18(1) and point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 in the context of a procedure for the award of a public contract for public transport bus services.

28 It must be recalled in that regard that, in accordance with settled case-law, in the context of the cooperation procedure between the national courts and the Court of Justice established in Article 267 TFEU, it is for the Court to provide the national court with an answer which will be of use to it and enable it to decide the case before it. With that in mind, it is for the Court, where appropriate, to reformulate the questions submitted to it. In addition, the Court may be prompted to consider rules of EU law to which the national court has not referred in the wording of its questions (see, to that effect, judgment of 14 May 2020, *T-Systems Magyarország*, C-263/19, EU:C:2020:373, paragraph 45 and the case-law cited).

29 In the present case, the provision or operation of networks providing a service to the public in the field of transport by bus is expressly referred to in Article 11 of Directive 2014/25 among the fields to which that directive applies. Accordingly, in so far as, by the public contract at issue in the main proceedings, the contracting entity seeks such provision or operation of networks, and that contract exceeds the threshold referred to in Article 15(a) of that directive – which it is for the referring court to ascertain – it must be considered that, in view of its subject matter, that contract falls within the scope of that directive.

30 In that regard, taking into account the provisions cited by the referring court in its request for a preliminary ruling, it should be noted, first, that the Court must interpret Article 36(1) of Directive 2014/25, according to which contracting entities are to treat economic operators equally and without discrimination and are to act in a transparent and proportionate manner, and which corresponds, in essence, to the provisions of Article 18(1) of Directive 2014/24.

31 Second, as regards the optional grounds for exclusion, Directive 2014/25 does not contain any rules of its own but refers in that regard to Directive 2014/24.

32 In particular, the third subparagraph of Article 80(1) of Directive 2014/25 provides that, if Member States so request, the objective rules and criteria for the exclusion and selection of candidates and

tenderers, inter alia in open, restricted or negotiated procedures, are to include the exclusion grounds listed in Article 57(4) of Directive 2014/24 ‘on the terms and conditions set out in that Article’.

33 It should be noted that the words ‘on the terms and conditions set out in that Article’ refer to the terms and conditions mentioned in that Article 57(4) (see, by analogy, judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 33).

34 Consequently, should the investigations carried out by the referring court show that Directive 2014/25 applies to the procurement procedure at issue in the main proceedings, in order to provide an answer to the questions referred that will be of use the Court must interpret Article 57(4) of Directive 2014/24 and, in particular, point (d) of the first subparagraph of that provision, to which the request for a preliminary ruling specifically refers, since the third subparagraph of Article 80(1) of Directive 2014/25 allows Member States to make Article 57(4) of Directive 2014/24 applicable in such procedures.

The first question

35 In those circumstances, it must be considered that, by its first question, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25, must be interpreted as meaning that the optional ground for exclusion provided for in point (d) of the first subparagraph of Article 57(4) covers only cases where there are sufficiently plausible indications to conclude that economic operators have infringed Article 101 TFEU.

36 It is apparent from the request for a preliminary ruling that the referring court’s questions as to the scope of the optional ground for exclusion provided for in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 are based on the fact that point 4 of Paragraph 124(1) of the GWB, which transposes point (d) of the first subparagraph of Article 57(4) into German law, reproduces the wording of the prohibition of agreements restricting competition in Paragraph 1 of the GWB, which, in essence, reproduces Article 101 TFEU in German law. The referring court recalls that it is apparent from the case-law of the Court (judgment of 17 May 2018, *Specializuotas transportas*, C-531/16, EU:C:2018:324, paragraph 28 and the case-law cited), that that article does not apply where the agreements it prohibits are carried out by undertakings which, as in the present case, constitute an economic unit.

37 First of all, it must be recalled that, in accordance with point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a procurement procedure where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.

38 That provision covers, in general terms, ‘agreements [entered into] with other economic operators aimed at distorting competition’. Its wording does not mention Article 101 TFEU and, in particular, unlike the latter, does not include the requirement that those agreements be concluded ‘between undertakings’, within the meaning of that provision, and ‘may affect trade between Member States’.

39 It follows that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 covers cases in which economic operators enter into any anticompetitive agreement and cannot be limited solely to the agreements between undertakings referred to in Article 101 TFEU.

40 Next, the objective underlying point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 confirms that interpretation.

41 The Court has held that the option, or even the obligation, for the contracting authority to exclude an economic operator from participating in a procurement procedure is intended in particular to enable it to assess the integrity and reliability of each of the economic operators. In particular, the optional ground for exclusion mentioned in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in conjunction with recital 101 of that directive, is based on an essential element of the relationship between the successful tenderer in question and the contracting authority, namely the

reliability of the successful tenderer, on which the contracting authority's trust is founded (see, to that effect, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 41).

42 Accordingly, point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 is intended to enable contracting authorities to assess and take into account the integrity and reliability of each of the economic operators, so that they may exclude from procurement procedures unreliable tenderers with whom they cannot maintain a relationship of trust in order to complete the supply of the services concerned when performing the contract in question.

43 Such an objective appears to be different from that referred to in Article 101 TFEU. The latter is intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct (judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 37).

44 The objective of point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 therefore leads to a broad interpretation of that provision to the effect that, inter alia, agreements between economic operators which do not affect trade between Member States are to be taken into account by the contracting authorities in connection with the optional ground for exclusion provided for therein.

45 Lastly, as regards the context of that provision, it should be noted that, in connection with the optional ground for exclusion provided for in point (c) of the first subparagraph of Article 57(4) of Directive 2014/24, the concept of 'professional misconduct', which covers all wrongful conduct which has an impact on the credibility, integrity or professional reliability of the economic operator in question, must be interpreted broadly (see, to that effect, order of 4 June 2019, *Consorzio Nazionale Servizi*, C-425/18, EU:C:2019:476, paragraphs 29 and 30).

46 In those circumstances, since, as is apparent from recital 101 of Directive 2014/24, the infringement of the competition rules may, in the light of the objective of Article 57(4) of that directive set out in paragraph 39 above, be regarded as a type of grave professional misconduct, it would be inconsistent to give the concept of 'agreements', provided for in point (d) of the first subparagraph of that provision, a narrow interpretation that would be limited solely to the agreements between undertakings referred to in Article 101 TFEU.

47 That is all the more so since the concept of 'economic operator', defined in point 10 of Article 2(1) of Directive 2014/24, does not refer to the concept of 'undertaking' within the meaning of Article 101 TFEU.

48 Consequently, it must be concluded that, although the existence of an agreement within the meaning of Article 101 TFEU must be regarded as falling within the optional ground for exclusion set out in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, the fact remains that the latter provision has a broader scope, which also covers economic operators which have entered into anticompetitive agreements that do not fall within Article 101 TFEU. Therefore, the mere fact that such an agreement between two economic operators does not fall within that article does not prevent it from being covered by that optional ground of exclusion.

49 However, in order to give an answer that will be of use to the referring court, the Court emphasises that that provision of Directive 2014/24 covers the case where there is sufficient evidence to enable the contracting authority to consider that two or more economic operators have entered into an agreement aimed at distorting competition, which necessarily presupposes that there is a common intention on the part of at least two different economic operators.

50 In the present case, it should be noted, as the European Commission states, that in a case such as that at issue in the main proceedings, it cannot be considered that two economic operators who, in substance, pass through the same natural person to take their decisions, may enter into 'agreements' between them, in so far as there do not appear to be two separate intentions that are capable of converging. It is, however, for the referring court to determine whether, having regard to the link between J and K. Reisen, it is possible for them to enter into such agreements aimed at distorting competition. If that is not the case, the optional ground for exclusion provided for in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 cannot apply to their situation.

51 In the light of the foregoing considerations, the answer to the first question is that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25, must be interpreted as meaning that the optional ground for exclusion provided for in point (d) of the first subparagraph of Article 57(4) covers cases where there are sufficiently plausible indications to conclude that economic operators have entered into an agreement prohibited by Article 101 TFEU, but is not limited solely to the agreements provided for in that article.

The second and third questions

52 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 57(4) of Directive 2014/24, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25, must be interpreted as meaning that Article 57(4) exhaustively regulates the optional grounds for exclusion, which prevents the principle of equal treatment, provided for in Article 36(1) of Directive 2014/25, from precluding the award of the contract in question to economic operators which constitute a separate economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.

53 In the analogous context of Directive 93/37, the Court held that the first paragraph of Article 24 of that directive, which, like Article 57(4) of Directive 2014/24, contained a list of the optional grounds for exclusion, must be read as listing exhaustively the grounds capable of justifying the exclusion of a contractor from participation in a procurement procedure for reasons based on objective factors that relate to its professional qualities. That provision therefore precludes Member States or contracting authorities from adding to the list contained in that provision other grounds for exclusion based on criteria relating to professional qualities (judgment of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 43).

54 Likewise, Article 57(4) of Directive 2014/24 lists exhaustively the optional grounds for exclusion capable of justifying the exclusion of an economic operator from participation in a procurement procedure for reasons based on objective factors relating to its professional qualities, to a conflict of interest or to a distortion of competition that would arise from its involvement in the preparation of that procedure.

55 In that regard, the fact, raised by the referring court, that that provision now includes a greater number of optional grounds for exclusion than the earlier EU directives on the award of public contracts has no bearing on whether the list provided for in that provision is exhaustive.

56 In the light of the nature of the grounds for exclusion set out in Article 57(4) of Directive 2014/24, it must be held that the EU legislature adopted the same approach with regard to the various grounds for exclusion set out in the successive EU directives on the award of public contracts, which is, as the Court held in paragraph 42 of the judgment of 16 December 2008, *Michaniki* (C-213/07, EU:C:2008:731), to adopt only grounds for exclusion based on the objective finding of facts or conduct specific to the contractor concerned, such as to discredit its professional reputation or call into question its economic or financial ability to complete the works covered by the public contract for which it is tendering, or, as regards contracts covered by Directive 2014/24, to create a situation which, in connection with the procurement procedure in question, qualifies as a conflict of interest or a distortion of competition, which are covered, respectively, in points (e) and (f) of the first subparagraph of Article 57(4) of that directive.

57 However, the fact that the optional grounds for exclusion set out in Article 57(4) of Directive 2014/24, to which the third subparagraph of Article 80(1) of Directive 2014/25 refers, are listed exhaustively does not prevent the principle of equal treatment, provided for in Article 36(1) of that directive, from precluding the award of the contract in question to economic operators which constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.

58 Such an exhaustive list does not preclude the option for Member States to maintain or adopt substantive rules designed, in particular, to ensure, as regards public contracts, observance of the principle of equal treatment and of the principle of transparency entailed by the latter, principles which are binding on contracting entities in any procedure for the award of a public contract and which

constitute the basis of the EU directives on procedures for the award of public contracts, provided that the principle of proportionality is observed (see, by analogy, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 21, and of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 30).

59 In particular, in the case of related tenderers, the principle of equal treatment provided for in Article 36(1) of Directive 2014/25 would be infringed if those tenderers were allowed submit coordinated or concerted tenders, that is to say, tenders that are neither autonomous nor independent, which would be likely to give them unjustified advantages in relation to the other tenderers (see, by analogy, judgment of 17 May 2018, *Specializuotas transportas*, C-531/16, EU:C:2018:324, paragraph 29).

60 In that context, observance of the principle of proportionality requires the contracting authority to examine and assess the facts, in order to determine whether the relationship between two entities has actually influenced the respective content of the tenders submitted in the same tendering procedure, a finding of such influence, in any form, being sufficient for those undertakings to be excluded from the procedure (see, to that effect, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 32, and of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 38).

61 The finding that the links between tenderers had a bearing on the content of the tenders they submitted during the same procedure suffices for those tenders not to be taken into consideration by the contracting authority, as tenders by related undertakings must be submitted completely autonomously and independently (see, to that effect, judgment of 17 May 2018, *Specializuotas transportas*, C-531/16, EU:C:2018:324, paragraph 38).

62 Those considerations apply a fortiori to the situation of tenderers which are not merely related but which constitute an economic unit.

63 Accordingly, should the referring court reach the conclusion, following the necessary checks and assessments, that the tenders at issue in the main proceedings were not submitted autonomously and independently, Article 36(1) of Directive 2014/25 precludes the award of the contract at issue to tenderers that have submitted such tenders.

64 In the light of the foregoing considerations, the answer to the second and third questions is that Article 57(4) of Directive 2014/24, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25, must be interpreted as meaning that Article 57(4) exhaustively regulates the optional grounds for exclusion capable of justifying the exclusion of an economic operator from participation in a procurement procedure for reasons based on objective factors relating to its professional qualities, to a conflict of interest or to a distortion of competition that would arise from its involvement in that procedure. However, Article 57(4) does not prevent the principle of equal treatment, provided for in Article 36(1) of Directive 2014/25, from precluding the award of the contract in question to economic operators which constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the action brought before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Point (d) of the first subparagraph of Article 57(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014**

on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, as amended by Commission Delegated Regulation (EU) 2017/2364 of 18 December 2017,

must be interpreted as meaning that the optional ground for exclusion provided for in point (d) of the first subparagraph of Article 57(4) covers cases where there are sufficiently plausible indications to conclude that economic operators have entered into an agreement prohibited by Article 101 TFEU, but is not limited solely to the agreements provided for in that article.

2. **Article 57(4) of Directive 2014/24, as amended by Delegated Regulation 2017/2365, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25, as amended by Delegated Regulation 2017/2364,**

must be interpreted as meaning that Article 57(4) exhaustively regulates the optional grounds for exclusion capable of justifying the exclusion of an economic operator from participation in a procurement procedure for reasons based on objective factors relating to its professional qualities, to a conflict of interest or to a distortion of competition that would arise from its involvement in that procedure. However, Article 57(4) does not prevent the principle of equal treatment, provided for in Article 36(1) of Directive 2014/25, as amended by Delegated Regulation 2017/2364, from precluding the award of the contract in question to economic operators which constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.

[Signatures]

---

* Language of the case: German.

JUDGMENT OF THE COURT (Third Chamber)

26 January 2023 (*)

(Reference for a preliminary ruling – Article 267 TFEU – Definition of 'court or tribunal of a Member State' – Criteria – Independence and compulsory nature of the jurisdiction of the national body concerned – Stability of the members of that body – Directive 2014/24/EU – Public procurement procedures – Article 58 – Selection criteria – Possibility of including, amongst those criteria, obligations under special laws applicable to the activities connected with the contract in question and not set out as a criterion for selection in the procurement documents – Article 63(1) – Tenderer relying on the capacities of another entity in order to meet the requirements of the contracting authority – Not possible to require recourse to subcontracting)

In Case C-403/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes, Romania), made by decision of 22 June 2021, received at the Court on 29 June 2021, in the proceedings

SC NV Construct SRL

v

Județul Timiș

intervening party:

SC Proiect – Construct Regiunea Transilvania SRL,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, M. Safjan, N. Piçarra, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the European Commission, by P. Ondrůšek, E.A. Stamate and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 58 and 63 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement

and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), and the principles of proportionality, liability and transparency.

2 The request has been made in proceedings between SC NV Construct SRL and Judeţul Timiş (District of Timiș, Romania) concerning the public procurement of a feasibility study for the construction of a road.

Legal context

European Union law

Directive 89/665/EEC

3 Headed ‘Requirements for review procedures’, Article 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31; ‘Directive 89/665’), provides in paragraph 9:

‘Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU] and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.’

Directive 2014/24

4 Entitled ‘Principles of procurement’, Article 18 of Directive 2014/24 provides in paragraph 1:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

5 Article 42 of that directive relates to ‘technical specifications’.

6 Entitled ‘Selection criteria’, Article 58 of that directive states:

‘1. Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are

appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

2. With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as described in Annex XI, or to comply with any other request set out in that Annex.

In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

…

4. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. …

…

5. Contracting authorities shall indicate the required conditions of participation which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest.'

7 Entitled 'Reliance on the capacities of other entities', Article 63 of that directive provides in paragraph 1:

'With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

The contracting authority shall, in accordance with Articles 59, 60 and 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57. The contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

Under the same conditions, a group of economic operators as referred to in Article 19(2) may rely on the capacities of participants in the group or of other entities.'

8 Entitled 'Contract award criteria', Article 67 of Directive 2014/24 provides in paragraph 3:

‘Award criteria shall be considered to be linked to the subject matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

(a) the specific process of production, provision or trading of those works, supplies or services; or

(b) a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance.’

9 Entitled ‘Conditions for performance of contracts’, Article 70 of that directive states:

‘Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.’

Romanian law

Law No 101/2016

10 The Legea nr. 101/2016 privind remediile și căile de atac în materie de atribuire a contractelor de achiziție publică, a contractelor sectoriale și a contractelor de concesiune de lucrări și concesiune de servicii, precum și pentru organizarea și funcționarea Consiliului Național de Soluționare a Contestațiilor (Law No 101/2016 on remedies and appeals relating to the award of public contracts, sectoral contracts and work concession and service concession contracts, as well as the organisation and functioning of the National Council for the Resolution of Disputes), of 19 May 2016 (*Monitorul Oficial al României*, Part I, No 393 of 23 May 2016), in the version applicable to the dispute in the main proceedings (‘Law No 101/2016’), provides in Article 2(1):

‘Any person who considers that one of his or her rights or legitimate interests has been breached by an act of an contracting authority or by a failure to rule on a claim within the period prescribed by law may seek the annulment of that act, an injunction that the contracting authority issue an act or take remedial measures, or the recognition of the right or legitimate interest claimed, by means of administrative and judicial or court action.’

11 Under Article 4(1) of that law:

‘For the resolution of the dispute, the person making the claim may pursue it:

(a) through administration and judicial proceedings, before the National Council for the Resolution of Disputes; or

(b) though legal proceedings, before a court.’

12 Article 15(1) of that law provides:

‘Proceedings for the resolution of disputes shall comply with the principles of legality, expedition, adversarial proceedings, guarantees of the rights of the defence, impartiality and independence of the administrative and judicial activity.’

13 Under Article 28(1) of that law:

‘The decision of the Council shall be binding on the parties to the case.’

14 Article 37 of Law No 101/2016 provides:

‘1. The National Council for the Resolution of Disputes … is an independent tribunal with administrative and judicial functions.

…

3. In the context of its functions, the Council shall be subject only to the law, and hearings of the full formation of the Council are legally constituted when the majority of its members are present.

4. As regards its decisions, the Council is independent and is not subordinate to any authority or public institution.’

15 Article 44(4) of that law provides:

‘In the exercise of its jurisdiction, the Council shall comply with the principles of independence and stability of its members.’

16 Article 45 of that law provides:

‘1. Members of the Council shall be selected on the basis of a competition, and are appointed by decision of the Prime Minister under the conditions provided for by law.

2. Members of the Council are selected on the basis of their professional suitability and good character. The candidates must have [undertaken] university studies, 10 years’ professional experience in a legal, economic or technical field and at least 3 years in the field of public procurement.

…

4. The President of the Council shall submit to the Prime Minister the proposals for appointment of Members of the Council, for candidates who have been declared to be admitted to the competition.’

17 Article 47(1) to (3) of that law provides:

‘1. It is prohibited for Members of the Council:

(a) to undertake commercial activities, directly or through intermediaries;

(b) to be associates or members of the management, administration or controlling bodies of private companies, companies governed by the Legea societăților nr. 31/1990 [Law No 31/1990 on companies], republished, as amended and supplemented, including of banks or other credit institutions, insurance or financial companies, national companies, or autonomous corporations;

(c) to be members of an economic interest grouping;

(d) to be members of a political party and carry out political activities or participate in such activities;

(e) to exercise any public or private function/activity, with the exception of higher education teaching or literary/artistic creation;

(f) to exercise any other professional or council activity.

2. Members of the Council shall be required to make declarations of their assets and interests …

3. Members of the Council are not permitted to participate in the resolution of a dispute if they are in one of the situations provided for below, on pain of the invalidity of the decision delivered:

(a) where those members, their spouse, their ascendants or their descendants have an interest in the outcome of the dispute, or where they are spouses, parents or associates to the fourth degree inclusive of one of the parties;

(b) where there has been a criminal procedure between them and one of the parties within the five years preceding the resolution of the case;

(c) where they have made public statements on the issue on which they are ruling;

(d) where they have received from one of the parties material goods or promises of material goods or other advantages.'

18 Article 48a of Law No 101/2016 provides:

'1. Findings of misconduct committed by the members of the Council shall fall within the remit of the Disciplinary Committee that shall be created within the Council.

2. The Disciplinary Committee shall be composed of three members, of which one shall be nominated by the President of the Council, one shall be elected by the members of the Council by simple majority, and one is a representative of the National Agency of Public Officials.

3. On a proposal of the Disciplinary Committee, disciplinary sanctions shall be applied by the President of the Council, except for the sanction of removal from public office, which is applied by the person who has legal competence to make appointments to that office.'

The Rules of Procedure of the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes, Romania)

19 Article 39(1) of the Rules of Procedure of the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) sets out the disciplinary sanctions that may be imposed where an official is guilty of misconduct, under, in particular, the Ordonanța de urgență a Guvernului nr. 57/2019 privind Codul administrativ (Emergency government order No 57/2019 on the Administrative code) of 3 July 2019 (*Monitorul Oficial al României*, Part I, No 555 of 5 July 2019; 'the Administrative code').

The Administrative code

20 Article 492 of the Administrative code, entitled 'Administrative disciplinary liability', provides:

'1. Culpable breach, by public officials, of the duties of a public office which they hold and of the rules of civil and professional conduct laid down by law shall constitute misconduct and give rise to their administrative disciplinary liability.

2. The following constitute misconduct:

(a) systematic lateness in carrying out tasks;

(b) repeated negligence in carrying out tasks;

(c) unjustified absence from work;

(d) non-compliance with working hours;

(e) interventions or insistence on dealing with claims outside the legal framework;

(f) failure to observe professional secrecy or confidentiality of work of that nature;

(g) statements that harm the reputation of the authority or public institution in which the public official carries out his or her duties;

(h) conduct of political activities during working hours;

(i) unjustified refusal to carry out professional tasks;

(j) unjustified refusal to be subject to work-related medical checks or examinations following the recommendations of a occupational health doctor, in accordance with provisions of law;

(k) breach of provisions relating to duties and prohibitions laid down by law for public officials other than those relating to conflicts of interest and incompatibilities;

(l) breach of provisions relating to incompatibilities where the public official fails to act to terminate them within a period of fifteen calendar days beginning from the date on which the incompatibility arose;

(m) breach of the provisions on conflicts of interest;

(n) other matters regarded as misconduct in the normative acts concerning public office and public officials or applicable to them.

3. The disciplinary sanctions shall be:

…

(f) Removal from public office.

4. Misconduct referred to in paragraph 2 is punishable by the following disciplinary sanctions:

(a) one of the disciplinary sanctions referred to in paragraph 3(a) or (b) for misconduct referred to in paragraph 2(a), (b) and (d);

(b) one of the disciplinary sanctions referred to in paragraph 3(b) to (f) for misconduct referred to in paragraph 2(c);

(c) one of the disciplinary sanctions referred to in paragraph 3(c) to (f) for misconduct referred to in paragraph 2(e) to (h);

(d) one of the disciplinary sanctions referred to in paragraph 3, for misconduct referred to in paragraph 2(i) to (k) and (m);

(e) the disciplinary sanction referred to in paragraph 3(f) in the conditions laid down in Article 520, for misconduct referred to in paragraph 2(l);

(f) one of the disciplinary sanctions referred to in paragraph 3, for misconduct referred to in paragraph 2(n).

…

6. In determining the individual disciplinary sanction in accordance with the provisions of paragraph 4, account is to be taken of the causes and seriousness of the misconduct, the circumstances under which it was committed, the degree of culpability and the consequences of the misconduct, the general conduct of the official during his or her service and whether there are, among his or her antecedents, other disciplinary sanctions which are not spent under the conditions laid down by this code.

…’

21 Article 568(2) of that code provides:

‘Administrative disciplinary liability is established in compliance with the principle of adversarial proceedings and the rights of the defence and subject to review by the administrative tribunals under the conditions laid down by law.’

The Law on public procurement

22 Article 3 of the Legea nr. 98/2016 privind achiziţiile publice (Law No 98/2016 on public procurement), of 19 May 2016 (*Monitorul Oficial al României*, Part I, No 390 of 23 May 2016; ‘the Law on public procurement’), provides in points (w) and (yy):

‘(w) supplier – entity which makes products available to the contractor, including services, where necessary, for the installation or placement thereof, or which provides services to the contractor, which does not have the status of a subcontractor.

…

(yy) subcontractor – any economic operator that is not party to a public contract and which carries out and/or provides certain parts or elements of works or the construction or performance of activities that are part of the subject of the public contract by being responsible, vis-a-vis the contractor, for the organisation or performance of all the necessary steps to that end.

The dispute in the main proceedings and the questions referred for a preliminary ruling

23 On 6 April 2021, in the context of an open call for tenders organised with a view to awarding a contract for the purpose of ‘drafting technico-economic documents – feasibility study and technical design – relating to the investment: Construction of the departmental road connecting the international airport ‘Traian Vuia’ of Timișoara to the A1 motorway’, the District of Timiș, in its capacity as the contracting authority, ranked NV Construct in fourth position.

24 On 16 April 2021, NV Construct seised the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes), which is the referring body, seeking the disqualification of the three tenderers ranked above it, and a new assessment of their tenders.

25 NV Construct submits, in essence, that those three tenderers did not comply with the requirements which were not set out in the procurement documents but which are imposed on the basis of special laws governing various activities that must or are liable to be carried out during the performance of a contract. The contracting authority accordingly should have verified that those tenderers or their subcontractors were authorised by the Autoritatea Feroviară Română (Romanian railway authority, Romania). In addition, since the successful tenderer intended to rely on the capacities of third parties in order to perform the contract, it necessarily should have, in order to comply with Article 3(1)(yy) of the Law on public procurement, relied on subcontractors to the exclusion of any other form of cooperation. Finally, it should have been required to have designated a subcontractor for the activity of ‘Services for the drafting of documents for the purpose of the notice and approval of the [setting aside] of expropriated land and the change of category of use’ even if it is not certain that it would have to have recourse to those services, since the procurement documents specify that that activity is to be carried out ‘only if necessary’.

26 The contracting authority and the successful tenderer, for their part, submit that the procurement documents do not contain any indication relating to the need to refer in the offer exclusively to operators authorised by the Romanian railway authority and the Asociația Națională a Evaluatorilor Autorizați din România (Romanian national association of authorised assessors). In addition, according to the contracting authority, at the time at which tenders are submitted, it is impossible to know whether it will be necessary to rely on services for the drawing up of documents for the purpose of setting aside expropriated land and drafting a pedology study. That is why the successful tenderer stated in its tender that it would undertake, itself and ‘only if necessary’, to draw up that documentation. Furthermore, the fact that it did not refer at the outset to its intention to subcontract those services does not raise any difficulty, since it could seek new subcontractors after the contract is signed. Moreover, experts from the national association of authorised assessors would have been designated and would have produced declarations of availability.

27 As a preliminary matter, the referring body observes that the value of the contract to be awarded is estimated to be 1 970 967 Romanian lei (RON) (approximately EUR 421 553), such that it exceeds the threshold for Directive 2014/24 to apply.

28 That body states that the Romanian courts are divided on the issue of whether a contracting authority may exclude an economic operator whose offer does not comply with an obligation under the rules applicable to a profession, without even allowing it the possibility of rectifying the tender and despite that obligation not having been expressly referred to in the procurement documents in question.

29 The present case therefore provides the opportunity to clarify whether, first, special rules relating to each activity concerned by a contract, whatever the importance of those activities to the contract, must be deemed to supplement the procurement documents and, second, whether the tenderers must necessarily designate in their tender, on pain of it being rejected, the subcontractors on which they will entrust those activities which are not of significant importance to that contract.

30 The Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) observes that it follows inter alia from the judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404), that an economic operator cannot be excluded from the procedure on the ground that it has not complied with requirements that were not set out in the procurement documents.

31 In the case in the main proceedings, rules relating to construction, modernisation, maintenance and repair of the railway infrastructure, which did not appear in the procurement documents, are binding on the tenderer only at the stage of the performance of the contract in question. In addition, the number of economic operators authorised for certain activities under that contract is limited. Therefore, the obligation to designate them as subcontractors would drastically reduce the competition, whilst increasing the administrative burden on participants in the call for tenders at issue in the main proceedings, which could be contrary to the principle of proportionality. The referring body wonders, therefore, whether it is necessary systematically to require tenderers to designate their potential subcontractors at the time when the tender is submitted, irrespective of the importance of the activities that would be entrusted to them under that contract, the time at which those subcontractors would act in the performance of that same contract, or yet the probability that they would be requested to act.

32 Furthermore, according to that body, those procurement documents are not supplemented by certain criteria which are binding as a result of special laws that are not relevant in the matter of public procurement. The fact of automatically supplementing procurement documents with such criteria would infringe the principle of proportionality and call into question the discretion that a contracting authority has under the second subparagraph of Article 58(1) of Directive 2014/24 as to the setting of selection criteria.

33 Likewise, in the context of their possible appeals, adversely affected economic operators may only contest the procurement documents that they consider to be too restrictive, without being able to claim that they are too permissive and should include additional criteria that may restrict the access of other operators to the procedure in question.

34 Moreover, the economic operators which are ranked lower cannot call into question an assessment of the tenders carried out in accordance with the requirements as set out in the procurement documents. On the contrary, they must establish that that assessment did not comply with those documents, such that the principle of transparency was breached.

35 Finally, to require subcontracting as the only form of carrying out an activity of a contract would infringe the freedom of contract, the right of economic operators to decide how to organise themselves and Article 63 of Directive 2014/24. To the extent that it follows from Article 63 of that directive that the production of an undertaking suffices to demonstrate compliance with the selection criteria, a mere statement of availability should a fortiori suffice where, as regards activities of minor importance to the contract, the satisfaction of those criteria has not been required.

36 In those circumstances, the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 58 of Directive [2014/24], the principle of proportionality and the principle of liability be interpreted as meaning that the contracting authority has the right to lay down the criteria relating to technical capacity, that is to say, to determine whether or not it is necessary to include in the procurement documents criteria relating to technical and professional capacity and the capacity to carry out the technical and professional activity arising from the provisions of special laws, in respect of activities that do not have significant importance in the contract?

(2) Do the principles of transparency and proportionality preclude the automatic supplementation of the procurement documents with qualification criteria arising from special laws applicable to activities relating to the contract to be awarded which were not set out in the procurement documents and which the contracting authority decided not to impose on the economic operators?

(3) (a) Do Article 63 of the directive and the principle of proportionality preclude the exclusion from the [tendering] procedure of a tenderer who has not named an operator as a subcontractor for the purpose of demonstrating compliance with certain criteria relating to technical and professional capacity and the capacity to carry out the technical and professional activity arising from the provisions of special laws not set out in the procurement documents in the case where the tenderer in question has chosen a different contractual form of involving specialists in the contract, that is to say [a] contract for the supply/provision of services, or has submitted [a] declaration of willingness on their part?

(b) Does the right to determine its organisation and contractual relations within the group lie with the economic operator and is it possible also to involve certain providers/suppliers in the contract in the case where the provider is not one of the entities on whose capacity the tenderer intends to rely in order to demonstrate compliance with the relevant criteria?'

Admissibility of the request for a preliminary ruling

37 As a preliminary matter, it must be ascertained whether the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) may be regarded as a 'court or tribunal of a Member State', within the meaning of Article 267 TFEU.

38 Although the referring body considers that it was recognised as having that status by the Court of Justice in the order of 17 October 2018, *Beny Alex* (C-353/18, not published, EU:C:2018:829), it must be observed that, in that order, the Court merely rejected the reference for a preliminary ruling made to it by that body as being manifestly inadmissible, within the meaning of Article 53(2) of the Rules of Procedure of the Court of Justice, without deciding that that body was a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU.

39 According to the Court's settled case-law, in order to determine whether a body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, to that effect, judgments of 30 June 1966, *Vaassen-Göbbels*, 61/65, EU:C:1966:39, p. 395, and of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 51).

40 In the light of the information that the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) provided to the Court on 6 July 2022, in response to a request that the latter had sent to it on 16 May 2022, there is no doubt that that body satisfies the criteria relating to its being established by law, its permanence, the *inter partes* nature of its procedure and the application, by that body, of rules of law. However, there is a question as to whether that body meets the criterion, first, of the compulsory nature of its jurisdiction and, second, of independence.

41 As regards, in the first place, the compulsory nature of the referring body's jurisdiction, it is true that Article 4(1) of Law No 101/2016, read in conjunction with Article 2(1) of that law, that any person who considers that one of his or her rights or legitimate interests has been breached by an act or an omission of a contracting authority may choose either to bring administration and judicial proceedings before the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes), or to bring legal proceedings before a court with a section that deals with administrative disputes. It is clear from the case file available to the Court that the Romanian legislature thus chose, in order to transpose Article 2(9) of Directive 89/665, as amended by Directive 2007/66, to attribute competence to hear this type of dispute concurrently to the referring body, on the one hand, and courts with a section for administrative disputes, on the other hand.

42 That being so, it must be observed that the decisions of the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes), whose jurisdiction does not depend on the parties' agreement, are binding on the parties (see, by analogy, judgment of 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, paragraph 23).

43 In those circumstances, the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) satisfies the criterion of the compulsory nature of its jurisdiction.

44 In the second place, as regards the criterion of independence, the external aspect of the principle of independence of national courts requires that the body concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever. In that regard, it is critical that the irremovability of the members of the body concerned is guaranteed, such that dismissals of members of that body should be determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal (see, to that effect, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraphs 56 to 60).

45 As regards the internal aspect of the principle of independence of national courts, that principle is linked to 'impartiality' and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. Thus, the concept of 'independence' requires above all that the body in question act as a third party in relation to the authority which adopted the contested decision (see, to that effect, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraphs 61 and 62).

46 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 63).

47 In the present case, as is clear from the information available to the Court, Law No 101/2016 emphasises, in several places, the external aspect of the independence of the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes). Thus, paragraphs 1, 3 and 4 of Article 37 of that law provide, respectively, that the Council 'is an independent tribunal with administrative and judicial functions', and that it is 'subject only to the law' and that it 'is independent and is not subordinate to any authority or public institution'. It is also clear from Article 15(1) of that law that the procedure for the resolution of disputes complies, inter alia, with the principle of independence of administrative and judicial activity. In the same vein, Article 44(4) of the same law provides that the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes), 'in the exercise of its jurisdiction, … shall comply with the principles of independence and stability of its members'.

48 As regards the appointment of the members of that body, it is clear from Article 45 of Law No 101/2016 that those members are selected by competition, on the basis of their professional suitability and their good character, from candidates with a university education and professional experience of 10 years' duration in the fields covered by that article, and experience of at least 3 years in the field of public procurement. They are appointed by decision of the Prime Minister, upon a proposal by the President of that body, from candidates who have been declared to be admitted to the competition.

49 In addition, it is clear from Article 48a of Law No 101/2016 that misconduct committed by the members of the referring body can only be found by a Disciplinary Committee established within that body. On a proposal by the Disciplinary Committee, disciplinary sanctions are to be applied by the President of that body, except for the sanction of removal from public office, which is applied only by the person who has legal competence to make appointments to that body, namely the Romanian Prime Minister.

50 Furthermore, Article 39(1) of the Rules of Procedure of the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) lays down a proportionate scale of sanctions, in accordance with Article 492(6) of the Administrative code.

51 Finally, the fact that Article 39 refers to the Administrative code in order to identify the cases in which a member of the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) incurs a sanction of removal from public office is such as to guarantee legal certainty.

52 Thus, that sanction may be pronounced, inter alia, against a member of the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) who is unable to justify his or her absence from work or who has failed to comply with the rules relating to professional secrecy or conflicts of interest. Such situations, referred to in Article 492(2) of the Administrative code, read in conjunction with paragraph (4) of that article, correspond to the exceptional cases reflecting legitimate and compelling grounds that warrant the adoption of such a measure, subject to the principle of proportionality and to the appropriate procedures being followed (see, by analogy, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraphs 59, 60 and 67). Therefore, members of the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) benefit throughout their mandate from a guarantee of stability which may only be derogated from for reasons expressly set out in law. (see, by analogy, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 70).

53 It should however be pointed out that the principle of stability that the members of the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) benefit from under Article 44(4) of Law No 101/2016 must be interpreted consistently with the criterion of independence, as defined in paragraph 44 of this judgment, with which every national body must comply in order to have the status of a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU, in order to comply with the principle of irremovability.

54 It should also be observed that, in the response referred to in paragraph 40 of this judgment, that the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) stated that its members are the subject of incompatibilities and prohibitions analogous to those imposed on the judiciary, and that those members are removed only in the event of serious misconduct. In addition, in the event that that sanction is pronounced against one of those members, the latter has a right of appeal before the administrative courts, pursuant to Article 568(2) of the Administrative code.

55 The referring body has furthermore indicated that, in practice, no member of the council had been removed since its creation in 2006.

56 As to the internal aspect of the principle of independence of a ‘court or tribunal of a Member State’, within the meaning of Article 267 TFEU, that appears to be guaranteed by Article 47 of Law No 101/2016, which seeks to avoid situations liable to give rise to conflicts of interest. Thus, the members of the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) must not carry out commercial activities, be members of an economic operator’s decision-making body, be involved in political activities, or exercise a public or private activity, with the exception of teaching duties within higher education. Those incompatibilities are moreover the same as those to which the judiciary is subject under Romanian law. In addition, the members of the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) are subject to rules concerning the grounds for recusal, laid down in Article 47(3) of that law, pursuant to which they are not authorised to participate in the resolution of a dispute, on pain of the decision given being invalid, where they are in one of the situations listed in that provision.

57 Moreover, it is clear from Article 15(1) of that law that the procedure for the resolution of disputes before the referring body complies, inter alia, with the principles of adversarial proceedings, of the guarantee of rights of the defence and of impartiality.

58 Having regard to all the foregoing considerations, it must be held that the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for the Resolution of Disputes) may be classified as a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU and that, consequently, the present request for a preliminary ruling is admissible.

Consideration of the questions referred

The first question

59 By its first question, the referring court asks, in essence, whether Article 58 of Directive 2014/24, read in conjunction with the principles of proportionality and of transparency, guaranteed in the first subparagraph of Article 18(1) of that directive, must be interpreted as meaning that the contracting authority has the option of imposing as selection criteria obligations under special laws applicable to the activities that may be required to be carried out in the context of performing the public contract and are not of significant importance.

60 As it is best placed to assess its own needs, the contracting authority is granted a broad discretion by the EU legislature when determining selection criteria, as can be seen inter alia from the recurring use of the term ‘may’ in Article 58 of Directive 2014/24. Thus, in accordance with paragraph 1 of that article, it has some flexibility in setting those requirements for participation in a procurement procedure which it considers to be related and proportionate to the subject matter of the contract and appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities required to perform the contract to be awarded. More specifically, according to paragraph 4 of that article, the contracting authority is free to determine which requirements for participation it considers appropriate, from its point of view, to ensure inter alia the performance of the contract to a quality standard which it considers appropriate (judgment of 31 March 2022, *Smetna palata na Republika Bulgaria*, C-195/21, EU:C:2022:239, paragraph 50).

61 In the exercise of that broad discretion, the contracting authority may decide to include, amongst the selection criteria referred to in the contract notice or tender specifications, obligations under special laws applicable to the activities that may be required to be carried out in the context of performing the public contract and which are not of significant importance.

62 Conversely, the contracting authority may equally, in the exercise of that broad discretion, consider that it is not necessary to include those obligations amongst the selection criteria. That choice may inter alia be explained by the fact that those obligations do not have significant importance or by the contingent nature of the activities to be carried out to which the obligations at issue apply. The contracting authority may equally prefer to refer to those same obligations as part of the conditions for performance of contracts in order to require compliance with them from a single tenderer only (see, by analogy, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 88 and 89).

63 Directive 2014/24 does not preclude the consideration of technical requirements simultaneously as selection criteria relating to technical and professional ability, as technical specifications and/or as conditions for the performance of the contract, within the meaning of Article 58(4), Article 42 and Article 70 of that directive, respectively (judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 84). Conversely, a contracting authority may decide to opt for only one of those classifications.

64 In that regard, a contracting authority may, pursuant to Article 70 of Directive 2014/24, lay down special conditions relating to the performance of a contract provided that they are linked to the subject matter of the contract, within the meaning of Article 67(3) of that directive, and indicated in the call for competition or in the procurement documents.

65 Furthermore, to oblige tenderers to satisfy all the conditions of performance of the contract at the time of submission of their tenders would be to impose an excessive requirement – one which might dissuade economic operators from participating in procurement procedures – and would thus infringe the principles of proportionality and transparency guaranteed by Article 18(1) of that directive (judgment of 8 July 2021, *Sanresa*, C-295/20, EU:C:2021:556, paragraph 62).

66 Therefore, the answer to the first question is that Article 58 of Directive 2014/24, read in conjunction with the principles of proportionality and of transparency, guaranteed in the first subparagraph of Article 18(1) of that directive, must be interpreted as meaning that the contracting authority has the option of imposing as selection criteria obligations under special laws applicable to the activities that

may be required to be carried out in the context of performing the public contract and are not of significant importance.

The second question

67 By its second question, the referring court asks, in essence, whether the principles of proportionality and of transparency guaranteed by the first subparagraph of Article 18(1) of Directive 2014/24 must be interpreted as precluding procurement documents from being automatically supplemented with qualification criteria arising under special laws applicable to activities relating to the contract to be awarded which were not set out in the procurement documents and which the contracting authority decided not to impose on the economic operators concerned.

68 As is clear from the answer to the first question, obligations under special laws applicable to activities connected with the public contract to be awarded cannot automatically be added as selection criteria to the criteria expressly referred to in the procurement documents, otherwise the broad discretion that the contracting authority has in determining the selection criteria that it wishes to impose on economic operators as conditions for participating in a procurement procedure would be rendered devoid of any substance.

69 Accordingly, the answer to the second question is that the principles of proportionality and of transparency guaranteed by the first subparagraph of Article 18(1) of Directive 2014/24 must be interpreted as precluding procurement documents from being automatically supplemented with qualification criteria arising under special laws applicable to activities relating to the contract to be awarded which were not set out in the procurement documents and which the contracting authority decided not to impose on the economic operators concerned.

The third question, point (a)

70 By point (a) of its third question, the referring court asks, in essence, whether Article 63(1) of Directive 2014/24 must be interpreted as precluding a tenderer from being excluded from a procurement procedure on the ground that it has not designated the subcontractor to which it intends to entrust the performance of obligations under special laws applicable to the activities related to the contract in question and not provided for in the procurement documents, where that tenderer has stated in its offer that it would perform those obligations by relying on the capacities of another entity without however having a subcontract agreement with that entity.

71 As is clear from paragraph 62 of this judgment, if the obligations under special laws applicable to activities related to the contract in question and not provided for, as selection criteria, in the procurement documents were classified as a condition for performance of the contract, and if the successful tenderer did not satisfy it when the public contract was awarded to it, the non-compliance with that condition would have no effect on the question of whether the award of the contract was compatible with the provisions of Directive 2014/24 (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 89).

72 In a situation where the obligations under special laws applicable to activities related to the contract in question and which were not provided for in the procurement documents in fact constitute selection criteria within the meaning of Article 58 of Directive 2014/24, it suffices to recall that Article 63(1) of that directive confers the right for any economic operator to rely, for a particular contract, on the capacities of other entities, regardless of the legal nature of the links which it has with them, with a view to satisfying the various categories of selection criteria set out in Article 58(1) of that directive and specified in paragraphs (2) and (4) of that article (see, to that effect, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 29 and 33, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 150).

73 Furthermore, it is clear from the last sentence of Article 63(1) of Directive 2014/24 that, where an economic operator wants to rely on the capacities of other entities, it suffices for it to prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

74 Consequently, it is clear that subcontracting constitutes only one of the means by which an economic operator may rely on the capacities of other entities and it cannot, therefore, be required of it by the contracting authority.

75 Having regard to the forgoing considerations, the answer to point (a) of the third question is that Article 63(1) of Directive 2014/24 must be interpreted as precluding the exclusion of a tenderer from a procurement procedure on the ground that it has not designated the subcontractor to which it intends to entrust the performance of obligations under special laws applicable to the activities related to the contract in question and not provided for in the procurement documents, where that tenderer has stated in its offer that it would perform those obligations by relying on the capacities of another entity without however having a subcontract agreement with that entity.

The third question, point (b)

76 By point (b) of its third question, the referring court asks, in essence, whether Article 63(1) of Directive 2014/24, read in conjunction with the principle of proportionality set out in the first subparagraph of Article 18(1) of that directive, must be interpreted as meaning that an economic operator has the right to organise itself and its contractual relations within a group and whether it may also rely on suppliers or service providers in a contract if the supplier concerned was not among the entities whose capacities the tenderer intends to rely on in order to demonstrate its compliance with the relevant criteria.

77 In that regard, it is true that, as the settled case-law of the Court of Justice states, questions on the interpretation of EU law referred by a national court in the factual and legal context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (see, to that effect, judgments of 7 September 1999, *Beck and Bergdorf*, C-355/97, EU:C:1999:391, paragraph 22, and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 43).

78 However, it has also been consistently held that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them, such that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see, to that effect, judgments of 16 December 1981, *Foglia*, 244/80, EU:C:1981:302, paragraph 18, and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 44).

79 From that point of view and since the request for a preliminary ruling is the basis for the proceedings before the Court, it is essential that, in that request, the national court should, in particular, set out the factual and legal background to the dispute in the main proceedings, most particularly in certain areas characterised by complex factual and legal situations, such as that of public procurement (see, to that effect, judgment of 26 January 1993, *Telemarsicabruzzo and Others*, C-320/90 to C-322/90, EU:C:1993:26, paragraphs 6 and 7, and order of 25 April 2018, *Secretaria Regional de Saúde dos Açores*, C-102/17, EU:C:2018:294, paragraphs 28 and 29).

80 In the present case, it must be observed that the order for reference does not contain a description of the factual and legal context of the dispute in the main proceedings that is sufficient to enable the Court to provide a useful answer to point (b) of the third question.

81 Consequently point (b) of the third question must be declared to be inadmissible.

Costs

82 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 58 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, read in conjunction with the principles of proportionality and of transparency guaranteed by the first subparagraph of Article 18(1) of that directive**

   must be interpreted as meaning that the contracting authority has the option of imposing as selection criteria obligations under special laws applicable to the activities that may be required to be carried out in the context of performing the public contract and are not of significant importance

2. **The principles of proportionality and of transparency guaranteed by the first subparagraph of Article 18(1) of Directive 2014/24**

   must be interpreted as precluding procurement documents from being automatically supplemented with qualification criteria arising under special laws applicable to activities relating to the contract to be awarded which were not set out in the procurement documents and which the contracting authority decided not to impose on the economic operators concerned.

3. **Article 63(1) of Directive 2014/24**

   must be interpreted as precluding the exclusion of a tenderer from a procurement procedure on the ground that it has not designated the subcontractor to which it intends to entrust the performance of obligations under special laws applicable to the activities related to the contract in question and not provided for in the procurement documents, where that tenderer has stated in its offer that it would perform those obligations by relying on the capacities of another entity without however having a subcontract agreement with that entity.

[Signatures]

---

* Language of the case: Romanian.

ARRÊT DE LA COUR (cinquième chambre)

22 décembre 2022 (*)

« Renvoi préjudiciel – Marchés publics – Directive 2014/24/UE – Attribution du marché public sans engagement d'une procédure d'appel d'offres – Marchés publics passés entre des entités appartenant au secteur public – Article 12, paragraphe 3 – Marchés publics faisant l'objet d'une attribution in house – Notion de "contrôle analogue" – Conditions – Représentation de tous les pouvoirs adjudicateurs participants – Article 12, paragraphe 4 – Contrat entre des pouvoirs adjudicateurs poursuivant des objectifs communs d'intérêt public – Notion de "coopération" – Conditions – Non-transposition dans les délais impartis – Effet direct »

Dans les affaires jointes C-383/21 et C-384/21,

ayant pour objet deux demandes de décision préjudicielle au titre de l'article 267 TFUE, introduites par le Conseil d'État (Belgique), par décisions du 15 juin 2021, parvenues à la Cour le 24 juin 2021, dans les procédures

Sambre & Biesme SCRL (C-383/21),

Commune de Farciennes (C-384/21)

contre

Société wallonne du logement (SWL),

LA COUR (cinquième chambre),

composée de M. E. Regan (rapporteur), président de chambre, MM. D. Gratsias, M. Ilešič, I. Jarukaitis et Z. Csehi, juges,

avocat général : M. M. Campos Sánchez-Bordona,

greffier : M^me^ M. Siekierzyńska, administratrice,

vu la procédure écrite et à la suite de l'audience du 30 mars 2022,

considérant les observations présentées :

– pour Sambre & Biesme SCRL, par M^es^ J. Laurent et C. Servais, avocats,

– pour la commune de Farciennes, par M^es^ J. Bourtembourg et N. Fortemps, avocats,

– pour le gouvernement belge, par M. J.-C. Halleux, M^mes^ C. Pochet et L. Van den Broeck, en qualité d'agents, assistés de M^e^ M. Vastmans, avocate,

– pour la Commission européenne, par MM. P. Ondrůšek et G. Wils, en qualité d'agents,

ayant entendu l'avocat général en ses conclusions à l'audience du 9 juin 2022,

rend le présent

Arrêt

1 Les demandes de décision préjudicielle portent sur l'interprétation de l'article 12, paragraphes 3 et 4, de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE (JO 2014, L 94, p. 65).

2 Ces demandes ont été présentées dans le cadre de litiges opposant, d'une part, Sambre & Biesme SCRL, société de logement de service public (SLSP) (ci-après la « SLSP Sambre & Biesme ») (affaire C-383/21) et, d'autre part, la commune de Farciennes (Belgique) (affaire C-384/21) à la Société wallone du logement (SWL) au sujet de l'annulation par cette dernière des décisions du conseil d'administration de la SLSP Sambre & Biesme par lesquelles celui-ci a, d'une part, approuvé la convention-cadre de marchés conjoints passée avec la commune de Farciennes et, d'autre part, prévu de ne pas mettre en concurrence un marché de services d'inventaire relatif à l'amiante en raison d'une relation *in house* unissant la SLSP Sambre & Biesme à l'Intercommunale pour la gestion et la réalisation d'études techniques et économiques (Igretec).

Le cadre juridique

Le droit de l'Union

3 La directive 2014/24 énonce, à ses considérants 5, 31 et 33 :

« (5) Il convient de rappeler que rien dans la présente directive ne fait obligation aux États membres de confier à des tiers ou d'externaliser la fourniture de services qu'ils souhaitent fournir eux-mêmes ou organiser autrement que par la passation d'un marché public au sens de la présente directive. La prestation de services fondés sur la législation, la réglementation ou des contrats d'emploi ne devrait pas être concernée. Dans certains États membres, cela pourrait par exemple être le cas pour certains services administratifs et publics, tels que les services exécutifs et législatifs, ou la fourniture de certains services à la population, tels que des services en matière d'affaires étrangères ou de justice ou des services de sécurité sociale obligatoire.

[...]

(31) Il existe une importante insécurité juridique quant à la question de savoir dans quelle mesure les règles sur la passation des marchés publics devraient s'appliquer aux marchés conclus entre entités appartenant au secteur public. La jurisprudence applicable de la Cour de justice de l'Union européenne fait l'objet d'interprétations divergentes entre États membres et même entre pouvoirs adjudicateurs. Il est dès lors nécessaire de préciser dans quels cas les marchés conclus au sein du secteur public ne sont pas soumis à l'application des règles relatives à la passation des marchés publics.

Ces précisions devraient s'appuyer sur les principes énoncés dans la jurisprudence pertinente de la Cour de justice de l'Union européenne. La seule circonstance que les deux parties à un accord sont elles-mêmes des pouvoirs publics n'exclut pas en soi l'application des règles relatives à la passation des marchés publics. L'application de ces règles ne devrait toutefois pas interférer avec la liberté des pouvoirs publics d'exercer les missions de service public qui leur sont confiées en utilisant leurs propres ressources, ce qui inclut la possibilité de coopérer avec d'autres pouvoirs publics.

Il convient de veiller à ce qu'aucune coopération public-public ainsi exclue n'entraîne de distorsion de concurrence à l'égard des opérateurs économiques privés dans la mesure où cela place un prestataire de services privé dans une situation privilégiée par rapport à ses concurrents.

[...]

(33) Les pouvoirs adjudicateurs devraient pouvoir choisir de fournir conjointement leurs services publics par la voie de la coopération, sans être contraints de recourir à une forme juridique particulière. Cette coopération pourrait porter sur tous les types d'activités liées à l'exécution de services et à l'exercice de responsabilités confiées aux pouvoirs adjudicateurs participants ou assumées par eux, telles que des missions obligatoires ou volontaires relevant d'autorités locales

ou régionales ou des services confiés à des organismes particuliers par le droit public. Les services fournis par les différents pouvoirs adjudicateurs participants ne doivent pas nécessairement être identiques ; ils pourraient également être complémentaires.

Les marchés concernant la fourniture conjointe de services publics ne devraient pas être soumis à l'application des règles établies dans la présente directive, à condition qu'ils soient conclus exclusivement entre pouvoirs adjudicateurs, que la mise en œuvre de cette coopération n'obéisse qu'à des considérations d'intérêt public et qu'aucun prestataire privé de services ne soit placé dans une situation privilégiée par rapport à ses concurrents.

Pour que ces conditions soient remplies, il convient que la coopération soit fondée sur le concept de coopération. Cette coopération n'exige pas que tous les pouvoirs participants se chargent de l'exécution des principales obligations contractuelles, tant que l'engagement a été pris de coopérer à l'exécution du service public en question. En outre, la mise en œuvre de la coopération, y compris tout transfert financier entre les pouvoirs adjudicateurs participants, ne devrait obéir qu'à des considérations d'intérêt public. »

4 Sous le titre I de cette directive, intitulé « Champ d'application, définition, et principes généraux », figure un chapitre I, intitulé « Champ d'application et définitions », dont la section 3, elle-même intitulée « Exclusions », comprend les articles 7 à 12.

5 L'article 12 de ladite directive, intitulé « Marchés publics passés entre entités appartenant au secteur public », dispose :

« 1. Un marché public attribué par un pouvoir adjudicateur à une personne morale régie par le droit privé ou le droit public ne relève pas du champ d'application de la présente directive lorsque toutes les conditions suivantes sont réunies :

a) le pouvoir adjudicateur exerce sur la personne morale concernée un contrôle analogue à celui qu'il exerce sur ses propres services ;

b) plus de 80 % des activités de cette personne morale contrôlée sont exercées dans le cadre de l'exécution des tâches qui lui sont confiées par le pouvoir adjudicateur qui la contrôle ou par d'autres personnes morales qu'il contrôle ; et

c) la personne morale contrôlée ne comporte pas de participation directe de capitaux privés, à l'exception des formes de participation de capitaux privés sans capacité de contrôle ou de blocage requises par les dispositions législatives nationales, conformément aux traités, qui ne permettent pas d'exercer une influence décisive sur la personne morale contrôlée.

Un pouvoir adjudicateur est réputé exercer sur une personne morale un contrôle analogue à celui qu'il exerce sur ses propres services, au sens du premier alinéa, point a), s'il exerce une influence décisive à la fois sur les objectifs stratégiques et sur les décisions importantes de la personne morale contrôlée. Ce contrôle peut également être exercé par une autre personne morale, qui est elle-même contrôlée de la même manière par le pouvoir adjudicateur.

2. Le paragraphe 1 s'applique également lorsqu'une personne morale contrôlée qui est un pouvoir adjudicateur attribue un marché au pouvoir adjudicateur qui la contrôle, ou à une autre personne morale contrôlée par le même pouvoir adjudicateur, à condition que la personne morale à laquelle est attribué le marché public ne comporte pas de participation directe de capitaux privés, à l'exception des formes de participation de capitaux privés sans capacité de contrôle ou de blocage requises par les dispositions législatives nationales, conformément aux traités, qui ne permettent pas d'exercer une influence décisive sur la personne morale contrôlée.

3. Un pouvoir adjudicateur qui n'exerce pas de contrôle sur une personne morale régie par le droit privé ou le droit public au sens du paragraphe 1 peut néanmoins attribuer un marché public à cette personne morale sans appliquer la présente directive, lorsque toutes les conditions suivantes sont réunies :

a) le pouvoir adjudicateur exerce, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle sur la personne morale concernée, analogue à celui qu'ils exercent sur leurs propres services ;

b) plus de 80 % des activités de cette personne morale sont exercées dans le cadre de l'exécution des tâches qui lui sont confiées par les pouvoirs adjudicateurs qui la contrôlent ou par d'autres personnes morales contrôlées par les mêmes pouvoirs adjudicateurs ; et

c) la personne morale contrôlée ne comporte pas de participation directe de capitaux privés à l'exception des formes de participation de capitaux privés sans capacité de contrôle ou de blocage requises par les dispositions législatives nationales, conformément aux traités, qui ne permettent pas d'exercer une influence décisive sur la personne morale contrôlée.

Aux fins du premier alinéa, point a), les pouvoirs adjudicateurs exercent un contrôle conjoint sur une personne morale lorsque toutes les conditions suivantes sont réunies :

i) les organes décisionnels de la personne morale contrôlée sont composés de représentants de tous les pouvoirs adjudicateurs participants, une même personne pouvant représenter plusieurs pouvoirs adjudicateurs participants ou l'ensemble d'entre eux ;

ii) ces pouvoirs adjudicateurs sont en mesure d'exercer conjointement une influence décisive sur les objectifs stratégiques et les décisions importantes de la personne morale contrôlée ; et

iii) la personne morale contrôlée ne poursuit pas d'intérêts contraires à ceux des pouvoirs adjudicateurs qui la contrôlent ;

4. Un marché conclu exclusivement entre deux pouvoirs adjudicateurs ou plus ne relève pas du champ d'application de la présente directive, lorsque toutes les conditions suivantes sont réunies :

a) le marché établit ou met en œuvre une coopération entre les pouvoirs adjudicateurs participants dans le but de garantir que les services publics dont ils doivent assurer la prestation sont réalisés en vue d'atteindre les objectifs qu'ils ont en commun ;

b) la mise en œuvre de cette coopération n'obéit qu'à des considérations d'intérêt public ; et

c) les pouvoirs adjudicateurs participants réalisent sur le marché concurrentiel moins de 20 % des activités concernées par la coopération ;

[...] »

6 L'article 90 de la même directive, intitulé « Transposition et dispositions transitoires », prévoit, à son paragraphe 1 :

« Les États membres mettent en vigueur les dispositions législatives, réglementaires et administratives nécessaires pour se conformer à la présente directive au plus tard le 18 avril 2016. Ils communiquent immédiatement à la Commission le texte de ces dispositions. »

Le droit belge

7 La directive 2014/24 a été transposée dans le droit belge par la loi relative aux marchés publics, du 17 juin 2016 (*Moniteur belge* du 14 juillet 2016, p. 44219), laquelle est entrée en vigueur le 30 juin 2017, après la date d'expiration du délai de transposition de cette directive prévu à l'article 90 de celle-ci.

Les litiges au principal et les questions préjudicielles

8 La SLSP Sambre & Biesme est une société coopérative à responsabilité limitée dont les actionnaires principaux sont les communes de Farciennes et d'Aiseau-Presles (Belgique). En tant que société de logement de service public, elle a pour autorité de tutelle la SWL, laquelle agit pour le compte du gouvernement wallon.

9 Au cours de l'année 2015, la SLSP Sambre & Biesme et la commune de Farciennes ont décidé d'unir leurs moyens pour créer un écoquartier à Farciennes regroupant environ 150 logements. À cette fin, les parties ont souhaité faire appel aux services de l'Igretec pour suivre la mise en œuvre de leur projet.

10 L'Igretec est une société coopérative à responsabilité limitée qui exerce des missions de service public et qui est, à ce titre, une personne morale de droit public. Son activité se déploie dans plusieurs domaines. Ainsi qu'il est décrit dans ses statuts, son objet social comprend, notamment, des activités de bureau d'études et de gestion.

11 Les règles relatives à l'organisation et au fonctionnement de l'Igretec dépendent du code de la démocratie locale et de la décentralisation ainsi que de ses statuts. À ce titre, pour ce qui est de sa composition, elle comprend exclusivement des personnes morales de droit public. À l'époque des faits au principal, l'Igretec comptait parmi ses associés plus de 70 communes, dont la commune de Farciennes, et plus de 50 autres pouvoirs publics. En particulier, au sein du capital social de l'Igretec, réparti en parts de cinq catégories, le nombre de parts de catégorie A attribuées aux communes s'élevaient à 5 054 351 et celui des parts de catégorie C attribuées aux « autres affiliés de droit public » étaient au nombre de 17 126.

12 S'agissant du fonctionnement de l'Igretec, les communes disposent toujours de la majorité des voix ainsi que de la présidence des différents organes de gestion et les décisions des organes de l'Igretec ne sont acquises que si elles recueillent, outre la majorité des voix des administrateurs présents ou représentés, la majorité des voix des administrateurs issus des communes associées.

13 Le 29 octobre 2015, la SLSP Sambre & Biesme a décidé d'acheter une part sociale de catégorie C dans l'Igretec afin de pouvoir bénéficier de ses services en tant qu'associée.

14 Le 23 mars 2016, la commune de Farciennes a conclu avec l'Igretec un contrat d'assistance à maître d'ouvrage et d'assistance juridique ainsi qu'un contrat de faisabilité en architecture, stabilité, technique spéciale, voirie, environnement et urbanisme. Dans le cadre de ces missions, l'Igretec a proposé trois variantes d'aménagements qui intégraient le projet de la SLSP Sambre & Biesme et a suggéré de conclure une convention de marché conjoint entre la SLSP Sambre & Biesme et la commune de Farciennes.

15 Le 19 janvier 2017, le conseil d'administration de la SLSP Sambre & Biesme a marqué son accord, d'une part, sur le projet de convention-cadre de marchés conjoints avec la commune de Farciennes et, d'autre part, sur le cahier spécial des charges concernant la désignation d'un bureau d'expert pour réaliser l'inventaire et le programme de gestion dans la problématique de l'amiante. Ce cahier des charges établi par l'Igretec était décrit comme étant la première étape de mise en œuvre du projet d'écoquartier à Farciennes.

16 Le 26 janvier 2017, le conseil communal de la commune de Farciennes a décidé d'approuver cette convention-cadre avec la SLSP Sambre & Biesme.

17 Ladite convention-cadre stipule à son article 1er, intitulé « Objet », que, notamment, la commune de Farciennes et la SLSP Sambre & Biesme déterminent, par la même convention-cadre, leurs droits et leurs obligations respectifs dans la conception et la réalisation des travaux de création de l'écoquartier de Farciennes et qu'elles décident de passer des marchés publics conjoints de services, de travaux et de promotion de travaux.

18 À cet égard, elles désignent la commune de Farciennes pour agir en qualité de pouvoir adjudicateur en leur nom collectif et de prendre seule toute décision relative à la passation et à l'attribution des marchés, étant entendu que, avant toute décision prise en exécution de la convention-cadre et conformément à l'article 2 de celle-ci, les parties se concertent au sein d'un comité de pilotage composé de représentants de chacune d'entre elles.

19 L'article 5 de ladite convention-cadre, intitulé « Choix de l'assistance à la maîtrise d'ouvrage pour la mise en œuvre de marchés de services, de travaux et de promotion de travaux et pour la réalisation du dossier de revitalisation urbaine », dispose que « les parties conviennent que la commune de Farciennes conclut avec [l'Igretec] [...] une convention d'assistance à maîtrise d'ouvrage, de prestations juridiques

et d'environnement, et ce dans le cadre de la relation *in house* qui unit chacune des parties à ladite intercommunale ».

20 Le 9 février 2017, le conseil d'administration de la SLSP Sambre & Biesme a décidé, d'une part, d'approuver la conclusion de la convention-cadre de marchés conjoints avec la commune de Farciennes et, d'autre part, de ne pas mettre en concurrence le marché public de services d'inventaire relatif à l'amiante dont il avait précédemment approuvé le cahier spécial des charges en raison de la relation *in house* existant entre la SLSP Sambre & Biesme et l'Igretec.

21 Par décision du 25 février 2017, la SWL a, en tant qu'autorité de tutelle, annulé ces deux décisions du conseil d'administration de la SLSP Sambre & Biesme, au motif que les conditions de l'exception *in house* n'étaient pas remplies entre la SLSP Sambre & Biesme et l'Igretec.

22 La SLSP Sambre & Biesme (affaire C-383/21) et la commune de Farciennes (affaire C-384/21) ont chacune introduit, respectivement les 28 avril et 2 mai 2017, un recours en annulation contre cette décision de la SWL devant le Conseil d'État (Belgique). Elles soutiennent que les conditions relatives à une telle exception, prévues à l'article 12, paragraphe 3, de la directive 2014/24, étaient remplies dans les circonstances visées de telle sorte qu'il était loisible d'opérer une attribution directe des marchés publics en cause. En outre, la commune de Farciennes (affaire C-384/21) prétend qu'une attribution sans mise en concurrence est également justifiée sur le fondement de l'article 12, paragraphe 4, de cette directive, dès lors qu'existerait une situation de coopération entre les pouvoirs adjudicateurs, au sens de cette dernière disposition.

23 Étant donné que la loi de transposition de ladite directive n'était pas encore entrée en vigueur au moment des faits en cause au principal alors que le délai prévu à l'article 90 de la directive 2014/24 aux fins d'une telle transposition était déjà expiré, la juridiction de renvoi se demande, tout d'abord, si, à la lumière de l'arrêt du 3 octobre 2019, Irgita (C-285/18, EU:C:2019:829), c'est sur le fondement de l'article 12, paragraphes 3 et 4, de cette directive qu'il y a lieu de trancher les litiges pendants devant elle, alors que les parties aux litiges au principal s'opposent, notamment, sur la question de savoir si celles-ci ont seulement pour objet de prévoir une faculté pour les États membres d'exclure du champ d'application de ladite directive l'attribution de certains marchés publics passés entre des entités appartenant au secteur public.

24 Ensuite, pour ce qui est des conditions devant être remplies pour qu'un pouvoir adjudicateur exerçant, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle sur la personne morale concernée puisse procéder à une attribution *in house*, elle s'interroge sur la manière dont ce pouvoir adjudicateur doit participer aux organes de l'entité contrôlée et contribuer effectivement à son contrôle, en particulier en vertu de l'exigence visée à l'article 12, paragraphe 3, second alinéa, sous i), de la même directive. À cet égard, la juridiction de renvoi indique que les associés de catégorie C, dont fait partie la SLSP Sambre & Biesme, se trouvaient en situation très minoritaire, laquelle ne leur permettait pas de contribuer effectivement au contrôle de l'Igretec.

25 De plus, relevant la prépondérance des communes en tant qu'associés de catégorie A dans les organes décisionnels, cette juridiction de renvoi précise que la position très minoritaire des associés de catégorie C ne leur permettait pas, de facto, de disposer d'un administrateur pour les représenter au sein du conseil d'administration de l'Igretec tandis que les statuts de l'Igretec, dans leur version applicable aux litiges au principal, ne garantissaient nullement la présence d'un administrateur désigné par ces associés pour les représenter. La juridiction de renvoi, constatant que lesdits associés ne disposaient effectivement d'aucun représentant au sein du conseil d'administration ou de la « commission permanente du bureau d'études et de gestion », en a déduit que les associés de catégorie C ne participaient en aucune manière à l'exercice d'un contrôle conjoint sur l'Igretec.

26 Cependant, la juridiction de renvoi indique que les requérantes dans les litiges au principal font valoir que siégeait au conseil d'administration de l'Igretec un conseiller communal de la commune de Farciennes qui était, en même temps, administrateur de la SLSP Sambre & Biesme, la commune de Farciennes étant actionnaire à la fois de l'Igretec et de la SLSP Sambre & Biesme.

27 La juridiction de renvoi précise, toutefois, qu'il n'est pas démontré qu'une telle circonstance était prévue et garantie en droit. Par ailleurs, cette personne siégeait au conseil d'administration de l'Igretec

en sa qualité de conseiller communal à Farciennes, sans qu'il soit possible de considérer qu'elle était, à ce titre, également réputée représenter les intérêts de la SLSP Sambre & Biesme.

28 Cela étant, eu égard à l'appréciation in concreto alléguée par les requérantes au principal devant la juridiction de renvoi afin de déterminer si un pouvoir adjudicateur exerce sur l'entité attributaire un contrôle analogue à celui qu'il exerce sur ses propres services, la juridiction de renvoi se demande si une situation telle que celle exposée aux points 26 et 27 du présent arrêt permet de conclure, comme le soutiennent les requérantes au principal, que la SLSP Sambre & Biesme participait aux organes décisionnels de l'Igretec et exerçait donc sur cette intercommunale un tel contrôle, conjointement avec d'autres pouvoirs adjudicateurs, par l'intermédiaire de la commune de Farciennes.

29 La juridiction de renvoi précise, d'une part, que, si les requérantes au principal font valoir que la commune de Farciennes est actionnaire tant de la SLSP Sambre & Biesme que de l'Igretec et exerce sur ces deux entités un contrôle analogue à celui qu'elle exerce sur ses propres services, elles n'entendent pas faire valoir la possibilité d'une attribution directe d'un marché public entre deux entités contrôlées par le même pouvoir adjudicateur. D'autre part, la juridiction de renvoi émet des doutes sur le fait que, en toute hypothèse, les conditions encadrant l'exclusion de telles attributions du champ d'application des règles du droit de l'Union en matière de marché public soient satisfaites, la commune de Farciennes exerçant son contrôle conjointement avec d'autres pouvoirs adjudicateurs.

30 Enfin, la juridiction de renvoi s'interroge également sur la possibilité d'attribuer le marché public sans procédure d'appel d'offres, en vertu de l'article 12, paragraphe 4, de la directive 2014/24, dès lors que la commune de Farciennes se prévaut, à titre subsidiaire, de l'existence d'une situation de coopération entre les pouvoirs adjudicateurs, au sens de cette disposition.

31 À cet égard, la juridiction de renvoi nourrit des doutes sur le fait que la notion de « coopération », visée à ladite disposition, puisse couvrir des circonstances telles que celles au principal au seul motif que les missions d'assistance à maîtrise d'ouvrage, de prestations juridiques et d'environnement confiées à l'Igretec s'inscrivent dans le cadre de la coopération entre la SLSP Sambre & Biesme et la commune de Farciennes en vue de la réalisation d'un projet commun de création d'un écoquartier à Farciennes, qu'une relation *in house* unit, en tout état de cause, cette commune et l'Igretec, et que ladite commune et la SLSP Sambre & Biesme sont membres de l'Igretec dans le secteur d'activités de son objet social qui est précisément concerné par les missions qu'elles souhaitent lui confier.

32 Dans ces conditions, le Conseil d'État a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes :

Dans l'affaire C-383/21 :

« 1) L'article [12, paragraphe 3,] de la directive [2014/24] doit-il être interprété en ce sens qu'il produit un effet direct ?

2) En cas de réponse affirmative à cette première question, l'article [12, paragraphe 3,] de la directive [2014/24] doit-il être interprété en ce sens que la condition pour un pouvoir adjudicateur, en l'occurrence une société de logement de service public, d'être représenté au sein des organes décisionnels de la personne morale contrôlée, en l'occurrence une société coopérative intercommunale, est remplie au seul motif qu'une personne siégeant au sein du conseil d'administration de cette société coopérative intercommunale en sa qualité de conseiller communal d'un autre pouvoir adjudicateur participant, en l'occurrence une commune, se trouve, en raison de circonstances exclusivement factuelles et sans garantie juridique de représentation, être également administrateur au sein de la société de logement de service public tandis que la commune est actionnaire (non exclusif) tant de l'entité contrôlée (société coopérative intercommunale) que de la société de logement de service public ?

3) En cas de réponse négative à la première question posée, faut-il considérer qu'un pouvoir adjudicateur, en l'occurrence une société de logement de service public, "participe" aux organes décisionnels de la personne morale contrôlée, en l'occurrence une société coopérative intercommunale, au seul motif qu'une personne siégeant au sein du conseil d'administration de cette société coopérative intercommunale en sa qualité de conseiller communal d'un autre

pouvoir adjudicateur participant, en l'occurrence une commune, se trouve, en raison de circonstances exclusivement factuelles et sans garantie juridique de représentation, être également administrateur au sein de la société de logement de service public tandis que la commune est actionnaire (non exclusif) tant de l'entité contrôlée (société coopérative intercommunale) que de la société de logement de service public ? »

Dans l'affaire C-384/21 :

« 1) L'article [12, paragraphe 3,] de la directive [2014/24] doit-il être interprété en ce sens qu'il produit un effet direct ?

2) En cas de réponse affirmative à cette première question, l'article [12, paragraphe 3,] de la directive [2014/24] doit-il être interprété en ce sens que la condition pour un pouvoir adjudicateur, en l'occurrence une société de logement de service public, d'être représenté au sein des organes décisionnels de la personne morale contrôlée, en l'occurrence une société coopérative intercommunale, est remplie au seul motif qu'une personne siégeant au sein du conseil d'administration de cette société coopérative intercommunale en sa qualité de conseiller communal d'un autre pouvoir adjudicateur participant, en l'occurrence une commune, se trouve, en raison de circonstances exclusivement factuelles et sans garantie juridique de représentation, être également administrateur au sein de la société de logement de service public tandis que la commune est actionnaire (non exclusif) tant de l'entité contrôlée (société coopérative intercommunale) que de la société de logement de service public ?

3) En cas de réponse négative à la première question posée, faut-il considérer qu'un pouvoir adjudicateur, en l'occurrence une société de logement de service public, "participe" aux organes décisionnels de la personne morale contrôlée, en l'occurrence une société coopérative intercommunale, au seul motif qu'une personne siégeant au sein du conseil d'administration de cette société coopérative intercommunale en sa qualité de conseiller communal d'un autre pouvoir adjudicateur participant, en l'occurrence une commune, se trouve, en raison de circonstances exclusivement factuelles et sans garantie juridique de représentation, être également administrateur au sein de la société de logement de service public tandis que la commune est actionnaire (non exclusif) tant de l'entité contrôlée (société coopérative intercommunale) que de la société de logement de service public ?

4) L'article [12, paragraphe 4,] de la directive [2014/24] doit-il être interprété en ce sens qu'il produit un effet direct ?

5) En cas de réponse affirmative à [la quatrième] question, l'article [12, paragraphe 4,] de la directive [2014/24] doit-il être interprété en ce sens qu'il permettrait de confier, sans mise en concurrence préalable, des missions d'assistance à maîtrise d'ouvrage, de prestations juridiques et d'environnement à un pouvoir adjudicateur, en l'occurrence une société coopérative intercommunale, dès lors que ces missions s'inscrivent dans le cadre d'une coopération entre deux autres pouvoirs adjudicateurs, en l'occurrence une commune et une société de logement de service public, qu'il n'est pas contesté que la commune exerce un contrôle "*in house* conjoint" sur la société coopérative intercommunale et que la commune et la société de logement de service public sont membres de la société coopérative intercommunale dans le secteur d'activités "bureau d'études et de gestion et centrale d'achat" de son objet social qui est précisément concerné par les missions qu'elles souhaitent lui confier, lesquelles missions correspondent à des activités effectuées sur le marché par des bureaux d'études et de gestion spécialisés en conception, réalisation et mise en œuvre de projets ? »

33 Par décision du président de la Cour du 27 août 2021, les affaires C-383/21 et C-384/21 ont été jointes aux fins des phases écrite et orale de la procédure ainsi que de l'arrêt.

Sur les questions préjudicielles

Sur la première question dans l'affaire C-383/21 ainsi que sur les première et quatrième questions dans l'affaire C-384/21

34 Par sa première question dans l'affaire C-383/21 ainsi que par ses première et quatrième questions dans l'affaire C-384/21, la juridiction de renvoi demande, en substance, si l'article 12, paragraphes 3 et 4, de la directive 2014/24 doit être interprété en ce sens qu'il produit des effets directs dans le cadre de litiges opposant des personnes morales de droit public au sujet de l'attribution directe de marchés publics, alors que l'État membre concerné s'est abstenu de transposer cette directive dans l'ordre juridique national dans les délais impartis.

35 Il ressort d'une jurisprudence constante que, dans tous les cas où les dispositions d'une directive apparaissent, du point de vue de leur contenu, inconditionnelles et suffisamment précises, il est possible de les invoquer devant les juridictions nationales à l'encontre de l'État membre concerné, soit lorsque celui-ci s'est abstenu de transposer dans les délais la directive dans le droit national, soit lorsqu'il en a fait une transposition incorrecte (arrêt du 14 janvier 2021, RTS infra et Aannemingsbedrijf Norré-Behaegel, C-387/19, EU:C:2021:13, point 44 ainsi que jurisprudence citée).

36 En vertu de l'article 288, troisième alinéa, TFUE, le caractère contraignant d'une directive sur lequel est fondée la possibilité d'invoquer celle-ci n'existe qu'à l'égard de « tout État membre destinataire ». Il s'ensuit, selon une jurisprudence constante, qu'une directive ne peut par elle-même créer d'obligations dans le chef d'un particulier et ne peut donc être invoquée en tant que telle à l'encontre d'une telle personne devant une juridiction nationale (arrêt du 12 décembre 2013, Portgás, C-425/12, EU:C:2013:829, point 22 et jurisprudence citée).

37 Toutefois, il convient de rappeler que, lorsque les justiciables sont en mesure de se prévaloir d'une directive à l'encontre non pas d'un particulier, mais d'un État membre, ils peuvent le faire quelle que soit la qualité en laquelle agit ce dernier. Il convient, en effet, d'éviter que l'État membre puisse tirer avantage de sa méconnaissance du droit de l'Union (voir, en ce sens, arrêt du 7 juillet 2016, Ambisig, C-46/15, EU:C:2016:530, point 21 et jurisprudence citée).

38 Ainsi, les dispositions inconditionnelles et suffisamment précises d'une directive peuvent être invoquées par les justiciables non seulement à l'encontre d'un État membre et de l'ensemble des organes de son administration, mais également à l'encontre d'organismes ou d'entités, fussent-ils de droit privé, qui soit sont soumis à l'autorité ou au contrôle d'une autorité publique, soit se sont vu confier par un État membre l'accomplissement d'une mission d'intérêt public et détiennent à cet effet des pouvoirs exorbitants par rapport à ceux qui résultent des règles applicables dans les relations entre particuliers (arrêt du 30 avril 2020, Blue Air – Airline Management Solutions, C-584/18, EU:C:2020:324, point 72 et jurisprudence citée).

39 Par conséquent, dès lors que l'obligation pour un État membre de prendre toutes les mesures nécessaires pour atteindre le résultat prescrit par une directive est une obligation contraignante, imposée par l'article 288, troisième alinéa, TFUE ainsi que par cette directive elle-même, et dont le respect incombe à toutes les entités visées au point précédent, les litiges opposant ces entités sont des litiges impliquant des parties tenues de faire application de la directive concernée et auxquelles, par voie de conséquence, les dispositions inconditionnelles et suffisamment précises de cette directive sont opposables. Il en découle que ces dispositions de ladite directive sont susceptibles d'être invoquées dans le cadre de tels litiges, qu'il s'agisse, pour lesdites entités, de faire respecter les obligations qu'elles imposent ou de faire valoir les droits qu'elles leur octroient (voir, en ce sens, arrêt du 12 décembre 2013, Portgás, C-425/12, EU:C:2013:829, points 34, 35 et 38).

40 En l'occurrence, ainsi qu'il ressort des demandes de décision préjudicielle, les parties aux litiges au principal sont des personnes morales de droit public tenues au respect de la directive 2014/24. Il s'ensuit que, dans le cadre de ces litiges, alors que cette directive n'a pas été transposée dans l'ordre juridique national dans les délais impartis, des pouvoirs adjudicateurs, tels que la SLSP Sambre & Biesme et la commune de Farciennes, sont en mesure de se prévaloir des dispositions de ladite directive, pour autant que ces dernières soient inconditionnelles et suffisamment précises.

41 À ces égards, la Cour a précisé qu'une disposition du droit de l'Union est, d'une part, inconditionnelle lorsqu'elle énonce une obligation qui n'est assortie d'aucune condition ni subordonnée, dans son exécution ou dans ses effets, à l'intervention d'aucun acte soit des institutions de l'Union européenne, soit des États membres et, d'autre part, suffisamment précise pour être invoquée par un justiciable et appliquée par le juge lorsqu'elle énonce une obligation dans des termes non équivoques (arrêt du

14 janvier 2021, RTS infra et Aannemingsbedrijf Norré-Behaegel, C-387/19, EU:C:2021:13, point 46 ainsi que jurisprudence citée). Or, tel est le cas de l'article 12, paragraphes 3 et 4, de la directive 2014/24.

42 En effet, s'agissant, en premier lieu, du caractère inconditionnel de ces dispositions, il y a lieu d'observer, à titre liminaire, que, ainsi qu'il a été exposé au point 23 du présent arrêt, la juridiction de renvoi s'interroge, à la lumière de l'arrêt du 3 octobre 2019, Irgita (C-285/18, EU:C:2019:829), sur la portée desdites dispositions, alors que les parties au principal s'opposent, notamment, sur la question de savoir si ces mêmes dispositions ont seulement pour objet de prévoir une faculté pour les États membres d'exclure l'attribution de certains marchés publics passés entre des entités appartenant au secteur public du champ d'application de cette directive. En effet, le cas échéant, les pouvoirs adjudicateurs ne pourraient pas se prévaloir de telles exclusions lorsque, faute de transposition de ladite directive, l'exercice d'une telle faculté par l'État membre concerné fait défaut.

43 À cet égard, il convient de relever que l'article 12 de la directive 2014/24, conformément à l'intitulé de la section dans laquelle il s'insère, prévoit, en substance, que les marchés publics passés entre des entités appartenant au secteur public remplissant les critères qui y sont visés sont exclus du champ d'application de cette directive, critères qu'un pouvoir adjudicateur doit donc respecter lorsqu'il souhaite procéder à l'attribution directe d'un tel marché public. En particulier, les paragraphes 3 et 4 dudit article 12 ont trait, d'une part, aux marchés publics attribués par un pouvoir adjudicateur à une personne morale sur laquelle celui-ci exerce, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle analogue à celui qu'il exerce sur ses propres services et, d'autre part, aux marchés publics conclus exclusivement entre des pouvoirs adjudicateurs afin d'établir ou de mettre en œuvre une coopération entre eux dans le but de garantir que les services publics dont ils doivent assurer la prestation sont réalisés en vue d'atteindre les objectifs qu'ils ont en commun.

44 Ainsi, la directive 2014/24 a, à son article 12, codifié et précisé la jurisprudence développée par la Cour en matière d'attribution directe, ce qui met en évidence que le législateur de l'Union a entendu que ce régime d'attribution directe soit rattaché à cette directive (voir, en ce sens, arrêt du 8 mai 2019, Rhenus Veniro, C-253/18, EU:C:2019:386, point 27 et jurisprudence citée).

45 Ce faisant, comme la Cour l'a constaté, l'article 12 de ladite directive n'a pas, par conséquent, privé les États membres de la liberté de privilégier un mode de prestation de services, d'exécution de travaux ou d'approvisionnement en fournitures au détriment des autres. En effet, une telle liberté implique un choix qui s'effectue à un stade antérieur à celui de la passation d'un marché et qui, dès lors, ne relève pas du champ d'application de la directive 2014/24 (voir, en ce sens, arrêt du 3 octobre 2019, Irgita, C-285/18, EU:C:2019:829, point 44 ; ordonnances du 6 février 2020, Pia Opera Croce Verde Padova, C-11/19, EU:C:2020:88, points 41 et 47, ainsi que du 6 février 2020, Rieco, C-89/19 à C-91/19, EU:C:2020:87, points 33, 39 et 40).

46 En outre, le considérant 5 et le considérant 31, deuxième alinéa, de la directive 2014/24 reflètent la volonté du législateur de l'Union de reconnaître la liberté des États membres quant au choix du mode de prestation de services par lequel les pouvoirs adjudicateurs peuvent pourvoir à leurs besoins (voir, en ce sens, arrêt du 3 octobre 2019, Irgita, C-285/18, EU:C:2019:829, point 45 ; ordonnances du 6 février 2020, Pia Opera Croce Verde Padova, C-11/19, EU:C:2020:88, points 42 et 47, ainsi que du 6 février 2020, Rieco, C-89/19 à C-91/19, EU:C:2020:87, points 34, 39 et 40).

47 En effet, d'une part, le considérant 5 de cette directive énonce que rien dans celle-ci ne fait obligation aux États membres de confier à des tiers ou d'externaliser la fourniture de services qu'ils souhaitent fournir eux-mêmes ou organiser autrement que par la passation d'un marché public, au sens de ladite directive. D'autre part, son considérant 31, deuxième alinéa, indique que, si la seule circonstance que les deux parties à un accord sont elles-mêmes des pouvoirs publics n'exclut pas en soi l'application des règles relatives à la passation des marchés publics, l'application de ces règles ne devrait pas interférer avec la liberté des pouvoirs publics d'exercer les missions de service public qui leur sont confiées en utilisant leurs propres ressources, ce qui inclut la possibilité de coopérer avec d'autres pouvoirs publics.

48 Ainsi, la Cour en a déduit que, de même que la directive 2014/24 n'oblige pas les États membres à exiger des pouvoirs adjudicateurs de recourir à une procédure de passation de marché public, elle ne saurait les contraindre à recourir aux opérations visées à l'article 12 de cette directive lorsque les

conditions prévues à cet article sont remplies (voir, en ce sens, arrêt du 3 octobre 2019, Irgita, C-285/18, EU:C:2019:829, point 46 ; ordonnances du 6 février 2020, Pia Opera Croce Verde Padova, C-11/19, EU:C:2020:88, points 43 et 47, ainsi que du 6 février 2020, Rieco, C-89/19 à C-91/19, EU:C:2020:87, points 35, 39 et 40).

49 Il résulte de ce qui précède que, certes, les États membres demeurent libres de fixer, dans la législation nationale, des conditions pour le recours, par les entités appartenant au secteur public, à des marchés publics tels que ceux visés à l'article 12, paragraphes 3 et 4, de la directive 2014/24. Cependant, il n'en demeure pas moins que, lorsque, en vertu du droit national, il est loisible aux pouvoirs adjudicateurs de se prévaloir de l'une des exclusions au champ d'application de cette directive prévues à ces dispositions, les marchés publics réunissant les conditions qui y sont mentionnées peuvent faire l'objet d'une attribution directe, sans que cela soit subordonné à l'exercice, par l'État membre concerné, d'une faculté à cet effet. Par conséquent, en ce que les dispositions dudit article énoncent, à l'égard de ces pouvoirs adjudicateurs, des exigences pour l'exclusion de l'application des règles énoncées par ladite directive qui ne sont subordonnées, dans leur exécution ou dans leur effet, à l'intervention d'aucun acte, elles présentent un caractère inconditionnel, au sens de la jurisprudence rappelée au point 41 du présent arrêt.

50 Pour ce qui est, en second lieu, du caractère suffisamment précis desdites dispositions, il suffit de relever que, ainsi qu'il a été rappelé au point 44 du présent arrêt, l'article 12 de la directive 2014/24 codifie et précise la jurisprudence développée par la Cour en matière d'attribution directe en énonçant en des termes non équivoques, notamment, à ses paragraphes 3 et 4, les exigences auxquelles la mise en œuvre de ce régime d'attribution directe par les pouvoirs adjudicateurs doit répondre, afin, ainsi qu'il ressort du considérant 31 de cette directive, de remédier aux interprétations divergentes dont cette jurisprudence faisait l'objet.

51 Il y a donc lieu de conclure que l'article 12, paragraphes 3 et 4, de ladite directive présente le caractère inconditionnel et suffisamment précis qui est requis afin de produire des effets directs dans le cadre de litiges qui, tels que ceux au principal, opposent des personnes morales de droit public.

52 Eu égard aux considérations qui précèdent, il y a lieu de répondre à la première question dans l'affaire C-383/21 ainsi qu'aux première et quatrième questions dans l'affaire C-384/21 que l'article 12, paragraphes 3 et 4, de la directive 2014/24 doit être interprété en ce sens qu'il produit des effets directs dans le cadre de litiges opposant des personnes morales de droit public au sujet de l'attribution directe de marchés publics, alors que l'État membre concerné s'est abstenu de transposer cette directive dans l'ordre juridique national dans les délais impartis.

Sur la deuxième question dans les affaires C-383/21 et C-384/21

53 Par sa deuxième question dans les affaires C-383/21 et C-384/21, la juridiction de renvoi demande, en substance, si l'article 12, paragraphe 3, second alinéa, sous i), de la directive 2014/24 doit être interprété en ce sens que, afin d'établir qu'un pouvoir adjudicateur exerce, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle sur la personne morale adjudicataire analogue à celui qu'ils exercent sur leurs propres services, l'exigence visée à cette disposition, tenant à ce qu'un pouvoir adjudicateur soit représenté dans les organes décisionnels de la personne morale contrôlée, est satisfaite au seul motif que siège au conseil d'administration de cette personne morale le représentant d'un autre pouvoir adjudicateur qui fait également partie du conseil d'administration du premier pouvoir adjudicateur.

54 Conformément à une jurisprudence constante, lors de l'interprétation d'une disposition du droit de l'Union, il y a lieu de tenir compte non seulement des termes de celle-ci, mais également de son contexte et des objectifs poursuivis par la réglementation dont elle fait partie. La genèse d'une disposition du droit de l'Union peut également révéler des éléments pertinents pour son interprétation (arrêt du 9 juin 2022, IMPERIAL TOBACCO BULGARIA, C-55/21, EU:C:2022:459, point 44 et jurisprudence citée).

55 En premier lieu, s'agissant du libellé de l'article 12, paragraphe 3, second alinéa, sous i), de la directive 2014/24, il convient d'observer que cette disposition vise l'un des critères devant être satisfait afin d'établir, en vertu de l'article 12, paragraphe 3, premier alinéa, sous a), de cette directive, qu'un

pouvoir adjudicateur exerce, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle sur la personne morale concernée, analogue à celui qu'ils exercent sur leurs propres services.

56 En l'occurrence, l'article 12, paragraphe 3, second alinéa, sous i), de ladite directive énonce que les organes décisionnels de la personne morale contrôlée doivent être composés de représentants de tous les pouvoirs adjudicateurs participants, une même personne pouvant représenter plusieurs pouvoirs adjudicateurs participants ou l'ensemble d'entre eux.

57 Il résulte ainsi des termes de cette disposition que celle-ci requiert qu'un pouvoir adjudicateur exerçant un contrôle conjoint sur une personne morale dispose d'un membre agissant en qualité de représentant de ce pouvoir adjudicateur dans les organes décisionnels de cette personne morale, ce membre pouvant, le cas échéant, représenter également d'autres pouvoirs adjudicateurs.

58 Cette interprétation est corroborée, en deuxième lieu, par le contexte dans lequel s'insère ladite disposition.

59 En effet, premièrement, il convient d'observer que l'article 12, paragraphe 1, de la directive 2014/24, relatif à l'hypothèse où un pouvoir adjudicateur unique exercerait sur la personne morale à laquelle un marché public est attribué un contrôle analogue à celui exercé sur ses propres services, prévoit, à son second alinéa, que ce contrôle peut également être exercé par une autre personne morale, qui est elle-même contrôlée de la même manière par le pouvoir adjudicateur.

60 Par ailleurs, le paragraphe 2 de cet article 12 dispose, notamment, que le paragraphe 1 de celui-ci est également susceptible de s'appliquer lorsqu'une personne morale contrôlée, qui est elle-même un pouvoir adjudicateur, attribue un marché au pouvoir adjudicateur qui la contrôle, ou à une autre personne morale contrôlée par le même pouvoir adjudicateur.

61 En revanche, pour ce qui est de l'article 12, paragraphe 3, de cette directive, cette disposition prévoit qu'un pouvoir adjudicateur qui n'exerce pas de contrôle sur une personne morale, au sens du paragraphe 1 de cet article 12, peut, néanmoins, attribuer un marché public à cette personne morale sans appliquer ladite directive lorsque ce pouvoir adjudicateur exerce, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle sur la personne morale concernée. Toutefois, il importe de souligner que, à la différence des paragraphes 1 et 2 dudit article, ladite disposition ne prévoit pas que les conditions relatives au contrôle du pouvoir adjudicateur sur la personne morale adjudicataire puissent être satisfaites de manière indirecte.

62 En particulier, l'exigence de représentation visée à l'article 12, paragraphe 3, second alinéa, sous i), de la directive 2014/24 requiert que la participation d'un pouvoir adjudicateur au sein des organes décisionnels de la personne morale contrôlée conjointement avec d'autres pouvoirs adjudicateurs s'effectue par l'intermédiaire d'un représentant de ce pouvoir adjudicateur lui-même. Cette exigence ne peut donc pas être satisfaite par l'intermédiaire d'un membre de ces organes y siégeant seulement en qualité de représentant d'un autre pouvoir adjudicateur.

63 Deuxièmement, l'article 12, paragraphe 3, second alinéa, sous ii), de cette directive prévoit, au titre des conditions devant être réunies pour que soit établi que les pouvoirs adjudicateurs exercent un contrôle conjoint sur une personne morale, au sens de l'article 12, paragraphe 3, premier alinéa, sous a), de ladite directive, que ces pouvoirs adjudicateurs doivent être en mesure d'exercer conjointement une influence décisive sur les objectifs stratégiques poursuivis par la personne morale contrôlée et sur les décisions importantes que celle-ci est susceptible de prendre.

64 Eu égard à la portée de la condition énoncée à l'article 12, paragraphe 3, second alinéa, sous ii), de la directive 2014/24, laquelle a trait à la détermination du contenu de ces objectifs et de ces décisions, il convient donc de comprendre le critère figurant à l'article 12, paragraphe 3, second alinéa, sous i), de cette directive comme visant à poser une exigence distincte portant sur les conditions formelles de la participation de ces pouvoirs adjudicateurs dans les organes décisionnels de la personne morale concernée.

65 Ces constatations sont confirmées par la genèse de l'article 12, paragraphe 3, second alinéa, de ladite directive.

66 Ainsi qu'il ressort du considérant 31 de la même directive, tout en relevant l'existence d'une importante insécurité juridique quant à la question de savoir dans quelle mesure les règles sur la passation des marchés publics devraient s'appliquer aux marchés conclus entre des entités appartenant au secteur public et, partant, la nécessité d'apporter des précisions à cet égard, le législateur de l'Union a considéré que ces précisions devraient s'appuyer sur les principes énoncés dans la jurisprudence pertinente de la Cour et, partant, n'a pas entendu remettre en cause cette jurisprudence (voir, en ce sens, arrêt du 28 mai 2020, Informatikgesellschaft für Software-Entwicklung, C-796/18, EU:C:2020:395, point 66).

67 À cet égard, il ressort de ladite jurisprudence que la question de savoir si un pouvoir adjudicateur exerce sur la personne morale concernée un contrôle analogue à celui qu'il exerce sur ses propres services s'apprécie au regard de l'ensemble des dispositions législatives et des circonstances pertinentes. Dès lors, les éléments dont il y a lieu de tenir compte ne recouvrent pas seulement des circonstances factuelles, mais incluent également la législation applicable ainsi que, notamment, les mécanismes de contrôle prévus par les statuts de cette personne morale (voir, en ce sens, arrêt du 10 septembre 2009, Sea, C-573/07, EU:C:2009:532, points 65 et 66 ainsi que jurisprudence citée).

68 Au titre des précisions apportées à la jurisprudence de la Cour s'agissant des conditions dans lesquelles les marchés conclus entre des entités appartenant au secteur public ne relèvent pas des règles sur la passation des marchés publics, le législateur de l'Union a entendu renforcer l'exigence tenant à cette condition de représentation.

69 En effet, il y a lieu d'observer que, antérieurement à l'adoption de la directive 2014/24, le fait que les organes décisionnels de la personne morale concernée soient composés de représentants des pouvoirs adjudicateurs exerçant sur celle-ci un contrôle conjoint était un des éléments dont il était tenu compte afin d'établir, dans le chef du pouvoir adjudicateur concerné, la possibilité d'une influence déterminante tant sur les objectifs stratégiques que sur les décisions importantes de cette personne (voir, notamment, arrêts du 13 novembre 2008, Coditel Brabant, C-324/07, EU:C:2008:621, points 28, 29, 33 et 34 ainsi que jurisprudence citée, et du 10 septembre 2009, Sea, C-573/07, EU:C:2009:532, points 65, 66 et 86 ainsi que jurisprudence citée).

70 Or, en les visant à des dispositions distinctes, à savoir à l'article 12, paragraphe 3, second alinéa, sous i) et ii), de cette directive, le législateur de l'Union a entendu faire des conditions de représentation des pouvoirs adjudicateurs exerçant un contrôle conjoint sur la personne morale adjudicataire une exigence autonome par rapport à celle tenant à la possibilité d'exercer une telle influence décisive.

71 En troisième lieu, l'interprétation selon laquelle cette disposition exige que la participation d'un pouvoir adjudicateur exerçant un tel contrôle conjoint au sein des organes décisionnels de la personne morale contrôlée s'effectue par l'intermédiaire d'un membre agissant en qualité de représentant de ce pouvoir adjudicateur lui-même, ce membre pouvant, le cas échéant, représenter également d'autres pouvoirs adjudicateurs, est confortée par l'objectif poursuivi par les dispositions de l'article 12, paragraphe 3, de ladite directive.

72 En effet, ainsi qu'il a été rappelé aux points 46 et 48 du présent arrêt, l'exclusion du champ d'application de la directive 2014/24 des marchés publics satisfaisant les critères visés, notamment, à son article 12, paragraphe 3, résulte de la reconnaissance, ainsi qu'il ressort du considérant 5 et du considérant 31, deuxième alinéa, de cette directive, de la liberté des État membres de prévoir que les pouvoirs publics puissent fournir certains services par eux-mêmes et exercer les missions de service public qui leur sont confiées en utilisant leurs propres ressources.

73 Or, il ne saurait être considéré qu'un pouvoir adjudicateur utilise ses propres ressources et agit par lui-même lorsqu'il n'est pas en mesure d'intervenir dans les organes décisionnels de la personne morale à qui le marché public est attribué par la voie d'un représentant qui agit au nom de ce pouvoir adjudicateur lui-même ainsi que, le cas échéant, au nom d'autres pouvoirs adjudicateurs, et que, par conséquent, l'expression de ses intérêts au sein de ces organes décisionnels est subordonnée au fait que lesdits intérêts soient communs avec ceux que les autres pouvoirs adjudicateurs y font valoir par l'intermédiaire de leurs propres représentants au sein de ces organes.

74 En l'occurrence, sous réserve de vérification par la juridiction de renvoi, il ressort des éléments fournis à la Cour que l'exigence visée à l'article 12, paragraphe 3, second alinéa, sous i), de ladite directive, tenant à ce que la participation d'un pouvoir adjudicateur exerçant un contrôle conjoint sur une personne morale au sein des organes décisionnels de celle-ci s'effectue par l'intermédiaire d'un membre agissant en qualité de représentant de ce pouvoir adjudicateur lui-même, ce membre pouvant, le cas échéant, représenter également d'autres pouvoirs adjudicateurs, n'apparaît pas être satisfaite dans les circonstances en cause au principal. En effet, d'une part, les associés de catégorie C, dont fait partie la SLSP Sambre & Biesme, ne disposaient, notamment, d'aucun représentant au sein du conseil d'administration de l'Igretec et, d'autre part, bien que siégeant également au conseil d'administration de la SLSP Sambre & Biesme, ce n'est qu'en qualité de représentant de la commune de Farciennes, associée de catégorie A, que le conseiller communal siégeait au conseil d'administration de l'Igretec.

75 Eu égard aux considérations qui précèdent, il y a lieu de répondre à la deuxième question dans les affaires C-383/21 et C-384/21 que l'article 12, paragraphe 3, second alinéa, sous i), de la directive 2014/24 doit être interprété en ce sens que, afin d'établir qu'un pouvoir adjudicateur exerce, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle sur la personne morale adjudicataire analogue à celui qu'ils exercent sur leurs propres services, l'exigence visée à cette disposition, tenant à ce qu'un pouvoir adjudicateur soit représenté dans les organes décisionnels de la personne morale contrôlée, n'est pas satisfaite au seul motif que siège au conseil d'administration de cette personne morale le représentant d'un autre pouvoir adjudicateur qui fait également partie du conseil d'administration du premier pouvoir adjudicateur.

Sur la troisième question dans les affaires C-383/21 et C-384/21

76 Compte tenu de la réponse apportée à la première question dans les affaires C-383/21 et C-384/21, il n'y a pas lieu de répondre à la troisième question dans ces affaires.

Sur la cinquième question dans l'affaire C-384/21

77 Par sa cinquième question dans l'affaire C-384/21, la juridiction de renvoi demande, en substance, si l'article 12, paragraphe 4, de la directive 2014/24 doit être interprété en ce sens qu'est exclu du champ d'application de cette directive un marché public par lequel sont confiées à un pouvoir adjudicateur des missions de service public qui s'inscrivent dans le cadre d'une relation de coopération entre d'autres pouvoirs adjudicateurs.

78 À titre liminaire, il convient d'observer que les paragraphes 1 à 4 de l'article 12 de ladite directive vise des cas distincts d'exclusion des règles de passation des marchés publics, chacun de ces cas étant soumis à des conditions qui lui sont propres.

79 Aux termes du paragraphe 4, sous a), de cet article 12, un marché public conclu exclusivement entre deux pouvoirs adjudicateurs ou plus ne relève pas du champ d'application de la directive 2014/24 lorsque ce marché établit ou met en œuvre une coopération entre les pouvoirs adjudicateurs participants dans le but de garantir que les services publics dont ils doivent assurer la prestation sont réalisés en vue d'atteindre les objectifs qu'ils ont en commun. Par ailleurs, aux termes des points b) et c) de ce paragraphe, il est requis que la mise en œuvre de cette coopération n'obéisse qu'à des considérations d'intérêt public et que les pouvoirs adjudicateurs participants réalisent sur le marché concurrentiel moins de 20 % des activités concernées par la coopération.

80 Il en découle que des circonstances telles que le fait qu'il existe une relation *in house* entre certains des pouvoirs adjudicateurs ou que les pouvoirs adjudicateurs attribuant le marché public concerné soient des associés du pouvoir adjudicateur auquel est confié, au moyen du marché public concerné, la réalisation de certaines missions ne sauraient, en elles-mêmes, être prises en compte afin d'apprécier si l'article 12, paragraphe 4, de la directive 2014/24 couvre une situation dans laquelle l'exercice de ses missions par un pouvoir adjudicateur s'inscrit dans le cadre d'une relation de coopération entre d'autres pouvoirs adjudicateurs.

81 En revanche, il y a lieu de relever que le libellé de cette disposition confère à la notion de « coopération » un rôle déterminant dans le dispositif d'exclusion qu'elle prévoit. À cet égard, l'exigence d'une coopération effective ressort également de la précision, énoncée au considérant 33,

troisième alinéa, de cette directive, selon laquelle la coopération doit être « fondée sur le concept de coopération ». Une telle formulation, en apparence tautologique, doit être interprétée comme renvoyant à l'exigence d'effectivité de la coopération ainsi établie ou mise en œuvre (voir, en ce sens, arrêt du 4 juin 2020, Remondis, C-429/19, EU:C:2020:436, points 26 et 28).

82 Dès lors, le marché public concerné doit apparaître comme l'aboutissement d'une démarche de coopération entre les pouvoirs adjudicateurs parties à celui-ci. L'élaboration d'une coopération entre des entités appartenant au secteur public présente, en effet, une dimension intrinsèquement collaborative, qui fait défaut dans une procédure de passation d'un marché public relevant des règles prévues par ladite directive (voir, en ce sens, arrêt du 4 juin 2020, Remondis, C-429/19, EU:C:2020:436, point 32).

83 Comme l'a souligné M. l'avocat général, au point 60 de ses conclusions, une telle dimension collaborative exige que, pour relever de l'article 12, paragraphe 4, de la directive 2014/24, la coopération en cause doit aboutir à la réalisation d'objectifs communs à l'ensemble des pouvoirs adjudicateurs.

84 Or, un tel objectif commun à l'ensemble des pouvoirs adjudicateurs fait défaut, lorsque, par l'accomplissement de ses missions, au titre du marché public concerné, un des pouvoirs adjudicateurs ne cherche pas à atteindre des objectifs qu'il partagerait avec les autres pouvoirs adjudicateurs, mais se limite à contribuer à la réalisation d'objectifs que seuls ces autres pouvoirs adjudicateurs ont en commun.

85 Dans de telles circonstances, le marché public concerné a uniquement pour objet l'acquisition d'une prestation moyennant le versement d'une rémunération, de sorte qu'il ne serait pas visé par l'exclusion prévue à l'article 12, paragraphe 4, de cette directive (voir, en ce sens, arrêt du 4 juin 2020, Remondis, C-429/19, EU:C:2020:436, points 36 à 38).

86 Sous réserve de vérification par la juridiction de renvoi, il ressort des éléments fournis à la Cour que, dans les circonstances en cause au principal, la participation de l'Igretec à un marché public visant à la mise en œuvre du projet d'écoquartier à Farciennes ne saurait relever de cette exclusion. En effet, ainsi que M. l'avocat général l'a observé, aux points 69 et 71 de ses conclusions, même si l'exercice de ses missions par l'Igretec s'inscrit dans le cadre de la coopération entre la SLSP Sambre & Biesme et la commune de Farciennes en vue de les assister dans la réalisation de leur projet commun de création d'un écoquartier à Farciennes, il n'en demeure pas moins qu'une telle réalisation ne constitue pas en elle-même un objectif poursuivi par l'Igretec.

87 Eu égard aux considérations qui précèdent, il y a lieu de répondre à la cinquième question dans l'affaire C-384/21 que l'article 12, paragraphe 4, de la directive 2014/24 doit être interprété en ce sens que n'est pas exclu du champ d'application de cette directive un marché public par lequel sont confiées à un pouvoir adjudicateur des missions de service public qui s'inscrivent dans le cadre d'une relation de coopération entre d'autres pouvoirs adjudicateurs, lorsque, par l'accomplissement de telles missions, le pouvoir adjudicateur à qui ces missions ont été confiées ne cherche pas à atteindre des objectifs qu'il partagerait avec les autres pouvoirs adjudicateurs, mais se limite à contribuer à la réalisation d'objectifs que seuls ces autres pouvoirs adjudicateurs ont en commun.

Sur les dépens

88 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (cinquième chambre) dit pour droit :

1) L'article 12, paragraphes 3 et 4, de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive

2004/18/CE,

doit être interprété en ce sens que :

il produit des effets directs dans le cadre de litiges opposant des personnes morales de droit public au sujet de l'attribution directe de marchés publics, alors que l'État membre concerné s'est abstenu de transposer cette directive dans l'ordre juridique national dans les délais impartis.

2) **L'article 12, paragraphe 3, second alinéa, sous i), de la directive 2014/24**

doit être interprété en ce sens que :

afin d'établir qu'un pouvoir adjudicateur exerce, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle sur la personne morale adjudicataire analogue à celui qu'ils exercent sur leurs propres services, l'exigence visée à cette disposition, tenant à ce qu'un pouvoir adjudicateur soit représenté dans les organes décisionnels de la personne morale contrôlée, n'est pas satisfaite au seul motif que siège au conseil d'administration de cette personne morale le représentant d'un autre pouvoir adjudicateur qui fait également partie du conseil d'administration du premier pouvoir adjudicateur.

3) **L'article 12, paragraphe 4, de la directive 2014/24**

doit être interprété en ce sens que :

n'est pas exclu du champ d'application de cette directive un marché public par lequel sont confiées à un pouvoir adjudicateur des missions de service public qui s'inscrivent dans le cadre d'une relation de coopération entre d'autres pouvoirs adjudicateurs, lorsque, par l'accomplissement de telles missions, le pouvoir adjudicateur à qui ces missions ont été confiées ne cherche pas à atteindre des objectifs qu'il partagerait avec les autres pouvoirs adjudicateurs, mais se limite à contribuer à la réalisation d'objectifs que seuls ces autres pouvoirs adjudicateurs ont en commun.

Regan Gratsias Ilešič

Jarukaitis Csehi

Ainsi prononcé en audience publique à Luxembourg, le 22 décembre 2022.

Le greffier Le président de chambre

A. Calot Escobar E. Regan

---

* Langue de procédure : le français.

EU:C:2022:456

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 9 June 2022 (1)

Joined Cases C-383/21 and C-384/21

Société de logement de service public (SLSP) 'Sambre & Biesme', SCRL (C-383/21)
Commune de Farciennes (C-384/21)
v
Société wallonne du logement

(Request for a preliminary ruling from the Conseil d'État (Council of State, acting as supreme administrative court, Belgium))

(Reference for a preliminary ruling – Directive 2014/24/EU – Public procurement – Services, works and project development – In-house award – In-house entity jointly controlled by several contracting authorities – Applicability of the directive)

1. In Belgium, a public housing developer and a municipality decided to conclude a framework procurement agreement. Under that agreement, a contract for technical assistance in connection with the building of housing and a contract for asbestos surveying services were to be granted not by competitive tendering but by direct award to a third party, which was also a public entity.

2. The authority commissioned by the Walloon Government to supervise the performance of public housing undertakings cancelled the aforementioned agreement on the ground that the conditions for a direct contract award were not met in that case.

3. The two signatories to that agreement each challenged its cancellation on the ground that, in their view, the direct award was compatible with Directive 2014/24. (2) The dispute has now reached the highest administrative court in Belgium, which has in each case made a reference to the Court for a preliminary ruling.

I. Legal framework. Directive 2014/24

4. According to recital 31:

'There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

…'

5. Recital 33 states:

'Contracting authorities should be able to choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form. Such cooperation might cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities need not necessarily be identical; they might also be complementary.

Contracts for the joint provision of public services should not be subject to the application of the rules set out in this Directive provided that they are concluded exclusively between contracting authorities, that the implementation of that cooperation is governed solely by considerations relating to the public interest and that no private service provider is placed in a position of advantage vis-à-vis its competitors.

In order to fulfil those conditions, the cooperation should be based on a cooperative concept. Such cooperation does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards the cooperative performance of the public service in question. In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest.'

6. Article 12 ('Public contracts between entities within the public sector') provides:

'1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

…

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities;

…

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

…’

II. Facts, proceedings and questions referred for a preliminary ruling

7. The company Société de logement de service public Sambre & Biesme (3) is a public entity in the legal form of a limited-liability cooperative society. Its main shareholders are the municipalities of Farciennes and Aiseau-Presles. It forms part of the network of public housing development companies in the Walloon Region (Belgium).

8. In 2015, SLSP Sambre & Biesme and the municipality of Farciennes decided to create an ‘ecodistrict’ comprising some 150 public and private housing units in Farciennes. Given the scale of the project, the parties sought the assistance of the Intercommunale pour la gestion et la réalisation d’études techniques et économiques, (4) an entity also in the legal form of a limited-liability cooperative society.

9. IGRETEC is comprised exclusively of legal persons governed by public law. In 2016, its members included more than 70 municipalities (including Farciennes) and more than 50 other ‘public authorities’. The municipalities held 5 054 351 voting shares, with the remaining public authorities holding 17 126 such shares.

10. Under IGRETEC’s articles of association, most of the votes and chairmanship of the various management bodies are reserved for the municipalities. The decisions of these bodies are adopted by majority of the votes cast by the municipal members.

11. At the material time, a councillor from the Municipality of Farciennes, who was also a director of SLSP Sambre & Biesme, was a member of IGRETEC’s board of directors.

12. On 29 October 2015, SLSP Sambre & Biesme decided to buy a single share in IGRETEC, for EUR 6.20, in order to benefit from its services. It thus became a member of the inter-municipal company, although its shareholding was purely symbolic. (5)

13. In January 2017, the Municipality of Farciennes and SLSP Sambre & Biesme drew up a draft framework agreement in order to establish their respective rights and obligations in the design and construction of the ecodistrict in Farciennes. The agreement contained the following clauses:

— Under Article 1, the parties decided to undertake jointly the public procurement of services, works and project development and designated the Municipality of Farciennes as contracting authority with the task of acting on their joint behalf and taking on its own initiative any decision relating to the award of contracts.

— According to Article 5, (6) 'the parties agree that the Municipality of Farciennes will conclude with IGRETEC … an agreement on project management assistance, legal advice and environmental services, within the framework of the in-house relationship which each of the parties has with that inter-municipal cooperative'.

— With a view to coordinating decision-making in connection with the implementation of the framework agreement, the annex thereto provided for a steering committee. (7)

— IGRETEC, although not a signatory to the framework agreement, would not only be represented on the steering committee but would also act as its secretariat.

14. On 9 February 2017, the board of directors of SLSP Sambre & Biesme decided: (a) 'to approve the conclusion of a framework agreement on the conclusion of contracts in conjunction with the Municipality of Farciennes'; and (b) 'not to issue a public call for tenders for asbestos surveying services', the specifications for which it had previously approved, 'in view of the in-house relationship between [SLSP Sambre & Biesme] and IGRETEC'. Those specifications are described as the first stage in the implementation of the ecodistrict project in Farciennes.

15. On 10 February 2017, the SWL representative assigned to SLSP Sambre & Biesme challenged the aforementioned decisions ('the contested decisions') before SWL itself. SWL acts on behalf of the Walloon Government as the oversight authority responsible for supervising public housing development companies.

16. On 25 February 2017, SWL annulled the contested decisions on the ground that the contracts for technical assistance (Article 5 of the framework agreement) and the contract for asbestos surveying had been awarded to IGRETEC without a public procurement procedure.

17. In the view of SWL:

— It is reasonable to question whether SLSP Sambre & Biesme exerts a decisive influence over IGRETEC, in so far as it holds only one share in the equity capital of that cooperative, under whose articles of association the municipalities hold a predominant position.

— The designation of the Municipality of Farciennes as the lead contracting authority for the project (Article 1 of the framework agreement) is not sufficient to justify the direct award of the contracts to IGRETEC on behalf of the various parties to that agreement, even though the Municipality of Farciennes qualifies for the in-house exception in its own right in its dealings with IGRETEC. In the context of a joint contract, the various partners come together to configure the requirement, but they each have a duty to follow the customary contracting procedures.

18. As the SWL agreements are actionable before the administrative courts, SLSP Sambre & Biesme and the Municipality of Farciennes, proceeding separately, challenged the annulment of the contested decisions.

19. The Conseil d'État (Council of State, acting as supreme administrative court, Belgium), to which it falls to rule on those actions, has made two references to the Court of Justice for a preliminary ruling.

20. By the first reference (Case C-383/21), it raises the following questions:

‘(1) Must Article 12(3) of Directive 2014/24 … be interpreted as having direct effect?

(2) If the answer to the first question is in the affirmative, must Article 12(3) of Directive 2014/24 be interpreted as meaning that the requirement for a contracting authority, in this case a public service housing company, to be represented on the decision-making bodies of the controlled legal person, in this case an inter-municipal cooperative society, is satisfied solely on the basis that a person who sits on the board of directors of that inter-municipal cooperative society in his or her capacity as a municipal councillor of another participating contracting authority, in this case a municipality, is, due to purely factual circumstances and without any legal guarantee of representation, also a director of the public service housing company, while the municipality is a (non-exclusive) shareholder in both the controlled entity (inter-municipal cooperative society) and the public service housing company?

(3) If the answer to the first question is negative, must it be considered that a contracting authority, in this case a public service housing company, “participates” in the decision-making bodies of the controlled legal person, in this case an inter-municipal cooperative society, solely on the basis that a person who sits on the board of directors of that inter-municipal cooperative society in his or her capacity as a municipal councillor of another participating contracting authority, in this case a municipality, is, due to purely factual circumstances and without any legal guarantee of representation, also a director of the public service housing company, while the municipality is a (non-exclusive) shareholder in both the controlled entity (inter-municipal cooperative society) and the public service housing company?’

21. In the second reference for a preliminary ruling (Case C-384/21), the referring court raises the following questions in addition to those set out above:

‘(4) Must Article 12(4) of Directive 2014/24 … be interpreted as having direct effect?

(5) If the answer to that question is in the affirmative, must Article 12(4) of Directive 2014/24 be interpreted as meaning that it allows tasks of project management assistance and legal and environmental services to be entrusted, without a prior call for competition, to a contracting authority, in this case an inter-municipal cooperative society, where those tasks form part of a cooperation between two other contracting authorities, in this case a municipality and a public service housing company, where it is not disputed that the municipality exercises “joint *in-house*” control over the inter-municipal cooperative society and where the municipality and the public service housing company are members of the inter-municipal cooperative society in the “consultancy and management and central purchasing” sector of its object, which is specifically concerned with the tasks they wish to entrust to it, which tasks correspond to activities carried out on the market by consultancy and management firms specialising in the design, execution and implementation of projects?’

III. Procedure before the Court of Justice

22. The requests for a preliminary ruling were registered at the Court on 24 June 2021. They were joined for the purposes of the written and oral stages of the procedure and the judgment.

23. Written observations have been lodged by SLSP Sambre & Biesme, the Municipality of Farciennes, the Belgian Government and the Commission. All of those parties attended the hearing held on 30 March 2022.

IV. Analysis

A. Preliminary point

24. In accordance with the Court's direction, this Opinion will deal with the first question in each case and with the fourth and fifth questions in the second case.

B. First question referred in Case C-383/21 and first and fourth questions referred in Case C-384/21

25. The referring court explains that the Belgian law incorporating Directive 2014/24 into domestic law was not yet in force at the time of the facts forming the subject of the dispute, even though the time limit for transposition had already expired. (8)

26. The applicants in the two cases each maintain that that Article 12(3) and (4) of Directive 2014/24 has direct effect, since it contains unconditional and sufficiently precise provisions which establish rights for individuals which the latter may enforce against the State and all of the bodies comprising its administration. (9)

27. The Belgian Government and the Commission (10) take the opposite view. They argue that Article 12(3) and (4) of Directive 2014/24 does not fulfil the conditions for producing direct effect, inasmuch as, in essence:

— The contracting authorities and public-law bodies covered by the public procurement directives are not 'individuals' benefiting from rights capable of being enforced against the State.

— Those provisions do not impose on the State an obligation to take or to refrain from taking action for the benefit of economic operators.

28. The outcome which I shall advocate below (that Article 12(3) and (4) of Directive 2014/24 is applicable to this dispute) would be arrived at in practice whether via the route of accepting that the benefit of any direct effect produced by those paragraphs extends to the public entities concerned, and is capable of being relied on by them against the State, or by simply arguing that, since that directive was not transposed within the time limit, those entities were bound by the aforementioned provisions. In my view, the latter proposition is correct.

1. Direct effect, unconditional nature and possibility for the public authorities to rely on Article 12(3) and (4) of Directive 2014/24

29. To my mind, the premiss underlying the aforementioned questions referred is not entirely sound. If it were, the answer would have to be along the lines of that which SWL advocated in the dispute in the main proceedings and which the Belgian Government and the Commission are putting forward in these proceedings.

30. In support of that answer, I would recall that the primary purpose of the 'direct effect' doctrine developed by the Court in connection with directives is to protect individuals. It allows them to exercise the rights which directives confer on them and which they could not otherwise assert in the absence of the necessary implementing measures at national level.

31. The Court's settled case-law on the direct effect of directives, in particular those not transposed in time or not correctly transposed, establishes who can rely on such direct effect and under what conditions.

32. In the recent judgment of 8 March 2022, the Court held:

— 'Whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly …' (11)

— '… a provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any

measure either by the institutions of the European Union or by the Member States and, second, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms …' (12)

— '… even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it …' (13)

33. On that basis, I take the view that public entities such as the Municipality of Farciennes and SLSP Sambre & Biesme, which are simply an emanation of the State in a broad sense, cannot rely as against the latter on the (hypothetical) direct effect of Article 12 of Directive 2014/24.

34. For one thing, even if that article were regarded as containing a 'sufficiently precise' form of words in paragraphs 3 and 4 thereof, it could not readily be said to be of an 'unconditional nature' or to impose an unequivocal obligation on Member States. On the contrary, it authorises those States, should they deem it appropriate to do so, to exclude contracts concluded between public-sector entities from the scope of Directive 2014/24.

35. The Court explains that Article 12(1) of Directive 2014/24, 'which … does no more than state the conditions which a contracting authority must observe when it wishes to conclude an in-house transaction, … *empower[s]* the Member States to exclude such a transaction from the scope of Directive 2014/24'. (14)

36. In the same vein, the Court states that Directive 2014/24 'does not require the Member States to have recourse to a public procurement procedure' and 'it cannot compel them to have recourse to an in-house transaction where the conditions laid down in Article 12(1) are satisfied'. (15) The same is true of paragraphs 3 and 4 of that article.

37. That statement is consistent with the freedom of the Member States 'as to the choice of means of providing services whereby the contracting authorities meet their own needs'. (16)

38. For another thing, as I have already said, municipal entities and bodies governed by public law (even if they take the form of commercial companies) cannot rely as against the State on the alleged 'direct effect' of Article 12(3) and (4) of Directive 2014/24. In their relations with the State bodies that control their decisions, municipal entities are not 'individuals' who are able to invoke that effect.

39. For those reasons, and notwithstanding that I consider an answer to the question of the direct effect of Article 12(3) and (4) of Directive 2014/24 to be unnecessary in this dispute, my view, should the Court decide to address this question, which was extensively debated at the hearing, is the same as that expressed at that hearing by the Belgian Government and the Commission.

40. Article 12 of Directive 2014/24 lays down the minimum conditions attached to a power the exercise of which, as I have said, the Member States may completely exclude. If they do not opt for exclusion, the only imaginable scenario in which Article 12 would have direct effect (on which only an economic operator considering itself to have been harmed would be eligible to rely) would be one in which a contracting authority sought to evade the public procurement rules and to have recourse to an in-house transaction or to horizontal cooperation in the absence of the minimum conditions laid down by the aforementioned article.

2. Application of Article 12(3) and (4) of Directive 2014/24 to public authorities

41. The foregoing does not mean, however, that Article 12(3) and (4) of Directive 2014/24 is not applicable in this case.

42. The requirement for public authorities to comply with Article 12(3) and (4) before the directive has been transposed derives not from any direct effect which those paragraphs might have, but from 'the obligation imposed on all State authorities to comply with the provisions of directives (third

paragraph of Article 288 TFEU) as well as to adhere to the duty of sincere cooperation and to ensure complete fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions (Article 4(3) TEU)'. (17)

43. The correct answer to the first question referred in each of the two references for a preliminary ruling should therefore, preferably, focus on the link that exists between public authorities and Directive 2014/24 (what might be called its *binding* effect, as the Commission described it at the hearing) in the case where that directive has not yet been transposed notwithstanding that the time limit for its transposition has expired.

44. The Court has confirmed that requirement of compliance. (18)

45. So far as concerns the contracting authorities involved in these two disputes, the public nature of which is not in issue, this means that they were bound by Directive 2014/24 as from the date on which that directive should have been transposed. (19)

46. In the absence of transposition and irrespective of whether or not Article 12(3) and (4) of Directive 2014/24 had direct effect such as to enable individuals to rely on those provisions as against the public authorities or the entities answerable to them, the latter, in so far as they were acting as contracting authorities, were obliged to comply with the conditions laid down in that article.

47. If, with a view to obtaining the services necessary to implement their respective projects, the Municipality of Farciennes and SLSP Sambre & Biesme preferred not to have recourse to the market and wished to avoid the customary public procurement procedures, they were, at the material time, subject to the conditions laid down in Article 12 of Directive 2014/24.

48. Once the directive has been transposed, cooperation between public entities, whether vertical (in-house) or horizontal, will not be subject to the public procurement procedures if the Member State, exercising its freedom to do so, has decided to avail itself of the options for exclusion from the scope of Directive 2014/24 that are afforded to it by Article 12 as interpreted by the Court. (20)

49. Accordingly, where a Member State has chosen to permit the mechanisms for inter-administrative cooperation that are excluded from the formalised procedures laid down in Directive 2014/24, its contracting authorities must comply with the conditions laid down in Article 12(3) and (4) thereof, whether or not they intend to have recourse to the market in order to obtain particular services or supplies.

C. Fifth question referred in Case C-384/21

1. Subject matter

50. The fifth question in Case C-384/21 concerns the exclusion from the scope of Directive 2014/24 that is provided for in Article 12(4) thereof.

51. Unlike the exclusion envisaged in Article 12(2) and (3) of Directive 2014/24, whereby a contracting authority (or a number of contracting authorities) must exercise control over a tenderer which has been awarded a public contract, the exclusion provided for in paragraph 4 is based on cooperation among contracting authorities between which no such relationship of control exists.

52. The question referred arises from the arguments which the Municipality of Farciennes put forward in the alternative, in the event that it is concluded that, in the light of the relationship between SLSP Sambre & Biesme and IGRETEC, the conditions laid down in Article 12(3) of the directive are not met. (21)

53. The Municipality of Farciennes submits that, in the absence of the joint control provided for in that paragraph, horizontal cooperation between contracting authorities is still possible under Article 12(4) of Directive 2014/24. The cooperation between itself, SLSP Sambre & Biesme and IGRETEC is of this nature.

54. I infer from reading its observations that the Municipality of Farciennes advocates two ways of understanding the relationship between the public entities in question:

— According to the first, which the municipality appears to prefer, that relationship is characterised by a horizontal cooperation which, according to the Municipality of Farciennes and SLSP Sambre & Biesme, is intended to support implementation of the ecodistrict creation plan and, according to IGRETEC, to assist the latter's work for the benefit of its members, which is to contribute towards their projects. The agreement between the parties is therefore geared towards the attainment of common objectives. (22)

— According to the second, the in-house relationship between the municipality and IGRETEC is defined by the fact that, where the municipality entrusts the performance of certain services to IGRETEC, the latter uses the former's own departments, a fact which must be taken into account in the context of its cooperation with SLSP Sambre & Biesme. (23)

55. In both configurations, the relationship is covered by Article 12(4) of Directive 2014/24. Consequently, a public call for tenders is unnecessary.

2. Cooperation under Article 12(4) of Directive 2014/24

56. According to Article 12(4), a public contract does not fall within the scope of Directive 2014/24 if the three conditions laid down in points (a), (b) and (c) of that paragraph are cumulatively met. (24)

57. The national court's doubts revolve around the concept of 'cooperation' within the meaning of that article, which must be interpreted independently. (25)

58. I explained on a different occasion (26) that the provision in question incorporates the Court's case-law prior to codification but expands upon that case-law by clarifying it and making it more flexible, bringing the conditions it lays down into line to some extent with those applicable to the other scenarios in which certain contracts concluded by public-sector entities may be excluded from Directive 2014/24. (27)

59. This explains the following characteristics of horizontal cooperation that is not subject to the formalised public procurement procedures under Directive 2014/24:

— There is no requirement, as was the case under the previous case-law, (28) for the cooperation to support the joint performance of a public-service task common to all of the participating contracting authorities. (29)

— Cooperation may relate to (or take the form of) activities to support public services, provided that they contribute towards the actual delivery of those services. (30)

— The services provided by the contracting authorities do not necessarily have to be identical. Subject to compliance with the condition that they are driven by objectives pursued in common, which must also be in the public interest, such services may be complementary. (31)

— So long as there are commitments to contribute towards the cooperative performance of the public service, it is not necessary for each of the parties to participate equally in the cooperation, which may be based on a division of tasks or on a particular specialisation. (32)

60. It *is* essential, on the other hand, that the collaboration between the parties should be intended to achieve *objectives common to all of them*. This is a key element of horizontal cooperation that differentiates the latter from the direct award of contracts to entities controlled by the contracting authority.

61. This was the view taken by the Court in the judgment in *Remondis II* when referring to the 'inherently collaborative dimension' of the cooperation provided for in Article 12(4) of Directive 2014/24. That dimension can be seen in particular in the fact that, when drawing up the cooperation agreement, the parties define common needs and identify solutions to them. (33)

62. What is more, horizontal cooperation is based on a *cooperative concept*, meaning that it takes the form of reciprocal commitments on the part of those participating in it. Those commitments go beyond the performance of a particular service, on the one hand, and the remuneration for that service, on the other, as the judgment in *Remondis II* makes clear. (34)

63. The expression 'cooperative concept' explicitly contained in recital 33 of Directive 2014/24 is equivalent to the proposals for the requirement of a 'genuine cooperation' 'involving mutual rights and obligations of the parties'. (35) It is not possible for one of the contracting authorities to be 'a mere "buyer"' (36) of the work, service or supply in question.

64. The *genuine* nature of the cooperation is fundamental in any agreement that seeks to benefit from Article 12(4) of Directive 2014/24. That feature will make it possible to distinguish this form of horizontal cooperation from vertical (in-house) cooperation, as well as from contracts subject to public procurement procedures, whereby one party performs a task in accordance with specifications laid down by the other, which, in turn, simply pays for the performance of that task. (37)

3. In the case in the main proceedings

(a) First scenario

65. The Municipality of Farciennes presents an initial scenario in support of its argument as to the existence of a relationship of horizontal cooperation between itself, SLSP Sambre & Biesmes and IGRETEC.

66. In summary, I would recall that:

— SLSP Sambre & Biesme and the Municipality of Farciennes took the initiative to undertake jointly their respective housing redevelopment and urban renewal projects in a given district.

— To that end, they concluded a framework procurement agreement to which IGRETEC was not a signatory.

— IGRETEC's involvement came about as a result of the commissioning of the services necessary to implement the ecodistrict project. That commission followed the decision of the contracting authorities to join forces in order to carry out that project.

67. In my opinion, the trilateral relationship as described above is not covered by Article 12(4) of Directive 2014/24. I concur in my assessment with the referring court, which takes the view that 'the mere fact that [IGRETEC] performs, in the context of the agreement concluded between the Municipality of Farciennes and SLSP Sambre & Biesme, tasks aimed at implementing a joint project for the creation of the ecodistrict in Farciennes does not mean that IGRETEC itself cooperates on that project, or that it pursues an objective in common with the signatories to that agreement'. (38)

68. There are several reasons why I endorse that assessment by the referring court, with which the Commission concurs, in the light of the description of the facts provided by that court. I should emphasise that it is for that court alone to establish the factual framework for the dispute, and, in doing so, to evaluate the actions of the parties to the dispute and the purpose pursued by each of them in taking those actions.

69. First, as the referring court notes in the terms I have just reproduced, there is no commonality of objectives that would warrant the existence between the three entities of cooperation within the meaning of Article 12(4) of Directive 2014/24. (39)

70. Following its analysis of IGRETEC's articles of association and its involvement in the projects at issue, the Conseil d'État (Council of State, Belgium) notes that the tasks performed by IGRETEC in this case fall under 'sector I' of its corporate purpose, that is to say activities carried out on the market by consultancy and management firms specialising in the implementation of projects, not 'sector II', which is concerned with the region's development from an economic, social and tourism point of view, and, in particular, the construction, financing and use of certain properties. (40)

71. Second, the collaborative dimension evidenced at the initial stage by the definition of needs and solutions common to the parties looking to cooperate is also lacking. At that stage, IGRETEC's professional intervention may serve to enable the Municipality of Farciennes and SLSP Sambre & Biesme to identify and understand the needs of the ecodistrict project which they both wish to create. IGRETEC's needs, on the other hand, are different.

72. Third, the strategy for how best to share and pool the parties' resources seems to me to be confined to the Municipality of Farciennes and SLSP Sambre & Biesme, even though they are working on the basis of options proposed by IGRETEC. (41) The latter does not actually provide any public service jointly with the municipality and SLSP Sambre et Biesme.

73. Finally, IGRETEC's incorporation into the relationship between the two contracting authorities (42) by way of the agreement on assistance with project management and legal and environmental services does not meet the requirements of genuine cooperation. By that agreement, the Municipality of Farciennes and SLSP Sambre & Biesme do not make, in relation to IGRETEC, any commitments that they would not make in a public call for tenders: they require services which IGRETEC offers and the sole obligation into which they enter in return is to pay for those services.

(b) Second scenario

74. The second scenario envisages a combination of horizontal and vertical cooperation whereby IGRETEC, controlled by one of the two participants in the horizontal cooperation (the Municipality of Farciennes), provides a service for the other participant (SLSP Sambre & Biesme) too and is paid by both.

75. The Municipality of Farciennes takes the view that, when it commissions IGRETEC to provide assistance with project management and legal and environmental services, the latter uses the municipality's own resources. That fact should also be taken into account in the context of the cooperation between itself and SLSP Sambre & Biesme.

76. I cannot accept that argument, which the Municipality of Farciennes itself puts forward in the alternative (in the course of a submission which is itself ancillary to the main proposition) and on which, perhaps for that reason, it does not elaborate further.

77. If I understand it correctly, the position of the Municipality of Farciennes is that the two entities party to the vertical cooperation relationship (IGRETEC and the municipality itself) are, by virtue of that relationship, a single entity for the purposes of horizontal cooperation with a third party. (43) There is therefore no need for both entities to sign the framework agreement with SLSP Sambre & Biesme.

78. I do not concur with that argument. In the context of vertical (in-house) cooperation, the contracting authority and the delivery body over which it exercises a control similar to that which it holds over its own departments are formally distinct entities both before and after they conclude a public contract.

79. Thus, the existence of an in-house relationship between the Municipality of Farciennes and IGRETEC is not sufficient to support the view that the requirements attached to the presence of horizontal cooperation with SLSP Sambre & Biesme are met.

V. Conclusion

80. In the light of the foregoing, I propose that the Court's answer to the Conseil d'État (Council of State, acting as supreme administrative court, Belgium) should be as follows:

(1) A contracting authority which wishes to award a public contract falling within the scope of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC without being subject to the award procedures laid down in that directive must fulfil the conditions set out in Article 12 thereof as

from the deadline for transposing that directive into national law, if it has not been so transposed by that date.

(2) Article 12(4) of Directive 2014/24 must be interpreted as meaning that:

– It precludes the existence of cooperation between contracting authorities where the relationship which exists between them, and in the context of which they undertake to provide their respective services, does not pursue objectives common to all of them.

– It does not cover a relationship between independent contracting authorities under which one obtains from the other a service in return exclusively for payment in money.

---

1 Original language: Spanish.

---

2 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5).

---

3 Sambre and Biesme public-service housing company (‘Sambre & Biesme SLSP’).

---

4 Inter-municipal Cooperative for the Management and Implementation of Technical and Financial Projects (‘IGRETEC’).

---

5 It amounted to 0.0000000197% of the voting shares (p. 26 of the order for reference in Case C-383/21) and to 0.0000049% of the shares (p. 39 of the order for reference in Case C-384/21).

---

6 Entitled ‘Choice of project management assistance in connection with the implementation of contracts for services, works and project development and the urban regeneration project’.

---

7 The steering committee is made up of four representatives from the Municipality of Farciennes, two from SLSP Sambre & Biesme, two from IGRETEC and two from the Société wallonne du logement (Walloon Housing Company; ‘SWL’). The committee’s decisions are adopted by consensus.

---

8 The deadline for bringing national law into line with Directive 2014/24 was 18 April 2016. The Belgian transposing law was adopted on 17 June 2016. It has been applicable since 30 June 2017, following the entry into force of an implementing decree of 18 April 2017.

---

9 Observations of the Municipality of Farciennes, paragraph 33 et seq.; and of SLSP Sambre & Biesme, paragraph 34 et seq.

---

10 Observations of the Belgian Government, paragraphs 17 et seq., and 80 et seq.; and of the Commission, paragraph 12 et seq. SWL had put the same argument to the referring court.

---

11 Judgment of 8 March 2022 *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)* (C-205/20, EU:C:2022:168, paragraph 17).

---

12 *Ibidem*, paragraph 18.

---

13 *Ibidem*, paragraph 19.

---

14 Judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829; 'the judgment in *Irgita*'; paragraph 43); emphasis added. Later, order of 6 February 2020, *Azienda ULSS n. 6 Euganea* (C-11/19, EU:C:2020:88, paragraphs 40 to 46).

---

15 The judgment in *Irgita*, paragraph 46.

---

16 *Ibidem*, paragraph 45, with reference to recital 5 of Directive 2014/24, which states that 'nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive'.

---

17 In this regard, I concur with Advocate General Wahl in his Opinion in *Portgás* (C-425/12, EU:C:2013:623, point 52).

---

18 Judgment of 12 December 2013, *Portgás* (C-425/12, EU:C:2013:829, paragraph 34).

---

19 Following (correct) transposition, the public procurement rules and the exceptions to them are as laid down in national legislation. At the hearing, it was reported that the Belgian legislature largely reproduced the content of Article 12 of Directive 2014/24 in the Law of 17 June 2016. It could, however, not have done so. Transposition not entailing recourse to the power of exclusion provided for in Article 12 is therefore (in theory) conceivable.

---

20 It is a cliché to require that that interpretation should be strict, on the ground that the situations referred to in Article 12 of Directive 2014/24 are 'exceptions' to, or 'derogations' from, that directive. Without wishing to embark here upon a discussion of how that interpretation is to be applied, I should reiterate that that article defines the scope of the Directive. It is not, strictly speaking, an exception to it (see my Opinion in *Informatikgesellschaft für Software-Entwicklung*, C-796/18, EU:C:2020:47, points 37 and 38).

---

21 It is clear from the wording of the question that, in the view of the referring court, the Municipality of Farciennes exercises over IGRETEC a control similar to that which it exercises over its own departments, but the same is not true of the relationship between SLSP Sambre & Biesme and IGRETEC.

---

22 Observations of the Municipality of Farciennes, paragraph 115 et seq., in particular paragraphs 143 and 145.

---

23 *Ibidem*, paragraph 115 et seq., in particular paragraphs 139 and 140.

---

24 In addition to those conditions, inter-administrative cooperation must in any event comply with the basic rules of the TFEU, in particular those relating to the free movement of goods, the freedom of establishment and the freedom to provide services, and the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. On the prohibition of cooperation between contracting authorities which has the effect of favouring one private undertaking over its competitors, see the judgment of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:395, paragraph 63 et seq. and paragraph 3 of the operative part).

---

25 Judgment of 4 June 2020, *Remondis* (C-429/19, EU:C:2020:436; 'the judgment in *Remondis II*'; paragraph 24).

---

26 Opinion in *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:47, points 26 to 28).

---

27 Prior to Directive 2014/24, the Court had refused to recognise horizontal cooperation in the direct award of contracts relating to the provision of support services to a public department, such as the production of architectural or engineering designs and office cleaning: see, in the case of the former, the judgment of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817); and, in the case of the latter, the judgment of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385). Nonetheless, it was possible to argue that the reason for that refusal lay not in the ancillary nature of the service but in the fact that the *inter partes* agreement was not directed towards the joint performance of shared public-service tasks: I refer to paragraph 34 of the judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others* and to paragraph 39 of the judgment in *Piepenbrock*. Be that as it may, that restriction disappeared in the directive in force.

---

28 In addition to those cited in the previous footnote, see the judgments of 9 June 2009, *Commission* v *Germany* (C-480/06, EU:C:2009:357, paragraph 37), and of 8 May 2014, *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:303, paragraph 35). A provision to the same effect was included by the Commission in its Proposal for a Directive of the European Parliament and of the Council on public procurement (COM/2011/0896 final), Article 11(4)(a).

---

29 Judgment of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:395, paragraphs 57 and 58 and operative part).

---

30 *Ibidem*, paragraphs 59 and 60 and the operative part. In my Opinion in that case (C-796/18, EU:C:2020:47, points 84 and 85), I submitted that supporting activities must be 'immediately and inseparably linked to the public service', being 'of such fundamental importance that the service itself could not be performed as a public service without them'. Although the form of words used by the Court is different, it is in my view no looser for that.

---

31 Examples of complementary services include waste collection and treatment activities, as referred to in the judgment of 9 June 2009, *Commission* v *Germany* (C-480/06, EU:C:2009:357); or teaching and research activities pursued by public universities, as mentioned by Advocate General in his Opinion in *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:23, point 59). In practice, the flexibility granted by Directive 2014/24 may prove to be redundant because the difference in the substance of the services provided by each contracting authority does not enable them to define objectives that are *common* to all those services. In such circumstances, an essential element of cooperation would be lacking. It is also conceivable that that difference might prevent the services from being performed *in a cooperative manner*, because one contracting authority has no interest in the services offered by the other, or because the complementarity is unilateral rather than reciprocal. Accordingly, if the relationship between the parties is confined to the fact that the contracting authority interested in the other contracting authority's services buys those services from the latter authority for a price, there is no cooperation within the meaning of Article 12(4) of Directive 2014/24. Neither, probably, could there be said to be an interaction governed *solely by considerations relating to the public interest*, as point (b) of that same paragraph requires: charging a fee for providing a service is not an objective in the public interest. The reference to complementary services (more specifically, public service 'tasks') appears in recital 14(aa) of the Proposal for a Directive of the European Parliament and of the Council on public procurement, annexed to the Note by the General Secretariat, Council Document 14971/12 of 19 October 2012. The exclusion of cooperation from the directive was expressly made subject to the condition that the complementary services could be delivered 'in a cooperative manner'. Given that it was redundant, the disappearance of that requirement from the final text is irrelevant.

32 Third paragraph of recital 33 of Directive 2014/24. This idea had already appeared in the Commission staff working document on the application of the EU public procurement rules to relations between contracting authorities (cooperation within the public sector), SEC(2011) 1169 final of 4 October 2011, point 3.3.2

33 The judgment in *Remondis II*, paragraphs 32 and 33.

34 *Ibidem*, paragraph 27.

35 Proposal for a Directive of the European Parliament and of the Council on public procurement of 20 December 2011 [COM(2011) 896 final], Article 11(4)(a).

36 This expression appears in the Note by the Secretariat-General, Council Document 9315/12 of 27 April 2012, p. 38. In the judgment in *Remondis II*, the idea is referred to in paragraph 29.

37 Horizontal cooperation does not preclude financial transfers between the participants but it does, as I have said, make it impossible for the contribution of one of the participants to be confined to a mere payment.

38 Order for reference in Case C-384/21, p. 56.

39 Order for reference in Case C-384/21, p. 56. The observations of the parties do not reveal any purpose common to all of them, if one exists, and that purpose is not obvious to an outside observer. In my opinion, these cases illustrate the difficulties I mentioned in footnote 31. An example of cooperation in connection with (and through) the provision of complementary services having the same aim can be found in the contract analysed in the judgment of 9 June 2009, *Commission* v *Germany* (C-480/06, EU:C:2009:357): see paragraph 37 thereof. The common objective was the rationalisation of waste treatment at the nearest possible facility.

40 Order for reference in Case C-384/21, pp. 56 and 57. It should nonetheless be noted that a precondition for exclusion from the scope of Directive 2014/24, pursuant to Article 12 thereof, is that the contracting authority should have a choice between procuring the service through (vertical or horizontal) inter-administrative cooperation or by going to the market. In general, services obtained through cooperation between public entities can (also) be obtained on the market.

41 Its proposals focused on matters such as the number of housing units, the demolition or refurbishment of existing units, the use of private capital investment, the type of public contract and so on.

42 In actual fact, as the Commission indicates (paragraph 33 of its written observations), IGRETEC does not have the appearance of a contracting authority. There is no indication of what service IGRETEC might ‘acquire’ and would have to put out to tender in the absence of the cooperation relationship.

43 Paragraph 146 *in fine* of the observations of the Municipality of Farciennes: ‘By definition, the in-house relationship means that [IGRETEC] can be regarded as being equivalent to the Municipality of Farciennes’. Although, at the hearing, the representative for the municipality referred to a ‘functional and organic link’ between the two entities, she maintained the line of argument based on the in-house relationship between them.

CONSEIL D'ÉTAT, SECTION DU CONTENTIEUX ADMINISTRATIF

VI^e CHAMBRE

A R R Ê T

n^o 259.019 du 4 mars 2024

A. 222.093/VI-21.017

En cause : **la société coopérative à responsabilité limitée Société de logement de service public** (SLSP) « Sambre & Biesme SCRL »,

ayant élu domicile chez
M^es Jean LAURENT et
Charline SERVAIS, avocats,
avenue Louise 250
1050 Bruxelles,

contre :

la Société wallonne du logement (SWL),

ayant élu domicile chez
M^e Marie VASTMANS, avocat,
avenue Tedesco 7
1160 Bruxelles.

I. Objet de la requête

Par une requête introduite le 28 avril 2017, la partie requérante demande l'annulation de :

« la décision du 25 février 2017 par laquelle la Société wallonne du logement a décidé d'annuler :
- la décision du conseil d'administration de la société de logement de service public "SAMBRE & BIESME" du 9 février 2017 approuvant la convention-cadre de marchés conjoints passée avec la commune de Farciennes ;
- la décision du conseil d'administration de la société de logement de service public "SAMBRE & BIESME" du 9 février 2017 refusant la mise en concurrence d'un marché de services d'inventaire amiante au motif d'une relation "*in house*" l'unissant à l'intercommunale ».

II. Procédure

Un arrêt n° 250.896 du 15 juin 2021 a sursis à statuer, posé trois questions préjudicielles à la Cour de Justice de l'Union européenne et, sur le vu des réponses qui seraient données à ces questions, chargé le membre de l'auditorat, désigné par l'Auditeur général, de déposer un rapport complémentaire.

Cet arrêt a été notifié aux parties.

Par un arrêt du 22 décembre 2022, la Cour de justice de l'Union européenne a répondu aux questions posées (affaires jointes C-383/21 et C-384/21).

M^me^ Geneviève Martou, premier auditeur chef de section au Conseil d'État, a rédigé un rapport sur la base de l'article 13 du règlement général de procédure.

Le rapport a été notifié aux parties.

Les parties ont déposé des derniers mémoires.

Par une ordonnance du 17 janvier 2024, l'affaire a été fixée à l'audience du 21 février 2024.

M^me^ Florence Piret, conseillère d'État, présidente f.f., a exposé son rapport.

M^e^ Charline Servais, avocate, comparaissant pour la partie requérante, et M^e^ Marie Vastmans, avocate, comparaissant pour la partie adverse, ont été entendues en leurs observations.

M^me^ Geneviève Martou, premier auditeur chef de section, a été entendue en son avis conforme.

Il est fait application des dispositions relatives à l'emploi des langues, inscrites au titre VI, chapitre II, des lois sur le Conseil d'État, coordonnées le 12 janvier 1973.

III. Exposé des faits utiles

Les faits utiles à l'examen du recours ont été exposés dans l'arrêt n° 250.896 du 15 juin 2021. Il y a lieu de s'y référer.

IV. Premier moyen

IV.1. Thèse de la partie requérante

Il est renvoyé à l'arrêt n° 250.896 du 15 juin 2021 pour l'exposé de la thèse défendue par la requérante dans sa requête, son mémoire en réplique et le dernier mémoire qu'elle a déposé avant la réouverture des débats.

Dans le dernier mémoire qu'elle a déposé après la réouverture des débats, la requérante fait valoir que l'article 12, § 3, alinéa 2, sous i), de la directive 2014/24/UE du Parlement européen et du Conseil du 26 février 2014 sur la passation des marchés publics et abrogeant la directive 2004/18/CE n'impose pas que chaque pouvoir organisateur dispose d'un administrateur au sein du conseil d'administration, ni que la représentation de plusieurs pouvoirs adjudicateurs par une même personne devrait être juridiquement garantie, mais qu'il suffit que les pouvoirs adjudicateurs soient représentés au sein des organes décisionnels de l'intercommunale, une même personne pouvant représenter plusieurs pouvoirs adjudicateurs participants ou l'ensemble d'entre eux. Elle estime qu'en l'espèce, la condition de représentation de la SLSP au sein du conseil d'administration de l'intercommunale IGRETEC est, dans les faits, rencontrée, ce qu'elle détaille.

IV.2. Appréciation du Conseil d'État

Dans l'arrêt intermédiaire n° 250.896 du 15 juin 2021, le Conseil d'État a jugé que :

- le premier grief du premier moyen tiré du prétendu revirement d'attitude de la partie adverse manquait en fait ;

- le troisième grief du premier moyen tiré du caractère licite de l'article 6 de la convention-cadre de marché conjoint conclue avec la commune de Farciennes n'était pas fondé.

Le deuxième grief du premier moyen tiré de la prétendue relation *in house* entre la requérante et l'intercommunale IGRETEC a donné lieu à trois questions préjudicielles qui ont été posées à la Cour de Justice de l'Union européenne. Avant de poser ces questions, l'arrêt n° 250.896 procède toutefois à une série de constats et émet un certain nombre de considérations. Le Conseil d'État relève notamment les éléments suivants :

« En l'espèce, il ressort des pièces du dossier que la SLSP "Sambre & Biesme" a, le 29 octobre 2015, acquis, pour un montant de 6,20 euros, une part sociale dans l'intercommunale IGRETEC, pour bénéficier directement des services de cette dernière, et donc dans la perspective de ne pas devoir s'ouvrir, pour la fourniture de ces services, à la concurrence. Cette part sociale fait de la SLSP un associé de "catégorie C1". Suivant les pièces communiquées au Conseil d'État, cette unique part sociale représentait, au 31 décembre 2015, 0,0000049 % des 20.366.778 parts sociales de l'intercommunale et 0,0000197 % des 5.071.477 parts donnant droit au vote en assemblée générale. Il ressort également de ces pièces qu'au même moment, les associés de "catégorie C" représentaient ensemble 0,084 % des parts sociales de l'intercommunale et 0,34 % des parts sociales donnant droit au vote en assemblée générale. Les associés de "catégorie C" – et en particulier la SLSP "Sambre & Biesme" – se trouvaient, dès lors, dans la situation d'associés très minoritaires au sein d'IGRETEC.

Quoi que la requérante puisse en dire, cette position très minoritaire ne permettait pas aux associés de catégorie C de contribuer effectivement au contrôle d'IGRETEC. Conformément aux statuts de l'intercommunale, chaque associé dispose, en assemblée générale, d'autant de voix qu'il a de parts sociales, en sorte que, comme le souligne l'acte attaqué, "une détention infime du capital social d'IGRETEC m[ène] […] à une faible influence". De plus, comme le reconnaissent toutes les parties et le souligne l'acte attaqué, les statuts, dans leur version applicable au moment des faits litigieux, donnaient, à tout point de vue et dans tous les organes décisionnels, la prépondérance aux communes (associées de catégories A), dans le respect des dispositions du Code de la démocratie locale et de la décentralisation, sans prévoir aucun mécanisme pour assurer la protection des intérêts des associés minoritaires comme l'autorise pourtant le Code. La requérante ne peut être suivie lorsqu'elle affirme, dans son dernier mémoire, que les associés de catégories C étaient représentés au conseil d'administration d'IGRETEC. Compte tenu du nombre limité d'administrateurs, la position très minoritaire des associés de catégorie C ne leur permet pas *de facto* de disposer d'un administrateur pour les représenter au sein de cet organe tandis que, dans leur version applicable au moment des faits litigieux, les statuts d'IGRETEC ne garantissaient nullement la présence d'un administrateur désigné par les associés de catégorie C pour les représenter. C'est donc tout à fait valablement que l'acte attaqué mentionne que « [l]es associés de la catégorie C — dont fait partie SAMBRE & BIESME — ne sont pas assurés d'être représentés par leurs propres membres au conseil d'administration ». Au terme des débats, il a d'ailleurs été confirmé qu'au moment des faits litigieux, les associés de catégorie C ne disposaient effectivement d'aucun représentant au sein du conseil d'administration ou de la "commission permanente du bureau d'études et de gestion". Il se déduit des éléments qui précèdent qu'à l'époque des faits litigieux, les associés de catégorie C – dont fait partie la SLSP "Sambre & Biesme" – ne participaient, dans aucune mesure et d'aucune manière, à l'exercice d'un contrôle conjoint sur l'intercommunale IGRETEC ».

Le Conseil d'État a toutefois été amené à interroger la Cour de justice de l'Union européenne à la suite d'un élément de fait porté à sa connaissance dans le

cours des débats. L'arrêt n° 250.896 indique, à ce propos, ce qui suit :

« Cependant, la requérante a, dans le cours des débats, fait valoir, pièces à l'appui, qu'au moment des faits, siégeait au conseil d'administration de l'intercommunale IGRETEC un conseiller communal de la commune de Farciennes qui était, en même temps, administrateur de la SLSP "Sambre & Biesme". La requérante n'a cependant pas pu démontrer que cette configuration était prévue et garantie en droit. Par ailleurs, il ressort des pièces soumises au Conseil d'État que cette personne siégeait au conseil d'administration d'IGRETEC en sa qualité de "conseiller communal à Farciennes". Rien ne permet de considérer qu'elle était, à ce titre, également réputée représenter les intérêts de la SLSP "Sambre & Biesme", nonobstant la circonstance que, dans les faits, elle était également administrateur de cette société.

La requérante soutient cependant que cet état de fait suffit à démontrer la "participation" de la SLSP "Sambre & Biesme" aux organes décisionnels d'IGRETEC et à considérer qu'elle exerce sur cette intercommunale un "contrôle analogue conjoint" *via* la commune de Farciennes qui est actionnaire à la fois d'IGRETEC et de la SLSP et dispose d'un administrateur dans chacune de ces entités. Elle rappelle, à cet égard, que la vérification d'un tel contrôle doit s'apprécier *in concreto* en tenant compte des circonstances de l'espèce et qu'il suffit que ce contrôle ait lieu, quelle que soit la manière dont il est en réalité exercé.

Il y a lieu d'interroger la Cour de justice de l'Union européenne à ce sujet. Il convient toutefois de préciser que si la requérante fait valoir que la commune de Farciennes est actionnaire tant de la SLSP "Sambre & Biesme" que de l'intercommunale IGRETEC et exerce un contrôle sur ces deux entités, elle ne revendique pas l'existence d'une relation du type « *in house* collatéral », laquelle permet à deux entités contrôlées par le même pouvoir adjudicateur de conclure entre elles des marchés sans mise en concurrence préalable. En toute hypothèse, il ne paraît pouvoir être satisfait à ce type de contrôle que dans le cas où les deux entités cocontractantes sont contrôlées de manière exclusive par la même autorité (concl.av. gén. P Mengozzi, 23 janvier 2014, aff. C-15/13, *Technische Universität Hamburg-Harburg*, pts. 44 et 45), *quod non* en l'espèce, la commune de Farciennes ne détenant l'intercommunale IGRETEC et la SLSP "Sambre & Biesme" que conjointement avec d'autres actionnaires publics et même privés, pour ce qui concerne cette dernière entité.

Les parties au litige semblent, par ailleurs, considérer que la réponse à la question posée pourrait différer selon qu'un effet direct est – ou non – reconnu à l'article 12.3 de la directive 2014/24/EU du Parlement européen et du Conseil du 26 février 2014 sur la passation des marchés publics et abrogeant la directive 2004/18/CE. Comme le relève la requérante, cette directive était déjà en vigueur au moment des faits et aurait dû être transposée tandis que la loi qui la transposait n'était, elle, pas encore entrée en vigueur. Il s'indique, dès lors, d'interroger également la Cour pour savoir s'il y a lieu de reconnaître un tel effet à la disposition précitée […] ».

Les questions suivantes ont dès lors été posées à la Cour de justice de l'Union européenne :

« 1) L'article 12.3 de la directive 2014/24/EU du Parlement européen et du Conseil, du 26 février 2014, telle que modifiée par le règlement délégué (UE) 2015/2170 de la commission du 24 novembre 2015, sur la passation des marchés publics et abrogeant la directive 2004/18/CE doit-il être interprété en ce sens qu'il produit un effet direct ?

2) En cas de réponse affirmative à cette première question, l'article 12.3 de la directive 2014/24/EU précitée doit-il être interprété dans ce sens que la condition pour un pouvoir adjudicateur, en l'occurrence une société de logement de service public, d'être représenté au sein des organes décisionnels de la personne morale contrôlée, en l'occurrence une société coopérative intercommunale, est remplie au seul motif qu'une personne siégeant au sein du conseil d'administration de cette société coopérative intercommunale en sa qualité de conseiller communal d'un autre pouvoir adjudicateur participant, en l'occurrence une commune, se trouve, en raison de circonstances exclusivement factuelles et sans garantie juridique de représentation, être également administrateur au sein de la société de logement de service public tandis que la commune est actionnaire (non exclusif) tant de l'entité contrôlée (société coopérative intercommunale) que de la société de logement de service public ?

3) En cas de réponse négative à la première question posée, faut-il considérer qu'un pouvoir adjudicateur, en l'occurrence une société de logement de service public, « participe » aux organes décisionnels de la personne morale contrôlée, en l'occurrence une société coopérative intercommunale, au seul motif qu'une personne siégeant au sein du conseil d'administration de cette société coopérative intercommunale en sa qualité de conseiller communal d'un autre pouvoir adjudicateur participant, en l'occurrence une commune, se trouve, en raison de circonstances exclusivement factuelles et sans garantie juridique de représentation, être également administrateur au sein de la société de logement de service public tandis que la commune est actionnaire (non exclusif) tant de l'entité contrôlée (société coopérative intercommunale) que de la société de logement de service public ? »

Aux deux premières questions posées, la Cour de justice a répondu ce qui suit :

« 1) L'article 12, paragraphes 3 et 4, de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE, doit être interprété en ce sens que :

il produit des effets directs dans le cadre de litiges opposant des personnes morales de droit public au sujet de l'attribution directe de marchés publics, alors que l'État membre concerné s'est abstenu de transposer cette directive dans l'ordre juridique national dans les délais impartis.

2) L'article 12, paragraphe 3, second alinéa, sous i), de la directive 2014/24 doit être interprété en ce sens que :

afin d'établir qu'un pouvoir adjudicateur exerce, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle sur la personne morale adjudicataire analogue à celui qu'ils exercent sur leurs propres services, l'exigence visée à cette disposition, tenant à ce qu'un pouvoir adjudicateur soit représenté dans les organes décisionnels de la personne morale contrôlée, n'est pas satisfaite au seul motif que siège au conseil d'administration de cette personne morale le représentant d'un autre pouvoir adjudicateur qui fait également partie du conseil d'administration du premier pouvoir adjudicateur ».

La Cour n'a pas répondu à la troisième question posée, compte tenu de la réponse apportée à la première question.

S’agissant, en particulier, de sa réponse à la deuxième question posée, la Cour de justice a précisé les éléments suivants :

« Sur la deuxième question dans les affaires C‑383/21 et C‑384/21

53. Par sa deuxième question dans les affaires C-383/21 et C-384/21, la juridiction de renvoi demande, en substance, si l’article 12, paragraphe 3, second alinéa, sous i), de la directive 2014/24 doit être interprété en ce sens que, afin d’établir qu’un pouvoir adjudicateur exerce, conjointement avec d’autres pouvoirs adjudicateurs, un contrôle sur la personne morale adjudicataire analogue à celui qu’ils exercent sur leurs propres services, l’exigence visée à cette disposition, tenant à ce qu’un pouvoir adjudicateur soit représenté dans les organes décisionnels de la personne morale contrôlée, est satisfaite au seul motif que siège au conseil d’administration de cette personne morale le représentant d’un autre pouvoir adjudicateur qui fait également partie du conseil d’administration du premier pouvoir adjudicateur.

54 Conformément à une jurisprudence constante, lors de l’interprétation d’une disposition du droit de l’Union, il y a lieu de tenir compte non seulement des termes de celle-ci, mais également de son contexte et des objectifs poursuivis par la réglementation dont elle fait partie. La genèse d’une disposition du droit de l’Union peut également révéler des éléments pertinents pour son interprétation (arrêt du 9 juin 2022, IMPERIAL TOBACCO BULGARIA, C-55/21, EU:C:2022:459, point 44 et jurisprudence citée).

55 En premier lieu, s’agissant du libellé de l’article 12, paragraphe 3, second alinéa, sous i), de la directive 2014/24, il convient d’observer que cette disposition vise l’un des critères devant être satisfait afin d’établir, en vertu de l’article 12, paragraphe 3, premier alinéa, sous a), de cette directive, qu’un pouvoir adjudicateur exerce, conjointement avec d’autres pouvoirs adjudicateurs, un contrôle sur la personne morale concernée, analogue à celui qu’ils exercent sur leurs propres services.

56 En l’occurrence, l’article 12, paragraphe 3, second alinéa, sous i), de ladite directive énonce que les organes décisionnels de la personne morale contrôlée doivent être composés de représentants de tous les pouvoirs adjudicateurs participants, une même personne pouvant représenter plusieurs pouvoirs adjudicateurs participants ou l’ensemble d’entre eux.

57 Il résulte ainsi des termes de cette disposition que celle-ci requiert qu’un pouvoir adjudicateur exerçant un contrôle conjoint sur une personne morale dispose d’un membre agissant en qualité de représentant de ce pouvoir adjudicateur dans les organes décisionnels de cette personne morale, ce membre pouvant, le cas échéant, représenter également d’autres pouvoirs adjudicateurs.

58 Cette interprétation est corroborée, en deuxième lieu, par le contexte dans lequel s’insère ladite disposition.

59 En effet, premièrement, il convient d’observer que l’article 12, paragraphe 1, de la directive 2014/24, relatif à l’hypothèse où un pouvoir adjudicateur unique exercerait sur la personne morale à laquelle un marché public est attribué un contrôle analogue à celui exercé sur ses propres services, prévoit, à son second alinéa, que ce contrôle peut également être exercé par une autre personne morale, qui est elle-même contrôlée de la même manière par le pouvoir

adjudicateur.

60 Par ailleurs, le paragraphe 2 de cet article 12 dispose, notamment, que le paragraphe 1 de celui-ci est également susceptible de s'appliquer lorsqu'une personne morale contrôlée, qui est elle-même un pouvoir adjudicateur, attribue un marché au pouvoir adjudicateur qui la contrôle, ou à une autre personne morale contrôlée par le même pouvoir adjudicateur.

61 En revanche, pour ce qui est de l'article 12, paragraphe 3, de cette directive, cette disposition prévoit qu'un pouvoir adjudicateur qui n'exerce pas de contrôle sur une personne morale, au sens du paragraphe 1 de cet article 12, peut, néanmoins, attribuer un marché public à cette personne morale sans appliquer ladite directive lorsque ce pouvoir adjudicateur exerce, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle sur la personne morale concernée. Toutefois, il importe de souligner que, à la différence des paragraphes 1 et 2 dudit article, ladite disposition ne prévoit pas que les conditions relatives au contrôle du pouvoir adjudicateur sur la personne morale adjudicataire puissent être satisfaites de manière indirecte.

62 En particulier, l'exigence de représentation visée à l'article 12, paragraphe 3, second alinéa, sous i), de la directive 2014/24 requiert que la participation d'un pouvoir adjudicateur au sein des organes décisionnels de la personne morale contrôlée conjointement avec d'autres pouvoirs adjudicateurs s'effectue par l'intermédiaire d'un représentant de ce pouvoir adjudicateur lui-même. Cette exigence ne peut donc pas être satisfaite par l'intermédiaire d'un membre de ces organes y siégeant seulement en qualité de représentant d'un autre pouvoir adjudicateur.

63 Deuxièmement, l'article 12, paragraphe 3, second alinéa, sous ii), de cette directive prévoit, au titre des conditions devant être réunies pour que soit établi que les pouvoirs adjudicateurs exercent un contrôle conjoint sur une personne morale, au sens de l'article 12, paragraphe 3, premier alinéa, sous a), de ladite directive, que ces pouvoirs adjudicateurs doivent être en mesure d'exercer conjointement une influence décisive sur les objectifs stratégiques poursuivis par la personne morale contrôlée et sur les décisions importantes que celle-ci est susceptible de prendre.

64 Eu égard à la portée de la condition énoncée à l'article 12, paragraphe 3, second alinéa, sous ii), de la directive 2014/24, laquelle a trait à la détermination du contenu de ces objectifs et de ces décisions, il convient donc de comprendre le critère figurant à l'article 12, paragraphe 3, second alinéa, sous i), de cette directive comme visant à poser une exigence distincte portant sur les conditions formelles de la participation de ces pouvoirs adjudicateurs dans les organes décisionnels de la personne morale concernée.

65 Ces constatations sont confirmées par la genèse de l'article 12, paragraphe 3, second alinéa, de ladite directive.

66 Ainsi qu'il ressort du considérant 31 de la même directive, tout en relevant l'existence d'une importante insécurité juridique quant à la question de savoir dans quelle mesure les règles sur la passation des marchés publics devraient s'appliquer aux marchés conclus entre des entités appartenant au secteur public et, partant, la nécessité d'apporter des précisions à cet égard, le législateur de l'Union a considéré que ces précisions devraient s'appuyer sur les principes énoncés dans la jurisprudence pertinente de la Cour et, partant, n'a pas entendu remettre en cause cette jurisprudence (voir, en ce sens, arrêt du 28 mai 2020, Informatikgesellschaft für Software-Entwicklung, C-796/18, EU:C:2020:395, point 66).

67 À cet égard, il ressort de ladite jurisprudence que la question de savoir si un pouvoir adjudicateur exerce sur la personne morale concernée un contrôle analogue à celui qu'il exerce sur ses propres services s'apprécie au regard de l'ensemble des dispositions législatives et des circonstances pertinentes. Dès lors, les éléments dont il y a lieu de tenir compte ne recouvrent pas seulement des circonstances factuelles, mais incluent également la législation applicable ainsi que, notamment, les mécanismes de contrôle prévus par les statuts de cette personne morale (voir, en ce sens, arrêt du 10 septembre 2009, Sea, C-573/07, EU:C:2009:532, points 65 et 66 ainsi que jurisprudence citée).

68 Au titre des précisions apportées à la jurisprudence de la Cour s'agissant des conditions dans lesquelles les marchés conclus entre des entités appartenant au secteur public ne relèvent pas des règles sur la passation des marchés publics, le législateur de l'Union a entendu renforcer l'exigence tenant à cette condition de représentation.

69 En effet, il y a lieu d'observer que, antérieurement à l'adoption de la directive 2014/24, le fait que les organes décisionnels de la personne morale concernée soient composés de représentants des pouvoirs adjudicateurs exerçant sur celle-ci un contrôle conjoint était un des éléments dont il était tenu compte afin d'établir, dans le chef du pouvoir adjudicateur concerné, la possibilité d'une influence déterminante tant sur les objectifs stratégiques que sur les décisions importantes de cette personne (voir, notamment, arrêts du 13 novembre 2008, Coditel Brabant, C-324/07, EU:C:2008:621, points 28, 29, 33 et 34 ainsi que jurisprudence citée, et du 10 septembre 2009, Sea, C-573/07, EU:C:2009:532, points 65, 66 et 86 ainsi que jurisprudence citée).

70 Or, en les visant à des dispositions distinctes, à savoir à l'article 12, paragraphe 3, second alinéa, sous i) et ii), de cette directive, le législateur de l'Union a entendu faire des conditions de représentation des pouvoirs adjudicateurs exerçant un contrôle conjoint sur la personne morale adjudicataire une exigence autonome par rapport à celle tenant à la possibilité d'exercer une telle influence décisive.

71 En troisième lieu, l'interprétation selon laquelle cette disposition exige que la participation d'un pouvoir adjudicateur exerçant un tel contrôle conjoint au sein des organes décisionnels de la personne morale contrôlée s'effectue par l'intermédiaire d'un membre agissant en qualité de représentant de ce pouvoir adjudicateur lui-même, ce membre pouvant, le cas échéant, représenter également d'autres pouvoirs adjudicateurs, est confortée par l'objectif poursuivi par les dispositions de l'article 12, paragraphe 3, de ladite directive.

72 En effet, ainsi qu'il a été rappelé aux points 46 et 48 du présent arrêt, l'exclusion du champ d'application de la directive 2014/24 des marchés publics satisfaisant les critères visés, notamment, à son article 12, paragraphe 3, résulte de la reconnaissance, ainsi qu'il ressort du considérant 5 et du considérant 31, deuxième alinéa, de cette directive, de la liberté des État membres de prévoir que les pouvoirs publics puissent fournir certains services par eux-mêmes et exercer les missions de service public qui leur sont confiées en utilisant leurs propres ressources.

73 Or, il ne saurait être considéré qu'un pouvoir adjudicateur utilise ses propres ressources et agit par lui-même lorsqu'il n'est pas en mesure d'intervenir dans les organes décisionnels de la personne morale à qui le marché public est attribué par la voie d'un représentant qui agit au nom de ce pouvoir adjudicateur lui-même ainsi que, le cas échéant, au nom d'autres pouvoirs adjudicateurs, et que, par conséquent, l'expression de ses intérêts au sein de ces organes décisionnels est

subordonnée au fait que lesdits intérêts soient communs avec ceux que les autres pouvoirs adjudicateurs y font valoir par l'intermédiaire de leurs propres représentants au sein de ces organes.

74 En l'occurrence, sous réserve de vérification par la juridiction de renvoi, il ressort des éléments fournis à la Cour que l'exigence visée à l'article 12, paragraphe 3, second alinéa, sous i), de ladite directive, tenant à ce que la participation d'un pouvoir adjudicateur exerçant un contrôle conjoint sur une personne morale au sein des organes décisionnels de celle-ci s'effectue par l'intermédiaire d'un membre agissant en qualité de représentant de ce pouvoir adjudicateur lui-même, ce membre pouvant, le cas échéant, représenter également d'autres pouvoirs adjudicateurs, n'apparaît pas être satisfaite dans les circonstances en cause au principal. En effet, d'une part, les associés de catégorie C, dont fait partie la SLSP Sambre & Biesme, ne disposaient, notamment, d'aucun représentant au sein du conseil d'administration de l'Igretec et, d'autre part, bien que siégeant également au conseil d'administration de la SLSP Sambre & Biesme, ce n'est qu'en qualité de représentant de la commune de Farciennes, associée de catégorie A, que le conseiller communal siégeait au conseil d'administration de l'Igretec.

75 Eu égard aux considérations qui précèdent, il y a lieu de répondre à la deuxième question dans les affaires C-383/21 et C-384/21 que l'article 12, paragraphe 3, second alinéa, sous i), de la directive 2014/24 doit être interprété en ce sens que, afin d'établir qu'un pouvoir adjudicateur exerce, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle sur la personne morale adjudicataire analogue à celui qu'ils exercent sur leurs propres services, l'exigence visée à cette disposition, tenant à ce qu'un pouvoir adjudicateur soit représenté dans les organes décisionnels de la personne morale contrôlée, n'est pas satisfaite au seul motif que siège au conseil d'administration de cette personne morale le représentant d'un autre pouvoir adjudicateur qui fait également partie du conseil d'administration du premier pouvoir adjudicateur ».

L'article 12, § 3, de la directive 2014/24/EU du Parlement européen et du Conseil du 26 février 2014 sur la passation des marchés publics et abrogeant la directive 2004/18/CE, qui fixe les conditions du contrôle *in house* conjoint permettant d'échapper à l'application de la réglementation des marchés publics, dispose comme il suit :

« 3. Un pouvoir adjudicateur qui n'exerce pas de contrôle sur une personne morale régie par le droit privé ou le droit public au sens du paragraphe 1 peut néanmoins attribuer un marché public à cette personne morale sans appliquer la présente directive, lorsque toutes les conditions suivantes sont réunies :

a) le pouvoir adjudicateur exerce, conjointement avec d'autres pouvoirs adjudicateurs, un contrôle sur la personne morale concernée, analogue à celui qu'ils exercent sur leurs propres services;

b) plus de 80 % des activités de cette personne morale sont exercées dans le cadre de l'exécution des tâches qui lui sont confiées par les pouvoirs adjudicateurs qui la contrôlent ou par d'autres personnes morales contrôlées par les mêmes pouvoirs adjudicateurs; et

c) la personne morale contrôlée ne comporte pas de participation directe de capitaux privés à l'exception des formes de participation de capitaux privés

sans capacité de contrôle ou de blocage requises par les dispositions législatives nationales, conformément aux traités, qui ne permettent pas d'exercer une influence décisive sur la personne morale contrôlée.

Aux fins du premier alinéa, point a), les pouvoirs adjudicateurs exercent un contrôle conjoint sur une personne morale lorsque toutes les conditions suivantes sont réunies :

i) les organes décisionnels de la personne morale contrôlée sont composés de représentants de tous les pouvoirs adjudicateurs participants, une même personne pouvant représenter plusieurs pouvoirs adjudicateurs participants ou l'ensemble d'entre eux;

ii) ces pouvoirs adjudicateurs sont en mesure d'exercer conjointement une influence décisive sur les objectifs stratégiques et les décisions importantes de la personne morale contrôlée; et

iii) la personne morale contrôlée ne poursuit pas d'intérêts contraires à ceux des pouvoirs adjudicateurs qui la contrôlent ».

Dans l'arrêt intermédiaire du 15 juin 2021, le Conseil d'État a relevé que « [p]our rejeter l'hypothèse de l'exception *in house* invoquée par la SLSP "Sambre & Biesme", l'acte attaqué se fonde sur l'absence de rapport de "contrôle analogue" entre cette société et l'intercommunale IGRETEC » en sorte qu'il ne devait être procédé qu'à l'examen de la légalité de ce motif.

Sur le respect de la condition d'un « contrôle analogue », le Conseil d'État a, dans cet arrêt, déjà jugé que la partie adverse avait valablement pu considérer que les associés de catégorie C – dont fait partie la SLSP « Sambre et Biesme » – ne participaient, dans aucune mesure et d'aucune manière, à l'exercice d'un contrôle analogue conjoint sur l'intercommunale IGRETEC, compte tenu de la position très minoritaire des associés de catégorie C, de la prépondérance donnée par les statuts de l'intercommunale aux communes (associés de catégorie A), de l'absence de tout mécanisme pour assurer la protection des associés minoritaires (notamment les associés de catégorie C) et de l'absence de représentants, au sein du conseil d'administration de l'intercommunale, d'associés de catégorie C.

La requérante ne démontre pas – et le Conseil d'État n'aperçoit pas – en quoi les réponses données par la Cour aux questions préjudicielles qui lui ont été posées – notamment la production d'effets directs reconnue à l'article 12, § 3, de la directive 2014/24 précitée – sont de nature à remettre en cause les constats déjà portés dans l'arrêt n° 250.896.

La seule question qui subsistait à l'issue des débats et qui a justifié d'interroger, à titre préjudiciel, la Cour de justice de l'Union européenne est liée à la

présence avérée, au moment des faits, d'une conseillère communale de la commune de Farciennes siégeant à la fois au conseil d'administration de la requérante et au conseil d'administration de l'intercommunale IGRETEC. La question se posait de savoir si cet « état de fait » – qui n'est pas garanti en droit, comme le précisait déjà l'arrêt n° 250.896 – suffisait à satisfaire à la condition de représentation de la requérante au sein des organes décisionnels de l'intercommunale IGRETEC, étant entendu toutefois que la personne concernée siégeait au conseil d'administration de cette intercommunale en sa qualité de « conseiller communal à Farciennes » et que « rien ne permet[tait] de considérer qu'elle était, à ce titre, également réputée représenter les intérêts de la SLSP "Sambre et Biesme" ».

La Cour de justice a clairement répondu par la négative à la question posée, en jugeant que l'exigence prévue par l'article 12, § 3, alinéa 2, sous i), de la directive 2014/24, tenant à ce qu'un pouvoir adjudicateur soit représenté dans les organes décisionnels de la personne morale contrôlée, « n'est pas satisfaite au seul motif que siège au conseil d'administration de cette personne morale le représentant d'un autre pouvoir adjudicateur qui fait également partie du conseil d'administration du premier pouvoir adjudicateur ».

L'affirmation de la requérante, dans son dernier mémoire déposé après la réouverture des débats, suivant laquelle les associés communaux de catégorie A représenteraient l'ensemble des associés – et donc également les associés de catégorie C dont fait partie la requérante – est contredite par la structure et les mécanismes de gestion de l'intercommunale IGRETEC, qui font clairement la distinction entre différentes catégories d'associés. Ainsi, la requérante relevait elle-même, dans le dernier mémoire qu'elle a déposé avant la réouverture des débats, que l'article 13.4, alinéa 3, des statuts de l'intercommunale prévoit que « chacune des catégories d'associés se réunit séparément pour désigner un nombre de candidats administrateurs, correspondant au nombre de mandats à conférer sur sa proposition ». Les statuts identifient clairement des communautés d'intérêts distinctes parmi les associés, suivant la catégorie à laquelle ils appartiennent. Par ailleurs, les mêmes statuts, dans leur version applicable au litige, accordaient une telle prépondérance aux communes dans les organes de gestion d'IGRETEC – au détriment des autres catégories d'associés – qu'il ne peut être sérieusement soutenu que les administrateurs communaux représenteraient l'ensemble des associés de l'intercommunale.

La requérante ne peut, non plus, être suivie lorsqu'elle affirme, que [D.] siégeait au sein du conseil d'administration de l'intercommunale IGRETEC à la fois en qualité de conseillère communale de la commune de Farciennes et en qualité

d’administratrice de la SLSP « Sambre et Biesme ». Le seul fait que [D.] est administratrice de la SLSP « Sambre et Biesme » ne signifie pas qu’en siégeant au conseil d’administration de l’intercommunale IGRETEC, elle « représente » la SLSP.

Comme l’a déjà jugé le Conseil d’État dans son arrêt intermédiaire, il apparaît des pièces produites par la requérante que [D.] siégeait en sa seule qualité de « conseiller communal à Farciennes » alors qu’aucun représentant des associés de catégorie C – dont fait partie la SLSP « Sambre et Biesme » – ne siégeait au sein du conseil d’administration de l’Intercommunale IGRETEC. Dans les considérants de son arrêt, la Cour de justice a confirmé que « l’article 12, paragraphe 3, de cette directive […] ne prévoit pas que les conditions relatives au contrôle du pouvoir adjudicateur sur la personne morale adjudicataire puissent être satisfaites de manière indirecte », qu’ « [e]n particulier, l’exigence de représentation […] requiert que la participation d’un pouvoir adjudicateur au sein des organes décisionnels de la personne morale contrôlée conjointement avec d’autres pouvoirs adjudicateurs s’effectue par l’intermédiaire d’un représentant de ce pouvoir adjudicateur lui-même » et que « cette exigence ne peut donc pas être satisfaite par l’intermédiaire d’un membre de ces organes y siégeant seulement en qualité de représentant d’un autre pouvoir adjudicateur ».

La circonstance que la commune de Farciennes serait actionnaire de la SLSP « Sambre et Biesme » et que ces deux entités partageraient des intérêts communs, notamment le projet de création d’un écoquartier, ne suffit pas à démontrer que la SLSP exercerait sur l’intercommunale IGRETEC un contrôle analogue conjoint au sens de l’article 12, § 3, de la directive 2014/24. La Cour de justice a ainsi jugé dans son arrêt qu’« il ne saurait être considéré qu’un pouvoir adjudicateur utilise ses propres ressources et agit par lui-même lorsqu’il n’est pas en mesure d’intervenir dans les organes décisionnels de la personne morale à qui le marché public est attribué par la voie d’un représentant qui agit au nom de ce pouvoir adjudicateur lui-même ainsi que, le cas échéant, au nom d’autres pouvoirs adjudicateurs, et que, par conséquent, l’expression de ses intérêts au sein de ces organes décisionnels est subordonnée au fait que lesdits intérêts soient communs avec ceux que les autres pouvoirs adjudicateurs y font valoir par l’intermédiaire de leurs propres représentants au sein de ces organes ». Dans le même arrêt, la Cour insiste sur le fait qu’ « en les visant à des dispositions distinctes, à savoir à l’article 12, paragraphe 3, second alinéa, sous i) et ii), de cette directive, le législateur de l’Union a entendu faire des conditions de représentation des pouvoirs adjudicateurs exerçant un contrôle conjoint sur la personne morale adjudicataire une exigence autonome par rapport à celle tenant à la possibilité d’exercer une telle influence décisive » (paragraphe 70) et « entendu

renforcer l’exigence tenant à cette condition de représentation » (paragraphe 68).

Au vu des exigences rappelées par la Cour dans son arrêt et des constats déjà opérés dans l’arrêt intermédiaire du 15 juin 2021, l’affirmation de la requérante – non autrement démontrée – selon laquelle « la présence d’une même conseillère communale au sein de la SLSP et d’IGRETEC ne relève nullement du hasard mais bien d’une volonté de cohésion dans la prise de décision au sein des trois entités » ne suffit pas à établir que cette personne représente les intérêts de la SLSP « Sambre & Biesme” lorsqu’elle siège au sein du conseil d’administration de l’intercommunale IGRETEC en qualité de « conseiller communal à Farciennes ».

La partie adverse a, dès lors, valablement pu considérer que, dans le chef de la requérante, « la condition relative à un contrôle analogue n’est pas rencontrée en l’état actuel des statuts d’IGRETEC » et que celle-ci ne peut, dès lors, se prévaloir d’une relation *in house* qui l’unirait à cette intercommunale.

Le premier moyen n’est pas fondé.

Quant au deuxième moyen de la requête, le Conseil d’État l’a jugé non fondé dans l’arrêt n° 250.896 du 15 juin 2021.

V. Indemnité de procédure

La partie adverse sollicite une indemnité de procédure liquidée à la somme de 700 euros. Il y a lieu de faire droit à cette demande.

PAR CES MOTIFS,
LE CONSEIL D’ÉTAT DÉCIDE :

Article 1er.

La requête est rejetée.

Article 2.

La partie requérante supporte les dépens, à savoir le droit de rôle de 200 euros, la contribution de 20 euros et l’indemnité de procédure de 700 euros

accordée à la partie adverse.

Ainsi prononcé à Bruxelles le 4 mars 2024, par la VI^e^ chambre du Conseil d'État, composée de :

Florence Piret,	conseillère d'État, Présidente
Michèle Belmessieri,	conseillère d'État,
Xavier Close	conseiller d'État
Adeline Schyns,	greffière.

La Greffière,	La Présidente,
Adeline Schyns	Florence Piret

CONSEIL D'ÉTAT, SECTION DU CONTENTIEUX ADMINISTRATIF

LE PRÉSIDENT DE LA VI^e^ CHAMBRE

A R R Ê T

n^o^ 256.871 du 20 juin 2023

A. 222.113/VI-21.018

En cause : **la commune de Farciennes**
ayant élu domicile chez
M^es^ Jean BOURTEMBOURG et
Nathalie FORTEMPS, avocats,
Boulevard Brand Whitlock, 114 bte 12
1200 Bruxelles,

contre :

la Société wallonne du logement (SWL),
ayant élu domicile chez
M^e^ Marie VASTMANS, avocat,
avenue Tedesco 7
1160 Bruxelles.

I. Objet de la requête

Par une requête introduite le 2 mai 2017, la commune de Farciennes demande l'annulation de :

« la décision de la Société wallonne de Logement prise le 25 février 2017, en exécution de l'article 168 du Code wallon du logement et de l'habitat durable, annulant les décisions prises par le conseil d'administration de la SLSP SAMBRE & BIESME le 9 février 2017 de conclure une convention cadre de marchés conjoints avec la Commune de FARCIENNES et de ne pas mettre en concurrence un marché de services d'inventaire amiante en raison de la relation *in house* l'unissant à l'intercommunale IGRETEC et déclarant, par conséquent, le recours introduit par le Commissaire de la SWL contre les deux décisions susmentionnées, fondé ».

II. Procédure

Par un arrêt n° 250.897 du 15 juin 2021, le Conseil d'État a sursis à statuer, a posé des questions préjudicielles à la Cour de Justice de l'Union européenne et a chargé un membre de l'auditorat de déposer un rapport complémentaire.

Par un arrêt du 22 décembre 2022, la Cour de Justice de l'Union européenne a répondu aux questions préjudicielles précitées.

M^me^ Geneviève Martou, premier auditeur au Conseil d'État, a rédigé un rapport sur la base de l'article 13 du règlement général de procédure, rapport concluant au rejet du recours.

Le rapport a été notifié à la partie requérante.

M^me^ Geneviève Martou, premier auditeur au Conseil d'État, a rédigé une note, le 2 mars 2023, demandant que soit mise en œuvre la procédure organisée par l'article 14*quater* de l'arrêté du Régent du 23 août 1948 déterminant la procédure devant la section du contentieux administratif du Conseil d'État.

Par un courrier du 8 mars 2023, le greffe a informé la partie requérante que la chambre allait statuer en décrétant le désistement d'instance à moins qu'elle ne demande, dans un délai de quinze jours, à être entendue.

Il est fait application des dispositions relatives à l'emploi des langues, inscrites au titre VI, chapitre II, des lois sur le Conseil d'État, coordonnées le 12 janvier 1973.

III. Désistement d'instance

L'article 21 des lois sur le Conseil d'État, coordonnées le 12 janvier 1973, dispose, en son alinéa 7, qu'il existe, dans le chef de la partie requérante, une présomption de désistement d'instance lorsqu'elle n'introduit aucune demande de poursuite de la procédure dans un délai de trente jours à compter de la notification d'un rapport de l'auditeur concluant au rejet du recours.

La partie requérante n'ayant pas introduit de demande de poursuite de la procédure dans le délai imparti et n'ayant pas non plus demandé à être entendue, elle est donc présumée légalement se désister de son recours.

IV. Indemnité de procédure

La partie adverse sollicite « une indemnité de procédure liquidée à la somme de 700,00 € ». Il y a lieu de faire droit à sa demande.

PAR CES MOTIFS,
LE CONSEIL D'ÉTAT DÉCIDE :

Article 1er.

Le désistement d'instance est décrété.

Article 2.

La partie requérante supporte les dépens, à savoir le droit de rôle de 200 euros et l'indemnité de procédure de 700 euros accordée à la partie adverse.

Ainsi prononcé à Bruxelles, en audience publique de la VIe chambre, le 20 juin 2023 par :

Florence Piret,	conseiller d'État, président f.f.,
Vincent Durieux,	greffier.

Le Greffier,	Le Président,
Vincent Durieux	Florence Piret

JUDGMENT OF THE COURT (Eighth Chamber)

16 June 2022 (*)

(Reference for a preliminary ruling – Public procurement – Regulation (EU, Euratom) 2018/1046 – Regulation (EU, Euratom) No 966/2012 – Inapplicability to public contracts awarded by Member States and financed by resources from the European Structural and Investment Funds – Directive 2014/24/EU – Direct and unconditional reference to provisions of EU law in national legislation – Applicability to a contract whose estimated value is lower than the threshold set in the directive – Article 32(2)(a) – Option for a contracting authority to invite only one economic operator to participate in a negotiated procedure without prior publication after deeming a prior open procedure unsuccessful – Obligation to maintain the initial conditions of the contract without introducing substantial alterations)

In Case C-376/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), made by decision of 28 May 2021, received at the Court on 17 June 2021, in the proceedings

Zamestnik-ministar na regionalnoto razvitie i blagoustroystvoto i rakovoditel na Upravlyavashtia organ na Operativna programa 'Regioni v rastezh' 2014-2020

v

Obshtina Razlog,

THE COURT (Eighth Chamber),

composed of N. Jääskinen, President of the Chamber, M. Safjan and M. Gavalec (Rapporteur), Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the European Commission, by D. Drambozova, P. Ondrůšek, P. Rossi and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 102 and 104 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), as amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 (OJ 2015 L 286, p. 1) ('Regulation No 966/2012'), as well as Articles 160 and 164 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general

budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation No 966/2012 (OJ 2018 L 193, p. 1) ('the Financial Regulation').

2 The request has been made in proceedings between the Zamestnik-ministar na regionalnoto razvitie i blagoustroystvoto i rakovoditel na Upravlyavashtia organ na Operativna programa 'Regioni v rastezh' 2014-2020 (Deputy Minister for Regional Development and Public Works and Head of the Managing Authority of the operational programme 'Regions in Growth' 2014-2020; 'the Minister') and the Obshtina Razlog (municipality of Razlog, Bulgaria) concerning that managing authority's decision to apply a financial correction to that municipality because of breaches of rules relating to, first, public procurement and, second, the use of EU funds allocated to that municipality.

Legal context

European Union law

Regulation No 966/2012

3 Article 102 of Regulation No 966/2012, entitled 'Principles applicable to public contracts', provided:

'1. All public contracts financed in whole or in part by the budget [of the European Union] shall respect the principles of transparency, proportionality, equal treatment and non-discrimination.

2. All contracts shall be put out to competition on the broadest possible basis, except when use is made of the procedure referred to in point (d) of Article 104(1).

…'

4 Article 104 of that regulation, entitled 'Procurement procedures', provided, in paragraph 1 thereof:

'Procurement procedures for awarding concession contracts or public contracts, including framework contracts shall take one of the following forms:

…

(d) negotiated procedure, including without prior publication;

…'

5 Article 117 of that regulation, entitled 'The contracting authority', provided, in paragraph 1 thereof:

'The institutions within the meaning of Article 2, executive agencies and bodies within the meaning of Articles 208 and 209 shall be deemed to be contracting authorities in the case of contracts awarded on their own account, except where they purchase from a central purchasing body. …

Those institutions shall delegate, in accordance with Article 65, the necessary powers for the exercise of the function of contracting authority.'

The Financial Regulation

6 Article 2 of the Financial Regulation, entitled 'Definitions', provides:

'For the purposes of this Regulation, the following definitions apply:

…

(51) "public contract" means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of

Articles 174 and 178, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services, comprising:

…

(b) supply contracts;

…’

7 Article 63 of that regulation, entitled ‘Shared management with Member States’, provides, in paragraph 1 thereof:

‘Where the [European] Commission implements the budget under shared management, tasks relating to budget implementation shall be delegated to Member States. The Commission and Member States shall respect the principles of sound financial management, transparency and non-discrimination and shall ensure the visibility of the Union action when they manage Union funds. To that end, the Commission and Member States shall fulfil their respective control and audit obligations and assume the resulting responsibilities laid down in this Regulation. Complementary provisions shall be laid down in sector-specific rules.’

8 Article 160 of that regulation, entitled ‘Principles applicable to contracts and scope’, provides:

‘1. All contracts financed in whole or in part by the budget shall respect the principles of transparency, proportionality, equal treatment and non-discrimination.

2. All contracts shall be put out to competition on the broadest possible basis, except when use is made of the procedure referred to in point (d) of Article 164(1).

…’

9 Article 164 of that regulation, entitled ‘Procurement procedures’, provides:

‘1. Procurement procedures for awarding concession contracts or public contracts, including framework contracts shall take one of the following forms:

…

(d) negotiated procedure, including without prior publication;

…

4. In all procedures involving negotiation, the contracting authority shall negotiate with tenderers the initial and any subsequent tenders or parts thereof, except their final tenders, in order to improve their content. The minimum requirements and the criteria specified in the procurement documents shall not be subject to negotiation.

…’

10 Article 174 of the Financial Regulation, entitled ‘The contracting authority’, provides, in the first subparagraph of paragraph 1 thereof:

‘Union institutions, executive agencies and Union bodies referred to in Articles 70 and 71 shall be deemed to be contracting authorities in respect of contracts awarded on their own account, except where they purchase from a central purchasing body. Departments of Union institutions shall not be deemed to be contracting authorities where they conclude service-level agreements amongst themselves.’

Directive 2014/24/EU

11 Recitals 2 and 50 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5) ('Directive 2014/24'), state:

'(2) Public procurement … [is] one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth, while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council [of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)] and Directive 2004/18/EC of the European Parliament and of the Council [of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)] should be revised and modernised in order to increase the efficiency of public spending …

…

(50) In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should be used only in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract. This is the case for works of art, where the identity of the artist intrinsically determines the unique character and value of the art object itself. Exclusivity can also arise from other reasons, but only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure.

Contracting authorities relying on this exception should provide reasons why there are no reasonable alternatives or substitutes such as using alternative distribution channels including outside the Member State of the contracting authority or considering functionally comparable works, supplies and services.

Where the situation of exclusivity is due to technical reasons, they should be rigorously defined and justified on a case-by-case basis. They could include, for instance, near technical impossibility for another economic operator to achieve the required performance or the necessity to use specific know-how, tools or means which only one economic operator has at its disposal. Technical reasons may also derive from specific interoperability requirements which must be fulfilled in order to ensure the functioning of the works, supplies or services to be procured.

Finally, a procurement procedure is not useful where supplies are purchased directly on a commodity market, including trading platforms for commodities such as agricultural products, raw materials and energy exchanges, where the regulated and supervised multilateral trading structure naturally guarantees market prices.'

12 Article 4 of that directive, entitled 'Threshold amounts', provides:

'This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

…

(c) EUR 209 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; …

…'

13 Under Article 5 of that directive, entitled ‘Methods for calculating the estimated value of procurement’:

‘1. The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.

…

3. The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.

4. That estimated value shall be valid at the moment at which the call for competition is sent, or, in cases where a call for competition is not foreseen, at the moment at which the contracting authority commences the procurement procedure, for instance, where appropriate, by contacting economic operators in relation to the procurement.

…’

14 Article 18 of that directive, entitled ‘Principles of procurement’, provides, in paragraph 1 thereof:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

15 Article 26 of Directive 2014/24, entitled ‘Choice of procedures’, provides, in paragraphs 4 and 6 thereof:

‘4. Member States shall provide that contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations:

…

(b) with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted. In such situations contracting authorities shall not be required to publish a contract notice where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in Articles 57 to 64 and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

In particular, tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low, shall be considered as being irregular. In particular tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority’s budget as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable.

…

6. In the specific cases and circumstances referred to expressly in Article 32, Member States may provide that contracting authorities may apply a negotiated procedure without prior publication of a call for competition. Member States shall not allow the application of that procedure in any other cases than those referred to in Article 32.’

16 Article 32 of that directive, entitled ‘Use of the negotiated procedure without prior publication’, provides, in paragraph 2 thereof:

‘The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:

(a) where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests.

A tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority’s needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Article 57 or does not meet the selection criteria set out by the contracting authority pursuant to Article 58;

…’

Bulgarian law

The Law on public procurement

17 The zakon za obshtestvenite porachki (Law on public procurement) (DV No 13 of 16 February 2016), in the version applicable to the dispute in the main proceedings (‘the Law on public procurement’), provides, in Article 2 thereof:

‘(1) Public contracts shall be awarded in accordance with the principles of [the FEU Treaty], in particular the free movement of goods, freedom of establishment, freedom to provide services and mutual recognition, and with the principles deriving therefrom:

1. equal treatment and non-discrimination;

2. free competition;

3. proportionality;

4. publicity and transparency.

(2) When awarding public contracts, contracting authorities are not entitled to restrict competition by laying down conditions or requirements which confer an unjustified advantage or which unduly restrict the participation of economic operators in public procurement and which are not linked to the subject matter, value, complexity, quantity or volume of the contract concerned.’

18 Article 18 of that law provides, in paragraphs 1, 2 and 7 thereof:

‘(1) The procedures covered by this Law are:

…

8. negotiation without prior publication;

9. negotiation without prior invitation to participate;

10. negotiation without publication of a contract notice;

…

13. direct negotiation.

(2) Open procedures and public competitive tendering are procedures in which any interested party may submit a tender.

…

(7) In negotiated procedures within the meaning of points 8 to 10 of paragraph 1, as well as point 13 thereof, the contracting authority shall negotiate the terms of the contract with one or more well-defined persons.'

19 According to Article 79(1) of that law:

'Public contracting authorities may use a negotiated procedure without prior publication only in the following cases:

1. where, in an open or restricted procedure, no tender or request to participate has been submitted or where the tenders or requests to participate were not suitable, and the initial conditions of the contract are not substantially altered;

…'

20 Article 110 of that law provides, in paragraph 1 thereof:

'The contracting authority shall discontinue the procedure by reasoned decision where:

1. no tender, request to participate or competitive project has been submitted, or where no participant has attended negotiations;

2. none of the tenders or requests to participate satisfied the conditions for submission, including with regard to forms, methods and deadlines, or none of those tenders or requests to participate were suitable;

…'

21 Article 182 of the Law on public procurement provides:

'(1) The contracting authority may negotiate directly with specified persons where one of the grounds referred to in points 3 and 5 to 9 of Article 79(1) applies or where:

…

2. the procedure for the award of a contract by means of public competitive tendering was discontinued on the ground that no tender had been submitted or that the tenders submitted were not suitable and that the initial conditions were not substantially altered;

…'

The Law on the European structural and investment funds

22 Article 49(2) of the zakon za upravlenie na sredstvata ot Evropeyskite strukturni i investitsionni fondove (Law on the management of resources from the European Structural and Investment Funds) (DV No 101 of 22 December 2015), in the version applicable to the dispute in the main proceedings ('the Law on the European structural and investment funds'), provides:

'For the appointment of a contractor responsible for tasks related to works, services and/or supplies of goods which are the subject of a public contract within the meaning of the Law on public procurement, the following rules shall apply:

1. the rules laid down in the Law on public procurement, where the beneficiary is a contracting authority within the meaning of that law;

…’

The Regulation implementing the Law on public procurement

23 Article 64 of the pravilnik za prilagane na zakona za obshtestvenite porachki (Regulation implementing the Law on public procurement) (DV No 28 of 8 April 2016), in the version applicable to the dispute in the main proceedings, provides, in paragraph 1 thereof:

‘In the decision discontinuing the procedure referred to in points 8 to 10 and 13 of Article 18(1) of the Law on public procurement, contracting authorities shall also indicate the persons who shall be invited to participate in the negotiation, except in the cases referred to in points 7 and 8 of Article 79(1), point 2 of Article 138(1), [and] points 9 and 10 of Article 164(1) of [that law], as well as in the cases referred to in point 3 of Article 182(1) of [that law].’

The dispute in the main proceedings and the questions referred for a preliminary ruling

24 The municipality of Razlog received EU funds allocated with a view to improving the educational infrastructure and learning process in the Vocational High School of Agricultural Mechanisation located in its territory. To that end, it organised, in its capacity as contracting authority, a procurement procedure involving public competitive tendering, the subject matter of which was the supply of technology, equipment and furniture for the needs of that school.

25 The contract was divided into four lots. The only tender submitted exclusively concerned Lot No 2, entitled ‘Metalworking equipment’. The contracting authority did not deem that tender to be in line with the conditions of the contract, on the ground that its amount was more than twice the estimated value of the contract. The contracting authority then found that that procedure had been unsuccessful and discontinued it by a decision of 1 November 2017 taken on the basis of points 1 and 2 of Article 110(1) of the Law on public procurement.

26 By decision of 1 December 2017, the contracting authority, pursuant to point 1 of Article 79(1) of that law, used a negotiated procedure without prior publication, the subject matter of which was the ‘Supply of metalworking equipment for the needs of the Vocational High School of Agricultural Mechanisation of the town of Razlog’. The estimated value of the contract, which reproduced, without alteration, the initially announced conditions of the contract for that lot, was 33 917.82 leva (BGN) excluding VAT (approximately EUR 17 370). The contracting authority stated that the reason for choosing that form of award was the lack of a suitable tender for that lot in the prior open procedure.

27 The contracting authority invited only one economic operator to take part in that negotiated procedure without prior publication – in this instance, Dikar Konsult OOD – and awarded it, by a contract concluded on 29 December 2017, a contract with a value of BGN 33 907 excluding VAT (approximately EUR 17 365).

28 That negotiated procedure without prior publication was the subject of a report made to the Minister. That report criticised the contracting authority for having, without any justification, favoured the chosen economic operator and for having thus eliminated free competition, in breach of the principles referred to, in particular, in Article 160 of the Financial Regulation.

29 By letter of 20 March 2020, the Minister informed the contracting authority, in its capacity as a recipient of EU funds, of the report received and the initiation of a financial correction procedure.

30 The contracting authority maintained that it was entitled to choose, in accordance with Article 18(7) of the Law on public procurement, to negotiate with one or more specified persons. Furthermore, it argued that the negotiated procedure without prior publication was inseparable from the public competitive tendering procedure which preceded it, in which all interested parties had the opportunity to participate. It stated that the submission of only one tender, the amount of which was more than twice the estimated value of the contract, demonstrated that there was a lack of interest in participating in that procedure because of the low value of the contract. The fact that the public competitive tendering procedure had been discontinued without a successful result thus justified the contracting authority’s decision to invite

only one economic operator to participate in the subsequent negotiated procedure without prior publication.

31 By decision of 15 April 2020 (‘the decision of 15 April 2020’), the Minister applied to the contracting authority a financial correction of 10% of the expenditure eligible for funding from the EU funds linked to the contract concluded with Dikar Konsult. In that decision, the Minister challenged the methods for the implementation of the negotiated procedure without prior publication. He stated that it is apparent in particular from Article 160 of the Financial Regulation that the principle of free competition absolutely must be complied with in a public procurement procedure. Accordingly, point 1 of Article 79(1) of the Law on public procurement cannot justify the award of a contract that has not been put out to competition at all, given that, by referring to ‘persons’ in the plural, Article 64(1) and (3) of the regulation implementing that law expressly requires that several persons must be invited to participate in the negotiations. Thus, by inviting only Dikar Konsult without giving reasons for that decision, the contracting authority conferred an unjustified advantage on that economic operator and restricted the participation of an undefined circle of economic operators interested in the contract.

32 Following an action brought by the contracting authority, the Administrativen sad Blagoevgrad (Administrative Court, Blagoevgrad, Bulgaria) annulled the decision of 15 April 2020. According to that court, the conditions under which the negotiated procedure without prior publication was conducted make it factually impossible to apply the principle of safeguarding competition on the broadest possible basis, either because of the specific subject matter of the contract or given the lack of suitable tenders. Furthermore, Article 18(7) of the Law on public procurement expressly provides the contracting authority with the option to negotiate the terms of the contract with one or more specified persons.

33 Hearing an appeal on a point of law brought by the Minister, the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) questions whether a contracting authority infringes the principles of equal treatment, non-discrimination and free competition when it sends an invitation to conclude a public contract to only one economic operator in a negotiated procedure without prior publication which, first, is launched following the discontinuation of an unsuccessful open procedure and, second, reproduces the initial conditions of the contract without altering them, even though the subject matter of the contract does not have special characteristics which justify its performance being entrusted to the economic operator invited to negotiate.

34 In that regard, that court notes divergences among the Bulgarian courts, including within the referring court itself, as regards the interpretation of point 1 of Article 79(1) of the Law on public procurement, read in conjunction with Article 160(2) and Article 164(1)(d) of the Financial Regulation. It observes, first of all, that although Article 160(2) of the Financial Regulation allows, exceptionally, derogation from the principle of public procurement involving competition on the broadest possible basis, that provision does not have the effect of setting aside the principles of equal treatment and non-discrimination. The first sentence of Article 164(4) of the Financial Regulation refers, moreover, to ‘tenderers’ in the plural.

35 Next, although the Financial Regulation does not normally apply to national contracting authorities, the referring court considers that it is necessary for it to apply that regulation in this case, since the value of the public contract concerned does not reach the threshold set by Directive 2014/24. The application of Article 160(1) and (2) of the Financial Regulation may be justified by the use of resources from the budget of the Union.

36 Lastly, the referring court notes that the relevant facts in this case occurred while Regulation No 966/2012 was still in force, whereas the decision of 15 April 2020 was adopted after the repeal of that regulation and the entry into force of the Financial Regulation. In any event, the content of Article 160 of the Financial Regulation and that of Article 102(1) and (2) of Regulation No 966/2012, which is applicable to the dispute in the main proceedings, are identical.

37 In those circumstances the Varhoven administrativen sad (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Article 160(1) and (2) of Regulation 2018/1046 and Article 102(1) and (2) of Regulation No 966/2012 to be interpreted as also applying to contracting authorities of Member States of the European Union where the public contracts that they award are financed by resources from the European Structural and Investment Funds?

(2) If the first question is answered in the affirmative, are the principles of transparency, proportionality, equal treatment and non-discrimination enshrined in Article 160(1) of Regulation 2018/1046 and Article 102(1) of Regulation No 966/2012 to be interpreted as permitting a total restriction of competition in the award of a public contract by way of a negotiated procedure without prior publication where the subject matter of the public contract does not have special characteristics which objectively require it to be performed only by the economic operator invited to negotiate? In particular, are Article 160(1) and (2) of Regulation 2018/1046, read in conjunction with Article 164(1)(d) thereof, and Article 102(1) and (2) of Regulation No 966/2012, read in conjunction with Article 104(1)(d) thereof, to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, following the discontinuation of a public procurement procedure on the ground that the sole tender submitted is unsuitable, the contracting authority may invite only one economic operator to participate in a negotiated procedure without prior publication where the subject matter of the public contract does not have special characteristics which objectively require it to be performed only by the economic operator invited to negotiate?’

Consideration of the questions referred

The first question

38 By its first question, the referring court asks, in essence, whether Article 160(1) and (2) of the Financial Regulation and Article 102(1) and (2) of Regulation No 966/2012 must be interpreted as applying to procedures for the award of public contracts organised by contracting authorities of the Member States where those contracts are financed by resources from the European Structural and Investment Funds.

39 Article 160 of the Financial Regulation, entitled ‘Principles applicable to contracts and scope’, provides, in paragraph 1 thereof, that ‘all contracts financed in whole or in part by the budget shall respect the principles of transparency, proportionality, equal treatment and non-discrimination’. Paragraph 2 of that provision states that ‘all contracts shall be put out to competition on the broadest possible basis, except when use is made of the procedure referred to in point (d) of Article 164(1)’, namely the negotiated procedure, including without prior publication.

40 As is apparent from paragraph 35 of this judgment, that first question is based on the premiss that, although not applicable to national contracting authorities, the Financial Regulation could nevertheless offset the inapplicability of Directive 2014/24 to a public contract whose value does not reach the threshold set by that directive.

41 The referring court rightly observes that the Financial Regulation does not apply to procurement procedures organised by contracting authorities of the Member States.

42 It follows from Article 2(51) of the Financial Regulation that, for the purposes of that regulation, a ‘public contract’ means ‘a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 174 and 178, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services …’.

43 Article 174 of that regulation, which is entitled ‘The contracting authority’, provides, in the first sentence of the first subparagraph of paragraph 1 thereof, that ‘Union institutions, executive agencies and Union bodies referred to in Articles 70 and 71 shall be deemed to be contracting authorities in respect of contracts awarded on their own account, except where they purchase from a central purchasing body’.

44 As indicated in Annex II to the Financial Regulation, the wording of Article 174 of that regulation corresponds to that of Article 117(1) of Regulation No 966/2012, which was repealed by the Financial Regulation with effect from 2 August 2018.

45 Accordingly, the essence of the concept of ‘contracting authority’ derived from Regulation No 966/2012 remained unchanged after the entry into force of the Financial Regulation, with the result that that concept must be interpreted in the same way in both of those regulations.

46 Thus it is clear from Article 174 of the Financial Regulation that the concept of ‘contracting authority’ to which Article 2(51) of that regulation refers includes, like Article 117 of Regulation No 966/2012, only the institutions of the European Union, executive agencies and bodies of the European Union referred to in Articles 70 and 71 of the Financial Regulation.

47 It follows that neither of those regulations is applicable to procedures for the award of public contracts by the contracting authorities of the Member States.

48 Moreover, it follows from Article 63(1) of the Financial Regulation that, where the Commission implements the budget under shared management, tasks relating to budget implementation are to be delegated to Member States. The Member States must comply, in particular, with the complementary provisions laid down in sector-specific rules. Therefore, as the Commission pointed out in its written observations, Article 63(1) of that regulation requires Member States, even when carrying out budget implementation tasks through public procurement financed by resources from the European Structural and Investment Funds, to apply not the Financial Regulation but their national legislation, including the provisions transposing the directives on public procurement.

49 It consequently appears that, even where a public contract is financed by resources from the European Structural and Investment Funds, the obligation on the contracting authorities of the Member States to comply with the fundamental principles of public procurement, namely the principles of equal treatment, non-discrimination, transparency and proportionality, cannot arise from Article 160 of the Financial Regulation.

50 In the light of the foregoing considerations, the answer to the first question is that Article 160(1) and (2) of the Financial Regulation and Article 102(1) and (2) of Regulation No 966/2012 must be interpreted as not applying to procedures for the award of public contracts organised by contracting authorities of the Member States, even where those contracts are financed by resources from the European Structural and Investment Funds.

The second question

51 As a preliminary point, it should be recalled that a question referred for a preliminary ruling must be examined in the light of all the provisions of the Treaties and of secondary legislation which may be relevant to the issue raised (see, to that effect, judgment of 11 July 1985, *Mutsch*, 137/84, EU:C:1985:335, paragraph 10). The fact that a national court’s question refers to certain provisions of EU law does not mean therefore that the Court of Justice may not provide the national court with all the guidance on points of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question (see, to that effect, judgments of 12 December 1990, *SARPP*, C-241/89, EU:C:1990:459, paragraph 8, and of 8 June 2017, *Medisanus*, C-296/15, EU:C:2017:431, paragraph 55).

52 By its second question, the referring court refers to Articles 160 and 164 of the Financial Regulation and Articles 102 and 104 of Regulation No 966/2012. It follows from the answer given to the first question that those provisions do not apply in the present case.

53 However, those provisions, which set out the principles of public procurement, have a purpose equivalent to that of Article 18(1) of Directive 2014/24, which also gives rise to an obligation to comply with the fundamental principles of public procurement.

54 Although the value of the contract at issue in the main proceedings does not reach the threshold for the applicability of Directive 2014/24, which is fixed in Article 4(c) thereof at EUR 209 000 for supply

contracts awarded by sub-central contracting authorities, such as the municipality of Razlog, the provisions of Directive 2014/24 have been made applicable, directly and unconditionally, by national law to situations which, like that of the contract at issue in the main proceedings, normally fall outside its scope. It follows from Article 49(2) of the Law on the European structural and investment funds that the Law on public procurement, which faithfully transposed Directive 2014/24 into the Bulgarian legal system, applies to all public procurement procedures subsidised by the European Structural and Investment Funds, irrespective of the value of the contracts concerned.

55 Where, in regulating situations outside the scope of an act of EU law, national legislation seeks to adopt, directly and unconditionally, the same solutions as those adopted in that act, it is clearly in the interest of the European Union that provisions taken from that act be given a uniform interpretation. This means that future differences of interpretation can be forestalled and identical treatment of internal situations and situations falling within the scope of those provisions can be ensured (see, to that effect, judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraphs 36 and 37; of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraphs 33 and 34; and of 31 March 2022, *Smetna palata na Republika Bulgaria*, C-195/21, EU:C:2022:239, paragraph 43).

56 Moreover, since the second question concerns a negotiated procedure without prior publication for public works contracts, public supply contracts and public service contracts, it should be noted that Article 32(2) of Directive 2014/24, which lists, in points (a) to (c) thereof, ‘any of the … cases’ in which it is permitted to use such a procedure, is relevant for the answer to that second question. That list is exhaustive, since Article 26(6) of that directive specifies that Member States must not allow the application of the negotiated procedure without prior publication of a call for competition in any other cases than those referred to in Article 32 of that directive (see, by analogy, judgments of 8 April 2008, *Commission* v *Italy*, C-337/05, EU:C:2008:203, paragraphs 56 and 57, and of 15 October 2009, *Commission* v *Germany*, C-275/08, not published, EU:C:2009:632, paragraph 54).

57 In those circumstances, Article 32(2)(a) of that directive, read in conjunction with Article 18(1) of that directive, must be interpreted as meaning that a contracting authority may, in a negotiated procedure without prior publication, approach a single economic operator where that procedure reproduces, without substantial alterations, the initial conditions of the contract that were referred to in a prior open procedure which was discontinued on the ground that the only tender submitted was unsuitable, even if the subject matter of the contract in question does not have special characteristics which objectively justify its performance being entrusted exclusively to that economic operator.

58 Under the first subparagraph of Article 32(2)(a) of Directive 2014/24, use of that procedure is allowed, inter alia, for public supply contracts where no tenders or no suitable tenders have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests.

59 Accordingly, it is clear from the wording of that provision that a contracting authority may use a negotiated procedure without prior publication where three cumulative conditions are satisfied. In the first place, it must demonstrate that it did not receive any tender or, at the very least, any suitable tender in a prior open or restricted procurement procedure which it discontinued on that ground. In the second place, the subsequent negotiated procedure without prior publication must not substantially alter the initial conditions of the contract, as set out in the contract notice published in the prior open or restricted procedure. In the third and last place, the contracting authority must be able to send a status report to the Commission if the latter so requests.

60 Since that last condition is not at issue in this case, it is necessary to clarify the content of the first two conditions for the application of the first subparagraph of Article 32(2)(a) of Directive 2014/24.

61 As regards the first condition, it is apparent from the second subparagraph of Article 32(2)(a) of that directive that a tender will be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority’s needs and requirements as specified in the procurement documents.

62 A tender must be considered not to be suitable where it is ‘unacceptable’ within the meaning of the second subparagraph of Article 26(4)(b) of that directive, which covers, inter alia, competitive

procedures with negotiation. Under that provision, tenders submitted by tenderers whose price exceeds the contracting authority's budget as determined and documented before the launching of the procurement procedure are to be considered unacceptable.

63 That is clearly the case for a tender which, like that referred to in paragraph 25 of this judgment, had proposed an amount more than twice the estimated value of the contract declared by the contracting authority.

64 As regards the second condition for the application of that provision, it seems to follow from the request for a preliminary ruling that, in the negotiated procedure at issue in the main proceedings, the contracting authority did not substantially alter the initial conditions of the contract, which it is, however, for the referring court to verify.

65 Moreover, neither recital 50 nor Article 18(1) of Directive 2014/24 can invalidate that literal interpretation of Article 32(2)(a) of that directive.

66 As is apparent from its general scheme, recital 50 of Directive 2014/24 refers to cases in which a negotiated procedure without prior publication may be used which do not correspond to that referred to in Article 32(2)(a) of that directive.

67 Furthermore, where a contracting authority decides to approach a single economic operator in a negotiated procedure without prior publication, which is organised following the failure of an open or restricted procedure and which reproduces, without substantial alterations, the conditions which initially appeared in the contract notice published in the prior open or restricted procedure, such conduct remains compatible with the principles of procurement set out in the first subparagraph of Article 18(1) of Directive 2014/24, even if the subject matter of the contract in question does not objectively require that contracting authority to approach that operator. In such a situation, both the prior open or restricted procedure and the subsequent negotiated procedure without prior publication form an indivisible whole, with the result that the fact that the economic operators potentially interested in the contract concerned have had the opportunity to come forward and to compete cannot be overlooked.

68 In those circumstances, economic operators who have failed to act diligently by not submitting a suitable tender during an open or restricted procedure cannot compel the contracting authority, in the subsequent negotiated procedure without prior publication, to enter into negotiations with them. It was open to them to submit a tender in the prior open or restricted procedure and, therefore, to benefit fully, in that procedure, from the principles of equality, non-discrimination, transparency and proportionality.

69 Nevertheless, in order to be able to demonstrate that the contract in question was not designed with the intention of excluding it from the scope of Directive 2014/24 or of artificially narrowing competition, as required by the second subparagraph of Article 18(1) thereof, the contracting authority must be able to prove that the price on which it has agreed with the successful tenderer corresponds to the market price and that it does not exceed the estimated value of the contract, calculated in accordance with the requirements of Article 5 of that directive. In so doing, the contracting authority complies with the principle that the burden of proving the actual existence of exceptional circumstances justifying a derogation under Article 32 of that directive lies on the person seeking to rely on that derogation (see, to that effect, judgments of 10 March 1987, *Commission* v *Italy*, 199/85, EU:C:1987:115, paragraph 14, and of 8 April 2008, *Commission* v *Italy*, C-337/05, EU:C:2008:203, paragraph 58).

70 Furthermore, by establishing that the price of the contract concluded at the end of the negotiated procedure without prior publication corresponds to the market price, the contracting authority demonstrates that it has made the best possible use of public funds, as provided for in recital 2 of the same directive, and therefore that no irregularity within the meaning of the EU rules on the European structural and investment funds has been committed (see, by analogy, judgments of 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, paragraph 46, and of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 51).

71 In the light of the foregoing considerations, the answer to the second question is that Article 32(2)(a) of Directive 2014/24, read in conjunction with Article 18(1) of that directive, must be interpreted as

meaning that a contracting authority may, in a negotiated procedure without prior publication, approach a single economic operator where that procedure reproduces, without substantial alteration, the initial conditions of the contract that were mentioned in a prior open procedure which was discontinued on the ground that the only tender submitted was unsuitable, even if the subject matter of the contract in question does not have special characteristics which objectively justify its performance being entrusted exclusively to that economic operator.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **Article 160(1) and (2) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, as well as Article 102(1) and (2) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, as amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015, must be interpreted as not applying to procedures for the award of public contracts organised by contracting authorities of the Member States, even where those contracts are financed by resources from the European Structural and Investment Funds.**

2. **Article 32(2)(a) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015, read in conjunction with Article 18(1) of that directive, as amended by Delegated Regulation 2015/2170, must be interpreted as meaning that a contracting authority may, in a negotiated procedure without prior publication, approach a single economic operator where that procedure reproduces, without substantial alteration, the initial conditions of the contract that were mentioned in a prior open procedure which was discontinued on the ground that the only tender submitted was unsuitable, even if the subject matter of the contract in question does not have special characteristics which objectively justify its performance being entrusted exclusively to that economic operator.**

[Signatures]

---

* Language of the case: Bulgarian.

ORDONNANCE DE LA COUR (neuvième chambre)

6 octobre 2021 (*)

« Renvoi préjudiciel – Article 99 du règlement de procédure de la Cour – Directive 2014/24/UE – Déroulement de la procédure – Choix des participants et attribution des marchés – Article 63 – Soumissionnaire recourant aux capacités d'une autre entité pour satisfaire aux exigences du pouvoir adjudicateur – Non-respect des conditions tenant aux capacités techniques et professionnelles du soumissionnaire par l'entité aux capacités desquelles le soumissionnaire entend recourir – Obligation de permettre audit soumissionnaire de remplacer ladite entité – Principe de proportionnalité »

Dans l'affaire C-316/21,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Raad van State (Conseil d'État, Belgique), par décision du 7 mai 2021, parvenue à la Cour le 21 mai 2021, dans la procédure

Monument Vandekerckhove NV

contre

Stad Gent,

en présence de :

Denys NV,

Aelterman BVBA,

LA COUR (neuvième chambre),

composée de M. N. Piçarra, président de chambre, MM. D. Šváby (rapporteur) et S. Rodin, juges,

avocat général : M. M. Campos Sánchez-Bordona,

greffier : M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 63 de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE (JO 2014, L 94, p. 65), telle que modifiée par le règlement délégué (UE) 2017/2365 de la Commission du 18 décembre 2017 modifiant la directive 2014/24/UE du Parlement européen et du Conseil en ce qui concerne les seuils d'application pour les procédures de passation des marchés (JO 2017, L 337, p. 19), ainsi que des principes du droit de l'Union d'égalité de traitement, de non-discrimination et de transparence.

2 Cette demande a été présentée dans le cadre d'un litige opposant Monument Vandekerckhove NV à la Stad Gent (ville de Gand, Belgique) au sujet de la décision de cette dernière de ne pas sélectionner cette

société dans la procédure de passation d'un marché public de travaux et d'attribuer ce marché aux entreprises Denys NV et Aelterman BVBA, constituées en une société momentanée.

Le cadre juridique

La directive 2014/24

3 Le considérant 84 de la directive 2014/24 énonce :

« De nombreux opérateurs économiques, et en particulier les PME, estiment que les lourdeurs administratives découlant de l'obligation de produire un nombre important de certificats ou d'autres documents en rapport avec les critères d'exclusion et de sélection constituent l'un des principaux obstacles à leur participation aux marchés publics. Limiter ces exigences, par exemple en utilisant un document unique de marché européen (DUME) consistant en une déclaration sur l'honneur actualisée, pourrait conduire à une simplification considérable dont bénéficieraient tant les pouvoirs adjudicateurs que les opérateurs économiques.

Le soumissionnaire à qui il a été décidé d'attribuer le marché devrait néanmoins être tenu de produire les éléments de preuve pertinents ; à défaut, les pouvoirs adjudicateurs ne devraient pas passer de marché avec lui. Les pouvoirs adjudicateurs devraient également être autorisés à demander, à tout moment, communication de tout ou partie des documents justificatifs lorsqu'ils l'estiment nécessaire pour assurer le bon déroulement de la procédure. Cela pourrait notamment être le cas lors de procédures en deux étapes (procédure restreinte, procédure concurrentielle avec négociation, dialogue compétitif et partenariat d'innovation) dans le cadre desquelles le pouvoir adjudicateur recourt à la possibilité de limiter le nombre de candidats invités à soumissionner. Demander que les documents justificatifs soient produits au moment de la sélection des candidats à inviter pourrait se justifier afin d'éviter que les pouvoirs adjudicateurs invitent des candidats qui se montreraient ultérieurement incapables de présenter les documents justificatifs au stade de l'attribution du marché, empêchant ainsi des candidats remplissant par ailleurs les conditions requises de participer.

Il convient d'indiquer expressément que le DUME devrait également fournir les informations pertinentes concernant les entités aux capacités desquelles un opérateur économique a recours, de sorte qu'il puisse être procédé à la vérification des informations concernant ces entités parallèlement aux vérifications concernant l'opérateur économique principal et aux mêmes conditions. »

4 L'article 4 de cette directive, intitulé « Montants des seuils », prévoit :

« La présente directive s'applique aux marchés dont la valeur estimée hors taxe sur la valeur ajoutée (TVA) est égale ou supérieure aux seuils suivants :

a) 5 548 000 [euros] pour les marchés publics de travaux ;

[...] »

5 L'article 18 de ladite directive, qui se rapporte aux « Principes de la passation de marchés », dispose :

« 1. Les pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité et sans discrimination et agissent d'une manière transparente et proportionnée.

Un marché ne peut être conçu dans l'intention de le soustraire au champ d'application de la présente directive ou de limiter artificiellement la concurrence. La concurrence est considérée comme artificiellement limitée lorsqu'un marché est conçu dans l'intention de favoriser ou de défavoriser indûment certains opérateurs économiques.

2. Les États membres prennent les mesures appropriées pour veiller à ce que, dans l'exécution des marchés publics, les opérateurs économiques se conforment aux obligations applicables dans les domaines du droit environnemental, social et du travail établies par le droit de l'Union, le droit

national, les conventions collectives ou par les dispositions internationales en matière de droit environnemental, social et du travail énumérées à l'annexe X. »

6 Intitulé « Opérateurs économiques », l'article 19 de la même directive dispose, à son paragraphe 2, premier alinéa :

« Les groupements d'opérateurs économiques, y compris les associations temporaires, peuvent participer aux procédures de passation de marchés. Ils ne sont pas contraints par les pouvoirs adjudicateurs d'avoir une forme juridique déterminée pour présenter une offre ou une demande de participation. »

7 L'article 57 de la directive 2014/24, intitulé « Motifs d'exclusion », prévoit, à son paragraphe 6 :

« Tout opérateur économique qui se trouve dans l'une des situations visées aux paragraphes 1 et 4 peut fournir des preuves afin d'attester que les mesures qu'il a prises suffisent à démontrer sa fiabilité malgré l'existence d'un motif d'exclusion pertinent. Si ces preuves sont jugées suffisantes, l'opérateur économique concerné n'est pas exclu de la procédure de passation de marché.

À cette fin, l'opérateur économique prouve qu'il a versé ou entrepris de verser une indemnité en réparation de tout préjudice causé par l'infraction pénale ou la faute, clarifié totalement les faits et circonstances en collaborant activement avec les autorités chargées de l'enquête et pris des mesures concrètes de nature technique et organisationnelle et en matière de personnel propres à prévenir une nouvelle infraction pénale ou une nouvelle faute.

Les mesures prises par les opérateurs économiques sont évaluées en tenant compte de la gravité de l'infraction pénale ou de la faute ainsi que de ses circonstances particulières. Lorsque les mesures sont jugées insuffisantes, la motivation de la décision concernée est transmise à l'opérateur économique.

Un opérateur économique qui a été exclu par un jugement définitif de la participation à des procédures de passation de marché ou d'attribution de concession n'est pas autorisé à faire usage de la possibilité prévue au présent paragraphe pendant la période d'exclusion fixée par ledit jugement dans les États membres où le jugement produit ses effets. »

8 Aux termes de l'article 59 de cette directive, qui s'intitule « Document unique de marché européen » :

« 1. Lors de la présentation de demandes de participation ou d'offres, les pouvoirs adjudicateurs acceptent le document unique de marché européen (DUME) consistant en une déclaration sur l'honneur actualisée à titre de preuve a priori en lieu et place des certificats délivrés par des autorités publiques ou des tiers pour confirmer que l'opérateur économique concerné remplit l'une des conditions suivantes :

a) il ne se trouve pas dans l'une des situations, visées à l'article 57, qui doit ou peut entraîner l'exclusion d'un opérateur ;

b) il répond aux critères de sélection applicables qui ont été établis conformément à l'article 58 ;

c) le cas échéant, il respecte les règles et critères objectifs qui ont été établis conformément à l'article 65.

Lorsque l'opérateur économique a recours aux capacités d'autres entités en vertu de l'article 63, le DUME comporte également les informations visées au premier alinéa, du présent paragraphe en ce qui concerne ces entités.

Le DUME consiste en une déclaration officielle par laquelle l'opérateur économique affirme que le motif d'exclusion concerné ne s'applique pas et/ou que le critère de sélection concerné est rempli et il fournit les informations pertinentes requises par le pouvoir adjudicateur. Le DUME désigne en outre l'autorité publique ou le tiers compétent pour établir les documents justificatifs et contient une déclaration officielle indiquant que l'opérateur économique sera en mesure, sur demande et sans tarder, de fournir lesdits documents justificatifs.

Lorsque le pouvoir adjudicateur peut obtenir directement les documents justificatifs en accédant à une base de données en vertu du paragraphe 5, le DUME contient également les renseignements requis à cette fin, tels que l'adresse internet de la base de données, toute donnée d'identification et, le cas échéant, la déclaration de consentement nécessaire.

[...]

4. Un pouvoir adjudicateur peut demander à des soumissionnaires et des candidats, à tout moment de la procédure, de fournir tout ou partie des documents justificatifs, si cela est nécessaire pour assurer le bon déroulement de la procédure.

Avant l'attribution du marché, le pouvoir adjudicateur exige du soumissionnaire auquel il a décidé d'attribuer le marché, sauf pour les marchés fondés sur des accords-cadres lorsque ces marchés sont conclus conformément à l'article 33, paragraphe 3, ou à l'article 33, paragraphe 4, point a), qu'il présente des documents justificatifs mis à jour conformément à l'article 60 et, le cas échéant, à l'article 62. Le pouvoir adjudicateur peut inviter les opérateurs économiques à compléter ou à expliciter les certificats reçus en application des articles 60 et 62.

5. Nonobstant le paragraphe 4, les opérateurs économiques ne sont pas tenus de présenter des documents justificatifs ou d'autres pièces justificatives lorsque et dans la mesure où le pouvoir adjudicateur a la possibilité d'obtenir directement les certificats ou les informations pertinentes en accédant à une base de données nationale dans un État membre qui est accessible gratuitement, comme un registre national des marchés publics, un dossier virtuel d'entreprise, un système de stockage électronique de documents ou un système de préqualification.

Nonobstant le paragraphe 4, les opérateurs économiques ne sont pas tenus de présenter des documents justificatifs lorsque le pouvoir adjudicateur ayant attribué le marché ou conclu l'accord cadre a déjà ces documents en sa possession.

Aux fins du premier alinéa, les États membres veillent à ce que les bases de données qui contiennent des informations pertinentes concernant les opérateurs économiques et qui peuvent être consultées par leurs pouvoirs adjudicateurs puissent l'être également, dans les mêmes conditions, par les pouvoirs adjudicateurs d'autres États membres.

6. Les États membres rendent accessible et mettent à jour dans la base e-Certis une liste complète des bases de données contenant les informations pertinentes relatives aux opérateurs économiques qui peuvent être consultées par les pouvoirs adjudicateurs d'autres États membres. Les États membres communiquent aux autres États membres, à leur demande, toute information relative aux bases de données visées au présent article. »

9 Intitulé « Moyens de preuve », l'article 60 de ladite directive dispose, à son paragraphe 1 :

« Les pouvoirs adjudicateurs peuvent exiger la production des certificats, déclarations et autres moyens de preuve visés aux paragraphes 2, 3 et 4, ainsi qu'à l'annexe XII, à titre de preuve de l'absence des motifs d'exclusion visés à l'article 57 et du respect des critères de sélection conformément à l'article 58.

Les pouvoirs adjudicateurs n'exigent pas de moyens de preuve autres que ceux visés au présent article et à l'article 62. En ce qui concerne l'article 63, les opérateurs économiques peuvent avoir recours à tout moyen approprié pour prouver au pouvoir adjudicateur qu'ils disposeront des moyens nécessaires. »

10 Aux termes de l'article 63 de la directive 2014/24 qui se rapporte au « Recours aux capacités d'autres entités » :

« 1. Un opérateur économique peut, le cas échéant et pour un marché déterminé, avoir recours aux capacités d'autres entités, quelle que soit la nature juridique des liens qui l'unissent à ces entités, en ce qui concerne les critères relatifs à la capacité économique et financière énoncés à l'article 58, paragraphe 3, et les critères relatifs aux capacités techniques et professionnelles, visés à l'article 58,

paragraphe 4. En ce qui concerne les critères relatifs aux titres d'études et professionnels visés à l'annexe XII, partie II, point f), ou à l'expérience professionnelle pertinente, les opérateurs économiques ne peuvent toutefois avoir recours aux capacités d'autres entités que lorsque ces dernières exécuteront les travaux ou fourniront les services pour lesquels ces capacités sont requises. Si un opérateur économique souhaite recourir aux capacités d'autres entités, il apporte au pouvoir adjudicateur la preuve qu'il disposera des moyens nécessaires, par exemple, en produisant l'engagement de ces entités à cet effet.

Le pouvoir adjudicateur vérifie, conformément aux articles 59, 60 et 61, si les entités aux capacités desquelles l'opérateur économique entend avoir recours remplissent les critères de sélection applicables et s'il existe des motifs d'exclusion en vertu de l'article 57. Le pouvoir adjudicateur exige que l'opérateur économique remplace une entité qui ne remplit pas un critère de sélection applicable ou à l'encontre de laquelle il existe des motifs d'exclusion obligatoires. Le pouvoir adjudicateur peut exiger ou peut être obligé par l'État membre à exiger que l'opérateur économique remplace une entité à l'encontre de laquelle il existe des motifs d'exclusion non obligatoires.

[...]

2. Pour les marchés de travaux, les marchés de services et les travaux de pose ou d'installation dans le cadre d'un marché de fournitures, les pouvoirs adjudicateurs peuvent exiger que certaines tâches essentielles soient effectuées directement par le soumissionnaire lui-même ou, si l'offre est soumise par un groupement d'opérateurs économiques visé à l'article 19, paragraphe 2, par un participant dudit groupement. »

Le droit belge

11 L'article 73, paragraphe 1, deuxième alinéa, de l'arrêté royal du 18 avril 2017, relatif à la passation des marchés publics dans les secteurs classiques (ci–après l'« arrêté royal de 2017 »), dispose :

« Le pouvoir adjudicateur vérifie, conformément aux articles 73 à 76 de la [loi du 17 juin 2016 relative aux marchés publics], si les entités à la capacité desquelles l'opérateur économique entend avoir recours remplissent les critères de sélection et s'il existe des motifs d'exclusion dans leur chef, sans préjudice de la possibilité d'appliquer des mesures correctrices conformément à l'article 70 de [cette loi]. Le pouvoir adjudicateur exige que l'opérateur économique remplace une entité à l'encontre de laquelle il existe des motifs d'exclusion visés aux articles 67 et 68 de [ladite loi] ou qui ne remplit pas un critère de sélection applicable. Le pouvoir adjudicateur peut en outre exiger que l'opérateur économique remplace une entité à l'encontre de laquelle il existe des motifs d'exclusion non obligatoires visés à l'article 69 de la [même loi]. L'absence de remplacement suite à une telle demande donne lieu à une décision de non-sélection ».

12 Le rapport au Roi (*Moniteur belge* du 9 mai 2017, p. 55345) indique, à l'égard de cet article (p. 55374) :

« Le présent article transpose l'article 63 de la directive 2014/24/UE et correspond à l'article 74 de l'arrêté royal du 15 juillet 2011. Il traite du cas du candidat ou du soumissionnaire qui ne répond pas par lui–même aux critères de sélection et qui fait dès lors appel à la capacité d'entités tierces.

[...]

Selon l'alinéa 2, le pouvoir adjudicateur doit vérifier si les entités à la capacité desquelles il est fait appel ne se trouvent pas en situation d'exclusion. Lorsqu'un motif d'exclusion obligatoire ou un motif d'exclusion relatif aux dettes fiscales ou sociales est détecté dans le chef de l'entité dont la capacité est invoquée ou que cette dernière ne satisfait pas au critère de sélection relatif à la capacité à laquelle il est fait appel, le pouvoir adjudicateur doit exiger son remplacement. Par contre, lorsqu'un motif d'exclusion facultatif est détecté dans le chef de cette entité, le pouvoir adjudicateur peut exiger son remplacement sans qu'il ne s'agisse ici d'une obligation. Il convient en outre de souligner que lorsque le remplacement de l'entité à la capacité de laquelle il est fait appel est demandé, l'absence de remplacement donne lieu à la non–sélection ».

Le litige au principal et les questions préjudicielles

13 Par un avis de marché publié, le 13 décembre 2018, au *Bulletin der Aanbestedingen* (Bulletin des adjudications), modifié le 5 février 2019, la ville de Gand a lancé une procédure ouverte de passation d'un marché public de travaux ayant pour objet la restauration de gazomètres protégés dans cette ville. Le seul critère d'attribution de ce marché, dont la valeur est estimée à 4 265 221,01 euros, hors TVA, est celui du moins-disant.

14 Quatre soumissionnaires, dont Monument Vandekerckhove et la société momentanée Denys – Aelterman, ont déposé une offre.

15 Après l'ouverture des offres, la ville de Gand a demandé, par lettres du 23 avril 2019 et du 20 mai 2019, des documents et des précisions à Monument Vandekerckhove, concernant notamment les capacités techniques en matière de rivetage des sous-traitants que cette société avait proposés. Monument Vandekerckhove a répondu à chacune de ces demandes.

16 Le rapport d'adjudication du 26 juin 2019 proposait de ne sélectionner que la société momentanée Denys – Aelterman et de lui attribuer le marché en cause. Il y était constaté, notamment, que seul l'un des trois sous-traitants auxquels Monument Vandekerckhove entendait recourir satisfaisait aux critères de sélection. Les deux autres sous-traitants ne satisfaisaient pas aux exigences relatives aux diplômes et aux références requises afin d'attester de l'expertise générale dans le domaine du marché. Or, il ressortait du cahier des charges que l'offre devait être accompagnée d'une déclaration indiquant les sous–traitants et qu'il fallait indiquer au moins trois sous-traitants par spécialité, et garantir que le travail sera effectué par l'un d'entre eux. Ces sous-traitants devaient, en outre, être soumis aux mêmes critères relatifs à l'expertise générale et aux qualifications d'études et professionnelles que les exécutants.

17 Le 10 juillet 2019, le collège des bourgmestre et échevins de la ville de Gand a décidé, en se référant au rapport d'adjudication du 26 juin 2019, d'une part, de ne pas sélectionner l'offre de Monument Vandekerckhove et, d'autre part, d'attribuer le marché à la société momentanée Denys – Aelterman (ci-après la « décision litigieuse »).

18 Par un arrêt du 12 septembre 2019, le Raad van State (Conseil d'État, Belgique) a rejeté la demande de suspension en extrême urgence de l'exécution de la décision litigieuse introduite par Monument Vandekerckhove le 21 août 2019.

19 Le 4 octobre 2019, Monument Vandekerckhove a introduit un recours au fond tendant à l'annulation de la décision litigieuse, au soutien duquel elle a fait valoir, en premier lieu, que c'est à tort qu'elle n'a pas été sélectionnée. La ville de Gand aurait en effet dû, conformément à l'article 73, paragraphe 1, deuxième alinéa, de l'arrêté royal de 2017, lui permettre de proposer d'autres sous-traitants pour remplacer ceux qui, selon elle, ne convenaient pas.

20 Monument Vandekerckhove relève également que c'est de manière erronée que le Raad van State (Conseil d'État) s'est appuyé, dans son arrêt du 12 septembre 2019, sur l'arrêt du 14 septembre 2017, Casertana Costruzioni (C-223/16, EU:C:2017:685). Cet arrêt reposerait, en effet, sur l'article 48, paragraphe 3, de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO 2004, L 134, p. 114). Or, cette disposition aurait été abrogée, avec effet au 18 avril 2016, par l'article 63, paragraphe 1, deuxième alinéa, de la directive 2014/24, lequel aurait substantiellement modifié le régime du recours aux capacités d'autres entités dans le cadre d'un marché public.

21 Au demeurant, le principe de transparence aurait été respecté dès lors qu'il était clair, pour tous les soumissionnaires, que le remplacement était possible, puisque l'article 73, paragraphe 1, de l'arrêté royal de 2017 s'appliquait. Par ailleurs, le principe d'égalité de traitement ne saurait être en cause, étant donné que le remplacement des deux sous-traitants n'aurait pas eu de conséquence sur l'unique critère d'attribution, à savoir le prix, et n'aurait dès lors eu aucune incidence sur le classement.

22 L'article 73, paragraphe 1, deuxième alinéa, de l'arrêté royal de 2017 devrait donc être interprété en ce sens que c'est uniquement à titre exceptionnel, en cas de risque d'atteinte aux principes d'égalité de traitement, de non-discrimination, de transparence et de proportionnalité, que le pouvoir adjudicateur peut refuser le remplacement.

23 Monument Vandekerckhove allègue, en second lieu, une violation de l'obligation de motivation, dès lors que le rapport d'adjudication s'est borné à constater sa non–sélection, sans justifier les raisons de l'inapplication de l'article 73, paragraphe 1, deuxième alinéa, de l'arrêté royal de 2017.

24 La ville de Gand estime, quant à elle, que l'article 63, paragraphe 1, deuxième alinéa, de la directive 2014/24 ne peut contraindre le pouvoir adjudicateur à autoriser, en tout état de cause, un soumissionnaire à remplacer les sous-traitants qui ne répondent pas aux critères requis.

25 Elle allègue, également, que les principes d'égalité de traitement et de transparence s'opposent à la modification d'une offre postérieurement à son dépôt. À cet égard, la société momentanée Denys – Aelterman ajoute que le pouvoir adjudicateur ne peut être tenu au remplacement d'un sous-traitant que dans la mesure où cela n'a pas pour effet de modifier l'offre ou de régulariser un manquement substantiel qui existait déjà à la date du dépôt de cette offre.

26 Dans son arrêt du 12 septembre 2019, le Raad van State (Conseil d'État) a rejeté la demande de suspension de l'exécution de la décision litigieuse, au motif que, prima facie, le pouvoir adjudicateur semble disposer d'une certaine marge d'appréciation dans le cadre de l'application de l'article 73, paragraphe 1, deuxième alinéa, de l'arrêté royal de 2017. Aussi ne saurait-il être tenu d'autoriser, de manière inconditionnelle, un soumissionnaire à remplacer une entité aux capacités de laquelle il entend recourir et qui ne satisfait pas aux critères de sélection.

27 Dans le cadre du recours au fond, la juridiction de renvoi estime que se pose la question de la portée de l'article 73, paragraphe 1, deuxième alinéa, de l'arrêté royal de 2017, ainsi que celle de l'article 63, paragraphe 1, deuxième alinéa, de la directive 2014/24 dans la mesure où la première de ces dispositions retranscrit quasi littéralement la seconde.

28 Selon cette juridiction, bien que la valeur du marché en cause au principal soit inférieure au seuil d'applicabilité de la directive 2014/24, qui est fixé, par son article 4, sous a), à un montant de 5 548 000 euros, hors TVA, l'arrêté royal n'établit aucune distinction selon que la valeur des marchés est inférieure ou supérieure au seuil fixé pour une publication à l'échelle de l'Union, de sorte que les dispositions de cette directive sont applicables, de manière directe et inconditionnelle, aux marchés publics dont la valeur n'atteint pas le seuil d'applicabilité de ladite directive, conformément à la jurisprudence initiée par l'arrêt du 18 octobre 1990, Dzodzi (C-297/88 et C-197/89, EU:C:1990:360, points 33 et suivants).

29 Ladite juridiction relève que se pose la question de savoir si, lorsqu'il énonce que « [l]e pouvoir adjudicateur exige que l'opérateur économique remplace une entité qui ne remplit pas un critère de sélection applicable ou à l'encontre de laquelle il existe des motifs d'exclusion obligatoires », l'article 63, paragraphe 1, deuxième alinéa, de la directive 2014/24 impose une obligation au pouvoir adjudicateur et crée, de ce fait, un droit pour le soumissionnaire de pouvoir remplacer le sous-traitant concerné ou si elle confère seulement au pouvoir adjudicateur la faculté d'exiger de l'opérateur économique qu'il procède au remplacement. Il conviendrait également de déterminer s'il existe des circonstances dans lesquelles, eu égard au principe d'égalité de traitement et de non–discrimination et au principe de transparence, par exemple en fonction du déroulement de la procédure d'attribution, le pouvoir adjudicateur ne doit pas (ou plus) ou ne peut pas (ou plus) exiger qu'il soit procédé à un remplacement.

30 La juridiction de renvoi considère que l'article 63, paragraphe 1, deuxième alinéa, de la directive 2014/24 doit être interprété en ce sens que le pouvoir adjudicateur a la faculté, et non l'obligation, d'exiger de l'opérateur économique qu'il procède au remplacement d'une entité aux capacités de laquelle il a recours et qui ne satisfait pas aux critères de sélection. Toutefois, dans l'exercice de cette faculté, il incomberait au pouvoir adjudicateur de tenir compte des principes d'égalité de traitement, de non–discrimination et de transparence.

31 C’est dans ce contexte que le Raad van State (Conseil d’État) a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes :

« 1) L’article 63, paragraphe 1, deuxième alinéa, de la directive [2014/24], considéré isolément et conjointement avec l’incidence des principes de droit de l’Union, à savoir l’égalité de traitement, la non-discrimination et la transparence en matière de marchés publics, doit-il être interprété en ce sens que, lorsqu’il constate qu’une entité aux capacités de laquelle un opérateur économique a recours ne remplit pas les critères de sélection, le pouvoir adjudicateur a l’obligation de demander à cet opérateur de remplacer cette entité ou bien a la faculté de demander ce remplacement, si l’opérateur veut être sélectionné ?

2) Eu égard aux principes d’égalité de traitement, de non-discrimination et de transparence, et en fonction du déroulement de la procédure d’attribution, existe-t-il des circonstances dans lesquelles le pouvoir adjudicateur ne doit pas (ou plus) ou ne peut pas (ou plus) exiger qu’il soit procédé au remplacement ? »

Sur les questions préjudicielles

32 En vertu de l’article 99 de son règlement de procédure, la Cour peut à tout moment décider, sur proposition du juge rapporteur, l’avocat général entendu, de statuer par voie d’ordonnance motivée notamment lorsque la réponse à une question posée à titre préjudiciel peut être clairement déduite de la jurisprudence ou qu’elle ne laisse place à aucun doute raisonnable.

33 Il y a lieu de faire application de cette disposition dans la présente affaire.

34 À titre liminaire, il convient de souligner que, ainsi qu’il ressort du point 28 de la présente ordonnance, la juridiction de renvoi a précisé, conformément à l’article 94 du règlement de procédure de la Cour, que les dispositions du droit de l’Union en cause ont été rendues applicables par la législation nationale aux situations dont tous les éléments se cantonnent à l’intérieur d’un seul État membre, de sorte que, en dépit de son caractère purement interne, le litige pendant devant elle présente un élément de rattachement avec le droit de l’Union qui rend l’interprétation préjudicielle sollicitée nécessaire à la solution de ce litige (voir, en ce sens, arrêt du 15 novembre 2016, Ullens de Schooten, C-268/15, EU:C:2016:874, points 53 et 55).

35 Par ses questions, la juridiction de renvoi demande, en substance, si l’article 63, paragraphe 1, deuxième alinéa, de la directive 2014/24, lu en combinaison avec les principes d’égalité de traitement, de non-discrimination et de proportionnalité tels qu’énoncés à l’article 18, paragraphe 1, de cette directive, doit être interprété en ce sens que, lorsqu’il constate qu’une entité aux capacités de laquelle un opérateur économique entend recourir ne remplit pas les critères de sélection, le pouvoir adjudicateur est tenu ou a simplement la faculté de demander à cet opérateur de remplacer cette entité, s’il ne veut pas être exclu de la procédure de passation du marché public concerné.

36 À cet égard, il y a lieu de relever que l’article 63, paragraphe 1, de la directive 2014/24 prévoit le droit pour un opérateur économique d’avoir recours, pour un marché déterminé, aux capacités d’autres entités, quelle que soit la nature juridique des liens qui l’unissent à ces entités, afin de satisfaire tant aux critères relatifs à la capacité économique et financière énoncés à l’article 58, paragraphe 3, de cette directive qu’aux critères relatifs aux capacités techniques et professionnelles, visés à l’article 58, paragraphe 4, de ladite directive (arrêts du 3 juin 2021, Rad Service e.a., C-210/20, EU:C:2021:445, point 30 ainsi que jurisprudence citée, et du 7 septembre 2021, „Klaipėdos regiono atliekų tvarkymo centras“, C-927/19, EU:C:2021:700, point 150).

37 L’opérateur économique qui entend se prévaloir de ce droit doit, en vertu de l’article 59, paragraphe 1, de la directive 2014/24, transmettre au pouvoir adjudicateur, lors de la présentation de sa demande de participation ou de son offre, un DUME par lequel cet opérateur affirme, notamment, que tant lui-même que les entités aux capacités desquelles il entend recourir, d’une part, remplissent les critères de sélection applicables qui ont été établis conformément à l’article 58 de cette directive et, d’autre part, ne se trouvent pas dans l’une des situations, visées à l’article 57 de ladite directive, qui doit ou peut entraîner l’exclusion d’un opérateur économique. Ainsi que l’énonce le considérant 84, troisième

alinéa, de ladite directive, le DUME doit fournir les informations pertinentes concernant les entités aux capacités desquelles un opérateur économique a recours, de sorte qu'il puisse être procédé à la vérification des informations concernant ces entités parallèlement aux vérifications concernant l'opérateur économique principal et aux mêmes conditions.

38 Il appartient alors, en vertu de l'article 63, paragraphe 1, deuxième alinéa, de la directive 2014/24, au pouvoir adjudicateur de vérifier, d'une part, que, conformément aux articles 59 à 61 de celle-ci, les entités aux capacités desquelles l'opérateur économique entend recourir remplissent les critères de sélection applicables et, d'autre part, s'il existe des motifs d'exclusion, visés à l'article 57 de cette directive, concernant tant cet opérateur économique lui-même que ces entités.

39 À cet égard, il ressort du libellé de l'article 63, paragraphe 1, deuxième alinéa, deuxième phrase, de la directive 2014/24 que le pouvoir adjudicateur exige, notamment, que l'opérateur économique remplace une entité qui ne remplit pas un critère de sélection applicable. Ce faisant, cette disposition ne laisse aucune marge d'appréciation au pouvoir adjudicateur et lui impose d'exiger d'un opérateur économique le remplacement d'une entité aux capacités desquelles il entend recourir lorsque celle-ci ne satisfait pas un critère de sélection applicable.

40 Une telle interprétation s'impose d'autant plus que, dans une situation dans laquelle une entité aux capacités desquelles un opérateur économique entend recourir ne satisfait pas à une condition de diplôme ou d'expérience professionnelle imposée par le pouvoir adjudicateur, une régularisation apparaît, par principe, inenvisageable.

41 Il s'ensuit que, dans un tel contexte, le mécanisme des mesures correctives (*self-cleaning*) prévu à l'article 57, paragraphe 6, de cette directive s'avère inadapté et n'a pas vocation à s'appliquer de sorte que le pouvoir adjudicateur n'a d'autre alternative que d'imposer à l'opérateur économique concerné le remplacement de l'entité aux capacités desquelles il entendait recourir.

42 L'interprétation ainsi faite de l'article 63, paragraphe 1, deuxième alinéa, deuxième phrase, de la directive 2014/24, contribue, en outre, à assurer le respect du principe de proportionnalité par les pouvoirs adjudicateurs, conformément à l'article 18, paragraphe 1, de cette directive, en ce qu'elle évite de devoir exclure d'emblée un opérateur économique qui entendait recourir aux capacités d'autres entités en raison du non-respect des critères de sélection par ces dernières.

43 Il convient, cependant, de préciser que, lorsqu'il exige d'un soumissionnaire qu'il remplace une entité aux capacités desquelles il entend recourir, le pouvoir adjudicateur doit veiller, conformément aux principes de transparence et d'égalité de traitement énoncés à l'article 18, paragraphe 1, de la directive 2014/24, à ce que le remplacement de l'entité concernée n'aboutisse pas à une modification substantielle de l'offre de ce soumissionnaire (arrêt du 3 juin 2021, Rad Service e.a., C-210/20, EU:C:2021:445, point 42).

44 En effet, l'obligation pour le pouvoir adjudicateur de respecter le principe d'égalité de traitement des soumissionnaires, qui a pour objectif de favoriser le développement d'une concurrence saine et effective entre les entreprises participant à un marché public et qui relève de l'essence même des règles de l'Union relatives aux procédures de passation des marchés publics, implique, notamment, que les soumissionnaires doivent se trouver sur un pied d'égalité aussi bien au moment où ils préparent leurs offres qu'au moment où celles-ci sont évaluées par ledit pouvoir adjudicateur. Le principe d'égalité de traitement et l'obligation de transparence s'opposent ainsi à toute négociation entre le pouvoir adjudicateur et un soumissionnaire dans le cadre d'une procédure de passation de marché public, ce qui implique que, en principe, une offre ne peut pas être modifiée après son dépôt, que ce soit à l'initiative du pouvoir adjudicateur ou du soumissionnaire. Il s'ensuit que, à l'instar d'une demande de clarification d'une offre, la demande d'un pouvoir adjudicateur exigeant le remplacement d'une entité aux capacités desquelles un soumissionnaire entend recourir ne doit pas aboutir à la présentation, par ce dernier, de ce qui apparaîtrait, en réalité, comme une nouvelle offre, tant elle modifierait de façon substantielle l'offre initiale (arrêt du 3 juin 2021, Rad Service e.a., C-210/20, EU:C:2021:445, points 43 et 44 ainsi que jurisprudence citée).

45 Eu égard aux considérations qui précèdent, il y a lieu de répondre aux questions posées que l'article 63, paragraphe 1, deuxième alinéa, de la directive 2014/24, lu en combinaison avec les

principes d'égalité de traitement, de non-discrimination et de proportionnalité tels qu'énoncés à l'article 18, paragraphe 1, de cette directive, doit être interprété en ce sens que, lorsqu'il constate qu'une entité aux capacités de laquelle un opérateur économique entend recourir ne remplit pas les critères de sélection, le pouvoir adjudicateur est tenu de demander à cet opérateur de remplacer cette entité, s'il ne veut pas être exclu de la procédure de passation du marché public concerné.

Sur les dépens

46 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (neuvième chambre) dit pour droit :

L'article 63, paragraphe 1, deuxième alinéa, de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE, lu en combinaison avec les principes d'égalité de traitement, de non-discrimination et de proportionnalité tels qu'énoncés à l'article 18, paragraphe 1, de cette directive, doit être interprété en ce sens que, lorsqu'il constate qu'une entité aux capacités de laquelle un opérateur économique entend recourir ne remplit pas les critères de sélection, le pouvoir adjudicateur est tenu de demander à cet opérateur de remplacer cette entité, s'il ne veut pas être exclu de la procédure de passation du marché public concerné.

Signatures

---

* Langue de procédure : le néerlandais.

JUDGMENT OF THE COURT (Eighth Chamber)

14 July 2022 (*)

(Reference for a preliminary ruling – Public procurement – Regulation (EU) No 1215/2012 – Not applicable to procedures for granting an interlocutory injunction and review procedures as referred to in Article 2 of Directive 89/665/EEC in the absence of an international element – Directive 2014/24/EU – Article 33 – Treatment of a framework agreement as a contract, for the purposes of Article 2a(2) of Directive 89/665 – Not possible to award a new public contract where the quantity and/or maximum value of the works, supplies or services concerned laid down by the framework agreement has or have already been reached – National legislation providing for the payment of fees for access to administrative proceedings in the field of public procurement – Obligations to determine and pay the fees for access to proceedings before the court rules on an application for an interlocutory injunction or an action for review – Non-transparent procedure for the award of a public contract – Principles of effectiveness and equivalence – Effectiveness – Right to an effective remedy – Directive 89/665 – Articles 1, 2 and 2a – Article 47 of the Charter of Fundamental Rights of the European Union – National legislation providing for the dismissal of an action for review where the fees for access to proceedings have not been paid – Determination of the estimated value of a public contract)

In Joined Cases C-274/21 and C-275/21,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Austria), made by decisions of 22 April 2021, received at the Court on 28 April 2021, in the proceedings

EPIC Financial Consulting Ges.m.b.H.

v

Republic of Austria,

Bundesbeschaffung GmbH,

THE COURT (Eighth Chamber),

composed of N. Jääskinen, President of the Chamber, N. Piçarra and M. Gavalec (Rapporteur), Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– EPIC Financial Consulting Ges.m.b.H., by K. Hornbanger, Rechtsanwältin,

– the Austrian Government, by A. Posch and J. Schmoll, acting as Agents,

– the Hungarian Government, by M.Z. Fehér and R. Kissné Berta, acting as Agents,

– the European Commission, by P. Ondrůšek, P.J.O. Van Nuffel and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of (i) Article 1(1), Article 2(1)(a) and Article 2a(2) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) ('Directive 89/665'), (ii) Article 1(1) and Article 35 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1), (iii) Article 81(1) TFEU, (iv) the principle of equivalence, (v) Article 4, Article 5(5) and Article 33(3) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), and (vi) Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in proceedings between EPIC Financial Consulting Ges.m.b.H. ('EPIC'), on the one hand, and the Republic of Austria and Bundesbeschaffung GmbH ('the federal purchasing company'), on the other, concerning the award by the Republic of Austria and Bundesbeschaffung GmbH of public contracts for the supply of tests to detect antigens produced by the SARS-CoV-2 virus (COVID-19) ('the antigen tests').

Legal context

European Union law

Directive 89/665

3 The fifth recital of Directive 89/665 is worded as follows:

'… since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorised to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority; … the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently'.

4 Article 1 of that directive, entitled 'Scope and availability of review procedures', provides, in paragraphs 1 and 3 thereof:

'1. This Directive applies to contracts referred to in Directive [2014/24] unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

…

Contracts within the meaning of this Directive include public contracts, framework agreements, works and services concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/24] …, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

5 Article 2 of Directive 89/665, entitled ‘Requirements for review procedures’, provides:

‘1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

…

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.

…’

6 Article 2a of that directive, entitled ‘Standstill period’, states:

‘1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive [2014/24] or Directive 2014/23/EU [of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1)] before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

– a summary of the relevant reasons as set out in Article 55(2) of Directive [2014/24], subject to Article 55(3) of that Directive, or in the second subparagraph of Article 40(1) of Directive [2014/23], subject to Article 40(2) of that Directive, and

– a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.'

7 Under Article 2b of that directive, entitled 'Derogations from the standstill period':

'Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

…

(c) in the case of a contract based on a framework agreement as provided for in Article 33 of Directive [2014/24] and in the case of a specific contract based on a dynamic purchasing system as provided for in Article 34 of that Directive.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

– there is an infringement of point (c) of Article 33(4) or of Article 34(6) of Directive [2014/24], and

– the contract value is estimated to be equal to or to exceed the thresholds set out in Article 4 of Directive [2014/24].'

Directive 2007/66/EC

8 Recitals 3, 4 and 36 of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31) state:

'(3) Consultations of the interested parties and the case-law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. …

(4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether conclusion occurs at the time of signature of the contract or not.

…

(36) This Directive respects fundamental rights and observes the principles recognised in particular by [the Charter]. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.'

Directive 2014/24

9 The thresholds for the applicability of Directive 2014/24, relating to the estimated value of procurements, are set out in Article 4 thereof.

10 Article 5 of that directive, entitled ‘Methods for calculating the estimated value of procurement’, provides, in paragraph 5 thereof:

‘With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of [value added tax (VAT)] of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.’

11 Article 18 of that directive, entitled ‘Principles of procurement’, provides, in the first subparagraph of paragraph 1 thereof:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.’

12 Article 32 of Directive 2014/24, entitled ‘Use of the negotiated procedure without prior publication’, provides, in paragraph 2 thereof:

‘The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:

…

(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.’

13 Article 33, entitled ‘Framework agreements’, provides, in paragraphs 2 and 3 thereof:

‘2. Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this paragraph and in paragraphs 3 and 4.

Those procedures may be applied only between those contracting authorities clearly identified for this purpose in the call for competition or the invitation to confirm interest and those economic operators party to the framework agreement as concluded.

Contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting authorities may consult the economic operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.’

14 Article 49 of that directive, entitled ‘Contract notices’, provides:

‘Contract notices shall be used as a means of calling for competition in respect of all procedures, without prejudice to the second subparagraph of Article 26(5) and Article 32. Contract notices shall contain the information set out in Annex V part C and shall be published in accordance with Article 51.’

15 Article 50 of that directive, entitled ‘Contract award notices’, provides, in paragraphs 1 and 2 thereof:

‘1. Not later than 30 days after the conclusion of a contract or of a framework agreement, following the decision to award or conclude it, contracting authorities shall send a contract award notice on the results of the procurement procedure.

Such notices shall contain the information set out in Annex V part D and shall be published in accordance with Article 51.

2. Where the call for competition for the contract concerned has been made in the form of a prior information notice and the contracting authority has decided that it will not award further contracts during the period covered by the prior information notice, the contract award notice shall contain a specific indication to that effect.

In the case of framework agreements concluded in accordance with Article 33, contracting authorities shall not be bound to send a notice of the results of the procurement procedure for each contract based on that agreement. Member States may provide that contracting authorities shall group notices of the results of the procurement procedure for contracts based on the framework agreement on a quarterly basis. In that case, contracting authorities shall send the grouped notices within 30 days of the end of each quarter.’

16 Article 72 of Directive 2014/24, entitled ‘Modification of contracts during their term’, provides:

‘1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

…

(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

…’

Regulation No 1215/2012

17 Recital 10 of Regulation No 1215/2012 states:

‘The scope of this Regulation should cover all the main civil and commercial matters apart from certain well-defined matters, in particular maintenance obligations, which should be excluded from the scope of this Regulation following the adoption of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [(OJ 2009 L 7, p. 1)].’

18 Article 1(1) of that regulation provides:

‘This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).’

19 Article 35 of that regulation provides:

‘Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.’

Austrian law

The Law on Public Procurement

20 Paragraph 144(1) of the Bundesvergabegesetz 2018 (Federal Law on the award of public contracts 2018) (BGBl. I, 65/2018; ‘the Law on Public Procurement’) provides:

‘The contracting authority may not award the contract before the expiry of the standstill period, failing which that contract shall be null and void. The standstill period shall begin when the notification of the contract award decision is communicated or made available. That period shall be 10 days in case of communication or making available by electronic means, and 15 days in case of communication by post or other suitable carrier.’

21 Paragraph 334 of that law provides:

‘(1) The Bundesverwaltungsgericht [(Federal Administrative Court, Austria)] shall rule, in accordance with the provisions of this section, on applications for review procedures (Section 2), for the adoption of interim orders (Section 3) and for declaratory proceedings (Section 4). Such applications shall be lodged directly with the Bundesverwaltungsgericht [(Federal Administrative Court)].

(2) Until the contract is awarded or the contract award procedure is revoked, the Bundesverwaltungsgericht [(Federal Administrative Court)] shall have jurisdiction, for the purpose of rectifying infringements of this federal law and regulations issued on the basis thereof or infringements of directly applicable EU law,

1. to adopt interim orders, and

2. to annul the contracting authority’s separately contestable decisions within the framework of the complaints put forward by the applicant.

(3) After a contract has been awarded, the Bundesverwaltungsgericht [(Federal Administrative Court)] shall have jurisdiction

…

3. to determine whether a contract award procedure has been unlawfully carried out without prior publication of a contract notice;

…

5. to determine whether a contract for the provision of a service on the basis of a framework agreement or a dynamic purchasing system has been awarded unlawfully on account of an infringement of Paragraph 155(4) to (9), Paragraph 162(1) to (5), Paragraph 316(1) to (3) or Paragraph 323(1) to (5);

…’

22 In accordance with Paragraph 336 of that law:

‘(1) Contracting authorities and contracting entities coming within the scope of this federal law must provide the Bundesverwaltungsgericht [(Federal Administrative Court)] with all the information necessary for the performance of its duties and submit to it in due form all the documents required to that end. The same shall apply to the undertakings involved in a contract award procedure.

(2) If a contracting authority, a contracting entity or an undertaking has failed to submit documents, has failed to provide information, or has provided information but has failed to submit the contract award procedure documents, the Bundesverwaltungsgericht [(Federal Administrative Court)] may, if the contracting entity or undertaking has been expressly informed in advance of the consequences of that failure, rule on the basis of the claims of the participant that has not failed to do so.’

23 Paragraph 340 of that law states:

‘(1) For applications under Paragraphs 342(1), 350(1) and 353(1) and (2), the applicant must pay a flat-rate fee in accordance with the following provisions:

1. The flat-rate fee must be paid when the application is lodged, in accordance with the rates set by the Federal Government by way of regulation.

…

4. In respect of applications under Paragraph 350(1), a fee equal to 50% of the fee set must be paid.

…

7. If an application is withdrawn before the hearing or, if no hearing takes place, before the delivery of the judgment or order, only a fee that is equal to 75% of the fee set for the respective application or the fee reduced in accordance with point 5 must be paid. Amounts previously paid in excess must be reimbursed.'

24 Paragraph 342 of the Law on Public Procurement provides:

'(1) An undertaking may, until a contract has been awarded or until a declaration of revocation has been made, apply for the contracting authority's separately contestable decision in the contract award procedure to be reviewed on account of unlawfulness, in so far as

1. it claims to have an interest in the conclusion of a contract coming within the scope of this federal law; and

2. the alleged unlawfulness has harmed or risks harming it.

…

(3) The application shall have no suspensive effect on the relevant contract award procedure.

…'

25 Paragraph 344 of that law provides:

'(1) An application under Paragraph 342(1) must in any event contain:

1. the designation of the relevant contract award procedure and of the contested, separately contestable decision,

2. the designation of the contracting authority, the applicant and, where applicable, the contracting entity, including their electronic addresses,

3. a presentation of the relevant facts, including of the interest in the conclusion of the contract, and where the contract award decision is being challenged in particular, the designation of the tenderer envisaged for the award of the contract,

4. information about the harm that the applicant claims it risks suffering or is already suffering,

5. the designation of the applicant's rights that it claims have been infringed (complaints) and the grounds on which the claim of unlawfulness is based,

6. an application for annulment of the contested, separately contestable decision,

7. the information necessary to assess whether the application has been lodged in due time.

(2) The application is in any event inadmissible in its entirety where

1. it does not concern a separately contestable decision, or

2. it has not been lodged within the time limit laid down in Paragraph 343, or

3. the appropriate fee has not been paid, despite requests having been made to that end.

(3) If an application pursuant to Paragraph 342(1) is lodged only after the contract has been awarded or the contract award procedure has been revoked, the Bundesverwaltungsgericht [(Federal Administrative Court)] must treat it as an application for a declaration under Paragraph 353(1), if the applicant could not have known about the award or revocation and the application was lodged within the time limit referred to in Paragraph 354(2). At the request of the Bundesverwaltungsgericht [(Federal Administrative Court)], the applicant must, within a reasonable time limit laid down by that court, specify which declaration under Paragraph 353(1) he or she is applying for. If no declaration pursuant to Paragraph 353(1) is applied for until the expiry of that time limit, the application shall be rejected.'

26 Paragraph 350 of that law states:

'(1) The Bundesverwaltungsgericht [(Federal Administrative Court)] must, where an undertaking that does not clearly fail to meet the requirements relating to the application pursuant to Paragraph 342(1) requests it, order without delay interim measures, such as appear necessary and appropriate to remedy or prevent any harm to the applicant's interests that has occurred or risks occurring imminently on account of the alleged unlawfulness of a separately contestable decision.

(2) The application for the adoption of an interim order must contain:

1. the precise designation of the relevant contract award procedure, of the separately contestable decision, and of the contracting authority, the applicant and, where applicable, the contracting entity, including their electronic addresses,

2. a presentation of the relevant facts and of the fact that the conditions referred to in Paragraph 342(1) have been met,

3. the precise designation of the alleged unlawfulness,

4. the precise presentation of the harm to the applicant's interests that risks occurring imminently and a credible presentation of the relevant facts,

5. the precise designation of the interim measure sought and

6. the information necessary to assess whether the application has been lodged in due time.

…

(5) The Bundesverwaltungsgericht [(Federal Administrative Court)] must immediately notify the contracting authority and, where applicable, the contracting entity, that it has received an application for the adoption of an interim order seeking to prohibit the contract from being awarded, a framework agreement from being concluded, the declaration of revocation from being made or the tenders from being opened. Applications for the adoption of interim orders seeking to prohibit the contract from being awarded, a framework agreement from being concluded, the declaration of revocation from being made or the tenders from being opened shall have suspensive effect from the date of receipt of the communication that the application has been lodged until the decision on the application. The contracting authority or contracting entity may not, until a decision on the application has been taken:

1. award the contract or conclude the framework agreement, or

2. revoke the contract award procedure; or

3. open the tenders.

…

(7) An application for the adoption of an interim order shall be inadmissible if the appropriate fee has not been paid, despite requests having been made to that end.'

27 Paragraph 382 of that law states:

‘This federal law transposes or takes account of the following acts of EU law:

…

2. Directive [89/665].

…

16. Directive [2014/24].’

The General Law on Administrative Procedure

28 Under Paragraph 49(1) of the Allgemeine Verwaltungsverfahrensgesetz (General Law on Administrative Procedure):

‘A witness may refuse to give testimony:

1. in relation to questions the answer to which would entail, for the witness, one of his or her relatives … direct pecuniary harm, the risk of criminal prosecution, or dishonour;

…’

The Regulation on Flat-Rate Fees 2018

29 The Verordnung der Bundesregierung betreffend die Pauschalgebühr für die Inanspruchnahme des Bundesverwaltungsgerichtes in den Angelegenheiten des öffentlichen Auftragswesens (BVwG-Pauschalgebührenverordnung Vergabe 2018 – BVwG-PauschGebV Vergabe 2018) (Regulation of the Federal Government relating to the flat-rate fees for bringing proceedings before the Federal Administrative Court in public procurement matters (Regulation on Flat-Rate Fees 2018 – BVwG-PauschGebV 2018)) provides:

‘On the basis of

1. Paragraph 340(1)(1) of the [Law on Public Procurement],

…

the following shall apply:

Fee rates

Paragraph 1. For applications under Paragraph 342(1) and Paragraph 353(1) and (2) [of the Law on Public Procurement], for applications under Paragraph 135 of [the Bundesgesetz über die Vergabe von Aufträgen im Verteidigungs- und Sicherheitsbereich (Bundesvergabegesetz Verteidigung und Sicherheit 2012 – BVergGVS 2012) (Federal Law on the awarding of public contracts in the field of defence and security (Federal Law on defence and security public procurement 2012 – BVergGVS 2012)) (BGBl. I, 10/2012)], in conjunction with Paragraph 342(1) and Paragraph 353(1) and (2) [of the Law on Public Procurement], and for applications under Paragraph 86(1) and Paragraph 97(1) and (2) [of the Bundesgesetz über die Vergabe von Konzessionsverträgen (Bundesvergabegesetz Konzessionen 2018 – BVergGKonz 2018) (Federal Law on the awarding of concession public contracts (Federal law on public procurement concessions 2018 – BVergGKonz 2018)) (BGBl. I, 65/2018)], the applicant must, in each case, pay a flat-rate fee in accordance with the following provisions:

Direct award [EUR] 324

…’

Federal Constitutional Law on accompanying measures in respect of COVID-19 in public procurement matters

30 Under Paragraph 5 of the Bundesverfassungsgesetz betreffend Begleitmaßnahmen zu COVID-19 in Angelegenheiten des öffentlichen Auftragswesens (COVID-19 Begleitgesetz Vergabe) (Federal Constitutional Law on accompanying measures in respect of COVID-19 in public procurement matters (COVID-19 Accompanying Law on Procurement)) (BGBl. I, 24/2020), which was extended until 30 June 2021 (BGBl. I, 5/2021):

‘If it appears, on the basis of the information contained in the application for the adoption of an interim order as regards a review in the context of the award of contracts in accordance with the [Law on Public Procurement] or the BVergGVS 2012, or if the contracting authority credibly states that a procurement procedure … serves to prevent and combat the spread of COVID-19 as a matter of urgency or to maintain public order in relation to the prevention and combating of the spread of COVID-19, the application for the adoption of an interim order seeking to prohibit the tenders from being opened, a framework agreement from being concluded, or the contract from being awarded shall have no suspensive effect. In that case, the contracting authority may award the contract, conclude the framework agreement or open the tenders before a decision on that application has been made.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

31 At the end of 2020, the Republic of Austria and the federal purchasing company (together, ‘the contracting authority’ or ‘the defendants in the main proceedings’) concluded 21 framework agreements worth EUR 3 million with a view to purchasing antigen tests.

32 On 1 December 2020, EPIC brought an action for review before the Bundesverwaltungsgericht (Federal Administrative Court) seeking, in essence, to challenge the conclusion of those framework agreements, on the ground that it had not been transparent and had infringed public procurement law. That action was accompanied by an application for an interlocutory injunction seeking, in essence, to prohibit, provisionally, the contracting authority from continuing the procedure or procedures for the award of contracts to supply antigen tests, the lawfulness of which is disputed by EPIC.

33 On the same day, the Bundesverwaltungsgericht (Federal Administrative Court) issued an initial order for regularisation vis-à-vis EPIC on the ground that its application initiating proceedings did not make it possible to identify clearly the separately contestable decisions, for the purposes of Directive 89/665, the annulment of which EPIC was seeking, or the contract award procedures referred to in its application for an interlocutory injunction.

34 By written submission of 7 December 2020, EPIC disputed the need to regularise its application and stated that it was directed at the only decision of the contracting authority of which it had become aware via the media, namely the decision to have recourse to a direct award procedure for the award of a public contract concerning the order of several million additional antigen tests with a view to carrying out mass testing in Austria. EPIC claimed that, in flagrant breach of the principle of transparency, it had not been able to have access to any documents relating to the contract in question, with the result that it cannot be required to designate specifically the contract award procedure concerned, failing which its right to effective judicial protection would be infringed.

35 By additional written submission of 9 December 2020, EPIC stated that it sought to challenge not the actual conclusion of the 21 framework agreements by the contracting authority, but exclusively the purchases of some two million additional antigen tests from the company R between 29 October and 24 November 2020 for over EUR 3 million. It asserted that those purchases should be regarded as resulting from an unlawful direct award of a contract on the ground that they significantly exceed the volume laid down by the framework agreement concerned.

36 On 14 December 2020, EPIC stated that its application for an interlocutory injunction merely objected to any new orders made since 20 November 2020, from three named undertakings, which exceeded the maximum purchase value of EUR 3 million provided for in the framework agreements concerned.

37 Lastly, EPIC stated, in a written submission of 5 January 2021, that it now disputed exclusively purchases made starting from 20 November 2020 under the framework agreements concluded on 13 and 18 November 2020 respectively, with companies I and S. According to EPIC, those purchases exceeded the maximum purchase value of EUR 3 million provided for in those framework agreements.

38 EPIC states, ultimately, that it could not know, at the time it brought its action for review, the amount of the flat-rate court fees which it would be liable to pay since those fees are calculated on the basis of the number of contested measures. That number would have been impossible to determine in the light of the lack of transparency of the contract award procedures at issue in the main proceedings.

39 For their part, the defendants in the main proceedings dispute the *locus standi* of EPIC since, until 10 December 2020, it did not have the professional qualifications required to market antigen tests. They also claim that EPIC's action for review is inadmissible, since it has not referred to the decision that is actually being contested and the procedure for the award of a public contract to which that decision relates. The defendants in the main proceedings also submit that, on 1 December 2020, they published, in the *Official Journal of the European Union,* a notice relating to an open procedure for the conclusion of a framework agreement for the supply of antigen tests. Moreover, the inadmissibility of the action for review brought before the Bundesverwaltungsgericht (Federal Administrative Court) entails, as a consequence, the inadmissibility of the application for an interlocutory injunction. In any event, according to them, pursuant to Paragraph 5 of the COVID-19 Accompanying Law, referred to in paragraph 30 of this judgment, that application cannot have a suspensive effect since the contested purchase of antigen tests was intended to prevent and combat the spread of COVID-19 as a matter of urgency. The defendants in the main proceedings also submit that each of the 21 framework agreements disputed by EPIC had been concluded with a single partner, which EPIC could clearly establish by consulting the website of the federal purchasing company. Lastly, since EPIC's action for review was notified, no purchase of antigen tests has been carried out under the framework agreements concluded with the companies S and I respectively. Therefore, there is no separately contestable decision.

40 The Bundesverwaltungsgericht (Federal Administrative Court) states, first, that, in Austria, litigants bringing an action for review in public procurement matters must pay flat-rate fees for each of their applications. Those fees are calculated, inter alia, by reference to the number of contested decisions under a specific procedure for the award of a public contract. According to the case-law of the Verfassungsgerichtshof (Constitutional Court, Austria), the fee becomes payable at the time when the application is lodged and must be paid at that stage to the Bundesverwaltungsgericht (Federal Administrative Court). Accordingly, an action for review or an application for an interlocutory injunction is inadmissible where the fee relating to that action or application has not been duly paid despite a request having been made to that end. Similarly, that court cannot take formal note of a withdrawal until the flat-rate fees that are due have been paid to it. As the case may be, the members of that court could be regarded as having caused, by their fault, pecuniary damage to the State Treasury, for which they are liable with their own funds. It follows that, in the event of a non-transparent procedure for the award of a public contract, the applicant would be able to acquaint him- or herself with the amount of the flat-rate fees linked to his or her action for review only after the Bundesverwaltungsgericht (Federal Administrative Court) has carried out extensive investigations in order to identify the procedures for the award of a public contract and the separate decisions referred to by the applicant.

41 The referring court states in that regard that, for actions for review concerning the direct award of contracts, a flat-rate fee of EUR 324 must be paid per contract award procedure and per separately contestable decision. That sum is increased by 50%, thus amounting to EUR 486, where the action for review is accompanied by an application for an interlocutory injunction. However, if the estimated value of the contract exceeds by twenty times the threshold value fixed at EUR 750 000 for contracts for public services relating to public health, it is necessary to pay, for each procedure for the award of a public contract and each contested decision of the contracting authority, a fee of EUR 19 440.

42 Pursuant to those rules, the referring court informed EPIC that, in the circumstances of the dispute in the main proceedings, if, for each of the 21 framework agreements, it intended to challenge three decisions and seek interim measures by way of interlocutory procedures, the flat-rate fees would amount to EUR 1 061 424. Since, until now, EPIC has paid only EUR 486 in flat-rate fees, it could

therefore be called upon to regularise the situation by paying an additional flat-rate fee of approximately EUR 1 000 000, which it could not necessarily have expected when it brought its action.

43 Second, the referring court states that EPIC has not demonstrated that, for the period prior to 10 December 2020, EPIC or its supplier had the professional qualifications required in Austria in order to market antigen tests.

44 Third, the referring court considers it likely that, at the time EPIC brought its action for review, it was unaware of both the number and type of contract award procedures conducted by the contracting authority and the number of separately contestable decisions already adopted in the contract award procedures at issue in the main proceedings. Thus, according to the referring court, EPIC could only make imprecise claims, even though the Austrian rules of civil procedure require, in principle, every applicant to set out the facts on which its action is based.

45 Fourth, the referring court states that, at the stage of its investigation, it was able to establish that there were 15 framework agreements concluded by the contracting authority, in autumn 2020, with a view to supplying antigen tests. Each of those framework agreements had been concluded with a single economic operator following a negotiated procedure without prior publication of a contract notice, in accordance with Article 32(2)(c) and Article 33(3) of Directive 2014/24.

46 Fifth, according to that court, EPIC has now limited itself to challenging specifically public contracts for the supply of antigen tests that have been directly awarded to the companies S and I and that exceed the estimated value of the framework agreement concluded with each of those companies. It should therefore be regarded, under Austrian law, as having withdrawn its action for review concerning the decisions adopted in the context of the other 19 framework agreements to which it had initially referred.

47 In the light of the foregoing considerations, the Bundesverwaltungsgericht (Federal Administrative Court) considers that the dispute in the main proceedings raises four sets of questions, having regard to EU law.

48 In the first place, that court states that actions for review concerning acts linked to a procedure for the award of a public contract come within the scope of civil matters within the meaning of Regulation No 1215/2012. The public procurement rules contained in Directive 2014/24 govern the pre-contractual obligations of contracting authorities and undertakings wishing to conclude agreements with those authorities. Therefore, the rules on public procurement come, in so far as they concern the conclusion of contracts, within the scope of special civil law and therefore within the scope of Regulation No 1215/2012.

49 Therefore, in accordance with the principle of equivalence, rules of civil procedure which are more flexible than those which that court must itself follow should apply. The referring court states in particular that, in civil matters, the court rules on the action for review and the application for an interlocutory injunction even if the applicant has not paid the flat-rate fees at the outset and without that calling into question the right of the Member State to collect those fees. Furthermore, no special flat-rate fee is payable before the civil courts in respect of applications for an interlocutory injunction linked to an action, which is itself subject to the obligation to pay a fee.

50 If the special fee system which prevails in the field of public procurement were held to be contrary to EU law, the referring court would consider the investigative measures necessary to set the fee to be subsidiary and could therefore, in accordance with the principle of procedural economy, dispose of the application for an interlocutory injunction very quickly, without first having to carry out extensive research in order to determine the number of contract award procedures and the decisions which were initially challenged.

51 In the second place, the referring court is uncertain whether the special fee system applicable in the field of public procurement is consistent with the right, guaranteed by Directive 89/665, that actions for review and applications for an interlocutory injunction may be disposed of as rapidly as possible and independently of matters connected with flat-rate court fees. In that regard, the obligation to identify, in mandatory terms, the contested decisions and procedures prior to the examination of the action for

review on its merits, and the fact that it is impossible for a litigant to ascertain in advance, in particular where the procedure in question lacks transparency, the amount of the flat-rate court fees which he or she is liable to pay, raise difficulties. That court is also uncertain whether, in the event of the award of a contract following a non-transparent procedure, the right to effective judicial protection, guaranteed by Article 47 of the Charter, precludes the application of a court fee system under which the amount of the fees to be paid depends on the estimated value of the contract, the number of contract award procedures at issue and the number of contested, separately contestable decisions.

52 In the third place, that court considers that Article 1(1) of Directive 89/665 may be interpreted as meaning that the conclusion of a framework agreement with a single economic operator corresponds, for the contracting authority, to the conclusion of a contract and is equivalent to the award of the contract at issue. Therefore, in the present case, the application for an interlocutory injunction should be dismissed on the ground that the contract concerned has already been awarded. According to the referring court, it is also necessary to specify the legal classification of public contracts awarded under a framework agreement whose maximum value has already been exceeded, as well as the methods for calculating the estimated value of such a contract.

53 In the fourth place, the Bundesverwaltungsgericht (Federal Administrative Court) states that Paragraph 336 of the Law on Public Procurement authorises it to give a judgment by default on the basis of the information provided by one party to the proceedings if another party thereto does not provide the information or documents requested. The obligation for the board members or staff of the contracting authority to provide details or information in order to eliminate the risk that such a judgment by default might be given to the detriment of that authority could be contrary to the prohibition on self-incrimination, which follows from Article 48 of the Charter. Contrary to what is provided for in Paragraph 49(1)(1) of the General Law on Administrative Procedure, Paragraph 336 of the Law on Public Procurement does not include any right to refuse to provide information. The information thus provided may reveal facts which may be used against the board members and staff of the contracting authority, in criminal proceedings or with a view to bringing actions for damages. The referring court states, moreover, that, according to a press article, members of the Austrian Federal Government are being prosecuted. That court thus considers that the possible relevance of the Court of Justice's answer to the question whether Paragraph 336 of the Law on Public Procurement is compatible with the prohibition on self-incrimination will be demonstrated, in the present case, by future investigations carried out in the context of the criminal proceedings reported by the media, which relate to certain administrators and concern the purchases of the antigen tests at issue in the main proceedings.

54 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided, in Case C-274/21, to stay the proceedings on the application for an interlocutory injunction lodged by EPIC and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the procedure for granting an interlocutory injunction provided for in Article 2(1)(a) of Directive [89/665], which is also provided for at national level in Austria in proceedings before the Bundesverwaltungsgericht (Federal Administrative Court), in which it is also possible to bring about, for example, a temporary prohibition on the conclusion of framework agreements or on the conclusion of supply contracts, constitute a dispute concerning a civil and commercial matter within the meaning of Article 1(1) of [Regulation No 1215/2012]? Does such a procedure for granting an interlocutory injunction as referred to in the preceding question at least constitute a civil matter pursuant to Article 81(1) [TFEU]? Is the procedure for granting interlocutory injunctions pursuant to Article 2(1)(a) of Directive [89/665] a procedure for granting provisional measures pursuant to Article 35 of [Regulation No 1215/2012]?

(2) Having regard to the other provisions of EU law, is the principle of equivalence to be interpreted as conferring subjective rights on individuals against the Member State and as precluding the application of Austrian national rules under which the court must, before disposing of an application for an interlocutory injunction, as provided for in Article 2(1)(a) of Directive [89/665], determine the type of contract award procedure and the (estimated) contract value as well as the total number of contested, separately contestable decisions from specific award procedures and also, if necessary, the lots from a specific award procedure, in order then to issue,

if necessary, an order for regularisation via the presiding judge of the competent chamber of the court for the purpose of recovering fees and, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for an interlocutory injunction due to failure to pay fees subsequently demanded – the procedural fees via the chamber of the court competent to deal with the action for review, failing which a loss of entitlement would ensue, when in (other types of) civil cases in Austria, such as, for example, in the case of actions seeking compensation or injunctions for infringements of competition law, non-payment of fees does not otherwise preclude the disposal of an application for an interlocutory injunction lodged in conjunction with an action, irrespective of the issue of the fees payable for judicial protection, whatever the amount, and, moreover, non-payment of flat-rate fees does not, in principle, preclude the disposal of an application for an interlocutory injunction lodged separately from an action in proceedings before the civil courts; and, by way of further comparison, in Austria, non-payment of appeal fees for bringing appeals against administrative decisions or for appeals or appeals on points of law [(*Revision*)] against decisions of administrative courts to the Verfassungsgerichtshof (Constitutional Court) or the Verwaltungsgerichtshof (Supreme Administrative Court[, Austria]) does not lead to the dismissal of an appeal owing to non-payment of fees and, for example, does not lead to applications for the granting of suspensive effect being disposed of only by way of their rejection in such appeals or appeals on points of law?

(2.1) Having regard to the other provisions of EU law, is the principle of equivalence to be interpreted as precluding the application of Austrian national rules under which, prior to the disposal of an application for an interlocutory injunction as provided for in Article 2(1)(a) of Directive [89/665], an order for regularisation of fees is to be made by the presiding judge of the chamber, sitting as a single judge, in the event of insufficient payment of flat-rate fees, and that single judge must reject the application for an interlocutory injunction in the event of non-payment of fees, when otherwise in civil actions in Austria, under the Gerichtsgebührengesetz (Law on Court Fees), no additional flat-rate court fees are to be paid, in principle, for an application for an interlocutory injunction lodged together with an action, on top of the fees for the action at first instance, and, moreover, with regard to applications for the granting of suspensive effect which are lodged together with an appeal against an administrative decision to an administrative court, an appeal on points of law [(*Revision*)] to the [Verwaltungsgerichtshof (Supreme Administrative Court)] or an appeal to the [Verfassungsgerichtshof (Constitutional Court)], and which, from a functional point of view, have the same or a similar objective in terms of judicial protection as an application for an interlocutory injunction, no separate fees must be paid for such ancillary applications for the granting of suspensive effect?

(3) Having regard to the other provisions of EU law, is the [principle of acting expeditiously enshrined in] Article 2(1)(a) of Directive [89/665], to take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, to be interpreted as meaning that that requirement to act without undue delay confers a subjective right to have a decision taken without undue delay on an application for an interlocutory injunction and that it precludes the application of Austrian national rules under which, even in the case of contract award procedures conducted in a non-transparent manner, the court must, before disposing of an application for an interlocutory injunction aimed at preventing further procurement by the contracting authority, determine the type of award procedure and the (estimated) contract value as well as the total number of separately contestable decisions contested or to be contested from specific award procedures and also, if necessary, the lots from a specific award procedure, even if those elements do not bear any relevance to the court's decision, in order then to issue, if necessary, an order for regularisation via the presiding judge of the competent chamber of the court for the purpose of recovering fees and, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for an interlocutory injunction due to failure to pay fees subsequently demanded – the procedural fees via the chamber of the court competent to rule on the application for review, failing which a loss of entitlement vis-à-vis the applicant would ensue?

(4) Having regard to the other provisions of EU law, is the right to a fair trial before a court or tribunal under Article 47 of [the Charter] to be interpreted as conferring subjective rights on

individuals and as precluding the application of Austrian national rules under which, even in the case of contract award procedures conducted in a non-transparent manner, the court must, before disposing of an application for an interlocutory injunction aimed at preventing further procurement by the contracting authority, determine the type of award procedure and the (estimated) contract value as well as the total number of contested, separately contestable decisions from specific award procedures and also, if necessary, the lots from a specific award procedure, even if those elements do not bear any relevance to the court's decision, in order then to issue, if necessary, an order for regularisation via the presiding judge of the competent chamber of the court for the purpose of recovering fees and, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for an interlocutory injunction due to failure to pay fees subsequently demanded – the procedural fees via the chamber of the court competent to rule on the application for review, failing which a loss of entitlement vis-à-vis the applicant would ensue?

(5) Having regard to the other provisions of EU law, is the principle of equivalence to be interpreted as conferring on individuals subjective rights against the Member State and as precluding the application of Austrian national rules under which, in the event of non-payment of flat-rate fees for an application for an interlocutory injunction within the meaning of Directive [89/665], (only) a chamber of an administrative court, as a judicial body, must prescribe flat-rate fees (leading to curtailed possibilities of judicial protection for the party liable to pay the fees) when fees for actions, interlocutory injunctions and appeals in civil court proceedings are otherwise prescribed, in the event of non-payment, by an administrative decision in accordance with the [Gerichtliches Einbringungsgesetz (Law on Judicial Collection)] and, in administrative law, appeal fees for appeals to an administrative court or to the [Verfassungsgerichtshof (Constitutional Court)] or for appeals on points of law [(*Revision*)] to the [Verwaltungsgerichtshof (Supreme Administrative Court)] are as a general rule prescribed, in the event of non-payment of those fees, by way of a notice of a tax authority (notice prescribing fees), against which an appeal can always be brought before an administrative court and then, in turn, an appeal on points of law [(*Revision*)] before the [Verwaltungsgerichtshof (Supreme Administrative Court)] or an appeal before the [Verfassungsgerichtshof (Constitutional Court)]?

(6) Having regard to the other provisions of EU law, is Article 1(1) of Directive [89/665] to be interpreted as meaning that the conclusion of a framework agreement with a single economic operator pursuant to Article 33(3) of Directive [2014/24] constitutes the conclusion of a contract pursuant to Article 2a(2) of Directive [89/665]?

(6.1) Are the words "contracts based on that agreement" in Article 33(3) of Directive [2014/24] to be interpreted as meaning that a contract based on the framework agreement exists where the contracting authority awards an individual contract expressly on the basis of the framework agreement concluded? Or is the cited phrase "contracts based on that agreement" to be interpreted as meaning that if the total quantity covered by the framework agreement within the meaning of the judgment [of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034, paragraph 64)], has already been exhausted, there is no longer a contract based on the framework agreement originally concluded?

(7) Having regard to the other provisions of EU law, is the right to a fair trial before a court or tribunal under Article 47 of [the Charter] to be interpreted as precluding the application of a rule under which the contracting authority designated in the procurement dispute must, in the proceedings for the granting of an interlocutory injunction, provide all the information required and produce all the documents required – whereby failure to do so in either respect may lead to a default decision to its detriment – if the officials or employees of that contracting authority who are required to provide that information on behalf of the contracting authority may thereby be exposed to the risk of possibly having to incriminate themselves under criminal law if they provide the information or produce the documents?

(8) Taking account also of the right to an effective remedy under Article 47 of the Charter, and having regard to the other provisions of EU law, is the requirement under Article 1(1) of Directive [89/665] that procurement review procedures must, in particular, be conducted

effectively, to be interpreted as meaning that those provisions confer subjective rights and preclude the application of national rules under which the party seeking judicial protection by way of an application for an interlocutory injunction is required to specify in his or her application for an interlocutory injunction the specific contract award procedure and the specific decision of a contracting authority, even where, in the case of award procedures without prior publication of a contract notice, that applicant will generally not know how many non-transparent award procedures the contracting authority has conducted and how many award decisions have already been taken in the non-transparent award procedures?

(9) Having regard to the other provisions of EU law, is the requirement of a fair trial before a court or tribunal under Article 47 of the Charter to be interpreted as meaning that that provision confers subjective rights and precludes the application of national rules under which the party seeking judicial protection by way of an application for review is required to specify in his or her application for an interlocutory [injunction] the specific contract award procedure and the specific contested, separately contestable decision of a contracting authority, even if, in the case of award procedures without prior publication of a contract notice that are non-transparent for that applicant, he or she cannot generally know how many non-transparent award procedures the contracting authority has conducted and how many award decisions have already been taken in the non-transparent award procedures?

(10) Having regard to the other provisions of EU law, is the requirement of a fair trial before a court or tribunal under Article 47 of the Charter to be interpreted as meaning that that provision confers subjective rights and precludes the application of national rules under which the party seeking judicial protection by way of an application for an interlocutory injunction is required to pay flat-rate fees in an amount which he or she cannot ascertain in advance, because, in the case of contract award procedures without prior publication of a contract notice that are non-transparent for that applicant, he or she cannot generally know whether non-transparent award procedures have been conducted by the contracting authority and, if so, the number of such procedures and their estimated contract value and how many separately contestable award decisions have already been taken in the non-transparent award procedures?’

55 In the circumstances set out in paragraphs 40 to 53 of this judgment, the Bundesverwaltungsgericht (Federal Administrative Court) decided, in Case C-275/21, to stay the proceedings on the action for review brought by EPIC and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does a review procedure before the Bundesverwaltungsgericht (Federal Administrative Court), which takes place in implementation of Directive [89/665], constitute a dispute concerning a civil and commercial matter within the meaning of Article 1(1) of Regulation [No 1215/2012]? Does such a review procedure as referred to in the preceding question at least constitute a civil matter pursuant to Article 81(1) [TFEU]?

(2) Having regard to the other provisions of EU law, is the principle of equivalence to be interpreted as conferring subjective rights on individuals against the Member State and as precluding the application of Austrian national rules under which the court must, before disposing of an application for review, which must be directed at the annulment of a separately contestable decision of a contracting authority, determine the type of contract award procedure and the (estimated) contract value as well as the total number of contested, separately contestable decisions from specific award procedures and also, if necessary, the lots from a specific award procedure, in order then to issue, if necessary, an order for regularisation via the presiding judge of the competent chamber of the court for the purpose of recovering fees and then, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for review due to failure to pay fees subsequently demanded – the procedural fees via the chamber of the court competent to deal with the application for review, failing which a loss of entitlement would ensue, when in civil cases in Austria, such as, for example, in the case of actions seeking compensation or injunctions for infringements of competition law, non-payment of fees does not otherwise preclude the disposal of an action, irrespective of the issue of the fees payable for judicial protection, whatever the amount, and, by way of further comparison, in

Austria, non-payment of appeal fees for bringing appeals against administrative decisions or for appeals or appeals on points of law [(*Revision*)] against decisions of administrative courts to the Verfassungsgerichtshof (Constitutional Court) or the Verwaltungsgerichtshof (Supreme Administrative Court) does not lead to the dismissal of an appeal owing to non-payment of fees?

(2.1) Having regard to the other provisions of EU law, is the principle of equivalence to be interpreted as precluding the application of Austrian national rules under which, prior to the disposal of an application for an interlocutory injunction as provided for in Article 2(1)(a) of Directive [89/665], an order for regularisation of fees is to be made by the presiding judge of the chamber, sitting as a single judge, in the event of insufficient payment of flat-rate fees, and that single judge must reject the application for an interlocutory injunction in the event of non-payment of fees, when otherwise in civil actions in Austria, under the Gerichtsgebührengesetz (Law on Court Fees), no additional flat-rate court fees are to be paid, in principle, for an application for an interlocutory injunction lodged together with an action, on top of the fees for the action at first instance, and, moreover, with regard to applications for the granting of suspensive effect which are lodged together with an appeal against an administrative decision to an administrative court, an appeal on points of law [(*Revision*)] to the [Verwaltungsgerichtshof (Supreme Administrative Court)] or an appeal to the [Verfassungsgerichtshof (Constitutional Court)], and which, from a functional point of view, have the same or a similar objective in terms of judicial protection as an application for an interlocutory injunction, no separate fees must be paid for such ancillary applications for the granting of suspensive effect?

(3) Having regard to the other provisions of EU law, is the [principle of acting expeditiously] under Article 1(1) of Directive [89/665], according to which procurement review procedures must, in particular, be conducted as rapidly as possible, to be interpreted as meaning that that [principle] confers a subjective right to a rapid review procedure and precludes the application of Austrian national rules under which, even in the case of contract award procedures conducted in a non-transparent manner, the court must in every case determine, before disposing of an application for review, which must be directed at the annulment of a separately contestable decision of a contracting authority, the type of award procedure and the (estimated) contract value as well as the total number of contested, separately contestable decisions from specific award procedures and also, if necessary, the lots from a specific award procedure, in order then to issue, if necessary, an order for regularisation via the presiding judge of the chamber of the court for the purpose of recovering fees and, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for review due to failure to pay fees subsequently demanded – the procedural fees via the chamber of the court competent to rule on the application for review, failing which a loss of entitlement would ensue?

(4) Having regard to the principle of transparency under Article 18(1) of Directive [2014/24] and the other provisions of EU law, is the right to a fair trial before a court or tribunal under Article 47 of the [Charter] to be interpreted as precluding the application of Austrian national rules under which, even in the case of contract award procedures conducted in a non-transparent manner, the court must in every case, before disposing of an application for review, which must be directed at the annulment of a separately contestable decision of a contracting authority, determine the type of award procedure and the (estimated) contract value as well as the total number of contested, separately contestable decisions from specific award procedures and also, if necessary, the lots from a specific award procedure, in order then to issue, if necessary, an order for regularisation via the presiding judge of the chamber of the court for the purpose of recovering fees and, in the event of non-payment of fees, to prescribe – before or no later than at the same time as rejecting an application for review due to failure to pay fees subsequently demanded – the procedural fees via the chamber of the court competent to deal with the application for review, failing which a loss of entitlement would ensue?

(5) Having regard to the other provisions of EU law, is the principle of equivalence to be interpreted as conferring subjective rights on individuals against the Member State and as precluding the application of Austrian national rules under which, in the event of non-payment of flat-rate fees for the lodging of an application for review of decisions of contracting authorities within the meaning of Directive [89/665], as amended (or, as the case may be, also for a finding of illegality

in connection with a contract award for the purpose of obtaining compensation), (only) a chamber of an administrative court, as a judicial body, must prescribe flat-rate fees which have not been paid but are payable (leading to curtailed possibilities of judicial protection for the party liable to pay the fees) when fees for actions and appeals in civil court proceedings are otherwise prescribed, in the event of non-payment, by an administrative decision in accordance with the Gerichtliches Einbringungsgesetz (Law on Judicial Collection) and, moreover, in administrative law, appeal fees for appeals to an administrative court or to the [Verfassungsgerichtshof (Constitutional Court)] or for appeals on points of law [(*Revision*)] to the [Verwaltungsgerichtshof (Supreme Administrative Court)] are as a general rule prescribed, in the event of non-payment of the fees, by way of a notice of an administrative authority (notice prescribing fees), against which an appeal can as a general rule always be brought before an administrative court and then, in turn, an appeal on points of law [(*Revision*)] before the [Verwaltungsgerichtshof (Supreme Administrative Court)] or an appeal before the [Verfassungsgerichtshof (Constitutional Court)]?

(6) Having regard to the other provisions of EU law, is Article 1(1) of Directive [89/665], to be interpreted as meaning that the conclusion of a framework agreement with a single economic operator pursuant to Article 33(3) of Directive [2014/24] constitutes the conclusion of a contract pursuant to Article 2a(2) of Directive [89/665], and, consequently, the decision of a contracting authority as to the single economic operator pursuant to Article 33(3) of Directive [2014/24] with which that framework agreement is to be concluded constitutes a contract award decision pursuant to Article 2a(1) of Directive [89/665]?

(6.1) Are the words “contracts based on that agreement” in Article 33(3) of Directive [2014/24] to be interpreted as meaning that a contract based on the framework agreement exists where the contracting authority awards an individual contract expressly on the basis of the framework agreement concluded? Or is the cited phrase “contracts based on that agreement” to be interpreted as meaning that if the total quantity covered by the framework agreement within the meaning of the judgment [of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034, paragraph 64)], has already been exhausted, there is no longer a contract based on the framework agreement originally concluded?

(6.2) If Question 6.1. is answered in the affirmative: Having regard to the other provisions of EU law, are Articles 4 and 5 of Directive [2014/24] to be interpreted as meaning that the estimated contract value of an individual contract based on the framework agreement is always the estimated contract value pursuant to Article 5(5) of Directive [2014/24]? Or, in the case of a single contract based on a framework agreement, is the estimated contract value pursuant to Article 4 of that directive the contract value derived in application of Article 5 of that directive for the purposes of determining the estimated contract value for a single supply contract based on the framework agreement?

(7) Having regard to the other provisions of EU law, is the right to a fair trial before a court or tribunal under Article 47 of the [Charter] to be interpreted as precluding the application of a rule under which the contracting authority designated in the procurement dispute must provide all the information required and produce all the documents required – whereby failure to do so in either respect may lead to a default decision to its detriment – if the officials or employees of that contracting authority who are required to provide that information on behalf of the contracting authority may thereby be exposed to the risk of possibly having to incriminate themselves under criminal law if they provide the information or produce the documents?

(8) Taking account also of the right to an effective remedy under Article 47 of the Charter, and having regard to the other provisions of EU law, is the requirement under Article 1(1) of Directive [89/665], that procurement review procedures must, in particular, be conducted effectively, to be interpreted as meaning that those provisions confer subjective rights and preclude the application of national rules under which the party seeking judicial protection by way of an application for review is required to specify in his or her application for review the specific award procedure in each case and the specific separately contestable decision of a contracting authority, even if, in the case of award procedures without prior publication of a

contract notice that are non-transparent for that applicant, he or she will generally not know whether the contracting authority has conducted direct award procedures under national law that are non-transparent for the applicant or negotiated procedures without prior publication of a contract notice that are non-transparent for the applicant, or whether one or more non-transparent award procedures with one or more contestable decisions have been conducted?

(9) Having regard to the other provisions of EU law, is the requirement of a fair trial before a court or tribunal under Article 47 of the Charter to be interpreted as meaning that that provision confers subjective rights and precludes the application of national rules under which the party seeking judicial protection by way of an application for review is required to specify in his or her application for review the specific contract award procedure and the specific separately contestable decision of a contracting authority, even if, in the case of award procedures without prior publication of a contract notice, that applicant cannot generally know whether the contracting authority has conducted direct award procedures under national law that are non-transparent for the applicant or negotiated procedures without prior publication of a contract notice that are non-transparent for the applicant, or whether one or more award procedures with one or more separately contestable decisions have been conducted?

(10) Having regard to the other provisions of EU law, is the requirement of a fair trial before a court or tribunal under Article 47 of the Charter to be interpreted as meaning that that provision confers subjective rights and precludes the application of national rules under which the party seeking judicial protection by way of an application for review is required to pay flat-rate fees in an amount which he or she cannot foresee at the time when the application is lodged, because, in the case of contract award procedures without prior publication of a contract notice that are non-transparent for that applicant, he or she cannot generally know whether the contracting authority has conducted direct award procedures under national law or non-transparent negotiated procedures without prior publication of a contract notice, and how high the estimated contract value is in the case of any negotiated procedure without prior publication of a contract notice that may have been conducted, or how many separately contestable decisions have already been issued?’

Consideration of the questions referred

The first questions in Cases C-274/21 and C-275/21

56 By its first questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether the concept of ‘civil and commercial matters’ within the meaning of Article 1(1) of Regulation No 1215/2012 must be interpreted as including the procedures for granting an interlocutory injunction and review procedures as referred to in Article 2(1)(a) and (b) of Directive 89/665.

57 In that regard, it is sufficient to recall that Regulation No 1215/2012 is applicable only where a dispute concerns several Member States or a single Member State provided, in the latter case, that there is an international element because of the involvement of a third State. That situation is such as to raise questions relating to the determination of international jurisdiction (see, to that effect, judgments of 1 March 2005, *Owusu*, C-281/02, EU:C:2005:120, paragraphs 25 and 26, and of 7 May 2020, *Rina*, C-641/18, EU:C:2020:349, paragraph 25).

58 In the present case, that international element is lacking.

59 It follows that that regulation does not apply in the dispute in the main proceedings and that, accordingly, there is no need to answer the first questions in Cases C-274/21 and C-275/21.

The sixth questions and the sixth questions, point 1, in Cases C-274/21 and C-275/21, and the sixth question, point 2, in Case C-275/21

The sixth questions in Cases C-274/21 and C-275/21

60 By its sixth questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Article 1(1) of Directive 89/665 must be interpreted as meaning that the conclusion of a framework agreement with a single economic operator, in accordance with Article 33(3) of Directive 2014/24, corresponds to the conclusion of a contract as referred to in Article 2a(2) of Directive 89/665.

61 At the outset, it must be stated that the third subparagraph of Article 1(1) of Directive 89/665 expressly provides that the concept of 'contracts', within the meaning of that directive, includes framework agreements.

62 Therefore, the first subparagraph of Article 2a(2) of Directive 89/665 is applicable to framework agreements. Pursuant to that provision, a contract may not be concluded following the decision to award a framework agreement concluded with a single economic operator, in accordance with Article 33(3) of Directive 2014/24, before the expiry of a standstill period of at least 10 or 15 calendar days, depending on the means of communication used, with effect from the day following the date on which the decision to award that framework agreement is sent to the tenderers and candidates concerned.

63 Furthermore, as the European Commission has submitted in its written observations, that interpretation is such as to ensure the effectiveness of Directive 89/665. As the case may be, as stated in recital 4 of Directive 2007/66, which amended and supplemented Directive 89/665, the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question could result in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. It is precisely in order to remedy that weakness in the review mechanisms existing in the Member States, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, that a minimum standstill period has been introduced, during which the conclusion of the contract in question is suspended, irrespective of whether that conclusion occurs at the time of signature of the contract or not.

64 In the light of the foregoing considerations, the answer to the sixth questions in Cases C-274/21 and C-275/21 is that Article 1(1) of Directive 89/665 must be interpreted as meaning that the conclusion of a framework agreement with a single economic operator, in accordance with Article 33(3) of Directive 2014/24, corresponds to the conclusion of a contract as referred to in Article 2a(2) of Directive 89/665.

The sixth questions, point 1, in Cases C-274/21 and C-275/21

65 By its sixth questions, point 1, in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Article 33(3) of Directive 2014/24 must be interpreted as meaning that a contracting authority may continue to rely, for the purpose of awarding a new contract, on a framework agreement in respect of which the quantity and/or maximum value of the works, supplies or services concerned laid down therein has or have already been reached.

66 In that regard, it is clear from the case-law of the Court that, by concluding a framework agreement, a contracting authority may make commitments only up to a maximum quantity and/or a maximum value of the works, supplies or services concerned, with the result that, once that limit has been reached, that framework agreement will no longer have any effect (judgment of 17 June 2021, *Simonsen & Weel*, C-23/20, EU:C:2021:490, paragraph 68).

67 Accordingly, as the Austrian Government and the Commission have submitted in their written observations, a contract can no longer be lawfully awarded, pursuant to Article 33(2) of Directive 2014/24, on the basis of a framework agreement whose limit has been exceeded and which, therefore, is rendered ineffective, unless that award does not substantially modify that agreement, for the purposes of Article 72(1)(e) of Directive 2014/24 (see, to that effect, judgment of 17 June 2021, *Simonsen & Weel*, C-23/20, EU:C:2021:490, paragraph 70).

68 The answer to the sixth questions, point 1, is therefore that Article 33(3) of Directive 2014/24 must be interpreted as meaning that a contracting authority may no longer rely, for the purpose of awarding a new contract, on a framework agreement in respect of which the quantity and/or maximum value of the works, supplies or services concerned laid down therein has or have already been reached, unless the

award of that contract does not entail a substantial modification of that framework agreement, as provided for in Article 72(1)(e) of that directive.

The sixth question, point 2, in Case C-275/21

69 In view of the answer given to the sixth question, point 1, in Case C-275/21, there is no need to answer the sixth question, point 2, in that case.

The second questions, the second questions, point 1, and the fifth questions in Cases C-274/21 and C-275/21

70 By its second questions, its second questions, point 1, and its fifth questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether the principle of equivalence must be interpreted as precluding national legislation which lays down, in respect of applications for an interlocutory injunction and actions for review relating to a procedure for the award of a public contract, procedural rules that are different from those which apply, inter alia, to civil proceedings.

71 By those questions, the referring court refers, more specifically, to three national rules that apply in particular to applications for an interlocutory injunction and actions for review lodged in the field of public procurement: first, the rule that, in that field, the admissibility of an application for an interlocutory injunction or of an action for review is subject to the payment by the litigant of flat-rate court fees, so that the merits of that action or application may be examined only if those fees have been paid in advance; second, the rule that, in that field, an application for an interlocutory injunction lodged at the same time as an action for review on the merits gives rise to the imposition of a specific flat-rate fee and, third, the rule that, in that same field, flat-rate court fees are not imposed by an administrative decision, with the result that those fees cannot be challenged before a court with unlimited jurisdiction.

72 It must be borne in mind that Article 1(1) and (3) of Directive 89/665 requires the Member States, as regards procedures for the award of public contracts, to take the measures necessary to guarantee reviews which are effective and as rapid as possible against decisions of the contracting authorities which are incompatible with EU law and to ensure that the review procedures are available to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. That directive thus leaves Member States a discretion in the choice of the procedural guarantees for which it provides, and the formalities relating thereto. In particular, that directive does not contain any provision relating specifically to the court fees to be paid by individuals when they lodge, in accordance with Article 2(1)(a) and (b) of that directive, an application for an interlocutory injunction or an action for annulment against an allegedly unlawful decision concerning a procedure for the award of a public contract (judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraphs 43 to 45).

73 Therefore, in the absence of EU rules governing the matter, it is for each Member State, in accordance with the principle of the procedural autonomy of the Member States, to lay down the detailed rules of administrative and judicial procedures governing actions for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (judgments of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 46, and of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraph 58).

74 The fact that the flat-rate court fees that a litigant must pay, in the context of procedures for the award of a public contract, are higher than the fees due in civil proceedings cannot, as such, demonstrate an infringement of the principle of equivalence (see, by analogy, judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 66).

75 That principle requires that actions based on an infringement of national law and similar actions based on an infringement of EU law be treated equally and not that there be equal treatment of national procedural rules applicable to proceedings of a different nature such as civil proceedings, on the one hand, and administrative proceedings, on the other, or applicable to proceedings falling within two

different branches of law (judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 67).

76 Moreover, that principle is not relevant as regards two types of actions both of which are based on a breach of EU law (see, to that effect, judgment of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 34).

77 The principle of equivalence cannot therefore be interpreted as requiring Member States to extend their most favourable rules to all actions brought in a certain field of law (see, to that effect, judgments of 15 September 1998, *Edis*, C-231/96, EU:C:1998:401, paragraph 36, and of 26 January 2010, *Transportes Urbanos y Servicios Generales*, C-118/08, EU:C:2010:39, paragraph 34).

78 In the light of the foregoing considerations, the answer to the second questions, the second questions, point 1, and the fifth questions in Cases C-274/21 and C-275/21 is that the principle of equivalence must be interpreted as not precluding national legislation which lays down, in respect of applications for an interlocutory injunction and actions for review relating to a procedure for the award of a public contract, procedural rules that are different from those which apply, inter alia, to civil proceedings.

The eighth and ninth questions in Cases C-274/21 and C-275/21

79 By its eighth and ninth questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Article 1(1) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation requiring a litigant to identify, in his or her application for an interlocutory injunction and action for review, the procedure for the award of a public contract concerned and the separately contestable decision that he or she is challenging, even where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice.

80 As a preliminary point, it should be noted that, in the present cases, the Court is not asked about the interpretation of Article 32(2)(c) of Directive 2014/24 in order to determine whether the contracting authority having recourse to a negotiated procedure without prior publication of a contract notice is compatible with that directive. The referring court appears to endorse the contracting authority's choice to have recourse, in the dispute in the main proceedings, to such a procedure in order to obtain the supply of antigen tests as a matter of urgency. The Austrian Government and the Commission state, moreover, that it is apparent from point 2.3.4 of the Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (OJ 2020 C 108 I, p. 1) that 'negotiated procedures without prior publication may offer the possibility to meet immediate needs' and that those procedures 'cover the gap until more stable solutions can be found, such as framework contracts for supplies and services, awarded through regular procedures (including accelerated procedures)'.

81 In any event, it cannot be disputed that, in the absence of prior publication of a contract notice, referred to in Article 49 of that directive, or of a contract award notice, referred to in Article 50 thereof, a litigant is not in a position to determine the type of procedure for the award of a public contract concerned and the number of contestable decisions.

82 It follows that national legislation requiring, in such a situation, a litigant to indicate that type of information, in his or her application for an interlocutory injunction and action for review, has the effect of rendering practically impossible the exercise of rights conferred by EU law and, accordingly, compromises the effectiveness of Directive 89/665 (see, by analogy, judgments of 28 January 2010, *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 40, and of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraphs 39 and 40), the objective of which is to ensure that decisions taken unlawfully by contracting authorities may be reviewed effectively and as rapidly as possible (judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 43).

83 Such legislation is also contrary to the right to an effective remedy guaranteed by Article 47 of the Charter, which is sufficient in itself and need not be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 78).

84 In those circumstances, the answer to the eighth and ninth questions in Cases C-274/21 and C-275/21 is that Article 1(1) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation requiring a litigant to identify, in his or her application for an interlocutory injunction or action for review, the procedure for the award of a public contract concerned and the separately contestable decision that he or she is challenging, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and the contract award notice has not been published yet.

The third and fourth questions in Cases C-274/21 and C-275/21

85 By its third and fourth questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Article 2(1) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation which, for the sole purpose of calculating the amount of the flat-rate court fees which the litigant must pay, failing which his or her application for an interlocutory injunction or action for review would be dismissed on that ground alone, requires a court to determine, before ruling on such an application or action, the type of procedure for the award of a public contract concerned, the (estimated) value of the contract at issue and the total number of separately contestable decisions and, where appropriate, the lots from the procedure for the award of a public contract concerned, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and, at the time the action for review is brought, the contract award notice has not been published yet.

86 In that regard, it should be borne in mind that, under the fourth subparagraph of Article 1(1) of Directive 89/665, the Member States must take the measures necessary to ensure that, as regards public contracts falling inter alia within the scope of Directive 2014/24, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of Directive 89/665, on the grounds that such decisions have infringed EU law in the field of public procurement or national rules transposing that law.

87 As has been pointed out in paragraph 72 of this judgment, Directive 89/665 does not, however, contain any provision relating specifically to the court fees to be paid by individuals when they lodge, in accordance with Article 2(1)(a) and (b) of that directive, an application for an interlocutory injunction or an action for annulment against an allegedly unlawful decision concerning a procedure for the award of a public contract.

88 That being so, it is for the Member States, when they lay down detailed procedural rules governing the judicial remedies intended to safeguard rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities, to ensure that neither the effectiveness of Directive 89/665, the objective of which is to ensure that decisions taken unlawfully by contracting authorities may be reviewed effectively and as rapidly as possible, nor rights conferred on individuals by EU law are undermined. In addition, as is clear from recital 36 thereof, Directive 2007/66, and Directive 89/665 that it amended and supplemented, seek to ensure full respect for the right to an effective remedy and to a fair hearing, enshrined in the first and second paragraphs of Article 47 of the Charter (see, to that effect, judgments of 12 December 2002, *Universale-Bau and Others,* C-470/99, EU:C:2002:746, paragraphs 72 and 73; of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraphs 42 to 46; of 7 August 2018, *Hochtief*, C-300/17, EU:C:2018:635, paragraph 38; and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 128).

89 In that context, it should be noted that the provisions of Directive 89/665, intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are designed to reinforce existing arrangements for ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (see, to that effect, judgments of 11 August 1995, *Commission* v *Germany*, C-433/93, EU:C:1995:263, paragraph 23, and of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 41).

90 In the context of a procedure for the award of a public contract organised in a non-transparent manner, the right to apply for interim protection is crucial. Recital 5 of Directive 89/664 states, furthermore, that, since procedures for the award of public contracts are of such short duration, competent review

bodies must, among other things, be authorised to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority, and that the short duration of the procedures means that the infringements of the rules of public procurement procedures need to be dealt with urgently.

91 In order to achieve that objective, Article 1(1) of Directive 89/665 provides for the establishment in the Member States of review procedures which are effective, and in particular as rapid as possible, against decisions which may have infringed EU law in the field of public procurement or national rules implementing that law. More specifically, Article 2(1)(a) of that directive requires Member States to make provision for the powers to 'take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned' (judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, C-568/08, EU:C:2010:751, paragraphs 52 and 53).

92 Where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and, at the time when the action for annulment against a decision linked to that procedure is brought, the contract award notice has not been published yet, that right to interim protection is very likely to be reduced to nothing if the court called upon to rule on the application for an interlocutory injunction must, before being able to adopt an interim measure and for the sole purpose of calculating the amount of the flat-rate court fees which the litigant must pay, identify the type of procedure followed for the award of the public contract, state the estimated value of the contract at issue, and identify all the decisions taken by the contracting authority in the context of that procedure. That risk is even higher where a procedure has been organised in breach of the principle of transparency enshrined in the first subparagraph of Article 18(1) of Directive 2014/24. In that type of situation, it is highly likely that that court might have to conduct long and complicated investigations. As long as its investigations continue, it will be impossible for that court to suspend the contracting authority's purchases challenged by the applicant.

93 Such a constraint on a court called upon to rule in urgent proceedings is thus manifestly disproportionate to the point of undermining the right to an effective remedy guaranteed by Article 47 of the Charter.

94 Furthermore, it is important to point out, as the Court has already stated, that the effectiveness of Directive 89/665 is called into question where the only possible remedy is that before the court ruling on the merits. The option of bringing proceedings for the annulment of the contract itself is not such as to compensate for the impossibility of challenging the act of awarding the contract concerned, before the contract is concluded. Thus, where the contract has already been signed, the fact that the only judicial review provided for is an *ex post* review excludes the possibility of bringing an action at a stage where infringements can still be rectified and therefore does not make it possible to ensure full legal protection of the applicant before the conclusion of the contract (see, to that effect, judgments of 3 April 2008, *Commission* v *Spain*, C-444/06, EU:C:2008:190, paragraph 38; of 11 June 2009, *Commission* v *France*, C-327/08, not published, EU:C:2009:371, paragraph 58; and of 23 December 2009, *Commission* v *Ireland*, C-455/08, not published, EU:C:2009:809, paragraph 28).

95 In those circumstances, national legislation which prevents a court with which an application for an interlocutory injunction has been lodged from ruling on that application until, first, the information referred to in paragraph 92 of this judgment has been gathered and, second and consequently, the flat-rate court fees have been paid by the person making that application, infringes both Article 2(1)(a) of Directive 89/665 and Article 47 of the Charter.

96 By contrast, the requirement for acting expeditiously does not apply to the same degree to a situation in which a litigant brings an action before a national court seeking the annulment of a separately contestable decision taken by a contracting authority and to a situation where the litigant lodges an application for an interlocutory injunction, as a preventive measure. Therefore, national legislation, such as the Austrian legislation, which requires the communication of the information referred to in paragraph 92 of this judgment, in proceedings for the annulment of a separately contestable decision taken by the contracting authority, does not infringe EU law.

97 The answer to the third and fourth questions referred in Cases C-274/21 and C-275/21 is therefore that Article 2(1) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as:

– precluding national legislation which requires a court with which an application for an interlocutory injunction is lodged seeking to prevent purchases on the part of the contracting authority, to determine, before ruling on that application, the type of contract award procedure concerned, the (estimated) value of the contract at issue and the total number of separately contestable decisions and, where appropriate, the lots from the contract award procedure concerned, for the sole purpose of calculating the amount of the flat-rate court fees which the person making that application must pay, failing which that application would be dismissed on that ground alone, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and, at the time the action for annulment against a decision linked to that procedure is brought, the contract award notice has not been published yet;

– not precluding national legislation which requires a court before which an action for the annulment of a separately contestable decision taken by the contracting authority is brought to determine, before ruling on that action, the type of contract award procedure concerned, the (estimated) value of the contract at issue and the total number of separately contestable decisions and, where appropriate, the lots from the contract award procedure concerned, for the sole purpose of calculating the amount of the flat-rate court fees which the applicant must pay, failing which his or her action would be dismissed on that ground alone.

The tenth questions in Cases C-274/21 and C-275/21

98 By its tenth questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Article 47 of the Charter must be interpreted as precluding national legislation which requires a litigant lodging an application for an interlocutory injunction or an action for review to pay flat-rate court fees of an amount impossible to foresee, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice or, as the case may be, without subsequent publication of a contract award notice, with the result that it can be impossible for the litigant to ascertain the estimated value of the contract and the number of separately contestable decisions adopted by the contracting authority on the basis of which those fees were calculated.

99 At the outset, it must be pointed out, as the Austrian Government has stated, that the person lodging an application for an interlocutory injunction or an action for review can ascertain in advance the detailed rules for calculating the flat-rate court fees payable by him or her, in the field of public procurement, since those rules are clear from Paragraph 340 of the Law on Public Procurement, read in conjunction with the Regulation on Flat-Rate Fees 2018 referred to in paragraph 29 above.

100 Nevertheless, where the contracting authority has recourse to a procedure for the award of a public contract without prior publication of a contract notice, a litigant who has lodged an application for an interlocutory injunction or an action for review may be aware neither of the estimated value of the contract concerned nor of the number of separately contestable decisions already adopted by the contracting authority on the basis of which those flat-rate fees are calculated.

101 Accordingly, that litigant can be unable to foresee the amount of the flat-rate fees which he or she must pay.

102 According to the referring court, in the circumstances of the dispute in the main proceedings, it was the fact that it was impossible for EPIC, first, to determine the type of procedure for the award of a public contract followed by the contracting authority and, second, to count the contestable decisions adopted by the contracting authority that led that company to challenge, initially, the 21 framework agreements concluded by the contracting authority and the three decisions taken under each of those framework agreements. Since EPIC chose to lodge an application for an interlocutory injunction and an action for review on the merits against all those decisions, it incurred, according to the referring court, the payment of flat-rate court fees of an amount exceeding EUR 1 000 000.

103 Thus, national legislation which requires a litigant to pay flat-rate court fees of an amount that is impossible to foresee before that person lodges his or her application for an interlocutory injunction or action for review makes it practically impossible or excessively difficult for him or her to exercise his or her right to an effective remedy, and therefore infringes Article 47 of the Charter, including where that amount represents only a tiny fraction of the value of the contract(s) concerned.

104 The answer to the tenth questions in Cases C-274/21 and C-275/21 therefore is that Article 47 of the Charter must be interpreted as precluding national legislation which requires a litigant lodging an application for an interlocutory injunction or an action for review to pay flat-rate court fees of an amount impossible to foresee, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice or, as the case may be, without subsequent publication of a contract award notice, with the result that it can be impossible for the litigant to ascertain the estimated value of the contract and the number of separately contestable decisions adopted by the contracting authority on the basis of which those fees were calculated.

The seventh questions in Cases C-274/21 and C-275/21

105 By its seventh questions in Cases C-274/21 and C-275/21, the referring court asks, in essence, whether Articles 47 and 48 of the Charter preclude national legislation pursuant to which a contracting authority which has the status of defendant in a dispute relating to the award of a public contract must submit, in the context both of an application for an interlocutory injunction and of an action for review, all the information and documents requested of it, even where, first, a judgment by default may be given against it and, second, the communication of that information and those documents may lead to its administrators or staff incriminating themselves under criminal law.

106 In that regard, it should be noted, as the Austrian Government has submitted and as has been pointed out it in paragraph 53 of this judgment, that it follows from the requests for a preliminary ruling that, in the present case, the relevance of the answer to those questions will be demonstrated by any potential future investigations to be carried out in the context of the criminal proceedings reported by the media, relating to certain administrators and concerning the purchases of the antigen tests at issue in the main proceedings.

107 In so doing, the referring court itself points out the hypothetical nature of the seventh questions in the present cases. In addition, that court merely refers to criminal proceedings brought against members of the Austrian Federal Government, without establishing a link between those proceedings and the present cases.

108 Moreover, as the Commission has stated in its written observations, those questions are irrelevant in so far as the referring court does not explain how the prohibition against self-incrimination could apply in a situation where the administrators or staff of the contracting authority provide a national court with information relating to the conduct of the contracting authority, without themselves incurring a priori any criminal penalty.

109 Lastly, the referring court merely makes a general reference to Articles 47 and 48 of the Charter, and merely submits that the Austrian legislation severely restricts the effectiveness of the judicial protection guaranteed by Directive 89/665, without, however, identifying the provisions of EU law that are liable to apply to the situation at issue in the main proceedings and, accordingly, render those two articles of the Charter applicable to the dispute in the main proceedings.

110 It follows that the seventh questions are hypothetical and, accordingly, inadmissible.

Costs

111 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, must be interpreted as meaning that the conclusion of a framework agreement with a single economic operator, in accordance with Article 33(3) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, corresponds to the conclusion of a contract as referred to in Article 2a(2) of Directive 89/665, as amended by Directive 2014/23.**

2. **Article 33(3) of Directive 2014/24 must be interpreted as meaning that a contracting authority may no longer rely, for the purpose of awarding a new contract, on a framework agreement in respect of which the quantity and/or maximum value of the works, supplies or services concerned laid down therein has or have already been reached, unless the award of that contract does not entail a substantial modification of that framework agreement, as provided for in Article 72(1)(e) of that directive.**

3. **The principle of equivalence must be interpreted as not precluding national legislation which lays down, in respect of applications for an interlocutory injunction and actions for review relating to a procedure for the award of a public contract, procedural rules that are different from those which apply, inter alia, to civil proceedings.**

4. **Article 1(1) of Directive 89/665, as amended by Directive 2014/23, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation requiring a litigant to identify, in his or her application for an interlocutory injunction or action for review, the procedure for the award of a public contract concerned and the separately contestable decision that he or she is challenging, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and the contract award notice has not been published yet.**

5. **Article 2(1) of Directive 89/665, as amended by Directive 2014/23, read in the light of Article 47 of the Charter of Fundamental Rights, must be interpreted as:**

   – **precluding national legislation which requires a court with which an application for an interlocutory injunction is lodged seeking to prevent purchases on the part of the contracting authority, to determine, before ruling on that application, the type of contract award procedure concerned, the (estimated) value of the contract at issue and the total number of separately contestable decisions and, where appropriate, the lots from the contract award procedure concerned, for the sole purpose of calculating the amount of the flat-rate court fees which the person making that application must pay, failing which that application would be dismissed on that ground alone, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice and, at the time the action for annulment against a decision linked to that procedure is brought, the contract award notice has not been published yet;**

   – **not precluding national legislation which requires a court before which an action for the annulment of a separately contestable decision taken by the contracting authority is brought to determine, before ruling on that action, the type of contract award procedure concerned, the (estimated) value of the contract at issue and the total number of separately contestable decisions and, where appropriate, the lots from the contract award procedure concerned, for the sole purpose of calculating the amount of the flat-rate court fees which the applicant must pay, failing which his or her action would be dismissed on that ground alone.**

6. **Article 47 of the Charter of Fundamental Rights must be interpreted as precluding national legislation which requires a litigant lodging an application for an interlocutory injunction or an action for review to pay flat-rate court fees of an amount impossible to foresee, where the contracting authority has opted for a procedure for the award of a public contract without prior publication of a contract notice or, as the case may be, without subsequent publication of a contract award notice, with the result that it can be impossible for the litigant to ascertain the estimated value of the contract and the number of separately contestable decisions adopted by the contracting authority on the basis of which those fees were calculated.**

[Signatures]

---

* Language of the case: German.

Gericht
Bundesverwaltungsgericht

Entscheidungsdatum
27.05.2024

Geschäftszahl
W131 2237371-1

Spruch

W131 2237371-1/49E

W131 2237371-2/220E

W131 2237371-3/21E

W131 2237371-4/33E

GEKÜRZTE AUSFERTIGUNG DER AM 22.05.2024 MÜNDLICH VERKÜNDETEN BESCHLÜSSE

BESCHLUSS

Das Bundesverwaltungsgericht hat durch den Richter Mag Reinhard GRASBÖCK als Vorsitzenden, durch die fachkundige Laienrichterin Dr´a Ilse POHL als Beisitzerin der Auftraggeberseite und durch den fachkundigen Laienrichter Mag Matthias WOHLGEMUTH als Beisitzer der Auftragnehmerseite betreffend das zur Verfahrenszahl W131 2237371-2 protokollierte Nachprüfungsverfahren sowie das betreffend das zur Verfahrenszahl W131 2237371-4 geführte Verfahren zur Vorschreibung allfälliger Pauschalgebühren beschlossen; und hat das Bundesverwaltungsgericht weiters durch den Richter Mag Reinhard GRASBÖCK als Einzelrichter betreffend das zur Verfahrenszahl W131 2237371-1 protokollierte Verfahren zur Erlassung einer einstweiligen Verfügung (= eV) und betreffend das zur Verfahrenszahl W131 2237371-3 protokollierte Pauschalgebührenersatzverfahren beschlossen, wobei die Verfahren zu W131 2237371-1, -2 und -3 jeweils über Antrag der anwaltlich vertretenen Antragstellerin XXXX eingeleitet wurden:

I.

A) Das Rechtschutzverfahren, welches über den Nachprüfungsantrag zu W131 2237371-2 eingeleitet wurde, und weiters das Verfahren zur Vorschreibung allfälliger Pauschalgebühren zu W131 2237371-4 werden eingestellt.

B) Die Revision ist gemäß Art 133 Abs 4 B-VG nicht zulässig.

II.

A) Das Verfahren zur Erlassung einer einstweiligen Verfügung zu W131 2237371-1 und das Pauschalgebührenersatzverfahren zu W131 2237371-3 werden eingestellt.

B) Die Revision ist gemäß Art 133 Abs 4 B-VG nicht zulässig.

Text

Gemäß § 29 Abs. 5 Verwaltungsgerichtsverfahrensgesetz – VwGVG, BGBl. I Nr. 33/2013 idgF, kann das Erkenntnis in gekürzter Form ausgefertigt werden, wenn von den Parteien auf die Revision beim Verwaltungsgerichtshof und die Beschwerde beim Verfassungsgerichtshof verzichtet oder nicht binnen zwei Wochen nach Ausfolgung bzw Zustellung der Niederschrift gemäß Abs. 2a eine Ausfertigung des Erkenntnisses gemäß Abs. 4 von mindestens einem der hiezu Berechtigten beantragt wird. Die gekürzte Ausfertigung hat den Spruch sowie einen Hinweis auf den Verzicht oder darauf, dass eine Ausfertigung des Erkenntnisses gemäß Abs. 4 nicht beantragt wurde, zu enthalten. Gemäß § 31 Abs 3 VwGVG sind auf die Beschlüsse des Verwaltungsgerichtes § 29 Abs 1 zweiter Satz, 2a, 2b, 4 und 5 und § 30 VwGVG sinngemäß anzuwenden. Dies gilt nicht für verfahrensleitende Beschlüsse.

Diese gekürzte Ausfertigung der am 22.05.2024 mündlich verkündeten Beschlüsse ergeht gemäß § 29 Abs 5 iVm § 31 Abs 3 VwGVG, da sowohl auf eine Ausfertigung der Beschlüsse verzichtet wurde als auch jeweils auf die Revision beim Verwaltungsgerichtshof und die Beschwerde beim Verfassungsgerichtshof durch die anwaltlich bzw durch die Finanzprokuratur vertretenen Parteien gemäß Verhandlungsniederschrift vom 22.05.2024 ausdrücklich verzichtet wurde.

European Case Law Identifier

ECLI:AT:BVWG:2024:W131.2237371.1.00

Gericht
Bundesverwaltungsgericht

Entscheidungsdatum
27.05.2024

Geschäftszahl
W131 2237371-1

Spruch

W131 2237371-1/49E

W131 2237371-2/220E

W131 2237371-3/21E

W131 2237371-4/33E

GEKÜRZTE AUSFERTIGUNG DER AM 22.05.2024 MÜNDLICH VERKÜNDETEN BESCHLÜSSE

BESCHLUSS

Das Bundesverwaltungsgericht hat durch den Richter Mag Reinhard GRASBÖCK als Vorsitzenden, durch die fachkundige Laienrichterin Dr´a Ilse POHL als Beisitzerin der Auftraggeberseite und durch den fachkundigen Laienrichter Mag Matthias WOHLGEMUTH als Beisitzer der Auftragnehmerseite betreffend das zur Verfahrenszahl W131 2237371-2 protokollierte Nachprüfungsverfahren sowie das betreffend das zur Verfahrenszahl W131 2237371-4 geführte Verfahren zur Vorschreibung allfälliger Pauschalgebühren beschlossen; und hat das Bundesverwaltungsgericht weiters durch den Richter Mag Reinhard GRASBÖCK als Einzelrichter betreffend das zur Verfahrenszahl W131 2237371-1 protokollierte Verfahren zur Erlassung einer einstweiligen Verfügung (= eV) und betreffend das zur Verfahrenszahl W131 2237371-3 protokollierte Pauschalgebührenersatzverfahren beschlossen, wobei die Verfahren zu W131 2237371-1, -2 und -3 jeweils über Antrag der anwaltlich vertretenen Antragstellerin XXXX eingeleitet wurden:

I.

A) Das Rechtschutzverfahren, welches über den Nachprüfungsantrag zu W131 2237371-2 eingeleitet wurde, und weiters das Verfahren zur Vorschreibung allfälliger Pauschalgebühren zu W131 2237371-4 werden eingestellt.

B) Die Revision ist gemäß Art 133 Abs 4 B-VG nicht zulässig.

II.

A) Das Verfahren zur Erlassung einer einstweiligen Verfügung zu W131 2237371-1 und das Pauschalgebührenersatzverfahren zu W131 2237371-3 werden eingestellt.

B) Die Revision ist gemäß Art 133 Abs 4 B-VG nicht zulässig.

Text

Gemäß § 29 Abs. 5 Verwaltungsgerichtsverfahrensgesetz – VwGVG, BGBl. I Nr. 33/2013 idgF, kann das Erkenntnis in gekürzter Form ausgefertigt werden, wenn von den Parteien auf die Revision beim Verwaltungsgerichtshof und die Beschwerde beim Verfassungsgerichtshof verzichtet oder nicht binnen zwei Wochen nach Ausfolgung bzw Zustellung der Niederschrift gemäß Abs. 2a eine Ausfertigung des Erkenntnisses gemäß Abs. 4 von mindestens einem der hiezu Berechtigten beantragt wird. Die gekürzte Ausfertigung hat den Spruch sowie einen Hinweis auf den Verzicht oder darauf, dass eine Ausfertigung des Erkenntnisses gemäß Abs. 4 nicht beantragt wurde, zu enthalten. Gemäß § 31 Abs 3 VwGVG sind auf die Beschlüsse des Verwaltungsgerichtes § 29 Abs 1 zweiter Satz, 2a, 2b, 4 und 5 und § 30 VwGVG sinngemäß anzuwenden. Dies gilt nicht für verfahrensleitende Beschlüsse.

Diese gekürzte Ausfertigung der am 22.05.2024 mündlich verkündeten Beschlüsse ergeht gemäß § 29 Abs 5 iVm § 31 Abs 3 VwGVG, da sowohl auf eine Ausfertigung der Beschlüsse verzichtet wurde als auch jeweils auf die Revision beim Verwaltungsgerichtshof und die Beschwerde beim Verfassungsgerichtshof durch die anwaltlich bzw durch die Finanzprokuratur vertretenen Parteien gemäß Verhandlungsniederschrift vom 22.05.2024 ausdrücklich verzichtet wurde.

European Case Law Identifier

ECLI:AT:BVWG:2024:W131.2237371.1.00

JUDGMENT OF THE COURT (Eighth Chamber)

7 July 2022 (*)

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Scope – Article 10(h) – Specific exclusions for service contracts – Civil defence, civil protection and danger prevention services – Non-profit organisations or associations – Ambulance service classified as an emergency service – Voluntary organisations – Social cooperatives)

In Joined Cases C-213/21 and C-214/21,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 18 January and 3 March 2021, received at the Court on 6 April 2021, in the proceedings

Italy Emergenza Cooperativa Sociale (C-213/21 and C-214/21)

v

Azienda Sanitaria Locale Barletta-Andria-Trani (C-213/21),

Azienda Sanitaria Provinciale di Cosenza (C-214/21),

interveners:

Regione Puglia (C-213/21),

Confederazione Nazionale delle Misericordie d'Italia (C-213/21),

Associazione Nazionale Pubbliche Assistenze (Organizzazione nazionale di volontariato) – ANPAS ODV (C-213/21 and C-214/21),

Croce Rossa Italiana – Comitato Provinciale di Cosenza (C-214/21),

THE COURT (Eighth Chamber),

composed of N. Jääskinen, President of the Chamber, M. Safjan and M. Gavalec (Rapporteur), Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Italy Emergenza Cooperativa Sociale, by S. Betti, M. Dionigi, C. Santuori and P. Stallone, avvocati,

– Confederazione Nazionale delle Misericordie d'Italia, by F. Sanchini and P. Sanchini, avvocati,

– Associazione Nazionale Pubbliche Assistenze (Organizzazione nazionale di volontariato) – ANPAS ODV, by V. Migliorini, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by F. Sclafani, avvocato dello Stato,

– the Spanish Government, by M.J. Ruiz Sánchez, acting as Agent,

– the Netherlands Government, by M.K. Bulterman and J. Langer, acting as Agents,

– the Kingdom of Norway, by J.T. Kaasin and H. Røstum, acting as Agents,

– the European Commission, by G. Gattinara, P. Ondrůšek and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 10(h) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The requests have been made in two sets of proceedings between, in Case C-213/21, Italy Emergenza Cooperativa Sociale ('Italy Emergenza') and the Azienda Sanitaria Locale Barletta-Andria-Trani (Local Health Authority, Berletta-Andria-Trani, Italy), and, in Case C-214/21, Italy Emergenza and the Azienda Sanitaria Provinciale di Cosenza (Provincial Health Authority, Cosenza, Italy), concerning two decisions by which those health authorities launched selection procedures with a view to awarding, by contract, the emergency ambulance transport service to voluntary organisations.

Legal context

European Union law

3 Recitals 28 and 118 of Directive 2014/24 state:

'(28) This Directive should not apply to certain emergency services where they are performed by non-profit organisations or associations, since the particular nature of those organisations would be difficult to preserve if the service providers had to be chosen in accordance with the procedures set out in this Directive. However, the exclusion should not be extended beyond that strictly necessary. It should therefore be set out explicitly that patient transport ambulance services should not be excluded. In that context it is furthermore necessary to clarify that CPV Group 601 'Land Transport Services' does not cover ambulance services, to be found in CPV class 8514. It should therefore be clarified that services, which are covered by CPV code 85143000-3, consisting exclusively of patient transport ambulance services should be subject to the special regime set out for social and other specific services (the 'light regime'). Consequently, mixed contracts for the provision of ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services.

…

(118) In order to ensure the continuity of public services, this Directive should allow that participation in procurement procedures for certain services in the fields of health, social and cultural services could be reserved for organisations which are based on employee ownership or active employee participation in their governance, and for existing organisations such as cooperatives to participate in delivering these services to end users. This provision is limited in scope exclusively to certain health, social and related services, certain education and training services, library, archive, museum and other cultural services, sporting services, and services for private households, and is not intended to cover any of the exclusions otherwise provided for by this Directive. Those services should only be covered by the light regime.'

4 Article 10 of that directive, entitled 'Specific exclusions for service contracts', states:

‘This Directive shall not apply to public service contracts for:

…

(h) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;

…’

5 Article 77 of that directive, entitled ‘Reserved contracts for certain services’, provides in paragraphs 1 and 2:

‘1. Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74, which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8.

2. An organisation referred to in paragraph 1 shall fulfil all of the following conditions:

(a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1;

(b) profits are reinvested with a view to achieving the organisation’s objective. Where profits are distributed or redistributed, this should be based on participatory considerations;

(c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders;

…’

Italian law

6 Article 17 of decreto legislativo n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 on the Public Contracts Code) of 18 April 2016 (Ordinary Supplement to GURI No 91 of 19 April 2016), entitled ‘Specific exceptions for public contracts and service concessions’, provides in paragraph 1:

‘The provisions of this code do not apply to public contracts or service concessions in respect of:

…

(h) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which come under CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;

…’

7 Decreto legislativo n. 117 – Codice del Terzo settore (Legislative Decree No 117 enacting the Third Sector Code) of 3 July 2017 (Ordinary Supplement to GURI No 179 of 2 August 2017) (‘Legislative Decree No 117/2017’) contains Article 4, entitled ‘Third sector organisations’, which provides, in paragraph 1:

‘Third sector organisations include voluntary organisations, associations for social advancement, philanthropic entities, social enterprises, including social cooperatives, association networks, mutual benefit societies, recognised or unrecognised associations, foundations and private-law entities, other

than corporations, created for the non-profit-making pursuit of civic objectives or objective of solidarity or social utility, which carry on, exclusively or principally, one or more activities of general interest in the form of voluntary work or the free provision of money, goods or services, or mutual assistance or production, or the exchange of goods or services, and which are registered in the national third sector register.'

8 Article 57 of Legislative Decree No 117/2017, entitled 'Emergency ambulance transport services, states:

'1. Emergency ambulance transport services may be awarded, on a preferential basis, by contract, to voluntary organisations which have been registered for at least six months in the national third sector register, belong to a network of associations referred to in Article 41(2) and are accredited under the relevant regional legislation, if any, where, by reason of the particular nature of the service, direct contracting ensures that a service which is in the public interest can be provided within a framework of effective contributions to social goals, which pursues objectives of solidarity, in an economically efficient and appropriate manner and in accordance with the principles of transparency and non-discrimination.

2. The provisions of paragraphs 2, 3, 3a and 4 of Article 56 shall apply to contracts for the services referred to in paragraph 1.'

9 Article 2514 of the Codice civile (Civil Code), entitled 'Requirements relating to cooperatives that are predominantly mutual', is worded as follows:

'Cooperatives that are predominantly mutual shall include in their articles of association:

(a) a prohibition on the distribution of dividends on capital invested that would exceed the maximum interest payable on post office savings certificates plus 2.5 percent;

(b) a prohibition on the remuneration of financial instruments offered for subscription by cooperative members that would exceed the maximum limit fixed for dividends by two percent;

(c) a prohibition on the distribution of reserves among cooperative members;

(d) the obligation, in the event of the winding up of the cooperative society, to attribute all the assets, deducting only the share capital and any dividends acquired, to mutual funds for the promotion and development of cooperation;

Cooperatives shall take a decision on the insertion and deletion of the clauses referred to in the preceding paragraph based on the majorities set for the extraordinary general meeting.'

10 According to Article 2545e of the Civil Code, entitled 'Rebates':

'The instrument of incorporation shall define the criteria for the distribution of rebates to members in proportion to the quantity and quality of mutual exchanges.

…

The general meeting may decide to distribute rebates to each member, including a proportionate increase in the respective shares or the issue of new shares, in derogation from Article 2525, or by issuing financial instruments.'

11 Decreto legislativo n. 112 – Revisione della disciplina in materia di impresa sociale (Legislative Decree No 112, amending the legislation on social enterprises) of 3 July 2017 (GURI No 167 of 19 July 2017) ('Legislative Decree No 112/2017'), provides in Article 3, entitled 'Non-profit-making objective':

'1. Without prejudice to paragraph 3 and to Article 16, a social enterprise shall allocate any profits and operating surpluses to the pursuit of its activities under its articles of association or to the increase of its assets.

2. For the purposes of paragraph 1, the distribution, including indirectly, of profits and operating surpluses, of funds and reserves, irrespective of their designation, to the founders, members or partners, employees and associates, administrators and other members of the enterprise's bodies shall be prohibited, including in the event of termination or any other case of individual termination of the relationship. In the case of social enterprises established in the forms referred to in Book V of the Civil Code, repayment to the member of the capital actually invested and, where appropriate, revalued or increased within the limits referred to in paragraph 3(a), shall be permitted. For the purposes of the present paragraph, 'indirect distribution of profits' shall, in any event, mean:

(a) the payment to the administrators, auditors and any person exercising a social mandate, of individual remuneration which is not proportionate to the activity carried out, to the responsibilities assumed and to the specific skills or, in any event, which is greater than the remuneration paid in entities operating in identical or similar sectors and circumstances.

…

2a. For the purposes referred to in paragraphs 1 and 2, the distribution, between members, of rebates associated with an activity in the general interest referred to in Article 2, carried out in accordance with Article 2545e of the Civil Code and in compliance with the conditions and limits laid down by law and their articles of association, by social enterprises incorporated in the form of cooperative societies, shall not be considered to be a distribution, even indirectly, of profits and operating surpluses, provided that their articles of association or instrument of incorporation indicate the criteria for the distribution of rebates to members in proportion to the quantity and quality of mutual exchanges and provided that a mutual operating surplus is recorded.

…'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-213/21

12 By a notice published in the *Official Journal of the European Union* of 27 April 2020, the Azienda Sanitaria Locale Barletta-Andria-Trani launched a competitive tendering procedure for the award, by contract, of the emergency ambulance transport service, for the territory within its competence, to voluntary organisations satisfying the requirements laid down in Article 57 of Legislative Decree No 117/2017.

13 Taking the view that that call for tenders contained unlawful clauses which prevented it from taking part in that procedure, Italy Emergenza, a social cooperative whose activity is the provision of the basic health and care ambulance service, challenged that procedure by bringing an action before the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia, Italy). Italy Emergenza considered that Article 57 of Legislative Decree No 117/2017 was contrary to Article 10(h) of Directive 2014/24, read in the light of recital 28 of that directive, on the ground that it authorised the direct award, by contract, of emergency ambulance transport services only to voluntary organisations and, consequently, excluded social cooperatives. For the purposes of the direct award, by contract, of emergency services, in Italy Emergenza's view, Article 10(h) fully treats social cooperatives as voluntary associations.

14 That court dismissed the action. First, it held that the service which was the subject of that call for tenders was an ambulance transport service in a 'qualified' ambulance, falling within the exception provided for in Article 10(h). Second, that court held that the exclusion of social cooperatives from the scope of that exception complied with EU law because those cooperatives pursued a business purpose justifying treatment that differed from the treatment of voluntary organisations or associations which do not pursue a profit-making objective. In the present case, as regards Italy Emergenza, its exclusion is justified in the light of Article 5 of that social cooperative's articles of association, which provides for the possibility of distributing dividends of a limited amount.

15 Italy Emergenza brought an appeal against the judgment of the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia) before the Consiglio di Stato (Council of State, Italy), the referring court, again stating that Article 57 of Legislative Decree No 117/2017 infringes Article 10(h) of Directive 2014/24.

16 The Consiglio di Stato (Council of State) has doubts as to whether Article 57 of Legislative Decree No 117/2017 complies with Article 10(h) of Directive 2014/24. While Article 57 mentions only voluntary organisations and, therefore, appears to exclude the award, by contract, of emergency ambulance transport services to social cooperatives, Article 10(h) refers to 'non-profit' organisations or associations and is not limited solely to voluntary organisations or associations.

17 In that context, the referring court states, first of all, that, in the judgment of 21 March 2019, *Falck Rettungsdienste and Falck* (C-465/17, EU:C:2019:234), the Court held that organisations and associations whose purpose is to undertake social tasks, which have no commercial purpose and which reinvest any profits in order to achieve their objective constitute 'non-profit organisations or associations' within the meaning of Article 10(h) of Directive 2014/24. The Court has thus emphasised that the decisive criterion for falling within that provision is the pursuit of a non-profit-making objective. According to the referring court, a social cooperative such as Italy Emergenza is characterised by the absence of a profit-making objective. Article 6 of its articles of association states that 'the social cooperative operates on a non-profit-making basis and pursues the general interest of the community in human advancement and social integration'. It is true that Article 5 of those articles of association provides for 'a prohibition on the distribution of dividends on capital invested that would exceed the maximum interest payable on post office savings certificates plus 2.5 percent'. However, Article 5 cannot be regarded as having probative value, since it is a provision that reproduces Article 2514 of the Civil Code.

18 Next, the referring court states that social cooperatives differ from voluntary organisations or associations. While the latter do not confer any economic advantage, even indirectly, on their members and merely reimburse the costs incurred by their members, social cooperatives produce an economic advantage for their members, even if they pursue objectives of integration and social advancement on a non-profit basis. Thus, those cooperatives are characterised by their business purpose of a mutual nature. However, that court puts that difference into context, because it is apparent from the case-law of the Court that a contract whereby the sole consideration is the reimbursement of costs incurred falls within the concept of a 'public contract' as a contract for pecuniary interest.

19 In addition, the referring court notes another factor capable of lessening the difference between voluntary organisations or associations and social cooperatives. This is, first, the fact that a voluntary organisation or association can employ workers and, second, the fact that a social cooperative can have voluntary members to whom only their expenses are reimbursed.

20 Finally, that court states that, even if, unlike voluntary organisations or associations, a social cooperative cannot be awarded, on a preferential basis, by contract, an emergency ambulance transport service, pursuant to Article 57 of Legislative Decree No 117/2017, the award of such a service to a social cooperative can take place only following a public procurement procedure, which, however, is contrary to Article 10(h) of Directive 2014/24.

21 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 10(h) of Directive [2014/24] – together with recital 28 of that directive – preclude national legislation which provides that contracts for the provision of emergency ambulance transport services may be directly awarded, on a preferential basis, solely to voluntary organisations – provided that they have been registered for at least six months in the national third sector register, belong to a network of associations and are accredited under the relevant sectoral regional legislation (if any) and on the condition that such an award ensures that the service can be provided within a framework of effective contributions to social goals, which pursues objectives of solidarity, in an economically efficient and appropriate manner and in accordance with the principles of transparency and non-discrimination – to the exclusion of other non-profit organisations, and more specifically social cooperatives, such as non-profit-making social enterprises?'

Case C-214/21

22 By a notice published on 26 February 2020, the Azienda Sanitaria Provinciale di Cosenza launched a selection procedure for the award, by contract, of the emergency ambulance transport service, for the territory within its competence, to voluntary organisations and the Croce Rossa Italiana (Italian Red Cross).

23 Taking the view that that call for tenders contained unlawful clauses which prevented it from taking part in that procedure, Italy Emergenza challenged that call for tenders by bringing an action before the Tribunale amministrativo regionale per la Calabria (Regional Administrative Court, Calabria, Italy), relying on the same pleas as those set out in paragraph 13 of the present judgment.

24 That court dismissed that action on the same grounds as those set out in paragraph 14 of the present judgment.

25 Italy Emergenza brought an appeal before the Consiglio di Stato (Council of State), the referring court, which, on the same grounds as those set out in paragraphs 16 to 20 of the present judgment, has doubts as to whether Article 57 of Legislative Decree 117/2017 is compatible with Article 10(h) of Directive 2014/24. That court is also unsure of the effect of Article 3(2)a of Legislative Decree No 112/2017, which authorises a social cooperative not to reinvest all of its profits and to distribute them to its members in the form of rebates.

26 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does Article 10(h) of Directive [2014/24] – together with recital 28 of that directive – preclude national legislation which provides that contracts for the provision of emergency ambulance transport services may be directly awarded, on a preferential basis, solely to voluntary organisations – provided that they have been registered for at least six months in the national third sector register, belong to a network of associations and are accredited under the relevant sectoral regional legislation (if any) and on the condition that such an award ensures that the service can be provided within a framework of effective contributions to social goals, which pursues objectives of solidarity, in an economically efficient and appropriate manner and in accordance with the principles of transparency and non-discrimination – to the exclusion of other non-profit organisations, and more specifically social cooperatives, such as non-profit-making social enterprises, including social cooperatives which offer rebates to their members in relation to activities of general interest, within the meaning of Article 3(2)a of Legislative Decree No 112/2017?’

Consideration of the questions referred for a preliminary ruling

27 By its question in Case C-213/21 and its question in Case C-214/21, which it is appropriate to examine together, the referring court asks, in essence, whether Article 10(h) of Directive 2014/24 precludes national legislation which provides that emergency ambulance transport services may be awarded, by contact, on a preferential basis, only to voluntary organisations, and not to social cooperatives which can offer rebates associated with their activities to their members.

28 It should be noted that Article 10(h) of Directive 2014/24 excludes from its scope public service contracts for services falling within the CPV codes referred to in that provision and which are provided by ‘non-profit organisations or associations’.

29 However, that directive does not define the concept of ‘non-profit’ organisations or associations.

30 In accordance with the requirements for the uniform application of EU law and the principle of equality, the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see, to that effect, judgment of

21 March 2019, *Falck Rettungsdienste and Falck*, C-465/17, EU:C:2019:234, paragraph 28 and the case-law cited).

31 In the first place, the concept of 'non-profit' organisations or associations is, by definition, in contrast to a profit-making group which is established for the purpose of making a profit. In that sense, that concept appears sufficiently broad to cover organisations based on employee ownership or active employee participation in the governance of those organisations, such as social cooperatives, provided that they pursue a non-profit-making objective.

32 In the second place, the objective of the exception provided for in Article 10(h) of Directive 2014/24 is, as stated in recital 28 of that directive, to preserve the particular nature of non-profit organisations and associations by preventing them from being subject to the procedures set out in that directive. However, that recital states that that exclusion must not be extended beyond what is strictly necessary. In that respect, that exception must, as a derogation from the scope of that directive, be interpreted strictly (see, by analogy, judgment of 20 March 2018, *Commission* v *Austria (State printing office)*, C-187/16, EU:C:2018:194, paragraph 77).

33 It follows that the concept of 'non-profit' organisations or associations, within the meaning of Article 10(h) of Directive 2014/24, must be strictly confined to organisations and associations of a particular nature, that is to say, those which do not pursue a profit-making objective and which cannot provide any benefit, even indirectly, to their members.

34 In the third place, it should be noted that the Court has held that organisations and associations whose purpose is to undertake social tasks, which have no commercial purpose and which reinvest any profits in order to achieve the objective of that organisation or association, fall within that concept (judgment of 21 March 2019, *Falck Rettungsdienste and Falck*, C-465/17, EU:C:2019:234, paragraph 59).

35 By requiring that any profits be reinvested in order to achieve the objective of the organisation or association concerned, the Court, first, considered that those profits had to be allocated for the performance of the social tasks pursued by that organisation or association and, second, clearly ruled out the possibility that those profits could be distributed to the shareholders or members of that organisation or association. It follows that organisations or associations which are able to distribute profits to their members do not fall within the scope of Article 10(h) of Directive 2014/24.

36 That interpretation is, moreover, supported by Article 77 of that directive, read in the light of recital 118 of the directive, which authorises Member States to provide that contracting authorities may reserve, for organisations that satisfy the conditions listed in Article 77(2), the right to participate in special procedures for the award of public contracts, exclusively in respect of certain services. Those conditions include, first, in point (b) of Article 77(2), the condition that, where profits are distributed or redistributed, this should be based on participatory considerations and, second, in point (c) of Article 77(2), the condition that the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders.

37 Thus, the EU legislature has provided for different treatment between, on the one hand, 'non-profit' organisations or associations referred to in Article 10(h) of Directive 2014/24 and, on the other hand, the organisations referred to in the preceding paragraph of the present judgment. It follows that the organisations and associations referred to in Article 10(h) of that directive cannot be treated in the same way as organisations based on employee ownership or active employee participation in the governance of the organisation, such as cooperatives, referred to in recital 118 and Article 77 of that directive (see, to that effect, judgment of 21 March 2019, *Falck Rettungsdienste and Falck*, C-465/17, EU:C:2019:234, paragraph 60).

38 It follows from the foregoing considerations that, where the members of an association or organisation can obtain a benefit, even indirectly, linked to the activities of that association or organisation, that association or organisation cannot fall within the exception laid down in Article 10(h) of Directive 2014/24.

39 In the present case, and without prejudice to the analysis of the national legislation and the articles of association of the organisations in question in the main proceedings, which it is for the referring court to carry out, it follows from a reading of Article 3(2)a of Legislative Decree No 112/2017 in conjunction with Article 34 of the articles of association of Italy Emergenza that the general meeting may decide to offer rebates to each of the members. As is apparent from both the orders for reference and the observations of several interested parties, since rebates are an instrument allowing an advantage to be conferred on the members of a cooperative, the existence of such a possibility of distributing 'profits' would have to preclude the classification of a social cooperative, such as Italy Emergenza, as a 'non-profit' organisation or association, within the meaning of Article 10(h) of Directive 2014/24.

40 The answer to the questions referred is, therefore, that Article 10(h) of Directive 2014/24 must be interpreted as not precluding national legislation which provides that emergency ambulance transport services may be awarded, by contract, on a preferential basis, only to voluntary organisations, and not to social cooperatives which can offer rebates associated with their activities to their members.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 10(h) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as not precluding national legislation which provides that emergency ambulance transport services may be awarded, by contract, on a preferential basis, only to voluntary organisations, and not to social cooperatives which can offer rebates associated with their activities to their members.

[Signatures]

---

* Language of the case: Italian.

JUDGMENT OF THE COURT (Eighth Chamber)

31 March 2022 (*)

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Applicability to a purely internal situation – Article 58(1) and (4) – Selection criteria – Technical and professional ability of the tenderers – Protection of the financial interests of the European Union – Council Regulation (EC, Euratom) No 2988/95 – Article 8(3) – Control measures – Possibility for national authorities protecting the financial interests of the European Union to assess differently a public procurement procedure)

In Case C-195/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria), made by decision of 26 March 2021, received at the Court on 26 March 2021, in the proceedings

LB

v

Smetna palata na Republika Bulgaria,

THE COURT (Eighth Chamber),

composed of N. Jääskinen, President of the Chamber, M. Safjan and M. Gavalec (Rapporteur), Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– LB, by A.S. Aslanyan, advokat,

– the Smetna palata na Republika Bulgaria, by T. Tsvetkov and D.A. Dimitrova, acting as Agents,

– the European Commission, by G. Wils, J. Baquero Cruz and P. Ondrůšek and by D. Drambozova, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 58(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 (OJ 2017 L 337, p. 19) (‘Directive 2014/24’), Article 8(3) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities’ financial interests (OJ 1995 L 312, p. 1) and the principles of legal certainty and effectiveness.

2 The request was made in the course of proceedings between LB and the Smetna palata na Republika Bulgaria (Chamber of Audit of the Republic of Bulgaria) ('the Chamber of Audit') concerning an administrative penalty which the latter has imposed on LB on account of irregularities committed during a public procurement procedure.

Legal framework

European Union law

Regulation No 2988/95

3 Regulation No 2988/95 contains three titles: Title I, entitled 'General principles' (Articles 1 to 3), Title II, entitled 'Administrative measures and penalties' (Articles 4 to 7) and Title III, entitled 'Checks' (Articles 8 to 11).

4 Article 8(2) and (3) of that regulation provides:

'2. Measures providing for checks shall be appropriate to the specific nature of each sector and in proportion to the objectives pursued. They shall take account of existing administrative practice and structures in the Member States and shall be determined so as not to entail excessive economic constraints or administrative costs.

The nature and frequency of the checks and inspections on the spot to be carried out by the Member States and the procedure for performing them shall be determined as necessary by sectoral rules in such a way as to ensure uniform and effective application of the relevant rules and in particular to prevent and detect irregularities.

3. The sectoral rules shall include the provisions necessary to ensure equivalent checks through the approximation of procedures and checking methods.'

Regulation (EU) No 1303/2013

5 Recitals 43 and 122 of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320), state:

'(43) In the interests of ensuring proportionate control arrangements and of safeguarding the added value of financial instruments, intended final recipients should not be deterred by there being an excessive administrative burden. …

…

(122) … In order to reduce the administrative burden on beneficiaries, specific rules should be introduced to reduce the risk of overlap between audits of the same operations by various institutions, namely the European Court of Auditors, the Commission and the audit authority.'

6 Article 2 of that regulation, entitled 'Definitions', provides:

'For the purposes of this Regulation, the following definitions apply:

…

(36) "irregularity" means any breach of Union law, or of national law relating to its application, resulting from an act or omission by an economic operator involved in the implementation of the [European Structural and Investment Funds (ESI Funds)], which has, or would have, the effect of

prejudicing the budget of the Union by charging an unjustified item of expenditure to the budget of the Union.

…’

Directive 2014/24

7 Article 1 of Directive 2014/24, entitled ‘Subject matter and scope’, provides in paragraph 1:

‘This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.’

8 Article 4 of that directive, entitled ‘Threshold amounts’, states:

‘This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

(a) EUR 5 548 000 for public works contracts;

…’

9 Article 18 of that directive, entitled ‘Principles of procurement’, provides in paragraph 1:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

10 Article 58 of Directive 2014/24, entitled ‘Selection criteria’, states:

‘1. Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

…

4. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

In procurement procedures for supplies requiring siting or installation work, services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.

…’

11 In accordance with Article 67 of that directive, entitled ‘Contract award criteria’:

‘1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.

2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject matter of the public contract in question. Such criteria may comprise, for instance:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;

(b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

…’

Bulgarian law

Law on public procurement

12 Article 1(1) of the Zakon za obshtestvenite porachki (Law on public procurement, DV No 13, of 16 February 2016), in the version applicable to the facts in the main proceedings (‘the Law on public procurement’), provides:

‘This law determines the conditions and procedures for the award of public works, supply or service contracts and the running of competitions organised by contracting authorities with the aim of ensuring the efficient allocation of:

…

2. resources granted under European funds and programmes;

…’

13 Article 2 of that law provides:

‘(1) Public contracts shall be awarded in accordance with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the principles of free movement of goods, freedom of establishment, freedom to provide services and mutual recognition, as well as the principles deriving therefrom:

1. equality and prohibition of all discrimination;

2. free competition;

3. proportionality;

4. publicity and transparency.

(2) In the award of public contracts, contracting authorities shall not be empowered to restrict competition by imposing conditions or requirements which result in an undue advantage or which unduly restrict the access of economic operators to public contracts and which are not proportionate to the subject matter, value, complexity, quantity or scope of the public contract.

…’

14 In accordance with Article 59 of that law:

‘(1) The contracting authority may lay down selection criteria for candidates or tenderers in relation to:

…

3. technical and professional ability.

(2) Contracting authorities may apply to candidates or tenderers only the selection criteria set out in this law which are necessary to ensure that they are able to perform the contract. The criteria laid down must be consistent with the subject matter, value, scope and complexity of the contract. Where the contract is divided into lots, the selection criteria for each lot must take account of the subject matter, value, scope and complexity of the lot concerned.

…’

15 Article 247(1) of that law states:

‘… A contracting authority which infringes the prohibition referred to in Article 2(2), Article 11(5), Article 16, Article 21(14), (15) or (17), Article 149(8) or Article 150(4) shall be punished by a pecuniary penalty of 2% of the value of the contract, including VAT, but not exceeding 10 000 [leva (BGN)] [(approximately EUR 5 100)].

…’

16 In accordance with Article 260(1) and (2) of the Law on public procurement:

‘(1) Investigations finding that infringements have been committed under this law, carried out by the authorities of the Chamber of Audit, shall be documented by authorised auditors within a period of six months from the day on which the perpetrator was discovered. This time limit may not exceed three years from the date on which the offence was committed.

(2) Decisions imposing administrative penalties shall be adopted by the President of the Chamber of Audit or by officials authorised by him.’

17 Paragraph 3 of the ‘supplementary provisions’ of the Law on public procurement provides that that law introduces the requirements laid down by Directive 2014/24.

Law on European funds

18 Article 49(2) of the Zakon za upravlenie na sredstvata ot evropeyskite strukturni i investitsionni fondove (Law on the management of resources from the European Structural and Investment Funds, DV No 101 of 22 December 2015), in the version applicable to the facts in the main proceedings (‘the Law on European funds’), provides:

‘In respect of the appointment of a contractor for activities related to works, services and/or supplies of goods which are the subject of public procurement within the meaning of the Law on public procurement, the rules laid down in:

1. the Law on public procurement – where the recipient is a contracting authority within the meaning of that law;

… shall apply. …’

Law on spatial planning

19 In accordance with Article 137(1) of the Zakon za ustroystvo na teritoriata (Law on spatial planning, DV No 1 of 2 January 2001), in the version applicable to the facts in the main proceedings (‘the Law on spatial planning’):

‘… Construction works shall be classified in the following manner according to their characteristics, size, complexity and operating risks:

1. first category:

…

(g) geo-protection and shoreline reinforcement equipment;

…’

20 Article 163a of that law provides:

‘(1) … The contractor shall be obliged to employ technically qualified persons by means of contracts of employment to carry out the technical management of the works.

(2) … Technically qualified persons are persons who hold a diploma from an accredited institution of higher education with the qualification “civil engineer”, “engineer” or “architect”, as well as persons who have completed secondary education and four years of vocational training leading to a professional qualification in the fields of “architecture and construction” or “engineering”.

…

(4) … The technical supervisor shall be a civil engineer, architect or construction technician who supervises the works and ensures the implementation of the responsibilities under Article 163(2)(1) to (5), and for constructions in the fifth category – also the responsibilities under Article 168(1) and Article 169a(1). Other technically qualified persons pursuant to paragraph 2 may carry out the specialised technical supervision of individual construction and installation works in accordance with their acquired specialisation and professional qualification.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

21 Under a management contract concluded on 21 March 2018 between the Minister for the Environment and Water (Bulgaria), in his capacity as Director of the Managing Authority of the Operational Programme ‘Environment 2014-2020’, and the municipality of Lukovit (Bulgaria), a grant cofinanced by the European Regional Development Fund (ERDF) and the Cohesion Fund was awarded to that town up to a maximum amount of BGN 649 732.14 (approximately EUR 331 000). That grant was intended to finance work to stabilise a landslide on the road leading to a regional landfill site located within that town.

22 By decision of 5 April 2018, LB, in his capacity as Mayor of Lukovit, launched a ‘public tender’ procedure for the award of a public contract for the performance of those works. The estimated value of that contract was BGN 482 668 excluding VAT (approximately EUR 247 000).

23 That decision, which was published on the same day in the Public Procurement Agency’s public procurement register, approved the contract notice and the public procurement documents at issue in the main proceedings.

24 The contract notice stated that the objective of the project was to reconstruct and improve the road section as a means of transport and that the award criteria would be ‘quality’ and ‘price’, each with a weighting of 50%.

25 Under the conditions for participation in that procurement procedure, the contract notice stated, first, that each participant had to be registered in the Central professional register of the building industry with a view to carrying out building works in Group IV, Category I, falling within the scope of Article 137(1)(1)(g) of the Law on spatial planning, or in a corresponding register for participants established in another Member State.

26 Moreover, with regard to the requirements relating to 'technical and professional ability', the contract notice stated that candidates had to prove, inter alia, that they had carried out building construction activities with the same or a similar subject matter to that of the contract at issue in the main proceedings during the five years preceding the submission of the tender. The contract notice specified, in that regard, that 'similar' activities meant activities to strengthen landslides and/or hillsides and/or banks and/or pits, or an equivalent building under construction.

27 Finally, with regard to the requirements applicable to technical engineering staff, the contract notice stated that the specific features of the contract required inter alia the presence of a technical director of construction who had the professional qualification of a 'designer' or 'civil engineer' or a similar specialisation where the qualification was obtained in a Member State in which there was no corresponding specialisation. The technical director also had to demonstrate a minimum of three years' experience in his or her specialisation.

28 Three tenders were submitted within the prescribed period. After additional explanations were requested from each of the three participants, the Mayor of Lukovit, by decision of 24 July 2018, decided, first, to exclude two of them on the ground that they did not meet the selection criteria and, secondly, to award the contract to the third. Subsequently, on 29 August 2018, a contract with a value of BGN 481 293.72 excluding VAT (approximately EUR 245 500) was concluded between that town and the successful tenderer.

29 By decision of 9 November 2018, on the basis of an *ex post* check of the legality of the procurement procedure at issue in the main proceedings, the managing authority of the operational programme 'Environment 2014-2020' imposed a general financial correction of 5% of the value of the expenditure concerned and recognised as eligible under the contract of 29 August 2018. That authority criticised the contracting authority for having, first, evaluated a tender which did not comply with the required technical specifications and, secondly, given unclear and confusing instructions to one of the participants, which led to its unlawful exclusion and prevented it from submitting a tender with a lower price than that offered by the selected tenderer.

30 In determining the correction to be applied to each of the two irregularities, that managing authority took into consideration, as mitigating circumstances, the fact that, first, three tenders had been submitted, which indicated a satisfactory level of competition, secondly, the estimated value of the contract was below the thresholds for mandatory disclosure in the *Official Journal of the European Union*, with the result that the lack of cross-border effects would have limited the circle of interested parties, and, thirdly, the award criterion of the 'optimum price-quality ratio' would not necessarily have guaranteed that the tender with the lowest price would be ranked in first place.

31 Alongside the check carried out by that managing authority, by order of 2 October 2019, the Vice President of the Chamber of Audit ordered an audit of the compliance of the management of public funds and the activities of the municipality of Lukovit during the period from 1 January 2018 to 30 June 2019.

32 On 18 June 2020, an auditor from the Chamber of Audit issued a document finding that there had been an administrative infringement, stating that, by his decision of 5 April 2018, the Mayor of Lukovit had infringed the principle of free competition laid down in Article 2(2) of the Law on public procurement. By requiring the presence of a technical director of construction who had the professional qualification of a 'designer' and/or 'civil engineer' with a minimum of three years' experience in his or her specialisation, the contract notice at issue in the main proceedings set a more stringent qualification requirement than that resulting from Article 163a(2) of the Law on spatial planning.

33 The Mayor of Lukovit lodged an objection against the document finding an infringement, justifying the qualification requirement at issue in the main proceedings, referred to in paragraph 27 of this

judgment, by the specific features of a landslide stabilisation operation and its engineering complexity. He also stated that that requirement stemmed from the operational programme through which the financing of the project had been secured. The Mayor of Lukovit added that, moreover, no infringement of the rules on free competition provided for in Article 2(2) of the Law on public procurement had been found during the *ex post* check carried out by the managing authority of the operational programme 'Environment 2014-2020'.

34 By decision of 16 December 2020, the President of the Chamber of Audit rejected the objection and, on the basis of the findings and conclusions contained in that document finding an infringement, imposed a fine of BGN 10 000 (approximately EUR 5 100) on the Mayor of Lukovit under Article 260(2) of the Law on public procurement.

35 The Mayor of Lukovit challenged that decision by bringing an action before the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria), which is the referring court.

36 In the first place, that court asks whether Article 58(4) of Directive 2014/24 precluded the contracting authority from setting a more stringent qualification requirement than that laid down in Article 163a of the Law on spatial planning or whether, on the contrary, as the latter provision merely lays down minimum requirements which apply to all categories of construction, that authority could lawfully set the qualification requirement at issue in the main proceedings, in view of the fact that land stabilisation works are among the most complex construction activities.

37 In the second place, the referring court asks how the various national authorities responsible for ensuring compliance with the Law on public procurement or the Law on European funds must coordinate their checks and conclusions regarding the legality of public procurement procedures. In that regard, various provisions of 'soft law' are said to advocate, first, prohibiting the managing authority and the supervisory authorities from interpreting more strictly the rules governing the selection of the successful tenderer and, secondly, coordinating the opinions of the different supervisory authorities with a view to avoiding any divergence as to the legality of procedures and expenditure incurred.

38 However, it states that account must also be taken, as the Chamber of Audit has noted, of the independence and complementarity of the various supervisory authorities. Thus, in the event of an established infringement of the Law on public procurement constituting an irregularity, the managing authority imposes financial corrections solely on legal persons who are beneficiaries, whereas the Chamber of Audit may impose administrative penalties on the natural persons responsible. To that end, it may challenge the administrative criminal liability of contracting authorities or authorised persons designated by them.

39 In the third place, the referring court asks whether the administrative measures and penalties provided for in Title II of Regulation No 2988/95 must vary according to whether or not there is wrongful conduct and according to the degree of social danger. Since the nature and gravity of the infringement and its financial consequences for the EU budget are taken into account when determining financial corrections, by the authorities responsible for ensuring compliance with the Law on European Funds, the referring court seeks to ascertain whether those same circumstances must also be taken into account in the case where penalties are imposed for infringement of EU public procurement rules.

40 In the fourth place and finally, the referring court asks whether Article 247(1) of the Law on public procurement, under which the contracting authority may be subject to 'a pecuniary penalty of 2% of the value of the contract, including VAT, but not exceeding BGN 10 000', which is said to be equivalent to approximately 16 times the minimum wage, is consistent with the principles of legality, effectiveness and proportionality.

41 It was in that context that the Rayonen sad Lukovit (District Court, Lukovit) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 58(4) of Directive [2014/24] be interpreted as meaning that the requirements imposed by the selection criteria on the professional ability of the staff of economic operators in respect of a specialised contract in the construction sector may be stricter than the minimum

requirements for training and professional qualifications laid down by the specific national law (Article 163a(4) of the [Law on spatial planning]) without being a priori restrictive of competition, and, more specifically, does the prescribed condition of "proportionality" of the participation requirements imposed in relation to the subject matter of the contract (a) require the national court to carry out an assessment of proportionality on the basis of the evidence gathered and the specific parameters of the contract, even in cases where the national law defines a large number of professionals who are in principle qualified to carry out the activities under the contract, or (b) permit judicial review to be limited only to an examination of whether the participation requirements are too restrictive in relation to those provided for in principle in the specific national law?

(2) Must the provisions of Title II "Administrative measures and penalties" of Regulation No 2988/95 be interpreted as meaning that the same infringement of the [Law on public procurement] transposing Directive [2014/24] (including the infringement in the determination of the selection criteria for which the complainant was penalised) may give rise to different legal consequences depending on whether the infringement was committed without fault or intentionally or was caused by negligence?

(3) Do the principles of legal certainty and effectiveness, having regard to the objective of Article 8(3) of Regulation No 2988/95 and recitals 43 and 122 to Regulation No 1303/13, permit the various national authorities called on to protect the financial interests of the European Union to assess the same facts differently in the procurement procedure, in that, more specifically, the managing authority of the operational programme finds no infringement in the determination of the selection criteria, whereas the Chamber of Audit, upon subsequent control and without there being any special or new circumstances, finds that those criteria are restrictive of competition and imposes an administrative penalty on the contracting authority on account of that finding?

(4) Does the principle of proportionality preclude a provision of national law, such as that in Article 247(1) of the Law on public procurement, which provides that a contracting authority which formally infringes the prohibition laid down in Article 2(2) of that law is to be punished by way of a pecuniary penalty of 2% of the value of the contract, including VAT, but not exceeding 10 000 leva (BGN), without it being necessary to establish the seriousness of the infringement and its actual or potential impact on the interests of the European Union?'

The questions referred for a preliminary ruling

The first question

42 As a preliminary point, it should be noted that the estimated value of the contract at issue in the main proceedings, amounting to BGN 482 668 excluding VAT (approximately EUR 247 000), is below the threshold for the applicability of Directive 2014/24, set at EUR 5 548 000 by Article 4(a) thereof with regard to public works contracts, and therefore that contract does not fall within the scope of that directive.

43 Nevertheless, as is clear from the Court's settled case-law, where, in regulating situations outside the scope of the EU measure concerned, national legislation seeks to adopt, directly and unconditionally, the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that provisions taken from that measure should be interpreted uniformly. That makes it possible to forestall future differences of interpretation and to ensure that those situations and situations falling within the scope of those provisions are treated in the same way (see, to that effect, judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraphs 36 and 37; of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraphs 33 and 34; and of 10 September 2020, *Tax-Fin-Lex*, C-367/19, EU:C:2020:685, paragraph 21).

44 In the present case, the Law on public procurement, which transposed Directive 2014/24 into Bulgarian law, applies more generally to all public procurement procedures subsidised by European funds, irrespective of the value of the contracts, as is clear from both Article 1(1) of that law and Article 49(2) of the Law on European funds.

45 Thus, since the provisions of Directive 2014/24 have been made directly and unconditionally applicable to situations which, like that of the contract at issue in the main proceedings, would normally fall outside its scope, the Court must answer the first question referred for a preliminary ruling.

46 By that question, the referring court asks, in essence, whether Article 58(4) of Directive 2014/24 must be interpreted as meaning that, in a public procurement procedure, a contracting authority may impose, as part of the selection criteria relating to the technical and professional ability of economic operators, requirements which are more stringent than the minimum requirements laid down by the national legislation in that regard.

47 It should be noted that the answer to that question clearly follows from the very wording of Article 58 of Directive 2014/24.

48 In accordance with the second subparagraph of Article 58(1) of that directive, a contracting authority may only impose criteria referred to in Article 58(2), (3) and (4) of that directive on economic operators as requirements for participation, relating respectively to the suitability to pursue the professional activity, economic and financial standing and technical and professional ability. Those requirements must, moreover, be limited to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. Furthermore, all of those requirements must be related and proportionate to the subject matter of the contract.

49 When determining the selection criteria, a contracting authority must also comply with the fundamental principles of procurement set out in Article 18(1) of Directive 2014/24. It must also, first, treat economic operators equally and without discrimination and act in a transparent and proportionate manner and, secondly, ensure that procurement is not designed with the intention of excluding it from the scope of that directive or of artificially narrowing competition, by designing it with the intention of unduly favouring or disadvantaging certain economic operators.

50 Nevertheless, as it is best placed to assess its own needs, the contracting authority has been granted a broad discretion by the EU legislature when determining selection criteria, as can be seen inter alia from the recurring use of the term ‘may’ in Article 58 of Directive 2014/24. Thus, in accordance with paragraph 1 of that article, it has some flexibility in setting those requirements for participation in a procurement procedure which it considers to be related and proportionate to the subject matter of the contract and appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. More specifically, according to paragraph 4 of that article, the contracting authority is free to determine which requirements for participation it considers appropriate, from its point of view, to ensure inter alia the performance of the contract to a quality standard which it considers appropriate.

51 Therefore, where a qualification requirement is justified by the subject matter of the contract, it remains proportionate to it and also complies with the other conditions recalled in paragraphs 48 and 49 of this judgment, Article 58 of Directive 2014/24 cannot prevent a contracting authority from imposing that requirement in the contract notice on the sole ground that it exceeds the minimum level imposed by national legislation. To that end, it is for national courts to interpret, to the greatest extent possible, their national law in conformity with EU law (see, to that effect, judgments of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 57, and of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 70).

52 In the present case, the qualification requirement at issue in the main proceedings appears to be justified in the light of Article 58 of Directive 2014/24, which, however, is a matter for the referring court to establish. First, that requirement undoubtedly has a link with the subject matter of the contract at issue in the main proceedings. Secondly, that requirement does not appear to have exceeded the discretion enjoyed by the contracting authority when defining selection criteria, particularly since three tenders were submitted even though the estimated value of that contract was modest as it was not even 5% of the threshold for the applicability of Directive 2014/24.

53 In the light of the foregoing considerations, the answer to the first question referred for a preliminary ruling is that Article 58(1) and (4) of Directive 2014/24 must be interpreted as not precluding, in a public procurement procedure, a contracting authority from being able to impose, under the selection criteria relating to the technical and professional abilities of the economic operators, stricter requirements than the minimum requirements set by the national legislation, provided that such requirements are appropriate to ensure that a candidate or tenderer has the technical and professional abilities to perform the contract to be awarded, that they are related to the subject matter of the contract and that they are proportionate to it.

The second and fourth questions

54 By its second question, the referring court asks, in essence, whether Articles 4 and 5 of Regulation No 2988/95 must be interpreted as meaning that the imposition by a contracting authority of selection criteria which infringe Article 58 of Directive 2014/24 may have different consequences depending on whether the infringement was committed without fault or intentionally or was caused by negligence.

55 The fourth question seeks, in essence, to ascertain whether the principle of proportionality must be interpreted as precluding national legislation under which a contracting authority which infringes public procurement rules may be fined 2% of the value of the contract concluded, including VAT, but limited to BGN 10 000, thus approximately EUR 5 100, without it being necessary to establish the seriousness of the infringement and its actual or potential impact on the interests of the European Union.

56 It should be noted that the second and fourth questions are based on the premiss that the qualification requirement at issue in the main proceedings was set by the contracting authority in breach of Article 58 of Directive 2014/24.

57 In so far as it is clear from the answer to the first question that such a requirement appears to be compatible with that provision, there is no need for the Court to examine the second and fourth questions.

The third question

58 By its third question, the referring court asks, in essence, whether Article 8(3) of Regulation No 2988/95, read in conjunction with recitals 43 and 122 of Regulation No 1303/2013, must be interpreted as precluding national authorities protecting the financial interests of the European Union from assessing the same facts differently in a public procurement procedure.

59 It should be recalled that, in accordance with Article 8(3) of Regulation No 2988/95, the sectoral rules must include the provisions necessary to ensure equivalent checks through the approximation of procedures and checking methods.

60 Recital 43 of the sectoral regulation applicable in the main proceedings, namely Regulation No 1303/2013, states, inter alia, that, in the interests of ensuring proportionate control arrangements and of safeguarding the added value of financial instruments, intended final recipients should not be deterred by there being an excessive administrative burden. Recital 122 of that regulation specifies that, in order to reduce the administrative burden on beneficiaries, specific rules should be introduced to reduce the risk of overlap between audits of the same operations by various institutions, namely the European Court of Auditors, the Commission and the audit authority.

61 However, it is clear from the order for reference that the audit of the management of the municipality of Lukovit was carried out by the Chamber of Audit with a view to ensuring compliance with the Law on public procurement and not compliance with Regulation No 1303/2013, with the result that that audit and the penalty imposed on the basis of it do not fall within the scope of that regulation.

62 Moreover, as the Commission noted in its written observations, Regulation No 1303/2013 does not prevent Member States from establishing bodies responsible for monitoring and auditing the activities of public or private bodies and therefore the competence of such bodies is not governed by that regulation.

63 Accordingly, recitals 43 and 122 of that regulation do not affect the answer to the question referred for a preliminary ruling.

64 It therefore appears that no provision of Regulations No 2988/95 and No 1303/2013 precludes a public procurement procedure from being subject to two checks, one carried out by the managing authority and the other by the audit authority. Both the independence of each of those authorities and the different purposes assigned to them mean that they may monitor in turn the same public procurement procedure.

65 Furthermore, the fact that, in the present case, the managing authority of the operational programme 'Environment 2014-2020' considered that the qualification requirement at issue in the main proceedings was not contrary to the rules on public procurement cannot give rise to any legitimate expectation on the part of the contracting authority. The right to rely on the principle of the protection of legitimate expectations extends only to a person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise unconditional and consistent assurances provided to him or her and originating from authorised, reliable sources. Nevertheless, the concept that a State is to be viewed as a single entity, which prevails both in public international law and in EU law, precludes, in principle, a national authority from relying on the principle of EU law of legitimate expectations in the context of a dispute between that authority and another component of that State (judgment of 20 May 2021, *Riigi Tugiteenuste Keskus*, C-6/20, EU:C:2021:402, paragraphs 69 and 70).

66 Thus, the fact that the managing authority of the operational programme 'Environment 2014-2020' had already approved, albeit implicitly, the qualification requirement at issue in the main proceedings cannot be relied on by the contracting authority in order to prevent the Chamber of Audit from examining its compatibility with EU law.

67 It should be noted, however, first, that the joint intervention by a managing authority and an audit authority must respect the rights and principles guaranteed by the Charter of Fundamental Rights of the European Union, and in particular the principle of proportionality. In that regard, Article 8(2) of Regulation No 2988/95 provides, moreover, that measures providing for checks must be determined so as not to entail excessive economic constraints or administrative costs.

68 In the present case, subject to verification by the national court, there is nothing to suggest that the recipients of EU funds would be deterred in the territory of the Republic of Bulgaria from applying for such funds on account of there being an excessive administrative burden.

69 Secondly, the *ex post* checks carried out by a managing authority and an audit authority cannot affect the legality of an award decision which has become final as regards the contract participants and the contracting authority, since the assessments made in that regard by the contracting authority fall within the scope of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

70 It follows from the foregoing considerations that Article 8(3) of Regulation No 2988/95, read in conjunction with Regulation No 1303/2013, must be interpreted as meaning that, subject to the principle of proportionality, it does not preclude national authorities protecting the financial interests of the European Union from assessing the same facts in a public procurement procedure differently.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **Article 58(1) and (4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017, must be interpreted as not precluding, in a public procurement procedure, a contracting authority from being able to impose, under the selection criteria relating to the technical and professional abilities of the economic operators, stricter requirements than the minimum requirements set by the national legislation, provided that such requirements are appropriate to ensure that a candidate or tenderer has the technical and professional abilities to perform the contract to be awarded, that they are related to the subject matter of the contract and that they are proportionate to it.**

2. **Article 8(3) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, read in conjunction with Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, must be interpreted as meaning that, subject to the principle of proportionality, it does not preclude national authorities protecting the financial interests of the European Union from assessing the same facts in a public procurement procedure differently.**

[Signatures]

---

* Language of the case: Bulgarian.

JUDGMENT OF THE COURT (Sixth Chamber)

27 October 2022 (*)

(References for a preliminary ruling – Approximation of laws – Motor vehicles – Directive 2007/46/EC – Technical specifications – Offer to supply spare parts equivalent to the originals of a specific mark – Absence of proof of type-approval – Declaration of equivalence to the original by the tenderer – Concept of 'manufacturer' – Means of proof – Public procurement – Directive 2014/25/EU)

In Joined Cases C-68/21 and C-84/21,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 14 December 2020, received at the Court on 3 and 11 February 2021, in the proceedings

Iveco Orecchia SpA

v

APAM Esercizio SpA (C-68/21),

Brescia Trasporti SpA (C-84/21),

intervening parties:

Veneta Servizi International Srl unipersonale,

VAR Srl,

Di Pinto & Dalessandro SpA,

Bellizzi Srl,

THE COURT (Sixth Chamber),

composed of P.G. Xuereb (Rapporteur), President of the Chamber, A. Kumin and I. Ziemele, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 10 March 2022,

after considering the observations submitted on behalf of:

– Iveco Orecchia SpA, by F. Brunetti and A. Vitale, avvocati,

– APAM Esercizio SpA, by E. Zani, avvocato,

– Brescia Trasporti SpA, by A. Salvadori, avvocato,

– Veneta Servizi International Srl unipersonale, by S. Lago and by A. Calegari, N. Creuso, N. de Zan and A. Manzi, avvocati,

– Var Srl, by M. Goria and S.E Viscio, avvocati,

– Di Pinto & Dalessandro SpA and Bellizzi Srl, by M. Lancieri, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by C. Pluchino, avvocatessa dello Stato,

– the European Commission, by G. Gattinara and M. Huttunen and by K. Talabér-Ritz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 May 2022,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 3(27) and Articles 10, 19 and 28 of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), and of Articles 60 and 62 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

2 The references have been made in two sets of proceedings between, on the one hand, Iveco Orecchia SpA and APAM Esercizio SpA (C-68/21) and, on the other hand, between Iveco Orecchia SpA and Brescia Trasporti SpA (C-84/21), concerning two public contracts awarded by APAM Esercizio SpA and Brescia Trasporti SpA, respectively.

Legal context

European Union law

Directive 2007/46

3 Recitals 2, 3 and 14 of Directive 2007/46 state:

‘(2) For the purposes of the establishment and operation of the internal market of the Community, it is appropriate to replace the Member States’ approval systems with a Community approval procedure based on the principle of total harmonisation.

(3) The technical requirements applicable to systems, components, separate technical units and vehicles should be harmonised and specified in regulatory acts. Those regulatory acts should primarily seek to ensure a high level of road safety, health protection, environmental protection, energy efficiency and protection against unauthorised use.

…

(14) The main objective of the legislation on the approval of vehicles is to ensure that new vehicles, components and separate technical units put on the market provide a high level of safety and environmental protection. …’

4 Article 1 of that directive, entitled ‘Subject matter’, provides:

‘This Directive establishes a harmonised framework containing the administrative provisions and general technical requirements for approval of all new vehicles within its scope and of the systems, components and separate technical units intended for those vehicles, with a view to facilitating their registration, sale and entry into service within the Community.

This Directive also establishes the provisions for the sale and entry into service of parts and equipment intended for vehicles approved in accordance with this Directive.

Specific technical requirements concerning the construction and functioning of vehicles shall be laid down in application of this Directive in regulatory acts, the exhaustive list of which is set out in Annex IV.'

5 Article 2 of that directive, entitled 'Scope', states in paragraph 1 thereof:

'This Directive applies to the type-approval of vehicles designed and constructed in one or more stages for use on the road, and of systems, components and separate technical units designed and constructed for such vehicles.

…'

6 Article 3 of Directive 2007/46, headed 'Definitions', states:

'For the purposes of this Directive and of the regulatory acts listed in Annex IV, save as otherwise provided therein:

1. "regulatory act" means a separate directive or regulation or a UNECE Regulation annexed to the Revised 1958 Agreement;

2. "separate directive or regulation" means a directive or regulation listed in Part I of Annex IV. This term includes also their implementing acts;

3. "type-approval" means the procedure whereby a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements;

…

5. "EC type-approval" means the procedure whereby a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements of this Directive and of the regulatory acts listed in Annex IV or XI;

…

23. "system" means an assembly of devices combined to perform one or more specific functions in a vehicle and which is subject to the requirements of any of the regulatory acts;

24. component" means a device subject to the requirements of a regulatory act and intended to be part of a vehicle, which may be type-approved independently of a vehicle where the regulatory act makes express provisions for so doing;

25. "separate technical unit" means a device subject to the requirements of a regulatory act and intended to be part of a vehicle, which may be type-approved separately, but only in relation to one or more specified types of vehicle where the regulatory act makes express provisions for so doing;

26. "original parts or equipment" means parts or equipment which are manufactured according to the specifications and production standards provided by the vehicle manufacturer for the production of parts or equipment for the assembly of the vehicle in question. This includes parts or equipment which are manufactured on the same production line as these parts or equipment. It is presumed unless the contrary is proven, that parts constitute original parts if the part manufacturer certifies that the parts match the quality of the components used for the assembly of the vehicle in question and have been manufactured according to the specifications and production standards of the vehicle manufacturer;

27. "manufacturer" means the person or body who is responsible to the approval authority for all aspects of the type-approval or authorisation process and for ensuring conformity of production. It is not essential that the person or body be directly involved in all stages of the construction of

the vehicle, system, component or separate technical unit which is the subject of the approval process;

…’

7 Under Article 5 of Directive 2007/46, entitled ‘Obligations of manufacturers’:

‘1. The manufacturer is responsible to the approval authority for all aspects of the approval process and for ensuring conformity of production, whether or not the manufacturer is directly involved in all stages of the construction of a vehicle, system, component or separate technical unit.

…’

8 Article 10 of that directive, entitled ‘Specific provisions concerning systems, components or separate technical units’, is worded as follows:

‘1. Member States shall grant an EC type-approval in respect of a system which conforms to the particulars in the information folder and which meets the technical requirements laid down in the relevant separate directive or regulation, as prescribed in Annex IV or Annex XI.

2. Member States shall grant a component or separate technical unit EC type-approval in respect of a component or separate technical unit which conforms to the particulars in the information folder and which meets the technical requirements laid down in the relevant separate directive or regulation, as prescribed in Annex IV.

…’

9 Under Article 19 of that directive, entitled ‘EC type-approval mark’:

‘1. The manufacturer of a component or separate technical unit, whether or not it is part of a system, shall affix to each component or unit manufactured in conformity with the approved type the EC type-approval mark, required by the relevant separate directive or regulation.

2. Where no EC type-approval mark is required, the manufacturer shall affix at least his trade name or trade mark, and the type number and/or an identification number.

…’

10 Article 28 of that directive, entitled ‘Sale and entry into service of components and separate technical units’, provides, in paragraph 1 thereof:

‘Member States shall permit the sale or entry into service of components or separate technical units if and only if they comply with the requirements of the relevant regulatory acts and are properly marked in accordance with Article 19.’

11 Article 38(1) of Directive 2007/46, entitled ‘Information intended for manufacturers of components or separate technical units’, provides:

‘The vehicle manufacturer shall make available to the manufacturers of components or separate technical units all those particulars including, as the case may be, drawings specifically listed in the annex or appendix to a regulatory act that are necessary for EC type-approval of components or separate technical units, or necessary to obtain an authorisation under Article 31.

…’

12 Annex IV to Directive 2007/46, entitled ‘Requirements for the purpose of EC type-approval of vehicles’, contains two parts. Part I of that annex contains the list of European Union regulatory acts, while Part II lists certain regulations of the United Nations Economic Commission for Europe (UNECE), stating that an approval must be recognised as an alternative to an EC type-approval granted under the relevant separate directive or regulation in the table of Part I.

Regulation (EC) No 1400/2002

13 Article 1(u) of Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ 2002 L 203, p. 30), which, under Article 12(3) of that regulation, expired on 31 May 2010, defined:

‘“spare parts of matching quality” means exclusively spare parts made by any undertaking which can certify at any moment that the parts in question match the quality of the components which are or were used for the assembly of the motor vehicles in question.’

Directive 2014/25

14 Recitals 56 and 83 of Directive 2014/25 are worded as follows:

‘(56) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that those measures are in conformity with the TFEU.

…

(83) …

Consequently, technical specifications should be drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows that objective to be achieved in the best way possible. …

…’

15 Article 1 of that directive, headed ‘Subject matter and scope’, provides:

‘1. This Directive establishes rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15.

2. Procurement within the meaning of this Directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 8 to 14.’

16 Article 3(1) of that directive provides:

‘For the purpose of this Directive “contracting authorities” means State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.’

17 Article 4(1)(a) of Directive 2014/25 provides:

‘For the purpose of this Directive contracting entities are entities, which:

(a) are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 8 to 14’.

18 Under Article 11 of that directive, entitled ‘Transport services’:

‘This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

…’

19 Article 15 of that directive, in the version applicable to the facts in the main proceedings, provided that it applied, in the case of supply contracts, to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than a threshold of EUR 414 000, save where those contracts were excluded by virtue of the exclusions in Articles 18 to 23 or pursuant to Article 34 concerning the pursuit of the activity in question.

20 Article 60 of that directive, entitled ‘Technical specifications’, is worded as follows:

‘1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. The technical specifications shall lay down the characteristics required of a works, service or supply.

…

2. Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

…

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or – when any of those do not exist – national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words “or equivalent”;

…

4. Unless justified by the [subject matter] of the contract, technical specifications shall not refer to a specific make or source, or to a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the [subject matter] of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words “or equivalent”.

5. Where a contracting entity uses the option of referring to the technical specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the ground that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in Article 62, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

…’

21 Under Article 62 of Directive 2014/25, entitled ‘test reports, certification and other means of proof’:

‘1. Contracting entities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

Where contracting entities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting entities.

…

2. Contracting entities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer where the economic operator concerned had no access to such certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned and provided that the economic operator concerned thereby proves that the works, supplies or services meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

…’

Italian law

Order No 32721 of the Ministry of Infrastructure and Transport of 28 April 2008

22 Directive 2007/46 was transposed in Italian law by decreto n^{o} 32721 del Ministero delle Infrastrutture e dei Trasporti – Recepimento della direttiva 2007/46/CE del Parlamento europeo e del Consiglio del 5 settembre 2007, relativa all’omologazione dei veicoli a motore e dei loro rimorchi, nonché dei sistemi, componenti ed entità tecniche destinati a tali veicoli (Order No 32721 of the Ministry of Infrastructure and Transport transposing Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles) of 28 April 2008 (Ordinary Supplement to GURI No 162 of 12 July 2008).

23 Article 3(ff) of that order defines a ‘manufacturer’ as ‘the person or body who is responsible to the approval authority for all aspects of the type-approval or authorisation process and for ensuring conformity of production. It is not essential that the person or body be directly involved in all stages of the construction of the vehicle, system, component or separate technical unit which is the subject of the approval.’

Decree of the President of the Republic No 445 of 28 December 2000

24 Under Article 49 of the decreto del Presidente della Repubblica n^{o} 445 – Testo unico delle disposizioni legislative e regolamentari in materia di documentazione amministrativa (Decree of the President of the Republic No 445 on the consolidated text of the laws and regulations on administrative documentation) of 28 December 2000 (Ordinary Supplement to GURI No 42 of 20 February 2001), ‘certificates … of origin, EC conformity, trade marks or patents cannot be replaced by another document, unless otherwise provided by the applicable legislation’.

Legislative Decree No 50 of 18 April 2016

25 Under Article 68 of the decreto legislativo n^{o} 50 – Codice dei contratti pubblici(Legislative Decree No 50 laying down a public procurement code) of 18 April 2016 (Ordinary Supplement to GURI No 91 of 19 April 2016):

‘1. The technical specifications defined in point 1 of Annex XIII shall be included in the procurement documents and shall define the characteristics required of the works, services or supplies. …

…

5. Without prejudice to mandatory national technical rules, the technical specifications shall be formulated in one of the following ways: … (b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or – when any of those do not exist – national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies. Each reference shall be accompanied by the words "or equivalent" …

6. Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraph 5 is not possible. Such reference shall be accompanied by the words "or equivalent".

7. Where a contracting authority uses the option of referring to the technical specifications referred to in point (b) of paragraph 5, it shall not declare that tender inadmissible or shall not reject it on the grounds that the works, supplies or services offered do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in Article 86, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.'

26 Article 86(5) of this legislative decree provides that: 'Proof of the technical capability of economic operators' may be demonstrated by one or more of the means listed in Annex XVII, Part II, depending on the nature, quantity or importance, and use of the works, supplies or services'.

27 Part II(k) of Annex XVII to that legislative decree states that the means of proof demonstrating the technical capability for the products to be supplied are: '(i) samples, descriptions or photographs the authenticity of which must be certified at the request of the contracting authority; (ii) certificates issued by official bodies or departments responsible for quality control and recognised as competent, confirming the conformity of products well identified by references to technical specifications or standards'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-68/21

28 By notice of invitation to tender published on 21 August 2018, APAM Esercizio, a public undertaking operating in the local public transport sector in Mantua (Italy), launched a procedure for the conclusion of a framework agreement for the supply of 'original Iveco spare parts, or equivalent, for buses', the value of which was estimated at EUR 710 000.

29 Article 5.1 of the tender specifications, entitled 'Typology of the spare parts', distinguished between three types of spare parts, namely 'Spare parts intended for vehicle safety and environmental protection', 'Original (or first-fit) spare parts' and 'equivalent spare parts', the latter being defined as 'spare parts (parts, components, equipment) of a quality equivalent to that of the original, or parts of a quality at least equal to that of the components used for vehicle assembly, produced according to the technical specifications and production standards of the manufacturer of the original spare part'.

30 In that regard, it was stated that 'in accordance with EU legislation and the legal provisions in force, the aforementioned [equivalent] spare parts may be manufactured by any undertaking able to certify at any time, in accordance with the rules in force (UNI-CEI-ENISO/IEC 17050), that the quality of the spare parts is consistent with that of the original components used in the assembly of the motor vehicles in question'.

31 Article 5.2 of the tender specifications, headed ‘Certifications and declarations’, stated that, in the event of the supply of an equivalent spare part, the tenderer ‘shall submit in the course of the tender procedure, in respect of any equivalent spare part proposed, a certificate of conformity or a specific type-approval for the replacement component, provided by the manufacturer, the type-approval body or the laboratory for tests certified according to ISO 45000 standard’.

32 In accordance with Article 15 of the tender specifications, entitled ‘administrative documentation’, the administrative documents to be submitted with the offer included, as laid down in Article 15(d), ‘the appropriate technical documentation for each equivalent spare part proposed, accompanied by: … a product type-approval certificate, where mandatory, issued by the manufacturer of the equivalent spare part proposed; a certificate as to the equivalence of the product proposed in relation to the relevant original (or first-fit) product, in that it is a perfect substitute requiring no adaptation of the spare part, the unit or the system into which it is to be fitted, and performance characteristics ensuring the product’s regular functionality and safety in the system, as well as an identical lifetime, issued by the producer of the equivalent spare part proposed’.

33 Three undertakings participated in the tendering procedure, including, inter alia, Veneta Servizi International Srl unipersonale (‘VSI’) and Iveco Orecchia, two undertakings established in Italy.

34 By decision of 29 January 2019, APAM Esercizio made a final award of the contract to VSI.

35 By an action brought before the Tribunale amministrativo regionale della Lombardia – sezione staccata di Brescia (Regional Administrative Court, Lombardy, Brescia Section, Italy), Iveco Orecchia, which was ranked second, challenged the award of the contract to VSI. In support of that action, Iveco Orecchia claimed, inter alia, that VSI should have been excluded from the call for tenders because the tender which it had submitted was incomplete, given that that undertaking had not provided, for the purposes of proving that the spare parts which it allegedly manufactured complied with the technical specifications, the certificates of approval or conformity and the technical documents, the submission of which was required, on pain of exclusion, by the tender specifications. According to Iveco Orecchia, VSI had merely submitted a general self-certification of equivalence of those spare parts, claiming, that it was both the ‘*fabbricante*’ and the ‘*costruttore*’ of those spare parts, although it was merely a dealer.

36 By judgment of 25 June 2019, le Tribunale amministrativo regionale per la Lombardia – Sezione staccata di Brescia (Regional Administrative Court, Lombardy, Brescia Section) dismissed Iveco Orecchia’s action as unfounded. That court held, inter alia, that the rules attached to the call for tenders relating to the documentation to be submitted by tenderers required production of a certificate of conformity or a specific type-approval, which means that it was sufficient to submit such a certificate. Moreover, Iveco Orecchia did not establish, as regards the individual spare parts covered by the relevant market, on what legal basis it was also necessary to adduce proof confirming the approval of those parts.

37 Iveco Orecchia brought an appeal against that judgment before the Consiglio di Stato (Council of State, Italy).

Case C-84/21

38 By notice of invitation to tender published on 21 November 2018, Brescia Trasporti, a public undertaking operating in the local public transport sector in Brescia (Italy), launched an award procedure, with a basic contract value estimated at EUR 2 100 000, ‘for the supply of spare parts for Iveco buses fitted with an Iveco engine – CIG 7680570EDB’.

39 Article 1 of the technical specifications annexed to the call for tenders, entitled ‘Technical definitions’, defined three types of spare parts, namely, ‘original spare parts’, ‘first-fit original spare parts’ and ‘equivalent spare parts’, the latter being defined as ‘[spare] parts of a quality at least equal to that of the components used for vehicle assembly, produced in accordance with the spare part manufacturer’s own technical specifications and production standards’.

40 Under Article 3 of the technical specifications, in the case of ‘equivalent quality spare parts’, the tender had to be accompanied, on pain of exclusion, by a ‘certificate from the spare part manufacturer

showing, in respect of each spare part (i) that its quality is of a level high enough to ensure that its use will not compromise the reputation of the authorised network; (ii) that it is perfectly interchangeable with the original spare parts, … and requires no adaptation of the spare part, the unit or the system onto which it is to be fitted'. That provision also provided that 'the supplier shall also submit the product type-approval certificate, where this is mandatory. As regards brake linings, brake discs and drums, the supplier shall, in addition to the aforementioned documents, provide a certificate confirming Community type-approval [under Regulation No 90 (UNECE)].'

41 Two undertakings took part in the tendering procedure, namely VAR Srl, a company also established in Italy, and Iveco Orecchia.

42 By decision of 28 February 2019, Brescia Trasporti made a final award of the contract to VAR.

43 By an action brought before the Tribunale amministrativo regionale della Lombardia – sezione staccata di Brescia (Regional Administrative Court, Lombardy, Brescia Section), Iveco Orecchia, which was ranked in second position, challenged the decision awarding the contract to VAR. In support of that action, Iveco Orecchia claimed, inter alia, that VAR should have been excluded from the call for tenders because the tender which it had submitted was incomplete, since that undertaking had not provided, in respect of the equivalent spare parts which it proposed, certificates from the manufacturer demonstrating the equivalence of those spare parts. The certificates from VAR itself are irrelevant, since it is a trader/distributor of spare parts and not a '*fabbricante/costruttore*'. In addition, VAR did not provide any certificates confirming the type-approval of those spare parts or any information concerning their possible approval.

44 By judgment of 26 August 2019, le Tribunale amministrativo regionale per la Lombardia – Sezione staccata di Brescia (Regional Administrative Court, Lombardy, Brescia Section) dismissed Iveco Orecchia's action as unfounded. That court held, inter alia, that a tenderer who demonstrates the equivalence of its products cannot be excluded from a call for tenders and that the relevant legislation did not require each component of a vehicle to be approved. The argument that all spare parts covered by the regulatory acts listed in Annex IV to Directive 2007/46 must be subject to a specific type-approval is unfounded. The absence of proof of type-approval for equivalent spare brake drums offered by VAR, for which approval is required by Regulation No 90 UNECE, is not relevant, given, in particular, that that regulation applies only to vehicles registered after November 2016.

45 Iveco Orecchia brought an appeal against that judgment before the referring court.

46 Di Pinto & Dalessandro Spa and Bellizzi srl, two companies established in Italy and operating in the bus maintenance market, participated in that procedure.

Questions referred for a preliminary ruling

47 The referring court considers that a distinction must be drawn between two aspects relating to the call for tenders procedures at issue, namely, first, that of the equivalence of spare parts proposed by the tenderers to original spare parts, which presupposes an assessment of the quality of the spare parts at issue and a comparison of the goods concerned and, second, that of the type-approval of such spare parts, which implies that they correspond to a European or national technical specification.

48 That court also observes that the principle that, in the context of a call for tenders, equivalent products are allowed is intended to safeguard free competition and equal treatment between tenderers.

49 Spare parts subject to approval, in particular those capable of compromising vehicle safety and environmental performance, may be sold only where they have been type-approved and authorised by the type-approval authority. In that regard, Annex IV to Directive 2007/46 contains a detailed list of the categories of components for which there are relevant and specific rules on approval.

50 In the procurement procedures at issue in the main proceedings, the rules set out in the call for tenders relating to the documentation to be provided by tenderers required a type-approval certificate to be provided, in the event that such approval was compulsory. In the present case, however, the successful tenderers submitted, and the contracting authorities accepted, as an alternative proof of the equivalence

of the spare parts proposed to the original parts, a declaration by the tenderer which was not accompanied by the required type-approval certificate or other equivalent technical documents, for example conformity verification tests.

51 In the first place, the question therefore arises whether, in the case of equivalent spare parts subject to approval, the tenderer must also produce, on pain of exclusion of its tender, the type-approval certificate as evidence that those parts are indeed equivalent to the original parts or, at the very least, adduce concrete proof that the spare part has been type-approved, or whether it is sufficient, as an alternative to those documents, to supply a declaration by the tenderer that the spare parts proposed in its tender are equivalent to the original parts.

52 According to the referring court, it appears that, if a spare part is covered by one of the regulatory acts listed in Annex IV to Directive 2007/46, it may be marketed only if it has been subject to prior approval, in accordance with the relevant provisions of that directive and with the principles of equal treatment, reasonableness, proper functioning and impartiality. However, it cannot be ruled out that it may be sufficient, instead of proof of such approval, to provide a certificate of equivalence stating that the spare part complies with the technical specifications laid down in the call for tenders at issue.

53 In the second place, it is necessary to determine which entity is responsible for issuing the declarations of equivalence and, in particular, whether they must necessarily be drawn up by the manufacturer of the spare part proposed or whether they may also be drawn up by a reseller or dealer.

54 According to the referring court, the concept of '*costruttore*', as defined in Article 3(27) of Directive 2007/46, may be interpreted restrictively which would result in that concept being the same as that of '*fabbricante*'. Article 1(1)(u) of Regulation No 1400/2002 supports such an approach. By contrast, that concept may also be understood in a broader sense, namely as covering the producer, within the meaning of the EU legislation on consumer protection or the operator who places on the market and markets, under its own name and own responsibility, equivalent parts manufactured by others.

55 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings in the two cases in the main proceedings and to refer the following questions, worded identically in each of those two cases, to the Court of Justice for a preliminary ruling:

'(1) Is it compatible with EU law, and in particular with the provisions of Directive 2007/46/EC (laid down in Articles 10, 19 and 28 of that directive) and the principles of equal treatment and impartiality, open competition and sound administration, for – with specific reference to the supply through public procurement of replacement parts for buses intended for public service – a contracting authority to be allowed to accept replacement parts intended for a particular vehicle, made by a manufacturer other than the vehicle manufacturer, and therefore not approved together with the vehicle, falling into one of the categories of components covered by the technical rules listed in Annex IV to that directive ([entitled] 'List of requirements for the purpose of EC type-approval of vehicles') and put to tender without being accompanied by the type-approval certificate and without any information on the actual type-approval, and indeed on the assumption that type-approval is not needed, as only a declaration of equivalence to the type-approved original made by the tenderer is sufficient?

(2) Is it compatible with EU law, and in particular Article 3(27) of Directive 2007/46/EC to allow – in relation to the supply through public procurement of replacement parts for buses intended for public service – an individual tenderer to describe itself as 'manufacturer' of a specific non-original replacement part intended for a particular vehicle, especially where it falls into one of the categories of components covered by the technical rules listed in Annex IV (List of requirements for the purpose of EC type-approval of vehicles) to Directive 2007/46/EC, or must that tenderer prove – for each of the replacement parts thus subject to tender and in order to certify their equivalence to the technical specifications of the tender – that it is the entity who is responsible to the approval authority for all aspects of the type-approval and for ensuring conformity of production and the related level of quality and is directly involved in at least some of the stages of the construction of the component which is the subject of the approval, and if so, by what means is such proof to be provided?'

Procedure before the Court

56 By decision of 16 March 2021, Cases C-68/21 and C-84/21 were joined for the purposes of the written and oral parts of the procedure, and of the judgment.

Consideration of the questions referred

Preliminary observations

57 In the first place, it should be noted as a preliminary point that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide on the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 31 and the case-law cited).

58 To that end, the Court can extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings (judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 32 and the case-law cited).

59 In the present case, while it is true that the referring court refers, in its questions for a preliminary ruling, only to certain provisions of Directive 2007/46 and only to a number of legal principles, it is apparent both from the explanations provided by that court and from its questions referred for a preliminary ruling that those questions relate to the means of proof which tenderers may or must be asked to submit in the context of a call for tenders. It follows that, in order to give a useful answer to the questions referred, account must also be taken of the provisions of EU law relating specifically to the means of proof which tenderers may or must be asked to submit in the context of a call for tenders in order to establish that their tenders comply with the technical specifications laid down in that call for tenders.

60 As regards call for tenders such as those concerned by the cases in the main proceedings, those provisions appear in Articles 60 and 62 of Directive 2014/25. Furthermore, as the Commission noted in its written observations, the two calls for tenders at issue in the main proceedings fall within the scope of that directive, in accordance with Article 1(1) and (2), Article 4(1), Article 11(1) and Article 15 of that directive, given that they concern the acquisition of supplies by contracting entities operating a network intended to provide a service to the public in the field of transport by bus, those supplies are intended for the performance of that activity and the value of the contracts at issue in the main proceedings exceeds the threshold laid down by that directive.

61 In the second place, it should be noted that although, under Article 88 of Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC (OJ 2018 L 151, p. 1), Directive 2007/46 was repealed by that regulation with effect from 1 September 2020, it is however apparent from the order for reference that the facts giving rise to the main proceedings took place before that date. Consequently, the provisions of Directive 2007/46 are the relevant provisions for the purpose of answering the questions referred for a preliminary ruling.

62 In the third place, it is apparent from the questions referred for a preliminary ruling that they relate only to legislation concerning spare parts for buses belonging to the types of components, within the meaning of Article 3(24) of Directive 2007/46, covered by the regulatory acts, within the meaning of Article 3(1) of that directive, which are listed in Annex IV to that directive.

The first question

63 By its first question, which is divided into two parts, the referring court asks, in essence, whether Article 10(2), Article 19(1) and Article 28(1) of Directive 2007/46 must be interpreted as precluding a contracting authority from accepting, in the context of a call for tenders for the supply of spare parts for buses intended for public service, a tender proposing components which are covered by the regulatory acts listed in Annex IV to Directive 2007/46, without being accompanied by a certificate confirming the type-approval of such spare parts and without submitting any proof of the actual existence of such approval, or, if, in the light of Articles 60 and 62 of Directive 2014/25, a declaration of equivalence to the type-approved spare parts, issued by the tenderer, is sufficient to permit such acceptance.

64 As regards the first part of that question, it should be noted, as a preliminary point, that Directive 2007/46 aims, as is apparent from recitals 2 and 3 of that directive, to 'replace the Member States' approval systems with a Community approval procedure based on the principle of total harmonisation' and for 'the technical requirements applicable to systems, components, separate technical units and vehicles [to] be harmonised and defined in regulatory acts'.

65 Thus, the first paragraph of Article 1 of Directive 2007/46 defines the subject matter of that directive as establishing 'a harmonised framework containing the administrative provisions and general technical requirements for approval of all new vehicles within its scope and of the systems, components and separate technical units intended for those vehicles, with a view to facilitating their registration, sale and entry into service within the Community'.

66 According to the second paragraph of Article 1 of that directive, it 'also establishes the provisions for the sale and entry into service of parts and equipment intended for vehicles approved in accordance with this Directive'.

67 Furthermore, in order to define the scope of the first question, it should be noted, first, that, although Directive 2007/46 distinguishes between several forms of type-approval, it may be inferred from the specific reference in that question to Articles 10, 19 and 28 of that directive that the first question refers only to EC type-approval, within the meaning of Article 3(5) of that directive, namely the act by which a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements of that directive and of the regulatory acts listed in Annex IV or Annex XI thereto; the latter annex refers to special purposes vehicles and the provisions which are applicable to them.

68 Article 10 of Directive 2007/46 appears in Chapter IV of that directive, entitled 'Conduct of EC type-approval procedures', while Article 19 of that directive concerns, as is apparent from its title, the 'EC type-approval mark' and Article 28(1) of that directive, referred to by the referring court in its order for reference, refers to Article 19 of Directive 2007/46.

69 Second, Directive 2007/46 establishes, in Article 6, the procedures to be followed for the EC type-approval of vehicles and, in Article 7, the procedure to be followed for the EC type-approval of systems, components or separate technical units. Since it is apparent from the order for reference that the components at issue in the main proceedings were not approved with the type of vehicle for which they were proposed by the tenderers, but were presented as equivalent to the original components approved with that type of vehicle, it must be held that the provisions of Directive 2007/46 relating to EC type-approval of systems, components or separate technical units are relevant to the present case.

70 In that regard, it is apparent, first of all, from the wording of Article 10(2) of Directive 2007/46 that Member States grant a component EC type-approval in respect of a component which conforms to the particulars in the information folder and which meets the technical requirements laid down in the relevant separate directive or regulation, as prescribed in Annex IV.

71 Next, Article 19(1) of Directive 2007/46 provides that the manufacturer of a component is to affix to each component manufactured in conformity with the approved type the EC type-approval mark, required by the relevant separate directive or regulation.

72 Lastly, under Article 28(1) of Directive 2007/46, Member States are to permit the sale or entry into service of components only if those components satisfy the requirements of the relevant regulatory acts and are properly marked in accordance with Article 19 of that directive.

73 It is apparent, first, from a combined reading of Article 10(2), Article 19(1), Article 28(1) of that directive and Annex IV thereto that the components covered by the regulatory acts, within the meaning of Article 3(1) of that directive, listed in that annex, are subject to compulsory type-approval, provided that those regulatory acts provide for such approval.

74 Second, it follows, as the Advocate General observed in point 51 of his Opinion, that the instrument selected by the EU legislature in the context of Directive 2007/46 to establish that vehicle components comply with the requirements laid down in the regulatory acts listed in Annex IV, is that of type-approval.

75 Such an interpretation is confirmed by the main objective of the legislation on the approval of vehicles which is, in accordance with recital 14 of Directive 2007/46, ‘to ensure that new vehicles, components and separate technical units put on the market provide a high level of safety and environmental protection’. By means of an EC component type-approval, the Member State concerned certifies, as follows from the definition in Article 3(5) of Directive 2007/46, that that component satisfies the relevant technical requirements listed in Annex IV or Annex XI thereto, thereby confirming that that component provides a high level of safety and environmental protection.

76 It is true that it is apparent from Article 19(2) of Directive 2007/46 that EC type-approval is not required for every type of component. That provision concerns the situation where the affixing of an EC type-approval mark is not required, which means that certain types of components may be exempt from the obligation to obtain such approval.

77 However, that finding does not affect the conclusion referred to in paragraph 73 of the present judgment that the components covered by the regulatory acts listed in Annex IV to Directive 2007/46 are subject to compulsory type-approval, provided that those regulatory acts require such approval. Therefore, such components may be sold or entered into service, in accordance with Article 28(1) and Article 19(1) of that directive, only if they have been subject to such approval.

78 That conclusion is not called into question by the principles of equal treatment and impartiality, free competition and sound administration, to which the referring court has referred. As regards, first, the principle of equal treatment, it must be borne in mind that, in so far as a type of component must be approved, that obligation is incumbent on all manufacturers. As the Advocate General observed, in substance, in point 56 of his Opinion, that compulsory approval does not therefore stem from any discrimination to the detriment of manufacturers of spare parts equivalent to original spare parts by comparison with manufacturers of those original spare parts.

79 Second, as regards the effect of such a compulsory approval on competition, besides the fact that, as has just been established, that obligation is incumbent on any manufacturer of components, suffice it to note that, in accordance with Article 38(1) of Directive 2007/46, the manufacturer of a vehicle must make available to manufacturers of components for that type of vehicle all the particulars necessary for the EC type-approval of such components.

80 Third, concerning the principles of impartiality and sound administration, the referring court has not explained how those principles could be relevant for the purpose of interpreting the provisions of Directive 2007/46 referred to in the first question.

81 As regards the second part of the first question, which seeks to determine whether a contracting authority may accept, in the context of a call for tenders such as those referred to in that question, a tender proposing components covered by the regulatory acts listed in Annex IV to Directive 2007/46 which does not establish that those components have been subject to approval, as long as such a tender is accompanied by a declaration by the tenderer that those components are equivalent to the original approved parts, it must be noted, as does the Advocate General in point 59 of his Opinion, that the concepts of ‘type-approval’ and ‘equivalence’ have different contents.

82 As is apparent from Article 3(5) of Directive 2007/46, type-approval certifies, following appropriate checks carried out by the competent authorities, that, as regards the EC type approval of components, a type of component satisfies the requirements of Directive 2007/46, including the technical requirements set out in the regulatory acts listed in Annex IV to that directive.

83 The concept of ‘equivalence’ is not defined in Directive 2007/46 and designates, according to its ordinary meaning, the status of having the same value or function. Therefore, the equivalence of a component concerns the question whether that component has the same qualities as another component, whether or not the latter has been approved. As the Advocate General observed in point 62 of his Opinion, proof of type-approval is therefore not interchangeable with proof of equivalence, since a type-approved component can be non-equivalent to an original component referred to in a call for tenders.

84 Admittedly, it cannot be ruled out that non-type-approved components may in fact be equivalent to the original components referred to in the call for tenders at issue. However, since the EU legislature decided, as has been noted in paragraph 77 of the present judgment, that components of a type for which the regulatory acts listed in Annex IV to Directive 2007/46 require approval may be sold or entered into service, in accordance with Article 28(1) and Article 19(1) of that directive, only if that type of component has been subject to such approval, it must be found that, for those types of components, proof of approval cannot be replaced by a declaration of equivalence issued by the tenderer.

85 That finding is not called into question by the provisions of Articles 60 and 62 of Directive 2014/25, which refer to the technical specifications which may be included in a call for tenders such as those which gave rise to the main proceedings and the proof by which tenderers are able to demonstrate that their tenders meet those technical specifications.

86 It follows from Article 60(2) of that directive that the technical specifications which, under Article 60(1) of that directive, define the characteristics required of the works, services or supplies referred to in that directive, afford economic operators equal access to the procurement procedure and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

87 Article 60(4) of Directive 2014/25 allows, on an exceptional basis, technical specifications to refer to ‘trade marks, patents, types or a specific origin or production’, if that is necessary to provide a sufficiently precise and intelligible description of the subject matter of the contract, and provided that such a reference is accompanied by the words ‘or equivalent’, an option which was relied on in the calls for tenders which gave rise to the main proceedings.

88 In such a case, Article 60(5) of Directive 2014/25 allows the tenderer to prove that the solutions which it proposes satisfy in an equivalent manner the requirements defined in the technical specifications ‘by any appropriate means, including the means of proof referred to in Article 62’ of that directive, which includes, in addition to the means referred to in Article 62(1) of that directive, such as a certificate issued by a conformity assessment body, other ‘appropriate means of proof’ within the meaning of Article 62(2) of that directive.

89 As is also apparent from recital 83 of Directive 2014/25, those provisions seek to ensure that the technical specifications are drawn up in terms of functional and performance requirements and to prevent those technical specifications from artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator.

90 However, it should be noted that, in accordance with recital 56 thereof, Directive 2014/25 cannot disregard mandatory requirements imposed by other rules of EU law concerning, inter alia, safety and environmental protection, such as the approval requirement laid down, for the same reasons, by Directive 2007/46.

91 Therefore, as the Advocate General observes in point 80 of his Opinion, Directive 2014/25 must not prevent the application of Directive 2007/46 inasmuch as that directive seeks, in accordance with

recital 3 thereof, to ensure a high level of road safety, health protection, environmental protection, energy efficiency and protection against unauthorised use. To the extent that Directive 2007/46 requires, with a view to attaining those very objectives, that certain vehicle spare parts be type-approved, that requirement becomes mandatory and cannot be circumvented by recourse to Directive 2014/25.

92 In the main proceedings, the calls for tenders related to the supply of components which could be Iveco original parts or equivalent parts. As has been pointed out in paragraph 77 of the present judgment, the components referred to in the regulatory acts listed in Annex IV to Directive 2007/46, which are subject to compulsory type-approval, may be sold or entered into service only if they have been subject to such approval.

93 Consequently, in order to satisfy the mandatory requirements laid down by Directive 2007/46, since the components are subject to compulsory type-approval, only components which have been subject to such approval and may therefore be marketed, can be regarded as equivalent within the meaning of the terms of those calls for tenders.

94 In the light of the foregoing considerations, the answer to the first question is that Article 10(2), Article 19(1) and Article 28(1) of Directive 2007/46 must be interpreted as precluding a contracting authority from accepting, in the context of a call for tenders for the supply of spare parts for buses intended for public service, a tender proposing components belonging to a type of component covered by the regulatory acts listed in Annex IV to Directive 2007/46, without being accompanied by a certificate confirming the type-approval of such a component and without submitting any proof of the actual existence of such approval, provided that those regulatory acts provide for such approval.

The second question

95 By its second question, the referring court asks, in essence, whether Articles 60 and 62 of Directive 2014/25 must be interpreted as precluding, in the light of the definition of the term ‘manufacturer’ in Article 3(27) of Directive 2007/46, a contracting authority from accepting, in the context of a call for tenders for the supply of spare parts for buses intended for public service, as proof of the equivalence of components, covered by the regulatory acts listed in Annex IV to that directive and offered by the tenderer, a declaration of equivalence issued by that tenderer, where that tenderer, while describing itself as a manufacturer of those components, is merely a reseller or dealer.

96 As the Court pointed out, in its judgment of 12 July 2018, *VAR and ATM* (C-14/17, EU:C:2018:568, paragraph 35), as regards the interpretation of Article 34 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), ‘when the technical specifications in the contract documentation refer to a specific mark, origin or production, the contracting authority must require the tenderer to submit, already in its tender, proof that the products which it proposes are equivalent to those defined in the technical specifications.’

97 In that judgment, the Court also stated that the contracting authority ‘has a discretion in determining the means that may be used by tenderers to prove such equivalence in their tenders. That discretion must, however, be exercised in such a way that the means of proof allowed by the contracting entity actually enable that entity to carry out a meaningful assessment of the tenders submitted to it and do not go beyond what is necessary in order to do so’.

98 The same interpretation must be adopted in respect of Articles 60 and 62 of Directive 2014/25, which replaced Directive 2004/17, since those articles require, like Article 34 of the latter directive, that a tenderer wishing to rely on the option to propose products equivalent to those defined by reference to a specific mark, origin or production already provide, in its tender, by any appropriate means, proof of the equivalence of the products concerned.

99 It follows from that case-law that, notwithstanding the contracting authority’s discretion in that regard, the means of proof accepted by it must enable it to carry out an effective assessment of the tender in order to determine whether it complies with the technical specifications referred to in the call for tenders in question.

100 In order to be considered an ‘appropriate means’, within the meaning of Article 60(5) and Article 62(2) of Directive 2014/25, a declaration of equivalence must therefore be issued by a body which is able to guarantee such equivalence, which means that that body assumes technical responsibility for the components in question and possesses the means necessary to ensure the quality of those components. Those conditions can be satisfied only by the producer or manufacturer of those components.

101 Such an interpretation is confirmed by Article 62(2) of Directive 2014/25, which provides that an appropriate means of proof may be a ‘technical dossier of the manufacturer’, which means that that proof is issued by the manufacturer of the spare part in question. That interpretation is also consistent with Article 1(u) of Regulation No 1400/2002, according to which, for the purposes of that regulation, ‘spare parts of matching quality’ meant ‘exclusively spare parts made by any undertaking which can certify at any moment that the parts in question match the quality of the components which are or were used for the assembly of the motor vehicles in question’. Although that regulation expired on 31 May 2010, Article 1(u) thereof confirmed that, in order to be relevant, a declaration of equivalence had to be made by the manufacturer.

102 Furthermore, under Article 3(27) of Directive 2007/46, the term ‘manufacturer’ is defined as ‘the person or body who is responsible to the approval authority for all aspects of the type-approval or authorisation process and for ensuring conformity of production’; that person or body does not necessarily have to intervene directly at all stages of the construction of a vehicle, system, component or separate technical unit subject to approval.

103 Although that definition refers only to vehicles and spare parts which are subject to approval, it provides useful guidance for determining who may be regarded as the ‘manufacturer’ of a component, in order to examine whether a declaration of equivalence issued by a person describing itself as a ‘manufacturer’ of that component may constitute an appropriate means of proof. It is apparent from that definition that, in order to be classified as a ‘manufacturer’ of a component, an undertaking does not necessarily have to intervene directly at all stages of the construction of that component.

104 The definition of the terms ‘original parts or equipment’ in Article 3(26) of Directive 2007/46, according to which ‘It is presumed unless the contrary is proven, that parts constitute original parts if the part manufacturer certifies that the parts match the quality of the components used for the assembly of the vehicle in question and have been manufactured according to the specifications and production standards of the vehicle manufacturer’ is also useful in that context.

105 It is apparent from that definition that, in order to be able to demonstrate that a spare part may be regarded as an original part, a declaration to that effect must be issued by the manufacturer of that component, notwithstanding the fact that the construction of that component was carried out in accordance with the specifications and production standards laid down by the manufacturer of the vehicle for which it is intended.

106 Accordingly, it must be found that, in order to be considered an appropriate means of proof, in the context of a call for tenders such as those which gave rise to the main proceedings, a declaration of equivalence of a component must be issued by the manufacturer of that component, even though that manufacturer does not necessarily have to intervene directly at all stages of the construction of that component.

107 By contrast, a declaration of equivalence from a reseller or dealer cannot be regarded as capable of constituting an appropriate means of proof.

108 Although it is for the referring court to determine whether, in the cases in the main proceedings, tenderers may be classified as ‘manufacturers’ of the components which they proposed, it must be stated, in order to give a useful answer to that court, that, contrary to what certain parties which took part in the procedure before the Court have argued, the fact that a tenderer manufactures spare parts other than those covered by the call for tenders at issue, whether that tenderer is registered with a chamber of commerce or its activity has been the subject of quality certification, is irrelevant for the purpose of determining whether that tenderer may be considered the manufacturer of the components which it proposes in its tender.

109 Furthermore, the argument that a broader interpretation of the concept of ‘manufacturer’ is necessary because, under certain EU directives on consumer protection, and in particular Article 1(2)(d) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12) and Article 2(4) of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ 2019 L 136, p. 28), the concept of ‘producer’ is to be understood as including the operator who merely markets the product, placing its name on it, without having materially participated in the construction process, must also be disregarded. That legislation seeks in particular to ensure the protection of consumers, as is apparent from Article 1(1) of Directive 1999/44 and Article 1 of Directive 2019/771, and is therefore not relevant for the purposes of interpreting EU public procurement legislation.

110 Lastly, it should be recalled, as is apparent from the case-law cited in paragraph 96 of the present judgment, that proof of the equivalence of the products proposed by a tenderer, in relation to those defined in the technical specifications set out in the call for tenders, must already be provided in the tender and that that proof actually enables the contracting entity to carry out a meaningful assessment of the tenders submitted to it.

111 Having regard to all the foregoing considerations, the answer to the second question is that Articles 60 and 62 of Directive 2014/25 must be interpreted, in the light of the definition of the term ‘manufacturer’ in Article 3(27) of Directive 2007/46, as precluding a contracting authority from accepting, in the context of a call for tenders for the supply of spare parts for buses intended for public service, as proof of the equivalence of components, covered by the regulatory acts listed in Annex IV to Directive 2007/46 and proposed by the tenderer, a declaration of equivalence issued by that tenderer where that tenderer cannot be regarded as being the manufacturer of those components.

Costs

112 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1. **Article 10(2), Article 19(1) and Article 28(1) of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive)**

   must be interpreted as meaning that they preclude a contracting authority from accepting, in the context of a call for tenders for the supply of spare parts for buses intended for public service, a tender proposing components belonging to a type of component covered by the regulatory acts listed in Annex IV to Directive 2007/46, without being accompanied by a certificate confirming the type-approval of such a component and without submitting any proof of the actual existence of such approval, provided that those regulatory acts provide for such approval.

2. **Articles 60 and 62 of Directive of the Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC**

   must be interpreted as meaning that in the light of the definition of the term ‘manufacturer’ in Article 3(27) of Directive 2007/46, they preclude a contracting authority from accepting, in the context of a call for tenders for the supply of spare parts for buses intended for public service, as proof of the equivalence of components, covered by the regulatory acts listed in Annex IV to Directive 2007/46 and proposed by the tenderer, a declaration of equivalence

issued by that tenderer where that tenderer cannot be regarded as being the manufacturer of those components.

[Signatures]

---

* Language of the case: Italian.

Opinion of Advocate General Campos Sánchez-Bordona delivered on 5 May 2022.
Iveco Orecchia SpA v APAM Esercizio SpA and Brescia Trasporti SpA.
Requests for a preliminary ruling from the Consiglio di Stato.
References for a preliminary ruling – Approximation of laws – Motor vehicles – Directive 2007/46/EC – Technical specifications – Offer to supply spare parts equivalent to the originals of a specific mark – Absence of proof of type-approval – Declaration of equivalence to the original by the tenderer – Concept of 'manufacturer' – Means of proof – Public procurement – Directive 2014/25/EU.
Joined Cases C-68/21 and C-84/21.

Court reports – general – 'Information on unpublished decisions' section

ECLI identifier: ECLI:EU:C:2022:365

Languages and formats available

	BG	ES	CS	DA	DE	ET	EL	EN	FR	GA	HR	IT*	LV	LT	HU	MT	NL	PL	PT	RO	SK	SL	FI	SV
HTML																								
PDF																								

Document published in the digital reports of cases. They have official status.

Multilingual display

English (en)

Please choose

Please choose

Display

Text

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 5 May 2022 ([1])

Joined Cases C-68/21 and C-84/21

Iveco Orecchia SpA

v

APAM Esercizio SpA (C-68/21),

Brescia Trasporti SpA (C-84/21),

interveners:

Veneta Servizi International Srl unipersonale,

Var Srl,

Di Pinto & Dalessandro SpA,

Bellizzi Srl

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Public procurement – Directive 2014/25/EU – Articles 60 and 62 – Technical specifications – Components for buses of the Iveco make or equivalent – Proof of equivalence – Directive 2007/46/EC – Article 10(2), Article 19(1), Article 28(1) and Annex IV – EC type-approval – Components – Need for components covered by one of the regulatory acts listed in Annex IV to be EC type-approved)

1. In Italy, two public undertakings responsible for providing urban and interurban passenger transport services in their respective municipalities (Mantua and Brescia) issued calls for tenders for the supply of spare parts for buses. The spare parts could be either originals made by Iveco, the vehicle manufacturer, or equivalents.
2. Following the award of the supply contracts, an unsuccessful tenderer brought an action concerned with whether 'equivalent spare parts' had to be EC type-approved in accordance with Directive 2007/46/EC. (2)
3. The Consiglio di Stato (Council of State, Italy) wishes to ascertain first and foremost whether type-approval is necessary for the supply of equivalent spare parts or whether the submission, along with the tender, of a declaration of equivalence to the type-approved original would be sufficient.

I. Legal framework. European Union law

A. Directive 2007/46

4. Article 1 ('Subject matter') states:

   'This Directive establishes a harmonised framework containing the administrative provisions and general technical requirements for approval of all new vehicles within its scope and of the systems, components and separate technical units intended for those vehicles, with a view to facilitating their registration, sale and entry into service within the Community.

   This Directive also establishes the provisions for the sale and entry into service of parts and equipment intended for vehicles approved in accordance with this Directive.

   Specific technical requirements concerning the construction and functioning of vehicles shall be laid down in application of this Directive in regulatory acts, the exhaustive list of which is set out in Annex IV'.

5. According to Article 2 ('Scope'):

   '1. This Directive applies to the type-approval of vehicles designed and constructed in one or more stages for use on the road, and of systems, components and separate technical units designed and constructed for such vehicles.

   …'

6. In accordance with Article 3 (‘Definitions’):

‘For the purposes of this Directive and of the regulatory acts listed in Annex IV, save as otherwise provided therein:

1. “regulatory act” means a separate directive or regulation or a UNECE Regulation annexed to the Revised 1958 Agreement;

2. “separate directive or regulation” means a directive or regulation listed in Part I of Annex IV. This term includes also their implementing acts;

3. “type-approval” means the procedure whereby a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements;

4. “national type-approval” means a type-approval procedure laid down by the national law of a Member State, the validity of such approval being restricted to the territory of that Member State;

5. “EC type-approval” means the procedure whereby a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements of this Directive and of the regulatory acts listed in Annex IV or XI;

…

24. “component” means a device subject to the requirements of a regulatory act and intended to be part of a vehicle, which may be type-approved independently of a vehicle where the regulatory act makes express provisions for so doing;

…’

7. Article 7 (‘Procedure to be followed for the type-approval of systems, components or separate technical units’) reads:

‘1. The manufacturer shall submit the application to the approval authority. Only one application may be submitted in respect of a particular type of system, component or separate technical unit and it may be submitted in only one Member State. A separate application shall be submitted for each type to be approved.

2. The application shall be accompanied by the information folder, the content of which is specified in the separate directives or regulations.

…’

8. Article 10 (‘Specific provisions concerning systems, components or separate technical units’) provides:

‘…

2. Member States shall grant a component or separate technical unit EC type-approval in respect of a component or separate technical unit which conforms to the particulars in the information folder and which meets the technical requirements laid down in the relevant separate directive or regulation, as prescribed in Annex IV.

…’

9. Article 19 (‘EC type-approval mark’) states:

‘1. The manufacturer of a component or separate technical unit, whether or not it is part of a system, shall affix to each component or unit manufactured in conformity with the approved type the EC type-approval mark, required by the relevant separate directive or regulation.

2. Where no EC type-approval mark is required, the manufacturer shall affix at least his trade name or trade mark, and the type number and/or an identification number.

3. The EC type-approval mark shall be in accordance with the Appendix to Annex VII.’

10. Article 28 (‘Sale and entry into service of components and separate technical units’) provides:

‘1. Member States shall permit the sale or entry into service of components or separate technical units if and only if they comply with the requirements of the relevant regulatory acts and are properly marked in accordance with Article 19.

…’

11. Article 46 (‘Penalties’) reads:

‘Member States shall determine the penalties applicable for infringement of the provisions of this Directive, and in particular of the prohibitions contained in or resulting from Article 31, and of the regulatory acts listed in Part I of Annex IV and shall take all necessary measures for their implementation. …’

12. Annex IV (‘List of requirements for the purpose of EC type-approval of vehicles’) comprises two parts: one sets out a list of ‘regulatory acts’ (separate directives and regulations) and the other, after defining what the UNECE Regulations are [‘the ones to which the Community has adhered as a Contracting Party to the United Nations Economic Commission for Europe “Revised 1958 Geneva Agreement” by virtue of Council Decision 97/836/EC [of 27 November 1997 (OJ 1997 L 346, p. 78)], or subsequent Council decisions as referred to in Article 3(3) of that Decision’], lists them.

B. Directive 2014/25/EU ([3])

13. Article 60 (‘Technical specifications’) states:

‘1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. The technical specifications shall lay down the characteristics required of a works, service or supply.

…

2. Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

(a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting entities to award the contract;

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or – when any of those do not exist – national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words “or equivalent”;

(c) in terms of performance or functional requirements referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;

(d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

4. Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents,

types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words "or equivalent".

5. Where a contracting entity uses the option of referring to the technical specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the ground that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in Article 62, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.

6. …

In its tender, the tenderer shall prove by any appropriate means including those referred to in Article 62, that the supplies, service or work in compliance with the standard meets the performance or functional requirements of the contracting entity.'

14. Article 62 ('Test reports, certification and other means of proof') states:

'1. Contracting entities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

Where contracting entities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting entities.

…

2. Contracting entities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer where the economic operator concerned had no access to such certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned and provided that the economic operator concerned thereby proves that the works, supplies or services meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

…'

II. Facts, procedures and questions referred for a preliminary ruling

A. Contested awards

1. Case C-68/21

15. APAM Esercizio SpA, an undertaking operating in the urban and interurban public transport sector in Mantua (Italy), published a notice ([4]) advertising an open tender procedure for the biannual supply of 'original Iveco spare parts or equivalents for buses' (CIG 7602877C91), the value of the contract having been estimated at EUR 710000.

16. Article 5.1 ('Typology of the spare parts') of the technical specifications distinguished between:

— 'Spare parts intended for vehicle safety and environmental protection'. So far as these are concerned, being 'components tested for type-approval with the vehicle or as separate technical units, only original components or equivalents legally approved in accordance with national legislation (the Highway Code) and Community legislation (Directive 98/14/EEC, Directive 2007/46 and Annex IV thereto) [should] be supplied'.

— 'Original (or first-fit) spare parts'.

— 'Equivalent spare parts', defined as being 'spare parts (parts, components, equipment) of a quality equivalent to that of the original, or parts of a quality at least equal to that

of the components used for vehicle assembly, produced according to the technical specifications and production standards of the manufacturer of the original spare part'.

17. That article went on to say that, 'in accordance with EU legislation and the provisions of [national] law in force, the aforementioned [equivalent] spare parts may be manufactured by any undertaking able to certify at any time, in accordance with the rules in force (UNI-CEI-ENISO/IEC 17050), that the quality of the spare parts is consistent with that of the original spare parts used in the assembly of the motor vehicles in question'.

18. Article 5.2 ('Certifications and declarations') of the technical specifications stated that the tenderer 'shall submit in the course of the tender procedure, in respect of the equivalent spare part proposed, a certificate of conformity or a specific type-approval for the replacement component, provided by the manufacturer, the type-approval body or the laboratory for tests certified according to ISO 45000 standard'.

19. Article 15 ('Administrative documentation') of the tender document stipulated, in point (d), the submission of '… the appropriate technical documentation for each equivalent spare part proposed, accompanied by: … a product type-approval certificate, where mandatory, issued by the manufacturer of the equivalent spare part proposed; a certificate as to the equivalence of the product proposed in relation to the relevant original (or first-fit) product, in that it is a perfect substitute requiring no adaptation of the spare part, the unit or the system into which it is to be fitted, and performance characteristics ensuring the product's regular functionality and safety in the system, as well as an identical lifetime, issued by the producer of the equivalent spare part proposed'.

20. Three undertakings participated in the procedure, including Iveco Orecchia and Veneta Servizi International Srl unipersonale, which was awarded the contract.

2. Case C-84/21

21. Brescia Trasporti SpA, an undertaking operating in the urban and interurban public transport sector in Brescia (Italy), published a notice ([5]) advertising a procedure for the award of a contract, with a basic value estimated at EUR 2100000, for 'the supply of spare parts for Iveco buses fitted with an Iveco engine – CIG 7680570EDB'.

22. Article 1 ('Technical definitions') of the document containing the technical specifications for the call for tenders provided for three types of spare part: 'original spare parts', 'first-fit original spare parts' and 'equivalent spare parts'.

23. According to Article 1(3), 'spare parts of a quality equivalent to that of the original are parts the quality of which is at least equal to that of the components used in the manufacture of the vehicle and which have been produced in accordance with the spare part manufacturer's own technical specifications and production standards'.

24. Article 2 ('Characteristics of the spare parts to be supplied …') of that same document stated that the tenderer was to indicate in respect of each replacement whether it wished to supply an original spare part, a first-fit spare part or an equivalent.

25. Article 3 ('Documentation to be submitted with the tender') required, so far as concerns 'equivalent quality spare parts', that the tender be accompanied, on pain of exclusion, by 'a certificate from the spare part manufacturer attesting, in respect of each spare part:

— that its quality is of a level high enough to ensure that its use will not compromise the reputation of the authorised network;

— that it is perfectly interchangeable with the original spare parts, … and requires no adaptation of the spare part, the unit or the system onto which it is to be fitted …'.

26. Article 3 went on to say that 'the supplier shall also submit the product type-approval certificate, where this is mandatory. As regards break linings, brake discs and drums, the supplier shall, in addition to the aforementioned documents, provide a certificate attesting to Community type-approval ECE R90'.

27. Tenders were submitted by Iveco Orecchia and VAR Srl, which was awarded the contract.

B. National proceedings and reference for a preliminary ruling

28. Iveco Orecchia challenged the two award decisions before the Tribunale amministrativo regionale per la Lombardia – sezione staccata di Brescia (Regional Administrative Court, Lombardy, Brescia Section), arguing in essence that:

— the successful tenderers had not proved, by certificate or any other means, that the components were type-approved, as required by the contract documents and relevant legislation;

— in the alternative, the tender documents were unlawful, inasmuch as they did not require, where necessary, the provision of a type-approval certificate issued by a competent authority, or, in any event, proof of the existence of such type-approval.

29. The court of first instance dismissed the two actions brought by Iveco Orecchia in judgments of 25 June and 26 August 2019, against which that company brought appeals before the Consiglio di Stato (Council of State). (6)

30. According to the Consiglio di Stato (Council of State): (7)

— The original Iveco spare parts forming the subject of the supply contract are type-approved along with the vehicle.

— Spare parts subject to type-approval, in particular those capable of compromising vehicle safety and environmental performance, may be sold only where they have been type-approved and authorised by the type-approval authority.

— Annex IV to Directive 2007/46 contains a specific and detailed list of the categories of component for which there is relevant and also specific legislation relating to their type-approval.

— The technical specifications required the submission of a type-approval certificate where necessary. (8)

— It falls to be determined, in the light of the foregoing factors, whether non-original components made by a manufacturer of such components need to be type-approved.

— The applicable legislation, that is to say Directive 2007/46 and the national transposing provisions, appears to impose the same type-approval obligations on both vehicle manufacturers (which type-approve vehicles as a whole and, in so doing, thus automatically type-approve each of the parts thereof) and component manufacturers.

— Thus, if a part or component is subject to the provisions of a regulatory act (referred to in Annex IV to Directive 2007/46), it may be placed on the market only if it has been type-approved.

— However, it could also be argued, as the respondent undertakings contend, that offers of spare parts as provided for in the typology of the aforementioned Annex IV which are made by parties other than vehicle manufacturers must not be required to provide the same technical documents evidencing testing as are required in the case of original type-approved components. From that point of view, an adequate alternative to such documentation might be a generic certificate of equivalence declaring the spare part to be compliant with the technical specifications laid down in the tender documentation and the solutions proposed to be consistent with the requirement set out in that documentation.

31. It is against that background that the Consiglio di Stato (Council of State) has made a reference for a preliminary ruling on two questions, of which I shall look only at the first, as instructed by the Court. This is worded as follows:

‘Is it compatible with EU law, and in particular with the provisions of Directive 2007/46/EC (laid down in Articles 10, 19 and 28 of that directive) and the principles of equal treatment and impartiality, open competition and sound administration, for – with specific reference to the supply through public procurement of replacement parts for buses intended for public service – a contracting authority to be allowed to accept replacement parts intended for a particular vehicle, made by a manufacturer other than the vehicle

manufacturer, and therefore not approved together with the vehicle, falling into one of the categories of components covered by the technical rules listed in |Annex IV to that directive (List of requirements for the purpose of EC type-approval of vehicles) and put to tender without being accompanied by the type-approval certificate and without any information on the actual type-approval, and indeed on the assumption that type-approval is not needed, as only a declaration of equivalence to the type-approved original made by the tenderer is sufficient?'

III. Procedure before the Court

32. The requests for a preliminary ruling were registered at the Court of Justice on 3 and 11 February 2021 respectively.

33. Written observations were lodged by Iveco Orecchia, Brescia Trasporti SpA, Var Srl, Veneta Servizi International Srl unipersonale, Di Pinto & Dalessandro SpA, APAM Esercizio SpA, the Italian Government and the European Commission. With the exception of Di Pinto & Dalessandro SpA, all of these parties attended the hearing held on 10 March 2022.

IV. Assessment

A. Preliminary observation

34. Although the referring court seeks an interpretation only of Articles 10, 19 and 28 of Directive 2007/46, it cannot be overlooked that the disputes relate to supply contracts that were awarded by means of a procedure subject to the requirements of Directive 2014/25.

35. After all, as the Commission notes and as was highlighted at the hearing, the contested awards were each made by an entity operating in the urban and interurban transport sector, the rules governing which are contained in Directive 2014/25.

36. Both the orders for reference and some of the written observations cite Directive 2014/24/EU. ([9]) However, I do not consider this to be an appropriate reference provision.

37. As I have already said, the subject matter of the contracts put out to tender in these cases was the supply of spare parts for buses used to provide public transport services. Such contracts are subject to Directive 2014/25, since they are instrumental to 'activities relating to the provision or operation of networks providing a service to the public in the field of transport by … bus', as referred to in Article 11 thereof.

38. Transport services are explicitly included in the scope of Directive 2014/25, according to Article 1(2) thereof.

39. In any event, the articles of Directive 2014/25 which are relevant here (Articles 60 and 62) are equivalent to their counterparts in Directive 2014/24 (Articles 42 and 44).

B. First question referred

40. The point of uncertainty raised by the Consiglio di Stato (Council of State) is clearly defined. It wishes to ascertain whether a contracting authority can accept spare parts for buses where, cumulatively:

— Those components fall into one of the categories listed in Annex IV to Directive 2007/46.

— They were made by a manufacturer other than the bus manufacturer, which is to say that they were not type-approved together with the bus.

— They are not accompanied by a type-approval certificate or any other indication of actual type-approval, it being assumed that such type-approval is not necessary and a declaration of equivalence (to the original component) by the tenderer itself is sufficient.

41. In order to clarify that point of uncertainty, I shall first analyse the EU rules on the type-approval of motor vehicles and of the systems, components and separate technical units

intended for such vehicles. Next, I shall consider the differences between type-approval and equivalence, and, finally, I shall look at the impact of Directive 2014/25 in these cases.

1. Type-approval of vehicles and their components

42. Directive 2007/46 seeks to 'replace the Member States' approval systems with a Community approval procedure based on the principle of total harmonisation'. (10)

43. Article 1 of Directive 2007/46, in referring to the subject matter of that directive, mentions the establishment of 'a harmonised framework containing the administrative provisions and general technical requirements for approval' not only of the new vehicles within its scope but also of the systems, components and separate technical units intended for those vehicles.

44. That framework establishes '… the provisions for the sale and entry into service of parts and equipment intended for vehicles approved in accordance with this Directive'.

45. Directive 2007/46 introduces the concept of 'type-approval', (11) as distinct from individual approval. Type-approval may be either 'national', in which case its validity is restricted to the territory of a Member State, or an 'EC type-approval'. The latter certifies compliance with 'the relevant administrative provisions and technical requirements of [the] Directive and of the regulatory acts listed in Annex IV or XI'. (12)

46. As I have already noted, the question referred for a preliminary ruling refers only to the categories of components (13) appearing in the regulatory acts (14) listed in Annex IV to Directive 2007/46.

47. Components can be EC type-approved either together with the new vehicle or independently. (15) In accordance with Article 3(24) of Directive 2007/46, a component intended to be part of a vehicle may be type-approved independently of that vehicle.

48. EC type-approval for separate components is granted in accordance with a procedure that is governed by Article 7 of Directive 2007/46 and the specific provisions of which are contained in Article 10 thereof. According to Article 10(2), 'Member States shall grant … EC type-approval in respect of a component … which meets the technical requirements laid down in the relevant separate directive or regulation, as prescribed in Annex IV'.

49. Albeit not quite as clearly as might be hoped for, Article 10(2), Article 19 and Article 28(1) of Directive 2007/46 support the inference that the vehicle components listed in Annex IV thereto are in principle subject to type-approval.

50. It is thus significant that, in accordance with Article 28(1) of Directive 2007/46, Member States may permit the sale or entry into service only of type-approved components, that is to say components which 'comply with the requirements of the relevant regulatory acts [as set out in Annex IV] and are properly marked in accordance with Article 19'.

51. The – only – instrument selected by Directive 2007/46 for the purposes of establishing that vehicle components (whether original or otherwise) comply with the technical requirements laid down in the regulatory acts referred to in Annex IV is type-approval itself. This, to my mind, is the most appropriate interpretation of Article 10(2) of that directive, read in the light of the regulatory acts referred to in Annex IV thereto.

52. It may be, however, (as the VAR pointed out in its written observations and as the Commission and the Italian Government confirmed at the hearing), that, in accordance with those same regulatory acts, a particular component is exempt from the type-approval requirement. In that event, there would be no obligation to provide the type-approval certificate which must of necessity be submitted for the other components listed in Annex IV.

53. It is that possibility which is provided for in Article 19(2) of Directive 2007/46: 'where no EC type-approval mark is required, the [component] manufacturer shall affix at least his trade name or trade mark, and the type number and/or an identification number'.

54. Other than in that situation, therefore, the components referred to in any of the regulatory acts listed in Annex IV to Directive 2007/46 may not be placed on the market if they have not first been granted EC type-approval. Without it, as I have said, their sale and entry into service are not permitted.

55. That condition is linked to vehicle traffic safety requirements necessitating type-approval for (some but not all) spare parts. (16) EC type-approval thus becomes a precondition for suitability that is applicable not only to public-procurement-based channels of introduction but also to any form of placing spare parts on the market.

56. Whether the components are manufactured by the trade mark proprietor or by a spare parts producer is immaterial, as is whether they are to be fitted to a new or a used vehicle. There cannot therefore be said to be any discrimination to the detriment of manufacturers of equivalent spare parts: where components require EC type-approval, equivalents and originals are both subject to the same rules. (17)

57. On that premiss, it must be stated in reply to the first part of the first question referred that:

— In principle, a contracting authority may not accept replacement components covered by the regulatory acts listed in Annex IV to Directive 2007/46 without a type-approval certificate, where such acts require type-approval for those components.

— It is for the referring court to determine, in the light of the specific components that were the subject of the call for tenders, whether they were subject to compulsory type-approval under the aforementioned regulatory acts.

2. Type-approval and equivalence

58. In the second part of the first question, the referring court wishes to ascertain whether, in the circumstances which it describes, a declaration of equivalence to the type-approved original, issued by the tenderer itself, would be sufficient.

59. The concepts of type-approval and equivalence have meanings specific to them and not identical to each other:

— Type-approval is a control mechanism used by an authority, a body or an entity acting under their auspices to certify that a vehicle (or, in this case, the components thereof) complies with certain regulatory provisions and technical requirements.

— (A declaration of) equivalence is simply an objective comparison of certain products, whether or not they have previously been type-approved.

60. Type-approval is, as I have already mentioned, a condition of placing on the market vehicle components that must comply with a number of very detailed technical specifications. It is based on mandatory and, in the case of vehicles to be used on the public highway, unavoidable safety requirements.

61. Equivalence (in this case, that between spare parts produced by different manufacturers that perform the same function) has more to do with the similar or dissimilar characteristics of the products compared.

62. Proof of either status is not interchangeable with that of the other. A type-approved component may not be equivalent to the component required by the contracting authority. Conversely, a non-type-approved component may be *materially* equivalent to the originals provided for in the technical specifications of the call for tenders.

63. It might be thought that, if two spare parts, one type-approved and the other not, are of equivalent quality and interchangeable, it is because they both meet the technical requirements that must be fulfilled in order to pass the type-approval test. To my mind, however, Directive 2007/46 does not permit that presumption. Where considerations of road safety and environmental protection are present, each prototype must be tested by a third party (the authority or body granting type-approvals in accordance with specific procedures and tests), unless a regulatory act deems this unnecessary.

64. In my view, replacement components are not exempt from type-approval testing (and subject only to a declaration of equivalence) solely because they are to be fitted to a used car. The fact that they are intended to be incorporated (by definition, retrospectively) into a used car does not automatically make them safer, which is what some of the parties to the dispute appear to think.

65. The clauses governing the two awards at issue in the present disputes were informed by that principle. In the case of equivalent spare parts subject to type-approval, tenderers were required, on pain of exclusion of their tender, to submit a type-approval certificate.

66. It is not therefore possible, in relation to that particular type of spare part, to accept as an alternative to the submission of type-approval certificates a mere unilateral declaration by the tenderer as to the equivalence of spare parts to original components.

67. Accordingly, so far as concerns replacement components subject to compulsory type-approval, a declaration of equivalence to the type-approved original issued by the tenderer is not sufficient.

68. It remains to be examined whether that interpretation of Directive 2007/46 is compatible with the principles and the provisions of Directive 2014/25.

3. Impact of Directive 2014/25

69. Contracting authorities are required to define, in the tender documents they publish, the characteristics of the works, services or supplies of goods which they propose to obtain by way of public procurement. Those characteristics may include the ‘technical specifications’ of the products or services concerned.

70. As I have said previously, ‘a biased description of those technical specifications may, at the very least, amount to a significant “barrier to entry” for certain tenderers and, in extreme cases, predetermine (including fraudulently) the final choice of successful tenderer if characteristics of products or services are stipulated which that tenderer alone is in a position to supply’. (18)

71. The concern to avoid irregular practices and the aim of ‘allow[ing] public procurement to be open to competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions, standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services’. (19)

72. That goal is reflected in Article 60(2) of Directive 2014/25: ‘Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition’.

73. As a rule, then, ‘technical specifications should be drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows that objective to be achieved in the best way possible’. (20)

74. By way of exception, however, Article 60(4) of Directive 2014/25 allows reference to be made ‘to trade marks, patents, types or a specific origin or production’. Nonetheless, that possibility, which favours certain producers, is mitigated by the requirement that any such reference be accompanied by the words ‘or equivalent’. (21)

75. It is consistent with the principles of Article 60(2) of Directive 2014/25 that paragraph 5 of that same article and Article 62(2) should provide for the possibility of demonstrating compliance with the technical specifications, with a view to proving the equivalence of

spare parts, in an open and flexible way, 'which means that the use of any appropriate means is permitted'. (22)

76. In this case, the contracts were for the supply of spare parts, which could be either Iveco originals or equivalents. However, in the case of spare parts subject to the requirement of type-approval, the certificate attesting to such type-approval could not be dispensed with, since, without it, those spare parts (be they originals or equivalents) could not be offered by a tenderer, since they would fail to meet an unavoidable precondition for being placed on the market.

77. Directive 2014/25 lays down the rules governing proof of compliance with the technical specifications without referring to the type-approval of the goods being supplied. This is only logical given that whether or not type-approval is required will depend on the type of supply to be procured, (23) and the sectors covered by that directive are very diverse.

78. Nonetheless, Directive 2014/25, however much it is driven by the goal of opening up public procurement to greater competition, cannot dispense with the mandatory requirements imposed by other provisions of EU law.

79. This is recognised in recital 56 of Directive 2014/25, which states that 'nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect … security, health, human and animal life, the preservation of plant life or other environmental measures'.

80. Directive 2014/25, therefore, 'should not prevent' the application of Directive 2007/46 inasmuch as the latter regulation seeks to '… ensure a high level of road safety, health protection, environmental protection, energy efficiency and protection against unauthorised use'. (24) To the extent that Directive 2007/46 requires, with a view to attaining those very objectives, that certain vehicle spare parts be type-approved, that requirement becomes unavoidable and cannot be circumvented by recourse to Directive 2014/25.

81. As the Commission submits, (25) that same principle informs other rules relating to the functioning of the internal market whereby the EU legislature has pointed out the fact that the *lex specialis* (such as, for example, that governing the movement of motor vehicles) takes precedence over the general provisions on the free movement of goods.

82. In any event, the obligation to type-approve spare parts is not incompatible with opening up public procurement to competition. In order to safeguard competition, Article 38(1) of Directive 2007/46 makes it easier for competitors of the vehicle manufacturer to access the production of separate components. The vehicle manufacturer must provide its competitors with the relevant particulars, 'including, as the case may be, drawings specifically listed in the annex or appendix to a regulatory act that are necessary for EC type-approval of [separate] components'.

V. Conclusion

83. In the light of the foregoing, I suggest that the Court's answer to the first question referred for a preliminary ruling by the Consiglio di Stato (Council of State, Italy) be as follows:

'Articles 10(2), 19(1) and 28(1) of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles must be interpreted as meaning that, where a call for tenders for a public contract for the supply of replacement components for buses to be used to provide public transport services permits offers of equivalent spare parts the type-approval of which is mandatory under one of the regulatory acts listed in Annex IV to the aforementioned directive, tenderers must submit the corresponding EC type-approval certificate, the submission of a declaration of equivalence alone being insufficient for these purposes'.

(1) Original language: Spanish.

(2) Directive of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1). This was replaced by Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46 (OJ 2018 L 151, p. 1). Regulation 2018/858 is not applicable, *ratione temporis*, to these disputes.

(3) Directive of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

(4) Contract notice published in the supplement to the European public procurement OJ of 21 August 2018 (under reference 2018/S 159-365946).

(5) Contract notice published in the supplement to the European public procurement OJ of 13 November 2018 (under reference 2018/S 218-500319).

(6) In the judgment of 26 August 2019, the court of first instance dismissed the first ground of the action brought by Iveco Orecchia, on the ground, inter alia, that it had failed to indicate exactly which spare parts offered by Brescia Trasporti SpA should be type-approved.

(7) Paragraphs VIII.1, VIII.2 and VIII.4 of the two orders for reference.

(8) The order for reference in Case C-84/21 states that, ‘in the call for tenders at issue, the technical specifications required the submission of the type-approval certificate where necessary, and, in the case of equivalent brake discs and drums, referred expressly to Article 34 of Directive 2007/46 (which in turn refers to the UNECE Regulations laid down for the purposes of EC type-approval’.

(9) Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

(10) Second recital.

(11)

(12) Article 3(5) of Directive 2007/46.

(13) It therefore leaves out systems and separate technical units.

(14) Article 3(1) of Directive 2007/46 defines ‘regulatory act’ as ‘a separate directive or regulation or a UNECE [United Nations Economic Commission for Europe] Regulation annexed to the Revised 1958 Agreement’ [‘to which the Community has adhered as a Contracting Party to the United Nations Economic Commission for Europe “Revised 1958 Geneva Agreement” by virtue of Council Decision 97/836/EC’ (Part II of Annex IV to the Framework Directive)]. In accordance with Article 34(1) of Directive 2007/46, ‘UNECE Regulations to which the Community has acceded and which are listed in Part I of Annex IV … are part of the EC type-approval of a vehicle in the same way as the separate directives or regulations’.

(15) In these disputes, the spare parts for buses are not type-approved together with the vehicle itself but separately from it.

(16) Accordingly, Article 46 of Directive 2007/46 requires Member States to determine ‘the penalties applicable for infringement of the provisions of this Directive …, and of the regulatory acts listed in Part I of Annex IV and [to] take all necessary measures for their implementation’.

(17) In its written observations (p. 15 of the original Italian), VAR states that ‘it has never maintained that … type-approval for a spare part equivalent to a component subject to compulsory type-approval “*would not be necessary*”, or that, in such circumstances, type-approval could be replaced by a “*declaration of equivalence to the type-approved original submitted by the tenderer*”’.

(18) Opinion in VAR and ATM (Case C-14/17, EU:C:2018:135, point 2).

(19) Recital 83 of Directive 2014/25.

(20) *Ibidem.*

(21) In point 33 et seq. of the Opinion in VAR and ATM (C-14/17, EU:C:2018:135), I examined at greater length the Court's case-law on 'the inclusion, in invitations to tender for public contracts or in the relevant contract documents, of technical specifications which refer to a specific trade mark'.

(22) Judgment of 12 July 2018, VAR and ATM (C-14/17, EU:C:2018:568, paragraph 33).

(23) Many supply contracts will not be subject to EU rules governing type-approval of the products concerned. In the present cases, on the other hand, since tenders were sought for spare parts for vehicles forming the subject of a harmonised framework, the contracts in question are bound by rigorous legislation that makes type-approval mandatory unless exempted, in the case of certain spare parts, by the relevant regulatory act in Annex IV to Directive 2007/46.

(24) Recital 3 of Directive 2007/46.

(25) Paragraph 42 and footnote 37 of its written observations, in which it cites recital 5 of Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (OJ 2008 L 218, p. 30). According to that recital, 'the framework for market surveillance established by this Regulation should complement and strengthen existing provisions in Community harmonisation legislation relating to market surveillance and the enforcement of such provisions. However, in accordance with the principle of *lex specialis*, this Regulation should apply only in so far as there are no specific provisions with the same objective, nature or effect in other existing or future rules of Community harmonisation legislation. Examples can be found in the following sectors: drug precursors, medical devices, medicinal products for human and veterinary use, *motor vehicles* and aviation. The corresponding provisions of this Regulation should not therefore apply in the areas covered by such specific provisions' (emphasis added).

Top

EUR-Lex

This site is managed by the Publications Office of the European Union

Need help?

Help pages
Contact
Sitemap

Follow us

X

Legal

Legal notice
Cookies policy
Accessibility
Privacy statement

Information

About EUR-Lex
Newsletter

Useful links

Other services

European Data
EU tenders
EU research results
EU Whoiswho
EU publications

N-Lex
EU Law in Force
EU Law Tracker

European Union

Discover more on europa.eu

Contact the EU

Call us 00 800 6 7 8 9 10 11
Use other telephone options
Write to us via our contact form
Meet us at one of the EU centres

Social media

Search for EU social media channels

Legal

Languages on our websites
Privacy policy
Legal notice
Cookies

EU institutions

European Parliament
European Council
Council of the European Union
European Commission
Court of Justice of the European Union (CJEU)
European Central Bank (ECB)
European Court of Auditors
European External Action Service (EEAS)
European Economic and Social Committee
European Committee of Regions (CoR)
European Investment Bank
European Ombudsman
European Data Protection Supervisor (EDPS)
European Data Protection Board

European Personnel Selection Office

Publications Office of the European Union

Agencies

JUDGMENT OF THE COURT (Fourth Chamber)

17 November 2022 (*)

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Principles of awarding contracts – Article 18 – Transparency – Article 21 – Confidentiality – Insertion of those principles in the national legislation – Right of access to the essential content of the information provided by tenderers concerning their experience and references, concerning the persons proposed to carry out the contract and concerning the design of the proposed projects and the manner of performance – Article 67 – Contract award criteria – Criteria relating to the quality of the proposed work or services – Requirement of precision – Directive 89/665/EEC – Article 1(1) and (3) – Right to an effective remedy – Remedy in the event of infringement of that right on account of the refusal to grant access to non-confidential information)

In Case C-54/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland), made by decision of 22 December 2020, received at the Court on 29 January 2021, in the proceedings

Antea Polska S.A.,

Pectore-Eco sp. z o.o.,

Instytut Ochrony Środowiska – Państwowy lnstytut Badawczy

v

Państwowe Gospodarstwo Wodne Wody Polskie,

intervening parties:

Arup Polska sp. z o.o.,

CDM Smith sp. z o.o.,

Multiconsult Polska sp. z o.o.,

Arcadis sp. z o.o.,

Hydroconsult sp. z o.o. Biuro Studiów i Badań Hydrogeologicznych i Geofizycznych,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, L.S. Rossi, J.-C. Bonichot, S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Siekierzyńska, Administrator,

having regard to the written procedure and further to the hearing on 16 March 2022,

after considering the observations submitted on behalf of:

– Antea Polska S.A., Pectore-Eco sp. z o.o. and Instytut Ochrony Środowiska – Państwowy Instytut Badawczy, by D. Ziembiński, radca prawny,

– Państwowe Gospodarstwo Wodne Wody Polskie, by P. Daca, M. Klink and T. Skoczyński, radcowie prawni,

– CDM Smith sp. z o.o., by F. Łapecki, adwokat, and J. Zabierzewski,

– the Polish Government, by B. Majczyna and M. Horoszko, acting as Agents,

– the Austrian Government, by A. Posch, acting as Agent,

– the European Commission, by P. Ondrůšek, J. Szczodrowski and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18(1) and Article 21(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), Article 2(1) of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1), and of Article 1(1) and (3) and Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2017 L 94, p. 1).

2 The request has been made in proceedings between Antea Polska S.A., Pectore-Eco sp. z o.o. and Instytut Ochrony Środowiska – Państwowy Instytut Badawczy, acting together as a single tenderer (‘Antea’), and the Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority, Poland; ‘the contracting authority’), supported by Arup Polska sp. z o.o. (‘Arup’), by CDM Smith sp. z o.o. (‘CDM Smith’), and by Multiconsult Polska sp. z o.o., Arcadis sp. z o.o. and Hydroconsult sp. z o.o. Biuro Studiów i Badań Hydrogeologicznych i Geofizycznych, acting together as a single tenderer (‘Multiconsult’), concerning the award of a public contract to CDM Smith.

Legal context

European Union law

Directive 89/665

3 Article 1 of Directive 89/665, entitled ‘Scope and availability of review procedures’, provides:

‘1. This Directive applies to contracts referred to in Directive [2014/24] …

…

Member States shall take the measures necessary to ensure that … decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a

particular contract and who has been or risks being harmed by an alleged infringement.

…’

Directive 2014/24

4 Recitals 90 and 92 of Directive 2014/24 state:

‘(90) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender. It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions.

…

…

(92) When assessing the best price-quality ratio contracting authorities should determine the economic and qualitative criteria linked to the subject matter of the contract that they will use for that purpose. Those criteria should thus allow for a comparative assessment of the level of performance offered by each tender in the light of the subject matter of the contract, as defined in the technical specifications. In the context of the best price-quality ratio, a non-exhaustive list of possible award criteria which include environmental and social aspects is set out in this Directive. …

The chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective and fair competition and be accompanied by detailed rules that allow the information provided by the tenderers to be effectively verified.

…’

5 Article 18 of that directive, entitled ‘Principles of procurement’, provides in paragraph 1:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…’

6 Article 21 of that directive, entitled ‘Confidentiality’, provides:

‘1. Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.’

7 Article 50 of that directive, entitled ‘Contract award notices’, states:

‘1. Not later than 30 days after the conclusion of a contract or of a framework agreement, following the decision to award or conclude it, contracting authorities shall send a contract award notice on the results of the procurement procedure.

Those notices shall contain the information set out in Annex V Part D …

…

4. Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.’

8 Article 55 of Directive 2014/24, entitled ‘Information to candidates and tenderers’, provides:

‘1. Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system …

2. On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

…

(b) any unsuccessful tenderer of the reasons for the rejection of its tender …;

(c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement;

…

3. Contracting authorities may decide to withhold certain information referred to in paragraphs 1 and 2, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.’

9 Article 58 of that directive, entitled ‘Selection criteria’, provides:

‘1. Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

…

4. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. …

In procurement procedures for supplies requiring siting or installation work, services or works, the professional ability of economic operators to provide the service or to execute the installation or the

work may be evaluated with regard to their skills, efficiency, experience and reliability.

…’

10 Under Article 59 of that directive, entitled ‘European Single Procurement Document’:

‘1. At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:

(a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;

(b) it meets the relevant selection criteria that have been set out pursuant to Article 58;

(c) where applicable, it fulfils the objective rules and criteria that have been set out pursuant to Article 65.

Where the economic operator relies on the capacities of other entities pursuant to Article 63, the ESPD shall also contain the information referred to in the first subparagraph of this paragraph in respect of such entities.

The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority. …

…

4. A contracting authority may ask tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

…’

11 Article 60 of that directive, entitled ‘Means of proof’, states:

‘1. Contracting authorities may require the certificates, statements and other means of proof referred to in paragraphs 2, 3 and 4 of this Article and Annex XII as evidence for the absence of grounds for exclusion as referred to in Article 57 and for the fulfilment of the selection criteria in accordance with Article 58.

Contracting authorities shall not require means of proof other than those referred to in this Article and in Article 62. In respect of Article 63, economic operators may rely on any appropriate means to prove to the contracting authority that they will have the necessary resources at their disposal.

…

3. Proof of the economic operator’s economic and financial standing may, as a general rule, be provided by one or more of the references listed in Annex XII Part I.

…

4. Evidence of the economic operators’ technical abilities may be provided by one or more of the means listed in Annex XII Part II, in accordance with the nature, quantity or importance, and use of the works, supplies or services.

…’

12 Article 63 of Directive 2014/24, entitled ‘Reliance on the capacities of other entities’, provides in paragraph 1:

‘With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

…’

13 In accordance with Article 67 of that directive, entitled ‘Contract award criteria’:

‘1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.

2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost …, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject matter of the public contract in question. Such criteria may comprise, for instance:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;

(b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

(c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

…

4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

5. The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.

…’

14 Annex V to that directive, entitled ‘Information to be included in the notices’, lists in Part D, entitled ‘Information to be included in contract award notices (referred to in Article 50)’:

‘…

12. For each award, name, address …, telephone, fax number, email address and internet address of the successful tenderer(s) including:

(a) information whether the successful tenderer is small and medium enterprise,

(b) information whether the contract was awarded to a group of economic operators (joint venture, consortium or other).

13. Value of the successful tender (tenders) or the highest tender and lowest tender taken into consideration for the contract award or awards.

14. Where appropriate, for each award, value and proportion of contract likely to be subcontracted to third parties.

…

19. Any other relevant information.’

15 Under Annex XII to that directive, entitled ‘Means of proof of selection criteria’:

‘Part I: Economic and financial standing

Proof of the economic operator’s economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of financial statements or extracts from the financial statements, where publication of financial statements is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking’s overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

Part II: Technical ability

Means providing evidence of the economic operators’ technical abilities, as referred to in Article 58:

(a) the following lists:

(i) a list of the works carried out over at the most the past five years, accompanied by certificates of satisfactory execution and outcome for the most important works; where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant works carried out more than five years before will be taken into account;

(ii) a list of the principal deliveries effected or the main services provided over at the most the past three years, with the sums, dates and recipients, whether public or private, involved. Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account;

(b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;

(c) a description of the technical facilities and measures used by the economic operator for ensuring quality and the undertaking's study and research facilities;

(d) an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract;

(e) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, …

(f) the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff, provided that they are not evaluated as an award criterion;

(g) an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;

(h) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;

(i) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;

(j) an indication of the proportion of the contract which the economic operator intends possibly to subcontract;

…'

Directive 2016/943

16 Article 1 of Directive No 2016/943, entitled 'Subject matter and scope', provides, in paragraph 1:

'This Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets.

…'

17 Article 2 of that directive, entitled 'Definitions', provides:

'For the purpose of this Directive, the following definitions apply:

(1) "trade secret" means information which meets all of the following requirements:

(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) it has commercial value because it is secret,

(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;

…'

Polish law

The Law on public procurement

18 The Ustawa Prawo zamówień publicznych (Law on public procurement) of 29 January 2004 (Dz. U. 2015, item 2164), in the version applicable to the dispute in the main proceedings ('the Law on public procurement'), provides in Article 8:

'1. The procurement procedure shall be public.

2. The contracting authority may restrict access to information relating to the procurement procedure only in the cases determined by law.

2a. The contracting authority may set out in the tender specifications requirements that must be met in order to maintain the confidentiality of information provided to the economic operator in the course of the procedure.

3. Information constituting trade secrets within the meaning of the provisions on combating unfair competition shall not be disclosed if the tenderer so requested before the expiry of the deadline for submission of tenders or applications to take part in the procedure and demonstrated that it constitutes trade secrets. The tenderer may not designate as confidential the information referred to in Article 86(4). …'

19 Under Article 86(4) of that law:

'The name (company name) and the address of tenderers, as well as information on the price, the period for performance of the contract, the guarantee period and the conditions of payment contained in the tenders, shall be disclosed when the tenders are opened.'

20 Article 96 of that law provides:

'1. In the course of the procedure for the award of the contract, the contracting authority shall draw up a report containing at least:

…

(5) the name or company name of the tenderer whose tender was accepted as the most advantageous and the justification for that choice, and, if known, the part of the contract or framework agreement which that tenderer intends to subcontract to third parties; and where that information is known at that stage, the names or company name of the potential subcontractors;

…

(7) where applicable, the results of the examination of the grounds for exclusion, assessment of compliance with the conditions for participation in the selection procedure or criteria, including:

(a) the name or company name of tenderers who have not been excluded, have demonstrated that they meet the conditions for taking part in the procedure or have fulfilled the selection criteria, along with the reasons justifying their selection;

(b) the name or company name of the unsuccessful tenderers who have been excluded, have not demonstrated that they meet the conditions for taking part in the procedure or have not fulfilled the selection criteria, and the reasons why they were not invited to participate in the procedure;

(8) the reasons for the rejection of tenders;

…

2. Tenders, expert reports, statements,… notices, requests, other documents and information submitted by the contracting authority and tenderers, as well as the public contract concluded, take the form of annexes to the report.

3. The report and the annexes thereto shall be public. The annexes to the report shall be made available after the most advantageous tender has been selected or the procedure cancelled, subject to the proviso that tenders shall be made available from the time of their opening, the initial tenders from the time of the invitation to tender, and requests to participate in the procedure, from the date on which the results of the examination of compliance with the conditions for participation in the procedure are communicated.'

Law on combating unfair competition

21 Article 11(2) of the Ustawa o zwalczaniu nieuczciwej konkurencji (Law on combating unfair competition) of 16 April 1993 (consolidated text, Dz. U. 2020, item 1913), states:

'A "trade secret" shall be construed as technical, technological, scientific and organisational information of an undertaking or other information of economic value that is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons normally dealing with that type of information, provided that the entity authorised to use or dispose of such information has taken reasonable measures to keep it confidential.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

22 In 2019, the contracting authority published a public contract notice, within the scope of Directive 2014/24, for the purposes of developing projects relating to the environmental management of certain river basin districts in Poland. The tender specifications set out the conditions for participation in the procedure, the documents required and the criteria for the award of that contract.

23 In the latter regard, the tender specifications stated that the tenders would be evaluated on the basis of three criteria, namely price (40% weighting), project development design (42% weighting) and the description of the manner of performance of the contract (weighting of 18%), the latter two criteria relating to the quality of the tender which were themselves subject to a number of sub-criteria.

24 Following the evaluation of the four tenders submitted, the contract was awarded to CDM Smith. Although the price of the Antea tender was lower than that of CDM Smith's tender, Antea obtained an overall score lower than that obtained by that other tenderer, more points having been awarded to that tenderer in respect of the quality criteria.

25 Antea brought an action before the referring court seeking, inter alia, annulment of the decision awarding the contract to CDM Smith, a fresh examination of the tenders and the disclosure of certain information.

26 In support of that action, Antea complains, in particular, that the contracting authority failed to disclose the information communicated to it by CDM Smith, Multiconsult and Arup concerning their tenders. This includes, in particular, lists of services previously provided, lists of persons who, if the contract were awarded, would be assigned to the performance of the contract, information relating to subcontractors or other third parties providing resources and, more generally, the project development design and the description of the manner of performance of the contract.

27 Antea claims that, by agreeing to treat that information confidentially, the contracting authority infringed the Law on public procurement and the Law on combating unfair competition. It wrongly considered that CDM Smith, Multiconsult and Arup had established that that information constituted trade secrets.

28 Moreover, the contracting authority failed to fulfil its obligation to give adequate reasons, on the basis of the sub-criteria set out in the tender specifications, for the scoring of each of the tenders.

29 Antea submits that it was deprived of its right to an effective remedy on account, first, of the excessive nature of the confidential treatment accorded to the information contained in its competitors' tenders and, second, of the lack of an adequate statement of reasons for the scores awarded. In the light of the principles of equal treatment and transparency, the right to confidential treatment of certain information

should be interpreted strictly. Economic operators who decide to participate in a public procurement procedure should agree that certain information about their activities might be disclosed.

30 The contracting authority disputes those arguments.

31 It considers that the project development design and the description of the manner of performance of the contract contain studies based on experience acquired over the years and refined for the procedure in question. Those studies thus form part of the intellectual property of their author.

32 The contracting authority maintains that disclosure of that information could, in any event, undermine the legitimate interests of the tenderer. Thus, the information contained in CDM Smith's tender has commercial value and, by means of internal rules, contractual clauses and instructions for the organisation of work and security of documents, that tenderer took the necessary measures for them to remain secret. Their disclosure would enable competitors to use the tenderer's know-how and the technical or organisational solutions which it has developed.

33 In the present case, the contracting authority maintains that each tenderer provided credible and coherent explanations concerning the classification of the information as trade secrets, on the basis of which it was decided to grant the confidential treatment requested. It considers, in that regard, that the principle of transparency does not override the right to protection of trade secrets.

34 Confidentiality extends, in particular, to the lists of persons assigned to perform the contract. The disclosure of such lists, which contain information enabling experts to be identified, would expose tenderers to loss of staff, since competitors might attempt to recruit those experts. Information on subcontractors or other third parties also includes information relating to their experts.

35 The contracting authority submits, moreover, that each of the award criteria was applied in accordance with the tender specifications and that the evaluation of the tenders in relation to those criteria took place in an exhaustive manner.

36 According to CDM Smith and Multiconsult, the information on the organisation and manner of performance of their services, such as that sent to the contracting authority, constitutes an intangible asset forming part of the tenderer's 'intellectual capital'. In the event of disclosure of that information, competitors could make use of the ideas and solutions presented therein. Moreover, and in any event, information on human resources is of high commercial value and constitutes a trade secret.

37 The referring court notes that it follows from Article 96 of the Law on public procurement that, in principle, tenderers have full access to the documents submitted in the context of public procurement procedures. The absence of such access would, according to that court, have a negative impact on the confidence of tenderers in the decisions of contracting authorities and on the exercise of the right to an effective remedy.

38 That court states that many tenderers seek confidential treatment of the documents that they submit to the contracting authorities, asserting that the information contained in them is a trade secret. Under Article 8(3) of the Law on public procurement, contracting authorities are prohibited from disclosing such information if the tenderer has made such a request and adduced the necessary evidence.

39 There is uncertainty as to the scope of Article 21(1) of Directive 2014/24 and as to the relevance, in that context, of Article 2(1) of Directive 2016/943. It is necessary, in order to ensure as far as possible uniformity of practice in the field of public procurement, to provide an interpretation of Article 21 which is consistent, in particular, with the principles of fair competition, equal treatment, transparency and proportionality.

40 According to the referring court, information provided by the tenderers to the contracting authority cannot all be regarded as being a trade secret or, more generally, as confidential. If the EU legislature had taken the view that all the information referred to in Articles 59 and 60 of Directive 2014/24 and Annex XII thereto is a trade secret, it would have indicated this. To facilitate, on the basis of an excessively broad interpretation of the concept of trade secrets, the grant of confidential treatment of the information transmitted by the tenderers would undermine the abovementioned principles.

41 That court presents an overview of the information and, in particular, of the design elements which each tenderer was required, in this instance, in accordance with the tender specifications, to submit to the contracting authority. It observes that, while the technical and methodological solutions thus submitted to the contracting authority have intellectual value and may therefore fall within the scope of a work protected by copyright, it does not necessarily follow that those elements constitute trade secrets.

42 Nor is that court convinced by the relevance of the risk of 'poaching' of experts relied on by the contracting authority. It is true that such a risk exists, but it is not problematic. It is natural for employees to look for new jobs and for employers to look for new employees, particularly in areas where expertise is required.

43 By contrast, the fact that a tenderer has very little information about the tenders which its competitors have submitted to the contracting authority is problematic, since that would have the effect of impeding or even preventing the effective use of remedies. In that regard, that court asks whether, in the event that it finds that certain documents should not have been treated as confidential, it would be necessary to allow the applicant to bring a new action.

44 The referring court also raises the issue of the award criteria relating to the 'project development design' and the 'description of the manner of performance of the contract'. It asks whether such criteria are too broad and vague. Any criterion laid down by the contracting authority should enable the contracting authority to take a decision on the basis of objective data which are easily comparable and quantifiable.

45 In those circumstances, the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive [2014/24] permit Article 21(1) of Directive 2014/24 and Article 2(1) of Directive [2016/943], including in particular the terms "is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible" and "has commercial value because it is secret" and the indication that "the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential", to be interpreted in such a manner that an economic operator can reserve, as a trade secret, any information on the ground that it does not wish to disclose that information to competing economic operators?

(2) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24/EU permit Article 21(1) of Directive 2014/24/EU and Article 2(1) of Directive 2016/943 to be interpreted in such a manner that economic operators competing for a public contract may reserve the documents referred to in Articles 59 and 60 of Directive 2014/24 and in Annex XII to Directive 2014/24 in whole or in part as trade secrets, including in particular the description of their experience, the list of references, the list of persons proposed to perform the contract and their professional qualifications, the names and capacities of the entities whose capacities they rely on or of their subcontractors, where those documents are required in order to prove fulfilment of the conditions for participation in the procedure or for the purpose of conducting an evaluation in accordance with the criteria for the evaluation of tenders or for ascertaining the compliance of the tender with the other requirements of the contracting authority contained in the procedure documentation (contract notice, tender specifications)?

(3) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24/EU, read in conjunction with Articles 58(1), 63(1) and 67(2)(b) thereof, permit the contracting authority to accept the economic operator's declaration that it has at its disposal the personal resources required by the contracting authority or declared by the economic operator, the entities on whose resources it wishes to rely or their subcontractors, which it must demonstrate to the contracting authority in accordance with applicable laws, and at the same time the economic operator's declaration that

the mere disclosure to competing economic operators of the details of those persons or entities (their names, experience and qualifications) may result in their being “poached” by those economic operators, with the result that it is necessary to treat that information as a trade secret? In the light of the foregoing, may such an impermanent link between the economic operator and those persons and entities be regarded as evidence of the availability of the resource in question and, in particular, may the economic operator be awarded additional points under the tender evaluation criteria?

(4) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24 permit Article 21(1) of Directive 2014/24 and Article 2(1) of Directive 2016/943 to be interpreted in such a manner that economic operators competing for a public contract may reserve as trade secrets documents required for the purpose of examining the compliance of their tender with the requirements of the contracting authority contained in the tender specifications (including the description of the subject matter of the contract) or for the purpose of evaluating the tender under the tender evaluation criteria, particularly where those documents relate to the fulfilment of the requirements of the contracting authority laid down in the tender specifications, in applicable laws or in other documents which are generally available or accessible to interested parties, and in particular where that evaluation does not take place according to objectively comparable schemes and mathematically or physically measurable and comparable indicators, but rather according to an individual assessment by the contracting authority? Consequently, are Article 21(1) of Directive 2014/24/EU and Article 2(1) of Directive 2016/943 to be interpreted as meaning that a declaration made by an economic operator in the context of its tender that it will perform the subject matter of the contract in accordance with the contracting authority's requirements included in the tender specifications, compliance with which is monitored and assessed by the contracting authority, can be regarded as a trade secret of the economic operator in question, even though it is for the economic operator to choose the methods intended to achieve the result required by the contracting authority (the subject matter of the contract)?

(5) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24, read in conjunction with Article 67(4) thereof, which provides that award criteria must not have the effect of conferring an unrestricted freedom of choice on the contracting authority, must ensure the possibility of effective competition and must allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria, permit the contracting authority to establish a tender evaluation criterion, including in particular a criterion evaluated according to the contracting authority’s own judgment, even though it is known at the time at which the criterion is established that economic operators will designate the part of their tender relating to that criterion as a trade secret, to which the contracting authority does not object, with the result that competing economic operators, being unable to verify their competitors’ tenders and compare them with their own tenders, may have the impression that the contracting authority examines and evaluates tenders in an entirely discretionary manner?

(6) Are the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24/EU, read in conjunction with Article 67(4) thereof, which provides that award criteria must not have the effect of conferring an unrestricted freedom of choice on the contracting authority, must ensure the possibility of effective competition and must allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria, to be interpreted as permitting the contracting authority to establish a tender evaluation criterion such as, in the present case, the criterion concerning the “[project development design]” and the criterion concerning the “description of the manner of performance of the contract”?

(7) Is Article 1(1) and (3) of [Directive 89/665], requiring the Member States to ensure that economic operators have effective remedies against decisions taken by contracting authorities and that review procedures are available to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, to be interpreted as meaning that a finding by the adjudicating authority that

documents reserved by the economic operators in a particular procedure are not trade secrets, which results in the contracting authority being obliged to disclose them and to make them available to competing economic operators – if such an effect is not directly provided for in applicable laws – imposes an obligation on the adjudicating authority to make a ruling enabling the economic operator in question to lodge an appeal again – within the scope arising from the content of those documents which the economic operator did not know beforehand, as a result of which it was not in a position to make effective use of a legal remedy – against an action with respect to which it would not be entitled to lodge an appeal on account of the expiry of the period for doing so, for instance by declaring invalid the examination and evaluation of tenders to which the documents in question reserved as trade secrets pertained?'

Consideration of the questions referred

The first question

46 By its first question, the referring court asks, in essence, whether Article 18(1) and Article 21(1) of Directive 2014/24 must be interpreted as precluding national legislation on public procurement which requires that, with the sole exception of trade secrets, information sent by the tenderers to the contracting authorities must be published in its entirety or communicated to the other tenderers, and a practice on the part of contracting authorities whereby requests for confidential treatment in respect of trade secrets are accepted as a matter of course.

47 In that regard, it should be noted at the outset that Article 18 of Directive 2014/24 establishes the principles governing the award of public contracts referred to in that directive. As follows from paragraph 1 of that provision, contracting authorities must treat economic operators 'equally and without discrimination' and must act 'in a transparent … manner'.

48 However, notwithstanding the obligation of the contracting authorities to act in a transparent manner, under Article 21(1) of that directive, such an entity may not disclose 'information forwarded to it by economic operators which they have designated as confidential'.

49 In that regard, the Court has repeatedly held that the principal objective of the EU rules on public procurement is to ensure undistorted competition, and that, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Since public procurement procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, those operators must be able to communicate any relevant information to the contracting authorities in such a procedure, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to those operators (judgments of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraphs 34 to 36, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 115).

50 That said, the principle of the protection of confidential information must be reconciled with the requirements of effective judicial protection. To that end, the prohibition laid down in Article 21(1) of Directive 2014/24 must be weighed against the general principle of good administration, from which the obligation to state reasons stems. That balancing exercise must take account of the fact that, in the absence of sufficient information enabling it to ascertain whether the decision of the contracting authority to award the contract is vitiated by errors or unlawfulness, an unsuccessful tenderer will not, in practice, be able to rely on its right, referred to in Article 1(1) and (3) of Directive 89/665, to an effective review (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 121 to 123).

51 In the present case, it is apparent from the order for reference that the request made by the applicant in the main proceedings for access to the information submitted to the contracting authority by CDM Smith, Arup and Multiconsult was examined on the basis of the Law on public procurement. In accordance with Article 8 of that law, trade secrets are, at the request of the tenderers holding them, to be treated confidentially, while any other information submitted by the tenderers to the contracting

authority must, pursuant to Article 96 of that law, be made public in an annex to the report drawn up by that entity.

52 It is also apparent from the order for reference that the concept of 'trade secrets', which is defined in Polish law in Article 11(2) of the Law on combating unfair competition, refers to information which has commercial value and is not generally known to persons who normally deal with the kind of information in question or is not easily accessible to them, provided that the person authorised to use or dispose of that information diligently took steps to preserve its confidentiality.

53 That definition corresponds essentially to that of the concept of trade secrets in Article 2(1) of Directive 2016/943.

54 It must be held that it does not follow either from the wording or objective of Directive 2014/24 that it precludes the use, by the legislature of a Member State, of such a concept to define the scope of Article 21(1) of that directive.

55 It is true that the concept of 'trade secret', as defined in Article 2(1) of Directive 2016/943, or in a corresponding provision of national law, overlaps only in part with the words 'information forwarded to it … designated as confidential' contained in Article 21(1) of Directive 2014/24. According to the very wording of that provision, the information referred to therein includes 'but [is] not limited to, technical or trade secrets and the confidential aspects of tenders' which indicates, as the Advocate General noted in points 34 and 35 of his Opinion, that the scope of the protection of confidentiality set out in Directive 2014/24 is broader than that of protection covering trade secrets alone. The Court has, moreover, already held that the rules on the unlawful acquisition, use or disclosure of trade secrets, within the meaning of Directive 2016/943, do not release public authorities from the confidentiality obligations which may arise under Directive 2014/24 (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 97 and 99).

56 However, Article 21(1) of Directive 2014/24 states that the prohibition on disclosure of information communicated in confidence applies 'unless otherwise provided … in the national law to which the contracting authority is subject'.

57 It follows from that indication that it is permissible for each Member State to strike a balance between the confidentiality referred to in that provision of Directive 2014/24 and the rules of national law pursuing other legitimate interests, including that, expressly mentioned in that provision, of ensuring 'access to information', in order to ensure the greatest possible transparency in public procurement procedures.

58 However, if the effectiveness of EU law is not to be undermined, the Member States, when exercising the discretion conferred on them by Article 21(1) of that directive, must refrain from introducing regimes which do not ensure full respect for the purpose of that provision, referred to in paragraph 49 of the present judgment, which undermine the balancing exercise referred to in paragraph 50 of the present judgment or which alter the regime relating to the publicising of awarded contracts and the rules relating to information to candidates and tenderers set out in Article 50 and 55 of that directive.

59 In that regard, it should be noted that any regime relating to confidentiality must, as Article 21(1) of Directive 2014/24 expressly states, be without prejudice to the abovementioned regime and to those rules laid down in Articles 50 and 55 of that directive.

60 Under Article 50(1) of that directive, the contracting authority must, at the end of the procurement procedure, issue, for publication, a contract award notice containing, in accordance with Part D of Annex V to that directive, certain information relating, inter alia, to the successful tenderer and to the tender submitted by that tenderer. However, Article 50(4) of Directive 2014/24 also provides that that information may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of an economic operator, public or private, or might prejudice fair competition.

61 Similarly, although Article 55(2) of Directive 2014/24 expressly allows any tenderer that has made an admissible tender to request the contracting authority to inform it of the reasons for the rejection of its

tender, the characteristics and relative advantages of the tender selected and the name of the successful tenderer, it is nevertheless provided, in paragraph 3 of that article, that the contracting authority may decide to withhold certain information, where its release would impede law enforcement, would otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of an economic operator or might prejudice fair competition.

62 National legislation which requires publicising of any information which has been communicated to the contracting authority by all tenderers, including the successful tenderer, with the sole exception of information covered by the concept of trade secrets, is liable to prevent the contracting authority, contrary to what Articles 50(4) and 55(3) of Directive 2014/24 permit, from deciding not to disclose certain information pursuant to interests or objectives mentioned in those provisions, where that information does not fall within that concept of a trade secret.

63 Consequently, Article 21(1) of Directive 2014/24, read in conjunction with Articles 50 and 55 of that directive, first, does not preclude a Member State from establishing a regime that limits the scope of the obligation to treat information as confidential on the basis of a concept of trade secrets corresponding, in essence, to that contained in Article 2(1) of Directive 2016/943. Second, it precludes such a regime where it does not contain an adequate set of rules allowing contracting authorities, in circumstances where Articles 50 and 55 apply, exceptionally to refuse to disclose information which, while not covered by the concept of trade secrets, must remain inaccessible pursuant to an interest or objective referred to in Articles 50 and 55.

64 As regards, lastly, the practice, described by the referring court, whereby, in the Member State concerned, contracting authorities accept requests from tenderers to classify as trade secrets any information that they do not wish to disclose to competing tenderers as a matter of course, it must be stated that such a practice, on the assumption that it has actually been put into effect, which it is not for the Court to ascertain, is liable to undermine not only the balance between the principle of transparency set out in Article 18(1) of Directive 2014/24 and the principle of confidentiality referred to in Article 21(1) of that directive, but also the requirements, recalled in paragraph 50 of this judgment, of effective judicial protection, and the general principle of good administration, which derives from the obligation to state reasons.

65 In that regard, it must be borne in mind that the contracting authority cannot be bound by an economic operator’s mere claim that the information submitted is confidential but must require that that operator demonstrate the genuinely confidential nature of the information which it claims should not be disclosed (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 117).

66 Furthermore, in order to comply with the general principle of good administration and to reconcile the protection of confidentiality with the requirements of effective judicial protection, the contracting authority must not only state the reasons for its decision to treat certain data as confidential but must also communicate in a neutral form – to the extent possible and in so far as such disclosure is capable of preserving the confidentiality of the specific elements of that data which merit protection on that basis – the essential content of that data to an unsuccessful tenderer which requests it, and in particular the content of the data concerning the decisive aspects of its decision and of the successful tender (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 122 and 123).

67 Thus, the contracting authority may, inter alia and in so far as it is not precluded from doing so by the national law to which it is subject, communicate in summary form certain aspects of an application or tender and their technical characteristics, in such a way that the confidential information cannot be identified. In addition, assuming that the non-confidential information is adequate in order to ensure that the unsuccessful tenderer’s right to an effective review is respected, the contracting authority may request the successful tenderer to provide it with a non-confidential version of the documents containing confidential information (judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centra*s, C-927/19, EU:C:2021:700, paragraphs 124 and 125).

68 In the light of all the foregoing considerations, the answer to the first question is that Article 18(1) and Article 21(1), read in conjunction with Article 50(4) and Article 55(3) of Directive 2014/24 must be

interpreted as precluding national legislation on public procurement which requires that, with the sole exception of trade secrets, information sent by the tenderers to the contracting authorities must be published in its entirety or communicated to the other tenderers, and as precluding a practice of contracting authorities whereby requests for confidential treatment in respect of trade secrets are accepted as a matter of course.

The second to fourth questions referred

69 The second to fourth questions, which it is appropriate to examine together, concern, in particular, the interpretation of Article 18(1) and Article 21(1) of Directive 2014/24.

70 That said, as stated in paragraph 59 of this judgment, the latter provision is without prejudice, in particular, to the regime on informing candidates and tenderers laid down in Article 55 of that directive.

71 Independently of the scope of Article 21(1) of that directive, Article 55(2) expressly allows any tenderer that has made an admissible tender to request the contracting authority to inform it of the reasons for the rejection of its tender, the characteristics and relative advantages of the tender selected and the name of the successful tenderer, subject, only, to the possibility granted in paragraph 3 of that article to the contracting authority to decide to withhold certain information, where its release would impede law enforcement, would otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of an economic operator or might prejudice fair competition.

72 In the light of the relevance of all those provisions, it must be held that, by its second to fourth questions, the referring court asks, in essence, whether Article 18(1), Article 21(1) and Article 55 of Directive 2014/24 must be interpreted as meaning that a contracting authority must allow or, on the contrary, refuse to allow a tenderer whose admissible tender has been rejected access to the information that the other tenderers submitted concerning their relevant experience and the references relating to that experience, concerning the identity and professional qualifications of the persons proposed to perform the contract or the sub-contractors, and concerning the design of the projects to be carried out under the contract and the manner of performance of that contract.

73 As regards, first of all, the tenderers' relevant experience and the reference material which they attach to their tenders, by way of demonstration of that experience and their capacities, it must be held that such information, which largely corresponds to that referred to in Annex XII to Directive 2014/24, to which Articles 60 and 63 thereof refer, cannot be classified as confidential in its entirety.

74 Where an economic operator participates in a public procurement procedure, it cannot legitimately request that the list of contracts obtained or projects carried out, pursuant to which it acquired the relevant experience for the public contract in question, and the references used to demonstrate such experience, be treated as confidential in whole or in part.

75 Since the experience of a tenderer is not, as a general rule, secret, its competitors cannot, in principle, be deprived of information relating to that experience, on the basis of the concept of 'trade secrets' contained in the law of the Member State concerned in order to define the scope of the confidentiality referred to in Article 21(1) of Directive 2014/24, or on the basis of the protection of 'legitimate commercial interests' or the preservation of 'fair competition' within the meaning of Article 55(3) of that directive.

76 In any event, in accordance with the principles deriving from the Court's case-law recalled in paragraphs 66 and 67 of the present judgment, tenderers must, in the interests of transparency and in order to ensure compliance with the requirements of good administration and effective judicial protection, enjoy access, at the very least, to the essential content of the information provided by each of them to the contracting authority concerning their relevant experience for the public contract in question and the references used to demonstrate that experience. Such access is, however, without prejudice to particular circumstances relating to certain contracts for sensitive products or services which may exceptionally justify a refusal of disclosure on one of the other grounds mentioned in Article 55(3) of Directive 2014/24, relating to compliance with a prohibition or requirement laid down by law or the protection of the public interest.

77 As regards, next, information on natural and legal persons, including subcontractors, on which a tenderer indicates that it may rely in order to perform the contract, a distinction must be made between information enabling those persons to be identified and that which relates, without the possibility of making such an identification, to the qualifications or professional capacities of those persons.

78 The contracting authority must determine whether the disclosure of the identity of the experts or subcontractors engaged by a tenderer to contribute to the performance of that contract in the event that it is awarded, is likely to undermine the confidentiality protection referred to in Article 21(1) of Directive 2014/24 in respect of that tenderer, as well as those experts or subcontractors. To that end, that contracting authority should take into account all relevant circumstances, including the subject matter of the public contract in question, and the interest of that tenderer and those experts and subcontractors in taking part, with the same commitments negotiated in confidence, in subsequent procurement procedures. The disclosure of information sent to the contracting authority in the context of a public procurement procedure cannot be refused if that information, although relevant to the procurement procedure in question, has no commercial value in the wider context of the activities of those economic operators.

79 In the light of those considerations and in so far as it is plausible that the tenderer and the experts or subcontractors proposed by it have created a synergy with commercial value, it cannot be ruled out that access to the name-specific data relating to those commitments must be refused on the basis of the prohibition on disclosure laid down in Article 21(1) of Directive 2014/24 or may be refused under Article 55(3) of that directive.

80 As regards non-name-specific data, indicating, without the possibility of personal identification, the qualifications or professional capacities of the natural or legal persons engaged to perform the contract, the size and format of the workforce thus created, or the share of performance of the contract that the tenderer intends to assign to subcontractors, it must be held, in view of the importance of that information for the award of the contract, that the principle of transparency and the right to an effective remedy require, at the very least, that the essential content of the information be accessible to all tenderers.

81 As regards, finally, the design of the projects planned to be carried out under the public contract and the description of the manner of performance of the contract, it is for the contracting authority to examine whether those projects constitute elements or contain elements which can be protected by an intellectual property right, in particular by copyright, and thus fall within the scope of the ground for refusal of disclosure set out in Article 55(3) of Directive 2014/24, relating to the application of laws.

82 In that regard, it should however be borne in mind that, even where that design and description, or a part thereof, are regarded as constituting works protected by copyright, which implies that they are regarded as original in the sense that they constitute intellectual creations specific to their author, reflecting the author’s personality (see, to that effect, judgment of 29 July 2019, *Funke Medien NRW*, C-469/17, EU:C:2019:623, paragraph 19 and the case-law cited), that protection is reserved for elements which are the expression of such a creation and does not extend to ideas, procedures, operating methods or mathematical concepts as such (see, to that effect, judgment of 13 November 2018, *Levola Hengelo*, C-310/17, EU:C:2018:899, paragraphs 37 and 39 and the case-law cited). That protection does not therefore relate to technical or methodological solutions such as those works may include.

83 In addition, and irrespective of whether they constitute or contain elements protected by an intellectual property right, the design of the projects planned to be carried out under the public contract and the description of the manner of performance of the relevant works or services may, as the case may be, have a commercial value which would be unduly undermined if that design and that description were disclosed as they stand. Their publication may, in such a case, be liable to distort competition, in particular by reducing the ability of the economic operator concerned to distinguish itself using the same design and description in future public procurement procedures.

84 It is therefore possible that full access to information relating to the design of the projects planned to be carried out under the public contract and to the description of the manner of performance of the contract should be refused on the basis of the prohibition on disclosure laid down in Article 21(1) of

Directive 2014/24 or may be refused under Article 55(3) of that directive. However, it is excessively difficult, if not impossible, for other tenderers to exercise their right to an effective remedy against decisions of the contracting authority concerning the evaluation of tenders if they have no information on that design or manner of performance. Consequently, the essential content of that part of the tenders must be accessible, in accordance with the principles arising from the case-law referred to in paragraphs 66 and 67 of the present judgment.

85 In the light of all the foregoing considerations, the answer to the second, third and fourth questions is that Article 18(1), Article 21(1) and Article 55 of Directive 2014/24 must be interpreted as meaning that the contracting authority must, in order to determine whether it will refuse a tenderer whose admissible tender has been rejected access to the information which other tenderers submitted concerning (i) their relevant experience and the references relating thereto, (ii) the identity and professional qualifications of the persons that they have proposed to perform the contract or the sub-contractors and (iii) the design of the projects to be performed under the public contract and the manner of performance of that contract, assess whether that information has a commercial value outside the scope of the public contract in question, where its disclosure might undermine legitimate commercial concerns or fair competition. The contracting authority may, moreover, refuse to grant access to that information where, even though it does not have such commercial value, its disclosure would impede law enforcement or would be contrary to the public interest. A contracting authority must, where full access to information is refused, grant that tenderer access to the essential content of that information, so that observance of the right to an effective remedy is ensured.

The fifth question

86 The fifth question is based on the factual premiss that, in the Member State of the referring court, contracting authorities as a matter of course accept requests from tenderers to treat as confidential information contained in tenders which is decisive in terms of the contract award criteria chosen by the contracting authority. It follows that no tenderer is in a position to form an opinion on the quality of its competitors' tenders. In such circumstances, it is impossible for each tenderer to know whether the award of the contract is based on an objective or arbitrary comparison.

87 Although it is not for the Court, in the context of a reference for a preliminary ruling, to examine whether that premiss actually corresponds to a practice of contracting authorities in that Member State, it must be noted that it is apparent from paragraphs 71 to 85 of the present judgment that the information contained in the tenders which is relevant for the evaluation of those tenders and the award of the contract on the basis of the criteria set out in the contract notice and the contract documents cannot systematically and entirely be classified as confidential. It follows that Directive 2014/24 precludes a practice such as that described in the fifth question in respect of its factual premiss. Consequently, there is no need to answer that question, which relates to the contract award criteria that may be used where such a practice in respect of confidential treatment is followed.

The sixth question

88 By its sixth question, the referring court asks, in essence, whether Article 18(1) of Directive 2014/24, read in the light of Article 67(4) thereof, must be interpreted as precluding the 'project development design' to be carried out under the public contract in question and the 'description of the manner of performance of the contract' for that contract from being included among the criteria for the award of the contract.

89 Those provisions of Directive 2014/24 require compliance with the principles of transparency and equal treatment, which allow the conditions of effective competition to be ensured.

90 As stated, moreover, in recital 90 of that directive, public contracts should be awarded on the basis of criteria which ensure compliance with those principles, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine which tender is the most economically advantageous tender on the basis of the best price-quality ratio. To that end, contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions. In the same vein, recital 92 of that directive states that the economic and

qualitative criteria determined by the contracting authority should allow for a comparative assessment of the level of performance offered by each tenderer.

91 It is therefore important that the award criteria do not confer an unrestricted freedom of choice on the contracting authority (judgment of 20 September 2018, *Montte*, C-546/16, EU:C:2018:752, paragraph 31 and the case-law cited). Therefore, as is apparent from Article 67(4) of Directive 2014/24, those criteria must be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet those criteria.

92 Therefore, where, as in the present case, the contracting authority establishes award criteria intended to measure the quality of the tenders, those criteria cannot merely refer to the design of the projects to be performed under the public contract and the manner of performance of that contract described by the tenderer, but must be accompanied by indications which allow a sufficiently concrete comparative assessment of the level of service offered to be made. In a case such as that at issue in the main proceedings, where the quality criteria correspond, in total, to 60% of the points that may be allocated for the purposes of awarding the tender, it is all the more important, in order to guarantee an objective comparison and to eliminate the risk of arbitrary treatment, that those criteria be clearly set out.

93 Such indications may, in particular, be provided by establishing sub-criteria.

94 Where the service which is the subject of the contract relates, as in the case in the main proceedings, to a project development service, account should be taken, in particular, of the training and professional experience of the members of the team proposed to perform the contract in question (see, to that effect, judgment of 26 March 2015, *Ambisig*, C-601/13, EU:C:2015:204, paragraphs 31 to 34).

95 In the present case, it is for the referring court to ascertain whether the sub-criteria relating to the ‘project development design’ and the ‘description of the manner of performance of the contract’ were sufficiently clear to enable the contracting authority to make a concrete and objective assessment of the tenders submitted.

96 In the light of the foregoing, the answer to the sixth question referred is that Article 18(1) of Directive 2014/24, read in the light of Article 67(4) thereof, must be interpreted as not precluding the ‘project development design’ planned to be carried out under the public contract in question and the ‘description of the manner of performance of the contract’ for that contract from being included among the criteria for the award of the contract, provided that those criteria are accompanied by indications enabling the contracting authority to make a specific and objective assessment of the tenders submitted.

The seventh question

97 As is apparent from the elements of the dispute in the main proceedings summarised in paragraphs 25 to 27 of the present judgment, Antea brought an action seeking annulment of the contract award decision on the ground, inter alia, that it did not have access, after that decision was adopted, to information that its competitors, including the successful tenderer, had forwarded to the contracting authority.

98 By its seventh question, the referring court asks, in essence, whether Article 1(1) and (3) of Directive 89/665 must be interpreted as meaning that, in the event of a finding, when dealing with an action brought against a decision awarding a public contract, of an obligation on the part of the contracting authority to disclose to the applicant information which was wrongly treated as confidential, that finding must also lead to the adoption, by that contracting authority, of a new award decision in order to enable the applicant to bring a fresh action.

99 It follows from Article 1(1) of Directive 89/665 that decisions taken by a contracting authority in a procurement procedure that falls under EU law must be capable of being reviewed effectively and, in particular, as rapidly as possible; that review makes it possible to challenge the compliance of those decisions with EU law or national rules transposing EU law. Article 1(3) states, moreover that those review procedures must be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

100 Article 1 is thus intended to protect economic operators against arbitrary decisions by a contracting authority by ensuring that there are, in all the Member States, effective remedies, so as to ensure the effective application of EU rules on public procurement, in particular at a stage where infringements can still be rectified. The purpose of Directive 89/665 is therefore to ensure full respect for the right to an effective remedy and to a fair trial, as enshrined in the first and second paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 127 and 128).

101 In order to observe that right to an effective remedy, the national court hearing an action relating to a procedure for the award of a public contract must ascertain, taking into account the obligation on the part of the contracting authority to provide the unsuccessful tenderer with sufficient information to safeguard that right to an effective remedy and the right of other economic operators to protection of confidentiality, that the contracting authority rightly considered that the information it refused to disclose to the applicant was confidential. To that end, that court must carry out a full examination of all the relevant matters of fact and law. Accordingly, it must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 129 and 130).

102 Where, at the end of that verification, the national court finds that certain information was wrongly classified as confidential, that court must be able to annul the contracting authority's decision refusing to disclose that information and, as the case may be, the decision dismissing the administrative appeal against that refusal. Furthermore, if it is permitted to do so under national law, that court must itself be able to take a new decision in that regard (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 136).

103 As regards the effects of failure to disclose that information on the legality of the procurement procedure and, thus, on the contract award decision, the provisions of Directive 89/665 do not make it possible to determine the detailed procedural rules under which the national court must examine those effects. It is therefore for each Member State to determine those detailed rules, which must, in accordance with Article 1(3) of that directive, enable any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement to challenge effectively and rapidly decisions taken by contracting authorities (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 136).

104 Therefore, in a case such as that at issue in the main proceedings, in which the applicant seeks annulment of the contract award decision on the ground, inter alia, that certain information was wrongly classified as confidential, it is for the court hearing the case to examine whether that information should have been disclosed and, if so, to assess whether the failure to disclose that information deprived the applicant of the possibility of bringing an effective action against that award decision.

105 It is then for that court to ensure that any infringement of any established right to an effective remedy is remedied.

106 In that context, that court must in particular take into account the settled case-law of the Court to the effect that the purpose, set out in Article 1 of Directive 89/655, of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the applicant knew, or ought to have known, of the alleged infringement of those provisions (judgments of 28 January 2010, *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 32, and of 8 May 2014, *Idrodinamica Spurgo Velox and Others*, C-161/13, EU:C:2014:307, paragraph 37, and order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 45).

107 Consequently, in the event that national procedural law does not allow the court before which an action has been brought against a decision to award a public contract to take, during the proceedings, measures restoring observance of the right to an effective remedy, that court must, where it transpires

that that right has been infringed as a result of the failure to disclose information, either annul that award decision or find that the applicant may bring a fresh action against the award decision already taken, the time limit for doing so running only from the time that that applicant has access to all the information that was wrongly classified as confidential.

108 Accordingly, the answer to the seventh question is that Article 1(1) and (3) of Directive 89/665 must be interpreted as meaning that, in the event of a finding, when dealing with an action brought against a decision awarding a public contract, of an obligation on the part of the contracting authority to disclose to the applicant information which was wrongly treated as confidential and of a breach of the right to an effective remedy on account of the failure to disclose that information, that finding does not necessarily have to lead to the adoption, by that contracting authority, of a new contract award decision, provided that the national procedural law permits the court hearing the case to adopt, during the proceedings, measures which restore compliance with the right to an effective remedy or allow it to find that the applicant may bring a new action against the award decision that has already been made. The time limit for bringing such an action must not start to run until the applicant has access to all the information which had been wrongly classified as confidential.

Costs

109 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 18(1) and Article 21(1), read in conjunction with Article 50(4) and Article 55(3) of 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC,**

   must be interpreted as precluding national legislation on public procurement which requires that, with the sole exception of trade secrets, information sent by the tenderers to the contracting authorities must be published in its entirety or communicated to the other tenderers, and as precluding a practice of contracting authorities whereby requests for confidential treatment in respect of trade secrets are accepted as a matter of course.

2. **Article 18(1), Article 21(1), and Article 55(3) of Directive 2014/24,**

   must be interpreted as meaning that the contracting authority

   – **must, in order to determine whether it will refuse a tenderer whose admissible tender has been rejected access to the information which other tenderers submitted concerning (i) their relevant experience and the references relating thereto, (ii) the identity and professional qualifications of the persons that they propose will perform the contract or the sub-contractors and (iii) the design of the projects to be performed under the contract and the manner of performance of that contract, assess whether that information has a commercial value outside the scope of the public contract in question, where its disclosure might undermine legitimate commercial or fair competition;**

   – **may, moreover, refuse to grant access to that information where, even though it does not have such commercial value, its disclosure would impede law enforcement or would be contrary to the public interest; and**

   – **must, where full access to information is refused, grant that tenderer access to the essential content of that information, so that observance of the right to an effective remedy is ensured.**

3. **Article 18(1) of Directive 2014/24, read in the light of Article 67(4) of that directive,**

must be interpreted as not precluding the 'project development design', planned to be carried out under the public contract in question and the 'description of the manner of performance of the contract' for that contract from being included among the criteria for the award of the contract, provided that those criteria are accompanied by indications enabling the contracting authority to make a specific and objective assessment of the tenders submitted.

4. **Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014,**

must be interpreted as meaning that, in the event of a finding, when dealing with an action brought against a decision awarding a public contract, of an obligation on the part of the contracting authority to disclose to the applicant information which was wrongly treated as confidential and of a breach of the right to an effective remedy on account of the failure to disclose that information, that finding does not necessarily have to lead to the adoption, by that contracting authority, of a new contract award decision, provided that the national procedural law permits the court hearing the case to adopt, during the proceedings, measures which restore observance of the right to an effective remedy or allow it to find that the applicant may bring a new action against the award decision that has already been made. The time limit for bringing such an action must not start to run until the applicant has access to all the information which had been wrongly classified as confidential.

[Signatures]

---

* Language of the case: Polish.

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 12 May 2022 (1)

Case C-54/21

Konsorcjum: ANTEA POLSKA S.A., Pectore-Eco sp. z o.o., Instytut Ochrony Środowiska – Państwowy lnstytut Badawczy
v
Państwowe Gospodarstwo Wodne Wody Polskie,
interveners:
ARUP Polska sp. z o.o.,
CDM Smith sp. z o.o.,
Konsorcjum: Multiconsult Polska Sp. z o.o., ARCADlS Sp. z o.o., HYDROCONSULT sp. z o.o. Biuro Studiów i Badań Hydrogeologicznych i Geofizycznych

(Request for a preliminary ruling from the Krajowa Izba Odwoławcza (Public Procurement Office, Poland))

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 21 – Confidentiality – Reasoned request for a declaration of confidentiality and proof – Powers of the contracting authority – Declaration of confidentiality – Statement of reasons – Modification of the scope of confidentiality by national legislation – Trade secrets – Directive (EU) 2016/943 – Applicability – Assessment of confidentiality in relation to categories of documents – Exclusion – Case-by-case assessment)

1. In the present reference for a preliminary ruling, the Court is asked to specify the limits of the confidentiality of information included by tenderers in their tenders in procedures for the award of public contracts.

2. In the judgment in *Klaipėdos*, (2) delivered after this request for a preliminary ruling was registered, the Court addressed the issues raised by the articles of Directive 2014/24/EU, (3) in particular Article 21, that deal with the confidentiality of such information.

3. The findings in that judgment provide answers to some of the questions raised by the Krajowa Izba Odwoławcza (Public Procurement Office, Poland), which is the referring body. (4)

I. Legal framework

A. European Union law

1. Directive 2014/24

4. Article 21 (‘Confidentiality’) states:

‘1. Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.’

5. Article 50 (‘Contract award notices’) provides:

‘…

4. Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.’

6. In accordance with Article 55 (‘Informing candidates and tenderers’):

‘…

3. Contracting authorities may decide to withhold certain information referred to in paragraphs 1 and 2, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.’

2. Directive (EU) 2016/943 (5)

7. According to recital 18:

‘Furthermore, the acquisition, use or disclosure of trade secrets, whenever imposed or permitted by law, should be treated as lawful for the purposes of this Directive. … In particular, this Directive should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in Union or national law. Such confidentiality obligations include, inter alia, the obligations in respect of information forwarded to contracting authorities in the context of procurement procedures, as laid down, for example, in … Directive 2014/24/EU …’

8. Article 1 (‘Subject matter and scope’) states:

‘…

2. This Directive shall not affect:

…

(c) the application of Union or national rules requiring or allowing Union institutions and bodies or national public authorities to disclose information submitted by businesses which those institutions, bodies or authorities hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;

…’

9. Article 2 (‘Definitions’) states:

‘For the purposes of this Directive, the following definitions apply:

(1) “trade secret” means information which meets all of the following requirements:

(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) it has commercial value because it is secret;

(c) it has been subject to reasonable steps under the circumstances, by the persons lawfully in control of the information, to keep it secret;

…’

10. Article 3 (‘Lawful acquisition, use and disclosure of trade secrets’) provides:

‘…

2. The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.’

B. Polish law

1. Ustawa z dnia 29 stycznia 2004 r. – Prawo zamówień publicznych (6)

11. Article 7 provides:

‘1. The contracting authority shall prepare and conduct the procurement procedure in a manner ensuring fair competition and equal treatment of all economic operators and in accordance with the principles of proportionality and transparency.

…’

12. Article 8 reads:

‘1. The procurement procedure shall be public.

2. The contracting authority may restrict access to information related to the procurement procedure only in the cases determined by law.

2a. The contracting authority may set out in the tender specifications requirements that must be met in order to maintain the confidentiality of information provided to the economic operator in the course of the procedure.

3. Information constituting a business secret within the meaning of the provisions on unfair competition shall not be disclosed if the economic operator, not later than the deadline for submission of tenders or requests to participate, has stated that the information concerned may not be disclosed and has demonstrated that the reserved information constitutes a business secret. An economic operator may not designate as confidential the information referred to in Article 86(4). This provision shall apply *mutatis mutandis* to competitions.

…’

2. Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji (7)

13. Article 11(2) states:

‘A “business secret” shall be construed as technical, technological, scientific and organisational information of an undertaking or other information of economic value that is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons normally dealing with that type of information, provided that the entity authorised to use such information or to which such information is available has taken reasonable measures to keep it confidential.’

II. Facts, procedure and questions referred for a preliminary ruling

14. In 2019, (8) the Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority, Poland) launched an open procedure to award a contract for the ‘preparation of draft second updates of river basin management plans (II aPGW) together with the methodologies’.

15. The tender specifications stated that tenders would be evaluated on the basis of three criteria: price (40%), concept of the study (42%) and description of the manner of performance of the contract (18%).

16. Tenders were submitted by four operators, including a consortium of undertakings headed up by ANTEA POLSKA S.A. (‘Antea Polska’). (9) The contract was awarded to CDM Smith Sp. z o.o. (‘CDM’).

17. Antea Polska, which had been ranked second, appealed the award before the Krajowa Izba Odwoławcza (Public Procurement Office). Among its claims, it sought access to certain documents and to the information described by CDM and other tenderers as being a trade secret.

18. Antea Polska was of the view that classifying that information as secret infringed the principles of equal treatment and transparency requiring confidentiality to be interpreted strictly. It further claimed that the excessive admittance of information as confidential, combined with the absence of an adequate statement of reasons for the classifications granted, had deprived it of its right to an effective remedy, since it was unaware of the details of its competitors’ tenders.

19. In rebuttal of that position, the contracting authority argued, inter alia, that:

— The holders of the confidential information had discharged their duty to provide a reasonable explanation for the need to protect that information as secret.

— The concept of the study and the description of the manner of performance of the contract are authored studies the disclosure of which could prejudice the interests of their creator.

— The information contained in CDM’s tender had commercial value. Its disclosure would allow competitors to use the tenderer’s know-how and the technical or organisational solutions it had developed.

— The list of persons due to participate in the performance of the contract contains data by which those persons could be identified, an eventuality which could expose the economic operator to the risk of loss if the competition tried to ‘poach’ the persons in question. Similarly, the data in the tender form contain detailed information on the third parties providing resources which has a commercial value.

20. It was in those circumstances that the Krajowa Izba Odwoławcza (Public Procurement Office), which is responsible for adjudicating on the challenge to the contracting authority’s decision, referred seven questions for a preliminary ruling. As directed by the Court, I shall deal only with the first four, which are worded as follows:

‘(1) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24 … permit Article 21(1) of Directive 2014/24 and Article 2(1) of Directive 2016/943 …, including in particular the terms “is not, as a body or in the precise configuration and assembly of its components, generally known

among or readily accessible” and “has commercial value because it is secret” and the indication that “the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential”, to be interpreted in such a manner that an economic operator can reserve, as a trade secret, any information on the ground that it does not wish to disclose that information to competing economic operators?

(2) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24 permit Article 21(1) of Directive 2014/24 and Article 2(1) of Directive 2016/943 to be interpreted in such a manner that economic operators competing for a public contract may reserve the documents referred to in Articles 59 and 60 of Directive 2014/24 and in Annex XII to Directive 2014/24 in whole or in part as trade secrets, including in particular the description of their experience, the list of references, the list of persons proposed to perform the contract and their professional qualifications, the names and capacities of the entities whose capacities they rely on or of their subcontractors, where those documents are required in order to prove fulfilment of the conditions for participation in the procedure or for the purpose of conducting an evaluation in accordance with the criteria for the evaluation of tenders or for ascertaining the compliance of the tender with the other requirements of the contracting authority contained in the procedure documentation (contract notice, tender specifications)?

(3) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24, read in conjunction with Articles 58(1), 63(1) and 67(2)(b) thereof, permit the contracting authority to accept the economic operator’s declaration that it has at its disposal the personal resources required by the contracting authority or declared by the economic operator, the entities on whose resources it wishes to rely or their subcontractors, which it must demonstrate to the contracting authority in accordance with applicable laws, and at the same time the economic operator’s declaration that the mere disclosure to competing economic operators of the details of those persons or entities (their names, experience and qualifications) may result in their being “poached” by those economic operators, with the result that it is necessary to treat that information as a trade secret? In the light of the foregoing, may such an impermanent link between the economic operator and those persons and entities be regarded as evidence of the availability of the resource in question and, in particular, may the economic operator be awarded additional points under the tender evaluation criteria?

(4) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24 permit Article 21(1) of Directive 2014/24 and Article 2(1) of Directive 2016/943 to be interpreted in such a manner that economic operators competing for a public contract may reserve as trade secrets documents required for the purpose of examining the compliance of their tender with the requirements of the contracting authority contained in the tender specifications (including the description of the subject matter of the contract) or for the purpose of evaluating the tender under the tender evaluation criteria, particularly where those documents relate to the fulfilment of the requirements of the contracting authority laid down in the tender specifications, in applicable laws or in other documents which are generally available or accessible to interested parties, and in particular where that evaluation does not take place according to objectively comparable schemes and mathematically or physically measurable and comparable indicators, but rather according to an individual assessment by the contracting authority? Consequently, are Article 21(1) of Directive 2014/24 and Article 2(1) of Directive 2016/943 to be interpreted as meaning that a declaration made by an economic operator in the context of its tender that it will perform the subject matter of the contract in accordance with the contracting authority's requirements included in the tender specifications, compliance with which is monitored and assessed by the contracting authority, can be regarded as a trade secret of the economic operator in question, even though it is for the economic operator to choose the methods intended to achieve the result required by the contracting authority (the subject matter of the contract)?’

III. Procedure before the Court

21. The request for a preliminary ruling was registered at the Court on 29 January 2021.

22. Written observations were lodged by Antea Polska, Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority), the Austrian and Polish Governments and the European Commission.

23. The hearing, held on 16 March 2022, was attended by Antea Polska, Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority), CDM, the Polish Government and the Commission.

IV. Assessment

A. Preliminary observation: Applicable directive

24. In the judgment in *Klaipėdos* (paragraphs 96 to 102), the Court held that the legislation applicable to cases relating to the protection of confidentiality in procedures for the award of public contracts is contained in Directive 2014/24, which is the *lex specialis*, and not in Directive 2016/943.

25. That finding took into account, among other considerations, the fact that:

- 'Having regard to its purpose, as set out in Article 1(1) thereof, read in conjunction with recital 4 thereof, Directive 2016/943 concerns only the unlawful acquisition, use or disclosure of trade secrets *and does not provide for measures to protect the confidentiality of trade secrets in other types of court proceedings, such as proceedings relating to public procurement*'. (10)

- Recital 18 of Directive 2016/943 reads '… this Directive should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in Union or national law. Such confidentiality obligations include, inter alia, the obligations in respect of information forwarded to contracting authorities in the context of procurement procedures, as laid down, for example, in … Directive [2014/24] …'.

26. On that basis, there is no reason why account should not be taken of the concepts under Directive 2016/943 (11) where, as here, the national legislation refers to them in laying down the rules governing confidentiality in public procurement procedures. I shall come back to this point later.

B. First question

27. The referring court wishes to ascertain first and foremost whether the interpretation of Article 21 of Directive 2014/24 (12) authorises the tenderer to classify as confidential, on the ground that it is a trade secret, any information which it does not wish to disclose to its competitors.

28. It must be assumed that the concern which the referring court raises by that question has to do not so much which the tenderer's unilateral action as with the consequences which that action has for the contracting authority.

29. To my mind, the answer can be inferred from the judgment in *Klaipėdos*, where the Court held:

- '… the principal objective of the EU rules on public procurement is the opening-up of public procurement to undistorted competition in all the Member States and …, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures.' (13)

- 'It follows from the provisions of Directive 2014/24, cited in paragraphs 113 and 114 [of this judgment] [Article 21(1) and (2), Article 50 and Article 55(2)(c) of Directive 2014/24], and from … case-law …, that a contracting authority which has received a request from an economic operator for disclosure of information deemed confidential in the tender of the competitor to which the contract was awarded, must not, in principle, disclose that information.' (14)

- ‘However, … the contracting authority cannot be bound by an economic operator’s mere claim that the information submitted is confidential. Such an operator must demonstrate the genuinely confidential nature of the information which it claims should not be disclosed, by establishing, for example, that that information contains technical or trade secrets, that it could be used to distort competition or that its disclosure could be damaging to that operator.’ (15)

- ‘… If the contracting authority has doubts as to the confidential nature of the information submitted by that operator, it must, before taking a decision granting the applicant access to that information, give the operator concerned the opportunity to provide additional evidence in order to ensure that its rights of defence are respected.’ (16)

30. Thus, both the contracting authority and the bodies reviewing its decisions are entrusted with the task of evaluating the confidentiality claimed by the tenderer, rather than simply being able to assume that assertion to be true. They have sufficient powers to combat what, according to the order for reference, would constitute an abusive practice (‘pathological abuse’) on the part of tenderers used to making disproportionate use of the option of classifying as confidential elements of their tenders which are in fact not.

31. It follows from the order for reference that, notwithstanding that the Polish legislature sought to limit the extent of confidentiality, certain tenderers systematically claim that a large part of the information contained in their tenders is a trade secret and contracting authorities are inclined to give credence to such claims. (17)

32. If that is the case and there is an anomaly in the implementation of the national provision transposing Directive 2014/24, it is for the national courts to correct that anomaly in accordance with EU law.

33. Although the referring body does not devote particular attention to the issue which I shall be looking at now, the restriction imposed by the national provision (Article 8(3) of the Law on public procurement), which prevents the disclosure only of the information constituting a trade secret within the meaning of the legislation on unfair competition, was discussed both in the parties’ observations and at the hearing. (18)

34. That issue had to do with whether the aforementioned national provision is compliant with Article 21 of Directive 2014/24, which protects a much broader sphere of confidentiality than technical and trade secrets (19) (it also covers, for example, ‘confidential aspects of tenders’).

35. As I have explained previously, (20) in accordance with Article 21 of Directive 2014/24, protection is not confined to technical and trade secrets but also extends to, inter alia, the confidential aspects of tenders. That provision may therefore cover information that cannot strictly be classified as a technical or trade secret. In my view, that same idea is latent in various passages of the judgment in *Klaipèdos*. (21)

36. In so far as the reform of Article 11 of the Law on unfair competition, (22) which transposes Directive 2016/943, includes the definition of ‘trade secret’ contained in that directive, the Polish legislation on public procurement arrives, via that chain of references, at a concept of ‘trade secret’ as that term is used in Directive 2016/943. (23)

37. This indirectly raises the question as to whether Article 21 of Directive 2014/24 is compatible with domestic legislation which confers on confidentiality a more restricted scope than that specified in that provision.

38. At first sight, there would appear to be no reason why the national law should not contain such a restriction, since Directive 2014/24 applies ‘unless otherwise provided in this Directive or in the national law to which the contracting authority is subject’.

39. That caveat confers on Member States a discretion similar to that conferred by other provisions of Directive 2014/24 that refer to national legislation. An example is Article 57(7) of Directive 2014/24,

which requires Member States to specify the implementing conditions for that article, ‘having regard to Union law’.

40. The Court, however, has adopted the interpretation that ‘the Member States’ discretion is not absolute and …, once a Member State decides to incorporate one of the optional grounds for exclusion provided for in Directive 2014/24, it must respect the essential characteristics thereof, as expressed in that directive. By stipulating that the Member States are to specify “the implementing conditions for this Article” “having regard to Union law”, Article 57(7) of Directive 2014/24 prevents Member States from distorting the grounds for exclusion laid down in that provision or ignoring the objectives or principles underlying each of those grounds’. (24)

41. In my opinion, that case-law is transposable, by analogy, to this case. Since Member States may modulate the scope of confidentiality, provided that they have due regard for EU law, there is in principle no reason why the types of information benefiting from protection should not be confined to ‘trade secrets’ and, as such, be more restricted than under the general provision contained in Article 21 of Directive 2014/24.

42. When it comes to interpreting the concept of trade secret, it may be useful to refer to Directive 2016/943, which clarifies the definition of that concept as employed in Article 21 of Directive 2014/24. This will be the case in particular where national legislation, by the operation of references which I have described above, links the assessment of confidentiality in the context of public procurement to trade secrets as defined in the law transposing Directive 2016/943.

43. Directive 2016/943, in so far as it is intended to lay down general rules on trade secrets, will enable the contracting authority – and the bodies reviewing its decisions – to strike a balance between the principles that specifically apply to confidentiality and those on which the system of public procurement under Directive 2014/24 is based, as well as to access an effective scheme of remedies.

44. However, it is important to take into account provisions of Directive 2014/24 other than Article 21, in the light of the general objectives pursued by that directive. Pursuant to these, certain confidential information, even if it does not strictly fall within the concept of trade secret, must be protected in order to preserve undistorted competition between economic operators or the legitimate commercial interests of an economic operator.

45. Article 21 of Directive 2014/24 requires the contracting authority to provide candidates and tenderers with the information laid down in Articles 50 and 55. That information does not in principle constitute confidential information but it may become confidential should the circumstances referred to in Article 50(4) and Article 55(3) of Directive 2014/24 materialise.

46. Thus, the duty of confidentiality is to apply to data (not necessarily constituting trade secrets) the disclosure of which ‘would prejudice the legitimate commercial interests of a particular economic operator … or might prejudice fair competition between economic operators’.

47. Although Article 55(3) of Directive 2014/24 specifically refers to the information mentioned in paragraphs 1 and 2 of that article, what matters for the purposes of this case is the exhortation not to prejudice the *legitimate* commercial interests of a (rival) economic operator and to preserve competition.

48. In its case-law on public procurement, the Court has adopted a broader interpretation of that twofold exhortation. It follows from this that:

– - Competition between operators could suffer if one of them takes unlawful advantage of sensitive information supplied by others in procedures of this kind. In the judgment in *Klaipèdos*, the Court confirmed that ‘… *it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition*, whether in an ongoing procurement procedure or in subsequent procedures’. (25)

– The need to avoid any detriment to the legitimate interests of other economic operators, whether public or private, must act as a logical limit to the disclosure of information which those

operators have provided to the contracting authority. (26) It is the contracting authority itself which is responsible for assessing whether or not there is a legitimate interest in preserving the secrecy of particular information, at the behest of the tenderer requesting that it be kept secret.

49. Article 50(4) and Article 55(3) of Directive 2014/24 leave in the hands of the contracting authorities the decision not to communicate the sensitive information to which those two provisions refer. Since neither of those provisions includes the reservation that characterises Article 21(1) of that directive ('unless otherwise provided … in national law'), their application is not conditional upon provisions of national law.

50. In any event, the ability of contracting authorities to disclose information contained in tenders, even if it is not a trade secret *stricto sensu*, may be limited by other sectoral provisions imposing such restrictions. (27)

51. In short, in answer to the first question referred for a preliminary ruling, I take the view that Article 21 of Directive 2014/24:

- Precludes an economic operator from classifying any information as secret simply because it does not wish to disclose that information to competitors.

- Establishes that the contracting authority is not bound by an economic operator's mere claim that the information submitted is confidential.

- Does not preclude a Member State from limiting confidentiality to trade secrets, provided that it does so in compliance with EU law and that the information disclosed on the ground that it does not fall within that concept cannot be used to the detriment of the legitimate commercial interests of other economic operators or to distort competition between them.

C. Second, third and fourth questions

52. By these questions, which can be answered together, the referring body expresses its doubts as to whether the tenderer may seek the benefit of confidentiality in particular for:

- 'The description of their experience, the list of references, the list of persons proposed to perform the contract and their professional qualifications, the names and capacities of the entities whose capacities they rely on or of their subcontractors' (second question).

- 'The economic operator's declaration that it has at its disposal the personal resources required by the contracting authority or declared by the economic operator, the entities on whose resources it wishes to rely or their subcontractors' (third question).

- 'Documents required for the purpose of examining the compliance of their tender with the requirements of the contracting authority contained in the tender specifications (including the description of the subject matter of the contract) or for the purpose of evaluating the tender under the tender evaluation criteria, particularly where those documents relate to the fulfilment of the requirements of the contracting authority laid down in the tender specifications, in applicable laws or in other documents which are generally available or accessible to interested parties' (fourth question).

53. Once again, the judgment in *Klaipèdos* provides the referring body with the key to drawing its own inference, in the dispute under its examination, as to whether or not that information (or any other information included in a tenderer's tender) is confidential.

54. In the judgment in *Klaipèdos*, the Court takes the view, as I see it, that confidentiality should be as specific as possible: (28)

- First, the link between the 'decision to treat certain data as confidential' and the duty to 'communicate in a neutral form … the essential content of [confidential data] to … a tenderer

which requests it' (29) suggests that declarations claiming comprehensive confidentiality or relating to generic categories of document should be rejected.

- Second, although the ways in which the balance between the conflicting principles can be maintained are varied and difficult to define, 'the contracting authority may, inter alia and in so far as it is not precluded from doing so by the national law to which it is subject, communicate in summary form certain aspects of an application or tender and their technical characteristics, in such a way that the confidential information cannot be identified.' (30)

- Third, the contracting authorities have available to them mechanisms which extend their discretion: 'pursuant to Article 21(2) of Directive 2014/24, [they] may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure. Thus, assuming that the non-confidential information is adequate for that purpose, a contracting authority may also avail itself of that power in order to ensure that the unsuccessful tenderer's right to an effective review is respected, by requesting the successful tenderer to provide it with a non-confidential version of the documents containing confidential information.' (31)

55. The interpretation of Article 21 of Directive 2014/24 that flows from that line of case-law is consistent with other provisions of that directive that refer to the *specificity* of confidentiality. (32)

56. At the hearing, the attendees discussed the 'principle of minimisation', to use the referring body's term, as a criterion for limiting confidentiality to the minimum necessary. Thus, only information, data, aspects or sections of the documents included in tenders (or of the tenders themselves) which are deemed essential to safeguarding the legitimate interests of the tenderer and to ensuring that none of its rivals distorts competition between them may be treated as confidential.

57. There is no reason why that principle, which applies only to specific parts of the information supplied, and not to the documents in their entirety, should not be implemented if the contracting authority considers it appropriate to do so. In any event, it is not possible to establish a priori when any given documents are likely to be classified as confidential, since their classification as such depends on the characteristics of each document in a particular dispute.

58. The order for reference seems to support the inference that the contracting authority acted in a general manner in relation to specific categories of information, thus departing from the case-by-case classification required.

59. This, however, is an assessment that falls exclusively to the referring body, which must carry out a detailed and reasoned evaluation of:

- Whether the tenderer made a reasoned and justified request for a declaration as to the trade secret status of all or part of each document the content of which it wished to keep concealed from its competitors.

- Whether the contracting authority adjudicated on a case-by-case basis on the reasons why it was of the view that a particular document or a collection of documents should be regarded as being covered by confidentiality, and on the required scope of, and conditions governing, that confidentiality.

- Whether the reasons given by the contracting authority for not declassifying the information which the tenderer had submitted as being reserved were justified.

60. Without wishing to take the referring body's place in carrying out this task (which, in fact, has more to do with implementing the provision than with interpreting it), I shall refer briefly to the tender information with which the questions referred for a preliminary ruling are concerned, and which the referring body summarises as falling into two categories.

61. The first category includes documents which describe the 'subjective situation of the economic operator selected, from the point of view of its experience and the entities and personnel proposed for

the purposes of performing the contract'.

62. According to the referring body, the only documents required by the tender specifications were those referred to in Articles 59 and 60 of, and Annex XII to, Directive 2014/24 (in addition to those required by national law).

63. If that is the case, it is difficult to regard documents the disclosure of which is prescribed by Directive 2014/24 as being capable of having the status of a trade secret or some other type of confidential information.

64. The referring body goes on to say, with regard to data relating to the tenderer's subjective situation (financial capacity), that the tender specifications simply stated that this must be in excess of a certain level, but did not require the tenderer to provide details of its financial capacity or to specify the funds which it holds in its bank.

65. Much the same can be said of the situation of third parties or entities on whose resources the tenderer wishes to rely, or of the subcontractors it proposes in its tender. Without prejudice to the general obligations in relation to the protection of personal data, no such designations can be kept secret where the tender specifications require them to be disclosed, any claim of a hypothetical risk that the tenderers' human resources may be 'poached' being insufficient in this regard.

66. The second category of documents includes 'studies required by the contracting authority … to aid the evaluation of tenders according to quality criteria', more specifically 'the concept of the study' and the 'description of the manner of performance of the contract'.

67. In principle, the possibility cannot be ruled out that one or more of the documents included by an economic operator in its tender will contain sensitive information benefiting from protection as constituting intellectual property to which third parties may not have access without proper authorisation. (33)

68. At the hearing, some of the attendees expressed disagreement with the foregoing proposition, although they ultimately confirmed that it will be for the referring body to assess, in the light of the circumstances of the dispute, whether such rights have been infringed. (34)

69. The foregoing reflections bear out how difficult it is to adopt a priori an abstract classification as confidential information, whether or not constituting a trade secret, of data included in tenderers' tenders. Inevitably, Article 21 of Directive 2014/24 has to use generic formulae that contracting authorities and review bodies can apply in a reasoned manner in each particular case.

V. Conclusion

70. In the light of the foregoing, I propose that the answers to the four questions referred for a preliminary ruling by the Krajowa Izba Odwoławcza (Public Procurement Office, Poland) should be as follows:

Article 21 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that:

- The contracting authority is not bound by an economic operator's mere claim that the information submitted in its tender is confidential.

- A Member State may limit confidentiality to trade secrets, provided that it does so in compliance with EU law and that information disclosed on the ground that it does not fall within that concept cannot be used to the detriment of the legitimate interests of a particular economic operator or in order to distort fair competition between operators.

- A contracting authority to which an economic operator has submitted a request for information deemed to be confidential must make a detailed and reasoned determination of whether

preference must be given to the right of the operator concerned to have its information protected over the right of its competitors to have access to that information, with a view, where appropriate, to challenging the contract award decision.

---

1 Original language: Spanish.

---

2 Judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700; 'the judgment in *Klaipėdos*'). Its bearing on this case was addressed by those who attended the hearing.

---

3 Directive of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

4 The standing of that body to make a reference for a preliminary ruling was recognised by the Court in the judgments of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801), and of 11 May 2017, *Archus and Gama* (C-131/16, EU:C:2017:358), inter alia.

---

5 Directive of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1).

---

6 Law on public procurement of 29 January 2004.

---

7 Law on unfair competition of 16 April 1993.

---

8 Contract notice published in the *Official Journal of the European Union* on19 December 2019 under number 2019/S 245 603343.

---

9 In addition to Antea Polska, the consortium comprised Pectore-Eco sp. z o.o. and the Instytut Ochrony Środowiska – Państwowy lnstytut Badawczy.

---

10 Judgment in *Klaipėdos*, paragraph 97 (emphasis added). In that case, the reference to court proceedings was apposite, as the question referred concerned the interpretation of Article 9 of Directive 2016/943 ('Preservation of the confidentiality of trade secrets in the course of legal proceedings'). The lines of reasoning informing that judgment can nonetheless readily be extended to the prior stage, in which the contracting authority must adjudicate on confidentiality.

---

11 Some language versions (the Spanish, English, German, Romanian, Italian and Portuguese) refer without distinction to 'trade secrets' both in Directive 2014/24 and in Directive 2016/943. Other versions (such as the Polish and the French, for example) use the expression 'trade secrets' in the former directive and 'business secrets' in the latter. The discrepancy has no bearing on this dispute, since the two terms are equivalent.

---

12 Although the question also cites the principles of equal treatment of economic operators and transparency, it can be answered simply on the basis of an interpretation of Article 21 of Directive 2014/24, which implements those principles.

---

13 Judgment in *Klaipėdos*, paragraph 115.

14 *Ibidem*, paragraph 116.

15 *Ibidem*, paragraph 117.

16 *Ibidem*, paragraph 118.

17 Paragraph IV.B of the order for reference. The referring court explains that the contracting authorities have two motivations for acting in this way: on the one hand, they have a fear of disclosing documents submitted as confidential that is borne of a desire not to expose themselves to difficulties or to incur liability; and, on the other hand, such opacity suits them, inasmuch as it renders their decisions practically unchallengeable, since tenderers lack information on the qualities or weaknesses of the successful tenderer's tender.

18 That lack of attention may be due to the fact, as explained by the Polish Government at the hearing, that, if the information included in the successful tender is secret, it will fall within the concept of a trade secret. There will therefore be no need to discuss the remaining concepts under Article 21 of Directive 2014/24.

19 For the purposes of Directive 2016/943, technical secrets form part of trade secrets. Recital 14 thereof defines technical knowledge as being a component of 'trade secrets'.

20 Opinion in *Klaipėdos* (C-927/19, EU:C:2021:295, point 44).

21 For example, in paragraph 130, which refers to the 'need to protect *genuinely confidential information and in particular the trade secrets* of participants in the procurement procedure'. Emphasis added.

22 The Polish Government confirmed at the hearing that the ustawa z dnia 5 lipca 2018 r. o zmianie ustawy o zwalczaniu nieuczciwej konkurencji oraz niektórych innych ustaw (Law amending the Law on unfair competition and other Laws (Dz. U. 2018/1637 z dnia 2018.08.27)) transposed Directive 2016/943 into domestic law.

23 A comparison of Article 11(2) of the Law on unfair competition with Article 2(1) of Directive 2016/943 points to the existence between the concepts of trade secret as employed in those two texts respectively of a substantial overlap which the referring court does not suggest is in any way problematic.

24 Judgment of 19 June 2019, *Meca* (C-41/18, EU:C:2019:507, paragraph 33). This view is reiterated in the order of 20 November 2019, *Indaco Service*, (C-552/18, not published, EU:C:2019:997, paragraph 23).

25 Paragraph 115 (emphasis added).

26 Judgment in *Klaipėdos*, paragraph 115: '… Since public procurement procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, *without fear that the authorities will communicate to third parties items of information whose*

disclosure could be damaging to those operators (see, to that effect, judgments of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraphs 34 to 36, and of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 112 and the case-law cited).' Emphasis added.

---

27 Considerations such as the protection of personal data and intellectual property rights were mentioned at the hearing. I shall come back to these later.

---

28 In paragraph 129 of the judgment in *Klaipèdos*, the Court refers to the notion of there being 'sufficient information' to safeguard the right to an effective remedy. That right 'must be weighed against the right of other economic operators' to have their confidential information protected.

---

29 Judgment in *Klaipèdos*, paragraph 123.

---

30 *Ibidem*, paragraph 124.

---

31 *Ibidem*, paragraph 125. The provision of a non-confidential version is an expression of the specific and targeted withholding of information. It means that the same document can be processed in such a way that only certain parts of it are kept from public knowledge.

---

32 This is true, for example, of Article 31(6) of Directive 2014/24: 'In the case of an innovation partnership with several partners, the contracting authority shall not, in accordance with Article 21, reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of *specific information*' (emphasis added).

---

33 Articles 2 to 4 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) impose on Member States the obligation, in particular, to guarantee for authors the exclusive rights to authorise or prohibit the reproduction of their works (Article 2(a)), to authorise or prohibit their communication to the public (Article 3(1)) and to authorise or prohibit their distribution (Article 4(1)).

---

34 The order for reference (paragraph IV.B) states that nobody has denied that 'the studies did not contain solutions which would constitute industry innovations – and therefore contained knowledge which is available to professionals'.

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

12 May 2022 (*)

(Reference for a preliminary ruling – Public procurement – Waste management – In-house award – Directive 2014/24/EU – Articles 12 and 72 – Loss of the conditions of 'similar control' following a concentration of undertakings – Possibility for the successor operator to continue to provide the service)

In Case C-719/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 18 November 2020, received at the Court on 30 December 2020, in the proceedings

Comune di Lerici

v

Provincia di La Spezia,

other parties:

IREN SpA,

ACAM Ambiente SpA,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, S. Rodin, J.-C. Bonichot, L.S. Rossi and O. Spineanu-Matei, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Comune di Lerici, by A. Fantappié and M. Clarich, avvocati,

– the Provincia di La Spezia, by P. Piciocchi, avvocato,

– ACAM Ambiente SpA and IREN SpA, by D. Anselmi, avvocatessa, and A. Lolli, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by S.L. Vitale, avvocato dello Stato,

– the Austrian Government, by J. Schmoll, acting as Agent,

– the European Commission, by G. Wils, G. Gattinara and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 12 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request was made in the course of proceedings between the Comune di Lerici (Municipality of Lerici, Italy) and the Provincia di La Spezia (Province of La Spezia, Italy) regarding the approval, by the latter, of a plan awarding ACAM Ambiente SpA the management of the municipal waste service until 2028.

Legal framework

European Union law

3 Article 12 of Directive 2014/24 provides:

‘1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.

2. Paragraph 1 also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

5. For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.’

4 In accordance with Article 18(1) of that directive:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

5 Article 67(4) of that directive provides:

‘Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively

verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.'

6 Article 72 of that directive states:

'1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

…

(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:

…

(ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or

…

4. A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

…'

7 Article 90(1) of Directive 2014/24 is worded as follows:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016. They shall forthwith communicate to the Commission the text of those measures.'

Italian law

8 Article 1(611) and (612) of legge n. 190 – Disposizioni per la formazione del bilancio annuale e pluriannuale dello Stato (legge di stabilità 2015) (Law No 190 on provisions for the preparation of the annual and multi-annual State budget (Stability Law 2015)) of 23 December 2014 (GURI No 300 of 29 December 2014 – Ordinary Supplement No 99, p. 1), provides:

'611. Without prejudice to the provisions laid down in Article 3(27) to (29) of Law No 244 of 24 December 2007, as amended, and Article 1(569) of Law No 147 of 27 December 2013, as amended, in order to ensure the coordination of public finances, the reduction of expenditure, sound administration and the protection of competition and the market, the regions, the autonomous provinces of Trento and Bolzano, the local authorities, the chambers of commerce, industry, crafts and agriculture, the universities and public higher education establishments and the port authorities, from 1 January 2015, shall embark on a process of streamlining companies and shares held directly or indirectly in companies, in order to reduce the number of such companies and shareholdings before 31 December 2015, by taking into account in particular the following criteria:

…

(d) concentration of companies providing local public services of economic interest;

…

612. The presidents of the regions and the autonomous provinces of Trento and Bolzano, the presidents of the provinces, the mayors and other governing bodies of the administrations specified in paragraph 611, in their respective areas of competence, shall define and approve, before 31 March 2015, an operational plan for streamlining companies and shares held directly or indirectly in companies, the methods of and time limits for implementation and the detailed presentation of the savings to be made. That plan, together with a specific technical report, shall be forwarded to the competent regional audit chamber of the Court of Auditors and published on the institutional website of the administration concerned. Before 31 March 2016, the bodies listed in the first sentence shall draw up a report on the results obtained, which shall be forwarded to the competent regional audit chamber of the Court of Auditors and published on the institutional website of the administration concerned. The publication of the plan and report constitutes mandatory disclosure under Decree No 33 of 14 March 2013'.

9 In accordance with Article 3*bis*(2*bis*) of decreto-legge n. 138 – Ulteriori misure urgenti per la stabilizzazione finanziaria e per lo sviluppo (Decree-Law No 138 establishing other urgent measures for financial stability and development) of 13 August 2011 (GURI No 216 of 16 September 2011, p. 89; 'Decree-Law No 138/2011'):

'Any economic operator who universally or partially succeeds the initial concession holder following transparent corporate transactions, including mergers and acquisitions, without prejudice to fulfilment of the original qualitative criteria, shall continue to operate the services until the agreed date …'

10 Article 7(5) of decreto legislativo n. 175 – Testo unico in materia di società a partecipazione pubblica (Legislative Decree No 175 – Consolidated law on publicly owned companies) of 19 August 2016 (GURI No 210 of 8 September 2016, p. 1) provides:

'Where the instrument of incorporation requires the participation of private shareholders, the latter shall be selected by means of a public procurement procedure, in accordance with Article 5(9) of Legislative Decree No 50 of 2016'.

The dispute in the main proceedings and the question referred for a preliminary ruling

11 On 15 June 2005, by a decision expressly described as an 'in-house award', the Municipality of Lerici awarded ACAM the contract for the management of the integrated waste cycle in that municipality until 31 December 2028, that management being, more specifically, entrusted to its subsidiary, ACAM Ambiente. On that date, ACAM was a limited company the share capital of which was distributed exclusively among several municipalities, including the Municipality of Lerici.

12 On 12 July 2013, ACAM was forced to enter into a restructuring agreement with its creditors. In the context of that agreement, ACAM sought, among other publicly owned companies managing public services operating in the Italian market, a suitable company with a view to carrying out a concentration. Following the public call for tenders launched for that purpose, ACAM chose to carry out a concentration with IREN SpA, which operates throughout Italy, is under public control and is listed on the stock market.

13 Under a special investment agreement, concluded on 29 December 2017, the local authorities with shareholdings in ACAM sold their shares in ACAM to IREN and acquired an equivalent portion of IREN's shares by subscribing to a capital increase reserved for them. Through ACAM's subsidiaries, which had become its own subsidiaries, IREN continued to manage the services initially entrusted to those subsidiaries.

14 After expressing its intention, on 21 February 2017, not to approve the concentration between ACAM and IREN, the Municipality of Lerici decided, on 19 January 2018, to accept the investment agreement

only in respect of the transfer of its ACAM shares to IREN and it actually transferred them to IREN on 11 April 2018.

15 By decision of 6 August 2018, the Province of La Spezia, which was now competent for the management of the integrated municipal waste service for the municipalities in its territorial remit, which includes the Municipality of Lerici, approved the updating of the area plan for the integrated management of municipal waste in the province, in that it designated ACAM Ambiente as the operator of the service for that municipality until 31 December 2028, by virtue of an in-house award.

16 The Municipality of Lerici brought an action against that decision, taking the view that the conditions for the in-house exception were no longer met. By judgment 847/2019, the Tribunale amministrativo regionale per la Liguria (Regional Administrative Court, Liguria, Italy) dismissed that action.

17 The Municipality of Lerici brought an appeal against that judgment before the Consiglio di Stato (Council of State, Italy).

18 In the first place, it points out that, while that municipality was competent to award the contract at issue to ACAM in 2005, that competence has now been transferred to the provinces, which are currently responsible for the integrated management of municipal waste services for the benefit of all municipalities within their territorial remit.

19 In the second place, that court notes that the concentration at issue in the main proceedings was concluded on the basis of Article 1(611) and (612) of Law No 190 of 23 December 2014, the objective of which is to curb public expenditure by limiting the shares in companies held by public bodies. Moreover, that operation was justified in view of the fact that ACAM had concluded a debt restructuring agreement. In such a situation, Article 3*bis*(2*bis*) of Decree-Law No 138/2011 provides for the continuation, until the agreed deadlines, of the operation of the services which had been entrusted to the initial contractor, by the economic operator succeeding it.

20 In the third place, the referring court considers that there are doubts as to the compatibility of that legislation with Article 12 of Directive 2014/24 in relation to the in-house exception in the context of the award of public contracts.

21 The concentration carried out in the present case has resulted in the municipal waste management service for the Municipality of Lerici – which had initially been awarded to ACAM, without a call for tenders, over which it is not disputed that that municipality exercised jointly with other municipalities, similar control to that exercised over its own departments, within the meaning of the case-law of the Court of Justice – now being awarded to IREN and, through it, to its subsidiary ACAM Ambiente, without the Municipality of Lerici retaining such control over either of those companies. Not only was the shareholding in IREN acquired by that municipality completely negligible, since that municipality sold that shareholding, any link between the municipality and IREN has disappeared.

22 The Province of La Spezia decided to award the service intended for the Municipality of Lerici directly, without a call for tenders. It is therefore necessary to determine whether that direct award complies with the rules of EU law on public procurement.

23 According to the referring court, it is necessary, more specifically, to examine whether the fact that ACAM’s decision to merge with IREN was preceded by a public call for tenders must be taken into account in that context.

24 In that regard, that court considers that the ultimate objective of the relevant rules of EU law is to promote competition and that that result is achieved, in the context of the award of public services, when several operators compete, or are in a position to do so, in order to obtain the contract in question, regardless of the legal classification of the instrument enabling that objective to be achieved. In those circumstances, that court is inclined to consider that it is irrelevant that a given service is awarded by means of a tendering procedure relating specifically to the award of that service, or by means of a tendering procedure for the acquisition of shares in the company providing those services, since competition is ensured in both cases.

25 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does Article 12 of Directive [2014/24] … preclude national legislation which imposes a concentration of companies providing local public services of economic interest, as a result of which the economic operator succeeding the initial concession holder following transparent corporate transactions, including mergers and acquisitions, continues to operate the services until the agreed date, if:

(a) the initial concession holder is a company awarded the contract in-house on the basis of similar control where several other public authorities are shareholders in that company;

(b) the new economic operator has been selected by means of a public call for tenders;

(c) as a result of the concentration, the requirements for similar control where several other public authorities are shareholders in that company no longer apply in relation to some of the local authorities which originally awarded the service in question.’

The question referred for a preliminary ruling

Admissibility of the question referred

26 In accordance with Article 94 of the Rules of Procedure of the Court of Justice, every request for a preliminary ruling must contain ‘a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based’, ‘the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law’, and ‘a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings’.

27 In the present case, contrary to the submissions of the Austrian Government, the order for reference contains a description of the factual and legislative context of the dispute in the main proceedings which is sufficient to satisfy the requirements of Article 94 of the Rules of Procedure of the Court of Justice.

28 Thus, first, the order for reference reproduces the content of the national provisions applicable to the dispute in the main proceedings. Secondly, the description by the referring court of the decisions of 15 June 2005 and 6 August 2018 and of the call for tenders launched by ACAM is sufficient to understand the reasons for the choice of the EU provisions the interpretation of which it seeks, as well as the link it establishes between those provisions and the national legislation applicable to the dispute before it.

29 It follows that the question referred to the Court is admissible.

Substance

30 By its question, the referring court asks, in essence, whether Directive 2014/24 must be interpreted as precluding national legislation or practice under which the performance of a public contract, awarded initially, without a call for tenders, to an in-house entity over which the contracting authority exercised, jointly, control similar to that which it exercises over its own departments, is automatically continued by the economic operator which acquired that entity, following a tendering procedure, where that contracting authority does not have such control over that economic operator.

31 As a preliminary point, it is apparent, first, from the order for reference that, in 2005, the Municipality of Lerici awarded the contract for the management of its waste services until 2028 to ACAM, the operational management of that service being entrusted to its subsidiary, ACAM Ambiente. On the date that contract was awarded, ACAM’s capital was held exclusively by a number of municipalities, including the Municipality of Lerici.

32 According to the referring court, the contract thus awarded to ACAM constituted a public service contract and could be awarded, without a call for tenders, on the ground, inter alia, that the Municipality of Lerici exercised, with the other local authority shareholders, joint control over ACAM similar to that which those municipalities exercised over their own departments, within the meaning of the case-law of the Court (see, to that effect, judgment of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, paragraph 50). The question referred for a preliminary ruling must be answered on the basis of that premiss.

33 In that regard, it must be borne in mind that Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which was applicable when the contract between the Municipality of Lerici and ACAM was entered into, did not require a contracting authority to initiate a tendering procedure for the award of a public contract where it exercised over the contractor similar control to that exercised over its own departments and where that distinct entity carried out the essential part of its activities with the contracting authority or authorities which owned it. In the case of an in-house award of that kind, the contracting authority is deemed to use its own resources since, even if the contractor is legally distinct from the contracting authority, it may, in practice, be treated in the same way as the internal departments of the contracting authority (see, to that effect, judgments of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 49, and of 18 June 2020, *Porin kaupunki*, C-328/19, EU:C:2020:483, paragraph 66).

34 Moreover, in the case of recourse to an entity which is jointly owned by a number of public authorities, the Court has held that ‘similar control’, within the meaning of the preceding paragraph, could be exercised jointly by those authorities (see, to that effect, judgment of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, paragraph 50, and of 8 May 2014, *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303, paragraph 27).

35 Secondly, it is also apparent from the order for reference that, after having concluded a restructuring agreement with its creditors in 2013, ACAM decided to launch a public call for tenders in order to select an economic operator with which to merge. That procedure resulted in the selection of IREN which acquired all of the shares in ACAM held by the local authority shareholders. Those shareholders acquired a corresponding portion of IREN’s shares in the course of a capital increase of that company reserved for them, the Municipality of Lerici deciding, for its part, to accept the agreement referred to above only in so far as it concerned the transfer of its shares in ACAM.

36 In accordance with Article 3*bis*(2*bis*) of Decree-Law No 138/2011, ACAM Ambiente, now wholly owned by IREN, continued to provide the waste management service for the municipalities which were formerly shareholders of ACAM, including the Municipality of Lerici.

37 Having made those preliminary observations, it should be noted that, where, as in the present case, a public contract has been awarded, without being put out to competitive tender, to a public capital company in accordance with the case-law referred to in paragraphs 33 and 34 of the present judgment, the acquisition of that company by another economic operator, during the period for which that contract was valid, is likely to constitute the alteration of a fundamental condition of the contract, requiring the contract to be put out for competitive tender (see, to that effect, judgments of 6 April 2006, *ANAV*, C-410/04, EU:C:2006:237, paragraphs 30 to 32, and of 10 September 2009, *Sea*, C-573/07, EU:C:2009:532, paragraph 53).

38 Such an amendment may lead to the contractor no longer being able in practice to be treated in the same way as the internal departments of the contracting authority, within the meaning of paragraph 34 of this judgment and, therefore, to the performance of the public contract concerned no longer being able to continue without a call for tenders since that contracting authority can no longer be deemed to be using its own resources.

39 In the present case, since the acquisition of ACAM by IREN took place in 2017, namely after the expiry of the period prescribed for the transposition by the Member States of Directive 2014/24, as laid down in Article 90(1) thereof, it is in the light of the provisions of that directive that it must be examined whether such an amendment required the contract to be put out for competitive tender (see,

to that effect, judgment of 2 September 2021, *Sisal and Others*, C-721/19 and C-722/19, EU:C:2021:672, paragraph 28 and the case-law cited).

40 In that regard, first, Article 72(1)(d)(ii) of Directive 2014/24 provides that a public contract may be modified, without carrying out a new procurement procedure in accordance with the requirements of that directive, where the initial contractor is replaced by a new contractor as a consequence of, inter alia, the acquisition of the former by the latter, provided that the latter fulfils the criteria for qualitative selection initially established and provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of that directive.

41 It is therefore apparent from the wording of Article 72(1) that its scope is limited to cases in which the successor to the initial contractor continues to perform a public contract which was the subject of an initial procurement procedure complying with the requirements laid down by Directive 2014/24, which include compliance with the principles of non-discrimination, equal treatment and effective competition between economic operators, as notably recalled and given concrete expression in Article 18(1) and Article 67(4) of that directive.

42 That interpretation is supported by Article 72(4) of that directive, under which a modification of a contract must be considered to be substantial where it introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure, and by the objective pursued by the directives in this area of attaining the widest possible opening up of public contracts to competition to the benefit not only of economic operators but also of contracting authorities (judgment of 27 November 2019, *Tedeschi and Consorzio Stabile Istant Service*, C-402/18, EU:C:2019:1023, paragraph 39).

43 Therefore, a change in the contractor, such as that at issue in the main proceedings, cannot fall within the scope of Article 72 of Directive 2014/24, contrary to the submissions of the Austrian Government, since the public contract at issue in the main proceedings was awarded initially to an in-house entity without a call for tenders.

44 Secondly, it should be noted that Article 12(1) to (3) of Directive 2014/24 incorporates, inter alia, the principles referred to in paragraphs 33 and 34 of the present judgment, while specifying the circumstances in which in-house awards fall outside the scope of that directive.

45 More specifically, under Article 12(3) of Directive 2014/24, a public contract may be awarded without applying the award procedures laid down by that directive provided that the contracting authority exercises, jointly with other contracting authorities, a control over the contractor which is similar to that which they exercise over their own departments, that more than 80% of the activities of that contractor are carried out in the performance of the tasks entrusted to it by those contracting authorities or by other legal persons controlled by them and, finally, that there is no direct private capital participation in that contractor, with the exception of non-controlling and non-blocking forms of private capital participation required by the legislation of the Member State concerned, in conformity with the Treaties, which do not exert a decisive influence on the contractor.

46 Furthermore, it follows from the last subparagraph of Article 12(3) that the existence of joint control, within the meaning of that provision, presupposes, inter alia, that all the contracting authorities are represented in the decision-making bodies of the controlled entity and are able jointly to exert decisive influence over the strategic objectives and significant decisions of that entity.

47 It is apparent from the file submitted to the Court, first, that, on the date of the decision forming the subject matter of the action before the referring court, the Municipality of Lerici held no shares in IREN which is, moreover, largely open to private equity. Secondly, it does not appear to be represented in the decision-making bodies of that company or to be able to influence, even jointly with the other municipalities which held shares in ACAM, the strategic objectives or significant decisions of IREN.

48 It follows that the conditions laid down in Article 12(3) of Directive 2014/24, which enable the view to be taken that the award of a public contract falls outside the scope of the procurement procedures laid

down by that directive, do not appear to be satisfied, which, however, is a matter for the referring court to establish.

49 Nor does it appear from the file submitted to the Court that IREN has a relationship with the Municipality of Lerici such that the conditions laid down in Article 12(1) or (2) of that directive enabling such a contract to be classified as an ‘in-house operation’ may be satisfied.

50 Subject to the checks to be carried out by the referring court, IREN’s continued performance of the public contract in the main proceedings must therefore be regarded as stemming from an amendment of a fundamental condition of the contract requiring the contract to be put out for competitive tender, since Directive 2014/24 authorises IREN to continue to perform the contract only after it has been designated as the successful tenderer for that contract, following a procurement procedure which complies with the requirements of that directive.

51 The fact that IREN was selected by ACAM and, therefore, by the municipalities with a shareholding in that company, following a public tendering procedure, does not alter that conclusion.

52 It is sufficient to note that, as stated in paragraph 47 of the present judgment, on the date of the decision forming the subject matter of the action before the referring court, the Municipality of Lerici held no shares, even indirectly, in IREN.

53 In the context of the performance of the public contract at issue in the main proceedings, IREN cannot therefore be treated as a mixed capital company owned both by the contracting authority, albeit indirectly, and by an entity which has been selected by the latter, following a transparent procedure which is open to competition, in accordance with the judgment of 15 October 2009, *Acoset (*C-196/08, EU:C:2009:628).

54 Therefore, it is not necessary to examine the characteristics of the public tendering procedure by which IREN was selected to determine that that procedure cannot, in any event, in the case of the public contract at issue in the main proceedings, equate to a procurement procedure which complies with the requirements laid down by Directive 2014/24 since, both before the concentration with ACAM and after the other municipalities acquired a stake in its capital, IREN is an entity which is not part of the Municipality of Lerici.

55 In the light of the foregoing, it must be concluded that Directive 2014/24 precludes the continued performance of a public contract that was awarded in house, without it being put out for competitive tender, where the contracting authority no longer holds any shares, even indirectly, in the contractor and no longer has any control over it.

56 It is also important to add that such a conclusion must also be drawn in a situation where, as the order for reference might suggest, the public contract at issue in the main proceedings must be regarded as having been re-awarded by the Province of La Spezia.

57 It is apparent from the order for reference that, on 6 August 2018, that province, which had become competent for the management of the waste service for the municipalities within its territorial remit, approved the updating of the area plan for the integrated management of municipal waste in the province, in so far as it awarded ACAM Ambiente the management of the waste service for the Municipality of Lerici until 2028.

58 Even if the decision of 6 August 2018 were to be assessed as awarding the management of such a waste service to ACAM Ambiente, a subsidiary wholly owned by IREN, the fact remains that such a direct award would not meet the requirements imposed by Directive 2014/24 either.

59 First, it is not apparent from the file submitted to the Court that the Province of La Spezia and ACAM Ambiente are in one of the situations listed in Article 12 of that directive. It should be noted, in particular, that that province does not appear to hold any shares in the capital of IREN and, therefore, in that of ACAM Ambiente, nor does it have any power of control over those entities.

60 It follows that, subject to the checks to be carried out by the referring court, Article 12 of Directive 2014/24 does not appear to be capable of justifying the award of a public service contract to ACAM Ambiente by the Province of La Spezia, without a call for tenders.

61 Secondly, having regard to the information in the file submitted to the Court, it also appears that such an award cannot be treated as the award of a public contract to a semi-public company under the conditions set out in paragraph 53 of the present judgment. Thus, it is sufficient to recall that, as noted in paragraph 59 of the present judgment, the Province of La Spezia does not appear to hold any shares in IREN and, therefore, in ACAM Ambiente.

62 It follows from all the foregoing considerations that Directive 2014/24 must be interpreted as precluding national legislation or practice under which the performance of a public contract, awarded initially, without a call for tenders, to an in-house entity over which the contracting authority exercised, jointly, control similar to that which it exercises over its own departments, is automatically continued by the economic operator which acquired that entity, following a tendering procedure, where that contracting authority does not have such control over that operator and does not hold any shares in its capital.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as precluding national legislation or practice under which the performance of a public contract, awarded initially, without a call for tenders, to an in-house entity over which the contracting authority exercised, jointly, control similar to that which it exercises over its own departments, is automatically continued by the economic operator which acquired that entity, following a tendering procedure, where that contracting authority does not have such control over that operator and does not hold any shares in its capital.

[Signatures]

---

* Language of the case: Italian.

ORDONNANCE DE LA COUR (neuvième chambre)

31 mars 2023 (*)

« Renvoi préjudiciel – Article 53, paragraphe 2, et article 99 du règlement de procédure de la Cour – Situation purement interne – Passation des marchés publics – Directive 2014/24/UE – Articles 74 à 77 – Prestation de services sociaux et de santé – Recours à des accords d'action conventionnée avec des entités privées sans but lucratif – Services dans le marché intérieur – Directive 2006/123/CE – Champ d'application – Article 2, paragraphe 2, sous f) et j) »

Dans l'affaire C-676/20,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Tribunal Superior de Justicia de Aragón (Cour supérieure de justice de la Communauté autonome d'Aragon, Espagne), par décision du 23 novembre 2020, parvenue à la Cour le 11 décembre 2020, dans la procédure

Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE)

contre

Consejería de Sanidad de la Diputación General de Aragón,

LA COUR (neuvième chambre),

composée de M^me^ L. S. Rossi, présidente de chambre, M. C. Lycourgos (rapporteur), président de la quatrième chambre, faisant fonction de juge de la neuvième chambre, et M^me^ O. Spineanu-Matei, juge,

avocate générale : M^me^ L. Medina,

greffier : M. A. Calot Escobar,

vu la procédure écrite,

considérant les observations présentées :

– pour l'Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE), par M^me^ M. Pascual Obis, procuradora, et M^e^ Y. Puiggrós Jiménez de Anta, abogada,

– pour la Consejería de Sanidad de la Diputación General de Aragón, par M^e^ M. Cremades Gracia, abogada,

– pour le gouvernement espagnol, par M. J. Rodríguez de la Rúa Puig, en qualité d'agent,

– pour le gouvernement français, par M^mes^ A.-L. Desjonquères et N. Vincent, en qualité d'agents,

– pour le gouvernement néerlandais, par M^me^ M. K. Bulterman et M. J. Langer, en qualité d'agents,

– pour le gouvernement norvégien, par M^me^ J. T. Kaasin et M. H. Røstum, en qualité d'agents,

– pour la Commission européenne, par M^me^ L. Armati, M. P. Ondrůšek, M^me^ E. Sanfrutos Cano et M. G. Wils, en qualité d'agents,

vu la décision prise, l'avocate générale entendue, de statuer par voie d'ordonnance motivée, conformément à l'article 53, paragraphe 2, et à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 49 TFUE, des articles 76 et 77 de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE (JO 2014, L 94, p. 65), lus en combinaison avec son article 74 et son annexe XIV, ainsi que de l'article 15, paragraphe 2, sous b), et paragraphe 7, de la directive 2006/123/CE du Parlement européen et du Conseil, du 12 décembre 2006, relative aux services dans le marché intérieur (JO 2006, L 376, p. 36).

2 Cette demande a été présentée dans le cadre d'un litige opposant l'Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE) [Association nationale des entités de soins à domicile] à la Consejería de Sanidad de la Diputación General de Aragón (ministère de la Santé du gouvernement de la Communauté autonome d'Aragon, Espagne) au sujet de la légalité du decreto 62/2017 del Gobierno de Aragón, sobre Acuerdos de Acción Concertada de Servicios Sanitarios y Convenios de Vinculación con Entidades Públicas y Entidades sin ánimo de Lucro (décret 62/2017 du gouvernement d'Aragón, relatif aux accords de conventionnement des services sanitaires et conventions de rattachement avec des entités publiques et entités sans but lucratif), du 11 avril 2017 (*Boletín Oficial de Aragón,* n° 76, du 21 avril 2017, p. 8529, ci-après le « décret 62/2017 »), de l'Orden SAN/1221/2017 por la que se establecen los precios y tarifas máximas aplicables en la prestación de servicios sanitarios con medios ajenos al sistema de salud de Aragón (arrêté SAN/1221/2017 relatif aux prix et tarifs maximums applicables à la prestation de services sanitaires avec des ressources étrangères à l'administration du système de santé d'Aragón), du 21 juillet 2017 (*Boletín Oficial de Aragón,* n° 165, du 29 août 2017, p. 21859, ci-après l'« arrêté du 21 juillet 2017 »), et de l'Orden del Consejero de Sanidad, por la que se aprueba el expediente relativo al acuerdo de acción concertada para la atención en dispositivos asistenciales de carácter residencial para enfermos de SIDA en la Comunidad Autónoma de Aragón (arrêté du ministre régional relatif à l'adoption de l'accord de conventionnement pour la prestation de services d'assistance résidentielle pour les malades du sida de la Communauté autonome d'Aragón), du 21 août 2017 (ci-après l'« arrêté du 21 août 2017 »).

Le cadre juridique

Le droit de l'Union

La directive 2006/123

3 Le considérant 27 de la directive 2006/123 énonce :

« La présente directive ne devrait pas couvrir les services sociaux dans les domaines du logement, de l'aide à l'enfance et de l'aide aux familles et aux personnes dans le besoin qui sont assurés par l'État au niveau national, régional ou local, par des prestataires mandatés par l'État ou par des associations caritatives reconnues comme telles par l'État avec pour objectif d'assister les personnes qui se trouvent de manière permanente ou temporaire dans une situation de besoin particulière en raison de l'insuffisance de leurs revenus familiaux, ou d'un manque total ou partiel d'indépendance et qui risquent d'être marginalisées. Ces services sont essentiels pour garantir le droit fondamental à la dignité et à l'intégrité humaines et sont une manifestation des principes de cohésion sociale et de solidarité et ne devraient pas être affectés par la présente directive. »

4 L'article 2, paragraphe 2, de cette directive dispose :

« La présente directive ne s'applique pas aux activités suivantes :

[...]

f) les services de soins de santé, qu'ils soient ou non assurés dans le cadre d'établissements de soins et indépendamment de la manière dont ils sont organisés et financés au niveau national ou de leur nature publique ou privée ;

[...]

j) les services sociaux relatifs au logement social, à l'aide à l'enfance et à l'aide aux familles et aux personnes se trouvant de manière permanente ou temporaire dans une situation de besoin qui sont assurés par l'État, par des prestataires mandatés par l'État ou par des associations caritatives reconnues comme telles par l'État ;

[...] »

5 L'article 15, paragraphes 2 et 7, de ladite directive prévoit :

« 2. Les États membres examinent si leur système juridique subordonne l'accès à une activité de service ou son exercice au respect de l'une des exigences non discriminatoires suivantes :

[...]

b) les exigences qui imposent au prestataire d'être constitué sous une forme juridique particulière ;

[...]

7. Les États membres notifient à la Commission [européenne] toute nouvelle disposition législative, réglementaire ou administrative qui prévoit des exigences visées au paragraphe 6 ainsi que les raisons qui se rapportent à ces exigences. La Commission communique lesdites dispositions aux autres États membres. La notification n'empêche pas les États membres d'adopter les dispositions en question.

Dans un délai de trois mois à compter de la réception de la notification, la Commission examine la compatibilité de ces nouvelles dispositions avec le droit communautaire et, le cas échéant, adopte une décision pour demander à l'État membre concerné de s'abstenir de les adopter, ou de les supprimer.

La notification d'un projet de loi nationale conformément à la directive 98/34/CE [du Parlement européen et du Conseil, du 22 juin 1998, prévoyant une procédure d'information dans le domaine des normes et réglementations techniques et des règles relatives aux services de la société de l'information (JO 1998, L 204, p. 37),] vaut respect de l'obligation de notification prévue par la présente directive. »

La directive 2014/24

6 Aux termes de l'article 4 de la directive 2014/24 :

« La présente directive s'applique aux marchés dont la valeur estimée hors taxe sur la valeur ajoutée (TVA) est égale ou supérieure aux seuils suivants :

[...]

d) 750 000 [euros] pour les marchés publics de services portant sur des services sociaux et d'autres services spécifiques énumérés à l'annexe XIV. »

7 Le titre III de cette directive, intitulé « systèmes spéciaux de passation de marchés », comprend, notamment, un chapitre I, relatif aux « [s]ervices sociaux et autres services spécifiques », dans lequel figurent les articles 74 à 77 de ladite directive.

8 L'article 74 de la directive 2014/24 dispose :

« Les marchés publics pour les services sociaux et d'autres services spécifiques énumérés à l'annexe XIV sont attribués conformément au présent chapitre lorsque la valeur des marchés est égale ou

supérieure au seuil indiqué à l'article 4, point d). »

9 L'article 75 de cette directive prévoit :

« 1. Les pouvoirs adjudicateurs qui entendent passer un marché public pour les services visés à l'article 74 font connaître leur intention par l'un des moyens suivants :

a) un avis de marché qui contient les informations visées à l'annexe V, partie H, conformément aux formulaires types visés à l'article 51 ; ou

b) un avis de préinformation, publié de manière continue et qui contient les informations mentionnées à l'annexe V, partie I. L'avis de préinformation fait référence spécifiquement aux types de services qui feront l'objet des marchés à passer ; il indique que les marchés seront passés sans publication ultérieure et invite les opérateurs économiques intéressés à manifester leur intérêt par écrit.

Le premier alinéa ne s'applique toutefois pas lorsqu'il aurait été possible de recourir, conformément à l'article 32, à une procédure négociée sans publication préalable pour la passation d'un marché de service public.

2. Les pouvoirs adjudicateurs qui ont attribué un marché public pour les services visés à l'article 74 font connaître les résultats de la procédure de passation de marché au moyen d'un avis d'attribution de marché, qui contient les informations visées à l'annexe V, partie J, conformément aux formulaires types visés à l'article 51. Toutefois, ils peuvent regrouper ces avis sur une base trimestrielle. Dans ce cas, ils envoient ces avis regroupés au plus tard trente jours après la fin de chaque trimestre.

[...]

4. Les avis visés au présent article sont publiés conformément à l'article 51. »

10 L'article 76 de ladite directive énonce :

« 1. Les États membres mettent en place, pour la passation des marchés relevant du présent chapitre, des règles nationales afin de garantir que les pouvoirs adjudicateurs respectent les principes de transparence et d'égalité de traitement des opérateurs économiques. Les États membres sont libres de déterminer les règles de procédure applicables, tant que celles-ci permettent aux pouvoirs adjudicateurs de prendre en compte les spécificités des services en question.

2. Les États membres veillent à ce que les pouvoirs adjudicateurs puissent prendre en compte la nécessité d'assurer la qualité, la continuité, l'accessibilité, le caractère abordable, la disponibilité et l'exhaustivité des services, les besoins spécifiques des différentes catégories d'utilisateurs, y compris des catégories défavorisées et vulnérables, la participation et l'implication des utilisateurs, ainsi que l'innovation. Les États membres peuvent également prévoir que le choix du prestataire de services est opéré sur la base de l'offre présentant le meilleur rapport qualité/prix, en tenant compte de critères de qualité et de durabilité en ce qui concerne les services à caractère social. »

11 Aux termes de l'article 77 de la même directive :

« 1. Les États membres peuvent prévoir que les pouvoirs adjudicateurs peuvent réserver aux organisations le droit de participer à des procédures de passation de marchés publics portant exclusivement sur les services de santé, sociaux ou culturels visés à l'article 74 relevant des codes CPV 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, de 85000000-9 à 85323000-9, 92500000-6, 92600000-7, 98133000-4 et 98133110-8.

2. Une organisation visée au paragraphe 1 remplit toutes les conditions suivantes :

a) elles ont pour objectif d'assumer une mission de service public liée à la prestation des services visés au paragraphe 1 ;

b) leurs bénéfices sont réinvestis en vue d'atteindre l'objectif de l'organisation. En cas de distribution ou de redistribution des bénéfices, celle-ci devrait être fondée sur des principes participatifs ;

c) les structures de gestion ou de propriété des organisations exécutant le marché sont fondées sur l'actionnariat des salariés ou des principes participatifs ou exigent la participation active des salariés, des utilisateurs ou des parties prenantes ;

d) les organisations ne se sont pas vu attribuer un marché par le pouvoir adjudicateur concerné pour les services visés par le présent article dans les trois années précédentes.

3. La durée maximale du marché n'est pas supérieure à trois ans.

4. L'appel à la concurrence renvoie au présent article.

5. Nonobstant l'article 92, la Commission évalue les effets du présent article et fait rapport au Parlement européen et au Conseil [de l'Union européenne] au plus tard le 18 avril 2019. »

Le droit espagnol

Le statut d'autonomie de la Communauté autonome d'Aragon

12 En vertu de l'article 71, points 34 et 55, ainsi que de l'article 77 de l'Estatuto de Autonomía de Aragón (statut d'autonomie de la Communauté autonome d'Aragon), modifié par la Ley Orgánica 5/2007 (loi organique 5/2007), du 20 avril 2007 (BOE n° 97, du 23 avril 2007, p. 17822), la Communauté autonome d'Aragon exerce une compétence en matière d'action sociale et de santé.

La loi 11/2016

13 Les compétences que détient la Communauté autonome d'Aragon conformément à son statut d'autonomie ont été mises en œuvre par la Ley 11/2016 de acción concertada para la prestación a las personas de servicios de carácter social y sanitario (loi 11/2016 relative à l'action conventionnée en matière de fourniture de services à la personne à caractère social et de santé), du 15 décembre 2016 (BOE n° 243, du 20 janvier 2017, p. 4023, ci-après la « loi 11/2016 »).

14 Le préambule de cette loi contient le passage suivant :

« La philosophie qui sous-tend la présente loi est [...] simple : si un opérateur économique aspire légitimement à tirer un gain commercial, un profit, de sa collaboration avec l'administration publique pour la fourniture de services à la personne, il ne peut le faire que dans le cadre d'une procédure de passation de marché public. La collaboration avec l'administration sous la forme d'une action conventionnée n'est possible que sur la base d'une gestion solidaire et sans but lucratif de ces prestations. »

15 L'article 3 de ladite loi, intitulé « Concept et régime général de l'action conventionnée », dispose :

« Les accords d'action conventionnée sont des instruments organisationnels de nature non contractuelle, qui offrent des garanties de non-discrimination, de transparence et d'utilisation efficace des fonds publics et visent à atteindre des objectifs sociaux et de protection de l'environnement, par lesquels les administrations publiques compétentes peuvent organiser la fourniture à la personne de services sociaux et de santé dont le financement, l'accès et le contrôle relèvent de leur compétence lorsque cela entraîne une prestation de meilleure qualité au regard desdits objectifs, tout en respectant la procédure et les exigences prévues par la présente loi ainsi que par la réglementation sectorielle applicable. »

16 Aux termes de l'article 4 de la même loi, intitulé « Principes généraux de l'action conventionnée » :

« Les administrations publiques veillent à ce que leur action conventionnée avec des tiers aux fins de la fourniture de services sociaux à la personne soit conforme aux principes suivants :

a) Principe de subsidiarité, en vertu duquel l'action conventionnée avec des entités publiques ou avec des entités privées sans but lucratif est préalablement subordonnée à l'utilisation optimale des ressources propres.

b) Principe de solidarité, en encourageant l'implication des entités du secteur non marchand dans la fourniture de services à la personne à caractère social ou de santé conformément aux dispositions de la Ley 43/2015, del Tercer Sector de acción social [(loi 43/2015 relative au troisième secteur de l'action sociale), du 9 octobre 2015].

c) Principe d'égalité, en garantissant que l'action conventionnée assure aux utilisateurs une attention identique à celle accordée aux utilisateurs directement fournis par l'administration publique.

d) Principe de publicité, les appels à candidatures pour des actions conventionnées et l'adoption des accords de conventionnement conclus étant publiés au *Boletín Oficial de Aragón* [(Journal officiel de la Communauté autonome d'Aragon)].

e) Principe de transparence, en diffusant sur le portail de transparence les accords d'action conventionnée conclus et les procédures en cours, dans les conditions prévues à l'article 17 de la Ley 8/2015, de Transparencia de la Actividad Pública y Participación Ciudadana de Aragón [(loi 8/2015 relative à la transparence de l'action publique et à la participation citoyenne dans la Communauté autonome d'Aragon), du 25 mars 2015].

f) Principe de non-discrimination, en fixant des conditions d'accès à l'action conventionnée garantissant l'égalité entre les entités choisissant d'y participer.

g) Principe d'efficacité budgétaire, en fixant les contreparties économiques que les entités conventionnées peuvent percevoir conformément aux tarifs maximaux et minimaux ou aux modules en vigueur, ces contreparties étant plafonnées à la couverture des coûts variables, fixes et permanents résultant de la fourniture du service, sans inclure de bénéfice commercial.

h) Principe de finalité sociale et environnementale, en atteignant divers objectifs dans ces domaines, ainsi que dans ceux de l'égalité entre les sexes et de la gestion innovante des entités et des services publics, et en intégrant expressément de tels objectifs dans l'objet des accords de conventionnement.

i) Principe de participation, par la mise en place de mécanismes visant à impliquer les utilisateurs de manière effective dans la fourniture et l'évaluation des services.

j) Principe de qualité de l'aide apportée, en tant que critère déterminant de choix de l'entité appelée à fournir le service, ce principe devant en outre inspirer l'organisation de l'action conventionnée dans tous ses aspects. »

17 L'article 5 de la loi 11/2016, intitulé « Procédure de conventionnement et critères de préférence », dispose, à son paragraphe 4 :

« La sélection des entités, le cas échéant après appel à candidatures, est basée sur les critères suivants, qui sont fixés dans l'objet et les conditions des accords de conventionnement :

[...]

g) Les bonnes pratiques sociales et en matière de gestion du personnel, le respect des droits des travailleurs et des autres avantages prévus dans les conventions collectives de travail, ainsi que le maintien de conditions d'égalité salariale adéquates et le respect des ratios de professionnels de soins directs par utilisateur prévus par la réglementation applicable, en particulier lors de la fourniture des services visés par l'action conventionnée, ainsi que l'éventuelle inclusion d'avantages volontaires en matière de travail, de salaire ou de sécurité au travail.

[...]

i) L'incorporation, dans l'équipe de travailleurs et de collaborateurs de l'entité appelés à exécuter l'accord de conventionnement, d'une proportion significative de personnes connaissant des difficultés d'accès au marché du travail et de femmes qualifiées ou occupant des postes de direction. L'accord de conventionnement détermine cette proportion au regard de la matière sociale essentielle à la fourniture du service.

j) Le respect et l'amélioration éventuelle des critères minimaux en matière d'égalité et de conciliation [de la vie privée, familiale et professionnelle] établis par la Ley Orgánica 3/2007, para la Igualdad Efectiva de Mujeres y Hombres [(loi organique 3/2007 relative à l'égalité effective entre les femmes et les hommes), du 22 mars 2007] et par la réglementation que la Communauté autonome d'Aragon adopte dans ce domaine.

[...] »

18 En vertu de l'article 6 de cette loi, intitulé « Formalisation et effets des accords de conventionnement » :

« 1. Les accords de conventionnement sont formalisés par un document administratif de conventionnement conformément à la présente loi et à la réglementation sectorielle applicable.

2. Les accords de conventionnement imposent à l'entité conventionnée de fournir à la personne les services de santé ou à caractère social dans les conditions établies par la présente loi, par la réglementation sectorielle applicable et par l'accord de conventionnement adopté conformément à cette dernière.

3. En dehors des prix publics établis, les entités conventionnées ne peuvent percevoir aucune somme auprès des utilisateurs pour les services conventionnés.

4. Le paiement des utilisateurs pour la fourniture de services complémentaires ainsi que son montant sont préalablement autorisés par l'administration publique accordant le conventionnement. Ces services complémentaires sont préalablement énumérés dans le document de conventionnement. »

Le décret 62/2017

19 Le décret 62/2017, qui a été pris en exécution de la loi 11/2016, a pour objet, conformément à son article 1er, de réglementer le régime juridique applicable aux accords de conventionnement conclus avec des entités publiques ou avec des entités privées sans but lucratif en vue de la fourniture de services de santé à la personne par des moyens extérieurs au réseau du service de santé de la Communauté autonome d'Aragon.

20 L'article 3 de ce décret, intitulé « Services et prestations de santé conventionnés », énonce, à son paragraphe 1 :

« L'action conventionnée peut porter sur les services et prestations suivants :

a) Les services de santé repris dans le catalogue de services communs du Sistema Nacional de Salud [(Système national de santé)], approuvé par le Real Decreto 1030/2006 [(décret royal 1030/2006) du 15 septembre 2006], ou dans le catalogue de services de santé du système de santé de la Communauté autonome d'Aragon, approuvé par le Decreto 65/2007 del Gobierno de Aragón [(décret 65/2007, du gouvernement de la Communauté autonome d'Aragon), du 8 mai 2007], ainsi que dans leurs modifications ou mises à jour ultérieures.

b) Les autres services de collaboration et de soutien aux soins de santé, tels que les transferts vers les centres de santé ou l'accompagnement des patients ou autres, qui sont, le cas échéant, expressément inclus dans les accords de conventionnement ou dans les conventions concernés.

[...] »

21 L'article 6 dudit décret, intitulé « Critères de conventionnement », dispose :

« 1. Afin de garantir les principes d'égalité et de non-discrimination qui doivent régir l'action conventionnée en matière de services de santé, ainsi que la qualité des soins fournis aux utilisateurs, les appels à conventionnement indiquent les critères d'évaluation des candidatures des fournisseurs souhaitant adhérer à l'accord de conventionnement concerné.

2. Ces critères couvrent au moins les aspects suivants :

[...]

j) Les bonnes pratiques sociales et en matière de gestion du personnel, telle que celles expressément énoncées à l'article 5, paragraphe 4, sous g), h), i) et j), de la loi 11/2016, en particulier dans le cadre de l'exécution des prestations visées par l'action conventionnée.

[…]

m) Tout autre critère permettant d'apprécier la capacité et l'adéquation de l'entité fournissant le service conventionné. »

22 L'article 7 du décret 62/2017, intitulé « Procédure », prévoit, à son paragraphe 6 :

« L'accord de conventionnement susceptible d'être finalement conclu [...] est publié au *Boletín Oficial de Aragón* [(Journal officiel de la Communauté autonome d'Aragon)] et fait l'objet d'une publicité active sur le portail de transparence du gouvernement de la Communauté autonome d'Aragon. »

23 L'article 12 de ce décret, intitulé « Durée des instruments de conventionnement », dispose, à son paragraphe 1 :

« La durée des accords de conventionnement [...] est limitée à quatre ans, étant entendu qu'ils doivent inclure la possibilité de prorogations successives à concurrence d'une durée maximale de dix ans. »

L'arrêté du 21 juillet 2017

24 L'article 2 de l'arrêté du 21 juillet 2017, intitulé « Champ d'application », prévoit :

« 1. Le présent arrêté s'applique aux accords de conventionnement susceptibles d'être formalisés par le ministère de la Communauté autonome d'Aragon compétent en matière de santé ou par le service de santé de la Communauté autonome d'Aragon avec des entités publiques ou avec des entités privées sans but lucratif, en vue de la fourniture de services de santé à la population protégée de la Communauté autonome.

2. Il s'applique également aux cas de fourniture de services de santé à la personne par voie de gestion indirecte, conformément à l'une des formules établies dans la réglementation sur les marchés publics. »

Le litige au principal et les questions préjudicielles

25 L'ASADE a introduit auprès du Tribunal Superior de Justicia de Aragón (Cour supérieure de justice de la Communauté autonome d'Aragon, Espagne), qui est la juridiction de renvoi, un recours tendant à l'annulation de la réglementation de la Communauté autonome d'Aragon permettant de conclure des accords d'action conventionnée avec des entités sans but lucratif, à savoir le décret 62/2017, l'arrêté du 21 juillet 2017 et l'arrêté du 21 août 2017. Au soutien de ce recours, l'ASADE fait valoir que cette réglementation est contraire au droit de l'Union au motif que les procédures d'action conventionnée qu'elle instaure sont des procédures d'adjudication analogues à celles des marchés publics de services auxquelles seules les entités sans but lucratif peuvent participer, alors qu'il résulte de la jurisprudence de la Cour qu'un pouvoir adjudicateur ne peut attribuer directement des marchés publics qu'à des organisations de bénévolat et pour des raisons d'efficacité budgétaire et financière.

26 La juridiction de renvoi relève que la loi 11/2016 envisage la technique de l'action conventionnée comme une option de gestion des services à caractère social et de santé, conjointement à la gestion

directe par des moyens propres et à la gestion indirecte par voie de marché public. Il résulterait de cette loi que l'exigence de fourniture adéquate des services, c'est-à-dire d'entière satisfaction du citoyen, est présumée remplie par chacune de ces trois modalités de fourniture des services.

27 Il en découlerait que l'objectif de l'action conventionnée est non pas la fourniture adéquate d'un service spécifique, mais la fourniture du service concerné par une entité sans but lucratif présentant certaines caractéristiques. Il s'agirait donc d'un instrument de politique sociale, dont les objectifs correspondraient aux critères de sélection établis à l'article 5, paragraphe 4, de la loi 11/2016. En outre, dans un tel contexte, toute entité sans but lucratif se verrait associer, par sa nature même, une présomption d'efficacité budgétaire et financière.

28 Cette juridiction souligne encore que l'arrêté du 21 août 2017 justifie le recours à l'action conventionnée avec des entités sans but lucratif par le fait, d'une part, que l'administration qui fournit le service concerné n'a pas de moyens propres disponibles et, d'autre part, qu'il n'est pas opportun d'augmenter les ressources matérielles et humaines dont dispose le ministère de la Santé de la Communauté autonome d'Aragon, ainsi que par la nécessité de maintenir la continuité des services de prise en charge résidentielle des malades du sida dans la Communauté autonome d'Aragon.

29 Dans ces conditions, le Tribunal Superior de Justicia de Aragón (Cour supérieure de justice de la Communauté autonome d'Aragon) a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes :

« 1) L'article 49 TFUE et les articles 76 et 77 (en combinaison avec l'article 74 et l'annexe XIV) de la directive [2014/24] doivent-ils être interprétés en ce sens qu'ils s'opposent à une réglementation nationale qui permet aux pouvoirs adjudicateurs de recourir à des accords de conventionnement avec des entités privées sans but lucratif (et pas seulement avec des associations de bénévolat) pour la fourniture de toute sorte de services sociaux à la personne en contrepartie du remboursement des coûts, sans avoir recours aux procédures prévues dans cette directive, et ce quelle que soit la valeur estimée, simplement en qualifiant préalablement ces accords comme étant d'une nature différente de celle des marchés publics ?

2) L'article 49 TFUE et les articles 76 et 77 (en combinaison avec l'article 74 et l'annexe XIV) de la directive [2014/24] doivent-ils être interprétés en ce sens qu'ils s'opposent à une réglementation nationale qui, pour la fourniture de services sociaux ou de santé d'intérêt général, permet de contourner la réglementation en matière de passation de marchés publics en ayant recours à la technique de l'action conventionnée (à titre de complément ou de substitut à la gestion par des moyens propres) non en raison de l'aptitude de cette technique aux fins de la fourniture adéquate du service, mais en vue d'atteindre des objectifs concrets de politique sociale qui concernent le mode de fourniture du service ou que l'agent doit respecter pour être choisi à cette fin, et ce bien que les principes de publicité, de concurrence et de transparence restent en vigueur ?

3) En cas de réponse négative à la question précédente, les dispositions du droit de l'Union précitées et l'article 15, paragraphe 2, sous b), de la directive [2006/123] doivent-ils être interprétés en ce sens qu'ils s'opposent à ce que cette technique soit exclusivement réservée aux entités sans but lucratif (et pas seulement aux associations de bénévolat), et ce bien que les principes de transparence et de publicité soient respectés ?

4) À la lumière de l'article 15, paragraphe 2, sous b), de la directive [2006/123], faut-il considérer que le fait d'accorder aux pouvoirs adjudicateurs le pouvoir discrétionnaire de recourir à l'action conventionnée pour confier la gestion de services de santé et sociaux à des entités sans but lucratif équivaut à subordonner l'accès à la fourniture de ces services à une condition relative à la forme juridique ? En cas de réponse affirmative à cette question, une réglementation nationale telle que celle en cause, pour laquelle l'État n'a pas notifié à la Commission l'inclusion de la condition relative à la forme juridique, est-elle valide au regard de l'article 15, paragraphe 7, de la directive 2006/123 ?

5) En cas de réponse négative aux trois premières questions et de réponse affirmative à la quatrième question, les articles 49 et 56 TFUE, les articles 76 et 77 (en combinaison avec l'article 74 et l'annexe XIV) de la directive [2014/24] et l'article 15, paragraphe 2, de la directive [2006/123]

doivent-ils être interprétés en ce sens qu'ils permettent aux pouvoirs adjudicateurs, afin de sélectionner les entités sans but lucratif (et pas seulement les associations de bénévolat) avec lesquelles conclure la fourniture conventionnée de toutes sortes de services sociaux à la personne [au-delà de ceux énoncés à l'article 2, paragraphe 2, sous j), de la directive 2006/123], d'inclure parmi les critères de sélection l'implantation dans la localité ou dans la zone géographique de fourniture du service ? »

La procédure devant la Cour

30 Par décision du président de la Cour du 7 septembre 2021, l'affaire a été suspendue jusqu'au prononcé de l'arrêt dans l'affaire ASADE (C-436/20).

31 À la suite du prononcé de l'arrêt du 14 juillet 2022, ASADE (C-436/20, ci-après l'« arrêt ASADE I », EU:C:2022:559), la Cour a interrogé la juridiction de renvoi sur le point de savoir si elle entendait maintenir la présente demande de décision préjudicielle, compte tenu de la connexité existant entre la présente affaire et celle ayant donné lieu à cet arrêt.

32 Par lettre du 22 septembre 2022, la juridiction de renvoi a répondu qu'elle retirait les première, troisième et cinquième questions, mais qu'elle maintenait les deuxième et quatrième questions.

Sur les questions préjudicielles

33 En vertu de l'article 53, paragraphe 2, de son règlement de procédure, lorsqu'une demande préjudicielle est manifestement irrecevable, la Cour peut à tout moment, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée, sans poursuivre la procédure. En outre, en vertu de l'article 99 de ce règlement, la Cour peut à tout moment décider, sur proposition du juge rapporteur, l'avocat général entendu, de statuer par voie d'ordonnance motivée lorsque, notamment, la réponse à une question posée peut être clairement déduite de la jurisprudence.

34 Il y a lieu de faire application de ces dispositions dans la présente affaire.

Sur la deuxième question

35 Par sa deuxième question préjudicielle, la juridiction de renvoi demande, en substance, si l'article 49 TFUE ainsi que les articles 76 et 77 de la directive 2014/24 doivent être interprétés en ce sens qu'ils s'opposent à une réglementation nationale qui réserve aux entités sans but lucratif la faculté de conclure, dans le respect des principes de publicité, de concurrence et de transparence, des accords en vertu desquels ces entités fournissent des services sociaux ou de santé d'intérêt général, en contrepartie du remboursement des coûts qu'elles supportent, quelle que soit la valeur estimée de ces services, lorsque le recours à ces accords vise à atteindre des objectifs de solidarité, sans améliorer nécessairement l'adéquation ou l'efficacité budgétaire de la fourniture desdits services par rapport au régime généralement applicable aux procédures de passation de marchés publics.

36 À titre liminaire, il importe de relever que, contrairement à ce qu'exige l'article 94 du règlement de procédure, la juridiction de renvoi n'explicite pas en quoi, malgré le caractère purement interne du litige pendant devant elle, celui-ci présente un élément de rattachement avec la liberté d'établissement rendant nécessaire, pour la solution dudit litige, de procéder à l'interprétation préjudicielle sollicitée de l'article 49 TFUE. Plus particulièrement, cette juridiction ne fait pas expressément valoir qu'elle se trouve dans l'une des hypothèses visées aux points 50 à 53 de l'arrêt du 15 novembre 2016, Ullens de Schooten (C-268/15, EU:C:2016:874) (voir, en ce sens, arrêt ASADE I, points 47 et 48 ainsi que jurisprudence citée).

37 En outre, si, conformément à une jurisprudence constante de la Cour, la passation des marchés qui, eu égard à leur valeur, ne relèvent pas du champ d'application des directives en matière de passation des marchés publics est néanmoins soumise aux règles fondamentales et aux principes généraux du traité FUE, en particulier aux principes d'égalité de traitement et de non-discrimination en raison de la nationalité ainsi qu'à l'obligation de transparence qui en découle, pour autant que ces marchés

présentent un intérêt transfrontalier certain, la juridiction de renvoi reste en défaut de fournir à la Cour les données de nature à prouver, en l'occurrence, l'existence d'un tel intérêt transfrontalier (voir, par analogie, arrêt ASADE I, point 49 et jurisprudence citée).

38 Partant, la deuxième question préjudicielle est manifestement irrecevable en ce qu'elle porte sur l'interprétation de l'article 49 TFUE.

39 Sous le bénéfice de cette précision liminaire, il importe, en premier lieu, de relever que, pour des motifs analogues à ceux énoncés aux points 53 à 71 de l'arrêt ASADE I, il découle du dossier dont dispose la Cour que la réglementation nationale en cause au principal semble régir, à tout le moins en partie, la passation de marchés publics de services soumis à la directive 2014/24.

40 En deuxième lieu, d'une part, il ressort de la demande de décision préjudicielle que les services susceptibles de faire l'objet d'un accord d'action conventionnée sont des services de santé ainsi que des services de collaboration et de soutien aux soins de santé, de sorte qu'une partie à tout le moins de ces services relève des services énumérés à l'annexe XIV de la directive 2014/24.

41 D'autre part, la deuxième question préjudicielle porte sur l'appréciation non pas des dispositions de cette directive généralement applicables aux procédures de passation de marchés publics, mais uniquement des articles 74 à 77 de ladite directive, lesquels instituent précisément un régime simplifié de passation des marchés publics ayant pour objet des services relevant de cette annexe XIV.

42 Partant, il y a lieu d'examiner cette deuxième question au regard uniquement des articles 74 à 77 de la directive 2014/24.

43 En troisième lieu, il importe de relever qu'un pouvoir adjudicateur ne peut attribuer un marché public à une organisation sur le fondement de la procédure prévue à l'article 77 de la directive 2014/24 que si plusieurs conditions cumulatives sont remplies. Au nombre de ces conditions figure celle, visée au paragraphe 3 de cet article, selon laquelle la durée maximale du marché ne peut être supérieure à trois ans (voir, en ce sens, arrêt ASADE I, points 76 à 78).

44 Or, en l'occurrence, il ressort de l'article 12 du décret 62/2017 que la durée des accords d'action conventionnée en cause au principal peut atteindre quatre ans, avec la possibilité de prorogations successives à concurrence d'une durée maximale de dix ans.

45 Partant, une réglementation telle que celle en cause au principal ne satisfait pas aux conditions requises pour relever du régime d'exception prévu à l'article 77 de la directive 2014/24.

46 Cela étant, cette disposition ne saurait être considérée comme couvrant, de manière exhaustive, les cas dans lesquels les marchés publics ayant pour objet la prestation d'un service visé à l'annexe XIV de la directive 2014/24 peuvent être réservés à certaines catégories d'opérateurs économiques (voir, en ce sens, arrêt ASADE I, points 80 à 82).

47 En quatrième lieu, l'article 76 de la directive 2014/24, qui fixe les règles, dérogatoires au droit commun, applicables à la passation de l'ensemble des marchés publics portant sur les services mentionnés dans l'annexe XIV de celle-ci, reconnaît un large pouvoir d'appréciation aux États membres pour organiser le choix des prestataires de tels services. En effet, en vertu de cet article 76, les États membres doivent, d'une part, mettre en place des règles de passation imposant aux pouvoirs adjudicateurs de respecter les principes de transparence et d'égalité de traitement des opérateurs économiques et, d'autre part, veiller à ce que ces règles permettent aux pouvoirs adjudicateurs de tenir compte des spécificités des services faisant l'objet de telles procédures de passation. À ce dernier égard, les États membres doivent autoriser les pouvoirs adjudicateurs à prendre en compte la nécessité d'assurer la qualité, la continuité, l'accessibilité, le caractère abordable, la disponibilité et l'exhaustivité de ces services, les besoins spécifiques des différentes catégories d'utilisateurs, la participation et l'implication des utilisateurs ainsi que l'innovation (voir, en ce sens, arrêt ASADE I, points 83 à 85).

48 Il convient, dès lors, d'examiner si les principes d'égalité de traitement et de transparence visés à l'article 76 de la directive 2014/24 s'opposent à une réglementation nationale réservant, afin de satisfaire à des impératifs sociaux, aux entités sans but lucratif, y compris lorsqu'elles ne remplissent

pas les conditions prévues à l'article 77 de cette directive, le droit de participer aux procédures d'attribution des marchés publics ayant pour objet la prestation de services tels que ceux visés au point 20 de la présente ordonnance.

49 S'agissant, premièrement, du principe d'égalité de traitement des opérateurs économiques, le fait que les entités privées à but lucratif soient privées de la possibilité de participer à de telles procédures d'attribution des marchés publics constitue une différence de traitement entre les opérateurs économiques contraire à ce principe, à moins que cette différence ne se justifie par des considérations objectives (arrêt ASADE I, point 87).

50 En l'occurrence, sous réserve d'une vérification par la juridiction de renvoi, le recours exclusif aux entités privées sans but lucratif afin d'assurer la fourniture des services sociaux et de santé pouvant faire l'objet d'un accord d'action conventionnée paraît être motivé tant par les principes d'universalité et de solidarité, propres à un système d'assistance sociale, que par des raisons d'efficacité économique et d'adéquation, en tant qu'il permet que ces services d'intérêt général soient assurés dans des conditions d'équilibre économique sur le plan budgétaire par des entités constituées essentiellement en vue de servir l'intérêt général et dont les décisions ne sont pas guidées, comme le relève le gouvernement espagnol, par des considérations purement commerciales (voir, en ce sens, arrêt ASADE I, point 90 et jurisprudence citée).

51 Lorsqu'elle est motivée par de telles considérations, l'exclusion des entités privées à but lucratif des procédures de passation des marchés publics ayant pour objet la fourniture de tels services n'est pas contraire au principe d'égalité, pour autant que cette exclusion contribue effectivement à la finalité sociale ainsi qu'à la poursuite des objectifs de solidarité et d'efficacité budgétaire sur lesquels ce système est fondé (arrêt ASADE I, point 91 et jurisprudence citée).

52 Il importe encore de souligner, s'agissant de cet objectif d'efficacité budgétaire, que l'exclusion des entités privées à but lucratif de ces procédures de passation n'est pas contraire au droit de l'Union au seul motif qu'une procédure d'attribution qui leur aurait été ouverte aurait éventuellement pu permettre de fournir le même service d'aide à la personne à moindre coût pour le pouvoir adjudicateur. En effet, l'efficacité budgétaire doit, dans le contexte de la fourniture des services en cause au principal, être appréhendée au regard des spécificités inhérentes à cette fourniture, tenant à la nécessité d'assurer que l'exclusion des entités à but lucratif contribue effectivement à la finalité sociale ainsi qu'aux objectifs de solidarité poursuivis par ce pouvoir adjudicateur.

53 Il s'ensuit que le principe d'égalité de traitement des opérateurs économiques, tel qu'il est désormais consacré à l'article 76 de la directive 2014/24, autorise les États membres à réserver le droit de participer à la procédure d'attribution des marchés publics de services de santé et de services sociaux, énumérés à l'annexe XIV de cette directive, aux entités privées sans but lucratif, y compris à celles qui ne sont pas strictement bénévoles, pour autant, d'une part, que les éventuels bénéfices qui résultent de l'exécution de ces marchés soient réinvestis par ces entités en vue d'atteindre l'objectif social d'intérêt général qu'elles poursuivent et, d'autre part, que l'ensemble des conditions rappelées aux points 50 et 51 de la présente ordonnance soient remplies (voir, en ce sens, arrêt ASADE I, point 95).

54 En revanche, l'article 76 de la directive 2014/24 s'oppose à ce que de tels marchés publics puissent être attribués directement, sans mise en concurrence, à une entité sans but lucratif autre qu'une entité bénévole. En effet, cet article requiert que, avant de procéder à une telle attribution, le pouvoir adjudicateur compare et classe les offres respectives des différentes entités sans but lucratif ayant manifesté leur intérêt, en ayant notamment égard au prix de ces offres, quand bien même ce prix serait plafonné à la couverture des coûts résultant de la fourniture du service (voir, en ce sens, arrêt ASADE I, point 96 et jurisprudence citée).

55 S'agissant, deuxièmement, du principe de transparence, celui-ci exige de la part du pouvoir adjudicateur un degré de publicité adéquate, permettant, d'une part, une ouverture à la concurrence et, d'autre part, le contrôle de l'impartialité de la procédure d'attribution afin de permettre à tout opérateur intéressé de décider de soumissionner sur le fondement de l'ensemble des informations pertinentes ainsi que de garantir l'absence de risque de favoritisme et d'arbitraire de la part du pouvoir adjudicateur. L'obligation de transparence implique ainsi que toutes les conditions et les modalités de la procédure d'attribution soient formulées de manière claire, précise et univoque, de façon, d'une part, à

permettre à tous les soumissionnaires raisonnablement informés et normalement diligents d'en comprendre la portée exacte et de les interpréter de la même manière et, d'autre part, à encadrer le pouvoir discrétionnaire du pouvoir adjudicateur et de mettre celui-ci en mesure de vérifier effectivement si les offres des soumissionnaires correspondent aux critères régissant la procédure en cause (arrêt ASADE I, point 97 et jurisprudence citée).

56 À cet égard, l'article 75 de la directive 2014/24 précise, pour les procédures d'attribution de marchés publics relevant du régime simplifié établi aux articles 74 à 77 de cette directive, les exigences de publicité qui sont requises par le principe de transparence. Or, selon cet article 75, les pouvoirs adjudicateurs qui entendent passer un marché public pour les services visés à l'annexe XIV de ladite directive doivent, en principe, faire connaître leur intention par un avis de marché ou un avis de préinformation qui est publié, conformément à l'article 51 de la même directive, par l'Office des publications de l'Union européenne ou, le cas échéant pour les avis de préinformation, sur leurs profils d'acheteur (arrêt ASADE I, points 99 et 100).

57 En l'occurrence, il semble découler de l'article 4, sous d), de la loi 11/2016 et de l'article 7, paragraphe 6, du décret 62/2017 que la publicité des avis de marché en cause est assurée par la seule publication au *Boletín Oficial de Aragón* (Journal officiel de la Communauté autonome d'Aragon) et sur le portail de transparence du gouvernement de la Communauté autonome d'Aragon.

58 Par conséquent, si tel était le cas, ce qu'il appartient à la juridiction de renvoi de vérifier, une telle publication ne constituerait pas une mesure de publicité conforme à l'article 75 de la directive 2014/24.

59 Il résulte des considérations qui précèdent qu'il convient de répondre à la deuxième question préjudicielle que les articles 76 et 77 de la directive 2014/24 doivent être interprétés en ce sens qu'ils ne s'opposent pas à une réglementation nationale qui réserve aux entités sans but lucratif la faculté de conclure, dans le respect des principes de publicité, de concurrence et de transparence, des accords en vertu desquels ces entités fournissent des services sociaux ou de santé d'intérêt général, en contrepartie du remboursement des coûts qu'elles supportent, quelle que soit la valeur estimée de ces services, lorsque le recours à ces accords vise à atteindre des objectifs de solidarité, sans améliorer nécessairement l'adéquation ou l'efficacité budgétaire de la fourniture desdits services par rapport au régime généralement applicable aux procédures de passation de marchés publics, pour autant que,

– d'une part, le cadre légal et conventionnel dans lequel se déploie l'activité desdites entités contribue effectivement à la finalité sociale ainsi qu'à la poursuite des objectifs de solidarité et d'efficacité budgétaire sur lesquels cette réglementation est fondée, et

– d'autre part, le principe de transparence, tel qu'il est notamment précisé à l'article 75 de cette directive, est respecté.

Sur la quatrième question

60 Par sa quatrième question préjudicielle, la juridiction de renvoi demande, en substance, si l'article 15, paragraphe 2, de la directive 2006/123 doit être interprété en ce sens que la décision d'une autorité publique de réserver la gestion de certains services de santé et sociaux aux seules entités sans but lucratif constitue une exigence imposant au prestataire d'un service d'être constitué sous une forme juridique particulière, au sens de cette disposition. En cas de réponse affirmative à cette question, la juridiction de renvoi demande également si l'article 15, paragraphe 7, de cette directive doit être interprété en ce sens qu'il s'oppose à l'application de cette exigence dans le cas où celle-ci n'a pas été notifiée à la Commission.

61 Selon une jurisprudence constante, dans le cadre de la procédure instituée à l'article 267 TFUE, il appartient au seul juge national, qui est saisi du litige au principal et qui doit assumer la responsabilité de la décision juridictionnelle à intervenir, d'apprécier, au regard des particularités de chaque affaire, tant la nécessité d'une décision préjudicielle pour être en mesure de rendre son jugement que la pertinence des questions qu'il pose à la Cour. Par conséquent, dès lors que les questions posées portent sur l'interprétation du droit de l'Union, la Cour est, en principe, tenue de statuer. Il s'ensuit que les questions portant sur le droit de l'Union bénéficient d'une présomption de pertinence. Le rejet par la Cour d'une demande formée par une juridiction nationale n'est ainsi possible que s'il apparaît de

manière manifeste que l'interprétation sollicitée du droit de l'Union n'a aucun rapport avec la réalité ou l'objet du litige au principal, lorsque le problème est de nature hypothétique ou encore lorsque la Cour ne dispose pas des éléments de fait et de droit nécessaires pour répondre de façon utile aux questions qui lui sont posées (arrêt du 22 décembre 2022, Quadrant Amroq Beverages, C-332/21, EU:C:2022:1031, point 32 et jurisprudence citée).

62 Aux termes de son article 2, paragraphe 2, sous f) et j), la directive 2006/123 ne s'applique pas aux services de soins de santé ainsi qu'aux services sociaux relatifs au logement social, à l'aide à l'enfance et à l'aide aux familles et aux personnes se trouvant de manière permanente ou temporaire dans une situation de besoin qui sont assurés par l'État, par des prestataires mandatés par l'État ou par des associations caritatives reconnues comme telles par l'État.

63 À cet égard, il importe de relever, en premier lieu, que, ainsi qu'il ressort de la demande de décision préjudicielle, les services pouvant faire l'objet d'un accord d'action conventionnée en vertu de l'article 3 du décret 62/2017 sont, pour l'essentiel, des services de santé, au sens de l'article 2, paragraphe 2, sous f), de la directive 2006/123, tel qu'interprété par la Cour (voir, en ce sens, arrêt du 11 juillet 2013, Femarbel, C-57/12, EU:C:2013:517, points 34 à 39), de sorte que cette directive ne leur est pas applicable.

64 Partant, il est manifeste que, s'agissant de ces services de santé, l'interprétation de l'article 15 de la directive 2006/123, qui est sollicitée par la quatrième question préjudicielle, n'a aucun rapport avec l'objet du litige au principal, de sorte que cette question est, dans cette mesure, manifestement irrecevable.

65 En second lieu, les accords d'action conventionnée en cause au principal peuvent également porter sur des services de collaboration et de soutien aux soins de santé, tels que les transferts vers les centres de santé ou l'accompagnement des patients ou autres, tels qu'ils sont visés à l'article 3, paragraphe 1, sous b), du décret 62/2017.

66 À cet égard, il ressort de l'article 2, paragraphe 2, sous j), de la directive 2006/123, lu conjointement avec le considérant 27 de celle-ci, que seuls les services qui remplissent deux conditions cumulatives relèvent de la notion de « services sociaux » visée à cette disposition (voir, en ce sens, arrêt du 11 juillet 2013, Femarbel, C-57/12, EU:C:2013:517, point 42).

67 Premièrement, les activités exercées doivent concerner notamment, comme il est également expliqué dans le *Manuel relatif à la mise en œuvre de la directive « services »*, l'aide aux personnes se trouvant dans une situation de besoin, en raison, entre autres, d'un manque d'indépendance (voir, en ce sens, arrêt du 11 juillet 2013, Femarbel, C-57/12, EU:C:2013:517, point 43).

68 Deuxièmement, les services concernés doivent être assurés, notamment, par des prestataires privés qui ont été mandatés par l'État au moyen d'un acte confiant de manière claire et transparente une véritable obligation d'assurer lesdits services, dans le respect de certaines conditions spécifiques d'exercice visant, notamment, à s'assurer que ces services sont offerts conformément aux exigences quantitatives et qualitatives établies et de sorte à garantir l'égalité d'accès aux prestations, sous réserve en principe d'une compensation financière adéquate dont le mode de calcul doit être préalablement défini de manière objective et transparente (voir, en ce sens, arrêt du 11 juillet 2013, Femarbel, C-57/12, EU:C:2013:517, points 44 à 48 et 53).

69 En l'occurrence, il semble ressortir de la réglementation nationale en cause au principal, en particulier des articles 4 à 6 de la loi 11/2016 ainsi que de l'article 6 du décret 62/2017, que les services de collaboration et de soutien aux soins de santé qui peuvent faire l'objet d'accords d'action conventionnée remplissent les deux conditions cumulatives explicitées aux points 67 et 68 de la présente ordonnance.

70 Par conséquent, il est vraisemblable, au vu du dossier dont dispose la Cour, que ces services relèvent de la catégorie des services sociaux visés à l'article 2, paragraphe 2, sous j), de la directive 2006/123 et, partant, qu'ils doivent également être exclus du champ d'application de cette directive.

71 En tout état de cause, ce même dossier ne permet pas de déterminer si ces services ne doivent pas être exclus du champ d'application de la directive 2006/123 au titre de cet article 2, paragraphe 2, sous j).

72 Dès lors, la juridiction de renvoi n'a pas mis la Cour en mesure de s'assurer que les services mentionnés au point 65 de la présente ordonnance relèvent effectivement du champ d'application de la directive 2006/123.

73 Il résulte des considérations qui précèdent que la quatrième question préjudicielle est manifestement irrecevable.

Sur les dépens

74 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (neuvième chambre) dit pour droit :

Les articles 76 et 77 de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE,

doivent être interprétés en ce sens que :

ils ne s'opposent pas à une réglementation nationale qui réserve aux entités sans but lucratif la faculté de conclure, dans le respect des principes de publicité, de concurrence et de transparence, des accords en vertu desquels ces entités fournissent des services sociaux ou de santé d'intérêt général, en contrepartie du remboursement des coûts qu'elles supportent, quelle que soit la valeur estimée de ces services, lorsque le recours à ces accords vise à atteindre des objectifs de solidarité, sans améliorer nécessairement l'adéquation ou l'efficacité budgétaire de la fourniture desdits services par rapport au régime généralement applicable aux procédures de passation de marchés publics, pour autant que,

– **d'une part, le cadre légal et conventionnel dans lequel se déploie l'activité desdites entités contribue effectivement à la finalité sociale ainsi qu'à la poursuite des objectifs de solidarité et d'efficacité budgétaire sur lesquels cette réglementation est fondée, et**

– **d'autre part, le principe de transparence, tel qu'il est notamment précisé à l'article 75 de cette directive, est respecté.**

Signatures

---

* Langue de procédure : l'espagnol.

JUDGMENT OF THE COURT (Fourth Chamber)

15 September 2022 (*)

(Reference for a preliminary ruling – Directive 2009/81/EC – Coordination of procedures for the award of certain works contracts, supply contracts and service contracts – Articles 38 and 49 – Obligation to verify whether an abnormally low tender exists – Criterion laid down by a piece of national legislation for assessing the abnormally low nature of a tender – Not applicable – Requirement that there be at least three tenders – Criterion based on the requirement that a tender be more than 20% lower than the mean value of the tenders submitted by the other tenderers – Judicial review)

In Case C-669/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), made by decision of 10 November 2020, received at the Court on 8 December 2020, in the proceedings

Veridos GmbH

v

Ministar na vatreshnite raboti na Republika Bulgaria,

Mühlbauer ID Services GmbH – S&T,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, S. Rodin (Rapporteur), J.-C. Bonichot, L.S. Rossi and O. Spineanu-Matei, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Veridos GmbH, by T.P. Nenov, advokat,

– Mühlbauer ID Services GmbH – S&T, by Y. Lambovski, advokat,

– the Bulgarian Government, by M. Georgieva and L. Zaharieva, acting as Agents,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the French Government, by R. Bénard, A.-L. Desjonquères and É. Toutain, acting as Agents,

– the Austrian Government, by J. Schmoll, acting as Agent,

– the European Commission, by P. Ondrůšek, G. Wils and I. Zaloguin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 and 69 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), Articles 38 and 49 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76), and Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in proceedings between Veridos GmbH, on the one hand, and the Ministar na vatreshnite raboti na Republika Bulgaria (Minister for the Interior of the Republic of Bulgaria) and the consortium Mühlbauer ID Services GmbH – S&T, on the other, concerning a decision ranking tenderers and selecting the successful tenderer in respect of a public contract.

Legal context

European Union law

Directive 2014/24

3 Article 56 of Directive 2014/24, entitled ‘General principles’, provides, in paragraph 1 thereof, that contracts are to be awarded on the basis of criteria laid down in accordance with Articles 67 to 69 thereof, provided that the contracting authority has verified that a certain number of conditions are fulfilled in accordance with Articles 59 to 61 of that directive.

4 Article 69 of that directive, entitled ‘Abnormally low tenders’, provides:

‘1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

2. The explanations referred to in paragraph 1 may in particular relate to:

(a) the economics of the manufacturing process, of the services provided or of the construction method;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with obligations referred to in Article 18(2);

(e) compliance with obligations referred to in Article 71;

(f) the possibility of the tenderer obtaining State aid.

3. The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2.

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2).

4. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.

5. Upon request, Member States shall make available to other Member States by means of administrative cooperation any information at [their] disposal, such as laws, regulations, universally applicable collective agreements or national technical standards, relating to the evidence and documents produced in relation to details listed in paragraph 2.'

Directive 2009/81

5 Under Article 35 of Directive 2009/81, entitled 'Information for candidates and tenderers':

'1. The contracting authorities/entities shall, at the earliest opportunity, inform candidates and tenderers of decisions reached concerning the award of a contract or the conclusion of a framework agreement, including the grounds for any decision not to award a contract or conclude a framework agreement for which there has been competitive tendering or to recommence the procedure; that information shall be given in writing upon request to the contracting authorities/entities.

2. At the request of the party concerned, the contracting authority/entity shall, subject to paragraph 3, at the earliest opportunity and at the latest within 15 days of receipt of the written request for information, inform the parties as follows:

(a) any unsuccessful candidate of the reasons for the rejection of the application;

(b) any unsuccessful tenderer of the reasons for the rejection of the tender, including, in particular, for the cases referred to in Article 18(4) and (5) the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements, and in the cases referred to in Articles 22 and 23, the reasons for its decision of non-conformity with the requirements of security of information and security of supply;

(c) any tenderer which has made an admissible tender that has been rejected, of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement.

3. Contracting authorities/entities may decide to withhold certain information on the contract award or the conclusion of the framework agreements referred to in paragraph 1 where release of such information would impede law enforcement or otherwise be contrary to the public interest, in particular defence and/or security interests, would prejudice the legitimate commercial interests of economic operators, whether public or private, or might prejudice fair competition between them.'

6 Article 38 of that directive, entitled 'Verification of the suitability and choice of participants and award of contracts', provides:

'1. Contracts shall be awarded on the basis of the criteria laid down in Articles 47 and 49, taking into account Article 19, after the suitability of the economic operators not excluded under Articles 39 or 40 has been checked by contracting authorities/entities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 41 to 46 and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

2. Contracting authorities/entities may require candidates to meet minimum capacity levels in accordance with Articles 41 and 42.

The extent of the information referred to in Articles 41 and 42 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject matter of the contract.

These minimum levels shall be indicated in the contract notice.

3. In restricted procedures, negotiated procedures with publication of a contract notice and competitive dialogues, contracting authorities/entities may limit the number of suitable candidates they will invite to tender or with which they will conduct a dialogue. In this case:

– the contracting authorities/entities shall indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number. The minimum number of candidates they intend to invite may not be less than three;

– subsequently, the contracting authorities/entities shall invite a number of candidates at least equal to the minimum number set in advance, provided a sufficient number of suitable candidates is available[.]

Where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number, the contracting authority/entity may continue the procedure by inviting the candidate or candidates with the required capabilities.

If the contracting authority/entity considers that the number of suitable candidates is too low to ensure genuine competition, it may suspend the procedure and republish the initial contract notice in accordance with Article 30(2) and Article 32, fixing a new deadline for the submission of requests to participate. In this case, the candidates selected upon the first publication and those selected upon the second shall be invited in accordance with Article 34. This option shall be without prejudice to the ability of the contracting authority/entity to cancel the ongoing procurement procedure and launch a new procedure.

4. In the context of an award procedure, the contracting authority/entity may not include economic operators other than those which made a request to participate, or candidates without the requisite capabilities.

5. Where the contracting authorities/entities exercise the option of reducing the number of solutions to be discussed or of tenders to be negotiated, as provided for in Article 26(3) and Article 27(4), they shall do so by applying the award criteria stated in the contract notice or the contract documents. In the final stage, the number arrived at shall make for genuine competition in so far as there are enough solutions or suitable candidates.’

7 Article 49 of that directive, entitled ‘Abnormally low tenders’, provides:

‘1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority/entity shall, before it rejects those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

(a) the economics of the construction method, manufacturing process or services provided;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid.

2. The contracting authority/entity shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting authority/entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority/entity, that the aid in question was granted legally. Where the contracting authority/entity rejects a tender in those circumstances, it shall inform the Commission thereof.’

8 Article 55 of that directive is entitled ‘Scope and availability of review procedures’; paragraphs 2 and 4 thereof are worded as follows:

‘2. Member States shall take the measures necessary to ensure that decisions taken by the contracting authorities/entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 56 to 62, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.

…

4. Member States shall ensure that review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.’

Bulgarian law

9 Article 72 of the Zakon za obshtestvenite porachki (Law on Public Procurement), entitled ‘Abnormally low tenders’, provides, in paragraph 1 thereof:

‘If, in a tenderer’s tender, an element that is linked to price or costs and is subject to assessment is more than 20% lower than the mean value of the tenders submitted by the other tenderers in respect of the same criterion for assessment, the contracting authority shall request a detailed written explanation of how that element was prepared, to be submitted within five days of receiving the request.’

10 Under Article 212 of that law, the Komisia za zashtita na konkurentsiata (Commission for Protection of Competition, Bulgaria) is to rule on complaints made against the contracting authority’s decision within one month or 15 days from the initiation of the proceedings and a reasoned decision is to be drawn up and published at the latest within seven days of the ruling on the complaint.

11 In addition, Article 216 of that law provides for an expedited procedure accompanied by shortened time limits for certain procedural steps. In accordance with paragraph 6 of that article, the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) is to rule within one month of the date of an appeal in cassation against the ruling of the Commission for Protection of Competition being lodged with it, and its decision is final.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 By a decision of 15 August 2018, the zamestnik-ministar na vatreshnite raboti (Deputy Minister for the Interior) launched a ‘restricted’ procurement procedure concerning the planning, establishment and management of a Generation 2019 system for the issue of Bulgarian identity documents. In that regard, an auxiliary commission was appointed to preselect candidates and to examine, assess and rank the tenders.

13 Following that preselection, Veridos and the consortium Mühlbauer ID Services GmbH – S&T were invited to submit tenders. By a decision of the Deputy Minister for the Interior of 29 April 2020, the contract was awarded to that consortium.

14 Veridos brought a complaint against that decision before the Commission for Protection of Competition, which, by a decision of 25 June 2020, rejected that complaint. On 13 July 2020, Veridos lodged an appeal in cassation against that decision before the Varhoven administrativen sad (Supreme Administrative Court), which is the referring court.

15 According to that court, the request for a preliminary ruling is intended to establish whether the contracting authority is under an obligation to verify whether an abnormally low tender exists, in accordance with the principles of transparency, non-discrimination and equal treatment enshrined in EU law, in order to ensure an objective comparison of tenders and to determine, under conditions of effective competition, which tender is the most economically advantageous, without that tender, however, being abnormally low such as to distort competition.

16 In addition, that court states that Article 72(1) of the Law on Public Procurement governs the criterion for verifying whether a tender is abnormally low by requiring that that tender be ‘more than 20% lower than the mean value of the tenders submitted by the other tenderers in respect of the same criterion for assessment’. Thus, the Bulgarian legislature implicitly requires that there be at least three tenders, since one of them must be assessed against the mean value of the other two. In that regard, the referring court states that it is in that context that the Commission for Protection of Competition found that that provision did not apply, since only two tenders had been submitted, and that, consequently, that mean value could not be calculated.

17 The referring court adds that the contracting authority, namely the Deputy Minister for the Interior, had no algorithm drawn up and announced in advance, which could be subject to review in the light of EU law, for the purposes of assessing and analysing whether an abnormally low tender exists.

18 Thus, that court states that the existence of a criterion which is laid down by law but inapplicable in practice, as well as the absence of any other criterion announced in advance such as to allow abnormally low tenders to be identified, raises the questions, first, whether the contracting authority is exempt from the obligation to verify whether such a tender exists, given that the Court of Justice has expressly stated, in its case-law, that the contracting authority must be satisfied that the tenders submitted to it are genuine, and, second, whether the contracting authority is always required to state reasons for its finding that an abnormally low tender exists or whether it may defend its decision ranking tenderers by providing reasons as regards the substance in judicial review proceedings. In that context, the referring court states that the latter question must be analysed in the light of the case-law of the Court of Justice according to which the reasons for such a decision may not be explained for the first time before a court except under exceptional circumstances.

19 In those circumstances, the Varhoven administrativen sad (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 56 of Directive [2014/24] in conjunction with Article 69 thereof, or, respectively, Article 38 of Directive [2009/81] in conjunction with Article 49 thereof, to be interpreted as meaning that a contracting authority, where it is objectively impossible to apply the criterion laid down in national law for the evaluation of an abnormally low tender and in the absence of a different criterion selected by the contracting authority and announced in advance, is not required to verify whether an abnormally low tender exists?

(2) Is Article 56 of Directive 2014/24 in conjunction with Article 69 thereof, or, respectively, Article 38 of Directive 2009/81 in conjunction with Article 49 thereof, to be interpreted as meaning that the contracting authority is required to verify whether abnormally low tenders exist only if there is a suspicion regarding any tender; or, conversely, is the contracting authority required to always ensure that the received tenders are genuine, and state the relevant reasons?

(3) Does such a requirement apply to the contracting authority if only two tenders have been received during the procedure for the award of a public contract?

(4) Is Article 47 of the [Charter] to be interpreted as meaning that the contracting authority’s assessment as regards a lack of suspicion that an abnormally low tender exists, or, respectively, that contracting authority’s conviction that the first-ranked tenderer has submitted a genuine tender, is subject to judicial review?

(5) Should the previous question be answered in the affirmative: is Article 47 of the [Charter] to be interpreted as meaning that a contracting authority in a procedure for the award of a public contract which has not verified whether an abnormally low tender exists is required to provide justification and reasons as to why there is no suspicion that an abnormally low tender has been submitted, in other words, that the first-ranked tender is genuine?’

The request for an expedited procedure

20 The referring court has requested that the Court determine the present case pursuant to an expedited procedure under Article 105(1) of the Rules of Procedure of the Court of Justice.

21 In support of its request, that court, first, states that the public contract at issue in the main proceedings concerns the issue and renewal of Bulgarian identity documents and that, as such, it is directly linked to national security and the legitimate legal status of Bulgarian nationals, and second, refers to the existence of an expedited procedure accompanied by shortened time limits provided for in Articles 212 and 216 of the Law on Public Procurement as regards certain procedural steps.

22 In addition, that court states that the need to determine the present reference for a preliminary ruling pursuant to the expedited procedure provided for in Article 105 of the Rules of Procedure does not stem from the financial aspect of the public contract concerned, but from the consequences of its implementation and the legal relationships linked to the main judicial proceedings. Those proceedings concern the identity documents of an indefinite number of Bulgarian citizens and their ability to exercise their fundamental rights, such as freedom of movement, freedom of establishment and the right to vote.

23 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of those rules.

24 In that connection, as regards, first of all, the fact that the questions raised by the present case may affect a large number of Bulgarian nationals and legal relationships, it must be borne in mind that the expedited procedure referred to in that provision is a procedural instrument intended to address matters of exceptional urgency (judgment of 28 April 2022, *Caruter*, C-642/20, EU:C:2022:308, paragraph 21 and the case-law cited).

25 The large number of persons or legal situations which may be affected by the decision that a referring court must give after making a reference to the Court for a preliminary ruling does not, as such, constitute an exceptional circumstance justifying the application of the expedited procedure (judgment of 3 March 2022, *Presidenza del Consiglio dei Ministri and Others (Trainee specialist doctors)*, C-590/20, EU:C:2022:150, paragraph 28 and the case-law cited).

26 Next, although the referring court refers to the significant and sensitive nature of the public contract at issue in the main proceedings, relating to the issue and renewal of Bulgarian identity documents, and of the responses that the Court is likely to give to the questions which have been put to it, in the field of EU law at issue, those separate elements are not such as to justify, in themselves, the present case being determined pursuant to the expedited procedure (see, to that effect, order of the President of the Court of 25 February 2021, *Sea Watch*, C-14/21 and C-15/21, EU:C:2021:149, paragraph 24).

27 In any event, it is not apparent from the request referred to in paragraph 20 of the present judgment in what way the length of the proceedings before the Court is likely to affect the production or issue of such documents.

28 In addition, it is apparent from the Court’s case-law that the mere interest of litigants in determining as quickly as possible the scope of their rights under EU law, while legitimate, is not such as to establish the existence of an exceptional circumstance for the purposes of Article 105(1) of the Rules of Procedure (judgment of 28 April 2022, *Phoenix Contact*, C-44/21, EU:C:2022:309, paragraph 16 and the case-law cited).

29 Lastly, as regards the existence of short procedural time limits, it must be noted that the requirement for a dispute pending before the Court to be dealt with rapidly cannot derive solely from the fact that the referring court is required to ensure the rapid settlement of the dispute or from the mere fact that the delay or suspension of the works concerned by a public contract could have adverse effects on the persons concerned (judgment of 28 April 2022, *Caruter*, C-642/20, EU:C:2022:308, paragraph 24 and the case-law cited).

30 In those circumstances, on 1 February 2021, after hearing the Judge-Rapporteur and the Advocate General, the President of the Court decided to reject the request referred to in paragraph 20 of the present judgment.

Consideration of the questions referred

31 As a preliminary point, it must be noted that the referring court is asking the Court to interpret both Articles 38 and 49 of Directive 2009/81 and Articles 56 and 69 of Directive 2014/24. That being said, since that court states that, even though the public contract at issue has aspects coming within the scope of Directive 2014/24, the contracting authority decided to award a single contract in accordance with the rules of Directive 2009/81, it is appropriate to interpret the relevant provisions of that latter directive. It is important, in that regard, to point out that that interpretation can be transposed to the provisions of Directive 2014/24 where those provisions are, in essence, identical to those of Directive 2009/81.

The first to third questions

32 By its first to third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 38 and 49 of Directive 2009/81 are to be interpreted as imposing on the contracting authority the obligation to verify whether an abnormally low tender exists, even in the absence of any suspicion regarding a tender or where the criterion laid down for that purpose by national legislation, which implicitly amounts to requiring that there be at least three tenders, does not apply on account of the insufficient number of tenders submitted.

33 EU law does not define the concept of an ‘abnormally low tender’. However, as the Advocate General noted in points 30 to 32 of his Opinion, the outlines of that concept have already been defined by the Court in the context of the interpretation of directives relating to public contracts other than the directive referred to in the preceding paragraph.

34 Thus, the Court has held, on several occasions, that it is for the Member States and, in particular, the contracting authorities to determine the method of calculating an anomaly threshold constituting an abnormally ‘low’ tender (see, inter alia, judgments of 27 November 2001, *Lombardini and Mantovani*, C-285/99 and C-286/99, EU:C:2001:640, paragraph 67, and of 18 December 2014, *Data Medical Service*, C-568/13, EU:C:2014:2466, paragraph 49) or to set its value, provided that an objective and non-discriminatory method is used. It has also held that the contracting authority is under an obligation ‘to identify suspect tenders’ (see, to that effect, judgment of 27 November 2001, *Lombardini and Mantovani*, C-285/99 and C-286/99, EU:C:2001:640, paragraph 55).

35 Furthermore, the Court has stated that the abnormally low nature of a tender must be assessed in relation to the service concerned. Thus, in the course of examining the abnormally low nature of a tender, the contracting authority may, for the purpose of ensuring healthy competition, take into consideration all the factors that are relevant in the light of that service (see, inter alia, judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraphs 29 and 30, and of 18 December 2014, *Data Medical Service*, C-568/13, EU:C:2014:2466, paragraph 50).

36 In that regard, Articles 38 and 49 of Directive 2009/81 mean that the contracting authority is under an obligation, first, to identify suspect tenders, second, to allow the tenderers concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, third, to assess the merits of the information provided by the persons concerned and, fourth, to take a decision as to whether to admit or reject those tenders. It is only on condition that the reliability of a tender is, a priori, doubtful that the obligations arising from those articles are imposed on the contracting authority (see, by analogy, judgment of 19 October 2017, *Agriconsulting Europe* v *Commission*, C-198/16 P, EU:C:2017:784, paragraphs 51 and 52 and the case-law cited).

37 As the Advocate General noted in point 38 of his Opinion, the contracting authority has to identify tenders which appear suspect, and are therefore subject to the *inter partes* examination procedure provided for in Article 49 of Directive 2009/81, in the light of all the features of the subject matter of the invitation to tender concerned. Comparison with other, competing tenders, however useful it may

be in certain cases for the purpose of identifying any anomalies, cannot constitute the sole criterion used by the contracting authority in that regard.

38 The examination of all the components relating to the invitation to tender and the contract documents concerned must enable the contracting authority to determine whether, despite the existence of distance between the suspect tender and the tenders submitted by the other tenderers, that tender is sufficiently genuine. In that regard, the contracting authority may rely on national rules which define a particular method for identifying abnormally low tenders.

39 Nevertheless, in the light of the foregoing considerations, it must be stated that Directive 2009/81 does not preclude the abnormally low nature of a tender from being assessed where only two tenders have been submitted. On the contrary, the inapplicability of the criterion laid down by national law for the purpose of assessing the abnormally low nature of a tender is not such as to exempt the contracting authority from its obligation, set out in paragraph 36 of the present judgment, to identify suspect tenders and to carry out, where there are such tenders, an *inter partes* examination.

40 It follows from the foregoing that Articles 38 and 49 of Directive 2009/81 must be interpreted as meaning that a contracting authority, where there is suspicion that a tender is of an abnormally low nature, is required to verify whether this is actually the case by taking account of all the relevant components of the invitation to tender and the contract documents, without the impossibility of applying the criteria laid down for that purpose by a piece of national legislation or the number of tenders submitted being relevant in that regard.

The fourth and fifth questions

41 By its fourth and fifth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 55(2) of Directive 2009/81, read in the light of Article 47 of the Charter, is to be interpreted as meaning that the contracting authority's finding that there is no suspicion as regards the existence of an abnormally low tender or its conclusion that the tender submitted by a first-ranked tenderer is genuine is subject to judicial review and whether the contracting authority is then required to state the reasons for its finding in the decision awarding the contract.

42 As the Advocate General noted in points 47 and 48 of his Opinion, in referring to abnormally low tenders, Article 49 of Directive 2009/81 does not impose on a contracting authority an indiscriminate obligation explicitly to state its views on whether the tender concerned might be of an abnormally low nature. Rather, under that article, that obligation arises if, 'for a given contract', the contracting authority considers that 'tenders' appear to be 'abnormally low in relation to the … services'.

43 In that regard, it is apparent from Article 35 of Directive 2009/81 that the contracting authorities must, at the earliest opportunity, inform candidates and tenderers of decisions reached concerning the award of a contract and that that information is to be given in writing upon request. In particular, where the party concerned makes a request in writing, the contracting authorities are to communicate to it, inter alia, adequate evidence substantiating the essential decisions taken during the procedure for the award of a contract. Consequently, where a contracting authority finds that a tender appears to be abnormally low and therefore conducts an *inter partes* examination procedure with the tenderer concerned, it is necessary to make a record of the result in writing.

44 Thus, it is only where there is suspicion that a tender is of an abnormally low nature, and following the *inter partes* examination procedure referred to in paragraph 37 of the present judgment, that the contracting authority must formally adopt a reasoned decision admitting or rejecting the tender in question.

45 However, in the present case, it is apparent from the file before the Court that the contracting authority neither initiated the *inter partes* examination procedure provided for in Article 49 of Directive 2009/81 nor adopted an express decision in that regard.

46 In that situation, the obligation arising from Article 55(2) of Directive 2009/81 and Article 47 of the Charter, according to which the decision to award the contract at issue must be amenable to effective

review, requires that tenderers who consider themselves wronged must be able to challenge that decision by claiming that the successful tender should have been classified as ‘abnormally low’.

47 In that regard, the fact that a tender is not regarded as being ‘abnormally low’, without this being set out in a specific statement of reasons, cannot, as such, lead to the annulment of the procedure for the award of a contract, since the EU legislature has not imposed on contracting authorities the obligation to adopt an express reasoned decision finding that there are no abnormally low tenders.

48 In the light of the foregoing, the answer to the fourth and fifth questions is that Article 55(2) of Directive 2009/81, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that, where a contracting authority has failed to initiate a procedure to verify whether a tender might be of an abnormally low nature, on the ground that it considered that none of the tenders submitted to it was of such a nature, its assessment may be subject to judicial review in the context of proceedings against the decision to award the contract at issue.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Articles 38 and 49 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC,**

   must be interpreted as meaning that a contracting authority, where there is suspicion that a tender is of an abnormally low nature, is required to verify whether this is actually the case by taking account of all the relevant components of the invitation to tender and the contract documents, without the impossibility of applying the criteria laid down for that purpose by a piece of national legislation or the number of tenders submitted being relevant in that regard.

2. **Article 55(2) of Directive 2009/81, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union,**

   must be interpreted as meaning that, where a contracting authority has failed to initiate a procedure to verify whether a tender might be of an abnormally low nature, on the ground that it considered that none of the tenders submitted to it was of such a nature, its assessment may be subject to judicial review in the context of proceedings against the decision to award the contract at issue.

[Signatures]

---

* Language of the case: Bulgarian.

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 24 February 2022(1)

Case C-669/20

Veridos GmbH
v
Ministar na vatreshnite raboti na Republika Bulgaria,
Mühlbauer ID Services GmbH – S&T

(Request for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria))

(Reference for a preliminary ruling – Procedures for the award of certain works contracts, supply contracts and service contracts – Directive 2014/24/EU – Directive 2009/81/EC – Setting of a criterion for assessing an abnormally low tender – Existence of at least three tenders)

1. Where certain public contracts are required to be awarded to the most economically advantageous tender or the tender with the lowest price, EU law permits the contracting authority to reject 'abnormally low tenders' for which there is no satisfactory justification.

2. In this request for a preliminary ruling, a number of questions are referred in connection with the conclusion of a public contract for the planning, establishment and management of a system for the issue of Bulgarian identity documents. The referring court seeks to ascertain, in summary:

– Under what conditions and with what scope the contracting authority has an obligation to verify whether any abnormally low tenders exist, for the purposes of Directive 2009/81/EC (2) and Directive 2014/24/EU. (3)

– At what time a judicial review of a contracting authority's assessment ruling out the existence of an abnormally low tender has to be carried out, and whether reasons must be given for that assessment.

I. Legal framework

A. European Union law

1. Directive 2014/24

3. Recital 90 states:

'Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective

comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender. …

In order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate.

To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision. Contracting authorities should therefore be obliged to indicate the contract award criteria and the relative weighting given to each of those criteria. …'

4. Recital 92 reads:

'When assessing the best price–quality ratio contracting authorities should determine the economic and qualitative criteria linked to the subject matter of the contract that they will use for that purpose. Those criteria should thus allow for a comparative assessment of the level of performance offered by each tender in the light of the subject matter of the contract, as defined in the technical specifications. In the context of the best price–quality ratio, a non-exhaustive list of possible award criteria which include environmental and social aspects is set out in this Directive. Contracting authorities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.

The chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective and fair competition and be accompanied by arrangements that allow the information provided by the tenderers to be effectively verified.

…'

5. Article 56 ('General principles') provides:

'1. Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled:

…'

6. Article 69 ('Abnormally low tenders') provides:

'1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

…

3. The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed …'

2. Directive 2009/81

7. Recital 15 reads:

'The award of contracts concluded in the Member States by contracting entities as referred to in Directive 2004/17/EC … and by contracting authorities as referred to in Directive 2004/18/EC … is subject to compliance with the principles of the Treaty and in particular the free movement of goods, the freedom of establishment and the freedom to provide services, and with the principles deriving therefrom, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

…’

8. Recital 69 is worded as follows:

‘Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in a transparent and objective manner under conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: “the lowest price” and “the most economically advantageous tender”.’

9. Pursuant to Article 38 (‘Verification of the suitability and choice of participants and award of contracts’):

‘1. Contracts shall be awarded on the basis of the criteria laid down in Articles 47 and 49, taking into account Article 19, after the suitability of the economic operators not excluded under Articles 39 or 40 has been checked by contracting authorities/entities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 41 to 46 and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

…’

10. Article 49 (‘Abnormally low tenders’) states:

‘1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority/entity shall, before it rejects those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

…

2. The contracting authority/entity shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

…’

11. Article 55 (‘Scope and availability of review procedures’) provides in paragraph 2:

‘Member States shall take the measures necessary to ensure that decisions taken by the contracting authorities/entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 56 to 62, on the grounds that such decisions have infringed [EU] law in the field of procurement or national rules transposing that law.’

B. Bulgarian law

12. Article 72 of the Zakon za obshtestvenite porachki (Law on Public Procurement), headed ‘Abnormally low tenders’, provides:

‘1. If, in a tenderer’s tender, an element that is linked to price or costs and is subject to assessment is more than 20% lower than the mean value of the tenders submitted by the other tenderers in respect of the same criterion for assessment, the contracting authority shall request a detailed written explanation of how that element was prepared, to be submitted within five days of receiving the request.’

II. Facts, dispute and questions referred for a preliminary ruling

13. The Ministry of the Interior of the Republic of Bulgaria, in its capacity as a contracting authority, initiated a procedure for the award of a public contract, the subject of which was the ‘planning, establishment and management of a Generation 2019 system for the issue of Bulgarian identity documents’. (4)

14. Following the appropriate preselection, Veridos GmbH (‘Veridos’) and the consortium Mühlbauer ID Services GmbH-S&T (‘Mühlbauer’) were invited to submit tenders.

15. The contract was ultimately awarded to Mühlbauer. (5)

16. Veridos challenged the award before the Komisia za zashtita na konkurentsiata (Commission for Protection of Competition, Bulgaria), arguing that the successful tender was abnormally low. (6)

17. By decision of 25 June 2020, the Commission for Protection of Competition rejected the complaint made by Veridos. The Commission for Protection of Competition took the view that Article 72 of the Law on Public Procurement was inapplicable because, as only two tenders had been submitted, it was not possible to calculate the mean value stipulated by that provision for the purpose of determining whether one of those tenders was abnormally low.

18. Veridos appealed against the decision of 25 June 2020 before the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), which has referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 56 of Directive [2014/24] in conjunction with Article 69 thereof, or, respectively, Article 38 of Directive [2009/81] in conjunction with Article 49 thereof, to be interpreted as meaning that a contracting authority, where it is objectively impossible to apply the criterion laid down in national law for the evaluation of an abnormally low tender and in the absence of a different criterion selected by the contracting authority and announced in advance, is not required to verify whether an abnormally low tender exists?

(2) Is Article 56 of Directive 2014/24 in conjunction with Article 69 thereof, or, respectively, Article 38 of Directive 2009/81 in conjunction with Article 49 thereof, to be interpreted as meaning that the contracting authority is required to verify whether abnormally low tenders exist only if there is a suspicion regarding any tender; or, conversely, is the contracting authority required to always ensure that the received tenders are genuine, and state the relevant reasons?

(3) Does such a requirement apply to the contracting authority if only two tenders have been received during the procedure for the award of a public contract?

(4) Is Article 47 of the [Charter of Fundamental Rights of the European Union (‘the Charter’)] to be interpreted as meaning that the contracting authority’s assessment as regards a lack of suspicion that an abnormally low tender exists, or, respectively, that contracting authority’s conviction that the first-ranked tenderer has submitted a genuine tender, is subject to judicial review?

(5) Should the previous question be answered in the affirmative: is Article 47 of the [Charter] to be interpreted as meaning that a contracting authority in a procedure for the award of a public contract which has not verified whether an abnormally low tender exists is required to provide justification and reasons as to why there is no suspicion that an abnormally low tender has been submitted, in other words, that the first-ranked tender is genuine?’

III. Procedure before the Court of Justice

19. The request for a preliminary ruling was received at the Registry of the Court on 8 December 2020.

20. On 1 February 2021, the President of the Court of Justice decided not to grant the request that the reference be dealt with under the expedited procedure.

21. Observations were lodged by Veridos, Mühlbauer, the Austrian, Bulgarian, Czech and French governments and the European Commission.

22. It was not considered necessary to hold a hearing.

IV. Analysis

A. Preliminary considerations

23. Directive 2009/81 is applicable to this case because it concerns a public contract for the issue of identity documents in relation to 'the fields of defence and security'. (7) As is apparent from the order for reference, the contracting authority published the invitation to tender for the single contract in accordance with that directive. (8)

24. However, the referring court has submitted its questions in relation to the relevant articles of Directive 2009/81 and Directive 2014/24. It justifies its approach on the basis of the 'identical content and analogous function of the relevant provisions of the two directives'. (9) There is no reason not to proceed in this way, since the provisions of the two directives the interpretation of which the referring court seeks are substantially the same, so that the Court's reply will apply equally to all those provisions. (10)

25. In the same vein, the case-law of the Court of Justice in this area can be applied to the present case even where it refers to analogous provisions of public procurement directives other than the two cited above, as I shall explain below.

26. On account of their content, the referring court's questions can be grouped together in two blocks:

– The first three questions seek to determine whether the contracting authority is required to verify whether any abnormally low tenders exist and, where appropriate, under what conditions and with what scope.

– The fourth and fifth questions concern the reasoning to be provided by the contracting authority in relation to the absence of an abnormally low tender and the judicial review of that assessment.

B. Obligation to verify whether any abnormally low tenders exist (questions 1, 2 and 3)

27. According to the referring court, the legal dispute concerns only the powers exercised by the national legislature in regulating, in Article 72(1) of the Law on Public Procurement, the criterion for assessing abnormally low tenders. (11)

28. If I have understood the referring court's line of argument correctly, the inference from its interpretation of the national provision appears to be that the *only* criterion for categorising a tender as 'abnormally low' is that that tender is 20% lower than the mean value of the tenders submitted by the other tenderers. If that criterion could not be applied, because only two tenders exist, the contracting authority would not be able to assess whether either of those tenders is abnormally low. (12)

29. Before addressing whether the national provision, as interpreted in that way, (13) is compatible with Directives 2009/81 and 2014/24 (in particular, with Article 49 of the former and Article 69 of the latter), it should be recalled that:

– Article 49 of Directive 2009/81 imposes on the contracting authority the obligation to monitor and verify that tenders are genuine. Should the contracting authority consider any of the tenders to be abnormally low in relation to the goods, works or services, it must request in writing details of the constituent elements of the tender which it considers relevant.

– Pursuant to Article 69 of Directive 2014/24, a contracting authority must 'require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.'

30. As I have pointed out above, those provisions must be read in the light of the Court's case-law because the EU legislature did not provide a definition of what constitutes an abnormally low tender; nor did it provide a specific method of calculating an *anomaly* threshold. (14) That, I repeat, explains

the importance of the interpretation given in the case-law, which has been notably consistent in this area over a period of time. (15)

31. The Court of Justice has ruled:

– In relation to Directive 92/50, that 'it is … for the Member States and, in particular, the contracting authorities to determine the method of calculating an anomaly threshold constituting an "abnormally low tender" …' (16)

– In relation to Directive 93/37, that the contracting authority cannot avoid the obligation to 'identify suspect tenders' and, therefore, to hold the relevant (*inter partes*) examination procedure. (17)

– In relation to Directive 2004/18, (18) that '… the European Union legislature intended *to require the awarding authority to examine* the details of tenders which are abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine'. (19)

32. As concerns Article 69 of Directive 2014/24, the Court has confirmed that:

– Where a tender appears to be abnormally low, contracting authorities are to *require* the tenderer to provide an explanation for the price or costs proposed in the tender, which could relate, inter alia, to the elements set out in paragraph 2 of that article. (20)

– The contracting authority must assess the information provided by consulting the tenderer and it may reject such a tender only where the evidence supplied does not satisfactorily account for the low level of price or costs proposed. (21)

33. In short, the EU legislation imposes on contracting authorities the obligation to examine, in all cases, whether any of the tenders submitted appear prima facie to be abnormally low.

34. It is immaterial for those purposes whether it is impossible 'to apply the criterion laid down in national law for the evaluation of an abnormally low tender' and whether a different criterion selected by the contracting authority was announced in advance. The contracting authority cannot, I repeat, refrain from examining whether the tender (all the tenders) is [(are)] suspected of being frivolous.

35. It is also immaterial whether only two candidates have submitted tenders in the procurement procedure: each of those two tenders must be scrutinised by the contracting authority, which will assess whether they are suspect.

36. In principle, as I have explained above, it is for the Member States and the contracting authorities to determine the method of calculating an anomaly threshold constituting an 'abnormally low tender'. In any event, EU law provides guidelines for specifying the subject matter of the details that can be required of anyone who submits a suspect tender. (22)

37. The Bulgarian Government submits that the identification of abnormally low tenders may be based only on arithmetical calculations, like that referred to in the national legislation. In its submission, that approach ensures an objectivity which cannot be ensured if the identification of suspect tenders is based on the contracting authority's subjective assessment. (23)

38. I do not agree with that argument. The contracting authority has to identify tenders which appear suspect (and are therefore subject to the *inter partes* examination procedure) in the light of all the features of the subject matter of the invitation to tender. Comparison with the other, competing tenders, however useful it may be in certain cases for the purpose of identifying any anomalies, cannot be held up as the *sole* criterion used by the contracting authority. The examination of all components, as such, of the tender enables the contracting authority to determine whether, despite appearances and the distance between its price and those of other tenderers, (24) the suspect tender is sufficiently genuine.

39. In addition, the Court has ruled that the use of a mere mathematical criterion may be contrary to the development of effective competition in the field of public procurement. That is what occurred in the cases giving rise to the judgments in *Fratelli Costanzo* and *Lombardini and Mantovani*:

– In the former case, the Italian measure treated as abnormal, and excluded from the tendering procedure, 'tenders with a percentage discount greater than the average percentage divergence of the tenders admitted, increased by a percentage which must be stated in the call for tenders'. Pursuant to that call for tenders, tenders which did not exceed the basic amount by at least 9.48% were automatically eliminated. (25)

– In the latter case, the percentage giving rise to the contracting authority's obligation to undertake an examination of an anomalous tender was fixed at 'a measure equal to the arithmetic mean of the discounts, in percentage terms, in the case of all tenders admitted, increased by the average arithmetic divergence of the discounts, in percentage terms, which exceed the said mean.' (26)

40. The Court held that 'a mathematical criterion in accordance with which tenders which exceeded the basic value fixed for the price of the work by a percentage more than 10 points below the average percentage by which the tenders admitted exceeded that amount would be considered anomalous and consequently eliminated, deprives tenderers who have submitted particularly low tenders of the opportunity to demonstrate that those tenders are genuine ones, so that application of such a criterion is contrary to the aim of Directive 71/305, namely to promote the development of effective competition in the field of public contracts'. (27)

41. On that basis, it may be inferred that a national provision pursuant to which the *sole* criterion for assessing whether a tender is abnormally low is that its value is 20% lower than the mean value of the tenders submitted by the other tenderers does not comply with EU law.

42. The obligation to examine the genuine nature of *all* the competing tenders is intended to ensure compliance with the principles of transparency, non-discrimination and equal treatment, in accordance with which public contracts must be awarded. (28)

43. That aim would be undermined if national legislation were to confine to mere percentage criteria (in relation to the other competitors) the situations in which a tender may warrant the classification of 'abnormally low', thereby superseding the provisions of Article 49 of Directive 2009/81 and Article 69 of Directive 2014/24.

C. Statement of reasons for and judicial review of the contracting authority's assessment of whether an abnormally low tender exists (questions 4 and 5)

44. Article 55(2) of Directive 2009/81 provides for the right to a review of decisions taken by a contracting authority. (29) The provision is aligned with the rules laid down in Directive 89/665/EC (30) and, as the Commission points out, ensures respect for the rights laid down in Article 47 of the Charter. (31)

45. Generally, and in accordance with Article 55(4) of Directive 2009/81, Member States have an obligation to make available 'review procedures … at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.'

46. In relation to abnormally low tenders, the answer to this second block of questions must be approached from a twofold perspective:

– First, by reference to the explicit or implicit nature of the contracting authority's decision regarding the genuineness of any of the competing tenders.

– Second, by reference to the judicial review of the contracting authority's assessment.

1. Nature of the contracting authority's decision (and any reasons on which it is based)

47. In referring to abnormally low tenders, Article 49 of Directive 2009/81 does not impose on a contracting authority an indiscriminate obligation *explicitly to state its views* on whether the tender concerned is abnormally low.

48. Rather, that obligation arises if, 'for a given contract', the contracting authority considers that 'tenders appear to be abnormally low in relation to the goods, works or services'.

49. As I have already stated, the obligation on 'the contracting authority is …, first, to identify suspect tenders', (32) in the light of all the characteristics of the subject matter of the invitation to tender and, as the case may be, the relationship between each characteristic and the other characteristics.

50. If the contracting authority takes the view that none of the tenders thus assessed is abnormally low, it is not required to issue an ad hoc statement to that effect. I agree with Mühlbauer and the French Government on this point: mere acceptance of a tender by a contracting authority implicitly demonstrates the latter's belief that that tender is not abnormally low.

51. An ad hoc determination is necessary only where, after noting that a tender may be abnormally low, the contracting authority has allowed the tenderer (under Article 49(1) of Directive 2009/81) to demonstrate its genuineness by asking it to provide the details which the contracting authority considers appropriate.

52. On completion of that *inter partes* procedure, the contracting authority must, in accordance with the case-law of the Court, assess 'the merits of the explanations provided by the persons concerned' in order to take the 'decision as to whether to admit or reject [the] tenders' that were initially suspect. (33) Naturally, that decision must be supported by a sufficient statement of reasons.

53. Therefore, where it is suspected that a tender is abnormally low, and following the appropriate *inter partes* examination procedure, the contracting authority must *decide* whether to admit or reject that tender. When it does this, the contracting authority must set out its view in a reasoned decision in order to respect the rights of the person concerned. (34)

54. That follows from Article 35 of Directive 2009/81, pursuant to which the contracting authority must, 'at the earliest opportunity, inform candidates and tenderers of decisions reached concerning the award of a contract'.

55. On the other hand, if the contracting authority does not consider prima facie that any of the tenders might be abnormally low, no *inter partes* examination procedure will take place and there will be no explicit decision in that regard.

56. In those circumstances, the decision bringing the tendering procedure to an end will implicitly include a decision not to regard as abnormally low any of the tenders submitted. The reasoning on which that decision is based is simply the lack of any evidence which would have necessitated the specific examination of a suspect tender.

2. Judicial review of the decision that a tender is abnormally low

57. In order to determine how the required judicial review of the contracting authority's decision should be carried out, it is necessary to distinguish between the two situations referred to above: either the contracting authority has explicitly stated its view on the suspicions aroused by a particular tender or it has done so implicitly, by deciding on the outcome of the procedure for the award of the contract without expressing any doubts as to the genuine nature of that or any other tender.

58. Even though it is Directive 2009/81 that is directly applicable, I shall refer to the Court's case-law in relation to Directive 89/665, (35) since, as I have noted, the former directive contains rules that are similar to those in Directive 89/665 as regards the institution of proceedings.

59. The review to which the general provision in the last subparagraph of Article 1(1) of Directive 89/665 refers extends to all decisions by the contracting authority which apply EU law in that

field. (36)

60. Decisions by the contracting authority which are open to review in this way include, of course, those that award a contract by selecting one of the tenders, but also others of a different kind which have a bearing on the legal position of the parties concerned. (37)

61. Directive 89/665 has not 'formally laid down the time from which the possibility of review, as provided for in Article 1(1), must be open'. (38) The Court's position is that it must be ensured that decisions by contracting authorities can be reviewed effectively and as quickly as possible. (39)

62. The EU legislature has entrusted to the Member States with the task of laying down the 'detailed rules' of the procedures for reviewing decisions by contracting authorities (Article 1(3) of Directive 89/665). (40)

63. It is therefore open to Member States, in principle, to legislate on applications for review of decisions adopted by a contracting authority by providing that they are to be made either jointly or separately (with/from the main challenge). Directive 89/665 neither prescribes nor excludes either of those mechanisms.

64. If Member States, availing themselves of their procedural autonomy, choose to prescribe a joint challenge, they must do so without contravening the purposes of Directive 89/665 in relation to the required effectiveness and speed. They must, in addition, take into consideration:

– the fact that the directive 'does not authorise Member States to make the exercise of the right to apply for review conditional on the fact that the public procurement procedure in question has formally reached a particular stage'. (41)

– the fact that, depending on its characteristics, national legislation which 'requires, in all cases, a tenderer to wait for a decision awarding the contract in question before it may apply for a review of a decision allowing another tenderer to participate in that procurement procedure infringes the provisions of Directive 89/665'. (42)

65. However, it must be borne in mind that the safeguarding of the principle of legal certainty 'would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements'. (43)

66. The case-law laid down in that judgment cited above is linked to the Court's case-law in connection with the action for annulment provided for in Article 263 TFEU.

67. As the French Government has observed, only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his or her legal position may be the subject of an action for annulment. (44)

68. With regard to acts or decisions which are drawn up in different stages, the measures which are open to challenge are those which definitively determine the position of the decision-making body 'upon the conclusion of an administrative procedure, and which are intended to have legal effects … and not intermediate measures whose purpose is to prepare for the final decision …' (45)

69. The Court has held that, for the purposes of the fourth subparagraph of Article 1(1) of Directive 89/665, the concept of 'decisions taken by the contracting authorities' must be interpreted broadly, as the wording of that provision – which 'refers generally to the decisions of a contracting authority without distinguishing between those decisions according to their content or time of adoption and does not lay down any restriction with regard to the nature or content of the decisions to which it refers' – 'implies that every decision of a contracting authority falling under the EU rules in the field of public procurement and liable to infringe them is subject to … judicial review'. (46)

70. That interpretation of the concept of 'decisions amenable to review' led the Court to consider that a decision of a contracting authority allowing an economic operator to participate in a public

procurement procedure constitutes such a decision. (47)

71. However, the *generosity* of that interpretation (48) has been limited in all cases to positive decisions, *actually adopted* by the contracting authority – in other words, decisions which entail an act of will whereby a contracting authority adopts a position when a legal provision requires it to make a decision.

72. As I have pointed out, it is important to differentiate between:

– Decisions in which the contracting authority explicitly states its view on any suspicions which may have been aroused by a particular tender, bringing to an end an *inter partes* examination procedure for determining whether or not that tender is abnormally low. In my view, that decision, in either of its two possible variations, affects the interests of tenderers, in particular, any tenderer whose tender is rejected for being abnormally low. The alteration of such a tenderer's position in the tendering procedure, together with the autonomy of the procedure in which the contracting authority has made its determination, lend support to the classification of that decision as one which is final and amenable to judicial review from the time it is adopted.

– Implicit decisions of the contracting authority which, in the absence of any doubts as to the genuine nature of the tenders, become part of the decision awarding the contract. Such decisions must be challenged before the courts using the appropriate action for contesting a final decision of that kind.

73. In so far as is important for these proceedings, it can be inferred from the information available that the contracting authority had no doubts which led it to suspect that either tender was abnormally low. Therefore, it did not have an obligation to commence the appropriate examination procedure.

74. In acting in that way, the contracting authority did not adopt any *decision* which Directive 2009/81 provides may be the subject of a separate review at that time. I stress that, under Article 49 of that directive, the contracting authority was not required to adopt an express decision on whether all the tenders were abnormally low but rather only to follow a certain procedure before rejecting any tenders which it 'considered' to be abnormally low.

75. As the French Government maintains, that article and, in parallel, Article 69 of Directive 2014/24, in conjunction with Article 47 of the Charter, mean only that, for the purposes of applying for a review of the award of the contract, a tenderer who has not been selected may challenge that award on the ground that the selected tender is abnormally low. (49)

V. Conclusion

76. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria):

'(1) Articles 38 and 49 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, must be interpreted as meaning that contracting authorities have an obligation to check, in all cases, for the presence of any abnormally low tenders. For those purposes, the number of tenders submitted is irrelevant, as is the fact that it is not possible to apply the criteria laid down in that respect by national legislation; a situation in which contracting authorities must, by reason of its direct effect, comply with Article 49 of Directive 2009/81/EC.

(2) Article 55(2) of Directive 2009/81/EC, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, if the contracting authority has no reason to commence the procedure for examining whether a tender is genuine, its assessment may be subject to judicial review in the context of proceedings against the final decision awarding the contract.'

1 Original language: Spanish.

2 Directive of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76).

3 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

4 Notice published by Decision No 5785 MPR-58 of 15 August 2018.

5 Decision No 5785 MPR-35 of 29 April 2020.

6 Order for reference, paragraph 41 *in fine*.

7 The Bulgarian Government states (paragraph 9 of its observations) that the technology and materials used for identity documents require or contain classified information and they therefore come under ‘sensitive equipment’ as referred to in Article 2(b) and (c) of Directive 2009/81.

8 According to the order for reference (paragraph 22), the contracting authority ‘took the decision and gave notice of a single contract in accordance with Directive 2009/81’, complying with recital 24 of that directive rather than relying on the option made available by recital 13 of Directive 2014/24. In accordance with Article 16(2)(b) of the latter directive, in the case of mixed contracts, ‘where part of a given contract is covered by Directive 2009/81/EC, the contract may be awarded in accordance with that Directive, provided that the award of a single contract is justified for objective reasons.’

9 Paragraph 22 of the order for reference.

10 References in legislation to abnormally low tenders have been, and continue to be, a constant in EU public procurement law since Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition, Series I 1971(II), p. 682), Article 29(5). Such a reference was included in Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), Article 25(5); Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), Article 37; Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 12), Article 27; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), Article 30(4); and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), Article 34. That wording was repeated in subsequent generations of that legislation, such as Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), Article 57; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), Article 55; and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), Article 84.

11 Paragraph 23 of the order for reference. After transcribing that provision, the national court maintains that the criterion of treating as abnormally low a tender that is more than 20% lower than the mean value of the tenders submitted by the other tenderers 'implicitly requires that there are at least three tenders, whereby one tender is assessed against the mean value of the other two tenders.'

12 The Bulgarian Government (paragraph 34 of its observations) takes the same view: where there are only two tenders, there is no objective identification criterion for categorising those tenders as abnormally low, meaning that it is impossible for the contracting authority to suspect that one of the tenders is abnormally low.

13 Although, naturally, it is for the referring court to interpret national law, the question could be asked whether, in fact, the Bulgarian legislation provides for comparison of the price of a tender with the mean value of the other tenders as a simple, non-exclusive, indication of an abnormally low tender. From that perspective, the contracting authority could use other, alternative criteria which, although not specified in that legislation, would enable it to identify whether a tender is in itself abnormally low.

14 The Commission draws attention to this in its 'Guidance on the participation of third-country bidders and goods in the EU procurement market', Communication of 24 July 2019, C(2019) 5494 final, paragraph 2.1.

15 That consistency is evident, in particular, in the judgments of 22 June 1989, *Fratelli Costanzo* (103/88, EU:C:1989:256; 'judgment in *Fratelli Costanzo*'); of 27 November 2001, *Lombardini and Mantovani* (C-285/99 and C-286/99, EU:C:2001:640; 'judgment in *Lombardini and Mantovani*'); of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191); of 18 December 2014, *Data Medical Service* (C-568/13, EU:C:2014:2466); of 19 October 2017, *Agriconsulting Europe* v *Commission* (C-198/16 P, EU:C:2017:784); and of 10 September 2020, *Tax-Fin-Lex* (C-367/19, EU:C:2020:685; 'judgment in *Tax-Fin-Lex*').

16 Judgment of 18 December 2014, *Data Medical Service* (C-568/13, EU:C:2014:2466, paragraph 49).

17 Judgment in *Lombardini and Mantovani*, paragraph 55.

18 Article 55(1) of which corresponds to Article 49(1) of Directive 2009/81.

19 Judgment of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 28). No italics in the original.

20 Judgment in *Tax-Fin-Lex*, paragraph 32.

21 Ibid., paragraph 33.

22 In accordance with Article 49 of Directive 2009/81, those details may refer to: (1) the economics of the construction method, manufacturing process or services provided; (2) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or services; (3) the originality of the work, supplies or services proposed by the tenderer; (4) compliance with the provisions relating to employment protection and working conditions in force at the

place where the work, service or supply is to be performed; (5) the possibility of the tenderer obtaining State aid. The wording of Article 69 of Directive 2014/24 is substantially identical.

---

23 Paragraph 18 of the Bulgarian Government's written observations.

---

24 In the judgment in *Tax-Fin-Lex*, the Court did not rule out that, in certain circumstances, even a zero-price tender may be admissible (that is to say, not abnormally low), no matter how much it may differ from the other tenders submitted.

---

25 Judgment in *Fratelli Costanzo*, paragraphs 6 to 10.

---

26 Judgment in *Lombardini and Mantovani*, paragraph 8.

---

27 Judgment in *Lombardini and Mantovani*, paragraph 47, citing the judgment in *Fratelli Costanzo*, paragraph 18. The latter judgment states that the EU provisions on public procurement, like those at issue here, create direct effect because of their content, unconditionality and precision.

---

28 This is reflected in recital 69 of Directive 2009/81.

---

29 'Member States shall take the measures necessary to ensure that decisions taken by the contracting authorities/entities may be reviewed effectively and, in particular, as rapidly as possible … on the grounds that such decisions have infringed [EU] law in the field of procurement or national rules transposing that law.'

---

30 Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33). Article 55(2) of Directive 2009/81 reproduces the wording of the fourth subparagraph of Article 1(1) of Directive 89/665, which means that the Court's judgments on the latter directive may be applied by analogy.

---

31 The Commission refers to recital 36 of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31). According to that recital, the directive 'seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.'

---

32 Judgment in *Lombardini and Mantovani*, paragraph 55.

---

33 Judgment in *Lombardini and Mantovani*, paragraph 55.

---

34 As the Court observed in the order of 14 February 2019, *Cooperativa Animazione Valdocco* (C-54/18, EU:C:2019:118, paragraph 33), according to settled case-law 'the effectiveness of the judicial review guaranteed by Article 47 of the Charter requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any

point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question'.

---

35 The considerations set out below (points 59 to 64) incorporate those which I set out in the Opinion in *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:295).

---

36 Judgment of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268; 'judgment in *Marina del Mediterráneo*', paragraph 26): 'the wording of Article 1(1) of Directive 89/665 assumes, by using the words "as regards … procedures", that every decision of a contracting authority falling under EU rules in the field of public procurement and liable to infringe them is subject to the judicial review provided for in Article 2(1)(a) and (b) of that directive.'

---

37 Ibid., paragraph 27. The Court therefore supports a 'broad construction of the concept of a "decision" taken by a contracting authority [which] is confirmed by the fact that Article 1(1) of Directive 89/665 does not lay down any restriction with regard to the nature or content of the decisions it refers to'.

---

38 Ibid., paragraph 31.

---

39 Judgment of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746, paragraph 74).

---

40 Judgment in *Marina del Mediterráneo*, paragraph 32: 'It is settled case-law that, in the absence of EU rules laying down the time from which a possibility of review must be open, it is for national law to lay down the detailed rules of judicial procedures governing actions for safeguarding rights which individuals derive from EU law', subject to the limitations inherent in the principles of effectiveness and equivalence.

---

41 Ibid., paragraph 31.

---

42 Ibid., paragraph 34.

---

43 Judgment of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 51 and the case-law cited). However, the principle of legal certainty cannot be decoupled from the requirement of the effectiveness of the directives in the field of public procurement.

---

44 See, for example, judgment of 26 January 2010, *Internationaler Hilfsfonds* v *Commission* (C-362/08 P, EU:C:2010:40, paragraph 51).

---

45 See, for example, judgment of 17 July 2008, *Athinaïki Techniki* v *Commission* (C-521/06 P, EU:C:2008:422, paragraph 42).

---

46 Judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraph 105).

---

47 Ibid., paragraph 106, citing the judgment in *Marina del Mediterráneo*, paragraph 28. Also regarded as amenable to review is '… a decision by which a contracting authority refuses to disclose to an economic operator the information deemed confidential submitted to it by a candidate or a tenderer.'

48 Although it may initially appear otherwise, I do not believe that such a broad interpretation is inconsistent with the case-law which, for the benefit of legal certainty, prohibits tenderers from claiming at any time that there have been infringements of the rules governing the award of public contracts. Both lines of case-law come together in an exercise which weighs legal certainty, on the one hand, against the judicial review of legality, on the other. The aim is to strike a balance with the criterion of the relative autonomy, as regards their content, of the successive decisions of the contracting authority. Thus, for example, the possibility of review has been ruled out in the case of 'acts which constitute a mere preliminary study of the market or which are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure', as stated in the judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 35). Since all the acts in the procedure are *preparatory* to the final award of the contract, not all of them provide the same *density* of content, and only those which have a level of decision-making that is sufficient to endow them with a certain amount of autonomy are open to challenge.

49 According to the order for reference, that is what occurred in this case, since Veridos was able to challenge the award of the contract by relying on the abnormally low nature of the tender submitted by Mühlbauer.

JUDGMENT OF THE COURT (Fourth Chamber)

28 April 2022 (*)

(Reference for a preliminary ruling – Directive 2014/24/EU – Public procurement – Article 63 – Reliance by a group of economic operators on the capacities of other entities – Possibility for the contracting authority to require certain critical tasks to be performed by a participant in that group – National legislation requiring that the agent must fulfil the majority of the requirements and provide the majority of the services)

In Case C-642/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy), made by decision of 14 October 2020, received at the Court on 27 November 2020, in the proceedings

Caruter Srl

v

S.R.R. Messina Provincia SCpA,

Comune di Basicò,

Comune di Falcone,

Comune di Fondachelli Fantina,

Comune di Gioiosa Marea,

Comune di Librizzi,

Comune di Mazzarrà Sant'Andrea,

Comune di Montagnareale,

Comune di Oliveri,

Comune di Piraino,

Comune di San Piero Patti,

Comune di Sant'Angelo di Brolo,

Regione Siciliana – Urega – Ufficio regionale espletamento gare d'appalti lavori pubblici Messina,

Regione Siciliana – Assessorato regionale delle infrastrutture e della mobilità,

other parties:

Ditta individuale Pippo Pizzo,

Onofaro Antonino Srl,

Gial Plast Srl,

Colombo Biagio Srl,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, S. Rodin (Rapporteur), J.-C. Bonichot, L.S. Rossi and O. Spineanu-Matei, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Ditta individuale Pippo Pizzo, by R. Rotigliano, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli, avvocato dello Stato, and M. Cherubini, procuratore dello Stato,

– the European Commission, by G. Wils, G. Gattinara and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The present request for a preliminary ruling concerns the interpretation of Article 63 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), read in conjunction with the principles of freedom of establishment and freedom to provide services enshrined in Articles 49 and 56 TFEU.

2 The request has been made in proceedings between, on the one hand, Caruter Srl and, on the other, S.R.R. Messina Provincia SCpA (‘SRR’), Comune di Basicò (Municipality of Basicò, Italy), Comune di Falcone (Municipality of Falcone, Italy), Comune di Fondachelli Fantina (Municipality of Fondachelli Fantina, Italy), Comune di Gioiosa Marea (Municipality of Gioiosa Marea, Italy), Comune di Librizzi (Municipality of Librizzi, Italy), Comune di Mazzarrà Sant’Andrea (Municipality of Mazzarrà Sant’Andrea, Italy), Comune di Montagnareale (Municipality of Montagnareale, Italy), Comune di Oliveri (Municipality of Oliveri, Italy), Comune di Piraino (Municipality of Piraino, Italy), Comune di San Piero Patti (Municipality of San Piero Patti, Italy), Comune di Sant’Angelo di Brolo (Municipality of Sant-Angelo di Brolo, Italy), Regione Siciliana – Urega – Ufficio regionale espletamento gare d’appalti lavori pubblici Messina (Region of Sicily – Urega – Regional Authority for Public Works Procurement in Messina, Italy) and Regione Siciliana – Assessorato regionale delle infrastrutture e della mobilità (Region of Sicily – Regional Infrastructure and Public Mobility Department, Italy) concerning the award of a public contract for the supply of a service consisting in the sweeping, collection and transportation for disposal of sorted and unsorted solid urban waste, and for other public cleaning services in 33 municipalities grouped within SRR.

Legal context

European Union law

3 Under recitals 1 and 2 of Directive 2014/24:

‘(1) The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular

the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

(2) … the public procurement rules … should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement …. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.'

4 Article 2 of that directive, which is entitled 'Definitions', provides, in paragraph 1 thereof:

'For the purposes of this Directive, the follow definitions apply:

…

(10) "economic operator" means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;

…'

5 Article 19 of Directive 2014/24, which is entitled 'Economic operators', provides, in paragraph 2 thereof:

'Groups of economic operators, including temporary associations, may participate in procurement procedures. They shall not be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.

Where necessary, contracting authorities may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in Article 58 provided that this is justified by objective reasons and is proportionate. Member States may establish standard terms for how groups of economic operators are to meet those requirements.

Any conditions for the performance of a contract by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate.'

6 Article 58 of that directive, which is entitled 'Selection criteria', provides, in paragraphs 3 and 4 thereof:

'3. With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts …. They may also require an appropriate level of professional risk indemnity insurance.

…

4. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

…’

7 Article 63 of Directive 2014/24, which is entitled ‘Reliance on the capacities of other entities’, states:

‘1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications … or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

…

Under the same conditions, a group of economic operators as referred to in Article 19(2) may rely on the capacities of participants in the group or of other entities.

2. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 19(2), by a participant in that group.’

Italian law

8 Article 83 of decreto legislativo del 18 aprile 2016, n. 50 – Codice dei contratti pubblici (supplemento ordinario alla GURI n. 91, del 19 aprile 2016) (Legislative Decree No 50 of 18 April 2016 – the Public Procurement Code (Ordinary Supplement to GURI No 91, 19 April 2916)) (‘the Public Procurement Code’), relating to the criteria for selection and assistance in compiling the tendering documentation, provides, in paragraph 8 thereof:

‘The contracting authorities shall state the participation requirements which may be expressed as minimum levels of capacity, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest, and shall carry out formal and substantial verification of the delivery capacities, technical and professional skills, including the human resources of the undertaking’s staff, and the activities actually carried out. With regard to the entities referred to in Article 45(2)(d), (e), (f) and (g), the contract notice may state to what extent those criteria must be fulfilled by the various competing participants. The agent must in any event fulfil the majority of the requirements and provide the majority of the services. The contract notice and the invitation to participate may not include other requirements other than those set out in the present code or other legal provisions in force, or they will otherwise be excluded. Such requirements are, in any event, void.’

9 Article 89 of the Public Procurement Code, relating to the reliance on the capacities of other entities, provides, in paragraph 1 thereof:

‘For a particular contract, the economic operator, whether as a single operator or a member of a group within the meaning of Article 45, may fulfil the requirements relating to the economic, financial, technical and professional criteria laid down in Article 83(1)(b) and (c) necessary to take part in a tendering procedure, and, in any event, excluding the requirements laid down in Article 80, by relying on the capacity of other entities, also participants in the group, regardless of the legal nature of the links which it has with them. …’

The dispute in the main proceedings and the question referred for a preliminary ruling

10 SRR announced an open tendering procedure for the award of a contract for the supply of a service consisting in the sweeping, collection and transportation for disposal of sorted and unsorted solid urban

waste, and similar waste, and for other public cleaning services in 33 municipalities grouped within SRR. The contract, for a period of seven years, the total value of which was EUR 42 005 042.16, excluding VAT, was subdivided into three lots. The contract notice specified the economic/financial capacity and technical capacity requirements for each lot. For the purposes of the award, provision was made for the application of the criterion of the most economically advantageous tender, to be identified on the basis of the best quality-price ratio.

11 As regards Lot 2, the value of which was EUR 19 087 724.73 in respect of service provision for 11 municipalities, the contract was awarded to the temporary association of undertakings consisting in the ditta individuale Pippo Pizzo, Onofaro Antonino Srl and Gial Plast Srl ('ATI Pippo Pizzo'), whereas the temporary association of undertakings consisting in Caruter Srl and Gilma Srl ('ATI Caruter') was ranked second.

12 Caruter brought an action before the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court for Sicily, Italy) against the decision awarding the contract to ATI Pippo Pizzo. ATI Pippo Pizzo also brought a counterclaim against the decision admitting ATI Caruter to the tendering procedure.

13 By judgment of 19 December 2019, that court upheld the principal action and annulled the admission of ATI Pippa Pizzo to the tendering procedure and the award of the contract to ATI Pippo Pizzo. Ruling on the counterclaim, the court also annulled the decision admitting ATI Caruter to the tendering procedure.

14 That court noted that, in accordance with Article 83(8) in conjunction with Article 89 of the Public Procurement Code, reliance by an agent on the capacities of other economic operators of the group is permitted, but the agent must in any event fulfil the majority of the conditions for admission to the tendering procedure and provide the majority of the services in relation to the other economic operators. However, in the present case, the ditta individuale Pippo Pizzo did not, on its own, fulfil the requirements laid down in the contract documents at issue in the main proceedings and it was not able to rely on the capacities of the other undertakings of the temporary association of undertakings of which it was the agent.

15 Caruter brought an appeal against that judgment before the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy), the referring court. ATI Pippo Pizzo for its part brought a cross-appeal against that judgment.

16 The referring court considers that the interpretation of the Public Procurement Code by the first-instance court, according to which the agent must, in any event, fulfil the majority of the admission requirements and provide the majority of the services, could be contrary to Article 63 of Directive 2014/24, since that latter provision does not appear to limit the possibility for an economic operator to rely on the capacities of other operators.

17 In those circumstances the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 63 of Directive [2014/24], concerning reliance on the capacities of other entities, in conjunction with the principles of freedom of establishment and freedom to provide services enshrined in Articles 49 and 56 [TFEU], preclude the application of the Italian national rules relating to "criteria for selection and the supplementing or amending of tendering documentation" laid down in the [third] sentence of Article 83(8) of the [Public Procurement Code], according to which where recourse is had to reliance on the capacities of other entities (referred to in Article 89 of the [Public Procurement Code]), the agent must in any event fulfil the majority of the requirements and provide the majority of the services?'

Request for an expedited procedure

18 The referring court requested the application of the expedited procedure to the present case, pursuant to Article 105 of the Rules of Procedure of the Court.

19 In support of its request, the referring court stated that the present case raised a question of principle having a bearing on the decisions of economic operators wishing to rely on the capacities of other undertakings in order to participate in a tendering procedure, and maintained that that question is the subject of numerous cases before the Italian courts. Furthermore, the continuation of the procedure for the award of the public contact at issue in the main proceedings depends on the decision of the Court, given that the referring court has already ruled on all the other arguments. Lastly, Lot 2 of that public contract concerns the supply of a service consisting in the collection and transportation for disposal of solid urban waste, and for other public cleaning services in 11 municipalities in the region of Sicily. The total value of Lot 2 is EUR 19 087 724.73.

20 In that regard, Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure.

21 So far as concerns, first of all, the fact that the question referred is the subject of extensive litigation in Italy, it should be borne in mind that the expedited procedure under Article 105(1) of the Rules of Procedure is a procedural instrument intended to address matters of exceptional urgency (orders of the President of the Court of 31 August 2010, *UEFA and British Sky Broadcasting,* C-228/10, not published, EU:C:2010:474, paragraph 6; of 20 December 2017, *M. A. and Others*, C-661/17, not published, EU:C:2017:1024, paragraph 17; and of 18 January 2019, *Adusbef and Others*, C-686/18, not published, EU:C:2019:68, paragraph 11).

22 The large number of persons or legal situations which may be affected by the question referred does not, as such, constitute an exceptional circumstance justifying application of the expedited procedure (order of the President of the Court of 8 March 2018, *Vitali*, C-63/18, not published, EU:C:2018:199, paragraph 17 and the case-law cited).

23 With regard, next, to the fact that the outcome of the dispute in the main proceedings depends on the answer to be provided by the Court, it is apparent from the case-law that the mere interest of litigants in determining as quickly as possible the scope of their rights under EU law, while legitimate, is not such as to establish the existence of an exceptional circumstance within the meaning of Article 105(1) of the Rules of Procedure (order of the President of the Court of 8 March 2018, *Vitali*, C-63/18, not published, EU:C:2018:199, paragraph 18 and the case-law cited).

24 As regards, moreover, the allegedly urgent character of the works to be performed under the public works contract at issue in the main proceedings, it should be noted that the requirement to deal rapidly with the dispute pending before the Court cannot derive solely from the fact that the referring court is required to ensure the rapid settlement of the dispute or from the mere fact that the delay or suspension of the works the subject of a public contract could have adverse effects on the persons concerned (see, to that effect, orders of the President of the Court of 18 July 2007, *Commission* v *Poland*, C-193/07, not published, EU:C:2007:465, paragraph 13 and the case-law cited, and of 8 March 2018, *Vitali*, C-63/18, not published, EU:C:2018:199, paragraph 19 and the case-law cited).

25 Lastly, so far as concerns the value of the contract at issue in the main proceedings, it is settled case-law that economic interests, however important or legitimate they may be, are not sufficient to justify in themselves application of the expedited procedure (order of the President of the Court of 16 March 2017, *Abanca Corporación Bancaria*, C-70/17, not published, EU:C:2017:227, paragraph 13 and the case-law cited).

26 In those circumstances, on 13 January 2021 the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to refuse the request for an expedited procedure.

The admissibility of the request for a preliminary ruling

27 The Italian Government contends that the request for a preliminary ruling is inadmissible on the ground that the issue raised is hypothetical, given that the relevance of that request in relation to the specific subject matter of the main proceedings has not been established.

28 In that regard, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling (judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraph 26 and the case-law cited).

29 It follows that questions concerning EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 29, and order of 26 March 2021, *Fedasil*, C-134/21, EU:C:2021:257, paragraph 48).

30 In the present case, it should be noted that the question referred concerns the interpretation of provisions of EU law, in particular Article 63 of Directive 2014/24, and that the order for reference sets out the factual and legal context in sufficient detail to enable the Court to determine the scope of that question.

31 Furthermore, it is not apparent that the interpretation sought bears no relation to the actual facts or the purpose of the dispute in the main proceedings; nor does the problem appear to be hypothetical. While Article 63 of Directive 2014/24 permits contracting authorities to require only that 'certain critical tasks' be performed by the lead undertaking of a group itself, it is apparent from the order for reference that the undertaking to which the contract at issue in the main proceedings was awarded was excluded from the tendering procedure on the ground that it did not carry out 'the majority' of the works, as required by Article 83(8) of the Public Procurement Code.

32 It is, therefore, apparent that the referring court needs an answer from the Court of Justice on its request for interpretation if it is to be able to give a ruling.

33 The request for a preliminary ruling is, accordingly, admissible.

Consideration of the question referred

34 By its question, the referring court asks, in essence, whether Article 63 of Directive 2014/24, read in conjunction with Articles 49 and 56 TFEU, must be interpreted as precluding national legislation requiring that the undertaking which is the agent of a group of economic operators participating in a public procurement procedure must fulfil the majority of the requirements set out in the contract notice and provide the majority of the services under that contract.

35 First of all, it should be noted that, as is apparent from the order for reference, Directive 2014/24 is applicable to the facts at issue in the main proceedings. In addition, it should be pointed out that the provisions of that directive must, by reason of recital 1 thereof, be interpreted in accordance with the principles of freedom of establishment and freedom to provide services as well as with the principles deriving therefrom. It is, therefore, not necessary to examine separately the question referred in the light of Articles 49 and 56 TFEU (see, by analogy, judgment of 10 November 2016, *Ciclat*, C-199/15, EU:C:2016:853, paragraph 25). Since, moreover, the present request for a preliminary ruling raises no new point of law with regard to the principles of freedom of establishment and freedom to provide services or the principles deriving therefrom, it is sufficient to deal with the question referred for a preliminary ruling by referring to Directive 2014/24.

36 Article 63(1) of that directive provides that, with regard to criteria relating to economic and financial standing and to criteria relating to technical and professional ability, an economic operator may, for a particular contract, rely on the capacities of other entities, and that, under the same conditions, a group of economic operators may rely on the capacities of participants in the group or of other entities. Furthermore, Article 63(2) states that, for certain types of contracts, including service contracts, 'contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators …, by a participant in that group'.

37 However, by requiring the undertaking which is the agent of the group of economic operators to provide 'the majority' of the services in relation to all the members of the group, that is to say to provide the majority of all the services covered by the contract, Article 83(8) of the Public Procurement Code lays down a stricter condition than that provided for by Directive 2014/24 which merely authorises the contracting authority to provide, in the contract notice, that certain critical tasks are to be performed directly by a participant in the group of economic operators.

38 Under the system established by that directive, it is the contracting authorities that may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 19(2) of Directive 2014/24, by a participant in that group whereas, according to the national legislation at issue in the main proceedings, it is the national legislature that requires horizontally, for all public contracts in Italy, that the agent of the group of economic operators must perform the majority of the services.

39 It is true that the second subparagraph of Article 19(2) of Directive 2014/24 provides that Member States may establish standard terms for how groups of economic operators are to meet the criteria relating to economic and financial standing and the criteria relating to technical and professional ability referred to in Article 58 of that directive.

40 However, even if the capacity to perform critical tasks falls within the notion of 'technical ability', within the meaning of Articles 19 and 58 of Directive 2014/24, which would allow the national legislature to include that capacity in its standard terms provided for in Article 19(2) of that directive, a rule such as that contained in the third sentence of Article 83(8) of the Public Procurement Code – which requires the agent of the group of economic operators to perform directly itself the majority of the tasks – goes beyond what is allowed by that directive. Such a rule is not limited to specifying how groups of economic operators are to guarantee they possess the human and technical resources necessary to perform the contract, within the meaning of Article 19(2) of that directive, read in conjunction with Article 58(4) thereof, but relates to the actual performance of the contract itself and requires, in that regard, the agent of the group to perform the majority of the services.

41 Lastly, it is true that, according to Article 63(2) of Directive 2014/24, in the case, inter alia, of service contracts, contracting authorities may require that 'certain critical tasks' be performed by a participant in the group of economic operators.

42 However, notwithstanding the slight variation between different language versions of Directive 2014/24, it is clear from the words '*certaines tâches essentielles* [certain essential tasks]', used in several language versions of that directive, including those in French and Italian ('*taluni compiti essenziali*'), and also from the words '*certain critical tasks*', used in other versions of that directive, including those in Spanish ('*determinadas tareas críticas*'), German ('*bestimmte kritische Aufgaben*'), English ('*certain critical tasks*'), Dutch ('*bepaalde kritieke taken*') and Romanian ('*anumite sarcini critice*'), that the intention of the EU legislature is, in accordance with the objectives set out in recitals 1 and 2 of that directive, to limit what can be imposed on a single operator of a group, following a qualitative approach rather than merely a quantitative approach, in order to facilitate the participation of groups such as temporary associations of small- and medium-sized undertakings in public procurement procedures. A requirement such as that set out in the third sentence of Article 83(8) of the Public Procurement Code, which extends to the 'provision of the majority of the services', is inconsistent with such an approach, goes beyond the targeted words used in Article 63(2) of Directive 2014/24 and therefore undermines the objective pursued by EU law in that area of attaining the widest

possible opening-up of public contracts to competition and of facilitating the involvement of small- and medium-sized undertakings (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 27).

43 Moreover, while Article 63(2) of Directive 2014/24 merely authorises contracting authorities to require, in the case, inter alia, of service contracts, that certain tasks be performed by a participant of the group of economic operators, Article 83(8) of the Public Procurement Code lays down the requirement that the agent of the group alone must perform the majority of the services, to the exclusion of all the other participating undertakings, and thus unduly restricts the meaning and scope of the words used in Article 63(2) of Directive 2014/24.

44 In the light of the foregoing considerations, the answer to the question referred is that Article 63 of Directive 2014/24 must be interpreted as precluding national legislation requiring that the undertaking which is the agent of a group of economic operators participating in a public procurement procedure must fulfil the majority of the requirements set out in the contract notice and provide the majority of the services under that contract.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 63 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

must be interpreted as precluding national legislation requiring that the undertaking which is the agent of a group of economic operators participating in a public procurement procedure must fulfil the majority of the requirements set out in the contract notice and provide the majority of the services under that contract.

[Signatures]

---

* Language of the case: Italian.

JUDGMENT OF THE COURT (Ninth Chamber)

24 February 2022 (*)

(Reference for a preliminary ruling – Directive 92/13/EEC – Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors – Article 1(1) and (3) – Access to review procedures – Article 2c – Time limits for applying for review – Calculation – Review of a decision allowing a tenderer to participate)

In Case C-532/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania), made by decision of 12 June 2020, received at the Court on 20 October 2020, in the proceedings

Alstom Transport SA

v

Compania Naţională de Căi Ferate CFR SA,

Strabag AG – Sucursala Bucureşti,

Swietelsky AG Linz – Sucursala Bucureşti,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Third Chamber, acting as President of the Ninth Chamber, S. Rodin (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Alstom Transport SA, by O. Gavrilă, C. Ciolan and I. Nedelcu, avocați,

– Compania Naţională de Căi Ferate CFR SA, by I. Pintea,

– Strabag AG – Sucursala Bucureşti, by S. Neagu, A. Viespe, Ş. Dinu and L. Savin, avocați,

– the European Commission, by G. Wils and P. Ondrůšek and by L. Nicolae, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and (3) and Article 2a of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ

1992 L 76, p. 14), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1) ('Directive 92/13').

2 The request was made in the course of proceedings between Alstom Transport SA and Compania Națională de Căi Ferate CFR SA ('the CFR'), and Strabag AG – Sucursala București ('Strabag') and Swietelsky AG Linz – Sucursala București concerning the calculation of the period for bringing an action against a decision adopted in the context of a procurement procedure relating to a public works contract.

Legal framework

European Union law

3 Article 1(1), fourth subparagraph and (3) of Directive 92/13 provide:

'1. …

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/25/EU [of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243)] or Directive 2014/23/EU [of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts], decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

4 Under Article 2a(2) of Directive 92/13:

'…

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

– a summary of the relevant reasons as set out in Article 75(2) of Directive 2014/25/EU, subject to the provisions of Article 75(3) of that Directive or in the second subparagraph of Article 40(1) of Directive 2014/23/EU, subject to the provisions of Article 40(2) of that Directive,

…'

5 Article 2c of Directive 92/13 provides:

'Where a Member State provides that any application for review of a contracting entity's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2014/25/EU or Directive 2014/23/EU must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of receipt of the contracting entity's decision. The communication of the contracting entity's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for a review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific

notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.'

Romanian law

6 Article 2(1) of Legea nr. 101/2016 privind remediile și căile de atac în materie de atribuire a contractelor de achiziție publică, a contractelor sectoriale și a contractelor de concesiune de lucrări și concesiune de servicii, precum și pentru organizarea și funcționarea Consiliului Național de Soluționare a Contestațiilor (Law No 101/2016 on remedies and review procedures relating to the award of public procurement contracts, sector-specific contracts and works and services concession contracts and on the organisation and operation of the National Council for the Resolution of Complaints) is worded as follows:

'Any person who considers that his rights or legitimate interests have been infringed by an act of a contracting authority or by a failure to take a decision on an application within the period prescribed by law may seek the annulment of that act, the obligation of the contracting authority to issue an act or to take corrective measures or to recognise the alleged right or legitimate interest, [before the Consiliu Național de Soluționare a Contestațiilor (National Council for the Resolution of Complaints) or a judicial body,] in accordance with the provisions of this Law.'

7 Article 3 of that law provides:

'1. For the purposes of this law:

…

(f) persons who consider themselves wronged means any economic operator that satisfies the following cumulative conditions:

(i) they have or have had an interest in a procurement procedure;

(ii) they have suffered, are suffering or risk suffering harm as a result of an act of a contracting authority capable of producing legal effects or a failure to respond to a request relating to a procurement procedure within the period prescribed by law.

…

3. For the purposes of paragraph 1(f)(i), persons shall be deemed to have or to have had an interest in a procurement procedure if they have not yet been definitively excluded from that procedure. Exclusion shall be definitive if it has been communicated to the candidate/tenderer in question and if it has been found lawful by the Consiliu [Național de Soluționare a Contestațiilor (National Council for the Resolution of Complaints)] or a court, or if it can no longer be the subject of a review procedure.'

8 In accordance with Article 8 of that law:

'1. Persons who consider that their rights or legitimate interests have been infringed as a result of an act of a contracting authority may apply to the Consiliu [Național de Soluționare a Contestațiilor (National Council for the Resolution of Complaints)] for the annulment of that act, to impose on the contracting authority the obligation to adopt an act or corrective measures and for the recognition of the alleged right or legitimate interest within the following time limits:

(a) ten days, with effect from the day following the date on which the existence of the act of the contracting authority considered to be unlawful became known, where the estimated value of the public/sectoral contract or concession is equal to or greater than the value thresholds above which the transmission of public procurement notices for the purpose of publication in the *Official Journal of the European Union* is mandatory, in accordance with public procurement legislation, the legislation on sectoral contracts or the legislation on works and services concessions; …'

9 Article 49(1) of that law provides:

‘In order for the action to be resolved in judicial proceedings, persons who consider that their rights or legitimate interests have been infringed may apply to the competent court, in accordance with the provisions of this law.’

The dispute in the main proceedings and the question referred for a preliminary ruling

10 The CFR published a call for tenders in the context of a sector-specific, public procurement procedure for the award of a works contract for the renovation of a railway line.

11 On 13 March 2018, the tender submitted by the consortium RailWorks, the leader of which is Alstom Transport, was declared admissible, however on 5 July 2018 it was excluded by the CFR on account of considerations relating to RailWorks’ ability to perform the subject matter of the contract.

12 By judgment of 19 October 2018, the Tribunalul Bucureşti (Regional Court, Bucharest, Romania) dismissed the action brought by Alstom Transport against the CFR’s decision excluding RailWorks’ tender and designating the BraSig consortium as the successful tenderer. By judgment of 20 December 2018, the Curtea de Apel București (Court of Appeal, Bucharest, Romania) upheld the appeal lodged by Alstom Transport against that judgment and annulled that decision. It also found that RailWorks’ tender was admissible and that the CFR was obliged to reassess BraSig’s tender taking into account the criticisms levelled against it by RailWorks.

13 On 12 February 2019, following the reassessment ordered by the Curtea de Apel București (Court of Appeal, Bucharest), RailWorks’ tender was declared admissible and, by letter of 19 June 2019, Alstom Transport was named as the successful tenderer for the contract in question.

14 On 5 July 2019, Alstom Transport brought a new action before the Tribunalul București (Regional Court, Bucharest) seeking, inter alia, the annulment of the CFR’s decision declaring BraSig’s tender as admissible and compliant, and of the report on the procurement procedure and all the documents relating to the procedures for evaluating that tender. Moreover, Alstom Transport asked that court to require the CFR to exclude that tender on the ground that BraSig had repeatedly attempted to influence the members of the CFR evaluation committee in order to place RailWorks’ tender at a disadvantage.

15 By judgment of 8 August 2019, the Tribunalul București (Regional Court, Bucharest) dismissed that action as being out of time. In that regard, that court considered that the time limit of 10 days laid down in Article 8(1)(a) of Law No 101/2016 started to run not from the date on which Alstom Transport became aware of the report on the procurement procedure, but from the date on which the outcome of that procedure had been communicated to it.

16 Alstom Transport brought an appeal before the Curtea de Apel București (Court of Appeal, Bucharest), the referring court, against that judgment. In support of its appeal, it stated that, by the letter of 19 June 2019 concerning the outcome of the procurement procedure, referred to in paragraph 13 of this judgment, it had been informed only of the assessment of its own tender and that no information concerning the procedures for evaluating the tender submitted by BraSig was apparent from that letter. Alstom Transport submitted that it was not until 25 June 2019, the date on which it had access to the procurement file after having requested it on 20 June 2019, that it became aware of the report on the procurement procedure and, implicitly, of those evaluation procedures. Consequently, in its view, the time limit of 10 days referred to in the preceding paragraph of this judgment started to run from 25 June 2019.

17 In those circumstances, the Curtea de Apel București (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are the third subparagraph of Article 1(1), Article 1(3) and Article 2c of [Directive 92/13] to be interpreted as meaning that the period within which the successful tenderer in an award procedure may apply for review of the decision of the contracting authority declaring admissible the bid submitted by a tenderer placed lower in the ranking must be calculated by reference to the date on which the interest of the successful tenderer arose, that is, upon the lodging by the unsuccessful tenderer of an action against the outcome of the award procedure?’

The question referred for a preliminary ruling

18 As a preliminary point, it must be noted that it is apparent from the documents before the Court that the referring court is asking the Court not about the interpretation of the third subparagraph of Article 1(1) of Directive 92/13, but about the interpretation of the fourth subparagraph of Article 1(1) of that directive.

19 Thus, it must be held that, by its question, the referring court asks, in essence, whether the fourth subparagraph of Article 1(1), Article 1(3) and Article 2c of Directive 92/13 must be interpreted as meaning that the period within which the successful tenderer for a contract may apply for review of a decision of the contracting entity declaring admissible the bid submitted by an unsuccessful tenderer may be calculated by using as a point of reference the date of receipt of that decision by that successful tenderer even if, at that date, first, the unsuccessful tenderer had not or had not yet applied for review of the outcome of the award procedure for that contract and, secondly, the successful tenderer had not received the relevant information concerning the procedures for evaluating the unsuccessful tenderer's bid.

20 Since Article 1(1), fourth subparagraph, Article 1(3) and Article 2c of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23, are analogous to, respectively, Article 1(1), fourth subparagraph, Article 1(3) and Article 2c of Directive 92/13, the case-law relating to those provisions of Directive 89/665, as amended by Directive 2014/23, is also relevant to the interpretation of the provisions of Directive 92/13 at issue.

21 The fourth subparagraph of Article 1(1) of Directive 92/13 requires the Member States, as regards contracts falling within the scope of Directive 2014/25 or Directive 2014/23, to ensure that decisions taken by contracting entities may be reviewed as effectively and as rapidly as possible. The imposition of time limits for bringing actions which will be time-barred if those time limits are not complied with enables the objective of rapidity pursued by that directive, which requires operators to challenge promptly preliminary measures or interim decisions taken in public procurement procedures, to be attained (see, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 27 and the case-law cited).

22 Setting reasonable time limits for bringing proceedings must be regarded, in principle, as satisfying the requirement of effectiveness under Directive 92/13, since it is an application of the fundamental principle of legal certainty and is compatible with the fundamental right to effective legal protection (see, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 28 and the case-law cited).

23 Therefore, in accordance with Article 2c of Directive 92/13, where a Member State lays down time limits for bringing an application for review of a contracting entity's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2014/25 or Directive 2014/23, the time limits for challenging that decision are to be determined according to the manner in which the contracting entity's decision is communicated to the tenderers.

24 Thus, the period must be at least 10 calendar days with effect from the day following the date on which that decision is sent to the tenderer or candidate if fax or electronic means are used. If other means of communication are used, that period is either at least 15 calendar days with effect from the day following the date on which that decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of that decision. In the case of an application for a review concerning decisions referred to in Article 2(1)(b) of Directive 92/13 that are not subject to a specific notification, the time period is at least 10 calendar days from the date of the publication of the decision concerned.

25 In the present case, the Romanian law provides that the 10-day period begins to run, for all tenderers, including the successful tenderer, from the day following the date on which the existence of the contracting entity's act became known. Thus, a successful tenderer who intends to challenge a decision declaring admissible the bid submitted by an unsuccessful tenderer must make its application for

review within that time limit, irrespective, first, of whether or, as the case may be, when, that tenderer applied for review of that decision and, secondly, of the fact that the successful tenderer has no information concerning the procedures for evaluating the unsuccessful tenderer's bid.

26 While both the national court, in its request for a preliminary ruling, and the parties to the main proceedings and the European Commission, in their respective written observations, address the condition of having an interest in bringing proceedings, it must be noted that that court chose to limit its question solely to the issue of the starting point of the period for applying for review.

27 In that regard, it should be noted that Article 1(3) of Directive 92/13 provides that Member States must ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

28 That provision is intended to apply, inter alia, to the situation of any tenderer which considers that a decision allowing a competitor to participate in a tender procedure is unlawful and is likely to cause it harm, that likelihood of harm being sufficient to justify an immediate interest in bringing an action against that decision, leaving aside harm which may also result from the award of the contract to another candidate (see, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 36).

29 Thus, Directive 92/13 does not, in principle, preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time limit in question is reasonable (see, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 40 and the case-law cited).

30 It follows that a successful tenderer may be required to comply with a time limit for applying for review of a decision by the contracting entity allowing an unsuccessful tenderer to participate in a public procurement procedure, even if that decision forms part of the decision designating the successful tenderer as such and even if, on that date, the tenderer has not or has not yet lodged an action against the latter decision.

31 Nevertheless, it cannot be excluded that, in the context of the particular circumstances, or having regard to some of their rules, the application of national rules on limitation periods may entail a breach of the rights conferred on individuals by EU law, in particular, the right to an effective remedy and the right to a fair trial, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (see, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 43 and the case-law cited).

32 In that regard, it should be recalled that effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (see, by analogy, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 45 and the case-law cited).

33 To that end, the contracting entity's decision that is communicated to tenderers must, in accordance with Article 2c of Directive 92/13, be accompanied by a summary of the relevant reasons.

34 That summary of the relevant reasons, which must accompany both the decisions of contracting entities which are notified specifically to tenderers and those which are published and which are not subject to a specific notification, is intended to ensure that the tenderers concerned are or may be aware of a possible infringement of the rules applicable to procurement procedures.

35 In the present case, subject to verification by the referring court, the relevant reasons for the contracting entity's decision allowing BraSig to participate in the procurement procedure at issue could be inferred from the report on the procurement procedure referred to in paragraphs 14 to 16 of this judgment, which, under Romanian law, must be made available to the tenderers concerned by means of a face-to-face consultation.

36 However, such a legal guarantee of access to the reasons for contracting entities' decisions is not equivalent to the communication, when those decisions are published or notified, of the relevant reasons for those decisions to tenderers.

37 Thus, in those circumstances where the relevant reasons for a contracting authority's decision have not been brought to the tenderers' attention either by means of a publication or when that decision was notified, the period within which the successful tenderer in an award procedure may apply for review of the decision of the contracting authority declaring admissible the bid submitted by an unsuccessful tenderer starts to run not on the date on which that decision was received, but the date of the communication to that successful tenderer of the relevant reasons for that decision, ensuring that the successful tenderer knew or ought to have known about possible infringements of EU law vitiating that decision.

38 In the light of the foregoing considerations, the answer to the question referred must be that Article 1(1), fourth subparagraph, Article 1(3) and Article 2c of Directive 92/13 must be interpreted as meaning that the period within which the successful tenderer for a contract may apply for review of a decision of the contracting entity declaring admissible, in the decision awarding that contract, the bid submitted by an unsuccessful tenderer may be calculated by using as a point of reference the date of receipt of that decision of the contracting authority by that successful tenderer, even if, at that date, that unsuccessful tenderer had not, or had not yet, applied for review of it. On the other hand, if, during the notification or publication of that decision, a summary of the relevant reasons for it, such as the information concerning the procedures for evaluating that tender, was not, in accordance with that Article 2c, brought to the knowledge of that successful tenderer, that time limit must be calculated by using as a point of reference the communication of such a summary to the same successful tenderer.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 1(1), fourth subparagraph, Article 1(3) and Article 2c of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, must be interpreted as meaning that the period within which the successful tenderer for a contract may apply for review of a decision of the contracting entity declaring admissible, in the decision awarding that contract, the bid submitted by an unsuccessful tenderer may be calculated by using as a point of reference the date of receipt of that decision of the contracting authority by that successful tenderer, even if, at that date, that unsuccessful tenderer had not, or had not yet, applied for review of it. On the other hand, if, during the notification or publication of that decision, a summary of the relevant reasons for it, such as the information concerning the procedures for evaluating that tender, was not, in accordance with that Article 2c, brought to the knowledge of that successful tenderer, that time limit must be calculated by using as a point of reference the communication of such a summary to the same successful tenderer.

[Signatures]

* Language of the case: Romanian.

EU:C:2021:1037

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2021 (*)

(Reference for a preliminary ruling – Second subparagraph of Article 19(1) TEU – Obligation of Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law – Public procurement – Directive 89/665/EEC – Article 1(1) and (3) – Article 47 of the Charter of Fundamental Rights of the European Union – Judgment of a Member State's highest administrative court declaring inadmissible, in breach of the case-law of the Court of Justice, an action brought by a tenderer excluded from a public procurement procedure – No remedy against that judgment before the highest court in that Member State's judicial order – Principles of effectiveness and equivalence)

In Case C-497/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 7 July 2020, received at the Court on 30 September 2020, in the proceedings

Randstad Italia SpA

v

Umana SpA,

Azienda USL Valle d'Aosta,

IN. VA SpA,

Synergie Italia agenzia per il Lavoro SpA,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, C. Lycourgos (Rapporteur), E. Regan, I. Jarukaitis, N. Jääskinen, I. Ziemele and J. Passer, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, T. von Danwitz, M. Safjan, A. Kumin and N. Wahl, Judges,

Advocate General: G. Hogan,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2021,

after considering the observations submitted on behalf of:

– Randstad Italia SpA, by M. Brugnoletti and S.D. Tomaselli, avvocati,

– Umana SpA, by F. Bertoldi, avvocato,

– Azienda USL Valle d'Aosta, by F. Dal Piaz and P. Borioni, avvocati,

– Synergie Italia agenzia per il Lavoro SpA, by A.M. Balestreri, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino and P. Gentili, avvocati dello Stato,

– the European Commission, by F. Erlbacher, P. Stancanelli, P.J.O. Van Nuffel and G. Gattinara, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) and Article 19(1) TEU, and Article 2(1) and (2) and Article 267 TFEU, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and also of Article 1(1) and (3) and Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) ('Directive 89/665').

2 The request has been made in proceedings between, on the one hand, Randstad Italia SpA ('Randstad') and, on the other, Umana SpA, Azienda USL Valle d'Aosta (local health agency of the Valle d'Aosta region, Italy) ('USL'), IN. VA SpA and Synergie Italia agenzia per il Lavoro SpA ('Synergie') concerning (i) the exclusion of Randstad from a procedure for the award of a public contract, and (ii) the regularity of that procedure.

Legal context

European Union law

3 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'1. This Directive applies to contracts referred to in Directive 2014/24/EU of the European Parliament and of the Council [of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)] unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

This Directive also applies to concessions awarded by contracting authorities, referred to in Directive 2014/23/EU of the European Parliament and of the Council [of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1)] unless such concessions are excluded in accordance with Articles 10, 11, 12, 17 and 25 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, works and services concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/24] or Directive [2014/23], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…'

4 Article 2 of that directive, entitled ‘Requirements for review procedures’, provides in paragraph 1:

‘Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.’

5 Under Article 2a of the directive, entitled ‘Standstill period’:

‘1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive [2014/24] or Directive [2014/23] before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

– a summary of the relevant reasons …, and

– a precise statement of the exact standstill period applicable …’

Italian law

6 The eighth paragraph of Article 111 of the Costituzione (Constitution) provides:

‘Appeals in cassation against decisions of the Consiglio di Stato [(Council of State, Italy)] and the Corte dei conti [(Court of Auditors, Italy)] are permitted only for reasons of jurisdiction.’

7 The first paragraph of Article 360 of the codice di procedura civile (Code of Civil Procedure) provides:

‘Judgments delivered on appeal or at sole instance may be challenged by an appeal in cassation: (1) for reasons relating to jurisdiction; …’

8 Under the first and second paragraphs of Article 362 of the Code of Civil Procedure:

‘An appeal in cassation may be brought … against a decision given by a special court on appeal or at sole instance, for reasons relating to the jurisdiction of that court.

The following may be appealed in cassation at any time: (1) positive or negative conflicts of jurisdiction between special judges, or between them and ordinary judges; (2) negative conflicts of attribution between the public administration and the ordinary judge.’

9 Article 6(1) of the codice del processo amministrativo (Code of Administrative Procedure) provides:

‘The Consiglio di Stato [(Council of State)] is the court of final instance in administrative cases.’

10 Article 110 of the Code of Administrative Procedure provides:

‘An appeal in cassation may be brought against a judgment of the Consiglio di Stato [(Council of State)] for reasons of jurisdiction only.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 On 13 December 2017, USL launched a tendering procedure for the purpose of awarding a public contract with a value of approximately EUR 12 million, on the basis of the most economically advantageous tender, to an employment agency for the temporary supply of personnel.

12 A ‘minimum threshold’ – set at 48 points – was stipulated for technical offers, and tenderers awarded points below that threshold were to be excluded.

13 Eight tenderers participated in the process, including Randstad, GI Group Spa and a temporary association of undertakings formed by Synergie and Umana (‘Synergie-Umana’).

14 On 3 October 2018, after evaluating the technical offers, the procurement committee admitted GI Group and Synergie-Umana to the next stage, relating to the economic assessment of tenders. Randstad, which was in third place after the evaluation of technical offers, was excluded, its technical offer having been awarded one mark less than the minimum threshold.

15 On 6 November 2018, the contract was awarded to Synergie-Umana.

16 Randstad brought an action before the Tribunale amministrativo regionale della Valle d’Aosta (Regional Administrative Court, Valle d’Aosta, Italy) disputing, first, its exclusion from the tendering procedure and, second, the regularity of that procedure. Its action thus concerned not only that exclusion, but also the award of the contract to Synergie-Umana.

17 In support of its action, Randstad argued in particular that there had been a failure to divide the call for tenders into lots, that the assessment criteria were imprecise and that the appointment of the procurement committee was unlawful. USL and Synergie-Umana contended that the pleas in law by which Randstad contested the regularity of the tendering procedure were inadmissible. They argued that Randstad did not have standing to raise those pleas, since it had been excluded from that procedure.

18 By judgment of 15 March 2019, the Tribunale amministrativo regionale della Valle d’Aosta (Regional Administrative Court, Valle d’Aosta) rejected that plea of inadmissibility. Since Randstad had participated lawfully in the tendering procedure and had been excluded from it on the basis of the negative assessment of its technical offer, Randstad did, according to that court, have standing to challenge the outcome of the procedure in all its aspects. On the merits, however, that court rejected all the pleas put forward by Randstad and, therefore, dismissed the action in its entirety.

19 Randstad brought an appeal against that judgment before the Consiglio di Stato (Council of State), reiterating the pleas it had raised at first instance. Synergie and Umana brought cross-appeals, criticising the Tribunale amministrativo regionale della Valle d’Aosta (Regional Administrative Court,

Valle d'Aosta) for having ruled Randstad's pleas challenging the regularity of the procedure, and thus the ensuing award of the contract, to be admissible.

20 By judgment of 7 August 2019 ('the judgment of the Council of State'), the Consiglio di Stato (Council of State) rejected on the merits the ground of appeal by which Randstad disputed the mark awarded to its technical offer. Upholding, moreover, the cross-appeals brought by Synergie and Umana, the Consiglio di Stato (Council of State), by that judgment, varied the judgment under appeal to the extent that the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) had declared admissible, and therefore examined the substance of, the pleas put forward by Randstad to challenge the regularity of the procedure.

21 In support of its decision, the Consiglio di Stato (Council of State) held, in particular, that Randstad, 'which was excluded from the tendering procedure because it did not pass the "stress test" of the minimum threshold to be attained by the mark awarded for the technical offer by means of a pair-wise comparison, and which did not succeed in demonstrating the unlawfulness of the tendering procedure as regards the award of that mark, is … not only ineligible to participate in that procedure, but also lacks standing to challenge its results from other aspects, since it has a purely factual interest, analogous to that of any other economic operator in the sector that had not participated in the tendering procedure'.

22 Randstad appealed to the referring court, the Corte suprema di cassazione (Supreme Court of Cassation, Italy), against the judgment of the Council of State. It maintains that the latter has infringed its right to an effective remedy as affirmed in particular in Article 1 of Directive 89/665. Randstad refers in that regard to the judgments of the Court of Justice of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448); of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199); and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675).

23 According to Randstad, the ground of appeal alleging infringement of the right to an effective remedy is among the reasons of 'jurisdiction' on the basis of which, according to the eighth paragraph of Article 111 of the Constitution, appeals in cassation against decisions of the Consiglio di Stato (Council of State) are permitted.

24 The other parties to the main proceedings contend that not only is that appeal in cassation unfounded, it is also inadmissible. They argue that it concerns the legality of the assessment made by the Consiglio di Stato (Council of State) and does not therefore relate to the issue of the jurisdiction of the administrative courts.

25 According to the referring court, the refusal of the Consiglio di Stato (Council of State) to examine, in a case such as that in the main proceedings, pleas relating to the irregularity of the tendering procedure undermines the right to an effective remedy, within the meaning of EU law.

26 According to that court, in order for the uniformity and effectiveness of EU law to be protected, it must be possible for an appeal in cassation to be brought against such a judgment of the Consiglio di Stato (Council of State), pursuant to the eighth paragraph of Article 111 of the Constitution. Such an appeal would constitute the final remedy thereby preventing a judgment of the Consiglio di Stato (Council of State) that is contrary to EU law from acquiring the force of *res judicata*.

27 In that regard, the referring court considers that, where the application or interpretation of national legal provisions by the Consiglio di Stato (Council of State) is incompatible with the provisions of EU law as interpreted by the Court of Justice, it is exercising a jurisdictional power which it does not have. In reality, in such cases it is exercising a power to create law which is not even within the national legislature's competence. That constitutes a lack of jurisdiction which should be amenable to appeal.

28 That being the case, the referring court notes that it is apparent from judgment No 6/2018 of the Corte costituzionale (Constitutional Court, Italy) of 18 January 2018 concerning the interpretation of the eighth paragraph of Article 111 of the Constitution (ECLI:IT:COST:2018:6, 'judgment No 6/2018') that it is not permitted, as Italian constitutional law currently stands, to equate a plea alleging infringement of EU law with a plea relating to 'jurisdiction', within the meaning of the eighth paragraph of Article 111 of the Constitution.

29 In application of that judgment, exceeding judicial authority, which may be contested by means of an appeal to the Corte suprema di cassazione (Supreme Court of Cassation) for reasons of jurisdiction, refers exclusively to two types of situation. First, such an appeal could be brought where there is a total lack of jurisdiction, that is, when the Consiglio di Stato (Council of State) or the Corte dei conti (Court of Auditors) asserts its own jurisdiction over an area reserved to the legislature or the administration, or when, on the contrary, it declines jurisdiction on the erroneous assumption that the subject matter absolutely cannot be the object of any judicial review. Second, an appeal relating to the exceeding of judicial authority could be brought where there is a relative lack of jurisdiction, when the Consiglio di Stato (Council of State) or the Corte dei conti (Court of Auditors) asserts jurisdiction over a subject matter attributed to another court or, on the contrary, declines it having wrongly concluded that jurisdiction lies with other courts.

30 The referring court considers that if it had to adhere to that interpretation of the eighth paragraph of Article 111 of the Constitution, it would have to declare Randstad's appeal in cassation inadmissible. It seems to the referring court, however, that that interpretation is incompatible with the right to an effective remedy, within the meaning of EU law. Should that be the case, it would be necessary to disregard the lessons to be drawn from judgment No 6/2018 and to examine the substance of Randstad's appeal in cassation.

31 The referring court states that, according to the consistent case-law of its own combined chambers prior to the delivery of judgment No 6/2018, in the event of an appeal against a judgment of the Consiglio di Stato (Council of State), the review of the external limits of 'jurisdiction' within the meaning of the eighth paragraph of Article 111 of the Constitution extended to cases of fundamental distortion of the law which could constitute a denial of justice, such as the application of a procedural rule under national law in a manner incompatible with the right to an effective remedy conferred by EU law.

32 The referring court therefore seeks a ruling from the Court of Justice on whether the right to an effective remedy, as laid down, in particular, in the second subparagraph of Article 19(1) TEU and in the first paragraph of Article 47 of the Charter, is such that it cannot be impossible, as it would be in particular under the eighth paragraph of Article 111 of the Constitution as interpreted by judgment No 6/2018, to rely, in the context of an appeal in cassation against a judgment of the Consiglio di Stato (Council of State), on grounds of appeal alleging an infringement of EU law.

33 Furthermore, in so far as the Consiglio di Stato (Council of State) has refrained in the main proceedings from asking the Court of Justice about the relevance, for the present case, of the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448); of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199); and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675), invoked by Randstad, the referring court should be able, in the context of the appeal brought by that undertaking, to put that question to the Court.

34 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do Article 4(3) TEU, Article 19(1) TEU, Article 2(1) and (2) TFEU, and Article 267 TFEU, read in the light of Article 47 of the [Charter], preclude an interpretative practice such as that regarding the eighth paragraph of Article 111 of the Italian Constitution, Article 360(1) … and Article 362(1) of the Italian Code of Civil Procedure, and Article 110 of the Italian Code of Administrative Procedure – under which provisions an appeal in cassation against a judgment of the Consiglio di Stato (Council of State) may be brought for "reasons of jurisdiction" – such as that which emerges from Judgment No 6/2018 of the Corte costituzionale (Constitutional Court) …, in which it has been held, marking a departure from the approach previously taken, that the remedy of an appeal in cassation, on grounds of a "lack of jurisdiction", is not available for the purpose of challenging judgments in which the Consiglio di Stato (Council of State) has applied interpretative practices developed nationally but in conflict with judgments of the Court of Justice, in sectors governed by EU law (in the present case, public procurement) and with regard to which the Member States have waived their right to exercise sovereign powers in a manner incompatible with EU law, with the effect of consolidating infringements of EU law that

might have been rectified using the remedy of an appeal in cassation and of undermining the uniform application of EU law and the effectiveness of the judicial protection afforded to individuals in legal situations of EU significance, contrary to the requirement that EU law be fully and duly applied by every court in a manner necessarily consistent with its correct interpretation by the Court of Justice, regard being had to the limits on the "procedural autonomy" of the Member States in the structuring of their rules of procedure?

(2) Do Article 4(3) TEU, Article 19(1) TEU, and Article 267 TFEU, read in the light of Article 47 of the [Charter], preclude the eighth paragraph of Article 111 of the Italian Constitution, Article 360(1) … and Article 362(1) of the Italian Code of Civil Procedure, and Article 110 of the Italian Code of Administrative Procedure from being interpreted and applied, as they have been in national judicial practice, in such a manner that an appeal in cassation before the Combined Chambers [of the Corte suprema di cassazione (Supreme Court of Cassation)] for "reasons of jurisdiction", on grounds of a "lack of jurisdiction", cannot be brought for the purpose of challenging a judgment in which the Consiglio di Stato (Council of State), ruling in a dispute involving issues concerning the application of EU law, refrains, without reason, from making a reference to the Court of Justice for a preliminary ruling, where the conditions relieving a national court of that obligation, which have been exhaustively listed by the Court of Justice [in its judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335)] and which must be strictly interpreted, are absent, contrary to the principle that national rules and procedural practices, even those arising from legislation or the Constitution, are incompatible with EU law if they prevent a national court (of last instance or otherwise), even temporarily, from making a reference for a preliminary ruling, with the effect of usurping the Court of Justice's exclusive jurisdiction to interpret EU law correctly and in binding fashion, of making any conflicts of interpretation between the law applied by national courts and EU law irremediable (and promoting the consolidation of such conflicts of interpretation), and of undermining the uniform application and effective judicial protection of the rights enjoyed by individuals under EU law?

(3) Do the principles expressed by the Court of Justice in its judgments of 5 September 2019, *Lombardi* [(C-333/18, EU:C:2019:675)], of 5 April 2016, *PFE* [(C-689/13, EU:C:2016:199)], and of 4 July 2013, *Fastweb* [(C-100/12, EU:C:2013:448)], in connection with Article 1(1) and (3) and Article 2(1) of Directive [89/665], as amended by Directive [2007/66], apply to the case in the main proceedings in which an undertaking has challenged its exclusion from a tendering procedure and the award of the contract to another undertaking and the Consiglio di Stato (Council of State) has examined the substance only of the ground of appeal whereby the excluded undertaking disputed the points awarded to its technical offer, which were below the "minimum threshold", and has examined as a matter of priority the cross-appeals brought by the contracting authority and the successful tenderer, has upheld them and has declared inadmissible (and refrained from examining the substance of) the other grounds of the main appeal disputing the outcome of the tendering procedure for other reasons (imprecise tender assessment criteria in the tendering specifications, failure to justify the marks awarded, unlawful appointment and composition of the tender committee), in accordance with national judicial practice according to which an undertaking that has been excluded from a tendering procedure has no standing to bring a claim disputing the award of the contract to a competitor undertaking, even by way of the lapse of the tendering procedure, it being necessary to determine the compatibility with EU law of the effect of depriving the undertaking of the right to submit for the court's examination each and every reason for which it disputes the outcome of the tendering procedure, in a situation where that undertaking's exclusion has not been definitively established and where every competitor may argue a similar legitimate interest in the exclusion of its competitors' tenders, which could make it impossible for the contracting authority to choose a regular tender and make it necessary to launch a new tendering procedure in which every tenderer might participate?'

The request for an expedited procedure and the procedure before the Court

35 In its request for a preliminary ruling, the Corte suprema di cassazione (Supreme Court of Cassation) requested that this reference for a preliminary ruling be determined pursuant to an expedited procedure under Article 105 of the Rules of Procedure of the Court of Justice, on the ground, in essence, that the

dispute in the main proceedings raises grave uncertainty about fundamental constitutional issues under national law, that there are numerous similar disputes pending in Italy, and that the dispute in the main proceedings concerns the field of public procurement, the importance of which in EU law was emphasised.

36 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may decide, after hearing the Judge-Rapporteur and the Advocate General, that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time.

37 It must be borne in mind, in that regard, that such an expedited procedure is a procedural instrument intended to address matters of exceptional urgency (judgment of 15 July 2021, *Commission* v *Poland* (*Disciplinary regime for judges*), C-791/19, EU:C:2021:596, paragraph 32 and the case-law cited).

38 In the present case, on 21 October 2020, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to refuse the request made by the referring court, referred to in paragraph 35 above.

39 The fact that the case concerns an important aspect of the organisation of the courts of the Member State concerned is not, as such, a reason that establishes the exceptional urgency necessary to justify an expedited procedure. The same is true of the fact that a large number of persons or legal situations are potentially concerned by the questions referred (see, to that effect, order of the President of the Court of 18 September 2018, *Tedeschi and Consorzio Stabile Istant Service*, C-402/18, not published, EU:C:2018:762, paragraph 15) or that the dispute in the main proceedings relates to the field of public procurement (see, to that effect, order of the President of the Court of 13 November 2014, *Star Storage*, C-439/14, not published, EU:C:2014:2479, paragraphs 10 to 15).

40 Nevertheless, having regard to the nature and importance of the questions referred, the President of the Court decided that the present case should be given priority treatment in accordance with Article 53(3) of the Rules of Procedure.

41 In addition, pursuant to the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, the Italian Government requested the Court to sit in a Grand Chamber.

Consideration of the questions referred

The first question

42 As a preliminary point, it should be borne in mind that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court, it is for the latter to provide the national court with an answer which will be of use to it and will enable the national court to determine the case before it. To that end, the Court may have to reformulate the questions referred to it (judgment of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 61 and the case-law cited).

43 The first question concerns the effective judicial protection of rights conferred by EU law. It concerns, essentially, the question whether that protection is undermined if the highest court in the judicial order of a Member State does not have jurisdiction to set aside a judgment delivered in breach of EU law by the highest court in the administrative order of that Member State.

44 As the Advocate General noted in point 59 of his Opinion, Article 2(1) and (2) and Article 267 TFEU, mentioned in the first question, are of no relevance for that purpose.

45 It must be noted, first, that Article 2 TFEU concerns the division, between the European Union and its Member States, of the competence to legislate and adopt legally binding acts. The rules set out in that respect in paragraphs 1 and 2 of that article are unrelated to the question of jurisdiction raised by the referring court.

46 Second, as regards Article 267 TFEU, it must be recalled that this is part of a system intended to ensure judicial review of compliance with EU law, such review being ensured, as can be seen from Article 19(1) TEU, not only by the Court of Justice but also by the courts and tribunals of the Member States (see, to that effect, judgments of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraph 112, and of 25 February 2021, *VodafoneZiggo Group* v *Commission*, C-689/19 P, EU:C:2021:142, paragraph 143). In the context of that system, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 16 and the case-law cited). Yet the issue raised by the referring court in its first question, which, as is apparent from paragraph 43 of the present judgment, concerns the extent to which the highest court in the national judicial order must, for the purposes of ensuring the effective judicial protection required by EU law, have jurisdiction to carry out a judicial review of judgments delivered by the highest court in the national administrative order, is not in itself related in any way to the mechanism for cooperation between the Court of Justice and the national courts provided for by Article 267 TFEU.

47 Accordingly, the first question must be reformulated so as to remove Article 2(1) and (2) and Article 267 TFEU from the substance of that question.

48 In so far as the referring court refers moreover, in its first question, to the right to an effective remedy set out in Article 47 of the Charter, it should be borne in mind that, under Article 51(1), the Charter is addressed to the Member States only when they are implementing EU law.

49 In that regard, it must be noted that, in the field of public procurement at issue in the main proceedings, Article 1(1) and (3) of Directive 89/665 lays down the Member States' obligation to provide for effective reviews. It follows, as the Advocate General stated in point 67 of his Opinion, that, in that field, the right to an effective remedy and to a fair hearing, enshrined in the first and second paragraphs of Article 47 of the Charter, is relevant, in particular, when the Member States establish, in accordance with that obligation, detailed procedural rules governing the judicial remedies which safeguard the rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 128 and the case-law cited).

50 Accordingly, the first question must also be reformulated to encompass Article 1(1) and (3) of Directive 89/665, which must be read in the light of Article 47 of the Charter.

51 It follows from the foregoing considerations that the first question must be understood as seeking to establish whether Article 4(3) and Article 19(1) TEU, and Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding a provision of a Member State's domestic law which, according to national case-law, has the effect that individual parties, such as tenderers who participated in a procedure for the award of a public contract, cannot challenge the conformity with EU law of a judgment of the highest court in the administrative order of that Member State by means of an appeal before the highest court in that Member State's judicial order.

52 On that point, it must be noted at the outset that, by virtue of the principle of primacy of EU law, rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law (judgment of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)*, C-439/19, EU:C:2021:504, paragraph 135 and the case-law cited).

53 The effects of that principle are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, being able to prevent that (judgment of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 245 and the case-law cited).

54 Consequently, where it is proved that a provision of EU law which imposes on the Member States a clear and precise obligation as to the result to be achieved has been infringed, the national courts must disapply, if necessary, the provisions of domestic law leading to that infringement, even if they are

constitutional provisions (see, to that effect, judgment of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraphs 250 and 251 and the case-law cited). Where the incompatibility of a provision of domestic law with EU law arises more specifically from the interpretation of that provision adopted by a court of the Member State concerned, that case-law must be disregarded (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 38 and the case-law cited).

55 It is important, therefore, to consider whether a limitation on the ability to bring an appeal in cassation against judgments of the highest court in a Member State's administrative order, such as that derived in the present case – according to the interpretation given in judgment No 6/2018 – from the eighth paragraph of Article 111 of the Constitution, is at odds with the requirements of effective judicial protection imposed by EU law, and therefore with the unity and with the effectiveness of EU law.

56 As regards those requirements, it must be noted that the second subparagraph of Article 19(1) TEU obliges Member States to provide remedies sufficient to ensure effective legal protection for individual parties in the fields covered by EU law (judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 32 and the case-law cited).

57 The principle of the effective legal protection of individual parties' rights under EU law thus referred to in that provision is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgment of 15 July 2021, *Commission* v *Poland* (*Disciplinary regime for judges*), C-791/19, EU:C:2021:596, paragraph 52 and the case-law cited).

58 That being so, subject to any EU rules on the matter, it is, in accordance with the principle of procedural autonomy, for the national legal order of each Member State to establish procedural rules for the remedies referred to in paragraph 56 of the present judgment, on condition, however, that those rules are not – in situations governed by EU law – less favourable than in similar domestic situations (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 10 March 2021, *Konsul Rzeczypospolitej Polskiej w N.*, C-949/19, EU:C:2021:186, paragraph 43 and the case-law cited).

59 Thus, EU law in principle does not preclude Member States from restricting or imposing conditions on the pleas which may be relied on in proceedings in an appeal in cassation, subject to respect for the principles of equivalence and effectiveness (judgment of 17 March 2016, *Bensada Benallal*, C-161/15, EU:C:2016:175, paragraph 27).

60 As regards observance of the principle of equivalence, it appears, in the light of the information provided in the order for reference and at the hearing before the Court, that the eighth paragraph of Article 111 of the Constitution, as interpreted in judgment No 6/2018, limits, according to the same procedural rules, the jurisdiction of the Corte suprema di cassazione (Supreme Court of Cassation) to hear and determine appeals against judgments of the Consiglio di Stato (Council of State), regardless of whether these are based on provisions of national law or of EU law.

61 In those circumstances, it must be held that such a rule of domestic law does not breach the principle of equivalence.

62 So far as the principle of effectiveness is concerned, it must be borne in mind that EU law does not have the effect of requiring Member States to establish remedies other than those established by national law, unless it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law, or the sole means of obtaining access to a court is effectively for individuals to break the law (see, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 143 and the case-law cited).

63 In the present case, while it is for the referring court to ascertain whether there is in principle such a remedy in the Italian legal order in the field of public procurement, there is ostensibly nothing in the request for a preliminary ruling or in the observations lodged before the Court to suggest that Italian procedural law in itself has the effect of making it impossible or excessively difficult to exercise, in this area of administrative law, the rights conferred by EU law.

64 In circumstances in which such a legal remedy does exist, making it possible to ensure respect for the rights that individual parties derive from EU law, it is, as is apparent from the case-law referred to in paragraph 62 of the present judgment, entirely open – from the point of view of EU law – to the Member State concerned to confer jurisdiction on the highest court in its administrative order to adjudicate on the dispute at last instance, in relation both to the facts and to points of law, and consequently to prevent the dispute from being open to further substantive examination in an appeal in cassation before the highest court in its judicial order.

65 It follows that, provided it is established that a judicial remedy such as that described in the preceding paragraph exists, a rule of domestic law such as the eighth paragraph of Article 111 of the Constitution, as interpreted by judgment No 6/2018, also does not undermine the principle of effectiveness and reveals nothing that would indicate any infringement of the second subparagraph of Article 19(1) TEU.

66 That conclusion cannot be called into question on the basis of Article 4(3) TEU, which requires the Member States to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. As regards the system of remedies sufficient to ensure effective judicial review in the fields covered by EU law, Article 4(3) TEU cannot be interpreted as meaning that the Member States are required to provide new legal remedies, which they are not however required to do under the second subparagraph of Article 19(1) TEU.

67 In the particular field of public procurement, Article 1 of Directive 89/665, read in the light of the first paragraph of Article 47 of the Charter, does not, moreover, militate against that conclusion.

68 It is apparent from Article 1(1) of Directive 89/665 that, in accordance with the conditions set out in Articles 2 to 2f thereof, the decision taken by the contracting authority in a tendering procedure falling within the scope of Directive 2014/24 or Directive 2014/23 must be capable of being reviewed effectively and as rapidly as possible as to its conformity with EU law in the field of public procurement or with national rules transposing that law. Article 1(3) makes clear, moreover, that such reviews must be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

69 In so far as individual parties have access, in the relevant field, to an independent and impartial tribunal previously established by law, within the meaning of the second paragraph of Article 47 of the Charter, which appears to be the case – subject to verification by the referring court – in the Italian legal system, a national rule of law which prevents substantive assessments by the highest court in the administrative order from being open to further examination by the highest court in the judicial order cannot be regarded as a limitation, within the meaning of Article 52(1) of the Charter, of the right to a fair trial laid down in Article 47 of the Charter.

70 However, it must be borne in mind that, in accordance with the case-law of the Court, the admissibility of reviews referred to in Article 1 of Directive 89/665 cannot be made subject to the condition that the applicant adduces evidence that the contracting authority will have to restart the public procurement procedure if the review is successful. The mere existence of such a possibility must be regarded as being sufficient in that respect (see, to that effect, judgment of 5 September 2019, *Lombardi*, C-333/18, EU:C:2019:675, paragraph 29).

71 It follows that in a case such as that in the main proceedings, where Randstad, as a tenderer excluded from a tendering procedure, brought an action before the administrative court at first instance that was based on pleas aimed at demonstrating the irregularity of that procedure, the substance of that action had to be examined.

72 In the case of tenderers which have been excluded from the tendering procedure, Article 2a of Directive 89/665 makes clear that these are no longer to be deemed to be concerned and the contract award decision must not therefore be communicated to them if their exclusion has become definitive. However, where those tenderers have not yet been definitively excluded, the contract award decision, accompanied by a summary of the relevant reasons and a statement of the standstill period for conclusion of the contract following that decision, must be communicated to them. It is apparent from reading paragraphs 1 and 2 of that article together that compliance with those minimum conditions is intended to enable such tenderers to seek an effective review of that decision.

73 In accordance with Article 2a(2) of Directive 89/665, the exclusion of a tenderer is definitive if it has been notified to that tenderer and has been 'considered lawful' by an 'independent review body' or can no longer be subject to a review procedure. That directive, which seeks to ensure full respect for the right to an effective remedy and to a fair hearing (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 45), must be interpreted in the light of the second paragraph of Article 47 of the Charter. In those circumstances, the term 'independent review body' within the meaning of Article 2a of that directive must, for the purposes of determining whether the exclusion of a tenderer has become definitive, be understood to mean an independent and impartial tribunal previously established by law, within the meaning of Article 47 of the Charter.

74 The fact that the exclusion decision is not yet definitive thus determines, for those tenderers, their standing to challenge the contract award decision, and that standing cannot be weakened by other – irrelevant – factors, such as the ranking of the excluded tenderer's offer or the number of participants in the tendering procedure (see, to that effect, in particular, judgments of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 57 and 58, and of 5 September 2019, *Lombardi*, C-333/18, EU:C:2019:675, paragraphs 29 to 32).

75 In the present case, by deciding that the independent review body seised at first instance, the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta), should have declared inadmissible the pleas calling the award decision into question, on the ground that Randstad had been excluded from the procedure, the Consiglio di Stato (Council of State) disregarded the rule, laid down by the EU legislature and recalled in the case-law of the Court of Justice, that only the definitive exclusion, within the meaning of Article 2a(2) of Directive 89/665, can have the effect of depriving a tenderer of standing to challenge the award decision.

76 It must be noted, in regard to the facts of the case in the main proceedings, that it is apparent from the file available to the Court that both at the time when Randstad brought the action before the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) and at the time when the latter gave its ruling, the decision of the procurement committee to exclude Randstad from the procedure had not yet been considered lawful by the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) or by any other independent review body.

77 It would thus appear that the variation of the judgment of the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) by the Consiglio di Stato (Council of State), declaring inadmissible that part of Randstad's action by which the award of the contract to Synergie-Umana was challenged, is incompatible with the right to an effective remedy guaranteed by Article 1(1) and (3) of Directive 89/665, read in the light of Article 2a(2) of that directive. Consequently, the judgment of the Consiglio di State (Council of State) is also inconsistent with the first paragraph of Article 47 of the Charter.

78 However, in a situation such as that at issue in the main proceedings, where, subject to verification by the referring court, national procedural law in itself permits interested persons to bring an action before an independent and impartial tribunal and to assert effectively that EU law, and provisions of national law transposing EU law into the domestic legal order, have been infringed, but where the highest court in the administrative order of the Member State concerned, adjudicating at last instance, wrongly makes the admissibility of that action subject to conditions that have the effect of depriving those interested persons of their right to an effective remedy, EU law does not require that that Member State make provision – for the purpose of addressing the infringement of that right to an effective remedy –

for the possibility of lodging an appeal before the highest court in the judicial order against such inadmissibility decisions from the highest administrative court, where no such remedy is provided for under its national law.

79 In that situation, the remedy against the infringement of Directive 89/665 and the first paragraph of Article 47 of the Charter resulting from the case-law of the highest administrative court lies in the obligation, for every administrative court of the Member State concerned, including the highest administrative court itself, to disregard that case-law which is not in conformity with EU law, and, if that obligation is not fulfilled, in the possibility of the European Commission instituting proceedings against that Member State for failure to fulfil its obligations.

80 It is moreover open to individuals who may have been harmed by the infringement of their right to an effective remedy as a result of a decision of a court adjudicating at last instance to hold that Member State liable, provided that the conditions relating to the sufficiently serious nature of the breach and to the existence of a direct causal link between that breach and the loss or damage sustained by the injured party are satisfied (see, to that effect, in particular, judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 59; of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 58; and of 4 March 2020, *Telecom Italia*, C-34/19, EU:C:2020:148, paragraphs 67 to 69).

81 In the light of all of the foregoing considerations, the answer to the first question is that Article 4(3) and Article 19(1) TEU, and Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as not precluding a provision of a Member State's domestic law which, according to national case-law, has the effect that individual parties, such as tenderers who participated in a procedure for the award of a public contract, cannot challenge the conformity with EU law of a judgment of the highest court in the administrative order of that Member State by means of an appeal before the highest court in that Member State's judicial order.

The second question

82 By its second question, the referring court asks, in essence, whether Article 4(3) and Article 19(1) TEU and Article 267 TFEU, read in the light of Article 47 of the Charter, must be interpreted as precluding a provision of domestic law which, according to national case-law, has the effect that individual parties cannot, by means of an appeal in cassation to the highest court in the judicial order of that Member State against a judgment of the highest court in that Member State's administrative order, challenge the failure, without reason, by the latter court adjudicating at last instance to submit a request for a preliminary ruling to the Court of Justice, despite there being some uncertainty as to the correct interpretation of EU law.

83 However, it is apparent from the file available to the Court that Randstad does not put forward in its appeal in cassation any grounds of appeal alleging that the Consiglio di Stato (Council of State) refrained, contrary to the third paragraph of Article 267 TFEU, from submitting a request for a preliminary ruling to the Court of Justice, as Randstad confirmed when questioned in that regard at the hearing before the Court of Justice.

84 It follows that, in the context of the proceedings before it, the referring court is not obliged to determine whether, in the light of the requirements ensuing from EU law, the Member States are required to make provision in their legal system for appeals to be brought before the highest court in the judicial order when the highest court in the administrative order has refrained from putting a question to the Court of Justice for a preliminary ruling; the answer to the second question is therefore irrelevant for the purpose of resolving this dispute.

85 Since it bears no relation to the subject matter of the dispute in the main proceedings, the second question is, in accordance with settled case-law, inadmissible (see, to that effect, judgment of 15 July 2021, *Ministrstvo za obrambo*, C-742/19, EU:C:2021:597, paragraph 30 and the case-law cited).

The third question

86 In view of the answer given to the first question, there is no need to answer the third question.

Costs

87 Since these proceedings are, for the parties to the main proceedings, a step in the action before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 4(3) and Article 19(1) TEU, and Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding a provision of a Member State's domestic law which, according to national case-law, has the effect that individual parties, such as tenderers who participated in a procedure for the award of a public contract, cannot challenge the conformity with EU law of a judgment of the highest court in the administrative order of that Member State by means of an appeal before the highest court in that Member State's judicial order.

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

HOGAN

delivered on 9 September 2021(1)

Case C-497/20

Randstad Italia SpA

v

Umana SpA,

Azienda USL Valle d'Aosta,

IN. VA SpA,

Synergie Italia agenzia per il lavoro SpA

(Request for a preliminary ruling from the Corte suprema di cassazione (Supreme Court of Cassation, Italy))

(Reference for a preliminary ruling – Public procurement – Directive 89/665/EEC – Article 1 – Right to an effective remedy – Article 47 of the Charter of Fundamental Rights of the European Union – Obligation for Member States to provide for a review procedure – Access to review procedures – Action for annulment of the decision awarding a public contract – Counterclaim brought by the successful tenderer – Case-law of the Constitutional Court limiting the cases where an appeal in cassation is possible – Article 267 TFEU)

I. Introduction

1. The present request for a preliminary ruling raises important and, in some respects, novel issues concerning the question whether a Member State is obliged to provide a further right of appeal where an appellate court has itself misinterpreted or misapplied EU law. It also raises the question of what (if any) other remedies are available to the injured party in the event that there is no such right of appeal.

2. This request concerns more specifically the interpretation of Articles 4(3) and 19(1) TEU and of Articles 2(1) and (2) and 267 TFEU, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). It also raises issues concerning the proper interpretation of Article 1(1) and (3) and Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (2) as amended, inter alia, by Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007. (3)

3. This application was made in the context of proceedings between Randstad Italia SpA ('Randstad') and Umana SpA, Azienda USL (Unità Sanitaria Locale) Valle d'Aosta (local health agency of the Valle d'Aosta region, Italy; 'USL'), IN. VA SpA and Synergie Italia agenzia per il lavoro SpA ('Synergie'). These proceedings concern, on the one hand, the exclusion of Randstad from a procedure for the award of a public contract and, on the other hand, the regularity of that procedure.

4. The Court is thus once again called upon to rule, at the request of an Italian court, on the scope of the obligation of the Member States, laid down in Article 1 of Directive 89/665, to ensure effective review of public contracts where, in the context of an action for annulment of the decision awarding a public contract, the successful tenderer brings a counterclaim against the unsuccessful tenderer.

5. However, this request occurs in a specific and sensitive context where, on the one hand, the Consiglio di Stato (Council of State, Italy) seems to have – at least at the time when it was called upon to rule on the dispute in question – some difficulty in applying the case-law of the Court on that issue and where, on the other hand, the Corte suprema di cassazione (Supreme Court of Cassation, Italy) has doubts about the extent of its jurisdiction with regard to appeals against judgments of the Consiglio di Stato (Council of State), as recently specified by the Corte costituzionale (Constitutional Court, Italy). With the present request for a preliminary ruling, the Court is therefore implicitly called upon to arbitrate a conflict between the three Italian supreme courts.

II. Legal Context

A. EU law

6. Recitals 17, 34 and 36 of Directive 2007/66 provide:

'(17) A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…

(34) ... In accordance with the principle of proportionality, as set out in [Article 5 TEU], this Directive does not go beyond what is necessary in order to achieve that objective, while respecting the principle of the procedural autonomy of the Member State.

…

(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.'

7. Article 1 of Directive 89/665, in its current version, entitled 'Scope and availability of review procedures', provide:

'1. This Directive applies to contracts referred to in Directive 2014/24/EU of the European Parliament and of the Council [of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65),] unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/24] or Directive 2014/23/EU [of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1)], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

8. Article 2 of Directive 89/665 is entitled 'Requirements for review procedures'. According to the first two paragraphs of that provision:

'1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.'

B. Italian law

9. The eight paragraph of Article 111 of the Italian Constitution provides:

'Appeals in cassation against decisions of the Council of State and the Corte dei conti [Court of Auditors] are permitted only for reasons of jurisdiction.'

10. Article 360(1)(1) of the Codice di procedura civile (Code of Civil Procedure) provides:

'Judgments delivered on appeal or at sole instance may be challenged by an appeal in cassation:

(1) for reasons relating to jurisdiction …';

11. Article 362(1)(2) of the same code provides:

'1. An appeal in cassation may be brought … against a decision given by a special court on appeal or at sole instance, for reasons relating to the jurisdiction of that court …

2. The following may be appealed in cassation at any time:

(1) positive or negative conflicts of jurisdiction between special judges, or between them and ordinary judges;

(2) negative conflicts of attribution between the public administration and the ordinary judge.'

12. Article 91 of the Codice del processo amministrativo (Code of Administrative Procedure) provides:

'Judgments [of the administrative courts] may be challenged by way of appeal, revocation, opposition by a third party or an appeal in cassation for reasons of jurisdiction only.'

13. Article 110 of the same code provides:

'An appeal in cassation may be brought against a judgment of the Consiglio di Stato [Council of State] for reasons of jurisdiction only.'

III. The facts of the main proceedings

14. USL launched a tendering procedure with a value of more than EUR 12 000 000 for the purpose of awarding a contract, on the basis of the most economically advantageous tender, to an employment agency for the temporary supply of personnel. The contracting authority stipulated in the tender documents that technical offers must exceed a 'minimum threshold' – set at 48 points – and that competitors awarded points below that threshold would be excluded.

15. Eight competing undertakings participated in the tender process, including Randstad, a temporary association of undertakings formed by Synergie and Umana ('the TAU'), and Gi Group Spa. After evaluating the technical offers, the procurement committee proceeded to make an economic

assessment of the tenders of the TAU and Gi Group alone and excluded Randstad for having failed to pass the threshold. The contract was ultimately awarded to the TAU on 6 November 2018.

16. Randstad brought proceedings before the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta, Italy) disputing its exclusion for having failed to pass the threshold and challenging the award of the contract to the TAU. With a view to gaining readmission to the tendering procedure, Randstad argued that the points it had been awarded were unreasonable, that the assessment criteria were imprecise, that there had been a failure to justify the marks, that the appointment and composition of the procurement committee were unlawful, and that there had been a failure to divide the call for tenders into lots.

17. USL and the TAU defended that action, raising the objection that Randstad's pleas in law were inadmissible: they maintained that Randstad lacked standing to make the claims since it had, in any event, been excluded from the tendering procedure.

18. In a judgment published 15 March 2019, the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) rejected that objection to admissibility, taking the view that Randstad had legitimately participated in the tendering procedure, inasmuch as it met the requirements, and had been excluded from that procedure following a negative assessment of its tender, and that it therefore had standing to challenge the outcome of the tendering procedure. That court then proceeded to examine all the claims made in the action and dismissed them on their merits.

19. Randstad brought an appeal against that judgment of the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) before the Consiglio di Stato (Council of State), reiterating the arguments it had made at first instance. Synergie and Umana brought a cross-appeal, taking issue with the Regional Administrative Court's judgment in so far as that court had treated as admissible and had examined the substance of Randstad's claims, which they regarded as having been made by a person that lacked standing, having been excluded from the tendering procedure.

20. In a judgment published 7 August 2019, the Consiglio di Stato (Council of State) rejected the main ground of appeal by which Randstad disputed the award of insufficient points and upheld the cross-appeals. In particular, the Consiglio di Stato (Council of State) varied the judgment under appeal in part and held that Randstad lacked *locus standi* since it had been excluded from the tendering procedure. It followed that the Regional Administrative Court therefore should not have examined the substance of the other claims made in the main action.

21. According to the Consiglio di Stato (Council of State), once it had been excluded from the tendering procedure Randstad lacked standing, because it had a purely factual interest, like any other operator in the sector that had not participated in the tendering procedure. The Consiglio di Stato (Council of State) followed its earlier case-law according to which a competitor that has been excluded from a tendering procedure has no standing to challenge the tender documents, unless it obtains a ruling that its exclusion was unlawful.

22. Randstad brought an appeal in cassation against the judgment of the Consiglio di Stato (Council of State) before the referring court. Synergie, Umana and the contracting authority are defending that appeal.

23. Randstad maintains that the Consiglio di Stato (Council of State) infringed Article 362(1) of the Italian Code of Civil Procedure and Article 110 of the Italian Code of Administrative Procedure, in that it ruled that a person excluded from a tendering procedure – by means of a decision whose lawfulness has not been definitively established, inasmuch as it is disputed in legal proceedings – has no standing and no interest in bringing a complaint concerning the tendering procedure. That, it contended, entails a breach of the principle of effective judicial protection which is enshrined in Directive 89/665, and a denial of access to such protection which may be challenged by way of an appeal in cassation for reasons of jurisdiction, in accordance with the eighth paragraph of Article 111 of the Italian Constitution.

24. Randstad relies on the case-law of the Court of Justice according to which even the mere likelihood of securing an advantage by bringing an action, consisting in the outcome thereof, whatever it may be, such as a repetition of the tendering procedure, is capable of establishing an interest in bringing proceedings and the right to judicial protection. The appellant cites for this purpose the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448); of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199); and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675).

25. The respondents argue that the appeal is inadmissible. They maintain that the ground of appeal in question concerns an alleged infringement of the law. It is not a 'reason of jurisdiction' and therefore cannot be invoked before the Corte suprema di cassazione (Supreme Court of Cassation) in order to challenge a judgment of the Consiglio di Stato (Council of State).

26. According to the referring court, the appeal in cassation referred to in the eighth paragraph of Article 111 of the Italian Constitution should, in such a case, be available. The effectiveness of Article 267 TFEU would be undermined if the national court were prevented from immediately applying EU law in accordance with the case-law of the Court of Justice. In a case such as the present, an appeal in cassation would be the final means of preventing a judgment of the Consiglio di Stato (Council of State) which (it is said) is contrary to EU law from becoming *res judicata*.

27. However, it is apparent from Judgment No 6 of 18 January 2018 of the Corte costituzionale (Constitutional Court) (4) concerning the eighth paragraph of Article 111 of the Italian Constitution ('Judgment No 6/2018') that it is not permissible, in the current state of Italian constitutional law as interpreted in that judgment, to equate a breach of EU law with a plea relating to jurisdiction. According to that judgment, '"Exceeding judicial authority", which may be contested by means of appeal to the Supreme Court of Cassation for reasons pertaining to jurisdiction [within the meaning of the eighth paragraph of Article 111 of the Italian Constitution], as it has always been understood … refers exclusively to two types of scenarios: those characterised by a total lack of jurisdiction, that is, when the Council of State or the Court of Auditors asserts its own jurisdiction over the area reserved to the legislator or the administration (a so-called invasion or encroachment), or when, on the contrary, it denies jurisdiction on the erroneous assumption that the subject matter cannot, absolutely speaking, be the object of its judicial review (so-called abstention), as well as those scenarios [characterised by a relative lack of] jurisdiction, when an administrative or Court of Auditors judge asserts jurisdiction over a subject matter attributed to a different jurisdiction or, on the contrary, denies it on the erroneous assumption that it belongs to other courts'. (5)

28. The referring court concludes that it should declare Randstad's appeal in cassation inadmissible if it were to comply with that judgment of the Corte costituzionale (Constitutional Court). That being so, it queries whether Judgment No 6/2018, which limits, in administrative matters, the jurisdiction of the Corte suprema di cassazione (Supreme Court of Cassation) referred to in the eighth paragraph of Article 111 of the Italian Constitution to cases in which it is alleged that the Consiglio di Stato (Council of State) has disregarded the 'external limits' of its jurisdiction, would infringe EU law.

29. In that regard, the referring court considers that, where the Consiglio di Stato (Council of State) misapplies or misinterprets national provisions of law in a manner incompatible with the provisions of EU law as interpreted by the Court of Justice, it is exercising a jurisdictional power which it does not have. In reality it is exercising a power to create law which is not even conferred on the national legislature. This constitutes a lack of jurisdiction which should be subject to an appeal to the Corte suprema di cassazione (Supreme Court of Cassation). It is irrelevant in this respect whether the judgment of the Court of Justice from which the incompatibility between the application or interpretation by the national court and EU law arose is prior or subsequent to that application or interpretation.

30. The referring court points out that, prior to Judgment No 6/2018, the consistent case-law of its own combined chambers was that, in the event of an appeal against a judgment of the Consiglio di Stato (Council of State), the review of the external limits of 'jurisdiction', within the meaning of the eighth paragraph of Article 111 of the Italian Constitution, did not extend to the review of the interpretative choices made by the administrative court that might involve simple errors '*in iudicando*' (on the merits) or '*in procedendo*' (on the procedure), unless there was a fundamental distortion of the applicable rules which could constitute a denial of justice, such as an error *in procedendo* consisting in the application of a domestic procedural rule which had the effect of denying the party concerned access to the judicial protection granted by directly applicable provisions of EU law.

31. Such an approach would be compatible with the principles of equivalence and effectiveness which, according to the case-law of the Court of Justice, condition the exercise of the procedural autonomy of the Member States. Judgment No 6/2018 and the case-law which has developed in its wake are, on the contrary, incompatible with those principles.

32. Then, it is also important for the Corte suprema di cassazione (Supreme Court of Cassation) to know, following that reference for a preliminary ruling, whether or not the approach followed by the Consiglio di Stato (Council of State) in the contested judgment is compatible with the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448); of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199); and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675). This aspect of the dispute raises two separate issues.

33. First, the referring court wonders whether the case-law already established by the Court of Justice concerning the right of review of tenderers excluded from public procurement procedures is transposable to a case such as that at issue in the main proceedings. Second, since the Consiglio di Stato (Council of State) refrained, without giving reasons, from asking the Court of Justice whether the lessons to be drawn from the judgments cited in the previous point of this Opinion are transposable to a case such as that at issue in the main proceedings, it is important, in the view of the referring court, that it should itself now be able to refer that question to the Court of Justice.

IV. The request for a preliminary ruling and the procedure before the Court

34. It is in those circumstances that, by decision of 7 July 2020, received at the Court on 30 September 2020, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do Article 4(3) TEU, Article 19(1) TEU, Article 2(1) and (2) TFEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, preclude an interpretative practice such as that regarding the eighth paragraph of Article 111 of the Italian Constitution, Article 360(1)(1) and Article 362(1) of the Italian Code of Civil Procedure, and Article 110 of the Italian Code of Administrative Procedure – under which provisions an appeal in cassation against a judgment of the Consiglio di Stato (Council of State) may be brought for "reasons of jurisdiction" – such as that which emerges from Judgment No 6/2018 of the Corte costituzionale (Constitutional Court) and from subsequent national case-law, in which it has been held, marking a departure from the approach previously taken, that the remedy of an appeal in cassation, on grounds of a "lack of jurisdiction", is not available for the purpose of challenging judgments in which the Council of State has applied interpretative practices developed nationally but in conflict with judgments of the Court of Justice, in sectors governed by EU law (in the present case, public procurement) and with regard to which the Member States have waived their right to exercise sovereign powers in a manner incompatible with EU law, with the effect of consolidating infringements of Community law that might have been rectified using the remedy of an appeal in cassation and of undermining the uniform application of EU law and the effectiveness of the judicial protection afforded to individuals in legal situations of Community significance, contrary to the requirement that EU law be fully and duly applied by every court in a manner necessarily consistent with its correct interpretation by the Court of Justice, regard being had to the limits on the "procedural autonomy" of the Member States in the structuring of their rules of procedure?

(2) Do Article 4(3) TEU, Article 19(1) TEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, preclude the eighth paragraph of Article 111 of the Italian Constitution, Article 360(1)(1) and Article 362(1) of the Italian Code of Civil Procedure, and Article 110 of the Italian Code of Administrative Procedure from being interpreted and applied, as they have been in national judicial practice, in such a manner that an appeal in cassation before the Combined Chambers [of the Court of Cassation] for "reasons of jurisdiction", on grounds of a "lack of jurisdiction", cannot be brought for the purpose of challenging a judgment in which the Council of State, ruling in a dispute involving issues concerning the application of EU law, refrains, without reason, from making a reference to the Court of Justice for a preliminary ruling, where the conditions relieving a national court of that obligation, which have been exhaustively listed by the Court of Justice (in its judgment of 6 October 1982, *Cilfit and Others*, 283/81 [EU:C:1982:335]) and which must be strictly interpreted, are absent, contrary to the principle that national rules and procedural practices, even those arising from legislation or the Constitution, are incompatible with EU law if they prevent a national court (of last instance or otherwise), even temporarily, from making a reference for a preliminary ruling, with the effect of usurping the Court of Justice's exclusive jurisdiction to interpret Community law correctly and in binding fashion, of making any conflicts of interpretation between the law applied by national courts and EU law irremediable (and promoting the consolidation of such conflicts of interpretation), and of undermining the uniform application and effective judicial protection of the rights enjoyed by individuals under EU law?

(3) Do the principles expressed by the Court of Justice in its judgments of 5 September 2019, *Lombardi*, C-333/18[, EU:C:2019:675]; of 5 April 2016, *PFE*, C-689/13[, EU:C:2016:199]; and of 4 July 2013, *Fastweb*, C-100/12[, EU:C:2013:448], in connection with Article 1(1) and (3) and Article 2(1) of [Directive 89/665], as amended by [Directive 2007/66], apply to the case in the main proceedings in which an undertaking has challenged its exclusion from a tendering procedure and the award of the contract to another undertaking and the Council of State has examined the substance only of the ground of appeal whereby the excluded undertaking disputed the points awarded to its technical offer, which were below the "minimum threshold", and has examined as a matter of priority the cross-appeals brought by the contracting authority and the successful tenderer, has upheld them and has declared inadmissible (and refrained from examining the substance of) the other grounds of the main appeal disputing the outcome of the tendering procedure for other reasons (imprecise tender assessment criteria in the tendering specifications, failure to justify the marks awarded, unlawful appointment and composition of the tender committee), in accordance with national judicial practice according to which an undertaking that has been excluded from a tendering procedure has no standing to bring a claim disputing the award of the contract to a competitor undertaking, even by way of the lapse of the tendering procedure, it being necessary to determine the compatibility with EU law of the effect of depriving the undertaking of the right to submit for the court's examination each and every reason for which it disputes the outcome of the tendering procedure, in a situation where that undertaking's exclusion has not been definitively established and where every competitor may argue a similar legitimate interest in the exclusion of its competitors' tenders, which could make it impossible for the contracting authority to choose a regular tender and make it necessary to launch a new tendering procedure in which every tenderer might participate?'

35. In its order for reference, the Corte suprema di cassazione (Supreme Court of Cassation) requested that the present reference for a preliminary ruling be dealt with under an expedited procedure pursuant to Article 105 of the Rules of Procedure of the Court of Justice.

36. In support of its request, the referring court submitted, in essence, that there are valid reasons for seeking to clarify swiftly questions of constitutional importance. The number of appeals against judgments of the Consiglio di Stato (Council of State) in EU law cases that are pending before the Corte di cassazione (Supreme Court of Cassation) shows that there is grave uncertainty as to the scope of the judicial protection of rights conferred

by EU law. This needs to be dispelled, particularly in a key sector such as public procurement, in order, inter alia, to avoid the consolidation of national case-law of courts of last instance that might be followed in numerous other rulings.

37. On 21 October 2020, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to refuse the referring court's request regarding the expedited procedure. On the same day, the President of the Court also decided to give priority treatment to the present case in accordance with Article 53(3) of the Rules of Procedure.

38. Written observations were submitted by Randstad, Umana, the USL, Synergie, the Italian Government, and the Commission. In addition, Randstad, Umana, the Italian Government, and the Commission presented oral arguments at the hearing on 6 July 2021.

V. Preliminary remarks on the context

39. As mentioned in the introduction to this Opinion, the present case concerns, at the outset, the scope of the obligation of the Member States, laid down in Article 1 of Directive 89/665, to ensure effective review of public contracts in the particular situation where a counterclaim is brought by the successful tenderer. The questions referred are, moreover, part of a wider debate between the three Italian supreme courts. In this context, before examining more specifically the questions asked by the Corte suprema di cassazione (Supreme Court of Cassation), it seems useful to begin the analysis by recalling, not only the case-law of the Court of Justice on the subject, but also the Italian procedural context.

A. Synthesis of the case-law of the Court on Directive 89/665 when a counterclaim is brought by the successful tenderer

40. The question of how to deal under Directive 89/665 with a situation in which a claim is brought against a tenderer seeking its exclusion and a counterclaim is submitted is not new. One can, I think, fairly say that the effect of a series of references for preliminary ruling has been that the issue of standing in public procurement proceedings has been clearly resolved by the Court.

41. First, it follows from the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 that in order for the review of decisions taken by contracting authorities to be regarded as effective, they must be available at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement. (6)

42. Accordingly, where, following a public procurement procedure, two tenderers bring actions, each seeking the exclusion of the other, each of those tenderers will have an interest in obtaining a particular contract within the meaning of the provisions referred to in the preceding paragraph. On the one hand, the exclusion of one tenderer may lead to the other being awarded the contract directly in the same procedure. On the other, if all tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly. (7)

43. It follows that the counterclaim brought by the successful tenderer cannot bring about the dismissal of an action for review brought by an unsuccessful tenderer where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings, given that, in such a situation, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid. (8)

44. Second, the Court has also pointed out that the number of participants in the public procurement procedure concerned as well as the number of participants who have instigated review procedures and the differing legal grounds relied on by those participants are irrelevant to the question of the applicability of the principle according to which the interests pursued in actions by tenderers, in the context of reciprocal 'excluding' actions, are to be regarded as equivalent in principle. (9)

45. That means that this principle also applies when other tenderers have submitted bids in the context of the procurement process and when the reciprocal 'excluding' actions by parties, do not relate to bids ranked lower than those that are the subject of the 'excluding' actions. (10) Indeed, if the action by the unsuccessful tenderer were held to be well founded, the contracting authority could decide to cancel the procurement procedure and open a new one on the ground that the remaining valid bids do not sufficiently meet the contracting authority's expectations. (11)

46. Third, in that regard, the Court stated that under those circumstances, the admissibility of the main action cannot, without depriving Directive 89/665 of its effectiveness, be contingent on a prior finding that all of the bids ranked lower than that of the tenderer are invalid. (12)

47. The importance of this is that each of the parties to the proceedings has a legitimate interest in the exclusion of the bids submitted by the other competitors. The reasoning here is that one of the irregularities justifying the exclusion of both the successful tenderer's bid and that of the tenderer challenging the contracting authority's decision may also vitiate the other bids submitted in the tendering procedure, which may result in that authority having to launch a new procedure. (13)

48. It follows from that case-law of the Court that the admissibility of the main action cannot be made subject to the condition that the tenderer must adduce evidence that the contracting authority will have to restart the public procurement procedure. The mere existence of such a possibility must be regarded as being sufficient in that respect. (14)

49. In other words, a tenderer excluded from a public procurement procedure must have the right to seek a review of the decision to exclude him from the procurement procedure as well as to access a review of other decisions of the contracting authority provided that any such review might at least *theoretically* result in either the awarding of the contract to the claimant or to a new procurement procedure. (15)

50. If I may now anticipate matters covered in the course of the third question, I am therefore of the view that inasmuch as the Consiglio di Stato (Council of State) ruled otherwise in the case at hand, this amounted – objectively speaking (16) – to a failure properly to apply the existing jurisprudence of the Court of Justice regarding *locus standi* in procurement matters. These standing rules – which, of necessity, are broad and liberal – serve the important public policy goal of ensuring that undertakings who maintain that they have been improperly or unfairly excluded from the procurement process may challenge that decision. The procurement rules seek to ensure that public monies are disbursed fairly and that public contracts are awarded on the basis of objectively justifiable criteria. The misapplication of these standing rules is not, therefore, simply a technical failure or error on the part of a national court but is rather one which has the potential to impact – sometimes in a far-reaching way – on the efficiency and even the integrity of the entire procurement process.

51. It is true that the judgment in *Lombardi* (itself a reference from the Consiglio di Stato) was delivered in September 2019 about a month after the judgment of the Consiglio di Stato (Council of State) at issue in the present case. Yet in truth the existing case-law of this Court in cases such as *Fastweb* and *PPE* had already given very clear guidance on this general question of standing in procurement matters. In any event, even if there was a real doubt within the various chambers of the Consiglio di Stato (Council of State) concerning the proper application of this earlier case-law – as the judgment in *Lombardi* duly records (17) – that court as a court of last resort was itself obliged to make a reference pursuant to the third paragraph of Article 267 TFEU.

B. Public procurement and review procedures in Italy

52. In a very schematic way, the review procedures in Italy in the field of public procurement fall under the jurisdiction of the administrative courts. There are two levels of jurisdiction: the Tribunali Amministrativi Regionali (Regional Administrative Courts) deal with disputes at first instance and an appeal can then be lodged before the Consiglio di Stato (Council of State).

53. In addition to this 'classic' organisation, the eighth paragraph of Article 111 of the Italian Constitution provides that appeals in cassation against decisions of the Consiglio di Stato (Council of State) are permitted, but only for reasons of jurisdiction.

54. The Corte costituzionale (Constitutional Court) has recently framed the scope of this specific appeal before the Corte suprema di cassazione (Supreme Court of Cassation) in Judgment No 6/2018. As previously explained, according to that judgment, 'exceeding judicial authority' refers exclusively to two types of scenarios: those characterised by a total lack of jurisdiction, that is, when the Consiglio di Stato (Council of State) asserts its own jurisdiction over the area reserved to the legislature or the administration (a so-called invasion or encroachment), or when, on the contrary, it denies jurisdiction on the erroneous assumption that the subject matter cannot, absolutely speaking, be the object of its judicial review (so-called abstention), as well as those scenarios characterised by a relative lack of jurisdiction, when an administrative judge asserts jurisdiction over a subject matter attributed to a different jurisdiction or, on the contrary, denies it on the erroneous assumption that it belongs to other courts. (18)

55. In the same judgment, the Corte costituzionale (Constitutional Court) made two further clarifications. On the one hand, the intervention of the Corte suprema di cassazione (Supreme Court of Cassation), in the context of its review of jurisdiction, 'cannot be justified even by the infringement of EU [law]'. (19) On the other hand, it is also 'impermissible to challenge judgments [by this procedural route] where an administrative court … has adopted an interpretation of a procedural or substantive rule in such a way that the full merits of the case are not subject to adjudication'. (20)

VI. Analysis

A. The first question

56. By its first question, the Corte suprema di cassazione (Supreme Court of Cassation) asks, in substance, whether Article 4(3) TEU, Article 19(1) TEU, Article 2(1) and (2) TFEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, preclude a rule such as the eighth paragraph of Article 111 of the Italian Constitution, as interpreted in Judgment No 6/2018, according to which an appeal in cassation for reasons of jurisdiction is not available for the purpose of challenging judgments in which the court of second degree has applied interpretative practices developed nationally but in conflict with judgments of the Court of Justice, in sectors governed by EU law.

1. On the provisions relevant to answer the first question

57. According to settled case-law of the Court, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts. (21)

58. Consequently, even if, formally, the referring court has limited its first question to the interpretation of Article 4(3) TEU, Article 19(1) TEU, Article 2(1) and (2) TFEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, that does not prevent the Court of Justice from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case before it, whether or not the referring court has referred to them in the wording of its question. It is, in that regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings. (22)

59. In that regard, it appears that the interpretation of Article 2(1) and (2) TFEU and of Article 267 TFEU does not appear, in view of the information contained in the request for a preliminary ruling, to be necessary in order to provide a useful answer to the first question referred, given that those articles relate, respectively, to the rules in relation the exclusive and sharing competence of the Union and to the preliminary ruling mechanism. On the contrary, it must be recalled, as is clear from its recital 36, Directive 2007/66, and therefore Directive 89/665 that it amended and supplemented, seek to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second paragraphs of Article 47 of the Charter. (23)

60. Similarly, to the extent that it applies to the Member States, Article 47 of the Charter echoes the second subparagraph of Article 19(1) TEU and gives specific expression to the principle of sincere cooperation laid down in Article 4(3) TEU. (24) Thus, it is clear, according to settled case-law, first, that 'under the principle of sincere cooperation laid down in Article 4(3) TEU, it is for the courts of the Member States to ensure judicial protection of a person's rights under EU law [and, secondly, that] Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection, *within the meaning in particular of Article 47 of the Charter*, in the fields covered by EU law'. (25) Moreover, the Court has already pointed out that the requirement on the part of the Member States laid down in Article 19(1) TEU '*corresponds* to the right enshrined in Article 47 of the Charter'. (26)

61. In that context, as it is not disputed that a procedure of review before independent courts exists in Italy and that the debate is not about the establishment of a remedy but about the way that remedy is implemented by the competent courts, Articles 4(3) and 19(1) TEU do not seem to be useful either.

62. Accordingly, as suggested by the Commission, (27) I consider that the first question put by the referring court should be understood as asking whether Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter must be interpreted as meaning that they preclude a rule such as the eighth paragraph of Article 111 of the Italian Constitution, as interpreted in Judgment No 6/2018, according to which an appeal in cassation for reasons of jurisdiction is not available for the purpose of challenging judgments in which the court of second degree has applied interpretative practices developed nationally but in conflict with judgments of the Court of Justice, in sectors governed by EU law.

2. The framework of the analysis: the procedural autonomy under Article 47 of the Charter

63. The obligation for Member States to organise a review procedure in the field of public procurement is laid down in Article 1(1) of Directive 89/665. According to the third subparagraph of that provision, Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24 or Directive 2014/23, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible on the grounds that such decisions have infringed EU law in the field of public procurement or national rules transposing that law.

64. In that regard, Article 1(3) of Directive 89/665 only specifies that Member States have to ensure that the review procedures are available, under detailed rules which they may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

65. In other words, Directive 89/665 does not contain any provisions specifically governing the conditions under which those review procedures may be used. That directive prescribes only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement. (28) In any case, it must be admitted that Directive 89/665 does not contain any specific provisions concerning appeals which can or must be organised.

66. However, in a context where there are no EU rules governing the matter, the Court has consistently held that it is for every Member State to lay down the detailed rules of administrative and judicial procedures for safeguarding rights which individuals derive from EU law. (29) This respect for the procedural autonomy of Member States is expressly mentioned in recital 34 of Directive 2007/66 and is reflected in Article 1(3) of Directive 89/665.

67. Accordingly, as previously stated by the Court, when they set out detailed procedural rules for legal actions intended to ensure the protection of rights conferred by Directive 89/665 on candidates and tenderers harmed by the decisions of contracting authorities, the Member States must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter. (30)

68. In other words, in implementing Directive 89/665, the Member States retain, in accordance with their procedural autonomy, the option of adopting rules which may differ from one Member State to another. They must, however, ensure that those rules do not frustrate the requirements arising from that directive, in particular as regards the judicial protection, guaranteed by Article 47 of the Charter, which underpins it. (31) That means that the characteristics of a remedy such as that under Article 1(1) of Directive 89/665 must be determined in a manner consistent with Article 47 of the Charter rather than by reference to the principles of equivalence and effectiveness, these requirements only 'embody[ing] the general obligation on the Member States to ensure judicial protection of an individual's rights under [EU] law', (32) now enshrined in Article 19(1) TEU and Article 47 of the Charter. (33)

69. A limitation on the right to an effective remedy before a tribunal within the meaning of Article 47 of the Charter can therefore be justified, in accordance with Article 52(1) of the Charter, only if it is provided for by law, if it respects the essence of that right and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. (34)

3. Application to the principles to present case

70. In the present case, the rule at issue concerns the limitation of the right to appeal in cassation for reasons of jurisdiction. However, it follows from the settled case-law of the Court that Article 47 of the Charter does not requires two levels of jurisdiction. (35) Indeed, under this provision, the principle of effective judicial protection does not afford a right of access to a second level of jurisdiction but only to a court or tribunal. (36)

71. In those circumstances, the fact that the appeal in cassation available to the unsuccessful tenderer is, as a third level of jurisdiction, limited to questions of jurisdiction can certainly not, in itself, be considered to be contrary to EU law even if it prevents a challenge to a judgment in which the court of second instance applied an interpretation of national law which, objectively speaking, is contrary to EU law.

72. Indeed, EU law does not in principle preclude Member States, in accordance with the principle of procedural autonomy, from restricting or imposing conditions on the pleas which may be relied on in proceedings in an appeal in cassation, subject to respect for the guarantees laid down in Article 47 of the Charter. (37) However, if the national procedural rules ensure that the right to an examination of the substance of the tenderer's claim by the court of first instance and, where appropriate, on appeal, is respected, (38) the procedural rule at issue is not likely to undermine the effectiveness of Directive 89/665 or the requirements of Article 47 of the Charter.

73. I would also add, for the sake of completeness, that, in any event, if a procedural rule such as the limitation on the right to appeal in cassation at issue in the main proceedings were to be regarded as a limitation on the right to an effective remedy before a tribunal within the meaning of Article 47 of the Charter, it would have to be admitted that it is a measure, on the one hand, provided for 'by law' and, on the other hand, liable to discourage frivolous challenges and ensure that all individuals have their actions dealt with as rapidly as possible, in the interest of the proper administration of justice, in accordance with Article 47, first and second paragraphs, of the Charter. (39) Finally, the rule in question does not go beyond what is necessary to achieve this objective.

74. Article 47 of the Charter naturally requires the establishment of a remedy that is effective both in law and in practice. (40) However, if it appears, on the one hand, that access to a 'tribunal' within the meaning of Article 47 of the Charter is guaranteed without difficulties, and that, on the other hand, national law confers on this 'tribunal' the competence to examine the merits of the dispute – as demonstrated by the judgment of the Tribunale amministrativo regionale della Valle d'Aosta (Regional Administrative Court, Valle d'Aosta) in the present case – neither Directive 89/665 nor Article 47 of the Charter can be interpreted as requiring a further level of appeal in order to remedy a misapplication of these rules by the appeal court.

75. Indeed, as several parties have pointed out, one must ask what would happen if the court of third instance in turn upheld the interpretation of the court of second instance. Would Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter, then require the organisation of a fourth level of jurisdiction? That question essentially answers itself. To my mind, the solution to a misapplication of EU law by a court of last instance must be found in other procedural forms, such as an action for failure to fulfil obligations pursuant to Article 258 TFEU (41) or, for example, a *Francovich*-style action (42) offering the possibility of holding the State liable in order to obtain by this means legal protection of the rights of individuals recognised by EU law. (43)

4. Further remarks on the Francovich case-law and the need for its development

76. In that regard, it must be admitted that, at the hearing, there was much discussion as to what remedies might be open to Randstad in the present circumstances, as it seems fair to say that the actual decision of the Consiglio di Stato (Council of State) itself – which rejected the appeal on standing grounds – seemed to have few defenders.

77. There was a suggestion at the hearing that Randstad might be able to invoke Article 2(1)(c) of Directive 89/665 which provides for the award of damages in respect of infringements of the procurement process. While, strictly speaking, it is unnecessary to decide this point, it would seem to me that this provision relates simply to the jurisdiction of the national courts to award damages on a strict liability basis in respect of breaches of the procurement rules by *a contracting authority* as distinct from the misapplication of EU public procurement law by a court. It was also observed that potential liability might lie with the Italian State in respect of a claim for *Francovich* damages arising from a failure of the judicial system of that State properly to apply EU law.

78. In that regard, it may be observed that the precise circumstances as to why the Consiglio di Stato (Council of State) came to find against Randstad on this point are not altogether clear. In the event that other actions were subsequently to be taken by Randstad, this would be a matter for the competent national court to determine and to assess the reasons why the Consiglio di Stato (Council of State) *appears* not to have applied the well-

established case-law of the Court in relation to standing in procurement matters or, in so far as that court had doubts, for its failure (as a court of last resort) to make the appropriate Article 267 TFEU reference. There may, perhaps, be an explanation for the decision of the Consiglio di Stato (Council of State) in this matter.

79. I would nevertheless take this opportunity to observe that I think that the *Francovich* jurisprudence should now be read with fresh eyes in the light of the requirements of Article 47 of the Charter and, if necessary, developed further in this light. It is clear from the judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79) ('judgment in *Brasserie du pêcheur and Factortame')* that Member States are liable to pay compensation in respect of a sufficiently serious breach of EU law where they have 'manifestly and gravely disregarded the limits of its discretion'. (44)

80. The difficulty, however, with the practical application of this test is that clear failures by Member States (including judicial failures) may too often and perhaps too readily be excused on the ground that such errors were made honestly or were otherwise pardonable in the circumstances or, at all events, that they are not 'manifest and grave'. Considerations of judicial politeness or respect for venerable national judicial institutions should not, however, make one hesitate to describe such errors as 'manifest and grave' in the *Brasserie du pêcheur* sense of this term where such is warranted. A willingness or propensity to excuse manifest and grave failures by a Member State in its application of EU law by downgrading the seriousness of such failures would itself represent a clear denial of an effective remedy to litigants under Article 47 of the Charter, especially where, viewed objectively, the failure to apply clearly established EU law cannot realistically be justified or otherwise excused. While the scope of *Francovich* is, perforce, never far from view in the present case, the issue will nevertheless have to await resolution at a later stage since it is not directly raised in the present proceedings.

81. At the same time, any willingness to excuse the failures of Member States is but cold comfort to a litigant if the availability of a '*Francovich* action' were itself to be made excessively difficult in practice. This may be summed up by saying that if the failure by an appellate court against whom there is no further right of appeal properly to apply the well-established case-law of the Court of Justice does not itself sound an action in damages by reason of the 'manifest and grave disregard' criteria, then it is necessary that these criteria – which, after all, predate the entry into force of the Charter – should themselves be further refined. If the promise of Article 47 of the Charter is not to be a hollow one, then it seems to me that the failure in this instance by a court of final appeal to apply the settled case-law of the Court should give rise to *Francovich*-style liability on the part of the Member State in question. The Court of Justice has, in any event, ruled that where a national court has violated EU law 'in manifest breach of the case-law of the Court', this is something which in itself suggests a sufficiently serious breach. (45)

82. All of this calls to mind the case of the Sherlock Holmes story regarding the dog which did not bark. (46) In that vein it is the general absence of the case-law on this topic which is telling. (47) That in itself may be regarded as an indication that these errors and failures are in practice too readily excused and that for many whose EU rights have not been secured, a *Francovich* remedy remains an illusion rather than a reality. This is yet a further reason why the 'grave and manifest' criteria in the judgment in *Brasserie du pêcheur and Factortame* may require to be reassessed so that EU law is enforced with the appropriate degree of vigour by the judiciary of the Member States, even if allowance should also be made for the particular factors identified by this Court in the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513) in respect of liability for judicial error, namely, 'the specific nature of the judicial function', together with the requirements of legal certainty. (48) Yet *Francovich* is, so to speak, a dog which must be allowed to bark for it is that very barking which should serve to warn us that the rights which EU law intended to vouchsafe and protect are being compromised – sometimes silently – by national judicial error.

83. To this one might add that in the special context of a public procurement violation it would be somewhat incongruous that Directive 89/665 should provide for a form of strict liability for error on the part of a contracting authority while at the same time liability for national judicial error in respect of any review of the procurement process were to remain at a dauntingly elevated level.

84. For my part, however, I think that the law has to some degree moved on since the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513). In the light of the subsequent entry into force of Article 47 of the Charter, I consider that, for the reasons already stated, it is also necessary to examine whether the judicial error at issue was *objectively* excusable. Absent such an examination, there is a real danger that the application of the criteria laid down in the judgment in *Brasserie du pêcheur and Factortame* would in practice tend to make the recovery of *Francovich* damages in respect of judicial error excessively difficult such that it would be only in quite special circumstances where these conditions of liability would be likely to be met.

5. Conclusion on the first question

85. In summary, therefore, I am of the view that Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter must be interpreted as meaning that it does not preclude a rule such as the eighth paragraph of Article 111 of the Italian Constitution, as interpreted in Judgment No 6/2018, according to which an appeal in cassation on grounds of a 'lack of jurisdiction' is not available for the purpose of challenging judgments in which the court of second instance has applied interpretative practices developed nationally but which are objectively in conflict with judgments of the Court of Justice, in sectors governed by EU law.

86. The solution in respect of the misapplication of EU law by a court of last instance must be found in other procedural forms, such as an action for failure to fulfil obligations pursuant to Article 258 TFEU or, the possibility of holding the State liable in order to obtain legal protection of the rights recognised by EU law.

B. The second question

87. By its second question, the Corte suprema di cassazione (Supreme Court of Cassation) asks, in substance, whether Article 4(3) TEU, Article 19(1) TEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, preclude the rules relating to appeals in cassation for 'reasons of jurisdiction' from being interpreted and applied in such a manner that an appeal in cassation before the Combined Chambers of the Supreme Court of Cassation cannot be brought for the purpose of challenging a judgment in which the Consiglio di Stato (Council of State) refrains, without reason, from making a reference to the Court of Justice for a preliminary ruling, where the conditions relieving a national court of that obligation, as listed by the Court in its judgment of 6 October 1982, *Cilfit and Others* (283/81 EU:C:1982:335), are absent.

88. The idea behind that question is that a national court cannot be prevented, even temporarily, from making a reference for a preliminary ruling, as this would have the effect of usurping the Court's exclusive jurisdiction to interpret EU law correctly and in binding fashion, thereby undermining the uniform application and effective judicial protection of the rights enjoyed by individuals under EU law.

89. At the outset it might be observed that the Corte di cassazione (Court of Cassation) raises an additional question in the introductory part of the request for a preliminary ruling relating to the second question, which does not appear in the wording of the question finally asked. In fact, it is clear from paragraph 50 of the reference for a preliminary ruling that the Corte suprema di Cassazione (Supreme Court of Cassation), in addition to the question formally posed, also questions the approach whereby it could not itself make a reference for a preliminary ruling directly.

90. Given that this issue is not included in the question finally referred, I will be brief. Moreover, the answer to this question does not seem to me to be in doubt. Indeed, it is settled case-law that Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they

consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case. (49) Consequently, if the Corte suprema di cassazione (Supreme Court of Cassation) is validly seised, national rules of procedure cannot affect the powers and obligations conferred on that court under Article 267 TFEU. (50)

91. That being said, and I come now to the second question expressly referred, I do not think that the national rules of procedure such as the rule at issue which limits the appeal in cassation to questions of jurisdiction must necessarily, in order to be compatible with EU law, be interpreted as allowing an appeal in cassation where a court of first instance or a court against whose decisions there is no judicial remedy under national law, does not refer a question to the Court of Justice.

92. Indeed, since it is for the national courts to apply EU law, the first task of interpretation necessarily falls to them. As previously stated by the Court, national courts, in collaboration with the Court of Justice, fulfil a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed. (51) It follows from the judicial system established by the Treaties – and in particular Article 4(3) TEU, Article 19(1) TEU and Article 267 TFEU to which the referring court refers – that the Court does not have a monopoly on the interpretation of EU law but rather has exclusive jurisdiction to give the *definitive* interpretation of that law. (52)

93. The obligation on national courts and tribunals against whose decision there is no judicial remedy to refer a matter to the Court of Justice under the third paragraph of Article 267 TFEU is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of EU law in all the Member States, between national courts, in their capacity as courts responsible for the application of EU law, and the Court. (53)

94. What Article 267 TFEU enables is thus the opening of a dialogue between the Court of Justice and the courts and tribunals of the Member States. (54) As already recalled in this Opinion, in accordance with settled case-law, this provision gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. (55) In addition, it must be borne in mind that, under the third paragraph of Article 267 TFEU, when there is no judicial remedy under national law against the decision of a court or tribunal of a Member State, that court or tribunal is, *in principle*, obliged to bring the matter before the Court of Justice, where a question relating to the interpretation of EU law is raised before it. (56)

95. In this specific context of cooperation established by Article 267 TFEU, what is forbidden is, therefore, for a rule of national law *to prevent* a national court from exercising that discretion, or from complying with that obligation. (57) In other words, the *minimum* requirement is that the court designated by the national procedural system to rule on issues related to EU law – such as, in this case, the Tribunali amministrativi regionali (Regional Administrative Courts) and the Consiglio di Stato (Council of State) in the field of public procurement – should have the possibility, if not the obligation, to proceed to a preliminary ruling. If it is the case, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. (58) To summarise, as recently explained by Advocate General Bobek, the logic of the case-law of the Court in this area seeks only to ensure that national rules of procedure do not prevent points of EU law from being raised, with a request for a preliminary ruling potentially being made regardless of the stage of proceedings. (59)

96. However, as will be seen in my analysis of the third question asked by the Corte suprema di cassazione (Supreme Court of Cassation), if it is clear that the Consiglio di Stato (Council of State) should have referred a question to the Court of Justice if it had any a doubt on the scope of application of Article 1(1) and (3) of Directive 89/665 as previously interpreted by the Court, it must be noted that there was nonetheless no national procedural rule preventing it from initiating this dialogue with the Court of Justice.

97. In my view, the failure to refer a question to the Court for a preliminary ruling is therefore likely to result in substantive illegality (due to the misapplication of EU law which was wrongly interpreted by the national court) and/or procedural illegality (due to the failure to refer a question to the Court for a preliminary ruling when the court in question was obliged to do so), but it should not be regarded as a question of jurisdiction in the sense understood by the eighth paragraph of Article 111 of the Italian Constitution. As I indicated at the end of my analysis of the first question referred, even if these solutions are not optimal, the answer to a misapplication of EU law by a court of last instance – and I add here including the obligations under Article 267 TFEU – must be found in other procedural forms, such as an action for failure to fulfil obligations or the possibility of holding the State liable for damages in order to obtain legal protection of the rights of individuals.

98. Indeed, in view of the essential role played by the judiciary in the protection of the rights derived by individuals from the rules of EU law, as I have already indicated, the full effectiveness of those rules would be called into question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain compensation or damages when their rights are prejudiced by an infringement of EU law attributable to a decision of a court or tribunal of a Member State adjudicating at last instance. (60)

99. Consequently, in accordance with the foregoing considerations, I arrive at the conclusion that Article 4(3) TEU, Article 19(1) TEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, do not preclude the rules relating to appeals in cassation for reasons of jurisdiction from being interpreted and applied in such a manner as to prevent an appeal in cassation before the Combined Chambers of the Corte suprema di cassazione (Supreme Court of Cassation) from being brought for the purpose of challenging a judgment in which the Consiglio di Stato (Council of State) refrains, without reason, from making a reference to the Court of Justice for a preliminary ruling.

C. The third question

100. By its third question, the Corte suprema di cassazione (Supreme Court of Cassation) asks, in substance, whether the interpretation of Article 1(1) and (3) and Article 2(1) of Directive 89/665, as amended by Directive 2007/66, which derives from the judgments of the Court of Justice of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675), applies to the case in the main proceedings.

101. In that regard, according to settled case-law, the justification for making a request for a preliminary ruling is not for advisory opinions to be delivered on general or hypothetical questions, but rather that it is necessary for the effective resolution of a dispute concerning EU law. (61)

102. However, given that I arrived at the conclusion, in relation to the first question referred, that the limitation of the jurisdiction of the Corte di cassazione (Supreme Court of Cassation) as provided for in the eighth paragraph of Article 111 of the Italian Constitution, as interpreted in Judgment No 6/2018, is not contrary to Article 1(1) and (3) of Directive 89/665 and Article 47 of the Charter, the referring court should lack jurisdiction to examine, in the main proceedings, the scope of Directive 89/665. I nonetheless propose to consider this question in the event that the Court were to decide differently.

103. As a reminder, in the main proceedings, Randstad has challenged its exclusion from a tendering procedure and the award of the contract to another undertaking. However, the Consiglio di Stato (Council of State) has examined the substance only of the ground of appeal whereby Randstad disputed the points awarded to its technical offer – which were below the ‘minimum threshold’ – and has examined as a matter of priority the cross-appeals

brought by the contracting authority and the successful tenderer. It has upheld those cross-appeals while refraining from examining the substance of the other grounds of the main appeal disputing the outcome of the tendering procedure for other reasons than those relating to the points awarded to its technical offer.

104. I have already set out in the preliminary remarks of this Opinion the case-law of the Court on the scope of the obligation to provide a review procedure laid down in Article 1(1) and (3) of Directive 89/665, in the specific context where a counterclaim is brought by the successful tenderer. At this stage, it can therefore be stated that the criterion which determines the obligation of a court to examine the applicant's appeal is that each of the parties to the proceedings has a legitimate interest in the exclusion of the bids submitted by the other competitors. That means that one cannot exclude the possibility that one of the irregularities justifying the exclusion of both the successful tenderer's bid and that of the tenderer challenging the contracting authority's decision may also vitiate the other bids submitted in the tendering procedure, which may result in that authority having to launch a new procedure. (62)

105. The Court has been particularly clear on this point: 'the admissibility of the main action cannot, without depriving Directive 89/665 of its effectiveness, be contingent on a prior finding that all of the bids ranked lower than that of the tenderer are invalid [or] subject to the condition that the tenderer adduces evidence that the contracting authority will have to restart the public procurement procedure. *The mere existence of such a possibility must be regarded as being sufficient in that respect*'. (63) The tenderer whose bid has been excluded by the contracting authority from a public procurement procedure may be refused access to a review of the decision awarding the public contract only if the decision to exclude that tenderer has been confirmed by a decision that has acquired the force of *res judicata* before the court hearing the review of the contract award decision has given its decision, so that that tenderer must be regarded to be definitively excluded from the public procurement procedure at issue. (64)

106. In the main proceedings, first, it is not disputed that Randstad had not been yet definitively excluded from the procurement process when it lodged its appeal before the Consiglio di Stato (Council of State). Second, it follows from the reference for a preliminary ruling that Randstad put forward, as one of the pleas for its readmission to the tendering procedure, the illegality of the appointment and composition of the procurement committee responsible for carrying out the economic assessment. However, if those irregularities were found to exist, they would justify the exclusion of both the successful tenderer's bid and that of the tenderer challenging the contracting authority's decision and would also vitiate the other bids submitted in the tendering procedure, which could lead the contracting authority to have to launch a new procedure.

107. In those circumstances, it seems certain to me that the principle established and confirmed by the case-law cited by the referring court was applicable in the main proceedings. The Consiglio di Stato (Council of State) was therefore obliged to recognise Randstad's interest in challenging, both at first instance and on appeal, the regularity of the procedure and therefore of the decision to award the contract or, alternatively, to submit a request to the Court of Justice on that matter in case of doubt.

VII. Conclusion

108. Accordingly, in the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Corte suprema di cassazione (Supreme Court of Cassation, Italy) as follows:

(1) Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended, inter alia, by Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007, read in the light of Article 47 of the Charter, must be interpreted as meaning that it does not preclude a rule such as the eighth paragraph of Article 111 of the Italian Constitution, as interpreted in Judgment No 6/2018, according to which an appeal in cassation for reasons of jurisdiction is not available for the purpose of challenging judgments in which the court of second degree has applied interpretative practices developed nationally but in conflict with judgments of the Court of Justice, in sectors governed by EU law.

The solution in respect of the misapplication of EU law by a court of last instance must be found in other procedural forms, such as an action for failure to fulfil obligations pursuant to Article 258 TFEU or, the possibility of holding the State liable in order to obtain legal protection of the rights of individuals recognised by EU law.

(2) Article 4(3) TEU, Article 19(1) TEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, do not preclude the rules relating to appeals in cassation for reasons of jurisdiction from being interpreted and applied in such a manner as to prevent an appeal in cassation before the Combined Chambers of the Corte di cassazione (Court of Cassation) from being brought for the purpose of challenging a judgment in which the Consiglio di Stato (Council of State) refrains, without reason, from making a reference to the Court of Justice for a preliminary ruling.

In the alternative,

(3) The interpretation of Article 1(1) and (3) and Article 2(1) of Directive 89/665, as amended by Directive 2007/66, which derives from the judgments of the Court of Justice of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448); of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199); and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675), applies to the case of the main proceedings where the decision to exclude the unsuccessful tenderer had not been confirmed by a decision which had acquired the force of *res judicata* when the court hearing the review of the contract award decision gave its decision and where that tenderer had put forward a plea which could lead the contracting authority to have to launch a new procedure.

---

1 Original language: English.

---

2 OJ 1989 L 395, p. 33.

---

3 OJ 2007 L 335, p. 31.

---

4 Judgment of 18 January 2018, No 6/2018 (ECLI:IT:COST:2018:6).

---

5 Judgment No 6/2018, paragraph 15 (in its English translation available on the website of the Corte costituzionale (Constitutional court) (https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza%20n.%206%20del%202018%20red.%20Coraggio%20EN.pdf).

---

6 See, to that effect, judgments of 4 July 2013, Fastweb (C-100/12, EU:C:2013:448, paragraph 25); of 5 April 2016, PFE (C-689/13, EU:C:2016:199, paragraph 23); and of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 22).

7 See, to that effect, judgments of 5 April 2016, PFE (C-689/13, EU:C:2016:199, paragraph 27), and of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 23).

8 See, to that effect, judgments of 4 July 2013, Fastweb (C-100/12, EU:C:2013:448, paragraph 33); of 5 April 2016, PFE (C-689/13, EU:C:2016:199, paragraph 24); and of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 24).

9 See, to that effect, judgments of 5 April 2016, PFE (C-689/13, EU:C:2016:199, paragraph 29), and of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 30).

10 See, to that effect, judgment of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 26).

11 See, to that effect, judgment of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 28).

12 See, to that effect, judgment of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 29).

13 See, to that effect, judgments of 5 April 2016, PFE (C-689/13, EU:C:2016:199, paragraph 28), and of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 27).

14 See, to that effect, judgment of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 29).

15 See, to that effect, Ginter, C., Väljaots, T., 'Excluded Tenderer's Access to a Review in a Public Procurement Procedure', *European Procurement & Public Private Partnership Law Review*, 2018/4, pp. 301 to 306, esp. p. 303.

16 See, in this respect, the caveat set out in point 78 of the present Opinion.

17 See, in that regard, judgment of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraphs 13 to 19).

18 See, to that effect, Judgment N 6/2018, paragraph 15 (English version). See the website address in footnote 5 of the present Opinion.

19 Judgment No 6/2018, paragraph 14.1 (English version). See the website address in footnote 5 of the present Opinion.

20 Judgment No 6/2018, paragraph 17 (English version). See the website address in footnote 5 of the present Opinion.

21 See, to that effect, judgment of 2 April 2020, Ruska Federacija(C-897/19 PPU, EU:C:2020:262, paragraph 43).

22 See, to that effect, judgments of 19 November 2020, 5th AVENUE Products Trading (C-775/19, EU:C:2020:948, paragraph 34), and of 22 April 2021, PROFI CREDIT Slovakia (C-485/19, EU:C:2021:313, paragraph 50).

23 See, to that effect, judgment of 15 September 2016, Star Storage and Others (C-439/14 and C-488/14, EU:C:2016:688, paragraph 45).

24 Opinion of Advocate General Sharpston in Joined Cases Star Storage and Others(C-439/14 and C-488/14, EU:C:2016:307, footnote 32).

25 Judgment of 14 June 2017, Online Games and Others (C-685/15, EU:C:2017:452, paragraph 54, emphasis added). See also judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153, paragraph 143).

26 Judgment of 27 September 2017, Puškár(C-73/16, EU:C:2017:725, paragraph 58). Emphasis added. See also, to that effect, judgment of 16 May 2017, Berlioz Investment Fund (C-682/15, EU:C:2017:373, paragraph 44).

27 Written observations of the Commission, paragraphs 35 and 39.

28 See, to that effect, judgment of 29 July 2019, Hochtief Solutions Magyarországi Fióktelepe(C-620/17, EU:C:2019:630, paragraph 52).

29 See for example, with regard to Directive 89/665, judgment of 12 March 2015, eVigilo(C-538/13, EU:C:2015:166, paragraph 39).

30 See, to that effect, judgment of 15 September 2016, Star Storage and Others (C-439/14 and C-488/14, EU:C:2016:688, paragraph 46).

31 See, to that effect, in relation to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24), judgment of 10 March 2021, PI (C-648/20 PPU, EU:C:2021:187, paragraph 58).

32 Judgment of 15 April 2008, Impact(C-268/06, EU:C:2008:223, paragraph 47). See also judgments of 18 March 2010, Alassini and Others (C-317/08 to C-320/08, EU:C:2010:146, paragraph 49), and of 14 September 2016, Martínez Andrés and Castrejana López (C-184/15 and C-197/15, EU:C:2016:680, paragraph 59).

33 See, to that effect, Opinion of Advocate General Wathelet in Hochtief (C-300/17, EU:C:2018:405, points 32 to 35).

34 See, to that effect, judgment of 15 September 2016, Star Storage and Others (C-439/14 and C-488/14, EU:C:2016:688, paragraph 49).

35 See, to that effect, judgments of 19 June 2018, Gnandi(C-181/16, EU:C:2018:465, paragraph 57), and of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)* (C-175/17, EU:C:2018:776, paragraph 34). It may also added that to date the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), does not create or require the existence of a right to a second level of jurisdiction either, at least in civil matters.

36 See, to that effect, judgments of 17 July 2014, Sánchez Morcillo and Abril García (C-169/14, EU:C:2014:2099, paragraph 36); of 11 March 2015, Oberto and O'Leary (C-464/13 and C-465/13, EU:C:2015:163, paragraph 73); of 19 June 2018, Gnandi(C-181/16, EU:C:2018:465, paragraph 57); of 26 September 2018, *Belastingdienst/Toeslagen (Suspensory effect of the appeal)* (C-175/17, EU:C:2018:776, paragraph 34); and of 29 July 2019, Bayerische Motoren Werke and Freistaat Sachsen v Commission (C-654/17 P, EU:C:2019:634, paragraph 51).

37 See, to that effect (with reference to the principles of effectiveness and equivalence rather than Article 47 of the Charter), judgment of 17 March 2016, Bensada Benallal (C-161/15, EU:C:2016:175, paragraph 27).

38 On this requirement, see judgment of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 33).

39 See, to that effect (in relation to a good conduct guarantee), judgment of 15 September 2016, Star Storage and Others (C-439/14 and C-488/14, EU:C:2016:688, paragraph 54). In that regard, it should be recalled that the Court interprets Article 1(1) and (3) of Directive 89/665 as requiring the Member States to adopt the measures necessary to ensure that the decisions taken by the contracting authorities in public contract award procedures may be reviewed effectively and, in particular, as rapidly as possible, on the ground that they have infringed EU law on public procurement or the national rules transposing that law (see, to that effect, judgments of 12 March 2015, eVigilo, C-538/13, EU:C:2015:166, paragraph 50; of 15 September 2016, Star Storage and Others, C-439/14 and C-488/14, EU:C:2016:688, paragraph 39; and of 29 July 2019, Hochtief Solutions Magyarországi Fióktelepe, C-620/17, EU:C:2019:630, paragraph 50).

40 See, to that effect (on Articles 6 and 13 ECHR), Varga, Z., 'National Remedies in the Case of Violation of EU Law by Member State Courts', *CML Rev.*, 2017, vol. 54, pp. 52 to 80, esp. p. 75.

41 See, to that effect, judgment of 4 October 2018, Commission v France (Advance payment) (C-416/17, EU:C:2018:811).

42 Judgment of 19 November 1991, Francovich and Others (C-6/90 and C-9/90, EU:C:1991:428).

43 See, to that effect, judgments of 4 March 2020, Telecom Italia (C-34/19, EU:C:2020:148, paragraphs 67 to 69), and judgment of 29 July 2019, Hochtief Solutions Magyarországi Fióktelepe (C-620/17, EU:C:2019:630, paragraph 64).

44 Judgment in Brasserie du pêcheur and Factortame (paragraph 55).

45 See, to that effect, judgments of 30 September 2003, Köbler (C-224/01, EU:C:2003:513, paragraph 56), and of 25 November 2010, Fuß(C-429/09, EU:C:2010:717, paragraph 52).

46 'The Adventure of the Silver Blaze' in Conan Doyle, A., *The Memoirs of Sherlock Holmes*, London, 1892.

47 See, generally, Beutler, B., 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?', *CML Rev.* 46, 2009, pp. 773 to 787.

48 See, to that effect, judgment of 30 September 2003, Köbler (C-224/01, EU:C:2003:513, paragraph 53).

49 See, to that effect and among others, judgments of 16 December 2008, Cartesio(C-210/06, EU:C:2008:723, paragraph 88); of 15 January 2013, Križan and Others (C-416/10, EU:C:2013:8, paragraph 64); and of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153, paragraph 91 and the case-law cited).

50 See, to that effect, judgment of 18 July 2013, Consiglio Nazionale dei Geologi (C-136/12, EU:C:2013:489, paragraph 32). The fact that both the Consiglio di Stato (Council of State) and the Corte di cassazione (Court of Cassation) could be regarded as being obliged to make a reference to the

Court under the third paragraph of Article 267 TFEU in the same litigation is not an issue. On the contrary, in that situation, if no reference has been made to the Court of Justice by a court such as the Consiglio di Stato (Council of State), then a court such as the Combined Chambers of the Corte di cassazione (Court of Cassation) must itself submit the question to the Court of Justice (see, to that effect, in a context where two courts are likely to be obliged to make a reference to the Court of Justice, judgment of 4 November 1997, Parfums Christian Dior, C-337/95, EU:C:1997:517, paragraph 30).

---

51 See, to that effect, Opinion 1/09 *(*Agreement creating a Unified Patent Litigation System*)* of 8 March 2011 (EU:C:2011:123, paragraph 69), and judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses (C-64/16, EU:C:2018:117, paragraph 33).

---

52 See, to that effect, Opinion 1/17 of 30 April 2019 (EU:C:2019:341, paragraph 111).

---

53 See, to that effect, judgments of 6 October 1982, Cilfit and Others (283/81, EU:C:1982:335, paragraph 7), and of 9 September 2015, X and van Dijk (C-72/14 and C-197/14, EU:C:2015:564, paragraph 54).

---

54 See, to that effect, judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153, paragraph 90).

---

55 See the case-law cited in footnote 49.

---

56 See, to that effect, judgment of 24 October 2018, XC and Others (C-234/17, EU:C:2018:853, paragraph 43). See also, under another formulation, judgments of 5 April 2016, PFE (C-689/13, EU:C:2016:199, paragraph 32); and of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153, paragraph 92).

---

57 See, to that effect, judgments of 5 April 2016, PFE (C-689/13, EU:C:2016:199, paragraphs 32 and 33), and of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153, paragraph 93).

---

58 See, to that effect, judgment of 9 September 2015, X and van Dijk (C-72/14 and C-197/14, EU:C:2015:564, paragraph 57).

---

59 See, to that effect, Opinion of Advocate General Bobek in Consorzio Italian Management and Catania Multiservizi(C-561/19, EU:C:2021:291, point 27).

---

60 See, to that effect, judgments of 30 September 2003, Köbler (C-224/01, EU:C:2003:513, paragraph 33), and of 9 September 2015, Ferreira da Silva e Brito and Others (C-160/14, EU:C:2015:565, paragraph 47).

---

61 See, to that effect, judgment of 3 October 2019, A and Others (C-70/18, EU:C:2019:823, paragraph 73).

---

62 See, to that effect, judgments of 5 April 2016, PFE (C-689/13, EU:C:2016:199, paragraph 28), and of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 27).

---

63 Judgment of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 29). Emphasis added.

---

64 See, to that effect, judgment of 5 September 2019, Lombardi (C-333/18, EU:C:2019:675, paragraph 31 and the case-law cited).

JUDGMENT OF THE COURT (Fourth Chamber)

3 February 2022 (*)

(Reference for a preliminary ruling – Directive 2014/24/EU – Article 72 – Modification of contracts during their term – Transfer of a framework agreement – New contractor assuming on the insolvency of the initial contractor the rights and obligations attributed to the latter under a framework agreement – Whether need for a new procurement procedure)

In Case C-461/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), made by decision of 15 September 2020, received at the Court on 24 September 2020, in the proceedings

Advania Sverige AB,

Kammarkollegiet

v

Dustin Sverige AB,

THE COURT (Fourth Chamber),

composed of K. Jürimäe, President of the Third Chamber, acting as President of the Fourth Chamber, S. Rodin (Rapporteur) and N. Piçarra, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Advania Sverige AB, by T. Wanselius,

– the Kammarkollegiet, by A. Ekberg and A. Thomsen, acting as Agents,

– Dustin Sverige AB, by C. Bokwall and L. Håkansson Kjellén, advokater,

– the Austrian Government, by J. Schmoll, acting as Agent,

– the European Commission, by P. Ondrůšek and K. Simonsson and by G. Tolstoy, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 72(1)(d)(ii) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Advania Sverige AB (‘Advania’) and the Kammarkollegiet (Swedish Legal, Financial and Administrative Services Agency) (‘the National Legal Services Agency’) and Dustin Sverige AB (‘Dustin’) concerning the decision of that agency to approve the transfer of four framework agreements without a new procurement procedure in accordance with Directive 2014/24.

Legal context

European Union law

3 Recitals 107 and 110 of Directive 2014/24 state:

‘(107) It is necessary to clarify the conditions under which modifications to a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties’ intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

…

(110) In line with the principles of equal treatment and transparency, the successful tenderer should not, for instance where a contract is terminated because of deficiencies in the performance, be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract should be able, in particular where the contract has been awarded to more than one undertaking, to undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that tenderer.’

4 Article 72 of Directive 2014/24, entitled ‘Modification of contracts during their term’, provides as follows:

‘1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

…

(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:

(i) an unequivocal review clause or option in conformity with point (a);

(ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or

(iii) in the event that the contracting authority itself assumes the main contractor’s obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Article 71;

(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

…

4. A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

(b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(c) the modification extends the scope of the contract or framework agreement considerably;

(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1.

…'

Swedish law

5 The first subparagraph of Paragraph 13 of Chapter 17 of Lagen (2016:1145) om offentlig upphandling (Law No 1145 of 2016 on public procurement; 'the Law on public procurement'), provides that a contract or a framework agreement might be modified with one contractor being replaced by another, without a new procurement, if:

'(1) the new contractor fully or partially replaces the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, and

(2) the circumstance that a new contractor fully or partially replaces the initial contractor did not entail other substantial modifications to the contract or framework agreement.'

6 According to the referring court, it is apparent from the second subparagraph of Paragraph 13 of Chapter 17 of that law that such a replacement of the contractor presupposes that the new service provider is not excluded under a ground for exclusion laid down by that law and that it meets the qualification conditions established in the original contract.

The dispute in the main proceedings and the question referred for a preliminary ruling

7 Four framework agreements with a reopening of competition, for the purchase of various computer equipment, were awarded by the National Legal Services Agency under a restricted procedure pursuant to Lagen (2007:1091) om offentlig upphandling (Law No 1091 of 2007 on public procurement), which was repealed in the meantime. In that procedure, 17 candidates qualified for the selection, including Advania, Dustin and Misco AB. While Dustin and Misco were among the nine candidates who were invited to tender, Advania was not invited to tender. At the end of that procedure, Misco was awarded framework agreements in the four areas at issue and Dustin was awarded framework agreements in two areas.

8 By letter of 4 December 2017, Misco requested the National Legal Services Agency to authorise the transfer to Advania of the four framework agreements which it held. On 12 December 2017, Misco was declared insolvent and, on 18 January 2018, its insolvency administrator signed a contract with Advania providing for the transfer of those framework agreements. The National Legal Services Agency authorised that transfer in February 2018.

9 Dustin then brought an appeal before the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm, Sweden) seeking that the framework agreements between Advania and the National Legal Services Agency be declared invalid.

10 The Förvaltningsrätten i Stockholm (Administrative Court, Stockholm) dismissed the appeal. It considered that the National Legal Services Agency had correctly found that the succession at issue resulted from the restructuring of Misco and that Advania had obtained the framework agreements at issue and had acquired the branches of business enabling them to be performed, under the conditions laid down in Paragraph 13 of Chapter 17 of the Law on public procurement, which transposes Article 72(1)(d)(ii) of Directive 2014/24 into Swedish law.

11 Dustin brought an appeal against the judgment of the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm) before the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden), which upheld that appeal and declared the invalidity of the four framework agreements between Advania and the National Legal Services Agency. That court was of the opinion that Advania could not be regarded as having replaced Misco universally or partially, within the meaning of Paragraph 13 of Chapter 17 of the Law on public procurement, since, with the exception of the framework agreements at issue, Misco had transferred virtually no business to Advania. In support of that conclusion, the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) noted that only one employee of Misco subsequently joined Advania, that the list of Misco's customers was not fully updated or relevant, that customers of Misco had already changed supplier and that there was no evidence to prove that Advania had taken on some of Misco's subcontractors or that other public framework agreements had been transferred to Advania, even though Misco was party to at least one other public framework agreement.

12 Advania and the National Legal Services Agency each brought an appeal against the judgment of the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) before the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden). In their appeals, they do not dispute the appeal court's assessment of the nature and extent of the elements covered by the transfer at issue. However, they contend that such a transfer satisfies the condition in Paragraph 13 of Chapter 17 of the Law on public procurement.

13 Before the referring court, Advania submits that Directive 2014/24 does not require that, in addition to the framework agreements, a business of a certain nature or scope be transferred to the new contractor which replaces that to which the contracting authority initially awarded the contract.

14 The National Legal Services Agency submits in its action before the referring court that the concept of 'universal or partial succession', which is one of the methods of transfer provided for by the relevant provisions of the Law on public procurement and Directive 2014/24, must be interpreted as meaning that the transferee contractor is required only to take the place of the original contractor in the rights and obligations arising from the contract or framework agreement at issue. By requiring, in addition to such substitution, the transfer of business or the transfer of assets, the applicability of those provisions would be severely limited. The fundamental point is that the new contractor may perform the contract or framework agreement at issue in accordance with the conditions and requirements originally laid down.

15 Dustin contends, for its part, before that court that the condition relating to the universal or partial succession of the original contractor following corporate restructuring operations provided for in Article 72(1)(d)(ii) of Directive 2014/24 covers situations in which the branches of business concerned by the contract or framework agreement at issue are transferred to the new contractor. The transfer of the contract or framework agreement in question is merely incidental to the transfer of business. The transfer of contracts or framework agreements which were the subject of calls for tenders without the simultaneous transfer of the branches of business concerned would lead not only to the trade in such contracts or framework agreements but would also enable the transfer of partial rights and obligations arising from those contracts or framework agreements.

16 In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court) stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

‘Does the circumstance that a new contractor has taken over the initial contractor’s rights and obligations under a framework agreement, after the initial contractor has been declared insolvent and the insolvency estate has transferred the agreement, mean that the new contractor will be deemed to have succeeded into the position of the initial contractor under conditions such as those referred to in Article 72(1)(d)(ii) of [Directive 2014/24]?’

Consideration of the question referred

17 By its question, the referring court asks, in essence, whether Article 72(1)(d)(ii) of Directive 2014/24 must be interpreted as meaning that an economic operator which, following the insolvency of the initial contractor which led to its liquidation, has taken over only the rights and obligations of the initial contractor arising from a framework agreement concluded with a contracting authority must be regarded as having succeeded that initial contractor under the conditions referred to in that provision.

18 As a preliminary point, it should be recalled that, in general, the substitution of a new contractor for one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question and, consequently, as a substantial modification to the contract, which must give rise to a new award procedure relating to the contract thus amended, in accordance with the principles of transparency and equal treatment which underlie the obligation of competition between the candidates potentially interested in the various Member States (see, to that effect, judgment of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraphs 40 and 47). That premiss is codified in Article 72(4)(d) of Directive 2014/24.

19 It follows from the Court’s case-law that the principle of equal treatment and the obligation of transparency resulting therefrom preclude, following the award of a public contract, the contracting authority and the successful tenderer from amending the provisions of that contract in such a way that those provisions differ materially in character from those of the original contract (see, to that effect, judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 28).

20 By way of exception, Article 72(1)(d)(ii) of that directive provides that a new contractor may, without a new procurement procedure in accordance with that directive, replace that to which the contracting authority initially awarded the contract following a universal or partial succession into the position of the original contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of that directive.

21 It is thus apparent from the wording of that article that it makes the application of the exception at issue subject, inter alia, to the condition that the replacement of the former contractor is due to a universal or partial succession which occurs following company restructuring, in particular insolvency.

22 In the present case, the referring court questions whether the condition of universal or partial succession of the original contractor following insolvency is satisfied where the new contractor takes over only the rights and obligations arising from the framework agreement concluded with the contracting authority and does not take over all or part of the business of the original contractor falling within the scope of that framework agreement.

23 In that regard, it should be noted, as regards the wording of Article 72(1)(d)(ii) of Directive 2014/24, first, that the replacement of the contractor to whom the contracting authority initially awarded the contract is authorised only ‘as a result of a universal or partial succession of the original contractor’. It follows that that succession may involve the taking over, by the new contractor, of all or only part of the assets of the initial contractor and may therefore involve, as the Advocate General noted in point 43 of his Opinion, the transfer only of a public contract or of a framework agreement making up the assets of the initial contractor.

24 Furthermore, it should be noted, as did the Advocate General in point 95 of his Opinion, that requiring a transfer of assets in order to prevent a party from circumventing the award rules is not necessary

where the transfer of the public contract or the framework agreement is, in any event, subject to the condition, laid down in Article 72(1)(d)(ii) of Directive 2014/24, not to constitute a means of excluding application of that directive.

25 Furthermore, while it is true that such an interpretation of the concept of 'partial succession' in Article 72(1)(d)(ii) of Directive 2014/24 is not sufficient in itself to ensure that the new contractor performs the contract or framework agreement in question with an equivalent capability to that of the original contractor, as Dustin contends, the fact remains that that provision provides that such succession is subject to the condition that the new contractor fulfils the qualitative selection criteria initially established.

26 Therefore, it is apparent from the wording of Article 72(1)(d)(ii) of Directive 2014/24 that the concept of 'insolvency', falling within the concept of 'restructuring operations', encompasses structural changes to the original contractor, in particular insolvency which includes insolvency resulting in liquidation.

27 Secondly, as for the scope of the concept of 'insolvency', which is covered by the concept of 'restructuring operations', it is necessary to examine whether that presupposes that the new contractor takes over all or part of the business falling within the scope of the framework agreement at issue.

28 Although the first three situations listed as examples of 'restructuring operations' in Article 72(1)(d)(ii) of Directive 2014/24, namely takeover, merger and acquisition, may involve the continuation of at least part of the original contractor's business, the fact remains that that provision also lists insolvency as an example of restructuring, which may lead, as the Advocate General noted in point 47 of his Opinion, to the dissolution of the insolvent company. There is no indication in the wording of that provision that the concept of 'insolvency' must be understood not in its usual meaning, but as being limited to situations in which the business of the original contractor which enables the performance of the public contract is pursued, at least in part.

29 Nor is there any such indication in recital 110 of that directive, which mentions insolvency together with purely internal restructurings, takeovers, mergers and acquisitions, as situations involving 'certain structural changes' of the successful tenderer.

30 In that regard, indeed it must be noted that Article 72(1)(d)(ii) of Directive 2014/24, and thus the concept of 'insolvency', must be interpreted strictly in so far as, as is apparent from paragraphs 20 and 21 of this judgment, that article sets out an exception. As the Advocate General noted in point 62 of his Opinion, however, that interpretation cannot render that exception ineffective. It would do so if the term 'insolvency' were limited solely to situations in which the business of the original contractor falling within the scope of the framework agreement at issue was taken over by the new contractor, at least in part, and if that term were not understood in its usual broader sense.

31 Therefore, it is clear from the wording of Article 72(1)(d)(ii) of Directive 2014/24 that the concept of 'restructuring' encompasses structural changes to the original contractor, in particular insolvency which includes insolvency resulting in liquidation.

32 That literal interpretation of Article 72(1)(d)(ii) of Directive 2014/24 is also consistent with the principal objective pursued by Article 72 of that directive, as set out in recitals 107 and 110 thereof. According to those recitals, Directive 2014/24 seeks to clarify the conditions under which changes to a contract during their performance require a new contract award procedure, while taking into account the relevant case-law of the Court and the principles of transparency and equal treatment.

33 In that regard, it should be noted, in the first place, that that interpretation of Article 72(1)(d)(ii) of Directive 2014/24 is based on the usual meaning of the concepts in that provision, without requiring, unlike the interpretation proposed by Dustin and the Commission, additional criteria not included therein.

34 In the second place, that interpretation takes account of the Court's case-law, in particular the judgment of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351), from which it follows that internal reorganisations of the initial contractor are capable of constituting insubstantial changes in

the terms of the public contract concerned which do not require the opening of a new public procurement procedure.

35 In recital 110 of Directive 2014/24, insolvency is listed without reservation as one of the examples of structural changes to the original contractor not being contrary to the principles of transparency and equal treatment on which that case-law is based. As the Advocate General noted in points 84 and 85 of his Opinion, the insolvency of the original contractor, including the bankruptcy which results in its winding-up proceedings, represents an extraordinary circumstance before the occurrence of which the public contract or framework agreement at issue has already been opened to competition in accordance with Directive 2014/24 and, under Article 72(1)(d)(ii) of that directive, can neither lead to any other substantial modifications, in particular those relating to the qualitative selection criteria initially established, or aimed at circumventing the application of that directive.

36 However, the case-law referred to in paragraph 34 of the present judgment does not apply to the insolvency of the original contractor or, generally, to situations in which a substantial modification of the original contractor does not require a reopening to competition. Therefore, that case-law does not preclude the interpretation which follows from paragraph 31 of the present judgment.

37 The interpretation of Article 72(1)(d)(ii) of Directive 2014/24 given in paragraph 31 of this judgment is also supported by the specific objective of the exception provided for in that provision, which is, as the Advocate General observed in points 82 and 83 of his Opinion, to introduce a degree of flexibility in the application of the rules in order to respond pragmatically to all the extraordinary instances, such as the insolvency of the successful tenderer, which prevents it from performing the public contract at issue. As the Advocate General noted in point 83 of his Opinion, the problem created by insolvency, which the EU legislature sought to address, does not arise differently depending on whether the business of the successful tenderer which has become insolvent is continued, at least in part, or is totally stopped.

38 In the light of all the foregoing considerations, the answer to the question referred is that Article 72(1)(d)(ii) of Directive 2014/24 must be interpreted as meaning that an economic operator which, following the insolvency of the initial contractor which led to its liquidation, has taken over only the rights and obligations of the initial contractor arising from a framework agreement concluded with a contracting authority must be regarded as having succeeded in part of that initial contractor, following corporate restructuring, within the meaning of that provision.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 72(1)(d)(ii) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that an economic operator which, following the insolvency of the initial contractor which led to its liquidation, has taken over only the rights and obligations of the initial contractor arising from a framework agreement concluded with a contracting authority must be regarded as having succeeded in part to that initial contractor, following corporate restructuring, within the meaning of that provision.

[Signatures]

* Language of the case: Swedish.

OPINION OF ADVOCATE GENERAL

SAUGMANDSGAARD ØE

delivered on 9 September 2021 (1)

Case C-461/20

Advania Sverige AB,

Kammarkollegiet

v

Dustin Sverige AB

(Request for a preliminary ruling from the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden))

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 72(1)(d)(ii) – Modification of contracts during their term – Insolvency – Transfer of a framework agreement on the insolvency of the initial contractor – New contractor – Definition of substantial modification of the contract – Exception to the requirement for a new procurement procedure – Conditions)

I. Introduction

1. This case, which relates to Directive 2014/24/EU on public procurement, (2) concerns one of the exceptions to the requirement for a procurement procedure, that is to say, where the person awarded the contract becomes insolvent while it is being performed. The exception in question appears in Article 72(1)(d)(ii) of the Public Procurement Directive ('the provision at issue').

2. The Court is asked to rule on the conditions for that exception to apply and, specifically, on whether those conditions require the person replacing the initial contractor to take over not only the contract concerned but also at least part of the initial contractor's business.

3. The question has been referred in proceedings between on the one hand, the Kammarkollegiet (Swedish Legal, Financial and Administrative Services Agency) and Advania Sverige AB ('Advania'), which replaced the initial contractor, and, on the other, Dustin Sverige AB ('Dustin'), a company with an interest in the contracts at issue in the main proceedings. Dustin is challenging the transfer to Advania of framework agreements initially awarded to Misco AB, after Misco AB, the original contractor, was declared insolvent, without a reopening to competition in accordance with the Public Procurement Directive, where the transfer was not accompanied by the transfer of at least part of Misco's business, that is to say, the part required to perform those framework agreements.

4. It is, in principle, unexpected and extraordinary for an initial successful tenderer to become insolvent and to be replaced by a new contractor, since every precaution is normally taken to ensure that tenderers are solvent. This is nevertheless a problem that contracting authorities do sometimes encounter in the life of a company, as the case in the main proceedings demonstrates, and which the legislature resolved to regulate for the first time in the provision at issue. The Court is invited to consider whether that provision allows a new

contractor to be appointed, including by an insolvency administrator, without the contract being reopened to competition and with no obligation on the new contractor to take over part of the business of the initial contractor, without thereby infringing the principles governing public procurement which the Public Procurement Directive is intended to uphold.

5. On completion of my analysis, I will propose that the Court should find that the exception laid down by the provision at issue does not require the new contractor, which is awarded the contract in place of the initial contractor, also to acquire part of the initial contractor's business.

II. Legal context

A. The Public Procurement Directive

6. Recitals 107 and 110 of the Public Procurement Directive state:

'(107) It is necessary to clarify the conditions under which modifications to a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

…

(110) In line with the principles of equal treatment and transparency, the successful tenderer should not, for instance where a contract is terminated because of deficiencies in the performance, be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract should be able, in particular where the contract has been awarded to more than one undertaking, to undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that tenderer.'

7. Article 18 of that directive, entitled 'Principles of procurement', provides in paragraph 1:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. …'

8. Article 57(4)(b) of that directive provides:

'Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations.'

9. Article 72 of the Public Procurement Directive, entitled 'Modification of contracts during their term', provides as follows:

‘1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

…

(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:

…

(ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; …

…

(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

…

4. A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

(b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(c) the modification extends the scope of the contract or framework agreement considerably;

(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1.

…’

B. Swedish law

10. Lagen (2016:1145) om offentlig upphandling (Law (2016:1145) on public procurement, ‘the LOU’), (3) provided in Chapter 17, Paragraph 13, that a contract or a framework agreement might be modified with one contractor being replaced by another, without a new procurement, if:

‘(1) the new contractor full or partially replaces the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, and

(2) the circumstance that a new contractor fully or partially replaces the initial contractor did not entail other substantial modifications to the contract or framework agreement.’

11. The referring court has clarified that it is apparent from the second condition that such a replacement of the contractor presupposes that the new service provider is not excluded on the grounds for exclusion laid down by that law and that it meets the qualification conditions established in the original contract.

III. The dispute in the main proceedings, the question referred and the proceedings before the Court of Justice

12. The Kammarkollegiet had held a tendering procedure for the supply of computer equipment, in particular computers, monitors and tablets, through a restricted procedure, (4) in accordance with the LOU.

13. Seventeen candidates, including Advania, demonstrated that they satisfied the necessary conditions. In accordance with the rules governing the restricted procedure, (5) the Kammarkollegiet had provided that if more than nine candidates qualified to tender, only the highest-placed nine would be invited to submit tenders. Advania was not among those nine.

14. Framework agreements were concluded with six suppliers in various fields. Misco was awarded four framework agreements covering all the fields concerned. Dustin was awarded framework agreements in two of those fields.

15. By letter of 4 December 2017, Misco requested the Kammarkollegiet to approve the transfer of its four framework agreements to Advania. On 12 December 2017, Misco was declared insolvent. On 18 January 2018, the insolvency administrator signed a contract with Advania for the transfer of the four framework agreements. The transfer was approved by the Kammarkollegiet in February 2018.

16. Following that transfer, Dustin applied to the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm, Sweden) for a declaration of invalidity of Advania's framework agreements with the Kammarkollegiet.

17. That court dismissed the application. It held that Advania had obtained the framework agreements and acquired the branches of Misco's business used for performance of those framework agreements, as Chapter 17, Paragraph 13, of the LOU requires.

18. Dustin appealed against that judgment before the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden), which upheld that appeal and declared the four framework agreements between Advania and the Kammarkollegiet invalid. The Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) found that the Kammarkollegiet had approved the transfer of the framework agreements because of Misco's insolvency. In contrast to the first instance court, however, it held that, with the exception of the framework agreements at issue, Misco had transferred virtually no business to Advania and, therefore, Advania could not be regarded as having fully or partially replaced Misco within the meaning of Chapter 17, Paragraph 13, of the LOU. The referring court noted in particular that only one of Misco's employees had subsequently joined Advania, that the Misco customer list transferred to Advania was not fully updated or relevant and that there was no evidence to prove that Advania had taken on any of Misco's subcontractors.

19. Advania and the Kammarkollegiet appealed against that second instance judgment to the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden). In their appeal, they do not dispute the appeal court's assessment of what was included in the transfer from the insolvency estate. However, they contend that such a transfer satisfies the condition in Chapter 17, Paragraph 13 of the LOU and in the Public Procurement Directive that there must be a whole or partial succession.

20. According to Advania and the Kammarkollegiet, neither the LOU nor the Public Procurement Directive requires that business of a certain nature or scope be transferred to the new contractor in addition to the framework agreements.

21. Dustin, for its part, is of the view that the expression 'universal or partial succession into the position of the initial contractor' in conjunction with the concept of 'corporate restructuring' in the provision at issue makes clear that, together with the framework agreement, the new contractor must take over all or part of the original contractor's business used to perform the contracts at issue.

22. In view of those divergent interpretations, the referring court states that it requires clarification on the scope of the provision at issue and in particular on what meaning is to be given to replacement as a consequence of 'universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency'.

23. In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court) stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

> ‘Does the circumstance that a new contractor has taken over the initial contractor’s rights and obligations under a framework agreement, after the initial contractor has been declared insolvent and the insolvency estate has transferred the agreement, mean that the new contractor will be deemed to have succeeded into the position of the initial contractor under conditions such as those referred to in Article 72(1)(d)(ii) of the Public Procurement Directive?’

24. The request for a preliminary ruling, of 15 September 2020, was received by the Court on 24 September 2020.

25. Written observations have been submitted by Advania, the Kammarkollegiet, Dustin, the Austrian Government and the European Commission.

IV. Analysis

26. With a view to assessing the scope of the provision at issue, I note at the outset, as the Court held in *pressetext Nachrichtenagentur*, (6) that as a rule, a change in the contractual partner is a change to one of the essential terms of the public contract. That premiss is reproduced in Article 72(4)(d) of the Public Procurement Directive.

27. This means that replacement of the initial successful tenderer is in principle a substantial modification of the contract giving rise to a new procurement procedure, (7) in accordance with the principles of transparency and equal treatment that underlie the requirement for competition between potentially interested candidates from the different Member States. (8)

28. By way of an exception, the provision at issue provides that where the initial successful tenderer is insolvent a replacement may be appointed for that person with no new procurement procedure.

29. The question arises of the precise circumstances in which that exception applies and, in particular, whether the person replacing the original contractor must take over at least part of the business of the initial successful tenderer.

30. Two divergent interpretations of the provision at issue have been put before the Court.

31. According to one interpretation, advocated by the Kammarkollegiet, Advania and the Austrian Government, the provision at issue must be interpreted as meaning that where the initial contractor is replaced, following its insolvency, the new contractor does not have to take over part of the initial contractor’s business alongside the transfer of the contract. They consider that if the terms at issue had to be interpreted as requiring some type of business transfer, the application of the provision would be severely limited.

32. The second interpretation, advocated by Dustin and the Commission, presupposes in contrast that the new contractor takes over at least part of the business of the initial contractor. Dustin is of the view that almost free rein would otherwise be given to trade in agreements that have been put out to tender.

33. According to Dustin and the Commission, in order to avoid jeopardising the principles of equal treatment and transparency and, accordingly, the objective of ensuring competition, the substantive identity of the initial successful tenderer must be preserved, that is to say, the assets used to perform the framework agreement, or at least a part of those assets, must be transferred to the person replacing the initial contractor, in order to ensure continued identity between that person and the initial contractor. The Commission recognises that this may be impossible where the business of the initial contractor is completely wound up. In such a situation it would then be necessary, according to the Commission, in order to ensure equal treatment between the initial tenderers, for the contracting authority to look as a matter of priority to those tenderers, perhaps in the order in which they were ranked on conclusion of the original procurement procedure.

34. The stakes are high. The Court is invited to define the margin of manoeuvre available to a contracting authority to replace the initial successful tenderer where it becomes insolvent.

35. To my mind, the wording of the provision at issue is not amenable to an interpretation such as that proposed by Dustin and the Commission. I will attempt below to demonstrate that the provision must be understood in line with the first interpretation, relying on its wording (section A), its internal and external context, that is to say, on the provisions that frame it and the *travaux préparatoires* (section B), and on the objectives pursued by the legislature (section C).

A. The wording of the provision at issue

36. I note, first of all, that according to the wording of Article 72(1) of the Public Procurement Directive, framework agreements may be modified with no new procurement procedure in five situations listed in subparagraphs (a) to (e) of that article. Article 72(1)(d)(ii), which the Court is asked to interpret, expressly mentions the insolvency of the initial contractor as one of the situations in which a framework agreement may be awarded to a new contractor without holding a new procurement procedure, even though that change constitutes a substantial modification of the contract.

37. Under the provision at issue, application of the exception in question is subject to several conditions, but they do not expressly include the transfer of part of the initial contractor's business.

38. There are three conditions, as follows.

– The new contractor must be an economic operator that *fulfils the criteria for qualitative selection*. It is common ground that this condition is satisfied where, as in the case in the main proceedings, the new contractor, in this instance Advania, was among the undertakings considered eligible to tender. (9)

– Replacement by the new contractor does not entail *other substantial modifications to the contract*. This condition likewise does not seem to give rise to any uncertainty in the case in the main proceedings as set out by the referring court.

– Replacement by the new contractor *is not aimed at circumventing the application of the Public Procurement Directive*. The replacement must not be a stratagem by means of which the contracting authority selects the contractor of its choice without calling for competition between the candidates interested in the contract. I will return to that last condition, which aims to prevent circumvention of the procurement rules laid down by the directive. (10) I would nevertheless clarify at the outset that the referring court has not suggested that the appointment of the new contractor in the case in the main proceedings was aimed at avoiding application of those rules.

39. Dustin and the Commission maintain, however, that the requirement that at least part of the initial contractor's business be transferred flows implicitly from the terms of the provision at issue themselves, according to which the initial contractor is replaced by another economic operator '*as a consequence of ... universal or partial succession* into the position of the initial contractor, following *corporate restructuring*, including takeover, merger, acquisition or insolvency'. (11)

40. I note that the terms used vary slightly from one language version of the provision at issue to another. The English- and French-language versions of the provision use the expression 'universal or partial succession', whereas the Swedish-language version of the provision at issue states that another economic operator 'replaces [the initial service provider] in full or in part'.

41. In the present context, however, I believe those expressions are broadly equivalent.

42. It has become clear – to my mind quite correctly – from the emphasis that all the parties that have submitted observations to the Court have laid on the notion of 'succession', that the new contractor succeeds universally or partially into the position of the initial contractor. The English-language version further highlights that consideration by specifying that the replacement takes place 'as a consequence of' a universal or partial succession. (12)

43. This implies that the new contractor takes over all or part of the assets of the initial contractor. I would emphasise nevertheless that the concept of 'part' is not defined in the provision at issue. The part may be smaller or larger depending on the event giving rise to the succession. (13) On a literal reading of those terms, it can therefore be considered that the new contractor may take over only a public contract or a framework agreement.

44. In contrast, the concept of 'part' does not mean that only part of a contract or framework agreement may be transferred because that would constitute a significant change to the contract or framework agreement and would infringe the requirement that there must be no other 'substantial modifications'. Reducing the scope of a framework agreement is, in my view, clearly capable of modifying the economic balance of the contract in favour of the contractor in a manner which was not provided for in the initial framework agreement and, therefore, of constituting a 'substantial modification' within the meaning of Article 72(4)(b) of the Public Procurement Directive.

45. The new contractor that replaces the initial successful tenderer, by succeeding into its position, must therefore take over the framework agreement or public contract in its entirety. In other words, the new contractor must accept all the rights and obligations under that contract. (14)

46. As specified in the remaining part of the provision at issue, the event giving rise to the succession must be a corporate restructuring, which can take various forms. The legislature lists four of these by way of example and therefore non-exhaustively. I note, as does the Commission, that the first three examples given, that is to say, takeover, merger and acquisition, have something in common. In all three cases, the operations referred to involve continuation of the undertaking concerned, that is to say, the continued existence of its business and the material and human resources necessary for that business.

47. In the case of insolvency, in contrast, mentioned as the fourth example, the undertaking does not necessarily continue to exist. Many situations are possible. The undertaking may indeed continue to be operated in its entirety, but it may also be wound up and its assets sold, if necessary, one by one. In the latter situation, a framework agreement constituting one of the undertaking's assets may be transferred separately to a third party which does not take over any other asset of the undertaking concerned.

48. I therefore see nothing, in the wording of the provision at issue alone, to suggest that, where the initial contractor becomes insolvent, in addition to the transfer of a framework agreement awarded to it, part of the other assets it possessed must be transferred to the new contractor.

49. I therefore do not share the Commission's view that because the first three examples involve the business of the initial successful bidder remaining in place and because, according to the terms of the provision, insolvency is placed on the same footing as those examples, by implication the initial contractor's underlying business must also continue fully or at least partially. According to that institution, the legislature did not envisage a situation in which the initial contractor's business is completely wound up.

50. To my mind, since the wording of the Public Procurement Directive does not expressly limit the scope of the concept of 'insolvency', that term cannot be understood in so restricted a manner as the Commission proposes.

51. That construction is in my view, corroborated by the context of the provision at issue.

B. The context of the provision at issue

52. To my mind the *travaux préparatoires* demonstrate that insolvency is not an example of restructuring similar to takeover, merger and acquisition and thereby requiring the new contractor to be substantively identical (15) to the initial contractor and, therefore, to preserve the part of its business that the initial contractor had assigned to performance of the public contract at issue. On the contrary, it emerges from the *travaux préparatoires* that from the outset the legislature envisaged insolvency in a broad sense, as a situation distinct from takeover, merger or acquisition.

53. I note first of all that in its green paper on public procurement (16) the Commission invited stakeholders to give their views specifically on changes affecting the successful tenderer where its status changes as a result of incidents impacting on the capacity to execute the contract, such as bankruptcy. The

Commission emphasised that there should be a discussion to ascertain whether EU-level instruments were needed to help contracting authorities address those situations in an appropriate manner. It also asked the stakeholders whether EU law should make provision for the explicit obligation or right of contracting authorities to change supplier or to terminate the contract in certain circumstances and whether it should also lay down specific procedures on how the new supplier should be chosen. (17)

54. The Commission envisaged inter alia replacing the initial contractor, where it becomes insolvent, using a simplified procedure; mandating the second best of the original tender procedure; or reopening competition only between the tenderers having participated in the original procedure, provided that the former procedure did not take place too long ago. (18)

55. In its original proposal for a directive, (19) which took into consideration the observations received on its green paper, the Commission proposed that the exception to the requirement for a public procurement procedure should apply in the case of corporate restructuring *or* insolvency. (20) The Commission therefore clearly distinguished between the two situations, and in the preamble to its proposal for a directive specified the types of situation envisaged, termed ‘structural changes’, that is to say, internal reorganisations, mergers and acquisitions, and insolvency. (21)

56. The fact that the final wording of the provision at issue does not expressly draw that distinction and that the legislature chose to list examples of possible situations does not in my view mean that it placed insolvency, on the one hand, and takeovers, mergers and acquisitions, on the other, on the same footing in respect of the transfer of business to a new contractor.

57. My assessment is borne out by the meaning of the expression ‘restructuring operations’ which is not confined to situations in which the business of the undertaking concerned remains in place. (22)

58. I therefore consider that the legislature intended to specify the types of situation envisaged in the provision at issue itself rather than only in the preamble to the Public Procurement Directive, as previously proposed, but did not thereby intend to suggest that they all have similar characteristics as regards any taking over of the business of the initial contractor for performance of the public contract.

59. The internal context of the provision at issue within the Public Procurement Directive in my view supports that interpretation.

60. The provision at issue forms part of Article 72 of that directive, entitled ‘Modification of contracts during their term’, which in its various paragraphs carefully describes the exceptions to the obligation to follow the procurement procedure rules and the conditions for them to apply. Paragraphs 1 and 2 list the situations in which contracts and framework agreements may be modified with no new procurement procedure and paragraph 5 further emphasises that a new procurement procedure is required where there are modifications other than those contained in those two paragraphs. Paragraph 4 specifies what constitutes a substantial modification of a contract or framework agreement, emphasising that the appointment of a new contractor constitutes a substantial modification *unless* the situation is, inter alia, one of those referred to in Article 72(1)(d) and therefore, in particular, in a situation of insolvency as specified in the provision at issue.

61. For each situation envisaged, Article 72 indicates the circumstances in which the exceptions to the requirement for procurement procedures apply. As I have already noted, those circumstances do not mention that at least part of the initial contractor’s business must be transferred to the new contractor where the initial contractor is insolvent.

62. Since it is an exception to the general rule that there must be a public procurement procedure, the concept of ‘insolvency’ in the provision at issue must of course be interpreted strictly. That interpretation may not however render the exception ineffective. It would do so, (23) in my view, if the term ‘insolvency’ was limited to situations in which the undertaking concerned can continue to operate, at least in part, rather than being understood in its usual broader sense. I would emphasise here that the term ‘insolvency’ is widely used and is in my view capable of including all the instances of insolvency referred to in Article 57(4)(b) of the Public Procurement Directive. (24)

63. I also do not believe that application of the insolvency exception is subject to any condition other than the three referred to in the provision at issue and set out in point 38 of this Opinion.

64. Recital 110 of that directive supports that view, stating as it does that, in the event of 'certain structural changes' to the successful tenderer during the performance of the contract, including insolvency, a new procedure is not automatically necessary. The very general expression 'certain structural changes' has the effect that 'corporate restructuring' is understood in a particularly broad sense. The examples given encompass incidents and events likely to affect the very structure of a company and vary from purely internal restructuring to insolvency, by way of company takeovers.

65. My proposed interpretation of the provision at issue, to the effect that the wording and context of that provision do not imply that part of the initial contractor's business must be transferred to the new contractor in order for the exception based on the insolvency of the initial contractor to apply, is further corroborated by the objectives of the Public Procurement Directive.

C. The objectives of the Public Procurement Directive

66. The objectives pursued by the legislature are apparent from the explanatory memorandum of the proposal for a directive.

67. While confirming the objective of ensuring competition between candidates in all the Member States and, to that end, reaffirming the principles of transparency and equal treatment, the legislature sought, first, to have regard to other objectives (25) and, second, to introduce a degree of flexibility and simplification in application of the rules. (26) The proposal for a directive also underscores the intention of reducing formalities and responding pragmatically to the actual problems encountered by contracting authorities and tenderers, in the light of the Court's case-law.

68. As academic commentators have highlighted, (27) whereas the public procurement directives previously focused on the rules applicable to *public procurement* and, in particular, to calls for competition between candidates *before* the procurement in the strict sense, the Public Procurement Directive (28) also addresses the *performance of public contracts* and, therefore, the phase *subsequent* to procurement, which includes any modification of the contracts during their performance.

69. In that respect, the Public Procurement Directive takes full account of and codifies the Court's case-law. Nevertheless, as I will demonstrate, it went much further. It is helpful to examine that case-law and how it is reflected in the directive in order to gauge the innovations in the directive.

70. The *pressetext* judgment (29) is decisive here. The case that gave rise to that judgment concerned an amendment to a public contract during its currency and turned specifically on the identity of the successful tenderer. The Court noted that the existing directive did not address the matter, (30) even though it did contain a number of pertinent indications.

71. The Court noted that Directive 92/50 sought to ensure both transparency of procedures and equal treatment of tenderers, in order to pursue the principal objective of opening up to competition in all the Member States. (31) It inferred that amendments to the provisions of a public contract during its currency constitute a new award of a contract when they are materially different in character from the original contract. The Court made clear what should be understood by a 'material amendment', stating that it includes an amendment which introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted. (32)

72. The Court accordingly found that, as a rule, 'the substitution of a new contractual partner' for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract. (33)

73. The *pressetext* judgment specifies the situations in which certain changes to the successful tenderer nevertheless do not constitute a fundamental amendment.

74. That is so where, as in the case giving rise to that judgment, the successful tenderer's business is transferred to one of its subsidiaries – which is wholly owned by it, which it directs and for which it is jointly and severally liable – and where there is no change in the overall service performed. An arrangement of that

nature is merely an ‘internal reorganisation’ of the contracting partner which does not modify in any fundamental manner the terms of the initial contract. (34)

75. That is also so where the successful tenderer is a legal person established as a public company listed on a stock exchange. The Court stated that it in fact follows from the very nature of such a company that the composition of its shareholders is liable to change at any time. As a rule, such a situation therefore does not affect the validity of the award of a public contract to such a company. (35)

76. The Court added that the same finding applies to legal persons established as limited liability registered cooperatives, as in the case that gave rise to the *pressetext* judgment. Any changes to the composition of the shareholders in such a cooperative will not, as a rule, result in a material amendment to the contract awarded to it. (36)

77. The Public Procurement Directive fully reflects those considerations, in the provision at issue on the one hand and in its preamble, in recitals 107 and 110, on the other. Recital 107 expressly refers to the Court’s case-law and recital 110 mentions purely internal reorganisations as well as takeovers, mergers and acquisitions, which involve a change of shareholders or partners and, therefore, of owners.

78. I would nevertheless note that the Public Procurement Directive does not merely take into account the guidance in the *pressetext* judgment but addresses other types of situation.

79. Whereas the Court identified the situations in which a change affecting the successful tenderer does not constitute a ‘material amendment’ and, therefore, does not give rise to a new public procurement procedure, in the provision at issue the Public Procurement Directive also specifies the situations where a change relating to the successful tenderer, while it would normally constitute a ‘substantial modification’, nevertheless likewise does not require a reopening of competition.

80. This applies, inter alia, to takeovers, mergers and acquisitions, provided the conditions listed in the provision at issue are satisfied.

81. In particular, for the purposes relevant to the Court in this case, the Public Procurement Directive specifically makes provision for insolvency, which had not yet been put before it.

82. Inclusion of that situation is novel compared with both the EU public procurement legislation and the case-law existing on the date on which the Public Procurement Directive was adopted. It addresses a practical problem encountered in the performance of public contracts.

83. This is the problem of ensuring that where the contracting authority is faced with a successful tenderer which is no longer able to perform the public contract because it is insolvent, a person can be appointed to replace it without a new procurement procedure causing excessive delay or disproportionately increasing the cost of the contract. The provision at issue seeks to address the problem by providing a solution that is in the interests of both the contracting authority and the successful tenderer and its creditors. The problem created by the insolvency is no less considerable where the insolvent undertaking continues to exist in part than where it is wound up entirely. A person must be found to replace it in any event. By not expressly differentiating between those situations, the legislature therefore appears to have sought to respond pragmatically to all those situations while upholding the principles governing public procurement enshrined in Article 18(1) of the Public Procurement Directive, in particular the prohibition on the contracting authority artificially narrowing competition by excluding the application of the directive.

84. Indeed, I note first of all in that respect that, where the initial successful tenderer becomes insolvent, the framework agreement has already been opened to competition (37) and that the tender accepted can no longer be substantially modified. As the provision at issue expressly states, if other substantial modifications are made, apart from a change of contracting partner, one of the three conditions laid down in the provision at issue (38) is not fulfilled and there must be a new procurement procedure.

85. Next, the insolvency of a successful tenderer, although not a rare occurrence, is an extraordinary situation which, in the normal course, is neither foreseen by the contracting authority or the initial successful tenderer nor desirable. Economic and financial standing is one of the three selection criteria for candidates laid down in Article 58 of the Public Procurement Directive. Moreover, an economic operator’s insolvency

within the meaning of Article 57(4)(b) of that directive is a ground – which may be facultative or mandatory depending on national law – for exclusion from participating in a procurement procedure.

86. The fact that insolvency is an extraordinary situation as a rule means that the replacement of a successful tenderer by a new contracting partner will not be a manoeuvre by the contracting authority aimed at excluding application of the Public Procurement Directive. The likelihood of such a manoeuvre is even less where an insolvency administrator has been appointed, as in the case in the main proceedings, representing not the interests of the contracting authority but those of the creditors of the successful tenderer, and acting under the supervision of a court.

87. It is in any event for the national court to verify that the persons concerned have not engaged in a manoeuvre of that kind. It is incumbent on the national court to verify, in particular, that the selection criteria, such as that relating to the financial standing of the successful tenderer, have in fact been examined. The date on which the insolvency occurs, especially if it is soon after the date on which the contract is concluded, may be circumstantial evidence that compliance with this qualitative criterion was not properly verified. In respect of a case such as that at issue in the main proceedings, I note that the Court has not been given any specific information on this matter, but that the referring court has not in any way suggested that the parties concerned intended to circumvent the application of the Public Procurement Directive.

88. Last, I note that, where an insolvency administrator has been appointed to administer the assets of the insolvent successful tenderer, it is for that administrator in the first place, not the contracting authority, to select the new contractor. According to Article 1(2) of the Public Procurement Directive, on the scope of application of the directive, procurement is defined as the acquisition by means of a public contract of supplies or services by a contracting authority from economic operators *chosen* by those contracting authorities. If the contracting authority has not chosen an economic operator, therefore, public procurement is not required under the Public Procurement Directive, even if it is necessary for the contracting authority to approve the contracting partner.

89. Since these are contracts involving mutual obligations of the new contractor and the contracting authority, that approval is needed, under the contract law of the Member States, even though it is not laid down in the Public Procurement Directive. The contracting authority may even have been consulted and have participated in some negotiation prior to the appointment of the new contractor, as appears to have occurred in the case in the main proceedings. (39) To my mind, that fact is not sufficient to regard the contracting authority as having ‘chosen’ the contracting partner within the meaning of the Public Procurement Directive. (40)

90. The fact that a new contracting partner can be appointed without a new procurement procedure where the initial contractor becomes insolvent clearly introduces a considerable margin of manoeuvre in relation to public procurement. However, I believe that such leeway both reflects the intention of the legislature and upholds the principles enshrined in Article 18(1) of the Public Procurement Directive, provided the three conditions for the exception to apply, set out in point 38 of this Opinion, are satisfied.

91. The argument put forward by Dustin and the Commission to the effect that the new contractor may only be appointed without a new procurement procedure if it takes over at least the part of the initial contractor’s business used for performance of the contract, besides the fact that it is not expressly laid down by the legislature and, to my mind, goes beyond the meaning of the provision at issue, creates more problems than it solves.

92. I note, first, that an obligation to take over part of the business of the initial contractor would significantly reduce the scope of the insolvency exception, since in many cases the undertaking is completely wound up. It is moreover unclear what proportion of the business activities of the initial contractor would have to be transferred for the exception to apply.

93. Second, such an obligation could make the work of the insolvency administrator particularly difficult. It could even conflict with the powers granted to an insolvency administrator under national insolvency law to negotiate in the interests of creditors. (41)

94. In that respect I share the view of the Austrian Government according to which it may or may not be common to transfer public contracts or framework agreements only, depending on the business sector. When

a construction undertaking becomes insolvent, for example, the transfer of certain large construction sites may involve the transfer of material and personnel. In contrast, the same does not necessarily apply to computer services or the supply of computer equipment. I also note, in common with that government, that an undertaking that has become insolvent is sometimes able to continue operating, provided it transfers a public contract. Ruling out that option would not only render it impossible to replace the contractor, but could also jeopardise attainment of the objectives of the insolvency procedure of preserving the existing undertaking to the extent possible in the interests of creditors.

95. Third, requiring a transfer of assets in order to prevent a party from circumventing the competition rules would not only be an onerous solution but is also arguably unnecessary, since the transfer of a public contract is in any event subject to the condition contained in the provision at issue that it must not be a means of circumventing the application of the Public Procurement Directive.

96. Fourth, I will examine the specific issues raised by the Commission's argument that there is no obligation on the insolvency administrator to look to the initial tenderers in the event that the business of the initial successful tenderer completely ceases to exist.

97. According to the Commission the legislature did not intend to provide for the situation in which the initial contractor's business is completely wound up. (42) That institution nevertheless concedes that such a situation may occur (43) and that a public contract may be its only remaining asset.

98. In such circumstances, the Commission is of the view that the provision at issue may be interpreted as meaning that the exception to the requirement to hold a new procurement procedure does apply, provided the public contract is offered to all the initial tenderers that satisfy the selection criteria, on a non-discriminatory and equivalent basis, for example by approaching them in their order of ranking. (44)

99. I emphasise, nevertheless, first, that the provision at issue contains no such requirement, which appears to be contrary to the intention of the legislature. Indeed, as I stated in points 53 and 54 of this Opinion, during the *travaux préparatoires* the Commission had envisaged that a specific procedure could apply in the event of bankruptcy and provided in particular that the contracting authority would revert to the original tenderers. Ultimately, the Public Procurement Directive did not take up that proposal and did not replace it with any other. I infer from this that the legislature clearly rejected any such obligation to contact the original tenderers.

100. Second, an obligation to offer the public contract or framework agreement to the original tenderers in their order of ranking would imply that it would have to be awarded to the first of them to accept it. However, that approach overlooks the need for the new contractor to be approved by the contracting authority. (45) A former tenderer, even if it is ranked first after the initial successful tenderer, does not have an automatic right to be awarded the contract in those circumstances.

101. Third, if the insolvency administrator is bound to look to the initial tenderers, it might be deprived of the ability to seek the most advantageous person to take over the contract, in the interests of the creditors. To my mind, nothing in the Public Procurement Directive suggests that the EU legislature intended to restrict in that way any powers conferred on insolvency administrators by national law. (46)

102. I therefore cannot concur with the Commission's view.

103. By contrast, as can be seen from the foregoing assessment, I am of the view that, provided the three conditions laid down in the provision at issue and set out in point 38 of this Opinion are satisfied, an interpretation of that provision as meaning that the previously awarded framework agreement or public contract alone may be transferred to a new contractor, with no requirement to carry out a new procurement procedure and without the new contractor being obliged to take over another business of the initial contractor, addresses an actual problem in the life of a company while upholding the principles that govern public procurement enshrined in Article 18(1) of the Public Procurement Directive.

V. Conclusion

104. In the light of the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) as follows:

> Article 72(1)(d)(ii) of Directive 2014/21/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that the fact that a new contractor has taken over the initial contractor's rights and obligations under a framework agreement after the initial contractor has been declared insolvent and the insolvency estate has transferred the agreement means that the new contractor must be deemed to have succeeded in full or in part into the position of the initial contractor within the meaning of that provision. That transfer is not required to be accompanied by a transfer to the new contractor of part of the initial contractor's business used to perform the framework agreement.

---

1 Original language: French.

---

2 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65; 'the Public Procurement Directive').

---

3 The referring court has indicated that this law has since been repealed.

---

4 That procedure is set out in detail in Article 28 of the Public Procurement Directive.

---

5 See Article 65 of the Public Procurement Directive, entitled 'Reduction of the number of otherwise qualified candidates to be invited to participate'.

---

6 Judgment of 19 June 2008 (C-454/06, EU:C:2008:351; 'the *pressetext* judgment'; paragraph 40). I will examine the consequences of that judgment in greater detail in points 70 to 78 of this Opinion.

---

7 See, to that effect, the *pressetext* judgment, paragraph 47, and Article 72(1)(e) of the Public Procurement Directive.

---

8 See judgment of 7 September 2016, *Finn Frogne* (C-549/14, EU:C:2016:634, paragraph 28). Those principles and the requirement for competition are set out in Article 18 of the Public Procurement Directive.

---

9 See point 13 of this Opinion.

---

10 See points 84 and 86 and 87 of this Opinion.

---

11 Emphasis added.

---

12 The English-language version reads: 'as a consequence of universal or partial succession into the position of the initial contractor'.

---

13 See points 46 and 47 of this Opinion.

---

14 I note that this aspect is not disputed. Dustin emphasises that part only of the framework agreement cannot be transferred to the new contractor.

---

15 The concept of 'substantive identity' between economic operators is used in the context of verifying that the tenders submitted by tenderers comply with the rules and is a corollary of the concept of 'legal identity'. The preselected economic operators must be legally and substantively identical to those who submit tenders (see judgments of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 40, and of 11 July 2019, *Telecom Italia*, C-697/17, EU:C:2019:599, paragraph 34). I would emphasise however that this requirement obtains at the procurement stage rather than at the contract performance stage.

---

16 Commission Green Paper of 27 January 2011 on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market (COM(2011) 15 final; 'the green paper').

---

17 See the green paper, question 41.

---

18 See page 27 and footnote 61 of the green paper.

---

19 Proposal for a Directive of the European Parliament and of the Council on public procurement (COM(2011) 896 final; 'the proposal for a directive').

---

20 See the proposal for a directive, Article 72(3).

---

21 See recital 47 of the proposal for a directive.

---

22 As can be seen from the opinion of the Conseil d'État (Council of State, France) (Finance Section) of 8 July 2000 (Cession de contrats – No 141654), a restructuring operation may be the consequence of the person originally awarded the public contract ceasing to exist.

---

23 On how the effectiveness of the provision at issue might be compromised, see also points 92 to 94 of this Opinion.

---

24 See point 8 of this Opinion.

---

25 Including protection of the environment and promoting innovation, employment and social inclusion (paragraph 1 of the explanatory memorandum of the proposal for a directive).

---

26 See the explanatory memorandum of the proposal for a directive.

---

27 See, among others, Treumer, S., 'Contract changes and the duty to retender under the new EU public procurement Directive', *Public Procurement Law Review*,2014, 3, p. 148.

---

28 Those observations apply likewise to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

---

29 See point 26 of this Opinion.

---

30 See paragraph 30 of the *pressetext* judgment. This concerned Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

---

31 See paragraphs 31 and 34 of the *pressetext* judgment.

---

32 See paragraph 35 of the *pressetext* judgment.

---

33 See paragraph 40 of the *pressetext* judgment.

---

34 See paragraph 45 of the *pressetext* judgment.

---

35 See paragraph 51 of the *pressetext* judgment.

---

36 See paragraph 52 of the *pressetext* judgment.

---

37 Treumer, S., 'Regulations of contract changes leading to a duty to retender the contract: the European Commission's proposals of December 2011', (*Public Procurement Law Review*, 2012, 5, 135-166) states that the 'public procurement rules have fulfilled their function'.

---

38 See the second condition referred to in point 38 of this Opinion.

---

39 See point 15 of this Opinion.

---

40 Sue Arrowsmith is of the view, however, that if the contracting authority remains able to have an influence in determining the contracting partner for reasons not relating to its technical or financial capability, it does choose the contracting partner and that choice must be subject to a procurement procedure. See, *The law of Public and Utilities procurement: Regulations in the EU and UK*, Sweet and Maxwell, 3rd edition, 2014, point 6-290.

---

41 It can be seen from the case file that the national law in Sweden and in Austria lays down such powers. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141 p. 19) recognises, in recital 22, that the Member States have widely differing substantive laws in the field of insolvency. In that respect, see also Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (OJ 2019 L 172 p. 18), in particular recitals 1, 4, 7,8 and 12.

---

42 See point 49 of this Opinion.

---

43 See point 33 of this Opinion.

---

44 The Commission states that Italian law appears to have adopted a solution of that nature. I would point out that in their commentaries on the Italian legislation transposing Directive 2014/24, Marion Comba and Sara Richetto state that, in Article 110 D Lgs 50/2016, the Member State included an *option* for the contracting authority to turn to the initial tenderers in their order of ranking (see, Treumer, S. and Comba, M., *Modernising Public Procurement – The approach of EU member States*, Elgar, 2018, Chapter 7, p. 149).

---

45 See point 89 of this Opinion.

---

46 For clarification, this does not mean that merely any financial difficulty affecting the initial successful tenderer can lead to a replacement being appointed with no new tendering procedure in accordance with the Public Procurement Directive. A formal insolvency procedure must also have been commenced, as in the case in the main proceedings.

Not 16

Högsta förvaltningsdomstolen meddelade den 13 maj 2022 följande dom (mål nr 5807-19).

Bakgrund

1. Ett ramavtal är ett avtal som fastställer villkoren för kontrakt som senare ska ingås mellan en upphandlande myndighet och en eller flera leverantörer. Ett upphandlat ramavtal får som huvudregel inte ändras utan att en ny upphandling genomförs. Ett byte av leverantör får dock under vissa förutsättningar ske om den nya leverantören helt eller delvis inträder i den ursprungliga leverantörens ställe till följd av företagsomstruktureringar, vartill i detta sammanhang räknas bl.a. insolvens.

2. Kammarkollegiet har upphandlat fyra ramavtal avseende inköp av datorer, bildskärmar, surfplattor m.m. genom selektivt förfarande. Sjutton anbudssökande kvalificerade sig och gick vidare till selektering. Om fler än nio anbudssökande kvalificerade sig för att lämna anbud skulle ett urval göras utifrån högst mervärde. Dustin Sverige AB (Dustin) och Misco AB (Misco) hörde till de nio anbudssökande med högst mervärde. Advania Sverige AB (Advania) hörde inte till dessa nio, men till de sjutton som kvalificerat sig. Misco tilldelades avtal inom samtliga fyra ramavtalsområden.

3. Efter det att Misco hade försatts i konkurs överlät konkursförvaltaren ramavtalen till Advania. Överlåtelsen godkändes av Kammarkollegiet.

4. Dustin ansökte hos Förvaltningsrätten i Stockholm om att ramavtalen mellan Kammarkollegiet och Advania skulle ogiltigförklaras. Förvaltningsrätten avslog Dustins ansökan. Kammarrätten i Stockholm biföll Dustins överklagande dit och beslutade att ramavtalen var ogiltiga. Kammarrätten konstaterade att Misco i stort sett inte hade överlåtit någon verksamhet till Advania förutom de aktuella ramavtalen. Enligt kammarrättens mening kunde Advania därför inte anses ha helt eller delvis inträtt i Miscos ställe på det sätt som krävs för att ett leverantörsbyte ska vara tillåtet.

5. Högsta förvaltningsdomstolen har hämtat in förhandsavgörande från EU-domstolen, se punkterna 13–16 nedan.

Yrkanden m.m.

6. *Advania Sverige AB* yrkar att kammarrättens dom ska upphävas och förvaltningsrättens dom fastställas samt anför följande. Det är i förevarande fall fråga om en omstrukturering av den tidigare leverantören på grund av insolvens med efterföljande konkurs. Advania har accepterat att överta alla Miscos förpliktelser enligt avtalen och Advania har således helt inträtt i Miscos ställe i ramavtalen.

7. *Kammarkollegiet* yrkar att kammarrättens dom ska upphävas och ramavtalen förklaras giltiga samt anför följande. Uttrycket ”helt eller delvis inträder i den ursprungliga leverantörens ställe” bör tolkas som att den övertagande leverantören träder i den ursprungliga leverantörens ställe i fråga om de rättigheter och skyldigheter som fastställts i det ramavtal eller kontrakt som överlåts. Det centrala är att den nya leverantören kan

uppfylla kontraktet enligt de villkor och krav som ursprungligen uppställdes.

8. *Dustin Sverige AB* anser att överklagandena ska avslås och anför följande. Ett leverantörsbyte enligt de aktuella bestämmelserna förutsätter att den nya leverantören träder i den ursprungliga leverantörens ställe genom att överta tillgångar från denne. Ett sådant ramavtal som nu är i fråga utgör ingen tillgång i redovisningsmässig mening och de aktuella ramavtalen har inte heller upptagits som tillgångar i Miscos balansräkning eller i Miscos konkurs.

Skälen för avgörandet

Frågan i målet

9. Frågan i målet är om en ny leverantör, som sedan den ursprungliga leverantören försatts i konkurs övertar enbart den ursprungliga leverantörens rättigheter och skyldigheter enligt ett upphandlat ramavtal, ska anses ha inträtt i dennes ställe, vilket är en förutsättning för att en ny upphandling av avtalet inte ska behöva göras.

Rättslig reglering m.m.

10. I 17 kap. 13 § första stycket lagen (2016:1145) om offentlig upphandling anges att ett kontrakt eller ett ramavtal får ändras genom att en leverantör byts ut mot en annan leverantör utan en ny upphandling, om
1. den nya leverantören helt eller delvis inträder i den ursprungliga leverantörens ställe till följd av företagsomstruktureringar, inklusive uppköp, sammanslagningar, förvärv eller insolvens, och
2. det förhållandet att en ny leverantör helt eller delvis inträder i den ursprungliga leverantörens ställe inte medför andra väsentliga ändringar av kontraktet eller ramavtalet.

11. I 13 § andra stycket anges att ett byte av leverantör förutsätter att den nya leverantören inte ska uteslutas enligt 13 kap. 1 § eller 2 § första stycket och att den uppfyller de kvalificeringskrav som har ställts i den ursprungliga upphandlingen enligt 14 kap. 1–5 §§.

12. Bestämmelserna motsvaras av artikel 72.1 d) ii) i direktiv 2014/24/EU om offentlig upphandling (upphandlingsdirektivet).

Förhandsavgörande från EU-domstolen

13. Högsta förvaltningsdomstolen har i begäran om förhandsavgörande från EU-domstolen ställt följande fråga.

14. Innebär den omständigheten att en ny leverantör övertagit den ursprungliga leverantörens rättigheter och skyldigheter enligt ett ramavtal, efter det att den ursprungliga leverantören försatts i konkurs och konkursboet överlåtit avtalet, att den nya leverantören ska anses ha inträtt i den ursprungliga leverantörens ställe under sådana förhållanden som avses i artikel 72.1 d) ii) i upphandlingsdirektivet?

15. EU-domstolen besvarade frågan på följande sätt genom dom i mål C-461/20 (EU:C:2022:72).

16. Artikel 72.1 d) ii) i upphandlingsdirektivet ska tolkas så, att en ekonomisk aktör som, till följd av den ursprungliga leverantörens konkurs och upplösning, endast har övertagit leverantörens rättigheter och skyldigheter enligt ett ramavtal med en upphandlande myndighet ska anses

delvis ha inträtt i den ursprungliga leverantörens ställe till följd av företagsomstruktureringar, i den mening som avses i den bestämmelsen.

Högsta förvaltningsdomstolens bedömning
17. Genom EU-domstolens dom står det klart att en ny leverantör som övertar enbart den ursprungliga leverantörens rättigheter och skyldigheter enligt ett ramavtal ska anses ha inträtt i den ursprungliga leverantörens ställe i den mening som avses i 17 kap. 13 § första stycket 1 lagen om offentlig upphandling, om övertagandet är föranlett av den ursprungliga leverantörens konkurs. Någon ny upphandling behöver då inte göras, förutsatt att övriga förutsättningar i 13 § är uppfyllda.

18. Överlåtelsen av de nu aktuella ramavtalen föranleddes av att Misco hade försatts i konkurs och innebar att Advania övertog Miscos rättigheter och skyldigheter enligt avtalen. Advania har därmed inträtt i Miscos ställe till följd av företagsomstruktureringar, i det här fallet insolvens. Det har inte framkommit att bytet av leverantör medförde några andra väsentliga ändringar av ramavtalen eller att det fanns grund för att utesluta Advania, som uppfyllde de kvalificeringskrav som hade ställts i den ursprungliga upphandlingen.

19. Dustin hävdar emellertid att avtalen måste ha redovisats som tillgångar i den ursprungliga leverantörens balansräkning för att någon ny upphandling inte ska behöva göras. Något sådant krav går dock inte att utläsa av EU-domstolens dom.

20. Av det anförda följer att samtliga förutsättningar var uppfyllda för att ett byte av leverantör i ramavtalen skulle få ske utan en ny upphandling. Det saknas därmed grund för att förklara ramavtalen mellan Kammarkollegiet och Advania ogiltiga. Advanias och Kammarkollegiets överklaganden ska därför bifallas, kammarrättens dom upphävas och förvaltningsrättens avgörande fastställas.

Högsta förvaltningsdomstolens avgörande
Högsta förvaltningsdomstolen upphäver kammarrättens dom och fastställer förvaltningsrättens avgörande.

I avgörandet deltog justitieråden *Jäderblom, Knutsson, Rosén Andersson, Jönsson* och *Medin.* Föredragande var justitiesekreteraren Sara Westerlund.

Förvaltningsrätten i Stockholm *(2018-11-30, Åberg):*
Förvaltningsrättens bedömning
[text här utelämnad]
När det slutligen kommer till kärnfrågan i målet, om Advania helt eller delvis inträtt i Miscos ställe och om leverantörsbytet ryms inom 17 kap. 13 § lagen om offentlig upphandling, gör förvaltningsrätten följande bedömning.

När det gäller utformningen av 17 kap. 13 § lagen om offentlig upphandling lämnar Lagrådet bl.a. följande synpunkter i prop. 2015/16:195 s. 1156.

”Ordet företagsomstruktureringar förekommer inte sedan tidigare i svensk lagstiftning. I direktivets bestämmelse, artikel 72.1 d ii), anges i en exemplifiering att uttrycket ”till följd av företagsomstruktureringar” innefattar uppköp, sammanslagningar, förvärv eller insolvens. Trots att direktivets uppräkning är en exemplifiering – och därmed enligt en i remissen tillämpad princip inte ska tas in i den svenska lagtexten – bör den enligt Lagrådets mening anges i paragrafen så att det framgår exempel på situationer där bestämmelsen kan vara tillämplig.”

Utifrån handlingarna i målet kan domstolen konstatera att Kammarkollegiet (Kollegiet) har utgått från att Miscos ansökan beror på insolvens och har utrett den rättsfråga som ansökan gav upphov till. Kollegiet har genom Advanias och Miscos konkursförvaltare fått klarhet i vad Advania köper och därefter kommit fram till att det föreligger identitet mellan Advania och Misco och att Advania därmed kan träda i Miscos ställe som ramavtalsleverantör. Det är Kollegiet som står en risk genom leverantörsbytet och som har ett visst tolkningsföreträde i den uppkomna situationen. Domstolen finner att de omständigheter som Dustin åberopat i målet inte utgör grund för att ifrågasätta att Advania förvärvat Miscos ramavtal och delar av Miscos verksamhet för ett fullgörande av ramavtalet på det sätt som förutsätts i 17 kap. 13 § lagen om offentlig upphandling. Ramavtalet har ändrats genom ett byte av leverantör på ett sätt som ryms inom vad som kan avses med företagsomstrukturering. Kollegiet har påtalat att leverantörsbytet inte har inneburit några ändringar i lydelse och villkor i ramavtalet och det har inte framkommit skäl att ifrågasätta denna uppgift. Det kan därmed konstateras att Advanias inträde i Miscos ställe inte har medfört andra väsentliga ändringar av ramavtalet, vilket är ytterligare en förutsättning för att bytet ska vara tillåtet.

När det gäller frågan om vilka krav som kan ställas på en leverantör i Advanias situation, som vill inträda i annans leverantörs ställe, ger inte 17 kap. 13 § andra stycket lagen om offentlig upphandling stöd för annat än kontroll av om det finns uteslutningsgrund hänförligt till brott eller obetalda skatter och socialförsäkringsavgifter och kontroll av om den nya leverantören uppfyller kvalificeringskrav ställda i den ursprungliga upphandlingen. Det har inte påståtts att någon av uteslutningsgrunderna föreligger avseende Advania som uppfyllde kvalificeringskraven i den ursprungliga ramavtalsupphandlingen. Att det efter kvalificeringen, enligt Kollegiets önskemål att begränsa antalet anbudssökande, genomförts ett urval där Advania inte tillhör de nio anbudssökande med högst mervärde utgör inte hinder mot att Advania deltar i ett leverantörsbyte. Dustin har inte förmått visa att den omständigheten att Advania, som kvalificerad anbudsgivare, efter ett genomfört byte av leverantör, kan lämna avropssvar har inneburit en oacceptabel snedvridning av konkurrensen, olikbehandling och ett kringgående av upphandlingsreglerna. Det kan därmed konstateras att det inte har skett något leverantörsbyte utan stöd i lagen om offentlig upphandling.

Dustin har också, utan att vidare utveckla påståendet, åberopat att Kollegiet godtagit leverantörsbytet utan stöd i 17 kap. 11§ lagen om offentlig upphandling, som avser kompletterande beställningar. Förvaltningsrätten finner att det i målet inte finns omständigheter som talar för att det skett en otillåten upphandling. Det saknas därmed skäl för

förvaltningsrätten att ingripa genom ett ogiltigförklarande av ingångna ramavtal och godkännandeavtalet mellan Kollegiet och Advania.

Sammanfattning
Förvaltningsrättens prövning i ett mål som det aktuella görs i förhållande till den upphandlingsrättsliga lagstiftningen. I prövningen ingår inte rent civilrättsliga ställningstaganden.

Förvaltningsrätten har funnit att Advania har inträtt i Miscos ställe i de aktuella ramavtalen på ett sätt som ryms inom vad som är ett tillåtet leverantörsbyte enligt 17 kap. 13 § lagen om offentlig upphandling. Det saknas därmed skäl att förklara ramavtal och godkännandeavtal ogiltiga på grund av att de har slutits i strid med annonseringskravet i 10 kap. 1 § lagen om offentlig upphandling. Dustins ansökan om ogiltigförklaring av avtalen ska därför avslås.

– Förvaltningsrätten avslår ansökan om ogiltigförklaring av ramavtalen Klient 1–4 mellan Statens inköpscentral vid Kammarkollegiet och Advania Sverige AB och godkännandeavtalet mellan Statens inköpscentral vid Kammarkollegiet, Advania Sverige AB och Misco AB, genom konkursförvaltare.

Kammarrätten i Stockholm *(2019-10-16, Silfverhjelm, Axelsson och Ringvall):*
Frågan i målet är om ändringen av Kammarkollegiets ramavtal Klienter 1–4 är förenlig med 17 kap. 13 § lagen om offentlig upphandling eller om det byte av leverantör som medgetts är en väsentlig ändring som utgjort en otillåten direktupphandling, som innebär att avtalet mellan Kammarkollegiet och Advania ska beslutas vara ogiltigt.

Bestämmelsen genomför artikel 72.1 i Europaparlamentets och rådets direktiv 2014/24/EU av den 26 februari 2014 om offentlig upphandling och om upphävande av direktiv 2004/18/EG.

Av 17 kap. 14 § lagen om offentlig upphandling och artikel 72.1 e och 72.4 i direktiv 2014/24/EU framgår att ett kontrakt eller ramavtal får ändras utan en ny upphandling om ändringen inte är väsentlig. I dessa bestämmelser föreskrivs vidare att byte av leverantör är en väsentlig ändring. I artikel 72.1 d ii, som i lagen om offentlig upphandling motsvaras av 17 kap. 13 §, anges dock att kontrakt och ramavtal får ändras utan nytt upphandlingsförfarande om den entreprenör som den upphandlande myndigheten ursprungligen hade tilldelat kontraktet byts ut mot en ny entreprenör, till följd av antingen att en annan ekonomisk aktör helt eller delvis inträder i den ursprungliga leverantörens ställe till följd av företagsomstruktureringar, inklusive uppköp, sammanslagningar, förvärv eller insolvens, under förutsättning att detta inte medför andra väsentliga ändringar av kontraktet och inte syftar till att kringgå tillämpningen av direktivet.

I skäl 110 i direktivet anges att i överensstämmelse med principerna om likabehandling och öppenhet bör en utvald anbudsgivare inte kunna ersättas med en annan ekonomisk aktör, exempelvis om ett kontrakt avslutas på grund av brister i fullgörandet, utan att kontraktet konkurrensutsätts på nytt. Den utvalda anbudsgivaren som fullgör kontraktet bör dock, särskilt om kontraktet har tilldelats fler än ett företag, kunna genomgå vissa strukturella förändringar under fullgörandet av

kontraktet, exempelvis rent interna omorganisationer, uppköp, sammanslagningar och förvärv eller insolvens. Sådana strukturella förändringar bör inte automatiskt kräva nya upphandlingsförfaranden för alla offentliga kontrakt som den anbudsgivaren fullgör.

Skäl 110 skulle eventuellt kunna tolkas så att det som avses är interna förändringar hos leverantören som leder till att denne inte kan sägas vara helt densamma som när avtalet ingicks. Det skulle därför kunna röra sig om rent interna förändringar som omorganisationer, men även kunna vara att ett annat företag köpts. Det får dock inte vara fråga om att ersätta leverantören med en annan ekonomisk aktör. Såsom artikeln i direktivet respektive bestämmelsen i lagen om offentlig upphandling har utformats framstår det dock som om leverantören, under vissa förutsättningar, kan bytas ut utan att ändringen är väsentlig.

Som anges i förvaltningsrättens dom påpekade Lagrådet vid införlivandet av direktivet att begreppet företagsomstrukturering inte tidigare förekommer i svensk lagstiftning. Insolvens anges i direktivet och i den aktuella bestämmelsen i lagen om offentlig upphandling som ett exempel på detta begrepp. Kammarkollegiet har under processen fört fram att anledningen till leverantörsbytet och att Advania trädde i Miscos ställe var Miscos insolvens och att det avtal som låg till grund för Kammarkollegiets beslut om godkännande var avtalet den 18 januari 2018. Kammarrätten anser att utredningen talar för att överlåtelsen skedde genom det avtalet och att det som Dustin har fört fram inte ger anledning till någon annan slutsats. Kammarkollegiets godkännande av överlåtelse av ramavtal gjordes alltså i anledning Miscos insolvens.

Enligt nämnda avtal överlät Misco förutom ramavtalen även rätten till bolagets personal-, kund- och leverantörsdata, artikelstatistik och -historik samt rätten att överta bolagets underleverantörer och Advania förklarade sig berett att erbjuda ett antal ”nyckelanställda” anställning på marknadsmässiga villkor. Av utredningen i målet framgår att en anställd sedan gick över till Advania. Det framgår även att Miscos kundlista enligt Advania inte var helt uppdaterad eller relevant och att Miscos kunder redan hade hunnit byta leverantör. Det finns inget som visar att några av Miscos underleverantörer övertogs av Advania till följd av överlåtelseavtalet. Inte heller finns det något som visar att några andra offentliga ramavtal har överlåtits. Tvärtom har Dustin presenterat uppgifter som visar att Misco var part i åtminstone ett annat offentligt ramavtal och att det inte har överlåtits till Advania.

Den upphandlande myndigheten har ansvaret för att säkerställa att de upphandlingsrättsliga reglerna följs och därmed även för att säkerställa att förutsättningarna för ett byte av leverantör är uppfyllda innan ett sådant godkänns. En utgångspunkt för den upphandlande myndigheten måste vara att det är korrekta uppgifter som lämnas, såvida inte omständigheter i det enskilda fallet ger anledning att ifrågasätta riktigheten. I detta fall har Dustin åberopat omfattande utredning till stöd för att överlåtelsen av Miscos verksamhet inte fullföljdes i enlighet med avtalet. Kammarkollegiet har inte kunnat motbevisa detta. Tvärtom visar utredningen att Misco i stort sett inte överlät någon verksamhet till Advania förutom de aktuella ramavtalen. Advania kan därför enligt kammarrättens mening inte anses ha helt eller delvis inträtt i Miscos ställe på det sätt som avses i 17 kap. 13 § lagen om offentlig upphandling. Det är därför en väsentlig

ändring. Kammarkollegiet borde inte ha godkänt leverantörsbytet. Det är därför fråga om en otillåten direktupphandling och det finns grund för att besluta att ramavtalen Klienter 1–4 mellan Kollegiet och Advania är ogiltiga.

Någon prövning enligt 17 kap. 13 § andra stycket lagen om offentlig upphandling om Advania uppfyller de kvalificeringskrav som ställdes i den ursprungliga upphandlingen aktualiseras därmed inte.

– Kammarrätten bifaller överklagandet och beslutar att ramavtalen Klienter 1–4 mellan Kammarkollegiet, Statens inköpscentral, och Advania Sverige AB är ogiltiga.

JUDGMENT OF THE COURT (Fourth Chamber)

14 July 2022 (*)

(Reference for a preliminary ruling – Articles 49 and 56 TFEU – Purely internal situation – Services in the internal market – Directive 2006/123/EC – Scope – Article 2(2)(j) – Public procurement – Directive 2014/24/EU – Concept of a 'public contract' – Articles 74 to 77 – Provision of social services in the form of personal assistance – Contractual action agreements with private, social initiative entities – Exclusion of profit-making operators – Location of the entity as a selection criterion)

In Case C-436/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia, Spain), made by decision of 3 September 2020, received at the Court on 16 September 2020, in the proceedings

Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE)

v

Consejería de Igualdad y Políticas Inclusivas,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, S. Rodin, J.-C. Bonichot, L.S. Rossi and O. Spineanu-Matei, Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE), by A. Martínez Gradoli, procuradora, and Y. Puiggròs Jiménez de Anta, abogada,

– the Consejería de Igualdad y Políticas Inclusivas, by I. Sánchez Lázaro, abogada,

– the Spanish Government, by S. Jiménez García and J. Rodríguez de la Rúa Puig, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S.L. Vitale, avvocato dello Stato,

– the Netherlands Government, by M.K. Bulterman, M.H.S. Gijzen and J. Langer, acting as Agents,

– the European Commission, by L. Armati, M. Jáuregui Gómez, P. Ondrůšek, E. Sanfrutos Cano and G. Wils, acting as Agents,

– the Norwegian Government, by J.T. Kaasin and H. Røstum, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 February 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 and 56 TFEU, Articles 76 and 77 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), read in conjunction with Article 74 thereof and Annex XIV thereto, and Article 15(2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2 The request has been made in proceedings brought by the Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE) (State Association of Domiciliary Care Providers, Spain) concerning the legality of Decreto 181/2017 del Consell, por el que se desarrolla la acción concertada para la prestación de servicios sociales en el ámbito de la Comunitat Valenciana por entidades de iniciativa social (Decree 181/2017 of the Council of the Community of Valencia making regulations governing public-private agreements for the provision of social services by social enterprises within the Community of Valencia) of 17 November 2017 (‘Decree 181/2017’).

Legal framework

European Union law

Protocol No 26

3 Article 1 of Protocol (No 26) on services of general interest, annexed to the FEU Treaty (‘Protocol No 26’), provides:

‘The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

– the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

– the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

– a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.’

Directive 2014/24

4 Recitals 4, 6 and 114 of Directive 2014/24 state:

‘(4) … Situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes (for instance licences for medicines or medical services).

…

(6) It is also appropriate to recall that this Directive should not affect the social security legislation of the Member States. Nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, or with the privatisation of public entities providing services.

It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic

interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive.

…

(114) Certain categories of services continue by their very nature to have a limited cross-border dimension, namely such services that are known as services to the person, such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for those services, with a higher threshold than that which applies to other services.

Services to the person with values below that threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects.

Contracts for services to the person above that threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this Directive take account of that imperative, imposing only the observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services, published by the Social Protection Committee. When determining the procedures to be used for the award of contracts for services to the person, Member States should take Article 14 TFEU and Protocol No 26 into account. In so doing, Member States should also pursue the objectives of simplification and of alleviating the administrative burden for contracting authorities and economic operators; it should be clarified that so doing might also entail relying on rules applicable to service contracts not subject to the specific regime.

Member States and public authorities remain free to provide those services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.’

5 Article 1 of that directive provides:

‘1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

…

5. This Directive does not affect the way in which the Member States organise their social security systems.

…’

6 Article 2 of that directive provides:

‘1. For the purposes of this Directive, the following definitions apply:

…

5. “public contracts” means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

…

9. “public service contracts” means public contracts having as their object the provision of services other than those referred to in point 6;

10. “economic operator” means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;

…’

7 In accordance with Article 10 of Directive 2014/24, entitled ‘Specific exclusions for service contracts’:

‘This Directive shall not apply to public service contracts for:

…

(h) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services;

…’

8 Title III of that directive, entitled ‘Particular procurement regimes’, contains, inter alia, Chapter I, relating to ‘social and other specific services’, which includes Articles 74 to 77 of that directive.

9 Article 74 of Directive 2014/24 states:

‘Public contracts for social and other specific services listed in Annex XIV shall be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in point (d) of Article 4.’

10 Article 75 of that directive provides:

‘1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by any of the following means:

(a) by means of a contract notice, which shall contain the information referred to in Annex V Part H, in accordance with the standard forms referred to in Article 51; or

(b) by means of a prior information notice, which shall be published continuously and contain the information set out in Annex V Part I. The prior information notice shall refer specifically to the types of services that will be the subject of the contracts to be awarded. It shall indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.

The first subparagraph shall, however, not apply where a negotiated procedure without prior publication could have been used in conformity with Article 32 for the award of a public service contract.

2. Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice, which shall contain the information referred to in Annex V Part J, in accordance with the standard forms referred to in Article 51. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.

3. The Commission shall establish the standard forms referred to in paragraphs 1 and 2 of this Article by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 89(2).

4. The notices referred to in this Article shall be published in accordance with Article 51.'

11 Article 76 of that directive provides:

'1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.

2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.'

12 In accordance with Article 77 of that directive:

'1. Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74, which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8.

2. An organisation referred to in paragraph 1 shall fulfil all of the following conditions:

(a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1;

(b) profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;

(c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and

(d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

3. The maximum duration of the contract shall not be longer than three years.

4. The call for competition shall make reference to this Article.

5. Notwithstanding Article 92, the Commission shall assess the effects of this Article and report to the European Parliament and the Council by 18 April 2019.'

Directive 2006/123

13 Recital 27 of Directive 2006/123 states:

'This Directive should not cover those social services in the areas of housing, childcare and support to families and persons in need which are provided by the State at national, regional or local level by providers mandated by the State or by charities recognised as such by the State with the objective of ensuring support for those who are permanently or temporarily in a particular state of need because of

their insufficient family income or total or partial lack of independence and for those who risk being marginalised. These services are essential in order to guarantee the fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity and should not be affected by this Directive.'

14 Article 2 of that directive provides:

'1. This Directive shall apply to services supplied by providers established in a Member State.

2. This Directive shall not apply to the following activities:

(a) non-economic services of general interest;

…

(f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;

…

(i) activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty;

(j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;

…'

Spanish law

Organic Law 5/1982

15 Under Article 49(1)(24) of Ley Orgánica 5/1982, de Estatuto de Autonomía de la Comunidad Valenciana (Organic Law 5/1982 on the Statute of Autonomy of the Community of Valencia) of 1 July 1982 (BOE No 164 of 10 July 1982), in the version applicable to the facts in the main proceedings, the Community of Valencia has exclusive competence in respect of social services and public institutions for the protection and assistance of minors, young people, migrants, the elderly, the disabled and other groups or sectors in need of social protection.

Law 5/1997

16 The powers of the Valencian Community under Organic Law 5/1982 were implemented by Ley 5/1997 de la Generalitat Valenciana por la cual se regula el Sistema de Servicios Sociales en el ambito de la Comunidad Valenciana (Law 5/1997 of the Valencia Regional Government governing the Social Services System within the Territory of the Community of Valencia) of 26 June 1997 (BOE No 192 of 12 August 1997, p. 24405).

17 That law was amended by Ley 13/2016, de medidas fiscales, de gestión administrativa y financiera, y de organización de la Generalitat (Law 13/2016 of the Community of Valencia on measures in respect of tax, administrative and financial management and the organisation of the Government of the Community of Valencia) of 29 December 2016 (BOE No 34 of 9 February 2017, p. 8694), before being repealed by Ley 3/2019 de servicios sociales inclusivos de la Comunitat Valenciana (Law 3/2019 of the Community of Valencia on inclusive social services in the Community of Valencia) of 18 February 2019 (BOE No 61 of 12 March 2019, p. 23249) ('Law 3/2019').

18 Article 44 bis of Law 5/1997, as amended by Law 13/2016 ('Law 5/1997'), entitled 'Methods of providing the services of the public social services system', provides:

‘1. The public administrations forming part of the public social services system shall provide persons with the services provided for by law or by the catalogue of social services using the following methods:

(a) Direct management or the use of own resources, which is the preferred method of supply.

(b) Indirect management in accordance with one of the formats established in the rules on public sector contracts.

(c) Contractual action agreements concluded with private, social initiative entities.

2. The provision of social services by the centres or services of an administration other than the competent administration shall be carried out under any form of collaboration and cooperation between public administrations provided for by law’.

19 Article 53 of that law, entitled ‘Conclusion of agreements with private social initiative entities’, provides:

‘1. Public administrations responsible for social services may entrust private social initiative entities with the provision of the services provided for in the catalogue of social services through the use of contractual action agreements, provided that those entities have the appropriate administrative accreditation and are entered as such in the corresponding register of entities, centres and social services.

2. Under the provisions of the law, the legal regime is established by regulation for each specific area of operation, by laying down the conditions for action by contracted private centres which participate in the social services system under public responsibility, by determining the conditions of access, the conditions of service, selection procedures, the maximum duration and grounds for terminating the agreement, as well as the obligations of the parties.

3. The agreement concluded between the administration and the private entity establishes the rights and obligations of each party in respect of its economic regime, duration, extension and termination and, where appropriate, the number and type of units agreed upon, and other legal conditions.

4. Access to places which are the subject of an agreement with private social initiative entities always takes place through the administration that awarded the contract.

5. Social initiative entities comprise foundations, associations, voluntary organisations and other non-profit entities carrying out social service activities. In particular, cooperative societies classified as non-profit entities in accordance with their specific legislation shall be regarded as social initiative entities.’

20 Article 56 of that law, entitled ‘Agreements’, provides, in paragraphs 1 and 2:

1. The Generalitat [(Valencia Regional Government)] shall contribute financially to developing and enhancing the skills of local entities and to supporting programmes with social content carried out by non-profit entities.

2. Similarly, the Generalitat shall allocate annually in the corresponding budgets the appropriations needed to finance the contractual action agreements concluded with private social initiative entities.’

21 Articles 62 to 66 of that law are contained in Title VI thereof, entitled ‘Contractual action’.

22 Under Article 62 of Law 5/1997, entitled ‘Concept, general regime and principles of contractual action’:

‘1. Contractual action agreements are organisational instruments that are not contractual in nature by means of which the competent administrations may organise the provision of social services to the person, the funding and monitoring of and access to which falls within their competence, in accordance with the procedure and requirements laid down in this law and the applicable sectoral rules.

2. Public administrations shall ensure that their contractual action with third parties for the purpose of providing social services to the person complies with the following principles:

(a) Principle of subsidiarity, under which contractual action concluded with private non-profit organisations is subject to the prior condition of optimal use of own resources.

(b) Principle of solidarity, by encouraging the involvement of entities in the third area of social action in the provision of social services to the person.

(c) Principle of equality, by ensuring that contractual action guarantees that users are given the same attention as that given to users supplied directly by the administration.

(d) Principle of publicity, by providing that calls for applications for contractual actions are to be published in the *Diari Oficial de la Generalitat Valenciana* [(Official Journal of the Valencia Regional Government)].

(e) Principle of transparency, by publishing on the transparency portal the contractual action agreements in force at any time.

(f) Principle of non-discrimination, by laying down the conditions for access to contractual action ensuring equality between entities which choose to participate.

(g) Principle of budgetary efficiency, by providing that the economic consideration which contracted entities may receive in accordance with the maximum rates or modules in force shall be capped at the variable, fixed and permanent costs of providing the service, without including any commercial profit.'

23 Article 63 of that law, entitled 'Substantive scope and preconditions for contractual action', provides:

'1. In the field of social services, services to the person which may be the subject of a contractual action shall be determined by regulation from among the services provided for in the catalogue of services.

2. The following may be the subject of a contractual action:

(a) The reservation and occupation of places for the purpose of their occupation by users of the public social services system, access to such places being authorised by the competent public administrations in accordance with the criteria established by the present law.

(b) The integral management of supplies, services or centres in accordance with provisions established by regulation.

3. Where the provision of the service involves processes requiring different types of intervention at different centres or services, the competent administration may conclude a single contractual action agreement imposing mandatory coordination and collaboration mechanisms.

4. Access to the contractual action regime is open to private social initiative entities providing social services which have an administrative accreditation and are entered in the corresponding register of entities, centres and social services.

5. The contractual action regime is incompatible with the grant of economic subsidies to finance activities or services covered by the contractual arrangement.'

24 In accordance with Article 64 of that law, entitled 'Procedure for contractual arrangements and preference criteria':

'1. Sectoral rules govern the procedures to ensure that entities meeting the established criteria can adhere to the contractual action regime in accordance with the general principles established in Article 62 of this law.

2. For the adoption of contractual action agreements, the sectoral rules establish the criteria for the selection of entities where such selection proves necessary on account of budgetary limits or the number and characteristics of the services which may be contracted.

3. The selection of entities may be based on the following criteria:

(a) establishment in the place where the service is provided;

…’

25 Article 65 of the same law, entitled ‘Formalisation and effects of the contracted action’, provides:

‘1. Contractual action agreements shall be formalised in administrative agreement documents the content of which is established by the applicable sectoral rules.

2. Contractual agreements require the contracted entity to provide persons with social services under the conditions established by the applicable sectoral rules and by the contractual agreement adopted in accordance with the latter.

3. Apart from the fees provided for, no sums may be collected from users for contracted services.

4. The collection from users of any remuneration for the provision of additional services and the amount thereof shall be authorised in advance by the administration granting the contractual arrangement.’

26 Article 66 of Law 5/1997, entitled ‘Financing of the contractual action’, states:

‘1. Each call for applications shall set the amount of the economic modules corresponding to each service which may be the subject of the contractual action.

2. Maximum tariffs or economic modules compensate the maximum variable, fixed and permanent costs of providing services, guaranteeing economic neutrality for the entity providing the services, without including any commercial profit.

3. The amounts resulting from the contractual action shall be paid after the relevant invoice has been produced by the contracted entity, by deduction using the budget heading intended for the financing of the administration’s current expenditure.’

27 In accordance with Article 67 of that law, entitled ‘Duration of contractual agreements’:

‘The duration of contractual agreements may not exceed four years. Where they are expressly provided for in the contractual agreement, any extensions may increase the total duration of the contractual agreement to 10 years. At the end of that period, the competent administration may conclude a new contractual agreement.’

Decree 181/2017

28 The objective of Decree 181/2017, which was adopted in implementation of Law 5/1997, is, in accordance with Article 1 thereof, to regulate the requirements, the selection procedures, the content and the basic conditions for the establishment, performance and development of contractual agreements, as a method of managing social services using private social initiative entities in order to provide persons with the social services provided for by law and by the catalogue of social services, or by their implementing acts.

29 Article 3(e) of that decree recognises as private social initiative entities ‘foundations, associations, voluntary organisations and other non-profit entities carrying out social service activities’, as well as cooperative societies classified as non-profit entities in accordance with their specific legislation.

30 Despite the repeal of Law 5/1997 by Law 3/2019, Decree 181/2017 remains in force, in accordance with the single repealing provision of the latter law.

The dispute in the main proceedings and the questions referred for a preliminary ruling

31 ASADE has brought before the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia, Spain) an action for annulment of Decree 181/2017, in support of which it submits that Article 44 bis(1)(c), Article 53, Article 56(2) and Title VI of Law 5/1997, which are implemented by that decree, are contrary to EU law on the ground that they exclude profit-making entities from the possibility of providing certain social services in the form of personal assistance under a contractual action agreement, while allowing all non-profit-making entities, and not solely voluntary organisations, to provide such services in return for payment without having to go through a transparent competitive process that ensures equal treatment between interested economic operators.

32 The referring court questions whether the use of contractual action agreements, as governed by Law 5/1997, is compatible with Articles 49 and 56 TFEU, Articles 76 and 77 of Directive 2014/24 and Article 15(2) of Directive 2006/123. It points out that an interpretation of those provisions of EU law remains necessary despite the repeal of Law 5/1997 by Law 3/2019, since the latter law did not alter the arrangements for public-private agreements for the provision of social services. Moreover, it states that, in order to assess the lawfulness of that decree, it is necessary to ascertain whether Law 5/1997, which implemented that decree, is compatible with EU law.

33 In those circumstances, the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 49 TFEU and Articles 76 and 77 of Directive [2014/24] (as read with Article 74 and Annex XIV thereto) be interpreted as precluding national legislation which permits contracting authorities to make use of agreements with private non-profit organisations – not solely voluntary associations – to provide all manner of social services to the person in return for reimbursement of costs without following the procedures [Directive 2014/24] and irrespective of the estimated value, simply by classifying the arrangements in question as non-contractual?

(2) If the reply is in the negative, meaning that such arrangements are possible, must Article 49 TFEU and Articles 76 and 77 of [Directive 2014/24] (as read with Article 74 and Annex XIV thereto) be interpreted as permitting contracting authorities to make use of agreements with private non-profit organisations (not solely voluntary associations) to provide all manner of social services to the person in return for reimbursement of costs without following the procedures in the directive and irrespective of the estimated value, simply by classifying the arrangements in question as non-contractual, where, moreover, the national legislation in question does not expressly include the requirements established in Article 77 of the directive, but refers to subsequent implementation through regulations without expressly stipulating, among the requirements to be satisfied by the implementing regulations, that they must explicitly include the conditions laid down in Article 77 of the directive?

(3) If the reply is, again, in the negative, meaning that such a situation is possible, must Articles 49 and 56 TFEU, Articles 76 and 77 of [Directive 2014/24] (as read with Article 74 and Annex XIV thereto) and Article 15(2) of Directive [2006/123] be interpreted as permitting contracting authorities, when selecting non-profit organisations (not solely voluntary associations) with which to enter into agreements to provide all manner of social services to the person, to include not only the selection criteria set out in Article 2(2)(j) of [Directive 2006/123] but also the criterion that the organisation be established in the place where the service is to be provided?’

The questions referred for a preliminary ruling

Admissibility

34 As a preliminary point, it must be recalled that, according to settled case-law, questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is

sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraphs 59 and 61, and of 25 November 2021, *État luxembourgeois (Information on a group of taxpayers)*, C-437/19, EU:C:2021:953, paragraph 81).

35 The need to provide an interpretation of EU law which will be of use to the national court makes it necessary for that court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 10 March 2022, *Commissioners for Her Majesty's Revenue and Customs (Comprehensive sickness insurance cover)*, C-247/20, EU:C:2022:177, paragraph 75 and the case-law cited).

36 It is in the light of those preliminary observations that the admissibility of the questions referred for a preliminary ruling must be assessed.

Repeal of Law 5/1997

37 The defendant in the main proceedings points out that the questions referred for a preliminary ruling are inadmissible on the ground that Law 5/1997, the conformity of which with EU law is challenged indirectly in the action in the main proceedings, was repealed by Law 3/2019.

38 In that regard, it is clear from the request for a preliminary ruling that the referring court is called upon to rule on the lawfulness of Decree 181/2017 on the date of its adoption. On that date, it is established that Law 5/1997, which is implemented by that decree, was still in force. Moreover, it is not disputed that that law, first, denied profit-making entities the possibility of concluding a contractual action agreement and, second, allowed the criterion of local establishment to be used in the context of the conclusion of such an agreement.

39 In those circumstances, the questions referred for a preliminary ruling retain a connection with the subject matter of the dispute in the main proceedings.

Directive 2014/24

40 The Spanish, Italian and Netherlands Governments express doubts as to the applicability of Directive 2014/24 to contractual action agreements provided for by the national legislation at issue in the main proceedings.

41 In that regard, it must be recalled that, where, as in the present case, it is not obvious that the interpretation of an EU provision bears no relation to the facts of the main action or its purpose, the objection alleging the inapplicability of that provision to the case in the main action does not relate to the admissibility of the request for a preliminary ruling, but concerns the substance of the questions (judgments of 12 December 2019, *Slovenské elektrárne*, C-376/18, EU:C:2019:1068, paragraph 29, and of 28 October 2021, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo*, C-319/19, EU:C:2021:883, paragraph 25).

Directive 2006/123

42 Under Article 2(2)(j) of Directive 2006/123, that directive does not apply to social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State.

43 First, as the Advocate General stated in essence in points 145 to 150 of her Opinion, the file before the Court does not make it possible to ensure that the social services in the form of personal assistance concerned by the national legislation at issue in the main proceedings are not among the services excluded from the scope of Directive 2006/123 under Article 2(2)(j) thereof, as interpreted by the Court in paragraphs 42 to 49 of the judgment of 11 July 2013, *Femarbel* (C-57/12, EU:C:2013:517).

44 Second, the absence of any clarification in that regard in the order for reference also does not enable the Court to determine whether, even if certain social services in the form of personal assistance covered by the national legislation at issue in the main proceedings fall outside the exclusion provided for in Article 2(2)(j) of that directive, they are included within the scope of another of the exclusions provided for in Article 2(2) of that directive, and in particular points (f) and (i) thereof.

45 In those circumstances, since the referring court has not put the Court in a position to satisfy itself that the factual premiss on which the third question referred is based does indeed fall within the scope of Directive 2006/123, that question is inadmissible in so far as it concerns the interpretation of Article 15(2) thereof.

Articles 49 and 56 TFEU

46 Lastly, it must be observed that, although all the elements of the dispute in the main proceedings are confined to a single Member State, the questions referred for a preliminary ruling concern, inter alia, the interpretation of Articles 49 and 56 TFEU.

47 In such a context, it is for the referring court to indicate to the Court, in accordance with the requirements of Article 94 of the Rules of Procedure of the Court, in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the provisions of EU law on the fundamental freedoms that makes the preliminary ruling on interpretation necessary for it to give judgment in that dispute (judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 55, and order of 6 May 2021, *Ministero dell'Istruzione, dell'Università e della Ricerca and Others*, C-571/20, not published, EU:C:2021:364, paragraph 23).

48 The referring court fails to explain how, despite the purely internal nature of the dispute pending before it, an interpretation of Articles 49 and 56 TFEU is necessary. More specifically, that court does not expressly state that it is in one of the situations referred to in paragraphs 50 to 53 of the judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874).

49 Moreover, although, in accordance with the Court's settled case-law, the award of contracts which, in view of their value fall outside the scope of the directives on public procurement, is nonetheless subject to the fundamental rules and the general principles of the FEU Treaty, in particular, the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts are of certain cross-border interest, the referring court may not merely submit to the Court of Justice evidence showing that such an interest cannot be ruled out but must, on the contrary provide information capable of proving that it exists (see, to that effect, order of 12 November 2020, *Novart Engineering*, C-170/20, not published, EU:C:2020:908, paragraphs 33 and 35). In the present case, the referring court has failed to provide the Court with such information.

50 Therefore, the questions referred for a preliminary ruling are inadmissible, in so far as they concern the interpretation of Articles 49 and 56 TFEU.

51 It follows from all the foregoing considerations that the questions referred for a preliminary ruling are admissible except in so far as they concern the interpretation of Articles 49 and 56 TFEU and Article 15(2) of Directive 2006/123.

The first and second questions

52 By its first two questions, which it is appropriate to examine together, the referring court asks, essentially, whether Articles 76 and 77 of Directive 2014/24 must be interpreted as precluding national legislation which reserves the right for private non-profit organisations to conclude agreements under which those organisations provide social services in the form of personal assistance in return for reimbursement of the costs which they incur, irrespective of the estimated value of those services, and without that legislation imposing any obligation on those entities to comply with the requirements laid down in Article 77.

The applicability of Directive 2014/24

53 In order to answer those questions, it is necessary, as a preliminary point, to determine whether agreements such as those at issue in the main proceedings are public contracts covered by Directive 2014/24.

54 In that regard, in accordance with Article 1 thereof, Directive 2014/24 establishes rules on the procurement procedures by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4 thereof. Article 2(1)(5) of that directive defines public contracts for the purposes of that directive as contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.

55 From that perspective, it must be observed, in the first place, that, since the concept of 'public contract' is a concept of EU law, the classification given to contractual action agreements by Spanish law is irrelevant (see, to that effect, judgments of 20 October 2005, *Commission* v *France*, C-264/03, EU:C:2005:620, paragraph 36, and of 22 April 2021, *Commission* v *Austria (Lease of a building not yet constructed)*, C-537/19, EU:C:2021:319, paragraph 43).

56 Thus, the clarification in Article 62(1) of Law 5/1997, that such agreements constitute 'organisational instruments that are not contractual in nature', is not sufficient to exclude them from the scope of Directive 2014/24.

57 Moreover, contrary to the submissions of the Netherlands Government, it is not apparent from the request for a preliminary ruling that those contractual action agreements should, in practice, be treated in the same way as unilateral administrative measures which, by the mere will of the contracting authorities, are binding on the private non-profit-making entities which are the contracting parties thereof (see, in that regard, judgments of 19 April 2007, *Asemfo*, C-295/05, EU:C:2007:227, paragraphs 52 to 55, and of 18 December 2007, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, C-220/06, EU:C:2007:815, paragraphs 51 to 55).

58 In the second place, in order to fall within the scope of Directive 2014/24, the contractual action agreements at issue in the main proceedings must consist of public service contracts within the meaning of Article 2(1)(9) thereof.

59 In that regard, first, the concept of 'services', within the meaning of that provision, must be interpreted in the light of the freedom to provide services enshrined in Article 56 TFEU, the scope of which is limited to economic activities (see, to that effect, judgments of 29 April 2010, *Commission* v *Germany*, C-160/08, EU:C:2010:230, paragraphs 73 and 74, and of 23 February 2016, *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraph 154).

60 More specifically, it must be observed that services normally provided for remuneration constitute economic activities, since the essential characteristic of remuneration resides in the fact that it constitutes financial consideration for the service in question, without however having to be paid for by the recipient of that service (judgment of 23 February 2016, *Commission* v *Hungary*, C-179/14, EU:C:2016:108, paragraphs 153 to 155). Furthermore, it follows from Article 62 TFEU, read together with Article 51 of that Treaty, that the freedom to provide services does not extend to activities which in a Member State are connected, even occasionally, with the exercise of official authority.

61 As confirmed in recital 6 of Directive 2014/24, only activities of an economic nature, in accordance with the preceding paragraph, may, therefore, be the subject of a public service contract, within the meaning of Article 2(1)(9) thereof. Moreover, such an interpretation is supported by Article 2(1)(10) of that directive, under which an economic operator, within the meaning of that directive, is characterised by the fact that it offers the execution of works or a work, the supply of products or the provision of services on the market.

62 That said, the fact that the contract is concluded with a non-profit-making entity does not preclude that entity from being able to carry out an economic activity, within the meaning of Directive 2014/24, with the result that that factor is irrelevant as regards the application of the rules of EU law on public contracts (see, to that effect, judgments of 19 June 2014, *Centro Hospitalar de Setúbal and SUCH*,

C-574/12, EU:C:2014:2004, paragraph 33 and the case-law cited, and of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 52).

63 Furthermore, services provided for remuneration which, without falling within the exercise of public powers, are carried out in the public interest and without a profit motive and are in competition with those offered by operators pursuing a profit motive, may be regarded as economic activities (see, by analogy, judgment of 6 September 2011, *Scattolon*, C-108/10, EU:C:2011:542, paragraph 44 and the case-law cited).

64 Second, with regard, more specifically, to the provision of services which, as in the present case, have a social purpose, it is true that Article 1(5) of Directive 2014/24 states that that directive does not affect the way in which the Member States organise their social security systems. Moreover, according to the Court's settled case-law, the activities of bodies managing a social security scheme do not, in principle, constitute economic activities where they are based on the principle of solidarity and those activities are subject to State supervision (see, to that effect, judgment of 11 June 2020, *Commission and Slovak Republic* v *Dôvera zdravotná poist'ovňa*, C-262/18 P and C-271/18 P, EU:C:2020:450, paragraph 31 and the case-law cited).

65 That said, that is not necessarily the case with specific social services which are provided by private operators, the cost of which is borne by either the State itself, or by those social security bodies. The Court has also held that the pursuit of a social objective or the taking into account of the principle of solidarity in the context of the provision of services does not, as such, prevent the provision of these services from being regarded as an economic activity (see, to that effect, judgments of 29 November 2007, *Commission* v *Italy*, C-119/06, not published, EU:C:2007:729, paragraphs 36 to 41, and of 12 September 2000, *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 118).

66 In the present case, as the Advocate General noted in points 55 to 61 of her Opinion, it would appear that, at the very least, certain social services in the form of personal assistance, falling within the scope of the national legislation at issue in the main proceedings, are provided in return for remuneration and do not fall within the exercise of official authority, with the result that such activities may be regarded as being of an economic nature and, therefore, as constituting services within the meaning of Directive 2014/24.

67 In the third place, the pecuniary nature of a public contract presupposes that each of the parties undertakes to provide one form of consideration in exchange for another, although that does not mean that the consideration given by the contracting authority consists solely in the reimbursement of the expenditure incurred in providing the agreed service (see, to that effect, judgment of 10 September 2020, *Tax-Fin-Lex*, C-367/19, EU:C:2020:685, paragraphs 25 and 26 and the case-law cited). Accordingly, a contract cannot fall outside the concept of a 'public service contract' merely because, as appears to be the case here, the remuneration is limited to reimbursement of the expenditure incurred to provide the agreed service (judgment of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 52).

68 In the fourth place, as confirmed by recital 4 and the final paragraph of recital 114 of Directive 2014/24, procedures, whereby the contracting authority refrains from comparing and classifying admissible tenders or designating one or more economic operators to whom contractual exclusivity is awarded, do not fall within the scope of that directive (see, to that effect, judgments of 2 June 2016, *Falk Pharma*, C-410/14, EU:C:2016:399, paragraphs 37 to 42, and of 1 March 2018, *Tirkkonen*, C-9/17, EU:C:2018:142, paragraphs 29 to 35).

69 That said, it is apparent from replies of ASADE, the Spanish Government and the defendant in the main proceedings to the questions put by the Court that the award of a contractual action agreement is, in practice, preceded by a selection of the private non-profit organisations which have expressed an interest in providing the social services in the form of personal assistance which are the subject matter of that agreement, which, however, is a matter for the referring court to verify.

70 In the fifth place, it is expressly stated in the first question referred that the national legislation at issue in the main proceedings applies to all contractual action agreements, irrespective of their estimated value. It follows that it is possible that that legislation whose conformity with EU law must be reviewed

by the referring court, may concern contractual action agreements the estimated value of which is equal to or greater than the thresholds laid down in Article 4 of Directive 2014/24.

71 In the light of the foregoing, the legislation at issue in the main proceedings appears to govern, at least in part, the award of public contracts subject to Directive 2014/24.

72 Finally, it is important to add, while it is regrettable that the request for a preliminary ruling failed to list the specific categories of social services in the form of personal assistance covered by the national legislation at issue in the main proceedings, that did not prevent the Court, contrary to what the Italian Government appears to argue, from satisfying itself that the interpretation of Directive 2014/24 is related to the subject of the dispute in the main proceedings.

73 First, it is clear from the documents before the Court that at least some of the social services in the form of personal assistance that may be the subject of a contractual action agreement fall within the scope of the services listed in Annex XIV to Directive 2014/24 and, second, the questions referred concern the interpretation, not of the provisions of that directive, which are generally applicable to procedures for the award of public contracts, but solely Articles 74 to 77 thereof, which specifically establish a simplified regime for the award of public contracts for services covered by that annex.

74 Accordingly, those questions must be examined solely in the light of Articles 74 to 77 of Directive 2014/24.

The requirements deriving from Directive 2014/24

75 In order to determine whether Articles 74 to 77 of Directive 2014/24 preclude legislation such as that at issue in the main proceedings, it must be observed, in the first place, that the simplified regime for the award of public contracts laid down in those articles is justified, as stated in recital 114 of Directive 2014/24, by the limited cross-border dimension of the services referred to in Annex XIV thereto, and by the fact that those services are provided within a particular context that varies widely amongst Member States due to different cultural traditions.

76 In the second place, Article 77 of Directive 2014/24 provides that, for some of the services referred to in Annex XIV thereto, the Member States may allow contracting authorities to reserve the right for ‘organisations’, such as those defined in paragraph 2 of that article, to participate in procedures for the award of public contracts, the object of which is the provision of such services.

77 Article 77(2) of Directive 2014/24 sets out the strict conditions under which an economic operator may be regarded as an ‘organisation’ within the meaning of that article. Accordingly, it is essential that the aim of that economic operator is the pursuit of a public service mission linked to the delivery of the social or special services referred to in that article, that the profits of that economic operator are reinvested with a view to achieving such an objective and that, where those profits are distributed or redistributed, such an operation is based on participatory considerations. Moreover, the structures of management or ownership of that economic operator must be based on employee ownership or participatory principles or require the active participation of employees, users or stakeholders.

78 Moreover, it follows from Article 77(2)(d) and (3) of Directive 2014/24 that a contracting authority may award a public contract to an ‘organisation’ on the basis of the procedure laid down in that article only for a period not exceeding three years and only provided that that contracting authority has not already awarded that ‘organisation’ a contract for the services referred to in that article during the preceding three years.

79 In the present case, as confirmed by the wording of the first question referred for a preliminary ruling, the national legislation at issue in the main proceedings stipulates that the right to take part in procedures for the award of contractual action agreements is reserved for private non-profit organisations, without requiring those entities to comply with all of the conditions laid down in Article 77 of Directive 2014/24.

80 That said, it cannot be concluded from that factor that such legislation is necessarily incompatible with the simplified regime provided for in Articles 74 to 77 of Directive 2014/24.

81 Article 77 of that directive has a very specific scope since it expressly guarantees that Member States may, for some of the services covered by that simplified regime, allow contracting authorities to reserve the right to participate in procedures for the award of public contracts relating to such services, by operation of law, solely for economic operators meeting all the conditions laid down in that article.

82 Thus, having regard to the specific features of the legal regime which it establishes, and in the light of the wording of Articles 74 to 77 of Directive 2014/24, Article 77 thereof cannot be regarded as covering, in an exhaustive manner, the cases in which public contracts for the provision of a service referred to in Annex XIV to that directive may be reserved for certain categories of economic operators.

83 In the third place, it must be observed that Article 76 of Directive 2014/24 lays down the rules, derogating from ordinary law, which are applicable to the award of all public contracts relating to social services and other specific services listed in Annex XIV to that directive.

84 Article 76 obliges Member States, first, to put in place procurement rules requiring contracting authorities to comply with the principles of transparency and equal treatment of economic operators and, second, to ensure that those rules allow contracting authorities to take into account the specificities of the services covered by such procurement procedures. In the latter regard, Member States must allow contracting authorities to take into account the need to ensure the quality, continuity, accessibility, affordability, availability and comprehensiveness of those services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.

85 As confirmed by recital 114 of Directive 2014/24, the legal regime established by that directive in Article 76 is characterised by the broad discretion enjoyed by the Member States to organise, in the way they consider most appropriate, the choice of the providers of the services listed in Annex XIV to that directive. It also follows from that recital that the Member States must also take account of Protocol No 26, which provides, inter alia, for the broad discretion of national authorities to commission services of general economic interest as closely as possible to the needs of the users.

86 It is therefore necessary to examine whether the principles of equal treatment and transparency, as referred to in Article 76 of Directive 2014/24, preclude national legislation which reserves the right to participate in procedures for the award of public contracts for the provision of social services in the form of personal assistance, covered by Annex XIV thereto, for private non-profit organisations, even where they do not fulfil the conditions laid down in Article 77 thereof.

87 As regards, first, the principle of equal treatment of economic operators, the fact that profit-making entities are deprived of the possibility of participating in such procedures for the award of public contracts constitutes a difference in treatment between economic operators which is contrary to that principle, unless that difference is justified by objective considerations (see, by analogy, judgments of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 52, and of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 56).

88 In that regard, it is important to recall that a Member State may, in the exercise of the powers it retains to organise its social security system, consider that a social welfare system necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making (judgments of 17 June 1997, *Sodemare and Others*, C-70/95, EU:C:1997:301, paragraph 32, and of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 58).

89 In the present case, it is clear from the national legislation at issue in the main proceedings and from the replies to the questions put by the Court that the contractual action agreements provided for by that legislation must comply, inter alia, with the principles of the good of the community and budgetary efficiency. In particular, first, the social services in the form of personal assistance which may be the subject of such agreements must be offered to everyone, in principle free of charge, and the amount of any additional charge which may be levied on users depends on their financial capacity. Second, the private non-profit organisations concerned by those agreements may obtain reimbursement only for the variable, fixed and permanent costs incurred providing the social services in the form of personal

assistance which are the subject of those agreements since obtaining a commercial profit is expressly excluded.

90 Thus, the exclusive recourse to private non-profit organisations in order to ensure the provision of such social services is likely to be grounded both in the principles of universality and solidarity, which are inherent in a social welfare system, and in reasons of economic efficiency and suitability, in so far as it allows those services of general interest to be provided in an economically balanced manner for budgetary purposes, by entities constituted, essentially, for the purpose of public service and whose decisions are not guided, as the Spanish Government observes, by purely commercial considerations (see, by analogy, judgment of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 57).

91 Where it is motivated by such considerations, the exclusion of private profit-making entities from the procedures for the award of public contracts for the provision of such social services is not contrary to the principle of equality, provided that such exclusion actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that system is based (see, by analogy, judgments of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 60, and of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 63).

92 In that regard, first, the Court has had occasion to state, with regard to public contracts to which Directive 2014/24 was not yet applicable, that, in order to meet those requirements, the private entities for which, under the legislation of the Member State concerned, such contracts are reserved may not pursue any objectives other than those mentioned in the previous paragraph nor make any profit, even indirectly, as a result of their services, apart from the reimbursement of the variable, fixed and permanent costs necessary to provide them. Nor may they procure any profit for their members. Moreover, the application of that legislation cannot be extended to cover the wrongful practices of those entities or their members. Thus, those entities must have recourse to a workforce only within the limits necessary for their proper functioning and in compliance with the requirements imposed on them by national legislation, since volunteers may be reimbursed only for expenditure actually incurred for the activity performed, within the limits laid down in advance by the private entities themselves (see, to that effect, judgments of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraphs 61 and 62, and of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraphs 64 and 65).

93 Second, it is also clear from the Court's case-law that the principle of equal treatment, which applies in connection with the freedom of establishment enshrined in Articles 49 to 55 TFEU, does not preclude a Member State from reserving the status of providers of social welfare services to non-profit-making private operators, including those which are not strictly voluntary (see, to that effect, judgment of 17 June 1997, *Sodemare and Others*, C-70/95, EU:C:1997:301, paragraphs 32 to 34).

94 That case-law remains relevant for the purposes of interpreting Article 76 of Directive 2014/24 which now expressly provides for a simplified regime for social public procurement.

95 It follows that the principle of equal treatment of economic operators, as now enshrined in Article 76 of Directive 2014/24, authorises Member States to reserve the right to participate in the procedure for the award of public contracts for the provision of social services in the form of personal assistance for private non-profit organisations, including those which are not strictly voluntary, provided that, first, any profits resulting from the performance of those contracts are reinvested by those entities with a view to achieving the social objective of general interest which they pursue and, second, all of the conditions recalled in paragraphs 90 and 91 of the present judgment are satisfied.

96 It should also be added, however, that Article 76 of Directive 2014/24 precludes such public contracts from being awarded directly, without being put out to competitive tender, to a not-for-profit entity, other than a voluntary entity (see, in the latter respect, judgment of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 70). To the contrary, that article requires that, before making such an award, the contracting authority must compare and rank the respective tenders of the various non-profit organisations which have expressed an interest, having regard in particular to the

price of those tenders, even if that price is constituted, as in the present case, by the total costs which the contracting authority will have to reimburse.

97 Second, as regards the principle of transparency, that principle requires the contracting authority to provide an adequate degree of publicity allowing (i) the opening-up to competition and (ii) the review of the impartiality of the procurement procedure to enable any interested operator to take the decision to tender on the basis of all the relevant information, and to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. The obligation of transparency thus implies that all the conditions and detailed rules governing the award procedure must be drawn up in a clear, precise and unequivocal manner so that (i) all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and (ii) the contracting authority is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question (see, to that effect, judgments of 16 February 2012, *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 73, and of 4 April 2019, *Allianz Vorsorgekasse*, C-699/17, EU:C:2019:290, paragraphs 61 and 62 and the case-law cited).

98 In the present case, first, it does not appear from the documents before the Court that the national legislation at issue in the main proceedings fails to offer sufficient guarantees to protect private non-profit organisations from the risk of favouritism or arbitrariness on the part of the contracting authority during the procedure for the award of a contractual action agreement.

99 Second, Article 75 of Directive 2014/24 specifies, in respect of procedures for the award of public contracts falling within the scope of the simplified regime established in Articles 74 to 77 thereof, the conditions regarding advertising required by the principle of transparency, as recalled in paragraph 97 of the present judgment.

100 In accordance with Article 75 of that directive, contracting authorities intending to award a public contract for the services referred to in Annex XIV to Directive 2014/24 must, in principle, make known their intention by means of a contract notice or a prior information notice which is to be published, in accordance with Article 51 thereof, by the Publications Office of the European Union or, where appropriate for prior information notices, on their buyer profile.

101 In the present case, as the Advocate General noted in point 116 of her Opinion, it would appear to follow from the national legislation at issue in the main proceedings that the contract notices to which it refers are published only in the *Diari Oficial de la Generalitat Valenciana* (Official Journal of the Valencia Regional Government). If that were the case, which it is for the referring court to ascertain, such publication would not constitute publicity in accordance with Article 75 of Directive 2014/24.

102 It follows from all of the foregoing considerations that Articles 76 and 77 of Directive 2014/24 must be interpreted as not precluding national legislation which reserves the right for private non-profit organisations to conclude, subject to a competitive bidding process, agreements under which those organisations provide social services in the form of personal assistance in return for reimbursement of the costs which they incur, irrespective of the estimated value of those services, even where those organisations do not satisfy the requirements laid down in Article 77, provided, first, that the legal and contractual framework within which the activity of those organisations is carried out contributes effectively to the social purpose and objectives of solidarity and budgetary efficiency on which that legislation is based and, second, that the principle of transparency, as specified in particular in Article 75 of that directive, is respected.

The third question

103 As a preliminary point, it must be observed that, under Article 64(3) of Law 5/1997, the establishment of private non-profit organisations in the place where the service is provided is one of the selection criteria which may be used by the contracting authority when concluding a contractual action agreement. Thus, and subject to verification by the referring court, it would appear that the contracting authority may require, on the basis of such a criterion, that, from the time of submission of their tenders, tenderers are located in the territory of the place concerned by the social services to be provided.

104 By its third question, the referring court asks, in essence, whether Articles 76 and 77 of Directive 2014/24 must be interpreted as meaning that they allow, in the award of a public contract for social services referred to in Annex XIV thereto, the establishment of the economic operator in the place where the services are to be provided to be a criterion for the selection of economic operators, prior to the examination of their tenders.

105 In the first place, it must be recalled that, as pointed out in paragraph 84 of the present judgment, Article 76 of that directive requires that criterion of establishment to be compatible with the principle of equal treatment of economic operators.

106 Such a criterion creates a difference in treatment between economic operators depending on whether or not they have an establishment in the place where the social service concerned is provided. Since the situation of those operators is comparable with regard to the award of a public contract for a service referred to in Annex XIV to that directive, such a difference in treatment is compatible with the principle of equal treatment only in so far as it may be justified by a legitimate objective.

107 In the second place, it is apparent from the written observations submitted to the Court that the selection criterion based on the establishment of the economic operator in the place where the services are to be provided is intended, inter alia, to ensure the proximity and accessibility of the social services that are the subject of a contractual action agreement.

108 It is true that that objective constitutes a legitimate objective under EU law and, moreover, is recognised both in Article 1 of Protocol No 26 and in Article 76 of Directive 2014/24, the latter article requiring Member States, as recalled in paragraph 84 of the present judgment, to ensure that contracting authorities may take into account the need to ensure inter alia the accessibility and availability of the services referred to in Annex XIV thereto.

109 That said, a criterion, such as that in the present case, which requires that, from the time of submission of their tenders, tenderers are located in the territory of the place concerned by the social services to be provided, is clearly disproportionate to the attainment of such an objective (see, to that effect, judgment of 27 October 2005, *Contse and Others*, C-234/03, EU:C:2005:644, paragraph 43). Even if the establishment of the economic operator in the territory of the place where it is called upon to provide the social services concerned is necessary in order to guarantee the proximity and accessibility of those services, such an objective could, in any event, be attained just as effectively by requiring that that economic operator satisfies that condition only at the stage of performance of the public contract in question.

110 In the light of the foregoing, the answer to the third question referred for a preliminary ruling must be that Article 76 of Directive 2014/24 must be interpreted as precluding national legislation under which, in the award of a public contract for social services referred to in Annex XIV to that directive, the location of the economic operator in the place where the services are to be provided is a criterion for the selection of economic operators, prior to the examination of their tenders.

Costs

111 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Articles 76 and 77 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as not precluding national legislation which reserves the right for private non-profit organisations to conclude, subject to a competitive bidding process, agreements under which those organisations provide social services in the form of personal assistance in return for reimbursement of the costs which they incur, irrespective of the estimated value**

of those services, even where those organisations do not satisfy the requirements laid down in Article 77, provided, first, that the legal and contractual framework within which the activity of those organisations is carried out contributes effectively to the social purpose and objectives of solidarity and budgetary efficiency on which that legislation is based and, second, that the principle of transparency, as specified in particular in Article 75 of that directive, is respected.

2. **Article 76 of Directive 2014/24 must be interpreted as precluding national legislation under which, in the award of a public contract for social services referred to in Annex XIV thereto, the location of the economic operator in the place where the services are to be provided is a criterion for the selection of economic operators, prior to the examination of their tenders.**

[Signatures]

---

* Language of the case: Spanish.

EU:C:2022:77

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 3 February 2022(1)

Case C-436/20

Asociación Estatal de Entidades de Servicios de Atención a Domicilio (ASADE)
v
Consejería de Igualdad y Políticas Inclusivas

(Request for a preliminary ruling from the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia, Spain))

(Reference for a preliminary ruling – Public procurement – Articles 49 and 56 TFEU – Freedom of establishment and freedom to provide services – Economic activity – Directive 2014/24/EU – Article 1(2), Article 2(1) and Article 4(d) – Conditions of applicability – Article 20(1) and Article 77 – Reserved contracts – Articles 74 to 76 and Annex XIV – Provision of social services – Public procurement in the field of social services – Simplified regime – Contractual action agreements to provide such services – Exclusion of profit-making entities – Principles of transparency, equality and proportionality – Tender condition – Geographical limitation – Directive 2006/123/EC – Scope ratione materiae – Article 2(2)(j) – Exclusion of social services)

Table of contents

I. Legal framework

A. European Union law

1. Directive 2014/24

2. The Services Directive

B. Spanish law

II. Facts, procedure and the questions referred for a preliminary ruling

III. Analysis

A. Preliminary remarks

B. The first and the second questions

1. The nature of the social services at issue

2. The conditions of applicability of Directive 2014/24

(a) The concept of ‘procurement’

(b) The characteristics of a public contract

(1) A contract concluded for pecuniary interest

(2) A contract concluded between an economic operator and one or more contracting authorities

(3) A contract for the provision of services

(c) The threshold criteria

3. Reserved contracts and the simplified regime under Directive 2014/24

(a) Reserved contracts

(1) Reserved contracts under Article 20 of Directive 2014/24

(2) Reserved contracts under Article 77 of Directive 2014/24

(b) The rules under Articles 75 and 76 of Directive 2014/24

4. Freedom of establishment

C. The third question

1. The compatibility of the selection criterion at issue with Directive 2014/24

2. Compatibility of the selection criterion with the Services Directive

3. Compatibility of the selection criterion with the fundamental freedoms

IV. Conclusion

1. The Asociación Estatal de Entidades de Servicios de Atención a Domicilio (State Association of Domiciliary Care Providers, ‘ASADE’, Spain) is a trade association for private undertakings. It is seeking before the referring court – the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia, Spain) – the annulment of Decree 181/2017 (2) adopted by the Comunitat Valenciana (Autonomous Community of Valencia, Spain), in so far as that decree prevents profit-making entities from entering into ‘contractual action agreements’ with public authorities. (3)

2. Under those agreements, public authorities entrust the management of certain social services to social initiative entities. In so doing, they are not required to follow the procedures laid down in EU public procurement legislation. However, because of Decree 181/2017, only private non-profit organisations may enter into those agreements in order to provide social services, which may include assistance to children, adolescents, young people, the elderly, the disabled, migrants, women in vulnerable situations, and members of the LGBTI (4) and Roma communities (‘the services at issue’). (5)

3. It is in that context that the Court is being asked, in essence, to clarify whether EU law, and, in particular, Articles 49 and 56 TFEU, Articles 74, 76 and 77 of Directive 2014/24/EU, (6) and Article 15(2) of Directive 2006/123/EC (7) (‘the Services Directive’), precludes national legislation that excludes profit-making entities from entering into contractual action agreements with public authorities in order to provide social services, whilst allowing non-profit organisations to conclude such agreements.

4. The complexity of the topic and the technical nature of the applicable rules, arising from various EU law instruments, should not conceal the undoubted importance of this question, since the Court is called upon to establish the relationship between economic activity and social matters, as well as that between EU law and national law.

5. In that regard, it is worth quoting Advocate General Tesauro, who more than 20 years ago stressed the fact that the social security sector does not constitute 'an island beyond the reach of [EU] law'. (8) That was true back then and it is all the more so now. While Member States remain autonomous as regards the organisation of their social security systems, that autonomy does not prevent the application of the fundamental freedoms laid down in the Treaties, (9) of which public procurement rules are parts and parcel. (10)

I. Legal framework

A. European Union law

1. Directive 2014/24

6. Directive 2014/24 lays down rules that seek to coordinate national procedures for the award of public contracts above a certain threshold amount so that they may be consistent with the principle of the free movement of goods, freedom of establishment and freedom to provide services, as well as ensuring the implementation of principles, such as equal treatment, non-discrimination, proportionality and transparency. That directive is also intended to ensure effective competition in public procurement.

7. Recitals 1 and 6 of Directive 2014/24 state:

'(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

…

(6) It is also appropriate to recall that this Directive should not affect the social security legislation of the Member States. Nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, or with the privatisation of public entities providing services.

It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive.'

8. Recital 114 of that directive clarifies the reasons for a specific simplified regime regarding certain services to the person, such as certain social health and educational services, and recital 118 thereof explains the regime concerning reserved contracts for services listed in Article 77(1) of the same directive.

9. Under Title I of Directive 2014/24, entitled 'Scope, definitions and general principles', Article 1(1), (2), (4) and (5) provides:

'1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than

the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of … services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the … services are intended for a public purpose.

…

4. This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.

5. This Directive does not affect the way in which the Member States organise their social security systems.'

10. Article 2(1)(5) of Directive 2014/24 defines 'public contracts' as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services'.

11. Article 2(1)(10) of that directive defines 'economic operator' as 'any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work; the supply of products or the provision of services on the market'.

12. Article 4 of the same directive, headed 'Threshold amounts', provides:

'This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

…

(d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV.'

13. Article 20 of Directive 2014/24, entitled 'Reserved contracts', states:

'1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

…'

14. Title III of the directive, headed 'Particular Procurement Regimes', includes a Chapter I comprising Articles 74 to 77. Those articles contain provisions regarding the simplified regime, which is applicable to 'social and other specific services'.

15. Article 74 of Directive 2014/24, headed 'Award of contracts for social and other specific services', states:

'Public contracts for social and other specific services listed in Annex XIV shall be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in point (d) of Article 4.'

16. Article 75 of that directive, headed 'Publication of notices', provides for conditions concerning the publication of notices for the award of the public contracts referred to in Article 74.

17. Article 76 of Directive 2014/24, headed ‘Principles of awarding contracts’, provides:

‘1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.

2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.’

18. Article 77(1) of Directive 2014/24, headed ‘Reserved contracts for certain services’, states that Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74 falling within the CPV codes listed in that article. (11) Article 77(2) of that directive sets out the conditions which those organisations must satisfy in order to participate in reserved contracts. Pursuant to Article 77(3) of Directive 2014/24, the maximum duration of the contract is not to be longer than three years.

19. Annex XIV to Directive 2014/24 contains a list of services referred to in Article 74.

2. The Services Directive

20. Recital 27 of the Services Directive is worded as follows:

‘This Directive should not cover those social services in the areas of housing, childcare and support to families and persons in need which are provided by the State at national, regional or local level by providers mandated by the State or by charities recognised as such by the State with the objective of ensuring support for those who are permanently or temporarily in a particular state of need because of their insufficient family income or total or partial lack of independence and for those who risk being marginalised. These services are essential in order to guarantee the fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity and should not be affected by this Directive.’

21. Article 2 of that directive provides:

‘1. This Directive shall apply to services supplied by providers established in a Member State.

2. This Directive shall not apply to the following activities:

…

(j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;

…’

B. Spanish law

22. By virtue of the powers conferred on it in respect of social services by the Spanish Constitution, the Community of Valencia passed Law 5/1997. Account must be taken of Articles 44*bis*, 53, 56, 62, 63, 64, 66, 67 and 68 of Law 5/1997.

23. Decree 181/2017 implements Law 5/1997 and is the subject of the main proceedings. Although Law 5/1997 was repealed by Law 3/2019, (12) under the latter law, Decree 181/2017 remains in force.

Account must be taken of Articles 3, 6, 11, 13, 15, 17, 19, and 21 to 26 of Decree 181/2017, which implement the rules laid down by Law 5/1997.

II. Facts, procedure and the questions referred for a preliminary ruling

24. ASADE brought an action before the referring court seeking both the annulment of Decree 181/2017 and the setting aside of certain provisions of Law 5/1997. (13) In its view, Decree 181/2017 is unlawful as it excludes profit-making entities from providing public services under a public-private contractual action agreement, whilst allowing non-profit organisations – not solely voluntary associations – (14) to provide such services in return for payment without those organisations having to go through a transparent competitive process that ensures equal treatment.

25. ASADE argues that Decree 181/2017 and certain provisions of Law 5/1997 are contrary to, first, the freedom of establishment enshrined in Article 49 TFEU, second, Directive 2014/24, in that those norms do not respect the principle of equal treatment between economic operators, and, third, Article 15(2) of the Services Directive. Moreover, in its view, the restriction on freedom of establishment brought about by the national legislation at issue is not justified on grounds of public interest. ASADE observes that the national legislation at issue is not confined to the areas of health and social security, but covers all types of social services and applies to all non-profit organisations and not solely to voluntary associations. (15) In its submission, this means that the exceptions to the application of EU public procurement rules that were established in the Court's case-law (16) are not applicable to the case at hand.

26. For its part, the defendant, the Consejería de Igualdad y Políticas Inclusivas de la Generalitat Valenciana (Department for Equality and Inclusive Policies of the Valencia Regional Government, Spain), considers that both Law 5/1997 and Decree 181/2017 comply with Directive 2014/24 and the Services Directive.

27. First, the defendant argues that the Court has already allowed exceptions to be made to the principle of free competition in the case of contracts concluded with non-profit organisations in relation to the social security system, given that social and health services display a number of characteristics that require them to be treated differently as regards public procurement rules. (17)

28. Second, the defendant contends that, in accordance with the principle of budgetary efficiency, contractual action agreements offer an alternative to the direct or indirect management of non-economic public services, which are provided by non-profit organisations which receive payment in the form of reimbursement of costs, which does not entail any business profit. It also considers that contractual action agreements do not infringe the Services Directive, since the latter does not apply to non-economic services of general interest or to social services relating to social housing, childcare and support to families and persons permanently or temporarily in need which are provided by the State or by charities recognised as such by the State.

29. Third, the defendant takes the view that the request for a preliminary ruling is baseless, since Law 5/1997 has been repealed by Law 3/2019.

30. The referring court's doubts derive in particular from two judgments of the Court, namely in *Ordine degli Ingegneri della Provincia di Lecce* and in *Piepenbrock*. (18) In those two judgments, the Court defined the concept of 'contract for pecuniary interest' as also including contracts for which the agreed remuneration is limited to reimbursement of the costs of providing the agreed service. The referring court therefore asks whether the recourse to contractual action agreements, as governed by Law 5/1997, as amended by Law 13/2016, (19) complies with Articles 49 and 56 TFEU, Articles 76 and 77 of Directive 2014/24, read in conjunction with Article 74 thereof and Annex XIV thereto and Article 15(2) of the Services Directive.

31. In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 49 TFEU and Articles 76 and 77 of [Directive 2014/24] (as read with Article 74 [thereof] and Annex [XIV thereto]) be interpreted as precluding national legislation which permits contracting authorities to make use of agreements with private non-profit organisations – not solely voluntary associations – to provide all manner of social services to the person in return for reimbursement of costs without following the procedures in [Directive 2014/24] and irrespective of the estimated value, simply by classifying the arrangements in question as non-contractual?

(2) If the reply is in the negative, meaning that such arrangements are possible, must Article 49 TFEU and Articles 76 and 77 of [Directive 2014/24] (as read with Article 74 [thereof] and Annex [XIV thereto]) be interpreted as permitting contracting authorities to make use of agreements with private non-profit organisations (not solely voluntary associations) to provide all manner of social services to the person in return for reimbursement of costs without following the procedures in the directive and irrespective of the estimated value, simply by classifying the arrangements in question as non-contractual, where, moreover, the national legislation in question does not expressly include the requirements established in Article 77 of the directive, but refers to subsequent implementation through regulations without expressly stipulating, among the requirements to be satisfied by the implementing regulations, that they must explicitly include the conditions laid down in Article 77 of the directive?

(3) If the reply is, again, in the negative, meaning that such a situation is possible, must Articles 49 and 56 TFEU, Articles 76 and 77 of [Directive 2014/24] (as read with Article 74 [thereof] and Annex XIV [thereto]) and Article 15(2) of [the Services Directive] be interpreted as permitting contracting authorities, when selecting non-profit organisations (not solely voluntary associations) with which to enter into agreements to provide all manner of social services to the person, to include not only the selection criteria set out in Article 2(2)(j) of the said directive but also the criterion that the organisation be established in the place where the service is to be provided?’

32. Written observations were submitted by the applicant, the defendant, the Spanish, Italian and Norwegian Governments, as well as the European Commission. Having decided to give judgment without holding a hearing, the Court put a number of questions, to be answered in writing, to the parties and interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union, to which the applicant, the defendant, the Spanish and Netherlands Governments, as well as the Commission, replied.

III. Analysis

A. Preliminary remarks

33. At the outset, I take the view that the questions referred for a preliminary ruling, in so far as they relate to Law 5/1997, are admissible. The referring court has clearly stated that the lawfulness of Decree 181/2017 can be assessed only by examining the compatibility with EU law provisions of its legal basis, that is, Law 5/1997. It was asked to rule on the lawfulness of Decree 181/2017 at the time when it was adopted. The national court states in its order for reference that at that time, Law 5/1997, as amended by Law 13/2016, was still in force. Therefore, the plea of inadmissibility put forward by the defendant should be rejected.

34. Second, I shall deal with the Italian Government’s criticism that the request for a preliminary ruling does not specify the types of social services which may be the subject of contractual action agreements at issue in the national proceedings.

35. According to settled case-law, it is essential that the national court gives, at the very least, some explanation of the reasons for the choice of the EU law provisions which it seeks to have interpreted and some explanation of the link it establishes between those provisions and the national legislation applicable to the proceedings pending before it. (20)

36. I acknowledge that this request for a preliminary ruling does not list the specific social services in question and that it is unfortunate that such information is lacking. However, it is clear from the legal framework laid out in the order for reference and from the wording of the questions referred that, in essence, it may involve 'all manner of social services'. Therefore, in my view, the referring court has sufficiently explained the legislative context of its request for an interpretation of EU law.

37. Third, I take the view that, in so far as the questions referred for a preliminary ruling relate to Articles 49 and 56 TFEU, they must be held admissible. It is true that it is not apparent from the order for reference whether the dispute in the main proceedings has any cross-border dimension.

38. However, it seems to me that the reference at issue is in exactly the same situation as that in '*Libert and Others*', (21) to which the Court referred in paragraph 51 of the *Ullens de Schooten* judgment. (22) In that paragraph, the Court held that a reference for a preliminary ruling may be declared admissible in a purely internal situation where 'the referring court makes a request for a preliminary ruling in proceedings for the annulment of provisions which apply not only to its own nationals but also to those of other Member States'. (23) That appears to be the case in the main proceedings, given that ASADE brought an action seeking annulment of Decree 181/2017, which applies not only to nationals of its own country, but also to those of other Member States.

39. In my opinion, it follows that, to the extent that those questions relate to the abovementioned Treaty provisions, they should be declared admissible.

B. The first and the second questions

40. By its first two questions, which should be examined together as they concern the same issue, the referring court is asking, in essence, whether Article 49 TFEU and Articles 74, 76 and 77 of Directive 2014/24 are to be interpreted as allowing a public authority to conclude, without complying with the procedural requirements imposed by EU law, agreements solely with private non-profit organisations, under which that authority entrusts those entities with certain social services in return for reimbursement of the costs incurred by those organisations in respect of the provision of those services.

41. Answering those questions is like venturing through a labyrinth of different legal problems. To make it easier, I will break it down into four separate issues. As a preliminary point, it is necessary to establish the nature of the social services at issue in the main proceedings in order to determine whether they are to be classified as 'economic activities' under the EU public procurement rules. Next, I shall analyse the conditions of applicability of Directive 2014/24. Then, I shall turn to examining the 'simplified regime' laid out in Articles 74 to 77 of that directive and, lastly, the rules of freedom of establishment enshrined in Article 49 TFEU.

42. However, before examining those questions, I would like to make the following two observations. First, by mentioning Article 49 TFEU in the questions referred, the national court considers that the current case comes within the scope of freedom of establishment rather than that of freedom to provide services.

43. In my opinion, that assumption is correct, since it is settled case-law that the provision of services is to be distinguished from establishment in that the latter involves an activity that is stable and permanent, whilst the former involves an activity of a temporary nature. (24) It seems to me that the provision of the social services at issue in the main proceedings requires such stability and that such activities may thus fall within the scope of freedom of establishment.

44. Second, since the referring court refers to Directive 2014/24, there appears to be an assumption that the contractual action agreements at issue are not concession contracts regulated by Directive 2014/23/EU. (25) A service concession is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment. Service concession implies a transfer by the public authority to the concessionaire of an operating risk in exploiting those services. (26) While the national legislation at issue in the main proceedings does not preclude users from having to pay in part for the social services that are the subject of those agreements, (27) it does

not appear that such a transfer took place under that legislation. (28)I therefore take the view that the contractual action agreements at issue do not fall within the scope of Directive 2014/23.

45. Thus, on the basis of the questions referred, I shall address the questions by reference to Directive 2014/24 or the provisions on freedom of establishment contained in the FEU Treaty.

1. The nature of the social services at issue

46. At the outset, I would like to point out that the principal objective of the EU rules on public procurement, and notably Directive 2014/24, is the freedom of establishment and the freedom to provide services. (29) As that directive is designed to implement the provisions of the FEU Treaty relating to those freedoms, (30) the social services at issue in the main proceedings necessarily fall within the material scope of the same fundamental freedoms.

47. It follows that, if the social services that are the subject of the contractual action agreements at issue were to be regarded as non-economic activities within the meaning of those Treaty provisions, those agreements would also be excluded from the scope of Directive 2014/24, since the latter may not extend the scope of the fundamental freedoms that it seeks to implement. (31)

48. Moreover, it is apparent from the wording of Article 1(4) and of recital 6 of Directive 2014/24 that Member States are free to define their ‘services of general economic interest’ and that ‘non-economic services of general interest’ do not fall within the scope of that directive. At the same time, it should be noted that Directive 2014/24 does not specifically define the terms ‘non-economic services’ and ‘services of general economic interest’.

49. I therefore take the view that, for the purposes of applying Directive 2014/24, the concepts of ‘economic activity’ and ‘non-economic services of general interest’ set out therein must be interpreted in the light of the case-law of the Court concerning freedom of establishment and free movement of services as provided for by the FEU Treaty. (32)

50. While the first two questions referred mention only Article 49 TFEU – and not Article 56 TFEU – the concepts of ‘services’ and ‘economic activity’ are largely defined by the latter Treaty provision. There exists no simple criterion for distinguishing between the two freedoms, although the distinction appears to lie in the temporary nature of the activities. (33) On account of the grey area between these two freedoms and as together they form the basis of Directive 2014/24, in the analysis of the first and second questions, reference is made in the present Opinion not only to freedom of establishment, but also to freedom to provide services.

51. In that context, the concepts of ‘economic activity’ and ‘non-economic services of general interest’ each determine whether a particular activity falls within or outside the scope of EU legislation. (34) It should also be pointed out that such a determination is not an exact science. Nevertheless, there is a common starting point for defining those concepts. Indeed, as the concept of ‘economic activity’ defines the scope of the fundamental freedoms laid down in the FEU Treaty, it is not to be interpreted restrictively. (35)

52. As public procurement rules under EU law were initially developed in the context of fundamental freedoms, and while I acknowledge that there is some overlap between those freedoms and other areas of law – namely competition law or State aid – (36) the concepts of ‘services of general interest’ and ‘economic activity’ used in the context of fundamental freedoms tend to vary from the ones developed in competition law. (37) Thus, according to the case-law concerning freedom of establishment, it is the provision of services for remuneration that must be regarded as an economic activity. (38)

53. Moreover, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, (39) that is to say, ‘the activity must not be provided for nothing’. (40) Therefore, I stress that the decisive factor, which brings an activity within the scope of the FEU Treaty relating to fundamental freedoms, is its *economic character*, irrespective of who pays for the service – whether it is the user or the Member State. (41) The Court has held, for example, that

the fact that the State is involved in financing medical benefits does not mean that a medical activity is not to be classified as a service. (42)

54. Taking into account the broad definition of the concept of 'economic activity' under fundamental freedoms, the Court did not hesitate, for example, in classifying as services, within the meaning of Directive 2004/18/EC, (43) contractual agreements relating to medical transport, even where the contracting authority concluded those agreements with voluntary associations, and those agreements were based on the principle of solidarity. (44) Moreover, the fact that the activity is carried out on a non-profit basis by a private partner such as a social solidarity institution does not prevent it from being classified as an economic activity. (45)

55. In the present case, the Annex to Decree 181/2017 lists the services that can be the subject of the contractual action agreements at issue. (46) As mentioned earlier in this Opinion, the services at issue may include services to children, adolescents, young people, the elderly, the disabled, migrants, women in distress and for persons falling under the 'Equality in diversity' category (LGBTI and Roma). (47)

56. In terms of the content of the services at issue, it must be borne in mind that the activities provided under contractual action agreements include a broad range of different activities, (48) comprising, for example, housing services, day-centres, residential care and receiving persons, supporting persons in difficulty, providing financial support and even programmes which consist in executing judicial measures. To name but a few examples, the services include providing facilities for the reception of minors who are under the care or guardianship of regional authorities; centres for the enforcement of judicial measures regarding minors; support for the emancipation and personal autonomy of young people who were under guardianship and have reached their majority; programmes of judicial measures for minors; places for family meetings; interventions in host families for minors; measures intended for adoption and adoptive families, day centres for minors in vulnerable situations; housing and subsistence services for young people; occupational centres for young people; residential care and day-centres for the elderly; social housing for the elderly; and centres for women exposed to the risk of social exclusion and reception centres for female victims of violence.

57. However, it is for the referring court to verify whether the services at issue are offered in return for remuneration, and thus constitute an 'economic activity' within the meaning of the case-law cited above.

58. In that regard, it seems to me that the beneficiaries of the services which are the subject of the contractual action agreements do not usually pay for the provision of those services, except in exceptional cases in which they may be required to pay a fee previously approved by the contracting authority. (49) Nevertheless, as the economic nature of an activity does not depend on whether the service is paid for by the users or by the contracting authority, (50) and as, under the national legislation at issue, such payment takes place, (51) those services can be regarded as an 'economic activity' under Article 49 TFEU. It also follows that the legal nature and the solidarity mechanism implemented by the entities providing the services at issue are immaterial. (52)

59. I shall therefore proceed on the basis that at least some of the services that are the subject of the contractual action agreements at issue could be regarded as constituting an 'economic activity' if these services were in fact to be offered in return for *remuneration*, even if that remuneration is not paid directly by the users of the service, but by the public authorities.

60. For the sake of completeness, one should examine whether the services at issue fall within the scope of the concept of 'exercise of official authority' within the meaning of Article 51 TFEU, as that constitutes a derogation from Article 49 TFEU. Although, in the questions referred, the national court has not expressly inquired about the exception provided for in the first paragraph of Article 51 TFEU, it cannot be ruled out that some of these activities may fall within the scope of the concept of 'exercise of official authority' within the meaning of that provision. For example, it appears that the Annex to Decree 181/2017 contains certain activities, such as the enforcement of court judgments by the social initiative entities under contractual action agreements.

61. The concept of 'exercise of official authority' is to be interpreted restrictively, since it is an exception to freedom of establishment. (53) That exception is restricted to activities which in

themselves are directly and specifically connected with the exercise of official authority. (54) Moreover, it does not extend to certain activities that are ancillary or preparatory to the exercise of official authority, (55) or to certain activities whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact. (56) Neither does it cover certain activities, which do not involve the exercise of decision-making powers, (57) powers of enforcement (58) or powers of coercion. (59)

62. In any case, it is for the referring court, and not for the Court, to ascertain the specific nature of the activities entrusted to such entities by way of contractual action agreements, and to determine whether some of those activities might involve a direct and specific connection with the exercise of official authority. If that is the case, those activities are not of an economic nature.

63. Once it is established, taking the nature of the activities at issue into account, that a specific activity constitutes an 'economic activity' within the meaning of Article 49 TFEU and Directive 2014/24, the next step is to determine whether the *lex specialis* of public procurement rules – Directive 2014/24 – is applicable to the national legislation at issue.

2. The conditions of applicability of Directive 2014/24

64. The application of Directive 2014/24 is subject to a number of conditions. First, the process established by national legislation must fall within the scope of the concept of 'procurement' for the purposes of Article 1(2) of Directive 2014/24. Second, the contractual action agreements at issue have to fall within the scope of the concept of 'public contract' defined in Article 2(1)(5) of that directive. Third, those agreements have to be equal or to exceed the threshold value laid out in Article 4(d) of that directive. I shall address each of those conditions in turn.

(a) The concept of 'procurement'

65. According to Article 1(2) of Directive 2014/24, that directive applies to 'procurement', which is defined as the acquisition by means of a public contract, inter alia, of services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the services are intended for a public purpose.

66. It follows from that definition that procurement entails, inter alia, a *choice* of one or more economic operators by one or more contracting authorities. Conversely, the mere fact of financing social services or granting licences or authorisations to all economic operators fulfilling the conditions predefined by the contracting authority, without setting limits or quotas, does not constitute procurement within the meaning of Article 1(2) of that directive. (60)

67. The issue of choice was first addressed in *Falk Pharma*. (61) In that case concerning Directive 2004/18, the Court ruled that where the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded, this means that there is no need to control the action of that contracting authority so that it complies with the detailed rules laid down in that directive. (62) The Court therefore emphasised that the *choice* of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive. (63)

68. Following that judgment, the Court held in *Tirkkonen* (64) that, when the contracting authority has not referred to any award criteria for the purpose of comparing and classifying admissible tenders, there cannot be a public contract within the meaning of that directive. (65) It was held that 'a farm advisory scheme … through which a public entity accepts all the economic operators who meet the suitability requirements set out in the invitation to tender and who pass the examination referred to in that invitation to tender, even if no new operator can be admitted during the limited validity period of that scheme, does not constitute a public contract within the meaning of that directive'. (66)

69. That being said, it seems to me that the criterion of choice as defined in the aforementioned judgments in *Falk Pharma* and *Tirkkonen* may lead to a dubious situation where the Member States can exclude certain procedures from the application of Directive 2014/24 by eliminating 'choice' as defined in those judgments. As some critics have pointed out – and I tend to agree with them – the restrictive

approach adopted by the Court in those judgments could, inter alia, discourage Member States from applying Directive 2014/24 and jeopardise the effectiveness of rules of EU public procurement law. (67) For example, a contracting authority need only include in the tender a tailor-made clause that can be met only by a number of specific operators and to provide that all the economic operators that comply with that clause will be chosen, in order to undermine the effectiveness of those rules.

70. I should also add that those judgments blur the line between, on the one hand, the criterion of choice within the meaning of Article 1(2) of Directive 2014/24, and, on the other, the selection and award criteria provided for in the same directive. (68) On the face of it, I find it doubtful that a single element is both a criterion of applicability of Directive 2014/24 and a condition that must be met by tenderers under that directive. (69) I therefore advise the Court not to follow that line of case-law. Instead, the Court should give the term 'procurement' a broader definition encompassing procedures which involve awarding contracts to certain service providers, whilst excluding others for a certain period of time.

71. Should the Court decide, however, to follow that line of case-law, it is unclear, in the present case, whether, in a similar vein to the aforementioned judgments, the national legislation at issue provides for a system whereby the contracting authorities grant an 'authorisation' and users of the relevant services choose between the entities providing such services, or whether the choice ultimately lies with the contracting authorities. (70)

72. Decree 181/2017 appears to provide for a call for tenders that must establish a minimum score and the criteria for selecting entities for the adoption of the contractual action agreements; (71) tenders are to be examined by the evaluation committee. (72) The decision concerning successful social entities, (73) who can then conclude binding agreements for the provision of social services, is published in the *Diari Oficial de la Generalitat Valenciana*. (74) However, it is not clear to me whether there is a limited number of successful entities who are awarded an 'authorisation', in the sense of *Falk Pharma*, or whether there is a limited number of entities *actually* chosen by the contracting authorities. Moreover, the criteria for selection laid down in Article 64(2) and (3) of Law 5/1997 would appear to come within the scope of the concept of choice, and thus constitute 'procurement' within the meaning of Article 1(2) of Directive 2014/24. In any case, it is for the national court to determine whether the actual choice has been shifted to users of the services at issue or whether it is made by the contracting authorities themselves. Nevertheless, for the reasons set out in this Opinion, (75) I consider that the applicability of Directive 2014/24 should not be made contingent on the way in which Member States choose successful entities, but rather on the subject matter of contracts.

73. Nonetheless, I must stress once again that it is for the referring court to establish whether the contractual action agreements at issue are subject to choice per se within the meaning of Article 1(2) of Directive 2014/24.

(b) The characteristics of a public contract

74. The existence of a public contract is a substantive condition for the applicability of Directive 2014/24. Under Article 2(1)(5) of that directive, a 'public contract' is a contract for pecuniary interest concluded in writing between an economic operator and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services.

75. Based on that definition, apart from the obvious requirement that such a contract be in written format, which clearly is not an issue in the present case, (76) the main characteristics of a public contract are as follows: the existence of a contract for pecuniary interest, concluded between an economic operator and one or more contracting authorities, the object of which is the provision of services.

(1) A contract concluded for pecuniary interest

76. At the outset, it should be borne in mind that the definition of a public contract is a matter of EU law and that, for the purposes of determining the scope of Directive 2014/24, the decisive factor is neither how the contract at issue is classified under national legislation, nor the intentions of the national legislature, nor those of the parties. The classification of the agreements at issue is governed

by the rules set out in that directive. (77) It is therefore irrelevant, in my opinion, that Article 62(1) of Law 5/1997 and Article 3(c) of Decree 181/2017 classify the contractual action agreement as 'non-contractual'. (78)

77. As to the meaning of the phrase 'for pecuniary interest', the Court has already held that it designates a contract under which each of the parties undertakes to provide one form of consideration in exchange for another. (79) As the provision of a service may be compensated by different forms of consideration, such as reimbursement of the expenditure incurred in providing the agreed service, (80) the fact remains that the reciprocal nature of a public contract necessarily results in the creation of legally binding obligations on both parties to the contract, the performance of which must be legally enforceable. The synallagmatic nature of the contract is thus an essential element of a public contract. (81)

78. In the present case, first, as regards the reciprocal nature of the public contract, it follows from the definitions set out in Article 3 and Articles 21 to 26 of Decree 181/2017 that the documents that can be adopted by the parties may constitute formal agreements. Moreover, it can be inferred from Article 65(2) of Law 5/1997 that the contractual action agreements give rise to obligations for the entities providing the services in question, which are specifically defined in Titles IV and V of that decree. Article 66(2) of that law and Article 22(1) of Decree 181/2017 establish the rates and the reimbursement mechanisms of those entities. Article 26 of Decree 181/2017 provides for a system of judicial remedies, and Title V thereof includes a list of obligations concerning the execution of the services. Based on those elements, I am inclined to take the view that the contractual action agreements establish a relationship of a synallagmatic nature. (82)

79. Second, as regards the concept of pecuniary interest, Article 22(2) of Decree 181/2017 provides that the contracting authority is to pay, at the most, the variable, fixed and permanent costs of the services at issue, without including any commercial profit for that entity. Although the users of the services at issue do not usually pay for the provision of those services, except in exceptional cases where they may be required to pay a fee previously authorised, (83) the entities in question are reimbursed for the costs of the services. In that regard, the Court has already stated that a contract cannot fall outside the scope of that concept merely because the remuneration remains limited to reimbursement of the expenditure incurred in providing the service. In other words, a mere cost-covering remuneration fulfils the 'pecuniary interest' criterion for the purposes of the public procurement directives. (84) It follows that the role of the national court is simply to ensure that a value is provided, but not to consider the adequacy of the consideration. The lack of profit for the entities providing the services is thus irrelevant for the purposes of establishing the existence of pecuniary interest.

80. It follows that, in the present case, there is a quid pro quo under the contractual action agreements at issue since, on the one hand, the entities provide social services to individuals under the conditions defined by the public authority and, on the other hand, those entities receive remuneration in return in the form of a reimbursement of costs by the public authority. I conclude that the criterion of the existence of a contract for pecuniary interest is fulfilled in the present case.

(2) A contract concluded between an economic operator and one or more contracting authorities

81. It is important to emphasise that the concepts of 'economic operator' and 'contracting authorities' are both very broad under Directive 2014/24 and in the case-law relating to public procurement rules. In my opinion, the latter concept is clearly not an issue in the present case, since the contractual action agreements are concluded by the authorities of the Valencia Region. (85)

82. As regards the concept of 'economic operator', under Article 2(1)(10) of Directive 2014/24, it encompasses any entity, regardless of its nature, offering, inter alia, the provision of services on the market. That definition reflects the case-law whereby, for the purposes of EU public procurement rules, it is irrelevant what the entity is, the emphasis being instead on what it does. (86)

83. In the present case, the national legislation at issue applies to 'social initiative entities', which are defined in Article 3(e) of Decree 181/2017 as foundations, associations, voluntary organisations and other non-profit entities carrying out social service activities. This definition also covers cooperative

societies classified as non-profit-making organisations in accordance with the specific legislation thereon. (87) According to settled case-law, the fact that the contracting partner of the contracting authority is a non-profit association, is not an issue. (88)

84. Accordingly, I conclude that the condition relating to a contract between an economic operator and one or more contracting authorities is met.

(3) A contract for the provision of services

85. The condition relating to the 'contract for the provision of services' relates to the *ratione materiae* of the contract and requires the identification of its purpose.

86. Article 6(2) of Decree 181/2017 defines the services that can be provided under the terms of the contractual action agreements at issue, which are listed in annex to that decree. As mentioned in point 57 above, the referring court must first verify whether those services involve an 'economic activity' and fall accordingly within the scope of the fundamental freedoms and that of Directive 2014/24. (89)

87. The defendant and the Spanish Government have placed considerable emphasis on the fact that Article 1(5) of Directive 2014/24 expressly states that that directive does not affect the way in which the Member States organise their social security systems, and that recital 6 of the same directive states that 'non-economic services of general interest should not fall within the scope' of that directive. However, I take the view that, in the present case, the freedom of the Member States to decide how public funds are to be allocated is not directly called into question. When a public authority decides to conduct a procurement procedure within in the meaning of Article 1(2) of Directive 2014/24, and conclude a public contract within the meaning of Article 2(1)(5) thereof, the latter falls within the scope of that directive, and, the public procurement rules laid down in that directive must therefore be applied.

88. If that is the case, Directive 2014/24 contains specific provisions relating to social and other specific services, which are listed in Annex XIV to that directive. That list includes several CPV codes, which come under the simplified regime laid down in Articles 74 to 76 of Directive 2014/24. That annex specifies in a footnote that compulsory social security services, under CPV 75300000-9, 'are not covered by that directive where they are organised as non-economic services of general interest'. (90)

89. From the information before the Court, it is not clear whether the services at issue are on that list or amongst the compulsory social services that the Member States can exclude from the scope of Directive 2014/24. The written questions put to the parties did not resolve this conundrum.

90. I therefore take the view that the referring court has to carry out the necessary checks and compare the list annexed to Decree 181/2017 and the list contained in Annex XIV to Directive 2014/24. (91) If the services listed in the Annex to Decree 181/2017 are covered by the CPV codes contained in Annex XIV to that directive, with the exception of the abovementioned compulsory social security services, those listed services fall under the scope of the 'simplified regime' laid down in Articles 74 to 76 of Directive 2014/24. In the analysis that follows, I shall assume that some of the services at issue are covered by that regime. Since the procedures, parties and the subject matter have been defined, I shall turn to an examination of whether the contractual action agreements at issue exceed the amount of the thresholds set out in Directive 2014/24.

(c) The threshold criteria

91. The threshold for service contracts relating to social services and other specific services listed in Annex XIV to Directive 2014/24 that are subject to the 'simplified regime' laid down in Articles 74 to 76 of the same directive is set out in Article 4(d) of that directive. It states that Directive 2014/24 applies to procurements with a value estimated to be equal to or greater than EUR 750,000. (92)

92. In that regard, it is important to emphasise that, under recital 114 of Directive 2014/24, certain categories of services, inter alia, certain social services, have a limited cross-border dimension and

therefore come under a specific regime with a higher threshold than that which applies to other services. (93)

93. Accordingly, the rules laid down in Directive 2014/24 do not apply to procurements with a value below that threshold set by Article 4(d) of that directive. (94) Such procurements must nonetheless comply with the rules on free movement as well as the principles of equal treatment, mutual recognition, non-discrimination and proportionality. (95)

94. In the present case, the national legislation at issue does not appear to provide any information on the economic value of the services which are the subject of the contractual action agreements. Given that the threshold in Article 4(d) of Directive 2014/24 is considerable, it cannot be ruled out that, in some cases, the value exceeds that threshold; whereas, in other cases, it may remain lower than that threshold. Therefore, it is for the referring court to verify whether that condition of Directive 2014/24 is met by the contractual action agreements at issue.

95. If all the aforementioned conditions of Article 1(2), Article 2(1)(5) and Article 4(d) of Directive 2014/24 are satisfied, then the contractual action agreements at issue fall within the scope of that directive. In particular, in response to the questions of the referring court, I take the view that the mere fact that those agreements are based on the principle of solidarity does not mean that the latter are to be excluded from the concept of public contracts within the meaning of Article 2(1)(5) of Directive 2014/24. Moreover, the facts that the services at issue are reimbursed for by public authorities, that they do not entail profit for the entities providing them or that they are provided free of charge to users, are immaterial for the purposes of determining whether there is such a public contract. However, as regards the conditions set out in Article 1(2) and Article 4(d) concerning the procurement and the threshold, respectively, it is for the referring court to ascertain whether the procedure and the value of the contracts satisfy the necessary conditions.

96. That being said, I turn now to the crux of the question: can profit-making entities be excluded from concluding public contracts under the specific provisions of Directive 2014/24?

3. Reserved contracts and the simplified regime under Directive 2014/24

97. Assuming that, at the very least, some of the contractual action agreements at issue in the main proceedings fall within the scope of Directive 2014/24, the referring court seeks to determine whether the ‘simplified regime’ to which those agreements are subject allows the Member States to exclude profit-making entities from any possibility of concluding such agreements.

98. First, the specific provisions of Directive 2014/24 do not identify whether public contracts in the field of social services are to be reserved for non-profit-making entities. However, Article 20 and Article 77(1) of Directive 2014/24 expressly allow the Member States to determine the type of organisations that may participate in the procedures for the award of public contracts in relation to certain social services. (96) Public contracts relating to social services included in Article 74 that do not fall within the scope of Article 20 and Article 77(1) of Directive 2014/24 come under the simplified regime of Articles 74 to 76 of that directive which, in my view, must be examined in the second place.

(a) Reserved contracts

99. Since Article 20 and Article 77(1) of Directive 2014/24 constitute a derogation from the general rules set out in that directive, I believe that the scope of those provisions is to be interpreted narrowly. This means, in particular, that those provisions contain an exhaustive list of cases that may be the subject of reserved contracts.

(1) Reserved contracts under Article 20 of Directive 2014/24

100. Article 20 of Directive 2014/24 deals with two alternative situations: (i) the possibility for contracting authorities of reserving contracts for either sheltered workshops or economic operators whose aim is the social and occupational integration of disabled or disadvantaged persons, or (ii) the possibility of providing for those contracts to be performed under sheltered programmes. (97)

101. While it is for the referring court to establish the applicability of that provision to the services at issue, I take the view that, in the present case, the application of that provision cannot be ruled out. Indeed, Section IV of the Annex to Decree 181/2017 includes persons with 'functional diversity' and, in particular, point 2 of that annex deals with their social integration. Therefore, in so far as the contractual action agreements at issue concern services provided to recipients who are those persons, Article 20 of Directive 2014/24 may be applicable.

102. That article allows – but does not compel – contracting authorities to reserve contracts to sheltered workshops and economic operators pursuing social initiatives or to provide for those contracts to be performed under sheltered programmes. The question whether Member States could, under that provision, impose additional limitations narrowing the circle of permitted participants and, thus, reserving procurements, was recently examined by the Court in *Conacee*. (98)

103. In that case, the Court pointed out that it follows from the wording of Article 20(1) of Directive 2014/24 and from the objectives pursued by the latter that it does not contain an exhaustive list of conditions under which a contracting authority may limit the type of economic operator with which it may enter into a reserved contract. Instead, that directive leaves it to Member States to adopt additional criteria defining those conditions, if those additional criteria contribute to ensuring the social and employment policy objectives pursued by Article 20 of Directive 2014/24. Following the Advocate General Tanchev's view that the requirements under that provision are regarded as minimum requirements, (99) the Court ruled that Member States are free to narrow the circle of permitted participants when having recourse to the reserved contracts under Article 20 of Directive 2014/24. (100)

104. It follows from the foregoing that Member States can add criteria, such as the criterion of excluding profit-making entities laid out in the national legislation, in so far as such exclusion 'contributes to ensuring the social and employment policy objectives pursued by that provision'. (101) However, it should be noted that, in the present case, the Court has not been provided with any information regarding the reasons behind such exclusion by the national legislature. One could argue that non-profit-making entities have a more social dimension than profit-making entities and are, therefore, better suited to pursuing such objectives. Conversely, it could be submitted that profit-making entities can provide high-quality services with low costs and, therefore, be able to pursue those objectives. That said, it is entirely for the referring court to assess whether the exclusion at issue contributes to 'ensuring … social and employment policy objectives'.

105. Here, I must stress that there are two limits to the option laid out in Article 20(1) of Directive 2014/24.

106. First, Article 20(2) of that directive requires the Member States, when availing themselves of the option provided by Article 20, to make explicit reference to that article in the call for tenders, in the absence of which such contracts cannot be reserved. In the present case, the referring court must ascertain whether that requirement has been met.

107. Secondly, when the Member States make use of the option provided for in Article 20 of Directive 2014/24, they must respect, inter alia, freedom of establishment, as well as the principles deriving from that freedom, such as the principles of equal treatment and proportionality. (102) As to the social services at issue in the main proceedings whose users are persons with functional diversity, it is for the referring court to determine whether the conditions set out in the national legislation are necessary and appropriate for ensuring the integration of those persons, as required by Article 20(1) of Directive 2014/24. Moreover, it is worth noting that the Court has already held that when the Member States limit reserved contracts to voluntary associations, the principle of equality is not, in essence, infringed. (103)

(2) Reserved contracts under Article 77 of Directive 2014/24

108. Article 77(1) of Directive 2014/24 applies to certain specific social services. While it seems possible that some of the services referred to in the Annex to Decree 181/2017 fall within the scope of Article 77, it is clear to me that neither the entities nor the contractual action agreements in question satisfy the conditions set out in Article 77(2) and (3) of Directive 2014/24.

109. The wording and general scheme of Article 77 of that directive do not provide much guidance on how to interpret it. (104) However, recital 118 of Directive 2014/24 explains the purpose of the procurement procedures that can be reserved for specific entities under Article 77 of that directive. That recital states that, in order to ensure the continuity of public services, that directive should allow that participation in procurement procedures for certain services in the field of social services could be reserved for certain organisations – such as organisations based on employee ownership or active employee participation in their governance, and cooperatives. Member States can therefore narrow the circle of participants to such organisations that participate in delivering these services to end users. It follows from those explanations that procurement procedures under Article 77 of Directive 2014/24 are merely a subset of the procurements which come under the simplified regime, and the conditions set out in that provision are therefore to be interpreted restrictively. (105)

110. First, Article 77(2) of that directive contains a list of four cumulative conditions. The first three concern the governance of the entities providing the services, whereas the fourth deals with the limitation set on successive repeat contracts. In the present case, as regards the national legislation at issue, it is the third and the fourth of those conditions that appear challenging. On the one hand, the national legislation at issue does not appear to be aimed at entities the economic governance of which entails employee ownership or participatory principles. (106) Thus, it is highly unlikely that the entities that are parties to the contractual action agreements at issue satisfy the condition set out in Article 77(2)(c) of Directive 2014/24. On the other hand, when examining the national legislation at issue, I did not come across a 'no-repeat' clause such as the one included in Article 77(2)(d) of Directive 2014/24. On the contrary, the final sentence of Article 23 of Decree 181/2017 seems to allow a renewal of a contract, even after the 10-year extension provided for in that article. Therefore, the national legislation at issue does not seem to fulfil the criteria of Article 77(2) of Directive 2014/24.

111. Neither do the contractual action agreements at issue satisfy the condition set out in Article 77(3) of Directive 2014/24, according to which the maximum duration of the contract must not exceed three years. Under Article 23 of Decree 181/2017, those agreements may be concluded for a maximum period of 4 years and, where appropriate, be extended up to 10 years (with the possibility of concluding another agreement immediately afterwards).

112. In the light of the foregoing, I conclude that Article 77 of Directive 2014/24 is not applicable to the present case.

113. I shall proceed on the basis that, as regards the contractual action agreements that fall within the scope of Directive 2014/24, except for the ones that come under Article 20 thereof, the remainder of those agreements must fulfil the criteria of the simplified regime laid down in Articles 75 and 76 of that directive.

(b) The rules under Articles 75 and 76 of Directive 2014/24

114. The referring court is asking, in essence, whether the public authorities can conclude contractual action agreements solely with private non-profit entities, under which those authorities entrust those entities with certain social services referred to in Article 74 of Directive 2014/24. To answer that question, I must turn to the rules laid down in Articles 75 and 76 of that directive, which deal, inter alia, with the obligation to publish notices and the principle of equality, respectively.

115. First, Article 75 of Directive 2014/24, concerning the publication of notices, requires contracting authorities to announce their intention to award a contract to the Publications Office of the European Union (107) by means of a contract notice or a prior information notice. Article 74 of Directive 2014/24 introduces a special procurement regime dedicated to public contracts for social and other specific services when they are equal to or greater than the threshold mentioned in Article 4(d) thereof. For its part, Article 75 of that directive emphasises the fact that public authorities still have to comply with rules on publication of the tender notices concerning those public procurements. In doing so, that requirement is an expression of the principle of transparency, as laid down in Section 2 and Article 76(1) of that directive.

116. In the present case, according to Article 13(2) of Decree 181/2017, the relevant contract notices are published by the *Diari Oficial de la Generalitat Valenciana* (Official Journal of the Valencia

Regional Government). However, as regards the contract notices, that form of publicity, limited to the Community of Valencia, does not suffice, to my mind, to meet the requirements of Article 75(1) of Directive 2014/24, which specifically refer to the procedure set out in Article 51 when the contracting authorities choose to issue a contract notice. Consequently, the national legislation at issue does not appear to comply with the transparency rules laid down in Article 75(1) of Directive 2014/24.

117. Second, according to Article 76(1) of that directive, even under the simplified regime, Member States must observe, inter alia, the principle of equality of economic operators. It should be recalled that Directive 2014/24 seeks to ensure freedom of establishment, as well as the principles stemming from the fundamental freedoms, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. (108)

118. Accordingly, the referring court will have to examine whether the national legislation at issue in the main proceedings, allowing the de facto exclusion of profit-making entities from the provision of certain social services pursuant to contractual action agreements under Decree 181/2017, (109) is consistent with those principles.

119. It should be recalled that, according to settled case-law, the principle of equality requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way, unless such treatment is objectively justified. (110) The comparability of situations must be assessed in the light of the subject matter and purpose of the EU measure, which makes the distinction in question. (111)

120. Thus, in the present case, the referring court will have to determine whether the ‘social initiative entities’, as defined in Article 3(e) of Decree 181/2017, are in the same situation as profit-making entities as regards the objective pursued by the simplified regime under Articles 74 to 76 of Directive 2014/24. (112)

121. As regards those objectives, recital 114 of that directive explains that the simplified regime concerning, in particular, certain social services is to be established in the light of the cultural context and sensitivity of those services. Therefore, and taking into account the wording of Article 1(5) of Directive 2014/24, the Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. That recital adds the objectives of simplification and of alleviating the administrative burden for contracting authorities and economic operators.

122. In my opinion, that recital is to be read in conjunction with Article 76(2) of Directive 2014/24, which refers to the quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, as well as the specific needs of different categories of users. It seems, therefore, that it is the specific nature of the social services in question that justifies the existence of the simplified regime. Accordingly, it seems to me that the relevant criterion should be the nature of the social services in question provided by the two categories of entity. (113)

123. In the present case, the defendant and the Spanish Government have not explained why profit-making entities are automatically excluded from the scope of Decree 181/2017. While it could be argued that the ‘social initiative entities’, as defined in Article 3(e) of Decree 181/2017, and profit-making entities have different legal natures and function differently, the two categories of entity may also be called on to perform similar social services, and provide services with the same level of quality at similar costs. It follows that, subject to the findings of the referring court, those two categories of entity may be in a comparable situation as regards the objective of the regime under Articles 74 to 76 of Directive 2014/24.

124. Moreover, according to settled case-law, as regards the principle of proportionality, which is a general principle of EU law, the rules laid down by the Member States in implementing the provisions of Directive 2014/24 must not go beyond what is necessary to achieve the objectives of that directive. (114) In that connection, it is clear to me that the case-law of the Court cannot be interpreted as allowing certain entities to be excluded from the application of the simplified regime owing solely to the fact that they are profit-making. (115)

125. In particular, I do not see how the automatic exclusion of profit-making entities from the scope of national legislation ensures that the services at issue are provided in an appropriate way, while simplifying and alleviating the administrative burden as mentioned in recital 114 of Directive 2014/24. Moreover, such automatic exclusion does not appear to contribute to the quality, continuity, affordability, availability and comprehensiveness of those services, as required by Article 76(2) of Directive 2014/24. In implementing the simplified regime, it would appear more appropriate to focus on the ability to provide cost-effective, quality social services, rather than on the nature of the entity providing those services. (116)

126. Consequently, it is inconceivable, in my view, that such an exclusion is either justified or proportionate; it is therefore contrary to the principle of equal treatment.

4. Freedom of establishment

127. If the contractual action agreements at issue do not fall within the scope of Directive 2014/24, (117) which is for the referring court to ascertain, that does not mean, however, that those agreements are necessarily excluded from the scope of EU law. It follows from the settled case-law of the Court that the contractual action agreements at issue may nonetheless be subject to the fundamental freedoms and general principles of EU law, in particular the principles of equal treatment and non-discrimination on grounds of nationality and the corollary obligation of transparency, provided that those agreements have a certain cross-border dimension. (118) Moreover, subject to that proviso, those fundamental freedoms and principles apply if there is no choice between the interested operators. Indeed, the Court has already held that, unlike Directive 2014/24, freedom of establishment and the principle of equal treatment apply to different licencing systems where there is no choice. (119)

128. In the present case, as mentioned above, since the Court has no information before it on the value of the contractual action agreements in question, I assume that, in some cases, the value of those agreements is above the threshold set in Article 4(d) of Directive 2014/24, while, in other cases, it may remain lower than that threshold, (120) which is for the referring court to verify. (121) In the latter cases, I would point out that the Court has already ruled that because of the ‘modest economic interest at stake’, it could reasonably be maintained that an undertaking located in a Member State other than the one where the contract is awarded would have no interest in the contract at issue, with the effect that the application of rules enshrined in primary EU law is not justified. (122)

129. Therefore, provided that the social services that are the subject of the contractual action agreements at issue consist in an economic activity and have a cross-border dimension, the referring court should examine whether or not the absence of sufficient publication of the invitation to tender and the de facto exclusion of profit-making entities constitutes an obstacle to freedom of establishment under Article 49 TFEU and an infringement of the corollary principles of equal treatment and the obligation of transparency. (123)

130. First, as regards freedom of establishment and the principle of equal treatment, the Court has already held that a requirement that persons wishing to carry out an economic activity adopt a specific legal form is a restriction on their freedom of establishment within the meaning of Article 49 TFEU. Indeed, such a requirement prevents economic operators located in the home Member State and of a different legal form from setting up a secondary establishment in the host Member State. (124)

131. However, since that restriction does not give rise to direct discrimination on grounds of nationality, it may also pursue any objective recognised as legitimate under EU law. In that regard, I believe that the reasoning set out in points 122 to 125 of this Opinion regarding justifications and the proportionality of the national legislation applies *mutatis mutandis*. In the absence of any justification put forward by the Spanish authorities concerning the exclusion of profit-making entities from the contractual action agreements at issue, the national legislation appears to be contrary to freedom of establishment and the principle of equal treatment. In any event, the automatic exclusion of profit-making entities from the scope of national legislation does not appear to be appropriate, since it is not focused on the nature and quality of the services provided, but rather on the legal form of the entity. That said, it is for the national court to determine whether the national legislation pursues a legitimate objective recognised by EU law and, if so, to assess whether that legislation complies with the principle of proportionality.

132. Second, as to the obligation of transparency under Article 49 TFEU, it is worth pointing out that, unlike the specific requirements stemming from Directive 2014/24, that obligation does not require an invitation to tender to be published in the *Official Journal of the European Union*. Instead, that obligation is limited to requiring a degree of advertising that is sufficient to ensure, first, the opening-up to competition and, second, the review of the impartiality of the procurement procedure. (125)

133. In the present case, as the *Diari Oficial de la Generalitat Valenciana* is the Official Journal of the Valencia Regional Government and is thus the ordinary means of publication in the field of public procurement, it seems to me that the national legislation at issue fulfils the aforementioned criteria concerning publicity.

134. If the conditions of application of Directive 2014/24 are satisfied, I therefore take the view that Articles 74 to 76 of that directive must be interpreted as not precluding national legislation, which allows a public authority to conclude, without complying with the procedural requirements imposed by EU law, a public contract under which that authority entrusts only non-profit entities with the provision of certain social services in return for reimbursement of the costs incurred by those entities, provided that that legislative measure complies with the principles of equal treatment and proportionality, which is for the referring court to ascertain. Article 75 of Directive 2014/24 has to be interpreted as precluding national legislation which provides that contract notices are to be published only in the regional official journal.

135. As regards the services for which the estimated value is below the threshold laid down in Article 4(d) of Directive 2014/24 and procedures that do not entail a choice within the meaning of Article 1(2) of that directive, the freedom of establishment enshrined in Article 49 TFEU must be interpreted as not precluding such national legislation, provided that that legislative measure pursues a legitimate objective recognised by EU law, and complies with the principles of equal treatment and proportionality, which is for the national court to ascertain.

C. The third question

136. If the first two questions are answered in the negative, by its third question, the referring court is asking, in essence, whether Articles 49 and 56 TFEU, Article 76 of Directive 2014/24 and Article 15(2) of the Services Directive must be interpreted as precluding national legislation, which provides for a selection criterion for the conclusion of the contractual action agreements at issue, according to which the contracting authorities may give weight to the fact that the potential tenderers for the provision of the social services in question are established in the place where such services are to be provided.

137. In order to answer that question, I shall analyse the compatibility of the selection criterion at issue with Directive 2014/24, the Services Directive and then with the fundamental freedoms.

1. The compatibility of the selection criterion at issue with Directive 2014/24

138. As regards the compatibility of the selection criterion at issue with Directive 2014/24, the issue of a geographical criterion has already been examined in *Grupo Hospitalario Quirón*, (126) which concerned tenders in the field of medical services. (127) In particular, the Court was called upon to assess the compatibility with Directive 2004/18 of a tender requirement according to which a tenderer was to be located in the municipality where the medical services in question were to be provided. The Court stated that such a requirement constituted a ‘territorial constraint on performance’. (128) That requirement did not ensure equal and non-discriminatory access to the contracts at issue by all tenderers, since it rendered those contracts accessible only to those tenderers who were able to provide the services in question in an establishment situated within the municipality designated by the contracting authorities. (129)

139. In the present case, it is apparent from Article 15(1)(a) of Decree 181/2017 that, in order to select the social initiative entities which will be responsible for providing the social services at issue, the contracting authorities may, inter alia, give weight to the fact that those entities are located in the area in which a given service is to be provided. (130) Thus, I believe that the geographical criterion at issue in the present case is similar to that which was at issue in *Grupo Hospitalario Quirón*. That criterion constitutes a ‘territorial constraint on performance’, (131) since it has the effect of putting at the

disadvantage those tenderers who cannot provide the services in question in an establishment situated within a given municipality, despite the fact that they may satisfy the other conditions laid down in the contract documents and technical specifications of the contracts under consideration.

140. I therefore take the view that the selection criterion at issue in the main proceedings gives rise to a difference in treatment between the entities that meet that requirement and those that do not. Unless those two categories of potential tenderers are not in an objectively comparable situation or that difference in treatment is objectively justified, that requirement is contrary to the principle of equal treatment to which the award of public service contracts is subject under Article 76 of Directive 2014/24.

141. As to the question whether those two groups of potential tenderers are in an objectively comparable situation, it seems to me that that is the case, provided that their ability to provide the social services at issue is the same in terms of quality and cost. Therefore, subject to that proviso which is for the referring court to verify, I take the view that such a requirement treats objectively comparable situations differently.

142. As regards justification, there is nothing in either the national legislation at issue or the file provided to the Court that would suggest any justification for the selection criterion at issue. However, it is ultimately for the referring court to ascertain whether that is actually the case.

2. Compatibility of the selection criterion with the Services Directive

143. The Court is being asked whether the selection criterion for the conclusion of the contractual action agreements at issue is compatible with the Services Directive.

144. At the outset, it must be determined whether the social services at issue fall within the scope of that directive.

145. In that regard, Article 2(2)(j) of the Services Directive, read in conjunction with recital 27 thereof, expressly excludes from the scope of that directive ‘social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State’.

146. Recital 27 explains that the objective of such exclusion is to ensure ‘support for those who are permanently or temporarily in a particular state of need because of their insufficient family income or total or partial lack of independence and for those who risk being marginalised’. That recital adds that those ‘services are essential in order to guarantee the fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity and should not be affected by [the Services Directive]’.

147. I must point out that the Court has given the concept of ‘social services’ in Article 2(2)(j) of the Services Directive a two-fold definition. In its judgment in *Femarbel*, the Court held that only services which meet two cumulative conditions fall within the scope of the exclusion laid down in that provision. The first relates to the nature of the activities, whilst the second one concerns the status of the service provider. (132)

148. In order to satisfy the first condition, the activities at issue must be ‘essential in order to guarantee the fundamental right to human dignity and integrity’ and ‘a manifestation of the principles of social cohesion and solidarity’. (133) In that case, the Court ruled that the national court had to ascertain whether the activities at issue are of a genuinely social nature, in that they are intended to provide the persons concerned with ‘assistance and care appropriate to their loss of independence’ accompanied by a specific programme of events, or the necessary care ‘which cannot be provided by their close relatives on a continuous basis’.

149. In the present case, as mentioned earlier in this Opinion, the Annex to Decree 181/2017 lists a broad range of social services, which may vary according to their nature and the groups of persons using those services. (134) However, all those services appear to have the common objective of

assisting persons in need and providing them with care. Therefore, I take the view that those services appear to satisfy the first condition put forward by the Court in *Femarbel*. (135)

150. As regards the second condition, the Court held in *Femarbel* that social services can be carried out by the State itself, a charity recognised as such by the State, or a private service provider mandated by the State. (136) In view of such a broad definition *ratione personae* given by the Court, the entities providing the services under the contractual action agreements at issue, which are non-profit associations, may fall within the scope of Article 2(2)(j) of the Services Directive, which is for the national court to ascertain.

151. Consequently, I take the view that the Services Directive is not applicable to the social services provided for in Decree 181/2017, since those services are, pursuant to Article 2(2)(j) of that directive, expressly excluded from the scope of that directive.

3. Compatibility of the selection criterion with the fundamental freedoms

152. As regards the compatibility of the selection criterion at issue with the fundamental freedoms, as I have already explained in this Opinion, on the one hand, the contractual action agreements at issue appear to fall within the scope of freedom of establishment enshrined in Article 49 TFEU rather than that of freedom to provide services laid down in Article 56 TFEU. (137) Therefore, notwithstanding the fact that the third question referred by the national court relates to both of those freedoms, I consider that the answer given should be limited to the former. On the other hand, it is worth recalling that it is only if those contractual action agreements have a cross-border dimension that Article 49 TFEU may apply. (138)

153. As regards freedom of establishment, a selection criterion, such as that laid down in Article 15(1)(a) of Decree 181/2017, may hinder or render less attractive the exercise of freedom of establishment. (139) In that regard, I should point out that the Court has ruled that national legislation that precludes entities from being able to pursue an independent economic activity on the premises of their choice constitutes a restriction. (140) In the present case, the fact of establishing themselves in the Community of Valencia may entail financial consequences for and administrative burdens on the entities that have exercised that fundamental freedom. (141) That would be the case, for example, for an entity, established in a Member State other than Spain, which has set up a secondary establishment in that Member State but outside the Community of Valencia. Consequently, I take the view that the requirement at issue constitutes a restriction on freedom of establishment within the meaning of Article 49 TFEU.

154. However, it may still be justified if it pursues objectives recognised as legitimate by EU law and complies with the principle of proportionality. (142)

155. In the present case, I take the view that my findings set out in point 142 of the present Opinion concerning the justifications for the infringement of the principle of equal treatment under Article 76 of Directive 2014/24 apply *mutatis mutandis*. However, it is for the national court to carry out an assessment as to whether the criterion at issue pursues a legitimate objective recognised by EU law, is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.

156. Lastly, for the sake of completeness and contrary to the submissions of the defendant and the Spanish Government, I should stress that the wording of the second indent of Article 1 of Protocol No 26 to the TFEU has no bearing on the question whether the selection criterion laid down in Article 15(1)(a) of Decree 181/2017 is compatible with freedom of establishment. That is because the values which that protocol seeks to protect are not reflected in the selection criterion at issue. Such a criterion, which is purely geographical, cannot be explained by the need to ensure ‘diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from a different geographical, social or cultural situation’. I consider, therefore, that the second indent of Article 1 of Protocol No 26 to the TFEU cannot be relied upon in order to justify geographical restrictions to the fundamental freedoms.

157. In conclusion, if the existence of any cross-border dimension were to be established in relation to the contractual action agreements at issue, Article 76 of Directive 2014/24 and Article 49 TFEU

preclude a selection criterion for the conclusion of the contractual action agreements at issue whereby the contracting authorities may give weight to the fact that the potential tenderers for the provision of the social services in question are established in the place where such services are to be provided, unless that criterion pursues a legitimate objective recognised by EU law, is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it, which is for the referring court to ascertain.

IV. Conclusion

158. I propose that the Court reply as follows to the questions referred by the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Community of Valencia, Spain) for a preliminary ruling:

Articles 74 to 76 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, and Article 49 TFEU must be interpreted as not precluding national legislation, which allows a public authority to conclude, without complying with the procedural requirements imposed by EU law, a public contract under which that authority entrusts only non-profit entities with the provision of certain social services in return for reimbursement of the costs incurred by those entities, provided that such legislation complies with the principles of equal treatment and proportionality, which is for the referring court to ascertain.

Article 75(1) of Directive 2014/24 must be interpreted as precluding national legislation that requires that contract notices be published only in the regional official journal.

Article 76 of Directive 2014/24 and Article 49 TFEU preclude a national legislation which provides for a selection criterion for the conclusion of contractual action agreements whereby the contracting authorities may give weight to the fact that the potential tenderers for the provision of the social services in question are established in the place where such services are to be provided, unless that criterion pursues a legitimate objective recognised by EU law, is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it, which is for the referring court to ascertain.

---

1 Original language: English.

---

2 Decreto 181/2017, de 17 de noviembre, del Consell, por el que se desarrolla la acción concertada para la prestación de servicios sociales en el ámbito de la Comunitat Valenciana por entidades de iniciativa social (Decree 181/2017 of 17 November 2017 of the Council of the Community of Valencia making regulations governing public-private agreements for the provision of social services by social enterprises within the Community of Valencia (DOGV No 8197 of 23 December 2017, p. 48245) (‘Decree 181/2017’).

---

3 The national law refers to the term ‘acuerdos de acción concertada’. See, to that effect, Articles 44*bis*, 53 and 56 and Title VI of Ley 5/1997, de 25 de junio, por la que se regula el Sistema de Servicios Sociales en el ámbito de la Comunidad Valenciana (Law 5/1997 of 25 June 1997 governing the Social Services System within the Community of Valencia) (BOE No 192 of 12 August 1997, p. 24405), as amended by Ley 13/2016, de 29 de diciembre, de medidas fiscales, de gestión administrativa y financiera, y de organización de la Generalitat (Law 13/2016 of 29 December 2016 on measures in respect of tax, administrative and financial management and the organisation of the Government of the Community of Valencia) (BOE No 34 of 9 February 2017, p. 8694), (‘Law 5/1997’).

---

4 Lesbian, gay, bisexual, transgender and intersex individuals.

---

5 That list was not in the preliminary reference referred to the Court. In its written observations, the Commission provides the Court with the link for the publication of Decree 181/2017 (see

https://www.dogv.gva.es/datos/2017/12/23/pdf/2017_11941.pdf). Article 6(2) of the decree refers to the annex thereof, which includes the list of services at issue.

---

6 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

7 Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

---

8 Opinion in Decker (C-120/95 and C-158/96, EU:C:1997:399, point 17).

---

9 Judgments of 28 April 1998, Kohll (C-158/96, EU:C:1998:171, paragraph 21); of 12 July 2001, Smits and Peerbooms (C-157/99, EU:C:2001:404, paragraph 54); of 13 May 2003, Müller-Fauré and van Riet (C-385/99, EU:C:2003:270, paragraph 39); and of 23 October 2003, Inizan (C-56/01, EU:C:2003:578, paragraph 17).

---

10 Judgment of 8 February 2018, *Lloyd's of London* (C-144/17, EU:C:2018:78, paragraph 33).

---

11 The CPV establishes a single classification system for public procurement aimed at standardising the references used by contracting authorities and entities to describe the subject of procurement contracts. See https://simap.ted.europa.eu/cpv.

---

12 Ley 3/2019, de 18 de febrero, de servicios sociales inclusivos de la Comunitat Valenciana (Law 3/2019 of 18 February 2019 on inclusive social services in the Community of Valencia) (BOE No 61 of 12 March 2019, p. 23249).

---

13 In particular, Article 44*bis*(1)(c), Article 53, Article 56(2) and Title VI of Law 5/1997.

---

14 The reference to that term appears to derive from the judgments of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440), and of 28 January 2016, CASTA and Others (C-50/14, EU:C:2016:56), which both dealt with voluntary associations in the context of public procurement contracts.

---

15 Ibid.

---

16 See, for example, judgments of 19 June 2014, Centro Hospitalar de Setúbal and SUCH (C-574/12, EU:C:2014:2004), and of 28 January 2016, CASTA and Others (C-50/14, EU:C:2016:56).

---

17 In this respect, it refers to recitals 6, 7 and 114 of Directive 2014/24, and also to Article 77 thereof.

---

18 Judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817), and of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385).

---

19 Article 4*bis*(1)(c), Article 53, Article 56(2) and Title VI of Law 5/1997.

---

20 See, for example, judgment of 10 March 2016, *Safe Interenvíos* (C-235/14, EU:C:2016:154, paragraph 115), and order of 12 May 2016, *Security Service and Others* (C-692/15 to C-694/15, EU:C:2016:344, paragraph 20).

---

21 Judgment of 8 May 2013 (C197/11 and C203/11, EU:C:2013:288).

---

22 Judgment of 15 November 2016 (C-268/15, EU:C:2016:874).

---

23 See, to that effect, judgment of 8 May 2013, *Libert and Others* (C197/11 and C203/11, EU:C:2013:288, paragraph 35). See, more recently, judgment of 11 February 2021, Katoen Natie Bulk Terminals and General Services Antwerp, (C-407/19 and C-471/19, EU:C:2021:107, paragraph 53).

---

24 See, in particular, judgment of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraph 25 et seq.). On the distinction between the freedom to provide services and the freedom of establishment, see also Opinion of Advocate General Cruz Villalón in *Yellow Cab Verkehrsbetrieb* (C-338/09, EU:C:2010:568, points 15 to 18).

---

25 Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

---

26 Directive 2014/23 defines ‘services concession’ in its Article 5(1)(b), in essence, as a contract for pecuniary interest by means of which a contracting authority or entity entrusts the provision and the management of services to an economic operator. According to the case-law of the Court, the difference between a public service contract and a service concession lies, namely, in the risk taken in operating the services in question (see, to that effect, judgment of 10 March 2011, *Privater Rettungsdienst und Krankentransport Stadler*, C-274/09, EU:C:2011:130, paragraphs 24, 26, 37 and the case-law cited).

---

27 See Article 65(3) and (4) of Law 5/1997 which provides that ‘in addition to the charges provided for, no sum may be charged to users for the provision of services which are subject of agreement’ and that ‘the collection from users of any form of payment for the provision of additional services and the amount thereof shall be authorised in advance’.

---

28 See Article 66(2) and Article 65(3) of Law 5/1997. In that regard, ASADE, in its answers to the written questions of the Court, submits that the legislation at issue does provide that *public authorities cover all losses regarding the costs of the services at issue*. The defendant submits that Article 11(1) of Decree 181/2017 provides for the beneficiaries of the services covered by the contractual action agreements to receive those services for free.

---

29 The legal basis for adoption of Directive 2014/24 are, in particular, Article 53(1) and Article 62 TFEU, which are contained in Title IV on ‘Free movement of persons, services and capital’, in Chapter 2 on ‘Rights of Establishment’ (Article 53) and Chapter 3 on ‘Services’ (Article 62).

---

30 See Opinion of Advocate General Stix-Hackl in Sintesi (C-247/02, EU:C:2004:399, point 27).

---

31 See, by analogy, judgment of 29 April 2010, Commission v Germany, C-160/08 (EU:C:2010:230, paragraphs 73 and 74).

---

32 See, inter alia, judgments of 21 July 2005, *Coname* (C-231/03, EU:C:2005:487); of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440); and of 28 January 2016, CASTA and Others (C-50/14, EU:C:2016:56).

---

33 See, in particular, judgment of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraph 25 et seq.). On the distinction between the freedom to provide services and the freedom of establishment, see also Opinion of Advocate General Cruz Villalón in *Yellow Cab Verkehrsbetrieb* (C-338/09, EU:C:2010:568, points 15 to 18).

---

34 According to settled case-law in the field of social security, EU law does not, in principle, detract from the powers of the Member States to organise their social security systems (see, most recently, judgment of 11 June 2020, Commission and Slovak Republic v Dôvera zdravotná poist'ovňa (C-262/18 P and C-271/18 P, EU:C:2020:450, paragraph 30 and the case-law cited)).

---

35 Judgment of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 42 and the case-law cited).

---

36 Sanchez-Graells, A., 'State Aid and EU Public Procurement: More Interactions, Fuzzier Boundaries' (8 October 2019), Hancher, L., and Piernas López, J.J., (eds), *Research Handbook on European State Aid Law*, 2nd edn, Edward Elgar, 2020, available at SSRN: https://ssrn.com/abstract= 3466288.

---

37 Regarding that distinction, see, in particular, Opinion of Advocate General Poiares Maduro in FENIN v Commission (C-205/03 P, EU:C:2005:666, point 51). See also Wauters, K., Bleux, S., 'A new generation of public procurement Directives: background, objectives and results', in Marique, Y., Wauters, K., (eds), *EU Directive 2014/24 on public procurement. A new turn for competition in public markets*?, Larcier, Brussels, 2016, p. 9.

---

38 Judgment of 1 February 2017, Commission v Hungary (C-392/15, EU:C:2017:73, paragraph 100). I should add that, as regards workers, the Court has added that the provision of services for remuneration must be regarded as an economic activity 'provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary' (judgment of 20 November 2001, *Jany and Others*, C-268/99, EU:C:2001:616, paragraph 33 and the case-law cited). However, the latter criteria, which relate to a working relationship, do not seem relevant in the present case.

---

39 See, inter alia, judgment of 18 December 2007, Jundt (C-281/06, EU:C:2007:816, paragraphs 28 and 29 and the case-law cited).

---

40 See, to that effect, judgment of 23 February 2016, Commission v Hungary (C-179/14, EU:C:2016:108, paragraph 154).

---

41 Ibid., paragraph 157 and the case-law cited.

---

42 Judgment of 12 July 2001, Smits and Peerbooms, C-157/99, EU:C:2001:404, paragraph 58).

---

43 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

44 See, to that effect, judgments of 29 November 2007, Commission v Italy (C-119/06, not published, EU:C:2007:729, paragraphs 36 to 41); of 11 December 2014, Azienda sanitaria locale n. 5 ‘Spezzino’ and Others (C-113/13, EU:C:2014:2440, paragraphs 32 to 43); and of 28 January 2016, CASTA and Others (C-50/14, EU:C:2016:56, paragraphs 26 and 33 to 41).

45 See, to that effect, judgment of 19 June 2014, *Centro Hospitalar de Setúbal and SUCH* (C-574/12, EU:C:2014:2004, paragraph 40).

46 See footnote 5 to this Opinion.

47 See point 2 of this Opinion.

48 For the full list, see the reference in point 2 of this Opinion.

49 See Article 65(3) and (4) of Law 5/1997 and Article 11(1)(c) of Decree 181/2017.

50 See point 53 above.

51 See Article 22 of Decree 181/2017.

52 Ibid.

53 See, to that effect, judgment of 1 December 2011, *Commission* v *Netherlands* (C-157/09, not published, EU:C:2011:794, paragraph 57 and the case-law cited).

54 See, in particular, judgment of 1 December 2011, *Commission* v *Netherlands* C-157/09, not published, EU:C:2011:794, paragraph 58 and the case-law cited).

55 See, to that effect, judgments of 13 July 1993, *Thijssen* (C-42/92, EU:C:1993:304, paragraph 22); of 30 March 2006, *Servizi Ausiliari Dottori Commercialisti* (C-451/03, EU:C:2006:208, paragraph 47); and of 22 October 2009, *Commission* v *Portugal* (C-438/08, EU:C:2009:651, paragraph 36).

56 See, to that effect, judgment of 21 June 1974, *Reyners* (C-2/74, EU:C:1974:68, paragraphs 51 and 53).

57 See, to that effect, judgments of 13 July 1993, *Thijssen* (C-42/92, EU:C:1993:304, paragraphs 21 and 22); of 29 November 2007, *Commission* v *Austria* (C-393/05, EU:C:2007:722, paragraphs 36 and 42); of 29 November 2007, *Commission* v *Germany* (C-404/05, EU:C:2007:723, paragraphs 38 and 44); and of 22 October 2009, *Commission* v *Portugal* (C-438/08, EU:C:2009:651, paragraphs 36 and 41).

58 See, to that effect, inter alia, judgment of 29 October 1998, *Commission* v *Spain* (C-114/97, EU:C:1998:519, paragraph 37).

59 See, to that effect, judgment of 30 September 2003, *Anker and Others* (C-47/02, EU:C:2003:516, paragraph 61), and of 22 October 2009, *Commission* v *Portugal* (C-438/08, EU:C:2009:651, paragraph 44).

60 See recital 114 of Directive 2014/24.

61 Judgment of 2 June 2016 (C-410/14, EU:C:2016:399).

62 Ibid., paragraph 37.

63 Ibid., paragraph 38.

64 Judgment of 1 March 2018, Tirkkonen (C-9/17, EU:C:2018:142).

65 Ibid., paragraph 35.

66 Ibid., paragraph 41.

67 See Turudić, M., 'Article 76 Principles Of Awarding Contracts' in European Public Procurement: Commentary on Directive 2014/24/EU, edited by Caranta, R., and Sanchez-Graells, A., 2021, Edward Elgar Publishing Limited, page 863. See also, Sanchez-Graells, A., https://www.howtocrackanut.com/blog/2018/3/5/the-end-of-procurement-as-we-knew-it-cjeu-consolidates-falk-pharma-approach-to-definition-of-procurement-c-917.

68 See, in particular, Articles 58 and 67 of Directive 2014/24.

69 See, by analogy, Opinion of Advocate General Cosmas in Joined Cases Hernández Vidal and Others (C-127/96, C-229/96 and C-74/97, EU:C:1998:426, point 80), in which he characterises the situation where the result achieved by applying a directive becomes a condition determining whether it is to apply as an absurd conclusion, or a vicious circle.

70 In the judgment of 2 June 2016, *Falk Pharma* (C-410/14, EU:C:2016:399), the choice was deferred to the patient, and, in the judgment of 1 March 2018, *Tirkkonen* (C-9/17, EU:C:2018:142), to the beneficiary of the aid at issue.

71 Article 9(1) and (2) of Decree 181/2017.

72 Article 17 of Decree 181/2017.

73 Article 19 of Decree 181/2017.

74 Article 19(1) of Decree 181/2017.

75 See points 69 and 70 above.

76 Article 3(d) and Article 21(1) of Decree 181/2017 provide a definition for 'social agreements', which refer to 'documents' formalising the agreement between the administration and social entities.

77 See, to that effect, judgment of 18 January 2007, Auroux and Others (C-220/05, EU:C:2007:31, paragraph 40 and the case-law cited).

78 See, to that effect, judgments of 20 October 2005, Commission v France, C-264/03, EU:C:2005:620, paragraph 36), and of 22 April 2021, Commission v Austria (Lease of a building not yet constructed) (C-537/19, EU:C:2021:319, paragraph 43).

79 See, to that effect, judgment of 18 October 2018, *IBA Molecular Italy* (C-606/17, EU:C:2018:843, paragraph 28).

80 In that regard, it should be borne in mind that, according to the settled case-law of the Court, only a contract concluded for pecuniary interest may constitute a public contract falling within the scope of Directive 2004/18 (see judgments of 25 March 2010, *Helmut Müller* (C-451/08, EU:C:2010:168, paragraph 47), and of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraph 43). While Directive 2014/24 repealed Directive 2004/18, that condition is laid down in similar terms in both directives. That case-law can therefore be applied to the new directive.

81 Judgment of 10 September 2020, Tax-Fin-Lex (C-367/19, EU:C:2020:685, paragraphs 25 and 26 and the case-law cited).

82 See, to that effect, judgment of 25 March 2010, *Helmut Müller* (C-451/08, EU:C:2010:168, paragraphs 60 to 62).

83 See Article 11(1)(c) of Decree 181/2017.

84 See judgments of 12 July 2001, Ordine degli Architetti and Others (C-399/98, EU:C:2001:401, paragraph 77), and of 18 January 2007, Auroux and Others (C-220/05, EU:C:2007:31, paragraph 45). It is worthwhile noting that, in her Opinion in *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:303, point 32), Advocate General Trstenjak states that ‘the view can be taken that only a broad understanding of the notion of “pecuniary interest” is consistent with the purpose of the procurement directives, which is to open up the markets to genuine competition’.

85 See Article 2(1) and (2) of Decree 181/2017.

86 See judgments of 29 November 2007, Commission v Italy (C-119/06, not published, EU:C:2007:729, paragraphs 37 to 41); of 23 December 2009, CoNISMa (C-305/08, EU:C:2009:807, paragraphs 30 and 45); and of 19 December 2012, Ordine degli Ingegneri della Provincia di Lecce and Others (C-159/11, EU:C:2012:817, paragraph 26). See, also, Opinion of Advocate General Wahl in Azienda sanitaria locale n. 5 ‘Spezzino’ and Others (C-113/13, EU:C:2014:291, point 24 and the case-law cited).

87 The fact that Decree 181/2017 excludes profit-making entities from the provision of the social services at issue will be dealt with under Section III.B.3 of the Opinion.

88 See case-law cited in footnote 86.

89 See Section III.B.1 of this Opinion.

90 ASADE submits that the services at issue do not fall within the scope of the services excluded from the directive under recital 6 and Annex XIV (CPV code 75300000-9) and, in its written answer to the questions put by the Court, it seems to indicate that the services at issue fall under the CPV codes ranging from 85000000-9 to 85321000-5. That submission must be examined by the referring court, which has sole jurisdiction to interpret the national legislation at issue.

91 See, by analogy, judgment of 21 March 2019, Falck Rettungsdienste and Falck (C-465/17, EU:C:2019:234, paragraph 37).

92 The provision specifies that it is the value net of value added tax.

93 I must point out, however, that some contracts may have a cross-border dimension even though their value is below the abovementioned threshold, for instance, if the procurement procedure is taking place in areas near the borders of other EU Member States (see, to that effect, judgments of 15 May 2008, *SECAP and Santorso* (C-147/06 and C-148/06, EU:C:2008:277, paragraph 31), and of 17 November 2015, *RegioPost* (C-115/14, EU:C:2015:760, paragraph 51)). That extension does not seem to apply in the present case.

94 See, by analogy, order of 7 July 2016, *Sá Machado & Filhos* (C-214/15, not published, EU:C:2016:548, paragraph 29).

95 See, to that effect, recital 1 of Directive 2014/24.

96 It is settled case-law that the only permitted exceptions to the application of Directive 2014/24 are those which are expressly mentioned therein (see judgment of 18 January 2007, Auroux and Others (C-220/05, EU:C:2007:31, paragraph 59 and the case-law cited).

97 On the legislative history of reserved contracts under Article 20, see Opinion of Advocate General Tanchev in Conacee (C-598/19, EU:C:2021:349, point 60).

98 Judgment of 6 October 2021, Conacee (C-598/19, EU:C:2021:810).

99 Opinion of Advocate General Tanchev in Conacee (C-598/19, EU:C:2021:349, point 40).

100 Judgment of 6 October 2021, Conacee (C-598/19, EU:C:2021:810, paragraphs 24 to 28).

101 Judgment of 6 October 2021, Conacee (C-598/19, EU:C:2021:810, paragraph 28).

102 Judgment of 6 October 2021, Conacee (C-598/19, EU:C:2021:810, paragraph 33 and the case-law cited).

103 As regards Directive 2004/18, the Court held that where public contracts for medical transport could be included among the service contracts covered by Annex II B to that directive and, therefore, were not subject to all of its provisions, those contracts could be reserved for voluntary associations without thereby infringing the principle of equal treatment (judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraph 59).

104 Legislative drafting history regarding Article 77 does not provide much guidance as to its interpretation, since that provision was not initially in the Commission's proposed legislation (see Proposal for a Directive of the European Parliament and of the Council on public procurement (COM(2011) 0896 final) – 2011/0438 (COD)), and it was added at the later stage of the legislative procedure (see Position of the European Parliament adopted at first reading on 15 January 2014 with a view to the adoption Directive 2014/…/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC(EP-PE_TC1-COD(2011)0438)).

105 According to some authors, that provision was introduced in order to take into account the specific needs of the United Kingdom. It is only applicable to a certain subset of the services of the simplified regime (see Turudić, page 867, cited in footnote 67 above and the literature cited by that author). That approach is confirmed by the last two sentences of recital 118 of Directive 2014/24, which implies that certain services covered by the simplified regime can be subject to the regime laid down by Article 77 of that directive.

106 As explained by the Norwegian Government, Article 77 of Directive 2014/24 deals with the possibility of reserving contracts to certain newly established companies by persons previously employed in the public sector. It is not restricted to non-profit organisations, but covers commercial entities as well.

107 See Articles 48 to 51 of Directive 2014/24.

108 Recital 1 of Directive 2014/24. See also judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829, paragraph 48 and the case-law cited).

109 See point 83 above.

110 See, inter alia, judgment of 14 December 2004, *Swedish Match* (C-210/03, EU:C:2004:802, paragraph 70 and the case-law cited).

111 See, inter alia, judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100, paragraph 29).

112 See, by way of analogy, judgment of 6 October 2021, Conacee (C-598/19, EU:C:2021:810, paragraph 38).

113 The defendant itself places considerable weight on that aspect when it points out that Directive 2014/24 aims to take into account the specific characteristics of services to persons (see point 17 of the defendant's observations).

114 See, to that effect, judgment of 6 October 2021, Conacee (C-598/19, EU:C:2021:810, paragraphs 42 to 44 and the case-law cited). See, by way of analogy, judgments of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887, paragraph 25), and of 26 April 2012, *Commission* v *Netherlands* (C-508/10, EU:C:2012:243, paragraph 75).

115 See, to that effect, judgment of 6 October 2021, Conacee (C-598/19, EU:C:2021:810, paragraph 42 and the case-law cited).

116 See point 122 above.

---

117 For example, if the value of the public procurement does not attain the threshold set out in Article 4(d) of Directive 2014/24, it is not subject to the provisions of that directive.

---

118 See, to that effect, judgments of 15 May 2008, *SECAP and Santorso* (C-147/06 and C-148/06, EU:C:2008:277, paragraphs 20 and 21); of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraphs 45 and 46); of 18 December 2014, *Generali-Providencia Biztosító* (C-470/13, EU:C:2014:2469, paragraph 32); and of 16 April 2015, *Enterprise Focused Solutions* (C-278/14, EU:C:2015:228, paragraph 16).

---

119 See judgment of 16 February 2012, *Costa and Cifone* (C-72/10 and C-77/10, EU:C:2012:80, paragraphs 70 to 73 and the case-law cited).

---

120 See point 94 above.

---

121 As opposed to the cases where the Court has declared the case inadmissible, as the referring court has submitted no evidence providing the Court with information on the existence of a cross-border dimension (see, inter alia, judgment of 6 October 2016, Tecnoedi Costruzioni (C-318/15, EU:C:2016:747), in the present case, the main proceedings involve an action for annulment, which means that paragraph 51 of the judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874) applies (see point 38 above). Therefore, such dimension is presumed.

---

122 See, to that effect, judgment of 21 July 2005, *Coname* (C-231/03, EU:C:2005:487, paragraph 20).

---

123 In the judgment of 11 December 2014, Azienda sanitaria locale n. 5 'Spezzino' and Others (C-113/13, EU:C:2014:2440, paragraph 50), the Court held that the general principles of transparency and equal treatment 'flow' from Articles 49 and 56 TFEU.

---

124 See, to that effect, judgments of 12 July 1984, Klopp (107/83, EU:C:1984:270, paragraph 19); of 7 July 1988, Stanton and L'Étoile 1905 (143/87, EU:C:1988:378, paragraph 11); of 29 April 2004, Commission v Portugal (C-171/02, EU:C:2004:270, paragraph 42); and of 9 September 2010, Engelmann (C-64/08, EU:C:2010:506, paragraph 28).

---

125 See, inter alia, judgment of 13 November 2008, *Coditel Brabant* (C-324/07, EU:C:2008:621, paragraph 25 and the case-law cited).

---

126 Judgment of 22 October 2015 (C-552/13, EU:C:2015:713).

---

127 The case dealt with public contracts in the health sector falling within the scope of Annex II B to Directive 2004/18.

---

128 Judgment of 22 October 2015, *Grupo Hospitalario Quirón* (C-552/13, EU:C:2015:713, paragraph 28).

---

129 Ibid., paragraphs 29 to 33.

130 A similar criteria is provided for in Article 64(3)(a) of Law 5/1997.

131 Judgment of 22 October 2015 (C-552/13, EU:C:2015:713, paragraph 29).

132 Judgment of 11 July 2013 (C-57/12, EU:C:2013:517, paragraph 42).

133 Ibid., paragraph 43, which refers to the *Handbook on the implementation of the Services Directive*, Office for Official Publications of the European Communities, 2007.

134 See point 56 above.

135 Judgment of 11 July 2013 (C-57/12, EU:C:2013:517).

136 Ibid., paragraph 44. In that regard, the Court ruled that the national court had to determine whether there was an act of public authority conferring, in a clear and transparent manner, on the operators of day-care centres and night-care centres at issue a genuine obligation to provide such services under specific conditions, and whether such an approval may therefore be considered as a mandating act for the purposes of Article 2(2)(j) of the Services Directive (judgment of 11 July 2013, Femarbel, C-57/12, EU:C:2013:517, paragraph 52).

137 See points 42 and 43 above.

138 See point 128 above.

139 See, for example, judgments of 5 February 2015, *Commission* v *Belgium* (C-317/14, EU:C:2015:63, paragraph 22), and of 20 December 2017, *Simma Federspiel* (C-419/16, EU:C:2017:997, paragraph 35 and the case-law cited).

140 See, to that effect, judgment of 1 June 2010, Blanco Pérez and Chao Gómez (C-570/07 and C-571/07, EU:C:2010:300, paragraph 53 and the case-law cited).

141 See, by way of analogy, judgment of 27 February 2020, Commission v Belgium (Accountants) (C-384/18, EU:C:2020:124, paragraph 76).

142 Judgments of 27 October 2005, *Commission* v *Spain* (C-158/03, not published, EU:C:2005:642, paragraph 70), and of 27 October 2005, *Contse and Others* (C-234/03, EU:C:2005:644, paragraph 41). More specifically, the Court held that fundamental freedoms preclude a selection criterion which rewards, by awarding extra points, the proximity of the installation to the place where the services are provided, in so far as that criterion is applied in a discriminatory manner, is not justified by imperative requirements in the general interest, is not suitable for securing the attainment of the objective which it pursues or goes beyond what is necessary to attain it, which is a matter for the national court to determine (judgment of 27 October 2005, *Contse and Others* (C-234/03, EU:C:2005:644, paragraph 79).

JUDGMENT OF THE COURT (Fourth Chamber)

1 August 2022 (*)

(Reference for a preliminary ruling – Public procurement – Concession contracts – Formation of a semi-public company – Award to that company of the management of an 'integrated school service' – Appointment of the private partner under a tender procedure – Directive 2014/23/EU – Article 38 – Directive 2014/24/EU – Article 58 – Applicability – 'In-house' criteria – Requirement for minimum participation of the private partner in the capital of the semi-public company – Indirect participation of the contracting authority in the capital of the private partner – Selection criteria)

In Case C-332/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 13 February 2020, received at the Court on 22 July 2020, in the proceedings

Roma Multiservizi SpA,

Rekeep SpA

v

Roma Capitale,

Autorità Garante della Concorrenza e del Mercato,

intervener:

Consorzio Nazionale Servizi Soc. coop. (CNS),

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, S. Rodin, J.-C. Bonichot, L. S. Rossi and O. Spineanu-Matei, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Roma Multiservizi SpA, by F. Baglivo, T. Frosini, P. Leozappa, D. Lipani and F. Sbrana, avvocati,

– Rekeep SpA, by A. Lirosi, M. Martinelli, G. Vercillo and A. Zoppini, avvocati,

– Roma Capitale, by L. D'Ottavi, avvocato,

– Consorzio Nazionale Servizi Soc. coop. (CNS), by F. Cintioli, G. Notarnicola and A. Police, avvocati,

– the European Commission, by G. Gattinara, P. Ondrůšek and K. Talabér-Ritz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 30 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), as amended by Commission Delegated Regulation (EU) 2017/2366 of 18 December 2017 (OJ 2017 L 337, p. 21) (‘Directive 2014/23), and Articles 12 and 18 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 (OJ 2017 L 337, p. 19) (‘Directive 2014/24’), read in conjunction with Article 107 TFEU.

2 The request has been made in proceedings between Roma Multiservizi SpA and Rekeep SpA, on the one hand, and Roma Capitale (city of Rome, Italy) and the Autorità Garante della Concorrenza e del Mercato (Italian competition authority, Italy), on the other hand, concerning that city’s decision to exclude from the contract award procedure the consortium proposed by Roma Multiservizi and Rekeep.

Legal context

European Union law

Directive 2014/23

3 Article 3 of Directive 2014/23 provides as follows:

‘1. Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

2. Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28.’

4 Article 5 of that directive provides:

‘For the purposes of this Directive, the following definitions apply:

(1) “concessions” means works or services concessions, as defined in points (a) and (b):

…

(b) “services concession” means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such

that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible;

…’

5 Article 8(1) of that directive states:

‘This Directive shall apply to concessions the value of which is equal to or greater than EUR 5 548 000.’

6 Article 10(3) of the directive is worded as follows:

‘This Directive shall not apply to concessions for air transport services based on the granting of an operating licence within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council [of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3)] or to concessions for public passenger transport services within the meaning of Regulation (EC) No 1370/2007 [of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1)].’

7 Under Article 17 of Directive 2014/23:

‘1. A concession awarded by a contracting authority or a contracting entity as referred to in point (a) of Article 7(1) to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority or contracting entity exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; and

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or contracting entity or by other legal persons controlled by that contracting authority or contracting entity; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority or contracting entity as referred to in point (a) of Article 7(1) shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph of this paragraph, where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. That control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority or contracting entity.

…

4. A contract concluded exclusively between two or more contracting authorities or contracting entities as referred to in point (a) of Article 7(1) shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities or contracting entities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities or contracting entities perform on the open market less than 20% of the activities concerned by the cooperation.

…’

8 Article 19 of that directive provides:

‘Concessions for social and other specific services listed in Annex IV falling within the scope of this Directive shall be subject only to the obligations arising from Article 31(3) and Articles 32, 46 and 47.’

9 Article 20(1) of that directive provides:

‘Concessions which have as their subject matter both works and services shall be awarded in accordance with the provisions applicable to the type of concession that characterises the main subject matter of the contract in question.

In the case of mixed concessions consisting partly of social and other specific services listed in Annex IV and partly of other services, the main subject matter shall be determined according to which of the estimated values of the respective services is the higher.’

10 Article 30 of Directive 2014/23 states:

‘1. The contracting authority or contracting entity shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with this Directive.

2. The design of the concession award procedure shall respect the principles laid down in Article 3. In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.

…’

11 Article 38(1) of Directive 2014/23 is worded as follows:

‘Contracting authorities and contracting entities shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of the candidates or tenderers, on the basis of self-declarations, reference or references to be submitted as proof in accordance with the requirements specified in the concession notice that shall be non-discriminatory and proportionate to the subject matter of the concession. The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject matter of the concession and the purpose of ensuring genuine competition.’

Directive 2014/24

12 Under Recital 32 of Directive 2014/24:

‘Public contracts awarded to controlled legal persons should not be subject to the application of the procedures provided for by this Directive if the contracting authority exercises a control over the legal person concerned which is similar to that which it exercises over its own departments, provided that the controlled legal person carries out more than 80% of its activities in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority, regardless of the beneficiary of the contract performance.

The exemption should not extend to situations where there is direct participation by a private economic operator in the capital of the controlled legal person since, in such circumstances, the award of a public contract without a competitive procedure would provide the private economic operator with a capital participation in the controlled legal person an undue advantage over its competitors. However, in view of the particular characteristics of public bodies with compulsory membership, such as organisations responsible for the management or exercise of certain public services, this should not apply in cases where the participation of specific private economic operators in the capital of the controlled legal person is made compulsory by a national legislative provision in conformity with the Treaties, provided

that such participation is non-controlling and non-blocking and does not confer a decisive influence on the decisions of the controlled legal person. It should further be clarified that the decisive element is only the direct private participation in the controlled legal person. Therefore, where there is private capital participation in the controlling contracting authority or in the controlling contracting authorities, this does not preclude the award of public contracts to the controlled legal person, without applying the procedures provided for by this Directive as such participations do not adversely affect competition between private economic operators.

It should also be clarified that contracting authorities such as bodies governed by public law, that may have private capital participation, should be in a position to avail themselves of the exemption for horizontal cooperation. Consequently, where all other conditions in relation to horizontal cooperation are met, the horizontal cooperation exemption should extend to such contracting authorities where the contract is concluded exclusively between contracting authorities.'

13 Article 2(1) of that directive provides:

'For the purposes of this Directive, the following definitions apply:

…

(9) "public service contracts" means public contracts having as their object the provision of services other than those referred to in point 6;

…'

14 Article 3 of that directive provides:

'1. Paragraph 2 shall apply to mixed contracts which have as their subject matter different types of procurement all of which are covered by this Directive.

Paragraphs 3 to 5 shall apply to mixed contracts which have as their subject matter procurement covered by this Directive and procurement covered by other legal regimes.

2. Contracts which have as their subject two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question.

In the case of mixed contracts consisting partly of services within the meaning of Chapter I of Title III and partly of other services or of mixed contracts consisting partly of services and partly of supplies, the main subject shall be determined in accordance with which of the estimated values of the respective services or supplies is the highest.

3. Where the different parts of a given contract are objectively separable, paragraph 4 shall apply. Where the different parts of a given contract are objectively not separable, paragraph 6 shall apply.

Where part of a given contract is covered by Article 346 TFEU or Directive 2009/81/EC [of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76)], Article 16 of this Directive shall apply.

4. In the case of contracts which have as their subject matter procurement covered by this Directive as well as procurement not covered by this Directive, contracting authorities may choose to award separate contracts for the separate parts or to award a single contract. Where contracting authorities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where contracting authorities choose to award a single contract, this Directive shall, unless otherwise provided in Article 16, apply to the ensuing mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

In the case of mixed contracts containing elements of supply, works and service contracts and of concessions, the mixed contract shall be awarded in accordance with this Directive, provided that the estimated value of the part of the contract which constitutes a contract covered by this Directive, calculated in accordance with Article 5, is equal to or greater than the relevant threshold set out in Article 4.

5. In the case of contracts which have as their subject both procurement covered by this Directive and procurement for the pursuit of an activity which is subject to Directive 2014/25/EU [of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243)], the applicable rules shall, notwithstanding paragraph 4 of this Article, be determined pursuant to Articles 5 and 6 of [Directive 2014/25].

6. Where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject matter of that contract.'

15 Article 4 of that directive states:

'This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

…

(b) EUR 144 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;

(c) EUR 221 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; that threshold shall also apply to public supply contracts awarded by central government authorities that operate in the field of defence, where those contracts involve products not covered by Annex III;

(d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV.'

16 Article 7 of Directive 2014/24 is worded as follows:

'This Directive shall not apply to public contracts and design contests which, under Directive [2014/25], are awarded or organised by contracting authorities exercising one or more of the activities referred to in Articles 8 to 14 of that Directive and are awarded for the pursuit of those activities …'

17 Under Article 12 of that directive:

'1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.

…

4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

…’

18 Article 18 of that directive provides:

‘1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.’

19 Article 57 of that directive provides:

‘1. Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

(a) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA [of 24 October 2008 on combating organised crime (OJ 2008 L 300, p. 42)];

(b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union … and Article 2(1) of Council Framework Decision 2003/568/JHA [of 22 July 2003 on combating corruption in the private sector (OJ 2003 L 192, p. 54)] as well as corruption as defined in the national law of the contracting authority or the economic operator;

(c) fraud within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests …;

(d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA [of 13 June 2002 on combating terrorism (OJ 2002 L 164, p. 3)] respectively, or inciting or aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;

(e) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council [of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15)];

(f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council [of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ 2011 L 101, p. 1)].

The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.

2. An economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.

Furthermore, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure an economic operator where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

(a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);

(b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations;

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

(e) where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures;

(f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 41, cannot be remedied by other, less intrusive measures;

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or

(i) where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Notwithstanding point (b) of the first subparagraph, Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator which is in one of the situations referred to in that point, where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business in the case of the situations referred to in point (b).

…’

20 Article 58 of that directive states:

‘1. Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

…

3. With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance.

The minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value, except in duly justified cases such as relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate the main reasons for such a requirement in the procurement documents or the individual report referred to in Article 84.

The ratio, for instance, between assets and liabilities may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents. Such methods and criteria shall be transparent, objective and non-discriminatory.

Where a contract is divided into lots this Article shall apply in relation to each individual lot. However, the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time.

Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in the second subparagraph of this paragraph shall be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement. In the case of dynamic purchasing systems, the maximum yearly turnover requirement referred to in the second subparagraph shall be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

…’

21 Article 74 of Directive 2014/24 is worded as follows:

‘Public contracts for social and other specific services listed in Annex XIV shall be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in point (d) of Article 4.’

Directive 2014/25

22 Under Article 6(2) of Directive 2014/25:

‘A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.’

23 Article 11 of that directive provides:

‘This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.’

Italian law

24 Article 5(9) of decreto legislativo n. 50 – Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull’aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d’appalto degli enti erogatori nei settori dell’acqua, dell’energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50 implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement by entities operating in the water, energy, transport and postal services sectors, and reforming the existing provisions in relation to public works, service and supply contracts) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016; ‘Legislative Decree No 50/2016), states:

‘Where the provisions in force authorise the formation of mixed companies for the performance and management of public works or for the organisation and management of a service of general interest, the private partner must be selected by means of a procedure for the award of a public contract.’

25 Article 4 of Legislative Decree No 175 – Testo unico in materia di società a partecipazione pubblica (Legislative Decree No 175 establishing the Consolidated Law on publicly owned companies) of 19 August 2016 (GURI No 210 of 8 September 2016; 'Legislative Decree No 175/2016') provides that the objectives pursued by public authorities when where they create companies in which they have a shareholding are to be subject to a double constraint. First, they must be companies whose purpose is to undertake activities that are strictly necessary to achieve the institutional objectives of the authority concerned. Second, the activities to be undertaken must fall within those expressly indicated in paragraph 2 of that article, namely, inter alia, the generation of a service of general interest, including the establishment and operation of networks and facilities used for those services and the organisation and management of a service of general interest through a partnership contract referred to in Article 180 of Legislative Decree No 50/2016, with a contractor selected in accordance with the detailed rules laid down in Article 17(1) and (2) of Legislative Decree No 175/2016.

26 Article 7(5) of Legislative Decree No 175/2016 requires private partners to be selected in advance by means of a public procurement procedure, in accordance with Article 5(9) of Legislative Decree No 50/2016.

27 Article 17(1) of Legislative Decree No 175/2016 is worded as follows:

'In public-private mixed companies, the percentage participation of the private partner may not be less than 30%, and that partner must be selected via a public procurement procedure in accordance with Article 5(9) of [Legislative Decree No 50/2016]. which covers both the subscription or the acquisition of the participation by the private partner and the award of the contract or concession forming the sole object of the activities of the semi-public company'.

28 According to Article 17(2) of Legislative Decree No 175/2016:

'The private partner must meet the qualification requirements laid down in the legal or regulatory provisions in relation to the purpose for which the company has been created …'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

29 On 4 September 2018, the city of Rome issued a call for tenders seeking, first, to appoint a partner in order to form a company with mixed public and private capital ('a semi-public company') and, second, to award that company a contract to manage the 'integrated school service', valued at EUR 277 479 616.21. According to the tender documents, the city of Rome was to own 51% of the shares in that company, with the remaining 49% to be acquired by its partner, which was also to bear the entire operational risk.

30 Only one tender was submitted by a consortium which was in the process of being formed, consisting of Roma Multiservizi and Rekeep. It was envisaged that that consortium would be 10% owned by Rekeep, as principal, and 90% by Roma Multiservizi, as the lead company, and that those two companies would hold a stake in the semi-public company to be formed with the city of Rome, in proportion to their participation in that consortium.

31 Roma Multiservizi, established in 1994 by the city of Rome, is 51% owned by AMA SpA, while the remainder of its capital is owned by Rekeep and La Venenta Servizi SpA. AMA is, itself, wholly owned by that city.

32 On 1 March 2019, the consortium in the process of being formed consisting of Roma Multiservizi and Rekeep was excluded from the ongoing procedure on the ground that, taking into account AMA's participation in the capital of Roma Multiservizi, the city of Rome, in practice, would have owned 73.5% of the semi-public company which would have been formed with that consortium, thus exceeding the limit of 51% set out in the call for tenders and bringing the share of risk capital in that company owned by private operators below the 49% threshold.

33 That exclusion decision was challenged by Rekeep and Roma Multiservizi before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy). That court

dismissed their actions by two judgments delivered on 18 June 2019.

34 Roma Multiservizi and Rekeep brought an appeal against those two judgments before the referring court.

35 During the appeal proceedings, the city of Rome awarded, following a negotiated procedure, the contract for the ‘integrated school service’ to the Consorzio Nazionale Servizi Soc. coop. (CNS). That award was suspended by the referring court.

36 In its request for a preliminary ruling, the Consiglio di Stato (Council of State, Italy) states, first, that under the applicable national legislation, where semi-public companies have as their object the carrying out of public works or the organisation and management of a service of general interest, by means of a partnership contract with a contractor selected in accordance with the detailed rules laid down in Article 17(1) and (2) of Legislative Decree No 175/2016, the private person’s participation may not be less than 30% and the selection of that private partner must be made through the award of a public contract.

37 The referring court notes, in that regard, that the lawfulness of the maximum participation of the contracting authority in a semi-public company has not been challenged before it and that it is required only to examine whether account should be taken of the indirect participation of the city of Rome in the capital of Roma Multiservizi in order to determine whether that limit was complied with.

38 In the second place, according to that court, the direct award of a service to a semi-public company is not, as such, incompatible with EU law, provided, first, that the call for tenders organised, for the purposes of selecting the private partner of the contracting authority in the successful company, is conducted in compliance with Articles 49 and 56 TFEU, and with the principles of equal treatment, non-discrimination and transparency and, second, that the criteria for selecting that private partner are related not only to the latter’s capital contribution but also to its technical capacities and the characteristics of its tender, with regard to the specific services to be provided, so that the selection of the contractor may be regarded as resulting indirectly from the selection of the partner of the contracting authority. That partner should, therefore, be a suitable operational partner and not merely a shareholder, the justification for its participation being precisely the lack, within the public authority, of the necessary expertise which the private partner possesses.

39 According to the referring court, it is in order to ensure such suitability that the Italian legislature set the minimum threshold for private participation in semi-public companies at 30%. It states that the cap of 70% on public participation in such companies corresponds to the threshold above which the activity of those companies may distort competition by depriving the relevant market of its attractiveness and by allowing the private partner to limit excessively the financial risk of its participation in those companies.

40 The referring court notes, in the third place, that if the percentage of the participation of the partner of the contracting authority in the capital of the semi-public company were to be calculated taking into account only the legal form of that partner, the exclusion of the consortium proposed by Roma Multiservizi and Rekeep from the award procedure at issue in the main proceedings would not be justified. By contrast, if account had to be taken of the indirect participation of the city of Rome in the capital of Roma Multiservizi, the private partner’s share resulting from the participation in the consortium proposed by Roma Multiservizi and Rekeep in the semi-public company, formally set at 49%, would in reality be 26.5%, which would give rise to a situation of market inefficiency and constitute a breach of the principle of competition in so far as that partner could unduly benefit from the advantages of the public participation and thus ensure a substantial profitable position.

41 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) For the purposes of determining the minimum limit of 30% participation by the private partner in a future semi-public company – the limit deemed appropriate by the Italian legislature in implementation of the principles [of EU law] set in relation to European case-law – is it compatible with [EU] law and the correct interpretation of recitals 14 and 32 and Articles 12 and

18 of Directive [2014/24] and of Article 30 of Directive [2014/23], with reference also to Article 107 TFEU, for consideration to be given solely to the legal form/on-paper composition of that partner or may – or in fact must – the authority launching the tender also consider its own indirect participation in the private partner submitting a bid?

(2) If the answer to the above question is yes, is it consistent and in line with the principles [of EU law], and in particular with the principles of fair competition, proportionality and appropriateness, for the authority launching the tender to be able to exclude from the tender a private partner submitting a bid, where the effective participation of that private partner in the future semi-public company is in fact less than 30%, on account of the direct or indirect public participation identified?'

Consideration of the questions referred

Admissibility of the questions referred

42 According to settled case-law, questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraphs 59 and 61, and of 25 November 2021, *État luxembourgeois (Information on a group of taxpayers)*, C-437/19, EU:C:2021:953, paragraph 81).

43 The need to provide an interpretation of EU law which will be of use to the referring court requires that court to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 10 March 2022, *Commissioners for Her Majesty's Revenue and Customs (Comprehensive sickness insurance)*, C-247/20, EU:C:2022:177, paragraph 75 and the case-law cited).

44 The referring court does not explain either the reasons why it considers that it is necessary to interpret Article 107 TFEU or the link it establishes between that provision and the national legislation at issue in the main proceedings.

45 On the other hand, contrary to what CNS maintains, the referring court, first, identifies with sufficient precision the provisions of Directives 2014/23 and 2014/24 which it seeks to have interpreted and, second, does not ask the Court to apply EU law to the dispute in the main proceedings.

46 It follows from the foregoing that the questions referred for a preliminary ruling are admissible, except, as regards the first of those questions, in so far as it concerns the interpretation of Article 107 TFEU.

Substance

47 The dispute at issue in the main proceedings concerns the exclusion of the consortium proposed by Roma Multiservizi and Rekeep from the procedure initiated on 4 September 2018, which – before it was abandoned by the city of Rome precisely because of the exclusion of that consortium, which had been the only one to submit a tender – was intended for the conclusion of an agreement the object of which was, first, to form a semi-public company with an economic operator selected by that city and, second, to entrust to that company the provision of a set of services ancillary to main school activities, consisting essentially of general support, handling services, cleaning services, collection and delivery services and assistance services for private school transport. It follows that the objective of such a procedure was to conclude a mixed contract.

48 It is apparent, moreover, from the order for reference that the city of Rome took the view that, if it had formed the semi-public company at issue in the main proceedings with the consortium proposed by Roma Multiservizi and Rekeep, it would in practice have owned 73.5% of that company, whereas the relevant national legislation limits the maximum share that a contracting authority may hold in such a company to 70% and the call-for-tenders documents drawn up by that city set the participation of that city in the capital of that company at 51%.

49 However, the city of Rome reached the conclusion that, in practice, it would have owned 73.5% of the semi-public company to be formed only because it took account of the fact that one of its subsidiaries, namely AMA, which it owned entirely, held 51% of the shares in Roma Multiservizi.

50 Furthermore, it is apparent from the request for a preliminary ruling and from the answers to the questions put by the Court that the exclusion of the consortium proposed by Roma Multiservizi and Rekeep from the procedure at issue in the main proceedings was justified, at the very least, both by the impossibility of complying, if that group was selected by the city of Rome, with the maximum participation limit of that city in the semi-public company, laid down by the relevant national legislation, and by the fact that it was impossible to comply with the stricter limit on such participation that was set out in the call-for-tenders documents.

51 In order to provide a useful answer to the referring court, it is therefore sufficient to examine whether, in order to examine whether that limit is complied with, EU law precludes a contracting authority from also taking into account its indirect participation in an economic operator which has expressed an interest in becoming its partner.

52 On the basis of those observations, it must be held that, by its two questions referred for a preliminary ruling, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 2014/24 and Directive 2014/23 must be interpreted as meaning that a contracting authority may not exclude an economic operator from a procedure seeking, first, to form a semi-public company and, second, to award that company a service contract, where that exclusion is justified by the fact that, on account of the indirect participation of that contracting authority in the capital of that economic operator, the maximum participation of that contracting authority in the capital of that company, as determined in the call-for-tenders documents, would, in practice, be exceeded if it selected that economic operator as its partner.

The legal regime applicable to the contract at issue in the main proceedings

53 In the first place, it must be borne in mind, first of all, that the creation of a joint venture by a contracting authority and a private economic operator is not covered as such by the rules of EU law on public contracts or services concessions. That being so, it is necessary to ensure that a capital transaction does not, in reality, conceal the award to a private partner of contracts which might be considered to be ‘public contracts’ or ‘concessions’. Furthermore, the fact that a private entity and a contracting entity cooperate within a mixed-capital entity cannot justify failure to observe those rules when awarding such a contract to that private entity or to that mixed capital entity (see, to that effect, judgment of 22 December 2010, *Mehiläinen and Terveystalo Healthcare*, C-215/09, EU:C:2010:807, paragraphs 33 and 34).

54 Next, as the Advocate General stated, in essence, in points 57 to 59 of his Opinion, it is apparent from the order for reference and from the answers to the questions put by the Court that the specific features of the mixed contract at issue in the main proceedings required that both components of the mixed contract be concluded with a single partner having, as the documents in the call for tenders required, both the financial capacity necessary to purchase 49% of the capital of the semi-public company to be formed, and the financial and technical capacity necessary to be responsible, in practice, for the provision of all services ancillary to the school activities of the city of Rome. It follows that, subject to verification by the referring court, the two components of the contract at issue in the main proceedings appear to be inseparably linked and form an indivisible whole. (see, to that effect, judgment of 6 May 2010, *Club Hotel Loutraki and Others*, C-145/08 and C-149/08, EU:C:2010:247, paragraphs 53 and 54).

55 In such a case, the transaction at issue must be examined as a whole for the purposes of its legal classification and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract (judgments of 6 May 2010, *Club Hotel Loutraki and Others*, C-145/08 and C-149/08, EU:C:2010:247, paragraph 48, and of 22 December 2010, *Mehiläinen and Terveystalo Healthcare*, C-215/09, EU:C:2010:807, paragraph 36).

56 In that regard, it is apparent from the order for reference and the replies to the questions put by the Court that the essential objective of the procedure at issue in the main proceedings was not to create a semi-public company, but to require the partner of the city of Rome, within that company, to bear the entire operational risk connected with the provision of services ancillary to that city's school activities, that company being conceived solely as the means by which that city considered that the quality of the services would be best ensured.

57 Moreover, there is nothing to indicate that the mere ownership of part of the capital of the same semi-public company could constitute a significant source of income for the partner of the city of Rome.

58 It therefore appears, subject to verification by the referring court, that the component relating to the supply of services ancillary to main school activities constitutes the main object and the predominant feature of the contract at issue in the main proceedings.

59 In those circumstances, the answer to the questions referred for a preliminary ruling must be based on the premiss that the two parts of the contract at issue in the main proceedings constitute an indivisible whole and that its predominant component is that of allocating to the semi-public company the supply of services ancillary to the school activities of the city of Rome. Therefore, the legal rules applicable to the contract at issue in the main proceedings, considered in its entirety, are those which govern that component.

60 In the second place, it must be noted that the referring court did not rule on whether the contract at issue in the main proceedings sought to grant a services concession, capable of falling within the scope of Directive 2014/23, or a public service contract, capable of falling under Directive 2014/24, to the semi-public company. The first question refers without distinction to those two directives, even though their scope is mutually exclusive.

61 In that regard, it should be recalled that a public service contract differs from a services concession because of the nature of the consideration granted to the contractor for the services which it provides. Thus, the consideration provided by the tenderer to which a public contract is awarded consists of a price paid by the contracting authority, whereas the consideration for a concessionaire consists of the right to exploit the service which is the subject of the concession, that right being accompanied, where appropriate, by a price. The award of a concession therefore entails the transfer to the concessionaire of an operating risk (see, to that effect, judgments of 10 September 2009, *Eurawasser*, C-206/08, EU:C:2009:540, paragraph 51, and of 15 October 2009, *Acoset*, C-196/08, EU:C:2009:628, paragraph 39).

62 It is for the referring court to determine, in the light of the foregoing, whether the award to the semi-public company, at issue in the main proceedings, of the management of services ancillary to the school activities of the city of Rome, constituted a public service contract or a services concession. In order to provide a useful answer to the referring court, it is necessary, however, in the context of the present judgment, to examine the questions referred for a preliminary ruling having regard to each of those two situations.

63 Second, in so far as, as has been pointed out in paragraph 47 of the present judgment, assistance services for private school transport form part of the services covered by the contract at issue in the main proceedings, it is necessary to examine whether that fact is such as to affect the applicability of Directive 2014/23 or Directive 2014/24 to the procedure for the award of the contract at issue in the main proceedings.

64 In that regard, it should be noted, first, that, in accordance with Article 7 of Directive 2014/24, the scope of that directive does not extend to public contracts in the transport services sector, as defined in Article 11 of Directive 2014/25.

65 That being so, it is not apparent from the documents before the Court that the assistance services for school transport at issue in the main proceedings consist of the operation of a network intended to provide a transport service, in particular, a bus transport service, under the conditions laid down by the competent national authority, such as conditions on the routes to be served, capacity to be made available or the frequency of the service, within the meaning of Article 11.

66 In any event, it follows from Article 3(5) of Directive 2014/24 that, in the case of contract which have as their subject procurement covered by that directive and procurement for the pursuit of an activity which is subject to Directive 2014/25, account must be taken of Articles 5 and 6 of Directive 2014/25. Article 6(2) of Directive 2014/25 provides that a contract intended to cover several activities is to be subject to the rules applicable to the activity for which it is principally intended.

67 It is not apparent from the file submitted to the Court that the assistance services for private school transport, provided for by the contract at issue in the main proceedings, even if they satisfy the conditions laid down in Article 11 of Directive 2014/25, constitute the principal activity for which such a contract was concluded.

68 Second, by virtue of Article 10(3) thereof, Directive 2014/23 does not apply to concessions for public passenger transport services, within the meaning of Regulation No 1370/2007.

69 That said, it is even less apparent from that file that the provision of assistance for private school transport, covered by the contract at issue in the main proceedings, must be regarded as public passenger transport services to which Regulation No 1370/2007 applies.

Directive 2014/24

70 If the component of the contract at issue in the main proceedings, relating to the award of services ancillary to school activities, were to be classified as a ‘public service contract’ within the meaning of Article 2(1)(9) of Directive 2014/24, the following findings would have to be made as a preliminary point.

71 First, it is apparent from the order for reference that the estimated value of such a contract, and therefore of the contract at issue in the main proceedings, as a whole, is well above the thresholds above which, in accordance with Article 4 of Directive 2014/24, public service contracts fall within the scope of that directive.

72 Second, it is necessary to examine, as requested by the referring court, whether the contract at issue in the main proceedings is nevertheless capable of falling outside the scope of that directive, by virtue of Article 12 thereof.

73 In that regard, it should be noted, first, that Article 12(4) of Directive 2014/24 provides that a contract concluded exclusively between two or more contracting authorities is to fall outside the scope of that directive where the conditions laid down in that provision are fulfilled.

74 Without it being necessary to examine whether, in the present case, the semi-public company at issue in the main proceedings could have been regarded as a contracting authority within the meaning of Article 2(1)(1) of Directive 2014/24, it is sufficient to note that, in order for it to be covered by Article 12(4) of that directive, a cooperation agreement cannot have the effect of placing a private undertaking in a position of advantage vis-à-vis its competitors (judgment of 28 May 2020, *Informatikgesellschaft für Softwckare-Enckare*, C-796/18, EU:C:2020:395, paragraph 76). As the Advocate General observed in point 78 of his Opinion, that would necessarily have been the case here, in view of the involvement of private capital in the semi-public company to be formed, with the result that that provision cannot exclude the procedure at issue in the main proceedings from the scope of Directive 2014/24.

75 Second, nor does it appear that the semi-public company at issue in the main proceedings could have satisfied the conditions laid down in Article 12(1) of Directive 2014/24 for it to be regarded as an in-house entity of the city of Rome.

76 In that regard, while it is true that, under that provision, an in-house entity may include forms of direct private capital participation it is also necessary that the latter do not have a controlling or blocking capacity, that they are required by national legislative provisions, in accordance with the Treaties, and that they do not exert a decisive influence on that company, since the contracting authority must, on the contrary, retain such influence.

77 As regards the condition that those forms of participation must be imposed by national legislative provisions, it must be held that the formation of the semi-public company, at issue in the main proceedings, and, consequently, the participation of a private partner in that company's capital, does not appear to stem from a legal obligation imposed on the city of Rome, but from that contracting authority's freedom to choose a public-private partnership procedure in order to manage services ancillary to school activities.

78 Third, it should be noted that Articles 74 to 77 of Directive 2014/24 lay down a simplified regime for the award of public contracts relating to the social and special services listed in Annex XIV to that directive. It is apparent from the answers given to the questions put by the Court that the contract at issue in the main proceedings appears to have had, in part, the object of awarding the services listed in that annex.

79 Under the second subparagraph of Article 3(2) of Directive 2014/24, the rules applicable to that type of mixed public contract are those governing the award of the main subject of the contract in question, that main subject being, in itself, determined on the basis of the highest of the respective values of the services concerned, as estimated.

80 In the light of the answers given to the questions put by the Court, it appears that the estimated value of the services at issue in the main proceedings, capable of falling within Annex XIV to Directive 2014/24, could be lower than the estimated value of the other services forming the subject matter of the contract at issue in the main proceedings. Therefore, it is necessary to start from the premiss that Articles 74 to 77 of that directive are not applicable in the present case, which is, however, a matter for the referring court to determine.

81 In the light of those observations, it is necessary to determine whether the general rules for the award of public contracts, as laid down in Directive 2014/24, preclude an economic operator from being excluded from the procedure for the award of a mixed contract, such as that at issue in the main proceedings, on the ground that, after having taken into account its indirect participation in that economic operator, the contracting authority considered that its contribution to the semi-public company to be formed, in practice, would go beyond what was provided for in the tender documents if it selected that economic operator as its partner.

82 In the first place, it should be noted that, in the context of a mixed contract such as that at issue in the main proceedings, a public service contract is awarded without that contract having been the subject, as such, of an award procedure in accordance with the requirements of Directive 2014/24.

83 That said, those requirements must be regarded as having been complied with when such a public contract is awarded where the economic operator with which the contracting authority is required to form the semi-public company to which that contract is awarded has been selected in accordance with a procedure which complies with those requirements. It follows that that procedure must make it possible, inter alia, to select the partner of the contracting authority to which the operational activity and the management of the service covered by the public contract is entrusted, in accordance with the principles of equal treatment and non-discrimination, free competition and transparency. The criteria for selecting that partner cannot, therefore, be based solely on the capital provided, but must enable candidates to establish, in addition to their ability to become a shareholder, primarily their technical capacity to provide the services which are the subject of the public contract and the economic and other advantages of their tender. (see, by analogy, judgment of 15 October 2009, *Acoset*, C-196/08, EU:C:2009:628, paragraphs 59 and 60).

84 In the second place, it is apparent from Article 58(1) and (3) of Directive 2014/24 that a contracting authority may use selection criteria which seek, inter alia, to exclude from the award procedure candidates or tenderers which do not offer sufficient guarantees as to their economic and financial

capacity to perform the public contract concerned, provided, first, that those criteria are appropriate for ensuring that a candidate or tenderer has such a capacity and, second, that they are related and proportionate to the subject matter of the contract.

85 In that regard, it should be noted, first, that it is in the very nature of a mixed contract, such as that at issue in the main proceedings, that the contracting authority determines the distribution, between itself and its partner, of the capital of the semi-public company to be formed.

86 It follows that, in the context of its application to such a mixed contract, Article 58(1) and (3) of Directive 2014/24 allows a contracting authority to require economic operators which have expressed an interest in becoming its partner and in assuming responsibility for the actual performance of the service contract awarded to the company thus formed, to demonstrate that they have the economic and financial capacity necessary both for the formation of that company and for the performance of that contract.

87 Second, in so far as the use of a semi-public company can be explained, in particular, by the contracting authority's concern to limit both its investment in that company and the ensuing financial uncertainties which follow from it, that contracting authority must still be allowed to take account of the participation which it holds, albeit indirectly, in the capital of economic operators which have expressed an interest in becoming its partner. Even where it is indirect, such participation exposes, in principle, the contracting authority to additional uncertainty to that which it would have incurred if it had not held, directly or indirectly, any share in the capital of its partner.

88 A contracting authority must therefore be able, in respect of the qualitative selection of the economic operator intended to become its partner, to exclude any candidate in which it holds shares, even indirectly, where that shareholding has the effect of in practice infringing the allocation of the capital of the semi-capital company between that contracting authority and its shareholder, as determined by the contract documents, and thereby calling into question the economic and financial capacity of its partner to bear, without the involvement of the contracting authority, the obligations arising from the contracting authority's contract.

89 Such a requirement therefore makes it possible to ensure, as required by Article 58(1) of Directive 2014/24, that economic operators have the economic and financial standing necessary to perform the obligations arising from the mixed contract concerned.

90 Furthermore, subject to verification by the referring court, it does not appear to go beyond what is necessary to guarantee the objective pursued by the contracting authority, which is not to make a financial commitment, even indirectly, in excess of the share in the semi-public company which that contracting authority has demonstrated its intention to purchase in the contract documents. Such a requirement could be regarded as disproportionate only in the event that the applicable national legislation or the relevant contractual provisions exclude the fact that, in the context of the activities of the semi-public company formed by a contracting authority and an economic operator in which that contracting authority owns, directly or indirectly, part of the capital, that contracting authority may be exposed to additional economic risk, even an indirect economic risk, on account of such a participation in the capital of its partner.

91 In the third place, it must be added that the principles of equal treatment, referred to in paragraph 83 of this judgment, also require that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract documents, so that, first, all reasonably well-informed candidates and tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenderers' profile and bids submitted satisfy the criteria applying to the contract in question (see, to that effect, judgments of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 63, and of 17 June 2021, *Simonsen & Weel*, C-23/20, EU:C:2021:490, paragraph 61).

92 It is therefore for the referring court to ascertain whether, in the present case, it could be clearly, precisely and unequivocally inferred from the contract documents that the indirect participations of the

city of Rome in the capital of economic operators who had applied to become its partner would be taken into account in order to determine whether they had sufficient economic and financial capacity.

93 It follows from all the foregoing considerations that Article 58 of Directive 2014/24 must be interpreted as meaning that a contracting authority may exclude an economic operator from the procedure seeking, first, to form a semi-public company and, second, to award that company a service contract, where that exclusion is justified by the fact that, on the basis of the indirect participation of that contracting authority in that economic operator, the maximum participation of that contracting authority in that company, as determined in the call-for-tenders documents would be, in practice, exceeded if that contracting authority selected that economic operator as its partner, in so far as that excess participation serves to increase the financial uncertainty borne by that contracting authority.

Directive 2014/23

94 In the event that the component of the contract at issue in the main proceedings relating to the award of services ancillary to school activities should be classified as a ‘services concession’ within the meaning of Article 5(1)(b) of Directive 2014/23, it should be noted, in the first place, that the estimated value of that component, and therefore of the contract at issue in the main proceedings, in its entirety, far exceeds the threshold above which, under Article 8, that directive is applicable.

95 In the second place, for reasons similar to those set out in paragraphs 73 to 77 above, Article 17(1) and (4) of that directive does not appear to be applicable to the procedure at issue in the main proceedings.

96 In the third place, for reasons similar to those set out in paragraphs 78 to 80 above, it is appropriate to start from the premiss, which it is, however, for the referring court to ascertain, according to which, under the second subparagraph of Article 20(1) of Directive 2014/23, the services concession at issue in the main proceedings is not subject to the simplified procurement regime laid down in Article 19 of that directive, since the estimated value of the services at issue in the main proceedings, which may fall within the scope of Annex IV to that directive, does not appear to be greater than the value of the other services covered by the concession.

97 In the fourth place, for reasons similar to those set out in paragraphs 82 to 93 of the present judgment, it must be held that Article 38 of Directive 2014/23 permits a contracting authority to take account of any indirect participation in the capital of economic operators which have expressed an interest in becoming its partner in order to determine whether the formation of the semi-public company with such operators would not, in practice, prevent it from complying with the limit on its participation in that company which it imposed itself. Article 38 also permits it, in principle, to exclude from the procedure for the award of a services concession any economic operator which, because the contracting authority owns, albeit indirectly, part of its capital, cannot be a partner of that contracting authority without in practice breaching the maximum participation in that semi-public company which the contracting authority itself determined.

98 It follows from all the foregoing considerations that Article 38 of Directive 2014/23 must be interpreted as meaning that a contracting authority may exclude an economic operator from the procedure seeking, first, to form a semi-public company and, second, to award that company a services concession, where that exclusion is justified by the fact that, on the basis of the indirect participation of that contracting authority in that economic operator, the maximum participation of that contracting authority in that company, as determined in the call-for-tenders documents would be, in practice, exceeded if that contracting authority selected that economic operator as its partner, in so far as that excess participation serves to increase the financial uncertainty borne by that contracting authority.

Costs

99 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 58 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 must be interpreted as meaning that a contracting authority may exclude an economic operator from the procedure seeking, first, to form a semi-public company and, second, to award that company a service contract, where that exclusion is justified by the fact that, on the basis of the indirect participation of that contracting authority in that economic operator, the maximum participation of that contracting authority in that company, as determined in the call-for-tenders documents would be, in practice, exceeded if that contracting authority selected that economic operator as its partner, in so far as the excess participation serves to increase the financial uncertainty borne by that contracting authority.**

2. **Article 38 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, as amended by Commission Delegated Regulation (EU) 2017/2366 of 18 December 2017 must be interpreted as meaning that a contracting authority may exclude an economic operator from the procedure seeking, first, to form a semi-public company and, second, to award that company a services concession, where that exclusion is justified by the fact that, on the basis of the indirect participation of that contracting authority in that economic operator, the maximum participation of that contracting authority in that company, as determined in the call-for-tenders documents would be, in practice, exceeded if that contracting authority selected that economic operator as its partner, in so far as that excess participation serves to increase the financial uncertainty borne by that contracting authority.**

[Signatures]

---

* Language of the case: Italian.

EU:C:2022:135

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 24 February 2022 (1)

Case C-332/20

Roma Multiservizi SpA,
Rekeep SpA
v
Roma Capitale,
Autorità Garante della Concorrenza e del Mercato

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Public procurement – Concession contracts – Award of the management of an integrated school service to a semi-public company – Appointment of the private partner under a tender procedure – Requirement that the private partner holds a participation of at least 30% in the capital of the semi-public company – Indirect participation by the contracting authority in the capital of the private partner)

I. Introduction

1. This reference for a preliminary ruling provides the Court with the opportunity to clarify its case-law on how EU law views institutionalised public-private partnerships (IPPPs), which are sometimes used by contracting authorities in place of 'traditional' public procurement or concession contracts.

2. Although there are no binding provisions of EU law that expressly govern IPPPs, (2) an IPPP is however defined by the European Commission as a form of cooperation between public and private partners who establish a mixed-capital entity that performs public contracts or concessions (3) and has been the subject of case-law of the Court. The Court has taken the view, inter alia, that EU law does not, as a rule, preclude the use of a procedure in the context of an IPPP by which, first, a private partner is selected and, second, a contract or a concession is awarded to a public-private entity to be formed. (4)

3. The lack of provisions of EU law governing IPPPs appears to lie at the heart of the difficulties raised by this reference for a preliminary ruling, difficulties which are reflected in the structure and the content of this Opinion. From the perspective of EU law, the legal issue raised in the present case is neither clearly defined nor specifically contextualised.

4. Detailed analysis of this reference for a preliminary has led me to conclude that the questions submitted by the referring court concern whether the way in which the contracting authority calculated

the private participation in the capital entity to be formed and subsequently excluded a tenderer from the tender procedure, is compatible with Directive 2014/23/EU (5) and/or Directive 2014/24/EU. (6)

II. Legal context

A. European Union law

1. Directive 2014/23

5. Article 3 of Directive 2014/23 provides:

‘1. Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

2. Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28.’

6. Article 30(1) and (2) of that directive states:

‘1. The contracting authority or contracting entity shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with this Directive.

2. The design of the concession award procedure shall respect the principles laid down in Article 3. In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.’

7. Article 38(1) of the Directive provides:

‘Contracting authorities and contracting entities shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of the candidates or tenderers, on the basis of self-declarations, reference or references to be submitted as proof in accordance with the requirements specified in the concession notice that shall be non-discriminatory and proportionate to the subject matter of the concession. The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject matter of the concession and the purpose of ensuring genuine competition.’

2. Directive 2014/24

8. Article 18(1) of Directive 2014/24 provides:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

9. Article 58(1) of that directive states:

‘Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.'

B. Italian law

10. In Italian law, the rules on mixed companies are governed by decreto legislativo n. 175 – Testo unico in materia di società a partecipazione pubblica (Legislative Decree No 175 – Consolidated text on publicly owned companies) of 19 August 2016, (7) in the version thereof applicable to the disputes in the main proceedings ('Legislative Decree No 175').

11. According to Article 1 of Legislative Decree No 175, the purpose of that decree is to ensure that public participations are managed effectively, to protect and promote competition and the market, and to streamline and reduce public expenditure. The decree provides that public authorities may, for the purpose of managing the relevant activities set out in its Article 4, choose between in-house management, via a company in which it holds 100% of the capital, and forming a semi-public company, and lays down detailed rules governing that second option so that it is compatible with EU law.

12. With regard to that second option, Article 17(1) of Legislative Decree No 175 states:

'In public-private mixed companies, the percentage participation of the private partner may not be less than 30%, and that partner must be selected via a public procurement procedure in accordance with Article 5(9) of Legislative Decree No 50 of 2016 [(8)] which covers both the subscription or the acquisition of the participation by the private partner and the award of the contract or concession forming the sole object of the activities of the mixed company.'

III. Facts of the case in the main proceedings

13. In the course of 2018, the city of Rome launched a call for tenders with a dual purpose: first, to select a private partner with whom it would form a public-private mixed company ('the mixed company to be formed') and, second, to award to that company the integrated school service, representing an estimated EUR 277 479 616.21, for which the city of Rome has responsibility. According to the tender documents, the city of Rome was to hold 51% of the shares in the company with the remaining 49% to be acquired by the private partner, who was required to bear the operational risk in its entirety.

14. A bid was submitted by a consortium of the companies Roma Multiservizi SpA and Rekeep SpA.

15. By Decision No 435 of 1 March 2019 ('the exclusion decision'), that consortium was excluded from the ongoing procedure because 51% of Roma Multiservizi was owned by the company AMA SpA, the capital of which was wholly owned by the city of Rome, and accepting the consortium's bid would mean that the city of Rome would in fact effectively hold a 73.5% participation in the mixed company to be formed, (9) thus exceeding the 51% ceiling set in the tender documents.

16. Rekeep and Roma Multiservizi challenged that decision before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), which dismissed their actions by two judgments delivered on 18 June 2019.

17. Rekeep and Roma Multiservizi appealed against those two judgments before the referring court.

18. It is apparent from those parties' observations that, whilst their appeals were being examined, the city of Rome awarded the contract to perform the service at issue, on completion of a negotiated procedure, to CNS.

IV. The procedure before the Court and the questions referred for a preliminary ruling

19. It is in those circumstances that the Consiglio di Stato (Council of State, Italy), by decision of 13 February 2020, received at the Court on 22 July 2020, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) For the purposes of determining the minimum limit of 30% participation by the private partner in a future semi-public company – the limit deemed appropriate by the Italian legislature in implementation of the principles [of EU law] set in relation to European case-law – is it compatible with [EU] law and the correct interpretation of recitals 14 and 32 and Articles 12 and 18 of Directive [2014/24] and of Article 30 of Directive [2014/23], with reference also to Article 107 TFEU, for consideration to be given solely to the legal form/on-paper composition of that partner or may – or in fact must – the authority launching the tender also consider its own indirect participation in the private partner submitting a bid?

(2) If the answer to the above question is in the affirmative, is it consistent and in line with the principles of EU law, and in particular with the principles of fair competition, proportionality and appropriateness, for the authority launching the tender to be able to exclude from the tender a private partner submitting a bid, where the effective participation of that private partner in the future semi-public company is in fact less than 30%, on account of the direct or indirect public participation identified?'

20. Written observations were submitted by the parties to the main proceedings, CNS and the Commission. No hearing was held.

V. Analysis

A. The subject matter of the questions referred

21. It is clear from reading the request for a preliminary ruling that, in the light of the circumstances of the case in the main proceedings, the referring court is considering two requirements concerning the public participation and the private participation in the mixed company to be formed.

22. The first requirement concerns the 30% minimum participation threshold to be satisfied by the private partner in order to hold a capital stake in a mixed capital entity to be formed, in accordance with Article 17(1) of Legislative Decree No 175. That minimum private participation threshold is the logical corollary of a 70% maximum public participation threshold.

23. The second requirement is that set, in the present case, by the contracting authority itself in the call for tenders, namely the 49% participation of the private partner and the 51% participation of the contracting authority.

24. The two questions referred for a preliminary ruling, as formulated by the referring court, refer only to the 30% minimum participation threshold to be satisfied by the private partner in order to hold a capital stake in a mixed company. I must point out, in that context, that the referring court does not ask the Court about the validity of that threshold in the light of EU law. The wording of the questions suggests that, by those questions, the referring court is seeking to ascertain whether EU law precludes, for the purpose of determining such a 30% minimum participation threshold, account from being taken of the contracting authority's indirect participation in the share capital of that private partner.

25. However, the grounds stated for the request for a preliminary ruling are not as unequivocal vis-à-vis the subject matter of the questions referred.

26. First, in line with the wording of the questions referred for a preliminary ruling, the referring court states that, in order to decide the case in the main proceedings, ‘it is necessary to establish whether, for the purposes of ensuring the correct thresholds for participation in the mixed company [to be formed] (no more than 70% public participation, no less than 30% private participation), reference should be made only to the legal nature of the private partner or, where that private partner has public participation, whether consideration should also be given to that public participation’.

27. Second, the referring court also states that the lawfulness of the limits on public participation (51%) and on private participation (49%) has not been challenged in the dispute in the main proceedings. Accordingly, it takes the view that ‘[that] dispute concerns the lawfulness of the decision by a contracting authority which, for the purposes of examining compliance with the 51% ceiling of its participation in the new company that was to be formed, considered that account also had to be taken of that authority’s [indirect participation in that company]’.

28. In the light of the ambiguity of the subject matter of the questions referred for a preliminary ruling, I am bound to note, in the first place, that the referring court states that the *lex specialis* of the call for tenders, the provisions of which are ‘effective’ in the case in the main proceedings, specifies the exact public and private participation, respectively 51% and 49%. (10) It therefore appears that, in the dispute in the main proceedings, which concerns the exclusion decision, the referring court is asking primarily about the public and private participation requirements laid down in the tender documents.

29. In the second place, when asked whether the exclusion decision was formally justified by an infringement of Article 17(1) of Legislative Decree No 175 or by the failure to comply with the capital distribution requirement laid down in the tender documents, most of the parties favoured that second scenario.

30. Roma Multiservizi gave a categorical response, stating that the exclusion decision invokes the alleged non-compliance with the distribution of share capital as set out in the tender documents.

31. The city of Rome initially stated that the bid submitted by the consortium concerned by the exclusion decision includes two irregularities relating to the two requirements concerning the public and private participation. However, it subsequently reproduced the grounds for that consortium’s exclusion, from which it is apparent that its exclusion is based on the finding that ‘the share of risk capital in the [mixed company to be formed] attributable to private investment is below 49% and manifestly fails to comply with the conditions set out in the tender documents and in the acts approved by the city council’.

32. In line with the city of Rome’s response, Rekeep stated that the reasoning in the exclusion decision refers only to the failure to comply with the capital shares specified in the tender documents, adding that Legislative Decree No 175 is mentioned in the preliminary considerations of that decision.

33. The Commission’s response appears implicitly to argue along the same lines. In its view, it is clear that the setting of the private participation at 49% – and the exclusion that follows as a result – is based solely on the limit laid down in Article 17 of Legislative Decree No 175. I infer from that fact that, in the Commission’s opinion, the exclusion *follows* directly from the failure to comply with the 49% private participation requirement laid down in the tender documents.

34. Only CNS is of the view that the exclusion decision is based both on the infringement of Article 17(1) of Legislative Decree No 175 and on non-compliance with the capital distribution requirement set out in the tender documents. However, the passages of that decision reproduced by CNS concern only the public and private participation requirements laid down in the call for tenders.

35. In the light of those clarifications, it should be concluded that, by its first question referred for a preliminary ruling, the referring court is seeking to ascertain whether, for the purpose of determining the private participation percentage in the mixed company to be formed, EU law precludes account from being taken of the contracting authority’s indirect participation in the share capital of a private partner submitting a bid.

36. Therefore, the second question referred for a preliminary ruling should be understood as meaning that the referring court is seeking to ascertain whether EU law precludes a contracting authority from excluding from the call for tenders a private partner submitting a bid whose effective participation in the mixed-capital entity to be formed does not comply with the requirement relating to the minimum private participation threshold set in the tender documents.

37. I must make a few additional comments regarding the questions referred for a preliminary ruling as thus reworded.

38. First of all, the original wording of the first question implies that the referring court is seeking to determine whether EU law precludes a contracting authority from taking into account not any public participation in the capital of the private partner submitting a bid, but rather only 'its own participation' in the capital of that partner ('may – or in fact must – the authority launching the tender consider its own indirect participation in the private partner submitting a bid?'). Several passages of the request for a preliminary ruling support such an interpretation not only of the public and private participation requirements laid down in the call for tenders (11) but also, even more importantly for the case in the main proceedings, of the exclusion decision. (12)

39. Next, by the first question referred for a preliminary ruling, as it is worded, the referring court asks whether account 'may – or in fact must –' be taken of such an indirect participation. However, it is established that, in the case in the main proceedings, the contracting authority did take account of its indirect participation. In order to review the exclusion decision, it is simply necessary to determine whether EU law precludes account from being taken of indirect participation.

40. Furthermore, the referring court states that the second question referred for a preliminary ruling arises if the first question is answered in the affirmative. However, as it was originally worded, the first question contains two alternatives ('[the provisions of EU law] preclude … consideration being given solely to the [direct participation] or [the contracting authority] may – or in fact must – consider [the indirect participation] in the private partner submitting a bid?'). In any case, the view should be taken that the second question is raised if the first question is answered to the effect that EU law does not preclude account from being taken of the contracting authority's indirect participation in the private partner submitting a bid.

41. Finally, in order for useful answers to be provided to the referring court, it is necessary to identify the regime applicable in the case in the main proceedings and the provisions of that regime requiring interpretation in order to settle the dispute before that court. Not all the provisions mentioned by the referring court in its reference for a preliminary ruling appear relevant. For that reason, some of the parties question the admissibility of the questions referred for a preliminary ruling.

B. Admissibility of the questions referred for a preliminary ruling and the applicable regime

42. In its first question, the referring court mentions several provisions of EU law without explicitly stating exactly why it was prompted to ask about their interpretation. As for the second question, it merely mentions the legal principles, in particular the principles of fair competition, proportionality and appropriateness, without mentioning any provision of EU law.

43. In that regard, the Commission takes the view that the first question referred for a preliminary ruling is inadmissible in so far as it concerns Article 107 TFEU, whereas CNS calls into question the admissibility of the request for a preliminary ruling in its entirety. (13) I will examine those pleas of inadmissibility as part of my analysis of the request for a preliminary ruling, the goal of which is to identify the provisions of EU law relevant to the present case.

1. Directives 2014/23 and 2014/24

44. The first question referred for a preliminary ruling, as worded by the referring court, makes reference to both Directive 2014/23 and Directive 2014/24. Those directives lay down, respectively, the rules applicable to the procedures for the award of concession contracts and those applicable to public procurement procedures.

45. In order to identify the directive applicable here, consideration must be given to the subject matter of the call for tenders and the contract that the contracting authority sought to conclude after the launch of that call for tenders.

46. The call for tenders at issue in the main proceedings has a dual purpose, meaning that the contract to be concluded can be regarded as consisting of two aspects: the first relates to the selection of a private partner for the mixed company to be formed, the second concerns the award to that company of the integrated school service.

47. Can the first aspect affect the applicability of Directive 2014/23 or Directive 2014/24 vis-à-vis the two aspects of the contract at issue in the main proceedings? Case-law contains useful guidance in answering that question.

(a) Relevant case-law

48. In the case that gave rise to the judgment in *Club Hotel Loutraki and Others*, (14) the Court was faced with a similar question. The reference for a preliminary ruling concerned a contract consisting of three agreements: one relating to the sale of 49% of the shares in a public undertaking with a view to its privatisation, one under which the transferee would take over the management of the casino business in return for payment, and one pursuant to which that transferee would undertake to implement a plan to refurbish the casino premises.

49. In order to settle that question, the Court, after confirming that the referring court had been right to classify the contract as a 'mixed contract', (15) examined whether the contract at issue constituted an indivisible whole and whether it fell, as a whole, because of its main object, within the scope of one of the directives at issue. (16) In so doing, the Court referred to case-law under which, 'in the case of a mixed contract, the different aspects of which are … inseparably linked and thus form an indivisible whole, the transaction at issue must be examined as a whole for the purposes of its legal classification and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract'. (17)

50. With regard to that case-law, the Court stated, first, that the contract in question was a mixed contract that constituted an indivisible whole, since that contract had to be concluded with a single partner with both the financial standing necessary to purchase the shares at issue and professional experience in operating a casino. Second, the Court took the view that the transfer of 49% of the shares of a public undertaking constituted the main object of the contract at issue. (18) That finding arose from the fact that the transfer of the shares in fact constituted a privatisation and had effects for an unlimited time, allowing the transferee to obtain, as a shareholder, significantly greater income than the remuneration that was payable to it as the service provider. (19)

51. In the judgment in *Mehiläinen and Terveystalo Healthcare,* (20) *the Court examined, on the basis of the same case-law,* (21) an arrangement by which the contracting authority concluded with a private entity separate from it a contract establishing a joint venture, in the form of a limited company, from which that contracting authority committed, when setting up that company, to purchase occupational health and welfare services for its own staff for a transitional period of four years.

52. In the judgment in *Healthcare*, as in the judgment in *Club Hotel Loutraki and Others*, the Court found that the arrangement in question constituted a mixed contract. However, the Court took the view that the aspects of that arrangement were not inseparable, since there was no objective need to conclude the mixed contract with a single partner. In particular, in the Court's view, the divisible nature of the aspect related to the services from the remainder of the mixed contract was supported by the fact, first, that the contracting authority had expressed its intentions to launch a call for tenders for the purchase of such services at the end of the transitional period and, second, that a joint venture had indeed been established and had operated without the aspect related to the services. (22)

53. In the judgment in *Acoset*, the Court, when asked about a direct award of a local public service for the integrated management of water to a semi-public company, did not even raise the question of whether the contract at issue constituted a mixed contract, the different aspects of which were inseparably linked and thus formed an indivisible whole. In determining whether that award fell within

the scope of one of the directives at issue, the Court focussed on the local public service for the integrated management of water and on the works connected with the management of that service.

54. However, the judgment in *Acoset* cannot be interpreted as meaning that, in the case of a contract consisting of several aspects, one of which concerns the formation of a semi-public company, that aspect should be disregarded and consideration given to the other aspects only. Such an interpretation would run counter to the case-law established after that judgment, which is cited in the preceding points of this Opinion.

55. The judgment in Acoset should therefore be understood to mean that the Court implicitly found, in the first place, that the contract in question was a mixed contract, the aspects of which formed an indivisible whole, and, in the second place, that the aspect related to the local public service constituted the main object of that contract.

56. It follows from the foregoing that the contract concluded as part of a procedure launched by a contracting authority for the selection of a private partner for a semi-public company and the award of a contract or a concession to that company is a mixed contract consisting of two aspects. (23) In addition, as far as concerns such a mixed contract, it is necessary, first, to determine whether the different aspects of the contract are indivisibly (inseparably) linked and form an indivisible whole; second, to identify the main object or predominant feature of that contract; and, third, to determine the rules applicable to the contract in the light of that main object or predominant feature. (24)

(b) Application

(1) Mixed contract: indivisible aspects?

57. It is my view that the two aspects of the contract at issue in the main proceedings are indivisible, as in the cases that gave rise to the judgments in *Club Hotel Loutraki and Others* and *Acoset*.

58. In order to guarantee the provision of the integrated school service by a semi-public company composed of the contracting authority and a private partner, it is objectively necessary to select a partner with the financial capacity necessary to purchase 49% of the capital of the mixed company to be formed and who satisfies other conditions which enable it, in the form of a semi-public company, to take on the integrated school service and bear the operational risk in its entirety. The two aspects of the contract must therefore concern the same partner, even though, technically, the first aspect concerns the selection of a private partner and the second the award of the integrated school service to a semi-public company in which that partner holds 49% of the shares. (25)

59. Furthermore, unlike the case that gave rise to the judgment in *Healthcare*, (26) in which the circumstances connected with the aspect related to the services were quite specific, there are no grounds for taking the view that, in the present case, the aspect related to the formation of a semi-public company is divisible from that related to the integrated school service. Without the latter aspect, the mixed company to be formed would objectively be deprived of its economic rationale. In Italian law, pursuant to Article 17(1) of Legislative Decree No 175, the contract or concession constitutes the sole object of the activities of the semi-public company.

60. It is now necessary to determine whether the aspect that constitutes the main object of the contract at issue in the main proceedings is that related to the formation of a semi-public company or that related to the integrated school service.

(2) Main object of the contract

61. I am of the view that the aspect related to the integrated school service is the main object of the mixed contract at issue in the main proceedings.

62. The mixed company to be formed was just one way of ensuring that the integrated school service is provided by an IPPP and was by no means the purpose of the call for tenders. Unlike the case that gave rise to the judgment in *Club Hotel Loutraki and Others*, the present case is concerned not

with a purchase of shares in a pre-existing public undertaking with a view to its privatisation but rather the formation of a mixed company with a view to providing an integrated school service.

63. In addition, in that case, the holding of shares in the pre-existing public undertaking constituted in itself a significant source of income. There is nothing to support the view that that is the case here. It cannot therefore be concluded, on the basis of the judgment in *Club Hotel Loutraki and Others*, that, in the present case, the formation of the mixed company is the main object of the contract at issue in the main proceedings.

64. Accordingly, the question of which directive applies in the case in the main proceedings must be examined in the light of the aspect related to the integrated school service.

(3) Public service contracts or services concessions?

65. The information contained in the request for a preliminary ruling concerning the aspect related to the integrated school service is incomplete.

66. It is true that the parties' replies to the written questions put by the Court do contain some clarifications as to the range of services that make up the aspect related to the integrated school service. (27) However, it is not possible on the basis of those clarifications to classify irrefutably, in the context of this Opinion, that aspect as falling within the scope of a 'public service contract' or a 'services concession'.

67. In any case, such classification is a matter falling within the jurisdiction of the national court alone. (28) The Court may, where appropriate, provide clarifications intended to guide that national court in carrying out that classification.

68. In that regard, I would point out, in the first place, that public service contracts, within the meaning of Directive 2014/24, involve consideration which is paid directly by the contracting authority to the service provider. (29) By contrast, a services concession, within the meaning of Directive 2014/23, consists in the act of entrusting the provision and the management of services, the consideration of which consists either solely in the right to exploit the services in question or in that right together with payment. (30) In that same vein, the Court has recognised the existence of a services concession, inter alia, in cases in which the service provider's remuneration came from payments made by users of a service. (31) Accordingly, the fact that, as the referring court states, a semi-public company under Italian law in fact carries on activities in return for remuneration and which generate profits (even if those profits are, according to that court, modest) may be an indication that Directive 2014/23 should be applied.

69. In the second place, while the method of remuneration is one of the determining factors for the classification of a services concession, the services concession implies that the service supplier takes the risk of operating the services in question. (32) The distinguishing feature related to the transfer of such a risk was codified in Directive 2014/23. (33) The Italian language version of that directive describes that feature using the term 'rischio operativo' (operating risk). The same term is used in the decision by which the city of Rome launched a call for tenders so as to make clear that the tenderer selected would be required to bear such a risk in its entirety. (34)

70. In the third place, in order to be able to answer the questions referred for a preliminary ruling, the Court may, on the basis of the information provided to it, proceed on the assumption that a contract falls within the scope of one of the directives at issue. (35) However, in the absence of information on the basis of which the rules applicable in the present case can be determined, such an approach appears inconceivable to me in the present case. More significantly, I, like the Commission, take the view that the application of the rules laid down in one or the other of those directives need not necessarily affect the answers that should be given to the questions referred for a preliminary ruling in the present case. After all, the rules applicable to the aspect related to the integrated school service will be applicable to the aspect related to the selection of a private partner only 'by extension'. Since the questions concern the latter aspect only, my sole focus, in that regard, will be the application of the general principles under those rules, which are common to those two aspects. Therefore, whilst observing the division of

jurisdiction between the national courts and the Court of Justice, I will refer in this Opinion to both Directive 2014/23 and Directive 2014/24. (36)

2. The rules governing public contracts awarded between entities within the public sector

71. In the first question referred for a preliminary ruling, the referring court mentions Article 12 and recitals 14 and 32 of Directive 2014/24 and reproduces, in the request for a preliminary ruling, the first subparagraph of Article 12(1) thereof. However, that court provides no explanation as to the reasons that led it to ask about the interpretation of the latter provision.

72. In that regard, in the first place, recital 14 of Directive 2014/24 states merely that the concept of 'economic operators' should be interpreted in a broad manner, thus confirming that a semi-public company can fall within the scope of that concept. The remainder of that recital reproduces, in essence, the definition of the concept contained in Article 2(1)(10) thereof. The latter provision was not invoked by the referring court in its question referred for a preliminary ruling.

73. In the second place, Article 12(1) of Directive 2014/24 provides that public contracts awarded to controlled legal persons by contracting authorities should not be subject to the application of the procedures provided for in that directive. That provision governs vertical cooperation between the relevant entities or a traditional in-house award.

74. However, the referring court clearly states that, in Italian law, the formation of a semi-public company, such as that at issue in the case in the main proceedings, constitutes an alternative to in-house management. (37)

75. Even more significantly, application of the exclusion provided for in Article 12(1) of Directive 2014/24 in the context of the award of services to an IPPP appears to me to be a priori precluded. As is stated in the third paragraph of recital 31 of that directive, care should be taken that any public-public cooperation thus excluded does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors. Furthermore, in line with the case-law pre-dating Directive 2014/24, (38) recital 32 of that directive clarifies that the exclusion provided for in Article 12(1) of the Directive 'should not extend to situations where there is direct participation by a private economic operator in the capital of the controlled legal person since, in such circumstances, the award of a public contract without a competitive procedure would provide the private economic operator with a capital participation in the controlled legal person an undue advantage over its competitors'.

76. In the third place, it is even open to consideration whether the mixed contract at issue in the main proceedings is excluded from the scope of Directive 2014/24 under Article 12(4) thereof. That provision concerns contracts concluded exclusively between a number of contracting authorities, where those contracts establish or implement cooperation between those contracting authorities.

77. It may be argued that the city of Rome, as the contracting authority, wanted to establish cooperation with a future semi-public company, which was also to provide the integrated school service and 51% of the shares in which would be held by the city of Rome. That company would therefore constitute a 'body governed by public law' for the purposes of Article 2(1)(4) of Directive 2014/24 and, accordingly, could constitute a 'contracting authority' for the purposes of Article 2(1)(1) of that directive.

78. However, even assuming that the conditions for application of the exclusion provided for in Article 12(4) of Directive 2014/24 are met in such a situation, the Court has held, in the judgment in *Informatikgesellschaft für Software-Entwicklung,* (39) that that provision means that cooperation between contracting authorities must not have the effect, in accordance with the principle of equal treatment, of placing a private undertaking in a position of advantage vis-à-vis its competitors. It follows from that fact, as Advocate General Campos Sánchez-Bordona observed in his Opinion in that case, (40) that cooperation between public authorities which places a private operator in a position of advantage vis-à-vis its competitors on the market cannot be covered by Article 12(4) of Directive 2014/24. In the light of those clarifications, and in view of the involvement of private capital in the

mixed company to be formed, it is my view that the cooperation at issue in the present case cannot come under the exclusion laid down in that provision.

79. There is therefore no need to interpret Article 12 of Directive 2014/24 in order to be able to answer the questions referred for a preliminary ruling.

3. The procurement regime for social and other specific services

80. Article 74 of Directive 2014/24 provides that public contracts for social and other specific services listed in Annex XIV to that directive are to be awarded in accordance with Chapter I of Title III of the Directive. With the exception of CNS, all the parties stated in their replies to the Court's written questions that, at the very least, one of the services making up the integrated school service falls within or may fall within the scope of that annex.

81. It will be for the referring court to assess whether that is the case. If so, the procurement procedure would simply have to comply with the more flexible rules laid down in Directive 2014/24 for the award of that type of contract. I will therefore merely put forward some additional considerations that may prove useful to that court.

82. First, it is true that Chapter I of Title III of Directive 2014/24 does establish a particular procurement regime for social and other specific services. Such contracts therefore fall outside the rules that make up the standard regime. However, Article 76(1) of that directive provides that Member States are to put in place national rules for the award of contracts subject to that chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Those principles are a priori the same principles as those referred to in Article 18 of the Directive. I cannot therefore rule out that the application of Chapter I of Title III of Directive 2014/24 in the case in the main proceedings will not affect the answers that should be given to the questions referred for a preliminary ruling. (41)

83. Second, before concluding that the rules in Chapter I of Title III of Directive 2014/24 apply to the contract at issue in the main proceedings, the estimated values of the services covered by that chapter must also be compared with those of the services covered by the standard regime under that directive, and then, on the basis of those values, the main object of the contract must be established. (42)

84. In the absence of information to support the conclusion that the services covered by Chapter I of Title III of Directive 2014/24 must be regarded as the main object of the contract at issue in the main proceedings and in view of the fact that the referring court makes no reference whatsoever to the provisions of that chapter, I am working on the assumption that the more flexible rules do not apply in the present case.

4. Article 107 TFEU

85. The first question referred for a preliminary ruling mentions Article 107 TFEU. The Commission argues that the request for a preliminary ruling is inadmissible in so far as it concerns the interpretation of that provision of primary law.

86. I agree with the Commission. The request for a preliminary ruling does not identify clearly the measure which, in the case at issue in the main proceedings, constitutes State aid. Nor does the referring court clarify the reasons why the interpretation of that provision is necessary for the resolution of the dispute pending before it.

87. The request for a preliminary ruling may, it is true, be understood to the effect that the referring court is asking the Court to interpret not one of the provisions of primary law but rather Directives 2014/23 and 2014/24 in the light of that law ('with reference … to Article 107 TFEU'). Nevertheless, such a reading of the request for a preliminary ruling would not alter the fact that, in any case, there is no need to answer the questions referred for a preliminary ruling in so far as they concern Article 107 TFEU.

88. In those circumstances, the plea of inadmissibility raised by CNS must also be accepted in so far as it concerns the first question referred for a preliminary ruling and both Article 107 TFEU and, for the reasons set out in points 71 to 79 of this Opinion, Article 12 of Directive 2014/24.

C. Substance

89. Besides the provisions of EU law deemed irrelevant to the present case, the first question referred for a preliminary ruling mentions Article 30 of Directive 2014/23 and Article 18 of Directive 2014/24. In order to be able to identify all the relevant provisions of those directives, the requirements related to the public and private participation laid down in the tender documents must first be put in context.

1. The requirements related to the public and private participation in the context of Directives 2014/23 and 2014/24

90. In Article 56 of Directive 2014/24, the EU legislature expressly distinguishes two types of criteria, namely criteria for qualitative selection, which essentially consist of exclusion grounds and selection criteria intended to assess the ability of economic operators to perform the contract awarded (Articles 57 and 58 of that directive), and the contract award criteria, which refer to the tenders themselves. Articles 38 and 41 of Directive 2014/23, which concern, respectively, criteria relating to the selection and qualitative assessment of candidates and award criteria, make a similar distinction.

91. In that connection, it must be stated that the request for a preliminary ruling does not clearly set out the rationale behind the requirements related to the public and private participation laid down in the tender documents. Since those requirements constitute *lex specialis* as compared with those laid down in Legislative Decree No 175, (43) that rationale may however be inferred from the clarifications related to that legislative decree. The tender documents appear to qualify the percentages and their nature (they are specific requirements rather than maximum and minimum thresholds), without however substantially affecting their objectives.

92. In that regard, I understand the clarifications provided by the referring court to mean that the 70% ceiling of public participation in the mixed company to be formed is intended to guarantee that the private participation in that company is not below 30%.

93. Therefore, on the one hand, from the general perspective of the market and of economic operators, a private partner would not be able to limit excessively (below 30%) the economic risk of its participation in a semi-public company and benefit unduly from the advantages of the public participation, by ensuring that other entities are prevented from enjoying profitable access to the same economic activity on the market segment concerned. Viewed thus, as the referring court points out, the aim of that ceiling is to prevent circumvention of the principle of free competition.

94. On the other hand, from the point of view of the subject matter of the tender procedure and of the contracting authority, that ceiling guarantees that the private partner is an operational partner whose contribution to the performance of the tasks entrusted to the mixed-capital entity to be formed consists in a capital contribution and the provision of the necessary skills to perform those tasks, whilst assuming the operational risk for their performance in its entirety.

95. I must point out that the aspect related to the actual contribution of the private partner appears to be of great importance as far as concerns the case in the main proceedings and the requirements of the public and private participation laid down in the tender documents. In view of the necessarily personalised nature of the conditions and criteria of economic and financial standing and/or technical and professional ability (44) and in line with the judgment in *Acoset*, (45) that observation is an indication that the requirements of the public and private participation laid down in the tender documents constitute qualitative selection criteria.

96. In addition, it is apparent from the request for a preliminary ruling that, given the method of calculation that factors in the indirect participation of the contracting authority in the share capital of that partner, the tenderers were excluded from the procedure launched following the call for tenders because they did not comply with those requirements. In that regard, it is settled case-law that the

qualitative selection criteria enable the contracting authority to restrict the tendering procedure to economic operators whose ability suggests that they will be able to perform the subject matter of the call for tenders. (46)

97. Thus, requirements concerning the public and private participation, such as those at issue in the case in the main proceedings, do not appear to relate to the tenders (contract award criteria). (47) However, they do appear to constitute qualitative selection criteria by which a contracting authority seeks to ensure that a private partner has the economic and financial standing and/or the technical and professional ability to enable it to maintain the division between the public capital and the private capital of the semi-public company, as determined by the contracting authority, via that partner's participation in the capital of that company and its assumption of the operational risk, in its entirety, for the performance of the service by the company. (48) Requirements related to the public and private participation laid down in the tender documents, such as those at issue in the case in the main proceedings, therefore constitute criteria and conditions within the meaning of Article 38(1) of Directive 2014/23 or, as the case may be, within the meaning of Article 58(1) of Directive 2014/24.

2. Reformulation of the questions referred for a preliminary ruling

98. In the light of the clarifications provided relating to the subject matter of the questions referred for a preliminary ruling, (49) the applicable regime in the case in the main proceedings (50) and the classification of the requirements of the public and private participation applicable in that case, (51) I propose to reformulate the questions referred for a preliminary ruling, clearly stating the provisions of EU law which require interpretation for useful answers to be provided to the referring court.

99. More specifically, I propose to take the view that, by its questions, which I intend to examine jointly, the referring court is seeking to ascertain whether Article 30 and Article 38(1) of Directive 2014/23 or, as the case may be, Article 18 and Article 58(1) of Directive 2014/24 are to be interpreted as precluding, for the purpose of determining the percentage participation of a private partner submitting a bid in the semi-public company to be formed, account from being taken of the indirect participation of the contracting authority in the share capital of that private partner submitting a bid, such that that partner is excluded from the call for tenders where, as a result of the account taken of that indirect participation, the private participation percentage sought by the contracting authority in accordance with the tender documents is not met.

3. Assessment

100. As they constitute conditions and criteria concerning economic and financial standing and/or technical and professional ability, the requirements related to the public and private participation laid down in the tender documents must be related and proportionate to the subject matter of the tender procedure. (52) In accordance with Article 30 of Directive 2014/23 and Article 18 of Directive 2014/24, the contracting authority must apply those requirements in accordance with the principles of equal treatment and non-discrimination between tenderers as well as those of transparency and proportionality.

101. In the first place, it is necessary to examine whether there is a link between those requirements and the subject matter of the tender procedure.

102. Following the rationale of the requirements laid down in the tender documents (participation set at 51% for the city of Rome and at 49% for the private partner), a tenderer eligible for selection must be an entity unaffiliated with the contracting authority. A greater participation by the contracting authority in the semi-public company via the control of that tenderer (also arising from an indirect participation) would affect the division between the public capital and the private capital of that company, as determined by the contracting authority. In addition, such a situation could limit the role of the private partner and, as a result, the genuine commitment of the economic and financial standing and/or the technical and professional ability of the tenderer below the 49% threshold set by the contracting authority. Those requirements are therefore related to the subject matter of the tender procedure.

103. Furthermore, since, as a rule, EU law does not preclude the use of a single procedure in the context of an IPPP, (53) the interpretation of the requirement related to the existence of a link between

the qualitative selection criteria and the subject matter of the tender procedure that must be accepted cannot prevent the use of that form of cooperation by contracting authorities (including the setting by the contracting authority of the division between the public capital and private capital of the semi-public company). Use of an IPPP is the result of the Member States' freedom of choice as to how the services are provided by which contracting authorities will meet their own needs. (54)

104. In the second place, as regards the proportionality of the requirements of the public and private participation, I would observe that, at the very least in the light of my reading of the request for a preliminary ruling, those requirements do not systematically exclude any tenderer whose capital is in public hands. (55) However, given the original wording of the first question referred for a preliminary ruling, those requirements appear to cover all forms of indirect participation by the contracting authority in the share capital of the private partner.

105. That being so, a contracting authority's indirect participation in the capital of a private partner can take different forms. In addition, its impact on the functioning of that private partner depends on the latter's organisational structure. It is therefore not certain that any indirect participation in the capital of the private partner restricts the actual commitment of the economic and financial standing and/or technical and professional ability of the tenderer below the 49% threshold, as set by the contracting authority.

106. Accordingly, taking account of any indirect participation of the contracting authority in the share capital of the private partner is inconsistent with the principle of proportionality, in so far as that approach disregards the fact that such an indirect participation does not necessarily restrict the actual commitment of the economic and financial standing and/or technical and professional ability of that tenderer below the 49% threshold, as set by the contracting authority. If checks are not conducted to establish that that is the case, that private partner submitting a bid cannot be automatically excluded from the call for tenders on account of that indirect participation.

107. It is not clear that the contracting authority actually conducted such checks in the present case. However, first of all, the analysis of the capital structure of the entities concerned contained in the exclusion decision may suggest that it did so. Next, it appears that the reference for a preliminary ruling echoes that decision in so far as the referring court states that if, 'account is taken of that substantive aspect, namely the business relationships of [Roma Multiservizi] and in particular the fact that it is 51% owned by [AMA], which is itself wholly owned by the city of Rome, … the [public and private] participation in the mixed company [to be formed] would *in reality* be 73.5% and [26.5%]'. Lastly, there is nothing to suggest that decision-making powers or operational risks have been allocated in proportion to the capital stake held. The fact that the contracting authority holds the majority of the capital of a private partner submitting a bid therefore seems capable of limiting the actual commitment of the economic and financial standing and/or technical and professional ability of that private partner below the 49% threshold, as set by the contracting authority.

108. I am therefore of the view that Article 30 and Article 38(1) of Directive 2014/23 or, as the case may be, Article 18 and Article 58(1) of Directive 2014/24 must be interpreted as meaning that they preclude, for the purposes of determining the percentage participation of a private partner submitting a bid in the mixed public-private company to be formed, account from being taken of any indirect participation of the contracting authority in the share capital of that private partner submitting a bid, such that that partner is automatically excluded from the tender documents, where, as a result of the account taken of that indirect participation, the private participation percentage sought by the contracting authority in accordance with the call for tenders is not met.

109. However, Article 30 and Article 38(1) of Directive 2014/23 or, as the case may be, Article 18 and Article 58(1) of Directive 2014/24 do not preclude account from being taken where it is not automatic. In particular, those provisions do not preclude account from being taken of an indirect participation where it is apparent from checks conducted by the contracting authority that that participation involves the majority of the capital of a private partner submitting a bid being held by another entity which, in turn, is wholly owned by the contracting authority, provided that decision-making powers and risks are allocated in proportion to the capital stake held as far as concerns that private partner submitting a bid and that entity.

110. As regards observance of the principle of proportionality, I note, for the sake of completeness, that the Commission appears to question whether the exclusion of the bid submitted by Rekeep and Roma Multiservizi complies with that principle on the ground that the city of Rome should have allowed them to show, where appropriate, that the indirect participation it holds in the capital of Roma Multiservizi did not entail a risk of conflicts of interest. However, the primary goal of the requirements related to the public-private participation laid down in the tender documents is not to eliminate such risks. In addition, a conflict of interests is a ground for exclusion provided for in Directives 2014/23 and 2014/24 and the request for a preliminary ruling makes no reference whatsoever to that ground. Moreover, that request mentions neither Article 35 of Directive 2014/23 nor Article 24 of Directive 2014/24.

111. In the third place, as regards the principles of transparency and equal treatment, I must point out that, in their written observations, Roma Multiservizi and Rekeep allege that no mention was made in the tender documents that account would be taken of the contracting authority's indirect participation in the capital of a tenderer.

112. The request for a preliminary ruling makes no reference to the failure to mention that fact in the tender documents. In that context, I am bound to note that, in its replies to the written questions put by the Court, the city of Rome states that, under Legislative Decree No 175, which appears to lay down rules for the implementation of Directives 2014/23 and 2014/24, a public undertaking is defined as an undertaking over which the contracting authorities can exercise a dominant influence, whether directly or indirectly. According to Rekeep's observations, that decree also provides that, 'where the provisions in force authorise the formation of mixed companies for the performance and management of public works or for the organisation and management of a service of general interest, the private partner must be selected by means of a procedure for the award of a public contract'. On the basis of an interpretation *a contrario*, it may therefore be stated that, in the context of a semi-public company, a private partner cannot be in a situation where the contracting authority has a direct or indirect dominant influence over it. However, an indirect participation in the capital of a private partner that results in the exercise of a dominant influence cannot be treated in the same way as any indirect participation whatsoever in the capital of that private partner.

113. In any case, the national courts alone have jurisdiction to determine, where appropriate, the merits of those allegations and their relevance at the current stage of the case in the main proceedings.

114. Thus, in so far as the referring court mentions Article 30 of Directive 2014/23 and Article 18 of Directive 2014/24, useful clarifications should be provided to that court as regards a review carried out in the light of the principles set out in those provisions.

115. It is settled case-law that the principles of transparency and equal treatment which govern all public procurement procedures require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates. (56)

116. For instance, and in relation to the regime under Directive 2014/24, contract notices must, as a rule, include a list and brief description of the selection criteria and the criteria regarding the personal situation of economic operators that may lead to their exclusion. (57)

117. The logical extension of that fact is that the principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or from the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or the administrative courts. (58)

118. Since the indirect participation of a contracting authority in the capital of a private partner can take different forms and its impact on the functioning of that private partner depends on the latter's organisational structure, it does not appear to me to be self-evident that any form of indirect

participation held by the contracting authority would automatically entail the exclusion of a tenderer from the tender documents by reason of non-compliance with the requirements of the public and private participation. It does not appear to be sufficiently clear that the national legislation or the tender documents should be interpreted to that effect.

119. Without prejudice to the foregoing additional remarks concerning compliance with the principles of transparency and equal treatment, I stand by the position that I set out in point 108 of this Opinion regarding compliance with the principle of proportionality.

VI. Conclusion

120. In the light of the foregoing, I propose that the Court provide the following answer to the Consiglio di Stato (Council of State, Italy):

Article 30 and Article 38(1) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts or, as the case may be, Article 18 and Article 58(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that they preclude, for the purposes of determining the percentage participation of a private partner submitting a bid in the mixed public-private company to be formed, account from being taken of any indirect participation of the contracting authority in the share capital of that private partner submitting a bid, such that that partner is automatically excluded from the call for tenders, where, as a result of the account taken of that indirect participation, the private participation percentage sought by the contracting authority in accordance with the tender documents is not met.

However, Article 30 and Article 38(1) of Directive 2014/23 or, as the case may be, Article 18 and Article 58(1) of Directive 2014/24 do not preclude account from being so taken where it is not automatic. In particular, those provisions do not preclude account from being taken of an indirect participation where it is apparent from checks conducted by the contracting authority that that participation involves the majority of the capital of a private partner submitting a bid being held by another entity which, in turn, is wholly owned by the contracting authority, provided that decision-making powers and risks are allocated in proportion to the capital stake held as far as concerns that private partner submitting a bid and that entity.

---

1 Original language: French.

---

2 With regard to the different forms of public-private partnership, in particular an IPPP, in the light of EU law, see Bovis, Ch., ‘Chapter 18: Public service partnerships’, *Research Handbook on EU Public Procurement Law*, edited by Bovis, Ch., Edward Elgar, Cheltenham-Northampton, 2016, p. 554 et seq.

---

3 See Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final), point 54.

---

4 See, inter alia, judgment of 15 October 2009, *Acoset* (C-196/08, EU:C:2009:628; ‘the judgment in *Acoset*’).

---

5 Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

---

6 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

7 GURI No 210 of 8 September 2016, p. 1.

---

8 Decreto legislativo n. 50 – Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonche' per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50 transposing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, contracts and procurement procedures of supplier entities operating in the water, energy, transport and postal services sectors as well as for reforming the existing provisions in relation public works contracts, public service contracts and public supply contracts), of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016).

---

9 An effective participation of 51% was already clear from the tender documents. According to those documents, the city of Rome was to hold 51% of the shares in the mixed company to be formed. As for the remainder (73.5% – 51% = 22.5%), an effective participation of 22.5% in that company would have to have followed from the fact that Roma Multiservizi's participation in the consortium formed with Rekeep amounted to approximately 90%. Accordingly, since AMA – the capital of which is wholly owned by the city of Rome – holds a 51% stake in the capital of Rome Multiservizi, the city of Rome has an effective participation of 22.5% in the mixed company to be formed (22.5% = 49% x 90% x 51%). In their written observations, Rekeep and the Consorzio Nazionale Servizi Società Cooperativa (CNS) state that it was agreed, first, that Rekeep, as the principal, would hold a 10% stake in that consortium and Roma Multiservizi, as the lead agent, would hold a 90% stake, and, second, that those companies would underwrite the capital of the mixed company to be formed with the city of Rome in proportion to their stake in the consortium.

---

10 Similarly, according to the information contained in the request for a preliminary ruling, Roma Multiservizi and Rekeep challenged the exclusion decision referring, inter alia, to the infringement, the misapplication and the inadmissible purposive interpretation of what those parties regarded as constituting *lex specialis*.

---

11 The referring court states inter alia that the contracting authority 'set the participation by the city of Rome at 51% and the participation by the private partner at 49%' and that that contracting authority launched a call for tenders 'setting the participation by the city of Rome at 51%'.

---

12 The referring court states inter alia that 'the city of Rome … ultimately held an effective participation of 73.5% in the public-private company, thus exceeding the 51% limit set in the tender documents' and that 'the city of Rome's participation in the [mixed company to be formed] exceeded the limit set at 51%'.

---

13 According to CNS, the referring court is simply requesting a review of the compatibility of national law in the light of general principles of EU law, without specifically identifying the exact provisions in the light of which such compatibility should be examined. In its view, the fact that EU law does not contain any specific provisions on the forms of public-private partnership further demonstrates that the first question referred for a preliminary ruling is irrelevant.

---

14 Judgment of 6 May 2010 (C-145/08 and C-149/08, EU:C:2010:247; 'the judgment in *Club Hotel Loutraki and Others*').

---

15 The judgment in *Club Hotel Loutraki and Others* (paragraph 46).

---

16 The judgment in *Club Hotel Loutraki and Others* (paragraph 50).

17 The judgment in *Club Hotel Loutraki and Others* (paragraph 48 and the case-law cited).

18 The judgment in *Club Hotel Loutraki and Others* (paragraph 57).

19 The judgment in *Club Hotel Loutraki and Others* (paragraphs 55 and 57).

20 Judgment of 22 December 2010 (C-215/09, EU:C:2010:807; 'the judgment in *Healthcare*').

21 The judgment in *Healthcare* (paragraph 36).

22 The judgment in *Healthcare* (paragraphs 43 and 44).

23 Some of the parties appear to question the classification as a 'mixed contract' of a contract, one of the aspects of which relates to the selection of a private partner for a mixed-capital entity to be formed. However, although the Court did not use the concept of a 'mixed contract' in the judgment in *Acoset*, it did so in its judgments in *Club Hotel Loutraki and Others* and *Healthcare*. In addition, even assuming that Directive 2014/24 applies in the present case and that the contract at issue in the main proceedings does not fall within the scope of the concept of a 'mixed contract' within the meaning of Article 3 of that directive because the selection of a private partner for the formation of a mixed company is unrelated to a contract (see footnote 24), that contract may nevertheless come under the broader category of mixed contracts to which the Court appears to have referred in the judgments in *Club Hotel Loutraki and Others* and *Healthcare*.

24 Regardless of the solution adopted by the Court in its case-law, assuming that Directive 2014/24 applies in the case in the main proceedings, the same outcome could a priori be reached on the basis of Article 3(6) thereof, under which, 'where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject matter of that contract'. Under that Directive, contracts are concerned with the execution of works, the supply of goods or the provision of services. The question therefore arises as to whether the selection of a private partner and the formation of a mixed company fall within the definition of a 'contract' within the meaning of that same directive. The view taken in legal literature appears to be that that is the case (see, to that effect, in so far as the author refers to Article 3(4) of Directive 2014/24, Andrecka, M., 'Institutionalised Public-Private Partnership as a Mixed Contract under the Regime of the New Directive 2014/24/EU', *European Procurement & Public Private Partnership Law Review*, Vol. 9, No 3, 2014, p. 176). Furthermore, in view of the doubts that exist as to the rules applicable in the present case, attention must be drawn to the difference between the wording used in Directive 2014/24, Article 3(6) of which provides that, 'where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject matter of that [mixed] contract', and that used in Directive 2014/23, Article 20(5) of which provides that, 'where the different *parts of a given contract* are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject matter of that contract' (emphasis added); the wording of the latter provision appears to me to be more flexible, at least as regards certain language versions of those directives, in particular the French version.

25 See, by way of analogy, paragraph 53 of the judgment in *Club Hotel Loutraki and Others*, read in the light of paragraph 28 thereof, in accordance with which the mixed contract at issue contained 'one aspect relating to the sale of shares by [the company Ellinika Touristika Akinita AE] to the highest bidding tenderer [and … one] aspect relating to a service contract to be concluded with the highest bidding tenderer, which assumes the obligations of managing the casino business'), whereas, as is apparent from paragraph 25 of that judgment, the company to be formed by the tenderer (and not that tenderer itself) acted as manager and concluded at the very least one agreement. See also, in this regard, the judgment in *Acoset* (paragraphs 54 and 61).

26 See point 52 of this Opinion.

27 It is apparent from the parties' observations and their replies to the written questions put by the Court that the integrated school service consists in general support, handling services, collection and delivery services and cleaning services in nurseries and schools as well as school transportation. The inclusion of a service concerned with school transportation in that range does not appear to encourage the referring court to consider applying Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243). In any event, first, that directive also lays down, in Articles 4 and 6, rules on mixed procurement and, second, there is nothing to support the view that school transportation constitutes the main object of the contract at issue in the main proceedings or of the aspect of that contract related to the integrated school service.

28 See, to that effect, judgment of 10 November 2011, *Norma-A and Dekom* (C-348/10, EU:C:2011:721, paragraphs 57 and 59).

29 See Article 2(1)(5) of Directive 2014/24. See also, to that effect, the judgment in *Acoset* (paragraph 39 and the case-law cited).

30 See Article 5(1)(b) of Directive 2014/23.

31 See the judgment in *Acoset* (paragraph 43 and the case-law cited).

32 See, to that effect, judgment of 10 November 2011, *Norma-A and Dekom* (C-348/10, EU:C:2011:721, paragraph 44). See also, to that effect, my Opinion in Joined Cases *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:122, points 62 and 63), in which I took the view that a services concession is characterised, in particular, by the fact that the authority entrusts the exercise of a service activity, a service the provision of which would as a rule fall to that authority (together with, I would add, the associated risk), to the concessionaire, thus requiring that concessionaire to provide a specific service.

33 See Article 1(1) and recital 18 of Directive 2014/23.

34 It is true that, in the case in the main proceedings, the risk was to have been assumed by the private partner selected in the context of the first aspect of the mixed contract, whereas the integrated school service, which constituted the main object of that contract, was to have been awarded, in the context of the second aspect of that contract, to the mixed company to be formed. In view of that particular circumstance, it could be argued that, in connection with the second aspect taken in isolation, there is no transfer of risk to the tenderer selected. However, in the present case, the tender procedure intended, in any event, to free the contracting authority from the risk associated with the provision of the integrated school service. For that reason, I cannot rule out the classification of that second aspect as a 'concession', despite the particular circumstance. With regard to the issues related to that same circumstance, see also point 58 of this Opinion.

35 See, by way of analogy, the judgment in *Acoset* (paragraph 42).

36 For the sake of completeness, I note that Directives 2014/23 and 2014/24 are applicable *ratione temporis* and that the value of the contract, estimated at above EUR 277 million, is greater than the thresholds required under those directives. See Article 8 of Directive 2014/23 and Article 4 of Directive 2014/24.

37 See point 11 of this Opinion.

38 See judgment of 6 April 2006, *ANAV* (C-410/04, EU:C:2006:237, paragraphs 31 and 32).

39 Judgment of 28 May 2020 (C-796/18, EU:C:2020:395).

40 Opinion in *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:47, point 109, point 3).

41 See also, in this regard, point 70 of this Opinion.

42 Under the second paragraph of Article 3(2) of Directive 2014/24, '[i]n the case of mixed contracts consisting partly of services within the meaning of Chapter I of Title III and partly of other services or of mixed contracts consisting partly of services and partly of supplies, the main subject shall be determined in accordance with which of the estimated values of the respective services or supplies is the highest'.

43 See point 28 of this Opinion.

44 The second sentence of Article 38(1) of Directive 2014/23 states that 'the conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject matter of the concession and the purpose of ensuring genuine competition'. In that same vein, Article 58(1) of Directive 2014/24 states inter alia that contracting authorities are to limit the requirements of participation 'to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.'

45 See paragraph 59 of the judgment in *Acoset*: '… that situation may be rectified by selecting the private participant in accordance with the requirements set out at paragraphs 46 to 49 above and choosing appropriate criteria for the selection of the private participant, since the tenderers must provide evidence not only of their capacity to become a shareholder but, primarily, of their technical capacity to provide the service and the economic and other advantages which their tender brings'. The Court pointed out, in that judgment, the significance of the qualitative selection criteria related to the capacity to perform a service or a concession (see, to that effect, Brown, A., 'Selection of the Private Participant in a Public-Private Partnership which is entrusted with a Public Services Concession: Acoset (Case C-196/08)', *Public Procurement Law Review*, Vol. 2, 2010, p. 4), without however disregarding the qualitative selection criteria related to the capacity to become a private partner of the mixed company to be formed.

46 See, to that effect, judgment of 8 July 2021, *Sanresa* (C-295/20, EU:C:2021:556, paragraph 62).

47 As has been observed in legal literature, in the context of an IPPP, it is important, in spite of the difficulties, to distinguish qualitative selection criteria from contract award criteria. See Andrecka, M., and Kania, M., 'Choosing the Private Partner for a Public Private Partnership: A European Union Law Perspective on Polish Practice', *Polish Review of International and European Law*, Vol. 2, No 1, 2013, p. 148.

48 For that reason, I take the view that the classification used by the Court in the judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317, paragraphs 21 and 23) as regards national legislation intended to

prevent any potential collusion between participants in the same procedure for the award of a public contract and to safeguard the equal treatment of candidates and the transparency of the procedure cannot be applied in the present case as regards the requirements of the public and private participation at issue here as laid down, moreover, in the tender documents.

---

49 See points 35 and 36 of this Opinion.

---

50 See point 70 of this Opinion.

---

51 See point 97 of this Opinion.

---

52 See footnote 44.

---

53 See the judgment in *Acoset* (paragraph 63).

---

54 See also recital 5 of Directive 2014/24, which states that ‘nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive’.

---

55 See point 38 of this Opinion.

---

56 See judgment of 17 May 2018, *Specializuotas transportas* (C-531/16, EU:C:2018:324, paragraph 23 and the case-law cited).

---

57 See Article 49 and point 11(c) of Part C of Annex V to Directive 2014/24.

---

58 See judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404, paragraph 51).

EU:C:2021:556

JUDGMENT OF THE COURT (Ninth Chamber)

8 July 2021 (*)

(Reference for a preliminary ruling – Public procurement – Award of a public contract for waste treatment services – Directive 2014/24/EU – Articles 58 and 70 – Classification of the operator's obligation to hold written prior consent for cross-border shipments of waste – Condition of performance of the contract)

In Case C-295/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), made by decision of 2 July 2020, received at the Court on 2 July 2020, in the proceedings

'Sanresa' UAB

v

Aplinkos apsaugos departamentas prie Aplinkos ministerijos,

other parties:

'Toksika' UAB,

'Žalvaris' UAB,

'Palemono keramikos gamykla' AB,

'Ekometrija' UAB,

THE COURT (Ninth Chamber),

composed of N. Piçarra, President of the Chamber, D. Šváby (Rapporteur) and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure,

having considered the observations submitted on behalf of:

– 'Žalvaris' UAB, by K. Kačerauskas, advokatas,

– the Lithuanian Government, by K. Dieninis and R. Dzikovič, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the European Commission, by L. Haasbeek, A. Steiblytė, K. Talabér-Ritz and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 18, 42, 56, 58 and 70 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), and of Articles 2(35), 3 to 7, 9 and 17 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1).

2 The request has been made in proceedings between ‘Sanresa’ UAB and the Aplinkos apsaugos departamentas prie Aplinkos ministerijos (Environmental Protection Department under the Ministry of Environment, Lithuania) (‘the contracting authority’) and relates to the decision of that department to exclude Sanresa from a public procurement procedure.

Legal framework

European Union law

Directive 2014/24

3 Article 18 of Directive 2014/24, which concerns the ‘principles of procurement’, provides:

‘1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.’

4 Article 42 of that directive makes provision for contracting authorities to formulate ‘technical specifications’ and take them into account in selecting tenders.

5 Article 49 of the directive, which is headed ‘Contract notices’, provides:

‘Contract notices shall be used as a means of calling for competition in respect of all procedures, without prejudice to the second subparagraph of Article 26(5) and Article 32. Contract notices shall contain the information set out in Annex V part C and shall be published in accordance with Article 51.’

6 Article 56 of the directive, which sets out the ‘general principles’ for the choice of participants and the award of contracts, provides in paragraph 1:

‘Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled:

…

(b) the tender comes from a tenderer that is not excluded in accordance with Article 57 and that meets the selection criteria set out by the contracting authority in accordance with Article 58 and, where applicable, the non-discriminatory rules and criteria referred to in Article 65.

Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2).’

7 Article 58 of that directive, which is headed ‘Selection criteria’, provides:

‘1. Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

2. With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as described in Annex XI, or to comply with any other request set out in that Annex.

In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

3. With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance.

The minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value, except in duly justified cases such as relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate the main reasons for such a requirement in the procurement documents or the individual report referred to in Article 84.

The ratio, for instance, between assets and liabilities may be taken into consideration where the contracting authority specifies the methods and criteria for such consideration in the procurement documents. Such methods and criteria shall be transparent, objective and non-discriminatory.

Where a contract is divided into lots this Article shall apply in relation to each individual lot. However, the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time.

Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in the second subparagraph of this paragraph shall be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement. In the case of dynamic purchasing systems, the maximum yearly turnover requirement referred to in the second subparagraph shall be calculated on the basis of the expected maximum size of specific contracts to be awarded under that system.

4. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience

to perform the contract to an appropriate quality standard.

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

…’

8 Annex XII to the directive, which is headed ‘Means of proof of selection criteria’ refers in paragraph (g) of Part II to ‘an indication of the environmental management measures that the economic operator will be able to apply when performing the contract’, as one of the means of providing evidence of the economic operators’ technical abilities, as referred to in Article 58.

9 Under Article 70 of Directive 2014/24, which is headed ‘Conditions for performance of contracts’:

‘Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.’

10 Annex V to the directive, which is headed ‘Information to be included in notices’ contains a Part C, devoted to ‘Information to be included in contract notices (as referred to in Article 49)’, paragraph 17 of which reads:

‘Where appropriate, particular conditions to which the performance of the contract is subject.’

Regulation No 1013/2006

11 Article 2(35) of Regulation No 1013/2006 defines the ‘illegal shipment’ of waste as follows:

‘For the purposes of this Regulation:

…

35. “illegal shipment” means any shipment of waste effected:

(a) without notification to all competent authorities concerned pursuant to this Regulation; or

(b) without the consent of the competent authorities concerned pursuant to this Regulation; or

(c) with consent obtained from the competent authorities concerned through falsification, misrepresentation or fraud; or

(d) in a way which is not specified materially in the notification or movement documents; or

…’

12 Articles 3 to 32 of the regulation are contained in Title II, headed ‘Shipments within the [Union] or without transit through third countries’. Article 3 of the regulation, which is headed ‘Overall procedural framework’ provides in paragraph 1:

‘Shipments of the following wastes shall be subject to the procedure of prior written notification and consent as laid down in the provisions of this Title:

(a) if destined for disposal operations:

all wastes;

(b) if destined for recovery operations:

(i) wastes listed in Annex IV, which include, inter alia, wastes listed in Annexes II and VIII to the Basel Convention,

(ii) wastes listed in Annex IVA,

(iii) wastes not classified under one single entry in either Annex III, IIIB, IV or IVA,

(iv) mixtures of wastes not classified under one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA.'

13 Under Article 4 of that regulation, which is headed 'Notification':

'Where the notifier intends to ship waste as referred to in Article 3(1)(a) or (b), he/she shall submit a prior written notification to and through the competent authority of dispatch and, if submitting a general notification, comply with Article 13.

When a notification is submitted, the following requirements shall be fulfilled:

1. notification and movement documents:

Notification shall be effected by means of the following documents:

(a) the notification document set out in Annex IA; and

(b) the movement document set out in Annex IB.

In submitting a notification, the notifier shall fill in the notification document and, where relevant, the movement document.

When the notifier is not the original producer in accordance with point 15(a)(i) of Article 2, the notifier shall ensure that this producer or one of the persons indicated in point 15(a)(ii) or (iii) of Article 2, where practicable, also signs the notification document set out in Annex IA.

The notification document and the movement document shall be issued to the notifier by the competent authority of dispatch;

2. information and documentation in the notification and movement documents:

The notifier shall supply on, or annex to, the notification document information and documentation as listed in Annex II, Part 1. The notifier shall supply on, or annex to, the movement document information and documentation referred to in Annex II, Part 2, to the extent possible at the time of notification.

A notification shall be considered properly carried out when the competent authority of dispatch is satisfied that the notification document and movement document have been completed in accordance with the first subparagraph;

3. additional information and documentation:

If requested by any of the competent authorities concerned, the notifier shall supply additional information and documentation. A list of additional information and documentation that may be requested is set out in Annex II, Part 3.

A notification shall be considered properly completed when the competent authority of destination is satisfied that the notification document and the movement document have been completed and that the information and documentation as listed in Annex II, Parts 1 and 2, as well as any additional information and documentation requested in accordance with this paragraph and as listed in Annex II, Part 3, have been supplied by the notifier;

4. conclusion of a contract between the notifier and the consignee:

The notifier shall conclude a contract as described in Article 5 with the consignee for the recovery or disposal of the notified waste.

Evidence of this contract or a declaration certifying its existence in accordance with Annex IA shall be supplied to the competent authorities involved at the time of notification. A copy of the contract or such evidence to the satisfaction of the competent authority concerned shall be provided by the notifier or consignee upon request by the competent authority;

5. establishment of a financial guarantee or equivalent insurance:

A financial guarantee or equivalent insurance shall be established as described in Article 6. A declaration to this effect shall be made by the notifier through completion of the appropriate part of the notification document set out in Annex IA.

The financial guarantee or equivalent insurance (or if the competent authority so allows, evidence of that guarantee or insurance or a declaration certifying its existence) shall be supplied as part of the notification document at the time of notification or, if the competent authority so allows, pursuant to national legislation, at such time before the shipment starts;

6. Coverage of the notification:

A notification shall cover the shipment of waste from its initial place of dispatch and including its interim and non-interim recovery or disposal.

If subsequent interim or non-interim operations take place in a country other than the first country of destination, the non-interim operation and its destination shall be indicated in the notification and Article 15(f) shall apply.

Only one waste identification code shall be covered for each notification, except for:

(a) wastes not classified under one single entry in either Annex III, IIIB, IV or IVA. In this case, only one type of waste shall be specified;

(b) mixtures of wastes not classified under one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA. In this case, the code for each fraction of the waste shall be specified in order of importance.’

14 Article 11 of Regulation No 1013/2006, which is headed ‘Objections to shipments of waste destined for disposal’, provides in paragraph 1:

‘Where a notification is submitted regarding a planned shipment of waste destined for disposal, the competent authorities of destination and dispatch may, within 30 days following the date of transmission of the acknowledgement of the competent authority of destination in accordance with Article 8, raise reasoned objections based on one or more of the following grounds and in accordance with the [TFEU]:

(a) that the planned shipment or disposal would not be in accordance with measures taken to implement the principles of proximity, priority for recovery and self-sufficiency at Community and national levels in accordance with Directive 2006/12/EC [of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9)], to prohibit generally or partially or to object systematically to shipments of waste; or

(b) that the planned shipment or disposal would not be in accordance with national legislation relating to environmental protection, public order, public safety or health protection concerning actions taking place in the objecting country; or

…’

15 Article 17 of the regulation, which is headed ‘Changes in the shipment after consent’, provides:

‘1. If any essential change is made to the details and/or conditions of the consented shipment, including changes in the intended quantity, route, routing, date of shipment or carrier, the notifier shall inform the competent authorities concerned and the consignee immediately and, where possible, before the shipment starts.

2. In such cases a new notification shall be submitted, unless all the competent authorities concerned consider that the proposed changes do not require a new notification.

3. Where such changes involve competent authorities other than those concerned in the original notification, a new notification shall be submitted.’

Lithuanian law

16 The Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on public procurement), in the version applicable to the main proceedings (‘the Law on public procurement’) provides, in Article 35, headed ‘Contents of procurement documents’:

‘1. In the procurement documents, the contracting authority shall provide full information as to the terms of the contract and the conduct of the procedure.

2. The procurement documents must:

(1) state the requirements as to the formulation of tenders;

(2) state the grounds for exclusion of suppliers, the capacity conditions and, where relevant, the required standards of quality management and environmental management, such requirements being equally capable of applying to the individual members of a group of suppliers making a joint request to participate or a joint tender;

(3) state that, in the event that the right to pursue the activity in question is dependent on some capacity of the supplier which has not been verified, or not fully verified, the supplier must undertake to the contracting authority that the contract will only be performed by persons holding that right;

…

(5) contain a list of the documents evidencing that none of the grounds for exclusion are applicable to the suppliers, that they meet the capacity conditions and, where relevant, particular standards of quality management and environmental management, state that the supplier must provide the European single procurement document (ESPD) in accordance with Article 50 of this Law, and state (in the case of an open procedure) that the option provided for by Article 59(4) of this Law, to evaluate a supplier’s tender in the first instance and verify that it meets the capacity conditions at a later date, will be exercised;

…

(8) state the nature of the goods, services or works to be supplied, their quantity (scope), the nature of the services to be supplied with goods, and the schedule for the supply of goods, provision of services or execution of works;

…

(13) contain the contractual terms proposed by the contracting authority and/or the draft contract as referred to in Article 87 of this Law, if it is already available. If a framework agreement is to be concluded, the procurement documents must likewise contain the terms of the framework agreement and/or the draft framework agreement, if it is already available;

…

(19) indicate when, where and how tenders are to be submitted;

…

4. The contracting authority shall draw up the procurement documents in accordance with the provisions of this Law. The procurement documents must be precise, clear and unambiguous, such that the suppliers are able to submit tenders and the contracting authority is able to procure that which it requires.'

17 Article 40 of the Law, which is headed 'Submission of requests to participate and tenders', provides:

'1. The contracting authority shall set a deadline which allows sufficient time for the submission of requests to participate and tenders, so as to enable suppliers to prepare and submit their requests for participation and their tenders in an appropriate and timely manner. The time allowed may not be less than the shortest period laid down in Articles 60, 62, 65, 69 and 74 of this Law for submission of requests to participate and tenders. In setting the deadline, the contracting authority shall have regard to the complexity of the contract and the time required to formulate requests to participate and tenders.

…

3. Where tenders can only be made after a visit to the place where the services are to be provided or the works executed, or after a site visit for the purposes of familiarisation with the terms laid down in the procurement documents, the contracting authority shall set a deadline for submission of tenders which allows more time than those provided for in Articles 60, 62, 65, 69 and 74 of this Law, in order for all suppliers concerned to have the opportunity to acquaint themselves with all the information necessary to formulate their tenders.

4. The contracting authority shall extend the deadline for submission of tenders, in order for all suppliers wishing to participate in the procedure to have the opportunity to acquaint themselves with all the information necessary to formulate their tenders, in the following cases:

(1) where, for any reason, further information, though requested by the supplier in a timely manner, is provided less than six days before the deadline for submission of tenders, or less than four days in the case of a simplified procedure. In the case of an open procedure, a restricted procedure, or a competitive procedure with expedited negotiations, as referred to in Article 60(3) and Article 62(7) of this Law, this period is four days, and in the case of a simplified expedited procedure, it is three days;

(2) where significant changes are made to the procurement documents.

5. In extending the deadline for submission of tenders in the cases referred to in paragraph 4 of this article, the contracting authority shall have regard to the significance of the information or the changes to the procurement documents. Where the further information was not requested in a timely manner or is not a decisive factor in the preparation of tenders, it shall be open to the contracting not to extend the deadline.

…'

18 Under Article 47 of the Law, which is headed 'Verification of the capacities of the supplier':

'1. Given that the contracting authority is required to determine whether the supplier is sufficiently skilful and reliable – and possesses the necessary capacities – to comply with the terms of the contract, it may define, in the contract notice or other procurement documents, the capacities required of the candidates or tenderers, and the documents or information to be submitted in order to certify that they possess those capacities. The capacities which the contracting authority requires of the candidates or tenderers may not artificially limit competition. They must be proportionate, must relate to the purposes of the contract, and must be clear and precise. For the purposes of verifying the suppliers' capacities, the contracting authority may choose to have reference to:

(1) their right to pursue the activity in question;

(2) their financial and economic standing;

(3) their technical and professional ability.

2. The contracting authority is entitled to require, in the procurement documents, that the supplier has the right to pursue the activity required for performance of the contract. In relation to a contract for services, the contracting authority may require the suppliers to possess specific authorisations or to be members of particular organisations, if that is an obligatory condition of the right to supply the services concerned in their country of origin.

…'

The main proceedings and the questions referred for a preliminary ruling

19 On 7 October 2018, the contracting authority published an international open call for tenders relating to a contract for hazardous waste management services.

20 The contracting authority stated in paragraph 9 of the call for tenders that, in order to prevent an environmental disaster, it was necessary to take swift action to halt the operation of a high risk facility in which hazardous waste was stored, and to have that waste treated. In paragraph 11 of the same document, the contracting authority stated that the waste was stored in the open, in deteriorating containers which were in direct contact with the ground and lay stacked on top of one another, under compression. Furthermore, the waste contained hazardous chemicals which were accessible to unauthorised persons. According to the contracting authority, it was justified in those circumstances to use the expedited procedure and reduce the time allowed for submission of tenders.

21 Paragraph 23 of the call for tenders at issue in the main proceedings defined the capacity requirements which tenderers were required to meet as at the deadline for submission of tenders. The contracting authority stated that only the first-ranked tenderer would be required to produce the documents evidencing its capacity, as referred to in the table set out in that paragraph. Furthermore, in the event that the right to pursue the activity in question was dependent on some capacity of the supplier which had not been verified, or not fully verified, the supplier was required to undertake to the contracting authority that the contract would only be performed by persons holding that right.

22 The call for tenders at issue in the main proceedings also made provision for tenderers to visit the site before submitting their tenders. Nevertheless, as it was impossible to gain access to a large number of containers, or determine how full they were, the actual quantity of hazardous waste was unknown.

23 The contracting authority received four tenders. One of these was made by Sanresa, in its capacity as the lead entity of a temporary association of Lithuanian undertakings. That tender designated two subcontractors, respectively established in Denmark and the Czech Republic.

24 On 22 November 2018, the contracting authority asked Sanresa to provide it, within five working days, with further information clarifying its tender, relating in particular to the division of the various waste management operations between its partners and subcontractors, and to the issue of which of its subcontractors held authorisation for international shipments of waste.

25 On 7 December 2018, the contracting authority informed Sanresa that, under Regulation No 1013/2006, international shipments of waste required prior authorisation from the authorities of the States concerned, and that none of the economic operators designated by Sanresa held such authorisation. Accordingly, the contracting authority gave Sanresa until 17 December 2018 to address those deficiencies, permitting it to supplement its tender or submit a new list of subcontractors.

26 On 26 February 2019, however, the contracting authority decided to terminate the tender procedure, on the basis that the call for tenders at issue in the main proceedings was unclear, before reversing that

decision on 18 March 2019. The following day, it informed Sanresa in writing that it had 40 days to supply an authorisation for the international shipment of waste or to change subcontractors.

27 The contracting authority rejected Sanresa's tender on 21 May 2019, on the ground (amongst others) that Sanresa did not hold the authorisation required under Regulation No 1013/2006 for the international shipment of waste, and thus had not demonstrated that it had the right to pursue the activity in question.

28 On 30 May 2019, Sanresa lodged a complaint against the rejection of its tender, arguing that it met the supplier capacity requirement as set out in the call for tenders. Sanresa considered that the call for tenders did not require the tender to be accompanied by consent from the national authorities for an international shipment of waste. The complaint was rejected, and Sanresa then brought legal proceedings which were dismissed both at first instance and on appeal. It then appealed on a point of law to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

29 According to that court, the main issue arising relates to the proper classification of the clause of the call for tenders under which the tenderer is required, in the course of the procurement procedure, to produce consent from the competent authorities, in accordance with Regulation No 1013/2006, to the international shipment of the waste, the parties being in dispute as to whether that clause is a condition relating to supplier capacity, or a condition relating to the performance of the contract once concluded.

30 The referring court observes, first of all, that the parties to the main proceedings consider that that clause does not expressly require the consent of the competent authorities to the international shipment of waste to be attached to the tender.

31 It then states that, like Sanresa, it considers that the obligation to produce the consent does not relate to the capacity of the supplier, but to the performance of the contract. Although the technical specifications are required to be sufficiently precise for tenderers to be able to identify the subject matter of the contract, and for the contracting authority to be able to award it, the contracting authority defined the subject matter of the contract – more specifically the composition of the hazardous waste to be removed, and its code – in an imprecise manner. Thus, *ex hypothesi*, it was impossible to supply all of the information at the time of submission of the tender.

32 Moreover, a situation in which the contracting authority has failed to exhaustively describe the subject matter of the contract may also be incompatible with Regulation No 1013/2006, given that the lawfulness of a shipment of waste depends (amongst other things) on compliance with the original conditions, on the basis of which consent for the shipment was given. In particular, Article 17 thereof requires the notification procedure to be recommenced in the event that the composition and actual quantity of the hazardous waste, considered in its entirety, become apparent in the course of performance of the contract.

33 Furthermore, the referring court states that under that regulation, and particularly Article 11(1)(b) thereof, the competent authorities of the States of dispatch, destination and transit have a broad discretion to raise objections to the shipment of waste for disposal or recovery, for example on the grounds of national legislation or public order. There is thus a non-negligible risk of the successful tenderer finding that it is legally impossible for it to perform the contract. In those circumstances, the referring court doubts that the risk of refusal of consent should be laid on the contracting authority which has chosen a tenderer and entered into a contract with it.

34 Last, the referring court states that when it provided, in paragraph 23.1.2 of the call for tenders, that 'in the event that the right to pursue the activity in question is dependent on some capacity of the supplier which has not been verified, or not fully verified, the supplier must undertake to the contracting authority that the contract will only be performed by persons holding that right' – this wording being identical to that of Article 35(2)(3) of the Law on public procurement – the contracting authority in question was laying down a condition relating to the capacity of tenderers to perform the contract.

35 In that regard, the referring court states that, up until 2017, calls for tender did not state any requirement as to the tenderers' right to pursue the contractual activity, and it was therefore a matter for tenderers to determine, in the light of the definition of the subject matter of the contract and the

technical specifications, what certificates, permits and declarations would be necessary to demonstrate that they possessed the specific right required.

36 The referring court indicates that since a judgment of 14 February 2017, reversing the previous position, it considers that contracting authorities are not entitled to reject tenders on the ground that they do not meet requirements which were not made public, even if those requirements arise from mandatory legal standards. Furthermore, where requirements relating to the right to pursue the activity in question, imposed by specific laws, have not been clearly set out in the terms of the contract, and tenderers do not meet those requirements, those tenderers must be given the opportunity to remedy the deficiencies in their tenders, and this extends to designating a new partner or subcontractor for the performance of the contract, even after the deadline for submission of tenders has passed.

37 The referring court adds that, in enacting the Law on public procurement, by which it transposed Directive 2014/24, the Lithuanian legislature was seeking to avoid a situation where the contracting authorities could reject tenders on the basis that the tenderers did not have the necessary capacity, when the capacity conditions had not been clearly set out in the procurement documents. To that end, the referring court observes, Article 35(2)(3) of the Law on public procurement now expressly provides that it is open to contracting authorities not to verify, or not fully to verify, the relevant capacities of the suppliers.

38 The referring court nevertheless questions whether the unlimited power thus conferred on the contracting authorities not to verify that the tenderers have the right to pursue the relevant activity is compatible with the principles of transparency and the protection of legitimate expectations, and with the rational organisation of public procurement procedures.

39 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Are Article 18(2), point (b) of the first subparagraph and the second subparagraph of Article 56(1), point (a) of the first subparagraph of Article 58(1) and the second subparagraph of Article 58(2) of Directive 2014/24 and Articles 3 to 6 and other provisions of Regulation No 1013/2006 (together or separately but without limitation thereto) to be interpreted as meaning that consent issued to an economic operator, which is necessary to ship waste from one Member State of the European Union to another, is to be classified as a requirement for performance of a service contract and not a requirement concerning the right to pursue an activity?

(2) If the aforementioned consent to ship waste is to be regarded as a supplier selection criterion (suitability to pursue the professional activity), are the principles of transparency and fair competition laid down in the first and second subparagraphs of Article 18(1) of Directive 2014/24, point (a) of the first subparagraph of Article 58(1) and the second subparagraph of Article 58(2) of that directive, the free movement of persons, goods and services enshrined in Article 26(2) TFEU and Articles 7 to 9 of Regulation No 1013/2006 (together or separately but without limitation thereto) to be interpreted and applied in such a way that conditions for the public procurement of waste management services, especially concerning closing dates for the submission of tenders, must create for domestic or foreign suppliers seeking to transport waste across the borders of the Member States of the European Union conditions enabling unrestricted participation in such procurement procedures, and they must inter alia be allowed to produce the aforementioned consent if it has been granted on a later date than the closing date for the submission of tenders?

(3) If the aforementioned consent to ship waste, in accordance with Article 49 of and point 17 of Part C of Annex V to Directive 2014/24 and Article 70 thereof, is to be regarded as a requirement for performance of a public procurement contract, should the principles of public procurement laid down in Article 18 of that directive and the general contract award procedure laid down in Article 56 thereof be interpreted as meaning that in public procurement procedures the tender of a participant who has not produced that consent may not be rejected?

(4) Are Article 18, point (b) of the first subparagraph of Article 56(1), point (a) of the first subparagraph of Article 58(1) and Article 58(2) of Directive 2014/24 to be interpreted as

precluding national legislation under which contracting authorities are entitled to define in advance in public procurement documents a tender evaluation procedure under which the suppliers' right to pursue an activity (suitability to pursue the professional activity) will be verified partially or not verified at all even though the possession of that right is a prerequisite for lawful performance of the public procurement contract and contracting authorities may be aware in advance of the need for that right?

(5) Are Article 18 and the first subparagraph of Article 42(1) of Directive 2014/24 and Articles 2(35), 5 and 17 of Regulation No 1013/2006 as well as other provisions of that regulation to be interpreted as meaning that, in the case of procurement of waste management services, contracting authorities may lawfully procure such services only if they clearly and precisely define in the public procurement documents the quantity and composition of the waste and other important conditions for performing the contract (for example, packaging)?'

Consideration of the questions referred

The first question

40 By its first question, the referring court is essentially asking whether Article 18(2) and Articles 58 and 70 of Directive 2014/24 are to be interpreted as meaning that, in the context of a public procurement procedure for waste management services, the obligation of an economic operator wishing to ship waste from a Member State to another State to possess, in compliance inter alia with Article 2(35) and Article 3 of Regulation No 1013/2006, the consent of the competent authorities of the States concerned by the shipment, is a condition relating to its suitability to pursue the professional activity or a condition of performance of the contract.

41 First, it is apparent from Article 56(1)(b), and from Articles 57 and 58 of Directive 2014/24, that only qualitative selection criteria can be imposed by contracting authorities as conditions of participation in a public procurement procedure. As is apparent from the second subparagraph of Article 58(1) of that directive, the criteria are those set out in paragraphs 2 to 4 thereof, relating to suitability to pursue the professional activity, economic and financial standing and technical and professional ability.

42 In the present case, it is necessary to determine whether the obligation to obtain the consent of the competent authorities to transfer hazardous waste from a Member State to another State, as required under the contract at issue in the main proceedings, can relate to one of the three categories of qualitative selection criteria set out in Article 58(1)(a) to (c) of that directive, and particularised in paragraphs 2 to 4 thereof.

43 Article 58(2) of Directive 2014/24, which relates to the suitability of an economic operator to pursue the professional activity relevant to a public contract, makes provision in that regard permitting contracting authorities to require economic operators to be enrolled in a professional or trade register in their Member State of establishment. Similarly, in procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

44 However, the obligation to obtain the consent of the competent authorities concerned in order to ship waste from a Member State to another State cannot be equated either with the obligation to be enrolled in a professional or trade register or to the obligation to possess a particular authorisation or to be a member of a particular organisation.

45 It is thus apparent that the obligation to obtain such consent does not relate to suitability to pursue the professional activity as referred to in Article 58(1)(a) of the directive.

46 Equally, that obligation does not relate to the economic and financial standing of an economic operator as referred to in Article 58(1)(b) of the directive.

47 There remains the question of whether the obligation might relate to technical and professional ability as referred to in Article 58(1)(c). Article 58(4) of Directive 2014/24 provides that contracting authorities may impose on economic operators, as a condition of participation in a procurement procedure, a requirement for them to possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard. They may require, in particular, that economic operators have a sufficient level of experience, demonstrated by suitable references from contracts performed in the past.

48 The assessment of the technical and professional ability of a candidate or a tenderer thus depends, in particular, on a retrospective evaluation of the experience gained by the operators through the performance of previous contracts, as is apparent from the two references to experience in Article 58(4) of the directive.

49 Thus, the obligation to obtain the consent of the competent authorities concerned, in order to transfer waste from a Member State to another State, equally does not relate to the technical and professional ability of a candidate or tenderer as referred to in Article 58(1)(c) of the directive.

50 That assessment is not called into question by the fact that paragraph (g) of Part II of Annex XII to Directive 2014/24 permits economic operators to provide evidence of their technical ability through an indication of the environmental management measures they will be able to apply when performing the contract. The environmental management measures referred to in that provision are measures that an economic operator intends to apply on its own initiative.

51 Second, Article 70 of the directive, which is headed ‘Conditions for performance of contract’, provides that contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of Article 67(3) thereof. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

52 In that regard, it is apparent that the obligation to obtain the consent of the competent authorities of the States of dispatch, transit and destination prior to the shipment of waste, laid down by Articles 3 to 6 of Regulation No 1013/2006, relates to the performance of the contract. Its purpose is to lay down special conditions addressing environmental considerations, which are to apply on export of the waste to another State. Accordingly, this requirement can only sensibly be raised in relation to an economic operator intending to export waste to another State.

53 Furthermore, by imposing such an obligation, the contracting authority complies with Article 18(2) of Directive 2014/24, which requires Member States to take appropriate measures to ensure that in the performance of public contracts economic operators comply inter alia with applicable obligations in the field of environmental law established by Union law.

54 Last, it does not appear that classifying the obligation as a ‘condition of performance of the contract’ would undermine the performance of the contract at issue in the main proceedings. The fact that an economic operator has already carried out activities practically equivalent to that required by the contract provides reason to believe that it is suitable to perform that contract. Furthermore, as the European Commission pointed out in its written observations, the contracting authority would have been able to protect itself against the risk of non-performance of the contract by imposing selection criteria designed to reduce the risk of consent not being granted, for example by giving weight to previous experience in the shipment of hazardous waste.

55 In the light of the foregoing considerations, the answer to the first question is that Article 18(2) and Articles 58 and 70 of Directive 2014/24 are to be interpreted as meaning that, in the context of a public procurement procedure for waste management services, the obligation of an economic operator wishing to ship waste from a Member State to another State to have the consent of the competent authorities of the States concerned by the shipment, in accordance inter alia with Article 2(35) and Article 3 of Regulation No 1013/2006, is a condition of performance of the contract.

The second question

56 Having regard to the answer given to the first question, there is no need to answer the second question.

The third question

57 By its third question, the referring court is essentially asking whether Article 70 of Directive 2014/24, read in conjunction with Article 18(1) of that directive, is to be interpreted as meaning that a tenderer's bid may not be rejected solely on the ground that, at the time of submitting the bid, the tenderer has not produced proof that it meets a condition of performance of the contract concerned.

58 Article 70 of Directive 2014/24 provides that the conditions for performance of the contract must be indicated in the call for competition or the procurement documents.

59 In the present case, it is apparent from the order for reference that the contracting authority was not in a position to state the exact quantity of hazardous waste to be treated, and also that it is not in dispute, between the parties to the main proceedings, that none of the procurement documents contained an express requirement for the competent authorities' consent to the international shipment of waste to be attached to the tender.

60 However, while a contracting authority is required, in principle, to state any condition of performance in the call for tenders or the procurement documents, the failure to do so does not make the procurement procedure unlawful where the condition of performance in question clearly arises from EU legislation applicable to the contractual activity, and from the decision of an economic operator not to perform the contract on the territory of the State in which the contracting authority is located.

61 In that regard, under Article 4 of Regulation No 1013/2006, an economic operator intending to ship waste, as referred to in Article 3(1)(a) or (b) thereof, must submit to the competent authority of dispatch, amongst other things, the notification and movement documents, the contract it has concluded with the consignee responsible for the recovery or disposal of the notified waste, and a financial guarantee or equivalent insurance. Those provisions thus presuppose that the tenderer is in possession of detailed information as to the quantity and composition of the waste, the shipment itinerary and the modes of transport to be used in the course of shipment.

62 Furthermore, under Article 58 of Directive 2014/24, in order to participate in a procurement procedure, a tenderer is required to demonstrate that, at the time of submitting the tender, it meets the qualitative selection criteria set out in Article 58(1)(a) to (c) of that directive. In contrast, the tenderer can wait until it is awarded the contract before supplying proof that it fulfils the conditions of performance of the contract. The qualitative selection criteria enable the contracting authority to restrict the tendering procedure to economic operators whose technical and professional ability, grounded in recent experience, suggests that they will be able to perform the contract in question, obtaining the required authorisations or logistical services as necessary. Furthermore, to oblige tenderers to satisfy all the conditions of performance of the contract at the time of submission of their tenders would be to impose an excessive requirement – one which might therefore dissuade economic operators from participating in procurement procedures – and would thus infringe the principles of proportionality and transparency guaranteed by Article 18(1) of the directive.

63 In those circumstances, the answer to the third question is that Article 70 of Directive 2014/24, read in conjunction with Article 18(1) of that directive, is to be interpreted as meaning that a tenderer's bid may not be rejected solely on the ground that, at the time of submitting the tender, the tenderer has not produced proof that it meets a condition of performance of the contract concerned.

The fourth question

64 By its fourth question, the referring court is essentially asking whether Article 18, point (b) of the first subparagraph of Article 56(1), point (a) of the first subparagraph of Article 58(1) and Article 58(2) of Directive 2014/24 are to be interpreted as precluding national legislation under which contracting authorities are entitled to define in the procurement documents a tender evaluation procedure under which the suitability of tenderers to pursue the contractual activity may or may not be verified, when suitability is a prerequisite of lawful performance of the contract, and this ought to be known to the contracting authority before the procurement documents are drawn up.

65 That question is based on the premiss that the obligation of an economic operator wishing to ship waste from a Member State to another State to possess, in compliance inter alia with Article 2(35) and Article 3 of Regulation No 1013/2006, the consent of the competent authorities concerned, constitutes a qualitative selection criterion falling within Article 58 of Directive 2014/24.

66 However, since this obligation is to be classified as a condition for performance of the contract within the meaning of Article 70 of that directive, as is apparent from the answer to the first question, it is not necessary to answer the fourth question.

The fifth question

67 By its fifth question, the referring court is essentially asking whether Article 18 and the first subparagraph of Article 42(1) of Directive 2014/24 are to be interpreted as meaning that, in a public contract for waste management services, the contracting authority may only procure such services lawfully if it specifies the quantity and composition of the waste, as well as the other important terms of performance of the contract, in a clear and precise manner in the procurement documents.

68 Questions relating to the interpretation of EU law which are referred by the national court, under the procedure provided for in Article 267 TFEU, enjoy a presumption of relevance. The Court may thus refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. The Court's function in preliminary rulings is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, to that effect, judgment of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 41 to 43 and the case-law cited).

69 Besides the fact that this question is formulated in abstract and general terms, the order for reference does not contain the minimum of explanatory material that would be necessary to establish a link between the question and the dispute in the main proceedings.

70 In those circumstances, the question is hypothetical and therefore inadmissible.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **Article 18(2) and Articles 58 and 70 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC are to be interpreted as meaning that, in the context of a public procurement procedure for waste management services, the obligation of an economic operator wishing to ship waste from a Member State to another State to have the consent of the competent authorities of the States concerned by the shipment, in accordance inter alia with Article 2(35) and Article 3 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, is a condition of performance of the contract.**

2. **Article 70 of Directive 2014/24, read in conjunction with Article 18(1) of that directive, is to be interpreted as meaning that a tenderer's tender may not be rejected solely on the ground that, at the time of submitting the tender, the tenderer has not produced proof that it meets a condition of performance of the contract concerned.**

[Signatures]

* Language of the case: Lithuanian.

JUDGMENT OF THE COURT (Fourth Chamber)

17 June 2021 (*)

(Reference for a preliminary ruling – Public procurement – Framework agreement – Directive 2014/24/EU – Article 5(5) – Article 18(1) – Articles 33 and 49 – Points 7, 8 and 10 of Part C of Annex V – Implementing Regulation (EU) 2015/1986 – Annex II, fields II.1.5 and II.2.6 – Procurement procedures – Obligation to state, in the contract notice or the tender specifications, first, the estimated quantity or the estimated value and, second, the maximum quantity or the maximum value of the supplies under a framework agreement – Principles of transparency and equal treatment – Directive 89/665/EEC – Article 2d(1) – Procedures for review of the award of public contracts – Ineffectiveness of the contract – Exception)

In Case C-23/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Klagenævnet for Udbud (Public Procurement Complaints Board, Denmark), made by decision of 16 January 2020, received at the Court on 17 January 2020, in the proceedings

Simonsen & Weel A/S

v

Region Nordjylland og Region Syddanmark,

intervener:

Nutricia A/S,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby (Rapporteur), S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Simonsen & Weel A/S, by S. Troels Poulsen, advokat,

– the Region Nordjylland og Region Syddanmark, by T. Braad and H. Padkjær Sørensen, advokater,

– the Danish Government, by J. Nymann-Lindegren, M. Jespersen and M. Wolff, acting as Agents,

– the Belgian Government, by L. Van den Broeck and J.-C. Halleux, acting as Agents,

– the German Government, by J. Möller, R. Kanitz and S. Eisenberg, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the French Government, by C. Mosser and E. de Moustier, acting as Agents,

– the Austrian Government, by A. Posch and J. Schmoll, acting as Agents,

– the European Commission, by P. Ondrůšek, H. Støvlbæk and L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 18(1) and Articles 33 and 49 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) as well as point 7 and point 10(a) of Part C of Annex V to that directive, and of Article 2d(1)(a) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) (‘Directive 92/13’).

2 The request has been made in proceedings between Simonsen & Weel A/S and both the Region Nordjylland (Region of North Jutland, Denmark) and the Region Syddanmark (Region of Southern Denmark) (together, ‘the Regions’) concerning the Regions’ decision to conclude a framework agreement with Nutricia A/S.

Legal context

European Union law

Directive 2014/24

3 Recitals 59 to 62 of Directive 2014/24 state:

‘(59) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs.

(60) The instrument of framework agreements has been widely used and is considered as an efficient procurement technique throughout Europe. It should therefore be maintained largely as it is. However, certain aspects need to be clarified, in particular that framework agreements should not be used by contracting authorities which are not identified in them. For that purpose, the contracting authorities that are parties to a specific framework agreement from the outset should be clearly indicated, either by name or by other means, such as a reference to a given category of contracting authorities within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified. Likewise, a framework agreement should not be open to entry of new economic operators once it has been concluded. …

(61) …

Contracting authorities should be given additional flexibility when procuring under framework agreements, which are concluded with more than one economic operator and which set out all the terms.

… Framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition. Contracting authorities should not be obliged pursuant to this Directive to procure works, supplies or services that are covered by a framework agreement, under that framework agreement.

(62) It should also be clarified that, while contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement itself, the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but might, as appropriate, be shorter or longer. …

It should also be clarified that there might be exceptional cases in which the length of the framework agreements themselves should be allowed to be longer than four years. Such cases, which should be duly justified, in particular by the subject of the framework agreement, might for instance arise where economic operators need to dispose of equipment the amortisation period of which is longer than four years and which must be available at any time over the entire duration of the framework agreement.'

4 Article 5 of that directive, which is entitled 'Methods for calculating the estimated value of procurement', provides, in paragraph 5 thereof:

'With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of [value added tax (VAT)] of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.'

5 Article 18 of the directive, which sets out the 'principles of procurement', provides, in the first subparagraph of paragraph 1 thereof:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.'

6 Under the heading 'Framework agreements', Article 33 of Directive 2014/24 provides:

'1. Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.

A framework agreement means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

The term of a framework agreement shall not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

2. Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this paragraph and in paragraphs 3 and 4.

…

Contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

…'

7 Under Article 49 of that directive, which is entitled 'Contract notices':

‘Contract notices shall be used as a means of calling for competition in respect of all procedures, without prejudice to the second subparagraph of Article 26(5) and Article 32. Contract notices shall contain the information set out in Annex V part C and shall be published in accordance with Article 51.’

8 Article 53 of the directive, which is entitled ‘Electronic availability of procurement documents’, provides, in the first subparagraph of paragraph 1 thereof:

‘Contracting authorities shall by electronic means offer unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with Article 51 or the date on which an invitation to confirm interest was sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which the procurement documents are accessible.’

9 Under the heading ‘Modification of contracts during their term’, Article 72 of Directive 2014/24 provides:

‘1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

…

(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

Contracting authorities having modified a contract in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the *Official Journal of the European Union*. Such notice shall contain the information set out in Annex V part G and shall be published in accordance with Article 51.

…

4. A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

(b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(c) the modification extends the scope of the contract of framework agreement considerably;

(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1.

5. A new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a public contract or a framework agreement during its term than those provided for under paragraphs 1 and 2.’

10 Article 91 of that directive provides:

‘Directive 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)] is repealed with effect from 18 April 2016.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex XV.'

11 Annex V to the directive identifies the 'information to be included in notices'. Part B of that annex sets out the 'information to be included in prior information notices (as referred to in Article 48)'. Title II of that part lists the 'additional information to be supplied where the notice is used as a means of calling for competition (Article 48(2))'.

12 That information includes the information mentioned in point 7 of that title, which reads as follows:

'As far as already known, estimated total magnitude for contract(s); where the contract is divided into lots, this information shall be provided for each lot.'

13 Part C of Annex V lists as 'information to be included in contract notices (as referred to in Article 49)':

'…

2. Email or internet address at which the procurement documents will be available for unrestricted and full direct access, free of charge.

…

…

5. CPV codes; where the contract is divided into lots, this information shall be provided for each lot.

…

7. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services. Where the contract is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.

8. Estimated total order of magnitude of contract(s); where the contract is divided into lots, this information shall be provided for each lot.

…

10. Time-frame for delivery or provision of supplies, works or services and, as far as possible, duration of the contract.

(a) In the case of a framework agreement, indication of the planned duration of the framework agreement, stating, where appropriate, the reasons for any duration exceeding four years; as far as possible, indication of value or order of magnitude and frequency of contracts to be awarded, number and, where appropriate, proposed maximum number of economic operators to participate.

…

…'

Implementing Regulation (EU) 2015/1986

14 Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011 (OJ 2015 L 296, p. 1) includes, in Annex II thereto, a standard form which sets out the different fields which, depending on the circumstances, a contracting authority or a contracting entity may or must complete.

15 Section II of that form, which is entitled 'Object' of the procurement, distinguishes between the 'scope of the procurement' and its 'description'.

16 The fields relating to the scope of the procurement include field II.1.5, which is entitled ‘Estimated total value’. That field refers to footnote No 2 of the form, which simply states ‘if applicable’. In that field, the contracting authority or contracting entity must indicate the value excluding VAT of the procurement and the currency used in that regard, it being specified that ‘for framework agreements or dynamic purchasing systems – [this means the] estimated total maximum value for the entire duration of the framework agreement or dynamic purchasing system’.

17 The fields relating to the description of the procurement include field II.2.1, which is to be used to state the ‘title’ of the procurement. That field includes a subdivision entitled ‘Lot No’, which likewise refers to footnote No 2 that reads ‘if applicable’.

18 Field II.2.6, which is entitled ‘Estimated value’, states that the contracting authority or contracting entity must indicate the value excluding VAT of the procurement and the currency used in that regard, and explains that ‘for framework agreements or dynamic purchasing systems – [this means the] estimated total maximum value for the entire duration of this lot’.

Directive 89/665/EEC

19 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23 (‘Directive 89/665’), applies to the facts at issue in the main proceedings because the date of transposition of the latter directive expired on 18 April 2016.

20 The initial version of Directive 89/665 was previously amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31). Recitals 13, 14 and 17 of Directive 2007/66 state:

‘(13) In order to combat the illegal direct award of contracts, which the Court of Justice has called the most serious breach of [EU] law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.

(14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete. Direct awards within the meaning of this Directive should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union* within the meaning of Directive 2004/18/EC. This corresponds to a procedure without prior call for competition within the meaning of Directive 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)].

…

(17) A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.’

21 Article 1 of Directive 89/665, which is entitled ‘Scope and availability of review procedures’, provides, in paragraph 1 thereof:

‘This Directive applies to contracts referred to in Directive [2014/24] unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

…

Contracts within the meaning of this Directive include public contracts, framework agreements, works and services concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/24] or Directive [2014/23], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.'

22 Under the heading 'Ineffectiveness', Article 2d of Directive 89/665 provides, in paragraph 1 thereof:

'Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2014/24/EU or Directive 2014/23/EU;

…'

Directive 92/13

23 Article 1 of Directive 92/13, which is entitled 'Scope and availability of review procedures', provides, in the first and second subparagraphs of paragraph 1 thereof:

'This Directive applies to the contracts referred to in Directive 2014/25/EU of the European Parliament and of the Council [of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243)] unless such contracts are excluded in accordance with Articles 18 to 24, 27 to 30, 34 or 55 of that Directive.

Contracts within the meaning of this Directive include supply, works and service contracts, works and services concessions, framework agreements and dynamic purchasing systems.'

24 The wording of Article 2d(1)(a) of Directive 92/13 is identical to that of Article 2d(1)(a) of Directive 89/665.

Danish law

Law on public procurement

25 The Udbudsloven, lov nr. 1564 (Law No 1564 on public procurement), of 15 December 2015, in the version applicable to the facts of the case in the main proceedings ('the Law on public procurement'), which transposes Directive 2014/24 into Danish law, includes a Title I, entitled 'General provisions', which contains Paragraphs 1 to 38 of that law.

26 Paragraph 2 of the law, which is entitled 'General principles', provides, in subparagraph 1 thereof:

'In relation to the public contracts referred to in Titles II to IV, the contracting authority shall comply with the principles of equal treatment, transparency and proportionality.'

27 Paragraph 24 of the same law contains inter alia the following definitions:

'…

(24) "public contracts" means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

…

(30) “framework agreement” means an agreement between one or more contracting authorities and one or more economic operators which establishes the terms governing contracts awarded during a given period, in particular with regard to price and the quantity envisaged.’

28 Title II of the Law on public procurement, which relates to ‘public contracts of a value greater than the threshold’, consists of Paragraphs 39 to 185 of that law.

29 Paragraph 56 of that law provides:

‘In an open procedure, any economic operator may submit a tender in response to a contract notice. The contract notice shall contain the information provided for in Part C of Annex V to Directive [2014/24]. The contracting authority shall use the standard form referred to in Paragraph 128(3) of this Law.’

30 Under Paragraph 128 of the law:

‘1. A contracting authority shall use the contract notices as a means of calling for competition in respect of all procedures, with the exception of the negotiated procedure without prior notice …

2. The contract notices shall contain the information provided for in Part C of Annex V to Directive [2014/24] …

3. The contract notice shall be drawn up on the basis of the standard forms established by the European Commission, transmitted electronically to the Publications Office of the European Union and published in accordance with Annex VIII to Directive [2014/24] …

…’

Law on the Public Procurement Complaints Board

31 The Lov om Klagenævnet for udbud, lovbekendtgørelse nr. 593 (Law on the Public Procurement Complaints Board, Codification Decree No 593) of 2 June 2016, which implements Directive 92/13, provides, in Paragraph 17(1)(1) thereof:

‘A contract falling within the scope of Title II or III of the Law on public procurement or that of Directive [2014/25] shall be considered ineffective if:

(1) in breach of the Law on public procurement or of the EU rules on procurement, the contracting authority has concluded a contract without prior publication of a notice in the *Official Journal of the European Union*, subject, however, to the provisions of Paragraph 4,

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

32 By a contract notice of 30 April 2019, the Regions initiated an open public procurement procedure within the meaning of Directive 2014/24 with a view to concluding a four-year framework agreement between the Region of North Jutland and a single economic operator for the purchase of probe kits for patients receiving home care and for institutions.

33 The contract notice stated that the Region of Southern Denmark would participate merely ‘by option’ and that the candidates were required to tender for ‘all items in the contract’.

34 Furthermore, that notice did not contain information about the estimated value of the contract under the framework agreement for the Region of North Jutland or of the option for the Region of Southern Denmark, or information about the maximum value of the framework agreements or about the estimated or maximum quantity of the products to be purchased under the framework agreements.

35 As is clear from Annex 3 to the notice, ‘indicated estimates and expected quantities to be consumed merely reflect the contracting authority’s expectations regarding the consumption of the services

covered by the contract. The contracting authority does not therefore undertake to buy a specific quantity of service or to make purchases in a particular amount under the framework agreement. In other words, the actual consumption may prove to be higher or lower than the estimates indicate'. Nor was the framework agreement to be regarded as being exclusive, such that the contracting authority could acquire similar products from other suppliers whilst complying with the rules governing public contracts.

36 By decision of 9 August 2019, the Regions found that Nutricia's tender was the most advantageous and declared that that company had been awarded the contract. On 19 August 2019, Simonsen & Weel lodged a complaint with the Klagenævnet for Udbud (Public Procurement Complaints Board, Denmark) seeking the annulment of that decision.

37 Since that court did not grant that complaint suspensive effect, the Region of North Jutland concluded a framework agreement with the successful tenderer. For its part, the Region of Southern Denmark did not exercise the option available to it.

38 In support of its complaint, Simonsen & Weel submits, in the first place, that, by failing to indicate in the contract notice the estimated quantity or estimated value of the supplies under the framework agreement at issue in the main proceedings, the Regions infringed Article 49 of Directive 2014/24, the principles of equal treatment and transparency enshrined in Article 18(1) of that directive and point 7 of Part C of Annex V to the directive.

39 In the second place, the Regions are required to indicate the maximum quantity of the products that can be acquired under the framework agreement or the total maximum value of that framework agreement, failing which they could divide that framework agreement up artificially throughout its duration, contrary to the case-law established in the judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034).

40 With regard to the failure to indicate the estimated quantity or estimated value, the Regions contend, inter alia, that the obligation to indicate a specific extent or a specific value in the contract notice does not apply in relation to framework agreements. In their view, it follows from the very wording of Article 33(1) of Directive 2014/24 that the estimated quantities envisaged can be stated 'where appropriate', thus meaning that such an indication remains optional for the contracting authority.

41 As for the failure to indicate the maximum quantity of the products that can be acquired under the framework agreement or the total maximum value of that framework agreement, the Regions argue that the solution adopted in the judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034), is limited to those situations in which a contracting authority is acting on behalf of other contracting authorities who are not directly parties to the framework agreement, which was not the case here. In addition, it follows from that judgment that the principles of transparency and equal treatment are observed where the total quantity of the services is indicated in the framework agreement itself or in another contractual document.

42 Moreover, in the case of calls for tenders relating to a framework agreement, the question of whether it is also carried out on behalf of other contracting authorities is decisive, as also follows from recitals 59 to 62 of Directive 2014/24. The requirement to indicate a maximum volume or a maximum value, which is mentioned in paragraph 61 of the judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034), cannot be extended to circumstances that are not comparable to that at issue in that case. In the present case, the Regions contend that they put out for tender a non-exclusive, non-synallagmatic framework agreement, and that they were unaware at the time of the call for tenders of the extent of the specific purchasing requirements or the price level for the 'individual contracts'. Accordingly, they were unable to provide a reliable estimate of the value of the framework agreement.

43 The Klagenævnet for Udbud (Public Procurement Complaints Board) therefore asks about the possibility of applying by analogy the solution adopted in the judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034), to the dispute in the main proceedings, given the particular nature of the circumstances of the case that gave rise to that judgment and the fact that Directive 2014/24 contains, in relation to framework

agreements, some – admittedly minor – amendments as compared with the wording of Directive 2004/18, which was applicable to that case. Its doubts relate in particular to whether a maximum limit should specify both the maximum quantities and maximum values of the products that may be purchased under the framework agreement and whether such a maximum should, where appropriate, be determined 'from the start', that is to say in the contract notice – in which case it would therefore be identical to the estimated value – and/or in the tender specifications, or whether it is sufficient for a maximum to be determined for the first time in the framework agreement itself, that is to say on completion of the competitive tendering procedure. Lastly, if that maximum limit was not duly stated by the contracting authority, the referring court asks whether, pursuant to Article 2d of Directive 92/13, the framework agreement concluded on that basis must be treated in the same way as the situation in which a contract notice was not published and, therefore, be regarded as being ineffective.

44 It is in that context that the Klagenævnet for Udbud (Public Procurement Complaints Board) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Are the principles of equal treatment and transparency laid down in Article 18(1) of [Directive 2014/24] and Article 49 of [that directive], in conjunction with points 7 and 10(a) of Part C of Annex V [thereto], to be interpreted as meaning that the contract notice in a case such as the present must contain information on the estimated quantity and/or the estimated value of the supplies under the framework contract to which the tender relates?

(b) If the answer to this question is in the affirmative, the Court is also asked whether the above provisions are to be interpreted as meaning that the information must be stated in respect of the framework contract (a) as a whole and/or (b) in respect of the original contracting authority which stated its intention to conclude an agreement on the basis of the invitation to tender (in the present case: Region of North Jutland) and/or (c) in respect of the original contracting authority which merely stated that it is participating in an option (in the present case: Region of Southern Denmark).

(2) (a) Are the principles of equal treatment and transparency laid down in Article 18(1) of [Directive 2014/24] and Articles 33 and 49 of [Directive 2014/24], in conjunction with points 7 and 10(a) of Part C of Annex V to Directive 2014/24, to be interpreted as meaning that either the contract notice or the tender specifications must set a maximum quantity and/or a maximum value of the supplies under the framework contract to which the tender relates, such that the framework contract in question will no longer have any effect when that limit is reached?

(b) If the answer to this question is in the affirmative, the Court is also asked whether the above provisions are to be interpreted as meaning that the above maximum limit must be indicated in respect of the framework contract (a) as a whole and/or (b) in respect of the original contracting authority which stated its intention to conclude an agreement on the basis of the invitation to tender (in the present case: Region of North Jutland) and/or (c) in respect of the original contracting authority which merely stated that it is participating in one option (in the present case: Region of Southern Denmark).

(3) If the answer to Question 1 and/or Question 2 is in the affirmative, the Court is further asked – in so far as it is relevant to the content of those answers – to answer the following question:

Is Article 2d(1)(a) of [Directive 92/13], read in conjunction with Articles 33 and 49 of [Directive 2014/24], in conjunction with points 7 and 10(a) of Part C of Annex V to Directive 2014/24, to be interpreted as meaning that the condition that "the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union*" covers a case such as the present where the contracting authority has published a contract notice in the *Official Journal of the European Union* concerning the envisaged framework contract, but

(a) where the contract notice does not meet the requirement to indicate the estimated quantity and/or the estimated value of the supplies under the framework contract to which the tender relates since an estimate thereof is set out in the tender specifications, and

(b) where the contracting authority has breached the requirement to set in the contract notice or the tender specifications a maximum quantity and/or a maximum value of the supplies under the framework contract to which the call for tenders relates?'

Consideration of the questions referred

Part (a) of the first question and part (a) of the second question

45 By part (a) of its first question and part (a) of its second question, the referring court asks, in essence, whether Article 49 of Directive 2014/24 and points 7, 8 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the contract notice must state the estimated quantity and/or the estimated value as well as a maximum quantity and/or a maximum value of the supplies under a framework agreement and that that agreement will no longer have any effect once that limit is reached.

46 It must be recalled that, pursuant to the second subparagraph of Article 33(1) of Directive 2014/42, a framework agreement is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged. The first subparagraph of that paragraph provides that contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in the directive.

47 Article 49 of Directive 2014/24 provides that contract notices are to be used as a means of calling for competition in respect of all procedures, without prejudice to the second subparagraph of Article 26(5) and Article 32 of that directive. They are to contain the information set out in Part C of Annex V to the directive and are to be published in accordance with Article 51 of the directive.

48 It follows that Article 49 of Directive 2014/24 and, therefore, Part C of Annex V thereto apply to framework agreements.

49 In that regard, certain provisions of Directive 2014/24, taken in isolation, may suggest that the contracting authority has some discretion as to expediency of indicating, in the contract notice, a maximum value of the supplies under a framework agreement.

50 Point 8 of Part C of Annex V to Directive 2014/24 provides that, in terms of the information to be included in contract notices, the contracting authority must state the estimated total order of magnitude of the contract(s), and that information is to be provided for each lot where the contract is divided into lots. The reference merely to an 'order of magnitude' rather than to a specifically defined value suggests that the valuation required of the contracting authority may be approximate.

51 Point 10 of that Part C, which relates to information concerning the timeframe for delivery or provision of supplies, works or services and, as far as possible, the duration of the contract, provides in point (a) thereof, which is specifically devoted to frameworks agreements, that the contracting authority must indicate, as far as possible, the value or the order of magnitude and the frequency of the contracts to be awarded. It therefore follows that, in accordance with that provision, the contracting authority is not required in all circumstances to indicate the value or the order of magnitude and the frequency of the contracts to be awarded.

52 Similarly, the second subparagraph of Article 33(1) of Directive 2014/24 provides that the purpose of a framework agreement is to establish, 'where appropriate', the quantity envisaged. By using the words 'where appropriate', that provision makes clear, specifically in relation to the quantity of the supplies, that that quantity must, in so far as possible, be established in a framework agreement. It is likewise apparent from the standard form contained in Annex II to Implementing Regulation 2015/1986 that the contracting authority is not required to complete field II.1.5, which is entitled 'Estimated total value'; that value can be specified 'if applicable', as is clear from the reference made in that field to footnote No 2 of that form.

53 It follows from the foregoing that a literal interpretation alone of those provisions is not conclusive for the purpose of determining whether a contract notice must indicate the estimated quantity and/or estimated value as well as a maximum quantity and/or maximum value of the supplies under a framework agreement.

54 However, in the light of the principles of equal treatment and transparency laid down in Article 18(1) of Directive 2014/24 and of the general scheme of that directive, a failure by the contracting authority to indicate, in the contract notice, a maximum value of the supplies under a framework agreement cannot be accepted.

55 Indeed, it follows from other provisions of Directive 2014/24 that the contracting authority must determine the content of the framework agreement that it intends to conclude.

56 First, Article 5 of that directive, which concerns the methods for calculating the estimated value of procurement, provides, in paragraph 5 thereof, that, with regard to framework agreements, the value to be taken into consideration is to be the maximum estimated value net of VAT of all the public contracts envisaged for the total term of the framework agreement.

57 Since the contracting authority is called upon to assess the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement, it is able to communicate that value to the tenderers.

58 Furthermore, the Court relied inter alia on Article 9(9) of Directive 2004/18, the wording of which is identical to that of Article 5(5) of Directive 2014/24, to find, in paragraph 60 of the judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034), that, although the contracting authority that is an original party to the framework agreement is subject only to a requirement to use best endeavours with regard to the value and frequency of each of the subsequent contracts to be awarded, it is nevertheless imperative that that authority state vis-à-vis the framework agreement itself the total quantity, and therefore the maximum quantity and/or maximum value, which the subsequent contracts may comprise.

59 Second, pursuant to point 7 of Part C of Annex V to Directive 2014/24, the contracting authority must, in respect of the information to be included in contract notices, describe the procurement and, in that regard, state the quantity or the value of the supplies which will be covered by the framework agreement in its entirety. It cannot comply with that requirement without indicating, at the very least, a maximum quantity and/or a maximum value of such supplies.

60 Furthermore, when a contracting authority is required to complete the form contained in Annex II to Implementing Regulation 2015/1986, it is required to indicate, in field II.2.6 of that form, which concerns the estimated value, the total maximum value for the entire duration of each of the lots.

61 Moreover, it is important to note that the fundamental principles of EU law, such as equal treatment and transparency, are applicable to the conclusion of a framework agreement; this follows from the first subparagraph of Article 33(1) of Directive 2014/24. Not only the principles of equal treatment and non-discrimination, but also the principle of transparency that stems from them imply that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (see, to that effect, judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 63).

62 The principles of transparency and equal treatment of economic operators with an interest in the conclusion of a framework agreement, as established, inter alia, by Article 18(1) of Directive 2014/24, would be affected if the contracting authority that is an original party to the framework agreement did not set out the maximum quantity which such an agreement covers (see, to that effect, judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 64).

63 In that connection, the indication by the contracting authority of the estimated quantity and/or the estimated value as well as of a maximum quantity and/or a maximum value of the supplies under a framework agreement is of considerable importance for a tenderer, since it is on the basis of that estimate that he or she will be able to assess his or her ability to perform the obligations arising from that framework agreement.

64 Furthermore, if the maximum estimated value or quantity which such an agreement covers were not indicated or if that indication were not legally binding, the contracting authority could flout that maximum quantity. As a result, the successful tenderer could be held contractually liable for non-performance of the framework agreement if he or she were to fail to supply the quantities requested by the contracting authority, even though those quantities exceed the maximum quantity in the contract notice. Such a situation would be contrary to the principle of transparency as laid down in Article 18(1) of Directive 2014/24.

65 In addition, the principle of transparency could be infringed over the long term since, as follows from the third subparagraph of Article 33(1) of that directive, a framework agreement can be concluded for a term of up to four years, or even longer in duly justified exceptional cases, in particular by the subject of the framework agreement. Moreover, as is stated in recital 62 of the directive, while contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement, the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but might sometimes be shorter or longer.

66 Lastly, a broad interpretation of the obligation to define the maximum estimated value or quantity covered by the framework agreement could also, first, render redundant the rule laid down in the third subparagraph of Article 33(2) of Directive 2014/24, under which contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, and, second, constitute improper use or use intended to prevent, restrict or distort competition, as referred to in recital 61 of the directive.

67 It follows that the requirement that the contracting authority that is an original party to the framework agreement indicate therein the maximum quantity or the maximum value of the services that that agreement will cover is a manifestation of the prohibition on using framework agreements improperly or in such a way as to prevent, restrict or distort competition (see, to that effect, judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 69).

68 It follows from the foregoing considerations that the contracting authority that is an original party to the framework agreement can make commitments on its own behalf or on behalf of the potential contracting authorities that are specifically indicated in the agreement only up to a maximum quantity and/or a maximum value and once that limit has been reached the agreement will no longer have any effect (see, by analogy, judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 61).

69 However, two further clarifications must be made.

70 First, in accordance with the third subparagraph of Article 33(2) and Article 72 of Directive 2014/24, modifications to a framework agreement that are not substantial are allowed, it being understood that, by definition, such a modification is consensual in nature and, accordingly, the agreement of the successful tenderer is required.

71 Second, the indication of the maximum quantity or the maximum value of the supplies under a framework agreement can appear in either the contract notice or the tender specifications, since, in the case of a framework agreement, the contracting authorities are required to offer, pursuant to Article 53(1) of Directive 2014/24, by electronic means unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with Article 51 of that directive.

72 Compliance with the principles of transparency and equal treatment laid down in Article 18(1) of Directive 2014/24 can thus be ensured if those conditions are met.

73 However, those principles would not be satisfied if an economic operator wanting to access those tender specifications in order to assess the expediency of tendering were required to express, in advance, any interest whatsoever to the contracting authority.

74 In those circumstances, part (a) of the first question and part (a) of the second question must be answered to the effect that Article 49 of Directive 2014/24 and points 7, 8 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the contract notice must indicate the estimated quantity and/or the estimated value as well as a maximum quantity and/or a maximum value of the supplies under a framework agreement and that that agreement will no longer have any effect once that limit is reached.

Part (b) of the first question and part (b) of the second question

75 By part (b) of its first question and part (b) of its second question, the referring court asks, in essence, whether Article 49 of Directive 2014/24 and points 7 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the estimated quantity or the estimated value of the supplies under a framework agreement as well as the maximum quantity or the maximum value of those supplies must be indicated in the contract notice as a whole.

76 Since, as is clear from the answer given to part (a) of the first question and part (a) of the second question, the contract notice must indicate the estimated quantity and/or estimated value as well as a maximum quantity and/or maximum value of the supplies under a framework agreement, the principles of transparency and equal treatment laid down in Article 18(1) of Directive 2014/24 preclude a contracting authority from communicating only partial information about the subject and the extent, in quantitative and/or financial terms, of a framework agreement.

77 That indication could appear as a whole in the contract notice, since such an indication would be sufficient to ensure compliance with the principles of transparency and equal treatment laid down in Article 18(1) of that directive.

78 However, nothing precludes a contracting authority, with a view to refining the information provided to tenderers and to enable them best to assess the expediency of submitting a tender, from laying down additional requirements and dividing the total estimated quantity or value of the supplies under the framework agreement in order to define the requirements of the contracting authority that is an original party which intends to conclude a framework agreement and those of the contracting authority or authorities that is/are an original party which has/have expressed the desire to participate in that framework agreement on an optional basis.

79 Similarly, a contracting authority can present separately, in the contract notice, the estimated quantity and/or the estimated value as well as a maximum quantity and/or a maximum value of the supplies under a framework agreement for each of the contracting authorities, whether they intend to conclude the framework agreement or have an option to do so. That could be the case in particular where, in the light of the terms governing the performance of the subsequent public contracts, the economic operators are invited to tender for all the lots or for all the items referred to in the contract notice, or even where the subsequent contracts are to be performed in remote locations.

80 Part (b) of the first question and part (b) of the second question must therefore be answered to the effect that Article 49 of Directive 2014/24 and points 7 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the contract notice must indicate the estimated quantity and/or the estimated value and a maximum quantity and/or a maximum value of the supplies under a framework agreement as a whole and that that notice may lay down additional requirements which the contracting authority decides to add thereto.

The third question

81 As a preliminary point, it must be recalled that the fact that the referring court has worded a question referred for a preliminary ruling with reference only to certain provisions of EU law does not preclude the Court from providing to the referring court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (see, inter alia, judgments of 27 October 2009, *ČEZ*, C-115/08, EU:C:2009:660, paragraph 81; of 22 March 2012, *Nilaş and Others*, C-248/11, EU:C:2012:166, paragraph 31; and of 20 December 2017, *Impresa di Costruzioni Ing. E. Mantovani and Guerrato*, C-178/16, EU:C:2017:1000, paragraph 28).

82 In the present case, Directive 92/13, the interpretation of a provision of which is sought by the referring court, concerns the rules on the procurement procedures of entities operating in the water, energy, transport and postal services sectors. However, such services are not at issue in the case in the main proceedings, which concerns reviews relating to contract award procedures based on Directive 2014/24 that are governed by Directive 89/665, Article 2d(1)(a) of which is worded in similar terms to the corresponding provision of Directive 92/13.

83 In those circumstances, the view must be taken that, by its third question, the referring court is essentially asking whether Article 2d(1)(a) of Directive 89/665 is to be interpreted as meaning that it is applicable where a contract notice has been published in the *Official Journal of the European Union*, even though, first, the estimated quantity and/or the estimated value of the supplies under the envisaged framework agreement is stated not in that contract notice but in the tender specifications and, second, neither that contract notice nor those tender specifications mention a maximum quantity and/or a maximum value of the supplies under that framework agreement.

84 Under Article 2d(1) of Directive 89/665, if a contract notice is not published beforehand in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2014/24, the contract or, as in the present case, the framework agreement concerned is ineffective.

85 Article 2d was inserted into the initial version of Directive 89/665 by Directive 2007/66. The EU legislature explained the amendments made by stating in recital 13 of Directive 2007/66 that, in order to combat the illegal direct award of contracts – which the Court in its judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraphs 36 and 37), called the most serious breach of EU law in the field of public procurement on the part of a contracting authority or contracting entity – there should be provision for effective, proportionate and dissuasive sanctions and, on that basis, a contract resulting from an illegal direct award should in principle be considered ineffective. In recital 14 of that directive, the EU legislature clarified that ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete, and that direct awards within the meaning of that directive should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union* within the meaning of Directive 2004/18.

86 It thus follows from Article 2d(1)(a) of Directive 89/665, read in the light of recitals 13 and 14 of Directive 2007/66, that, when Directive 2007/66 was adopted, the EU legislature intended to introduce into the applicable law a serious penalty, the application of which should however be confined to the most serious cases of infringements of EU law on public procurement, namely those in which a contract is awarded directly without having been the subject of any prior publication of a contract notice in the *Official Journal of the European Union*.

87 It follows that it would be disproportionate to extend the application of that provision to a situation such as that at issue in the main proceedings, in which the Regions published a contract notice and made the tender specifications accessible without mentioning, in that notice or those tender specifications, the estimated quantity and/or estimated value and the maximum quantity and/or maximum value of the supplies under that framework agreement.

88 In such a situation, the infringement of Article 49 of Directive 2014/24, read in conjunction with points 7, 8 and 10(a) of Part C of Annex V to that directive, does not reach the degree of seriousness required to entail the application of the penalty provided for in Article 2d(1)(a) of Directive 89/665.

89 The contracting authority's failure to comply with its obligation to indicate the extent of a framework agreement is, in such circumstances, sufficiently noticeable for it to be detected by an economic operator who intended to submit a tender and who ought, as a result, to be regarded as being duly informed.

90 The third question must therefore be answered to the effect that Article 2d(1)(a) of Directive 89/665 is to be interpreted as meaning that it is not applicable where a contract notice has been published in the *Official Journal of the European Union*, even though, first, the estimated quantity and/or the estimated value of the supplies under the envisaged framework agreement is stated not in that contract notice but in the tender specifications and, second, neither that contract notice nor those tender specifications mention a maximum quantity and/or a maximum value of the supplies under that framework agreement.

Costs

91 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 49 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC and points 7, 8 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the contract notice must indicate the estimated quantity and/or the estimated value as well as a maximum quantity and/or a maximum value of the supplies under a framework agreement and that that agreement will no longer have any effect once that limit is reached.**

2. **Article 49 of Directive 2014/24 and points 7 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the contract notice must indicate the estimated quantity and/or the estimated value and a maximum quantity and/or a maximum value of the supplies under a framework agreement as a whole and that that notice may lay down additional requirements which the contracting authority decides to add thereto.**

3. **Article 2d(1)(a) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, is to be interpreted as meaning that it is not applicable where a contract notice has been published in the *Official Journal of the European Union*, even though, first, the estimated quantity and/or the estimated value of the supplies under the envisaged framework agreement is stated not in that contract notice but in the tender specifications and, second, neither that contract notice nor those tender specifications mention a maximum quantity and/or a maximum value of the supplies under that framework agreement.**

[Signatures]

---

* Language of the case: Danish.

JUDGMENT OF THE COURT (Fourth Chamber)

20 May 2021 (*)

(Reference for a preliminary ruling – Public supply contracts – Directive 2004/18/EC – Articles 2 and 46 – Project financed by the Fund for European Aid to the Most Disadvantaged – Criteria for the selection of tenderers – Regulation (EC) No 852/2004 – Article 6 – Requirement of a registration certificate or approval issued by the national food safety authority of the State in which the contract is to be performed)

In Case C-6/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia), made by decision of 19 December 2019, received at the Court on 7 January 2020, in the proceedings

Sotsiaalministeerium

v

Riigi Tugiteenuste Keskus, formerly Innove SA,

intervener:

Rahandusministeerium,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby (Rapporteur), S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Estonian Government, by N. Grünberg, acting as Agent,

– the European Commission, by P. Ondrůšek and W. Farrell, L. Haasbeek and E. Randvere, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 January 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2 and 46 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44), and the principle of the protection of legitimate expectations.

2 The request has been made in proceedings between the Sotsiaalministeerium (Ministry of Social Affairs, Estonia) and Riigi Tugiteenuste Keskus (shared services centre for the State), formerly Innove SA, concerning the financial correction decision by which the latter rejected certain requests for payment submitted by that ministry in connection with a project to purchase and distribute food aid to the most disadvantaged persons.

Legal context

EU Law

Directive 2004/18

3 Recital 42 of Directive 2004/18 states:

‘The relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement procedure or a design contest.’

4 Article 2 of that directive, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

5 Article 26 of that directive, entitled ‘Conditions for performance of contracts’, provides:

‘Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.’

6 Chapter VII of Title II of Directive 2004/18, entitled ‘Conduct of the procedure’, includes Section 1, entitled ‘General provisions’. The latter consists solely of Article 44 of that directive, entitled ‘Verification of the suitability and choice of participants and award of contracts’, which is worded as follows:

‘1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

These minimum levels shall be indicated in the contract notice.

…’

7 Section 2 of that chapter, entitled ‘Criteria for qualitative selection’, comprises Articles 45 to 52 of that directive.

8 Pursuant to Article 46 of that directive, entitled ‘Suitability to pursue the professional activity’:

‘Any economic operator wishing to take part in a public contract may be requested to prove its enrolment, as prescribed in his Member State of establishment, on one of the professional or trade

registers or to provide a declaration on oath or a certificate as described in Annex IX A for public works contracts, in Annex IX B for public supply contracts and in Annex IX C for public service contracts.

In procedures for the award of public service contracts, in so far as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.'

9 Article 48 of that directive, entitled 'Technical and/or professional ability', provides:

'1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

…

(d) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate;

…

(j) with regard to the products to be supplied:

…

(ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards.

…'

10 Article 49 of that directive, entitled 'Quality assurance standards', states:

'Should they require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, contracting authorities shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators.'

11 Pursuant to Article 50 of that directive, which relates to 'environmental management standards':

'Should contracting authorities, in the cases referred to in Article 48(2)(f), require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators.'

12 Article 52 of Directive 2004/18, which is entitled 'Official lists of approved economic operators and certification by bodies established under public or private law', provides:

‘1. Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 45(1), Article 45(2)(a) to (d) and (g), [Article] 46, Article 47(1), (4) and (5), Article 48(1), (2), (5) and (6), Article 49 and, where appropriate, Article 50.

…

2. Economic operators registered on the official lists or having a certificate may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority or the certificate issued by the competent certification body. The certificates shall state the references which enabled them to be registered in the list/to obtain certification and the classification given in that list.

3. Certified registration on official lists by the competent bodies or a certificate issued by the certification body shall not, for the purposes of the contracting authorities of other Member States, constitute a presumption of suitability except as regards [Article] 45(1) and (2)(a) to (d) and (g), Article 46, Article 47(1)(b) and (c), and Article 48(2)(a)(i), (b), (e), (g) and (h) in the case of contractors, (2)(a)(ii), (b), (c), (d) and (j) in the case of suppliers and [(2)](a)(ii) and (c) to (i) in the case of service providers.

4. Information which can be deduced from registration on official lists or certification may not be questioned without justification. With regard to the payment of social security contributions and taxes, an additional certificate may be required of any registered economic operator whenever a contract is offered.

The contracting authorities of other Member States shall apply paragraph 3 and the first subparagraph of this paragraph only in favour of economic operators established in the Member State holding the official list.

5. For any registration of economic operators of other Member States in an official list or for their certification by the bodies referred to in paragraph 1, no further proof or statements can be required other than those requested of national economic operators and, in any event, only those provided for under Articles 45 to 49 and, where appropriate, Article 50.

However, economic operators from other Member States may not be obliged to undergo such registration or certification in order to participate in a public contract. The contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.

6. Economic operators may ask at any time to be registered in an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body.

…’

13 Annex VII A to that directive, entitled ‘Information to be included in public contract notices’, states in point 17, under the heading ‘Contract notices’, that the contract notice must state, inter alia in open procedures, the ‘selection criteria regarding the personal situation of economic operators that may lead to their exclusion, and required information proving that they do not fall within the cases justifying exclusion[,] selection criteria and information concerning the economic operators’ personal situation, information and any necessary formalities for assessment of the minimum economic and technical standards required of the economic operator [and] minimum level(s) of standards possibly required’.

Regulation (EC) No 852/2004

14 Recitals 1 and 8 of Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 139, p. 1), as amended by Regulation (EC)

No 219/2009 of the European Parliament and of the Council of 11 March 2009 (OJ 2009 L 87, p. 109) ('Regulation No 852/2004'), state:

'(1) The pursuit of a high level of protection of human life and health is one of the fundamental objectives of food law, as laid down in Regulation (EC) No 178/2002 [of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1)]. That Regulation also lays down other common principles and definitions for national and Community food law, including the aim of achieving free movement of food within the Community.

…

(8) An integrated approach is necessary to ensure food safety from the place of primary production up to and including placing on the market or export. Every food business operator along the food chain should ensure that food safety is not compromised.'

15 Article 1 of Regulation No 852/2004, entitled 'Scope', provides in paragraph 1:

'This Regulation lays down general rules for food business operators on the hygiene of foodstuffs, taking particular account of the following principles:

(a) primary responsibility for food safety rests with the food business operator;

(b) it is necessary to ensure food safety throughout the food chain, starting with primary production;

…

This Regulation shall apply to all stages of production, processing and distribution of food and to exports, and without prejudice to more specific requirements relating to food hygiene.'

16 Article 3 of that regulation, entitled 'General obligation', provides:

'Food business operators shall ensure that all stages of production, processing and distribution of food under their control satisfy the relevant hygiene requirements laid down in this Regulation.'

17 Article 6 of Regulation No 852/2004, entitled 'Official controls, registration and approval', provides:

'1. Food business operators shall cooperate with the competent authorities in accordance with other applicable Community legislation or, if it does not exist, with national law.

2. In particular, every food business operator shall notify the appropriate competent authority, in the manner that the latter requires, of each establishment under its control that carries out any of the stages of production, processing and distribution of food, with a view to the registration of each such establishment.

Food business operators shall also ensure that the competent authority always has up-to-date information on establishments, including by notifying any significant change in activities and any closure of an existing establishment.

3. However, food business operators shall ensure that establishments are approved by the competent authority, following at least one on-site visit, when approval is required:

(a) under the national law of the Member State in which the establishment is located;

(b) under Regulation (EC) No 853/2004 [of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin (OJ 2004 L 139, p. 55)],

or

(c) by a decision adopted by the Commission. That measure, designed to amend non-essential elements of this Regulation, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 14(3).

Any Member State requiring the approval of certain establishments located on its territory under national law, as provided for in subparagraph (a), shall inform the Commission and other Member States of the relevant national rules.'

Estonian law

Law on public procurement

18 Under the title 'General principles governing the award of public contracts', Article 3 of the Riigihangete seadus (Law on public procurement), in the version applicable to the dispute in the main proceedings (RT I 2016, 20; 'the Law on public procurement'), provides:

'When awarding public contracts, the contracting authority shall comply with the following principles:

(1) the contracting authority shall use the financial means in a manner that is efficient and consistent with the aim pursued and shall attain the objective of the public contract in question at a reasonable price, ensuring, in the event of competition, the best possible price and quality by comparing the various tenders;

(2) the contracting authority shall ensure the transparency of the procedure for the award of the public contract and the possibility of reviewing it;

(3) all persons who have their domicile or registered office in Estonia, another Member State of the European Union, another Member State of the European Economic Area or in a State that has acceded to the [Agreement on Government Procurement (OJ 1996 C 256, p. 2) in Annex 4 to the Agreement establishing the World Trade Organisation (WTO) (OJ 1994 L 336, p. 3)], shall be treated equally and without discrimination by the contracting authority, and the contracting authority shall ensure that all limitations and criteria imposed on persons are proportionate, relevant and well founded in relation to the objective of the public contract;

(4) when awarding public contracts, the contracting authority shall ensure the effective use of existing competition and, in that context, the participation of a legal person governed by public law or a person governed by private law using public resources in the procedure for the award of a public contract must not distort competition through the use of public resources;

(5) the contracting authority shall avoid conflicts of interest that adversely affect competition;

(6) the contracting authority shall, where possible, give priority to environmentally friendly solutions.'

19 Article 39 of the Law on public procurement, entitled 'Verification of the qualifications of the tenderer or candidate', provides in paragraph 1:

'The contracting authority shall examine whether the economic and financial standing and the technical and professional ability of the tenderer or candidate meet the conditions relating to qualification set out in the tender notice. The conditions relating to qualification must be sufficient to establish the tenderer or candidate's suitability to perform the public contract and must also be relevant and proportionate in the light of the nature, quantity and objective of the goods, services or works covered by the public contract.'

20 Article 41 of that law, which deals with the 'technical and professional ability of tenderers or candidates', provides in paragraph 3:

'Where the legislature lays down specific conditions for an activity which must be carried out under a public contract, the contracting authority shall indicate in the tender notice the specific conditions

which must be met, in addition to the operating licences and registration certificates required for qualification of the tenderer or candidate. In order to verify compliance with the specific conditions laid down in the statutory provisions, the contracting authority shall stipulate in the tender notice that the tenderer or candidate must furnish proof that it holds an operating licence or registration certificate or that it fulfils any other specific condition, or that the tenderer must prove that it is a member of a competent organisation in accordance with the legislation of its State of establishment, unless the contracting authority is able to obtain that proof, without any further expenditure, by consulting the public data on a database. If the tenderer or candidate does not hold an operating licence or registration certificate, or is not a member of the relevant organisation in accordance with the legislation of its State of establishment, the contracting authority shall exclude it.'

Law on foodstuffs

21 Under the title 'Obligation to hold a licence', Article 8 of the Toiduseadus (Law on foodstuffs), in the version applicable to the dispute in the main proceedings (RT I 1999, 30, 415; 'the Law on foodstuffs'), provides:

'1. The economic operator shall hold an operating licence for activities in the food sector in the following establishments:

(1) an establishment for the purposes of Article 6(3)(b) and (c) of Regulation [No 852/2004];

(2) an establishment in which operations relating to primary products of animal origin do not involve any alteration of the form or original characteristics of the products, unless the establishment concerned is one which deals with the primary production of those products and in which the producer carries out associated operations within the meaning of Regulation [No 852/2004];

(3) an establishment in which operations relating to primary products not of animal origin involve the alteration of the form and original characteristics of the products, unless the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];

(4) an establishment in which the processing of foodstuffs takes place, in particular the preparation and wrapping of foodstuffs, with the exception of the wrapping of primary products not of animal origin or where the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];

(5) an establishment which deals with operations relating to foodstuffs of animal origin which are then distributed to another operator and are included in Annex II, Chapter III of Regulation [No 852/2004];

(6) an establishment dealing with the storage of foodstuffs which, in order to ensure food safety, must be kept at a temperature other than ambient temperature;

(7) an establishment dealing with retail trade, in particular in foodstuffs which must be stored at a temperature other than ambient temperature in order to ensure food safety, unless the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];

…

2. The operating licence shall entitle the economic operator to commence operations and to pursue and carry on an economic activity in the establishment or in the part of the establishment referred to in the operating licence.

3. The competent minister in the field shall establish, by regulation, a detailed list of the areas of operation and categories of foodstuff in respect of which operators must be in possession of an operating licence.'

22 Under Article 10 of the Law on foodstuffs, entitled 'Purpose of the control of the operating licence':

‘An operating licence shall be granted to an economic operator if its establishment or the establishment which it uses for its activity as a food sector operator satisfy the conditions laid down in [Regulation No 852/2004 and Regulation No 853/2004, and] in other relevant provisions on foodstuffs.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

23 The Ministry of Social Affairs organised two open invitations to tender for public contracts for the purchase of food aid for the most disadvantaged persons, one in 2015, the other in 2017, each with the estimated value of EUR 4 million.

24 As regards the first contract, tenderers were initially required to have the approval of the Veterinaar- ja Toiduamet (Veterinary and Food Office, Estonia), since that approval was deemed necessary for the performance of that contract. However, during the procurement procedure, the tender documentation was amended in order to replace that requirement with the obligation to provide confirmation of compliance with the obligations relating to information and authorisation laid down in the Law on foodstuffs and which were necessary for the performance of that contract.

25 As regards the second contract, the contracting authority required from the outset the confirmation referred to in the preceding paragraph.

26 In the context of each of those two public contracts, framework agreements were signed with the three successful tenderers.

27 By a financial correction decision of 30 October 2018, Riigi Tugiteenuste Keskus rejected requests for payment amounting to approximately EUR 463 000. Those requests had been made in connection with the project ‘Purchase and transport of foodstuffs to the place of storage’, which forms part of a food aid programme of the Ministry of Social Affairs for the most disadvantaged persons.

28 In so doing, Riigi Tugiteenuste Keskus followed the position stated by the Rahandusministeerium (Ministry of Finance, Estonia) in the final audit report of 10 September 2018, which concluded that the requirement that tenderers must have an approval issued by an Estonian authority or must comply with the obligations relating to information and authorisation in Estonia was unjustifiably restrictive for tenderers established in a Member State other than the Republic of Estonia.

29 Following the dismissal of the administrative complaint that it had brought before Riigi Tugiteenuste Keskus, the Ministry of Social Affairs brought an action before the Tallinna Halduskohus (Tallinn Administrative Court, Estonia) seeking annulment of the financial correction decision of 30 October 2018.

30 In support of that action, it claimed, first, that in order to comply with Article 41(3) of the Law on public procurement, the contract notice must state, as a condition for the qualification of tenderers, the specific requirements to be met and the registration certificates and operating licences required.

31 In the present case, the performance of the public contracts at issue required the use of an intermediate warehouse in which foodstuffs could be stored or a means of transport situated in Estonia. By satisfying those conditions, the tenderer would become a food business operator and should, in accordance with Article 8 of the Law on foodstuffs and Article 6(3) of Regulation No 852/2004, fulfil the obligations relating to information and authorisation in Estonia. The contracting authority is not in fact able to accept an operating licence issued by the Member State in which the tenderer is established since, in the case of operating licences in the food sector, there is no mutual recognition between the Member States.

32 According to the Ministry of Social Affairs, the setting of qualification conditions linked to specific requirements under the Law on foodstuffs enabled the contracting authority legally to reduce the risks of improper performance of the public contracts in question. The verification of compliance with the obligations imposed by that law, concerning information and authorisation, should therefore have been carried out at the stage of qualification of tenderers, and not during the performance of those contracts. In that regard, it would have sufficed for a tenderer established in a Member State other than the

Republic of Estonia to inform the Veterinary and Food Office by letter of the fact that it was going to start an activity, without it being necessary to obtain a reply from that office. At the same time as it informed that office, or subsequently, that tenderer could have initiated, if necessary, a licencing procedure. In view of the time limit set for the submission of tenders in the case of an international call for tenders, which is at least 40 days, and the period required for the licensing procedure laid down in that law, which is 30 days, a tenderer would have had sufficient time to carry out the steps associated with the licencing procedure.

33 In the second place, the first contract had already been assessed and approved twice by the auditors of the Ministry of Finance. Thus, the retroactive change in the interpretation of the public procurement rules during a third audit carried out by the same auditors is not consistent with the principles of sound administration and the protection of legitimate expectations.

34 Riigi Tugiteenuste Keskus, supported by the Ministry of Finance, contended before the Tallinna Halduskohus (Tallinn Administrative Court) that the action of the Ministry of Social Affairs should be dismissed. It argued, inter alia, that Article 46 of Directive 2004/18 only permits for a tenderer to be required to furnish proof that it holds a licence to provide services issued by the Member State in which it is established or proof that it is a member of a specific organisation in that Member State. Furthermore, it is unreasonable and contrary to the principle of equal treatment to require the tenderer to have already carried out various administrative steps in Estonia at the time of submitting the tender, even if such steps are linked to performance of the contract. Lastly, Riigi Tugiteenuste Keskus contends that there has been no infringement of the principle of the protection of legitimate expectations.

35 By decision of 22 May 2019, the Tallinna Halduskohus (Tallinn Administrative Court) dismissed the action of the Ministry of Social Affairs on the ground that the requirement that tenderers must have an approval issued by an Estonian authority or must comply with the obligations relating to information and authorisation in Estonia was disproportionate and discriminatory to tenderers established in other Member States. That court also rejected the plea alleging infringement of the principle of the protection of legitimate expectations in so far as the Ministry of Social Affairs could not, in the light of previous, non-binding audits carried out by the Ministry of Finance, be legally certain that there would be no future infringements of the rules applicable to public procurement.

36 Following the dismissal of its action, the Ministry of Social Affairs appealed to the Tallinna Ringkonnakohus (Tallinn Court of Appeal, Estonia).

37 According to the Tallinna Ringkonnakohus (Tallinn Court of Appeal), since the conditions for the issue of the confirmation or approval by the competent authority are not fully harmonised under Regulation No 852/2004, an economic operator cannot rely, in order to commence an activity in a Member State other than its State of origin, on an approval issued in the latter, but must rather obtain the approval required in the former State.

38 Furthermore, allowing a tenderer to qualify for a public contract solely on the basis of its undertaking to apply for an operating licence or registration certificate could jeopardise the performance of the contract concerned if that tenderer does not fulfil that obligation or is not in a position to carry on its activity in accordance with the conditions for obtaining that licence or registration certificate.

39 While noting that the requirement for an operating licence or registration certificate in Estonia is disproportionate in relation to tenderers established in another Member State, the referring court observes that the interpretation of Article 46 of Directive 2004/18 is not readily apparent, particularly as the Court has not yet had an opportunity to interpret that provision. Furthermore, the requirements laid down in the interests of food safety are justified as a condition for the performance of the public contracts at issue and, accordingly, the dispute in the main proceedings concerns only the question of when those requirements must be met, either at the time of submitting the tender or at the time of performance of the contract.

40 In those circumstances, the Tallinna Ringkonnakohus (Court of Appeal, Tallinn), stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Articles 2 and 46 of [Directive 2004/18] to be interpreted as precluding national legislation – such as Paragraph 41(3) of [the Law on public procurement] – pursuant to which, if specific requirements for the activities to be carried out under a public contract are laid down by law, the contracting authority must specify in the tender notice which registrations or activity licences are required to qualify the tenderer, must require the tenderer to submit evidence of the activity licence or registration for the purpose of verifying compliance with the special statutory requirements in the tender notice, and must refuse the tenderer as unqualified if the latter does not possess the relevant activity licence or registration?

(2) Read together, are Articles 2 and 46 of [Directive 2004/18] to be interpreted as precluding the contracting authority, in the case of a food aid procurement contract that exceeds the international threshold, from setting a selection criterion for the tenderers according to which all tenderers, irrespective of where they were previously established, must already hold an activity licence or be registered in the country of the food aid operations at the time of submission of the tenders, even if the tenderer has not previously been established in that Member State?

(3) If the preceding questions are answered in the affirmative:

(a) Are Articles 2 and 46 of [Directive 2004/18] to be regarded as provisions that are so unambiguous that the principle of the protection of legitimate expectations cannot be invoked against them?

(b) Are Articles 2 and 46 of [Directive 2004/18] to be interpreted as meaning that a situation in which the contracting authority in a public tender for food aid requires, pursuant to the national law on foodstuffs, that the tenderers already hold an activity licence at the time of submission of the tender may be regarded as constituting a manifest infringement of the rules in force, as negligence or as an irregularity precluding reliance on the principle of the protection of legitimate expectations?’

Consideration of the questions referred

The first and second questions

41 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 2 and 46 of Directive 2004/18 must be interpreted as precluding national legislation under which the contracting authority must require, in a contract notice and as a qualitative selection criterion, that tenderers furnish proof, at the time of submitting their tender, that they hold the registration certificate or approval required under the legislation applicable to the activity which is the subject of the public contract in question and that it be issued by the competent authority of the Member State in which the contract is to be performed, even where they already hold a similar registration certificate or approval in the Member State in which they are established.

42 As a preliminary point, it should be noted that the second public contract at issue in the main proceedings was awarded in 2017, when Directive 2004/18 was no longer in force, since it had been repealed with effect from 18 April 2016 by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 95, p. 65) and the time limit for transposition of the provisions of Directive 2014/24 also expired on 18 April 2016.

43 However, in the absence of any clarifications from the referring court regarding the date on which the contracting authority chose the type of procedure it intended to follow and definitively decided whether or not there was an obligation to conduct a prior call for competition for the award of the public contract in question, it cannot be determined whether the provisions of Directive 2014/24 are inapplicable on the ground that the period for transposition of that directive expired after that date (see, to that effect, judgments of 27 October 2016, *Hörmann Reisen*, C-292/15, EU:C:2016:817, paragraphs 31 and 32, and of 28 February 2018, *MA.T.I. SUD and Duemme SGR*, C-523/16 and C-536/16, EU:C:2018:122, paragraph 36), it being noted that the content of Articles 2 and 46 of Directive 2004/18 was reproduced in Directive 2014/24.

44 In addition, it should be noted that the obligation for tenderers to hold the registration certificate or approval required by the legislation applicable to the activity which is the subject of the public contract at issue must be understood as a qualitative selection criterion and not as a condition for the performance of the contract for the purposes of Article 26 of Directive 2004/18.

45 First, that requirement corresponds to the option given to the contracting authority under Article 46 of that directive to ask an economic operator to prove its suitability to pursue the professional activity concerned by a public procurement procedure. That requirement thus sets out a criterion for qualitative selection of tenderers intended to enable contracting authorities to assess the suitability of tenderers to perform the public contract concerned.

46 Secondly, the obligation for an economic operator to register or obtain approval in the Member State in which the public contract in question is to be performed presupposes, of course, that the successful tenderer will be required to have an establishment in that State. Conversely, it does not provide any information as to the manner in which that contract is to be performed. Therefore, the requirement to hold a registration certificate or approval cannot be regarded as a special condition concerning the performance of that contract.

47 It is therefore necessary to determine whether Article 46 of Directive 2004/18 precludes a contracting authority from requiring, as a criterion for qualitative selection of tenderers, that tenderers hold a registration certificate and/or approval in the Member State in which the public contract in question is to be performed, even where a tenderer already has a registration certificate and/or approval in the Member State in which it is established.

48 In the first place, as regards Directive 2004/18, it follows from Article 46, read in conjunction with recital 42 thereof, that the principle of mutual recognition of qualifications prevails at the stage of the selection of tenderers. The first paragraph of Article 46 of that directive thus provides that, where an economic operator wishing to take part in a public procurement procedure is asked to prove that it is enrolled on one of the professional or trade registers or to provide a declaration on oath or a certificate, it may do so in accordance with the conditions laid down in the Member State in which it is established. The second paragraph of that article accordingly provides that in procedures for the award of public service contracts, in so far as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform the service concerned in their State of origin, the contracting authority may require them to prove that they hold such authorisation or membership.

49 It follows that a tenderer must be able to prove its suitability to perform a public contract by means of documents, such as a certificate or proof of enrolment on one of the professional or trade registers, issued by the competent authorities of the Member State in which it is established.

50 That interpretation of Article 46 of Directive 2004/18 is borne out by other provisions of that directive. Thus, Article 48(2)(d) and (2)(j)(ii) of that directive refers to a number of situations in which an economic operator may demonstrate its technical and/or professional abilities by sending to the contracting authority of the Member State of performance of a public contract documents issued by the competent authorities of another Member State. The same applies to Article 49 of that directive as regards compliance with quality assurance standards.

51 It also follows from Article 52(3) of Directive 2004/18 that certified registration on official lists by the competent bodies of a Member State or a certificate issued by the certification body of that Member State constitutes a presumption of suitability for the purposes of the contracting authorities of other Member States, in relation inter alia to Article 46 of that directive. It is also apparent from Article 52(4) of that directive that information which may be deduced from registration on official lists or certification may not be questioned without justification. Lastly, in accordance with the second subparagraph of Article 52(5) of that directive, the contracting authorities of a Member State must recognise equivalent certificates from bodies established in other Member States.

52 It should also be noted that infringement of Article 46 of Directive 2004/18 necessarily entails infringement of the principles of proportionality and equal treatment of tenderers, which are enshrined in Article 2 of that directive, since the requirement that tenderers must have the approval of an Estonian

authority or must fulfil obligations relating to information and authorisation in Estonia is discriminatory and does not appear to be justified as regards tenderers established in other Member States.

53 In the present case, there is nothing to suggest that the public contracts at issue in the main proceedings could not be performed from the Member State in which the tenderer is established or another Member State. Thus, it is for the tenderer to decide, on the basis of economic calculations, whether it wishes to take on an establishment in the Member State in which that contract is to be performed.

54 Moreover, the Court has already held that for a Member State to make the provision of services by an undertaking established in another Member State subject to the possession of a business licence in the first State would have the result of depriving of all effectiveness Article 56 TFEU, the purpose of which is precisely to abolish restrictions on the freedom to provide services of persons not established in the Member State in which the service is to be provided (see, by analogy, judgment of 10 February 1982, *Transporoute et travaux*, 76/81, EU:C:1982:49, paragraph 14).

55 It follows that Article 46 of Directive 2004/18 must be interpreted as precluding a contracting authority from requiring, as a qualitative selection criterion, a registration certificate and/or approval in the Member State of performance of public contracts where the tenderer already has similar approval in the Member State in which it is established.

56 In the second place, the order for reference nevertheless suggests that the obligation for tenderers to hold a registration certificate or approval in Estonia, even where they already have similar approval in the Member State in which they are established, follows from the Law on foodstuffs, which is intended to give effect to the provisions of Regulation No 852/2004 pursuant to the numerous references to that regulation contained therein. In those circumstances, both national and EU legislation on foodstuffs might constitute a special law and, on that basis, be allowed to derogate from the rules governing the award of public contracts.

57 It is therefore necessary to determine whether the interpretation of Article 46 of Directive 2004/18 set out in paragraph 55 above conflicts with Regulation No 852/2004, in which case the Court would be required to reconcile the conflicting requirements arising from that regulation and that directive.

58 In that regard, it is apparent, as stated in recital 1 thereof, that the objective of Regulation No 852/2004 is to achieve a high level of protection of human life and health, but that it also seeks to achieve the free movement of foodstuffs within the European Union.

59 That objective of the free movement of foodstuffs would be affected if food business operators were required to register or obtain an operating licence in each Member State in which they transport or store their foodstuffs.

60 As is apparent from Article 3 of Regulation No 852/2004, read in conjunction with recital 8 thereof, the EU legislature promotes an integrated approach to ensure food safety from the place of primary production up to and including the placing on the market or export and, to that end, it is for each food business operator along the food chain to ensure that food safety is not compromised. Similarly, Article 1(1)(a) of that regulation emphasises that the primary responsibility for food safety rests with the food business operator.

61 That said, in order to ensure food safety throughout the food chain, starting with primary production, as required by Article 1(1)(b) of that regulation, Article 6 thereof provides for official controls, registration and approval of food business establishments.

62 Article 6 of Regulation No 852/2004 does not, however, preclude a disjunction between, on the one hand, the competence to register a food business establishment or to grant approval to such an establishment and, on the other hand, the competence to supervise the activity thus authorised. Thus, in circumstances such as those in the main proceedings, a registration certificate or approval obtained in one Member State must enable its holder to distribute foodstuffs in another Member State whose authorities are in that case nevertheless free to monitor that distribution and to ensure compliance with the provisions of that regulation.

63 It follows that the fact that an economic operator holds a registration certificate or approval issued by the Member State in which it is established constitutes, in the context of a public procurement procedure taking place in another Member State, a presumption of its ability to ensure in the latter State the activity of supplying and distributing foodstuffs and, therefore, of performing the contract in question.

64 As the Commission stated in response to a written question from the Court, an operator may therefore rely on a registration certificate or approval issued by the Member State of the food business establishment from which it dispatched its food. This is because the Member States are required to subject all establishments to official controls, to apply procedures to ensure that the controls are carried out efficiently and to ensure cooperation between the competent authorities of the Member States. Therefore, in a situation such as that at issue in the main proceedings, a food business operator that has an establishment in a Member State other than the Republic of Estonia which is registered or approved in that State may deliver foodstuffs in Estonia without having to obtain a special additional authorisation.

65 In those circumstances, it should be noted, as observed by the Commission, that the obligation to have a warehouse situated on Estonian territory follows from a specific requirement of the procurement procedure at issue in the main proceedings and not from Regulation No 852/2004 itself.

66 In the light of the foregoing considerations, the answer to the first and second questions is that Articles 2 and 46 of Directive 2004/18 must be interpreted as precluding national legislation under which the contracting authority must require, in a contract notice and as a qualitative selection criterion, that tenderers furnish proof, at the time of submitting the tender, that they hold the registration certificate or approval required under the legislation applicable to the activity which is the subject of the public contract in question and that it be issued by the competent authority of the Member State in which the contract is to be performed, even where they already hold a similar registration certificate or approval in the Member State in which they are established.

The third question

67 By its third question, the referring court asks, in essence, whether the principle of the protection of legitimate expectations must be interpreted as meaning that it may be relied on by a contracting authority which, in the context of a public procurement procedure, has, in order to comply with the national rules on foodstuffs, required tenderers to have, at the time of submitting their tender, a registration certificate or approval issued by the competent authority of the Member State in which the contract is to be performed.

68 It is apparent from the order for reference that, in the dispute in the main proceedings, the Ministry of Social Affairs considers that, if it were to be criticised for having infringed Articles 2 and 46 of Directive 2004/18, that infringement of the EU public procurement rules should remain ineffective by virtue of the principle of the protection of legitimate expectations since, prior to the adoption of the financial correction decision of 30 October 2018, the auditors of the Ministry of Finance approved, on two occasions, the requirement for all tenderers, including those established in a Member State other than the Republic of Estonia, to submit, at the time of submitting their tender, an operating licence issued by the Veterinary and Food Office.

69 According to the Court’s settled case-law, the right to rely on the principle of the protection of legitimate expectations extends only to a person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise unconditional and consistent assurances provided to him or her and originating from authorised, reliable sources (see, to that effect, judgments of 7 August 2018, *Ministru kabinets*, C-120/17, EU:C:2018:638, paragraph 50 and the case-law cited; of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 97; and of 19 December 2019, *GRDF*, C-236/18, EU:C:2019:1120, paragraph 46).

70 Nevertheless, the concept that a State is to be viewed as a single entity, which prevails both in public international law and in EU law (see, to that effect, judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 34), precludes, in principle, a

national authority from relying on the principle of EU law of legitimate expectations in the context of a dispute between that authority and another component of that State.

71 Thus, in the context of the dispute in the main proceedings, the fact that the Ministry of Finance has already approved a practice contrary to EU law may not be relied on by the Ministry of Social Affairs in order to allow that practice to continue or, at the very least, neutralise its past effects.

72 The answer to the third question must therefore be that the principle of the protection of legitimate expectations must be interpreted as meaning that it may not be relied on by a contracting authority which, in the context of a public procurement procedure, has, in order to comply with the national rules on foodstuffs, required tenderers to have, at the time of submitting their tender, a registration certificate or approval issued by the competent authority of the Member State in which the contract is to be performed.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Articles 2 and 46 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as precluding national legislation under which the contracting authority must require, in a contract notice and as a qualitative selection criterion, that tenderers furnish proof, at the time of submitting the tender, that they hold the registration certificate or approval required under the legislation applicable to the activity which is the subject of the public contract in question and that it be issued by the competent authority of the Member State in which the contract is to be performed, even where they already hold a similar registration certificate or approval in the Member State in which they are established.**

2. **The principle of the protection of legitimate expectations must be interpreted as meaning that it may not be relied on by a contracting authority which, in the context of a public procurement procedure, has, in order to comply with the national rules on foodstuffs, required tenderers to have, at the time of submitting their tender, a registration certificate or approval issued by the competent authority of the Member State in which the contract is to be performed.**

[Signatures]

---

* Language of the case: Estonian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 28 January 2021(1)

Case C-6/20

Sotsiaalministeerium

v

Innove SA,

intervener:

Rahandusministeerium

(Request for a preliminary ruling
from the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia))

(Reference for a preliminary ruling – Directive 2004/18/EC – Public procurement – Qualitative selection criteria – Article 2 – Equal and non-discriminatory treatment – Article 26 – Conditions for performance of the contract – Article 46 – Authorisation to pursue a professional activity obtained in another Member State – Regulation (EC) No 852/2004 – Hygiene of foodstuffs – Article 6 – Requirement of a licence or registration certificate from the national food safety authority in the country where the establishment carrying out the supply is located – Time when the licence or registration certificate is submitted to the contracting authority)

1. In Estonia, the law provides that, where special conditions are stipulated for the performance of a public contract, a tenderer must provide evidence that it satisfies those conditions by furnishing, *at the time of submission of the tender*, a licence issued by the authorities of that State or evidence of registration in the appropriate register, failing which the tenderer will be excluded.

2. In 2015 and 2017, the Estonian Ministry of Social Affairs announced procedures for the award of two contracts for the supply of food to disadvantaged persons. Tenderers were required to provide evidence, when they submitted their tenders, that they had obtained an activity licence from the Estonian competent authority or that they were registered in the appropriate national register.

3. Innove SA, the body responsible for the management of aid financed by European funds, (2) and the Ministry of Finance disagreed with the Ministry of Social Affairs regarding the compatibility of those conditions with EU law. Since that disagreement was not settled at the administrative stage, the Ministry of Social Affairs, relying on Regulation (EC) No 852/2004, (3) brought proceedings in the Estonian courts challenging the decision adopted by Innove, which conflicted with its view.

4. Since the dispute (4) which has arisen concerns contractual conditions, the court seized of that dispute has submitted a request for a preliminary ruling to which the Court of Justice must respond. It will be necessary to examine, in particular: (a) whether the obligation to furnish national licences or evidence of registration at the same time as the tender constitutes an obstacle to the equal treatment of and freedom of competition among tenderers bidding for public contracts; and (b) whether Directive 2004/18/EC (5) can be interpreted in a manner that is consistent with the requirements laid down in Regulation No 852/2004.

I. Legal framework

A. EU law

1. Directive 2004/18

5. Pursuant to Article 2 (‘Principles of awarding contracts’):

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

6. Article 26 (‘Conditions for performance of contracts’) reads:

‘Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.’

7. Article 46 (‘Suitability to pursue the professional activity’) stipulates:

‘Any economic operator wishing to take part in a public contract may be requested to prove its enrolment, as prescribed in his Member State of establishment, on one of the professional or trade registers or to provide a declaration on oath or a certificate as described in Annex IX A for public works contracts, in Annex IX B for public supply contracts and in Annex IX C for public service contracts.

In procedures for the award of public service contracts, in so far as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.’

2. Regulation No 852/2004

8. According to Article 2 (‘Definitions’):

‘1. For the purposes of this Regulation:

…

(c) “establishment” means any unit of a food business;

…’

9. Article 6 (‘Official controls, registration and approval’) is worded as follows:

‘1. Food business operators shall cooperate with the competent authorities in accordance with other applicable Community legislation or, if it does not exist, with national law.

2. In particular, every food business operator shall notify the appropriate competent authority, in the manner that the latter requires, of each establishment under its control that carries out any of the stages of production, processing and distribution of food, with a view to the registration of each such establishment.

Food business operators shall also ensure that the competent authority always has up-to-date information on establishments, including by notifying any significant change in activities and any closure of an existing establishment.

3. However, food business operators shall ensure that establishments are approved by the competent authority, following at least one on-site visit, when approval is required:

(a) under the national law of the Member State in which the establishment is located;

(b) under Regulation (EC) No 853/2004;

or

(c) by a decision adopted by the Commission. That measure, designed to amend non-essential elements of this Regulation, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 14(3).

Any Member State requiring the approval of certain establishments located on its territory under national law, as provided for in subparagraph (a), shall inform the Commission and other Member States of the relevant national rules.’ (6)

B. Estonian law

1. Riigihangete seadus (7)

10. Paragraph 39(1) provides:

‘The contracting authority must examine whether the economic and financial standing and the technical and professional ability of the tenderer or candidate meet the conditions relating to qualification set out in the tender notice. The conditions relating to qualification must be sufficient to establish the tenderer or candidate’s suitability to perform the public contract and must also be relevant and proportionate in the light of the nature, quantity and objective of the goods, services or works covered by the public contract.’

11. Paragraph 41(3) provides:

‘Where the legislature lays down specific conditions for an activity which must be carried out under a public contract, the contracting authority shall indicate in the tender notice the specific conditions which must be met, in addition to the registration certificates and operating licences required for qualification of the tenderer or candidate. In order to verify compliance with the specific conditions laid down in the statutory provisions, the contracting authority shall stipulate in the tender notice that the tenderer or candidate must furnish proof that it holds an operating licence or registration certificate or that it fulfils any other specific condition, or that the tenderer must prove that it is a member of a competent organisation in accordance with the legislation of its State of establishment, unless the contracting authority is able to obtain that proof, without any further expenditure, by consulting the public data on a database. If the tenderer or candidate does not hold an operating licence or

registration certificate, or is not a member of the competent organisation in accordance with the legislation of its State of establishment, the contracting authority shall exclude it.'

2. Toiduseadus (8)

12. In accordance with Paragraph 8 ('Obligation to hold a licence'):

'(1) The economic operator must hold an operating licence for activities in the food sector in the following establishments:

(1) an establishment for the purposes of Article 6(3)(b) and (c) of Regulation [No 852/2004];

(2) an establishment in which operations relating to primary products of animal origin do not involve any alteration of the form or original characteristics of the products, unless the establishment concerned is one which deals with the primary production of those products and in which the producer carries out associated operations within the meaning of Regulation [No 852/2004];

(3) an establishment in which operations relating to primary products not of animal origin involve the alteration of the form and original characteristics of the products, unless the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];

(4) an establishment in which the processing of foodstuffs takes place, in particular the preparation and wrapping of foodstuffs, with the exception of the wrapping of primary products not of animal origin or where the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];

(5) an establishment which deals with operations relating to foodstuffs of animal origin which are then distributed to another operator and are included in Annex II, Chapter III of Regulation [No 852/2004];

(6) an establishment dealing with the storage of foodstuffs which, in order to ensure food safety, must be kept at a temperature other than ambient temperature;

(7) an establishment dealing with retail trade, in particular in foodstuffs which must be stored at a temperature other than ambient temperature in order to ensure food safety, unless the establishment is one referred to in Annex II, Chapter III of Regulation [No 852/2004];

…

(2) The operating licence shall entitle the economic operator to commence operations and to pursue and carry out an economic activity in the establishment or in the part of the establishment referred to in the operating licence.

(3) The competent minister in the field shall establish, by regulation, a detailed list of the areas of operation and categories of foodstuff in respect of which operators must be in possession of an operating licence.'

13. Paragraph 10 reads:

'An operating licence shall be granted to an economic operator if its establishment or the establishment which it uses for its activity as a food sector operator satisfy the conditions laid down in [Regulation No 852/2004 and Regulation No 853/2004, and] in other relevant provisions on foodstuffs.'

II. Facts, national proceedings and questions referred for a preliminary ruling

14. In 2015 and 2017, the Estonian Ministry of Social Affairs announced two open invitations to tender for public contracts (Nos 157505 and 189564) for the supply of 'food aid for the most disadvantaged'. Each of the invitations to tender was for a value of more than EUR 4 million. (9)

15. In accordance with tender notice No 157505, tenderers were required to have the approval of the Veterinaar- ja Toiduamet (Veterinary and Food Office, 'VFO') and to provide the corresponding certificate and approval number.

16. The conditions of contract No 157505 were amended during the tendering procedure, to the effect that it would be sufficient to attach a declaration of compliance with the obligations relating to information and approval laid down in the ToiduS. The same amendment was stipulated for contract No 189564.

17. As a result of both procedures, two framework agreements were concluded with three tenderers. Finally, Sanitex OÜ (Estonian subsidiary of UAB Sanitex, the parent company established in Lithuania) was awarded the contract on the grounds that it submitted the most economically advantageous bid in the *mini competition* held in the context of the framework agreements.

18. Purchases made under the contracts were of foodstuffs from Estonia, Latvia, Lithuania and other European Union Member States.

19. In the performance of its duties, Innove, by a 'financial correction decision' of 30 October 2018, (10) rejected the requests for payment (in the amount of EUR 463 291.55) submitted by the Ministry of Social Affairs as a result of those contracts.

20. The financial correction decision was based on the failure of the Ministry of Social Affairs to fulfil the obligation to comply with the provisions of the RHS. (11)

21. Innove took the view that, in the case of both public contracts, selection criteria had been applied which unduly restricted the circle of tenderers, in particular foreign tenderers. The unreasonable restriction resided, in its view, in the fact that the tenderers were required to have a licence from the Estonian authority or to comply with the registration obligation in Estonia.

22. According to Innove, the possibility that foreign tenderers could have satisfied those requirements by relying on the resources of another person or by submitting a joint tender with an undertaking which satisfied the requirements did not prevent the undue restriction of the circle of tenderers, by discouraging them from participating in the tendering procedure.

23. The Ministry of Social Affairs filed a (optional) complaint against the financial correction decision, which Innove dismissed on 25 January 2019.

24. The Ministry of Social Affairs brought an action against that dismissal decision before the Tallinna Halduskohus (Administrative Court, Tallinn, Estonia), seeking its annulment. It submitted in short that:

– The tender notices were lawful because they did not confer any discretion to determine the stage of the procedure at which the activity licence requirement had to be satisfied.

– The specific requirements complied with the law and were the same as the requirements of registration and approval laid down by Article 6 of Regulation No 852/2004.

– The contested decision wrongly took the view that the contracting authority could not require an activity licence pursuant to Article 46 of Directive 2004/18. Since the activity involved the physical handling of foodstuffs in Estonia, the contractor or the warehouse used by it under contracts or subcontracts must hold an activity licence issued by the VFO. Foodstuff-handling licences are not mutually recognised by the Member States.

– It was not possible for the contracting authority to admit a tenderer who only had an activity licence from the State in which it was established. Moreover, the tenderer had sufficient time to deal with the licensing procedure in Estonia.

25. Innove opposed the action brought by the Ministry of Social Affairs, claiming that:

– Although a literal interpretation of Paragraph 41(3) of the RHS allowed the contracting authority to require the tenderer to produce the activity licence or registration certificate required under Estonian law to demonstrate compliance with the specific requirements, that requirement must be interpreted in the light of the provisions of EU law (in particular, Directive 2004/18) and the case-law.

– The condition stipulating that tenderers had to comply with the specific requirements of Estonian law at the time of submission of a tender is incompatible with the principle of equal treatment laid down in Paragraph 3(3) of the RHS.

– According to the case-law of the Court of Justice, the principle of equal treatment of tenderers precludes the introduction of conditions for participation in a tendering procedure which require tenderers to have knowledge of the practice of the State in which the contracting authority is established. (12)

– There should have been an assessment as to whether, in the light of the condition at issue, the tenderers who had previously provided services in another Member State and the tenderers who had previously carried out activities relating to foodstuffs in Estonia were in the same situation.

26. The Ministry of Finance intervened in the proceedings in support of Innove's position. In its submission, the selection criteria in the tender notice were unduly restrictive. The Ministry of Finance argued, in particular, that:

– Foreign tenderers who do not carry on their activity in Estonia have to comply with the requirements of the State in which they operate and are subject to the supervision of the competent authority of the State in which they are established.

– The requirement to be registered or hold a licence is a requirement of EU law which applies throughout the Union.

– In order for the restriction to be proportionate in relation to foreign tenderers and at the same time to provide the contracting authority with the assurance that it was not dealing with an illegal operator, the contracting authority should have allowed them to submit an equivalent licence or certificate issued by the State in which they were established or by another competent authority. It was possible for a foreign tenderer to have been required to comply with the requirements arising under Estonian law and necessary for the performance of the contract only during performance of that contract.

27. By judgment of 22 May 2019, the Tallinna Halduskohus (Administrative Court, Tallinn) dismissed the action, finding, in summary, that:

1. The requirement at issue creates unequal treatment of foreign tenderers who, where they have not previously operated in Estonia, cannot comply with the registration and licence obligation at the time of submission of a tender.

2. Estonian tenderers who have been able to gain previous experience, by carrying out an activity in Estonia, are in a better position when compared with other economic operators having similar experience in other Member States. (13)

3. The obligation of tenderers to apply for a licence to operate as a food business operator at the same time as preparing the tender is disproportionate.

4. The licence application provided for in the ToiduS requires, inter alia, notification of a specific activity which is subject to approval and an indication of capacities. First, that information is not available at the time of submission of a tender because the tenderer still does not know whether its tender will be accepted and is unaware of the volumes that it must take into account. Second, it is not the aim of that law to require that a licence must be applied for in respect of hypothetical activities, in addition to which it may not be possible to apply for a licence for reasons related to timing.

28. The Ministry of Social Affairs brought an appeal against the judgment at first instance before the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia), which, in its order for reference, sets out, inter alia, the following considerations:

1. The dispute concerns the determination of whether it was possible to impose, as a condition for participating in the procurement procedure, the requirement that tenderers must already have a licence issued by an Estonian authority in accordance with the ToiduS or must have complied with the registration obligations in Estonia.

2. Such conditions, laid down in Regulation No 852/2004, were introduced with a view to guaranteeing food safety. Since the conditions regarding certification or approval by the competent authority in order to commence the pursuit of an activity in a Member State other than the State of origin are not fully harmonised, an economic operator cannot rely on a licence issued by his State of origin and instead must obtain a new licence or registration certificate issued by the Member State of the place of business.

3. Performance of the contract could be compromised if a tenderer qualifies on the basis of its undertaking to apply for an operating licence or registration and that tenderer fails to fulfil that obligation or is unable to carry out its activity in accordance with the criteria for obtaining a licence or registration. In that case, the contracting authority would have to launch a new tendering procedure.

4. It is essential to determine whether the guarantee of food safety and the needs relating to attainment of the objectives of public contracts justify the imposition of a restriction on foreign tenderers which, before submitting their tenders, have to apply for and obtain the required licence or registration or have to submit a joint tender with a company that already holds an operating licence or is registered in Estonia.

5. Although such a requirement may be disproportionate as regards foreign tenderers, the interpretation of Article 46 of Directive 2004/18 is not so obvious and is, moreover, a provision which the Court of Justice has not yet had occasion to interpret.

29. Against that background, the Tallinna Ringkonnakohus (Court of Appeal, Tallinn) has referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Articles 2 and 46 of Directive 2004/18/EC … to be interpreted as precluding national legislation – such as Paragraph 41(3) of the [RHS] – pursuant to which, if specific requirements for the activities to be carried out under a public contract are laid down by law, the contracting authority must specify in the tender notice which registrations or activity licences are required to qualify the tenderer, must require the tenderer to submit evidence of the activity licence or registration for the purpose of verifying compliance with the special statutory requirements in the tender notice, and must refuse the tenderer as unqualified if the latter does not possess the relevant activity licence or registration?

(2) Read together, are Articles 2 and 46 of Directive 2004/18/EC … to be interpreted as precluding the contracting authority, in the case of a food aid procurement contract that exceeds the international threshold, from setting a selection criterion for the tenderers according to which all tenderers, irrespective of where they were previously established, must already hold an activity licence or be registered in the country of the food aid operations at the time of submission of the tenders, even if the tenderer has not previously been established in that Member State?

(3) If the preceding questions are answered in the affirmative:

(1) Are Articles 2 and 46 of Directive 2004/18/EC … to be regarded as provisions that are so unambiguous that the principle of the protection of legitimate expectations cannot be invoked against them?

(2) Are Articles 2 and 46 of Directive 2004/18/EC … to be interpreted as meaning that a situation in which the contracting authority in a public tender for food aid requires, pursuant to the national law on foodstuffs, that the tenderers already hold an activity licence at the time of submission of the tender may be regarded as constituting a manifest infringement of the rules in force, as negligence or as an irregularity precluding reliance on the principle of the protection of legitimate expectations?’

III. Procedure before the Court of Justice

30. The order for reference was received at the Registry of the Court on 7 January 2020.

31. Written observations were lodged by the Estonian Government and the European Commission. Those parties, together with the Riigi Tugiteenuste Keskus (Centre for State Aid Services, Estonia), a body which has partly taken over Innove’s functions, gave written responses to the questions addressed to them by the Court of Justice, in place of a hearing.

IV. Assessment

A. Preliminary remarks

32. At the Court's request, I shall confine myself to examining the first two questions referred for a preliminary ruling.

33. The referring court's questions concern, essentially, whether Articles 2 and 46 of Directive 2004/18 preclude national provisions in accordance with which the contracting authority has imposed, in respect of two public contracts for the purchase and distribution of food aid to the most disadvantaged, the conditions at issue for the purposes of assessing whether tenderers qualify.

34. By means of those conditions, the contracting authority required tenders to submit, at the same time as their tenders, evidence that they held an activity licence issued in Estonia or that they were registered for that purpose in that country. According to the Estonian Government, those requirements are derived from Paragraph 41(3) of the RHS. (14)

35. The tender specifications for contract No 157505 reflected that provision, stipulating that tenderers should hold a licence in Estonia and that they should attach to their tenders the relevant certificate and licence number. However, that condition was relaxed by acceptance that a simple declaration of compliance with the information and approval obligations could be attached. For the purposes of contract No 189564, fulfilment of the latter condition was sufficient from the outset.

36. It can be inferred from the parties' observations and from the order for reference that, by acting in that way, the contracting authority was seeking to comply with Article 6 of Regulation No 852/2004: it originally requested the approval required under paragraph 3 thereof and later simply required compliance with the less stringent requirements of paragraph 2, which amount to a number of obligations to provide information.

37. As I shall explain in more detail, the premiss for those two paragraphs of Article 6 of Regulation No 852/2004 is that foodstuff operators must have an establishment in the territory of the State in which the competent authority performs its public functions.

38. In that connection, it can be deduced that the contracting authority stipulated that tenderers must have an establishment in Estonia (and must also hold an activity licence or be registered in the applicable registers in that country).

39. Since the order for reference does not explain the terms of the tendering procedure in detail, it would be possible to examine the clauses at issue from a different perspective if, in fact, the tender specifications permitted food supplies to be offered from establishments located outside Estonia. (15)

40. In those circumstances, Regulation (EC) No 178/2002, (16) the primary objective of which is to ensure the free movement of safe and wholesome food in the European Union, could be applicable. The same objective can also be found among those proposed by Regulation No 852/2004, with which it is connected. (17)

41. If the tender specifications did not require tenderers to have an establishment in Estonia, it would have to be assumed that tenders from those economic operators could be based on the supply of food from outside Estonia, a point which it is for the referring court to verify. (18)

42. On the other hand, if the tender specifications required all tenderers to have an establishment in Estonia, from which to carry out the supply of food, (19) it would be necessary to assess whether that requirement was properly justified and, if so, whether it went beyond what was needed in order to achieve the aims pursued. That would also be a task which would fall to the national court.

43. In that second scenario, were the referring court to find that the obligation to have an establishment in Estonia was unjustified or disproportionate, the Ministry of Social Affairs may have breached Article 2 of Directive 2004/18, in that it discriminated against operators with their headquarters in other Member States but without an establishment in Estonia.

44. The considerations I shall set out below are based on the premiss that the contract documents required, tacitly or expressly, that tenderers must have an establishment in Estonia, which will lead to an examination of the application of Article 6(2) and (3) of Regulation No 852/2004, in conjunction with Directive 2004/18.

B. Questions 1 and 2

45. I believe that it is appropriate to answer the two questions together in view of their connection. My reply will be developed in three stages: (a) the qualification of tenderers; (b) the requirement that tenderers must have an establishment for handling foodstuffs in Estonia; and (c) the lawfulness of the requirements at issue if they must be satisfied during performance of the contract and not at the beginning of the procedure.

1. Qualification of tenderers

46. The order for reference stresses that the conditions at issue in the dispute concerned the 'qualification' of tenderers. The Estonian Government confirms this, pointing out that 'they are linked to the figure of the tenderer itself and can be likened to a qualifying condition'. (20)

47. That is clearly reflected in the first question: under the national provisions, the contracting authority must specify in the tender notice the 'registrations or activity licences … required' for *qualification* of the tenderer. If, when submitting its tender, the tenderer fails to provide evidence that it had either, the contracting authority would categorise it as *not qualified* (and would, therefore, reject it).

48. The second question is worded similarly: now the query is whether Articles 2 and 46 of Directive 2004/18 preclude the contracting authority from requiring, as a condition for *qualification* of tenderers, that, 'irrespective of their previous place of business', tenderers must hold 'an activity licence or be registered in the State in which the food aid is granted at the time of submission of their tender'.

49. Expressed in that way, it is striking that both questions refer to Article 46 of Directive 2004/18. In accordance with Article 44 of the directive, when verifying the *suitability* of economic operators participating in procurement procedures, those excluded under Article 46 (and Article 45) must be eliminated.

50. Article 46 of Directive 2004/18 merely governs the 'suitability to pursue the professional activity', which is required of economic operators. That suitability is subjective and is linked to the professional status of an economic operator wishing to participate in a procurement procedure. As a consequence, such an operator may be required to demonstrate its professional suitability by producing the documents referred to in Article 46.

51. Scrutiny of Article 46 of Directive 2004/18 in conjunction with recital 42 thereof (21) reveals that, at the stage when tenderers are selected, the principle of mutual recognition applies for the purpose of confirming professional suitability:

– In accordance with the first paragraph of Article 46, any economic operator wishing to take part in a public contract may be requested to provide evidence of 'its enrolment, as prescribed in his Member State of establishment, on one of the professional or trade registers or to provide a declaration on oath or a certificate.'

– In the same vein, albeit only in relation to public service contracts, the second paragraph states that, 'in so far as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.'

52. It follows from those provisions that a tenderer can prove that it qualifies (is subjectively suitable to perform a public contract) by relying on documents issued by the competent authorities of the Member State in which it is located.

53. Other provisions of Directive 2004/18, included in the same section, 'Criteria for qualitative selection', take the same line:

– Under Article 48(2)(d), an economic operator can provide evidence of its technical or professional ability by sending to the contracting authority of the State of performance of a public contract documents drawn up by the competent authorities of the Member State in which it is established.

– Article 49 applies the same criterion in relation to 'Quality assurance standards'.

– In accordance with Article 52(3), 'certified registration on official lists by the competent bodies or a certificate issued by the certification body shall not, for the purposes of the contracting authorities of other Member States, constitute a presumption of suitability' except as regards, inter alia, Article 46 of the directive. The second subparagraph of Article 52(5) provides that contracting authorities are to recognise 'equivalent certificates from bodies established in other Member States'.

54. Those positive stipulations are reinforced by a number of limitations imposed on contracting authorities:

– Article 52(4) of Directive 2004/18 provides that 'information which can be deduced from registration on official lists or certification [as referred to in Article 52(3)] may not be questioned without justification'.

– As regards 'any registration of economic operators of other Member States in an official list or for their certification by [competent] bodies', Article 52(5) of Directive 2004/18 provides, with particular intensity, that 'no further proof or statements can be required other than those requested of national economic operators', adding that 'economic operators from other Member States may not be obliged to undergo such registration or certification in order to participate in a public contract.'

55. Article 46 of Directive 2004/18 requires, therefore, that when an assessment is made of the professional suitability of a tenderer from another Member State, that tenderer must be placed on an equal footing with a national tenderer which has an equivalent level of suitability.

56. Where a tenderer demonstrates, using one of the methods provided for in Directive 2004/18, that it qualifies as necessary in another Member State, proof of this must suffice for the contracting authority to consider that the hurdle of professional suitability has been cleared.

57. In short, Article 46 of Directive 2004/18 is to be interpreted as meaning that a contracting authority cannot impose, as a qualifying criterion (that is, a qualitative selection criterion), the requirement that a registration certificate or licence must be obtained in the Member State of performance of the contract if a tenderer already has similar approval in the Member State where it is established.

58. In so far as the tender specifications at issue in these proceedings (or, as the case may be, the national provisions with which they comply) created, for the purposes of verifying the suitability of tenderers with authorisation in another Member State, the obligation to obtain *further*, similar authorisation in Estonia, those tender specifications are incompatible with Article 46 of Directive 2004/18.

59. On that basis, it is necessary to ascertain whether the application of Regulation No 852/2004 is liable to affect that interpretation of Article 46 of Directive 2004/18. That could occur if the conditions imposed on tenderers concerned their specific presence, by means of a particular establishment, in the Member State of the contracting authority which stipulated those conditions, rather than their (subjective) *qualification* as authorised economic operators.

60. The Estonian Government refers to Regulation No 852/2004 (Article 6(3)(a)) in support of its claim that it is entitled to require tenderers to have a 'licence for the *storage* of foodstuffs'. In particular, the Estonian Government asserts that an economic operator must be the 'holder of an activity licence in the food sector *for the establishment where foodstuffs are stored* which … must be kept at a temperature other than ambient temperature'. (22)

2. Requirement that tenderers must have an establishment for the handling of foodstuffs in Estonia

61. As I have already pointed out, in the absence of further details in the order for reference, it must be assumed that the contract documents required tenderers to have an establishment in Estonia.

62. Article 6 of Regulation No 852/2004 is based on a territorial link between the establishment in which the food business activity is pursued and the Member State in which it is located.

63. By virtue of that territorial link, as far as that establishment is concerned, the competent authority with control over the stages of production, processing and distribution of food must, of necessity, be that of the Member State where the establishment is located.

64. The corollary of that rule is that the obligation to have an establishment which is authorised or registered in Estonia also applies to food businesses with professional qualifications issued in another Member State. That is the only way of ensuring that the *control of activities carried out in an establishment* situated in Estonia is performed by the authorities of that country.

65. The requirement that undertakings which have establishments for the production, processing and distribution of food in a Member State must be registered in that Member State or have a licence issued by the authorities of that Member State therefore complies, in principle, with EU law.

66. Difficulties arise when it comes to reconciling that rule with the provisions of EU law governing public procurement. In accordance with those provisions, contracting authorities:

– Must, on the one hand, abolish restrictions on competition and 'treat economic operators equally and non-discriminatorily' (Article 2 of Directive 2004/18), ensuring that the fundamental freedoms laid down the FEU Treaty are respected.

– May not, on the other hand, disregard the other mandatory EU provisions: in so far as is relevant for the present purposes, those adopted in the field of public health and, more specifically, the hygiene of foodstuffs. Recital 6 of Directive 2004/18 reads: 'Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect … health [and] human … life …, provided that these measures are in conformity with the Treaty.'

67. I believe that it is possible to overcome the apparent conflict (23) between the general rules on public contracts and the specific rules on food hygiene. Where compliance with the latter rules is compulsory, those rules must take precedence over the general rules on public contracts, as set out in recital 6 of Directive 2004/18. The specific rules must be applied in a way which has the minimum possible impact on the general principles of EU law on public contracts.

68. At this juncture, when addressing how the requirements imposed by the specific rules on food hygiene are applied in the procurement procedure (provided, I repeat, that they are mandatory under Regulation No 852/2004), it may be helpful to identify the time when the tenderer is required to furnish the licence relating to its establishment or a declaration that it is registered as the owner of that establishment.

69. I agree with the referring court's assertion that 'the requirements imposed in this case, in the interests of food safety', are justified as 'conditions for the performance of a public contract' and that 'the dispute concerns only the question of when the tenderer was required to fulfil those conditions – when the tender was submitted or when the contract was being performed'. (24)

3. Time when the tenderer must provide evidence that it has an administrative licence relating to its establishment or that it is registered as the proprietor of that establishment.

70. Having regard solely to the need to ensure that the right contractor is selected, the optimal time for furnishing those documents may be the time when tenders are submitted. Proof that a tenderer has an establishment which is covered by a licence or which is entered in the appropriate register assists the contracting authority to establish at the outset whether a tenderer will be able to comply with its (future) contractual obligations.

71. In *CoNISMa*, (25) the Court held that the harmonisation of the directives on procurement was also carried out in the interests of contracting authorities. It thus drew attention to the position of the public procuring entity, which is required to uphold the general interest. (26)

72. However, like others before and after it, the judgment also pointed out that 'one of the primary objectives of Community rules on public procurement is to attain the widest possible opening-up to competition … and that it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders'. (27) That objective is also beneficial to the contracting authority, which will have more criteria at its disposal when it chooses the successful tenderer. (28)

73. The Estonian Government and the Commission have put forward opposing views on that point.

74. In the Estonian Government's submission, if the obligation of registration or approval were classified as a condition relating to performance and not a qualitative selection criterion, the successful tenderer might ultimately not be in a position to perform the contract. That eventuality would increase the contracting authority's workload and the duration of the procedure needed for signature of the contract. (29) Moreover, any economic operator has the right to submit a joint tender with an entity which has already satisfied the prerequisites of approval and registration. (30)

75. The Commission draws attention to proper observance of the principle of equality and non-discrimination as regards the treatment of economic operators. (31) The Commission maintains, contrary to the view of the Estonian Government, that the obligation to obtain approval or registration as a condition for participating in the tendering procedure will be compatible with the principles of non-discrimination and proportionality only if no less restrictive measure exists. The possibility of establishing the obligation of approval or registration as a performance condition is precisely one such less restrictive measure. (32)

76. My view, which essentially coincides with that of the Commission on this point, is that the arguments set out by the first-instance court, (33) and the arguments of the Ministry of Finance (34) and Innove (35) transcribed above, draw attention to the fact that requiring approval or registration at the classification stage creates, for food undertakings not located in Estonia, a disproportionate obstacle which, without the relevant justification, restricts their access to public procurement procedures like that at issue in this case. To the same extent, it unfairly reduces the circle of potential tenderers, in particular, foreign tenderers.

77. A restriction of that nature is possible only if the objective it pursues 'could not be achieved by … restrictions of lesser extent or having less effect on intra-Community trade'. (36)

78. In order to reconcile the requirements of Directive 2004/18 with the need for establishments handling food in Estonia to have approval or be registered, within the meaning of Article 6 of Regulation No 852/2004, the requirements at issue could be framed as 'special conditions relating to the performance of a contract', as referred to in Article 26 of Directive 2004/18.

79. The case-law has paid attention those special conditions in situations where they were imposed as a result of 'social … considerations', thus focusing on some of those covered by the open wording of the last part of Article 26 of Directive 2004/18. (37) There is no reason why they should not be extended to other areas, since the reference to 'social and environmental considerations' is given merely as an example ('in particular').

80. Therefore, there is nothing to preclude the conditions relating to performance of a contract for the supply of foodstuffs from including requirements derived specifically from the application of the EU provisions on food hygiene or those of the Member State concerned.

81. It will be sufficient to stipulate that those requirements must be satisfied at a later time and independently of the assessment of whether a tenderer whose professional authorisation was granted in another Member State satisfies the qualifying criteria.

82. Accordingly, the principle of equal treatment would apply in harmony with the principle of opening up to competition as far as possible, because all tenderers would be given a genuine opportunity to win the contract without undermining the application of the provisions of EU law on food hygiene. Otherwise, an excessive advantage in favour of national food-sector operators would be established.

83. In accordance with that scheme, operators who already have a national licence or are registered as food-handling establishments in Estonia would be able to submit their licence or registration certificate with their tenders; the remaining tenderers would have to undertake to obtain a licence or registration if they were awarded the contract.

84. There is certainly some merit to the Estonian Government's objection (if it was necessary to wait until the of performance stage of the contract, there would be a risk that the procedure would be deemed to have failed if the successful tenderer did not ultimately obtain a licence or registration). However, the aim of ensuring that the procedure does not fail cannot override the essential principles of public procurement, in particular the principles of ensuring that tenderers can access public procurement procedures on an equal basis without being faced with unjustified obstacles.

85. Moreover, there is nothing to suggest that an undertaking which deals professionally with the handling of food in another Member State would have difficulty in obtaining the licence required to enable it to open an establishment in Estonia if it were awarded the contract.

86. The procedures for obtaining such a licence must satisfy the general criteria laid down in Directive 2006/123/EC, (38) including administrative simplification. (39) In fact, the Ministry of Social Affairs argued that a non-Estonian tenderer would be able to obtain a licence or registration in a short period of time, (40) an assertion which could be applied to the performance stage of the contract.

87. The Estonian Government's argument to the effect that it would be possible for any tenderer established in another Member State to rely on the capacities of a third-party undertaking which already has the relevant licence or registration certificate in Estonia cannot be upheld either.

88. Articles 47(2) and 48(3) of Directive 2004/18 'recognise the right of every economic operator to rely, for a particular contract, upon the capacities of other entities'. (41) Precisely because that is a right and not a duty, it makes no sense to impose on a tenderer the obligation to rely on the capacities of another economic operator where that tenderer is capable of performing the contract by itself. (42)

89. In summary, the imposition of the requirements at issue in relation to food-handling establishments, as a condition for the performance of the contract, is a less onerous measure which, first, ensures respect for the principle of equality and greater competition between tenderers and, second, enables the consistent application of the general rules and the mandatory specific rules, thereby preventing any friction when it comes to the effective application of EU law.

V. Conclusion

90. In the light of the foregoing considerations, I suggest that the following answers be given to the first two questions referred by the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia):

> ‘Articles 2 and 46 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts are to be interpreted as meaning that a contracting authority may not require, as a qualifying condition which must be met, failing which a tenderer will be excluded, that tenderers or candidates whose professional suitability has been recognised in their own Member State must furnish with their tenders an activity licence or evidence of registration issued by the authorities of the Member State of the place of the contract.
>
> However, if the contract notice or tender specifications require with justification that the successful tenderer must have an establishment in the Member State of the contracting authority, Articles 2 and 46 of Directive 2004/18 do not preclude a requirement that tenderers must provide evidence, at the performance stage of the contract and in relation to that establishment, that they have the relevant licence or registration issued by the competent authorities for control of the stages of production, processing and distribution of food in that Member State, in accordance with Article 6 of Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs.’

---

1 Original language: Spanish.

---

2 According to information supplied by the Estonian Government in response to a question from the Court of Justice, Innove was, until 31 March 2020, the national ‘implementation unit’ for programme 14.1.1 ‘Fund for European aid to the most disadvantaged persons – purchase and distribution of food’. Several passages of the order for reference state that the supplies of food covered by the contracts were co-financed using European Union structural funds.

---

3 Regulation of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 139, p. 1).

---

4 The dispute could be described as *atypical* because it does not appear that any of the economic operators which participated, or could have participated, in the call for tenders objected to the conditions governing that call for tenders or the final outcome of the procurement procedure. The applicant and the defendants are all organs of the Estonian Government which, in its observations to the Court of Justice, expressed its support for the position of the Ministry of Social Affairs and its opposition to the positions of Innove and the Ministry of Finance. The latter, for its part, suggested at first instance that the appropriate procedure for resolving differences between those organs was that laid down in ‘Paragraphs 3 and 4 of the Perioodi 2014-2020 struktuuritoetuse seadus (Law on structural aid for the period 2014-2020) and Paragraph 101 of the Vabariigi Valitsuse seadus (Law on the government of the Republic)’.

---

5 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

6 Points (b) and (c) of paragraph 3 were worded, respectively, in accordance with the Corrigendum to Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 226, p. 3) and Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 (OJ 2009 L 87, p. 109).

---

7 Law on public procurement (‘the RHS’) in the version in force until 31 August 2017 (RT I of 25 October 2016, 20).

---

8 Law on foodstuffs (‘the ToiduS’) (RT I 1999, 30, 415).

---

9 There are no details regarding when the 2017 procedure was commenced but the referring court does not hint at the possibility of applying Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

10 ‘The financial correction decision’.

---

11 That obligation flowed from the Perioodi 2014-2020 struktuuritoetuse seadus (Law on structural aid for the period 2014-2020).

12 Innove relied, in that connection, on the judgments of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 42, and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraphs 45, 46 and 51.

13 The Tallinna Halduskohus (Administrative Court, Tallinn) referred to the *Public procurement guidance* drawn up by the Commission (https://ec.europa.eu/regional_policy/sources/docgener/guides/public_procurement/2018/guidance_public_procurement_2018_en.pdf). The current version of that guidance includes as an example of a discriminatory selection criterion the obligation to 'already [have] qualifications/professional certificates recognised in the country of the contracting authority at the time of submission of tenders, as this would be difficult for foreign tenderers to comply with in such a short timeframe'.

14 Paragraph 10 of its written observations.

15 In its observations (paragraph 2), the Commission points out that 'the reasons on which the need for an establishment situated in Estonia is based cannot be clearly inferred from the request for a preliminary ruling'.

16 Regulation of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).

17 See, in particular, recitals 16, 17 and 20 of Regulation No 852/2004.

18 The Estonian Government's replies to the Court's questions create further confusion on this point. It states (paragraph 10) that 'the contracting authority conceived the provision of services on the basis of a food business model which probably requires an establishment on national territory. The contracting authority accepts that, even though it did not assume this and no tender in that sense was submitted, although unlikely, it is not possible to rule out completely that, in its financial and operational model, a tenderer would envisage providing services in another way, that is, *without having an establishment on national territory*'. Italics added.

19 According to the order for reference (paragraph 3), the Ministry of Social Affairs claimed before the first-instance court that 'it is not possible to perform the contract without using an intermediate warehouse or a means of transport situated in Estonia. Since the successful tenderer cannot perform the contract without storing foodstuffs, it has the status of food sector undertaking'.

20 Paragraph 12 of its written observations.

21 'The relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement procedure or a design contest.'

22 Observations of the Estonian Government, paragraph 19. No italics in the original.

23 This is not the first time that the Court has been faced with such a situation. The judgment of 8 June 2017, *Medisanus*, C-296/15, EU:C:2017:431, paragraph 79, stated that 'the contracting authority is subject to two *potentially conflicting* requirements … Indeed, the contracting authority must comply with Article 6 of the Law on medicinal products, which lays down the principles of priority supply and national self-sufficiency … At the same time, the contracting authority must, pursuant to Article 2 of Directive 2004/18, afford equal access to public procurement and, accordingly, ensure non-discriminatory treatment of economic operators that have medicinal products derived from plasma.' No italics in the original.

24 Paragraph 15 of the order for reference.

25 Judgment of 23 December 2009, C-305/08, EU:C:2009:807.

26 The interests of the contracting authority and the effectiveness of the actions of the administrative authority were taken into account in, inter alia, the judgment of 15 May 2008, *SECAP and Santorso*, C-147/06 and C-148/06, EU:C:2008:277.

27 Judgment of 23 December 2009, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 37.

28 Ibid., paragraph 37: ‘the widest possible opening-up to competition is contemplated not only from the point of view of the Community interest in the free movement of goods and services but also the interest of the contracting authority concerned itself, which will thus have greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question’.

29 Paragraph 14 of its written observations.

30 Paragraph 15 of its written observations.

31 Paragraph 19 of its written observations.

32 Paragraph 20 of its written observations.

33 Point 27 of this Opinion.

34 Point 26 of this Opinion.

35 Point 25 of this Opinion.

36 Judgment of 11 September 2008, *Commission* v *Germany*, C-141/07, EU:C:2008:492, paragraph 50 and the case-law cited.

37 Judgments of 18 September 2014, *Bundesdruckerei*, C-549/13, EU:C:2014:2235; of 17 November 2015, *RegioPost*, C-115/14, EU:C:2015:760; and of 27 November 2019, *Tedeschi and Consorzio Stabile Istant Service*, C-402/18, EU:C:2019:1023.

38 Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36). It must be borne in mind that, for the purposes of that directive, the definition of ‘service’ is broader than that of ‘public service contracts’ in Directive 2004/18.

39 Under Article 5(1) of Directive 2006/123, Member States must ‘examine the procedures and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities examined … are not sufficiently simple, Member States shall simplify them.’

40 It argued before the Tallinna Halduskohus (Administrative Court, Tallinn) that, in view of the period for the submission of tenders in an international tendering procedure (a minimum of 40 days) and the period required for the licensing procedure set out in the ToiduS (30 days), a tenderer had sufficient time to complete the licensing procedure (point 3, third paragraph, under the heading ‘Facts and procedure’ in the order for reference).

41 Judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 25.

42 That would also create a situation where undertakings established outside Estonia were dependent on those established in that country. Again, the latter would be in a more favourable position than the former.

EU:C:2021:700

JUDGMENT OF THE COURT (Grand Chamber)

7 September 2021 (*)

Table of contents

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 58(3) and (4) – Article 60(3) and (4) – Annex XII – Conduct of procurement procedures – Selection of participants – Selection criteria – Methods of proof – Economic and financial standing of economic operators – Whether the leader of a temporary association of undertakings may rely on income received in relation to a previous public contract in the same area as the public contract at issue including where it did not itself exercise the activity which is the subject matter of the public contract at issue – Technical and professional ability of economic operators – Exhaustive nature of means of proof permitted by the directive – Article 57(4)(h), (6) and (7) – Award of public service contracts – Non-compulsory grounds for exclusion from participation in a procurement procedure – Inclusion on a list of economic operators excluded from procurement procedures – Joint liability of members of a temporary association of undertakings – Personal nature of the penalty – Article 21 – Protection of the confidentiality of information submitted to the contracting authority by an economic operator – Directive (EU) 2016/943 – Article 9 – Confidentiality – Protection of trade secrets – Applicability to procurement procedures – Directive 89/665/EEC – Article 1 – Right to an effective remedy)

In Case C-927/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania), made by decision of 17 December 2019, received at the Court on 18 December 2019, in the proceedings

‘Klaipėdos regiono atliekų tvarkymo centras’ UAB

intervening parties:

‘Ecoservice Klaipėda’ UAB,

‘Klaipėdos autobusų parkas’ UAB,

‘Parsekas’ UAB,

‘Klaipėdos transportas’ UAB,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, N. Piçarra and A. Kumin, Presidents of Chambers, C. Toader, M. Safjan, D. Šváby (Rapporteur), S. Rodin, F. Biltgen, L.S. Rossi, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Longar, Administrator,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– ‘Ecoservice Klaipėda’ UAB, by J. Elzbergas and V. Mitrauskas, advokatai,

– ‘Klaipėdos autobusų parkas’ UAB, by D. Soloveičik, advokatas,

– the Lithuanian Government, by K. Dieninis and R. Butvydytė, acting as Agents,

– the Austrian Government, by A. Posch and J. Schmoll, acting as Agents,

– the European Commission, by L. Haasbeek and by S.L. Kalėda and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 21 and 42, Article 57(4)(h), Article 58(3) and (4) and Article 70 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), of Articles 1 and 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) (‘Directive 89/665’), and Article 9(2) of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1).

2 The request has been made in proceedings between ‘Klaipėdos regiono atliekų tvarkymo centras’ UAB (Regional Waste Management Centre for the Region of Klaipėda, Lithuania) (‘the contracting authority’) and ‘Ecoservice Klaipėda’ UAB (‘Ecoservice’) concerning the award of a public contract for waste collection and transport to a group of economic operators composed of ‘Klaipėdos autobusų parkas’ UAB, ‘Parsekas’ UAB and ‘Klaipėdos transportas’ UAB (‘the Consortium’).

Legal context

EU law

Directive 2014/24

3 Recital 51 of Directive 2014/24 states:

‘It should be clarified that the provisions concerning protection of confidential information do not in any way prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes.’

4 Article 18 of that directive, entitled ‘Principles of procurement’, provides in paragraph 1:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…’

5 Article 21 of that directive, entitled ‘Confidentiality’, provides:

‘1. Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to

the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.'

6 Article 42 of the directive, entitled 'Technical specifications', provides:

'1. The technical specifications as defined in point 1 of Annex VII shall be set out in the procurement documents. The technical specifications shall lay down the characteristics required of a works, service or supply.

Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance, provided that they are linked to the subject matter of the contract and proportionate to its value and its objectives.

The technical specifications may also specify whether the transfer of intellectual property rights will be required.

…

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

(a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting authorities to award the contract;

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or – when any of those do not exist – national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words "or equivalent";

(c) in terms of performance or functional requirements referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;

(d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

…'

7 Annex VII to Directive 2014/24 relates to the 'definition of certain technical specifications'.

8 Article 50 of that directive, entitled 'Contract award notices', provides in paragraph 4:

'Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.'

9 Under Article 55 of that directive, entitled 'Informing candidates and tenderers':

‘1. Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement, not to award a contract for which there has been a call for competition, to recommence the procedure or not to implement a dynamic purchasing system.

2. On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

(a) any unsuccessful candidate of the reasons for the rejection of its request to participate,

(b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in Article 42(5) and (6), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,

(c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,

(d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

3. Contracting authorities may decide to withhold certain information referred to in paragraphs 1 and 2, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.’

10 Article 56 of that directive, entitled ‘General principles’, states in paragraph 3:

‘Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.’

11 Article 57 of Directive 2014/24, entitled ‘Exclusion grounds’, provides in paragraphs 4 and 6:

‘4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or

…

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.'

12 Under Article 58 of that directive, entitled 'Selection criteria':

'1. Selection criteria may relate to:

(a) suitability to pursue the professional activity;

(b) economic and financial standing;

(c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

2. With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as described in Annex XI, or to comply with any other request set out in that Annex.

In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

3. With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance.

…

4. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. A contracting authority may assume that an economic operator does not possess the required professional abilities

where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

In procurement procedures for supplies requiring siting or installation work, services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.

…’

13 Article 60 of that directive, entitled ‘Means of proof’, states in paragraphs 3 and 4:

‘3. Proof of the economic operator’s economic and financial standing may, as a general rule, be provided by one or more of the references listed in Annex XII Part I.

Where, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.

4. Evidence of the economic operators’ technical abilities may be provided by one or more of the means listed in Annex XII Part II, in accordance with the nature, quantity or importance, and use of the works, supplies or services.’

14 Annex XII to that directive, entitled ‘Means of proof of selection criteria’, provides:

‘Part I: Economic and financial standing

Proof of the economic operator’s economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of financial statements or extracts from the financial statements, where publication of financial statements is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking’s overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

Part II: Technical ability

Means providing evidence of the economic operators’ technical abilities, as referred to in Article 58:

(a) the following lists:

(i) a list of the works carried out over at the most the past five years, accompanied by certificates of satisfactory execution and outcome for the most important works; where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant works carried out more than five years before will be taken into account;

(ii) a list of the principal deliveries effected or the main services provided over at the most the past three years, with the sums, dates and recipients, whether public or private, involved. Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account;

(b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;

(c) a description of the technical facilities and measures used by the economic operator for ensuring quality and the undertaking's study and research facilities;

(d) an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract;

(e) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, where necessary, on the means of study and research which are available to it and the quality control measures it will operate;

(f) the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff, provided that they are not evaluated as an award criterion;

(g) an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;

(h) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;

(i) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;

(j) an indication of the proportion of the contract which the economic operator intends possibly to subcontract;

(k) with regard to the products to be supplied:

(i) samples, descriptions or photographs, the authenticity of which must be certified where the contracting authority so requests;

(ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to technical specifications or standards.'

15 Article 63 of Directive 2014/24, entitled 'Reliance on the capacities of other entities', provides in paragraph 1:

'With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

The contracting authority shall, in accordance with Articles 59, 60 and 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57. The contracting authority shall require

that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

Under the same conditions, a group of economic operators as referred to in Article 19(2) may rely on the capacities of participants in the group or of other entities.'

16 Under Article 70 of that directive, entitled 'Conditions for performance of contracts':

'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.'

Directive 89/665

17 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'1. This Directive applies to contracts referred to in Directive [2014/24] unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/24] or Directive [2014/23], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…

5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

…

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.'

18 Article 2 of that directive, headed 'Requirements for review procedures', provides in paragraph 1:

'Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

19 Directive 89/665, in its original version, had – prior to the amendments made by Directive 2014/23 – been amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) in order to improve the effectiveness of review procedures in relation to the award of public contracts. Recital 36 of the latter directive stated that that directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union ('the Charter') and seeks, in particular, to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second paragraphs of Article 47 of the Charter.

Directive 2016/943

20 Recitals 4 and 18 of Directive 2016/943 state:

'(4) Innovative businesses are increasingly exposed to dishonest practices aimed at misappropriating trade secrets, such as theft, unauthorised copying, economic espionage or the breach of confidentiality requirements, whether from within or from outside of the Union. Recent developments, such as globalisation, increased outsourcing, longer supply chains, and the increased use of information and communication technology contribute to increasing the risk of those practices. The unlawful acquisition, use or disclosure of a trade secret compromises legitimate trade secret holders' ability to obtain first-mover returns from their innovation-related efforts. Without effective and comparable legal means for protecting trade secrets across the Union, incentives to engage in innovation-related cross-border activity within the internal market are undermined, and trade secrets are unable to fulfil their potential as drivers of economic growth and jobs. Thus, innovation and creativity are discouraged and investment diminishes, thereby affecting the smooth functioning of the internal market and undermining its growth-enhancing potential.

…

(18) Furthermore, the acquisition, use or disclosure of trade secrets, whenever imposed or permitted by law, should be treated as lawful for the purposes of this Directive. This concerns, in particular, the acquisition and disclosure of trade secrets in the context of the exercise of the rights of workers' representatives to information, consultation and participation in accordance with Union law and national laws and practices, and the collective defence of the interests of workers and employers, including co-determination, as well as the acquisition or disclosure of a trade secret in the context of statutory audits performed in accordance with Union or national law. However, such treatment of the acquisition of a trade secret as lawful should be without prejudice to any obligation of confidentiality as regards the trade secret or any limitation as to its use that Union or national law imposes on the recipient or acquirer of the information. In particular, this Directive should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in Union or national law. Such confidentiality obligations include, inter alia, the obligations in respect of information forwarded to contracting authorities in the context of procurement procedures, as laid down, for example, in … Directive [2014/24]'.

21 Article 1 of that directive, entitled 'Subject matter and scope', states:

‘1. This Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets.

…

2. This Directive shall not affect:

…

(b) the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information including trade secrets, to the public or to administrative or judicial authorities for the performance of the duties of those authorities;

(c) the application of Union or national rules requiring or allowing Union institutions and bodies or national public authorities to disclose information submitted by businesses which those institutions, bodies or authorities hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;

…’

22 Article 3 of that directive, entitled ‘Lawful acquisition, use and disclosure of trade secrets’, provides in paragraph 2:

‘The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.’

23 Article 4 of that directive, entitled ‘Unlawful acquisition, use and disclosure of trade secrets’, provides in paragraph 2(a):

‘The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful, whenever carried out by:

(a) unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced’.

24 Article 9 of Directive 2016/943, entitled ‘Preservation of confidentiality of trade secrets in the course of legal proceedings’, provides in paragraph 2:

‘Member States shall also ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret. Member States may also allow competent judicial authorities to take such measures on their own initiative.

The measures referred to in the first subparagraph shall at least include the possibility:

(a) of restricting access to any document containing trade secrets or alleged trade secrets submitted by the parties or third parties, in whole or in part, to a limited number of persons;

(b) of restricting access to hearings, when trade secrets or alleged trade secrets may be disclosed, and the corresponding record or transcript of those hearings to a limited number of persons;

(c) of making available to any person other than those comprised in the limited number of persons referred to in points (a) and (b) a non-confidential version of any judicial decision, in which the passages containing trade secrets have been removed or redacted.

The number of persons referred to in points (a) and (b) of the second subparagraph shall be no greater than necessary in order to ensure compliance with the right of the parties to the legal proceedings to an

effective remedy and to a fair trial, and shall include, at least, one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings.'

Lithuanian law

Law on public procurement

25 The Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on Public Procurement), in the version applicable to the case in the main proceedings ('the Law on public procurement'), provides, in Article 20, entitled 'Confidentiality':

'1. The contracting authority, the award committee, its members and experts, and any other person shall be prohibited from disclosing to third parties information which suppliers have provided in confidence.

2. The supplier's tender or request to participate may not be classified as confidential in its entirety, but the supplier may indicate that certain information presented in its tender is confidential. Confidential information may include, inter alia, technical or trade secrets and confidential aspects of the tender. Information cannot be classified as confidential:

(1) where this would infringe legal provisions establishing the obligation to disclose or the right to access information, and the regulations implementing those legal provisions;

(2) where this would infringe the obligations laid down in Articles 33 and 58 of this Law in connection with the publication of awarded contracts, the provision of information to candidates and tenderers, including information on the price of goods, services or works mentioned in the tender, with the exception of price components;

(3) where that information has been presented in documents confirming that the supplier is not subject to any grounds for exclusion and fulfils the capacity requirements and the standards for quality management and environmental protection, with the exception of information the disclosure of which would infringe the provisions of the Law of the Republic of Lithuania on the protection of personal data or the supplier's obligations under contracts concluded with third parties;

(4) where that information relates to economic operators and subcontractors on whose capacity the supplier relies, with the exception of information the disclosure of which would infringe the provisions of the Law on the protection of personal data.

3. Where the contracting authority has doubts as to the confidential nature of the information contained in the supplier's tender, it must ask the supplier to demonstrate why the information in question is confidential. …

4. Not later than six months after the date on which the contract was awarded, the tenderers concerned may ask the contracting authority to grant them access to the successful tenderer's tender or request to participate (just as candidates may ask it for access to requests to participate made by other suppliers which have been invited to submit a tender or participate in a dialogue), but no information may be disclosed which candidates or tenderers have classified as confidential, without prejudice to paragraph 2 of this article.

…'

26 Article 45 of that law, entitled 'General principles for the evaluation of a supplier and the request for participation or tender submitted by it', provides in paragraph 3:

'If a candidate or tenderer has submitted incorrect, incomplete or incorrect documents or data concerning compliance with the requirements of the procurement documents or such documents or data are missing, the contracting authority shall, without infringing the principles of equal treatment and transparency, ask the candidate or tenderer to correct, supplement or clarify those documents or data,

within a reasonable period fixed by the contracting authority. Only the following may be corrected, supplemented, clarified or submitted: documents or data relating to the non-existence of a ground for exclusion of the supplier, its compliance with the capacity requirements, quality assurance standards and environmental protection criteria, a mandate given by the supplier to sign the request to participate or the tender, a joint venture agreement, a document certifying the validity of the tender and documents bearing no relation to the subject matter of the contract, its technical characteristics, the conditions of performance of the contract or the price of the tender. Other documents in the supplier's tender may be corrected, supplemented or clarified in accordance with Article 55(9) of this Law.'

27 Article 46 of that law, entitled 'Grounds for exclusion of a supplier', provides in paragraph 4:

'The contracting authority shall exclude a supplier from the procurement procedure where:

…

(4) that supplier, in the course of the procurement procedure, has withheld information or submitted false information concerning compliance with the requirements set out in this Article and Article 47 of this Law and the contracting authority can demonstrate this by any legal means, or the supplier is not able to submit the supporting documents required pursuant to Article 50 of this Law due to the misrepresentation of information. …'

28 Article 52 of the Law on public procurement, entitled 'Withholding information, submission of false information or failure to produce documents', provides:

'1. The contracting authority shall publish, at the latest within 10 days, in the Centrinė viešųjų pirkimų informacinė sistema [(Central Portal of Public Procurement, Lithuania)], in accordance with the rules laid down by the Viešųjų pirkimų tarnyba [(Public Procurement Authority, Lithuania)], the information relating to the supplier who, in the course of the procurement procedure, has withheld information or has provided false information concerning compliance with the requirements set out in Articles 46 and 47 of this Law or who, due to the submission of false information, is unable to produce the supporting documents required under Article 50 of this Law, where:

(1) that supplier was excluded from the procurement procedure;

(2) a judicial decision has been issued.

…'

29 Article 55 of the Law on public procurement, entitled 'Evaluation and comparison of tenders', provides in paragraph 9:

'The contracting authority may, acting in accordance with Article 45(3) of this Law, request tenderers to correct, supplement or clarify their tenders; however, it may not request, propose or allow the modification of essential elements of a tender submitted in an open or restricted procedure or of a final tender submitted in a competitive dialogue, a negotiated procedure with or without publication of a contract notice or an innovation partnership, that is to say, modification of the price or any other modifications which would render a non-compliant tender compliant with the requirements set out in the procurement documents. In the event that, during the evaluation of tenders, the contracting authority discovers errors in the calculation of the price or costs, it must request the tenderer to correct the calculation errors identified in the tender, within the time limit fixed by the contracting authority, without changing the price or costs set out in the tender at the time it was evaluated. When correcting the calculation errors identified in the tender, the tenderer may correct the price or cost components, but may not remove price or cost components or add new components to the price or costs.'

30 Article 58 of that law, entitled 'Communication of the results of procurement procedures', provides in paragraph 3:

'In the cases referred to in paragraphs 1 and 2 of this article, the contracting authority may not disclose information the disclosure of which would infringe the rules on the provision of information and

protection of data or otherwise be contrary to the general interest, would prejudice the legitimate commercial interests of a particular supplier or would adversely affect competition between suppliers.'

Code of Civil Procedure of the Republic of Lithuania

31 Article 10^1 of the Lietuvos Respublikos civilinio proceso kodeksas (Code of Civil Procedure of the Republic of Lithuania), entitled 'Special provisions on the protection of trade secrets', provides:

'1. This Article lays down specific provisions on the protection of trade secrets in cases concerning the unlawful acquisition, use and disclosure of trade secrets and other civil matters.

2. Where there are grounds for considering that a trade secret may be disclosed, the court, at the duly reasoned request of the parties or of its own motion, shall, by reasoned order, name the persons who may:

(1) have access to those parts of the file that contain information which constitutes or may constitute a trade secret, and make and obtain extracts, duplicates and copies (digital copies);

(2) take part in hearings in camera in which information which constitutes or may constitute a trade secret may be disclosed, and have access to the records of those hearings;

(3) obtain a certified copy (digital copy) of a judgment or order containing information which constitutes or may constitute a trade secret.

3. The number of persons referred to in paragraph 2 of this Article may not exceed what is necessary to safeguard the right to judicial protection and the right to a fair trial. Those persons are at least the following:

(1) if the party is a natural person: that person and his or her representative;

(2) if the party is a legal person: at least one natural person who is conducting the case on behalf of that legal person and a representative of that legal person.

4. In applying the restrictions laid down in paragraph 2 of this article, the court shall take into account the need to guarantee the right to judicial protection and the right to a fair trial, the legitimate interests of the parties and of the other persons taking part in the proceedings and the harm that may be caused by applying or not applying those restrictions.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

32 By a notice of a public call for competition published on 27 September 2018, the contracting authority launched an open international procurement procedure for the award of a contract for the provision of services relating to the collection and transport of municipal waste from the municipality of Neringa (Lithuania) to waste treatment facilities in the Region of Klaipėda (Lithuania).

33 The contracting authority set out technical specifications in that notice. It provided, inter alia, that the service provider would be required to use municipal waste collection vehicles which had to comply, at least, with the Euro 5 standard and be equipped with a fixed global positioning system (GPS) transmitter operating continuously, so as to enable the contracting authority to determine the exact position of the vehicle and its specific itinerary.

34 The notice also contained a description of the professional and technical capacities necessary for the performance of the contract and a description of the required financial and economic capacities. In that regard, it stated that each tenderer had to submit a free-form declaration that its average annual turnover generated from the activity of collecting and transporting mixed municipal waste during the three

preceding financial years or from the date of its registration, if it had carried on that business for less than three years, was not less than EUR 200 000 excluding value added tax.

35 The contracting authority received three tenders, including those of Ecoservice and the Consortium.

36 On 29 November 2018, the contracting authority notified the tenderers of the evaluation of the tenders and their final ranking. The contract was awarded to the Consortium because of the lower price of its tender, Ecoservice being ranked second.

37 On 4 December 2018, Ecoservice requested the contracting authority, on the basis of Article 20(4) of the Law on public procurement, to grant it access to the information used to establish that classification, in particular the Consortium's tender.

38 On 6 December 2018, Ecoservice was granted access to the non-confidential information in that tender.

39 On 10 December 2018, taking the view that the Consortium did not meet the qualification requirements, Ecoservice lodged a complaint with the contracting authority seeking to challenge the outcome of the procurement procedure. It submitted, first, that none of the members of the Consortium could have performed contracts for the collection and transport of mixed municipal waste with a value of EUR 200 000 over the three preceding years. It stated in that regard that, since Parsekas did not carry out mixed municipal waste management services, the contracting authority should have asked it to clarify the submitted declaration that Parsekas had performed mixed waste management contracts with a value of EUR 235 510.79. Secondly, Ecoservice claimed that the Consortium did not have the required technical capacities.

40 On 17 December 2018, the contracting authority dismissed that complaint, stating briefly, according to the referring court, that the Consortium had complied with the two qualification requirements contested by Ecoservice.

41 On 27 December 2018, Ecoservice brought an action against that decision before the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania), seeking, inter alia, an order requiring the contracting authority to produce the tender submitted by the Consortium and the correspondence exchanged between the latter and the contracting authority. Ecoservice argued that all the evidence had to be submitted to the court, irrespective of its confidential nature, and submitted that it required access to those documents, some of which were not confidential, in order to clarify its own requests.

42 By decision of 3 January 2019, that court ordered the contracting authority to provide all the requested documents to Ecoservice.

43 In its pleading of 11 January 2019 lodged in response to that order, the contracting authority claimed, first, that, when examining the complaint, it had asked the Consortium to provide it with clarifications concerning the waste management services contracts it had concluded. The Consortium had submitted the requested information while stating that much of the information submitted was confidential and therefore had to be protected against disclosure to third parties. The contracting authority also considered that that information had commercial value for the Consortium and that its disclosure to competitors could harm the Consortium and therefore did not communicate that confidential information to the court so as not to infringe Article 20 of the Law on public procurement. It therefore produced only the non-confidential information in the tender submitted by the Consortium, while indicating that it would submit the confidential information to the court if the latter again requested it.

44 Secondly, the contracting authority contended that the action should be dismissed on the ground that the additional clarifications it had received from the Consortium and the inspection which had been carried out at the latter's premises had confirmed that the tender at issue had been evaluated correctly.

45 By order of 15 January 2019, the Klaipėdos apygardos teismas (Regional Court, Klaipėda) limited the obligation to produce documents to the tender submitted by the Consortium and the documents attached thereto and ordered their production by 25 January 2019.

46 On 25 January 2019, the contracting authority submitted the requested documents to that court, specifying whether or not they contained confidential information. The information which the Consortium claimed to be confidential, without being contradicted by the contracting authority, was addressed exclusively to the court. Moreover, the contracting authority asked the court not to grant Ecoservice access to the confidential information in the Consortium's tender and to classify that information as non-public information in the case file.

47 By order of 30 January 2019, the court of first instance granted the contracting authority's request that the information in the Consortium's tender which had been submitted to it, first, be classified as confidential and, second, not be disclosed.

48 On 14 February 2019, by an order not amenable to appeal, that court dismissed Ecoservice's request of 11 February 2019 for access to all the evidence in the case file.

49 On 21 February 2019, by an order not amenable to appeal, that court dismissed Ecoservice's request of 12 February 2019 for an order requiring Parsekas to produce data relating to waste management contracts it had concluded.

50 By judgment of 15 March 2019, the Klaipėdos apygardos teismas (Regional Court, Klaipėda) dismissed Ecoservice's action on the ground that the Consortium satisfied the qualification requirements.

51 Ruling on an appeal brought by Ecoservice, the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania), by judgment of 30 May 2019, set aside both the judgment of the court of first instance and the decision of the contracting authority establishing the ranking of the tenders. The appeal court also ordered the contracting authority to carry out a fresh evaluation of the tenders.

52 The contracting authority brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

53 On 26 July 2019, Ecoservice, before submitting its response to the appeal on a point of law, applied to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) for access to the confidential documents submitted by the contracting authority at first instance, with the commercially sensitive information redacted.

54 In the first place, the referring court notes that some of the qualification requirements for tenderers set out in the tender notice could be understood as conditions relating to the financial and economic capacity of the economic operator as well as conditions relating to its technical and professional ability, but also as technical specifications or conditions relating to the performance of the public contract.

55 It is necessary to determine the nature of those requirements, since, in accordance with Article 45(3) and Article 55(9) of the Law on public procurement, the obligation or the possibility to correct a declaration of a tenderer differs depending on whether the information in question concerns the classification of that tenderer or the tender it submitted.

56 In the second place, according to the referring court, the question arises as to the appropriate balance between the protection of the confidential information provided by a tenderer and the effectiveness of the rights of defence of other tenderers.

57 In the present case, Ecoservice attempted unsuccessfully to gain access to the Consortium's tender. The contracting authority itself very actively prioritised the Consortium's right to protect its confidential information. That practice, which is common in Lithuania, results in the rights of tenderers being only partly protected. In disputes relating to the award of public contracts, the unsuccessful tenderers have less information than the other parties to those disputes. Furthermore, the effective protection of their rights depends on whether the court decides to classify the information they request as confidential. A decision by which the court does not grant a request for access to such information may diminish an unsuccessful tenderer's chances of having its action against the decision to award the contract upheld.

58 The referring court states, first, that it has held, inter alia, in the field of public procurement, that the right of tenderers, enshrined in Article 20 of the Law on public procurement, to the protection of confidential information which they submitted in a tender concerns only information which must be classified as trade secrets or industrial secrets under Article 1.116(1) of the Lietuvos Respublikos civilinio kodekso (Civil Code of the Republic of Lithuania), which corresponds in essence to the provisions of Directive 2016/943. Secondly, the right of a tenderer to have access to another tenderer's bid should be regarded as forming an integral part of the protection of potentially infringed rights.

59 However the referring court has doubts as to the precise scope of the contracting authorities' obligations to protect the confidentiality of the information sent to them by the tenderers and the relationship between those obligations and the obligation to ensure effective judicial protection for the economic operators which have brought an action. It takes the view that, even though the Court, in its judgment of 14 February 2008, *Varec* (C-450/06, EU:C:2008:91), stated that public contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, it appears from the third subparagraph of Article 9(2) of Directive 2016/943, which postdates that judgment, that, in any event, the parties to proceedings cannot have different amounts of information at their disposal, since otherwise the right to effective judicial protection and right to a fair trial would be infringed. It states that, since that provision requires the court to guarantee the right of economic operators to access trade secrets of a party to the proceedings, it may also be the case that economic operators should be allowed to exercise that right prior to any litigation, in particular so that they may decide whether to bring an action in full knowledge of the facts.

60 The referring court observes that there is, however, a risk that certain economic operators might abuse that right by seeking such information from the contracting authority not in order to defend their rights, but solely in order to obtain information about their competitors. However, the bringing of proceedings before a court would in any event enable those operators to obtain the information sought.

61 The referring court notes that, with the exception of recital 18 thereof, Directive 2016/943 does not contain any specific provision concerning public procurement procedures. It notes that, even though contracting authorities are not review bodies, the mandatory system of pre-litigation dispute resolution, provided for under domestic law, confers on them a broad power to cooperate with economic operators, whether they are applicants or defendants. The contracting authorities also have – as a result of their objective of guaranteeing the effective protection of those operators' rights – the duty to adopt, to the extent of their competence and the means at their disposal, the measures necessary to ensure that those operators have the ability to defend effectively any interests that may have been damaged. Thus, it may be the case that Article 21 of Directive 2014/24 and the corresponding provisions of Directive 89/665 should be interpreted as meaning that tenderers may access information which constitutes trade secrets of other tenderers not only in the context of judicial proceedings, but also during the prior administrative review stage.

62 In the third place, the referring court intends to raise of its own motion the issue of the assessment of the Consortium's conduct in the light of Article 57(4)(h) of Directive 2014/24, that is to say whether the Consortium or, at the very least, some of its members submitted false information to the contracting authority concerning the conformity of their capacities with the requirements set out in the call for tenders.

63 The referring court infers from the case-law of the Court that the information provided by Parsekas could constitute a case of negligence in the submission of information, which has affected the outcome of the procurement procedure. In that regard, it considers that Parsekas should not have indicated the income which it derived from the contracts concluded and performed together with other economic operators which provided the part of the services relating to mixed waste management and the contracts which it performed itself, but in respect of which the management of mixed waste represented only a minimal part of the waste concerned.

64 Furthermore, the referring court, which observes that the Court's case-law on Article 57(4) of Directive 2014/24 is based on the particular relationship of mutual trust between the contracting authority and the supplier concerned, has doubts as to whether a national court may depart from the contracting

authority's assessment that the information communicated to it during the procurement procedure was not false or misleading.

65 Lastly, the referring court is unsure whether, where an economic operator which is a party to a joint venture agreement has provided potentially false information, its partners, with whom it submitted the joint tender, must also be included, pursuant to Article 46(4)(4) and Article 52 of the Law on public procurement, on the 'List of suppliers which have submitted false information', which would prohibit them from participating in calls for tenders published by other contracting authorities for one year.

66 That approach, which could be based on the joint liability and common interests and responsibility of all the partners, nevertheless seems incompatible with the principle of the personal responsibility of those operators, by virtue of which only economic operators which have supplied false information may be penalised.

67 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a tender condition under which suppliers are required to demonstrate a certain level of average annual operating income derived from carrying out activities relating only to specific services (mixed municipal waste management) fall within the scope of Article 58(3) or (4) of Directive 2014/24?

(2) Does the method of assessment of the supplier's capacity, which is set out by the Court of Justice in its judgment of 4 May 2017, *Esaprojekt* (C-387/14, EU:C:2017:338), depend on the answer to the first question?

(3) Does a tender condition under which suppliers are required to demonstrate that the vehicles necessary for the provision of [refuse management] services comply with the specific technical requirements, including polluting emissions (Euro 5 standard), installation of a GPS transmitter, appropriate capacity and so forth, fall within the scope of Article 58(4) of Directive 2014/24, Article 42 of that directive in conjunction with the provisions of Annex VII, and/or Article 70 of that directive?

(4) Are the [fourth] subparagraph of Article 1(1) of Directive 89/665, which lays down the principle of the effectiveness of review procedures, Article 1(3) and (5) thereof, Article 21 of Directive 2014/24 and the provisions of Directive [2016/943], in particular recital 18 and the third subparagraph of Article 9(2) thereof (together or separately, but without limitation thereto), to be interpreted as meaning that, where a binding pre-litigation dispute settlement procedure is laid down in the national legal rules governing public procurement:

(a) the contracting authority has to provide to the supplier who initiated the review procedure all information regarding another supplier's tender (regardless of its confidential nature), if the subject matter of that procedure is specifically the lawfulness of the evaluation of that tender and the supplier who initiated the procedure had explicitly requested the contracting authority, prior thereto, to disclose that information;

(b) irrespective of the answer to the previous question, the contracting authority, when rejecting a complaint submitted by a supplier regarding the lawfulness of the evaluation of a competitor's tender, must in any event give a clear, comprehensive and specific reply, regardless of the risk of disclosing confidential tender information entrusted to it?

(5) Are the [fourth] subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Directive 89/665, Article 21 of Directive 2014/24 and Directive 2016/943, in particular recital 18 thereof (together or separately, but without limitation thereto), to be interpreted as meaning that the contracting authority's decision not to grant a supplier access to the confidential details of another participant's tender is a decision which may be challenged separately before the courts?

(6) If the answer to the previous question is in the affirmative, is Article 1(5) of Directive 89/665 to be interpreted as meaning that the supplier must file a complaint with the contracting authority in respect of such a decision by it and, if need be, bring an action before the courts?

(7) If the answer to the previous question is in the affirmative, are the [fourth] subparagraph of Article 1(1) and Article 2(1)(b) of Directive 89/665 to be interpreted as meaning that the supplier may, depending on the extent of the information available on the content of the other supplier's tender, bring an action before the courts concerning exclusively the refusal to provide information to it, without separately calling the lawfulness of other decisions of the contracting authority into question?

(8) Irrespective of the answers to the previous questions, is the third subparagraph of Article 9(2) of Directive 2016/943 to be interpreted as meaning that, where the court is requested to order the other party to the dispute to produce evidence and make it available to the applicant, it must grant such a request regardless of the actions on the part of the contracting authority during the procurement or review procedures?

(9) Is the third subparagraph of Article 9(2) of Directive 2016/943 to be interpreted as meaning that, if the court rejects the request to disclose confidential information of the other party to the dispute, the court should of its own motion assess the relevance of the requested information and its effects on the lawfulness of the public procurement procedure?

(10) May the ground for exclusion of suppliers which is laid down in Article 57(4)(h) of Directive 2014/24, regard being had to the judgment of the Court of Justice of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93* (C-267/18, EU:C:2019:826), be applied in such a way that the court, when examining a dispute between a supplier and the contracting authority, may decide of its own motion, irrespective of the assessment of the contracting authority, that the tenderer concerned, acting intentionally or negligently, submitted misleading, factually inaccurate information to the contracting authority and therefore should be excluded from public procurement procedures?

(11) Is Article 57(4)(h) of Directive 2014/24, read in conjunction with the principle of proportionality set out in Article 18(1) of that directive, to be interpreted and applied in such a way that, where national law provides for additional penalties (besides exclusion from procurement procedures) in respect of the submission of false information, those penalties may be applied only on the basis of personal responsibility, in particular where factually inaccurate information is submitted only by some of the joint participants in the public procurement procedure (for example, one of several partners)?'

Consideration of the questions referred

The first question

68 By its first question, the referring court asks, in essence, whether Article 58 of Directive 2014/24 must be interpreted as meaning that the obligation on economic operators to demonstrate that they have a certain average annual turnover in the area covered by the public contract at issue constitutes a selection criterion relating to their economic and financial standing, within the meaning of paragraph 3 of that provision, or their technical and professional ability, within the meaning of paragraph 4 of that provision.

69 In that regard, it should be noted that Article 58(1) of that directive sets out the three types of selection criteria which contracting authorities may impose on economic operators as requirements for participation. Those criteria, which relate to the suitability to pursue the professional activity concerned, the economic and financial standing and the technical and professional ability of the operators, are set out in paragraphs 2 to 4 of that article respectively.

70 In addition, it is apparent from Article 58(3) of that directive that, in order to ensure that they possess the necessary economic and financial standing to perform the contract, contracting authorities may

require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract.

71 It follows that the requirement that economic operators demonstrate that they have a certain average annual turnover in the area covered by the contract corresponds precisely to the definition of a selection criterion based on their economic and financial standing, within the meaning of Article 58(3) of Directive 2014/24 and therefore falls within the scope of that definition. Moreover, it is apparent from Annex XII to that directive, concerning ‘means of proof of selection criteria’, and more specifically from Part I of that annex, to which Article 60(3) of that directive refers, that the non-exhaustive list of means of proof of an economic operator’s economic and financial standing includes ‘turnover in the area covered by the contract’, which supports that interpretation.

72 In the light of the foregoing considerations, the answer to the first question is that Article 58 of Directive 2014/24 must be interpreted as meaning that the obligation on economic operators to demonstrate that they have a certain average annual turnover in the area covered by the public contract at issue constitutes a selection criterion relating to the economic and financial standing of those operators, within the meaning of paragraph 3 of that provision.

The second question

73 By its second question, the referring court asks, in essence, whether Article 58(3) in conjunction with Article 60(3) of Directive 2014/24 must be interpreted as meaning that, where the contracting authority has required that economic operators have a certain minimum turnover in the area covered by the public contract in question, an economic operator may, in order to prove its economic and financial standing, rely on the income received by a temporary group of undertakings to which it belonged only where it actually contributed, in the context of a specific public contract, to the performance of an activity of that group analogous to the activity which is the subject matter of the public contract for which that operator seeks to prove its economic and financial standing.

74 In order to prove its economic and financial standing, within the meaning of Article 58(3) of Directive 2014/24, an economic operator may, as a general rule, in accordance with the first subparagraph of Article 60(3) of that directive, submit one or more of the references listed in Part I of Annex XII to that directive to the contracting authority. The second subparagraph of Article 60(3) of that directive even provides that where, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.

75 As is apparent from Article 58(3) of Directive 2014/24, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract.

76 It thus follows from that provision that, when setting out the requirements to ensure that economic operators have the necessary economic and financial standing to perform the contract, contracting authorities may require that economic operators have a certain overall minimum yearly turnover or a certain minimum turnover in the area covered by the public contract in question, or they may combine those two requirements.

77 If the contracting authority has imposed only a requirement of a certain minimum annual turnover, without requiring that that minimum turnover have been achieved in the area covered by the contract, nothing precludes an economic operator from relying on the income received by a temporary group of undertakings to which it belonged, even if it did not actually contribute, in the context of a specific public contract, to the performance of an activity of that group analogous to the activity which is the subject matter of the public contract for which that operator seeks to prove its economic and financial standing.

78 However, where the contracting authority has required that that minimum turnover have been achieved in the area covered by the contract, that requirement has a twofold purpose. It is intended to establish the economic and financial standing of economic operators and helps to demonstrate their technical and

professional abilities. In that situation, an operator's economic and financial standing is, like its technical and professional abilities, specific and exclusive to that operator as a natural or legal person.

79 It follows that, in the latter situation, an economic operator may, in order to prove its economic and financial standing, rely, in a public procurement procedure, on the income received by a temporary group of undertakings to which it belonged only if it actually contributed, in the context of a specific public contract, to the performance of an activity of that group analogous to the activity which is the subject matter of the public contract for which that operator seeks to prove its economic and financial standing.

80 Indeed, where an economic operator relies on the economic and financial capacities of a temporary group of undertakings in which it has participated, those capacities must be assessed in relation to the effective participation of that operator and, therefore, to its actual contribution to the performance of an activity required of that group in the context of a specific public contract (see, by analogy, judgment of 4 May 2017, *Esaprojekt*, C-387/14, EU:C:2017:338, paragraph 62).

81 It is therefore necessary, in the context of Article 58(3) of Directive 2014/24, to limit, in the situation referred to in paragraph 78 of the present judgment, the turnover which may be relied on under that provision to that relating to the actual contribution of the operator in question to the performance of an activity required of that group in the context of a previous public contract.

82 The answer to the second question is therefore that Article 58(3) in conjunction with Article 60(3) of Directive 2014/24 must be interpreted as meaning that, where the contracting authority has required that economic operators have achieved a certain minimum turnover in the area covered by the public contract in question, an economic operator may, in order to prove its economic and financial standing, rely on income received by a temporary group of undertakings to which it belonged only if it actually contributed, in the context of a specific public contract, to the performance of an activity of that group analogous to the activity which is the subject matter of the public contract for which that operator seeks to prove its economic and financial standing.

The third question

83 By its third question, the referring court asks, in essence, whether Article 58(4), Article 42 and Article 70 of Directive 2014/24 must be interpreted as meaning that those articles can apply simultaneously to a technical requirement set out in a call for tenders.

84 In that regard, it must be held that Directive 2014/24 does not preclude the consideration of technical requirements simultaneously as selection criteria relating to technical and professional ability, as technical specifications and/or as conditions for the performance of the contract, within the meaning of Article 58(4), Article 42 and Article 70 of that directive, respectively.

85 As regards selection criteria relating to the 'technical and professional ability' of economic operators within the meaning of Article 58(4) of Directive 2014/24, it should be noted that the means of proof of those abilities listed in Part II of Annex XII to that directive, includes, in points (g) and (i) of that part, respectively, 'an indication of the environmental management measures that the economic operator will be able to apply when performing the contract' and 'a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract'.

86 If such means of proof are capable of demonstrating the 'technical and professional ability' of economic operators, then technical requirements such as those concerning polluting emissions from vehicles (Euro 5 standard) and the obligation to equip those vehicles with a GPS transmitter, which are at issue in the present case, appear apt to relate to the 'technical resources' of economic operators and, therefore, to be classified as selection criteria relating to their technical and professional abilities, within the meaning of Article 58(4) of that directive, provided that the tender documentation states that they are imposed specifically as abilities which tenderers must prove they have or will have in time to perform the contract, which it is for the referring court to verify.

87 As regards 'technical specifications', within the meaning of Article 42 of Directive 2014/24, it is apparent from paragraph 3 of that article that such specifications define the 'characteristics required' of

the services covered by a contract and are formulated in terms of performance or functional requirements, including environmental characteristics, or by reference to technical standards. Moreover, paragraph 1 of that article refers to Annex VII to that directive, point 1(b) of which states, with regard to public supply or service contracts, that a technical specification is contained 'in a document defining the required characteristics of a product or a service, such as … environmental and climate performance levels …'. Thus, the technical requirements at issue in the main proceedings, which are formulated in terms of performance or functional requirements, and which refer in particular to the Euro 5 standard relating to polluting emissions from vehicles, may also fall within the concept of 'technical specifications'.

88 Lastly, since they lay down special conditions relating to the performance of a contract, they appear to be linked to the subject matter of the contract and they are indicated in the call for competition or in the procurement documents, those requirements, which include innovation-related and environmental considerations, may also fall within the scope of 'conditions for performance of the contract', within the meaning of Article 70 of Directive 2014/24, provided that it is apparent from the tender documentation that they are imposed as conditions with which the successful tenderer must comply when performing the contract, which it is for the referring court to verify.

89 In that regard, it must be noted that compliance with the conditions for the performance of a contract is not to be assessed when a contract is awarded. It follows that, if the requirement at issue in the main proceedings were classified as a performance condition and if the successful tenderer did not satisfy it when the public contract was awarded to it, the non-compliance with that condition would have no effect on the question whether the award of the contract to the Consortium was compatible with the provisions of Directive 2014/24.

90 Thus, a requirement contained in a call for tenders, such as the requirement at issue in the main proceedings, may be classified as a selection criterion relating to technical and professional ability or a technical specification or even as a condition for the performance of the contract. Furthermore, since the referring court raises the question, inter alia, of the compatibility of the requirements at issue in the main proceedings with EU law, it should be added that Articles 42 and 70 of Directive 2014/24 must be interpreted as not precluding, as a matter of principle, the imposition, in a call for tenders, of requirements specifying certain technical characteristics of vehicles which must be used for the purpose of providing the services covered by the contract in question, subject to compliance with the fundamental principles of public procurement, as set out in Article 18(1) of that directive.

91 It should be noted that, in the context of the third question, the referring court is also unsure whether the classification of the requirements at issue may have an effect on the possibility of rectifying and correcting submitted tenders.

92 In that regard, it should be pointed out that, under Article 56(3) of Directive 2014/24, where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing that directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

93 As is apparent from settled case-law on the interpretation of the provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), based in particular on the principle of equal treatment and which it is appropriate to apply by analogy in the context of Article 56(3) of Directive 2014/24, a request for clarification sent to an economic operator under that provision cannot however make up for the lack of a document or information the submission of which was required by the contract documents, since the contracting authority is required to observe strictly the criteria which it has itself laid down. In addition, such a request may not lead to the submission by a tenderer of what would appear in reality to be a new tender (see, by analogy, judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 40; of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 36

and 40; and of 28 February 2018, *MA.T.I. SUD and Duemme SGR*, C-523/16 and C-536/16, EU:C:2018:122, paragraphs 51 and 52).

94 It follows from the foregoing considerations that the scope of the contracting authority's power to allow the successful tenderer subsequently to supplement or clarify its initial tender depends on compliance with the provisions of Article 56(3) of Directive 2014/24, having regard, in particular, to the requirements of the principle of equal treatment, and not, as such, on the classification of the requirements at issue in the main proceedings as selection criteria relating to the 'technical and professional ability' of economic operators, within the meaning of Article 58(4) of that directive, as 'technical specifications', within the meaning of Article 42 thereof or as 'conditions for performance' within the meaning of Article 70 of that directive.

95 The answer to the third question is therefore that Article 58(4), Article 42 and Article 70 of Directive 2014/24 must be interpreted as meaning that they can apply simultaneously to a technical requirement set out in a call for tenders.

The fourth to ninth questions

Preliminary observations

96 Since the fourth, fifth, eighth and ninth questions concern the interpretation of provisions of Directive 2016/943, it must be determined whether that directive is applicable, first, to a situation in which a contracting authority receives a request from a tenderer for the disclosure of information deemed confidential contained in a competitor's tender and, where relevant, a complaint against the decision rejecting that request in the context of a mandatory pre-litigation procedure and, secondly, where an action is brought before a court against the decision of the contracting authority dismissing that complaint.

97 Having regard to its purpose, as set out in Article 1(1) thereof, read in conjunction with recital 4 thereof, Directive 2016/943 concerns only the unlawful acquisition, use or disclosure of trade secrets and does not provide for measures to protect the confidentiality of trade secrets in other types of court proceedings, such as proceedings relating to public procurement.

98 Moreover, Article 4(2)(a) of that directive provides that the acquisition of a trade secret without the consent of the trade secret holder is to be considered unlawful whenever it is carried out by unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced.

99 Furthermore, as is apparent from Article 1(2)(c) thereof, that directive does not affect the application of EU or national rules requiring or allowing EU institutions and bodies or national public authorities to disclose information submitted by businesses which those institutions, bodies or authorities hold pursuant to, and in compliance with, the obligations and prerogatives set out in EU or national law. In addition, recital 18 of that directive, in the light of which that provision must be interpreted, states that Directive 2016/943 should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in EU or national law. Accordingly, it must be concluded that Directive 2016/943 does not release public authorities from the confidentiality obligations which may arise under Directive 2014/24.

100 Lastly, Article 3(2) of Directive 2016/943 provides that the acquisition, use or disclosure of a trade secret is to be considered lawful to the extent that it is required or allowed by EU or national law.

101 In that context, it should be noted that Article 21 of Directive 2014/24, read in conjunction with recital 51 thereof, provides that, in principle, the contracting authority is not to disclose information forwarded to it by economic operators which they have designated as confidential and that it may impose on economic operators requirements aimed at protecting the confidential nature of information which they make available throughout the procurement procedure.

102 Accordingly, in order to provide a useful answer to the referring court, the Court will interpret the relevant provisions of Directives 2014/24 and 89/665 which specify, inter alia, the special rules applicable to contracting authorities and national courts as regards the protection of the confidentiality of documents submitted to them in the context of public procurement procedures.

The fifth to seventh questions

103 By its fifth to seventh questions, the referring court asks, in essence, whether the fourth subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Directive 89/665 must be interpreted as meaning that a decision of a contracting authority refusing to disclose to an economic operator the information deemed confidential in the application file or in the tender of another economic operator is a measure amenable to review and that, where the Member State in which the public procurement procedure in question is taking place has provided for a mandatory pre-litigation procedure in respect of decisions taken by contracting authorities, judicial proceedings against that decision must be preceded by such a prior administrative review procedure.

104 In that regard, it follows from the fourth subparagraph of Article 1(1) of Directive 89/665 that the Member States are to take the measures necessary to ensure that, as regards inter alia contracts falling within the scope of Directive 2014/24, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of Directive 89/665, on the grounds that such decisions have infringed EU law in the field of public procurement or national rules transposing that law. Under Article 1(3) of that directive, those review procedures must be available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

105 Furthermore, it is clear from the case-law of the Court that the concept of ‘decisions taken by the contracting authorities’ must be interpreted broadly. By using the terms ‘as regards contracts’, the wording of the fourth subparagraph of Article 1(1) of Directive 89/665 implies that every decision of a contracting authority falling under the EU rules in the field of public procurement and liable to infringe them is subject to the judicial review provided for in Articles 2 to 2f of that directive. That wording thus refers generally to the decisions of a contracting authority without distinguishing between those decisions according to their content or time of adoption and does not lay down any restriction with regard to the nature or content of the decisions to which it refers (see, to that effect, judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraphs 26 and 27 and the case-law cited).

106 That broad interpretation of the concept of ‘decisions amenable to review’, which led the Court, inter alia, to consider that a decision of a contracting authority allowing an economic operator to participate in a public procurement procedure constitutes a decision within the meaning of the fourth subparagraph of Article 1(1) of Directive 89/665 (judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 28, and see, to that effect, as regards Article 1(3) of that directive, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 36), must also apply as regards a decision by which a contracting authority refuses to disclose to an economic operator the information deemed confidential submitted to it by a candidate or a tenderer.

107 Since the referring court asks, in essence, by its seventh question, whether an unsuccessful tenderer may bring legal proceedings relating solely to the refusal to disclose to it information deemed confidential, without also challenging the legality of other decisions of the contracting authority, it is sufficient, first of all, to note that Directive 89/665 does not contain any provision precluding such a tenderer from bringing an action against a contracting authority’s decision refusing to provide it with such information, regardless of the content and scope of that decision.

108 Next, as the Advocate General noted, in essence, in points 77 and 78 of his Opinion, that finding is supported by the objectives of effectiveness and speed referred to in the fourth subparagraph of Article 1(1) of that directive.

109 Lastly, as regards the question whether judicial proceedings against a decision by which the contracting authority refuses to disclose to an economic operator information deemed confidential submitted by a candidate or tenderer must be preceded by a prior administrative review procedure where the Member State in which the public procurement procedure in question takes place has provided for a mandatory pre-litigation procedure, it should be noted that, although Article 1(5) of Directive 89/665 provides that a Member State may require that the person concerned first seek review with the contracting authority before seeking judicial review, that provision does not however specify that review procedure or the detailed rules thereof.

110 Accordingly, where, in accordance with Article 1(5) of that directive, the Member State in which the public procurement procedure in question takes place has provided that any person who wishes to challenge a decision taken by the contracting authority is required to seek administrative review before bringing an action before the courts, that Member State may also provide, while respecting the principles of equivalence and effectiveness, that an action against a decision of the contracting authority refusing to disclose to an economic operator the information deemed confidential in the application file or in the tender of another economic operator must be preceded by an administrative review procedure before the contracting authority.

111 It follows from the foregoing considerations that the answer to the fifth to seventh questions is that the fourth subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Directive 89/665 must be interpreted as meaning that a decision of a contracting authority refusing to disclose to an economic operator the information deemed confidential in the application file or in the tender of another economic operator is a measure amenable to review and that, where the Member State in which the public procurement procedure in question takes place has provided that any person wishing to challenge decisions taken by the contracting authority is required to seek administrative review before bringing an action before the courts, that Member State may also provide that judicial proceedings against that decision refusing access have to be preceded by such a prior administrative review procedure.

The fourth, eighth and ninth questions

112 By its fourth, eighth and ninth questions, the referring court asks, in essence, whether the fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665 and Article 21 of Directive 2014/24 must be interpreted as meaning that both the contracting authority and, as the case may be, the competent national court are required to disclose to an economic operator which has requested it all the information contained in the documents submitted by a competitor, including the confidential information contained therein. That court also wishes to know whether, in the event of a refusal to disclose information on the ground of its confidentiality, the contracting authority must state reasons for its position regarding the confidential nature of that information.

– *The scope of the contracting authority's obligation to protect confidential information and the obligation to state reasons*

113 Under Article 21(1) of Directive 2014/24, unless otherwise provided in that directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55 of that directive, the contracting authority is not to disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders. Article 21(2) of that directive provides that contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

114 In addition, it is true that Article 55(2)(c) of Directive 2014/24 expressly authorises any tenderer that has made an admissible tender to request the contracting authority to communicate to it, as quickly as possible, and in any event within 15 days from receipt of a written request, the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer. Article 50(4) and Article 55(3) of that directive provide, however, that contracting authorities may decide not to disclose certain information concerning the award of the contract, inter alia where its release would be

contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators

115 In that regard, it should be recalled that the principal objective of the EU rules on public procurement is the opening-up of public procurement to undistorted competition in all the Member States and that, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Furthermore, the obligation to state reasons for a decision rejecting a tender in a public procurement procedure does not mean that that unsuccessful tenderer must be provided with all the information regarding the characteristics of the tender accepted by the contracting authority. Since public procurement procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to those operators (see, to that effect, judgments of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraphs 34 to 36, and of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 112 and the case-law cited).

116 It follows from the provisions of Directive 2014/24, cited in paragraphs 113 and 114 above, and from the case-law referred to in paragraph 115 above, that a contracting authority which has received a request from an economic operator for disclosure of information deemed confidential in the tender of the competitor to which the contract was awarded, must not, in principle, disclose that information.

117 However, as the Advocate General observes, in essence, in points 40 and 41 of his Opinion, the contracting authority cannot be bound by an economic operator's mere claim that the information submitted is confidential. Such an operator must demonstrate the genuinely confidential nature of the information which it claims should not be disclosed, by establishing, for example, that that information contains technical or trade secrets, that it could be used to distort competition or that its disclosure could be damaging to that operator.

118 Consequently, if the contracting authority has doubts as to the confidential nature of the information submitted by that operator, it must, before taking a decision granting the applicant access to that information, give the operator concerned the opportunity to provide additional evidence in order to ensure that its rights of defence are respected. Having regard to the harm which could result from the improper disclosure of certain information to a competitor, the contracting authority must, before disclosing that information to a party to the dispute, give the economic operator concerned an opportunity to plead that the information in question is confidential or a trade secret (see, by analogy, judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 54).

119 Furthermore, it is for the contracting authority to ensure that the decision which it intends to take on an economic operator's request for access to information contained in the documents submitted by a competitor complies with the public procurement rules set out in Directive 2014/24, in particular those relating to the protection of confidential information referred to in paragraphs 113 and 114 above. The contracting authority is subject to the same obligation where, under Article 1(5) of Directive 89/665, the Member State of that authority has opted to make the right to seek judicial review of decisions taken by the contracting authorities subject to the obligation first to seek administrative review before those authorities.

120 It should also be pointed out that the contracting authority – whether where it refuses to disclose the confidential information of an economic operator to one of its competitors or where it receives an application for administrative review of its refusal to disclose such information in the context of a mandatory pre-litigation procedure – must also comply with the general principle of EU law relating to good administration, which entails requirements that must be met by the Member States when they implement EU law (judgment of 9 November 2017, *LS Customs Services*, C-46/16, EU:C:2017:839, paragraph 39 and the case-law cited). Among those requirements, the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressee in a position to defend its rights and decide in full knowledge of the circumstances whether it is worthwhile

to bring an action against those decisions. It is also necessary in order to enable the courts to review the legality of those decisions and it is therefore a requirement for ensuring that the judicial review guaranteed by Article 47 of the Charter is effective (see, to that effect, judgments of 15 October 1987, *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 15; of 9 November 2017, *LS Customs Services*, C-46/16, EU:C:2017:839, paragraph 40; and of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 103).

121 Furthermore, the principle of the protection of confidential information and of trade secrets must be observed in such a way as to reconcile it with the requirements of effective judicial protection and the rights of defence of the parties to the dispute (judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraphs 51 and 52 and the case-law cited).

122 In order to balance the prohibition laid down in Article 21(1) of Directive 2014/24 on the disclosure of confidential information communicated by economic operators with the general principle of EU law relating to good administration, from which the obligation to state reasons arises, a contracting authority must indicate clearly the reasons it considers that the requested information, or at least some of it, is confidential.

123 In addition, that balancing exercise must take account of the fact that, in the absence of sufficient information enabling it to ascertain whether the decision of the contracting authority to award the contract at issue to another operator is vitiated by errors or unlawfulness, an unsuccessful tenderer will not, in practice, be able to rely on its right, referred to in Article 1(1) and (3) of Directive 89/665, to an effective review of that decision, whether in the context of a review before the contracting authority, in accordance with Article 1(5) of that directive, or judicial review. Accordingly, if that right is not to be infringed, the contracting authority must not only state the reasons for its decision to treat certain data as confidential but must also communicate in a neutral form – to the extent possible and in so far as such disclosure is capable of preserving the confidentiality of the specific elements of that data which merit protection on that basis – the essential content of that data to such a tenderer which requests it, and in particular the content of the data concerning the decisive aspects of its decision and of the successful tender.

124 The contracting authority's obligation to protect the information deemed confidential of the economic operator to which the public contract has been awarded cannot be given so broad an interpretation that the obligation to provide a statement of reasons is thereby deprived of its essence (see, to that effect, judgment of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 120) and Article 1(1) and (3) of Directive 89/665, which sets out, in particular, the obligation for the Member States to provide effective review procedures, is rendered ineffective. To that end, the contracting authority may, inter alia and in so far as it is not precluded from doing so by the national law to which it is subject, communicate in summary form certain aspects of an application or tender and their technical characteristics, in such a way that the confidential information cannot be identified.

125 It should also be noted that, pursuant to Article 21(2) of Directive 2014/24, contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure. Thus, assuming that the non-confidential information is adequate for that purpose, a contracting authority may also avail itself of that power in order to ensure that the unsuccessful tenderer's right to an effective review is respected, by requesting the successful tenderer to provide it with a non-confidential version of the documents containing confidential information.

126 Lastly, it should be noted that, in any event, before implementing a decision to disclose information which an economic operator claims to be confidential to one of its competitors, the contracting authority is required to inform the economic operator concerned of its decision in a timely manner, in order to enable that operator to request the contracting authority or the competent national court to adopt interim measures, such as those referred to in Article 2(1)(a) of Directive 89/665, and thus prevent irreparable damage to its interests.

– *The scope of the competent national court's obligation to protect confidential information*

127 As regards the obligations of the competent national court in the context of proceedings brought against a decision of the contracting authority to reject, in whole or in part, a request for access to information submitted by the successful tenderer, it should also be noted that Article 1(1) and (3) of Directive 89/665, which is intended to protect economic operators against arbitrary behaviour on the part of the contracting authority, is thus designed to reinforce the existence, in all Member States, of effective remedies, so as to ensure the effective application of the EU rules on public procurement, in particular at a stage when infringements can still be rectified (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 41 and the case-law cited).

128 Accordingly, it is up to the Member States to adopt detailed procedural rules governing the judicial remedies intended to safeguard the rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities in such a way as to ensure that neither the effectiveness of Directive 89/665 nor the rights conferred on individuals by EU law are undermined. In addition, as is clear from recital 36 thereof, Directive 2007/66, and therefore Directive 89/665 which it amended and supplemented, is intended to ensure full respect for the right to an effective remedy and to a fair hearing, enshrined in the first and second paragraphs of Article 47 of the Charter (see, to that effect, judgment 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraphs 42 to 46 and the case-law cited). Consequently, when they lay down the detailed procedural rules governing legal remedies, the Member States must ensure that that right is observed. Thus, despite the absence of rules of EU law on procedures for bringing actions before national courts, and in order to determine the rigour of judicial review of national decisions adopted pursuant to an act of EU law, it is necessary to take into account the purpose of the act and to ensure that its effectiveness is not undermined (judgment of 26 June 2019, *Craeynest and Others*, C-723/17, EU:C:2019:533, paragraphs 46 and the case-law cited).

129 However, in the context of a review of a decision taken by a contracting authority in relation to a public procurement procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the procurement procedure concerned which has been filed with the body responsible for the review (see, to that effect, judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 51). On the contrary, as noted, in essence, in paragraph 121 above in relation to the obligations incumbent on contracting authorities in that regard, the obligation to provide the unsuccessful tenderer with sufficient information to safeguard its right to an effective remedy must be weighed against the right of other economic operators to protection of their confidential information and their trade secrets.

130 The competent national court must therefore ascertain, taking full account of both the need to safeguard the public interest in maintaining fair competition in public procurement procedures and the need to protect genuinely confidential information and in particular the trade secrets of participants in the procurement procedure, that the contracting authority rightly considered that the information which it refused to disclose to the applicant was confidential. To that end, the competent national court must carry out a full examination of all the relevant matters of fact and law. Accordingly, it must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and trade secrets (see, to that effect, judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 53).

131 Assuming that that court also concludes that the information in question is confidential, which precludes its disclosure to the competitors of the operator concerned, it must be borne in mind that, as the Court has already held, although the adversarial principle means, as a rule, that the parties to proceedings have a right to inspect and comment on the evidence and observations submitted to the court, in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest (judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 47).

132 The fundamental rights capable of being protected in this way include the right to respect for private life and communications, enshrined in Article 7 of the Charter, and the right to the protection of trade secrets, which the Court has acknowledged as a general principle of EU law (see, to that effect, judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraphs 48 and 49).

133 Accordingly, in view of the importance of protecting confidential information, highlighted in paragraphs 131 and 132 above, the entity responsible for a review procedure in relation to the award of a public contract must be able to decide, if necessary, that certain information in the file should not be communicated to the parties or their lawyers (see, to that effect, judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 43).

134 It should also be pointed out that, if the competent national court considers that the contracting authority decided correctly and with sufficient reasons that the requested information could not be disclosed because of its confidential nature, having regard to that contracting authority's obligations in respect of the principle of effective judicial protection, as set out in paragraphs 121 to 123 above, the conduct of that contracting authority in that regard cannot be criticised on the ground that it was excessively protective of the interests of the economic operator whose confidential information was requested.

135 The competent national court must also review the adequacy of the statement of reasons for the decision by which the contracting authority refused to disclose the confidential information or for the decision dismissing the application for administrative review of the prior refusal decision, in order to ensure, in accordance with the case-law referred to in paragraph 120 above, first, that the applicant is able to defend its rights and decide in full knowledge of the circumstances whether it is worthwhile to seek judicial review of that decision and, secondly, that the courts are able to review the legality of that decision. Furthermore, in view of the harm to an economic operator which could result from the improper disclosure of certain information to a competitor, it is for the competent national court to reconcile the applicant's right to an effective remedy, within the meaning of Article 47 of the Charter, with that operator's right to the protection of confidential information.

136 Lastly, the competent national court must be able to annul the refusal decision or the decision dismissing the application for administrative review if they are unlawful and, where appropriate, refer the case back to the contracting authority, or itself adopt a new decision if it is permitted to do so under national law. In so far as the referring court asks, in the context of its ninth question, whether a court which has received a request for disclosure of confidential information must itself examine not only its relevance but also its effects on the legality of the procurement procedure, it is sufficient to point out that, in accordance with Article 1(3) of Directive 89/665, it is for the Member States to determine the detailed rules governing the review procedures enabling decisions taken by contracting authorities to be challenged.

137 In the light of the foregoing considerations, the answer to the fourth, eighth and ninth questions is that:

– The fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665, and Article 21 of Directive 2014/24, read in the light of the general principle of EU law relating to good administration, must be interpreted as meaning that a contracting authority which is requested by an economic operator to disclose information deemed confidential contained in the tender of a competitor to which the contract has been awarded is not required to communicate that information where its disclosure would infringe the rules of EU law relating to the protection of confidential information, even if that request is made in the context of an action brought by that operator challenging the lawfulness of the contracting authority's assessment of the competitor's tender. Where it refuses to disclose such information or where, while refusing such disclosure, it dismisses the application for administrative review lodged by an economic operator concerning the lawfulness of the assessment of the tender of the competitor concerned, the contracting authority is required to balance the applicant's right to good administration with its competitor's right to protection of its confidential information in order that the refusal or dismissal decision is supported by a statement of reasons and the unsuccessful tenderer's right to an effective remedy is not rendered ineffective;

– the fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665 and Article 21 of Directive 2014/24, read in the light of Article 47 of the Charter, must be interpreted as meaning that the competent national court, hearing an action brought against a decision of a contracting authority refusing to disclose to an economic operator information deemed confidential in the documents submitted by the competitor to which the contract has been

awarded or an action brought against the decision of a contracting authority dismissing an application for administrative review lodged against such a refusal decision, is required to weigh the applicant's right to an effective remedy against the competitor's right to protection of its confidential information and trade secrets. To that end, that court, which must necessarily have at its disposal the information required, including confidential information and trade secrets, in order to be able to determine, with full knowledge of the facts, whether that information can be disclosed, must examine all the relevant matters of fact and of law. It must also be able to annul the refusal decision or the decision dismissing the application for administrative review if they are unlawful and, where appropriate, refer the case back to the contracting authority, or itself adopt a new decision if it is permitted to do so under national law.

The tenth question

138 By its tenth question, the referring court asks, in essence, whether Article 57(4) of Directive 2014/24 must be interpreted as meaning that a national court, hearing a dispute between an economic operator excluded from the award of a contract and a contracting authority, may, first, depart from the latter's assessment of the lawfulness of the conduct of the economic operator to which the contract was awarded and, accordingly, draw all the necessary inferences in its decision and, secondly, raise of its own motion the issue of an error of assessment made by the contracting authority.

139 Under Article 57(4) of Directive 2014/24, contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a procurement procedure in any of the situations referred to in that provision.

140 It should be noted at the outset, since the referring court expressly referred to the judgment of 3 October 2019, *Delta Antrepriză de Construcţii şi Montaj 93* (C-267/18, EU:C:2019:826), in the wording of its tenth question, that that judgment relates to the powers of the contracting authority itself to carry out its own assessment under one of the non-compulsory grounds for exclusion referred to in Article 57(4) of Directive 2014/24, and it is therefore not directly relevant in order to answer that question, which concerns the powers of a court hearing a dispute between an unsuccessful tenderer and a contracting authority.

141 In that regard, it is true that the Court noted, in paragraphs 28 and 34 of the judgment of 19 June 2019, *Meca* (C-41/18, EU:C:2019:507), that it follows from the wording of that provision that it is the contracting authority alone – and not, therefore, a national court – that has been entrusted with determining whether an economic operator must be excluded from a procurement procedure during the stage of selecting the tenderers.

142 However, that interpretation was made in view of the context of the case which gave rise to that judgment, in which the Court had to rule on a national provision under which the lodging of a legal challenge to a decision adopted by a contracting authority to terminate a public contract early on account of major deficiencies in the performance thereof prevented the contracting authority which issued a further call for tenders from conducting an assessment, at the stage of selecting tenderers, of the reliability of the operator concerned by that early termination (judgment of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 42).

143 If the right to an effective remedy – as guaranteed, in relation to public procurement, by the fourth subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 and by Article 47 of the Charter – is not to be disregarded, a decision by which a contracting authority refuses, even implicitly, to exclude an economic operator from a procurement procedure on one of the non-compulsory grounds for exclusion laid down in Article 57(4) of Directive 2014/24 must necessarily be capable of being challenged by any person having or having had an interest in obtaining a specific contract or having been or at risk of being harmed by a breach of that provision.

144 It follows that a national court may, in the context of a dispute between a candidate or a tenderer excluded from the award of a contract and a contracting authority, review the latter's assessment as to whether the conditions required for the application of one of the non-compulsory grounds for exclusion referred to in Article 57(4) of Directive 2014/24 were satisfied with regard to the economic operator to which the contract was awarded and, consequently, depart from that assessment. Accordingly,

depending on the case, that court may rule to that effect on the merits or remit the case to the contracting authority or the competent national court for that purpose.

145 That being said, EU law does not require national courts to raise of their own motion an issue concerning the breach of provisions of EU law where the examination of that issue would oblige them to overstep the bounds of the role assigned to them, inter alia by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in the application of those provisions bases its claim (see, to that effect, judgments of 14 December 1995, *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:441, paragraphs 21 and 22, and of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 40).

146 The Court has consistently held that, in the absence of EU rules governing the matter, it is for each Member State, in accordance with the principle of the procedural autonomy of the Member States, to lay down the detailed rules of administrative and judicial procedures governing actions for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions, in accordance with the principle of equivalence (judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 46 and the case-law cited).

147 Accordingly, a national court may raise of its own motion an issue concerning the breach, by an economic operator, of Article 57(4) of Directive 2014/24, only if it is permitted to do so under national law (see, to that effect, judgment of 14 December 1995, *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:441, paragraphs 13 and 14).

148 In the light of the foregoing considerations, the answer to the tenth question is that Article 57(4) of Directive 2014/24 must be interpreted as meaning that a national court, hearing a dispute between an economic operator excluded from the award of a contract and a contracting authority, may depart from the latter's assessment of the lawfulness of the conduct of the economic operator to which the contract was awarded and, accordingly, draw all the necessary inferences in its decision. However, in accordance with the principle of equivalence, such a court may raise of its own motion the issue of an error of assessment made by the contracting authority only if permitted to do so under national law.

The eleventh question

149 By its eleventh question, the referring court asks, in essence, whether the second subparagraph of Article 63(1) of Directive 2014/24, read in conjunction with Article 57(4) and (6) of that directive, must be interpreted as precluding national legislation under which, where an economic operator which is a member of a group of economic operators has been found guilty of serious misrepresentation in supplying the information required for the verification, as regards that group, of the absence of grounds for exclusion or the fulfilment of the selection criteria, without the other members of that group having been aware of that misrepresentation, all of the members of that group may be excluded from participation in any public procurement procedure.

150 In that regard, it must be noted that the first subparagraph of Article 63(1) of Directive 2014/24 provides for the right of an economic operator to rely, for a particular contract, on the capacities of other entities, regardless of the legal nature of the links which it has with them, with a view to satisfying both the criteria relating to economic and financial standing set out in Article 58(3) of that directive and the criteria relating to technical and professional capacities referred to in Article 58(4) of that directive (judgment of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 30 and the case-law cited).

151 An economic operator intending to invoke that right must, pursuant to the second and third subparagraphs of Article 59(1) of Directive 2014/24, send a European Single Procurement Document (ESPD) to the contracting authority when submitting its request to participate or its tender, stating that both itself and the entities on whose capacities it intends to rely are not in one of the situations referred to in Article 57 of that directive, which must or may lead to an economic operator's exclusion, and/or that the selection criterion concerned is fulfilled.

152 It is then for the contracting authority, pursuant to the second subparagraph of Article 63(1) of Directive 2014/24, to determine, inter alia, whether there are grounds for exclusion, as referred to in Article 57 of that directive, in respect of that economic operator itself or one of those entities. If so, the contracting authority may require, or may be obliged by its Member State to require, that the economic operator concerned replace an entity on whose capacities it intends to rely, but in respect of which there are non-compulsory grounds for exclusion.

153 It must however be noted that, even before requiring a tenderer to replace an entity on whose capacities it intends to rely, on the ground that it is in one of the situations referred to in Article 57(1) and (4) of Directive 2014/24, Article 63 of that directive presupposes that the contracting authority will give that tenderer and/or that entity the opportunity to submit to it corrective measures which it may have adopted in order to remedy the irregularity found and, consequently, to demonstrate that it may once again be considered a reliable entity (see, to that effect, judgments of 3 October 2019, *Delta Antrepriză de Construcţii şi Montaj 93*, C-267/18, EU:C:2019:826, paragraph 37, and of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 36).

154 That interpretation of the second subparagraph of Article 63(1) of Directive 2014/24 ensures the effectiveness of the first subparagraph of Article 57(6) of that directive, which guarantees, as a matter of principle, the right of any economic operator in one of the situations referred to in paragraphs 1 and 4 of Article 57 to provide evidence that the measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion (see, to that effect, judgment of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 35).

155 That interpretation also helps to ensure that contracting authorities comply with the principle of proportionality, in accordance with the first subparagraph of Article 18(1) of that directive. It follows from that principle, which is a general principle of EU law, that the rules laid down by the Member States or the contracting authorities in implementing the provisions of that directive must not go beyond what is necessary to achieve the objectives of that directive (see, to that effect, judgments of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 48, and of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 45).

156 In that regard, it must be borne in mind that, when applying non-compulsory grounds for exclusion, contracting authorities must pay particular attention to that principle. That attention must be even greater in the case where the exclusion provided for by national legislation is imposed on the tenderer not for a failure attributable to it, but for a failure on the part of an entity on whose capacities the tenderer intends to rely and over which it has no control (see, to that effect, judgments of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 48, and of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 39).

157 The principle of proportionality requires the contracting authority to carry out a specific and individual assessment of the conduct of the entity concerned. On that basis, the contracting authority must have regard to the means available to the tenderer for establishing whether there was a failure on the part of the entity on whose capacities it intended to rely (judgment of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 40).

158 Consequently, the answer to the eleventh question is that the second subparagraph of Article 63(1) of Directive 2014/24, read in conjunction with Article 57(4) and (6) of that directive, must be interpreted as precluding national legislation under which, where an economic operator which is a member of a group of economic operators has been guilty of serious misrepresentation in supplying the information required for the verification, as regards that group, of the absence of grounds for exclusion or the fulfilment of the selection criteria, without the other members of that group having been aware of that misrepresentation, all of the members of that group may be excluded from participation in any public procurement procedure.

Costs

159 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting

observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 58 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that the obligation on economic operators to demonstrate that they have a certain average annual turnover in the area covered by the public contract at issue constitutes a selection criterion relating to the economic and financial standing of those operators, within the meaning of paragraph 3 of that provision.**

2. **Article 58(3) in conjunction with Article 60(3) of Directive 2014/24 must be interpreted as meaning that, where the contracting authority has required that economic operators have achieved a certain minimum turnover in the area covered by the public contract in question, an economic operator may, in order to prove its economic and financial standing, rely on income received by a temporary group of undertakings to which it belonged only if it actually contributed, in the context of a specific public contract, to the performance of an activity of that group analogous to the activity which is the subject matter of the public contract for which that operator seeks to prove its economic and financial standing.**

3. **Article 58(4), Article 42 and Article 70 of Directive 2014/24 must be interpreted as meaning that they can apply simultaneously to a technical requirement set out in a call for tenders.**

4. **The fourth subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, must be interpreted as meaning that a decision of a contracting authority refusing to disclose to an economic operator the information deemed confidential in the application file or in the tender of another economic operator is a measure amenable to review and that, where the Member State in which the public procurement procedure in question takes place has provided that any person wishing to challenge decisions taken by the contracting authority is required to seek administrative review before bringing an action before the courts, that Member State may also provide that judicial proceedings against that decision refusing access have to be preceded by such a prior administrative review procedure.**

5. **The fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665, as amended by Directive 2014/23, and Article 21 of Directive 2014/24, read in the light of the general principle of EU law relating to good administration, must be interpreted as meaning that a contracting authority, when requested by an economic operator to disclose information deemed confidential contained in the tender of a competitor to which the contract has been awarded, is not required to communicate that information where its disclosure would infringe the rules of EU law relating to the protection of confidential information, even if that request is made in the context of an action brought by that operator challenging the lawfulness of the contracting authority's assessment of the competitor's tender. Where it refuses to disclose such information or where, while refusing such disclosure, it dismisses the application for administrative review lodged by an economic operator concerning the lawfulness of the assessment of the tender of the competitor concerned, the contracting authority is required to balance the applicant's right to good administration with its competitor's right to protection of its confidential information in order that the refusal or dismissal decision is supported by a statement of reasons and the unsuccessful tenderer's right to an effective remedy is not rendered ineffective.**

6. **The fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665, as amended by Directive 2014/23, and Article 21 of Directive 2014/24, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that the competent national court, hearing an action brought**

against a decision of a contracting authority refusing to disclose to an economic operator information deemed confidential in the documents submitted by the competitor to which the contract has been awarded or an action brought against the decision of a contracting authority dismissing an application for administrative review lodged against such a decision, is required to weigh the applicant's right to an effective remedy against its competitor's right to protection of its confidential information and trade secrets. To that end, that court, which must necessarily have at its disposal the information required, including confidential information and trade secrets, in order to be able to determine, with full knowledge of the facts, whether that information can be disclosed, must examine all the relevant matters of fact and of law. It must also be able to annul the refusal decision or the decision dismissing the application for administrative review if they are unlawful and, where appropriate, refer the case back to the contracting authority, or itself adopt a new decision if it is permitted to do so under national law.

7. **Article 57(4) of Directive 2014/24 must be interpreted as meaning that a national court, hearing a dispute between an economic operator excluded from the award of a contract and a contracting authority, may depart from the latter's assessment of the lawfulness of the conduct of the economic operator to which the contract was awarded and, accordingly, draw all the necessary inferences in its decision. However, in accordance with the principle of equivalence, such a court may raise of its own motion the issue of an error of assessment made by the contracting authority only if permitted to do so under national law.**

8. **Article 63(1) of Directive 2014/24, read in conjunction with Article 57(4) and (6) of that directive, must be interpreted as precluding national legislation under which, where an economic operator which is a member of a group of economic operators has been guilty of serious misrepresentation in supplying the information required for the verification, as regards that group, of the absence of grounds for exclusion or the fulfilment of the selection criteria, without the other members of that group having been aware of that misrepresentation, all of the members of that group may be excluded from participation in any public procurement procedure.**

[Signatures]

---

* Language of the case: Lithuanian.

EU:C:2021:295

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 15 April 2021 (1)

Case C-927/19

UAB Klaipėdos regiono atliekų tvarkymo centras

interveners:

UAB Ecoservice Klaipėda,

UAB Klaipėdos autobusų parkas,

UAB Parsekas,

UAB Klaipėdos transportas

(Request for a preliminary ruling
from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania))

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Articles 21, 50 and 55 – Confidentiality – Competence of the contracting authority – Directive (EU) 2016/943 – Applicability – Directive 89/665/EEC – Articles 1 and 2 – Effects of the application for review of the declaration of confidentiality – Statement of reasons – Independent application for review to the contracting authority – Judicial review – Scope of the court's powers)

1. Documentation provided to contracting authorities in a public procurement procedure may include trade secrets and other confidential information, the disclosure of which would be detrimental to the holders thereof.

2. Such circumstances bring together two sets of opposing interests:

– On the one hand, those of the tenderer who, in tendering for a public contract, does not waive his or her right to have confidential information protected in such a way as to prevent others from taking unfair advantage of business endeavours of others.

– On the other hand, those of tenderers who, in the exercise of their right to challenge the decisions of the contracting authority, seek access, in order to substantiate their application for review, to certain information which the successful tenderer has submitted and regards as confidential.

3. The conflict between those interests is the basis for this reference for a preliminary ruling, in which the referring court seeks an interpretation of Directives 89/665/EEC, (2) 2014/24/EU (3) and (EU) 2016/943. (4)

I. Legal framework

A. EU law

1. Directive 2014/24

4. Article 18 (‘Principles of procurement’) states:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…’

5. Article 21 (‘Confidentiality’) provides:

‘1. Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.’

6. Article 50 (‘Contract award notices’) provides:

‘… Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.’

7. Article 55 (‘Informing candidates and tenderers’) states:

‘3. Contracting authorities may decide to withhold certain information referred to in paragraphs 1 and 2, regarding contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.’

2. Directive 89/665

8. According to Article 1 (‘Scope and availability of review procedures’): (5)

‘1. This Directive applies to contracts referred to in Directive 2014/24/EU of the European Parliament and of the Council unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

4. Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

…’

9. Article 2 (‘Requirements for review procedures’) provides:

‘1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

…

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

…’

3. Directive 2016/943

10. Recital 18 states:

‘… In particular, this Directive should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in Union or national law. Such confidentiality obligations include, inter alia, the obligations in respect of information forwarded to contracting authorities in the context of procurement procedures, as laid down, for example, in Directive 2014/24/EU …’

11. Article 1 (‘Subject matter and scope’) states:

‘2. This Directive shall not affect:

…

(b) the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information including trade secrets, to the public or to administrative or judicial authorities for the performance of the duties of those authorities;

(c) the application of Union or national rules requiring or allowing Union institutions and bodies or national public authorities to disclose information submitted by businesses which those institutions, bodies or authorities hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;

…’

B. Lithuanian law

1. Lietuvos Respublikos viešųjų pirkimų įstatymas (Law on public procurement of the Republic of Lithuania; ‘the LCP’)

12. Article 20 states:

‘1. The contracting authority, the award committee, its members and experts, and any other person shall be prohibited from disclosing to third parties information which suppliers have provided in

confidence.

2. The supplier's tender or request to participate may not be classified as confidential in its entirety, but the supplier may indicate that some information presented in his tender is confidential. Confidential information may include, inter alia, trade (manufacturing) secrets and confidential aspects of the tender. Information cannot be classified as confidential:

(1) if it infringes the legal provisions establishing the obligation to disclose or the right to acquire information, and the regulations implementing those legal provisions;

(2) if it constitutes an infringement of the obligations laid down in Articles 33 and 58 of this Law in connection with the publication of concluded contracts, the provision of information to candidates and tenderers, including information on the price of goods, services or works which is mentioned in the call for tenders, with the exception of the constituent elements of such tenders;

(3) where that information has been presented in documents certifying that the supplier is not subject to any grounds for exclusion and fulfils the capacity requirements and the standards for quality management and environmental protection, with the exception of information the disclosure of which would infringe the provisions of the law of the Republic of Lithuania on the protection of personal data or the supplier's obligations under contracts concluded with third parties;

(4) where that information relates to economic operators and subcontractors on whose capacity the supplier draws, with the exception of information the disclosure of which would infringe the provisions of the law on the protection of personal data.

3. Where the contracting authority has doubts about the confidential nature of the information contained in the supplier's tender, it must ask the supplier to demonstrate why the information in question is confidential. …

4. Not later than six months after the date on which the contract was concluded, the tenderers concerned may ask the contracting authority to grant them access to the successful tenderer's tender or request (just as candidates may ask it for access to requests made by other suppliers who have been invited to submit a tender or participate in a dialogue), but no information may be disclosed which candidates or tenderers have classified as confidential without infringing paragraph 2 of this article.'

13. Article 58 states:

'3. In the cases referred to in paragraphs 1 and 2 of this article, the contracting authority may not disclose information the disclosure of which would infringe the rules on the provision of information and protection of data or otherwise be contrary to the general interest, would prejudice the legitimate commercial interests of a particular supplier or would adversely affect competition between suppliers.'

2. Lietuvos Respublikos civilinio proceso kodeksas (Code of Civil Procedure of the Republic of Lithuania)

14. Article 10^1 provides:

'2. Where there are grounds for considering that a trade secret may be disclosed, the court, at the duly reasoned request of the parties or of its own motion, shall, by reasoned order, name the persons who may:

(1) have access to those parts of the file that contain information which constitutes or may constitute a trade secret, and make and obtain extracts, duplicates and copies (digital copies);

(2) take part in hearings in camera in which information which constitutes or may constitute a trade secret may be disclosed, and have access to the records of those hearings;

(3) obtain a certified copy (digital copy) of a judgment or order containing information which constitutes or may constitute a trade secret.

…

4. In applying the restrictions laid down in paragraph 2 of this article, the court shall take into account the need to guarantee the right to judicial protection and the right to a fair trial, the legitimate interests of the parties and of the other persons taking part in the proceedings and the harm that may be caused by applying or not applying those restrictions.'

II. Facts, dispute and questions referred for a preliminary ruling

15. On 27 September 2018, UAB Klaipėdos regiono atliekų tvarkymo centras ('the contracting authority') published a calls for tenders for the award of a public contract for the provision of services relating to the collection of municipal waste in the municipality of Neringa (Lithuania) and the transportation of that waste to treatment facilities in the region of Klaipėda (Lithuania). (6)

16. On 29 November 2018, that contract was awarded to the grouping of economic operators made up of UAB Klaipėdos autobusų parkas, UAB Parsekas and UAB Klaipėdos transportas ('the Consortium'). UAB Ecoservice Klaipėda ('Ecoservice') was ranked second.

17. On 4 December 2018, Ecoservice asked for the contracting authority's permission to access the information contained in the Consortium's tender. On 6 December 2018, it was provided with the non-confidential information in that tender.

18. On 10 December 2018, Ecoservice filed an application for review of the final outcome of that procedure with the contracting authority on the ground that the Consortium did not meet the requirements of the call for tenders. (7) The contracting authority dismissed that application on 17 December 2018.

19. On 27 December 2018, Ecoservice brought an action against the contracting authority's decision before the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania). Along with its application, it submitted a requested for access to all of the information contained in the Consortium's tender, as well as the correspondence exchanged between the latter and the contracting authority.

20. After hearing the contracting authority, which opposed Ecoservice's request, on 15 January 2019, the court of first instance ordered that authority to make available all of the documents requested, with the exception of the correspondence with the Consortium.

21. On 25 January 2019, the contracting authority provided the information, both confidential and non-confidential, contained in the Consortium's tender. It requested that Ecoservice be denied access to the confidential information, which was upheld by the court of first instance.

22. By two subsequent requests, Ecoservice applied to that court for access to: (a) the tender information which had been classified as confidential; and (b) details of the waste management contracts concluded by one of the bodies comprising the Consortium. The court of first instance denied both requests, in each case by unappealable order.

23. By judgment of 15 March 2019, the court of first instance held that the Consortium satisfied the requirements governing the supplier's classification [regarding confidentiality] and dismissed Ecoservice's action.

24. Ecoservice brought an appeal against the judgment of the court of first instance to the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania), which, on 30 May 2019, set aside that judgment, annulled the contracting authority's decision and ordered the tenders be re-evaluated.

25. The contracting authority lodged with the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) an appeal in cassation confined to challenging the appeal court's assessment of the Consortium's technical (in)capacity. (8)

26. On 26 July 2019, Ecoservice, before responding to the appeal in cassation, requested access to the confidential documents submitted by the Consortium to the court of first instance, ‘which contained highly commercially sensitive information which had been concealed’.

27. It was in those circumstances that the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) referred, inter alia, the following questions for a preliminary ruling:

‘(4) Are the third subparagraph of Article 1(1) of Directive 89/665, which lays down the principle of the effectiveness of review procedures, Article 1(3) and (5) thereof, Article 21 of Directive 2014/24 and Directive 2016/943, in particular recital 18 and the third subparagraph of Article 9(2) thereof (together or separately, but without limitation thereto), to be interpreted as meaning that, where a binding pre-litigation dispute settlement procedure is laid down in the national legal rules governing public procurement:

(a) the contracting authority has to provide to the supplier who initiated the review procedure all information regarding another supplier’s tender (regardless of their confidential nature), if the subject matter of that procedure is specifically the lawfulness of the evaluation of that tender and the supplier which initiated the procedure had explicitly requested the contracting authority prior thereto to disclose that information;

(b) irrespective of the answer to the previous question, the contracting authority, when rejecting the claim submitted by a supplier regarding the lawfulness of the evaluation of his competitor’s tender, must in any event give a clear, comprehensive and specific reply, regardless of the risk of disclosing confidential tender information entrusted to it?

(5) Are the third subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Directive 89/665, Article 21 of Directive 2014/24 and Directive 2016/943, in particular recital 18 thereof (together or separately, but without limitation thereto), to be interpreted as meaning that the contracting authority’s decision not to grant a supplier access to the confidential details of another participant’s tender is a decision which may be challenged separately before the courts?

(6) If the answer to the previous question is in the affirmative, is Article 1(5) of Directive 89/665 to be interpreted as meaning that the supplier must file a claim with the contracting authority in respect of such a decision by it and, if need be, bring an action before the court?

(7) If the answer to the previous question is in the affirmative, are the third subparagraph of Article 1(1) and Article 2(1)(b) of Directive 89/665 to be interpreted as meaning that, depending on the extent of the information available on the content of the other supplier’s tender, the supplier may bring an action before the courts concerning exclusively the refusal to provide information to him, without separately calling the lawfulness of other decisions of the contracting authority into question?

(8) Irrespective of the answers to the previous questions, is the third subparagraph of Article 9(2) of Directive 2016/943 to be interpreted as meaning that the court, having received the applicant’s request that the other party to the dispute be ordered to produce evidence and that the court make it available to the applicant, must grant such a request regardless of the actions on the part of the contracting authority during the procurement or review procedures?

(9) Is the third subparagraph of Article 9(2) of Directive 2016/943 to be interpreted as meaning that, after rejecting the applicant’s request for disclosure of confidential information of the other party to the dispute, the court should of its own motion assess the significance of the data whose loss of confidentiality is requested and the data’s effects on the lawfulness of the public procurement procedure?’

III. Procedure before the Court of Justice

28. The request for a preliminary ruling was received at the Court on 18 December 2019.

29. Written observations have been lodged by Klaipėdos autobusų parkas, (9) Ecoservice, the Republic of Austria, the Republic of Lithuania and the European Commission.

30. The parties replied in writing to the questions put to them by the Court, in replacement of the hearing.

IV. Assessment

A. Preliminary observations

31. At the Court's request, I shall confine myself to an analysis of the fourth to ninth questions referred for a preliminary ruling. These can be grouped, by subject matter, into three sets:

– In the fourth question, the referring court expresses uncertainty as to the scope of the contracting authority's obligation to maintain the secrecy of the information that a tenderer designates as confidential when adjudicating on an application for review made by another tenderer wishing to access that information.

– In the fifth to seventh questions, the uncertainty has to do with an action before the courts to challenge a contracting authority's decision refusing to grant an operator access to confidential information provided by another operator.

– Finally, the eighth and ninth questions concern the power of the court to disclose confidential information in its possession and, where appropriate, to examine of its own motion the legality of the award.

32. I shall look in the first place at the interpretation of Directives 2014/24 and 2016/943 with respect to the handling of confidential information. I shall then set out my reply to the questions referred, which will include references to Directive 89/665.

B. Protection of confidential information provided in a public procurement procedure

33. According to the Court, 'the principal objective of the Community rules in that field is the opening-up of public procurement to undistorted competition in all the Member States. … In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition'. (10)

34. Directive 2014/24 brings together several rules relating to the publication of information held by the contracting authority. These include (11) Article 21, which, in principle, (12) prohibits the disclosure of 'information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders'.

35. In the light of the arguments put forward by the parties, it is necessary to define what type of confidential information is to be protected by the contracting authority (and the bodies that review its decisions), according to Directive 2014/24. Later, I shall assess the impact of Directive 2016/943 on public procurement procedures.

1. Confidential information under Directive 2014/24

36. A literal and isolated interpretation of Article 21 of Directive 2014/24 would support the inference that confidential information is, quite simply, that which an economic operator designates as such. Protected information would thus in all circumstances mean information which economic operators 'have designated as confidential'.

37. If that interpretative criterion were to be applied, access to any (13) information not authorised [to be released] by the operator that made it available to the contracting authority, whatever its content, would automatically be blocked which is to say that that information could not be disclosed.

38. Such a broad interpretation cannot be accepted. Indeed, Article 21 of Directive 2014/24 mentions as examples of information which may be classified as confidential 'technical or trade secrets and the

confidential aspects of tenders'. Thus, it indicates that the classification of information as confidential rests on an *objective* basis rather than on the *subjective* will of the person providing the information.

39. That proposition is borne out, from a schematic point of view, by other provisions of Directive 2014/24 (in particular Article 50(4) and Article 55(3)). In accordance with those provisions, disclosure of information is to be refused where this would harm 'the legitimate commercial interests of a particular economic operator, public or private'. Once again, it is objective rather than subjective factors that take precedence.

40. I therefore take the view that Article 21 of Directive 2014/24, read in context, does not entrust to the economic operator *alone* the task of specifying, at its discretion, which information is to be classified as confidential. Any reasoned request to that effect – essential if the economic operator wishes to restrict publication of the data which it is itself providing – is subject to the subsequent decision of the contracting authority (and, where appropriate, to the decision of the body reviewing that authority's decisions).

41. The purpose of that provision leads to the same conclusion. If that provision, in common with the rest of Directive 2014/24, is intended to avoid distortions of competition, (14) it stands to reason that the power to determine which risks to competition would flow from disclosing allegedly confidential information should be conferred on the contracting authority – rather than unilaterally on the operator concerned. Its duty of impartiality and objectivity in dealings with the various tenderers makes the contracting authority ideally suited to making that judgment.

42. Moreover, in that way, the contracting authority can ensure that all economic operators are treated 'equally and without discrimination', in accordance with the guiding principles of public procurement.

2. Application of Directive 2016/943

43. The referring court seeks an interpretation of Article 9 of Directive 2016/943 in conjunction with recital 18 thereof because the test for granting access to certain information is, according to that court, whether it constitutes a trade secret. (15)

44. I should point out, however, that, in accordance with Article 21 of Directive 2014/24, the benefit of protection is not confined to 'trade secrets' but also extends to, inter alia, 'the confidential aspects of tenders'. That provision may therefore cover information that cannot strictly be classified as a trade secret, since those two concepts are not equivalent.

45. In any event, Directive 2016/943, the purpose of which is to protect 'undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure', provides for a situation contrary to that in the present case. The latter is concerned with the *non*-disclosure of certain confidential information that the contracting authority refuses to communicate to the operator requesting it.

46. I therefore concur with the Commission (16) that Article 9 of Directive 2016/943 is not applicable to the present case, since that provision concerns judicial proceedings relating to the *unlawful* acquisition, use and disclosure of a trade secret. (17)

47. Furthermore, Directive 2014/24 is the *lex specialis* governing the disclosure of information provided by economic operators in the context of a public call for tenders.

48. Recital 18 of Directive 2016/943 is evidence of that when it refers to the obligations on the public authorities to maintain the confidentiality of 'information forwarded to contracting authorities in the context of procurement procedures, as laid down, for example, in Directive 2014/24 …'.

49. It is therefore Directive 2016/943 itself which subjects the treatment of the rules on the protection of confidential information in this field to the regime laid down in Directive 2014/24. If, in the legitimate exercise of its powers, a contracting authority discloses such information, in a manner permitted by Directive 2014/24, this constitutes one of the cases in which Directive 2016/943 is not applicable, as provided for in Article 1(2) and Article 3(2) thereof.

50. The answers to the questions raised by the referring court in connection with the protection of confidentiality must therefore be based on the interpretation of Directive 2014/24. Since its subject matter is related, Directive 2016/943 may be used as a supporting text, but not a primary text.

C. Fourth question

51. By this question, the referring court wishes to ascertain:

– In the first place (point (a)), whether the contracting authority must supply to a tenderer challenging the evaluation of tenders *all* of the information contained in the tender submitted by the successful tenderer, in the case where the applicant for review has previously requested that information from the contacting authority itself.

– In the second place (point (b)), whether, if the application for review is dismissed, the contracting authority must 'give a clear, comprehensive and specific reply', even at the risk of disclosing confidential tender information which has been entrusted to it.

52. The referring court explains that national law establishes a 'binding *ex ante* administrative dispute settlement procedure' in respect of which the contracting authority itself is the adjudicator.

1. Point (a)

53. It falls to the contracting authority, as I have already said, to determine which information supplied by the tenderer, which the latter has designated as being confidential, really are confidential. It is that same power which enables the competent authority, at the stage of the application for review, to examine the actions of the contracting authority.

54. The safeguard for confidential information and trade secrets must be applied in such a way as to reconcile it 'with the requirements of effective legal protection and the rights of defence of the parties to the dispute … in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial'. (18)

55. It is implicit in the need to maintain that balance that a request [for the disclosure of confidential information] made to, or the filing of an application for review with, the contracting authority does not require that authority automatically to supply to the applicant for review all of the information contained in the successful tenderer's tender. (19) Neither does it require that authority systematically to refuse to supply that information. (20) The contracting authority must adopt its decision in the light of the grounds for the request - or, where appropriate, the application for review - and the nature of the information requested.

56. As I have said, the contracting authority exercises its powers whether it is responding to a reasoned request for the disclosure of confidential information or adjudicating on an application for review (within the meaning of Article 1(5) of Directive 89/665) (21) of the decision to permit or refuse such disclosure or the decision to award the contract following the evaluation of tenders.

57. Point (a) of the fourth question raised by the referring court concerns the role played by the contracting authority in 'a review procedure'. It falls to the contracting authority, when adjudicating on such a procedure, to strike a balance between the protection of confidentiality and right to an effective remedy within the meaning of Directive 89/665.

58. Consequently, the contracting authority must evaluate the interests and reasons of the person requesting the disclosure of confidential information (provided by a competitor in the call for tenders) and compare them with the need to safeguard the confidentiality of that information. Where appropriate, it may ask the economic operator concerned to explain why the classification of certain information as confidential should be maintained in full or in part.

59. The contracting authority's response to such an *application for review*, even if this challenges the 'legality of the evaluation of that tender', must include the reasons for its decision. As I have already explained, that response does not necessarily have to be to provide the applicant for review with 'all' of the information contained in another tenderer's tender. To the contrary, that will depend on whether the

contracting authority considers, in whole or in part, that maintaining the confidentiality of the information made available to it is justified.

2. Point (b)

60. The referring court wishes to ascertain whether, when dismissing a claim brought by a tenderer challenging the outcome of an evaluation, the contracting authority must give a 'clear, comprehensive and specific reply, regardless of the risk of disclosing confidential tender information entrusted to it'.

61. The answer to that question may be inferred from the answer given to point (a) of the same question.

62. When substantiating a decision dismissing an application for review submitted to it, the contracting authority must respect the rights of both the applicant for review and the other party (the successful tenderer, whose information the applicant for review is seeking to have disclosed). It must set out the reasons for its course of action, thus facilitating any subsequent review of its acts.

63. While the contracting authority's decision does have to be 'clear and specific', it does not necessarily and automatically have to contain *all* the confidential data supplied in the tender. That would be the case only if, after balancing the interests involved (22) as it must, the contracting authority decides that some interests take precedence over others.

D. Fifth, sixth and seventh questions

64. Of these three questions, which must be addressed together, the fifth refers to whether the contracting authority's decision not to grant access to confidential information may be 'challenged separately'. The sixth and seventh questions seem to start from that very assumption.

65. In actual fact, it is not clear from the order for reference (23) that Ecoservice did launch such a *separate* (or independent) challenge when the contracting authority decided to send it only the non-confidential information contained in the Consortium's tender. (24)

66. It follows from the account of the facts set out in that order that the action taken by Ecoservice was to ask both the contracting authority and, subsequently, the court of first instance (in the latter case, at the same time as bringing its action) to order the full disclosure of the information provided by the Consortium. Therefore, it is doubtful whether that request may be classified as an *independent* application for review within the meaning indicated above.

67. However, that fact does not necessarily render inadmissible the fifth, sixth and seventh questions, which benefit from the presumption of relevance which the Court confers on requests for a preliminary ruling.

68. Those questions could be held to be admissible if the referring court takes the view that Ecoservice had, or could or should have, challenged the decision not to provide it with the information requested separately before the contracting authority and the court of first instance.

69. That being the basis of those questions:

- The fifth question asks whether the contracting authority's decision not to disclose confidential information may be challenged separately before the courts.
- The sixth, on the assumption that the foregoing remedy is available, asks whether the operator 'must file a claim with the contracting authority' in order to challenge the latter's decision to turn down its request for access to confidential information.
- Finally, the seventh asks, if the answers to the previous questions are in the affirmative, whether the operator may 'bring an action before the courts concerning exclusively the refusal to provide [the] information' requested.

70. The answer to those questions must be based on the general provision in the last subparagraph of Article 1(1) of Directive 89/665. The review to which it refers extends to all decisions by the contracting

authority which apply EU law in that field. (25)

71. Decisions by the contracting authority which are open to review in this way include, of course, those that award a contract by selecting one of the tenders, but also others of a different kind (for example, those adopting or dismissing provisional measures) which have a bearing on the legal position of the parties concerned. (26)

72. One of the decisions in which the contracting authority applies EU law (in particular, Article 21 of Directive 2014/24), and thus renders it open to potential review, is the decision whether to designate certain information as confidential and not allow its disclosure, or to authorise its full or partial disclosure.

73. Directive 89/665 has not 'formally laid down the time from which the possibility of review, as provided for in Article 1(1), must be open'. (27) The Court's position is that it must be ensured that decisions by contracting authorities can be reviewed effectively and, in particular, as quickly as possible.

74. The EU legislature has entrusted to the Member States the task of laying down the 'detailed rules' of the procedures for reviewing decisions by contracting authorities (Article 1(3) of Directive 89/665). (28)

75. The Member States also have the option, within the margins made available by Article 2 of Directive 89/665, to entrust those reviews either to the courts in the strict sense of that term or to other bodies. (29) It follows from the order for reference, however, that, in Lithuania, reviews of decisions adopted by a contracting authority, including its decision in the pre-litigation dispute settlement procedure, are conducted by the courts.

76. It is therefore open to Member States, in principle, to legislate on applications for review of decisions adopted by a contracting authority by providing that they are to be made either jointly or separately (with/from the main challenge). Directive 89/665 neither prescribes nor excludes either of those mechanisms.

77. If Member States, availing themselves of their procedural autonomy, choose to prescribe a joint challenge, they must do so without contravening the purposes of Directive 89/665 in relation to the required effectiveness and speed. They must, in addition, take into consideration:

– That the Directive 'does not authorise Member States to make the exercise of the right to apply for review conditional on the fact that the public procurement procedure in question has formally reached a particular stage'. (30)

– That, depending on its characteristics, national legislation which 'requires, in all cases, a tenderer to wait for a decision awarding the contract in question before it may apply for a review of a decision allowing another tenderer to participate in that …procurement procedure infringes the provisions of Directive 89/665'. (31)

78. The objectives of speed and effectiveness are more easily attained through the 'separate challenge' mechanisms to which the referring court refers. A review of this kind not only satisfies the requirement of speed but is also able to do so at the same time as meeting the need for effectiveness, inasmuch as it allows the (principal) challenge to the substantive decision (that is to say, the award) to be brought once the party in question has the information necessary to enable it to mount an effective defence of its rights. (32)

79. One might raise the objection that independent reviews entail a risk of delay to the conclusion of the contractor selection process. In the view of the Court, that objection is countered by the '… justification of reasonable time limits for applying for review of decisions which may be challenged and not the barring of an independent review'. (33)

80. In principle, therefore, since an independent challenge is consistent with Directive 89/665, there is no reason why national law should not allow it.

81. If, on the other hand, national law were to require that an application for review of the decision on confidentiality should be made jointly with the application for review of the decision awarding the contract, the court would have to assess whether that requirement preserves the effectiveness of Directive 89/665 to the same extent from the point of view of the speed and efficacy of such a challenge mechanism.

82. The procedural autonomy of the Member States also extends to the – optional – introduction of a pre-litigation application for review to the contracting authority. Article 1(5) of Directive 89/665 does not preclude national legislation from 'requir[ing] the person concerned to apply for review in the first place to the contracting authority'.

83. Article 2 of Directive 89/665 sets out the requirements governing the review procedures provided for in Article 1, whether such a procedure entails an application for review made initially to the contracting authority, or an application made subsequently to a review body (in this case, of a judicial nature).

84. In the light of those considerations, I take the view that Directive 89/665 does not prevent:

– A party from bringing a separate challenge, before the courts, against the contracting authority's decision not to disclose the confidential information provided in a participant's tender in the tendering procedure.

– National legislation from requiring the person concerned to apply in the first place to the contracting authority for review of the latter's decision turning down its request for access to confidential information.

– The person concerned from bringing an action before the courts exclusively in connection with the refusal to provide it with the information requested.

E. Eighth and ninth questions

85. These questions concern the interpretation of the third subparagraph of Article 9(2) of Directive 2016/943. It is my view, however, as I said earlier, that Directive 2016/943 is not directly applicable in the present case.

86. Nevertheless, Directive 89/665 provides a basis for giving a useful answer to the referring court.

87. Both questions concern the process to be followed by the court called upon to settle the dispute in terms of: (a) having regard to the contracting authority's prior actions (eighth question); and (b) assessing of its own motion the data the disclosure of which is sought (ninth question). (34)

88. It is for to the contracting authority to decide whether it is appropriate to disclose the confidential information provided by a tenderer in its tender. That decision (or the later decision by which the contracting authority itself confirms the earlier one in the course of adjudicating on an application for review under national law) is open to review in the manner laid down in Article 2 of Directive 89/665.

89. If, as in the present case, that review is to be made by a court, the latter must be able to conduct a full examination of the contracting authority's decisions. It may therefore annul them, in full or in part, if it considers that they are unlawful.

90. Where one of the contracting authority's decisions which it must subject to judicial review is the refusal to disclose certain information accompanying a tender, the reviewing court may declare that refusal to be either justified or unfounded.

91. Before formulating its judgment, whatever that may be, that court must 'have regard to the actions by the contracting authority during the procurement or review procedures', to use the form of words contained in the order for reference.

92. Of course, that does not mean that the reviewing court is bound by the contracting authority's actions the lawfulness of which forms the subject of its examination. To deny the court the power to correct and, where appropriate, to annul the contracting authority's decisions would be to confer on purely administrative acts adopted by that authority a force equivalent to the force of *res judicata*, in breach of the right to judicial protection and of the system of guarantees provided for in Directive 89/665.

93. The refusal to provide the information requested on the ground that it cannot be disclosed does not, however, prevent the reviewing court from analysing 'the importance of the data the disclosure of which is

requested’.

94. That analysis will allow it to access to the full file, including confidential information. The Court has already held in that regard that ‘the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets’. (35)

95. Whether that assessment can be conducted by the reviewing body of its own motion or only at the request of one of the parties is, once again, something which will depend on the powers which the domestic legislation confers on each of the bodies competent in the context of judicial review procedures.

F. Conclusion

96. In the light of the foregoing, I propose that the answers to the fourth to ninth questions referred for a preliminary ruling by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) should be as follows:

(1) Articles 21, 50 and 55 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC do not necessarily require the contracting authority to provide to a participant in a procurement procedure who is challenging before that authority the latter’s evaluation of tenders *all* of the information contained in the tender submitted by the selected tenderer.

When adjudicating on an application for review of the decision evaluating tenders, the contracting authority must substantiate its response by expressing the reasons for its decision, so that this may be effectively challenged before a review body. The duty to state reasons does not in itself entail a requirement to disclose the confidential information that has been entrusted to that authority, in the case where it considers such disclosure to be inappropriate.

(2) Articles 1 and 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts are to be interpreted as meaning that they do not prohibit:

– A party from bringing a separate challenge, before the courts, against the contracting authority’s decision not to disclose the confidential information provided in a participant’s tender in the tendering procedure.

– National legislation from requiring the person concerned to apply in the first place to the contracting authority for review of the latter’s decision turning down its request for access to confidential information.

– The person concerned from bringing an action before the courts exclusively in connection with the refusal to provide it with the information requested.

(3) Articles 1 and 2 of Directive 89/665 are to be interpreted as meaning that the body competent to review the decisions of the contracting authority:

– Must be empowered to annul the decisions that the contracting authority has adopted in respect of the disclosure of the confidential information made available to it, and, where appropriate, to order that that information be provided to the applicant for review.

– May, if national law authorises it, evaluate of its own motion the lawfulness of the acts adopted by the contracting authority, having regard to the confidential information made available to it.

---

1 Original language: Spanish.

---

2 Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

---

3 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

4 Directive of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1).

---

5 In the wording contained in Article 46 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

---

6 According to paragraph 3 of the order for reference, the contract notice states that the provisional value of the contract is in excess of EUR 750 000 (excluding VAT).

---

7 More specifically, it argued: (i) that the contracts for the collection and transportation of mixed municipal waste cited by the Consortium as evidence of its economic and financial capacity had not been performed directly by the bodies comprising that Consortium; and (ii) that the vehicles mentioned in the documents submitted by the Consortium do not meet the technical specifications laid down in the tender specifications.

---

8 The order for reference (paragraphs 36 and 37) states that, since the appeal in cassation was lodged not by Ecoservice but by the contracting authority, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) was in principle bound only to determine whether the successful tenderer had adequate technical capacity, this being the only question raised by the appellant. The court nonetheless decided of its own motion to go beyond the limits of the appeal in cassation and to rule on other aspects of the dispute.

---

9 One of the bodies comprising the Consortium.

---

10 Judgment of 14 February 2008, *Varec* (C-450/06, EU:C:2008:91; 'the judgment in *Varec*', paragraphs 34 and 35).

---

11 Directive 2014/24 contains other provisions on the protection of confidentiality, to which I shall refer later, in the context of contract award notices (Article 50(4)) and information provided to candidates and tenderers (Article 55). Both state that information is not to be published where '[its] release … would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators'.

---

12 Unless the directive itself or national law provides otherwise. It would not appear from Article 20 of the LCP that there is any national provision to the contrary.

---

13 This is not the case with the Lithuanian legislation, inasmuch as it prohibits the *entirety* of a tender from being communicated on a confidential basis.

---

14 See point 33 of this Opinion.

15 Paragraph 64 et seq. of the order for reference.

16 Paragraphs 70 to 75 of its written observations.

17 This is also follows from recitals 13 and 24 of Directive 2016/943.

18 Judgment in *Varec*, paragraph 52.

19 *Ibidem*, paragraph 40: ‘the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors’ business secrets’.

20 The order for reference states that, in Lithuania, the customary ‘public procurement practice, which the court of cassation consistently attempts to limit’, is to refuse to grant access to those requesting information supplied by tenderers.

21 Article 1(5) of Directive 89/665 authorises the domestic law of a Member State to provide for such a *review*, which is in fact a re-examination procedure conducted by the contracting authority itself. According to the order for reference, this is an administrative process in Lithuania.

22 The balance between protecting the confidentiality of information and judicial protection is also referred to in Article 9 of Directive 2016/943.

23 In paragraphs 64 to 76 of that order, the referring court explains its reasons for raising the fourth to ninth questions. The fact remains that those reasons do not always correspond exactly with the wording of the corresponding questions.

24 Klaipėdos autobusų parkas makes this point in its written observations, paragraphs 81 and 82.

25 Judgment of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268, paragraph 26): ‘the wording of Article 1(1) of Directive 89/665 assumes, by using the words “as regards [contract award] procedures”, that every decision of a contracting authority falling under EU rules in the field of public procurement and liable to infringe them is subject to the judicial review provided for in Article 2(1) (a) and (b) of that directive’.

26 *Ibidem*, paragraph 27. The Court therefore supports a ‘broad construction of the concept of a “decision” taken by a contracting authority [which] is confirmed by the fact that Article 1(1) of Directive 89/665 does not lay down any restriction with regard to the nature or content of the decisions it refers to’.

27 *Ibidem*, paragraph 31.

28 *Ibidem*, paragraph 32: ‘In the absence of EU rules laying down the time from which a possibility of review must be open, it is for national law to lay down the detailed rules of judicial procedures governing actions for safeguarding rights which individuals derive from EU law’, subject to the limitations inherent in the principles of effectiveness and equivalence.

---

29 Article 2(9) provides for the possibility for bodies responsible for review procedures not to be judicial in character and for ‘independent bodies’ to be set up which are comprised of members having a status similar in some regards to that of judges.

---

30 Judgment of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268, paragraph 31).

---

31 *Ibidem*, paragraph 34.

---

32 Ecoservice requested access to the information necessary to prepare its application for review of the contract award decision on 4 December 2018.

---

33 Judgment of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268, paragraph 35).

---

34 The referring court recognises that, as a ‘court of cassation[, it] it is required to rule only on the issues raised by the defendant in its appeal in cassation, in particular whether tenderer B complies with the technical capacity requirement’. However, it ‘is contemplating going, of its own motion, beyond the limits of the appeal in cassation and ruling on other aspects of the dispute between the parties, … not only on the basis of protecting the public interest but also in the light of the specific situation that has arisen in the present case, in which the applicant was essentially denied all of the information to which it had requested access at the pre-litigation stage and in the proceedings’ (paragraphs 36 and 37 of the order for reference).

---

35 Judgment in *Varec*, paragraph 53.

LITEKO Lietuvos teismų informacinė sistema

Public search for solutions

Quick search Detailed search Aid

Title: [2022-01-14][anonymised order in the case][e3K-3-185-916-2022].docx
Case no.: e3K-3-185-916/2022
Type of case: civil case
Court: Supreme Court of Lithuania **Keywords:**
Legal terms:
Parties: Parties:

Name/Surname/Name	Code	In the case as
Private limited liability company Klaipeda Region Waste Management Center	163743744	Defendant
JSC "Ecoservice Klaipeda"	140026178	Applicant
JSC "PARSEKAS"	142150210	third person
Private limited liability company "KLAIPĖDOS AUTOBUSŲ PARKAS"	140033557	third person
JSC "Klaipėdos transportas"	304923194	third person

Categories:

Proceedings for annulment or modification of decisions of the contracting authority

Revocation or modification of the contracting authority's decisions

CIVIL LEGAL RELATIONS

Public procurement-sale

Other issues on public procurement legal relations

Law of obligations

CASES CONCERNING LEGAL RELATIONS IN PUBLIC PROCUREMENT

Buying-selling

?

Civil Case No. e3K-3-185-916/2022
Judicial Process No. 2-57-3-00716-2018-2
Categories of procedural decision: 2.6.11.4.1; 2.6.11.4.5 (S)

SUPREME COURT OF LITHUANIA

N U T A R T I S
FOR THE REPUBLIC OF LITHUANIA

2022 m. 13 January
Vilnius

Chamber of Judges of the Civil Division of the Supreme Court of Lithuania, composed of Judges Sigita Rudėnaitė (President of the Chamber), Gediminas Sagatis and Dalia Vasarienė (Rapporteur),,

at the hearing in cassation by written procedure, heard a civil case on the basis **of an appeal by the defendant's private limited liability company Klaipėda Region Waste Management Centreand** on a point of law (cassation) against the review of the decision of the Chamber of Judges of the Civil Division of the Court of Appeal of Lithuania of 30 May 2019 in a civil case on the basis of an appeal by the applicant's private limited liability company Ecoservice Klaipėda a lawsuit against the defendant private limited liability company Klaipeda Region Waste Management Centrefor annulment of the contracting authority's decision,

thirdlyit will be a private limited liability companyė "Klaipėdos autobusų parkas", a closedcompany akcinė company"Parsekas" and closed joint stock company"Klaipėdos transportas".

Panel of Judges

n u s t a t i on :

I. The essence of the dispute

1. In cassation proceedings, it is decided on the substantive rules governing the pre-litigation procedure for the settlement of public procurement disputes, the classification of the terms and conditions of the procurement, the recognition of the relevant information in the offer of suppliers as false, the protection, interpretation and application of confidential information provided by suppliers to contracting authorities during procurement and review procedures.
2. The applicant, UAB Ecoservice Klaipėda (hereinafter also referred to as the applicant), brought an action seeking: (1) annulment of the defendants UAB Klaipėda Region Waste Management Centreo (hereinafter also referred to as the defendant, the contracting authority) the decision to approve the series of tenders, of which the applicant was informed on 29 November 2018 by means of the C-Entrical Procurement Information System; 2) to oblige the defendant to re-perform the evaluation of the offer of the group of supplierss, compiled from UAB "Klaipėdos autobusų parkas", UAB "Parsekas" and UAB "Klaipėdos transportas", and to form a new order of proposals; (3) order the costs of the proceedings to bepaid.
3. The applicant pointed out that the defendant carried out the public procurement by means of an open tendering procedure entitled "Purchase of services for the collection and removal of municipal waste of Neringa Municipality to the treatment facilities of the Klaipėda Region Landfill" (Purchase No. 402058) (hereinafter referred to as the "Tender"). 3 suppliers participated in the tender and submitted tenders – the applicant, EKONOVUS UAB and a group of economic entities operating on the basis of joint activities, consisting of UAB Klaipėdos autobusų parkas, UAB Parsekas and UAB Klaipėdos transportas (hereinafter also referred to as the SupplierGroup).. After the Contracting Authority had established the order of the tenders on 29 November 2018, the Supplier Group was awarded the Contract. On 10 December 2018, the Company filed a claim against the decision of 29 November 2018 against the decision of the Supplier Group, challenging the supplier group's compliance with the provisions of point 2 "Technical and professional capacity" of Annex 4 to the Tender Conditions and 4 punkto "Financial and economic capacity" requirements. Byletter dated December 17, 2018, A dismissed the plaintiff's claim.
4. According to the applicant, neither the Group of Suppliers in general nor its members individually satisfies the qualification requirement of point 4 of Annex 4 to the TenderIng Conditions, entitled 'Financial and economic capacity', according to which the supplier's average annual operating income in the course of activities related to the collection and transport of mixed municipal waste has, in the last 3 financial years, be at least EUR 200,000 excluding VAT. 21 November 2018 In the Supplier's Declaration of Compliance with Qualification Requirements No. The information specified in D-p18/22 is declaratory. None of the members of the Supplier Group shall carry out the collection and transport of mixed municipal waste or related activities. The compliance of the qualifications of the group of suppliers with therequirements of f inansical and economic capacity cannot be based on the agreements concluded by UAB Parsekas with the State Enterprise Klaipėda State Seaport Authority for the removal of waste from incoming ships, since the services of collection and transportation of mixed municipal (household) waste in accordance with the specified services of collection and transportation of mixed municipal (household) waste according to the specified services of collection and transportation of mixed municipal (household) waste in accordance with the specified the contracts were provided by the applicant as a partner in the joint venture, and the full remuneration under them was paid to UAB Parsekas (as a responsible partnerei) only for the purpose of distributing (transferring) it to other partners.
5. The applicant has pointed out that the Group of Suppliers also fails to meet the requirement of a qualification of t-echnical and professional capacity laid down in point 2 of Schedule 4 to the Tender Specifications, according to which the supplier must own or lease (or otherwise lawfully use) the quantity of technical means necessary for the performance of the procurement contract which meets the requirements of the technical specification: at least one a garbage truck complying with the EURO 5 standard; at least one container washer; at least one carfor the collection of household bulky, electrical and electronic equipment, hazardous waste and other waste by detour; at least one of the specified cars must be able to serve underground containers; all specified cars must be capable of servicing underground containers; all specified cars must be equipped with geo-positioning system (GPS) transmitters. According to the applicant, the Supplier Group did not offer (did not provide) a garbage truck complying with the EURO 5 standard, nor a vehicle capable of servicing underground containers. In the defence, the

vehicles mercedes benz 2024, Mercedes Benz 310 and DAF FAN CF 250 EUR05/HIAB 21/Crane referred to by the Supplier Groups were not named when the Supplier Group submitted its offer to the p mite organization.

II. Substance of the procedural decisions of the courts of first instance and of appeal

6. Klaipėda Regional Court 15 March 2019 dismissed the action by decision and apportioned the costs of the proceedings.
7. The Court of First Instance, in deciding on the conformity of the group of suppliers with the requirements of point 4 of Annex 4 to the Tender Specifications, entitled 'Financial and economic capacity', and point 6 of the revision of the tendering specifications concerning the average annual operating income, found that In order to confirm his compliance with this condition,the tenderer in K onkurs had to submit to the contracting authority a free-form supplier's declaration.
8. According to the Declaration of Compliance with the Supplier's Qualification Requirements No. D-p-18/22 of 21 November 2018, submitted by UAB Parsekas, a member of the Supplier's Group, UAB Parsekas, average annual operating income of UAB Parsekas in the course of activities related to the collection and transportation of mixed municipal waste in the last 3 the financial year amounted to EUR 233,510.79 excluding VAT. According to the certificate of operating income No P-2018/11/22 of 22 November 2018 submitted by UAB Parsekas in the case of the contracting authority, UAB Parsekas received a total of EUR 719,757.87 (excluding VAT) in revenue in the last 3 financial years. To substantiate the reality of the data of this certificate, UAB Parsekas also submitted waste collection contracts to the contracting authority.
9. The Court of First Instance held that the Supplier Group also satisfied the requirements of point 2 of Annex 4 to the Tender Specifications and entitled 'Technical and professional capacity'. , Mercedes Benz 310, Nissan Primastar, DAF FAN CF 250 EUR05/HIAB 21/Crane and Mercedes Benz 1838 match data technical requirements, vehicle registration certificates, uab "Klaipėdos transportas" obligations agreement of 22 November 2018 with a third (non-case) party on the acquisition of the vehicle "DAF FAN CF 250 EUR05/HIAB 21/Kranas".
10. By a decision of 30 May 2019, a panel of judges of the Civil Division of the Court of Appeal of Lithuania annulled the decision of the Klaipėda Regional Court of 15 March 2019 and issued a new decision granting the applicant's application and deciding to annul the defendant's decision confirming the order of the tenders, of which the applicant was informed on 29 November 2018, and returning the parties to the situation prior to the infringement, reallocated the costs of the proceedings.
11. In the view of the Bench, there is no objective basis for concluding that the Supplier Group did not meet the requirement of point 4, entitled 'Financial and economic capacity', of Annex 4 to the Tender Specifications.
12. The applicant has not put forward any arguments that could confirm that the justification of financial and economic capacity in the manner required by the Terms and Conditions of the Tender (free-form supplier's declaration) is illegal, and according to the declaration of compliance with the supplier's qualification requirements submitted by the Director of UAB Parsekas, a member of the Supplier's Group, dated 21 November 2018, No D-p-18/22, the average annual operating income of UAB Parsekas in the course of carrying out activities related to activities related to the collection and transportation of mixed municipal waste in the last 3 financial years amounted to EUR 233,510.79 excluding VAT.
13. The bench of judges pointed out that the respondent, in accordance with the provisions of the Law on Public Procurement of the Republic of Lithuania (hereinafter referred to as the "LPP"), during the qualification assessment of the Supplier Group, requested to providemore information confirming the compliance of the Supplier Group with the requirement of clause 4 of Annex 4 to the Tender Conditions than was requested.In the terms of the competition. The Court of First Instance considered not only the free-form supplier's declaration, but also all the other evidence adduced by both the defendant and the applicant herself in support of the income in the case.
14. The Bench observed that the failure to produce a document substantiating the qualification does not negate the existence of qualification as a certain legal fact (objective category) or circumstances if they arose no later than the final date of submission of tenders.
15. With regard to the plaintiff's argument that the Supplier Group was not entitled to rely on the income of UAB Parsekas in the course of the execution of the joint venture agreement, the bench of the judges pointed out that there was no requirement in the tender terms and conditions to prove that the supplier who received the proceeds from the removal of mixed municipal waste would have actually shipped the

waste himself, nor was it required to deduct it for each of the joint venture partners the share of revenues under the executed joint venture agreement. In accordance with the agreement No. 41-2017-116 of 13 April 2017 (the total cost of services is EUR 359,504.13 excluding VAT) and the agreement No. 41-2018-92 of 26 March 2018 (total cost of services – EUR 1,559,504.13 excluding VAT), concluded with the State Enterprise Klaipėda State Seaport Authority, the object of which is the collection and removal of mixed municipal waste, UAB Parsekas was the responsible partner of the joint activity, whicha was directly settled. In addition, the Joint Activity Agreement No P17-0315/1 of 15 March 2017, concluded by the joint venture partners UAB Parsekas (responsible partner), UAB BNS Capital and UAB Ecoservice Klaipėda, submitted in the case , confirms that part of the obligations of UAB Parsekas, entering the total value of the offer, it was 35%. the total amount of the project as a whole.

16. The bench of the judges pointed out that the Supplier Group, in its letter dated 21st November, 2018 entitled 'Data on compliance withthe technical requirements', which was submitted with the proposal, referred only to a specialised car/tanker with equipment Mercedes Benz 1838 and a freight vehicle " Nissan Primaster, which did not meet all the requirements set out in point 2 of Annex 4 to the Tender Conditions (notadapted for servicing underground containers, moreover, the mercedes benz 1838 vehicle, as a garbage truck manufactured in 1993, does not meet the EURO Standard 5, which came into force in 2008).

17. The panel of judges found that the vehicles Mercedes Benz 2024, Mercedes Benz 310 and DAF FAN 75 CF 250 EURO 5 HIAB 21 was not referred to in either the letter of 21 November 2018 or the letter No SR-127 of 13 December 2018 entitled 'On the provision of documents and information', which was submitted to the contracting authority after the contracting authority requested clarification of the tender after receiving the applicant's claim. In the light of the above, the bench concluded that, in assessing the conformity of the Supplier Group with the qualification requirements set out in point 2 of Schedule 4 to the Tender Conditions, these three vehicles referred to by the defendant could not be relied upon, since it is not clear when they were offered to the contracting authority.

18. There is no evidence in the file to support the right (real possibility) of the Supplier Group to use the DAF FAN 75 CF 250 EURO5/HIAB 21 garbage carrier, but the mere public announcement on the internet networkaboutthe sale of such a technical device cannot confirm this, and the non-public file is recognised as a commitment agreement dated 22 November 2018, which was concluded after the date of the submission of the tender, it is not even possible to establish that UAB Klaipėdos transportas has agreed specifically on the purchase of the DAF FAN 75 CF 75 CF 250 EURO5/HIAB 21 garbage truck.

19. The Bench pointed out that the defendant herself relies on the requirement to comply with the EURO 5 standard on the vehicle 'DAF FAN 75 CF 250 EURO5/HIAB 21', which, as stated, cannot be regarded as there is no evidence that it was submitted together with the offer of the Supplier Group. It is also unclear on what basis the Supplier Group intends to use this vehicle. In addition, the testimonial states that it is the vehicle in question, and not the Mercedes Benz or Nissan Primaster, that also has the hydraulic lift needed to service the undergroundams containerams.

20. Having found that there was no evidence in the case to show that the Mercedes Benz 1838 garbage truck proposed by the Supplier Group complied with the EURO 5 standard or that any of the vehicles proposed by the Supplier Group could serve underground containers (equipped with a hydraulic lift), the bench of the judges held that the bid of the Supplier Group should have been rejected as not complying with the Euro 5 standard or that any of the vehicles proposed by the Supplier Group could serve underground containers (equipped with a hydraulic lift), the bench of the judges held that the bid of the Supplier Group should have been rejected as not complying with the euro 5 standard Qualification requirements set out in the terms and conditions of the competition (paragraph 10.3.9 ofthe Competition Conditions).

21. The Bench of The Court observed that the unlawful acts of the contracting authority alleged and complained of in the application (the cause of action) must coincide with the ground e of the contracting authority's decision appealed against in the supplier's claim (code of civil procedure of the Republic of Lithuania (hereinafter referred to as the "and CCP) 423 Article ^{3}(2)). Theclaimant's claim was limited to the compliance of the Mercedes Benz 1838 vehicle offered by the Supplier Group with the requirements of the Tender Conditions (Mercedes Benz 1838 is not suitablefor mixed municipal waste collectti and carry, especially 5 cu. m. m capacityfor underground containers, and is not a container washer), the applicant cannot rely either in the application or in the appeal on the argument that all the vehicles offered by the suppliers must comply with standard EURO 5.

III. Legal arguments in the cassation and in the response

22. By an appeal in cassation, the defendant seeks the annulment of the decision of the Chamber of Judges of the Civil Division of the Court of Appeal of Lithuania of 30 May 2019 and the maintenance of the decision of the Klaipėda Regional Court of 15 March 2019. The appeal in cassation is based on the following arguments:

22.1. The appellate court violated the rules for the examination and evaluation of evidence by not examining, in principle, all the data on the compliance of the qualifications of the Supplier Group (the offer of the Supplier Group and the documents submitted with it), and did not give a reasoned statement in the decision on their assessment. As a result, the court came to the unfounded conclusion that the Supplier Group did not rely on three vehicles in the s proposal to justify the qualification: Mercedes 2024, Mercedes Benz 310 and DAF FAN CF 250 EURO5/HIAB 21/Crane. The court did not appreciate that the Supplier Group offered vehicles in the tender: Mercedes Benz 2024, Mercedes Benz/310, DAF FAN CF 250 EURO5/HIAB 21/Crane, Mercedes Benz 1838", Nissan Primastar, and justified their compliance with the documents submitted with the proposal of 23 November 2018.

22.1.1. Annexes Nos. 9 and 10 submitted with the proposal (The Commitment Agreement of UAB Klaipėdos transportas and "Data on compliance with technical requirements" of UAB Klaipėdos transportas) confirmed that the group of suppliers intended to use the garbage truckto "DAF FAN CF 250 EURO5/HIAB 21/Kranas". Although at the time of submission of the tender, this garbage truck had not yet been delivered and registered in Lithuania, the Group of Suppliers would havedisposed of it in accordance with the agreement (In paragraph 4(2) of the Tender Conditions, the qualification of the in support of the claim, it was not required to own a garbage truck operated in Lithuania).

22.1.2. Annex No. 21 submitted with the proposal (JSC "Klaipėdos autobusų parkas" "Data on compliance with technical requirements") confirmed the compliance of mercedes benz 310 and mercedes benz 2024 vehicles with its technical and qualification requirements.

22.1.3. Annex No. 20 submitted with the proposal (UAB "Parsekas" "Data on compliance with the technical requirements") confirmed the compliance of the proposed vehicles Mercedes Benz 1838 and Nissan Primastar with the qualification requirements and their suitability of the containerfor the removal of bulky cargo.

22.2. The court of appeal infringed Article 45(3) of the LSA, which allows the supplier to clarify and clarify his inaccurate or incomplete data on the justification of qualifications, deviated from the case-law of the Court of Cassation, which states that the failure to provide a document substantiating the qualification does not negate the qualification as a certain legal fact; the contracting authority must ask the candidate or tenderer to supplement or clarify the inaccurate or clarifying the inaccurate or explanations submitted incomplete data on his qualifications (order of the Supreme Court of Lithuania of 16 October 2015 in civil case No. 3K-3-554-690/2015). If the court had considered that the Supplier Group had referred to the "DAF FAN CF 250 EURO5/HIAB 21/Crane" garbage truck in its tender, the court would have been obliged to rely on LSA 45, even if it considered that there was insufficient data on that vehicle in the Tender, to rely on LSA 45 paragraph 3 and in accordance with the settled case-law of the Court of Cassation to propose to the Supplier's Group to clarify the unclear data. Those infringements affected the unlawful conclusion of the decision that the Supplier Group could not base its capacity on the 'DAF FAN CF 250 EURO5/HIAB 21/Crane' garbage truck at all. Moreover, if the court had properly examined the details of the supplier group's bid, such a revision would not havebeen necessary even, since the offer contains all the information about the garbage truckto the "DAF FAN CF 250 EURO5/HIAB 21/Crane".

22.3. The appellate court required evidence in the form prescribed by the court in support of its unreasonable qualification and considered the evidence by selecting two documents (in the letter of 21 November 2018 and in letter No SR-127 of 13 December 2018 "On the provision of data and information"), and thereby limited the supplier group's right to base its qualifications on other documents. Such a conclusion is contrary to the principles of the evaluation of the tender and the qualification verification laid down in Article 47 of the LSA, as laid down in Article 45 of the LSA, which do not impose any restrictions or requirements on which the supplier can prove his qualifications. Qualification is an objective category that can be proved by any evidence supporting the qualification (order of the Supreme Court of Lithuania of 27 June 2011 in civil case No. 3K-3-293/2011). The court also violatedthe principle of content before form , deviating from the interpretations of the Court of Cassation, which states that the substantive assessment of the actions of suppliers and the decisions of the contracting authority, taking into account the principles and objectives of public procurement, takes precedence over the formal one (order of the Supreme Court of Lithuania of 8 June 2012 in civil case No 3K-3-280/2012).

23. Inits response to the appeal on a point of law (cassation), the applicant requests that the appeal be dismissed and that the decision of the Chamber of Judges of the Civil Division of the Court of Appeal of

Lithuania of 30 May 2019 be left unchanged and that the costs of the proceedings be awarded. The response includes the following arguments:

23.1. The appellate court made an objective assessment of all the evidence in the case, reached its conclusions on the supplier group's compliance with therequirement of t-echnical and professional capacity from the totality of the evidence, without prejudice to Articles 176(1), 185(1) and 185(2) of the CCP, as well as the principles for the evaluation and qualification verification of tenders established by the LSA (LSA 45, 47 articles). The defendant, in its appeal on a point of law (cassation), declares that the vehicles referred to by the Supplier Group meet the criteria for technical and professional capacity. Contrary to the defendant's contentions, there is no evidence in the file to support the right (real possibility) of the Supplier Group to use the DAF FAN CF 250 EUR05/HIAB 21/Crane garbage truck or that such a ground will arise in the future, even though the Tender Conditions require the submission of documents proving such a ground. The details of the supplier group's offer did not confirm the compliance of the mercedes benz 310 and Mercedes Benz 2024 vehicles with the qualification requirement for technical and professional capacity, they were not specified in the letter of 21 November 2018 and the letter of 13 December 2018, which was following a request by the contracting authority for clarification of the tender. The mercedes benz 1838 and Nissan Primastar vehicles referred to in the offer of the supplier group do not meet all the criteria for the qualification requirement for technical and professional capacity, since they do not serve underground containers, and one of them is not a garbage truckis, which complies with the EURO 5 standard.

23.2. The supplier group should not have been and could not be given the opportunity to re-correct unclear and/or inaccurate data due to compliance with therequirement of t-echnical and professional capacity. The technical means necessary for the performance of the tendering contract and the particulars and documents required to be provided in connection with them are to be regarded as part of the supplier group's tender in the strict sense. Thus, itis not Article 45(3) of the LSA, which is applicable to the proposal in the broadest sense, but Article 55(9) of the LSA, which, in the light of the case-law of the Court of Cassation, which is to be interpreted and applied narrowly in the light of the case-law of the Court of Cassation, which means that the adjustment of the details of the offer covers only exceptional situations in which the defects in the tender are editorial in nature, objectively identifiable and usually remediable. In this case, the shortcomings of the supplier group's proposal in the strict sense are of such a nature that the tender cannot be explained (clarified) without changing its details, and therefore such a change in the substance of the proposal would not be in accordance with the regulation of Article 55(9) of the LSA. Accordingly, the appellate court was not under any obligation to provide an opportunity for the p-mite organization to request clarification (clarification) of the details of the Supplier Group's proposal.

23.3. The offer of the supplier group does not comply with the requirement specified in paragraph 12 of Annex 1 "Technical Specification" of the Tender Conditions, which states that the service providerprovides services using municipal waste collection vehicles that meet the requirements of at least euro 5 standard. Vehicles offered by the supplier group Mercedes Benz 2024, Mercedes Benz 310 and Mercedes Benz 1838, taking into account their dates of manufacture, are objectively not able to meet the EURO 5 standard, which appeared in 2008. The appellate court did not unreasonably evaluate these arguments of the plaintiff on the ground that the plaintiff had not stated this type of circumstance in the december 10, 2018 claim. However, theapplicant did not become aware of these facts until the time of the hearing, so that the applicant could not objectively state them at the time of the application for the claim (Article 3(3) CCP 423).

23.4. The bid of the supplier group does not comply with the requirement of finsancial and economic capacity set out in point 4 of Annex 4 to the Tender Conditions. This conclusion is supported by the following circumstances: (1) contract No. 41-2018-92 of 26 March 2018 and the income received by UAB Parsekas on the basis thereof should not have been assessed, since neither the Supplier Group, nor the contracting authority, nor the court of first instance relied on this contract; 2) bthere is no evidence provided that would allow us to reliably determine whether the services under the 6 contracts submitted by the Supplier Group were provided only by UAB Parsekas, whether they were provided together with other partners, how much, when and what services under the contracts were provided by UAB Parsekas, how much and for the provision of specific services UAB Parsekas received income; 3) according to part of the contracts, UAB Parsekas did not provide precisely the services of collection and transportation of mixed municipal waste and did not receive income from this particular activity, shared these revenues with other joint venture partners, for example, the income (EUR 359,504.13) received from the agreement concluded with the SE on 13 April 2017, concluded with the SE, could not be includedKlaipėda State Seaport Authority. The services under that contract were not only provided by UAB Parsekas, it operated together with the joint venture partners, and the services of collection and transportation of mixed municipal (household) waste under that contract were provided by the applicant. The share of uab "Parsekas" liabilities is 35% of the total amount of the project, therefore, this company could receive no more than EUR 125,826.46

under the agreement of 13 April 2017, which means that the average annual operating income of UAB Parsekas (excluding VAT) in the last 3 years is less than EUR 200,000 excluding VAT.

IV. Substance of the referral to the Court of Justice of the European Union and of the preliminary ruling given by that court , written pleadings by the parties to the proceedings

24. Chamber of Judges of the Civil Division of the Supreme Court of Lithuania 2019 m. by order of 17 December 2014, referred a reference to the Court of Justice of the European Union ('the Court of Justice') for a preliminary ruling in respect of Article 18(1), Articles 21, 42, 57(4)(h), 58 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ('Directive 2014/24') article 3 and (4), Article 70, Article 1(1)(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures for the award of public supply contracts and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 ('Directive 89/665') os, (3) and (5), Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure ('Directive 2016/943') 18th recital ('Directive 2016/943') part ofthe interpretation of article 9(2)(3) on the following issues:

24.1. Does the procurement clause requiring suppliers to prove an appropriate amount of average annual operating income for the purpose of carrying out activities solely for specific services (management of mixed municipal waste) fall within the scope of Article 58(3) or (4) of Directive 2014/24?

24.2. Does the answer to the first question determine the procedure for assessing the supplier's capacity as laid down in the judgment of the Court of Justice of 4 May 2017 in Case C-387/14 *Esaprojekt*?

24.3. Whether the procurement clause requiring suppliers to demonstrate the conformity of vehicles required for the provision of [garbage management] services with specific technical requirements, including pollution emissions (EURO 5), installation of a GPS transmitter, appropriate capacity, etc., falls within the scope of Article 58(4) of Directive 2014/24: (a) Article 58(4); (b) Article 42 in conjunction with annex VII; (c) the scope of Article 70?

24.4. Is article 1(1)(3) of Directive 89/665, which lays down the principle of effectiveness of the review procedures, article 1(3) and (5) of that directive, Article 21 of Directive 2014/24 and the provisions of Directive 2016/943, in particular recital 18 and Article 9(2)(3)the paragraph (jointly or separately, but not limited to them), must be interpreted as meaning that, where the national legal regulation on public procurement provides for a mandatory pre-litigation procedure for the settlement of disputes:

(a) the contracting authority must provide the supplier who initiated the review procedure with all the particulars (irrespective of the nature of the confidentiality) of another supplier's tender, provided that the object of the procedure is precisely the lawfulness of the evaluation of another supplier's tender and the supplier who initiated the procedure has previously expressly requested it to provide them;

(b) irrespective of the answer to the question asked above, does the contracting authority, when rejecting a claim made by a supplier concerning the legality of the evaluation of his competitor's tender, in any event give a clear, complete and specific answer, irrespective of the risk of disclosing the confidential information of the tender entrusted to it?

24.5. Must the wording of Article 1(1)(3) of Directive 89/665, Article 1(3) and (5), Article 2(1)(b) of that Article, Article 21 of Directive 2014/24 and the provisions of Directive 2016/943, and in particular recital 18 in the preamble (jointly or separately but not limited to them) be interpreted as meaning that the decision of the contracting authority not to acquaint the supplier with the confidential data of another tenderer's tender is a separate appeal to the court solution?

24.6. If the answer to the preceding question is in the affirmative, is Article 1(5) of Directive 89/665 to be interpreted as meaning that the supplier is obliged to submit a claim against such a decision of the contracting authority and, if necessary, to bring an action before the courts?

24.7. If the answer to the preceding question is in the affirmative, is Article 1(1)(3) and Article 2(1)(b) of Directive 89/665 to be interpreted as meaning that the supplier, depending on the extent of the information at his disposal concerning the content of another supplier's tender, may bring an action before the court solely on the ground of refusal to provide him with information, without separately questioning the legality of the other decisions of the contracting authority?

24.8. Irrespective of the answers to the questions asked above, is Article 9(2)(3) of Directive 2016/943 to be interpreted as meaning that the court, upon receipt of a request from the applicant to recover evidence from the other party to the dispute and make it available to the applicant, must comply with such a request, irrespective of the conduct of the contracting authority during the procurement or review procedures?

24.9. Must the wording of Article 9(2)(3) of Directive 2016/943 be interpreted as meaning that a court which has not satisfied the applicant's request for the disclosure of confidential information of the other party to the dispute should, of its own motion, assess the significance and consequences of the data requested to be declassified for the lawfulness of the procurement procedure?

24.10. Is it the basis for the exclusion of suppliers laid down in Article 57(4)(h) of Directive 2014/24 in the light of the judgment of the Court of Justice of 3 October 2019 in *Delta Antrepriz? de Construc? ii ?i Montaj 93*, can be applied in such a way that the court, in a dispute between a supplier and a contracting authority, may, irrespective of the latter's assessment, of its own motion, decide that the supplier in question, acting intentionally or negligently, provided it with misleading information which is not in accordance with reality and, as a result, should have been excluded from the procurement procedures?

24.11. Whether the provisions of Article 57(4)(h) of Directive 2014/24, which are applied in conjunction with the principle of proportionality laid down in Article 18(1) of that directive, must be interpreted and applied in such a way that, where national law imposes sanctions additionally (in addition to exclusion from procurement procedures) for the provision of false information, those provisions may be applied only on the basis of personal liability, in particular where information which is not in accordance with reality only parts of the members of the joint procurement participant (e.g. one of several partners)?

25. The Court of Justice in 2021. in its judgment of 7 September in Case C-927/19 *Klaipeda Region Waste Management Centre* ('the preliminary ruling'), it gave the following interpretations.

26. Article 58 of Directive 2014/24 must be interpreted as meaning that the burden on economic operators to prove a certain average annual turnover in the course of their activities in the field relating to the public contract in question is a selection criterion as to the economic and financial capacity of those economic operators within the meaning of paragraph 3 of that article.

27. The combined provisions of Articles 58(3) and 60(3) of Directive 2014/24, which apply in conjunction, must be interpreted as meaning that, where the contracting authority requires economic operators to have a specified minimum turnover in the area relating to the public contract in question, the economic operator may rely on a temporary the income received by the group of undertakings to which it belongs only if it has actually contributed, under the public contract in question, to the activities of that group, analogous to that to which the public contract relates, for which that economic operator seeks to prove its economic and financial capacity.

28. Articles 58(4), 42 and 70 of Directive 2014/24 must be interpreted as meaning that they may be applied together to a technical requirement laid down in a tendering procedure.

29. Dektyvos 89/665 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply contracts and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, the fourth subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) must be interpreted as follows, that the decision of the contracting authority to refuse to make available to an economic operator information which is treated as confidential and contained in the documents or in the tender of another economic operator constitutes a contestable act and that, in the event that the Member State in whose territory the procurement procedure in question takes place hasruled that any person seeking to challenge a decision taken by the contracting authority must bring an administrative action before bringing an action before a court. that Member State may also provide that such aprior administrative appeal must be lodged before an action is brought before a court or tribunal against this decision refusing access to the information.

30. The fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665, as amended by Directive 2014/23, as well as Article 21 of Directive 2014/24, read in the light of the general principle of good administration of EU law, must be interpreted as meaning that a contracting authority to which an economic operator applies for information which is treated as confidential in the presence of a competitor with whom the award of the contract has been decided, in a tender, it is not obliged to provide it if its transmission would infringe the provisions of Union law on the protection of confidential information, even if the request of the economic operator is made in the context of a complaint by the same economic operator concerning the lawfulness of the assessment of a competitor's tender by the contracting authority. Where a contracting authority refuses to communicate such information or refuses to do so and

rejects an administrative complaint lodged by an economic operator concerning the lawfulness of the assessment of the competitor's tender concerned, it must compare the applicant's right to good administration and the competitor's right to the protection of his confidential information in such a way that its decision to refuse to provide information or to reject the administrative complaint is reasoned and that the right to an effective remedy, which is used by the unsuccessful tenderer would not lose its effectiveness.

31. The fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665, as amended by Directive 2014/23, as well as Article 21 of Directive 2014/24, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that the competent national court hearing an action against a decision of a contracting authority to refuse to provide information which is treated as confidential to an economic operator, contained in the documents transmitted by the competitor with whom the contract has been awarded, or in an action against a decision of the contracting authority rejecting an administrative appeal against such a decision refusing to provide information, must compare the applicant's right to an effective remedy with the competitor's right to the protection of his confidential information and trade secrets. To this end, this court, which must necessarily have at its disposal the necessary information, including confidential information and trade secrets, in order to be able to decide, knowing all the circumstances, whether this information can be provided, must examine all relevant factual and legal circumstances. It must also be able to overturn a decision refusing to provide information or a decision rejecting an administrative appeal if they are unlawful and, if necessary, refer the case back to the contracting authority or take a new decision itself, where permitted by national law.

32. Article 57(4) of Directive 2014/24 must be interpreted as meaning that a national court hearing a dispute between an economic operator with whom it has been decided not to award a contract and the contracting authority may deviate from the assessment made by the contracting authority as to the legality of the conduct of the economic operator with whom the contract has been awarded and, consequently, to determine in its decision all the necessary consequences arising therefrom. However, in accordance with the principle of equivalence, such a court may examine of its own motion a plea alleging an error of assessment on the part of the contracting authority only if this is permitted by national law.

33. The second subparagraph of Article 63(1) of Directive 2014/24, read in the light of Article 57(4) and (6) of that directive, must be interpreted as precluding provisions of national law which preclude provisions of national law according to which, where an economic operator who is a member of a group of economic operators has seriously distorted the facts by providing the information necessary to verify that there are no grounds for exclusion of a group or its compliance with the selection criteria, and its partners are not aware of these distorted facts, the measure of exclusion from any procurement procedure may apply to all members of that group.

34. Chambers of Judges of the Civil Division of the Supreme Court of Lithuania in 2021 By order of 13 October, the proceedings in this civil case were resumed and it was proposed that the parties to the proceedings should submit written legal arguments against the rejudicial decision of the Court of Justice P.

35. The applicant has submitted written submissions on the preliminary ruling to the Supreme Court of Lithuania, stating:

35.1. The court's interpretations confirm the applicant's position that, in accordance with point 4 of Annex 4 to the TenderIng Conditions, the financial and economic capacity of the supplier required to be proved when the supplier participates in the Tender as a member of a group of suppliers must be proved by the submission by such a supplier of specific contracts proving specifically for him as an individual tenderer (and not jointly with others or other entities), the scope of the work carried out inthe field of specificized waste management services (individual actual contribution). In the present case, the documents submitted by the Supplier Group did not substantiate the financial and economic capacity, since the Supplier Group fulfilled this requirement by means of contracts that provided mixed waste management services by other suppliers and by contracts under which not only mixed municipal waste but also other waste was managed. Accordingly, the interpretations of the judgment of the Court of Justice of 4 May 2017 in Case C-387/14 *Esaprojekt* are also relevant to the case .

35.2. The requirements set out in the tender documentation, according to whichthese suppliers had to prove their conformity by submitting vehicles with the relevant technical characteristics, are to be qualified both as qualification and as requirements of the technical specification, as well as the conditions for the performance of the contract. In the light of the Court's interpretations, such a coincidence does not render the tendering specifications unlawful. According to the interpretations of the Court of Justice, regardless of the classification of the tendering conditions, the standard for adjusting the data is the same, but the principles of equal treatment and transparency must be taken into account. Thus, in the present case, the dispute between the parties concerning the right of the group of Tiehares to re-adjust the data for compliance with the technical requirements is no longer

relevant. Once it has been established that the data provided by the T iegroup of loggers on which compliance with the qualification requirements is based, melagingi, the Supplier Group should be entered in the list of suppliers who have provided information in M elaging.

35.3. In the light of the court's interpretations that a contracting authority, when refusing to provide certain particulars, must provide information on the particulars of the tender in such a way that the other party suspected of an infringement can defend his interests and that data which cannot be treated as confidential must in all cases be provided, the applicant's right to information and the right to a remedy have been infringedos, since all the applicant's requests for information on the supplier group's bid were rejected without giving reasons.

35.4. According to the interpretations of the Court of Justice, the defendant's decision to refuse to provide the applicant with the details of the offer of the Supplier Group is appealed against. There is no requirement in national law to make a claim to the contracting authority for refusing to provide data on another supplier's tender, so that the applicant's right of access to the confidential data of another tenderer's tender can also be exercised after the legal proceedings have begun.

35.5. According to the interpretations of the Court of Justice, a national court which finds that the supplier has provided the contracting authority with untrue information regarding compliance with the qualification requirements may independently declare such information to be false and order the contracting authority to include such a supplier in the Ma list of suppliers who have provided elaging information. In this case, the Supplier Group provided false information about the available capacity.

36. A third party, UAB Parsekas, submitted written explanations to the Supreme Court of Lithuania on the preliminary ruling, stating:

36.1. According to the interpretations of the Court of Justice, the third party UAB "Parsekas", which also carried out the collection of mixed municipal waste, acquired the right to rely on the income received by the group of companies operating on the basis of the joint activity agreement in accordance with the public procurement services for the collection and recovery of waste from ships arriving at Klaipeda State Seaport and pollutants from the port area on 13 April 2017 purchase and sale agreement No. 41-2017-116 and base the economic and financial capacity of the Supplier Group.

36.2. In the light of the interpretations of the Court of Justice, the measure of adverse effect, i.e. inclusion in the list of suppliers who have submitted false information, is applied on the basis of the personal liability of the economic operator only to the supplier who provided the false information. information provided by a third party to JSC "Parsekas" cannot be classified as false, since there are no objective and subjective elements.

37. A third party, UAB Klaipėdos autobusų parkas, submitted written explanations on the preliminary ruling to the Supreme Court of Lithuania . The third party submits that, in the light of the Court's interpretations as to the personal liability of an economic operator for providing false information, a third party cannot be subject to any negative consequences if it were even accepted that the Group of Suppliers had provided false information (although the third party does not agree with this). The third party could not be included in the list of suppliers who provided false information, since he did not know and could not have known about the correctness of the content of the information provided by the other partner, the third party, as the managing partner, was responsible for submitting the offer, for communicating with the defendant, but not for the veracity of the information provided by each partner.

Panel of Judges

k o n s t a t i o n s o j a :

V. Arguments and explanations of the Court of Cassation

The limits of the case before the Court of Cassation

38. The boundaries of the proceedings before the Court of Cassation are defined by Article 353 of the CCP. The first paragraph ofthe said article provides that the Court of Cassation shall, within the limits of the appeal in cassation, review the contested decisions and/or orders from the point of view of the application of the law. The Court of Cassation is bound by the circumstances established by the courts of first and appellate instance. Such a definition of the limits of the proceedings before the Court of Cassation (and

thus the purpose of the cassation proceedings) means that the Court of Cassation decides exclusively on questions of law and, moreover, only on issues that are directly raised in the appeal on a point of law (see, for example, paragraph 36 of the order of the Supreme Court of Lithuania of 17 December 2019 in civil case No e3K-3-384-916/2019 and the case-law of the Court of Cassation cited therein). Cassation traffichas the right to go beyond the scope of an appeal in cassation when the public interest so requires and the rights and legitimate interests of a person, society or the state would be violated within the limits of the complaint (article 353(2) CCP).

39. It has been pointed out in the case-law of the Court of Cassation that thelegal framework for public procurement is linked to the protection of the public interest and that the provisions of the LSA are to be interpreted and applied in such a way as to protect the public interest. Therole and duty of traffic in safeguarding the public interest is relevantnot only for the protection of the public interest goods, ensuring the achievement of the objectives of the legal regulation of the LSA, but also for the promotion of fair competition between suppliers (see, e.g. the order of the Supreme Court of Lithuania of 9 June 2015 in civil case No e3K-3-362-415/2015 and the case-law of the Court of Cassation cited therein). Thus, the public interest in public procurement disputes enables the courtto be an active arbitratorin order to achieve a fair hearing of the case.

40. On the other hand, the Court of Assay held that the active role of the courts is to be regarded as their discretion, but not as absolute and limited by the obviousness of a potentially unlawful act (decision) by the contracting authorities (see, for example, the order of the Supreme Court of Lithuania of 30 March 2016 in civil case No e3K-3-175-415/2016 83). Consequently, if the possible illegality of the contracting authority's actions is not obvious, it is not to be established without an additional (separate) assessment of certain facts, and the proceedings do not contain at least any objective doubts as to this, the court's position *ex officio* (in accordance with the duties) not to go beyond the boundaries of the dispute is not to be classified as a violation of his active role in disputes of this kind (order of the Supreme Court of Lithuania of 18 June 2018 in civil case No e3K-3-234-469/2018, paragraph 52).

41. In the present case,the dispute arose as to the conformity of the SuccessfulTenderer's s (group of T iekers) with the requirements of financial and technical capacity (the disagreement over confidential information arose only in the course of legal proceedings). The courts of first and appellate instance ruled that the Supplier Group met the requirement of financial strength, but their positions diverged due to the assessment of the technical capacity requirement. It is precisely because of the aspect of assessing the compliance of the Tiegroup of hares with the technical capacity requirement that the cassation proceedings were initiated on the defendant's initiative.

42. Inview, inter alia, of the questions raised by the Court of Cassation in its order of 17 December 2019 before the Court of Justice, the written submissions of the parties to the proceedings before the courts in the preliminary ruling proceedings and the subsequent adoption of that procedural decision, moreover, to the subjectmatter of the dispute in cassation proceedings formed in the above-mentioned order (see, by analogy, paragraph 57 of the order of the Supreme Court of Lithuania of 17 December 2019 in civil case No e3K-3-494-469/2019 and the case-law of the Court of Cassation referred to therein) and the fact that the applicant was not provided with all the information requested by her, the importance of the public interest in the present case in a public procurement case, the aspect of the court's activism in cases of this kind must be decided *to speak ex officio* not only on the issues raised in the appeal on a point of law. Accordingly, the case concerns the legality of the contested decision of the contracting authority, which established the ranking of the tenders and declared the winner a group of suppliers,and in the following respects:

42.1. the significance of compliance with the pre-litigation procedure in public procurement disputes in the present case;

42.2. compliance of the supplier group with the requirement of financial and economic capacity set out in point 4 of Annex 4 to the Tender Conditions;

42.3. In terms of the falsity of the assessment of the information specified in the proposal of the supplier group;

42.4. compliance of the supplier group with the requirement of technical and professional capacity set out in point 2 of Annex 4 to the Tender Conditions;

42.5. The balance between the protection of confidential data in the supplier group's bid and the applicant's rights of defence.

The pre-litigation procedure in public procurement cases

43. The pre-litigation stage I of public procurement disputes is a mandatory part of the review procedure (Article 10(1)(3) of the LSA, Article 423(2) of the CCP). The essence of this stage of the defence of rights is to allow the supplier and the contracting authority, before the award of the public contract, to resolve disagreements by avoiding legal proceedings, that is to say, for the contracting authority to set aside its wrong decisions or for the complaining supplier to set out in more detail the reasons and reasons for those decisions.

44. Such a mandatory pre-litigation dispute resolution procedure is established not only in order to ensure the expeditiousness of public procurement procedures, to enable the supplier and the contracting authority to find out the validity of mutual claims without initiating legal proceedings, but also to determine the boundaries of the dispute that has arisen (see, for example, the order of the Supreme Court of Lithuania of 7 November 2018 in civil case No e3K-3-406-378/2018 Para. 38).

45. Thus, the scope(s) of the legal arguments based on the specific facts and the positions of the parties in the present case are largely determined by the content of the documents of the parties concerned at the pre-litigation stage of the dispute— the content of the claim and the response to the claim. It should be noted that thislimitation was first established in jurisprudence and only in relation to suppliers. The Court of Cassation held that the issues raised in the supplier's claim are relevant to the scope of the dispute between the supplier and the contracting authority. The precise determination of the content of the claim is also important because the possible infringements of the contracting authority brought before the plaintiff's court should coincide with those raised in the claim, i.e. the plaintiff could base his claim in court only on those infringements which were alleged in the claim and either not examined or examined by the contracting authority, but found to be unfounded (Order of the Supreme Court of Lithuania of 13 November 2009 in civil case No. 3K-3-506/2009). Subsequently, the restriction in question also arose in legal regulation, and its application was extended to the contracting authorities in accordance with the caselaw of the Court of Cassation.

46. Article 3(2) of the CCP 423 provides that claimswhich were not raised in an application by a supplier or an economic operator in an out-of-court preliminary settlement procedure may not be raised in a claim, unless these claims could not have been raised by the plaintiff at the time of filing the application;the basis for the claim must be the same as the facts set out in the supplier's or economic operator's application for the out-of-court preliminary settlement of disputes on which the application was based, unless these circumstances could not be stated by the claimant at the time of filing the application (paragraph 3 of the same article);it is forbidden to go to the cause of action or the subject matter of the claim, unless the need for such a change arose later or the court considers that this will not delay the proceedings (paragraph 4 of the same article).

47. Theprovisions of the N ors CCP contain separately the provisions on the requirements for the claim and the above-mentioned restrictions on the procedural conduct of the plaintiff, which *per se* (in itself) does not mean that the defendants - contracting authorities - have been granted more rights in the proceedings (order of the Supreme Court of Lithuania of 9 October 2018 in civil case No e3K-3-354-378/2018, paragraph 35). Such a rule of interpretation of the law means, in essence, that if the plaintiff (supplier) is limited in the proceedings in relation to the content of the claim, then the defendant (the contracting authority) cannot also rely in the defence or rejoinder on new facts or legal arguments that were not raised by the supplier in the response to the claim.

48. It is apparent from the facts established in the casethat the applicant based its claim on two aspects on the basis of the non-confidential information provided to it by the contracting authority in the tender of the successful tenderer:

    1) The group of suppliers does not meet the requirement of financial and economic capacity, because: a) a formal declaration, without submitting any primary documents (contracts), does not confirm the income of EUR 200,000 executed and received by UAB Parsekas in the last three years in the provision of mixed municipal waste collection and removal services; (b) this enterprise does not carry out such activities at all; (c) although it participates in the joint venture asthe main partner in the provision of such services, in fact such activities did not take place on its own (as an example, the applicant referred to an agreement with the State Enterprise Klaipėda Seaport Authority, according to which it was the applicant who claimed to actually provideusi mixed utilities collection and transportation services);

    2) The group of suppliers does not meet the requirements of technical capacity, since the mercedes benz 1838 garbage truck presented in the table of the declaration of conformity of UAB Parsekas does not meet the mandatory technical parameters (euro 5 standard, cannot service underground containers, does not have container washing equipment).

49. In rejecting the applicant's claim, the Contracting Authority has stated declaratively that the Group of Suppliers meets the requirements of the Tender Conditions. Relied on the fact that the Supplier Group submitted a dozen concluded contracts proving that the revenue from the collection and transportation of

mixed municipal waste is at least EUR 200,000 , and the technical information provided confirms the approval of the Mercedes Benz garbage truck 1838" complies with the requirements set forth in the Competition.

50. According to the facts of the case, the applicant, having become aware of the successful tenderer, formulated a general request to the contracting authority for access to the successful tenderer's tender and its documents. There is no dispute in the case that, at the pre-litigation stage of the dispute, neither information on the technical data of the mercedes benz 2024, Mercedes Benz 310 and DAF FAN CF 250 EUR05/HIAB 21/Crane" offered by the Supplier Groupenis, nor thefact that such a vehiclees The supplier's group of suppliers indicated in its proposal was not disclosed to the plaintiff i.

51. It should be noted that insupport of its decision determining the ranking and the winner of the tenders, the p-mite organisation, in support of its decision determining the ranking and the winner of the tenders, in respect of the mercedes benz 2024, Mercedes Benz 310 and DAF FAN CF 250 EUR05/HIAB 21/Crane proposed by the Supplier Group relied only on the court of first instance in its defence. In other words, the contracting authority revealed new circumstances that were not known (disclosed) at the pre-litigation stage of the dispute. Accordingly, the caselaw of the Court of Cassation on the definition of the boundaries of a public procurement dispute, as discussed above, presupposes that the contracting authority is restricted from proving the legality of its decision with new ones, that is to say, arguments not specified in the response to the claim.

52. Although the reliance of the contracting authority on new arguments not mentioned in the reply to the claim is, in principle, not possible, in such a case, the winner of the s konkursos (in this case, the Supplier Group) whose rights and interests will be affectedbythe court's decision should have an interest in proving the conformity of its tender with the requirements ofthe tender, be active and base its position on concrete arguments and evidence. Such a right of the successful tenderer shall not be limited to the extent to which the contracting authority responds to the claim. In the present case, the Supplier Group essentially defended its interests passively, transferring (transferring) the defence of its rights to the contracting authority, which, as stated above, the right to submit new arguments compared to the reply to the claim in the course of the trial is limited.

53. Thus, the aforesaid arguments of the contracting authority in respect of the vehicles, made only in the course of the proceedings before the court of first instance, as coming out of the bounds of the facts at the pre-trial stage of the dispute, should not have been considered and evaluated by the trial courts. In this regard, although partly inaccurate, the appellate court's arguments that the defendant's three vehicles (garbage trucks) referred to in the course of the trial are not taken into account and are not decided on the merits in the context of the assessment of the technical capacity of the Supplier Group are accepted as legally correct.

The interpretation and application of the financial and economic capacity laid down in point 4 of Annex 4 to the tendering specifications

54. As stated above, although the appeal in cassation did not raise the question of the conformity of the Supplier Group with the aforesaid requirement, in the event of any ambiguity on the part of the bench as to the proper classification and application of the tendering clause referred to and, accordingly, the legality of the defendant's conduct in assessing the conformity of the Supplier Group with that condition, the Court of Cassation, by way of appeal to the Court of Justice, *ex officio* raised issues related to these aspects. In this context, it should also be noted that the classification of the Tender Clause in question relates to the ex *officio* issue raised by the Court of Cassation in the assessment of false information, which is the subject of more detailed reference in this order.

55. Point 4 of Annex 4 to the tendering specifications requires that the supplier's average annual operating income for activities related to the collection and transport of mixed municipal waste during the last 3 financial years or during that period from the date of registration of the supplier (if the supplier has been in business for less than 3 financial years) is not less than 200 000 Eur excluding VAT. In order to justify thetitiktto thisam rtion, the supplier had to submit a free-form supplier's declaration to the contracting authority.

56. The court of cassation's appeal to the Court of Justice noted national jurisprudence according to which a means of proof of abstract content does not presuppose a restriction on the applicant to call into question the assessment of the conformity of the successful tenderer or his tender. Thus, the mere fact that the Supplier Group submitted the required declaration of conformity of capacity with the tender and, subsequently, the list of executed contracts, contrary to the findings of the courts, does not *per se* mean that its capacity meets the requirements of the Tender. In the present case, it is common ground that the applicant raised its doubts as to the conformity of the Supplier Group with the Tender Clause in question

(the applicant was not made aware of the specific evidence of the conformity of the qualifications of the Successful Tenderer) in the light of the possibility (presumption) that the Successful Tenderer would rely, *inter alia* (inter alia) on the applicant's co-operation with one of the Suppliers' Group a contract previously executed by members.

57. Indeed, the parties to the dispute themselves did not agree on the application of the requirement laid down in point 4 of Annex 4 to the TenderIng Conditions, not on its specific classification, but on the application, essentially generally taking the view that the condition of the turnover of an appropriate amount in the last year relates to economic (financial) capacity. The Contracting Authority, the Supplier Group and the courts have interpreted the qualification requirement of suppliers in question as meaning that, under the terms of the Tender, the economic operator proving the conformity of qualifications was not required to receive income only in his own name and/or for his own benefit (i.e. not as the main partner) and only for the management of mixed municipal waste in the case of the performance of a complex contract (various wastes); took the exact opposite position, taking the view that suppliers, under that requirement, were required to actually carry out the waste management services themselves, in particular for the collection and disposal of mixed municipal waste.

58. The question raised by the Court of Cassation in its appeal to the Court of Justice as to the classification of that condition was framed, in particular for the purpose of determining the legality of the conformity assessment of the capacity of the Supplier Group. It should be noted that, although the Court classified the requirement set out in point 4 of Annex 4 to the Tendering Conditions as a condition of economic and financial capacity, it has nevertheless, in the light of its specific content, made new interpretations as to its application. The meaning of the provisions of Directive 2014/24 is relevant for the interpretation and application of the terms and conditions of the Competition. In view of the above, the court's arguments that the Tender Terms and Conditions do not impose any restrictions on the proof of turnover on suppliers are not legally valid and, therefore, these are not applicable to them.

59. The Court has pointed out that, if the contracting authority has imposed only a requirement relating to the relevant minimum annual turnover and has not required that that fixed minimum turnover be achieved in the area to which the contract relates, there is nothing to prevent an economic operator from relying on the income received by the temporary group of undertakings to which it belonged, even if, under a given public contract, it did not actually contribute to the activities of that group, analogous to the activities to which the public contract relates, in respect of which that economic operator seeks to substantiate its economic and financial capacity (paragraph 77 of the preliminary ruling). Such an interpretation by the Court of Justice, which reflects the position of the Group of Suppliers, the Contracting Authority and the courts in the proceedings, essentially embodies the classic meaning of the content of the financial and economic capacity: it is sufficient for the supplier to prove the fact of the revenues generated under the contracts previously concluded and performed — ne dependent on their nature and the composition of the contractors.

60. However, the Court further clarified in its preliminary ruling that, although the turnover requirement concerns economic and financial capacity, where the tendering specifications require that a minimum turnover be achieved in the area to which the contract relates, that requirement pursues a twofold objective, namely, to determine the economic and financial capacity of economic operators and to help demonstrate their technical and professional capacity (paragraphs 72 and 78 of the preliminary ruling).

61. Thus, in the context of the court's interpretations referred to above, the selection criterion laid down in point 4 of Annex 4 to the TenderIng Conditions concerning the annual turnover in the course of activities relating to the collection and transport of mixed municipal waste is concerns the economic and financial capacity of economic operators, which is also aimed at demonstrating the technical and professional capacity of economic operators. In such a case, according to the court's interpretations, the economic and financial situation of an economic operator, as well as its technical and professional capacity, is a specificundertaking and relates only to that economic operator as a natural or legal person (see (see paragraph 78 of the preliminary ruling). This means that the tendering clause in question, although it qualifies as a condition of economic capacity, is applicable, *inter alia*, in the light of aspects specific to the requirements of professional capacity.

62. Referring by analogy to the judgment in *Esaprojekt*, the Court stated in its preliminary ruling that, where a contracting authority requires economic operators to have a specified minimum turnover in the area relating to the public contract in question, in order to prove their an economic and financial capacity may be relied on by an economic operator on the income received by the temporary group of undertakings to which it belongs only if it has actually contributed, under the relevant public contract, to the performance of the activities of that group, analogous to that to which the public contract relates, in respect of which that economic operator seeks to prove its economic and financial capacity (paragraph 82 of the preliminary ruling).

63. In the present case, it must be pointed out that the requirement(e) in point 4 of Annex 4 to the TenderIng Specifications concerning annual operating income excludes precisely the activities relating to the

collection and transport of mixed municipal waste, that is to say, activities which would have been carried outby a supplier who has won the Tender and awarded the public contract. In the light of the interpretations given by the Courtof Justice, under point 4 of Annex 4 to the Tendering Specifications, an economic operator may rely on the revenues of the joint venture group to which it belongs only if, under the specific public contract*, it* de *facto* (in fact) contributed to the activities of that group, analogous to that to which the public contract relates (paragraph 79 of the preliminary ruling).

64. According to the facts of the case, the Supplier Group, in support of the requirement of clause 4 of Annex 4to the Tender Conditions, submitted a free-form declaration of UAB Parsekas.Operating income in carrying out activities related to the collection and transportation of mixed municipal waste in the last 3 financial yearsamounts to EUR 235,510.79 excluding VAT.

65. The applicant has consistently (in the claim, in the pleadings) taken the position that UAB Parsekas, a member of the Supplier Group, did not carry out the activities of collection and transportation of mixed municipal waste, from which the average income per year would exceed EUR 200 000 excluding VAT. Tclaimed that UAB Parsekas does not carry out activities of this kind, citing as an example the reliance of UAB Parsekas on the agreement with the State Enterprise Klaipėda State Seaport Authority for the removal of waste from incoming ships. The applicant argued that, on the basis of the joint venture agreement, by participating in the execution of that agreement, UAB Parsekas itself had in fact mixed municipal waste collection and transport services does not provide, on the contrary, it is the applicant, as a joint venture partner, that has provided such services.

66. It should be noted that the specific contracts and the certificate of income received were submitted by UAB Parsekas to the defendant after the submission of the plaintiff's claim, together with the letter dated 13 December 2019, when the contracting authority asked for clarification of the data on the annualoperating income. Consequently, it was on the basis of those specifically referred to contracts, taking into account their content, *inter alia*, the contractual obligations of UAB Parsekas to its customers, that theconformity of the Supplier Group with the economic (financial) capacity had to be decided. It should be borne in mind that, according to the case-law of the Court of Cassation, if in the revised data, in their totality, the supplier has not corrected all the deficiencies or made new errors in order to ensure the concentration of the procurement procedures, the balance of interests of the participants in those relations and not to prejudice *the bonus pater familias* the principle (the standard of a careful and prudent person), the seller and the buyer are not subject to the right enshrined in the law to revisit the information of the economic operator's capacity, respectively, and the obligation to require it to do so (see (see paragraph 157 of the order of the Supreme Court of Lithuania of 11 November 2020 in civil case No e3K-3-272-378/2020 and the case-law of the Court of Cassation cited therein).

67. Both the courts of first instance and the appellate courts held that the Supplier Group had justified its compliance withthe requirement of clause 4 of Schedule 4 to the Tender Conditions. The court of appeal, agreeing with the assessment of the court of first instance, pointed out that UAB Parsekas submitted not only a free-form declaration, which would have been sufficient in accordance with the terms of the Competition, but also specific contracts, a certificate of the specified income received. It also emphasized that UAB Parsekas could rely on the agreements concluded with the State Enterprise Klaipėda State Seaport Authority on the basis of the joint activity agreement, since the terms and conditions of the Competition did not contain a requirement that the income received by the supplier be for the waste actually shipped by him, nor was there a requirement to deduct the share of each joint activity partner's income under the executed joint activity agreement.

68. The Bench observes that such a classification and interpretation by the courts of the requirement of point 4 of Annex 4 to the Tendering Conditions is not consistent with the interpretations given by the Court in its preliminary ruling, as discussed above, inter alia, that the condition of a procurement of this kind has a dual purpose: identify the economic and financial capacity of economic operators and help demonstrate their technical and professional capacity. Thus, contrary to whatthe courts have ruled, in view of the wording of the requirement 4 priedo 4 punk of the Terms and Conditions of the Competition, the income of Amos UAB Parsekas, received specifically for the services actually provided by it in connection with the collection and transport of mixed municipal waste.

69. JSC "Parsekas" did not prove in the process that *it was de facto* engaged in the activity of collecting and transporting municipal waste itself. In essence, it did not dispute that, according to the agreement of 13 April 2017 with the State Enterprise Klaipėda State Seaport Authority, it itself did not actually provide the services of collection and transportation of mixed municipal waste for the total amount of revenue it claims. On the contrary, in the written submissions submitted to the appellants, he claimedthat he had contributed to the activities carried out by the partners acting under the joint venture agreement, including the collection of mixed municipal waste, and took the position that the mere fact of the contribution (regardless of the scope of the services specifically provided) Enough. However, in the light of the interpretations set out above in the preliminary ruling, contributing to an activity constitutes an act

actually carried out in connection with the provision of the services in question, with the result that the mere presence of a group of suppliers which provided, inter alia, such services is not sufficient.

70. Even if, as stated by the courts, UAB Parsekas (as the main partners) when executing the contract with the State Enterprise Klaipėda State Seaport Authority, the part of the obligations included in the general value of the contract amounts to 35%. the total amount of the project (EUR 359,504.13 x 35% = EUR 125,826.46), the amount of revenue generated by it under this contract is not sufficient to substantiatethe requirement of the Tender Clause regarding at least EUR 200,00 of annual operating income in the course of activities related to the collection and transportation of mixed municipal waste (486 080,82 Eur (85 729,96 Eur + 136 230,46 Eur + 93 506,16 Eur + 34 984,28 Eur + 9803,50 Eur + 125 826,46 Eur) / 3 = 162 026,94 Eur). Thesame position was taken by the applicant in its response to the appeal on a point of law. In the light of the foregoing, it must be concluded that the Supplier Group did not meet the requirement of economic and financial capacity and that agroup of suppliers unlawfully assessed its compliance with that condition.

The recognition of the information in the proposal of the Tiekei group as false

71. SSA (2017) Law No XIII-327 of 2 May, in its version in force since 18 May. 1 January), Article 46(4)(4) provides that the contracting authority shall exclude a supplier from the procurement procedure if the supplier, during the procurement procedures, has withheld information or provided false information regarding compliance with the requirements laid down in that article and in Article 47 of that Law, and the contracting authority can prove this by any lawful means, or the supplier cannot prove this by any lawful means, or the supplier cannot, because of the false information provided, to provide the supporting documents required under Section 50 of this Act. It should be noted that, in contrast to the previous (before 1 July 2017) regulation of public procurement, Article 46(4)(4) of the LSA lays down a mandatory ground for the exclusion of suppliers due to false information provided to the contracting authority.

72. In the present case, theBench, since it had doubts as to the possible falsity of the information submitted by the Supplier Group (a member of the group) on the basis of a conformity with the tender clause on annual operating income, by appealing to the Court of Justice for ex *officio*, raised questions in that regard. In its order of 17 December 2019, the Bench of Judges raised doubts as to whether, in principle, in accordance with the circumstances of the Judgment of the Court of Justice in *Esaprojekt*, UAB Parsekas provided information on the income received from contracts that were either concluded and executed jointly with other economic operators who, in particular, performed the required proportion of mixed waste management services, or were concluded and carried out without partners, but even in this case, in addition to mixed waste, other waste was managed (in both cases, mixed waste occupied a smaller share of total waste management), in principle, it could not correspond to the careless presentation of data, i.e. i.e. the situation of false information.

73. In its judgment in *Esaprojekt*, cited above , the Court of Justice treated as gross negligence on the part of the supplier his conduct which led to the classification of the information submitted as false when the supplier, in order to meet the general professional requirement, had fulfilled at least two contracts for the installation of software in the administrative and medical parts of the hospital together, submitted, inter *alia*, a contract by which, together with another company in the consortium, *de jure* (legally) obligations were made to install the software for these parts jointly, but *the de facto* partners fulfilled the relevant parts of the contract independently.

74. Theinterpretations of the case-law of the Court of Cassation that, according to the LSA, information can be declared false only if the verification of its conformity with the truth does not require an additionalethical interpretation (order of the Supreme Court of Lithuania of 24 February 2016 in civil case No e3K-3-112-969/2016, paragraph 53), are to be taken into account.The current case-law of the Court of Cassation states that the criterion of additional legal interpretation asthe basis for classifying data as (un)false information is not absolute and has limits of application and cannot be abused (see paragraph 118 of the above order of the Court of Cassation in civil case No e3K-3-272-378/2020).

75. The case-law of the Court of Cassation interpreting the finding of the information provided by the supplier as false has, *inter alia*, pointed out that the information must be regarded as false after establishing the cumulative existence of elements of the objective (non-compliance with the truth (reality) is of a factual rather than a legal nature) and subjective (the provider of the information perceives or must perceive that it does not correspond to reality) (see. Order of the Supreme Court of Lithuania of 28 February 2017 in civil case No. e3K-3-106-690/2017 item 39). However, such an interpretation of the law does not mean that the factual details of the tender cannot be assessed additionally; since the specific factual content of the tender can be determined both in the initial evaluation of the tenders, in the assessment of the explanations of the tender submitted after the request of the contracting authority, or in

the examination of the claim submitted by the supplier or in the settlement of the dispute in court (see Order of the Supreme Court of Lithuania of 4 January 2018 in civil case No e3K-3-16-378/2018, paragraphs 53, 54).

76. It has also been pointed out by the Court of Cassation in that regard that the classification of information as false does not in itself mean only distorting or concealing data, but also referring to situations in which the supplier does not actually meet the terms of the tender, but creatively presents the information in such a way that it is technically correct and gives the impression that the conditions are met; in other words, these are situations in which the means of proof itself is correct, however, it is not suitable, if the supplier understands (or should have understood), to prove the conformity of his capacity with the requirement made (see paragraph 130 of the order of the Court of Cassation in civil case No e3K-3-272-378/2020, referred to above, and the case-law of the Court of Cassation cited therein).

77. Pagal the interpretations given by the Court of Justice in the preliminary ruling, the court itself may find that the information submitted is false (see Paragraphs 144, 148 of the preliminary ruling), and the Court of Cassation, in its enquiry before the Court, took a preliminary view of that assessment as to the conformity of the information contained in the supplier group's tender and its revision with point 4 of Annex 4 to the Tender Specifications. However, in the light of the Court's interpretations concerning the assessment of economic and financial capacity, where the turnover requirement is made in a specific area, in the present case the information of PARSEKAS UAB cannot be classified as false within the meaning of Article 46(4)(4) of the LSA.

78. In this context, it should be noted that the Court of Cassation itself had questions as to the legal classification and application of the tendering clause in question (whether it is a question of economic financial or technical capacity and whether the answer to that question determines the procedure for assessing the capacity of the supplier of information), and that those doubts must therefore be regarded as falling withinthe scope of thes to a situation of legal interpretation and does not give rise to a decision on the recognition of information as false. In addition, it should be noted that the interpretations given by the Court in its preliminary ruling on the purpose(s) of the contested contest of a dual nature as to the purpose(s) of the tendering clause are to be regarded as new.

79. In the view of the Bench, the tems of the first and appellate instances, having misclassified and interpreted the requirement of clause 4 of Schedule 4 to the TenderIng Conditions, wrongly found the legality of the defendant's conduct by admitting that PARSEKAS UAB had substantiated its declaration of as annual income from activities related to the collection and transport of mixed municipal waste. The totality of the circumstances of the case established by the courts forms the basis for finding that the Supplier Group (UAB Parsekas) did not meet the requirement of clause 4 of Annex 4 to the Tender Conditions, but does not presuppose the conclusion that the information provided by the Supplier Group (UAB Parsekas) should have been consideredama as false.

80. In the light of the foregoing, in the present case, there are no grounds for deciding not only on the conduct of UAB Parsekas within the meaning of Article 46(4)(4) of the LSA, but also on the possibility of that economic operator being cleansed (rehabilitated) (see Paragraphs 50, 51 of the order of the Supreme Court of Lithuania of 17 November 2021 in civil case No. e3K-3-278-969/2021), but also on whether this entity, and at the same time its partners, are to be included in the list of participants who submitted false information.

81. In this context, it is only the court's interpretations that, pagal, the principle of proportionality, requires the contracting authority to make a specific and individual assessment of the conduct of the entity concerned;to this end, the contracting authority must take into account the means at the tenderer's disposal to verify whether the entity whose capacity it intended to rely on has committed an infringement;prohibits provisions of national law according to which, where an economic operator who is a member of a group of economic operators has seriously distorted the facts by providing the information necessary to verify that there are no grounds for exclusion of a group or its compliance with the selection criteria, and its partners are not aware of those distorted facts, the measure of exclusion from any public procurement procedure may apply to all the members of that group (preliminary ruling judgment, paragraphs 157, 158).

Interpretation and application of the requirement of technical and professional capacity laid down in point 2 of Annex 4 to *the TenderIng* Specifications

82. Point 2 of Annex 4 to the tender specifications sets outthe requirement of technical and professional capacity forthe supplier to own or rent vehicles that meet specific technical requirements: at least 1 garbage truck, compliant with standard EURO 5; 1 container washer; 1 car in the householdfor the collection of bulky, electrical and electronic equipment, hazardous waste and other wasteby detour; all

vehicles must be equipped with GPS transmitters; at least one of these vehicles must be able to serve underground containers. In order to substantiate this requirement, the supplier was obliged to provide a list of vehicles,to indicate the technical data and data, the state registration certificates and the card of the results of valid roadworthiness tests, documents proving the legitimate grounds for using the vehicle.

83. In its application to the Court for a preliminary ruling, the Bench expressed doubts as to the classification of the tendering condition referred to above, all the more so since the conditions in question relating to the EURO 5 standard and the GPS transmitter were also laid down as a requirement of a technical specificationi. Onthe basis of the fact that the existing national procurement regulation provides suppliers with a different right to adjust qualifications and tender data (Articles 45(3) and 55(9) of the LSA), in the light of the Court of Justice's previous case-law on the distinction between the qualification conditions of suppliers and the requirements for the assessment of a tender, the Court of Cassation raised the question of whether this condition should be regarded as a qualification requirement or requirement relating to the subject-matter of the contract, the performance of the contract, etc.

84. The Court of Justice stated in its preliminary ruling that Directive 2014/24 does not exclude the possibility that technical requirements may also be understood as selection criteria relating to technical and professional capacity, as technical specifications and/or as conditions for the performance of a contract within the meaning of Articles 58(4), 42 and 70 of that directive respectivelyius (paragraph 84 of the preliminary ruling). Thus, K's requirement for vehicles complying with specific technical data can be regarded as a selection criterion relating to technical and professional capacity or to a technical specification or even a condition for the performance of a contract (paragraph 90 of the preliminary ruling).

85. With regard to the latter aspect (i.e. the technical requirements as a condition for the performance of the contract), attention should be drawn to the caselaw of the Court of Justice and the Court of Cassation, according to which contracting authorities may raise in public procurement documents requirements which are relevant during the performance of the contract but cannot verify their conformity in the context of public procurement procedures (see Paragraphs 51, 52 of the order of the Supreme Court of Lithuania of 21 October 2021 in civil case No e3K-3-405-469/2021 and the case-law of the Court of Justice cited therein). The bench finds that the technical requirements for garbage trucks, in view of their universal nature (once the contract has been performed, GPS transmitters and vehicle pollution indicators will be able to be relevant even with the reintroduction of these devices), as well as the interpretation of the content and purpose of the requirements in question in the preliminary ruling in the Decision, to be classified as conditions of technical capacity and technical specification which may have been raised and verified in the course of the procurement procedures.

86. With regard to the requirement of Annex 4(2) to the Tender Specifications in question, theCourt of First Instance held that the Supplier Group had failed to substantiate this requirementof technical capacityand that the vehicles Nissan Primaster and Mercedes Benz 1838 does not meet all the criteria set out in the condition, but the fact that the vehicles referred to by the defendants are Mercedes Benz 2024, Mercedes Benz 310 and DAF FAN 75 CF 250 EURO 5 HIAB 21 were referred to in the motion in the case, unproven.

87. The defendant submits in its appeal on a point of law that the appellate court, without considering the totality of the tender data submitted by the Supplier Group, wrongly held that the Supplier Group did not rely on the Mercedes 2024, Mercedes Benz 310 and DAF FAN CF 250 EURO5/HIAB 21/Crane vehicles. According to the defendant, although all the necessary documents were submitted with the proposal, if the court considered that insufficient data had been submitted with the proposal for the garbage truck "DAF FAN CF 250 EURO5/HIAB 21/Crane", the court was obliged to rely on Article 45(3) of the LSA and the case-law of the Court of Cassation and to suggest to the Supplier Group to clarify the qualification data. The panel of judges finds the arguments in this appeal to be unfounded.

88. As has already been pointed out, at the pre-litigation stage of the dispute, the boundaries of the dispute are determined by the content of the claim and the response to it. Since the response to the claim does not contain any information about the vehicles offered by the Supplier Group mercedes benz 2024, Mercedes Benz 310 and DAF FAN CF 250 EUR05/HIAB 21/Crane (including the contract of obligations for the purchase of the latter vehicle) it was not presented, and accordingly, the fact of the conformity of these vehicles with the requirements of the Tender Conditions could not be relied upon by the defendant to substantiate the legality of its actions in its pleadings submitted to the courts, and the trial courts had no reason to assess them either.

89. There is no dispute in the case that, in assessing the conformity of the qualification (and the technical aspects of the offer) by the Supplier Group only on the basis of the vehicles Nissan Primaster and Mercedes Benz 1838, which do not meet the requirements of point 2 of Annex 4 to the Tender Specifications. Consequently, that circumstance alone would be a ground for holding that the appellate court's finding that the Group of Suppliers did not meet the qualification requirements set out in point 2 of Annex 4 to the Tender Specifications, entitled 'Technical and professional capacity', is well founded.

90. The arguments put forward by the defendant in the appeal on the ground that the decision of the appellate court infringed the regulation of the LSA are not legally valid (Article 45(3)). *Firstly*, the defendant herself did not assess during the procurement procedures that the data on all the vehicles were vague and inaccurate, and it did not contact the Supplier Group on its own initiative. *Secondly*, in response to the applicant's claim, the defendant asked the Supplier's Group to clarify the information about the declaration of compliance with the technical requirements issued by UAB Parsekas (Annex 8 to the Tender Conditions), but did not apply separately for a document of a similar nature and the commitment agreement of UAB Klaipėdos transportas; as indicated above, the possibility of adjusting the data in the proposal is applicable only once. *Thirdly*, the appeal in cassation states that these data were at all times in the offer of the Supplier Group (a position which it took in both the first instance and the appeal proceedings). *Fourthly*, the contracting authority has, in principle, the right to question the legality of its decision in the proceedings (order of the Supreme Court of Lithuania of 11 December 2013 in civil case No 3K-3-656/2013), but in the present case the defendant asks the Court of Cassation to maintain in force the decision of the court of first instance declaring its actions to be lawful. Thus, the defendant in the proceedings emphasises precisely the basis of the scope (content) of the original offer of the Supplier Group, which, as stated above, is limited to relying on. *Fifthly*, the appeal in cassation states (the correctness of these arguments is not decided separately)that in certain cases the court itself must fulfil the obligations arising from Article 45(3) of the LSA in favour of the contracting authority, but neither the contracting authority nor the Supplier Group has expressly refuted the arguments of the court of appeal in relation to the garbage truck "DAF FAN CF 250 EUR05/HIAB 21/Crane" as a means of proof of technical capacity is not suitable for use.

91. In that regard, it should be noted that the defendant, in arguing that the Supplier Group had offered a vehicle in conformity with the EURO 5 standard, submitted to the Court of First Instance a contract of commitments dated 22 November 201 concerning the DAF FAN CF 250 EUR05/HIAB 21/Crane, in respect of the garbage truck 'DAF FAN CF 250 EUR05/HIAB 21/Crane'. acquisition (this contract was recognized by the court of first instance as non-public case file), as well as an advertisement from the Internet networklapio. The defendant states in its appeal on a point of law that, pursuant to the contract of obligations of 22 November 201, the Supplier Group hasacquired and will dispose of the DAF FAN CF 250EU/HIAB 21/CRANE garbage truck during the performance of the contract, only that vehicle has not yet been delivered and registered in Lithuania at the time of submission of the tender. Apelicia court considered that there was no clear basis for the possible acquisition of the DAF FAN 75 CF 250 CF 250 EURO 5 HIAB 21 garbage carrier, on which, according to the defendant, the claim concerning the euro 5 standard was based, since the contract of obligations of 22 November 201 and the public announcement on the Internet networklap. did not prove the agreement purchase specific garbage trucksto.

92. Article 49(1) of the LSA provides that the supplier may rely on the capacities of other economic operators to meet the requirements of the financial and economic capacity set out in the procurement documents in accordance with the provisions of Article 47(3) of the LSA or the requirements of technical and professional capacity in accordance with the provisions of Article 47(6) of the LSA, irrespective of the legal nature of the relationship with those economic operators.

93. In accordance with the settled case-law of the Court of Justice, any economic operator is entitled to rely on the capacities of other entities when participating in a given procurement, irrespective of the legal nature of its links with such entities, if the candidate or tenderer proves to the contracting authority that it will indeed have access to the resources of those economic operators necessary for the performance of the contract; although the participant is free to enter into relations with the entities whose capabilities he relies on and to choose the legal nature of such a relationship, he must provide evidence that he will indeed have access to the resources of that entity which are not owned by him and are necessary for the performance of a particular contract (see Court of Justice 2016 7 April sjudgment in *Partner Apelski Dariusz*, C-324/14, paragraphs 33 and 37 and the case-law of the Court of Justice cited therein).

94. The Court of Cassation has also stated that, in acase, it is for the supplier to prove to the contracting authorities that the capacities of third parties (regardless of their actions on behalf of the contracting authorities) will be effectively available to him throughout the performance of the public contract (see Order of the Supreme Court of Lithuania of 22 June 2017 in civil case No. e3K-3-279-690/2017 paras. 48-53).

95. In the present case, neither under the terms of the Tendering Procedure nor, in general, from the point of view of the legal framework for public procurement, the content of the contract for commitments of 22 November 201 does not meet the criterion of reality, that is to say, it does not substantiate the supplier group's legitimate basis for the use of the DAF FAN CF 250 EUR05/HIAB 21/Crane. Such a conclusion is due to the fact that the seller indicated in the contract does not own the vehicle (the defendant's own extract from this contract in the cassation complaint states that the vehicle will only belong to the seller in the future), it is not clear who owns it, the contract does not specify the price, and these provisions are the essential conditions of the contract for the sale of the item (Civil Code of the Republic of Lithuania 6.305(1), 6.413(2)), nor is there any data (e.g. engine numbero)) to identify a specific vehicle. In view of

the above, I agree with the appellate court's assessment that the contract of obligations does not prove the real availability of the Supplier Group in particular to the 'DAF FAN CF 250 EUR05/HIAB 21/Crane' garbage truck.

96. Kai supplier wishes to rely on the capacities of other economic operators, he must prove to the contracting authority in the tender(s) that, in the performance of the contract, the resources of the economic operators whose capacities he relies on will be available to him (Article 49(3) of the LPA). The presented assessment of the content of the contract of obligations presupposes not only the conclusion that the Supplier Group flawedly relied on technical capacity, but also the fact that the third party does not own it himself. In the light of the foregoing, it must be held that the Supplier Group has not properly identified a third party whose resources it could rely on to prove compliance with the technical capacity requirement. The Court of Cassation held that if it is not possible to determine in any way from the totality of the tenderer's tender his intention to rely on the capacity of other persons, the possibility of submitting such evidence at a later stage is not recognized (order of the Supreme Court of Lithuania of 30 November 2017 in civil case No e3K-3-354-690/2017, paragraph 41).

97. The provisions of the legal framework governing public procurement referred to above and the case-law of the Court of Cassation(a) and the interpretations given in the preliminary ruling presuppose that, contrary to the defendant's argument in the appeal on a point of law, there would be no legal basis for enabling the Supplier Group to clarify the data relating to the garbage truck ' DAF FAN CF 250 EUR05/HIAB 21/Crane". If it is accepted that the data provided by the Supplier Group concerning the vehicle "DAF FAN CF 250 EUR05/HIAB 21/Crane" are inadequate, it must be concluded that the Tiekeel group did not offer a vehicle complying with the EURO 5 standard. Accordingly, the appellate court's finding that the group of T ie haresdoes not meet the requirement of technical and professional capacity laid down in point 2 of Schedule 4 to the Tender Conditions must be held to be well founded.

The contracting authority's refusal to make the applicant aware of the relevant parts of the supplier group's tender and the assessment of that refusal in the course of the legal proceedings

98. During the tendering procedures, the applicant submitted a request to the contracting authority for inspection of the successful tenderer's tender, the defendant made part of the bid of the Supplier Group available to it and did not make the other part available to it as confidential. In its claim to the contracting authority, the applicant did not specifically question such actions on its part, but instead applied to the Court of First Instance for the recovery of the relevant particulars of the successful tenderer's tender. The court of appeal did not decide on this issue separately, and in the cassation proceedings, the applicant, before submitting its response to the appeal on a point of law, submitted to the court a request to make available to the court of first instance the confidential data of the offer of the Supplier Group, which was recognized as confidential by the Court of First Instance, by separately masking commercially sensitive information.

99. In the proceedings before the Court of First Instance, the question of the non-disclosure of part of the offer of the Supplier Group to the plaintiff was considered several times: the application made by the plaintiff in the application for recovery of the relevant data from the defendant was granted by a court resolution; the defendant did not agree with such an obligation to provide information, requested that it be amended; subsequently, three unchallenged orders partially did not satisfy the individual requests of the plaintiff to recover the relevant data from the defendant. the relevant particulars of the Successful Tenderer's tender, treated as a trade secret and non-public file. In view of the above, in the present case, the following waste management contracts have been recognised as non-public data: waste management contracts of UAB Parsekas; JSC "Klaipėdos transportas" concluded a contract of obligations regarding the purchase of a garbage truck; The suppliers' group's proposal contains declarations of the technical characteristics of some of the vehicles.

100. The Bench observes that although the part of the dispute between the parties in question, in view of the examination of other aspects of their disagreement relating to the legality of the assessment of the capacity of the Supplier Group, is not decisive for the procedural outcome of the case, the scope of the cassation proceedings reviewed above (paragraph 42 of this order) is of decisive importance for the procedural outcome of the case, but because of the scope of the cassation proceedings reviewed above (paragraph 42 above), grounds for speaking separately on the (non-)disclosure of tenders for certain rights and obligations of suppliers and contracting authorities (and courts). It should be recalled from the caselaw of the Court of Cassation according to which, where a question of European Union law in question is raised in a binding act of the Court of Justice, the caselaw of the Court of Cassation develops without applying the rules for reversing the rules on the reversal of previous jurisprudence (see (see

paragraph 51 of the order of the Supreme Court of Lithuania of 27 June 2018 in civil case No e3K-3-317-469/2018 and the case-law of the Court of Cassation cited therein).

101. In that context, it must be noted, first of all, that, according to the Court's interpretations concerning the rules applicable to the publication of a tender of one supplier to another supplier, the provisions of Directive 2016/943 are not relevant (paragraphs 96 to 102 of the preliminary ruling). In the light of the foregoing, it must be concluded that, in disputes between suppliers and contracting authorities concerning the (non)disclosure of a tender from one tenderer to another, the provisions implementing the provisions of Directive 2016/943, such as Article 1 of the CCP 10, are not applicable. On the other hand, the mere fact that the provisions of the directive referred to above reproduce the national regulation previously in force concerning the definition of a trade secret (Article 1.116 CC) does not mean that this (and the caselaw interpreting them) renders those (and the caselaw interpreting them) irrelevant.

102. It has been clarified by the Court of Cassation that the subject matter of the procedure for reviewing the decisions (or actions) of the contracting authority is any decisions of the contracting authority which infringe the provisions of the legal framework governing public procurement, without imposing any restrictions on the nature and content of those decisions, irrespective of the possibility of the supplier being awarded damages and the moment the decisions are taken. Any decision taken by a contracting authority in respect of a public contract which falls within the *ratione materiae* of the regulation of public procurement (substantive basis) and which may have legal effects, whether or not that act is adopted in the framework of a formal contract award procedure, constitutes a decision to which the review procedure is to be applied (see Order of the Supreme Court of Lithuania of 23 May 2018 in civil case No. e3K-3-211-248/2018, paragraphs 57, 58 and the case-law of the Court of Justice cited therein).

103. In view of the above, the Court of Cassation held that the supplier's subjective right of access to his competitor's tender is separately enshrined in law and is therefore autonomous and protected; although the right of suppliers to have access to the tenders of other suppliers does indeed have the characteristics of a procedural element, the nature of the claim made in order to defend the exercise of that right is therefore not to be regarded as purely procedural and not separately (independently) protected (see e.g. the order of the Court of Cassation in Civil Case No. e3K-3-211-248/2018 paras 67, 70). It should be noted that, in principle, identical interpretations are given in paragraphs 103 to 111 of the preliminary ruling.

104. Thus, according to the case-law of the Court of Cassation and the Court of Justice, a decision of a contracting authority not to make a tenderer,in whole or in part, the tender of another supplier public , but is an independent, separately contested decision, which alone may lead to the initiation of a review procedure, that is to say, a claim lodged and, where appropriate, an action brought before a court, without further questioning the other decisions of the contracting authority, such as the conclusion of other decisions of the contracting authority, such as the ranking of the winners of the public procurement tender, the legality of the legality. It is the applicant himself who chooses, in a particular case, a specific remedy for his rights, that is to say, merely to challenge the decision of the contracting authority not to acquaint himself with another supplier's tender or to call that decision into question with other decisions taken in the course of the procurement procedure.

105. It should be noted that the LSA (including Directive 89/665) does not specify the contested decisions of the contracting authority, so that the decision of the contracting authority in question not to disclose the information requested (not necessarily related to the proposal of another supplier) ex *lege* (by law) is one of the possible subject of the review procedures. In view of the fact that the position put forward by the applicant in its written submissions to the Court of Cassation that the LSA does not impose an obligation on suppliers to submit a claim against the contracting authority's decision not to make public another tenderer's tender is recognised as legally unfounded.

106. Attention should be drawn to the fact that, as the Court noted in its preliminary ruling, the subjectmatter of the review procedure is not only the decision of the contracting authority not to disclose the relevant particulars of the tender, but also to make those particulars public, since such a decision necessarily affects the rights and obligations of a particular economic operator, *inter alia*,, a relationship based on trust between him and the contracting authority, a competitive advantage (paragraph 126 of the preliminary ruling). In view of the above, it must be concluded that the principle of effective protection of rights applies not only to the applicant for information, but also to its holder.

107. In this context, it should be noted that the decision taken by the contracting authority to make public the relevant particulars of the tender which, at the direction of the economic operator which submitted them, are confidential, that is to say, in the light of the differences between the assessments made by that supplier and the contracting authority as regards the protection of specific data, must not coincide with the *de facto* temporal disclosure. According to the Court of Justice, the holder of the information to be disclosed must in any event be given the opportunity to seek interim measures from the contracting authority or the court in order to avoid irreparable harm. A similar position is taken in the case-law of the Court of Cassation, which has noted that in certain cases, although *it is not de jure* obliged to apply the

period of deferral, the contracting authority, while ensuring the effectiveness of the defence of rights, must give time to appeal against its relevant decision to the supplier seeking to prevent the implementation of that decision (see, by analogy, the order of the Supreme Court of Lithuania of 6 April 2010 in civil proceedings No. 3K-3-150/2010).

108. Section 101(1)(1) of the LSA provides, *inter alia*, in general terms, that a supplier who considers that the contracting authority has not complied with the requirements of this Act and thereby has infringed or will prejudice his legitimate interests may apply to the court for annulment or amendment of decisions of the contracting authority which do not comply with the requirements of that Law. (not)to make the offer of the supplier concerned illegal, but also to modify its content, i.e., to narrow or expand the scope (nature) of the information to be (not) disclosed to the plaintiff (see paragraphs 110, 120, 121 above).

109. The regulation of public procurement in question presupposes, inter alia, the aforesaid restrictions on the parties to the procurement dispute to rely on new grounds or to raise new requirements in the proceedings (paragraphs 45, 47 of this order). In view of the above, a supplier who fails to submit to the contracting authority a claim for that refusal to make it aware of another tenderer's tender shall, in principle, be limited, subsequently in the proceedings, to question and/or indirectly (by means of a claim) such a decision of the contracting authority, either directly (by means of a claim) or indirectly (by asking the court to recover evidence) and/or to rely on new facts which have come to light in the proceedings, if he has not properly implemented his interests in the course of the procurement procedures.

110. On the other hand, it should be noted that the relevant facts of the case may be made public on the own initiative of the court hearing the dispute between the parties. The established rules on the publicity of the hearing and the application of the publicity of the case-file underline the exclusivity of the non-application of the principle of public hearing and require that the publicity of the case be limited only to the extent and to the extent necessary to protect the rights and legitimate interests of the parties. when making a written order declaring a certain part of the material in the case to be non-public, the court must individualise the information to be protected (specific evidence) and argue the need to protect it; the higher court, in a case in which the lower court had appointed a closed hearing and/or declared all or part of the case file to be non-public, is not bound by this decision and may choose a different scope and method of publicity of the hearing and/or the publicity of the case file. The court, recognizing certain material as non-public or appointing a closed hearing, decides on a question of a procedural nature; i.e.a traffic speech on a procedural issue does not have the force of *res judicata* (final court decision) (see, for example, paragraphs 64, 67, 70 of the order of the Supreme Court of Lithuania of 14 February 2017 in civil case No. 3K-3-72-421/2017).

111. Where the court *ex officio* modifies the procedural decision of the lower court on the content (scope) of the non-public file and declares the relevant case file to be public, in view of the legal regulation on public procurement discussed above, the plaintiff, who at the pre-litigation stage of the dispute did not properly question the decision of the contracting authority not to disclose the relevant data, has the right to to rely on data made public on the court's initiative to the extent that this does not lead to a statutory restriction on the assertion of new claims in legal proceedings and to reliance on new grounds.

112. It should be noted that the applicant, as stated above, although it did not specifically question in the claim the decision of the contracting authority not to make public the bid of the Supplier Group, it has always consistently argued that it does not meet the requirements of financial and technical capacity and that the information recognised as confidential relates precisely to those qualification conditions. In view of the fact that the applicant was not provided with the relevant information (paragraph 51 of this order), the bench of the Judges will not decide specifically in the present case whether, in view of the fact that it has not properly exercised its defence of rights at the pre-litigation stage of the dispute, the applicant could lawfully have used the classified information if, at any stage of the proceedings, those data were *exmitted by the court officio* would be recognized as public file in the case.

113. With regard to the latter aspect, it should be noted, first of all, that, according to the consistently established caselaw of the Court of Cassation, the supplier's right to protect the non-public information separately contained in the tender covers only those data which qualify as a commercial/industrial secret in Article 1.116(1) of the CC in the sense of the part; The mere fact that, in other cases (as a general rule), certain information relating to the supplier and his activities is not freely available to other economic operators does not mean that it is protected in public procurement procedures if it does not correspond to the concept of a trade secret; thus, it is the recognition of data as a trade secret that is the most important criterion for deciding the question of providing information to the supplier about another supplier, his proposal (see, for example, paragraphs 59, 60 of the order of the Supreme Court of Lithuania of 13 January 2021 in civil case No e3K-3-184-248/2021 and the case-law of the Court of Cassation cited therein). It should be noted that the Court's interpretations do not call into question this nature(s) of the (non)disclosure.

114. In the preliminary ruling, the purpose of public procurement is to ensure undistorted competition, and it is therefore necessary that the contracting authority does not disclose information which could harm the

fair competition between economic operatorsin the context of a dispute or in other tenders; moreover, in the event of a relationship of trust between suppliers and the contracting authorities in the context of a public procurement procedure, suppliers who have submitted tenders must be to ensure that the contracting authority does not disclose to other tenderers information which would cause them harm (paragraphs 115, 117 of the preliminary ruling). In order to ascertain whether the information requested for disclosure has such characteristics, the contracting authority must cooperate with the economic operator submitting the tender in order to provide a detailed explanation of the relevant circumstances on the basis of which a legitimate decision may be taken.

115. To this end, it must contact the supplier concerned, ask him to explain the specific reasons and reasons why certain information has been marked as protected, and, upon receipt of these explanations, evaluate them. As has been clarified in the case-law of the Court of Cassation, such cooperation between the contracting authority and the tenderer who submitted the tender is possible even in cases where the economic operator does not indicate in advance that any part of his tender is confidential (see Order of the Supreme Court of Lithuania of 18 October 2013 in civil case No 3K-3-495/2013). The contracting authority must in any event take a decision on the (non-)disclosure of the relevant part of the tender, regardless of the passivity of the tenderer who submitted the tender, non-cooperation.

116. Itis to be noted that neither the respondent at the pre-trial stage of the dispute nor the trial court in the proceedings, in the opinion of the bench of the judges, has clearly substantiated its decisions not to disclose the relevant details of the offer of the Supplier Group on the above grounds (paragraphs 41, 49, 66, 88, 91 of this order). Although, in its defence, the defendant stated that the information requested could cause damage to the economic entities constituting the Supplier Group, undermine competitive advantages and restrict opportunities to compete, it did not comment further on this, especially since the applicant and the entities constituting the Supplier Group, in particular UAB Klaipėdos autobusų parkas and UAB Klaipėdos transportas, are engaged in atypical activities. The Court of First Instance did not give any reasons at all to its decisions to declare that part of the proposals submitted by the third party were not public.

117. In the light of the foregoing, it must be held that, in the present case, the data recognised by the courts as confidential information are to be regarded as public file in the case. *First*, as regards the declarations of the technical characteristics of the vehicles, it should be noted, on the one hand, that the models of garbage trucks were common to all the parties to the dispute in the proceedings and, therefore, the declaration of their characteristics in accordance with the Tender Documents cannot undermine or cause damage to the competitiveness of the members of the Group of Suppliers. *Secondly*, the obligation agreement concluded between UAB Klaipėdos transportas and UAB Verslo alėja is also not to be recognised as falling within the scope of the trade secret of the contractors, since this one-page agreement (without the details of the parties and the attached photograph of the vehicle) does not contain, in principle, any provisions presupposing the competitive advantage of these economic entities; moreover, as indicated above (paragraph 95 of this order), in it, in addition to the declaratory provisions that the seller himself will purchase for an undetermined price the vehicle "DAF FAN CF 250 EUR05/HIAB 21/Kranas" and sell it to UAB Klaipėdos transportas, as well as the terms of transfer of this vehicle, etc. the conditions, according to the panel of judges, do not contain any commercially sensitive information, the disclosure of which could cause harm to contractors. Although the vehicle lease agreement between UAB Parsekas and UAB Salarijus is of a wider scope, it also did not identify any commercially sensitive data, especially since, as indicated above, information was made public at the pre-trial stage of the dispute that the vehicle Nissan Primastar would be used.

118. *Thirdly*, the five sanitary toll contracts submitted by PARSEKAS UAB, concluded with different customers, according to the Court of Cassation, also do not contain any relevant data that could cause damage, undermine the competitive advantage. , that they were prepared specifically by UAB Parsekas, they contain general provisions on the contractual obligations of the service provider and the customer (for example, how long it takes to issue an invoice, the amount of interest on late payment is applied) that are characteristic of contracts of this kind; moreover, although annexes 2 to the contracts refer to the rates, these annexes have not been submitted to the court; Annexes No 1 to these contracts are not completed and define the application for the waste that can be collected, which should be completed in the case of a specific order.

119. It should be noted that, even if the contracting authority and the court had rightly recognised the abovementioned documents as confidential information (non-public file), in any event their actions did not guarantee the applicant's rights to effective protection of rights. the decision contains interpretations according to which both contracting authorities and courts must ensure an appropriate balance between the interests of the two suppliers, namely the applicant for the information and the holder. This obligation on their part means not only that cooperation must be carried out with the tenderer who submittedthe tender , asking him to provide detailed and clear explanations justifying the confidentiality of the information, in the light of those explanations and in a reasoned decision on them, but also in the fact that he must be sufficiently motivated to provide information to the economic operator requesting it.

120. In the light of the court's interpretations (paragraphs 120 to 126, 135 and 136 of the preliminary ruling), it must be concluded that, contrary to what has occurred in the present case, even where it is reasonably concluded that certain data are of a confidential nature and must therefore be protected, that does not mean that no information can be provided to the person requesting the information. Contracting authorities, as indicated above, must give reasons for their decisions in this field, in accordance with the principle of sound administration, and the scope of such an obligation is directly correlated with the nature(s) and extent of the information to be protected.

121. In any event, the document *in corpore* itself (in its entirety), such as the contract, cannot be disclosed to another economic operator, since the protection of the information cannot negate the duty of reasoning and presuppose a fictitiousness of the defence of the plaintiff's rights. In view of this, the arguments for not acquainting the supplier with the proposal of another tenderer cannot be limited to an indication of the confidentiality of information. The contracting authority (and the courts), when reconciling the right of one supplier to the confidentiality of information and its protection with the imperative of effective defence of the rights of another supplier, must, depending on the specific balance between those interests, provide the supplier requesting the information with at least a minimum amount of information so that it can decide on its basis the need to initiate a review procedure.

122. As stated by the Court, the contracting authority is obliged to notify its decision to treat certain data as confidential *as neutrally as possible and in such a way that such notification preserves the* confidentiality of the specific elements of those particulars (and therefore not all of them) *whose protection is justified in that regard, their essential content*; *to this end, the contracting authority may provide a summary of certain aspects of the tender and their technical characteristics in order to prevent the content of confidential information from being identified*; *it may also provide the proposing entity to request a non-confidential version of documents containing confidential information.*

123. Thecourt of cassation's interpretations that the relevant data can, in principle, be systematized and presented in such a way that, although their disclosure will make it possible to understand what equipment, materials, etc. are part of the subject-matter of the public contract, it will not reveal the specific technological solutions proposed by the supplier (answers as to how, in what way a particular device works, what components it is composed of, etc.), his *knowledge-how (know-how*, technological innovations), drawings, etc.; rin the presence and general knowledge of several technological solutions for a particular object in the inca, the choice of the economic operator participating in the public procurement procedure, which one of the possible technical solutions to use, *does not per se* (in itself) constitute a trade secret (see paragraph 47 of the above order of the Court of Cassation in civil case No e3K-3-16-378/2018).

124. In addition, the Court of Cassation has also clarified in this regard that, where a conflict arises in a case between the clarity of the procedural decision and the completeness of the statement of reasons and the desire to protect the trade secret of a party to the proceedings, the court must, as far as possible, ensure the achievement of both of those objectives; a decision of limited content, anonymised by a procedural decision and a detailed reasoned decision, including the use of confidential information, could only be seen by a higher court if it continued to deal with the same dispute or by another court re-examining the case (paragraph 75 of the order of the Court of Cassation in civil case No e3K-3-16-378/2018 referred to above).

125. The Court of Cassation clarifies that if the court hearing a dispute between the parties concerning the non-disclosure of confidential information and finds that the decision of the contracting authority not to disclose the requested information was duly reasoned and well founded, it is under an obligation to decide *ex officio* on the content and significance of the classified data for the legality of the results of the tendering procedure, in accordance with paragraphs 39 and 40 of this order. clarifications on the active role of the court.

The outcome of the proceedings and the *costs*

126. On the basis of the totality of the above arguments, the bench finds that the courts of first and appellate instance, in considering the facts concerning certain vehicles proposed by the Supplier Group and which were not relied upon in the claim and in the reply to it, have infringed the legal regulation defining the limits of the pre-litigation stage and the case-law of the Court of Cassation interpreting it, misclassifyingand interpretedthe requirement of clause 4 of Annex 4 to the Tender Conditions and came to the unfounded conclusion that UAB Parsekas had justified its declared annual income from activities related to the collection and transportation of mixed municipal waste, and therefore the Supplier Group complied with this requirement of the Tender Conditions. Inthe meantime, the appellate court, while relying on other considerations, has, in principle, come to the reasonable conclusion that the Supplier Group has not demonstrated compliance with the requirement laid down in point 2 of Annex 4 to the

Tender Specifications concerning the possession of vehicles meeting the specific technical requirements, therefore, the Bid of the Supplier Group could not be declared successful in the Tender. Since the infringements found by the court of appeal do not affect the outcome of the final procedural decision of the court, the appeal in cassation must be dismissed and the decision of the court of appeal should be left unchanged (Article 346 CCP, Article 359(1)(1) CCP).

127. Finding that the trial courts, in deciding on the confidentiality of the offer of the Supplier Group submitted by the respondent to the case as non-public material, violated the legal regulation provision discussed above governingthe determination of the content (scope) of the non-public case fileAnd deviated from the relevant interpretations of the Court of Cassation and the Court of Justice, the order of the Klaipėda Regional Court of 30 January 2019, which recognized as confidential information and non-public case file, the data of the offer of the supplier group submitted by the defendant as confidential information and non-public case file are to be considered as public case file.

128. As to the other arguments of the cassation and the response to it as legally irrelevant to the resolution of the dispute between the parties, the bench of the judges does not comment.

129. The party in whose favour the decision is made is ordered to pay the costs of the proceedings against the second party (Article 93(1), (2) and Article 98(1) of the CCP). The costs incurred by a party for the assistance of a lawyer or an assistant lawyer, taking into account the complexity of the particular case and the costs of the work and time of the lawyer or assistant lawyer, are awarded no more than those set out in the recommendations on the amount of remuneration approved by the Minister of Justice together with the Chairman of the Lithuanian Bar Council (Article 98(2) of the CCP).

130. Article 93(6) of the CCP provides that the costs of litigation arising from a court's referral to the Constitutional Court or the competent judicial authority of the European Union, as well as from an appeal to the administrative court on the legality of a regulatory act, are to be allocated to the participants in the proceedings in accordance with the rules set out in that article.

131. It has been clarified in the case-law of the Court of Cassation that, in determining the amount of the costs for the preparation of written explanations to the Court of Justice, the guidelines on the maximum amount of fees awarded in civil cases for assistance provided by a lawyer or an assistant lawyer, approved by Order No 1R-85 of the Minister of Justice of the Republic of Lithuania of 2 April 2004 and The Lithuanian The Resolution of the Bar Council of 26 March 2004 "On the approval of the maximum amount of fees awarded in civil cases for assistance provided by a lawyer or an assistant lawyer", (hereinafter referred to as the "Recommendations") sets out in paragraph 8.2 the coefficient for the preparation of a claim, counterclaim, defence or counterclaim (order of the Supreme Court of Lithuania of 24 April 2019 in civil case No e3K-3-150-611/2019, paragraph 22).

132. If the defendant's appeal in cassation is not upheld, the costs incurred by the defendant before the Court of Cassation are not reimbursed.

133. The third party, UAB Klaipėdos autobusų parkas, requests that the applicant be ordered to pay eur 6942.01 in respect of the costs of the proceedings to the lawyer's legal aid for the preparation of procedural documents for the Court of Cassation and the Court of Justice. In view of the fact that thethird party participated in the case of UAB Klaipėdos autobusų parkas in support of the defendant's position in principle, if the appeal in cassation is not satisfied, it is not awarded the reimbursement of the costs of the proceedings.

134. The applicant requests that the applicant be ordered to pay the costs of the proceedings to the lawyer's legal aid of EUR 15 512.20 for the preparation of the pleadings before the Court of Cassation and the Court of Justice. Submitted VAT invoices, reports on services rendered and payment orders to justify the expenditure:

134.1. He incurred EUR 3484.80 for the preparation of the response to the cassation appeal and EUR 363 for the preparation of the application for access to the documents (VAT invoice No 2019-07-022 of 31 July 2019, VAT invoice No 2019-08-027 of 31 August 2019, VAT invoice No 2019-08-027 of 31 July 2019 and 1 August 2019–31 days of legal services provided, statements from the bank account regarding payments made on 9 and 20 September 2019). The reimbursement of the costs claimed for the preparation of the response to the cassation appeal exceeds the maximum amount of the lawyer's assistance costs to be reimbursed in accordance with point 8.14 of the Guidelines– EUR 2146.59 (1.7 x EUR 1262.70 (EUR 2019) m. Q1)). The reimbursement of the costs claimed for the preparation of the application for access to documents does not exceed the maximum amount of the lawyer's assistance costs to be reimbursed in accordance with paragraph 8.16 of the Guidelines – EUR 505.08 (0.4 x EUR 1262.70 (2019 years 1 quarter)).

134.2. For the preparation of the application for the award of costs and for the award of costs, he incurred costs of EUR 108.90 (VAT invoice No. 2019-11-032 of 29 November 2019, statement of legal services provided on 1-30 November 2019, extract from the bank account regarding the payment

made on 14 April 2020). The reimbursement of the costs claimed for the preparation of the application and the award of costs does not exceed the maximum amount of the lawyer's assistance costs to be reimbursed in accordance with paragraph 8.16 of the Guidelines– EUR 543.44 (0.4 x EUR 1358.60 (Q4 2019)).

134.3. The preparation of the written observations submitted to the Court of Justice on the application for a preliminary ruling of the Court of Cassation entailed costs of EUR 3775.20 (VAT invoice No 2020-04-022 of 30 April 2020, report on legal services rendered between 1 and 30 April 2020, extract from a bank account for payment made on 5 June 2020). The reimbursement of the costs claimed for the preparation of written explanations to the Court of Justice exceeds the maximum amount of the lawyer's assistance costs to be reimbursed in accordance with point 8.2 of the Guidelines , which is EUR 3396.50 (2.5 x EUR 1358.60 (Q4 2019)).

134.4. The preparation of the additional written explanations and answers submitted to the Court of Justice incurred costs of EUR 2662 (VAT invoice No 2021-01-042 of 29 January 2021, report on legal services provided on 1-31 January 2021, extract from the bank account regarding the payment made on 25 February 2021). The reimbursement of the costs claimed for the preparation of the written explanations and answers submitted to the Court of Justice shall not exceed the maximum amount of the lawyer's fees to be reimbursed in accordance with point 8.2 of the Guidelines , which is EUR 3637 (2.5 x EUR 1454.80 (Q3 2020)).

134.5. For the preparation of the notification of the progress of the proceedings before the Court of Justice (15 minutes), he incurred costs of EUR 36.30 (VAT invoice No 2021-04-076 of 30 April 2021, report on legal services provided on 1-30 April 2021, extract from the bank account regarding the payment made on 28 May 2021). Subject to paragraphs 8.20 and 9 of the Recommendations, reimbursement of costs for the provision of the specified legal services of a lawyer is not awarded.

134.6. For the analysis of the preliminary decision of the Court of Justice, the identification of further actions and the informing of the customer (1 hour 30 minutes), he incurred expenses of EUR 290.40 (VAT invoice No. 2021-09-039 of 30 September 2021, report on legal services provided on 1-30 September 2021, extract from the bank account regarding the payment made on 12 October 2021). The reimbursement of the costs claimed for the specified legal services does not exceed the maximum amount of the lawyer's assistance costs to be reimbursed in accordance with paragraph 8.20 of the Recommendations – EUR 313.28 (2 hours x 0.1 x EUR 1566.40 (Q2 2021)).

134.7. For the preparation of written explanations to the Court of Cassation incurred expenses of EUR 1161.60 and EUR 3630 (VAT invoice No. 2021-10-014 of 29 October 2021, report on legal services provided on 1-30 October 2021, statement from the bank account regarding the payment made on 12 October 2021, VAT invoice No. 2021-11-015 of 30 November 2021, Report on legal services provided on 1-30 November 2021, statement from the bank account regarding the payment made on 30 November 2021). The reimbursement of the costs claimed for the preparation of written explanations exceeds the maximum amount of attorney's fees to be reimbursed in accordance with paragraph 8.16 of the Guidelines – EUR 626.56 (0.4 x EUR 1566.40 (Q2 2021)).

135. In view of the fact that the reimbursement of the costs claimed by the applicant exceeds the maximum amounts of the fees to be reimbursedand the fees for the assistance of a lawyer laid down in the Guidelines, the maximum amount of the lawyer's assistance costs incurred by the applicant before the Court of Cassation and the Court of Justice is 9593.95 Eur (2146,59 Eur + 363 Eur + 108,90 Eur + 3396,50 Eur + 2662 Eur + 290,40 Eur + 626,56 Eur) (Article 98(1) CCP).

136. The caselaw of the Court of Cassation is to be recalled, according to which, where a applicant defends its interests against two procedural rivals (normally against the contracting authority and the successful tenderer), once the arguments of the latter parties have been found to be unfounded, it is correct to order them to pay the applicant's costs in equal shares (Article 93(4) CCP) (see, for example, the order of the Court of Cassation referred to above (e.g. the order of the Court of Cassation referred to above(e))s in civil case No. e3K-3-272-378/2020, paragraph 201).

137. In the present case, uab Klaipėdos autobusų parkas, UAB Parsekas and UAB Klaipėdos transportas (a group of suppliers recognized as the winner of the Competition) are participating on the side of the defendant as third parties who do not make independent claims. However, UAB Klaipėdos transportas did not submit procedural documents in all instances of the courts, UAB Klaipėdos autobusų parkas submitted a response to the applicant's appeal to the Court of Appeal and submitted written explanations to the Court of Cassation regarding the Preliminary Ruling of the Court of Justice , UAB Parsekas also submitted only written explanations to the Court of Cassation.

138. In the light of the foregoing, the bench of judges decides that, in such circumstances, it is right to order the defendant to pay the costs of the proceedings in cassation proceedings, i.e. the partyto the proceedings o, against whomthe applicant defended her arguments (Article 93(1) and (4) of the CCP).

139. According to the certificate of the Supreme Court of Lithuania of 10 December 2021 on the costs related to the service of procedural documents, the Court of Cassation incurred such costs of EUR 13, therefore, the defendant is ordered to pay the State compensation for these costs (Article 79 CCP, Article 88(1)(3), Article 96).

a chamber of judges of the Civil Division of the Supreme Court of Lithuania in accordance with Article 359(1)(1), Article 362(1) of the Code of Civil Procedure of the Republic of Lithuania,

n u t a r i a :

The decision of the Chamber of Judges of the Civil Division of the Court of Appeal of Lithuania of 30 May 2019 to remain unchanged.

Declare all the case file public.

Orders the applicant, UAB Ecoservice Klaipėda (j.a.k.140026178), to pay the costs of the lawyer's assistance in the amount of EUR 9593.95 (nine thousand five hundred and ninety-three Eur 95 ct) from the defendant UAB Klaipėda Region Waste Management Centre o (j.a.k. 163743744) Salary.

Orders the State to order the defendant UAB Klaipėda Region Waste Management Centreo (j. a. k. 163743744) EUR 13 (thirteen) in respect of costs. The amount awarded to the State is payable to the collection account of the budget revenues of the State Tax Inspectorate (j. a. k. 188659752), contribution code – 5660.

This order of the Supreme Court of Lithuania is final, not subject to appeal and becomes effective from the date of its adoption.

Judges Sigita Rudėnaitė

Gediminas Sagatys

Dalia Vasarienė

Mentioned in the text:

- CCP
- 3K-3-280/2012
- Art. 353 CCP The limits of the proceedings
- e3K-3-362-415/2015
- e3K-3-175-415/2016
- e3K-3-234-469/2018
- e3K-3-494-469/2019
- e3K-3-406-378/2018
- e3K-3-354-378/2018
- e3K-3-272-378/2020
- e3K-3-16-378/2018
- e3K-3-278-969/2021
- e3K-3-405-469/2021
- 3K-3-656/2013
- e3K-3-354-690/2017
- e3K-3-317-469/2018
- CK1 Art. 1.116. Commercial/industrial and professional secrecy
- 3K-3-150/2010
- 3K-3-72-421/2017
- CK
- e3K-3-184-248/2021
- 3K-3-495/2013
- Art. 346 CCP grounds for reviewing judgments and orders in cassation that have become final
- Art. 93 CCP Apportionment of costs
- Art. 98 CCP Reimbursement of attorney's or assistant lawyer's fees

- e3K-3-150-611/2019
- Art. 79 CCP Costs

ORDER OF THE COURT (Ninth Chamber)

26 November 2020 (*)

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Award of concession contracts – Directive 2014/23/EU – Article 2(1), first subparagraph – Article 30 – Freedom of contracting authorities to establish and organise the procedure leading to the choice of concessionaire – National legislation prohibiting the use of project financing for motorway concessions)

In Case C-835/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 13 June 2019, received at the Court on 18 November 2019, in the proceedings

Autostrada Torino Ivrea Valle D'Aosta – Ativa SpA

v

Presidenza del Consiglio dei Ministri,

Ministero delle Infrastrutture e dei Trasporti,

Ministero dell'Economia e delle Finanze,

Autorità di regolazione dei trasporti,

intervening parties:

Autorità di bacino del Po,

Regione Piemonte,

THE COURT (Ninth Chamber),

composed of D. Šváby (Rapporteur), acting as President of the Chamber, S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, in accordance with Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 The request for a preliminary ruling concerns the interpretation of Article 30 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), read in conjunction with recital 68 of that directive.

2 The request has been made in proceedings between Autostrada Torino Ivrea Valle d'Aosta – Ativa SpA ('Ativa'), on one hand, and, on the other, the Presidenza del Consiglio dei Ministri (Presidency of the Council of Ministers, Italy), the Ministero delle Infrastrutture e dei Trasporti (Ministry of Infrastructure and Transport, Italy) ('the MIT'), the Ministero dell'Economia e delle Finanze (Ministry of Economy and Finance, Italy) and the Autorità di regolazione dei trasporti (Transport Administration Authority, Italy), relating to the MIT's rejection of two project financing proposals submitted by Ativa.

Legal framework

European Union law

3 Recitals 5, 8, and 68 of Directive 2014/23 state as follows:

'(5) This Directive recognises and reaffirms the right of Member States and public authorities to decide the means of administration they judge to be most appropriate for performing works and providing services. In particular, this Directive should not in any way affect the freedom of Member States and public authorities to perform works or provide services directly to the public or to outsource such provision by delegating it to third parties. Member States or public authorities should remain free to define and specify the characteristics of the services to be provided, including any conditions regarding the quality or price of the services, in accordance with Union law, in order to pursue their public policy objectives.

…

(8) For concessions equal to or above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives and to ensure a certain degree of flexibility. Member States should be allowed to complete and develop further those provisions if they find it appropriate, in particular to better ensure compliance with the principles set out above.

…

(68) Concessions are usually long-term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and contracting entities and normally falling within their remit. For that reason, subject to compliance with this Directive and with the principles of transparency and equal treatment, contracting authorities and contracting entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire. However, in order to ensure equal treatment and transparency throughout the awarding process, it is appropriate to provide for basic guarantees as to the awarding process, including information on the nature and scope of the concession, limitation of the number of candidates, the dissemination of information to candidates and tenderers and the availability of appropriate records. It is also necessary to provide that the initial terms of the concession notice should not be deviated from, in order to prevent unfair treatment of any potential candidates.'

4 Article 1 of that directive, entitled 'Subject matter and scope', provides, in paragraph 1:

'This Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, whose value is estimated to be not less than the threshold laid down in Article 8.'

5 Article 2 of that directive, entitled 'Principle of free administration by public authorities', provides, in paragraph 1:

'This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to

manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.

…’

6 According to Article 3 of that directive, which is entitled ‘Principle of equal treatment, non-discrimination and transparency’:

‘1. Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

2. Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28.’

7 Article 8 of that directive, entitled ‘Threshold and methods for calculating the estimated value of concessions’, provides, in paragraph 1:

‘This Directive shall apply to concessions the value of which is equal to or greater than EUR 5 186 000.’

8 Title II of Directive 2014/23, which sets out the general principles and procedural guarantees for the award of concessions, contains Articles 30 to 41.

9 Under the title ‘General principles’, Article 30 of that directive provides, in paragraphs 1 and 2:

‘1. The contracting authority or contracting entity shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with this Directive.

2. The design of the concession award procedure shall respect the principles laid down in Article 3. In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others.’

10 Article 37 of that directive, entitled ‘Procedural guarantees’, states, in paragraph 6:

‘The contracting authority or contracting entity may hold negotiations with candidates and tenderers. The subject matter of the concession, the award criteria and the minimum requirements shall not be changed during the course of the negotiations.’

Italian law

Law No 11 of 28 January 2016

11 Under Article 1(1)(lll) of legge n. 11 – Deleghe al Governo per l’attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE del Parlamento europeo e del Consiglio, del 26 febbraio 2014, sull’aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d’appalto degli enti erogatori nei settori dell’acqua, dell’energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Law No 11, delegating to the Government the transposition of directives 2014/23/EU, 2014/24/EU and 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, on public procurement and procurement procedures of entities operating in the water, energy, transport and postal services sectors, and recasting the provisions applicable to public works contracts, public services contracts and public supply contracts) of 28 January 2016 (GURI No 23 of 29 January 2016), the delegated legislature was required to lay down the rules governing ‘the commencement of tendering procedures for the award of new motorway concessions no later than

24 months before expiry of the existing concessions, with a review of the system for motorway concessions, concerning in particular the introduction of a prohibition on extension clauses and provisions, in accordance with the new general regime for concession contracts'.

12 According to Article 1(1)(mmm) of that law, the delegated legislature was to establish 'specific transitional provisions for awarding motorway concessions which have expired or are due to expire on the date on which the decree transposing the directives enters into force, in order to ensure full compliance with the principle of competitive tendering and, for concessions where the contracting authority or contracting entity exercises over the concessionaire a control which is similar to that which it exercises over its own departments, with the principles enshrined in Article 17 of [Directive 2014/23]'.

The new Public Procurement Code

13 It is apparent from Article 180 of decreto legislativo n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 laying down a public procurement code) of 18 April 2016 (GURI No 91 of 19 April 2016) ('the new Public Procurement Code') that public-private partnership contracts include, inter alia, project financing.

14 According to Article 183 of that code, entitled 'Project financing':

'1. In relation to public works or works in the public interest, including works concerning structures intended for leisure boating, included in the programming instruments officially adopted by the contracting authority under the legislation in force, including port plans, which can be fully or partly financed by private capital, contracting authorities may, instead of awarding contracts by means of a concession under Part III, award a concession by means of a tender procedure on the basis of the feasibility project, by publishing a contract notice calling for the submission of tenders envisaging the use of resources provided in full or in part by the persons submitting proposals. In any event, for infrastructure relating to track work, the corresponding proposals must be included in the programming instruments adopted by the Ministry of Infrastructure and Transport.

2. The contract notice shall be published in accordance with the procedures laid down in Article 72 or Article 36(9), depending on the value of the works, and the tender procedure shall be based on the feasibility project prepared by the contracting authority. The feasibility project on which the tender procedure is based shall be prepared by personnel of the contracting authority who personally meet the requirements necessary for preparation of that project, belonging to the various professions involved in the multidisciplinary approach that informs the feasibility project. Where there are insufficient adequately skilled personnel, the contracting authorities may engage third parties, chosen in accordance with the procedures laid down by this code, to draft the feasibility project. The costs incurred in outsourcing activities to third parties may be included in the economic scope of the work.

…

15. Economic operators may submit proposals to the contracting authorities to perform, on the basis of a concession, public works or works in the public interest, including works concerning structures intended for leisure boating, that are not included in the programming instruments officially adopted by the contracting authority under the legislation in force. The proposal shall contain a feasibility project, a draft agreement, the economic and financial plan certified by one of the entities referred to in the first sentence of Article 183(9) and the service and management specifications. In the case of structures for leisure boating, the feasibility project must describe the qualitative and functional characteristics of the work and the scope of the requirements to be satisfied and the specific services to be provided, must contain a study including a description of the project and the data necessary to determine and assess the principal effects that the project may have on the environment, and must be supplemented in accordance with any specific requests by the Ministry of Infrastructure and Transport, adopted by means of decrees of that ministry. The economic and financial plan shall include the amount of expenditure incurred in preparing the proposal, including royalties in respect of intellectual works under Article 2578 of the Civil Code. The proposal shall be accompanied by declarations on honour relating to compliance with the conditions referred to in Article 183(17), the surety referred to in Article 93 and the undertaking to provide surety for the amount indicated in the third sentence of

Article 183(9) in the event of a call for competition. The contracting authority shall assess the feasibility of the proposal within a strict time limit of three months. The contracting authority may for that purpose invite the person submitting the proposal to make any changes to the feasibility project necessary for it to be approved. If the person submitting the proposal does not include the requested modifications, the proposal may not be evaluated as feasible. The feasibility project, modified if applicable, shall be included in the programming instruments adopted by the contracting authority under the legislation in force and shall be approved in accordance with the procedures applicable to the approval of projects. The person submitting the proposal must include any further modifications requested at the project approval stage, and the project shall otherwise be deemed not to have been approved. The approved feasibility project shall serve as the basis for the tender procedure, in which the person submitting the proposal shall be invited to participate. In the contract notice, the contracting authority may ask participants, including the person making the proposal, to submit alternative scenarios for the project. The contract notice shall indicate that the promoter may exercise its pre-emptive right. The participants, including the promoter, must satisfy the requirements laid down in Article 183(8) and shall submit a bid containing a draft agreement, the economic and financial plan certified by one of the entities referred to in the first sentence of Article 183(9), the service and management specifications and any alternative scenario for the feasibility project. Article 183(4), (5), (6), (7) and (13) shall apply. If the promoter is not awarded the contract, it may, within 15 days from notification of the award, exercise its pre-emptive right and be awarded the contract if it undertakes to comply with the contractual obligations on the same terms as those proposed by the successful bidder. If the promoter is not awarded the contract and does not exercise its pre-emptive right it will be entitled to be reimbursed, by the successful bidder, the amount of the expenditure incurred in preparing the proposal up to the limits referred to in Article 183(9). If the promoter exercises its pre-emptive right, the initial successful bidder will be entitled to be reimbursed, by the promoter, the amount of the expenditure incurred in preparing its bid up to the limits referred to in Article 183(9).

16. The proposals referred to in the first sentence of Article 183(15) may relate to all procurement on a public-private partnership basis instead of to concessions.

…’

15 Article 216(1) and (23) of the new Public Procurement Code provides:

‘1. Without prejudice to the provisions of this article or other provisions of this code, this code shall apply to procedures and contracts for which notices launching the procedure for the selection of a contractor are published after the date on which it enters into force, and, in the case of contracts where no notice is published, to procedures and contracts in relation to which invitations to tender have not yet been sent on the date on which this code enters into force.

…

23. Preliminary projects relating to the execution of public works or public interest works in relation to concession proposals under Article 153 or Article 175 of [decreto legislativo n. 163 – Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 – Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (GURI No 100 of 2 May 2006)] for which a declaration of public interest has already been made but which have not yet been approved on the date of entry into force of this code shall be subject to an assessment of economic and financial feasibility and to approval by the administrative authorities in accordance with the provisions of this code. If the preliminary project is not approved the procedures launched shall be revoked, as shall the classification of any promoters, which will be entitled to be reimbursed their incurred and proven costs in creating the project on which the tender procedure was based, if those costs were mandatory in order to carry out an environmental impact and zoning study.’

The amending decree

16 Decreto legislativo n. 56 – Disposizioni integrative e correttive al decreto legislativo 18 aprile 2016, n. 50 (Legislative Decree No 56 supplementing and amending Legislative Decree No 50 of 18 April 2016)

of 19 April 2017 (GURI No 103 of 5 May 2017) (‘the amending decree’), inter alia, inserted Article 178(8*bis*) in the new Public Procurement Code, which is worded as follows:

‘Administrative authorities may not renew motorway concessions that have expired or are due to expire using the procedures described in Article 183.’

The main proceedings and the question referred for a preliminary ruling

17 Ativa, a company that operates motorways on a concession basis, operated an approximately 220 km section of the A5 motorway in Piedmont (Italy) under several concessions, the most recent of which expired in 2016.

18 On 25 September 2015, under Article 153(19) of decreto legislativo n. 163 – Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 – Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (GURI No 100 of 2 May 2006) (‘the previous Public Procurement Code’), Ativa submitted a project financing proposal to the MIT for the concession for the operation of the A5 motorway, the A4/A5 motorway interchange, the Turin (Italy) motorway and orbital road network and the execution of works to protect the Ivrea (Italy) canal system, to reduce seismic risk and to upgrade infrastructure (‘the first proposal’).

19 By decision of 29 July 2016 (‘the first refusal decision’), the MIT rejected that proposal stating, first, that the project financing procedure was not applicable to motorway operation concessions and, secondly, that the proposal did not comply either with the requirements of the previous Public Procurement Code or with Article 178 and Article 183(15) of the new Public Procurement Code.

20 Ativa brought an action before the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont, Italy), requesting the court, first, to annul the first refusal decision and, secondly, to require the MIT to give a decision on the public interest or feasibility of the first proposal.

21 In support of that action, Ativa argued that the MIT had breached the three-month time limit under Article 153(19) of the previous Public Procurement Code within which contracting authorities must assess the proposals submitted. It argued that its first proposal, which had been submitted in September 2015, should, first, have been assessed before the end of 2015 instead of in June 2016 when it was actually assessed, and, secondly, have been based on the previous Public Procurement Code rather than the new Public Procurement Code.

22 On 20 September 2016, Ativa submitted a second project financing proposal to the MIT for the projects referred to in paragraph 18 of the present order, now based on Article 183(15) of the new Public Procurement Code. By decision of 22 May 2017, on grounds comparable to those of the first refusal decision, the MIT rejected the second proposal (‘the second refusal decision’). The MIT relied in particular on Article 178(8*bis*) of the new Public Procurement Code, inserted by the amending decree, which entered into force on 20 May 2017. According to that provision, administrative authorities could not use the project financing procedure to renew motorway concessions that had expired or were due to expire.

23 Ativa brought an action before the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont), seeking, inter alia, annulment of the second refusal decision.

24 By two judgments of 31 August 2018, that court dismissed Ativa’s actions.

25 By its first judgment, the court found that the MIT’s breach of the three-month time limit under Article 153(19) of the previous Public Procurement Code did not of itself alone mean that the first refusal decision was unlawful. That court also dismissed the plea alleging infringement of that provision on the grounds that it required the project financing proposal to consist of a preliminary plan on the basis of which the concessionaire would be selected. The Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont) accordingly held that a proposal like that of

Ativa, which contains a final plan, is inadmissible because the final plan is only required at a later stage in the procedure.

26 That court also held that the argument that the MIT could not base its decision on Article 183 of the new Public Procurement Code was irrelevant. Although that article had been adopted after the first proposal had been submitted, it was in force at the time the first refusal decision was adopted.

27 By its second judgment, that court dismissed the action against the second refusal decision on grounds similar to those set out in paragraphs 25 and 26 of the present order. In addition, according to that court, the second proposal did not comply with Article 183(15) of the new Public Procurement Code.

28 Ativa appealed against both those judgments to the Consiglio di Stato (Council of State, Italy). Ativa submits that Article 178(8*bis*) of the new Public Procurement Code, which prohibits the administrative authorities from renewing motorway concessions that have expired or are due to expire using the procedure under Article 183 thereof, was introduced after it had submitted both the proposals at issue in the main proceedings and that both its proposals should therefore be governed by the provisions of the previous Public Procurement Code. Further, since the MIT had not made any reference to the provisions of the amending decree, Ativa had not been given an opportunity to adduce the reasons why the newly introduced rules do not, in its view, apply to the dispute in the main proceedings, thereby infringing its right to participate in the procedure.

29 The MIT is of the view, in contrast, that Article 178(8*bis*) of the new Public Procurement Code is applicable *ratione temporis* in the case in the main proceedings because that article concerns concessions ‘that have expired or are due to expire’. It argues that Article 178(8*bis*) also contributes to a greater opening up to competition and to avoiding further consolidation of the position of previous operators, who hold concessions that are due to expire and which were awarded without tender procedures. Moreover, it follows from the principle *tempus regit actum* that, subject to specific transitional provisions, each phase or act in a procedure is governed by the rules laid down by the national provisions in force on the date when that phase takes place or on the date of adoption of the act concluding the discrete phase of the procedure of which it forms part. The dispute in the main proceedings in fact concerns a preparatory phase of the tender procedure that took place after the new Public Procurement Code entered into force.

30 Further, the preliminary phase does not involve selecting the best bid on the basis of pre-established technical and financial criteria but, rather, assessing the preliminary feasibility of a project proposal and approving a project on which the tender procedure will be based. The person submitting the proposal is only classified as a ‘promoter’ and invited to submit a bid if the project is approved and the tender procedure is commenced.

31 Once the project has been approved, the concession is awarded only following the tender procedure, on the basis of the criterion of the most economically advantageous tender. That phase is separate from the previous one and must be conducted in accordance with the rules on competitive tendering, subject to the promoter’s pre-emptive right under Article 183(15) of the new Public Procurement Code.

32 The Consiglio di Stato (Council of State), like the MIT, takes the view that according to the general principle of legality the administrative authority must comply with the law in force at the time it states its intention to hold the procedure leading to selection of the concessionaire. Accordingly, if a concession proposal submitted on the basis of the provisions of the previous law has not yet been approved at the time the new law enters into force, the administrative authority has no option, subject to applying transitional rules laid down by the legislation that has come into force during the procedure, but to approve that project and hold the tender procedure on the basis of the new rules.

33 In relation to motorway concessions, the amending decree inserted paragraph 8*bis* into Article 178 of the new Public Procurement Code, prohibiting use of the project financing procedure laid down in Article 183 thereof for the renewal of motorway concessions that had expired or were due to expire.

34 Against that background, the referring court believes, first, that the second refusal decision is lawful. Article 178(8*bis*) of the new Public Procurement Code entered into force during the preliminary phase

of the procedure and is therefore applicable to the decision that definitively concluded the procedure by rejecting the proposal of the outgoing concessionaire.

35 Secondly, since the first refusal decision was adopted before the amending decree entered into force, the prohibition on using project financing for a motorway concession does not apply. However, although the MIT was not entitled to rely on Article 178(8*bis*) of the new Public Procurement Code to reject the first proposal, the breach of that provision is of no effect. That provision in fact also precludes projects submitted by private operators and which have already been assessed as feasible from being included in the programming of the contracting authority, with the effect that Ativa has no interest in obtaining annulment of the first refusal decision.

36 The Consiglio di Stato (Council of State) nevertheless believes it is necessary to examine Ativa's plea alleging that, by purely and simply prohibiting the contracting authorities from using project financing to award a concession, Article 178(8*bis*) of the new Public Procurement Code infringes the principle of 'procedural freedom' according to which the contracting authority has considerable flexibility to define and organise the procedure leading to the choice of concessionaire, which the national legislature is required to uphold by virtue of recital 68, Article 30 and Article 37(6) of Directive 2014/23.

37 That is the context in which the Consiglio di Stato (Council of State) stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'With regard to the award of concessions, does [EU] law, in particular the principles laid down in Directive [2014/23], specifically freedom of choice as regards award procedures in accordance with the principles of transparency and [equal] treatment, as referred to in recital 68 and Article 30 of the directive, preclude the application of the provisions laid down in Article 178(8-*bis*) of the [new Public Procurement Code], which unconditionally prohibit the award by administrative authorities of motorway concessions in respect of concessions that have expired or are due to expire, using the procedures laid down in Article 183 [of that code], which governs project financing?'

The question referred

38 Under Article 99 of the Rules of Procedure of the Court, where the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to such a question admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

39 It is appropriate to apply that article in the present case.

40 As a preliminary point, it must be observed that this request for a preliminary ruling is not intended to determine whether the project financing procedure under Article 183 of the new Public Procurement Code is compatible with Directive 2014/23, but rather to determine whether a Member State can require its contracting authorities to use a concession for the operation of motorways and, thereby, prevent them from opting for the project financing procedure.

41 By its question, the Consiglio di Stato (Council of State) is asking, in essence, whether the first subparagraph of Article 2(1) of Directive 2014/23, read in conjunction with Article 30 and recitals 5 and 68 of that directive, must be interpreted as precluding a national provision whereby contracting authorities are prohibited from using the project financing procedure laid down in Article 183 of the new Public Procurement Code when renewing motorway concessions that have expired or are due to expire.

42 Having regard to both the wording of Directive 2014/23 and the recent case-law of the Court on public procurement, that question must be answered in the negative.

43 First, as is clear from Article 1 of Directive 2014/23, read in conjunction with recital 8, the sole objective of the directive is to establish rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, where the value of those contracts is estimated to be not less than the thresholds laid down in Article 8 thereof.

44 Directive 2014/23 is therefore intended to apply only where a contracting authority or contracting entity has launched a procurement procedure to award a concession.

45 Secondly, the first subparagraph of Article 2(1) of Directive 2014/23 recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those ‘authorities’, in their capacity as authorities with legislative powers rather than as contracting authorities or contracting entities, are in that way free to decide how best to manage the execution of works or the provision of services, in order to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.

46 Thirdly, it can be seen from the second subparagraph of Article 2(1) of Directive 2014/23, read in conjunction with recital 5 thereof, that those authorities can choose to perform their public interest tasks using their own resources, cooperating with other authorities or by delegating those tasks to economic operators.

47 It is therefore apparent that Directive 2014/23 cannot deprive the Member States of their freedom to favour one management method to the detriment of others. That freedom involves a choice which is made at an earlier stage than the procurement procedure and cannot, therefore, fall within the scope of application of that directive (see by analogy, judgment of 3 October 2019, *Irgita*, C-285/18, EU:C:2019:829, paragraph 44, and orders of 6 February 2020, *Pia Opera Croce Verde Padova*, C-11/19, EU:C:2020:88, paragraph 41, and of 6 February 2020, *Rieco*, C-89/19 to C-91/19, EU:C:2020:87, paragraph 33).

48 Fourthly, that interpretation cannot be called into question by the statement, in Article 30(1) and recital 68 of that directive, to the effect that the contracting authority or contracting entity is to have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with that directive.

49 Where national, regional or local authorities have chosen to favour one management method in particular, the contracting authorities or contracting entities in fact have only conditional freedom which can only be used, therefore, in the context of the policy choices made previously by those authorities.

50 Fifthly, the freedom available to national, regional or local authorities, under the first subparagraph of Article 2(1) of Directive 2014/23, to decide how best to manage the execution of works or the provision of services, cannot however be unlimited. It must, rather, be exercised with due regard to the fundamental rules of the FEU Treaty, in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving from them, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency (see by analogy, judgment of 3 October 2019, *Irgita*, C-285/18, EU:C:2019:829, paragraph 48 and the case-law cited, and orders of 6 February 2020, *Pia Opera Croce Verde Padova*, C-11/19, EU:C:2020:88, paragraph 45, and of 6 February 2020, *Rieco*, C-89/19 to C-91/19, EU:C:2020:87, paragraph 37).

51 Although it is incumbent on the referring court, in the case in the main proceedings, to ensure that the prohibition on contracting authorities and contracting entities using the project financing procedure, as set out in Article 178(8*bis*) of the new Public Procurement Code, has not gone beyond the limits referred to in the preceding paragraph of the present order, it is apparent both from the decision to refer and the written observations submitted to the Court by the Italian Government and the European Commission that the article in question sought to ensure that motorway concessions are opened up to the widest possible competition. Since the motorway concessions sector has only recently been opened up to competition, the Italian legislature opted for a system of public tender procedures prohibiting the alternative system in the form of awarding concessions by means of project financing. Article 178(8*bis*) of the new Public Procurement Code sought in that way to avoid enshrining any advantage, even a de facto one, for the outgoing concessionaires.

52 In the light of the foregoing, the answer to the question referred is that the first subparagraph of Article 2(1) of Directive 2014/23, read in conjunction with Article 30 and recitals 5 and 68 thereof, must be interpreted as not precluding a national provision whereby contracting authorities are

prohibited from using the project financing procedure laid down in Article 183 of the new Public Procurement Code to renew motorway concessions that have expired or are due to expire.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

The first subparagraph of Article 2(1) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, read in conjunction with Article 30 and recitals 5 and 68 thereof, must be interpreted as not precluding a national provision whereby contracting authorities are prohibited from renewing motorway concessions that have expired or are due to expire using the project financing procedure laid down in Article 183 of decreto legislativo n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 laying down a public procurement code) of 18 April 2016.

[Signatures]

---

* Language of the case: Italian.

JUDGMENT OF THE COURT (Tenth Chamber)

24 March 2021 (*)

(Reference for a preliminary ruling – Procurement contracts in the water, energy, transport and telecommunications sectors – Directive 92/13/EEC – Review procedures – Pre-contractual stage – Assessment of bids – Rejection of a technical bid and acceptance of the bid of a competitor – Suspension of the implementation of that measure – Legitimate interest of the unsuccessful tenderer in challenging the legality of the bid of the successful tenderer)

In Case C-771/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Symvoulio tis Epikrateias (Epitropi Anastolon) (Council of State (Suspension Chamber), Greece), made by decision of 12 September 2019, received at the Court on 21 October 2019, in the proceedings

NAMA Symvouloi Michanikoi kai Meletites AE – LDK Symvouloi Michanikoi AE,

NAMA Symvouloi Michanikoi kai Meletites AE,

LDK Symvouloi Michanikoi AE

v

Archi Exetasis Prodikastikon Prosfigon (AEPP),

Attiko Metro AE,

intervening parties:

SALFO kai Synergates Anonymi Etairia Meletitikon Ypiresion Technikon Ergon – Grafeio Doxiadi Symvouloi gia Anaptyxi kai Oikistiki AE – TPF Getinsa Euroestudios SL,

SALFO kai Synergates Anonymi Etairia Meletitikon Ypiresion Technikon Ergon,

Grafeio Doxiadi Symvouloi gia Anaptyxi kai Oikistiki AE,

TPF Getinsa Euroestudios SL,

THE COURT (Tenth Chamber),

composed of M. Ilešič, President of the Chamber, E. Juhász (Rapporteur) and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– NAMA Symvouloi Michanikoi kai Meletites AE – LDK Symvouloi Michanikoi AE, LDK Symvouloi Michanikoi AE and NAMA Symvouloi Michanikoi kai Meletites AE, by S. Vlachopoulos and N. Gountza, dikigoroi,

– Archi Exetasis Prodikastikon Prosfigon (AEPP), by S. Karatza and F. Katsigianni, dikigoroi,

– Attiko Metro AE, by G. Arvanitis and E. Christofilopoulos, dikigoroi,

– SALFO kai Synergates Anonymi Etairia Meletitikon Ypiresion Technikon Ergon, Grafeio Doxiadi Symvouloi gia Anaptyxi kai Oikistiki AE and TPF Getinsa Euroestudios SL, by K. Vrettos, dikigoros,

– the Greek Government, by K. Georgiadis, Z. Chatzipavlou and O. Patsopoulou, acting as Agents,

– the European Commission, by A. Bouchagiar, P. Ondrůšek and L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(3), Article 2(1)(a) and (b), and Article 2a(2) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1), (‘Directive 92/13’), interpreted in the light of the case-law of the Court relating to those provisions.

2 The request has been made in the context of a suspension procedure brought by a business association and its constituent companies (‘NAMA’) against the Archi Exetasis Prodikastikon Prosfigon (Public Procurement Review Authority (AEPP), Greece) and Attiko Metro AE concerning the lawfulness of a decision taken by the latter, as contracting authority, in connection with the review of technical bids submitted in the context of a public procurement procedure in the field of transport.

Legal context

EU law

3 The second recital of Directive 92/13 states that ‘the existing arrangements at both national and Community levels for ensuring [the effective application of the rules governing public procurement] are not always adequate’.

4 Article 1 of Directive 92/13, which is entitled ‘Scope and availability of review procedures’, provides as follows in paragraphs 1 and 3:

‘1. This Directive applies to contracts referred to in Directive 2014/25/EU of the European Parliament and of the Council [of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243)], unless such contracts are excluded in accordance with Articles 18 to 24, 27 to 30, 34 or 55 of that directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/25/EU or Directive 2014/23/EU, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

5 Article 2 of that directive, entitled 'Requirements for review procedures', states:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity;

and

(b) to set aside or ensure the setting-aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting entity, reviews a contract award decision, Member States shall ensure that the contracting entity cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

…

9. Whereas bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU] and independent of both the contracting authority and the review body.

…’

6 Article 2a of that directive, entitled ‘Standstill period’, provides:

‘1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting entities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2014/25/EU or Directive 2014/23/EU before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting entity has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

…’

Greek law

7 Law 4412/2016 on public works contracts, public supply contracts and public service contracts (FEK A’ 147/8.8.2016), as amended (‘Law 4412/2016’) reorganised the system of judicial protection in the field of public procurement in the pre-contractual stage, in particular by creating an independent central administrative authority, namely the AEPP, tasked with the administrative review of the measures adopted by the contracting authorities and contracting bodies, and by introducing the possibility of requesting the suspension and setting-aside of decisions adopted by that authority.

8 Article 346(1) and (2) of Law 4412/2016 states:

‘1. Every interested party who has or has had an interest in obtaining a contract referred to in Article 1(2)(a) or (b), and who has been harmed or risks being harmed by an enforceable measure or by the omission of the contracting authority, contrary to national legislation or to that of the European Union, may bring proceedings before the [AEPP] under the special conditions set out in Article 360 and request interim protection measures under Article 366, the setting-aside of an unlawful measure or the omission of the contracting authority under Article 367 or the setting-aside of an unlawfully concluded contract under Article 368.

2. Any interested party who has been harmed or risks being harmed by a decision of the AEPP relating to an application for review coming within the scope of Article 360 may bring an action seeking the suspension and annulment of that decision before the competent courts, in accordance with Article 372. The right to bring those actions shall be available to the contracting authority if the application for review is accepted by the AEPP.’

9 Article 347 of Law 4412/2016 provides:

‘1. The [AEPP] shall be established, the mission of which shall be to resolve disputes arising from the stage of the procedure prior to the award of public works contracts, public supply contracts and public service contracts, where an application for review is brought before it, in accordance with the provisions of section II of the present title. …

2. The AEPP shall have functional independence and administrative and financial autonomy, and shall not be subject to control or supervision by government bodies or other administrative authorities. It shall be subject exclusively to control by Parliament, in accordance with its rules.'

10 Article 360 of Law 4412/2016 provides:

'1. Every interested party who has or has had an interest in obtaining a specific contract covered by the present law who is harmed, has been harmed or risks being harmed by an enforceable measure or by an omission of the contracting authority, contrary to national legislation or to that of the European Union, shall be required, prior to bringing actions under Title 3, to submit an application for administrative review to the AEPP against that measure or that omission of the contracting authority.

2. The act of bringing an application for administrative review shall be a prerequisite for the introduction of actions under Title 3 against enforceable measures or omissions of contracting authorities.

3. Enforceable measures or omissions of contracting authorities in the public procurement procedure cannot be the subject of applications for administrative review other than that referred to in paragraph (1).'

11 Under Article 372 of Law 4412/2016, any person who can establish a legitimate interest may request a suspension and annulment of the decision of the AEPP before the Symvoulio tis Epikrateias (Council of State) in cases concerning a public procurement contract which comes within the scope of Directive 2014/25.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 By a contract notice published on 24 January 2018, Attico Metro launched an open procurement procedure for technical consultancy services for the project for the extension of the Metro in Athens (Greece), to the value of approximately EUR 21.5 million. The award criterion was the most financially advantageous bid based on an optimum quality/price ratio. According to the contract notice, the first stage of the procedure was to consist in the review of supporting documents and of candidates' technical bids, while the second was to consist in the opening of bids and general assessment.

13 Four economic operators each submitted a bid. In the first stage of the procedure, the assessment committee of the contracting body, on the one hand, proposed the rejection of the bid of one of those candidates at the supporting document review stage, and the rejection of those of two other candidates, including NAMA, at the technical bid review stage. It also proposed admitting the business association SALFO and its three constituent companies ('SALFO') to the second stage of the procedure. Prior to the issue of a definitive decision in that regard, the contracting body requested details on the experience of the team proposed by NAMA.

14 By a decision of the contracting body's board of directors of 6 March 2019, the committee's aforementioned proposals were approved. In particular, NAMA's bid was excluded from the remainder of the procedure on the ground that the experience of certain members of its team with regard to construction works did not meet the requirements of the contract notice. On 26 March 2019, NAMA brought an application for review before the AEPP against that decision, by which it contested both the rejection of its technical bid and the acceptance of SALFO's bid.

15 By decision of 21 May 2019, the AEPP upheld NAMA's application only in so far as it contested the grounds of the contracting body's decision concerning the proof of experience of one of the members of the proposed team. It dismissed that application as to the remainder.

16 Following the partial dismissal of its administrative application, NAMA brought an action before the Symvoulio tis Epikrateias (Epitropi Anastolon) (Council of State (Suspension Chamber), Greece), the referring court in the present case, by which it requested that that court order, on the one hand, the suspension of the AEPP's decision of 21 May 2019 and the suspension of the decision of 6 March 2019 of the board of directors of the contracting body Attico Metro and, on the other hand, every relevant

measure designed to ensure the interim protection of its interests in the context of pursuing the procurement procedure at issue. The Symvoulio tis Epikrateias (Epitropi Anastolon) (Council of State (Suspension Chamber)) held to be inadmissible or unfounded the pleas put forward by NAMA alleging, on the one hand, that its exclusion from that procedure was unlawful on the ground that the contracting body had wrongly evaluated the experience of some of its experts and, on the other hand, that the principle of equality in the review of technical bids of tenderers had been infringed on the ground that the contracting body had assessed them differently.

17 The referring court observes that it has consistently held that a tenderer which has been excluded from the tendering procedure cannot show an interest in bringing proceedings in order to contest the legality of the participation of another tenderer in that procedure, except on grounds relating to an infringement of the principle of equality in the assessment of bids. That court is, however, uncertain to what extent the approach resulting in particular from the judgment of 11 May 2017, *Archus and Gama* (C-131/16, EU:C:2017:358), also applies in the case of a request for suspension brought by a tenderer which was not disqualified at the final stage of the award of the public contract, but at an earlier stage of the procurement procedure for that contract, such as the stage of review of supporting documents for participation or of assessment and review of technical bids. That question, the referring court notes, has not yet been resolved by the Court of Justice and has given rise to differences of interpretation within the Suspension Chamber of the Symvoulio tis Epikrateias (Council of State), which ultimately caused the case in the main proceedings to be brought before a full panel of five judges.

18 The referring court explains that that Suspension Chamber takes the view that a tenderer excluded from a procurement procedure for the award of public contracts must be regarded as being definitively excluded in the case where that tenderer did not contest the decision to exclude it or where that decision has become definitive. By contrast, that tenderer cannot be regarded as having been definitively excluded in the case where its application for review was dismissed by a decision of the AEPP, but where the period for bringing an action for annulment or a request for suspension under Law 4412/2016 has not yet expired. Likewise, a tenderer whose request for suspension brought against the AEPP's dismissal of its application for review is dismissed is not to be definitively excluded, provided that that tenderer has the right to bring an action for annulment of that rejection decision, or provided that the decision to dismiss the action for annulment which that tenderer has brought has not become definitive. Furthermore, the referring court specifies that the recognition of an excluded tenderer's interest in bringing proceedings against the decision to accept the bid of one of its competitors and to award that competitor the contract is dependent on whether the action leads to the definitive annulment of the procurement procedure in question, that is to say, whether it makes the procedure impossible to relaunch. It is immaterial in that context at which stage of the procurement procedure the tenderer at issue was excluded, since the interest in bringing proceedings exists at all stages of that procedure. Therefore, NAMA has in principle an interest in bringing proceedings in order to put forward the other complaints which it brought against SALFO, in addition to those relating to the infringement of the principle of equality of assessment.

19 Finally, the referring court states that it rejected the request for suspension in the main proceedings, in so far as NAMA contested the legality of its exclusion from the procurement procedure and the acceptance of SALFO's bid by submitting that the contested decisions infringed the principle of equality of assessment. By contrast, the referring court is uncertain as to whether NAMA can put forward, in support of its request for suspension, arguments directed against the decision to accept SALFO's bid on the basis of the failure to comply with the conditions set out in the contract notice, the provisions of Law 4412/2016, and the principles of equal treatment of tenderers and of transparency.

20 In those circumstances, the Symvoulio tis Epikrateias (Epitropi Anastolon) (Council of State (Suspension Chamber)) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Do Articles 1(3), 2(1)(a) and (b) and 2a(2) of Council Directive 92/13/EEC, interpreted in the light of the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), of 11 May 2017, *Archus and Gama* (C-131/16, EU:C:2017:358), and of 5 September 2019, *Lombardi* (C-333/18, EU:C:2019:675), conflict with national judicial practice whereby if, by decision of the contracting body, one competitor is excluded from, and another interested party (competitor) is admitted to, a

stage of the procurement procedure prior to the final contract award stage (for example, the stage for the examination of technical bids) and the court with jurisdiction dismisses the part of its application for suspension contesting its exclusion, the excluded competitor retains a legal interest in contesting the admission of the other competitor, by the same application for suspension, only if the other competitor was admitted in breach of the same criterion?

(b) If the answer to Question 1(a) is in the affirmative, do the above provisions mean that the tenderer excluded as described above may, by its application for suspension, raise any complaint against the participation of its competitor in the procurement procedure; in other words, may it also complain of other, separate, shortcomings in the competitor's bid which have no bearing on the shortcomings for which its bid was excluded, in order to obtain suspension of the competition and of the award of the contract to its competitor in a decision to be adopted at a later stage of the procedure, so that if the main remedy (application for annulment) is subsequently upheld, its competitor will be excluded, the contract award will be cancelled and the only remaining possibility will be to launch a new contract award procedure in which the excluded applicant will participate?

(2) In the light also of the judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988), is the answer to the previous question affected by the fact that provisional (or even final) judicial protection depends on an application for review having previously been dismissed by an independent national review board?

(3) Is the answer to the first question affected by (a) the finding that, if the excluded tenderer's complaints against its competitor's participation in the competition are upheld, it will not be possible to issue a new notice of competition or (b) the fact that the reason the applicant was excluded will make it impossible for it to participate if a new competition is announced?'

21 By decision of the President of the Court of 19 October 2019, the request made by the Symvoulio tis Epikrateias (Epitropi Anastolon) (Council of State (Suspension Chamber)) that the present case be dealt with under the expedited procedure was rejected.

Consideration of the questions referred

Admissibility of the questions referred

22 The Commission is of the opinion that the second and third questions bear no relation to the subject matter of the dispute in the main proceedings and must, therefore, be considered inadmissible. NAMA, in essence, makes an identical claim of inadmissibility with regard to the third question.

23 According to settled case-law, although questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court of Justice to determine, enjoy a presumption of relevance, the fact nonetheless remains that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they require in order to resolve the disputes before them. The justification for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. As is apparent from the actual wording of Article 267 TFEU, the question referred for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgment' in the case before it. Furthermore, under Article 94(c) of the Rules of Procedure of the Court, the referring court must set out precisely the reasons for its uncertainty as to the interpretation of EU law (judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 167 and 168).

24 In the present case, contrary to what the Commission argues, it is apparent from the order for reference that, by its second question, the referring court seeks to determine whether the fact that the exclusion of NAMA's bid by the contracting entity was partially validated by the AEPP, following a mandatory

application for administrative review, is a factor which must be taken into account in order to determine whether that tenderer may also contest, before the referring court, the decision of the contracting body to admit the bid of that tenderer's competitor. That question is therefore admissible.

25 By contrast, the order for reference does not set out the reasons why the answer to the third question would be necessary in order to resolve the case in the main proceedings, and the referring court has not established in what way the circumstances of the case in the main proceedings corresponds to one of the two cases envisaged by the third question.

26 It follows from the foregoing that the third question submitted by the referring court for a preliminary ruling must be declared inadmissible.

Substance

27 By the first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(3), Article 2(1)(a) and (b) and Article 2a(2) of Directive 92/13, interpreted in the light of the case-law of the Court, must be interpreted as meaning that they preclude a national practice under which a tenderer who has been excluded from a procurement procedure for the award of a public contract at a stage of the procurement procedure prior to the final contract award stage and whose request for a suspension of the decision to exclude it from that procedure has been refused, may not, in the absence of any interest in bringing proceedings, advance, in its request for suspension of the decision to admit the bid of another tenderer, introduced simultaneously, pleas with no connection to the shortcomings for which its own bid was excluded, with the exception of a plea that the decision to admit that bid infringes the principle of equality in the assessment of bids. Furthermore, that court is uncertain whether an unsuccessful tenderer's interest in bringing proceedings is affected by the fact that the application for administrative review of the decision to exclude it, which it was required to bring, under national law, before an independent national body, was dismissed.

28 Under Article 1(3) of Directive 92/13, Member States must ensure that review procedures are available, in accordance with detailed rules which they themselves may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

29 Article 2(1)(a) and (b) of that directive sets out the requirements which national measures taken to ensure the review procedures referred to in Article 1 thereof must respect, which include the fact that those review procedures must allow Member States, on the one hand, to take interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned and, on the other hand, to set aside or ensure the setting-aside of decisions which have been taken unlawfully.

30 Article 2a of that directive establishes rules on the standstill periods which the persons referred to in Article 1(3) of that directive must have in order to seek an effective review of decisions to award contracts taken by the contracting bodies. Article 2a(2) thus provides that, following the decision to award a contract, that contract may not be concluded before the expiry of a period calculated on the basis of the means by which the decision to award the contract was communicated to the tenderers and to the candidates concerned, and it specifies, inter alia, the conditions under which a tenderer or a candidate is considered to be concerned. As regards tenderers, the second subparagraph of that provision indicates that they are deemed to be concerned if they have not yet been definitively excluded and that an exclusion is definitive if it has been communicated to the tenderers concerned and has either been deemed lawful by an independent review body or can no longer be subject to a review procedure.

31 Tasked with interpreting the provisions of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), the Court has ruled that, in the context of a procurement procedure for the award of public contracts, tenderers whose exclusion is requested have an equivalent legitimate interest in the exclusion of the bids submitted by the other tenderers with a view to obtaining the contract (see, to that effect, judgment of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33). In paragraph 27 of the judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), the Court held that, on the one hand,

the exclusion of one tenderer may lead to another tenderer directly being awarded the contract in the same procedure and, on the other hand, if both tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly. Furthermore, in paragraph 29 of the same judgment, the Court specified that the number of participants in the public procurement procedure concerned as well as the number of participants who have instigated review procedures and the differing legal grounds relied on by those participants are irrelevant to the question of the applicability of the principle of the case-law established by the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448).

32 The case-law principle set out in the preceding paragraph, which was developed at a time when Directive 89/665 was in force, can be transposed to the system of judicial protection established by Directive 92/13 (see, to that effect, judgment of 11 May 2017, *Archus and Gama,* C-131/16, EU:C:2017:358, paragraphs 50 to 53).

33 It is, however, necessary to consider whether that case-law principle can also be applied where the legality of a decision admitting the bid of a tenderer is contested at a stage of the procurement procedure prior to the final contract award stage by a tenderer whose bid has been excluded.

34 In that regard, it should be noted that Directive 92/13 does not specify the stage at which an action against such a decision of a contracting body may be brought by a tenderer.

35 Furthermore, as follows from the second recital of Directive 92/13, that directive is intended to strengthen the existing mechanisms, both at national and EU levels, to ensure the effective application of the directives relating to public procurement. To that end, the fourth subparagraph of Article 1(1) of that directive requires Member States ‘to ensure that … decisions taken by the contracting bodies may be reviewed effectively and, in particular, as rapidly as possible’ (see, by analogy, judgment of 5 April 2017, *Marina de Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 30).

36 The objective of effective and rapid judicial protection, in particular by interim measures, pursued by that directive does not therefore authorise the Member States to make the exercise of the right to apply for review conditional on the fact that the public procurement procedure in question has formally reached a particular stage (see, by analogy, judgment of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 38, and judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 31).

37 More specifically, a national law which requires, in any event, a tenderer to wait for a decision awarding the contract in question before it may apply for a review of a decision allowing another tenderer to participate in that procurement procedure would infringe the provisions of Directive 92/13 (see, by analogy, judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 34).

38 It follows, first, that an unsuccessful tenderer may bring an action against the decision of the contracting body which admits the bid of one of its competitors, regardless of the stage of the procurement procedure for the award of a public contract at which that decision was taken and, secondly, that, in the context of such an action, the case-law principle recalled in paragraph 31 above may be applied.

39 As regards the pleas which an unsuccessful tenderer may advance in the context of such an action, it should be noted that Directive 92/13 does not set out any requirement other than that established in Article 1(1) thereof, namely that that tenderer may rely on pleas based on the infringement of EU law concerning public procurement or of national laws transposing that directive.

40 Moreover, in paragraph 29 of the judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), the Court noted that the fact that differing pleas have been advanced by the tenderers who were excluded from the procurement procedure at issue is not relevant for the application of the case-law principle recalled in paragraph 31 above.

41 It follows that the unsuccessful tenderer is entitled to advance any plea against the decision allowing another tenderer to participate, including those which do not have any connection with the

shortcomings for which its own bid was excluded.

42 That being so, the case-law principle recalled in paragraph 31 above applies only on condition that the exclusion of the tenderer was not confirmed by a decision which has become definitive (see, to that effect, judgments of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 57 and 58, and of 5 September 2019, *Lombardi*, C-333/18, EU:C:2019:675, paragraphs 31 and 32).

43 It is thus for the referring court to determine whether, in the present case, NAMA's exclusion must be regarded as final and conclusive on the ground that it has been confirmed by a decision which has become definitive. As was recalled in paragraph 18 above, it is, however, not apparent from the order for reference that that is the case.

44 Subject to that reservation, the fact that the national law requires an unsuccessful tenderer to apply for review before being able to bring an action before the referring court is immaterial to the interpretation set out in paragraphs 38 and 41 above. Article 2(9) of Directive 92/13 expressly authorises the Member States to confer on non-judicial authorities the power to rule, at first instance, on actions provided for by that directive, in so far as any allegedly illegal measure taken by that authority or any alleged defect in the exercise of the powers conferred on it can be the subject of a judicial action or of an action before another body which is a court or tribunal within the meaning of Article 267 TFEU which is independent of the contracting body and of the non-judicial authority which ruled at first instance.

45 Such an interpretation is not invalidated by the judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988), mentioned by the referring court in that context. Although it is true that it follows from paragraphs 13 to 16, 31 and 36 of that judgment that the tenderer whose bid had been excluded by the contracting authority from a procurement procedure for the award of public contracts could be refused access to a review of the decision awarding the public contract, in the case giving rise to that judgment, which did not concern an application before a national review authority, the decision to exclude that tenderer had been confirmed by a decision which had become definitive before the court hearing the review of the contract award decision delivered its decision, with the result that that tenderer had to be regarded as having been definitively excluded from the public procurement procedure at issue (see, to that effect, judgment of 5 September 2019, *Lombardi*, C-333/18, EU:C:2019:675, paragraph 31).

46 In the light of all of the foregoing, the answer to the questions referred is that Article 1(1) and (3), Article 2(1)(a) and (b) and Article 2a(2) of Directive 92/13 must be interpreted as meaning that a tenderer who has been excluded from a procurement procedure for the award of a public contract at a stage prior to the final contract award stage and whose request for suspension of the decision to exclude it from that procedure has been refused, may advance, in its request for suspension of the decision to admit the bid of another tenderer, introduced simultaneously, any plea based on the infringement of EU law concerning public procurement or of national rules transposing that law, including pleas which have no connection with the shortcomings for which its own bid was excluded. That option is not affected by the fact that the application for an administrative review before an independent national authority, which must, under national law, first be brought by the tenderer against the decision to exclude it, has been rejected, provided that that rejection has not become definitive.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 1(1) and (3), Article 2(1)(a) and (b) and Article 2a(2) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, must be interpreted as meaning that a

tenderer who has been excluded from a procurement procedure for the award of a public contract at a stage prior to the final contract award stage and whose request for suspension of the decision to exclude it from the procedure has been refused, may advance, in its request for suspension of the decision to admit the bid of another tenderer, introduced simultaneously, any plea based on the infringement of EU law concerning public procurement or of national rules transposing that law, including pleas which have no connection with the shortcomings for which its own bid was excluded. That option is not affected by the fact that the application for an administrative review before an independent national authority, which must, under national law, first be brought by the tenderer against the decision to exclude it, has been rejected, provided that that rejection has not become definitive.

[Signatures]

---

* Language of the case: Greek.

EU:C:2020:508

ORDONNANCE DE LA COUR (neuvième chambre)

30 juin 2020 (*)

[Texte rectifié par ordonnance du 3 septembre 2020]

« Renvoi préjudiciel – Article 99 du règlement de procédure de la Cour – Marchés publics – Directive 2014/24/UE – Article 12, paragraphe 4 – Attribution du marché à un établissement public non économique sans mise en concurrence – Marché des services relatifs à la gestion de la taxe sur les véhicules automobiles – Exclusion relative aux contrats relevant de la coopération entre entités publiques – Conditions »

Dans l'affaire C-618/19,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Consiglio di Stato (Conseil d'État, Italie), par décision du 4 juillet 2019, parvenue à la Cour le 16 août 2019, dans la procédure

Ge.Fi.L. – Gestione Fiscalità Locale SpA

contre

Regione Campania,

en présence de :

ACI – Automobile Club d'Italia,

ACI Informatica SpA,

ACI di Napoli,

ACI di Avellino,

ACI di Benevento,

ACI di Caserta,

ACI di Salerno,

LA COUR (neuvième chambre),

composée de M. S. Rodin, président de chambre, M. D. Šváby (rapporteur) et M^me^ K. Jürimäe, juges,

avocat général : M. M. Campos Sánchez-Bordona,

greffier : M. A. Calot Escobar,

vu la procédure écrite,

considérant les observations présentées :

– [Tel que rectifié par ordonnance du 3 septembre 2020] pour Ge.Fi.L. – Gestione Fiscalità Locale SpA, par M^es^ A. Dal Ferro, S. Armellini, A. Manzi, A. Calegari, N. Creuso, S. Lago et N. de Zan, avvocati,

– pour la Regione Campania, par M^es^ M. Consoli, G. Testa et A. Bove, avvocati,

– [Tel que rectifié par ordonnance du 3 septembre 2020] pour ACI – Automobile Club d'Italia, par M^es^ A. Lamberti, F. Guarini, V. Petrella, M. D'Ostuni et A. Pera, avvocati,

– pour le gouvernement italien, par M^me^ G. Palmieri, en qualité d'agent, assistée de M. F. Sclafani, avvocato dello Stato,

– pour le gouvernement estonien, par M^me^ N. Grünberg, en qualité d'agent,

– pour la Commission européenne, par MM. G. Gattinara et P. Ondrůšek ainsi que par M^me^ L. Haasbeek, en qualité d'agents,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 12, paragraphe 4, de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE (JO 2014, L 94, p. 65).

2 Cette demande a été présentée dans le cadre d'un litige opposant Ge.Fi.L. – Gestione Fiscalità Locale SpA à la Regione Campania (Région de Campanie, Italie) au sujet de l'attribution directe par cette région à ACI – Automobile Club d'Italia du service de support à la gestion des taxes sur les véhicules automobiles.

Le cadre juridique

Le droit de l'Union

3 Le considérant 33 de la directive 2014/24 énonce :

« Les pouvoirs adjudicateurs devraient pouvoir choisir de fournir conjointement leurs services publics par la voie de la coopération, sans être contraints de recourir à une forme juridique particulière. Cette coopération pourrait porter sur tous les types d'activités liées à l'exécution de services et à l'exercice de responsabilités confiées aux pouvoirs adjudicateurs participants ou assumées par eux, telles que des missions obligatoires ou volontaires relevant d'autorités locales ou régionales ou des services confiés à des organismes particuliers par le droit public. Les services fournis par les différents pouvoirs adjudicateurs participants ne doivent pas nécessairement être identiques ; ils pourraient également être complémentaires.

Les marchés concernant la fourniture conjointe de services publics ne devraient pas être soumis à l'application des règles établies dans la présente directive, à condition qu'ils soient conclus exclusivement entre pouvoirs adjudicateurs, que la mise en œuvre de cette coopération n'obéisse qu'à des considérations d'intérêt public et qu'aucun prestataire privé de services ne soit placé dans une situation privilégiée par rapport à ses concurrents.

Pour que ces conditions soient remplies, il convient que la coopération soit fondée sur le concept de coopération. Cette coopération n'exige pas que tous les pouvoirs participants se chargent de l'exécution des principales obligations contractuelles, tant que l'engagement a été pris de coopérer à l'exécution du service public en question. En outre, la mise en œuvre de la coopération, y compris tout transfert financier entre les pouvoirs adjudicateurs participants, ne devrait obéir qu'à des considérations d'intérêt public. »

4 L'article 2, paragraphe 1, point 5, de cette directive définit les « marchés publics » comme « des contrats à titre onéreux conclus par écrit entre un ou plusieurs opérateurs économiques et un ou plusieurs pouvoirs adjudicateurs et ayant pour objet l'exécution de travaux, la fourniture de produits ou la prestation de services ».

5 Intitulé « Marchés publics passés entre entités appartenant au secteur public », l'article 12 de ladite directive, prévoit, à son paragraphe 4 :

« Un marché conclu exclusivement entre deux pouvoirs adjudicateurs ou plus ne relève pas du champ d'application de la présente directive, lorsque toutes les conditions suivantes sont réunies :

a) le marché établit ou met en œuvre une coopération entre les pouvoirs adjudicateurs participants dans le but de garantir que les services publics dont ils doivent assurer la prestation sont réalisés en vue d'atteindre les objectifs qu'ils ont en commun ;

b) la mise en œuvre de cette coopération n'obéit qu'à des considérations d'intérêt public ; et

c) les pouvoirs adjudicateurs participants réalisent sur le marché concurrentiel moins de 20 % des activités concernées par la coopération ».

Le droit italien

6 Intitulé « Principes communs en matière d'exclusion pour les concessions, les marchés publics et les accords entre organismes publics et pouvoirs adjudicateurs dans le cadre du secteur public », l'article 5 du decreto legislativo n. 50 – Codice dei contratti pubblici (décret législatif n° 50, portant code des contrats publics), du 18 avril 2016 (supplément ordinaire à la GURI n° 91, du 19 avril 2016, ci-après le « code des contrats publics »), prévoit, à son paragraphe 6 :

« Un accord conclu exclusivement entre deux pouvoirs adjudicateurs ou plus ne relève pas du champ d'application du présent code, lorsque toutes les conditions suivantes sont réunies :

a) le marché établit ou met en œuvre une coopération entre les pouvoirs adjudicateurs ou les organismes publics adjudicateurs participants dans le but de garantir que les services publics dont ils doivent assurer la prestation sont réalisés en vue d'atteindre les objectifs qu'ils ont en commun ;

b) la mise en œuvre de cette coopération n'obéit qu'à des considérations d'intérêt public ; et

c) les pouvoirs adjudicateurs ou les organismes publics adjudicateurs participants réalisent sur le marché concurrentiel moins de 20 % des activités concernées par la coopération. »

7 Depuis le 1er janvier 1999, la taxe sur les véhicules automobiles est perçue par les régions, sur le fondement de l'article 17 de la legge n. 449 – Misure per la stabilizzazione della finanza pubblica (loi n° 449, portant mesures de stabilisation des finances publiques), du 27 décembre 1997 (GURI n° 302, du 30 décembre 1997), lequel dispose :

« la perception, la constatation, le recouvrement, le remboursement, l'application des sanctions et le contentieux administratif concernant les taxes locales sur les véhicules automobiles sont confiés aux régions à statut ordinaire et sont réalisés selon les modalités définies par décret du Ministre des finances après consultation de la Conférence permanente pour les relations entre l'État, les régions et les provinces autonomes de Trento et de Bolzano [(Italie)] [...] »

8 L'article 1er, paragraphe 121, de la legge della Regione Campania n. 16 « Interventi di rilancio e sviluppo dell'economia regionale nonché di carattere ordinamentale e organizzativo » (loi de la Région de Campanie n° 16, relative aux interventions de relance et de développement de l'économie régionale et à caractère normatif et organisationnel), du 7 août 2014 (*Bollettino ufficiale della Regione Campania* n° 57, du 7 août 2014, ci-après la « loi régionale n° 16/2014 »), dispose :

« Pour la gestion de la taxe sur les véhicules automobiles, l'exécutif régional est habilité à négocier avec l'[ACI], reconnu [...] en tant qu'établissement public non économique préposé aux services d'intérêt général, une convention ad hoc, d'une durée de trois ans, pour l'exercice des activités inhérentes à l'application de la taxe. »

9 L'article 2 du decreto ministeriale n. 418 – Regolamento recante norme per il trasferimento alle regioni a statuto ordinario delle funzioni in materia di riscossione, accertamento, recupero, rimborsi e contenzioso relative alle tasse automobilistiche non erariali (décret ministériel n° 418, portant fixation des règles de transfert aux régions statutaires ordinaires des fonctions relatives à la perception, à l'évaluation, au recouvrement, aux remboursements et aux litiges relatifs aux taxes sur les véhicules à moteur), du 25 novembre 1998 (GURI n° 285, du 5 décembre 1998), prévoit que les régions exercent lesdites fonctions directement, fût-ce en ayant recours au système de l'« *avvalimento* », c'est-à-dire en recourant aux structures et au personnel d'autres organismes publics, mais sans leur transférer la charge de la mission de service public, ou par l'intermédiaire de concessionnaires choisis par celles-ci suivant les modalités et les procédures d'appels d'offres publics prévues par la législation de l'Union et par la législation nationale en matière de marchés publics et de services.

Le litige au principal et la question préjudicielle

10 Ge.Fi.L. est une société qui opère dans le secteur des services de support à la gestion des taxes sur les véhicules automobiles. Elle a remporté l'appel d'offres que la Région de Vénétie (Italie) avait lancé relativement à ces services et a également participé à l'appel d'offres organisé par la Région des Marches (Italie) en vue de l'attribution des mêmes services.

11 Ge.Fi.L. a saisi le Tribunale amministrativo regionale per la Campania (tribunal administratif régional de Campanie, Italie) d'un recours en annulation dirigé, notamment, contre la décision de l'exécutif régional de Campanie, du 28 décembre 2017, approuvant un « modèle de convention entre la Région de Campanie et l'[ACI] en matière de taxes régionales sur les véhicules automobiles, conformément à l'article 15 de la [legge n. 241 – Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (loi n° 241, portant sur les nouvelles règles de procédure administrative et le droit d'accès aux documents administratifs), du 7 août 1990 (GURI n° 192, du 18 août 1990)], pour la période allant du 1er janvier 2018 au 31 décembre 2020 ». Cette convention, qui est renouvelable pour trois années supplémentaires, prévoit le versement d'une contrepartie forfaitaire, pour ces trois années, de 10 485 000 euros, majorée de paiements à la prestation, d'une indexation fondée sur les indices établis par l'Istituto Nazionale di Statistica (Istat) (Institut national de statistique, Italie) et, le cas échéant, de la taxe sur la valeur ajoutée (TVA). Selon Ge.Fi.L., les conditions posées à l'article 5, paragraphe 6, du code des contrats publics et à l'article 12, paragraphe 4, de la directive 2014/24, pour recourir directement à un partenariat entre pouvoirs adjudicateurs, n'étaient pas réunies, de sorte qu'il aurait été nécessaire de publier un appel d'offres en vue de l'attribution d'un marché public avec mise en concurrence.

12 Cette juridiction a rejeté le recours de Ge.Fi.L. au motif que l'ACI constituait un établissement public non économique ayant pour mission de gérer le registre public des automobiles, ainsi que les services en matière de taxes sur les véhicules automobiles que les régions et les provinces autonomes italiennes lui confient. En vertu de l'article 17, paragraphe 10, de la loi n° 449, du 27 décembre 1997, les régions, qui sont compétentes en matière de constatation et de perception des taxes locales sur les véhicules automobiles, pourraient, conformément à l'article 2 du décret ministériel n° 418, du 25 novembre 1998, exercer ces activités soit directement, au besoin en s'appuyant sur les structures et le personnel d'autres organismes publics sans leur transférer la charge de la mission de service public en recourant à la procédure d'« *avvalimento* », soit par l'intermédiaire de concessionnaires choisis à l'issue de procédures d'appel d'offres. Par ailleurs, avant le transfert aux régions des fonctions administratives en ce domaine, qui est intervenu le 1er janvier 1999, la République italienne elle-même se serait appuyée sur l'ACI pour les services de recouvrement et de constat des taxes sur les véhicules automobiles.

13 Le Tribunale amministrativo regionale per la Campania (tribunal administratif régional de Campanie) a relevé que, conformément à l'article 2 du décret ministériel n° 418, du 25 novembre 1998, l'article 1er, paragraphe 121, de la loi régionale n° 16/2014 habilite l'exécutif régional à négocier avec l'ACI, en sa qualité d'établissement public non économique préposé aux services d'intérêt général, une convention ad hoc, d'une durée de trois ans, pour la gestion de la taxe sur les véhicules automobiles. Une telle coopération trouverait ainsi son fondement dans une disposition législative expresse. Le législateur régional aurait estimé que l'intérêt général justifiait de s'appuyer sur un autre organisme public, en l'occurrence l'ACI, pour gérer le service en cause au principal. Cette appréciation serait insusceptible de faire l'objet d'un contrôle juridictionnel de légalité. Enfin, l'activité de gestion de la taxe sur les véhicules automobiles ne saurait notamment conduire ni cette région ni l'ACI à exercer la moindre activité concurrentielle susceptible de donner lieu à des distorsions de concurrence sur le marché.

14 Cette juridiction a, dès lors, conclu que la décision de la Région de Campanie de confier directement à l'ACI la gestion du service en cause au principal constituerait un accord entre pouvoirs adjudicateurs conforme à l'article 5, paragraphe 6, du code des contrats publics et à l'article 12, paragraphe 4, de la directive 2014/24.

15 Ge.Fi.L., qui a interjeté appel du jugement du Tribunale amministrativo regionale per la Campania (tribunal administratif régional de Campanie) devant le Consiglio di Stato (Conseil d'État, Italie), soutient que l'ensemble des conditions auxquelles ces dispositions soumettent la conclusion d'un partenariat entre pouvoirs adjudicateurs ne sont pas réunies en l'occurrence. En effet, dans d'autres régions italiennes, le service en cause au principal lui aurait été attribué par la voie d'un appel d'offres. En outre, l'ACI bénéficierait non pas uniquement d'un remboursement de certaines dépenses encourues, mais, au contraire, d'une rémunération substantielle.

16 Le Consiglio di Stato (Conseil d'État) considère que la convention en cause au principal a été attribuée en méconnaissance des conditions requises pour conclure un partenariat entre pouvoirs adjudicateurs. Certes, l'ACI serait un établissement public non économique, sans but lucratif et chargé de services d'intérêt général consistant à représenter, à protéger et à promouvoir dans ses multiples aspects les intérêts du secteur automobile italien, dans les domaines du sport, du tourisme, de la sécurité, des consommateurs, de l'assistance et de l'information. Néanmoins, la mission de service public dont l'ACI serait chargé se limiterait à la gestion du registre public des automobiles et n'inclurait donc pas la gestion de la taxe sur les véhicules automobiles, de sorte que la convention en cause au principal ne porterait pas sur une mission commune aux parties contractantes. L'exigence d'un intérêt général commun aux pouvoirs adjudicateurs contractants ferait donc défaut.

17 Il s'ensuit que, selon la juridiction de renvoi, l'ACI devrait être assimilé à un simple opérateur économique, dès lors qu'il opère en dehors de la mission de service public qui lui incombe. Cette juridiction relève qu'il bénéficie de paiements largement supérieurs aux niveaux de prix pratiqués sur le marché. En outre, ceux-ci seraient prévus et fixés dans le contrat a priori et dus à l'ACI en toute hypothèse, ce qui exclurait expressément tout contrôle des coûts ou des dépenses encourues. À cet égard, la juridiction de renvoi relève que 4 366 682 véhicules sont en circulation dans la Région de Campanie et que le coût annuel du service faisant l'objet de la convention en cause au principal est de 3 495 000 euros pour la seule contrepartie forfaitaire, cette somme étant majorée, le cas échéant, de la TVA ainsi que de nombreux paiements à la prestation s'élevant à plusieurs centaines de milliers d'euros par an. En revanche, le coût annuel du service effectué par Ge.Fi.L. pour la Région de Vénétie, dans laquelle 3 939 166 véhicules seraient en circulation, serait de 2 148 019,29 euros, marge bénéficiaire comprise.

18 Eu égard aux considérations qui précèdent, le Consiglio di Stato (Conseil d'État) a décidé de surseoir à statuer et de poser à la Cour la question préjudicielle suivante :

« Le droit [de l'Union], et, en particulier, les principes de libre circulation des services et d'ouverture maximale à la concurrence dans le cadre des marchés publics de services, s'oppose-t-il à une disposition régionale comme l'article 1er, paragraphe 121, de la loi [régionale n° 16/2014], qui permet l'attribution directe, sans appel d'offres, des services relatifs à la gestion de la taxe sur les véhicules automobiles par la Région de Campanie à l'ACI ? »

Sur la question préjudicielle

19 Par sa question, la juridiction de renvoi demande, en substance, si l'article 12, paragraphe 4, de la directive 2014/24 doit être interprété en ce sens qu'il s'oppose à une disposition nationale qui permet l'attribution directe, sans appel d'offres, du marché des services relatifs à la gestion de la taxe sur les véhicules automobiles à un établissement public non économique ayant pour mission de gérer le registre public des automobiles.

20 À titre liminaire, il convient de rappeler que l'article 12, paragraphe 4, de la directive 2014/24, qui expose les conditions dans lesquelles les relations de collaboration entre pouvoirs adjudicateurs ne relèvent pas du champ d'application de cette directive, ne s'applique qu'à des contrats qui ont la qualité de « marchés publics » et qui, partant, ont un caractère onéreux.

21 En effet, tant l'intitulé de l'article 12 de cette directive qui vise les « [m]archés publics passés entre entités appartenant au secteur public » que l'appartenance de cette disposition à la section 3, intitulée « Exclusions », du chapitre I de cette directive suffisent à établir qu'un marché conclu entre pouvoirs adjudicateurs constitue un « marché public », au sens de l'article 2, paragraphe 1, point 5, de ladite directive (voir, en ce sens, arrêt du 28 mai 2020, Informatikgesellschaft für Software-Entwicklung, C-796/18, EU:C:2020:395, points 31 et 32).

22 Or, pour être qualifié de « marché public », au sens de l'article 2, paragraphe 1, point 5, de la directive 2014/24, un contrat doit avoir été conclu à titre onéreux et, partant, impliquer que le pouvoir adjudicateur qui conclut un marché public reçoive en vertu de ce contrat, moyennant une contrepartie, une prestation devant comporter un intérêt économique direct pour ce pouvoir adjudicateur. En outre, ce contrat doit présenter un caractère synallagmatique, ce trait constituant une caractéristique essentielle d'un marché public (voir, par analogie, arrêt du 21 décembre 2016, Remondis, C-51/15, EU:C:2016:985, point 43).

23 Il s'ensuit, d'une part, que l'exclusion des règles de passation des marchés publics présuppose que le contrat concerné soit un marché public, au sens de l'article 2, paragraphe 1, point 5, de la directive 2014/24, et, d'autre part, qu'un marché public remplissant les conditions posées à l'article 12, paragraphe 4, sous a) à c), de cette directive, conserve sa nature juridique de « marché public », et ce même si de telles règles ne lui sont pas applicables (arrêt du 28 mai 2020, Informatikgesellschaft für Software-Entwicklung, C-796/18, EU:C:2020:395, points 31, 32 et 34).

24 À cet égard, il ressort de l'article 12, paragraphe 4, de la directive 2014/24 que, pour être exclu des règles de passation des marchés publics, un marché public conclu exclusivement entre deux pouvoirs adjudicateurs ou plus doit établir ou mettre en œuvre une coopération entre les pouvoirs adjudicateurs participants dans le but de garantir que les services publics dont ils doivent assurer la prestation sont réalisés en vue d'atteindre les objectifs qu'ils ont en commun. En outre, la mise en œuvre de cette coopération ne doit obéir qu'à des considérations d'intérêt public. Par ailleurs, les pouvoirs adjudicateurs participants doivent réaliser sur le marché concurrentiel moins de 20 % des activités concernées par la coopération.

25 En premier lieu, il convient de relever, ainsi que cela ressort de son libellé, que l'article 12, paragraphe 4, sous a) et b), de ladite directive place la notion de « coopération » au cœur même du dispositif d'exclusion prévu à cette disposition. La précision, en apparence tautologique, énoncée au considérant 33, troisième alinéa, de la directive 2014/24, selon laquelle la coopération doit être « fondée sur le concept de coopération », renvoie, en réalité, à l'exigence d'effectivité de la coopération ainsi établie ou mise en œuvre (arrêt du 4 juin 2020, Remondis, C-429/19, EU:C:2020:436, point 28).

26 Il s'ensuit, d'une part, que la conclusion d'un accord de coopération entre entités appartenant au secteur public doit apparaître comme l'aboutissement d'une démarche de coopération entre les parties à celui-ci. L'élaboration d'une coopération entre entités appartenant au secteur public présente, en effet, une dimension intrinsèquement collaborative (arrêt du 4 juin 2020, Remondis, C-429/19, EU:C:2020:436, point 28).

27 D'autre part, la participation conjointe de toutes les parties à l'accord de coopération est indispensable pour garantir que les services publics dont ils doivent assurer la prestation sont réalisés. Cette condition

ne saurait être réputée satisfaite lorsque l'unique contribution de certains cocontractants se limite à un simple remboursement des frais encourus par l'une des parties contractantes (arrêt du 4 juin 2020, Remondis, C-429/19, EU:C:2020:436, point 29). En effet, si un tel remboursement des frais suffisait à lui seul à caractériser une « coopération », au sens de l'article 12, paragraphe 4, de la directive 2014/24, aucune différenciation ne pourrait être établie entre une telle « coopération » et un « marché public » non couvert par l'exclusion prévue à cette disposition.

28 Ainsi, il ne saurait être déduit de la circonstance que la Cour se soit référée, dans l'arrêt du 9 juin 2009, Commission/Allemagne (C-480/06, EU:C:2009:357, point 43), à des mouvements financiers correspondant au remboursement de la part des charges incombant à chacun des pouvoirs adjudicateurs participant au partenariat que seul ce type de frais peut être admis.

29 En l'occurrence, la décision de renvoi ne semble toutefois pas pouvoir permettre de caractériser l'existence d'une véritable coopération entre la Région de Campanie et l'ACI, la convention en cause au principal ayant, selon la juridiction de renvoi, uniquement pour objet l'acquisition d'une prestation moyennant le versement d'une rémunération. La convention en cause au principal ne semble pas non plus constituer l'aboutissement d'une démarche de coopération entre ces deux pouvoirs adjudicateurs.

30 En deuxième lieu, ainsi que cela a été relevé au point 16 de la présente ordonnance, la juridiction de renvoi considère que la convention en cause au principal n'a pas été conclue en vue d'atteindre des objectifs communs à la Région de Campanie et à l'ACI.

31 Néanmoins, dans la mesure où l'ACI allègue, dans ses observations écrites, qu'il a pour mission de gérer le registre public des automobiles, lequel sert à déterminer les redevables de cette taxe, et que, partant, il serait titulaire de missions publiques relatives à ladite taxe, il appartient à la juridiction de renvoi d'apprécier si la mission ainsi confiée à l'ACI n'est pas susceptible d'être appréhendée comme une activité accessoire à la perception de la taxe sur les véhicules automobiles.

32 En effet, il découle de l'article 12, paragraphe 4, de la directive 2014/24, lu en combinaison avec le considérant 33, premier alinéa, de cette directive, qu'une coopération entre personnes publiques peut porter sur tous les types d'activités liées à l'exécution de services et à l'exercice de responsabilités confiées aux pouvoirs adjudicateurs participants ou assumées par eux. Or, l'expression « tous les types d'activités », figurant audit considérant 33, premier alinéa, est susceptible de couvrir une activité accessoire à un service public, pour autant que cette activité accessoire contribue à la réalisation effective de la mission de service public qui fait l'objet de la coopération entre les pouvoirs adjudicateurs participants (arrêt du 28 mai 2020, Informatikgesellschaft für Software-Entwicklung, C-796/18, EU:C:2020:395, point 60).

33 En troisième lieu, ainsi que cela a été relevé au point 17 de la présente ordonnance, il ressort de la décision de renvoi que les paiements prévus par la convention en cause au principal excèdent manifestement le simple remboursement des dépenses encourues puisque ce contrat prévoirait le paiement d'une contrepartie largement supérieure aux niveaux de prix pratiqués sur le marché.

34 Il apparaît donc que la contrepartie financière prévue par le contrat en cause en principal n'obéit pas uniquement à des considérations d'intérêt public, contrairement à ce que requièrent tant l'article 12, paragraphe 4, sous b), de la directive 2014/24 que le considérant 33, troisième alinéa, de cette directive.

35 Il s'ensuit que, dans la mesure où les conditions d'application de l'article 12, paragraphe 4, de la directive 2014/24 sont cumulatives, la convention en cause au principal ne saurait, en tout état de cause, remplir les conditions prévues à cette disposition.

36 Eu égard aux considérations qui précèdent, il convient de répondre à la question posée que l'article 12, paragraphe 4, de la directive 2014/24 doit être interprété en ce sens qu'il s'oppose à une disposition nationale qui permet l'attribution directe, sans appel d'offres, du marché des services relatifs à la gestion de la taxe sur les véhicules automobiles à un établissement public non économique ayant pour mission de gérer le registre public des automobiles.

Sur les dépens

37 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (neuvième chambre) dit pour droit :

L'article 12, paragraphe 4, de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE, doit être interprété en ce sens qu'il s'oppose à une disposition nationale qui permet l'attribution directe, sans appel d'offres, du marché des services relatifs à la gestion de la taxe sur les véhicules automobiles à un établissement public non économique ayant pour mission de gérer le registre public des automobiles.

Signatures

---

* Langue de procédure : l'italien.

JUDGMENT OF THE COURT (Fifth Chamber)

6 October 2021 (*)

[Text rectified by order of 6 December 2021]

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 20 – Reserved contracts – National legislation reserving the right to participate in certain public procurement procedures to Social initiative special employment centres – Additional conditions not provided for by the directive – Principles of equal treatment and proportionality)

In Case C-598/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain), made by decision of 17 July 2019, received at the Court on 6 August 2019, in the proceedings

Confederación Nacional de Centros Especiales de Empleo (Conacee)

v

Diputación Foral de Gipuzkoa,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász, C. Lycourgos (Rapporteur) and I. Jarukaitis, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Confederación Nacional de Centros Especiales de Empleo (Conacee), by F. Toll Musteros, Procurador, and by L. García Del Río, and A. Larrañaga Ysasi-Ysasmendi, abogados,

– Diputación Foral de Gipuzkoa, by B. Urizar Arancibia, Procuradora, and I. Arrue Espinosa, abogado,

– the Spanish Government, by J. Rodríguez de la Rúa Puig, acting as Agent,

– the European Commission, by M. Jáuregui Gómez, L. Haasbeek, and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 April 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 20 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between the Confederación Nacional de Centros Especiales de Empleo (Conacee) (National Confederation of Special Employment Centres, Spain) and the Diputación Foral de Gipuzkoa (Provincial Council of Gipuzkoa, Spain) concerning a decision of the Governing body of that provincial council of 15 May 2018 approving instructions issued to that institution's contracting authorities for certain reserved contracts.

Legal context

European Union law

Directive 2004/18/EC

3 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) was repealed with effect from 18 April 2016. The first paragraph of Article 19 of that directive provided:

'Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.'

Directive 2014/24

4 Recitals 1 and 36 of Directive 2014/24 state:

'(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

…

(36) Employment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all. In this context, sheltered workshops can play a significant role. The same is true for other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups. However, such workshops or businesses might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States should be able to reserve the right to participate in award procedures for public contracts or for certain lots thereof to such workshops or businesses or reserve performance of contracts to the context of sheltered employment programmes.'

5 Under Article 2(1), points (5) and (10), of that directive:

'For the purposes of this Directive:

…

(5) “public contracts” means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

…

(10) “economic operator” means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market.’

6 Article 18(1) of that directive, entitled ‘Principles of procurement’, provides:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

7 Article 20 of that directive states, under the heading ‘Reserved contracts’:

‘1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

2. The call for competition shall make reference to this Article.’

Spanish law

8 Ley 9/2017 de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014 (Law 9/2017 on Public Sector Procurement, which transposes Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of 26 February 2014 into Spanish law), of 8 November 2017 (BOE No 272, of 9 November 2017, p. 107714) (‘Law on public sector contracts’) transposes Directive 2014/24 into Spanish law. The Fourth Additional Provision of that law, entitled ‘Reserved contracts’, provides:

‘1. By decision of the Council of Ministers or of the competent body within the sphere of the autonomous communities and local authorities, minimum percentages shall be set for reservation of the right to participate in procurement procedures for the award of certain contracts or certain lots of those contracts to social initiative special employment centres and to work integration social enterprises, governed, respectively, by Real Decreto Legislativo 1/2013 por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social [(Royal Legislative Decree 1/2013 approving the consolidated text of the General Law on the rights of persons with disabilities and their social inclusion) of 29 November 2013 (“Royal Legislative Decree 1/2013”)] and by Ley 44/2007 para la regulación del régimen de las empresas de inserción [(Law 44/2007 on work integration social enterprises)] of 13 December 2007, which satisfy the eligibility criteria laid down in that legislation to qualify as such, or establish a minimum percentage for reservation of the performance of those contracts in the context of sheltered employment programmes, provided that the proportion of disabled or socially excluded staff of special employment centres, work integration social enterprises and programmes is that stipulated in the legislation in question and, in any event, at least 30%.

The decision of the Council of Ministers or of the competent body within the sphere of the autonomous communities and local authorities shall set out the minimum requirements for ensuring compliance

with the provisions of the previous paragraph.

…

2. The call for competition shall make reference to this Article.

…’

9 The Fourteenth Final Provision of the Law on public sector contracts, which defines the concept of ‘social initiative special employment centres’ to which the Fourth Additional Provision of that Law restricts the reservation of public contracts, states:

‘… Social initiative special employment centres are those which satisfy the criteria laid down in paragraphs 1 and 2 of [Article 43 of the consolidated text of the General Law on the rights of persons with disabilities and their social inclusion], and are promoted and in which more than 50 per cent of the shares are held, directly or indirectly, by one or more public or private undertakings which are not-for-profit or whose social nature is referred to in their articles of association, whether these are associations, foundations, bodies governed by public law, social initiative cooperatives or other social economy entities, and also those owned by commercial companies referred to above, whether directly or indirectly (through the concept of dominant company governed by Article 42 of the Commercial Code), and provided in all cases that it is stipulated in their articles of association or a shareholders’ resolution that their profits must be reinvested in full in the creation of employment opportunities for persons with disabilities and the continuous improvement of their competitiveness and their social economy activity, while having, in any event, the right to opt to reinvest profits in the special employment centre itself or in other social initiative special employment centres.’

10 Article 43 of the consolidated text of the General Law on the rights of persons with disabilities and their social inclusion, which defines special employment centres, provides in paragraphs 1, 2 and 4:

‘1. The principal objective of special employment centres is to carry on activities for the production of goods or services, by participating regularly in market operations, in order to provide paid employment to disabled persons; they are also a means of including as many of those persons as possible in regular employment. …

2. Special employment centres shall be staffed by as many disabled workers as the nature of the production process allows and, in any case, at least 70% of the employees shall be disabled.

…

4. [This paragraph reproduces the definition of “social initiative special employment centres” as set out in the Fourteenth Final Provision of the Law on public sector contracts]’

The dispute in the main proceedings and the question referred for a preliminary ruling

11 Conacee is a non-profit-making association governed by Spanish law whose members are federations and associations of special employment centres.

12 On 23 July 2018, Conacee brought an administrative action before the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain) seeking annulment of the decision of the Diputación Foral de Gipuzkoa of 15 May 2018, which approved the instructions issued to that institution’s contracting authorities and reserved the right to participate in procedures for the award of contracts or certain lots of those contracts to social initiative special employment centres or to work integration social enterprises, and the performance of a number of such contracts in the context of sheltered employment programmes.

13 The contracts included in those instructions are those that are referred to as being reserved in the Fourth Additional Provision and the Fourteenth Final Provision of the Law on public contracts, which transpose Article 20 of Directive 2014/24 into Spanish law.

14 Those provisions reserve access to the contracts referred to in Article 20 to social initiative special employment centres and work integration social enterprises, thereby excluding from the scope of those provisions and, consequently, from the reservation of those contracts, the business initiative special employment centres which Conacee represents at the national level.

15 The referring court states that, by determining the scope *ratione personae* of reserved contracts, those provisions impose requirements in addition to those laid down in Article 20 of Directive 2014/24. That provision, by limiting its scope to only 'social initiative special employment centres', has the effect of excluding from the reservation undertakings and economic operators which otherwise satisfy the conditions laid down in Article 20 in that at least 30% of their employees are disabled or disadvantaged persons and their main aim is to further the social and professional integration of those persons.

16 In those circumstances, the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 20 of Directive [2014/24] be interpreted as meaning that the scope *ratione personae* of the reservation laid down therein cannot be defined in terms which exclude from its scope undertakings or economic operators which satisfy the condition that at least 30% of their employees must be persons with disabilities and which meet the aim or objective of the social and professional integration of those persons, by setting additional criteria related to the constitution, character and aims of those bodies, to their activities and investments, or to other matters?'

Consideration of the question referred

17 By its question the referring court asks, in essence, whether Article 20(1) of Directive 2014/24 must be interpreted as precluding a Member State from imposing requirements in addition to those laid down in that provision, thereby excluding from reserved public procurement procedures certain economic operators which satisfy the criteria laid down in that provision.

18 Article 20(1) of Directive 2014/24 gives Member States the option of reserving the right to participate in public procurement procedures to certain entities and makes that provision subject to fulfilment of the two cumulative conditions listed in that provision, namely, (i) that the participants in the procurement procedure are sheltered workshops or economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, and (ii) that at least 30% of the employees of those workshops and economic operators are disabled or disadvantaged persons.

19 In order to reply to the question referred, it is necessary to determine whether those two conditions are listed exhaustively in Article 20(1), in such a way that that provision precludes Member States from imposing additional criteria and thereby excluding from the reserved public procurement procedures referred to in that provision economic operators which, despite satisfying the conditions laid down in that provision, do not satisfy the additional criteria laid down by national law.

20 According to settled case-law, when interpreting a provision of EU law it is necessary to consider not only its wording but also the objectives of the legislation of which it forms part and the origin of that legislation (judgment of 15 November 2018, *Verbraucherzentrale Baden-Württemberg*, C-330/17, EU:C:2018:916, paragraph 23 and the case-law cited).

21 In the first place, as regards the wording of Article 20(1) of Directive 2014/24, it should be noted, first, that that provision confers on Member States the option of reserving to sheltered workshops and certain economic operators the right to participate in public procurement procedures and sets out the conditions to which that option is subject. As the Advocate General has stated, in essence, in points 41 and 42 of his Opinion, that provision is worded in terms which in no way indicate that all entities which meet those conditions must benefit from that right.

22 Secondly, the second condition laid down in that provision, namely that disabled or disadvantaged persons must make up at least 30% of the employees of the entities referred to in that provision, constitutes merely a minimum requirement.

23 Third, it is important to point out that the reference to ‘economic operators’ indicates, in the light of the definition of those terms in Article 2(10) of that directive and as the Advocate General stated, in essence, in point 42 of his Opinion, that those conditions are broad and unspecific as to which entities may benefit from the public procurement procedures referred to in Article 20(1), provided that the main aim of those operators is the social and professional integration of disabled or disadvantaged persons.

24 Thus it follows from the wording of Article 20(1) of Directive 2014/24 that, when they decide to reserve to certain participants the right to participate in public procurement procedures, pursuant to that provision, Member States enjoy a degree of latitude in implementing the conditions laid down in that provision.

25 In the second place, as regards the objective pursued by Article 20(1) of Directive 2014/24, it is clear from recital 36 of the directive that, in order for employment and occupation to contribute to integration in society and to guarantee equal opportunities for all, the option provided for in that provision must be exercised for the benefit of sheltered workshops and economic operators whose main aim is to support the social and professional integration or reintegration of disabled or disadvantaged persons, such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups who might not be able to obtain contracts under normal conditions of competition.

26 It follows that the EU legislature wished to promote, by means of employment and occupation, the integration of disabled or disadvantaged persons in society, by allowing Member States to reserve the right to participate in award procedures for public contracts, or for certain lots of those contracts, to protected workshops and economic operators which, in view of their social objective, operate in the market with a competitive disadvantage.

27 Thus, Article 20(1) of Directive 2014/24 pursues a social policy objective, relating to employment. However, as EU law currently stands, the Member States have a wide margin of discretion in defining the measures likely to achieve a given social and employment policy objective (see, to that effect, judgment of 19 September 2018, *Bedi*, C-312/17, EU:C:2018:734, paragraph 59 and the case-law cited).

28 Consequently, an examination of the objective pursued by Article 20(1) of Directive 2014/24 supports the interpretation arising from the wording of that provision, in the sense that, in the light of that discretion, the Member States enjoy a certain latitude in the implementation of that provision. It follows that Article 20(1) of Directive 2014/24 does not contain an exhaustive list of conditions, but leaves it to Member States to adopt additional criteria which the entities referred to in that provision must satisfy in order to be allowed to participate in reserved public procurement procedures pursuant to that provision, provided that those additional criteria contribute to ensuring the social and employment policy objectives pursued by that provision.

29 In the third place, that interpretation is also borne out by the origin of Article 20(1) of Directive 2014/24. Article 19(1) of Directive 2004/18, which was applicable to reserved contracts before it was repealed by Directive 2014/24, imposed considerably stricter requirements on the right to participate in public contract award procedures which could be reserved by Member States, as regards both the entities allowed to participate in those procedures, which were limited to sheltered workshops, and the persons employed by those entities, which had to be staffed predominantly by handicapped persons who, by reason of the nature or the seriousness of their disabilities, were unable to pursue an occupation under normal conditions.

30 It should be noted that it is not apparent from Directive 2014/24 or the origin of that directive that the EU legislature, when it broadened the scope *ratione personae* for public procurement procedures reserved by Article 20(1) of Directive 2014/24, intended to create a situation in which the economic operators referred to in that provision, which employ a lower percentage of disabled or disadvantaged persons, would replace economic operators meeting the stricter requirements under Article 19(1) of Directive 2004/18. Moreover, such an outcome would be contrary to the objective pursued by Article 20(1) of Directive 2014/24, which, as is apparent from paragraph 26 above, is to integrate disabled and disadvantaged persons in society by means of occupation and employment.

31 However, as the Advocate General observed, in essence, in point 51 of his Opinion, that is precisely what would happen if Member States were required to allow the participation of all economic operators fulfilling the conditions laid down in Article 20(1) in public procurement procedures for reserved contracts. There is a risk that, in such a situation, economic operators meeting the stricter requirements laid down in Article 19(1) of Directive 2004/18 would be obliged to dismiss some of the less productive disabled or disadvantaged workers, in order to be able to participate in those public contract award procedures on an equal footing with economic operators with only 30% disabled or disadvantaged workers.

32 Consequently, Article 20(1) of Directive 2014/24 must be interpreted as meaning that the conditions which it sets out are not exhaustive and that Member States may, where appropriate, stipulate additional criteria which the entities referred to in that provision must satisfy in order to be allowed to participate in reserved public procurement procedures.

33 However, it is important to note that Member States, in making use of this option, must respect the fundamental rules of the TFEU, in particular those relating to the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles deriving from them, such as the principles of equal treatment and proportionality (see, to that effect, judgment of 3 October 2019, *Irgita*, C-285/18, EU:C:2019:829, paragraph 48 and the case-law cited), which are, moreover, reflected in Article 18 of Directive 2014/24.

34 Accordingly, the referring court will have to examine whether the national legislation at issue in the main proceedings, according to which, in the context of reserved procurement procedures under Article 20(1) of Directive 2014/24, special employment centres must, first, be promoted and have more than 50% of their shares held, directly or indirectly, by not-for-profit entities and, second, reinvest their profits in full in their own establishment or in another centre of the same kind, is consistent with those principles.

35 In order to provide that court with the information necessary to carry out such an examination, the following should be noted.

36 In the first place, it should be noted that the principle of equal treatment, which is one of the fundamental principles of EU law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, paragraph 85 and the case-law cited).

37 In particular, in the field of EU public procurement law, the principle of equal treatment, which constitutes the basis of the EU rules on procedures for the award of public contracts, means, in particular, that tenderers must be in a position of equality when they formulate their tenders, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure (see, to that effect, judgment of 11 July 2019, *Telecom Italia*, C-697/17, EU:C:2019:599, paragraphs 32 and 33 and the case-law cited).

38 Thus, in the present case, the referring court will have to determine, inter alia, whether social initiative special employment centres are in the same situation as business initiative special employment centres as regards the objective pursued by Article 20(1) of Directive 2014/24.

39 In making that determination, that court must take into account, in particular, first, the fact that it is apparent from the national legislation that the purpose of a special employment centre, whether a social or business initiative, is to provide paid employment for disabled persons and is regarded as a means of including as many of those people as possible in regular employment, and, second, that at least 70% of the employees of special employment centres are disabled.

40 It follows that, subject to the findings of the referring court, business initiative special employment centres, like social initiative special employment centres, appear to be in a situation in which they would not be able to participate in award procedures for public contracts under normal conditions of competition.

41 However, that court will also have to determine whether, as the Spanish Government stated, in essence, in its written observations, social initiative special employment centres, on account of their particular characteristics, are in a position to implement more effectively the social integration objective pursued by Article 20(1) of Directive 2014/24, which could objectively justify a difference in treatment with respect to business initiative special employment centres. In that regard, the Spanish Government states that social initiative special employment centres maximise social and non-economic value, given, first, that they have no profit-making aim and that they reinvest all their profits in their social objectives, second, that they tend to be governed by democratic and participatory principles and, third, that they thus achieve greater social impact by providing better quality employment and better social and professional integration and reintegration for disabled and disadvantaged persons.

42 In the second place, it follows from settled case-law that, in accordance with the principle of proportionality, which is a general principle of EU law, the rules laid down by the Member States or contracting authorities in implementing the provisions of Directive 2014/24, such as the rules intended to lay down the implementing conditions of Article 20(1) of that directive, must not go beyond what is necessary to achieve the objectives of that directive (see, to that effect, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 45 and the case-law cited).

43 In that regard, it should be noted that both the condition that centres be promoted and more than 50% of its shares be held, directly or indirectly, by non-profit entities, and the condition relating to the obligation to reinvest all profits in social initiative special employment centres, referred to in paragraph 34 above, appear to be suitable for ensuring that the main purpose of such special employment centres is the integration of disabled or disadvantaged persons, as required by Article 20(1) of Directive 2014/24.

44 [As rectified by order of 6 December 2021] As to whether those requirements go beyond what is necessary to achieve that objective, it is for the referring court to determine whether both the fact that a for-profit entity has a majority shareholding, directly or indirectly, in a special employment centre, and the reinvestment of only part of the profits in those centres, are such as to ensure that those centres are able to achieve that objective as effectively as by application of the conditions mentioned in the preceding paragraph.

45 In the third place, it should be added, as the Spanish Government and the European Commission have observed, that it does not appear from the analysis of the Spanish legislation submitted by the Spanish Government in response to the Court's written questions that economic operators established in accordance with the law of other Member States are excluded from the right to take part in reserved public procurement procedures, provided for by that Spanish legislation, as long as those operators fulfil the conditions expressly laid down in that legislation for social initiative special employment centres. However, it is for the referring court to carry out the necessary checks in that regard.

46 In the light of the foregoing considerations, the answer to the question referred is that Article 20(1) of Directive 2014/24 must be interpreted as not precluding a Member State from imposing additional criteria beyond those laid down by that provision, thereby excluding from reserved public procurement procedures certain economic operators which satisfy the criteria laid down in that provision, provided that that Member State complies with the principles of equal treatment and proportionality.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 20(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as not precluding a Member State from imposing additional criteria beyond those

laid down by that provision, thereby excluding from reserved public procurement procedures certain economic operators which satisfy the criteria laid down in that provision, provided that that Member State complies with the principles of equal treatment and proportionality.

[Signatures]

---

* Language of the case: Spanish.

OPINION OF ADVOCATE GENERAL

TANCHEV

delivered on 29 April 2021(1)

Case C-598/19

Confederación Nacional de Centros Especiales de Empleo (CONACEE)

v

Diputación Foral de Guipúzcoa,

Federación Empresarial Española de Asociaciones de Centros Especiales de Empleo (Feacem)

(Request for a preliminary ruling from the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain))

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Articles 18 and 20 – National legislation reserving the right to participate in certain public procurement procedures to Social initiative special employment centres – Additional conditions not provided for by the directive)

1. This request for a preliminary ruling from the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country, Spain) ('the referring court') asks the Court to interpret, for the first time, Article 20 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. (2)

2. The question referred asks the Court to clarify, in essence, whether the Member States, when making use of the option under Article 20 of Directive 2014/24 to reserve the right to participate in public procurement procedures to certain operators, must permit all economic operators that meet the criteria under that provision to participate in the procurement procedures, or whether the Member States, when making use of that option, may further restrict the circle of economic operators that may participate and place bids for the contracts in question.

3. I have concluded that the Member States may indeed define the circle of economic operators permitted to participate by imposing criteria that are narrower than the requirements imposed by Article 20 of Directive 2014/24, which, in my analysis, are minimum requirements. However, if a Member State chooses to do so, it must still comply with the provisions of the directive, including Article 18, 'Principles of procurement', as well as with generally applicable requirements of EU public procurement law.

I. Legal framework

A. EU law

4. Recital 1 to Directive 2014/24 states:

'The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free

movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.'

5. Recital 2 to Directive 2014/24 reads:

'Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to [Directive 2004/17 (3)] and [Directive 2004/18 (4)] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals …'

6. Recital 36 to Directive 2014/24 is worded as follows:

'Employment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all. In this context, sheltered workshops can play a significant role. The same is true for other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups. However, such workshops or businesses might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States should be able to reserve the right to participate in award procedures for public contracts or for certain lots thereof to such workshops or businesses or reserve performance of contracts to the context of sheltered employment programmes.'

7. Article 2(1)(5) of Directive 2014/24 defines, for purposes of the directive, 'public contracts' as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services'.

8. Article 2(1)(10) of Directive 2014/24 defines 'economic operator' as 'any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market'.

9. Article 18 of Directive 2014/24, entitled 'Principles of procurement', provides:

'1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

…'

10. Article 20 of Directive 2014/24, entitled 'Reserved contracts', states:

'1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30 % of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

…’

B. Spanish law

11. Article 20 of Directive 2014/24 was transposed into Spanish law by the Fourth Additional Provision of Ley 9/2017 de contratos del sector público (Law 9/2017 on public sector contracts) (‘Law 9/2017’) of 8 November 2017, which provides:

> ‘1. By decision of the Council of Ministers or of the competent body within the sphere of the autonomous communities and local authorities, minimum percentages shall be set for reservation of the right to participate in procurement procedures for the award of certain contracts or certain lots of those contracts to social initiative special employment centres and to work integration social enterprises, …, which satisfy the eligibility criteria laid down in [the relevant] legislation, or a minimum percentage shall be set for reservation of the performance of those contracts in the context of sheltered employment programmes, provided that the proportion of disabled or socially excluded staff of special employment centres, work integration social enterprises and programmes is that stipulated in the legislation in question and, in any event, at least 30%.
>
> The decision of the Council of Ministers or of the competent body within the sphere of the autonomous communities and local authorities shall set out the minimum requirements for ensuring compliance with the provisions of the previous paragraph.
>
> …
>
> 2. The contract notice shall make reference to this provision.
>
> …’.

12. The Fourteenth Final Provision of Law 9/2017 states:

> ‘…
>
> 4. Social initiative special employment centres are those which satisfy the criteria laid down in paragraphs 1 and 2 of the present Article, and are promoted and in which more than 50 per cent of the shares are held, directly or indirectly, by one or more public or private undertakings which are not-for-profit or whose social nature is referred to in their articles of association, whether these are associations, foundations, bodies governed by public law, social initiative cooperatives or other social economy entities, and also those owned by commercial companies referred to above, whether directly or indirectly … and provided in all cases that it is stipulated in their articles of association or a shareholders’ resolution that their profits must be reinvested in full in the creation of employment opportunities for persons with disabilities and the continuous improvement of their competitiveness and their social economy activity, while having, in any event, the right to opt to reinvest profits in the special employment centre itself or in other social initiative special employment centres.’

II. Facts, main proceedings and the question referred for a preliminary ruling

13. The dispute in the main proceedings arises from a decision of 15 May 2018 (‘the decision of 15 May 2018’), whereby the Consejo de Gobierno de la Diputación Foral de Guipúzcoa (Governing body of the Guipúzcoa Provincial Authority, Spain) approved instructions issued to that institution’s contracting authorities. Those instructions concern the reservation of the right to participate in procurement procedures, as provided for by the Spanish legislation implementing Directive 2014/24.

14. The action in the main proceedings was brought by the Confederación Nacional de Centros Especiales de Empleo (National Confederation of Special Employment Centres) (‘CONACEE’), which is an association representing Special Employment Centres in Spain. Its members include, among other categories, ‘entrepreneurial’ Special Employment Centres.

15. As is apparent from the file before the Court, prior Spanish law permitted Special Employment Centres in Spain to participate in public procurement procedures for 'reserved contracts' regardless of whether they were not-for-profit or entrepreneurial in nature. (5) That situation changed with the introduction of Law 9/2017.

16. Law 9/2017 introduced a new category of so-called 'Social Initiative Special Employment Centres' and reserved participation in Article 20 reserved contract procurement procedures (6) to those centres.

17. In addition to the requirements that Special Employment Centres had to meet to qualify as such under prior law, Social Initiative Special Employment Centres must be organised as not-for-profit entities or satisfy certain ownership requirements, and must also reinvest their profits, either in their own operations or in similar Social Initiative Special Employment Centre operations.

18. According to CONACEE, these additional requirements exclude a large portion of Spanish Special Employment Centres from participating in Spanish reserved procurement procedures, even though they satisfy the requirements laid down in Article 20 of Directive 2014/24.

19. Against that background, CONACEE brought an action against the decision of 15 May 2018 before the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country) challenging the decision of 15 May 2018 and claiming, in essence, that the new Spanish regime is contrary to EU law.

20. The referring court has doubts as to whether the new regime is compatible with EU law and specifically with Article 20 of Directive 2014/24.

21. In those circumstances, the Tribunal Superior de Justicia del País Vasco (High Court of Justice of the Basque Country) stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

> 'Must Article 20 of Directive 2014/24/EU on public procurement be interpreted as meaning that the scope *ratione personae* of the reservation laid down therein cannot be defined in terms which exclude from its scope undertakings or economic operators which satisfy the condition that at least 30% of their employees must be persons with disabilities and which meet the aim or objective of the social and professional integration of those persons, by setting additional criteria related to the constitution, character and aims of those bodies, to their activities and investments, or to other matters?'

22. Written observations were submitted by CONACEE, the Guipúzcoa Provincial Authority, the Kingdom of Spain and the Commission.

23. A hearing was requested, but none was held. The Court put two questions to the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union for a written response. CONACEE, the Diputación Foral de Guipúzcoa, the Kingdom of Spain and the Commission submitted written responses.

III. Analysis

24. By its question, the referring court seeks, in essence, to clarify whether the provisions of that directive or other applicable rules of EU law governing public procurement prevent the Member States from imposing additional limits or requirements on the undertakings or economic operators that may participate in Article 20 reserved procurement procedures, other than the limitations that follow from that article. The referring court is especially, but not exclusively, concerned with 'additional criteria related to the constitution, character and aims of those bodies [and] to their activities and investments'.

25. I have reached the conclusion that the better view is that Article 20 of Directive 2014/24 sets out minimum requirements that the Member States must ensure are met by the permitted participants, (7) if the Member States choose to avail themselves of the option to reserve contracts pursuant to that article, and that that provision does not in and of itself prevent the Member States from placing further requirements or restrictions on the permitted participants, either on a general level or for specific public procurement procedures or for individual lots thereof. However, when making use of the option to reserve contracts as

provided by Article 20, the Member States are still required to comply with the rules of Directive 2014/24 and the general rules of EU law applicable to public procurement; here, in particular Article 18 of the directive and the principles of equal treatment and proportionality.

A. Preliminary remarks

26. According to Article 4 of Directive 2014/24, that directive applies to procurements with an estimated value equal to or greater than certain thresholds set out in that article. (8) Procurements that do not meet the thresholds are not subject to the provisions of that directive, however they must still comply with the principles of the Treaty on the Functioning of the European Union, and in particular with the rules on free movement as well as the principles deriving from those rules, including the principles of equal treatment, mutual recognition, non-discrimination and proportionality. (9)

27. The present case concerns only public procurement falling within the scope of application of Directive 2014/24. I should add that the facts of the case in the main proceedings appear to involve exclusively Spanish actors and that the facts in respect of which the referring court must give a decision do not appear to involve any cross-border element.

28. Pursuant to Article 20 of Directive 2014/24, the Member States may reserve the 'right to participate in public procurement procedures' to sheltered workshops and economic operators with certain specific 'main aim[s]' or may provide that the contracts in question are to be 'performed in the context of sheltered employment programmes'. This option is subject to the proviso that 'at least 30%' of the employees of those workshops, economic operators or programmes are 'disabled or disadvantaged workers'.

29. Spain has availed itself of this option, and has enacted legislation concerning its Special Employment Centres that imposes additional restrictions on the economic operators wishing to participate in the Spanish Article 20 reserved procurement procedures that CONACEE is contesting in the main proceedings. That legislation stipulates, in essence, that the entities or persons concerned must be not-for-profit and that they must undertake to reinvest any profits made, either in the Special Employment Centre itself or in another similar Special Employment Centre.

30. Spain has also set an employment percentage requirement regarding disadvantaged persons in Special Employment Centres that is significantly higher (70%) than the minimum required by Article 20 of Directive 2014/24 (30%). This limit does not appear to be contested in the main case, possibly because CONACEE's members actually meet that criterion.

31. Other Member States have likewise enacted legislation in which the limitations in respect of the permitted participants in their Article 20 reserved public procurement procedures are stricter than the limitations that follow from the text of Directive 2014/24. (10)

B. The Member States' discretion

32. Article 20 of Directive 2014/24 lays down a number of criteria for the 'permitted participants' that must be satisfied, if a given Member State chooses to avail itself of the option to use Article 20 reserved contracts (11) in its procurement procedures. Article 20(1) requires that either (i) the permitted participants in those reserved public procurement procedures must belong to one of two different categories of participants, namely either 'sheltered workshops' or 'economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons', or (ii) '[the] contracts [must] be performed in the context of sheltered employment programmes'. The case before the Court concerns only the category 'economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons' and the possible imposition of additional requirements for participation on that group of economic operators apart from the requirements that are explicitly laid down in the directive.

33. Article 20(1) of Directive 2014/24 further imposes a requirement that at least 30% of the employees of the permitted participants must be disabled or disadvantaged workers.

34. Finally, Article 20(2) of Directive 2014/24 requires the Member States, when availing themselves of the option provided by Article 20, to make explicit reference to that article in the call for competition. That requirement is not at issue in the present case.

35. CONACEE argues, in essence, that the wording of Article 20 of Directive 2014/24 exhaustively describes the requirements that economic operators must meet in order to qualify for participation in public procurement procedures reserved under that provision, and that economic operators that satisfy those criteria therefore cannot be excluded from participation due to additional requirements such as the non-profit requirement and the reinvestment-of-profit requirement imposed by the Spanish legislation in question.

36. The Commission argues, in essence, that the Member States enjoy a broad discretion when defining in their national legislation what is to be understood by the expression ‘economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons’. (12)

37. I cannot share the Commission’s analysis. It is settled case-law that it follows from the need for a uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union. That interpretation must take into account, not only its terms, but also its context and the objective pursued by the relevant legislation. (13)

38. Therefore, I do not consider that the Member States enjoy a broad discretion to define the meaning of the terms of Article 20 of Directive 2014/24. In my view, those terms must be given a uniform interpretation. Thus, any discretion that the Member States may enjoy when implementing Article 20 of Directive 2014/24 does not stem from a discretion for them each to apply their own meaning to the terms of the directive.

39. Rather, the requirements under Article 20 of Directive 2014/24 can be understood either as *minimum requirements* that the Member State must impose on the permitted participants in order for the Member State’s use of Article 20 reserved procurement procedures to be lawful, or, as CONACEE argues, as an *exhaustive definition* of the criteria determining which economic operators are to be accepted by the Member States as permitted participants, if the Member States choose to make use of Article 20 reserved procurement procedures.

40. As I shall explain, in my view, the requirements under Article 20 of Directive 2014/24 are best understood as minimum requirements, which leave the Member States free to impose additional limitations, narrowing the circle of permitted participants in their Article 20 reserved procurement procedures, subject to the limitations imposed by other provisions of Directive 2014/24 and other applicable provisions of EU procurement law. It is therefore not Article 20 of Directive 2014/24 that may limit the Member States’ ability to impose additional requirements on the permitted participants, but Article 18 of that directive and the principles of equal treatment and proportionality, as well as the prohibition on artificially narrowing competition.

41. First, nothing in the text of Article 20 of Directive 2014/24 requires that all economic operators satisfying the requirements of that article be admitted to any given public procurement procedure held by a Member State for Article 20 reserved contracts.

42. On the contrary, Article 20 of Directive 2014/24 provides the Member States with an option – of which they may choose to avail themselves or not – and sets out the conditions that the Member States must comply with if they choose to take up the option under that article. Those conditions specify in broad and unspecific terms the kinds of undertakings or economic operators to which the Member States may reserve procurement procedures, and set out a minimum percentage in relation to the disabled or disadvantaged workers employed at those undertakings or economic operators.

43. Second, as described in recital 36 to Directive 2014/24 and recital 28 to Directive 2004/18, the rationale for the inclusion of Article 20 of Directive 2014/24 and its predecessor provision, Article 19 of Directive 2004/18, in these two directives must be understood in the context of ‘guaranteeing equal opportunities for all’, employment and occupation being ‘key elements’ of that objective. Article 20 of Directive 2014/24 (and its predecessor provision, Article 19 of Directive 2004/18) thus allow the Member States to pursue social and employment policy aims through instruments of public procurement.

44. It should be recalled in that regard that the Member States enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, (14) but also in the definition of measures capable of achieving it. (15) Taking the rationale for Article 20 of Directive 2014/24 into account, it

is my view that the definition of the permitted participants is a matter first and foremost of social and employment policy where the Member States enjoy a broad discretion.

45. I should also point out that whereas Article 20, as an exception to the general regime for public procurement procedures under Directive 2014/24, should be given a strict interpretation, this principle of interpretation, in my view, would logically apply to the *size of the carve-out* from ordinary procurement procedures in terms of the part of the market covered (not at issue in the present case and not subject, in any event, to any explicit limitations in Directive 2014/24 to which a strict or narrow interpretation of the carve-out could apply) and to the *depth* of the carve-out in terms of the scope of the rules from which the carved-out procurement procedures are exempted. It should not apply in such a way as to require the widest possible circle of permitted participants for any given Article 20 reserved procurement procedure. Once a portion of the public procurement market has been segregated from the normal market and set aside for economic operators which are presumed to be uncompetitive due to the significant societal benefits they provide, I see no real benefit to the principles of market economy, competition or equal treatment from an insistence that the circle of permitted participants (presumed to be uncompetitive) be defined as broadly as possible. From a market economy perspective, it is – in my view – the size of the carve-out that matters, whereas the delineation of the circle of beneficiaries should be seen as an issue – and an instrument – of social and employment policy that is subject to the Member States' broad discretion.

46. Therefore, in my opinion, a literal and teleological interpretation of Article 20 of Directive 2014/24 supports the conclusion that the Member States are *not* required by that article to accept the participation of any given economic operator satisfying the criteria set out in that article in their Article 20 reserved procurement procedures. However, any additional restrictions must satisfy the requirements of Article 18 of Directive 2014/24 and any other applicable provisions or principles of EU public procurement law.

47. This conclusion is also supported by the origins of Article 20 of Directive 2014/24 and its predecessor provision, Article 19 of Directive 2004/18, which introduced the concept of 'reserved contracts' into the public procurement directives. (16)

48. Article 20 of Directive 2014/24 and its predecessor provision permits or permitted the Member States to reserve the right to participate in award procedures for public contracts or certain lots thereof, because the workshops or social businesses concerned may not be able to obtain contracts under normal conditions of competition, the underlying premiss being that the employment of the ultimate intended beneficiaries of the Article 20 reserved procurement procedures, namely disabled or disadvantaged persons, whose social and professional integration must be the main aim of the economic operators that the Member State in question accepts as permitted participants, is or may be economically disadvantageous to the economic operators in question to the extent where they cannot be expected to be able to compete on ordinary market terms. Therefore, the Member States may, subject to certain safeguards and limitations, create what amounts to a protected space for public procurement contracts where such operators compete only with other operators in comparable circumstances.

49. It is apparent, when considering Article 20 of Directive 2014/24 in isolation, that a true or even only approximate level playing field between those actors can be achieved only by adding detail to the rough outline provided by that provision of the directive. Accepting the notion that those economic operators may not be able to compete on normal market terms because of their significant societal contributions, it must equally be acknowledged that the terms 'disabled or disadvantaged' cover very diverse groups of people and that within each subset of those groups, individuals will vary greatly in their abilities and potential productivity. Thus, an economic operator seeking to aid the integration of, merely as an example, someone suffering long-term unemployment faces very different challenges compared to an economic operator seeking to aid the integration of a person who is permanently handicapped by, again merely as an example, blindness. Keeping this and the aim mentioned in recital 36 of Directive 2014/24 of 'guaranteeing equal opportunities for all' in mind, I consider that the purpose of Article 20 of Directive 2014/24 is best served by allowing the Member States to impose more detailed requirements for participation in their Article 20 reserved procurement procedures.

50. This becomes even clearer if Article 20 of Directive 2014/24 is analysed in the context of its predecessor provision, Article 19 of Directive 2004/18. Article 19 of Directive 2004/18 imposed considerably stricter requirements concerning the employees of the permitted participants in reserved procurement

procedures, requiring that most of the employees were ‘handicapped persons who, by reason of the nature or the seriousness of their disabilities [could not] carry on occupations under normal conditions’, thus setting the bar significantly higher both with respect to the minimum percentage of disadvantaged employees and with respect to the severity and nature of their disadvantage.

51. When the scope of application, *ratione personae*, for Article 20 reserved contracts was broadened in Directive 2014/24, the intention of the EU legislature clearly was not to create a ‘race to the bottom’ where social businesses employing a lower percentage of less affected persons – as per the new, relaxed requirements – would out-compete social businesses meeting the tougher requirements in place under previous legislation for Article 20 reserved procurement procedures. However, taking into account the premiss of recital 36 of Directive 2014/24 and recital 28 of Directive 2004/18, which describes the rationale for reserving contracts, namely that the operators in question may be unable to compete under normal market conditions, the result to be expected, if any economic operator employing only 30% of less affected persons were to be permitted to compete on an equal footing with operators meeting the earlier, much stricter requirements, would be exactly that: the economic operators satisfying the earlier, stricter requirements would be forced to dismiss their least productive and presumably most needy employees down to the 30% mark, or face the prospect of losing the reserved procurement procedures intended for their benefit to economic operators shouldering only much lighter social responsibilities.

52. It should be emphasised that this analysis does not permit the Member States to exclude economic operators at will from their Article 20 procurement procedures, and does not prejudice whether the exclusion of ‘entrepreneurial’ Special Employment Centres *en bloc* from the Spanish Article 20 procurement procedures is lawful. Rather, this issue should be determined mainly according to the standards and principles set out in Article 18 of Directive 2014/24.

C. Limits on the Member States’ discretion

1. Applicability of Article 18 of Directive 2014/24

53. The Member States are not free to impose requirements at their leisure on permitted participants in their Article 20 reserved procurement procedures. On the contrary, the Article 20 reserved procurement procedures remain subject to the provisions of Directive 2014/24, including Article 18, and any additional requirements imposed must therefore comply with Article 18 and the principles therein.

54. This conclusion is supported by the text of Article 20 of Directive 2014/24, which does not include any indication that the reserved contracts should be exempt from the remaining provisions of the directive, and by the placement of that article in Chapter II, ‘General rules’, of Title I, and not in Section 3, ‘Exclusions’, of Chapter I of Title I, which would be the natural place for a provision setting out an exemption from the application of the directive.

55. It is, further, clear from the legislative history of the predecessor provision to Article 20 of Directive 2014/24, namely Article 19 of Directive 2004/18, that the reserved procurement procedures were not intended to be exempt from the application of the other provisions of that directive.

56. Article 19 of Directive 2004/18, which together with Article 28 of Directive 2004/17 introduced the concept of ‘reserved contracts’ into EU procurement law, was not included in the Commission’s original draft for that directive. It has its origin in Amendment 9 of the Opinion of the European Parliament’s Committee on Industry, External Trade, Research and Energy of 29 June 2001 on the proposed directive, which would, as originally drafted, have excluded ‘public supply, service or works contracts’ awarded to ‘sheltered employment schemes’ from the application of Directive 2004/18 altogether. (17)

57. That proposed amendment was the subject of several changes, and various justifications were offered for the different proposed versions of the provision before it found its final form, in particular as Article 19 of Directive 2004/18. The Commission’s comment on the version of the proposed provision in the ‘Amended proposal’ submitted on 6 May 2002 (18) clarifies that the ‘reservation does not imply exemption from the application of all other provisions of the Directive applicable to public contracts’. This is also reflected in the text of Directive 2004/18 as adopted, which does not exempt the contracts in question from the application of Directive 2004/18 (as did the original proposed amendment), but merely provides that participation in the public procurement procedures for those contracts may be reserved for those workshops. The various stages

in the legislative process leading to the final version of Article 19 of Directive 2004/18 further shows a clear legislative intent that the 'reserved contracts' should remain subject to Union-wide competition in accordance with the remaining provisions of Directive 2004/18 and the 'relevant rules of the Treaty'. (19)

58. The various justifications provided for the introduction of this new provision at different stages of the legislative process, and recital 28 to the final directive, make clear that the *raison d'être* for Article 18 of Directive 2004/18 was that the workshops and employment programmes in question might not be able to 'obtain contracts on normal conditions of competition'. Those workshops and employment programmes, the recital considers, 'contribute efficiently towards the integration or reintegration of people with disabilities in the labour market'. The recital also states in that context that 'employment and occupation are key elements in guaranteeing equal opportunities for all'.

59. The legislative history of Article 19 of Directive 2004/18 and recital 28 to that directive thus makes it clear that the purpose of the provision was to allow the Member States to use reserved contract procurement procedures to provide certain permitted participants with contracts they would not have been able to achieve under normal market conditions, and that the justification for this preferential treatment was the efficient contribution towards integration or reintegration of the ultimate intended beneficiaries of the scheme, namely, as regards Article 19 of Directive 2004/18, 'handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions'. This objective was part of a higher-level goal of 'guaranteeing equal opportunities for all'. The use of reserved contracts was to take place under observance of all the other provisions of Directive 2004/18, cross-border competition for the reserved contracts being specifically contemplated. (20)

60. Directive 2014/24 introduced several changes to the regime for 'reserved contracts'. (21) Article 20 of Directive 2014/24 thus restates and expands the option initially granted to the Member States by Article 19 of Directive 2004/18 to reserve to certain operators the right to participate in public contract award procedures. Compared with Article 19 of Directive 2004/18, Article 20 of Directive 2014/24 substantially widens the circle of operators that can be accepted as permitted participants in public procurement procedures for reserved contracts. Nothing in those changes, however, indicates any intention on the part of the EU legislature to exempt the Article 20 reserved procurement procedures from the application of the remainder of Directive 2014/24 or any intention to lower the amount of social responsibility borne by the individual permitted participants. Rather, the application of the provision, *ratione personae*, is simply expanded by allowing more operators to qualify as permitted participants, presumably with a view to expanding the use of this social and employment policy tool with the aim of benefitting a larger, more broadly defined and more numerous group of ultimate beneficiaries (employed disabled or disadvantaged persons).

61. The legislative history of Directive 2014/24 itself provides relatively little guidance as to the interpretation of Article 20. The European Economic and Social Committee, in its Opinion on the 'Proposal for a Directive of the European Parliament and of the Council on public procurement' (COM(2011) 896 final), suggested certain changes that were not adopted, including a requirement that 'the sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged workers "should be promoted and controlled primarily by non-profit entities"' which, in its view, would further justify such preferential access to government support. (22)

2. General remarks on Article 18 of Directive 2014/24

62. Article 18 of Directive 2014/24, entitled 'Principles of procurement', provides, in the first subparagraph of paragraph 1, that the contracting authorities must treat economic operators equally and without discrimination, and that they must act in a 'proportionate manner'. This is, in essence, a reiteration of the principles of equal treatment and proportionality, which would be applicable even without the abovementioned provision. (23) The second subparagraph of Article 18(1) provides that 'the design of the procurement shall not be made with the intention of … artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators'. Though the facts of the main proceedings appear to exclusively concern Spanish actors, it should be borne in mind that Directive 2014/24 extends the principles of equal treatment of tenderers, proportionality and non-distorted competition to internal situations. (24)

63. In the case in the main proceedings, Spain has enacted legislation that appears to exclude *en bloc* a large part of a particular sector, namely the entrepreneurial Special Employment Centres, from that Member State's Article 20 reserved procurement procedures. That legislation further reserves those contracts exclusively to another subset of Special Employment Centres, namely the 'Social Initiative Special Employment Centres', and sets aside what appears to be a significant body of public procurement contracts for Article 20 reserved procurement procedures.

64. This raises fairly obvious issues in terms of conformity with the principles of equal treatment and proportionality, and the prohibition on artificially narrowed competition.

3. Article 18 of Directive 2014/24 and the principle of equal treatment

65. Under settled case-law, the principle of equal treatment is one of the fundamental principles of EU law, (25) which the Member States must observe when they act within the scope of EU law. That principle, which is one of the fundamental rights whose observance the Court ensures, (26) requires that similar or comparable situations must not be treated differently unless the difference in treatment is objectively justified. (27) As a general principle of EU law, the principle of equal treatment must be observed by Member States when they implement EU rules. Consequently, Member States must, as far as possible, apply those rules in accordance with the requirements flowing from the protection of fundamental rights in the EU legal order. (28)

66. In the field of EU public procurement law, the principle of equal treatment has found a particular expression in the principle of equal treatment of tenderers, which requires that they be afforded equality of opportunity when formulating their tenders. (29) As pointed out by Advocate General Bot in his Opinion in *Wall*, (30) the aim of the principle of equal treatment as between tenderers is to promote the development of healthy and effective competition between applicant undertakings. Observance of that principle must make it possible to ensure an objective comparison of the tenders and is required at every stage of the procedure. In other words, the rules of the game must be known to all potential tenderers and must apply to them all in the same way.

67. An exclusion of one group of potential tenderers from a Member State's Article 20 reserved procurement procedures to the benefit of another group of tenderers, such as the Spanish exclusion of the entrepreneurial Special Employment Centres to the benefit of the Social Initiative Special Employment Centres, is therefore only permissible if those two groups of potential tenderers are not in similar or comparable situations or if the difference in treatment is objectively justified.

68. It is for the referring court, which alone has jurisdiction to rule on the facts of the main proceedings, to verify whether the 'entrepreneurial' Special Employment Centres and the Social Initiative Special Employment Centres are in similar or comparable situations and/or whether the difference in treatment is objectively justified. The 'entrepreneurial' Special Employment Centres appear to have previously fulfilled, and to be currently fulfilling, the same societal functions as those required of the Social Initiative Special Employment Centres. Therefore, prima facie, it does not seem unreasonable to consider that those two groups of Special Employment Centres are in a similar or comparable situation as far as their ability to fulfil the function of aiding the social and professional integration of disabled or disadvantaged persons is concerned. At the same time, there are differences in the organisation of the 'entrepreneurial' Special Employment Centres and the Social Initiative Special Employment Centres, notably concerning the not-for-profit nature of the latter and the reinvestment of profits requirement, that could arguably support the conclusion that the two groups of entities are not in similar or comparable situations or that any difference in treatment is objectively justified. Ultimately, this is a determination that involves an interpretation of the applicable Spanish law, which it is for the referring court to carry out.

4. Article 18 of Directive 2014/24 and the principle of proportionality

69. As the Court has stated in its case-law, the purpose of national legislation relating to public procurement procedures is, in general, to safeguard the equal treatment of tenderers. Therefore, in accordance with the principle of proportionality, such legislation must not go beyond what is necessary to achieve that intended objective. (31)

70. When Member States enact national legislation implementing Article 20 of Directive 2014/24 and setting aside ‘reserved contracts’ in public procurement procedures for the benefit of providers of sheltered employment, the purpose of that legislation is at least two-fold: the equal treatment of tenderers mentioned in the previous paragraph and the social and employment policy of making reserved contracts available to providers of sheltered employment.

71. As is the case with regard to the principle of equal treatment, it is for the referring court, which alone has jurisdiction to rule on the facts of the main proceedings, to verify whether the imposition of the additional requirements are indeed appropriate means of achieving the legitimate objectives pursued by the Member State in relation to maximising the social objectives of integration or reintegration of disabled or disadvantaged persons, and if so, whether those requirements go beyond what is necessary to achieve those objectives.

72. In my view, requirements that the participants in an Article 20 reserved procurement procedure must be organised as, or owned by, a not-for-profit entity and that they must reinvest profits earned from Article 20 reserved contracts may well be considered appropriate means of furthering the legitimate objective of social and professional integration of disabled or disadvantaged persons. Neither of those requirements are unrelated to the proviso under Article 20(1) that the ‘main aim’ of the admitted economic operators (other than ‘sheltered workshops’) must be ‘the social and professional integration of disabled or disadvantaged persons’. A for-profit entity generally has as one of its ‘aims’ the generation of profits for its owners. It is not an inherently unreasonable view to hold that this detracts from the focus on the social aim. Thus, the requirement concerning not-for-profit status or ultimate ownership of the permitted participant by a not-for-profit entity does appear to serve a legitimate purpose. The requirement that profits are reinvested in the same or similar social enterprises whose aim is the social and professional integration of disabled or disadvantaged persons even more clearly serves that purpose, and given the inherent transfer of public funds that is foreseeable in Article 20 reserved procurement procedures (the very rationale of the provision being that the permitted participants may not be able to compete on normal price/quality terms implies that the contracting authorities are likely to overpay on purchases made under Article 20 reserved procurement procedures), the reinvestment of related profits for the ultimate benefit of the relevant social goals appears particularly appropriate.

73. The 70% employment requirement set out in the Spanish legislation obviously also contributes to achieving the ultimate goal of the Article 20 reserved procurement procedures, namely the ‘social and professional integration or reintegration of disabled or disadvantaged persons’. (32)

74. Therefore, in my view, these requirements appear to be suitable to achieve the desired end. However, the requirement that the Special Employment Centres must take the particular legal form of a not-for-profit entity or satisfy the ownership requirements in question would, in my view, appear to go further than what is necessary in order to achieve those objectives. It is difficult to see how the exclusion of a large subset of economic operators that have previously been serving, are currently serving, and intend to serve in the future exactly those social aims and that population segment, merely because of the legal form in which those economic operators are constituted or because of the legal form of their ultimate owners, would not go beyond what is necessary to ensure the attainment of the legitimate objective of social and professional integration or reintegration of disabled or disadvantaged persons. This applies *a fortiori* if the reinvestment of profits requirement is upheld.

75. Subject to verification by the referring court, it is therefore my opinion that requirements as to the legal form or ownership of the economic operators, which are accepted as permitted participants in a Member State’s Article 20 reserved procurement procedures, such as the Spanish requirements at issue in the main case, are inconsistent with the principle of proportionality.

5. Article 18 of Directive 2014/24 and the prohibition on artificially narrowing competition

76. As provided by the second subparagraph of Article 18(1) of Directive 2014/24, the design of a procurement shall not be made with the intention of artificially narrowing competition. Competition is to be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

77. It is clear that the Social Initiative Special Employment Centres are favoured by the Spanish legislation at issue and that the entrepreneurial Special Employment Centres are disadvantaged. It also appears obvious that this is intentional. However, the second subparagraph of Article 18(1) of Directive 2014/24 does not prohibit any and all intentional favouring or disadvantaging. The prohibition applies only where the intention is to 'unduly' favour or disadvantage certain economic operators.

78. The Court has not yet clarified the meaning of 'unduly' (or 'artificial') in the context of Article 18 of Directive 2014/24. Some guidance for the interpretation of those concepts may, however, be gleaned from the principles of equal treatment and proportionality. Although the concepts of equal treatment and 'non-artificially narrowed competition' are obviously distinct, a 'favouring' or 'disadvantaging' of some economic operator(s) over other(s) implies a difference in treatment. It is difficult to think of a 'favouring' or 'disadvantaging' that is 'unduly' and at the same time 'objectively justified' or vice versa, and so it would appear that there must be some overlap of those two distinct concepts. Likewise, as regards the relationship between artificially narrowed competition and proportionality, it is hard to think of a favouring or disadvantaging of some economic operator(s) over other(s) that 'duly' goes further than necessary to attain the legitimate objectives sought. Artificially narrowed competition would thus also seem to have a certain overlap with infringement of proportionality.

79. It may seem tempting to define 'artificial narrowing of competition' solely by reference to the two principles mentioned in the previous point. However, the inclusion of the prohibition on artificially narrowing competition in the second subparagraph of Article 18(1) would be superfluous if it only covered behaviour already prohibited by the principles of equal treatment and proportionality. Therefore, in my view, the prohibition on artificially narrowing competition should be given a broader scope than that.

80. As already discussed in the context of the proportionality analysis in point 74, above, the narrowing of competition that follows from the exclusion of the entrepreneurial Special Employment Centres from the Spanish Article 20 reserved procurement procedures does not appear to be proportionate to a legitimate purpose in so far as the requirement that the economic operators in question take the form of not-for-profit entities or are ultimately owned or partially owned by not-for-profit entities is concerned. Regardless of the exact scope of the prohibition on artificially narrowing competition, this requirement would, in my view, appear to infringe it. It is, however, ultimately for the referring court to decide whether, in the case before it, there is an intention to unduly favour and/or disadvantage.

81. As far as the reinvestment of profits requirement is concerned, this could, in my view, conceivably be regarded as artificially narrowing competition, even if my analysis that this requirement may meet the standards of equal treatment and proportionality is accepted. If the requirement is imposed not only to serve the legitimate purpose of furthering the social and professional integration of disabled or disadvantaged persons, but also at the same time is intentionally designed so as to benefit one group of potential tenderers over another for reasons unrelated to the legitimate purpose pursued, (33) in my view, this should be regarded as unduly favouring and disadvantaging the respective groups and as artificially narrowing competition. It is for the referring court to determine whether this may be the case.

IV. Conclusion

82. In the light of the foregoing considerations, I suggest that the Court of Justice should reply to the referring court in the following terms:

> Article 20 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement does not preclude national legislation under which the right to participate in public procurement procedures for contracts reserved pursuant to that article is made subject to conditions which are in addition to those specified in that article.
>
> However, such additional conditions must comply with all applicable requirements of EU law, including Article 18 of Directive 2014/24 and the principles of equal treatment and proportionality, and those conditions must not artificially narrow competition.
>
> In that respect, a condition that only economic operators that are not-for-profit entities, or owned or partially owned by not-for-profit entities, may participate in procurement procedures for reserved

contracts would appear, prima facie, to go beyond what is necessary in order to obtain the legitimate objective of furthering the social and professional integration of disabled and disadvantaged persons.

An intentional exclusion of a large segment of economic operators for reasons unrelated to the legitimate objective of furthering the social and professional integration of disabled and disadvantaged persons would appear, prima facie, to artificially narrow competition.

---

1 Original language: English.

---

2 OJ 2014 L 94, p. 65.

---

3 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

---

4 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

5 CONACEE refers to Ley estatal 31/2015 *por la que se modifica y actualiza la normativa en materia de autoempleo y se adoptan medidas de fomento y promoción del trabajo autónomo y de la economíasocial* (National law 31/2015 amending and updating the regulations on self-employment and adopting measures to promote and encourage independent work and the social economy) of 9 September 2015.

---

6 I shall for ease of reference refer to public procurement procedures for contracts that are reserved pursuant to Article 20 of Directive 2014/24 as ‘Article 20 reserved procurement procedures’.

---

7 I shall refer to the undertakings and economic operators that a Member State permits to participate in its Article 20 reserved procurement procedures as ‘permitted participants’.

---

8 The threshold amounts are subject to biannual revisions in accordance with Article 6 of Directive 2014/24. Public contracts that are awarded by contracting authorities operating in the water, energy, transport and postal services sectors and that fall within the scope of those activities are covered by Directive 2014/25/EU and, generally, not by Directive 2014/24. Article 4(d) provides for a significantly higher threshold for public service contracts for certain listed ‘social and other specific services’. Those contracts are the subject of a particular procurement regime under Chapter I of Title III of Directive 2014/24.

---

9 See to that effect Recital 1 to Directive 2014/24.

---

10 The Commission, in paragraph 16 of its observations, states, as examples, that France, the Czech Republic and Croatia all have stricter requirements concerning the percentage of disabled or disadvantaged employees, and that the Czech Republic in this respect only counts disabled persons, and not other disadvantaged persons.

---

11 I shall for ease of reference refer to contracts obtained by bidders in Article 20 reserved procurement procedures as ‘Article 20 reserved contracts’.

---

12 Paragraph 14 of the Commission's observations: ' … [L]es États membres sont en droit de préciser dans leur législation ce qu'il convient d'entendre par «*opérateurs économiques dont l'* ***objet principal*** *est l'intégration sociale et professionnelle de personnes handicapées ou défavorisées*' ('Member States are entitled to state in their legislation what is to be understood by the expression 'economic operators whose ***main aim*** is the social and professional integration of disabled or disadvantaged persons').

---

13 Judgment of 4 June 2020, *Remondis* (C-429/19, EU:C:2020:436, paragraph 24).

---

14 This corresponds with the EU legislature's choice to make the use of Article 20 reserved procurement procedures optional for the Member States.

---

15 Judgment of 19 September 2018, *Bedi* (C-312/17, EU:C:2018:734, paragraph 59 and the case-law cited).

---

16 Directive 2014/24 was enacted together with Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1) and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), Article 24 and Article 38 of which, respectively, are almost ad verbatim identical to Article 20 of Directive 2014/24. Directive 2004/18 was enacted together with Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), Article 28 of which is almost ad verbatim identical to Article 19 of Directive 2004/18.

---

17 Opinion of the Committee on Legal Affairs and the Internal Market on the proposal for a European Parliament and Council regulation on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM(2000) 275 – C5-0367/2000 – 2000/0115(COD)), accessible at https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A5-2001-0378+0+DOC+XML+V0//EN (last accessed on 23 March 2021).

---

18 Amended proposal for a European Parliament and Council directive concerning the co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts, COM(2002) 236 final – 2000/0115(COD), amendment 36.

---

19 See, for example, the original Amendment 9 and the later Justification to the Compromise Amendment 29 by A. P. Vallelersundi, cited in footnote 20, below. A compilation of the legislative history of Article 19 of Directive 2004/18 can be found in Hebly, Jan M., *European Public Procurement – Legislative History of the 'Classic' Directive 2004/18/EC*, p. 603 et seq.

---

20 See the Justification to the Compromise Amendment 29 by A. P. Vallelersundi, where the proposed text changes from exempting contracts awarded to sheltered workplaces and schemes to the concept of reserving contracts for them: 'It is also necessary to ensure that contracts of this kind … can be awarded to such workshops anywhere in the [Union] and do not turn into another means of giving preference to regional or local tenderers'. The view is implicitly preserved in the Commission's comment on Amendment 36 in the Amended proposal for a European Parliament and Council Directive concerning the co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM(2002) 236 final – 2000/0115(COD), OJ 2002 C 203E, p. 210): 'Th[e] amendment can be accepted if modified in order further to clarify that reservation does not imply exemption from the application of all other provisions of the Directive applicable to public contracts'.

---

21 Directive 2014/24, in addition to the changes included in Article 20, introduced in Chapter I, 'Social and other specific services' (Articles 74-77) of Title III, 'Particular procurement regimes', a different type of reserved contracts for certain health, social and cultural services. That regime is distinct and separate from the provisions at issue in the present case, but it is possible that the Spanish legislator may have looked to Article 77(2)(b) as a model for the 'reinvestment of profits' requirement of the Spanish rules.

---

22 Points 4.10 and 4.11 of the Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors' (COM(2011) 895 final – 2011/0439 (COD)); the 'Proposal for a Directive of the European Parliament and of the Council on public procurement' (COM(2011) 896 final – 2011/0438 (COD)); and the 'Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts' (COM(2011) 897 final – 2011/0437 (COD)) (OJ 2012 C 191, p. 84).

---

23 This provision is an expansion on its predecessor provision, Article 2 of Directive 2004/18, which only required equal and non-discriminatory treatment of the economic operators as well as transparency, but which did not mention proportionality.

---

24 See, in that regard, Advocate General Szpunar's Opinion in *Grupo Hospitalario Quirón* (C-552/13, EU:C:2015:394, point 40 et seq.) regarding Article 23(2) of Directive 2004/18 concerning equal access for tenderers and the absence of unjustified obstacles to competition in the context of technical specifications.

---

25 Judgments of 19 October 1977, *Ruckdeschel and Others* (117/76 and 16/77, EU:C:1977:160, paragraph 7); of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 23); and of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 85).

---

26 Judgments of 12 December 2002, *Rodríguez Caballero* (C-442/00, EU:C:2002:752, paragraph 32), and of 17 January 2008, *Velasco Navarro* (C-246/06, EU:C:2008:19, paragraph 32).

---

27 Judgments of 25 November 1986, *Klensch and Others* (201/85 and 202/85, EU:C:1986:439, paragraph 9); of 12 December 2002, *Rodríguez Caballero* (C-442/00, EU:C:2002:752, paragraph 32 and the case-law cited); and of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 85).

---

28 Judgment of 12 December 2002, *Rodríguez Caballero* (C-442/00, EU:C:2002:752, paragraph 30). See also Opinion of Advocate General Bot in *Wall* (C-91/08, EU:C:2009/659, points 35 and 36).

---

29 Judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404, paragraph 36).

---

30 C-91/08, EU:C:2009/659, point 38.

---

31 See, to that effect, judgments of 8 February 2018, *Lloyd's of London* (C-144/17, EU:C:2018:78, paragraph 32); of 2 May 2019, *Lavorgna* (C-309/18, EU:C:2019:350, paragraph 24 and the case-law cited); of 30 January 2020, *Tim* (C-395/18, EU:C:2020:58, paragraph 45); and of 14 May 2020, *T-Systems Magyarország* (C-263/19, EU:C:2020:373, paragraph 71).

---

32 Recital 36 to Directive 2014/24.

33 Such reasons could, merely as an example, stem from ideologically or politically motivated desires to further one group or one form of undertakings over another.

JUDGMENT OF THE COURT (Ninth Chamber)

11 June 2020 (*)

(Reference for a preliminary ruling — Concession contract award procedure — Directive 2014/23/EU — Article 38(9) — System of compliance measures to demonstrate the reliability of an economic operator affected by a ground for exclusion — National legislation prohibiting economic operators which are the subject of a ground for compulsory exclusion from participating, for a period of 5 years, in a concession contract award procedure — Impossible for such operators to demonstrate that compliance measures have been taken)

In Case C-472/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 14 June 2019, received at the Court on 20 June 2019, in the proceedings

Vert Marine SAS

v

Premier ministre,

Ministre de l'Économie et des Finances,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, D. Šváby (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Vert Marine SAS, by F. Dereux, avocat,

– the French Government, by P. Dodeller, A.-L. Desjonquères and C. Mosser, acting as Agents,

– the Greek Government, by A. Dimitrakopoulou, D. Tsagkaraki and L. Kotroni, acting as Agents,

– the European Commission, by J.-F. Brakeland, P. Ondrůšek and L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 38(9) and (10) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

2 The request has been made in proceedings between Vert Marine SAS ('Vert Marine') and the Premier ministre (Prime Minister) and the Ministre de l'Économie et des Finances (Minister for the Economy

and Finance, France) concerning an application submitted by Vert Marine for the repeal of certain provisions of décret n^{o} 2016-86, du 1er février 2016, relatif aux contrats de concession (Decree No 2016-86 of 1 February 2016 concerning concession contracts; 'the decree') (JORF, 2 February 2016, text No 20).

Legal context

European Union law

3 Recital 71 of Directive 2014/23 states:

'Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the concession award procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities or contracting entities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.'

4 Article 38(4), (9) and (10) of that directive provides:

'4. Contracting authorities and contracting entities as referred to in point (a) of Article 7(1) shall exclude an economic operator from participation in a concession award procedure where they have established that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

(a) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA [of 24 October 2008 on combating organised crime (OJ 2008 L 300, p. 42)];

(b) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union [(OJ 1997 C 195, p. 1)] and Article 2(1) of Council Framework Decision 2003/568/JHA [of 22 July 2003 on combating corruption in the private sector (OJ 2003 L 192, p. 54)], as well as corruption as defined in the national law of the contracting authority or entity or the economic operator;

(c) fraud within the meaning of Article 1 of the Convention relating to the protection of the European Communities' financial interests [(OJ 1995 C 316, p. 48)];

(d) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA [of 13 June 2002 on combating terrorism (OJ 2002 L 164, p. 3)] respectively, or inciting, aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision;

(e) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council [of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15)];

(f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council [of 5 April 2011 on preventing and

combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ 2011 L 101, p. 1)].

…

9. Any economic operator that is in one of the situations referred to in paragraphs 4 and 7 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of the relevant ground for exclusion. If such evidence is considered to be sufficient, the economic operator concerned shall not be excluded from the procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator concerned shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

10. By law, regulation or administrative provision and having regard for Union law, Member States shall specify the implementing conditions for this article. They shall in particular, determine the maximum period of exclusion if no measures as specified in paragraph 9 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed 5 years from the date of the conviction by final judgment in the cases referred to in paragraph 4 and 3 years from the date of the relevant event in the cases referred to in paragraph 7.’

5 Article 51 of the directive reads as follows:

‘1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive by 18 April 2016. They shall forthwith communicate to the Commission the text thereof.

When Member States adopt those measures, they shall contain a reference to this directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this directive.’

French law

6 Article 30 of ordonnance n^{o} 2016-65, du 29 janvier 2016, relative aux contrats de concession (Order No 2016-65, of 29 January 2016, on concession contracts) (JORF, 30 January 2016, text No 66), provided:

‘The following shall be excluded from the procedure for the award of concession contracts:

1° Persons who have been the subject of a conviction by final judgment for one of the offences listed in Articles 222-34 to 222-40, 313-1, 313-3, 314-1, 324-1, 324-5, 324-6, 421-1 to 421-2-4, 421-5, 432-10, 432-11, 432-12 to 432-16, 433-1, 433-2, 434-9, 434-9-1, 435-3, 435-4, 435-9, 435-10, 441-1 to 441-7, 441-9, 445-1 to 445-2-1 or 450-1 of the code pénal (Criminal Code), Articles 1741 to 1743, 1746 or 1747 of the code général des impôts (General Tax Code), and, in respect of concession contracts which are not defence or security concession contracts, Articles 225-4-1 et 225-4-7 of the

code pénal (Criminal Code), or for concealing such offences, and for equivalent offences provided for in the legislation of another Member State of the European Union […]

…

Exclusion from the procedure for procurement by concession contracts pursuant to point 1° shall apply for a period of 5 years from the date of delivery of the sentence;

…’

7 Article 19 of décret n^{o} 2016-86 (Decree No 2016-86) was worded as follows:

‘I. – In support of the application, the candidate shall produce a sworn statement stating:

1° That it is not subject to any of the exclusions from participation in the procedure for the award of concession contracts laid down in Articles 39, 40 and 42 of the abovementioned order of 29 January 2016;

2° That the information and documents relating to its abilities and aptitudes, required pursuant to Article 45 of the abovementioned order of 29 January and in accordance with the conditions laid down in Articles 20 and 21, are correct.

II. – The candidate shall produce all the documents proving that it is not subject to any of the exclusions from participation in the procedure for the award of concession contracts laid down in Articles 39, 40 and 42 of the abovementioned order of 29 January 2016.

…’

8 Article 23 of that decree provided as follows:

‘I. – Before considering the applications, an awarding authority which finds that documents or information, the production of which was required under Articles 19, 20 and 21, [are missing] may request the candidates concerned to complete their application file within an appropriate time limit. It shall then inform the other applicants of the implementation of this provision.

II. – … Inadmissible applications shall also be eliminated. An application submitted by a candidate which is unable to take part in the procurement procedure pursuant to Articles 39, 40, 42 and 44 of Order [No 2016-65] referred to above, or which does not have the abilities or aptitudes required pursuant to article 45 of that order, shall be inadmissible.’

9 All the abovementioned provisions of Order No 2016-65 and of Decree 2016-86 were repealed on 1 April 2019 and reproduced, in essence, in Article L. 3123-1 and Articles R. 3123-1 to R. 3123-21 of the code de la commande publique (Public Procurement Code) respectively.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Vert Marine, a company specialising in the delegated management of sports and leisure facilities, with the core part of its business stemming from the use of concession contracts with public authorities, brought an action before the Conseil d’État (Council of State, France) challenging the implied rejection, by the Premier Ministre (Prime Minister), of its application for the repeal of Articles 19 and 23 of Decree No 2016-86.

11 In that regard, it submits in particular that those provisions are incompatible with Article 38 of Directive 2014/23, in that they do not grant, to an economic operator which is automatically excluded from participation in concession contract award procedures as a result of a definitive conviction for one of the serious offences referred to in Article 39(1) of Order No 2016-65, the possibility of providing evidence that it has taken compliance measures enabling it to demonstrate its restored reliability despite the existence of its conviction. It is apparent from the file submitted to the Court that the infringements

referred to in Article 39(1) of Order No 2016-65 correspond, in essence, to the offences referred to in Article 38(4) of Directive 2014/23.

12 In that context, the referring court asks whether Article 38(9) and (10) of Directive 2014/23 precludes national legislation which deprives an economic operator of the possibility of providing such evidence, where that economic operator has been automatically excluded from participation in concession contract award procedures following a definitive conviction for offences of specific gravity that the national legislature intended to suppress, with the aim of promoting accountability in public procurement, in order to ensure that candidates are exemplary.

13 In addition, that court asks whether, if the examination of the appropriateness of the compliance measures taken by the economic operator may be entrusted to the judicial authorities, a number of judicial mechanisms provided for in national law, namely release, judicial rehabilitation and the removal of any mention of the conviction from Bulletin No 2 of the criminal record, may be regarded as satisfying the system of compliance measures established in Article 38(9) of Directive 2014/23.

14 In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must [Directive 2014/23] be interpreted as precluding the legislation of a Member State, with an objective of promoting accountability in public procurement, from not giving an economic operator which has been convicted by final judgment of an offence of specific gravity, and which, on that ground, is the subject of a measure prohibiting it from participating in a procedure for procurement by a concession contract for a period of 5 years, the opportunity of providing evidence to the effect that the measures which it has taken are sufficient to demonstrate its reliability despite the existence of that ground for exclusion?

2. If [Directive 2014/23] allows the Member States to entrust authorities other than the contracting authority concerned with the responsibility of assessing the compliance mechanism for operators, does that power enable that authority to entrust the courts with that mechanism? If so, can mechanisms such as the provisions of French law on release, judicial rehabilitation and the removal of any mention of the conviction from Bulletin No 2 of the criminal record be treated in the same way as compliance mechanisms in accordance with the directive?'

Consideration of the questions referred

The first question

15 By its first question, the referring court asks, in essence, whether Article 38(9) and (10) of Directive 2014/23 must be interpreted as precluding national legislation which does not allow an economic operator which has been definitively convicted of one of the offences referred to in Article 38(4) of that directive and which, on that ground, is automatically prohibited from participating in concession contract award procedures to provide evidence that it has taken compliance measures capable of demonstrating its restored reliability.

16 In that regard, it must be recalled that, under the first subparagraph of Article 38(9) of Directive 2014/23, any economic operator which is in one of the situations referred to, inter alia, in paragraph 4 of that article may provide evidence to demonstrate that the measures it has taken are sufficient to demonstrate its reliability despite the existence of the ground for exclusion relied on and that, if that evidence is deemed sufficient, the economic operator concerned is not to be excluded from the procedure. That provision thus introduces a 'self-cleaning' mechanism (see, by analogy, as regards Article 57(6) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), which equates to Article 38(9) of Directive 2014/23, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 49 and the case-law cited).

17 It is apparent from the wording of the first subparagraph of Article 38(9) of Directive 2014/23 that, by providing that any economic operator may provide evidence of compliance measures taken, that

provision confers on economic operators a right which the Member States must guarantee when transposing that directive, in accordance with the conditions laid down by the directive.

18 The third subparagraph of Article 38(9) of Directive 2014/23 provides, however, that an economic operator which has been excluded by a final judgment from participating in procurement or concession award procedures is not to be entitled to make use, during the total period of exclusion resulting from that judgment, in the Member States where the judgment is effective, of the possibility of providing evidence of compliance measures taken. It is therefore only in that case that an economic operator cannot benefit from the right conferred by the first subparagraph of Article 38(9) of Directive 2014/23.

19 In that regard, an exclusion by a final judgment, within the meaning of the third subparagraph of Article 38(9) of Directive 2014/23, cannot be equated with an exclusion which, under national legislation such as Article 39(1) of Order No 2016-65, is automatically provided for in respect of any economic operator convicted by a final judgment for one of the offences referred to in Article 38(4) of Directive 2014/23.

20 It is clear from the wording of the third subparagraph of Article 38(9) of Directive 2014/23 that the exclusion must be the direct result of a final judgment relating to a specific economic operator and not merely from the fact, in particular, that a conviction has been issued by final judgment for one of the reasons listed in Article 38(4) of Directive 2014/23.

21 It is apparent, therefore, from the wording of Article 38(9) of Directive 2014/23 that, with the exception of the situation envisaged in the third subparagraph of that provision, an economic operator may provide evidence of the compliance measures adopted in order to demonstrate its reliability despite the fact that it is subject to one of the grounds for exclusion referred to in Article 38(4) and (7) of Directive 2014/23, such as a conviction issued by final judgment for one of the reasons listed in Article 38(4)(a) to (f) of Directive 2014/23.

22 That interpretation is supported by the objective pursued in Article 38(9) of Directive 2014/23. By providing that an economic operator must be able to provide evidence of compliance measures taken, that provision seeks to underline the importance attaching to the reliability of economic operators (see, by analogy, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 49 and the case-law cited) and, accordingly, as the Greek Government stated in its written observations, to ensure an objective assessment of economic operators and to ensure effective competition. That objective would be jeopardised if the Member States were free to restrict, beyond the situation envisaged in the third subparagraph of Article 38(9) of Directive 2014/23, the right of economic operators to provide evidence of the compliance measures taken.

23 In addition, that interpretation is not called into question by the fact that the Member States must, by virtue of Article 38(10) of Directive 2014/23, specify the implementing conditions of that article and, in that regard, have some discretion (see, by analogy, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 34 and the case-law cited).

24 The expression ‘implementing conditions’ presupposes that the very existence of the right conferred by the first subparagraph of Article 38(9) of Directive 2014/23 and the possibility of exercising that right are guaranteed by the Member States, failing which, as the Commission stated in its written observations, the Member States would be able, when determining those implementing conditions, to deprive that right of its substance. Such an interpretation is, moreover, confirmed in recital 71 of Directive 2014/23, from which it is apparent that the Member States have the power only to determine the procedural and substantive conditions applicable to the exercise of that right.

25 In the light of the foregoing considerations, the answer to the first question is that Article 38(9) of Directive 2014/23 must be interpreted as precluding national legislation which does not allow an economic operator which has been definitively convicted of one of the offences referred to in Article 38(4) of that directive and which, on that ground, is automatically prohibited from participating in concession contract award procedures to provide evidence that it has taken compliance measures capable of demonstrating its restored reliability.

The second question

26 By its second question, the referring court asks, in essence, whether Article 38(9) and (10) of Directive 2014/23 must be interpreted as meaning that it does not preclude the assessment of the appropriateness of the compliance measures taken by the economic operator from being entrusted to the judicial authorities and, if so, whether Article 38(9) of that directive must be interpreted as precluding national legislation which allows the judicial authorities to release a person from an automatic prohibition, following a conviction, from participating in concession contract award procedures, to lift such a prohibition or to remove any mention of the conviction from the criminal record.

27 With regard to the first part of the second question, it must be noted that the wording of the three subparagraphs comprising Article 38(9) of Directive 2014/23 does not indicate which authority is responsible for assessing the appropriateness of the compliance measures claimed by the economic operator. In those circumstances, it is for the Member States, when determining the implementing conditions of that provision under Article 38(10) of that directive, to specify, in their national legislation, the identity of the authority empowered to carry out that assessment, so that the economic operator may effectively exercise the right conferred on it in the first subparagraph of Article 38(9) of the directive.

28 That interpretation is borne out by recital 71 of Directive 2014/23, which states that, when determining the procedural and substantive conditions for the application of Article 38(9) of Directive 2014/23, Member States must be free to allow the individual contracting authorities or contracting entities to carry out the assessments of the appropriateness of the compliance measures claimed by the economic operator or to entrust other authorities on a central or decentralised level with that task.

29 It is apparent from that recital that the EU legislature wished to leave a broad discretion to the Member States when designating the authorities responsible for assessing the appropriateness of the compliance measures. In that regard, it follows from the terms ‘other authorities on a central or decentralised level’ that the Member States may entrust that task of assessment to any authority other than the contracting authority or contracting entity.

30 That is all the more the case where, as the French and Greek Governments and the Commission submit in their written observations, the judicial authorities are, by their nature, able to carry out an objective and independent assessment of the appropriateness of the compliance measures and to examine, for that purpose, the evidence referred to in the first sentence of the second subparagraph of Article 38(9) of Directive 2014/23 in accordance with the requirements laid down in the second and third sentences of that provision.

31 That being so, it is necessary, as the Commission has stated in its written observations, where a Member State intends to entrust such an assessment to the judicial authorities, for the national system established for that purpose to comply with all the requirements laid down in Article 38(9) of Directive 2014/23 and for the applicable procedure to be compatible with the time limits laid down by the concession contract award procedure. Otherwise and, in particular, if the judicial authority were not empowered to carry out a detailed assessment of the evidence required under the second subparagraph of Article 38(9) of Directive 2014/23 or would not be in a position to make a definitive decision before the end of the award procedure, the right established in the first subparagraph of that provision in favour of the economic operator would be deprived of its substance.

32 As regards the second part of the second question, it must be borne in mind that, in accordance with the settled case-law of the Court, it is not for the Court, in proceedings brought under Article 267 TFEU, to rule on the compatibility of national rules with EU law. However, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of EU law necessary to enable that court to determine whether those national rules are compatible with EU law (judgment of 25 October 2018, *Sciotto*, C-331/17, EU:C:2018:859, paragraph 27 and the case-law cited).

33 In that regard, it is for the referring court to determine whether judicial procedures, such as the procedures for release, judicial rehabilitation or removal of any mention of the conviction from Bulletin No 2 of the criminal record, effectively satisfy the conditions laid down and the objective pursued by the system of compliance measures established in Article 38(9) of Directive 2014/23.

34 In particular, it is for the referring court to determine whether such procedures allow, on the one hand, the economic operators concerned to provide the competent judicial authorities with evidence of the compliance measures referred to in the first sentence of the second subparagraph of Article 38(9) of Directive 2014/23 and, on the other, those judicial authorities to assess the appropriateness of those measures in the manner laid down in the second sentence of that provision and to order, where they consider that the reliability of the operator is restored by the effect of the measures in question, release, rehabilitation or the removal of any mention of the conviction from Bulletin No 2 of the criminal record.

35 In that context, it must be pointed out that, in the event that release, rehabilitation, or the removal of any mention of the conviction in Bulletin No 2 of the criminal record could be ordered without the competent judicial authority being required to assess the appropriateness of the compliance measures taken and the economic operators concerned could thus participate in concession contract award procedures without adducing evidence of those measures, which Vert Marine and the Commission argue in their written observations, such judicial procedures could not be regarded as satisfying the objective pursued and the conditions laid down by the system of compliance measures regime established in Article 38(9) of Directive 2014/23, since, first, they give no guarantee to the contracting authority that the reliability of the economic operator concerned has been restored and, second, they allow potentially unreliable operators to participate in concession contract award procedures.

36 Furthermore, the referring court must satisfy itself that the judicial procedures provided for by national law are capable of ensuring, in a timely manner, that an economic operator wishing to take part in a concession contract award procedure has the opportunity to provide evidence of the compliance measures taken. The right provided for in Article 38(9) of Directive 2014/23 would be deprived of its substance if the economic operator could not make effective use of those procedures before the end of the award procedure.

37 Both Vert Marine and the Commission submit, in their written observations, that judicial rehabilitation, apart from the fact that it does not satisfy the condition referred to in paragraph 34 of this judgment, can be sought only after a certain period, varying from two to 5 years, which does not enable the economic operators concerned to benefit from rehabilitation before the expiry of that period. It is for the referring court to verify that point, just as it is required to ascertain that the time limits laid down by the procedures for release and removal of any mention of the conviction in Bulletin No 2 of the criminal record are compatible with those relating to concession contract award procedures.

38 In the light of all the foregoing considerations, the answer to the second question is that Article 38(9) and (10) of Directive 2014/23 must be interpreted as not precluding the assessment of the appropriateness of the compliance measures taken by an economic operator from being entrusted to the judicial authorities, provided that the national rules put in place for that purpose satisfy all the requirements laid down in Article 38(9) of that directive and that the relevant procedure is compatible with the time limits laid down by the concession contract award procedure. Moreover, Article 38(9) of Directive 2014/23 must be interpreted as not precluding national legislation which allows the judicial authorities to release a person from an automatic prohibition on participating in concession contract award procedures following a criminal conviction, to lift such a prohibition or to remove any mention of the conviction in the criminal record, provided that such judicial procedures effectively satisfy the conditions laid down and the objective pursued by that system and, in particular, make it possible, when an economic operator wishes to take part in a concession contract award procedure, to lift, in a timely manner, the prohibition affecting it, on the sole basis of the compliance measures claimed by that operator and assessed by the competent judicial authority in accordance with the requirements laid down in that provision, which it is for the referring court to ascertain.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **Article 38(9) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts must be interpreted as precluding national legislation which does not allow an economic operator which has been definitively convicted of one of the offences referred to in Article 38(4) of that directive and which, on that ground, is automatically prohibited from participating in concession contract award procedures to provide evidence that it has taken compliance measures capable of demonstrating its restored reliability.**

2. **Article 38(9) and (10) of Directive 2014/23 must be interpreted as not precluding the assessment of the appropriateness of the compliance measures taken by an economic operator from being entrusted to the judicial authorities, provided that the national rules put in place for that purpose satisfy all the requirements laid down in Article 38(9) of that directive and that the relevant procedure is compatible with the time limits laid down by the concession contract award procedure. Moreover, Article 38(9) of Directive 2014/23 must be interpreted as not precluding national legislation which allows the judicial authorities to release a person from an automatic prohibition on participating in concession contract award procedures following a criminal conviction, to lift such a prohibition or to remove any mention of the conviction in the criminal record, provided that such judicial procedures effectively satisfy the conditions laid down and the objective pursued by that system and, in particular, make it possible, when an economic operator wishes to take part in a concession contract award procedure, to lift, in a timely manner, the prohibition affecting it, on the sole basis of the compliance measures claimed by that operator and assessed by the competent judicial authority in accordance with the requirements laid down in that provision, which it is for the referring court to ascertain.**

[Signatures]

---

* Language of the case: French.

Afficher les raccourcis

CONSEIL D'ÉTAT

Base de jurisprudence

Ariane Web: Conseil d'État 419146, lecture du 12 octobre 2020,
ECLI:FR:CECHR:2020:419146.20201012

Décision n° 419146
12 octobre 2020
Conseil d'État

N° 419146
ECLI:FR:CECHR:2020:419146.20201012
Mentionné aux tables du recueil Lebon

7ème - 2ème chambres réunies

M. Marc Pichon de Vendeuil, rapporteur
Mme Mireille Le Corre, rapporteur public

Lecture du lundi 12 octobre 2020

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

Vu la procédure suivante :

Par une décision du 14 juin 2019, le Conseil d'Etat, statuant au contentieux sur la requête de la société Vert Marine tendant à l'annulation pour excès de pouvoir de la décision implicite de rejet née du silence gardé par le Premier ministre sur sa demande tendant à l'abrogation des articles 19 et

This site uses cookies and gives you control over what you want to activate ✓ OK, accept all
✗ Deny all cookies Personalize

1° La directive 2014/23/UE du Parlement européen et du Conseil du 26 février 2014 sur l'attribution de contrats de concession doit-elle être interprétée comme s'opposant à ce que la législation d'un Etat membre, dans un objectif de moralisation de la commande publique, puisse ne pas donner à un opérateur économique condamné par un jugement définitif pour une infraction d'une particulière gravité et faisant l'objet pour ce motif d'une mesure d'interdiction de participer à une procédure de passation d'un contrat de concession pendant une durée de cinq ans, la possibilité de fournir des preuves afin d'attester que les mesures qu'il a prises suffisent à démontrer sa fiabilité au pouvoir adjudicateur malgré l'existence de ce motif d'exclusion '

2° Si la directive 2014/23/UE du Parlement européen et du Conseil du 26 février 2014 permet aux Etats membres de confier à d'autres pouvoirs que le pouvoir adjudicateur concerné le soin d'apprécier le dispositif de mise en conformité des opérateurs, une telle faculté permet-elle de confier ce dispositif à des autorités juridictionnelles ' Dans l'affirmative, des mécanismes tels que les dispositifs de droit français de relèvement, de réhabilitation judiciaire et d'exclusion de la mention de la condamnation au bulletin n° 2 du casier judiciaire peuvent-ils être assimilés à des dispositifs de mise en conformité au sens de la directive '

Par un arrêt C-472/19 du 11 juin 2020, la Cour de justice de l'Union européenne s'est prononcée sur ces questions.

Vu les autres pièces du dossier, y compris celles visées par la décision du Conseil d'Etat du 14 juin 2019 ;

Vu :
- le traité sur le fonctionnement de l'Union européenne ;
- la directive 2014/23/UE du Parlement européen et du Conseil du 26 février 2014 ;
- le code de la commande publique ;
- le code pénal ;
- le code de procédure pénale ;
- l'ordonnance n° 2016-65 du 29 janvier 2016 ;
- le décret n° 2018-1075 du 3 décembre 2018 ;
- l'arrêt de la Cour de justice de l'Union européenne du 11 juin 2020, Vert Marine SAS contre Premier ministre (C-472/19) ;
- le code de justice administrative ;

This site uses cookies and gives you control over what you want to activate

- le rapport de M. Marc Pichon de Vendeuil, maître des requêtes,

- les conclusions de Mme Mireille Le Corre, rapporteur public ;

Considérant ce qui suit :

1. L'article 38 de la directive 2014/23/UE du Parlement européen et du Conseil du 26 février 2014 sur l'attribution de contrats de concession prévoit des motifs d'exclusion, obligatoires ou facultatifs, des opérateurs économiques des procédures d'attribution des contrats de concession. Son paragraphe 4 précise les infractions pour lesquelles la condamnation d'un opérateur économique entraîne exclusion obligatoire de la participation à une procédure d'attribution de concession. Toutefois, aux termes du paragraphe 9 du même article : " Tout opérateur économique qui se trouve dans l'une des situations visées aux paragraphes 4 et 7 peut fournir des preuves afin d'attester que les mesures qu'il a prises suffisent à démontrer sa fiabilité malgré l'existence du motif d'exclusion invoqué. Si ces preuves sont jugées suffisantes, l'opérateur économique concerné n'est pas exclu de la procédure. / À cette fin, l'opérateur économique prouve qu'il a versé ou entrepris de verser une indemnité en réparation de tout préjudice causé par l'infraction pénale ou la faute, clarifié totalement les faits et circonstances en collaborant activement avec les autorités chargées de l'enquête et pris des mesures concrètes de nature technique et organisationnelle et en matière de personnel propres à prévenir une nouvelle infraction pénale ou une nouvelle faute. Les mesures prises par les opérateurs économiques sont évaluées en tenant compte de la gravité de l'infraction pénale ou de la faute ainsi que de ses circonstances particulières. Lorsque les mesures sont jugées insuffisantes, la motivation de la décision en question est transmise à l'opérateur économique concerné. / Un opérateur économique qui a été exclu par un jugement définitif de la participation à des procédures de passation de marché ou d'attribution de concession n'est pas autorisé à faire usage de la possibilité prévue au présent paragraphe pendant la période d'exclusion fixée par ledit jugement dans les États membres où le jugement produit ses effets ".

2. L'ordonnance du 29 janvier 2016 relative aux contrats de concession a transposé la directive 2014/23/UE sur l'attribution de contrats de concession. Aux termes de son article 39, aujourd'hui repris à l'article L. 3123-1 du code de la commande publique, qui figure dans une sous-section intitulée " Interdictions de soumissionner obligatoires et générales " : " Sont exclues de la procédure de passation des contrats de concession : / 1° Les personnes qui ont fait l'objet d'une condamnation définitive pour l'une des infractions prévues aux articles 222-34 à 222-40, 313-1,

This site uses cookies and gives you control over what you want to activate

du code pénal, aux articles 1741 à 1743, 1746 ou 1747 du code général des impôts, et pour les contrats de concession qui ne sont pas des contrats de concession de défense ou de sécurité aux articles 225-4-1 et 225-4-7 du code pénal, ou pour recel de telles infractions, ainsi que pour les infractions équivalentes prévues par la législation d'un autre Etat membre de l'Union européenne. / La condamnation définitive pour l'une de ces infractions ou pour recel d'une de ces infractions d'un membre de l'organe de gestion, d'administration, de direction ou de surveillance ou d'une personne physique qui détient un pouvoir de représentation, de décision ou de contrôle d'une personne morale entraîne l'exclusion de la procédure de passation des contrats de concession de cette personne morale, tant que cette personne physique exerce ces fonctions. / L'exclusion de la procédure de passation des contrats de concession au titre du présent 1° s'applique pour une durée de cinq ans à compter du prononcé de la condamnation (...) ".

3. Dans l'arrêt du 11 juin 2020 par lequel elle s'est prononcée sur les questions dont le Conseil d'Etat, statuant au contentieux, l'avait saisie à titre préjudiciel après avoir écarté les autres moyens de la requête, la Cour de justice de l'Union européenne a dit pour droit que l'article 38, paragraphe 9, de la directive 2014/23/UE du Parlement européen et du Conseil du 26 février 2014 sur l'attribution de contrats de concession, doit être interprété en ce sens qu'il s'oppose à une réglementation nationale qui n'accorde pas à un opérateur économique condamné de manière définitive pour l'une des infractions visées à l'article 38, paragraphe 4, de cette directive et faisant l'objet, pour cette raison, d'une interdiction de plein droit de participer aux procédures de passation de contrats de concession la possibilité d'apporter la preuve qu'il a pris des mesures correctrices susceptibles de démontrer le rétablissement de sa fiabilité.

4. La Cour de justice de l'Union européenne a également dit pour droit que l'article 38, paragraphes 9 et 10, de de la directive 2014/23 doit être interprété en ce sens qu'il ne s'oppose pas à ce que l'examen du caractère approprié des mesures correctrices prises par un opérateur économique soit confié aux autorités judiciaires, à condition que le régime national mis en place à cet effet respecte l'ensemble des exigences posées à l'article 38, paragraphe 9, de cette directive et que la procédure applicable soit compatible avec les délais imposés par la procédure de passation des contrats de concession. Par ailleurs, l'article 38, paragraphe 9, de la directive 2014/23 doit être interprété en ce sens qu'il ne s'oppose pas à une réglementation nationale qui permet aux autorités judiciaires de relever une personne d'une interdiction de plein droit de participer aux procédures de passation de contrats de concession à la suite d'une condamnation pénale, d'effacer une telle interdiction ou d'exclure toute mention de la condamnation dans le casier judiciaire, à condition que de telles procédures judiciaires répondent effectivement aux conditions posées et à l'objectif poursuivi par ce régime et, en particulier, permettent, dès lors qu'un opérateur économique souhaite participer à

This site uses cookies and gives you control over what you want to activate

opérateur et évaluées par l'autorité judiciaire compétente conformément aux exigences prévues à cette disposition, ce qu'il appartient à la juridiction de renvoi de vérifier.

5. Il résulte de l'interprétation ainsi donnée par la Cour de justice de l'Union européenne que, pour ne pas méconnaître les objectifs de la directive du 26 février 2014, le droit français doit prévoir la possibilité pour un opérateur économique, lorsqu'il est condamné par un jugement définitif prononcé par une juridiction judiciaire pour une des infractions pénales énumérées à l'article 39 de l'ordonnance du 29 janvier 2016, repris à l'article L. 3123-1 du code de la commande publique, et que, pour cette raison, il se trouve en principe exclu des procédures d'attribution des contrats de concession pour une durée de cinq ans, d'apporter la preuve qu'il a pris des mesures correctrices susceptibles de démontrer le rétablissement de sa fiabilité. Toutefois, la faculté de faire preuve de sa fiabilité ne saurait être ouverte lorsque l'opérateur a été expressément exclu par un jugement définitif de la participation à des procédures de passation de marché ou d'attribution de concession, pendant la période fixée par ce jugement.

6. Or, d'une part, aucune disposition de l'ordonnance relative aux contrats de concession n'a cet objet ou cet effet. D'autre part, contrairement à ce que soutient le ministre de l'économie et des finances, les différents dispositifs existants par ailleurs en droit pénal français, tels le relèvement - qui permet à la juridiction judiciaire de relever en tout ou partie une personne d'une interdiction, déchéance ou incapacité quelconque résultant d'une condamnation pénale - , la réhabilitation - qui permet d'effacer toutes les incapacités et déchéances résultant d'une condamnation - et l'exclusion de la mention de la condamnation au bulletin n° 2 du casier judiciaire, prévus respectivement par l'article 132-21 du code pénal, par l'article 133-12 du code pénal et par l'article 775-1 du code de procédure pénale, ne peuvent être regardés, eu égard à leurs conditions d'octroi, notamment de délai, et à leurs effets, comme des dispositifs de mise en conformité au sens de la directive du 26 février 2014 telle qu'interprétée par la Cour de justice de l'Union européenne dans les conditions mentionnées au point 4.

7. Il suit de là que les dispositions de l'article 39 de l'ordonnance du 29 janvier 2016, aujourd'hui reprises à l'article L. 3123-1 du code de la commande publique, sont incompatibles avec les objectifs de l'article 38 de la directive 2014/23 du 26 février 2014 en tant qu'elles ne prévoient pas de dispositif de mise en conformité permettant à un opérateur économique candidat à l'attribution d'un contrat de concession d'échapper aux interdictions de soumissionner prévues en cas de condamnation pour certaines infractions.

8. Il en résulte que la société Vert Marine est fondée à demander l'annulation de la décision

This site uses cookies and gives you control over what you want to activate

commande publique, qui, fixant la liste des documents permettant de justifier qu'un candidat ne fait l'objet d'aucune exclusion de soumissionner, doivent être regardés comme ayant été pris pour l'application de ces dispositions législatives et en tant que ces dispositions ne prévoient pas le dipositif énoncé au point 7.

9. Toutefois une telle annulation ne saurait avoir pour effet de maintenir dans l'ordre juridique français des règles incompatibles avec les objectifs de la directive du 26 février 2014. Il y a lieu, dans ces conditions, pour le Conseil d'Etat de préciser la portée de sa décision d'annulation par des motifs qui en constituent le soutien nécessaire.

10. La présente décision a nécessairement pour conséquence que, dans l'attente de l'édiction des dispositions législatives et réglementaires nécessaires au plein respect des exigences découlant du droit de l'Union européenne, l'exclusion de la procédure de passation des contrats de concession prévue à l'article L. 3123-1 du code de la commande publique n'est pas applicable à la personne qui, après avoir été mise à même de présenter ses observations, établit dans un délai raisonnable et par tout moyen auprès de l'autorité concédante, qu'elle a pris les mesures nécessaires pour corriger les manquements correspondant aux infractions mentionnées au même article pour lesquelles elle a été définitivement condamnée et, le cas échéant, que sa participation à la procédure de passation du contrat de concession n'est pas susceptible de porter atteinte à l'égalité de traitement.

11. Il y a lieu, dans les circonstances de l'espèce, de mettre à la charge de l'Etat la somme de 3 000 euros à verser à la société Vert Marine au titre de l'article L. 761-1 du code de justice administrative.

D E C I D E :

Article 1er : La décision implicite par laquelle le Premier ministre a rejeté la demande tendant à l'abrogation des articles 19 et 23 du décret n° 2016-86 du 1er février 2016 relatif aux contrats de concession, en tant que ces dispositions, reprises aux articles R. 3123-16 à R. 3123-21 du code de la commande publique, ne prévoient pas de dispositif de mise en conformité permettant à un opérateur économique candidat à l'attribution d'un contrat de concession d'échapper aux interdictions de soumissionner prévues en cas de condamnation pour certaines infractions, est annulée.

Article 2 : L'annulation prononcée à l'article 1er comporte pour les autorités concédantes les obligations énoncées par les motifs de la présente décision.

Article 3 : L'Etat versera à la société Vert Marine la somme de 3 000 euros au titre de l'article L.

This site uses cookies and gives you control over what you want to activate

Article 5 : La présente décision sera notifiée à la société Vert Marine, au Premier ministre et au ministre de l'économie, des finances et de la relance.

Voir aussi

http://www.conseil-etat.fr/fr/arianeweb/CE/analyse/2020-10-12/419146 (http://www.conseil-etat.fr/fr/arianeweb/CE/analyse/2020-10-12/419146)
http://www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2020-10-12/419146 (http://www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2020-10-12/419146)

This site uses cookies and gives you control over what you want to activate

EU:C:2020:436

JUDGMENT OF THE COURT (Ninth Chamber)

4 June 2020(*)

(Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Article 12(4) — Scope — Public contracts between entities within the public sector — Concept of ‘cooperation’ — Absence)

In Case C-429/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Koblenz (Higher Regional Court, Coblenz, Germany), made by decision of 14 May 2019, received at the Court on 5 June 2019, in the proceedings

Remondis GmbH

v

Abfallzweckverband Rhein-Mosel-Eifel

intervener:

Landkreis Neuwied,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, D. Šváby (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Remondis GmbH, by C. Werkle, Rechtsanwalt,

– Abfallzweckverband Rhein-Mosel-Eifel, by G. Moesta and A. Gerlach, Rechtsanwälte,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the Spanish Government, by M.J. García-Valdecasas Dorrego, acting as Agent,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by L. Haasbeek, M. Noll-Ehlers and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 12(4)(a) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement

and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Remondis GmbH and Abfallzweckverband Rhein-Mosel-Eifel (Rhine-Moselle-Eifel special-purpose association for waste, Germany) ('the association') concerning the award of a contract for the treatment of waste in the mechanical biological treatment plant of Landkreis Neuwied (Neuwied District, Germany).

Legal context

3 Recitals 31 and 33 of Directive 2014/24 state:

'(31) There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of [the Court] is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

Such clarification should be guided by the principles set out in the relevant case-law of [the Court]. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.

…

(33) Contracting authorities should be able to choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form. Such cooperation might cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities need not necessarily be identical; they might also be complementary.

Contracts for the joint provision of public services should not be subject to the application of the rules set out in this Directive provided that they are concluded exclusively between contracting authorities, that the implementation of that cooperation is governed solely by considerations relating to the public interest and that no private service provider is placed in a position of advantage vis-à-vis its competitors.

In order to fulfil those conditions, the cooperation should be based on a cooperative concept. Such cooperation does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards the cooperative performance of the public service in question. In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest.'

4 Article 2(1) of that directive provides as follows:

'For the purposes of this Directive, the following definitions apply:

1. "contracting authorities" means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

…

4. “bodies governed by public law” means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

…’

5 Article 12 of that directive, entitled ‘Public contracts between entities within the public sector’, provides in paragraph 4:

‘A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.’

The dispute in the main proceedings and the question referred for a preliminary ruling

6 The districts of Mayen-Coblenz (Germany) and Cochem-Zell (Germany) and the town of Coblenz (Germany) entrusted the performance of their tasks of disposing of the waste produced in their respective territories to the association which they control together.

7 However, solely the association, which is itself a contracting authority, has the ability to place residual waste into landfills, that is to say, waste which comes mainly from households and which contains no recyclable material, or almost no such material. Mixed municipal household waste must undergo complex pre-treatment in a complex mechanical biological treatment plant in order to obtain residual waste. That pre-processing makes it possible to extract recyclable materials and waste with a high calorific content, to remove harmful substances to the extent possible and to reduce significantly the biological activity of organic waste. The remainder, which is then placed into landfill, represents on average slightly less than 50% of the original volume.

8 Since it does not have a treatment plant of that type, the association entrusts 80% of its municipal waste disposal operations to private undertakings. The treatment of the remaining 20%, around 10 000 megagrams (Mg) per annum, is undertaken by the district of Neuwied (‘the District’) under an agreement concluded between the association and the District on 27 September 2018. That agreement was approved by the competent authority on 18 October 2018 and published in local and regional official journals.

9 That agreement provides as follows:

‘Article 1

Initial position

1. The [District] is a public waste management body [Paragraph 17(1) of the Kreislaufwirtschaftsgesetz (Law on the circular economy; “the KrWG”)], read in conjunction with Paragraph 3(1) of the [Landeskreislaufwirtschaftsgesetz (Law on the circular economy of the Land of Rhineland-Palatinate; “the LKrWG”)]. In that capacity, it must accept and properly dispose of waste from private households, as provided for in Paragraph 2(2) of the [Gewerbeabfallverordnung (Regulation on business waste; “the GewAbfV”)], or from other sources produced within its territory and supplied to it.

The [association], as a body governed by public law, is responsible, inter alia, for the treatment and disposal of residual waste from private households or other sources, in particular residual waste and business waste similar to household waste, produced within the territory of the member local authorities of the association, namely the town of Coblenz and the districts of Mayen-Koblenz and Cochem-Zell, and supplied to it.

Paragraph 3(2) of the LKrWG requires public waste management bodies to cooperate with each other in order to fulfil their tasks. The District and the association agree, in accordance with Paragraph 108(6) of the [Gesetz gegen Wettbewerbsbeschränkungen (Law prohibiting restraints of competition; “the GWB”)], to cooperate in relation to the treatment of residual waste and the disposal of mixed municipal waste on the basis of this agreement, as provided for in Paragraphs 12 and 13 of the [Landesgesetz über die kommunale Zusammenarbeit (Law on cooperation between municipalities of the Land of Rhineland-Palatinate; “the KomZG”)].

2. The District shall operate the Linkenbach waste treatment plant in the territory of the municipality of Linkenbach [Germany] …, which includes a mechanical biological treatment plant (MBT) …

3. On the basis of the provisions set out above and having regard to the proximity principle, the District and the association agree, in accordance with Paragraph 12(1) of the KomZG, that the association can use the Linkenbach MBT plant for part of the waste … supplied to it.

Article 2

Subject matter

1. The association undertakes to treat part of the waste from households and other sources (mixed municipal waste, code 20 03 01) under the [Abfallverzeichnisverordnung (Decree relating to the list of waste; “the AVV”)] which has been supplied to it … at the Linkenbach MBT plant.

2. The District undertakes to accept that waste in accordance with Article 3 of this agreement and to treat it in accordance with the requirements of Paragraph 6(4) of the [Deponieverordnung (Regulation on landfill sites; “the DepV”)]. The association shall remain responsible for the disposal of residual waste.

3. In accordance with the cooperation required, the association declares that it is willing to receive, up to a maximum of 3 000 Mg per year, part of the mineral waste to be treated under the disposal obligation to which the District is subject as a public authority. The quantities which the association is required to receive depend on its capacity and the details thereof have been agreed between the parties concerned, having regard to their respective interests.

Article 3

Delivery conditions

1. The association undertakes not to deliver to the Linkenbach MBT facility more than 50 Mg of the waste referred to in Article 2 per working day (Monday to Friday). The parties agree that the annual amount to be delivered by the association is 10 000 Mg; for the year 2018 the prorata amount is approximately 4 000 Mg. The District may refuse waste which does not meet the definition contained in Article 2(1), in consultation with the association.

The tonnage referred to in the second sentence [of paragraph 1] is a provisional quantity, in relation to which the quantity actually treated may be 15% higher or lower, without any effect on the fee (Article 5(1)).

…

Article 4

Operation of the Linkenbach MBT facility

1. The District shall comply with the provisions of authorisation decisions in force when operating the treatment and disposal plant at the Linkenbach MBT plant.

…

3. Treatment at the Linkenbach MBT plant produces waste which shall be placed into landfill representing 46% of inputs, which the association shall accept in accordance with the second sentence of Article 2(2).

Article 5

Fee

1. In respect of the treatment of residual waste, the association shall pay the District a fee, which shall vary according to the quantity of waste treated, by way of reimbursement of costs, not taking into account a profit margin in relation to operating costs. The details are set out in a separate fee scale.

2. If the minimum waste quantity of 8 500 Mg/year agreed in Article 3(1) is not reached, the association shall be obliged to pay compensation based on tonnage in respect of the difference between the actual quantity delivered and 8 500 Mg/year. The amount of such compensation shall then be determined by mutual agreement between the parties, having particular regard to the sincere cooperation clause set out in Article 10 of this agreement. In determining that compensation, account shall be taken in particular of the costs which the District did not have to incur and the quantities treated on behalf of third parties. The District shall in no way be obliged to seek waste to be treated in order to compensate for the shortfall in the quantity of waste. If it is impossible for the District to use the available capacity and if it cannot reduce the costs incurred by the plant, the fee agreed in Article 5(1) shall be due as compensation for the shortfall in the quantity of waste. If the maximum quantity of waste is exceeded (11 500 Mg/year), the parties shall, in accordance with the general principle described above, agree to adjust the fee in respect of the amount exceeding 11 500 Mg.

Article 6

Duration of this agreement

1. This agreement, once approved by the [competent authority], shall enter into force on the day of its publication, probably on 1 October 2018.

2. It is concluded for a period of 10 years. It may be extended twice, by mutual agreement, at least one year before the stipulated expiry date, on each occasion for a period of two years. Otherwise, it shall terminate automatically without any requirement to give notice of termination.

…

Article 8

Mutual assistance network

If the residual waste cannot be treated at the Linkenbach MBT plant because of: (i) a temporary disruption of operations, (ii) refurbishment of the facility or (iii) other events for which the District is responsible; the District has put in place a mutual assistance network with the operators of other plants.

In those circumstances, it is entitled to transport the association's residual waste to plants in the mutual assistance network and to have it treated there or it shall have it disposed of according to other methods. Any additional cost shall be borne by the District.

The District shall consult the association specifically and on a case-by-case basis regarding the disposal — possibly departing from the provisions in the first and second sentences of Article 2(2) of this agreement — of residual waste in those plants. The parties shall also be free to agree to suspend reciprocal obligations under Article 7 also in circumstances covered by the first sentence of Article 8.

Article 9

Interim storage

Should a situation covered by Article 8(1) occur, the association shall, in accordance with the reciprocal nature of this agreement, as a priority over using the mutual assistance network, store, to the extent possible and at its own expense, the waste to be delivered by it, on a temporary basis on land belonging to it. Once the impediment is no longer present, the parties shall catch up with the performance of their obligations, taking due account of their respective capacities. The temporary storage obligation is subject to the caveat that authorisation under the rules on protection from emissions is granted for the association's site.

Article 10

Duty of sincere cooperation

The Parties undertake to cooperate in complete confidence and in good faith for the purpose of achieving the objectives pursued by this agreement and to keep each other informed at all times of any developments or changes which may affect the implementation of this agreement.

…'

10 After unsuccessfully lodging an objection against that agreement which, in its view, constituted an unlawful direct award of a public contract, Remondis, a private company active in the waste treatment sector, brought an action on 3 December 2018 before the Vergabekammer Rheinland-Pfalz (Public Procurement Board of the Land of Rhineland-Palatinate, Germany).

11 By decision of 6 March 2019, the Vergabekammer Rheinland-Pfalz (Public Procurement Board of the Land of Rhineland-Palatinate) declared the action inadmissible on the ground that the agreement at issue in the main proceedings constituted a form of cooperation between two contracting authorities, which fell within the scope of Paragraph 108(6) of the GWB and Article 12(4) of Directive 2014/24, and, as such, could not be the subject of an action.

12 That court pointed out in particular that the association had undertaken to deliver annually a quantity, fixed at 10 000 Mg, of residual waste to the District, so that the District could process the waste at the Linkenbach MBT plant. Through that mechanical and biological treatment, the District manages to have part of the waste recovered and the volume of the waste considerably reduced. The association, for its part, undertook through the agreement at issue in the main proceedings to take back the remaining material to be placed into landfill, which represents around 46% of inputs, and to take responsibility for its disposal. The reasoning of that court was that the two parties therefore entered into reciprocal obligations, establishing that there was a form of cooperation, as provided for in Paragraph 108(6) of the GWB and Article 12(4) of Directive 2014/24. Furthermore, in Article 9 of that agreement, the parties agreed that, in circumstances covered by Article 8 of that agreement, the association was to store, to the extent possible, the waste at its own cost on a site belonging to it, rather than using a mutual assistance network. The association thus, in that court's reasoning, entered into an obligation to store the waste on a temporary basis in the event of non-performance attributable to the District, which contributes to the conclusion that there was cooperation, within the meaning of those provisions.

13 Remondis brought an action against the decision of the Vergabekammer Rheinland-Pfalz (Public Procurement Board of the Land of Rhineland-Palatinate) before the referring court, the Oberlandesgericht Koblenz (Higher Regional Court, Coblenz, Germany). In support of that action, it submits that there is no cooperation based on a cooperative concept and that the situation at issue in the main proceedings is one entailing a public contract which must be put out to tender.

14 The referring court notes, as a preliminary point, that the value of the contract at issue in the main proceedings, around EUR 1 million per year, exceeds the threshold beyond which it is possible to bring an action, which is EUR 221 000. Furthermore, the agreement at issue in the main proceedings has all the characteristics of a public contract. However, if the conditions set out in Article 12(4) of Directive 2014/24 and Paragraph 108(6) of the GWB were satisfied, such a public contract would be subject neither to EU law nor to national public procurement law.

15 The wording of Article 12(4)(a) of Directive 2014/24 does not, however, make it possible to determine whether the agreement at issue in the main proceedings 'establishes … a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common' and, accordingly, whether it falls within the scope of EU public procurement law. Furthermore, that provision has been the subject of differing interpretations by the German courts.

16 In that regard, the referring court considers that the acceptance by the association of mineral waste, fixed at 3 000 Mg per annum by Article 2 of the agreement at issue in the main proceedings, was purely theoretical and was intended solely to conceal the lack of cooperation. The same is true of Article 9 of that agreement, having regard to the words 'to the extent possible', which appear in that provision, and to the fact that, until then, the association had not attempted to obtain the necessary authorisation for temporary storage. Therefore, the content of that agreement is limited, in essence, to the obligation on the part of the District, as service provider, to pre-treat, in return for consideration, the residual waste delivered by the association in order to ensure that it is possible for that waste to be placed into landfill, which is the task of the association.

17 Thus, even though the parties to the agreement at issue in the main proceedings both have a general interest in disposing of waste, they nevertheless pursue different interests of their own within that context. The association has to accomplish a task which has been assigned to it by German law. Since it did not have a mechanical biological treatment plant, it sought assistance from the District, which would, in return, increase the profitability of its plant.

18 According to the referring court, it cannot be inferred from the above that the conditions laid down in Article 12(4)(a) of Directive 2014/24 are not satisfied since, according to recital 33 of that directive, the contracting authorities have the right 'to provide jointly their public services by way of cooperation without being obliged to use any particular legal form', on condition, however, that 'cooperation … be based on a cooperative concept'. It is not, however, required that all participating authorities assume the performance of main contractual obligations, as long as there are commitments to contribute towards the cooperative performance of the public service concerned.

19 Those considerations leave room for interpretation and do not make it possible to establish whether two contracting authorities, both of which are responsible for waste management, cooperate, as provided for in Article 12(4)(a) of that directive, on the basis of the sole fact that they share the performance of a specific task for the disposal of waste which is incumbent only upon one of them, or whether the association 'cooperates in the joint performance' of that waste disposal task by paying the District a fee so that the District can perform part of the task incumbent on it.

20 In that regard, the referring court states that the concept of 'cooperation' requires that each party's contribution goes beyond merely implementing an obligation by which it is already bound or a purely financial 'contribution'. Cooperation therefore presupposes that each party makes a contribution which, in the absence of a cooperation agreement, would have to be made not by itself, but by one of the other parties.

21 In those circumstances, the Oberlandesgericht Koblenz (Higher Regional Court, Coblenz) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 12(4)(a) of [Directive 2014/24] to be interpreted as meaning that cooperation does indeed exist if a contracting authority responsible for waste disposal within its territory performs a disposal task — which is incumbent on it under national law and for the performance of which several operations are required — not entirely by itself, but rather commissions another contracting authority that is independent of it and is likewise responsible for waste disposal within its territory to carry out one of the necessary operations in return for consideration?’

Consideration of the question referred

22 By its question, the referring court asks, in essence, whether Article 12(4)(a) of Directive 2014/24 must be interpreted as meaning that cooperation between contracting authorities cannot be said to exist where a contracting authority which is responsible for a task in the public interest within its territory does not itself perform the entirety of that task — which is incumbent on it alone under national law and for the performance of which a number of operations are required — but rather commissions another contracting authority that is independent of it and is likewise responsible for that public interest task within its own territory to carry out one of the operations required in return for consideration.

23 It should be noted at the outset that the concept of ‘cooperation’ in Article 12(4) of Directive 2014/24 is not defined by that directive.

24 In accordance with settled case-law, it follows from the need for a uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account, not only its terms, but also its context and the objective pursued by the relevant legislation (see, to that effect, judgments of 17 November 1983, *Merck*, 292/82, EU:C:1983:335, paragraph 12; of 18 January 1984, *Ekro*, 327/82, EU:C:1984:11, paragraph 11; of 19 September 2000, *Linster*, C-287/98, EU:C:2000:468, paragraph 43; and of 21 March 2019, *Falck Rettungsdienste and Falck*, C-465/17, EU:C:2019:234, paragraph 28).

25 It is apparent from Article 12(4)(a) of Directive 2014/24 that a contract concluded exclusively between two or more contracting authorities falls outside the scope of that directive where it establishes or implements cooperation between the participating contracting authorities with the aim of ensuring that the public services they have to perform are provided with a view to achieving objectives they have in common.

26 The very wording of that provision thus places the concept of ‘cooperation’ at the very heart of the exclusion laid down in that provision.

27 It is of little importance, in that regard, that the final text of Article 12(4) of Directive 2014/24 no longer refers, in contrast to Article 11(4) of the Proposal for a Directive of the European Parliament and of the Council on public procurement of 20 December 2011 (COM (2011)896 final), to the requirement of ‘genuine cooperation between the participating contracting authorities’.

28 Indeed, unless the view is to be taken that the intention of the EU legislature was to establish a mechanism based on cooperation which was not genuine or was to undermine the effectiveness of horizontal cooperation between contracting authorities, the requirement of ‘genuine cooperation’ is apparent from the clear statement in the third paragraph of recital 33 of Directive 2014/24 that cooperation must be ‘based on a cooperative concept’. Such wording, which is ostensibly a tautology, must be interpreted as referring to the requirement that the cooperation thus established or implemented be effective.

29 It follows that the joint participation of all the parties to the cooperation agreement is essential to ensure that the public services they have to perform are provided and that that condition cannot be deemed to be satisfied where the sole contribution of certain contracting parties goes no further than a simple reimbursement of costs, such as those referred to in Article 5 of the agreement at issue in the main proceedings.

30 Moreover, if such reimbursement of costs were in itself sufficient to constitute ‘cooperation’ within the meaning of Article 12(4) of Directive 2014/24, no distinction could be drawn between such a form of ‘cooperation’ and a ‘public contract’ which is not covered by the exclusion laid down in that provision.

31 That interpretation of the concept of ‘cooperation’, within the meaning of Article 12(4) of that directive, is, indeed, supported by the second paragraph of recital 31 of the directive, which states that the sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of public procurement rules.

32 Furthermore, the conclusion of a cooperation agreement between parties in the public sector must be discernible as the culmination of a process of cooperation between the parties to the agreement (see, to that effect, judgment of 9 June 2009, *Commission* v *Germany*, C-480/06, EU:C:2009:357, paragraph 38). The development of cooperation between entities belonging to the public sector has an inherently collaborative dimension, which is not present in a public procurement procedure falling within the scope of the rules laid down by Directive 2014/24.

33 Accordingly, drawing up a cooperation agreement presupposes that the public sector entities which intend to conclude such an agreement establish jointly their needs and the solutions to be adopted. By contrast, that stage of assessing and establishing needs is, as a general rule, unilateral in the case of the award of a normal public contract. In the latter case, the contracting authority does no more than launch a call for tenders setting out the specifications which it has itself drawn up.

34 It follows that the existence of cooperation between entities belonging to the public sector is based on a strategy which is common to the partners to that cooperation and requires the contracting authorities to combine their efforts to provide public services.

35 In the present case, it is apparent from the order for reference that the agreement concluded between the association and the District does not disclose any form of cooperation between the contracting parties. Indeed, the referring court observed, in essence, that only Article 2(3) of the agreement at issue in the main proceedings is likely to foster cooperation between the contracting parties. However, after the contracting parties submitted that that clause constituted a statement of intention, the association expressly recognised, in the proceedings before the Vergabekammer Rheinland-Pfalz (Public Procurement Board of the Land of Rhineland-Palatinate), that that clause was nugatory.

36 Furthermore, it does not appear from the documents before the Court that the conclusion of the agreement at issue in the main proceedings is the culmination of a process of cooperation between the association and the District, which it is nevertheless for the referring court to establish.

37 Finally, neither the fact that, under Article 2(2) and Article 4(3) of the agreement at issue in the main proceedings, the association must accept the residual waste for the purpose of placing it into landfill, such waste accounting for 46% of inputs, nor the fact that, under Article 5(1) of that agreement, the District’s remuneration takes the form solely of a reimbursement of costs without any account being taken of a profit margin for operating costs, is sufficient to establish that a genuine form of cooperation exists between the association and the District.

38 Therefore, the sole purpose of the agreement at issue in the main proceedings appears to be that of acquiring a service in return for payment of a fee. In those circumstances, and subject to verification by the referring court, the public contract at issue in the main proceedings is not covered by the exclusion laid down in Article 12(4) of Directive 2014/24.

39 In the light of all the foregoing, the answer to the question referred is that Article 12(4)(a) of Directive 2014/24 must be interpreted as meaning that cooperation between contracting authorities cannot be said to exist where a contracting authority which is responsible for a task in the public interest within its territory does not itself perform the entirety of that task — which is incumbent on it alone under national law and for the performance of which a number of operations are required — but rather commissions another contracting authority that is independent of it and is likewise responsible for that public interest task within its own territory to carry out one of the operations required in return for consideration.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 12(4)(a) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that cooperation between contracting authorities cannot be said to exist where a contracting authority which is responsible for a task in the public interest within its territory does not itself perform the entirety of that task — which is incumbent on it alone under national law and for the performance of which a number of operations are required — but rather commissions another contracting authority that is independent of it and is likewise responsible for that public interest task within its own territory to carry out one of the operations required in return for consideration.

[Signatures]

---

* Language of the case: German.

JUDGMENT OF THE COURT (Fourth Chamber)

14 January 2021 (*)

(Reference for a preliminary ruling – Public procurement contracts – Directive 2014/24/EU – Article 57(6) – Optional grounds for exclusion – Measures taken by the economic operator to demonstrate its reliability despite the existence of an optional ground for exclusion – Obligation of the economic operator to provide evidence of such measures on its own initiative – Direct effect)

In Case C-387/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Belgium), made by decision of 7 May 2019, received at the Court on 17 May 2019, in the proceedings

RTS infra BVBA,

Aannemingsbedrijf Norré-Behaegel BVBA

v

Vlaams Gewest,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby (Rapporteur), S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– RTS infra BVBA and Aannemingsbedrijf Norré-Behaegel BVBA, by J. Goethals, advocaat,

– the Belgian Government, by J.-C. Halleux and by L. Van den Broeck and C. Pochet, acting as Agents, and by F. Judo and N. Goethals, advocaten,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the Hungarian Government, by M. Z. Fehér, acting as Agent,

– the Austrian Government, by J. Schmoll and by M. Fruhmann, acting as Agents,

– the European Commission, by L. Haasbeek and by P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 57(4),(6) and (7) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public

procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5), (‘Directive 2014/24’).

2 The request has been made in proceedings between RTS infra BVBA and Aannemingsbedrijf Norré-Behaegel BVBA and the Vlaams Gewest (Flemish Region, Belgium) concerning the latter’s decision to exclude those two companies from a public procurement procedure.

Legal context

EU law

Directive 2014/24

3 Recital 102 of Directive 2014/24 states:

‘Allowance should … be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.’

4 Article 18 of that directive, headed ‘Principles of procurement’, provides in paragraph 1 thereof:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…’

5 Article 57 of that directive, entitled ‘Exclusion grounds’, provides in paragraphs 4 to 7 thereof:

‘ 4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

…

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; …

…

5. …

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.’

6 Article 59 of that directive, entitled ‘European Single Procurement Document’, provides in paragraphs 1 and 2:

‘ 1. At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:

(a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;

…

The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority. The ESPD shall further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

…

2. The ESPD shall be drawn up on the basis of a standard form. The Commission shall establish that standard form, by means of implementing acts. …'

7 Article 69 of Directive 2014/24, entitled 'Abnormally low tenders', provides in paragraph 1:

'Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.'

8 Article 90(1) of Directive 2014/24 provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 18 April 2016 at the latest, while the first paragraph of Article 91 of that directive provides that Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) is repealed with effect from 18 April 2016.

Implementing Regulation (EU) 2016/7

9 Annex 2, Part III, C, to Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ 2016 L 3, p. 16) contains, inter alia, the following two headings:

' …	…
Is the economic operator guilty of grave professional misconduct … ? If yes, please provide details:	[] Yes [] No [……]
	If yes, has the economic operator taken self-cleaning measures? [] Yes [] No If it has, please describe the measures taken: [……]
…	…
Has the economic operator experienced that a prior public contract, a prior contract with a contracting entity or a prior concession contract was terminated early, or that damages or other comparable sanctions were imposed in connection with that prior contract? If yes, please provide details:	[] Yes [] No [……]

	If yes, has the economic operator taken self-cleaning measures? [] Yes [] No If it has, please describe the measures taken: [……]
…	…’

Belgian law

10 Article 61(2)(4) of the koninklijk besluit van 15 juli 2011 plaatsing overheidsopdrachten klassieke sectoren (Royal Decree of 15 July 2011 on the award of public contracts in traditional sectors) (*Belgisch Staatsblad* of 9 August 2011, p. 44862), in the version applicable to the dispute in the main proceedings, provides:

‘In accordance with Article 20 of the Law [of 15 June 2006 on public procurement and certain works, supply and service contracts (Wet van 15 juni 2006 overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten, *Belgisch Staatsblad* of 15 February 2007, p. 7355)], a candidate or tenderer may be excluded from the procedure at any time:

…

4) if it has been guilty of grave professional misconduct;

…’

11 Article 70 of the wet van 17 juni 2016 inzake overheidsopdrachten (Law of 17 June 2016 on public procurement) (*Belgisch Staatsblad* of 14 July 2016, p. 44219), which entered into force on 30 June 2017 (‘the Law of 17 June 2016’), provides:

‘Any candidate or tenderer who is in one of the situations referred to in Articles 67 or 69 may provide evidence to show that the measures it has taken are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If the contracting authority considers that evidence to be sufficient, the candidate or tenderer concerned shall not be excluded from the award procedure.

To that end, the candidate or tenderer shall prove on its own initiative that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, has clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 By contract notice published on 11 May 2016 in the *Bulletin der Aanbestedingen* (Public Procurement Bulletin) and on 13 May 2016 in the *Official Journal of the European Union*, the afdeling Wegen en Verkeer Oost-Vlaanderen (Department of Roads and Traffic of East Flanders, Belgium) of the Agentschap Wegen en Verkeer van het Vlaamse gewest (Agency for Roads and Traffic of the Flemish Region, Belgium) launched a public call for tenders for a works contract concerning the remodelling of the Nieuwe Steenweg (N60) junction and the access and exit spurs to and from the E17 in De Pinte. The contract notice referred in particular to the grounds for exclusion under Article 61(1) and (2) of the Royal Decree of 15 July 2011 on the award of public contracts in traditional sectors, in the version applicable to the main proceedings, which included ‘grave professional misconduct’.

13 Following the submission of six tenders, including that of the applicants in the main proceedings, the Flemish Region, by decision of 13 October 2016, excluded the applicants from access to the procedure and awarded the contract to the undertaking which had submitted the economically most advantageous tender in order.

14 The Flemish Region justified the exclusion of the applicants in the main proceedings on the ground that, in the context of the performance of earlier contracts awarded by the same contracting authority as in the main proceedings, they had committed acts of 'grave professional misconduct' which had, for the most part, been the subject of penalties and which concerned aspects that were important for the performance of the contract for which they were now tendering. In that context, the Flemish Region took the view that the serious and repeated contractual breaches by the applicants in the main proceedings raised doubts and uncertainties as to their ability to ensure the proper performance of the new contract.

15 The applicants in the main proceedings brought an action before the referring court seeking the annulment of the decision of 13 October 2016. They submit in that regard that, before being excluded on the grounds of alleged grave professional misconduct, they should have had been afforded the opportunity to defend themselves in that regard and to demonstrate that they had remedied the consequences of that misconduct by taking appropriate corrective measures, as provided for in Article 57(6) of Directive 2014/24, which is directly effective.

16 The contracting authority disputes the assertion that Article 57 of Directive 2014/24 can be regarded as being directly effective. The contracting authority also submits that, although it did not enter into force until 30 June 2017, that is to say, after the adoption of the decision of 13 October 2016, the Law of 17 June 2016 provides specifically, in Article 70 thereof, that the economic operator concerned must declare the corrective measures taken on its own initiative. Since Directive 2014/24 does not contain any provision prescribing the time of manner in which evidence of corrective measures should be provided, the contracting authority seeks to rely, in such circumstances, on Article 70 of the Law of 17 June 2016.

17 In order to be able to assess the merits of the action brought before it, the referring court asks whether Article 57(4), (6) and (7) of Directive 2014/24 precludes an economic operator from being excluded from a procurement procedure for grave professional misconduct without first having been invited by the contracting authority or the tender specifications to provide evidence that it remains reliable despite that misconduct.

18 The court notes that, in so far as the classification of the grave professional misconduct alleged against the tenderer concerned is a matter for the discretion of the contracting authority, that classification may prove unforeseeable for the tenderer. Furthermore, according to the referring court, tenderers would not be inclined to engage in a form of self-accusation by providing a list of failures that could possibly be classified by the contracting authority as 'grave misconduct'. Ensuring an adversarial procedure could therefore favour competition in the procurement procedure. On the other hand, the referring court submits that leaving it to the tenderer to provide evidence of the corrective measures taken would allow greater transparency, particularly since that operator knows, because of the maximum duration of exclusion, the period of time during which it must, on its own initiative, report the corrective measures.

19 If the answer to the first question is in the affirmative, the referring court also wishes to know whether the abovementioned provisions of Directive 2014/24 have direct effect. In particular, the referring court is uncertain whether certain elements of those provisions constitute, in relation to self-cleaning, minimum guarantees which allow them to be classified as 'sufficiently precise and unconditional' to confer direct effect on them.

20 In those circumstances, the Raad van State (Council of State, Belgium) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1) Should the provisions of Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of Directive 2014/24 … be interpreted as precluding an application whereby the economic operator is required to provide evidence on its own initiative of the measures that the economic operator has taken to demonstrate its reliability?

2) If so, do the provisions of Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of [Directive 2014/24] therefore have direct effect?'

The questions referred

Preliminary observations

21 As a preliminary point, it should be noted that, given that the provisions of Article 57(6) of Directive 2014/24, the interpretation of which is sought, do not correspond to any provision in the EU legislation applicable to public procurement until the date of adoption and entry into force of that directive, the questions referred for a preliminary ruling can be relevant only if that directive is applicable to the situation at issue in the main proceedings. The referring court is of the view that this is the case because the publication of the contract notice on 11 and 13 May 2016 took place after 18 April 2016, the date on which, in accordance with Articles 90 and 91 thereof, Directive 2014/24, first, should have been transposed by the Member States and, second, repealed Directive 2004/18.

22 Nevertheless, it is apparent from the documents before the Court that that contract notice was preceded by a prior information notice, which was published on 17 October 2015, the date on which Directive 2004/18 was still applicable.

23 In that regard, it is apparent from settled case-law that the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether a prior call for competition needs to be issued for the award of a public contract. Conversely, the provisions of a directive are not applicable if the period prescribed for its transposition expired after that date (judgment of 27 November 2019, *Tedeschi and Consorzio Stabile Istant Service*, C-402/18, EU:C:2019:1023, paragraph 29 and the case-law cited).

24 In the present case, in view of the fact that the prior information notice was published before the deadline for transposing Directive 2014/24, whereas the contract notice was published after that date, it is for the referring court to ascertain on which date the contracting authority chose the type of procedure which it intended to follow and decided definitively whether or not there was an obligation to issue a prior call for competition for the award of the public contract at issue in the main proceedings.

The first question

25 By its first question, the referring court asks, in essence, whether Article 57(6) of Directive 2014/24 must be interpreted as precluding a practice of a Member State whereby the economic operator concerned is required, at the time of submission of their requests to participate or of their tenders in a public procurement procedure, to provide voluntarily evidence of the corrective measures taken to demonstrate its reliability despite the existence, in respect of that operator, of an optional ground for exclusion referred to in Article 57(4) of that directive, where such an obligation does not arise either from the applicable national rules or from the tender specifications.

26 In that regard, it should be recalled, in the first place, that, under Article 57(6) of Directive 2014/24, any tenderer which is concerned, in particular, by one of the optional grounds for exclusion referred to in Article 57(4) of that directive may provide evidence to show that the measures which it has taken are sufficient to demonstrate its reliability, it being specified that, if that evidence is deemed sufficient, the economic operator concerned may not be excluded from the procurement procedure for that reason. That provision thus introduces a 'self-cleaning' mechanism by conferring on tenderers a right which the Member States must guarantee when transposing that directive, in compliance with the conditions laid down by the directive (see, by analogy, as regards Article 38(9) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), which is equivalent to Article 57(6) of Directive 2014/24, judgment of 11 June 2020, *Vert Marine*, C-472/19, EU:C:2020:468, paragraphs 16 and 17).

27 It should be noted that neither the wording of Article 57(6) of Directive 2014/24 nor recital 102 of that directive specifies how or at what stage of the procurement procedure the evidence of corrective

measures can be provided.

28 In those circumstances, it should be noted that, having regard solely to the wording of Article 57(6) of Directive 2014/24, the possibility for tenderers to provide evidence of the corrective measures taken may just as well be exercised on their own initiative or on the initiative of the contracting authority, as well as at the time of submission of requests to participate or of tenders or at a later stage of the procedure.

29 That interpretation is supported by the objective pursued in Article 57(6) of Directive 2014/24. By providing that an economic operator must be able to provide evidence of the corrective measures taken, that provision seeks to underline the importance attaching to the reliability of economic operators and to ensure an objective assessment of economic operators and to ensure effective competition (see, by analogy, judgment of 11 June 2020, *Vert Marine*, C-472/19, EU:C:2020:468, paragraph 22). That objective can be achieved where evidence of corrective measures is provided at any stage of the procedure preceding the adoption of the award decision, the key point being that the economic operator must have the opportunity to put forward and to have examined the measures which, in its view, enable a ground for exclusion concerning it to be remedied.

30 That interpretation is also supported by the context of Article 57(6) of Directive 2014/24. In that regard, it should be borne in mind that, in accordance with Article 57(7) of that directive, the implementing conditions for that article and, furthermore, Article 57(6) of that directive must be specified by the Member States having regard to EU law. Within the framework of the discretion the latter enjoy when determining the procedural terms and conditions of Article 57(6) of that directive (see, by analogy, judgment of 11 June 2020, *Vert Marine*, C-472/19, EU:C:2020:468, paragraph 23), the Member States may provide that evidence of corrective measures must be provided voluntarily by the economic operator concerned at the time of submission of their requests to participate or of their tenders, just as they may also provide that such evidence may be adduced after that economic operator has been formally invited to do so by the contracting authority at a later stage of the procedure.

31 That discretion of the Member States is, however, without prejudice to the provisions of Directive 2014/24 which provide that operators may voluntarily provide evidence of corrective measures at the time of submission of their requests to participate in the public procurement procedure or of their tenders. As the Advocate General observed, in essence, in point 49 of his Opinion, Article 59(1)(a) of Directive 2014/24 provides that the contracting authorities must accept, when submitting such requests or such tenders, the ESPD, by means of which the economic operator declares on its honour that it is concerned by a ground for exclusion and has taken self-cleaning measures, subject to subsequent verification.

32 That said, the provisions in Article 59 of Directive 2014/24, relating to the ESPD, do not preclude Member States from deciding, in the context of the discretion referred to in paragraph 30 of the present judgment, to leave to the contracting authority the initiative to request evidence of corrective measures after the request to participate or the tender has been submitted, even if the request to participate or the tender is accompanied by an ESPD.

33 It is apparent from the textual, teleological and contextual interpretation of Article 57(6) of Directive 2014/24, as set out in paragraphs 27 to 30 of the present judgment, that that provision does not preclude the economic operator concerned from providing evidence of corrective measures on its own initiative or at the express request of the contracting authority, or from that evidence being provided at the time of submission of requests to participate or of tenders, or at a later stage of the procurement procedure.

34 In the second place, it should be noted that, as is apparent from Article 57(7) of Directive 2014/24, the Member States are required, when determining the implementing conditions for Article 57, to comply with EU law. In particular, they must observe not only the principles for the award of contracts set out in Article 18 of Directive 2014/24, which include, inter alia, the principles of equal treatment, transparency and proportionality, but also the principle of respect for the rights of the defence which, as a fundamental principle of EU law, of which the right to be heard in any procedure is an integral part, is applicable where the authorities are minded to adopt a measure which will adversely affect an individual, such as an exclusion decision adopted in the context of a public procurement procedure

(judgment of 20 December 2017, *Prequ' Italia*, C-276/16, EU:C:2017:1010, paragraphs 45 and 46 and the case-law cited).

35 In those circumstances, it should be recalled at the outset, first, that, in accordance with the principle of transparency, all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way (judgment of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 40 and the case-law cited). Second, the principle of equal treatment requires tenderers interested in a public contract to be afforded equality of opportunity when formulating their tenders, to be made aware of the exact constraints of the procedure and to be in fact assured that all tenderers are subject to the same conditions (judgment of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 39 and the case-law cited).

36 It follows that, where a Member State provides that evidence of corrective measures can be provided only voluntarily by the economic operator at the time of submission of requests to participate or of tenders, without that operator having the opportunity to provide such evidence at a later stage of the procedure, the principles of transparency and equal treatment require, as the Advocate General observed, in essence, in points 66 and 67 of his Opinion, that economic operators be openly informed in advance, in a clear, precise and unequivocal manner, of the existence of such an obligation, whether that information results directly from the tender specifications or from a reference in those documents to the relevant national rules.

37 Next, the right to be heard means that, as the Advocate General observed, in essence, in points 90 and 91 of his Opinion, those economic operators must be in a position to make known their views effectively in that request or in that tender, to identify, by themselves, the grounds for exclusion which may be relied on against them by the contracting authority in the light of the information contained in the tender specifications and the national rules on that subject.

38 Lastly, in so far as it does not constitute an unreasonable obstacle to the exercise of the system of corrective measures, the obligation on tenderers to voluntarily provide evidence of corrective measures in their request to participate or in their tender is, since it is exercised under the conditions set out in paragraphs 36 and 37 of the present judgment, consistent with the principle of proportionality, under which the rules laid down by the Member States or contracting authorities in the context of the implementation of the provisions of Directive 2014/24, such as the rules intended to specify the implementing conditions for Article 57 of that directive, must not go beyond what is necessary to achieve the objectives of that directive (see, to that effect, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 45 and the case-law cited).

39 In the present case, it should be noted, as the referring court points out, that, although the Kingdom of Belgium transposed into its national law, by means of Article 70 of the Law of 17 June 2016, Article 57(6) of Directive 2014/24, specifying that evidence of corrective measures must be provided on the initiative of the economic operator, that law had not entered into force on the date of publication of the contract notice or even on the date of submission of the applicants' tender in the main proceedings. Furthermore, it is apparent from the documents before the Court that, although they referred to the grounds for exclusion laid down by the national legislation in force at the time, the tender specifications did not expressly state that such evidence had to be provided voluntarily by the economic operator concerned.

40 In those circumstances, and without prejudice to the obligation on the applicants in the main proceedings, in accordance with the requirements of transparency and fairness, to inform the contracting authority of the grave professional misconduct that they had committed in the context of the performance of earlier contracts awarded by the same contracting authority, those applicants could reasonably expect, solely on the basis of Article 57(6) of Directive 2014/24, that they would subsequently be invited by the contracting authority to provide evidence of the corrective measures taken to remedy any optional ground for exclusion which that authority may have identified.

41 It is also apparent from paragraphs 34 to 37 of the judgment of 3 October 2019, *Delta Antrepriză de Construcţii şi Montaj 93* (C-267/18, EU:C:2019:826), which relates to national legislation which did

not specify whether evidence of corrective measures had to be provided voluntarily by the economic operator or at what stage of the procedure it should be provided, that, although it is for economic operators to inform the contracting authority, upon submission of their request to participate or their tender, of the termination of a previous contract on grounds of serious deficiency, the contracting authority, where it concludes that there is a ground for exclusion arising from such termination or from the withholding of information relating to such termination, must nevertheless give the operators concerned the possibility of providing evidence of the corrective measures taken.

42 In the light of the foregoing considerations, the answer to the first question referred is that Article 57(6) of Directive 2014/24 must be interpreted as precluding a practice whereby an economic operator is required, at the time of submission of their requests to participate or of their tenders, to provide voluntarily evidence of the corrective measures taken to demonstrate its reliability despite the existence, in respect of that operator, of an optional ground for exclusion referred to in Article 57(4) of that directive, where such an obligation does not arise either from the applicable national rules or from the tender specifications. By contrast, Article 57(6) of that directive does not preclude such an obligation where it is laid down in a clear, precise and unequivocal manner in the applicable national rules and is brought to the attention of the economic operator concerned by means of the tender specifications.

The second question

43 By its second question, the referring court asks, in essence, whether Article 57(6) of Directive 2014/24 must be interpreted as having direct effect.

44 In that regard, it is settled case-law that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the Member State concerned where that state has failed to transpose the directive into national law within the time limit or has transposed it incorrectly (judgment of 13 February 2019, *Human Operator*, C-434/17, EU:C:2019:112, paragraph 38).

45 In the present case, it should be noted that, as is apparent, in essence, from the order for reference, the Law of 17 June 2016 intended to transpose Directive 2014/24 into Belgian law did not enter into force until 30 June 2017, that is to say, after the expiry of the period for transposition of that directive, namely 18 April 2016. Therefore, the question of the direct effect of Article 57(6) of that directive is relevant.

46 The Court has stated that a provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States and, second, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms (judgment of 1 July 2010, *Gassmayr*, C-194/08, EU:C:2010:386, paragraph 45 and the case-law cited).

47 Furthermore, the Court has held that even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it (see, to that effect, judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 à C-403/01, EU:C:2004:584, paragraphs 104 and105, and of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraphs 57 and 58).

48 In the present case, it must be held that, by providing that any tenderer may provide evidence to show that the measures it has taken are sufficient to demonstrate its reliability despite the existence of a ground for exclusion concerning that tenderer, Article 57(6) of Directive 2014/24 confers on tenderers a right which, first, is formulated in unequivocal terms and, second, places on the Member States an obligation as to the result to be achieved which, although its material and procedural conditions of application must be adopted by the Member States pursuant to Article 57(7) of that directive, is not dependent on transposition into national law in order to be invoked by the economic operator concerned and applied to its benefit.

49 Irrespective of the specific rules for the application of Article 57(6) of Directive 2014/24, that provision provides in a sufficiently precise and unconditional manner, within the meaning of the case-law cited in paragraph 46 of the present judgment, that the economic operator concerned cannot be excluded from the procurement procedure if it is able to establish, to the satisfaction of the contracting authority, that the corrective measures taken restore its reliability despite the existence of a ground for exclusion concerning that operator. Consequently, Article 57(6) of that directive provides, for the benefit of that economic operator, a minimum level of protection irrespective of the margin of discretion left to Member States in determining the procedural conditions of that provision (see, to that effect, judgments of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292, paragraph 17, and of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 105). That is all the more true given that, as the Advocate General observed, in essence, in point 102 of his Opinion, Article 57(6) of that directive lays down the fundamental elements of the system of corrective measures and the right conferred on the economic operator by indicating the minimum elements to be proved and the assessment criteria to be met.

50 In the light of the foregoing considerations, the answer to the second question referred is that Article 57(6) of Directive 2014/24 must be interpreted as having direct effect.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 57(6) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015, must be interpreted as precluding a practice whereby an economic operator is required, at the time of submission of their requests to participate or of their tenders, to provide voluntarily evidence of the corrective measures taken to demonstrate its reliability despite the existence, in respect of that operator, of an optional ground for exclusion referred to in Article 57(4) of that directive, as amended by Delegated Regulation 2015/2170, where such an obligation does not arise either from the applicable national rules or from the tender specifications. By contrast, Article 57(6) of that directive, as amended by Delegated Regulation 2015/2170, does not preclude such an obligation where it is laid down in a clear, precise and unequivocal manner in the applicable national rules and is brought to the attention of the economic operator concerned by means of the tender specifications.**

2. **Article 57(6) of Directive 2014/24, as amended by Delegated Regulation 2015/2170, must be interpreted as having direct effect.**

[Signatures]

---

* Language of the case: Dutch.

EU:C:2020:728

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 17 September 2020 (1)

Case C-387/19

RTS infra BVBA,

Aannemingsbedrijf Norré-Behaegel

v

Vlaams Gewest

(Request for a preliminary ruling
from the Raad van State (Council of State, Belgium))

(Reference for a preliminary ruling – Public procurement of works, supplies and services – Conduct of the procedure – Grounds for exclusion – Evidence of reform measures – Detailed rules)

1. Article 57 of Directive 2014/24/EU (2) governs the grounds for excluding economic operators from participating in public procurement procedures.

2. Those operators may nonetheless provide evidence to show that the measures they have taken are sufficient to demonstrate that they are reliable, despite having been caught by one of those grounds for exclusion. The *self-cleaning* permitted by Article 57(6) is one of the new features of Directive 2014/24 as compared with Directive 2004/18/EC, (3) which preceded it.

3. The Court has already examined Article 57 of Directive 2014/24 on a number of occasions, including in relation to paragraph 6 thereof. (4) It has not, however, ruled on whether the contracting authority may make it a condition of qualifying for self-cleaning that the economic operator act on its own initiative, as is the case here.

I. Applicable law

A. EU law

1. Directive 2014/24

4. Recitals 101 and 102 state:

‘(101) Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. …

Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision, contracting authorities … should be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. …

(102) Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. … Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.'

5. According to Article 18(1) ('Principles of procurement'):

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…'

6. Article 56(1) ('General principles') provides:

'Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled:

…

(b) the tender comes from a tenderer that is not excluded in accordance with Article 57 …'.

7. Article 57 ('Exclusion grounds') states:

'…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

…

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment

of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or

(i) where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

…

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

…

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. …

…

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. …'

8. Article 59 ('European Single Procurement Document') stipulates:

'1. At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:

(a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;

…

4. A contracting authority may ask tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

…'

2. Implementing Regulation (EU) 2016/7 (5)

9. In accordance with Article 1:

'From the moment the national measures implementing Directive 2014/24/EU enter into force, and at the latest from 18 April 2016, the standard form set out in Annex 2 to this Regulation shall be used for the purposes of drawing up the European single procurement document referred to in Article 59 of Directive 2014/24/EU. Instructions for its use are set out in Annex 1 to this Regulation.'

B. Belgian law

10. Article 61(2), point 4, of the koninklijk besluit van 15 juli 2011 plaatsing overheidsopdrachten klassieke sectoren states: (6)

'In accordance with Article 20 of the Law, a candidate or tenderer who … has been guilty of grave professional misconduct may be excluded from the procedure at any time.'

11. Article 70 of the wet van 17 juni 2016 inzake overheidsopdrachten provides: (7)

> ‘Any candidate or tenderer who is in one of the situations referred to in Articles 67 or 69 may provide evidence to show that the measures it has taken are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If the contracting authority considers that evidence to be sufficient, the candidate or tenderer concerned shall not be excluded from the award procedure.
>
> To that end, the candidate or tenderer shall prove [on its own initiative] that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, has clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.
>
> …’

II. Facts and questions referred for a preliminary ruling

12. In May 2016, the Flemish Administration (8) published a notice of a public call for tenders for works contract X40/N60/54, concerning the remodelling of the Nieuwe Steenweg (N60) junction and the access and exit spurs to and from the E17 in De Pinte. (9)

13. The notice made formal reference to the application of the grounds for exclusion under Article 61(1) and (2) of the Royal Decree of 15 July 2011, including the previous commission of an act of grave professional misconduct. (10)

14. The contracting authority, by decision of 13 October 2016, chose to exclude one of the tenderers (a joint venture made up of Norré Behaegel and RTS infra BVBA; ‘RTS-Norré’) from the procedure because its members had previously committed acts of grave professional misconduct. (11)

15. The contract was awarded to another tenderer, which had submitted the economically most advantageous tender.

16. The undertakings comprising RTS-Norré challenged the decision of 13 October 2016 before the Raad van State (Council of State, Belgium). They claimed that, before being excluded, they should have been allowed to demonstrate that they had taken corrective measures evidencing their reliability, in accordance with Article 57(6) of Directive 2014/24. In their view, that provision is directly applicable.

17. They also argued that the defendant administration had acted negligently and had infringed a number of principles: the right to a fair hearing (*audi et alteram partem*), transparency, fair competition and equality (since they themselves had been treated unequally by comparison with their ‘European colleagues’).

18. The contracting authority rebutted the assertion that Article 57 of Directive 2014/24 can be regarded as being directly effective; in particular, it rejected the notion that paragraph 6 is unconditional, clear and precise. As regards the remedial measures, it submitted that it is for the Member States to define the conditions governing the implementation of that provision.

19. In the alternative, it went on to say that the contested decision does not infringe the regime for the adoption by economic operators, on their own initiative, of the self-cleaning measures provided for in Directive 2014/24. (12)

20. The referring court is uncertain about how to interpret Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of Directive 2014/24. In particular, it wishes to ascertain whether those provisions:

– Allow a tenderer to be excluded without being given the opportunity to present evidence of reliability, in the case where, according to the contracting authority, that tenderer has committed an act of grave professional misconduct and has not indicated on its own initiative the corrective measures it has taken;

– Are directly effective, in the event that they preclude a requirement that the tenderer provide evidence on its own initiative.

21. It was in those circumstances that the Raad van State (Council of State) referred the following questions to the Court of Justice for a preliminary ruling:

> ‘Should the provisions of Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC be interpreted as precluding an application whereby the economic operator is required to provide evidence on its own initiative of the measures that the economic operator has taken to demonstrate its reliability?
>
> If so, do the provisions of Article 57(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of [Directive 2014/24] therefore have direct effect?’

III. Procedure before the Court of Justice

22. The reference for a preliminary ruling was received at the Court on 17 May 2019.

23. Written observations have been lodged by RTS-Norré, the Governments of Austria, Belgium, Hungary and Estonia, and the Commission.

IV. Assessment

A. Preliminary clarifications

24. In order to answer the two questions referred for a preliminary ruling, it is necessary first and foremost to clarify which directive is applicable in this case.

25. It follows from the documents before the Court that the applicable legislation is not Directive 2014/24 (on which the reference is based) but the directive previously in force (Directive 2004/18), to which the contract notices referred.

26. That call for tenders for that contract was conducted in two stages:

– The ‘Prior Information Notice’ was published on 17 October 2015 (13) and cited Directive 2004/18 as the legal basis for the procedure.

– The ‘Contract Notice’ was published on 13 May 2016 (14) and this too states that Directive 2004/18 is applicable, while at the same time drawing the attention of parties to the grounds for exclusion set out in the Royal Decree of 15 July 2011, which transposed Directive 2004/18.

27. The time limit for transposing Directive 2014/24 expired, in accordance with Article 90 thereof, on 18 April 2016, on which date Directive 2004/18 was repealed.

28. According to the Court’s settled case-law, ‘the applicable directive in the field of public procurement is, as a rule, the one in force when the contracting authority [chooses which type of procedure it intends to pursue]. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time’. (15)

29. As the [date of publication of the] contract notice in this case was ‘necessarily after the time when the contracting authority selected the type of procedure which it intended to pursue and determine[d] conclusively whether or not there was an obligation to conduct a prior call for competition for the award of the public contract in question’, (16) which it did prior to 18 April 2016, Directive 2004/18 was applicable *ratione temporis*.

30. It is therefore clear both from the Court’s case-law and, specifically, from the prior information notice and the contract notice that the public procurement procedure was subject in this case to the provisions of

Directive 2004/18. The corollary of the foregoing is that the questions referred for a preliminary ruling are concerned with the interpretation of provisions of EU law (Directive 2014/24) which are not relevant to the resolution of the dispute. (17)

31. The considerations I shall set out below are therefore presented in the alternative, in the event only that the Raad van State (Council of State) takes the view, for reasons inherent in its domestic law, that it must nonetheless apply Directive 2014/24.

B. First question

1. Criteria for textual and contextual interpretation

(a) Wording of Article 57(6) and (7) of Directive 2014/24

32. Directive 2004/18 did not make it possible for an economic operator caught by a ground for exclusion to demonstrate that it had adopted self-cleaning measures. Article 51 thereof nonetheless allowed the contracting authority to invite undertakings to submit documents on their personal situation. (18)

33. Directive 2014/24, on the other hand, does devote a provision (Article 57(6)) to such measures, (19) but this contains only certain information concerning, for example, the purpose of the measures (20) or the need to give reasons for a negative evaluation of them. (21) Otherwise, reference is made to the *implementing conditions* to be specified by the Member States.

34. Article 57(7) thus provides that, 'by law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article'.

35. The freedom enjoyed by the Member States in this field manifests itself on two levels:

– At the general level, inasmuch as they have some discretion in 'determining the implementing conditions of the optional grounds for exclusion laid down in Article 57(4) of Directive 2014/24'. (22)

– At the specific level, in relation to the required timing and form for submitting evidence of reform. As regards such evidence, recital 102 of Directive 2014/24 states that 'it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases'.

36. There is, therefore, nothing to stop a Member State from requiring the economic operator concerned to take the initiative in this regard. Recital 102 of the directive specifically refers to *requests* by economic operators that the measures they have adopted be examined. (23)

37. As I have already stated elsewhere, (24) the intention behind Article 57(6) is that the contracting authority '*should evaluate the evidence presented by* the operator claiming to have reformed itself'. The task of the contracting authority 'in the evaluation of that evidence is … *passive*, while the task that falls to the economic operator is *active* …'.

38. In short, the wording of Article 57(6) and (7) of Directive 2014/24 does not preclude a Member State from providing that an economic operator which wishes to participate in a public procurement procedure, despite having been caught by grounds for exclusion, must, in order to demonstrate its reliability, provide, *motu proprio*, evidence of the measures which it has taken.

(b) Context of Article 57(6) of Directive 2014/24

39. A schematic or contextual interpretation of Article 57(6) of Directive 2014/24 leads to the same result.

40. First, in accordance with Article 56(3) of that directive, contracting authorities may request economic operators to submit, supplement, clarify or complete the relevant information or documentation (be it on the tender or on the candidate) within an appropriate time limit.

41. The provision so worded does not lay down a *duty*, that is to say a positive obligation, to request the information referred to in paragraph 1(b) of that article. In fact, that article itself allows the national transposing legislation to provide otherwise.

42. Secondly, Article 59 of Directive 2014/24 requires the economic operator itself to certify, by means of the European Single Procurement Document (ESPD), that it is not in one of the exclusion situations.

43. The ESPD is thus a formal declaration by the economic operator in which the latter must state that it is not covered by the relevant ground for exclusion or, if it is, that it has corrected its conduct in order to recover its lost credibility.

44. The ESPD, the rules governing which are set out in Implementing Regulation 2016/7:

– Puts the economic operator signing it in a position whereby it must *itself* identify whether it is caught by any grounds for exclusion, be these the compulsory ones or any others provided for in national legislation or specified in the contract notice or the tender specifications;

– Compels the operator, in that event, to state which self-cleaning measures it has taken by completing the sections provided for that purpose in the 'standard form'. (25)

45. Use of the ESPD does not exempt the tenderer from having to provide subsequent evidence, this being one of the undertakings it has to give. Article 59(1) of Directive 2014/24 states that the ESPD 'shall … contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents'.

46. Article 59(4) of Directive 2014/24 therefore authorises the contracting authority to ask tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents (mentioned or referred to in the ESPD) where this is necessary to ensure the proper conduct of the procedure.

47. In accordance with the same provision, that right becomes an obligation in the case of a tenderer to which the contracting authority has decided to award the contract: the contracting authority must then require it to submit up-to-date supporting documents (in accordance with Article 60 and, where appropriate, Article 62).

48. The inference I draw from all of the foregoing is that, if analysed schematically and in context, the provisions of Directive 2014/24 and Implementing Regulation 2016/7 indicate a clear preference as regards the proper timing and form for a declaration by the economic operator that it has taken reform measures, which is to say that, whether it does so by using the ESPD or by some other means, it must always make that declaration when submitting its tender.

49. It follows from that rule that a requirement by a national legislature or a national contracting authority that economic operators must claim to have taken self-cleaning measures (and, in that event, provide (26) the corresponding supporting documents) at the outset, is consistent with Directive 2014/24.

(c) Article 69, in particular

50. RTS-Norré proposes that Article 57(6) of Directive 2014/24 be interpreted by analogy with the rules governing abnormally low tenders (Article 69). The referring court also refers to that interpretative criterion in its order. (27)

51. I cannot endorse that proposal, since Article 69 of Directive 2014/24 deals with tenders which, in other provisions of the directive, are classified as 'irregular' (28) but may be admissible. That provision is concerned not with the economic operator's reliability but with the material viability of its tender.

52. Analogies are not to be used where, as is the case here, in my opinion, the applicable provision contains enough information on its own to enable it to be interpreted without the need for recourse to another (supposedly) analogous provision. This is particularly true where the latter provision serves a different purpose: Article 69 of Directive 2014/24 is intended to protect candidates from arbitrary decisions by the contracting authority in a context very different from that of Article 57(6).

2. Objective of Article 57(6) of Directive 2014/24

53. The rule allowing economic operators to declare and demonstrate their reliability despite the existence of grounds for exclusion appears at first sight to be favourable primarily to them. It is logical, then, that it should fall to the person with an interest in participating in the procurement procedure to declare and prove that self-cleaning measures have been taken.

54. There is, in addition, another side to that rule which applies to the contracting authority. In accordance with Article 56(1)(b) of Directive 2014/24, the contracting authority must award the contract after verifying that the tender was submitted by a suitable tenderer (that is to say, not one excluded under Article 57).

55. It is for the contracting authority to verify whether there are any grounds for exclusion (29) and, if there are, whether the *unreliable* economic operator has nonetheless claimed to be worthy of trust on account of the measures it has taken. (30)

56. In performing that task, the contracting authority must rely in the first place on the data provided to it by tenderers. Article 57(4)(h) of Directive 2014/24 refers to the scenario in which the operator has *withdrawn* the information required to verify the absence of grounds for exclusion or is not able to submit the supporting documents required pursuant to Article 59. Both of those circumstances are sufficient to warrant the operator's rejection from the procurement procedure. (31)

57. It might be excessive to require those participating in a procurement procedure to include in their tender, *motu proprio*, documentary evidence, in the form of the relevant certificates, of compliance with *all* of the conditions listed in Article 59(1) of Directive 2014/24. This would also be unnecessary from the point of view of ensuring that the procedure is conducted properly, and inconsistent with the introduction of the ESPD into EU public procurement legislation.

58. By contrast, it does not seem to me to be excessive to require that the tenderer's tender be accompanied by a declaration and a description of the self-cleaning measures it has taken if it wishes to rely on those measures. That requirement is in the nature of a procedural burden. (32)

59. The contracting authority needs, as I have said, to be acquainted with those measures in order to be able to assess them and satisfy itself as to the reliability of a technically unreliable successful tenderer. This does not mean, however, that, in the absence of any such declaration from the tenderer, the contracting authority must ascertain of its own motion whether or not the tenderer has taken those measures.

60. The Court states in the judgment in *Vossloh* that:

- the economic operator 'must provide the contracting authority with evidence demonstrating that [the reform measures] are sufficient for the purpose of its admission to the procurement procedure';
- and that, if it 'wishe[es] to establish its reliability despite the existence of a relevant ground for exclusion[, it] must collaborate effectively with the authorities to which those respective duties have been entrusted, regardless of whether this is the contracting authority or the investigating authority'. (33)

61. The same judgment nonetheless qualifies the duty to cooperate, which is limited 'to the measures which are strictly necessary for the effective pursuit of the objective of the examination of the reliability of the economic operator, mentioned in Article 57(6) of Directive 2014/24'. (34)

62. I shall deal with the requirement of proportionality directly, after looking at the requirements that flow from the principles of transparency and equality.

3. Limits on the rule requiring economic operators to provide evidence on their own initiative

63. Article 57(7) stipulates that the laws, regulations and administrative provisions which the Member States introduce under it must comply with EU law. Part of that duty is to observe the principles of EU law

governing public procurement. The call for proportionality is also made expressly in paragraph 6 of that article, in the context of the evaluation of self-cleaning measures.

(a) Transparency and equality

64. The principle of transparency, which is expressed in the obligation to set out clearly the conditions governing the suitability of tenderers, is so closely linked to the principle that they be treated equally that, in the view of the Court, one is the corollary of the other. (35)

65. All tenderers must therefore be in a position whereby they are equally acquainted with the conditions of the call for tenders. Hence the need for the grounds for exclusion, in particular the optional ones, to be set out clearly, since the uniform regime and mode of implementation applicable to them are defined not by EU law but by the rules of each Member State. (36)

66. Where a ground for exclusion is specified in the contract notice, the principles of transparency and equality do not preclude a national provision from requiring an economic operator wishing to counter that ground to include in its tender (that is to say, on its own initiative) evidence of the self-cleaning measures it has taken.

67. This will enable all candidates to identify, under the same conditions, whether, because they are caught by the ground for exclusion specified, they must from the outset declare that they have *recovered* their credibility to the contracting authority that is to select one of them.

68. According to the Court, tenderers cannot be required to disclose on their own initiative circumstances internal to them where 'neither applicable national legislation nor the call for tenders or the tender specifications' provide for such an obligation. In those circumstances, that obligation would not constitute a clearly defined condition and the principles of transparency and equal treatment would be infringed. (37)

69. By converse inference, the duty to disclose the aforementioned circumstances will be lawful if it is provided for 'in [the] applicable national legislation[, …] the call for tenders or the tender specifications'.

70. That case-law does not therefore preclude a model for the relationship between the contracting authority and the economic operator whereby the latter is generally made to bear the burden of declaring and, in that event, providing evidence of the reform measures it has taken, if it wishes to rely on those measures in order to overcome the ground for exclusion set out in the contract notice.

71. A 'reasonably informed [tenderer] exercising ordinary care' (38) might, hypothetically, be unaware of substantive requirements applicable to the tender which have not been published. By contrast, once the tenderer has been alerted to the specific grounds for exclusion in the contract notice, the fact that that operator has to declare (and, in that event, prove) that, despite being caught by one of those grounds, it has remedied its lack of credibility, does not infringe the principles of transparency and disclosure.

72. That same operator cannot be unaware of the fact that, even if the contract notice does not make explicit reference to cleaning measures, Directive 2014/24 enables it to avail itself of them.

73. All of the foregoing has been particularly true since the introduction of the ESPD, which, as I have said, includes specific sections for declaring (and describing) reform measures. I would reiterate that use of the ESPD is practically compulsory in almost all of the procedures covered by Directive 2014/24. (39)

(b) Proportionality

74. According to recital 1 of Directive 2014/24, procedures for the award of public contracts are governed by the principle of proportionality. Recital 101 reiterates this with reference to optional grounds for exclusion in particular.

75. Article 57(6) includes an express reference to proportionality in the evaluation of any *reform* measures which economic operators claim to have taken.

76. It is logical, therefore, that the Court should have held that '… the rules intended to lay down the implementing conditions of Article 57 of that directive … must not go beyond what is necessary to achieve the objectives of that directive …'. (40)

77. The principle of proportionality has a material role to play, therefore, where the contracting authority has to evaluate the adequacy of self-cleaning measures and its own grounds for exclusion, while ensuring, in connection with the latter, that minor one-off irregularities do not have an exclusionary effect, except in exceptional circumstances. (41)

78. Could the contracting authority be asked to apply that same principle to the requirement that a tenderer declare in its tender that, despite having been caught by an optional ground for exclusion, it has subsequently rectified its behaviour and thereby recovered its credibility?

79. In normal circumstances, the contracting authority will have to confine itself to verifying whether the tenderer has complied with that requirement. A decision whereby it rejects the application of an economic operator which, in breach of its duty, has omitted to mention in its tender that it is caught by a ground for exclusion cannot be described as disproportionate. This will be the case, for example where the tenderer fails to disclose the fact that it has previously committed an act of grave professional misconduct.

80. In such a situation, the trigger for exclusion will be not so much the failure to declare as the very existence of the ground for exclusion (grave professional misconduct, for example) the rectification of which, in the form of a suitable self-cleaning measure, has not been disclosed by the economic operator.

81. There will, conversely, be situations in which there is greater scope for flexibility, in accordance with the criteria which the Court laid down in the judgment in *Pizzo* in connection with tenderers established in other Member States, 'inasmuch as their level of knowledge of national law and the interpretation thereof and of the practice of the national authorities cannot be compared to that of national tenderers'. (42)

82. In those situations, 'the principles of equal treatment and of proportionality must be interpreted as not precluding an economic operator from being allowed to regularise its position and comply with that obligation within a period of time set by the contracting authority'. (43)

83. In the judgment of 14 December 2016, *Conexxion Taxi Services*, the Court returned to that idea that an economic operator established in another Member State is less familiar with the terms and conditions of application of the relevant national legislation because it is foreign. (44)

84. In my view, that criterion would also apply where the ground for exclusion counting against the economic operator is not readily apparent from the documents relating to the procedure. It would be consistent with the principles of equality and proportionality, in those circumstances, for the economic operator to be given the opportunity to make good its initial failure to refer to that ground (and to the subsequent self-cleaning measures it has taken).

(c) Right of defence

85. In the order for reference, the Raad van State (Council of State) suggests that the fact that tenderers have to list, *motu proprio*, the acts of grave misconduct they have committed and the reform measures they have taken since might be described as 'self-accusation'. (45)

86. There is nothing to compel an economic operator to participate in a public procurement procedure. If it does, however, it must comply with the rules of that procedure. Under Directive 2014/24, the relationship between tenderers and the contracting authority must be informed by good faith, meaning that the former, precisely because of the reliability required of them, cannot conceal information concerning the grounds for exclusion by which they are caught.

87. The tenderer must thus provide the information required to verify the existence or non-existence of grounds for exclusion, and is not permitted to *withhold* (the term used in Article 57(4)(h)) of Directive 2014/24) or misrepresent that information.

88. Requiring someone voluntarily participating in a public procurement procedure, on pain of exclusion, to disclose the pre-existing acts of grave misconduct they have committed (and any subsequent self-cleaning measures they may have taken) is not the same as disregarding the right not to plead guilty or incriminate oneself that applies in other areas of the legal system.

89. What is more, the Court has already held that the contracting authority is authorised to ask a tenderer to provide documentary evidence of a reform measure, even if providing it may bring unfavourable consequences to bear on the tenderer. (46)

90. The fact that, because the concept of 'grave professional misconduct which renders its integrity questionable' is so broad, an economic operator may be unable to determine with certainty whether one of its behaviours in the past is capable of being deemed to be such, is a different matter. In this regard, the referring court is right to note that, given the degree of discretion enjoyed by the contracting authority in assessing such conduct (recital 101 of Directive 2014/24), it will not always be easy to identify whether that ground for exclusion is satisfied.

91. In such a situation, where the tenderer concerned is unable to foresee whether its behaviour will be classified as an act of grave misconduct, the tenderer cannot be expected to mention that behaviour in its tender or in the ESPD. In those circumstances, it will be for the contracting authority, which is ultimately responsible for 'demonstrat[ing] by appropriate means that the economic operator is guilty of grave professional misconduct', to give the tenderer the opportunity to declare whatever it considers to be appropriate in relation to that misconduct.

92. I have stated that, in accordance with the principle of transparency, grounds for exclusion must be set out in such a way as to enable the economic operator to identify whether it is caught by them and, if so, to claim to have remedied them.

93. In that connection, I would recall that the exclusion authorised by Article 57(4) of Directive 2014/24 may be based both on deficiencies in the performance of previous contracts (point (g)) and on the commission of acts of grave professional misconduct (point (c)). Those two grounds were materially present in this case, according to the assessment of the contracting authority, and the first question referred for a preliminary ruling makes specific reference to both of them. (47)

94. Thus, the contract notice that gave rise to the present dispute, which was issued under Directive 2004/18, included as a ground for exclusion the commission of acts of grave professional misconduct, also provided for in the Royal Decree of 15 July 2011. It was interpreted in this way by the contracting authority, which relied on that ground in order to exclude the applicant undertakings from the procurement procedure.

95. In short, it is my view that Article 57(6) of Directive 2014/24 does not preclude a position whereby, in the case where the ground for exclusion is clearly set out in the contract notice, the economic operator must, on its own initiative, declare (and, in that event, provide evidence of) the self-cleaning measures it has taken.

C. Second question referred

96. In the event that the answer to the first question is in the affirmative, the referring court wishes to ascertain whether Article 57(6) of Directive 2014/24 could be relied on directly by an economic operator as against a contracting authority. (48)

97. If my proposed answer to the previous question were accepted, there would be no need to answer this one. The submissions that follow are therefore by way of a further alternative (I have already explained why Directive 2014/24 is not applicable in this case). (49)

98. In my view, Article 57(6) of Directive 2014/24 could, if it were applicable, be regarded as being directly effective for the purposes of the claim on which the Raad van State (Council of State) must adjudicate. (50)

99. That article confers on tenderers a right (to rely on self-cleaning measures before the contracting authority) which they may assert before the national courts and which the latter are bound to protect.

100. The differences of opinion between those who have intervened in the preliminary ruling proceedings are confined to whether that provision is unconditional and sufficiently precise, as required by case-law. (51)

101. As regards *unconditionality*, the right established in Article 57(6) of Directive 2014/24 does not depend on the Member States and is not contingent, from the point of view of its substance, upon whatever they may prescribe.

102. As regards *precision*, that provision itself provides indications of what, as a minimum, must be proved and, therefore, evaluated. (52) It also indicates the criteria (gravity and particular circumstances) against which that evaluation must be carried out (53) and the consequences that follow from a positive and a negative evaluation. (54) In addition, it makes clear when there will be no right to present remedial measures. (55) In short, it lays down the basic elements of the scheme and content of that right.

103. It is true that other elements, whether substantive or procedural, remain in the hands of the Member States, in accordance with the general rule laid down in Article 57 of Directive 2014/24. This is the case, for example, with the maximum period of exclusion and the timing and form of demonstrating reform.

104. As regards how and when the tenderer must declare and, in that event, provide evidence of the reform measures it has taken, this is left to the discretion of the Member States. Neither is the choice between *ex officio* assessment and assessment on the initiative of the operator concerned an essential condition of the right which Article 57(6) of Directive 2104/24 confers on tenderers.

105. The absence of any national provision (in the form of laws, regulations or administrative measures) on the detailed rules of form and timing cannot, however, operate to the detriment of tenderers to such an extent as to eliminate their right to seek the benefit of self-cleaning measures before a national court.

V. Conclusion

106. In the light of all the foregoing, I suggest that the Court of Justice reply to the Raad van State (Council of State, Belgium) as follows:

> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC is not applicable, *ratione temporis*, to the facts of the dispute in the main proceedings as they are set out in the request for a preliminary ruling.
>
> In the alternative:
>
> – Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of Directive 2014/24 do not preclude an economic operator from having to declare and, in that event, prove, on its own initiative, that the self-cleaning measures it has taken are sufficient to demonstrate its reliability, despite the existence of a ground for exclusion by which it has been caught.
>
> – Economic operators which are in one of the situations referred to in Article 57(1) and (4) of Directive 2014/24 may rely directly, before a national court, on the right conferred on them by paragraph 6 of that article.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

3 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

4 Judgments of 24 October 2018, *Vossloh Laeis* (C-124/17, EU:C:2018:855; 'judgment in *Vossloh*'), and of 19 June 2019, *Meca* (C-41/18, EU:C:2019:507).

---

5 Commission Implementing Regulation of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ 2016 L 3, p. 16).

---

6 Royal Decree of 15 July 2011 on the award of public contracts in traditional sectors (*Belgisch Staatsblad*, 9 August 2011, p. 44862, 'Royal Decree of 15 July 2011').

---

7 Law of 17 June 2016 on public procurement (*Belgisch Staatsblad*, 14 July 2016, p. 44219; 'Law of 17 June 2016'),which entered into force on 30 June 2017.

---

8 In particular the Department of Roads and Traffic in East Flanders at the Agency for Roads and Traffic in the Flemish Region, Belgium.

---

9 That notice was published on 11 May 2016 in the *Bulletin der Aanbestedingen* (Public Tendering Bulletin) and on 13 May 2016 in the supplement to the *Official Journal of the European Union* devoted to European public procurement.

---

10 This is confirmed by the order for reference (paragraph 3.3).

---

11 Those offences raised doubts as to RTS-Norré's ability to perform the contract properly.

---

12 In its opinion, support [for that regime] could be found in the Law of 17 June 2016, which lays down the obligation [on the economic operator] to provide *motu proprio* evidence of the measures taken (even though that law was not in force at the time when the call for tenders was issued).

---

13 OJ 2015/S 202-365107.

---

14 OJ 2016/S 092-164635.

---

15 Judgment of 28 February 2018, *MA.T.I. SUD and Duemme SGR* (C-523/16 and C-536/16, EU:C:2018:122, paragraph 36). See, to the same effect, the judgments of 5 October 2000, *Commission* v *France* (C-337/98, EU:C:2000:543, paragraphs 36, 37, 41 and 42); of 11 July 2013, *Commission* v *Netherlands* (C-576/10, EU:C:2013:510, paragraphs 52 to 54); of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraphs 31 to 33); of 7 April 2016, *Partner Apelski Dariusz* (C-324/14, EU:C:2016:214, paragraph 83); and of 27 October 2016, *Hörmann Reisen* (C-292/15, EU:C:2016:817, paragraphs 31 and 32).

---

16 *Ibidem*, paragraph 36.

---

17 The same opinion was expressed by the Belgian Government and the European Commission when replying to the questions put to them by the Court. The former goes on to say, however, that it is for the referring court to assess whether the contracting authority had already conclusively decided in the prior information notice to issue a call for tenders.

---

18 One author had suggested that this type of measure might be covered by the general interest exception provided for in Article 45 of Directive 2004/18. See Risvig Hamer, C., 'Article 57', in Steinicke, M., and Vesterdorf, P.L., *EU Public Procurement Law*, C. H. Beck, Nomos, Hart, 2018, p. 643. The fact that that directive did not provide for such measures did not mean that they were proscribed or were incapable of affecting the reliability of the economic operator, in accordance with principles such as the principle of proportionality.

19 Which may, without distinction, be called self-cleaning, self-reform, remedial or amendment measures.

20 Second subparagraph of paragraph 6.

21 Third subparagraph of paragraph 6.

22 Judgment of 30 January 2020, *Tim* (C-395/18, EU:C:2020:58; 'judgment in *Tim*'), paragraph 34.

23 Economic operators 'should have the possibility to *request* that compliance measures taken with a view to possible admission to the procurement procedure be examined' (my emphasis).

24 Opinion in *Vossloh Laeis* (C-124/17, EU:C:2018:316, points 48 and 49).

25 Annex II (Standard form for the ESPD) to Implementing Regulation 2016/7 lists the various grounds for exclusion in response to which the economic operator must provide answers. If any of the grounds apply to the operator, it must indicate in the relevant boxes whether it 'has … taken measures to demonstrate its reliability despite the existence of this ground for exclusion (self-cleaning)' or 'has taken self-cleaning measures'. The form then says, 'if it has, please describe the measures taken'.

26 An operator using the ESPD discharges that obligation (subject to subsequent checks) if it indicates in it the measures it has taken by completing the fields specifically provided for that purpose in the form.

27 Order for reference, paragraphs 20 and 21.

28 Article 26(4), *in fine*, and the second subparagraph of Article 35(5).

29 It is irrelevant for the purposes of this case whether the contracting authority verifies this point itself or via other authorities at a central or decentralised level (recital 102 of Directive 2014/24).

30 It is also for the contracting authorities to assess the risks to which they might be exposed if they were to award a contract to an operator of questionable reliability (judgment in *Vossloh*, paragraphs 24 and 26). In this connection, recital 101 of Directive 2014/24 reminds them that they will be responsible for the consequences of any erroneous decisions.

31 According to point (i) of that same paragraph, a further optional ground for excluding economic operators is 'negligently provid[ing] misleading information that may have a material influence on decisions concerning exclusion, selection or award'.

32 A procedural burden means that, pursuant to the principle of preclusion, anyone who fails to comply with the rule in question (in this case, that economic operators must claim to have taken measures) loses the opportunity to do so later.

---

33 Judgment in *Vossloh*, paragraph 27.

---

34 *Ibidem*, paragraph 28.

---

35 Judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404; 'judgment in *Pizzo*'), paragraph 36.

---

36 Those same principles prohibit the contracting authority from rejecting a tender which meets the requirements of the contract notice on grounds not provided for in that notice or in the applicable national law (judgment of 16 April 2015, *Enterprise Focused Solutions* (C-278/14, EU:C:2015:228, paragraphs 26 and 28)).

---

37 Judgment of 17 May 2018, *Specializuotas transportas* (C-531/16, EU:C:2018:324, paragraphs 24 and 26 and operative part).

---

38 This is the type of operator described by the Court in the judgment in *Pizzo* (paragraph 36).

---

39 Use of the ESPD would create an unnecessary administrative burden in cases where there is only one possible predetermined participant or where the transaction is urgent or exhibits particular characteristics: see Annex I to Implementing Regulation 2016/7.

---

40 Judgment in *Tim*, paragraph 45.

---

41 'In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator'.

---

42 Judgment in *Pizzo*, paragraph 46.

---

43 *Ibidem*, paragraph 51 and paragraph 2 of the operative part. On the obligation to provide certain items of information in the tender which is not laid down in the documentation itself but which follows from judicial interpretation, see the orders of 10 November 2016, *Spinosa Costruzioni Generali and Melfi* (C-162/16, not published, EU:C:2016:870); *Edra Costruzioni and Edilfac* (C-140/16, not published, EU:C:2016:868); and *MB* (C-697/15, not published, EU:C:2016:867).

---

44 Judgment of 14 December 2016, *Conexxion Taxi Services* (C-171/15, EU:C:2016:948, paragraph 42).

---

45 Order for reference, paragraph 18.

---

46 For example, where 'the transmission of such a document might facilitate the introduction of a civil liability action … against that economic operator' for damage arising from the very conduct constituting the ground for exclusion (judgment in *Vossloh*, paragraph 30).

47 The order for reference lists in meticulous detail (section 3.6) the many deficiencies in the performance of similar works for which both RTS infra and, principally, Norré-Behaegel, to which the previous contracts in question had been awarded, were held responsible. The contracting authority described those deficiencies as ‘serious and repeated breaches’.

48 Although the second question contains references to other paragraphs and points, it is concerned only with whether Article 57(6) is directly effective (see to that effect section 22 of the order for reference).

49 Points 24 to 31 of this Opinion.

50 Whether or not the conditions for a provision to be directly effective are met is not a matter that can be disposed of outside the specific context in which that question is raised. Deriving a positive mandate from a directive demands greater textual rigour than relying on it by way of defence for the purposes of obtaining the annulment of an individual decision or a review as to the compatibility of a national provision. The national court requires more extensive guidance in the first case than in the others. See Prechal, S., *Directives in EC Law*, Oxford EC Law Library, 2nd ed., 2005, pp. 250 to 254 and the case-law references there.

51 That case-law starts with the judgment of 5 April 1979, *Ratti* (148/78, EU:C:1979:110), and is very clearly endorsed in the judgment of 19 January 1982, *Becker* (8/81, EU:C:1982:7).

52 Second subparagraph of Article 57(6).

53 Third subparagraph of Article 57(6).

54 First and third subparagraphs of Article 57(6).

55 Fourth subparagraph of Article 57(6) and Article 57(7).

Machine Translated by Google

COUNCIL OF STATE, ADMINISTRATIVE LAW DIVISION

XIIth CHAMBER

A R R E S T

No. 252.171 of 19 November 2021 in case
A. 220.959/XII-8274

In his case: 1. BVBA RTS INFRA 2. BVBA
AANNEMINGSBEDRIJF NORRÉ-BEHAEGEL, now the nv Aannemingsbedrijf Norré-Behaegel
together forming a temporary trading company assisted and
represented by lawyer Jo Goethals with offices at 8800 Roeselare
Kwadestraat 151B/41 where domicile is elected

in return for:

the FLEMISH REGION assisted
and represented by lawyers Frank Judo and
Ruben Dewulf, with offices at 1000 Brussels

Keizerslaan 3
where residence is chosen

I. Subject of the appeal

1. The appeal, filed on 29 January 2017, seeks to annulment of the decision of the Roads and Traffic Agency, East Flanders department of the Flemish Region of 13 October 2016, whereby the public works contract X40/N60/54 relating to to the redevelopment of the intersection Nieuwe Steenweg (N60) and the E17 on- and off-ramp in De Pinte is awarded to the nv Stadsbader and not to the bvba RTS Infra and the private limited company Norré-Behaegel Construction Company, together forming a temporary trading company.

Machine Translated by Google

II. Course of proceedings

2. By interlocutory judgment no. 244.404 of 7 May 2019, the Council of State referred preliminary questions to the Court of Justice of the European Union (hereinafter: the Court of Justice).

The Court of Justice has answered these preliminary questions by judgment of 14 January 2021, Case C-387/19.

First auditor Inge Vos has a supplementary report drawn up.

The applicants and the defendant have a final memorandum submitted.

The parties have been summoned to the hearing, which has took place on October 26, 2021.

Councillor of State Pierre Barra has reported.

Attorney Jo Goethals, who appears for the applicant parties, and attorney Frank Judo, who appears for the defending party, are heard.

Auditor Frederick Ongena has delivered a judgment that agrees with this judgment advice given.

The provisions on the use of the languages, contained in Title VI, Chapter II, of the laws on the Council of State, coordinated on January 12, 1973.

Machine Translated by Google

III. Facts

3.1. The Roads and Traffic Agency, East Flanders Department, of the Flemish Region issues a government contract for the acceptance of work on the redevelopment of the intersection of Nieuwe Steenweg (N60) and the E17 on- and off-ramp in De Pinte.

3.2. The contract will be awarded by open tender. announcement in the Bulletin of Tenders will take place on 11 May 2016 and in the Supplement to the Official Journal of the European Union on 15 May 2016.

3.3. The announcement explicitly points out that the grounds for exclusion of Article 61, §§ 1 and 2, of the Royal Decree of 15 July 2011 'placement of government contracts in classical sectors' will apply.

Furthermore, the minimum requirement for technical competence is a recognition in class 8, category C, is stated.

3.4. Six bids are submitted, including that of the requesting parties.

3.5. On October 13, 2016, the defendant decides to to exclude requesting parties from participating in the assignment and to to award the contract to Stadsbader NV, as the lowest regular bidder.

This is the contested award decision.

3.6. The motivation in the award report, which is in the award decision is upheld, reads:

> "Pursuant to Article 61, § 2, 4° of the Royal Decree of 15 July 2011 on public contracts for the acceptance of works, supplies and services and concessions for public works, the contracting authority has the possibility to exclude a tenderer

Machine Translated by Google

when he commits a serious error in the exercise of his profession.
In the context of the award of the current public contract, the contracting authority excludes THV Norré Behaegel - RTS on the basis of the aforementioned provision. In light of the facts, which are described in detail below, the contracting authority, if it wishes to conduct a sound management, cannot commit itself to THV Norré - RTS for the current contract. These facts have seriously damaged the contracting authority's confidence in THV Norré - RTS.

Norré-Behaegel's review:
The company Norré-Behaegel is excluded on the grounds of serious errors committed during the execution of the order 'Erpe-Mere N9 Gentsesteenweg / N46 Oudenaardsesteenweg/ N442 Leedsesteenweg (Vijf Huizen)' with specification no. 1M3D8H/13/12. During this order, the company RTS acted as subcontractor.
In the execution of the public contract 'Erpe-Mere N9 Gentsesteenweg / N46 Oudenaardsesteenweg / N442 Leedsesteenweg (Vijf Huizen)', the contracting authority (Roads and Traffic Agency) has drawn up 24 reports of default and 32 reports of determination, in application of Article 20 of the General Contracting Conditions attached as an appendix to the Royal Decree of 26 September 1996.

Five reports of default concern safety and health on the site and deal with a total of 12 violations thereof (including failure to comply with comments from the safety coordinator). Either no defence was lodged against these reports, or a defence was lodged that could not be accepted. All these reports were confirmed with a penalty.

The safety and health of the employees and personnel of the contracting authority are a major concern for the contracting authority in the current contract, with works on the motorway and on structures. In addition, during the evaluation of the current tender, the safety coordinator determined that the amount provided by THV Norré - RTS for safety and health is 'on the low side' (lowest of all tenderers). The repeated infringements during the execution of the public contract 'Erpe-Mere N9 Gentsesteenweg / N46 Oudenaardsesteenweg / N442 Leedsesteenweg (Vijf Huizen)' and the low amount provided for safety and health measures in the current tender, therefore lead the government to have particular doubts in this regard about the executor of the contract.

Seven reports of default concern the road signage of the road works (including the closure of roads without a permit). Either no defence was lodged against these reports, or a defence was lodged that could not be accepted. All these reports were confirmed with a penalty.

In the current contract, all works must be carried out on motorways and primary roads. These are roads with a high traffic load on which flow, good traffic management and,

Machine Translated by Google

again, safety is of paramount importance. The repeated infringements in the execution of the public contract 'Erpe-Mere N9 Gentsesteenweg / N46 Oudenaardsesteenweg / N442 Leedsesteenweg (Vijf Huizen)' lead to the contracting authority having little confidence in the executor in this respect.

The 32 reports of determination relate to various technical aspects of the road construction. The shortcomings include all possible parts of the road, ranging from earthworks, foundations and water drainage to the construction of the finishing layers in concrete and asphalt. Penalties and [sanctions] were applied for the infringements. All these aspects also occur to a very significant extent in the current contract, which is why the contracting authority has doubts about the professional competence of the Norré-Behaegel company for the execution of such comprehensive works.

RTS assessment:

The firm RTS is excluded on the grounds of serious errors committed during the execution of the assignment TV3V file '4083: N35 Gaversesteenweg — Driesstraat — N494 Oudenaardsesteenweg — Rijbroekstraat — Ten Rodelaan' with specification no. 1M3D8H/13/54.

In the execution by the company RTS of the government contract 'TV3V-dossier '4083: N35 Gaversesteenweg — Driesstraat — N494 Oudenaardsesteenweg — Rijbroekstraat — Ten Rodelaan', the contracting authority (Roads and Traffic Agency), in application of Article 20 of the General Contracting Conditions attached as an appendix to the Royal Decree of 26 September 1996, drew up nine reports of determination and one report of notice of default.

The nine reports of determination mainly concern a defective technical execution of both sewerage, foundations and finishing layers in concrete and asphalt. The report of default was written for a poor execution of the sewerage, which caused a flooding with damage to the road surface, water pipe and adjacent house.

One report of determination concerns the soil management report. In this report, the company RTS claims that no soil surpluses were removed, while this was not in accordance with reality. The regulations regarding earthmoving are very strict, with joint and several liability of both the staff of the contracting authority and the contractor. In the current contract, there are considerable earthworks, which require careful monitoring of the earthmoving. Submitting an incorrect soil management report leads to little confidence in the executor in this regard.

Conclusion:

The above-mentioned assignments all relate to works from the 'TV3V' programme for the reconstruction of dangerous intersections and road sections in Flanders, which also includes the current tender.

The serious and repeated contractual shortcomings found in the above-mentioned assignments, and attributable to both

Machine Translated by Google

to the firm Norré-Behaegel and to the firm RTS, lead to well-founded doubts and uncertainty regarding the regular execution of the current contract if it were to be awarded to the THV Norré — RTS. The THV consisting of both firms is therefore excluded due to a serious error in the exercise of its professional duties and is excluded from the further award procedure."

IV. Examination of the sole remedy

Position of the parties

Position of the parties before the preliminary questions to the Court of Justice

4. For the explanation of the positions of the parties of before the judgment of the Court of Justice on the sole plea, in the first place referred to judgment no. 244.404 of 7 May 2019.

The applicants essentially argue that Article 57, Members 4 to 7 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on the award of public contracts and to repeal of Directive 2004/18/EC (hereinafter: Directive 2014/24/EU) direct has effect and is applicable to the case at hand. They believe that this provisions give them the opportunity to opt-out before being excluded on the grounds of alleged serious professional misconduct, to present a defence in which they can demonstrate that they have remedied the problems. According to them, this article provides after all, in an adversarial procedure.

The defendant essentially argues that the aforementioned Article 57 has no direct effect, either in whole or in part. Furthermore, does she consider that in line with this Article 57 and Article 70 of the Act of 17 June 2016 'on public procurement' (hereinafter: Public Procurement Act 2016) the the applicant must submit the cleaning measures he/she wishes to take on his/her own initiative has taken to prevent professional errors. She also argues that on a

Machine Translated by Google

contracting authority wishing to take an exclusion decision, in principle
no hearing obligation.

Position of the parties following the judgment of the Court of Justice of 14 January 2021, Case C-387/19, and after the supplementary auditor's report

5. In judgment no. 244.404 of 7 May 2019, the Council of State decided to refer the following questions to the Court of Justice for a preliminary ruling:

> "1. Must the provisions of Article 57(4)(c) and (g) in conjunction with paragraphs 6 and 7 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC be interpreted as precluding the application whereby the economic operator is required to provide evidence, on its own initiative, of the measures it has taken to demonstrate its reliability?
>
> 2. If so, do the provisions of Article 57(4)(c) and (g) in conjunction with paragraphs 6 and 7 of Directive 2014/24/EU, interpreted in this way, have direct effect?

6. By judgment of 14 January 2021, Case C-387/19 (hereinafter: the judgment), the Court of Justice answers these questions as follows:

> "1) Article 57(6) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015, must be interpreted as precluding a practice whereby an economic operator, when submitting its request to participate or its tender, must spontaneously provide evidence of the corrective measures it has taken in order to demonstrate its reliability despite the existence of an optional ground for exclusion referred to in Article 57(4) of that directive, as amended by Delegated Regulation 2015/2170, where no such obligation arises from the applicable national legislation or the procurement documents. However, Article 57(6) of that directive, as amended by Delegated Regulation 2015/2170, does not preclude such an obligation where it is clearly, precisely and unambiguously stated in the applicable national legislation and

Machine Translated by Google

is brought to the attention of the entrepreneur concerned via the tender documents.

2) Article 57(6) of Directive 2014/24, as amended by Delegated Regulation 2015/2170, must be interpreted as having direct effect."

7. After notification of the supplementary auditor's report,

the defending party stated the following in its final statement.

7.1. Firstly, she points out the problem of the

applicability of Directive 2014/24/EU and on what was stated in the judgment of the Court of

The Justice Department has considered this as follows:

"Preliminary observations

21 It should be noted as a preliminary point that Article 57(6) of Directive 2014/24, the interpretation of which is sought, has no equivalent in the provisions of EU public procurement legislation in force before the adoption and entry into force of that directive, so that the questions referred for a preliminary ruling can be relevant only if that directive is applicable to the situation at issue in the main proceedings. The referring court considers that this is the case because the notice was published on 11 and 13 May 2016 and therefore after 18 April 2016, the date on which Directive 2014/24 had to be transposed by the Member States in accordance with Article 90 thereof and which repealed Directive 2004/18 in accordance with Article 91 thereof.

22 However, it is apparent from the file before the Court that the announcement was preceded by a prior information notice published on 17 October 2015, when Directive 2004/18 was still applicable.

23 In that regard, it is clear from settled case-law that the applicable directive is, in principle, that in force on the date on which the contracting authority chooses the type of procedure to be followed and definitively determines whether a prior call for competition is required for the award of a public contract. However, the provisions of a directive the transposition period of which expired after that date are not applicable (judgment of 27 November 2019, Tedeschi and Consorzio Stabile Istant Service, Cÿ402/18, EU:C:2019:1023, paragraph 29 and the case-law cited).

24 In the present case, the prior information notice was published before the deadline for transposition of Directive 2014/24, and the notice after that date. It is therefore for the referring court to verify the date chosen by the contracting authority

Machine Translated by Google

> what type of procedure he was going to follow and finally determined whether there was an obligation to issue a prior call for competition for the award of the public contract at issue in the main proceedings."

The defending party requests the Council of State "to rule on the basis to consider that Directive 2004/18 applies to [its] documents 2 and 3 is, which was explicitly submitted for verification by the Court of Justice to [the Council of State]".

7.2. Furthermore, it disputes that Article 57(6) of Directive 2014/24/EU has direct effect in the internal legal order. After all, she argues, this provision is not unconditional or sufficiently clear in nature for the conditions for direct effect would be met. This is evident from the Defendant inter alia from Article 57(7) of Directive 2014/24/EU that the allows Member States to determine not only the procedural but also the substantive aspects conditions for the application of the exclusion and self-employment scheme cleaning to be determined in the light of national needs and characteristics. "From an unconditional or sufficiently clear and precise provision is thus "no question".

Furthermore, the defending party fails to see that the mere given that Article 57(6) of Directive 2014/24/EU provides for a minimum guarantee would imply, would justify its direct effect. Such after all, a guarantee does not automatically mean that they are unconditional and is sufficiently clear and accurate.

The defendant also emphasises that it has no legislative had the power to transpose the directive provision into the domestic legal order.

7.3. Finally, the defendant argues that in the auditor's report ignores "the core of this annulment procedure", namely the fact that the applicants are already too well

Machine Translated by Google

knew that, given the factual antecedents regarding defects in orders that
belong to the same programme (“TV3V”), the defendant has a well-founded claim
doubts and uncertainty regarding the regular performance of the disputed
assignment may be.

According to the defendant, there was therefore a “reasonable
predictability of the decision” to exclude the applicants.

The role of the requesting parties should therefore be
discounted in the assessment. For example, the requesting parties had spontaneously
can bring forward corrective measures. Furthermore, the
the applicants have failed to provide evidence that they “pursuant to the requirements of loyalty
and transparency” still provide proof of action taken within a reasonable period of time
could have presented corrective measures. It is sufficient with other
words not to take corrective measures until after a possible request to do so
to carry out.

Finally, the defending party points out a number of reasons
why “a Member State would require tenderers to provide evidence of their own accord
providing self-cleaning measures”.

8. The applicants argue that Directive 2014/24/EU
is indeed applicable to the order in question.

As regards the dispute concerning the direct effect of this
As regards the directive, the applicants refer to the judgment of the Court of
Justice. “The Court [according to the applicants] is very clear in its judgment
on the scope of the rights that the legal subjects of the Directive can exercise
The defendant's argument that the arrangement regarding 'self
cleaning' could not be applied on his own initiative is therefore not correct”.

Machine Translated by Google

Finally, the applicants note that they do
had taken proper measures to avoid the previous problems
but that they should be given the opportunity to use the knowledge they had already acquired at that time
to communicate the measures taken to the defending party in a timely manner".

Judgement

9. The Court of Justice notes in its judgment that in this case the prior announcement of the contract has taken place before the deadline for the transposition of Directive 2014/24/EU, while the announcement is dated after that date, and that it is therefore for the referring court to verify on which date the contracting authority has chosen which type procedure he was going to follow and finally decided whether the award was of the public contract at issue in the main proceedings an obligation existed to make a prior call for competition.

It cannot be inferred from the pre-announcement itself which type of procedure chosen by the contracting authority. A mere reference to that prior information to the Directive repealed by Directive 2014/24/EU 2004/18/EC of the European Parliament and of the Council of 31 March 2004 'on the coordination of procedures for the placement of public contracts for works, supplies and services', does not include decision on the type of procedure.

Moreover, as the applicants also note,
pointed out in the advance announcement that no cutlery is yet available.

Only in the announcement, i.e. after the deadline for conversion of the Directive, information is provided under 'Section IV: Procedure' on what type of procedure the contracting authority will follow.

The defendant does not provide any other information that would

Machine Translated by Google

a relevant decision, with a date earlier than that of the announcement, would
to turn out.

In those circumstances, the Council finds that the contested order falls under Directive 2014/24/EU.

10. The Court of Justice decided on the first preliminary question concerns that Article 57(6) of Directive 2014/24/EU should be amended as follows: explained that it opposes a practice whereby an entrepreneur at the submission of his request for participation or his registration spontaneously provides proof must provide details of the corrective measures he has taken to demonstrate that he is reliable despite the existence of an optional ground for exclusion referred to in Article 57(4) of this Directive, where the applicable national regulation or the tender documents do not provide such an obligation arises. Furthermore, the Court of Justice rules that Article 57, paragraph 6, of this Directive, however, does not preclude such a obligation when it is stated clearly, precisely and unambiguously in the applicable national regulation and to the attention of the tendering documents involved entrepreneur is brought.

Neither the cutlery nor the applicable regulations at that time national regulations refer to an obligation that applied to the requesting parties to spontaneously submit their tender to provide evidence of the corrective measures they have taken to to demonstrate that they are reliable despite the existence of a applicable optional exclusion ground, or a possibility to do so to adduce evidence at a later stage in the proceedings. The principles of transparency and equal treatment nevertheless require – as the Court stated in its judgment notes under point 36 – that if the tenderer must provide the evidence spontaneously provide upon registration, without the possibility of submitting this proof at a later date stage of the procedure, he should indicate this in advance on a clear, is informed of such a situation in an accurate and unambiguous manner obligation.

Machine Translated by Google

With the Court of Justice – point 39 of the judgment – it must be established that Article 57(6) of Directive 2014/24/EU, although national law was transposed by Article 70 of the Public Procurement Act 2016, which requires evidence of corrective action to be provided delivered at the initiative of the entrepreneur, but that this law is not yet in force had entered into force when the announcement was made, nor when the applicants submitted their tender. The specifications therefore did not yet include referred to the aforementioned Article 70.

As noted in the judgment of the Court of Justice – point 39 – the specifications also refer to the grounds for exclusion that applied under the then national scheme, but it is not explicitly stated anywhere that the entrepreneur concerned intended proof must be provided spontaneously.

The Court must therefore agree with point 40 of the judgment established that, without prejudice to the obligation of the requesting parties under the requirements of transparency and loyalty, in order to to inform the contracting authority of the serious professional misconduct they had committed committed in the performance of previous contracts by the same contracting authority awarded contracts, if only on the basis of the given circumstances Article 57(6) of Directive 2014/24/EU could reasonably have expected that the contracting authority would later ask them to provide evidence of the corrective measures they had taken to resolve the only optional to remedy the grounds for exclusion that this service could invoke.

Now it does not appear that the requesting parties have the opportunity received to enforce and investigate the measures that, according to they can remedy the exclusion ground in question, the objective of Article 57(6) of Directive 2014/24/EU, as stated by the Court of Justice in its judgment explained in point 29, not to have been reached.

Machine Translated by Google

Furthermore, the Court of Justice emphasises – paragraph 37 of the judgment – that, even where a Member State imposes an obligation to provide evidence spontaneously, the right to be heard implies that entrepreneurs can state their position their request or registration must be made known in a useful and efficient manner To this end, they must themselves, on the basis of the information in the tender documents and the relevant national regulations may determine which grounds for exclusion that the contracting authority may invoke against them.

In the interim judgment no. 244.404 of 7 May 2019 in the

In the present case, the Council of State notes that although a company itself is aware of the actions she has taken in the past, certainly when they have given rise to a report of notice of default or even determination and even more so when they give rise given to a sanction, its qualification as a “serious error” by the contracting authority is not always foreseeable for the tenderer concerned.

The Court of Justice refers – paragraph 41 of the judgment – expressly referring to its judgment of 3 October 2019, Case C-267/18, in Delta Construction and Assembly Company 93. It notes that from points 34 to with 37 of this last judgment – which concerned a national scheme which did not determine whether the entrepreneur took the corrective measures spontaneously or not had to be proven and at what stage of the procedure this had to be done, as is also the case here – it appears that entrepreneurs have the contracting authority although already when submitting their request for participation or their registration must be informed of any termination of a previous order due to serious shortcoming, but that the contracting authority service, if he sees a ground for exclusion in that termination or in the withholding information about this, the entrepreneurs involved must be given the opportunity to provide evidence of the corrective actions they have taken.

Although in the present case it appears that there was

Machine Translated by Google

of a large number of reports of default and proceedings
report of findings, which also appear to have given rise to
sanctions, the applicants could not establish with certainty whether their
previous conduct by the defendant would be considered as
a serious mistake that could call their integrity into question.

In addition, this decision to exclude apparently also
the first was where these actions by the defendant party were considered “serious misconduct”
were qualified.

The argument of the defending party in its final
memorandum that the applicants failed to make spontaneous corrective
measures cannot therefore be supported.

Moreover, even if it were assumed in this case that the
qualification as a “serious error” was sufficiently foreseeable for the
requesting parties, this does not in any case alter the fact – as stated in the aforementioned
judgment of the Court of Justice of 14 January 2021 noted that it is for
it was not foreseeable to them that they would provide evidence of the corrective measures
could only deliver spontaneously upon submission of the quotation, without the possibility
to provide this evidence at a later stage of the proceedings. The
the defendant has therefore not given the applicants the opportunity to
to propose corrective measures. The defendant's argument
party in its final memorandum that the applicants in any event have no
providing evidence of corrective actions taken can also
not convincing either.

In those circumstances, it is clear that the defendant
the practice followed by the party is contrary to Article 57(6) of Directive 2014/24/EU, the
principle of equality and transparency and the right to be heard.

11. With regard to the second preliminary question, the Court of Justice notes

Machine Translated by Google

on – point 48 of the judgment – that Article 57(6) of Directive 2014/24/EU, by to determine that every entrepreneur may prove that the measures he has taken taken are sufficient to demonstrate its reliability despite a applicable ground for exclusion, grants entrepreneurs a right that in has been formulated in unambiguous terms and the Member States have a imposes an obligation to achieve results which, although the material and procedural conditions of application thereof in accordance with Article 57(7) of this Directive must be determined by the Member States and does not need to be included in national law converted so that it can be invoked and used by the entrepreneur concerned to be applied for his benefit.

The protection provided for in Article 57(6) of this Directive thus offers and which is independent of the margin of appreciation allowed to the Member States left to the determination of the procedural conditions of this provision – point 49 of the judgment – the Court of Justice, contrary to what the the defending party argues in its final statement that direct effect granted. That the defendant, according to the internal division of powers between the federal government, the communities and the regions, not even was competent to transpose the provisions of the directive into national law, is not carte blanche not to comply with the directive provision that has direct effect to come.

It thus appears that the applicants are before the Council of State against the defendant directly on a violation of Article 57, paragraph 6, of Directive 2014/24/EU.

12. The decision is therefore that the only remedy is well-founded in the to the extent that an infringement of Article 57(6) of Directive is alleged 2014/24/EU, the principle of equality and transparency and the right to be heard.

DECISION

Machine Translated by Google

1. The Council of State annuls the decision of the Roads and Traffic, East Flanders department, of the Flemish Region of 13 October 2016, in which the government contract for the contracting of works with regarding the redevelopment of the Nieuwe Steenweg (N60) intersection and The E17 on- and off-ramp in De Pinte is awarded to Stadsbader NV.

2. The defendant is ordered to pay the costs of the appeal annulment, estimated at a fee of 400 euros and a legal fees of 700 euros, which are due to the requesting parties.

This judgment was pronounced in Brussels, in open court on November 19, 2021, by the Council of State, XIIth chamber, composed of:

Paul Lemmens,	Speaker of the House,
Pierre Barra,	council of state,
Patricia De Somere,	council of state,

assisted by

Greta Scheveneels,	clerk.

The clerk **The Chairman**

Greta Scheveneels **Paul Lemmens**

JUDGMENT OF THE COURT (Fourth Chamber)

10 September 2020 (*)

(Reference for a preliminary ruling – Public service contracts – Directive 2014/24/EU – Article 2(1)(5) – Concept of 'public contract' – Concept of 'contract for pecuniary interest' – Tenderer's bid at a price of EUR 0.00 – Rejection of the tender – Article 69 – Abnormally low tender)

In Case C-367/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Commission for the supervision of public procurement procedures, Slovenia), made by decision of 30 April 2019, received at the Court on 8 May 2019, in the proceedings

Tax-Fin-Lex d.o.o.

v

Ministrstvo za notranje zadeve,

intervener:

LEXPERA d.o.o.,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, S. Rodin, D. Šváby, K. Jürimäe and N. Piçarra, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Tax-Fin-Lex d.o.o., by Z. Tavčar, Director,

– the Ministrstvo za notranje zadeve, by M. Bregar Hasanagić and M. Urek, acting as Agents,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by L. Haasbeek, B. Rous Demiri and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 May 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1)(5) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 (OJ 2017 L 337, p. 19)('Directive 2014/24').

2 The request has been made in proceedings between Tax-Fin-Lex d.o.o., a company established in Slovenia, and Ministrstvo za notranje zadeve (Ministry of the Interior, Slovenia) (‘the Ministry’) concerning the Ministry’s rejection of the tender submitted by that company in a procurement procedure for the award of a public contract.

Legal context

EU law

3 Recital 2 of Directive 2014/24 states:

‘Public procurement [is] … one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules … should be revised and amended in order to increase the efficiency of public spending …’

4 Under Title I of Directive 2014/24, headed ‘Scope, definitions and general principles’, Article 1(1) and (2) of the directive provides:

‘1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.’

5 As set out in Article 2(1)(5) of Directive 2014/24:

‘1. For the purposes of this Directive:

…

(5) “public contracts” means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.’

6 Article 4 of the directive, headed ‘Threshold amounts’, provides:

‘This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

…

(b) EUR 144 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; …

…’

7 Article 18 of Directive 2014/24, headed ‘Principles of procurement’, provides in paragraph 1:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

8 Title II of Directive 2014/24, relating to the rules on public contracts, contains Chapter III on the conduct of the procedure, Section 3 of which is headed ‘Choice of participants and award of contracts’. Article 69 of the directive, on ‘abnormally low tenders’, which is contained in Section 3, provides:

‘1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

2. The explanations referred to in paragraph 1 may in particular relate to:

(a) the economics of the manufacturing process, of the services provided or of the construction method;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;

(c) the originality of the work, supplies or services proposed by the tenderer;

…

(f) the possibility of the tenderer obtaining State aid.

3. The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2.

…’

Slovenian law

9 Article 2 of the Zakon o javnem naročanju (Law on public procurement) of 30 May 2015 (Uradni list RS, No 91/2015), in the version applicable at the material time in the main proceedings (‘the ZJN’), provides in paragraph 1:

‘Terms used in this law shall have the following meaning:

1. “public contract” means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as its object the execution of works, the supply of products or the provision of services;

…’

The main proceedings and the questions referred for a preliminary ruling

10 On 7 June 2018, the Ministry published a contract notice, divided into two lots, for the award of a public contract concerning access to a legal information system for a period of 24 months. The estimated value of the contract, as determined by the Ministry, amounted to EUR 39 959.01.

11 The Ministry received only two tenders for the first lot in the time period prescribed, including that of the applicant in the main proceedings, Tax-Fin-Lex, which proposed a price of EUR 0.00.

12 By decision of 11 January 2019, Tax-Fin-Lex was informed, first, that its tender had been rejected on the ground that the final price of its tender was EUR 0.00, which, in the Ministry’s view, was contrary to the rules on public procurement and, second, that the public contract for the first lot had been awarded to the second tenderer.

13 On 17 January 2019, Tax-Fin-Lex lodged a request that the Ministry review its decision to reject the tender. On 5 February 2019, the Ministry rejected that request and, on 11 February 2019, referred the matter to the referring court, which initiated the review procedure.

14 The referring court states, as a preliminary observation, that although Directive 2014/24 does not directly govern the situation in the main proceedings, the Slovenian legislature decided, when transposing the provisions of that directive into national law, that the expression ‘public contract’ is to apply to contracts whose value is greater than the threshold laid down in the directive as well as to contracts whose value is below that threshold. The Court therefore has jurisdiction to answer the questions referred.

15 On the merits, the referring court states that the Ministry’s decision to reject the tender submitted by Tax-Fin-Lex was based on a single ground relating to the amount of the tender that was proposed. In that regard, it is uncertain, first, whether a contract may be classified as a ‘contract for pecuniary interest’, within the meaning of Article 2(1)(5) of Directive 2014/24, where the contracting authority is not obliged to provide any consideration to the other party to the contract but where the latter, by reason of the contract, obtains access to a new market or to new users and therefore to references, which may constitute a future economic benefit for it. The referring court also wishes to know whether the sole fact that receiving the public contract is itself of economic value to the economic operator, even if it is not possible to express that value in monetary terms at the time the contract is awarded or concluded, may be sufficient for the contract to be characterised as a contract for pecuniary interest within the meaning of that provision.

16 Second, assuming that, in that situation, there is no ‘contract for pecuniary interest’ within the meaning of Article 2(1)(5) of Directive 2014/24, the referring court is uncertain as to whether that provision may constitute an autonomous legal basis for rejecting a tender in which the price is fixed at EUR 0.00.

17 It states that, if such a tender were accepted, the contract concluded could not be considered as a contract for the performance of a public contract. Consequently, the contracting authority would have initiated a public procurement procedure the end result of which would be not the award of a public contract but rather, for example, a gift.

18 Nevertheless, the referring court points out that Article 2(1)(5) of Directive 2014/24 defines the concept of ‘public contract’ in order to specify the cases in which the directive applies, without governing the procedure for the award of a public contract. It states that the contracting authority, when it initiated that procedure in the main proceedings, appreciated that it was going to be required to provide consideration for receiving the services that were the subject matter of the contract. The contracting authority’s preliminary assessment could not be affected by the conduct of the tenderers or the content of their tenders. After initiating the public procurement procedure and receiving the tenders, the contracting authority is obliged to consider those tenders and to examine them solely in the light of the requirements defined in advance. In addition, contracting authorities organise public procurement procedures not with the aim of concluding a contract for pecuniary interest, but in order to obtain goods or services. In the present case, even if it had accepted the tender at a price of EUR 0.00, the contracting authority would still have received the services in respect of which the public contract was put out to tender.

19 In the light of all of those considerations, the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Commission for the supervision of public procurement procedures, Slovenia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is there a “contract for pecuniary interest” as part of a public contract within the meaning of Article 2(1)(5) of Directive 2014/24, where the contracting authority is not required to provide any consideration but, by performing the public contract, the economic operator obtains access to a new market and references?

(2) Is it possible or necessary to interpret Article 2(1)(5) of Directive 2014/24 in such a way that it constitutes a basis for rejecting a bid with a price of EUR 0.00?’

Consideration of the questions referred

20 As a preliminary observation, it should be noted that the amount of the contract at issue in the main proceedings is below the threshold of EUR 144 000 set out in Article 4(b) of Directive 2014/24, with the result that the contract falls outside the scope of the directive. However, as the referring court states, when transposing the provisions of the directive into national law, the Slovenian legislature reproduced in Article 2(1) of the ZJN the definition of the term 'public contract' as it appears in Article 2(1)(5) of the directive, and that definition therefore applies to all public contracts governed by the ZJN, irrespective of their amount.

21 According to settled case-law, an interpretation by the Court of provisions of EU law in situations not falling within the scope of those provisions is warranted where such provisions have been made directly and unconditionally applicable to such situations by national law, in order to ensure that those situations and situations falling within the scope of those provisions are treated in the same way (see, to that effect, judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraphs 36, 37 and 41, and of 24 October 2019, *Belgische Staat*, C-469/18 and C-470/18, EU:C:2019:895, paragraph 23).

22 The Court must therefore answer the questions referred.

23 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 2(1)(5) of Directive 2014/24 must be interpreted as constituting a legal basis for rejecting a tenderer's bid in a public procurement procedure on the sole ground that, since the price proposed in the tender is EUR 0.00, the contracting authority would provide no financial consideration, while by performing the contract the tenderer would merely obtain access to a new market and to references that it could rely on in subsequent calls for tenders.

24 In that regard, it should be recalled that Article 2(1)(5) of Directive 2014/24 defines 'public contracts' as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services'.

25 According to the Court's case-law, it is clear from the usual legal meaning of 'for pecuniary interest' that those terms designate a contract under which each of the parties undertakes to provide one form of consideration in exchange for another (see, to that effect, judgment of 18 October 2018, *IBA Molecular Italy*, C-606/17, EU:C:2018:843, paragraph 28). The synallagmatic nature of the contract is thus an essential element of a public contract (see, to that effect, judgments of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paragraph 43; of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung*, C-796/18, EU:C:2020:395, paragraph 40; and of 18 June 2020, *Porin kaupunki*, C-328/19, EU:C:2020:483, paragraph 47).

26 As the Advocate General observed in point 47 of his Opinion, even if that consideration need not necessarily consist of the payment of a sum of money, so that the supply of the service is compensated for by other forms of consideration, such as reimbursement of the expenditure incurred in providing the agreed service (see, inter alia, judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 29; of 13 June 2013, *Piepenbrock*, C-386/11, EU:C:2013:385, paragraph 31; and of 18 October 2018, *IBA Molecular Italy*, C-606/17, EU:C:2018:843, paragraph 29), the fact remains that the reciprocal nature of a public contract necessarily results in the creation of legally binding obligations on both parties to the contract, the performance of which must be legally enforceable (see, to that effect, judgment of 25 March 2010, *Helmut Müller*, C-451/08, EU:C:2010:168, paragraphs 60 to 62).

27 It follows that a contract under which a contracting authority is not legally obliged to provide any consideration in return for that which the other party to the contract has undertaken to provide does not fall within the concept of 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24.

28 The fact, referred to by the referring court and inherent in all public procurement procedures, that the award of the contract could be of economic value to the tenderer in that it would open up access to a new market or enable the tenderer to receive references, is too uncertain and is therefore insufficient to

characterise the contract as a ‘contract for pecuniary interest’, as the Advocate General stated, in essence, in points 63 to 66 of his Opinion.

29 However, it should be noted that Article 2(1)(5) of Directive 2014/24 defines the concept of ‘public contracts’ merely for the purposes of specifying when the directive applies. As is clear from Article 1(1) of the directive, it does not apply to ‘public contracts’, within the meaning of Article 2(1)(5) ,whose value is estimated to be not less than the thresholds laid down in Article 4.

30 It follows that Article 2(1)(5) of Directive 2014/24 cannot constitute a legal basis capable of justifying the rejection of a tender which proposes a price of EUR 0.00. Accordingly, that provision does not permit the automatic rejection of a tender submitted in a public procurement procedure, such as a tender at a price of EUR 0.00, in which an economic operator offers to supply a contracting authority with the works, supplies or services which that authority wishes to purchase, without seeking consideration.

31 Accordingly, since a tender at a price of EUR 0.00 could be classified as an abnormally low tender within the meaning of Article 69 of Directive 2014/24, where a contracting authority is presented with such a tender, it must follow the procedure provided for in that provision and ask the tenderer to explain the amount of the tender. It follows from the underlying logic of Article 69 of Directive 2014/24 that a tender cannot be automatically rejected on the sole ground that the price proposed is EUR 0.00.

32 Thus it is clear from paragraph 1 of Article 69 that where a tender appears to be abnormally low, contracting authorities are to require the tenderer to provide an explanation for the price or costs proposed in the tender, which could relate, inter alia, to the elements set out in paragraph 2 of that article. The explanation provided is thus to be used in the assessment as to whether the tender is reliable and enables the contracting authority to establish that, although the tenderer proposes a price of EUR 0.00, the tender at issue will not impair the proper performance of the contract.

33 In accordance with paragraph 3 of the same article, the contracting authority must assess the information provided by consulting the tenderer and it may reject such a tender only where the evidence supplied does not satisfactorily account for the low level of price or costs proposed.

34 The assessment of that information must also be carried out in compliance with the principles of equal treatment and non-discrimination between tenderers, and the principles of transparency and proportionality, which are binding on the contracting authority under Article 18(1) of Directive 2014/24.

35 Therefore, the argument made by a tenderer which has submitted a tender at a price of EUR 0.00 that the price proposed in its tender is explained by the fact that it anticipates obtaining access to a new market or references if the tender is accepted must be assessed in the context of the possible application of Article 69 of Directive 2014/24.

36 In the light of all of the above considerations, the answer to the questions referred is that Article 2(1)(5) of Directive 2014/24 must be interpreted as not constituting a legal basis for rejecting a tenderer’s bid in a public procurement procedure on the sole ground that the price proposed in the tender is EUR 0.00.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 2(1)(5) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission

Delegated Regulation (EU) 2017/2365 of 18 December 2017, must be interpreted as not constituting a legal basis for rejecting a tenderer’s bid in a public procurement procedure on the sole ground that the price proposed in the tender is EUR 0.00.

[Signatures]

---

* Language of the case: Slovenian.

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 28 May 2020 (1)

Case C-367/19

Tax-Fin-Lex d.o.o.

v

Ministrstvo za notranje zadeve,

in the presence of

LEXPERA d.o.o.

(Request for a preliminary ruling from the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia))

(Reference for a preliminary ruling – Public service contracts – Directive 2014/24/EU – Article 2(1)(5) – Characterisation as a 'public contract' – Notion of 'contract for pecuniary interest' – Bid submitted by a tenderer in the amount of EUR 0.00 – Assessment of the onerous nature of the transaction – Absence of pecuniary consideration to be supplied by the contracting authority – Rejection of the tender – Legal basis – Article 69 – Abnormally low tender)

I. Introduction

1. Is zero (an) abnormally low (number)?

2. Leaving to one side the spirited discussion to which the nature of the number zero has given rise in the field of mathematics, (2) such a question put to a layman from a legal perspective would in all likelihood cause him to regard the lawyers with the look of astonishment which lawyers are accustomed to receiving when they try to explain what they do. The layman will even observe, perhaps – not without sarcasm – that only a lawyer is capable of devoting page after page to discussing (literally) nothing.

3. The fact nonetheless remains that, in relation to public contracts as in mathematics, zero seems to be an unusual number, difficult to place in existing evaluation grids. Does a tenderer offering goods or services at the nominal price of EUR 0.00 submit an abnormally low tender? Or rather does that tenderer automatically exclude himself from the scope of the law relating to public procurement by placing the magic number '0' in his tender rather than another nominal figure far below the real cost of the contract (such as, for example, EUR 1.5 or EUR 101), the reasoning being that, unlike all other natural numbers, '0' cannot appear in a public contract?

4. In a nutshell, that is the problem that arises in the present case. In the course of the procedure for the award of a public service contract initiated by the Ministrstvo za notranje zadeve (Ministry of the Interior, Slovenia), the undertaking Tax-Fin-Lex d.o.o. submitted a tender for the amount of EUR 0.00 to supply one of the relevant services. The Ministry of the Interior rejected that tender on the ground that it did not make it

possible to conclude a ‘contract for pecuniary interest’ within the meaning of Article 2(1)(5) of Directive 2014/24/EU (3) and therefore did not fall within the rules on public procurement. Conversely, Tax-Fin-Lex d.o.o. maintains that the transaction whereby it undertakes to supply the service for the sum of EUR 0.00 would be performed ‘for pecuniary interest’ within the meaning of that provision. In its submission, performing the contract would enable it to benefit from an economic advantage, owing to the references on which it would be able to rely afterwards for the purpose of the award of new public contracts.

II. Legal framework

5. Directive 2014/24 lays down rules that permit the coordination of national procedures for the award of public contracts above a certain amount so that they may be consistent with the principle of free movement of goods, freedom of establishment and freedom to provide services, as well as the ensuing principles, such as equal treatment, non-discrimination, proportionality and transparency. That directive is also intended to ensure effective competition in public procurement.

6. In particular, recitals 4 and 103 of Directive 2014/24 state:

> ‘(4) The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC. [(4)] The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. It should be clarified that such acquisitions of works, supplies or services should be subject to this Directive whether they are implemented through purchase, leasing or other contractual form.
>
> The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question …
>
> …
>
> (103) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions.’

7. In the context of Title I of Directive 2014/24, entitled ‘Scope, definitions and general principles’, Article 1(1) and (2) provides:

> ‘1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.
>
> 2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of … services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the … services are intended for a public purpose.’

8. Article 2(1)(5) of Directive 2014/24 defines ‘public contracts’ as ‘contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services’.

9. Article 18 of that directive sets out the ‘principles of procurement’. It states the following:

> ‘1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.'

10. Article 69 of Directive 2014/24 is dedicated to 'abnormally low tenders'. It is found in Title II, Chapter III, Section 3 of that directive, which is entitled 'Choice of participants and award of contracts'. Article 69 provides:

'1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

2. The explanations referred to in paragraph 1 may in particular relate to:

(a) the economics of the manufacturing process, of the services provided or of the construction method;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with obligations referred to in Article 18(2);

(e) compliance with obligations referred to in Article 71;

(f) the possibility of the tenderer obtaining State aid.

3. The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2.

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2).

…'

III. The main proceedings, the questions for a preliminary ruling and the procedure before the Court

11. On 7 June 2018, the Ministry of the Interior (the contracting authority) initiated a procedure for the award of a public service contract for access to a legal information system for a period of 24 months. That contract consists of two lots. The Ministry of the Interior estimated the value of the contract at EUR 39 959.01.

12. As regards the first lot, relating to access to a legal information system, only two economic operators, established in Ljubljana (Slovenia) and specialising in the field of legal information, submitted tenders within the prescribed time limits: Tax-Fin-Lex d.o.o. ('the applicant') and LEXPERA d.o.o. ('the intervener').

13. The applicant proposed to provide the service for a sum of EUR 0.00.

14. By a decision of 11 January 2019, the Ministry of the Interior awarded the contract consisting of the first lot to the intervener and rejected the applicant's tender on the ground that it was contrary to the rules on public procurement.

15. The applicant lodged a request for a review of that decision. In the course of the procedure preceding the review, the Ministry of the Interior rejected that request on 5 February 2019. On 11 February 2019, the Ministry of the Interior referred the matter to the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia), the referring court in the present case, seeking a ruling on the legality of that decision.

16. The applicant maintains that a tender such as that at issue is admissible. It claims that, in the context of public procurement, the tenderer is entitled to determine freely the price proposed and, consequently, to offer a service free of charge. That does not mean, however, that the applicant would be deprived of consideration for performing the public contract in question. Indeed, as in its submission, it maintains that the conclusion of the contract would obtain an advantage for the applicant consisting in access to a new market and to new users.

17. The Ministry of the Interior contends, on the other hand, that the notion of 'public contract' referred to in Article 2(1)(5) of Directive 2014/24 cannot cover a contract whereby the economic operator proposed to provide the service to the contracting authority free of charge. It maintains that the advantage which the economic operator derives from winning the contract, namely potential access to a new market and references, does not constitute consideration for the performance of a public contract. In its submission, such an advantage represents added value for all economic operators which cannot however be expressed as a monetary value and cannot therefore be invoiced to the contracting authority. Consequently, the Ministry of the Interior contends that a transaction in which the service is provided free of change cannot lead to the conclusion of a contract for pecuniary consideration.

18. In its request for a preliminary ruling, the referring court states that the Ministry of the Interior examined that tender in the light of the provisions relating to abnormally low tenders. Nonetheless, it rejected that tender not on the ground that it was abnormally low or contrary to the principles governing public procurement, but on the sole ground that it was for a sum of EUR 0.00.

19. The referring court expresses its doubts as to the interpretation of the notion of 'contract for pecuniary interest' referred to in Article 2(1)(5) of Directive 2014/24. It observes, first of all, that one of the essential elements of 'public contracts' in that provision is the pecuniary nature of the contract concluded between the contracting authority and the economic operator. It specifies, in that regard, that the notion of 'public contracts' is relevant not only before the conclusion of a contract, since the contracting authority is required to comply with the rules defined in the context of Directive 2014/24, but also after its conclusion, for the purpose of assessing whether the contract was in fact concluded in accordance with those rules.

20. The referring court then wonders whether and, if so, to what extent a contract whereby the economic operator undertakes to supply to the contracting authority, free of charge, the service referred to in the tender notice without any advantage other than gaining access to a new market and obtaining references may be characterised as a 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24. The referring court acknowledges that securing a public contract and obtaining references may in themselves represent an advantage for that operator. That advantage would not be capable of being quantified, from an economic point of view, at the time when the contract was awarded; nonetheless, it would be capable of constituting a future economic advantage linked with the performance of the contract.

21. However, the referring court also acknowledges that, in a situation in which the contracting authority does not pay the economic operator for the supply of the service, it is possible that the contract concluded is not a public contract, since it would be a contract concluded free of charge, taking, for example, the form of a gift. Last, the referring court wonders, in those circumstances, whether Article 2(1)(5) of Directive 2014/24 may constitute the legal basis of a decision rejecting the tender submitted by the economic operator.

22. In those circumstances, the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is there a "contract for pecuniary interest" as part of a public contract within the meaning of Article 2(1)(5) of Directive 2014/24, where the contracting authority is not required to provide any consideration but, by performing the public contract, the economic operator obtains access to a new market and references?

(2) Is it possible or necessary to interpret Article 2(1)(5) of Directive 2014/24 in such a way that it constitutes a basis for rejecting a bid with a price of EUR 0.00?'

23. The applicant, the Ministry of the Interior, the Austrian Government and the European Commission have lodged written observations.

IV. Analysis

24. The present Opinion is structured as follows. I shall begin by dealing with the admissibility of the present reference for a preliminary ruling (A). Next, I shall examine the scope of the notion of 'contract for pecuniary interest' in Article 2(1)(5) of Directive 2014/24 and, in particular, the related notion of 'consideration' (B). Last, I shall address the question whether a tender for the amount of EUR 0.00 may always be characterised as an 'abnormally low tender' in order to be examined and, where appropriate, rejected under the provisions set out in Article 69 of that directive (C).

A. Admissibility

25. The admissibility of the request for a preliminary ruling does not, in my view, raise any problem.

26. As regards, in the first place, the competence of the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia) to submit a request for a preliminary ruling, I recall that the Court held, in the judgment of 8 June 2017, *Medisanus*, (5) that that tribunal met the criteria for being regarded as a 'national court or tribunal' for the purposes of Article 267 TFEU. (6)

27. As regards, in the second place, the amount of the contract at issue in the main proceedings, it is true that that contract is below the threshold of EUR 144 000 laid down in Article 4(b) of Directive 2014/24, applicable for public service contracts awarded by central government authorities.

28. However, the referring court notes that, when transposing the provisions of that directive into national law, the Slovenian legislature decided that the notion of 'public contract' in Article 2(1)(1) of the Zakon o javnem naročanju (Law on public procurement) (7) of 30 May 2015 applied directly and unconditionally to contracts whose value is below the threshold defined in Article 4 of Directive 2014/24, which in principle are excluded from its scope.

29. In accordance with the Court's settled case-law, known as the *Dzodzi* line of decisions, the interpretation of the provisions of an act of the Union in situations which do not fall within its scope is warranted in order to ensure that situations falling under national law and those governed by EU law are treated in the same way where those provisions have been made directly and unconditionally applicable to such situations by national law. (8)

30. In the present case, the information supplied by the referring court, which is not disputed by any of the parties which have lodged observations, confirms that the national legislature decided to extend the scope of the EU rules on public procurement to public contracts of low value specifically in order to ensure that situations falling under national law and those governed by EU law are subject to the same rules. Thus, the logic underlying the *Dzodzi* judgment appears to be fully applicable in the present case.

31. In those circumstances, the Court may answer the questions for a preliminary ruling referred to it.

B. A contract 'for pecuniary interest'?

32. The referring court requests the Court, in essence, to define the material scope of Directive 2014/24. The Court is called upon to determine whether and, if so, to what extent a transaction by which a tenderer undertakes to supply the service for an amount of EUR 0.00 is capable of giving rise to the conclusion of a contract 'for pecuniary interest' within the meaning of Article 2(1)(5) of that directive and of thus being characterised as a 'public service contract'. In that regard, it should be borne in mind that, according to the Court's settled case-law, 'only a contract concluded for pecuniary interest may constitute a public contract falling within the scope of Directive 2004/18'. (9)

33. In order to answer the first question referred, it is necessary to determine whether the notion of ‘contract for pecuniary interest’ is capable of covering a transaction whereby a tenderer submits a tender of EUR 0.00, following a literal, systematic and teleological interpretation. It is also necessary to examine whether, in that regard, the Court’s case-law enables any light to be cast on the discussion by specifying the essential characteristics of such a contract.

1. ‘Contract for pecuniary interest’ for the purposes of the provisions of Directive 2014/24

34. The literal content of Article 2(1)(5) of Directive 2014/24 is not sufficient to provide a clear interpretation of the notion of ‘contract for pecuniary interest’. The wording of that provision already shows, rather, that there are multiple possible readings and meanings of ‘for pecuniary interest’.

35. On the one hand, certain language versions refer to the condition of onerousness. (10) The underlying reasoning is simply that something must be given in exchange. On the other hand, other language versions seem to be more restrictive: the ‘something’ that must be given in exchange by the contracting authority seems to assume a specifically pecuniary nature, (11) that is to say, it takes the form of money. Yet other language versions seem to occupy the middle ground. (12)

36. However, too much significance should perhaps not be attached here to the letter of Directive 2014/24, since certain language versions of that directive even use different terms to translate the notion of ‘contract for pecuniary interest’ depending on whether it appears in recitals 4 and 70 or indeed in Article 2(1)(5) of that directive.

37. Nor, unfortunately, are the *intra-systemic arguments* (with respect to Directive 2014/24) particularly helpful. In Article 1(2) of that directive, the EU legislature provided that ‘procurement … is the *acquisition* by means of a public contract of … services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the … services are intended for a public purpose’. (13)

38. That provision must be read in the light of recital 4 of Directive 2014/24, where the EU legislature stated that ‘the Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the *acquisition* of … services for consideration by means of a public contract’. (14) The legislature went on to state, moreover, that ‘such acquisitions of … services should be subject to [Directive 2014/24] whether they are implemented through purchase, leasing or other contractual forms’. It is essential to point out here that the notion of ‘acquisition’ should, according to the EU legislature, ‘be understood broadly in the sense of obtaining the benefit of the … services in question’.

39. While the principle *objective* of the law relating to public procurement should be to regulate the acquisition of goods or services by the public authorities, the scheme and purpose of Directive 2014/24 do not really make it possible to determine the characteristics of the condition of onerousness to which Article 2(1)(5) of that directive makes reference. The notion of ‘acquisition’ is sufficiently broad to be agnostic about the details of that acquisition: what matters is that the goods or services are ultimately obtained by the contracting authorities. However, the goods and services may be lawfully acquired in various ways.

40. Thus, a simple literal and systemic reading is not sufficient to enable us to comprehend the meaning of ‘contract for pecuniary interest’ and in particular the crucial notion of ‘consideration’ concealed behind the very concept of contract: what precisely is the nature of the consideration that must be supplied by the contracting authority in order for the public contract to be considered valid?

2. The interpretation in the case-law of the notion of ‘contract for pecuniary interest’

41. The Court has held that, in accordance with the usual legal meaning of the concept of ‘contract for pecuniary interest’ used in the definition of public contracts, those words designate a contract by which each of the parties undertakes to provide a service in exchange for another. (15) The existence of ‘consideration’ or ‘compensation’ to be supplied by the contracting authority, and therefore of a synallagmatic relationship (involving reciprocal obligations), constitute, for the Court, decisive elements for the purpose of assessing the existence of a contract for pecuniary interest. (16)

42. That case-law is consistent with the line taken by the Court in other areas of law, in particular in relation to transactions subject to value added tax (VAT). Thus, in the judgment of 18 January 2017, *SAWP*, (17) the Court observed that a supply of services is made for consideration, within the meaning of Directive 2006/112/EC, (18) only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is a reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient. (19) The Court held that 'that is the case if there is a direct link between the service supplied and the consideration received, the sums paid constituting actual consideration for an identifiable service supplied in the context of such a legal relationship'. (20)

43. Nonetheless, it must be recognised that there are two coexisting lines of case-law as regards the nature of the consideration required in order to satisfy the condition of onerousness. Those two lines reflect, to a certain degree, the divergences in the wording of Article 2(1)(5) of Directive 2014/24. (21)

44. The first line favours a strict interpretation of the 'onerous' criterion of the contract, requiring payment of remuneration or a price in money by the contracting authority.

45. Thus, in the judgment of 13 July 2017, *Malpensa Logistica Europa*, (22) the Court rejected the characterisation as a 'service contract' within the meaning of Article 1(1)(a) of Directive 2004/17 and the application of the rules relating thereto of a contract whereby the managing body of Milan Malpensa Airport (Italy) had not acquired the service provided by the supplier in return for remuneration. (23) In that judgment, the Court expressly referred to the approach defended by the Commission, according to which the onerous nature of the contractual relationship arising under a contract for services clearly meant that the contract must entail remuneration paid directly by the contracting authority in order to 'acquire' a service directly from a supplier.

46. The second line of case-law tends, conversely, to defend a broader interpretation of the condition of onerousness in the form of consideration, whether '*contrepartie'* (24) or '*contre-prestation*'. (25) This represents the majority view, also shared by the Commission in its Green Paper of 30 April 2004 on public-private partnerships and Community law on public contracts and concessions. (26)

47. According to that line of case-law, the notion of onerousness does not necessarily entail payment of a sum of money by the contracting authority. The Court thus considers that contracts in which the service is paid for by providing other forms of compensation, such as reimbursement of the fees incurred in providing the agreed service or exemption from charges, may be concluded for pecuniary interest and be characterised as 'public contracts'. That is also the case, even where the consideration paid is not sufficient to offset the costs borne by the tenderer. (27)

48. In that regard, two judgments are particularly illustrative.

49. Thus, in the judgment of 12 July 2001, *Ordine degli Architetti and Others*, (28) the Court held that the assessment of the elements making up the definition of 'public works contracts' within the meaning of Directive 93/37/EEC (29) must be carried out in such a way as to ensure that that measure was given full effect and, in particular, to promote genuine competition by means of the publication of contract notices. (30) It thus recognised the onerous nature of the contract and the characterisation as 'public works contract' in a situation in which the economic operator, the holder of a building permit, carries out the works in return for being *relieved of the infrastructure contribution* imposed on him by the national legislation. In that instance, the Court held that the requirement that the contract be of a pecuniary nature must be held to be satisfied since, in carrying out the works in question, the economic operator settled a debt of the same value which arose towards the municipality. (31)

50. In the judgment of 18 October 2018, *IBA Molecular Italy*, (32) the Court also held that 'a contract providing for the exchange of services is covered by the concept of public contract, even if the remuneration provided for is limited to the *partial reimbursement of costs incurred in order to supply the services agreed*'. (33) In that judgment, the Court made clear that a contract whereby an economic operator undertakes to manufacture a product and supply it to various authorities in exchange for specific-purpose funding granted for the achievement of that objective fell within the definition of 'contract for pecuniary interest' within the meaning of Article 1(2)(a) of Directive 2004/18, '*even though the costs of production and*

distribution of that product are not fully covered by that grant or by the transport costs which may be charged to those authorities'. (34)

51. It should be noted that the same approach was defended by Advocate General Campos Sánchez-Bordona in his Opinion in *Informatikgesellschaft für Software-Entwicklung*. (35) That case raises the question, in particular, whether the making available of software agreed in writing between two contracting authorities has a pecuniary interest within the meaning of Article 2(1)(5) of Directive 2014/24 where the entity receiving the software does not have to pay a price or reimbursement costs for the software, but is required, in principle, to make available to the other the future adaptations and developments of that software.

52. In his Opinion, the Advocate General considered that the condition of onerousness was satisfied. First, he observed that the consideration, namely the subsequent adaptations and development of the software, had an economic value. Second, he considered that that consideration was an enforceable undertaking, since it was essential to the supply of the public service for which those entities were responsible. (36)

3. The extensive notion of 'consideration' and its limits

53. What I understand to be the dominant view in the case-law (and one which I fully support) may be summarised as follows.

54. First, the nature of the consideration, inherent in the condition of onerousness, which is supplied by the contracting authority may take forms other than a price paid in money. There is thus not necessarily a need for a transfer of a sum of money. Other types of payment, including those of a non-monetary nature, are possible.

55. Second, the consideration must have a certain economic value, without being required to correspond precisely to the value of the goods or services supplied. Thus, the contracting authority and the tenderer may agree on the option of making payment in different forms, provided that such forms of payment have a clear economic value.

56. Third, the nature and the content of the consideration which the contracting authority must pay must be apparent from the contract as a direct and enforceable legal obligation arising under the contract. It is in that context that I understand the reference made by the Court, and also that made by Advocate General Mengozzi, to the *synallagmatic nature* of the public contract which is reflected in the *creation of legally binding obligations* for both parties to the contract. (37)

57. Thus, in order to determine whether the contract includes consideration (and, accordingly, whether the condition of onerousness laid down in Article 2(1)(5) of Directive 2014/24 is satisfied), I am of the view that the focal point of the analysis is not the precise sum of money stated in the contract. The question is, rather, whether, on the basis of that contract, the two contracting parties are locked inside a relationship of reciprocal legal obligations which each party may enforce against the other and in the context of which the contracting authority provides at least clear and precise consideration of an economic nature.

58. Such an approach deliberately shifts the terms of the discussion from the precise nature of the requisite 'consideration' to the broader question of the definition of the precise content of the reciprocal obligations borne by each of the parties. Although it is possible that the notion of 'consideration' varies considerably from one country to another in Europe, (38) the broad consensus seems to be that the formation of the contract requires that the parties agree in a sufficiently precise manner on the terms of the contract, which assumes that the mutual rights and obligations of each of the parties are clear so that the contract can be performed. (39) From a certain aspect, that discussion goes back to Roman law in its original form and to the fundamental distinction, still in force in civil-law legal systems, between synallagmatic legal relationships (for example contracts) and unilateral legal relationships (for example donations and gifts).

59. A contract for pecuniary interest is therefore, above all, a synallagmatic contract which means that the parties undertake to provide to each other services which are precise and reciprocal. The nature of those services must be determined at the time when the contract is formed. The services must be enforceable on the basis of that contract. On the other hand, the consideration that can be required is more flexible. It need not

necessarily consist in compensation of a monetary nature. What matters is that that consideration is clear, precise and enforceable on the basis of the contract which the parties have entered into.

4. Application to the present case

60. It should be noted, as a preliminary point, that, in the present case, unlike the cases referred to in the case-law cited earlier in this Opinion, there is no contract concluded between the contracting authority and the tenderer, since the case was brought before the national court at the stage at which the bid submitted by the tenderer was rejected. At that stage of the procedure, there is thus no contractual provision that might show the existence of consideration to be supplied by the contracting authority, in any form whatsoever.

61. The question for the Court is therefore whether, in a situation in which the tenderer's bid entails the absence of any direct remuneration for the service by the contracting authority, the advantage on which the tenderer may rely as a consequence of actually being awarded the contract may constitute 'consideration' capable of permitting the conclusion of a contract for pecuniary interest within the meaning of Article 2(1)(5) of Directive 2014/24.

62. In the light of the factual circumstances of the present case, as presented by the referring court, I am unable to see what such consideration might indeed consist of, even on the very broad definition of that notion as set out in the preceding section. There are three potential advantages which might be considered in the context of the present case: first, developing relevant experience; next, obtaining references for future contracts; and, last, establishing a reputation for future calls for tenders that might be launched by the same contracting authority for other lots.

63. First, obtaining relevant experience is certainly important for new entrants or small and medium-sized enterprises wishing to grow. However, it clearly does not constitute consideration which the contracting authority supplies in exchange for the services received. It is simply a legal fact that follows from the award of the contract.

64. Second, it is also undeniable that obtaining references may constitute an advantage. Those references may play a strategic role in the future award of public contracts. However, it must be stated that the giving of references is not sufficient to establish the synallagmatic nature of the contract envisaged. It does not constitute an obligation placed on the contracting authority, and cannot therefore constitute consideration enforceable against that authority. That advantage is a condition, the satisfaction of which is aleatory and uncertain, since the references on which the undertaking may rely in the future depend in reality on factual circumstances linked with the proper performance of the contract. There is thus no guarantee as to the references on which the tenderer may rely. There is merely speculation about the contract.

65. Third, the order for reference states that in the present case the contract consisted of two lots. (40) The call for tenders at issue here related only to the first lot. No further information was provided as to any connection between the first and the second lots. However, it is difficult to imagine that such a situation plays a role in the definition of the consideration in the sense of the legal obligation which the contracting authority would have to the tenderer with respect to the two lots. It is certainly not desirable either to accept or to promote a policy, whether explicit or implicit, whereby an undertaking would submit a tender significantly below the costs, including for the sum of EUR 0.00, in the context of one lot while hoping to recover those costs subsequently when a second lot in the contract was awarded.

66. In sum, none of the three scenarios corresponding to the potential 'advantages' likely to be put forward as the consideration received by a tenderer proposing to supply certain services free of charge falls within the notion of 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24. None of those hypotheses involve consideration enforcement of which could be legally demanded of the contracting authority in the context of the contract. The common denominator of those advantages is that they are all a bet on the future.

67. In conclusion, it might be added that the latter factual element makes it possible to clearly distinguish the present case from the even more flexible approach to consideration and 'onerousness' taken, for example, by Advocate General Campos Sánchez-Bordona in his Opinion in *Informatikgesellschaft für Software-Entwicklung*. (41) Especially in a rather dynamic sector such as software development, it is possible to conceive of a number of somewhat atypical forms of consideration. Thus, the first software may be supplied

free of charge, unlike future developments of that software; the contracting authority may make payment in kind by supplying its own data in exchange, so that the programmer can use those data in subsequent applications; the contracting authority may promise to provide feedback at regular intervals, thus enabling the developer to improve his product and increase its sales, etc. All of those situations might lead to the conclusion of contracts for pecuniary interest, since those obligations clearly emerge from the agreement entered into with the contracting authority and define a legally enforceable consideration, even though it is not always easy to put a price on each specific form of consideration.

68. In the present case, on the other hand, no distinct consideration incumbent on the contracting authority results from a clear and enforceable obligation arising from the contract whose conclusion is envisaged. The first 'advantage' is simply an automatic legal fact. The second is purely speculative and uncertain. As for the third, if it should even be envisaged, it would be highly problematic. Therefore, in the absence of consideration to be supplied by the contracting authority, the future contract cannot be characterised as a 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24.

C. Is a tender in the amount of EUR 0.00 an abnormally low tender?

69. The second question requires a determination of the legal basis on which a tender, such as that at issue, of an amount of EUR 0.00, may be rejected.

70. Although the referring court focuses its question on the provisions set out in Article 2(1)(5) of Directive 2014/24, I nonetheless recall that, according to the information which the referring court supplies, the Ministry of the Interior examined the tender at issue by reference to the provisions dedicated to 'abnormally low tenders' in Article 69 of that directive. However, the Ministry of the Interior rejected the applicant's tender not because it was abnormally low or because it did not satisfy the requirements and obligations set out in the contract notice, but because the tender was for an amount of EUR 0.00.

71. Thus, the second question submitted by the referring court is of a procedural nature: if a contracting authority receives a tender proposing EUR 0.00 in the box marked 'price', (i) must the contracting authority automatically reject the tender directly on the basis of Article 2(1)(5) of Directive 2014/24 since no tender of that type can ever lead to the conclusion of a valid public contract; or (ii) must such a tender also be examined in accordance with the procedure relating to abnormally low tenders provided for in Article 69 of Directive 2014/24?

72. In view of the answer which I propose be given to the referring court's first question (the consideration that can be demanded in the context of a public contract does not necessarily entail a direct transfer of money, but may be consideration in kind provided that it has a certain economic value), the logical answer to the second question is that suggested by (ii): a tender offering a nominal prince of EUR 0.00 must also be treated as an abnormally low tender.

73. In the first place, the procedure laid down in Article 69 of Directive 2014/24 concerns the stages of the tender and negotiation. In that article, the EU legislature requires that the contracting authority give the tenderer the opportunity to explain the amount of its tender and to show that the tender is genuine. Next, the contracting authority is required to take account not only of the explanations given, in particular those relating to the economics of the service, the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the service agreed, (42) but also all the relevant matters concerning the service in question and the obligations associated with its supply. (43)

74. Thus, unless the nature of the contract or the tender itself indicates unambiguously that there can be no other conceivable consideration and that there is thus no point in allowing the tenderer to provide explanations about his tender, it cannot be ruled out that the future contract may ultimately be a contract 'for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24.

75. All of this is reminiscent of the paradox of Schrödinger's cat. As long as the box is not opened and its contents examined, it cannot be ruled out that the cat inside the box is alive. Likewise, as long as the contracting authority does not give the tenderer, on the basis of Article 69 of Directive 2014/24, the opportunity to explain the logic and the structure of the costs underpinning its tender, it cannot be ruled out that the tender in question may lead to the conclusion of a public contract, without prejudice, ultimately, to the tender being rejected by the contracting authority. However, the tender cannot be rejected purely because

a nominal tender of EUR 0.00 does not satisfy the condition of onerousness set out in Article 2(1)(5) of that directive.

76. In the second place, it must be stated that Directive 2014/24 does not define the concept of 'abnormally low tender' or specify the numerical amount which that concept covers. (44) The words used by the EU legislature are general and the Court also employs the notion of the 'low price proposed in [the] tender'. (45)

77. It is apparent from the Court's case-law, however, that the Court is opposed to the establishment of a mathematical criterion for exclusion. It tends to favour effective competition in accordance with the rules on public procurement. In the judgment of 22 June 1989, *Costanzo*, (46) the Court held that a mathematical criterion for exclusion deprived tenderers who had submitted exceptionally low tenders of the opportunity of demonstrating that those tenders were genuine and was thus contrary to the objective of Directive 71/305/EEC, (47) namely to promote the development of effective competition in the field of public procurement.

78. In the light of those factors, it thus seems that there is nothing to preclude the notion of 'abnormally low tender' from including a tender in the amount of EUR 0.00. Admittedly, an amount of 'EUR 0.00' resembles a sort of psychological barrier. Nonetheless, in economic terms there is no reason why it should be distinguished from a tender of EUR 10 or EUR 100, provided that those tenders are all below the costs of the contract.

79. In the third and last place, there can be no doubt that a number of additional arguments might be made in favour of a refusal to examine tenders of EUR 0.00. To allow such tenders might run counter to the objective of *transparency* in connection with public funds and the fight against corruption: the actual costs and subsequent payments would simply be shifted and concealed in other parallel transactions. Likewise, although such a step would at first sight appear beneficial for *public budgets*, a public contract concluded for a nominal price of EUR 0.00 could ultimately prove more expensive and difficult to enforce for the contracting authority and thus lead to increased costs rather than simply paying the appropriate price at the outset. In addition, a practice of predatory pricing sponsored by the contracting authorities could give rise to concerns from the perspective of *competition law*.

80. In any event, regardless of the legitimacy of those concerns, the same arguments might be used in the opposite sense, that is to say, in favour of examining such tenders. (48) Above all, however, all of those arguments could be used directly against any examination of abnormally low tenders. The same considerations as those outlined in the preceding point of this Opinion would apply without distinction to every abnormally low tender: that would be the case, for example, for a contract evaluated at EUR 150 000, of a tender of EUR 1 000, of EUR 101 or of a symbolic EUR 1. Even though all of those tenders would be far below the real costs, the contracting authority could not automatically reject them, but would have to examine them in accordance with the procedure specifically laid down for that purpose in Article 69 of Directive 2014/24.

81. If such a legislative choice was made by the EU legislature in the context of the law relating to public procurement after it had weighed up all the advantages and disadvantages inherent in abnormally low tenders, I find no logical argument that would allow tenders of EUR 0.00 to be excluded from such an arrangement. Such tenders should therefore be treated in the same way. Thus, if the Court should accept my proposal with regard to the first question (a 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24 does not necessarily require payment of a sum of money, but may entail consideration in kind to be supplied by the contracting authority), then the amount of the nominal sum stated on the tender for the contract is not decisive.

82. Consequently, I consider that it is indeed through the prism of the conditions set out in Article 69 of Directive 2014/24 that the contracting authority must examine a tender of an amount of EUR 0.00 in order, where appropriate, to reject that tender on the ground, in particular, that it cannot lead to the conclusion of a contract for pecuniary interest within the meaning of Article 2(1)(5) of that directive, owing to the fact that no consideration of an economic nature would be supplied by the contracting authority in the context of a tendering procedure.

V. Conclusion

83. I propose that the Court should answer the questions submitted for a preliminary ruling by the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia) as follows:

(1) The notion of 'contract for pecuniary interest' referred to in Article 2(1)(5) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017, must be interpreted as not permitting a transaction whereby the tenderer proposes to the contracting authority to supply the service for an amount of EUR 0.00 cannot be characterised as a 'public service contract' in so far as the parties to the contract do not agree on consideration of economic value to be supplied by the contracting authority.

(2) A tender at a price of EUR 0.00 must be examined in accordance with the provisions set out in Article 69 of Directive 2014/24, as amended by Delegated Regulation 2017/2365, on abnormally low tenders, where appropriate after having obtained additional information from the tenderer on the precise nature of the consideration of economic value to be supplied by the contracting authority. Such a tender must be rejected where it cannot lead, in the specific context of a call for tenders, to the conclusion of a 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of that directive.

---

1 Original language: French.

---

2 For an accessible introduction (short on calculations and long on cultural history), see, for example, Kaplan, R., *The Nothing that Is: A Natural History of Zero*, Oxford University Press, Oxford, 1999.

---

3 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 (OJ 2017 L 337, p. 19) ('Directive 2014/24').

---

4 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44).

---

5 C-296/15, EU:C:2017:431.

---

6 See paragraph 38 of that judgment.

---

7 Uradni list RS, No 91/15.

---

8 See judgments of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360; 'the *Dzodzi* judgment'; paragraphs 36 to 42), and, more recently, of 14 February 2019, *CCC – Consorzio Cooperative Costruzioni* (C-710/17, not published, EU:C:2019:116, paragraph 22 and the case-law cited), and of 24 October 2019, *Belgische Staat* (C-469/18 and C-470/18, EU:C:2019:895, paragraphs 22 and 23 and the case-law cited).

---

9 See judgments of 25 March 2010, *Helmut Müller* (C-451/08, EU:C:2010:168, paragraph 47), and of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraph 43). It should be noted that Directive

2014/24 repealed Directive 2004/18.

10 Like, for example, the Spanish (‘oneroso’), French (‘à titre onéreux’), Italian (‘a titolo oneroso’), Portuguese (‘a título oneroso’) and Romanian (‘cu titlu oneros’) versions.

11 Like, for example, the English (‘for pecuniary interest’) and Croatian (‘financijski interes’) versions.

12 Like the Czech and Slovak versions (where the concept of ‘úplatné smlouvy’ or the words ‘odplatné zmluvy’ mean primarily payment as consideration, but may also be interpreted as including non-financial consideration) or again the Swedish version, which uses the expression ‘kontrakt med ekonomiska villkor’, referring to the economic value of the contract.

13 Emphasis added.

14 Emphasis added.

15 See, in particular, judgments of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31, paragraph 45), and of 18 October 2018, *IBA Molecular Italy* (C-606/17, EU:C:2018:843, paragraph 28).

16 See, to that effect, judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraph 43 and the case-law cited), concerning the interpretation of the notion of ‘public contract’ referred to in Article 1(2)(a) of Directive 2004/18.

17 C-37/16, EU:C:2017:22.

18 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

19 See judgment of 18 January 2017, *SAWP* (C-37/16, EU:C:2017:22, paragraph 25 and the case-law cited).

20 Judgment of 18 January 2017, *SAWP* (C-37/16, EU:C:2017:22, paragraph 26 and the case-law cited).

21 See point 35 of this Opinion.

22 C-701/15, EU:C:2017:545. That judgment concerns the interpretation of Article 1(2)(a) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1). Under that article, ‘supply, works and service contracts’ are ‘contracts for pecuniary interest concluded in writing’.

23 See paragraph 29 of that judgment.

24 See, in that regard, judgments of 25 March 2010, *Helmut Müller* (C-451/08, EU:C:2010:168, paragraphs 47 to 52), and of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraph 43).

---

25 Judgment of 12 July 2001, *Ordine degli Architetti and Others* (C-399/98, EU:C:2001:401, paragraphs 77 to 86).

---

26 COM(2004) 327 final. In point 10 of that green paper, the Commission states that 'the pecuniary nature of the contract in question does not necessarily imply the direct payment of a price by the public partner, but may derive from any other form of economic consideration received by the private partner'.

---

27 See the considerations set out by the Court in the judgment of 25 March 2010, *Helmut Müller* (C-451/08, EU:C:2010:168), according to which a contract for the sale of land may constitute a public works contract even though, apart from the sale of the land, the contracting authority provides no consideration to the other contracting party.

---

28 C-399/98, EU:C:2001:401.

---

29 Council Directive of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

---

30 Paragraph 52 of that judgment.

---

31 It should be noted that the Court did not take the approach defended by Advocate General Léger in his Opinion in *Ordine degli Architetti and Others* (C-399/98, EU:C:2000:671), where he considered that the criterion of onerousness was not satisfied.

---

32 C-606/17, EU:C:2018:843.

---

33 Paragraph 29 of that judgment and the case-law cited. Emphasis added. See also judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817, paragraph 29); of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385, paragraph 31); and of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraph 37).

---

34 Paragraph 31 of that judgment. Emphasis added.

---

35 C-796/18, EU:C:2020:47.

---

36 See, in that regard, the developments set out in points 52 to 63 of this Opinion.

---

37 See judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraph 43), which itself followed the Opinion of Advocate General Mengozzi in *Remondis* (C-51/15, EU:C:2016:504, point 36). See footnote 16 of the present Opinion.

---

38 Showing that the legal regimes of contracts are characterised by considerable diversity, see, for example, Kötz, H., 'Comparative Contract Law' in Reimann, M. and Zimmermann, R., *The Oxford*

Handbook of Comparative Law, 2nd ed., Oxford University Press, Oxford, 2019, pp. 902-932, in particular pp. 910-912; or Chloros, A.G., 'The Doctrine of Consideration and the Reform of the Law of Contract: A Comparative Analysis', *International and Comparative Law Quarterly*, British Institute of International and Comparative Law, London, 1968, vol. 17, No 1, pp. 137-166.

---

39 See, for example, Articles 2:101 (Conditions for the Conclusion of a Contract) and 2:103 (Sufficient Agreement) of 'Principles of European Contract Law' (see Lando, O. and Beale, H., *Principles of European contract law, Parts I and II*, Kluwer Law International, The Hague, 2000); or Articles II.–I:101(I) (definition of the contract) and III.–I:102(4) (on the reciprocal nature of the obligations) of the *Draft Common Frame of Reference* (see von Bar, C. et al., *Principles, Definitions and Model Rules of European Private Law, draft Common Frame of Reference: outline edition*, Sellier European Law Publishers, Munich, 2009). See also, to that effect, *Projet de cadre commun de référence. Terminologie contractuelle commune*, Société de législation comparée, collection 'Droit comparé et européen', Paris, 2008, vol. 6, p. 25, published by the Association Henry Capitant des amis de la culture juridique française et la Société de législation comparée.

---

40 See point 11 of this Opinion.

---

41 C-796/18, EU:C:2020:47. See points 51 and 52 of this Opinion.

---

42 Those justifications are set out in Article 69(2) of Directive 2014/24.

---

43 See judgment of 16 May 2019, *Transtec* v *Commission* (T-228/18, EU:T:2019:336, paragraph 69 and the case-law cited).

---

44 In the judgment of 18 December 2014, *Data Medical Service* (C-568/13, EU:C:2014:2466), the Court thus pointed out that it is for the Member States and, in particular, the contracting authorities to determine the method of calculating an anomaly threshold constituting an 'abnormally low tender' (paragraph 49 and the case-law cited).

---

45 See, in that regard, judgment of 18 December 2014, *Data Medical Service* (C-568/13, EU:C:2014:2466, paragraph 46).

---

46 103/88, EU:C:1989:256, paragraph 18.

---

47 Council Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition, 1971(II), p. 682).

---

48 For example, as regards competition, it might be argued that those rules are in reality favourable for competition: it is likely that small and medium-sized enterprises and start-ups have lower fixed costs and may include zero margins for a specific contract. In such circumstances, bids of EUR 0 may be competitive by allowing those small undertakings to enter the market.

EU:C:2020:483

JUDGMENT OF THE COURT (Fourth Chamber)

18 June 2020 (*)

(Reference for a preliminary ruling – Public procurement – Directive 2004/18/EC – Article 1(2)(a) – Public procurement in the field of transport services – Cooperation agreement between municipalities regarding the organisation and provision of social and healthcare services based on the model of the 'responsible municipality' under Finnish law – Transfer of responsibility for the organisation of services to one of the municipalities in the area covered by the cooperation concerned – 'In-house' contract – Award of services to a company wholly owned by the responsible municipality without a call for competition)

In Case C-328/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), made by decision of 15 April 2019, received at the Court on 19 April 2019, in the proceedings brought by

Porin kaupunki

other parties to the proceedings:

Porin Linjat Oy,

Lyttylän Liikenne Oy,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, S. Rodin, D. Šváby (Rapporteur), K. Jürimäe and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Porin kaupunki, by A. Kuusniemi-Laine and J. Lähde, asianajajat,

– the Finnish Government, by J. Heliskoski and M. Pere, acting as Agents,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by M. Huttunen, P. Ondrůšek and L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of

procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings brought by Porin kaupunki (City of Pori, Finland) concerning the award by that city of public transport services to Porin Linjat Oy.

Legal background

EU law

Directive 2004/18

3 Article 1 of Directive 2004/18, entitled ‘Definitions’, provides:

‘1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

(d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

…’

Regulation (EC) No 1370/2007

4 Article 2 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1), entitled ‘Definitions’, provides:

‘For the purposes of this Regulation:

…

(b) “competent authority” means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority;

(c) “competent local authority” means any competent authority whose geographical area of competence is not national;

…

(j) “internal operator” means a legally distinct entity over which a competent local authority or, in the case of a group of authorities, at least one competent local authority, exercises control similar to that which it exercises over its own departments;

…’

5 Article 5 of that regulation, entitled ‘Award of public service contracts’, provides:

‘1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004

L 134, p. 1)] or [2004/18] for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives [2004/17] or [2004/18], the provisions of paragraphs 2 to 6 of this Article shall not apply.

2. Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services, may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments. Where a competent local authority takes such a decision, the following shall apply:

…

(b) the condition for applying this paragraph is that the internal operator and any entity over which this operator exerts even a minimal influence perform their public passenger transport activity within the territory of the competent local authority, notwithstanding any outgoing lines or other ancillary elements of that activity which enter the territory of neighbouring competent local authorities, and do not take part in competitive tenders concerning the provision of public passenger transport services organised outside the territory of the competent local authority;

…’

Finnish law

Law on public procurement

6 Article 10 of the Laki julkisista hankinnoista (348/2007) (Law on public procurement (348/2007)) of 30 March 2007, which transposes Directive 2004/18, provides that the Law does not apply to contracts which the contracting entity awards to an entity that is formally distinct from it but independent in its decision-making, where it exercises over that entity, alone or with other contracting entities, a control similar to that exercised over its own departments and where that distinct entity carries out the essential part of its activities with the contracting entities which control it.

Law on municipalities of 1995

7 Under Article 76(1) of the Kuntalaki (365/1995) (Law on municipalities (365/1995)) of 17 March 1995 (‘Law on municipalities of 1995’), municipalities may, pursuant to an agreement, carry out their tasks jointly. Article 76(2) of that law allows municipalities to agree that one municipality is to be entrusted with a task on behalf of one or more other municipalities.

8 Under Article 77(1) of that law, where, pursuant to an agreement, a municipality is charged with a task on behalf of one or more municipalities, it may be agreed that the other municipalities concerned appoint some of the members of the institution of the first municipality that is responsible for that task.

Law on municipalities of 2015

9 The Law on municipalities of 1995 was repealed by the Kuntalaki (410/2015) (Law on municipalities (410/2015)) of 10 April 2015 (‘Law on municipalities of 2015’), which entered into force on 1 May 2015.

10 Under Article 8 of that law, a municipality may itself carry out the tasks entrusted to it by law or agree to entrust responsibility for carrying them out to another municipality or a group of municipalities. The municipality or group of municipalities responsible for arranging for performance of those tasks must, inter alia, ensure equal access to the services concerned, determine the need for, quality and quantity of the services, specify how those services are to be provided, oversee their provision and the exercise of the power vested in the authority concerned. Furthermore, a municipality remains responsible for

financing its tasks, even where the responsibility for performing them has been transferred to another municipality or a group of municipalities.

11 Under Article 49 of the Law on municipalities of 2015, municipalities and groups of municipalities may, pursuant to an agreement, carry out their tasks jointly. Such cooperation may take the form, among others, of a joint institution. Article 50(2) of that law provides, inter alia, that the Law on public procurement does not apply to cooperation between municipalities where the cooperation relates to an award by a municipality or group of municipalities to a linked entity, within the meaning of Article 10 of that law, or where the Law on public procurement does not apply to the cooperation for some other reason.

12 Article 50(1) of the Law on municipalities of 2015 provides that, where a municipality agrees to transfer responsibility for arranging a task for which that municipality is responsible to another municipality or a group of municipalities, the Law on public procurement does not apply to that transfer.

13 Under Article 51(1) of the Law on municipalities of 2015, a municipality, called the ‘responsible municipality’, may perform a task on behalf of one or more municipalities in such a manner that the municipalities have a joint institution responsible for performing that task. The municipalities may agree that the other municipalities are to appoint some of the members of the joint institution.

14 Article 52(1) of that law provides that the agreement establishing a joint institution, referred to in paragraph 11 of the present judgment, must specify that institution’s tasks and, where appropriate, provide for the transfer of organisational responsibility referred to in Article 8 of that law, the composition of that institution and the right of the other municipalities to appoint members, the principles on which costs are to be calculated and allocated, and the duration and termination of the agreement.

Law on public transport

15 Under Article 12(3) of the Joukkoliikennelaki (869/2009) (Law on public transport (869/2009)) of 13 November 2009, as amended by the Laki joukkoliikennelain muuttamisesta (1219/2011) (Law on the amendment of the Law on public transport (1219/2011)) of 9 December 2011 (‘Law on public transport’), the regional municipal authority may authorise the operation of scheduled services only in the territory over which it has authority.

16 Under Article 4 of the Law on public transport, the competent authorities for road transport for the purposes of Regulation No 1370/2007 are required to determine the level of service applicable to public transport in the area over which they have authority. That provision requires those authorities to cooperate, to the extent necessary, between themselves and with municipalities and groups of provinces when determining the level of service.

17 Under Article 5(2) of that law, the competent authorities for transport operated in accordance with Regulation No 1370/2007 are responsible for specifying services. However, responsibility for planning routes and timetables may lie with the transport operators or the authorities, or else may be shared between them.

18 Under Article 6 of the Law on public transport, the competent authorities are required to plan public transport services, above all, as regional or territorial systems, in order to achieve a functional public transport network. When planning public transport, those authorities are to cooperate with each other and with the municipalities.

19 Under Article 14(4) of that law, those authorities are to adopt decisions on the organisation of public transport services in the area over which they have authority or a part thereof in accordance with Regulation No 1370/2007.

Law on services and support for persons with disabilities

20 Article 3 of the Laki vammaisuuden perusteella järjestettävistä palveluista ja tukitoimista (380/1987) (Law on services and support for persons with disabilities (380/1987)) of 3 April 1987 confers responsibility on the municipalities to arrange transport services for persons with disabilities.

The main proceedings and the questions referred for a preliminary ruling

21 By a cooperation agreement which entered into force on 1 July 2012 (‘public transport cooperation agreement’), the City of Pori, the Towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila (Finland) decided to entrust certain transport-related tasks to the City of Pori, as the competent local authority. Those tasks are managed by the municipalities which are parties to that agreement in accordance with the arrangements laid down in Articles 76 and 77 of the Law on municipalities of 1995, and the City of Pori has set up a joint institution to that end.

22 The public transport committee for the Pori Region (‘public transport committee’), made up of five members appointed by the City of Pori and a member appointed by each of the other municipalities which are parties to the public transport cooperation agreement, acts as the competent authority for local transport in the City of Pori and exclusively for transport operated in the area formed by the parties to that agreement. The operation of the public transport committee is governed by regulations approved by the City of Pori municipal assembly and management rules approved by that committee.

23 Transport-related costs are allocated in compliance with Regulation No 1370/2007 and divided among the municipalities which are parties to that agreement in accordance with specific arrangements determined by the public transport committee. When the budget and the financial plan are drawn up, the municipalities which are parties to the public transport cooperation agreement must be given the opportunity to put forward proposals concerning the objectives and financing of the cooperation.

24 The regulations of the public transport committee provide that, as a joint competent regional authority for transport for the area consisting of the territories of the parties to that agreement, it acts under the authority of the municipal assembly and municipal executive council of the City of Pori. The committee is responsible for the tasks which Regulation No 1370/2007 and the Law on public transport confer on the competent authority in the field of public transport, in the entire area covered by the cooperation agreement. On that basis, it specifies, inter alia, detailed arrangements for the organisation and award of public transport, as referred to in that regulation, which is operated solely in the area over which it has authority. It also approves contracts to be concluded and sets fares and charges.

25 At the same time, the City of Pori, the Town of Ulvila and the Municipality of Merikarvia (Finland) agreed, by a cooperation agreement on the organisation and provision of social and healthcare services concluded on 18 December 2012 (‘healthcare services cooperation agreement’), pursuant to Articles 76 and 77 of the Laki kunta- ja palvelurakenneuudistuksesta (169/2007) (Law on the restructuring of municipalities and services (169/2007)) of 9 February 2007, to transfer responsibility for organising social and healthcare services for their entire territory to the City of Pori.

26 That agreement is based on the ‘responsible municipality’ model provided for under the Law on municipalities of 1995 and the Law on municipalities of 2015. In that model, a task entrusted to various municipalities is performed by one among them, called the ‘responsible municipality’, on their behalf under an agreement which those municipalities have entered into.

27 The healthcare services cooperation agreement designates the City of Pori as the ‘responsible city [or municipality]’ or the ‘host city’, while the Town of Ulvila and the Municipality of Merikarvia are called the ‘contracting municipalities’.

28 That agreement provides that the system of social and healthcare services is to form a coherent whole, developed jointly by the responsible municipality and the contracting authorities under that agreement. The responsible municipality is to assess and determine the needs of residents for healthcare and social services, decide on the scope and level of quality of those services offered to residents, ensure that the residents have access to the necessary services and also decide how those services are to be delivered. It is also responsible for the availability, accessibility and quality of social and healthcare services and for overseeing and monitoring them.

29 In practice, responsibility for organising social and healthcare services in the area covered by the cooperation lies with the Committee for the Guarantee of Fundamental Social Rights of the City of Pori, which is a joint committee consisting of 18 members, 3 of whom are appointed by the Town of Ulvila, 2 by the Municipality of Merikarvia and the 13 others by the City of Pori. In addition, the healthcare services cooperation agreement provides that the municipal assembly of the City of Pori is to approve the Committee's regulations and determine its field of activity and tasks. That committee is fully responsible for social and healthcare services, the system of services and the necessary budget. The Committee approves contracts to be concluded within its field of activity and sets charges for the services and other benefits concerned in line with general criteria specified by the municipal assembly of the City of Pori. In addition, each year, the City of Pori's Committee for the Guarantee of Fundamental Social Rights draws up a service plan that specifically determines the content of services, the draft plan having previously been submitted to the contracting municipalities under the healthcare services cooperation agreement for their opinion. Finally, that agreement provides that the financial management of healthcare and social services is to be based on a jointly established budget, financial plan and plan for those services, and also on the monitoring of expenditure and use of those services. Costs are allocated according to use of social and healthcare services, so that each municipality pays for the actual cost of the services used by its own population and the residents for whom it is responsible.

30 By decision of 4 May 2015, the Committee for the Guarantee of Fundamental Social Rights of the City of Pori decided that, in the entire area covered by the healthcare services cooperation agreement, persons with disabilities would be transported to their work and day activity facilities by low-floor buses operated by the City of Porin as its own service through Porin Linjat, a limited company which the City owned entirely. Consequently, the City of Pori did not organise a call for competitive tenders for the contract to transport persons with disabilities but awarded it directly to Porin Linjat under the rules governing in-house contracts, known in Finnish law as 'awards to linked entities'.

31 However, the City of Pori states it had previously entered into two other contracts with Porin Linjat under the public transport cooperation agreement: first, the contract concluded on 5 September 2013 for transport services from 1 January 2013 to 31 May 2016, which governed the management of public transport in the City of Pori and the award of services to operators and applied to transport routes linking the City of Pori, the Municipality of Nakkiki and the Towns of Harjavalta and Kokemäki and, second, the contract concluded on 11 June 2014, which covered transport between the City of Pori and the Town of Ulvila from 1 July 2014 to 31 May 2016.

32 Lyttylän Liikenne Oy challenged the decision of the Committee for the Guarantee of Fundamental Social Rights of the City of Pori of 4 May 2015 before the Markkinaoikeus (Market Court, Finland), which annulled it on the grounds, first, that Porin Linjat could not be classified as a 'linked entity' or 'internal operator' of the City of Pori within the meaning of Article 10 of Law (348/2007) and, second, that the Law did not specify any other reasons to exclude the contract from the obligation to call for competitive tendering. That court considers that, unlike the City of Pori, which has five representatives on the public transport committee, the other municipalities which are parties to the healthcare services cooperation agreement have only one representative on that committee and so are not able to exercise control over Porin Linjat. As a result, the profit made by that company from operating public transport in those municipalities cannot be taken into account when assessing whether that company performs the essential part of its activities for the benefit of the contracting authority which controls it, in this case the City of Pori. Although the transport is partly operated pursuant to instruments adopted by the City of Pori, Porin Linjat's turnover from operating that city's transport is not enough to establish a relationship between the City of Pori and a linked entity since Porin Linjat does not perform the essential part of its activities for the benefit of its sole shareholder.

33 The City of Pori, supported by Porin Linjat, appealed to the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), claiming that Porin Linjat is an entity linked to it. Porin Linjat is a company owned and controlled by the City of Pori and, since 2009, has not taken part, as a tenderer, in calls for tenders for transport services. In addition, it does not compete on the market. Under the public transport cooperation agreement, the Towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila entrusted the City of Pori with responsibility for managing, as the responsible municipality, the operation of the public transport services of the municipalities participating in the cooperation. Consequently, the turnover generated by Porin Linjat's operation of that transport in the territory of

those municipalities must be attributed to the City of Pori. More than 90% of Porin Linjat's turnover is thus generated by operating the transport of the City of Pori.

34 The referring court is uncertain whether the healthcare services cooperation agreement may, by its nature, be excluded from the scope of Directive 2004/18 because it gives tangible form to a transfer of powers or cooperation between public-sector entities, or for another reason.

35 In that regard, the referring court points out that cooperation between the municipalities in the Pori Region is based, as regards the provision of both social and healthcare services and transport services, on the 'responsible municipality' model. That court is unsure whether the contracts awarded by the responsible municipality are exempt from the obligation to call for competitive tendering where that municipality or its linked entity procure services on behalf of the municipalities in the area covered by the cooperation which are intended for the inhabitants of those municipalities. The referring court considers that the 'responsible municipality' model may be understood as a transfer of powers, as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985). However, that judgment did not expressly address the question of whether the obligation to call for competitive tendering laid down in EU public procurement legislation must apply to decisions taken after a transfer of powers.

36 The referring court states that the 'responsible municipality' model could also possibly be classified as 'cooperation between public-sector entities'. In that case, however, it must be clarified whether the responsible municipality may, when organising services for the other contracting entities involved in the cooperation, use an entity linked to it without a call for competitive tendering.

37 The question also arises as to, first, whether, in calculating the share of Porin Linjat's turnover derived from operating the public transport of the City of Pori, account should be taken of the turnover generated by the regional transport services which the City of Pori, as the competent authority, organises on behalf of the Towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila under the public transport cooperation agreement and, second, whether the share of Porin Linjat's turnover generated by operating the public transport of the City of Pori is such that it may be classified as an entity over which that city has control.

38 In so far as, first, the City of Pori awards contracts for regional transport services, on its own behalf but also on behalf of the other municipalities which are parties to the public transport cooperation agreement, and, second, those municipalities bear part of the costs of the services awarded, the question arises as to whether the City of Pori can be regarded as a contracting authority for all regional transport and whether, therefore, all of those contracts must be taken into account in calculating Porin Linjat's turnover from operating that city's public transport.

39 Against that background, the Korkein hallinto-oikeus (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 1(2)(a) of Directive [2004/18] be interpreted as meaning that the model of the "responsible municipality" in accordance with the cooperation agreement between municipalities in question [in the main proceedings] meets the conditions for a transfer of responsibilities which is not covered by the scope of the Directive (judgment of 21 December 2016, *Remondis*,C-51/15, EU:C:2016:985) or a horizontal cooperation which is not covered by an obligation to issue a call for tenders (judgment of 13 June 2013, *Piepenbrock*, C-386/11, EU:C:2013:385 and the case-law cited), or does this constitute another case altogether?

(2) If the model of the "responsible municipality" in accordance with the cooperation agreement meets the conditions for a transfer of responsibilities: in the event that contracts are awarded after responsibilities have been transferred, is the public entity to which the responsibilities have been transferred the contracting authority and is this public entity entitled, on the basis of the responsibilities transferred to it by the other municipalities, to award contracts for services to one of its related entities without a call for tenders in circumstances where the award of these contracts for services would – without the principle of the "responsible municipality" – have been the responsibility of the municipalities which transferred the responsibility?

(3) If, on the other hand, the model of the "responsible municipality" in accordance with the cooperation agreement fulfils the conditions of a horizontal cooperation: can the municipalities taking part in the cooperation award contracts for services without issuing calls for tenders to a municipality taking part in the cooperation, which awarded these service contracts to one of its related entities without a call for competitive tenders?

(4) As part of the assessment whether a company carries out the essential part of its activities for the municipality by which it is controlled, does the calculation of the turnover related to the municipality take into account the turnover of a company owned by the municipality which operates transport services within the meaning of [Regulation No 1370/2007] to the extent that the company derives this turnover from transport services organised by the municipality as the competent authority within the meaning of that regulation?'

Consideration of the questions referred

Preliminary observations

40 First, although, unlike the healthcare services cooperation agreement, the legal nature of the public transport cooperation agreement is not expressly indicated by the referring court, it is apparent from the order for reference that, under the latter agreement, the Towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila transferred to the City of Pori, as the responsible municipality, responsibility for managing the operation of the public transport of the municipalities participating in the cooperation.

41 It therefore appears to follow from the order for reference that, like the healthcare services cooperation agreement, the public transport cooperation agreement is based on the 'responsible municipality' model.

42 The Court will therefore examine the questions referred by the national court based on that premiss.

43 Second, it appears that the public transport cooperation agreement and healthcare services cooperation agreement were not concluded by the same parties. The public transport cooperation agreement involves the City of Pori, the Towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila. The healthcare services cooperation agreement was concluded by the City of Pori, the Town of Ulvila and the Municipality of Merikarvia.

44 Third, it should be noted that, in its capacity as the 'responsible municipality', the City of Pori must provide the services covered by those two agreements. For that purpose, it relies on a linked entity, that is to say an internal operator, which it owns wholly and controls, namely Porin Linjat.

The first question

45 By its first question, the referring court asks, in essence, whether Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that an agreement under which the municipalities which are parties to that agreement entrust to one among them responsibility for organising services for their benefit is excluded from the scope of Directive 2004/18 on the ground that it constitutes a transfer of powers, for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985), or cooperation between contracting authorities subject to an obligation to call for competitive tendering as referred to in the judgment of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385).

46 As the Court noted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraphs 40 and 41), the division of competences within a Member State benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including local and regional self-government. Moreover, as that division of competences is not fixed, the protection conferred by that provision also concerns internal reorganisations of powers within a Member State. Such reorganisations, which, in particular, may take the form of voluntary transfers of competences between

public authorities, have the consequence that a previously competent authority relinquishes the obligation or power to perform a given public task, whereas another authority is henceforth entrusted with that obligation or power.

47 Paragraphs 42 to 44 of the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985), also make clear that such a transfer of powers does not fulfil all the conditions required to come within the definition of ‘public contract’. Only a contract concluded for pecuniary interest may constitute a public contract coming within the scope of Directive 2004/18. The pecuniary nature of the contract means that the contracting authority concluding a public contract receives a service which must be of direct economic benefit to that contracting authority. The synallagmatic nature of the contract is thus an essential element of a public contract. The very fact that a public authority is released from a competence with which it was previously entrusted by that self-same fact eliminates any economic interest in the accomplishment of the tasks associated with that competence.

48 That said, in order to be regarded as an internal organisation measure covered by Article 4(2) TEU, a transfer of powers between public authorities requires that the public authority on which competence has been conferred has the power to organise the performance of the tasks coming within that competence and to draw up the regulatory framework relating to those tasks and, lastly, that it has the financial autonomy allowing it to ensure the financing of those tasks. The authority initially competent cannot, therefore, retain primary responsibility over those tasks nor retain financial control over them or give prior approval for decisions envisaged by the entity on which it has conferred powers. A transfer of competence hence implies that the newly competent public authority acts autonomously and under its own responsibility in the performance of its tasks (see, to that effect, judgment of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paragraphs 49 and 51).

49 However, the autonomy of action of the public authority to which a competence is conferred does not mean that the newly competent entity must be shielded from any influence whatsoever by another public entity. An entity that transfers competence may retain a certain degree of influence over the tasks associated with the public service thus transferred. That influence, which may be brought to bear through a body, such as the general meeting, made up of representatives of the previously competent local and regional authorities, does, however, in principle, preclude any involvement in the actual performance of the tasks coming within the transferred competence (see, to that effect, judgment of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paragraph 52).

50 In this case, first, the order for reference makes plain that the healthcare services cooperation agreement transfers responsibility for organising the social and healthcare services of the municipalities which are parties to that agreement from those municipalities to the City of Pori. That voluntary transfer of powers is based on Law (169/2007).

51 Second, the management of the area covered by the cooperation thus established is organised in accordance with the rules laid down in Articles 76 and 77 of the Law on municipalities of 1995. It follows that the healthcare services cooperation agreement thus confers on the responsible municipality responsibility for assessing and determining the needs of the residents of the municipalities concerned for social and healthcare services, deciding the scope and quality of those services offered to those residents and ensuring that they have access to the necessary services. The responsible municipality is also to determine how those services are to be delivered and decide on their availability, accessibility and quality and their oversight and monitoring.

52 Third, responsibility for organising social and healthcare services in the area covered by the cooperation is entrusted, in practice, to a joint institution, in this case the Committee for the Guarantee of Fundamental Social Rights of the City of Pori, the composition and tasks of which are described in paragraph 29 of this judgment.

53 Fourth, the healthcare services cooperation agreement provides that the municipal assembly of the City of Pori is to approve the Committee’s regulations and determine its field of activity and tasks.

54 Fifth, that cooperation agreement provides that the financial management of healthcare and social services is to be based on a budget, financial plan and plan for those services drawn up jointly by the

municipalities which are parties to that agreement, and also on the monitoring of expenditure and use of those services.

55 Sixth, the costs of social and healthcare services are allocated according to the use thereof, so that each municipality pays for the actual cost of the services used by its own population and the residents for whom it is responsible.

56 Thus, subject to the verifications which it will be for the referring court to carry out, the conditions for a transfer of powers, for the purposes of Article 4(2) TEU, appear to be met, with the result that the healthcare services cooperation agreement does not appear to constitute a ‘public contract’ within the meaning of Article 1(2)(a) of Directive 2004/18. Accordingly, that cooperation agreement should be excluded from the scope of Directive 2004/18.

57 In those circumstances, it does not appear necessary to examine whether the healthcare services cooperation agreement may also constitute cooperation between contracting authorities which is excluded from the obligation to call for competitive tendering in accordance with the judgments of 9 June 2009, *Commission* v *Germany* (C-480/06, EU:C:2009:357), and of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385).

58 The answer to the first question is therefore that Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that an agreement under which the municipalities which are parties to that agreement entrust to one among them responsibility for organising services for the benefit of those municipalities is excluded from the scope of Directive 2004/18 on the ground that it constitutes a transfer of powers, for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985).

The second and fourth questions

59 By its second and fourth questions, which the Court will consider together, the referring court asks, in essence, whether Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a cooperation agreement under which the parties to that agreement transfer to one among them responsibility for organising services for their benefit allows that municipality, in awards made after that transfer, to be regarded as a contracting authority and authorises it to entrust to an in-house entity, without a prior call for competitive tendering, services meeting not only its own needs but also those of the other municipalities which are parties to that agreement whereas, without that transfer of powers, those municipalities would have had to fulfil their own needs themselves.

60 The answer to the first question makes clear that, subject to verification by the referring court, an arrangement such as the ‘responsible municipality’ model involves a transfer of powers for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985).

61 By its very nature, such a transfer of powers implies that the other municipalities which are parties to the cooperation agreement relinquish those powers to the responsible municipality. As noted in paragraph 26 of this judgment, in the ‘responsible municipality’ model, such a municipality assumes, on behalf of the other municipalities, a task which each municipality hitherto performed itself.

62 Thus, as a result of that transfer, the responsible municipality is, as it were, assigned the rights and duties of its contractual partners as regards the delivery of services which are the subject matter of a cooperation agreement based on the ‘responsible municipality’ model.

63 It follows that, in this case, it is for the beneficiary of the transfer of powers, in other words the responsible municipality, to meet the needs of the other municipalities which are parties to the healthcare services cooperation agreement and therefore to provide the social and healthcare services at issue in the main proceedings throughout the territory covered by that agreement, although each municipality remains liable for the actual cost of the services used by its own population and the residents for which it is responsible.

64 Consequently, if a transfer of powers, for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985), is not to be deprived of its practical effect, the authority to which the task has been transferred must necessarily be regarded, as regards the award of a service, as the contracting authority for that task, in respect of all the territory of the municipalities which are parties to the agreement that transfers powers.

65 It is necessary, however, to ascertain whether that contracting authority may use an in-house entity to meet not only its own needs but also those of the municipalities which have transferred a power to it.

66 In an in-house award, the contracting authority is deemed to use its own resources. Even if the contractor is legally distinct from the contracting authority, it is almost part of the contracting authority's internal departments, where two conditions are satisfied: first, the contracting authority must exercise over the contractor a control similar to that which it exercises over its own departments; secondly, the entity must carry out the essential part of its activities for the benefit of the contracting authority or authorities which control it (see, to that effect, judgments of 18 November 1999, *Teckal*, C-107/98, EU:C:1999:562, paragraph 50, and of 11 May 2006, *Carbotermo and Consorzio Alisei*, C-340/04, EU:C:2006:308, paragraph 33).

67 Under the Court's settled case-law, the first condition, relating to control by the public authority is deemed to be satisfied where the contracting authority holds, alone or together with other public authorities, all of the share capital in a successful tenderer. That circumstance tends to indicate, generally, that the contracting authority exercises over that company a control similar to that which it exercises over its own departments (judgments of 19 April 2007, *Asemfo*, C-295/05, EU:C:2007:227, paragraph 57, and of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, paragraph 30).

68 Although use of an in-house award has so far been accepted by the Court only in cases where a contracting authority held all or part of the shares in a contractor, it cannot be inferred from this that, in an arrangement such as the 'responsible municipality' model in Finnish law, it is impossible for a contracting authority, in this case the responsible municipality, to opt for an in-house award in order to meet the needs of the contracting authorities with which it has entered into an agreement based on that model for the sole reason that the other municipalities which are parties to that agreement do not hold any shares in the in-house entity. The criterion of holding part of the shares cannot constitute the only means of achieving that objective, since control similar to that exercised by a contracting authority over its own departments may take a form other than a shareholding.

69 In that regard, it should be noted, first, that it follows from the answer to the first question and from paragraphs 40 to 42 of this judgment that, in this case, the City of Pori was transferred powers by the other municipalities not only under the public transport cooperation agreement but also the healthcare services cooperation agreement. Furthermore, paragraphs 60 to 64 of this judgment make clear that, as a result of those transfers of powers, the City of Pori, as the 'responsible municipality', assumed, on behalf of the contracting municipalities, the tasks which they entrusted to it. Moreover, it is common ground that the contractor Porin Linjat is an entity linked to the City of Pori, which controls it. It follows that the City of Pori must necessarily be regarded, as concerns the award of services, as the contracting authority for those tasks.

70 Second, assuming that, following a transfer of powers for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15 EU:C:2016:985), the requirement of control over the in-house entity exercised jointly by the contracting authority benefiting from the transfer of powers and the other contracting authorities which have relinquished the power concerned, it suffices to observe that the 'responsible municipality' model enables contracting municipalities that are parties to an agreement based on that model – despite the fact that they do not hold shares in the in-house entity – to exercise, like the responsible municipality, decisive influence on both the contractor's strategic objectives and important decisions and, therefore, effective, structural and functional control over that entity (see, by analogy, judgments of 13 October 2005, *Parking Brixen*, C-458/03, EU:C:2005:605, paragraph 65; of 11 May 2006, *Carbotermo and Consorzio Alisei*, C-340/04, EU:C:2006:308, paragraph 36; of 29 November 2012, *Econord*, C-182/11 and C-183/11, EU:C:2012:758, paragraph 27; and of 8 May 2014, *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303, paragraph 26).

71 As regards the second condition referred to in paragraph 66 of this judgment, namely that the contractor must carry out the essential part of its activities for the benefit of the contracting authority or authorities which control it, it must be observed that, where an undertaking is controlled by several authorities, that condition may be satisfied if that undertaking carries out the essential part of its activities with those authorities taken as a whole and not merely with one of those authorities in particular (see, to that effect, judgment of 11 May 2006, *Carbotermo and Consorzio Alisei*, C-340/04, EU:C:2006:308, paragraphs 70 and 71). That requirement is designed to ensure that Directive 2004/18 remains applicable in the event that an undertaking controlled by one or more authorities is active in the market, and therefore liable to be in competition with other undertakings. An undertaking is not necessarily deprived of freedom of action merely because the decisions concerning it are controlled by the controlling municipal authority or authorities, if it can still carry out a large part of its economic activities with other operators (judgment of 8 December 2016, *Undis Servizi*, C-553/15, EU:C:2016:935, paragraphs 32 and 33 and the case-law cited).

72 It is therefore necessary to consider whether services awarded to an in-house entity pursuant to two cooperation agreements which each, first, transfer powers to the same responsible municipality, second, relate to different services, third, do not involve the same parties and, fourth, are intended to cover both the needs of the contracting authority itself and those of the other contracting authorities which are parties to those agreements, may be treated as activities carried out for the benefit of the contracting authority.

73 Subject to verification by the national court, the information available to the Court, referred to in paragraphs 10, 24 to 26, 29 to 31 and 33 of this judgment, indicates that the implementation of each of the two cooperation agreements at issue in the main proceedings appears to entail a number of safeguards such as to prevent the in-house entity from becoming market-oriented and gaining a degree of independence that would render tenuous the control exercised by the City of Porin and its contractual partners (see, by analogy, judgment of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, paragraph 36).

74 Since those cooperation agreements contain sufficient safeguards to protect against any harm to competition, it is immaterial that the personal and material scope of those agreements does not coincide.

75 As a result, in order to determine whether the in-house entity carries out the essential part of its activities for the benefit of the contracting authority or authorities controlling it, account must be taken of all the activities which it carries out under the two cooperation agreements at issue in the main proceedings.

76 Thus, in the circumstances of the main proceedings, in calculating the share of Porin Linjat’s turnover derived from operating the services at issue in the main proceedings, the turnover realised by that company at that city’s behest under the healthcare services cooperation agreement and the public transport cooperation agreement with a view to meeting that city’s own needs, must be added to the turnover realised by that company at the behest of the municipalities that are parties to those agreements.

77 In the light of the foregoing considerations, the answer to the second and fourth questions is that Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a cooperation agreement under which the municipalities which are parties to that agreement transfer to one among them responsibility for organising services for the benefit of those municipalities allows that municipality, in awards made subsequent to that transfer, to be regarded as a contracting authority and empowers it to entrust to an in-house entity, without a prior call for competitive tendering, services fulfilling not only its own needs but also those of the other municipalities that are parties to that agreement whereas, without that transfer of powers, those municipalities would have had to fulfil their own needs themselves.

The third question

78 In the light of the answer given to the first question, there is no need to answer the third question.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that an agreement under which the municipalities which are parties to that agreement entrust to one among them responsibility for organising services for the benefit of those municipalities is excluded from the scope of Directive 2004/18 on the ground that it constitutes a transfer of powers for the purposes of Article 4(2) TEU as interpreted in the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985).**

2. **Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a cooperation agreement under which the municipalities which are parties to that agreement transfer to one among them responsibility for organising services for the benefit of those municipalities allows that municipality, in awards made subsequent to that transfer, to be regarded as a contracting authority and empowers it to entrust to an in-house entity, without a prior call for competitive tendering, services fulfilling not only its own needs but also those of other municipalities that are parties to that agreement whereas, without that transfer of powers, those municipalities would have had to fulfil their own needs themselves.**

[Signatures]

---

* Language of the case: Finnish.

Vi håller på att förnya Finlex och har nu publicerat en testversion av den nya tjänsten. Testversionen av nya Finlex är tillgänglig på adressen beta.finlex.fi. Vi tar gärna emot respons på testversionen per e-post på finlex-tuki@om.fi.

Finlex ®

18.12.2020/4376 HFD:2020:146

Offentlig upphandling - Samarbetsavtal mellan kommuner - Modell med ansvarskommun - Överföring av befogenheter - Upphandlingar efter överföringen av befogenheter - Enhet anknuten till den upphandlande enheten (in house-enhet) - Unionens domstols förhandsavgörande

Diarienr: 960/3/17
Givet: 18.12.2020
Liggare: 4376
ECLI: ECLI:FI:KHO:2020:146

Frågan gällde om B stad offentligt borde ha konkurrensutsatt den färdtjänst för personer med funktionsnedsättning som staden köpt av A Ab, som ägdes av staden, när färdtjänsten köpts förutom för B stads, även för C stads och D kommuns behov och organiseringen av färdtjänsterna grundade sig på ett samarbetsavtal mellan dem om organisering och producering av social- och hälsovårdstjänster, enligt vilket ansvaret för organiseringen av tjänsterna hade överförts på B stad som ansvarig kommun. Huvuddelen av A Ab:s omsättning hade influtit från kollektivtrafik som hade organiserats enligt ett samarbetsavtal mellan städerna B, C, E och F samt G kommun.

Marknadsdomstolen hade ansett att det inte hade funnits en grund enligt upphandlingslagen för att avstå från en konkurrensutsättning av upphandlingen. Enligt marknadsdomstolens beslut kunde A Ab inte anses vara en till B stad anknuten enhet (in house-enhet) eftersom A Ab inte bedrev huvuddelen av sin verksamhet tillsammans med B stad som var dess enda aktieägare.

Högsta förvaltningsdomstolen ansåg efter att unionens domstol avgett sitt förhandsavgörande att det på kommunallagens modell om ansvarskommuner baserade samarbetsavtalet mellan B och C stad samt D kommun om organisering och producering av social- och hälsovårdstjänster och samarbetsavtalet om kollektivtrafik mellan städerna B, C, E och F samt G kommun, innebar en överföring av befogenhet enligt artikel 4.2 FEUF, vilken faller utanför tillämpningsområdet för lagen om offentlig upphandling.

Ansvarskommunen B skulle i de upphandlingar som skett efter överföringen av befogenheterna anses som upphandlande enhet både avseende färdtjänsterna för personer med funktionsnedsättning och kollektivtrafiktjänsterna även till den del tjänster hade köpts för de andra kommunernas, som var parter i samarbetsavtalen, behov.

Även om det antas att en överföring av befogenheter skulle anses leda till ett krav på att in house-enheten ska kontrolleras gemensamt av den upphandlande myndighet till vilken befogenhetsöverföringen har skett och av de andra upphandlande myndigheter som har avstått från nämnda befogenhet så räcker det enligt unionens domstol att konstatera att modellen med ”ansvariga kommuner” ger de kommuner som är parter i ett avtal som är baserat på denna modell trots det att de inte äger någon andel i den aktuella in house -enheten möjlighet att, på samma sätt som den ansvariga kommunen, utöva ett bestämmande inflytande i fråga om både de strategiska målen för den enhet som tilldelats kontraktet och enhetens viktiga beslut, och således utöva en effektiv, strukturell och funktionell kontroll över denna enhet.

Vidare hade genomförandet av samarbetsavtalen varit förenat med tillräckliga säkerhetsmekanismer som förhindrade A Ab att bli marknadsinriktad och få ett för stort handlingsutrymme. I bedömningen av vilken del

av A Ab:s omsättning som härrör från den aktuella verksamheten beräknas den omsättning som A Ab genererar till följd av de uppgifter det utför åt B stad med stöd av samarbetsavtalet om social- och hälsovårdstjänster och samarbetsavtalet om kollektivtrafik för att tillgodose B stads egna behov, samt den omsättning som A Ab genererar till följd av de uppgifter som det utför åt övriga kommuner som är parter i nämnda avtal. Upphandlingen uppfyllde kraven på upphandling hos enheter anknutna till den upphandlande enheten enligt 10 § i lagen om offentlig upphandling.

B stad hade således kunnat köpa färdtjänst för personer med funktionsnedsättning av A Ab utan konkurrensutsättning också till den del köpet av tjänsterna utan en överföring av befogenheterna hade hört till C stads och D kommuns egna uppgifter.

Högsta förvaltningsdomstolen upphävde marknadsdomstolen beslut till den del besvär hade anförts över det.

Lagen om offentlig upphandling (348/2007) 1 § 1 mom., 5 § 1 och 4 punkten samt 10 §

Kommunallagen (365/1995) 76 § 1 ja 2 mom. samt 77 § 1 mom.

Kommunallagen (410/2015) 8 §, 49 § 1 och 2 mom., 50 §, 51 § samt 52 § 1 mom.

Kollektivtrafiklagen (869/2009) 4 §, 5 § 2 mom., 12 § 3 mom. 8 punkten (872/2012) och 14 § 1 och 4 mom.

Fördraget om Europeiska unionen art. 4.2

Europeiska unionens domstols dom i ärendet C-328/19 Björneborgs stad (EU:C:2020:483)

Unionens domstols dom C-51/15 Remondis (EU:C:2016:985)

Se HFD 2019:52 (begäran om förhandsavgörande)

Ärendet har avgjorts av justitieråden Irma Telivuo, Leena Äärilä, Vesa-Pekka Nuotio, Anne Nenonen och Tero Leskinen. Föredragande Hannamaria Nurminen.

Finlex ® är en offentlig och gratis internettjänst för rättsligt material som ägs av justitieministeriet.
Innehållet i Finlex produceras och upprätthålls av Edita Lakitieto Ab. Varken justitieministeriet eller Edita svarar för eventuella fel i innehållet i databaserna, för den omedelbara eller medelbara skada som orsakas av att felaktig information används eller för avbrott i användningen av eller andra störningar i Internet.

JUDGMENT OF THE COURT (Fourth Chamber)

14 May 2020 (*)

(Reference for a preliminary ruling – Public procurement – Award of public contracts – Directive 2014/24/EU – Article 1(2) and Article 72 – Directive 2014/25/EU – Article 1(2) and Article 89 – Procedures for review of the award of public supply and public works contracts – Directive 89/665/EEC – Article 2e(2) – Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors – Directive 92/13/EEC – Article 2e(2) – Modifications to a contract concluded following a public procurement procedure – No new public procurement procedure – Fines imposed on the contracting authority and on the successful tenderer – Principle of proportionality)

In Case C-263/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), by judgment of 7 March 2019, received at the Court on 28 March 2019, in the proceedings

T-Systems Magyarország Zrt.,

BKK Budapesti Közlekedési Központ Zrt.

v

Közbeszerzési Hatóság Közbeszerzési Döntőbizottság,

Intervening party:

Közbeszerzési Hatóság Elnöke,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, S. Rodin, D. Šváby, K. Jürimäe and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 5 February 2020,

after considering the observations submitted on behalf of:

– T-Systems Magyarország Zrt., by P. Szilas, Zs. Okányi and V. Kovács, ügyvédek,

– the Közbeszerzési Hatóság Közbeszerzési Döntőbizottság, by I. Hunya, acting as Agent,

– the Közbeszerzési Hatóság Elnöke, by T.A. Cseh, acting as Agent,

– the Hungarian Government, by M.Z. Fehér, G. Koós and M.M. Tátrai, acting as Agents,

– the European Commission, by L. Haasbeek, P. Ondrůšek and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns, in essence, the interpretation of Article 1(2) and Article 72 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), Article 2e(2) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665'), Article 2e(2) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66 ('Directive 92/13'), and Articles 41 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between T-Systems Magyarország Zrt. ('T-Systems') and BKK Budapesti Közlekedési Központ Zrt. ('BKK'), on the one hand, and the Közbeszerzési Hatóság Közbeszerzési Döntőbizottság (Arbitration Panel of the Public Procurement Authority, Hungary, 'the Arbitration Panel) concerning fines imposed on the former on account of the modification, during its performance, of the contract between them without use being made of new public procurement procedures.

Legal context

EU law

Directive 89/665

3 Article 2e of Directive 89/665, which is entitled 'Infringement of this Directive and alternative penalties', provides:

'1. In the case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) which is not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

– the imposition of fines on the contracting authority; or

– the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.'

Directive 92/13

4 The provisions of Article 2e of Directive 92/13, which is entitled 'Infringements of this Directive and alternative penalties', are worded identically to the provisions of Article 2e of Directive 89/665.

Directive 2007/66

5 Recitals 19 to 21 of Directive 2007/66 state:

‘(19) In the case of other infringements of formal requirements, Member States might consider the principle of ineffectiveness to be inappropriate. In those cases Member States should have the flexibility to provide for alternative penalties. Alternative penalties should be limited to the imposition of fines to be paid to a body independent of the contracting authority or entity or to a shortening of the duration of the contract. It is for Member States to determine the details of alternative penalties and the rules of their application.

(20) This Directive should not exclude the application of stricter sanctions in accordance with national law.

(21) The objective to be achieved where Member States lay down the rules which ensure that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed. The consequences resulting from a contract being considered ineffective should be determined by national law. National law may therefore, for example, provide for the retroactive cancellation of all contractual obligations (*ex tunc*) or conversely limit the scope of the cancellation to those obligations which would still have to be performed (*ex nunc*). This should not lead to the absence of forceful penalties if the obligations deriving from a contract have already been fulfilled either entirely or almost entirely. In such cases Member States should provide for alternative penalties as well, taking into account the extent to which a contract remains in force in accordance with national law. Similarly, the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law.’

Directive 2014/24

6 Recitals 10, 29, 107, 109 and 111 of Directive 2014/24 read as follows:

‘(10) The notion of ‘contracting authorities’ and in particular that of ‘bodies governed by public law’ have been examined repeatedly in the case-law of the Court of Justice of the European Union. To clarify that the scope of this Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case-law. …

…

(29) It is appropriate to recall that this Directive applies only to contracting authorities of Member States. …

…

(107) It is necessary to clarify the conditions under which modifications to a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the [Court]. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties’ intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

Modifications to the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure. To this effect and in order to ensure legal certainty, this Directive should provide for *de minimis* thresholds, below which a new procurement procedure is not necessary. Modifications to the contract above those thresholds should be possible without the need to carry out a new procurement procedure to the extent they comply with the relevant conditions laid down in this Directive.

…

(109) Contracting authorities can be faced with external circumstances that they could not foresee when they awarded the contract, in particular when the performance of the contract covers a long period. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure. …

…

(111) Contracting authorities should, in the individual contracts themselves, have the possibility to provide for modifications to a contract by way of review or option clauses, but such clauses should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial contract. …'

7 Article 1(2) of Directive 2014/24 provides:

'Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.'

8 Title II of Directive 2014/24, which is entitled 'Rules on public contracts', includes, inter alia, Chapter IV on 'contract performance', which contains Articles 70 to 73 of that directive. Article 72, which is itself entitled 'Modification of contracts during their term', provides:

'1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

(a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;

(b) for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor:

(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and

(ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority.

However, any increase in price shall not exceed 50% of the value of the original contract. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;

(c) where all of the following conditions are fulfilled:

(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;

(ii) the modification does not alter the overall nature of the contract;

(iii) any increase in price is not higher than 50% of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;

…

(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

Contracting authorities having modified a contract in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the *Official Journal of the European Union*. Such notice shall contain the information set out in Annex V part G and shall be published in accordance with Article 51.

2. Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, contracts may equally be modified without a new procurement procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:

(i) the thresholds set out in Article 4; and

(ii) 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts.

However, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

…

5. A new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a public contract or a framework agreement during its term than those provided for under paragraphs 1 and 2.'

Directive 2014/25/EU

9 Under recitals 12, 113, 115 and 117 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243):

'(12) The notion of 'contracting authorities' and in particular that of 'bodies governed by public law' have been examined repeatedly in the case-law of the [Court]. To clarify that the scope of this Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concept as elaborated by the case-law.

…

(113) It is necessary to clarify the conditions under which modifications to a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the [Court]. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

Modifications to the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure. To this effect and in order to ensure legal certainty, this Directive should provide for *de minimis* thresholds, below which a new procurement procedure is not necessary. Modifications to the contract above those thresholds should be possible without the need to carry out a new

procurement procedure to the extent they comply with the relevant conditions laid down in this Directive.

…

(115) Contracting entities can be faced with external circumstances that they could not foresee when they awarded the contract, in particular when the performance of the contract covers a long period. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure. …

…

(117) Contracting entities should, in the individual contracts themselves, have the possibility to provide for modifications by way of review or option clauses, but such clauses should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial contract. …'

10 Article 1(2) of that directive reads as follows:

'Procurement within the meaning of this Directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 8 to 14.'

11 Title II of Directive 2014/25, which is entitled 'Rules applicable to contracts', includes, inter alia, Chapter IV on 'contract enforcement', which contains Articles 87 to 90 of that directive. Article 89, which is itself entitled 'Modification of contracts during their term', provides:

'1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

(a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or framework agreement;

(b) for additional works, services or supplies by the original contractor, irrespective of their value, that have become necessary and were not included in the initial procurement where a change of contractor:

(i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; and

(ii) would cause significant inconvenience or substantial duplication of costs for the contracting entity;

(c) where all of the following conditions are fulfilled:

(i) the need for modification has been brought about by circumstances which a diligent contracting entity could not foresee;

(ii) the modification does not alter the overall nature of the contract;

…

(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

Contracting entities having modified a contract in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the *Official Journal of the European Union*. Such notice shall contain the information set out in Annex XVI and shall be published in accordance with Article 71.

2. Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, contracts may equally be modified without a new procurement procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:

(i) the thresholds set out in Article 15; and

(ii) 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts.

However, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

3. For the purpose of the calculation of the price referred to in paragraph 2, the updated price shall be the reference value when the contract includes an indexation clause.

4. A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

(b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(c) the modification extends the scope of the contract or framework agreement considerably;

(d) where a new contractor replaces the one to which the contracting entity had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1.

5. A new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a works, supply or service contract or a framework agreement during its term than those provided for under paragraphs 1 and 2.’

Hungarian law

12 Article 2(1) of the közbeszerzésekről szóló 2015. évi CXLIII. törvény (Law No CXLIII on public procurement, ‘the Public Procurement Law’) provides:

‘The contracting authority must ensure the fairness and the transparency of competition in procurement procedures and the public nature of those procedures, with which economic operators must comply.’

13 Article 141 of that law, which determines the different cases in which the parties to a public contract may modify that contract, provides in paragraph 8 thereof:

‘Save in the cases covered by the provisions of this article, a contract may be modified only further to the organisation of a new procurement procedure. If a contract is modified such that a public

procurement procedure is unlawfully precluded, the modification shall be void pursuant to Article 137(1)(a).'

14 Article 153(1) of the Law states:

'The Közbeszerzési Hatóság Elnöke [(Director of the Public Procurement Authority, Hungary)] shall take the initiative to initiate the procedure *ex officio* before the [Arbitration Panel]

…

(c) where it is plausible, in the light of the outcome of the checks conducted by the Public Procurement Authority pursuant to Article 187(2)(j), or even without initiating administrative checks, that the contract has been modified or performed in breach of this Law, in particular where an infringement as referred to in Article 142(2) has been committed;

…'

15 Under Article 165 of the same law:

'…

(2) In its ruling, the [Arbitration Panel]

…

(d) shall find that an infringement has been committed and apply the legal consequences provided for in paragraph 3;

(e) in the cases referred to in paragraph 6, shall find that an infringement exists and impose a fine;

…

(3) If, in its ruling, it finds that an infringement exists, the [Arbitration Panel]

…

(d) may impose a fine on the entity or person in breach as well as on a person or an entity which has a legal relationship with the entity or person responsible for the infringement and which is also responsible for the infringement.

…

(6) The [Arbitration Panel] shall find an infringement exists and impose a fine where

(a) the procurement procedure is unlawfully precluded by virtue of the infringement;

…

(e) the Director of the Public Procurement Authority initiated the procedure [under Article 153] *ex officio* and the Arbitration Panel has found that an infringement had been committed.

…'

16 Article 176 of the Public Procurement Law provides:

'(1) If, in its ruling on the merits of the case, the [Arbitration Panel] finds that an infringement exists as referred to in Article 137(1), it shall initiate judicial proceedings for a declaration that the contract is invalid and that the legal consequences of that illegality apply.

…

(4) If, following the proceedings referred to in paragraph 1, the court finds that a contract is invalid for the reasons defined in Article 137(1), it shall give due effect to the legal consequences of that illegality in accordance with the provisions of the Civil Code and of this Law.

(5) If the court declares, pursuant to Article 137(3), that the contract concluded further to the procurement procedure is valid, it shall be required to impose a fine the amount of which, taking into account all the circumstances of the case in question, shall be a maximum of 15% of the contract value. If, where it gives due effect to the legal consequences of the illegality, the court orders the reimbursement of the equivalent value of the service received without consideration, it shall be required to impose a fine the amount of which, taking into account all the circumstances of the case in question, shall be a maximum of 10% of the contract value.

(6) The proceedings referred to in paragraph 1 shall fall within the exclusive jurisdiction of the administrative and labour court which, in the case of one and the same infringement of the rules on procurement, shall apply the procedure for administrative proceedings provided for in Article 170. …'

17 Article 240(1) of the Polgári Törvénykönyvről szóló 1959. évi IV. törvény (Law No IV of 1959 on the Civil Code) reads as follows:

'Unless otherwise provided for by law, the parties may by common agreement modify the content of the contract or the legal nature of the commitments which they have entered into.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 BKK, a company established by the municipal authorities of Budapest Capital (Hungary), carries out public service tasks in the field of public transport in that city.

19 Following a restricted tendering procedure for the manufacture, transport, installation and operation of ticket vending machines, on 4 September 2013 BKK, as the contracting authority, concluded with T-Systems a contract with a total value of 5 561 690 409 Hungarian forints (HUF) (approximately EUR 18 500 000).

20 The parties modified that contract on several occasions. In particular, by a modification of 13 July 2017, BKK ordered T-Systems to supplement the central control system of the ticket vending machines with a software module enabling tickets to be purchased online.

21 It was subsequently stipulated that the amount of the additional consideration corresponding to the various contractual modifications could not exceed the amount of HUF 2 530 195 870 (approximately EUR 8 200 000).

22 On 29 September 2017, the Director of the Public Procurement Authority initiated, pursuant to Article 153(1)(c) of the Public Procurement Law, a procedure *ex officio* against the contracting parties for breach, inter alia, of Article 141(2) and (4)(b) and (c) of that law and referred the matter to the Arbitration Panel.

23 The Arbitration Panel found that each of the modifications to the contract should have been subject to a new public procurement procedure. It observed that the two contracting parties must comply with the requirements laid down in public procurement law as regards modifications of contracts, which means that, if they have applied those provisions unlawfully, they must each be regarded as having committed an infringement.

24 The Arbitration Panel therefore found that, by virtue of the contractual modifications, the contracting parties had infringed inter alia the provisions of Article 141(8) of the Public Procurement Law. Taking into account in particular the provisions of Article 165(3)(d) of that law, it imposed a fine of HUF 80 000 000 (approximately EUR 258 941) on BKK and a fine of HUF 70 000 000 (approximately EUR 226 573) on T-Systems.

25 The latter brought proceedings before the Fővárosi Törvényszék (Budapest High Court, Hungary) for a finding that there was no infringement on its part and, accordingly, for the reversal of the decision which imposed a fine on it.

26 T-Systems takes the view that the requirement to organise a public procurement procedure is incumbent on the contracting authority and that a successful tenderer cannot be held responsible for a decision taken by that authority as regards its needs in terms of public procurement. Thus, in the present case, by making it bear the consequences of the decisions adopted by BKK, the Arbitration Panel infringed the principles of legal certainty and the rule of law.

27 In T-Systems' opinion, the contracting authority is the sole addressee of the rule of law contained in Article 141(8) of the Public Procurement Law and, on that basis, the contracting authority alone is capable of committing the infringement punishable by that provision.

28 T-Systems is of the view that the requirements of foreseeability and due diligence are incumbent on the contracting authority and that the breach of those requirements is attributable to the contracting authority alone where it takes the initiative to alter a contract.

29 BKK has also contested the decision imposing a fine on it before the referring court, seeking, primarily, a review of that decision, a finding that an infringement does not stem from the modifications to the contract at issue in the main proceedings and the cancellation of that fine.

30 The Arbitration Panel asks the referring court to find that the modifications made to the contract at issue in the main proceedings were invalid, to order, if it deems it necessary, the restoration of the situation existing prior to that contract and to reject the forms of order sought by BKK and T-Systems. It states that, with regard to the latter company, it found there to be an infringement solely because of a breach of the rules of law of which it was the addressee, namely the provisions of Article 141 of the Law on Public Procurement. It observes that the provisions of the Civil Code state that the two parties must act jointly in order for a contract to be modified, which justifies examining the breach of the rules on contract modifications in respect of the two parties.

31 For his part, the Director of the Public Procurement Authority considers that the lawful performance of the public procurement procedure is a matter primarily but not exclusively for the contracting authority. He points out that it is not unusual for the successful tenderer for a public contract to take the initiative to modify a contract. He also refers to the fundamental principle of civil law that the modification of the contract presupposes the common agreement of the parties concerned.

32 The referring court notes that it is for the contracting authority to organise a public procurement procedure.

33 It takes the view that, in order to maintain competition that is as broad as possible, even after the contract has been signed, strict penalties are attached to offending conduct resulting from the legal relationships between the parties. It clarifies that those relationships fall within the field of civil law as a result of the conclusion of the contract.

34 The referring court is of the view that it follows from the provisions of Article 141 of the Public Procurement Law that, although a contract may be modified only by common agreement of the parties, the contracting authority is the only party that can be caught by an infringement of the rules on public procurement because it falls within the scope *ratione personae* of the legislation.

35 It states that the provisions of the national legislation on review procedures do not specify which persons involved in a procurement procedure may be penalised. In addition, in order to determine which individual should be regarded as having infringed a rule, it would be necessary to determine which person is the addressee of the provision that has been infringed. In its view, the penalty laid down, which is punitive in nature and must be imposed on the perpetrator of the offence alone, concerns the person required to conduct a procurement procedure, namely the contracting authority.

36 The referring court refers to several judgments of Hungarian courts from which it is clear that the contracting authority or the economic operator was exempted from payment of the fine imposed, inter

alia because the latter was not responsible for the organisation of the procurement procedure.

37 The referring court states that the fact that the successful tenderer for a contract is an addressee of the provisions of the Public Procurement Law on modifications to contracts cannot mean that that tenderer may be held to bear the same responsibility to that borne by the contracting authority from the perspective of public procurement law.

38 It takes the view that, although the responsibility of the contracting parties may be called into question from the point of view of that law, they must be afforded the opportunity to furnish probative evidence capable of clarifying their involvement in the modification of the contract at issue and in the commission of any offence.

39 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

‘(1) Do Articles 41(1) and 47 of the [Charter], as well as recitals 10, 29, 107, 109 and 111 and Articles 1(2) and 72 of Directive [2014/24] preclude a national rule or a practice in relation to the interpretation and application of that rule which, taking into account the contractual legal relationship between the contracting parties, stipulates that an infringement for an unlawful failure to hold a public tender, allegedly violating the rules concerning the modification of contracts, and a failure to comply with the provisions governing the modification of contracts, is committed not only by the contracting entity, but also by the successful tenderer which concluded the contract with it, on the basis that the unlawful modification of the contracts requires joint action by the parties?

(2) In the event that the first question is answered in the negative, taking into account the provisions of Articles 41(1) and 47 of the [Charter] and recitals 10, 29, 107, 109 and 111 and Articles 1(2) and 72 of Directive [2014/24], do recitals 19, 20 and 21 of Directive [2007/66] and Article 2e(2) of [Directive 89/665] and Article 2e(2) of [Directive 92/13], which articles are identical in terms of content, preclude a national rule or a practice in relation to the interpretation and application of that rule which allows a penalty (fine) – other than a reduction of the duration of the contract – for unlawful failure to hold a public tendering procedure and for failure to comply with the rules on the modification of contracts to be imposed also on the successful tenderer which concluded the contract with the contracting entity?

(3) If the first two questions are answered in the negative, the referring court asks the [Court] to also provide it with guidance as to whether, in order to determine the amount of the penalty (fine), it is sufficient that there is a contractual legal relationship between the parties, without it being necessary to examine the action and the contribution of the parties which led to the modification of the contract?’

The questions referred for a preliminary ruling

Preliminary observations

40 According to the referring court, the resolution of the dispute in the main proceedings turns on whether the Charter and Directives 89/665, 92/13, 2007/66 and 2014/24 preclude national legislation which, in the context of a review procedure initiated *ex officio* by a supervisory authority, allows an offence to be attributed to, and a fine imposed on, not only the contracting authority but also the successful tenderer for a public contract where, when that contract is modified during its performance, the public procurement rules have been unlawfully disapplied.

41 In the first place, it must be observed that the provisions of the Charter are not relevant for the provision of guidance to the referring court in the context of the dispute in the main proceedings.

42 First, it is clear from the wording of Article 41 of the Charter that that article is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union

(judgment of 26 March 2020, *HUNGEOD and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 63 and the case-law cited).

43 Second, with regard to Article 47 of the Charter, which is likewise invoked by the referring court, it must be recalled that, when defining the detailed procedural rules governing the remedies intended to protect the rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities, the Member States must not compromise the effectiveness of the rights conferred on individuals by EU law, in particular, the right to an effective remedy and to a fair hearing enshrined in Article 47 of the Charter (judgment of 26 March 2020, *HUNGEOD and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 64 and the case-law cited).

44 However, it is not apparent from any documents available to the Court that the procedure which resulted in the imposition of a fine, where a public contract was unlawfully modified during its performance, not only on the contracting authority but also on the successful tenderer for the contract would have the effect of compromising the effectiveness of the right to an effective remedy or to a fair hearing.

45 In the second place, it must be recalled that, in accordance with settled case-law, in the context of the cooperation procedure between the national courts and the Court established in Article 267 TFEU, it is for the Court to provide the national court with an answer which will be of use to it and enable it to decide the case before it. With that in mind, it is for the Court, where appropriate, to reformulate the questions submitted to it. In addition, the Court may be prompted to consider rules of EU law to which the national court has not referred in the wording of its questions (judgment of 12 December 1990, *SARPP*, C-241/89, EU:C:1990:459, paragraph 8, and of 8 June 2017, *Medisanus*, C-296/15, EU:C:2017:431, paragraph 55).

46 In the present case, since the contract at issue in the main proceedings related to the manufacture, transport, installation and operation of ticket vending machines, it is Directive 2014/25 that may be applicable and not Directive 2014/24; this is, however, a matter for the referring court to determine.

47 Accordingly, in order to provide an answer which will be of use to that court, account must be taken of recitals 12, 113, 115 and 117 as well as Articles 1(2) and 89 of Directive 2014/25, which corresponds, in that directive, to the recitals and provisions of Directive 2014/24 invoked in the request for a preliminary ruling.

48 In those circumstances, the view must be taken that, by its first and second questions, the referring court asks whether Article 2e(2) of Directive 89/665, Article 2e(2) of Directive 92/13, recitals 19 to 21 of Directive 2007/66, and recitals 12, 113, 115 and 117, Article 1(2) and Article 89 of Directive 2014/25 preclude national legislation which, in the context of a review procedure initiated *ex officio* by a supervisory authority, allows an offence to be attributed to, and a fine imposed on, not only the contracting authority but also the successful tenderer for a public contract where, when that contract is modified during its performance, the rules on public procurement have been unlawfully disapplied, and, by its third question, whether, if the first and second questions are answered in the negative, the amount of the fine penalising the unlawful modification of the public contract concluded between the contracting authority and the successful tenderer for the contract must be determined taking into account merely the existence of the contractual relationship between those two parties or whether consideration must be given to the specific conduct of each of those parties.

The first and second questions

49 By its first and second questions, the referring court asks whether Article 2e(2) of Directive 89/665, Article 2e(2) of Directive 92/13, recitals 19 to 21 of Directive 2007/66, and recitals 12, 113, 115 and 117, Article 1(2) and Article 89 of Directive 2014/25 are to be interpreted as precluding national legislation which, in the context of a review procedure initiated *ex officio* by a supervisory authority, allows an offence to be attributed to, and a fine imposed on, not only the contracting authority but also the successful tenderer for the contract where, when that contract is modified during its performance, the rules on public procurement have been unlawfully disapplied.

50 In the first place, it must be observed that Directives 89/665 and 92/13 do indeed provide merely that the Member States are to ensure that the review procedures are available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement (judgment of 26 March 2020, *HUNGEOD and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 71).

51 The provisions of those directives are intended to protect tenderers against arbitrary behaviour on the part of the contracting authority and thus designed to reinforce the existence, in all Member States, of effective remedies, so as to ensure the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (judgment of 26 March 2020, *HUNGEOD and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 72).

52 It is with that in mind that Article 2e of Directive 89/665 and Article 2e of Directive 92/13, which are worded identically, require that Member States provide, in the case of infringement of certain provisions of those directives, either for the ineffectiveness of the contract or for alternative penalties that may consist in the imposition of fines on the contracting authority.

53 However, although Directives 89/665 and 92/13 require that remedies are available to undertakings having or having had an interest in obtaining a particular contract and who have been or risk being harmed by an alleged infringement, they cannot be regarded as bringing out complete harmonisation and, therefore, as providing for all possible remedies in matters of public procurement (judgment of 26 March 2020, *HUNGEOD and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 73).

54 It follows that Article 2e of Directive 89/665 and Article 2e of Directive 92/13 relate only to actions brought by undertakings having or having had an interest in obtaining a particular contract and who have been or risk being harmed by an alleged infringement.

55 In those circumstances, those articles cannot preclude an appeal procedure from being initiated *ex officio* by a supervisory authority or an infringement relating to the modification of a public contract during its performance in breach of the rules on public procurement from being attributed not only to the contracting authority but also to the successful tenderer for the contract and, therefore, a penalty in the form of a fine from being imposed on both the contracting authority and that tenderer.

56 Moreover, recitals 19 to 21 of Directive 2007/66, which inserted Article 2e into Directives 89/665 and 92/13, in no way invalidate such an interpretation.

57 In the second place, it cannot be inferred either from Article 1(2) of Directive 2014/25, which defines both the scope *ratione materiae* and the scope *ratione personae* of that directive, or from recital 12 of that directive, which, in support of that provision, clarifies inter alia the concept of a ‘contracting authority’, that the successful tenderers for public contracts are not covered by the rules of law laid down by the Directive.

58 First, under Article 1(2) of Directive 2014/25, procurement is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators who, after having put themselves forward as a candidate or submitted a tender, have been chosen by those entities. It follows that the term ‘economic operators’ used in that provision necessarily includes the successful tenderers for public contracts.

59 Second, Article 89 of Directive 2014/25, which is entitled ‘Modification of contracts during their term’, and which is part of Chapter IV on contract performance in Title II of that directive, confirms that the Directive applies to the successful tenderers for contracts.

60 Paragraphs 1 and 2 of that article list the different situations in which a contract may be modified during its performance by the contracting parties, namely the contracting authority and the successful tenderer, without recourse being had to a new procurement procedure, regardless of whether or not that modification gives rise to the publication of a notice in the *Official Journal of the European Union*.

61 Article 89(5) of that directive requires that a new procurement procedure is organised for modifications of the provisions of a public contract other than those provided for in paragraphs 1 and 2 of that article.

It follows that a new procurement procedure must be organised for modifications that are materially different in character from the original contract and are, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, by analogy, judgments of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraph 34, and of 29 April 2010, *Commission* v *Germany*, C-160/08, EU:C:2010:230, paragraph 99).

62 However, Article 89(5) of the Directive does not specify the appropriate conclusions which the national authorities should draw from the fact that a public contract has been modified materially during its performance without recourse being had to a new procurement procedure.

63 In addition, it should be observed that recitals 113, 115 and 117 of Directive 2014/25, which are mentioned by the referring court, provide no clarification in that regard. Furthermore, recital 113 states that material changes to a public contract during its performance demonstrate the contracting parties' intention to renegotiate essential terms or conditions of that contract.

64 It follows from the foregoing that, since neither Article 1(2) nor Article 89 of Directive 2014/25 brings about complete harmonisation, neither of those two provisions can preclude, in the context of a review procedure initiated *ex officio* by a supervisory authority, an infringement consisting in the modification of a public contract during its performance in breach of the rules on public procurement from being attributed not only to the contracting authority but also to the successful tenderer for that contract and, therefore, a penalty in the form of a fine from being imposed on the latter.

65 The fact remains that, where provision is made for it in national legislation, a review procedure initiated *ex officio* by a supervisory authority which culminates in an infringement being attributed to the successful tender for a public contract on account of the unlawful modification of that contract during its performance and, therefore, in a fine being imposed on that tenderer must be consistent with EU law in so far as such a contract itself falls within the scope *ratione materiae* of the directives on public procurement, either *ab initio* or following its unlawful modification.

66 Therefore, such an *ex officio* review procedure must comply with EU law, including the general principles of that law.

67 Having regard to the foregoing, the first and second questions must be answered to the effect that Article 2e(2) of Directive 89/665, Article 2e(2) of Directive 92/13, recitals 19 to 21 of Directive 2007/66, and recitals 12, 113, 115 and 117, Article 1(2) and Article 89 of Directive 2014/25 are to be interpreted as not precluding national legislation which, in the context of a review procedure initiated *ex officio* by a supervisory authority, allows an infringement to be attributed to, and a fine imposed on, not only the contracting authority but also the successful tenderer for the contract where, when a public contract is modified during its performance, the rules on public procurement have been unlawfully disapplied. However, where the national legislation provides for a review procedure, that procedure must comply with EU law, including the general principles of that law, in so far as the public contract concerned itself falls within the scope *ratione materiae* of the directives on public procurement, either *ab initio* or following its unlawful modification.

The third question

68 By its third question, the referring court asks whether, if the first and second questions are answered in the negative, the amount of the fine penalising the unlawful modification of a public contract concluded between the contracting authority and the successful tenderer for the contract must be determined taking into merely the existence of a contractual relationship between those parties, pursuant to which they should act jointly in order to modify the public contract between them, or whether consideration must be given to the specific conduct of each of those parties.

69 As is clear from paragraph 65 of this judgment, where such provision is made in national legislation, a review procedure initiated *ex officio* by a supervisory authority which culminates in an infringement being attributed to the successful tender for a public contract on account of the unlawful modification of that contract during its performance and, therefore, in a fine being imposed on that tenderer must be consistent with EU law in so far as the contract at issue itself falls within the scope *ratione materiae* of the directives on public procurement, either *ab initio* or following its unlawful modification.

70 In the light of the scope of the third question, it is therefore necessary to determine the requirements arising from the principle of proportionality which must be met where, in the context of an *ex officio* review procedure, the amount of the fine imposed on the successful tenderer for the public contract must be determined.

71 It must be recalled that, in accordance with the principle of proportionality, which constitutes a general principle of EU law, the rules laid down by the Member States or contracting authorities in the application of the directives on public procurement must not go beyond what is necessary to achieve the intended objectives of those directives (see, to that effect, judgments of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 32, and of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 45).

72 In the present case, although it is for the referring court to assess whether the amount of the fine imposed on T-Systems is proportionate to the objectives of the Public Procurement Law, the supervisory authority or the referring court cannot determine such an amount simply taking into consideration the mere fact that, under the contractual relationship between them, the parties must act jointly in order to modify the public contract between them. That amount must be determined having regard to the conduct or the actions of the parties to the public contract concerned over the period during which they contemplated modifying that contract.

73 With regard more specifically to the successful tenderer, account may be taken inter alia of the fact that it took the initiative to propose the modification of the contract or whether it suggested, or even demanded, that the contracting authority refrain from organising a public procurement procedure to meet the needs necessitating the modification of that contract.

74 However, the amount of the fine imposed on the successful tenderer cannot be dependent on the fact that use was not made of a public procurement procedure to modify the contract, since the decision to adopt such a procedure falls within the prerogatives of the contracting authority alone.

75 Accordingly, the third question must be answered to the effect that the amount of the fine penalising the unlawful modification of a public contract concluded between a contracting authority and a successful tenderer must be determined taking into consideration the specific conduct of each of those parties.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action brought before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 2e(2) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contract, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, Article 2e(2) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66, recitals 19 to 21 of Directive 2007/66, and recitals 12, 113, 115 and 117, Article 1(2) and Article 89 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC are to be interpreted as not precluding national legislation which, in the context of a review procedure initiated *ex officio* by a supervisory authority, allows an infringement to be attributed to, and a fine imposed on, not only the contracting authority but also the successful tenderer for the contract where, when a public contract is modified during its performance, the rules on public procurement have been**

unlawfully disapplied. However, where the national legislation provides for a review procedure, that procedure must comply with EU law, including the general principles of that law, in so far as the public contract concerned itself falls within the scope *ratione materiae* of the directives on public procurement, either *ab initio* or following its unlawful modification.

2. **The amount of the fine penalising the unlawful modification of a public contract concluded between a contracting authority and a successful tenderer must be determined taking into consideration the specific conduct of each of those parties.**

[Signatures]

---

* Language of the case: Hungarian.

Machine Translated by Google

The Manor

as a court of second instance

intermediate

í t is lete

Case number: Kf.I.40.725/2021/18.

Members of the council: Dr. Mudráné dr. Erzsébet Láng, president of the council Dr. Zsoltné Banu, dr. Judit Szabó, reporting judge

Judge Dr. Péter Hajnal

The first-ranking plaintiff is: Plaintiff1.
Title2

Representative of the first-tier plaintiff: Plaintiff's representative
Title7

The 2nd-tier plaintiff: Plaintiff2 Title4

Representative of the 2nd-tier plaintiff: Dr. Szilvia Timár, barrister The 3rd-tier plaintiff:

Public Procurement Authority Public Procurement Arbitration Committee
Title1

Representative of the third-ranking plaintiff: Dr. Zoltán Fáry, barrister The first-ranking

defendant: Public Procurement Authority Public Procurement Arbitration Committee Title1

Representative of the first-rank defendant: Dr. Zoltán Fáry, barrister The second-

rank defendant: Plaintiff2 Title4

Representative of the 2nd-rank defendant: Dr. Szilvia Timár, barrister. Representative of

the 3rd-rank defendant: Plaintiff1.
Title2

Representative of the third-tier defendant: Plaintiff's representative
Title7

The defendant intervener: Defendant intervener1
Title1

Representative of the defendant intervener: Dr. Tamás Attila Cseh, barrister

Subject of the lawsuit: joint lawsuit for the review of the decision in a public procurement case - No. D.561/17. 2017 - and the declaration of invalidity of a public administrative contract

The party filing the appeal: the 1st defendant The party

filing the cross-appeal: the 1st plaintiff

Machine Translated by Google

The decision challenged in the appeal: judgment No. 103.K.702.699/2021/5 of the Budapest Metropolitan Court of July 7, 2021

Disposing part

The Curia does not affect the provision of the judgment of the first instance court not affected by the appeal, changes the part affected by the appeal and rejects the claim of the first-tier plaintiff with regard to the legal basis for establishing a violation under the fourth element of the ex officio initiative, omits the provision regarding the reduction of the amount of the fine and orders the first-tier court to rehear the case and issue a new decision with regard to the examination of the amount of the fine imposed on the first-tier plaintiff for the violation under the fourth element of the ex officio initiative.

The Curia disregards the provision of the first instance court's judgment regarding the partial claim fee of HUF 1,000,000 out of the HUF 2,500,000 imposed on the first-tier plaintiff, and the partial claim fee of HUF 500,000 imposed on the state due to the personal exemption from the duty of the first-tier defendant.

The fee for the cross-appeal is 8,000 (eight thousand) forints, which is borne by the first-rank plaintiff.

The parties shall bear the legal costs incurred in the second instance proceedings.

There is no further legal remedy against the interim judgment.

In the meantime

The facts and background of the case

[1] The 2nd-rank plaintiff, as the contracting authority, initiated a negotiated public procurement procedure, starting with the publication of a notice with a call for participation on 29 January 2013, for the production, installation and operation of ticket vending machines (TVM), the winning bidder of which was the 1st-rank plaintiff. The total value of the contract concluded with the 1st-rank plaintiff, as the winning bidder, on 4 September 2013 was HUF 5,561,690,409. The Main Project Contract concluded was annexed to a business contract, an Operating Contract, a technical specification and the winning bidder's offer.

Machine Translated by Google

[2] At the time of the conclusion of the Main Project Contract, the procedure for the procurement of the Project1 System (hereinafter referred to as the AFC Project) (Project1) was in progress before the Second-tier Plaintiff. The Second-tier Plaintiff had not yet concluded a separate contract for the implementation and operation of the AFC Project when the Main Project Contract entered into force, but within the framework of the public procurement of the subject matter related to the Main Project Contract
It was stated in Section III.5.2.3 of the Contract that "the contractor will participate in the performance of the AFC project contract by developing and modifying the TVM central control system, which development and modification are necessary for the TVM system to cooperate with the AFC system."

[3] The parties amended the concluded contract several times: on July 29, 2014 (contract amendment no. 1), on September 10, 2015 (contract amendment no. 2), on December 22, 2016 (Cost Compensation Agreement), on July 13, 2017 (contract amendment no. 3), and on September 15, 2017 (contract amendment no. 4).

[4] With Contract Amendment No. 3, the Main Project Contract was amended in such a way that the Second-tier Plaintiff ordered the First-tier Plaintiff to supplement the TVM central control system with a software module enabling web sales. According to Section III.7.4 of Contract Amendment No. 3, the deadline for launching (putting into operation) the service access to the Web Sales Software is: 10 July 2017, while the second paragraph of the same section refers back to the previously specified deadline of 13 July 2017. Annex 1 to Contract Amendment No. 3 contains the public procurement law justification for the amendment, according to which the procurement of additional goods (Web Sales Software) and services (Web Sales Software operation) from the original contracting party became necessary. The purchase of additional goods and related services is justified by the combined effect of two reasons: on the one hand, the number of abuses experienced during the use of the TVM system can be reduced by introducing a more efficient ticket verification mechanism, the service for providing verification devices is technically closely related and forms a unit with the provision and operation of the Web sales software; on the other hand, Hungary has been awarded the right to organize the 2017 FINA Swimming, Artistic Swimming, Open Water and Water Polo World Championships, during which the 2nd-tier claimant, as the transport organizer of the name1, is obliged to ensure that predominantly foreign persons (athletes, companions and tourists) can use public transport services during the FINA World Championships in such a way that they can purchase the prize products as widely as possible, through all of the internationally customary and established sales channels. The TVM system did not previously have a Web sales interface and

option, this function is necessary to be introduced in order to ensure the smooth sale of prize products during the FINA World Championships. They also referred to an additional operational task, since the Web sales software is a software module of the existing TVM central control system, and Web sales is a new sales channel of the TVM system, and its operation is one of the operational tasks. They recorded that at the time of entry into force of Contract Amendment No. 3, only the First-tier Plaintiff had the necessary technical conditions (the source code of the TVM central system), which is the software of the TVM central system control system, and the Web

Machine Translated by Google

necessary for the integration of the sales software. According to the Business Agreement, the 2nd-order plaintiff will not use the source codes during the Operation Period, nor will it transfer them to third parties, therefore, from a technical and legal point of view, only the 1st-order plaintiff is in a position to carry out the integration of the TVM central system software and the Web sales software during the Operation Period of the TVM system.
It was established that a change in the identity of the contracting party would result in a significant disadvantage for the second-tier plaintiff or a multiplication of costs. The increase in the consideration does not exceed 50% of the value of the original contract. According to the notice of contract amendment No. 3, the consideration increased by HUF 659,400,000.

[5] Based on the findings of the audit ordered and conducted pursuant to Government Decree 308/2015. (X. 27.) on the audit of the performance and modification of contracts concluded as a result of the public procurement procedure by the Public Procurement Authority, the defendant intervener initiated legal remedy proceedings ex officio against the contracting parties on 29 September 2017 pursuant to Section 153. (1) c) of the Public Procurement Act, alleging a violation of the fundamental provisions set out in the first sentence of Section 128. (2), Section 30. (4) and Section 2. (3) of the Public Procurement Act, as well as the provisions of Section 153. (1) c) of the Public Procurement Act. For violation of Section 4(1), Section 141(2), and Section (4)(b) and (c).
The supplemented ex officio initiative consisted of six elements. According to the fourth element of the ex officio initiative, contract amendment No. 3 violates the rules of the Civil Code on contract amendment, there was no legal possibility of contract amendment, and Section 141(4) (b) of the Civil Code was violated, since there is no close technical interdependence between the TVM central control system and the web sales channel that would make the use of the source code and technology of the TVM central control system, the copyrights of which are not owned by the second-tier plaintiff, indispensable. The technical documentation indicated in the initiative also supports the fact that the web sales channel was not planned to be developed as an integrated part of the TVM central control system. The European Union financing of the procurement made it necessary for the second-tier plaintiff to acquire the copyright, so the first-tier plaintiff does not have the exclusive right to performance.

[6] The first-rank defendant concluded the legal remedy proceedings initiated on 2 October 2017 on the merits with decision No. D.561/17/2017 of 15 December 2017, in which it established that the second-rank plaintiff violated the provisions of Section 30 (4) of the 2011 Civil Procedure Code (second element of ex officio initiative), and that the second-rank plaintiff and the first-rank plaintiff violated the provisions of Section 141 (8) of the 2011 Civil Procedure Code (fourth, fifth and sixth elements of ex officio initiative).
As a legal consequence, it imposed a fine of 80 million forints on the second-tier plaintiff and 70 million forints on the first-tier plaintiff. It found that there was no violation of the first and third elements of the ex officio initiative.

[7] The first-tier defendant stated in the justification of the decision that the provisions of the Civil Procedure Code shall apply to the legal remedy procedure, and in a substantive sense, the provisions of the Civil Procedure Code of 2011 shall apply to the first and second elements of the ex officio initiative, and the provisions of the Civil Procedure Code shall apply to the remaining elements. In the context of the examination of the procedural objections, it stated, among other things, that the

Machine Translated by Google

The ex officio initiator's motion for a decision is not binding on him, in the event that the infringement indicated in the initiative may necessarily be committed by more than one person, he is entitled to proceed and make a decision against all perpetrators of the infringement. He pointed out that the statutory addressee of the provisions on contract amendment contained in Section 141 of the Civil Procedure Code is the "parties", therefore he conducted the investigation against both parties - actively participating in the contract amendment. As a reason for this, he explained that with regard to those acts where the joint conduct of the parties is necessary for their creation, a violation by only one party is conceptually excluded, since the contract amendments would not have been created solely by the conduct of the first-order plaintiff or solely by the conduct of the second-order plaintiff.

[8] The first-tier defendant examined all elements of the ex officio initiative in substance and set out its findings regarding the fourth element of the ex officio initiative in paragraphs 53-61 of its decision. In doing so, it pointed out that the European Union rules allow for the amendment of a public procurement contract in a more flexible manner than the previous regulations. It compared the provisions of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (hereinafter: the Directive) and the provisions of the Public Procurement Act on contract amendment.
It stated that the scope of contract modification cases of the Public Procurement Act can be basically classified into three groups: the “de minimis” modification, the three categories of cases defined in Section 142(4) of the Public Procurement Act, and the group of non-substantial modifications defined in paragraph (6). It pointed out that Article 72(1) of the Directive provides that the contract may be modified in accordance with the Directive without a new procurement procedure in any of the cases specified therein, while Article 72(5) provides that a modification during the term of the contract requires a new procurement procedure in the event of a modification other than that specified in paragraphs (1) and (2). Based on the joint interpretation of the relevant provisions of the Directive, it highlighted that in any of the cases specified in the Directive, if any of them exist, the contracting parties are free to modify the public procurement contract without conducting a new procurement procedure. For the contract modification to be lawful, it is sufficient if any of the cases specified in the Directive are met. It was noted that the subject of the 3rd contract amendment was the creation and operation of the premium product sales channel, which was a new procurement requirement of the 2nd-order plaintiff compared to the subject of the Main Project Contract. The new web sales channel and the TVM sales channel under the Main Project Contract both enable the sale of the 2nd-order plaintiff's premium products. However, it does not follow from the necessary connection of the sales channels with the 2nd-order plaintiff's background systems that it is possible to develop the individual sales channels exclusively by integrating them into each other's systems. It emphasized that the rules of the Public Procurement Act must be interpreted in light of the basic principles and the objectives of the Public Procurement Act, and that the fundamental objective of the Public Procurement Act is to create conditions for fair competition, and that the procurement requirement cannot be established within the framework of the contractual relationship in such a way as to artificially and unjustifiably exclude the possibility of competition. It pointed out that the 2nd-order plaintiff's The first-tier plaintiff himself stated that he had implemented a new procurement requirement by developing and operating the web sales system. In the justification for the decision, he emphasized that the contracting parties themselves did not dispute that the web sales system could have been developed independently of the TVM system. It was the contracting authority's decision that it would be developed as a module of the TVM system, but the first-tier defendant, based on the statements and documents at its disposal, did not consider it justified that the web sales channel could have been developed exclusively in the TVM central system, and thus the second-tier plaintiff made a contracting authority's decision by which he himself excluded competition. He stated that Section 141 (4) of the Civil Code

Machine Translated by Google

Based on the comparison of the conditions under paragraph b) of the Act and the facts, it could be established that it does not establish the legality of the contract amendment, since the web sales system could not be obtained exclusively from the original contracting party, and although the advantages referred to by the parties exist, they are not proportionate to the advantages of procurement ensuring competition and do not in themselves provide grounds for the applicability of the statutory conditions. It pointed out that the legal basis under paragraph c) of Section 98 (2) of the Act does not establish the applicability of the contract amendment either, if the condition excluding competition results from the intentional decision of the contracting authority. In paragraph 58 of the decision, it was further noted that the reasons referred to by the parties in contract amendment no. 3 (the ticket verification mechanism, the FINA World Championships, the copyright obligation) do not establish the applicability of the Act. The conditions required for a lawful contract amendment under Section 141 of the Act, the advantages referred to by the parties (creating integration between TVM and web sales, use of TVM hardware park, implementation costs, etc.) do exist, but they are not proportionate to the advantages provided by the procedure ensuring competition and do not in themselves justify the applicability of the statutory conditions. The other arguments referred to in the appeal proceedings did not justify the fact that the web sales channel had to be acquired from the first-tier plaintiff in any case. It found that the amendment condition indicated by the parties does not establish the legality of the contract amendment, and the parties did not refer to the fulfilment of any other amendment condition, which it assessed as the fact that the parties themselves did not claim the existence of any other further amendment conditions. Based on the above, it found that the public procurement procedure was unlawfully omitted, and thus, with contract amendment no. 3, the contracting parties violated the provisions of the Civil Code. Section 141(8).

[9] Regarding the first-tier plaintiff's claim that he has no insight into the contracting authority's public procurement obligations and the relevant data, and therefore is not liable, he emphasized that the addressee of the norm regarding the amendment of the contract is the parties concluding the contract, so they can only commit a violation of its provisions jointly.

[10] The first-tier defendant established the infringement in relation to the second, fourth, fifth and sixth elements of the ex officio initiative on the basis of Section 165(2)(d) of the Code of Civil Procedure, and imposed a fine on the basis of Section 165(3)(d) of the Code of Civil Procedure, taking into account Section 165(6)(e) of the Code of Civil Procedure. The amount of the fine under Section 165(3)(d) of the Code of Civil Procedure was determined taking into account the provisions of Section 165(4) of the Code of Civil Procedure, while the amount of the fine under Section 165(6)(7) of the Code of Civil Procedure was determined taking into account the provisions of Section 165(11) of the Code of Civil Procedure. It stated that, in view of the infringement established under the fourth, fifth and sixth elements of the ex officio initiative, it had to impose a fine as an additional legal consequence. When determining the amount of this fine, it acted on the basis of the provisions of Section 165 (7) and (11) of the Civil Procedure Code, and noted the circumstances assessed when determining the amount of the fine, such as the estimated value of the public procurement, the value of the Main Project Contract without amendments (5,561,690,409 HUF), the value of the part affected by the established infringement (3,589,454,369 HUF), and the total value of the Cost Compensation Agreement, the 3rd and 4th contract amendments (3,314,633,969 HUF), and that an infringement had been established against the 2nd-rank plaintiff several times in the past two years, while no such infringement had been established against the 1st-rank plaintiff previously. He described the violation as extremely serious. He highlighted that the main subject of contract amendment No. 3

Machine Translated by Google

When determining the contracting authority, the conditions of the procurement requirement were designed so that it could be obtained exclusively from the first-tier plaintiff, and this was assessed in the context of the gravity of the infringement. It included in its assessment the fact that the contracting parties themselves stated in the Cost Compensation Agreement that both contracting parties were responsible for the situation created by the clogged “uncloggable TVMs”. It assessed the infringement against the first-tier plaintiff that it was not repairable. It included in its assessment the fact that the clogged cases were first classified as vandalism, and later a new contractual provision was created for them, despite the fact that they were a case specified as a technical requirement in the technical specifications of the second-tier plaintiff. It also took into account that the contract was partly financed from a grant, so a penalty for repayment may be associated with the infringement. It specifically addressed the penalty related to the second request element. It stated that the different fines were justified by the fact of the further infringement against the second-tier claimant, while it assessed the contribution and responsibility of the first-tier and second-tier claimants as being the same with regard to the infringements established on the basis of the fourth, fifth and sixth elements of the claim.

The applicants' claims, the defendants' counterclaims and the defendant's statement in intervention

[11] The first-rank plaintiff brought his action for the review of the part of the first-rank defendant’s decision covering the fourth, fifth and sixth elements of the ex officio initiative. In his action, he requested, on the basis of Section 339(2)(q) of Act III of 1952 on the Code of Civil Procedure (hereinafter: Pp.) and Section 172(3) of the Code of Civil Procedure, the amendment of the decision and the declaration of the absence of a violation of law in his case, and, in the alternative, the Pp. Pursuant to Section 339 (1), the provisions of the decision relating to him are repealed, thirdly, the decision is amended in this respect and the fine is waived, fourthly, the decision is repealed and the first-tier defendant is ordered to initiate new proceedings, stating that there is no legal possibility to impose a fine on the first-tier plaintiff, and finally, the amount of the fine imposed on him is reduced by amending the decision. He also requested payment of his costs incurred in the lawsuit.

[12] The first-tier plaintiff stated in his claim as a fact which element of the ex officio initiative he was named as liable or possibly liable, and further stated that the ex officio initiative of the defendant intervener did not request a finding of violation of Section 141. (8) of the Civil Procedure Code against the contracting parties. In view of these, he raised procedural objections (lack of extension of the investigation, lack of proper notification, exceeding the administrative deadline), in connection with which, in addition to the provisions of the Civil Procedure Code, he also referred to the violation of the Fundamental Law and to the Constitutional Court's decision 5/2017. (III. 10.) AB, as well as to a decision of the Curia. In terms of the elements of the application concerning him, he explained that, contrary to his previous practice, the first-tier defendant treats the liability of the contracting authority and the tenderer in relation to the violation of public procurement rules as practically the same, which seriously violates the principles of legal certainty and the rule of law, because thus the winning tenderer is obliged to bear the public procurement legal consequences of the contracting authority's decisions without being the addressee of the legal norms binding for the conduct of the public procurement procedure. According to his position, the satisfaction of the procurement requirement in accordance with public procurement legislation is solely the obligation and responsibility of the purchasing contracting authority, and the contracting authority is in a position to decide on the conduct of the public procurement pr

Machine Translated by Google

In view of the above. The addressee of the unlawful contract modification (which means the unlawful omission of the public procurement) under Section 141 (8) of the Public Procurement Act is the contracting authority, so the contracting authority is able to commit this. He referred to Section 4 of the Public Procurement Act, the public procurement procedure is obliged to be conducted by the organisations specified as the contracting authority. In his claim, he explained separately for each element of the application, on what grounds the decision is unfounded in his opinion.

[13] The first-tier plaintiff referred to the case law regarding the fourth element of the ex officio initiative, according to which the fact that another economic operator could have performed does not in itself mean that it would have met the contracting authority's requirements in every respect. He pointed out that there may be cases where, despite this, the contracting authority may lawfully decide to amend the contract, avoiding the conduct of a new public procurement procedure. He emphatically disputed that he was the addressee of the contract amendment rules of the Public Procurement Act, and in particular not the addressee of Section 141(8) of the Public Procurement Act.

He submitted that if a violation of law pursuant to Section 141(8) of the Civil Procedure Code could nevertheless be established against him, then the first-rank defendant should have demonstrated how he committed the violation alleged against him and what his unlawful conduct was. According to his position, even if the first-rank defendant could have demonstrated this, it is certain that it cannot be of the same gravity as the liability of the second-rank plaintiff, and this will affect the sanction.

[14] The additional arguments in the first-tier plaintiff's claim covered the Cost Compensation Agreement (the fifth element of the ex officio initiative) and Contract Amendment No. 4 (the sixth element of the ex officio initiative).

[15] Regarding the fine, the first-ranking plaintiff emphasized that it was conceptually impossible to establish the violations contained in the decision against him, and therefore the fine imposed on him was unlawful from the outset. He also specifically highlighted the unreasonableness of the assessment by the fact that the first-ranking defendant assessed the proportion of the contribution and liability of the first-ranking plaintiff and the second-ranking plaintiff equally. He also considered it concerning that the first-ranking defendant had imposed unreasonable requirements on him by expecting a comprehensive legality examination from the bidders during the contract amendment.

[16] In its action, the second-ranking plaintiff primarily requested the amendment of the first-ranking defendant's decision and the determination of the absence of a violation of law with regard to the fourth, fifth and sixth elements of the ex officio initiative, the waiver of the fine, while in the case of the decision related to the second element, the waiver of the imposition of a fine was requested. Secondarily, it requested the annulment of the decision - with the exception of the second element - on the grounds that the reduction of the amount of the fine was justified due to the absence of a violation, and it also requested that the first-ranking defendant be ordered to conduct new proceedings. Thirdly, it requested the amendment of the decision in such a way that the court refrains from imposing a fine on it. Fourthly, it requested the amendment of the decision and the waiver of the amount of the fine. It also requested the determination of its legal costs. In its action, it alleged that the Civil Code was violated. He named Section 2, Section 4 (1), Section 141 (4) points b) and c) and (8), Section 158 (1) and Section 164 (3) and (5). The initiative is the fourth

Machine Translated by Google

In the subject of the element of the Act, it pointed out that the Act only intends to sanction conduct that unjustifiably excludes competition, and that it only has to substantiate the legal title of the contract amendment, but is not obliged to justify why the content of the procurement request was developed in the manner set out in the amendment. In view of the legal basis under Section 141 (4) b) of the Act, it continues to consider the legal title to be well-founded.

[17] In his partially clarified claim, the third-tier plaintiff requested a declaration of invalidity of the unlawful contract amendments based on the arguments he had put forward.

[18] The first-rank defendant requested the dismissal of the claims in its counterclaim. In connection with the first-rank plaintiff's claim, it emphasized that the infringement was established against it solely for the violation of a legal norm to which it was the addressee, namely the addressees of the provisions on contract amendment set out in Section 141 of the Civil Code are the parties concluding the contract. It submitted that contracts concluded on the basis of a public procurement procedure are subject to civil law regulations, with the exceptions set out in the Civil Code, and based on Section 240 (1) of Act IV of 1959 on the Civil Code (hereinafter: the Civil Code) and Section 141 (1) of the Civil Code, the addressees of the civil and public procurement regulations are clearly the parties, i.e. in this case the first-rank and second-rank plaintiffs. The conditions for the amendment were not met, so the contract amendment was unlawful, these legal acts can only be violated jointly, the 2nd-tier plaintiff could not amend the contract on its own, as this requires the mutual agreement of the parties. In connection with the fourth element of the ex officio initiative, it referred to the provisions of paragraphs 56 and 58 of its decision, stating that the 2nd-tier plaintiff wanted to implement the web sales channel within the framework of the AFC Project before concluding the TVM contract, so the circumstance in itself that the procurement requirement for the procurement of the web sales channel arose earlier than the conclusion of the contract for the implementation of the TVM sales channel excludes the statutory condition for the admissibility of the amendment case that the procurement is required from the original contracting party. It explained its arguments regarding the fifth and sixth elements of initiative in connection with the claim of the 1st-tier plaintiff, and also disputed the 1st-tier plaintiff's submissions regarding the contractual value. Against the argument of the claim regarding the fine, it consistently emphasized that the infringement was committed jointly by the contracting parties, and that the consequences of the contractual amendments reached by mutual agreement are borne jointly and equally by the parties. According to its position, the first-rank plaintiff was unable to identify a group of data that was relevant and that it did not present in this context. The first-rank defendant referred to the fact that in paragraph 73 of its decision it took into account that no infringement had been established against the first-rank plaintiff in the past two years, and furthermore, it set out the aspects taken into account in the imposition of the fine in the decision.

[19] In connection with the claim of the plaintiff of the second rank, the first-rank defendant emphasized that in paragraph 73 of the decision he gave detailed reasons for why he decided to impose the fine and what aspects he took into particular account when determining the amount of the fine. In connection with the contract amendment no. 3, he pointed out that the plaintiff of the second rank claims against the documents that he considered it unlawful due to the lack of the condition under Section 141(4)(b) of the Civil Code. He emphasized that the decision clearly states that an infringement was found because one of the

Machine Translated by Google

There was no modification condition either. In this regard, it referred to points 53 and 59 of its decision, examining the modification conditions separately, including the condition under paragraph (4) b), the absence of which it provided detailed justification for in point 58 of the decision.
In addition, he repeated the arguments highlighted in connection with the claim of the first-tier plaintiff. He denied that it could be read from his decision that he had acknowledged the existence of an economic reason. He then also presented his objections to the second-tier plaintiff's further claims - such as the Cost Compensation Agreement and Contract Amendment No. 4.

[20] The respondent intervener agreed with the content of the first respondent's counter-application.
He referred to the fact that the contracting authority is the primary, but not the only, obliged party to ensure the proper conduct of the public procurement procedure. He pointed out that the judgment of the Court of Justice of the European Union clearly supports his position by stating that national legislation that allows both the establishment of an infringement and the imposition of a fine against the successful tenderer in addition to the contracting authority is not contrary to EU law. In relation to contract amendment No. 3, he highlighted that the possibility of changing the original contractual partner was not ruled out a priori due to the objective technical and legal nature and specificities of the procurement claim of the second-tier claimant, but due to the specific method chosen by the second-tier claimant to satisfy the procurement claim. In connection with the claim for a reduction of the amount of the fine, referring to Section 121(1)(e) of the Pp., he failed to specify the amount of the reduction in terms of amount.

He then presented his arguments regarding the claim of the second-tier plaintiff.

[21] In the joint action for the declaration of invalidity of the contract amendments resulting from the unlawful amendment, the second and third defendants requested in their counterclaim that the claim of the third plaintiff be dismissed and that costs be awarded. In their claims, they maintained their arguments regarding the legality of the third and fourth contract amendments and the Cost Compensation Agreement concluded between them, as a result of which, in their opinion, the claim of the third plaintiff for the declaration of invalidity of the contract amendments is unfounded.

Judgment of the Court of Justice of the European Union C-263/19

[22] The Budapest Metropolitan Court submitted a request for a preliminary ruling under Article 267 TFEU on the question of the determination of the liability of the tenderer for an unlawful modification of the contract. In its judgment No. C-263/19 of 14 May 2020 (hereinafter: the CJEU judgment), the Court of Justice of the European Union (hereinafter: the CJEU judgment) ruled that Article 2e of Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply contracts and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, (2) of Directive 2007/66, recitals (19) to (21) of Directive 2007/66, and the provisions on water, energy, transport and postal services

Machine Translated by Google

Recitals (12), (113), (115) and (117), Article 1(2) and Article 89 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by contracting entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [correctly: coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC] must be interpreted as not precluding national legislation which, in the context of a review procedure initiated by the supervisory authority of its own motion, allows not only the contracting entity but also the successful tenderer of a public contract to be held liable for the infringement and to be fined in the event that, when a public contract is being modified in the course of performance, the application of the rules on the award of public contracts has been unlawfully disregarded. However, where national legislation provides for such a possibility, the review procedure must respect Union law, including its fundamental principles, since the public contract concerned itself falls within the material scope of the public procurement directives, both in its original form and after its unlawful modification. The amount of the fine sanctioning the unlawful modification of a public contract concluded between the contracting authority and the successful tenderer must be determined taking into account the conduct of each of the parties.

[23] The CJEU judgment also stated that the relevant articles of the directive cannot prevent a supervisory authority from initiating a review procedure of its own motion, nor from the infringement resulting from the modification of a public contract in progress in breach of the rules on the award of public contracts being attributable not only to the contracting authority but also to the successful tenderer and, consequently, from the imposition of a penalty in the form of a fine against both the contracting authority and the successful tenderer. However, where national legislation provides for a review procedure initiated by the supervisory authority of its own motion, which results in the liability of the successful tenderer for an infringement consisting in an unlawful amendment of a public contract in progress and, consequently, in the imposition of a fine on that tenderer, that procedure must be compatible with EU law, since such a contract itself, both in its original form and after its unlawful amendment, falls within the scope of the public procurement directives. Although, in the present case, it is for the referring court to assess whether the amount of the fine imposed on the first-tier applicant is proportionate to the objectives of the Law on public procurement, the supervisory authority or the referring court cannot, in determining such an amount, confine itself to taking into account solely the fact that, by virtue of the contractual relationship between the contracting parties, their joint conduct is necessary in order to effect the amendment of their public contract. That amount must be determined in the context of the conduct or activities of the parties to the public contract concerned during the period during which the parties planned to amend that contract.

Judgment of the court of first instance

Machine Translated by Google

[24] In the appealed judgment, the court of first instance found the claim of the first-tier plaintiff to be partly well-founded, partially changed the decision of the first-tier defendant D.561/17/2017 and, with regard to the fourth element of the ex officio initiative, omitted the provision establishing the infringement of the provisions of Section 141 (8) of the Civil Procedure Code against the first-tier plaintiff, at the same time reduced the amount of the fine imposed on the first-tier plaintiff to HUF 40,000,000 (forty million), exceeding which it dismissed the claim of the first-tier plaintiff, and dismissed the claim of the second-tier plaintiff in its entirety, further established the nullity of Contract Amendment No. 3, the Cost Compensation Agreement and Contract Amendment No. 4, and ordered the payment of the legal costs and the claim fee. It did not assess the procedural references as well-founded, therefore it examined the claims on their merits. Referring to the judgment of the CJEU, it pointed out that the rules for contract amendments falling within the scope of the CJEU are specified in Section 141 of the CJEU, which provision is addressed to the contracting parties. Referring to the provisions of the CJEU judgment, it stated that the public procurement law liability of the contracting parties cannot be derived solely from the existence of a civil law legal relationship between the parties and the conditions of the contract amendment defined by civil law (mutual agreement), but at the same time, the amount of the fine sanctioning the unlawful amendment of the public procurement contract must be determined taking into account the conduct of the individual parties, the tenderer may be the recipient of the fine sanction, but its liability cannot be treated as the same without examining the contribution. The first instance court examined the decision of the first-tier defendant along this principle, taking into account the previous judicial practice regarding the legality of contract amendments.

[25] As explained in the reasoning of the judgment, the court of first instance agreed with the examination method set out in the decision of the first-tier defendant regarding the fourth element of the ex officio initiative, and also with the fact that contract amendment No. 3 was aimed at the establishment and operation of a fee product sales channel constituting a new procurement requirement, but in its opinion, no exclusive aspects were indicated in connection with the product to be procured that could have justified the exclusion of competition by establishing the procurement requirement. In the lawsuit, the parties did not refute the rulings that the establishment of individual sales channels is possible independently; the web sales channel can be established independently of the TVM system; the establishment of a data connection with the AFC system can also be implemented in an independent development. The reasons cited in connection with contract amendment No. 3 did not support the existence of the statutory conditions for the contract amendment. The court of first instance agreed with the II. The plaintiff of the first class, arguing that the formation of his procurement requirement is his own, unquestionable decision, but if, during the procurement, he acts in violation of the rules of the applicable Public Procurement Act, he must bear the responsibility for it. There is no doubt that the conditions under Section 141 (4) b) of the Public Procurement Act do not define exclusive rights, but at the same time they assume the necessity of purchasing from the original contracting party, under additional conditions.
The first-tier defendant basically claimed the absence of this necessity when he argued with the previous existence of the demand for the sales channel and its connection to the AFC system. An additional (conjunctive) condition assigned to this condition, specified in sub-paragraphs ba) and bb) of paragraph (4) of Section 141 of the Civil Code, is connected, so the second-tier plaintiff wrongly argued that the economic advantage presented by him creates the legal possibility of amending the contract. He noted that in this regard the first-tier defendant had established the infringement on a well-founded basis, and that there was no legal possibility of amending the contract even by referring to sub-paragraphs ba) and bb) of paragraph (4) of Section 141 of the Civil Code. The amendment of the contract, as a bilateral legal transaction, is a characteristic of the obligation, and does not in itself establish liability under public procurement law, but at the same time the court of first instance

Machine Translated by Google

In its judgment, the first-tier defendant did not present any circumstances in its decision that would have led to a contract amendment and that would have indicated the establishment of the first-tier plaintiff's liability under public procurement law, so it found the first-tier plaintiff's claim well-founded in this respect.

[26] The first-instance court shared the position of the first-tier defendant in the Cost Compensation Agreement and Contract Amendment No. 4, according to which both contracting parties were liable for the unlawful amendment.

[27] In the area of the fine sanction, it was recorded that the first-tier defendant considered the imposition of a fine mandatory for the fourth, fifth and sixth elements of the ex officio initiative, as set out in point 73 of the decision, while considering it as an option in the case of the second element. It emphasised that, according to Section 165(11) of the Code of Civil Procedure, the first-tier defendant had to assess all aspects relevant to the case when determining the necessity of applying the fine (if the law allows this) and the amount of the fine and to account for them in its decision. The Code of Civil Procedure provides an exemplary list in this regard, therefore the specific characteristics of the case determine the range of aspects that can actually be taken into account. In connection with the imposition of the fine, it examined the legality of the first-tier defendant’s decision on the basis of Section 339/B of the Code of Civil Procedure. In the case of the second-tier defendant, the second-tier defendant had to assess all aspects relevant to the case when determining the necessity of applying the fine (if the law allows this) and the amount of the fine. assessed the fine imposed on the plaintiff as lawful.

[28] The court of first instance pointed out in the reasoning of the judgment that the first-tier defendant assessed the parties' contribution and liability in respect of the infringement established in respect of the fourth, fifth and sixth elements of the ex officio initiative as being the same in all amendments, while in the case of contract amendment no. 3 it took into account the contracting authority's conduct, as a result of which the product could only be purchased from the winning bidder. It assessed the estimated value, the contractual values, and the blatant seriousness of the infringement equally for both parties, but the two parties' history in terms of the infringement was different, which was not weighted, and the first-tier defendant did not give reasons for the reason for not making the distinction. Regarding the issue of liability - referring to the judgment of the CJEU - it stated that it cannot be derived from a mere agreement of will in terms of obligations. A sanction may be related to public procurement law liability, which can be clarified by examining the circumstances that necessitated the modification in the case of a contract modification and may lead to the violation of one of the cases allowing modification regulated in Section 141 of the Civil Procedure Code. With regard to the fourth element of the ex officio initiative, the infringement established against the first-degree plaintiff and the applied sanction were both assessed as unlawful.

[29] The court of first instance found the claim of the second-tier plaintiff to be unfounded both in terms of the finding of the infringements and the imposition of the fine, and explained the reasons for this in its judgment.

Machine Translated by Google

[30] The court of first instance found the claim of the third-tier plaintiff well-founded, explaining that the 3rd and 4th contract amendments and the Cost Compensation Agreement were unlawfully concluded pursuant to Section 141(8) of the Civil Code, and thus their necessary legal consequence is nullity pursuant to Section 137(1)(a) of the Civil Code, the determination of which was ordered based on the secondary claim of the third-tier plaintiff.

The appeal, the cross-appeal, the counter-appeal and the respondent's intervener's observations

[31] The first-tier defendant filed an appeal against the first-tier judgment's amending provision regarding the fourth element of the ex officio initiative, primarily requesting the first-tier judgment to be changed based on Section 253(2) of the Code of Civil Procedure, since - in his opinion - the first-tier court unlawfully interpreted Section 141(1) and (8) of the Code of Civil Procedure, thereby erroneously ordering the change of the decision, and the dismissal of the claim regarding the fourth element of the initiative is also a lawful decision. He also requested the first-tier judgment to be set aside based on Section 253(2) of the Code of Civil Procedure, since the first-tier court overestimated the fine imposed on the first-tier plaintiff in violation of Section 165(11) of the Code of Civil Procedure. He also requested reimbursement of his legal costs incurred in the second-instance proceedings, the amount of which he calculated at 70,000 forints, and then at 124,000 forints when making his observations on the cross-appeal.

[32] As grounds for the appeal, it was explained that, according to Section 141(1) and (8) of the Civil Code, the liability of the contracting parties for an unlawful contract amendment can be established, but on the contrary - from the findings in points [79], [62] and [70] of the first-instance judgment - the first-instance court concluded that the finding of a breach of law and the applied sanction against the first-instance plaintiff in respect of contract amendment No. 3 were unlawful. The first-instance court established that contract amendment No. 3 was unlawful, but exempted the first-instance plaintiff from liability for an unlawful contract amendment as a breach of law under Section 141(1) and (8) of the Civil Code, which contradicts the provisions of the Civil Code. The references to Section 141(1) and (8), the case law, the CJEU judgment, and the first instance judgment contradict what was stated in point 73 of the decision of the first-tier defendant in the context of the consideration of the fine.

[33] The first-tier defendant submitted that, contrary to the interpretation of Section 141 of the Civil Procedure Code, the first-tier judgment reached the opposite conclusion, since the legislation establishes mandatory conduct for the “parties”, and in the case of contract amendment No. 3, which is considered to be infringing, the first-tier judgment found that only one of the contracting parties, the second-tier plaintiff, committed an infringement. According to the first-tier defendant’s interpretation, it does not follow from the CJEU judgment that in the event of an unlawful contract amendment, the winning bidder may be exempted from liability for the unlawful contract amendment; the CJEU judgment requires individualization, consideration, and, where appropriate, the determination of the infringement and the renunciation of the imposition of a fine. He challenged the provisions of paragraphs [62] and [79] of the first-tier judgment - according to which the

Machine Translated by Google

The public procurement law liability of contracting parties cannot be derived solely from the existence of a civil legal relationship between the parties and the conditions of the contract amendment defined by civil law (mutual agreement), and it is considered to be expressly contrary to Section 141(1) and (8) of the Civil Procedure Code and to what is stated in the judgment of the CJEU. In the context of judicial practice, it referred to the judgment of the Curia Kfv.II.37.434/2017/12. and the judgment of the Metropolitan Court 104.K.706.819/2020/5., which support that judicial practice accepts the objective legal liability of the other party to the contract for the contract amendment based on Section 141(1) and (8) of the Civil Procedure Code and the judgment of the CJEU. In his oral statement at the appeal hearing, he stated that by objective liability he means that the parties conclude a contract as a result of the public procurement procedure, by which they enter into a process regulated by public law, and if the infringement is established, then a sanction should also be applied in parallel with the establishment of liability for the infringement.

[34] In its appeal, the first-tier defendant maintained the provisions of paragraph 73 of its decision regarding the assessment of the amount of the fine. In its view, paragraph [70] of the first-tier judgment erroneously highlights that, according to the decision, the second-tier plaintiff created the conditions that served as the basis for the infringement. In contrast, in paragraphs 56 and 58 of its decision, it examined the conditions under Section 141(4)(b) of the Civil Code, not in the context of the first-tier plaintiff's liability for the infringement, but by describing in a descriptive manner how the second-tier plaintiff created conditions under which the unlawful contract amendment could have taken place. In its view, by signing the contract, both parties committed the infringement, and the fact that the second-tier plaintiff formulated the new procurement claim does not exempt the first-tier plaintiff from this. The first-tier plaintiff signed contract amendment No. 3 in the knowledge of the new procurement requirement and the new technical content, as he expressly undertook to implement it. In light of this, he should have recognized that the contract amendment conflicts with Section 141(4)(b) of the Public Procurement Act, as it concerns a new order requirement not included in the original contract. In addition, it can also be expected that the economic operator participating in the public procurement will incur a public procurement obligation for the service for consideration based on the value of the contract amendment (which in this case is 659,400,000 HUF net).

He emphasized that in point 73 of his decision, he explained in detail, based on the legal provisions in force on December 15, 2017 and the judicial practice known at that time, the conditions under which he imposed the fine on the first-tier plaintiff, and he also specifically referred to contract amendment no. 3. In his opinion, the first-instance judgment was based on the facts of the decision.
misinterpretation.

[35] With regard to the amount of the fine imposed by the court of first instance, he emphasised that the criteria for assessing the amount of the fine cannot be established from the judgment of first instance, and furthermore, Section 172(3) of the Code of Civil Procedure referred to in paragraph [80] of the judgment cannot be applied in the present case, as it serves as the basis for a fine that liberates in the event of a deviation from the nullity pursuant to Section 137(3) of the Code of Civil Procedure in view of the overriding public interest. In his view, if the court of first instance takes over the defendant's jurisdiction by reassessing the fine, then it must assess all the conditions of the law and all the circumstances of the case, and account must be taken of the scope of the assessment, but the lawful scope of the decision cannot be established from the reasoning of the judgment.

Machine Translated by Google

[36] In its cross-appeal, the first-tier plaintiff requested a review of the judgment provisions relating to all three contract amendments classified as unlawful. Its primary request was to change the first-tier judgment based on Section 253(2) of the Civil Procedure Code in such a way that the reasoning made it clear that its liability could not be established in relation to contract amendment number 3 either because Section 141(8) of the Civil Procedure Code does not contain an obligation that can be interpreted in relation to the tenderer, and if it did, then a new public procurement procedure did not have to be conducted based on Section 141(4)(b) of the Civil Procedure Code, and in the operative part, to omit the finding of a violation of law in relation to the first-tier plaintiff in relation to all further contract amendments, including Contract Amendment Number 4 and the Cost Compensation Agreement, and to omit the imposition of a fine in relation to these as well. In the alternative, the Civil Procedure Code requested that Pursuant to Section 253(2), the first-instance judgment was changed, the fine imposed on the first-rank plaintiff in respect of Contract Amendment No. 4 and the Cost Compensation Agreement was reduced. The first-rank defendant was also ordered to reimburse the incurred legal costs.

[37] The first-tier plaintiff emphasized in the context of amending and supplementing the reasoning of the first-instance judgment that, according to his unchanged position, Section 141(8) of the Public Procurement Act does not contain an obligation that can be interpreted as applicable to the tenderer, and if it could be concluded that Section 141(8) of the Public Procurement Act also constitutes an obligation applicable to the tenderer, based on Section 141(4)(b) of the Public Procurement Act - due to the fulfillment of the prerequisites stated therein - a new public procurement procedure did not have to be conducted in the case of contract amendment No. 3, therefore, as explained in the statement of claim - the public procurement could be lawfully omitted. He further made references beyond contract amendment No. 3, including those explained in the context of the amount of the fine.

[38] The second-tier plaintiff did not appeal against the first-tier judgment, and given that neither the first-tier defendant's appeal nor the first-tier plaintiff's cross-appeal affect his procedural position, he did not make any substantive observations.

[39] In its observations on the cross-appeal, the first-tier defendant stressed that the cross-appeal could not extend to the part of the first-tier judgment that exceeded the fourth element. The first-tier plaintiff disputed the arguments put forward by the first-tier plaintiff in the cross-appeal regarding the amendment of the reasoning of the judgment in connection with contract amendment no. 3 (section 2.2 of the cross-appeal) and requested that the reasons set out in sections 57-59 of the administrative decision be taken into account. As regards the cross-appeal’s reasoning regarding the imposition of the fine (section 2.5), it pointed out that it supported its secondary appeal.

[40] In its written statement, the defendant intervener requested that the cross-appeal of the first-tier plaintiff be dismissed and that the first-tier plaintiff be ordered to pay the costs incurred by the defendant intervener in the appeal proceedings. In relation to the procedural arguments of the first-tier plaintiff regarding the scope of the cross-appeal, it agreed with those presented in the first-tier defendant's observations. In addition, it pointed out that the first-tier plaintiff had wrongly, out of its systematic and logical context,

Machine Translated by Google

interprets Section 141(8) of the Public Procurement Act, and on the other hand, ignores the fact that the public procurement procedure was not omitted pursuant to Section 4(1) of the Public Procurement Act, but rather the contract was amended by unlawfully omitting the public procurement procedure (a special case), to which Section 141(8) of the Public Procurement Act applies. According to his position, the first-tier plaintiff misinterprets this as a simple rule of omission, since it also imposes a clear expectation on the winning bidder (it is necessary to submit a bid for the purpose of amending the public procurement contract, and in the absence of a new public procurement procedure for this purpose and the possibility of lawfully amending the contract, it must refrain from amending the contract). He disputed the position of the first-tier plaintiff summarized in point 26 of the cross-appeal, and in his view, the second-tier plaintiff Violation of Section 141(8) of the Civil Code may also be committed by the successful tenderer, who is the clear addressee of this legal provision. The position of the first-order plaintiff expressed in relation to Section 141(4) c) of the Civil Code was also contested on the merits, emphasizing that the conditions specified therein are conjunctive, so the absence of even one of them results in the contract amendment being unlawful.

[41] In his oral counter-appeal at the appeal hearing, the first-instance plaintiff requested the dismissal of the appeal. According to his position, the first-instance court correctly perceived that in an administrative lawsuit, the legality of the administrative decision must be decided within the framework of the administrative decision. During the 3rd contract amendment, the web development requirement set the course that the second-instance plaintiff wanted to conclude a contract with the person with whom the original contract also existed. Under such circumstances, the first-instance plaintiff cannot be held liable, nor can he be fined. In view of the partial dismissal of the cross-appeal, his request to change the reasoning of the first-instance court’s judgment remained, for which the fee was 8,000 forints, and therefore he requested the refund of 1,250,000 forints of the fee previously imposed of 1,258,000 forints.

The Curia's procedure

[42] By its order No. 11 dated 17 November 2021, the Curia partially rejected the cross-appeal filed by the first-tier plaintiff - covering the part of the first-instance judgment not affected by the appeal - on the basis of the reasons stated in the order, since it follows from the provision contained in Section 244 (3) of the Code of Civil Procedure that a cross-appeal extending beyond the scope of the appeal is excluded. In view of this, the appeal proceedings in relation to the cross-appeal could further extend to the examination of the merits of the part of the cross-appeal that was not rejected.

The Curia's decision and legal reasons

[43] The appeal of the first-tier defendant is well-founded, and the cross-appeal of the first-tier plaintiff is unfounded, as follows.

Machine Translated by Google

[44] The Curia overturned the judgment of the first instance court based on Section 253(3) of the Code of Civil Procedure, within the limits of the appeal of the first-tier defendant, the cross-appeal of the first-tier plaintiff not exceeding the scope of the appeal, and the counter-appeal, thus the second instance proceedings exclusively covered the examination of the references made in the first instance judgment provision regarding the fourth element of the ex officio initiative - including the fine related thereto. In doing so, it established that the first instance court examined the relevant material of the administrative proceedings, the statements and submissions of the parties in the proceedings, initiated preliminary ruling proceedings, took into account the provisions of the CJEU judgment when making the first instance judgment, developed its interpretation, and drew the conclusion that the claim of the first-tier plaintiff is well-founded to a lesser extent. This conclusion of the first instance court was based on the fact that the Civil Procedure Code The Court did not assess the unlawful contract amendment pursuant to Section 141(8) - which means the unlawful omission of public procurement - as an objective form of liability, but in relation to contract amendment No. 3 it took into account that - in its opinion - the first-tier defendant did not indicate any circumstances giving rise to the contract amendment that would have indicated the establishment of the first-tier plaintiff's liability under public procurement law. Referring to the contents of the appeal, the cross-appeal and the counter-appeal, the Curia highlights the following.

[45] The first-rank defendant correctly referred to the necessity of establishing the infringement due to the strict liability structure, based on the provisions of Section 141(1) and (8) of the Civil Code, and thus to the fact that the infringement must be established for the account of both parties involved in the contract amendment. In this context, the Curia first examined the first-rank defendant’s argument regarding the existence of strict liability.

[46] The first-tier defendant pointed out factually that, as stated in the Curia's judgment Kfv.II.37.434/2017/12., "Liability for public procurement law violations is objective."
(Judgment No. Kfv.II.37.434/2017/12, paragraph [44]). At the same time, the Curia notes that the facts of the referenced judgment No. Kfv.II.37.434/2017/12 and the present litigation are not completely identical, since in the referenced case there was no public procurement procedure and no amendment of the contract concluded as a result of the public procurement procedure, and a violation of public procurement law was not established against the bidder (in the absence of a public procurement procedure, there was no bidder). According to the facts forming the basis of the referenced Curia judgment, the unlawful omission of the public procurement procedure constituted a violation, since the procurements were considered to be computable, and given the computable nature, a public procurement procedure should have been conducted. The reasoning of the cited Curia judgment stated, among other things, that “The first-tier defendant did not have to examine or assess why the first-tier plaintiff *(note: in the cited case, the buyer who entered into a contract by unlawfully omitting the public procurement procedure to satisfy the procurement requirement)* was not aware of the rules of the public procurement procedure and why he did not comply with them”, just as it can be read from the reasoning of the judgment that it did not have to examine whether there was any intent on the part of the infringer. The public procurement procedure should have been conducted, therefore its omission could be assessed as an infringement against the first-tier plaintiff in the cited case. The reasoning of the Curia judgment No. Kfv.II.37.434/2017/12 also states (point [45], penultimate sentence) that “The obligation to conduct the public procurement procedure and the related liability lie exclusively with the first-tier plaintiff.” *(Note: the sole responsibility*

Machine Translated by Google

in this case, the court did not record it in the context of the sales partner contracting with the first-tier plaintiff, but stated it in relation to the authority providing support for the first-tier plaintiff's application and concluding a contract with him in this regard.)

[47] The Curia assessed that the difference between the factual circumstances, and thus the difference in the violations that occurred, is not relevant from the point of view of examining the liability structure as a legal issue, since there is an identity in that in both cases a public procurement violation occurred, in which the legislator does not make the application of the legal consequence dependent on discretion, but rather imposes a mandatory fine. In addition to the similarity of these basic characteristics, the difference in the further factual elements does not affect the definition of the liability structure, and thus the answer to the legal issue of what liability structure the Civil Code regulates in the case of unlawful contract modification as a violation. Before further examining the liability structure, the Curia points out that the argument of the first-tier defendant in relation to the CJEU judgment is correct insofar as the CJEU judgment makes individualisation and consideration mandatory not when establishing the infringement, but when imposing the fine. However, the first-tier defendant incorrectly concludes that the CJEU judgment would support the existence of the objective liability structure, since the CJEU judgment did not examine the liability structure itself, but rather provided that it is not contrary to the relevant EU standards if national legislation also establishes the liability of the tenderer for the infringement.

[48] In connection with the liability structure, the Curia points out that objective liability is typically an administrative liability, which differs from both the liability structures typical of criminal law (based on guilt/culpability) and civil law (typically based on blameworthiness). Objective liability was defined by the Constitutional Court in its 60/2009. (V. 28.)
In its decision, the Constitutional Court examined in detail the liability for road traffic violations, to which it also referred in its later decisions [e.g. Decision 16/2018. (X. 8.) AB]. As is evident from the decisions of the Constitutional Court, the characteristic of objective liability, which is widespread in the field of administrative legal liability, is that it attaches the legal consequence to the infringing conduct itself, regardless of the culpability or blameworthiness of the infringer, and thus the application of the sanction is more effective, since it encourages law-abiding conduct through the inevitability of liability. In the case of objective liability, therefore, the violation of administrative legislation in itself entails a legal consequence with regard to the illegality, regardless of the blameworthiness or possible guilt of the person(s) who committed the illegal conduct. These subjective elements do not need to be examined in order to establish a violation of law, since the legislator attributes such importance to the community interest protected by law that it must be protected regardless of the guilt or blameworthiness of the violator. In the case of objective liability, therefore, the fact of unlawful conduct establishes the establishment of a violation of law, for which the law prescribes the application of the mandatory legal consequence to be imposed.

[49] The Curia also notes with regard to the liability structure that the Commentary on the Civil Procedure Code (Budapest, 2016 Edited by: Attila Dezsÿ) in connection with the statutory provisions relating to the decisions of the first-tier defendant, such as Section 165 of the Civil Procedure Code, points out on the one hand that in the case of the most serious violations, the imposition of a fine cannot be omitted, and in certain cases - such as Section 165 (6) of the Civil Procedure Code - in addition to the finding of the violation, the I.

Machine Translated by Google

The defendant of the order is obliged to impose the fine. The Commentary states in relation to the most serious violations punishable by a mandatory fine that “the legal consequences of public procurement cases are otherwise objective, i.e. they do not depend on intent, negligence, imputability or the establishment of any other subjective form of liability. Instead of establishing the level of liability, public procurement law punishes all violations on the basis of objective liability…”.

[50] In the present case, Section 141(1) and (8) of the Civil Procedure Code define the unlawful conduct (contract modification by unlawful omission of public procurement) which is a violation and is to be borne by the perpetrators of the unlawful conduct, and Section 165(6)(e) of the Civil Procedure Code makes the application of the legal consequence of a fine mandatory in the event of a violation. The application of the legal consequence of a fine is mandatory against the perpetrator of the unlawful conduct, but the amount of the fine is determined by taking into account all the circumstances of the case, and thus by weighing it, based on the provision of Section 165(11) of the Civil Procedure Code. The judgment of the CJEU does not contain any provision that would break this objective liability; the determination of the infringement and the application of the legal consequence related to it continue to be carried out on an objective basis, taking into account the fact of the unlawful conduct. The CJEU ruling sets out the requirements necessary to ensure respect for EU principles with regard to the circumstances to be assessed in the context of the amount of the fine, which influences the amount of the fine, but does not affect the determination of liability for the infringement and the mandatory application of the fine.

[51] The Curia then examined who could be the perpetrator of the unlawful conduct under Section 141(8) of the Civil Code, and therefore who could be held liable for the infringement. The first-tier defendant and the defendant intervener correctly pointed out during the appeal proceedings that the infringement was an unlawful amendment to the contract, and therefore the perpetrators could be the contracting parties amending the contract, i.e. in the present case, the first-tier and second-tier plaintiffs. This was sufficiently supported by the fact that Section 141(1) of the Civil Code orders the provisions of the subtitle “Amendment to the Contract” to be applied to the contracting parties, and thus the infringement under Section 141(8) of the Civil Code must also be established for the contracting parties. The conclusion drawn in the judgment of the court of first instance that no circumstances giving rise to a contract amendment were presented in the decision of the first-tier defendant that would have indicated the establishment of public procurement law liability cannot result in the omission of the establishment of a violation in the case of contract amendment no. 3, since in the case of strict liability, the establishment of a violation is based on the implementation of unlawful conduct - in this case, the unlawful amendment of the contract by omitting public procurement - and furthermore, it does not follow from either the provisions of the Civil Code or the judgment of the CJEU that a liability structure different from strict liability would apply.

[52] The Curia emphasises that the provisions of Section 141 of the Public Procurement Act must be interpreted in the light of the judgment of the CJEU. Based on Section 141 of the Public Procurement Act, as explained above, not only the contracting authority but also the contracting parties may be held liable for an unlawful amendment to a public procurement contract. In this regard, the Curia refers to the statements made by another Curia panel in judgment No. Kfv.IV.37.130/2021/4. [25], according to which “The judgment of the European Court of Justice in case C-263/19 c

Machine Translated by Google

doubt that the successful tenderer of the public procurement contract is also liable for the unlawful disregard of the rules set out in Section 141 of the Public Procurement Act when amending the public procurement contract and may also be subject to a sanction in the legal remedy proceedings initiated by the supervisory authority. Since this decision supported the successful tenderer's subjection to the scope of the Public Procurement Act in relation to the amendment of the contract, the court of first instance acted lawfully when it undertook a substantive examination of the plaintiff's claim and rejected it by referring to the EU decision as a legal basis." The present Chamber of the Curia agrees with the above interpretation of Section 141 of the Public Procurement Act following the EU Court's judgment and does not intend to deviate from it. The CJEU ruling does not affect the liability structure, the CJEU ruling only states that it is not contrary to the relevant EU standards if internal regulations make the modification of the contract that does not comply with the public procurement rules the responsibility of not only the contracting authority, but also the successful tenderer. Unlawful modification of the contract, as a violation, can therefore exist not only on the part of the contracting authority, but also on the part of the tenderer. However, the manner in which this is done is determined by the rules of national law.

[53] Pursuant to the provisions of Section 141(1) and (8) of the Public Procurement Act, the contracting parties may implement an unlawful modification of a public procurement contract as a violation of law. The contracting parties must conduct the public procurement in compliance with the provisions of the Public Procurement Act, which naturally includes the fact that they must act in accordance with the provisions of Section 141 of the Public Procurement Act when modifying the contract. This obligation also results in the contracting parties being able to modify the contract concluded between them on the basis of the public procurement procedure if the statutory conditions are met. If the conditions for modifying the contract according to the Public Procurement Act are not met, the contract may be modified only by reopening the competition. The legality of the modification of the contract is to be proven by the person who modified the contract. If the person who modified the contract cannot prove the legality of the modification of the contract, the burden of proof falls on the person who modified the contract. The breach of law is established by the Public Procurement Act. does not require either blame or guilt, thus, with the implementation of the unlawful conduct, a violation of law exists on the part of the contracting parties, the legal consequence of which is the imposition of a fine pursuant to Section 165(6)(e) of the Civil Code. The first-rank defendant therefore had sufficient grounds to challenge the first-rank judgment's finding of no violation of law with regard to contract amendment No. 3, and consequently the change of its decision to include the fine. The violation is incumbent on the first-rank plaintiff with regard to contract amendment No. 3, and thus the mandatory imposition of a fine also exists in this regard. This partial well-foundedness of the first-rank defendant's appeal was not refuted by the first-rank plaintiff's counter-appeal, since it did not substantiate the existence of the statutory conditions for the contract amendment.

[54] The first-tier defendant also correctly argued in its appeal that in paragraphs 56 and 58 of its decision it did not examine the extent of liability for the infringement, but rather assessed whether one of the circumstances listed there establishes the legality of the contract amendment, taking into account the conditions set out in paragraph (4) of Section 141(b) of the Civil Procedure Code. Therefore, paragraph [70] of the reasoning of the first-tier judgment contains an erroneous conclusion that one of these circumstances precludes the finding of infringement by the first-tier plaintiff. The proportion of liability for the infringement and the degree of contribution do not influence the determination of the infringement, but the amount of the fine.

Machine Translated by Google

[55] In connection with the appeal arguments regarding the determination of the fine, the Curia points out that the first-instance defendant had sufficiently well-foundedly complained about the lack of criteria for assessing the amount of the fine imposed by the first-instance judgment, and also that, given the existing facts, Section 172(3) of the Code of Civil Procedure does not authorize the change of the amount of the fine, but given that the legal basis for imposing the fine exists, these references did not result in the change of the first-instance judgment. The first-instance court, taking a different position regarding the legal basis, omitted to establish a violation by the first-instance defendant, as a result of which it did not rule on this part of the first-instance plaintiff's claim relating to the imposition and amount of the fine. Paragraph [79] of the first-instance judgment expressly states that one of the reasons for changing the fine was the change in the seriousness of the infringement, and it is also clear from this paragraph that the first-instance court assessed the legality of the imposition of the fine, including the determination of the first-instance defendant's involvement in the infringement, solely with regard to the Cost Compensation Agreement and Contract Amendment No. 4, but the legality of the fine imposed on the first-instance plaintiff for Contract Amendment No. 3, which is the subject of the fourth element of the ex officio initiative, as a violation, was not examined, so the first-instance plaintiff's claim in this part remained unexamined.

[56] The Curia emphasizes that it cannot decide for the first time in the second instance proceedings on the unexamined element of the first-instance plaintiff's claim, and it cannot assess the reasonableness of the assessment and the amount of the fine imposed by the first-instance defendant for the first time within the framework of the first-instance plaintiff's claim, as this would deprive the first-instance plaintiff of the right to legal remedy, and also for the reason that the appeal proceedings are not aimed at adjudicating the claim, but at examining the legality of the first-instance judgment.

[57] The Curia then examined the references made by the first-tier plaintiff in the part of the cross-appeal that was not dismissed. This part of the cross-appeal aimed to change the reasoning of the first-instance judgment, however, the arguments put forward in this regard do not substantiate the cross-appeal. The liability of the contracting authority for the infringement can be established according to the CJEU judgment and according to the case law expressed in the decision of another chamber of the Curia. An unlawful contract amendment, as an infringement, is incumbent on both the contracting authority and the contracting party pursuant to the provisions of Section 141(1) and (8) of the Public Procurement Act. It is a fact that public procurement also enters the civil law stage with the conclusion of the contract, but at the same time the mandatory rules for the amendment of the public procurement contract are contained in the Public Procurement Act, and the provisions of the Public Procurement Act must also apply during the amendment of the public procurement contract. objectives, for the achievement of which there are obligations not only for the contracting authority but also for the tenderer. The Curia emphasises that, pursuant to the provision in Section 2(3) of the Public Procurement Act, “The contracting authority and economic operators are obliged to act in accordance with the requirements of good faith and fairness in the public procurement procedure. Abuse of rights is prohibited.” This obligation also includes, with regard to a contract concluded on the basis of a public procurement procedure, that the contracting parties may amend the contract if the conditions set out in the Public Procurement Act are met. The mandatory requirement set out in Section 141(8) of the Public Procurement Act (according to which a public procurement contract may only be amended as a result of a new public procurement procedure, except in the cases set out in Section 141 of the Public Procurement Act) also applies to the tenderer, and thus contains an expectation and obligation towards it, just as the public procurement regulation contains expectations towards tenderers, including the winning tenderer.

Machine Translated by Google

also by the fact that, within the framework of statutory objectives and principles, the purity, transparency and publicity of the competition must be respected not only by the contracting authority, but also by the economic operator, and thus the winning bidder, which requirement must also be met during contract amendments.

[58] In connection with the first-tier plaintiff's cross-appeal based on Section 141(4)(b) of the Civil Code, the Curia points out that the first-tier defendant conducted the necessary investigation with regard to Section 141(4)(b) of the Civil Code and gave a detailed account in the justification of its decision of why the circumstances listed there do not establish the legality of the contract amendment. The first-tier defendant's justification of the first-tier defendant's decision related to Section 141(4)(b) of the Civil Code, and in this respect the legality of the administrative decision, was examined in detail in its judgment (paragraphs [64]-[67] of the first-tier judgment). In doing so, it did not assess the arguments put forward by the contracting parties in support of the legality of the contract amendment, in agreement with the first-tier defendant, as being in breach of the provisions of Section 141(4)(b) of the Civil Code. According to Section 141(4)(b)(ba) or (bb), the legal possibility of contract modification would have been created, and the first-instance court did not assess the prerequisites stated there as existing either. The first-instance plaintiff did not explain in his cross-appeal why he considered this reasoning of the first-instance judgment to be unlawful, he merely repeated the points made in his claim, which the first-instance court had already examined and correctly determined in the course of doing so that no case of legal contract modification existed. Thus, the first-instance plaintiff, without presenting any new facts or circumstances, baselessly referred in his cross-appeal that a new public procurement procedure did not have to be conducted based on Section 141(4)(b) of the Public Procurement Act.

[59] In view of the above, the Curia changed the first-instance judgment in the part affected by the appeal based on Section 253(2) of the Curia, and dismissed the claim of the first-instance plaintiff in the matter of the legal ground regarding the infringement under the fourth element of the ex officio initiative. The legal ground for applying the legal consequence of a fine therefore also exists in the case of this infringement, however, the first-instance court did not take a position on the legality of imposing a fine in this case - due to its different legal position regarding the legal ground -, therefore, the Curia ordered the first-instance court to rehear the case and issue a new decision in this case based on Section 252(3) of the Curia.

[60] In the new proceedings, the court of first instance must decide, within the limits of the claim of the first-tier plaintiff and the counterclaim of the first-tier defendant, on the claim for a fine imposed on the first-tier plaintiff for the violation established due to contract amendment No. 3 pursuant to the fourth element of the ex officio initiative.

The principle content of the decision

Machine Translated by Google

[61] *An unlawful modification of a contract concluded as a result of a public procurement procedure that contravenes the rules of the Public Procurement Act is a public procurement infringement, for which the legislator does not require imputability or fault; the infringement exists by the implementation of the unlawful conduct on the part of the contracting parties. The expectations formulated in the CJEU judgment, ensuring respect for EU principles, such as the assessment of the conduct of the contracting parties, do not affect the ascertainability of the infringement, but the amount of the fine.*

Closing part

[62] The Curia adjudicated the appeal and the part of the cross-appeal to be examined on the merits at a hearing, based on Section 340(6) of the Code of Civil Procedure, taking into account the statement of the first-tier plaintiff.

[63] The Curia considered that the appeal of the first-tier defendant was well-founded, however, the appeal proceedings ended with the first-instance court ordering the trial court to rehear the case and issue a new decision in the scope specified in this interim judgment. It assessed all this as meaning that there was no significant difference between the ratio of winning and losing cases in the appeal proceedings, thus, based on the provisions of Section 81(1) of the Civil Procedure Code, it ruled that each party shall bear its own costs incurred in the appeal proceedings.

[64] In view of the new procedure ordered, the Curia, in view of the action for judicial review of the administrative decision of the first-tier plaintiff, set aside the first-tier judgment provision regarding the partial fee of HUF 1,000,000 imposed on the first-tier plaintiff and HUF 500,000 imposed on the state, since the first-tier court must provide for this application fee in its new decision. In the present appeal proceedings, the fee for the application of the cross-appeal subject to substantive assessment is HUF 8,000, which is borne by the first-tier plaintiff, pursuant to Section 48 of Act XCIII of 1990 on Fees (hereinafter: the Itv.). The part of the cross-appeal of the first-tier plaintiff that has not been examined on the merits is exempt from fees pursuant to the provision contained in Section 57(1)(a) of the Itv. The first-ranking plaintiff did not have to be ordered to pay the appeal fee he had paid, as he had previously paid the additional appeal fee of HUF 1,258,000. In addition to the additional appeal fee of HUF 8,000, the first-ranking plaintiff is entitled to a refund of the HUF 1,250,000 (one million two hundred and fifty thousand) fee unnecessarily paid to the Curia's procedural fee account. The first-ranking plaintiff requested this refund at the hearing, and therefore the Curia will take separate action on this matter.

[65] The possibility of appeal against the interim judgment of the Curia is excluded by Sections 233(1) and 233/A of the Code of Civil Procedure, and review is excluded by Section 271(1)(e) of the Code of Civil Procedure.

Budapest, February 10, 2022.

Machine Translated by Google

Dr. Mudráné dr. Erzsébet Láng sk, President of the Council,

Dr. Zsoltné Banu, Dr. Judit Szabó, sk, presenting judge, Dr. Péter Hajnal, sk, judge

Credit to the publication:

Machine Translated by Google

Metropolitan Court
103.K.702.699/2021/5.

Case number:	103.K.702.699/2021/5.
Plaintiff I:	plaintiff1 (target1)
Representative of the first-degree plaintiff:	Szilas Law Office - administrator: Dr. Péter Szilas, attorney-at-law
The second-ranking plaintiff:	plaintiff2 (target3)
The representative of the second-tier plaintiff:	Dr. Zoltán Szilágyi, attorney at law (target4)
The third-tier claimant: Public Procurement Arbitration Board	Public Procurement Authority (1026 Budapest, Riadó Street 5.)
Representative of the third-tier plaintiff: legal counsel	Dr. István Hunya's Chamber
The first-rank defendant: Public Procurement Arbitration Board	Public Procurement Authority (1026 Budapest, Riadó Street 5.)
Representative of the first-tier defendant: legal counsel	Dr. István Hunya's Chamber
The second-ranking defendant:	plaintiff2 (target3)
The representative of the second-tier defendant:	Dr. Zoltán Szilágyi, attorney at law (target4)
The third-ranking defendant:	plaintiff1 (target1)
Representative of the third-degree defendant: Administrator: Dr. Péter Szilas, attorney-at-law	Szilas Law Firm - (target2)
The defendant intervener:	President of the Public Procurement Authority (1026 Budapest, Riadó Street 5.)
Representative of the defendant intervener: legal counsel	Dr. Tamás Attila Cseh Chamber of Commerce
Subject of the lawsuit: Review of decision No. D.561/17/2017	brought in a public procurement case

Machine Translated by Google

and administrative contract

consolidated action for the declaration of invalidity

í t is let:

The Metropolitan Court partially changes the decision No. D.561/17/2017 of the first-tier defendant and, with regard to the fourth element of the ex officio initiative, omits the provision establishing the infringement of Section 141 (8) of Act CXLIII of 2015 on Public Procurement (hereinafter: the Public Procurement Act) against the first-tier plaintiff and reduces the amount of the fine imposed on the first-tier plaintiff to HUF 40,000,000 (forty million), rejecting the claim of the first-tier plaintiff in excess of this amount and rejecting the claim of the second-tier plaintiff.

The Budapest Metropolitan Court finds that the contract amendment No. 3 between the first and second-ranking plaintiffs dated July 13, 2017; the Cost Compensation Agreement concluded on December 22, 2016 and the contract amendment No. 4 concluded on September 15, 2017 are null and void. It

obliges the first-ranking plaintiff, as the third-ranking defendant, to pay the first-ranking defendant, as the third-ranking plaintiff, HUF 500,000 (five hundred thousand) within 15 days, and the defendant intervener HUF 300,000 (three hundred thousand) as partial litigation costs.

It obliges the 2nd-rank plaintiff, as the 2nd-rank defendant, to pay the 1st-rank defendant, as the 3rd-rank plaintiff, 1,000,000 (one million) forints (one million) in legal costs, and the 500,000 (five hundred thousand) forints (five hundred thousand) in legal costs to the 1st-rank defendant, as the 3rd-rank plaintiff, within 15 days.

It obliges the first-rank plaintiff, as a third-rank defendant, to pay the Hungarian State – upon a separate request from the tax authority – 2,500,000 (two million five hundred thousand) forints
partial fee.

It obliges the second-ranking plaintiff, as the second-ranking defendant, to pay the Hungarian State – upon a separate request from the tax authority – a fee of 4,500,000 (four million five hundred thousand) forints. The remaining fee of 500,000 (five hundred thousand) forints shall be borne by the state.

An appeal against the judgment may be filed within 15 days of its publication, which must be submitted electronically to the Metropolitan Court, addressed to the Curia, through a legal representative.

In the meantime

Fact

[1] The contracting authority, the plaintiff of the second order (hereinafter referred to as the contracting authority), initiated the negotiated procedure for the production, delivery, installation and full operation of ticket vending machines (TVM) with a call for participation sent on 29 January 2013, which began with the publication of the notice and ended with the acceptance of the bid of the plaintiff of the first order, as the winning bidder (hereinafter referred to as the winning bidder), and ended with the contract concluded on 4 September 2013. The Main Contract concluded by the contracting parties

Machine Translated by Google

The project contract was annexed to a business contract, an operating contract, a technical specification, and the winning bidder's offer. The total value of the contract was HUF 5,561,690,409. During the public procurement procedure, the issue of the unblockability of the bank card and money slot openings of the TVM devices as a technical requirement had already arisen, since it was expected that no device would get in the way of the money that would hinder its acceptance or return, thus preventing unauthorized persons from accessing it.

When these openings were designed, they were expected to open only when performing their function.

[2] Section III.2.2 of the Operation Contract provided for the repair of TVM devices. According to subsection 1, in the event of a failure of the TVM devices – including any part of them, not only the main components, but specifically all components – during the operation period, the contractor shall be solely responsible, liable and at its own expense. A failure shall be deemed to be any malfunction or phenomenon in the operation of any given component, equipment or sub-assembly, as a result of which the given component, equipment or sub-assembly operates differently from the functional and/or performance parameters of the manufacturer and/or from the operational requirements applicable to it under the Main Project Contract.

A failure of the TVM device as a whole also occurs if a given TVM device fails to meet the operational requirements set out in the technical specifications or the applicable service level requirements, regardless of whether any of its components can be considered defective or not. According to Section III.4.1., the liability and risk of damage related to the tangible assets of the TVM system owned by the contracting authority and operated by the successful tenderer under the operating contract (e.g. the TVM devices themselves, any of their components, the parts necessary for fault repair) during the operating period shall be borne entirely and exclusively by the successful tenderer. This liability and risk of damage shall also extend to the entire TVM central control system and all software forming part of it, for which the contracting authority has acquired the right to use pursuant to Part 9 of the contract and which is operated by the successful tenderer during the operating period. According to Section III.4.2. According to point 1, this liability and risk of damage does not only cover those damages that are attributable to the successful tenderer, but also specifically to those that are caused by unforeseen and unavoidable external causes, force majeure, intentional or negligent conduct of the contracting authority's clients or third parties, a criminal offense, or other unavoidable external causes. The parties further detailed the obligations that the successful tenderer undertakes to fulfill in order to reduce the risk of damage.

[3] At the time of the conclusion of the Main Project Contract, the contracting authority was in the process of procuring the Electronic Ticket and Fare Sales System of the Budapest Public Transport, the AFC Project (Automated Fare Collection). The contracting authority had not concluded a separate contract for the introduction and operation of the AFC Project when the Main Project Contract came into force, and the successful bidder for the AFC Project was not known, but certain phases of its implementation were expected to require the TVM system to be compatible with the AFC system. For this reason, in order to develop and modify the TVM system, the agreement between the contracting parties also included provisions on how the successful bidder should implement its cooperation with the AFC system.

Machine Translated by Google

[4] On September 13, 2015, a joint protocol interpreting the contract was concluded between the contracting parties, with the aim of remedying the problems of interpretation and clarity of the Main Project Contract. Its subject was the determination of the availability level of the operation services starting from November 2014. Under point 2.3., the availability level calculations related to the consideration of the error notes recording customer complaints were clarified, defining the individual customer complaints from the perspective of which regulation they fall under according to the Operation Contract. In point 2.4., the data on the outage times included in the technical description in a table were interpreted. Under point 2.5., the legal consequences of a delay in the 15-calendar-day repair deadline due to equipment failure were recorded.

[5] The Main Project Contract was amended several times. Amendment No. 3 was dated 13 July 2017, in which the contracting authority ordered the successful bidder to supplement the TVM central control system with a software module enabling web sales. On 15 September 2017, the parties defined the contractual concepts of “blocking”, “banknote withdrawal” and “customer error” in Amendment No. 4; the duration of the correction of functional losses resulting from the above behaviors and its detailed rules. It was stipulated that the amount of additional compensation under the contract amendment may not exceed 2,530,195,870 HUF, 50% of the original contract value. According to the notice of the amendment, the compensation increased by the latter amount.

[6] The Cost Compensation Agreement was concluded between the contracting parties on 22 December 2016, the subject of which was the cost compensation regulation arising from the additional requirements of the contracting authority during the operation of the TVM on the side of the winning bidder. The additional costs arose, on the one hand, from the shorter deadline for repairing malfunctions resulting from cases of clogging of the TVM devices, and, on the other hand, from the on-site servicing of banknote withdrawal cases. The subject of the agreement dated 22 December 2016 was the regulation of the cost compensation to be paid to the bidder by the contracting authority for the additional costs incurred during the operation of the TVM in the amount fixed in the agreement and according to the legal basis. According to point 2.2 of the agreement, the parties stipulated that the agreement supersedes all previous statements regarding the matter falling within the regulatory scope of the agreement. The payment amount was HUF 125,038,099 net as a one-time reimbursement of additional operating costs incurred between September 1, 2015 and December 31, 2016. Additional operating costs were detailed in Section 3.3 of the agreement, setting out the definition of the phenomenon of blockage, which can be resolved by on-site visits or troubleshooting, and setting out the contractual terms and conditions for repairing blockages, which, compared to the previous cases, fall under the category of vandalism, and the repair period was thus changed from 15 days to 5 days, and the contracting authority requested their completion within a shorter deadline.

Machine Translated by Google

[7] According to the statement of the contracting parties, contract amendment no. 3 was terminated on June 4, 2019, no performance or payment was made, and a gross amount of HUF 162,679,973 was paid for the performance related to contract amendment no. 4 until April 2021.

[8] On 29 September 2017, the defendant intervener initiated legal redress proceedings against the contracting parties on the basis of Section 153(1)(c) of Act CXLIII of 2015 on Public Procurement (hereinafter: the Public Procurement Act) for, on the one hand, a violation of the fundamental provisions set out in the first sentence of Section 128(2), Section 30(4) and Section 2(3) of the Public Procurement Act, on the other hand, a violation of Section 4(1); Section 141(2) and Section 4(4)(b) and (c) of the Public Procurement Act. The first-rank defendant initiated the legal remedy proceedings on October 2, 2017 (order number 2), and at the same time called on the contracting authority to attach the documents within five days, which the contracting authority complied with on October 18, 2017. The first-rank defendant extended the administrative deadline by ten days on one occasion (order number 14).

[9] In its decision No. D.561/17/2017 dated 15 December 2017, the first-tier defendant, acting on the ex officio initiative of the defendant intervener, determined that the contracting authority had violated the provisions of Section 30(4) of the old Civil Code (element 2 of the claim).
It further found that the contracting authority and the successful tenderer had violated the provisions of Section 141(8) of the Public Procurement Act (elements 4, 5 and 6). It therefore imposed a fine of HUF 80 million on the contracting authority and HUF 70 million on the successful tenderer. It found that there was no violation of elements 1 and 3 of the initiative.

[10] In paragraphs 6-19 of the decision of the first-tier defendant, the relevant elements of the basic contracts and the harmful amendments were recorded in paragraphs 25-30. In paragraph 42, the findings were made regarding the applicable legislation.

[11] In paragraphs 53-61 of the decision, it dealt with element 4 of the initiative, where it examined the infringements related to contract amendment No. 3. It analysed the relevant parts of the rules set out in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (hereinafter: the Directive) in connection with the provisions of the Public Procurement Act, highlighting that for the contract amendment to be lawful, it is sufficient if any of the cases set out in the Directive are met. It took into account the reasons for the contract amendment specified by the contracting authority (reducing the number of abuses experienced in the TVM system by introducing a new web-based sales channel; transport challenges associated with the organisation of the FINA World Championships; compatibility with the TVM system; procurement from a third party would result in a significant disadvantage or multiplication of costs). He stated that the contract amendment was the creation and operation of a fee product sales channel, which constitutes a new procurement requirement of the contracting authority compared to the subject matter of the Main Project Contract. The new web sales channel and the TVM sales channel as per the subject matter of the Main Project Contract both enable the sale of the contracting authority's fee products. Another such sales channel is the contracting authority's ticket and season ticket office. In terms of their purpose and function, these

Machine Translated by Google

are identical, they are necessarily connected to the background systems of the contracting authority, however, it does not follow from this that the individual sales channels can be developed exclusively by integrating them into each other's systems. The contracting authority has implemented a new procurement requirement by developing and operating the web sales system. There is basically no necessary additional technical connection between the TVM and the web sales system, as there would be between any other sales channels. The first-tier defendant considered this to be an essential element of the facts because the contracting parties did not dispute that the web sales system could be developed independently of the TVM system. It was the contracting authority's decision that the TVM would be developed as a module of the central system, the most basic justification for which was that integration into the AFC system could be implemented most easily in this way. It is a question of fact that if the web sales channel is developed as a module of the TVM system, the connection between the TVM and the AFC system is implemented. However, the documents available in the legal remedy proceedings did not substantiate the claim that the web sales channel could only have been developed integrated into the central system of TVM. The establishment of the data connection of the TVM and the AFC system is feasible even if the web sales channel is implemented as an independent development. The first-tier defendant examined the conditions under Section 141(4)(b) of the Public Procurement Act. It established that the web sales system could not be purchased exclusively from the original contracting party. The contracting authority's procurement requirement for this system was completely independent of the previous one, on the one hand, and the Main Project Contract, on the other. With regard to the examination of legality, it cannot be taken into account that the contracting authority created a factual situation with its conduct excluding competition that resulted exclusively in the use of the winning bidder. The contract amendment by omitting the public procurement procedure is subject only to the provisions of the Public Procurement Act. 141. § can be applied legally, so the examination of the legal basis according to Section 98. (2) c) of the Kbt. did not attach importance. The reasons according to the contract amendment do not establish the statutory conditions either, the ticket control mechanism is not relevant because it is only an additional benefit, since the main object is the development and operation of the web sales channel, and the statutory provisions do not contain a purpose. Thus, it had to be ignored that it could potentially reduce the number of abuses. The reference to the FINA World Championships is also irrelevant for the same reason. The copyright obligation did not affect the procurement requirement for the web sales channel, but the integration into the TVM central system. Although the advantages referred to by the contracting parties exist, they are not proportionate to the advantages of the competitive procurement of the web sales system in a separate procedure.

[12] In connection with the Cost Compensation Agreement challenged under element 5, the First-tier Defendant dealt with the issue in paragraphs 62-65 of its decision, referring in the preamble to the judicial practice developed in connection with the relationship between the violation of fundamental rights and substantive law, by conducting its examination on the substantive legal provisions it indicated. It referred to certain points of the Operating Agreement and the minutes signed by the contracting parties on September 13, 2015, drawing the conclusion from all of this that the Cost Compensation Agreement should be considered an amendment to the Main Project Agreement, since the parties made provisions different from the provisions of the Main Project Agreement in the scope of the service according to its subject matter. Although, prior to the time of the later agreement, the successful tenderer, on the instructions of the contracting authority, carried out performance that differed from the Main Project Contract, the legal framework and the amount of compensation were settled by the parties in the Cost Compensation Agreement. It was not disputed that the "de minimis" modification condition did not exist, and with regard to legality, Section 141 (4) c) of the Public Procurement Act

Machine Translated by Google

referred to the provisions of point 1. Regarding unforeseeability, the high number of cases of blockage was indicated. However, the first-rank defendant considered that the contracting authority had foreseen the possibility of blockage, taking into account the technical description annexed to the public procurement documentation. The winning bidder could only offer a TVM with this function, the fifth paragraph of page 57 of the professional offer, which was declared a business secret, clearly provides for the issue of compliance with the requirements of the technical description. The parties concluded the Main Project Contract on the basis of these conditions, the winning bidder assumed a warranty for the TVM devices in the business contract, and a repair obligation was stipulated in the event of a defect preventing proper operation. The first-rank defendant did not find the interpretation of the protocol regarding the elimination of damage outside the scope of the warranty to be well-founded. No. 1 of the Cost Compensation Agreement Annex itself states in detail that the TVM devices do not meet the requirement for impermeability specified in the technical requirements, but the contracting authority took over the devices in the framework of the handover. Accordingly, a 50% sharing ratio was applied. The first-tier defendant assessed only the public procurement law aspect of the relevant facts, drawing the conclusion that the contracting authority had already taken into account the situation of impermeability. It was unlawful for the parties not to treat the contract amendment - as a result of which the contracting authority decided to spend HUF 125,038,099 - as an amendment.

[13] As the 6th element, the first-tier defendant examined the 4th amendment to the contract in paragraphs 66-70 of the decision. According to this amendment, the parties defined the concepts of “blocking”; “banknote withdrawal”; “customer error”. The Operating Agreement was supplemented with a new section, according to which the correction of these errors must be carried out accordingly. They referred to the provisions of Section 141 (4) c) of the Civil Code. In paragraph 5 of the amendment, it was stated that a maximum of HUF 2,530,195,870 could be paid on the title specified in the amendment. The first-tier defendant found the conduct of the contracting parties to be unlawful for the same reasons as those stated when examining the cost compensation agreement, and also for the reason that the contract amendment does not contain a quantitative clause, thus ordering its terms to be applied even if only one TVM is affected by the blockage. The criterion set out in Section 141(4)(cc) of the Civil Code was also not met due to the amount of the additional compensation specified in the amendment, because the amount of the compensation to be paid under the Cost Compensation Agreement should also have been taken into account. It is not relevant whether this was due to an administrative error, nor is it relevant that the forecasted payment is not expected to reach this amount.

[14] The first-tier defendant ruled on the obligation to pay the fine, taking into account Section 165. (4); (3) point d); (6)-(7); (11) of the Civil Code. It assessed the estimated value of the public procurement, and at the same time also noted that the final value of the Main Project Contract without amendments was 5,561,690,409 HUF, while the value of the part affected by the established infringement was 3,589,454,369 HUF. The Cost Compensation Agreement and the 3rd and 4th contract amendments were concluded unlawfully, the total value of which agreements was 3,314,633,969 HUF. It assessed that the contracting authority had been found to have committed an infringement several times in the past two years, but it also noted that no such infringement had been previously found against the winning bidder. He described the violation as extremely serious. He highlighted that when the contracting authorities determined the main subject of contract amendment No. 3, the procurement requirement was

Machine Translated by Google

was developed with a set of conditions so that it could be obtained exclusively from the winning bidder. With regard to the contract amendments dealing with clogging cases, it assessed that the parties themselves stipulated in the cost compensation agreement that both parties were responsible for the situation created by the clogged “unclogging TVMs”. It assessed that the violation could not be repaired to the detriment of the winning bidder. The parties first qualified the contractual concept of clogging cases and the provisions relating to it as damage in the protocol evaluating the provisions of the contract, and then in the framework of contract amendment no. 4, clogging cases were not interpreted as damage, but a new contractual provision was created for them, although it is clear that this is a category of cases prescribed as a technical requirement specified in the technical specifications of the contracting authority. It also took into account that the contract was partly financed from a grant, so the violation may be subject to a sanction for the repayment of the grant in the proceedings of another body. It specifically mentioned that it considered the imposition of a fine for element 2 of the ex officio initiative to be justified, given that the posting of the notice on the modification of the contract is a guarantee-type obligation of the contracting authority, the failure to which constitutes a serious infringement, but it assessed that the information notice was published subsequently, although also that it was almost two years after the statutory deadline. At the same time, it assessed the contracting authority's benefit in the context of cooperation that it acknowledged the infringement for element 2. The different amount of the fine was justified by the fact of an additional infringement established against the contracting authority, while it assessed the legal acts assessed as infringing on the basis of elements 4, 5 and 6 as being identical in terms of the contribution and liability of the contracting authority and the successful tenderer.

Claims and counterclaims

[15] The first-rank plaintiff (successful bidder) filed its action for the review of the first-rank defendant's decision, in relation to the 4th, 5th and 6th requests of the ex officio initiative, requesting, on the basis of Section 339(2)(q) of Act III of 1952 on the Code of Civil Procedure (hereinafter: the Code of Civil Procedure) and Section 172(3) of the Code of Civil Procedure, the amendment of the decision and the determination of the absence of a violation of law with respect to the first-rank plaintiff, and, in the alternative, the application of Section 339(2)(q) of the Code of Civil Procedure. Pursuant to Section 339 (1), the provisions of the decision relating to him are repealed, thirdly, the decision is amended in this respect and the fine is waived, fourthly, the decision is repealed and the first-tier defendant is ordered to initiate new proceedings, stating that there is no legal possibility to impose a fine on the first-tier plaintiff, while fifthly, the decision is amended to the effect that a reduction in the amount of the fine is justified in the case of the first-tier plaintiff. He also requested payment of his costs incurred in the lawsuit.

[16] In its application, it summarised the relevant facts, explaining in the preamble that, contrary to its previous practice, which it also referred to in the specific decision numbers, the defendant treats the liability of the contracting authority and the tenderer in relation to the violation of public procurement rules as practically the same. It ignores that the public procurement requirement and the obligation to conduct the public procurement procedure arise with the contracting authority.
The contracting authority is in a position to decide on the conduct of the public procurement procedure in the light of its procurement requirement or, where appropriate, to declare it unnecessary. In its decision, the defendant also holds the successful tenderer liable for decisions taken by the contracting authority in relation to its procurement requirement, for which the plaintiff has no right to appeal.

Machine Translated by Google

has no influence on it and cannot have any. In his opinion, this seriously violates the principles of legal certainty and the rule of law, because in this way the winning bidder is obliged to bear the public procurement legal consequences of the contracting authority's decisions without being the addressee of the legal norms binding for the conduct of the public procurement procedure. The satisfaction of the procurement requirement in accordance with public procurement legislation is the sole obligation and responsibility of the purchasing contracting authority.

[17] As a procedural objection, he referred to Section 141(8) of the Civil Procedure Code in connection with all the violations charged against him, stating that the ex officio extension of the proceedings was not made because the ex officio initiator did not request the establishment of the violation on this legal basis, while in connection with the 5th and 6th request elements, the initiator did not request the establishment of any violation against the first-tier plaintiff either in his ex officio initiative or in his observations. He referred to the provisions of Section 158(1) of the Civil Procedure Code, based on which it is obvious that the first-tier defendant must make a decision on the extension of the proceedings, the procedural instrument of which is the order. Because the first-tier defendant did not expand its proceedings, and therefore the first-tier plaintiff could not have been informed of them, he was deprived of his right to defend himself, and therefore the decision is seriously unlawful.

The first-tier defendant exceeded the administrative deadline, which a priori precludes the imposition of a fine. He referred to Section 164(3) of the Civil Procedure Code, stating that the first-rank defendant initiated the legal remedy proceedings on 2 October 2017. The administrative deadline was extended by ten days on one occasion, as a result of which the administrative deadline expired on 11 December 2017, while the first-rank defendant issued its decision on 15 December.

The right to a fair trial, as enshrined in Article XXIV. (1) of the Fundamental Law, has been violated.
Citing certain provisions of the Constitutional Court's decision 5/2017. (III.10.) AB, as well as its decision IV/1201/2017. in a case subject to the same factual and legal assessment, and the decision of the Curia in case Kfv.I.35.760/2016., the Constitutional Court emphasized that the courts are obliged to assess in favor of the client the exceeding of the administrative deadline by the administrative authority. The consequences of exceeding the deadline should have been deducted, and the fine was imposed in an unlawful manner for this reason as well.

[18] He disputed the violation of Section 141(8) of the Public Procurement Act primarily on the grounds that the addressee of this legal norm may only be the contracting authority, not the contracting party. This legal provision provides for the obligation to conduct public procurement, the failure to do so may constitute an unlawful omission of the public procurement. However, only the contracting authority can commit this violation. He referred to Section 4(1) of the Public Procurement Act and pointed out that the first-order defendant practice is consistent in finding the violation against the contracting authority only in the case of unlawful omission of the public procurement and imposing a fine accordingly. Following the ruling of the Court of Justice of the European Union on this matter, there is no obstacle in principle to the infringement resulting from the unlawful modification of the contract being attributed not only to the contracting authority but also to the successful tenderer, but only if national legislation provides for such a possibility in compliance with EU law. However, the Civil Code does not currently contain such a provision. Thus, in the absence of national legislation, the infringement cannot be attributed to it. Based on the judgment of the Court of Justice of the European Union, it also objected that the first-tier defendant incorrectly referred to the relevant directive in its decision and did not refer to the provisions of Government Decree 307/2015.(X.27.) on specific public procurement rules for public procurement by public service providers.

Machine Translated by Google

In connection with the 4th element of the request, it maintained its observations submitted in the public procurement procedure against the findings of the decision. It referred to case-by-case decisions, stating that there may be cases where the contracting authority may lawfully refrain from conducting the public procurement and may decide to amend the contract in order to satisfy its procurement requirement. It referred to the similarity of Section 141(4)(b) of the Public Procurement Act and the rules of the negotiated procedure without a notice due to technical characteristics, artistic aspects or the protection of exclusive rights. The assessment of what technological solution would have been the most appropriate for the contracting authority's procurement requirement requires complex expertise that the first-tier defendant did not necessarily possess when the decision was made, and therefore did not make it the subject of a substantive examination during its proceedings. The fact that another economic operator could have formally developed a similar web sales interface does not necessarily mean that another solution would have met the specific and extremely complex procurement needs of the specific contracting authority. The first-tier defendant completely failed to conduct the necessary procedure, which may require an expert examination. In its decision, it discussed the contracting authority's liability in several places and raised a single argument against the winning bidder, namely that the winning bidder is also the addressee of the norms of the Public Procurement Act on contract amendments. However, it did not even attempt to demonstrate how exactly it implemented the infringement found against it. In connection with elements 5 and 6 of the claim, it did not take into account or assess the actual extent of the blockages experienced in practice, which far exceeded realistic expectations, and it considered further assessment of the situation unnecessary compared to the conditions at the time of the tender. The requirements of foreseeability/non-foreseeability and due diligence are circumstances to be examined in relation to the contracting authority, and consequently, their violation can only be attributed to the contracting authority, and not to the successful tenderer contracting with it. The first-tier defendant's argument is also based on what the contracting authority should have foreseen in a given situation. In this regard, it referred to certain findings of Decision No. D.171/2017. However, the fact that the contracting authority ordered unclogable devices and accepted them as meeting this condition shows that it acted with due diligence with regard to the blockages, i.e. it assumed that the devices were unclogable in accordance with the contractual clause.

In comparison, the argument of the first-tier defendant that he considers the amount of clogging that exceeded any conceivable amount experienced in reality to be foreseeable is untenable.

[19] The first-tier defendant erroneously referred to Section 2(2) of the Public Procurement Act in connection with the Cost Compensation Agreement, because the requirement of publicity is regulated by Section (1). Although this is not listed as a violation in the operative part, the contracting authority is entitled to post the notice on contract amendments, therefore it is obliged to ensure publicity. Against the arguments of the decision related to Section 141(4)(c) sub-point cc) of the Public Procurement Act, it referred to the amount in forints set out in the Main Project Contract and appearing in several places in the decision as the amount to be taken into account in relation to the 50% limit. The total amount payable under the Cost Compensation Agreement and Contract Amendment No. 4 is 2,655,233,969 forints, which does not exceed 50% of the original value of the Main Project Contract, therefore no violation of law can be established in relation to the winning bidder based on this legal provision either.

[20] In addition to his primary argument regarding the imposition of the fine, which was that the application of this sanction to him was unlawful, he argued that the assessment of the first-tier defendant was unreasonable and

Machine Translated by Google

contains blatant logical contradictions, because it ignored important circumstances when it considered the involvement and responsibility to be the same for the contracting parties. Thus, it ignored the fact that the necessity of the contract amendments was initiated by the contracting authority, i.e. the formulation of the procurement request in each case. There was no intent, bad faith, or any collusion on the part of the winning bidder. Its activity was responsive in each case, and as a company operating in a competitive market environment, it tried to show as much flexibility as possible in order to implement the requests formulated by its client. In point 53 of the decision, the first-rank defendant itself stated that the comparison of the amendment condition and the facts is the responsibility of the contracting authority, and the first-rank defendant or even the ex officio initiator cannot take this on. This necessarily leads to the conclusion that the winning bidder cannot either. The statement in point 61 of the decision that both parties involved in the contract amendment are to be held liable for the fact that the conclusion of the Cost Compensation Agreement was not treated as an amendment and, as a result, the guarantee procedure rules specified in the public procurement regulations, such as the publication of the notice, were omitted, is also unfounded. The latter is the contracting authority's obligation, therefore the failure to do so cannot be attributed to the successful tenderer in the same way as the contracting authority. Point 73 of the decision states that the contracting authority has been fined several times in the past two years, while no such fine has been imposed on the successful tenderer, but the amount of the fine does not reflect this difference either.

[21] In its action, the second-ranking plaintiff (contractor) requested the review of the first-ranking defendant's decision, primarily by changing it and by establishing the absence of a violation with regard to the 4th, 5th and 6th request elements of the ex officio initiative, and by omitting the fine, while in the case of the decision related to the 2nd request element, the omitting of the imposition of a fine.
In the second place, it requested the annulment of the decision, with the exception of the 2nd request element, on the grounds that the reduction of the amount of the fine was justified due to the absence of a violation, and it also requested that the first-rank defendant be ordered to conduct new proceedings. In the third place, it requested that the decision be changed in such a way that the court refrains from imposing a fine on the second-rank plaintiff. In the fourth place, it requested that the decision be changed in such a way that the amount of the fine is reduced in favor of the contracting authority. It also requested that its legal costs be determined. It referred to the violation of Section 2; Section 4(1); Section 141(4)(b) and (c), (8); Section 158(1) and Section 164(3) and (5) of the Civil Code.

[22] He maintained what was presented during the appeal proceedings, stating that in relation to the 2nd request element of the ex officio initiative, he did not dispute during the appeal proceedings that the information notice was published on 1 August 2017, nor did he dispute the infringement of the indicated legislation. He claimed, however, that he had fulfilled his legal obligation, albeit belatedly, and that Amendment No. 2 of the Main Project Contract was available on the contracting authority's website. He referred to the defendant's practice according to which, in addition to the establishment of such a violation, no other legal consequence - in particular the imposition of a fine - was justified on the part of the proceeding authority. With the additional fulfillment of the obligation, the recognition of the violation, and the cooperative conduct shown during the appeal proceedings, no other sanction was justified against him beyond the establishment of the violation. Thus, in this respect, his application aimed at omitting the fine, or at least reducing it.

Machine Translated by Google

[23] In relation to the 4th element of initiative, in his opinion, the first-tier defendant did not properly assess the documents, evidence and statements submitted by him, although he himself states in the decision that the regulation on the modification of public procurement contracts creates a more flexible environment compared to the previous rules. The Public Procurement Act only intends to sanction conduct that unjustifiably excludes competition. The legal basis for contract modification under Section 141(4)(b) of the Public Procurement Act does not require the contracting authority to justify why and how it specified its procurement requirement, even if – in a given case – the lower level of competition would result from the fact that it specified its procurement requirement in a restrictive manner. It is only necessary to substantiate the legal title of the contract modification and is not obliged to justify why it developed the content of the procurement requirement as it did in the modification. The existence of an exclusive right based on copyright, and thus of technical exclusivity, is not a condition for the legal basis under Section 141(4)(b) of the Civil Code, in view of which the legal title is still considered well-founded. This legal provision defines two conjunctive, but in some elements alternative conditions, which results in the fact that if even one of the alternative conditions exists, the legality of the contract amendment is adequately supported. Neither the ex officio initiator nor the first-rank defendant disputed the existence of the economic reason under Section 141(4)(b), sub-point ba) of the Civil Code and its verification by the contracting authority, so in their opinion it was also recognized by the first-rank defendant.

At the same time, it unjustifiably underestimated the economic reasons and significant cost-reducing factors taken into account by the second-tier plaintiff. It also underestimated the elements it defined as additional advantages, which can be achieved by introducing the web sales module, given that the cited legal title does not distinguish between the methods of avoiding the disadvantage. It is not disputed that the value of contract amendment No. 3 did not exceed 50% of the original contract value.

[24] Regarding the 5th initiative element, the contracting authority maintained that the Cost Compensation Agreement did not qualify as a contract amendment, but merely served to fulfill the documentation obligation set out in Section 142(1) of the Civil Code. Its essence was to handle claims arising from the legal dispute between the parties. It was not clear which contractual provision should apply to the so-called blockage-related failures. According to the contracting authority, such failures should have been repaired under the warranty, while according to the successful tenderer, it should have been repaired under the rules on vandalism. According to the contracting authority, there was no additional service requirement for the repair within a shorter deadline, while according to the successful tenderer, there was. The consensus is recorded in the agreement, in which the contracting authority acknowledged that its legal position that a defect repair within a shorter period than that specified in the contract does not qualify as additional services was incorrect and accordingly acknowledged the successful bidder's claim for the consideration for the additional services. The agreement did not have the subject matter of amending any contractual provision, either for the future or for the past, this finding by the defendant is incorrect. If it were nevertheless to be considered an amendment to the contract, the legal basis under Section 141 (4) c) of the Civil Code would not be applicable in this case, because neither when signing the Main Project Contract nor when amending it No. 2 could the contracting authority foresee the extent to which the clogging of the TVM machines would occur, the amount of loss of income or additional costs that the reduction of the repair deadline might generate, thus the condition of unforeseeability exists.

Machine Translated by Google

[25] Regarding the 6th initiative element, the contracting authority referred, without prejudice to the previous ones, to the fact that in the 4th amendment to the contract it was stated that the 50% payment limit set out in Section 141(4)(c)(cc) of the Public Procurement Act was to be interpreted independently of the additional payments under Amendment 4, and independently of the additional payments under Amendment 2 and Amendment 3, as the referred amendments became necessary due to unrelated circumstances. The total contract value following Amendment 4 cannot be determined precisely, so in its VIII.2.3. point, a value increased by the maximum value of the 50% payment limit set out in Section 141(4)(c)(cc) of the Public Procurement Act was set out, by which amount the actual contract value may be lower and is expected to be lower, but not higher. The basis for the actual settlement is the number of relevant event tickets recorded by the contracting authority. After the closing of the settlement period, the event tickets were subject to an itemized check based on the rules specified in the contract, at the end of which the associated payment value is determined individually for each event ticket. The parameters to be checked include, among others, the length of the repair time, the time of the repair, the location of the repaired machines relative to each other, or, for example, the filtering of administrative anomalies related to the event ticket. In addition to the above, according to the contract, if a negative payment is due for a given ticket vending machine based on the associated event tickets, it is to be corrected to zero forints. Thus, the actual payment to the winning bidder can only be made according to the itemized settlement following the month in question, based on the performance signed by the contracting authority. Given the specifics of the notice template, the contracting authority had no other option, when filling in the price increase section, than to set the theoretical maximum amount. For administrative reasons, an incorrect amount was indicated in Amendment No. 4 and in the information notice about it, since the consideration for the Cost Compensation Agreement was not deducted. The correct maximum amount is therefore HUF 2,405,157,771. As a result of Amendment No. 4, a total of HUF 138 million may be paid from the Main Project Contract during the remaining period, so the consideration for the Main Project Contract may realistically increase by this amount as a result of Amendment No. 4.

[26] The partially clarified claim of the third-ranking plaintiff was aimed at establishing the invalidity of the three unlawful contract amendments as follows: it requested that the contract amendment between the second-ranking defendants dated 15 September 2017 be declared invalid due to its nullity under Section 176(4) of the Civil Code, in view of the second sentence of Section 141(8) of the Civil Code, provided that the court, pursuant to Section 237(1) of Act IV of 1959 on the Civil Code (hereinafter: the Civil Code), order the restoration of the situation prior to the conclusion of the contract by obliging the third-ranking defendant to pay the costs of the contract to the second-ranking defendant. The 16,156,300 forints paid by the 1st defendant until 19 October 2018, as well as the consideration paid for the performance of the contract until the date of the judgment, in favour of the 2nd defendant. If the court does not grant its primary claim, it requested in the alternative that the contract be declared invalid and that the 2nd and 3rd defendants be ordered to jointly pay the legal costs. It referred to Section 237 (1) of the Civil Code and Section 305 (1) of the Civil Code, with regard to the latter, it explained that in its opinion, the TVM devices did not have the property specified in the contract when they were delivered, according to which they must be designed in such a way that a device that prevents the acceptance of banknotes or coins could get in the way of the money either when receiving or returning it, or

Machine Translated by Google

return, however, he did not file a claim on the grounds of defective performance – taking into account the specific features of the lawsuit and the jurisdiction granted to him by the Civil Code. According to his position, in the case of a TVM with a technical requirement of non-clogging, the number of clogging attempts is completely irrelevant, since if the third-order defendant had supplied TVM devices with the technical parameters specified in the contract, the clogging cases would have been caught in the experiment phase, since the issue of non-clogging does not depend on the number of attempts. In connection with the secondary claim, he stated that he was only requesting a determination in accordance with the provisions of Section 176 (1) of the Civil Code, referring to Section 1 of the Civil Code, 5/2013. Civil Code Decision (hereinafter: 5/2013. PJE), according to which in lawsuits for the determination of the invalidity of the contract, the court does not have to examine the provisions of Section 176 of the Civil Code. The conditions set out in Section 123 were met. When determining the amount of the penalty, the contractual parties' declarations regarding performance were taken into account.

The invalidity of the contract amendment concluded on 13 July 2017 was requested on the basis of Section 176 (4) of the Civil Code, in view of the second sentence of Section 141 (8) of the Civil Code, on the basis of the nullity ground under Section 137 (1) a) of the Civil Code, in addition to the determination of the legal costs. He referred to the findings of the decision, stating that the web sales system has been developed and its operation has been continuous since then. constitutes the contractual task of the second-order defendant. Accordingly, the service is irreversible.

In this case, he only requested a determination, also referring to the PJE. He indicated the value of the subject matter of the lawsuit at 659,000,400 forints, which is the same as the value of the contract.

The invalidity of the contract amendment concluded on December 22, 2016, with a net value of HUF 125,038,099, was also requested based on Section 176 (4) of the Civil Code, with regard to the second sentence of Section 141 (8) of the Civil Code, on the grounds of nullity existing under Section 137 (1) a) of the Civil Code, and requested the restoration of the original state based on Section 237 (1) of the Civil Code, and the obligation of the third-rank defendant to repay HUF 125,038,099 to the second-rank defendant. In the alternative, it was requested solely to declare the invalidity on the grounds of nullity already referred to, and it was also requested that the second-rank defendants be jointly and severally liable for the payment of the legal costs. It referred to the relevant contractual elements established in its decision and the legal conclusions drawn from them for the benefit of the contracting parties. It also reiterated its arguments regarding the contract amendment of 15 September 2017.

[27] In its counterclaim, the first defendant requested that the claims be dismissed.

[28] In connection with the claim of the first-tier plaintiff, he emphasized in the preamble that the infringement was established against the successful tenderer solely for the violation of a legal norm to which it was the addressee, namely the addressees of the provisions on contract modification set out in Section 141 of the Civil Code are the parties concluding the contract. Section 141 of the Civil Code – adopting the reverse logic of Article 72 of the Directive – regulates, the main rule is found in paragraph (8), while Section 141 paragraphs (1)-(7) contain the specified cases of modification, in the absence of which the parties may not modify the contract.

The infringement indicated in the ex officio initiative was the unlawful modification of the contract, and the legal basis was Section 141 of the Civil Procedure Code. The first-rank defendant referred to point 53 of the decision, arguing that Section 158(1) of the Civil Procedure Code was not applicable, as it did not examine the infringement beyond the infringement indicated in the ex officio initiative. In connection with the lack of an initiator's motion, he referred to point 45 of his decision.

Machine Translated by Google

The notice of initiation of the procedure made it clear what the position of the successful tenderer was in the legal remedy procedure and there was no question that it was involved in the capacity of a petitioner. It received all comments during the procedure and was able to fully exercise its client rights.

[29] According to Section 145 (1) of the Public Procurement Act, the provisions of Act CXL of 2004 on the general rules of public administrative procedure and service (hereinafter: the Public Procurement Act) were to apply to the proceedings of the Public Procurement Arbitration Board, unless otherwise provided for in this Act and the Government Decree enacted on the basis of the authorization of this Act. According to Section 33 (3) (c) of the Public Procurement Act, unless otherwise provided for in law, the time from the invitation to remedy the deficiency or to provide the data necessary to clarify the facts until its fulfillment shall not be included in the administrative deadline. The Public Procurement Act does not contain any different rule regarding the suspension of the deadline, so the rules of the Public Procurement Act shall apply, taking into account Section 145 (1) of the Public Procurement Act. With regard to exceeding the three-day deadline, the winning bidder disregarded the rules regarding the suspension of the deadline. It correctly determined the first day of the deadline, but did not take into account that, in the context of clarifying the facts, the first-tier defendant requested, among other things, all original documents and other data and information from the contracting authority, until the receipt of which documents, the deadline was suspended for more than 14 days, thus rendering the first-tier plaintiff's motion unfounded.
Otherwise, the Constitutional Court and Supreme Court decisions cannot be considered analogous to a significant omission that exceeded the administrative deadline several times in the administrative procedures that formed the basis of the referenced decisions.

[30] Contracts concluded on the basis of a public procurement procedure are subject to civil law regulations, in this case the Civil Code. According to Section 240 (1) of the Civil Code, the law does not make any exceptions; the parties may amend the content of the contract or change the legal title of their commitment by mutual agreement. According to Section 141 (1) of the Civil Code, the provisions of this sub-title shall apply to amendments made by the contracting parties – or by one of the parties entitled to do so – and to changes in the legal relationship of the parties in accordance with the provisions of the contract (hereinafter collectively referred to as: contract amendment). The parties amended the contract on several occasions. The addressees of the civil and public procurement regulations are clearly the parties, i.e. in this case the successful tenderer and the contracting authority. The conditions for the amendment were not met, so the contract amendment was unlawful, these legal provisions can only be violated jointly, the contracting authority could not amend the contract on its own, as this requires the mutual agreement of the parties. Its position was confirmed by the judgment of the Court of Justice of the European Union.

[31] In connection with the 4th initiative element, the defendant did not consider it possible to take into account the court decisions made on the basis of the old Public Procurement Act, also because the applicability of the negotiated type of public procurement procedure without a notice in the case decisions was questionable. Although the Public Procurement Act still includes a procedural type related to the contract amendment case, but with by no means identical conditions, it referred to this in point 58 of the decision. It referred to points 56 and 58 of its decision by stating that, prior to the conclusion of the TVM contract, the contracting authority wanted to implement its web sales channel within the framework of the AFC Project. The fact that the procurement requirement for the procurement of the web sales channel arose earlier than TVM

Machine Translated by Google

The conclusion of a contract for the implementation of a sales channel excludes the legal provision regarding the admissibility of a modification case that requires procurement from the original contracting party.

[32] With regard to initiative elements 5 and 6, it referred to point 64 of the decision, highlighting that a valid bid based on the technical description of the tender could only be submitted with a TVM in which tampering with the seal was excluded. The winning bidder's bid had to include a TVM offering that met the conditions specified in the technical description, so the large number of tampering with the seal could not be the reason for the cited contract modification case, since successful tampering was excluded in the case of TVM according to the technical description. The fact that the seal was ultimately successful in the case of TVM devices cannot in any way be considered an unforeseeable circumstance. The fact that the examination of the requirement of foreseeability may arise on the side of which contracting party shows no connection with the legal consequence of the illegality of a contract modification concluded with the unity of the parties' will, which can be applied against which contracting party.

[33] The findings regarding the contractual values were also disputed. The contractual price set out in the Main Project Contract included a final delivery schedule for an optional order of 30 units, which although was included in the value of the Main Project Contract, was correctly calculated when the contract was amended, taking into account Section 141(5) of the Civil Code. However, the so-called Cost Compensation Agreement was not explicitly taken into account, the value of which should have been taken into account when maximizing the actual value of the amendment by 50%.

[34] In opposition to the claim argument regarding the fine, it consistently emphasized that the infringement was committed jointly by the parties, and that the consequences of the contractual amendments reached by mutual agreement are borne jointly and equally by the parties. The winning bidder was unable to identify a group of data that was relevant and that it did not present in this context. The first-tier defendant referred to paragraph 73 of its decision, in which it took into account that no infringement had been established against the winning bidder in the past two years. The aspects taken into account in the context of imposing the fine were recorded in the relevant part of the decision.

[35] In connection with its claim, the second-tier claimant referred to the fact that, in paragraph 73 of the decision, it gave detailed reasons for why it decided to impose the fine and what aspects it took into particular account when determining its amount.
It is a flawed logic that, based on previous defendant decisions, casts doubt on the imposition of a fine related to the violation of Section 30(4) of the old Civil Procedure Code, after which only all the circumstances of the case can be taken into account.

Machine Translated by Google

[36] The plaintiff of the second rank claims, in breach of the document, that he considered the 3rd amendment to the contract to be unlawful because the condition under Section 141(4)(b) of the Civil Code did not exist. The decision clearly states that a violation was found because none of the amendment conditions existed. In this regard, he referred to points 53 and 59 of his decision. The defendant of the first rank examined the amendment conditions separately, including the condition under Section 4(b), the absence of which he provided detailed justification for in point 58 of the decision. In addition, he repeated the arguments highlighted in connection with the plaintiff of the first rank's claim. He denied that it could be read from his decision that he had acknowledged the existence of an economic reason.

[37] In connection with the Cost Compensation Agreement, citing the statements of claim of the contracting parties, it concluded that both contracting parties considered performance and compensation for it to be the content of this agreement, i.e. the parties themselves emphasized the agreement to perform performance differently from the provisions of the basic contract. Therefore, the first-tier defendant could not assess this as anything other than an amendment to the basic contract. With regard to Section 141(4)(c) of the Civil Code, it referred to point 64 of its decision, emphasizing that it did not find an appreciable connection between the requirement of unforeseeability and the large number of blockages referred to by the contracting authority, for which it provided detailed justification with regard to TVMs with the technical requirement of impenetrability.

[38] The Court found contract amendment No. 4 to be unlawful for three reasons, which it explained in detail in paragraphs 68 and 69 of its decision. Paragraph 70 provides a justification for one element of the amendment condition. The administrative error is unacceptable, and the formality of the information notice to be published on the amendment is completely irrelevant, since the contract amendment document also includes the unlawful amount specified in its decision as the maximum amount.

[39] The intervener, in agreement with the counterclaim of the first-tier defendant, argued that the contracting authority is the primary, but not the exclusive, obligor for the proper conduct of the public procurement procedure. The responsibility for compliance with public procurement law requirements is more nuanced when amending a contract concluded as a result of a previous public procurement procedure. It is not uncommon for the successful tenderer itself to initiate this. In such cases, the successful tenderer necessarily has more information about the performance/fulfilment of the public procurement contract concluded in the previous public procurement procedure in accordance with the Public Procurement Act, and about the existence of the conditions of any possible contract amendment in the Public Procurement Act. The Public Procurement Act restricts the parties' freedom to conclude contracts with regard to contract amendments. However, this does not change the fundamental civil law principle that contract amendments presuppose the unanimous expression of will of the parties to the contract.

This, and the obligation to cooperate, also presupposes the transfer of information between the parties. Therefore, the argument that the tenderer has no opportunity or influence to examine the fulfilment of the conditions of the contract amendment in the Public Procurement Act is incorrect. Although the contract amendments also served the economic interest of the successful tenderer, the risks related to the legality of the amendments were placed exclusively on the contracting authority. The judgment of the Court of Justice of the European Union clearly supports the defendant's intervener position.
National legislation which, in addition to the contracting authority,

Machine Translated by Google

It also allows for the determination of a violation and the imposition of a fine against the winning bidder.

[40] The intervener also agreed with the first-tier defendant that the ex officio extension was not necessary. The first-tier defendant acted within the framework of the initiative. The successful bidder's rights in the appeal procedure were not violated.

[41] It was possible to impose a fine. The Constitutional Court decision and the Curia's case-by-case decision set fixed deadlines for each specific legal institution.

[42] In relation to contract amendment no. 3, it was highlighted that the possibility of changing the original contractual partner was not ruled out a priori due to the objective technical and legal nature and specificities of the contracting authority's procurement requirement, but rather due to the specific method chosen by the contracting authority to satisfy the procurement requirement.

[43] Initiative elements 5 and 6 are closely related. Essentially, the same circumstance made the contract amendment necessary. On the one hand, the combined value of the compensation agreement and amendment number 4 exceeded 50%, thus it conflicts with Section 141(4)(c)(cc) of the Civil Code, and on the other hand, the condition of unforeseeability was not met.

[44] In connection with the application for a reduction of the fine, the intervener failed to specify the amount of the reduction, referring to Section 121(1)(e) of the Code of Criminal Procedure.

[45] In its application for damages, the second-ranking plaintiff submitted that the contracting authority did not dispute the violation of Section 30(4) of the old Civil Code, the fining practice had become stricter, the fine applied by the first-ranking defendant was well-founded, and the assessment criteria were relevant.

[46] Against the claim argument related to the 4th initiative element, he referred to the EU public procurement directives and the regulation of the Public Procurement Act, and its unchangeability regarding the primacy of competition, stating that the contracting authority satisfied its procurement requirement for the introduction and development of the new sales channel by amending the contract, thereby providing only the existing contractual partner, the winning bidder, with the opportunity to fulfill the order, thereby excluding competition.

[47] In relation to initiative element 5, it is considered relevant that as a result of the Cost Compensation Agreement, the contract

Machine Translated by Google

has been amended, it can be clearly established that certain repair works had to be carried out within a shorter period than the time within which the winning bidder was obliged to repair them under the original contract, and thus the contracting authority undertook additional expenses. The contracting authority's references to unforeseeability are contradictory, as it defined the requirements for the implementation of the TVM system in a way that contractually excluded the possibility of abuses such as blockages and withdrawals. Thus, it is not possible to later claim that the customer could not have foreseen the occurrence of a circumstance whose possibility it itself had completely excluded in advance in the contract.

[48] Regarding the 6th initiative element, the contracting authority cannot reasonably rely on the probability that it would not have exhausted the maximum amount set in contract amendment no. 4, the violation is already founded on the fact of endangerment, and based on the contract amendment, the possibility of exceeding 50% of the contract value was opened, taking into account the value of the cost compensation agreement.

[49] Regarding the claim element regarding the reduction of the amount of the fine, the defendant intervener also referred to the lack of a specific request. The first-tier defendant assessed numerous circumstances when determining the amount, including the contribution of the first-tier plaintiffs.

[50] In their counterclaim, the defendants II and III requested the dismissal of the plaintiff III's claim and the determination of their costs, maintaining their arguments in their claims regarding the legality of the 3rd and 4th contract amendments and the Cost Compensation Agreement concluded between them, as a result of which the plaintiff III's claim is unfounded.

Judgment of the Court of Justice of the European Union C-263/19

[51] In response to a request for a preliminary ruling submitted by the Budapest Metropolitan Court under Article 267 TFEU, the Court of Justice of the European Union (hereinafter: CJEU) ruled in its judgment No. C-263/19 (hereinafter: CJEU judgment) that Article 2(e)(2) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply contracts and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, was not applicable. Article 2e) (2) of Council Directive 92/13/EEC of 25 February 1992 on the coordination of laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66, Recitals 19 to 21, and Directive 2004/17/EC on procurement by entities operating in the water, energy, transport and postal services sectors

Machine Translated by Google

repealing [correctly Recitals 12, 113, 115 and 117, Article 1(2) and Article 89 of Directive 2014/245/EU of the European Parliament and of the Council of 26 February 2014 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC must be interpreted as not precluding national legislation which, in the context of a review procedure initiated by the supervisory authority ex officio, allows not only the contracting authority but also the successful tenderer of the public contract to be held liable for the infringement and to be fined in the event that, when a public contract in progress is amended, the rules on the award of public contracts have been unlawfully disregarded. However, where national legislation provides for such a possibility, the review procedure must respect Union law, including its fundamental principles, since the public contract concerned itself, both in its original form and after its unlawful modification, falls within the material scope of the public procurement directives. The amount of the fine sanctioning an unlawful modification of a public contract concluded between the contracting authority and the successful tenderer must be determined taking into account the conduct of each party.

[52] The CJEU emphasised that Directives 89/665 and 92/13 are undoubtedly limited to requiring Member States to ensure that a remedy is available at least to those persons who have an interest in, or have had an interest in, the award of a contract and who have been or are likely to be harmed by the alleged infringement. (See paragraph 50) The provisions of those directives are intended to protect economic operators from the arbitrariness of the contracting authority and thus to ensure that effective remedies are available in all Member States in order to ensure the effective application of the EU rules on public procurement, in particular where the infringement can still be remedied (See paragraph 51). Article 2(e) of Directive 89/665 and Article 2(e) of Directive 92/13, which are identical in wording, require Member States to provide for either invalidity or alternative sanctions, which may include the imposition of fines on the contracting authority, in the event of infringement of certain provisions of those directives (see paragraph 52). However, while Directives 86/665 and 92/13 may provide for remedies for undertakings which have an interest in, or have had an interest in, the award of a contract and which have been or are likely to be harmed by the alleged infringement, those directives cannot be regarded as achieving complete harmonisation and, therefore, as taking into account all the remedies available in the field of public procurement (see paragraph 53). It follows that Article 2(e) of Directive 89/665 and Article 2(e) of Directive 92/13 apply only to actions brought by undertakings which have or had an interest in obtaining a given contract and which are or are likely to be harmed by the alleged infringement (see paragraph 54). In those circumstances, those articles cannot prevent a supervisory authority from initiating a review procedure of its own motion or from imputing the infringement resulting from the modification of a public contract in progress in breach of the rules on the award of public contracts not only to the contracting authority but also to the successful tenderer and, consequently, from imposing a penalty in the form of a fine on both the contracting authority and the successful tenderer (see paragraph 55). Nor can it be inferred from Article 25(1) of Directive 2014/25 that the award of a public contract in question is based on the same principle. From Article 1(2) of the Directive, which covers both its material and personal

Machine Translated by Google

nor from recital 12 of that directive, which, in support of that provision, clarifies, inter alia, the concept of contracting authority, that the rules laid down in that directive do not apply to the successful tenderer of a public contract (see paragraph 57). However, where national legislation provides for a review procedure initiated by the supervisory authority of its own motion, which results in the liability of the successful tenderer of that contract being established for an infringement consisting in an unlawful modification of a public contract in progress and consequently in the imposition of a fine on that contract, that must be compatible with EU law, since such a contract itself falls within the material scope of the public procurement directives, both in its original form and after its unlawful modification (see paragraph 65). According to the principle of proportionality, which is a general principle of EU law, rules adopted by the Member States or by contracting authorities in the context of the implementation of the public procurement directives must not go beyond what is necessary to achieve the objectives of those directives (see paragraph 71). While it may be for the referring court in the present case to assess whether the amount of the fine imposed on the first-tier applicant is proportionate to the objectives of the public procurement law, the supervisory authority or the referring court cannot, when determining such an amount, confine itself to taking into account solely the fact that, by virtue of the contractual relationship between the contracting parties, their joint conduct is necessary in order to amend their public procurement contract. That amount must be determined in the light of the conduct or activities of the parties to the public procurement contract concerned during the period during which the parties intended to amend that contract (see paragraph 72).

Decision No. III/1920-4/2020 of the Constitutional Court

[53] In its decision No. III/1920-4/20, the Constitutional Court (hereinafter: AB) rejected the judicial initiative to declare the second sentence of Section 197 (1) of the Civil Code and the phrase “with the exception of the second sentence of Section 197 (2)” of the Civil Code unconstitutional and to exclude their application. The provisions challenged in the motion result in the fact that, after the entry into force of the new Civil Code, the provisions of Section 141 of the new Civil Code must be applied with regard to amendments to contracts concluded under the old Civil Code, which do not result in a restriction of rights, because the new substantive law governing contract amendments is not more disadvantageous to legal entities, which was also not referred to by the parties or the petitioning judicial panel. According to the practice cited in the decision of the Supreme Court, the prohibition of retroactive legislation does not violate the prohibition of retroactive legislation if the application of new legal provisions does not modify the legal fact that occurred before the entry into force in a way that is detrimental to the legal entities. According to the Supreme Court, the substantive law on contract amendments regulated under Section 132 of the old Civil Code and Section 141 of the new Civil Code was regulated differently, since the old Civil Code “negatively” recorded the prohibited cases of contract amendments, while the substantive law under the new Civil Code “positively” regulates those cases that are lawful cases of contract amendments, however, this regulatory difference – mainly due to the implementation of the new EU directive – does not result in ad malam partem retroactive legislation. It considered it a question of professional law to assess when and whether contract amendments were made lawfully.

Machine Translated by Google

The court's decision and its legal reasons

[54] The Metropolitan Court – given that the legal remedy proceedings were initiated on 2 October 2017 – necessarily merged the lawsuits initiated under Section 170(1) of the Civil Procedure Code and Section 176(1) of the Civil Procedure Code, as a result of which it applied the provisions of the Civil Procedure Code (Act III of 1952) in force at the earliest at the time the claim was received by the court. It proceeded in the lawsuit in a panel consisting of three professional judges, pursuant to Section 324(4) of the Civil Procedure Code.

[55] The Metropolitan Court had to review the public procurement decision in the first instance.

[56] The claim of the second-ranking plaintiff is unfounded, the claim of the first-ranking plaintiff is partially well-founded.

[57] At the court's initiative, it examined ex officio the question of the unconstitutionality of the applicable law, and the Supreme Administrative Court ruled that no such unconstitutionality had arisen. The Metropolitan Court therefore reviewed the defendant's decision pursuant to Section 170(1) of the Civil Procedure Code and Section 324 of the Civil Procedure Code, in the proceedings pursuant to Chapter XX of the Civil Procedure Code, pursuant to Section 339/A of the Civil Procedure Code, on the basis of the applicable legislation at the time the decision was made - designated in point 42 of the decision of the first-tier defendant - and the existing facts, within the framework of the claims and counterclaims (Section 215 of the Civil Procedure Code). According to Section 335/A of the Civil Procedure Code, the plaintiff may amend his claim at the first hearing. The claim may only be extended to the uncontested and independent parts of the administrative decision within the time limit for initiating proceedings.

[58] The court established the facts based on the statements of the parties and the public procurement and administrative documents at its disposal. According to consistent judicial practice, the client, or the party whose legitimate interests have been harmed, may request judicial review of the decision on the merits of the administrative case, citing a violation of the law.
In his claim, he may also refer to a violation of substantive and procedural law, as well as to the fact that the law applied when the decision was made was misinterpreted. The decision can only be set aside due to a violation of procedural law in itself if the violation of procedural law is significant, affects the merits of the decision, and cannot be remedied in court proceedings. Therefore, the primary issue was the objections to the remedy of the first-tier plaintiff of the winning bidder, so it was necessary to examine whether an unlawful extension of the remedy had occurred? Did the defendant comply with the remedy deadlines?

Machine Translated by Google

[59] Section 158 of the Public Procurement Act provides for the scope of the proceedings of the first-tier defendant. According to paragraph (1), if the Public Procurement Arbitration Board becomes aware of a violation of the law beyond that examined on the basis of the application or initiative, before making the substantive decision, it may also act ex officio in relation to additional conditions – in the event of a violation of principle – in the event of a violation of the law being detected. The intervener defendant initiated the examination of the agreements by referring to Section 2(3), Section 141(2) and (4) (b); (c) of the Public Procurement Act, however, according to the content of his initiative, it concerned the illegality of the contract amendments for the reason he indicated. The first-tier defendant correctly argued that the extension of the legal remedy proceedings was not justified, and that it did not occur unlawfully, considering the scope of his decision. There is no doubt that in the initiative, the Public Procurement Arbitration Board According to Section 152 (4), the violated legal provision must be clearly identified, among other things, in accordance with Section 149 (1) d) with respect to all application elements, but this assumes a coherent scope with the content description of the unlawful event. There is only one Section under the subtitle of the Contract Amendment Act, Section 141, and its paragraph (1) makes it clear that the provisions of this subtitle must be applied to the amendment of the contract by the parties - or by one of the parties entitled to do so - and to the change in the legal relationship of the parties in accordance with the provisions contained in the contract. The examination of possible and lawful changes regulated in the Section may ultimately lead to the determination of a new public procurement procedure that was unlawfully omitted and its consequences, which is set out in paragraph (8). The court therefore agreed with the first-tier defendant that the issue of examining the infringement beyond the infringements under examination did not arise, and that its procedure remained within the framework of the initiative when examining the conduct of the parties involved in the contract amendment. The first-tier defendant referred to the Supreme Court decision (since confirmed by the Curia practice) on the principles crystallized in the practice of law enforcement regarding the relationship between the basic principles and substantive legal provisions, and explained its position in point 62 of the decision, limiting itself exclusively to the examination of substantive legal provisions. However, since the initiative also contained the designation of substantive legal provisions, the basic principles specified therein cannot raise the illegality of the first-tier defendant's procedure due to the lack of extension. The winning bidder had to be aware of the reason for and extent of the legal remedy proceedings initiated and conducted, during which it could exercise its procedural rights, in accordance with the Civil Procedure Code. Section 158 is not violated.

[60] The first-rank defendant correctly referred to the fact that the deadline was not delayed during the appeal proceedings, taking into account Section 33(3)(c) of the Code of Civil Procedure, after the first-rank defendant ordered the correction of deficiencies in the case. Thus, the administrative deadline initiated on 2 October 2017 and extended once by ten days, the 14-day suspension of the deadline requiring the correction of deficiencies and the decision made on 15 December 2017 cannot be considered to have resulted in a delay. On the one hand, if the delay could have been determined, it would not have had any significance for the merits of the case due to the potentially significant duration of the delay, so the court could not have taken this into account. On the other hand, the reduction of the fine or its exclusion could not have been determined for this reason. The first-tier defendant correctly argued in this regard that there was no analogy to the Constitutional Court decision or the Curia decision referred to by the first-tier plaintiff.

In the context of the right to a fair trial, exceeding the administrative deadline, and the application of a fine, several interpretations have come to light since the AB decision referred to by the first-degree plaintiff, including the Kúria's judgment Kfv.V.35.523/2018/5., which in paragraph 28 refers to the Constitutional Court's decision 17/2019. (V.30.) AB as a guideline determining the framework and aspects of legal remedies during judicial review.

Machine Translated by Google

[61] The first-tier plaintiff referred to the lack of consideration of the special regulation (identical to the relevant content of EU law) on public service contracts and the application of the provisions of Government Decree 307/2015.(X.27.) on specific public procurement rules for public procurement by public service providers beyond the deadline provided for amending the claim, since this objection cannot be included among the grounds listed under Section 121 of the Code of Civil Procedure, and therefore the court did not examine this reference on its merits.

[62] In the absence of a procedural right infringement, the Metropolitan Court further examined the substantive claims, respecting the guidelines set out in the CJEU judgment. The provisions of Section 141 of the Civil Procedure Code shall apply to the modification of the contract by the parties - or by one of the parties entitled to do so - and to the change in the legal relationship of the parties in accordance with the provisions set out in the contract. It can be seen from this provision that the addressees of the provisions are the contracting parties, since it concerns a change in the contractual relationship between them as a result of the public procurement procedure, the manner of which, in accordance with Section 141(2)-(6) of the Civil Procedure Code, may determine whether one or all of the parties to the contract are liable and to what extent, if the contract is modified in breach of these rules. The liability of the contracting parties under public procurement law cannot be derived solely from the existence of a civil law relationship between the parties and the conditions of the contract amendment defined by civil law (mutual agreement). This position is reinforced by the CJEU judgment, when the CJEU states that it is not contrary to EU law to establish liability for the infringement not only of the contracting authority but also of the successful tenderer of the public procurement contract and to impose a fine on him, but at the same time it calls for respect for EU law, including its fundamental principles, by stipulating that the amount of the fine sanctioning the unlawful amendment of the public procurement contract concluded between the contracting authority and the successful tenderer must be determined taking into account the conduct of the individual parties. However, the application of the fine as a public law sanction and the determination of the amount of the fine may obviously be related to the unlawful conduct of the contracting parties under public procurement law, according to the extent of their involvement.

[63] The court therefore agreed with the argument of the first-tier plaintiff-winning bidder that treating the liability of the contracting authority and the winning bidder as identical in the absence of any further examination of the influence is unlawful, but did not accept, in light of the CJEU judgment, its arguments that it cannot be the recipient of the fine.

It could not successfully claim that in the absence of national legislation applicable to the case, an infringement could not be attributed to it. The rules defining the scope of application of the Public Procurement Act and requiring compliance with the basic principles contain provisions for the contracting authority and the economic operator in general and the individual procedural rules in their respective places. Since the provisions of Sections 141 and 165 of the Public Procurement Act do not limit the person committing the infringement to one or the other subject of the public procurement procedure, it cannot be inferred from the rules applicable to the case that the winning tenderer would not be liable under national legislation – notably the Public Procurement Act. While Section 141 of the Public Procurement Act names the contracting parties, Section 165 of the Public Procurement Act Section 165 of the Code of Civil Procedure allows for the imposition of a fine against the infringing organization or person or the organization or person responsible for the infringement in a legal relationship with the organization or person responsible for the infringement. The court therefore examined the defendant's decision on individual contract amendments along these principles.

Machine Translated by Google

[64] According to Section 141(2) of the Public Procurement Act, a contract may be modified without conducting a new public procurement procedure - without examining the conditions set out in paragraphs (4) or (6) - if the increase in the consideration as a result of the modification - or in the case of several modifications, their net total value - does not reach any of the values set out herein, and the modification does not change the general nature of the contract and is consistent with the nature of the original contract (de minimis modification). Paragraph (4) provides that, in addition to the cases regulated in paragraph (2), a contract may be modified or modified without conducting a new public procurement procedure - without examining the conditions set out in paragraph (6) - in any of the cases listed from points a) to c).

[65] In its judgment Kfv.VI.37.948/2019/5., the Curia explained, among other things, that ensuring the transparency and public control of the efficient use of public funds, as well as creating conditions for fair competition in public procurement, is a requirement that must also be met when amending the contract. Certain circumstances may justify amending the contract, but this possibility must not lead to abuse, must not be aimed at violating the fairness of competition, or circumventing the Public Procurement Act. Therefore, amending the contract is only possible if the conditions specified in the Public Procurement Act are fully met. The contracting authority must determine its public procurement needs, and in doing so, it sets the individual conditions itself – within the framework of the law. Only those reasons that the contracting authority indicated as the reason for amending the contract in the published notice can be examined. The Curia Kfv.III.38.151/2018/18. In its judgment no. 101/2001, the Court of Justice of the European Union (CJEU) in connection with the public procurement law assessment of the conduct of the contracting parties during the performance of the contract concluded as a result of the public procurement procedure, attributed importance to the real existence of a unity of will between the parties behind the performance of the contract with different content, which must be supported by specific facts and evidence (judgment [76] point). At the time of the two decisions considered as guiding in the case, the CJEU judgment was not yet known. They should be considered guiding even in the knowledge of the decision, insofar as the title of the contract amendment and the reasons supporting its legality must be made clear to the contracting parties at the time of the amendment, which ultimately – if a notice is published – is recorded in the published notice, and the legality of the contract amendment cannot be justified later on based on arguments different from those. When deciding on the issue of influence and liability, the actual existence of unity of will should be a determining factor in assessing the conduct of the parties with regard to the relevant public procurement law elements of the obligation.

[66] The I-II. Plaintiff did not consider the Cost Compensation Agreement to be a contract amendment, while the contracting parties justified contract amendment No. 3 essentially on the basis of Section 141(4)(b), sub-paragraphs ba) and bb) of the Civil Code, citing the FINA World Championships as an unforeseen circumstance and the large number of blockage cases, which would become a problem that could be alleviated by a new sales channel. According to Annex 1 to the contract, the legal basis for contract amendment No. 4 was paragraph (4) (c). In the former case, it is lawful to amend the contract if it is necessary to procure additional construction works, services or goods from the original contracting party that were not included in the original contract, if a change in the identity of the contracting party *ba)* is not feasible for economic or technical reasons, in particular due to interchangeability or cooperation with existing equipment, services or facilities purchased under the original contract; and *bb)* at a significant disadvantage for the contracting authority

Machine Translated by Google

or would result in a multiplication of costs. However, the increase in the consideration - or in the case of several modifications, their combined net value - may not exceed 50% of the value of the original contract. In the latter case, if the following conditions are met: *ca)* the modification was made necessary by circumstances that the contracting authority could not have foreseen if it had exercised due diligence; *cb)* the modification does not change the general nature of the contract; *cc)* the increase in the consideration does not exceed 50% of the value of the original contract. According to paragraph (8), the contract may be modified only as a result of a new public procurement procedure, except in the cases provided for in Section 141. If the modification of the contract is carried out by unlawfully omitting a public procurement procedure, the modification is null and void pursuant to Section 137(1)(a) .

[67] In paragraphs 54-61 of its decision, the first-tier defendant listed its arguments regarding contract amendment No. 3, which led to the finding of a violation of Section 141(8) of the Civil Code by the parties. The court agreed with the method of its examination, since the contract amendment cannot be considered unlawful if any of the conditions set out in the statutory provision are met, that it had to assess all relevant elements (referred to by the contracting parties). The court also agreed that contract amendment No. 3 meant the creation and operation of a fee product sales channel constituting a new procurement requirement. In the factual part of its decision, the defendant also presented the relevant elements of the contracting authority's project running in parallel with or prior to the Main Project Contract, to which the contracting authority itself referred in the Main Project Contract and its annexes, and the contractual terms and conditions were drawn up with this in mind. In connection with the product to be purchased, such exclusive aspects that could have justified the exclusion of competition by establishing the procurement requirement were not indicated. The decision finding that the development of individual sales channels is possible independently; the web sales channel can be established independently of the TVM system; the development of the data connection with the AFC system can also be implemented as an independent development was not refuted by the statements of the parties in the lawsuit. The reason for the easy implementation of the procurement requirement appeared as the decision of the contracting authority that the integration into the AFC system should take place as a module of the TVM system. The plaintiff of the first and second degree did not refute that the development of the connection with the AFC system could also have been implemented as another development, as is also a matter of fact that the development of the AFC system had already started prior to the project in question, the development of the web channel was planned, and it is not the case that its acquisition via the TVM system is necessary. The contracting authority also unsuccessfully argued that it could be read from the defendant's decision that the existence of the economic reason among the reasons underlying contract amendment No. 3 and its justification by the first-rank defendant were not disputed. On the one hand, the first-rank defendant referred to the fact in paragraph 58 of its decision, among the economic considerations, that the reference to the ticket verification mechanism is only an additional benefit, since the main subject of the contract amendment was the development and operation of the web sales channel, and on the other hand, the purpose is not a consideration when examining the contract amendment. The court agreed with the contracting authority's argument that the formulation of its procurement requirement is its own, unquestionable decision, but if, during its procurement, it acts in violation of the rules of the applicable Public Procurement Act, it must bear responsibility for that. There is no doubt that the Public Procurement Act The conditions under Section 141(4)(b) do not define exclusive rights, but they do assume the necessity of purchasing from the original contracting party under additional conditions. The first-tier defendant essentially claimed the absence of this necessity when the need for the sales channel had previously existed and its connection to the AFC system had not been established.

Machine Translated by Google

This condition is accompanied by additional (conjunctive) conditions ba) and bb), so the second-tier plaintiff wrongly argued that the economic advantage he presented creates the legal possibility of amending the contract.

[68] The Metropolitan Court also agreed with the reasoning in the decision that no connection was found between the acquisition of the new sales channel, the increased travel demand due to the FINA World Championships currently being held, and the contract concluded with the Main Project Contract that would meet the condition set out in Section 141(4)(c) of the Civil Code, since the conditions regulated there must obviously be interpreted in relation to the contract to be amended, and circumstances that may justify the amendment must arise in connection with it. The arguments regarding the copyright obligation were not accepted by the First-tier Defendant – correctly – since they did not concern the acquisition requirement for the web sales channel itself, but rather the integration into the central system of TVM, as well as the advantages that it did not dispute, such as the integration between the two sales channels, the use of the TVM hardware park and the existence of costs, as well as the advantages of the procurement ensuring competition. The fact that the value of the purchase did not exceed 50% of the original contract value is therefore irrelevant, since the decision of the first-tier defendant was not based on this element of the investigation (which can be taken into account under additional conjunctive conditions).

[69] In its claim, the first-tier claimant, the successful tenderer, mainly referred to the undoubtedly similar case-law decisions regulating the choice of a public procurement procedure that legally restricts competition, the protection of exclusive rights and the consideration of technical specificities, regulated by the previous Public Procurement Act. However, these case-law decisions are irrelevant, although some elements of the regulation regulating the choice of a negotiated procedure without a notice regulated by the old Public Procurement Act are similar, they still represent a fundamental difference, in that the regulation requires the examination of an independent procurement request, while the regulation of contract modification is fundamentally aligned with the framework of the contract between the parties. However, even by examining these legal cases, it cannot be doubted that the condition according to which the change of the contracting party should not be feasible for economic or technical reasons cannot be justified in any way along the logic of the successful tenderer's claim, which did nothing more than reverse the reasoning of the first-tier defendant in the decision. The first-tier defendant argued in favor of establishing a violation of the law that the contracting authority itself developed its new procurement requirement when developing the web sales area in such a way that it would implement it through the TVM system operated by the successful tenderer. At the same time, according to the logic of the first-tier plaintiff, the circumstance in itself that another economic operator would have been able to develop a similar web sales interface does not necessarily mean that this other solution would have met the specific procurement requirement of the specific contracting authority. However, this circumstance alone does not establish the existence of the legal conditions ensuring the amendment of the contract, as explained earlier.

[70] The first-tier defendant based its findings on the breach of contract against the contracting authority due to contract amendment no. 3, but at the same time, its findings do not imply a breach of contract against the winning bidder, since the first-tier defendant consistently based its decision on the fact that it was the contracting authority's burden and responsibility to ensure that the new applicant

Machine Translated by Google

wanted to implement its purchasing requirement by integrating it into the central system of TVM (point 56). The contracting authority was condemned as having created a factual situation by its conduct that excluded competition, which resulted exclusively in the use of the successful tenderer (paragraph 58). With regard to this contract amendment, it did not indicate any circumstances giving rise to the contract amendment that would have indicated the establishment of the liability of the successful contracting authority under public procurement law. The contract amendment, as a bilateral legal transaction, is a specific feature of the obligation, but does not in itself establish liability under public procurement law. For this reason, the general arguments of the first-tier plaintiff, supported by the judgment of the CJEU, regarding the liability of the contracting authority under this contract amendment, were well-founded.

[71] Regarding the Cost Compensation Agreement, the Metropolitan Court shared the position of the first-tier defendant in that it was based on the will of the contracting parties and brought changes to the basic agreement in such elements that met the conditions for amending the contract, while exceeding the changes permitted under Section 141 of the Civil Code. In this regard, the first-tier defendant argued with Section III.4.2 of the operating contract, which clarified the obligation of the winning bidder to correct unforeseeable and unavoidable errors, including those resulting from the intentional or negligent conduct of the contracting authority's clients or third parties, or from criminal acts, within a given deadline. By radically reducing the repair deadline (5 or 1 day) due to the unexpected number of blockage cases compared to the 15-day deadline provided for troubleshooting, and by creating the legal framework for the performance already performed within the scope of the service, the parties amended the contract by this agreement, compensating for the additional performance. In this regard, the need to examine Section 141(4)(c) of the Civil Code arose, which, according to the contracting parties, was justified by the high, unexpected number of blockage cases. The first-tier defendant took into account the elements of the contract concluded by the parties that contain the technical requirements imposed on the TVM and the guarantees of uninterrupted operation, and argued with reason that the issue of impermeability arose during the public procurement procedure, that it was also part of the tender conditions and the bid submitted and accepted as the winner, so the parties anticipated possible problems. The Main Project Contract and its related elements contain detailed regulations on the cases of device failure, the related liability and risk of damage, so a lack of foreseeability cannot arise, since they also took into account the possibility of manipulation.

The first-tier defendant could not give a civil law answer to that question due to the lack of jurisdiction, although a given technical content was a requirement, the number of cases of blockages was still so high that it justified the partial transformation of the rules of operation and failure on the part of the parties, and only the latter could draw the public procurement law consequences. The argument of the second-tier plaintiff, which referred to the settlement of the interpretation disputes between him and the winning bidder and the settlement disputes that arose as a result of the repair of the failures, which resulted in the Cost Compensation Agreement, strengthens the argument of the first-tier defendant, who well-foundedly concluded from the agreement resulting from the negotiations between the parties that the condition of unforeseeability was not met, and the parties unlawfully agreed on an additional payment of HUF 125,038,099. The requirement of foreseeability and due diligence is set out in the Civil Code. According to Section 141(4)(c)(ca), the requirement imposed on the contracting authority, however, the absence of this condition may result from the situation generated by the contractual conduct of the contracting parties, as revealed by the first-tier defendant.

Machine Translated by Google

[72] In point 65 of the decision of the first-rank defendant – since the parties did not consider the Cost Compensation Agreement to be an amendment to the contract – the violation of the principle of publicity set out in Section 2(2) of the Public Procurement Act and Section 141(8) of the Public Procurement Act was established to the detriment of both the successful tenderer and the contracting authority in relation to the initiative, since the observance of the conditions relating to the amendment of the contract is an obligation of both contracting parties and its unlawful application presupposes a breach of the rights of both parties, based on the specific facts revealed, the court agreed with the determination of the first-rank defendant. The successful tenderer correctly referred to the violation of the principle of publicity set out in Section 2(2) of the Public Procurement Act. Section 2(1) contains the reference to paragraph (2) may be an obvious typo, however, this has no significance on the merits of the case, especially considering that the operative part of the decision records the violation exclusively in the substantive infringement of rights, the first-tier defendant did not impose any additional conduct on the contracting parties that would have independently justified the finding of a fundamental infringement of rights on his part.

[73] The reasons for the infringement regarding the 4th amendment to the contract were revealed by the 1st defendant in paragraphs 66-70 of its decision. It examined the arguments based on Section 141(4)(c) of the Civil Code. In this amendment to the contract, the parties concluded an agreement that differed from the content of the operating contract, which clearly defined the content of the contractual relationship between them, both in terms of the contractual obligations of the winning bidder and its remuneration. The concepts of “blocking”, “banknote withdrawal” and “customer error” were reinterpreted, and the fees for the related services were re-regulated, and they also agreed to add a new 11th point to Part III of the operating contract, and at the same time, certain provisions of the operating contract would not be applied, subject to the deviation pursuant to the Cost Compensation Agreement. The parties themselves referred to the Cost Compensation Agreement as a precedent, among other things, and their arguments in favor of the legality of the amendment were identical to that. The first-tier defendant argued well in connection with the Cost Compensation Agreement, identical to what has already been explained in relation to the sealing cases. The court agreed and will not repeat its reasons here.

[74] The first-rank defendant also alleged the absence of the condition pursuant to Section 141(4)(c)(cc) of the Civil Code, based on the calculation set out in point 5 of the contract amendment.
The court agreed with the argument of the first-tier defendant that, from the point of view of examining the infringement, what is recorded in the contract is significant, administrative error, actual payment adjusted to the occurrence of the number of cases and the settlement of the parties along a case-by-case, special logic, or the forecasted final, expectedly lower amount cannot be taken into account. The event examined from the point of view of the infringement of public procurement law is the contract amendment, the contracting authority (in this case, the parties involved in the development of the conditions of the contract amendment) must then calculate with all circumstances that make it possible for him/her to decide whether he/she can apply Section 141 of the Public Procurement Act, or whether the amendment is prohibited, because, in terms of paragraph (8), the contract could not be concluded illegally without conducting a new public procurement procedure. Therefore, the court did not accept the argument of the second-tier plaintiff on the basis of the basis of the calculation he/she gave.

And the fact that the advertisement template to be filled out may give rise to misunderstandings obviously cannot be a consideration against compliance with the mandatory provisions of the Civil Code.

Machine Translated by Google

[75] The first-tier defendant, having determined the infringement, imposed a fine on the basis of Section 165 (3) d) of the Code of Civil Procedure, referring to Section 165 (6) e). When determining the amount of the fine, it referred to both the percentage rate under Section 165 (4) and (7) of the Code of Civil Procedure. As can be seen from point 73 of its decision, it considered the imposition of a fine mandatory for elements 4; 5; 6 of the initiative, while it considered element 2 as an option.

[76] According to Section 165(11) of the Civil Procedure Code, the first-tier defendant had to assess all aspects relevant to the case when determining the necessity of applying a fine (if the law allows this) and the amount of the fine and to account for them in his decision. The law provides an exemplary list in this regard, therefore, the specific characteristics of the case determine the range of aspects that can actually be taken into account.

[77] According to Section 339/B of the Code of Civil Procedure, an administrative decision made in the exercise of discretion shall be deemed lawful if the administrative body has sufficiently investigated the facts, complied with the procedural rules, the criteria for the assessment can be established, and the reasoning of the decision shows that the evidence was considered reasonable. The court, acting within the limits of the claim, examined whether the decision of the first-tier defendant was lawful, and in this regard it did not deviate from the guiding principles set out in numerous decisions of the Curia. In this regard, the EBH refers to the principled decision of 2017. K. 30. that only the reasons stated in the contested decision may be taken into account during the judicial review of the administrative decision; an administrative decision made in the exercise of discretion is unlawful if it does not - or does not contain in sufficient detail - the criteria for the assessment.

[78] The first-tier defendant assessed the parties' contribution and liability as the same in all amendments with regard to the infringement established for initiative elements 4; 5; 6, but in the case of contract amendment no. 3, it took into account the contracting authority's conduct, as a result of which the product could be purchased exclusively from the winning bidder. In the case of the other two amendments, it argued that both parties were responsible for the situation regarding the management of the impermeability. The estimated value, the contractual values, and the blatant seriousness of the infringement were assessed equally to the detriment of both parties, however, the two parties' history with regard to the infringement was different, which was not weighted, and the first-tier defendant did not provide a reason for not making a distinction. The first-rank defendant considered the fine sanction as an option after the infringement established according to the 2nd element of the initiative - following from the reasoning - and considered the application of a fine to be justified. It considered the infringement to be serious due to the guarantee nature of the act, and applied the difference between the two sanctions as a result of this infringement, consequently the significant delay in sending the information notice - which was not disputed by the second-rank plaintiff - resulted in the imposition of a fine of 10,000,000 forints on it. The court could not have taken into account how the defendant's fining practice develops in the case of similar infringements, since this cannot be a criterion for examining an individual decision. Cooperative behavior is expected from the parties to the proceedings during the appeal procedure, and it cannot be assessed separately in favor of the client. However, it is undeniable that the second-rank plaintiff The first-order plaintiff admitted the violation, as well as the fact that he fulfilled his obligation with a significant delay, which the first-order defendant assessed in his favor, and the delay

Machine Translated by Google

The duration of the contract was also taken into account. Since the contracting authority did not disclose any additional circumstances that should have been taken into account but that it failed to assess, the size of the fine in itself does not call into question the fact that the consideration was made, its legality and reasonableness, and the court had no legal opportunity to change, reduce or waive the decision on the fine.

[79] The Budapest Metropolitan Court has already explained in point [60] of the reasoning that, in light of the CJEU judgment, the issue of liability cannot be derived from a mere agreement under the law of obligations. A sanction may be related to liability under public procurement law, which, in the case of a contract amendment, can be clarified by examining the circumstances that necessitated the amendment and may lead to the infringement of one of the cases allowing the amendment regulated in Section 141 of the Public Procurement Act. The court demonstrated that the first-order defendant himself considered contract amendment no. 3 to arise from the contracting authority's new procurement requirement, which he repeated in the decision point justifying the fine sanction, for this reason the infringement established against the first-order plaintiff and the sanction applied in relation to initiative element no. 4 are unlawful. The relevant circumstances of the Cost Compensation Agreement and Contract Amendment No. 4 were revealed by the First-tier Defendant, and both during the examination of the infringement and the application of the sanction, he addressed the reasons why he considered it justified to condemn the winning bidder, especially because of its involvement, in comparison to the initiative, with which reasons the court agreed according to the reasoning of the judgment related to these two contract amendments. This involvement was the basis for the application of the fine sanction, the sole reason for the change of which was the change in the number of infringements attributed to the winning bidder, and the circumstance that – unlike the contracting authority – no infringement had been established against the winning bidder in the previous two years.

[80] In view of all this, the Metropolitan Court partially changed the defendant's decision based on Section 339 (2) point q) of the Code of Civil Procedure, in accordance with the authorization granted in Section 172 (3) of the Code of Civil Procedure, disregarded the infringement established against the first-degree plaintiff with regard to the 4th element of the ex officio initiative and reduced the fine of 70,000,000 forints to 40,000,000 forints, and dismissed the claims of the first and second-degree plaintiffs in excess of this. The subject matter of the lawsuit in this part was the review of an administrative decision, the claims submitted alternatively regarding the fine sanction contained the indication of the infringement for each claim in accordance with the petition, thus the condition pursuant to Section 121 (1) point e) of the Code of Civil Procedure was met, for this reason there was no obstacle to the court's decision.

[81] Due to the unfoundedness of the three actions for the absence of a violation of Section 141(8) of the Civil Code, brought regarding the amendment of the contract, the Metropolitan Court had to decide on their nullity based on the action of the third-tier plaintiff.

[82] The claim of the Tier III plaintiff is well-founded as follows.

Machine Translated by Google

[83] In a lawsuit initiated under Section 176(1) of the Civil Procedure Code, the Metropolitan Court found that since Contract Amendments Nos. 3 and 4 and the Cost Compensation Agreement were unlawfully concluded under Section 141(8) of the Civil Procedure Code, it is a necessary legal consequence that these contracts are to be considered null and void under Section 137(1)(a) of the Civil Procedure Code. According to Section 137(3) of the Civil Procedure Code, the wording of Section 137(3) of the Civil Procedure Code in force until 31 December 2017 allows the court to declare a contract null and void due to a violation of public procurement law valid if the performance of the contract is of paramount public interest. From the point of view of determining the overriding public interest, the purpose of the service, the objective sought by the contracting authority through the contract, is of fundamental importance (BH2000. 44.)

[84] Section 176(4) of the Civil Code provides that if the court, in a lawsuit pursuant to paragraph (1), establishes the invalidity of the contract for the reasons specified in Section 137(1), it shall apply the legal consequences of invalidity in accordance with the provisions of the Civil Code and this Act. In accordance with paragraph (7), in a unified lawsuit, the provisions of Chapter XX of the Civil Code shall apply.
Its Chapter shall be applied with the exceptions set out in Sections (2), (5)-(7) of Section 173 and Section 174.
Section 174 (2) of the Civil Code – identically to Section 176 (5) – stipulates that if the court declares a contract concluded on the basis of a public procurement procedure to be valid pursuant to Section 137 (3), it shall impose a fine, the amount of which shall be - taking into account all the circumstances of the case - no more than 15% of the value of the contract. If, when applying the legal consequences of invalidity, the court orders monetary compensation for the value of the service for which no consideration has been provided, it shall impose a fine, the amount of which shall be - taking into account all the circumstances of the case - no more than 10% of the value of the contract.

[85] The Metropolitan Court did not see any possibility to satisfy the primary claim of the third-tier plaintiff, based on the statement of the contracting parties, due to the termination of the contract amendment and the continuous performance, which the second-tier defendant pays periodically, based on subsequent settlement, and may apparently generate a settlement dispute between the contracting parties that goes beyond the scope of the single lawsuit, to which the third-tier plaintiff also referred by reference to Section 305 of the Civil Code. The court therefore ruled in accordance with the third-tier plaintiff's secondary claim, limited to a declaration of nullity, after the third-tier plaintiff himself referred to the judicial practice established for the application of Section 239/A of the Civil Code regarding the consideration of Section 5/2013 of the Civil Code and Section 123 of the Civil Code in such cases. The second-tier defendant The 3rd-rank defendant did not request the declaration of the contracts as valid due to the overriding public interest in the performance, the 3rd-rank plaintiff did not have a motion to this effect, and the court itself did not see any reason that would have allowed the overriding public interest to be established.

[86] The plaintiff II.r., as well as the defendant II.r. for the entire case, the plaintiff I.r. was partially unsuccessful in the administrative part of the case. The plaintiff III.r. was successful in the civil part of the case, the defendant I.r. and the defendant intervener supporting him were largely successful. By applying the appropriate provisions of Article 3(2)(b) and (c) and (6) of Decree 32/2003 (VIII.22) of the Ministry of Justice on the legal representation costs and attorneys' fees that may be determined in court proceedings (hereinafter: the Decree), the court found that

Machine Translated by Google

the amount of litigation costs to be borne by the contracting authority and the successful tenderer separately, taking into account the ratio of winning and losing the case. It was mindful of the fact that it had to act on the basis of five claims, each in lawsuits with a high value of the subject matter of the lawsuit. It did not accept the arguments of the second-ranking plaintiff, who was also the second-ranking defendant, on the merits, for the reasons explained there, and consequently, the values of the subject matter of the lawsuit had to be considered as guiding in the civil parts of the lawsuit to the extent specified by the third-ranking plaintiff in the statements of claim. It assessed the amount of the work of the first-ranking defendant, as well as the third-ranking plaintiff and the defendant intervener, their professional demands, the time spent, and the number of hearings held in the lawsuit, thus determining the amount of litigation costs in accordance with the operative part, which was to be borne by the Pp. Pursuant to Sections 77 and 78 (1), Section 82 (2) and Section 83 (1), the first and second-ranking plaintiffs, as well as the second- and third-ranking defendants, are liable separately.

[87] The provision on the application fees is based on Sections 37(1); 39(1); 42(1)(a); and 43(3) of Act XCIII of 1990 on Fees (hereinafter: Act XCIII of 1990).

Based on the five claims – taking into account the provisions of the Administrative-Labor-Civil Law Uniformity Resolution 1/2012 on the application of Section 38 (1) and Section 39 (1)-(3) of Act XCIII of 1990 on Fees to Act CLVI of 2011 on the amendment of certain tax laws and other related laws – the fee had to be charged separately for each claim, for each initiated procedure. Taking into account the proportions of losing and winning the case, the total of HUF 7,500,000 is divided between the parties as follows: in the administrative lawsuit initiated by the first-order plaintiff, the Itv. From the fee recorded due to the right to record a fee in respect of the subject matter provided for in Section 62 (1) h), the first-order plaintiff is obliged to pay a fee of HUF 1,000,000 in view of his partial success in the case, HUF 500,000 in fee remains at the expense of the state due to the exemption from fees of the first-order defendant pursuant to Section 5 (1) c) of the Civil Procedure Act; from the total amount of HUF 4,500,000 allocated to the civil lawsuit, according to Section 176 (1) of the Civil Procedure Act, the third-order plaintiff is obliged to pay HUF 1,500,000 in accordance with the infringement of rights. The second-order defendant is obliged to pay HUF 1,500,000 in fee due to the full personal exemption from fees. In view of the plaintiff's loss in the case, he is obliged to pay the fee of 1,500,000 forints incurred in the administrative lawsuit, while he must pay 3,000,000 forints of the fee incurred in the civil lawsuit.

[88] The judgment is subject to appeal, subject to Section 174(3) of the Civil Procedure Code, which is applicable accordingly under Section 176(7) of the Civil Procedure Code.

Closing part

Budapest, July 7, 2021.

Dr. Sára Katalin sk Fintáné Dr. Vásárhelyi Julianna sk Dr. Bíró Péter sk

Machine Translated by Google

presiding judge judge

Machine Translated by Google

Clause

ÿÿ A

Judgment number 8 became final on September 7, 2022.

Budapest, September 27, 2022.

Dr. Sára Katalin sk

ÿÿÿ ÿÿa

council president

Metropolitan Court

Case number: 103.K.700.721/2022/8.

The first-order plaintiff:

Plaintiffÿÿ **ÿÿÿÿÿÿÿÿÿÿÿ ÿÿ** (title1)

Representative of the first-tier plaintiff: Szilas Law Firm - Dr. Péter Szilas, attorney-at-law (address 2)

Tercsák Law Firm – Dr. Tamás Tercsák, attorney (address 3)

The first-tier defendant: Public Procurement Authority Public Procurement Arbitration Committee (1026 Budapest, Riadó utca 5.)

Representative of the first-tier defendant: Dr. Zoltán Fáry, legal advisor

to the defendant intervener , President of the Public Procurement Authority (1026 Budapest, Riadó utca 5.)

Representative of the defendant intervener: Dr. Tamás Attila Cseh, barrister

Subject of the lawsuit: challenge to administrative decision No. D.561/17/2017 in a public procurement case

í t is let:

The Metropolitan Court partially changes the decision No. D.561/17/2017 of the first-rank defendant and reduces the fine of 70,000,000 (seventy million) forints imposed on the first-rank plaintiff to 50,000,000 (fifty million) forints, and rejects the claim of the first-rank plaintiff in excess of this amount.

Machine Translated by Google

The first-rank defendant is ordered to pay the first-rank plaintiff 50,000 (fifty thousand) forints in partial litigation costs within 15 days.

The first-class plaintiff is ordered to pay a partial claim fee of HUF 500,000 (five hundred thousand) upon a separate request from the authority acting in the tax case, and the remaining partial claim fee of HUF 1,000,000 (one million) shall be borne by the Hungarian State.

The judgment may be appealed within 15 days of its publication. The appeal must be submitted electronically to the Budapest Court of Appeals, addressed to the Budapest Court of Appeals. The appeal must contain the violation of the law on which it is based, with the precise indication of the legal text, as well as the published court decision and the part thereof from which the judgment deviates in terms of law. Failure to indicate the violation of the law and the precise indication of the violated legal text shall result in the appeal being rejected without any correction.

In the meantime

The facts underlying the judgment

[1] In its decision No. D.561/17/2017 dated 15 December 2017, the first-tier defendant, acting on the ex officio initiative of the intervener, found that the contracting authority (the second-tier plaintiff in the main proceedings) had violated the provisions of Section 30(4) of Act CVIII of 2011 on Public Procurement (hereinafter: the old Public Procurement Act) (2nd element of the claim).

It further found that the contracting authority and the first-rank plaintiff had violated the provisions of Section 141(8) of Act XLIII of 2015 on Public Procurement (hereinafter: the Public Procurement Act) (elements 4, 5 and 6). It therefore imposed a fine of HUF 80 million on the contracting authority and HUF 70 million on the first-rank plaintiff. It found that there was no violation of the law with regard to elements 1 and 3 of the initiative.

[2] The first-rank defendant ordered the payment of the fine in accordance with Section 165(4); (3)(d); (6)-(7); (11) of the Civil Procedure Code. It assessed the estimated value of the public procurement, and also noted that the final value of the Main Project Contract without amendments was HUF 5,561,690,409, while the value of the part affected by the established infringement was HUF 3,589,454,369. The Cost Compensation Agreement and the 3rd and 4th contract amendments were concluded unlawfully, the total value of which agreements was HUF 3,314,633,969. It assessed that infringements had been established against the contracting authority several times in the past two years, but it also noted that no such infringement had been established against the first-rank plaintiff before. He described the infringement as extremely serious. He highlighted that when the contracting authorities determined the main subject of contract amendment No. 3, the procurement requirement was formulated with the condition that it could be obtained exclusively from the first-tier plaintiff. With regard to the contract amendments dealing with blockage cases, he assessed that

Machine Translated by Google

that in the cost compensation agreement the parties themselves stated that both parties were responsible for the situation created by the clogged “unclogable TVMs”. It assessed the fact that the breach of law could not be repaired to the detriment of the contracting parties. In the case of the 4th contract amendment, the parties first qualified the contractual concept of clogging cases and the provisions relating to it as damage in the protocol evaluating the provisions of the contract, and then, within the framework of the contract amendment, clogging cases were not interpreted as damage, but a new contractual provision was created for them, although it is clear that this is a case specified as a technical requirement in the technical specifications of the contracting authority. It also took into account that the contract was partly financed from a grant, so the breach of law may be subject to a sanction for the repayment of the grant in the proceedings of another body. It specifically mentioned that it considered the imposition of a fine for element 2 of the ex officio initiative to be justified, given that the posting of the notice on the modification of the contract is a guarantee-type obligation of the contracting authority, the failure to which constitutes a serious infringement, but it assessed that the information notice was published subsequently, although also that it was almost two years after the statutory deadline. At the same time, it assessed the contracting authority's benefit in the context of cooperation that it acknowledged the infringement for element 2. The different amount of the fine was justified by the fact of an additional infringement established against the contracting authority, while it assessed the legal acts assessed as infringing on the basis of elements 4, 5 and 6 as being identical in terms of the contribution and liability of the contracting authority and the successful tenderer.

Claims and counterclaims

[3] The first-ranking plaintiff filed his action for review of the first-ranking defendant's decision, in relation to the 4th, 5th and 6th requests of the ex officio initiative, requesting, pursuant to Section 339(2)(q) of Act III of 1952 on the Code of Civil Procedure (hereinafter: Pp.) and Section 172(3) of the Civil Procedure Code, the amendment of the decision and the determination of the absence of a violation of law with respect to the first-ranking plaintiff, and, in the alternative, the Pp. Pursuant to Section 339 (1), the provisions of the decision relating to him are repealed, thirdly, the decision is amended in this respect and the fine is waived, fourthly, the decision is repealed and the first-tier defendant is ordered to initiate new proceedings, stating that there is no legal possibility to impose a fine on the first-tier plaintiff, while fifthly, the decision is amended to the effect that a reduction in the amount of the fine is justified in the case of the first-tier plaintiff. He also requested payment of his costs incurred in the lawsuit.

[4] In addition to its primary argument regarding the imposition of the fine, which was that the application of this sanction against it was unlawful, it claimed that the first-tier defendant's reasoning was unreasonable and contained blatant logical contradictions, because it ignored important circumstances when it considered the involvement and liability to be the same for the contracting parties. Thus, it ignored that the necessity of the contract amendments was initiated by the contracting authority, i.e. the formulation of the procurement request in each case.
There was no evidence of intent, bad faith, or any collusion on his part.
Its activities were always responsive and, as a company operating in a competitive market environment, it tried to show as much flexibility as possible in order to meet the needs of its clients. In point 53 of the decision, the first-tier defendant itself

Machine Translated by Google

established that the comparison of the modification condition and the facts is the responsibility of the contracting authority, and the first-tier defendant or even the ex officio initiator cannot take this on. This necessarily leads to the conclusion that neither is the winning bidder. The statement in point 61 of the decision, according to which the fact that the conclusion of the Cost Compensation Agreement was not treated as a modification and, as a result, the guarantee procedure rules specified in the public procurement regulations, such as the publication of the notice, were disregarded, should be assessed as a burden on both parties involved in the contract modification, is also unfounded. The latter is the obligation of the contracting authority, therefore the failure to do so cannot be attributed to the first-tier plaintiff in the same way as the contracting authority. Point 73 of the decision states that the contracting authority has been fined several times in the past two years, while no such fine has been imposed on the winning bidder, but the amount of the fine does not reflect this difference either.

[5] In its counterclaim, the first-rank defendant requested the dismissal of the first-rank plaintiff's claim. In response to the claim argument regarding the fine, it consistently emphasized that the infringement was committed jointly by the parties, and that the consequences of the contractual amendments reached by mutual agreement are borne jointly and equally by the parties. The first-rank plaintiff was unable to identify a relevant data group that was not presented in this context. The first-rank defendant referred to point 73 of its decision, in which it took into account that no infringement had been established against the winning bidder in the past two years. The aspects taken into account in the context of imposing the fine were recorded in the relevant part of the decision.

[6] The intervener defendant - in agreement with the counterclaim of the first-tier defendant - argued that the contracting authority is the primary, but not the only, obligor for the proper conduct of the public procurement procedure. The judgment of the Court of Justice of the European Union in Case C-263/2019 (hereinafter: CJEU judgment) clearly supports the intervener defendant's position. National legislation that allows both the establishment of an infringement and the imposition of a fine against the successful tenderer in addition to the contracting authority is not contrary to EU law.

Judgment No. 103.K.702.699/2021/5 of the Metropolitan Court

[7] In its first-instance judgment, the Metropolitan Court partially changed the decision No. D.561/17/2017 of the first-tier plaintiff and, with regard to the fourth element of the ex officio initiative, omitted the provision establishing the infringement of Section 141 (8) of Act CXLIII of 2015 on Public Procurement (hereinafter: the Public Procurement Act) against the first-tier plaintiff and reduced the amount of the fine imposed on the first-tier plaintiff to HUF 40,000,000 (forty million), exceeding which it dismissed the claim of the first-tier plaintiff and dismissed the claim of the second-tier plaintiff. It further ruled on the amendment to the contract No. 3 between the first-tier and second-tier plaintiffs dated July 13, 2017; on the nullity of the cost compensation agreement concluded on December 22, 2016 and the contract amendment No. 4 concluded on September 15, 2017, as well as on the payment of legal costs.

Machine Translated by Google

[8] According to point [78] of the first-instance judgment, the 1st-tier defendant assessed the parties' contribution and liability as the same in all amendments regarding the infringement of the 4th; 5th; 6th initiative elements, but in the case of contract amendment number 3, it took into account the contracting authority's conduct, as a result of which the product could be purchased exclusively from the winning bidder. In the case of the other two amendments, it argued that both parties were responsible for the situation regarding the management of the impermeability. The estimated value, the contractual values, and the blatant seriousness of the infringement as criteria were assessed equally to the detriment of both parties, however, the two parties' history with regard to the infringement was different, which was not weighted, and the 1st-tier defendant did not provide a reason for the reason for which it refrained from making a distinction. The first-rank defendant considered the fine sanction as an option after the infringement established according to element 2 of the initiative – following from the justification – and considered the application of a fine to be justified. It considered the infringement serious due to the guarantee nature of the act, and applied the difference between the two sanctions as a result of this infringement, consequently the significant delay in sending the information notice – which was not disputed by the second-rank plaintiff – resulted in the imposition of a fine of HUF 10,000,000.

[9] In light of the CJEU judgment, the Budapest Metropolitan Court concluded in paragraph [79] of its judgment that the issue of liability cannot be derived from a mere agreement under the law of obligations. A sanction may be related to liability under public procurement law, which in the case of a contract amendment can be clarified by examining the circumstances that necessitated the amendment and may lead to the infringement of one of the cases allowing the amendment regulated in Section 141 of the Civil Procedure Code. Since the first-rank defendant himself considered contract amendment No. 3 to arise from the contracting authority’s new procurement requirement, which he also repeated in the decision paragraph justifying the fine sanction, for this reason the infringement established against the first-rank plaintiff and the sanction applied in relation to initiative element No. 4 are unlawful. At the same time, the relevant circumstances of the Cost Compensation Agreement and Contract Amendment No. 4 were revealed by the First-tier Defendant, and both during the examination of the infringement and the application of the sanction, he addressed the reasons why he considered it justified to condemn the winning bidder, in comparison to the initiative, precisely because of its involvement, with which reasons the court agreed according to the reasoning of the judgment related to these two contract amendments. This involvement was the basis for the application of the fine sanction, the sole reason for the change of which was the change in the number of infringements attributed to the winning bidder, and the circumstance that – unlike the contracting authority – no infringement had been established against the winning bidder in the previous two years.

Interim ruling of the Curia Kf.I.40.725/2021/18.

[10] In its interim judgment, the Curia did not affect the provision of the first instance court's judgment not affected by the appeal, changed the part affected by the appeal and dismissed the claim of the first-tier plaintiff with regard to the legal basis for establishing an infringement under the fourth element of the ex officio initiative, omitted the provision on reducing the amount of the fine and upheld the fourth element of the ex officio initiative.

Machine Translated by Google

In relation to the examination of the amount of the fine imposed on the first-degree plaintiff for the violation of the law under the first-degree element, the court of first instance ordered a new hearing of the case and a new decision.

[11] The Curia set aside the provision of the first-instance court's judgment regarding the partial claim fee of HUF 1,000,000 out of the HUF 2,500,000 imposed on the first-instance plaintiff, and the partial claim fee of HUF 500,000 imposed on the state due to the personal exemption from the fee of the first-instance defendant. The fee for the cross-appeal is HUF 8,000 (eight thousand), which is borne by the first-instance plaintiff. The parties themselves shall bear the legal costs incurred in the second-instance proceedings. [12] In paragraphs [46]-[47] of the Curia's judgment, it was established that the first-instance defendant had factually pointed out that, as stated in the Curia's judgment Kfv.II.37.434/2017/12. "The liability for the violation of public procurement law is objective." (Judgment No. Kfv.II.37.434/2017/12, paragraph [44]). At the same time, it noted that the facts of the referenced judgment No. Kfv.II.37.434/2017/12 and the present litigation are not completely identical, since in the referenced case there was no public procurement procedure and no amendment of the contract concluded as a result of the public procurement procedure, and the infringement of public procurement law was not established against the bidder (in the absence of a public procurement procedure, there was no bidder). The Curia assessed that the difference between the factual situations, and thus the difference in the violations that occurred, is not relevant to the examination of the liability structure as a legal issue, since there is an identity in that in both cases a public procurement violation occurred in which the legislator does not make the application of the legal consequence dependent on consideration, but rather imposes a mandatory fine. In addition to the similarity of these basic characteristics, the difference in the further factual elements does not affect the determination of the liability structure, and thus the answer to the legal issue of what liability structure the Civil Code regulates in the case of unlawful contract modification as a violation. Before further examining the liability structure, the Curia points out that the first-order defendant's argument in relation to the CJEU judgment is correct insofar as the CJEU judgment makes individualization and consideration mandatory not when establishing the violation, but when imposing a fine. However, the first-tier defendant incorrectly concludes that the CJEU judgment would support the existence of the strict liability model, since the CJEU judgment did not examine the liability model itself, but rather ruled that it is not contrary to the relevant EU standards if national law also establishes the liability of the tenderer for the infringement.

[13] The Curia explained in paragraph [48] of its judgment that "The Curia points out in connection with the liability structure that strict liability is typically an administrative liability, which differs from both the liability structures typical of criminal law (based on guilt/culpability) and civil law (typically based on blameworthiness). Strict liability was examined in detail by the Constitutional Court in its Decision 60/2009. (V. 28.) AB in the context of liability for road traffic violations, to which it also referred in its later decisions [e.g. Decision 16/2018. (X. 8.) AB]. As is evident from the decisions of the Constitutional Court, the characteristic of objective liability, which is widespread in the field of administrative liability, is that it attaches the legal consequence to the unlawful conduct itself, regardless of the culpability or blameworthiness of the violator, and thus the application of the sanction is more effective, as it encourages lawful conduct through the inevitability of liability."

Machine Translated by Google

[14] In paragraph [50] of the Curia judgment, it referred to the provisions of the CJEU judgment, stating that “The CJEU judgment does not contain any provision that would break this objective liability; the determination of the infringement and the application of the legal consequence related to it continue to be made on an objective basis, taking into account the fact of the implementation of the unlawful conduct. The CJEU judgment sets out the requirements necessary for ensuring compliance with the fundamental principles of the EU in relation to the circumstances to be assessed in the context of the amount of the fine, which influence the amount of the fine, but do not affect the determination of liability for the infringement and the mandatory application of the legal consequence of the fine.”

[15] According to point [51] of the second-instance judgment, “The conclusion drawn in the judgment of the first-instance court that no circumstances giving rise to a contract amendment were presented in the decision of the first-tier defendant that would have indicated the establishment of public procurement law liability cannot result in the omission of the establishment of a violation in the case of contract amendment no. 3, since in the case of strict liability, the establishment of a violation is based on the implementation of unlawful conduct - in this case, the unlawful amendment of the contract by omitting public procurement - and furthermore, it does not follow from either the provisions of the Civil Code or the judgment of the CJEU that a liability form different from strict liability would apply.”

[16] Consequently, the Curia emphasized that the provisions of Section 141 of the Public Procurement Act must be interpreted in light of the provisions of the CJEU judgment, i.e., not only the contracting authority but also the contracting parties may be held liable for an unlawful contract amendment in relation to a public procurement contract. In this regard, it referred to the provisions of Section [21] of the Kfv.IV.37.130/2021/4. judgment, stating that the successful tenderer of the public procurement contract is also liable for the unlawful disregard of the rules set out in Section 141 of the Public Procurement Act and may be subject to a sanction in the appeal proceedings initiated by the supervisory authority. Thus, the infringement is incumbent on the First-tier Plaintiff in relation to contract amendment No. 3, and therefore there is a mandatory case for imposing a fine in this regard as well. It agreed with the content of the appeal of the first-tier defendant, with the exception that in points [56] and [58] of its decision it did not examine the extent of liability for the infringement, but rather assessed whether one of the circumstances listed there establishes the legality of the contract amendment, taking into account the conditions set out in point b) of paragraph (4) of Section 141 of the Civil Code. Point [70] of the reasoning of the first-tier judgment therefore contains an erroneous conclusion that one of these circumstances excludes the finding of a breach of the first-tier plaintiff. The proportion of liability for the infringement and the degree of contribution do not influence the determination of the infringement, but the amount of the fine.

[17] Paragraph [55] of the second-instance judgment stated that the first-instance court, taking a different position on the legal basis, omitted to establish an infringement by the first-rank defendant, as a result of which it did not rule on the element of the first-rank plaintiff's claim relating to the imposition and amount of the fine in this part. Paragraph [79] of the first-instance judgment expressly states that one of the reasons for changing the fine was the change in the seriousness of the infringement, and it is also clear from this paragraph that the

Machine Translated by Google

The court of first instance assessed the legality of the fine imposed on the first-tier plaintiff, including the determination of the first-tier defendant's involvement in the infringement, solely with regard to the cost compensation agreement and contract amendment no. 4. However, the legality of the fine imposed on the first-tier plaintiff for contract amendment no. 3, which is the subject of the fourth element of the ex officio initiative, as a violation, was not examined, so the first-tier plaintiff's claim in this part remained unexamined.

[18] According to points [60] and [64] of the interim judgment, the first instance court must decide in the new proceedings, within the limits of the claim of the first-rank plaintiff and the counterclaim of the first-rank defendant, on the claim for a fine imposed on the first-rank plaintiff for the violation established due to contract amendment no. 3 under the fourth element of the ex officio initiative, and on the payment of a partial fee of HUF 1,500,000.

New procedure of the Metropolitan Court

[19] In the repeated proceedings, the first-rank plaintiff maintained his claim for a reduction of the fine and the grounds on which it was based. Despite the fact that Section 165(11) of the Public Procurement Act provides with regard to the amount of sanctions that the Public Procurement Arbitration Board is obliged to take into account all the circumstances of the case when determining the amount of the fine, he claimed that the first-rank defendant's decision – in direct contradiction to the statement contained therein – did not at all address the circumstances to be examined in the determination of the amount of the fine imposed on the first-rank plaintiff. The amount of the fine was not determined in accordance with the extent of the infringement. The extent of the liability of the contracting parties cannot in any way be considered to be automatically the same without any further consideration. In practice, the tenderer is typically faced with a ready-made situation and has no influence on the situation arising from the newly formulated customer requirement, in particular not on making decisions relevant to public procurement (such as the decision to refrain from conducting a public procurement procedure). The tenderer does not actually have information about the relevant circumstances to assess whether conducting a public procurement procedure is necessary in the given case.

[20] The first-rank plaintiff, primarily based on Section 339 (2) point *q)* of the Code of Civil Procedure, requested the amendment of the decision in view of the interim judgment of the Curia Kf.I.40.725/2021/18., so that the court significantly reduces the amount of the fine imposed in respect of each infringement established in relation to the first-rank plaintiff, based on the substantive assessment of the contribution of the parties involved; secondly, based on Section 339 (1) of the Code of Civil Procedure, the Curia Kf.I.40.725/2021/18. In view of the provisions of its interim judgment no. 1, the Court requested the annulment of the provision imposing the fine as unlawful and the obligation of the first-rank defendant to conduct new proceedings, with the instruction that the amount of the fine for the ice violation be determined separately for each established violation in relation to the first-rank plaintiff, taking into account the contribution of the parties involved. The first-rank defendant failed to break down the amount of the fine imposed by violation, since it was imposed uniformly, without further detail,

Machine Translated by Google

It was established in the nature of a declaration, and in the present proceedings, it is therefore necessary to review the entire amount of the fine imposed, regardless of the fact that the Curia formally ordered the court of first instance to conduct a new procedure only with regard to contract amendment no. 3.
For the sake of clarity, it referred to the fact that it cannot be determined from its decision what part of the uniformly determined fine amount belonged to each violation, thus the issue of the fine for the violation related to contract amendment no. 3 cannot be assessed in isolation, as it necessarily opens the possibility of reviewing the fine amount in relation to the other violations.

[21] The first-tier plaintiff, taking into account the limitations of the new procedure, requested that the amount of the fine be reduced to the amount imposed in the main proceedings, since it was established that the defendant's decision did not contain any relevant element that would justify the plaintiff's participation. He also requested that his legal costs be determined.

[22] The first-rank defendant requested the dismissal of the action, referring to the arguments it had put forward in the main proceedings in connection with the imposition of the fine. The infringement was committed jointly by the parties. The consequences of the contract amendments concluded by mutual agreement of the parties are borne jointly and equally by the parties. It is an indisputable fact that the conduct of the public procurement procedure is the obligation of the contracting authority, however, the amendment of the contract cannot be concluded without the same intervention of the party contracting as the winning bidder. Since point 73 of the decision states that no infringement has been established against the first-rank plaintiff in the past two years, the claim that the first-rank defendant did not assess it is unfounded.

[23] The defendant intervener did not make a statement in the repeated proceedings.

The court's decision and its legal reasons

[24] The claim is partly well-founded as follows.

[25] The court of first instance is bound by the operative part and reasoning of the judgment of the court of second instance, its findings and resolutions. In the new proceedings, the court of first instance was only able to examine the amount of the fine imposed on the first-tier plaintiff in respect of contract amendment number 3 within the limits of the claim and counterclaim.
All this placed the following constraints on the trial court.

[26] In its decision, the first-tier defendant made a difference of 10 million forints between the amount of the fine imposed on the contracting authority and the first-tier plaintiff, regarding which the first-tier court determined in point [78] of its decision that it should be assessed as a sanction for a further infringement of the law imposed on the contracting authority, which determination cannot be appealed in the absence of an appeal.

Machine Translated by Google

was part of the appeal proceedings, so in this part the first instance judgment is final. This means that the 70 million - 70 million forint fine is the amount that is imposed on the contracting parties equally, as an objective sanction for the unlawfully concluded contract amendments.

[27] The defendant did not differentiate between the three violations it assessed as contractual amendments, either by contract or by the involvement of the contracting parties (the latter being claimed to be identical). The trial court was not allowed to examine the fine sanction for the violation due to the conclusion of the Cost Compensation Agreement and Contract Amendment No. 4.

[28] In point [79] of its decision, the court of first instance assessed the difference in the history of the contracting parties in favor of the first-degree plaintiff, in addition to the number of violations, as a reason for the change, since this difference (whether they committed violations in the previous two years or not) does not appear in the decision, if the 10 million forint excess for the contracting authority is the result of the further violation. The second-degree judgment did not address this judgment finding – in the absence of separate appeal arguments relating to this finding – but this aspect influencing the amount of the fine is part of the omitted provision.

[29] The Curia assessed the arguments appearing in paragraphs 56 and 58 of the decision as an examination of the conditions pursuant to Section 141(4)(b) of the Civil Procedure Code and, due to objective liability, excluded its consideration as a reason for the absence of a violation, but at the same time accepted it as a circumstance to be assessed when imposing a fine.

[30] According to Section 339/B of the Code of Civil Procedure, an administrative decision made in the exercise of discretion shall be deemed lawful if the administrative body has sufficiently investigated the facts, complied with the procedural rules, the criteria for the exercise of discretion can be established, and the reasoning of the decision demonstrates the reasonableness of the exercise of the evidence. According to established judicial practice (Curia Kf.III.38.211/2019/5, Kf.III.37.630/2019/6.), there is a possibility of mitigation if the defendant failed to assess a relevant circumstance or incorrectly took a circumstance into account when determining the amount of the fine. Therefore, the court has no possibility of overriding the defendant's decision regarding the amount of the fine determined after reasonably taking into account the circumstances. According to the EBH 2017. K. 30. principle decision, only the reasons stated in the contested decision may be taken into account during the judicial review of an administrative decision; an administrative decision made in the exercise of discretion is unlawful if it does not - or does not contain in sufficient detail - the considerations of the discretion.

[31] The amount of the fine was determined by the defendant by consideration. Points 72 and 73 of the decision contain the considerations of consideration with reference to Section 165 (6); (7) and (11) of the Public Procurement Act. According to paragraph (11), in deciding whether the imposition of a fine is justified and in determining the amount of the fine and the duration of the ban, the Public Procurement Arbitration Board shall take into account all the circumstances of the case - in particular the gravity of the infringement, the subject and value of the public procurement, the reason for the infringement closing the public procurement procedure.

Machine Translated by Google

the influence on the decision, the repeated conduct in breach of this Act, the cooperative conduct of the infringer in assisting the procedure, the long period of time between the occurrence of the infringement and the initiation of the legal remedy procedure, and in the case of a procurement carried out with support, the circumstance that the infringement may be subject to a sanction for repayment of the support in the proceedings of another body - shall be taken into account. When determining the amount of the fine and the duration of the ban, it shall also be taken into account if the infringement was obviously intentional. When imposing the fine, the first-tier defendant took into account the contractual values, the gravity of the infringement, whether there had been an infringement before, and did not separately assess the cooperative conduct after the parties had fulfilled their legal obligations. The Metropolitan Court found that the first-tier defendant had assessed all relevant aspects, and the lack of intentional bad faith complained of by the first-tier plaintiff cannot be taken into account as a fine reduction criterion, since the parties are expected to act in good faith, so the lack of separate mention or assessment of this circumstance cannot be held accountable.

[32] The range of assessment criteria is therefore complete, according to established judicial practice (Curia Kf.III.38.211/2019/5., Kf.III.37.630/2019/6.) there is a possibility of mitigation if the defendant did not assess a relevant circumstance or incorrectly took into account a circumstance when determining the amount of the fine. In the case of contract amendment No. 3, the first-order defendant highlighted the contracting authority's definition of the main subject of the amendment and the method of formulating the procurement requirement when assessing the gravity of the infringement, which is the exclusive competence of one of the contracting parties. However, in comparison, in the amendments concerning sealing cases, he assessed a number of joint or joint decisions arising from the contractual relationship of the parties, which led to the summary finding that the 4th; 5th; The legal acts judged as infringing on the basis of element 6 result in the same contribution and liability, making it unreasonable. In the logical system of the reasoning of the decision, the arguments regarding the applied sanction, in particular the findings justifying the gravity of the infringement, are to be interpreted together with the reasons underlying the finding of the infringement. In points 56 and 58 of the decision of the first-tier defendant, the contracting authority identified (exclusion of competition) acts during the examination of the occurrence of the infringement, which – regardless of the issue of liability for the infringement – makes the ratio of the contribution of the contracting parties to the decision of the contracting authority that triggers public procurement law consequences and the economic operator acting fundamentally along economic considerations to be assessed. The Curia also considered this justified according to point [54] of the second-instance intermediate judgment, regardless of the establishment of objective liability for the infringement.

[33] Based on the provisions of the first-instance judgment that were not challenged on appeal and the interim judgment of the Curia, the Metropolitan Court, taking into account all of this, reduced the amount of the fine by 20 million forints, taking into account the following considerations. The first-instance defendant did not weight the amount of the 70 million forint fine imposed on the first-instance plaintiff for each individual contract amendment, and the sanction part of the first-instance judgment for the other two contract amendments cannot be the subject of the new proceedings, while the first-instance defendant referred to the identity of its assessment. The aspects listed in point 73 of the first-instance defendant’s decision are comprehensive and well-founded, with two exceptions. It did not unreasonably differentiate between the first-instance plaintiff and the contracting authority with regard to the amount of the fine, even though it had not previously found any infringement against the first-instance plaintiff. This circumstance – regardless of the gravity of the violation of each contract amendment – is the first-order plaintiff

Machine Translated by Google

to be assessed in favor of. Based on the reasons of the first-rank defendant, the court considered the amount of the fine to be the same for each violation on the part of the first-rank defendant. In the case of contract amendment no. 3, it had to take into account that the violation can be established against the first-rank plaintiff, but at the same time, its contribution to the occurrence of the violation is, as mentioned above, smaller than that of the contracting authority, so the first-rank defendant unjustifiably ignored it, although it itself stated this in several places in its decision.

[34] In the absence of an appeal, the repeated proceedings did not include the examination of the part of the fine imposed on the First-tier Plaintiff based on the Cost Compensation Agreement and Contract Amendment No. 4, and the reason for disregarding the first-tier judgment ruling on the reduction of the fine was solely the different assessment of the possibility of establishing liability due to Contract Amendment No. 3. The First-tier Plaintiff's motion that the court examine this part of the decision in its entirety was unfounded and contrary to the binding nature of the second-tier judgment.

[35] In view of all this, the Metropolitan Court partially changed the defendant's decision based on Section 339 (2) q) of the Code of Civil Procedure (and taking into account the procedural rules containing rules different from the Code of Civil Procedure applicable at the time of the initiation of the legal remedy proceedings and applicable at the time of the submission of the statement of claim) and applied by the first-order defendant with temporal effect pursuant to point 41 of its decision (October 2, 2017) in accordance with the authorization received in Section 172 (3) of the Code of Civil Procedure (2 October 2017), reduced the 70 million forint fine imposed on the first-order plaintiff to 50 million forints for element 4 of the ex officio initiative, and dismissed the first-order plaintiff's claim in excess of this (with regard to the examination of the sanction covering all violations, and the reduction to 40 million forints as previously).

[36] By applying Section 3(2)(b) and (6) of Decree 32/2003. (VIII.22) of the Ministry of Justice on attorneys' fees incurred in legal representation and ascertainable in court proceedings (hereinafter: IM.r.), the court determined the amount of the legal fees, taking into account the ratio of winning and losing the case, based on the amount of the fine as the subject matter of the case, in favor of the first-rank plaintiff in the new proceedings, which it obliged the first-rank defendant to bear based on Sections 77 and 78(1) of the Code of Civil Procedure. No separate costs were incurred by the intervener's proceedings, so there was no need to decide on this matter.

[37] The decision on the 1,500 thousand forints earnings fee shall be made based on the instructions of the Curia, and its amount shall be based on Section 37 (1); Section 39 (1); Section 42 (1) a); Section 43 (3) of Act XCIII of 1990 on Fees (hereinafter: Act).
In the administrative lawsuit initiated by the first-rank plaintiff, the first-rank plaintiff is required to pay a fee of HUF 500,000 from the fee recorded due to the right to record a subject-matter fee provided for in Section 62 (1) h) of the Civil Procedure Act, in view of his partial victory in the lawsuit, and HUF 1 million of the fee remains the responsibility of the state due to the exemption of the first-rank defendant from the fee pursuant to Section 5 (1) c) of the Civil Procedure Act.

Machine Translated by Google

[38] The judgment is subject to appeal, subject to Section 172(5) of the Civil Procedure Code.

Closing part

Budapest, July 13, 2022.

Dr. Sára Katalin sk Fintáné Dr. Vásárhelyi Julianna sk Dr. Bíró Péter sk

presiding judge judge

EU:C:2020:470

JUDGMENT OF THE COURT (Tenth Chamber)

11 June 2020 (*)

(Reference for a preliminary ruling — Public works contracts, public supply contracts and public service contracts — Directive 2014/24/EU — Procurement procedure for the award of a service contract — Architectural and engineering services — Article 19(1) and Article 80(2) — National legislation limiting participation solely to economic operators in certain legal forms)

In Case C-219/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 16 January 2019, received at the Court on 11 March 2019, in the proceedings

Parsec Fondazione Parco delle Scienze e della Cultura

v

Ministero delle Infrastrutture e dei Trasporti,

Autorità nazionale anticorruzione (ANAC),

THE COURT (Tenth Chamber),

composed of I. Jarukaitis, President of the Chamber, E. Juhász (Rapporteur) and M. Ilešič, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Parsec Fondazione Parco delle Scienze e della Cultura, by A. Pontenani and I. Cecchi, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and C. Pluchino, avvocato dello Stato,

– the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of recital 14, Article 19(1) and Article 80(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Parsec Fondazione Parco delle Scienze e della Cultura (‘Parsec’), on the one hand, and Ministero delle Infrastrutture e dei Trasporti (Ministry of Infrastructure and Transport) and Autorità nazionale anticorruzione (ANAC) (National Anti-Corruption Authority, Italy), on the other hand, concerning the latter’s decision rejecting Parsec’s application for

inclusion in the national register of engineering firms and firms of professionals entitled to provide architectural and engineering services.

Legal context

European Union law

3 Under recital 14 of Directive 2014/24:

‘It should be clarified that the notion of “economic operators” should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are “legal persons” in all circumstances.’

4 Article 2(1) of that directive, that article being entitled ‘Definitions’, provides:

‘For the purposes of this Directive, the following definitions apply:

…

10. “economic operator” means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;

…’

5 Article 19(1) of that directive, that article being entitled ‘Economic operators’, provides:

‘Economic operators that, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of public service and public works contracts as well as public supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.’

6 Article 80 of the directive, entitled ‘Rules on the organisation of design contests and the selection of participants’, provides:

‘1. When organising design contests, contracting authorities shall apply procedures which are adapted to the provisions of Title I and this Chapter.

2. The admission of participants to design contests shall not be limited:

(a) by reference to the territory or part of the territory of a Member State;

(b) on the grounds that, under the law of the Member State in which the contest is organised, they would be required to be either natural or legal persons.

3. Where design contests are restricted to a limited number of participants, the contracting authorities shall lay down clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.’

Italian law

7 Decreto legislativo n. 50 — Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50 implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement by entities operating in the water, energy, transport and postal services sectors, and reforming the existing provisions in relation to public works, service and supply contracts) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016) constitutes the Codice dei contratti pubblici (Public Procurement Code).

8 Whereas Article 45 of that code defines in broad terms the concept of economic operator allowed to take part in procurement procedures for the award of public contracts, Article 46 thereof establishes a special regime for architectural and engineering services. Under the latter provision:

'1. Participation in procurement procedures in relation to architectural and engineering services is open to the following:

(a) providers of engineering and architectural services: independent or associated professionals, firms of professionals as referred to in subparagraph (b), engineering firms as referred to in subparagraph (c), consortia, European Economic Interest Groupings (EEIGs), temporary groupings of the abovementioned forms, which provide public and private customers operating on the market with engineering and architectural services as well as technical and administrative activities, and economic and financial feasibility studies related to these activities, including, as regards measures relating to the restoration and maintenance of movable property and surfaces decorated with architectural objects, persons qualified as restorers of cultural objects in accordance with the regulations in force;

(b) firms of professionals: firms constituted exclusively from among professionals enrolled with the respective professional associations provided for by the professional regulations in force, in the form of partnerships as referred to in Chapters II, III and IV of Title V of Book V of the Civil Code and in the form of cooperative societies as referred to in Chapter I of Title VI of Book V of the Civil Code, which provide private and public developers with engineering and architectural services such as feasibility studies, research, consultations, design or site management work, technical and economic feasibility assessments or environmental impact assessments;

(c) engineering firms: limited liability companies as referred to in Chapters V, VI and VII of Title V of Book V of the Civil Code, or in the form of cooperative societies as referred to in Chapter I of Title VI of Book V of the Civil Code, which do not meet the conditions to be classified as firms of professionals, and which carry out feasibility studies, research, consultancy, design or site management work, technical and economic feasibility studies or impact assessments as well as other goods production activities associated with the provision of these services;

(d) providers of engineering and architectural services identified under CPV codes 74200000-1 to 74276400-8, 74310000-5 to 74323100-0 and 74874000-6 established in other Member States, constituted in accordance with the legislation in force in the respective countries;

(e) temporary groupings constituted from among the forms referred to in subparagraphs (a) to (d);

(f) permanent groupings of firms of professionals and of engineering firms, including in a mixed form, consisting of at least three members that have operated in the sectors of engineering and architectural services.

2. For the purpose of taking part in the procurement procedures referred to in paragraph 1, firms may, within five years from their constitution, show compliance with the economic/financial and technical/organisational conditions required in the contract notice, including the conditions relating to the members of the firm where the firm is constituted in the form of a partnership or a cooperative society, and those relating to the technical managers or professionals employed on a permanent basis by the firm, where the latter is constituted in the form of a limited liability company.'

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Parsec is a non-profit-making private-law foundation constituted in accordance with the Italian Civil Code.

10 Its seat is located in Prato (Italy) and, as provided for in its founding document, it is active inter alia in the study of natural disasters, the detection and prevention of risk conditions, environmental and land use planning, management and monitoring as well as civil and environmental protection. It created a seismology 'observatory' in its midst, which operates in stable cooperation with the Istituto nazionale di geofisica e vulcanologia (National Institute of Geophysics and Volcanology, Italy). Through that observatory, Parsec manages a network of stations for measuring seismic activity, works in cooperation with universities and research bodies, and provides seismic risk management, civil protection and land use planning services for the benefit of numerous municipalities and local authorities. It carries out all of those activities thanks to staff that is highly qualified in that field.

11 In order to be able to take part in tendering procedures for the service of classifying the territory according to seismic risk, Parsec lodged an application for inclusion in ANAC's register of operators entitled to provide engineering and architectural services. However, since Parsec did not fall within any of the categories of economic operators referred to in Article 46(1) of the Public Procurement Code, ANAC issued a decision rejecting the application for inclusion, against which Parsec lodged an action before the referring court, namely the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).

12 Before that court, both the Ministry for Infrastructure and Transport and ANAC submit, as a preliminary point, that the fact that Parsec is not included in ANAC's register of economic operators as referred to in Article 46 of the Public Procurement Code does not preclude it from taking part in the tendering procedures for the services in question.

13 The referring court notes, in the first place, that the services covered by the proceedings before it, namely seismic services and that of classifying the territory according to seismic risk, fall within the architectural and engineering services referred to in the Public Procurement Code. For the performance of services, Article 46 of the code provides that participation in the tendering procedures is open solely to certain categories of operators, which do not include non-profit-making bodies such as Parsec. According to the referring court, this is due to the fact, that since those bodies may not enrol on ANAC's register, it is impossible for the contracting authority to verify the professional characteristics of such bodies wishing to submit a tender.

14 In the second place, the referring court is of the opinion that that special rule, which has the effect of limiting the scope of the concept of 'economic operator' set out in Article 45 of the Public Procurement Code, can be justified by the significant degree of professionalism required of the tenderers to guarantee the quality of the services they would have to provide and by a 'presumption' that the persons providing those services on a continuous professional basis, subject to remuneration, are more likely to have performed their activity without interruption and to have undergone professional development training.

15 In the third place, the referring court states that in its judgment of 23 December 2009, *CoNISMa* (C-305/08, EU:C:2009:807), the Court declared the incompatibility with EU law of Italian legislation that prohibited entities which were primarily non-profit-making from taking part in a procurement procedure for the award of public contracts, even though such entities were entitled to offer the services covered by the contract in question. According to the referring court, while the Italian legislature in Article 45 of the Public Procurement Code — which defines in broad terms the concept of 'economic operator' — reproduced the Court's broad definition of that concept in that judgment, by adopting Article 46 of the code, it chose a narrower definition for architectural and engineering services.

16 In view of the general guidance given in that judgment, the referring court asks whether under EU law Member States may nonetheless adopt narrower definitions with regard to the services covered by the dispute in the main proceedings. In that regard, it notes that under the wording of Article 19(1) and that of Article 80(2) of Directive 2014/24, even if only by implication, it seems that Member States may limit participation in procurement procedures for the award of public contracts solely to natural persons

and certain legal persons. It notes, in addition, that economic operators established in another Member State are not affected by the restrictive definition provided for in Article 46 of the Public Procurement Code given the applicability to those operators of the general rule set out in Article 45(1) of that code, according to which, in line with the provisions of Article 80(2) of Directive 2014/24, those operators are permitted to take part in procurement procedures for the award of contracts according to the legislation of the Member State in which they are established.

17 In those circumstances, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does recital 14 in conjunction with Articles 19(1) and 80(2) of Directive [2014/24] preclude a legal provision such as Article 46 of [the Public Procurement Code], by which the Italian Republic transposed Directives 2014/23, 2014/24 and 2014/25 into national law, which permits only economic operators created in the legal forms indicated in that provision to take part in tendering procedures for the award of “architectural and engineering services”, which has the effect of excluding from participation in such procedures economic operators that perform such services using a different legal form?’

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether Article 19(1) and Article 80(2) of Directive 2014/24, read in the light of recital 14 thereof, are to be interpreted as precluding national legislation that prevents non-profit-making entities from being able to take part in a procurement procedure for the award of a public contract for engineering and architectural services, even though those entities are entitled under national law to offer the services covered by the contract in question.

19 As a preliminary point, it is important to note that it is apparent from the request for a preliminary ruling that under the national legislation applicable to the dispute in the main proceedings, a foundation such as Parsec, whose activity is non-profit-making, is not allowed to take part in a procurement procedure for the award of a public contract for engineering and architectural services, even though that entity is entitled under national law to offer the services covered by the contract in question.

20 The Court has previously held, in paragraphs 47 to 49 of the judgment of 23 December 2009, *CoNISMa* (C-305/08, EU:C:2009:807), with regard to national legislation that transposed into domestic law Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), that Member States have indeed a discretion as to whether or not to allow certain categories of economic operators to provide certain services and they can, inter alia, determine whether or not entities which are non-profit-making and whose primary object is teaching and research are authorised to operate on the market, according to whether the activity in question is compatible with their objectives as an institution and those laid down in their statutes. However, if and to the extent that such entities are entitled to offer certain services on the market, national law cannot prohibit them from taking part in procurement procedures for the award of public contracts for the provision of those services.

21 That case-law of the Court was confirmed in respect of that directive (judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 27, and of 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, paragraph 35) as well as the directive that it replaced, namely Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (judgment of 18 December 2014, *Data Medical Service*, C-568/13, EU:C:2014:2466, paragraph 36).

22 That case-law of the Court remains relevant with the entry into force of Directive 2014/24, which repealed and replaced Directive 2004/18. In addition to the fact that the concept of ‘economic operator’ set out in Article 1(8) of Directive 2004/18 was reproduced, without substantial modification, in point 10 of Article 2(1) of Directive 2014/24, recital 14 thereof now states explicitly that that concept is

to be interpreted ‘in a broad manner’, so as to include any persons or entities active on the market ‘irrespective of the legal form under which they have chosen to operate’. Similarly, both Article 19(1) and Article 80(2) of the directive explicitly provide that an economic operator cannot be precluded from taking part solely on the ground that, under national law, it would be required to be either a natural or a legal person.

23 It follows that, in accordance with the Court’s case-law set out in paragraphs 20 and 21 above, national law cannot prohibit a non-profit-making foundation entitled to offer certain services on the domestic market from taking part in procurement procedures for the award of public contracts for the provision of those services.

24 That interpretation cannot be challenged on the ground, put forward by the referring court in its request for a preliminary ruling and referred to in the Italian Government’s written observations, that the narrow definition of the concept of ‘economic operator’ set out in Article 46 of the Public Procurement Code in the context of services relating to architecture and engineering are justified by the significant degree of professionalism required to guarantee the quality of those services and by an alleged presumption that the persons providing those services on a continuous professional basis, subject to remuneration, are more likely to have performed their activity without interruption and to have undergone professional development training.

25 In the first place, as observed by the European Commission, the Italian Government has not established the existence of any specific correlation between, on the one hand, the degree of professionalism demonstrated in providing a service and, consequently, the quality of the service provided, and, on the other hand, the legal form of the economic operator providing that service.

26 In the second place, with regard to the ‘presumption’ that the persons providing services in relation to architecture and engineering on a professional basis and subject to remuneration are more likely to have performed their activity without interruption and to have undergone professional development training, suffice it to note that such a presumption cannot prevail in EU law since it is incompatible with the Court’s case-law set out in paragraph 20 above, from which it follows that to the extent that an entity is entitled under national law to offer on the market engineering and architectural services in the Member State concerned, it cannot be precluded from being able to take part in a procurement procedure for the award of a public contract concerning the provision of those services.

27 Lastly, it should be added that the EU legislature appreciated the importance, for candidates and tenderers in the case of public service contracts and public works contracts as well as certain public supply contracts, of presenting a high degree of professionalism. It is to that end that it provided, in Article 19(1) of Directive 2014/24, that legal persons may be required to indicate in their offers or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question. By contrast, the EU legislature, to that same end, did not introduce a different treatment on account of the legal form under which such candidates and tenderers have chosen to operate.

28 The answer to the question referred is therefore that Article 19(1) and Article 80(2) of Directive 2014/24, read in the light of recital 14 thereof, are to be interpreted as precluding national legislation that prevents non-profit-making entities from being able to take part in a procurement procedure for the award of a public contract for engineering and architectural services, even though those entities are entitled under national law to offer the services covered by the contract in question.

Costs

29 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 19(1) and Article 80(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, read in the light of recital 14 thereof, are to be interpreted as precluding national legislation that prevents non-profit-making entities from being able to take part in a procurement procedure for the award of a public contract for engineering and architectural services, even though those entities are entitled under national law to offer the services covered by the contract in question.

[Signatures]

---

* Language of the case: Italian.

JUDGMENT OF THE COURT (Fourth Chamber)

3 February 2021 (*)

(Reference for a preliminary ruling – Public procurement – Public procurement procedure – Directive 2014/24/EU – Article 2(1)(4) – Contracting authority – Bodies governed by public law – Concept – National sports federation – Meeting of needs in the general interest – Supervision of the federation's management by a body governed by public law)

In Joined Cases C-155/19 and C-156/19,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 17 January 2019, received at the Court on 22 February 2019, in the proceedings

Federazione Italiana Giuoco Calcio (FIGC),

Consorzio Ge.Se.Av. S. c. arl

v

De Vellis Servizi Globali Srl,

intervening parties:

Consorzio Ge.Se.Av. S. c. arl,

Comitato Olimpico Nazionale Italiano (CONI),

Federazione Italiana Giuoco Calcio (FIGC),

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby (Rapporteur), S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 1 July 2020,

after considering the observations submitted on behalf of:

– the Federazione Italiana Giuoco Calcio (FIGC), by L. Medugno and L. Mazzarelli, avvocati,

– Consorzio Ge.Se.Av. S. c. arl, by V. Di Martino, avvocato,

– De Vellis Servizi Globali Srl, by D. Lipani, A. Catricalà, F. Sbrana and S. Grillo, avvocati,

– the Comitato Olimpico Nazionale Italiano (CONI), by S. Fidanzia and A. Gigliola, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by D. Del Gaizo, avvocato dello Stato,

– the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 October 2020,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 2(1)(4)(a) and (c) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The requests have been made in two sets of proceedings between, on the one hand, the Federazione Italiana Giuoco Calcio (Italian Football Federation; 'the FIGC') and Consorzio Ge.Se.Av. S. c. arl ('Consorzio') and, on the other, De Vellis Servizi Globali Srl concerning the award of a contract to Consorzio.

Legal context

EU law

3 Article 2(1)(4) of Directive 2014/24 provides:

'For the purposes of this Directive, the following definitions apply:

…

(4) "bodies governed by public law" means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law'.

Italian law

The Public Procurement Code

4 Article 3(1)(d) of decreto legislativo n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 establishing the Public Procurement Code) of 18 April 2016 (GURI, ordinary supplement No 91 of 19 April 2016; 'the Public Procurement Code') provides:

'For the purposes of this Code, the following definitions apply:

…

(d) "bodies governed by public law", means bodies, even if in the legal form of a company, the non-exhaustive list of which is contained in Annex IV:

(1) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(2) having legal personality; and

(3) financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.'

Decree-Law No 220

5 Article 1 of decreto-legge n. 220 – Disposizioni urgenti in materia di giustizia sportiva (Decree-Law No 220 laying down urgent provisions concerning sports law) of 19 August 2003 (GURI No 192 of 20 August 2003), converted into law, following amendment, by Article 1 of Legge n. 208 (Law No 208) of 17 October 2003 (GURI No 243 of 18 October 2003), provides:

'1. The Italian Republic recognises and promotes the autonomy of national sports law as an expression of international sports law falling within the purview of the International Olympic Committee.

2. The relationship between sports law and Italian law is governed by the principle of autonomy, except in cases involving individual rights linked to sports law which are of relevance to the legal system of the Italian Republic.'

Legislative Decree No 242

6 Article 1 of decreto legislativo n. 242 – Riordino del Comitato olimpico nazionale italiano - CONI, a norma dell'articolo 11 della legge 15 marzo 1997, n^{o} 59 (Legislative Decree No 242 on the reorganisation of the Italian National Olympic Committee - CONI, pursuant to Article 11 of Law No 59 of 15 March 1997) of 23 July 1999 (GURI No 176 of 29 July 1999), in the version applicable to the disputes in the main proceedings ('Legislative Decree No 242'), is worded as follows:

'1. The [Comitato Olimpico Nazionale Italiano (Italian National Olympic Committee; "the CONI")] shall have legal personality under public law, with its seat in Rome and shall be responsible to the Ministero per i Beni e le Attività Culturali (Ministry of Heritage and Cultural Activities, Italy).'

7 Article 2(1) of that legislative decree states:

'The CONI … shall comply with the principles of international sports law, in line with the decisions and guidelines issued by the International Olympic Committee ("IOC"). The CONI shall be responsible for the organisation and enhancement of national sport and, in particular, the preparation of athletes and the provision of adequate resources for the Olympic Games and for all other national or international sports events geared towards preparation for the Olympic Games. It shall also be responsible, within the framework of sports law …, for adopting measures to prevent and eliminate the use of substances that alter the natural physical performance of athletes in sports activities, as well as for promoting the practice of sports on the broadest possible scale …, within the limits laid down in the decreto del Presidente della Repubblica n. 616 (Decree of the President of the Republic No 616) of 24 July 1977. …'

8 Article 4(1) and (2) of Legislative Decree No 242 provides:

'1. The National Council shall be composed of:

(a) the President of the CONI at its head;

(b) the presidents of the national sports federations;

(c) Italian members of the IOC;

(d) athletes and coaches representing national sports federations and associated sports disciplines, provided that they have never been suspended from sports activity by way of penalty for any use of substances altering natural physical performance during sports activities;

…

2. The representatives of [national sports] federations, as defined in the context of Olympic sports, must represent the majority of voters within the CONI National Council.’

9 Article 5 of Legislative Decree No 242 provides:

‘1. In accordance with the decisions and guidelines of the IOC, the National Council shall work to promote the dissemination of the Olympic spirit and regulate and coordinate national sports activities, harmonising to that end the actions undertaken by national sports federations and national sports disciplines.

…

2. The National Council shall have as its task to:

(a) adopt the statutes and other normative measures falling within its competence, as well as guidelines on the interpretation and implementation of the rules in force;

(b) define the fundamental principles with which the statutes of national sports federations, associated sports disciplines, sports promotion bodies and sports associations and societies must be aligned in order to be recognised for sporting purposes;

(c) take decisions to recognise for sporting purposes national sports federations, sports societies and associations, sports promotion bodies, charitable organisations and other sports disciplines associated with the CONI and the federations, in accordance with the requirements laid down in the statute …;

…

(e) establish criteria and conditions governing the exercise of controls over national sports federations, associated sports disciplines and recognised sports promotion bodies;

…

(e *ter*) adopt, on a proposal from the National Board, decisions to place national sports federations or associated sports disciplines under administrative supervision in cases of serious management irregularities or serious infringements of sports law by the governing bodies, in cases of the proven inability of those bodies to function, or where the proper launch and running of national sports competitions cannot be ensured;

…’

10 Article 6(1) of that legislative decree provides:

‘The National Board shall consist of:

(a) the President of the CONI at its head;

(b) Italian members of the IOC;

(c) 10 representatives of the national sports federations and associated sports disciplines;

…’

11 Article 7 of Legislative Decree No 242 is worded as follows:

‘1. The National Board shall act as a directorate-general for the administration and management of the CONI, defining its objectives and programmes and verifying that the results are consistent with the guidelines given.

2. The National Board shall carry out the following tasks:

…

(e) it exercises, on the basis of the criteria and procedures established in accordance with Article 5(2)(e), the power of control over national sports federations, associated sports disciplines and recognised sports promotion bodies with regard to the proper organisation of competitions, Olympic preparation, high-level sports activity and the use of the financial aid referred to in point (d) of this paragraph;

(f) it proposes to the National Council the placing of national sports federations or associated sports disciplines under administrative supervision in cases of serious management irregularities or serious infringements of sports law by the governing bodies, in cases of the proven inability of those bodies to function, or where the regulatory requirements are not complied with in order to ensure the launch and proper conduct of national sporting competitions;

…’

12 Article 15(1) to (6) of that legislative decree states:

‘1. The national sports federations and associated sports disciplines shall pursue sports activities in accordance with the decisions and guidelines of the IOC, international federations and the CONI, and with due regard for the public dimension of certain types of activity which are set out in the CONI Statute. Sports societies and associations shall participate in those activities, as shall individual members solely in the cases provided for in the statutes of national sports federations and associated sports disciplines concerning that particular activity.

2. National sports federations and associated sports disciplines shall take the form of associations having legal personality under private law. They shall be non-profit-making and, except as otherwise expressly provided for in this Decree, shall be governed by the provisions of the Civil Code and the relevant implementing provisions.

3. The budgets of national sports federations and associated sports disciplines shall be approved annually by the administrative body of each federation and shall be subject to the approval of the CONI National Board. In the event of a negative opinion by the auditors of a federation or associated federation or in the event that a budget is not approved by the CONI National Board, an assembly of societies and associations shall be convened in order to deliberate on approving the budget.

4. The assembly competent to elect the management bodies shall approve the administrative body’s indicative budgetary programmes, which shall be submitted to the assembly for scrutiny at the end of each four-year period or at the end of the mandate for which they have been approved.

5. National sports federations and associated sports disciplines shall be recognised for sporting purposes by the National Council.

6. Recognition of new national sports federations and associated sports disciplines as having legal personality under private law shall be granted in accordance with the decreto del Presidente della Repubblica n. 361 (Decree of the President of the Republic No 361) of 10 February 2000, subject to recognition for sporting purposes by the National Council.’

13 Article 16(1) of Legislative Decree No 242 provides:

‘National sports federations and associated sports disciplines shall be governed by the provisions of statutes and regulations on the basis of the principle of internal democracy, the principle of sport for all on equal terms, and in accordance with national and international sports law.’

The CONI Statute

14 Article 1 of the CONI Statute states:

‘1. The [CONI] shall be the confederation of national sports federations … and associated sports disciplines …

2. The CONI … shall be the authority responsible for disciplining, regulating and managing sports activities, regarded as being an essential component of the physical and mental development of the individual and an integral part of national education and culture. …’

15 Article 6 of the CONI Statute provides:

‘1. The National Council, in its capacity as supreme representative body for Italian sport, shall be responsible for disseminating the Olympic ideal, ensuring that the actions necessary to prepare for the Olympic Games are taken, regulating and coordinating national sports activities and harmonising the action of national sports federations and associated sports disciplines.

…

4. The National Council shall:

…

(b) establish the fundamental principles that must govern, as a condition of acquisition of recognition for sporting purposes, the statutes of national sports federations, associated sports disciplines, sports promotion bodies, associations of recognised standing in the field of sport and sports associations and societies, and adopt the Sports Disciplinary Code, which must be observed by all national sports federations and associated sports disciplines;

(c) adjudicate on the recognition for sporting purposes of national sports federations, associated sports disciplines, sports promotion bodies and associations of recognised standing in the field of sport, in accordance with the requirements laid down in the statutes, taking into account also to that end the representation and Olympic nature of the sport in question, any recognition by the IOC and the sporting tradition of the discipline;

…

(e) establish the criteria and procedures governing the carrying out by the CONI of checks of national sports federations, associated sports disciplines and, for sports matters, recognised sports promotion bodies;

(e1) lay down, with a view to ensuring that sports championships are properly organised, the criteria and procedures governing checks by federations of [member] sports corporations and the CONI’s substitute oversight function in the event of proven failure on the part of national sports federations to carry out checks;

…

(f1) decide, on a proposal from the National Board, the placing of national sports federations or associated sports disciplines under administrative supervision in cases of serious management irregularities or serious infringements of sports law by the governing bodies, in cases of the proven inability of those bodies to function, or where the launch and proper conduct of national sporting competitions cannot be ensured;

…’

16 Article 7(5) of the CONI Statute provides:

‘The National Board shall:

…

(e) on the basis of the criteria and procedures established by the National Council, oversee national sports federations in matters of a public nature and, in particular, in matters concerning the proper organisation of competitions, Olympic preparations, high-level sporting activities and the use of awards of financial assistance, and lay down the criteria for granting financial assistance to federations;

…

(f) make proposals to the National Council on the placement of national sports federations or associated sports disciplines under administrative supervision in cases of serious management irregularities or serious infringements of sports law by the governing bodies, in cases of the proven inability of those bodies to function, or where national sports federations have failed to adopt regulatory procedures, or on the placement of the competent internal bodies under administrative supervision in order to ensure the proper launch and conduct of national sports competitions;

…

(g2) approve the budgets and related activity programmes, as well as the annual balance sheets of national sports federations and associated sports disciplines;

…

(h1) appoint auditors to represent the CONI in national sports federations and associated sports disciplines and on the CONI's regional committees;

…

(l) approve, for sporting purposes, the statutes, regulations implementing the statutes, sports regulations and anti-doping rules of national sports federations and associated sports disciplines, determining whether they comply with the law, the CONI Statute, fundamental principles, and the guidelines and criteria laid down by the National Council, and referring them back, where appropriate, to the national sports federations and associated sports disciplines within 90 days to enable the necessary amendments to be made;

…'

17 Article 20(4) of the CONI Statute is worded as follows:

'National sports federations shall engage in sports activities and the corresponding promotional activities in accordance with the decisions and guidelines of the IOC and the CONI and taking into account the public dimension of certain aspects of those activities. In the context of sports law, national sports federations shall enjoy technical, organisational and managerial autonomy, subject to oversight by the CONI.'

18 Under Article 21 of the CONI Statute:

'1. The CONI shall recognise national sports federations which fulfil the following conditions:

(a) the carrying out of a sporting activity, on national territory and at international level, including participation in competitions and the implementation of training programmes for athletes and coaches;

(b) membership of an international federation recognised by the IOC, where such a federation exists, and the management of the activity in accordance with the Olympic Charter and the rules of the international federation to which they belong;

(c) a statutory and regulatory regime based on the principle of internal democracy and the participation of women and men in sporting activity under conditions of equality and equal opportunities, and in compliance with IOC and CONI resolutions and guidelines;

(d) electoral procedures and the composition of management bodies in accordance with Article 16(2) of [Legislative Decree No 242].

…

3. If a recognised national sports federation fails to comply with the requirements laid down in paragraph 1 above, the CONI National Council shall decide to revoke recognition granted at the time.'

19 Article 22 of the CONI Statute provides:

'1. The statutes of the national sports federations must respect the fundamental principles laid down by the National Council and aim, in particular, to strike a constant balance between the rights and duties of the professional and amateur sectors, including between the various categories of the same sporting area.

2. The statutes of the national sports federations shall lay down the procedures governing the exercise of the right to vote and to stand for election of athletes and trainers, in accordance with the IOC's recommendations and with the fundamental principles of the CONI National Council.

…

4. The second-level assembly, made up of representatives elected at the territorial level, is authorised in national sports federations with more than 2 000 associations and affiliated societies entitled to vote.

5. The National Board has 90 days to approve, for sporting purposes, the statutes of the national sports federations. In order to do so, it must assess their compliance with the law, the CONI Statute and the fundamental principles laid down by the CONI National Council. In the event of non-compliance and within 90 days from the date of lodgement of the statute with the Secretariat-General, the National Board shall forward that document to the federations concerned, indicating to them the criteria to be complied with, so that the necessary amendments may be made. If that period of 90 days elapses without the document having been so forwarded, the federal statute shall be deemed to have been approved. If the national sports federations do not amend their statute in the sense indicated, the National Board may appoint an ad hoc administrator and, in the most serious cases, after formal notice has been given, withdraw recognition.

5 *bis*. The statutes shall define the powers of supervision and control which may be exercised by federations in the light of the associative organisation of their structure.

…'

20 Article 23 of the CONI Statute provides:

'1. In accordance with Legislative Decree No 242, as subsequently amended and supplemented, in addition to the activities the public nature of which is expressly provided for by law, the only national sports federation activities to have a public dimension shall be those which concern the following: the admission and membership of sports societies, associations, and individuals; revocation on any ground; the amendment of admission or membership decisions; scrutiny as to the proper running of professional sports competitions and championships; the use of public subsidies; the prevention and punishment of doping; high-level activities connected with preparations for the Olympics; the training of coaches; and the use and management of public sports facilities.

1 *bis*. In pursuing the activities of a public nature to which paragraph 1 refers, national sports federations shall comply with the guidelines and controls applied by the CONI and operate in accordance with the principles of impartiality and transparency. The public nature of an activity shall not change the ordinary rules of private law to which the individual acts and related individual legal situations are subject.

1 *ter*. The National Board shall establish the criteria and procedures for ensuring that decisions taken by federations comply with the CONI's programmes in so far as concerns the competitiveness of

national teams, the safeguarding of the national sports heritage and its specific identity and the need to ensure effective internal management.

2. The National Board, acting on the basis of the criteria and procedures laid down by the National Council, shall approve national sports federation budgets and establish the financial contributions payable to them, determining, where appropriate, the purpose for which those contributions are to be used, with particular attention being paid to the promotion of youth sport, preparation for the Olympic Games and high-level sporting activities.

3. The National Board shall oversee the proper functioning of national sports federations. In the event of proven serious management irregularities or serious infringements of sports law by the governing bodies, in cases of the proven inability of those bodies to function, or where the proper launch and conduct of sports competitions cannot be ensured, the National Board shall propose that the National Council appoint an administrator.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

21 De Vellis Servizi Globali was invited to participate in a negotiated procedure organised by the FIGC for the award of a contract for porterage services for accompanying the national football teams and for the purposes of the FIGC store in Rome (Italy) for a period of three years. Since the contract had been awarded at the end of that procedure to Consorzio, De Vellis Servizi Globali challenged, before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), the detailed rules governing the conduct of that procedure, arguing that the FIGC ought to have been regarded as a body governed by public law within the meaning of Article 3(1)(d) of the Public Procurement Code and should, therefore, have complied with the rules on publication laid down by that code.

22 The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) granted the application of De Vellis Servizi Globali and annulled the award of the contract to Consorzio.

23 The FIGC and Consorzio both brought an appeal against the judgment of that court before the Consiglio di Stato (Council of State, Italy). They both contest the premiss that the FIGC should be classified as a 'body governed by public law' and, therefore, the jurisdiction of the administrative courts and the granting of the application by the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio).

24 The referring court states that, in order to determine whether the Italian administrative courts have jurisdiction to adjudicate on that dispute and whether the FIGC was required to apply the rules relating to the award of public contracts, it is necessary, first, to establish whether the FIGC may be classified as a 'body governed by public law', within the meaning of Article 3(1)(d) of the Public Procurement Code, which transposes Article 2(1)(4) of Directive 2014/24.

25 In particular, the referring court asks, in the first place, whether the FIGC fulfils the condition, laid down in Article 2(1)(4)(a) of Directive 2014/24, that 'bodies governed by public law' means bodies that are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.

26 In that regard, the referring court observes, first, that, as a national sports federation, the FIGC is a private-law entity with legal personality, which the State is content to recognise in accordance with the procedural rules for recognising legal persons governed by private law, and the public nature of certain activities carried out by the FIGC does not alter the ordinary rules of private law to which it is subject. In addition, having regard to the FIGC's ability to finance itself and in the light of the judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4), activities other than tasks of a public nature which are entrusted to it on the basis of an exhaustive list could be regarded as falling within its general private-law capacity irrespective of its obligation to carry out those tasks.

27 Secondly, the referring court explains that it could also be considered that that formal qualification as a matter of law is not decisive, in so far as the national sports federations subject to the supervisory powers of the CONI are required by law to pursue the public-interest aims exhaustively set out in Article 23 of the CONI Statute, to comply with the CONI's guidelines and controls, to be recognised for sporting purposes by the CONI and to observe the principles of impartiality and transparency. In those circumstances, it could be considered that any ancillary activity such as porterage services is of such a functional character in relation to the tasks of a public nature that it forms an integral part of them.

28 In the second place, the referring court, while noting that the FIGC is not covered by the first and third parts of the alternative, provided for in Article 2(1)(4)(c) of Directive 2014/24, is uncertain whether that federation fulfils the condition referred to in the second part of that alternative, according to which, in order for an entity to be classified as a 'body governed by public law', it must be subject to management supervision by a public authority such as the CONI.

29 In that regard, the referring court points out that the CONI, which is itself subject to the supervision of the Ministro per i beni e le attività culturali (Minister for Heritage and Cultural Activities), has various powers with regard to national sports federations such as the FIGC, such as the powers of recognition for sporting purposes, powers of oversight and direction of activities of a public nature and powers of approving annual balance sheets and placing under administrative supervision.

30 The referring court, however, also points out that the FIGC could be regarded as not being under the dominant influence of the CONI because the national sports federations participate in the supreme bodies of the CONI and the powers of the CONI with regard to them do not constitute the usual supervision of bodies governed by public law, since approval of annual balance sheets is limited to verifying the use of public contributions.

31 In those circumstances the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling the following questions, which are identical in Cases C-155/19 and C-156/19:

'(1) (a) On the basis of the characteristics of national sports law, can the [FIGC] be classified as a body governed by public law in so far as it was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character?

(b) In particular, is the requirement relating to the purpose of the body satisfied in respect of the [FIGC], even in the absence of a formal act establishing a public authority and despite its membership base, on account of its incorporation into a sector (sports) organised in accordance with models of a public-law nature and the fact that it is required to comply with the principles and rules drawn up by the [CONI] and international sporting bodies, as a result of the recognition, for sporting purposes, of the national public entity?

(c) Furthermore, can this requirement arise in relation to a sports federation such as the [FIGC], which has the ability to fund itself, in respect of an activity of no significance in the context of public law, such as that at issue in this case, or must the requirement that the application of the rules on public and open tendering be ensured in any event, where such an entity awards any type of contract to third parties, be regarded as taking precedence?

(2) (a) On the basis of the legal relationship between the CONI and the FIGC …, does the former have a dominant influence over the latter in the light of the legal powers relating to recognition of the undertaking for sporting purposes, approval of annual budgets, supervision of the management and proper functioning of the bodies, and placing the entity itself under administrative supervision?

(b) On the other hand, are those powers insufficient to meet the requirement relating to the dominant public influence of a body governed by public law on account of the significant participation of the presidents and representatives of the sports federations in the key bodies of the [CONI]?'

32 By decision of the President of the Court of 2 April 2019, Cases C-155/19 and C-156/19 were joined for the purposes of the written and oral procedures and of the judgment.

Consideration of the questions referred

The first question

33 By its first question, the referring court seeks to ascertain, in essence, whether Article 2(1)(4)(a) of Directive 2014/24 must be interpreted as meaning that an entity entrusted with tasks of a public nature exhaustively defined by national law may be regarded as having been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, within the meaning of that provision, even though it was established not in the form of a public authority but of an association governed by private law and some of its activities, for which it enjoys a self-financing capacity, are not public in nature.

34 In that regard, it should be borne in mind that, under Article 2(1)(4)(a) to (c) of Directive 2014/24, an entity is to be classified as a 'body governed by public law' where, first, it is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, secondly, it has legal personality and, thirdly, it is financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law, or is subject to management supervision by those authorities or bodies, or has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

35 The Court has already ruled that the three conditions in Article 2(1)(4)(a) to (c) of Directive 2014/24 are cumulative, it being understood that the three criteria mentioned in the third condition are alternative in nature (see, to that effect, judgments of 12 September 2013, *IVD*, C-526/11, EU:C:2013:543, paragraph 20, and of 5 October 2017, *LitSpecMet*, C-567/15, EU:C:2017:736, paragraph 30 and the case-law cited).

36 As regards the first of those three conditions, referred to in Article 2(1)(4)(a) of Directive 2014/24, it is apparent from the case-law of the Court that the EU legislature intended to make only entities established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and whose activity meets such needs subject to the binding rules on public contracts (see, to that effect, judgment of 5 October 2017, *LitSpecMet*, C-567/15, EU:C:2017:736, paragraph 35).

37 In that respect, whether since its establishment or afterwards, the entity concerned must actually meet needs in the general interest, and the assumption of responsibility for meeting those needs must be capable of being objectively determined (see, to that effect, judgment of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 63).

38 In the present case, it is apparent from the explanations provided by the referring court that, in Italy, the activity of general interest comprised by sport is pursued by each of the national sports federations within the framework of tasks of a public nature expressly assigned to those federations by Article 15(1) of Legislative Decree No 242 and exhaustively listed in Article 23(1) of the CONI Statute.

39 In that connection, it is apparent that several of the tasks listed in Article 23(1) of the CONI Statute, such as the supervision of the proper running of competitions and championships, the prevention and punishment of doping, and Olympic and high-level preparation, are not of an industrial or commercial nature, which it is, however, for the referring court to verify. In those circumstances, if it does in fact carry out such tasks, a national sports federation fulfils the condition laid down in Article 2(1)(4)(a) of Directive 2014/24.

40 That conclusion cannot be called into question, in the first place, by the fact that the FIGC has the legal form of an association governed by private law and that it was not, therefore, established by a formal act instituting a public administration.

41 First, the wording of Article 2(1)(4) of Directive 2014/24 does not contain either a reference to the rules for establishing the entity or to its legal form. Secondly, it must be borne in mind that the concept of a 'body governed by public law' must be interpreted in functional terms independent of the formal rules for its application, with the result that, in view of that requirement, no distinction should be drawn by reference to the legal form and rules which govern the entity concerned under national law or to the legal form of the provisions establishing that entity (see, to that effect, judgments of 10 November 1998, *BFI Holding*, C-360/96, EU:C:1998:525, paragraph 62; of 15 May 2003, *Commission* v *Spain*, C-214/00, EU:C:2003:276, paragraphs 55 and 56; and of 12 September 2013, *IVD*, C-526/11, EU:C:2013:543, paragraph 21 and the case-law cited).

42 In the second place, it is also irrelevant that the FIGC pursues, alongside the activities of general interest exhaustively listed in Article 23(1) of the CONI Statute, other activities which constitute a large part of its overall activities and are self-financed.

43 The Court has held that it is immaterial whether, in addition to its duty to meet needs in the general interest, an entity carries out other activities, and the fact that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued by that entity is also irrelevant, provided that it continues to attend to the needs which it is specifically required to meet (see, to that effect, judgment of 10 November 1998, *BFI Holding*, C-360/96, EU:C:1998:525, paragraph 55).

44 It must be pointed out that, in those circumstances, the fact that a national sports federation has a self-financing capacity in the light, in particular, of the non-public activities which it carries out cannot be of any relevance, as the Advocate General observed in point 56 of his Opinion, since such a self-financing capacity has no bearing on the assignment of public tasks.

45 Furthermore, nor does the judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4), enable a different conclusion to be reached.

46 First, the considerations set out in paragraphs 20 to 35 of that judgment specifically illustrate the line of case-law referred to in paragraph 43 above, which means, in essence, that, in order to determine whether an entity may be regarded as a body governed by public law, it is immaterial whether that entity carries out activities other than those intended to meet needs in the general interest, even if the activities intended to meet those needs in the general interest are not considerable.

47 Secondly, the considerations set out in paragraphs 38 to 41 of the judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4), are not relevant to resolving the case in the main proceedings, whose characteristics differ from those of the situation described in that judgment, which was that of a company established and held for the most part by a contracting authority with a view to carrying out commercial activities in relation to which that company benefited from a transfer of the funds derived from the activities pursued by that contracting authority in order to meet needs in the general interest, not having an industrial or commercial character.

48 In the light of the foregoing considerations, the answer to the first question is that Article 2(1)(4)(a) of Directive 2014/24 must be interpreted as meaning that an entity entrusted with tasks of a public nature exhaustively defined by national law may be regarded as having been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, within the meaning of that provision, even though it was established not in the form of a public authority but of an association governed by private law and some of its activities, for which it enjoys a self-financing capacity, are not public in nature.

The second question

49 By its second question, the referring court seeks to ascertain whether the second part of the alternative referred to in Article 2(1)(4)(c) of Directive 2014/24 must be interpreted as meaning that a national sports federation must be regarded as being subject to management supervision by a public authority having regard, first, to the powers conferred on that authority with regard to such a federation and, secondly, to the fact that the key bodies of that authority are composed for the most part of representatives of all the national sports federations.

50 In that regard, it should be borne in mind that each of the alternative criteria in Article 2(1)(4)(c) of Directive 2014/24, as set out in paragraph 34 above, reflects the close dependency of a body on the State, regional or local authorities or other bodies governed by public law; more specifically, as regards the criterion of management supervision, such supervision is based on the finding that there is active control over the management of the body concerned such as to give rise to the dependency of that body on the public authorities equivalent to that which exists where one of the two other alternative criteria is fulfilled, which is likely to enable those authorities to influence that body's decisions with regard to public contracts (see, to that effect, judgment of 27 February 2003, *Adolf Truley*, C-373/00, EU:C:2003:110, paragraphs 68, 69 and 73 and the case-law cited).

51 Consequently, in principle, a review *ex post facto* does not satisfy that criterion, in that it does not enable the public authorities to influence the decisions of the body in question with regard to public contracts (see, to that effect, judgment of 12 September 2013, *IVD*, C-526/11, EU:C:2013:543, paragraph 29 and the case-law cited).

52 In the present case, it is apparent from the national rules – and, in particular, from Article 1 of Decree-Law No 220, in conjunction with Articles 2(1) and 5(1) of Legislative Decree No 242 and Articles 1(2) and 6(1) of the CONI Statute – that, as the authority responsible for the discipline, regulation and management of sports activities, the CONI's primary tasks, within the framework of the autonomy of sports law and in compliance with the principles of international sports law, are as follows: the organisation and enhancement of national sport, in particular the preparation of athletes and the provision of adequate resources for preparation for the Olympic Games; the adoption of anti-doping measures; and the promotion of the practice of sports on the broadest possible scale. To that end, the CONI National Council, as the supreme representative body of Italian sport, is responsible for disseminating the Olympic ideal, ensures that the actions necessary to prepare for the Olympic Games are taken, regulates and coordinates national sports activities, and harmonises, inter alia, the action of national sports federations.

53 It is therefore apparent that, by carrying out essentially a regulatory and coordination function, the CONI is an umbrella organisation which aims above all to issue to national sports federations common sporting, ethical and structural rules in order to regulate the practice of sport in a harmonised manner in accordance with international rules, in particular in the context of competitions and preparation for the Olympic Games. In that regard, it should moreover be noted that, under Article 7(2)(e) of Legislative Decree No 242, the CONI's power of control over those federations appears essentially limited to the proper organisation of competitions, Olympic preparation, high-level sporting activity and the use of financial aid, which it is for the referring court to verify.

54 By contrast, it is not apparent from the documents before the Court that the CONI is responsible for regulating the details of day-to-day sporting practice or interfering in the actual management of national sports federations and in the relations which they maintain – as the Advocate General observed, in essence, in point 29 of his Opinion – with the lower-level structures consisting in clubs, associations and other public or private bodies and with any individual wishing to practise sport.

55 That definition of the role and mission of the CONI appears to be supported by Article 20(4) of the CONI Statute, according to which national sports federations, while being required to engage in sports activities and associated promotional activities in accordance with the decisions and instructions of the IOC and the CONI, enjoy, subject to oversight by the CONI, technical, organisational and managerial autonomy in the context of sports law. It is therefore apparent that, with the exception of the areas in which the CONI is authorised to intervene and exercise control, those federations enjoy broad autonomy as regards their own management and the management of the different aspects of the sporting discipline for which they are responsible, their relationship with the CONI being limited, primafacie, to complying with the guidelines and general rules issued by it. Article 15(4) of Legislative Decree No 242 states, moreover, that it is the assembly of the national sports federation concerned which approves and monitors the administrative body's indicative budgetary programmes, which again tends to show that those federations have full management autonomy.

56 In the case of such a configuration which, given the diverse range of solutions adopted in the different Member States, is specific to Italian sports law, it must be found that a public authority responsible in

essence for laying down sporting rules, verifying that they are properly applied and intervening only as regards the organisation of competitions and Olympic preparation, without regulating the day-to-day organisation and practice of the different sporting disciplines, cannot be regarded, prima facie, as a hierarchical body capable of controlling and directing the management of national sports federations, and even less so when those federations enjoy management autonomy.

57 The management autonomy conferred on the national sports federations in Italy thus seems, a priori, to militate against active control on the part of the CONI to the extent that it would be in a position to influence the management of a national sports federation such as the FIGC, particularly in relation to the award of public contracts.

58 That said, such a presumption may be rebutted if it is established that, in practice, the various powers conferred on the CONI in relation to the FIGC have the effect of making the FIGC dependent on the CONI to such an extent that the CONI may influence its decisions with regard to public contracts. In that regard, the spirit of sports competition the organisation and actual management of which come within the remit of the national sports federations, as has been seen in paragraph 55 above, necessitates that the various powers of the CONI should not be understood in an overly technical sense, but interpreted more substantively than formally.

59 It is, therefore, for the referring court to examine whether the various powers vested in the CONI in relation to the FIGC reveal, on the whole, the existence of dependency coupled with such a possibility of influence. While that verification is solely a matter for the referring court, the Court of Justice, when giving a preliminary ruling on a reference, may, in appropriate cases, nonetheless give clarifications to guide the national court in its decision (see, to that effect, judgment of 2 May 2019, *Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego*, C-614/17, EU:C:2019:344, paragraph 37 and the case-law cited).

60 As regards, first, the CONI's power to recognise national sports federations for sporting purposes – as follows from Articles 5(2)(c) and 15(5) and (6) of Legislative Decree No 242 and from Article 6(4)(b) and (c) of the CONI Statute – it should be noted, first, that the CONI applies in that context general rules which, according to the written observations of the Italian Government, are common to any sports association which wishes to obtain legal personality or is dependent even for a minority of its finances on public contributions. Secondly, it is apparent from the documents before the Court that recognition by the CONI is only a preliminary stage which relates solely to the process of recognition for sporting purposes, with all national sports federations being recognised uniformly in accordance with the detailed rules and conditions laid down by the Italian regulations in force, in this case Decree No 361 of the President of the Republic of 10 February 2000.

61 In addition, it follows from Article 6(4)(c) in conjunction with Article 21(1) of the CONI Statute that, subject to verification by the referring court, the criteria on the basis of which recognition is granted do not in any way concern aspects of the management of the federation concerned, but relate to general conditions which must be met by any national sports federation in respect of sport and organisation and to compliance with basic rules and principles, such as the principle of internal democracy or the principle of gender equality and equal opportunities. Similarly, the recognition of a national sports federation may be revoked by the CONI National Council, pursuant to Article 21(3) of the CONI Statute, only if the federation concerned no longer fulfils the conditions referred to in Article 21(1) of that statute.

62 Admittedly, as the Advocate General observed in point 71 of his Opinion, the recognition process appears – by reason of Article 5(2)(b) of Legislative Decree No 242 in conjunction with Article 6(4)(b) of the CONI Statute – to be linked to the examination of whether the statutes of the national sports federation concerned are consistent with the fundamental principles established by the CONI National Council. However, the expression 'fundamental principles', read in conjunction with the principles which the statutory and regulatory provisions of those federations must observe in accordance with Article 16(1) of Legislative Decree No 242 and Articles 21(1)(c) and 22(1) to (3) of the CONI Statute, appears to show that the CONI National Council may define only organisational rules, based on the principle of internal democracy which the statutes of those federations must observe, without being able to impose detailed and far-reaching management rules on those federations.

63 Since the CONI's intervention is limited to establishing fundamental principles in order to harmonise the general rules to which all national sports federations are subject and to ensure that those federations are operational, in the sports discipline for which they are responsible, at national and international level, by pursuing the objectives laid down by law and adopting provisions in the statutes and regulations which comply with that law and with the principle of internal democracy, it does not appear, prima facie, that prior recognition of the FIGC for sporting purposes of itself enables the CONI subsequently to exercise active control over the management of that federation to such an extent as to be able to influence the latter's decisions with regard to public contracts.

64 As regards, secondly, the CONI's power – provided for in Articles 5(2)(a) and 15(1) of Legislative Decree No 242 and in Articles 20(4) and 23(1 *bis*) and (1 *ter*) of the CONI Statute – to adopt, with regard to Italian sports federations, the guidelines, decisions, directives and instructions relating to the exercise of the sporting activity which those federations supervise, the referring court must ascertain whether, as the FIGC, the CONI and the Italian Government contended during the hearing, those norms all seek to impose on national sports federations overall, broad and abstract rules or general guidelines relating to the organisation of sport in its public dimension, with the result that, accordingly, the CONI does not intervene actively in the management of those federations to the extent of being able to influence their decisions with regard to public contracts; alternatively, the referring court must ascertain whether, on the contrary, the CONI is able to make those national federations subject to very detailed management rules and impose on them a specific course of management, in particular with regard to public contracts (see, to that effect, judgment of 1 February 2001, *Commission* v *France*, C-237/99, EU:C:2001:70, paragraphs 50 to 52 and 57).

65 As regards, thirdly, the CONI's power to approve for sporting purposes national sports federation statutes, it should be noted that, in exercising that power as set out in Articles 7(5)(l) and 22(5) of the CONI Statute, the CONI may only assess whether those federations' statutes comply with the law, its own Statute and the fundamental principles established by the CONI. In those circumstances, it is for the referring court to ascertain whether the CONI could have imposed on the FIGC, when approving the statutes, such amendments as would have restricted its management autonomy or, when assessing the statutes, revoked the FIGC's recognition, on the ground that the FIGC had not accepted amendments designed to restrict its management autonomy, or imposed on it predetermined management conduct.

66 As regards, fourthly, the CONI's power to approve the national sports federations' annual balance sheets and budgets, as set out in Article 15(3) of Legislative Decree No 242 and Articles 7(5)(g2) and 23(2) of the CONI Statute, it is for the referring court to ascertain whether, in that regard, the CONI confines itself to purely accounting checks of the balance sheets and of the balancing of the budget, which would not indicate that there is active control over the management of those federations (see, to that effect, judgments of 1 February 2001, *Commission* v *France*, C-237/99, EU:C:2001:70, paragraph 53, and of 12 September 2013, *IVD*, C-526/11, EU:C:2013:543, paragraph 29), or whether those checks also concern the conduct of those federations, in particular from the point of view of proper accounting, regularity, economy, efficiency and expediency, which would tend to show the existence of active control over management (see, to that effect, judgment of 27 February 2003, *Adolf Truley*, C-373/00, EU:C:2003:110, paragraph 73).

67 As regards specifically the approval of the balance sheets, the referring court must verify that the only 'penalty' linked to the failure of the CONI to approve the balance sheets consists in their non-publication. Such evidence would tend to show that the CONI has no power of coercion concerning the national sports federations in that regard.

68 As regards the approval of the budget, it will be for the referring court to ascertain whether, as evidenced by the explanations provided by the CONI during the hearing, the national sports federations ultimately decide on their budgets, without the CONI being able to oppose their adoption and therefore control the management of those federations on that point, which would again indicate that the CONI has no power of coercion.

69 As regards the CONI's power, referred to in Article 23(2) of its statute, to determine the financial contributions allocated to national sports federations and to define the purposes for which those

contributions are to be used, it will be for the referring court to ascertain the effect of that power on the actual management of the FIGC and on the FIGC's ability to retain control over its decisions with regard to public contracts. In that context, the referring court will have to take account of the fact that, first, the public contributions seem to be apportioned, under that provision, according to very general categories within the public dimension of sport, namely the promotion of youth sport, preparation for the Olympic Games and preparation for high-level sporting activity, and, secondly, in any event in the specific case of the FIGC – as is apparent from the order for reference and the information provided during the hearing – a minority of that federation's funding is public, since the federation has a considerable self-financing capacity.

70 As regards, fifthly, the CONI's power to appoint, pursuant to Article 7(5)(h1) of the CONI Statute, auditors representing it in national sports federations, it will be for the referring court to ascertain whether the auditors are in a position to influence that federation's management policy, particularly in the area of public contracts, given that, as evidenced by the written observations of the FIGC and the CONI, those auditors would have no veto power and would not have any representative or management powers.

71 As regards, sixthly, the CONI's power, provided for in Article 5(2)(e) of Legislative Decree No 242 and Articles 6(4)(e) and (e1), 7(5)(e) and 23(3) of its Statute, to oversee the exercise of activities of a public nature entrusted to national sports federations and, more generally, the proper functioning of those federations, it will be for the referring court to ascertain the scope of that oversight of the management autonomy of those federations and of their decision-making capacity with regard to public contracts. In particular, the referring court will have to determine whether, as stated in paragraph 53 above, oversight of the proper functioning of national sports federations is limited essentially to the proper organisation of competitions, Olympic preparation, high-level sporting activity and the use of financial aid, or whether more active oversight of the management of those federations is carried out by the CONI.

72 As regards specifically the CONI's power to place national sports federations under administrative supervision in cases of serious management irregularities, serious infringements of sports law, the inability of those federations to function, or problems with the proper conduct of sports competitions, it will be for the referring court, in order to exclude the existence of active control over the management of those federations, to determine whether, as the FIGC, the CONI and the Italian Government have argued both in their written observations and during the hearing, those cases of intervention by the CONI – as derived from Articles 5(2)(e *ter*) and 7(2)(f) of Legislative Decree No 242 and Articles 6(4)(f1), 7(5)(f) and 23(3) of the CONI Statute – fall within the mere verification of legality, and not the management policy of national sports federations, and whether, regardless of the exceptional nature of placing under administrative supervision, the exercise of that power does not imply permanent supervision of the management of those federations (see, to that effect, judgment of 1 February 2001, *Commission* v *France*, C-237/99, EU:C:2001:70, paragraphs 55 and 56).

73 It should be pointed out, as the Advocate General observed in essence in point 66 of his Opinion, that, in order to assess the existence of active control by the CONI over the management of the FIGC and of the possibility of the CONI influencing FIGC's decisions with regard to public contracts, the analysis of the CONI's various powers must be the subject of an overall assessment, bearing in mind that, as a general rule, the existence of such control will be likely to be revealed by a body of evidence (see, to that effect, judgment of 1 February 2001, *Commission* v *France*, C-237/99, EU:C:2001:70, paragraph 59).

74 As regards the circumstance, noted by the referring court, that if it were concluded that the CONI exercises supervision over the management of national sports federations such as the FIGC, within the meaning of the second part of the alternative referred to in Article 2(1)(4)(c) of Directive 2014/24, those federations would, on account of their majority participation in the CONI's main deliberative and collegiate bodies, pursuant to Articles 4 and 6 of Legislative Decree No 242, exert an influence over the CONI's activity which would offset that supervision, it should be emphasised that that circumstance would be relevant only if it could be established that each national sport federation, considered individually, is in a position to exert a significant influence over the management supervision exercised by the CONI over it with the result that that supervision would be offset and such a national sports

federation would thus regain control over its management, notwithstanding the influence of the other national sports federations in a similar situation.

75 In the light of all the foregoing considerations, the answer to the second question is that the second part of the alternative referred to in Article 2(1)(4)(c) of Directive 2014/24 must be interpreted as meaning that where a national sports federation has management autonomy under national law, that federation may be regarded as being subject to management supervision by a public authority only if it emerges from an overall analysis of the powers which that authority has in relation to that federation that there is active management control which, in practice, calls into question that autonomy to such an extent as to allow the authority to influence the federation's decisions with regard to public contracts. The circumstance that the various national sports federations exert an influence over the activity of the public authority concerned on account of their majority participation in that authority's main deliberative and collegiate bodies is relevant only if it can be established that each federation, considered individually, is in a position to exert a significant influence over the public supervision exercised by that authority over it with the result that that supervision would be offset and such a national sports federation would thus regain control over its management, notwithstanding the influence of the other national sports federations in a similar situation.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 2(1)(4)(a) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that an entity entrusted with tasks of a public nature exhaustively defined by national law may be regarded as having been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, within the meaning of that provision, even though it was established not in the form of a public authority but of an association governed by private law and some of its activities, for which it enjoys a self-financing capacity, are not public in nature.**

2. **The second part of the alternative referred to in Article 2(1)(4)(c) of Directive 2014/24 must be interpreted as meaning that where a national sports federation has management autonomy under national law, that federation may be regarded as being subject to management supervision by a public authority only if it emerges from an overall analysis of the powers which that authority has in relation to that federation that there is active management control which, in practice, calls into question that autonomy to such an extent as to allow the authority to influence the federation's decisions with regard to public contracts. The circumstance that the various national sports federations exert an influence over the activity of the public authority concerned on account of their majority participation in that authority's main deliberative and collegiate bodies is relevant only if it can be established that each federation, considered individually, is in a position to exert a significant influence over the public supervision exercised by that authority over it with the result that that supervision would be offset and such a national sports federation would thus regain control over its management, notwithstanding the influence of the other national sports federations in a similar situation.**

[Signatures]

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 1 October 2020 (1)

Joined Cases C-155/19 and C-156/19

Federazione Italiana Giuoco Calcio (FIGC),

Consorzio Ge.Se.Av. S. c. arl

v

De Vellis Servizi Globali Srl,

interveners:

Consorzio Ge.Se.Av. S. c. arl,

Comitato Olimpico Nazionale Italiano (CONI),

Federazione Italiana Giuoco Calcio (FIGC)

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Public procurement of supplies, works or services – Directive 2014/24/EU – Contracting authority – Body governed by public law – Concept – National football federation – Meeting of needs in the general interest – Supervision of the federation's management by a body governed by public law)

1. In the judgment of 11 September 2019, (2) the Court analysed whether a national Olympic committee (in that case, the Italian Olympic Committee) had exercised 'public control' over two sports federations in that country, (3) 'with a view to classifying them either within the public authorities sector or within the sector of NPISHs [(non-profit institutions serving households)]' under the European System of Accounts. (4)

2. The Consiglio di Stato (Council of State, Italy) has now submitted to the Court two substantively identical requests for a preliminary ruling relating to the same issue, from the point of view this time not of accounting but of public procurement. In the disputes in the main proceedings, it falls to be ascertained whether the Federazione Italiana Giuoco Calcio (Italian Football Federation; 'the FIGC') was established for the specific purpose of meeting needs in the general interest and, if so, whether the Comitato Olimpico Nazionale Italiano (Italian National Olympic Committee; 'CONI') controls its management.

3. The answers to those questions may determine whether a contract concluded by the FIGC, which forms the subject of the disputes at issue, is subject to the procedures laid down in Directive 2014/24/EU (5) and in the national rules transposing that directive into domestic law. This will be the case only if the [Italian] national sports federations ('NSFs'), when procuring works, supplies and services above a certain threshold, are capable of being classified as contracting authorities because they are bodies governed by public law within the meaning of Directive 2014/24.

I. Legal framework

A. EU law. Directive 2014/24

4. Article 2 reads:

‘1. For the purposes of this Directive, the following definitions apply:

(1) “contracting authorities” means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

…

(4) “bodies governed by public law” means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those bodies or authorities; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

…’

B. Italian law

1. Legislative Decree No 50 of 18 April 2016 (‘Public Procurement Code’)

5. Article 3(1)(d) reproduces, in essence, the definition of ‘body governed by public law’ contained in Article 2(1)(4) of Directive 2014/24.

2. Decree-Law No 220 of 19 August 2003 (6)

6. Article 1 provides:

‘1. The Republic recognises and promotes the autonomy of the national system of sports governance as an expression of the international system of sports governance deriving from the International Olympic Committee.

2. The relationship between the system of sports governance and the Republic’s legal system shall be governed by the principle of autonomy, except in cases involving subjective situations linked to the system of sports governance which are relevant to the Republic’s legal system.’

3. Legislative Decree No 242 of 23 July 1999 on the reorganisation of CONI (7)

7. Article 1 states:

‘[CONI] shall have legal personality under public law … and shall be responsible to the Ministry of Heritage and Cultural Activities.’

8. Article 2 provides:

‘1. CONI … shall be responsible for the organisation and enhancement of national sport, in particular the preparation of athletes and the provision of adequate resources for the Olympic Games and for all other national or international sports events. It shall also be responsible, within the

framework of the system of sports governance, for adopting measures to prevent and eliminate the use of substances that alter the natural physical performance of athletes in sports activities, as well as for promoting the practice of sports on the broadest possible scale, within the limits laid down in Decree of the President of the Republic No 616 of 24 July 1977.

…'

9. According to Article 4(2) thereof:

'Representatives of the [NSFs], selected from the Olympic sports, shall make up the majority of the votes on [CONI].'

10. Article 5 provides:

'1. In accordance with the decisions and guidelines of the International Olympic Committee, the National Council shall work to promote the dissemination of the Olympic spirit and regulate and coordinate national sports activities, harmonising to this end the actions undertaken by NSFs and associated sports disciplines.

…

2. The National Council shall have as its task to:

(a) adopt the statute and other normative measures falling within its competence, as well as guidelines on the interpretation and implementation of the rules in force;

(b) define the fundamental principles with which the statutes of [NSFs], associated sports disciplines, sports promotion bodies and sports associations and societies must be aligned in order to be recognised for sporting purposes;

(c) take decisions to recognise for sports purposes [NSFs], sports societies and associations, sports promotion bodies, charitable organisations and other sports disciplines associated with CONI and [national sports] federations, in accordance with the requirements laid down in the Statute …;

…

(e) establish criteria and conditions governing the exercise of controls by [NSFs], associated sports disciplines and recognised sports promotion bodies;

…

(e *ter*) adopt, on a proposal from the National Board, decisions to place [NSFs] or associated sports disciplines under guardianship in cases of serious management irregularities or serious infringements of sports law by the governing bodies, in cases of the proven inability of those bodies to function or where the lawfulness of the operation and running of sports competitions cannot be guaranteed;

…'

11. In accordance with Article 15:

'1. [NSFs] … shall pursue sports activities in accordance with the decisions and guidelines of the [International Olympic Committee], international federations and CONI, and with due regard for the public dimension of certain types of activity which are set out in the CONI statutes. Membership [of NSFs] shall be made up of sports societies and associations and, only in the cases provided for by [NSF] statutes … in connection with certain activities, individuals too.

2. [NSFs] … shall take the form of associations having legal personality under private law. They shall be non-profit-making and, to the extent that they are not provided for in this Decree, shall be

governed by the provisions of the Civil Code and the relevant implementing provisions.

3. The budgets of [NSFs] … shall be approved annually by the administrative body of each federation and shall be subject to the approval of the National Board of CONI. In the event of a negative opinion by a federation's auditors … or in the event that a budget is not approved by the National Board of CONI, an assembly of societies and associations shall be convened in order to deliberate on approving the budget.

4. The assembly competent to elect the management bodies shall approve the administrative body's indicative budgetary programmes, which shall be submitted to the assembly for scrutiny at the end of each four-year period or at the end of the mandate for which they have been approved.

5. [NSFs] … shall be recognised for sports purposes by the National Council.

6. Recognition of [NSFs] … as having legal personality under private law shall be granted in accordance with the decreto del Presidente della Repubblica 10 febbraio 2000, n. 361 (Decree of the President of the Republic No 361 of 10 February 2000), subject to recognition for sports purposes by the National Council.

…'

4. The CONI Statute (8)

12. Article 1 ('Definitions') states:

'1. [CONI] shall be the confederation of [NSFs] and associated sports disciplines.

2. CONI … shall be the authority responsible for disciplining, regulating and managing sports activities, regarded as being an essential component of the physical and mental development of the individual and an integral part of education and national culture. …'

13. Article 6 ('National Council') states:

'1. The National Council, in its capacity as supreme representative body for Italian sport, shall be responsible for disseminating the Olympic ideal, ensuring that the actions necessary to prepare for the Olympic Games are taken, regulating and coordinating national sports activities and harmonising the action of [NSFs] and associated sports disciplines.

…

4. The National Council shall:

…

(b) establish the fundamental principles that must govern, as a condition of acquisition of recognition for sports purposes, the statutes of [NSFs], associated sports disciplines, sports promotion bodies, associations of recognised standing in the field of sport and sports associations and societies, and adopt the Sports Disciplinary Code, which must be observed by all [NSFs] …;

(c) adjudicate on the recognition of [NSFs] … for sports purposes in accordance with the requirements laid down in its statutes, taking into account also to that end the representation and Olympic nature of the sport in question, any recognition by the [International Olympic Committee] and the sports tradition of the discipline;

…

(e) define the criteria and procedures for applying CONI's controls to [NSFs] …;

(e1) with a view to ensuring that sports competitions are run properly, define the criteria and procedures for deploying the controls which federations must apply to [associated] sports societies and the subsidiary control exercised by CONI in the event that the controls applied by [NSFs] are found to be unsuitable;

…

(f1) adjudicate, on a proposal from the National Board, on the managerial performance of [NSFs] … in the event of serious management irregularities or serious infringements of the system of sports governance by the management bodies, or in the event that they are found to be unable to perform their functions or the proper organisation and running of national sports competitions cannot be guaranteed;

…’

14. Paragraph 5 of Article 7 (‘National Board’) reads:

‘The National Board shall:

…

(g2) approve the budgets, together with the relevant activity programmes and annual accounts, of [NSFs] …;

…

(h1) appoint auditors to represent CONI within [NSFs] … and the regional committees of CONI;

…

(l) check, for sports purposes, the statutes, regulations implementing those statutes, regulations on sports discipline, and anti-doping regulations of [NSFs] …, assessing their compliance with the law, with the CONI statutes, and with the fundamental principles, guidelines and criteria established by the National Council, and, where appropriate, return them to [NSFs] … within a period of 90 days so that they can make the necessary amendments;

…’

15. Paragraph 4 of Article 20 (‘System of governance of [NSFs]’) provides:

‘[NSFs] shall engage in sports activities and the corresponding promotional activities in accordance with the decisions and guidelines of the [International Olympic Committee] and CONI and taking into account the public dimension of certain aspects of those activities. In the context of the system of sports governance, [NSFs] shall enjoy technical, organisational and managerial autonomy, subject to supervision by CONI.’

16. In accordance with paragraph 3 of Article 21 (‘Requirements governing the recognitions of [NSFs]’):

‘If a recognised [NSF] fails to comply with the requirements laid down in paragraph 1 above, the National Council of CONI shall decide to revoke recognition granted at the time.’

17. Article 23 (‘Guidelines and controls applicable to [NSFs]’) provides:

‘1. In accordance with Legislative Decree No 242 of 23 July 1999, as subsequently amended and supplemented, in addition to the activities the public nature of which is expressly provided for by law, the only [NSF] activities to have a public dimension shall be those relating to the admission and membership of sports societies and associations, as well as individuals, revocation on any ground and the amendment of admission or membership decisions, scrutiny as to the proper running of professional sports competitions and championships, the use of public subsidies and the prevention and sanctioning of doping, as well as high-level activities connected with

preparations for the Olympics, the training of coaches and the use and management of public sports facilities.

1 *bis*. In pursuing the activities of a public nature to which paragraph 1 refers, [NSFs] shall comply with the guidelines and controls applied by CONI and operate in accordance with the principles of impartiality and transparency. The public nature of an activity shall not change the ordinary rules of private law to which their individual measures and the associated subjective legal situations are subject.

1 *ter*. The National Board shall establish the criteria and procedures for ensuring that decisions taken by federations comply with CONI's programmes in so far as concerns the competitiveness of national teams, the safeguarding of the national sports heritage and its specific identity and the need to ensure effective internal management.

2. The National Board, acting on the basis of the criteria and procedures laid down by the National Council, shall approve [NSF] budgets and establish the financial contributions payable to them, determining, where appropriate, the purpose for which those contributions are to be used, with particular attention being paid to the promotion of youth sport, preparation for the Olympiads and high-level activities.

3. The National Board shall supervise the proper functioning of [NSFs]. In the event of serious management irregularities or serious infringements of the sports regulations by [NSF bodies] and in the event that the organisation and proper running of sports competitions cannot be guaranteed or [NSF bodies] are found not to be capable of performing their functions, it shall propose that the National Council appoint a receiver.'

II. Facts and questions referred

18. The FIGC launched a procedure for the award of three-year contracts for the porterage services needed to accompany the national football squads when travelling and to support the Federation's store in Rome. (9) It invited De Vellis Servizi Globali, s.r.l. ('De Vellis') and Consorzio Ge.Se.Av. S. c. arl ('Consorzio') to participate. The contract was ultimately awarded to Consorzio.

19. De Vellis brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) challenging the way in which the tendering procedure had been conducted, inasmuch as the rules on disclosure laid down in the Code of Public Procedure had been infringed.

20. The court of first instance (judgment No 4101/2018) upheld the action and annulled the award of the contract to Consorzio. In particular, it classified the FIGC as a body governed by public law, dismissed the plea of lack of jurisdiction and annulled the measures adopted in the context of the tendering procedure on the grounds which De Vellis had put forward.

21. The FIGC and Consorzio have each lodged appeals against that judgment. They contest the finding that the FIGC is a body governed by public law and, consequently, the jurisdiction of the administrative courts to hear and determine the dispute.

22. The Consiglio di Stato (Council of State) submits that, before it is determined whether the FIGC was obliged to apply the rules relating to the award of public contracts, and which court has jurisdiction, it falls to be ascertained whether the FIGC can be classified as a body governed by public law in accordance with Article 3(1)(d) of the Public Procurement Code, which transposes Article 2(1)(4) of Directive 2014/24.

23. It is in those circumstances that the Consiglio di Stato (Council of State) has referred the following questions to the Court for preliminary ruling:

'(1) (a) On the basis of the characteristics of national sports law, can the [FIGC] be classified as a body governed by public law in so far as it was established for the specific purpose of meeting needs in the general interest, not having a commercial character?

(b) In particular, is the requirement relating to the purpose of the body satisfied in respect of the [FIGC], even in the absence of a formal act establishing a public authority and despite its membership base, on account of its incorporation into a sector (sports) organised in accordance with models of a public-law nature and the fact that it is required to comply with the principles and rules drawn up by [CONI] and international sporting bodies, as a result of the recognition, for sporting purposes, of the national public entity?

(c) Furthermore, can this requirement arise in relation to a sports federation such as the [FIGC], which has the ability to fund itself, in respect of an activity of no significance in the context of public law, such as that at issue in this case, or must the requirement that the application of the rules on public and open tendering be ensured in any event, where such an entity awards any type of contract to third parties be regarded as taking precedence?

(2) (a) On the basis of the legal relationship between CONI and the [FIGC], does the former have a dominant influence over the latter in the light of the legal powers relating to recognition of the undertaking for sporting purposes, approval of annual budgets, supervision of the management and proper functioning of the bodies, and placing the entity into receivership?

(b) On the other hand, are those powers insufficient to meet the requirement relating to the dominant public influence of a body governed by public law on account of the significant participation of the presidents and representatives of the sports federations in the key bodies of [CONI]?'

III. Procedure before the Court of Justice

24. The orders for reference were received at the Court on 22 February 2019.

25. Written observations have been lodged by the FIGC, CONI, De Vellis, Consorzio, the Italian Government and the Commission.

26. At the hearing held on 1 July 2020, which was attended via video conference by the FIGC, CONI, the Italian Government and, in an observer capacity, the Commission, the Court invited the parties to comment on the bearing on this case of the judgment in *FIG and FISE*.

IV. Assessment

A. Preliminary observation

27. A comparison of situations across Europe shows that models for the relationship between NSFs and the public authorities vary substantially. To put it simply, some Member States have opted for 'liberal' approaches whereby NSFs are given maximum autonomy; (10) others have chosen more 'interventionist' formulas under which public supervision may in some cases be rigorous; (11) while certain others combine both models.

28. In public law, it is common for the legal system to entrust certain private entities, set up in order to achieve objectives common to their members, with the task of achieving public aims, including by delegating to them functions which would typically be administrative. (12)

29. In Italy, NSFs follow this format: on the same strict membership basis as that on which the clubs operate as first-tier sports associations, NSFs are set up as second-tier private associations, (13) to which the government authorities entrust certain functions of a public nature.

30. In that context, the referring court will of course be bound by the situation at issue and the specific features of the sports law in force in Italy. It will have to determine, in accordance with that law:

– whether the FIGC was established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character;

– whether the relationship between the public supervisory authority (CONI) and the FIGC allows the former to be recognised as exercising control over the latter and, if so, to what extent;

– whether the characteristics of the FIGC set it apart from other NSFs as regards the application of Directive 2014/24.

31. As the judgment in *FIG and FISE* made clear, the Court itself cannot dispel those points of uncertainty, the resolution of which falls to the referring court as being alone able to interpret its own national law. (14) The submissions that follow are therefore geared exclusively towards providing the referring court with some guidance on the interpretation of the provisions of Directive 2014/24.

B. First question

32. Directive 2014/24 takes a very broad view of the concept of contracting authority, (15) which extends beyond the State and local authorities to bodies governed by public law, if they meet all of the three requirements laid down in Article 2(1)(4) thereof.

33. In considering whether a particular body meets those requirements, the Court avoids formal methodologies and relies instead on a 'functional interpretation' whereby the scheme of law contained in that directive takes second place. (16)

34. The first of those requirements is that the body should have been *established for the specific purpose* of meeting needs in the general interest not having an industrial or commercial character. It is with the interpretation of that wording that the first question referred is concerned. (17)

35. Although an analysis of the formal aspects of the entity's *establishment* is not essential, the referring court will have to determine whether, for Italian NSFs, recognition by CONI (18) is a substantive condition or no more than a step in the process of acquiring legal personality. I shall look at this point later.

36. From a material point of view, which is the one that matters most, the Consiglio di Stato (Council of State) must pay attention first and foremost to the content of the public functions performed by the FIGC. From this it will be able to infer whether that body was established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, or meets them objectively in practice. (19)

37. Classification as such a body, as I have said, is not precluded by the fact that needs in the general interest are met by a technically private entity, particularly if that entity forms part of an organisational system the structure and configuration of which are laid down by law and administrative in nature. (20)

38. Now, the referring court itself infers from Legislative Decree No 242/1999 (Article 15(1)) that Italian NSFs are entrusted with the performance of functions of a 'public dimension'. (21)

39. It reaches that conclusion on the basis of an examination of Article 23 of the CONI Statute, in accordance with which NSF activities having a 'public dimension' are those relating to: (i) the admission and membership of sports societies and associations; (ii) the revocation and amendment of decisions on admission and membership; (iii) scrutiny as to the proper running of professional sports competitions and championships; (iv) the use of public subsidies; (v) the prevention and sanctioning of doping; (vi) high-level activities relating to Olympic preparations; (vii) the training of coaches; and (viii) the use and management of public sports facilities.

40. The FIGC, for its part, recognises that it has entrusted to it, 'under delegation from CONI …, certain pre-defined powers characterised by their public purpose', although, in its opinion, 'the public nature of the delegating [body] cannot be extended to the delegated [body] in such a way as to bind the latter beyond the predetermined limits of the delegation'. (22)

41. After noting that each NSF is responsible for a single sports discipline and for organising competitions relating to that discipline, the Consiglio di Stato (Council of State) submits that, according to the rules of sports law in Italy, 'public-interest aims are achieved by bodies which are technically private, albeit that they

operate within the framework of an organisational system the structure and configuration of which are laid down by *law* (rather than being an expression of *private autonomy*) and administrative in nature'. (23)

42. This assessment is consistent with that carried out by the Court when analysing the relationship between NSFs and CONI. In the judgment in *FIG and FISE*, it referred to 'the public face of the sporting activity, that is to say, … in a formalised, official or representative context …'. It also took the view that the public dimension of the activities carried on by NSFs was apparent 'in the proper organisation of competitions, Olympic preparations and high-level sporting activities'. (24)

43. The Consiglio di Stato (Council of State) emphasises, in short, that, in Italy, sport has the status of an 'activity in the public interest which is for that reason organised, promoted, incentivised and financed by the State'. (25)

44. It is particularly significant that the referring court interprets the rules governing NSFs as meaning that the tasks having a public dimension which they perform seem to 'exhaust the scope of their operations and [are] the very reason for their establishment. Any other activity, including portage services for the national football squads, at issue in this dispute, operates as an instrument in service to the tasks having a "*public dimension*" which are laid down in the CONI statutes'. (26)

45. If that is its interpretation of national law, the referring court may draw the inference that NSFs, the *primary* purpose of which is to meet needs in the general interest within the context of sport, satisfy the first condition laid down in Article 2(1)(4) of Directive 2014/24.

46. Those needs in the general interest do not have an industrial or commercial character and are met by NSFs on the basis of a monopoly, (27) following the delegation to them of public functions by CONI. It makes no difference, for the purposes of this case, that NSFs also perform other, *instrumental* activities of an economic nature, as I shall go on to explain now.

47. The foregoing having been established, the doubts expressed by the Consiglio di Stato (Council of State) have to do not so much with whether the FIGC has been entrusted with functions in the general interest not having an industrial or commercial character (which, as I have said, that federation expressly recognises), as with the extent to which its procurement activities are linked to those public functions.

48. The referring court's uncertainty would be prompted by the fact that, according to Article 23(1 *bis*) of the CONI Statute, the public nature of the activities carried on by NSFs does nothing to alter the ordinary rules of private law to which the individual measures they take and the subjective legal situations associated with those measures are subject.

49. In my opinion, however, that provision is not decisive. The Court has held that 'it [is] immaterial whether, in addition to its duty to meet needs in the general interest, an entity [is] free to carry out other activities. The fact that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued by that entity is also irrelevant, provided that it continues to attend to the needs which it is specifically required to meet'. (28)

50. The Italian Government, (29) in common with the FIGC and CONI, (30) argues that the private activities carried on by NSFs, which are purely economic in nature, should be differentiated from those that serve a purpose in the general interest.

51. However, that differentiation does not strike me as being suitable for determining whether, in their contractual relations, NSFs meet needs in the general interest. The Court has held in this regard that '[the provision equivalent to Article 2(1)(4) of Directive 2014/24] [does not make] a distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task'. (31)

52. The argument put forward by the Italian Government, the FIGC and CONI has already been put to the Court, which rejected it in its judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others*. (32) It opted instead for the so-called 'contagion theory' argument, whereby it is 'immaterial that such an entity is free to carry out other activities in addition to [functions in the general interest] …', with the

result that ‘the condition, laid down in [the provision equivalent to Article 2(1)(4)(a) of Directive 2014/24] …, does not mean that it should be entrusted only with meeting such needs’. (33)

53. That position would later be corroborated by the judgments in *BFI Holding*, (34)*Korhonen and Others* (35) and *Adolf Truley*, (36) and definitively endorsed in the judgment in *Ing. Aigner*. (37) In the latter judgment, the Court, in the face of doubts expressed by the referring court with respect to the application of the case-law established in the judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others*, (38) in a situation where the public and private activities of a single entity were clearly distinguishable, (39) confirmed that, ‘having regard to the reasons of legal certainty, transparency and predictability which govern the implementation of procedures for all public procurement, the case-law of the Court [set out in the judgments cited above] must be followed’. (40)

54. In any event, the Consiglio di Stato (Council of State) has stated that the contract forming the subject of the dispute (porterage services for the Italian football squad) was instrumental to the performance of the FIGC’s public functions, in particular those relating to the national teams in that sport.

55. Nor is it decisive, for our purposes here, whether or not NSFs carry on commercial activities or aim to make a profit. (41) The line of case-law which I have just set out supports that conclusion.

56. Finally, the fact that the FIGC is financially self-sufficient does not in any way prevent it from performing functions in the general interest under delegation from the public authorities. Its economic self-sufficiency sets the FIGC apart from other Italian NSFs whose subsistence depends to a large extent on public funds. As I have said, however, that fact is irrelevant for the purposes of determining whether it is entrusted with functions in the general interest. (42)

57. In short, unless it draws a different inference from its analysis of its domestic law, the referring court could interpret Article 2(1)(4) of Directive 2014/24 as meaning that the FIGC fulfils the first (point (a)) of the three conditions laid down in that provision.

C. Second question

58. The third requirement (point (c)) laid down in Article 2(1)(4) of Directive 2014/24 itself breaks down into three conditions. (43) It is sufficient for any one of those conditions to be present in order for the requirement as a whole to be regarded as being fulfilled.

59. Of those conditions, the only one at issue here is that of whether the FIGC ‘is subject to management supervision’ (44) by the State or other bodies governed by public law. The referring court has doubts as to whether the rules of Italian law governing the relationship between the FIGC and CONI support the assertion that the latter exerts a ‘decisive influence’ over the management of the latter.

60. It is common ground that CONI is a body governed by public law. Legislative Decree No 242/1999 (Article 1) expressly confers on it the status of a body having ‘legal personality under public law’, which is responsible to the Ministry of Heritage and Cultural Activities. The judgment in *FIG and FISE* even classified it as a ‘public authority’. (45)

61. So far as concerns the relationship between CONI and NSFs, the Court summarised this in the judgment in *FIG and FISE*, (46) listing a number of powers exercised by the former that might give an indication of the extent of its supervision of the latter.

62. That list included the powers of CONI:

‘– to approve the budgets, related activity programmes and the annual balance sheets of national sports federations;

– to oversee national sports federations in matters of a public nature;

– to approve, “for sporting purposes”, the statutes, regulations implementing the statutes, sports regulations governing sports disciplinary matters and anti-doping rules of national sports federations, and, where appropriate, propose the necessary amendments to those texts;

– to appoint auditors to represent it within national sports federations;

– to place national sports federations under supervision in the event of serious mismanagement or serious violations of sports law by the governing bodies;

– to establish the criteria and procedures governing the carrying out by CONI of checks of national sports federations;

– to lay down, with a view to ensuring that sports competitions are properly organised, the criteria and procedures governing the checks carried out by national sports federations on member sports corporations and CONI's substitute oversight function in the event of failure;

– to lay down the fundamental principles which, in order to obtain recognition for sporting purposes, must govern the statutes of national sports federations and to adopt the code of sporting discipline to be observed by all national sporting federations;

– … to adopt, in relation to national sports federations, guidelines concerning the pursuit of the sporting activities for which they are responsible.'

63. As I have already stated, the Consiglio di Stato (Council of State) asks whether, on the basis of that relationship between NSFs and CONI, the latter exerts a 'decisive influence' over the former. A potential obstacle to the existence of such an influence is the fact that the presidents and representatives of NSFs have a qualifying holding within the main bodies of CONI.

64. I shall look first at the supervision exercised by CONI over NSFs and, later, at the composition of CONI itself.

1. Supervision exercised by CONI over NSFs

65. The Court classifies 'management supervision' as supervision which gives rise to 'dependence on the public authorities equivalent to that which exists where one of the other alternative criteria is fulfilled, … enabling the public authorities to influence [the] decisions [of the body in question] in relation to public contracts'. (47)

66. The various indicators of control must be analysed by way of an 'overall assessment', since, 'while a single indicator may be sufficient, in some cases, to establish control, the existence of such control will, in most cases, be evidenced by a set of indicators'. (48)

67. In the field of public procurement, the Court has taken into consideration as factors indicative of the exercise of control over entities capable of being classified as bodies governed by public law the fact, inter alia, that the public authority:

– is able to dissolve the entity concerned, appoint a liquidator, order the suspension of its managerial organs and appoint a provisional administrator, in the event of serious omissions or irregularities; (49)

– has a power of inspection allowing it to carry out studies, audits or assessments in the field of activity of the entity concerned, as well as to draw up proposals as to the action to be taken following its inspection reports; (50)

– verifies that the entity which is responsible to it implements the measures it has adopted; (51)

– is authorised to examine the annual accounts of the entity concerned, as well as its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency, or is able to inspect its business premises and facilities and to report the results of those inspections to the competent bodies. (52)

68. In the judgment in *FIG and FISE*, the Court, after taking note of all of the powers which CONI enjoys in relation to NSFs, called upon the national court to assess whether the former was able to 'exert an actual

and substantial influence over the [latter's] general policy or programme', notwithstanding the 'technical, organisational and management autonomy' which NSFs enjoy. (53)

69. By the same token, the Consiglio di Stato (Council of State) will have to consider the various factors present in this case, not that this prevents the Court from providing it with some guidelines on the interpretation of Directive 2014/24.

70. I shall set these out under four headings.

(a) Powers relating to the establishment of NSFs

71. One of the functions of CONI is to recognise NSFs for sports purposes. (54) The referring court will have to determine whether such recognition is purely formal or, as appears to be the case, a matter of substance, inasmuch as it is linked to an examination of NSF statutes.

72. In order to approve the statutes of NSFs, (55) CONI has to assess their conformity with the law, with CONI's own Statute and with the fundamental principles which it has itself laid down. (56) It may refuse to grant such approval, in which case it returns the statutes presented to it to the NSF concerned, with an indication of the criteria that must be observed, so that the relevant amendments can be incorporated. (57) Compliance with those indications is compulsory. (58)

73. The referring court takes the view that 'recognition [of NSFs] for sports purposes may be regarded as comparable, from the point of view of the requirement relating to purpose, to the establishment of a body governed by public law', (59) a position which is of a piece with its assertions to the effect that the public functions entrusted to NSFs are 'the reason for their establishment'. (60)

74. If the public functions entrusted to NSFs are the reason why CONI plays such a decisive role in the recognition of the status of those federations, that role in itself reflects the influence which CONI, as a body governed by public law, exerts at the first stage in the existence of the NSFs.

(b) Powers relating to the activities of NSFs

75. NSFs are required to carry on the sports activity for which they are responsible in harmony with the decisions and guidelines of CONI. (61) Although they enjoy technical, organisational and management autonomy, they exercise that autonomy under CONI's *supervision*. (62) In performing their public activities, they must comply with the CONI guidelines and controls. (63)

76. Some of the parties to the dispute argue that those legislative provisions establish not control mechanisms but reciprocal cooperation. They go on to say that, because of their general and abstract nature, the aforementioned guidelines act as soft law and are not suitable for determining the management policies or strategies of NSFs. (64)

77. It is once again for the referring court to assess the extent of CONI's powers in relation to NSFs. In so doing, it will have to determine, inter alia, whether the former issues to the latter binding instructions, which are capable of being coercively imposed.

78. In the order for reference, the Consiglio di Stato (Council of State) takes the view that CONI exercises enhanced control over *all* of the activities carried on by NSFs, not just those of a public nature. It states that NSFs 'seem to lack the freedom to attain at will the aim pursued by a collective body', since 'their nature is in fact one that is institutional and externally determined, either by law or by measures adopted by the authorities …, not only as regards matters relating to their essential structure but also as regards their principal spheres of activity and the ways in which that activity is to be carried on, a fact which leads in consequence to the elimination or reduction of the space and freedom of organisation inherent in private autonomy'. (65)

79. If that is the case, intervention by the public authorities (in particular, CONI) in the business of NSFs does not seem to stop at adopting statutory or regulatory rules with which those federations must comply, (66) since CONI is able, by way of guidelines or other types of measure, to mark out the main lines that the activities carried on by NSFs must follow. In that connection, the Commission notes that CONI

could, for example, influence the FIGC's decisions on the selection of which tenderers are to be awarded public contracts. (67)

80. Prominent among the powers conferred on CONI is its ability to place NSFs under its guardianship in the case where: (a) they commit serious management irregularities or serious infringements of sports law; (b) the managerial organs are found to be incapable of functioning; or (c) the proper operation or running of sports competitions cannot be guaranteed. In those circumstances, a receiver may be appointed. (68)

81. Those powers are consistent with the general mandate to the effect that CONI must ensure the proper functioning of NSFs and is even able to revoke their recognition as such. (69)

82. The case-law of the Court to which I have referred previously regards as a sign of control on the part of public authorities the fact that they can order an entity to be dissolved, appoint a liquidator or order the suspension of managerial staff in cases of serious irregularity. (70)

83. As the Commission notes, (71) the only way of telling the difference between a serious irregularity and one of lesser importance is the permanent and systematic control of an NSF's activities: CONI is free to decide whether, in the first case, it must intervene and place the NSF in question under its guardianship.

84. That same permanent supervisory link is in keeping with the task, also entrusted to CONI, of replacing an NSF in the case where the controls it applies to sports societies are shown to be unsuitable for ensuring the proper running of championships. (72)

85. A replacement measure of this kind goes to the core of a federation's activities, since the very purpose of the FIGC is to organise football competitions. As the Commission notes, (73) in order to be able to ascertain whether controls are unsuitable, CONI must hold a position allowing it to determine on an ongoing basis whether NSFs are complying with the requirements imposed on sports societies with respect to the proper running of championships. Those requirements must be consistent with the criteria and conditions of control laid down by CONI.

86. From the foregoing evidence, the referring court will be able to draw its own conclusions as to the extent of the supervision which CONI exercises over NSFs.

87. In that same context, it will have to assess whether CONI's general supervision of the activities carried on by NSFs extends to the way in which the latter draw up their public procurement policy, or at least to the precautions which have to be put in place so that the organisational autonomy of NSFs complies, in this field, with rules on disclosure, transparency, non-discrimination and respect for competition such as those laid down in Directive 2014/24. In that connection, CONI might exert an influence over the NSFs' procurement policy.

88. It is not inconceivable, moreover, that the irregularities forming the subject of supervision by CONI might arise under a procurement scheme operated by NSFs which is not governed by the rules on disclosure and transparency, in which case the risks of corruption would increase. (74) CONI's supervisory powers appear to include not only responding to such irregularities but also preventing them.

(c) Powers relating to NSF budgets and accounts

89. CONI also has the power to approve NSF budgets. (75) Unlike in the case of approval of NSF statutes, in connection with which CONI's view is imposed in the manner already analysed, its disagreement with the budgets presented to it does not have the same effects. (76)

90. Once again, the Consiglio di Stato (Council of State) will have to gauge whether, even in cases where it rejects an NSF budget but is not able to replace it, (77) CONI exercises some control over NSFs, as the Commission maintains. (78) As the approval of budgets is based on the criteria and conditions laid down by CONI, (79) the latter may play an important role in their make-up.

91. In assessing the instruments available to CONI for controlling the economic activities carried on by NSFs, it should not be forgotten, finally, that CONI can appoint auditors to act within NSFs. (80)

92. The Court has held that 'auditors are not regarded as "officers" and are thus not in a position to determine an entity's "general policy or programme"'. (81) They may nonetheless be regarded as an additional means of exercising permanent supervision over the financial activities of NSFs.

93. According to the FIGC statutes, intervention by the auditors appointed by CONI is more significant than it might seem at first sight. Those auditors make up the majority (two thirds) of the FIGC's College of Auditors (82) and are entitled to attend all meetings of the Federation's organs.

94. Depending on the extent of their powers, a permanent presence of CONI's auditors within the decision-making bodies of the FIGC (83) might meet the conditions to which the judgment in *Adolf Truley* referred in connection with the financial supervision of entities by public authorities. (84)

(d) Powers relating to revocation of the recognition of NSFs

95. If an NSF fails to fulfil the obligations to which its recognition was made subject, CONI may revoke that recognition. (85) Together with receivership and guardianship, revocation is the strongest measure by which Italian law confers effective powers of supervision on CONI.

96. The fact that revocation is adopted only in situations of particular seriousness does nothing to alter its status as a mechanism by which CONI exercises supervision over NSFs. It would appear to be a power that may be likened to those which the Court examined in the judgment in *Commission* v *France*, (86) whereby the public authority was authorised to order the dissolution of an entity and to appoint a liquidator and a provisional administrator.

97. According to the Court, 'the exercise of the powers conferred on [the authority] by those provisions[, even though it] is in fact the exception, … nonetheless implies *permanent supervision*, which provides the only means of detecting gross mismanagement or failure to act on the part of the managerial organs'. (87)

98. Finally, in the case of the FIGC, its dissolution, even if voluntary, does not entail a distribution of its assets, which are transferred to CONI. (88) This fact confirms, to my mind, that the public component of the FIGC's activities, which is subject to supervision by CONI, determines the entirety of the rules of law by which that federation is governed. (89)

2. Does CONI control the NSFs or do the NSFs control CONI?

99. Worthy of particular attention is the fact that those who argue that the NSFs are fully independent of CONI submit that it is in fact the NSFs which *control* CONI itself, given their participation in the latter's supreme organs. (90)

100. The Court addressed that same argument in the judgment in *FIG and FISE*, emphasising that '[that fact] is relevant only if it can be established that each federation, considered individually, is able to exert a significant influence over the public control exercised by CONI in respect of it so as to neutralise that control'. (91)

101. Albeit from a different point of view, the Consiglio di Stato (Council of State), too, rejects such a proposition. It takes view, with which I concur, that:

– first, the persons who make up the essential organs of CONI (even if they do, for the most part, come from the NSFs) 'are obliged to respect the official duties inherent in their position, without regard to where they have come from';

– secondly, 'CONI is itself subject … to supervision by the ministerial authority …, which may order the dissolution of the National Board and remove from office the President of CONI …', in the circumstances provided for in Article 13 of Legislative Decree No 242/1999. (92)

102. The point of reference for determining who controls whom cannot be anything other than the legal configuration of the relationship between CONI and the NSFs. A situation in which, notwithstanding that the law confers on CONI the power of supervision over NSFs, that relationship were to become effectively inverted, because the members of CONI did not act 'without regard to where they have come from' and

overlooked the fact that they are performing public functions, would constitute an anomaly (93) which would have to be corrected.

103. Consequently, in determining whether the FIGC is a body governed by public law within the meaning of Directive 2014/24, the referring court will have to take into account the legal conception of the relationship between CONI and the NSFs, regardless of any dysfunction which may in practice arise.

V. Conclusion

104. In the light of the foregoing, I suggest that the Court's answer to the Consiglio di Stato (Council of State, Italy) should be as follows:

'(1) In accordance with Article 2(1)(4)(a) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, a national sports federation may be classified as a body governed by public law if, in addition to having its own legal personality, it has been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character and its management is subject to the supervision of another body governed by public law such as a national Olympic committee on which the law of a Member State confers that status.

(2) The national court may infer that national sports federations meet needs in the general interest not having an industrial or commercial character in the case where the public functions which the legal system has entrusted to them by way of a monopoly and which constitute the reason for the existence of those non-profit making entities make up the essential core of their activities, with the result that their remaining activities are purely instrumental in relation to the former. It is immaterial for these purposes whether the national sports federation is financially self-sufficient or depends on public contributions.

(3) In order to determine whether a public authority such as the national Olympic committee forming the subject of the dispute in the main proceedings exercises supervision over national sports federations, the national court will have to carry out an overall assessment of the powers which that committee enjoys in relation to the management of those federations. Factors capable of being classified as indications the presence of which would, in principle, demonstrate that the national Olympic committee exercises powers of control are the fact that it:

– grants recognition for sports purposes to national sports federations, following approval of their statutes, and, in that event, may revoke such recognition;

– is authorised to issue guidelines and adopt decisions on the public activities of national sports federations;

– may require national sports federations to comply with the general provisions, guidelines and decisions of the national Olympic committee, and, in the event of serious management irregularities or serious infringements of the sports regulations, order that the aforementioned federations be placed into receivership;

– exercises permanent supervision over the functioning of national sports federations;

– approves the budgets, activity programmes and annual accounts of national sports federations, and may appoint auditors (who, in that event, hold a controlling majority within the College of Auditors) to represent it within the organs of those federations.

(4) The fact that the representatives from the national sports federations have a qualifying or majority holding within the organs of the national Olympic committee does not prevent those federations from being regarded as bodies governed by public law which are subject to the supervision of that committee.'

1 Original language: Spanish.

---

2 Judgment in *FIG and FISE* (C-612/17 and C-613/17, EU:C:2019:705; 'the judgment in *FIG and FISE*'). Although relating to the European System of National and Regional Accounts of the European Union, the arguments set out in that judgment may be useful in the context of this reference for a preliminary ruling, inasmuch as the question of who supervises the management of bodies governed by public law is a relevant factor in the sphere of the procurement activities of such bodies too. It should nonetheless be noted that the criteria for determining whether such supervision exists vary significantly as between the sphere of procurement and that of accounting.

---

3 In that case, the Federazione Italiana Golf and the Federazione Italiana Sport Equestri.

---

4 The judgment in *FIG and FISE*, paragraph 31.

---

5 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

6 Decreto legge 19 agosto 2003, n. 220 (GURI No 192 of 20 August 2003) (ratified, after amendment, by Article 1 of legge 17 ottobre 2003, n. 280 (Law No 280 of 17 October 2003; GURI No 243 of 18 October 2003)).

---

7 Decreto legislativo 23 luglio 1999, n. 242, riordino del Comitato olimpico nazionale italiano – CONI (GURI No 176 of 29 July 1999; 'Legislative Decree No 242/1999').

---

8 Adopted by agreement of the National Council of CONI, the last amended version of 2 October 2019 having been approved by Decree of 10 January 2020 of the President of the Council of Ministers.

---

9 The value of the contract was EUR 1 000 000, excluding VAT.

---

10 The public authorities generally deal only with matters concerning the grant of subsidies.

---

11 In these cases, the NSFs tend to be private-law entities to which the legal system entrusts a greater or lesser number of public functions.

---

12 In using private membership-based bodies to perform public functions, the State avoids the need to create public structures. The function in question is owned by the delegating State, which retains powers of control and supervision so as to ensure that the delegated function does not deviate from the aims established by the legal system.

---

13 Article 1(2) of the Statute of the FIGC (https://www.figc.it/it/federazione/norme/statuto-della-figc/) defines it as an 'association of sports societies and sports associations the purpose of which is to practise the game of football in Italy, and other entities affiliated to it which pursue activities to achieve that aim'.

---

14 As the Court asserts time and again in the successive paragraphs of the judgment in *FIG and FISE*.

---

15 Judgment of 4 June 2020, *Asmel* (C-3/19, EU:C:2020:423, paragraph 54): ‘Article 1(9) of [Directive 2004/18] defines the concept of “contracting authority” broadly and in functional terms, in order to secure the objectives of that directive, which seek to exclude both the risk of preferring national tenderers or bidders in any contract award made by the contracting authorities and the possibility that a body financed or controlled by the State, regional authorities or other bodies governed by public law may be guided by considerations other than economic ones (see, to that effect, judgment of 5 October 2017, *LitSpecMet*, C-567/15, EU:C:2017:736, paragraph 31 and the case-law cited)’.

---

16 Judgments of 10 November 1998, *BFI Holding* (C-360/96, EU:C:1998:525, paragraph 62), and of 15 May 2003, *Commission* v *Spain* (C-214/00, EU:C:2003:276, paragraph 56): ‘the effectiveness of [the Directive] would not be fully preserved if [its] application … to an entity which fulfils the three … conditions [governing recognition as a body governed by public law] could be excluded solely on the basis of the fact that, under the national law to which it is subject, its legal form and rules which govern it fall within the scope of private law’.

---

17 There will be no need to examine the second requirement (legal personality), since it is common ground that the FIGC is a legal person. Italian NSFs are in the ‘nature of associations having legal personality under private law’ (paragraph 3.3 of the orders for reference).

---

18 The existence of an NSF seems to depend not only on the will of the first-tier associations comprising it (the clubs), but also on official recognition by CONI, without which they will not acquire legal personality.

---

19 ‘A body which was not established to satisfy specific needs in the general interest not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has since satisfied, fulfils the requirement …, on condition that the assumption of responsibility for the satisfaction of those needs can be established objectively’ (judgment of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746, operative part, paragraph 1).

---

20 In the judgment of 13 January 2005, *Commission* v *Spain* (C-84/03, EU:C:2005:14), the Court held that the Kingdom of Spain had failed to comply with the public procurement directives precisely because it excluded bodies governed by private law (that is to say, commercial corporations whose activities were governed by private law) from classification as bodies governed by public law within the meaning of those directives.

---

21 Paragraph 3.5 of the orders for reference.

---

22 Paragraph 23 of its written observations.

---

23 Paragraph 3.3 of the orders for reference. Emphasis in the original.

---

24 The judgment in *FIG and FISE*, paragraph 99.

---

25 Paragraph 3.2 of the orders for reference, and the national case-law cited (Cons. Stato V, of 22 June 2017, No 3065).

---

26 Paragraph 5.3.2 of the orders for reference. Emphasis and quotation marks in the original.

---

27 In the judgment of 22 May 2003, *Korhonen and Others* (C-18/01, EU:C:2003:300, paragraph 51), the Court held that needs of an industrial or commercial character are usually met by bodies which operate under normal market conditions, aim to make a profit and bear the losses associated with the exercise of their activities, characteristics which are not exhibited by Italian NSFs.

---

28 Judgments of 10 November 1998, *BFI Holding* (C-360/96, EU:C:1998:525, paragraph 55), and of 5 October 2017, *LitSpecMet* (C-567/15, EU:C:2017:736, paragraphs 40 and 41).

---

29 Paragraphs 15 and 16 of its written observations. It cites, in support of its argument, the judgment of 1 July 2008, *MOTOE* (C-49/07, EU:C:2008:376), which, however, is not concerned with NSFs, but with a private organisation organising motorcycling events in Greece the status of which as an *undertaking* had been called into question. It also relies on the judgment of 10 May 2001, *Agorà and Excelsior* (C-223/99, EU:C:2001:259), in which the Court recognised (paragraph 39) that the Ente Autonomo Fiera Internazionale di Milano met needs in the general interest but of an industrial or commercial character in organising fairs, exhibitions and other similar initiatives, and could not therefore be classified as being subject to the public procurement rules.

---

30 The FIGC states (paragraph 27 of its observations) that there is no justification for subjecting it to rules of public law in circumstances, such as those of this case, where it pursues interests of a commercial nature not consistent with those of CONI. The latter submits (paragraph 42 of its observations) that there is no reason to subject the FIGC, in the context of its contractual activities, to the rules of public law.

---

31 Judgment of 15 July 2010, *Commission* v *Germany* (C-271/08, EU:C:2010:426, paragraph 73 and the case-law cited).

---

32 Case C-44/96, EU:C:1998:4.

---

33 Judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4, paragraphs 25 and 26).

---

34 Judgment of 10 November 1998 (C-360/96, EU:C:1998:525, paragraphs 55 and 56).

---

35 Judgment of 22 May 2003 (C-18/01, EU:C:2003:300, paragraphs 57 and 58).

---

36 Judgment of 27 February 2003 (C-373/00, EU:C:2003:110, paragraph 56; ‘the judgment in *Adolf Truly*’).

---

37 Judgment of 10 April 2008 (C-393/06, EU:C:2008:213).

---

38 C-44/96, EU:C:1998:4.

---

39 Judgment of 10 April 2008, *Ing. Aigner* (C-393/06, EU:C:2008:213, paragraph 49): ‘the referring court asks whether all contracts awarded by an entity which is a body governed by public law, within the meaning of [Directive 2004/17 or Directive 2004/18, are to be subject to the rules of one or other of those directives if, through effective precautions, a clear separation is possible between the activities carried out by that body to accomplish its task of meeting needs in the general interest and the activities which it carries out in competitive conditions’.

40 *Ibidem*, paragraph 54. In paragraph 53, citing the Opinion of Advocate General Ruiz-Jarabo, the Court stated that 'there must be serious doubts that, in reality, it is possible to establish such a separation between the different activities of one entity consisting of a single legal person which has a single system of assets and property and whose administrative and management decisions are taken in unitary fashion, even ignoring the many other practical obstacles with regard to reviewing before and after the event the total separation between the different spheres of activity of the entity concerned and the classification of the activity in question as belonging to a particular sphere'.

41 According to Article 15(2) of Legislative Decree No 242/1999, NSFs 'shall not be profit-making'. The referring court appears implicitly to dismiss the commercial nature of the FIGC's activities, on which some of the parties rely (in reference to its ability to finance itself).

42 If the FIGC were financed mainly by the State, regional or local authorities or other bodies governed by public law, it would automatically fulfil the third requirement laid down in Article 2(1)(4) of Directive 2014/24. On those aspects of public financing that are relevant to the interpretation of that provision, see the judgment of 3 October 2000, *University of Cambridge* (C-380/98, EU:C:2000:529). The judgment in *FIG and FISE* (paragraphs 95 to 107) recognises that, in certain circumstances, the fees paid to an Italian NSF by its members may be classified as public contributions and may, in some cases, indicate the existence of public control by CONI. At the hearing, the Commission suggested that the referring court (whose orders for reference do not address this matter) might take note of the judgment in *FIG and FISE* in assessing the extent to which the FIGC is publicly financed.

43 These are that the body: (i) must be financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or (ii) must be subject to management supervision by those authorities or bodies; or (iii) must have an administrative, managerial or supervisory board more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

44 I shall use without distinction the terms 'supervision' and 'control' employed by the different language versions in this provision. Thus, the English (*supervision*), the Spanish (*supervisión*) and the German (*Aufsicht*) opt for the former, while the French (*contrôle*) and the Portuguese (*controlo*) opt for the latter. The Italian version uses the term *vigilanza*.

45 The judgment in *FIG and FISE*, paragraphs 77 and 85, as well as paragraph 2 of the operative part.

46 Paragraph 81.

47 The judgment in *Adolf Truley*, paragraphs 69 and 70: '… the criterion of managerial supervision cannot be regarded as being satisfied in the case of mere review since, by definition, such supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts'.

48 The judgment in *FIG and FISE*, paragraph 87.

49 Judgment of 1 February 2001, *Commission* v *France* (C-237/99, EU:C:2001:70, paragraph 54).

50 *Ibidem*, paragraph 58.

51 *Ibidem*, paragraph 58. See, to the same effect, the judgment of 17 December 1998, *Commission* v *Ireland* (C-353/96, EU:C:1998:611, paragraph 38), which states that the 'Minister's power to give instructions to Coillte Teoranta, in particular requiring it to comply with State policy on forestry or to provide specified services or facilities, and the powers conferred on that Minister and the Minister for Finance in financial matters give the State the possibility of controlling Coillte Teoranta's economic activity'. See, in identical wording, paragraph 33 of the judgment of the same date, *Connemara Machine Turf* (C-306/97, EU:C:1998:623).

---

52 The judgment in *Adolf Truley*, paragraph 73. The same is not true if the authority simply verifies that the body's budget is balanced (judgment of 12 September 2013, *IVD* (C-526/11, EU:C:2013:543, paragraph 29)).

---

53 The judgment in *FIG and FISE*, paragraph 82.

---

54 Article 5(2)(c) and Article 15(5) of Legislative Decree No 242/1999.

---

55 It is for the National Council of CONI to define the principles with which the statutes of NSFs must be aligned as a condition of recognition (Article 5(2)(b) of Legislative Decree No 242/1999).

---

56 Second subparagraph of Article 22(5) of the CONI Statute.

---

57 Third subparagraph of Article 22(5) of the CONI Statute.

---

58 If the NSF does not amend its statutes as indicated, CONI can appoint an ad hoc receiver and, in the most serious cases, after issuing a warning, revoke its recognition (fifth subparagraph of Article 22(5) of the CONI Statute).

---

59 Paragraph 5.3.3 of the orders for reference.

---

60 Point 44 of this Opinion.

---

61 Article 15(1) of Legislative Decree No 242/1999 and Article 20(4), first subparagraph, first indent, of the CONI Statute.

---

62 Last subparagraph of Article 20(4) of the CONI Statute.

---

63 First subparagraph of Article 23(1 *bis*) of the CONI Statute. According to what the Italian Government stated at the hearing, that provision should be interpreted in the light of Article 15 of Legislative Decree No 242/1999. It is for the national court to interpret, jointly or separately, Legislative Decree No 242/1999 and the CONI Statute in order to clarify the limits of the CONI 'decisions', 'guidelines' and 'controls' by which NSFs are bound.

---

64 Observations of the FIGC and CONI (paragraphs 37 and 29 respectively).

---

65 Paragraph 5.3.6 of the order for reference.

66 According to the judgment in *FIG and FISE* (paragraph 48), regulatory intervention which is 'intrusive enough to determine, de facto, the general policy or programme of [an entity] … may be indicative of control'.

67 Paragraph 76 of its written observations.

68 Article 5(2)(e *ter*) of Legislative Decree No 242/1999 and the second subparagraph of Article 23(3) of the CONI Statute.

69 First subparagraph of Article 23(3) and Article 21(3) of the CONI Statute.

70 Judgment of 1 February 2001, *Commission* v *France* (C-237/99, EU:C:2001:70, paragraphs 54 and 55).

71 Paragraph 72 of its written observations.

72 Article 5(2)(e *bis*) of Legislative Decree No 242/1999.

73 Paragraph 68 of its written observations.

74 See the report on *Task Force 1* of the International Partnership against Corruption in Sport (IPACS), *Reducing the risk of corruption in procurement relating to sporting events and infrastructure*, at http://www.oecd.org/corruption/multi-stakeholder-sports-integrity-taskforces-established.htm.

75 Article 15(3) of Legislative Decree No 242/1999, as well as Article 21(4) and Article 23(2) of the CONI Statute.

76 Some of the parties to the dispute play down the importance of CONI's role in the context of NSFs' accounts, describing that role as more symbolic, inasmuch as it is the assembly which makes the final adjudication.

77 In the event of non-approval by CONI, the power to replace the budget passes to the assembly comprised of representatives from sports societies (Article 20(1) of the FIGC statutes).

78 Paragraph 70 of its written observations.

79 First subparagraph of Article 23(2) of the CONI Statute.

80 Article 7(5)(h1) of CONI Statute.

81 The judgment in *FIG and FISE*, paragraph 80.

82 Article 31(1) of the FIGC statutes.

83 Article 31(4) of the FIGC statutes: the College of Auditors exercises accounting control over the FIGC and its organs. Members of the College must be invited to all meetings of the Federation's organs.

84 See point 68 and footnote 5 of this Opinion.

85 Article 21(3) of the CONI Statute.

86 Judgment of 1 February 2001 (C-237/99, EU:C:2001:70).

87 *Ibidem*, paragraphs 54 and 56. No emphasis in the original.

88 Article 38(1) of the FIGC statutes.

89 Otherwise, dissolution would be governed by the rules of ordinary company law and any positive balance reported in its accounts on winding-up would be distributed among the members of the organisation. This is not the case, however, and the residual assets remain tied to the public aim pursued through transfer to the public supervisory authority.

90 Observations of the FIGC (paragraphs 43 to 45), of CONI (paragraphs 32 to 34) and of the Italian Government (paragraph 26), which emphasise that 'membership of the principal decision-making bodies of CONI is made up for the most part [of representatives from the NSFs]'.

91 The judgment in *FIG and FISE*, paragraph 89.

92 Fourth indent of paragraph 5.6 of the orders for reference.

93 The legal and economic literature on the activities of public agencies has examined extensively the phenomenon known as 'regulatory capture' by the operators concerned.

ORDER OF THE COURT (Ninth Chamber)

6 February 2020 (*)

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Public procurement – Directive 2014/24/EU – Article 10(h) – Article 12(4) – Specific exclusions for service contracts – Civil defence, civil protection, and danger prevention services – Non-profit organisations or associations – Ordinary and emergency medical transport services – Regional legislation requiring priority to be given to recourse to a partnership between contracting authorities – Freedom of the Member States to choose how services are provided – Limits – Obligation to state reasons)

In Case C-11/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 26 July 2018, received at the Court on 7 January 2019, in the proceedings

Azienda ULSS n. 6 Euganea

v

Pia Opera Croce Verde Padova,

interveners:

Azienda Ospedaliera di Padova,

Regione Veneto,

Croce Verde Servizi,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, D. Šváby (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Pia Opera Croce Verde Padova, by A. Veronese and R. Colagrande, avvocati,

– the Romanian Government, by C.-R. Canţăr and S.-A. Purza, acting as Agents,

– the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 10(h) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), read in conjunction with recital 28 and Article 12(4) of that directive.

2 The request has been made in the context of a dispute between the Azienda ULSS n. 6 Euganea (Local Health Authority No 6 Euganea, Italy; 'AULSS No 6') and Pia Opera Croce Verde Padova (Green Cross Charity, Padua, Italy; 'Croce Verde') concerning the award of ambulance transport services for patients receiving haemodialysis by AULSS No 6 and the Azienda Ospedaliera di Padova (Padua Hospital Centre, Italy).

Legal context

Directive 2014/24

3 Recitals 2, 5, 28, 31 and 33 of Directive 2014/24 state:

'(2) Public procurement plays a key role in the Europe 2020 strategy, set out in the [European] Commission Communication of 3 March 2010 entitled "Europe 2020, a strategy for smart, sustainable and inclusive growth" …, as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council [of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)] and Directive 2004/18/EC of the European Parliament and of the Council [of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

…

(5) It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. …

…

(28) This Directive should not apply to certain emergency services where they are performed by non-profit organisations or associations, since the particular nature of those organisations would be difficult to preserve if the service providers had to be chosen in accordance with the procedures set out in this Directive. However, that exclusion should not be extended beyond that strictly necessary. It should therefore be set out explicitly that patient transport ambulance services should not be excluded. In that context it is furthermore necessary to clarify that CPV [Common Procurement Vocabulary] Group 601 "Land Transport Services" does not cover ambulance services, to be found in CPV class 8514. It should therefore be clarified that services, which are covered by CPV code 85143000-3, consisting exclusively of patient transport ambulance services, should be subject to the special regime set out for social and other specific services (the "light regime"). Consequently, mixed contracts for the provision of ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services.

…

(31) There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of public procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.

…

(33) Contracting authorities should be able to choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form. Such cooperation might cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities need not necessarily be identical; they might also be complementary.

Contracts for the joint provision of public services should not be subject to the application of the rules set out in this Directive provided that they are concluded exclusively between contracting authorities, that the implementation of that cooperation is governed solely by considerations relating to the public interest and that no private service provider is placed in a position of advantage vis-à-vis its competitors.

In order to fulfil those conditions, the cooperation should be based on a cooperative concept. Such cooperation does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards the cooperative performance of the public service in question. In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest.’

4 Article 2(1)(4) of that directive defines ‘bodies governed by public law’ as:

‘bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or which have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.’

5 Articles 7 to 12 of that directive can be found in Section 3, headed ‘Exclusions’, of Chapter I of that directive, entitled ‘Scope and definitions’.

6 Under the heading ‘Specific exclusions for service contracts’, Article 10 of Directive 2014/24 provides:

‘This Directive shall not apply to public service contracts for:

…

(h) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3 [Fire-brigade and rescue services], 75251000-0 [Fire-brigade services], 75251100-1 [Firefighting services], 75251110-4 [Fire-prevention services], 75251120-7 [Forest-fire-fighting services], 75252000-7 [Rescue Services], 75222000-8 [Civil defence services], 98113100-9 [Nuclear safety services] and 85143000-3 [Ambulance services] except patient transport ambulance services;

…’

7 Under the heading ‘Public contracts between entities within the public sector’, Article 12 of that directive provides:

‘1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

…

4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation;

…’

8 The light regime referred to in recital 28 of Directive 2014/24 is defined in Articles 74 to 77 thereof.

Italian law

9 Dealing with ‘agreements between public authorities’, Article 15 of legge n. 241 – Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (Law No 241 concerning new provisions on administrative procedure and the right of access to administrative documents) of 7 August 1990 (GURI No 192 of 18 August 1990), in the version

applicable to the facts of the case in the main proceedings (‘Law No 241/1990’), provides in its paragraph 1:

‘Even in cases other than those referred to in Article 14, public administrative authorities may at any time enter into agreements among themselves with a view to laying down rules governing cooperation in activities of common interest.’

10 Headed ‘Common principles on exclusion for concessions, public contracts and contracts between public bodies and contracting authorities in the public sector’, Article 5 of decreto legislativo n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 establishing the public procurement code) of 18 April 2016 (Ordinary Supplement to GURI No 91 of 19 April 2016; ‘the public procurement code’) provides in its paragraph 6:

‘A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this code where all of the following conditions are satisfied:

(a) the contract establishes or implements cooperation between the participating contracting authorities or the participating public contracting bodies with the aim of ensuring that the public services that they have to perform are provided with a view to achieving objectives which they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities or the participating public contracting bodies perform on the open market less than 20% of the activities concerned by the cooperation.’

11 Article 17 of that code, headed ‘Specific exclusions for service contracts and concessions’, provides, in its paragraph 1:

‘The provisions of this code do not apply to service contracts and concessions in respect of:

…

(h) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3 [Fire-brigade and rescue services], 75251000-0 [Fire-brigade services], 75251100-1 [Firefighting services], 75251110-4 [Fire-prevention services], 75251120-7 [Forest-fire-fighting services], 75252000-7 [Rescue Services], 75222000-8 [Civil defence services], 98113100-9 [Nuclear safety services] and 85143000-3 [Ambulance services] except patient transport ambulance services;

…’

12 In decreto legislativo n. 117 – Codice del Terzo settore (Legislative Decree No 117 establishing the third sector code) of 3 July 2017 (Ordinary Supplement to GURI No 179 of 2 August 2017), Article 57, headed ‘Emergency medical transport services’, provides as follows in its paragraph 1:

‘Contracts for the provision of emergency medical transport services may, as a matter of priority, be awarded to voluntary organisations which have been included in the single national third sector register for at least six months and belong to a network of associations as referred to in Article 41(2) and are accredited under relevant regional legislation, if it exists, where, on account of the specific nature of the service, the direct award of a contract ensures that a service in the public interest is provided, in a system which actually contributes to a social purpose and pursues objectives connected with the good of the community, in an economically efficient and appropriate manner, and in compliance with the principles of transparency and non-discrimination.’

13 Legge regionale n. 26 – Disciplina del sistema regionale di trasporto sanitario di soccorso ed emergenza (Regional Law No 26 on the regional system of medical transport (emergency response and emergency care)) of 27 July 2012 (*Bollettino Ufficiale della Regione del Veneto*, No 61 of 3 August

2012; ‘Regional Law No 26/2012’) establishes the ‘regional system of emergency medical transport services’.

14 Article 1 of that law, headed ‘Subject matter and purpose’, provides:

‘1. The Region of Veneto [(Italy)] shall lay down the rules governing the regional system of emergency response medical transport services, giving health-care bodies and authorised and accredited associations the possibility of tendering to provide intrinsically health-related emergency and rescue transport services, having regard to their geographic coverage, how well they are established in the health and welfare fabric of Veneto, and efficiency and quality of the service rendered, in the public interest and in compliance with the principles of universality, the good of the community, economic efficiency and suitability.’

15 Article 2 of that law, headed ‘Definitions’, provides, in its paragraph 1:

‘For the purposes of this Law, [“]emergency medical transport[”] comprises those activities which are carried out using emergency vehicles by the personnel, medical or otherwise, responsible for that service, in the exercise of the following functions:

(a) emergency transport services provided using emergency vehicles under the direction of the [*Servizio urgenze ed emergenze mediche* (emergency medical service) (SUEM)] coordination centres;

(b) transport services provided with [*livelli essenziali di assistenza* (essential levels of care) (LEA)] using emergency vehicles;

(c) transport services provided in circumstances where the patient’s condition requires the use of an emergency vehicle and the attention, during the journey, of medical or specially trained personnel, and also requires uninterrupted care to be ensured.’

16 Under Article 4 of Regional Law No 26/2012, which concerns the ‘Regional list’:

‘1. Within 60 days of the entry into force of this Law, the Regional Government shall approve a regional list containing, for an initial period, already authorised health care bodies and associations which have provided emergency patient transport services in the region for at least five years, on behalf of the [*unità locali socio-sanitarie* (local health and welfare bodies) (ULSSs)] with local competence, on the basis of specific contracts and/or agreements that have been entered into for that purpose, and which meet the authorisation requirements referred to in [legge regionale n. 22 – Autorizzazione e accreditamento delle strutture sanitarie, socio-sanitarie e sociali (Regional Law No 22 on approval and accreditation of health and social facilities) of 16 August 2002 (*Bollettino Ufficiale della Regione del Veneto* n. 82)] and successive amendments, in compliance with EU legislation on freedom of establishment and freedom to provide services.

2. In addition to the persons referred to in paragraph 1, the regional list referred to therein shall include the committees of the Italian Red Cross (CRI), following specific agreement by the Veneto regional committee thereof, and the Istituti Pubblici di Assistenza e Beneficienza (public welfare and charity organisations) (IPABs) which provide emergency patient transport services, on the agreement and related sworn declaration that the conditions for authorisation, set out in Regional Law [No 22] and its subsequent amendments, as well as the conditions specified by the Regional Government, under Article 3(2), are satisfied, in compliance with EU legislation on freedom of establishment and freedom to provide services.

3. The regional list referred to in paragraph 1 shall be updated annually with the addition of new health bodies and associations which satisfy the authorisation and accreditation conditions set out by Regional Law [No 22] and its subsequent amendments.

4. Persons on the regional list shall be subject to periodic checks in order to establish that the conditions continue to be satisfied.’

17 Article 5 of that law, concerning the ‘organisation of emergency medical transport’, provides:

‘1. The provision of emergency medical transport services shall be carried out by [ULSSs] and by persons on the regional list referred to in Article 4.

2. The relationship with the [ULSSs], and the ways in which the persons on the regional list referred to in Article 4 may participate in the provision of emergency medical services shall be governed by specific agreements, entered into on the basis of a model approved by the Regional Government and made public in accordance with the national and EU legislation on public procurement in force.

3. The agreements referred to in paragraph 2 shall provide for a budgeting system established in accordance with criteria based on the application of standard costs identified by the Regional Government and updated every three years.

…

5. If the provision of emergency medical transport services cannot be carried out by the persons on the regional list referred to in Article 4, the [ULSSs] may award the contract for the provision of those services, in return for payment, to persons identified by means of a public tendering procedure, in accordance with national and EU legislation on public procurement in force, who meet the requirements designed to ensure appropriate levels of quality and to enhance the welfare function of the service.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 In 2017, AULSS No 6 launched a call for tenders for a contract to provide, for a period of five years with an option for an additional year, ambulance transport services for patients receiving haemodialysis, to be awarded in accordance with the criterion of the most economically advantageous offer (‘the contested call for tenders’). The annual value of that contract was estimated at EUR 5 043 560, amounting to EUR 25 217 800 for the five-year period.

19 Croce Verde brought an action before the Tribunale amministrativo regionale del Veneto (Regional Administrative Court, Veneto, Italy) against the decision of AULSS No 6 to opt for awarding a public contract rather than a partnership between entities within the public sector. When the required conditions for entering such a partnership are satisfied, it argued, Regional Law No 26/2012 requires that an agreement governed by Article 12(4) of Directive 2014/24 and Article 5(6) of the public procurement code be entered into with the accredited public body without there being any need to contemplate the award of a public contract, even under the simplified regime, as provided for by Article 10(h) of that directive and Article 17(1)(h) of that code.

20 In that regard, Croce Verde states that it is not a mere association governed by private law doing voluntary work but rather a non-economic public body – more precisely, an IPAB. In that connection, it states that it has been involved for more than a century in the health care of the inhabitants of the territory of Padua (Italy), principally providing transport for the wounded and sick on a non-profit basis. It was also awarded AULSS No 6’s emergency medical services by an agreement entered into on 22 December 2017 pursuant to Regional Law No 26/2012. In addition, following a call for tenders launched in 2010, which had been extended twice and expired on 31 March 2018, it was also awarded the ordinary transport service.

21 The Tribunale amministrativo regionale del Veneto (Regional Administrative Court, Veneto) took the view, however, that Articles 10 and 74 of Directive 2014/24 and Article 17(1)(h) of the public procurement code provided for the award of contracts for non-emergency ambulance transport services by means of a call for tenders.

22 Since that court nevertheless upheld the plea alleging that AULSS No 6 was not entitled to organise the contested call for tenders, AULSS No 6 appealed against the judgment of the Tribunale amministrativo regionale del Veneto (Regional Administrative Court, Veneto), arguing that point before the referring court, namely the Consiglio di Stato (Council of State, Italy).

23 The referring court, which dismissed the main appeal, must still rule on the cross-appeal in which Croce Verde reiterates the argument which it raised at first instance.

24 The referring court takes the view that it is necessary to distinguish between, on the one hand, emergency ambulance services and, on the other hand, (ordinary) patient transport ambulance services. Article 10 of Directive 2014/24, in conjunction with recital 28 thereof, and Article 17(1)(h) of the public procurement code exclude emergency ambulance services, which consist in non-profit organisations transporting a patient by ambulance and providing first aid in situations of extreme emergency, from the rules on the public procurement procedure. By contrast, patient transport ambulance services that are non-emergency in nature are subject to the 'light regime' established by Articles 74 to 77 of Directive 2014/24 when, as in the case in the main proceedings, their value is at least equivalent to the threshold of EUR 750 000 provided for by Directive 2014/24.

25 However, according to the referring court, Article 5 of Regional Law No 26/2012 provides that, when they are not carried out directly by ULSSs, 'emergency medical transport' services must be carried out by persons on the regional list referred to in Article 4 of that law and that the relationship with the ULSSs and the methods of performance of that service are governed by specific agreements. In addition, the contract for emergency medical transport services may be awarded following a competitive public tendering procedure only when that service cannot be performed by persons on that regional list.

26 Furthermore, under Article 2 of Regional Law No 26/2012, the regime for the award of the contract for 'emergency medical transport' services covers services provided, using emergency vehicles, by healthcare personnel among others, consisting in particular of 'transport services provided with essential levels of care (LEA) using emergency vehicles' and 'transport services provided in circumstances where the patient's condition requires the use of an emergency vehicle and the attention, during the journey, of healthcare personnel, or specially trained personnel, in order to ensure uninterrupted care'. According to the referring court, the activities covered by that regime are therefore, particularly in the latter case, activities which appear to come within the category of ordinary (non-emergency) transport of patients rather than within that of emergency transport.

27 Consequently, the referring court takes the view that the service at issue in the main proceedings can be classified as an 'ordinary transport service' or 'medical transport service' and not as an 'emergency medical transport service'. Therefore, in accordance with Article 5 of Regional Law No 26/2012, the referring court considers that the contracting authority could organise a tendering procedure only if it were impossible directly to award the contract by means of an agreement.

28 The referring court is, however, uncertain whether Article 5 of Regional Law No 26/2012 is compatible with EU law when that article is applied in respect of services other than those relating to emergency medical transport. Its uncertainty also relates to the supposition that direct award of the contract constitutes the implementation of a partnership between contracting authorities.

29 The referring court notes that, under Article 15 of Law No 241/1990, public bodies may still conclude agreements between themselves in order to lay down rules governing cooperation in activities of common interest. Nevertheless, such collaboration between public bodies cannot interfere with the main objective of the applicable EU rules on public procurement, namely the free movement of services and the opening up of undistorted competition in all Member States.

30 Article 5(6) of the public procurement code confirms the exclusion from the application of the public procurement rules when the conditions set out therein are satisfied, which, it finds, is the case here. AULSS No 6 and Croce Verde have the common objectives of encouraging participation of the persons on the regional list referred to in Article 4 of Regional Law No 26/2012 and promoting the use of voluntary work. In addition, Croce Verde features on that regional list in its capacity as an IPAB. Lastly, it carries out a minimal portion of its activity on the market for emergency medical transport services.

31 The referring court states, however, that Article 15 of Law No 241/1990 and Article 5(6) of the public procurement code merely present a partnership between entities within the public sector as an alternative to awarding a public contract and cannot impose it as a method to be given priority. An agreement between contracting authorities is therefore an option available to the contracting authorities

and would require the creation of a bilateral agreement between the contracting parties. It follows that a contracting authority may merely express its wish to enter into such a partnership, without compelling another contracting authority to choose that option. The referring court notes, in this regard, that, in the present case, AULSS No 6 did not intend to exercise that option since it decided to launch the contested call for tenders.

32 Furthermore, the referring court takes the view that Article 5 of Regional Law No 26/2012 cannot oblige the contracting authority to state reasons for its choice in awarding the contract for the service in question by means of a call for tenders. Such a requirement to state reasons would, in its view, be justified only in the event that the contracting authority intends to make a direct award, following bilateral negotiations, since that does not provide comparative data serving to identify the most economically advantageous tender.

33 Conversely, in its view, the tendering procedure guarantees compliance with the EU-law principles of impartiality, right of access, transparency, participation and equal treatment through the comparison of several tenders having regard to the criterion of the most economically advantageous tender.

34 Thus, since EU law does not qualify general, different and concomitant interests such as the promotion of volunteering, the direct award of the contract by means of an agreement cannot, in the view of the referring court, be justified. That is so in the present case since Croce Verde claims to be the only authorised public body in the Veneto region, which would eliminate all competition and comparison between operators potentially interested in providing the service at issue in the main proceedings. By contrast, like the other volunteer organisations on the regional list referred to in Article 4 of Regional Law No 26/2012, Croce Verde is fully entitled, as an economic operator, to participate in the contested tendering procedure and could therefore assert in that context the advantageous nature of its tender.

35 It was in that context that the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Where both parties concerned are public bodies, do recital 28 of Directive [2014/24] and Articles 10 and 12(4) thereof preclude the applicability of Article 5 of [Regional Law No 26/2012], in conjunction with Articles 1 [to] 4 thereof, on the basis of the public-public partnership referred to in Article 12(4) of [that directive], [Article] 5(6) of [the public procurement code] and [Article] 15 of Law No 241/1990?

(2) Where both parties concerned are public bodies, do recital 28 of Directive [2014/24] and Articles 10 and 12(4) thereof preclude the applicability of the provisions of [Regional Law No 26/2012], on the basis of the public-public partnership referred to in Article 12(4) of [that directive] and [Article] 5(6) of [the public procurement code] and [Article] 15 of Law No 241/1990, in the limited sense of placing the contracting authority under an obligation to give reasons for the decision to award the contract for the provision of ordinary patient transport services by way of a tendering procedure rather than by direct award of the contract?’

The questions referred for a preliminary ruling

36 Under Article 99 of the Rules of Procedure of the Court of Justice, where the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

37 That provision must be applied in the present case.

The first question

38 By its first question, the referring court asks, in essence, whether Article 10(h) and Article 12(4) of Directive 2014/24 must be interpreted as precluding regional legislation that makes the award of a

public contract conditional on there being no partnership between entities within the public sector which would be capable of providing the ordinary medical transport service.

39 As the Court stated in the judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829, 'the *Irgita* judgment', paragraph 41), the purpose of Directive 2014/24, as stated in recital 1 thereof, is to coordinate national procurement procedures above a certain value.

40 It is clear from paragraph 43 of the *Irgita* judgment that the effect of Article 12(1) of that directive, concerning internal operations, also known as in-house transactions, which thus does no more than state the conditions which a contracting authority must satisfy when it wishes to conclude an in-house transaction, is solely to empower the Member States to exclude such a transaction from the scope of Directive 2014/24.

41 That provision cannot, consequently, deprive the Member States of the freedom to give preference to one means of providing services, performing work or obtaining supplies to the detriment of others. That freedom implies a choice which is at a stage prior to that of procurement and which cannot, therefore, come within the scope of Directive 2014/24 (the *Irgita* judgment, paragraph 44).

42 The freedom of the Member States to choose the means of providing services whereby the contracting authorities meet their own needs follows, moreover, from recital 5 of Directive 2014/24, which states that 'nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive', thereby reflecting the case-law of the Court prior to that directive (the *Irgita* judgment, paragraph 45).

43 Thus, just as Directive 2014/24 does not require the Member States to have recourse to a public procurement procedure, it cannot compel them to have recourse to an in-house transaction where the conditions laid down in Article 12(1) are satisfied (the *Irgita* judgment, paragraph 46).

44 Further, as the Court stated in paragraph 47 of the *Irgita* judgment, the freedom thus left to the Member States is more clearly distinguished in Article 2(1) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), which states:

'This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.

Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities, or to confer them upon economic operators.'

45 The freedom of Member States to choose the management method that they judge to be most appropriate for the performance of works or the provision of services cannot, however, be unlimited. It must, rather, be exercised with due regard to the fundamental rules of the FEU Treaty, in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency (the *Irgita* judgment, paragraph 48).

46 Consequently, the Court held, in paragraph 50 of the *Irgita* judgment, that Article 12(1) of Directive 2014/24 must be interpreted as not precluding a rule of national law whereby a Member State imposes a requirement that the conclusion of an in-house transaction should be subject, inter alia, to the condition that public procurement does not ensure that the quality of the services performed, their availability or their continuity can be guaranteed, provided that the choice made in favour of one means of providing services in particular, made at a stage prior to that of public procurement, has due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

47 It follows from the foregoing that, in the first place, the freedom of the Member States to choose the means of providing services whereby the contracting authorities meet their own needs authorises them, *mutatis mutandis*, to make the award of a public contract conditional on it being impossible for contracting authorities to enter into a partnership, in accordance with the conditions laid down in Article 12(4) of Directive 2014/24.

48 According to that provision, a partnership between contracting authorities may be concluded only if (i) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that the public services they have to perform are provided with a view to achieving objectives that they have in common, (ii) the implementation of that cooperation is governed solely by considerations relating to the public interest, and (iii) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

49 In that regard, it must be stated, as the Commission did in its written observations, that, even though Croce Verde is an IPAB, it is in no way certain that it is a body governed by public law within the meaning of Article 2(1)(4) of Directive 2014/24.

50 It is also for the referring court to satisfy itself that Article 5(2) and (3) of Regional Law No 26/2012 is in fact capable of establishing the existence of cooperation between contracting authorities given that, according to that provision, the relationships between the ULSSs and the persons on the regional list referred to in Article 4 of that law and which participate in the provision of emergency services are governed by specific agreements, concluded on the basis of a uniform format approved by the Regional Government.

51 In the second place, the freedom of the Member States to choose the means of providing services whereby the contracting authorities meet their own needs allows them, in the context of civil protection, civil defence and danger prevention, to favour a public procurement procedure, with non-profit organisations or associations, subject to the light regime defined in Articles 74 to 77 of Directive 2014/24, provided that the conditions set out in Article 10(h) of that directive are satisfied.

52 In that regard, it must be borne in mind that Article 10(h) of Directive 2014/24 must be interpreted as meaning that the exclusion from the application of the public procurement rules that that article lays down covers the care of patients in an emergency situation in a rescue vehicle by an emergency worker/paramedic, covered by CPV code 75252000-7 (rescue services) and transport by qualified ambulance covered by CPV code 85143000-3 (ambulance services), provided that, as regards transport by qualified ambulance, it is in fact undertaken by personnel properly trained in first aid and, second, it is provided to a patient whose state of health is at risk of deterioration during that transport (judgment of 21 March 2019, *Falck Rettungsdienste and Falck*, C-465/17, EU:C:2019:234, paragraph 51). The benefit of that exclusion is also only available when the ambulance service is provided by non-profit organisations or associations, within the meaning of that provision, and there is an emergency (order of 20 June 2019, *Italy Emergenza and Associazione Volontaria di Pubblica Assistenza 'Croce Verde'*, C-424/18, EU:C:2019:528, paragraph 28).

53 Lastly, in the two cases mentioned in paragraphs 47 and 51 of the present order, it is for the Member States, in exercising their freedom to choose the means of providing services whereby the contracting authorities meet their own needs, to ensure due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency (the *Irgita* judgment, paragraph 48).

54 The answer to the first question is therefore that Article 10(h) and Article 12(4) of Directive 2014/24 must be interpreted as not precluding a regional law that makes the award of a public contract conditional on the fact that a partnership between public bodies cannot provide the ordinary medical transport service, provided that the choice made in favour of one means of providing services in particular, made at a stage prior to that of public procurement, has due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

The second question

55 By the second question, the referring court asks, in essence, whether Article 10(h) and Article 12(4) of Directive 2014/24 must be interpreted as precluding a regional law that requires a contracting authority to provide reasons for its decision to award the contract for the provision of ordinary patient transport services by way of a tendering procedure rather than by direct award of the contract by means of an agreement entered into with another contracting authority.

56 As is clear from the answer to the first question, neither Article 10(h) nor Article 12(4) of that directive precludes a regional law which envisages the award of a public contract only as an alternative and by way of derogation.

57 Accordingly, EU law, in particular Article 10(h) and Article 12(4) of Directive 2014/24, cannot preclude a regional law which requires a contracting authority to demonstrate that the conditions for application of those provisions are not satisfied.

58 The answer to the second question is, therefore, that Article 10(h) and Article 12(4) of Directive 2014/24 do not preclude a regional law that requires a contracting authority to provide reasons for its decision to award the contract for the provision of ordinary patient transport services by way of a tendering procedure rather than by direct award of the contract by means of an agreement entered into with another contracting authority.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **Article 10(h) and Article 12(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as not precluding a regional law that makes the award of a public contract conditional on a partnership between public bodies being unable to provide the ordinary medical transport service, provided that the choice made in favour of one means of providing services in particular, made at a stage prior to that of public procurement, has due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.**

2. **Article 10(h) and Article 12(4) of Directive 2014/24 do not preclude a regional law that requires a contracting authority to provide reasons for its decision to award the contract for the provision of ordinary patient transport services by way of a tendering procedure rather than by direct award of the contract by means of an agreement entered into with another contracting authority.**

[Signatures]

---

* Language of the case: Italian.

JUDGMENT OF THE COURT (Second Chamber)

4 June 2020 (*)

(Reference for a preliminary ruling – Public procurement – Directive 2004/18/EC – Central purchasing bodies – Small municipalities – Restriction to only two organisational models for central purchasing bodies – Prohibition on using a central purchasing body governed by private law and involving the participation of private entities – Territorial restrictions on the activities of central purchasing bodies)

In Case C-3/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy) by a decision of 20 September 2018, received at the Court on 3 January 2019, in the proceedings

Asmel Soc. cons. a r.l.

v

Autorità Nazionale Anticorruzione (ANAC),

with the intervention of:

Associazione Nazionale Aziende Concessionarie Servizi entrate (Anacap),

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, K. Lenaerts (Rapporteur), President of the Court, acting as a Judge of the Second Chamber, P.G. Xuereb, T. von Danwitz and A. Kumin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 29 January 2020,

after considering the observations submitted on behalf of:

– Asmel Soc. cons. a r.l., by M. Chiti, A. Sandulli, L. Lentini and B. Cimino, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, C. Colelli and C. Pluchino, avvocatesse dello Stato,

– the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 April 2020,

gives the following

Judgment

1 The request for a preliminary ruling concerns the interpretation of Article 1(10) and Article 11 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), as amended by Commission Regulation (EU) No 1336/2013

of 13 December 2013 (OJ 2013 L 335, p. 17) (‘Directive 2004/18’), and the principles of freedom to provide services and of opening up to competition as far as possible in the field of public service contracts. Directive 2004/18 was repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ 2014 L 94, p. 65).

2 This request was made in proceedings between Asmel Soc. cons. a r.l. (‘Asmel’) and the Autorità Nazionale Anticorruzione (National Anti-Corruption Authority, Italy) (‘the ANAC’) relating to the ANAC’s decision No 32 of 30 April 2015 in which it prohibited Asmel from performing brokerage activities in the field of public procurement and declared the tendering procedures it had conducted to be unlawful, on the grounds that Asmel had not complied with the organisational models for central purchasing bodies established by Italian law (‘the decision at issue’).

Legal context

EU law

3 According to recital 2 of Directive 2004/18, which applied at the time of the facts at issue in the main proceedings:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.’

4 Recital 16 of that directive states:

‘In order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure, as defined and regulated by this Directive.’

5 Article 1(8) to (10) of that directive provides:

‘8. The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term “economic operator” shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

…

9. “Contracting authorities” means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A “body governed by public law” means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

…

10. A “central purchasing body” is a contracting authority which:

– acquires supplies and/or services intended for contracting authorities, or

– awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.’

6 Article 2 of that directive, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

7 According to the first indent of Article 7(b) of Directive 2004/18, the directive applies, inter alia, to public supply and service contracts awarded by contracting authorities other than those listed in Annex IV to that directive and which have a value exclusive of value added tax equal to or greater than EUR 207 000. Under Article 7(c), that threshold is EUR 5 186 000 for public works contracts.

8 Article 11 of that directive, entitled ‘Public contracts and framework agreements awarded by central purchasing bodies’, reads as follows:

‘1. Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body.

2. Contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it.’

Italian law

Legislative Decree No 267/2000

9 The first paragraph of Article 30 of decreto legislativo n. 267 – Testo unico delle leggi sull’ordinamento degli enti locali (Legislative Decree No 267 – Consolidated Law on the rules governing local authorities) of 18 August 2000 (GURI No 227 of 28 September 2000; ‘Legislative Decree No 267/2000’) states:

‘In order to discharge certain functions and to provide certain services in a coordinated manner, local bodies may enter into appropriate agreements with each other.’

10 Under the first paragraph of Article 31 of that legislative decree, entitled ‘Consortia (*Consorzi*)’:

‘Local bodies for the associated management of one or more services and for the associated exercise of functions may form a consortium (*consorzio*) in accordance with the rules laid down for special undertakings provided for in Article 114, in so far as they are compatible. Other public bodies may participate in the consortium, when they are authorised to do so, in accordance with the laws to which they are subject.’

11 The first paragraph of Article 32 of that legislative decree defines an ‘association of municipalities’ as ‘a local body formed of two or more municipalities, usually contiguous, for the associated exercise of functions and provision of services’.

Legislative Decree No 163/2006

12 Article 3(25) of decreto legislativo n. 163 – Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 establishing the Public Works Contracts, Public Supply Contracts and Public Service Contracts Code implementing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006; 'Legislative Decree No 163/2006') defines 'contracting authorities' as 'State administrative authorities; regional or local authorities; other non-economic public bodies; bodies governed by public law; associations, unions, consortia, however named, established by those entities'.

13 Under Article 3(34) of Legislative Decree No 163/2006, 'central purchasing body' means:

'A contracting authority which:

– acquires supplies or services intended for contracting authorities or other contracting entities, or

– awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities or other contracting entities.'

14 Article 33(3a) of that legislative decree, inserted by decreto-legge n. 201 – Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici (Decree Law No 201 on urgent provisions relating to growth, fairness and the consolidation of public accounts) of 6 December 2011 (Ordinary Supplement to GURI No 284 of 6 December 2011), converted into a law and amended by legge n. 214 (Law No 214) of 22 December 2011 (Ordinary Supplement to GURI No 300 of 27 December 2011), states:

'Municipalities with a population not exceeding 5 000 inhabitants situated within the territory of each province shall compulsorily entrust to a single central purchasing body the acquisition of works, services and supplies within the framework of the associations of municipalities, as provided for in Article 32 of [Legislative Decree No 267/2000], where they exist, or by establishing a special consortium agreement between those municipalities and relying on the support of the relevant departments.'

15 Article 9(4) of decreto-legge n. 66 – Misure urgenti per la competitività e la giustizia sociale (Decree Law No 66 on urgent measures to promote competitiveness and social justice) of 24 April 2014 (GURI No 95 of 24 April 2014), converted into a law and amended by Law No 89 of 23 June 2014 (GURI No 143 of 23 June 2014), amended Article 33(3a) as follows:

'Municipalities that are not the provincial capital shall acquire works, goods and services within the framework of the associations of municipalities provided for in Article 32 of Legislative Decree [No 267/2000], where they exist, or by establishing a special consortium agreement between those municipalities and relying on the support of the relevant departments, or using an aggregator or the provincial authorities, pursuant to Law No 56 of 7 April 2014. …'

The main proceedings and the questions referred for a preliminary ruling

16 Asmel, a limited liability consortium company established on 23 January 2013, is owned by the municipality of Caggiano (Italy) (51%), the private association Asmel, whose members include the Associazione nazionale piccoli comuni italiani (National Association of Small Italian Municipalities) (25%), and the Consorzio Asmel (Asmel Consortium), a consortium of private undertakings and municipalities (24%).

17 In the past, Asmel has carried on activities as a central purchasing body for various local authorities. Specifically, it arranged an invitation to tender for framework agreements to provide the service for collecting and overseeing municipal property taxes and enforcing tax debts, and 152 e-tender procedures to award various kinds of public contracts.

18 According to Asmel's operating arrangements, the local authorities became members of the Asmel Association by a decision of the municipal council, and, subsequently, by a decision of the municipal

board, entrusted their procurement responsibilities to Asmel. Asmel was remunerated for the services supplied via an e-platform at a rate of 1.5% of the contract price, payable by the successful tenderer.

19 Following several complaints, the ANAC began an investigation which found that Asmel did not conform to the organisational models for central purchasing bodies established in Article 33(3a) of Legislative Decree No 163/2006.

20 According to the ANAC, Asmel was an entity governed by private law, whereas Italian law requires central purchasing bodies to behave as public bodies acting through public entities or associations of local authorities, such as associations or consortia of municipalities established under agreements concluded pursuant to Article 30 of Legislative Decree No 267/2000. The ANAC also highlighted that, while private entities may be used, they must, under all circumstances, be in-house bodies that operate only within the territory of the founding municipalities, whereas in the case under analysis the requirements that there be comparable oversight and that the activities be performed in a restricted area were not met.

21 The ANAC also found that the local authorities were only indirectly involved in the central purchasing body, given that they initially became members of the Asmel association and then, under a decision of the municipal board, entrusted responsibility for procurement to Asmel.

22 In terms of Asmel's legal nature, the ANAC held that it could not be classed as a 'body governed by public law' because it operated only indirectly to meet the needs of its member local authorities and therefore did not directly serve the public interest needs that those authorities are required to satisfy.

23 The ANAC therefore made the decision at issue.

24 Asmel challenged the decision at issue before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy). It argued that, although it was a body governed by ordinary law, it had legal personality, met public interest needs, was non-industrial and non-commercial in nature, and was funded by its local authority members and operated under their dominant influence. It was therefore a body governed by public law and, accordingly, a contracting authority that satisfied the requirements to be classed as a 'central purchasing body'.

25 By a judgment of 22 February 2016, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) dismissed Asmel's action. In view of the way in which it was financed and how the company's management was supervised, that court found that it could not be classed as a 'body governed by public law' since it did not satisfy the requirement of operating under the dominant influence of public bodies. It also found that Asmel did not comply with the organisational models laid down for central purchasing bodies by Legislative Decree No 163/2006 and that its operating area should be restricted to the territory of the founding municipalities.

26 Asmel appealed that judgment to the Consiglio di Stato (Council of State, Italy), advancing, among other claims, that, first, it is incorrect to find the operational model consisting of a consortium (*consorzio*) governed by private law in the form of a company to be incompatible with the provisions of Legislative Decree No 163/2006 relating to central purchasing bodies and, secondly, that Legislative Decree No 163/2006 does not impose any territorial restriction on the activities of central purchasing bodies.

27 The Consiglio di Stato (Council of State) states that although, under the provisions of Legislative Decree No 163/2006 on central purchasing bodies, any contracting authority can act as a central purchasing body, Article 33(3a) of that legislative decree derogates from that rule to provide that small municipalities can only use central purchasing bodies configured in accordance with two specific organisational models, that is to say, the association of municipalities under Article 32 of Legislative Decree No 267/2000 or the consortium (*consorzio*) of local authorities under Article 31 of that legislative decree. In the opinion of the Consiglio di Stato (Council of State), that obligation on small municipalities seems to be at odds with the fact that under Directive 2004/18 central purchasing bodies can be used without any restrictions on the forms of cooperation.

28 The Consiglio di Stato (Council of State) also harbours doubts in relation to the obligation imposed on small municipalities to use public-law organisational models, excluding participation by private entities, in so far as concerns consortia (*consorzi*) of municipalities. That exclusion is potentially contrary to the principles of freedom to provide services and of opening up procurement procedures to competition as far as possible, enshrined in EU law, in that the provision of services which can be classed as 'economic activities' and which, as such, could be better provided under a system of free competition within the internal market, is reserved solely to Italian public-law bodies as specified in an exhaustive list.

29 The Consiglio di Stato (Council of State) also states that, while the domestic legislation does not define an operating area for central purchasing bodies, it does provide that their operating area must be the same as the territory of the small municipalities that use the services of those central purchasing bodies. The operating area is therefore restricted to the territory of the municipalities that are members of the association or consortium (*consorzio*). According to the Consiglio di Stato (Council of State), that restriction may be contrary to the principles of freedom to provide services and of opening up procurement procedures to competition as far as possible, since in its view it establishes exclusive operating zones for central purchasing bodies.

30 In those circumstances, the Consiglio di Stato (Council of State) stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does a provision of national legislation, such as Article 33(3a) of Legislative Decree No 163 of 12 April 2006, which restricts the autonomy of municipalities to entrust [procurement] to a central purchasing body to only two organisational models (the union of municipalities, if it already exists, or a consortium to be established between municipalities), infringe EU law?

(2) In any event, does a provision of national legislation, such as Article 33(3a) of Legislative Decree No 163 of 12 April 2006 which, read in conjunction with Article 3(25) thereof, regarding the organisational model based on consortia of municipalities, excludes the possibility of creating entities governed by private law, such as a consortium under ordinary law whose members include private entities, infringe EU law, in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts?

(3) Does a provision of national legislation, such as Article 33(3a) which, if interpreted in the sense of allowing consortia of municipalities that are central purchasing bodies to operate in a territory corresponding to that of the participating municipalities as a whole, and so, at most, to the provincial territory, limits the scope of operation of those central purchasing bodies, infringe EU law, in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts?'

Admissibility

31 In the first place, the Italian Government argues that the request for a preliminary ruling is inadmissible because it is hypothetical.

32 That government contends that the referring court relies on a twofold premiss to the effect that, first, the procurement of goods and services on behalf of a contracting authority is an economic activity, namely a service within the meaning of Article 57 TFEU, and that, secondly, Asmel, which does not satisfy the requirements under EU law and Italian law to be classed as a 'central purchasing body', must by definition be classed as an 'economic operator'. According to that government, even if the Court found that EU law does preclude the provisions of Italian law at issue in the main proceedings, that finding would not enable the referring court to uphold the appeal brought before it, since the procurement services at issue in the main proceedings were not entrusted to Asmel on completion of a competitive procedure in accordance with EU law.

33 It should be noted here that, according to settled case-law, questions on the interpretation of EU law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of

relevance. The Court may refuse to rule on a request for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 27 November 2019, *Tedeschi and Consorzio Stabile Istant Service*, C-402/18, EU:C:2019:1023, paragraph 24 and the case-law cited).

34 According to equally consistent case-law, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 28 and the case-law cited).

35 In the case under analysis, it is clear from the request for a preliminary ruling that the dispute in the main proceedings being heard by the referring court concerns whether Asmel was lawfully prevented from being among the entities that may act as central purchasing bodies for small local authorities. According to the referring court, the reason for that exclusion lies in the restrictions imposed by the provisions of Legislative Decree No 163/2006 relating to central purchasing bodies. By the questions it has referred for a preliminary ruling, the referring court invites the Court to rule on precisely whether EU law precludes those restrictions.

36 Under those circumstances, it is not ‘quite obvious’ that the interpretation of EU law sought by the referring court bears no relation to the actual facts of the main action or its purpose or that the questions referred relate to a hypothetical issue.

37 The presumption that the questions referred are relevant cannot be rebutted, in the present case, by the Italian Government’s argument that the Court’s answer would not enable the referring court to uphold Asmel’s appeal – on the grounds that the procurement of goods and services was not entrusted to that company following a competitive procedure in accordance with EU law – because it is apparent from the order for reference that the decision at issue prohibits Asmel from acting as a central purchasing body for local authorities, in general, as opposed to for a specific contract, even though, according to Asmel, that prohibition is contrary to EU law.

38 In the second place, in its written observations, the European Commission expressed doubts as to whether the questions referred are relevant to resolution of the dispute in the main proceedings on the ground that Article 33(3a) of Legislative Decree No 163/2006, mentioned in the wording of the questions referred, was subsequently repealed by the Italian legislature, and that the dispute in the main proceedings may therefore have become devoid of purpose.

39 It must be observed in that respect that, in proceedings brought under Article 267 TFEU, it is not for the Court to specify the relevant provisions of national law applicable to the main proceedings. That is the prerogative of the referring court which, while setting out the internal legal framework, leaves it open to the Court to provide all the criteria for interpreting EU law so as to permit the court making the reference to assess the compatibility of national legislation with EU rules (see to that effect, judgment of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 22 and the case-law cited).

40 The admissibility of the questions referred cannot, therefore, be called into question on the grounds that the provision of national law that the referring court found to be applicable to the main proceedings has subsequently been repealed.

41 Furthermore, when examined on the point of view expressed by the Commission that the questions referred may not be relevant to resolution of the dispute in the main proceedings, the Italian Government stated at the hearing that the new rules on central purchasing bodies, which have repealed and replaced Article 33(3a) of Legislative Decree No 163/2006, will not take effect until 31 December 2020, meaning that the dispute in the main proceedings is still governed by that article, a situation that the Commission also acknowledged at the hearing.

42 In the light of the foregoing, the request for a preliminary ruling cannot be dismissed as inadmissible.

43 The Italian Government and the Commission also expressed doubts as to whether the third question referred is admissible, on the grounds that, according to information provided in the order for reference, the territorial restriction on the area of operation of central purchasing bodies created by local authorities, on which the referring court seeks a ruling, may amount to an advantage for a central purchasing body. Specifically, the Italian Government points to a contradiction in that order regarding whether such a territorial restriction amounts to a disadvantage or an advantage for such a body. Those issues can appropriately be addressed as part of examination of the third question.

The questions referred

Preliminary observations

44 In its questions, the referring court looks in general to EU law and to the principles of freedom to provide services and of opening up to competition as far as possible in the field of public service contracts. However, it is apparent from the request for a preliminary ruling that the referring court's uncertainties concern specifically Article 56 TFEU, which enshrines the freedom to provide services, and Article 1(10) and Article 11 of Directive 2004/18 on central purchasing bodies.

45 As regards which provisions of primary or secondary law should be interpreted in order to provide the referring court with a reply of use, it should be noted, first, that the questions referred are intended to enable that court to determine whether Legislative Decree No 163/2006 is compatible with EU law. It is clear from the title itself of that decree that it implements Directive 2004/18.

46 Secondly, it is apparent from the request for a preliminary ruling that the concept of 'central purchasing body' established in Article 1(10) and Article 11 of Directive 2004/18 is crucial to the dispute in the main proceedings.

47 Thirdly and lastly, the thresholds for Directive 2004/18 to apply, laid down in Article 7, have been reached. It can be seen from documents in the case file before the Court that in a number of the 152 tendering procedures arranged by Asmel between May 2013 and February 2014, vitiated by unlawfulness as a result of the decision at issue, the contract price exceeds the relevant thresholds under that article. Moreover, the decision at issue prohibits Asmel from carrying on any brokerage activities in public procurement procedures irrespective of the amount involved.

48 Under those circumstances, the questions referred should be examined only in the light of Directive 2004/18, and of Article 1(10) and Article 11 thereof in particular.

Substance

First and second questions

49 By its first and second questions, which must be examined together, the referring court asks, in essence, whether Article 1(10) and Article 11 of Directive 2004/18 must be interpreted as precluding a provision of national law which restricts the autonomy of small municipalities to use the services of a central purchasing body to only two exclusively public organisational models with no participation by private persons or undertakings.

50 To answer those questions, it should be noted, in the first place, that the concept of 'central purchasing body' is defined in Article 1(10) of Directive 2004/18 and denotes a contracting authority which acquires supplies and/or services intended for contracting authorities, or awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.

51 The concept of 'central purchasing body' is thus defined in Directive 2004/18 by reference to the concept of 'contracting authority'.

52 The concept of 'contracting authority', in turn, is defined in Article 1(9) of Directive 2004/18 and, according to the first subparagraph thereof, means the State, regional or local authorities, bodies

governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

53 Under the second subparagraph of Article 1(9) of Directive 2004/18, ‘body governed by public law’ means any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, having legal personality and financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

54 The Court has already had occasion to indicate that Article 1(9) of that directive defines the concept of ‘contracting authority’ broadly and in functional terms, in order to secure the objectives of that directive which seeks to exclude both the risk of preferring national tenderers or bidders in any contract award made by the contracting authorities and the possibility that a body financed or controlled by the State, regional authorities or other bodies governed by public law may be guided by considerations other than economic ones (see, to that effect, judgment of 5 October 2017, *LitSpecMet*, C-567/15, EU:C:2017:736, paragraph 31 and the case-law cited). Furthermore, there is no requirement under that article to adhere to any specific organisational models in order to fall within the definition of ‘contracting authority’.

55 It needs to be said, in the second place, that, according to recital 16 of Directive 2004/18, ‘in order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use … central purchasing bodies, … as defined and regulated by this Directive’. Accordingly, under Article 11(1) of Directive 2004/18, Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body. Under Article 11(2), contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) of that directive are to be deemed to have complied with Directive 2004/18 in so far as the central purchasing body has complied with it.

56 It is apparent from Article 11 of Directive 2004/18, in conjunction with Article 1(9) and (10) and recital 16 thereof, that the only restriction which the directive places on the choice of a central purchasing body is that requiring the purchasing body to be classed as a ‘contracting authority’. That wide margin of discretion also applies to how the Member States may define the organisational models for central purchasing bodies, provided the measures that they take to implement Article 11 of Directive 2004/18 comply with the restriction laid down by that directive to the effect that the entity that the contracting authorities wish to use as a central purchasing body must be classed as a contracting authority. That means that a national rule cannot recognise an entity as being classed as a ‘central purchasing body’, and therefore one to which Directive 2004/18 applies, where it is not classed as a contracting authority within the meaning of Article 1(9) of that directive.

57 In the third place, the foregoing interpretation of Directive 2004/18 is, moreover, consistent with its underlying principles, namely the principles of the freedom to provide services and of the opening up to undistorted competition in all the Member States, set out in recital 2 thereof.

58 Although under Article 11(2) of Directive 2004/18 contracting authorities that use a central purchasing body are themselves not subject, in the situations to which that article refers, to the public procurement procedures laid down by that directive, under the same article that central purchasing body is subject to the obligation on contracting authorities to comply with the procedures laid down by the directive. The main objective of the rules of EU law in the field of public contracts, namely freedom to provide services and the opening up of undistorted competition in all the Member States (see, to that effect, judgment of 8 December 2016, *Undis Servizi*, C-553/15, EU:C:2016:935, paragraph 28 and the case-law cited), is thereby secured.

59 The Court’s judgment of 20 October 2005, *Commission* v *France* (C-264/03, EU:C:2005:620), does not preclude that conclusion, holding as it does that the agency agreement of delegated project contracting, governed by the French town planning legislation, which reserved the role of agent to certain exhaustively listed categories of legal persons under French law, was a public service contract

for the purposes of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), and, in so far as it prescribes no procedure for putting the choice of agent out to competition, infringed that directive.

60 That judgment does not concern the provisions of Directive 2004/18 that expressly prescribe that contracting authorities may use central purchasing bodies. In any event, it emerges from that judgment that the agent's responsibilities included various tasks constituting provisions of services that had been entrusted to it without reference to any competitive procedure prescribed by Directive 92/50 (judgment of 20 October 2005, *Commission* v *France*, C-264/03, EU:C:2005:620, paragraphs 46, 51 and 55).

61 In view of the Member States' broad margin of discretion, referred to in paragraph 56 of this judgment, there is likewise nothing in Directive 2004/18 or in its underlying principles that precludes the Member States from tailoring the organisational models of those central purchasing bodies to their own needs and the particular circumstances pertaining in a Member State and for that purpose stipulating purely public organisational models, with no participation by private persons or undertakings.

62 Against that background, the Italian Government has stated that the Italian legislature, by initially encouraging local authorities to use central purchasing bodies, created in accordance with defined organisational models, and then requiring small local authorities to use the services of those bodies, sought not only to guard against the risk of infiltration by the mafias but to provide a means of controlling expenditure.

63 In any event, as the Advocate General indicated in essence in points 70 to 72 of his Opinion, since the concept of 'contracting authority' is closely linked to that of 'central purchasing body', as expounded in paragraphs 51 to 58 of this judgment, central purchasing bodies cannot be regarded as offering services on a market open to competition by private undertakings.

64 A central purchasing body acts in fact as a contracting authority, in order to satisfy the needs of a contracting authority, not as an economic operator in its own commercial interests.

65 National legislation that restricts the freedom of choice of small local authorities when using a central purchasing authority, by stipulating two exclusively public organisational models with no participation by private persons or undertakings, is therefore not contrary to the objective pursued by Directive 2004/18 of freedom to provide services and opening up to undistorted competition in all the Member States, since it does not place any private undertaking at an advantage over its competitors.

66 Furthermore, the national legislation at issue does not give preference to any national tenderer. On the contrary, it furthers the objective referred to in the preceding paragraph because it protects small local authorities from the risk of a cartel consisting of a central purchasing body and a private undertaking that holds capital in that central purchasing body.

67 In the light of the foregoing, the answer to the first and second questions is that Article 1(10) and Article 11 of Directive 2004/18 must be interpreted as meaning that they do not preclude a provision of national law which restricts the autonomy of small municipalities to use the services of a central purchasing body to only two exclusively public organisational models with no participation by private persons or undertakings.

Third question

68 By its third question the referring court asks, in essence, whether Article 1(10) and Article 11 of Directive 2004/18 must be interpreted as precluding a provision of national law which restricts the operating area of the central purchasing bodies created by local authorities to the territory of those local authorities.

69 It should be noted, first, that, since Directive 2004/18 contains no express provision governing any territorial limits on the operating area of a central purchasing body, that question relates to the implementation of the provisions of that directive on central purchasing bodies, in respect of which, as can be seen from paragraph 56 of the present judgment, the Member States have a wide margin of discretion.

70 A measure by which a Member State restricts the geographical operating area of central purchasing bodies to the respective territories of the local authorities that created them, to ensure that those central purchasing bodies act in the public interest of those authorities instead of in their own commercial interests, further afield than those territories, must be found to be consistent with Article 1(10) of Directive 2004/18, which provides that a central purchasing body must be classed as a contracting authority and must, as such, satisfy the conditions under Article 1(9) of that directive. As the Court has already stated, according to Article 1(9), a contracting authority is an entity not having an industrial or commercial character which performs a task in the general interest. As a general rule, such a body does not pursue gainful activity on the market (see, to that effect, judgment of 23 December 2009, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 38). A provision of national law such as that at issue in the main proceedings must, therefore, be considered to fall within the bounds of the margin of discretion available to the Member States when implementing Directive 2004/18.

71 Secondly, as regards the referring court's uncertainty as to whether the territorial restriction at issue in the main proceedings is compatible with the principles of the freedom to provide services and the opening up to competition as far as possible in the field of public service contracts which underlie Directive 2004/18, which that court believes may give rise to exclusive operating zones for central purchasing bodies, mindful of the reasons set out in the examination of the first and second questions, it must be held that a provision of national law that limits the operating area of central purchasing bodies to the respective territories of the local authorities that created them does not, as such, place any private undertaking at an advantage over its competitors and thereby infringe those principles.

72 In the light of the foregoing, the answer to the third question is that Article 1(10) and Article 11 of Directive 2004/18 must be interpreted as meaning that they do not preclude a provision of national law which restricts the operating area of the central purchasing bodies created by local authorities to the territory of those local authorities.

Costs

73 Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber), hereby rules:

1. **Article 1(10) and Article 11 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EU) No 1336/2013 of 13 December 2013,must be interpreted as meaning that they do not preclude a provision of national law which restricts the autonomy of small municipalities to use the services of a central purchasing body to only two exclusively public organisational models with no participation by private persons or undertakings.**

2. **Article 1(10) and Article 11 of Directive 2004/18, as amended by Regulation No 1336/2013, must be interpreted as meaning that they do not preclude a provision of national law which restricts the operating area of the central purchasing bodies created by local authorities to the territory of those local authorities.**

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 2 April 2020(1)

Case C-3/19

Asmel società consortile a r.l.

v

A.N.A.C. — Autorità Nazionale Anticorruzione,

with the intervention of:

A.N.A.C.A.P. — Associazione Nazionale Aziende Concessionarie Servizi entrate

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling — Public procurement — Central purchasing bodies — Small municipalities — Restriction to only two public-law organisational models for purchasing bodies — Prohibition of the involvement of private capital — Member States' margin of discretion — Territorial restrictions on their activities)

1. Under the Italian law in force at the time of the events, as interpreted by the Consiglio di Stato (Council of State, Italy), small local authorities may make use of central purchasing bodies in order to purchase works, goods and services, provided that they use organisational models that are exclusively public, such as municipal consortia or associations of municipalities.

2. The referring court has doubts as to whether this measure is consistent with EU law, since it could restrict the use of central purchasing bodies in a way that is incompatible with Directive 2004/18/EC, (2) which applies *ratione temporis* at the time addressed in the question referred, and with 'the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts'.

I. Legal framework

A. EU law. Directive 2004/18

3. Recital 15 of the directive reads as follows:

'Certain centralised purchasing techniques have been developed in Member States. Several contracting authorities are responsible for making acquisitions or awarding public contracts/framework agreements for other contracting authorities. In view of the large volumes purchased, those techniques help increase competition and streamline public purchasing. Provision should therefore be made for a Community definition of central purchasing bodies dedicated to contracting authorities. A definition should also be given of the conditions under which, in accordance with the principles of non-

discrimination and equal treatment, contracting authorities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with this Directive.'

4. Recital 16 states that:

'In order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting authorities may use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure, as defined and regulated by this Directive.'

5. According to Article 1 ('Definitions'):

'…

9. "Contracting authorities" means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A "body governed by public law" means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.

10. A "central purchasing body" is a contracting authority which:

– acquires supplies and/or services intended for contracting authorities, or

– awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.

…'

6. Article 11 ('Public contracts and framework agreements awarded by central purchasing bodies') establishes that:

'1. Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body.

2. Contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) shall be deemed to have complied with this Directive in so far as the central purchasing body has complied with it.'

B. Italian law

1. Testo unico degli enti locali (Consolidated law on local authorities) (3)

7. Under Article 30(1):

‘In order to discharge certain functions and to provide certain services in a coordinated manner, local bodies may enter into appropriate agreements with each other.’

8. Article 31(1) provides that:

‘Local bodies for the associated management of one or more services and for the associated exercise of functions may form a consortium in accordance with the rules laid down for special undertakings provided for in Article 114, in so far as they are compatible. Other public bodies may participate in the consortium, when they are authorised to do so, in accordance with the laws to which they are subject.’

9. According to Article 32(1):

‘An association of municipalities is a local body formed of two or more municipalities, usually contiguous, for the associated exercise of functions and provision of services.’

2. Codice dei contratti pubblici (Public procurement code) (4)

10. Article 3(25) classifies as contracting authorities:

‘State administrative authorities; regional or local authorities; other non-economic public bodies; bodies governed by public law; associations, consortia, however named, established by those entities.’

11. According to Article 3(34), a central purchasing body is:

‘A contracting authority which:

– acquires supplies or services intended for contracting authorities or other contracting entities, or

– awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities or other contracting entities.’

12. The original version of Article 33(3)*bis* (5) stipulates that:

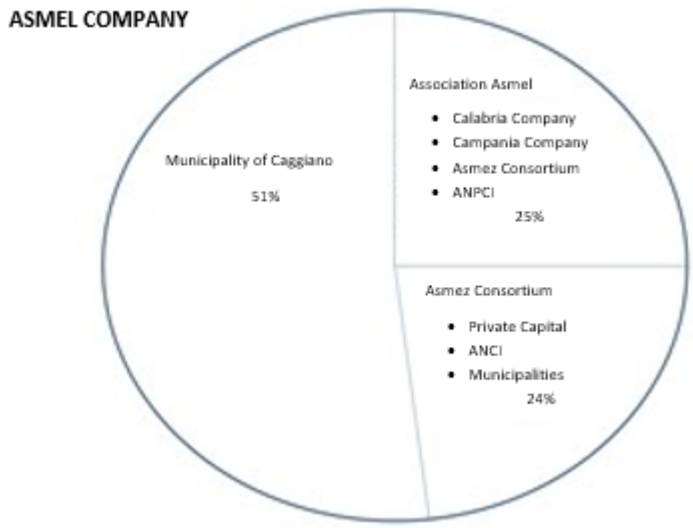
‘Municipalities with a population not exceeding 5 000 inhabitants situated within the territory of each province shall compulsorily entrust to a single central purchasing body the acquisition of works, services and supplies within the framework of the associations of municipalities, as provided for in Article 32 of the consolidated text contained in Legislative Decree No 267 of 18 August 2000, where they exist, or by establishing a special consortium agreement between those municipalities and relying on the support of the relevant departments.’

13. The amended wording (6) (introduced in 2014) of Article 33(3)*bis* reads as follows:

‘Municipalities that are not the provincial capital shall acquire works, goods and services within the framework of the associations of municipalities provided for in Article 32 of Legislative Decree No 267 of 18 August 2000, where they exist, or by establishing a special consortium agreement between those municipalities and relying on the support of the relevant departments, or using an aggregator or the provincial authorities, pursuant to Law No 56 of 7 April 2014. Alternatively, those municipalities may carry out their own purchases by means of the electronic purchasing tools managed by Consip SpA or by another reference aggregator.’

II. Facts and question referred

14. Asmel società consortile a r.l. (‘Asmel s.c.a.r.l.’) is a limited liability consortium company, established on 23 January 2013, whose shares are held by the Asmez Consortium (24%), (7) the private association Asmel (25%) (8) and the municipality of Caggiano (51%).



15. Over the years, Asmel s.c.a.r.l. has acted as the central purchasing body for the local authorities. (9)

16. Under the relationship between Asmel s.c.a.r.l. and non-member municipalities, the governments of non-member municipalities took the procurement decisions in which:

– firstly, they referred to a previous decision under which they had resolved to join the Asmel association and form a consortium within the meaning of Article 33(3)*bis* of the CCP;

– secondly, they gave Asmel s.c.a.r.l. responsibility for carrying out the public procurement processes on an electronic platform. (10)

17. Following several complaints, the Autorità Nazionale Anticorruzione (National Anti-Corruption Authority, 'the ANAC') began an investigation which found that Asmel s.c.a.r.l. and the Asmez Consortium did not comply with the organisational models for central purchasing bodies established in the CCP.

18. According to the ANAC, Asmel s.c.a.r.l. was a private entity, more specifically, a company governed by private law made up, in turn, of other associations. Therefore, it could not be a central purchasing body, because the Italian legislation requires these to behave as public bodies acting through public entities or associations of local authorities, such as associations or consortia of municipalities established under agreements concluded pursuant to Article 30 of the TUEL. The ANAC also noted that, while private entities can be used, these must be in-house bodies that operate only within the territory of the founding municipalities, whereas in the case under consideration in these proceedings the requirement for comparable oversight was not met and there was no territorial restriction on the activities performed.

19. The ANAC found that Asmel s.c.a.r.l. was performing its activity of purchasing goods for member organisations, but that members were only indirectly involved in the central purchasing body. The ANAC explained that, first, the local authorities became members of the Asmel association and then, under a decision of the Board, they entrusted responsibility for procurement to Asmel s.c.a.r.l.

20. In decision No 32 of 30 April 2015, the ANAC ruled that Asmel s.c.a.r.l. could not be classed as a body governed by public law, prohibited it from performing brokerage activities in the field of public procurement and declared that the tendering procedures it had conducted were unlawful.

21. Asmel s.c.a.r.l. challenged the ANAC's decision in the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy). Asmel considered that although it was a body governed by ordinary law, it had legal personality, met public interest needs, was non-industrial and non-commercial in nature, was funded by its local authority members and operated under their dominant influence. It therefore maintained that it was a contracting authority that satisfied the requirements needed in order to be classed as a 'central purchasing body'.

22. The court of first instance dismissed the appeal by Asmel s.c.a.r.l. in judgment No 2339 of 22 February 2016. In view of the way it was financed and the supervision of its management, the court ruled that it was not a body governed by public law. The court found that it did not conform to the organisational

models for central purchasing bodies laid down by the CCP and ruled that its activities should be confined to the territory of the founding municipalities.

23. Asmel s.c.a.r.l. brought an appeal against the judgment of the court of first instance to the Consiglio di Stato (Council of State), citing various grounds; the Council of State considers two of those grounds to be relevant for present purposes:

– the ruling that the organisational model consisting in a consortium in the form of a company is incompatible with the CCP's provisions on central purchasing bodies is incorrect; and

– the CCP does not impose any territorial restrictions on the operations of those central purchasing bodies.

24. The Consiglio di Stato (Council of States) notes that regional and local public authorities are included among the contracting authorities referred to in Article 3(25) of the CCP. In principle, any of these authorities may act as a central purchasing body (Article 3(34) of the CCP). However, small municipalities must do so through a 'specific organisational model' (Article 33(3)*bis* of the CCP) which is different from the model generally established for other administrative authorities.

25. Under this 'specific model', small municipalities (11) may only use central purchasing bodies that conform to one of the following two models: (a) the associations provided for in Article 32 of the TUEL; and (b) the consortia between local authorities established in Article 31 of the TUEL. (12)

26. In the opinion of the Consiglio di Stato (Council of State), this obligation on small municipalities seems to be at odds with the possibility of using central purchasing bodies without any restrictions on the forms of cooperation.

27. The Consiglio di Stato (Council of State) also considers that the national legislation contains an additional restriction on municipal consortia that excludes participation by private entities. (13) That exclusion could be contrary to the EU legal principles of free movement of services and maximum possible competition, in that the provision of services which can be classed as commercial activities and which, as such, could be better provided under a system of free competition within the internal market, is reserved solely to Italian public-law bodies as specified in an exhaustive list.

28. In addition, according to its interpretation, while the domestic legislation does not define a geographical operating area for central purchasing bodies, it does provide that the operating area must be the same as the territory of the municipalities using the central purchasing body. The operating area is therefore restricted to the territory of the municipalities in the association or the consortium. In its view, this restriction is also contrary to the principles of free movement of services and maximum possible competition, since it establishes exclusive operating zones for central purchasing bodies.

29. Against this background, the Consiglio di Stato (Council of States), refers the following questions to the Court of Justice for a preliminary ruling:

> 'Does a provision of national legislation, such as Article 33(3)*bis* of Legislative Decree No 163 of 12 April 2006, which restricts the autonomy of municipalities to entrust [procurement] to a central purchasing body to only two organisational models (an association of municipalities, if it already exists, or a consortium to be established between municipalities), infringe EU law?
>
> In any event, does a provision of national legislation, such as Article 33(3)*bis* of Legislative Decree No 163 of 12 April 2006 which, read in conjunction with Article 3(25) of that legislative decree, regarding the organisational model based on consortia of municipalities, excludes the possibility of creating entities governed by private law, such as a consortium under ordinary law whose members include private entities, infringe EU law, in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts?
>
> Lastly, does a provision of national legislation, such as Article 33(3)*bis* which, if interpreted in the sense of allowing consortia of municipalities that are central purchasing bodies to operate in a territory corresponding to that of the participating municipalities as a whole, and so, at most, to the provincial

territory, limits the scope of operation of those central purchasing bodies, infringe EU law, in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts?'

III. Proceedings before the Court of Justice

30. The order for reference was received at the Court of Justice on 3 January 2019.

31. Written observations were submitted by Asmel s.c.a.r.l., the Government of Italy and the European Commission, all of whom attended the hearing held on 29 January 2020.

IV. Assessment

A. Admissibility of the questions referred

32. Both the Commission and the Government of Italy raise some objections concerning the admissibility of the questions referred.

33. In the Italian Government's opinion, the entire set of questions is inadmissible because they are hypothetical. It states that, whatever answer is given by the Court of Justice, it would not render the appeal to the referring court admissible, because Asmel s.c.a.r.l. was not entrusted with any procurement service as the result of a competitive procedure.

34. This objection cannot be upheld, because it is for the referring court to assess whether a reference is needed in order for it to rule on the proceedings before it, and the Court of Justice could refuse to reply to the question only if it were absolutely clear that no such need existed (which is not the case here).

35. The objection raised by the Italian Government relates more to the substance of the dispute than to the admissibility of the actual reference. Determining the type of central purchasing bodies that may be used by small municipalities — that is, whether these are public bodies or may include private-sector participation — is not a hypothetical issue but a real one, and in order to answer it the restrictions imposed by Italian legislation must be examined in the light of EU law.

36. The Commission states, first, that the provision applied by the ANAC, about which the Consiglio di Stato (Council of State) has doubts as regards its compatibility with EU law, *seems* to have been repealed, in which case any potential damage to Asmel s.c.a.r.l. that is addressed in the reference will have disappeared. The litigation may therefore in the interim have become devoid of purpose.

37. The repeal referred to by the Commission is the 2016 repeal relating to the text of Article 33(3)*bis* of the CCP, following its amendment in 2014. It is for the national court to verify the impact of that repeal in the proceedings being heard in the referring court but, so far as the point at issue here is concerned, it is not possible to speak of the reference for a preliminary ruling having become devoid of purpose, particularly if the case is to be decided under the legislation in force at the material time. (14)

38. With regard to the objection of inadmissibility raised by the Commission in connection with the third question referred, I shall address this point in my analysis of that question.

B. Preliminary observations

39. To summarise, the Consiglio di Stato (Council of State) wishes to know whether an *organisational model* which, in the case of small local authorities, restricts them (15) to two types of central purchasing bodies (associations and consortia of municipalities) is compatible with EU law.

40. The order for reference mentions the freedom to provide services (Article 56 TFEU) as being the principle that could be called into question by the Italian legislation, and also expressly cites the provisions in Directive 2004/18 regarding central purchasing bodies.

41. In cases concerning government procurement, the case-law of the Court of Justice looks to the fundamental freedoms in the TFEU where the relevant directive does not apply. In the present case, the directive which, *ratione temporis*, governed public procurement (and, therefore, the legal framework for central purchasing bodies under EU law) was Directive 2004/18.

42. Moreover, Article 3(34) of the CCP reproduces the definition of central purchasing body found in Article 1(10) of Directive 2004/18, thus demonstrating that this national legislation incorporates the directive into domestic law.

43. Consequently, I agree with the Commission that the response to the questions referred must be found within the framework provided by Directive 2004/18.

44. The fact that the order for reference does not specify the amount of any public contract being challenged in the main proceedings, which would allow us to know whether it reaches the applicable threshold in Directive 2004/18, is irrelevant. The description of the scale of the activities of Asmel s.c.a.r.l. provides sufficient grounds to assume that it exceeds the minimum laid down in Article 7 of Directive 2004/18, (16) and it is to that activity, in general, that the order for reference refers.

45. While I will give a single final answer to the three questions referred, I believe it is more appropriate to analyse them separately, in the order proposed by the Consiglio di Stato (Council of State).

C. First question referred

46. According to the referring court, Article 33(3)*bis* of the CCP 'restricts the autonomy of municipalities to entrust procurement to a central purchasing body to only two organisational models (an association of municipalities, if it already exists, or a consortium to be established between municipalities)'. Its question is whether that provision infringes EU law (with no further details). (17)

47. The degree of autonomy enjoyed by local authorities in each Member State, which is mentioned by the referring court, is a matter for the legislature in constitutional terms or the ordinary legislature of those States to determine; EU law does not lay down specific rules on this point.

48. I shall therefore focus on Directive 2004/18, which introduced 'central purchasing bodies' into EU law, reflecting a practice common in some Member States that was designed to enable public authorities to purchase goods or services through such a centralised system. (18)

49. While not applicable here, *ratione temporis*, Directive 2014/24/EU (19) has opted to retain this centralised purchasing technique in even clearer terms than the previous directive. (20)

50. According to the definition in Article 1(10) of Directive 2004/18, 'a "central purchasing body" is a contracting authority which … acquires supplies and/or services intended for contracting authorities, or … awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities'.

51. Under Article 11 of Directive 2004/18, Member States *may* stipulate that contracting authorities 'may purchase works, supplies and/or services from or through a central purchasing body'. (21)

52. Article 1(9) of Directive 2004/18 defines which entities are contracting authorities: 'the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law'.

53. In the structure of Directive 2004/18, there is nothing to prevent a body governed by public law from including private entities, under strict conditions. According to the second paragraph of Article 1(9) of Directive 2004/18, whether or not a body is governed by public law is determined by certain factors relating to its origin and legal personality (22) on the one hand, and its dependence on and supervision by the State, regional or local authorities or other bodies governed by public law, on the other. (23)

54. A private legal person could, therefore, in principle, be part of a public body that is classed as a contracting authority, provided that the body in question satisfies the above requirements. (24)

55. According to the order for reference, where small local authorities are concerned, in order to create local central purchasing bodies they must establish bodies composed exclusively of public persons, such as associations or consortia of municipalities. Therefore, these central purchasing bodies, which can be used by small local authorities in order to purchase works, goods and services, may not include participation by private legal persons.

56. While Directive 2004/18 stipulates that central purchasing bodies must be contracting authorities, it does require Member States to ensure that any body governed by public law (whether or not it includes participation by private persons) that is classed as a contracting authority must use these central purchasing bodies.

57. Directive 2004/18 gives Member States considerable discretion in this area. 'In order to take account of the different circumstances obtaining in Member States', recital 16 emphasises that 'Member States should be allowed to choose whether contracting authorities may use … central purchasing bodies, … as defined and regulated by this Directive'.

58. This recital is given legislative force in Article 11(1) of Directive 2004/18, which I alluded to earlier. Under this provision, Member States may *opt* to permit their contracting authorities (in this case, local authorities) to use central purchasing bodies.

59. In my opinion, that same option extends to choosing the regulation that best meets the public interest, given that Directive 2004/18 does not establish specific rules on the inclusion of private legal persons in central purchasing bodies. It will therefore suffice for national legislation not to distort the essential features of that body and to require those central bodies to comply with the provisions of Directive 2004/18 in their operations (final part of Article 11(2)).

60. The recent judgment in *Irgita* (25) provides some interpretation guidelines that can also be applied in this reference for a preliminary ruling. Although that judgment was given in a different context (26) (albeit one that still concerned public procurement) and concerned a provision of legislation (Article 12(1) of Directive 2014/24) that does not deal with public purchasing bodies, the judgment underlines that the provision in question does not deprive Member States 'of the freedom to give preference to one means of providing services, performing work or obtaining supplies to the detriment of others'. (27)

61. In *Irgita*, the Court of Justice:

- states that 'the freedom of the Member States as to the choice of means of providing services whereby the contracting authorities meet their own needs follows moreover from recital 5 of Directive 2014/24'; (28)
- looks to Directive 2014/23/EU (29) as a supporting argument, in so far as this highlights the freedom of Member States to decide how best to manage the performance of works or the provision of services. (30) In support of its position, it cites Article 2(1) of that directive. (31)

62. Based, therefore, on this freedom of choice available to Member States, in my view, Directive 2004/18 does not prevent a Member State from opting to require its small local authorities that wish to use their own central purchasing body to have recourse to cooperative structures, such as associations and consortia of municipalities, that are exclusively public in nature.

63. I reiterate that Member States are free to establish centralised public procurement models or techniques (which may operate at national, regional, provincial or local level), depending on their own interests and on the particular circumstances at any given time. (32) As was later to be confirmed by the final part of Article 37(1) of Directive 2014/24, they may also 'provide that certain procurements are to be made by having recourse to central purchasing bodies or to one or more specific central purchasing bodies'.

64. Associations and consortia of municipalities are *organisational models* available to local authorities which, like the authorities themselves, are public law bodies. There is therefore nothing unusual in the fact that the national law that governs those *models*, which were established to enable joint management of services or the joint exercise of public functions, does not provide that private individuals or undertakings may participate in them.

65. The national legislature may choose either a decentralised local public procurement system (in which each municipality purchases its goods, works or services separately) or a centralised or aggregated system (that is, a model involving joint procurement run by several municipalities or by central purchasing bodies used by the municipalities). (33)

66. With regard to this latter system, Directive 2004/18, I repeat, gives the national legislature freedom to design the system. While not expressly stated in that directive (although it is stated in Directive 2014/24), that freedom includes power to make the system compulsory for some contracting authorities.

67. There would be nothing to prevent the involvement of private persons in the central purchasing bodies. But I cannot see why it would be contrary to Directive 2004/18, or any other rule of EU law, for the public organisational model followed by the associations and consortia of municipalities also to apply to the central purchasing bodies established by those associations or consortia to enable the municipalities in question to purchase work, services and supplies.

68. Nevertheless, it is true that the freedom of the national legislature is not unlimited — as was also noted, in a similar context, in *Irgita* — and that its chosen option must not contravene the rules and principles in the FEU Treaty or the freedoms enshrined in that treaty. (34)

69. On this point, the Consiglio di Stato (Council of State) restricts itself to stating that, as 'the central purchasing bodies are undertakings which offer contracting authorities the service of purchasing goods and supplies', (35) the restriction imposed by the Italian legislature could be in breach of the freedom to provide services recognised by Article 57 TFEU.

70. The fact that a central purchasing body may be classed as an economic operator in its relations with third parties (36) is not sufficient on its own to determine the application of Articles 56 and 57 TFEU when that concept cannot be separated from that of a contracting authority and, under Directive 2004/18, the latter concept covers only 'the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law'.

71. Consequently, I agree with the Italian Government when it argues that the status of a central purchasing body that is responsible, on a permanent basis, for performing the function of a contracting authority on behalf of public authorities, can be reserved by the national legislature to persons governed by public law. (37)

72. Under Directive 2004/18, those central purchasing bodies did not compete in a non-existent *market for central purchasing bodies' services* with private legal persons who provided the same services to public bodies. The fact that private undertakings or entities may be able to supply the contracting authorities with purely ancillary activities in support of their procurement activities (in the form of consultancy services, for example), in return for payment, is a separate matter.

73. The situation may have changed following Directive 2014/24, Article 37(4) of which permits the award of a 'public service contract for the provision of centralised purchasing activities to a central purchasing body'.

74. The fact that such an award may be made 'without applying the procedures provided for in this Directive', as the provision expressly states, could be due to the fact that the award must be made to central purchasing bodies governed by public law (which may include some limited private participation under public oversight). Otherwise — that is to say, if the award could be made to a private legal person — it would be hard to see how such a person could be awarded the contract without first having been made subject to the procedures laid down in Directive 2014/24.

75. Based on these premisses, in my view Articles 56 and 57 TFEU do not apply directly to the present case. Quite apart from the fact that the situation in these proceedings is confined in all respects to Italy, and there is no indication of any cross-border links, (38) the key point is that the interpretation of the EU law that must be deemed to apply (Directive 2004/18) does not require the central purchasing bodies established by small local authorities necessarily to include private legal persons.

76. I do not consider that the Italian legislation, when assessed from the perspective of competition law (39) in connection with public procurement, is in breach of that law. The competition which EU law seeks to protect in this field is, fundamentally, competition between economic operators who provide works, goods or services to contracting authorities. Provided that those authorities (in this case, the central purchasing bodies established by the associations and consortia of municipalities) comply with the procedures in Directive 2004/18 when they obtain those supplies, competition between those economic operators is preserved.

77. In other words, the requirement for small local authorities to use their own central purchasing bodies (through associations or consortia of municipalities) does not mean that the competitive market for the supply of goods, works or services to those public authorities by the economic operators concerned becomes closed.

D. Second question referred

78. The Consiglio di Stato (Council of State) seeks to ascertain whether a provision of national legislation which 'excludes the possibility of creating entities governed by private law, such as a consortium under ordinary law whose members include private entities' infringes EU law ('in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts').

79. I should begin by pointing out that, in spite of its actual wording, the second question referred is not asking whether private entities must, in general, be permitted to participate in consortia of municipalities. Viewed in context, the referring court's question is instead asking whether the prohibition on private-sector participation in the central purchasing bodies established by those consortia is compatible with EU law.

80. When the question is interpreted in this way, I believe that the answer to it can be inferred from the answer to the first question referred, and therefore no further comment would be required.

81. The Commission, however, maintains (40) that the decision by the ANAC that gave rise to the proceedings goes further than it should in that it imposes an absolute prohibition on Asmel s.c.a.r.l. acting as an 'aggregator' under any circumstances and rules that the company cannot be classed as a contracting authority. (41)

82. According to the Commission, a provision of national legislation which, as in the present case, excludes entities that have a particular legal form and involve the participation of private legal persons is compatible with EU law provided that, for functions *other* (42) than those that are the subject of that provision, those entities can be classed as bodies governed by public law within the meaning of Article 1(9) of Directive 2004/18.

83. At the hearing, the Commission qualified its position: having first confirmed that Article 11(1) of Directive 2004/18 is compatible with a provision of national legislation such as that at issue, which restricts the organisational models for central purchasing bodies available to smaller local authorities to two, the Commission stated that its objection related solely to other methods of awarding public contracts that did not involve the use of such central bodies.

84. I do not believe that the Court of Justice needs to give a ruling on this observation by the Commission, given that the referring court's question relates only to the *specific* functions of associations and consortia of municipalities in establishing permanent central purchasing bodies, and not to any *other* functions. If local authorities have the power to carry out their own procurement, under non-centralised purchasing arrangements, that is something that goes beyond the scope of the reference for a preliminary ruling.

E. Third question referred

85. The Consiglio di Stato (Council of State) starts from the premiss that the provision of national legislation at issue should be interpreted 'in the sense of allowing consortia of municipalities that are central purchasing bodies to operate in a territory corresponding to that of the participating municipalities as a whole, and so, at most, to the provincial territory'.

86. Based on that interpretation, the referring court seeks to ascertain whether that provision of national law infringes the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts.

87. Both the Italian Government and the Commission express certain reservations about the way in which the question is posed:

- The Italian Government states that the reasons invoked by the referring court are unclear, which makes it impossible to take a position on this question. In its opinion, the court puts forward contradictory arguments in that it states, on the one hand, (43) that the provision would introduce 'exclusive operating zones for central purchasing bodies operating on behalf of small municipalities' (which, according to the Italian Government, would seem to imply that it gives consortia of municipalities an advantage); and, on the other, it asserts that the territorial restriction puts the central purchasing bodies at a disadvantage.

- In the Commission's view, the question is hypothetical, because the geographical restriction would benefit, rather than disadvantage, a central purchasing body such as Asmel s.c.a.r.l., in that it would extend (rather than reduce) its area of activity, which differs from that of the associations and consortia of municipalities.

88. In my opinion, the question is not hypothetical. The issue it raises, which goes beyond the literal wording in the order for reference, is whether the territorial restriction on the activities of certain central purchasing bodies, namely those formed by the associations and consortia of municipalities, infringes EU law (that is, the principles referred to above).

89. It is true that the full significance of this question would be in relation to a decision in a possible future dispute concerning the establishment of a (public) consortium of municipalities as a central purchasing body; but that is not the matter directly at issue in the main proceedings. Given that those proceedings concern only the decision by the ANAC on the ability of Asmel s.c.a.r.l. to operate as a central purchasing body on behalf of any municipality, with no geographical restrictions on its operations, the objections raised by the Commission carry some weight.

90. However, once again, the presumption must prevail that the question referred, as posed by the referring court, is relevant. If that court believes that a response is needed from the Court of Justice on a point of law which, in its opinion, requires the interpretation of a provision of EU law, the Court of Justice must provide that response, unless it is patently unnecessary to the main proceedings, which is not the case here.

91. With regard to the substance of the question, I cannot find any provision in Directive 2004/18 that imposes mandatory rules on Member States with regard to defining the territorial scope of the central purchasing bodies established by associations and consortia of municipalities.

92. Moreover, it seems to me to be consistent with the design of these models for cooperation between local authorities that the central purchasing bodies established by them should be restricted to the territory of the local authorities as a whole. From the perspective of the municipalities that are the recipients of the services provided by the central purchasing body, the effects of the relationship between the central purchasing body and those municipalities can only apply within the territory of those municipalities.

93. Once again, the potential difficulties in endorsing those models could arise from the requirement to respect the fundament freedoms enshrined in the treaties. However, for the reasons I set out in connection with the first question, I believe that neither Article 56 TFEU nor the rules of competition law are infringed. In any event, it is not clear from the wording of the decision to refer why any of those freedoms could be adversely affected.

94. I will add that, as regards the people who supply work, goods and services to the municipalities through the central purchasing bodies established by them, there is nothing to indicate that those works, services or supplies must come from undertakings based in the territory of the municipalities in question. In other words, there is no reason to think that the market is closed to undertakings from outside that territory, whether those undertakings are Italian or from any other Member State.

V. Conclusion

95. In the light of the above, I recommend that the Court of Justice should reply to the Consiglio di Stato (Council of State, Italy) in the following terms:

> EU law, in particular, Article 11 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, does not preclude a provision of national legislation under which, according to the interpretation of the referring court, small local authorities are required to purchase works, goods and services through central purchasing bodies established in accordance with two specific organisational models, namely an association of municipalities or a consortium of municipalities, whose sphere of operation is restricted to the territory of the municipalities in question as a whole.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 Legislative Decree No 267 of 18 August 2000 (‘the TUEL’).

---

4 Legislative Decree No 163 of 12 April 2006 (‘the CCP’).

---

5 Inserted by Article 23(4) of Decree-Law No 201 of 6 December 2011, approved by Law No 214 of 22 December 2011.

---

6 Article 9(4) of Decree-Law No 66 of 24 April 2014, approved by Law No 89 of 23 June 2014. Article 3(3)*bis* of the CCP was subsequently repealed by Article 217 of Legislative Decree No 50 of 18 April 2016.

---

7 The Asmez Consortium was established in Naples on 25 March 1994 by private undertakings. It came into operation when Selene service s.r.l., which has an agreement with the Associazione Nazionale Comuni Italiani (National Association of Italian Municipalities), joined its membership. Municipalities in Basilicata and Calabria subsequently became members.

---

8 The Asmel association was formed on 26 May 2010 by Asmenet Campania and Asmenet Calabria, both of which are limited liability consortium companies, and by the Asmez Consortium and the Associazione Nazionale Piccoli Comuni Italiani (National Association of Small Italian Municipalities).

---

9 Specifically, according to the order for reference, it organised an invitation to tender for framework agreements to provide the service for collecting and overseeing municipal property taxes and enforcing tax debts, as well as 152 e-tender procedures of various kinds for municipalities connected with Asmel s.c.a.r.l.

---

10 Payment for these services was set at 1.5% of the contract price, payable by the successful tenderer for each contract concluded via the platform.

---

11 Originally, under the first version of this provision, municipalities with a population of less than 5 000 inhabitants; then, under the 2014 wording, all municipalities that were not provincial capitals.

---

12 It should be added, however, that, as noted by the Italian Government, following the amendment introduced in 2014, the provision at issue permits that 'alternatively, those municipalities may carry out their own purchases by means of the electronic purchasing tools managed by Consip SpA or by another reference aggregator'. The ANAC's decision of 30 April 2015 referred to these two possibilities, stressing that small municipalities could also use the central purchasing body established at a national level for public procurement (Consip) or other 'reference aggregators' including, among others, the regional central purchasing bodies.

---

13 According to the definition of 'contracting authority' in Article 3(25) of the CCP, consortia that are classed as contracting authorities can be formed only between bodies governed by public law.

---

14 At the hearing, the Italian Government stated that the new regulation of central purchasing bodies (Article 37(4) of Legislative Decree No 50 of 18 April 2016), which was to replace the repealed Article 33(3)*bis* of the CCP, would not come into force until 31 December 2020, pursuant to Article 1 of Law No 55 of 2019. In the light of this information, the Commission acknowledged that the reply to the reference for a preliminary ruling would be helpful in deciding the case, in spite of the 2016 amendments to the legislation.

---

15 This assertion provides the basis for the order for reference. See, however, the clarification provided by the Italian Government concerning the scope for small municipalities also to use national or regional central purchasing bodies (see footnote 12).

---

16 Paragraph 1.4 of the order for reference, referred to by the Commission in paragraph 34 of its observations, notes that Asmel s.c.a.r.l. conducted at least 152 procurement procedures on behalf of various local authorities (see footnote 9 of this Opinion).

---

17 On other options available to municipalities, see footnote 12.

---

18 Recital 15 of Directive 2004/18.

---

19 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65).

---

20 Recital 59 of Directive 2014/24: 'There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management'.

---

21 According to the English version of the article, 'contracting authorities may purchase works, supplies and/or services *from* or *through* a central purchasing body' (no italics in the original). The use of that dual phrase (*from or through*) would seem to anticipate the dual classification and functions of central purchasing bodies that are set out more clearly in the subsequent Directive 2014/24: they may act either as *wholesalers*, which buy, stock and resell, or as *intermediaries* for the contracting authorities, for which they award contracts, operate dynamic purchasing systems or conclude framework agreements to be used by contracting authorities (see recital 69 of Directive 2014/24).

---

22 They must be bodies established for the specific purpose of meeting needs in the general interest, may not have an industrial or commercial character, and must have legal personality.

---

23 They must be bodies ‘financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law’.

---

24 With regard to Asmel s.c.a.r.l, the decision not to recognise it as a body governed by public law was based on the way it was financed and the fact that it included businesses and other private entities over the management or supervision of which the State, regional or local authorities or other bodies governed by public law cannot exercise the oversight required by the legislation. It will be for the referring court to determine whether or not this assessment by the court of first instance is correct.

---

25 Judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829).

---

26 That case concerned whether national restrictions went beyond ‘… the conditions which a contracting authority must observe when it wishes to conclude an in-house transaction’.

---

27 *Irgita*, paragraph 44.

---

28 Ibid. paragraph 45. While the references are to Directive 2014/24, which, *ratione temporis*, does not apply to this case, that same paragraph 45 notes that recital 5 ‘[reflects] the case-law of the Court prior to that directive’. According to that recital, ‘nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive’.

---

29 Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

---

30 *Irgita*, paragraph 47.

---

31 ‘This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services. Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators.’

---

32 In reproducing part of the ANAC’s decision of 30 April 2015, the Italian Government notes that the disputed provision was introduced to guard against the risk of infiltration by the mafias (Article 13 of Law 136/2010, ‘extraordinary plan against the mafias’). Under the subsequent ‘Salva-Italia’ Decree (Article 23(4) of Decree Law No 201 of 6 December 2011, approved by Law No 214 of 22 December 2011), centralisation of procurement by the smallest municipalities was made compulsory and became a means of controlling expenditure, with the introduction of the new version of Article 33(3)*bis* of the CCP.

---

33 The question of the limits which the Constitution of each State may impose on the legislative power as regards the local autonomy of regional or local authorities (that is, their capacity for self-organisation) is

outside the remit of these proceedings.

---

34 *Irgita*, paragraph 48: ‘The freedom of the Member States as to the choice of the management method that they judge to be most appropriate for the performance of works or the provision of services cannot however be unlimited. That freedom must, on the contrary, be exercised with due regard to the fundamental rules of the FEU Treaty, in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency’.

---

35 Paragraph 10.3 of the order for reference.

---

36 As is the case with Asmel s.c.a.r.l., whose clients pay for its services.

---

37 Observations of the Italian Government, paragraph 70 et seq.

---

38 Judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 47), citing previous case-law: ‘the provisions of the FEU Treaty on … the freedom to provide services … do not apply to a situation which is confined in all respects within a single Member State’.

---

39 From that perspective, the risk that competition will be distorted may be prompted more by the aggregation and centralisation of purchases which, as noted by recital 59 of Directive 2014/24, could give rise to an ‘excessive concentration of purchasing power and collusion’.

---

40 Paragraphs 60 to 63 of its written observations.

---

41 The Commission recognises that a decision on whether or not Asmel s.c.a.r.l. is a body governed by public law is purely a matter for the national court and that, in reaching its decision, the court would have to assess, among other factors, whether public authorities exercise a dominant influence over that company. Asmel s.c.a.r.l. agrees with this starting point.

---

42 Italicised in the original.

---

43 Paragraph 11.3 of the order for reference.

JUDGMENT OF THE COURT (Fourth Chamber)

28 May 2020 (*)

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 2(1)(5) – Article 12(4) – Article 18(1) – Concept of 'contract for pecuniary interest' – Contract between two contracting authorities pursuing a common objective in the public interest – Transfer of software for the coordination of fire service operations – No financial consideration – Link with a cooperation agreement under which supplementary modules of that software are made mutually available free of charge – Principle of equal treatment – Prohibition on placing a private undertaking in a position of advantage vis-à-vis its competitors)

In Case C-796/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), made by decision of 28 November 2018, received at the Court on 19 December 2018, in the proceedings

Informatikgesellschaft für Software-Entwicklung (ISE) mbH

v

Stadt Köln,

intervener:

Land Berlin,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fourth Chamber, S. Rodin, D. Šváby (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 6 November 2019,

after considering the observations submitted on behalf of:

– Informatikgesellschaft für Software-Entwicklung (ISE) mbH, by Bernhard Stolz, Rechtsanwalt,

– Stadt Köln, by K. van de Sande and U. Jasper, Rechtsanwältinnen,

– the Austrian Government, by J. Schmoll and by G. Hesse and M. Fruhmann, acting as Agents,

– the European Commission, by L. Haasbeek, M. Noll-Ehlers and P. Ondrůšek, acting as agents,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(1)(5) and Article 12(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Informatikgesellschaft für Software-Entwicklung (ISE) mbH and Stadt Köln (City of Cologne, Germany) concerning two contracts concluded between the City of Cologne and Land Berlin (*Land* of Berlin, Germany) which provide, respectively, for the transfer of fire service operations management software to the City of Cologne free of charge and for cooperation with a view to the development of that software.

Legal context

EU law

3 Recitals 31 and 33 of Directive 2014/24 state:

‘(31) There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice … is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice … The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.

…

(33) Contracting authorities should be able to choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form. Such cooperation might cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities need not necessarily be identical; they might also be complementary.

Contracts for the joint provision of public services should not be subject to the application of the rules set out in this Directive provided that they are concluded exclusively between contracting authorities, that the implementation of that cooperation is governed solely by considerations relating to the public interest and that no private service provider is placed in a position of advantage vis-à-vis its competitors.

In order to fulfil those conditions, the cooperation should be based on a cooperative concept. Such cooperation does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards the cooperative performance of the public service in question. In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest.’

4 Article 1 of that directive, entitled ‘Subject matter and scope’, provides in paragraph 1:

‘This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.’

5 Article 2(1)(5) of the directive defines ‘public contracts’ as ‘contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services’.

6 Article 12 of Directive 2014/24, entitled ‘Public contracts between entities within the public sector’, provides in paragraph 4:

‘A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation’.

7 Article 18 of the directive, which sets out the ‘principles of procurement’, provides in paragraph 1:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

German law

8 Paragraph 103(1) of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition) of 26 June 2013 (BGBl. 2013 I, p. 1750), in the version applicable to the dispute in the main proceedings (‘the Law against restrictions on competition’), provides that public contracts are contracts for pecuniary interest concluded between contracting authorities and undertakings having as their object the supply of products, the execution of works or the provision of services.

9 Under the first sentence of Paragraph 106(1) of that Law, recourse may be had to the bodies responsible for reviewing the award of public contracts in the case of the award of public contracts whose value, exclusive of VAT, is estimated to be not less than the thresholds laid down.

10 Paragraph 108(6) of that Law provides that recourse may not be had to the bodies responsible for reviewing the award of public contracts in the case of contracts concluded exclusively between two or more contracting authorities where:

‘1. the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common,

2. the implementation of the cooperation referred to in paragraph 1 is governed solely by considerations relating to the public interest; and

3. the contracting authorities perform on the market less than 20% of the activities concerned by the cooperation referred to in paragraph 1.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 The *Land* of Berlin, which has the largest professional fire brigade in Germany, uses the ‘IGNIS Plus’ software which it acquired, under a contract, from Sopra Steria Consulting GmbH for the purpose of managing operations carried out by its fire services. The contract allows it, inter alia, to transfer that software to other safety authorities free of charge.

12 In Germany, under the ‘Kiel’ decisions of 1979, which established the principles for the exchange of software between public administrative authorities, the transfer of software by one public body to another free of charge is not regarded as a procurement procedure for which an invitation to tender must be issued. According to the principle of general reciprocity, software developments in respect of which commercialisation by public authorities is not permitted may be transferred between administrative authorities free of charge, since they are not in competition with one another.

13 On 10 September 2017, pursuant to those decisions, the City of Cologne and the *Land* of Berlin entered into a contract for the permanent transfer of the ‘IGNIS Plus’ software free of charge (‘the software transfer contract’), which stipulates inter alia:

‘1. Subject matter of the contract

The following provisions apply to the permanent transfer and use of the customised software “IGNIS Plus”. The software provider holds the rights over this software.

The customised software “IGNIS Plus” is the software provider’s operations management software for emergency calls, scheduling and operational tracking for activities of the fire service in firefighting, technical assistance, emergency rescue and disaster control. …

2. Nature and scope of performance

2.1. The software provider shall provide the software recipient with the customised software “IGNIS Plus” for the purpose of the agreements in the cooperation agreement.

…

4. Remuneration for transfer

The customised software “IGNIS Plus” is to be provided for use as operations management software free of charge. …’

14 On the same day, the City of Cologne and the *Land* of Berlin also entered into a cooperation agreement concerning that software (‘the cooperation agreement’), with a view, inter alia, to adapting the software to the requirements of the partner and making it available to it by adding new technical functionalities in the form of ‘supplementary add-on technical modules’ to be provided to the cooperation partners free of charge.

15 The cooperation agreement provides in particular:

‘Article 1 – Purpose of the willingness to cooperate

… The partners have decided to put in place an equal partnership entailing, if necessary, a readiness to compromise in order to adapt the software to each other’s needs and to make it available to each other on a cooperative basis. …

Article 2 – Definition of the objective of the cooperation

The objective pursued by the cooperation partners is to implement the “IGNIS Plus” operations management software as a computer-aided dispatch system in the control centres of the fire service. The software system can be extended by further specialised functionalities in the form of modules and transferred to the other cooperation partners for them to use on a cost-neutral basis. …

…

Article 5 – Structure of the cooperation

… The base software shall be transferred on a cost-neutral basis. Supplementary add-on technical modules shall be provided to the cooperation partners on a cost-neutral basis.

The adaptation of the base software and the modules to individual processes must be independently commissioned and financed.

… The cooperation agreement is binding only together with the [software transfer contract] as a joint document.'

16 ISE, which develops and sells operations management software for safety authorities, submitted an application for review to the Vergabekammer Rheinland (Rhineland Public Procurement Board, Germany) with the aim of having the software transfer contract and the cooperation agreement declared to be ineffective on grounds of failure to comply with public procurement rules. According to ISE, the participation of the City of Cologne in the further development of the 'IGNIS Plus' software provided free of charge constitutes a sufficient economic advantage for the *Land* of Berlin, such that those contracts are for pecuniary interest.

17 By decision of 20 March 2018, the Vergabekammer Rheinland (Rhineland Public Procurement Board) dismissed the application for review as inadmissible on the ground that the contracts did not constitute public contracts because they are not for pecuniary interest. In particular, the cooperation at issue lacked the synallagmatic connection between performance and consideration.

18 ISE lodged an appeal against that decision before the referring court, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany). It reaffirms that the cooperation agreement is a contract for pecuniary interest since the *Land* of Berlin sought to acquire an economic advantage by providing the software at issue in the main proceedings, the City of Cologne being obliged to make supplementary add-on software modules developed by it available to the *Land* of Berlin. ISE also complains that the Vergabekammer Rheinland (Rhineland Public Procurement Board) wrongly disregarded the fact that the procurement of the base software entailed the commissioning of the producer with follow-up contracts, as it alone would be able to adapt, support and maintain the software.

19 The City of Cologne contends that the decision of the Vergabekammer Rheinland (Rhineland Public Procurement Board) should be upheld and, furthermore, asserts that, were the cooperation agreement to be regarded as a contact for pecuniary interest, it would constitute cooperation between contracting authorities and therefore would not come within the scope of public procurement law under Paragraph 108(6) of the Law against restrictions on competition.

20 Since it has doubts as the validity of the decision of the Vergabekammer Rheinland (Rhineland Public Procurement Board), the referring court considers it necessary to refer questions to the Court concerning the interpretation of Directive 2014/24.

21 The first question referred thus seeks to ascertain whether a 'public contract' within the meaning of Article 2(1)(5) of Directive 2014/24 is different from a 'contract' under Article 12(4) of that directive. If so, a contract which is not for pecuniary interest could, without constituting a public contract, be categorised as a 'contract' within the meaning of Article 12(4) of the directive and therefore fall outside the scope of the public procurement rules, provided that the conditions set out in points (a) to (c) of that provision are met.

22 Furthermore, in its previous case-law the referring court has adopted a broad understanding of the concept of a contract for pecuniary interest which characterises public contracts within the meaning of Paragraph 103(1) of the Law against restrictions on competition, regarding any legal relationship of reciprocal performance as being sufficient. Consequently, although the provision of the 'IGNIS Plus' software leads to cooperation that gives rise to entitlements only if one of the cooperation partners

wishes to extend the functionalities of that software, the offer of cooperation at issue is for pecuniary interest, despite the uncertainty surrounding further developments of the software in the future.

23 The referring court is, however, uncertain whether, having regard to the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985), it is necessary to adopt an understanding of the terms 'public contract' and 'contract for pecuniary interest' in Article 2(1)(5) of Directive 2014/24 which is narrower than that which it has previously adopted and which does not cover situations such as the one at issue in the main proceedings.

24 Lastly, the contracts awarded by the City of Cologne for the adaptations and maintenance of the 'IGNIS Plus' software should be regarded as being for pecuniary interest. They are independent contractual agreements with third parties that are severable from the provision of the software.

25 The second question concerns the subject matter of the cooperation between the contracting authorities under Article 12(4) of Directive 2014/24. After comparing the German, English and French versions of the directive and having regard to the beginning of recital 33 of that directive, the referring court considers that ancillary activities can be the subject matter of that cooperation without it being necessary for the cooperation to have taken place in the provision of the public services themselves.

26 The third question is justified by the fact that, according to the Court's case-law on Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts(OJ 2004 L 134, p. 114), the prohibition on placing an economic operator in a position of advantage was interpreted as meaning that horizontal cooperation could be exempt from public procurement law only if no private undertaking was placed in a position of advantage vis-à-vis its competitors. Article 12(4) of Directive 2014/24 does not provide for any such prohibition, even though it is mentioned in recital 33 of the directive.

27 Against this background, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the provision of software by one public administrative authority to another public administrative authority, which is agreed in writing and linked to a cooperation agreement, constitute a "public contract" within the meaning of Article 2(1)(5) of Directive [2014/24] or a contract within the meaning of Article 12(4) of that directive which – at least initially, subject to Article 12(4)(a) to (c) thereof – comes within the scope of the directive if, although the software recipient does not have to pay a price or reimbursement costs for the software, the cooperation agreement connected with the provision of the software provides that each cooperation partner – and therefore also the software recipient – is required to make available to the other partner, free of charge, any of its own further developments of the software that it may create – but is not obliged to create – in the future?

(2) [If Question 1 is answered in the affirmative], [p]ursuant to Article 12(4)(a) of Directive 2014/24, does the subject matter of the cooperation of the participating contracting authorities have to be the actual public services that are to be provided to citizens and must be provided jointly, or is it sufficient if the cooperation relates to activities that in some way serve the public services that are to be provided in the same way but do not necessarily have to be provided jointly?

(3) Does a so-called – unwritten – prohibition on placing a party in a position of advantage apply in the context of Article 12(4) of Directive 2014/24 and, if so, what is its scope?'

The questions referred for a preliminary ruling

The first question

28 By its first question, the referring court asks, in essence, whether Directive 2014/24 must be interpreted as meaning that an agreement which (i) provides that one contracting authority is to transfer software to another contracting authority free of charge and (ii) is linked to a cooperation agreement under which each party to that agreement is required to make available to the other party, free of charge, any further developments of the software that it may create constitutes a ‘public contract’ within the meaning of Article 2(1)(5) of the directive or a ‘contract’ within the meaning of Article 12(4) of the directive.

29 It should be noted as a preliminary point that, by referring only to ‘contract’ and not to ‘public contract’, the wording of Article 12(4) of Directive 2014/24 might suggest that these are two distinct concepts. However, in actual fact no distinction should be drawn.

30 First, Article 1 of that directive, which defines its ‘subject matter and scope’, provides in paragraph 1 that ‘this Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4 [of that directive]’. It follows that the directive regulates only public contracts and design contests, to the exclusion of contracts which do not constitute a public contract.

31 Second, Article 2(1) of Directive 2014/24, which defines the main concepts governing the application of the directive, does not make any mention of ‘contract’, but only of ‘public contracts’, which suggests that the term ‘contract’ is merely an abbreviated version of the expression ‘public contract’.

32 Third, that interpretation is supported by the title of Article 12 of Directive 2014/24, which refers to ‘public contracts between entities within the public sector’. Consequently, the term ‘contract’ in Article 12(4) of that directive must be understood as referring to the concept of ‘public contract’ within the meaning of Article 2(1)(5) of that directive.

33 Fourth, that interpretation is also supported by the *travaux préparatoires* relating to Article 12(4) of Directive 2014/24. As the European Commission pointed out in its written observations, whilst its Proposal for a Directive of the European Parliament and of the Council on public procurement of 20 December 2011 (COM(2011) 896 final) included an Article 11 entitled ‘Relations between public authorities’, paragraph 4 of which provided that ‘an agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive where the following cumulative conditions are fulfilled’, the EU legislature did not wish to adopt that proposal. It follows that the effect of Article 12(4) of Directive 2014/24 cannot be to preclude the characterisation of cooperation between contracting authorities as a public contract. Its effect is confined to excluding such a contract from the procurement rules normally applicable.

34 Fifth, this interpretation is confirmed by an analysis of the context of Article 12 of Directive 2014/24. That article is included in Section 3, entitled ‘Exclusions’, of Chapter I of the directive. It would be inconsistent for the EU legislature to have sought to exclude contracts which do not constitute public contracts from the rules on public procurement. By definition, the exclusion Articles do not apply to such contracts.

35 It follows, first, that exclusion from the public procurement rules presupposes that the contract in question is a public contract within the meaning of Article 2(1)(5) of Directive 2014/24 and, second, that a public contract satisfying the conditions laid down in Article 12(4)(a) to (c) of the directive retains its legal nature as a ‘public contract’ even if those rules are not applicable to it.

36 Consequently, the concept of ‘contract’ in Article 12(4) of Directive 2014/24 is congruent with the concept of ‘public contract’ defined in Article 2(1)(5) of the directive.

37 In these circumstances, it must be determined whether an agreement which (i) provides that one contracting authority is to transfer software to another contracting authority free of charge and (ii) is linked to a cooperation agreement under which each party to that agreement is required to make available to the other party, free of charge, any further developments of the software that it may create constitutes a ‘public contract’ within the meaning of Article 2(1)(5) of Directive 2014/24.

38 It should be noted as a preliminary point that in order to determine whether a multi-stage operation should be categorised as a ‘public contract’ within the meaning of that provision, the operation must be examined as a whole, taking account of its purpose (see, by analogy, judgments of 10 November 2005, *Commission* v *Austria*, C-29/04, EU:C:2005:670, paragraph 41, and of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paragraph 37).

39 Under that provision, ‘public contracts’ are defined as contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.

40 Consequently, to be categorised as a ‘public contract’ within the meaning of that provision, a contract must have been concluded for pecuniary interest, meaning that the contracting authority which has concluded a public contract receives under that contract, in return for consideration, a service which must be of direct economic benefit to that contracting authority. In addition, the contract must have a synallagmatic nature, which is an essential element of a public contract, (see, by analogy, judgment of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paragraph 43).

41 In this case, the pecuniary nature of the software transfer contract and of the cooperation agreement appears to be conditional on the synallagmatic nature of the cooperation thereby established.

42 Since the third paragraph of Article 5 of the cooperation agreement provides that the contract is binding ‘only together with the [software transfer contract] as a single document’, account should be taken, in assessing the synallagmatic nature of the contractual framework formed by those two contracts, not only of their terms but also of the regulatory environment in which they were concluded.

43 On this latter point, it appears that, as the City of Cologne stated both in its written observations and at the hearing, the German rules on fire protection, technical assistance and disaster control and the rules on the emergency services, emergency response and ambulance transport by undertakings require the German local authorities responsible for those tasks to use the operations management system as optimally as possible and to adapt it to requirements on an ongoing basis.

44 It is on that basis that the Court will examine the terms of the contractual framework at issue.

45 In this regard, both the terms of the software transfer contract and the terms of the cooperation agreement make the existence of consideration likely. Although Article 4 of the software transfer contract states that the provision of the software is ‘free of charge’, it is nevertheless clear from Article 1 of the contract that it is ‘permanent’. A software transfer contract like that at issue in the main proceedings, which is intended to be for the long term, will inevitably be subject to changes in order to take account of adaptations required by new rules, developments in the organisation of the emergency services or technological progress, as was asserted by ISE in particular at the hearing. Furthermore, according to statements made by the City of Cologne at the hearing, significant modifications are made to the software and supplementary modules are added three or four times each year.

46 In addition, as is stipulated in Article 2.1 of the software transfer contract, the ‘IGNIS Plus’ software is provided ‘for the purpose of the agreements in the cooperation agreement’, which suggests that the *Land* of Berlin introduced a form of conditionality. Consequently, although free of charge, the provision of the software does not appear to be disinterested.

47 Furthermore, according to Article 1 of the cooperation agreement, its purpose is to create ‘an equal partnership entailing, if necessary, a readiness to compromise in order to adapt the software to each other’s needs and to make it available to each other’. The wording also suggests that the parties undertake to develop the initial version of the software at issue in the main proceedings where the optimal use of the operations management system and the ongoing adaptation of that system to requirements call for such developments.

48 Moreover, Article 5 of that agreement stipulates that ‘the adaptation of the base software and the modules to individual processes must be independently commissioned and financed’, which reflects the *Land* of Berlin’s financial interest in the provision of the software free of charge. In addition, in

response to a question asked by the Court at the hearing, the City of Cologne acknowledged that such a contract should allow each partner to make savings.

49 Lastly, in the event that one of the contracting parties to the contractual framework at issue in the main proceedings made adaptations to the software at issue in the main proceedings and did not pass them on to the other party, it would seem that the other party could terminate the cooperation agreement and, if necessary, the software transfer contract, or even bring legal proceedings to claim the benefit of the adaptation which had been made. It thus appears that the obligations arising from the public contract at issue in the main proceedings are legally binding and that their execution is legally enforceable (judgment of 25 March 2010, *Helmut Müller*, C-451/08, EU:C:2010:168, paragraph 62).

50 Thus, subject to verification by the referring court, it is clear from the above considerations that the software transfer contract and the cooperation agreement have a synallagmatic nature in so far as the provision of the 'IGNIS Plus' software free of charge gives rise to a reciprocal obligation to develop that software where the optimal use of the operations management system and the ongoing adaptation of that system to requirements call for such developments, which results in the financing of supplementary modules which must subsequently be provided to the other partner free of charge.

51 In those circumstances, it seems, as the Advocate General noted in essence in points 59 and 62 of his Opinion, that it is inevitable in practice that the 'IGNIS Plus' software will eventually have to be updated, with the result that the consideration is not dependent on a purely potestative condition.

52 Since the adaptation of the software at issue in the main proceedings by one of the partners presents a clear financial interest for the other partner, if the referring court were to conclude that the contractual framework formed by the software transfer contract and the cooperation agreement were synallagmatic in nature, those contracts would have to be regarded as having been concluded for pecuniary interest, with the result that the conditions for categorisation as a public contract, as recalled in paragraph 40 of this judgment, would be satisfied.

53 The answer to the first question is therefore that Directive 2014/24 must be interpreted as meaning that an agreement which (i) provides that one contracting authority is to transfer software to another contracting authority free of charge and (ii) is linked to a cooperation agreement under which each party to that agreement is required to make available to the other party, free of charge, any further developments of the software that it may create constitutes a 'public contract' within the meaning of Article 2(1)(5) of that directive where it is clear from the terms of those agreements and from the applicable national rules that the software will, in principle, be subject to adaptations.

The second question

54 By its second question, the referring court asks, in essence, whether Article 12(4) of Directive 2014/24 must be interpreted as meaning that cooperation between contracting authorities may fall outside the scope of the public procurement rules laid down in the directive where that cooperation relates to activities ancillary to the public services that are to be provided, even individually, by each cooperation partner, provided that the ancillary activities contribute to the effective performance of those public services.

55 It should be determined, first, whether Article 12(4)(a) of Directive 2014/24 authorises contracting authorities to establish cooperation relating to public service tasks which they do not provide jointly.

56 Under that provision, a public contract concluded exclusively between two or more contracting authorities falls outside the scope of the directive where it establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common.

57 As the Advocate General noted in essence in point 71 of his Opinion, that provision simply mentions common objectives, without requiring the joint provision of a single public service. As is stated in the first paragraph of recital 33 of Directive 2014/24, 'the services provided by the various participating authorities [in such cooperation] need not necessarily be identical; they might also be complementary'.

It does not therefore seem essential for the public service activity to be provided in common by public entities participating in the cooperation.

58 It follows that Article 12(4)(a) of Directive 2014/24 must be interpreted as indiscriminately authorising the participating contracting authorities to carry out a public service task, either jointly or each individually, provided their cooperation makes it possible to achieve objectives they have in common.

59 Second, according to Article 12(4) of Directive 2014/24, read in conjunction with the first paragraph of recital 33 of the directive, cooperation between public entities can cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities.

60 The expression ‘all types of activities’ can potentially cover an activity ancillary to a public service as long as that ancillary activity contributes to the effective performance of the public service task to which the cooperation between the participating contracting authorities relates. The third paragraph of recital 33 of Directive 2014/24 provides that cooperation between public authorities ‘does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards the cooperative performance of the public service in question’.

61 In addition, it is not certain that software for tracking fire service operations in firefighting, technical assistance, emergency rescue and disaster control, like that at issue in the main proceedings, which would seem to be essential to the performance of those tasks, can be reduced to the status of a purely ancillary activity. This must, however, be ascertained by the referring court.

62 The answer to the second question is therefore that Article 12(4) of Directive 2014/24 must be interpreted as meaning that cooperation between contracting authorities may fall outside the scope of the public procurement rules laid down in that directive where that cooperation relates to activities ancillary to the public services that are to be provided, even individually, by each cooperation partner, provided that those ancillary activities contribute to the effective performance of those public services.

The third question

63 By its third question, the referring court asks, in essence, first, whether Article 12(4) of Directive 2014/24, read in conjunction with recital 33 and Article 18(1) of that directive, must be interpreted as meaning that cooperation between contracting authorities must not have the effect, in accordance with the principle of equal treatment, of placing a private undertaking in a position of advantage vis-à-vis its competitors and, second, what the scope of that principle is.

64 As is rightly noted by the referring court, it is clear from the Court’s case-law concerning Directive 2004/18 that European Union rules on public procurement are not applicable to contracts which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out in so far as such contracts are concluded exclusively by public entities, without the participation of a private party, no private provider of services is placed in a position of advantage vis-à-vis competitors and implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest. Such contracts can fall outside the scope of European Union public procurement rules only if they fulfil all those criteria cumulatively (see, to that effect, judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraphs 34 to 36, and of 13 June 2013, *Piepenbrock*, C-386/11, EU:C:2013:385, paragraphs 36 to 38).

65 Although Article 12(4) of Directive 2014/24 does not mention that contracting authorities participating in cooperation must not place a private undertaking in a position of advantage vis-à-vis its competitors, the EU legislature did not in any way intend to depart from the Court’s case-law cited in the preceding paragraph.

66 First, whilst noting that there is ‘considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules’ and that it is therefore necessary to provide clarification in this regard, Directive 2014/24 states, in recital 31, that such clarification should be guided by the principles set out in the relevant case-law of the Court of

Justice. It follows that the EU legislature did not intend to call into question the Court's case-law on this point.

67 Second, according to the second paragraph of recital 33 of the directive, contracts for the joint provision of public services should not be subject to the application of the rules set out in the directive provided that they are concluded exclusively between contracting authorities, that the implementation of that cooperation is governed solely by considerations relating to the public interest and that no private service provider is placed in a position of advantage vis-à-vis its competitors, which corresponds, in essence, to the Court's existing case-law concerning Article 1(2)(a) of Directive 2004/18, as mentioned in paragraph 64 of this judgment.

68 Third, in any event, since cooperation between contracting authorities satisfying the conditions laid down in Article 12(4) of Directive 2014/24 remains a 'public contract' within the meaning of Article 2(1)(5) of that directive, as follows from the answer given to the first question, Article 18 of the directive, which sets out the principles of public procurement, is applicable to such cooperation.

69 Under Article 18(1) of Directive 2014/24, contracting authorities must treat economic operators equally and without discrimination and act in a transparent and proportionate manner and, furthermore, the design of the procurement may not be made with the intention of excluding it from the scope of the directive or of artificially narrowing competition, which is considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

70 Thus, however regrettable it may be, in particular in the light of the principle of legal certainty, which is a fundamental principle of EU law and requires, in particular, that rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly (judgments of 9 July 1981, *Gondrand and Garancini*, 169/80, EU:C:1981:171, paragraph 17; of 13 February 1996, *Van Es Douane Agenten*, C-143/93, EU:C:1996:45, paragraph 27, and of 14 April 2005, *Belgium* v *Commission*, C-110/03, EU:C:2005:223, paragraph 30), the failure in Article 12(4) of Directive 2014/24 to mention that, in the context of cooperation between contracting authorities, a private provider may not be placed in a position of advantage vis-à-vis its competitors cannot be decisive.

71 In this case, the *Land* of Berlin acquired the 'IGNIS Plus' software from Sopra Steria Consulting before transferring it, free of charge, to the City of Cologne.

72 As ISE has asserted, without being contradicted by the City of Cologne at the hearing before the Court, the adaptation of the software is a very complex process the economic value of which is much higher than that corresponding to the initial acquisition of the base software. Thus, according to ISE, the City of Cologne has already estimated the costs of adapting the software at EUR 2 million, whilst the *Land* of Berlin published a pre-information notice in the *Official Journal of the European Union* relating to the development of the 'IGNIS Plus' software for an amount of EUR 3.5 million. Consequently, according to ISE, the economic interest lay not in the acquisition or sale of the base software but at the later stage of the adaptation, maintenance (which costs EUR 100 000 per year) and development of the software.

73 ISE considers that, in practice, the contracts for the adaptation, maintenance and development of the base software are reserved exclusively for the software publisher since its development requires not only the source code for the software but also other knowledge relating to the development of the source code.

74 It should be stated in this regard that, if a contracting authority is considering organising a public procurement procedure for the maintenance, adaptation or development of software acquired from an economic operator, it must ensure that adequate information is communicated to potential candidates and tenderers in order to allow effective competition to develop on the secondary market for the maintenance, adaptation or development of the software.

75 In this case, in order to ensure compliance with the principles of public procurement set out in Article 18 of Directive 2014/24, the referring court must establish, first, that both the *Land* of Berlin

and the City of Cologne have the source code for the ‘IGNIS Plus’ software, second, that, in the event that they organise a public procurement procedure for the maintenance, adaptation or development of that software, those contracting authorities communicate that source code to potential candidates and tenderers and, third, that access to that source code is in itself a sufficient guarantee that economic operators interested in the award of the contract in question are treated in a transparent manner, equally and without discrimination.

76 In the light of the above considerations, the answer to the third question is be Article 12(4) of Directive 2014/24, read in conjunction with the second paragraph of recital 33 and Article 18(1) of that directive, must be interpreted as meaning that cooperation between contracting authorities must not, in accordance with the principle of equal treatment, have the effect of placing a private undertaking in a position of advantage vis-à-vis its competitors.

Costs

77 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that an agreement which (i) provides that one contracting authority is to transfer software to another contracting authority free of charge and (ii) is linked to a cooperation agreement under which each party to that agreement is required to make available to the other party, free of charge, any further developments of the software that it may create constitutes a ‘public contract’ within the meaning of Article 2(1)(5) of that directive where it is clear from the terms of those agreements and from the applicable national rules that the software will, in principle, be subject to adaptations.**

2. **Article 12(4) of Directive 2014/24 must be interpreted as meaning that cooperation between contracting authorities may fall outside the scope of the public procurement rules laid down in the directive where that cooperation relates to activities ancillary to the public services that are to be provided, even individually, by each cooperation partner, provided that the ancillary activities contribute to the effective performance of those public services.**

3. **Article 12(4) of Directive 2014/24, read in conjunction with the second paragraph of recital 33 and Article 18(1) of that directive, must be interpreted as meaning that cooperation between contracting authorities must not have the effect, in accordance with the principle of equal treatment, of placing a private undertaking in a position of advantage vis-à-vis its competitors.**

[Signatures]

---

* Language of the case: German.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 29 January 2020 (1)

Case C-796/18

Informatikgesellschaft für Software-Entwicklung (ISE) mbH

v

Stadt Köln,

intervener:

Land Berlin

(Request for a preliminary ruling
from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany))

(Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Concept of contract for pecuniary interest — Horizontal cooperation between contracting authorities — Making available of software for the coordination of fire-fighting operations — Cooperation agreement on updating and developing the software — Activity ancillary to the public service — Prohibition on placing third parties in a position of advantage)

1. The first European rules on public procurement date back to the 1970s. A number of successive provisions enacted since then culminated in the adoption in 2014 of three texts intended to regulate all aspects of this field: Directive 2014/24/EU (2) (the interpretation of which forms the subject of this reference for a preliminary ruling), Directive 2014/23/EU (3) and Directive 2014/25/EU. (4)

2. Prior to the entry into force of the 2014 Directives, the Court of Justice had already accepted that the rules of EU law governing public procurement did not apply, in principle, in the case where, subject to certain conditions:

– a contracting authority entrusted the performance of certain tasks to a legal person under its control without recourse to other external entities (*vertical* cooperation or *in-house* award); or

– two contracting authorities worked together to ensure the performance of a public-service task common to both (*horizontal* cooperation).

3. In the case of the second form of cooperation between public authorities mentioned above, the case-law of the Court of Justice had generated a degree of legal uncertainty (5) which Directive 2014/24 attempted to dispel. I am not convinced that that attempt has been as successful as might have been expected.

4. In the dispute giving rise to this reference for a preliminary ruling, a company (Informatikgesellschaft für Software-Entwicklung; ‘ISE’) is challenging before the referring court a contract between Stadt Köln (City of Cologne) and Land Berlin under which the latter transfers to the former software for managing

interventions by its fire service, and which is accompanied by an agreement on cooperation between the two authorities.

5. The referring court needs to know, first and foremost, whether or not the relationship between the contracting authorities which prompted this dispute falls outside the public procurement rules contained in Directive 2014/24. The Court thus has an opportunity to supplement its previous case-law, albeit in the light of a new provision (Article 12(4) of Directive 2014/24) on the subject of which, unless I am mistaken, no judgment has yet been given.

I. Legal framework

A. EU law: Directive 2014/24

6. Recital 5 states:

> '… nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. […]'.

7. Recital 31 reads:

> 'There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.
>
> Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.
>
> It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors'.

8. According to recital 33:

> 'Contracting authorities should be able to choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form. Such cooperation might cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities need not necessarily be identical; they might also be complementary.
>
> Contracts for the joint provision of public services should not be subject to the application of the rules set out in this Directive provided that they are concluded exclusively between contracting authorities, that the implementation of that cooperation is governed solely by considerations relating to the public interest and that no private service provider is placed in a position of advantage vis-à-vis its competitors.
>
> In order to fulfil those conditions, the cooperation should be based on a cooperative concept. Such cooperation does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards the cooperative performance of the public service in question. In addition, the implementation of the cooperation, including any financial

transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest'.

9. Article 1(4) provides:

'This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26'.

10. Article 2(1)(5), defines public contracts as follows:

'… contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services'.

11. Article 12 ('Public contracts between entities within the public sector') states, in paragraph 4:

'A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation'.

12. Article 18(1) states:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators'.

B. National law

13. Under Article 91c(1) of the German Basic Law, 'the Federation and the *Länder* may cooperate in planning, constructing and operating information technology systems needed to enable them to discharge their responsibilities'.

14. Paragraph 108 of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition; 'the GWB') reproduces Article 12 of Directive 2014/24.

15. According to the so-called 'Kiel decisions', adopted in 1979, a public authority may transfer software developed or acquired (by itself or on its behalf) to other public authorities in Germany, provided that there is reciprocity. Reciprocity is granted where the budgetary provisions or the budgetary laws or by-laws of the entities in question — the owner and the recipient of the software — have taken into account the budgetary rules recommended in 1980 by the Conference of Finance Ministers. Generally speaking, reciprocity is measured in political rather than commercial terms. It is seen not as a mutual exchange *per se* but as the possibility of one. (6)

II. The dispute in the main proceedings and the questions referred for a preliminary ruling

16. In September 2017, Stadt Köln and Land Berlin concluded a software transfer contract whereby the latter transferred to the former, free of charge and for an indefinite period, software for managing interventions by its fire service.

17. The transfer was to comply with the conditions set out in a cooperation agreement of the same date that contained, inter alia, the following articles:

> ‘Article 1. Purpose of the willingness to cooperate
>
> […] The partners have decided to put in place an equal partnership and, if necessary, to exhibit a readiness to compromise in order to adapt the software to each other’s prevailing needs and to make it available to each other on a cooperative basis […].
>
> Article 2. Definition of the objective of the cooperation
>
> […] The software system can be extended by further specialised functionalities in the form of modules and transferred to the other partners in cooperation for them to use on a cost-neutral basis […].
>
> […]
>
> Article 5. Form of cooperation
>
> […] Transfer of the basic software shall be cost-neutral. Specialised add-on modules shall be offered to the partners in cooperation on a cost-neutral basis.
>
> […]
>
> The cooperation agreement shall be binding only with the [software transfer] contract as a joint document’.

18. ISE, which develops and sells software, applied to the Vergabekammer Rheinland (Rhineland Public Procurement Board, Germany) for a review of the contracts concluded between Land Berlin and Stadt Köln, claiming that they should be terminated. It argued that Stadt Köln had awarded a public supply contract the value of which exceeded the amount exempt from the obligation to apply the public procurement rules. Stadt Köln’s involvement in developing the software represented, in its opinion, a sufficient economic advantage. Furthermore, the purchase of the base software entailed new orders from the manufacturer, inasmuch as, for a third party, developing and maintaining that software would represent an unbearable economic cost.

19. The Vergabekammer Rheinland (Rhineland Public Procurement Board) dismissed ISE’s application for review, on the ground that the agreements between Stadt Köln and Land Berlin could not be classified as ‘public contracts’ for the purposes of the European legislation. In the Board’s opinion, the two parties had simply established a scheme for fair cooperation under which the software was transferred free of charge.

20. ISE appealed that decision to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany). Stadt Köln opposed the appeal on the ground that the decision under appeal was correct.

21. It was in those circumstances that the aforementioned court referred the following questions for a preliminary ruling:

> (1) Does the provision of software by one public administrative authority to another public administrative authority, which is agreed in writing and linked to a cooperation agreement, constitute a ‘public contract’ within the meaning of Article 2(1)(5) of Directive 2014/24/EU or a contract within the meaning of Article 12(4) of that directive which — at least initially, subject to Article 12(4)(a) to (c) thereof — comes within the scope of the directive if, although the software recipient does not have to pay a price or reimbursement costs for the software, the cooperation agreement connected with the provision of the software provides that each cooperation partner — and therefore also the software recipient — is required to make available to the other partner, free

of charge, any of its own further developments of the software that it may create — but is not obliged to create — in the future?

(2) Pursuant to Article 12(4)(a) of Directive 2014/24/EU, does the subject matter of the cooperation of the participating contracting authorities have to be the actual public services that are to be provided to citizens and which must be provided jointly, or is it sufficient if the cooperation relates to activities that in some way serve the public services that are to be provided in the same way but do not necessarily have to be provided jointly?

(3) Does a so-called — unwritten — prohibition on placing a party in an advantageous position ('Besserstellungsverbot') apply in the context of Article 12(4) of Directive 2014/24/EU and, if so, with what content does it apply?

22. The order for reference was received at the Court on 19 December 2018. Written observations have been lodged by Stadt Köln, the Austrian Government and the Commission.

23. A hearing attended by counsel for ISE, Stadt Köln, the Austrian Government and the Commission was held on 6 November 2019.

III. Analysis

A. Issues raised and preliminary observations

24. The provision of services through intra-administrative cooperation, also known as 'horizontal' or 'public-public' cooperation, was expressly incorporated into EU law in Section 3 ('Exclusions') of Chapter I of Title I of Directive 2014/24, in particular, Article 12(4). (7)

25. According to that provision, 'a contract concluded exclusively between two or more contracting authorities shall fall outside the scope of' Directive 2014/24 where all of the conditions which it lists are fulfilled. (8)

26. The text in force accommodates horizontal cooperation more *generously* than the Court's case-law prior to the 2014 Directives did. That case-law, (9) to which recital 31 of Directive 2014/24 refers, (10) had laid down certain conditions for verifying that public services could be provided without recourse to the market by way of cooperation between public administrative authorities.

27. As well as requiring that the entities entering into a such a scheme with each other should be contracting authorities, those conditions stipulated that the inter-administrative agreement must:

– be intended to ensure the performance of a public-service task common to the entities concerned;

– be concluded exclusively by public entities, without the participation of a private undertaking;

– not favour any private supplier over its competitors;

– establish cooperation governed only by considerations and requirements characteristic of the pursuit of public-interest objectives.

28. Directive 2014/24, however, does not simply codify the arrangements that were already in place, but reformulates, clarifies, removes and supplements one or more of the aforementioned requirements. It follows that, when it comes to interpreting that directive, it will not always be relevant or expedient simply to turn back to the previous case-law.

29. The provisions relevant in this instance are Article 12(4) and recitals 31 and 33 of Directive 2014/14. Taken together, these create a legal regime that reconciles two competing objectives: on the one hand, the desire not to interfere with the way in which Member States organise their internal administration; on the other hand, the need to ensure that exclusion does not have the effect of infringing the principles governing public procurement under EU law.

30. Directive 2014/24 makes it clear that Member States are under no obligation to turn to the market in order to procure or obtain the services they need to carry on their activities. (11)

31. However, removing this type of inter-administrative contract from the public procurement procedures may operate to the detriment of the objective of establishing an internal market in this area too. The more contracts that are excluded, the less scope there is for creating and developing the internal market in public procurement.

32. Self-supply on the part of public entities, be this in the form of 'in-house' or 'horizontal' cooperation, is not without risk for the free movement of goods and services. (12) Equally legitimate are the misgivings about its effects on free competition beyond the situation expressly referred to in the second paragraph, *in fine*, of recital 33 of Directive 2014/24, which warns against cooperation that places an economic operator in a position of advantage vis-à-vis other competitors.

33. Inappropriate use of these collaborative mechanisms could indeed have the effect of 'shrinking' the demand side of the market and reducing the number of suppliers which that market could sustain. Neither is it inconceivable, in theory, that the public authorities would abuse the (collective) dominant position they might come to hold.

34. It is also true that, viewed from another perspective, the greater flexibility which Directive 2014/24 grants to horizontal cooperation between contracting authorities (as a result of a political decision on the part of the European legislature) may at the same time have positive effects on competition in the sense of incentivising private operators to offer better contract terms.

35. A Member State's decision about how to provide a public service (which may indeed be to do so not by recourse to the market but by way of administrative cooperation) must comply with the fundamental rules of the TFEU, in particular those relating to the free movement of goods, freedom of establishment and freedom to provide services, as well as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. (13) These rules and principles must also be taken into account when it comes to interpreting Article 12 of Directive 2014/24.

36. The sum of the foregoing considerations explains the existence of Article 12 of Directive 2014/24 and justifies the prerequisites for 'public-public' cooperation which are explicitly set out in paragraph 4 thereof.

37. It should be noted, finally, that *the exclusion* of those mechanisms for collaboration between contracting authorities from the scope of Directive 2014/24 is dictated not by the binary logic of rule versus exception, but by a different understanding of the field of play on which that directive operates.

38. After all, what Article 12(4) of Directive 2014/24 seeks to do in stating that the collaborative relationships between contracting authorities for which it provides 'fall outside' (14) the scope of that directive is to set the limits of that directive, all the other rules of which are simply not enforceable against such relationships. It follows, in my opinion, that the findings contained in the aforementioned judgments with respect to the (restrictive) interpretative criterion applicable to exceptions, as opposed to the general rule, are not, strictly speaking, an automatic point of reference for the interpretation of that *exclusion*. (15)

B. First question referred for a preliminary ruling: the transfer of software and the scope of Directive 2014/24/UE

1. Preliminary point: factual premiss for the application of Article 12

39. The referring court asks, in the first place, whether a transfer of software such as that which took place between Land Berlin and Stadt Köln falls within the scope of Directive 2014/24: either as a 'public contract' (within the meaning of Article 2(1)(5), or as a mere 'contract' (within the meaning of Article 12(4)).

40. The question, as raised, is prompted by the (apparent) lack of pecuniary interest in the transfer. Its wording supports the inference that, in the view of the referring court, the scope of Directive 2014/24 is not defined by Article 2 alone. The fact that, in Article 12(4), the term 'contract' is not accompanied by the adjective 'public' could mean that certain contracts not consistent with the definition given in Article 2(1)(5), are also subject to the EU public procurement rules.

41. Rather than undertaking a detailed analysis of the different meanings that attach to the term ‘contract’ and its accompanying adjectives depending on the various provisions of Directive 2014/24 in which that term appears, (16) I shall focus on interpreting Article 12(4) thereof with a view to determining whether it is applicable to a relationship such as that agreed upon between Land Berlin and Stadt Köln. I shall therefore address the first question referred in the light of the special nature of that provision.

42. The word ‘contract’ in Article 12(4) is explained by reference to its schematic relationship not so much with Article 2 of Directive 2014/24 as with the other paragraphs of Article 12 itself. In that context, it reflects the difference between it and vertical cooperation (paragraphs 1 to 3 of that provision), whereby the relationship between the participants is structured around internal control. It would appear to serve, in effect, to express the idea that there must be an agreement or arrangement that establishes the basis of, and legal framework for, the relationship between the parties, the objective of the cooperation and the activities (contributions) which each party has to carry out (make). (17)

43. The same idea is conveyed by the second paragraph of recital 33 of Directive 2014/24, when it refers to ‘contracts for the joint provision of public services’, and, then, by the third paragraph, ‘commitments to contribute towards the cooperative performance of the […] service’, which do not necessarily have to take the form of the performance by all the parties of the main contractual obligations.

44. On that premiss, Article 12 of Directive 2014/24 envisages two types of situation in which the usual meaning of ‘public contract’ may not be very appropriate because those situations are, more accurately, alternatives to that category.

45. First, it provides for ‘vertical cooperation’ (paragraphs 1, 2 and 3), whereby, as I have stated elsewhere, ‘under the in-house system, the contracting authority does not, from a functional point of view, contract with a separate body but, in effect, contracts with itself, given the nature of its connection with the formally separate body. Strictly speaking, there is no award of a contract, but simply an order or task, which the other “party” cannot refuse to undertake, whatever the name given to it’. (18)

46. Secondly, it also provides for ‘horizontal cooperation’, which is to say that which contracting authorities establish between themselves in the form of a contract aimed at ensuring that the public services for which they are responsible are provided with a view to achieving a common objective, within a framework guided only by the public interest and with due regard for free competition (Article 12(4) of Directive 2014/24).

47. There is, of course, another type of inter-administrative relationship that falls outside the scope of Directive 2014/24, even though its enacting provisions do not expressly say as much, such as those arising from a transfer or delegation of competence, (19) including the creation of a consortium of entities having legal personality under public law. Such situations are regarded, in principle, as ‘fall[ing] outside the sphere of public procurement law’. (20)

48. Under a horizontal cooperation scheme, a contracting authority, which could meet its needs (in terms of goods, works or services) by resorting to private suppliers via a call for tender, chooses to dispense with that route and, instead, collaborates with another public body that is able to satisfy those needs.

49. From an objective point of view, this type of collaboration between public bodies is special in three ways: the form of cooperation that governs the *inter partes* relationship; the common purpose which that cooperation pursues; and the public interest objective by which the cooperation must be guided.

50. The collaboration usually entails contributions from all the parties, which are subsequently paid for from the public purse. The relationship between those parties, however, does not stop at the ‘quid pro quo’ which defines a synallagmatic contract and which, according to the Court’s case-law, characterises a public contract subject to the procurement directives. (21)

51. A legal transaction involving mutually enforceable acts of performance by all those party to it will be present in so far as the respective contributions of those parties are intended to achieve a shared ulterior objective. It is precisely that common goal, which must serve the public interest, that forms the *reason* for the contributions made.

2. Whether the relationship between Land Berlin and Stadt Köln is for pecuniary interest or free of charge

52. In order to determine whether the relationship between Stadt Köln and Land Berlin was governed by the rules of Directive 2014/24, account must be taken not only of the transfer contract (by which the software is made available to the former) but also of the cooperation agreement accompanying it. (22)

53. The parties themselves devised the relationship between them as a single unit, making it explicit in Article 5 of the cooperation agreement that the latter is inseparable from the software transfer contract. (23)

54. As I have already said, the referring court's doubts stem from the apparent lack of pecuniary interest in the relationship between Land Berlin and Stadt Köln.

55. Being of pecuniary interest is part of the definition of a 'public contract' given in Article 2(1)(5), of Directive 2014/24. It may also, in my opinion, be regarded as a characteristic component of the relationship between contracting authorities that is provided for in Article 12(4), which, as I have already explained, is not necessarily identical to the usual meaning of a 'public contract'.

56. As regards the meaning of pecuniary interest, I would recall that this has been the subject of extensive interpretation in the Court's case-law. (24)

57. In the relationship between Land Berlin and Stadt Köln, provision of the software is free of charge and fundamental to a scheme of cooperation aimed at developing and adapting that software to meet the management needs of the respective fire services.

58. As the referring court states, (25) the subsequent development of the software has an economic value which is potentially very high. (26) In the description of the facts, Stadt Köln states that the software is made available to it so that it can participate in the cooperation scheme. It has previously recognised that the fire-fighting services — which, according to its submissions at the hearing, it has a statutory obligation to provide — cannot feasibly be delivered without an optimum incident management system that must be continuously adapted to the operational requirements of the fire service, and for this, effective software is essential.

59. It is therefore reasonable to take the view, as the Commission maintains, that, even though the agreement does not lay down an obligation *stricto sensu* to develop the software, it would be unrealistic to assume that the software will not be developed and, if it is, that it will not be the subject of successive adaptations. As became apparent at the hearing, it is all but inevitable that the software will have to be updated, in the short term and subsequently. (27)

60. There is therefore a reasonable expectation that Stadt Köln will contribute developments and modular extensions of the software. This serves as consideration for the provision of the software by Land Berlin, otherwise, the transfer contract would not have been accompanied by a cooperation agreement.

61. In short, from the point of view of Stadt Köln, the consideration which makes it possible to speak of pecuniary interest in its relationship with Land Berlin is its participation in a cooperation scheme suitable for generating benefits for the latter in the form of adaptations of the software (Article 1 of the cooperation agreement) and additional specialised modules (Article 5 of that agreement). Those adaptations are bound to take place, at a given economic cost, because fire incident control centres cannot function without them.

62. The consideration is not therefore dependent on an optional condition; it is just a matter of time as to when it will materialise. We are therefore dealing not with the mere expression of an intention to cooperate but with an enforceable undertaking the discharge of which is a matter of *when* (when the update will take place) rather than *if* (if the update takes place).

63. It is true that the cooperation agreement provides for the possibility of software developments by both parties, and that, in theory, either of them could remain inactive and simply await contributions from the other. As I have already said, however, such a scenario is highly unlikely, inasmuch as it would have the effect of putting at risk the provision of the public service each party is responsible for delivering. That approach would render meaningless the very cooperation agreement the parties voluntarily entered into with each other.

64. In short, the contractual relationship between the contracting authorities which concluded an agreement on the transfer of the software in question and the conditions of their cooperation in developing that software is caught by Article 12(4) of Directive 2014/24.

C. Second question referred for a preliminary ruling: subject matter of the cooperation

1. Issue

65. The public fire service which the cooperating entities in this case are responsible for providing is not delivered jointly: it cannot be, not least because of the geographical distance between the territories on which those entities are respectively active.

66. For that reason, the referring court is uncertain whether the cooperation in question is covered by Article 12(4)(a) of Directive 2014/24 and asks whether, in order for that to be the case, '[it is] sufficient if the cooperation relates to activities that in some way serve the public services that are to be provided in the same way but do not necessarily have to be provided jointly'.

67. The answer calls for separate analyses of two matters: (a) the joint performance of the public service to which the cooperation relates; and (b) the 'public service' nature of the activity in which the cooperation occurs.

(a) Joint provision of the public service: from a 'common public service task' to 'common public interest objectives'

68. In accordance with the Court's case-law prior to Directive 2014/24, the viability of horizontal cooperation was conditional upon, inter alia, the requirement that the parties should perform a *common* public service task. The Court was not for that matter required to address the question whether that *commonality* extended to the actual provision of the service.

69. The model for horizontal cooperation which was excluded from the European public procurement rules was Case C-480/06, *Commission* v *Germany*, in which that cooperation, which took the form of actions and undertakings of a different nature and scale, effectively guaranteed the performance of a public service task which all of the contracting authorities were responsible for performing. That case concerned the disposal of waste, an activity in which all of those involved participated, inasmuch as they operated the facility for disposing of that waste.

70. The present issue was not the subject of special consideration in that judgment or in other, later judgments, in which the *commonality* of the public service task as a condition of its joint provision was lacking. (28)

71. Article 12(4)(a) of Directive 2014/24 provides that, in order for intra-administrative cooperation to fall outside the scope of that directive, the contract must cover objectives which the participating contracting authorities have in common. Each of those authorities must provide the 'public services they have to perform' (29) 'with a view to achieving objectives they have *in common*'. The contract or agreement must specify the form of provision in order to ensure that this is the case. The wording of that directive shows that that *commonality* now extends to the objectives, not to a particular public service task.

72. The preparatory texts for the directive show that the legislature's intention was to take a more flexible approach to the subject matter of the cooperation. (30)

73. The proposal for a Commission directive still spoke of the 'joint performance of their [the contracting authorities'] public service tasks'. On its passage through the Council and the Parliament, the text received different forms of words until the current version was arrived at. The current recital 33 also went through a process of modification in tandem with the transition of the wording of the article and of the opening line itself.

74. The final negotiations saw the disappearance from Article 12(4) of Directive 2014/24 of the reference to the joint performance of tasks, although this still appears in the current recital 33. The reference to common objectives was introduced at the Parliament's suggestion, at the same time as the description of the

concept of cooperation as including ‘common management and decision making and sharing of risks responsibilities and synergy effects’ was removed from the corresponding recital (then, recital 14). (31)

75. The statement in the first paragraph *in fine* of recital 33 to the effect that the public services provided by the cooperating entities do not have to be identical but can be complementary, confirms that the requirement of a common public service task has been dispensed with.

76. In that context, the reference to the *joint* provision of services, which appears a number of times in the same recital, probably means that the public services, whether identical or complementary, which are the responsibility of each of the contracting authorities must be performed ‘cooperatively’, which is to say by each entity with support from the other or in a coordinated fashion.

77. The foregoing may appear to be semantic niceties, but it is a feature of the law that the legal consequences attendant upon the choice of one set of terms or another may differ significantly. The important point, as I have said, is that the (new) rule refers to objectives that are common to the contracting authorities cooperating with each other.

(b) ‘Public service’ and ‘activities in support of a public service’

78. The second question referred for a preliminary ruling also calls for an analysis of the nature of the activity in which the contracting authorities cooperate: must that activity itself be a ‘public service’ (32) or can it be an ancillary activity, that is to say one in support of a public service? (33)

79. In the case-law prior to Directive 2014/24, the judgment in *Commission* v *Germany* threw some light on the type of activities suitable for the ‘public-public’ cooperation which is excluded from the public procurement rules. (34)

80. A reading of that judgment supported the inference that activities which were not in and of themselves public services, but which were directly related to the public service covered by the cooperation agreement between the contracting authorities, could be the subject matter of the cooperation.

81. The foregoing, however, does not answer the question whether the cooperation may relate *exclusively* to an activity which is not in and of itself a public service in a context such as that at issue in this dispute. I note that, in this case, the participating contracting authorities each provide the same public service (the fire service) on their own account and on a separate basis, while the cooperation is confined to an ancillary activity (the computerised management of the incident control centre).

82. So far as Directive 2014/24 is concerned, recital 33 points towards an affirmative answer to that question, inasmuch as it states that cooperation may cover ‘*all types of activities related to the performance of services and responsibilities* assigned to or assumed by the participating authorities […]’. (35) The legislative works again show that there was a desire to highlight this feature of cooperation, which had not appeared in the Commission’s original proposal. (36)

83. The flexibility which I have mentioned as being a characteristic of horizontal cooperation under Directive 2014/24, and which is significant by comparison with the previous legislative position, the Court’s previous case-law and the Commission’s proposal, bears out the correctness of that affirmative answer.

84. This does not mean, however, that horizontal cooperation on this basis is unlimited. It goes without saying that the requirement that such cooperation should be directed at the provision of public services which the parties are responsible for providing still stands. (37) Where the subject matter of the cooperation is not the public service itself but an activity ‘related’ to it, that relationship must be such that the activity is functionally steered towards the performance of the service.

85. The balance between the competing objectives present in this field, as discussed earlier, (38) also indicates that, for the purposes of analysing that relationship, a distinction should be drawn according to the extent to which the various activities in question are linked to the service the provision of which they contribute to. To my mind, Article 12(4) of Directive 2014/24 permits the acceptance of, inter alia, supporting activities which are immediately and inseparably linked to the public service, which is to say those that are of such fundamental importance that the service itself could not be performed as a public service without them.

86. The cooperation must also meet the other requirements laid down in Article 12(4) (with respect to the authorities providing the cooperation, the purpose of that cooperation and the principles by which it must be guided) which I highlighted earlier.

2. The cooperation between Land Berlin and Stadt Köln

87. As I have already said, the two contracting authorities in this case do not jointly perform the principal public service activity, that is to say the fire service. The objective of their cooperation, on the other hand, is to create and keep updated a software package that is essential to enabling each of them to ensure optimum management of the operations carried out by their respective fire services in their own geographical areas.

88. According to the description of the software and its updates contained in the documents before the Court, combined with the consistent submissions made in this regard at the hearing, the software was and is essential to the provision of that public service.

89. It follows that the cooperation between *Land* Berlin and Stadt Köln, inasmuch as it relates to an activity essential to the effective performance of a public service which both contracting authorities have to provide, satisfies the requirement laid down in Article 12(4)(a) of Directive 2014/24.

D. Third question referred for a preliminary ruling: placing third parties in a position of advantage

90. The agreement between Land Berlin and Stadt Köln faces other objections, based on the tension between horizontal cooperation and competition law. The referring court addresses these in its third question, when it asks whether Article 12(4) of Directive 2014/24 contains an implicit unwritten prohibition on placing a party in a position of advantage and, if it does, to what substantive effect.

1. Horizontal cooperation and competition law

91. The condition that no private operator be placed in a position of advantage vis-à-vis its competitors as a result of horizontal cooperation is not expressly and separately laid down in Article 12 of Directive 2014/24. It was laid down, however, in the previous case-law. (39)

92. In order to look at whether, despite the lack of verbatim reference to it, that requirement subsists, I note that the Member States enjoy a broad margin of discretion in deciding whether to provide services themselves or to outsource them.

93. In the first of those two scenarios (self-supply, in a broad sense), provided that certain conditions should be met, the Member States are not required to follow the rules and procedures of EU public procurement law. They do, however, remain subject to other rules, (40) including those relating to free competition that are laid down in Article 106(2) TFEU.

94. For that reason, the second subparagraph of Article 18(1) of Directive 2014/24 states, in a related context, that ‘the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition’.

95. Thus, the limitation imposed by the rules on free competition also affects horizontal cooperation between contracting authorities. It does this in at least two ways:

– First, it governs their relationship with private operators as a whole, in their capacity as competitors on the market.

– Secondly, it determines how public entities must act in order to ensure that their cooperation, if it also involves private operators in some way, does not distort competition between them.

96. Article 12(4) of Directive 2014/24 is intended to avoid any distortion of competition in the context referred to in the first indent above, when it requires that the collaboration should take place exclusively between contracting authorities. (41) At the same time, it also lays down a number of restrictions with the same aim in mind:

– The cooperation must be confined to the provision of public services which the participating contracting authorities have to perform, which is to say that it must not extend to its ordinary economic activities (point (a)).

– It must be guided exclusively by reasons in the public interest, not market-related reasons (point (b)).

– If the entities cooperating with each other are also active on the open market, they may not perform there more than 20% of the activities concerned by that cooperation.

97. It is not possible to take the view, as Stadt Köln attempts to do, that the obligation to have regard for free competition is confined to the situation where the contracting authorities compete on the market with private operators as a whole.

98. On the contrary, as I have already explained, the general duty not to distort competition is found in primary law (Article 106(2) TFEU) and, within the specific context of public procurement, in the second subparagraph of Article 18(1) of Directive 2014/24.

2. Contracting third parties

(a) General considerations

99. Recitals 31 and 33 of Directive 2014/24 confirm that cooperation between contracting authorities must not 'result in a distortion of competition' by placing a private provider of services in a position of advantage vis-à-vis its competitors. (42) It is important to make the point that those recitals do not actually add any new normative material to the enacting terms of the directive; they simply serve as a guide to the interpretation of Article 12(4).

100. It follows that any conduct by the contracting authorities which distorted competition and placed a private provider of services at a disadvantage vis-à-vis its competitors would not comply with Directive 2014/24. 'Placing a party in a position of advantage', as referred to by the national court, inasmuch as it favours one private operator over others, is therefore prohibited.

101. Two not exactly equivalent situations may be presented in this regard:

– Horizontal cooperation in which one contracting authority makes available to another certain goods or services which the former itself acquired from a private operator without complying with the public procurement rules. In so far as those rules were applicable at that time (on account of the subject matter or value of the contract, and so on), the third party operator would suffer *new* and, as it were, *twofold* disadvantageous treatment on account of the failure to take those rules into account both the first time and subsequently.

– Horizontal cooperation requiring for its future development the participation of economic operators other than the contracting authorities. If any of those private operators were, in a discriminatory or arbitrary way, robbed of the opportunity to join the mechanism for the future supply of goods and services, those affected would be in a position of disadvantage.

102. In the second of those scenarios, in which a tendering process is initiated with a view to supplementing or continuing an inter-administrative cooperation scheme, there are no grounds on which it may be claimed that an individual is, in law or in fact, inevitably in a better position than his competitors to contribute to the tasks comprising that scheme.

(b) Contracting third parties for the purposes of the cooperation between the Land Berlin and Stadt Köln

103. The documents before the Court do not contain sufficient information to be able to say on what basis Land Berlin originally purchased the software package that it would later transfer to Stadt Köln. Neither is it entirely certain whether Land Berlin acquires new software modules, outside the context of its cooperation with Stadt Köln, on or off the market. (43) It will be for the referring court to verify these points of fact.

104. The future development of the cooperation scheme, on the other hand, appears to require the participation of third parties, and Stadt Köln has therefore published a notice of a (restricted) invitation to tender for a contract for the adaptation, deployment and maintenance of the software transferred by Land Berlin. (44)

105. The extensions and updates of the software transferred by Land Berlin to Stadt Köln for the purposes of cooperation are characterised by their high economic value. It is therefore logical that the interest of market operators (45) should be centred on the subsequent contracts for its adaptation, maintenance and development.

106. ISE argues that the technical complexity of those operations is such that nobody other than the manufacturer would be able to carry them out. If that were the case, the decision relating to the original purchase of the software might have a significant bearing on the award of the later public contracts, inasmuch as it might effectively block the participation of operators other than the software creator.

107. In those circumstances (which it is for the referring court to verify), the requirement not to place market operators in a position of advantage vis-à-vis their competitors (46) would call for special care to be taken when it comes to drawing up calls for tenders for subsequent services. In particular, all potentially interested parties would have to be provided with the information necessary to enable them to take part in such a process. (47)

108. This may nonetheless prove to be insufficient, which would indicate that the problem lies at an earlier point in time, that is to say when the software was first purchased. It is for the referring court to determine whether, for technical reasons, the original purchase gives rise to a situation of exclusivity that predetermines later procurement procedures, and, if that is the case, to establish the relevant measures for correcting the effects of that exclusivity. (48)

IV. Conclusion

109. In the light of the foregoing, I propose that the answer to the questions referred for a preliminary ruling by the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) should be as follows:

‘(1) Article 12(4) of Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that a transfer of software agreed in writing between two contracting authorities and linked to a cooperation agreement between those two authorities constitutes a “contract” within the meaning of the aforementioned provision.

That contractual relationship is for pecuniary interest even where the transferring entity does not have to pay a price or reimbursement costs for the software, if each of the parties (and, therefore, the transferee too) undertakes to make available to the other the future adaptations and developments of that software and these, being essential to the provision of a public service which both contracting authorities have to perform, will inevitably take place.

(2) Cooperation between the contracting authorities under Article 12(4)(a) of Directive 2014/24 does not necessarily have to relate to the actual public services that have to be provided to citizens. Cooperation which relates to activities in support of those services will still be covered by Article 12(4) of Directive 2014/24 in the case, inter alia, where the ancillary activity is of such fundamental importance to the public service that the latter could not be performed without it.

(3) Cooperation between public authorities which places a private operator in a position of advantage vis-à-vis its competitors on the market cannot be covered by Article 12(4) of Directive 2014/24’.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

3 Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

---

4 Directive of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

---

5 Described as ‘considerable’ in recital 31 of Directive 2014/24. That recital states that the relevant case-law ‘is interpreted differently between Member States and even between contracting authorities’.

---

6 A study conducted in 2014 found that, in Germany, the Kiel decisions are commonly understood to operate in practice as follows: where the principle of general reciprocity provided for in those decisions is applied to a unique form of cooperation, an essential component of a public contract as defined in the GWB is lacking. The absence of any consideration for the transfer of software supports the idea that such a transfer is free from the point of view of the GWB. Pursuant to the principle of general reciprocity, the recipient of the service does not specifically undertake to furnish pecuniary consideration; it has merely determined in the abstract to provide software developments free of charge in a comparable situation, if necessary (Gutachten: Evaluierung der Kieler Besschlüsse II, 20.08.2014, p. 106).

---

7 A similar scheme is provided for in Article 17 of Directive 2014/23 and in Article 28 of Directive 2014/25.

---

8 The Member States are free to decide whether or not to apply their own public procurement rules to such relationships.

---

9 Judgment of 9 June 2009, *Commission* v *Germany* (C-480/06, EU:C:2009:357; ‘the judgment in *Commission* v *Germany*’); judgment of 19 December 2012, *Azienda Sanitaria Locale di Lecce and Università del Salento* v *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817; ‘the judgment in *ASL*’); order of 16 May 2013, *Consulta Regionale Ordine Ingegneri della Lombardia and Others* (C-564/11, not published, EU:C:2013:307); judgment of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385; ‘the judgment in *Piepenbrock*’); order of 20 June 2013, *Consiglio Nazionale degli Ingegneri* (C-352/12, not published, EU:C:2013:416, ‘*Consiglio Nazionale* order’); and judgment of 8 May 2014, *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:303; ‘judgment in *Datenlotsen*’). References to horizontal cooperation can be found in other judgments relating to vertical cooperation.

---

10 According to that recital, the clarification as to which contracts between public-sector entities fall outside the scope of Directive 2014/24 ‘should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union’.

---

11 The discretion to decide whether or not to go to the market had been reiterated in the Court’s case-law concerning vertical cooperation: see the judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5), paragraph 48; the judgment of 13 November 2008, *Coditel Brabant* (C-324/07, EU:C:2008:621), paragraph 48; and, recently, the judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829; ‘the judgment in *Irgita*’), paragraph 50 and paragraph 2 of the operative part. So far as concerns horizontal cooperation, see the judgment in *Commission* v *Germany*, paragraph 45.

---

12 The risks are similar to those which Directive 2014/24 identifies in connection with the aggregation and centralisation of purchases, which, according to recital 59 of that directive, 'should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs'.

---

13 Judgment in *Irgita*, paragraphs 48 and 50 and paragraph 2 of the operative part, by way of interpretation of 12(1) of Directive 2014/24.

---

14 This is the expression used in the first paragraph of Article 12(4) of Directive 2014/24.

---

15 See, in connection with vertical cooperation, the Opinion of Advocate General Hogan in *Irgita* (C-285/18, EU:C:2019:369), point 45. The same idea is expressed in the judgments of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5), paragraph 46; of 13 October 2005, *Parking Brixen* (C-458/03, EU:C:2005:605), paragraph 63; and of 11 May 2006, *Carbotermo and Consorzio Alisei* (C-340/04, EU:C:2006:308), paragraph 45; and in the judgment in *Datenlotsen*, paragraph 23.

---

16 There are arguments to support the proposition that the term 'contract' has only one meaning: the title of Article 12 itself ('Public contracts between entities within the public sector'); the fact that that term is used at various points in Directive 2014/24 and in other directives as an abbreviated form for 'public contract'; the addition or otherwise of the adjective 'public' to qualify the noun 'contract' varies depending on which language version of the text is consulted: thus, it appears in Article 12 (in particular, paragraph 1 thereof) in some versions, such as German, French, English and Italian, but not in others, such as Spanish.

---

17 Article 11(4) of the proposal for a Directive of 20 December 2011, COM(2011) 896 final, used this form of words: 'An agreement concluded between two or more contracting authorities *shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive*' […]' (emphasis added).

---

18 Opinion in *LitSpecMe* (C-567/15, EU:C:2017:319), point 70.

---

19 On the conditions under which a transfer of competence relating to the performance of public functions falls outside the scope of the public procurement rules (contained, at that time, in Directive 2004/18), see the judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985; 'judgment in *Remondis*'), paragraph 41 et seq..

---

20 Judgment in *Remondis*, paragraph 53.

---

21 *Ibidem*, paragraph 43.

---

22 See, by analogy, the judgment in *Remondis*, paragraph 37: 'For possible categorisation of a multi-stage operation as a public contract […], the operation must be examined as a whole, taking account of its purpose'.

---

23 That relationship could have been devised differently, as counsel for Stadt Köln stated at the hearing in reference to a software transfer contract between Land Berlin and the city of Hamburg which does not have a cooperation agreement attached to it.

---

24 *Consiglio Nazionale* order, paragraph 38; judgment in *Remondis*, paragraph 43; judgment of 18 October 2018, *IBA Molecular Italy* (C-606/17, EU:C:2018:843), paragraph 31. In her Opinion in *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:303), point 32, Advocate General Trstenjak stated that 'the view can be taken that only a broad understanding of the notion of "pecuniary interest" is consistent with the purpose of the procurement directives, which is to open up the markets to genuine competition', and made specific reference to other forms of remuneration such as swaps or the waiver of reciprocal claims existing between the contracting parties.

---

25 Paragraph 29 of the order for reference.

---

26 It may exceed that of the software itself. ISE mentioned this at the hearing, in the context of the third question referred for a preliminary ruling.

---

27 Counsel for Stadt Köln distinguished between major updates and other, more minor ones. The former must be carried out three or four times a year and take place following consultation of the other party (or parties) to the cooperation scheme in order, as far as possible, to take account of their requirements. The latter, involving the correction of minor errors, do not require consultation.

---

28 Judgment in *ASL*, paragraph 37. The Court's later rulings adhered to the case-law established in the judgment in *ASL* in cases which were almost identical as regards the nature of the parties concerned and the substantive issue raised: see order of 16 May 2013, *Consulta Regionale Ordine Ingegneri della Lombardia* (C-564/11, not published, EU:C:2013:307), and *Consiglio Nazionale* order. That case-law was also applied to other fields in the judgments in *Piepenbrock*, paragraph 39, and *Datenlotsen*, paragraph 35.

---

29 In my opinion, the requirement that the contracting authorities *have to perform* the service in question means that they were responsible for providing it before they concluded the cooperation agreement. That expression could also include a public service to be provided as part of a specific cooperation scheme.

---

30 That flexibility is also in evidence in relation to the persons providing the cooperation: see recital 32, on horizontal cooperation between contracting authorities in which there is private capital participation. Article 11(4)(e) of the Commission's proposal, on the other hand, ruled out that possibility.

---

31 See the note from the Council of the European Union of 26 June 2013, number 11644/13.

---

32 I note that Article 12(4)(a) of Directive 2014/24 expressly refers to the 'public services they [the contracting authorities] have to perform'. This category of service is mentioned only in Article 93 TFEU. To a large extent, its equivalent is the 'service of general interest' (SGI), which may or may not have economic content. The freedom of the Member States to define, organise and finance services of general economic interest (SGEI) is dealt with in Article 1(4) of Directive 2014/24, which in turn refers to Article 14 TFEU and Protocol No 26 annexed to the TFEU and the TEU. See, in that regard, the Opinion of Advocate General Hogan in *Engie Cartagena* (C-523/18, EU:C:2019:769).

---

33 Directive 2014/24 does not specify the priority, status or nature (principal or auxiliary; compulsory or optional; economic or otherwise) of the *public services* to which horizontal cooperation may relate. Recital 33 suggests that there is much flexibility in this regard. It is therefore safe to say that cooperation is not confined to activities which serve a core (principal) function of the contracting authority, as appeared to follow from the judgment in *ASL*, first sentence of paragraph 37.

---

34 In that case, one of the contributions was the provision of facilities for the recovery of waste collected by the participants in the geographical area for which they were each responsible. Another field of cooperation was the provision of surplus capacity: waste disposal capacity unused by one party could offset another party's lack of disposal capacity. A further contribution consisted in an undertaking by the street cleaning service of one of the contracting authorities to defend the rights of the other services against the facility operator in the event that the latter caused loss or damage to the former.

---

35 Emphasis added.

---

36 See, by way of comparison, interinstitutional document number 12167/13.

---

37 In its previous case-law, the Court had held as follows in the judgment in *Datenlotsen*, paragraph 16 (by reference from paragraph 34): '… neither the University nor HIS are public authorities, and HIS is not entrusted directly with the performance of a public service task'.

---

38 Point 29 et seq. above: the desire not to interfere in the Member States' organisation of their internal administration must be reconciled with the requirement that exclusion from the scope of EU law does not give rise to an infringement of the principles of public procurement and free competition.

---

39 Judgments in *Commission* v *Germany*, paragraph 47; *ASL*, paragraphs 35, 38 and the operative part; *Consegli Nazionale* order paragraph 44 and the operative part.

---

40 Points 30 to 35 above.

---

41 Although, in line with the in-house cooperation scheme, Directive 2014/24 does allow some private capital participation in public entities; see footnote 30 above.

---

42 There are of course other conceivable forms of distortion, as, for example, if the acquisition of the software and the successive maintenance or add-on operations were made the subject of individual contracts as a way of avoiding a single contract the value of which would exceed the threshold beyond which public procurement is compulsory. See the judgment of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31), paragraph 67; and the judgment in *Commission* v *Germany*, in which the Court says that the authorities in question were 'contriving to circumvent the rules on public procurement' (paragraph 48).

---

43 At the hearing, counsel for ISE stated that, in July 2018, Land Berlin had published a notice of an invitation to tender for a contract for the development of that software worth EUR 3 500 000.

---

44 At the hearing, it was stated that the notice (reference number: 2019-0040-37-3) was published in OJ 2019/S 160-394603 and that the economic value of the call for tenders is EUR 2 000 000.

---

45 At the hearing, counsel for ISE stated that the economic interest lay not in the acquisition of the base software, or in its sale, but in the subsequent operations of adapting, maintaining and developing the program.

---

46 Together with the objective of awarding the contract to the supplier submitting the economically most advantageous tender.

---

47 At the hearing, it was debated whether it was sufficient to indicate in later calls for tender that the successful tenderer would have access to the software source code. Stadt Köln emphasised that this was what it had done, although ISE contended that this step would not be sufficient, given the practical difficulties associated with developing adaptations from the base program in a risk-free way.

---

48 The possibility that the purchase of the original software would give rise to a blocking effect should, ideally, have been assessed at the time when it was purchased. Otherwise, at the current juncture, such an assessment would not be possible, and any remedies could only be palliative. At the hearing, the Commission suggested that the software manufacturer be asked to give an undertaking to cooperate with the suppliers having successfully tendered to provide subsequent services.

ORDONNANCE DE LA COUR (neuvième chambre)

20 novembre 2019 (*)

« Renvoi préjudiciel – Article 99 du règlement de procédure de la Cour – Marchés publics – Directive 2014/24/UE – Article 57, paragraphe 4, sous c) et g) – Passation de marchés publics de services – Motifs d'exclusion facultatifs – Faute professionnelle grave – Remise en cause de l'intégrité de l'opérateur économique – Contrat antérieur – Exécution – Manquements – Résiliation – Recours juridictionnel – Appréciation du manquement contractuel par le pouvoir adjudicateur – Empêchement jusqu'à la fin de la procédure judiciaire »

Dans l'affaire C-552/18,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Consiglio di Stato (Conseil d'État, Italie), par décision du 10 mai 2018, parvenue à la Cour le 29 août 2018, dans la procédure

Indaco Service Soc. coop. sociale, agissant en son nom propre et en qualité de mandataire de Coop. sociale il Melograno,

contre

Ufficio Territoriale del Governo Taranto,

en présence de :

Cometa Società Cooperativa Sociale,

LA COUR (neuvième chambre),

composée de M. S. Rodin, président de chambre, M. D. Šváby (rapporteur) et M^me^ K. Jürimäe, juges,

avocat général : M. M. Campos Sánchez-Bordona,

greffier : M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 57, paragraphe 4, de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE (JO 2014, L 94, p. 65).

2 Cette demande a été présentée dans le cadre du litige opposant Indaco Service Soc. coop. sociale, agissant en son nom propre et en qualité de mandataire de Coop. sociale il Melograno, à l'Ufficio Territoriale del Governo Taranto (préfecture de Tarente, Italie) au sujet de la décision prise par la préfecture de Tarente d'exclure Indaco Service d'une procédure d'adjudication.

Le cadre juridique

La directive 2014/24

3 Le considérant 101 de la directive 2014/24 énonce :

« Les pouvoirs adjudicateurs devraient [...] pouvoir exclure des opérateurs économiques qui se seraient avérés non fiables, par exemple pour manquement à des obligations environnementales ou sociales, y compris aux règles d'accessibilité pour les personnes handicapées, ou pour d'autres fautes professionnelles graves telles que la violation de règles de concurrence ou de droits de propriété intellectuelle. Il convient de préciser qu'une faute professionnelle grave peut remettre en question l'intégrité d'un opérateur économique et avoir pour conséquence que celui-ci ne remplit pas les conditions requises pour se voir attribuer un marché public, indépendamment du fait qu'il disposerait par ailleurs des capacités techniques et économiques pour exécuter le marché concerné.

Compte tenu du fait qu'ils seront responsables des conséquences d'une éventuelle décision erronée de leur part, les pouvoirs adjudicateurs devraient également avoir la faculté de considérer qu'il y a eu faute professionnelle grave lorsque, avant qu'une décision finale et contraignante quant à l'existence de motifs d'exclusion obligatoires ne soit prise, ils peuvent démontrer, par tout moyen approprié, que l'opérateur économique a manqué à ses obligations, y compris ses obligations relatives au paiement d'impôts et taxes ou de cotisations de sécurité sociale, sauf disposition contraire du droit national. Ils devraient également pouvoir exclure des candidats ou des soumissionnaires lorsque des défaillances importantes dans l'exécution d'obligations essentielles ont été constatées lors de l'exécution de marchés publics antérieurs, par exemple un défaut de fourniture ou d'exécution, des carences notables du produit ou du service fourni qui le rendent impropre aux fins prévues, ou un comportement fautif jetant sérieusement le doute quant à la fiabilité de l'opérateur économique. La législation nationale devrait prévoir une durée maximale pour ces exclusions.

Lorsqu'ils appliquent des motifs facultatifs d'exclusion, les pouvoirs adjudicateurs devraient accorder une attention particulière au principe de proportionnalité. Des irrégularités mineures ne devraient entraîner l'exclusion d'un opérateur économique que dans des circonstances exceptionnelles. Toutefois, des cas répétés d'irrégularités mineures peuvent susciter des doutes quant à la fiabilité d'un opérateur économique, ce qui pourrait justifier son exclusion. »

4 L'article 57 de cette directive, intitulé « Motifs d'exclusion », dispose :

« [...]

4. Les pouvoirs adjudicateurs peuvent exclure ou être obligés par les États membres à exclure tout opérateur économique de la participation à une procédure de passation de marché dans l'un des cas suivants :

[...]

c) le pouvoir adjudicateur peut démontrer par tout moyen approprié que l'opérateur économique a commis une faute professionnelle grave qui remet en cause son intégrité ;

[...]

g) des défaillances importantes ou persistantes de l'opérateur économique ont été constatées lors de l'exécution d'une obligation essentielle qui lui incombait dans le cadre d'un marché public antérieur, d'un marché antérieur passé avec une entité adjudicatrice ou d'une concession antérieure, lorsque ces défaillances ont donné lieu à la résiliation dudit marché ou de la concession, à des dommages et intérêts ou à une autre sanction comparable ;

[...]

6. Tout opérateur économique qui se trouve dans l'une des situations visées aux paragraphes 1 et 4 peut fournir des preuves afin d'attester que les mesures qu'il a prises suffisent à démontrer sa fiabilité malgré l'existence d'un motif d'exclusion pertinent. Si ces preuves sont jugées suffisantes, l'opérateur économique concerné n'est pas exclu de la procédure de passation de marché.

À cette fin, l'opérateur économique prouve qu'il a versé ou entrepris de verser une indemnité en réparation de tout préjudice causé par l'infraction pénale ou la faute, clarifié totalement les faits et circonstances en collaborant activement avec les autorités chargées de l'enquête et pris des mesures concrètes de nature technique et organisationnelle et en matière de personnel propres à prévenir une nouvelle infraction pénale ou une nouvelle faute.

Les mesures prises par les opérateurs économiques sont évaluées en tenant compte de la gravité de l'infraction pénale ou de la faute ainsi que de ses circonstances particulières. Lorsque les mesures sont jugées insuffisantes, la motivation de la décision concernée est transmise à l'opérateur économique.

Un opérateur économique qui a été exclu par un jugement définitif de la participation à des procédures de passation de marché ou d'attribution de concession n'est pas autorisé à faire usage de la possibilité prévue au présent paragraphe pendant la période d'exclusion fixée par ledit jugement dans les États membres où le jugement produit ses effets.

7. Par disposition législative, réglementaire ou administrative et dans le respect du droit de l'Union, les États membres arrêtent les conditions d'application du présent article. Ils déterminent notamment la durée maximale de la période d'exclusion si aucune des mesures visées au paragraphe 6 n'a été prise par l'opérateur économique pour démontrer sa fiabilité. Lorsque la durée de la période d'exclusion n'a pas été fixée par jugement définitif, elle ne peut dépasser cinq ans à compter de la date de la condamnation par jugement définitif dans les cas visés au paragraphe 1 et trois ans à compter de la date de l'événement concerné dans les cas visés au paragraphe 4. »

Le droit italien

5 L'article 80, paragraphe 5, sous c), du decreto legislativo n. 50 Codice dei contratti pubblici (décret législatif n° 50, portant code des contrats publics), du 18 avril 2016 (supplément ordinaire à la GURI n° 91, du 19 avril 2016, ci-après le « code des contrats publics »), dispose qu'un opérateur économique peut être exclu d'une procédure d'appel d'offres notamment lorsque :

« les pouvoirs adjudicateurs démontrent, par des moyens appropriés, que l'opérateur économique s'est rendu coupable de fautes professionnelles graves, de nature à mettre en doute son intégrité ou sa fiabilité. Font partie des fautes professionnelles graves, les défaillances importantes dans l'exécution d'un contrat de marché public antérieur ou d'une concession antérieure lorsque ces défaillances ont donné lieu à leur résiliation anticipée, non contestée en justice ou confirmée à l'issue d'une procédure juridictionnelle, à des dommages et intérêts ou à une autre sanction comparable [...] »

Le litige au principal et la question préjudicielle

6 Par un avis publié le 21 février 2017, la préfecture de Tarente a lancé un appel d'offres ouvert pour la conclusion d'un contrat-cadre pour le service d'accueil temporaire de ressortissants étrangers demandeurs de protection internationale, pour la période allant du 1er mai 2017 au 31 décembre 2017.

7 À la suite de l'évaluation des offres techniques et économiques qui lui ont été soumises, la commission d'appel d'offres a adjugé provisoirement le marché de services en question à Indaco Service, qui était classée à la quatorzième position au classement provisoire.

8 Pendant le déroulement de cette procédure d'appel d'offres, la préfecture de Tarente a, cependant, résilié, par un décret du 26 juin 2017 (ci-après le « décret de résiliation »), un contrat conclu avec Indaco Service le 19 décembre 2016 et portant sur un service d'accueil de ressortissants étrangers demandeurs de protection internationale. La préfecture de Tarente a en effet considéré que le comportement d'Indaco Service constituait un manquement contractuel grave qui ne permettait pas le maintien de la nécessaire relation de confiance dans la collaboration avec l'administration concernée.

9 Le 13 juillet 2017, Indaco Service a demandé à la préfecture de Tarente l'accès au dossier administratif, ainsi que la copie des actes relatifs à la résiliation du contrat afin d'apprécier la légalité

des pénalités qui lui ont été infligées par cette préfecture et, partant, la possibilité de former un recours juridictionnel contre le décret de résiliation.

10 Par une note du 13 juillet 2017 (ci-après la « décision d'exclusion »), publiée sur son site Internet le 17 juillet 2017, la préfecture de Tarente a exclu Indaco Service de la procédure d'appel d'offres en cause au principal en se référant au décret de résiliation et a, en conséquence, attribué, de manière définitive, le marché de services en question à d'autres opérateurs.

11 Indaco Service a alors saisi le Tribunale amministrativo regionale per la Puglia (tribunal administratif régional des Pouilles, Italie) d'un recours en annulation de la décision d'exclusion.

12 Ce recours a toutefois été rejeté au motif que le décret de résiliation n'avait été attaqué ni à la date de l'adoption de la décision d'exclusion ni lors de l'audience. La juridiction de première instance doutait également de l'interprétation de l'article 80, paragraphe 5, sous c), dernière partie, du code des contrats publics soutenue par Indaco Service, car elle aboutissait à priver de pertinence les résiliations faisant l'objet d'une contestation aussi longtemps que la juridiction saisie n'a pas statué sur le recours.

13 Indaco Service estime, toutefois, que l'interprétation littérale de cette disposition simplifie la preuve incontestable que le manquement antérieur a été significatif.

14 Par ailleurs, l'article 329 du code de procédure civile régirait l'acquiescement de manière telle que celui-ci peut se produire par la « renonciation expresse à une voie de recours » contre l'acte faisant grief ou par un comportement implicite clairement incompatible avec la volonté de contester la légalité de l'acte en justice. L'acquiescement ne pourrait donc être constaté que dans le cas où le destinataire d'un acte a clairement la volonté d'en accepter les effets.

15 Or, en l'occurrence, Indaco Service n'aurait pas acquiescé au décret de résiliation. Sa demande d'accès au dossier administratif en témoignerait, celle-ci ayant vocation à lui permettre d'apprécier la possibilité de former un recours à l'encontre de ce décret. Indaco Service ajoute que les délais impartis pour attaquer ou contester en justice cet acte n'avaient pas encore expiré. Enfin, la préfecture de Tarente n'aurait produit les documents relatifs au décret de résiliation que le 9 août 2017, de sorte qu'Indaco Service n'aurait pas pu intenter une action en justice avant cette date ou, en tout état de cause, avant la publication de la décision d'exclusion sur le site Internet de cette préfecture, le 17 juillet 2017.

16 Dans ce contexte, le Consiglio di Stato (Conseil d'État) a décidé de surseoir à statuer et de poser à la Cour la question préjudicielle suivante :

« Le droit de l'Union et plus précisément l'article 57, paragraphe 4, de la directive [2014/24], lu en combinaison avec le considérant 101 de cette directive et les principes de proportionnalité et d'égalité de traitement, s'opposent-ils à une réglementation nationale, telle que celle examinée en l'espèce, qui définit la "faute professionnelle grave" comme une cause d'exclusion obligatoire d'un opérateur économique et précise que, lorsque la faute professionnelle a donné lieu à la résiliation anticipée d'un marché, l'opérateur ne peut être exclu que si la résiliation n'est pas contestée ou qu'elle est confirmée à l'issue d'une procédure juridictionnelle ? »

17 Par décision du 25 septembre 2018, le président de la Cour a décidé de suspendre l'examen de la présente affaire dans l'attente du prononcé de l'arrêt du 19 juin 2019, Meca (C-41/18, EU:C:2019:507).

Sur la question préjudicielle

18 En vertu de l'article 99 du règlement de procédure de la Cour, lorsque la réponse à une question posée à titre préjudiciel peut être clairement déduite de la jurisprudence ou lorsque la réponse à une telle question ne laisse place à aucun doute raisonnable, la Cour peut, à tout moment, sur proposition du juge rapporteur, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée.

19 Il y a lieu de faire application de cette disposition dans le cadre de la présente affaire.

20 Par sa question, la juridiction de renvoi demande, en substance, si l'article 57, paragraphe 4, sous c) et g), de la directive 2014/24 doit être interprété en ce sens qu'il s'oppose à une réglementation nationale en vertu de laquelle l'introduction d'un recours juridictionnel contre une décision de résilier un contrat de marché public prise par un pouvoir adjudicateur en raison d'une « faute professionnelle grave », survenue lors de l'exécution de ce contrat, empêche le pouvoir adjudicateur qui lance un nouvel appel d'offres d'exclure un opérateur, au stade de la sélection des soumissionnaires, sur la base d'une appréciation de la fiabilité de cet opérateur.

21 Il résulte de la décision de renvoi que l'article 80, paragraphe 5, sous c), du code des contrats publics empêche un pouvoir adjudicateur d'exclure d'une procédure de passation de marché un soumissionnaire qui a formé un recours contre une décision résiliant un contrat de marché public antérieur au motif qu'il aurait commis une faute professionnelle grave.

22 À cet égard, il y a lieu de relever que, aux termes de l'article 57, paragraphe 4, de la directive 2014/24, « [l]es pouvoirs adjudicateurs peuvent exclure ou être obligés par les États membres à exclure tout opérateur économique de la participation à une procédure de passation de marché dans l'un des cas [visés à cette disposition] ».

23 Cela étant, ainsi que la Cour l'a jugé dans l'arrêt du 19 juin 2019, Meca (C-41/18, EU:C:2019:507, point 33), le pouvoir d'appréciation des États membres n'est pas absolu de telle sorte que, une fois qu'un État membre décide d'intégrer une des causes facultatives d'exclusion prévues par la directive 2014/24, il doit en respecter les caractéristiques essentielles, telles qu'elles y sont exprimées. En spécifiant que les États membres arrêtent « les conditions d'application du présent article » « dans le respect du droit de l'Union », l'article 57, paragraphe 7, de la directive 2014/24 empêche que les États membres dénaturent les causes facultatives d'exclusion établies à cette disposition ou ignorent les objectifs ou les principes qui inspirent chacune de ces causes.

24 Il ressort en effet du libellé de l'article 57, paragraphe 4, de la directive 2014/24 que le législateur de l'Union a entendu confier au pouvoir adjudicateur, et à lui seul, et non pas à une juridiction nationale, le soin d'apprécier, au stade de la sélection des soumissionnaires, si un candidat ou un soumissionnaire doit être exclu d'une procédure de passation de marché (arrêt du 19 juin 2019, Meca, C-41/18, EU:C:2019:507, points 28 et 34).

25 Dans ces conditions, il est manifeste qu'une disposition nationale telle que l'article 80, paragraphe 5, sous c), du code des contrats publics n'est pas de nature à préserver l'effet utile de la cause facultative d'exclusion prévue à l'article 57, paragraphe 4, sous c) ou g), de la directive 2014/24 (arrêt du 19 juin 2019, Meca, C-41/18, EU:C:2019:507, point 37).

26 En effet, le pouvoir d'appréciation que l'article 57, paragraphe 4, de la directive 2014/24 confère au pouvoir adjudicateur est paralysé du seul fait de l'introduction par un candidat ou un soumissionnaire d'un recours dirigé contre la résiliation d'un précédent contrat de marché public dont il était signataire, alors même que son comportement a paru suffisamment déficient pour justifier cette résiliation (arrêt du 19 juin 2019, Meca, C-41/18, EU:C:2019:507, point 38).

27 En outre, une règle telle que celle énoncée à l'article 80, paragraphe 5, sous c), du code des contrats publics n'incite manifestement pas un adjudicataire visé par une décision de résiliation d'un précédent contrat de marché public à adopter des mesures correctives alors même que ces mesures soulignent l'importance qui est attachée à la fiabilité de l'opérateur économique, cette fiabilité influençant profondément les causes d'exclusion relatives aux caractéristiques subjectives du soumissionnaire. Dans cette mesure, une telle règle est susceptible de heurter les prescriptions de l'article 57, paragraphe 6, de la directive 2014/24 (arrêt du 19 juin 2019, Meca, C-41/18, EU:C:2019:507, points 40 et 41).

28 Compte tenu de l'ensemble des considérations qui précèdent, il y a lieu de répondre à la question posée que l'article 57, paragraphe 4, sous c) et g), de la directive 2014/24 doit être interprété en ce sens qu'il s'oppose à une réglementation nationale en vertu de laquelle l'introduction d'un recours juridictionnel contre une décision de résilier un contrat de marché public prise par un pouvoir adjudicateur en raison d'une « faute professionnelle grave », survenue lors de l'exécution de ce contrat, empêche le pouvoir

adjudicateur qui lance un nouvel appel d'offres d'exclure un opérateur, au stade de la sélection des soumissionnaires, sur la base d'une appréciation de la fiabilité de cet opérateur.

Sur les dépens

29 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (neuvième chambre) dit pour droit :

L'article 57, paragraphe 4, sous c) et g), de la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE, doit être interprété en ce sens qu'il s'oppose à une réglementation nationale en vertu de laquelle l'introduction d'un recours juridictionnel contre une décision de résilier un contrat de marché public prise par un pouvoir adjudicateur en raison d'une « faute professionnelle grave », survenue lors de l'exécution de ce contrat, empêche le pouvoir adjudicateur qui lance un nouvel appel d'offres d'exclure un opérateur, au stade de la sélection des soumissionnaires, sur la base d'une appréciation de la fiabilité de cet opérateur.

Signatures

---

* Langue de procédure : l'italien.

EU:C:2020:867

JUDGMENT OF THE COURT (Fifth Chamber)

28 October 2020(*)

(Reference for a preliminary ruling – Procurement in the water, energy, transport and postal services sectors – Directive 2014/25/EU – Article 13 – Activities relating to the provision of postal services – Contracting entities – Public undertakings – Admissibility)

In Case C-521/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 4 July 2018, received at the Court on 6 August 2018, in the proceedings

Pegaso Srl Servizi Fiduciari,

Sistemi di Sicurezza Srl,

YW

v

Poste Tutela SpA,

interveners:

Poste Italiane SpA,

Services Group,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász (Rapporteur), C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: M. Bobek,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 22 January 2020,

after considering the observations submitted on behalf of:

– Pegaso Srl Servizi Fiduciari and Sistemi di Sicurezza Srl, by A. Scuderi and F. Botti, avvocati,

– Poste Tutela SpA, by S. Napolitano, avvocato,

– Poste Italiane SpA, by A. Fratini and A. Sandulli, avvocati,

– Services Group, by L. Lentini, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by D. Del Gaizo, avvocato dello Stato,

– the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 April 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of recitals 21 and 46 and Article 16 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), Article 2(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) and Article 3(4), Article 4(1) and (2) and Article 13 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

2 The request has been made in proceedings between, of the one part, Pegaso Srl Servizi Fiduciari, Sistemi di Sicurezza Srl and YW (together 'Pegaso') and, of the other, Poste Tutela SpA and Poste Italiane SpA, concerning the legality of a contract notice for the award, in an open procedure, of caretaking, reception and access control services for the premises of Poste Italiane and of other companies in its group.

Legal context

EU law

Directive 2004/17/EC

3 Article 6 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), entitled 'Postal services', provided in paragraph 1 thereof:

'This Directive shall apply to activities relating to the provision of postal services or, on the conditions set out in paragraph 2(c), other services than postal services.'

Directive 2014/23

4 Recitals 21 and 46 of Directive 2014/23 state:

'(21) The notion of "bodies governed by public law" has been examined repeatedly in the case-law of the Court of Justice of the European Union. A number of clarifications are key to the full understanding of this concept. It should therefore be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered to be a "body governed by public law", since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character. Similarly, the condition relating to the origin of the funding of the body considered, has also been examined by the Court, which has clarified that financed for "the most part" means for more than half and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law.

…

(46) Concessions awarded to controlled legal persons should not be subject to the application of the procedures provided for by this Directive if the contracting authority or contracting entity as referred to point (a) of Article 7(1) exercises a control over the legal person concerned which is similar to that which it exercises over its own departments provided that the controlled legal person carries out more than 80% of its activities in the performance of tasks entrusted to it by the controlling contracting authority or contracting entity or by other legal persons controlled by that

contracting authority or contracting entity, regardless of the beneficiary of the contract performance. …’

5 Article 6 of that directive, entitled ‘Contracting authorities’, states, in paragraph 4 thereof:

‘“Bodies governed by public law” means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those bodies or authorities; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.’

6 Article 16 of Directive 2014/23, entitled, ‘Exclusion of activities which are directly exposed to competition’, provides:

‘This Directive shall not apply to concessions awarded by contracting entities where, for the Member State in which such concessions are to be performed, it has been established pursuant to Article 35 of Directive 2014/25/EU that the activity is directly exposed to competition in accordance with Article 34 of that Directive.’

Directive 2014/24

7 The definition of the concept of ‘bodies governed by public law’ in Article 2(1)(4) of Directive 2014/24 corresponds to that in Article 6(4) of Directive 2014/23.

Directive 2014/25

8 The definition of the concept of ‘bodies governed by public law’ in Article 3(4) of Directive 2014/25 also corresponds to that in Article 6(4) of Directive 2014/23.

9 Article 4(1) and (2) of Directive 2014/25 is worded as follows:

‘1. For the purpose of this Directive contracting entities are entities, which:

(a) are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 8 to 14;

(b) when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 8 to 14, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

2. “Public undertaking” means any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed in any of the following cases in which those authorities, directly or indirectly:

(a) hold the majority of the undertaking’s subscribed capital;

(b) control the majority of the votes attaching to shares issued by the undertaking;

(c) can appoint more than half of the undertaking’s administrative, management or supervisory body.’

10 Article 6(1) and (2) of that directive provides:

‘1. In the case of contracts intended to cover several activities, contracting entities may choose to award separate contracts for the purposes of each separate activity or to award a single contract. Where contracting entities choose to award separate contracts, the decision as to which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

Notwithstanding Article 5, where contracting entities choose to award a single contract, paragraphs 2 and 3 of this Article shall apply. However, where one of the activities concerned is covered by Article 346 TFEU or Directive 2009/81/EC [of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76)], Article 26 of this Directive shall apply.

The choice between awarding a single contract or awarding a number of separate contracts shall not, however, be made with the objective of excluding the contract or contracts from the scope of application either of this Directive or, where applicable, Directive 2014/24/EU or Directive 2014/23/EU.

2. A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.’

11 Articles 8 to 14 of Directive 2014/25 list the activities to which that directive applies. Those activities are gas and heat (Article 8), electricity (Article 9), water (Article 10), transport services (Article 11), ports and airports (Article 12), postal services (Article 13) and the extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels (Article 14).

12 Article 13 of that directive is worded as follows:

‘1. This Directive shall apply to activities relating to the provision of:

(a) postal services;

(b) other services than postal services, on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) of paragraph 2 of this Article and provided that the conditions set out in Article 34(1) are not satisfied in respect of the services falling within point (b) of paragraph 2 of this Article.

2. For the purpose of this Article and without prejudice to Directive 97/67/EC of the European Parliament and of the Council [of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14)]:

(a) “postal item” means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;

(b) “postal services” means services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC;

(c) “other services than postal services” means services provided in the following areas:

(i) mail service management services (services both preceding and subsequent to despatch, including mailroom management services);

(ii) services concerning postal items not included in point (a), such as direct mail bearing no address.’

13 Article 19(1) of Directive 2014/25 provides:

‘This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 8 to 14 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Union nor shall it apply to design contests organised for such purposes.’

Italian law

14 Decreto legislativo n. 50 – Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull’aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d’appalto degli enti erogatori nei settori dell’acqua, dell’energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50, implementing Directive 2014/23/EU on the award of concession contracts, Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, and reforming the existing provisions in relation to public works, service and supply contracts) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016) established the Codice dei contratti pubblici (Public Procurement Code).

15 Article 3(1)(d) of that code defines the concept of ‘bodies governed by public law’, within the meaning of that code, in the same terms as that concept is defined in Article 6(4) of Directive 2014/23, Article 2(1)(4) of Directive 2014/24 and Article 3(4) of Directive 2014/25.

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 By notice published on 29 July 2017 in the *Official Journal of the European Union*, Poste Tutela, 100% owned at the time by Poste Italiane, launched an open tendering procedure with a view to establishing framework agreements for caretaking, reception and access control services for the premises of Poste Italiane and of other companies in its group, subdivided territorially into seven cumulative lots, for a period of 24 months (with a further 12 months, in the event of contract renewal), for a total estimated amount of EUR 25 253 242. The contract notice indicated Directive 2014/25 as the ‘legal basis’.

17 Taking the view that the contract notice was contrary to certain provisions of the Public Procurement Code, Pegaso brought an action before the referring court, which, by interim order of 20 October 2017, suspended the tendering procedure.

18 Before that court, Poste Italiane, with which Poste Tutela merged with effect from 1 March 2018, argued that the action was inadmissible on the ground that the administrative courts had no jurisdiction to hear it. Poste Italiane explains that, while, at the date on which the contract notice at issue in the main proceedings was published, Poste Tutela took the form of a public undertaking, the services concerned by that contract notice did not come under one of the special sectors covered by Directive 2014/25. It adds that that point of view was upheld in an order of the Corte suprema di cassazione (Supreme Court of Cassation, Italy) of 1 October 2018, which found that the ordinary courts have jurisdiction in respect of public contracts concluded by Poste Italiane, even though it has the status of a public undertaking, where those contracts concern activities unconnected with those covered by the special sector concerned.

19 In any event, Poste Italiane submits that the subject matter of the dispute has ceased to exist, since the contract notice at issue in the main proceedings was withdrawn after the present request for a preliminary ruling was made.

20 Pegaso, for its part, disputes the plea of lack of jurisdiction raised by Poste Italiane. It maintains that it is necessary to include among the services covered by the special sectors not only the services directly

referred to in the applicable legislation, such as postal services, but also complementary and ancillary services, the purpose of which is to ensure that the postal services are actually provided.

21 The referring court considers that it is necessary, at the outset, to resolve the question whether the case in the main proceedings falls within the jurisdiction of the administrative courts or the ordinary courts. To that end, it is essential to determine whether Poste Tutela, now Poste Italiane, was under the obligation to initiate a tendering procedure with a view to awarding the services at issue in the main proceedings. On that point, the referring court considers that Poste Italiane possessed all the characteristics necessary to be classified as a body governed by public law, within the meaning of Article 3(1)(d) of the Public Procurement Code and Directives 2014/23, 2014/24 and 2014/25. However, it also notes that the Corte suprema di cassazione (Supreme Court of Cassation) reached a different conclusion, in the order mentioned in paragraph 18 above, emphasising in particular that Poste Italiane is now essentially driven by industrial and commercial requirements.

22 In those circumstances the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Should the company Poste Italiane, on the basis of characteristics set out above, be classified as a “body governed by public law” within the meaning of Article 3(1)(d) of [the Public Procurement Code] and of the relevant EU directives (2014/23, 2014/24 and 2014/25)?

(2) Should that classification be extended to include the wholly owned subsidiary company [Poste Tutela] – whose merger with Poste Italiane is already under way – bearing in mind what is stated in recital 46 of Directive 2014/23 concerning controlled legal persons? (See, also, to that effect, judgment of 5 October 2017[, *LitSpecMet* (C-567/15, EU:C:2017:736)]: competitive tendering requirement for companies controlled by public authorities; judgment No 6211 of the Consiglio di Stato [(Council of State, Italy)], Chamber VI, of 24 November 2011).

(3) Are those companies, as contracting entities, required to conduct competitive tendering procedures only when awarding contracts in connection with activities carried out in the special sectors, pursuant to Directive 2014/25 – such contracting entities having to be deemed bodies governed by public law under the rules laid down in Part II of the Public Procurement Code – whilst, on the other hand, having unfettered freedom and being subject only to private-sector rules for contracts not connected to such sectors, bearing in mind the principles set out in recital 21 and Article 16 of Directive 2014/23?

(4) On the other hand, with regard to contracts considered not to be directly connected with the specific activities covered by the special sectors, are those companies, where they satisfy the requirements for being classified as bodies governed by public law, subject to the general Directive 2014/24 (and therefore to the rules governing competitive tendering procedures), even when performing primarily entrepreneurial activities under competitive market conditions, having developed from when they were originally established?

(5) In any event, in the case of offices in which activities connected to the universal service and activities unrelated to it are both performed, may the concept of functionality, in connection with a service which is specifically in the public interest, be said to be inapplicable as regards contracts relating to ordinary and extraordinary maintenance, cleaning, furnishing, caretaking and storage services for such offices?

(6) Finally, were the arguments of Poste Italiane to be endorsed, should the fact that a decision to organise a competitive tendering procedure has been taken without there being any obligation to conduct such a procedure – which is not subject to all the guarantees of transparency and equal treatment, as governed by the Public Procurement Code – and the fact that the decision is duly published without any further notice in that regard in the *Gazzetta Ufficiale della Repubblica italiana* (Official Journal of the Italian Republic) and the *Official Journal of the European Union*, be regarded as incompatible with the established principle that the legitimate expectations of tenderers must be protected?’

23 After the Court was informed by Poste Italiane that the contract notice at issue in the main proceedings had been annulled, the Court asked the referring court whether it wished to withdraw its request for a preliminary ruling. On 26 October 2018, the referring court informed the Court that it was maintaining its request for a preliminary ruling.

24 In response to a request from the Court to explain the grounds on which it considered that the dispute at issue in the main proceedings was still pending before it, the referring court provided clarification in that regard on 18 March 2019.

Admissibility

25 Poste Italiane and the Italian Government contend that the request for a preliminary ruling is inadmissible, arguing that the subject matter of the dispute in which the request was made has ceased to exist, since the contract notice at issue in the main proceedings was withdrawn after the action was brought before the referring court.

26 In that regard, it must be borne in mind that, in accordance with the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling (judgment of 1 October 2019, *Blaise and Others*, C-616/17, EU:C:2019:800, paragraph 34 and the case-law cited).

27 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 1 October 2019, *Blaise and Others*, C-616/17, EU:C:2019:800, paragraph 35 and the case-law cited)

28 In the present case, it is common ground that, following the merger by incorporation of Poste Tutela into Poste Italiane, Poste Italiane had its decision 'to annul/revoke' the contract notice at issue in the main proceedings published in the *Official Journal of the European Union* (S series, of 29 September 2018) and that, as confirmed by the referring court to the Court of Justice on 18 March 2019, Poste Italiane had published in the *Official Journal of the European Union* (S series, of 19 January 2019) a new contract notice concerning caretaking, reception and access control services for the premises of Poste Italiane and of the other companies in its group. Moreover, Pegaso does not deny that the contract notice at issue in the main proceedings was withdrawn, even though it argues that the referring court is still required to rule on the substance of dispute in the main proceedings, in particular on whether that contract notice was lawful, both for the purposes of a possible claim for compensation and for the purposes of costs.

29 In those circumstances, it must be found that, notwithstanding the initial doubts of the referring court in that regard, the subject matter of the dispute in the main proceedings has indeed ceased to exist.

30 However, the referring court considers that, in order to be able to determine what action is to be taken on the application brought before it, it must first settle the question whether it has jurisdiction to hear the case. It states that that would be the case if the contract at issue in the main proceedings were governed by one of the European Union's public procurement directives.

31 Consequently, the request for a preliminary ruling is admissible.

Consideration of the questions referred

The third and fifth questions

32 By its third and fifth questions, which it is appropriate to examine together at the outset, the referring court seeks, in essence, to ascertain whether Article 13(1) of Directive 2014/25 must be interpreted as applying to activities consisting in the provision of caretaking, reception and access control services for the premises of postal service providers, such as Poste Italiane and other companies in its group.

33 As a preliminary point, it must be stated, first, that Directive 2014/25 repealed and replaced Directive 2004/17. In that regard, as regards the provisions of Directive 2014/25 having essentially the same scope as the relevant provisions of Directive 2004/17, the Court's case-law on Directive 2004/17 is also applicable to Directive 2014/25.

34 Secondly, it is common ground between the parties that Poste Tutela and Poste Italiane have the status of 'public undertakings' within the meaning of Article 4(2) of Directive 2014/25 and therefore, as contracting entities, fall within the scope *ratione personae* of that directive. Consequently, there is no need to examine whether those undertakings also constitute a body governed by public law within the meaning of Article 3(4) of that directive.

35 According to Article 13(1) of Directive 2014/25, that directive is to apply to activities relating to the provision, first, of postal services and, secondly, services other than postal services, on condition that those other services are provided by an entity which also provides postal services. The concepts 'postal services' and 'other services than postal services' are defined in Article 13(2)(b) and (c) of that directive as referring, respectively, to (i) services consisting in the clearance, sorting, routing and delivery of postal items and (ii) mail service management services and services concerning items other than postal items, such as direct mail bearing no address.

36 In addition, Article 19(1) of Directive 2014/25 states, in particular, that that directive is not to apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 8 to 14 of that directive.

37 In that regard, the Court has held that Directive 2004/17 in fact applied not only to contracts awarded in the sphere of one of the activities expressly listed in Articles 3 to 7 thereof, but also to contracts which, even though they were different in nature and could as such normally fall within the scope of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), were used in the exercise of activities defined in Directive 2004/17. The Court inferred from this that where a contract awarded by a contracting entity was connected with an activity which that entity carried out in the sectors listed in Articles 3 to 7 of that directive, in the sense that that contract was awarded in connection with and for the exercise of activities in one of those sectors, the contract was subject to the procedures laid down in that directive (see, to that effect, judgments of 10 April 2008, *Ing. Aigner*, C-393/06, EU:C:2008:213, paragraphs 31 and 56 to 59, and of 19 April 2018, *Consorzio Italian Management and Catania Multiservizi*, C-152/17, EU:C:2018:264, paragraph 26).

38 Article 6(1) of Directive 2004/17 applied, inter alia, to 'activities relating to the provision of postal services' and Article 13(1) of Directive 2014/25, which replaced that provision, defines the scope of Directive 2014/25 by referring, in particular, to 'activities relating to the provision of postal services'.

39 In those circumstances, and is apparent from the comparison between the introductory parts of those two provisions, the scope *ratione materiae* of Directive 2014/25 cannot be interpreted more restrictively than that of Directive 2004/17 and it cannot, therefore, be limited solely to activities of providing postal services as such, but also includes, in addition, activities relating to the provision of such services.

40 It follows that the interpretation adopted by the Court in its case-law referred to in paragraph 37 above, based on a systematic interpretation of Directives 2004/17 and 2004/18, has been confirmed, since the entry into force of Directive 2014/25, by the wording of Article 13(1) thereof, which sets out the scope of that new directive.

41 It must, therefore, be determined whether, as Pegaso and the European Commission assert, services such as those at issue in the main proceedings may be regarded as being connected, within the meaning of paragraph 37 above, with the activity carried out by the contracting entity concerned in the postal sector.

42 In that regard, in order to be of use in carrying out the activity falling within the postal sector, the connection between the contract at issue and that sector cannot be of just any kind, on pain of misconstruing the meaning of Article 19(1) of Directive 2014/25. It is not sufficient that the services which are the subject of that contract make a positive contribution to the activities of the contracting entity and increase profitability, in order to be able to establish the existence of a connection between that contract and the activity falling within the scope of the postal sector, for the purposes of Article 13(1) of that directive.

43 It is, therefore, appropriate to consider as activities relating to the provision of postal services, within the meaning of that provision, all activities which actually serve to carry out the activity falling within the postal services sector, by enabling that activity to be carried out adequately, having regard to the normal conditions under which it is carried out, to the exclusion of activities carried out for purposes other than the pursuit of the sectoral activity concerned.

44 The same applies to activities which, being complementary and transverse in nature, could in other circumstances serve to carry out other activities outside the scope of the special sectors directive.

45 In the present case, it is difficult to imagine that postal services may be adequately provided in the absence of the caretaking, reception and access control services for the premises of the provider concerned. That finding applies both to premises which are open to the recipients of postal services and thus admit the public and to premises used for administrative functions. As the Advocate General observed in point 116 of his Opinion, the provision of postal services also includes the management and planning of those services.

46 In those circumstances, a contract such as that at issue in the main proceedings cannot be regarded as awarded for purposes other than the pursuit of the activity falling within the postal services sector, in terms of Article 19(1) of Directive 2014/25, and, on the contrary, having regard to the considerations set out in paragraph 43 above, displays a connection with that activity which justifies the contract being subject to the regime established by that directive.

47 Accordingly, in view of the fact that Poste Italiane has the status of a public undertaking within the meaning of Article 4(2) of Directive 2014/25, as has been pointed out in paragraph 34 above, and that the services at issue in the main proceedings are activities related to the provision of postal services, which they actually serve to carry out, that directive is, therefore, applicable both *ratione personae* and *ratione materiae* to the contract at issue in the main proceedings.

48 Such a conclusion is not invalidated by Poste Italiane’s argument that the reception and caretaking activities which are the subject of the tender at issue in the main proceedings are also provided for the benefit of activities which are outside the material scope of Directive 2014/25, such as payment services, mobile telephony, insurance or digital services.

49 As the Advocate General observed, in essence, in points 119 and 120 of his Opinion, Article 6(1) of Directive 2014/25 provides, in the case of contracts intended to cover several activities, that contracting entities may decide to award separate contracts for each of the different activities or to award a single contract. In the latter case, it follows from Article 6(2) of that directive that that single contract is to be subject to the rules applicable to the activity for which it is principally intended.

50 However, the information provided to the Court does not enable it to be established that the contract at issue in the present case was principally intended for activities not falling within the material scope of Directive 2014/25.

51 Consequently, it cannot be held, in the context of the information provided to the Court and subject to verification by the referring court, that the contract at issue in the main proceedings falls outside the material scope of Directive 2014/25.

52 In the light of the foregoing, the answer to the third and fifth questions is that Article 13(1) of Directive 2014/25 must be interpreted as applying to activities consisting in the provision of caretaking, reception and access control services for the premises of postal services providers, where such activities are connected with the activity falling within the postal sector, in the sense that such activities actually serve to carry out that activity by enabling it to be carried out adequately, having regard to the normal conditions under which it is carried out.

The other questions

53 In the light of the reply given to the third and fifth questions, there is no need to answer the other questions referred.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 13(1) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC must be interpreted as applying to activities consisting in the provision of caretaking, reception and access control services for the premises of postal services providers, where such activities are connected with the activity falling within the postal sector, in the sense that such activities actually serve to carry out that activity by enabling it to be carried out adequately, having regard to the normal conditions under which it is carried out.

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 23 April 2020(1)

Case C-521/18

Pegaso Srl Servizi Fiduciari,

Sistemi di Sicurezza Srl,

YW

v

Poste Tutela SpA,

joined parties:

Poste Italiane SpA,

Services Group

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy))

(Reference for a preliminary ruling — Public procurement — Directive 2014/25/EU — Postal services — Activities relating to postal services — Caretaking, reception and access control services — Withdrawal of the contract notice in the course of the proceedings — Interest to act of the applicants despite that withdrawal — Outstanding decision on costs)

I. Introduction

1. A contract notice was issued in 2017 by Poste Tutela SpA (‘Poste Tutela’), back then a wholly owned subsidiary of Poste Italiane SpA (‘Poste Italiane’). That contract notice aimed at establishing framework agreements for caretaking, reception and access control services for the premises of Poste Italiane and of other companies in its group.

2. Pegaso Srl Servizi Fiduciari, Sistemi di Sicurezza Srl and YW sought the annulment of that contract notice before the referring court. Within the framework of that procedure, the referring court wishes to know whether the activities covered by that contract notice fall within the scope of application of Directive 2014/25/EU (2) (‘the Utilities Directive’) or of Directive 2014/24/EU (3) (‘the Public Sector Directive’).

3. However, after the order for reference, the contested contract notice was withdrawn. That fact opens up the preliminary issue of whether this Court remains validly seised of the case. In particular, does the fact that the referring court still has to make a pronouncement on costs suffice to establish that an answer should be given to the questions posed by the request for a preliminary ruling?

II. Legal framework

A. EU law

1. The Public Sector Directive

4. Recital 10 of the Public Sector Directive states that:

‘The notion of “contracting authorities” and in particular that of “bodies governed by public law” have been examined repeatedly in the case-law of the Court of Justice of the European Union. … [I]t should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a “body governed by public law” since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.

Similarly, the condition relating to the origin of the funding of the body considered, has also been examined in the case-law, which has clarified inter alia that being financed for “the most part” means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law.’

5. According to Article 1(1) of the Public Sector Directive:

‘This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.’

6. Pursuant to Article 2(1) of that directive:

‘(1) “contracting authorities” means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law;

…

(4) “bodies governed by public law” means bodies that have all of the following characteristics:

(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) they have legal personality; and

(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

…’

7. Pursuant to Article 7 of the Public Sector Directive:

‘This Directive shall not apply to public contracts and design contests which, under Directive 2014/25/EU, are awarded or organised by contracting authorities exercising one or more of the activities referred to in Articles 8 to 14 of that Directive and are awarded for the pursuit of those activities …’

2. The Utilities Directive

8. Recital 16 of the Utilities Directive reads as follows:

‘… contracts might be awarded for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single contract intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the contract is principally intended can be based on an analysis of the requirements which the specific contract must meet, carried out by the contracting entity for the purposes of estimating the contract value and drawing up the procurement documents. …’

9. Recital 19 reads as follows:

‘To ensure a real opening up of the market and a fair balance in the application of procurement rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 345 TFEU, that the rules governing the system of property ownership in Member States are not prejudiced.’

10. Article 1(1) of the Utilities Directive provides that:

‘This Directive establishes rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15.’

11. Article 4(1) defines ‘contracting entities’ as ‘entities, which:

(a) are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 8 to 14;

(b) when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 8 to 14, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.’

12. Under Article 4(2) of the Utilities Directive:

‘“Public undertaking” means any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed in any of the following cases in which those authorities, directly or indirectly:

(a) hold the majority of the undertaking’s subscribed capital;

(b) control the majority of the votes attaching to shares issued by the undertaking,

(c) can appoint more than half of the undertaking’s administrative, management or supervisory body.’

13. By virtue of Article 5(4):

‘In the case of contracts which have as their subject-matter procurement covered by this Directive as well as procurement not covered by this Directive, contracting entities may choose to award separate contracts for the separate parts or to award a single contract. Where contracting entities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where contracting entities choose to award a single contract, this Directive shall, unless otherwise provided in Article 25, apply to the ensuing mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

…’

14. Article 13(1) of the Utilities Directive provides that:

‘This Directive shall apply to activities relating to the provision of:

(a) postal services;

(b) other services than postal services, on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) of paragraph 2 of this Article and provided that the conditions set out in Article 34(1) are not satisfied in respect of the services falling within point (b) of paragraph 2 of this Article.’

15. Article 13(2) defines, under (b), ‘postal services’ as ‘services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC’. Under (c), ‘other services than postal services’ are defined as mail service management services (services both preceding and subsequent to despatch, including mailroom management services) and certain services concerning postal items, such as direct mail bearing no address.

16. By virtue of Article 19(1) of the Utilities Directive:

‘This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 8 to 14 …’

III. Facts, procedure and questions referred

17. Poste Italiane is a stock company. The order for reference indicates that 29.26% of its share capital is held by the Ministero dell’Economia e delle Finanze (Ministry of Economic Affairs and Finance, Italy), 35% by Cassa Depositi e Prestiti and the remainder by private investors. Poste Italiane holds the concession for the universal postal service. It also operates in the financial, insurance and mobile phone sectors.

18. At the time of the issuance of the contested contract notice, Poste Tutela was a wholly owned subsidiary of Poste Italiane. It merged with Poste Italiane with effect as from 1 March 2018.

19. In July 2017, Poste Tutela issued a contract notice for establishing framework agreements in connection with caretaking, reception and access control services for the premises of Poste Italiane and of other companies in its group, for a period of 24 months (with a further 12 months, in the event of contract renewal), for a total estimated amount of EUR 25 253 242.

20. That contract notice specified the Utilities Directive as its legal basis. It was published in Gazzetta Ufficiale della Repubblica Italiana (Official Journal of the Italian Republic; ‘GURI’) (4) and in the *Official Journal of the European Union*. (5)

21. On 28 September 2017, Pegaso Srl Servizi Fiduciari, Sistemi di Sicurezza Srl and YW (‘the applicants’) challenged the contract notice in question before the referring court. They alleged a number of infringements of the Italian Public Procurement Code.

22. On 20 October 2017, the referring court decided to suspend the procurement procedure in question by way of an interim order on the grounds that the applicants’ allegations were prima facie founded.

23. Poste Tutela and Poste Italiane (‘the defendants’) raised a preliminary objection concerning the jurisdiction of the referring court. They argued that administrative courts do not have jurisdiction in cases where procurement procedures are launched by a public undertaking for the provision of services unconnected to those included in special sectors, such as the postal sector.

24. The referring court considers that that issue of jurisdiction requires it to determine whether Poste Tutela (and now Poste Italiane) was obliged to launch a procurement procedure to decide on the award of the services at issue. According to the referring court, Poste Tutela/Poste Italiane meet the conditions to be

characterised as a ‘body governed by public law’ within the meaning of Directive 2014/23/EU (6) (‘the Concessions Directive’), the Public Sector Directive and the Utilities Directive.

25. It is under those circumstances that the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) stayed the proceedings and referred the following questions for a preliminary ruling:

> ‘(1) Should the company Poste Italiane SpA, on the basis of characteristics set out above, be classified as a “body governed by public law” within the meaning of Article 3(1)(d) of Legislative Decree No 50 of 2016 and of the relevant EU directives (2014/23/EU, 2014/24/EU and 2014/25/EU)?
>
> (2) Should that classification be extended to include the wholly owned subsidiary company Poste Tutela SpA — whose merger with Poste Italiane SpA is already under way — bearing in mind what is stated in recital 46 of Directive 2014/23/EU concerning controlled legal persons? (See, also, in this respect, judgment of the Court of Justice of the European Union (Fourth Chamber) of 5 October 2017, Case [C-567/15]: competitive tendering requirement for companies controlled by public authorities; judgment No 6211 of the Consiglio di Stato [(Council of State, Italy)], Chamber VI, of 24 November 2011.)
>
> (3) Are those companies, as contracting entities, required to conduct competitive tendering procedures only when awarding contracts in connection with activities carried out in the special sectors, pursuant to Directive 2014/25/EU — such contracting entities having to be deemed bodies governed by public law under the rules laid down in Part II of the Public Procurement Code — whilst, on the other hand, having unfettered freedom and being subject only to private-sector rules for contracts not connected to such sectors, bearing in mind the principles set out in recital 21 and Article 16 of Directive 2014/23/EU?
>
> (4) On the other hand, with regard to contracts considered not to be directly connected with the specific activities covered by the special sectors, are those companies, where they satisfy the requirements for being classified as bodies governed by public law, subject to the general Directive 2014/24/EU (and therefore to the rules governing competitive tendering procedures), even when performing primarily entrepreneurial activities under competitive market conditions, having developed from when they were originally established?
>
> (5) In any event, in the case of offices in which activities connected to the universal service and activities unrelated to it are both performed, may the concept of functionality, in connection with a service which is specifically in the public interest, be said to be inapplicable as regards contracts relating to ordinary and extraordinary maintenance, cleaning, furnishing, caretaking and storage services for such offices?
>
> (6) Finally, were the arguments of Poste Italiane SpA to be endorsed, should the fact that a decision to organise a competitive tendering procedure has been taken without there being any obligation to conduct such a procedure — which is not subject to all the guarantees of transparency and equal treatment, as governed by the Public Procurement Code — and the fact that the decision is duly published without any further notice in that regard in the [GURI] and the *Official Journal of the European Union*, be regarded as incompatible with the established principle that the legitimate expectations of tenderers must be protected?’

26. On 11 October 2018, Poste Italiane informed both the referring court and the Court, by way of letter, that it had withdrawn the challenged contract notice. Poste Italiane expressly asked the referring court to declare the applicants’ action therefore inadmissible. On 20 October 2018, the referring court rejected that request.

27. On 16 October 2018, after the Court was informed by the defendants that the contract notice had been annulled, the Court asked the referring court whether it wanted to withdraw its reference for a preliminary ruling. On 26 October 2018, the referring court expressed its wish to maintain its reference for a preliminary ruling.

28. On 9 January 2019, in reply to the Court's request to substantiate the grounds for which the referring court considers that the dispute at issue is still pending before it, the Court received an additional clarification from the referring court. The latter stated why, in its view, the dispute was still pending before it and why therefore the questions posed should be answered by the Court.

29. On 3 April 2019, the referring court further informed the Court that an application was introduced seeking the annulment of another contract notice launched by Poste Italiane concerning the same services. According to the referring court, that contract notice is identical to the one at issue at the present case. The referring court has suspended this new case until the Court makes a decision in the present case.

30. Written observations have been submitted by Pegaso Srl Servizi Fiduciari and Sistemi di Sicurezza Srl, Poste Italiane, the Italian Government and the European Commission. All of them participated at the hearing held on 22 January 2020.

IV. Assessment

31. This Opinion is structured as follows. I will first explain why, in view of the developments taking place after the introduction of the present request for a preliminary ruling, there is no need to answer the referring court's questions (A). Should the Court not share my position, I will briefly sketch out how the key questions should be answered on the merits. I will suggest that activities such as the ones at issue in the main proceedings (caretaking, reception and access control services of the premises of Poste Italiane) are subject to EU public procurement rules, namely those laid down in the Utilities Directive regarding the special sectors (B).

A. Existence of a pending dispute in the main proceedings?

32. According to established case-law, questions regarding the interpretation of EU law are referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine. Such questions enjoy a presumption of relevance. (7)

33. However, it is also established case-law that it is clear from both the wording and the scheme of Article 267 TFEU that the preliminary ruling procedure presupposes that a dispute is *actually pending* before the national courts in which they are called upon to give a decision which is capable of taking account of the preliminary ruling. Therefore, the Court may verify of its own motion that the dispute in the main proceedings is continuing. (8) If the object of the dispute has disappeared while the proceedings before the Court are still pending, thereby making the questions posed hypothetical or unrelated to an actual dispute, the Court is to decide that there is no need to give a ruling on the request for a preliminary ruling. (9)

34. In the present case, there is controversy as to whether there is still a pending dispute before the national court. The disagreement is twofold: first, has the contested contract notice been withdrawn by Poste Italiane? Second, despite the withdrawal, would there be any other ground on which the applicants would still have an interest to act before the referring court?

1. The withdrawal of the contract notice

35. In reply to the question posed by the Court as to whether there is still a dispute pending before it, the referring court noted that Poste Italiane has published a notice to that effect in the GURI and shorter notices in daily newspapers. In the notice in the GURI, it was stated that Poste Italiane decided to 'annul/revoke' the contract notice in view of the complex restructuring of Poste Italiane following the merger between the latter and Poste Tutela. However, the referring court goes on to note that in the other, shorter notices published in the daily newspapers, Poste Italiane only declared that the procurement procedure had been interrupted. The referring court continues to wonder whether, in so doing, Poste Italiane aimed at rectifying the infringements alleged by the applicants or to proceed differently (through a direct award) in order to satisfy the needs that were the object of the contract notice.

36. Poste Italiane and the Italian Government claim that the contract notice has been formally withdrawn. In particular, Poste Italiane argues that the annulment was duly published in all the required fora (the GURI,

two national and two local newspapers and the Official Journal). Following the annulment, a new procurement procedure was launched in order to fulfil more efficiently the new needs of Poste Italiane after the restructuring of the group, in particular the rescaling of the needs in matters of safety and monitoring.

37. The applicants are not contesting the fact that the contract notice has been withdrawn. They nevertheless maintain that the request for a preliminary ruling remains admissible, but for different reasons, discussed in the next section. (10)

38. I must admit to being somewhat puzzled at this stage. With the exception of the referring court, everybody else appears to agree that the contract notice in question was withdrawn. The referring court itself confirms that in the full notice published in GURI, the term used was to 'annul/revoke'. The referring court also notes that in the other, shorter versions of the notice published in daily press, it was stated that the procedure 'has been interrupted', but that was the consequence of the interim order issued by the referring court already on 20 October 2017. (11)

39. On the basis of all the facts presented before this Court, it indeed seems that the contract notice has been withdrawn. The referring court appears to have reserved its decision on whether or not the withdrawal has taken place. In its reply to this Court, it stressed that, irrespective of that question, there is still the issue of competence: whether administrative courts have jurisdiction in relation to such contract notices.

40. I am well aware of the standard division of tasks within the preliminary rulings procedure. Indeed, it remains solely for the referring court to ascertain whether the contract notice at issue was withdrawn, both on the facts as well as to their evaluation under national law. The launching of a new procurement procedure by the same tenderer may be a further hint of such a withdrawal.

41. However, this case pushes that traditional division of tasks to its limits. Despite the great degree of deference that this Court normally shows towards its reference partners under Article 267 TFEU, it is ultimately the responsibility of this Court to assess whether or not it remains validly seised. (12)

42. On all the available documentation, the contract notice was withdrawn. In fact, a new contract notice for the same services has been issued. The referring court nonetheless still harbours doubts as to whether the contract notice was 'formally' withdrawn.

43. Although I have difficulty understanding that statement, I would have less difficulty in understanding that a referring court would still wish to receive an answer in a case in which it would be suggested that a certain respondent keeps withdrawing contract notices as a matter of strategy. I could imagine a situation in which an entity, which does not desire certain matters to be authoritatively settled by a court, would keep withdrawing contract notices if challenged, thus systematically seeking to deprive national courts of their jurisdiction.

44. That would certainly be a different matter. In such a case, even already at the stage of the assessment of admissibility of a request for a preliminary ruling, (13) greater flexibility could perhaps be shown with regard to the notion of what is a pending dispute. After all, prohibition of abuse is a transversal principle of EU law. (14)

45. However, none of the parties, and nor the referring court, have suggested that Poste Italiane repetitively withdrew contract notices, with the intention to avoid judicial review or with the aim of deterring certain candidates from participating in the procurement procedure. (15) In fact, it is rather to the contrary: Poste Italiane offered a plausible explanation as to why the original contract notice was withdrawn, and appears to have acted consistently with that explanation. (16)

46. In those circumstances, it indeed appears that the dispute in the main proceedings has lost its object.

2. The applicants' ongoing interest to act at the national level

47. In the alternative, the referring court, the applicants, as well as, partially, the European Commission, appear to consider that that interest still exists, independently from the withdrawal of the contract notice.

48. The referring court is of the view that it cannot be presumed that the applicants had no longer an interest to act against the contract notice, even if the latter was withdrawn. The Court must therefore address its reference for a preliminary ruling, especially in view of the principle of effective judicial review.

49. The applicants claim that, despite the withdrawal, Italian law still requires the competent court to rule on the lawfulness of the contested acts for the purposes of awarding damages and deciding who shall bear the costs. In particular, under Italian law, an action for damages may be filed within 120 days after the annulment judgment has become final. To rule on that action, it must first be established whether the referring court has jurisdiction. That issue requires one to determine whether Poste Italiane is subject to public procurement rules.

50. According to the European Commission, should it be assumed that the contract notice was formally withdrawn, that latter fact is by no means a decisive element. The referring court's Question 6 requires an answer inasmuch as that question concerns the consequences attached to a possible violation of legitimate expectations, thus a matter that is independent from the keeping into force of the contested contract notice. In addition, determining whether the contested contract notice concerns a tender falling within the scope of the Utilities Directive is decisive in order to establish what is the competent court before which the applicants could ask for damages.

51. By contrast, according to Poste Italiane and the Italian Government, the applicants no longer have any interest to act. While Poste Italiane considers that a judgment of the referring court would have no favourable effects vis-à-vis the applicants, the Italian Government submits that the applicants have not launched an action for damages. Therefore, the prospect of such an action is merely hypothetical.

52. Thus, in spite of the contract notice being withdrawn, it has been suggested that (a) the applicants might introduce an action for damages in relation to the contested contract notice and (b) the issue of costs must still be determined by the referring court.

(a) The prospect of a future action for damages

53. It is settled case-law that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute. (17) In circumstances similar to the ones in the main proceedings, the Court has already held that the intention of bringing an action for damages, the latter being merely possible and hypothetical, could not justify maintaining a request for a preliminary ruling where the main proceedings no longer have a purpose. (18)

54. The applicants confirmed at the hearing that an action for damages *has not been filed* yet before the referring court, or any other national court for that matter. It is certainly true that if an action for damages were eventually filed, then the issue of whether the contract notice was mandatory and, accordingly, which national court would be competent to adjudicate on the matter, would be of importance. However, it would be precisely of importance for that later potential action that is not currently pending. Thus, within the framework of the present proceedings before the referring court, the issues relating to potential future action for damages are entirely hypothetical.

55. The fact, underlined by the European Commission, that the applicants may have entertained legitimate expectations with regard to the continuance of the procurement procedure, and that there would in any case be the need to answer Question 6, does not alter the previous conclusion.

56. First, prima facie, I personally would be rather surprised to learn that the EU principle of legitimate expectation effectively prevents a contracting authority from ever withdrawing a contract notice. Would that then mean that, once published, a public contract must be run to an end, whatever the (changed) circumstances?

57. Second, if that is not the case, then Question 6 also effectively becomes an issue that would be assessed in a potential successive claim for damages, as the infringement of any other rights of candidates to a tendering procedure. (19) However, once more, those issues are not the object of the proceedings currently pending before the referring court.

(b) The decision on costs

58. Finally, there is the issue of costs of national proceedings. Even if the contract notice were withdrawn, the referring court would still need to decide on the costs of the proceedings. Thus, it could be suggested that there is still a dispute pending before the national court relating to, at least, the matter of costs.

59. I do not think that that logic can be embraced.

60. First, my understanding of the general statements of what is a *dispute pending* (20) has always been one which considers that what is required is a reasonable correlation (albeit, indeed, perhaps not a perfect match) between *the scope of the questions* posed by the referring court and the legal dispute before it. Thus, the subject matter of the questions posed must have some bearing on the resolution of the dispute pending before the national judge. Outside that scope (and thus hypothetical) are questions that, in whatever way the Court provides the answer to them, would have no impact on the resolution of the dispute before the referring court.

61. In this light, I fail to see how the settling of the six rather detailed questions, which were all posed in view of the review of an ongoing tendering procedure and its contract notice, would have any bearing whatsoever on the settling of the issue of costs before the national court after that notice has been withdrawn. That is simply a matter for national law, with the answers solicited from this Court having no bearing on the outstanding issue of costs.

62. Second, in general, unless costs in a given case are in a specific way tied to an issue of interpretation of EU law, which then should be properly explained in the order for reference, the fact that, following the object of a dispute falling away, there is still a need to decide on costs, is not enough to maintain the jurisdiction of the Court. (21)

63. In principle, the Court's jurisdiction disappears when there is no longer any dispute pending before the referring court, for instance because the applicant obtained what he or she wanted in the course of the proceedings, or because the author of the contested measure withdrew it, or because the applicable national provisions have changed. (22) In those circumstances, the dispute is considered to have been settled. The fact that the national court is still to decide on costs is immaterial. (23) If it is not for the Court to settle the dispute by applying EU law provisions to the facts at issue, it is a fortiori even less so for the Court to decide on the costs of a dispute that no longer exists. Thus, decisions on costs are a matter for the sole referring court to make, on the basis of national law. (24)

64. Of course, there is the caveat: *unless* the issue of costs before the national court is itself tied to the interpretation of EU law solicited before this Court. This will notably be the case in two instances.

65. First, the Court certainly has jurisdiction when the subject matter of the dispute in the main proceedings is precisely the costs. In such a factual context, it is within the mission of the Court under Article 267 TFEU to interpret any EU law provision that specifically deals with the costs of judicial proceedings or, more generally, the right to an effective access to justice. (25) However, in those cases, what the Court is called to interpret are concrete, harmonised provisions of EU law that provide for costs allocation or their capping in certain matters. A notable example in the latter category is a provision stating that costs in environmental matters are 'not prohibitively expensive'. (26)

66. Second, there are also borderline cases, in which there are no EU harmonised rules on costs, but the question of interpretation or validity posed to this Court has a clear impact on the decision on costs. It is in this way that I would interpret why the Court decided to provide an answer on merits in *Amt and Others*. (27)

67. *Amt and Others* concerned the decision of a contracting authority to launch a tender procedure for the award of public transport services in a region of Italy. The national legislation did not allow economic operators to bring an action against the decisions of a contracting authority relating to a tendering procedure in which they have decided not to participate. The referring court essentially sought to know whether such economic operators had standing under EU law.

68. In the course of the proceedings, the contracting authority decided not to pursue the call for tenders after the adoption of a new law. Thus, the object of the dispute had formally disappeared. Nevertheless, the

Court considered that the request for a preliminary ruling remained admissible and it answered the question on the merits. That was understandable given the structure of that case and the only question asked by the referring court: does EU law preclude national law that does not allow non-participants in the tendering procedure to challenge the documents relating to the tendering procedure?

69. The positive (or negative) answer to that question was decisive for settling the matter of whether or not the applicants in the main proceedings, who challenged the tendering documentation even though it did not participate in the tendering procedure, would pay the costs of the proceedings.

70. One may only contrast that scenario, in which one single targeted question by the referring court is conclusive for the issue of costs still outstanding, with the present case. The six rather detailed questions posed by the referring court concern the applicability of a number of public procurement rules to caretaking, reception and access control services for the premises of Poste Italiane. They do not raise any issues of interpretation of EU rules governing costs or, more generally, the overall cost of the review procedure that was launched by the applicants. Likewise, none of the referring court's questions raise any issues that could have a direct impact on the decision on costs. In particular, the applicants' standing against the contract notice at issue is not contested. I therefore fail to see how, *whatever answer* were to be provided by this Court in response to the six detailed questions posed, it could have any bearing on the issue of costs in the present proceedings, within the parameters of the two scenarios outlined above.

71. As a consequence, in the circumstances of the present case, since the object of the dispute (the contract notice) has disappeared and because no action for damages is currently pending, the outstanding decision on costs cannot be the only reason to justify the maintaining of the preliminary reference.

72. On a closing note, I readily acknowledge that the issue of the relevance of the answer to be given by the Court for the settlement of a real dispute pending before the national court is hardly a two-sided, clear-cut divide. There are admittedly also cases in which the Court has shown greater lenience (or rather greater imagination) as to how exactly the answer given by it would be relevant for the specific dispute pending before the national court. (28)

73. Be that as it may, and even acknowledging that it is indeed rather a continuum of relevance than a two-sided clarity, the six questions posed in the present request for a preliminary ruling are at the outer end of that continuum. Again, the only issue which remains is how those questions are relevant for *the scope of the dispute currently pending* before the national court. The uneasy answer is that they are not.

74. It follows that there is no need to answer any of the questions posed by the referring court.

B. Consideration of the questions referred

75. In view of the mission of Advocates General to (fully) assist the Court (Article 252 TFEU), I will briefly address the merits of the referring court's questions, should the Court not share my view on the (absence of the) need to adjudicate in the circumstances of the present case. However, I shall only do so briefly and to the extent that it would have been necessary had the object of the dispute not fallen away. Even if the Court were to adjudicate on the merits of the case, it would not have been necessary to address all the questions posed by the referring court.

76. The referring court has asked six questions. Through all those questions, the referring court seeks, in essence, to know whether the services at issue, that were tendered by Poste Tutela before its merger with Poste Italiane, fall within the scope of EU public procurement rules, in particular the Utilities Directive and the Public Sector Directive. (29)

77. Questions 1, 2 and 4 (and, partly, Question 3) concern the legal characterisation of Poste Italiane (and Poste Tutela) as bodies governed by public law within the meaning of the Public Sector Directive and the Utilities Directive. Questions 3 and 5 concern the applicability of the Utilities Directive to activities such as those in the main proceedings. As to Question 6, its scope is somewhat unclear. It could be understood as a generic question as to what legitimate expectations are created for the tenderers by the launching of a procurement procedure and whether those expectations prevent the withdrawal of an already published notice. (30) It could also be understood as enquiring whether any legitimate expectations are created for the

tenderers in a case in which a body, which would normally not be obliged to organise a tendering procedure, does so of its own accord.

78. For the purposes of the present case, whereby the referring court seeks to know whether the activities in question are governed by EU public procurement rules and, if so, by which one, it is entirely sufficient to answer Questions 3 and 5, in relation to the applicability of the Utilities Directive. In my view, in the context of the contract notice that was the subject matter of the case before the referring court, it was the Utilities Directive that would have been applicable to the activities at issue.

1. The respective scopes of application of the Public Sector Directive and the Utilities Directive

79. The respective scopes of application of the Public Sector Directive and of the Utilities Directive are defined differently. As far as their applicability in the individual case is concerned, both instruments are supposed to be mutually exclusive. (31)

80. The scope of application of the Public Sector Directive is primarily defined *ratione personae*. It generally applies to contracting authorities, thus, in particular the State, regional or local authorities and bodies governed by public law, (32) because of their formal status and their quality as certain types of legal persons.

81. By contrast, the scope of application of the Utilities Directive is primarily defined *materially*, by reference to *the nature of the activities*. (33) Those activities are referred to in Articles 8 to 14 of that directive. They notably cover heat, electricity, water, transport services, ports and airports and postal services.

82. At the same time, the Utilities Directive is less strict as to the quality of the persons it covers. It applies to a wide range of ‘contracting entities’. The latter category includes contracting authorities, public undertakings, and undertakings enjoying exclusive or special rights. (34) That broad personal scope of application is the logical consequence of the material scope of the directive. The latter indeed aims at regulating the water, energy, transport and postal services sectors. Yet, in those sectors where there used to be State monopolies, entities that currently operate therein take various legal forms so that ‘it is necessary for the entities covered to be identified on a basis other than their legal status’. (35)

83. It follows from those provisions that the material scope of the Utilities Directive is defined rather strictly. One of the more important consequences of that conceptual difference is that, for that reason, in the context of Utilities Directive, there is no room for application of the approach known as the ‘contagion theory’.

84. That approach was originally set out by the Court in 1998 in its judgment in Mannesmann Anlagenbau Austria and Others. (36) That case concerned the legal characterisation of the Austrian State printing office (Österreichische Staatsdruckerei; ‘ÖS’). Under Austrian law, ÖS used to be a State undertaking, which later became a trader for the purposes of the Commercial Code. ÖS was primarily entrusted with the production of official administrative documents requiring secrecy or security measures. However, it also pursued other activities, such as the publication of books or newspapers. The Court held that ÖS was a body governed by public law within the meaning of the then applicable Public Sector Directive. As a consequence, *all* its activities fell within the scope of that directive. Even its commercial activities were thus considered subject to the Public Sector Directive *because of* its legal status as a body governed by public law.

85. In a metaphorical nutshell, therefore, much like King Midas, the public law body’s touch ‘taints’ all its activities and makes them all fall under the Public Sector Directive (albeit perhaps not necessarily turning them into gold).

86. By contrast, the Court refused to extend that logic to the Utilities Directive in *Ing. Aigner*. (37) That case regarded an undertaking, Fernwärme Wien, that was established for the purpose of supplying heating in the City of Vienna. At the same time, that undertaking was engaged in the general planning of refrigeration plants for large real estate projects. In carrying out that activity, it competed with other undertakings. In its judgment, the Court reinstated that all contracts entered into by a contracting authority were subject to EU public procurement rules, since Fernawärme Wien happened to also be a ‘body governed by public law’. However, the Court distinguished between the activities at issue: while the contracts related to activities

enumerated in the Utilities Directive were subject to the rules laid down therein, the other contracts were covered by the Public Sector Directive.

87. It follows that the legal status as a body governed by public law has the effect of extending the application of EU public procurement rules to all its activities under the Public Sector Directive. However, it does not stretch the potential applicability of the Public Sector Directive to activities expressly covered by the Utilities Directive. The material scope of the latter therefore remains intact irrespective of the legal status of the undertaking at issue. Equally, the contagion theory does not apply within and across the activities under the Utilities Directive.

88. Thus, the Utilities Directive is *lex specialis*, while the Public Sector Directive is *lex generalis*. As a *lex specialis*, the Utilities Directive is to be applied in a stricter manner.

2. 'Postal Services' under the Utilities Directive

89. What is then the scope of the notion of postal services under the Utilities Directive? According to Article 13(1), that directive applies to activities relating to the provision of postal services and of other services than postal services, notably on condition that such services are provided by an entity which also provides postal services.

90. Transcribed, this provision appears to set out two categories: (i) the postal services (in the narrow sense); (ii) the other services enumerated in Article 13(2)(c) of the Utilities Directive, provided that the conditions laid down in Article 13(1)(b) are met. However, the introduction of Article 13(1) of the Utilities Directive also clearly says that it is not just those services in the narrow sense, but (iii) the *activities relating to* the provision of postal services or the other services enumerated in Article 13(2)(c).

91. First, what exactly are *postal services* is legislatively defined in Article 13(2)(b) as services consisting of the clearance, sorting, routing and delivery of postal items, with a successive definition of 'postal item' in Article 13(2)(a). The definition includes both services falling within, as well as services falling outside, the scope of the universal service.

92. Second, Article 13(2)(c) defines those 'other services' than postal services as 'mail service management services (services both preceding and subsequent to despatch, including mailroom management services)' and 'services concerning postal items not included in [Article 13(2)(a)], such as direct mail bearing no address'.

93. Third, what about the residual or additional category of 'activities relating to the provision' of postal services and other than postal services?

94. According to Poste Italiane and the Italian Government, since no 'contagion theory' is applicable in the context of the Utilities Directive, the scope of Article 13 of the Utilities Directive is to be interpreted narrowly. Only those two types of activities explicitly listed in Article 13(1) of the Utilities Directive are covered.

95. I agree with the first proposition. I disagree with the second one.

96. Indeed, the statement made by the Court in this regard in *Ing. Aigner* is good law. However, the correct interpretation of Article 13 of the Utilities Directive is that its scope is not as narrow as Poste Italiane and the Italian Government suggest.

97. In my view, there is clearly a third category inscribed in Article 13(1) of the Utilities Directive: *activities relating to* the provision of postal services.

98. First, there is the wording not only of Article 13(1), but also of Article 1(2) of the Utilities Directive: 'procurement within the meaning of this Directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services *are intended for the pursuit of one of the activities* referred to in Articles 8 to 14'. (38) Both of these turns of phrases indicate that what is

supposed to be covered are not just those postal services in the narrow sense, but also other necessary supplies or services that make that main service happen.

99. Second, the same is also confirmed by the logic of the sector. It is fair to assume that the provision of postal services in the narrow sense (clearing, sorting, routing, and the delivery of postal items) would normally be done by the contracting entities themselves. It would be rather surprising to find out that a post, in particular the provider of the universal postal service, would in fact not be delivering any postal items itself. However, if it were to be then said, as Poste Italiane is essentially suggesting, that the obligation to resort to public procurement procedures relates only to postal services in the narrow sense, then Article 13(1)(a), as well as 13(1)(b) for that matter, would be in practice vacated of any content. What would those provisions then be applicable to?

100. Thus, it is rather clear to me that what Article 13 of the Utilities Directive aims at are, in particular, works, supplies or services that are intended to *enable* the provision of postal services. As stated by the Court, 'where a contracting entity exercising one of the activities mentioned in [the Utilities Directive] contemplates, in the exercise of that activity, the award of a supply, works or service contract or the organisation of a design contest, that contract or contest is governed by the provisions of this directive'. (39)

101. Thus, in general, the Utilities Directive applies not only to contracts awarded in the sphere of one of the activities expressly listed therein, but also to contracts which are entered into in the exercise of activities defined in the Utilities Directive. Consequently, where a contract awarded by a contracting entity is connected with an activity which that entity carries out in the sectors listed in the Utilities Directive, that contract is subject to the procedures laid down in that directive. (40)

102. However, the crucial question then becomes how far does that logic of 'in relation to' or 'in order to enable' reach. On the one hand, it is certainly not as narrow as suggested by Poste Italiane. On the other hand, it is not as broad as to amount to a de facto application of the contagion theory also within the Utilities Directive.

103. In my view, 'activities relating to the provisions of' under Article 13(1) of the Utilities Directive should best be understood as including all those activities that are *necessary for* or *usually connected with* the exercise of postal services. Necessary in the sense that without them, postal services could not be properly provided. However, 'relating to' in this sense would also include activities which are not, strictly speaking, necessary, but which are normally and usually connected with the provision of such types of services.

104. I would suggest including both categories, because the borderline between the two may be sometimes rather blurred. Of course, nowadays, electricity to run postal offices, cars or scooters to deliver the mail, or specific outfits making postal agents identifiable for the public, may all be classed as examples of the necessary supplies. However, already the last example might be challenged: is a special uniform for postal agents really necessary for effective delivery of postal items? It could indeed be suggested that a fancy uniform is not strictly speaking necessary for the effective delivery of postal items. A postal agent in jeans and a T-shirt can certainly do the job as well.

105. That is why 'relating to' should not only cover strictly *technically necessary*, but also *usually connected with*. Thus, activities not usually connected with the provision of postal services, such as contracting car insurance, selling newspapers or journals, or the opening of a massage corner in the lobby of a post office for that matter, are unlikely to be qualified as activities relating to the normal provision of postal services. (41)

106. Beyond that, it will certainly be a matter for the national courts to decide whether, on the facts of the particular case, the concrete supply or activity in question is usually relating to the provision of postal services or other services than postal services. The logic is to capture the package that nowadays is normally understood as constituting the proper provision of postal services.

3. Application to the present case

107. The present case concerns caretaking, reception and access control services on the premises of Poste Italiane and of other companies in that group. Do such activities fall within the scope of the Utilities Directive?

108. According to the applicants, even if they themselves are not directly postal services, the services at issue are necessary and/or connected to the exercise of the activities mentioned in Article 13 of the Utilities Directive, in so far as they enable the exercise of the activities pertaining to the universal service. The efficient operation of the premises where the universal service is provided is also ensured by the concierge and the wardens.

109. According to Poste Italiane, the activities at issue do not fall within the activities enumerated in the Utilities Directive. The activities at issue do not pertain to those services that justify the application of public law rules because they do not consist in a service including mail collection and delivery. The activities at issue are not ancillary to postal services since they are not necessary for the exercise of those services. Caretaking, reception and access control services are complementary and transversal activities with regard to all types of services provided by Poste Italiane. The premises concerned by the activities at issue are simultaneously used as administrative offices and head office for the financial services. By the same token, the services at issue are provided to companies of the whole group, thereby including those that do not provide postal services (for instance, PostePay SpA, which is specialised in payment services, digital services and mobile phones; or Poste Vita, which provides insurance services).

110. According to the European Commission, the Utilities Directive is applicable to services that are functionally linked to the services expressly covered therein. In the present case, the premises that constitute the bedrock of the services at issue are the same as those where the postal services are provided. Not only is it immaterial that those premises are also used for financial operations, but it is not necessary to establish the degree of intensity of the functional link existing between the services at issue and postal services for the purposes of deciding whether the Utilities Directive is applicable.

111. I essentially agree with the applicants and the European Commission. There is no doubt that the activities at issue fall within the scope of the Utilities Directive in so far as they are necessary for the proper exercise of postal services, and thus relating to the provision of postal services pursuant to Article 13 of the Utilities Directive.

112. First, Poste Italiane (and Poste Tutela at the time of the issuance of the contract notice) falls within the *personal* scope of the Utilities Directive. Although there has been an extensive discussion in the written and oral observations submitted by the parties regarding the legal nature of Poste Italiane, it is not necessary, for the purposes of the applicability of the Utilities Directive, to establish whether Poste Italiane is a ‘body governed by public law’.

113. It is sufficient to note that Poste Italiane fulfils the criteria of Article 4(2) of the Utilities Directive to be characterised as a ‘public undertaking’. Since the majority of the shares of Poste Italiane are owned by the State or State-related bodies, (42) a dominant influence of the State over Poste Italiane is to be presumed. It follows that Poste Italiane is a public undertaking within the meaning of Article 4(2) of the Utilities Directive.

114. Second, the services at issue are within the *material* scope of the Utilities Directive. In my view, caretaking, reception and access control on the premises of Poste Italiane would be necessary for an adequate completion of postal services. Certainly, in a similar vein to the general points above, (43) there could be a discussion on whether those specific services are, strictly speaking, necessary for the provision of postal services. (44) However, they are certainly *usually connected with* the provision of such services and in this sense indeed *relating to* them.

115. In that respect, the fact that the services at issue are not provided for only postal offices, but also for administrative offices that do not receive the public and in premises where financial or insurance services are provided, is of no relevance.

116. First, even if administrative offices do not normally receive the public — the users of postal services — the fact that policies regarding postal services are decided and implemented in those offices means that they are simply part of postal services. In a way, this is the continuation of the argument of Poste Italiane suggesting that postal services are effectively only the physical handling of postal items. Nevertheless, by necessity, postal services must also include the management and planning of those services: postal services do not happen spontaneously.

117. Second, as regards the other types of services performed by Poste Italiane, they are for their part likely to be provided on the same premises as postal services. In order to establish the absence of a functional link between the activities at issue and postal services, it should in any event be proven that those activities have been contracted out *exclusively* for premises that do not directly or indirectly touch upon postal services.

118. Third, Article 5(4) of the Utilities Directive does in fact foresee that there might be some overreach in cases where contracting entities choose to award a single contract (covering postal and non-postal services). However, even in such cases, that directive applies to the ensuing *mixed single contract*.

119. However, such an overreach is not inevitable. It is the consequence of the choice of the contracting entity to proceed in this way and to have all those services bundled into one contract. Article 6(1) indeed allows contracting entities to award separate contracts in order to avoid an undifferentiated application of the Utilities Directive to all— admittedly diverse — activities of Poste Italiane, no matter how diverse.

120. In sum, the logic of the operation of the Utilities Directive is in a way contrary to what Poste Italiane seems to be suggesting. It is indeed possible to escape the applicability of the Utilities Directive if, instead of bidding for one mixed contract applicable transversally to all the activities, including postal ones, the contracting entity chooses to award separate contracts for the purposes of each separate activity. It is nonetheless not possible to escape the applicability of the Utilities Directive by bidding for a mixed contract and then claiming that, since the directive would not apply to some parts of the contract if they were to stand alone, it does not apply to the entire contract.

V. Conclusion

121. I propose that there is no need to answer the questions referred by the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy).

---

1 Original language: English.

---

2 Directive of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

---

3 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

4 N° 87 del 31 luglio 2017, 5ª Serie Speciale — Contratti Pubblici (No 87 of 31 July 2017, 5th Special Series — Public Contracts).

---

5 OJ S 144 of 29 July 2017 (contract notice No 297868).

---

6 Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

---

7 See, for example, judgments of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* (C-426/16, EU:C:2018:335, paragraph 31); of 4 December 2018, *The Minister for Justice and Equality and Commissioner of the Garda Síochána* (C-378/17, EU:C:2018:979, paragraph 27); and of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800, paragraph 35).

---

8 See, for example, judgments of 13 September 2016, Rendón Marín (C-165/14, EU:C:2016:675, paragraph 24); of 5 June 2018, Kolev and Others (C-612/15, EU:C:2018:392, paragraph 46); and of 19 June 2018, Gnandi (C-181/16, EU:C:2018:465, paragraph 31).

---

9 See, for example, orders of 10 January 2019, *Mahmood and Others* (C-169/18, EU:C:2019:5); of 2 May 2019, *Faggiano* (C-524/16, not published, EU:C:2019:399); and of 1 October 2019, *YX (Forwarding of a judgment to the Member State of nationality of the sentenced person)* (C-495/18, EU:C:2019:808).

---

10 Below, in point 49.

---

11 As stated above in point 22.

---

12 Above, point 33 and the case-law cited therein.

---

13 See, for a later stage, the second sentence of Article 100(1) of the Rules of Procedure of the Court.

---

14 See, by analogy, on the prohibition of abusive practices in VAT law, judgments of 21 February 2006, Halifax and Others (C-255/02, EU:C:2006:121), and of 22 November 2017, Cussens and Others (C-251/16, EU:C:2017:881). However, the principle of the prohibition of abuse is certainly not limited to just VAT: see my Opinion in *Cussens and Others* (C-251/16, EU:C:2017:648, points 23 to 30). See, also, judgment of 26 February 2019, *N Luxembourg I and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 96 to 102).

---

15 It is to be noted that, in another case pending before the Court (C-419/19, Irideos, OJ 2019 C 328, p. 5) which raises very similar questions as the present case, the contract notice in issue has not been withdrawn by Poste Italiane.

---

16 Above, points 35 and 36.

---

17 See, for example, judgments of 10 November 2016, Private Equity Insurance Group (C-156/15, EU:C:2016:851, paragraph 56), and of 26 October 2017, Balgarska energiyna borsa (C-347/16, EU:C:2017:816, paragraph 31).

---

18 Order of 10 June 2011, Mohammad Imran (C-155/11 PPU, EU:C:2011:387, paragraphs 18 to 22).

---

19 See, to that effect, judgment of 26 July 2017, Persidera (C-112/16, EU:C:2017:597, paragraph 25).

---

20 Above, point 33 and the case-law cited therein.

---

21 The contrary suggestion would lead to rather absurd consequences: since a national court has always to decide on outstanding costs, even if the object of the dispute before it fell away for whatever reason, would it then mean that a case before this Court can never be withdrawn, because there will always remain the issue of costs before the national court? Thus, irrespective of the fate of a case at the national level, would the Court remain validly seised forever?

---

22 See, for example, order of 14 October 2010, Reinke (C-336/08, not published, EU:C:2010:604, paragraph 14), and judgment of 27 June 2013, Di Donna (C-492/11, EU:C:2013:428, paragraph 27).

23 See, for example, order of 14 October 2010, Reinke (C-336/08, not published, EU:C:2010:604, paragraphs 15 and 16).

24 Judgment of 6 December 2001, Clean Car Autoservice (C-472/99, EU:C:2001:663, paragraph 27).

25 See, also, Opinion of Advocate General Campos Sánchez-Bordona in *Amt Azienda Trasporti e Mobilità and Others* (C-328/17, EU:C:2018:542, points 40 to 49).

26 See, for recent examples, judgment of 17 October 2018, Klohn (C-167/17, EU:C:2018:833), or judgment of 15 March 2018, *North East Pylon Pressure Campaign and Sheehy* (C-470/16, EU:C:2018:185).

27 Judgment of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others* (C-328/17, EU:C:2018:958; '*Amt and Others*').

28 See, for a recent example, judgment of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800, paragraphs 26 to 29 and 31 to 39).

29 The referring court also mentions Directive 2014/23 on the award of concession contracts. However, I do not see how the latter is of any relevance for the present case. In the somewhat unlikely scenario in which the activities in issue happened to be provided through a concession, the last subparagraph of Article 5(4) of the Utilities Directive provides that, in principle, 'in the case of mixed contracts containing elements of supply, works and service contracts *and of concessions*, the mixed contract shall be awarded in accordance with this Directive' (my emphasis).

30 Which would appear to be the understanding of the European Commission in relation to the issue of what questions of the referring court would remain relevant in spite of the contract notice being withdrawn (above, point 50).

31 Article 7 of the Public Sector Directive. See, also, Articles 5(4) and 6(3) of the Utilities Directive.

32 See Articles 1(2) and 2(1) of the Public Sector Directive.

33 See Articles 1(2) and 4(1) of the Utilities Directive.

34 See Article 4(1) of the Utilities Directive.

35 Recital 19 of the Utilities Directive.

36 Judgment of 15 January 1998 (C-44/96, EU:C:1998:4).

37 Judgment of 10 April 2008 (C-393/06, EU:C:2008:213, paragraphs 28 to 30).

38 My emphasis.

39 Judgment of 16 June 2005, Strabag and Kostmann (C-462/03 and C-463/03, EU:C:2005:389, paragraph 39).

40 See judgments of 16 June 2005, Strabag and Kostmann (C-462/03 and C-463/03, EU:C:2005:389, paragraphs 41 and 42); of 10 April 2008, Ing. Aigner (C-393/06, EU:C:2008:213, paragraphs 56 to 59); and of 19 April 2018, Consorzio Italian Management and Catania Multiservizi (C-152/17, EU:C:2018:264, paragraph 26).

41 Although no doubt that, certainly with regard to the latter activity, it would be nice.

42 Above, point 17 of this Opinion.

43 Above, points 101 to 103 of this Opinion.

44 But such an objection could then in fact be made with regard to any activities that would, on a reasonable construction, be normally seen as a necessary part of postal services. Certainly, postal services could be perhaps delivered without electricity (postal offices being lit by candles), without cars (postal agents can walk), or without cleaning services (piles of rubbish may not physically prevent customers from accessing a counter at a post office).

JUDGMENT OF THE COURT (Fourth Chamber)

26 March 2020 (*)

(Reference for a preliminary ruling – Public procurement – Review procedures concerning the award of public supply and public works contracts – Directive 89/665/EEC – Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors – Directive 92/13/EEC – Public procurement – Directives 2014/24/EU and 2014/25/EU – Review of the application of public procurement rules – National legislation which allows certain bodies to initiate a procedure of their own motion where there has been an unlawful amendment to a contract which is in the course of being performed – Time-barring of an authority's right to initiate a procedure of its own motion – Principles of legal certainty and proportionality)

In Joined Cases C-496/18 and C-497/18,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decisions of 7 June 2018, received at the Court on 30 July 2018, in the proceedings

Hungeod Közlekedésfejlesztési, Földmérési, Út- és Vasúttervezési Kft. (C-496/18),

Sixense Soldata (C-496/18),

Budapesti Közlekedési Zrt. (C-496/18 and C-497/18),

v

Közbeszerzési Hatóság Közbeszerzési Döntőbizottság,

intervener:

Közbeszerzési Hatóság Elnöke,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, S. Rodin, D. Šváby, K. Jürimäe and N. Piçarra, Judges,

Advocate General: M. Bobek,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 4 September 2019,

after considering the observations submitted on behalf of:

– Budapesti Közlekedési Zrt., by T.J. Misefay, ügyvéd,

– the Közbeszerzési Hatóság Közbeszerzési Döntőbizottság, by É. Horváth, acting as Agent,

– the Közbeszerzési Hatóság Elnöke, by T.A. Cseh, acting as Agent,

– the Hungarian Government, by M.Z. Fehér, acting as Agent,

– the European Commission, by L. Haasbeek, P. Ondrůšek and A. Sipos, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 November 2019,

gives the following

Judgment

1 These requests for a preliminary ruling concern, in essence, the interpretation of Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31), ('Directive 89/665'), of Article 1(1) and (3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66, ('Directive 92/13'), of Article 83(1) and (2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), of Article 99(1) and (2) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), of Articles 41 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and of the principles of legal certainty and proportionality.

2 The requests have been made in two sets of proceedings brought, first, by Hungeod Közlekedésfejlesztési, Földmérési, Út- és Vasúttervezési Kft. ('Hungeod'), Sixense Soldata ('Sixense') and Budapesti Közlekedési Zrt. (Case C-496/18), and, second, by Budapesti Közlekedési (Case C-497/18) against the Közbeszerzési Hatóság Közbeszerzési Döntőbizottság (Public Procurement Arbitration Panel of the Public Procurement Authority, Hungry; 'the Arbitration Panel') concerning the amendment of contracts in the course of being performed that were entered into following public procurement

Legal context

EU law

Directive 89/665

3 Article 1 of Directive 89/665 provides:

'1. …

Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directive 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the ground that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement.'

4 Article 2d of Directive 89/665, headed ‘Ineffectiveness’, was inserted by Directive 2007/66 and is worded as follows:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/18/EC;

…

2. The consequences of a contract being considered ineffective shall be provided for by national law.’

Directive 92/13

5 Article 1 of Directive 92/13 provides:

‘1. …

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p 1)], decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.’

6 Article 2d of Directive 92/13, headed ‘Ineffectiveness’, was inserted by Directive 2007/66 and provides as follows:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/17/EC;

…

2. The consequences of a contract being considered ineffective shall be provided for by national law.’

Directive 2007/66

7 Recitals 2, 25, 27 and 36 of Directive 2007/66 state:

‘(2) Directives [89/665] and [92/13] … apply only to contracts falling within the scope of Directives [2004/18] and [2004/17] as interpreted by the Court of Justice of the European Communities, whatever competitive procedure or means of calling for competition is used, including design contests, qualification systems and dynamic purchasing systems. According to the case-law of the

[Court], the Member States should ensure that effective and rapid remedies are available against decisions taken by contracting authorities and contracting entities as to whether a particular contract falls within the personal and material scope of Directives [2004/18] and [2004/17].

…

(25) Furthermore, the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective.

…

(27) As this Directive strengthens national review procedures, especially in cases of an unlawful direct award, economic operators should be encouraged to make use of these new mechanisms. For reasons of legal certainty the enforceability of the ineffectiveness of a contract is limited to a certain period. The effectiveness of these time-limits should be respected.

…

(36) This Directive respects fundamental rights and observes the principles recognised in particular by the [Charter]. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second paragraphs of Article 47 of the Charter.'

Directive 2014/24

8 Recitals 121 and 122 of Directive 2014/24 state:

'(121) The evaluation has shown that there is still considerable room for improvement in the application of the Union public procurement rules. With a view to a more efficient and consistent application of the rules, it is essential to get a good overview on possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way. …

(122) Directive [89/665] provides for certain review procedures to be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement of Union law in the field of public procurement or national rules transposing that law. Those review procedures should not be affected by this Directive. However, citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to Directive [89/665] do nevertheless have a legitimate interest, as taxpayers, in sound procurement procedures. They should therefore be given a possibility, otherwise than through the review system pursuant to Directive [89/665] and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of this Directive to a competent authority or structure. …'

9 As set out in Article 83(1) and (2) of Directive 2014/24:

'1. In order to effectively ensure correct and efficient implementation, Member States shall ensure that at least the tasks set out in this Article are performed by one or more authorities, bodies or structures. They shall indicate to the Commission all authorities, bodies or structures competent for those tasks.

2. Member States shall ensure that the application of public procurement rules is monitored.

…'

Directive 2014/25

10 Recitals 127 and 128 of Directive 2014/25 are, in essence, identical to recitals 121 and 122 of Directive 2014/24.

11 Article 99(1) and (2) of Directive 2014/25 provides:

‘1. In order to effectively ensure correct and efficient implementation, Member States shall make sure that at least the tasks set out in this Article are performed by one or more authorities, bodies or structures. They shall indicate to the Commission all authorities or structures competent for those tasks.

2. Member States shall ensure that the application of public procurement rules is monitored.

…’

Hungarian law

The 2003 Law on Public Procurement

12 Article 303(1) of the közbeszerzésekről szóló 2003. évi CXXIX. törvény (Law No CXXIX of 2003 on Public Procurement; ‘the 2003 Law on Public Procurement’) provides:

‘The parties may amend the part of the contract established on the basis of the conditions set out in the call for tenders or in the documentation relating thereto, and on the basis of the content of the tender, only where the contract, as a result of a circumstance which has arisen after the contract has been entered into – for a reason which was not foreseeable at the time when the contract was entered into – infringes the substantive legitimate expectations of one of the co-contractors.’

13 Article 306/A(2) of the 2003 Law on Public Procurement is worded as follows:

‘Any contract coming within the scope of this law shall be void where:

(a) the public procurement procedure was unlawfully disregarded at the time when that contract was entered into

…’

14 Article 307 of the 2003 Law on Public Procurement provides:

‘(1) The contracting entity is required to draw up, in accordance with the model laid down specifically by law, a statement regarding amendments to and performance of the contract, and shall publish it by way of a notice to be included in the *Közbeszerzési Értesítő* [*Public Procurement Journal*]. That notice shall be delivered no later than 15 working days from the amendment of the contract or from the performance of the contract by both parties. In the case of a contract concluded for a period exceeding one year or for an indefinite period, a statement of the partial performance of the contract shall be drawn up annually from the date on which the contract is entered into. The obligation to provide information relating to the performance of the contract requires – if performance takes place on another date, or on dates other than those envisaged – that date of performance of the contract recognised by the contracting entity and the date when payment is made be specifically stated. The party which entered into the contract as a tenderer shall declare in the statement whether it agrees with the elements set out therein.

…

(3) The President of the Council on Public Procurement shall take the initiative to commence a procedure of his own motion before [the Arbitration Panel] if it is plausible that the contract was amended in breach of Article 303, or that the contract was performed in breach of Article 304 or Article 305.’

15 Article 327 of the 2003 Law on Public Procurement provides:

‘(1) The following bodies or persons may take the initiative to commence proceedings of their own motion before [the Arbitration Panel] if, in exercising their powers, they become aware of conduct or an omission which is contrary to this law:

(a) the President of the Council on Public Procurement;

…

(2) A procedure may be commenced of a body’s own motion before [the Arbitration Panel]:

(a) on the initiative of one of the bodies referred to in paragraph 1(a), (b) and (d) to (i) within 30 days as from the date on which that body becomes aware of the infringement or, in the case where the public procurement procedure has been disregarded, from the date on which the contract was entered into, or – if that date cannot be established – from the date on which that body becomes aware of the start of the performance of the contract by one of the parties, but at the latest within one year as from the occurrence of the infringement, or within three years in cases where the public procurement procedure has been disregarded.

…’

16 Article 328 of the 2003 Law on Public Procurement provides:

‘(1) The President of the Council on Public Procurement shall take the initiative to commence proceedings of his own motion before [the Arbitration Panel]

…

(c) in the case referred to in Article 307(3).

(2) Article 327(2) to (7) shall apply to the initiative referred to in paragraph 1 above.’

17 As set out in Article 379(2) of the 2003 Law on Public Procurement:

‘The Council [on Public Procurement]

…

(l) shall follow attentively the amendment and performance of contracts entered into following a public procurement procedure (Article 307(4));

…’

The 2015 Law on Public Procurement

18 Article 2(8) of the közbeszerzésekről szóló 2015. évi CXLIII. törvény (Law No CXLIII of 2015 on Public Procurement; ‘the 2015 Law on Public Procurement’) provides:

‘Unless otherwise provided in this law, the provisions of the [Civil Code] shall apply to contracts concluded following a public procurement procedure.’

19 Article 148(1) of the 2015 Law on Public Procurement Law is worded as follows:

‘A procedure before [the Arbitration Panel] shall be initiated upon application or on a body or person’s own motion.’

20 Article 152(1) and (2) of the 2015 Law on Public Procurement provides:

‘(1) The following bodies or persons may take the initiative to commence a procedure of their own motion before [the Arbitration Panel] if, in exercising their powers, they become aware of conduct or an omission which is contrary to this law:

(a) the Közbeszerzési Hatóság Elnöke [the President of the Public Procurement Authority, Hungary];

…

(2) One of the bodies or persons referred to in paragraph 1 may take the initiative to commence a procedure of its own motion before [the Arbitration Panel] within 60 days as from the date on which that body becomes aware of the infringement, but

(a) at the latest within the time period of 3 years as from the occurrence of the infringement,

(b) by way of derogation from (a) above, where purchases have been made without a public procurement procedure having been organised, within a maximum of five years as from the date on which the contract was entered into, or – if that date cannot be established – as from the commencement of the performance of the contract by one of the parties, or

(c) by way of derogation from (a) and (b) above, where acquisitions have been made with financial aid, during the period for which documents must be retained as laid down specifically by law relating to the payment and use of the aid provided, but as a minimum within a period of 5 years from the occurrence of the infringement – where acquisitions have been made without a public procurement procedure having been organised, as from the date on which the contract was entered into or, if that date cannot be established, as from the commencement of the performance of the contract by one of the parties.'

21 As set out in Article 153 of the 2015 Law on Public Procurement:

'(1) The President of the Public Procurement Authority shall take the initiative to commence the procedure of his own motion before [the Arbitration Panel]

…

(c) if it is plausible, in the light of the result of the monitoring carried out by the Public Procurement Authority in accordance with Article 187(2)(j), or even without administrative monitoring having been carried out, that the amendment or performance of the contract has been carried out in infringement of this law, in particular if an infringement of the type referred to in Article 142(2) has been committed.

…

(3) Article 152(2) to (8) shall apply to the initiative referred to in paragraphs 1 and 2.'

22 Article 187(1) and (2) of the 2015 Law on Public Procurement provides:

'(1) The task of the Public Procurement Authority shall be to contribute effectively, while taking into account the public interest and the interests of contracting entities and tenderers, to the development of public procurement policy, and to the emergence and generalisation of conduct that complies with public procurement law, in order to promote publicity and transparency of public spending.

The [Public Procurement] Authority

…

(j) shall follow attentively the amendment of contracts entered into following a public procurement procedure and, in the context of the administrative review …, performance shall also be monitored – in accordance with the detailed rules provided for specifically by law – and, inter alia, adopt the measures referred to in Article 153(1)(c) and in Article 175;

…'

23 As set out in Article 197(1) of the 2015 Law on Public Procurement:

‘The provisions of this law shall apply to contracts entered into following award procedures … or public procurement procedures which commenced after its entry into force, to competition procedures commenced after that date, and to review procedures relating thereto which have been requested, commenced or brought of an authority’s own motion, including dispute settlement procedures preceding an action. Article 139, Article 141, Article 142, Article 153(1)(c) and Article 175 shall apply to the possibility of amending, without carrying out a new public procurement procedure, contracts entered into following public procurement procedures which commenced before the entry into force of this law, and to the monitoring of amendments and the performance of contracts. The provisions of Chapter XXI shall also apply to review procedures relating to such contracts.’

Government Decree 4/2011

24 Article 1(1) of the 2007–2013 programozási időszakban az Európai Regionális Fejlesztési Alapból, az Európai Szociális Alapból és a Kohéziós Alapból származó támogatások felhasználásának rendjéről szóló 4/2011. (I. 28.) Korm. Rendelet (Government Decree 4/2011 of 28 January 2011 on the use of aid from the European Regional Development Fund, the European Social Fund and the Cohesion Fund for the 2007–2013 programming period; ‘Government Decree 4/2011’) provides as follows:

‘The scope of this Regulation shall extend to (i) the assumption and implementation of commitments – whether for consideration or by way of grants – from the European Regional Development Fund, the European Social Fund and the Cohesion Fund … for the 2007–2013 programming period – with the exception of aid from European Territorial Cooperation programmes; (ii) the monitoring of implementation; (iii) natural and legal persons and entities without legal personality involved in the use, payment and monitoring of the grants; and (iv) applicants, recipients and beneficiaries of grants.’

25 As set out in Article 80(3) of Government Decree 4/2011:

‘The beneficiary and the bodies involved in the payment of aid shall keep separate accounts for each project, register all the documents related to the project separately and retain them until at least 31 December 2020.’

The Civil Code

26 Article 200(2) of the Polgári Törvénykönyvről szóló 1959. évi IV. törvény (Law No IV of 1959 establishing the Civil Code) provides:

‘Contracts which breach legal provisions and contracts concluded by evading a legal provision shall be void, save where a different legal consequence is provided for by law.’

27 Article 6:95 of the Polgári törvénykönyvről szóló 2013. évi V. törvény (Law No V of 2013 establishing the Civil Code) provides:

‘Contracts which breach legal provisions and contracts concluded by evading a legal provision shall be void, save where a different legal consequence is provided for by law. Without prejudice to other legal penalties, a contract shall be void where a legal provision states so specifically or where the purpose of that provision is to prohibit the legal effect sought by means of the contract in question.’

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-496/18

28 On 30 September 2005, Budapesti Közlekedési, acting as contracting authority, published a call for tenders in the *Official Journal of the European Union* for the award of a public contract for the ‘acquisition of a monitoring system for the surveillance of movements of the structures and the control of noise and vibrations during the first stage of construction of Line 4 of the metro in Budapest (Hungary)’, the estimated value of which exceeded the Community thresholds and which received financial assistance from the European Union. The contract was awarded to a consortium of undertakings consisting of Hungeod and Sixense.

29 The corresponding contract was concluded on 1 March 2006.

30 On 5 October 2009, the contracting parties decided to amend the contract, claiming that unforeseeable circumstances had arisen. On 18 November 2009, a notice of that amendment of the contract was published in the *Közbeszerzési Értesítő* (*Public Procurement Journal*).

31 On 29 May 2017, the President of the Public Procurement Authority referred the matter to the Arbitration Panel, seeking, first, a declaration that the applicants in the main proceedings had committed an infringement by amending the contract in breach of Article 303(1) of the 2003 Law on Public Procurement and, second, the imposition of fines on the applicants. The President stated that he had become aware of the infringement on 30 March 2017 and referred to Article 153(3) and Article 152(2)(a) of the 2015 Law on Public Procurement as the basis for his request.

32 In its decision of 3 August 2017, the Arbitration Panel found, at the outset, that the procedural provisions of the 2015 Law on Public Procurement were applicable in the present instance, since, although that law did not enter into force until 1 November 2015 and, in principle, concerns only contracts entered into after that date, it applies, by virtue of the transitional provisions contained in Article 197(1) thereof, to the review of amendments to contracts made before it entered into force. The Arbitration Panel pointed out that the project carried out under the contract at issue in the main proceedings received EU funding and that, therefore, in accordance with Article 80(3) of Government Decree 4/2011, the period for a body or person to initiate a procedure of its own motion expires on 31 December 2020.

33 On the merits, after finding that there had been an infringement of Article 303 of the 2003 Law on Public Procurement, the Arbitration Panel ordered Budapesti Közlekedési to pay a fine of HUF 25 000 000 (approximately EUR 81 275) and Hungeod and Sixense to pay, jointly and severally, a fine of HUF 5 000 000 (approximately EUR 16 255).

34 The applicants in the main proceedings brought an action against the Arbitration Panel’s decision before the Fővárosi Törvényszék (Budapest High Court, Hungary).

35 The referring court is uncertain as to the requirements which arise from EU law, more specifically from the principle of legal certainty, in a situation where new legislation of a Member State, such as the 2015 Law on Public Procurement, authorises, in respect of a public contract concluded before that legislation entered into force, the monitoring authority to initiate of its own motion, notwithstanding the expiry of the limitation periods laid down by previous national legislation, an investigation into public procurement infringements committed before the new legislation entered into force in order to have the Arbitration Panel establish that an infringement has been committed and to impose a penalty.

36 The referring court states that, unlike cases in which the Court has been called upon to rule on time limits for bringing a review in public procurement procedures, Case C-496/18 concerns the right of a monitoring authority to initiate a review in the interest of the objective protection of rights. It is uncertain as to the application in such a situation of the principles of EU law, such as those of legal certainty or effectiveness.

37 The referring court also refers to the content of Article 99 of Directive 2014/25 and questions whether there are limits on the powers conferred on the Member States in relation to the prerogatives of the monitoring authorities and whether the requirements of EU law concerning the protection of persons with an interest in obtaining a particular contract also hold good in that context.

38 It expresses doubts as to the compatibility with EU law of the power provided for, as a transitional measure, in Article 197(1) of the 2015 Law on Public Procurement to review contractual amendments which were made before that law entered into force.

39 The referring court is uncertain as to whether it is possible to apply the rule that, in the case of a project financed by EU funds, the time limit for bringing a review is linked to the period for which documents are to be retained, since that rule was introduced by the 2015 Law on Public Procurement.

40 It wishes to know if it is relevant, for the purposes of determining the above questions of law, to ascertain the legal, regulatory, technical or organisational deficiencies or other obstacles that prevented an investigation from being conducted into the infringement of public procurement rules at the time when the infringement took place.

41 The referring court points out that recitals 25 and 27 of Directive 2007/66 emphasise the requirement of legal certainty only as regards reviews seeking to establish that the contract is ineffective and not as regards actions seeking to establish, and impose penalties in respect of, an infringement.

42 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 41(1) and Article 47 of the [Charter], recitals 2, 25, 27 and 36 of Directive [2007/66], Article 1(1) and (3) of Directive [92/13] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, be interpreted as precluding legislation of a Member State which, in relation to public procurement contracts entered into before that legislation came into force, provides a general authorisation that enables the competent (monitoring) authority created by that legislation, after the periods established in the Member State’s previous legislation for bringing an action for review of public procurement infringements committed prior to the entry into force of the new legislation have expired but within the time period established in the new legislation, to commence proceedings to investigate a specific public procurement infringement and to rule on the substance, leading to a ruling that the infringement did take place, the imposition of a public procurement penalty, and the application of the consequences of the voiding of the public contract?

(2) Can the legal rules and principles referred to in Question 1 — and also the effective exercise of the (subjective and personal) right of review enjoyed by parties with an interest in the award of a public contract — be applied to the right to commence and conduct review proceedings conferred on the (monitoring) authorities created by the law of the Member State, which have the power to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest?

(3) Does Article 99(1) and (2) of Directive [2014/25] mean that, in order to defend EU financial interests in the field of public procurement, the law of the Member State may, through the adoption of new legislation, confer on the (monitoring) authorities which have power under the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest, a general power to investigate public procurement infringements committed before the entry into force of the legislation in question and to commence and conduct proceedings, even where the time periods established under the previous legislation have expired?

(4) If — having regard to the legal rules and principles referred to in Question 1 — the (monitoring) authorities’ power of investigation described in Questions 1 and 3 is held to be compatible with EU law, is any relevance to be ascribed to the legal, regulatory, technical or organisational deficiencies or other obstacles that prevented the public procurement infringement from being investigated at the time when the infringement took place?

(5) Even if, in the light of the above principles, the (monitoring) authorities which are authorised by the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest may be granted the power referred to in Questions 1 to 4, must Article 41(1) and Article 47 of the [Charter], recitals 2, 25, 27 and 36 of Directive [2007/66], Article 1(1) and (3) of Directive [92/13] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, and the proportionality principle, be interpreted as meaning that the national courts may assess whether the period of time that has elapsed between the occurrence of the infringement, the expiry of the period previously established for bringing an action for review, and the commencement of the proceedings to investigate the infringement, is reasonable and

proportionate, and may use this as a basis for determining the legal consequences of the nullity of the contested decision or other consequences established by the law of the Member State?'

Case C-497/18

43 On 3 January 2009, Budapesti Közlekedési published, in its capacity as contracting authority, a call for tenders in the *Official Journal of the European Union* with a view to awarding a public contract for 'the provision of services requiring expertise in relation to the management of the DBR project during the first stage of construction of metro Line 4. 7th part: Risk management expert', the estimated value of which exceeded the Community thresholds and which received financial assistance from the European Union. The contract was awarded to Matrics Consults Ltd, which is established in the United Kingdom.

44 The corresponding contract was concluded on 14 May 2009. It was terminated on 16 November 2011 by Budapesti Közlekedési with effect from 31 December 2011.

45 On 30 May 2017, the President of the Public Procurement Authority referred the matter to the Arbitration Panel, seeking, first, a declaration that Budapesti Közlekedési and Matrics Consults had committed infringements and, second, the imposition on them of fines. The President stated that, although the parties to the contract had not amended it in writing, they had, as a result of their conduct when paying invoices and issuing certificates of performance, departed from the payment conditions defined at the time of the tender submission and included in the contract to such an extent that those changes had to be regarded as an amendment to the contract. Accordingly, the President of the Public Procurement Authority took the view that the parties had infringed Article 303(1) of the 2003 Law on Public Procurement. He stated that he had become aware of the infringement on 31 March 2017, the infringement being deemed to have taken place on 8 February 2010.

46 In its decision of 18 August 2017, the Arbitration Panel found, at the outset, that the procedural provisions of the 2015 Law on Public Procurement were applicable in the present instance, since, although that law did not enter into force until 1 November 2015 and, in principle, concerns only contracts concluded after that date, it applies, by virtue of the transitional provisions contained in Article 197(1) thereof, to the review of amendments to contracts made before the date on which it entered into force.

47 On the merits, the Arbitration Panel found that there had been an infringement of Article 303 of the 2003 Law on Public Procurement and ordered Budapesti Közlekedési to pay a fine of HUF 27 000 000 (approximately EUR 88 938) and Matrics Consults to pay a fine of HUF 13 000 000 (approximately EUR 42 822).

48 Budapesti Közlekedési and Matrics Consults brought an action against the Arbitration Panel's decision before the Fővárosi Törvényszék (Budapest High Court).

49 The referring court sets out considerations which are similar to those in Case C-496/18, as set out in paragraphs 35 to 41 of the present judgment.

50 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 41(1) and Article 47 of the [Charter], recitals 2, 25, 27 and 36 of Directive [2007/66], Article 1(1) and (3) of Directive [89/665] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, be interpreted as precluding legislation of a Member State which, in relation to public procurement contracts entered into before that legislation came into force, provides a general authorisation that enables the competent (monitoring) authority created by that legislation, after the periods established in the Member State's previous legislation for bringing an action for review of public procurement infringements committed prior to the entry into force of the new legislation have expired but within the time period established in the new legislation, to commence proceedings to investigate a specific public procurement infringement and to rule on the substance, leading to a ruling that

the infringement did take place, the imposition of a public procurement penalty, and the application of the consequences of the voiding of the public contract?

(2) Can the legal rules and principles referred to in Question 1 — and also the effective exercise of the (subjective and personal) right of review enjoyed by parties with an interest in the award of a public contract — be applied to the right to commence and conduct review proceedings conferred on the (monitoring) authorities created by the law of the Member State, which have the power to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest?

(3) Does Article 83(1) and (2) of Directive [2014/24] mean that, in order to defend EU financial interests in the field of public procurement, the law of the Member State may, through the adoption of new legislation, confer on the (monitoring) authorities which have power under the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest, a general power to investigate public procurement infringements committed before the entry into force of the legislation in question and to commence and conduct proceedings, even where the time periods established under the previous legislation have expired?

(4) If — having regard to the legal rules and principles referred to in Question 1 — the (monitoring) authorities' power of investigation described in Questions 1 and 3 is held to be compatible with EU law, is any relevance to be ascribed to the legal, regulatory, technical or organisational deficiencies or other obstacles that prevented the public procurement infringement from being investigated at the time when the infringement took place?

(5) Even if, in the light of the above principles, the (monitoring) authorities which are authorised by the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest may be granted the power referred to in Questions 1 to 4, must Article 41(1) and Article 47 of the [Charter], recitals 2, 25, 27 and 36 of Directive [2007/66], Article 1(1) and (3) of Directive [89/665] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, and the proportionality principle, be interpreted as meaning that the national courts may assess whether the period of time that has elapsed between the occurrence of the infringement, the expiry of the period previously established for bringing an action for review, and the commencement of the proceedings to investigate the infringement, is reasonable and proportionate, and may use this as a basis for determining the legal consequences of the nullity of the contested decision or other consequences established by the law of the Member State?'

51 By decision of the President of the Court of 18 September 2018, Cases C-496/18 and C-497/18 were joined for the purposes of the written and oral procedure and of the judgment.

Admissibility of the requests for a preliminary ruling

52 The President of the Public Procurement Authority and the Hungarian Government take the view that the requests for a preliminary ruling are inadmissible on the ground that the national legislation at issue in the main proceedings, specifically Article 303 of the 2003 Law on Public Procurement and Article 197 of the 2015 Law on Public Procurement, does not come within the scope of EU law.

53 In that regard, it should be noted that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court of Justice to determine, enjoy a presumption of relevance. Where such questions concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see, to that effect, judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 18 and the case-law cited).

54 Thus, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular

circumstances of the case, both the need for a preliminary ruling in order for it to deliver judgment, and the relevance of the questions submitted to the Court (judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 19 and the case-law cited).

55 However, where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it, it may reject the request for a preliminary ruling as inadmissible (judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 20 and the case-law cited).

56 In the present cases, by the questions which it has referred, the referring court asks the Court whether various provisions of EU law, be they set out in the Charter, in Directives 89/665 and 92/13 relating to review procedures in the field of public procurement, or in Directives 2014/24 and 2014/25 on the award of public contracts, and certain general principles of EU law, in particular those of legal certainty and proportionality, preclude the possibility, provided for by Hungarian legislation, of a national monitoring authority being authorised to initiate of its own motion, under new legislation, a procedure for the review of amendments made to a public contract so that the monitoring authority can impose penalties on the contracting parties and the contractual amendments may be set aside by the national court.

57 It is apparent from the orders for reference that, when they were entered into, the contracts that were the subject of the amendments at issue in the main proceedings came within the scope of EU law, since the corresponding public contracts exceeded the thresholds laid down by the relevant EU legislation.

58 Furthermore, it is, prima facie, particularly necessary for the referring court to be provided with clarification as to whether the directives or the general principles of EU law which it invokes preclude procedures that can be initiated by an authority of its own motion, such as the procedure at issue in the main proceedings.

59 Lastly, there is nothing in the documents before the Court to suggest that the interpretation of EU law that is sought bears no relation to the subject matter of the disputes in the main proceedings or their purpose, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions referred.

60 It follows from the foregoing that the requests for a preliminary ruling are admissible.

Consideration of the questions referred

Preliminary observations

61 According to the referring court, the outcome of the disputes in the main proceedings depends on whether the directives and general principles of EU law, referred to in paragraph 56 of the present judgment, preclude national legislation under which a national monitoring authority may initiate, of its own motion, a review procedure in respect of amendments made to public contracts, even though those amendments took place under previous legislation and the limitation period laid down by that legislation had already expired as at the date on which the monitoring authority initiated the procedure of its own motion.

62 In the first place, it should be noted that the provisions of the Charter invoked by the referring court are not relevant to a resolution of the disputes in the main proceedings.

63 It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (see, to that effect, judgments of 21 December 2011, *Cicala*, C-482/10, EU:C:2011:868, paragraph 28, and of 9 March 2017, *Doux*, C-141/15, EU:C:2017:188, paragraph 60).

64 In addition, it should be noted that, when defining the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers adversely affected by

decisions of contracting authorities, the Member States are required to take care to ensure that the rights conferred on private individuals by EU law, in particular the right to an effective remedy and the right to a fair hearing, enshrined in Article 47 of the Charter, are not undermined (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraphs 43 to 45, and order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 30).

65 However, there is nothing in the documents before the Court to suggest that the procedure initiated by an authority of its own motion for the review of infringements of public procurement rules undermines the right to an effective remedy or the right to a fair hearing.

66 In the second place, as the various questions referred overlap in several respects, it is appropriate for them to be regrouped and reformulated in order to provide the referring court with the most precise answers possible.

67 Accordingly, it must be found that the referring court is asking, in essence, first, by its second questions, whether recitals 25 and 27 of Directive 2007/66, Article 1(1) and (3) of Directive 89/665, Article 1(1) and (3) of Directive 92/13, Article 83(1) and (2) of Directive 2014/24 and Article 99(1) and (2) of Directive 2014/25 require the Member States to adopt, or preclude them from adopting, legislation under which a monitoring authority may initiate of its own motion, on grounds of the protection of the European Union's financial interests, a procedure for the review of infringements of public procurement rules, second, by its first, third and fourth questions, whether the general principle of legal certainty precludes, in a review procedure initiated by a monitoring authority of its own motion, on grounds of protection of the European Union's financial interests, national legislation from providing that, in order to review the legality of amendments to public contracts, such a procedure must be brought within the limitation period set out in that national legislation, even where the limitation period laid down by previous legislation applicable on the date of the amendments has expired, and, third, by its fifth questions, if the first, third and fourth questions are answered in the negative, whether the principle of proportionality precludes a national court from being able to assess the reasonableness and proportionality of the periods that have elapsed between the commission of the infringement, the expiry of the previous limitation period and the procedure initiated in order to investigate the infringement, and from being able to draw the necessary conclusions as to the validity of the contested administrative decision, or any other legal consequence provided for by the law of the Member State.

The second questions

68 By its second questions, the referring court asks, in essence, whether recitals 25 and 27 of Directive 2007/66, Article 1(1) and (3) of Directive 89/665, Article 1(1) and (3) of Directive 92/13, Article 83(1) and (2) of Directive 2014/24 and Article 99(1) and (2) of Directive 2014/25 require the Member States to adopt, or preclude them from adopting, legislation under which a monitoring authority may initiate of its own motion, on grounds of protection of the European Union's financial interests, a review procedure in order to monitor infringements of public procurement rules.

69 In the first place, although the Hungarian Government submits that the recitals of an EU act are not binding, it must be pointed out that the operative part of an act is indissociably linked to the statement of reasons for it, with the result that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (judgments of 27 June 2000, *Commission v Portugal*, C-404/97, EU:C:2000:345, paragraph 41, and of 4 December 2019, *Consorzio Tutela Aceto Balsamico di Modena*, C-432/18, EU:C:2019:1045, paragraph 29).

70 It follows that Directive 2007/66 must be interpreted in the light of recitals 25 and 27 of that directive.

71 In the second place, it should be pointed out that Directives 89/665 and 92/13, in particular Article 1(3) of those directives, do indeed merely provide that the Member States are to ensure that review procedures are available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement (see, to that effect, judgment of 21 October 2010, *Symvoulio Apochetefseon Lefkosias*, C-570/08, EU:C:2010:621, paragraph 37).

72 Those provisions are intended to protect economic operators against arbitrary behaviour on the part of contracting authorities and thus seek to ensure the existence, in all Member States, of effective remedies, so as to ensure the effective application of the EU rules on the award of public contracts, in particular at a stage where infringements can still be rectified (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 41).

73 Nonetheless, although Directives 89/665 and 92/13 require that remedies should be available to undertakings having or having had an interest in obtaining a particular contract and which have been or risk being harmed by an alleged infringement, Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13 cannot be regarded, as the Advocate General observes in point 63 of his Opinion, as carrying out a complete harmonisation and, therefore, as envisaging all possible remedies in public procurement matters.

74 Consequently, those provisions must be interpreted as neither requiring Member States to provide for, nor precluding them from providing for, the existence of remedies in favour of national monitoring authorities so that those authorities can, in order to ensure the protection of the European Union's financial interests, obtain a declaration that infringements of public procurement rules have occurred.

75 Neither recitals 25 and 27 nor Articles 1 and 2 of Directive 2007/66, which inserted Article 2d into Directives 89/665 and 92/13, respectively, undermine such an interpretation.

76 By providing, in essence, that Member States are to ensure that a contract is considered ineffective by a review body that is independent of the contracting authority, Article 2d of Directive 89/665 and Article 2d of Directive 92/13 have served only to strengthen the review procedures which those directives require the Member States to implement, that is to say, review procedures available to undertakings having or having had an interest in obtaining a particular contract and which have been or risk being harmed by an alleged infringement.

77 In the third place, Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25, which are drafted in identical terms, cannot be interpreted as requiring Member States to provide for, or as precluding them from providing for, a mechanism for a review brought by an authority of its own motion in the public interest, such as that at issue in the main proceedings.

78 In that regard, it must be stated that Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 – further context for which is given, respectively, in recitals 121 and 122 of the former directive and in recitals 127 and 128 of the latter directive – appear in Title IV, headed 'Governance', of each of those directives.

79 Thus, recital 121 of Directive 2014/24 and recital 127 of Directive 2014/25 merely state that those provisions seek to ensure a 'good overview of possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way'.

80 Recital 122 of Directive 2014/24 and recital 128 of Directive 2014/25 state that the review procedures provided by Directives 89/665 and 92/13, respectively, should not be affected by Directives 2014/24 and 2014/25. Those recitals go on to state that citizens, concerned stakeholders and other persons or bodies which do not have access to those review procedures have a legitimate interest, as taxpayers, in sound procurement procedures, and should therefore be given a possibility, otherwise than through the review system pursuant to Directives 89/665 and 92/13 and without it necessarily involving them being given standing before courts and tribunals, to indicate possible breaches of Directives 2014/24 and 2014/25 to a competent authority or structure.

81 In that context, Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 each provide, in their respective paragraphs 1, that, in order effectively to ensure correct and efficient implementation of those directives, Member States are to ensure that at least the tasks set out in those articles are performed by one or more authorities, bodies or structures and, in their respective paragraphs 2, that Member States are to ensure that the application of public procurement rules is monitored.

82 In so doing, those provisions contain minimum requirements pursuant to which the Member States are obliged to establish mechanisms for monitoring the application of public procurement rules.

83 In that context, it must be noted that those provisions do not prohibit the Member States from providing for the existence of review procedures in favour of national monitoring authorities which allow those authorities to obtain a declaration of their own motion that there have been infringements of public procurement rules in order to ensure the protection of the European Union's financial interests in the field of public procurement. On the contrary, as the Advocate General states in points 72 and 73 of his Opinion, a procedure of that nature is one of the possible expressions of the new role ascribed to national monitoring authorities by Article 83 of Directive 2014/24 and by Article 99 of Directive 2014/25.

84 It follows from the foregoing that the various provisions and recitals examined in paragraphs 69 to 83 of the present judgment neither require Member States to allow, nor preclude them from allowing, a monitoring authority to initiate of its own motion, on grounds of protection of the European Union's financial interests in the field of public procurement, a review procedure in order to monitor infringements of public procurement rules.

85 However, it should be noted that, where such an automatic review procedure is provided for, it comes within the scope of EU law since the public contracts which are the subject of such a review come within the material scope of the public procurement directives.

86 Accordingly, such an automatic review procedure must comply with EU law, including the general principles of EU law, of which the general principle of legal certainty forms part.

87 Consequently, the answer to the second questions referred is that recitals 25 and 27 of Directive 2007/66, Article 1(1) and (3) of Directive 89/665, Article 1(1) and (3) of Directive 92/13, Article 83(1) and (2) of Directive 2014/24 and Article 99(1) and (2) of Directive 2014/25 must be interpreted as neither requiring Member States to adopt, nor as precluding them from adopting, legislation under which a monitoring authority may initiate of its own motion, on grounds of protection of the European Union's financial interests, a review procedure in order to monitor infringements of public procurement rules. However, where provision is made for such a procedure, it comes within the scope of EU law since the public contracts which are the subject of such a review come within the material scope of the public procurement directives and it must therefore comply with EU law, including the general principles of EU law, of which the general principle of legal certainty forms part.

The first, third and fourth questions

88 By its first, third and fourth questions, the referring court asks, in essence, whether the general principle of legal certainty precludes, in the context of a review procedure initiated by a monitoring authority of its own motion on grounds of protection of the European Union's financial interests, new national legislation from providing that, in order to review the legality of amendments to public contracts, such a procedure must be initiated within the limitation period which is laid down in that legislation, even though the limitation period laid down by previous legislation applicable at the date of those amendments has expired.

89 At the outset, it should be noted that EU law prohibits only substantial amendments to a public contract corresponding to amendments to the provisions of a public contract during its currency which constitute a new award of a contract, within the meaning of Directive 2014/24, on the ground that they are materially different in character from the original contract and, therefore, such as to demonstrate the parties' intention to renegotiate its essential terms (see, to that effect, judgments of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraph 34, and of 29 April 2010, *Commission* v *Germany*, C-160/08, EU:C:2010:230, paragraph 99).

90 While, under EU law, the principle of legal certainty is binding on every national authority, that is so only when that authority is responsible for applying EU law (judgments of 17 July 2008, *ASM Brescia*, C-347/06, EU:C:2008:416, paragraph 65, and of 21 March 2019, *Unareti*, C-702/17, EU:C:2019:233, paragraph 34).

91 As is clear from paragraph 85 of the present judgment, where a national monitoring authority initiates of its own motion a review procedure in respect of amendments made to a public contract which is in

the course of being performed and which comes within the scope of EU public procurement rules, such a review also comes within the scope of EU law.

92 It is therefore necessary to examine whether such a review, initiated by an authority of its own motion in order to have a penalty imposed on contracting parties which have unlawfully amended the contract binding them, or even to obtain a declaration that the contract is ineffective on that ground, complies with the principle of legal certainty where the new national legislation which makes provision for that review allows the limitation periods to be reopened in respect of the amendments made, even though those amendments took place while previous legislation was in force and the limitation period provided for by that previous legislation had already expired on the date on which the review procedure was initiated.

93 In that regard, the principle of legal certainty requires, in particular, that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences for individuals and undertakings (judgments of 17 July 2008, *ASM Brescia*, C-347/06, EU:C:2008:416, paragraph 69, and of 17 December 2015, *X-Steuerberatungsgesellschaft*, C-342/14, EU:C:2015:827, paragraph 59).

94 It must also be borne in mind that, while the principle of legal certainty precludes rules from being applied retroactively, that is to say, to a situation which existed before those rules entered into force, and irrespective of whether such application might produce favourable or unfavourable effects for the person concerned, the same principle requires that any factual situation should normally, in the absence of any express contrary provision, be examined in the light of the legal rules existing at the time when the situation obtained, the new rules thus being valid only for the future and also applying, save for derogation, to the future effects of situations which came about during the period of validity of the old law (see, to that effect, judgments of 3 September 2015, *A2A*, C-89/14, EU:C:2015:537, paragraph 37, and of 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, paragraph 55).

95 Furthermore, as regards limitation periods specifically, it is clear from the Court's case-law that, in order to fulfil their function of ensuring legal certainty, limitation periods must be fixed in advance (see, to that effect, judgments of 15 July 1970, *ACF Chemiefarma* v *Commission*, 41/69, EU:C:1970:71, paragraph 19, and of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraph 52) and be sufficiently foreseeable (see, to that effect, judgments of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraph 34, and of 17 September 2014, *Cruz & Companhia*, C-341/13, EU:C:2014:2230, paragraph 58).

96 In the present cases, it is clear from the documents before the Court that, having regard to the dates of the amendments to the public contracts at issue in the main proceedings, Article 327(2)(a) of the 2003 Law on Public Procurement was applicable. The time limit afforded by that provision to the President of the Council on Public Procurement for initiating of his own motion a procedure before the Arbitration Panel in respect of those amendments had already passed several years prior to the date on which the 2015 Law on Public Procurement entered into force, this, however, being a matter which the referring court will have to verify.

97 Accordingly, by allowing procedures to be initiated by an authority of its own motion with regard to amendments made to public contracts where those procedures were time-barred under the relevant provisions of the 2003 Law on Public Procurement applicable to those amendments, Article 197(1) of the 2015 Law on Public Procurement is not intended to cover existing legal situations, but is a provision with retroactive effect.

98 As Budapesti Közlekedési and the Commission have stated, that legislation authorises the authority competent to initiate such a procedure to reopen the limitation period even though that period had expired while the previous legislation was in force.

99 It is true that EU law exceptionally allows an act to be recognised as having retroactive effect when the purpose to be attained so demands and when the legitimate expectations of the persons concerned are

duly respected (see, to that effect, judgment of 15 July 2004, *Gerekens and Procola*, C-459/02, EU:C:2004:454, paragraph 24).

100 However, the principle of the protection of legitimate expectations precludes amendments to national legislation which allow a national monitoring authority to initiate a review procedure even though the limitation period provided for by previous legislation, which was applicable on the date of those amendments, has expired.

101 Lastly, the considerations set out in paragraphs 90 to 100 of the present judgment cannot be called into question by the fact that the 2015 Law on Public Procurement seeks to ensure the protection of the European Union's financial interests in relation to public procurement and to mitigate the legal, technical or organisational deficiencies which allegedly resulted from the application of the previous legislation.

102 Consequently, the answer to the first, third and fourth questions is that the general principle of legal certainty precludes, in a review procedure initiated by a monitoring authority of its own motion on grounds of protection of the European Union's financial interests, new national legislation from providing that, in order to review the legality of amendments to public contracts, such a procedure must be initiated within the limitation period laid down in the new legislation, even though the limitation period provided for by the previous legislation, which was applicable on the date of those amendments, has expired.

The fifth questions

103 By its fifth questions, the referring court asks, in essence, whether, in the event that the first, third and fourth questions are answered in the negative, the principle of proportionality precludes a national court from being able to assess the reasonableness and proportionality of the periods that have elapsed between the commission of the infringement, the expiry of the previous limitation periods and the procedure initiated in order to investigate the infringement, and from being able to draw conclusions as to the validity of the contested administrative decision or any other legal consequence provided for by the law of the Member State.

104 In the light of the answer given to the first, third and fourth questions, there is no need to answer the fifth questions.

Costs

105 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Recitals 25 and 27 of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66, Article 1(1) and (3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66, Article 83(1) and (2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, and Article 99(1) and (2) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC must be**

interpreted as neither requiring Member States to adopt, nor as precluding them from adopting, legislation under which a monitoring authority may initiate of its own motion, on grounds of protection of the European Union's financial interests, a review procedure in order to monitor infringements of public procurement rules. However, where provision is made for such a procedure, it comes within the scope of EU law since the public contracts which are the subject of such a review come within the material scope of the public procurement directives and it must therefore comply with EU law, including its general principles, of which the general principle of legal certainty forms part.

2. The general principle of legal certainty precludes, in a review procedure initiated by a monitoring authority of its own motion on grounds of protection of the European Union's financial interests, new national legislation from providing that, in order to review the legality of amendments to public contracts, such a procedure must be initiated within the limitation period laid down in the new legislation, even though the limitation period provided for by the previous legislation, which was applicable on the date of those amendments, has expired.

[Signatures]

---

* Language of the cases: Hungarian.

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 21 November 2019 (1)

Joined Cases C-496/18 and C-497/18

HUNGEOD Közlekedésfejlesztési, Földmérési, Út- és Vasúttervezési Kft.,

SIXENSE Soldata,

Budapesti Közlekedési Zrt. (C-496/18)

Budapesti Közlekedési Zrt. (C-497/18)

v

Közbeszerzési Hatóság Közbeszerzési Döntőbizottság

(Request for a preliminary ruling from the Fővárosi Törvényszék (Budapest High Court, Hungary))

(Reference for a preliminary ruling — Public procurement — Modifications of public contracts — Remedies Directives — Review initiated ex officio by a public authority of an alleged infringement of public procurement rules — Time limits for the initiation of a review — Expiry of time limits under the national legislation in force at the time of the alleged infringement — Ex officio review initiated under new legislation — Imposition of fines on the contracting authority and on the tenderers — Principles of legal certainty and non-retroactivity — Article 83 of Directive 2014/24/EU and Article 99 of Directive 2014/25/EU — Protection of the financial interests of the Union)

I. Introduction

1. Budapesti Közlekedési Zrt. (‘the contracting authority’) concluded two public contracts, in 2006 and in 2009, in relation to the construction of Line 4 of the Budapest Metro. In 2017, the Közbeszerzési Hatóság Elnöke (President of the Public Procurement Authority; ‘the President of the PPA’) initiated *ex officio* reviews, pursuant to national provisions adopted in 2015, of modifications made to those contracts in 2009 and 2010 respectively. Following those reviews, the Közbeszerzési Döntőbizottság (Public Procurement Arbitration Panel; ‘the Arbitration Panel’) imposed fines on the contracting authority and on the tenderers.

2. The key question raised by these cases can be summarised as follows: does EU law permit reviews of modifications of public contracts to be initiated *ex officio* by public authorities *after* the expiry of the time limits laid down for that purpose by the national legislation in force at the time of the modifications, when such reviews lead, years after the modifications occurred, to the imposition of sanctions on both parties to the contracts?

3. In my view, EU law neither requires nor prevents *ex officio* reviews of public contracts or modifications to such contracts. However, the EU law principle of legal certainty bars national public authorities from initiating such reviews once the applicable time limits have expired.

II. Legal framework

A. EU law

1. Directive 89/665 and Directive 92/13, as amended by Directive 2007/66

4. Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (2) and Article 1 of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, (3) both as amended by Directive 2007/66, (4) provide that, within their respective scopes of application:

> '1. …
>
> Member States shall take the measures necessary to ensure that … decisions taken by contracting [authorities/entities] may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.
>
> …
>
> 3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.
>
> …'

5. In addition, recital 25 of Directive 2007/66 reads as follows:

> '… the need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective.'

6. Furthermore, recital 27 of Directive 2007/66 states that '… for reasons of legal certainty the enforceability of the ineffectiveness of a contract is limited to a certain period. The effectiveness of these time limits should be respected'.

2. Directives 2014/24 and 2014/25

7. Recital 122 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (5) and recital 128 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (6) state that the review procedures provided for by Directives 89/665 and 92/13 respectively 'should not be affected by' those directives. However, 'citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to [either of those directives] do nevertheless have a legitimate interest, as taxpayers, in sound procurement procedures. They should therefore be given a possibility, otherwise than through the review system pursuant to [those directives] and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of [those directives] to a competent authority or structure. So as not to duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities'.

8. Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25, which are entitled 'Enforcement' and which fall within Title IV 'Governance' provide that:

‘…

2. Member States shall ensure that the application of public procurement rules is monitored.

Where monitoring authorities or structures identify by their own initiative or upon the receipt of information specific violations or systemic problems, they shall be empowered to indicate those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees thereof.

…’

B. Hungarian law

1. The 2003 Law on Public Procurement

9. Article 303(1) of the közbeszerzésekről szóló 2003. évi CXXIX. törvény (Law No CXXIX of 2003 on Public Procurement; ‘the 2003 Law on Public Procurement’) reads as follows:

‘The parties may amend the part of the contract established on the basis of the conditions set out in the call for tenders or in the documentation relating thereto, and on the basis of the content of the tender, only where the contract, as a result of a circumstance which has arisen after the contract has been entered into – for a reason which was not foreseeable at the time the contract was entered into – infringes the substantive legitimate expectations of one of the co-contractors.’

10. Article 306/A is worded as follows:

‘(1) Any contract falling within the scope of this law shall be void where

(a) the public procurement procedure was unlawfully disregarded at the time said contract was entered into …

…’

11. By virtue of Article 307(3), ‘the Közbeszerzések Tanácsának elnöke [(President of the Council on Public Procurement)] shall take the initiative to commence a procedure of his own motion before [the Arbitration Panel] if it is plausible that the amendment of the contract was carried out in breach of Article 303 …’.

12. Article 327 provides that:

‘(1) The following bodies or persons may take the initiative to commence proceedings of their own motion before [the Arbitration Panel] if, in exercising their powers, they become aware of conduct or an omission which is contrary to this law:

(a) the President of the Council on Public Procurement;

…

(2) A procedure may be commenced of a body’s own motion before [the Arbitration Panel]:

(a) on the initiative of one of the bodies referred to in paragraph 1(a), (b) and (d) to (i) within 30 days as from the date on which that body becomes aware of the infringement or, in the case where the public procurement procedure has been disregarded, from the date on which the contract was entered into, or — if that date cannot be established — from the date on which that body becomes aware of the start of the execution of the contract by one of the parties, but at the latest within 1 year as from the occurrence of the infringement, or within 3 years in cases where the public procurement procedure has been disregarded,

…’

13. Under Article 328(1):

‘The President of the Council on Public Procurement shall take the initiative to commence a procedure of his own motion before [the Arbitration Panel]

…

(c) in the case referred to in Article 307(3).’

14. Pursuant to Article 379(2):

‘The Council [on Public Procurement] …

(l) shall follow attentively the amendment and execution of contracts entered into following a public procurement procedure (Article 307(4)).’

2. The 2015 Law on Public Procurement

15. Article 152 of the közbeszerzésekről szóló 2015. évi CXLIII. törvény (Law No CXLIII of 2015 on Public Procurement; ‘the 2015 Law on Public Procurement’) provides that:

‘(1) The following bodies or persons may take the initiative to commence proceedings of their own motion before [the Arbitration Panel] if, in exercising their powers, they become aware of conduct or an omission which is contrary to this law:

(a) [the President of the PPA];

…

(2) One of the bodies referred to in paragraph 1 may take the initiative to commence a procedure of its own motion before [the Arbitration Panel] within 60 days as from the date on which that body becomes aware of the infringement, but

(a) at the latest within the time period of 3 years as from the occurrence of the infringement,

(b) by way of derogation from (a) above, where purchases have been made without a public procurement procedure having been organised, within a maximum of 5 years as from the date on which the contract was entered into, or — if that date cannot be established — as from the commencement of the execution of the contract by one of the parties, or

(c) by way of derogation from (a) and (b) above, where acquisitions have been made as a result of aid, for the duration of the conservation of documents laid down specifically by law relating to the payment and use of the aid considered, but as a minimum within a time period of 5 years as from the occurrence of the infringement — where acquisitions have been made without a public procurement procedure having been organised, as from the date the contract was entered into or, if that date cannot be established, as from the commencement of the execution of the contract by one of the parties.

…’

16. Article 153(1) is worded as follows:

‘[The President of the PPA] shall take the initiative to commence the procedure of his own motion before [the Arbitration Panel],

…

(c) if it is plausible, in the light of the result of the monitoring carried out by the Public Procurement Authority in accordance with Article 187(2)(j), or even without administrative monitoring having been carried out, that the amendment or execution of the contract has been carried out in infringement of this law, in particular if an infringement of the type referred to in Article 142(2) has been committed …

…’

17. Article 187 provides that:

‘…

(2) The [Public Procurement] Authority …

(j) shall follow attentively the amendment of contracts entered into following a public procurement procedure and, in the context of the administrative review pursuant to the [közigazgatási hatósági eljárás és szolgáltatás általános szabályairól 2004. évi CXL. törvény (Law No CXL of 2004 laying down general provisions on administrative services and procedure)] execution shall also be monitored — in accordance with the detailed rules provided for specifically by law — and, inter alia, adopt the measures referred to in Article 153(1)(c) and Article 175;

…’

18. By virtue of Article 197(1):

‘The provisions of this law shall apply to contracts entered into following procedures for the award [of concessions] or public procurement procedures which commenced after its entry into force, to competition procedures commenced after that date, as well as to review procedures relating thereto which have been requested, commenced or brought of an authority’s own motion, including dispute settlement procedures preceding an action. Articles 139, 141, 142, 153(1)(c) and 175 shall apply to the possibility of amending, without carrying out a new public procurement procedure, contracts entered into following public procurement procedures which commenced before the entry into force of this law, and to the monitoring of amendments and the execution of contracts. Moreover, the provisions of Chapter XXI shall apply to review procedures relating to such contracts.’

3. Decree No 4/2011

19. Under Article 80(3) of 2007-2013 programozási időszakban az Európai Regionális Fejlesztési Alapból, az Európai Szociális Alapból és a Kohéziós Alapból származó támogatások felhasználásának rendjéről szóló 4/2011. (I. 28.) Korm. rendelet (Decree No 4/2011 of 28 January 2011 on the use of aid from the European Regional Development Fund, the European Social Fund and the Cohesion Fund for the 2007-2013 programming period):

‘The beneficiary and the bodies involved in the payment of aid shall keep separate accounts for each project, register all the documents related to the project separately and retain them until at least 31 December 2020.’

III. Facts, procedure and the questions referred

A. Case C-496/18

20. On 30 September 2005, the contracting authority published a call for tenders in the *Official Journal of the European Union* for the purposes of the ‘acquisition of a monitoring system for the surveillance of movements of the structures and the control of noise and vibrations during the first stage of construction of Line 4 of the Budapest Metro’. The estimated value of the contract exceeded the Community (EU) thresholds. The project received EU funding (under the Operational Programme for Transport).

21. The contract was awarded to a consortium of service providers consisting of Sol-Data SA (which later changed its name to SIXENSE Soldata) and HUNGEOD Kft. On 1 March 2006, the contracting authority concluded a public contract with the members of the Sol-Data — Hungeod Konzorcium.

22. On 5 October 2009, the parties modified the contract, claiming that unforeseeable circumstances had arisen. On 18 November 2009, a notice of the modification of the contract was published in the Közbeszerzési Értesítő (Public Procurement Journal).

23. According to the order for reference, a review procedure concerning the modification of the contract with Sol-Data SA and HUNGEOD Kft. was initiated *ex officio* by Az Európai Támogatásokat Auditáló Főigazgatóság (the Directorate-General for the Audit of European Aid). However, on 9 November 2010, the Arbitration Panel rejected that review application as being out of time.

24. On 29 May 2017, the President of the PPA, the intervener in support of the Arbitration Panel, commenced a procedure of his own motion, pursuant to Article 153(1)(c) of the 2015 Law on Public Procurement, against HUNGEOD Kft., Sol-Data and the contracting authority ('the applicants'). In its view, by modifying the contract at issue, the applicants infringed Article 303(1) of the 2003 Law on Public Procurement since the conditions for modifications laid down in that provision were not satisfied. The President of the PPA identified the date of the modification of the contract, namely 5 October 2009, as the date of the infringement. However, he gave 30 March 2017 as the date on which he became aware of the infringement.

25. On 3 August 2017, in the decision at issue in the main proceedings, the Arbitration Panel found that the applicants had infringed Article 303 of the 2003 Law on Public Procurement.

26. In its decision, prior to its finding on the merits, the Arbitration Panel dismissed a procedural objection regarding the issue of whether the President of the PPA had initiated the procedure in due time. According to the Arbitration Panel, while the 2003 Law on Public Procurement was applicable to the substance of the case, the 2015 Law on Public Procurement applied as far as the procedure was concerned. The second sentence of Article 197(1) of the 2015 Law on Public Procurement provides, as a transitional provision, that it is necessary to apply, inter alia, the 2015 Law on Public Procurement to the monitoring of modifications of contracts entered into following public procurement procedures launched before the entry into force of that law, and to apply the chapter of that law concerning the rules governing review procedures to review procedures related to the monitoring of such modifications. Consequently, the Arbitration Panel did not consider that the applicants were entitled to rely on the principles of non-retroactivity and legal certainty. Thus, the President of the PPA was correct in initiating a review within the time limits laid down in Article 152(2) of the 2015 Law on Public Procurement.

27. The Arbitration Panel also found that a significant part of the project at issue, and of the modification of the contract under examination, had been carried out with EU financing, therefore falling under Decree No 4/2001. The Arbitration Panel found that it was necessary to apply Article 80(3) of that decree to the modification of the contract at issue. Accordingly, the time period within which a body can commence a procedure of its own motion was due to expire on 31 December 2020. It follows that the President of the PPA acted within that time frame in commencing the procedure of his own motion on 29 May 2017.

28. As a consequence of the finding of an infringement, the Arbitration Panel imposed a fine on the contracting authority in the amount of 25 000 000 Hungarian forint (HUF). It also imposed a fine in the amount of HUF 5 000 000 on HUNGEOD Kft. and SIXENSE Soldata jointly and severally.

29. The applicants challenged the Arbitration Panel's decision before the referring court, the Fővárosi Törvényszék (Budapest High Court, Hungary). Harbouring doubts as to the correct interpretation of EU law, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> '1. Must Article 41(1) and Article 47 of the Charter of Fundamental Rights of the European Union, recitals 2, 25, 27 and 36 of [Directive 2007/66], Article 1(1) and (3) of [Directive 92/13], and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, be interpreted as precluding legislation of a Member State which, in relation to public procurement contracts entered into before that legislation came into force, provides a general authorisation that enables the competent (monitoring) authority created by that legislation, after the periods established in the Member State's previous legislation for bringing an action for review of public procurement infringements committed prior to the entry into force of the new legislation have expired but within the time period established in the new legislation, to commence proceedings to investigate a specific public procurement infringement and to rule on the substance, leading to a ruling that the infringement did take place, the imposition of a public procurement penalty, and the application of the consequences of the voiding of the contract?

2. Can the legal rules and principles referred to in question 1 — and also the effective exercise of the (subjective and personal) right of review enjoyed by parties with an interest in the award of a public contract — be applied to the right to commence and conduct review proceedings conferred on the (monitoring) authorities created by the law of the Member State, which have the power to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest?

3. Does Article 99(1) and (2) of [Directive 2014/25] mean that in order to defend EU financial interests in the field of public procurement, the law of the Member State may, through the adoption of new legislation, confer on the (monitoring) authorities which have power under the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest, a general power to investigate public procurement infringements committed before the entry into force of the legislation in question and to commence and conduct proceedings, even where the time periods established under the previous legislation have expired?

4. If — having regard to the legal rules and principles referred to in question 1 — the (monitoring) authorities' power of investigation described in questions 1 and 3 is held to be compatible with EU law, is any relevance to be ascribed to the legal, regulatory, technical or organisational deficiencies or other obstacles that prevented the public procurement infringement from being investigated at the time when the infringement took place?

5. Even if, in the light of the above principles, the (monitoring) authorities which are authorised by the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest may be granted the power referred to in questions 1 to 4, must Article 41(1) and Article 47 of the Charter of Fundamental Rights of the European Union, recitals 2, 25, 27 and 36 of [Directive 2007/66], Article 1(1) and (3) of [Directive 92/13] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, and the proportionality principle, be interpreted as meaning that the national courts may assess whether the period of time that has elapsed between the occurrence of the infringement, the expiry of the period previously established for bringing an action for review, and the commencement of the proceedings to investigate the infringement, is reasonable and proportionate, and may use this as a basis for determining the legal consequences of the nullity of the contested decision or other consequences established by the law of the Member State?'

B. Case C-497/18

30. On 3 July 2009, the contracting authority published a call for tenders in the *Official Journal of the European Union* for the purposes of 'the provision of services requiring expertise in relation to the management of the DBR project during the first stage of construction of metro Line 4'. The estimated value of the contract (HUF 90 000 000 over a period of 3 years) exceeded the Community (EU) thresholds. The project received EU funding (under the Operational Programme for Transport).

31. The public contract was awarded to Matrics Consult Ltd. The contracting authority concluded the contract on 14 May 2009. It terminated the contract on 16 November 2011, with effect from 31 December 2011.

32. On 30 May 2017, the President of the PPA commenced a procedure *ex officio*, pursuant to Article 153(1)(c) of the 2015 Law on Public Procurement, against the contracting authority and Matrics Consult Ltd, seeking a declaration that the public procurement rules had been infringed and the imposition of a fine. Although the parties had not amended the contract at issue in writing, they had, as a result of their conduct when paying invoices and issuing certificates of performance, departed to a great extent from the payment conditions defined at the time of the tender submission and inserted into the contract. Those changes were regarded as a modification to the contract amounting to an infringement of Article 303(1) of the 2003 Law on Public Procurement since the conditions for contractual modifications laid down in that article were not satisfied. In his review application, the President of the PPA gave 8 February 2010 as the date of the infringement, namely the date on which the invoice was paid, the payment of which led to the parties

exceeding the amount of the consideration agreed in the contract. The date given for when the President of the PPA became aware of the infringement was 31 March 2017.

33. On 18 August 2017, the Arbitration Panel found that the contracting authority and Matrics Consult Ltd had infringed Article 303 of the 2003 Law on Public Procurement by unlawfully modifying the contract relating to a public procurement procedure that they had entered into. The Arbitration Panel imposed a fine on the contracting authority in the amount of HUF 27 000 000 and a fine in the amount of HUF 13 000 000 on Matrics Consult Ltd.

34. Before making that finding on merits, the Arbitration Panel dismissed a procedural objection regarding whether the initiation of the review procedure by the President of the PPA had taken place within the applicable time limit. The Arbitration Panel considered that the provisions regarding time limits laid down in the 2015 Law on Public Procurement were applicable to the de facto modification of the contract that occurred before the entry into force of that law, meaning that the parties to the contract were not entitled to rely on the principles of non-retroactivity and legal certainty.

35. The contracting authority challenged the Arbitration Panel's decision before the referring court, the Fővárosi Törvényszék (Budapest High Court). That court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> '1. Must Article 41(1) and Article 47 of the Charter of Fundamental Rights of the European Union, recitals 2, 25, 27 and 36 of [Directive 2007/66], Article 1(1) and (3) of [Directive 89/665] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, be interpreted as precluding legislation by a Member State which, in relation to public procurement contracts entered into before that legislation came into force, provides a general authorisation that enables the competent (monitoring) authority created by that legislation, after the periods established in the Member State's previous legislation for bringing an action for review of public procurement infringements committed prior to the entry into force of the new legislation have expired but within the time period established in the new legislation, to commence proceedings to investigate a specific public procurement infringement, leading to a ruling that the infringement did take place, the imposition of a public procurement penalty, and the application of the consequences of the voiding of the public contract?
>
> 2. Can the legal rules and principles referred to in question 1 — and also the effective exercise of the (subjective and personal) right of review enjoyed by parties with an interest in the award of a public contract — be applied to the right to commence and conduct review proceedings conferred on the (monitoring) authorities created by the law of the Member State, which have the power to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest?
>
> 3. Does Article 83(1) and (2) of [Directive 2014/24] mean that in order to defend EU financial interests in the field of public procurement, the law of the Member State may, through the adoption of new legislation, confer on the (monitoring) authorities which have power under the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest, a general power to investigate public procurement infringements committed before the entry into force of the legislation in question and to commence and conduct proceedings, even where the time periods established under the previous legislation have expired?
>
> 4. If — having regard to the legal rules and principles referred to in question 1 — the (monitoring) authorities' power of investigation described in questions 1 and 3 is held to be compatible with EU law, is any relevance to be ascribed to the legal, regulatory, technical or organisational deficiencies or other obstacles that prevented the public procurement infringement from being investigated at the time when the infringement took place?
>
> 5. Even if, in the light of the above principles, the (monitoring) authorities which are authorised by the law of the Member State to identify and investigate public procurement infringements of their own motion, and which are under a duty to defend the public interest may be granted the power referred to

in questions 1 to 4, must Article 41(1) and Article 47 of the Charter of Fundamental Rights of the European Union, recitals 2, 25, 27 and 36 of [Directive 2007/66], Article 1(1) and (3) of [Directive 89/665] and, in this context, the principle of legal certainty, as a general principle of EU law, and the requirement for effective and rapid remedies against decisions by contracting authorities in public procurement cases, and the proportionality principle, be interpreted as meaning that the national courts may assess whether the period of time that has elapsed between the occurrence of the infringement, the expiry of the period previously established for bringing an action for review, and the commencement of the proceedings to investigate the infringement, is reasonable and proportionate, and may use this as a basis for determining the legal consequences of the nullity of the contested decision or other consequences established by the law of the Member State?'

36. By decision of 18 September 2018, the President of the Court joined the two cases.

37. Written submissions were lodged by the contracting authority, the Arbitration Panel, the President of the PPA, the Hungarian Government and the European Commission. All of them presented oral argument at the hearing held on 4 September 2019.

IV. Analysis

38. This Opinion is structured as follows. I will start with several introductory remarks concerning the specificities of the Hungarian system of *ex officio* review of public contracts by public authorities. It will also be necessary to determine, at the outset, the rules of EU law applicable to the present case and to rephrase the questions posed by the referring court (A). Next, I will address Question 2 regarding the scope of application of Directives 89/665 and 92/13 ('the Remedies Directives'), as amended by Directive 2007/66, and of Directives 2014/24 and 2014/25: do *ex officio* reviews of public contracts initiated by public authorities fall within the scope of those directives (B)? I will subsequently turn to Questions 1, 3 and 4, which I shall assess together, since they all deal essentially with the same issue: does EU law, in particular the principle of legal certainty, preclude the *ex officio* initiation of such reviews *after* the expiry of the time limits for review, laid down by the national legislation in force at the time of the allegedly illegal modifications of the contracts (C)? Finally, I will conclude with Question 5 on national courts' powers with regard to the examination of potential infringements raised *ex officio* by national public authorities (D).

A. Preliminary considerations

1. The Hungarian system of review in public procurement matters and the cases at hand

39. Hungarian law provides for two types of review of public contracts, depending on the identity of the person initiating the review.

40. On the one hand, a review can be sought by persons that have a *subjective interest* (in the sense of a real and individual interest) in the public contract at issue, such as the successful tenderer, the unsuccessful (actual or potential) tenderers or even the relevant contracting authority. That type of review facilitates the *private* enforcement of public procurement rules.

41. On the other hand, Hungarian law also provides for reviews that may be initiated *ex officio* by a number of public authorities charged with protecting the *general interest*, including, for example, the upholding of the principle of legality and/or monitoring the use of public funds. That type of review represents the *public* enforcement of public procurement rules.

42. The President of the PPA is one of those public authorities. He has the right to commence a procedure of his own motion under Article 153(1) of the 2015 Law on Public Procurement. Once such an *ex officio* review has been initiated, it is subsequently for the Arbitration Panel to carry out the review as regards both admissibility and the merits. When an infringement of public procurement rules is found, the Arbitration Panel may impose a fine on the persons responsible for the infringement. The imposition of a fine appears to be compulsory when the finding of an infringement arises from an *ex officio* review initiated by the President of the PPA under Article 153 of the 2015 Law on Public Procurement. In addition, it was explained at the hearing that a finding of an infringement may also lead to the annulment of the contract, but only following a decision of a court of law.

43. In the cases at hand, the President of the PPA initiated *ex officio* reviews of the modifications of the two public contracts at issue. The modifications occurred in 2009 and 2010 respectively. At the time of the modifications, the applicable national legislation was the 2003 Law on Public Procurement. However, the transitional provisions of the 2015 Law on Public Procurement (in Article 197) have been interpreted in such a way that the *procedural* provisions of that law apply to modifications of public contracts that occurred *before* that law entered into force.

44. In line with this reasoning, the President of the PPA launched *ex officio* reviews before the Arbitration Panel in 2017, that is, 7 and 8 years respectively after the alleged infringements had occurred. At that time, the time limits for review laid down by the 2003 Law on Public Procurement had already lapsed. The President of the PPA justified such apparently belated reviews by the fact that he only became aware of the infringements at issue in 2017. The Arbitration Panel subsequently assessed whether the reviews had been initiated in due time with reference to the 2015 Law on Public Procurement and concluded that they had. In both cases, the Arbitration Panel ultimately imposed the contested fines on both the contracting authority and the tenderers. However, neither the contracts nor the allegedly unlawful modifications were declared null and void.

45. It is against this factual and procedural background that the referring court has posed a set of questions to the Court. It is not for this Court to interpret the rather complex national legislative landscape and procedural background. However, I wish to stress two points that appear to be uncontested and that this Opinion takes as points of departure.

46. First, both the 2003 Law on Public Procurement and the 2015 Law on Public Procurement contain deadlines by which an authority entitled to launch an *ex officio* review must act. I understand those rules to be contained in Article 327(2) of the 2003 Law on Public Procurement and Article 152(2) of the 2015 Law on Public Procurement. (7) The structure of both provisions is similar. Each contains a combination of subjective and objective limitation periods. What changed, however, between the 2003 and 2015 iterations of those provisions was the length of the limitation periods, which were more than doubled by the 2015 Law on Public Procurement.

47. Second, and rather importantly to my mind, the referring court states, without being contradicted on this point by any party to these proceedings, (8) that the time limits for review that were in force and applicable at the time of the modifications had already lapsed before the 2015 Law on Public Procurement entered into force. (9)

2. Relevant provisions of EU law and rephrasing of the questions

48. In each of the joined cases, the referring court poses five near identical questions. (10) The wording of those questions is, unfortunately, not very clear. Their content also overlaps to some extent. Thus, some rephrasing is called for in order to provide the referring court with a useful answer in the light of the factual and legal context of the present cases.

49. Before doing so, a note on the relevant rules of EU law is warranted. The referring court cites in its questions a number of provisions of the Charter of Fundamental Rights of the European Union ('the Charter') and of several public procurement directives, together with some general principles of EU law. However, only some appear to be fully relevant to the cases at hand. Conversely, other rules of EU law not referred to might in fact be relevant.

50. First, I do not think that Article 41 and Article 47 of the Charter are relevant to the present cases. Article 41, regarding the right to good administration, is addressed only to the institutions, bodies, offices and agencies of the European Union. (11) Likewise, Article 47 of the Charter is not applicable to the cases at hand. In mentioning that article, the referring court wonders whether the initiation of a review 7 or 8 years after the commission of the alleged infringements is compatible with the requirement to conduct legal proceedings within a reasonable time. However, on the facts of the cases at hand, the right to an effective remedy *before a tribunal* in the sense of Article 47 does not appear to be at issue. The real issue appears to be respect for limitation periods by an administrative authority.

51. Second, as regards the general principles of EU law that were raised by the referring court, the principle of legal certainty is key to the resolution of Questions 1, 3 and 4, while the principle of

proportionality has some relevance for Question 5. The requirement to have swift and effective remedies against the decisions of contracting authorities is specifically enshrined in Article 1(1) of the Remedies Directives.

52. Third, since the referring court has invoked in general the protection of the financial interests of the Union, I will examine that aspect of the case with regard to provisions of EU law that have not been raised by the referring court, but were discussed at the hearing, namely Regulation No 2988/95 (12) and Regulation No 1083/2006. (13)

53. Turning now to the specific questions posed by the referring court, they can, in my view, be regrouped as follows.

54. By Question 2, the referring court seeks, in essence, to determine whether EU law — in particular the Remedies Directives, as notably amended by Directive 2007/66, and Directives 2014/24 and 2014/25 — governs or in any way limits the possibility for public authorities to conduct reviews in the public interest. More precisely, I understand this question as asking the Court whether reviews such as those at issue in the main proceedings fall within the scope of any of those directives.

55. By Question 1, the Court is called on to determine whether EU law, in particular the general principle of legal certainty, allows public authorities to initiate reviews of modifications to public contracts — and, as the case may be, to impose sanctions — even though the time limits for such reviews under the national legislation in force at the time of the modifications have already lapsed. Questions 3 and 4 concern the possible impact of the need to protect the financial interests of the Union on the answer to Question 1. Questions 1, 3 and 4 will therefore be addressed together.

56. Question 5 is, for its part, relevant only if it is assumed that EU law does not preclude *ex officio* review in the circumstances of the cases at hand. In that case, does EU law, in particular the principle of proportionality, empower national courts to review the sanctions that were imposed?

B. Question 2

57. By Question 2, the referring court seeks to determine whether EU law governs or limits the possibility for public authorities acting in the general interest to initiate *ex officio* reviews of modifications of public contracts. In particular, do such reviews fall within the scope of the Remedies Directives, as amended by Directive 2007/66, or Directives 2014/24 and 2014/25?

58. According to the President of the PPA, the Remedies Directives do not govern reviews initiated in the public interest by public authorities. It is for the Member States only to adopt rules to that effect. It follows that the present cases are outside the scope of EU law.

59. The Hungarian Government also considers that the national provisions relating to time limits for initiating *ex officio* reviews in the public interest do not implement the Remedies Directives, nor do they fall within their scope of application. It relies on Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 to explain that the prerogatives of monitoring authorities are, by their nature, fundamentally different from the review at the disposal of economic operators with an interest in securing a contract.

60. According to the Commission, in the absence of provisions to that effect, the Remedies Directives do not oblige Member States to establish, or preclude them from establishing, *ex officio* reviews of the decisions of contracting authorities. Nor do Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 require Member States to establish *ex officio* reviews in the public interest. However, Member States must uphold the general principles of EU law, including the principle of legal certainty.

61. I broadly agree with the Commission. In my opinion, the Remedies Directives, Directive 2014/24 and Directive 2014/25 neither oblige Member States to provide for *ex officio* reviews initiated by public authorities in the public interest, nor prevent them from doing so. However, even if such reviews are not mandated by those directives, if a Member State decides to provide for such mechanisms, they fall within the (material) scope of application of those directives. Therefore, the questions posed by the referring court, and in particular Question 2, are admissible.

62. The Remedies Directives only require Member States to provide for reviews *on the initiative of affected undertakings.* Indeed, Article 1(3) requires Member States to ensure that review procedures are available '*at least* to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement'. (14)

63. The wording of that provision suggests that the Remedies Directives do not require a comprehensive system of review in public procurement matters. As stated by the Court, 'Directive 89/665, as is apparent, in particular, from Article 1(3) thereof, does not seek to completely harmonise the relevant national legislation'. (15) It sets a minimum requirement ('at least') for the Member States to provide for a review mechanism for undertakings, and not necessarily also for public authorities acting in the public interest.

64. That reading is further confirmed by the context and purpose of Article 1(3) of the Remedies Directives, as amended by Directive 2007/66. First, as regards the overall context of Article 1(3), the EU legislature has introduced mechanisms aimed at strengthening the framework for reviews *initiated by undertakings*. (16) Second, as regards the system and purpose of the Remedies Directives, it is established case-law that they aim at protecting tenderers against arbitrary behaviour on the part of the contracting authority and ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified. (17) It follows that, although upholding legality is certainly also a key aim of the Remedies Directives, the type of review provided for in those directives in order to achieve that aim is clearly one initiated by *economic operators*, as further suggested by recital 27 of Directive 2007/66. (18)

65. The fact that Directive 2007/66 also provides for the so-called 'corrective mechanism' (19) does not alter that conclusion. Under that mechanism, the Commission is empowered to request the correction of serious infringements of EU law that occurred during a contract award procedure. Even if that mechanism could be said to pertain to the *public* enforcement of public procurement rules, it cannot be inferred therefrom that the Remedies Directives, as amended by Directive 2007/66, require the establishment by the Member States of reviews in the public interest. That mechanism rather shows, *a contrario*, that the Remedies Directives do not provide for any *other* form of review in the public interest.

66. By the same token, Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25, which are both phrased in an identical manner, cannot be interpreted as *requiring* Member States to establish a mechanism of review in the public interest, such as the one at issue in the main proceedings.

67. Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 only require that specific infringements or systemic problems regarding the application of public procurement rules may be 'indicated' to courts or tribunals or other appropriate authorities or structures. There is therefore no obligation to bring actual proceedings, but merely an option, in cases where *specific* infringements are identified. The main task of public authorities under Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 appears rather to consist in reporting *structural* problems and suggesting appropriate remedies. (20)

68. Therefore, although Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 clearly promote *public* enforcement of public procurement rules, (21) they do not require Member States to establish review mechanisms such as those at issue in the main proceedings.

69. It follows that the Remedies Directives, Directive 2014/24 and Directive 2014/25 neither require nor preclude Member States from establishing other types of reviews, such as an *ex officio* review initiated by public authorities in the interest of legality and the protection of public funds.

70. However, if such review mechanisms are in fact established by a Member State, those reviews, in particular their impact and outcomes, will still fall within the scope of application of EU law.

71. First, in so far as public contracts fall within the scope *ratione materiae* of the public procurement directives, modifications of them are also governed by EU law. (22) Logically, reviews of such modifications fall within the scope of EU law to the extent that they seek to ensure compliance with substantive EU public procurement rules on modifications of public contracts.

72. Second, and as a subsidiary argument, the specific type of review at issue in the cases at hand pertains to Directives 2014/24 and 2014/25. Although Article 83 and Article 99, respectively, of those directives do

not *require* the Member States to establish a review such as the one in the main proceedings, such reviews still constitute one of the possible expressions (at the discretion of the Member States) of the new role ascribed to monitoring authorities by Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25.

73. Any other conclusion would have the singular consequence that the regulation of the subject matter of the *ex officio* public review procedure (namely the public contract itself and modifications to it) would be harmonised by EU law, while the potentially significant consequences of the review (sanctions imposed on the contracting authority or on the tenderers, or the annulment of the public contract), which could impact upon the entire tendering procedure, would fall completely outside of an otherwise harmonised area only by virtue of being initiated by a public authority. That can hardly be the case.

74. On the other hand, the fact that there is no specific EU harmonising measure governing that type of review means that only the general principles of EU law will apply to such review procedures.

75. It follows that Question 2 must be answered as follows: the Remedies Directives, Directive 2014/24 and Directive 2014/25 neither require Member States to establish, nor prevent them from establishing, *ex officio* reviews by public authorities of alleged infringements of public procurement rules. However, once established and initiated, such reviews fall within the scope of application of EU law.

C. Questions 1, 3 and 4

76. By Questions 1, 3 and 4, the referring court seeks to know, in essence, whether EU law — in particular the general principles of legal certainty and the protection of the financial interests of the Union — allows public authorities, on the basis of newly adopted provisions of national law or of EU law, to initiate a review of modifications of a public contract — and, as the case may be, to impose fines — *even if* the time limits for review under the national legislation in force at the time of the modifications have already lapsed.

77. In my view, the answer is clearly ‘no’.

1. The EU principle of legal certainty

78. The referring court acknowledges that Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 enhance the role of monitoring authorities. However, it wonders whether EU law, in particular the principle of legal certainty, limits the powers conferred upon them, or whether Article 194 of the 2015 Law on Public Procurement, which transposed those provisions, can be relied on to ‘reopen’ time limits that have already expired in order to allow for the exercise of those new competences.

79. According to the contracting authority, the *ex officio* reviews at issue in the main proceedings breach the principle of legal certainty. Even if the 2015 Law on Public Procurement created new competences for public authorities, that could not, as a result, reopen time limits that had already expired.

80. According to the Arbitration Panel, Hungarian law grants the President of the PPA a period of 60 days from the date on which he became aware of the infringement in order to initiate an *ex officio* review. Such a review may be initiated until 31 December 2020, which corresponds to the end of the duty to keep the relevant documents available.

81. The Hungarian Government acknowledges the relevance of the principle of legal certainty. That principle requires that legal rules be clear, precise and predictable in their effects. However, that government is of the view that the national provisions at issue are predictable.

82. According to the Commission, the principle of legal certainty precludes the *ex officio* review of a decision of a contracting authority, leading to the imposition of a fine, when the time limits to that effect have already lapsed. Time limits may only be reopened in exceptional circumstances, which are not present in the cases at hand.

83. To my mind, save in very exceptional circumstances, the EU principle of legal certainty precludes the ‘reopening’ of time limits that have already expired.

84. According to the settled case-law of the Court, as a matter of principle, new rules apply immediately to the *future effects* of a situation which arose under the old rule. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application. (23)

85. It is also settled case-law that procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force. (24) According to the Court, 'this interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effect of [EU] legislation must be clear and predictable for those who are subject to it'. (25)

86. More generally, the principle of legal certainty — which is one of the general principles of European Union law — requires that rules of law be clear and precise and predictable in their effect, especially where they may have negative consequences for individuals and undertakings, so that interested parties can ascertain their position in situations and legal relationships governed by European Union law. (26) The same principle must be observed by the national legislature when it adopts legislation within the sphere of EU law. (27)

87. As far as limitation periods are concerned, they must be fixed in advance to ensure legal certainty (28) and in order to be sufficiently foreseeable. (29)

88. In the cases at hand, what is at issue is not the application of new *procedural* rules to *ongoing* situations. Without wishing to reopen the debate on whether limitation periods are procedural or substantive rules, (30) the important point to my mind is rather that, as far as the time limits were concerned, the legal situation was closed (and time-barred).

89. It might again be recalled (31) that under the previously applicable legislation, namely Article 327(2) of the 2003 Law on Public Procurement, the (objective) time limits for review lapsed 3 years after the occurrence of the infringement. Thus, with regard to Case C-496/18, they lapsed in 2012. In Case C-497/18, the initiation of the review became time-barred in 2013. In 2015, the new Article 153(1)(c) of the 2015 Law on Public Procurement entered into force. In 2017, those new time limits were invoked as apparently starting to run from 2015 and allowing for the reopening of the review of the modifications to the public contracts at issue. (32)

90. If my understanding of those facts and of national law — both of which are ultimately for the national court to verify — is correct, then there is, to my mind, no ongoing legal situation to which new procedural rules are being applied. This is an instance of *true retroactivity.* What is sought is to reopen already expired time limits by enacting new legislation setting new deadlines.

91. If it were accepted that, in ordinary circumstances, time limits for review that have already expired can be reopened (or, in effect, reset) every time that new national provisions containing general time limits are adopted, that could lead to a situation where contractual modifications could in fact be reviewed without any limitation in time. (33) In this way, the national legislation could endlessly reset the clock, simply by enacting new time limits. Such an outcome is clearly not acceptable in the light of the principle of legal certainty.

92. No compelling grounds have been put forward (before this Court at least) that could justify such reopening of time limits and, in effect, (true) retroactivity of new rules. Such retroactivity is possible only in exceptional circumstances, only when the purpose to be attained so demands and when the legitimate expectations of the persons concerned are duly respected. (34)

93. Before I turn to the arguments relating to the purpose behind the construction of the temporality rules advanced by the Arbitration Panel and the Hungarian Government (sections 2, 3, and 4 below), I would note that the laying down of new deadlines in new legislation applicable to past events years after the fact can hardly be labelled as foreseeable or respecting the legitimate expectations of the persons concerned. In addition, I agree with the Commission that Article 197 of the 2015 Law on Public Procurement, which governs the *rationae temporis* applicability of that law, lacks clarity and, therefore, foreseeability for the parties to the contracts. Thus, that provision does not contain anything close to the level of justification that would be required in order to justify such (true) retroactivity.

94. Question 1 must therefore be answered as follows: the principle of legal certainty precludes the application of national provisions allowing for *ex officio* review of infringements of public procurement rules that occurred before their entry into force, in a situation where the time limits laid down under the previously applicable national legislation have already elapsed.

2. The new role of monitoring authorities under Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25

95. The Arbitration Panel argues that the present cases are not about the (re)opening of time limits that have already lapsed under the previous procedural provisions in force at the time of the modifications, but about allowing the exercise, in the context of administrative review, of new monitoring competences laid down in Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25. The predecessor of the Public Procurement Authority did not have such a review competence. Consequently, the 2015 Law on Public Procurement does not allow for the reopening of an expired deadline, but it does allow for the exercise of an *entirely new competence*. The President of the PPA and the Hungarian Government largely share that view, although with some minor variations.

96. I must admit that I am very puzzled by that argument.

97. Subject to verification by the national court, it would appear to me that the 2003 Law on Public Procurement already contained the possibility for certain public authorities to initiate *ex officio* reviews in the public interest. (35) Indeed, the 2015 recast of the law brought about some amendments to that competence and, importantly, set new longer time limits for its exercise. (36) But the competence to carry out such a type of review can hardly be described as new.

98. In addition, it should be noted that Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 are not applicable *ratione temporis* to the present cases. Moreover, as confirmed at the hearing, those provisions have been transposed by Article 194 of the 2015 Law on Public Procurement. However, the reviews at issue in the main proceedings were initiated on the basis of Article 153, not of Article 194.

3. The protection of the financial interests of the Union

99. By Question 3, the referring court specifically enquires whether the answer to Question 1 may be affected by the fact that the tenders at issue received EU subsidies. In other words, as the referring court puts it: beyond legal certainty, are there other public interests, such as the protection of the financial interests of the Union, that could justify allowing for the review of public contracts after the expiry of the time limits to that effect, potentially until 2020? (37)

100. In the context of Question 3, the referring court relies on Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25. It also explains that, under the 2015 Law on Public Procurement, the time limit for review in the public interest of public contracts carried out using EU subsidies was linked with the duration of the obligation to keep documents available (in connection with EU subsidies), so that the national legislature could, as a result, prolong those time limits.

101. According to the contracting authority, the protection of the financial interests of the Union can be ensured through other means than *ex officio* review in the public interest, for instance, through financial corrections, which are possible at any time. Financial corrections have already been applied in the present cases, so that the imposition of fines constitutes, in practice, a second penalty for the same alleged infringements.

102. According to the Arbitration Panel, the *ex officio* reviews at issue are primarily aimed at protecting public funds, especially the financial interests of the Union.

103. According to the Hungarian Government, one of the aims of Article 152(2)(c) of the 2015 Law on Public Procurement is that the *ex officio* procedure could be initiated at any time during the period in which Article 90 of Regulation No 1083/2006 imposes an obligation to keep available all supporting documents regarding expenditure and audits under the operational programme concerned. In addition, Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 demonstrate the importance, from an EU law perspective, of ensuring that public spending is monitored.

104. According to the Commission, the fact that an infringement of public procurement rules concerns a project partly financed by EU funds does not require Member States to reopen time limits to investigate that infringement. Even if they do so in the name of the protection of the Union's financial interests, Member States must still respect the EU general principle of legal certainty.

105. I agree with the Commission.

106. It should be noted that Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 are not directly relevant for the protection of the Union's financial interests. Admittedly, the draft proposals for the directives that were initially tabled by the Commission insisted on the EU budget dimension of those proposals. (38) However, in the versions currently in force, Article 83 of Directive 2014/24 and Article 99 of Directive 2014/25 do not mention the protection of the financial interests of the Union.

107. The relevant secondary acts of EU law are therefore rather Regulation No 1083/2006 and Regulation No 2988/95. (39)

108. First, as regards the obligation, laid down by Article 90 of Regulation No 1083/2006, to keep available for a certain duration all the supporting documents regarding expenditure, it does not necessarily entail the possibility of providing for review proceedings — and the imposition of sanctions — for that same duration.

109. As rightly stated by the contracting authority at the hearing, limitation periods for the initiation of reviews are simply different from periods during which documents must be kept. Of course, as a matter of legislative design, a national (or EU) legislature could decide to apply the same time periods to both. But such a choice would have to be clearly and unequivocally provided for in the applicable legislation, since one does not automatically follow from the other. In the same vein, Article 98 of Regulation No 1083/2006 only requires the Member States to investigate irregularities and make the financial corrections required during that period. It does not provide for reviews or, a fortiori, penalties as a means of redress for identified irregularities in the use of EU funds.

110. Second, the protection of the Union's financial interests cannot be construed as simply overriding the EU principle of legal certainty as a matter of course. Rather, the protection of the Union's financial interests must be weighed against the principle of legal certainty. This is normally achieved through the adoption of clear and foreseeable time limits. Thus, while the importance of the protection of financial interests must be acknowledged, at a certain point in time even illegal decisions must become final.

111. Without taking any position on its applicability to the specific cases at hand, Regulation No 2988/95 serves as *an illustration* of that balancing exercise. (40) Under Article 3(1) of Regulation No 2988/95, the standard limitation period for proceedings is 4 years from the time when the irregularity was committed. The limitation period expires at the latest on the day on which a period equal to twice the limitation period lapses without the competent authority having imposed a penalty. (41) That is seen as appropriate to pursue the objective of protecting the Union's financial interests. (42)

112. Those provisions illustrate that, under EU law, the protection of financial interests does not justify either extendable time limits or temporally limitless review. As stated by the Court, even if Member States do retain the option of applying a period longer than 4 years, a longer national limitation period must, inter alia, not go clearly beyond what is necessary to achieve the objective of protecting the European Union's financial interests. In assessing whether the limitation periods are reasonable, one must look at 'the legal traditions of those States and the perception in their respective legal systems of what length of time is necessary and sufficient for a diligent public service to bring proceedings in respect of irregularities committed to the detriment of the public authorities and national budgets'. (43)

113. Thus, as far as national limitation periods are concerned, there is indeed a caveat to the reasonable length of the *initial* time limits. The outer limit is reasonableness. Only if the initial time limits were so short as to fail to guarantee the effectiveness of the review (44) can the issue of their appropriateness be opened. In any case, that principle certainly does not automatically warrant either true retroactivity or (even less) selective disregard for applicable deadlines because administrative authorities were not, for whatever reason, able to act in time.

114. I do not think that it is necessary, in the context of the main proceedings, to engage in a discussion on *Taricco* (45) and its potential implications for the case at hand. The facts of that case were quite different from those of the cases at hand. *Taricco* concerned criminal penalties for VAT fraud (VAT being an EU own resource), where the limitation periods were *still running* when the new legislation was adopted. Moreover, the main issue was the fact that the limitation periods were *too short*, thereby preventing the application of effective and deterrent penalties to counter fraud affecting the financial interests of the Union.

115. In any case, in view of the clarifications subsequently made in the judgments in *M.A.S.* and *Scialdone*, (46) I would no longer consider *Taricco* a good precedent on the specific point of whether time limits that normally apply can be disregarded in the name and for the sake of the protection of the financial interests of the Union.

4. Deficiencies in the review procedure

116. By Question 4, the referring court seeks to know whether the answer to Question 1 can be affected by the fact that there was no investigation into the infringement of public procurement rules at the time of the commission of the infringement, and the potential reasons for that lack of investigation.

117. According to the Arbitration Panel and the President of the PPA, it was because of regulatory deficiencies in the 2003 Law on Public Procurement that it had not been possible to detect the unlawful contract modifications. The contracting authority had not submitted an information notice relating to the modification of the contracts and the notices published concerning the execution of the contracts did not suggest an infringement. Consequently, the predecessor of the President of the PPA did not have the information that would have enabled it to check the performance and modification of the contract. In short, the 2003 Law on Public Procurement did not ensure the level of transparency and administrative oversight that was subsequently achieved in the 2015 Law on Public Procurement. As a result, it was necessary to apply the provisions of the latter national legislation.

118. That argument can be dismissed with relative ease.

119. Assuming, as a matter of fact, that there had been any such structural deficiencies, which would have prevented effective *ex officio* monitoring and enforcement of the public procurement rules, (47) that fact still would not justify resorting to truly retroactive measures in order to remedy such deficiencies *ex post*. The Roman law maxim *nemo auditur propriam turpitudinem allegans* traditionally applies in the realm of civil law. I think that it could also be applied to a state or public authority that has crafted and applied certain rules. Having perhaps later realised that those rules, which it had sole responsibility for developing and applying, did not operate in an optimal way, it cannot be allowed to then seek to reset the clock altogether and have ‘another bite at the apple’, to the detriment of the parties concerned.

120. It is therefore for the Member States to ensure that they monitor infringements of their own laws effectively. Deficiencies in their own laws or their enforcement cannot be turned against third parties by resetting time limits that have already expired. (48)

D. Question 5

121. The wording of Question 5 is not very clear. I understand it as follows. The referring court starts from the assumption that the Court answers Question 2 in the opposite way to that suggested in the present Opinion. Thus, if *ex officio* reviews can be carried out in the circumstances of the cases at hand, does EU law (especially the principle of proportionality) empower national courts evaluating the sanction that was imposed in the context of those reviews to look at the specific aspects of the case in order to determine the appropriateness of the sanction?

122. According to the Arbitration Panel, national courts should not be able to declare invalid the contested administrative decision, or impose any other legal consequence, since the Arbitration Panel has already assessed, within the exercise of its competence, the elements raised by the referring court. In particular, the Arbitration Panel has taken into account, in deciding the amount of the fines, the fact that several years elapsed between the infringement and the initiation of the review. National courts should not make a new assessment in that respect.

123. According to the Hungarian Government, it is for the national legislature to decide what national courts are entitled to do as regards the scope of their assessment of the decision of the Arbitration Panel and the type of legal consequences that can follow.

124. According to the Commission, there is no need to separately address Question 5 since it overlaps with Question 1.

125. Since my suggested answer to Question 1 is a negative one (the EU law principle of legal certainty precludes the *ex officio* review of potential infringements of public procurement rules in cases in which the applicable time limits have already expired), there is indeed no need to address Question 5. It is therefore not necessary, in the circumstances of the present cases, to examine whether national courts hearing such cases can assess the sanction(s) *in concreto*, in the light of factors such as the passage of time, the fact that time limits under the previous legislation have already lapsed or the severity of the infringement.

126. Beyond that, it might only be mentioned in lieu of a conclusion that the specific type of review of administrative decisions falling within the scope of EU law is a matter of choice of a national legislature, (49) provided that it is guaranteed, at the stage of either administrative review or review by a court, that the proportionality of the sanction, which constitutes a general principle of EU law, will be duly assessed. (50)

V. Conclusion

127. I propose that the Court answer the questions posed by the Fővárosi Törvényszék (Budapest High Court, Hungary) as follows:

– Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, neither require Member States to establish nor prevent them from establishing *ex officio* reviews by public authorities of alleged infringements of public procurement rules. However, once provided for and initiated, such reviews and their outcomes fall within the scope of application of EU law.

– The principle of legal certainty precludes the application of national provisions allowing for *ex officio* review of infringements of public procurement rules that occurred before the entry into force of those new provisions, in circumstances where the time limits laid down for that purpose in the previously applicable national legislation had already expired.

---

1 Original language: English.

---

2 OJ 1989 L 395, p. 33.

---

3 OJ 1992 L 76, p. 14.

---

4 Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

---

5 OJ 2014 L 94, p. 65.

6 OJ 2014 L 94, p. 243.

7 Reproduced above, in points 12 and 15 of this Opinion.

8 The argument advanced by the President of the PPA and the Arbitration Panel, restated above in points 26, 34 and 44, appears to be of a different nature, namely that for reviews launched after 2015, the time limits of the 2015 Law on Public Procurement became applicable, including for modifications of public contracts carried out before 2015.

9 As noted above in point 23 of this Opinion, in Case C-496/18, a review procedure concerning the amendment of the contract with Sol-Data SA and HUNGEOD Kft. was initiated *ex officio* by another Hungarian public authority, namely the Directorate-General for the Audit of European Aid. However, on 9 November 2010, the Arbitration Panel rejected that application as being out of time. I can only assume that this was done while applying the then (in 2010) applicable time limit stemming from the 2003 Law on Public Procurement.

10 The only difference between them lies in the fact that different public procurement directives are applicable. In Case C-496/18, Directive 92/13 and Article 99 of Directive 2014/25 apply, while in Case C-497/18, it is Directive 89/665 and Directive 2014/24.

11 See judgments of 21 December 2011, Cicala (C-482/10, EU:C:2011:868, paragraph 28); of 17 July 2014, YS and Others (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67); of 5 November 2014, Mukarubega (C-166/13, EU:C:2014:2336, paragraph 44); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 83); and of 9 March 2017, *Doux* (C-141/15, EU:C:2017:188, paragraph 60).

12 Council Regulation (EC, EURATOM) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1).

13 Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25). That regulation was repealed on 31 December 2013.

14 My emphasis.

15 Judgment of 21 October 2010, Symvoulio Apochetefseon Lefkosias (C-570/08, EU:C:2010:621, paragraph 37).

16 In particular, Directive 2007/66 introduced minimum time limits and standstill periods *to the benefit of tenderers* in award procedures, especially unsuccessful ones, in order to guarantee the effectiveness of their right of review. See Articles 2a(1) and 2c of the Remedies Directives, as amended by Directive 2007/66.

17 See, for example, judgments of 11 September 2014, Fastweb (C-19/13, EU:C:2014:2194, paragraph 34); of 12 March 2015, eVigilo (C-538/13, EU:C:2015:166, paragraph 50); and of 15 September 2016, Star Storage and Others (C-439/14 and C-488/14, EU:C:2016:688, paragraph 41).

18 ‘As this Directive strengthens national review procedures, especially in cases of an illegal direct award, economic operators should be encouraged to make use of these new mechanisms.’

19 See Article 3 of the Remedies Directives.

20 See, to that effect, the Commission draft proposal for Directive 2014/24 (COM(2011) 896 final, p. 12).

21 Thus mirroring the trend that is also apparent in some parts of the literature on public procurement, calling for more public enforcement of public procurement rules. See, for example, Sanchez-Graells, A., ‘*“If it ain’t broke, don’t fix it”?* EU requirements of administrative oversight and judicial protection for public contracts’, in Folliot Lalliot, L. and Torricelli, S. (eds.), *Contrôles et contentieux des contrats publics — Oversight and Challenges of public contracts*, Bruylant, Brussels, 2018, p. 495.

22 See, to that effect, judgments of 19 June 2008, pressetext Nachrichtenagentur (C-454/06, EU:C:2008:351), and of 7 September 2016, Finn Frogne (C-549/14, EU:C:2016:634). See also Article 72 of Directive 2014/24 and Article 89 of Directive 2014/25, being the first comprehensive EU law provisions dealing with modifications of public contracts during their term.

23 See, for example, judgments of 26 March 2015, Commission v Moravia Gas Storage (C-596/13 P, EU:C:2015:203, paragraph 32); of 6 October 2015, Commission v Andersen (C-303/13 P, EU:C:2015:647, paragraph 50); and of 15 January 2019, E.B. (C-258/17, EU:C:2019:17, paragraph 50).

24 See, for example, judgments of 12 November 1981, Meridionale Industria Salumi and Others (212/80 to 217/80, EU:C:1981:270, paragraph 9); of 14 November 2002, Ilumitrónica (C-251/00, EU:C:2002:655, paragraph 29 and the case-law cited); and of 9 March 2006, Beemsterboer Coldstore Services (C-293/04, EU:C:2006:162, paragraph 19).

25 See, for example, judgments of 12 November 1981, Meridionale Industria Salumi and Others (212/80 to 217/80, EU:C:1981:270, paragraph 10), and of 12 May 2005, *Commission v Huhtamaki Dourdan* (C-315/03, not published, EU:C:2005:284, paragraph 51).

26 See, for example, judgments of 8 December 2011, France Télécom v Commission (C-81/10 P, EU:C:2011:811, paragraph 100 and the case-law cited); of 11 June 2015, Berlington Hungary and Others (C-98/14, EU:C:2015:386, paragraph 77 and the case-law cited); and of 17 October 2018, *Klohn* (C-167/17, EU:C:2018:833, paragraph 50 and the case-law cited).

27 Judgment of 26 April 2005, ‘Goed Wonen’ (C-376/02, EU:C:2005:251, paragraph 34).

28 See, for example, judgment of 15 July 1970, ACF Chemiefarma v Commission (41/69, EU:C:1970:71, paragraph 19), regarding the Commission’s power to impose fines for infringement of the rules on competition. See also judgments of 11 July 2002, *Marks & Spencer* (C-62/00, EU:C:2002:435, paragraph 39), and of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading* (C-201/10 and C-202/10, EU:C:2011:282, paragraph 52).

29 See, in the context of limitation periods for recovery of export refunds wrongly received, judgments of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading* (C-201/10 and C-202/10, EU:C:2011:282, paragraphs 32 to 34), and of 17 September 2014, *Cruz & Companhia* (C-341/13, EU:C:2014:2230, paragraph 58).

30 See my Opinion in Scialdone (C-574/15, EU:C:2017:553, points 145 to 166).

31 Above, points 46 to 47 of this Opinion.

32 Since the public procurement projects at issue received EU funds, the Arbitration Panel considers that the time limits for *ex officio* review could potentially extend until 31 December 2020, hence 10 and 11 years, respectively, after the allegedly illegal modifications took place.

33 Needless to say, in circumstances where all the relevant facts occurred years or even decades previously. In the present cases, all the relevant facts apparently happened while the 2003 Law on Public Procurement was in force. The only event that happened while the 2015 Law on Public Procurement was in force was that the relevant authority declared that it became (subjectively) aware of the infringement.

34 See, for example, judgment of 15 July 2004, *Gerekens and Procola* (C-459/02, EU:C:2004:454, paragraph 24).

35 See Articles 307 and 327 of the 2003 Law on Public Procurement.

36 Above, point 46 of this Opinion.

37 See Article 80(3) of Decree No 4/2001, as interpreted by the Arbitration Panel.

38 See COM(2011) 896 final, in particular Articles 83(3) and 84(2) of draft Directive 2014/24.

39 See above, point 52 of this Opinion.

40 That regulation constitutes the general (as opposed to sectoral) legislation on the protection of the Union's financial interests through *administrativ*e checks, measures and penalties. For the criminal aspect, see Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ 2017 L 198, p. 29).

41 It should be noted that, under Article 12 of Directive 2017/1371, the standard period for criminal offences affecting the Union's financial interest is 5 years.

42 See, for example, judgment of 5 May 2011, Ze Fu Fleischhandel and Vion Trading (C-201/10 and C-202/10, EU:C:2011:282, paragraph 43).

43 Judgment of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading* (C-201/10 and C-202/10, EU:C:2011:282, paragraphs 38 to 39).

44 See, to that effect, judgment of 26 November 2015, MedEval (C-166/14, EU:C:2015:779, paragraph 39 to 44). Furthermore, it is established case-law that, under the Remedies Directives, 'the setting of reasonable limitation periods for bringing proceedings must be regarded as satisfying, in principle, the requirement of effectiveness under [the Remedies Directives], since it is an application of the fundamental principle of legal

certainty’. See, for example, judgments of 12 December 2002, Universale-Bau and Others (C-470/99, EU:C:2002:746, paragraph 76); of 21 January 2010, *Commission v Germany* (C-17/09, not published, EU:C:2010:33, paragraph 22); and of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 51).

---

45 Judgment of 8 September 2015, Taricco and Others (C-105/14, EU:C:2015:555).

---

46 Judgments of 5 December 2017, M.A.S. and M.B. (C-42/17, EU:C:2017:936), and of 2 May 2018, Scialdone (C-574/15, EU:C:2018:295).

---

47 It need only be recalled, as stated above at point 23, that at least in Case C-496/18, an *ex officio* review was actually initiated under the 2003 Law on Public Procurement, albeit unsuccessfully.

---

48 It might be recalled that in both cases at hand, sanctions were imposed not only on the contracting authority, but also on the successful tenderers — see above, points 28 and 33. While there could potentially be greater leeway where a Member State wishes to monitor and impose budgetary sanctions on its own departments or emanations while leaving contracts already entered into untouched, it is a different matter altogether to reopen the procurement procedures, sanction all the participants thereto, and even potentially nullify the contracts in question a number of years later.

---

49 But see, by analogy, the requirements concerning the effectiveness of any such national institutional choice in judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraphs 64 to 66 and 77).

---

50 See, to that effect, judgment of 9 February 2012, Urbán (C-210/10, EU:C:2012:64, paragraph 23), and my Opinion in Link Logistik N&N (C-384/17, EU:C:2018:494, points 104 to 112).

EU:C:2019:476

ORDER OF THE COURT (Ninth Chamber)

4 June 2019 (*)

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court of Justice — Public procurement in the water, energy, transport and postal services sectors — Directive 2004/18/EC — Point (d) of the first subparagraph of Article 45(2) — Grounds for exclusion — Grave professional misconduct — Infringement of competition rules)

In Case C-425/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court of Piedmont, Italy), made by decision of 7 February 2018, received at the Court on 28 June 2018, in the proceedings

Consorzio Nazionale Servizi Società Cooperativa (CNS)

v

Gruppo Torinese Trasporti GTT SpA,

intervening parties:

Consorzio Stabile Gestione Integrata Servizi Aziendali GISA,

La Lucente SpA,

Dussmann Service Srl,

So.Co.Fat. SC,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, D. Šváby (Rapporteur) and S. Rodin, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Consorzio Nazionale Servizi Società Cooperativa (CNS), by F. Cintioli, G. Notarnicola, E. Perrettini and A. Police, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by D. Del Gaizo, avvocato dello Stato,

– the European Commission, by G. Gattinara and P. Ondrůšek and by L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling relates to the interpretation of Article 53(3) and Article 54(4) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and point (d) of the first subparagraph of Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between Consorzio Nazionale Servizi Società Cooperativa (CNS) and Gruppo Torinese Trasporti GTT SpA (‘GTT’) seeking, inter alia, annulment of the decision of GTT to withdraw the award to CNS of a public contract.

Legal context

EU law

Directive 2004/17

3 Article 53(3) of Directive 2004/17, under the heading ‘Qualification systems’, and Article 54(4) of the same directive, under the heading ‘Criteria for qualitative selection’, provide that the criteria and rules for qualification and also the criteria for qualitative selection ‘may include the exclusion criteria listed in Article 45 of Directive 2004/18 on the terms and conditions set out therein’.

Directive 2004/18

4 Article 45 of Directive 2004/18, which is headed ‘Personal situation of the candidate or tenderer’, appears in a section entitled ‘Criteria for qualitative selection’ and provides as follows:

‘…

2. Any economic operator may be excluded from participation in a contract where that economic operator:

…

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

…

Member States shall specify, in accordance with their national law and having regard for [EU] law, the implementing conditions for this paragraph.

…’

Italian law

5 Decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006) (‘the Code on public contracts’) transposed Directives 2004/17 and 2004/18 into Italian law.

6 Article 38 of the Code on public contracts, entitled ‘General requirements’, listed, in paragraph 1, the grounds on which an economic operator may be excluded from participating in a public contract:

‘The following persons shall be excluded from participation in procedures for the award of concessions and public works contracts, supply contracts and service contracts and may not be awarded subcontracts or conclude any related contract:

…

(f) any person who, in the reasoned assessment of the contracting authority, has been guilty of serious negligence or bad faith in the performance of any contract awarded to that person by the contracting authority which published the contract notice or any person who has been found guilty of grave professional misconduct proven by any means which the contracting authority can demonstrate;

…’

7 Article 230(1) of that code provided as follows:

‘Contracting entities shall apply Article 38 to verify that candidates or tenderers comply with the general requirements.’

The dispute in the main proceedings and the question referred for a preliminary ruling

8 GTT is a company operating urban railway, tramway, trolleybus and bus transport services.

9 By a notice sent for publication in the *Official Journal of the European Union* on 30 July 2015 and a letter of invitation of 27 November 2015, GTT opened a restricted procedure, in accordance with Directive 2004/17, for the procurement of services for the cleaning of vehicles, premises and sites, services for the movement and refuelling of vehicles, and ancillary services at the contracting authority’s establishments.

10 GTT stated that the total value of the contract, consisting of six lots, was EUR 29 434 319.39 excluding value added tax (VAT), the value of each lot being between EUR 4 249 999.10 and EUR 6 278 734.70.

11 Having awarded three of those lots to CNS, GTT then withdrew that award, by a decision of 14 July 2017 (‘the contested decision’). In so doing, it relied on a decision of the Autorità Garante della Concorrenza e del Mercato (Competition Authority, Italy) (‘the AGCM’) of 22 December 2015 (‘the AGCM’s decision’), which imposed a fine of EUR 56 190 090 on CNS for having participated in an anticompetitive horizontal agreement, with the aim of influencing the outcome of a procurement procedure opened by another administration.

12 In the contested decision, it was also noted that the AGCM’s decision had already been upheld by a judicial decision with the force of *res judicata*. The contested decision relies additionally on two judgments, of 29 March and 3 April 2017, in which the referring court held that an anticompetitive agreement implemented by the operator in question in another procurement procedure and established in the course of administrative proceedings constituted grave professional misconduct within the meaning of Article 38(1)(f) of the Code on public contracts and point (d) of the first subparagraph of Article 45(2) of Directive 2004/18. It is also claimed, first, that, in the procedure for the award of the contract in question, CNS failed to mention in its participation file that penalty proceedings were pending against it before the AGCM and, secondly, that CNS only put compliance measures into place during the course of the procurement procedure, meaning that, at the start of the procedure, the ground for exclusion still existed.

13 GTT therefore took the view that the conduct penalised by the AGCM was such as to break the relationship of trust with the contracting authority.

14 By an interim order of 11 October 2017, the referring court dismissed an application for interim measures submitted by CNS.

15 Both that interim order and the judgments delivered by the referring court on 29 March and 3 April 2017 were reversed by the Consiglio di Stato (Council of State, Italy) by, respectively, an order of 20 November 2017 and two decisions of 4 December 2017 and 5 February 2018. According to the explanations provided by the referring court, those decisions make it clear that conduct constituting an infringement in competition matters cannot be classified as 'grave professional misconduct' for the purposes of the application of Article 38(1)(f) of the Code on public contracts and that 'only failures and negligence committed in the performance of a public contract' can be classified as such. 'Matters, even unlawful ones, which occurred during the preceding award procedure should therefore be ruled out.' That interpretation is based on the legal certainty of economic operators. According to the Consiglio di Stato (Council of State), that interpretation is compatible with the judgment of 18 December 2014, *Generali-Providencia Biztosító* (C-470/13, EU:C:2014:2469), from which it can be inferred only that national legislation which expressly classifies an infringement of competition law as 'grave professional misconduct' does not breach EU law, and not that EU law requires such infringements to be included in the concept of 'grave professional misconduct'. It follows that, under Italian law, the commission of such infringements is irrelevant in public procurement procedures governed by the Code on public contracts.

16 CNS relies on those three decisions of the Consiglio di Stato (Council of State) in support of its action for annulment of the contested decision.

17 Referring to the judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 33), the referring court observes, however, that, since the Italian Republic had availed itself of the power granted to Member States by Article 54(4) of Directive 2004/17 to include the exclusion criteria listed in Article 45 of Directive 2004/18 in the criteria for the qualitative selection of operators in the special sectors, the Court's case-law relating to that provision is relevant to the case in the main proceedings, even though it concerns a restricted procedure under Directive 2004/17.

18 The referring court further observes that, in the judgments of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 27), and of 18 December 2014, *Generali-Providencia Biztosító* (C-470/13, EU:C:2014:2469, paragraph 35), the Court already clarified that the concept of 'professional misconduct' covers all wrongful conduct having an impact on the professional credibility of the operator at issue and that the commission of an infringement of the competition rules, in particular where that infringement has been penalised by a fine, constitutes a cause for exclusion under point (d) of the first subparagraph of Article 45(2) of Directive 2004/18.

19 The referring court essentially infers, from a comparison of the judgments of 9 February 2006, *La Cascina and Others* (C-226/04 and C-228/04, EU:C:2006:94, paragraph 23), and of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 25), that Member States have a limited power of assessment with regard to the optional grounds for exclusion which do not refer to national legislation or rules to specify the implementing conditions thereof.

20 However, since the referring court considers the Court's case-law on the so-called 'optional' grounds for exclusion, which developed pursuant to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and Directive 2004/18, to be ambiguous in its interpretation, it is seeking clarification from the Court in this regard.

21 In those circumstances, the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court of Piedmont, Italy) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Articles 53(3) and 54(4) of [Directive 2004/17], in conjunction with [point (d) of the first subparagraph of Article 45(2)] of [Directive 2004/18], preclude a provision such as Article 38(1)(f) of [the Code on public contracts], as interpreted by national case-law, which excludes from the scope of "grave professional misconduct" on the part of an economic operator conduct consisting in infringement of the competition rules, which has been established and penalised by the national competition authority by decision upheld by the courts, thereby precluding a priori the contracting authorities from assessing such infringements independently for the purposes of determining whether

such an economic operator is to be excluded from a tender procedure for the award of a public contract, as a possible but not a mandatory outcome?'

Consideration of the question referred

22 Under Article 99 of the Rules of Procedure of the Court, where the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

23 That provision must be applied in the present case.

24 By its question, the referring court is essentially asking whether point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 must be interpreted as precluding national legislation, such as Article 38(1)(f) of the Code on public contracts, which is interpreted as excluding from the scope of 'grave professional misconduct' on the part of an economic operator conduct consisting in infringement of the competition rules, which has been established and penalised by the national competition authority by decision upheld by the courts, thereby precluding the contracting authorities from assessing such infringements independently for the purposes of determining whether such an economic operator is potentially to be excluded from a procedure for the award of a public contract.

25 According to settled case-law, Article 45(2) of Directive 2004/18 does not provide for uniform application at national level of the grounds of exclusion it mentions, since the Member States may choose not to apply those grounds of exclusion at all or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context, the Member States have the power to make the criteria laid down in that provision less onerous or more flexible (judgments of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 36, and of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 29).

26 That being the case, it must be noted that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18, unlike the provisions relating to the grounds for exclusion in points (a), (b), (e) and (f) of the same subparagraph, does not refer to national legislation or rules, but that the second subparagraph of Article 45(2) provides that Member States shall specify, in accordance with their national law and having regard for EU law, its implementing conditions, (judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 25).

27 It is therefore clear from the case-law — and as the referring court has observed — that where an optional ground for exclusion provided for in Article 45(2) of Directive 2004/18, such as that contained in point (d) of the first subparagraph thereof, does not refer to national law, the Member States' discretion is more strictly circumscribed. In such a case, it falls to the Court to define the scope of such an optional ground for exclusion (see, to that effect, judgments of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraphs 25 to 31, and of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 35).

28 Consequently, the concepts of 'professional' 'grave' 'misconduct', in point (d) of the first subparagraph of Article 45(2) can be specified and explained in national law, provided that it has regard for EU law (judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 26).

29 In that regard, it should be noted that the concept of 'professional misconduct' covers all wrongful conduct which has an impact on the professional credibility of the operator at issue (judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 27), or on its integrity or reliability.

30 It follows that the concept of 'professional misconduct', which is interpreted broadly, cannot be limited only to failures and negligence committed in the performance of a public contract.

31 In addition, the concept of ‘grave misconduct’ must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part (judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 30).

32 Finally, point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 allows the contracting authorities to prove professional misconduct by any demonstrable means. Since a judgment which has the force of *res judicata* is not required in order to prove professional misconduct (judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 28), the decision of a national competition authority establishing that an operator has infringed the competition rules can undoubtedly be indicative of the existence of grave misconduct by that operator.

33 In those circumstances, the commission of an infringement of the competition rules, in particular where that infringement has been penalised by a fine, constitutes a ground for exclusion under point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 (judgment of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 35).

34 It should be noted, however, that the decision of a national competition authority establishing an infringement of the competition rules does not necessarily result in the automatic exclusion of an economic operator from a procedure for the award of a public contract. In accordance with the principle of proportionality, a finding of ‘grave misconduct’ requires, in principle, a specific and individual assessment of the conduct of the economic operator concerned to be carried out (see, to that effect, judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 31).

35 In the light of all the foregoing considerations, the answer to the question referred is that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which is interpreted as excluding from the scope of ‘grave professional misconduct’ on the part of an economic operator conduct consisting in infringement of the competition rules, which has been established and penalised by the national competition authority by decision upheld by the courts, thereby precluding the contracting authorities from assessing such infringements independently for the purposes of determining whether such an economic operator is potentially to be excluded from a procedure for the award of a public contract.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Point (d) of the first subparagraph of Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which is interpreted as excluding from the scope of ‘grave professional misconduct’ on the part of an economic operator conduct consisting in infringement of the competition rules, which has been established and penalised by the national competition authority by decision upheld by the courts, thereby precluding the contracting authorities from assessing such infringements independently for the purposes of determining whether such an economic operator is potentially to be excluded from a procedure for the award of a public contract.

[Signatures]

* Language of the case: Italian.

ORDER OF THE COURT (Ninth Chamber)

20 June 2019 (*)

(Reference for a preliminary ruling — Public procurement of supplies, works or services — Directive 2014/24/EU — Article 10(h) — Specific exclusions for service contracts — Patient transport ambulance services — Concept)

In Case C-424/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Veneto (Regional Administrative Court for Veneto, Italy), made by decision of 13 June 2018, received at the Court on 27 June 2018, in the proceedings

Italy Emergenza Cooperativa Sociale,

Associazione Volontaria di Pubblica Assistenza 'Croce Verde'

v

ULSS 5 Polesana Rovigo,

Regione del Veneto,

interveners:

Regione del Veneto,

Croce Verde Adria,

Italy Emergenza Cooperativa Sociale,

Associazione Nazionale Pubbliche Assistenze (Organizzazione nazionale di volontariato) — ANPAS ODV,

Associazione Nazionale Pubblica Assistenza (ANPAS) — Comitato regionale Liguria,

Confederazione Nazionale delle Misericordie d'Italia,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, D. Šváby (Rapporteur) and S. Rodin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having considered the observations submitted:

– on behalf of Italy Emergenza Cooperativa Sociale, by R. Speranzoni and S. Betti, avvocati,

– on behalf of Associazione Volontaria di Pubblica Assistenza 'Croce Verde', by V. Migliorini and C. Tamburini, avvocati,

– on behalf of Regione del Veneto, by E. Zanon, C. Zampieri and C. Drago, avvocati,

– on behalf of Croce Verde Adria, by C. Tamburini, avvocato,

– on behalf of Associazione Nazionale Pubbliche Assistenze (Organizzazione nazionale di volontariato) — ANPAS ODV, by V. Migliorini and C. Tamburini, avvocati,

– on behalf of Associazione Nazionale Pubblica Assistenza (ANPAS) — Comitato regionale Liguria, by R. Damonte, avvocato,

– on behalf of Confederazione Nazionale delle Misericordie d'Italia, by P. Sanchini, F. Sanchini and C. Sanchini, avvocati,

– on behalf of the Italian Government, by G. Palmieri, acting as Agent, and by F. Sclafani, avvocato dello Stato,

– on behalf of the German Government, initially by T. Henze and J. Möller, and subsequently by J. Möller, acting as Agents,

– on behalf of Ireland, by M. Browne and G. Hodge, and by A. Joyce, acting as Agents, and by C. Donnelly, Barrister-at-law,

– on behalf of the European Commission, by G. Gattinara and P. Ondrůšek, and by L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to rule by reasoned order in accordance with Article 99 of the Rules of Procedure of the Court,

makes this

Order

1 This request for a preliminary ruling concerns the interpretation of Article 10(h) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 It has been made in the context of two disputes, the first between Italy Emergenza Cooperativa Sociale ('Italy Emergenza') and ULSS 5 Polesana Rovigo (local public health unit 5 of the Polesine of Rovigo, Italy, 'ULSS 5 Polesana'), and the second between Associazione Volontaria di Pubblica Assistenza 'Croce Verde' ('Croce Verde') and ULSS 5 Polesana and Regione del Veneto (Region of Veneto, Italy), concerning the award by ULSS 5 Polesana, by means of direct contracting, of a contract for ambulance transport services.

Legal background

European Union law

3 Recital 28 of Directive 2014/24 states:

'This Directive should not apply to certain emergency services where they are performed by non-profit organisations or associations, since the particular nature of those organisations would be difficult to preserve if the service providers had to be chosen in accordance with the procedures set out in this Directive. However, the exclusion should not be extended beyond that strictly necessary. It should therefore be set out explicitly that patient transport ambulance services should not be excluded. In that context, it is furthermore necessary to clarify that CPV [Common Procurement Vocabulary] Group 601 'Land Transport Services' does not cover ambulance services, to be found in CPV class 8514. It should therefore be clarified that services, which are covered by CPV code 85143000-3, consisting exclusively of patient transport ambulance services, should be subject to the special regime set out for social and other specific services (the 'light regime'). Consequently, mixed contracts for the provision of

ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services.'

4 Article 10 of the directive, headed 'Specific exclusions for service contracts', provides, in paragraph (h):

'This Directive shall not apply to public service contracts for:

…

(h) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3 [Fire-brigade and rescue services], 75251000-0 [Fire-brigade services], 75251100-1 [Firefighting services], 75251110-4 [Fire-prevention services], 75251120-7 [Forest-firefighting services], 75252000-7 [Rescue Services], 75222000-8 [Civil defence services], 98113100-9 [Nuclear safety services] and 85143000-3 [Ambulance services] except patient transport ambulance services;

…'

5 Title III of the directive, headed 'Particular Procurement Regimes', contains a Chapter I consisting of Articles 74 to 77. Those articles make provision for the light regime which is applicable to social and other specific services.

Italian law

6 Decreto legislativo n. 50 — Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50 making provision for the application of Directives 2014/23/EU [on the award of concession contracts], 2014/24/EU and 2014/25/EU, on procurement by entities operating in the water, energy, transport and postal services sectors, and reorganising the legislation applicable to public works contracts, public services contracts and public supply contracts), of 18 April 2016 (GURI No 91 of 19 April 2016), constitutes the new Codice dei contratti pubblici ('public contracts code').

7 Article 17 of that code, headed 'Specific exceptions for public contracts and service concessions', provides, in paragraph (1):

'The provisions of this code do not apply to public contracts or service concessions in respect of:

…

(h) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 except patient transport ambulance services.'

8 Article 57 of decreto legislativo n. 117 — Codice del Terzo settore (Legislative Decree No 117 enacting the third sector code) of 3 July 2017 (Ordinary Supplement to GURI No 179 of 2 August 2017) provides:

'Emergency ambulance transport services may be awarded as a priority, by direct contracting, to volunteer organisations which have been registered for at least 6 months in the national third sector register, which belong to a network of associations for the purposes of Article 41(2), and which are accredited under the relevant regional legislation, if any, where, by reason of the particular nature of the service, direct contracting ensures that a service which is in the public interest can be provided within a framework of effective contributions to social goals, which pursues objectives of solidarity, in an economically efficient and appropriate manner, and in accordance with the principles of transparency and non-discrimination.'

9 The decreto del Presidente del Consiglio dei Ministri — Definizione e aggiornamento dei livelli essenziali di assistenza, di cui all'articolo 1, comma 7, del decreto legislativo 30 dicembre 1992 n. 502 (Decree of the President of the Council of Ministers defining and updating the basic levels of care provided for in Article 1(7) of Legislative Decree No 502 of 30 December 1992) of 12 January 2017 (Ordinary Supplement to GURI No 65 of 18 March 2017), provides in Article 7, headed 'Local emergency medical care':

'1. The national health service shall ensure that medical care is provided rapidly, with a view to stabilising the patient's condition, in emergencies arising out of hospital, through the provision of safe transport to the most appropriate hospital facility. Local emergency services shall be coordinated and managed by '118' centres of operations, 24 hours a day.

2. In particular, the following shall be ensured:

(a) medical intervention by means of ground and air vehicles providing basic and advanced emergency care, and carrying appropriately trained medical personnel,

(b) secondary ambulance transport services, with or without the provision of care,

(c) medical care and coordination in the event of major emergencies or incidents carrying a nuclear, biological, chemical or radiological (NBCR) risk,

(d) medical care in respect of demonstrations and scheduled events, in accordance with the detailed provisions laid down by the regions and autonomous provinces.

3. The delivery of local emergency medical services shall be integrated with the emergency hospital care provided by the first response and emergency services, and with the provision of basic and ongoing care.'

10 Article 2(1) of the legge regionale n. 26 — Disciplina del sistema regionale di trasporto sanitario di soccorso ed emergenza (Regional Law of Veneto No 26 on the regional system of medical transport (emergency response and emergency care)) of 27 July 2012 ('Regional Law No 26/2012'), provides:

'For the purposes of this law, emergency response ambulance transport comprises those activities which are carried out using emergency vehicles by the personnel, in particular the medical personnel, responsible for that service, in the exercise of the following functions:

(a) emergency transport services provided using emergency vehicles under the direction of the emergency medical service (SUEM) coordination centres;

(b) transport services provided with the *Livelli Essenziali di Assistenza* (basic levels of care), using emergency vehicles;

(c) transport services provided in circumstances where the patient's condition requires the use of an emergency vehicle and the attention, during the journey, of medical or specially trained personnel, and also requires uninterrupted care to be ensured.'

11 Resolution No 1515 of the Giunta Regionale del Veneto (Executive Organ of the Region of Veneto, Italy), of 29 October 2015, provides that 'during the delivery of the service, a driver with emergency response training shall be present on board the ambulance together with at least one emergency responder with the qualifications and skills mandatory for that activity', which are obtained by completing a course and passing an examination in three subjects, namely anatomy, physiology and emergency response. It follows that the secondary service, which includes the service of transport alone, is delivered in a context which brings ordinary transport together with medical care.

The main proceedings and the questions referred for a preliminary ruling

12 Italy Emergenza, which is a social cooperative organisation providing ambulance transport services, brought an action seeking, principally, the annulment of Decision No 1754 of the Director-General of

ULSS 5 Polesana of 28 December 2017, together with a series of preparatory measures taken with a view to its adoption. By that decision, that local unit, ULSS 5 Polesana, had awarded the provision of emergency and secondary ambulance transport services, within its geographical area, to Croce Verde, by direct contracting. The contract, which runs from 1 April 2018 to 31 March 2020, can be renewed for a further 2 years provided that Croce Verde continues to meet the accreditation requirements of Regional Law No 26/2012 and Decision No 179/2014 of the Regional Council of Veneto. It quantifies the reimbursable costs at EUR 2 291 260 per annum, representing EUR 6 873 780 over 3 years.

13 Italy Emergenza submits that secondary ambulance transport services are not among the services excluded from the public procurement rules by Article 10(h) of Directive 2014/24, read in conjunction with recital 28 of that directive.

14 While that action was pending before the Tribunale amministrativo regionale per il Veneto (Regional Administrative Court for Veneto, Italy), by Decision No 372 of 24 April 2018, ULSS 5 Polesana annulled Decision No 1754, so as to reflect a judgment of the Consiglio di Stato (Council of State, Italy), of 22 February 2018, which held that only emergency ambulance services could fall within the exclusion from the award procedure, and only where they were provided by non-profit organisations. A service consisting simply in transport by ambulance, or in other words in the ordinary non-urgent transport of patients, was, on the other hand, held to be subject to the light regime provided for in Articles 74 to 77 of Directive 2014/24.

15 Following the adoption of Decision No 372, Italy Emergenza, in essence, indicated a wish to withdraw its action, on the basis that Croce Verde would not seek to have that decision annulled.

16 Croce Verde did challenge the decision, however, submitting that the distinction between emergency transport services and ordinary transport services had not been settled beyond argument. While recital 28 of Directive 2014/24 appeared to make the light regime applicable ‘exclusively’ to patient transport ambulance services, no such stipulation was to be found in Article 10(h) of the directive.

17 In a judgment delivered in a similar matter, on 9 March 2018, the referring court held that in accordance with that article, and with Article 17(1)(h) of the public contracts code, which transposes it word-for-word, the ‘ambulance services’ covered by CPV code 85143000-3 are, by derogation from the usual rules of public procurement, excluded from the provisions of the public contracts code, with the exception of ‘patient transport ambulance services’, which remain subject to the light regime. In order for the exclusion in Article 10(h) of Directive 2014/24 to apply, it held, the emergency assistance services must be provided by ambulance, must consist in the provision of transport and first aid to patients in an emergency, and must be provided by a non-profit organisation. Ambulance transport services alone, or in other words the ordinary transport of patients where there is no emergency, were held to be subject to the light regime.

18 The referring court states, however, that while it is easy to distinguish emergency response services from mere patient transport services, there are intermediate forms of transport where the proper classification is less than obvious. This is true, in particular, of certain healthcare services referred to in Article 2 of Regional Law 26/2012, such as transport services provided with basic levels of care (which comprise an obligation on the part of the Servizio Sanitario Nazionale (National Health Service, Italy), to provide all citizens, free of charge or on payment of a contribution, with services delivered using emergency vehicles), or transport services provided in circumstances where the patient’s condition requires the use of an emergency vehicle and the attention, during the journey, of healthcare personnel, or specially trained personnel, in order to ensure uninterrupted care.

19 The referring court states that Article 2 of Regional Law No 26/2012 treats all such services as emergency transport services delivered using emergency vehicles and thus brings them, where they are provided by non-profit organisations or associations, within the exclusion in Article 10(h) of Directive 2014/24 and Article 17(1)(h) of the public contracts code.

20 Against that background, the Tribunale amministrativo regionale per il Veneto (Regional Administrative Court for Veneto) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 10(h) and recital 28 of Directive [2014/24] be interpreted as meaning that:

(a) ambulance services that require the presence on board of a driver with emergency response training and at least one emergency responder with the qualifications and skills obtained from completing a course and passing an examination in emergency response, and

(b) transport services provided with basic levels of care using emergency vehicles are covered by the exclusion laid down in the above-mentioned Article 10(h), or must they be among the services referred to in Articles 74 to 77 of Directive [2014/24]?

(2) Must Directive 2014/24/EU be interpreted as precluding national legislation which provides that, even in the absence of an actual emergency,

(a) ambulance services that require the presence on board of a driver with emergency response training and at least one emergency responder with the qualifications and skills obtained from completing a course and passing an examination in emergency response, and

(b) transport services provided with basic levels of care using emergency vehicles are awarded as a priority to voluntary associations by means of direct contracting?’

Consideration of the questions referred

21 Under Article 99 of the Rules of Procedure of the Court, where the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

22 It is appropriate to apply that provision in the present case.

23 By its questions, which can appropriately be examined together, the referring court asks, in essence, whether Article 10(h) of Directive 2014/24, read in conjunction with recital 28 of that directive, is to be interpreted as precluding national legislation under which, first, ambulance services requiring the presence on board of a driver with emergency response training and at least one emergency responder with the qualifications and skills obtained from completing a course and passing an examination in emergency response, and second, transport services provided with basic levels of care using emergency vehicles, fall, in the absence of any emergency, within the exclusion provided for by that article.

24 In answering that question, it should be observed that Article 10(h) of Directive 2014/24 excludes public service contracts relating to civil defence services, civil protection services and danger prevention services from the scope of the traditional public procurement rules, provided that they fall within the CPV codes referred to in that article and are provided by non-profit organisations or associations. That exclusion to the public procurement rules is itself subject to an exception, however, in that it does not extend to patient transport ambulance services, which are subject to the light regime provided for in Articles 74 to 77 of Directive 2014/24 (see, to that effect, judgment of 21 March 2019, *Falck Rettungsdienste and Falck*, C-465/17, EU:C:2019:234, paragraph 38).

25 It is clear from Article 10(h) of Directive 2014/24, read in the light of recital 28 thereof, that the exclusion from the public procurement rules laid down in that provision in favour of danger prevention services only benefits certain emergency services provided by non-profit organisations or associations and that it must not go beyond what is strictly necessary (judgment of 21 March 2019, *Falck Rettungsdienste and Falck*, C-465/17, EU:C:2019:234, paragraph 43).

26 Thus, as regards danger prevention services, the inapplicability of the public procurement rules laid down in Article 10(h) of that directive is inextricably linked to the existence of an emergency service, such that the presence of qualified personnel on board an ambulance cannot suffice to establish, in itself, the existence of an ambulance service covered by CPV code 85143000-3 (see, to that effect,

judgment of 21 March 2019, *Falck Rettungsdienste and Falck*, C-465/17, EU:C:2019:234, paragraphs 44 and 45).

27 An emergency may nevertheless be shown to exist, at least potentially, where it is necessary to transport a patient whose state of health is at risk of deterioration during that transport, although it must be possible, in principle, for that risk to be objectively assessed. It is only in those circumstances that transport by qualified ambulance could fall within the scope of the exclusion from the application of the public procurement rules laid down in Article 10(h) of Directive 2014/24 (see, to that effect, judgment of 21 March 2019, *Falck Rettungsdienste and Falck*, C-465/17, EU:C:2019:234, paragraphs 46 and 49).

28 It follows from the considerations set out above that neither ambulance services which, under the legislation at issue in the main proceedings, require the presence on board of an appropriately trained emergency response driver and at least one appropriately trained emergency responder, nor transport services provided with basic levels of care using emergency vehicles, can automatically fall within the exclusion in Article 10(h) of Directive 2014/24. The benefit of that exclusion is only available where, in addition to appropriately trained first responders being present, the ambulance service is provided by non-profit organisations or associations, within the meaning of that provision, and there is an emergency.

29 Accordingly, the answer to the questions referred is that Article 10(h) of Directive 2014/24, read in conjunction with recital 28 of that directive, must be interpreted as precluding national legislation under which ambulance services that require the presence on board of a driver with emergency response training and at least one emergency responder with the qualifications and skills obtained from completing a course and passing an examination in emergency response, and transport services provided with basic levels of care using emergency vehicles, fall, in the absence of any emergency, within the exclusion provided for in that article.

Costs

30 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 10(h) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, read in conjunction with recital 28 of that directive, must be interpreted as precluding national legislation under which ambulance services that require the presence on board of a driver with emergency response training and at least one emergency responder with the qualifications and skills obtained from completing a course and passing an examination in emergency response, and transport services provided with basic levels of care using emergency vehicles, fall, in the absence of any emergency, within the exclusion provided for in that article.

[Signatures]

---

* Language of the case: Italian.

EU:C:2020:58

JUDGMENT OF THE COURT (Second Chamber)

30 January 2020(*)

(Reference for a preliminary ruling — Public procurement of supplies, works or services — Directive 2014/24/EU — Article 18(2) — Article 57(4) — Optional grounds for exclusion — Ground for exclusion of a subcontractor mentioned in the economic operator's tender — Subcontractor's failure to comply with environmental, social and labour law obligations — National legislation providing for automatic exclusion of the economic operator for such a failure)

In Case C-395/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 21 February 2018, received at the Court on 14 June 2018, in the proceedings

Tim SpA — Direzione e coordinamento Vivendi SA

v

Consip SpA,

Ministero dell'Economia e delle Finanze,

intervener:

E-VIA SpA,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the Chamber, P.G. Xuereb, T. von Danwitz, C. Vajda (Rapporteur) and A. Kumin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 2 May 2019,

after considering the observations submitted on behalf of

– Tim SpA — Direzione e coordinamento Vivendi SA, by F. Cardarelli, F. Lattanzi and F.S. Cantella, avvocati,

– Consip SpA, by F. Sciaudone and F. Iacovone, avvocati,

– the Austrian Government, by J. Schmoll, M. Fruhmann and G. Hesse, acting as Agents,

– the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 57(4) and Article 71(6) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 That request has been made in proceedings between Tim SpA — Direzione e coordinamento Vivendi SA ('Tim') and Consip SpA and the Ministero dell'Economia e delle Finanze (Ministry of the Economy and Finance, Italy) concerning the exclusion of Tim from an open tender procedure organised by Consip.

Legal context

European Union law

3 Recitals 40, 101 and 102 of Directive 2014/24 state:

'(40) Control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders. …

…

(101) Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. …

…

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion.

(102) Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.'

4 Under Article 2(1), points (10) to (12), of that directive:

'For the purpose of this Directive:

…

10. “economic operator” means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;

11. “tenderer” means an economic operator that has submitted a tender;

12. “candidate” means an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, in a competitive procedure with negotiation, in a negotiated procedure without prior publication, in a competitive dialogue or in an innovation partnership;’

5 Article 18 of that directive, entitled ‘Principles of procurement’ and which constitute the first provision of Chapter II of that directive, entitled ‘General Rules’, provides:

‘1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.’

6 Under Article 56(1)(b) of that directive:

‘Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled:

…

(b) the tender comes from a tenderer that is not excluded in accordance with Article 57 …’

7 Article 57 of Directive 2014/24, entitled ‘Exclusion grounds’, provides in paragraphs 4 to 7 thereof:

‘4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

(a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);

…

5. …

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

…

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. …

…

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. …'

8 Article 71(6)(b) of that Directive provides:

'With the aim of avoiding breaches of the obligations referred to in Article 18(2), appropriate measures may be taken, such as:

…

(b) Contracting authorities may, in accordance with Articles 59, 60 and 61, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. In such cases, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.'

Italian law

9 Article 17 of legge n. 68 — Norme per il diritto al lavoro dei disabili (Law No 68 concerning the rules on disabled persons' right to work) of 12 March 1999 (ordinary supplement to GURI No 68, of 23 March 1999) provides:

'Both public and private sector companies which take part in public procurement procedures, operate concessions or have agreements with government bodies must first provide the government body in question with a declaration by their legal representative stating that they comply with the rules on disabled persons' right to work. If they fail to do so they face exclusion.'

10 Article 80(5)(i) of decreto legislativo n. 50 — Codice dei contratti pubblici (Legislative Decree No 50 establishing the public procurement code) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016, 'the Public Procurement Code') provides:

'The contracting authorities shall exclude an economic operator from participation in a tendering procedure in any of the following situations, and this shall also apply to a subcontractor of the economic operator in the cases referred to in Article 105(6), where:

…

(i) the economic operator fails to submit the certification referred to in Article 17 of Law No 68 … or to self-certify that the requirement in question has been satisfied; …'

11 Article 105(6) and (12) of the Public Procurement Code is worded as follows:

'6. The list of three subcontractors must be provided where the value of the works contracts, service contracts or supply contracts is equal to or greater than the thresholds laid down in Article 35 and no special qualifications are required in order to perform the contracts. In such cases this requirement must be specified in the call for tenders. The contracting authority may specify in the call for tenders other situations in which the list of three subcontractors must be provided even where the value of the contract is below the threshold laid down in Article 35.

…

12. The successful tenderer shall provide for the replacement of subcontractors for whom it has been shown, following verification to that effect, that the grounds for exclusion under Article 80 were

present.’

The dispute in the main proceedings, the questions referred and the procedure before the Court

12 By a call for tenders published on 3 August 2016 in the *Official Journal of the European Union*, Consip, the Italian central authority for public procurement, launched an open procedure for the award of a contract for the supply of an optical communication system, known as the ‘Wavelength Division Multiplexing (WDM) system’, for the interconnection of the data processing centre of several departments of the Ministry of Economy and Finance.

13 Tim submitted a tender mentioning three subcontractors whom it intended to use in the event of being awarded the contract at issue in the main proceedings, attaching for each of them the Single European Market Document (SEMD).

14 In the course of the procedure, the contracting authority found that one of the subcontractors mentioned by Tim in its tender did not comply with the standards relating to the right to work for people with disabilities. Consip therefore excluded Tim from the procedure pursuant to Article 80(5)(i) of the Public Procurement Code.

15 Tim brought an action before the national court, challenging the unfair and disproportionate nature of its exclusion. According to Tim, it is apparent from Directive 2014/24 that the finding of a ground for exclusion in respect of a subcontractor cannot result in the imposition of a penalty more severe than replacement of that subcontractor. Tim adds that it could, in any event, have had recourse, in order to perform the contract at issue in the main proceedings, to the two other subcontractors in respect of whom no grounds for exclusion were found, especially since recourse to subcontracting was not indispensable for the performance of that contract, since Tim fulfilled all the conditions necessary to perform the services concerned on its own.

16 The referring court observes that Tim’s exclusion is in accordance with Article 80(5)(i) of the Public Procurement Code, since the replacement of a subcontractor may be required, in accordance with Article 105(12) of that code, only if the ground for exclusion is established in respect of that subcontractor after the award of the contract.

17 The referring court asks, however, whether, by providing that the contracting authority is required, where there is a ground for exclusion found in respect of a subcontractor at the tender stage, to exclude from the procedure the tenderer who has indicated its intention to have recourse to that subcontractor, Article 80(5)(i) of the Public Procurement Code is compliant with Articles 57(4) and (5) and 71(6)(b) of Directive 2014/24.

18 In particular, the referring court asks whether the grounds for exclusion provided for in Article 57(4) and (5) of Directive 2014/24 can lead to the exclusion of the tenderer only if they relate to the tenderer or whether such exclusion is also possible where those grounds relate to a subcontractor designated by the tenderer. Furthermore, the referring court seeks to ascertain whether Article 71(6) of Directive 2014/24 precludes an automatic exclusion of the tenderer, such as that provided for in Article 80(5) of the Public Procurement Code, whereas that provision of the directive appears to provide only for the replacement of a subcontractor as the maximum penalty which may be imposed on the tenderer following the finding of a ground for exclusion in respect of a subcontractor.

19 In the alternative, the referring court asks whether, if the Court were to find that the provisions of Directive 2014/24 do not preclude national legislation such as Article 80(5) of the Public Procurement Code, such legislation complies with the principle of proportionality, where exclusion of the tenderer is automatic, without the possibility of exceptions, the contracting authority not having the option to require the tenderer to replace the subcontractor or to refrain from using that tenderer, even where recourse to subcontracting is not strictly necessary for the performance of the contract.

20 In those circumstances, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Do Articles 57 and 71(6) of Directive [2014/24] preclude national legislation, such as Article 80(5) of [the Public Procurement Code], which requires the exclusion of a tendering economic operator where, during the tendering procedure, a ground is established for excluding a subcontractor forming part of the group of three subcontractors specified in the tender, rather than requiring the tenderer to replace the designated subcontractor?

2. In the alternative, if the [Court] considers that the option of excluding the tenderer is one of the options open to the Member State, does the principle of proportionality enshrined in Article 5 of the EU Treaty, referred to in recital 101 of Directive [2014/24] and established as a general principle of EU law by the [Court], preclude national legislation, such as Article 80(5) of [the Public Procurement Code], which provides that, where a ground for excluding a designated subcontractor is established during the tendering procedure, a tendering economic operator is to be excluded in all cases, including where there are other subcontractors that have not been excluded and satisfy the requirements for the provision of the services to be subcontracted, or where the tendering economic operator declares that it will not subcontract as it satisfies the requirements for the provision of the services on its own?’

21 On 27 February 2019, pursuant to Article 101 of its Rules of Procedure, the Court sent the referring court a request for clarification, seeking in particular to ascertain whether Tim was required to indicate three subcontractors in its tender and, if so, whether it was required to use those three subcontractors or at least one of them in the event that it was awarded the contract at issue in the main proceedings. The referring court was also asked to state whether, when drawing up its tender, Tim was required, under the Italian legislation, to verify that the subcontractors which it intended to designate in its tender were not affected by the ground for exclusion referred to in Article 57(4)(a) of Directive 2014/24, transposed into Italian law by Article 80(5)(i) of the Public Procurement Code, and whether it had the practical possibility of doing so.

22 In its reply, received at the Registry of the Court on 26 March 2019, the referring court stated, first of all, that Tim was obliged to indicate a fixed number of three subcontractors only in so far as it wished to reserve the option of subcontracting in the event of being awarded the contract at issue in the main proceedings. It went on to state that Tim was not obliged to use the three subcontractors mentioned in its tender or even one of them if it was awarded the contract. Finally, it stated that Tim was not required, under the Italian legislation, to verify that the subcontractors which it intended to designate in its tender were not affected by the ground for exclusion referred to in Article 57(4)(a) of Directive 2014/24 and that such verification required, in any event, the cooperation of the subcontractors concerned.

The request to have the oral procedure reopened

23 By letter of 15 July 2019 addressed to the Registry of the Court of Justice, the Austrian Government requested the reopening of the oral phase of the proceedings pursuant to Article 83 of the Rules of Procedure. In that regard, it argued that paragraph 52 of the Advocate General’s Opinion does not accurately reflect the reasoning underlying the argument it developed in its written observations.

24 Pursuant to Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of decisive significance for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

25 In the present case, the Court, after hearing the Advocate General, considers that it has all the information necessary to answer the questions raised by the referring court and that the case does not have to be examined in the light of a new fact which is of decisive significance for its decision or of an argument which has not been debated before it.

26 In so far as the application for the reopening of the oral phase of the proceedings is to be understood as meaning that the Court lacks sufficient information on the Austrian Government’s argument on account

of the considerations expressed by the Advocate General in point 52 of his Opinion, it should be borne in mind, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for interested parties to submit observations in response to the Advocate General's Opinion (judgment of 22 November 2018, *MEO — Serviços de Comunicações e Multimédia*, C-295/17, EU:C:2018:942, paragraph 26 and the case-law cited).

27 Second, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. In that regard, the Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgment of 16 September 2015, *Société des Produits Nestlé*, C-215/14, EU:C:2015:604, paragraph 32 and the case-law cited).

28 In those circumstances, since the Austrian government's argument clearly emerges from its written observations and since the Advocate General's Opinion is not binding on the Court as regards the exposition or interpretation of that argument, the Court must be held not to lack sufficient information within the meaning of Article 83 of the Rules of Procedure.

29 The application for the oral procedure to be reopened must therefore be dismissed.

Consideration of the questions referred

30 By its questions, which must be examined together, the referring court asks, in essence, whether Directive 2014/24 and the principle of proportionality preclude national legislation under which the contracting authority is required automatically to exclude an economic operator from the contract award procedure where the ground for exclusion referred to in Article 57(4)(a) of that directive is found in respect of one of the subcontractors mentioned in that operator's tender.

31 Under Article 57(4)(a) of Directive 2014/24, contracting authorities may exclude or be obliged by Member States to exclude any economic operator from participation in a contract award procedure where they can demonstrate, by any appropriate means, a failure to comply with the applicable obligations referred to in Article 18(2) of that directive.

32 It should be noted, first of all, that it follows from Article 2(1)(10) of Directive 2014/24 that 'economic operator' is defined as any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market.

33 As regards an optional ground for exclusion such as that provided for in Article 57(4)(a) of Directive 2014/24, it should be noted at the outset that, in accordance with Article 57(7) of that directive, it is for the Member States, in compliance with EU law, to lay down the 'implementing conditions'.

34 It is apparent from the case-law of the Court of Justice that Article 57(7) of Directive 2014/24 does not provide for uniform application at Union level of the exclusion grounds it mentions, since the Member States may choose not to apply those grounds, or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. Member States therefore enjoy some discretion in determining the implementing conditions of the optional grounds for exclusion laid down in Article 57(4) of Directive 2014/24 (see, by analogy, judgment of 20 December 2017, *Impresa di Costruzioni Ing. E. Mantovani et Guerrato*, C-178/16, EU:C:2017:1000, paragraphs 31 and 32).

35 As regards the optional ground for exclusion provided for in Article 57(4)(a) of Directive 2014/24, it must be emphasised, as the Advocate General points out in point 32 of his Opinion, that that ground is drafted impersonally, without specifying who is responsible for the failure to fulfil the obligations referred to in Article 18(2) of that directive. Consequently, it must be held that the wording of Article 57(4)(a) of Directive 2014/24, even when read in the light of the first subparagraph of recital 101 of that directive, from which it is apparent that contracting authorities should be able to exclude unreliable economic operators for failure to comply with environmental or social obligations,

does not prevent Member States from considering that the party responsible for the identified failure to fulfil obligations may also be the subcontractor and thus provide for the contracting authority to have the option, or even the obligation, to exclude, as a result, the economic operator who submitted the tender from participation in the contract award procedure.

36 It should be noted, however, that it is necessary, in interpreting a provision of EU law, to take into account not only the wording of the provision concerned, but also its context and the general scheme of the rules of which it forms part and the objectives pursued thereby (judgment of 5 July 2018, *X*, C-213/17, EU:C:2018:538, paragraph 26).

37 As regards, in the first place, the context of Article 57(4)(a) of Directive 2014/24 and the general scheme of that directive, it must be noted that that provision expressly refers to a failure to fulfil the obligations referred to in Article 18(2) of that directive, namely the obligations applicable in the fields of environmental, social and labour law.

38 In this respect, it should be noted that Article 18 of Directive 2014/24, entitled ‘Principles of procurement’, is the first article of Chapter II of that directive devoted to ‘general rules’ on public procurement procedures. Accordingly, by providing in paragraph 2 of that article that economic operators must comply, in the performance of the contract, with obligations relating to environmental, social and labour law, the Union legislature sought to establish that requirement as a principle, like the other principles referred to in paragraph 1 of that article, namely the principles of equal treatment, non-discrimination, transparency, proportionality and prohibiting the exclusion of a contract from the scope of Directive 2014/24 or artificially narrowing competition. It follows that such a requirement constitutes, in the general scheme of that directive, a cardinal value with which the Member States must ensure compliance pursuant to the wording of Article 18(2) of that directive.

39 In those circumstances, the need to ensure appropriate compliance with the obligations referred to in Article 18(2) of Directive 2014/24 must enable Member States, when determining the implementing conditions of the ground for exclusion referred to in Article 57(4)(a) of that directive, to consider that the party responsible for the failure to fulfil obligations may be not only the economic operator who submitted the tender, but also the subcontractors which the latter intends to use. The contracting authority may legitimately claim to award the contract only to economic operators who, at the stage of the contract award procedure, demonstrate their capacity to ensure in an appropriate manner, during the performance of the contract, that those obligations are fulfilled, where appropriate by having recourse to subcontractors who themselves comply with those obligations.

40 It follows that Member States may provide, for the purposes of applying Article 57(4)(a) of Directive 2014/24, that the contracting authority has the option, or even the obligation, to exclude the economic operator who submitted the tender from participating in the contract award procedure where a failure to fulfil the obligations referred to in Article 18(2) of that directive is established with regard to one of the subcontractors referred to in that operator’s tender.

41 That interpretation is supported, secondly, by the objective underlying Article 57(4) of Directive 2014/24. In that connection, it should be borne in mind that the option, or even the obligation, for the contracting authority to exclude an economic operator from participating in a contract award procedure is intended in particular to enable it to assess the integrity and reliability of each of the economic operators. In particular, the optional ground for exclusion mentioned in Article 57(4)(a) of Directive 2014/24, read in conjunction with recital 101 of that directive, is based on an essential element of the relationship between the successful tenderer and the contracting authority, namely the reliability of the successful tenderer, on which the contracting authority’s trust is founded (see, by analogy, judgment of 3 October 2019, *Delta Antrepriză de Construcţii şi Montaj 93*, C-267/18, EU:C:2019:826, paragraph 26 and the case-law cited).

42 Combined with the specific objective of Article 57(4)(a) of Directive 2014/24, which is to ensure compliance with obligations under environmental, social and labour law, the objective relating to the reliability of the economic operator must enable the Member States to grant the contracting authority the option, or even the obligation, to regard as reliable only those economic operators who, when drawing up their tenders, have exercised the care and diligence required to ensure that, in the course of

performance of the contract, the obligations concerned are complied with in all circumstances, whether by themselves or by the subcontractors to whom they intend to entrust part of that performance.

43 It follows from the foregoing considerations that Article 57(4)(a) of Directive 2014/24 does not preclude national legislation under which the contracting authority has the option, or even the obligation, to exclude the economic operator who submitted the tender from participation in the contract award procedure where the ground for exclusion referred to in that provision is found in respect of one of the subcontractors mentioned in that operator's tender.

44 That being so, it should be recalled, as stated in paragraph 33 of the present judgment, that Member States, when adopting the implementing conditions of Article 57 of Directive 2014/24, must, under paragraph 7 of that article, comply with EU law.

45 In that regard, it should be borne in mind, first, that the contracting authorities must, throughout the procedure, observe the principles of procurement set out in Article 18 of Directive 2014/24, which include, inter alia, the principles of equal treatment and proportionality (judgment of 26 September 2019, *Vitali*, C-63/18, EU:C:2019:787, paragraph 39 and the case-law cited), and, second, that, in accordance with the principle of proportionality, which is a general principle of EU law, the rules laid down by the Member States or contracting authorities in implementing the provisions of that directive, such as the rules intended to lay down the implementing conditions of Article 57 of that directive, must not go beyond what is necessary to achieve the objectives of that directive (see, to that effect, judgments of 7 July 2016, *Ambisig*, C-46/15, EU:C:2016:530, paragraph 40, and of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 32 and the case-law cited).

46 Accordingly, first, where the contracting authority undertakes to verify during the contract award procedure, as it is obliged to do under Article 56(1)(b) of Directive 2014/24, read in the light of recital 40 of that directive, whether there are exclusion grounds within the meaning of Article 57(4)(a) of that directive and the national rules provide that it has the option, or even the obligation, to exclude the economic operator on the grounds that a subcontractor has failed to comply with obligations relating to environmental, social and labour law, it is required, in order to comply with the principle of equal treatment, to verify whether there is any failure to comply with those obligations in respect not only of all the economic operators who have submitted a tender, but also in respect of all the subcontractors indicated by those operators in their respective tenders.

47 Since such a uniform verification takes place at the stage of the contract award procedure, it should be made clear that the principle of equal treatment does not preclude national legislation from providing that a finding of failure to fulfil obligations in respect of a subcontractor after the award of the contract does not entail the exclusion of the successful tenderer, but only the replacement of the subcontractor. Since all the economic operators and subcontractors indicated in those operators' tenders were subject, in the course of the procurement procedure, to a verification process carried out under identical conditions by the contracting authority, those operators and subcontractors should be considered to have been treated on an equal footing in that regard during the procurement procedure, the principle of equal treatment not precluding the provision of a different rule where the failure to fulfil obligations could not be established until later, during the performance phase of the contract.

48 As regards, second, the principle of proportionality, it should be recalled, in addition to the case-law referred to in paragraph 45 of the present judgment, that it follows from the third paragraph of recital 101 of Directive 2014/24 that, when applying optional grounds for exclusion such as that set out in Article 57(4)(a) of that directive, contracting authorities must pay particular attention to the principle of proportionality, taking into account in particular the minor nature of the irregularities committed or the repetition of minor irregularities. That attention must be even greater where the exclusion provided for by national legislation is imposed on the economic operator who submitted the tender for a failure to fulfil obligations committed not directly by that operator but by a person outside his undertaking, in relation to the control of whom the operator may not have all the authority required or all the necessary means at his disposal.

49 The need to comply with the principle of proportionality is also reflected in the first subparagraph of Article 57(6) of Directive 2014/24, according to which any economic operator who, inter alia, is in the situation referred to in Article 57(4)(a) of that directive including, as is apparent from paragraph 43 of

the present judgment, by the effect of a failure found in respect of a subcontractor indicated in the tender, may provide evidence to show that the measures it has taken are sufficient to demonstrate its reliability despite the existence of that ground for exclusion. The first subparagraph of Article 57(6) of Directive 2014/24 specifies that, if such evidence is considered sufficient, the economic operator concerned must not be excluded from the contract award procedure. That provision thus introduces a mechanism for corrective measures (self-cleaning) which underlines the importance attaching to the reliability of the economic operator (judgment of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraphs 40 and 41).

50 It follows that, where he runs the risk of being excluded from participation in the procurement procedure because of a failure to fulfil environmental, social and labour law obligations attributable to one of the subcontractors he is considering using, the economic operator who submitted the tender can demonstrate to the contracting authority that he remains reliable despite the existence of such a ground for exclusion, the contracting authority being required, in accordance with the third subparagraph of Article 57(6) of Directive 2014/24, to assess the evidence provided by that operator in the light of the seriousness of the situation and the particular circumstances of the case.

51 However, the national legislation at issue in the main proceedings provides in a general and abstract manner for the automatic exclusion of the economic operator where a failure to fulfil obligations under environmental, social and labour law is established in relation to one of the subcontractors indicated in that operator's tender, irrespective of the circumstances which led to that failure, and thus establishes an irrebuttable presumption that the economic operator must be excluded for any failure attributable to one of its subcontractors, without leaving the contracting authority the option of assessing, on a case-by-case basis, the particular circumstances of the case or the economic operator being able to demonstrate its reliability despite the finding of that failure.

52 In particular, such legislation does not allow the contracting authority to take account, for the purposes of assessing the situation, of a series of relevant factors such as the means which the economic operator submitting the tender had at its disposal to verify whether there was a failure on the part of the subcontractors or any indication in its tender that it is able to perform the contract without necessarily having recourse to the subcontractor in question.

53 In those circumstances, national legislation providing for such automatic exclusion of the economic operator who submitted the tender infringes the principle of proportionality by requiring the contracting authorities to proceed automatically to that exclusion on the ground of the failure of a subcontractor and thus exceeding the discretion enjoyed by the Member States pursuant to Article 57(7) of Directive 2014/24, in specifying the implementing conditions for the ground for exclusion set out in Article 57(4)(a) of that directive in compliance with EU law. Such a regulation also deprives the economic operator of the possibility of demonstrating, in accordance with Article 57(6) of Directive 2014/24, its reliability despite the existence of a failure to fulfil obligations on the part of one of its subcontractors (see, by analogy, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 30; of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraphs 34 and 35; and of 26 September 2019, *Vitali*, C-63/18, EU:C:2019:787, paragraphs 40 and 41).

54 Consequently, an automatic exclusion of the economic operator who submitted the tender, provided for by the national legislation, in so far as it deprives, first, that operator of the possibility of providing detailed information about the situation and, secondly, the contracting authority of any discretion in that regard, cannot be regarded as being compatible with Article 57(4) and (6) of Directive 2014/24 and the principle of proportionality (see, by analogy, judgment of 26 September 2019, *Vitali*, C-63/18, EU:C:2019:787, paragraphs 42 and 43).

55 In the light of the foregoing considerations, the answer to the questions referred must be that Article 57(4)(a) of Directive 2014/24 does not preclude national legislation under which the contracting authority has the option, or even the obligation, to exclude the economic operator who submitted the tender from participation in the contract award procedure where the ground for exclusion referred to in that provision is established in respect of one of the subcontractors mentioned in that operator's tender. However, that provision, read in conjunction with Article 57(6) of that directive, and the principle of proportionality preclude national legislation providing for the automatic nature of such exclusion.

Costs

56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 57(4)(a) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC does not preclude national legislation under which the contracting authority has the option, or even the obligation, to exclude the economic operator who submitted the tender from participation in the contract award procedure where the ground for exclusion referred to in that provision is established in respect of one of the subcontractors mentioned in that operator's tender. However, that provision, read in conjunction with Article 57(6) of that directive, and the principle of proportionality preclude national legislation providing for the automatic nature of such an exclusion.

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 11 July 2019(1)

Case C-395/18

Tim SpA — Direzione e coordinamento Vivendi SA

v

Consip SpA,

Ministero dell'Economia e delle Finanze,

with the intervention of:

E-VIA SpA

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy))

(Reference for a preliminary ruling — Directive 2014/24/EU — Public procurement — Optional grounds for exclusion — Exclusion of an economic operator from participating in a tender procedure due to non-compliance of a subcontractor proposed by it — Breach of the environmental, social or labour law obligations referred to in Article 18(2) — Exclusion of the tenderer — Article 71 — Article 57(4)(a))

1. An Italian contracting authority (Consip SpA) (2) issued a tender for a public contract for the provision of certain services. The tender specifications permitted the services to be subcontracted. In order to take advantage of this option, tenderers had to state in their tenders that they intended to subcontract part of the services and had to provide a list of three subcontractors.

2. One of the tenderers (Tim SpA) stated in its tender that it would subcontract some of the services covered by the contract and listed the names of three subcontractors. As one of the subcontractors was subject to an optional ground for exclusion (it had breached social and labour law requirements), the contracting authority excluded the tenderer from the procedure.

3. In summary, the referring court wishes to know whether, under Directive 2014/24/EU, (3) the contracting authority is entitled to exclude a tenderer from the procurement procedure on grounds that have to do with the subcontractor proposed in the tender.

I. Legal framework

A. EU law. Directive 2014/24

4. Recital 101 is as follows:

‘Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations …

…

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion.’

5. Recital 105 states that:

‘It is important that observance by subcontractors of applicable obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in this Directive, provided that such rules, and their application, comply with Union law, be ensured …

…

It should also be clarified that the conditions relating to the enforcement of observance of applicable obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in this Directive, provided that such rules, and their application, comply with Union law, should be applied whenever the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor. Furthermore, it should be stated explicitly that Member States should be able to go further, for instance by extending the transparency obligations, by enabling direct payment to subcontractors or by enabling or requiring contracting authorities to verify that subcontractors are not in any of the situations in which exclusion of economic operators would be warranted. Where such measures are applied to subcontractors, coherence with the provisions applicable to main contractors should be ensured so that the existence of compulsory exclusion grounds would be followed by a requirement that the main contractor replace the subcontractor concerned. Where such verification shows the presence of non-compulsory grounds for exclusion, it should be clarified that contracting authorities are able to require the replacement. It should, however, also be set out explicitly that contracting authorities may be obliged to require the replacement of the subcontractor concerned where exclusion of main contractors would be obligatory in such cases.

It should also be set out explicitly that Member States remain free to provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors.’

6. Article 18 (‘Principles of procurement’) provides as follows:

‘1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.’

7. Article 57 (‘Exclusion grounds’) stipulates that:

‘…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

(a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);

…’

8. Article 71 (‘Subcontracting’) establishes that:

‘1. Observance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.

2. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

…

4. Paragraphs 1 to 3 shall be without prejudice to the question of the main contractor’s liability.

…

6. With the aim of avoiding breaches of the obligations referred to in Article 18(2), appropriate measures may be taken, such as:

(a) Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 18(2).

(b) Contracting authorities may, in accordance with Articles 59, 60 and 61, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. In such cases, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

7. Member States may provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for them to request such direct payment.

8. Member States having chosen to provide for measures pursuant to paragraphs 3, 5 or 6 shall, by law, regulation or administrative provisions and having regard for Union law, specify the implementing conditions for those measures. In so doing, Member States may limit their applicability, for instance in respect of certain types of contracts, certain categories of cont[r]acting authorities or economic operators or as of certain amounts.’

B. Italian law. Legislative Decree No 50/2016 (4)

9. Article 80(5) provides as follows:

‘The contracting authorities shall exclude an economic operator from participation in a procurement procedure in any of the following situations, and this shall also apply to a subcontractor of the economic operator in the cases referred to in Article 105(6), where:

…

(i) the economic operator fails to submit the certification referred to in Article 17 of Law No 68 of 12 March 1999 or to self-certify that the requirement in question has been satisfied; [(5)]

…’

10. Article 105 stipulates that:

‘…

6. The list of three subcontractors must be provided where the value of the works contracts, service contracts or supply contracts is equal to or greater than the thresholds laid down in Article 35 and no special qualifications are required in order to perform the contracts. In such cases this requirement must be specified in the call for tenders. The contracting authority may specify in the call for tenders other situations in which the list of three subcontractors must be provided even where the value of the contract is below the thresholds laid down in Article 35.

…

12. The contractor must replace any subcontractors which, following an inspection, are shown to be subject to the grounds for exclusion laid down in Article 80.

…’

II. Facts of the case and questions referred for a preliminary ruling

11. On 29 July 2016, Consip published an invitation to tender for ‘a contract for the provision of the WDM system for interconnecting the data processing centre for the RGS, DT and DAG Departments’. (6) The estimated value of the contract was EUR 1 420 785.60, excluding VAT.

12. Clause 11 of the tender conditions permitted subcontracting. In order to subcontract, tenderers had to state in their tenders that they intended to avail themselves of this option and provide a list of three subcontractors.

13. Tim submitted its tender, in which it listed the three subcontractors it intended to use if it was awarded the contract. It attached the European single procurement document (ESPD) for each subcontractor.

14. When it checked the status of the subcontractors, the contracting authority found that, according to a certificate dated 5 April 2017 issued by Milan City Council, one of them (Maticmind SpA) was in breach of the rules on disabled persons’ right to work.

15. Consip therefore excluded Tim from the tender procedure under Article 80(5)(i) of the PPC.

16. Tim lodged an appeal against that decision with the referring court arguing, in summary, that:

– The exclusion was unfair and disproportionate because, under Directive 2014/24, where there are grounds for excluding a subcontractor the only permissible outcome is the replacement of the subcontractor.

– In any event, in order to perform the contract it could have used the other two subcontractors, to which no grounds for exclusion applied.

– Subcontracting was not essential in order to perform the contract, as Tim fulfilled all the requirements needed in order to perform the services itself.

17. According to the referring court, Tim’s exclusion is compliant with Article 80(5) of the PPC. However, the referring court’s reading of paragraphs 6 and 12 of Article 105 of the PPC leads it to identify different courses of action where a subcontractor is found to be subject to a ground for exclusion:

– If the fact that one of the group of three subcontractors on the list is subject to a ground for exclusion is identified during the tender procedure, the tenderer is excluded (Article 80(5) of the PPC).

– If the issue is identified after the contract has been signed, the contracting authority must ask the contractor to replace the subcontractor (Article 105(12) of the PPC).

18. Given this difference in treatment, the referring court has doubts as to whether the exclusion of the tender in the circumstances of the present case is compatible with Article 71(6) of Directive 2014/24 and with the proportionality principle.

19. In view of the situation, the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) refers the following questions to the Court of Justice for a preliminary ruling:

‘(1) Do Articles 57 and 71(6) of Directive 2014/24/EU preclude national legislation, such as Article 80(5) of Legislative Decree No 50 of 2016, which requires the exclusion of a tendering economic operator where, during the tendering procedure, a ground is established for excluding a subcontractor forming part of the group of three subcontractors specified in the tender, rather than requiring the tenderer to replace the designated subcontractor?

(2) In the alternative, if the Court of Justice considers that the option of excluding the tenderer is one of the options open to the Member State, does the principle of proportionality enshrined in Article 5 of the EU Treaty, referred to in recital 101 of Directive 2014/24/EU and established as a general principle of EU law by the Court of Justice, preclude national legislation, such as Article 80(5) of Legislative Decree No 50 of 2016, which provides that, where a ground for excluding a designated subcontractor is established during the tendering procedure, a tendering economic operator is to be excluded in all cases, including where there are other subcontractors that have not been excluded and satisfy the requirements for the provision of the services to be subcontracted, or where the tendering economic operator declares that it will not subcontract as it satisfies the requirements for the provision of the services on its own?’

III. Proceedings before the Court of Justice

20. The order for reference was received at the Court on 14 June 2018.

21. Under Article 101 of the Rules of Procedure, the Court of Justice asked the referring court to clarify certain aspects of the procurement procedure. In its reply of 26 March 2019, the referring court clarified that:

– If Tim intended to subcontract, it had to list three subcontractors in its tender. Alternatively, it could have opted not to list any subcontractors, in which case it would forego the option to subcontract.

– Tim was not under any obligation to use all or any of the subcontractors on the list if it was awarded the contract. It could opt not to subcontract, and perform the contract itself.

– In preparing its tender, Tim was not required to verify whether the proposed subcontractors were subject to the optional ground for exclusion in Article 57(4)(a) of Directive 2014/24, since it was only asked to provide the ESPD issued by the representative of each subcontractor.

22. Written observations have been submitted by Tim, Consip, the Austrian Government and the Commission. With the exception of the Austrian Government, all of them attended the hearing held on 2 May 2019.

IV. Assessment

A. The issue

23. Under the Italian legislation, breaches committed by a subcontractor can impact on the tenderer which included the proposed subcontractor in its tender, resulting in the exclusion of the tenderer from the procurement procedure.

24. That same legislation, however, treats two sets of circumstances differently:

– If the breach by the subcontractor comes to light after the contract has been awarded, the successful tenderer must replace the subcontractor.

– By contrast, if the breach is uncovered during the contractor selection stage the consequences are more extreme, as the tenderer is then excluded.

25. The referring court has doubts as to whether this dual treatment is compatible with Directive 2014/24. In order to answer its questions, I believe that we first need to examine whether it is permissible under Article 57 of that directive for a breach by a subcontractor to constitute grounds for excluding a tenderer, before going on to ascertain whether such an exclusion is possible under the provisions on subcontracting in Article 71 of that directive.

26. In both cases, the background to Tim's exclusion is failure (by the subcontractor) to comply with social or labour law obligations — specifically, failure to comply with national regulations on the employment of disabled persons.

27. Article 18(2) of Directive 2014/24 requires Member States (7) to take appropriate measures to ensure that in the performance of public contracts economic operators comply with their obligations in the fields of social and labour law (amongst others), as established in national law.

28. This requirement applies both to main contractors and to subcontractors, since both groups are economic operators. In this way, the EU legislator sought to use administrative procurement as a tool to achieve certain other public interest objectives, and this is reflected in Articles 57 and 71 of Directive 2014/24.

29. In particular, 'control of the observance of the … social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria …'. (8)

B. The interpretation of Article 57(4)(a) of Directive 2014/24

30. The EU legislator makes a link between Article 18(2) of Directive 2014/24 and the optional ground for exclusion in Article 57(4)(a) of that directive. This latter provision refers specifically to breach of the obligations that apply under the former provision.

31. The question is whether the behaviour of the subcontractor can justify the (optional) exclusion of the tenderer, or whether the tenderer can be excluded only on grounds of actions attributable to the tenderer itself.

32. An examination of the wording of Article 57(4)(a) of Directive 2014/24 reveals that it is deliberately generic. It uses an impersonal expression (in Spanish, 'se ha[ya]n incumplido obligaciones') (9) to refer to breach of social or labour obligations, without specifying who has perpetrated those breaches. Viewed literally, this provision thus contrasts with other provisions that identify who is responsible for behaviour that constitutes grounds for exclusion.

33. Under this grammatical construction it is therefore possible for the breach (and, consequently, the ground for exclusion) to have been committed by the subcontractor which, as a party that employs workers on its account in the course of the public contract, is subject to national rules of social or labour law.

34. If one adopts a systematic approach to interpretation, attributing a breach committed by the subcontractor to the tenderer during the initial selection stage is consistent with recital 40 of Directive 2014/24, which states that 'control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure'. (10)

35. Applying this approach, Article 57(5) of Directive 2014/24 confirms that any economic operator (which therefore includes the tenderer) may be excluded 'in view of acts committed or omitted either before or during the procedure'. Failure by the tenderer to carry out checks when it includes in its tender a subcontractor that has breached the obligations in Article 18(2) is, at the very least, a case of negligent omission.

36. Finally, Article 71(6)(a) of Directive 2014/24 refers explicitly, in connection with the application of Article 18(2), to 'joint liability between subcontractors and the main contractor' as one of the mechanisms that may be used by Member States.

37. Recital 105 of Directive 2014/24 reiterates that both parties are liable, in that it authorises the Member State to establish 'a mechanism of *joint* liability between subcontractors and the main contractor'. It is well known that an action to require joint obligors to perform their obligations and to enforce the consequences of breach can be brought against any of the obligors, regardless of the internal relationship that holds between them.

38. The objective of Article 57(4)(a) of Directive 2014/24 provides support for this approach, which I believe is the most appropriate in the light of the EU legislator's clear intention to safeguard social and labour rights by also strengthening protection for these rights in the field of public procurement.

39. The desire to ensure fair competition between tenderers also points in the same direction. Competition would be distorted if, while others complied with the rules, one tenderer were to submit its tender in the knowledge that one of its main elements (the subcontractor to which it intended to entrust a significant part of the contract) had an illegal cost advantage precisely because it did not comply with its social obligations. This would affect the credibility of the tenderer which sought to exploit this unfair advantage.

40. Once this premiss has been established, then logically the tenderer's suitability as a contractor could be affected by breaches committed by the subcontractor. Given that it is the tenderer that decides of its own volition to use the subcontracting mechanism and that selects and proposes the subcontractors to be involved in performing the contract, there is no reason why the tenderer's liability should not extend to cover the conduct of those subcontractors in respect of that contract (even if only on grounds of *culpa in eligendo*).

41. Moreover, ploys designed to avoid liability and achieve an unjustified reduction in the main contractor's labour costs are not uncommon in the field of administrative subcontracting, and they can take shape even during the initial (tender) stage of the procurement.

42. It is true that, in its general approach to administrative procurement, EU law attaches great importance to ensuring freedom of establishment and freedom to provide services, and to encouraging competition between economic operators. This objective is facilitated by opening up procurement procedures as widely as possible, and could be hampered by excessive use of the optional grounds for exclusion.

43. However, the optional grounds for exclusion enable Member States to satisfy public interest objectives and are, in any event, intended to ensure the reliability, diligence, professional honesty and responsibility of the tenderer. (11)

44. As I noted in my Opinion in *Delta Antrepriză de Construcţii şi Montaj 93*, (12) Directive 2014/24 includes reliability as a key element of the relationship. Under the first paragraph of recital 101, contracting authorities may exclude 'economic operators which have proven unreliable'. The element of reliability thus imbues the grounds for exclusion concerning the status of both the tenderer and the other economic operators which the tenderer intends to use as subcontractors to perform the contract.

45. Article 57(4)(a) of Directive 2014/24 is not immune from this influence. Indeed, recital 101 begins with a reference to the unreliability of the economic operator prompted precisely by violations of 'environmental or social obligations, including rules on accessibility for disabled persons'.

46. The case-law of the Court of Justice allows Member States considerable discretion in configuring the optional grounds for exclusion. (13) Article 57(7) of Directive 2014/24 nevertheless makes clear that Member States shall specify the implementing conditions for those grounds 'having regard to Union law'.

47. It seems to me that a Member State can legitimately use that discretion in order to enable its contracting authorities to use the optional ground for exclusion provided for in Article 57(4)(a) against a tenderer in situations where the breach of social or labour obligations has been committed by one of the tenderer's proposed subcontractors.

48. However, the scope to exclude the tenderer is not automatic: it will instead depend on the specific circumstances of the case, as assessed in accordance with the principles underpinning administrative procurement, including the principle of proportionality. (14)

49. Under the proportionality principle, in order for offences by the subcontractor to impact so significantly on the tenderer as to prompt its exclusion from the procedure, the breaches committed by the subcontractor will generally have to be such that the contracting authority is unable to trust the tenderer. I will address this issue below.

C. The interpretation of Article 71 of Directive 2014/24

50. Article 71(1) of Directive 2014/24 imposes a duty on the competent authorities to ensure 'observance of the obligations referred to in Article 18(2) by subcontractors' (including, amongst others, social and labour obligations).

51. Article 71(6) gives Member States authority so that 'with the aim of avoiding breaches [by subcontractors] of the obligations referred to in Article 18(2), appropriate measures may be taken'.

52. Some of the parties taking part in the proceedings (15) have argued that Article 71 of Directive 2014/24 does not apply to the tenderer selection stage but to the contract performance stage. In support of their argument they cite recital 105 of the directive, which refers only to the main contractor and the subcontractors, but not to tenderers.

53. In my view, this terminological objection is not decisive. In fact, in addition to 'main contractor' (meaning 'the economic operator to whom the public contract has been awarded'), Article 71 of Directive 2014/24 also uses the terms 'subcontractor', 'tenderer' (the person who has submitted a tender) and 'economic operator'. This last term is the broadest, encompassing any undertaking that supplies its goods or services in the market, (16) which logically includes subcontractors.

54. Recital 105 should be read in conjunction with the express references in Article 71 of Directive 2014/24 to the tenderer, main contractor and economic operators. There is therefore nothing to prevent this provision from applying both prior to the award of the contract (that is, to the tenderers) and after the award (that is, to the contractors) so that it covers the relationship between both tenderers and contractors and their subcontractors.

55. Specifically, Article 71(6)(b) of Directive 2014/24, which deals specifically with the exclusion of a subcontractor for breach of the obligations referred to in Article 18(2), refers to the 'economic operator', and therefore it applies during both the selection stage and the contract performance stage.

56. This is logical, because the information which the economic operator has to supply to the contracting authority regarding the subcontractors' relationship to the contract is central to Directive 2014/24. On this point, I refer to my comments in the Opinion in *Delta Antrepriză de Construcţii şi Montaj 93*. (17)

57. This desire on the part of the legislator finds its legislative expression in Article 71(2) and (5) of Directive 2014/24, which refers to the obligation on the tenderer and the main contractor respectively to inform the contracting authority of any subcontracting, whether proposed (during the selection stage) or in operation (after the award of the contract).

58. Article 71(6)(b) establishes a link with this duty to provide information when it authorises contracting authorities to use the means provided for in Articles 59, 60 and 61 of Directive 2014/24 to verify whether there are grounds for excluding any subcontractor pursuant to Article 57.

59. The reference in Article 71 to Article 57 covers both the mandatory and the optional grounds for exclusion, in the context of breach of the obligations in Article 18(2). The consequences are different, however:

– If the subcontractor is subject to a mandatory ground of exclusion, (18) the economic operator *shall be required* to replace the subcontractor.

– In the case of a non-mandatory ground for exclusion, (19) the contracting authority *may require* the economic operator to replace the subcontractor. As I shall explain, this is one of several measures that may be taken to guard against unsuitable subcontractors.

60. In this regard, two elements of the legislation are particularly significant:

– Firstly, the open formulation used in Article 71(6) of Directive 2014/24 ('With the aim of avoiding breaches of the obligations referred to in Article 18(2), *appropriate measures* may be taken, *such as*: …').

– Second, the power for Member States to provide for 'more stringent liability rules' (Article 71(7)).

61. Taken together, in my view, these two elements reinforce what can already be inferred from the interpretation of Article 57(4)(a) of Directive 2014/24, namely that in these circumstances Member States have the power to attribute direct liability to tenderers which have proposed subcontractors that have breached the obligations referred to in Article 18(2) of the directive.

62. Indeed, the wording of Article 71(6) of Directive 2014/24 leaves the door open to the introduction of *other national measures*. The EU legislator has set out, purely by way of example, some of the measures that may be taken in respect of breach of social and labour obligations, such as replacing the subcontractor to which the (mandatory or optional) grounds of exclusion apply; but it does not close off other options. Under Article 71(8), Member States must specify the implementing conditions for those measures.

63. This same approach prevails in Article 71(7), when it makes provision for Member States to decide to implement 'more stringent liability rules' regarding subcontracting in national law. In my opinion, a reading of this paragraph shows that these rules are not limited to 'direct payments to subcontractors' (where the text uses the expression 'to go further'), but may apply more generally.

64. This can be inferred more clearly from recital 105 of Directive 2014/24, which states that 'Member States remain free to provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors'. Use of the conjunction 'or' shows that these are two different types of (possible) interventions.

65. These powers available to Member States do not apply only to the relationship between the main contractor and its subcontractors, but may also extend to the relationship between the contracting authority and a tenderer that has submitted a tender in which it proposes to use the services of a subcontractor affected by one of the grounds for exclusion. I refer to my earlier comments on the joint liability of main contractors and subcontractors.

66. Article 57 of Directive 2014/24 deals specifically with grounds for exclusion, and in referring to that provision Article 71(6) and (7) reinforces the possibility of excluding tenderers on the grounds of breaches by subcontractors which have failed to comply with the obligations referred to in Article 18(2). The exclusion of tenderers is specifically addressed in Article 57 but, I repeat, the provisions on subcontracting in Article 71 confirm that possibility.

D. The Italian provisions on exclusion due to offences committed by subcontractors, as they apply to the facts of the case

67. Under the combined application of Articles 80(5) and 105(12) of the PPC, where a tender includes a subcontractor which has breached the social and labour obligations regarding disabled persons, the tenderer which freely chose to propose that subcontractor is *automatically* excluded, provided the situation is identified before the contract is signed.

68. This categorical outcome may perhaps be incompatible with the principle of proportionality. The Court of Justice ruled on the optional grounds of exclusion in connection with Directive 2004/18 (20) and ruled out their automatic application. It can be concluded from the judgment in *Forposta and ABC Direct Contact* (21) that automatic application might exceed the limits of the discretion granted to Member States by Article 45(2) of Directive 2004/18 (now Article 57(7) of Directive 2014/24).

69. That judgment held that ‘a specific and individual assessment of the conduct of the economic operator concerned’ (22) must be carried out. The Court of Justice ruled that provisions of national legislation that ‘require the contracting authority … to exclude an economic operator from a … procedure for the award of a contract … without allowing the contracting authority the power to assess, on a case-by-case basis, the gravity of the allegedly wrongful conduct of that operator …’ were incompatible with EU law, because they did not comply with that requirement.

70. However, in *Connexxion Taxi Services* the Court of Justice did not follow that case-law, which had been followed in previous judgments. In weighing up the (previously mandatory) requirement for a tenderer’s offence to be assessed under the proportionality principle against respect for the principles of transparency and equal treatment, the Court came down in favour of the latter. It concluded that the latter principles took precedence in a case where, according to the ‘tender conditions of [the] contract, a tenderer which has been guilty of grave professional misconduct must necessarily be excluded, without consideration of the proportionality of that sanction’. (23)

71. It would therefore seem that different types of assessment are required, depending on whether the requirement for automatic exclusion appears only in the legislation (in which case the proportionality check must be capable of being applied, even if the legislation makes no such provision) or whether it is explicitly included in the tender specifications.

72. Neither the order for reference nor the subsequent clarification (24) indicates that the requirement for automatic exclusion was included in the documents governing the award of the contract. It will be for the national court to decide whether Clause 11, or any other clause in the tender specifications, included such a mandatory requirement. If it did, the principles of transparency and equal treatment of tenderers, as set out in the *Connexxion Taxi Services* judgment, (25) will take precedence, thereby ensuring that a tenderer which complied with the tender specifications is not passed over in favour of someone who breached the requirements.

73. If the requirement for automatic exclusion was not included in the tender documentation, then the demands imposed by the proportionality principle come into play. Once again, it is for the referring court to assess all the relevant factors, in this case in order to decide whether the sanction of excluding the tenderer is appropriate to the seriousness of its conduct.

74. The factors to be assessed could include the point put forward by the referring court in its clarificatory submission, namely that the excluded tenderer was under no obligation to check whether the ESPD supplied by the subcontractor was correct, which could mitigate the tenderer’s negligence. The tenderer would, however, still be negligent, albeit to a lesser extent, because there was nothing to prevent it from using other means to verify the subcontractor’s non-compliance beforehand (as the contracting authority did subsequently).

75. The fact that, in addition to the non-compliant subcontractor, the tenderer included two other economic operators with an unblemished record on the list of subcontractors is not enough to reduce its liability. If such a practice were to be allowed, it could encourage a form of fraud involving the designation of a non-compliant subcontractor (which, as I noted earlier, tends to have lower labour or social costs), whose services will be called upon if the irregularity goes unnoticed, and two other subcontractors which are simply there to make up the numbers.

76. Nor does the fact that the tenderer could have performed the contract itself without using a subcontractor reduce its liability. Given that it was free to use the subcontracting mechanism and that it had informed the contracting authority in its tender that it intended to make use of this option and to submit a list of three subcontractors, it was responsible for ensuring that the list did not include anyone who had breached national requirements regarding the employment of disabled persons.

V. Conclusion

77. In the light of the reasoning set out above, I suggest that the Court of Justice should reply to the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) in the following terms:

‘(1) Article 57(4)(a) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC does not in principle preclude the exclusion of a tenderer which stated in its tender that it intended to subcontract to an economic operator where the subcontractor in question has breached its labour or social obligations under national law.

(2) In reaching a decision on exclusion, the contracting authority must have power to assess the proportionality of the measure on a case-by-case basis, taking into account all relevant circumstances in order to determine the tenderer’s reliability, unless the tender specifications stipulate that the tenderer must be excluded without taking into consideration the proportionality of the sanction.’

---

1 Original language: Spanish.

---

2 Consip is a public limited company whose entire share capital is owned by the Italian Ministry of Economic Affairs and Finance. It acts solely on behalf of the public administration.

---

3 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

4 Decreto legislativo 18 aprile 2016, n. 50. Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull’aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d’appalto degli enti erogatori nei settori dell’acqua, dell’energia, dei trasporti e dei servizi postali, nonchè per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture: Codice dei contratti pubblici (GURI No 91 of 19 April 2016 — Ordinary supplement No 10) (Legislative Decree No 50 of 18 April 2016 implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement by entities operating in the water, energy, transport and postal services sectors, and restructuring the regulations governing public contracts for works, services or supplies: Public Procurement Code) (‘PPC’).

---

5 Under Article 17 of Law No 68 of 1999, both public and private sector companies which take part in public procurement procedures, operate concessions or have agreements with government bodies must first provide the government body in question with a declaration by their legal representative stating that they comply with the rules on disabled persons’ right to work. If they fail to do so they face exclusion.

---

6 The tender concerned, specifically, the provision of interconnection services together with maintenance and support, optional services for increasing the bandwidth, with maintenance and support, and optional transfer services.

---

7 Although Article 18(2) is addressed only to Member States, recital 37 of Directive 2014/24 also refers to contracting authorities: ‘with a view to an appropriate integration of environmental, social and labour requirements into public procurement procedures, it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law …’.

---

8 Recital 40 of Directive 2014/24.

---

9 The language versions that I have consulted contain an equivalent meaning: *peut démontrer, par tout moyen approprié, un manquement aux obligations*, in French; *can demonstrate by any appropriate means a violation of applicable obligations*, in English; *dimostrare con qualunque mezzo adeguato la violazione degli*

obblighi applicabili, in Italian; *puder demonstrar, por qualquer meio adequado, o incumprimento das obrigações aplicáveis*, in Portuguese; or *kann auf geeignete Weise Verstöße gegen geltenden Verpflichtungen*, in German.

---

10 The proposal for a directive sent by the European Commission to the Council and the European Parliament (COM/2011/0896 final — 2011/0438 (COD)) even referred to participants in the supply chains (Article 55). The open formulation that was finally adopted is, if anything, broader in scope.

---

11 Judgment of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici* (C-358/12, EU:C:2014:2063, paragraphs 29, 31 and 32).

---

12 Case C-267/18, EU:C:2019:393.

---

13 Judgment of 20 December 2017, *Impresa di Costruzioni Ing. E. Mantovani and Guerrato* (C-178/16, EU:C:2017:1000, paragraph 31 and the case-law cited).

---

14 Article 18(1) of Directive 2014/24 stipulates that ‘contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner’.

---

15 Consip and the Austrian Government.

---

16 Article 2(1)(10) of that directive defines ‘economic operator’ as ‘any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market’. In addition, ‘tenderer’ is defined as ‘an economic operator that has submitted a tender’ (Article 2(1)(11)).

---

17 Case C-267/18, EU:C:2019:393.

---

18 That is, where there has been a final judgment confirming breach of social or labour obligations that fall within one of the grounds in Article 57(1).

---

19 As established in Article 57(4)(a), which deals specifically with breach of the obligations in Article 18(2).

---

20 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

21 Judgment of 13 December 2012 (C-465/11, EU:C:2012:801, paragraph 35).

---

22 Judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 31).

---

23 Judgment of 14 December 2016, *Connexxion Taxi Services* (C-171/15, EU:C:2016:948, operative part).

24 Summarised in point 21 of this Opinion.

25 Judgment of 14 December 2016 (C-171/15, EU:C:2016:948).

EU:C:2019:1100

ORDONNANCE DE LA COUR (neuvième chambre)

18 décembre 2019 (*)

« Renvoi préjudiciel – Marchés publics – Procédures de recours – Directive 89/665/CEE – Directive 92/13/CEE – Droit à une protection juridictionnelle effective – Principes d'effectivité et d'équivalence – Recours en révision des décisions juridictionnelles méconnaissant le droit de l'Union – Responsabilité des États membres en cas de violation du droit de l'Union par les juridictions nationales – Évaluation du dommage indemnisable »

Dans l'affaire C-362/18,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par la Székesfehérvári Törvényszék (cour de Székesfehérvár, Hongrie), par décision du 6 décembre 2017, parvenue à la Cour le 5 juin 2018, dans la procédure

Hochtief AG

contre

Fővárosi Törvényszék,

LA COUR (neuvième chambre),

composée de M. S. Rodin, président de chambre, MM. M. Vilaras (rapporteur) et D. Šváby, juges,

avocat général : M. P. Pikamäe,

greffier : M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 4, paragraphe 3, TUE, de l'article 19, paragraphe 1, second alinéa, TUE, de l'article 49 TFUE, de l'article 47 de la charte des droits fondamentaux de l'Union européenne, de la directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO 1989, L 395, p. 33), telle que modifiée par la directive 2007/66/CE du Parlement européen et du Conseil, du 11 décembre 2007 (JO 2007, L 335, p. 31) (ci-après la « directive 89/665 »), de la directive 92/13/CEE du Conseil, du 25 février 1992, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des règles communautaires sur les procédures de passation des marchés des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications (JO 1992, L 76, p. 14), telle que modifiée par la directive 2007/66 (ci-après la « directive 92/13 »), de la directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux (JO 1993, L 199, p. 54), ainsi que des principes de primauté, d'équivalence et d'effectivité du droit de l'Union.

2 Cette demande a été présentée dans le cadre d'un litige opposant Hochtief AG à la Fővárosi Törvényszék (cour de Budapest-Capitale, Hongrie) au sujet d'un dommage prétendument causé par cette dernière juridiction, dans l'exercice de ses compétences juridictionnelles, à Hochtief.

Le cadre juridique

Le droit de l'Union

3 L'article 1er, paragraphe 1, troisième alinéa, et l'article 1er, paragraphe 3, de la directive 89/665, rédigés en des termes quasiment identiques à ceux, respectivement, de l'article 1er, paragraphe 1, troisième alinéa, et de l'article 1er, paragraphe 3, de la directive 92/13, prévoient :

« 1. [...]

Les États membres prennent, en ce qui concerne les procédures de passation des marchés publics relevant du champ d'application de la directive 2004/18/CE [du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO 2004, L 134, p. 114)], les mesures nécessaires pour garantir que les décisions prises par les pouvoirs adjudicateurs peuvent faire l'objet de recours efficaces et, en particulier, aussi rapides que possible, dans les conditions énoncées aux articles 2 à 2 septies de la présente directive, au motif que ces décisions ont violé le droit [de l'Union] en matière de marchés publics ou les règles nationales transposant ce droit.

[...]

3. Les États membres s'assurent que les procédures de recours sont accessibles, selon des modalités que les États membres peuvent déterminer, au moins à toute personne ayant ou ayant eu un intérêt à obtenir un marché déterminé et ayant été ou risquant d'être lésée par une violation alléguée. »

4 L'article 2, paragraphe 1, de la directive 89/665 dispose :

« Les États membres veillent à ce que les mesures prises aux fins des recours visés à l'article 1er prévoient les pouvoirs permettant :

a) de prendre, dans les délais les plus brefs et par voie de référé, des mesures provisoires ayant pour but de corriger la violation alléguée ou d'empêcher qu'il soit encore porté atteinte aux intérêts concernés, y compris des mesures destinées à suspendre ou à faire suspendre la procédure de passation de marché public en cause ou l'exécution de toute décision prise par le pouvoir adjudicateur ;

b) d'annuler ou de faire annuler les décisions illégales, y compris de supprimer les spécifications techniques, économiques ou financières discriminatoires figurant dans les documents de l'appel à la concurrence, dans les cahiers des charges ou dans tout autre document se rapportant à la procédure de passation du marché en cause ;

c) d'accorder des dommages et intérêts aux personnes lésées par une violation. »

5 L'article 2, paragraphe 1, de la directive 92/13 prévoit :

« Les États membres veillent à ce que les mesures prises aux fins des recours visés à l'article 1er prévoient les pouvoirs permettant :

soit

a) de prendre, dans les délais les plus brefs et par voie de référé, des mesures provisoires ayant pour but de corriger la violation alléguée ou d'empêcher que d'autres préjudices soient causés aux intérêts concernés, y compris des mesures destinées à suspendre ou à faire suspendre la procédure de passation de marché en cause ou l'exécution de toute décision prise par l'entité adjudicatrice

et

b) d'annuler ou de faire annuler les décisions illégales, y compris de supprimer les spécifications techniques, économiques ou financières discriminatoires figurant dans l'avis de marché, l'avis périodique indicatif, l'avis sur l'existence d'un système de qualification, l'invitation à soumissionner, les cahiers des charges ou dans tout autre document se rapportant à la procédure de passation de marché en cause ;

soit

c) de prendre, dans les délais les plus brefs, si possible par voie de référé et, si nécessaire, par une procédure définitive quant au fond, d'autres mesures que celles prévues aux points a) et b), ayant pour but de corriger la violation constatée et d'empêcher que des préjudices soient causés aux intérêts concernés ; notamment d'émettre un ordre de paiement d'une somme déterminée dans le cas où l'infraction n'est pas corrigée ou évitée.

Les États membres peuvent effectuer ce choix soit pour l'ensemble des entités adjudicatrices, soit pour des catégories d'entités définies sur la base de critères objectifs, en sauvegardant en tout cas l'efficacité des mesures établies afin d'empêcher qu'un préjudice soit causé aux intérêts concernés ;

d) et, dans les deux cas susmentionnés, d'accorder des dommages-intérêts aux personnes lésées par la violation.

Lorsque des dommages-intérêts sont réclamés au motif qu'une décision a été prise illégalement, les États membres peuvent prévoir, si leur système de droit interne le requiert et s'il dispose d'instances ayant la compétence nécessaire à cet effet, que la décision contestée doit d'abord être annulée ou déclarée illégale. »

Le droit hongrois

6 L'article 260 du polgári perrendtartásról szóló 1952. évi III. törvény (loi n° III de 1952, instituant le code de procédure civile, ci-après le « code de procédure civile ») prévoit :

« 1. La révision est ouverte contre un jugement définitif lorsque

a) une partie se prévaut d'un fait ou de preuves, ou d'une décision définitive d'une juridiction ou autre autorité que la juridiction n'a pas appréciés au cours de la procédure, à condition que ces éléments – s'ils avaient été appréciés – aient été de nature à conduire à une décision plus favorable à cette partie ;

[...]

2. En application du paragraphe 1, sous a), une partie ne peut exercer un recours en révision que lorsque, sans faute de sa part, elle n'a pas pu faire valoir au cours de la procédure antérieure le fait, les preuves ou la décision qu'elle invoque dans ce recours. »

7 L'article 361, sous a), du code de procédure civile dispose :

« La Kúria [(Cour suprême, Hongrie)], afin de tirer les conséquences d'un recours constitutionnel, décide ce qui suit : dans le cas où l'Alkotmánybíróság [(Cour Constitutionnelle, Hongrie)] a annulé une règle ou disposition de droit matériel, et où seule une procédure contentieuse (ou non contentieuse) était en cours dans cette affaire, elle informe l'auteur du recours constitutionnel qu'il peut dans les trente jours présenter un recours en révision auprès de la juridiction qui était saisie en première instance dans cette procédure. »

Le litige au principal et les questions préjudicielles

8 Le 5 février 2005, le Budapest Főváros Önkormányzata (municipalité de Budapest-Capitale, Hongrie) (ci-après le « pouvoir adjudicateur ») a publié un appel à participer à une procédure de passation d'un marché public de travaux d'un montant dépassant le seuil prévu par le droit de l'Union, suivant la

procédure négociée avec publication préalable d'un avis de marché. Cinq candidatures ont été reçues dans le délai requis, au nombre desquelles figurait celle d'un consortium dirigé par Hochtief (ci-après le « consortium »).

9 Le 19 juillet 2005, le pouvoir adjudicateur a annoncé au consortium que sa candidature était invalide en raison d'une incompatibilité et qu'elle avait été rejetée. Cette décision était motivée par le fait que le consortium avait désigné comme chef de projet un expert qui avait participé à la préparation de l'appel d'offres aux côtés du pouvoir adjudicateur.

10 Par sentence du 12 septembre 2005, le Közbeszerzési Döntőbizottság (commission arbitrale des marchés publics, Hongrie) (ci-après la « commission arbitrale ») a rejeté le recours administratif introduit par le consortium contre cette décision, estimant que la désignation de l'expert dans la demande de participation ne pouvait être considérée comme étant une erreur administrative, comme le faisait valoir Hochtief.

11 Le 4 novembre 2005, Hochtief a introduit un recours contre la sentence de la commission arbitrale auprès du Fővárosi Bíróság (tribunal de Budapest, Hongrie).

12 Par jugement du 28 avril 2006, le Fővárosi Bíróság (tribunal de Budapest) a rejeté ce recours.

13 Le consortium a interjeté appel devant la Fővárosi Ítélőtábla (cour d'appel régionale de Budapest-Capitale, Hongrie) contre le jugement mentionné au point précédent. À l'appui de son appel, il a, notamment, invoqué l'arrêt du 3 mars 2005, Fabricom (C-21/03 et C-34/03, EU:C:2005:127), qui n'a été disponible en langue hongroise que postérieurement à l'introduction de son recours contre la sentence du 12 septembre 2005.

14 Par décision du 13 février 2008, la Fővárosi Ítélőtábla (cour d'appel régionale de Budapest-Capitale) a saisi la Cour d'une demande de décision préjudicielle, qui a donné lieu à l'arrêt du 15 octobre 2009, Hochtief et Linde-Kca-Dresden (C-138/08, EU:C:2009:627).

15 À la suite du prononcé de cet arrêt, la Fővárosi Ítélőtábla (cour d'appel régionale de Budapest-Capitale) a, par un arrêt du 20 janvier 2010, confirmé le jugement du Fővárosi Bíróság (tribunal de Budapest) du 28 avril 2006.

16 Par arrêt du 7 février 2011, le Legfelsőbb Bíróság (dénomination antérieure de la Cour suprême, Hongrie) a confirmé l'arrêt de la Fővárosi Ítélőtábla (cour d'appel régionale de Budapest-Capitale) du 20 janvier 2010.

17 Entre temps, le 23 août 2010, Hochtief avait introduit un recours en révision contre l'arrêt de la Fővárosi Ítélőtábla (cour d'appel régionale de Budapest-Capitale) du 20 janvier 2010, en demandant l'annulation de celui-ci et son remplacement par une nouvelle décision.

18 À l'appui de son recours en révision, Hochtief a fait valoir que l'arrêt du 3 mars 2005, Fabricom (C-21/03 et C-34/03, EU:C:2005:127), qu'elle n'avait pu invoquer ni devant la commission arbitrale ni dans le cadre de son recours contre la sentence de cette dernière dès lors qu'il n'était pas disponible en langue hongroise, tout comme l'arrêt du 15 octobre 2009, Hochtief et Linde-Kca-Dresden (C-138/08, EU:C:2009:627), constituaient des faits nouveaux, au sens de l'article 260, paragraphe 1, sous a), du code de procédure civile, susceptibles de justifier la révision de l'arrêt de la Fővárosi Ítélőtábla (cour d'appel régionale de Budapest-Capitale) du 20 janvier 2010.

19 Le recours en révision de la Hochtief a été rejeté par ordonnance du Fővárosi Közigazgatási és Munkaügyi Bíróság (tribunal administratif et du travail de Budapest-Capitale, Hongrie) du 6 juin 2013. Saisie d'un appel de Hochtief contre cette ordonnance, la Fővárosi Törvényszék (cour de Budapest-Capitale), statuant en dernier ressort, a, par ordonnance du 29 mai 2014, confirmé l'ordonnance de rejet du recours en révision.

20 Le 15 août 2014, Hochtief a formé un recours constitutionnel contre l'ordonnance visée au point précédent. Ce recours a été rejeté comme irrecevable par ordonnance de l'Alkotmánybíróság (Cour constitutionnelle) du 9 février 2015.

21 Hochtief a alors saisi la juridiction de renvoi d'une action en réparation du préjudice que la Fővárosi Törvényszék (cour de Budapest-Capitale) lui aurait causé dans l'exercice de sa compétence juridictionnelle, en adoptant l'ordonnance du 29 mai 2014, qui a confirmé sur appel le rejet de son recours en révision.

22 À l'appui de son recours, Hochtief fait valoir que la Fővárosi Törvényszék (cour de Budapest-Capitale), en tant que juridiction statuant en dernier ressort, a commis une violation suffisamment caractérisée du droit de l'Union, d'une part, en méconnaissant le droit à une protection juridictionnelle effective, consacré à l'article 19, paragraphe 1, second alinéa, TUE, ainsi que les principes fondamentaux du droit de l'Union en matière de marchés publics, tels qu'affirmés dans l'arrêt du 15 octobre 2009, Hochtief et Linde-Kca-Dresden (C-138/08, EU:C:2009:627), et, d'autre part, en omettant de soumettre une question préjudicielle à la Cour, en application de l'article 267, troisième alinéa, TFUE.

23 En ce qui concerne le préjudice qu'elle aurait subi du fait de la violation alléguée du droit de l'Union, Hochtief fait valoir que la Fővárosi Törvényszék (cour de Budapest-Capitale), en rejetant son recours en révision, l'a privée de la possibilité de récupérer les dépens qu'elle avait exposés tant dans la procédure principale que dans la procédure de révision.

24 C'est dans ces circonstances que la Székesfehérvári Törvényszék (cour de Székesfehérvár, Hongrie) a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes :

« 1) Faut-il interpréter les principes fondamentaux et les règles du droit de l'Union (notamment l'article 4, paragraphe 3, TUE et l'exigence d'une interprétation uniforme du droit), tels que la Cour les a interprétés notamment dans l'arrêt [du 30 septembre 2003, Köbler (C-224/01, EU:C:2003:513),] en ce sens que la responsabilité de l'État en raison d'une décision contraire au droit de l'Union d'une juridiction statuant en dernier ressort peut être établie en se fondant uniquement sur le droit national ou sur des critères développés par le droit national ? Dans la négative, faut-il interpréter les principes fondamentaux et les règles du droit de l'Union, notamment les trois critères dégagés par la Cour dans [l'arrêt du 30 septembre 2003, Köbler (C-224/01, EU:C:2003:513),] à propos de la responsabilité de l'"État", en ce sens que la réalisation des conditions de la responsabilité de l'État membre en raison d'une violation du droit de l'Union par les juridictions dudit État membre doit être appréciée sur la base du droit national ?

2) Faut-il interpréter les règles et les principes fondamentaux du droit de l'Union (notamment l'article 4, paragraphe 3, TUE et l'exigence d'un recours effectif), en particulier les arrêts de la Cour relatifs à la responsabilité des États membres [du 19 novembre 1991, Francovich e.a. (C-6/90 et C-9/90, EU:C:1991:428), du 5 mars 1996, Brasserie du pêcheur et Factortame (C-46/93 et C-48/93, EU:C:1996:79), ainsi que du 30 septembre 2003, Köbler (C-224/01, EU:C:2003:513)], en ce sens que l'autorité de la chose jugée de décisions contraires au droit de l'Union rendues par des juridictions statuant en dernier ressort exclut que la responsabilité de l'État membre puisse être établie ?

3) Faut-il interpréter les principes d'"effectivité" et d'"équivalence" prévus dans les directives [89/665], [92/13] et [2007/66], ainsi que dans les arrêts [du 13 janvier 2004, (C-453/00, EU:C:2004:17), du 16 mars 2006, Kapferer (C-234/04, EU:C:2006:178), du 26 janvier 2010, Transportes Urbanos y Servicios Generales (C-118/08, EU:C:2010:39), et du 10 juillet 2014, Impresa Pizzarotti (C-213/13, EU:C:2014:2067),] en ce sens qu'une partie ne doit plus pouvoir se prévaloir, au stade de la procédure de révision, des constatations d'un arrêt de la Cour rendu à l'issue d'une procédure préjudicielle engagée dans la procédure principale par une juridiction de second degré, étant précisé que celles-ci n'ont pas été prises en compte dans la procédure principale, notamment dans le cas où la juridiction nationale statuant en dernier ressort a rejeté le pourvoi en cassation formé contre l'arrêt rendu dans la procédure principale au motif que la partie ne s'est pas prévalue en temps utile de l'arrêt de la Cour ?

4) Faut-il interpréter les directives visées à la troisième question ainsi que la jurisprudence de la Cour sur la question de l'ouverture de la révision, résultant notamment des arrêts [du 13 janvier 2004, (C-453/00, EU:C:2004:17), du 16 mars 2006, Kapferer (C-234/04, EU:C:2006:178), du

26 janvier 2010, Transportes Urbanos y Servicios Generales (C-118/08, EU:C:2010:39), et du 10 juillet 2014, Impresa Pizzarotti (C-213/13, EU:C:2014:2067)], ainsi, également, que les principes dégagés par la Cour dans les arrêts [du 12 décembre 2002, Universale-Bau e.a. (C-470/99, EU:C:2002:746), du 27 février 2003, Santex (C-327/00, EU:C:2003:109), ainsi que du 11 octobre 2007, Lämmerzahl (C-241/06, EU:C:2007:597)], à propos des délais du droit national appliqués dans des procédures de recours en matière de marchés publics, en ce sens que les juridictions nationales peuvent légalement opposer la forclusion à la partie qui, en seconde instance, se prévaut, d'une part, d'un arrêt de la Cour que la juridiction de seconde instance a obtenu dans le cadre de l'affaire pendante devant elle et, d'autre part, d'un arrêt de la Cour qui n'a été disponible dans la langue officielle de l'État membre qu'en seconde instance, puis rejeter, malgré cela, la demande de révision introduite par ladite partie sur la base des arrêts de la Cour invoqués par celle-ci, mais non pris en compte, et des faits qui sont pertinents en vertu desdits arrêts ?

5) Faut-il interpréter les directives susmentionnées, ainsi que la jurisprudence de la Cour résultant notamment des arrêts [du 13 janvier 2004, Kühne & Heitz (C-453/00, EU:C:2004:17), du 16 mars 2006, Kapferer (C-234/04, EU:C:2006:178), du 26 janvier 2010, Transportes Urbanos y Servicios Generales (C-118/08, EU:C:2010:39), et du 10 juillet 2014, Impresa Pizzarotti (C-213/13, EU:C:2014:2067),] en ce sens que les juridictions nationales peuvent légalement, alors même que la partie au litige cite l'arrêt [du 12 février 2008, Kempter (C-2/06, EU:C:2008:78)] – en vertu duquel une partie n'a pas l'obligation d'invoquer explicitement les arrêts de la Cour, la juridiction étant tenue de [les] appliquer d'office – ne pas tenir compte desdits arrêts en se prévalant du droit procédural national – au point de ne même pas mentionner cette circonstance dans la décision clôturant la procédure, pas plus que dans ses motifs – puis rejeter, malgré cela, la demande de révision introduite par ladite partie sur la base des arrêts de la Cour invoqués par celle-ci, mais non pris en compte, et des faits qui sont pertinents en vertu desdits arrêts ?

6) Faut-il interpréter la condition d'une "violation suffisamment caractérisée", dégagée dans les arrêts [du 30 septembre 2003, Köbler (C-224/01, EU:C:2003:513), et du 13 juin 2006, Traghetti del Mediterraneo (C-173/03, EU:C:2006:391),] comme n'étant pas remplie lorsque la juridiction statuant en dernier ressort passe entièrement sous silence une jurisprudence de la Cour bien établie et très précisément décrite – et que différents avis juridiques ont par ailleurs confortée – et, en contradiction manifeste avec celle-ci, rejette sans aucune motivation au regard du droit de l'Union une demande de révision sans, visiblement, n'avoir examiné ni même évoqué la nécessité d'un renvoi préjudiciel devant la Cour, alors même que cette nécessité a également été démontrée dans le moindre détail dans la jurisprudence pertinente de la Cour ? Compte tenu de l'arrêt [du 6 octobre 1982, Cilfit e.a. (283/81, EU:C:1982:335),] rendu par la Cour, la juridiction nationale doit-elle fournir une motivation lorsqu'elle n'autorise pas la révision en s'écartant d'une interprétation de la Cour dotée d'un caractère contraignant et s'abstient, sans donner de motivation, de saisir la Cour d'une question préjudicielle à ce propos ?

7) Faut-il interpréter les principes de recours effectif et d'équivalence, au sens de l'article 19 et de l'article 4, paragraphe 3, TUE, ainsi que la liberté d'établissement et de prestation de services consacrée à l'article 49 TFUE, ou encore la directive [93/37], ainsi que les directives [89/665], [92/13] et [2007/66], en ce sens que ceux-ci permettent que les autorités et les juridictions saisies rejettent systématiquement, au mépris manifeste du droit de l'Union applicable, les recours exercés par le requérant pour avoir été exclu de la procédure de marché public, étant précisé que ces recours exigent le cas échéant de rédiger de nombreux mémoires au prix d'un investissement important de temps et d'argent, sans oublier la participation à des audiences, et que, même s'il existe en théorie la possibilité d'établir la responsabilité en raison d'un dommage causé dans l'exercice d'une compétence juridictionnelle, la réglementation en cause empêche le requérant de pouvoir exiger de la juridiction réparation du préjudice qu'il a subi en raison des mesures illégales ?

8) Faut-il interpréter les principes qui ont été dégagés dans les arrêts [du 9 novembre 1983, San Giorgio (199/82, EU:C:1983:318), du 30 septembre 2003, Köbler (C-224/01, EU:C:2003:513), et du 13 juin 2006, Traghetti del Mediterraneo (C-173/03, EU:C:2006:391),] en ce sens que le

dommage causé par le fait que la juridiction statuant en dernier ressort, en contradiction avec la jurisprudence constante de la Cour, n'a pas autorisé la révision demandée en temps utile par une partie et dans le cadre de laquelle ladite partie aurait pu exiger le remboursement des frais qui lui ont été occasionnés n'est pas un dommage susceptible d'être indemnisé ?

9) Dès lors que le droit national commande d'autoriser la révision lorsque celle-ci est nécessaire pour rétablir la constitutionnalité en raison d'une nouvelle décision de la juridiction constitutionnelle, ne devrait-il pas alors, en vertu du principe d'équivalence et de [l'arrêt du 26 janvier 2010, Transportes Urbanos y Servicios Generales (C-118/08, EU:C:2010:39)], autoriser la révision dans le cas où un arrêt de la Cour rendu antérieurement dans une autre affaire, ainsi qu'un arrêt de la Cour obtenu dans l'affaire principale, de même que les faits qui sont pertinents en vertu desdits arrêts, ne sont pas pris en compte dans la procédure principale en raison des dispositions du droit national relatives aux délais de procédure ? »

Sur les questions préjudicielles

25 En vertu de l'article 99 du règlement de procédure de la Cour, lorsque la réponse à une question posée à titre préjudiciel peut être clairement déduite de la jurisprudence ou lorsque la réponse à une telle question ne laisse place à aucun doute raisonnable, la Cour peut, à tout moment, sur proposition du juge rapporteur, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée.

26 Il y a lieu de faire application de cette disposition dans le cadre de la présente affaire.

Considérations liminaires

27 Ainsi qu'il ressort de la décision de renvoi, l'affaire au principal porte sur une demande de réparation du préjudice prétendument subi par Hochtief du fait de l'ordonnance de la Fővárosi Törvényszék (cour de Budapest-Capitale) du 29 mai 2014, mentionnée au point 19 de la présente ordonnance, par laquelle cette juridiction, statuant en dernier ressort, a confirmé l'ordonnance du Fővárosi Közigazgatási és Munkaügyi Bíróság (tribunal administratif et du travail de Budapest-Capitale) du 6 juin 2013 ayant rejeté le recours en révision introduit par cette société contre l'arrêt de la Fővárosi Ítélőtábla (cour d'appel régionale de Budapest-Capitale) du 20 janvier 2010, mentionné au point 15 de la présente ordonnance.

28 Il s'ensuit que l'affaire au principal suppose de déterminer si, en procédant ainsi, la Fővárosi Törvényszék (cour de Budapest-Capitale) a commis une violation du droit de l'Union susceptible de fonder une obligation de réparer le préjudice que Hochtief allègue avoir subi du fait de cette violation.

29 Dans ce contexte, la juridiction de renvoi se demande si le droit de l'Union doit être interprété en ce sens qu'une juridiction nationale saisie d'un recours en révision d'un jugement revêtu de l'autorité de la chose jugée postérieur à un arrêt rendu par la Cour sur le fondement de l'article 267 TFUE est tenue de faire droit à ce recours.

Sur la recevabilité de la septième question

30 Par sa septième question, la juridiction de renvoi demande à la Cour, en substance, si le rejet systématique, en méconnaissance du droit de l'Union, de recours introduits par un soumissionnaire évincé d'une procédure de marché public, tel que Hochtief, est compatible avec le droit de l'Union.

31 À cet égard, il y a lieu de rappeler que, selon une jurisprudence constante de la Cour, la procédure prévue à l'article 267 TFUE est un instrument de coopération entre celle-ci et les juridictions nationales. Il en découle qu'il appartient aux seules juridictions nationales qui sont saisies du litige et qui doivent assumer la responsabilité de la décision juridictionnelle à intervenir d'apprécier, au regard des particularités de chaque affaire, tant la nécessité d'une décision préjudicielle pour être en mesure de rendre leur jugement que la pertinence des questions qu'elles posent à la Cour. En conséquence, dès lors que les questions posées par les juridictions nationales portent sur l'interprétation d'une disposition du droit de l'Union, la Cour est, en principe, tenue de statuer (arrêt du 29 juillet 2019, Hochtief

Solutions Magyarországi Fióktelepe, C-620/17, ci-après l'« arrêt Hochtief Solutions », EU:C:2019:630, point 30 et jurisprudence citée).

32 Toutefois, le refus de statuer sur une question préjudicielle posée par une juridiction nationale est possible, notamment, lorsqu'il apparaît de manière manifeste que l'interprétation du droit de l'Union sollicitée n'a aucun rapport avec la réalité ou l'objet du litige au principal ou lorsque le problème est de nature hypothétique (arrêt Hochtief Solutions, point 31 et jurisprudence citée).

33 Or, la septième question relève, précisément, de ce dernier cas de figure. En effet, il apparaît de manière manifeste que cette question n'a aucun rapport avec l'objet de l'affaire au principal, tel qu'il a été résumé au point 28 de la présente ordonnance, et qu'elle présente, dès lors, un caractère hypothétique.

34 Il s'ensuit que la septième question est irrecevable.

Sur les première, deuxième, sixième et huitième questions

35 Par ces questions, qu'il convient d'examiner ensemble, la juridiction de renvoi cherche à obtenir des indications concernant, en particulier, les principes énoncés par la Cour en matière de responsabilité d'un État membre pour les dommages causés aux particuliers en raison d'une violation du droit de l'Union par une juridiction nationale statuant en dernier ressort. La juridiction de renvoi demande, en substance, si lesdits principes doivent être interprétés en ce sens, premièrement, que la responsabilité de l'État membre concerné doit être appréciée sur la base du droit national, deuxièmement, que le principe de l'autorité de la chose jugée exclut que la responsabilité de cet État membre puisse être établie, troisièmement, qu'il y a une violation suffisamment caractérisée du droit de l'Union lorsque la juridiction statuant en dernier ressort refuse de soumettre à la Cour une question d'interprétation du droit de l'Union qui a été soulevée devant elle et, quatrièmement, qu'ils s'opposent à une règle de droit national qui exclut des dommages susceptibles de faire l'objet d'une réparation les frais occasionnés à une partie par la décision juridictionnelle en cause.

36 En premier lieu, il convient de rappeler que, s'agissant des conditions d'engagement de la responsabilité d'un État membre pour des dommages causés aux particuliers par des violations du droit de l'Union qui lui sont imputables, la Cour a itérativement jugé que les particuliers lésés ont un droit à réparation dès lors que trois conditions sont réunies, à savoir que la règle de droit de l'Union violée a pour objet de leur conférer des droits, que la violation de cette règle est suffisamment caractérisée et qu'il existe un lien de causalité direct entre cette violation et le dommage subi par ces particuliers (arrêt Hochtief Solutions, point 35 et jurisprudence citée).

37 Il convient également de rappeler que la responsabilité d'un État membre pour des dommages causés par une décision d'une juridiction statuant en dernier ressort qui viole une règle de droit de l'Union est régie par les mêmes conditions (arrêt Hochtief Solutions, point 36 et jurisprudence citée).

38 Par ailleurs, les trois conditions rappelées au point 36 de la présente ordonnance sont nécessaires et suffisantes pour engendrer au profit des particuliers un droit à obtenir réparation, sans pour autant exclure que la responsabilité d'un État membre puisse être engagée dans des conditions moins restrictives sur le fondement du droit national (arrêt Hochtief Solutions, point 37 et jurisprudence citée).

39 Il en résulte que le droit de l'Union ne s'oppose pas à une règle de droit national qui prévoit, pour l'engagement de la responsabilité d'un État membre au titre des dommages causés aux particuliers par des violations du droit de l'Union qui lui sont imputables, des conditions moins restrictives que celles établies par la jurisprudence de la Cour rappelée au point 36 de la présente ordonnance (arrêt Hochtief Solutions, point 38 et jurisprudence citée).

40 En deuxième lieu, ainsi qu'il ressort de la jurisprudence de la Cour, le principe de l'autorité de la chose jugée ne s'oppose pas à la reconnaissance du principe de la responsabilité d'un État membre du fait de la décision d'une juridiction nationale statuant en dernier ressort qui viole une règle de droit de l'Union. En effet, en raison, notamment, de la circonstance qu'une violation des droits tirés du droit de l'Union par une telle décision ne peut normalement plus faire l'objet d'un redressement, les particuliers ne

sauraient être privés de la possibilité d'engager la responsabilité de l'État afin d'obtenir par ce moyen une protection juridique de leurs droits (arrêt Hochtief Solutions, point 39 et jurisprudence citée).

41 En troisième lieu, il découle d'une jurisprudence constante de la Cour que la mise en œuvre des conditions rappelées au point 36 de la présente ordonnance permettant d'établir la responsabilité d'un État membre pour des dommages causés aux particuliers par des violations du droit de l'Union qui lui sont imputables doit, en principe, être opérée par les juridictions nationales conformément aux orientations fournies par la Cour pour procéder à cette mise en œuvre (arrêt Hochtief Solutions, point 40 et jurisprudence citée).

42 À cet égard, s'agissant, en particulier, de la deuxième de ces conditions, il convient de rappeler que, selon la jurisprudence de la Cour, la responsabilité d'un État membre pour des dommages causés par une décision d'une juridiction nationale statuant en dernier ressort qui viole une règle de droit de l'Union ne saurait être engagée que dans le cas exceptionnel où la juridiction nationale statuant en dernier ressort a méconnu de manière manifeste le droit applicable (arrêt Hochtief Solutions, point 41 et jurisprudence citée).

43 Afin de déterminer s'il existe une violation suffisamment caractérisée du droit de l'Union, la juridiction nationale saisie d'une demande en réparation doit tenir compte de tous les éléments qui caractérisent la situation qui lui est soumise. Parmi les éléments pouvant être pris en considération à cet égard figurent, notamment, le degré de clarté et de précision de la règle violée, l'étendue de la marge d'appréciation que la règle violée laisse aux autorités nationales, le caractère intentionnel ou involontaire du manquement commis ou du préjudice causé, le caractère excusable ou inexcusable d'une éventuelle erreur de droit, la circonstance que, le cas échéant, les attitudes prises par une institution de l'Union européenne ont pu contribuer à l'adoption ou au maintien de mesures ou de pratiques nationales contraires au droit de l'Union, ainsi que l'inexécution, par la juridiction nationale en cause, de son obligation de renvoi préjudiciel en vertu de l'article 267, troisième alinéa, TFUE (arrêt Hochtief Solutions, point 42 et jurisprudence citée).

44 En tout état de cause, une violation du droit de l'Union est suffisamment caractérisée lorsqu'elle est intervenue en méconnaissance manifeste de la jurisprudence de la Cour en la matière (arrêt Hochtief Solutions, point 43 et jurisprudence citée).

45 S'agissant du litige au principal, il appartient à la juridiction de renvoi d'apprécier, en tenant compte de tous les éléments qui caractérisent la situation en cause au principal, si la Fővárosi Törvényszék (cour de Budapest-Capitale), par l'ordonnance du 29 mai 2014, mentionnée au point 19 de la présente ordonnance, a commis une violation suffisamment caractérisée du droit de l'Union en méconnaissant de manière manifeste le droit de l'Union applicable, y compris la jurisprudence de la Cour pertinente, notamment les arrêts du 3 mars 2005, Fabricom (C-21/03 et C-34/03, EU:C:2005:127), ainsi que du 15 octobre 2009, Hochtief et Linde-Kca-Dresden (C-138/08, EU:C:2009:627) (voir, en ce sens, arrêt Hochtief Solutions, point 44).

46 En quatrième lieu, dès lors que les conditions rappelées au point 36 de la présente ordonnance sont réunies, c'est dans le cadre du droit national de la responsabilité qu'il incombe à l'État membre de réparer les conséquences du préjudice causé, étant entendu que les conditions fixées par les législations nationales en matière de réparation des dommages ne sauraient être moins favorables que celles qui concernent des réclamations semblables de nature interne (principe d'équivalence) ni être aménagées de manière à rendre, en pratique, impossible ou excessivement difficile l'obtention de la réparation (principe d'effectivité) (arrêt Hochtief Solutions, point 45 et jurisprudence citée).

47 À cet égard, il ressort de la jurisprudence de la Cour que la réparation des dommages causés aux particuliers par des violations du droit de l'Union doit être adéquate au préjudice subi, de nature à assurer une protection effective de leurs droits (arrêt Hochtief Solutions, point 46 et jurisprudence citée).

48 Or, une règle de droit national en vertu de laquelle, dans un cas où la responsabilité d'un État membre est engagée pour des dommages causés du fait d'une violation d'une règle de droit de l'Union par une décision d'une juridiction de cet État statuant en dernier ressort, les frais occasionnés à une partie par cette décision sont de manière générale exclus des dommages susceptibles de faire l'objet d'une

réparation peut rendre, en pratique, excessivement difficile ou même impossible d'obtenir une réparation adéquate du préjudice subi par cette partie (arrêt Hochtief Solutions, point 47).

49 Compte tenu de ce qui précède, il y a lieu de répondre aux première, deuxième, sixième et huitième questions que la responsabilité d'un État membre pour des dommages causés par la décision d'une juridiction nationale statuant en dernier ressort qui viole une règle de droit de l'Union est régie par les conditions énoncées par la Cour, notamment au point 51 de l'arrêt du 30 septembre 2003, Köbler (C-224/01, EU:C:2003:513), sans pour autant exclure que la responsabilité de cet État puisse être engagée dans des conditions moins restrictives sur le fondement du droit national. Cette responsabilité n'est pas exclue du fait que cette décision a acquis l'autorité de la chose jugée. Dans le cadre de la mise en œuvre de cette responsabilité, il appartient à la juridiction nationale saisie de la demande en réparation d'apprécier, en tenant compte de tous les éléments qui caractérisent la situation en cause, si la juridiction nationale statuant en dernier ressort a commis une violation suffisamment caractérisée du droit de l'Union en méconnaissant de manière manifeste le droit de l'Union applicable, y compris la jurisprudence de la Cour pertinente. En revanche, le droit de l'Union s'oppose à une règle de droit national qui, dans un tel cas, exclut de manière générale des dommages susceptibles de faire l'objet d'une réparation les frais occasionnés à une partie par la décision préjudiciable de la juridiction nationale.

Sur les troisième, quatrième, cinquième et neuvième questions

50 Compte tenu du contexte de l'affaire au principal, tel que rappelé aux points 28 et 29 de la présente ordonnance, il convient de comprendre que, par ses troisième, quatrième, cinquième et neuvième questions, la juridiction de renvoi demande à la Cour, en substance, si le droit de l'Union, notamment la directive 89/665 et la directive 92/13 ainsi que les principes d'équivalence et d'effectivité, doit être interprété en ce sens qu'il ne s'oppose pas à la réglementation d'un État membre qui n'autorise pas la révision d'un jugement, revêtu de l'autorité de la chose jugée, d'une juridiction dudit État membre, ayant statué sur un recours en annulation contre un acte d'un pouvoir adjudicateur sans aborder une question dont l'examen était envisagé dans un arrêt antérieur de la Cour prononcé en réponse à une demande de décision préjudicielle présentée dans le cadre de la procédure relative à ce recours en annulation ou dans un arrêt antérieur de la Cour prononcé en réponse à une demande de décision préjudicielle posée dans le cadre d'une autre affaire.

51 À cet égard, il y a lieu de rappeler que l'article 1er, paragraphe 1, de la directive 89/665 et l'article 1er, paragraphe 1, de la directive 92/13 imposent aux États membres l'obligation d'adopter les mesures nécessaires pour s'assurer que les décisions prises par les pouvoirs adjudicateurs dans le cadre des procédures de passation des marchés concernés par ces directives peuvent faire l'objet de recours efficaces et, en particulier, aussi rapides que possible, au motif qu'elles ont violé le droit de l'Union en matière de marchés publics ou les règles nationales transposant ce droit (arrêt Hochtief Solutions, point 50 et jurisprudence citée).

52 Ces dispositions, qui sont destinées à protéger les opérateurs économiques contre l'arbitraire du pouvoir adjudicateur, visent ainsi à s'assurer de l'existence, dans tous les États membres, de moyens de recours efficaces, afin de garantir l'application effective des règles de l'Union en matière de passation de marchés publics, en particulier à un stade où les violations peuvent encore être corrigées (arrêt Hochtief Solutions, point 51 et jurisprudence citée).

53 Ni la directive 89/665 ni la directive 92/13 ne contiennent de dispositions régissant spécifiquement les conditions dans lesquelles ces voies de recours peuvent être exercées. Ces directives ne prévoient que des dispositions établissant les conditions minimales auxquelles doivent répondre les procédures de recours instaurées dans les ordres juridiques nationaux, afin de garantir le respect des prescriptions du droit de l'Union en matière de marchés publics (arrêt Hochtief Solutions, point 52 et jurisprudence citée).

54 En l'occurrence, il ressort des éléments fournis par la juridiction de renvoi que, en droit procédural hongrois, la révision, au sens de l'article 260 du code de procédure civile, est une voie de recours extraordinaire, permettant, lorsque les conditions posées par cette disposition sont remplies, de remettre

en cause l'autorité de la chose jugée attachée à un jugement définitif (arrêt Hochtief Solutions, point 53).

55 Or, il convient de rappeler l'importance que revêt, tant dans l'ordre juridique de l'Union que dans les ordres juridiques nationaux, le principe de l'autorité de la chose jugée. En effet, en vue de garantir aussi bien la stabilité du droit et des relations juridiques qu'une bonne administration de la justice, il importe que des décisions juridictionnelles devenues définitives après épuisement des voies de recours disponibles ou après expiration des délais prévus pour ces recours ne puissent plus être remises en cause (arrêt Hochtief Solutions, point 54, ainsi que arrêt du 11 septembre 2019, Călin, C-676/17, EU:C:2019:700, point 26 et jurisprudence citée).

56 Partant, le droit de l'Union n'impose pas au juge national d'écarter l'application des règles de procédure internes conférant l'autorité de la chose jugée à une décision juridictionnelle, même si cela permettrait de remédier à une situation nationale incompatible avec ce droit (arrêt Hochtief Solutions, point 55, ainsi que arrêt du 11 septembre 2019, Călin, C-676/17, EU:C:2019:700, point 27 et jurisprudence citée).

57 En effet, il a été jugé que le droit de l'Union n'exige pas que, pour tenir compte de l'interprétation d'une disposition pertinente de ce droit adoptée par la Cour, un organe juridictionnel national doive, par principe, revenir sur sa décision revêtue de l'autorité de la chose jugée (arrêt Hochtief Solutions, point 56, ainsi que arrêt du 11 septembre 2019, Călin, C-676/17, EU:C:2019:700, point 28 et jurisprudence citée).

58 L'arrêt du 13 janvier 2004, Kühne & Heitz (C-453/00, EU:C:2004:17), évoqué par la juridiction de renvoi, ne saurait remettre en cause cette considération.

59 Certes, il ressort de cet arrêt que le principe de coopération loyale, consacré à l'article 4, paragraphe 3, TUE, impose à un organe administratif, saisi d'une demande en ce sens, de réexaminer une décision administrative définitive afin de tenir compte de l'interprétation de la disposition pertinente retenue entre-temps par la Cour lorsque, notamment, cet organe dispose, selon le droit national, du pouvoir de revenir sur cette décision (voir, en ce sens, arrêt du 13 janvier 2004, Kühne & Heitz, C-453/00, EU:C:2004:17, point 28).

60 Il est constant toutefois que cette considération ne concerne qu'un éventuel réexamen d'une décision définitive d'un organe administratif et non pas, comme en l'occurrence, d'une juridiction (arrêt Hochtief Solutions, point 59).

61 À cet égard, il ressort de la jurisprudence de la Cour que si les règles de procédure internes applicables comportent la possibilité, sous certaines conditions, pour le juge national, de revenir sur une décision revêtue de l'autorité de la chose jugée en vue de rendre la situation issue de cette décision compatible avec le droit national, cette possibilité doit, conformément aux principes d'équivalence et d'effectivité, prévaloir, si ces conditions sont réunies, afin que soit restaurée la conformité de cette situation avec la réglementation de l'Union (arrêt Hochtief Solutions, point 60, ainsi que arrêt du 11 septembre 2019, Călin, C-676/17, EU:C:2019:700, point 29 et jurisprudence citée).

62 En l'occurrence, il ressort des indications fournies par la juridiction de renvoi que, aux termes de l'article 260 du code de procédure civile, la révision d'un jugement définitif est ouverte lorsqu'une partie peut se prévaloir, notamment, d'une décision juridictionnelle définitive dont il n'a pas été tenu compte au cours de la procédure ayant abouti au jugement dont la révision est sollicitée et uniquement si cette partie n'a pas été en mesure, sans que cela résulte d'une faute de sa part, de faire valoir l'existence de cette décision au cours de ladite procédure (arrêt Hochtief Solutions, point 61).

63 Par ailleurs, il ressort du libellé de la neuvième question que le droit hongrois autorise la révision d'une décision revêtue de l'autorité de la chose jugée pour rétablir la constitutionnalité d'une situation en raison d'une nouvelle décision de l'Alkotmánybíróság (Cour constitutionnelle) (arrêt Hochtief Solutions, point 62).

64 Il appartient, dès lors, à la juridiction de renvoi de vérifier si les règles procédurales hongroises comportent la possibilité de revenir sur un jugement revêtu de l'autorité de la chose jugée, en vue de

rendre la situation issue de ce jugement compatible avec une décision juridictionnelle définitive antérieure, dont la juridiction qui a rendu ce jugement ainsi que les parties à l'affaire ayant donné lieu à celui-ci avaient déjà connaissance. Si tel était le cas, conformément à la jurisprudence de la Cour citée au point 61 de la présente ordonnance, cette possibilité devrait, conformément aux principes d'équivalence et d'effectivité, dans les mêmes conditions, prévaloir, pour rendre la situation compatible avec un arrêt antérieur de la Cour (voir, en ce sens, arrêt Hochtief Solutions, point 63).

65 C'est dans le même contexte qu'il y a lieu d'apprécier l'éventuelle pertinence de la circonstance qu'un tel arrêt antérieur de la Cour, en l'occurrence l'arrêt du 3 mars 2005, Fabricom (C-21/03 et C-34/03, EU:C:2005:127), n'est devenu disponible en langue hongroise qu'en cours d'instance, avant que la juridiction saisie en appel rende son jugement.

66 Cela étant, il convient, en tout état de cause, de rappeler qu'il est de jurisprudence constante que, en raison, notamment, de la circonstance qu'une violation des droits tirés du droit de l'Union par une décision juridictionnelle définitive ne peut normalement plus faire l'objet d'un redressement, les particuliers ne sauraient être privés de la possibilité d'engager la responsabilité de l'État afin d'obtenir par ce moyen une protection juridique de leurs droits (arrêt Hochtief Solutions, point 64).

67 Compte tenu de l'ensemble des considérations qui précèdent, il y a lieu de répondre aux troisième, quatrième, cinquième et neuvième questions que le droit de l'Union, notamment la directive 89/665 et la directive 92/13 ainsi que les principes d'équivalence et d'effectivité, doit être interprété en ce sens qu'il ne s'oppose pas à la réglementation d'un État membre qui n'autorise pas la révision d'un jugement, revêtu de l'autorité de la chose jugée, d'une juridiction dudit État membre, ayant statué sur un recours en annulation contre un acte d'un pouvoir adjudicateur sans aborder une question dont l'examen était envisagé dans un arrêt antérieur de la Cour prononcé en réponse à une demande de décision préjudicielle présentée dans le cadre de la procédure relative à ce recours en annulation ou dans un arrêt antérieur de la Cour prononcé en réponse à une demande de décision préjudicielle dans une autre affaire. Toutefois, si les règles de procédure internes applicables comportent la possibilité, pour le juge national, de revenir sur un jugement revêtu de l'autorité de la chose jugée en vue de rendre la situation issue de ce jugement compatible avec une décision juridictionnelle définitive nationale antérieure, dont la juridiction qui a rendu ledit jugement ainsi que les parties à l'affaire ayant donné lieu à celui-ci avaient déjà connaissance, cette possibilité doit, conformément aux principes d'équivalence et d'effectivité, dans les mêmes conditions, prévaloir, pour rendre la situation compatible avec le droit de l'Union, tel qu'interprété par un arrêt antérieur de la Cour.

Sur les dépens

68 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, la Cour (neuvième chambre) ordonne :

1) La responsabilité d'un État membre pour des dommages causés par la décision d'une juridiction nationale statuant en dernier ressort qui viole une règle de droit de l'Union est régie par les conditions énoncées par la Cour, notamment au point 51 de l'arrêt du 30 septembre 2003, Köbler (C-224/01, EU:C:2003:513), sans pour autant exclure que la responsabilité de cet État puisse être engagée dans des conditions moins restrictives sur le fondement du droit national. Cette responsabilité n'est pas exclue du fait que cette décision a acquis l'autorité de la chose jugée. Dans le cadre de la mise en œuvre de cette responsabilité, il appartient à la juridiction nationale saisie de la demande en réparation d'apprécier, en tenant compte de tous les éléments qui caractérisent la situation en cause, si la juridiction nationale statuant en dernier ressort a commis une violation suffisamment caractérisée du droit de l'Union en méconnaissant de manière manifeste le droit de l'Union applicable, y compris la jurisprudence de la Cour pertinente. En revanche, le droit de l'Union s'oppose à une règle de droit national qui, dans un tel cas, exclut de manière générale des dommages susceptibles de faire l'objet d'une réparation les frais occasionnés à une partie par la décision préjudiciable de la juridiction nationale.

2) **Le droit de l'Union, notamment la directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux, telle que modifiée par la directive 2007/66/CE du Parlement européen et du Conseil, du 11 décembre 2007, et la directive 92/13/CEE du Conseil, du 25 février 1992, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des règles communautaires sur les procédures de passation des marchés des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications, telle que modifiée par la directive 2007/66, ainsi que les principes d'équivalence et d'effectivité, doit être interprété en ce sens qu'il ne s'oppose pas à la réglementation d'un État membre qui n'autorise pas la révision d'un jugement, revêtu de l'autorité de la chose jugée, d'une juridiction dudit État membre, ayant statué sur un recours en annulation contre un acte d'un pouvoir adjudicateur sans aborder une question dont l'examen était envisagé dans un arrêt antérieur de la Cour prononcé en réponse à une demande de décision préjudicielle présentée dans le cadre de la procédure relative à ce recours en annulation ou dans un arrêt antérieur de la Cour prononcé en réponse à une demande de décision préjudicielle dans une autre affaire. Toutefois, si les règles de procédure internes applicables comportent la possibilité, pour le juge national, de revenir sur un jugement revêtu de l'autorité de la chose jugée en vue de rendre la situation issue de ce jugement compatible avec une décision juridictionnelle définitive nationale antérieure, dont la juridiction qui a rendu ledit jugement ainsi que les parties à l'affaire ayant donné lieu à celui-ci avaient déjà connaissance, cette possibilité doit, conformément aux principes d'équivalence et d'effectivité, dans les mêmes conditions, prévaloir, pour rendre la situation compatible avec le droit de l'Union, tel qu'interprété par un arrêt antérieur de la Cour.**

Signatures

---

* Langue de procédure : le hongrois.

EU:C:2019:675

JUDGMENT OF THE COURT (Tenth Chamber)

5 September 2019 (*)

(Reference for a preliminary ruling — Review procedures on the award of public supply and public works contracts — Directive 89/665/EEC — Action for annulment of the decision awarding a public contract by a tenderer whose bid was unsuccessful — Counterclaim brought by the successful tenderer — Admissibility of the main action in the event that the counterclaim is well founded)

In Case C-333/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 14 February 2018, received at the Court on 23 May 2018, in the proceedings

Lombardi Srl

v

Comune di Auletta,

Delta Lavori SpA,

Msm Ingegneria Srl,

intervening party:

Robertazzi Costruzioni Srl,

THE COURT (Tenth Chamber),

composed of C. Lycourgos, President of the Chamber, E. Juhász (Rapporteur) and M. Ilešič, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– Lombardi Srl, by A. Brancaccio and A. La Gloria, avvocati,

– Delta Lavori SpA, by G.M. Di Paolo and P. Piselli, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by D. Del Gaizo, avvocato dello Stato,

– the European Commission, by G. Gattinara and P. Ondrůšek and by L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the third subparagraph of Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 89/665’).

2 The request has been made in proceedings between Lombardi Srl, on the one hand, and the Commune di Auletta (Municipality of Auletta, Italy), Delta Lavori SpA and Msm Ingegneria, on the other, concerning the award of a public contract by the Municipality of Auletta to design and carry out hydrogeological works.

Legal context

European Union law

3 Article 1 of Directive 89/665, entitled ‘Scope and availability of review procedures’, provides:

‘1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [(OJ 2004 L 134, p. 114)], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…’

Italian law

4 Article 112 of the codice di procedura civile (Code of Civil Procedure) provides:

‘The court must address the application in its entirety, but may not exceed the limits thereof; and may not rule of its own motion on counterclaims that may only be raised by the parties.’

5 Under the terms of Article 2697 of the codice civile (Civil Code):

‘The party seeking to enforce a right in the courts must prove the facts on which that claim is founded. The party alleging that those facts are immaterial or that the right has altered or been extinguished must prove the facts on which that plea is founded.’

6 Article 2909 of the codice civile (Civil Code) is drafted as follows:

‘Findings made in judgments which have acquired the force of *res judicata* shall be binding in all respects on the parties, their lawful successors and assignees.’

The dispute in the main proceedings and the question referred for a preliminary ruling

7 In a notice published on 29 June 2015, the Commune di Auletta (Municipality of Auletta) issued an open call for tenders with a view to awarding a contract for the design and execution of hydrogeological improvements to the historical centre of that municipality. According to the procurement documents, the total amount of that contract was EUR 6 927 970.95 and the selection process was to be based on the most economically advantageous bid.

8 Lombardi, placed third in the final ranking, brought proceedings before the Tribunale amministrativo regionale per la Campania (Regional Administrative Court, Campania, Italy) disputing, first, the admission to the tendering procedure of the successful tenderer, Delta Lavori, on the ground that the designer indicated by that firm, Msm Ingegneria, did not possess the characteristics required by the tender specifications, and, second, the tenderer in second place, Robertazzi Costruzioni Srl — Giglio Costruzioni Srl, a temporary association of undertakings.

9 Delta Lavori requested that the action be dismissed and filed a counterclaim contending that Lombardi should have been excluded from the public procurement procedure (the '"excluding" counterclaim'), on the grounds that in the course of the procedure, the latter had ceased to satisfy the eligibility criteria laid down in the call for tender.

10 The remaining tenderers ranked lower than Lombardi did not intervene in the dispute.

11 The Tribunale amministrativo regionale per la Campania (Regional Administrative Court, Campania) gave priority to examining Delta Lavori's counterclaim, and granted that claim, after declaring the public procurement procedure in the main proceedings invalid due to the fact that Lombardi had not been excluded. On that basis, that court dismissed Lombardi's claim as being inadmissible on the ground of its lack of interest in bringing proceedings.

12 Lombardi brought an appeal before the Consiglio di Stato (Council of State, Italy), alleging, inter alia, infringement of the principles established by the Court in the judgment of 5 April 2016, *PFE*, (C-689/13, EU:C:2016:199). It argued that irrespective of the court's ruling on the counterclaim, the substance of the main action should have been examined in consideration of Lombardi's derived (*strumentale*) and indirect interest in having the failure to exclude the successful tenderer declared unlawful, since a decision to that effect could have led to the contracting authority cancelling the tendering procedure at issue in the main proceedings and issuing a new public procurement procedure.

13 The Fifth Chamber of the Consiglio di Stato (Council of State), having observed divergences in the case-law of that court regarding the implementation of the judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), decided to refer the following question to the plenary session of that court:

'In an action for review against measures in an open public procurement procedure, is the court required to examine the main action and the successful tenderer's counterclaim to exclude the applicant, even if other candidates, whose tenders have not been challenged, took part in the procurement process and the court finds that only the contested tenders are marred by the irregularities relied on in support of the action?'

14 The Plenary Session of the Consiglio di Stato (Council of State) noted that, under national case-law, if only two tenderers have responded to a call for tenders and each has brought an action seeking exclusion of the other, both the main action and the counterclaim have to be examined. Furthermore, it was clear to that court that where there are more than two tenderers, the same applies if the main action is founded on pleas which, if granted, would result in the entire procedure being repeated, whether those claims contest the eligibility of the successful tenderer and the other tenderers still in play in the procedure, or the validity of the selection procedure itself.

15 However, doubts remain where, as in the present case, the main action is not founded on pleas which, if granted, would result in the entire procedure being repeated.

16 There is conflicting national case-law on that point. One branch of case-law interprets the judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199) as requiring, under those circumstances, examination of

the main action even after the counterclaim has been granted, regardless of how many undertakings are party to the proceedings or the irregularities raised as pleas in the main action. The referring court observes, however, that that branch of case-law fails to take account of the judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988), in which the Court of Justice held that Directive 89/665 does not preclude a tenderer who has been excluded from a public procurement procedure by a decision of the contracting authority which has become final being refused access to a review of the decision awarding the public contract concerned. The referring court adds that that line of case-law fails to take account of the fact that the review and cancellation of the public procurement procedure is entirely optional, with the result that the main applicant does not have a vested legal interest in the case.

17 Under the other branch of case-law, the main action for review must be examined solely where the merits of the claim would confer a real advantage on the applicant, meaning that the bids by tenderers not party to the proceedings were marred by the same illegality as that underpinning the decision allowing the main action for review. However, according to the referring court, that interpretation has been criticised as being at variance with the judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199) and overlooking the fact that, even if, upon examination of the counterclaim and the main action, it were found that all of the bids, including those submitted by tenderers not party to the proceedings, contain defects analogous to those marring the bids examined by the court, the fact remains that the contracting authority would merely have the option, but not the obligation, to recommence the tendering procedure.

18 In the opinion of the Plenary Session of the Consiglio di Stato (Council of State), for reasons of consistency with national procedural law and the principle of procedural autonomy based on the initiative of the parties, the applicant's legal interest should be assessed in concrete terms by the court hearing the case, not by reference to purely theoretical grounds. From that perspective, Member States should be allowed to determine the methods for demonstrating whether the party has a vested interest in the case, whilst safeguarding the rights of defence of the tenderers still in play in the public procurement procedure, but not joined to the proceedings, and observing the principles in relation to the burden of proof.

19 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Can the third paragraph of Article 1(1) and Article 1(3) of Directive [89/665] be interpreted as allowing, where several undertakings have participated in the tendering procedure and have not been joined to the legal proceedings (and in any event no objection has been lodged in respect of the tenders submitted by some of them), it to be left to the court concerned, by virtue of the procedural autonomy accorded to the Member States, to assess whether the interest claimed in the main action by the candidate against whom an "excluding" counterclaim, considered to be well founded, has been brought, is a vested interest, using the procedural instruments available to it under the national legal order and thus ensuring that the protection of that subjective position is in line with the consolidated national principles: (i) that the court must address all the parties' claims but can grant only the relief sought by them (Article 112 of the Code of Civil Procedure); (ii) relating to proof of the interest alleged (Article 2697 of the Civil Code); and (iii) that a judgment having the force of *res judicata* has effect only as between the parties to the proceedings and cannot concern the position of persons not involved in the dispute (Article 2909 of the Civil Code)?'

Consideration of the question referred

20 By its question, the referring court seeks to ascertain, in essence, whether the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 must be interpreted as meaning that a main action for review brought by a tenderer with an interest in obtaining a particular contract who has been or could be adversely affected by an alleged infringement of EU public procurement law or rules transposing that law, seeking the exclusion of another tenderer, can be declared inadmissible under national jurisprudential procedural rules or practices on the treatment of actions brought by the parties, seeking exclusion of one another (the 'reciprocal "excluding" actions'), irrespective of the number of tenderers

having participated in the procurement procedure or the number of those having brought actions for review.

21 As a preliminary point, it should be observed that, as apparent from the second recital of Directive 89/665, that directive is intended to strengthen the existing mechanisms, at both national and EU levels, to ensure the effective application of the directives relating to public procurement, in particular at a stage when infringements can still be corrected (judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 30).

22 It follows from the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 that in order for the review of decisions taken by contracting authorities to be regarded as effective, they must be available at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

23 Accordingly, where, following a public procurement procedure, two tenderers bring actions, each seeking the exclusion of the other, each of those tenderers will have an interest in obtaining a particular contract, within the meaning of the provisions referred to in the preceding paragraph. On the one hand, the exclusion of one tenderer may lead to the other being awarded the contract directly in the same procedure. On the other, if all tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 27).

24 It follows that the counterclaim brought by the successful tenderer cannot bring about the dismissal of an action for review brought by an unsuccessful tenderer where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings, given that, in such a situation, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid (judgments of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33, and of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 24).

25 The principle established in the judgments referred to in the preceding paragraph that the interests pursued in actions by tenderers, in the context of reciprocal ‘excluding’ actions, are to be regarded as equivalent in principle, means, for the courts hearing those proceedings, to refrain from declaring inadmissible the main action seeking exclusion under national procedural rules providing for the counterclaim by the other tenderer to be examined first.

26 That principle also applies when, as is the case in the main proceedings, other tenderers have submitted bids in the context of the procurement process and when the reciprocal ‘excluding’ actions by parties, do not relate to bids ranked lower than those that are the subject of the ‘excluding’ actions.

27 It must be recognised that the tenderer ranked in third place, as in the present case, who brought the main action, has a legitimate interest in the exclusion of the bids submitted by the successful tenderer and the second-placed tenderer, for even if its bid were declared invalid, it cannot be excluded that the contracting authority would find that it could not select another valid bid, and would therefore organise a new procedure.

28 In particular, if the action by the unsuccessful tenderer were held to be well founded, the contracting authority could decide to cancel the procurement procedure and open a new one on the ground that the remaining valid bids do not sufficiently meet the contracting authority’s expectations.

29 Under those circumstances, the admissibility of the main action cannot, without depriving Directive 89/665 of its effectiveness, be contingent on a prior finding that all of the bids ranked lower than that of the tenderer are invalid. That admissibility cannot, moreover, be made subject to the condition that the tenderer adduces evidence that the contracting authority will have to restart the public procurement procedure. The mere existence of such a possibility must be regarded as being sufficient in that respect.

30 It must be added that the fact that other bidders ranked lower than the applicant in the main action were not party to the main proceedings has no bearing on that interpretation. As the Court has

previously held, the number of participants in the public procurement procedure concerned, as well as the number of participants who have instigated actions for review and the differing legal grounds relied on by those participants are irrelevant to the question of the applicability of the principle established by the case-law referred to in paragraph 25 above (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 29).

31 The judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988), cited by the referring court, is not incompatible with such an interpretation. Although it is true that in paragraphs 13 to 16, 31 and 36 of that judgment, the Court held that the tenderer whose bid had been excluded by the contracting authority from a public procurement procedure could be refused access to a review of the decision awarding the public contract, in the case giving rise to that judgment, the decision to exclude that tenderer had been confirmed by a decision that had acquired the force of *res judicata* before the court hearing the review of the contract award decision gave its decision, so that that tenderer had to be regarded as definitively excluded from the public procurement procedure at issue (see, to that effect, judgment of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraph 57).

32 In the main proceedings, none of the tenderers who have brought an action to have the other party excluded have been definitively excluded from the procurement process. Therefore, that judgment in no way undermines the legal principle referred to in the preceding point.

33 Finally, as regards the principle of procedural autonomy of the Member States, it is sufficient to note that that principle may not, in any case, serve to justify provisions of domestic law that render virtually impossible or excessively difficult the exercise of rights conferred by the EU legal order (see, to that effect, judgment of 11 April 2019, *PORR Építési Kft.*, C-691/17, EU:C:2019:327, paragraph 39 and the case-law cited). For the reasons set out in the paragraphs above, it follows from the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665, as interpreted by the Court, that a tenderer who has brought an action for review such as that at issue in the main proceedings may not, on the basis of national procedural rules or practices, such as those described by the referring court, be deprived of its right to an examination of the substance of his claim.

34 In the light of the foregoing, the answer to the question referred is that the third subparagraph of Article 1(1) and (3) of Directive 89/665 must be interpreted as precluding a main action for review brought by a tenderer with an interest in obtaining a particular contract, who has been or could be adversely affected by an alleged infringement of EU public procurement law or rules transposing that law, and seeking the exclusion of another tenderer, from being declared inadmissible in application of national jurisprudential procedural rules or which concern the treatment of reciprocal ‘excluding’ actions brought by the parties, irrespective of the number of tenderers having participated in the procurement procedure or the number of those having brought actions for review.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

The third subparagraph of Article 1(1) and (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted as precluding a main action for review brought by a tenderer with an interest in obtaining a particular contract who has been or could be adversely affected by an alleged breach of EU public procurement law or rules transposing that law, and seeking the exclusion of another tenderer, from being declared inadmissible in application of national jurisprudential procedural rules or which concern the treatment of reciprocal ‘excluding’ actions brought by the parties, irrespective of the number of

tenderers having participated in the procurement procedure or the number of those having brought actions for review.

[Signatures]

---

* Language of the case: Italian.

EU:C:2019:350

JUDGMENT OF THE COURT (Ninth Chamber)

2 May 2019 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Labour costs — Automatic exclusion of tenderer where those costs were not listed separately in the tender — Principle of proportionality)

In Case C-309/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 20 March 2018, received at the Court on 7 May 2018, in the proceedings

Lavorgna Srl

v

Comune di Montelanico,

Comune di Supino,

Comune di Sgurgola,

Comune di Trivigliano,

intervener:

Gea Srl,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, S. Rodin (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Gea Srl, by E. Potena, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by M. Santoro, avvocato dello Stato,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), and the principles of EU law on public procurement.

2 The request has been made in proceedings between, of the one part, Lavorgna Srl and, of the other, the Comune di Montelanico (municipality of Montelanico, Italy), the Comune di Supino (municipality of Supino, Italy), the Comune di Sgurgola (municipality of Sgurgola, Italy) and the Comune di Trivigliano (municipality of Trivigliano, Italy), concerning the award of a public contract to a company that failed to list its labour costs separately in its financial tender.

Legal context

EU law

3 Recitals 40 and 98 of Directive 2014/24 are worded as follows:

‘(40) Control of the observance of the … labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders. …

…

(98) [The] requirements concerning the basic working conditions regulated in Directive 96/71/EC [of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive.’

4 Article 18 of Directive 2014/24 provides:

‘1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.’

5 According to Article 56(3) of that directive:

‘Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.’

Italian law

6 Article 83(9) of decreto legislativo no. 50 — Codice dei contratti pubblici (Legislative Decree No 50 establishing the public procurement code) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016), as amended by decreto legislativo no. 56 (Legislative Decree No 56) of 19 April 2017

(ordinary supplement to GURI No 103 of 5 May 2017), ('the Code of Public Contracts') is worded as follows:

'Shortcomings in any formal element of the application may be regularised using the *soccorso istruttorio* procedure [a procedure whereby a tenderer is permitted to rectify shortcomings in its tendering documentation] referred to in this paragraph. In particular, if the information and the European Single Procurement Document referred to in Article 85 are absent or incomplete, or where there is any other material irregularity affecting that information or those declarations, with the exception of defects relating to the technical and financial tender, the contracting authority shall give the tenderer a period, not exceeding 10 days, in which to submit, supplement or regularise the required declarations, and will indicate what they should contain and who is required to produce them …'

7 According to Article 95(10) of the Code of Public Contracts:

'In their financial tender operators must list their labour costs and the amount of business charges allocated to complying with their health and safety at work obligations, excluding supplies not requiring siting operations, intellectual services and the contracts referred to in Article 36(2)(a). In relation to labour costs, contracting authorities shall, before awarding the contract, verify that Article 97(5)(d) has been complied with.'

The dispute in the main proceedings and the question referred for a preliminary ruling

8 By a notice of 29 September 2017, the municipality of Montelanico published an open tender procedure with a contract value exceeding the threshold in Article 4 of Directive 2014/24. That notice did not expressly refer to the obligation on operators, under Article 95(10) of the Code of Public Contracts, to list labour costs in their financial tenders.

9 Six tenderers, which included Gea Srl and Lavorgna, submitted tenders.

10 After expiry of the deadline for submitting tenders, the awards committee, using the *soccorso istruttorio* procedure under Article 83(9) of the Code of Public Contracts, invited a number of the tenderers, including Gea, to state their labour costs.

11 By a decision of 22 December 2017, the municipality of Montelanico awarded the public contract to Gea.

12 Lavorgna, which was ranked second on conclusion of the selection procedure, brought proceedings before the referring court seeking, in particular, annulment of that decision, arguing that Gea ought to have been excluded from the tendering procedure because it had failed to list the labour costs in its tender, and ought not to have been given the opportunity to avail itself of the *soccorso istruttorio* procedure.

13 The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) observes that, in its judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404), and its order of 10 November 2016, *Edra Costruzioni and Edilfac* (C-140/16, not published, EU:C:2016:868), the Court of Justice ruled on whether participants may be excluded from a public procurement procedure for failing to specify the costs relating to safety and security at work and whether such an omission can be regularised subsequently. On that occasion, the Court stated that, in a situation where a condition for participating in a procurement procedure, on pain of the tenderer being excluded, is not expressly laid down in the contract documentation and that condition can be identified only by a judicial interpretation of national law, the contracting authority may grant the excluded tenderer a sufficient period in order to regularise its situation.

14 The referring court states that when the national legislature adopted the Code of Public Contracts in order to transpose Directive 2014/24 into the Italian legal system, that legislature expressly imposed an obligation on tenderers to list their labour costs in the financial tender, and at the same time ruled out the possibility that the contracting authority could use the *soccorso istruttorio* procedure to invite tenderers who have not satisfied that obligation to regularise their situation.

15 The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) entertains doubts as to whether the national legislation at issue in the main proceedings is compatible with the general principles of protection of legitimate expectations, legal certainty and proportionality, in particular where, as in the case before it, the financial tender, which does not contain a statement of labour costs, was drawn up by the undertaking participating in the tender procedure in conformity with the documentation devised for that purpose by the contracting authority, and where the substantive compliance with the rules on labour costs is not in doubt.

16 The referring court notes that applying that national legislation could prove to be discriminatory against undertakings established in other Member States wishing to participate in a tendering procedure published by an Italian authority, because those undertakings could not rely on the accuracy of the tender application form provided by the contracting authority.

17 In those circumstances the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Do the [EU] principles of the protection of legitimate expectations and legal certainty, together with the principles of the free movement of goods, the freedom of establishment and the freedom to provide services, laid down in the [FEU Treaty], as well as the principles deriving therefrom, such as equality of treatment, non-discrimination, mutual recognition, proportionality and transparency, referred to in Directive [2014/24], preclude the application of national legislation, such as the Italian legislation founded on the combined provisions of [Article 95(10) and Article 83(9) of the Code of Public Contracts], according to which the failure to list the labour costs separately in the financial tender in a procedure for the award of public services inevitably results in the exclusion of the tendering undertaking concerned without the possibility of supplementing or amending its tendering documentation [‘*soccorso istruttorio*’], even where the obligation to list those costs separately was not set out in the tender documents, and even though, in substantive terms, the tender in question actually took into account the minimum labour costs, in accordance, moreover, with a declaration for that purpose made by the tenderer?’

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether the principles of legal certainty, equal treatment and transparency, to which Directive 2014/24 refers, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, according to which failure to list the labour costs separately, in a financial tender submitted in a procedure for the award of public services, results in that tender being excluded without the possibility of supplementing or amending the tendering documentation, even where the obligation to list those costs separately was not set out in the tender documents.

19 In that regard, it is settled case-law of the Court that, first, the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all tenderers must be subject to the same conditions. Secondly, the obligation of transparency, which is its corollary, is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36 and the case-law cited).

20 In the light of those considerations, the Court has held that the principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator’s non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those

documents and from the incorporation of provisions into those documents by the national authorities or administrative courts (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 51; see, to that effect, order of 10 November 2016, *Spinosa Costruzioni Generali and Melfi*, C-162/16, not published, EU:C:2016:870, paragraph 32).

21 By contrast, those same principles do not, as a rule, preclude an economic operator from being excluded from a procedure for the award of a public contract because it has failed to comply with an obligation that is expressly imposed — on pain of the operator's being excluded — by the documents relating to that procedure or provisions of national law in force.

22 The foregoing applies all the more since, according to the settled case-law of the Court, where obligations were clearly imposed in the documents relating to the public procurement procedure — on pain of the operator's being excluded — the contracting authority cannot accept any rectification whatsoever of failures to comply with those obligations (see, by analogy, judgments of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraphs 46 and 48; of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 49; and of 10 November 2016, *Ciclat*, C-199/15, EU:C:2016:853, paragraph 30).

23 It should be added in that respect that under Article 56(3) of Directive 2014/24 Member States may restrict the situations in which the contracting authorities can request the economic operators concerned to submit, supplement, clarify or complete the supposedly incomplete, incorrect or missing information or documentation within an appropriate time limit.

24 Lastly, in accordance with the principle of proportionality, which is a general principle of EU law, since the purpose of national legislation relating to public procurement procedures is to safeguard the equal treatment of tenderers, such legislation must not go beyond what is necessary to achieve the intended objective (see, to that effect, judgment of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 32 and the case-law cited).

25 In the present case, it is apparent from the information provided by the referring court that the obligation, on pain of an operator's being excluded, to list labour costs separately, is clearly apparent from reading Article 95(10) of the Code of Public Contracts in conjunction with Article 83(9) of that code, in force when the contract notice at issue in the main proceedings was published. On the basis of Article 56(3) of Directive 2014/24, the Italian legislature decided to exclude, in Article 83(9) of that code, use of the *soccorso istruttorio* procedure where, in particular, the missing information relates to labour costs.

26 Furthermore, although the referring court states that the contract notice at issue in the main proceedings did not expressly refer to the obligation on potential tenderers, under Article 95(10) of the Code of Public Contracts, to list their labour costs in the financial tender, it is nonetheless apparent from the information in the file available to the Court that the contract notice stated that 'the rules of the [Code of Public Contracts shall apply] to matters not expressly provided for in this notice and the tender documents and specifications'.

27 It follows that any reasonably informed tenderer exercising ordinary care was, as a rule, in a position to be aware of the relevant rules applicable to the tender procedure at issue in the main proceedings, including the obligation to list labour costs in the financial tender.

28 In those circumstances, the principles of equal treatment and transparency do not preclude national legislation, such as that at issue in the main proceedings, according to which the absence of a statement of labour costs causes the tenderer concerned to be excluded with no opportunity to use the *soccorso istruttorio* procedure, even where the contract notice did not expressly refer to the statutory obligation to provide that statement.

29 Nevertheless, it is apparent from Gea's written observations to the Court that it was not physically possible for the tenderers in the tender at issue in the main proceedings to list their labour costs separately on the tender application form that they were obliged to use. Moreover, the specifications for that tender procedure stated that tenderers could not submit any document that had not been specifically requested by the contracting authority.

30 It is for the referring court, which alone has jurisdiction to rule on the facts of the main proceedings and the documents relating to the contract notice at issue, to verify whether it was in fact physically impossible for the tenderers to list the labour costs in accordance with Article 95(10) of the Code of Public Contracts, and to assess whether, as a result, those documents gave rise to confusion in the minds of tenderers, even though they expressly referred to the clear provisions of that code.

31 Should the referring court conclude that this was in fact the case, it would then be necessary to add that, in such a situation, having regard to the principles of legal certainty, transparency and proportionality, the contracting authority may give such a tenderer the opportunity to regularise its position and comply with the obligations under the relevant national legislation within a period set by the contracting authority (see, to that effect, judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 51, and order of 10 November 2016, *Spinosa Costruzioni Generali and Melfi*, C-162/16, not published, EU:C:2016:870, paragraph 32).

32 In the light of all the foregoing, the answer to the question referred for a preliminary ruling is that the principles of legal certainty, equal treatment and transparency, as referred to in Directive 2014/24, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, according to which failure to list the labour costs separately, in a financial tender submitted in a procedure for the award of public services, results in that tender being excluded without the possibility of supplementing or amending the tendering documentation, even where the obligation to list those costs separately was not set out in the tender documents, in so far as that requirement and that possibility of exclusion are clearly provided for by the national legislation on public procurement expressly referred to in those tender documents. However, if the provisions of the tender procedure do not enable the tenderers to list those costs in their financial tenders, the principles of transparency and proportionality must be interpreted as not precluding tenderers from being allowed to regularise their position and to comply with the obligations under the relevant national legislation within a period set by the contracting authority.

Costs

33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules that:

The principles of legal certainty, equal treatment and transparency, as referred to in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, according to which failure to list the labour costs separately, in a financial tender submitted in a procedure for the award of public services, results in that tender being excluded without the possibility of supplementing or amending the tendering documentation, even where the obligation to list those costs separately was not set out in the tender documents, in so far as that requirement and that possibility of exclusion are clearly provided for by the national legislation on public procurement expressly referred to in those tender documents. However, if the provisions of the tender procedure do not enable the tenderers to list those costs in their financial tenders, the principles of transparency and proportionality must be interpreted as not precluding tenderers from being allowed to regularise their position and to comply with the obligations under the relevant national legislation within a period set by the contracting authority.

[Signatures]

* Language of the case: Italian.

JUDGMENT OF THE COURT (Fourth Chamber)

3 October 2019 (*)

Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Article 12(1) — Temporal application — Freedom of the Member States as to choice of how services are provided — Limits — Public contracts subject to so-called 'in house' awards — In-house transaction — Overlapping of a public contract and an in-house transaction)

In Case C-285/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), made by decision of 13 April 2018, received at the Court on 25 April 2018, in the proceedings brought by

Kauno miesto savivaldybė,

Kauno miesto savivaldybės administracija,

interveners:

UAB 'Irgita',

UAB 'Kauno švara',

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, K. Jürimäe, D. Šváby (Rapporteur), S. Rodin and N. Piçarra, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Kauno miesto savivaldybės administracija, initially by L. Ziferman, advocatė, M. Dobilas and A. Mikočiūnienė, advocato padėjėjai, and subsequently by K. Kačerauskas, V. Vaitkutė Pavan, advokatai, and A. Mikočiūnienė, advokato padėjėja,

– UAB 'Irgita', by D. Pakėnas, advokatas,

– UAB 'Kauno švara', by V. Masiulis, advokatas,

– the Lithuanian Government, by K. Dieninis, R. Butvydytė, J. Prasauskienė and R. Krasuckaitė, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by S.L. Kalėda, P. Ondrůšek and L. Haasbeek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 May 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) and Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114); Articles 1, 12 and 18 of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65); Articles 18, 49, 56 and 106 TFEU, and Article 36 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings brought by Kauno miesto savivaldybė (the Municipality of the City of Kaunas, Lithuania; 'the city of Kaunas) and the Kauno miesto savivaldybės administracija (Administration of the Municipality of the City of Kaunas; 'the contracting authority') concerning the conclusion, between UAB 'Kauno švara' and the contracting authority, of a contract for the supply of services.

Legal context

European Union law

3 Recitals 1, 2, 5, 7, 31 and 32 of Directive 2014/24 state:

'(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the [FEU Treaty], and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

(2) Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled "Europe 2020, a strategy for smart, sustainable and inclusive growth" … as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council [of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)] and Directive [2004/18] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

…

(5) It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. …

…

(7) It should finally be recalled that this Directive is without prejudice to the freedom of national, regional and local authorities to define, in conformity with Union law, services of general economic interest, their scope and the characteristics of the service to be provided, including any

conditions regarding the quality of the service, in order to pursue their public policy objectives. This Directive should also be without prejudice to the power of national, regional and local authorities to provide, commission and finance services of general economic interest in accordance with Article 14 TFEU and Protocol No 26 on Services of General Interest annexed to the [FEU Treaty] and to the [EU Treaty]. In addition, this Directive does not deal with the funding of services of general economic interest and does not apply to systems of aids granted by Member States, in particular in the social field, in accordance with [EU] rules on competition.

…

(31) There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of [the Court] is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

Such clarification should be guided by the principles set out in the relevant case-law of [the Court]. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.

(32) Public contracts awarded to controlled legal persons should not be subject to the application of the procedures provided for by this Directive if the contracting authority exercises a control over the legal person concerned which is similar to that which it exercises over its own departments, provided that the controlled legal person carries out more than 80% of its activities in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority, regardless of the beneficiary of the contract performance.

…’

4 Article 1(4) of that directive, that article being headed ‘Subject matter and scope’, provides:

‘This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with State aid rules, and which specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.’

5 Article 12(1) of that directive, that article relating to ‘Public contracts between entities within the public sector’, provides:

‘A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

…’

6 Article 18(1) of Directive 2014/24, that article being headed ‘Principles of procurement’, provides:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

7 By virtue of the first paragraph of Article 91 of Directive 2014/24, that directive repealed Directive 2004/18 with effect from 18 April 2016.

Lithuanian law

8 According to Article 10(5) of the Lietuvos Respublikos viešųjų pirkimų įstatymas (Law on Public Procurement of the Republic of Lithuania; ‘the Law on Public Procurement’), in the version in force from 1 January 2014 to 1 July 2017, an in-house transaction ‘[could] be entered into … only with the consent of the Public Procurement Authority’.

9 In the version that has been in force since 1 July 2017, Article 10 of the Law on Public Procurement provides:

‘1. The requirements of this Law shall not apply to in-house transactions concluded by a contracting authority with another contracting authority in the case where all the following conditions are satisfied:

(1) the contracting authority exercises control over the other contracting authority similar to that which it exercises over its own departments or structural divisions, exercising decisive influence over its strategic goals and significant decisions, including decisions on long-term investments, disposals, leases, securities and mortgages; acquisition or transfer of shareholdings in other economic entities; transfer of management of one branch of another entity. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority;

(2) income received from contracts concluded with the controlling contracting authority or with legal entities controlled by that contracting authority and intended to meet its/their needs or to perform its/their functions accounts for more than 80% of the average income received by the controlled contracting authority from sales contracts during the previous three financial years. If the controlled contracting authority has been active for less than three years, its results must be estimated on the basis of its business plan;

(3) there is no direct private capital participation in the controlled contracting authority.

2. An in-house transaction may be concluded only in an exceptional case, when the conditions set out in paragraph 1 of this article are satisfied and the continuity, good quality and availability of services cannot be ensured if they are purchased through public procurement procedures.

…

5. Public undertakings, public limited liability companies, and private limited liability companies in which State-owned shares confer more than half of the votes at the general meeting of shareholders may not conclude any in-house transactions.’

10 Article 4 of the Lietuvos Respublikos konkurencijos įstatymas (Law on Competition of the Republic of Lithuania) of 23 March 1999, Žin., 1999, No 30-856 ('the Law on Competition'), provides as follows:

'1. When carrying out the assigned tasks relating to the regulation of economic activities within the Republic of Lithuania, entities of public administration must ensure freedom of fair competition.

2. Entities of public administration shall be prohibited from adopting legal acts or other decisions which grant privileges to, or discriminate against, any individual economic entities or their groups and which give rise to, or may give rise to, differences in the conditions of competition for economic entities competing in a relevant market, except where the difference in the conditions of competition cannot be avoided when complying with the requirements of the laws of the Republic of Lithuania.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 On 7 February 2014 the contracting authority published notice of a contract for the supply of services relating to the maintenance and management of plantations, forests and parks in the city of Kaunas.

12 That contract, in three parts, was awarded in its entirety to Irgita and led, inter alia, to the signature, on 18 March 2014, of a contract to supply mowing and cutting services for a period of 3 years, that is, until 18 March 2017.

13 That contract made provision for the maximum quantity of services that could be sought from Irgita. However, the contracting authority gave no commitment to order all the services nor the entire quantity of services provided for in that contract. Further, the contracting authority was required to pay Irgita only for those services that were actually performed according to the tariffs laid down in that contract.

14 On 1 April 2016 the contracting authority requested the consent of the Viešųjų pirkimų tarnyba (the Public Procurement Authority, Lithuania) to the conclusion with Kauno švara of an in-house transaction concerning services that were essentially the same as those for which Irgita had been made responsible by the contract of 18 March 2014.

15 Kauno švara, which has legal personality, is controlled by the contracting authority, which own 100% of its shares. Further, in 2015 Kauno švara achieved 90.07% of its turnover from activities performed solely for the benefit of the contracting authority.

16 On 20 April 2016 the Public Procurement Authority consented to the conclusion of a contract between Kauno švara and the contracting authority for the supply of the services concerned, while imposing on the contracting authority the obligation to assess, before the conclusion of that contract, the possibility of obtaining those services by organising a public procurement procedure. In any event, the contracting authority was bound to comply with Article 4(2) of the Law on competition.

17 On 3 May 2016 the city of Kaunas decided to conclude a contract for the supply of mowing and cutting services with Kauno švara and set the tariffs for the services to be performed ('the contested decision').

18 On 19 May 2016 the contracting authority and Kauno švara concluded that contract ('the contested contract'). That contract, the duration of which was fixed at 5 years, provides, inter alia, that orders for services will depend on the needs of the contracting authority, that the services will be paid for according to the tariffs laid down in the contract and that the term of the contract may be extended.

19 On 20 May 2016 Irgita brought, before the Lithuanian court of first instance with jurisdiction, an action challenging the contested decision and the contested contract. In that action, Irgita claimed that, having regard to the contract of 18 March 2014 concluded between it and the contracting authority, the latter was not in a position to conclude the contested contract.

20 That action having been dismissed at first instance, Irgita's action was then upheld by the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania), which, by a decision of 4 October 2017, annulled the contested decision and declared the contested contract null and void.

21 That court stated that the right to conclude an in-house transaction, provided for in Article 10(5) of the Law on Public Procurement, in the version in force from 1 July 2014 to 1 July 2017, cannot be an exception to the prohibitions on undermining competition between economic operators, on granting privileges to one economic operator, and discriminating against others, as laid down in Article 4(2) of the Law on Competition. The contested contract, according to that court, was unlawful, on the grounds, in particular, that it entailed a reduction in the quantity of services ordered from Irgita and, by concluding an in-house transaction, with no objective need, the contracting authority had granted to the undertaking that it controlled privileges liable to distort the conditions of competition between economic operators in the market for the maintenance of wooded areas in the city of Kaunas.

22 In the appeal on a point of law brought before it by the city of Kaunas and the contracting authority, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) states, first, that the contested contract is clearly an in-house transaction and, second, that the main proceedings raise the general question of the relationship between in-house transactions and compliance with the principle of free competition between independent operators.

23 The referring court observes further that, from the end of 2011 until the middle of 2015, the case-law of the Lietuvos vyriausiasis administracinis teismas (Administrative Supreme Court of Lithuania) had been settled on the point that in-house transactions that satisfied the criteria laid down in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), were lawful. However, from the middle of 2015, taking into consideration two orders of the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania), the Lietuvos vyriausiasis administracinis teismas (Administrative Supreme Court of Lithuania) held that the lawfulness of in-house transactions was subject not only to satisfying the criteria laid down in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), but also to other assessment criteria deriving from, inter alia, the Law on Competition. Those criteria include the continuity, good quality and availability of the service and the effect of the envisaged in-house transaction, first, on equal treatment of other economic operators and, second, on whether those operators have an opportunity to compete in order to supply the services concerned.

24 The referring court considers that the concept of an ‘in-house transaction’ constitutes an autonomous concept of EU law in that, having regard to the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), it appears to stem from the general concept of ‘public contract’. Since the definition of that concept makes no reference to the law of the Member States, that concept falls within the scope of EU law, as is apparent from the judgment of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31).

25 Further, it is apparent from Article 12 of Directive 2014/24, read in the light of recitals 2, 31 and 32 of that directive, that the lawfulness of an in-house transaction for the purposes of that article depends exclusively on the conditions laid down in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), which, according to the referring court, rules out other factors being taken into consideration and suggests that Directive 2014/24 is carrying out a strict harmonisation of in-house transactions.

26 The referring court is conscious however that the Member States retain a degree of discretion. In that regard, in the wording of Article 1(4) of Directive 2014/24, that directive does not affect the freedom of Member States to define, in conformity with EU law, what they consider to be ‘services of general economic interest’, how those services should be organised and financed, in compliance with State aid rules, and what specific obligations they should be subject to. Equally, that directive does not affect the right of public authorities to decide whether and how they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26. Article 36 of the Charter also provides that the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the treaties, in order to promote the social and territorial cohesion of the Union.

27 In the opinion of the referring court, the Member States should be able to decide that the possibility of having recourse to an in-house transaction should be subject to compliance with requirements of clarity,

predictability and the protection of legitimate expectations in particular, provided that those requirements are clearly laid down in their legislation and do not emerge solely from the case-law.

28 Further, even in the event that the national courts might make provision for restrictions on entering into in-house transactions, the referring court doubts whether those restrictions would be well founded. According to the referring court, the reasoning of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) would amount to calling into question the right of the contracting authority to enter into an in-house transaction in accordance with the criteria laid down in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), since economic operators other than the controlled undertaking are capable of performing the services concerned.

29 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Given the circumstances in the case under consideration, does the in-house transaction come within the scope of application of Directive 2004/18 or of Directive 2014/24, when the procedures for the conclusion of the disputed in-house transaction, inter alia, the administrative procedures, were initiated at a time when Directive 2004/18 was still in force but the contract itself was concluded on 19 May 2016, when Directive 2004/18 was no longer in force?

(2) Assuming that the in-house transaction comes within the scope of application of Directive 2004/18:

(a) Must Article 1(2)(a) of the Directive (but not limited thereto), taking into account the judgments of the Court of Justice of [18 November 1999, *Teckal* (C-107/98, EU:C:1999:562); of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31); and of 6 April 2006, *ANAV* (C-410/04, EU:C:2006:237], and other cases, be understood and interpreted as meaning that the concept of an “in-house transaction” comes within the scope of EU law, and that the content and application of that concept are not affected by the national law of Member States, inter alia, by limitations on the conclusion of such transactions, for example, by the condition that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided?

(b) If the answer to the previous question is in the negative, that is to say, the concept of an in-house transaction comes, either partially or fully, within the scope of the law of the Member States, should the abovementioned provision of Directive 2004/18 be interpreted as meaning that Member States have a discretion to establish limitations or additional conditions for the conclusion of in-house transactions (in comparison with EU law and the case-law of the Court of Justice interpreting that law) but can implement that discretion only by means of specific and clear provisions of substantive law governing public procurement?

(3) On the assumption that the in-house transaction comes within the scope of application of Directive 2014/24:

(a) Must the provisions of Article 1(4) and Article 12 of the Directive and those of Article 36 of the Charter, either together or separately (but not limited thereto), taking into account the judgments of the Court [of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562); of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31); and of 6 April 2006, *ANAV* (C-410/04, EU:C:2006:237] and other cases, be understood and interpreted as meaning that the concept of an “in-house transaction” comes within the scope of EU law, and that the content and application of that notion are not affected by the national law of Member States, inter alia, by limitations on the conclusion of such transactions, for example, by the condition that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided;

(b) If the answer to the previous question is in the negative, that is to say, the concept of an in-house transaction, either partially or fully, comes within the scope of the law of the Member States, should the provisions of Article 12 of Directive 2014/24 be interpreted as meaning

that Member States have a discretion to establish limitations or additional conditions for the conclusion of in-house transactions (in comparison with EU law and the case-law of the Court of Justice interpreting that law) but can implement that discretion only by means of specific and clear provisions of substantive law governing public procurement?

(4) Irrespective of which directive covers the disputed in-house transaction, should the principles of equality and non-discrimination of public procurement suppliers and transparency (Article 2 of Directive 2004/18 and Article 18 of Directive 2014/24), the general prohibition of discrimination on grounds of nationality (Article 18 TFEU), the freedom of establishment (Article 49 TFEU), the freedom to provide services (Article 56 TFEU), the possibility of granting undertakings exclusive rights (Article 106 TFEU), and the case-law of the Court of Justice (judgments of 18 November 1999, *Teckal*, C-107/98, EU:C:1999:562; of 6 April 2006, *ANAV*, C-410/04, EU:C:2006:237; of 10 September 2009, *Sea*, C-573/07, EU:C:2009:532; of 8 December 2016, *Undis Servizi*, C-553/15, EU:C:2016:935] and others) be understood and interpreted as meaning that an in-house transaction being concluded by a contracting authority and by an entity legally separate from that contracting authority, where the contracting authority exercises control over that entity similar to that which it exercises over its own departments and the activity of that entity consists mainly of an activity carried out for the benefit of the contracting authority, is in itself lawful, inter alia, does not infringe the right of other economic operators to fair competition, does not discriminate against those other operators, and no privileges are conferred on the controlled entity which concluded the in-house transaction?'

Consideration of the questions referred

The first question

30 By its first question, the referring court seeks, in essence, to ascertain whether a situation, such as that at issue in the main proceedings, where a public contract has been awarded by a contracting authority to a legal person over which it exercises a control similar to the control it exercises over its own departments, as part of a procedure initiated when Directive 2004/18 was still in force, which led to the conclusion of a contract after the repeal of that directive, falls within the scope of Directive 2004/18 or within the scope of Directive 2014/24.

31 As is apparent from settled case-law, the directive applicable to a public contract is, as a rule, the one in force at the time when the contracting authority chooses the type of procedure to be followed and decides definitively whether a prior call for competition needs to be issued for the award of a public contract (see, inter alia, judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 31, and of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83).

32 Since Directive 2004/18 was, in accordance with the first paragraph of Article 91 of Directive 2014/24, repealed with effect from 18 April 2016, it is necessary to examine whether, on that date, the contracting authority had already adopted, in the main proceedings, the definitive decision to have recourse to an in-house transaction.

33 In this case, it is clear from the order for reference that the contracting authority made a request, on 1 April 2016, to the Public Procurement Authority to obtain consent to conclude the in-house transaction at issue in the main proceedings and that that consent was issued to it on 20 April 2016, namely after the repeal of Directive 2004/18.

34 Consequently, as stated by the Advocate General in point 34 of his Opinion, since the Public Procurement Authority issued its consent after the repeal of Directive 2004/18, the situation at issue in the main proceedings necessarily falls within the scope of Directive 2014/24.

35 Further, since a condition of that consent was that the contracting authority was required to assess the possibility of its obtaining the services at issue in the main proceedings by means of a normal public procurement procedure, the contracting authority could not have definitively resolved the question whether it was obliged to initiate a competition procedure prior to the award of the public contract at issue in the main proceedings on the date of repeal of Directive 2004/18, namely 18 April 2016.

36 In those circumstances, the answer to the first question is that a situation, such as that at issue in the main proceedings, where a public contract has been awarded by a contracting authority to a legal person over which it exercises a control similar to the control it exercises over its own departments, as part of a procedure initiated when Directive 2004/18 was still in force, which led to the conclusion of a contract after the date of repeal of that directive, namely 18 April 2016, falls within the scope of Directive 2014/24 where the contracting authority definitively resolved the question whether it was obliged to initiate a prior competition procedure for the award of a public contract after that date.

The second question

37 Having regard to the answer given to the first question, there is no need to answer the second question.

The third question, part (a)

38 First, it must be observed that part (a) of the third question refers, inter alia, to Article 1(4) of Directive 2014/24 and Article 36 of the Charter, provisions which concern services of general economic interest.

39 However, since the order for reference contains no explanation of why an interpretation of the concept of 'services of general economic interest' is relevant to the resolution of the dispute in the main proceedings, it fails to put the Court in a position to give a useful answer to part (a) of the third question, in so far as that question concerns Article 1(4) of Directive 2014/24 and Article 36 of the Charter.

40 It is necessary therefore to reformulate part (a) of the third question, and to hold that, by that question, the referring court seeks to ascertain whether Article 12(1) of Directive 2014/24 must be interpreted as precluding a rule of national law whereby a Member State imposes the requirement that the conclusion of in-house transaction should be subject, inter alia, to the condition that public procurement fails to ensure that the quality of the services performed, their availability or their continuity can be guaranteed.

41 It must be observed, first, that the purpose of Directive 2014/24, as stated in recital 2 thereof, is to coordinate national procurement procedures above a certain value.

42 That consideration can guide the Court in the interpretation of Article 12(1) of Directive 2014/24, according to which 'A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions [set out in Article 12(1)(a) to (c)] are fulfilled'.

43 The effect of that provision, which thus does no more than state the conditions which a contracting authority must observe when it wishes to conclude an in-house transaction, is solely to empower the Member States to exclude such a transaction from the scope of Directive 2014/24.

44 That provision cannot, consequently, deprive the Member States of the freedom to give preference to one means of providing services, performing work or obtaining supplies to the detriment of others. That freedom implies a choice which is at a stage prior to that of procurement and which cannot, therefore, fall within the scope of Directive 2014/24.

45 The freedom of the Member States as to the choice of means of providing services whereby the contracting authorities meet their own needs follows moreover from recital 5 of Directive 2014/24, which states that 'nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive', thereby reflecting the case-law of the Court prior to that directive.

46 Thus, just as Directive 2014/24 does not require the Member States to have recourse to a public procurement procedure, it cannot compel them to have recourse to an in-house transaction where the conditions laid down in Article 12(1) are satisfied.

47 Further, the freedom thus left to the Member States is more clearly distinguished in Article 2(1) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the

award of concession contracts (OJ 2014 L 94, p. 1), which states:

‘This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the performance of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.

Those authorities may choose to perform their public interest tasks with their own resources or in cooperation with other authorities or to confer them upon economic operators.’

48 The freedom of the Member States as to the choice of the management method that they judge to be most appropriate for the performance of works or the provision of services cannot however be unlimited. That freedom must, on the contrary, be exercised with due regard to the fundamental rules of the FEU Treaty, in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency (see, by analogy, judgments of 9 July 1987, *CEI and Bellini*, 27/86 to 29/86, EU:C:1987:355, paragraph 15; of 7 December 2000, *Telaustria and Telefonadress*, C-324/98, EU:C:2000:669, paragraph 60; and of 10 September 2009, *Sea*, C-573/07, EU:C:2009:532, paragraph 38).

49 Within those limits, it is open to a Member State to impose on a contracting authority conditions, not laid down in Article 12(1) of Directive 2014/24, if it is to conclude an in-house transaction, including conditions to guarantee the continuity, good quality and availability of the service.

50 In the light of the foregoing, the answer to part (a) of the third question is that Article 12(1) of Directive 2014/24 must be interpreted as not precluding a rule of national law whereby a Member State imposes a requirement that the conclusion of an in-house transaction should be subject, inter alia, to the condition that public procurement fails to ensure that the quality of the services performed, their availability or their continuity can be guaranteed, provided that the choice made in favour of one means of providing services in particular, made at a stage prior to that of public procurement, has due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

The third question, part (b)

51 By its third question, part (b), the referring court seeks, in essence, to ascertain whether Article 12(1) of Directive 2014/24, read in the light of the principle of transparency, must be interpreted as meaning that the conditions to which Member States subject the conclusion of in-house transactions must be made known by means of precise and clear rules of the substantive law governing public procurement.

52 As stated in paragraph 44 of the present judgment, Directive 2014/24 does not have the effect of depriving Member States of the freedom to give preference, at a stage prior to that of public procurement, to one means of providing services, performing work or obtaining supplies to the detriment of others.

53 It follows that, where a Member State introduces rules under which one such means of providing services, performing work or obtaining supplies is given preference over others, as has been done, in this case, with respect to the conditions subject to which Lithuanian law permits the conclusion of in-house transactions for the purposes of Article 12(1) of Directive 2014/24, the introduction of those rules cannot be covered by the transposition of that directive.

54 The fact remains, however, that where the Member States decide to proceed in that way, they continue to be subject, as stated in paragraph 48 of the present judgment, to the need to respect various principles, including the principle of transparency.

55 The principle of transparency requires, like the principle of legal certainty, that the conditions to which the Member States subject the conclusion of in-house transactions should be made known by means of

rules that are sufficiently accessible, precise and predictable in their application to avoid any risk of arbitrariness.

56 In the light of the foregoing, it is for the referring court to assess whether the changes in the interpretation of the provisions of the Law on Competition that have been effected by the higher courts of Lithuania as from the middle of 2015 have emerged with sufficient clarity and precision and whether those changes have been sufficiently publicised so that both the contracting authorities and the economic operators concerned might reasonably have been aware of them.

57 The answer therefore to part (b) of the third question is that Article 12(1) of Directive 2014/24, read in the light of the principle of transparency, must be interpreted as meaning that the conditions to which the Member States subject the conclusion of in-house transactions must be made known by means of precise and clear rules of the substantive law governing public procurement which must be sufficiently accessible, precise and predictable in their application to avoid any risk of arbitrariness, which it is, in this case, for the referring court to determine.

The fourth question

58 By its fourth question, the referring court seeks, in essence, to ascertain whether the conclusion of an in-house transaction which satisfies the conditions laid down in Article 12(1)(a) to (c) of Directive 2014/24 is, as such, compatible with EU law.

59 It follows from Article 12(1)(a) to (c) of Directive 2014/24 that a public contract awarded by a contracting authority to a legal person governed by private or public law does not fall within the scope of that directive where (i) the contracting authority exercises a control over that legal person which is similar to that which it exercises over its own departments, (ii) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by the latter and (iii) there is, as a rule, no direct private capital participation in that legal person.

60 However, that provision concerns solely the scope of Directive 2014/24 and cannot be construed as establishing the conditions governing whether a public contract is to be awarded in the form of an in-house transaction.

61 As follows, in essence, from paragraph 48 of the present judgment, the fact that an in-house transaction, within the meaning of Article 12(1) of Directive 2014/24, does not fall within the scope of that directive cannot relieve the Member States or the contracting authorities of the obligation to have due regard to, inter alia, the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

62 It must moreover be observed that recital 31 of that directive states, in relation to cooperation between entities belonging to the public sector, that it should be ensured that any cooperation of that kind, which is excluded from the scope of that directive, does not result in a distortion of competition in relation to private economic operators.

63 In this case, it is particularly the task of the referring court to assess whether, by concluding the in-house transaction at issue in the main proceedings, the subject matter of which overlaps with that of a public contract still in force and performed by Irgita, as the party to whom that contract was awarded, the contracting authority has not acted in breach of its contractual obligations, arising from that public contract, and of the principle of transparency; whether it had to be established that the contracting authority failed to define its requirements sufficiently clearly, in particular by not guaranteeing the provision of a minimum volume of services to the party to whom that contract was awarded, or, further, whether that transaction constitutes a substantial amendment of the general structure of the contract concluded with Irgita.

64 The answer therefore to the fourth question is that the conclusion of an in-house transaction which satisfies the conditions laid down in Article 12(1)(a) to (c) of Directive 2014/24 is not as such compatible with EU law.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **A situation, such as that at issue in the main proceedings, where a public contract has been awarded by a contracting authority to a legal person over which it exercises a control similar to the control it exercises over its own departments, as part of a procedure initiated when Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts was still in force and which led to the conclusion of a contract after the date of repeal of that directive, namely 18 April 2016, falls within the scope of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 where the contracting authority definitively resolved the question of whether it was obliged to initiate a prior competition procedure for the award of a public contract after that date.**

2. **Article 12(1) of Directive 2014/24 must be interpreted as not precluding a rule of national law whereby a Member State imposes a requirement that the conclusion of an in-house transaction should be subject, inter alia, to the condition that public procurement does not ensure that the quality of the services performed, their availability or their continuity can be guaranteed, provided that the choice made in favour of one means of providing services in particular, made at a stage prior to that of public procurement, has due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.**

3. **Article 12(1) of Directive 2014/24, read in the light of the principle of transparency, must be interpreted as meaning that the conditions to which the Member States subject the conclusion of in-house transactions must be made known by means of precise and clear rules of the substantive law governing public procurement, which must be sufficiently accessible, precise and predictable in their application to avoid any risk of arbitrariness, which it is, in this case, for the referring court to determine.**

4. **The conclusion of an in-house transaction which satisfies the conditions laid down in Article 12(1(a) to (c) of Directive 2014/24 is not as such compatible with EU law.**

[Signatures]

---

* Language of the case: Lithuanian.

OPINION OF ADVOCATE GENERAL

HOGAN

delivered on 7 May 2019 (1)

Case C-285/18

Kauno miesto savivaldybė

Kauno miesto savivaldybės administracija

joined parties:

UAB Irgita

UAB Kauno švara

(Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania))

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Scope ratione temporis — Directive 2014/24/EU — 'In-house transactions' — Additional conditions for an 'in-house transaction' under national law)

I. Introduction

1. This request for a preliminary ruling deals, in essence, with the question whether a Member State can impose additional requirements on a contracting authority for the conclusion of an 'in-house contract' (2) although this contract satisfies the criteria for an 'in-house transaction' under the case-law of the Court and, if applicable, Article 12 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. (3)

2. The referring court has also asked for clarification on the applicability *ratione temporis* of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (4) and of Directive 2014/24.

II. Legal framework

A. EU law

3. Recitals 1, 2, 4, 5 and 31 of Directive No 2014/24 state:

'(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition,

proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

(2) Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled "Europe 2020, a strategy for smart, sustainable and inclusive growth" …, as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. … There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

…

(4) The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC. The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. …

(5) It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. …

…

(31) There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.'

4. Article 1 of Directive No 2014/24, headed 'Subject matter and scope', provides, in paragraph 4:

'This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.'

5. Article 12 of Directive No 2014/24, headed 'Public contracts between entities within the public sector', provides, in paragraph 1:

'A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.'

6. The first paragraph of Article 91 of Directive 2014/24 provides:

'Directive 2004/18/EC is repealed with effect from 18 April 2016.'

B. Lithuanian law

1. Viešųjų pirkimų įstatymas (Law on Public Procurement) of 13 August 1996, No I 1491

7. Article 3 of the Law on Public Procurement of the Republic of Lithuania of 13 August 1996, No I-1491 ('the Law on Public Procurement'), provides as follows:

'1. The contracting authority shall ensure, in the course of performance of procurement procedures and the award of contracts, that there is compliance with the principles of equal rights, non-discrimination, mutual recognition, proportionality and transparency.

...'

8. Article 10(5) of the Law on Public Procurement (as applicable on 1 January 2016), provides as follows:

'The requirements of this Law shall not apply to procurement procedures where a contracting authority concludes a contract with an entity having separate legal personality, over which it exercises a control identical to that which it exercises over its own department or structural division and in which it is the sole member (or exercises the rights and obligations of the State or the municipality as the sole member) and where the controlled entity receives at least 80% of sales income in the last financial year (or in the period from the day of the establishment of the entity if the entity has carried out its activities for less than one financial year) from activities intended to meet the needs of the contracting authority or to perform the functions of the contracting authority. A procurement procedure in the manner specified in this paragraph may be commenced only upon receipt of the consent of the Viešųjų pirkimų tarnyba (Public Procurement Office). ...'

9. Article 10 of the Law on Public Procurement (as applicable on 1 July 2017) provides, inter alia, as follows:

'1. The requirements of this Law shall not apply to in-house transactions concluded by a contracting authority with another contracting authority in the case where all of the following conditions are present without exception:

(1) the contracting authority exercises control over the other contracting authority identical to that which it exercises over its own department or structural division, exercising decisive influence over its strategic goals and significant decisions ...;

(2) income received from contracts concluded with the controlling contracting authority or with legal entities controlled by that contracting authority and intended to meet its/their needs or to perform

its/their functions accounts for more than 80% of the average income received by the controlled contracting authority from sales contracts during the previous three financial years. ...;

(3) there is no direct private capital participation in the controlled contracting authority.

2. An in-house transaction may be concluded only in an exceptional case, when the conditions set out in paragraph 1 of this article are satisfied and the continuity, good quality and availability of services cannot be ensured if they are purchased through public procurement procedures.

…

5. Public undertakings, public limited liability companies, and private limited liability companies in which State-owned shares grant more than half of the votes at the general meeting of shareholders may not conclude any in-house transactions.'

2. Konkurencijos įstatymas (Law on Competition) of 23 March 1999, No VIII 1099

10. Article 4 of the Lietuvos Respublikos konkurencijos įstatymas (Law on Competition of the Republic of Lithuania) of 23 March 1999, No VIII-1099 ('the Law on Competition'), provides as follows:

'1. When carrying out the assigned tasks relating to the regulation of economic activities within the Republic of Lithuania, entities of public administration must ensure freedom of fair competition.

2. Entities of public administration shall be prohibited from adopting legal acts or other decisions which grant privileges to, or discriminate against, any individual economic entities or their groups and which give rise to, or may give rise to, differences in the conditions of competition for economic entities competing in a relevant market, except where the difference in the conditions of competition cannot be avoided when complying with the requirements of the laws of the Republic of Lithuania.'

III. Background facts and main proceedings

11. The request for a preliminary ruling has been made in appeal proceedings before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) brought by Kauno miesto savivaldybė (Municipality of the City of Kaunas) and Kauno miesto savivaldybės administracija (Administration of the Municipality of the City of Kaunas) against a judgment of the private law division of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania). The initial action was brought by UAB Irgita ('Irgita'), a limited liability company, against the Municipality of the City of Kaunas, the Administration of the Municipality of the City of Kaunas and UAB Kauno švara ('Kauno švara'), a limited liability company.

12. On 7 February 2014, the Administration of the Municipality of the City of Kaunas ('the contracting authority') launched a procurement procedure for services relating to the maintenance and management of plantations, forests and forest parks in the City of Kaunas.

13. On 18 March 2014, a contract for the provision of those services was concluded between the contracting authority and the successful bidder, Irgita. The contract's period of validity was three years. Payment was to be made on the basis of the services ordered and rendered. The contracting authority had no obligation to order all its relevant services or a specific minimum quantity of services from Irgita.

14. On 1 April 2016, the contracting authority requested the consent of the Viešųjų pirkimų tarnyba (Public Procurement Office) to conclude an 'in-house transaction' for services which were essentially similar to those provided under the existing contract between the contracting authority and Irgita. The request related to a possible contract with Kauno švara. The Municipality of the City of Kaunas was the sole owner of Kauno švara. In 2015, the year preceding the transaction, Kauno švara had received 90.07% of its income from activities performed for the benefit of the contracting authority.

15. On 20 April 2016, the Public Procurement Office gave its consent to the 'in-house transaction' described above. However, it stated, inter alia, that, prior to concluding the 'in-house transaction', the contracting authority should evaluate whether it was possible to procure the services in accordance with the

Law on Public Procurement with a view to the rational use of financial resources and in order to ensure competition between suppliers. It noted that, in any event, the decision of the contracting authority would have to comply with Article 4(2) of the Law on Competition.

16. On 3 May 2016, the Council of the Municipality of the City of Kaunas adopted a decision approving the conclusion of the 'in-house transaction' with Kauno švara referred to above ('the disputed Council decision').

17. Accordingly, on 19 May 2016, the contracting authority and Kauno švara concluded a contract for services ('the disputed contract').

18. On 20 May 2016, Irgita brought proceedings before the court of first instance challenging the disputed Council decision and the disputed contract, claiming that the contracting authority was not entitled to enter into an 'in-house transaction' for the relevant services as its contract with Irgita was still in force. Further, it claimed that the disputed contract was contrary to the Law on Public Procurement and the Law on Competition, distorted free and fair competition and conferred privileges on Kauno švara that discriminated against other providers.

19. By decision of 13 March 2017, the court at first instance dismissed Irgita's action. However, in its judgment of 4 October 2017, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) decided in favour of Irgita. Both courts agreed in their reasoning that the exercise of the right to conclude an 'in-house transaction' in accordance with Article 10(5) of the Law on Public Procurement must not infringe the mandatory requirement laid down in Article 4(2) of the Law on Competition that competition between economic operators must not be adversely affected. The courts differed in their assessment whether, in the circumstances, competition between suppliers had been adversely affected.

20. The Municipality of the City of Kaunas and the contracting authority lodged an appeal with the referring court, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), requesting a review of the judgment of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania).

21. The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) states that the disputed contract is clearly a transaction fulfilling the criteria for an 'in-house transaction' set out in EU law (5) and the case-law of the Court. This assessment is shared by all the parties to the dispute.

22. The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) explains that the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) has consistently held since 2011 that contracts satisfying the *Teckal* criteria were to be considered lawful. From mid-2015 onwards, on the basis of two orders of the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania), further criteria were taken into consideration, emanating from the Law on Competition, such as, for example, the continuity, the quality and accessibility of services as well as the effects on the equality of treatment of other economic operators and the possibility for them to compete for such services. The referring court points out that Article 4(2) of the Law on Competition, as applied by the courts, had in fact not changed since its original wording, which has remained the same since 23 March 1999, and that only the interpretation of the provision in the case-law had changed since 2015.

23. In this context, the referring court has doubts whether, taking into account the case-law of the Court of Justice, the criteria that have to be fulfilled for an 'in-house transaction' to be permissible are stipulated exhaustively by EU law or whether the Member States have a margin of discretion to establish additional rules regarding in-house transactions and, if such discretion exists, the manner in which it can be exercised.

IV. Request for a preliminary ruling and the procedure before the Court

24. In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Given the circumstances in the case under consideration, does the in-house transaction come within the scope of application of Directive 2004/18 or of Directive 2014/24, when the procedures for the conclusion of the disputed in-house transaction, inter alia, the administrative

procedures, were initiated at a time when Directive 2004/18 was still in force but the contract itself was concluded on 19 May 2016, when Directive 2004/18 was no longer in force?

(2) Assuming that the in-house transaction comes within the scope of application of Directive 2004/18:

(a) Must Article 1(2)(a) of the directive (but not limited thereto), taking into account the judgments of the Court of Justice in *Teckal* (C-107/98), *Jean Auroux and Others* (C-220/05), *ANAV* (C-410/04), and other cases, be understood and interpreted as meaning that the notion of an "in-house transaction" comes within the scope of EU law, and that the content and application of that notion are not affected by the national law of Member States, inter alia, by limitations on the conclusion of such transactions, for example, the condition that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided?

(b) If the answer to the previous question is in the negative, that is to say, the notion of an "in-house transaction" comes, either partially or fully, within the scope of the law of the Member States, should the abovementioned provision of Directive 2004/18 be interpreted as meaning that Member States have a discretion to establish limitations or additional conditions for the conclusion of in-house transactions (in comparison with EU law and the case-law of the Court of Justice interpreting that law) but can implement that discretion only by means of specific and clear positive legal provisions governing public procurement?

(3) On the assumption that the in-house transaction comes within the scope of application of Directive 2014/24:

(a) Must the provisions of Article 1(4) and Article 12 of the Directive and those of Article 36 of the Charter, either together or separately (but not limited thereto), taking into account the judgments of the Court of Justice in *Teckal* (C-107/98), *Jean Auroux and Others* (C-220/05), *ANAV* (C-410/04), and other cases, be understood and interpreted as meaning that the notion of an "in-house transaction" comes within the scope of EU law, and that the content and application of that notion are not affected by the national law of Member States, inter alia, by limitations on the conclusion of such transactions, for example, the condition that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided?

(b) If the answer to the previous question is in the negative, that is to say, the notion of an "in-house transaction", either partially or fully, comes within the scope of the law of the Member States, should the provisions of Article 12 of Directive 2014/24 be interpreted as meaning that Member States have a discretion to establish limitations or additional conditions for the conclusion of in-house transactions (in comparison with EU law and the case-law of the Court of Justice interpreting that law) but can implement that discretion only by means of specific and clear positive legal provisions governing public procurement?

(4) Irrespective of which directive covers the disputed in-house transaction, should the principles of the equality and non-discrimination of public procurement suppliers and transparency (Article 2 of Directive 2004/18 and Article 18 of Directive 2014/24), the general prohibition of discrimination on grounds of nationality (Article 18 TFEU), the freedom of establishment (Article 49 TFEU), the freedom to provide services (Article 56 TFEU), the possibility of granting undertakings exclusive rights (Article 106 TFEU), and the case-law of the Court of Justice (judgments in *Teckal, ANAV, Sea, Undis Servizi*, and in other cases) be understood and interpreted as meaning that an in-house transaction being concluded by a contracting authority and by an entity legally separate from that contracting authority, where the contracting authority exercises control over that entity similar to that which it exercises over its own departments and the activity of that entity consists mainly of an activity carried out for the benefit of the contracting authority, is in itself lawful, inter alia, does not infringe the right of other economic operators to fair

competition, does not discriminate against those other operators, and no privileges are conferred on the controlled entity which concluded the in-house transaction?’

25. Written observations were submitted by Irgita, the contracting authority, Kauno švara, the Estonian, Lithuanian and Polish Governments (in the case of the Polish Government, however, these submissions were limited to Question 4, which will not be dealt with here) and the European Commission.

V. Assessment

26. Without prejudice to any answer that the Court may give to Question 4, but, in line with the request by the Court, I propose to confine my observations to Question 1 and, depending on the answer to that question, Question 2 or 3 asked by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

A. Application ratione materiae of Directives 2004/18 and 2014/24

27. It should be noted that the application of Directives 2004/18 and 2014/24 to the disputed contract is subject to the condition that the estimated value of that contract reaches the thresholds laid down in Article 7(b) of Directive 2004/18 or Article 4(c) of Directive 2014/24 respectively.

28. According to the estimations of the referring court, the value of the transaction at issue is nearly EUR 490 000 and may be considerably higher. Thus, irrespective of which directive covers the disputed contract, the value of that contract surpasses the minimum threshold amounts laid down in either Article 7(b) of Directive 2004/18 or Article 4(c) of Directive 2014/24 required for them to apply.

B. Application ratione temporis of Directives 2004/18 and 2014/24

29. Since Directive 2014/24 has repealed Directive 2004/18 with effect from 18 April 2016, it is necessary to determine the relevant point in time that determines which directive is to apply.

30. According to the settled case-law of the Court, the relevant point in time for identifying the legislation applicable to a public contract is when the authority not only chooses the type of procedure to be followed but also decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. (6) If such a decision was taken before the date on which the period for transposition of the later directive, here Directive 2014/24, was reached, it would be plainly contrary to the principle of legal certainty to determine the law applicable to the case in the main proceedings by reference to the date of the award of the contract. (7)

31. Several events which took place up to and including the time when the contract between the contracting authority and Kauna švara was concluded may have qualified as the moment when the final decision on the type of procedure — and thus the decision on whether a call for competition was necessary — was taken. These include the date on which the request for consent to conclude the disputed contract was submitted to the Public Procurement Office for consent to an ‘in-house transaction’, the date of the Public Procurement Office’s decision, the date of the disputed Council decision and the date of the disputed contract. Only the submission of the request to the Public Procurement Office took place before the repeal of Directive 2004/18; the three latter events took place thereafter.

32. It is thus pertinent to consider whether the request for consent submitted to the Public Procurement Office already constituted a final decision on whether a public procurement procedure had to be initiated. Article 10(5) of the Law on Public Procurement applicable until 1 July 2017 indeed stipulated that ‘a procurement procedure in the manner specified in this paragraph may be commenced only upon receipt of the consent of the Viešųjų pirkimų tarnyba (Public Procurement Office)’. While it is for the referring court to interpret its national legislation, that court described the procedure to obtain the consent of the Public Procurement Office as an ‘administrative filter’. Accordingly, it does not appear that even the consent of the Public Procurement Office of 20 April 2016 compelled the contracting authority to enter into the disputed contract.

33. This view is corroborated by the Lithuanian Government in its observations. (8) The assessment that the Public Procurement Office’s decision of 20 April 2016 was not decisive is further supported by a

statement made by the Public Procurement Office in that assessment. The Public Procurement Office prompted the contracting authority to evaluate whether it was possible to procure the services in accordance with the Law on Public Procurement prior to concluding the disputed contract. It further clarified that, in any event, the decision of the contracting authority would have to comply with Article 4(2) of the Law on Competition. Such guidance presupposes that (i) the decision on the procedure was still open at that point in time, (ii) the contracting authority could refrain from concluding the disputed contract and (iii) according to the Public Procurement Office, if the conditions set out in Article 4(2) of the Law on Competition were not fulfilled, the contracting authority was obliged to refrain from doing so, despite consent from the Public Procurement Office having been granted.

34. As the Public Procurement Office reached its decision on 20 April 2016, a date after Directive 2004/18 was repealed, it follows that the applicable directive must be Directive 2014/24.

C. Whether the criteria for an 'in-house transaction' under EU law are exhaustive

35. As Directive 2014/24 is applicable, I propose to answer only Question 3.

36. Further, I propose to deal with Question 3(a) together with the first part of Question 3(b). The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) wishes to know whether Member States can limit the possibility for public authorities to enter into 'in-house transactions' by stipulating further criteria, such as the criterion in the present case, which provides that 'in-house transactions' can be concluded only, inter alia, if 'public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided'. This calls for an assessment whether the criteria for an 'in-house transaction' under EU law are exhaustive or whether Member States can supplement these criteria.

37. First, it is appropriate to define 'in-house transactions' and recall why they are treated differently from other contracts in the area of public procurement.

1. Meaning of the term 'in-house transaction'

38. Directive 2014/24 does not use the term 'in-house transaction' or 'in-house award', although, as will be seen later, Article 12(1) does, in fact, deal with those types of contracts. The terms 'in-house transaction', 'in-house contract', 'in-house operation', (9) 'in-house service' (10) and 'in-house award' (11) have, however, gradually come into use. (12) While, in some cases, the terms were used more loosely, (13) they are now generally used to describe contracts between a contracting authority and another public body (or a separate entity that is in some way linked to that contracting authority) that fulfil certain criteria. These criteria were initially established by the case-law of the Court and have meanwhile been enshrined in Article 12(1) of Directive 2014/24. (14)

39. First of all, when we are talking about 'in-house transactions', as the term is generally used, we are not dealing with cases in which a public authority simply carries out a task by using its own resources. While the activity is obviously carried out 'in-house' in those cases, there is no award, transaction or contract. These cases are generally outside the scope of public procurement law as they do not in fact constitute procurement at all. (15) Rather, for the concept of procurement to be relevant, the relationship between the contracting parties must be a contractual one.

40. For a transaction to be considered to be 'in-house', it must also fulfil certain criteria. Since the Court's landmark decision in *Teckal*, the basic criteria have been that (i) the contracting authority exercises over a separate legal person with which it enters into a contract a control which is similar to that which it exercises over its own departments and, at the same time, (ii) that separate legal person carries out the essential part of its activities with the controlling public authority or authorities which control it. (16) Contracts between entities that fulfil these criteria are generally referred to as 'in-house transactions'.

41. As mentioned above, the requirements for transactions to be considered in-house transactions and, thus, to be exempt from the public procurement regime are now set out in Article 12(1) of Directive 2014/24. Those requirements are that (i) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments, (ii) the controlled legal person exercises more than 80% of its activities in the performance of tasks for the controlling entity, and (iii) there is no direct private capital participation in the controlled entity (subject to some exceptions for certain private

capital participations that do not give control). The first two requirements are derived from the case-law of the Court since the judgment in *Teckal*. (17) Only the exact figure of 80% was added. The third criterion has been applied since the judgment in *Stadt Halle and RPL Lochau*. (18)

2. Reason for the exemption of in-house transactions from the public procurement regime

42. In-house transactions as described above are outside the scope of public procurement law because, as Advocate General Sánchez-Bordona stated: 'Under the in-house system, the contracting authority does not, from a functional point of view, contract with a separate body but, in effect, contracts with itself, given the nature of its connection with the formally separate body. Strictly speaking, there is no award of a contract, but simply an order or task, which the other "party" cannot refuse to undertake, whatever the name given to it. … Procurement procedures make sense only between two separate and autonomous bodies, since what those procedures seek to do is precisely to create between them the kind of bilateral legal relationship that is essential for concluding a contract for consideration on equal terms rather than those of dependence or subordination in a hierarchy. The term "in-house transaction" thus describes a contract that, due to its own particularities, is assimilated to a case in which a contracting authority uses its own resources, i.e., "in-house resources".' (19)

3. Degree of harmonisation

43. Whether the provisions of Article 12 of Directive 2014/24 are exhaustive depends on the degree of harmonisation of the area that the provision deals with. In the case of full harmonisation, it is not permissible for a Member State to introduce further measures in that area as this would amount, in essence, to undermining the harmonisation effected by the directive with regard to the issues that have been harmonised. (20) The question is whether Article 12(1) constitutes a complete harmonisation of the area of in-house transactions.

44. First, according to recital 4 of Directive 2014/24, it is not the directive's aim to harmonise the entire area of the disbursements of public funds, but only of those aimed at the acquisition of works, supplies or service for consideration by means of a public contract. While the disputed contract is a public contract, the situation of an in-house transaction is, according to the case-law, assimilated to cases in which the public authority acts using its own resources. (21) Thus, recital 4 cannot be considered as conclusive regarding the question whether the area of in-house transactions was meant to be fully harmonised.

45. While it is clear, given the purpose of the rules on public procurement in Directive 2014/24 and the inclusion of Article 12 in Section 3 thereof, headed 'Exclusions', that the exceptions contained in that directive may not be expanded, (22) so that Member States cannot apply them selectively or less strictly, (23) the purpose of that directive is not compromised if Member States are allowed to apply more stringent rules that further limit the right to enter into in-house transactions. These considerations, together with the fact that that directive does not contain a clear statement that full harmonisation is intended, constitute weighty arguments in favour of the right of Member States to provide for additional criteria for in-house transactions.

46. If Article 12(1) constituted full harmonisation, this would in fact mean that a contracting authority *must* enter into an in-house transaction (or carry out the service at issue by its own means) in cases in which the requirements of Article 12(1) can be fulfilled. In my opinion, this is not the case. I reach this conclusion for the following further reasons.

47. First, the wording of Article 12 of Directive 2014/24 does not seem to support this supposition. The wording of Article 12 is clear in that it states that a public contract that fulfils certain criteria is to fall outside of the scope of that directive. Accordingly, the application of that provision presupposes the existence of a contract. It does not purport to deal in general with situations in which an in-house transaction is possible. Thus, if a Member State decides, for whatever reason, not to allow public contracts in the form of an in-house transaction, that situation is not dealt with at all in the specific exception contained in Article 12(1).

48. Furthermore, Article 1(4) of Directive 2014/24 refers to the freedom of Member States to define, in conformity with EU law, not only what they consider to be services of general economic interest, but also how those services should be organised. (24) It also states that that directive does not affect the decision of public authorities whether, how and *to what extent* they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26. (25) The word 'freedom' makes it clear that Member States are also

free to provide for the application of public procurement procedures in cases in which EU law does not prohibit the use by a public authority of its own resources or indeed the conclusion of an in-house transaction. This is in line with the case-law of the Court.

49. It should also be observed that, as the Commission points out in its observations, the fact that a Member State decides to limit the possibilities for entering into in-house transactions and, thus, extends the area of application of the rules on public procurement is in line with the objectives of the public procurement directives. (26) The principle that public procurement is a means of ensuring the most efficient use of public funds, as stated in recital 2 of Directive 2014/24, also seems to have been at the centre of the Lithuanian legislative decision. The Lithuanian Government claims in its written observations that a market study of the Lietuvos Respublikos konkurencijos taryba (Competition Council of the Republic of Lithuania) in the area of public waste management came to the conclusion that the prices were highest in communities where services were carried out by companies controlled by those communities and that this had encouraged the Republic of Lithuania to give precedence to public procurement transactions over in-house transactions. (27) This is a policy decision by the Republic of Lithuania which it is, naturally, free to take.

50. Thus, in the current state of harmonisation provided for by Directive 2014/24, a Member State is not prevented from stipulating additional requirements limiting the opportunities for public authorities to enter into in-house transactions, despite the entry into that transaction being permissible under EU law.

51. It should be pointed out, however, that a Member State's freedom when implementing such additional requirements is naturally not unlimited. The settled case-law clearly provides that the fundamental rules of the TFEU generally apply to the economic activities of public bodies, even in cases which are outside the ambit of the directives on public procurement (28) provided that those public bodies do not carry them out themselves, including by means of in-house transactions. (29)

52. This principle is also contained in recital 1 of Directive 2014/24, which states as a general consideration that the award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the TFEU, and, in particular, the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. These rules are, of course, applicable to all transactions, regardless of their specific value. It is only once transactions surpass a certain value that the specific procurement procedures set out in Directive 2014/24 must be followed.

53. This means that the fundamental rules of the TFEU also apply to an exercise of a Member State's legislative power in the area of public bodies' economic activities in the context of public procurement.

54. The additional requirements stipulated by Lithuanian law to allow for in-house transactions — namely, that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided — do not give rise to any doubt that they might be contrary to any of the aforementioned principles.

D. Whether such additional requirements must be enshrined in positive law

55. Beyond the question whether such additional requirements can be stipulated as such, in the second part of Question 3(b) the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) specifically wishes to know whether these requirements can only be implemented by means of specific and clear positive provisions of the law on public procurement, rather than by case-law on the basis of provisions of competition law. The specific question posed by the referring court is whether the manner in which a Member State introduced such rules might amount in itself to an infringement of EU law.

56. As I have already observed, it is, generally, up to the Member States to determine whether they wish to provide for additional criteria limiting public authorities' choice as to whether they can enter into in-house transactions. If it is up to a Member State whether to provide for such additional criteria, which are not a requirement of EU law, it is generally also within their discretion how they are to be provided for. However, as set out above, the fundamental rules of the TFEU also apply if a Member State is acting outside its obligations under a directive.

57. In cases dealing with the implementation of Member States' obligations under EU law or the transposition of directives, the Court has consistently held that legislative action is not necessarily

required. (30) It should be kept in mind that those decisions were taken in application of the EU law principle of legal certainty, as they must give to the persons concerned by such measures certainty as regards the extent of their rights in areas governed by EU law. Given that the present case deals with the implementation of national measures that are not required by EU law, the requirements cannot be more stringent.

58. It follows therefrom that there is no requirement under EU law obliging Member States that are establishing limitations or additional conditions for the conclusion of in-house transactions to do so only by means of specific and clear positive legal provisions governing public procurement.

VI. Conclusion

59. Accordingly, I propose that the Court answer Questions 1 and 3 referred by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) as follows:

(1) As a rule, the directive applicable to an in-house transaction is the one in force when the contracting authority chooses the type of procedure to be followed and definitively decides against a prior call for competition to be issued for the award of a public contract. It is for the referring court to assess when this decision was finally taken by the contracting authority.

(3) (a) The provisions of Articles 1(4) and 12 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be understood and interpreted as listing the minimum requirements for an in-house transaction to be admissible under EU law. This does not, however, prevent a Member State from stipulating additional conditions limiting the possibility of public authorities to enter into in-house transactions as long as these additional conditions are not contrary to EU law, such as, for example, the condition that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided.

(b) There is no requirement under EU law that obliges Member States establishing limitations or additional conditions for the conclusion of in-house transactions to do so only by means of specific and clear positive legal provisions governing public procurement.

---

1 Original language: English.

---

2 For a definition of the term see points 38 to 41 below.

---

3 OJ 2014 L 94, p. 65.

---

4 OJ 2004 L 134, p. 114, corrigenda OJ 2004 L 351, p. 44.

---

5 The term is used neither by Directive 2004/18 nor by Directive 2014/24. See points 38 to 41 below.

---

6 Judgments of 5 October 2000, *Commission* v *France* (C-337/98, EU:C:2000:543, paragraphs 36 and 37); of 11 July 2013, *Commission* v *Netherlands* (C-576/10, EU:C:2013:510, paragraph 52); of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 31); and of 8 February 2018, *Lloyd's of London* (C-144/17, EU:C:2018:78, paragraph 25).

---

7 Judgments of 5 October 2000, *Commission* v *France* (C-337/98, EU:C:2000:543, paragraph 40); of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627, paragraph 29); and of 11 July 2013, *Commission* v *Netherlands* (C-576/10, EU:C:2013:510, paragraph 53).

---

8 Paragraph 27 of the observations of the Lithuanian Government.

---

9 Judgment of 19 June 2014, Centro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCH (C-574/12, EU:C:2014:2004, paragraph 32)

---

10 See Opinion of Advocate General Alber in RI.SAN. (C-108/98, EU:C:1999:161, paragraphs 21, 49 and 52).

---

11 Throughout I will be using the term ‘in-house transaction’ as used in the questions of the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania); however, all of the above terms were used in the context described.

---

12 Advocate General Stix-Hackl spoke about ‘quasi-in-house procurement’ as opposed to ‘in-house procurement (self-supply)’ in her opinion in *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2004:553, paragraph 49).

---

13 See for example judgment of 8 May 2014, Datenlotsen InformationssystemeDatenlotsen InformationssystemeDatenlotsen Informationssysteme (C-15/13, EU:C:2014:303, paragraph 8), where the Court uses the heading ‘Award of a public contract without applying the procedures laid down by Directive 2004/18 — In-house award’ or judgment of 8 December 2016, Undis ServiziUndis ServiziUndis Servizi (C-553/15, EU:C:2016:935, paragraph 5), where the Court speaks quite broadly about a ‘possibility of a direct award of a public contract without the initiation of a tendering procedure’.

---

14 See for example judgments of 19 June 2014, Centro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCHCentro Hospitalar de Setúbal and SUCH (C-574/12, EU:C:2014:2004, paragraph 32), and of 8 December 2016, Undis ServiziUndis ServiziUndis Servizi (C-553/15, EU:C:2016:935, paragraph 24).

---

15 See also Article 1(2) of Directive 2014/24.

---

16 Judgment of 18 November 1999, Teckal (C-107/98, EU:C:1999:562, paragraph 50).

---

17 Judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 50).

---

18 Judgment of 11 January 2005, Stadt Halle and RPL LochauStadt Halle and RPL LochauStadt Halle and RPL Lochau (C-26/03, EU:C:2005:5, paragraphs 49 to 52).

---

19 Opinion of Advocate General Campos Sánchez-Bordona in *LitSpecMet* (C-567/15, EU:C:2017:319, points 70 and 71).

---

20 Judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 71).

---

21 According to recital 31 of Directive 2014/24, while the directive intends to provide clarification in respect of the cases in which contracts concluded within the public sector are not subject to the application of public procurement rules, such clarification should be guided by the principles set out in the relevant case-law of the Court. From this it can be inferred that the Union legislature simply sought to re-state — albeit with clarifications — the principles governing the identification of 'in-house transactions' to which the rules on public procurement do not apply. See also, in a similar vein, opinion of Advocate General Campos Sánchez-Bordona in Joined Cases *Rhein-Sieg-Kreisand Rhenus Veniro* (C-266/17 and C-267/17, EU:C:2018:723, point 28).

---

22 See, by analogy, judgments of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 59), and of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31, paragraph 59).

---

23 Judgments of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 46); of 8 May 2014, *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:303, paragraphs 22 and 23); and of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935, paragraph 29).

---

24 See also recital 5 of Directive 2014/24 as well as the judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 49), where the Court states: 'In accordance with the Court's case-law, it is not excluded that there may be other circumstances in which a call for tenders is *not mandatory.* …' (emphasis added).

---

25 Emphasis added.

---

26 Paragraph 47 of the observations of the Commission; see also recital 2 of Directive 2014/24.

---

27 Paragraphs 61 and 62 of the observations of the Lithuanian Government.

---

28 See judgments of 18 November 2010, *Commission* v *Ireland* (C-226/09, EU:C:2010:697, paragraph 29), of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817, paragraph 23), and of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647, paragraph 26), with regard to contracts relating to services falling within the ambit of Annex II B of Directive 2004/18; judgment of 25 October 2018, *Anodiki Services EPE* (C-260/17, EU:C:2018:864, paragraph 36), with regard to employment contracts; and judgments of 13 October 2005, *Parking Brixen* (C-458/03, EU:C:2005:605, paragraph 46), and of 6 April 2006, *ANAV* (C-410/04, EU:C:2006:237, paragraph 17), with regard to public service concessions.

---

29 Judgment of 13 October 2005, *Parking Brixen* (C-458/03, EU:C:2005:605, paragraph 62); judgment of 6 April 2006, *ANAV* (C-410/04, EU:C:2006:237, paragraph 24) and judgment of 25 October 2018, *Anodiki Services EPE* (C-260/17, EU:C:2018:864, paragraph 36).

---

30 See judgment of 20 June 2002, *Mulligan and Others* (C-313/99, EU:C:2002:386, paragraph 50), with respect to a legislative instrument delegating power to adopt measures under an EU regulation to a minister and the publication of such measures in a national newspaper, and judgments of 15 March 1990, *Commission* v *Netherlands* (C-339/87, EU:C:1990:119, paragraph 6), and of 30 May 1991, *Commission* v *Germany* (C-361/88, EU:C:1991:224, paragraph 15), as well as Opinion of Advocate General Trstenjak in *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:161, point 80), with respect to the importance of taking into account not only the wording of a provision, but also how it is interpreted by the national courts.

EU:C:2019:826

JUDGMENT OF THE COURT (Fourth Chamber)

3 October 2019 (*)

(Reference for a preliminary ruling — Public Procurement — Public procurement procedure — Directive 2014/24/EU — Article 57(4) — Optional grounds for exclusion — Exclusion of an economic operator from participating in a public procurement procedure — Early termination of a prior contract on account of partial subcontracting — Concept of 'significant or persistent deficiencies' — Scope)

In Case C-267/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania), made by decision of 2 April 2018, received at the Court on 17 April 2018, in the proceedings

Delta Antrepriză de Construcţii şi Montaj 93 SA

v

Compania Naţională de Administrare a Infrastructurii Rutiere SA,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, K. Jürimäe, D. Šváby (Rapporteur), S. Rodin and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Şereş, administrator,

having regard to the written procedure and further to the hearing on 27 February 2019,

after considering the observations submitted on behalf of:

– Delta Antrepriză de Construcţii şi Montaj 93 SA, by I.G. Iacob, R.E. Cîrlig, I. Cojocaru, A.M. Abrudan and I. Macovei, avocaţi,

– the Romanian Government, by C.-R. Canţăr and by R.I. Haţieganu and L. Liţu, acting as Agents,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by A. Biolan, P. Ondrůšek and L. Haasbeek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 57(4)(g) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Delta Antrepriză de Construcții și Montaj 93 SA ('Delta') and Compania Națională de Administrare a Infrastructurii Rutiere SA (national company for

the administration of road infrastructure, ‘CNAIR’), in its capacity as contracting authority, concerning Delta’s exclusion from participation in a public procurement procedure.

Legal context

EU law

Directive 2014/24

3 Recitals 101 and 102 of Directive 2014/24 state:

‘(101) Contracting authorities should … be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. It should be clarified that grave professional misconduct can render an economic operator’s integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.

> Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision, contracting authorities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by national law. They should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.
>
> In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion.

(102) Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.’

4 Article 57 of that directive, headed ‘Exclusion grounds’, provides:

‘…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or

…

5. Contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2.

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed 5 years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and 3 years from the date of the relevant event in the cases referred to in paragraph 4.’

5 Article 71 of Directive 2014/24, relating to ‘Subcontracting’, provides:

‘…

2. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

…

5 In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to indicate to the contracting authority the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at this point in time. The contracting authority shall require the main contractor to notify the contracting authority of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services.

Notwithstanding the first subparagraph, Member States may impose the obligation to deliver the required information directly on the main contractor.

Where necessary for the purposes of point (b) of paragraph 6 of this Article, the required information shall be accompanied by the subcontractors' self-declarations as provided for in Article 59. The implementing measures pursuant to paragraph 8 of this Article may provide that subcontractors which are presented after the award of the contract shall provide the certificates and other supporting documents instead of the self-declaration.

The first subparagraph shall not apply to suppliers.

Contracting authorities may extend or may be required by Member States to extend the obligations provided for in the first subparagraph to for instance:

(a) supply contracts, to services contracts other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority or to suppliers involved in works or services contracts;

(b) subcontractors of the main contractor's subcontractors or further down the subcontracting chain.

6. With the aim of avoiding breaches of the obligations referred to in Article 18(2), appropriate measures may be taken, such as:

(a) Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 18(2).

(b) Contracting authorities may, in accordance with Articles 59, 60 and 61, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. In such cases, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

…'

Implementing Regulation (EU) 2016/7

6 Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ 2016 L 3, p. 16), includes Annex 2, entitled 'Standard Form for the European Single Procurement Document (ESPD)'. Part III of that annex, entitled 'Exclusion grounds', defines the detailed rules for the application of Article 57 of Directive 2014/24.

Romanian law

7 Article 167(1) of Legea nr. 98/2016 privind achiziţiile publice (Law No 98/2016 on public procurement) of 19 May 2016 (*Monitorul Oficial al României,* Part I, No 390 of 23 May 2016), provides:

‘1. The contracting authority shall exclude from the procedure for the award of a public contract or framework agreement any economic operator that is in one of the following situations:

…

(g) where the economic operator has committed serious or repeated breaches of its principal obligations under a public contract, a sectoral procurement contract or a concession contract concluded previously, and those breaches have led to the early termination of that prior contract, the payment of damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required by the contracting authority for the purposes of establishing the non-existence of any grounds for exclusion or compliance with the selection or qualifying criteria, has withheld such information or is unable to submit the supporting documents required; …

…

8. Under paragraph 1(g), examples of serious breaches of contractual obligations are, for instance, the failure to perform a contract or the delivery/supply/performance of products/works/services that present significant shortcomings making them unusable for the intended purpose provided for in the contract.’

8 Article 171 of that Law provides:

‘1. Any economic operator that is in one of the situations referred to in Articles 164 and 167 which entail exclusion from the award procedure may provide evidence to the effect that the measures which it has taken are sufficient to demonstrate its reliability despite the existence of the grounds for exclusion.

2. If the contracting authority takes the view that the evidence submitted by the economic operator in accordance with paragraph 1 is sufficient to demonstrate its reliability in practice, it shall not exclude the economic operator from the award procedure.

3. The evidence that an economic operator which is in any of the situations set out in Articles 164 and 167 may provide to the contracting authority, pursuant to paragraph 1, shall be to the effect that: it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct; clarified the facts and circumstances of the criminal offence or misconduct in a comprehensive manner by actively collaborating with the investigating authorities, and taken concrete and suitable technical, organisational and personnel measures, such as severing ties with persons and organisations involved in the unlawful conduct; taken measures for the reorganisation of personnel; implemented monitoring and reporting systems; established an internal auditing structure to verify compliance with laws and regulations; or adopted internal rules on liability and compensation for damage, in order to prevent further criminal offences or other cases of misconduct.

…’

The dispute in the main proceedings and the question referred for a preliminary ruling

9 By a decision of 3 October 2014, the Municipality of Râmincu Vâlcea (Romania) (‘the municipality’) awarded to a consortium of which Delta was lead contractor (‘Consortium No 1’) a works contract for the restoration and modernisation of a leisure facility (‘contract No 1’).

10 On 7 June 2017, that municipality terminated that contract early on the ground that Consortium No 1 had used a subcontractor without the municipality's prior authorisation.

11 On 25 July 2017, the municipality lodged, on the on-line platform known as the 'Electronic public procurement system' ('the EPPS platform'), a report ('the report') stating, first, that that contract had been terminated early on account of misconduct by Consortium No 1 and, secondly, that that early termination caused the municipality losses evaluated at 2 345 299.70 Romanian lei (RON) (approximately EUR 521 000).

12 By a notice of tender of 27 July 2017, CNAIR initiated an open public procurement procedure for the construction project for widening a national road. To that end, it envisaged entering into a framework agreement in the amount of RON 210 627 629 (approximately EUR 46 806 140) for an 84-month period.

13 In the context of that procedure, the consortium formed by Delta, Aleandri SpA and Luca Way Srl ('Consortium No 2') submitted a tender.

14 After searching the EPPS platform in respect of each tenderer, the CNAIR evaluation committee became aware of the report and requested clarification in that regard from the municipality and from Delta.

15 In reply to the request for clarification, Delta stated, first, that even if that report reflects reality, it does not prove that Delta committed serious breaches of its contractual obligations on several occasions and, secondly, that it has brought two actions before the Romanian courts, which are currently pending and are directed against that report and the decision terminating contract No 1 early, respectively.

16 For its part, the municipality stated that the early termination of contract No 1 was justified by the fact that, during its performance, significant parts of the works concerned had been subcontracted without the municipality's prior authorisation.

17 In the light of the replies obtained, the CNAIR evaluation committee concluded that Delta had failed to show that the report had been suspended or annulled. In addition, since Consortium No 2 had declared, in the European Single Procurement Document, that it did not come within the scope of the exclusion grounds for grave professional misconduct and that it was not in a situation in which a prior public procurement contract had been terminated early, or damages or other comparable penalties had been imposed in connection with contract No 1, that committee found that the tender submitted by that consortium came within the provisions of Article 167(1)(g) of Law No 98/2016. Consequently, CNAIR excluded Consortium No 2's tender by a decision of 18 December 2017 ('the exclusion decision').

18 Delta therefore requested CNAIR to remedy the alleged breach of the laws regulating public contracts by revoking the exclusion decision, and by proceeding to a fresh assessment of the documents and of the tender submitted by Consortium No 2.

19 It is apparent from the order for reference that CNAIR has not filed any response to that request.

20 On 8 January 2018, Delta lodged a complaint with the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Complaints, Romania; 'the CNSC'), which was rejected by a decision of 2 February 2018. In that decision, the CNSC found that it did not have the power to analyse the lawfulness of the report, or to ascertain any misconduct in the performance of Contract No 1. It stated, however, that since the report had not been annulled by a final judgment, it benefited from a presumption of lawfulness such as to prove the serious breach of the contractual obligations under Contract No 1. The CNSC also noted that the contracting authority had not relied solely on that report in order to exclude Consortium No 2. It had taken steps in order to assess the information apparent from that report and relied on the observations of the parties to the main proceedings. Lastly, Consortium No 2 had relied solely on the alleged unlawfulness of the report, without adducing evidence of its own reliability in respect of the grounds of exclusion, as required by Article 171 of Law No 98/2016.

21 In order to seek the annulment of the CNSC's decision of 2 February 2018, Delta brought proceedings against CNAIR before the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania), on 16 February 2018.

22 Delta disputes CNAIR's right to exclude it from the public procurement procedure, relating to the widening of a national road, on the basis of the early termination decision referred to in paragraph 10 above. The early termination of contract No 1 on the ground that part of the works was subcontracted without the contacting authority's prior authorisation amounts to a minor irregularity, not a breach of a principal obligation of the contract. Consequently, such an irregularity could only in exceptional circumstances lead to an economic operator being excluded, in accordance with recital 101 of Directive 2014/24. In that regard, Delta refers to paragraph 30 of the judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801), from which it is apparent that the concept of 'grave misconduct' refers to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part.

23 Since it noted that the Court of Justice has not yet had occasion to interpret Article 57(4)(g) of Directive 2014/24, the Curtea de Apel Bucureşti (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Can Article 57(4)(g) of [Directive 2014/24] be interpreted as meaning that the early termination of a public works contract on the ground that part of the works was subcontracted without the contracting authority's authorisation reflects a significant or persistent deficiency in the performance of a substantive requirement under a prior public contract leading to an economic operator being excluded from participation in a public procurement procedure?'

Consideration of the question referred

24 By its question, the referring court asks, in essence, whether Article 57(4)(g) of Directive 2014/24 must be interpreted as meaning that subcontracting, by an economic operator, of part of the works under a prior public contract, decided upon without the contracting authority's authorisation and which led to the early termination of that contract, constitutes a significant or persistent deficiency shown in the performance of a substantive requirement under that public contract, within the meaning of that provision, and justifies excluding that economic operator from participation in a subsequent public procurement procedure.

25 As is clear from the wording of Article 57(4) of Directive 2014/24, the EU legislature intended to confer on the contracting authority, and to it alone, the task of assessing whether a candidate or tenderer must be excluded from a public procurement procedure during the stage of selecting the tenderers (judgment of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 34).

26 The option available to any contracting authority to exclude a tenderer from a procurement procedure is particularly intended to enable it to assess the integrity and reliability of each of the tenderers. In particular, the optional ground for exclusion mentioned in Article 57(4)(g) of Directive 2014/24, read in conjunction with recital 101 of that directive, is based on an essential element of the relationship between the successful tenderer and the contracting authority, namely the reliability of the successful tenderer, on which the contracting authority's trust is founded (see, to that effect, judgment of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraphs 29 and 30).

27 The establishment of a relationship of trust between the contracting authority and the successful tenderer assumes, therefore, that that contracting authority is not automatically bound by an assessment conducted, in the context of an earlier public procurement procedure, by another contracting authority, so that in particular it may be in a position to pay particular attention to the principle of proportionality when applying the optional grounds for exclusion (see, to that effect, judgment of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraphs 30 and 32). That principle requires the contracting authority to examine and assess the facts itself. In that regard, as the Advocate General observed in point 32 of his Opinion, it is apparent from the wording of Article 57(4)(g) of Directive 2014/24 that the irregularity committed by the tenderer must have been serious enough to make it justifiable, in the light of the principle of proportionality, to terminate the contract early.

28 It follows that a contracting authority cannot automatically infer from the decision of another contracting authority to terminate a prior public contract early, on the ground that the successful tenderer subcontracted part of the works without its prior authorisation, that significant or persistent deficiencies, within the meaning of Article 57(4)(g) of Directive 2014/24, have been committed by that successful tenderer in the performance of a substantive requirement under that public contract.

29 It is for the contracting authority to carry out its own evaluation of the economic operator's conduct covered by the early termination of a prior public contract. In that regard, it must examine, diligently and impartially, on the basis of all the relevant factors, in particular the early termination decision, and in the light of the principle of proportionality, whether that operator is, from its point of view, responsible for significant or persistent deficiencies in the performance of a substantive requirement imposed on it under that contract, those deficiencies being such as to break the relationship of trust with the economic operator in question.

30 In the circumstances of the main proceedings, CNAIR must, in particular, determine whether, in its view, Consortium No 1's use of a subcontractor without having sought prior authorisation from the municipality constituted a significant deficiency and, if so, whether that deficiency affected the performance of a substantive requirement imposed on the successful tenderer under contract No 1.

31 To that effect, CNAIR must evaluate the significance of the part of contract No 1 which was subcontracted and determine, as the Advocate General observed in point 45 of his Opinion, whether the subcontractor's involvement had an adverse impact on the performance of that contract.

32 CNAIR must also examine whether the actual contract included an obligation which had to be performed by the successful tenderer itself or whether it made using a subcontractor conditional upon obtaining prior authorisation from the municipality, such requirements being compatible with Article 71(2) of Directive 2014/24, as the Advocate General observed, in essence, in point 39 of his Opinion. It is apparent from that provision that, 'in the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors'. As the Advocate General observed in point 38 of his Opinion, it is only on the basis of that information that the contracting authority will be able to gauge whether the subcontractor is itself reliable. The request for prior authorisation from the contracting authority is intended, in particular, to enable the latter to satisfy itself that there are no grounds on which the subcontractor which the successful tenderer envisages using may be excluded.

33 CNAIR must also ask itself whether or not the use of a subcontractor is likely to constitute a substantial amendment of the tender submitted by the successful tenderer (see, by analogy, judgment of 13 April 2010, *Wall*, C-91/08, EU:C:2010:182, paragraph 39), in the sense that it introduces conditions which, if they had been part of the original award procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of an offer other than that originally accepted (judgments of 13 April 2010, *Wall*, C-91/08, EU:C:2010:182, paragraph 38, and of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraph 35).

34 Furthermore, it is for CNAIR to assess whether or not, in failing to inform it of the early termination of contract No 1, Consortium No 2 adopted conduct caught by Article 57(4)(h) of Directive 2014/24. As the Advocate General observed, in essence, in point 53 of his Opinion, that provision encompasses both active conduct, such as falsification, and an omission, provided that the communication of false information is, in the same way as the concealment of true information, likely to have a bearing on the decision adopted by the contracting authority.

35 That interpretation is moreover supported by the second subparagraph of Article 57(5) of Directive 2014/24, which provides that, 'at any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4'.

36 In the present case, since the early termination of contract No 1 has been formally determined, it was for Consortium No 2, in accordance with the requirements of transparency and good faith, to inform the contracting authority of its situation. Accordingly, it ought to have provided at the outset all the information that could prove that the characterisation as subcontracting was mistaken, so that it had not failed to fulfil its obligations in the context of contract No 1, or that the failure to obtain the contracting authority's authorisation in the context of the prior public contract constituted only a minor irregularity. Such information could in particular have been mentioned in the standard form for the European Single Procurement Document, annexed to Implementing Regulation 2016/7. Part III of that form, which concerns 'Exclusion grounds', includes Point C on 'Grounds relating to insolvency, conflicts of interests or professional misconduct'. In the context of Point C, tenderers must, in particular, answer whether they are guilty of grave professional misconduct and, if so, they are requested to provide details.

37 Lastly, if the contracting authority concludes that the conditions laid down in Article 57(4)(g) or (h) of Directive 2014/24 are fulfilled, it must, in order to meet the requirements of Article 57(6) of that directive, read in conjunction with recital 102 of that same directive, allow the economic operator in question the opportunity to provide evidence to the effect that the corrective measures taken by it are sufficient to prevent the irregularity giving rise to the early termination of the prior public contract being repeated and are, therefore, capable of demonstrating the operator's reliability despite the existence of a relevant optional ground for exclusion.

38 In those circumstances, the answer to the question referred is that Article 57(4)(g) of Directive 2014/24 must be interpreted as meaning that the subcontracting, by an economic operator, of part of the works under a prior public contract, decided upon without the contracting authority's authorisation and which led to the early termination of that contract, constitutes a significant or persistent deficiency shown in the performance of a substantive requirement under that public contract, within the meaning of that provision, and is therefore capable of justifying that economic operator being excluded from participation in a subsequent public procurement procedure if, after conducting its own evaluation of the integrity and reliability of the economic operator concerned by the early termination of the prior public contract, the contracting authority which organises that subsequent procurement procedure considers that such subcontracting entails breaking the relationship of trust with the economic operator in question. Before deciding such an exclusion, the contracting authority must however, in accordance with Article 57(6) of that directive, read in conjunction with recital 102 thereof, allow that economic operator the opportunity to set out the corrective measures adopted by it further to the early termination of the prior public contract.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 57(4)(g) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that the subcontracting, by an economic operator, of part of the works under a prior public contract, decided upon without the contracting authority's authorisation and which led to the early termination of that contract, constitutes a significant or persistent deficiency shown in the performance of a substantive requirement under that public contract, within the meaning of that provision, and is therefore capable of justifying that economic operator being excluded from participation in a subsequent public procurement procedure if, after conducting its own evaluation of the integrity and reliability of the economic operator concerned by the early termination of the prior public contract, the contracting authority which organises that subsequent procurement procedure considers that such subcontracting entails breaking the relationship of trust with the economic operator in question. Before deciding such an exclusion, the contracting authority must however, in accordance with Article 57(6) of that directive, read in conjunction with recital 102 thereof, allow that economic

operator the opportunity to set out the corrective measures adopted by it further to the early termination of the prior public contract.

[Signatures]

---

* Language of the case: Romanian.

EU:C:2019:393

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 8 May 2019 (1)

Case C-267/18

Delta Antrepriză de Construcţii şi Montaj 93 SA

v

Compania Naţională de Administrare a Infrastructurii Rutiere SA

(Request for a preliminary ruling from the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania))

(Reference for a preliminary ruling — Directive 2014/24/EU — Public procurement — Optional grounds for exclusion — Exclusion of an economic operator from participating in a tendering procedure on grounds of the termination of a prior contract on account of subcontracting not communicated to the contracting authority — Concept of significant or persistent deficiencies — Withholding of information on the termination of a prior contract — Information on the participation of subcontractors in the performance of the contract — Objectives and purposes — Seriousness of the withholding of information)

1. Directive 2014/24/EU (2) authorises contracting authorities to exclude from public procurement procedures a tenderer which has exhibited ‘significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract … which led to early termination of that prior contract’ (Article 57(4)(g)).

2. A Romanian court has raised with the Court of Justice its uncertainty as to whether that provision is applicable in the case where the ‘early termination of the prior contract’ came about because the successful tenderer had subcontracted some of the work without notifying the administrative authority. That situation was further characterised by the fact that, in the new procurement procedure, the same economic operator also failed to inform the (second) contracting authority that the prior contract had been terminated.

I. Legal framework

A. EU law: Directive 2014/24

3. According to recital 101:

> ‘Contracting authorities should further be given the possibility to exclude economic authorities which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. It should be clarified that grave professional misconduct can render an economic operator’s integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.

Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision, contracting authorities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by national law. They should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator which might justify its exclusion'.

4. Article 57 ('Exclusion grounds') states:

'…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

…

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59;

…

5. Contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of its acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2.

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and

circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

…’

5. Article 71 (‘Subcontracting’) states:

‘…

2. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

…

5. In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to indicate to the contracting authority the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at this point in time. The contracting authority shall require the main contractor to notify the contracting authority of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services.

Notwithstanding the first subparagraph, Member States may impose the obligation to deliver the required information directly on the main contractor.

Where necessary for the purposes of point (b) of paragraph 6 of this Article, the required information shall be accompanied by the subcontractors’ self-declarations as provided for in Article 59. …

6. With the aim of avoiding breaches of the obligations referred to in Article 18(2), appropriate measures may be taken, such as:

…

(b) Contracting authorities may, in accordance with Articles 59, 60 and 61, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. In such cases, the contracting authority shall require that the economic authority replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

…’

B. National law: Legea nr. 98/2016 privind achizițiile publice (Law No 98/2016 on public procurement (‘Law No 98/2016’))

6. Article 167 states:

‘(1) The contracting authority shall exclude from the procedure for the award of a public contract or framework agreement any economic operator that is in one of the following situations:

…

(g) where the economic operator has committed serious or repeated breaches of its principal obligations under a public contract, a sectoral procurement contract or a concession contract concluded previously, and those breaches have led to the early termination of that prior contract, the payment of damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required by the contracting authority for the purposes of establishing the non-existence of any grounds for exclusion or compliance with the selection or qualifying criteria, has withheld such information or is unable to submit the supporting documents required;

…

(8) Under paragraph 1(g), examples of serious breaches of contractual obligations are, for instance, the failure to perform a contract or the delivery/supply/performance of products/works/services that present significant shortcomings making them unusable for the intended purpose provided for in the contract'.

7. Article 171 provides:

'(1) Any economic operator that is in one of the situations referred to in Articles 164 and 167 which entail exclusion from the award procedure may provide evidence to the effect that the measures which it has taken are sufficient to demonstrate its reliability despite the existence of the grounds for exclusion.

(2) If the contracting authority takes the view that the evidence submitted by the economic operator in accordance with paragraph 1 is sufficient to demonstrate its reliability in practice, it shall not exclude the economic operator from the award procedure.

(3) The evidence that an economic operator which is in any of the situations set out in Articles 164 and 167 may provide to the contracting authority, pursuant to paragraph 1, shall be to the effect that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances of the criminal offence or misconduct in a comprehensive manner by actively collaborating with the investigating authorities, and taken concrete and suitable technical, organisational and personnel measures, such as severing ties with persons and organisations involved in the unlawful conduct, taking measures for the reorganisation of personnel, for the implementation of monitoring and reporting systems aimed at establishing an internal auditing structure to verify compliance with laws and regulations, or for the adoption of internal rules on liability and compensation for damage, in order to prevent further criminal offences or other cases of misconduct.

…'

II. Facts of the dispute and question referred for a preliminary ruling

8. On 3 October 2010, the Municipality of Râmnicu Vâlcea (Romania) awarded to Delta Antrepriză de Construcții și Montaj 93 SA ('Delta') and a further two companies with which Delta formed a consortium ('Consortium 1') a works contract for the restoration and modernisation of a leisure facility.

9. On 7 June 2017, the Municipality decided to terminate that contract on the ground that Consortium 1 had breached it by subcontracting large parts of the work without the Municipality's prior authorisation, despite the fact that the tender specifications contained a provision to the effect that subcontractors were not permitted to participate in the performance of the contract without the consent of the contracting authority. (3)

10. On 25 July 2017, the early termination of that contract on grounds attributable to Consortium 1 was communicated to the Sistemul Electronic de Achiziții Publice (Electronic Public Procurement System; 'public e-procurement system') online platform.

11. On 27 July 2017, the Compania Națională de Administrare a Infrastructurii Rutiere SA (National company for the administration of road infrastructure; ‘CNAIR’) issued a call for tenders for the public construction works contract ‘Proiectare și execuție lărgire la 4 benzi DN 7 Bâldana-Titu km 30 + 950 — 52 + 350’ (Planning and implementation of the widening to four lanes of National Road DN 7 Bâldana-Titu km 30 + 950 — 52 + 350), with an estimated value of RON 210 627 629 (EUR 46 806 139.78) and a term of 84 months.

12. Delta joined two other companies to form a new consortium (‘Consortium 2’) and participated as a tenderer in that procedure. In its tender, it stated that it was not affected by any of the grounds for exclusion.

13. When conducting a search on the public e-procurement system, the CNAIR evaluation committee accessed the findings report issued by the Municipality of Râmnicu Vâlcea, which contained a record of the termination of the contract that had existed between Consortium 1 and that municipality.

14. On 18 December 2017, after hearing Delta and the Municipality of Râmnicu Vâlcea, the CNAIR evaluation committee excluded Consortium 2 from the procedure for the award of the national road widening contract. It stated in this regard that the early termination of the prior contract and the failure to disclose it in the course of the second procedure were grounds for exclusion as provided for in Article 167(1)(g) and (h) of Law No 98/2016.

15. Consortium 2 asked the contracting authority to reverse the decision to exclude it and to re-examine its tender. In the absence of any response from the CNAIR, it filed a claim with the National Council for the Resolution of Claims (‘NCRC’).

16. On 2 February 2018, the NCRC dismissed that claim, after stating that:

– it was competent to examine the lawfulness of the decision to exclude the tender and to establish whether the ground for exclusion provided for by law was present, but not to analyse the lawfulness of the findings report;

– that report, inasmuch as it benefits from the presumption of lawfulness, constituted proof of a serious breach of obligations under a prior public contract;

– Consortium 2 had confined itself to putting forward grounds relating to the unlawfulness of the findings report, without adducing evidence of its own reliability, as required by Article 171 of Law No 98/2016.

17. The NCRC’s decision was challenged before the referring court on 16 February 2018. In the application, it was claimed, in essence, (a) that the findings report was not a suitable means of proving that Delta had committed a serious and repeated breach of its contractual obligations, and (b) that the information contained in that report, even if it were true, could not be brought within the scope of the ground for exclusion consisting in a serious or repeated breach of contractual obligations. (4)

18. In those circumstances, the Curtea de Apel București (Court of Appeal, Bucharest, Romania) has referred the following question to the Court of Justice for a preliminary ruling:

> ‘Can Article 57(4)(g) of [Directive 2014/24] be interpreted as meaning that the termination of a public works contract on the ground that part of the works was subcontracted without the contracting authority’s authorisation constitutes a significant or persistent deficiency in the performance of a substantive requirement under a prior public contract leading to an economic operator being excluded from participation in a public procurement procedure?’

III. Procedure before the Court of Justice

19. The order for reference was received at the Court of Justice on 17 April 2018.

20. Written observations have been lodged by Delta, the Romanian Government and the European Commission. The hearing, which was held on 27 February 2019, was attended by Delta, the Austrian

Government and the Commission.

IV. Assessment

A. Preliminary observation

21. The question from the referring court is confined to the interpretation of Article 57(4)(g) of Directive 2014/24. I take the view, however, that, in keeping with the Court's consistent practice, (5) its reply can be extended to include other provisions of that directive that relate to the same facts so as to provide the referring court with material that will make its adjudication easier.

22. In particular, it is true that the ground for exclusion relating to the early termination of the contract is dealt with in Article 57(4)(g) of Directive 2014/24. However, the order for reference itself (6) states that, according to the contracting authority's evaluation committee, 'Article 167(1)(h) of Law No 98/2016 was also applicable to the tender in question'. As that provision transposes into national law the ground for exclusion contained in Article 57(4)(h) of Directive 2014/24, the Court's answer will be more comprehensive if it addresses the presence of that ground for exclusion in the facts at issue. (7)

B. The ground for exclusion under Article 57(4)(g) of Directive 2014/24

23. As I pointed out in my Opinion in *Meca*, (8) Article 57(4) of Directive 2014/24 refers under the heading of conduct on the part of economic operators that may justify their exclusion from a procurement procedure both to 'grave professional misconduct which renders [their] integrity questionable' (point (c)) and to 'significant … deficiencies in the performance of a substantive requirement under a prior public contract … which led to early termination of that prior contract' (point (g)).

24. Recital 101 of Directive 2014/24 supports the inference that the professional misconduct referred to in point (c) is predominantly *non-contractual* in nature, which is to say that it is improper conduct that generally takes place outside the scope of the contractual relationship. This is the case with misconduct involving a breach of environmental or social obligations or an infringement of competition rules or intellectual or industrial property rights, or with a failure to comply with tax or social security obligations. The conduct provided for in point (g), on the other hand, is a typical breach *of contract*.

25. It is true, however, that some breaches of contract can at the same time constitute a form of grave professional misconduct, which is to say misconduct committed within the context of a prior administrative contract the significance of which was sufficient to warrant the breakdown of the contractual relationship.

26. From that point of view, the link between those two points (of Article 57(4)) would be that between a *lex generalis* (point (c)) and a *lex specialis* (point (g)), in which case the principles that must govern the interpretation of the rule contained in point (g) could be identified by reference to the aims of, and justifications for, the general provision.

27. Both grounds for exclusion rest on an essential ingredient in the relationship between the supplier awarded the contract and the contracting authority, that is to say the *reliability* of the former, on which the trust which the latter has in the former is founded. Although Directive 2004/18/EC (9) made no express reference to that factor, the Court of Justice took it took it into account in its case-law. (10)

28. Directive 2014/24 makes reliability a key component of that relationship in the very context of grave professional misconduct. According to the first paragraph of recital 101, contracting authorities can exclude 'economic operators which have proven unreliable'. The second paragraph of that recital provides for activities under prior contracts that '[cast] serious doubts as to the reliability of the economic operator'.

29. The importance given to the economic operator's *reliability* is apparent in a number of paragraphs (6 and 7) of Article 57 of Directive 2014/24, inasmuch as these allow the economic operator to demonstrate that it is worthy of trust, notwithstanding the presence of a ground for exclusion. In this way, the *reliability* ingredient is integral to the grounds for exclusion that relate to the candidate's subjective circumstances.

30. Now, according to the scheme of Article 57 of Directive 2014/24, the contracting authority must have the freedom to evaluate that component (the candidate's reliability) without necessarily being bound by the findings of other public bodies. It is for contracting authorities and them alone to assess the extent of any misconduct entailing a substantive breach of contract so serious as to justify the termination of a prior contract on grounds of loss of trust.

31. As has already been explained, the ground for exclusion under Article 57(4)(g) of Directive 2014/24, which is being invoked in this case, applies where, under a prior contract, the operator has shown significant or persistent deficiencies (11) in the performance of a substantive requirement which led to the early termination of that contract.

32. The most important point to be drawn from the foregoing is that the irregularity committed by the tenderer must have been serious ('significant') enough to make it justifiable, in the light of the principle of proportionality, to terminate the contract early.

33. A comparison of certain language versions of the provision in question (12) shows that that ground for exclusion requires there to have been a breach of an essential obligation under a prior public contract. That obligation can be either material or formal, there being no reason why formal obligations should not be essential to the performance of a public contract. (13)

34. For the exclusion to apply, it is not therefore sufficient for the prior public contract simply to have been unilaterally terminated. The contracting authority will have to carry out the additional task of assessing the breach for which the contractor was held responsible at the time in order to establish whether or not the requirements of Article 57(4)(g) of Directive 2014/24 are met.

35. The Court of Justice must not replace with its own the referring court's assessment of the facts or its evaluation of the seriousness of the breach on account of which Delta was excluded. It therefore falls to the referring court to determine whether, in this case, the unauthorised subcontracting (14) of the leisure facility construction work constituted a significant deficiency in the performance of the contract between Consortium 1 and the Municipality of Râmnicu Vâlcea.

36. The Court of Justice may nonetheless provide the referring court with some guidance that will be useful to it when it comes to carry out its own assessment.

37. In the first place, it will be necessary to look at the content of the procurement documents and, in particular, the extent to which those documents laid down a duty for the contractor to communicate its intention to subcontract some of the work and to obtain the contracting authority's authorisation to do so. According to the Romanian Government, there were specific clauses pursuant to which no subcontractor could participate in the performance of the contract without the contracting authority's consent. (15)

38. It should not be forgotten that Article 71(2) of Directive 2014/24 provides that, 'in the procurement documents, the contracting authority may ask … the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors'. It is only on the basis of this information that the contractor will be able to gauge whether the subcontractor is itself reliable. (16)

39. A clause in the procurement documents requiring a prior indication to that effect thus has a sound legal basis in EU law. What is more, the introduction of such a clause is of a piece with the scheme of Directive 2014/24, in so far as this is concerned with mechanisms for communicating any intention to subcontract and the identity of the subcontractor.

40. While Directive 2004/18 said little in this regard, (17) inasmuch as it simply mentioned the advisability of including provisions on subcontracting in order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, (18) Directive 2014/24 emphasises why 'transparency in the subcontracting chain' is so important.

41. In particular, the preamble to Directive 2014/24 explains that 'this gives contracting authorities information on who is present at building sites … It should be clarified that the obligation to deliver the required information is in any case incumbent upon the main contractor, either on the basis of *specific clauses, that each contracting authority would have to include in all procurement procedures,* or on the basis

of obligations which Member States would impose on main contractors by means of generally applicable provisions'. (19)

42. From a strictly prescriptive point of view, Article 71(6)(b) of Directive 2014/24 provides that 'contracting authorities may … verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57'. It is only logical that, in order for such verification to be possible, the contractor must first have informed the contracting authorities that it is proposing to subcontract part of the work.

43. That premiss having been established, it falls to be ascertained in addition whether, pursuant to the procurement documents, the failure to comply with the duty to notify the contracting authority of the existence of the subcontractor triggered the early termination of the contract. In that event, the contracting authority, in terminating the contract, would simply be 'comply[ing] strictly with the criteria which it has itself laid down' within the meaning of the judgment in *Connexxion Taxi Services*. (20)

44. In the second place, it will be necessary to assess whether performance by the contractor itself and by it alone was an obligation *essential* to the attainment of the objective pursued by the contracting authority. If not, that is to say if the use of subcontractors under that works contract seems viable, albeit subject to the duty of prior notification and subsequent administrative authorisation, it will be necessary to gauge whether the absence of that notification (and, hence, of the required authorisation) was nothing more than a mere administrative error that was otherwise insignificant and could be made good afterwards. (21)

45. In the third place, the referring court will be able to consider to what extent the subcontracting affected a large part of the municipal leisure facility construction works and whether the subcontractor's involvement had an adverse impact on the performance of those works. (22)

46. Such assessments will be relevant to the examination of the exclusion measure from the point of view of the principle of proportionality. (23) If the conduct of the economic operator which infringed its obligations under the first contract was not of at least some significance (that is to say, if it was only *de minimis*), its exclusion from the second contract may have been inappropriate because disproportionate.

47. In the fourth place, if that ground for exclusion is found to be present, Article 57(6) of Directive 2014/24 (transposed in Article 171 of Law No 98/2016) still allows the tenderer to provide evidence to the effect that, since its previous conduct, it has shown itself to be reliable. (24)

48. Finally, Delta's submission with respect to the pending disputes in connection with the decision of the Municipality of Râmnicu Vâlcea to terminate Consortium 1's contract (25) does not, in and of itself, preclude the application of that ground for exclusion. As I maintained in my Opinion in *Meca*, (26) the mere fact that a decision to terminate a contract early has been challenged cannot be regarded as an obstacle preventing the contracting authority from assessing the conduct that prompted that decision and the operator's subsequent reliability.

C. The ground for exclusion under Article 57(4)(h) of Directive 2014/24

49. The situations provided for in Article 57(4)(h) of Directive 2014/24 as grounds for excluding an economic operator from a public procurement procedure include the following:

– where it 'has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria'; and

– where it 'has withheld such information'. (27)

50. The Court of Justice was confronted with the first of those situations when, in the judgment in *Esaprojekt*, (28) it interpreted the provision in Directive 2004/18 (that is to say, Article 45(2)(g)) which similarly made it possible to exclude an economic operator from participation in a public contract on account of its false declarations to the contracting authority.

51. In that judgment, it held that the false declaration did not have to be intentional, it being sufficient for there to be 'some degree of negligence which may have a decisive effect on the decisions to exclude

candidates from being selected or awarded a public contract'. Since this was the case in those proceedings, the economic operator could be regarded as being guilty of 'serious misrepresentation', a fact which justified 'the decision of the contracting authority to exclude that operator from the public contract concerned'. (29)

52. The second situation was addressed in the judgment in *Impresa di Costruzioni Ing. E. Mantovani and Guerrato*, (30) in relation to the corresponding provision of Directive 2004/18. (31) In that case, the tenderer had chosen not to disclose in its tender information relating to the criminal record of a director who had been convicted of a number of offences. The Court took the view that such a circumstance formed a sufficient basis on which to exclude the tenderer from the award procedure. (32)

53. Although it might seem from the wording of Article 57(4)(h) of Directive 2014/24 that 'seriousness' is required only in relation to the provision of false information and not in relation to the withholding of information, that is not the case in my view. Whether the conduct is active (falsification) or passive (concealment), the important point is that the information, whether false or concealed, should have a bearing on the decision adopted by the contracting authority. To my mind, this, once again, is a consequence of the principle of proportionality.

54. In this reference, as I have already said, the national court does not concern itself with the ground for exclusion which I am analysing, unlike the contracting authority, which did. (33) After all, as Delta refrained from informing the CNAIR that its previous public contract had been terminated because of its failure to comply with the subcontracting clause, the CNAIR chose to apply (in conjunction with the ground for exclusion already examined in the preceding section) Article 167(1) of Law No 98/2016, that is to say the national provision transposing Article 57(4)(h) of Directive 2014/24.

55. In that context, if the referring court considers it advisable to look at the second ground for exclusion applied by the CNAIR, it will have to take into account the particular circumstances in which the information in question was concealed and the seriousness of that conduct.

56. More specifically, in order to assess the seriousness of the information concealed from the contracting authority, it will not be sufficient to establish whether the tenderer chose not to disclose the presence of a possible ground for exclusion. It will be essential to consider also the significance of the information omitted.

57. In a case such as this, where there has been a formally declared prior termination of a contract, (34) the principle of fair dealing compelled Delta to notify the contracting authority of that objective fact at the outset, a course of action which would not have prevented it from providing as much information as it might have thought necessary to demonstrate that, in its view, the breach of obligations did not exist or was of scant significance. (35)

58. In any event, it will be for the national court to consider the factual circumstances of the dispute in order to determine, in the light of the principle of proportionality, whether the tenderer's exclusion on either ground was adequately justified.

V. Conclusion

59. In the light of the foregoing lines of reasoning, I propose that the Court's answer to the question referred for a preliminary ruling by the Curtea de Apel București (Court of Appeal, Bucharest, Romania) should be as follows:

(1) Article 57(4)(g) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that:

– a contracting authority is in principle authorised to exclude from a procedure for the procurement of public works an economic operator which has been the subject of a decision to terminate a prior public contract early on the ground that it breached the clause imposing on it the obligation to inform the contracting authority, as a condition of the authorisation required to do so, of its intention to award some of those works to a subcontractor;

– it is for the national court to determine, in the light of the particular circumstances of the dispute and in accordance with the principle of proportionality, whether the early termination of the (first) public contract was due to a significant deficiency in the performance of a substantive requirement applicable under that contract that is sufficient to warrant the economic operator's exclusion from the (second) contract.

(2) Article 57(4)(h) of Directive 2014/24 does not preclude the contracting authority from excluding from a (second) public contract a tenderer which has concealed from it the fact that a prior contract awarded to it was terminated early on the ground of the existence of significant deficiencies in the performance of a substantive requirement applicable under that (first) contract. It is for the national court to consider, in the light of the principle of proportionality, the seriousness of that concealment of information.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

3 That decision also calculated consequential losses in the amount of 2 345 299.70 Romanian lei (RON) (EUR 521 000).

---

4 Delta went on to say that both the findings report and the alleged breaches referred to had been challenged before the courts.

---

5 Judgment of 22 October 2015, *Impresa Edilux and SICEF* (C-425/14, EU:C:2015:721), paragraph 20: 'the fact that the referring court's question refers only to certain provisions of EU law does not mean that the Court may not provide the national court with all the guidance on points of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to these points in its question. It is, in this regard, for the Court to extract from all the information provided by the referring court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute'.

---

6 Paragraph 15.

---

7 The analysis of the breach of contract might even include the ground for exclusion provided for in Article 57(4)(c) of Directive 2014/24 (that is to say, grave professional misconduct). I shall not, however, be looking at that possibility.

---

8 Opinion of 7 March 2019 (C-41/18, EU:C:2019:183), points 38 to 45.

---

9 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

10 Judgments of 20 March 2018, *Commission* v *Austria* (State printing office) (C-187/16, EU:C:2018:194), paragraphs 88 and 91; of 14 December 2016, *Connexxion Taxi Services* (C-171/15, EU:C:2016:948), paragraph 28; and of 9 February 2006, *La Cascina and Others* (C-226/04 and C-228/04, EU:C:2006:94), paragraph 21.

---

11 This article refers to *deficiencies* in the plural. It is my view, however, that the criterion is qualitative rather than quantitative, meaning that a single deficiency could trigger exclusion in its own right. This point was also made by the Commission and the Austrian Government at the hearing. Recital 101 of Directive 2014/24, when giving some examples of the 'major deficiencies' it has in mind, uses the singular to refer to 'failure to deliver or perform' or 'misbehaviour that casts serious doubt as to the reliability of the economic operator'. Everything hangs, I would emphasise, on the proportionality of the measure to the seriousness of the conduct.

---

12 The Spanish version uses the expression *requisito de fondo*, but the other versions refer rather to the *substance* of that requirement: to wit the French (*obligation essentielle*); the English (*substantive requirement*); the German (*einer wesentlichen Anforderung*); and the Italian (*requisito sostanziale*).

---

13 The malicious concealment of participation by a subcontractor, which the tenderer chooses not to mention in order to evade those provisions of the contract that reflect the binding rules of Directive 2014/24, notwithstanding that it appears to be formal, may bring about serious losses and be classified, by reference to these and to the fraudulent intent behind it, as significant.

---

14 Delta states that, in actual fact, there was no subcontracting, only a relationship with another undertaking for the provision of services and the supply of materials. The order for reference, the statement of facts contained in which the Court must take as read, seems to start from the premiss that subcontracting did indeed take place.

---

15 Paragraph 17 of its written observations. The content of this clause (point 23.6) was the subject of debate at the hearing, Delta having acknowledged its existence.

---

16 Recital 115 of Directive 2014/24: '… Furthermore, it should be stated explicitly that Member States should be able to go further, for instance by extending the transparency obligations … or by enabling or requiring contracting authorities to verify that subcontractors are not in any of the situations in which exclusion of economic operators would be warranted …'

---

17 A comparison of the subcontracting rules in Directive 2004/18 (Article 25) and those in Directive 2014/24 (Article 71) shows that, in essence, the latter retains the duty, if so provided for in the procurement documents, to let the contracting authority know how much of the work is to be subcontracted and the identity of the proposed subcontractors.

---

18 Recital 32 of Directive 2004/18.

---

19 Recital 105 of Directive 2014/24. My emphasis.

---

20 Judgment of 14 December 2016 (C-171/15, EU:C:2016:948), paragraph 38 and the case-law cited there.

---

21 This is one of the possibilities noted by the Commission in its written observations (along with others, such as the hypothesis that Consortium 1 sought to mislead the contracting authority as to the identity of the subcontractor).

---

22 The Romanian Government takes the view that, although the order for reference does not specify whether there were any defects in the performance of those works, the declaration as to the liability of

Consortium 1 would indicate that there were.

---

23 Directive 2014/24 requires the measure to be proportionate, even in the context of mandatory exclusion grounds such as the non-payment of taxes or social security contributions (second subparagraph of Article 57(3)).

---

24 Paragraph 21 of the order for reference asserts that Consortium 2 ‘relied exclusively on grounds relating to the unlawfulness of the findings report, without providing any evidence of its reliability …’. At the hearing, Delta did not claim to have taken corrective measures aimed at rectifying its conduct and thus restoring its reliability (it simply stated that it had tried to make good its failure to give notice of its intention to subcontract).

---

25 The order for reference mentions that pending litigation in paragraph 12.

---

26 C-41/18, EU:C:2019:183.

---

27 Although the various language versions which I have consulted differ in the use of verbs in the affirmative or the negative (in Italian, *non ha trasmesso*; in English, *has withheld*; in French, *a caché*; in German, *zurückgehalten*; in Portuguese, *tiver retido*; in Romanian, *nu a divulgat*), it is my view that they are, in essence, all describing the same conduct.

---

28 Judgment of 4 May 2017 (C-387/14, EU:C:2017:338).

---

29 *Ibidem,* paragraphs 71 and 77.

---

30 Judgment of 20 December 2017 (C-178/16, EU:C:2017:1000).

---

31 In accordance with Article 45(2)(g) of Directive 2004/18, ‘any economic operator may be excluded from participation in a contract where that economic operator … has not supplied [the] information [required under this Section]’.

---

32 Judgment of 20 December 2017 (C-178/16, EU:C:2017:1000), paragraph 48: ‘Thus, failure to inform the contracting authority of the criminal conduct of the former director may also make it possible to exclude, under that provision, a tenderer from participating in a procedure for the award of a public works contract’.

---

33 At the hearing, the Commission raised the possibility that Article 57(4)(h) might serve as the basis for the exclusion.

---

34 At the hearing, the Austrian Government submitted that the early termination of a public contract is a factor the relevance of which cannot be underestimated and which must necessarily be highlighted in later award procedures.

---

35 At the hearing, Delta acknowledged that it did not include this fact in the European Single Procurement Document, giving as its reason the fact that there was no space on the form for comments. However, there would have been nothing to stop it, had it wished to explain the details of the termination of its contract, to provide that explanation in a separate document.

JUDGMENT OF THE COURT (Fifth Chamber)

6 June 2019 (*)

(Reference for a preliminary ruling — Procedures for the award of public works contracts, public supply contracts and public service contracts — Directive 2014/24/EU — Article 10, (c), and (d)(i), (ii) and (v) — Validity — Scope — Exclusion of arbitration and conciliation services and of certain legal services — Principles of equal treatment and subsidiarity — Articles 49 and 56 TFEU)

In Case C-264/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Grondwettelijk Hof (Constitutional Court, Belgium), made by decision of 29 March 2018, received at the Court on 13 April 2018, in the proceedings

P. M.,

N. G.d.M.,

P. V.d.S.

v

Ministerraad,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, C. Lycourgos, E. Juhász, M. Ilešič and I. Jarukaitis, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– P. M., P. V.d.S., and N. G.d.M., by P. Vande Casteele, advocaat,

– the Belgian Government, by J.-C. Halleux, P. Cottin, L. Van den Broeck and C. Pochet, acting as Agents, assisted by D. D'Hooghe, C. Mathieu and P. Wytinck, advocaten.

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the Greek Government, by M. Tassopoulou, S. Papaioannou and S. Charitaki, acting as Agents,

– the Cypriot Government, by D. Kalli and E. Zachariadou, acting as Agents,

– the European Parliament, by A. Pospíšilová Padowska and R. van de Westelaken, acting as Agents,

– the Council of the European Union, by M. Balta and F. Naert, acting as Agents,

– the European Commission, by L. Haasbeek and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 10(c) and (d)(i), (ii) and (v) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between P. M., N. G.d.M. and P. V.d.S. and the Ministerraad (Council of Ministers, Belgium) concerning the exclusion, under the Belgian law transposing Directive 2014/24, of certain legal services from the application of the procedures for the award of public contracts.

Legal context

European Union law

3 Recitals 1, 4, 24 and 25 of Directive 2014/24 state:

‘(1) The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

…

(4) The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)]. The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. …

…

(24) It should be recalled that arbitration and conciliation services and other similar forms of alternative dispute resolution are usually provided by bodies or individuals which are agreed on, or selected, in a manner which cannot be governed by procurement rules. It should be clarified that this Directive does not apply to service contracts for the provision of such services, whatever their denomination under national law.

(25) A certain number of legal services are rendered by service providers that are designated by a court or tribunal of a Member State, involve representation of clients in judicial proceedings by lawyers, must be provided by notaries or are connected with the exercise of official authority. Such legal services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules, such as for instance the designation of State Attorneys in certain Member States. Those legal services should therefore be excluded from the scope of this Directive.’

4 Article 10 of that directive, entitled ‘Specific exclusions for service contracts’, provides in points (c) and (d):

‘This Directive shall not apply to public service contracts for:

…

(c) arbitration and conciliation services;

(d) any of the following legal services:

(i) legal representation of a client by a lawyer within the meaning of Article 1 of Council Directive 77/249/EEC [of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17)], in:

– an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation instance; or

– judicial proceedings before the courts, tribunals or public authorities of a Member State or a third country or before international courts, tribunals or institutions;

(ii) legal advice given in preparation of any of the proceedings referred to in point (i) of this point or where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer within the meaning of Article 1 of Directive [77/249];

…

(v) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority’.

Belgian law

5 By the Law on public contracts of 17 June 2016 (*Moniteur belge* of 14 July 2016, p. 44219), the Belgian legislature revised the procurement rules and brought its legislation into line with Directive 2014/24. Paragraph 28 of that law provides:

‘(1) Subject to paragraph 2, the following public service contracts shall not be subject to this law:

…

3° arbitration and conciliation services;

4° any of the following legal services:

(a) legal representation of a client by a lawyer within the meaning of Article 1 of Council Directive [77/249], in:

(i) an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation instance; or

(ii) judicial proceedings before the courts, tribunals or public authorities of a Member State or a third country or before international courts, tribunals or institutions;

(b) legal advice given in preparation of any of the proceedings referred to in point (a) of this point or where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer within the meaning of Article 1 of Directive [77/249];

…

(e) other legal services which in the Member State concerned are connected, even on an occasional basis, with the exercise of public authority;

…

(2) The King may establish procurement rules to which the contracts covered by paragraph 1, 4(a) and (b) shall be subject, in circumstances that He shall determine.’

The dispute in the main proceedings and the question referred for a preliminary ruling

6 On 16 January 2017, P. M., N. G.d.M. and P. V.d.S., the applicants in the main proceedings, brought an action for annulment before the referring court, the Grondwettelijk Hof (Constitutional Court, Belgium), against the provisions of the Law on public contracts, which excludes certain legal services and certain arbitration and conciliation services from the scope of application of that law.

7 The applicants in the main proceedings submit that those provisions create, in so far as their effect is to exclude the award of contracts for the services they cover from the public procurement rules laid down by that law, a difference of treatment which cannot be justified.

8 The referring court therefore considers that the question arises as to whether the exclusion of those services from the public procurement rules breaches the objectives, pursued by the European Union legislature by the adoption of Directive 2014/24, relating to full competition, freedom to provide services and freedom of establishment, and whether the principles of subsidiarity and equal treatment should have led to the harmonisation of EU law rules as regards those services also.

9 According to that court, in order to assess the constitutionality of the provisions of national law, the annulment of which is sought before it, it is necessary to examine whether the provisions of Article 10(c) and (d)(i), (ii) and (v) of that directive comply with the principles of equal treatment and subsidiarity and with Articles 49 and 56 TFEU.

10 In those circumstances, the Grondwettelijk Hof (Constitutional Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘Is Article 10[(c) and (d)(i), (ii) and (v)] of [Directive 2014/24] compatible with the principle of equal treatment, whether or not read in conjunction with the principle of subsidiarity and with Articles 49 and 56 [TFEU], since the services mentioned therein are excluded from the application of the procurement rules in the aforementioned directive which nevertheless guarantee full competition and free movement in the procurement of services by public authorities?’

Admissibility of the request for a preliminary ruling

11 The Czech and Cypriot Governments contest the admissibility of the question referred and therefore the reference for a preliminary ruling.

12 The Czech Government alleges that the question bears no relation to the actual facts of the main action or its purpose, which concerns whether the Belgian constitution precludes national law from excluding from the scope of national public procurement rules certain legal services also excluded from the scope of application of Directive 2014/24. However, EU law does not oblige a Member State to include the services in question within the scope of the national rules which implement it. That question should therefore be decided purely on the basis of the Belgian constitution.

13 The Cypriot Government submits that the question referred concerns whether Article 10(c) and (d)(i), (ii) and (v) of that directive is consistent with Articles 49 and 56 TFEU. However, any national measure in an area which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of that harmonising measure and not those of primary law.

14 In that regard, it should be remembered that, when a question on the validity of a measure adopted by the institutions of the European Union is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and, consequently, whether it should request the Court to rule on that question. Consequently, where the questions referred by the

national court or tribunal concern the validity of a provision of EU law, the Court is, as a general rule, obliged to give a ruling (judgments of 11 November 1997, *Eurotunnel and Others*, C-408/95, EU:C:1997:532, paragraph 19, of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 34 and of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 49).

15 The Court may refuse to give a ruling on a question referred by a national court for a preliminary ruling, under Article 267 TFEU, only where, for instance, the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure of the Court, are not satisfied or where it is quite obvious that the interpretation of a provision of EU law, or the assessment of its validity, which is sought by the national court, bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 50).

16 In the present case, it is clear from the order for reference that the national provisions at issue in the main proceedings, the annulment of which is sought before the referring court, concern the law which transposes, into Belgian law, Directive 2014/24 and, in particular, the exclusion of certain legal services from its scope of application.

17 In those circumstances, contrary to the submissions advanced by the Czech and Cypriot governments, the question of the validity of Article 10(c) and (d)(i),(ii) and (v) of Directive 2014/24 is not irrelevant for the outcome of the dispute in the main proceedings. If the exclusion laid down in those provisions were held to be invalid, the provisions in respect of which annulment is sought before the referring court would also have to be regarded as contrary to EU law.

18 It follows from the foregoing considerations that the question referred and, therefore, the reference for a preliminary ruling is admissible.

Consideration of the question referred

19 By its question the referring court asks, in essence, the Court of Justice to rule on the validity of the provisions of Article 10(c) and (d)(i), (ii) and (v) of Directive 2014/24, having regard to the principles of equal treatment and subsidiarity, as well as Articles 49 and 56 TFEU.

20 As regards, in the first place, the principle of subsidiarity and compliance with Articles 49 and 56 TFEU, it must be recalled, first, that the principle of subsidiarity, set out in Article 5(3) TEU, provides that, in areas which do not fall within its exclusive competence, the European Union is to act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at EU level (see, to that effect, the judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 215 and the case-law cited).

21 It necessarily follows from the fact that the EU legislature excluded from the scope of application of Directive 2014/24 the services covered by Article 10(c) and (d)(i), (ii) and (v) that, in so doing, it considered that it was for national legislatures to determine whether those services should be subject to the public procurement rules.

22 Therefore, it cannot successfully be claimed that those provisions were adopted in breach of the principle of subsidiarity.

23 Second, as regards compliance with Articles 49 and 56 TFEU, recital 1 of Directive 2014/24 states that the award of public contracts by or on behalf of Member States' authorities must comply with the principles of the Treaty on the Functioning of the European Union, including the provisions concerning the freedom of establishment and the freedom to provide services.

24 According to the Court's settled case-law, the purpose of coordinating, at European Union level, the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore protect the interests of traders established in a Member State who wish to offer

goods or services to contracting authorities established in another Member State (see, to that effect, the judgment of 13 November 2007, *Commission* v *Ireland*, C-507/03, EU:C:2007:676, paragraph 27 and the case-law cited).

25 It does not however follow that, by excluding the services covered by Article 10(c) and (d)(i), (ii) and (v) of Directive 2014/24 from its scope of application and, therefore, not requiring Member States to subject those services to public procurement rules, that directive would adversely affect the freedoms guaranteed by the treaties.

26 As regards, secondly, the EU legislature's discretion and the general principle of equal treatment, according to its settled case-law, the Court has acknowledged that, in the exercise of the powers conferred on it, the EU legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations (judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 57, and of 30 January 2019, *Planta Tabak*, C-220/17, EU:C:2019:76, paragraph 44). Only if a measure adopted in this field is manifestly inappropriate in relation to the objectives which the competent institutions are seeking to pursue can the lawfulness of such a measure be affected (judgment of 14 December 2004, *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 48).

27 However, even where it has such a discretion, the EU legislature is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 58).

28 Furthermore, according to the Court's settled case-law, the principle of equal treatment, as a general principle of EU law, requires comparable situations not to be treated differently and different situations not to be treated in the same way, unless such treatment is objectively justified (judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraph 23 and the case-law cited).

29 The comparability of different situations must be assessed having regard to all the elements which characterise them. Those elements must, in particular, be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (judgment of 12 May 2011, *Luxembourg* v *Parliament and Council*, C-176/09, EU:C:2011:290, paragraph 32, and of 30 January 2019, *Planta Tabak*, C-220/17, EU:C:2019:76, paragraph 37).

30 It is in the light of those principles that the validity of Article 10(c) and (d)(i)(ii) and (v) of Directive 2014/24, having regard to the principle of equality treatment, must be examined.

31 Thus, as regards, in the first place, arbitration and conciliation services covered by Article 10(c) of Directive 2014/24, recital 24 thereof states that bodies or individuals providing arbitration and conciliation services and other similar forms of alternative dispute resolution are selected in a manner which cannot be governed by procurement rules.

32 Arbitrators and mediators must always be accepted by all parties to a dispute and are designated by them by common agreement. A public body that launches a public procurement procedure for an arbitration or conciliation service may not therefore impose the successful tenderer for that contract on the other party as the common arbitrator or mediator.

33 Taking their objective characteristics into account, arbitration and conciliation services, covered by Article 10(c), are not therefore comparable with other services included within the scope of application of Directive 2014/24. It follows that the EU legislature was able, in the exercise of its discretion, to exclude the services covered by Article 10(c) of Directive 2014/24 from its scope of application without infringing the principle of equal treatment.

34 In the second place, regarding services provided by lawyers, covered by Article 10(d)(i) and (ii) of Directive 2014/24, it is clear from recital 25 of that directive that the EU legislature took into account

the fact that such legal services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules in certain Member States, so that it was appropriate to exclude those legal services from the scope of that directive.

35 In that regard, it must be observed that Article 10(d)(i) and (ii) of Directive 2014/24 does not exclude all services provided by a lawyer for the benefit of a contracting authority, but only the legal representation of their client in proceedings before an international arbitration or conciliation instance, before courts or public authorities of a Member State or a third country, or in judicial proceedings before international courts or institutions, and also legal advice given in preparation for, or in view of the probability of, such proceedings. Such services provided by a lawyer are to be conceived only in the context of a relationship *intuitu personae* between the lawyer and his or her client, characterised by the utmost confidentiality.

36 First, such a relationship *intuitu personae* between a lawyer and his or her client, which is characterised by the free choice of representative and the relationship of trust that unites the client with their lawyer, renders it difficult to provide an objective description of the quality expected of the services to be provided.

37 Second, the confidentiality of the relationship between the lawyer and their client, the purpose of which is, particularly in the circumstances described in paragraph 35 above, both to safeguard the full exercise by individuals of their rights of the defence and to protect the requirement that all persons must have the possibility of consulting their lawyer without constraint (see, to that effect, judgment of 18 May 1982, *AM & S Europe* v *Commission*, 155/79, EU:C:1982:157, paragraph 18), could be threatened by a requirement for the contracting authority to provide details of the conditions for the award of such a contract and the publicity that must be given to such conditions.

38 It follows that, having regard to their objective characteristics, the services covered by Article 10(d)(i) and (ii) of Directive 2014/24 are not comparable with other services included within the scope of application of that directive. Having regard to that objective difference, the EU legislature was also able, in the exercise of its discretion, to exclude those services from the scope of that directive without infringing the principle of equal treatment.

39 In the third place, as regards legal services involving activities connected, even occasionally, with the exercise of official authority, covered by Article 10(d)(v) of Directive 2014/24, those activities and, therefore, those services are excluded, under Article 51 TFEU, from the scope of the provisions of the Treaty relating to the freedom of establishment and from those relating to freedom to provide services under Article 62 TFEU. Such services are different from those falling within the scope of the directive in that they directly or indirectly participate in the exercise of public authority and in functions the purpose of which is to safeguard the general interests of the State or other public authorities.

40 It follows that, by their very nature, legal services connected, even occasionally, with the exercise of public authority are not comparable, because of their objective characteristics, with the services included in the scope of application of Directive 2014/24. Having regard to that objective difference, the EU legislature was also able, in the exercise of its discretion, to exclude those services from the scope of Directive 2014/24 without infringing the principle of equal treatment.

41 Therefore, the examination of the provisions of Article 10(c) and (d)(i), (ii) and (v) of Directive 2014/24 has disclosed no factor of such a kind as to affect their validity having regard to the principles of equal treatment and subsidiarity, and also Articles 49 and 56 TFEU.

42 In view of the foregoing considerations, the answer to the question referred is that the examination thereof has disclosed no factor of such a kind as to affect the validity of the provisions of Article 10(c) and (d)(i), (ii) and (v) of Directive 2014/24 having regard to the principles of equal treatment and subsidiarity, and also Articles 49 and 56 TFEU.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

The examination of the question referred has disclosed no factor of such a kind as to affect the validity of the provisions of Article 10(c) and (d)(i), (ii) and (v) of Directive 2014/24/EU, of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, having regard to the principles of equal treatment and subsidiarity, and also Articles 49 and 56 TFEU.

[Signatures]

---

* Language of the case: Dutch.

JUDGMENT OF THE COURT (Tenth Chamber)

28 March 2019 (*)

(Reference for a preliminary ruling — Coordination of procedures for the award of public works contracts, public supply contracts and public service contracts — Directive 2004/18/EC — Article 45(2), first subparagraph, point (b) — Personal situation of the candidate or tenderer — Possibility for the Member States to exclude from participation in a public contract any operator subject to a procedure for an arrangement with creditors — National legislation providing for the exclusion of persons subject to an 'ongoing' procedure for a declaration of admission to an arrangement with creditors, except where the insolvency plan provides for the continuation of the business — Operator having filed an application for an arrangement with creditors, reserving the possibility to submit a plan providing for the continuation of the business)

In Case C-101/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 11 January 2018, received at the Court on 12 February 2018, in the proceedings

Idi Srl

v

Agenzia Regionale Campana Difesa Suolo (Arcadis),

intervening parties:

Regione Campania,

THE COURT (Tenth Chamber),

composed of C. Lycourgos, President of the Chamber, E. Juhász (Rapporteur) and M. Ilešič, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Idi Srl, by L. Lentini, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by V. Fedeli and C. Colelli, avvocati dello Stato,

– the European Commission, by G. Gattinara and P. Ondrůšek and by L. Haasbeek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between Idi Srl and the Agenzia Regionale Campana Difesa Suolo (Arcadis) (Regional Agency of Campania for Soil Protection, Italy) concerning the exclusion from the ad hoc consortium of undertakings ('the Consortium') of which Idi was the representative, from participating in a tendering procedure for a public services contract.

Legal context

European Union law

3 Article 45 of Directive 2004/18, headed 'Personal situation of the candidate or tenderer', provides in paragraph 2:

'Any economic operator may be excluded from participation in a contract where that economic operator:

(a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

…

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.'

4 Directive 2004/18 was repealed, with effect from 18 April 2016, by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65), which is not applicable to the dispute in the main proceedings.

5 Article 57 of Directive 2014/24, headed 'Exclusions from the scope', provides:

'Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(b) the economic operator is bankrupt, subject to insolvency or winding-up procedures, where its assets are being administered by a liquidator or by a court, where it is in an arrangement with creditors, where its business activities are suspended, or where it is in any analogous situation arising from a similar procedure provided for under national laws or regulations;

…'

Italian law

6 Article 38(1) of Decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 adopting the Code on public works contracts, public service contracts and public supply contracts and transposing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to the GURI No 100 of 2 May 2006), in the version applicable to the facts in the main proceedings ('the Public Procurement Code') provides:

‘The following persons shall be excluded from participation in procedures for the award of concessions and public works contracts, supply contracts and service contracts and may not be awarded subcontracts or conclude any related contract:

(a) persons against whom insolvency proceedings or compulsory liquidation proceedings have been opened or who are in an arrangement with creditors, except in a case under Article 186a of Royal Decree No 267 of 16 March 1942, or with respect to whom proceedings seeking a declaration of one of those situations is ongoing.

…’

7 Article 161 of the legge fallimentare (Bankruptcy Law), approved by Regio Decreto n. 267 (Royal Decree No 267) of 16 March 1942 (GURI No 81 of 6 April 1942; ‘Law on bankruptcy’), headed ‘Application for an arrangement with creditors’, provides:

‘1. An application for admission to an arrangement with creditors shall be submitted in an application, signed by the debtor, filed at the court of the place where the undertaking has its head office; a relocation of the head office in the year prior to the application is irrelevant for the purpose of determining jurisdiction.

2. The debtor shall attach the following documents to the application:

…

(e) a plan that contains an analytical description of the detailed rules and deadlines for the implementation of the proposal; in any event, the application must specify and quantify in an economically measurable manner the benefit to which the person making the proposal guarantees each of the creditors.

…

6. The entrepreneur may file the originating application, containing the application for an arrangement with creditors, together with the balance sheets for the last three financial years and a list of the names of the creditors, indicating their respective claims, and reserving the right to submit the proposal, the plan and the documents as provided for in paragraphs 2 and 3 of this Article, within a time limit of 60 to 120 days to be determined by the Court, which may be extended for no more than 60 days where the reasons are justified. … By reasoned decision fixing the time limit pursuant to the first sentence, the court may appoint the insolvency administrator within the meaning of Article 163(2)(3). Article 170(2) shall apply …

7. Upon filing of the originating application … the debtor may, with the prior approval of the court, take urgent measures of extraordinary administration, whereby the court may obtain summary information and must obtain the opinion of a judicial auditor, if appointed. At the same time, and within the same time limit, the debtor may also take measures of ordinary administration. …’

8 Article 168 of the Law on bankruptcy, entitled ‘Effects of the lodgement of the action’, states:

‘1. From the date of publication of the application in the Companies Register and up until the time when the decree approving the arrangement with creditors becomes final, creditors whose title or cause arose prior thereto shall not, on pain of nullity, start or pursue enforcement and precautionary actions on the assets of the debtor.

…

Creditors cannot acquire pre-emptive rights as against competing creditors, unless they are authorised by the court in the cases provided for in the previous article. Judicial mortgages registered in the 90 days prior to the date of publication of the action in the register of companies are ineffective with regard to creditors prior to the arrangement.’

9 Article 186*bis* of the Law on bankruptcy, entitled ‘Arrangements with creditors as a going concern’, provides:

‘1. When the insolvency plan referred to in Article 161(2)(e) provides for the activity of the undertaking to be continued by the debtor, for the transfer of the continuing business, or for the continuing business to be assigned into one or more companies, including newly formed companies, the provisions of this article shall apply. The plan may also provide for the sale of assets that are not necessary for the operation of the undertaking.

…

4. After the application has been submitted, participation in procedures for the award of public contracts must be authorised by the court, after hearing the opinion of the judicial auditor, if appointed; if no judicial auditor has been appointed, the court shall decide.

5. Admission to an arrangement with creditors shall not prevent participation in procedures for the award of public contracts provided that the undertaking submits for the purpose of the call for tenders:

(a) a report by an expert fulfilling the conditions set out in Article 67(3)(d) confirming that participation consistent with the plan and the contract could reasonably be performed;

(b) a declaration by another operator fulfilling the general conditions relating to financial, technical and economic capacities, as well as certification required for the award of the contract, who has undertaken, in relation to the tenderer and the contracting authority, to make available, for the duration of the contract, the resources necessary to perform the contract, and to take over from the assisted undertaking if the latter becomes insolvent during the tender procedure or after the contract has been entered into, or is for any other reason no longer in a position properly to perform the contract. Article 49 of Legislative Decree No 163 of 12 April 2006 shall apply.

6. Subject to the provisions of the previous paragraph, the undertaking that has entered into an arrangement with creditors may also participate in an ad hoc tendering consortium, provided it is not acting as principal and that the other undertakings forming the consortium are not subject to collective proceedings. In that circumstance, the declaration referred to in the fourth subparagraph under (b) may also be made by an operator belonging to the consortium.

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 It is apparent from the file submitted to the Court that, by a notice of 24 July 2013, Arcadis launched a call for tenders for the award of a public services contract for project management, evaluation and accounting, assistance with inspection, as well as coordination of safety and health matters. The estimated value of this service contract was EUR 1 028 096.59.

11 On 14 October 2013, TEI Srl, as the principal of the consortium, submitted a request to participate in the call for tenders mentioned in the previous paragraph.

12 On 29 April 2014, the public services contract was provisionally awarded to the consortium.

13 On 18 June 2014, TEI filed an application with the Tribunale di Milano (District Court, Milan, Italy) seeking admission to an arrangement with creditors, reserving the right, pursuant to Article 161(6) of the Law on bankruptcy, to submit a plan for an arrangement as a going concern.

14 By decision notified on 9 December 2014 (‘the exclusion decision’), Arcadis excluded the Consortium from the public procurement procedure. In that regard, Arcadis based its decision on the fact that, in accordance with Article 38(1) of the Public Procurement Code, the filing of an application by a company for admission to an arrangement with creditors precludes its participation in a public

tendering procedure, except if, as distinct from the present case, the debtor has submitted with the application a plan for an arrangement as a going concern (*concordato in continuità aziendale*).

15 By judgment of 29 April 2015, the Tribunale amministrativo regionale per la Campania (Regional Administrative Court, Campania, Italy) dismissed the application for annulment brought by Idi against the exclusion decision. That court held that the filing of an application for an arrangement with creditors by TEI amounted to an admission that it was in a crisis situation, which justified the exclusion of the Consortium from any participation in public procurement procedures.

16 Idi brought an appeal before the referring court, the Consiglio di Stato (Council of State, Italy).

17 That court observes that the exclusion decision is compatible with its case-law.

18 According to that case-law, an economic operator who has filed an application for an arrangement with creditors may participate in public procurement procedures only if it has been admitted to the arrangement with creditors as a going concern, provided for Article 186*bis* of the Law on bankruptcy, or if, having applied to be admitted to the latter procedure, it has been authorised by the competent court to participate in public procurement procedures.

19 On the other hand, according to that case-law, any operator whose application for an arrangement with creditors is not accompanied by a plan that expressly provides for the continuation of the business is excluded from public procurement procedures. In fact, in such a situation, called 'blank arrangement' (*concordato in bianco*), the absence of such a plan constitutes an admission by the operator of the economic difficulties it faces.

20 The referring court adds that the 'blank arrangement', which is a 'contingent' arrangement with creditors for the purpose of Article 161(6) of the Law on bankruptcy allows, on one hand, applications for bankruptcy filed by creditors to be temporarily 'frozen' (normally between 30 and 120 days) and, on the other hand, enables the applicant to choose either to submit an arrangement plan or to submit a corporate restructuring agreement, in order to postpone such a choice until the outcome of a renegotiation with the general body of creditors.

21 However, that court expresses doubts as to the compatibility of such case-law with Article 45(2), first subparagraph, points (a) and (b), of Directive 2004/18.

22 In that connection, it submits that, where the creditors request the opening of insolvency proceedings, such a procedure is regarded as being 'open' only once the competent court has declared the debtor to be insolvent. However, where an economic operator applies for a 'blank arrangement' the procedure is regarded as being 'open' from the time the application is lodged.

23 The referring court therefore asks whether Article 45(2), first subparagraph, points (a) and (b), of Directive 2004/18 must be interpreted as meaning that it covers the situation of an economic operator, such as that at issue in the main proceedings, which filed an for admission to the 'blank arrangement' procedure.

24 In those circumstances, the Consiglio di Stato (Council of State) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is it compatible with Article 45(2)(a) and (b) of Directive 2004/18 … to regard a debtor that has merely made a request to the competent judicial body to enter into an arrangement with creditors as being "the subject of proceedings"?

(2) Is it compatible with the abovementioned provision to regard a debtor's declaration that it is in a state of insolvency and wishes to submit a preliminary request (the features of which are described above) to enter into an arrangement with creditors as grounds for excluding that debtor from a public tendering procedure, thereby interpreting broadly the term "the subject of proceedings" used in the provisions of [EU] law (Article 45 of [Directive 2004/18]) and of national law (Article 38 of [the Public Procurement Code]) cited above?'

Admissibility of the questions referred for a preliminary ruling

25 The Italian Government questions the admissibility of the request for a preliminary ruling.

26 First of all, the Italian Government observes that, in the order for reference, the Consiglio di Stato (Council of State) merely referred to the content of its case-law concerning the effects of the application of 'blank arrangements' on the public procurement procedures and reproduced the provisions of Article 45(2), first subparagraph, points (a) and (b), of Directive 2004/18 without explaining why it has doubts about the conformity of the national legislation to Article 45.

27 The Italian Government further claims that the questions raised by the Consiglio di Stato (Council of State) are hypothetical. In this regard, it states that TEI's participation in the public procurement procedure in the main proceedings was refused because the Tribunale di Milano (District Court, Milan), at which TEI had filed an application for an arrangement, had not authorised it to participate in the procedure for the award of that contract. That implies that '[the] cause of exclusion [from such a participation] exists regardless of … the date from which the collective procedure can be considered to be ongoing'.

28 In that regard, it should be borne in mind that, according to settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it, which requires the national court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based (judgments of 21 September 2016, *Etablissements Fr. Colruyt*, C-221/15, EU:C:2016:704, paragraph 14, and of 31 May 2018, *Zheng*, C-190/17, EU:C:2018:357, paragraph 48 and the case-law cited).

29 In the present case, and as the observations set out by the Italian Government regarding the answer to be given to the preliminary questions confirm, the factual and legal elements mentioned in the order for reference make it possible to understand why the national court has referred such a question to the Court.

30 Furthermore, as regards the alleged hypothetical nature of the questions referred, it must be stated that the legality of the exclusion decision at issue in the main proceedings necessarily depends on the answer to the question referred. By that question, the referring court asks whether Article 45(2), first subparagraph, points (a) and (b), of Directive 2004/18, which recognises that Member States have the right to exclude from participation in public procurement procedures operators in arrangements with creditors or which are the subject of an arrangement with creditors, covers the situation of a company that has filed an application seeking admission to the 'blank arrangement'. It is clear from the information contained in the order for reference that the Consortium was excluded precisely because TEI was in such a situation.

31 It follows that the questions referred for a preliminary ruling are admissible.

Consideration of the questions referred

32 As a preliminary point, it should be noted that, in the formulation of its questions, the referring court makes reference to Article 45(2) first subparagraph, point (a), and to Article 45(2), first subparagraph, point (b), of Directive 2004/18.

33 Since an economic operator may be excluded from public procurement procedures either on the basis of Article 45(2), first subparagraph, point (a), or Article 45(2), first subparagraph, point (b), of Directive 2004/18, it must be held that, having regard to the circumstances which characterise the case in the main proceedings, only the latter provision is relevant.

34 In those circumstances, by its two questions, which should be examined together, the referring court essentially asks whether Article 45(2), first subparagraph, point (b), of Directive 2004/18 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which allows for the exclusion from a public procurement procedure of an economic operator who, at the date of the exclusion decision, has filed an application for admission to an arrangement with creditors, while reserving the right to submit a plan that provides for the continuation of the business.

35 According to settled case-law, as regards public contracts falling within the scope of Directive 2004/18, Article 45(2) thereof leaves the application of the seven grounds for excluding candidates from participation in a contract, relating to their professional honesty, solvency and reliability, to the determination of the Member States, as evidenced by the phrase ‘may be excluded from participation in a contract’, which appears at the beginning of that provision (judgment of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 28).

36 More specifically, in order to guarantee the solvency of the party entering into the contract with the contracting authority, Article 45(2), first subparagraph, point (b), of that directive permits, allows for the exclusion from participation in a public contract of any economic operator who is the subject of an arrangement with creditors.

37 Under Article 45(2), second subparagraph, of that directive, the Member States are to specify, in accordance with their national law and having regard for EU law, the implementing conditions for that paragraph. It follows that the concepts in Article 45(2), first paragraph, including the expression ‘entered into an arrangement with creditors’ may be specified and explained in national law, provided that that is done with regard for EU law (see, to that effect, judgment of 4 May 2017, *Esaprojekt*, C-387/14, EU:C:2017:338, paragraph 74 and the case-law cited).

38 In the present case, as is clear from the national legislation, and from Article 168 of the Law on bankruptcy in particular, one of the effects of filing an application for an arrangement with creditors is that creditors are prevented, for a period determined by the Law on bankruptcy, from bringing actions against the debtor’s estate and the applicant’s rights over its estate are limited, since from the time the application is lodged the applicant is unable to take extraordinary measures of administration with regard to its estate itself, that is without the authorisation of a court.

39 Therefore, filing of such an application produces legal effects on the rights and obligations of both the applicant and the creditors. That means that the filing of that application must be regarded, even before any decision by the competent judge, as the starting point of the arrangement with creditors referred to in Article 45(2), first paragraph, point (b) of Directive 2004/18 and, therefore, as the act initiating such procedure.

40 That finding is also justified by the applicant’s economic and financial situation. By filing such an application, the economic operator acknowledges that it is in a state of financial difficulty which may jeopardise its economic stability. As stated in paragraph 35 of the present judgment, the optional ground of exclusion referred to in Article 45(2), first subparagraph, point (b), of Directive 2004/18 specifically aims to guarantee the contracting authority that it will enter into a contract with an economic operator with sufficient economic stability.

41 It follows that, from the time the application is filed, it must be considered that the economic operator is subject to an arrangement with creditors, within the meaning of that provision.

42 The fact that, in its application for an arrangement with creditors, the economic operator reserves the right to submit a plan that provides for the continuation of its business cannot affect that finding.

43 It is true, as is apparent from the order for reference that an economic operator who has filed an application for a court approved arrangement including a plan for the continuation of the business may, under the conditions laid down by national law, participate in public procurement procedures. It follows that Italian legislation provides for a difference in treatment, as regards their eligibility to participate in public procurement procedures, as between economic operators who have filed an application for an arrangement with creditors depending on whether or not they have included a plan in their application that provides for the continuation of the business.

44 However, that difference in treatment is not incompatible with the case-law of the Court.

45 Article 45(2) of Directive 2004/18 does not provide for uniform application at EU level of the grounds of exclusion it mentions, since the Member States may choose not to apply those grounds of exclusion at all or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context, Member States have the power to make the criteria laid down in Article 45(2) less onerous or more flexible (judgment of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 29 and the case-law cited).

46 In that case, the Member State concerned is entitled to determine the conditions under which the optional grounds for exclusion do not apply (see, to that effect, judgment of 20 December 2017, *Impresa di Costruzioni Ing. E Mantovani and Guerrato*, C-178/16, EU:C:2017:1000, paragraph 41).

47 As the Italian Government observed, the fact that an economic operator is the subject of an arrangement with creditors pursuant to Article 45(2), first subparagraph, point (b), of Directive 2004/18, does not, however, prevent the relevant national legislation from authorising that economic operator to participate in public procurement procedures, under the conditions defined by that legislation.

48 It is equally consistent with EU law and specifically the principle of equality in public procurement procedures for national legislation to exclude from participation in a public contract an economic operator who has submitted an application for ‘blank arrangement’ or to include it.

49 Furthermore, the situation in which that operator has not yet, on the date on which the exclusion decision is made, committed itself to enter into an arrangement with creditors as a going concern is not comparable, in terms of its financial stability, to the situation of an economic operator which undertakes to continue its economic activity on that date.

50 In the light of all the foregoing, the answer to the questions referred is that Article 45(2), first subparagraph, point (b), of Directive 2004/18 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows the exclusion from a public procurement procedure of an economic operator who, at the date of the exclusion decision, has filed an application for an arrangement with creditors, while reserving the right to present a plan which provides for the continuation of the business.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 45(2), first subparagraph, point (b), of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows the exclusion from a public procurement procedure of an economic operator who, at the date of the exclusion decision, has filed an application for an arrangement with creditors, while reserving the right to present a plan which provides for the continuation of the business.

[Signatures]

* Language of the case: Italian.

EU:C:2019:787

JUDGMENT OF THE COURT (Fifth Chamber)

26 September 2019 (*)

(Reference for a preliminary ruling — Articles 49 and 56 TFEU — Public procurement — Directive 2014/24/EU — Article 71 — Subcontracting — National legislation limiting the possibility of subcontracting to 30% of the total amount of the contract)

In Case C-63/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy), made by decision of 13 December 2017, received at the Court on 1 February 2018, in the proceedings

Vitali SpA

v

Autostrade per l'Italia SpA,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, C. Lycourgos, E. Juhász, M. Ilešič and I. Jarukaitis, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli and V. Nunziata, avvocati dello Stato,

– the Norwegian Government, by K.H. Aarvik, H. Røstum and C. Anker, acting as Agents,

– the European Commission, by L. Haasbeek, G. Gattinara and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 and 56 TFEU, Article 71 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5) ('Directive 2014/24'), and the principle of proportionality.

2 The request has been made in proceedings between Vitali SpA and Autostrade per l'Italia SpA concerning a decision taken by the latter, in its capacity as contracting authority, to exclude the former from a public procurement procedure.

Legal context

EU law

3 Recitals 1, 41, 78, 100 and 105 of Directive 2014/24 state:

‘(1) The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

…

(41) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality [and] public security …, provided that those measures are in conformity with the TFEU.

…

(78) Public procurement should be adapted to the needs of [small and medium-sized enterprises (SMEs)]. Contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled “European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts”, providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation. To that end and to enhance competition, contracting authorities should in particular be encouraged to divide large contracts into lots. …

Member States should remain free to go further in their efforts to facilitate the involvement of SMEs in the public procurement market, by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions. With the same purpose, Member States should also be free to provide mechanisms for direct payments to subcontractors.

…

(100) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union’s financial interests, terrorist offences, money laundering or terrorist financing. …

…

(105) It is important that observance by subcontractors of applicable obligations in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in this Directive, provided that such rules, and their application, comply with Union law, be ensured through appropriate actions by the competent national authorities within the scope of their responsibilities and remit, such as labour inspection agencies or environmental protection agencies.

…

… Furthermore, it should be stated explicitly that Member States should be able to go further, for instance by extending the transparency obligations, by enabling direct payment to subcontractors

or by enabling or requiring contracting authorities to verify that subcontractors are not in any of the situations in which exclusion of economic operators would be warranted. …

It should also be set out explicitly that Member States remain free to provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors.'

4 In accordance with Article 4(a) of Directive 2014/24, that directive applies, in the case of public works contracts, to procurements with a value net of value added tax (VAT) estimated to be equal to or greater than the threshold of EUR 5 225 000.

5 Article 18 of that directive, headed 'Principles of procurement', provides in the first subparagraph of paragraph 1:

'Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.'

6 Article 57 of that directive, headed 'Exclusion grounds', provides in paragraph 1 that contracting authorities are to exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the reasons listed in that provision.

7 Article 63 of the directive, headed 'Reliance on the capacities of other entities', provides in the first subparagraph of paragraph 1:

'With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.'

8 Article 71 of Directive 2014/24, headed 'Subcontracting', provides:

'1. Observance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.

2. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

3. Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to whom the public contract has been awarded (the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

4. Paragraphs 1 to 3 shall be without prejudice to the question of the main contractor's liability.

5. In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to

indicate to the contracting authority the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at this point in time. The contracting authority shall require the main contractor to notify the contracting authority of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services.

Notwithstanding the first subparagraph, Member States may impose the obligation to deliver the required information directly on the main contractor.

Where necessary for the purposes of point (b) of paragraph 6 of this Article, the required information shall be accompanied by the subcontractors' self-declarations as provided for in Article 59. The implementing measures pursuant to paragraph 8 of this Article may provide that subcontractors which are presented after the award of the contract shall provide the certificates and other supporting documents instead of the self-declaration.

The first subparagraph shall not apply to suppliers.

Contracting authorities may extend or may be required by Member States to extend the obligations provided for in the first subparagraph to for instance:

(a) supply contracts, to services contracts other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority or to suppliers involved in works or services contracts;

(b) subcontractors of the main contractor's subcontractors or further down the subcontracting chain.

6. With the aim of avoiding breaches of the obligations referred to in Article 18(2), appropriate measures may be taken, such as:

(a) Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 18(2).

(b) Contracting authorities may, in accordance with Articles 59, 60 and 61, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. In such cases, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

7. Member States may provide for more stringent liability rules under national law or go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for them to request such direct payment.

8. Member States having chosen to provide for measures pursuant to paragraphs 3, 5 or 6 shall, by law, regulation or administrative provisions and having regard for Union law, specify the implementing conditions for those measures. In so doing, Member States may limit their applicability, for instance in respect of certain types of contracts, certain categories of contacting authorities or economic operators or as of certain amounts.'

Italian law

9 The third sentence of Article 105(2) of decreto legislativo n. 50 — Codice dei contratti pubblici (Legislative Decree No 50 establishing the public procurement code) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016, 'Legislative Decree No 50/2016') provides:

'Save as provided for in paragraph 5, any subcontracting shall not exceed 30% of the total amount of the contract for works, services or supplies.'

10 Article 105(5) of Legislative Decree No 50/2016 is worded as follows:

‘For works referred to in Article 89(11), and without prejudice to the limits provided for in that paragraph, any subcontracting shall not exceed 30% of the amount of the works and shall not be subdivided without objective reasons.’

The dispute in the main proceedings and the question referred for a preliminary ruling

11 By a public contract notice published in August 2016, Autostrade per l’Italia launched a restricted tendering procedure for the award of works to widen the fifth lane of the Italian A8 motorway between the toll barrier at North Milan (Italy) and the interconnection in Lainate (Italy), for a basic amount of EUR 85 211 216.84, excluding VAT.

12 Vitali was excluded from the tendering procedure on the ground that the 30% limit in respect of subcontracting laid down in Article 105(2) of Legislative Decree No 50/2016 had been exceeded.

13 Vitali brought an action before the referring court seeking, inter alia, its readmission to the tendering procedure.

14 By partial judgment of 5 January 2018, the referring court rejected all the pleas in law advanced by Vitali in support of the action, with the exception of the plea alleging that the 30% limit on subcontracting provided for by Italian law is not in conformity with EU law.

15 The referring court has doubts as to whether such a quantitative limit is compatible with Articles 49 and 56 TFEU, Article 71 of Directive 2014/24 and the principle of proportionality.

16 That court points out that the Consiglio di Stato (Council of State, Italy) has ruled that the national legislature is entitled to fix limits on subcontracting that are more stringent than those provided for in the relevant provisions of EU law, in so far as more stringent limits are justified, first, in the light of the principles of social sustainability and, second, in the light of the values set out in Article 36 TFEU, which include public policy and public security. The referring court also points out that the Consiglio di Stato (Council of State) is of the opinion that the Court’s case-law relating to the quantitative limits on subcontracting in the field of public procurement, which concerns Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), does not apply in the context of Directive 2014/24.

17 However, the referring court also observes that, like Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Directive 2004/18, Directive 2014/24 does not impose any quantitative limit on subcontracting. According to the referring court, the setting of a general limit on subcontracting of 30% of the total amount of the contract may make it more difficult for undertakings, particularly small and medium-sized undertakings, to access public contracts, thereby hindering the exercise of freedom of establishment and the freedom to provide services. That limit is set in abstract terms as a certain percentage of the contract, irrespective of the possibility of verifying the capacities of potential subcontractors and without mention of the essential character of the tasks in question.

18 Consequently, the referring court is uncertain as to whether the national legislation at issue goes beyond what is necessary to achieve the objectives pursued.

19 In those circumstances, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do the principles of freedom of establishment and freedom to provide services referred to in Articles 49 and 56 of the [TFEU], Article 71 of [Directive 2014/24], which does not contemplate quantitative limitations on subcontracting, and the EU-law principle of proportionality preclude the

application of national legislation in matters relating to public procurement, such as the Italian rule set out in the third sentence of Article 105(2) of [Legislative Decree No 50/2016], pursuant to which subcontracting cannot exceed 30% of the total amount of the contract for works, services or supplies?'

20 The referring court's request that its request for a preliminary ruling be determined pursuant to an expedited procedure in accordance with Article 105(1) of the Rules of Procedure of the Court of Justice was refused by order of the President of the Court of 8 March 2018, *Vitali* (C-63/18, not published, EU:C:2018:199).

Consideration of the question referred

21 By its question, the referring court asks, in essence, whether Articles 49 and 56 TFEU and Directive 2014/24 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties.

22 As a preliminary point, it should be noted that since the value, net of VAT, of the contract at issue in the main proceedings is greater than the threshold of EUR 5 225 000 prescribed by Article 4(a) of Directive 2014/24, it is in the light of that directive that the present request for a preliminary ruling must be answered.

23 That directive, as is apparent, in essence, from recital 1, seeks to ensure compliance, in the award of public contracts, with, inter alia, the free movement of goods, freedom of establishment and the freedom to provide services, as well as with the principles deriving therefrom, in particular equal treatment, non-discrimination, proportionality and transparency, and to ensure that public procurement is opened up to competition.

24 In particular, to that end, the directive explicitly contemplates, in Article 63(1), the possibility for tenderers to rely, subject to certain conditions, on the capacities of other entities to meet certain selection criteria for economic operators.

25 In addition, Article 71 of that directive, which deals specifically with subcontracting, provides, in paragraph 2, that the contracting authority may ask, or may be required by a Member State to ask, the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

26 It follows that, like Directive 2004/18 that it repealed, Directive 2014/24 provides for the possibility for tenderers to rely on subcontractors for the performance of a contract, provided that the conditions laid down in that directive are met (see, to that effect, in respect of Directive 2004/18, judgment of 14 July 2016, *Wrocław — Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraphs 31 to 33).

27 According to settled case-law, and as recital 78 of Directive 2014/24 makes clear, it is in the interests of the European Union to ensure, in the field of public procurement, that the opening up of competition in tendering procedures is enhanced. The use of subcontractors, which is likely to facilitate access of small and medium-sized undertakings to public contracts, contributes to the pursuit of that objective (see, to that effect, judgment of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraph 48 and the case-law cited).

28 Furthermore, the Court held in paragraph 35 of its judgment of 14 July 2016, *Wrocław — Miasto na prawach powiatu* (C-406/14, EU:C:2016:562), which concerned the interpretation of Directive 2004/18, that a clause in the tender specifications for a public works contract which imposes limits on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks which would be concerned, is incompatible with Directive 2004/18, which was applicable in the context of the proceedings giving rise to that judgment.

29 In that regard it should be noted that, while Article 71 of Directive 2014/24 reproduces, in essence, the wording of Article 25 of Directive 2004/18, it nevertheless prescribes additional rules on subcontracting. In particular, Article 71 provides for the possibility for the contracting authority to ask, or of being required by a Member State to ask, the tenderer to inform it of its intentions as regards subcontracting, and for the possibility, subject to certain conditions, for the contracting authority to transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In addition, Article 71 provides that contracting authorities may verify, or may be required by Member States to verify, whether there are grounds to exclude subcontractors pursuant to Article 57 of that directive due to, inter alia, participation in a criminal organisation, corruption or fraud.

30 However, it cannot be inferred from the intention of the EU legislature to circumscribe more precisely, by means of the adoption of such rules, the situations in which the tenderer uses subcontractors that Member States now have the power to limit that use to a share of the contract fixed in abstract terms as a certain percentage of the contract, as in the case of the limit imposed by the legislation at issue in the main proceedings.

31 In that regard, the Italian Government submits that it is open to Member States to provide for measures other than those specifically listed in Directive 2014/24, in order to ensure, inter alia, observance of the principle of transparency in public procurement procedures, given the greater emphasis placed on that principle in the context of that directive.

32 More specifically, the Italian Government highlights the fact that the limit on the use of subcontracting at issue in the main proceedings is justified in the light of the particular circumstances prevailing in Italy, where subcontracting has always been one of the mechanisms used to carry out criminal operations. By limiting the share of the contract that can be subcontracted, the national legislation makes participation in public purchasing less attractive to criminal organisations, and this is capable of preventing the phenomenon of mafia infiltration in public purchasing and thus protecting public policy.

33 It is true, as the Italian Government points out, that recitals 41 and 105 of Directive 2014/24 and certain provisions thereof, such as Article 71(7), explicitly state that Member States remain free to provide for rules in their national legislation that in some respects are more stringent than those provided for by the directive as regards subcontracting, provided that those rules are compatible with EU law.

34 It is also true, as is apparent from, inter alia, the qualitative selection criteria provided for in Directive 2014/24, in particular the exclusion grounds laid down in Article 57(1), that, by adopting such provisions, the EU legislature intended to prevent economic operators who have been the subject of a conviction by final judgment in the circumstances prescribed in that article from participating in a procurement procedure.

35 Similarly, recital 41 of Directive 2014/24 states that nothing in that directive should prevent the imposition or enforcement of measures necessary, inter alia, to protect public policy, public morality and public security, provided that those measures are in conformity with the TFEU, while recital 100 of that directive states that public contracts should not be awarded, inter alia, to economic operators who have participated in a criminal organisation.

36 In addition, according to settled case-law, Member States must be recognised as having a certain discretion for the purpose of adopting measures intended to ensure observance of the principle of transparency, which is binding on contracting authorities in any procedure for the award of a public contract. Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it, situations propitious to conduct liable to bring about breaches of that principle (see, to that effect, judgment of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 26 and the case-law cited).

37 More specifically, the Court has already held that combating the phenomenon of infiltration of the public procurement sector by organised crime constitutes a legitimate objective capable of justifying a restriction on the fundamental rules and general principles of the TFEU which apply in public procurement procedures (see, to that effect, judgment of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraphs 27 and 28).

38 However, even if a quantitative limit on the use of subcontracting may be regarded as likely to combat such a phenomenon, a restriction such as that at issue in the main proceedings goes beyond what is necessary to achieve that objective.

39 In that regard, it should be borne in mind that the contracting authorities must, throughout the procedure, observe the principles of procurement set out in Article 18 of Directive 2014/24, which include, inter alia, the principles of equal treatment, transparency and proportionality (judgment of 20 September 2018, *Montte*, C-546/16, EU:C:2018:752, paragraph 38).

40 In particular, as pointed out in paragraph 30 of the present judgment, the national legislation at issue in the main proceedings prohibits, in general and abstract terms, use of subcontracting which exceeds a fixed percentage of the public contract concerned, so that that prohibition applies whatever the economic sector concerned by the contract at issue, the nature of the works or the identity of the subcontractors. Furthermore, such a general prohibition does not allow for any assessment on a case-by-case basis by the contracting entity (see, by analogy, judgment of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraphs 54 and 55).

41 It follows that, in the context of national legislation such as that at issue in the main proceedings, in respect of all contracts, a significant part of the works, supplies or services concerned must be performed by the tenderer itself, failing which it will be automatically excluded from the procurement procedure, including where the contracting entity would be able to verify the identity of the subcontractors concerned and would take the view, after verification, that such a prohibition is not necessary in order to combat organised crime in the context of the contract in question.

42 As the Commission points out, the objective pursued by the Italian legislature could be achieved by less restrictive measures, as in the case of those provided for in Article 71 of Directive 2014/24 and referred to in paragraph 29 of the present judgment. In fact, as the referring court states, Italian law already provides for numerous measures explicitly intended to prohibit undertakings suspected of belonging to the mafia, or in any event of being linked to the interests of the main criminal organisations operating in the country, from having access to public tendering procedures.

43 Accordingly, a restriction on the use of subcontracting such as that at issue in the main proceedings cannot be regarded as compatible with Directive 2014/24.

44 That conclusion cannot be called into question by the argument put forward by the Italian Government that the checks which the contracting authority is required to carry out under national law are ineffective. That fact, which, as seems clear from the Italian Government's own observations, results from the specific manner in which those checks are carried out, does not in any way alter the restrictive nature of the national measure at issue in the main proceedings. Moreover, in the present case the Italian Government has not in any way demonstrated that the various rules provided for in Article 71 of Directive 2014/24, by which Member States may limit the use of subcontracting, and the grounds for excluding subcontractors made possible under Article 57 of that directive, which are referred to in Article 71(6)(b), cannot be implemented in such a way as to achieve the objective pursued by the national legislation at issue in the main proceedings.

45 In the light of the foregoing considerations, the answer to the question referred for a preliminary ruling is that Directive 2014/24 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which limits to 30% the share of the contract which the tenderer is permitted to subcontract to third parties.

[Signatures]

---

* Language of the case: Italian.

EU:C:2019:118

ORDER OF THE COURT (Fourth Chamber)

14 February 2019 (*)

(Reference for a preliminary ruling — Public procurement — Review procedures — Directive 89/665/EEC — Articles 1 and 2c — Action brought against decisions to allow tenderers to participate in, or to exclude them from, a tendering procedure — Time limit for applying for review — 30-day time limit — National legislation excluding the possibility to plead the illegality of an admission decision in an action brought against subsequent decisions — Charter of Fundamental Rights of the European Union — Article 47 — Right to effective judicial protection)

In Case C-54/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont, Italy), made by decision of 27 September 2017, received at the Court on 29 January 2018, in the proceedings

Cooperativa Animazione Valdocco Soc. coop. soc. Impresa Sociale Onlus

v

Consorzio Intercomunale Servizi Sociali di Pinerolo,

Azienda Sanitaria Locale To3 di Collegno e Pinerolo,

intervening parties:

Ati Cilte Soc. coop. soc.,

Coesa Pinerolo Soc. coop. soc. arl,

La Dua Valadda Soc. coop. soc.,

Consorzio di Cooperative Sociali il Deltaplano Soc. coop. soc.,

La Fonte Soc. coop. soc. Onlus,

Società Italiana degli Avvocati Amministrativisti (SIAA),

Associazione Amministrativisti.it,

Camera degli Avvocati Amministrativisti,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, K. Jürimäe, D. Šváby, S. Rodin and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Cooperativa Animazione Valdocco Soc. coop. soc. Impresa Sociale Onlus, by A. Sciolla, S. Viale and C. Forneris, avvocati,

– Consorzio Intercomunale Servizi Sociali di Pinerolo, by V. Del Monte, avvocato,

– Ati Cilte Soc. coop. soc., Coesa Pinerolo Soc. coop. soc. arl and La Dua Valadda Soc. coop. soc., by L. Gili and A. Quilico, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli and V. Nunziata, avvocati dello Stato,

– the Netherlands Government, by M. Bulterman and J.M. Hoogveld, acting as Agents,

– the European Commission, by L. Haasbeek and by G. Gattinara and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and (2) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 3), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) (‘Directive 89/665’), read in the light of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’) and the principles of equivalence and effectiveness.

2 The request has been made in a dispute between Cooperativa Animazione Valdocco Soc. coop. soc. Impresa Sociale Onlus (‘Cooperativa Animazione Valdocco’), on one hand, and Consorzio Intercomunale Servizi Sociali di Pinerolo (‘CISS di Pinerolo’) and Azienda Sanitaria Locale To3 di Collegno e Pinerolo, on the other, concerning the award of a public services contract for home care services to an ad hoc consortium of undertakings constituted by Ati Cilte Soc. coop. soc., Coesa Pinerolo Soc. coop. soc. arl and La Dua Valadda Soc. coop. soc. (‘the ad hoc consortium’).

Legal context

European Union law

3 The fourth subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 provide as follows:

‘1. …

‘Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directive 2014/24/EU [of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)] or Directive [2014/23], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.'

4 Article 2c of that directive, relating to 'time limits for applying for review', provides:

'Where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive [2014/24] or [Directive 2014/23] must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The communication of the contracting authority's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.'

Italian law

5 Article 120(2-bis) of Annex I to decreto legislativo n. 104 — Codice del processo amministrativo (Legislative Decree No 104 establishing the Administrative Procedure Code) of 2 July 2010 (Ordinary Supplement to the GURI No 156 of 7 July 2010), as amended by Article 204 of decreto legislativo n. 50 — Codice dei contratti pubblici (Legislative Decree No 50 establishing the Public Procurement Code) of 18 April 2016 (Ordinary Supplement to the GURI No 91 of 19 April 2016) ('the Administrative Procedure Code'), provides:

'The decision determining exclusions from a tendering procedure and admissions to it on the outcome of the evaluation of the subjective economic-financial and technical-professional requirements must be challenged within 30 days from its publication on the contracting authority's website, in accordance with Article 29(1) of the [Public Procurement Code]. Failure to mount a challenge excludes the possibility of pleading illegality in respect of subsequent decisions in the tendering procedure, including by cross-appeal. Any challenge to the proposal for award of the contract, when it is made, and of other intermediate decisions made during the procedure which do not cause immediate harm shall also be inadmissible.'

6 Article 29 of Legislative Decree No 50 establishing the Public Procurement Code of 18 April 2016, as amended by decreto legislativo n. 56 (Legislative Decree No 56) of 19 April 2017 (Ordinary Supplement to the GURI No 103 of 5 May 2017) ('the Public Procurement Code') provides:

'… In order to allow an action to be brought pursuant to Article 120(2-bis) of the Administrative Procedure Code, the decision determining exclusions from a tendering procedure and admissions to it following verification of the documents establishing a lack of grounds for exclusion as set out in Article 80, as well as the fulfilment of the economic-financial and technical-professional requirements, shall also be published within the two days following the adoption of the relevant decisions. Within that same period of two days, the candidates and tenderers shall be given notice … of that decision, stipulating the office or restricted-access computer links at which the relevant documents are available. The period for the challenge referred to in the aforementioned Article 120(2-bis) starts to run from the moment the documents referred to in the second sentence are made effectively available, together with the reasoning adopted by the contracting authority.'

7 Article 53(2) and (3) of the Public Procurement Code provides:

'2. Without prejudice to the provisions laid down by the present code concerning the contracts awarded on condition of confidentiality or the implementation of which requires specific security measures, the right of access shall be postponed:

(a) until the expiry of the time limit for submission of the tender in open procedures, as regards the list of persons having submitted tenders;

(b) until the expiry of the time limit for the submission of tenders in the restricted and negotiated procedures and in informal calls for tender, as regards the list of persons having requested an invitation to participate or who have expressed their interest, and the list of persons who have been invited to submits tenders and the list of persons who have submitted those tenders; the persons whose request for an invitation was rejected may have access to the list of persons who have requested an invitation to participate or who have expressed their interest, after the official notification by the contracting authorities of the name of candidates to be invited;

(c) as regards tender, until the contract is awarded;

(d) as regards the procedure for checking anomalies in the tender, until the contract is awarded;

3. The decisions indicated in paragraph 2, until the expiry of the time limits set out therein, cannot be communicated to third parties or disseminated in any manner whatsoever.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 By decision of 19 May 2017, the CISS di Pinerolo awarded the public services contract for home assistance services within its territorial remit to the ad hoc consortium for the period from 1 June 2017 to 31 May 2020, applying the criterion of the most economically advantageous offer.

9 Once the award was made, the Cooperativa Animazione Valdocco, which was ranked second, brought an action for annulment before the referring court, namely the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont, Italy), against the decision awarding the public contract concerned and various decisions in the course of the tendering procedure, including the decision not to exclude the ad hoc consortium, arguing, inter alia, that due to the failure to lodge a provisional deposit of the required amount or to satisfy the conditions for participation, that group should not have been allowed to participate in the tendering procedure.

10 The referring court states that the contracting authority and the ad hoc consortium pleaded the inadmissibility of the action, on the ground that it was brought against the final decision of the contracting authority. In accordance with the accelerated procedure established by the combined provisions of Article 29 of the Public Procurement Code and Article 120(2-bis) of the Administrative Procedure Code, the action brought by Cooperativa Animazione Valdocco should have been brought within 30 days from the notification of the act authorising the tenderers to participate in the bidding procedure.

11 The referring court states, in that regard, that the introduction of the accelerated procedure for challenging decisions to exclude or admit tenderers, laid down in Article 120(2-bis) of the Administrative Procedure Code, responds to the need to enable disputes to be resolved before the award decision, by determining, in an exhaustive manner, the persons eligible to participate in the tendering procedure before the examination of the tenders and, therefore, the designation of the successful tenderer.

12 It states, however, that that accelerated procedure is just as open to criticism with regard to certain aspects, in particular, with regard to EU law.

13 In that connection, it observes, first of all, that that procedure obliges the tenderer who is not eligible to participate in the tendering procedure to seek a review of the decision relating to admission or non-exclusion of all the tenderers so that, on one hand, it does not know at that time who will be the successful tenderer and, on the other hand, it does not itself have any advantage in challenging the award decision without a ranking in the final classification. That tenderer is therefore obliged to bring legal proceedings without any guarantee that that initiative will yield real benefits, while obliging it to bear the costs related to the initial costs of bringing those procedures.

14 The referring court then points out that a tenderer required to bring proceedings in that way in accordance the accelerated procedure not only has no actual and current interest but, under Article 120(2-bis) of the Administrative Procedure Code, also suffers various types of damage. The first results from the substantial financial costs related to bringing multiple actions. The second relates to the possible compromise of its position in the eyes of the adjudicating authority. The third relates to the negative consequences of its ranking, as Article 83 of the Public Procurement Code provides that the influence of proceedings brought by the tenderer is a negative criterion.

15 Lastly, the referring court points out that the excessively difficult access to administrative justice is made worse by Article 53 of the Public Procurement Code, paragraph 3 of which prohibits public officials or persons responsible for public services from communicating or, in any event making public, subject to criminal penalties, the decisions in the tendering procedure, access to which is deferred until the award decision. Having regard to the mandatory nature of that prohibition, the persons responsible for the procedure are reluctant to disclose the administrative documents relating to tenderers, apart from the admission decision, which forces economic operators to bring proceedings 'blindfolded'.

16 In those circumstances, the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do the European rules on the rights of defence, due process and effective substantive operation of the protection afforded, in particular, by Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, Article 47 of [the Charter] and Article 1(1) and (2) of [Directive 89/665] preclude a provision of national law, such as Article 120(2-bis) of [the Administrative Procedure Code], which requires an operator taking part in a tendering procedure to challenge the admission of/failure to exclude another entity, within a period of 30 days of the communication of the decision to admit/exclude participants?

(2) Do the European rules on the rights of defence, due process and effective substantive operation of the protection afforded, in particular, by Articles 6 and 13 ECHR, Article 47 of [the Charter] and Article 1(1) and (2) of [Directive 89/665], preclude a provision of national law, such as Article 120(2-bis) of [the Administrative Procedure Code], which prevents an economic operator from claiming, upon conclusion of the procedure, even by cross-appeal, that the decision to admit other operators is unlawful, in particular the one awarded the contract or the applicant in the main action, if they had not previously challenged the decision to admit in the manner set out in the preceding question?'

Consideration of the questions referred

17 Pursuant to Article 99 of its Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, give its decision by reasoned order.

18 It is appropriate to apply that article in the present case.

Admissibility of the request for a preliminary ruling

19 As a preliminary point, it must be observed, as is clear from the observations presented to the Court, that the value of the public contract at issue in the main proceedings is EUR 5 684 000, which largely exceeds the thresholds laid down in Article 4 of Directive 2014/24.

20 Directive 89/665 is therefore applicable to that contract in accordance with Article 46 of Directive 2014/23 and, therefore, the request for a preliminary ruling cannot be declared inadmissible simply on the ground that there was no mention of the value of that contract in the order for reference, contrary to the Italian Government's submissions.

21 Neither can the request for a preliminary ruling be declared inadmissible on the ground that it asks the Court to review the discretionary choice of the Italian legislature in transposing Directive 89/665, as the CISS di Pinerolo argues. The questions referred are clearly directed towards the interpretation of a number of provisions of that directive.

22 The reference for a preliminary ruling is therefore admissible.

The first question

23 By its first question, the referring court asks essentially whether Article 1(1) and (2) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that actions against the decisions by contracting authorities to admit or exclude tenderers from participation in public procurement procedures must be brought within 30 days of their notification to the parties concerned, failing which they will be time-barred.

24 It must be recalled, first of all, that in accordance with Article 2c of Directive 89/665, Member States may lay down time limits within which an action may be brought against a decision of a contracting authority taken in the context of an award procedure for a contract falling within the scope of Directive 2014/24.

25 That provision states that that time limit is to be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision. The same provision also states that the contracting authority's decision is to be sent to each tenderer or candidate, accompanied by a summary of the relevant reasons.

26 Thus it is clear from the very wording of Article 2c of Directive 89/665 that a time limit, such as that at issue in the main proceedings, within which actions against decisions of contracting authorities to admit or exclude tenderers from participation in public procurement procedures falling within the scope of Directive 2014/24 must be brought within 30 days from the time that the decisions are sent to the parties concerned, failing which those actions will be time-barred is, in principle, compatible with EU law, provided that those decisions contain a summary of the relevant reasons.

27 Furthermore, Article 1(1) of Directive 89/665 requires the Member States to ensure that decisions taken by contracting authorities may be reviewed as effectively and as rapidly as possible. The Court has already had occasion to point out that the imposition of time limits for bringing actions which will be time-barred if those time limits are not complied with, enables the objective of rapidity pursued by Directive 89/665, which requires operators to challenge promptly preliminary measures or interim decisions taken in public procurement procedures, to be attained (see, to that effect, judgment of 28 January 2010, *Commission* v *Ireland*, C-456/08, EU:C:2010:46, paragraph 60 and the case-law cited).

28 The Court also held that setting reasonable time limits for bringing proceedings must be regarded, in principle, as satisfying the requirement of effectiveness under Directive 89/665, since it is an application of the fundamental principle of legal certainty (judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 76, and of 21 January 2010, *Commission* v *Germany*, C-17/09, not published, EU:C:2010:33, paragraph 22), and is compatible with the fundamental right to effective legal protection (see, to that effect, judgment of 11 September 2014, *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 58).

29 The objective of rapidity pursued by Directive 89/665 must, however, be achieved in national law in compliance with the requirements of legal certainty. Thus, Member States have the obligation to put in place rules on time limits which are sufficiently precise, clear and transparent so as to enable individuals to ascertain their rights and obligations (see, to that effect, judgments of 30 May 1991,

Commission v *Germany*, C-361/88, EU:C:1991:224, paragraph 24, and of 7 November 1996, *Commission* v *Luxembourg*, C-221/94, EU:C:1996:424, paragraph 22).

30 In that connection, when defining the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities, the Member States must not compromise the effectiveness of Directive 89/665 or the rights conferred on individuals by EU law, in particular, the right to an effective remedy and to a fair hearing enshrined in Article 47 of the Charter (see, that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraphs 43 to 45).

31 The objective laid down in Article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (judgments of 28 January 2010, *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 32; of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 52; and of 8 May 2014, *Idrodinamica Spurgo Velox and Others*, C-161/13, EU:C:2014:307 paragraph 37).

32 It follows that a national law, such as that at issue in the main proceedings, which provides that actions against the decisions of contracting authorities admitting or excluding tenderers from participating in public procurement procedures must be brought within 30 days from their communication to the parties concerned, failing which they will be time-barred, is compatible with Directive 89/665 only if the decisions sent contain a summary of the relevant reasons ensuring that the parties concerned knew or ought to have known of the infringements of EU law alleged.

33 According to the Court's settled case-law, the effectiveness of the judicial review guaranteed by Article 47 of the Charter requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question (see, to that effect, judgments of 15 October 1987, *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 15, and of 4 June 2013, *ZZ*, C-300/11, EU:C:2013:363, paragraph 53).

34 However, the referring court points out that the tenderer who wishes to challenge a decision to admit a competitor must bring its action within 30 days of its notification, that is at a time when it is often unable to determine whether there is really an interest, as it does not know whether that competitor will ultimately be awarded the contract or whether it will be in a position to win the contract itself.

35 It should be recalled, in that connection, that Article 1(3) of Directive 89/665 provides that Member States must ensure that review procedures are available, under detailed rules which they themselves may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

36 The latter provision is intended to apply, inter alia, to the situation of any tenderer which considers that a decision allowing a competitor to participate in a tender procedure is unlawful and is likely to cause it harm, that likelihood of harm being sufficient to justify an immediate interest in bringing an action against that decision, leaving aside harm which may also result from the award of the contract to another candidate.

37 In any event, the Court has ruled that a decision allowing a tenderer to participate in an award procedure is a decision which may, under Article 1(1) and Article 2(1)(b) of Directive 89/665, be subject to an independent judicial review (see, to that effect, judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraphs 26 to 29 and 34).

38 Therefore, the answer to the first question is that Directive 89/665 and, in particular, Articles 1 and 2c, read in the light of Article 47 of the Charter, must be interpreted as meaning that it does not preclude a national law, such as that at issue in the main proceedings, which provides that actions against the

decisions of contracting authorities to allow or exclude tenderers from participation in public procurement award procedures must be brought within 30 days from their communication to the parties concerned, failing which they will be time-barred, provided that decisions communicated contain a summary of the relevant reasons, ensuring that the persons concerned knew or could have known of the infringement of EU law alleged.

The second question

39 By its second question, the referring court asks essentially whether Article 1(1) and (2) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that, in the absence of remedies against the decisions of the contracting authorities to allow tenderers to participate in public procurement procedures within 30 days of their communication, it is no longer possible for the parties concerned to rely on the illegality of those decisions in the context of an appeal against subsequent acts and, in particular, against award decisions.

40 In that connection, the Court has repeatedly held that Directive 89/665 must be interpreted as not, in principle, precluding national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time limit in question is reasonable (judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 79; of 27 February 2003, *Santex*, C-327/00, EU:C:2003:109, paragraph 50; and of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraph 50).

41 That case-law is based on the consideration that full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements (judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 75; of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraph 51; and of 28 January 2010, *Commission* v *Ireland*, C-456/08, EU:C:2010:46, paragraph 52). Such conduct, in so far as it may delay, without any objective reason, the commencement of the review procedures which Member States were required to institute by Directive 89/665 impairs the effective implementation of the EU directives on the award of public contracts (judgment of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 38).

42 In the present case, it follows from the case-law of the Court that Directive 89/665, in particular, Article 2c thereof, must be interpreted as meaning that, in principle, it does not preclude the provisions of Italian law under which there is no possibility for a tenderer to rely on the unlawfulness of the decision in the context of an action brought against a subsequent act where no action is brought against the decision of a contracting authority within 30 days.

43 However, although national rules on limitation periods are not in themselves contrary to the requirements of Article 2c of Directive 89/665, it cannot be excluded that, in the context of the particular circumstances, or having regard to some of their rules, their application may entail a breach of the rights conferred on individuals by EU law, in particular, the right to an effective remedy and the right to a fair trial, enshrined in Article 47 of the Charter (see, to that effect, judgments of 27 February 2003, *Santex*, C-327/00, EU:C:2003:109, paragraph 57, and of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraphs 55 and 56).

44 Thus, the Court has already had the occasion to rule that Directive 89/665 was to be interpreted as preluding rules on limitation periods laid down by national law from being applied in such a way that a tenderer is refused access to a review of an unlawful decision even though he became aware of that illegality only after the expiry of the time limit (see, to that effect, judgments of 27 February 2003, *Santex*, C-327/00, EU:C:2003:109, paragraph 60, and of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraphs 59 to 61 and 64).

45 It must also be pointed out, as set out in paragraph 31 of the present order, that the Court also held that effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the time limits within which to bring proceedings start to run from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (see, to that effect, judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 52 and the case-law cited).

46 Therefore, it is for the referring court to determine whether, in the circumstances of the case in the main proceedings, the Cooperativa Animazione Valdocco did in fact know or ought to have known from the notification by the contracting authority of the decision to allow the ad hoc consortium to participate in the tender procedure, in accordance with Article 29 of the Public Procurement Code, of the grounds for the unlawfulness of that decision that it alleges, based on the failure to lodge a provisional security in the amount required or to prove that the conditions for participation were satisfied and, therefore, whether it was in fact in a position to bring an action within the time limit of 30 days laid down in Article 120(2-bis) of the Administrative Procedure Code.

47 In particular, it is for the referring court to ensure that, in the circumstances of the case in the main proceedings, the combined application of the provisions of Article 29 and Article 53(2) and (3) of the Public Procurement Code, which regulate access to the tender documents and their dissemination, did not exclude all possibilities for the Cooperativa Animazione Valdocco to learn of the illegality of the decision to allow the ad hoc consortium to participate that it alleges or to bring an action from the time at which it knew of that decision, within the time limit laid down in Article 120(2-bis) of the Administrative Procedure Code.

48 It must be added that it is for the referring court interpret the national law in a way which accords with the objective of Directive 89/665. Where an interpretation in accordance with the objective of Directive 89/665 is not possible, the national court must refrain from applying provisions of national law which are at variance with that directive (see, to that effect, judgment of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraphs 62 and 63), since Article 1(1) thereof is unconditional and sufficiently precise to be relied on against the contracting authority (judgments of 2 June 2005, *Koppensteiner*, C-15/04, EU:C:2005:345, paragraph 38, and of 11 October 2007, *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraph 63).

49 Having regard to the foregoing, the answer to the second question is that Directive 89/665, and in particular Articles 1 and 2c thereof, read in the light of Article 47 of the Charter, must be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which provides that, in the absence of an action against the decisions of contracting authorities allowing tenderers to participate in public procurement procedures within 30 days from the communication of those decisions, it is no longer possible for the persons concerned to plead the illegality of the decisions in an action against subsequent decisions and, in particular, against award decisions, subject to the proviso that such a time limit may be relied on only if the persons concerned knew or ought to have known from that notification of the illegality they allege.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, and in particular Articles 1 and 2c thereof, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it does not preclude a national law, such as that at issue in the main proceedings, which provides that actions against the decisions of contracting authorities to allow or exclude tenderers**

from participation in public procurement award procedures must be brought within 30 days from their communication to the parties concerned, failing which they will be time-barred, provided that decisions communicated contain a summary of the relevant reasons, ensuring that the persons concerned knew or ought to have known of the infringement of EU law alleged.

2. Directive 89/665, as amended by Directive 2014/23, and in particular Articles 1 and 2c thereof, read in the light of Article 47 of the Charter of Fundamental Rights, must be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which provides that, in the absence of an action against the decisions of contracting authorities allowing tenderers to participate in public procurement procedures within 30 days from the communication of those decisions, it is no longer possible for the persons concerned to plead the illegality of the decisions in an action against subsequent decisions and, in particular, against award decisions, subject to the proviso that such a time limit may be relied on only if the persons concerned knew or ought to have known from that notification of the illegality they allege.

[Signatures]

---

* Language of the case: Italian.

EU:C:2019:507

JUDGMENT OF THE COURT (Fourth Chamber)

19 June 2019 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Article 57(4)(c) and (g) — Award of public service contracts — Optional grounds for exclusion from participation in a procurement procedure — Grave professional misconduct rendering the integrity of the economic operator questionable — Early termination of a prior contract owing to deficiencies in its performance — Legal challenge preventing the contracting authority from assessing the breach of contract until the end of the legal proceedings)

In Case C-41/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale della Campania (Regional Administrative Court, Campania, Italy), made by decision of 22 November 2017, received at the Court on 22 January 2018, in the proceedings

Meca Srl

v

Comune di Napoli,

other parties:

Sirio Srl,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, D. Šváby (Rapporteur), S. Rodin and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 13 December 2018,

after considering the observations submitted on behalf of

– the Comune di Napoli, by A. Andreottola and A. Cuomo, avvocati,

– Sirio Srl, by L. Lentini and C. Sito, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli and C. Pluchino, avvocati dello Stato,

– the Hungarian Government, by G. Koós, M.Z. Fehér and A. Pokoraczki, acting as Agents,

– the European Commission, by G. Gattinara, P. Ondrůšek and L. Haasbeek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 March 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 57(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Meca Srl and the Comune di Napoli (Municipality of Naples, Italy) concerning the decision of the Municipality of Naples to authorise Sirio Srl to continue to participate in a call for tenders.

Legal context

EU law

3 Recitals 101 and 102 of Directive 2014/24 state:

‘(101) Contracting authorities should … be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. It should be clarified that grave professional misconduct can render an economic operator’s integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.

Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision, contracting authorities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by national law. They should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion.

(102) Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.’

4 Article 57 of that directive, entitled ‘Exclusion grounds’, provides:

‘…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

…

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

…

5. Contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2.

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.’

Italian law

5 Article 80(5)(c) of decreto legislativo n. 50 Codice dei contratti pubblici (Legislative Decree No 50 on the Public Procurement Code) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016;

‘the Public Procurement Code’) provides:

‘The contracting authorities shall exclude an economic operator from participation in the tendering procedure in any of the following situations, which may also concern a subcontractor in any of the cases provided for in Article 105(6), where:

…

(c) the contracting authorities demonstrate, by appropriate means, that the economic operator has committed grave professional misconduct such as to render its integrity or reliability questionable. Grave professional misconduct shall include: major deficiencies in the performance of a prior public contract or a prior concession contract where those deficiencies have led to the early termination of those contracts that has not been challenged in court or upheld following legal proceedings, to damages or to another comparable sanction; an attempt to influence unduly the decision-making process of the contracting authority or to obtain confidential information with a view to personal gain; the provision, even due to oversight, of incorrect or misleading information capable of influencing the decisions on exclusion, selection or award, or the omission of the information required for the proper conduct of the selection procedure;

…’

The dispute in the main proceedings and the question referred for a preliminary ruling

6 The Municipality of Naples issued a call for tenders with a view to awarding a public service contract for school catering for the school year 2017/2018. That contract was divided into 10 lots, each of the lots corresponding to one of the districts in the Municipality of Naples.

7 It is apparent from the order for reference that, in the previous school year, Sirio and the Municipality of Naples had entered into a contract for the provision of school catering services in respect of two lots, which was terminated ahead of time in May 2017 on account of food poisoning caused by the presence of coliform bacteria in food served in a school canteen.

8 In that regard, after analyses carried out by the Agenzia regionale per la protezione ambientale della Campania (ARPAC) (the Campania Regional Environmental Protection Agency, Italy) on food samples kept by the management of the school in question confirmed the presence of coliform bacteria, in particular in braised beef, the public contract for school catering services in the school year 2016/2017 was awarded to Meca, which had been ranked second at the end of the tendering procedure for the award of that public contract.

9 In the context of its participation in the call for tenders referred to in paragraph 6 above, Sirio expressly stated that ‘by decision … of 29 June 2017, the Municipality of Naples terminated the contract … of 9 May 2017 early on account of a case of food poisoning’ and that an action contesting that early termination of contract had been lodged with the Tribunale di Napoli (District Court, Naples, Italy).

10 On 1 August 2017, the contracting authority authorised Sirio to proceed with its participation in that call for tenders for the lot in respect of which it had submitted a tender. Meca challenged the participation of Sirio in that call for tenders before the Tribunale amministrativo regionale della Campania (Regional Administrative Court, Campania, Italy), without waiting for the Municipality of Naples to adopt a decision awarding the contract at issue in the main proceedings, which it did on 7 November 2017, granting the contract to Sirio.

11 Meca takes the view that Sirio should not have been authorised to continue participating in the tendering procedure since its contract with the Municipality of Naples for the provision of school catering services in the school year 2016/2017 had been terminated early by the latter following the food poisoning of pupils and school staff.

12 In support of its action before the referring court, Meca complains that the Municipality of Naples did not assess the gravity of Sirio's breach of its obligations under the public contract to provide school catering services in the school year 2016/2017, despite Article 80(5)(c) of the Public Procurement Code, which entitles the Municipality to demonstrate 'by appropriate means, that the economic operator has committed grave professional misconduct such as to render its integrity or reliability questionable'. In the view of Meca, the challenge by Sirio before a civil court of the early termination of the contract for the provision of services referred to in paragraph 7 above cannot divest the contracting authority of that power. Thus, in view of the food poisoning which occurred in May 2017, the Municipality of Naples should not have automatically allowed Sirio to participate in the call for tenders at issue in the main proceedings.

13 Conversely, both the Municipality of Naples and Sirio consider that the action brought by Sirio before the Tribunale di Napoli (District Court, Naples) prevented the contracting authority from conducting an assessment of the latter's reliability.

14 The referring court notes that the position of the Municipality of Naples and Sirio is not without basis since, according to the case-law of the Italian courts, it can be inferred from Article 80(5)(c) of the Public Procurement Code that a tenderer whose performance of a prior public contract has shown deficiencies must be admitted to a subsequent tendering procedure if it has brought an action, which is still pending, against the early termination of contract which resulted from those deficiencies.

15 The referring court considers that EU law may, however, preclude a national provision such as Article 80(5)(c) of the Public Procurement Code. That provision has the effect of rendering ineffective the optional ground for exclusion provided for therein since the contracting authority's discretion is rendered nugatory in the event that litigation is brought against the early termination of a prior contract. Although the Court has not yet had an opportunity to interpret Article 57(4) of Directive 2014/24, it is clear from the Court's case-law relating to Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), a provision repealed by Article 57(4) of Directive 2014/24, that EU law opposes automatic decisions concerning the optional exclusion of tenderers for grave professional misconduct, since such decisions must necessarily take the principle of proportionality into account.

16 The referring court submits that, conversely, the principles of proportionality and effectiveness should forbid automatic rules in the event that it is impossible to exclude an economic operator. Therefore, by preventing the contracting authority from conducting a reasoned assessment of the gravity of the professional misconduct giving rise to the early termination of a prior contract on the ground that a challenge to the early termination of that contract has been brought before a civil court, Article 80(5) of the Public Procurement Code infringes those principles and consequently Directive 2014/24. The referring court takes the view that Article 57(4)(g) of that directive does not in any way require a final, and therefore judicial, finding that the contractor was responsible.

17 The referring court submits that it is also apparent from the judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801), that 'professional misconduct' is a ground for exclusion where it has the characteristics of objective gravity. Under Italian law, the outcome of participation in a call for tenders is subject to an event that is within the control of the contractor alone, namely the decision to bring a legal action against the early termination of a prior contract.

18 Lastly, the referring court considers that the Italian legislation is also incompatible with the aims set out in recital 102 of Directive 2014/24, which introduces the mechanism enabling tenderers to take 'compliance measures'. Automatic admission to participate which results from the lodging of a civil action against the early termination of a prior contract discourages undertakings from adopting compliance measures even though these are necessary in order to avoid a recurrence of the conduct which led to that early termination.

19 It is in that context that the Tribunale amministrativo regionale della Campania (Regional Administrative Court, Campania) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do the EU principles of protection of legitimate expectations and of legal certainty, laid down in the [TFEU], and the principles deriving therefrom, such as those of equal treatment, non-discrimination, proportionality and effectiveness, referred to in Directive [2014/24], and the provisions of Article 57(4)(c) and (g) of that directive, preclude the application of a national provision, such as that contained in Article 80(5)(c) of [the Public Procurement Code], according to which challenging before the courts significant deficiencies identified in the performance of a previous procurement contract, which resulted in the early termination of that contract, excludes any assessment by the procuring entity as to the reliability of the tenderer, until a final ruling has been issued in the civil proceedings, when the undertaking concerned has not demonstrated that it has adopted any “self-cleaning” measures in order to remedy the breaches and avoid any repetition of them?’

Question referred for a preliminary ruling

Preliminary observations

20 In the first place, it is apparent from the file submitted to the Court that the estimated value of the contract at issue in the main proceedings is EUR 1 127 660 and that consequently it exceeds the threshold of EUR 750 000 laid down in Article 4(d) of Directive 2014/24 for public service contracts for specific services listed in Annex XIV to that directive. It follows that Directive 2014/24 is applicable to the main proceedings and that the question referred by the national court must be understood exclusively in the light of the provisions of that directive.

21 In the second place, during the hearing before the Court, the Italian Government claimed that the interpretation of Article 80(5)(c) of the Public Procurement Code provided by the referring court in its request for a preliminary ruling no longer corresponds to the new legal position in Italian law.

22 Nevertheless, in a situation where opinions appear to differ as regards the applicable national legislation, it is settled case-law that, in preliminary ruling proceedings brought under Article 267 TFEU, it is not for the Court to specify the relevant provisions of national law applicable to the main proceedings. That is the prerogative of the referring court which, while setting out the internal legal framework, leaves it open to the Court to provide all the criteria for interpreting EU law so as to permit the court making the reference to assess the compatibility of national legislation with EU rules (judgment of 26 June 2008, *Burda*, C-284/06, EU:C:2008:365, paragraph 39).

23 In that context, the question referred by the national court must be answered on the basis of the factual and legal circumstances as they appear from the order for reference.

Substance

24 By its question, the referring court asks, in essence, whether Article 57(4)(c) and (g) of Directive 2014/24 must be interpreted as precluding a national provision under which the lodging of a legal challenge to a decision adopted by a contracting authority to terminate a public contract early on account of major deficiencies in the performance thereof prevents the contracting authority which issues a further call for tenders from conducting an assessment, at the stage of selecting tenderers, of the reliability of the operator concerned by that early termination.

25 In the first place, as the Advocate General noted in point 32 of his Opinion, the wording of Article 57(4) of Directive 2014/24 is sufficiently close to that of Article 45(2) of Directive 2004/18 — a provision which it repealed — for the interpretation sought by the referring court to draw on the case-law of the Court relating to the latter provision.

26 Thus, when the Court interpreted the optional grounds for exclusion, such as those provided for in points (d) and (g) of the first subparagraph of Article 45(2) of Directive 2004/18, the only provisions which did not refer to national law, the Court relied on the second subparagraph of Article 45(2) of that directive, under which the Member States were to specify, having regard for EU law, the implementing conditions of paragraph 2, in order to circumscribe more strictly the discretion of the Member States and itself determine the scope of the optional ground for exclusion at issue (see, inter alia, judgment of

13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraphs 25 to 31).

27 In that regard, it is undeniable that Directive 2014/24 restricts the discretion of the Member States. While a reference to national law and regulations was provided for in five of the seven situations referred to in Article 45(2) of Directive 2004/18, now, among the nine situations envisaged in Article 57(4) of Directive 2014/24, only the situation referred to in point (b) of paragraph 4 includes such a reference.

28 In the second place, under Article 57(4) of Directive 2014/24, 'contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the [situations referred to in that provision]'. Thus, it follows from the wording of that provision that it is the contracting authorities, and not a national court, that have been entrusted with determining whether an economic operator must be excluded from a procurement procedure.

29 In the third place, the option available to any contracting authority to exclude a tenderer from a procurement procedure is particularly intended to enable it to assess the integrity and reliability of each of the tenderers, as is apparent from Article 57(4)(c) and (g) and recital 101 of Directive 2014/24.

30 As the Advocate General noted in points 42 and 43 of his Opinion, those two grounds for exclusion are based on an essential element of the relationship between the successful tenderer and the contracting authority, namely the reliability of the successful tenderer, on which the contracting authority's trust is founded. Thus, the first paragraph of recital 101 of Directive 2014/24 states that contracting authorities may exclude 'economic operators which have proven unreliable', while the second paragraph of that recital takes into consideration, in the performance of prior public contracts, 'misbehaviour that casts serious doubts as to the reliability of the economic operator'.

31 In the fourth place, under Article 57(5) of Directive 2014/24, contracting authorities must be able to exclude an economic operator 'at any time during the procedure' and not only after a court has delivered its judgment, which is additional evidence of the EU legislature's intention to enable the contracting authority to conduct its own assessment of the acts which an economic operator has committed or omitted either before or during the procurement procedure, in any of the cases referred to in Article 57(4) of that directive.

32 Lastly, if a contracting authority were to be automatically bound by an assessment conducted by a third party, it would probably be difficult for it to pay particular attention to the principle of proportionality when applying the optional grounds for exclusion. According to recital 101 of Directive 2014/24, that principle implies in particular that, before deciding to exclude an economic operator, that authority should take into account the minor nature of the irregularities committed or the repetition of minor irregularities.

33 It is thus clear, as the Advocate General observed in points 35 and 36 of his Opinion, that the Member States' discretion is not absolute and that, once a Member State decides to incorporate one of the optional grounds for exclusion provided for in Directive 2014/24, it must respect the essential characteristics thereof, as expressed in that directive. By stipulating that the Member States are to specify 'the implementing conditions for this Article' 'having regard to Union law', Article 57(7) of Directive 2014/24 prevents Member States from distorting the grounds for exclusion laid down in that provision or ignoring the objectives or principles underlying each of those grounds.

34 As has been pointed out in paragraph 28 above, it is clear from the wording of Article 57(4) of Directive 2014/24 that the EU legislature intended to confer on the contracting authority, and on it alone, the task of assessing whether a candidate or tenderer must be excluded from a procurement procedure during the stage of selecting the tenderers.

35 It is on the basis of the foregoing considerations that the referring court must be answered.

36 As is apparent from the order for reference, Article 80(5)(c) of the Public Procurement Code entitles a contracting authority to exclude from the tendering procedure an economic operator where, inter alia, it

establishes, by appropriate means, that: (i) that operator has committed grave professional misconduct such as to cast doubt on its integrity or reliability; (ii) that grave professional misconduct, which may result from major deficiencies in the performance of a prior public contract, has led to the early termination of the contract with the contracting authority, damages or another comparable sanction; and (iii) that early termination has not been challenged in court or upheld following legal proceedings.

37 It is clear that a national provision such as Article 80(5)(c) of the Public Procurement Code is not capable of safeguarding the effectiveness of the optional grounds for exclusion laid down in Article 57(4)(c) and (g) of Directive 2014/24.

38 The discretion which Article 57(4) of Directive 2014/24 confers on the contracting authority can be hamstrung merely because a candidate or tenderer brings an action challenging the early termination of a prior public contract awarded to it, even though its conduct appeared sufficiently deficient as to warrant that early termination.

39 In addition, a rule such as that set out in Article 80(5)(c) of the Public Procurement Code clearly does not encourage a successful tenderer to whom a decision to terminate a prior public contract early is addressed to take corrective measures. To that extent, such a rule is likely to conflict with the requirements of Article 57(6) of Directive 2014/24.

40 That directive innovates, in particular by laying down, in Article 57(6), the mechanism for adopting corrective measures (‘self-cleaning’). That arrangement, which applies to economic operators which have not been excluded by a final judgment, is designed to encourage an economic operator who is in one of the situations referred to in Article 57(4) of that directive to provide evidence showing that the measures which it has taken are sufficient to demonstrate its reliability despite the existence of a relevant optional ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned must not be excluded from the procurement procedure. For this purpose, the economic operator must prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

41 In that regard, the corrective measures emphasise, as the Advocate General observed in point 44 of his Opinion, the importance attached to the reliability of the economic operator, as that factor profoundly influences the grounds for exclusion that relate to the tenderer’s subjective characteristics.

42 In view of the foregoing, the answer to the question referred must therefore be that Article 57(4)(c) and (g) of Directive 2014/24 must be interpreted as precluding a national provision under which the lodging of a legal challenge to a decision adopted by a contracting authority to terminate a public contract early on account of major deficiencies in the performance thereof prevents the contracting authority which issues a further call for tenders from conducting an assessment, at the stage of selecting tenderers, of the reliability of the operator concerned by that early termination.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 57(4)(c) and (g) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as precluding a national provision under which the lodging of a legal challenge to a decision adopted by a contracting authority to terminate a public contract early on account of major deficiencies in the performance thereof prevents the contracting authority which issues a further call for tenders from

conducting an assessment, at the stage of selecting tenderers, of the reliability of the operator concerned by that early termination.

[Signatures]

---

* Language of the case: Italian.

EU:C:2019:183

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 7 March 2019(1)

Case C-41/18

Meca Srl

v

Comune di Napoli,

with the intervention of:

Sirio Srl

(Request for a preliminary ruling
from the Tribunale Amministrativo Regionale della Campania (Regional Administrative Court, Campania, Italy))

(Reference for a preliminary ruling — Public procurement — Optional grounds for exclusion — Admissibility — Final award assented to by the appellant — Supervening loss of the object of the preliminary ruling proceedings — Grave professional misconduct — Termination of a previous contract due to deficiencies in performance — Legal challenge that prevents the contracting authority from assessing the breach of contract until the conclusion of the legal proceedings)

1. Under Italian public procurement rules, a candidate may be excluded from a (new) procurement procedure where significant deficiencies in its performance of a previous contract awarded to it led to the termination of that (first) contract.

2. Those rules would seem to indicate, (2) however, that, in assessing the reliability of candidates for the new procurement procedure, the contracting authority cannot take those deficiencies into account as grounds for exclusion if the economic operator that committed them has challenged the termination of the (first) contract through the courts.

3. The referring court needs to clarify whether this consequence of a legal challenge is consistent with the principles underlying Directive 2014/24/EU, (3) specifically, Article 57.

I. Legal framework

A. EU law. Directive 2014/24

4. Recital 101 is as follows:

‘Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct,

such as violations of competition rules or of intellectual property rights. It should be clarified that grave professional misconduct can render an economic operator's integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.

Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision, contracting authorities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by national law. They should also be able to exclude candidates or tenderers whose performance in previous public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion.'

5. Article 57 ('Exclusion grounds'), provides as follows:

'…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

…

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

…

5. Contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2.

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

…

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.'

B. Italian law. Legislative Decree No 50/2016 (4)

6. Article 80(5)(c) provides as follows:

'The contracting authority shall exclude from the procurement procedure any economic operator … which … can be demonstrated by appropriate means to have committed grave professional misconduct that renders its integrity or reliability questionable. Such misconduct includes significant deficiencies in the performance of a previous contract or concession contract which has led to its early termination, provided that the said termination has not been challenged through legal proceedings or that it has been confirmed on the conclusion of legal proceedings, or which has led to an award for damages or to other sanctions; attempts to exercise undue influence on the contracting authority's decision-making process or to obtain confidential information for its own benefit; and provision, including through negligence, of false or misleading information that may influence decisions on exclusion, selection or award of contracts, or failure to provide information required for the proper conduct of the selection process.'

II. Facts of the case and question referred

7. In the 2016/2017 academic year, Sirio Srl took part in a procurement procedure launched by the Municipality of Naples to provide the school meals service, for which it was awarded the contract.

8. While it was performing the contract there was a case of food poisoning, caused by the presence of coliform bacteria in the food that was supplied, which affected children and members of staff.

9. In view of this occurrence, on 29 June 2017 the Municipality of Naples: (a) ordered the suspension of the service and awarded the service to Meca, which had come second in the procurement procedure; and (b) terminated the contract with Sirio and enforced the guarantee.

10. Sirio challenged the termination of the contract in the civil courts (Tribunale di Napoli (District Court, Naples), Italy)), in proceedings in which a decision is pending.

11. In 2017/18, the Municipality of Naples opened a new procurement procedure for the school meals service, divided into 10 lots, for which Sirio submitted a tender.

12. Under Article 80(5)(c) of the PPC, in a decision of 1 August 2017, the contracting authority allowed Sirio's tender for lot No 7, without making any assessment of the seriousness of the breach of the previous contract.

13. Meca also took part in the tender process for the school meals service for 2017/2018 and is challenging the admission of Sirio in proceedings before the referring court. In its opinion, the contracting authority should have assessed Sirio's reliability, following the outbreak of food poisoning, instead of simply noting that Sirio had lodged a legal action against the termination of the previous contract.

14. The referring court considers that, in cases such as the present one, under a strict application of Italian law the contracting authority cannot assess the tenderer's reliability. In its opinion, the national legislature has opted to suspend evaluation by the administrative body and has made that evaluation entirely a matter for the courts, whose focus, moreover, is on whether the termination of the contract was correct, rather than on the reliability of the economic operator.

15. In the view of the referring court, the seriousness of the breach does not depend on an objective factor, but on a subjective decision by the economic operator which, when its contract is terminated early, opts to challenge the termination in the civil courts. The fact that a tenderer is automatically admitted to the new tender process as a result of taking legal action acts as an incentive to ignore professional misconduct and therefore as a disincentive to undertakings to take appropriate remedial action (as envisaged in recital 102 of Directive 2014/24) to prevent any reoccurrence of the breaches that led to the termination of the previous contract.

16. In these circumstances, the Tribunale Amministrativo Regionale della Campania (Regional Administrative Court, Campania, Italy) refers the following question to the Court of Justice:

> 'Do the EU principles of protection of legitimate expectations and of legal certainty, laid down in the Treaty on the Functioning of the European Union (TFEU), and the principles deriving therefrom, such as those of equal treatment, non-discrimination, proportionality and effectiveness, referred to in Directive 2014/24 and the provisions of Article 57(4)(c) and (g) of that directive, preclude the application of a national provision, such as that contained in Article 80(5)(c) of Legislative Decree No 50/2016, according to which challenging before the courts significant deficiencies identified in the performance of a previous procurement contract, which resulted in the early termination of that contract, excludes any assessment by the contracting authority as to the reliability of the tenderer, until a final ruling has been issued in the civil proceedings, when the undertaking concerned has not demonstrated that it has adopted any "self-cleaning" measures in order to remedy the breaches and avoid any repetition of them?'

III. Proceedings before the Court of Justice

17. The order for reference was received at the Court on 22 January 2018.

18. Written observations have been submitted by Sirio, the Municipality of Naples, the Governments of Italy and Hungary, and the Commission. Only the Commission and the Government of Italy attended the hearing held on 13 December 2018.

IV. Assessment

A. The alleged supervening loss of the object of the preliminary ruling proceedings

19. In Sirio's view, the decision challenged by Meca, that is, the decision of 1 August 2017 which allowed Sirio to take part in the procurement procedure, did not prevent that procedure from going ahead, culminating, on 7 November 2017, with the award of the (new) contract to Sirio for the 2017/2018 school year.

20. As this latter administrative decision has not been challenged, Sirio maintains that the preliminary ruling proceedings have no purpose since, whatever their outcome, the award of the *second* contract is final and will be unaffected by the judgment.

21. I do not believe, however, that this circumstance is sufficient in order to rule that the reference for a preliminary ruling has become inadmissible. In my opinion, the challenge to the decision of 1 August 2017

remains unresolved, and a decision on it is not dependent on Meca's acceptance of the decision of 7 November 2017 on the award of the tender.

22. Specifically, if the decision of 1 August 2017 were eventually to be ruled null and void, this could have the effect of also invalidating the award of 7 November 2017 or alternatively, if that were not possible, it could provide the basis for an award for damages to Meca under domestic law, in line with Article 2(1)(c) of Directive 89/665/EEC. (5)

23. In my view, therefore, there has been no supervening loss of the object of the preliminary ruling proceedings.

B. Comments on the interpretation of the national legislation

24. The referring court takes as a starting point that, under 'the interpretation provided by domestic case-law', Article 80(5)(c) of the PPC imposes 'an inescapable legal obligation' (6) to allow a tenderer to take part in a procurement procedure where the tenderer has had a previous contract terminated early due to significant deficiencies in performance of that contract (7) and it has challenged that termination through the courts.

25. The national legislation that now applies is different from the previous legislation (Legislative Decree No 163/2006). (8) Under the previous legislation, the contracting authority had the power, 'on the basis of any evidence', to demonstrate grave professional misconduct that would justify the exclusion of the tenderer. By contrast, the new regulations, contained in the PPC, combine points (c) and (g) of Article 57(4) of Directive 2014/24 to produce the outcome described above.

26. Article 80(5)(c) of the PPC includes a general description of grave professional misconduct as grounds for exclusion and then goes on to specify that 'such misconduct includes significant deficiencies in the performance of a previous contract or concession contract which has led to its early termination'. However, these deficiencies only enable the tenderer in question to be excluded if the decision 'has not been challenged through legal proceedings or … has been confirmed on the conclusion of legal proceedings'.

27. However, as the Italian Government explained at the hearing, after the question was referred there seems to have been a change in the doctrine of the Consiglio di Stato (Council of State, Italy), (9) which has caused the Italian Government to change the main thrust of its observations.

28. The Italian Government's reading of that opinion (10) is that even if the early termination of the previous contract, terminated because of the significant deficiencies attributed to a candidate who was bidding for a new contract, were *sub judice*, the contracting authority has discretion to evaluate the existence of those deficiencies as grounds for excluding the tenderer, without waiting for the civil courts to give judgment.

29. Clearly, the Court of Justice cannot become involved in that debate over the interpretation of the provision of national law, which is solely a matter for the referring court. Therefore:

– if the referring court believes it can adopt the position which the Italian Government argues can be inferred from the opinion of the Consiglio di Stato (Council of State) of 13 November 2018, then it will be able to interpret Article 80(5)(c) of the PPC in a way that is consistent with Directive 2014/24, along the lines set out by the referring court itself in its order for reference. This would in practice remove the need for the reference;

– if, on the other hand, it were to conclude that such an interpretation of the national provision is *contra legem*, the question referred would continue to be pertinent.

30. In order to reply to the questions raised by the referring court, I will first consider the interpretation adopted by that court of the domestic legislation. Therefore, in the words of the question referred, I will assume that, under the national provision, 'challenging before the courts significant deficiencies identified in the performance of a previous procurement contract, which resulted in the early termination of that contract, *excludes* any assessment by the contracting authority as to the reliability of the tenderer, until a final ruling has been issued in the civil proceedings'.

C. The optional grounds for exclusion in Directive 2014/24

31. In introducing the list of optional grounds for exclusion, Directive 2004/18/EC (11) places the emphasis on the tenderer ('any … operator may be excluded from participation in a contract'), whereas Directive 2014/24 focuses on the contracting authority ('contracting authorities may exclude … an economic operator').

32. After these introductory phrases, both directives set out a series of optional grounds for exclusion before going on to allow Member States a degree of discretion (12) where they opt to include these grounds in their national legislation. The directives do not differ significantly on this point either:

– The final paragraph of Article 45(2) of Directive 2004/18 stated that 'Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph'.

– Article 57(7) of Directive 2014/24 provides that 'by law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article'. (13)

33. In commenting on that discretion over the optional grounds for exclusion provided for in Directive 2004/18, the Court of Justice had held that:

– according to settled case-law, 'Article 45(2) of Directive 2004/18 does not provide for uniform application at EU level of the grounds of exclusion it mentions, since the Member States may choose not to apply those grounds of exclusion at all or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context, the Member States have the power to make the criteria laid down in Article 45(2) less onerous or more flexible'; (14)

– 'Member States … enjoy some discretion in determining the requirements governing the application of the optional grounds for exclusion laid down in Article 45(2) of Directive 2004/18'. (15)

34. This degree of discretion provided the basis for the argument put forward by Sirio, the Municipality of Naples, the Government of Italy (in its written observations, but not at the hearing) and the Government of Hungary: if an optional ground for exclusion need not be included in domestic law then, a fortiori, national legislation may restrict the effect of that ground, making it conditional on satisfying certain requirements (such as, for example, stipulating that where the early termination of a previous contract due to breach on the part of the successful tenderer has been challenged through the courts, the termination must have been confirmed in a final judgment).

35. However, their argument fails to take sufficient account of the fact that Member States' power in this regard is not absolute. (16) Once a Member State has decided to include one of the optional grounds for exclusion provided for in Directive 2014/24, (17) the essential characteristics of that ground, as established in the directive, must be respected.

36. Indeed, in stipulating that Member States are to have 'regard to Union law' when specifying 'the implementing conditions for this Article', Article 57(7) of Directive 2014/24 prevents Member States, in their national law, from distorting the optional grounds for exclusion included in that provision or ignoring the objectives and guiding principles that underpin each of those grounds, within the uniform framework provided by Directive 2014/24.

37. As I shall argue below, the provision of Italian law which is at the centre of the order for reference does not respect the essential characteristics of the optional ground for exclusion provided for in Article 57(4)(g) of Directive 2014/24.

D. The optional ground for exclusion in Article 57(4)(g) of Directive 2014/24

38. Under Article 57(4) of Directive 2014/24, practices by an economic operator that may provide grounds for excluding it from a procurement procedure include both ‘grave professional misconduct, which renders its integrity questionable’ (point (c)) and ‘significant … deficiencies in the performance of a substantive requirement under a prior public contract … which led to early termination of that prior contract’ (point (g)).

39. It can be inferred from recital 101 of Directive 2014/24 that the professional misconduct in point (c) is predominantly *extra-contractual*, in other words, irregular conduct that generally takes place outside the scope of the contractual relationship. This is the case with conduct concerning breach of environmental or social obligations, violations of competition rules or intellectual or industrial property rights, or breach of tax or social security obligations. By contrast, the behaviour described in point (g) typically involves a *contractual* breach.

40. It is true, however, that some breaches of contract may simultaneously involve a form of grave professional misconduct, that is to say, professional misconduct committed in the context of a previous administrative contract that was sufficiently serious to constitute grounds for terminating the contractual relationship.

41. Viewed from this perspective, the connection between the two points would be that of a *lex generalis* (point (c)) as compared with a *lex specialis* (point (g)), which would allow us to examine the objectives and reasons for the general provision in order to discern the principles to be applied in interpreting the rule in point (g). (18)

42. Both grounds for exclusion are founded on an essential element in the relationship between the successful tenderer and the contracting authority, namely the former’s *reliability*, which is the basis for the confidence placed in it by the latter. Although Directive 2004/18 does not expressly refer to this element, it has been established by the case-law of the Court of Justice. (19)

43. Directive 2014/24 already includes reliability as a key component in the relationship, precisely when it addresses grave professional misconduct. According to the first paragraph of recital 101, contracting authorities may exclude ‘economic operators which have proven unreliable’. The second paragraph of the same recital refers to performance in previous contracts ‘that casts serious doubts as to the reliability of the economic operator’.

44. The importance ascribed to the *reliability* of the economic operator appears in some paragraphs ((6) and (7)) of Article 57 of Directive 2014/24, where the economic operator is permitted to take steps to demonstrate that it is reliable despite the existence of a ground for exclusion. The *reliability* element thus pervades the grounds for exclusion concerning the candidate’s subjective circumstances.

45. Article 57 of Directive 2014/24 is constructed such that the contracting authority must be free to assess that component (the candidate’s reliability) without necessarily being bound by assessments made by other public bodies. It is for the contracting authorities, and them alone, to assess the extent of the misconduct involved in a substantive breach of contract that is so serious as to justify termination of a previous contract due to loss of confidence. (20)

E. The provision of Italian law in the light of Article 57(4) of Directive 2014/24

46. The condition included in the Italian legislation adds an additional element that does not comply with Article 57(4) of Directive 2014/24 and is not consistent with the rest of that article. Moreover, it may give rise to discrimination against other tenderers who have committed serious misconduct. While it may have been inspired by a particular view of the right to judicial protection, (21) ultimately, the domestic provision under discussion amounts to a reward for serious breach of contract, enabling the perpetrator, de facto, to avoid the subsequent consequences of that breach simply by lodging a legal challenge.

47. I will briefly address those two aspects of the Italian provision.

1. The contrast between the national law and Directive 2014/24

48. As the Commission rightly notes, Article 57(4)(g) of Directive 2014/24 does not mention the need to wait for a final judgment before assessing the significant or persistent deficiencies in the behaviour of the

winner of the previous contract.

49. In similar cases, with reference to the EU law in force at the time, the Court of Justice had held that:

– With regard to grave professional misconduct, serious misrepresentation or failure to supply the information (required under Article 45(2)(d) and (g) of Directive 2004/18) could be proven by any means which the contracting authorities can demonstrate, '… *without there being any need for the economic operator concerned to have been convicted by a judgment that has become final*'. (22)

– 'Point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 allows the contracting authorities to prove professional misconduct by any demonstrable means. In addition, unlike point (c) of that subparagraph, *a judgment which has the force of res judicata is not required* in order to prove professional misconduct, within the meaning of point (d) of that subparagraph'. (23)

50. The Court of Justice therefore rejected the notion that the assessment of a ground for exclusion relating to professional misconduct was dependent on the existence of a prior judgment (unless the EU legislation itself included such a requirement). That was its interpretation of Article 45(2) of Directive 2004/18.

51. This doctrine can be extrapolated to the present case in order to demonstrate that Article 80(5)(c) of the PPC fails to comply with it: if a previous contract is terminated, the tenderer need only challenge that early termination in order for the contracting authority to be unable to apply the tenderer's breach of contract against it in a subsequent procurement exercise.

52. Thus, a serious breach on the part of the successful tenderer, which led a contracting authority to terminate a bilateral contract (which is permissible where one of the parties fails to satisfy its obligations), has no consequences for subsequent procedures if the tenderer challenges the early termination of the contractual relationship through the courts.

53. By ascribing this automatic effect to a legal challenge, the domestic provision deprives the contracting authority of the power to make a full assessment of the candidate's reliability, because it will be unable to take into account, as a relevant factor, the early termination of the previous contract on grounds of significant deficiencies.

54. The restriction imposed on the contracting authority where the previous breach of contract is *sub judice* deprives the contracting authority of the ability to exclude a tenderer 'at any time during the procedure … where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4', as laid down in Article 57(5) of Directive 2014/24.

55. The national provision therefore improperly imposes a condition on the scope of the actions of the contracting authority, which is expressly protected by Article 57 of Directive 2014/24 and by the case-law interpreting similar provisions in Directive 2004/18, thereby preventing it from verifying the existence of a ground for exclusion until judgment is given in a civil action taken over the early termination of the contract.

56. Likewise, Article 80(5)(c) of the PPC prevents the contracting authority from assessing whether the tenderer has adopted sufficient measures to demonstrate its reliability, despite the existence of a relevant ground for exclusion (Article 57(6) of Directive 2014/24).

2. Discrimination against other tenderers excluded on grounds of grave misconduct

57. The domestic provision under discussion may lead to discrimination against tenderers which have committed grave professional misconduct other than breach of contract and which have challenged the assessment of that misconduct before the courts. In their case, the contracting authority will not be constrained by Article 80(5)(c) of the PPC and will therefore be free to reach a reasoned decision that they lack the necessary reliability.

58. There is no justification for this difference in the treatment of tenderers which all fall within similar optional grounds for exclusion. The difference between them (the fact that the challenge remains *sub judice*) depends solely on the fact that the contractor which is in breach has lodged an action against the early termination of its previous contract, thus defeating the normal powers of assessment enjoyed by the contracting authority.

59. The situation is particularly sensitive if there is a cross-border element to the contract, since it 'is likely to concern the economic operators from other Member States who are less familiar with the terms and detailed rules of application of the relevant national legislation'. (24)

60. As the filing of a civil action is entirely dependent on the wishes of the contractor, the seriousness of its breach would not be decided on the basis of an objective element but would instead be determined by an extrinsic, subjective factor (the mere decision to file an action). However, this would not be sufficient in the case of other tenderers that had committed professional misconduct, particularly tenderers established in other Member States.

V. Conclusion

61. In the light of the reasoning set out above, I suggest that the Court of Justice should state in response to the question referred by the Tribunale Amministrativo Regionale della Campania (Regional Administrative Court, Campania, Italy) for a preliminary ruling that:

> Article 57(4)(c) and (g) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC precludes national legislation under which a mere challenge through the courts to the early termination of a previous public contract on grounds of significant deficiencies in performance prevents the contracting authority from assessing that behaviour and the subsequent reliability of the tenderer as grounds for exclusion in a new procurement procedure until a judgment in the court proceedings has become final.

---

1 Original language: Spanish.

---

2 There are some differences of interpretation over the meaning of these rules. See points 27 to 29 of this Opinion.

---

3 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

4 Decreto legislativo 18 aprile 2016, n. 50. Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonchè per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture: Codice dei contratti pubblici (GURI No 91 of 19 April 2016 — Ordinary supplement No 10) (Legislative Decree No 50 of 18 April 2016 implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, public procurement, and procurement by entities operating in the water, energy, transport and postal services sectors, and restructuring current regulations on public works contracts, public service contracts or public supply contracts: Public Procurement Code; 'PPC').

---

5 Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

---

6 Order for reference, paragraph 2.3.

7 One of the premisses of the referring court seems to be that as Sirio was responsible for the outbreak of food poisoning it had committed one of the ‘significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract’. The reference for a preliminary ruling contains no question concerning this assessment.

8 This transposed Directives 2004/17 and 2004/18/EC into Italian law [Decreto legislativo 12 aprile 2006, n. 163. Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (GURI No 100 of 2 May 2006 — Ordinary supplement No 107) (Legislative Decree No 163 of 12 April 2006. Code of public procurement in respect of public works contracts, public service contracts and public supply contracts, implementing Directives 2004/17/EC and 2004/18/EC)]. Article 38(1)(f), which was transcribed in paragraph 8 of the judgment of 11 December 2014, *Croce Amica One Italia* (C-440/13, EU:C:2014:2435), provided as follows: ‘The following persons shall be excluded from participation in procedures for the award of … public works contracts, supply contracts and service contracts, and may not … conclude any related contract: … (f) any person who, in the reasoned assessment of the contracting authority, has been guilty of serious negligence or bad faith in the performance of any contract awarded to that person by the contracting authority which published the contract notice; or any person who has been found guilty of serious professional misconduct on the basis of any evidence which the contracting authority may establish’.

9 It specifically mentioned Opinion No 2616/2018 of 13 November 2018.

10 Given its consultative nature, the opinion does not equate to a judgment handed down in the exercise of judicial functions. Moreover, on 15 May 2018 (that is, after this reference) the Consiglio di Stato (Council of State), acting now as a court, referred a similar question to the Court of Justice (*Sicilville*, C-324/18, which is still pending before the Court).

11 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

12 This was stated in the Opinion delivered in *Impresa di Costruzioni Ing. E. Mantovani y Guerrato* (C-178/16, EU:C:2017:487), point 58: like the previous directive, the new directive ‘gives the Member States wide discretion to determine the “implementing conditions” for the optional grounds of exclusion’.

13 While the reference to national law differs in the two texts, it seems to me that this difference is principally one of style. In any event, the situation addressed in Directive 2004/18 that could be relevant in deciding on this reference for a preliminary ruling (had the events taken place while it was in force) is the situation provided for in Article 45(2)(d) (grave professional misconduct), now contained in Article 57(4)(c) of Directive 2014/24, and this provision did not refer to national law.

14 Judgment of 14 December 2016, *Connexxion Taxi Services* (C-171/15, EU:C:2016:948), paragraph 29 and the case-law cited).

15 Judgment of 20 December 2017, *Impresa di Costruzioni Ing. E. Mantovani y Guerrato* (C-178/16, EU:C:2017:1000), paragraph 32.

16 In my Opinion in *Impresa di Costruzioni Ing. E. Mantovani y Guerrato* (C-178/16, EU:C:2017:487), point 53, I noted that the exercise of this power by Member States is not, however, unconditional, citing the

judgment of 10 July 2014, *Consorcio Stabile Libor Lavori Pubblicci* (C-358/12, EU:C:2014:2063), paragraphs 29, 31 and 32.

---

17 The Government of Italy argued at the hearing that, within its territorial scope of application, Article 80(5) of the PPC has recognised as a mandatory ground for exclusion something which, in Directive 2014/24, is merely optional.

---

18 Indeed, the Italian legislature has combined the two cases into one, although it has added a (currently disputed) procedural condition (*sub judice* situations), which applies only to breach of a previous contract.

---

19 Judgments of 20 March 2018, *Commission* v *Austria* (*State Printing Office*) (C-187/16, EU:C:2018:194), paragraphs 88 and 91; of 14 December 2016, *Connexxion Taxi Services* (C-171/15, EU:C:2016:948), paragraph 28; and of 9 February 2006, *La Cascina and Others* (C-226/04 and C-228/04, EU:C:2006:94), paragraph 21.

---

20 The irregularity committed by the tenderer must have been sufficiently serious ('significant') to justify early termination of the contract, having regard to the proportionality principle.

---

21 The Government of Hungary argued that if the tenderer challenges the termination of contract, the presumption of innocence operates in its favour and it must be allowed to take part in the procurement procedure unless and until its breach of contract has been confirmed in a final judgment.

---

22 Judgment of 11 December 2014, *Croce Amica One Italia* (C-440/13, EU:C:2014:2435), paragraph 28, italics added.

---

23 Judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801), paragraph 28, italics added.

---

24 Judgment of 14 December 2016, *Connexxion Taxi Services* (C-171/15, EU:C:2016:948), paragraph 42.

JUDGMENT OF THE COURT (Fifth Chamber)

11 July 2019 (1)

(Reference for a preliminary ruling — Award of public supply and public works contracts — Directive 2014/24/EU — Article 28(2) — Restricted procedure — Economic operators permitted to tender — Requirement for the legal and substantive identity of the tendering candidate to correspond to that of the preselected candidate — Principle of equal treatment of tenderers)

In Case C-697/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 19 October 2017, received at the Court on 11 December 2017, in the proceedings

Telecom Italia SpA

v

Ministero dello Sviluppo Economico,

Infrastrutture e telecomunicazioni per l'Italia (Infratel Italia) SpA,

intervening party:

OpEn Fiber SpA,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Fifth Chamber, C. Lycourgos, E. Juhász (Rapporteur) and I. Jarukaitis, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 15 November 2018,

having considered the observations submitted on behalf of:

– Telecom Italia SpA, by F. Lattanzi, F. Cardarelli and F.S. Cantella, avvocati,

– Infrastrutture e telecomunicazioni per l'Italia (Infratel Italia) SpA, by F. Isgrò, P. Messina and D. Cutolo, avvocati,

– OpEn Fiber SpA, by L. Torchia, avvocatessa,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Aiello, avvocato dello Stato,

– the European Commission, by G. Conte, P. Ondrůšek and T. Vecchi, acting as Agents,

– the EFTA Surveillance Authority, by M. Sánchez Rydelski and C. Zatschler, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 January 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 28(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request arises out of five actions brought by Telecom Italia SpA for the annulment of decisions adopted by Infrastrutture e telecomunicazioni per l'Italia (Infratel Italia) SpA ('Infratel'), a company which the Ministero dello Sviluppo Economico (Ministry of Economic Development, Italy) has entrusted with the management of projects for the creation of a broadband and ultra-broadband network in Italy, as regards the award of public contracts for the construction, maintenance and management of public ultra-broadband networks in several regions of Italy (Abruzzo, Molise, Emilia-Romagna, Lombardy, Tuscany and Veneto).

Legal background

European Union law

Directive 2004/17/EC

3 Article 51(3) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) provided:

'Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 55 and 57.'

Directive 2014/24

4 Under Article 2(1)(12) of Directive 2014/24, a 'candidate' is defined as 'an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, in a competitive procedure with negotiation, in a negotiated procedure without prior publication, in a competitive dialogue or in an innovation partnership'.

5 Article 28 of that directive, headed 'Restricted procedure', is worded as follows:

'1. In restricted procedures, any economic operator may submit a request to participate in response to a call for competition containing the information set out in Annex V parts B or C as the case may be by providing the information for qualitative selection that is requested by the contracting authority.

…

2. Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65.

…'

Italian law

6 Decreto legislativo n. 50 — Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50 transposing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, public procurement, and procurement by entities operating in the water,

energy, transport and postal services sectors, and restructuring the legislation applicable to public works contracts, public services contracts and public supply contracts, of 18 April 2016 (Ordinary Supplement to GURI No 91 of 19 April 2016) (‘the Public Procurement Code’) transposed the abovementioned directives into Italian law.

7 Article 61 of the Public Procurement Code, headed ‘Restricted procedure’, transposed Article 28(2) of Directive 2014/24. Paragraph 3 of that article provides:

‘Following the contracting authority’s assessment of the information provided, only those economic operators invited to do so may submit a tender.’

The dispute in the main proceedings and the question referred for a preliminary ruling

8 In May 2016, Infratel, on behalf of the Ministry of Economic Development, initiated a restricted procedure for the award of public contracts for the construction, maintenance and management of a public passive ultra-broadband network in the so-called ‘white’ areas of several regions of Italy (Abruzzo, Molise, Emilia-Romagna, Lombardy, Tuscany and Veneto).

9 The award procedure was part of the implementation of the State aid scheme SA.41647 (2016/N) (‘Strategia Italiana Banda Ultra-Larga’), which had been notified by the Italian authorities on 10 August 2015 and approved by a Commission decision of 30 June 2016 (C(2016) 3931 final).

10 It related to the award of five lots, and comprised the following three stages:

– submission of requests to participate (up to 18 July 2016);

– sending of invitations to preselected operators (up to 9 August 2016), and

– submission of tenders (up to 17 October 2016).

11 Requests to participate were submitted in respect of each of the five lots by Telecom Italia and, amongst others, Metroweb Sviluppo Srl and Enel OpEn Fiber SpA (‘OpEn Fiber’). Although preselected, Metroweb Sviluppo did not ultimately submit a tender.

12 Infratel published the list of successful tenderers on 9 January 2017, and the provisional classification of those tenderers on 24 January 2017. OpEn Fiber was in first place in each of the five lots, with Telecom Italia second except in lot 4, where it was third.

13 Telecom Italia was not satisfied with the outcome of the award procedure and made an application for access to the documents in the file relating to that procedure.

14 It is apparent from those documents that between the preselection phase and 17 October 2016 (the deadline for submission of tenders), more specifically on 10 October 2016, a binding framework agreement was concluded between two holding companies, Enel SpA and Metroweb Italia SpA, which provided for OpEn Fiber to acquire a 100% shareholding in Metroweb SpA which controlled Metroweb Sviluppo, so as to bring about a merger by absorption of Metroweb SpA and, consequently, Metroweb Sviluppo, into OpEn Fiber. OpEn Fiber acquired Metroweb Sviluppo under a resolution of 23 January 2017, made pursuant to that framework agreement.

15 The proposed concentration had been notified to the European Commission on 10 November 2016, pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1). By decision of 15 December 2016 (Case M.8234 — Enel/CDP Equity/Cassa Depositi e Prestiti/Enel Open Fiber/Metroweb Italia) (OJ 2017 C 15, p. 1), the Commission decided not to oppose it.

16 Telecom Italia contested the award of the five lots in five actions it brought before the Tribunale amministrativo regionale del Lazio (Regional Administrative Court of Lazio, Italy), all of which were dismissed by that court. Telecom Italia then brought an appeal against the decisions thus made by that court before the Consiglio di Stato (Council of State, Italy).

17 The Consiglio di Stato (Council of State) has raised the question of whether the requirement of legal and substantive identity established by the Court, in relation to Article 51 of Directive 2004/17, in its judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347), can apply in the context of a restricted procedure under Article 28 of Directive 2014/24, such as that at issue in the main proceedings.

18 It also observes that, as at 17 October 2016 (the date for submission of tenders) the merger at issue in the main proceedings had only begun, with completion to take place at a later date; and consequently that, as at that date, there had been no change in the structure of OpEn Fiber.

19 In its view, it cannot be demonstrated that, in concluding the merger agreement in question, the parties intended to enter into an anticompetitive agreement with a view to restricting competition in relation to the procurement procedure at issue in the main proceedings.

20 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must the first sentence of Article 28(2) of Directive 2014/24/EU be interpreted as requiring pre-qualified operators and those who submit tenders in the context of a restricted procedure to be completely legally and economically identical and, in particular, must that provision be interpreted as precluding the conclusion of an agreement between the holding companies which control two pre-qualified operators at some point between pre-qualification and the submission of tenders, where: (a) that agreement has as its purpose and effect (inter alia) the completion of a merger by the absorption of one of those pre-qualified undertakings into the other (a transaction which, however, is authorised by the European Commission); (b) the effects of that merger were fully realised after the submission of a tender by the absorbing undertaking (for which reason, at the time the tender was submitted, its composition had not changed from that which existed at the time of pre-qualification); (c) the undertaking then absorbed (whose composition had not changed at the time of the deadline for submitting tenders) has however stated that it is not taking part in the restricted procedure, probably in implementation of the contractual schedule established by the agreement drawn up between the holding companies?’

Admissibility of the request for a preliminary ruling

21 Infratel, OpEn Fiber and the Italian Government submit that the request for a preliminary ruling should be declared inadmissible, on the basis that it is not relevant for the purposes of the main proceedings, and also on the basis that it is hypothetical, or does not reflect a genuine doubt on the part of the referring court.

22 In this regard, it must be borne in mind that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions referred concern the interpretation of EU law, the Court is in principle bound to give a ruling. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 31 and the case-law cited).

23 In the present case, it is apparent from the order for reference that the procurement procedure at issue in the main proceedings is governed by the rules set out in the contract notice, one of which refers to Article 61 of the Public Procurement Code, transposing Article 28 of Directive 2014/24. Furthermore, there is nothing in the file to indicate that the question of interpretation of EU law which is raised is unrelated to the actual facts of the main action or its purpose, or that it is hypothetical. As the referring court has pointed out, its question is intended to enable it to determine whether that provision of

Directive 2014/24 requires the identity of the operator submitting a tender in a restricted procurement procedure to correspond perfectly to that of the preselected operator.

24 Furthermore, while it is true that the Consiglio di Stato (Council of State) explains why it inclines towards a particular interpretation of Article 28 of Directive 2014/24, that does not mean that it has no doubt as to the meaning of that provision. In explaining its view, the referring court is cooperating in good faith with the Court of Justice in the context of proceedings for a preliminary ruling, and responding to the invitation in paragraph 17 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2018 C 257, p. 1), which states that 'the referring court or tribunal may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling', indicating that this paragraph 17 'may be useful to the Court'.

25 In those circumstances, the request for a preliminary ruling must be held to be admissible.

On the question referred

26 By its question, the referring court asks, essentially, whether the first sentence of Article 28(2) of Directive 2014/24 must be interpreted, with regard to the requirement for the legal and substantive identity of the economic operator submitting a tender to correspond to that of the preselected operator, and in the context of a restricted procedure for the award of a public contract, as precluding a preselected candidate which has agreed to acquire another preselected candidate, under a merger agreement concluded between the preselection stage and the tendering stage, but completed after the tendering stage, from submitting a tender.

27 Under the first sentence of Article 28(2) of Directive 2014/24, only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender.

28 That rule is laid down in relation to the restricted procedure, which has several stages, and particularly in relation to the preselection and tendering stages.

29 It is clear from the wording of the first sentence of Article 28(2) of Directive 2014/24 that the economic operator that submits the tender must, in principle, be the one that was preselected.

30 That provision does not lay down any rules concerning any changes which may have occurred in the structure or economic and technical capacity of the preselected candidate.

31 In its judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347), the Court considered, in the analogous context of Directive 2004/17, the consequences of such changes taking place during a negotiated procedure for the award of a public contract, having regard to general principles of EU law — particularly the principle of equal treatment and the consequent obligation of transparency — and the objectives pursued by EU law in the field of public procurement.

32 In that regard, it must be recalled that the principle of equal treatment and the duty of transparency mean, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority, and constitute the basis of the EU rules on procedures for the award of public contracts (judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 37 and the case-law cited).

33 The principle of equal treatment of tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, requires that all tenderers must be afforded equality of opportunity when formulating their tenders, and therefore implies that the tenders of all competitors must be subject to the same conditions. A strict application of the principle of equal treatment of tenderers, in the context of a negotiated procedure, would lead to the conclusion that only those economic operators who have been preselected can in that capacity submit tenders and be awarded contracts (see, to that effect, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraphs 38 and 39).

34 That approach is based on Article 28(2) of Directive 2014/24, under which ‘only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender’; this presupposes that the preselected economic operators and those submitting tenders are legally and substantively the same (see, by analogy, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 40).

35 However, the Court has also held that, in a negotiated procedure, where a group of undertakings preselected as such, incorporating two economic operators, had been dissolved, one of those operators could take the place of the group and continue the procedure in its own name, provided that it was established that that economic operator by itself met the requirements initially laid down by the contracting entity, and that the continuation of its participation in that procedure did not mean that other tenderers were placed at a competitive disadvantage (see, to that effect, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 48 and operative part).

36 It should be noted that the case which gave rise to that judgment involved a change in both the legal and the substantive identity of the tendering operator, as compared to the preselected operator, given that the procedure was not taken forward by the group of undertakings which had been preselected as such, but by one of the operators which had formed that group, and that the economic and technical capacity of the original candidate had been reduced through the loss of the capacity of one of the economic operators in question. However, that change did not mean that the procedure could not be followed through, provided that the conditions identified by the Court were satisfied.

37 In that regard, it should be emphasised that the main proceedings relate, by contrast, to a situation in which one of the tenderers has increased its capacity, through the acquisition of one of the other preselected tenderers.

38 It is therefore necessary to determine whether, in those circumstances, there has been a change in the legal and substantive identity of the preselected tenderers.

39 It is common ground in this matter that, as regards OpEn Fiber, the requirement for the legal identity of the tendering candidate to correspond to that of the preselected candidate has been met.

40 On the other hand, it is apparent from the request for a preliminary ruling that, between the preselection stage and the deadline for submission of tenders, the holding companies of two tenderers, OpEn Fiber and Metroweb Sviluppo, entered into a binding framework agreement on terms leading to a merger by absorption of Metroweb Sviluppo into OpEn Fiber. In so far as a firm commitment had been made, under which OpEn Fiber was obliged to acquire the assets of Metroweb Sviluppo, and in so far as OpEn Fiber could, therefore — despite the need to wait for a decision of the Commission — reasonably count on the capacity of Metroweb Sviluppo being available in relation to its future activity, it must be held that, even though the concrete and definitive effects of the merger at issue did not materialise until after submission of tenders, the substantive identity of OpEn Fiber was not the same, on the deadline for submission of tenders, as it had been on the date of preselection.

41 Consequently, it is necessary to determine whether, notwithstanding that change in substantive identity, the principle of equal treatment can be held not to have been infringed, in the light of the criteria referred to in the judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347, paragraph 48), cited in paragraph 36 of the present judgment.

42 In that regard, it is important to point out, as is apparent from paragraph 37 of this judgment, that those criteria were developed in the context of the case that gave rise to the judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347), where, essentially, the circumstances were such that the capacity of the initially preselected tenderer had decreased, whereas the present case concerns a situation in which one of the tenderers has increased its capacity through the acquisition of one of the other preselected tenderers. That difference of circumstances inevitably has consequences as regards the application of the criteria to the facts of the present case, bearing in mind that, unlike an increase in the capacity of a tenderer, a reduction in capacity is liable to give rise to difficulties in the context of a procedure for the award of a public contract.

43 To allow a tender to be submitted by a candidate whose economic and technical capacity is appreciably less than it was at the time of preselection is, potentially, to circumvent the preselection procedure, given that a candidate whose capacity had been thus reduced might not have been preselected.

44 In a negotiated procedure for the award of a public contract, it is in the interests of the contracting authority that, where the candidates have been preselected, their economic and technical capacity is maintained throughout the procedure, as the loss of such capacity would create a risk of undermining the objective of the procedure, which is to select a tenderer capable of performing the contract in question.

45 By contrast, it is not contrary to the interests of the contracting authority for a candidate to increase its economic and technical capacity after preselection. It may even be regarded as normal for a candidate to acquire the resources necessary to satisfy itself that it can guarantee the proper performance of the contract.

46 Such an increase in economic and technical capacity may take the form, amongst other things, of the candidate availing itself of the resources of other economic operators, or indeed of partial or total absorption of another economic operator, including one participating in the same negotiated procedure for the award of a public contract.

47 In the light of those considerations, it must be held that the proviso which, essentially, requires an economic operator wishing to continue a procedure for the award of a public contract as a tenderer to establish, where its legal or substantive identity has changed between the preselection stage and the deadline for submission of tenders, that it still meets the requirements initially laid down by the contracting authority, is satisfied by hypothesis in circumstances where its substantive capacity has only increased.

48 As to the proviso that the continuing participation of the tenderer in a procedure for the award of a public contract must not place other tenderers at a competitive disadvantage, and whether that proviso is satisfied on the facts of the present case, it must be noted that there are other provisions of EU law, distinct from those governing public contracts, which are specifically intended to ensure that mergers such as that at issue in the main proceedings do not pose a threat to free and undistorted competition within the internal market. Thus, in so far as the conduct of an economic operator complies with those specific rules, its participation in such a merger cannot be regarded as being liable, in itself, to place other tenderers at a competitive disadvantage, simply on the basis that the merged entity will benefit from greater economic and technical capacity.

49 Accordingly, an acquisition such as that at issue in the main proceedings must be effected in accordance with EU legislation, and particularly Regulation No 139/2004.

50 In the present case, it is apparent from the request for a preliminary ruling that the Commission decided, on 15 December 2016, pursuant to that regulation, not to oppose the notified concentration.

51 It should be added that, although the principle of equal treatment is not undermined by the mere fact of a merger between two preselected tenderers, the possibility cannot be ruled out that sensitive information relating to the procurement procedure may have been exchanged by the parties to the merger, prior to its completion. Such a situation could give the acquiring operator unjustified advantages, at the tendering stage, in relation to the other tenderers, which would inevitably place those other tenderers at a competitive disadvantage (see, by analogy, judgment of 17 May 2018 *Specializuotas transportas*, C-531/16, EU:C:2018:324, paragraph 29).

52 In principle, such circumstances would be sufficient to prevent the acquiring operator’s tender being considered by the contracting authority (see, by analogy, judgment of 17 May 2018, *Specializuotas transportas*, C-531/16, EU:C:2018:324, paragraph 31).

53 However, it is not to be presumed that such exchanges of information — which, as the Commission pointed out in its observations, might infringe Article 7 of Regulation No 139/2004, under which concentrations falling within the scope of that regulation may not be implemented until they have been

authorised, as well as Article 101 TFEU — have in fact taken place. In the present case, it is apparent from the information available to the Court that no collusive conduct has been established.

54 It follows from all the foregoing considerations that the first sentence of Article 28(2) of Directive 2014/24 must be interpreted, with regard to the requirement for the legal and substantive identity of the economic operator submitting a tender to correspond to that of the preselected operator, and in the context of a restricted procedure for the award of a public contract, as not preventing a preselected candidate which has agreed to acquire another preselected candidate, under a merger agreement concluded between the preselection stage and the tendering stage, but completed after the tendering stage, from submitting a tender.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

The first sentence of Article 28(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be must be interpreted, with regard to the requirement for the legal and substantive identity of the economic operator submitting a tender to correspond to that of the preselected operator, and in the context of a restricted procedure for the award of a public contract, as not preventing a preselected candidate which has agreed to acquire another preselected candidate, under a merger agreement concluded between the preselection stage and the tendering stage, but completed after the tendering stage, from submitting a tender.

[Signatures]

---

1 Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 23 January 2019 (1)

Case C-697/17

Telecom Italia SpA

v

Ministero dello Sviluppo Economico,

Infrastrutture e telecomunicazioni per l'Italia SpA (Infratel Italia SpA),

interveners:

Open Fiber SpA

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Preliminary-ruling proceedings — Public contracts — Directive 2014/24/EU — Restricted procedure — Economic operators invited to submit a tender — Merger by absorption carried out during the procurement procedure — Requirement that legal identity must remain the same during the preselection stage and the tender submission stage)

1. In this reference for a preliminary ruling, the Consiglio di Stato (Council of State, Italy) asks whether, for the purposes of Directive 2014/24/EU, (2) a company initially selected as part of a restricted public procurement procedure remains 'legally and substantively identical' if that company merges by absorption with another company which was also selected but which did not ultimately submit a tender.

2. The case now before the Court is, in some ways, the reverse of the case which led to the judgment in *MT Højgaard and Züblin*, (3) in which the tenderer, when it was preselected, was part of a group of undertakings that was subsequently dissolved. The question in that case was whether, following the dissolution of the group, that tenderer could continue to participate in its own name in the negotiated procedure for the award of a public contract.

3. The Court of Justice is therefore presented with a fresh opportunity to develop its case-law on the requirement that preselected economic operators and those who submit tenders must be legally and substantively identical.

I. Legislative framework

A. EU law: Directive 2014/24

4. Article 8 provides:

'This Directive shall not apply to public contracts and design contests for the principal purpose of permitting the contracting authorities to provide or exploit public communications networks or to

provide to the public one or more electronic communications services.

For the purposes of this Article, “public communications network” and “electronic communications service” shall have the same meaning as in Directive 2002/21/EC of the European Parliament and of the Council.’ (4)

5. In accordance with Article 18(1):

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

6. Pursuant to Article 28:

‘1. In restricted procedures, any economic operator may submit a request to participate in response to a call for competition containing the information set out in Annex V parts B or C as the case may be by providing the information for qualitative selection that is requested by the contracting authority.

…

2. Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65.

…’

B. National law: Codice dei contratti pubblici (Code on public sector contracts) (5)

7. Article 61(3) reads:

‘Following the assessment by the contracting authority of the information provided, only those economic operators invited to do so may submit a tender.’

8. In accordance with Article 48(11):

‘In restricted or negotiated procedures, or in competitive dialogue procedures, economic operators who are invited individually, or candidates who are admitted individually to the competitive dialogue procedure, shall have the possibility of submitting a tender or of negotiating on their own behalf or as representatives for associated operators.’

II. Facts and question referred for a preliminary ruling

9. Infratel Italia SpA (‘Infratel’), on behalf of the Ministero dello Sviluppo economico (Ministry of Economic Development, Italy), launched a restricted procedure for the award of a concession contract for the construction, maintenance and management of a publicly owned passive ultra-broadband network in certain regions.

10. The restricted procedure, subdivided into five lots (corresponding to five geographical areas), was split into the following stages:

(a) submission of applications to participate (by 18 July 2016);

(b) sending of invitations to participate to the selected operators (by 9 August 2016); and

(c) submission of tenders (by 17 October 2016).

11. Telecom Italia SpA (‘Telecom Italia’), Metroweb Sviluppo SpA (‘Metroweb Sviluppo’) and Enel Open Fiber SpA (‘Enel Open Fiber’), (6) in addition to other operators, submitted their applications (first stage of the procedure). Infratel accepted those applications and therefore invited those undertakings to participate (second stage of the procedure) as selected tenderers.

12. Although it was selected in that second stage, Metroweb Sviluppo did not submit any tender, thereby de facto waiving its right to participate in the tendering procedure.

13. On 9 January 2017, Infratel published the list of invited tenderers, and, on 24 January 2017, it published the provisional lists of successful tenderers. Enel Open Fiber was ranked first in the five lots while Telecom Italia was ranked second in all lots apart from Lot No 4, where it was ranked third.

14. Following the conclusion of the procedure, Telecom Italia had access to the documents held by the contracting authority and after viewing those documents it found that, at some point between the selection stage and the deadline for submitting tenders (17 October 2016), Metroweb Sviluppo and Enel Open Fiber had been involved in a complex company transaction.

15. That transaction arose from a concentration whereby the companies Enel SpA (‘Enel’) and Cassa Depositi e Prestiti SpA (‘CDP’), through its subsidiary CDP Equity SpA. (‘CDPE’), acquired overall control of the undertaking resulting from the merger of Enel Open Fiber with Metroweb Italia SpA (‘Metroweb Italia’).

16. According to the ‘investment framework agreement’ concluded on 10 October 2016 between the holding company Enel (which controlled Enel Open Fiber) and Metroweb Italia (which controlled Metroweb Sviluppo), the transaction involved:

– the acquisition by Enel and CDPE of 50% each of the share capital of Enel Open Fiber;

– the acquisition by Enel Open Fiber of 100% of the share capital of Metroweb Italia;

– the merger by absorption by Metroweb Italia of certain companies in the Metroweb Italia group, including Metroweb Sviluppo;

– the merger of Enel Open Fiber with the company resulting from the merger of the Metroweb Italia group, creating a ‘new Enel Open Fiber’. (7)

17. Pursuant to that agreement, on 17 October 2016 Metroweb Sviluppo (participating in the tendering procedure) was merged by absorption into the Metroweb group. On 23 January 2017, the merger by absorption of Metroweb into Open Fiber was agreed.

18. The proposed concentration was notified to the European Commission on 10 November 2016, (8) pursuant to Regulation (EC) No 139/2004. (9) By decision of 15 December 2016, the Commission decided not to oppose the transaction. (10)

19. Telecom Italia challenged the award of the five lots into which the restricted procedure was divided in five actions brought before the Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio, Italy), which dismissed those actions by five similarly worded judgments.

20. Against that background, Telecom Italia brought five appeals before the Consiglio di Stato (Council of State), which decided to stay the proceedings and refer the following question for a preliminary ruling:

> ‘Must the first sentence of Article 28(2) of Directive 2014/24/EU be interpreted as requiring pre-qualified operators and those who submit tenders in the context of a restricted procedure to be completely legally and economically identical and, in particular, must that provision be interpreted as precluding the conclusion of an agreement between the holding companies which control two pre-qualified operators at some point between pre-qualification and the submission of tenders, where: (a) that agreement has as its purpose and effect (inter alia) the completion of a merger by the absorption of

one of those pre-qualified undertakings into the other (a transaction which, however, is authorised by the European Commission); (b) the effects of that merger were fully realised after the submission of a tender by the absorbing undertaking (for which reason, at the time the tender was submitted, its composition had not changed from that which existed at the time of pre-qualification); (c) the undertaking then absorbed (whose composition had not changed at the time of the deadline for submitting tenders) has however stated that it is not taking part in the restricted procedure, probably in implementation of the contractual schedule established by the agreement drawn up between the holding companies?'

21. The referring court points out that the disputed procedure is not governed in its entirety by Directive 2014/24 or by Directive 2014/23/EU, (11) but rather only by the rules of the invitation to tender, in accordance with which Article 61 of the CCP, transposing Article 28 of Directive 2014/24, was applicable.

22. The invitation to tender further stipulated that the outcome of the procurement procedure would be decided in favour of the most economically advantageous tender, on the basis of the best price-quality ratio, within the meaning of Article 95 of the CCP, which transposes Article 67 of Directive 2014/24.

23. The referring court considers that it is unlikely, in the context of a restricted procedure governed by Article 28 of Directive 2014/24, that it will be possible to apply the principle of legal and substantive identity established by the Court in *MT Højgaard and Züblin*. (12)

24. The Consiglio di Stato (Council of State) notes that the merger operation which ended in January 2017 had only just started on the date for the submission of tenders (October 2016), meaning that the structure of Enel Open Fiber had not yet been altered. The Consiglio di Stato (Council of State) believes that, ultimately, it is not possible to prove that through the merger agreement — which resulted in a stable and structural alteration of the companies concerned — the parties involved intended to engage in concerted action to distort competition in the procurement procedure.

III. Procedure before the Court of Justice and the parties' positions

25. The reference for a preliminary ruling was received at the Registry of the Court of Justice on 11 December 2017. Written observations were lodged by Telecom Italia, Infratel, Open Fiber, the EFTA Surveillance Authority, the Italian Government and the Commission. All the parties which have entered an appearance, with the exception of the EFTA Surveillance Authority, attended the hearing which was held on 15 November 2018.

26. Telecom Italia maintains that, in the case of a proposed merger by absorption, it is the substantive identity of the preselected absorbing undertaking, rather than its legal identity, which really changes, making the merger incompatible with the principle in Article 28(2) of Directive 2014/24.

27. Telecom Italia further submits that the referring court underestimated the complexity of the transaction at issue, since it merely examined the subjective and formal identity of Enel Open Fiber on the deadline for the submission of tenders, thereby fragmenting the overall programme of gradual integration with Metroweb Sviluppo. In fact, in Telecom Italia's submission, leaving aside any anti-collusion principle, that overall programme was initiated by a mandatory framework agreement entered into between the preselection stage and the deadline for the submission of tenders, implemented during the tendering procedure, and concluded after the contract was finally awarded but before it was signed. The framework agreement merged the two companies into a single decision-making centre with effect from the invitation to tender stage, which enabled Metroweb Sviluppo to refrain from submitting a tender while at the same time ensuring that it could be selected as if it had submitted one. That situation should be penalised in the same way as it would if the same decision-making centre had submitted two tenders.

28. Infratel submits that the reference for a preliminary ruling is inadmissible for being hypothetical because the referring court does not ask about the interpretation of the applicable EU law and there has already been a ruling on the subject matter of the main proceedings. In the alternative, Infratel contends that the preselected entities did not change in any way from the entities which submitted tenders. At the time when it submitted its tender, Enel Open Fiber acted as a single operator with the same composition as it had

during the preselection stage. The merger did not alter its legal personality and therefore its identity was the same as that of the preselected undertaking.

29. Open Fiber also contends that the reference for a preliminary ruling is inadmissible:

- first, because it raises the question of the conformity of the framework agreement with Directive 2014/24, even though the lawfulness of that agreement is not in issue in the main proceedings;
- second, because, since the tendering procedure concerns a concession for the construction of a communications network, it would be governed by Directive 2014/23, but both that directive and Directive 2014/24 are inapplicable on account of the derogation laid down therein in respect of communications networks and services. The documents relating to the procedure cannot be construed as referring to Article 28 of Directive 2014/24;
- third, because the alleged prohibition on merger by absorption between preselected entities is not an inherent principle of the EU legal order;
- fourth, because the referring court does not have any uncertainties regarding the interpretation of EU law.

30. As regards the substance, Open Fiber agrees with the view expressed by the referring court and contends that its invitation to participate in the tender evaluation stage is not contrary to Article 28 of Directive 2014/24 or the Court's case-law.

31. The Italian Government also submits that the reference for a preliminary ruling is inadmissible, arguing that the referring court merely refers, in general terms, to a rule of EU law and accepts that there is no link at all between the situation at issue and that rule, because Enel Open Fiber's tender was submitted by the same legal person which had been permitted to participate in the restricted procedure.

32. As regards the substance, the Italian Government submits that it is apparent from Article 51(2) of Directive 2004/17/EC (13) that the operator invited to participate and the operator which submits the tender must be completely economically and legally identical. However, Article 28(2) of Directive 2014/24 introduced a less stringent requirement.

33. The Italian Government contends that it does not follow from either the national provisions or the general principles of EU law that the merger by absorption of the preselected entities, which was authorised by the Commission and completed after the absorbing company submitted the tender, is an unlawful operation.

34. The EFTA Surveillance Authority submits that there is no breach of the identity requirement if — as it believes occurred in this case — first, the economic operator which ultimately submits the tender fulfils the conditions established by the contracting entity and, second, the fact that that operator is permitted to submit a tender does not place other competitors at a disadvantage. The identity requirement — which is by no means an absolute requirement — does not preclude the conclusion of an agreement leading to the merger of two preselected operators during a public procurement procedure.

35. In the Commission's submission, the question should be reworded, for it could be construed as asking the Court about the lawfulness of the merger agreement.

36. The Commission maintains that the criteria laid down in *MT Højgaard and Züblin*, (14) in relation to Directive 2004/17, could be applied *mutatis mutandis* in similar circumstances governed by Directive 2014/24. However, the Commission observes that the situation which led to that judgment is very different from that now at issue. In this case, there was no change of identity whatsoever between the date for preselection of operators invited to submit a tender and the date for submission of tenders, as occurred in *MT Højgaard and Züblin*.

37. The Commission contends that the conclusion of a merger by absorption agreement does not in itself result in a deterioration of the competitive position of other tenderers or a breach of the principle of equal treatment. That risk can be excluded if, first, pursuant to Article 7(1) of Regulation No 139/2004, the parties

have not carried out — even partially — the merger operation and have not previously exchanged sensitive information likely to influence their conduct during the public procurement procedure, and, second, all the operators participating in the procedure are aware that the merger agreement has been concluded.

38. The Commission believes that it is irrelevant that the company being absorbed waived its right to participate in the restricted procedure. That factor can have no bearing on the admission of the absorbing company to the evaluation stage, unless it makes clear that the parties have partially performed the merger and have exchanged sensitive information likely to influence their conduct during the procurement procedure, thereby infringing the principle of equal treatment.

IV. Analysis

A. The admissibility of the reference for a preliminary ruling

39. Infratel, Open Fiber and the Italian Government submit that the reference for a preliminary ruling is inadmissible because, they claim, it is of no relevance to the main proceedings and it is also hypothetical, in that it does not actually reflect a genuine uncertainty of the referring court.

40. I believe, however, that that plea should be dismissed.

41. The Consiglio di Stato (Council of State) has indicated that the procurement procedure is governed by the rules contained in the invitation to tender, one of which refers to Article 61 of CCP which transposes Article 28 of Directive 2014/24 into Italian law. Moreover, the grounds of appeal put forward by Telecom Italia include the infringement of the principle of identity laid down by EU law, (15) inter alia other grounds relating to national law.

42. Having dismissed the infringements of national law alleged by the appellant, the referring court states that it only remains for it to examine the ground alleging infringement of EU law, which ‘has become relevant and decisive for the purposes of adjudicating on the dispute at issue and on which the Division considers it necessary to seek a preliminary ruling within the meaning of Article 267 TFEU.’ (16)

43. In such a situation, I believe that the presumption of the relevance of questions referred for a preliminary ruling should apply. As is well known, that presumption can be rebutted but only if very specific circumstances exist: (a) where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose; (b) where the problem is hypothetical; or (c) where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (17)

44. In my view, none of those three circumstances exist in this case. Further, although, admittedly, the Consiglio di Stato (Council of State) sets out the reasons which, in its opinion, support a particular interpretation of Article 28 of Directive 2014/24, that does not mean that it does not harbour uncertainties about the meaning of that provision. (18)

45. The referring court believes that its interpretation of that provision is feasible but it takes the view that another interpretation might also be possible and that, therefore, the permitted intervention of the Court of Justice is required. By acting in that way, the referring court is cooperating faithfully with the Court of Justice in the exercise of jurisdiction, in accordance with the spirit underlying point 17 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings. (19)

B. Substance

46. The Commission rightly suggests that the question referred by the Consiglio di Stato (Council of State) should be reworded, as that question might give the — incorrect — impression that it concerns the compatibility of the merger agreement with EU law. However, the referring court does not actually express any uncertainty about that agreement or cast doubt on its validity.

47. Accordingly, the dispute is confined to the determination of whether Article 28(2) of Directive 2014/24 precludes an operator involved in a merger by absorption with another preselected operator from

being admitted to the tender evaluation stage (in a restricted procurement procedure).

48. That is the question specifically asked by the referring court, which, as I stated above, (20) considers that Article 28(2) of Directive 2014/24 is applicable (by way of reference from the national provisions) to the case on which it is required to adjudicate and that the outcome of the proceedings turns on the interpretation of that provision, once the issues of national law to be determined in those proceedings have been addressed.

49. Although Infratel, Open Fiber and the Italian Government insisted on disputing that assessment of the Consiglio di Stato (Council of State) at the hearing, I believe that that court's interpretation of the law applicable to the case is reasonable and based on adequate reasoning.

50. In view of the clear separation of functions between the national courts and the Court of Justice which characterises the procedure laid down in Article 267 TFEU, it is solely for the Consiglio di Stato (Council of State), before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. (21) That assertion assumes that there has been a prior determination of the legislation applicable to the case, a determination which, for the reasons set out, cannot be challenged on grounds of reasonableness or reasoning.

1. The legal and substantive identity of the operators selected in a restricted procedure

51. It is, in short, a matter of determining whether Article 28(2) of Directive 2014/24 requires 'pre-qualified operators and those who submit tenders in … a restricted procedure to be completely legally and economically identical' in a situation in which two preselected operators have agreed the merger by absorption of one of them, which has the following particular features:

– the proposed merger was agreed between the selection date and the date for the submission of tenders and was subsequently authorised by the Commission;

– the effects of the merger were completed after the absorbing company had submitted its tender; and

– the company being absorbed decided not to participate in the restricted procedure.

52. The so-called 'requirement for preselected economic operators and those who submit tenders to be legally and substantively identical' is based on Article 51(3) of Directive 2004/17, which states that the contracting entities are to 'verify that the tenders submitted by the selected tenderers comply [with the rules and requirements applicable to tenders] …' That is what the Court held in *MT Højgaard and Züblin*, (22) a judgment to which the referring court explicitly refers.

53. The same rule has been encapsulated in Article 28(2) of Directive 2014/24, according to which 'only those economic operators invited to do so by the contracting authority … may submit a tender (in restricted procedures)'.

54. That requirement is ultimately intended to safeguard the principle of equal treatment of tenderers. (23) Strict application of that principle must 'lead to the conclusion that only those economic operators who have been preselected can in that capacity submit tenders and be awarded contracts.' (24)

55. Article 28(2) of Directive 2014/24 is aimed at ensuring that restricted procedures really are just that; in other words, that in such procedures only economic operators who have been invited to do so by the contracting authority — and no other operators — may submit tenders. As a result of that invitation, the scope to which the tendering procedure is *restricted*, from a subjective point of view, is established.

56. If an economic operator who has not been preselected were permitted to submit a tender, that would constitute preferential treatment of that operator in relation to other operators. The latter will have been able to submit their tenders only after formally applying to participate in the (restricted) procedure and after having undergone the appropriate evaluation by the contracting authority.

57. In *MT Højgaard and Züblin*, the Court observed that the identity rule 'may be qualified in order to ensure, in a negotiated procedure, adequate competition'. (25) That observation must be understood in the context of that case, the facts of which were, as I pointed out above, completely the opposite of those now at issue.

58. Advocate General Mengozzi correctly described the background to that case when he stated that 'the factual context of the question is that a group of two undertakings, constituted in the form of a commercial company and having been preselected in a procurement procedure, was dissolved following the insolvency of one of its two members, and the contracting authority allowed the remaining member to continue to take part in the procedure in place of the group and ultimately awarded it the contract, despite the fact that that member as such had not been preselected.' (26)

59. Had the identity principle been strictly applied on that occasion and had it accordingly been concluded that the remaining member of the group of undertakings could not, as a different person, continue to participate in the procedure, the number of candidates tendering for the contract would have been reduced to three. However, that outcome was contrary to the terms of the contract notice, according to which the contracting entity considered that there should be at least four candidates in order to ensure competition. (27)

60. When striking a proper balance between the principle of equal treatment of tenderers — which the identity principle reflects — and the need to ensure effective competition — in a case in which, moreover, a reduction of the number of tenderers was liable to result in the failure of the procurement procedure — the Court held that the principle of equal treatment is not undermined where 'one of two economic operators, who formed part of a group of undertakings that had, as such, been invited to submit tenders …, [is permitted] to take the place of that group following the group's dissolution, and to take part, in its own name, in the negotiated procedure for the award of a public contract, provided that it is established, first, that that economic operator *by itself meets the requirements* laid down by the contracting entity and, second, that the continuation of its participation in that procedure *does not mean that the other tenderers are placed at a competitive disadvantage*.' (28)

61. In the case now before the Court, there is no suggestion that the exclusion of the absorbing company (this is, in truth, what Telecom Italia seeks), together with the withdrawal, on its own initiative, of the company being absorbed, would have restricted the number of tenderers so that, because that number was below the minimum required, it might have prevented the award of the contract.

62. Thus, it is not mandatory to modify the requirements of the identity principle in the interests of the principle of preservation of the procedure for the award of the contract, rather than in the interests of competition between tenderers. Accordingly, since the particular and special situation on which the approach taken in *MT Højgaard and Züblin* (29) was based is not present in this case, there are, in principle, no reasons to 'qualify' the requirement of identity.

63. However, the Court took the view in that case that it was necessary to 'qualify' the identity principle on the basis that it did not concern a tenderer who was completely different from the preselected tenderers and who was seeking to submit a tender (which is, I stress, the typical situation which the legislature had in mind when enacting Article 28(2) of Directive 2014/24). The Court accepted that a company which, owing to its links to one of the preselected operators (of which, in fact, it formed part), was not completely unconnected to the procedure, could do so.

64. This case also involves a situation in which the financial structure of two of the preselected operators, one of which absorbed the other, was altered or was in the course of being altered. Accordingly, this case does not concern the possible involvement of a third party with no connection to the restricted procedure either.

2. The impact of the merger by absorption on the legal and substantive identity of the selected tenderer

65. According to the information provided by the referring court, there had been no change in the legal personality of Enel Open Fiber on the date on which that company, having been selected, submitted its tender, which is the exact point in the procurement procedure about which the referring court asks. The referring court states that 'its composition had not changed at the time of the deadline for submitting tenders'.

66. In that connection, it should be noted that, as the Commission has observed, (30) since the merger by absorption was a concentration with an EU dimension, it could not be performed without having first obtained the Commission's consent (more correctly, its non-opposition and a declaration that the concentration was compatible with the internal market), which was given on 15 December 2016, in other words, two months after the deadline for the submission of tenders.

67. Nonetheless, what really interests the referring court is whether the fact that the negotiations for the merger were already in progress when the operators which were to be merged were selected by the contracting authority amounted to a certain *substantive* change in the personality of Enel Open Fiber, which would be sufficient to support the conclusion that that company was not, de facto, the same legal person as the Enel Open Fiber which had been preselected.

68. In other words, the question is whether the fact that a change is *in the process of being made* to the financial structure of a preselected tenderer, which is acquiring or is proposing to absorb another preselected tenderer, is sufficient to exclude that tenderer from a (restricted) procedure. (31)

69. In support of exclusion, it could be argued that, since the merger process is set to culminate in a structural change to the absorbing company and the company being absorbed, the principles of transparency and equal treatment of tenderers require that that outcome be brought forward to the actual moment when, as a result of the planned merger agreement, *substantive confusion* between the companies concerned commences. The selected company and the company which submitted the tender would therefore have ceased to be *substantively* identical and, for those purposes, they would no longer be the same person.

70. However, I am not persuaded by that argument. First, it overlooks the fact that, in this case, the two operators (the absorbing operator and the operator being absorbed) were preselected to submit tenders prior to the merger, from which it follows that it is possible to refer to a cessation of the *substantive identity* and also to a *substantive* continuity between the two of them.

71. Second, I believe that it is disproportionate to take the requirement of *substantive identity* to that extreme in a situation involving the merger of companies by absorption. In a transaction of this kind, the absorbing company retains its legal personality and increases its assets, by adding to them those of the company being absorbed. (32) In fact, from a *substantive* point of view, that change to the acquiring company's assets is no different from that which would occur in the event of an increase in the company's share capital or other similar transactions. If the preselected tenderers were unable to carry out this kind of corporate transaction during the restricted tendering procedure, because doing so would undermine their *substantive identity*, their business capability would be unnecessarily and disproportionately reduced.

72. At the hearing, Telecom Italia qualified its written observations, acknowledging that transactions of this kind (including mergers) would be irrelevant, from the perspective that is important for the present purposes, if they involved operators who were not participants in the tendering procedure. In so doing, I believe that Telecom Italia accepts that its complaint is actually concerned with the risk of collusion which could result from a merger with another tenderer in the same tendering procedure, rather than the preservation of the substantive identity of the preselected tenderer (for, if its original argument were adopted the tenderer's identity would also be altered by the absorption of any other undertaking).

73. The prohibition of changes to the shareholding structure of a preselected undertaking while a restricted procedure for the award of a contract is underway could also create the legal uncertainty to which the Consiglio di Stato (Council of State) refers in its order for reference. (33)

74. Directive 2014/24 provides for the possibility that, following a corporate restructuring (as a result, inter alia, of a merger), a new contractor may replace the contractor named as the successful tenderer, without the need to commence a new procurement procedure. (34) If the conditions to which the legislature has made that possibility subject are fulfilled, (35) I see no reason why that provision should not also apply to the case of a procedure which is in progress. (36)

75. It is worth pointing out that any ground of exclusion based on that reason must have been *expressly* stated in the tender documents, in the national provisions or in the EU provisions governing the tendering procedure. That is not so in this case and therefore the arguments set out in the judgment in *Specializuotas transportas*, (37) concerning the imposition on tenderers of an obligation which is not provided for in either

‘applicable national legislation [or] the call for tenders or the tender specifications …, [since it does] not constitute a clearly defined condition for the purpose of the case-law [cited]’ are fully applicable. (38)

3. The principle of equal treatment as regards (the other) selected operators

76. Based on the continuity of the two preselected operators (the absorbing company and the company being absorbed), I believe that there are no reasons to find that here has been a breach of the principle of equal treatment in relation to the other tenderers. None of those tenderers was required to compete with an economic operator who was entirely unconnected to the restricted procedure but rather with an operator which has an undeniable *substantive* connection to two operators which were also preselected and which were required to undergo the same evaluation procedure.

77. Therefore, there was no breach of the principle of equal treatment *at the time when the tenders were submitted*, which is what essentially matters for the present purposes. Although it later merged with another of the preselected operators, the fact is that Enel Open Fiber was also successful in the preselection stage, and its circumstances are radically different from those of a third party which has been invited to submit a tender without being required to follow the procedure with which operators admitted to the restricted procedure have had to comply.

78. Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders. This therefore implies that the tenders of all competitors must be subject to the same conditions, (39) and its effects extend to the whole of the procedure for the award of a contract, in particular, both when tenderers formulate their tenders and when those tenders are being assessed by the contracting authority. (40)

79. Was the fact that the merger of the two operators took place after the deadline for the submission of tenders but *before the definitive classification of those tenders* (41) liable to be detrimental to the other tenderers by placing them in a position of inequality? I do not believe so. The decisive factor is that the contract was ultimately awarded to the tenderer who fulfilled the conditions set out in the contract notice, provided that the successful tenderer did not receive preferential treatment throughout the procedure.

80. In particular, for our purposes here, since the procedure was restricted, the following factors are relevant:

- first, Enel Open Fiber was duly preselected and kept its legal personality unchanged even though its shareholding structure was altered when it absorbed another tenderer;
- second, Metroweb Sviluppo, the tenderer which was absorbed, did not submit a tender in the end even though it had been preselected. That means that, ultimately, the merger of the two operators resulted in the submission of a single tender.

81. It was not even absolutely essential that Metroweb withdrew from the tendering procedure, for the purposes of giving full effect to the principle of equal treatment, since the Court has held that tenderers who are linked to one another may submit tenders simultaneously in the same procedure, provided that these are not ‘coordinated or concerted tenders, that is to say, tenders that are neither autonomous nor independent, which would be likely to give them unjustified advantages in relation to the other tenderers’. (42)

82. The possible risks of collusion which could arise as a result of the merger do not really have anything to do with a change in the substantive identity of Enel Open Fiber but rather with the fact that improper contact might have taken place between two of the tenderers, irrespective of whether or not they were involved in a merger operation.

83. There is nothing to suggest that Metroweb Sviluppo and Enel Open Fiber’s tenders were coordinated or concerted and, in any event, only one of them ultimately submitted a tender, which eliminates the risk of collusion.

84. Moreover, the Consiglio di Stato (Council of State) expressly rules out the possibility that the merger agreement was aimed at circumventing the rules of competition or that it sought, ‘in essence, to disturb the

balance of the tendering procedure to the detriment of the other competitors and the procuring entity … The concentration transaction carried out under the framework agreement of 10 October 2016 cannot, in itself, be said to amount to a concerted practice between participants in the tendering procedure'. (43)

85. However, it is appropriate to consider the situations in which a merger in progress is capable of undermining the principle of equal treatment. I am not ruling out that, in the abstract, that might occur where, contrary to Article 7(1) of the EC Merger Regulation, (44) the merger has de facto begun to take effect, thereby enabling a possible exchange of information between the operators concerned — who have been preselected — which could place them at an advantage over the other tenderers. (45)

86. It is for the referring court to determine whether that occurred in this case although, I repeat, its view, as set out in the order for reference, is that the structural merger of the two companies 'falls far short of being a collusive agreement between two competitors who intend to upset the balance of an individual tendering procedure'. (46)

87. In summary, the submission of a tender by a tenderer which is in the process of merging with another tenderer, which has also been selected, is not incompatible with Article 28(2) of Directive 2014/24, unless the two operators act in a coordinated or concerted manner in the restricted procurement procedure so that they have an unfair advantage over other tenderers, a matter which it is for the national court to determine.

V. Conclusion

88. In the light of the foregoing considerations, I suggest that the Court of Justice reply as follows to the Consiglio di Stato (Council of State, Italy):

> Article 28(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that it does not preclude, in a restricted procedure, the admission to the tender evaluation stage of an economic operator which has concluded an agreement for the merger by absorption of another economic operator which has also been selected, provided that:
>
> – that merger agreement was not legally or substantively implemented before the tender submission stage; and
>
> – the two operators have not acted in a coordinated or concerted manner in the restricted procurement procedure so that they have an unfair advantage over other tenderers, a matter which it is for the national court to determine.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

3 Judgment of 24 May 2016 (C-396/14, EU:C:2016:347).

---

4 Directive of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108 p. 33).

---

5 Legislative Decree No 50 of 18 April 2016 (GURI No 91 of 19 April 2016, Ordinary Supplement No 10) transposing, inter alia, the provisions of Directive 2014/24 ('CCP').

---

6 Open Fiber has been the name of Enel Open Fiber since December 2016.

---

7 See paragraph 9 of the Commission decision of 15 December 2016 declaring the concentration compatible with the internal market and with the EEA Agreement (Case M.8234 — Enel/CDP Equity/Cassa Depositi e Prestiti/Enel Open Fiber/Metroweb Italia).

---

8 OJ 2016 C 427, p. 5.

---

9 Council Regulation of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1).

---

10 OJ 2017 C 15, p. 1.

---

11 Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

---

12 Case C-396/14, EU:C:2016:347.

---

13 Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1.)

---

14 Case C-396/14, EU:C:2016:347.

---

15 In particular, Telecom Italia contends that there has been an ‘infringement of the mandatory principle that preselected persons and those who submit tenders must be legally and economically identical, which, for the purposes of the restricted procedure, is laid down by Article 28(2) of Directive 2014/24/EU and the relevant case-law of the Court of Justice’ (paragraph 7.3 of the order for reference).

---

16 Paragraph 7.4 of the order for reference.

---

17 In that connection, see, for example, judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraphs 24 and 25); of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraphs 15 and 16); of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 19); of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 54); of 28 March 2017 *Rosneft* (C-72/15, EU:C:2017:236, paragraphs 50 and 155); of 10 July 2018, *Jehovan todistajat* (C-25/17, EU:C:2018:551, paragraph 31); and of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 44).

---

18 Paragraph 8.2, *in fine*, of the order for reference states that ‘it would be possible to come to a different conclusion only if the Court of Justice were to find that EU law prohibits the conclusion of agreements between competing operators in the context of the same tendering procedure in implementation of which a transaction is carried out, such as a merger by absorption, which is in principle permitted by that same EU law.’

---

19 ‘The referring court or tribunal may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling. That information may be useful to the Court’ (OJ 2018 C 257,

p. 1).

20 See points 21 to 23, 41 and 42 of this Opinion.

21 For example, judgment of 26 June 2007, *Ordre des barreaux francophones et germanophone and Others* (C-305/05, EU:C:2007:383, paragraph 18).

22 Case C-396/14, EU:C:2016:347, paragraph 40.

23 That principle, 'the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, requires that all tenderers must be afforded equality of opportunity when formulating their tenders, and therefore implies that the tenders of all competitors must be subject to the same conditions'. Judgment in *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347, paragraph 38).

24 Loc. cit., paragraph 39.

25 Loc. cit., paragraph 41.

26 Opinion of Advocate General Mengozzi in *MT Højgaard and Züblin* (C-396/14, EU:C:2015:774, point 48).

27 As explained in paragraphs 10 and 42 of the judgment in *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347).

28 Judgment in MT *Højgaard and Züblin* (C-396/14, EU:C:2016:347, paragraph 44), italics added.

29 Case C-396/14, EU:C:2016:347.

30 Point 31 of its written observations.

31 As Telecom Italia states in its written observations (point 31), 'in that scenario, the [subsequent] formal legal nature of the absorbed company (Metroweb Sviluppo) is not important …; in reality, it is sufficient that the substantive, rather than legal, identity of the absorbing company (Open Fiber) changes … for the merger to be incompatible with … the principle laid down in Article 28(2) of Directive 2014/24'.

32 Pursuant to Article 3(1) of Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (OJ 2011 L 110, p. 1), '"merger by acquisition" shall mean the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.'

33 ‘If the principles to be inferred from Article 28(2) were more broadly construed, the consequences would be difficult for contracting authorities to manage and there would be a constant risk of the *ex post* nullity of acts awarding a contract … in clear contravention of the general principle of the stability of legal situations’ (paragraph 8.3 *in fine* of the order for reference).

---

34 The specific situation referred to in Article 72(1)(d)(ii) is ‘universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive’.

---

35 That possibility is based on the principle of preservation of the contract and the requirement that any changes in the shareholding structure should not be prejudiced by interference in the normal performance of corporate transactions. The latter could be affected if changes occurring in the capital had a negative impact on restricted procurement procedures. Companies would therefore be prevented from carrying out corporate restructuring programmes.

---

36 According to recital 110 in the preamble to Directive 2014/24, ‘… the successful tenderer performing the contract should be able, in particular where the contract has been awarded to more than one undertaking, to undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that tenderer.’

---

37 Judgment of 17 May 2018 (C-531/16, EU:C:2018:324).

---

38 Ibid., paragraph 24.

---

39 Judgment of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 33 and the case-law cited).

---

40 For example, judgment of 16 December 2008, *Michaniki* (C-213/07, EU:C:2008:731, paragraph 45).

---

41 As stated above (point 17), the merger took place on 23 January 2017, while the provisional lists of successful tenderers for the five lots were published on 24 January 2017.

---

42 *Specializuotas transportas* (C-531/16, EU:C:2018:324, paragraph 29).

---

43 Order for reference, paragraph 8.4.

---

44 Pursuant to which ‘a concentration with a Community dimension … or which is to be examined by the Commission … shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision’.

---

45 These are the situations referred to in paragraph 29 of the judgment in *Specializuotas transportas* (C-531/16, EU:C:2018:324), transcribed above. That situation might have occurred if the merger process had begun before the submission of tenders and the substantive (and unlawful) implementation of the merger prior to the Commission’s decision had affected the subject matter of Enel Open Fiber’s tender in the same

way as would have happened if that undertaking and Metroweb Sviluppo had coordinated with one another to align their conduct throughout the successive stages of the procedure, to the detriment of other operators.

---

46 Order for reference, paragraph 8.4.

JUDGMENT OF THE COURT (Fourth Chamber)

29 July 2019 (*)

(Reference for a preliminary ruling — Public procurement — Review procedures — Directive 89/665/EEC — Directive 92/13/EEC — Right to effective judicial protection — Principles of effectiveness and equivalence — Action for review of judicial decisions in breach of EU law — Liability of the Member States in the event of infringement of EU law by national courts or tribunals — Assessment of damage eligible for compensation)

In Case C–620/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Székesfehérvári Törvényszék (Székesfehérvár High Court, Hungary), made by decision of 24 October 2017, received at the Court on 2 November 2017, in the proceedings

Hochtief Solutions AG Magyarországi Fióktelepe

v

Fővárosi Törvényszék,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, K. Jürimäe, D. Šváby, S. Rodin and N. Piçarra, Judges,

Advocate General: M. Bobek,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 21 November 2018,

after considering the observations submitted on behalf of:

– Hochtief Solutions AG Magyarországi Fióktelepe, by G.M. Tóth and I. Varga, ügyvédek,

– Fővárosi Törvényszék, by H. Beerné Vörös and K. Bőke, acting as Agents, and by G. Barabás, bíró,

– the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,

– the Greek Government, by M. Tassopoulou, D. Tsagkaraki and G. Papadaki, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by A. Tokár, H. Krämer and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) TEU, of the second subparagraph of Article 19(1) TEU, of Article 49 TFEU, of Article 47 of the Charter of Fundamental

Rights of the European Union, of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665'), of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66 ('Directive 92/13'), of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and of the EU-law principles of primacy, equivalence and effectiveness.

2 The request has been made in proceedings between Hochtief Solutions AG Magyarországi Fióktelepe ('Hochtief Solutions') and the Fővárosi Törvényszék (Budapest High Court, Hungary), concerning damage allegedly caused by the latter court, in the exercise of its judicial powers, to Hochtief Solutions.

Legal context

EU law

3 The third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665, drafted in almost identical terms to those of the third subparagraph of Article 1(1) and Article 1(3) of Directive 92/13, provide as follows:

'1. …

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed [EU] law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

4 Article 2(1) of Directive 89/665 provides:

'Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

…'

5 Article 2(1) of Directive 92/13 provided:

‘The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity; and

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.’

Hungarian law

6 Article 260 of the polgári perrendtartásról szóló 1952. évi III. törvény (Law No III of 1952 instituting the Code of civil procedure (‘the Code of Civil Procedure’) provides:

‘1. A request for review may be submitted against a final judgment if:

(a) the party presents any fact or evidence, or any final court or administrative decision, that the court did not take into consideration during the previous proceedings, provided that it would have been to its benefit had it been considered originally;

…

2. Under subparagraph (a) of paragraph (1) above, either of the parties shall be able to file a request for review only if it was unable to present the fact, evidence or decision mentioned therein during the previous proceedings through no fault of its own.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 On 25 July 2006, the Észak-Dunántúli Környezetvédelmi és Vízügyi Igazgatóság (North Transdanubia Environmental Protection and Water Management Directorate, Hungary) (‘the contracting authority’) published a call for expressions of interest in the *Official Journal of the European Union*, S Series, under number 139-149235, for a public works contract concerning the development of transportation

infrastructures in the intermodal centre of the national commercial harbour of Győr-Gönyű (Hungary) pursuant to the accelerated procedure under Chapter IV of the közbeszerzésekről szóló 2003. évi CXXIX. törvény (Law No CXXIX of 2003 on public procurement).

8 Section III.2.2 of the call for expressions of interest, relating to economic and financial capacity, provided that 'a candidate or sub-contractor whose balance sheet shows a negative result for more than one of the last three financial years does not fulfil the conditions for capacity'.

9 It is apparent from the order for reference that Hochtief Solutions, which did not fulfil that criterion, challenged its lawfulness before the Közbeszerzési Döntőbizottság (Public Procurement Arbitration Committee, Hungary) ('the Arbitration Committee'), arguing (i) that that criterion was discriminatory and (ii) that it was not by itself capable of providing information on the financial capacity of a tenderer.

10 The Arbitration Committee upheld Hochtief Solutions' action in part, ordering the contracting authority to pay a fine of 8 000 000 Hungarian forint (HUF) (approximately EUR 24 500), but did not find that that criterion was unlawful.

11 On 2 October 2006, Hochtief Solutions brought an action against the decision of the Arbitration Committee before the Fővárosi Bíróság (Budapest High Court, Hungary), which took the view that the results of the balance sheet constituted a suitable criterion for providing information about economic and financial capacity and, accordingly, dismissed the action.

12 On 4 June 2010, Hochtief Solutions appealed against the judgment at first instance to the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary), which decided to stay the proceedings and to submit a request for a preliminary ruling to the Court of Justice.

13 By judgment of 18 October 2012, *Édukövízig and Hochtief Construction* (C-218/11, EU:C:2012:643), the Court held, inter alia, that Article 44(2) and Article 47(1)(b) of Directive 2004/18 must be interpreted as meaning that a contracting authority may require a minimum level of economic and financial standing by reference to one or more particular aspects of the balance sheet, provided that those aspects are such as to provide information on such standing of an economic operator and that that level is adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose. The requirement of a minimum level of economic and financial standing cannot, in principle, be disregarded solely because that level relates to an aspect of the balance sheet regarding which there may be differences between the legislation of the different Member States.

14 The Fővárosi Törvényszék (Budapest High Court), which had meanwhile succeeded the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal), having taken account of that judgment of the Court, upheld the judgment delivered at first instance, holding that the criterion used by the contracting authority to assess economic and financial capacity was not discriminatory.

15 On 13 September 2013, Hochtief Solutions lodged an appeal on a point of law before the Kúria (Supreme Court, Hungary) against the judgment of the Fővárosi Törvényszék (Budapest High Court), in which it claimed that the results of the balance sheet were not an appropriate basis for providing the contracting authority with a genuine and objective view of a tenderer's economic and financial situation. Hochtief Solutions also requested the Kúria (Supreme Court) to make another reference to the Court of Justice for a preliminary ruling.

16 By judgment of 19 March 2014, the Kúria (Supreme Court), however, dismissed the appeal on the ground that that complaint had not been raised within the prescribed period, since Hochtief Solutions had raised that issue, not in its initial administrative action before the Arbitration Committee, but solely in its subsequent submissions.

17 On 25 July 2014, Hochtief Solutions lodged a constitutional appeal against the judgment of the Kúria (Supreme Court) before the Alkotmánybíróság (Constitutional Court, Hungary) by which it sought a declaration that that judgment was unconstitutional and requested that it be set aside. That appeal was dismissed as inadmissible by order of 9 February 2015.

18 In the meantime, on 26 November 2014, Hochtief Solutions filed an application before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) for review of the judgment of the Fővárosi Törvényszék (Budapest High Court), referred to in paragraph 14 of the present judgment.

19 According to the information provided by the referring court, Hochtief Solutions, in support of its application for review, claimed that the question whether the results of the balance sheet were an appropriate indicator for assessing the economic and financial capacity of a tenderer, and the judgment of 18 October 2012, *Édukövízig and Hochtief Construction* (C-218/11, EU:C:2012:643), had not, in fact, been subject to any examination. According to Hochtief Solutions, that omission constitutes a 'fact', within the meaning of Article 260(1)(a) of the Code of Civil Procedure, capable of justifying the opening of the judgment of the Fővárosi Törvényszék (Budapest High Court) to review. Relying, in particular, on the judgment of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraphs 26 and 27), Hochtief Solutions argued that, where a judgment of the Court of Justice could not be taken into account in the main proceedings on the ground that it was out of time, it may and must be examined in the context of a review.

20 Although Hochtief Solutions requested the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court) to make a reference to the Court for a preliminary ruling on the questions raised in the course of the review proceedings, that court did not accede to that request and dismissed the application for review, finding that the facts and evidence relied on by Hochtief Solutions were not new.

21 Hochtief Solutions then appealed against the order dismissing its application for review before the Fővárosi Törvényszék (Budapest High Court), requesting that court (i) to lay the case open to review and order examination of it on the merits and (ii) to submit a request for a preliminary ruling to the Court of Justice.

22 On 18 November 2015, the Fővárosi Törvényszék (Budapest High Court) made an order confirming the order at first instance of the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court).

23 Hochtief Solutions then brought an action before the referring court, the Székesfehérvári Törvényszék (Székesfehérvár High Court, Hungary), seeking compensation for the damage which, it argued, the Fővárosi Törvényszék (Budapest High Court) had caused it in exercising its jurisdiction. It claims, in this regard, that it has not been given the opportunity, in accordance with EU law, to have account taken of the facts or circumstances that it had put forward before the Arbitration Committee and in the main proceedings, but on which neither that Committee nor the national courts seised of the case had given a ruling. In so doing, it contends, the Hungarian authorities responsible for the implementation of the law deprived of their substance the rights guaranteed by the relevant rules of EU law.

24 In those circumstances, the Székesfehérvári Törvényszék (Székesfehérvár High Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are the basic principles and rules of EU law (in particular Article 4(3) TEU, and the requirement of uniform interpretation), as interpreted by the Court of Justice of the European Union, especially in the judgment [of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513)] to be interpreted as meaning that the declaration of the liability of the court of the Member State ruling at final instance in a judgment infringing EU law may be based exclusively on national law or on the criteria laid down by national law? If not, are the basic principles and rules of EU law, particularly the three criteria laid down by the Court of Justice in [the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513)] for declaring the liability of the "State" to be interpreted as meaning that whether the conditions for the Member State to incur liability for infringement of EU law by the courts of that State are met is to be assessed on the basis of national law?

(2) Are the basic principles and rules of EU law (in particular Article 4(3) TEU and the requirement of effective judicial protection), particularly the judgments of the Court of Justice concerning the liability of the Member State …, inter alia, [of 19 November 1991, *Francovich and Others*

(C-6/90 and C-9/90, EU:C:1991:428); of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79), and of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513)], to be interpreted as meaning that the force of *res judicata* attaching to judgments that infringe EU law delivered by courts of the Member States ruling at final instance precludes a declaration that the Member State is liable for damages?

(3) In the light of Directive [89/665] and of Directive [92/13], are the review procedure concerning the award of public contracts of a value greater than the [EU] thresholds and the judicial review of the administrative decision adopted in that procedure relevant for the purposes of EU law? If so, are EU law and the case-law of the Court of Justice [in particular, the judgments of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17) and of 16 March 2006, *Kapferer* (C-234/04, EU:C:2006:178), and especially the judgment of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067)] regarding the necessity of granting review, as an extraordinary appeal, which is derived from national law on judicial review of the administrative decision adopted in the abovementioned review procedure concerning the award of public contracts, relevant for the purposes of EU law?

(4) Are the directives on review procedures concerning the award of public contracts (namely, Directive [89/665] and Directive [92/13]) to be interpreted as meaning that national legislation, under which the national courts before which the dispute in the main proceedings is brought may disregard a fact that has to be examined in accordance with a judgment of the Court of Justice, delivered in a preliminary ruling procedure in connection with a review procedure concerning the award of public contracts, a fact that is not taken into account either by the national courts ruling in proceedings instituted as a result of the review procedure brought against the decision adopted in the main proceedings, is compatible with those directives?

(5) Are Directive [89/665], in particular Article 1(1) and (3) thereof, and Directive [92/13], in particular Articles 1 and 2 thereof (especially in the light of [the judgments of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17); of 16 March 2006, *Kapferer* (C-234/04, EU:C:2006:178); of 12 February 2008, *Willy Kempter* (C-2/06, EU:C:2008:78); of 4 June 2009, *Pannon GSM* (C-243/08, EU:C:2009:350); and of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067)], to be interpreted as meaning that national legislation, or an application thereof, in accordance with which, although a judgment of the Court of Justice delivered in a preliminary ruling procedure before judgment in the proceedings at second instance establishes a relevant interpretation of the rules of EU law, the court hearing the case rejects it on the grounds that it is out of time and subsequently the court hearing the application for review does not consider the review admissible, is compatible with the abovementioned directives and with the requirements of effective judicial protection and with the principles of equivalence and effectiveness?

(6) If, under national law, review must be granted in order to re-establish constitutionality by means of a new decision of the Constitutional Court, should review not be granted, in accordance with the principle of equivalence and the principle laid down in [the judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39)], if it has not been possible to take into account a judgment of the Court of Justice in the main proceedings owing to the provisions of national law concerning procedural time limits?

(7) Are Directive [89/665], in particular Article 1(1) and (3) thereof, and Directive [92/13], in particular Articles 1 and 2 thereof, in the light of the judgment of the Court of Justice [of 12 February 2008, *Willy Kempter* (C-2/06, EU:C:2008:78)], according to which an individual need not rely specifically upon the case-law of the Court of Justice, to be interpreted as meaning that the review procedures concerning the award of public contracts governed by the abovementioned directives may be initiated only by an action containing an express description of the infringement concerning the award of public contracts invoked and, furthermore, clearly indicates the procurement rule infringed (the specific article and paragraph), that is to say, that in a review procedure concerning the award of public contracts only those infringements that the appellant has indicated by reference to the procurement provision infringed (the specific article and paragraph), whereas in any other administrative and civil procedure it is sufficient for the

individual to present the facts and the evidence supporting them, and for the competent authority or court to give a ruling in accordance with their content?

(8) Is the requirement of a sufficiently serious infringement laid down in the judgments [of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), and of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391)] to be interpreted as meaning that there is no such infringement if the court ruling at final instance, in clear contravention of the established case-law, cited in the greatest detail, of the Court of Justice, supported by various legal opinions as well, refuses an individual's request for a question to be referred for a preliminary ruling as to whether review ought to be granted, on the absurd grounds that EU law, in this case, in particular, [Directives 89/665 and 92/13], contains no rules governing review, in spite of the fact that, for that purpose, reference has also been made in the greatest detail to the relevant case-law of the Court of Justice, including also [the judgment of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067)], which specifically states the need of review in relation to the public procurement procedure? In the light of the judgment of the Court of Justice in [the judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335)], with what degree of detail must the national court that does not grant review justify its decision to depart from the authoritative legal interpretation given by the Court of Justice?

(9) Are the principles of effective judicial protection and of equivalence in Article 19 TEU and Article 4(3) TEU, freedom of establishment and freedom to provide services laid down in Article 49 TFEU, and [Directive 93/37] and also [Directives 89/665, 92/13 and 2007/66], to be interpreted as not precluding the competent authorities and courts from dismissing one after another, in manifest disregard of the applicable EU law, the appeals brought by the appellant because it was unable to participate in a public procurement procedure, appeals for which it is necessary to prepare, depending on the circumstances, numerous documents with considerable investment of time and money or to participate at hearings, and, although it is true that, in theory, liability may be declared for damage caused in the exercise of judicial functions, the relevant legislation prevents the appellant claiming from the court compensation for harm suffered as a consequence of the unlawful measures?

(10) Are the principles laid down in the judgments [of 9 November 1983, *San Giorgio* (199/82, EU:C:1983:318); of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), and of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391)] to be interpreted as meaning that compensation may not be paid for damage caused by the fact that, in infringement of the established case-law of the Court of Justice, the court of the Member State ruling at final instance has not granted the review requested in good time by the individual, in which he could have claimed compensation for the costs incurred?'

Consideration of the questions referred

Preliminary observations

25 As is apparent from the order for reference, the main proceedings concern compensation for the harm allegedly suffered by Hochtief Solutions as a result of the order, mentioned in paragraph 22 of the present judgment, by which the Fővárosi Törvényszék (Budapest High Court), adjudicating at final instance, upheld the order of the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court), mentioned in paragraph 20 of the present judgment, by which it (i) refused to submit a request to the Court of Justice for a preliminary ruling and (ii) dismissed the application for review brought by Hochtief Solutions against the judgment of the Fővárosi Törvényszék (Budapest High Court), mentioned in paragraph 14 of the present judgment.

26 It follows that the case in the main proceedings concerns the question whether, in so proceeding, the Fővárosi Törvényszék (Budapest High Court) committed a breach of EU law which is capable of forming the basis of an obligation to compensate Hochtief Solutions for the harm which it claims to have suffered as a result of that breach.

27 In this context, the referring court seeks, in particular, to ascertain whether EU law must be interpreted as meaning that, in circumstances such as those of the main proceedings, a national court dealing with an application for review of a judgment which acquired the force of *res judicata* after a judgment delivered by the Court on the basis of Article 267 TFEU in the proceedings which led to that national judgment is required to uphold that application.

28 It is in the light of the context, as thus defined, of the dispute in the main proceedings that the questions referred for a preliminary ruling should be examined.

The admissibility of the seventh and ninth questions

29 By its seventh question, the referring court asks the Court, in essence, to rule on the conformity with EU law of national procedural rules, relating to the mandatory content of an action in the field of public procurement, while by its ninth question it asks, in essence, whether the act of systematically dismissing, in breach of EU law, actions brought by an unsuccessful tenderer in a public procurement procedure, such as Hochtief Solutions, is compatible with EU law.

30 In that regard, it should be borne in mind that, according to settled case-law of the Court, the procedure laid down in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts. It follows that it is for the national courts alone which are seised of the case and which are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they put to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of EU law, the Court is, in principle, obliged to give a ruling (judgment of 28 March 2019, *Verlezza and Others*, C-487/17 to C-489/17, EU:C:2019:270, paragraphs 27 and 28 and the case-law cited).

31 However, the Court may refuse to rule on a question referred for a preliminary ruling by a national court, inter alia, where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (judgment of 28 March 2019, *Verlezza and Others*, C-487/17 to C-489/17, EU:C:2019:270, paragraph 29 and the case-law cited).

32 The seventh and ninth questions specifically come within the latter situation. It is quite obvious that those questions bear no relation to the subject matter of the main proceedings, as summarised in paragraph 26 of the present judgment and are, therefore, hypothetical.

33 It follows that the seventh and ninth questions are inadmissible.

The first, second, eight and 10th questions

34 By these questions, which it is appropriate to examine together, the referring court seeks guidance on, in particular, the principles laid down by the Court concerning the liability of a Member State for damage caused to individuals as a result of an infringement of EU law by a national court adjudicating at final instance. The referring court asks, in essence, whether those principles must be interpreted as meaning (i) that the liability of the Member State concerned must be assessed on the basis of national law; (ii) that the principle of *res judicata* precludes a declaration of the liability of that Member State from being made; (iii) that there is a sufficiently serious infringement of EU law where the court adjudicating at final instance refuses to refer to the Court of Justice a question concerning the interpretation of EU law which has been raised before it; and (iv) that they preclude a rule of national law which excludes the costs incurred by a party as a result of the judicial decision in question from the damage which may be the subject of compensation.

35 In the first place, it should be noted that, with regard to the conditions under which a Member State may be rendered liable to make reparation for loss and damage caused to individuals as a result of breaches of EU law for which it is responsible, the Court has repeatedly held that individuals who have been harmed have a right to reparation if three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by those individuals (see, to

that effect, in particular, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 51; of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 51; and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 22).

36 It should also be borne in mind that the liability of a Member State for damage caused by a decision of a court adjudicating at final instance which breaches a rule of EU law is governed by the same conditions (see, to that effect, judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 52, and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 23).

37 Furthermore, the three conditions mentioned in paragraph 35 of the present judgment are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that a Member State cannot incur liability under less strict conditions on the basis of national law (see, to that effect, inter alia, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 66, and of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 57).

38 It follows that EU law does not preclude a rule of national law which — in order for a Member State to incur liability for harm caused to individuals as a result of infringements of EU law for which it can be held responsible — provides for less strict conditions than those laid down by the case-law of the Court mentioned in paragraph 35 of the present judgment.

39 In the second place, as is apparent from the case-law of the Court, the principle of *res judicata* does not preclude recognition of the principle of liability of a Member State for the decision of a national court or tribunal adjudicating at final instance which infringes a rule of EU law. Given, inter alia, that an infringement, by such a decision, of rights deriving from EU law cannot normally be corrected thereafter, individuals cannot be deprived of the possibility of holding the State liable in order to secure legal protection of their rights (see, to that effect, judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 34, and of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 58 and the case-law cited).

40 In the third place, it is clear from the settled case-law of the Court that it is, in principle, for the national courts to apply the conditions mentioned in paragraph 35 of the present judgment for establishing the liability of a Member State for damage caused to individuals by breaches of EU law, for which the State can be held responsible, in accordance with the guidelines laid down by the Court for the application of those conditions (see, to that effect, judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 100, and of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 95).

41 In that connection, as regards, in particular, the second of those conditions, it should be borne in mind that, according to the Court's case-law, the liability of a Member State for damage caused to individuals by reason of an infringement of EU law attributable to a national court adjudicating at final instance can be incurred only in the exceptional case where the national court adjudicating at final instance has manifestly infringed the applicable law (judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 53, and of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391, paragraphs 32 and 42).

42 In order to determine whether a sufficiently serious infringement of EU law has occurred, the national court before which a claim for compensation has been brought must take account of all the factors which characterise the situation brought before it. The factors which may be taken into consideration in that regard include, in particular, the degree of clarity and precision of the rule breached, the scope of the room for assessment that the infringed rule confers on national authorities, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, and the issue, where applicable, of whether the position taken by an EU institution may have contributed to the adoption or maintenance of national measures or practices contrary to EU law, and non-compliance by the national court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 TFEU (see, to that effect, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 56; of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraphs 54 and 55; and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 25).

43 In any event, an infringement of EU law is sufficiently serious if it was made in manifest breach of the relevant case-law of the Court (judgments of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 56; of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 52; and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 26).

44 With regard to the dispute in the main proceedings, it is for the referring court to assess, taking into account all the factors which characterise the situation at issue in the main proceedings, whether the Fővárosi Törvényszék (Budapest High Court), by the order mentioned in paragraph 22 of the present judgment, committed a sufficiently serious infringement of EU law by manifestly disregarding the applicable EU law, including the relevant case-law of the Court, in particular the judgment of 18 October 2012, *Édukövízig and Hochtief Construction* (C-218/11, EU:C:2012:643).

45 In the fourth place, where the conditions referred to in paragraph 35 of the present judgment are satisfied, the Member State must make reparation for the consequences of the loss and damage occasioned in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not such as in practice to make it impossible or excessively difficult to obtain reparation (principle of effectiveness) (see, to that effect, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 67; of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 58; and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 38).

46 In that regard, it follows from the case-law of the Court that reparation for loss or damage caused to individuals as a result of breaches of EU law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights (see, to that effect, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 82, and of 25 November 2010, *Fuß*, C-429/09, EU:C:2010:717, paragraph 92).

47 A rule of national law under which — in a case where the liability of a Member State is incurred in respect of damage caused by an infringement of a rule of EU law by a decision of a court or tribunal of that State adjudicating at final instance — the costs incurred by one party as a result of that decision are generally excluded from the damage which may be the subject of compensation may render it, in practice, excessively difficult or even impossible to obtain adequate compensation for the harm suffered by that party.

48 In the light of the foregoing, the answer to the first, second, eighth and 10th questions must be that the liability of a Member State for damage caused by a decision of a national court or tribunal adjudicating at final instance which infringes a rule of EU law is governed by the conditions laid down by the Court, in particular in paragraph 51 of the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), without excluding the possibility that that State may incur liability under less strict conditions on the basis of national law. That liability is not precluded by the fact that that decision has acquired the force of *res judicata*. In the context of the enforcement of that liability, it is for the national court or tribunal before which the action for damages has been brought to determine, taking into account all the factors which characterise the situation in question, whether the national court or tribunal adjudicating at final instance committed a sufficiently serious infringement of EU law by manifestly disregarding the applicable EU law, including the relevant case-law of the Court. By contrast, EU law precludes a rule of national law which, in such a case, generally excludes the costs incurred by a party as a result of the harmful decision of the national court or tribunal from damage which may be the subject of compensation.

The third, fourth, fifth and sixth questions

49 Taking account of the context of the case in the main proceedings, as noted in paragraphs 26 and 27 of the present judgment, it must be understood that, by its third, fourth, fifth and sixth questions, the referring court is asking the Court, in essence, whether EU law, in particular, Directives 89/665 and 92/13 and the principles of equivalence and effectiveness, must be interpreted as not precluding legislation of a Member State which does not allow review of a judgment, which has acquired the force of *res judicata*, of a court or tribunal of that Member State which has ruled on an action for annulment against an act of a contracting authority without addressing a question the examination of which was

envisaged in an earlier judgment of the Court in response to a request for a preliminary ruling made in the course of the proceedings relating to that action for annulment.

50 In that connection, it must be recalled that Article 1(1) of Directive 89/665 and Article 1(1) of Directive 92/13 require the Member States to adopt the measures necessary to ensure that the decisions taken by the contracting authorities in public contract award procedures coming within the scope of those directives may be reviewed effectively and, in particular, as rapidly as possible, on the ground that they have infringed EU law on public procurement or the national rules transposing that law (judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 39).

51 Those provisions, which are intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are thus designed to reinforce the existence, in all Member States, of effective remedies, so as to ensure the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 41 and the case-law cited).

52 Neither Directive 89/665 nor Directive 92/13 contains any provisions specifically governing the conditions under which those review procedures may be used. Those directives lay down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 42).

53 In the present case, it is apparent from the information provided by the referring court that, under Hungarian procedural law, review, within the meaning of Article 260 of the Code of Civil Procedure, is an extraordinary remedy which, where the conditions laid down by that provision are satisfied, allows the force of *res judicata* attached to a judgment that has become final to be called into question.

54 Attention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata.* In order to ensure both stability of the law and of legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after the passing of the time limits provided for in that connection can no longer be called into question (judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 58, and of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 28).

55 Consequently, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law (judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 59, and of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 29).

56 It has been held that EU law does not require a judicial body automatically to reverse a judgment having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court (see, to that effect, judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 60, and of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 38).

57 The judgment of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17), relied on by the referring court, cannot call that consideration into question.

58 It is apparent from that judgment that the principle of sincere cooperation, laid down in Article 4(3) TEU, imposes on an administrative body, when so requested, an obligation to review a final administrative decision in order to take account of the interpretation of the relevant provision given in the meantime by the Court, in particular where that administrative body has, under national law, the power to reopen that decision (judgment of 13 January 2004, *Kühne & Heitz*, C-453/00, EU:C:2004:17, paragraph 28).

59 It is common ground, however, that that consideration concerns only the possible review of a final decision of an administrative body and not, as in the present case, a final decision of a court or tribunal.

60 In that regard, it is apparent from the case-law of the Court that, if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to reverse a decision having the authority of *res judicata* in order to render the situation arising from that decision compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that that situation is brought back into line with EU legislation (see, to that effect, judgment of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 62).

61 In the present case, it is apparent from the information provided by the referring court that, under Article 260 of the Code of Civil Procedure, review of a final judgment is allowed where a party may rely on, inter alia, a final judicial decision not taken into account in the course of the proceedings which led to the judgment, the review of which is sought, and only if that party was unable to present, through no fault on its part, that decision during those proceedings.

62 Moreover, it is clear from the wording of the sixth question that Hungarian law authorises the review of a decision having the authority of *res judicata* in order to re-establish constitutionality by means of a new decision of the Alkotmánybíróság (Constitutional Court).

63 It is consequently a matter for the referring court to determine whether Hungarian procedural rules include the possibility of reversing a judgment which has acquired the force of *res judicata*, for the purpose of rendering the situation arising from that judgment compatible with an earlier judicial decision which has become final where both the court which delivered that judgment and the parties to the case leading to that judgment were already aware of that earlier decision. If that were the case, in accordance with the case-law of the Court cited in paragraph 60 above, that possibility should, in accordance with the principles of equivalence and effectiveness, in the same circumstances, prevail in order to render the situation compatible with an earlier judgment of the Court.

64 Nonetheless, it should, in any event, be borne in mind that it is settled case-law that, by reason, inter alia, of the fact that an infringement, by a final decision of a court of tribunal, of rights deriving from EU law cannot normally be corrected thereafter, individuals cannot be deprived of the possibility of holding the State liable in order to obtain legal protection of their rights (judgments of 6 October 2015, *Târşia*, C-69/14, EU:C:2015:662, paragraph 40, and of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 58).

65 In the light of all the foregoing considerations, the answer to the third, fourth, fifth and sixth questions is that EU law, in particular, Directives 89/665 and 92/13 and the principles of equivalence and effectiveness, must be interpreted as not precluding legislation of a Member State which does not allow review of a judgment, which has acquired the force of *res judicata*, of a court or tribunal of that Member State which has ruled on an action for annulment against an act of a contracting authority without addressing a question the examination of which was envisaged in an earlier judgment of the Court in response to a request for a preliminary ruling made in the course of the proceedings relating to that action for annulment. However, if the applicable domestic rules of procedure provide the possibility for national courts to reverse a judgment which has acquired the force of *res judicata*, for the purposes of rendering the situation arising from that judgment compatible with an earlier national judicial decision which has become final — where both the court which delivered that judgment and the parties to the case leading to that judgment were already aware of that earlier decision — that possibility must, in accordance with the principles of equivalence and effectiveness, in the same circumstances, prevail in order to render the situation compatible with EU law, as interpreted by an earlier judgment of the Court of Justice.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **The liability of a Member State for damage caused by a decision of a national court or tribunal adjudicating at final instance which breaches a rule of European Union law is governed by the conditions laid down by the Court, in particular in paragraph 51 of the judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), without excluding the possibility that that State may incur liability under less strict conditions on the basis of national law. That liability is not precluded by the fact that that decision has acquired the force of *res judicata*. In the context of the enforcement of that liability, it is for the national court or tribunal before which the action for damages has been brought to determine, taking into account all the factors which characterise the situation in question, whether the national court or tribunal adjudicating at final instance committed a sufficiently serious infringement of European Union law by manifestly disregarding the relevant European Union law, including the relevant case-law of the Court. By contrast, European Union law precludes a rule of national law which, in such a case, generally excludes the costs incurred by a party as a result of the harmful decision of the national court or tribunal from damage which may be the subject of compensation.**

2. **European Union law, in particular Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66, as well as the principles of equivalence and effectiveness, must be interpreted as not precluding legislation of a Member State which does not allow review of a judgment, which has acquired the force of *res judicata*, of a court or tribunal of that Member State which has ruled on an action for annulment against an act of a contracting authority without addressing a question the examination of which was envisaged in an earlier judgment of the Court in response to a request for a preliminary ruling made in the course of the proceedings relating to that action for annulment.However, if the applicable domestic rules of procedure include the possibility for national courts to reverse a judgment which has acquired the force of *res judicata*, for the purposes of rendering the situation arising from that judgment compatible with an earlier national judicial decision which has become final — where both the court which delivered that judgment and the parties to the case leading to that judgment were already aware of that earlier decision — that possibility must, in accordance with the principles of equivalence and effectiveness, in the same circumstances, prevail in order to render the situation compatible with European Union law, as interpreted by an earlier judgment of the Court of Justice.**

[Signatures]

---

* Language of the case: Hungarian.

EU:C:2019:340

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 30 April 2019(1)

Case C-620/17

Hochtief Solutions AG Magyarországi Fióktelepe

v

Fővárosi Törvényszék

(Request for a preliminary ruling from the Székesfehérvári Törvényszék (Székesfehérvár High Court, Hungary))

(Reference for a preliminary ruling — Public procurement — Review procedures — Binding force of preliminary rulings — Member State procedural autonomy — Motion for retrial — Equivalence and effectiveness — Member State liability for breaches of EU law arising from decisions of national courts — Failure to refer under the third paragraph of Article 267 TFEU)

I. Introduction

1. The present case is another instalment of a rather complex procedural saga, currently in its third episode. With a considerable degree of simplification, the *first* episode featured the original national decisions on the merits. Within that episode (or litigation round), the appellate national court dealing with the case, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary), requested guidance from this Court. (2) Disagreeing with the way in which the national courts allegedly (mis)applied that guidance in the litigation on the merits, the *second* round of national litigation concerned a motion for a retrial brought by Hochtief Solutions AG Magyarországi Fióktelepe ('Hochtief Hungary').

2. The present request for a preliminary ruling was made within the *third* round of national litigation concerning a claim for damages brought by Hochtief Hungary on two grounds. First, in the view of Hochtief Hungary, the Fővárosi Törvényszék (Budapest High Court, Hungary), acting as an appeal court in the request for a retrial in the second round, should have authorised a retrial in order to take into account the preliminary ruling of the Court given earlier in the same case. Second, it should have made a further request for a preliminary ruling to the Court so that the latter could determine whether, in the circumstances of the case, EU law required a retrial.

3. It is in this context that the Court is asked to address essentially three sets of questions: first, the consequences, under EU law, of the alleged failure of the national courts hearing the case on the merits to correctly implement the preliminary ruling of the Court due to the operation of various procedural limitations; second, whether EU law requires that the extraordinary remedy of a retrial, offered under national law in certain situations, also be extended to alleged breaches of EU law in a situation such as the one in the main proceedings; and, third, a number of elements relating to the conditions for Member State liability.

II. Legal framework

A. EU law

4. Article 1 of Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (3) requires the Member States to ensure that decisions taken by the contracting authorities may be reviewed effectively and that the review procedures are available to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement.

5. Article 2(1) of Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (4) requires the Member States to provide for the power either to take interim measures regarding the procedure for the award of a contract or the implementation of any decision taken by the contracting entity and to set aside decisions taken unlawfully relating to the contract award procedure in question, or to take other types of measures with the aim of correcting any identified infringement and preventing injury to the interests concerned. Member States must also provide for the power to award damages to persons injured by the infringement.

B. Hungarian Law

6. Sections 6:548(1) and 6:549(1) of a Polgári Törvénykönyvről szóló 2013. évi V. törvény (Law V of 2013 on the Civil Code) (‘the Civil Code’) set out under the title ‘Liability for the actions of public authorities’:

> ‘Section 6:548 [Liability for the actions of administrative authorities]: (1) Liability for damage caused within the scope of administrative jurisdiction shall be established only if the damage results from actions or omissions in the exercise of public authority, and if the damage cannot be abated by common remedies or by way of administrative actions.
>
> ...
>
> Section 6:549 [Liability for the actions of courts, public prosecutors, notaries public and court bailiffs]: (1) The provisions on liability for damage caused within the scope of administrative jurisdiction shall apply *mutatis mutandis* to liability for the actions of courts and public prosecutors … A claim may be lodged only if common remedies have been exhausted.
>
> ...’

7. Section 260(1)(a) and (2) of a Polgári perrendtartásról szóló 1952. évi III. törvény (Act III of 1952 on the Code of Civil Procedure) (‘the Civil Procedural Code’) reads as follows:

> ‘(1) A request for a retrial may be submitted against a final judgment if:
>
> (a) the party presents any fact or evidence, or any final court or administrative decision that the court did not take into consideration during the previous proceedings, provided that it would have been to his benefit had it been considered originally;
>
> ...
>
> (2) Under Paragraph (a) of Subsection (1) above, either of the parties shall be able to file a request for a retrial only if he was unable to present the fact, evidence or decision mentioned therein during the previous proceedings through no fault of his own.’

8. Section 361(a) of the Civil Procedural Code provides that:

> ‘The *Kúria* (Supreme Court, Hungary) shall resolve constitutional complaints as per the following:
>
> (a) if the resolution of the Alkotmánybíróság (Constitutional Court, Hungary) is for the annulment of a substantive law or provision, and the case was handled by way of an action (or non-judicial

proceedings) only, the applicant shall be advised of his right to submit a request for a retrial within 30 days at the competent court of first instance.'

III. Facts, procedure and questions referred

9. On 25 July 2006, the Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (North Transdanubia Environmental Protection and Water Management Directorate, 'the contracting authority') published a call for expressions of interest in the *Official Journal of the European Union* (5) for a public works contract concerning the development of transportation infrastructures in the intermodal centre of the national commercial harbour of Győr-Gönyü. The call for expressions of interest contained a number of conditions for participation in the tendering procedure. In particular, point III.2.2. of the call for expressions of interest laid down a criterion for economic and financial capacity ('the economic requirement'). Under that requirement, the profit/loss item in the candidates' balance sheet could not be negative for more than one of the last three completed financial years.

10. Hochtief Hungary is the Hungarian branch of Hochtief Solutions AG, a German construction company that is, in turn, a subsidiary of the parent company Hochtief AG. Hochtief Hungary did not participate in the tendering procedure. By decision of 14 August 2006, the contracting authority declared that only one candidate, the Hungarian Port 2006 Konzorcium, met all the qualification criteria, so only that candidate could be invited to submit a tender.

11. On 9 August 2006, Hochtief Hungary challenged the lawfulness of the economic requirement laid down in the call for expressions of interest before the Közbeszerzési Döntőbizottság (Public Procurement Arbitration Committee, Hungary, 'the Arbitration Committee'), putting forward that the economic requirement was both discriminatory and not suitable to substantiate the financial capacity of the candidates. It also sought the annulment of the call for expressions of interest and the adoption of an order to conduct a new tendering procedure.

12. In its decision of 25 September 2006, the Arbitration Committee considered that the economic requirement was not inappropriate to establish the economic and financial capacity of the candidates. However, by the same decision, the Arbitration Committee imposed a fine of 8 000 000 Hungarian forint (HUF) on the contracting authority for infringing other provisions of the national legislation on public procurement.

13. On 2 October 2006, Hochtief Hungary sought judicial review of the Arbitration Committee's decision before the Fővárosi Bíróság (Budapest Regional Court, Hungary) with regard to the committee's findings concerning financial capacity. Hochtief Hungary maintained that the economic requirement was not suitable to substantiate the financial capacity of an undertaking.

14. In its judgment of 17 March 2010, the Fővárosi Bíróság (Budapest Regional Court) dismissed Hochtief Hungary's request for judicial review. Although it noted that the latter had claimed in its original complaint before the Arbitration Committee that net worth was not suitable to substantiate financial capacity, the Fővárosi Bíróság (Budapest Regional Court) still found that the economic requirement at issue was a suitable criterion to provide information as to the candidates' financial capacity.

15. Hochtief Hungary appealed against that first-instance judgment before the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal). That court stayed the proceedings and made a request for a preliminary ruling to the Court.

16. In its judgment of 18 October 2012, the Court held that 'a contracting authority may require a minimum level of economic and financial standing by reference to one or more particular aspects of the balance sheet, provided those aspects are such as to provide information on such standing of an economic operator and that that level is adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose. The requirement of a minimum level of economic and financial standing cannot, in principle, be disregarded solely because that level relates to an aspect of the balance sheet regarding which there may be differences between the legislations of the different Member States'. (6)

17. In its final judgment on the matter of 18 June 2013, the Fővárosi Törvényszék (Budapest High Court) concluded that, in the light of the preliminary ruling given by the Court, the economic requirement was not incompatible with EU law. The Fővárosi Törvényszék (Budapest High Court) further noted that the necessity and proportionality of the economic requirement had been duly examined by the Arbitration Committee and was also addressed in the first-instance judgment.

18. On 13 September 2013, Hochtief Hungary filed an appeal on points of law before the Kúria (Supreme Court) against the second-instance judgment. It argued that the Fővárosi Törvényszék (Budapest High Court) had not examined the objective suitability of the economic requirement. In this context, Hochtief Hungary requested the Kúria (Supreme Court) to refer the case for a preliminary ruling on the question of whether the Fővárosi Törvényszék (Budapest High Court) was entitled not to examine the objective suitability of the qualification criteria without making a new request for a preliminary ruling.

19. By its judgment of 19 March 2014, the Kúria (Supreme Court) rejected the appeal on points of law on the ground that the complaint against the economic requirement had been brought out of time, as Hochtief Hungary had not raised that issue in its original complaint before the Arbitration Committee, but only in its subsequent submissions. The only issue that was raised in time by Hochtief Hungary in relation to the contested requirement was its discriminatory nature, so only that aspect was to be assessed.

20. Subsequently, Hochtief Hungary filed a constitutional complaint before the Alkotmánybíróság (Constitutional Court), as well as a request for a retrial before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary).

21. First, within the framework of the constitutional complaint, Hochtief Hungary contended that its rights to a fair trial and to an effective remedy had been infringed. It argued that the Kúria (Supreme Court) should have referred further questions to the Court. On 9 February 2015, the Alkotmánybíróság (Constitutional Court) declared the constitutional complaint inadmissible. The right to an effective remedy invoked by Hochtief Hungary did not guarantee a right to a specific decision and it was for the Kúria (Supreme Court) to decide whether it was necessary to request a preliminary ruling.

22. Second, as regards the request for a retrial, Hochtief Hungary contested the lack of consideration of the suitability of the economic requirement and asked for the reopening of the judicial review proceedings in their entirety, the setting aside of all previous judgments and the adoption of a new decision. It also requested the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court) to request a new preliminary ruling on the question of whether a preliminary ruling could be ignored without a new referral.

23. By its order of 8 May 2015, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court) declared the request for a retrial inadmissible, while not considering a reference to the Court necessary. It noted that the facts relied on by Hochtief Hungary in its request for a retrial were not new. The courts in the main proceedings already knew them and had evaluated them. By its request for a retrial, Hochtief Hungary was seeking the review of the legal position taken by the Kúria (Supreme Court), which was a question of law and not of fact. A retrial is not designed to correct alleged errors in the application of the law.

24. Hochtief Hungary subsequently filed an appeal against the order of inadmissibility of the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court) before the Fővárosi Törvényszék (Budapest High Court), the defendant in the present case. The latter upheld the first-instance decision in its order of 18 November 2015. It confirmed that the extraordinary remedy of a retrial aimed to rectify factual errors as opposed to errors in the application of the law. The relevant facts had been the same throughout the entire chain of proceedings, and they were assessed at every stage.

25. Eventually, Hochtief Hungary brought an action for damages before the referring court, the Székesfehérvári Törvényszék (Székesfehérvár High Court, Hungary), for the harm allegedly caused by the decision of the Fővárosi Törvényszék (Budapest High Court) in its capacity as the appeal court in the request for a retrial. Hochtief Hungary claims that declaring the request for a retrial inadmissible ran contrary to both national and EU law and should give rise to damages in the form of the legal costs which could have been reimbursed if a retrial had been granted and if Hochtief Hungary had ultimately been successful.

26. It is within this factual and legal context that the Székesfehérvári Törvényszék (Székesfehérvár High Court) decided to stay the proceedings and refer the following questions to the Court of Justice:

‘(1) Are the basic principles and rules of EU law (in particular Article 4(3) TEU, and the requirement of uniform interpretation), as interpreted by the Court of Justice of the European Union, especially in the judgment in *Köbler*, to be interpreted as meaning that the declaration of the liability of the court of the Member State ruling at final instance in a judgment infringing EU law may be based exclusively on national law or on the criteria laid down by national law? If not, are the basic principles and rules of EU law, particularly the three criteria laid down by the [Court of Justice] in *Köbler* for declaring the liability of the “State” to be interpreted as meaning that whether the conditions for the Member State to incur liability for infringement of EU law by the courts of that State are met is to be assessed on the basis of national law?

(2) Are the basic principles and rules of EU law (in particular Article 4(3) TEU and the requirement of effective judicial protection), particularly the judgments of the [Court of Justice] concerning the liability of the Member State delivered in, inter alia, *Francovich*, *Brasserie du pêcheur* and *Köbler*, to be interpreted as meaning that the force of *res judicata* attaching to judgments that infringe EU law delivered by courts of the Member States ruling at final instance precludes a declaration that the Member State is liable for damages?

(3) In the light of [Directive 89/665], as amended by Directive 2007/66/EC, (7) and of [Directive 92/13], are the review procedure concerning the award of public contracts of a value greater than the Community thresholds and the judicial review of the administrative decision adopted in that procedure relevant for the purposes of EU law? If so, are EU law and the case-law of the [Court of Justice] (inter alia, the judgments in *Kühne & Heitz*, *Kapferer*, and especially *Impresa Pizzarotti*) regarding the necessity of granting review, as an extraordinary appeal, which is derived from national law on judicial review of the administrative decision adopted in the abovementioned review procedure concerning the award of public contracts, relevant for the purposes of EU law?

(4) Are the directives on review procedures concerning the award of public contracts (namely, [Directive 89/665], as amended in the meantime by [Directive 2007/66], and [Directive 92/13]) to be interpreted as meaning that national legislation, under which the national courts before which the dispute in the main proceedings is brought may disregard a fact that has to be examined in accordance with a judgment of the [Court of Justice], delivered in a preliminary ruling procedure in connection with a review procedure concerning the award of public contracts, a fact that is not taken into account either by the national courts ruling in proceedings instituted as a result of the review procedure brought against the decision adopted in the main proceedings, is compatible with those directives?

(5) Are [Directive 89/665], in particular Article 1(1) and (3) thereof, and [Directive 92/13], in particular Articles 1 and 2 thereof (especially in the light of the judgments delivered in *Willy Kempter*, *Pannon GSM* and *VB Pénzügyi Lízing*, and also *Kühne & Heitz*, *Kapferer* and *Impresa Pizzarotti*), to be interpreted as meaning that national legislation, or an application thereof, in accordance with which, although a judgment of the [Court of Justice] delivered in a preliminary ruling procedure before judgment in the proceedings at second instance establishes a relevant interpretation of the rules of EU law, the court hearing the case rejects it on the grounds that it is out of time and subsequently the court hearing the application for review does not consider the review admissible, is compatible with the abovementioned directives and with the requirements of effective judicial protection and with the principles of equivalence and effectiveness?

(6) If, under national law, review must be granted in order to re-establish constitutionality by means of a new decision of the Constitutional Court, should review not be granted, in accordance with the principle of equivalence and the principle laid down in the judgment in *Transportes Urbanos*, if it has not been possible to take into account a judgment of the [Court of Justice] in the main proceedings owing to the provisions of national law concerning procedural time limits?

(7) Are [Directive 89/665], in particular Article 1(1) and (3) thereof, and [Directive 92/13], in particular Articles 1 and 2 thereof, in the light of the judgment of the [Court of Justice] in *Willy*

Kempter, C-2/06, EU:C:2008:78, according to which an individual need not rely specifically upon the case-law of the Court of Justice, to be interpreted as meaning that the review procedures concerning the award of public contracts governed by the abovementioned directives may be initiated only by an action containing an express description of the infringement concerning the award of public contracts invoked and, furthermore, clearly indicates the procurement rule infringed (the specific article and paragraph), that is to say, that in a review procedure concerning the award of public contracts only those infringements that the appellant has indicated by reference to the procurement provision infringed (the specific article and paragraph), whereas in any other administrative and civil procedure it is sufficient for the individual to present the facts and the evidence supporting them, and for the competent authority or court to give a ruling in accordance with their content?

(8) Is the requirement of a sufficiently serious infringement laid down in the judgments in *Köbler* and *Traghetti* to be interpreted as meaning that there is no such infringement if the court ruling at final instance, in clear contravention of the established case-law, cited in the greatest detail, of the [Court of Justice], supported by various legal opinions as well, refuses an individual's request for a question to be referred for a preliminary ruling as to whether review ought to be granted, on the absurd grounds that EU law, in this case, in particular, [Directives 89/665 and 92/13], contains no rules governing review, in spite of the fact that, for that purpose, reference has also been made in the greatest detail to the relevant case-law of the [Court of Justice], including also the judgment in *Impresa Pizzarotti*, which specifically states the need of review in relation to the public procurement procedure? In the light of the judgment of the [Court of Justice] in *CILFIT*, 283/81, EU:C:1982:335, with what degree of detail must the national court that does not grant review justify its decision to depart from the authoritative legal interpretation given by the Court of Justice?

(9) Are the principles of effective judicial protection and of equivalence in Article 19 TEU and Article 4(3) TEU, freedom of establishment and freedom to provide services laid down in Article 49 TFEU, and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, and also [Directives 89/665, 92/13 and 2007/66], to be interpreted as not precluding the competent authorities and courts from dismissing one after another, in manifest disregard of the applicable EU law, the appeals brought by the appellant because it was unable to participate in a public procurement procedure, appeals for which it is necessary to prepare, depending on the circumstances, numerous documents with considerable investment of time and money or to participate at hearings, and, although it is true that, in theory, liability may be declared for damage caused in the exercise of judicial functions, the relevant legislation prevents the appellant claiming from the court compensation for harm suffered as a consequence of the unlawful measures?

(10) Are the principles laid down in the judgments in *Köbler*, *Traghetti* and *Saint Giorgio* to be interpreted as meaning that compensation may not be paid for damage caused by the fact that, in infringement of the established case-law of the Court of Justice, the court of the Member State ruling at final instance has not granted the review requested in good time by the individual, in which he could have claimed compensation for the costs incurred?'

27. Written submissions were lodged by Hochtief Hungary, the Fővárosi Törvényszék (Budapest High Court), the Greek, Hungarian and Polish Governments and the European Commission. With the exception of the Greek and Polish Governments, they all presented oral argument at the hearing held on 21 November 2018.

IV. Assessment

28. This Opinion is structured as follows. I will start with a number of necessary clarifications (A). I will then address in turn the 3 sets of issues that permeate the 10 questions posed by the referring court: *first*, the extent of the duty of national courts to implement preliminary rulings, notably in the context of various procedural provisions the operation of which may hamper the full implementation of those preliminary rulings at various stages of the national judicial proceedings (B); *second*, the (non-)existence, in the circumstances of a case such as the present one, of a right to a retrial as a matter of EU law, when a judgment

given previously by the Court, following a request for a preliminary ruling within the same proceedings, has allegedly not been correctly complied with by the national courts hearing the case on the merits (C); *third*, several elements of Member State liability for alleged failures of the national courts to correctly apply EU law (D).

A. Introductory remarks

1. Admissibility of the questions posed by the referring court

29. According to the defendant, the questions posed by the referring court are inadmissible. The order for reference does not state the reasons why interpretation of EU law is required in the present case. Nor does it mention the link between the relevant EU law provisions and the national legislation at issue.

30. It is established case-law that questions on the interpretation of EU law referred by a national court in a factual and legislative context, which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. Consequently, where the questions submitted concern the interpretation of a rule of EU law, the Court is in principle bound to give a ruling. (8) In so doing, the Court must provide the national court with an answer which will be of use and enable the latter to determine the case at issue. (9)

31. Admittedly, the present case puts those principles to quite a test on a number of accounts. In contrast to the defendant, however, I would suggest that, after reformulation, the questions of the referring court are admissible, with the exception of Questions 7 and 9.

32. First, it is indeed true that the questions posed by the referring court are drafted in a complex and somewhat convoluted style. However, after rephrasing, it would appear that those questions touch upon the following three sets of issues.

33. Questions 4 and 5 essentially relate to the compatibility with EU law of various national limits pertaining to the conduct of various stages of national judicial proceedings. It would appear that the operation of those procedural rules could limit the full implementation of preliminary rulings issued previously in the course of the main proceedings.

34. Questions 3 and 6 enquire, in substance, whether it is compatible with the requirements of equivalence and effectiveness not to consider a preliminary ruling of the Court given previously in the main proceedings that was allegedly not implemented in those proceedings as a possible ground for a retrial.

35. Questions 1, 2, 8 and 10 pertain to various elements of Member State liability for the alleged failure of the national courts, in particular the Fővárosi Törvényszék (Budapest High Court).

36. Second, while regrouping and reformulating the questions, it is also necessary to underline that, restated in this way, the questions pertain exclusively to the interpretation of EU law. The questions as formulated by the referring court contain a number of preconceived factual or circumstantial evaluations and inferences. By answering questions posed in that way, the Court would thus effectively be invited to evaluate a certain reading of the facts or of national law, or even to endorse the suggestions about certain practices at national level. That is, however, not the role of the Court in the preliminary ruling procedure. It is solely for the referring court to assess the facts. (10) Thus, I wish to clearly underline that the answers to be given here pertain only to EU-law elements raised by the referring court by the three sets of issues identified above. They in no way approve or endorse the factual statements and evaluations contained in the questions as originally phrased.

37. Third, another potential admissibility issue concerns the relevance of some of the questions for the main proceedings. It is settled case-law that the Court may refuse to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (11)

38. In the present case, as was confirmed at the hearing, the subject matter before the referring court is, strictly speaking, the damage allegedly caused by the Fővárosi Törvényszék (Budapest High Court), acting as the (last-instance) court adjudicating on the reopening of the case, both by its refusal to reopen the case and by its failure to submit a new request for a preliminary ruling before doing so. It could thus be suggested that the questions that are not directly connected with the liability action pending before the referring court should be held inadmissible, since they do not directly relate to the specific subject matter of the dispute before the referring court.

39. I find such strict logic difficult to embrace. At the structural level, it would be at odds with the rather generous approach of this Court to the relevance of questions asked by national courts. (12) The 'spirit of cooperation' and 'presumption of relevance' would thus effectively be replaced by this Court interpreting for the national court its own scope of case and procedure and, on that interpretation (of national law and facts), deciding which questions that court is allowed to ask.

40. Furthermore, at the level of the case at hand, such an approach would also hardly do justice to the specific context of the present case. The questions posed by the referring court are indeed part of an interconnected and complex judicial story. It is no easy task, solely on the basis of the order for reference, to navigate through and disentangle all the intricacies of the national procedural background in this case, notably with regard to the progression of the proceedings themselves. A fortiori, it may then be even more difficult to state categorically which of those procedural stages is or is not relevant for a potential liability claim.

41. As already alluded to in the introduction to this Opinion, there were actually three 'rounds' (13)of litigation. The first round encompassed a number of decisions on the merits. It consisted in the (administrative) review before the Arbitration Committee, followed by the first- and second-instance judgments and, subsequently, by the appeal on points of law before the Kúria (Supreme Court) and the constitutional complaint. The second round encompassed the request for a retrial, together with the appeal procedure in that respect. The third round includes the action in the main proceedings, namely Member State liability for the alleged failures of the national courts.

42. All three rounds are connected through a common thread: the alleged failure by the national courts, throughout those different rounds, to comply with a preliminary ruling issued by the Court in the course of the first round. Admittedly, there would be no second round, or a fortiori any third round, without the alleged infringement that occurred within the first one. Thus, addressing the — currently pending — third round and, more broadly, the consequences that flow from the alleged failure to implement the preliminary ruling in the first round, necessarily requires looking at the national proceedings in their entirety. It would indeed be difficult to artificially split the proceedings since potential irregularities committed within the first round spill over into the second round and those in the second round into the third. Or, put in reverse order, if there is no duty to conduct a retrial as a matter of EU law, then the purpose of the third round of litigation effectively falls away. Going even further, if there was potentially no failure in the first round, then the other two rounds become futile and the answer relating to the obligations of national courts in that first round pre-empts the need for any further interpretation of EU law.

43. Furthermore, it is also difficult to look at the court of second instance (upon receiving the preliminary ruling) without also having regard to the administrative review by the Arbitration Committee since the main reason for not fully applying the Court's preliminary ruling seems to lie in the procedural rule that limits the scope of the judicial dispute to the claims initially raised before that committee. (14) According to that rule, all claims relating to an alleged incompatibility of the tendering procedure with EU law must have already been raised before the Arbitration Committee. No new claim can subsequently be put forward before the courts examining that latter's decision such as, in the present case, the first- and second-instance courts.

44. In such circumstances, I would find it difficult to categorically state that questions relating to the first or second round of the national litigation are inadmissible because they bear no relation whatsoever to the proceedings pending before the referring court. They clearly do.

45. That being said, it can only be repeated that it is certainly not for this Court to determine whether the national courts correctly applied EU law — and even less national law — in each of the rounds. It is also not for this Court to evaluate whether or not the procedural route chosen by Hochtief Hungary was correct or

whether it should have filed a liability action against the Kúria (Supreme Court) directly, after the first round, as suggested by the Hungarian Government at the hearing.

46. In my view, therefore, on the application of the Court's standard case-law, (15) in line with the reformulation and understanding of the questions outlined above, (16) the questions posed by the referring court are admissible, save for Questions 7 and 9.

47. Question 7 specifically concerns the degree of precision that requests for (administrative) review before the Arbitration Committee must feature. By this question, the referring court seeks to determine whether such requests must contain an express description of the infringement and precisely indicate the specific provision infringed whereas, in any other administrative and civil procedure, it would be sufficient to present the facts and the evidence supporting them.

48. Even with all the allowances made, I fail to see how Question 7 would be of any relevance for settling the present dispute. No party has suggested, including Hochtief Hungary, that the rule at issue was so strict that it would make it impossible or excessively difficult to apply EU law, notably in the form of a previously issued Court judgment, and to ensure effective judicial protection in public procurement matters. There is simply no further information on how that rule would be relevant for the purposes of the present case.

49. Question 9 concerns for its part the issue of whether EU law allows national authorities and courts to consistently dismiss the actions brought by Hochtief Hungary in a context where those actions are costly and time-consuming and where the relevant national legislation allegedly prevents applicants from seeking damages for the harm caused by national courts in the exercise of their judicial function.

50. By that question, the national court is not really posing a question, but rather seeks the endorsement of a number of (rather far-reaching and radical) factual assumptions.

2. A terminological note

51. In the English (as well as some other) versions of the questions as published in the Official Journal, (17) the word 'review' has been used to refer to the different types of remedies discussed in the present case. The problem with the indiscriminate use of such a generic concept is that it lacks precision as to which type of judicial remedy it refers to (and to which round), in particular in distinguishing between the first round of litigation (judicial review on the merits in the proper sense) and the second round (reopening or retrial). The following terminology will therefore be used throughout this Opinion.

52. 'Administrative review' refers to the procedure before the Arbitration Committee, which was apparently the first body that assessed the lawfulness of the economic requirement.

53. 'Judicial review' refers to judicial scrutiny of the administrative decision issued by the Arbitration Committee before the national courts, within the first 'round', when deciding the merits of the case. That obviously includes the first and second instances. It also includes appeals on points of law, as an extraordinary remedy. Despite its specific nature, that latter is indeed still concerned with the (primary) subject matter of the case, namely the legality of the decision taken by the Arbitration Committee.

54. 'Retrial' will be used to refer to the extraordinary remedy that is the core of the second 'round'. It normally consists in reopening and revisiting a case when it subsequently appears that certain elements have not been taken into consideration, despite the existence of a final decision having the force of *res judicata* issued within the first 'round' on the merits. In the context of the present case, retrial refers to the procedure provided for under Section 260 of the Hungarian Code of Civil Procedure.

B. Executing a preliminary ruling of the Court in ongoing national judicial proceedings

55. Questions 4 and 5 essentially relate to the compatibility with EU law of various procedural limits laid down by national law that could prevent the full and correct execution of a preliminary ruling of the Court issued in the case at hand. With some degree of reconstruction, I would understand Question 4 to enquire about the compatibility with EU law of national rules of procedure that allegedly prevent the taking into account of *new facts at a certain level of review*. Thus, if guidance in the form of a judgment of the Court is issued at the request of a national court at the level of appeal where no new facts can normally be ascertained,

by the operation of that national procedural rule, such type of assessment would no longer be possible. Question 5 then focuses more on *new points of law* that could be rejected as being *brought too late*, either before a higher jurisdiction or within the judicial review itself, if the same arguments or legal points had not already been made during the administrative review.

56. In other words, both elements relate, in one way or another, to the distribution of tasks within the judicial (and/or administrative) system and the economy of proceedings. It is natural, in both national as well as EU systems of legal protection, that not any and every fact or legal argument can be brought at whatever stage of proceedings. There are general rules relating to, for example, the permissible scope of review or concentration of pleadings, certainly as a case advances through the judicial system.

57. However, what is rather unusual is to invoke such rules to justify potentially refusing to implement the guidance issued by this Court in a preliminary ruling only by virtue of the fact that such guidance came at a certain level of national judicial review in the main proceedings. In this section, I shall explain why, in general, (18) such reliance on those rules is very much mistaken and cannot be maintained if guidance issued by this Court is to be correctly implemented.

58. In doing so, I shall first recall the scope of the obligation incumbent on national courts to execute a decision issued by this Court on a preliminary ruling and to apply the guidance contained therein (1). I will subsequently turn to the national procedural rule that appears to be the main reason why the Court's preliminary ruling was allegedly not fully applied in the first round (2). Finally, I will examine whether, in circumstances such as those of the present case, such a procedural rule is to be set aside on the grounds that it stands in the way of correct implementation of the Court's judgment (3).

1. The national courts' duties following a preliminary ruling

59. It is settled case-law that a preliminary ruling of the Court is binding on the national court, as regards the interpretation or the validity of the acts of the European Union institutions in question, for the purposes of the decision to be given *in the main proceedings*. (19) Article 267 TFEU requires the referring court to give *full effect* to the interpretation of EU law provided by the Court. (20)

60. Beyond that type of binding effect of a preliminary ruling, which could be classified as *inter partes*, the case-law of the Court only ever explicitly confirmed the *erga omnes* binding force of declarations of invalidity of EU-law provisions. (21)

61. However, the same *inter partes* logic also fully extends to any subsequent judicial stages *within the same* main proceedings. Thus, if the guidance from this Court was requested by, for example, a first-instance court, then a court of appeal or a supreme court being seised later of the same case would also be bound by the guidance issued by the Court in that case. To my mind, that is an extension of the *inter partes* binding effect, because what is being resolved is still the same case with the same facts and legal questions posed. It is not the (by its nature 'looser') *erga omnes* effect in other cases concerning other facts and parties but interpreting the same legal provisions of EU law. (22)

62. That notably means, in practice, that if the interpretative statement contained in a preliminary ruling requires the national court to complete a certain type of assessment, that assessment must then be carried out in order to ensure the correct implementation of that judgment and, thereby, the proper application of EU law. (23) That is a fortiori the case when the Court *explicitly* leaves it, in the operative part of the judgment, to the referring court to verify certain elements in order to establish the compatibility of national law with EU law.

2. National procedural autonomy and effectiveness

63. In its submissions, the Hungarian Government relies extensively on the principle of national procedural autonomy to stress that it is for each Member State to shape procedural rules and remedies. It further maintains that in previous cases, including a decision relating to Hochtief AG, (24) the Court accepted various procedural limitations on judicial review as to the time when an action may be brought and under what conditions.

64. It is indeed established case-law that, in the absence of EU legislation in this area, it is for each Member State, in accordance with the principle of procedural autonomy, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions at law for safeguarding the rights which individuals derive from EU law. However, it is also settled case-law that, in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (the requirement of equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (the requirement of effectiveness). (25)

65. In addition, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent EU rules from having full force and effect are incompatible with those requirements which are the very essence of the European Union. (26) In particular, national rules of procedure cannot affect the powers and obligations conferred on a national court under Article 267 TFEU. (27)

66. Applied to the issue of the structuring of national systems of appeals and remedies, the case-law of the Court very much respects the different national legal traditions and the diversity of the Member States' administrative and judicial systems. Thus, a national judicial system can be more inquisitorial or more adversarial and decide to what extent it applies the *iura novit curia* maxim. Equally, the ambit of judicial review can normally be limited to the pleas that were raised by the parties at the stage of the administrative review.

67. As stated by the Court, EU law does not require national courts to raise of their own motion an issue concerning the breach of provisions of EU law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim. (28) In particular, 'the principle of effectiveness does not ... impose a duty on national courts to raise a plea based on a Community provision of their own motion, irrespective of the importance of that provision to the Community legal order, where the parties are given a genuine opportunity to raise a plea based on Community law before a national court'. (29)

68. Hence, in the context of judicial review in public procurement matters, the Court recently confirmed that Member States are entitled to lay down procedural rules limiting judicial review in time or in scope to guarantee the effectiveness and swiftness of that review as long as, in doing so, they do not render practically impossible or excessively difficult the exercise of the right to bring an action. (30) Thus, according to the Court, EU law does not preclude, in the context of an action for damages, a national procedural rule which restricts the judicial review of arbitral decisions issued by the Arbitration Committee responsible at first instance for the review of decisions taken by contracting authorities in public procurement procedures to examining only the pleas raised before that committee. (31)

69. It follows that a similar procedural limitation should also be in general possible, *mutatis mutandis*, in the context of an action for annulment, such as that filed in the first round of this case: under EU law, the national courts responsible for reviewing decisions of an arbitration committee called upon to examine actions for annulment against decisions adopted by contracting authorities in public procurement procedures may dismiss as inadmissible any new plea in law which was not raised before that committee.

3. Implementing a preliminary ruling

70. Thus, in general and in cases not involving a preliminary ruling of the Court, that is, when a case progresses normally through the national administrative and judicial system, procedural limitations of such kind are, under the conditions outlined in preceding section, indeed possible. That picture, however, changes rather markedly if, within such a procedure, guidance is issued by the Court in the form of a preliminary ruling.

71. Contrary to the suggestions of the Hungarian Government, such a case ceases to be one primarily involving procedural limitations within the sphere of national procedural autonomy, to which the case-law

discussed in the preceding section could mechanically be applied. Instead, it becomes a case involving the implementation of a judgment of the Court.

72. What would such a different context then mean in a case like the present one? What would it mean, in particular, for the issues raised by the referring court, such as national rules preventing the taking into account of *new facts at a certain level of review* (Question 4) and/or the impossibility of pleading *new points of law* at a later stage of review if they have not been brought forward before the administrative authority (Question 5)?

73. I wish to note at the outset that, as far as Question 5 is concerned, in the context of the present situation, the parties appear to have duly raised before the Arbitration Committee the argument as to the unsuitability of the economic requirement, which is the bone of contention. (32)

74. However, even if that was not established as a matter of fact, which is of course for the national court to ascertain, in my view, the principled answer to both of the questions raised by the referring court is relatively straightforward: such national limitation rules can naturally be maintained, *as long as* it is ensured that a national court will implement and fully apply the guidance issued by the Court in the case in which the preliminary ruling was requested.

75. This may happen in a number of ways. If the national court that requested the preliminary ruling from this Court has the necessary competence for that type of review under national law (such as to examine the suitability of the economic requirement), then it must carry out that examination itself and demonstrate in its reasoning that it has done so. Should that court have no jurisdiction to that effect, because it is, for example, an appellate court or the supreme court whose review is limited and/or cannot assess any new evidence, and any such assessment is still relevant for the case at hand, then several options might be open to such a national court. First, it might annul the decision in question and send the case back to the appropriate administrative or judicial authority that has the competence under national law to examine the suitability of the economic requirement in accordance with the preliminary ruling (that is, the first-instance court, if it is competent to assess questions of fact, or the Arbitration Committee). Alternatively, the national court in question must set aside the national procedural rules limiting its jurisdiction and carry out such assessment itself. The choice between those different options remains that of each Member State, provided that a national authority, whether administrative or judicial, ultimately ensures the correct application of the Court's preliminary ruling. (33)

76. However, what certainly cannot be allowed to happen is that, by the mechanical operation of national rules of limitation, the implementation of the judgment of this Court at national level turns into a proverbial catch-22, in which nobody accepts responsibility for ensuring the effective execution of a preliminary ruling of the Court.

4. Interim conclusion

77. It follows that Article 4(3) TEU and Article 267 TFEU require that a national court, implementing a preliminary ruling previously requested from the Court, must fully implement the guidance contained therein. If executing the Court's guidance requires a certain type or scope of appraisal to be carried out, which is not normally carried out by the referring court in question, that court is obliged either to set aside the national procedural rules limiting its competence in that regard or to annul and remit the case to the appropriate judicial, or even administrative, level where such an assessment can be carried out in full.

C. The (duty of) retrial

78. Moving on to the issues relating to the second round of national litigation, Questions 3 and 6 enquire whether it is compatible with the principle of effective judicial protection not to consider as a possible ground for a retrial an allegation that a judgment of the Court given in the first round (on a request for a preliminary ruling from the appellate court) was not duly taken into account in that round. In particular, Question 3 is to be understood as enquiring as to the existence of a possible duty, deriving from EU law, of Member States to allow for a retrial, as an extraordinary remedy provided for by national law, in a case such as the one in the main proceedings. By Question 6, the referring court seeks to know whether the requirement of equivalence calls for a retrial to be allowed when a preliminary ruling of the Court has allegedly not been taken into

account correctly in the main proceedings on the merits, but when, at the same time, national law apparently allows for a retrial in the similar case of a (new) judgment of the Constitutional Court.

79. Thus, the question posed to the Court is in fact whether EU law, in particular the principle of effective judicial protection, requires the 'reopening' of a final judicial decision in order to take into account a previous judgment of the Court that was (allegedly) not fully taken into consideration in the litigation on the merits.

80. In my view, the answer to that question is no.

1. The scope of the duty to reopen final judicial decisions

81. As outlined in the previous section of this Opinion, national courts have an obligation to implement the answer given to a request for a preliminary ruling that they themselves submit to the Court (the binding force *inter partes*). Furthermore, they must equally respect the case-law of the Court on the matter of interpretation or validity of EU law of which they are seised in the case at hand (the binding effects *erga omnes*). The common denominator in both of these cases is that the decisions of the Court that are to be taken into account *exist* at the moment when the national court takes a decision.

82. By contrast, there is, in principle, no obligation under EU law to *reopen* final national judicial decisions that were given *prior* to a decision of the Court on a preliminary ruling, even if reopening the case would make it possible to remedy a domestic situation which is incompatible with EU law.

83. Indeed, it is settled case-law that the principle of legal certainty and its emanation, the principle of *res judicata*, (34) are paramount both in the legal order of the European Union and in national legal systems. (35) In view of those principles, the Court has ruled that EU law does not require a judicial body automatically to go back on a judgment having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court after delivery of that judgment. (36) There is thus, in general, no duty to reopen final judicial decisions incompatible with a *subsequent* judgment of the Court.

84. It is true that the Court has recognised two exceptions to the principle that final decisions need not be reopened in order to comply with EU law.

85. The first exceptional situation, which follows from *Kühne & Heitz*, is the obligation, imposed on *administrative* bodies, to review final administrative decisions in order to take account of an interpretation subsequently given by the Court, where certain conditions are met. (37) However, that exception only entails an obligation to reopen final *administrative* decisions, but not judicial decisions. (38)

86. The second exceptional situation was set out by the Court in *Lucchini*, where it held that EU law precluded the application of a provision of national law which sought to lay down the principle of *res judicata* in so far as the application of that provision prevented the recovery of State aid granted in breach of EU law. (39) The underlying rationale of that exception was that, since the national decision had been adopted in breach of the division of powers between the Member States and the European Union, it could not even acquire the force of *res judicata*. The Court subsequently stressed the exceptional character of *Lucchini*, noting that it had been decided in a highly specific situation having to do with the aforementioned division of powers. (40)

87. Neither of these exceptions appears to be immediately relevant to the present case. Thus, as a starting point, the present case defaults back to the general rule: there is no general obligation to reopen final judicial decisions in order to render them compatible with a subsequent decision of the Court. (41)

88. However, while EU law does not impose an obligation on Member States to create new remedies, (42) if national law does provide for such a possibility, then that legislation must comply not only with the requirement of equivalence, but also with the requirement of effectiveness. (43) It is thus necessary to turn to the remedy of a retrial under national law.

2. Retrial under national law

89. Under Hungarian law, retrial appears to be governed by Section 260(1)(a) and (2) of the Civil Procedural Code. According to the Hungarian Government, the rules on retrial are not applicable in cases

such as the present one since that remedy only aims at taking into account new *factual* elements, as opposed to new *legal* elements. By contrast, Hochtief Hungary claims that a retrial may serve to implement a preliminary ruling that was issued by the Court during the main proceedings, but was not taken into account for procedural reasons. For its part, the Commission leaves it to the referring court to determine whether Section 260(1) of the Civil Procedural Code authorises a retrial where national courts have not properly taken into account a preliminary ruling of the Court.

90. I largely share the Commission's stance. It is for the referring court, as the sole authoritative interpreter of national law, to determine whether, under those rules, a retrial could be possible in a case where a preliminary ruling that already existed when the final decision on the merits was issued was allegedly not properly taken into account.

91. I would just venture two remarks. In my understanding of what the (extraordinary) remedy of a retrial generally entails, it tends to be limited to cases where, after the national decision becomes final, it emerges that certain facts were not or could not have been taken into account by the national court when it gave that decision.

92. It would be somewhat surprising to apply that logic to an interpretative judgment of the Court that existed and was known at the moment when the previous decision on the merits was given. First, such a decision is hardly a new *fact*. Second, that decision undoubtedly existed and was known at the moment of the original decision on the merits, thus could hardly be classified as something *new* that came to light only later on.

93. Thus, prima facie and on a general understanding of what a retrial tends to entail, it is difficult to see how that extraordinary remedy should be used to remedy alleged shortcomings in the proper application of interpretative *legal* guidance that clearly existed and *was known* when the original national decision was issued.

3. Equivalence to constitutional complaints?

94. However, an additional argument has to be addressed in this context: suggested *equivalence* with regard to constitutional complaints. According to Hochtief Hungary, a retrial should have been authorised in the circumstances of the present case, on the grounds that a preliminary ruling of the Court was not taken into account, because national law provides for a retrial where the Alkotmánybíróság (Constitutional Court) subsequently declares unconstitutional a norm that was applied by an ordinary court in its final judicial decision. It is in this context that the national court refers, in Question 6, to the judgment of the Court in *Transportes Urbanos y Servicios Generales*.

95. *Transportes Urbanos y Servicios Generales* admittedly bears some similarities to the present case. In that decision, the Court held that EU law, and in particular the principle of equivalence, precluded the application of a rule according to which actions for damages against the State, alleging a breach of EU law established by a judgment of the Court, were subject to a condition requiring prior exhaustion of remedies against a harmful administrative measure, when those actions were not subject to such a condition where they alleged a breach of the Constitution established by the Constitutional Court. (44) However, it should be noted that the Court reached that conclusion after having observed that the *only* difference between those two actions was the fact that the breaches of law on which they were based were established, respectively, by the Court and by the Constitutional Court. The Court concluded that that fact alone, *in the absence of any other difference* between both actions, could not suffice to establish a distinction between them in the light of the principle of equivalence. (45)

96. Recently, in *XC and Others*, the Court insisted on the importance of a clear similarity between the actions at issue, in terms of *their purpose, cause of action and essential characteristics*, in order for the principle of equivalence to be triggered. (46) The Court then examined, in the light of those elements, whether an action permitting the retrial of criminal proceedings, closed by a decision that acquired the force of *res judicata*, on the basis of a subsequent finding of an infringement of the European Convention for the Protection of Human Rights and Fundamental Freedoms or one of the protocols thereto, on the one hand, and an action for protecting rights which individuals derive from EU law, on the other hand, could be regarded as similar actions.

97. The Court concluded that the differences between those actions were such they could not be regarded as similar. It noted in particular that the former action was essentially created in order to permit the reopening of decisions having the force of *res judicata*. By contrast, the constitutional framework of the European Union guarantees everyone the opportunity to obtain the effective protection of rights conferred by the EU legal order before a national decision with the force of *res judicata* even comes into existence. (47)

98. Similarly to *XC and Others*, the national provision invoked in the present case allowing for the reopening of a final national judgment as a result of a new decision of the Constitutional Court, is a consequence of the mechanism of constitutional review, as stated in Section 361(a) of the Civil Procedural Code. Indeed, that provision, which sets out an exceptional remedy permitting a decision of the Constitutional Court to be taken into account, can only be used in respect of the specific judgment that, once becoming final, gave rise to the constitutional complaint. Put differently, in cases in which such (abstract) constitutional review is possible only following a final judicial decision, the only way of reflecting that constitutional review and potentially removing the unconstitutionality in the individual case is by reopening it.

99. The mechanism and logic of that requirement to reopen a judgment is very different from the preliminary ruling mechanism, which by definition operates while the national procedure is still pending and before any final national decision can be taken. Thus, there is no need to reopen a final decision in order for the guidance of the Court to be taken into account.

100. For these reasons, as I recently argued in further detail in *Călin*, the execution and *inter partes* binding effects of a preliminary ruling of this Court on the one hand, and of a judgment of a national constitutional court on a constitutional review on the other (or, for that matter, of a decision of the European Court of Human Rights in the case at national level giving rise to a complaint) are structurally different remedies. (48) Their purpose, cause of action and essential characteristics are simply different.

101. It may be added that the situation could be different if national law were to allow for a *preliminary* review of constitutionality upon a reference by a national court to the Alkotmánybíróság (Constitutional Court). In this respect, if I understand the argument correctly, the Hungarian Government appeared to suggest at the hearing that a retrial was also authorised if the decision of the Alkotmánybíróság (Constitutional Court) was not delivered *subsequent* to the final judicial decision in the main proceedings but *before* it, within those proceedings on the merits. (49)

102. I must confess to being somewhat lost on that point. If that were the case, and indeed a number of national constitutional systems (also) recognise a preliminary review of constitutionality, typically triggered by a reference from a national (ordinary) judge, I have difficulty seeing how the rules on retrial would be relevant in such cases. One would rather assume that, following such a preliminary reference on constitutionality, the ordinary judge awaits the decision of the constitutional court and then, once that decision is given, determines the original dispute while implementing the judgment of the national constitutional court. If that is the case, then such a preliminary review of constitutionality could indeed be functionally equivalent to a request for a preliminary ruling to this Court. However, there would then be little need for any specific rules on retrial for that kind of procedure.

103. Be that as it may, if the referring court were to find that (i) the national rules on retrial do also include decisions of the Alkotmánybíróság (Constitutional Court) given during the main proceedings, that is, before the final decision on the merits is taken by an ordinary court, and that (ii) on the application of the criteria concerning the requirement of equivalence outlined in this section, such a type of review is indeed equivalent to implementing a prior decision of the Court given on a request for a preliminary ruling, then the requirement of equivalence would require that a retrial is also authorised in the latter type of situation.

4. A direct or indirect application of Kühne & Heitz?

104. A last point to be addressed in connection with retrial concerns *Kühne & Heitz*. (50)That decision has indeed been abundantly quoted by the referring court, as well as by the parties in the written and oral procedure before the Court.

105. That case established an obligation, under EU law, to re-examine final administrative decisions if (i) under national law, the administrative body has the power to reopen that decision; (ii) the administrative

decision in question has become final as a result of a judgment of a national court ruling at final instance; (iii) that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of EU law which was adopted without a question being referred to the Court for a preliminary ruling; and (iv) the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court. (51)

106. While Hochtief Hungary maintained that this line of case-law should also apply to final judicial decisions *by analogy*, the Commission suggested at the hearing that a *direct* application of that logic could perhaps be contemplated with regard to the (administrative) decision of the Arbitration Committee. I will examine both scenarios in this subsection.

107. First, as regards a potential application by analogy (or extension) of *Kühne & Heitz* to the present case, the conditions set out by the Court in that judgment clearly aim at a different and rather specific scenario, namely the reopening of a final *administrative*, not judicial, decision, following a *subsequent* preliminary ruling of the Court.

108. Even if it were assumed that the same logic could apply to final *judicial* decisions, (52) at least the first and third conditions laid down by the Court in that judgment would still not be fulfilled: under national law, retrial is certainly an available remedy, yet it is apparently not designed to cover the type of situation at issue in the present case; furthermore, the decision given by the Court was not subsequent to the final judicial decision, but was issued *prior* to it.

109. Moreover, although not expressly stated as one of the conditions, the obligation to reopen national administrative decisions set out in *Kühne & Heitz* has always had the flavour of an indirect sanction for the failure of the national court having reviewed that decision to comply with the duty to make a request for a preliminary ruling. By contrast, in the present case the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) did make such a request.

110. Finally and on a subsidiary note, if *Kühne & Heitz* is read in the light of the more recent approach of the Court as regards the reopening of judicial decisions in *XC and Others*, then the former case indeed ought to remain the exception applicable to administrative authorities only. Indeed, the direction taken in *XC and Others* confirms that in the interplay between, on the one hand, the effective enforcement of EU law and, on the other hand, respect for the principles of legal certainty and finality of (judicial) decisions, the balance clearly tilts in favour of the latter.

111. I thus consider that any further extension of *Kühne & Heitz* (or its application by analogy to final *judicial* decisions) is not called for.

112. Second, as regards the Commission's suggestion of a *direct* application of *Kühne & Heitz* in the context of the present case by reopening the final *administrative* decision, namely that of the Arbitration Committee, (53) I am not convinced either. Apart from the fact that it is not at all at issue, and in view of the lack of information regarding potential national law rules providing for the reopening of administrative decisions, it appears that the facts of the present case differ substantially from the facts of *Kühne & Heitz*.

113. In *Kühne & Heitz*, the issue of the existence of an eventual duty to take a judgment of the Court into consideration was raised at a moment when both the administrative procedure and the subsequent judicial procedure were closed. All the decisions made in the course of those procedures were therefore final. By contrast, in the present case, the preliminary ruling of the Court came at a moment when only the administrative procedure was closed and hence the administrative decision was final. The judicial procedure, however, was still pending. For that reason, but also having regard to the factual circumstances of that case, as confirmed by the very detailed conditions set out by the Court in *Kühne & Heitz* in order to justify the duty to reopen the administrative decision, it appears that those conditions are not fulfilled.

5. Interim conclusion

114. In view of these considerations, I conclude that the principle of effective judicial protection does not require authorising a retrial, as an extraordinary remedy, in the circumstances of the present case, in order to implement a preliminary ruling of the Court issued in the main proceedings that was allegedly not fully taken into account within those proceedings on the merits. However, should a national system provide for a remedy

allowing for the possibility or even the duty to reopen final decisions given in similar cases at national level, the requirement of equivalence would require that such a possibility also be open for infringements relating to preliminary rulings of the Court previously issued in the same case.

D. Member State liability

115. Finally, by Questions 1, 2, 8, and 10, the referring court seeks guidance on a number of issues pertaining to the third round of the national litigation, concerning potential Member State liability.

116. Under Question 1, the referring court enquires into the general aspects of Member State liability on the grounds of national courts' judgments: is Member State liability to be determined on the basis of EU law only or also on the basis of national law, in particular as regards the assessment of the conditions to incur liability? Under Question 2, the referring court seeks to determine whether, in the case of a national court's judgment being incompatible with EU law, Member State liability can be incurred despite the *res judicata* attached to that judgment.

117. The answers to these two questions can be inferred from the case-law with relative ease.

118. It is settled case-law that individuals relying on EU law must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance. (54)

119. As to the conditions to be satisfied, the Court has held that they are threefold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties. (55)

120. Those three conditions are necessary and sufficient to establish, as a matter of EU law, a right in favour of individuals to obtain redress. However, Member States may provide *for less strict conditions* for State liability to be triggered. Subject to the existence of a right to obtain reparation which is founded directly on EU law where the conditions mentioned above are met, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused, with the proviso that the conditions for reparation of loss and damage laid down by the national legislation must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation. (56)

121. In addition, it is equally clear from the case-law that the principle of *res judicata* does not preclude recognition of the principle of State liability for a decision of a court adjudicating at last instance. (57)

122. Thus, in answer to Question 1, Member State liability can only be determined on the basis of the conditions set out by EU law, although national law may lay down less strict conditions. As regards Question 2, the principle of *res judicata* does not preclude recognition of the principle of State liability for a decision of a court adjudicating at last instance.

123. By Question 10, the referring court enquires whether, under the principles of State liability in EU law, damages (in the form of reimbursement of the legal costs incurred) can be claimed for the harm caused by the fact that the court of last instance has refused to reopen the case. In other words, is there any limitation as to the *type of* damages that may be claimed for the alleged breach of EU law by a last-instance court?

124. The uncertainty as to the exact source of the limitations alluded to in Question 10 was dispelled at the hearing, where both Hochtief Hungary and the Hungarian Government confirmed that those limitations resulted from the national case-law.

125. Having clarified the source of the limitations as to the type of damages recoverable, it appears rather clear to me that such limitations would be incompatible with EU law. It is indeed impossible to limit the damages that can be sought. According to the Court, the rules on the assessment of damage caused by a breach of EU law are determined by the national law of each Member State, it being understood that the national regulations fixing those rules must respect the requirements of equivalence and effectiveness. (58)

Thus, so long as the three conditions for Member State liability, as laid down under EU law, are met, then *any and all damages* must be recoverable, including legal costs.

126. That being said, while the type of damages claimed cannot be used to establish a 'block exclusion' of a certain type of damage per se, the exact type of damage sought by an applicant will of course be relevant on a different level, namely, for ascertaining a direct causal link between that damage and the 'sufficiently serious infringement' of EU law reproached.

127. By Question 8, the referring court seeks to know whether, in the circumstances of the present case, the refusal by a court of last instance (the defendant) to request a preliminary ruling, upon a party's request, as to whether a retrial should have been granted is constitutive of a 'sufficiently serious infringement of EU law' that can trigger Member State liability. In the second part of the question, the referring court further asks to what extent a national court must state reasons for its decision not to refer in the light of the judgment in *CILFIT*. (59)

128. The answer to that question is somewhat more complex.

129. It must be recalled at the outset that it is not the role of the Court to decide on the potential liability of a Member State in a specific case. However, the Court can give guidance regarding the application of the liability criteria, notably that of a 'sufficiently serious infringement' of EU law.

130. Furthermore, it may also be useful to recall that whether or not a reference to this Court is made is the exclusive privilege and responsibility of a national judge. The parties to the main proceedings may of course make a suggestion in this regard, but they have no right to request a preliminary ruling from the Court. (60)

131. With those preliminary clarifications made, and again regardless of a number of factual statements that the referring court embedded in its question, which are not for this Court to comment upon, the question of the referring court mentions two further variables: the '*Köbler* standard' of 'sufficiently serious infringement' and the '*CILFIT* standard' for the courts of last instance to be allowed to dispense with making a request for a preliminary ruling under the third paragraph of Article 267 TFEU.

132. The '*Köbler* standard' adapts the condition of 'sufficiently serious breach' to potential judicial misapplication of EU law. According to the Court, in order to determine whether there is a sufficiently serious breach of EU law, it is necessary to take account of all the factors which characterise the situation brought before the national court. Among the factors which can be taken into consideration in that regard are, in particular, the degree of clarity and precision of the rule infringed, the scope of the room for assessment that the infringed rule allows for national authorities, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by an EU institution may have contributed to the adoption or maintenance of national measures or practices contrary to EU law, and non-compliance by the court in question with its obligation to make a request for a preliminary ruling under the third paragraph of Article 267 TFEU. In any event, an infringement of EU law is deemed sufficiently serious where it was made in manifest breach of the case-law of the Court in the matter. (61)

133. The '*CILFIT* standard' focuses specifically on courts of last instance and their potential disregard for the duty to refer. According to the Court, under the third paragraph of Article 267 TFEU, a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court, unless it has established that the question raised is irrelevant or that the EU provision in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union. (62) Accordingly, every provision of EU law, including the case-law of the Court in the relevant area, must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied. (63)

134. Much could be written about the need for (i) re-interpreting *CILFIT* in order to make it relevant again (if, in fact, it ever was (64)); (ii) being clear about the exact relationship between the *Köbler* conditions and

the *CILFIT* conditions, and ideally integrating them into one coherent whole; (65) (iii) while also integrating and taking into account the standard to be applied to potential failures of last-instance courts if pursued via infringement proceedings under Article 258 TFEU. (66)

135. This is, however, hardly the right case for such endeavours. For the purposes of the referring court in the present case, it suffices to recall that the standard by which any such potential matter *of state liability* is to be assessed is that of the *Köbler* criteria, outlined above in point 132 of this Opinion. For that purpose, it is not the *CILFIT* standard, but simply 'manifest breach of the case-law of the Court in the matter' (67) that will amount to a sufficiently serious infringement of EU law. Whether or not the failure of the national court in question was indeed so manifest as to amount to blatant disregard for the case-law of the Court, by either omitting to engage with EU law at all or interpreting it in an obviously untenable way, will again be for the referring court to ascertain.

V. Conclusion

136. In the light of the aforementioned considerations, I propose that the Court answer the questions posed by the Székesfehérvári Törvényszék (Székesfehérvár High Court, Hungary) as follows:

– Article 4(3) TEU and Article 267 TFEU require that a national court, when implementing a preliminary ruling previously requested from the Court, must fully implement the guidance contained therein. If executing the Court's guidance in a preliminary ruling requires a certain type or scope of appraisal to be carried out, which is not normally carried out at the level of the referring court in question, that court is obliged either to set aside the national procedural rules limiting its competence in that regard or to annul and remit the case to the appropriate judicial, or even administrative, level to conduct that appraisal;

– The principle of effective judicial protection does not require authorising a retrial, as an extraordinary remedy, in order to implement a preliminary ruling of the Court that was allegedly not fully taken into account in the previous proceedings on the merits in the course of which the preliminary ruling was issued. However, should national law provide for a remedy allowing for the possibility or the duty to reopen final decisions given in similar cases at national level, the requirement of equivalence would require that such a possibility or duty also be extended to decisions of the Court previously issued in the same case;

– The EU rules and principles on Member State liability must be interpreted as meaning that:

  – a declaration of liability on account of a breach of EU law by a (last-instance) national court is to be based on the criteria laid down by EU law;

  – the principle of *res judicata* attached to a decision of a court adjudicating at last instance that infringed EU law does not preclude recognition of State liability for that infringement;

  – national law cannot exclude the possibility of certain types of damages being claimed, if it were established that such damages are the direct consequence of a sufficiently serious infringement of EU law;

  – an infringement of EU law by a court of last instance refusing to make a reference contrary to the third paragraph of Article 267 TFEU will be sufficiently serious where it was made in manifest breach of the case-law of the Court in the matter before that court.

---

1 Original language: English.

---

2 Judgment of 18 October 2012, Édukövízig and Hochtief Construction (C-218/11, EU:C:2012:643).

---

3 Council Directive of 21 December 1989 (OJ 1989 L 395, p. 33) ('Directive 89/665').

4 Council Directive of 25 February 1992 (OJ 1992 L 76, p. 14) (‘Directive 92/13’).

5 S Series, No 139-149325.

6 Judgment of 18 October 2012, Édukövízig and Hochtief Construction (C-218/11, EU:C:2012:643, paragraph 32).

7 Directive of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665 and 92/13.

8 See, for example, judgments of 31 January 2017, Lounani (C-573/14, EU:C:2017:71, paragraph 56); of 8 March 2018, Saey Home & Garden (C-64/17, EU:C:2018:173, paragraph 18); and of 13 June 2018, Deutscher Naturschutzring (C-683/16, EU:C:2018:433, paragraph 29).

9 See, for example, judgments of 11 September 2014, *B.* (C-394/13, EU:C:2014:2199, paragraph 21 and the case-law cited), and of 26 April 2017, Farkas (C-564/15, EU:C:2017:302, paragraph 38).

10 See, for example, judgments of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 43); of 26 May 2011, *Stichting Natuur en Milieu and Others* (C-165/09 to C-167/09, EU:C:2011:348, paragraph 47); and of 26 April 2017, Farkas (C-564/15, EU:C:2017:302, paragraph 37).

11 See, for example, judgments of 31 January 2017, Lounani (C-573/14, EU:C:2017:71, paragraph 56); of 8 March 2018, Saey Home & Garden (C-64/17, EU:C:2018:173, paragraph 18); and of 13 June 2018, Deutscher Naturschutzring (C-683/16, EU:C:2018:433, paragraph 29).

12 Cited above in footnotes 8 and 9.

13 I wish to stress that the term ‘round’ is just my shorthand for the three distinct phases of litigation in the context of the present case.

14 It is to be noted that that stage might also be relevant for another reason in the present context since the Commission suggested at the hearing that there could perhaps be a duty, on the basis of the *Kühne & Heitz* line of case-law, to reopen the *administrative* review before the Arbitration Committee (see below, Section C of this Opinion).

15 Outlined above, points 30 and 37 of this Opinion.

16 Above, points 31 to 36.

17 OJ 2018 C 22, p. 26.

18 Again, as already outlined in general above, in point 36, assessing the general compatibility of the rules, while not endorsing or confirming that any such failure has actually happened in the individual case. Any such assessment is for the referring court to make.

19 See, for example, judgments of 5 October 2010, Elchinov (C-173/09, EU:C:2010:581, paragraph 29), and of 16 June 2015, Gauweiler and Others (C-62/14, EU:C:2015:400, paragraph 16).

20 See, for example, judgment of 5 July 2016, Ognyanov (C-614/14, EU:C:2016:514, paragraph 28).

21 See, for example, regarding the effects of a preliminary ruling declaring the act of an institution to be void, judgments of 13 May 1981, International Chemical Corporation (66/80, EU:C:1981:102, paragraphs 12 to 13), and of 27 February 1985, Société des produits de maïs (112/83, EU:C:1985:86, paragraph 16).

22 See, for example, judgments of 27 March 1963, Da Costa and Others (28/62 to 30/62, EU:C:1963:6), and of 4 November 1997, Parfums Christian Dior (C-337/95, EU:C:1997:517, paragraph 29).

23 That of course does not preclude the referring court, or any other national court deciding in the same proceedings, from requesting another decision from the Court, should they be of the opinion that such a request is for whatever reason necessary — see, for example, judgments of 24 June 1969, Milch-, Fett- und Eierkontor (29/68, EU:C:1969:27, paragraph 3), and of 11 June 1987, X (14/86, EU:C:1987:275, paragraph 12). As stated in Article 104(2) of the Rules of Procedure of the Court of Justice: ‘It shall be for the national courts or tribunals to assess whether they consider that sufficient guidance is given by a preliminary ruling, or whether it appears to them that a further reference to the Court is required.’ Put more bluntly, following a decision of the Court, the options left to the referring court are either to apply the guidance or to refer again in the case of disagreement. Ignoring the guidance issued is not an option.

24 Judgment of 7 August 2018, Hochtief (C-300/17, EU:C:2018:635).

25 See, for example, judgments of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 54); of 6 October 2015, Târșia (C-69/14, EU:C:2015:662, paragraphs 26 to 27); and of 24 October 2018, XC and Others (C-234/17, EU:C:2018:853, paragraphs 21 to 22).

26 See, for example, judgments of 9 March 1978, Simmenthal (106/77, EU:C:1978:49, paragraph 22); of 22 June 2010, Melki and Abdeli (C-188/10 and C-189/10, EU:C:2010:363, paragraph 44); and of 4 December 2018, The Minister for Justice and Equality and Commissioner of the Garda Síochána (C-378/17, EU:C:2018:979, paragraph 36).

27 See, for example, judgments of 5 October 2010, Elchinov (C-173/09, EU:C:2010:581, paragraph 25); of 15 January 2013, Križan and Others (C-416/10, EU:C:2013:8, paragraph 67); and of 18 July 2013, Consiglio Nazionale dei Geologi and Autorità Garante della Concorrenza e del mercato (C-136/12, EU:C:2013:489, paragraph 32).

28 See, for example, judgments of 14 December 1995, van Schijndel and van Veen(C-430/93 and C-431/93, EU:C:1995:441, paragraph 22); of 7 June 2007, van der Weerd and Others (C-222/05 to C-225/05, EU:C:2007:318, paragraph 36); and of 26 April 2017, Farkas (C-564/15, EU:C:2017:302, paragraph 32).

29 Judgment of 7 June 2007, van der Weerd and Others (C-222/05 to C-225/05, EU:C:2007:318, paragraph 41).

30 See judgment of 7 August 2018, Hochtief (C-300/17, EU:C:2018:635, paragraphs 50 to 54 and the case-law cited).

31 See judgment of 7 August 2018, Hochtief (C-300/17, EU:C:2018:635, paragraph 58).

32 Point 11 of this Opinion.

33 That is, clearly not allowing for a ‘negative competence conflict’, in which no body or court will eventually accept responsibility — see, in a similar vein, my Opinion in Link Logistik N&N (C-384/17, EU:C:2018:494, points 111 to 112).

34 Judgment of 1 June 1999, Eco Swiss (C-126/97, EU:C:1999:269, paragraph 46).

35 For a recent example, see judgment of 24 October 2018, XC and Others (C-234/17, EU:C:2018:853, paragraph 52). See also judgment of 30 September 2003, Köbler (C-224/01, EU:C:2003:513, paragraph 38); of 16 March 2006, Kapferer (C-234/04, EU:C:2006:178, paragraph 20); of 10 July 2014, Impresa Pizzarotti (C-213/13, EU:C:2014:2067, paragraph 58); or of 6 October 2015, Târșia (C-69/14, EU:C:2015:662, paragraph 28).

36 See, for example, judgments of 10 July 2014, Impresa Pizzarotti (C-213/13, EU:C:2014:2067, paragraph 60), and of 6 October 2015, Târșia (C-69/14, EU:C:2015:662, paragraph 38).

37 See judgment of 13 January 2004 (C-453/00, EU:C:2004:17, paragraph 28).

38 See judgment of 16 March 2006, Kapferer (C-234/04, EU:C:2006:178, paragraph 23).

39 Judgment of 18 July 2007 (C-119/05, EU:C:2007:434, paragraph 63).

40 Judgment of 10 July 2014, Impresa Pizzarotti (C-213/13, EU:C:2014:2067, paragraph 61).

41 That, to my knowledge, is indeed a general principle of law common to the Member States, since in the national legal systems that I am aware of, a subsequent change in (clarification of or departure from) the case-law of a higher/supreme court is not normally considered to be a sufficient ground for reopening previous final decisions in which the previous legal opinion was applied.

42 Judgment of 24 October 2018, XC and Others (C-234/17, EU:C:2018:853, paragraph 51).

43 See for example, judgments of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 62), and of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraph 30).

44 Judgment of 26 January 2010 (C-118/08, EU:C:2010:39, paragraphs 46 and 48).

45 Judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraphs 43 and 44).

46 Judgment of 24 October 2018, XC and Others (C-234/17, EU:C:2018:853, paragraph 27).

47 Judgment of 24 October 2018, XC and Others (C-234/17, EU:C:2018:853, paragraphs 33, 46 and 47).

48 See my Opinion in *Călin* (C-676/17, EU:C:2019:94, points 66 to 79).

49 It shall be noted in this respect that Section 260(1)(a) of the Civil Procedural Code indeed does not only refer to new facts but also to 'any final court or administrative decision' as conditions to submit a request for a retrial. What exactly that turn of the phrase involves is again a matter for the national court.

50 Judgment of 13 January 2004 (C-453/00, EU:C:2004:17).

51 See judgment of 13 January 2004, Kühne & Heitz (C-453/00, EU:C:2004:17, paragraph 28).

52 Which would already be quite a leap: as outlined above (points 82 to 87 of this Opinion), in contrast to the potential administrative (mis)application of EU law, the approach of the Court has always been much more cautious as regards the balance between legal certainty (and *res judicata*) and the requirement of effective enforcement of EU law applied to judicial decisions, leaning much more towards the former.

53 It is to be noted that the Arbitration Committee carries out the administrative review and has thus quasi-judicial functions. It is therefore uncertain whether it can be characterised as an *administrative* body within the meaning of *Kühne & Heitz*. But if the administrative body were to be the contracting authority that actually ran the tendering procedure, the same logic could be said to apply, just one level lower.

54 See, for example, judgments of 30 September 2003, Köbler (C-224/01, EU:C:2003:513, paragraph 36); of 13 June 2006, Traghetti del Mediterraneo (C-173/03, EU:C:2006:391, paragraph 31); and of 28 July 2016, Tomášová (C-168/15, EU:C:2016:602, paragraph 20).

55 See, for example, judgments of 30 September 2003, Köbler (C-224/01, EU:C:2003:513, paragraph 51); of 13 June 2006, Traghetti del Mediterraneo (C-173/03, EU:C:2006:391, paragraphs 42 and 45); and of 28 July 2016, Tomášová (C-168/15, EU:C:2016:602, paragraphs 22 to 23).

56 See, for example, judgments of 30 September 2003, Köbler (C-224/01, EU:C:2003:513, paragraphs 57 to 58); of 13 June 2006, Traghetti del Mediterraneo (C-173/03, EU:C:2006:391, paragraphs 44 to 45); and of 28 July 2016, Tomášová (C-168/15, EU:C:2016:60, paragraph 38).

57 See, for example, judgments of 30 September 2003, Köbler (C-224/01, EU:C:2003:513, paragraph 40); of 28 February 2018, ZPT (C-518/16, EU:C:2018:126, paragraph 22); and of 24 October 2018, XC and Others (C-234/17, EU:C:2018:853, paragraph 58).

58 See, for example, judgment of 28 July 2016, Tomášová (C-168/15, EU:C:2016:602, paragraphs 38 to 39).

59 Judgment of 6 October 1982, Cilfit and Others (283/81, EU:C:1982:335).

60 See, for example, judgment of 22 June 2010, Melki and Abdeli (C-188/10 and C-189/10, EU:C:2010:363, paragraph 63), and order of 16 July 2015, Striani and OthersStriani and OthersStriani and

Others (C-299/15, not published, EU:C:2015:519, paragraph 33).

---

61 See, for example, judgments of 30 September 2003, Köbler (C-224/01, EU:C:2003:513, paragraph 54 to 56), and of 28 July 2016, Tomášová (C-168/15, EU:C:2016:602, paragraphs 25 to 26).

---

62 See judgments of 6 October 1982, Cilfit and Others (283/81, EU:C:1982:335, paragraph 21); of 18 October 2011, Boxus and Others (C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667, paragraph 31); and of 28 July 2016, Association France Nature Environnement (C-379/15, EU:C:2016:603, paragraph 50).

---

63 See, for example, judgment of 28 July 2016, Association France Nature Environnement (C-379/15, EU:C:2016:603, paragraph 49).

---

64 I cannot but refer back to the wise words of Advocate General Jacobs uttered already in 1997 in *Wiener SI* (C-338/95, EU:C:1997:352) in this regard. See also Opinion of Advocate General Ruiz-Jarabo Colomer in Gaston Schul Douane-expediteur (C-461/03, EU:C:2005:415, point 44 et seq.).

---

65 In particular also in view of the more recent case-law that appears to be embracing a more ‘liberal’ approach to the duty to refer — see notably judgment of 9 September 2015, Ferreira da Silva e Brito and Others (C-160/14, EU:C:2015:565, paragraphs 41 to 42).

---

66 Recently see judgment of 4 October 2018, Commission v France (Advance payment) (C-416/17, EU:C:2018:811, paragraphs 111 to 113).

---

67 Judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 56); of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 214); of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 52); and of 28 July 2016, Tomášová (C-168/15, EU:C:2016:602, paragraph 26).

EU:C:2019:756

JUDGMENT OF THE COURT (Fifth Chamber)

18 September 2019 (*)

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Directive 2004/18/EC – Coordination of procedures for the award of public works contracts, public supply contracts and public service contracts – Public works concession contracts – Extension of the duration of an existing concession for the construction and operation of a motorway without publication of a contract notice)

In Case C-526/17,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 4 September 2017,

European Commission, represented by G. Gattinara, P. Ondrůšek and A. Tokár, acting as Agents,

applicant,

v

Italian Republic, represented by G. Palmieri, acting as Agent, and V. Nunziata, E. De Bonis and P. Pucciariello, avvocati dello Stato,

defendant,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, C. Lycourgos, E. Juhász (Rapporteur), M. Ilešič and I. Jarukaitis, Judges,

Advocate General: E. Sharpston,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 12 December 2018,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2019,

gives the following

Judgment

1 By its application, the European Commission requests that the Court declare that, by extending the concession for the A12 Livorno-Civitavecchia motorway (Italy) from 31 October 2028 to 31 December 2046 without publishing a contract notice, the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ 2007 L 317, p. 34; ‘Directive 2004/18’).

Legal context

2 Article 1(2)(b) of Directive 2004/18 defines ‘public works contracts’ as ‘public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work

corresponding to the requirements specified by the contracting authority'. Under that provision, a 'work' is 'the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function'.

3 Annex I to that directive, entitled 'List of the activities referred to in Article 1(2)(b)', includes the construction of highways, roads, airfields and sports facilities (Class 45.23 according to the Statistical Classification of Economic Activities in the European Community (NACE)), which includes, as a class, the construction of highways.

4 Article 1(3) of that directive defines 'public works concession' as 'a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment'.

5 Under Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts':

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

6 Under Article 56 of that directive, the rules governing public works concessions are to apply to all public works concession contracts concluded by the contracting authorities where the value of the contracts is equal to or greater than EUR 5 150 000.

7 Article 58 of the directive, entitled 'Publication of the notice concerning public works concessions', provides:

'1. Contracting authorities which wish to award a public works concession contract shall make known their intention by means of a notice.

2. Notices of public works concessions shall contain the information referred to in Annex VII C and, where appropriate, any other information deemed useful by the contracting authority, in accordance with the standard forms adopted by the Commission pursuant to the procedure in Article 77(2).

3. Notices shall be published in accordance with Article 36(2) to (8).

4. Article 37 on the publication of notices shall also apply to public works concessions.'

8 Under Article 80(1) of Directive 2004/18, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive no later than 31 January 2006.

Background to the dispute

The 1969 concession contract

9 On 23 October 1969, a public works concession contract ('the 1969 concession contract') was entered into between Azienda Nazionale Autonoma delle Strade SpA ('ANAS'), the contracting authority responsible for motorway concessions, and Società Autostrada Tirrenica SpA ('SAT'), an economic operator. Article 1 of that contract provides that the objective thereof is the construction and operation of the motorway from Livorno to Civitavecchia, with a total length of approximately 237 km.

10 Article 5 of the 1969 concession contract provides in particular, in paragraph 1, that the construction of sections by the concessionaire must comply with the time limits set out in the general works implementation plan and, in paragraph 2, that that concessionaire has the option of bringing forward the construction of the sections without, however, having the right to bring forward the corresponding consideration. Under Article 5(3), following approval of the implementation plans, the concessionaire must commence the works for the construction of the tranches on the dates set in the general works implementation plan and deliver the complete works within the time limits provided for in the respective special specifications. Under Article 5(4), at the request of the concessionaire, and for reasons not attributable to it, ANAS can extend the time limits for the presentation of each project, as

regards both the start and the end of the works relating to that project. Article 5(5) provides that, in the latter case, the date of expiry of the concession can be postponed for a period not exceeding the extension granted in accordance with the preceding paragraph, and Article 5(6) provides that the management of the works is to be governed by the provisions relating to State works and by the general specifications.

11 Article 7 of the 1969 concession contract provides that the concession is to terminate at the end of the 30th year following the point at which operation of the entire motorway commences. However, without prejudice to the provisions set out in Article 5(5) and (6) of that contract, the period cannot exceed the 30th year from the date on which the works described in the general works implementation plan referred to in Article 5(1) and (2) of that contract are completed.

12 The concession awarded by the 1969 concession contract was approved and made enforceable on 7 November 1969.

The 1987 addendum

13 On 14 October 1987, ANAS and SAT signed an addendum to the 1969 concession contract ('the 1987 addendum').

14 Article 14 of that addendum provides that 'the duration of the present concession is set at 30 years from the date on which the entire motorway is open to traffic'.

The 1999 contract

15 On 7 October 1999, ANAS and SAT concluded a contract ('the 1999 contract'), Article 2 of which is entitled 'Subject matter'.

16 Under Article 2(1) thereof, that contract is to govern as between the concession-granting authority and the concessionaire the operation of the 36.6 km section between Livorno and Cecina, open to traffic on 3 July 1993 and forming an integral part of the A12 Livorno -Civitavecchia motorway, the concession for the construction and operation of which had been granted to SAT.

17 Under Article 2(2) of that contract, the activities and tasks necessary for operation of the motorway are entrusted to the concessionaire, in accordance with the terms and conditions set out in the contract and with Article 14 of Legge n. 531, Piano decennale per la viabilità di grande comunicazione e misure di riassetto del settore autostradale (Law No 531 introducing a ten-year plan for the viability of major roads and restructuring measures in the highway sector) of 12 August 1982 (GURI No 223 of 14 August 1982).

18 Article 2(3) of that contract provides that 'when the legal and factual conditions for the continuation of the construction programme in respect of which a concession has been granted are met, an addendum shall be concluded to establish a contractual framework for the construction and operation of the two further sections: Cecina-Grosseto and Grosseto-Civitavecchia'.

19 Article 23 of the 1999 contract, entitled 'Duration of the concession', provides, in paragraph 1, that 'the concession shall expire on 31 October 2028'.

The 2009 single agreement

20 On 11 March 2009, ANAS and SAT signed a standard agreement ('the 2009 single agreement'), Article 1(4) of which provides that 'the parties agree that they have no right, interest or claim, actual or prospective, in respect of [the 1999 contract] or any act or measure adopted prior to the conclusion of the present agreement'.

21 Article 2 of that single agreement, entitled 'Subject matter', provides, in paragraph 1, that 'the present single agreement shall govern fully and exclusively the relationship between the concession-granting authority and the concessionaire as regards the design, construction and operation of all the works previously allocated under the concession contract concluded with ANAS on 7 October 1999:

(a) A12 Livorno-Cecina (Rosignano), 36.6 km

(open to traffic on 3 July 1993);

(b) Cecina (Rosignano)-Grosseto, 110.5 km;

(c) Grosseto-Civitavecchia, 95.5 km,

totalling 242.6 km’.

22 Article 4 of that single agreement, entitled ‘Duration of the concession’, provides, in paragraph 1, that ‘taking account of the periods when the execution of the works was suspended, as referred to in the preamble and Article 143 of Legislative Decree No 163/2006, the concession for the completion of the Cecina (Rosignano)-Civitavecchia motorway shall terminate on 31 December 2046. …’.

The pre-litigation procedure

23 In 2009, a complaint was sent to the Commission regarding the extension, from 31 October 2028 to 31 December 2046 provided for by the 2009 single agreement, of the duration of the concession relating to the A12 motorway from Livorno to Civitavecchia.

24 The Commission and the Italian authorities communicated with each other in that respect, although no solution was reached.

25 Following fruitless contact on several occasions with the Italian authorities, the Commission sent, on 22 April 2014, a letter of formal notice to the Italian Republic pursuant to Article 258 TFEU, requesting that that Member State submit its observations as regards that extension, which, it claimed, may have infringed Articles 2 and 58 of Directive 2004/18.

26 Since the Commission did not consider the replies to that letter of formal notice to be satisfactory, it sent a reasoned opinion to the Italian Republic on 17 October 2014.

27 After that reasoned opinion was sent, discussions took place between the Commission and the Italian Republic, having as their objective a possible reduction of the duration of the concession at issue and the possibility of launching a competitive tendering procedure with respect to the works to be carried out under that concession.

28 By letter sent to the Italian Republic on 8 March 2016, the Commission called on that Member State to take all the measures necessary to comply with the reasoned opinion by ending that concession on 31 October 2028, as provided for in the 1999 contract.

29 Considering that the measures necessary to comply with the obligations arising from Directive 2004/18 had not been adopted by the Italian Republic and that the alleged infringement of Articles 2 and 58 of that directive had not been brought to an end, the Commission brought the present action.

The action

Arguments of the parties

Arguments of the Commission

30 By its action, the Commission claims that the Italian Republic has infringed Articles 2 and 58 of Directive 2004/18, as a result of extending, by means of the 2009 single agreement, by over 18 years,

namely until 31 December 2046, without publishing a contract notice, the duration of the concession relating to the A12 motorway from Livorno to Civitavecchia, the termination date of which had been set at 31 October 2028 in the 1999 contract.

31 The Commission maintains that the present case concerns a public works concession within the meaning of Article 1(3) of Directive 2004/18, since the concessionaire is remunerated through the operation of the infrastructure which it undertakes to build and that, as the value of that works concession is EUR 66 631 366.93, the threshold laid down in Article 56 of that directive is exceeded. The Commission claims that, in accordance with Article 58(1) of Directive 2004/18, a contract notice should have been published in respect of that works concession. However, no notice was published, either in 1969, when the contract relating to the original concession was concluded, or in 1999, when that concession was extended until 2028.

32 In particular, the Commission, which refers to the judgment of 7 September 2016, *Finn Frogne* (C-549/14, EU:C:2016:634, paragraph 28 and the case-law cited), argues, in the first place, that the deferral of the termination date of the concession at issue from 31 October 2028 to 31 December 2046, which is equivalent to the award of a new concession, as it leads to a material change to an existing works concession, should have been the subject of a contract notice and a competitive tendering procedure, in accordance with Article 58 of Directive 2004/18. According to the Commission, such a material change required the launch of a new competitive tendering procedure, since, if it had been known about in advance, other tenderers would have participated in the call for tenders. Further, according to the judgment of 5 April 2017, *Borta* (C-298/15, EU:C:2017:266, paragraph 70 and the case-law cited), the fact that no competitive tendering procedure was organised for the award of the original concession means, a fortiori, that a competitive tendering procedure must be launched in the event of a material change to that concession.

33 The Commission adds that, in the present case, the renegotiation of the duration of the concession at issue constitutes, in itself, proof of the material nature of the change and that the parties have clearly expressed their intention to amend the essential terms of that concession, in accordance with paragraph 37 of the judgment of 13 April 2010, *Wall* (C-91/08, EU:C:2010:182). Further, the Commission asserts that, in so far as the concessionaire is remunerated by operating the infrastructure that it has built, an extension of the concession by 18 years allows for an increase in remuneration, which changes the economic balance considerably in favour of the concessionaire.

34 In the second place, the Commission claims that change in essential aspects of a concession without the publication of a contract notice, such as the extension of the concession at issue by 18 years, constitutes an infringement of the principles of equal treatment and transparency under Article 2 of Directive 2004/18. Referring to the judgment of 22 April 2010, *Commission* v *Spain* (C-423/07, EU:C:2010:211, paragraph 56), it notes that, with specific regard to a works concession relating to the construction and operation of a motorway, the publication obligation requiring contracting authorities to make known their intention to award the concession ensures a level of competition considered satisfactory by EU legislature in the field of public works concessions.

35 As regards the Italian Republic’s arguments, the Commission disputes, first, the continuity alleged by that Member State between the 1969 concession contract and the 2009 single agreement, on the ground that the latter constitutes an independent set of rules. According to the Commission, the provisions of the 2009 single agreement must not be interpreted in the light of the 1969 concession contract. The extension introduced by that single agreement concerns the ‘existing concession’ at the time that agreement was concluded, that is to say, the concession governed by the 1999 contract.

36 Further, according to the Commission, even though the original concession was concluded at a time when EU law did not lay down any rules on the matter, any amendment or revision of that original concession should be assessed in the light of the provisions of EU law which have entered into force in the meantime (judgment of 27 October 2005, *Commission* v *Italy*, C-187/04 and C-188/04, not published, EU:C:2005:652).

37 Secondly, the Commission disputes the relevance of the alleged difficulties resulting from the performance of the original concession and the various amendments to national legislation, and states that if the need arose to carry out important construction works not provided for by the 1999 contract,

that also called for a competitive tendering procedure by means of the publication of a contract notice. Moreover, according to the Commission, it is not logical to rely on the existence of material changes to the concession at issue, resulting from the increase in the investments to be made, a rise in tariffs of 51.42% and the need to increase the duration of the concession, while at the same time claiming that the subject matter of that concession has remained unchanged since 1969. Further, the assertion that the 30-year period set out in the original concession was a ‘floating’ period, which was to start to run only after the completion of the works, is at odds with the principle of transparency and the effectiveness of Directive 2004/18.

38 Thirdly, according to the Commission, the Italian Republic misinterprets the scope of the judgment of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351), by disregarding the obligation incumbent on it in the present case to hold a competitive tendering procedure, on the ground that the new provisions of the 2009 single agreement are intended to balance the contractual relationship in the light of the original concession.

39 Fourthly, the Commission maintains that there is no need, in the present case, to balance a reciprocally binding relationship, since, under a concession, where the concessionaire is remunerated by operating the infrastructure and assumes the risk associated with the operation, maintaining the contractual balance would remove that risk completely and alter the subject matter of the concession contract. Moreover, as regards the possible justification for the lack of a competitive tendering procedure at the time when the 2009 single agreement was concluded by the ‘need to guarantee contractual balance’, the Commission claims that the judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558), relied on by the Italian Republic, is not relevant to the present case, since it concerns whether it is possible to subject to principles deriving from the TFEU concessions which, until the entry into force of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), were not covered by any directive, whereas Directive 2004/18 was in force at the time the 2009 single agreement was concluded. Referring to the judgment of 4 June 2009, *Commission* v *Greece* (C-250/07, EU:C:2009:338, paragraph 38), the Commission argues that Directive 2004/18 does not contain derogations from the principle of equal treatment based on an alleged need to ‘guarantee contractual balance’, but that it lays down other exceptions to that principle, which must be interpreted strictly. Further, the Commission asserts that it is apparent from the judgment of 14 November 2013, *Belgacom* (C-221/12, EU:C:2013:736, paragraph 40) that the principle of legal certainty cannot be relied on in order to justify an extension to an agreement which is contrary to the principles of equal treatment and non-discrimination and the obligation of transparency deriving therefrom.

Arguments of the Italian Republic

40 The Italian Republic describes the chronology of the relevant facts in detail. It explains, in particular, that for a period of 13 years, SAT was unable to begin the planned works, since legislative acts provided that the award of concessions for the construction of motorways was to be suspended and for the general suspension of the construction of new motorways or motorway sections, so that it was only in 1982 that SAT was authorised to proceed with the works relating to the A12 motorway, within the limits of the appropriations allocated and on condition that the public holding in the capital of the concessionaire company was changed. That Member State adds that it was in that context that ANAS and SAT signed the 1987 addendum, which confirmed that the duration of the concession was fixed at 30 years from the date on which the entire motorway opened to traffic. Thus, that addendum enabled the section from Livorno to Cecina, which represents only approximately 15% of the total length of the A12 motorway, to be completed.

41 The Italian Republic asserts that the objective of the 2009 single agreement is to replace the 1969 concession contract and the acts which amended it, by updating and revising the contractual terms in force in 2009 and by providing for the full completion of the A12 motorway.

42 As regards the substance, the Italian Republic submits that the Commission’s action is based on an incorrect factual premiss, in so far as that institution is of the opinion that the 1999 contract related to the works and the operation of the entire length of the A12 motorway between Livorno and Civitavecchia.

43 The Italian Republic maintains that Article 23(1) of the 1999 contract fixed the date of expiry of the concession at 31 October 2028 only in respect of the section from Livorno to Cecina. By virtue of Article 2(1) thereof, that contract governed only the operation of that 36.6 km section, which was open to traffic on 3 July 1993, and not that of the other sections of the A12 motorway, the completion of which had been suspended.

44 As regards the remaining part of the A12 motorway, according to the Italian Republic, Article 2(3) of the 1999 contract clearly provided that, when the legal and factual conditions for the continuation of the construction programme were met, a special addendum was to be concluded in order to establish the contractual framework for the construction and operation of the Cecina-Grosseto and Grosseto-Civitavecchia sections.

45 According to the Italian Republic, the 2009 single agreement was concluded on the basis of that latter provision, when the conditions for completion of the entire A12 motorway were satisfied.

46 In addition to relying on that alleged incorrect factual premiss, the Italian Republic puts forward several arguments to show that the Commission's action is unfounded.

47 In the first place, it claims that, in the present case, no 'extension' of the concession by 18 years has been decided on.

48 The Italian Republic submits that the 'floating' termination date 30 years from the 'the point at which operation of the entire motorway commences', as defined in Article 7 of the 1969 concession contract, has never been reached. Moreover, the 2009 single agreement concerns works all of which were already anticipated in the original 1969 concession and contains only a necessary revision of the provisions of the 1969 concession contract for the purpose of the full completion of the A12 motorway and in order to guarantee the original contractual balance.

49 The Italian Republic submits that the 2009 single agreement governs the entire concession as regards the design, implementation and operation of all the works already awarded in the previous contracts. It claims that that single agreement provides for the completion of the motorway in question, unlike the 1999 contract, which included only a reservation in that regard. Further, the judgment of 27 October 2005, *Commission* v *Italy* (C-187/04 and C-188/04, not published, EU:C:2005:652) cannot be transposed to the present case because the case which gave rise to that judgment concerned a new agreement regarding the execution of new works, whereas the present case concerns the same works as those referred to in the 1969 concession contract.

50 According to the Italian Republic, the Commission is wrong to conclude that there is 'a material change to the existing concession' in the present case. According to that Member State, the subject matter of that concession has not changed as compared to that originally defined and the conclusion of the 2009 single agreement resulted from an obligation, introduced in 2006 by regulatory and legislative acts, to include all the contractual terms of each motorway concession in a single legal document, which summarises, revises and represents a novation of the previous contracts. The Italian Republic specifies that it is Decreto-legge n. 262 – Disposizioni urgenti in materia tributaria e finanziaria (Decree-Law No 262 introducing urgent provisions regarding tax and financial matters) of 3 October 2006 (GURI No 230 of 3 October 2006), converted into law, with amendments, by Legge n. 286 (Law No 286) of 24 November 2006 (Ordinary Supplement to GURI No 277 of 28 November 2006) and subsequently amended by Article 1(1030) of Legge n. 296 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (finanziaria 2007) (Law No 296 relating to provisions as regards the annual and pluriannual budget of the State (Finance Law for 2007)) of 27 December 2006 (Ordinary Supplement to GURI No 299 of 27 December 2006) which laid down new provisions in the field of motorway concessions.

51 Consequently, the Italian Republic submits that the Commission is wrong to rely on the provision in the 2009 single agreement under which the parties may not assert any 'right, claim, interest or expectation' on the basis of acts or measures predating the conclusion of that agreement in order to show the lack of continuity with the original concession and that legal relationships prior to 2009 must not be taken into account.

52 The Italian Republic asserts that the 2009 single agreement does not confer any unjustified or additional advantage on the concessionaire. It adds that the tariffs provided for during the period for completion of the investment project had reached a level beyond which the tariff paid by the users would have become socially unsustainable and the infrastructure in question would have had to be abandoned. Consequently, the balance provided for by the 1969 concession contract requires that the termination date of the concession be fixed at the year 2046, which can also be explained by the failure, not attributable to the parties, to complete the project in due time.

53 In the second place, the Italian Republic submits that, given the continuity of the contractual relations which commenced in 1969, Directive 2004/18 is not applicable in the present case.

54 In the third place, and in any event, the Italian Republic maintains that the deferral of the termination date of the concession at issue is justified by the principles of protection of legitimate expectations, respect for contractual obligations (*pacta sunt servanda*) and legal certainty. It submits that those principles require a proper assessment of the economic interest of SAT, a fortiori in a situation which was originally not contrary to EU law. It contends, referring to the judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558, paragraphs 71 to 73), that derogations from the principle of equal treatment may be justified by the need to guarantee contractual balance, in particular from an economic point of view. Further, the Italian Republic maintains that, as they relate to circumstances different from those in the present case, the judgments of 13 April 2010, *Wall* (C-91/08, EU:C:2010:182) and of 5 April 2017, *Borta* (C-298/15, EU:C:2017:266), cannot be transposed to the present case.

Findings of the Court

55 By its action, the Commission requests that the Court declare that the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18, on the ground that, by the 2009 single agreement, the concession for the A12 motorway was extended from 31 October 2028 to 31 December 2046, without publication of a contract notice.

56 It is necessary to ascertain whether Directive 2004/18 is applicable to the present case, which is disputed by the Italian Republic, and subsequently, if appropriate, to examine the alleged infringement of those provisions of Directive 2004/18.

Applicability of Directive 2004/18

57 According to the Italian Republic, Directive 2004/18 cannot be applicable to the relationship between the concession-granting authority and the concessionaire resulting from the concession contract concluded in 1969, that is to say, prior to the development of the Court’s case-law on public procurement and the adoption of secondary EU law in that area.

58 In that regard, it must be recalled that, according to the case-law of the Court, the principle of equal treatment and the obligation of transparency deriving therefrom preclude, following the award of a public works concession contract, the concession-granting authority and the concessionaire from making amendments to the provisions of their concession contract in such a way that those provisions differ materially in character from those of the original contract. Such will be the case if the proposed amendments would either extend the scope of the public works concession considerably to encompass elements not initially covered or to change the economic balance of that contract in favour of the concessionaire, or if those changes are liable to call into question the award of the public works concession, in the sense that, had such amendments been incorporated in the documents which had governed the original award procedure, either another tender would have been accepted or other tenderers might have been admitted to that procedure (see, to that effect, judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 28 and the case-law cited).

59 Thus, in principle, a substantial amendment of a public concession contract must give rise to a new award procedure for the contract so amended (see, to that effect, judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 30 and the case-law cited).

60 For that purpose, it must be noted that, in accordance with the Court's case-law, the applicable EU legislation is that in force at the date of that amendment (see, to that effect, judgment of 11 July 2013, *Commission* v *Netherlands*, C-576/10, EU:C:2013:510, paragraph 54). In that regard, the fact that the original concession contract was concluded prior to the adoption of EU rules on the matter is therefore without consequence.

61 In the present case, the Commission claims that the 2009 single agreement contains material changes as compared to the original public works concession at issue and that, accordingly, the failure to publish a contract notice for the purpose of concluding that single agreement constitutes an infringement of certain provisions of Directive 2004/18.

62 Therefore, since it is common ground between the parties that the public works concession at issue and the 2009 single agreement fall within the material scope of Directive 2004/18, the changes made by that single agreement to the contractual relationship between ANAS and SAT may, in principle, be assessed in the light of the provisions of that directive.

Alleged infringement of Directive 2004/18

63 According to the Commission's application, the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18, on the ground that the concession for the A12 motorway from Livorno to Civitavecchia was extended by 18 years, until 31 December 2046, whereas under the 1999 contract that concession was due to expire on 31 October 2028.

64 In that regard, it must be noted that, even though the Commission refers, in its reply, to the 2009 single agreement as an 'independent set of rules' and states that it cannot be regarded as a mere updating or revision of a pre-existing concession, the fact remains that it considers that the fixing, in Article 4(1) of the 2009 single agreement, of the termination date of the concession at issue constitutes an 'extension' of the period previously set by the 1999 contract, that 1999 contract therefore being necessary for the interpretation of the 2009 single agreement.

65 As the Advocate General observed in point 46 of her Opinion, the Commission has not challenged the compliance of the 1999 contract with EU law but only that of the 2009 single agreement.

66 As regards the changes made to the contractual relationship between ANAS and SAT by the provisions of the 1999 contract, the Italian Republic submits that that contract distinguished between the section of motorway already open to traffic at the date of conclusion of that contract and the other sections of the A12 motorway, the construction of which had not yet commenced or been completed at that date.

67 That Member State claims that the 1999 contract governed only the operation of the section from Livorno to Cecina, with a length of 36.6 km, open to traffic in 1993 as part of the A12 motorway from Livorno to Civitavecchia, and that the setting of the termination date of the concession at 31 October 2028, by virtue of Article 23(1) of that contract, related to that section only.

68 That position is supported by the wording of Article 2(1) of the 1999 contract, which states that it 'shall govern as between the concession-granting authority and the concessionaire the operation of the 36.6 km section between Livorno and Cecina, open to traffic on 3 July 1993 and forming an integral part of the A12 Livorno-Civitavecchia motorway, the concession for the construction and operation of which was granted to SAT'.

69 That position is also confirmed by Article 2(3) of that contract, which states that 'when the legal and factual conditions for the continuation of the construction programme in respect of which a concession has been granted are met, an addendum shall be concluded to establish a contractual framework for the construction and operation of the two further sections: Cecina-Grosseto and Grosseto-Civitavecchia'.

70 Moreover, it must be added that, as regards those two other sections, it would be illogical to take the view that the parties to the 1999 contract intended to replace the period of validity of the concession, consisting of an indefinite period for construction and opening of the motorway, the duration of which, based on previous experience, was uncertain due to legislative interventions but could be very long, and of a fixed period of 30 years for the operation of the motorway in question, with a fixed concession

period of 29 years up to 31 October 2028, encompassing the periods required for both the construction and opening of the motorway and the operation of the concession.

71 It must be noted that the Commission did not call into question, in its reply or at the hearing, the evidence submitted by the Italian Republic with a view to establishing that not only the section from Livorno to Cecina was affected by the extension provided for by the 2009 single agreement but also the sections from Cecina to Grosseto and Grosseto to Civitavecchia.

72 Consequently, the Commission's action must be dismissed in so far as it concerns the sections of the A12 motorway from Cecina to Grosseto and Grosseto to Civitavecchia, since it has not proved, to the requisite legal standard, that the public works concession as regards those sections was extended by 18 years.

73 However, the Commission challenges Article 4(1) of the 2009 single agreement, in the light of the provisions of Directive 2004/18, in so far as that provision fixes the termination date for the entire A12 motorway, therefore also including the section from Livorno to Cecina, at 31 December 2046.

74 The termination date for the concession, as regards that latter section, open to traffic on 3 July 1993 and involving separate management by the concessionaire, should have therefore remained fixed, in accordance with Article 23(1) of the 1999 contract, at 31 October 2028.

75 It is common ground that the change of the termination date of the concession, which was extended to 31 December 2046 by virtue of the 2009 single agreement, provides SAT with a significant additional period of time to operate the section from Livorno to Cecina and that, as that concessionaire receives its remuneration by operating that section, considerably increases its remuneration.

76 That extension of the original duration of that concession by 18 years and 2 months therefore constitutes, by virtue of the principles referred to in paragraph 58 of the present judgment, a material change to the conditions of the existing concession.

77 Therefore, in so far as it extends the concession in respect of the section of the A12 motorway from Livorno to Cecina from 31 October 2028 to 31 December 2046, Article 4(1) of the 2009 single agreement infringes the equal treatment obligation laid down in Article 2 of Directive 2004/18 and the obligation to publish a contract notice laid down in Article 58 of that directive.

78 That finding cannot be called into question by the arguments put forward by the Italian Republic. Those arguments based on the need to maintain the economic balance of the original concession contract between the parties, in so far as they refer to the concession in its entirety, cannot, in any event, be accepted. Moreover, since the 1999 contract concluded between the concession-granting authority and the concessionaire fixed, as regards the section from Livorno to Cecina, the termination date of the concession at 31 October 2028, by virtue of Article 23(1) thereof, it cannot be maintained that for that section, the deferral of that termination date is necessary for the purposes of compliance with the principles of protection of legitimate expectations, respect for contractual obligations (*pacta sunt servanda*) and legal certainty.

79 In the light of all the above considerations, it must be held that, by extending the concession for the section of the Livorno-Civitavecchia A12 motorway between Livorno and Cecina from 31 October 2028 to 31 December 2046, without publishing a contract notice, the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18.

80 The action is dismissed as to the remainder.

Costs

81 Under Article 138(1) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

82 In the present case, the Commission and the Italian Republic have applied, respectively, for the other party to be ordered to pay the costs.

83 Under Article 138(3) of the Rules of Procedure, if it appears justified in the circumstances of the case, the Court may order one party, in addition to bearing its own costs, to pay a proportion of the other party's costs. In the present case, since the Commission's action has been upheld only as regards the section of the Livorno-Civitavecchia A12 motorway from Livorno to Cecina, it is appropriate, in accordance with that provision, to order the Commission to bear, in addition to its own costs, three quarters of the costs of the Italian Republic and the latter to bear one quarter of its own costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. **Declares that, by extending the concession for the section of the A12 Livorno-Civitavecchia motorway between Livorno and Cecina (Italy) from 31 October 2028 to 31 December 2046, without publishing a contract notice, the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission to bear its own costs and to pay three quarters of the costs of the Italian Republic. The Italian Republic is ordered to bear one quarter of its own costs.**

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 21 March 2019(1)

Case C-526/17

European Commission

v

Italian Republic

(Failure of a Member State to fulfil obligations — Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts — Public works concession — Extension of an existing concession for the construction and management of a motorway without publication of a tender notice)

1. In 1969 a public works concession contract was awarded without following a public procurement procedure for a motorway to be built between Livorno and Civitavecchia on the west coast of Italy. That contract was subsequently amended by further contracts in 1987, 1999 and 2009. On no occasion was the further contract preceded by public procurement proceedings.

2. The European Commission has now brought infringement proceedings under Article 258 TFEU against the Italian Republic. It considers that the contract concluded in 2009 constituted material change to the original contract and that a public procurement procedure should therefore have been undertaken in accordance with Directive 2004/18/EC. (2) The Italian Republic disputes that contention.

Legislative framework

EU law

3. Article 1(2) of Directive 2004/18 defines ‘public works contracts’ as ‘public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I [(3)] or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority’. Article 1(2) further provides that ‘a “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function’. Article 1(3) defines ‘public works concession’ as ‘a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment’.

4. Article 2 of Directive 2004/18 provides that ‘contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way’.

5. Article 56 provides that the rules governing public works concessions ‘shall apply to all public works concession contracts concluded by the contracting authorities where the value of the contracts is equal to or greater than EUR 5 150 000’. (4)

6. Article 58 provides that:

‘(1) Contracting authorities which wish to award a public works concession contract shall make known their intention by means of a notice.

(2) Notices of public works concessions shall contain the information referred to in Annex VII C and, where appropriate, any other information deemed useful by the contracting authority, in accordance with the standard forms adopted by the Commission pursuant to the procedure in Article 77(2).

(3) Notices shall be published in accordance with Article 36(2) to (8).

(4) Article 37 on the publication of notices shall also apply to public works concessions.’

7. Article 61 provides that:

‘This Directive shall not apply to additional works not included in the concession project initially considered or in the initial contract but which have, through unforeseen circumstances, become necessary for the performance of the work described therein, which the contracting authority has awarded to the concessionaire, on condition that the award is made to the economic operator performing such work: — when such additional works cannot be technically or economically separated from the initial contract without major inconvenience to the contracting authorities, or — when such works, although separable from the performance of the initial contract, are strictly necessary for its completion. However, the aggregate value of contracts awarded for additional works may not exceed 50% of the amount of the original works concession contract.’

8. Article 80(1) provides that ‘the Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive no later than 31 January 2006’.

Factual and procedural background

The 1969 Contract

9. On 23 October 1969 a public works concession contract was entered into between the contracting authority Azienda Nazionale Autonoma delle Strade (‘ANAS’) and the economic operator Società Autostrada Tirrenica (‘SAT’) (5) (‘the 1969 Contract’).

10. Article 1, paragraph 1 of that contract described its objective as the construction and management of the A12 motorway from Livorno (Cecina) to Civitavecchia (‘the motorway’). (6) Article 1, paragraph 2 specified the total length of the motorway to be ‘approximately 237 km’.

11. Article 7 provided that ‘the concession will terminate at the end of the 30th year following the point at which operation of the entire motorway commences; in any event, without prejudice to the provisions set out in Article 5(5) and (6), the period shall not exceed the 30th year from the date on which the works described in the general works implementation plan referred to in Article 5(1) and (2) are completed’.

The 1987 Contract

12. On 14 October 1987, a further contract was entered into between the same parties (‘the 1987 Contract’). According to the Italian Government, that contract replaced Article 7 of the 1969 Contract with the following provision: ‘The duration of the present concession is set at 30 years from the date on which the entire motorway is open to traffic.’

The 1999 Contract

13. On 7 October 1999 a further contract was entered into between the same parties (‘the 1999 Contract’). Article 2(1) thereof provided that ‘the present agreement shall govern as between the concession-granting authority and the concessionaire the operation of the 36.6 km section between Livorno and Cecina, open to

traffic on 3 July 1993 and forming an integral part of the A12 Livorno-Civitavecchia motorway, the concession for the construction and operation of which was granted to SAT'.

14. Article 2(3) further provided that 'when the legal and factual conditions for the continuation of the construction programme in respect of which a concession has been granted are met, an addendum shall be concluded to establish a contractual framework for the construction and operation of two further sections: Cecina-Grosseto and Grosseto-Civitavecchia'.

15. Article 23 was entitled 'Duration of the concession'. It provided that 'the concession shall expire on 31 October 2028'.

The 2009 Contract

16. On 11 March 2009, yet a further contract was entered into between the same parties ('the 2009 Contract'). The recitals to that contract provided, inter alia, that on 7 October 1999 the new agreement was concluded between ANAS and SAT, approved by Decree of 21 December 1999, registered with the Court of Auditors on 11 April 2000 which replaced the previous agreement of 23 October 1969 and the related addendum of 14 October 1987, and which, inter alia, provided that the concession is to terminate on 31 October 2028.

17. Article 1.4 provided that 'the parties agree that they have no right, interest or claim, actual or prospective, in respect of the agreement of 7 October 1999 or any act or measure adopted prior to the conclusion of the present agreement'.

18. Article 2.1 provided that 'the present single agreement shall govern fully and exclusively the relationship between the concession-granting authority and the concessionaire as regards the design, construction and operation of all the works previously allocated under the concession agreement concluded with ANAS on 7 October 1999: (a) A12 Livorno – Cecina (Rosignano) 36.6 km (open to traffic on 3 July 1993); (b) Cecina (Rosignano) – Grosseto, 110.5 km; (c) Grosseto – Civitavecchia, 95.5 km, totaling 242.6 km'.

19. The first part of Article 4.1 provided that 'taking account of the periods when the execution of the works was suspended, as referred to in the preamble and Article 143 of Legislative Decree No 163/2006, the concession for the completion of the Cecina (Rosignano) – Civitavecchia motorway shall terminate on 31 December 2046'.

20. The second part of Article 4.1 provided that 'if the concession-granting authority has not approved the final project and the related economic and financial plan (EFP) for the execution of the Cecina – Civitavecchia section by 31 December 2012, the parties shall determine the economic and financial consequences thereof, including the investment costs incurred, by reference to the termination of the concession on the date originally stipulated, namely 31 October 2028'.

Progress of the construction work

21. The recitals of the 2009 Contract indicate that construction work on the motorway was suspended as a result of Article 11 of Law No 287 of 28 April 1971 (7) and of Article 18a of Decree-law No 376 of 13 August 1975, (8) subsequently converted into Law No 492 of 16 October 1975. (9) That suspension was subsequently lifted by Articles 9 and 14 of Law No 531/1982, adopted on 12 August 1982. (10)

22. It is common ground that the first stretch of the motorway, covering 36.6 kilometres from Livorno to Cecina (Rosignano), was opened to traffic on 3 July 1993. The second and third stretches of the motorway, respectively from Cecina (Rosignano) to Grosseto and from Grosseto to Civitavecchia, were not built at that time. Only minor sections have subsequently been completed. (11)

23. The recitals of the 2009 Contract further indicate that construction work on the motorway was suspended again by Article 55(12) of Law No 449 of 27 December 1997, (12) and that that suspension was lifted by Law No 443 of 21 December 2001. (13) According to the Italian Government, Law No 286 of 24 November 2006 and Law No 101 of 6 June 2008 further required that the existing concession contracts be consolidated. It was on that basis that the 2009 Contract was agreed.

24. Neither the Commission nor the Italian Government has provided information concerning any subsequent changes to the Italian legislation that might affect the validity of the concession contract. (14)

Pre-litigation procedure

25. In 2009, the Commission received a complaint regarding the extension (from 31 October 2028 to 31 December 2046) of the term for the works concession contract awarded to SAT. The Commission pursued that complaint, which it registered under number 2009/4154. The exchange of communications between the Commission and Italy indicates that Italy undertook to reduce the term by three years to 2043 and to submit the award of all of the construction works on the motorway to a public procurement procedure. On the basis of that undertaking, the Commission decided not to proceed with complaint No 2009/4154.

26. It seems that SAT assigned approximately 30% of the value of the works to companies under its control, in two tranches totalling respectively EUR 34 724 661 and EUR 117 323 225, on respectively 15 December 2009 and 30 March 2012.

27. On 22 April 2014 the Commission sent a letter to Italy stating its formal position that by extending the concession contract term through the 2009 Contract without engaging in a public procurement procedure, Italy had infringed Directive 2004/18, in particular Articles 2 and 58 thereof, and that Article 61 of that directive was not applicable to the circumstances.

28. In June 2014, Italy offered to put out to tender 70% of the works and reiterated its offer to reduce the term of the concession by three years.

29. On 17 October 2014, the Commission sent Italy a reasoned opinion. It refused to accept that 30% of the works would *not* be subject to a public procurement procedure. The Commission considered that extending the contract to 2046 had been the equivalent of awarding a new contract and that ‘as ANAS has concluded an agreement with SAT, which extended the end date of the concession for the A12 Civitavecchia – Livorno motorway from 31 October 2028 to 31 December 2046, without prior publication of a contract notice, the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18/EC’.

30. Subsequent to the reasoned opinion, Italy proposed various commitments with the aim of resolving the dispute between it and the Commission. Thus:

– on 27 October 2014, Italy sent the Commission a draft contract with a three year reduction in term and a commitment to tender out 100% of the works to third parties;

– on 26 June 2015, Italy sent the Commission a draft contract with a six year reduction in term and a commitment to tender out 100% of the works;

– on 22 July 2015, Italy sent the Commission a draft contract proposing a reduction in the term from 2046 to 2040 and the award of 100% of the works via a public procurement procedure. Furthermore, SAT would be deprived of its contract if it did not award those works to third parties, and the end date of the term would be brought forward to 2028 if the draft contract was not approved by 28 February 2017;

– on 24 July 2015, Italy provided further explanations as to why it had been necessary to extend the term, indicating that the delays in the works had inter alia been caused by lack of public funds and concerns relating to public security.

31. On 8 March 2016, the Commission requested Italy to take all measures necessary to bring the public works concession contract to an end by 31 October 2028, as previously provided for by the 1999 Contract.

32. In reply, on 18 November 2016, Italy sent evidence to the Commission in the form of a notarial act to the effect that SAT had committed to tendering out all of the works. Italy also raised the possibility of bringing forward the end date of the concession term from 2046 to 2038.

Litigation procedure

33. The Commission considered Italy's responses to be inadequate. It therefore brought infringement proceedings under Article 258 TFEU on 4 September 2017, seeking a declaration that 'in deferring expiry of the works contract relating to the A12 Civitavecchia-Livorno motorway until 31 December 2046 without publishing any contract notice, the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18/EC … as subsequently amended'. The Commission also requested that the Italian Republic should be ordered to pay the costs of the proceedings.

34. The Commission and the Italian Government have submitted written pleadings, and the Italian Government has filed a written response to a written question from the Court, on which the Commission has submitted its observations.

35. That question concerned the investments already made by SAT in the construction of the motorway and the investments expected up till 2028, together with the total investment on which, it was alleged, SAT would not receive an adequate return if the concession were terminated in 2028. In its reply of 3 October 2018 to the Court, the Italian Government explained that:

> (i) Between 2009 and 2017, SAT invested EUR 253.136 million in two stretches of motorway from Cecina (Rosignano) to San Pietro in Palazzi and from Tarquina Sud to Civitavecchia, both of which have since been opened to traffic.
>
> (ii) In the economic and financial plan from 2011, based on the 2009 Contract, it was projected that SAT would invest EUR 3 411.7 million to finalise the motorway by 2028, of which the EUR 253.136 million identified above covered work planned for the period 2009 to 2015. If the contract were terminated in 2028, SAT would not earn a projected EUR 1 135.7 million during the period 2028 to 2046.
>
> (iii) In the economic and financial plan from 2016, based on the commitments proposed by Italy to the Commission during the pre-litigation procedure, the overall investment to be made by SAT up to 2023 would be EUR 1 400 million. Since EUR 253.136 million had already been invested, that left EUR 1 146.86 million still to be invested. If the contract were terminated in 2028, SAT would not earn a projected EUR 505.185 million between 2028 and 2038 (that being one of the dates for the end of the concession that Italy had proposed during the pre-litigation procedure). (15)

36. In its observations of 25 October 2018 on that written answer, the Commission pointed out that the time frame for investments used by the Italian Government did not match the time frame specified in the question from the Court. The Commission also observed that, according to SAT's own website, the stretch of motorway from Cecina (Rosignano) to San Pietro in Palazzi had been opened in 2012, and that from Tarquina Sud to Civitavecchia in 2016. The Commission noted that the total stretch of motorway now completed was indicated to be 54.6 km. That represented an additional 18 km over and above the 36.6 km completed in 1993. Finally, the Commission observed that according to newspaper reports the Italian Government had given up further work on the planned motorway in 2017, preferring instead to renovate existing roads. (16)

37. A hearing was held on 12 December 2018 at which Italy and the Commission submitted further observations and responded to questions from the Court.

Preliminary observations

Applicability of Directive 2004/18

38. Italy contests the applicability of Directive 2004/18 to a contract originally entered into in 1969, prior to the development of any case-law or relevant secondary legislation on public procurement.

39. I do not share Italy's doubt. Whilst an initial contract may itself be outside the scope of public procurement rules, it does not follow that all amendments to the contract must likewise remain outside the scope of public procurement rules.

40. In *Belgacom* (17) the Court held that the 'principle of legal certainty, which is a general principle of European Union law, provides ample justification for observance of the legal effects of a contract, including — in so far as that principle requires — in the case of a contract concluded before the Court has ruled on the implications of the primary law on contracts of that kind and which, after the fact, turn out to be contrary to those implications'.

41. Accordingly, whilst the Court has also established that the fundamental principles of public procurement apply under certain circumstances to contracts formally excluded from the scope of EU legislation on public procurement, (18) such fundamental principles (here, in particular, the principles of equal treatment and transparency) cannot apply to a contract entered into before the principles in question were established by the Court.

42. The first EU legal instrument regulating the award of public works concessions was Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts. (19) That directive was to be transposed by 19 July 1990. (20) Self-evidently, therefore, it could not apply to the 1969 Contract.

43. However, the Court has also established that, where a contract was concluded prior to the adoption of EU legislation on public procurement, and that contract therefore remains outside the scope of that legislation both *ratione materiae* and *temporis*, any material change of the contract falls to be considered in light of the EU legislation in force at the time of change. In particular, where the intention of the parties is to renegotiate the essential terms of the contract, the application of the EU public procurement rules may be justified. In infringement proceedings (such as these) the burden of proof rests with the Commission. (21)

44. It is common ground that the contract at issue falls within the definition of a public works concession contract in Article 1(3) of Directive 2004/18. It also clearly exceeds the threshold value in Article 56 of the directive, as amended. Accordingly, the 2009 Contract also *ratione materiae* falls within the field of application of Directive 2004/18, as well as being covered *ratione temporis*.

45. It follows that any change imposed by the 2009 Contract falls to be evaluated under Directive 2004/18. As explained by the Court in *pressetext Nachrichtenagentur*, (22) the deciding issue is whether the change may be considered to be 'material'.

46. I note also that, whilst questions could be raised as to whether the 1987 and 1999 Contracts complied with EU legislation on public procurement, there is no basis for the Court to address such questions in the present case. The Commission has challenged only the compliance of the 2009 Contract with EU law. Accordingly, I shall refer to and, as necessary, interpret the preceding contracts in this Opinion only to the extent that they may contribute to an understanding of whether the 2009 Contract introduced material changes to the contractual relationship between ANAS and SAT.

Legal assessment

The Commission's case

47. The burden in these proceedings is on the Commission to prove each allegation it makes. (23) It is important, therefore, to clarify the case that the Commission makes against Italy.

48. The Commission claims that Italy has violated Articles 2 and 58 of Directive 2004/18 by failing to undertake a public procurement procedure in order to make a material change in a contract. (24) The factual basis for the allegation is relatively concise, namely that the 2009 Contract extended the term of the public works concession from 2028, the end date set in the 1999 Contract, to 2046. The Italian Government criticises the simplicity of that allegation. In its view, the 2028 date set by the 1999 Contract related only to one stretch of the motorway, whilst the remaining stretches were subject to a term to be specified at a later time. The Italian Government nevertheless accepts that the 2009 Contract now sets the term for the entire concession for the motorway at 2046.

49. I do not consider that that argument of the Italian Government affects the admissibility of the Commission's case. The Commission's position was clearly communicated, thus allowing the Italian

Government to establish its defence in relation to the 'Community legislation in force at the close of the period prescribed by the Commission for the Member State concerned to comply with its reasoned opinion'. (25)

50. The Court can only proceed to its legal analysis of the infringements allegations once it has a clear view of the contractual arrangements in place. It is therefore necessary to analyse the scope of the original 1969 Contract and, in particular, the termination date that it established, and then to consider the amendments introduced by the subsequent contracts.

Interpretation of the contracts

51. Article 7 of the 1969 Contract provided for what may be termed a floating term of up to 30 years for the concession, commencing on completion of the entire motorway from Livorno to Civitavecchia. That term was amended by the 1987 Contract so as to be a period of exactly 30 years, rather than up to 30 years.

52. Did the setting of a definitive termination date (2028) in the 1999 Contract apply to the entire contract (the 'wide' interpretation), or only to the first stretch of motorway from Livorno to Cecina (Rosignano), which opened to traffic in 1993, but which covered only 36.6 kilometres of the projected 240 kilometres for the entire motorway (the 'narrow' interpretation)? Whilst there should normally be no doubts as to the date of termination of a contract, there is doubt here as to what aspects of the 1969 Contract were covered by that new termination date.

53. The Italian Government prefers the narrow interpretation; the Commission the wide interpretation.

54. In favour of the narrow interpretation is the fact that Article 2(1) of the 1999 Contract expressly states that that contract only applies to the first stretch of motorway from Livorno to Cecina, whilst Article 2(3) states that the necessary conditions are to be agreed for the remaining two stretches of motorway once the legislation has been adopted to enable work on these stretches to continue. That interpretation therefore leads to the conclusion that the 1999 Contract applies only to that first stretch of motorway, not to the entire route.

55. In favour of a wider interpretation is the fact that Article 23 of the 1999 Contract provides that the concession ends in 2028 without apparently making any distinction between the different stretches of the motorway. That appears to be underpinned by the recitals to the 2009 Contract, which explain that the 1969 and 1987 Contracts, which applied to the entire motorway without distinction, were to be amended by the 1999 Contract so as to end the concession in 2028. (26)

56. The second part of Article 4.1 of the 2009 Contract explicitly states that the 'original' 2028 end date applies to the remaining stretches from Cecina (Rosignano) to Civitavecchia. (27) The first part of Article 4.1 of the 2009 Contract also provides for a new termination date in 2046, likewise without making any distinction between the different stretches of the motorway. (28)

57. Finally, the Italian Government's answer to the question from the Court and the Commission's observations thereon made it clear that work was undertaken on the remaining stretches of motorway prior to the adoption of the 2009 Contract. That fact militates against favouring the narrow interpretation.

58. I therefore prefer the wider interpretation of the 1999 Contract advanced by the Commission; and consider that Article 23 of the 2009 Contract changed the termination date for the concession for the whole of the motorway from 2028, as established by the 1999 Contract, to 2046.

59. However, even if the narrower interpretation were to be preferred, I note that the 2009 Contract changes the termination date also for the second and third stretches of the motorway. That could be seen to build upon Article 2(3) of the 1999 Contract, which provided that conditions for the second and third stretches of the motorway were to be established at a later date.

60. On that basis, the termination dates specified in the 1969 and 1987 Contracts thereafter no longer applied to any part of the motorway. The setting of a termination date in the 2009 Contract accordingly constituted a change also for the second and third stretches of the motorway.

61. Here I recall that the proposition that a pre-existing contract cannot be challenged under subsequent legislation, or under subsequently established principles of law, must be regarded as an exception, which in accordance with well-established case-law of the Court must be given a restrictive interpretation. (29) Thus, once the 1969 Contract was amended by the 1999 Contract, it could not subsequently be changed back to more generous terms in line with the original contract.

62. I would therefore consider that having modified the 1969 and 1987 Contracts in the 1999 Contract by providing that conditions were to be agreed at a later stage, the Italian Government is precluded from arguing that those conditions, defined by the 2009 Contract, correspond more or less to the original conditions in the 1969 and 1987 Contracts and for that reason should be excluded from public procurement obligations.

63. However, even if what might be termed a 'very narrow' approach is adopted, so that the arrangements in the 2009 Contract in relation to the second and third stretches of the motorway are compared only with the conditions laid down in the 1969 and 1987 Contracts, the fact remains that the termination date was changed from a floating 30 year period to a definitive 37 year period. Thus even taking that very narrow interpretation, the essence of the Commission's allegation remains intact. The conditions of the contract have been changed.

64. I merely add that, to the extent that there are difficulties and uncertainties regarding the proper wording in, and import of, the various contracts, ANAS and through it the Italian Government must take responsibility for the contractual texts that were agreed. Where there is doubt, an ambiguous text should not automatically be construed in their favour.

65. I turn now to the question of whether the changes made by the 2009 Contract can be characterised as material.

Material changes

66. The Court has established a non-exhaustive list of circumstances and conditions under which a change is to be viewed as material. Thus, the Court has held in *pressetext Nachrichtenagentur* that a change may be considered material when it:

– is materially different in character from the original contract and therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract; or

– if introduced at the time of the initial award procedure, would have permitted other tenderers to have been admitted or accepted; or

– extends the scope of the contract considerably to encompass services not initially covered; or

– changes the economic balance of the contract in favour of the contractor in a way that was not provided for in the initial contract. (30)

67. In my view, two of the criteria for material change that the Court set out in *pressetext Nachrichtenagentur* are fulfilled here. The parties clearly intended to renegotiate essential terms of the contract. They did so in a manner that changed the economic balance in favour of the contractor.

68. I begin with whether the termination date of a contract may be considered an 'essential term of that contract' and one that 'changes the economic balance'. The contracts at issue are for a public works concession. The longer the concessionaire can exploit that concession, the more it can look to generate profit once the works are completed and it has recovered the costs of construction through the tolls charged for the use of the motorway.

69. The length of the term negotiated between the parties is, in my view, very obviously an essential aspect of any contract governing such a concession. The 29 year exploitation period in the 1999 Contract (until 2028) was extended by an additional 18 years in the 2009 Contract (until 2046). That must be regarded as constituting a change to essential terms and at the same time, a change in the economic balance of the contract in favour of the concessionaire.

70. It is true that if one adopts the very narrow approach, and the 37 year fixed exploitation period in the 2009 Contract is thus compared to the floating 30 year exploitation period in the 1969 Contract, it becomes less easy to assess which of the two is more economically beneficial for the concessionaire.

71. I have however, set out above the reasons why I consider that the very narrow interpretation is not readily supported by the texts. (31) Moreover, where — as here — there is a change that *on any view* fundamentally alters the contract, I consider that it is for the Italian Government to demonstrate that such a change should nevertheless *not* be regarded as a 'material change' in the sense of *pressetext Nachrichtenagentur*. (32) I do not find that the Italian Government has done so here.

72. Furthermore, were the Court to conclude that only the first stretch of the motorway (approximately 36 kilometres) was subject to material change, the Commission's allegation would still remain proven for that sector.

73. I do not regard it as significant that the first stretch of the motorway constituted only 15% of a larger contractual engagement to construct 240 kilometres of motorway. That cannot affect the finding that the public procurement obligations were not respected.

74. Accordingly, I conclude that the 2009 Contract constituted a material change to the pre-existing contractual arrangements and that it should therefore have been made subject to a public procurement procedure.

75. I turn now to the question of whether the Italian Government can rely on any grounds exempting it from that obligation.

Grounds for exemption

76. The Italian Government has referred to factual and legal elements that have intervened since 1969, specifically external developments outside the control of SAT which contributed to the delay in building the motorway and hence to being able to exploit the concession. The Italian Government argues that an extension of the exploitation period was required in order to 'guarantee the balance of the contract'. It claims that had the exploitation period not been extended, that balance would have been undermined.

77. I reject that argument for two reasons.

78. First, the Court has already made clear that 'neither (i) the fact that a material change of the terms of a contract results not from the deliberate intention of the contracting authority and the successful tenderer to renegotiate the terms of that contract, but from their intention to reach a settlement in order to resolve objective difficulties encountered in the performance of the contract nor (ii) the objectively unpredictable nature of the performance of certain aspects of the contract can provide justification for the decision to carry out that change without respecting the principle of equal treatment from which all operators potentially interested in a public contract must benefit'. (33)

79. Second, it is clear from the facts that I have summarised above (34) that the delays to the construction of the motorway were primarily attributable to certain legislative initiatives undertaken by the Italian Government itself. Whatever may have been the reasons for introducing the legislation in question, the fact remains that the Italian Government made an explicit choice by adopting legislation that directly affected SAT's ability to construct and exploit the motorway according to the schedule originally envisaged.

80. It follows from well-established case-law of the Court that 'a Member State may not plead practical or administrative difficulties in order to justify non-compliance with the obligations and time limits laid down by a directive. The same holds true of financial difficulties, which it is for the Member States to overcome by adopting appropriate measures'. (35) Accordingly, although the Italian Government may have had perfectly valid reasons to take measures that affected the public works concession previously granted, and although the Italian Government may have wished to mitigate the impact of that legislation on SAT by extending the exploitation period, it could not do so in disregard of EU public procurement law.

81. The Italian Government further argues that the absence of a public procurement procedure in 2009 (thus derogating from the principle of equality of treatment) may be justified by reference to SAT's right to

rely on the principles of legal certainty and legitimate expectations.

82. In so arguing, the Italian Government appears to rely on an *a contrario* argument derived from the Court's ruling in *Promoimpresa and Others*, where the Court held that 'the concessions at issue in the main proceedings were awarded when it had already been established that contracts with certain cross-border interest were subject to a duty of transparency, so that the principle of legal certainty cannot be relied on in order to justify a difference in treatment prohibited on the basis of Article 49 TFEU'. (36)

83. As I understand it, the Italian Government here relies on the (undisputed) fact that the 1969 Contract was concluded before EU public procurement rules and principles became applicable, so as to claim that it should thereafter remain exempt from scrutiny under EU law. However, the question is not whether the 1969 Contract complies with the relevant EU rules. It is whether the 2009 Contract does. (37)

84. Furthermore, as the Commission has correctly pointed out, the principle of legal certainty cannot 'be relied on to give an agreement an extended scope which is contrary to the principles of equal treatment and non-discrimination and the obligation of transparency deriving therefrom. It is of no import in that regard that that extended scope may offer a suitable solution for putting an end to a dispute which has arisen between the parties concerned, for reasons outside their control, as to the scope of the agreement by which they are bound'. (38) As I see it, there is no reason not to apply that dictum to the 1969 Contract.

85. The very nature of a concession is that the majority of risk must pass over to the concessionaire. (39) Thus, in contrast with other types of contract, the concessionaire (here SAT) must accept the inherent element of future risk when entering into the initial contract. Ordinary commercial prudence will ensure that the need to factor in such risk will affect the bid that is put forward and/or the detailed negotiations for the contract itself.

86. It should be noted that the Court has indeed held that provisions within the original contract documents of a public procurement procedure may expressly allow for material changes to be made subsequently. (40)

87. Against that background, the Italian Government might have sought to argue that Article 2(3) of the 1999 Contract, according to which the contractual conditions attaching to the second and third stretches of the motorway were to be concluded at a later stage 'when the legal and factual conditions for continuation of the construction programme in respect of which a concession has been granted are met' should be treated as a reservation analogous to a reservation in the contract documents.

88. In my opinion, that cannot be the case for two reasons.

89. First, there *were* no original 'contract documents' resulting from a public procurement procedure, since none of the contracts in question were made subject to such a procedure.

90. Second, the right to use such a reservation as a basis for later material change must be regarded as an exception to the general principle that all the necessary elements resulting from a public procurement procedure should be reflected in the contract documents drawn up by the contracting public authority. In accordance with well-established case-law, exceptions are to be given a restrictive interpretation. It would be unacceptable if a contract, which was originally exempted from public procurement obligations, could later be 'complemented' by inserting a reservation that introduced a material change at a time when such a contract would otherwise be subject to public procurement obligations under EU law.

91. Thus, even if one construes the 1999 Contract as containing a reservation for future changes, that reservation cannot serve as the basis for exonerating the 2009 Contract from the requirement to comply with Directive 2004/18.

92. Finally, I do not consider that Italy can rely on Article 61 of Directive 2004/18 which allows changes to be made with regard to 'additional works'. The material change between 1999 and 2009 was not to the scope of the original works that were to be undertaken by the concessionaire, but to the *time* given for SAT to derive profit from them after their completion. Such a change does not fall within the scope of Article 61 *ratione materiae*.

93. In my view the change to the duration of the concession introduced by Article 4.1 of the 2009 Contract constituted a material change, as defined in *pressetext Nachrichtenagentur*, (41) irrespective of whether it is considered in relation to the 1999 Contract (as the Commission argues) or in relation to the 1969 Contract (the approach proposed by the Italian Government). The conclusion of the 2009 Contract without following a public procurement procedure thus constituted a violation of the equal treatment obligation in Article 2 of Directive 2004/18 and the obligation to publish a contract notice laid down by Article 58 thereof.

Costs

94. Under Article 138(1) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since I consider that the Court should grant the form of order sought by the European Commission, the Italian Republic should pay the costs.

Conclusion

95. In the light of the foregoing considerations, I therefore propose that the Court should:

(1) Declare that the extension, from 2028 to 2046, to the term of the public works concession for the construction and management of the A12 motorway introduced in 2009 was a change to a material aspect of the 1999 Contract between the contracting authority (Azienda Nazionale Autonoma delle Strade) and the concessionaire (Società Autostrada Tirrenica); and that, by failing to subject that change to a public procurement procedure, the Italian Republic has infringed its obligations under Articles 2 and 58 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended;

(2) order the Italian Republic to pay the costs.

---

1 Original language: English.

---

2 European Parliament and Council Directive of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), now repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ 2014 L 94, p. 65).

---

3 Annex I includes 'construction of highways'.

---

4 As amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2007 L 317, p. 34).

---

5 Strictly speaking the Tyrrhenian Sea (il mar Tirreno) from which the economic operator derives its name is that part of the Mediterranean off the west coast of Italy that is bordered to the south by Sicily, to the west by Sardinia and Corsica, and to the North by the Isle of Elba, including the Gulf of Follonica. The waters from there up to Livorno itself are part of the Ligurian Sea. See the website of the Istituto idrografico della Marina (http://www.marina.difesa.it).

---

6 The term motorway, as used in this Opinion, is defined in Article 1, paragraph 2 of the 1969 Contract as 'a dual carriageway, each side of which measures 7.5 metres and is separated by a central reservation and flanked by a hard shoulder'.

7 Legge n. 287, Modifiche ed integrazioni all'attuale legislazione autostradale (Law No 287, Modifying and complementing the legislation on motorways), GURI No 137 of 1 June 1971.

8 Decreto-legge n. 376, Provvedimenti per il rilancio dell'economia riguardanti le esportazioni, l'edilizia e le opere pubbliche (Decree-law No 376, introducing economic recovery measures for exports, construction and public works), GURI No 218 of 18 August 1975.

9 Legge n. 492, Conversione in legge, con modificazioni, del decreto-legge 13 agosto 1975, n. 376, concernente provvedimenti per il rilancio dell'economia riguardanti le esportazioni, l'edilizia e le opere pubbliche (Conversion into law, with amendments, of the Decree-Law of 13 August 1975, No 376, concerning measures to re-launch the economy concerning exports, construction and public works), GURI No 276 of 17 October 1975.

10 Legge n. 531, Piano decennale per la viabilità di grande comunicazione e misure di riassetto del settore autostradale (Law No 531 Introducing a ten-year plan for the viability of major roads and restructuring measures in the highway sector), GURI No 223 of 14 August 1982.

11 See point 36 below.

12 Legge n. 449, Misure per la stabilizzazione della finanza pubblica (Law No 449, Introducing measures to stabilise public finances), GURI No 302 of 30 December 1997.

13 Legge n. 443, Delega al Governo in materia di infrastrutture ed insediamenti produttivi strategici ed altri interventi per il rilancio delle attività produttive (Law No 443, Providing a delegation to the government for strategic infrastructure and production facilities as well as other interventions for the revival of production activities), GURI No 299 of 27 December 2001.

14 It seems that the route proposed for the construction of this particular motorway has given rise to controversy and that issues have been raised concerning, inter alia, its environmental impact (see wikivisually.com). I do not engage with that debate in this Opinion.

15 See point 30 above.

16 The Commission referred to an article in *Il Fatto quotidiano* dated 15 April 2017, which it enclosed as an annex to its observations.

17 Judgment of 14 November 2013, C-221/12, EU:C:2013:736, paragraph 40 and the case-law cited.

18 See in relation to the principle of non-discrimination on grounds of nationality, judgment of 7 December 2000, *Telaustria and Telefonadress*, C-324/98, EU:C:2000:669, paragraph 60.

19 OJ 1989 L 210, p. 1. Directive 71/305 was subsequently replaced by Council Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which in turn was replaced by Directive 2004/18.

20 See Article 3 of Directive 89/440.

21 Judgment of 5 October 2000, *Commission* v *France*, C-337/98, EU:C:2000:543, paragraphs 41 to 45.

22 Judgment of 19 June 2008, C-454/06, EU:C:2008:351; see further point 66 et seq. below.

23 See, inter alia, judgments of 25 May 1982, *Commission* v *Netherlands*, 96/81, EU:C:1982:192, paragraph 6, and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 25.

24 See point 27 above.

25 Judgment of 9 November 1997, *Commission* v *Italy*, C-365/97, EU:C:1999:544, paragraph 32.

26 See point 16 above.

27 See point 20 above.

28 See point 19 above.

29 Judgment of 13 January 2005, *Commission* v *Spain*, C-84/03, EU:C:2005:14, paragraph 58.

30 Judgment of 19 June 2008, C-454/06, EU:C:2008:351, paragraphs 34 to 37. That case concerned the application of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), but I see no good reason to apply a different test as to ‘material change’ in the context of Directive 2004/18. See also judgments of 5 October 2000, *Commission* v *France*, C-337/98, EU:C:2000:543, paragraph 46, and of 11 July 2013, *Commission* v *Netherlands*, C-576/10, EU:C:2013:510, paragraph 46.

31 See points 63 and 64 above.

32 Judgment of 19 June 2008, C-454/06, EU:C:2008:351, paragraphs 34 to 37.

33 Judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 32.

34 See points 21 to 23 above.

35 Judgment of 18 October 2012, *Commission* v *United Kingdom*, C-301/10, EU:C:2012:633, paragraph 66 and the case-law cited.

36 Judgment of 14 July 2016, C-458/14 and C-67/15, EU:C:2016:558, paragraph 73.

37 See point 46 above.

38 Judgment of 14 November 2013, *Belgacom*, C-221/12, EU:C:2013:736, paragraph 40.

---

39 Judgment of 10 March 2011, *Privater Rettungsdienst und Krankentransport Stadler*, C-274/09, EU:C:2011:130, paragraphs 24 to 26.

---

40 Judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraphs 36 and 37.

---

41 Judgment of 19 June 2008, C-454/06, EU:C:2008:351, paragraphs 34 to 37.

JUDGMENT OF THE COURT (Third Chamber)

21 March 2019 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Article 10(h) — Specific exclusions for service contracts — Civil defence, civil protection and danger prevention services — Non-profit organisations or associations — Patient transport ambulance services — Transport by qualified ambulance)

In Case C-465/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), made by decision of 12 June 2017, received at the Court on 2 August 2017, in the proceedings

Falck Rettungsdienste GmbH,

Falck A/S

v

Stadt Solingen,

interveners:

Arbeiter-Samariter-Bund Regionalverband Bergisch Land eV,

Malteser Hilfsdienst eV,

Deutsches Rotes Kreuz, Kreisverband Solingen,

THE COURT (Third Chamber),

composed of M. Vilaras, President of the Fourth Chamber, acting as President of the Third Chamber, J. Malenovský, L. Bay Larsen, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 5 September 2018,

after considering the observations submitted on behalf of

– Falck Rettungsdienste GmbH and Falck A/S, by P. Friton and H.-J. Prieß, Rechtsanwälte,

– Stadt Solingen, by H. Glahs, Rechtsanwältin, and by M. Kottmann and M. Rafii, Rechtsanwälte,

– Arbeiter-Samariter-Bund Regionalverband Bergisch Land eV, by J.-V. Schmitz and N. Lenger, Rechtsanwälte, and by J. Wollmann, Rechtsanwältin,

– Malteser Hilfsdienst eV, by W. Schmitz-Rode, Rechtsanwalt,

– Deutsches Rotes Kreuz, Kreisverband Solingen, by R.M. Kieselmann and M. Pajunk, Rechtsanwälte,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the Romanian Government, by C.-R. Canţăr and R.H. Radu and by R.I. Haţieganu and C.-M. Florescu, acting as Agents,

– The Norwegian Government, by M.R. Norum and K.B. Moen, acting as Agents

– the European Commission, by A.C. Becker and by P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 10(h) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Falck Rettungsdienste GmbH and Falck A/S, on the one hand, and Stadt Soligen (City of Solingen, Germany), on the other hand, concerning the direct award of the contract for 'Emergency Services in Solingen — Project No V16737/128', lots 1 and 2 ('the contract at issue'), without prior publication of a contract notice in the *Official Journal of the European Union*.

Legal context

Directive 2014/24

3 Recitals 28, 117 and 118 of Directive 2014/24 read as follows:

'(28) This Directive should not apply to certain emergency services where they are performed by non-profit organisations or associations, since the particular nature of those organisations would be difficult to preserve if the service providers had to be chosen in accordance with the procedures set out in this Directive. However, the exclusion should not be extended beyond that strictly necessary. It should therefore be set out explicitly that patient transport ambulance services should not be excluded. In that context it is furthermore necessary to clarify that CPV [Common Procurement Vocabulary] Group 601 "Land Transport Services" does not cover ambulance services, to be found in CPV class 8514. It should therefore be clarified that services, which are covered by CPV code 85143000-3, consisting exclusively of patient transport ambulance services should be subject to the special regime set out for social and other specific services (the "light regime"). Consequently, mixed contracts for the provision of ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services.

…

(117) Experience has shown that a series of other services, such as rescue services, firefighting services and prison services are normally only of cross-border interest as of such time as they acquire sufficient critical mass through their relatively high value. In so far as they are not excluded from the scope of this Directive, they should be included under the light regime. To the extent that their provision is actually based on contracts, other categories of services, such as government services or the provision of services to the community, they would normally only be likely to present a cross-border interest as from a threshold [EUR] 750 000 and should consequently only then be subject to the light regime.

(118) In order to ensure the continuity of public services, this Directive should allow that participation in procurement procedures for certain services in the fields of health, social and cultural services could be reserved for organisations which are based on employee ownership or

active employee participation in their governance, and for existing organisations such as cooperatives to participate in delivering these services to end users. This provision is limited in scope exclusively to certain health, social and related services, certain education and training services, library, archive, museum and other cultural services, sporting services, and services for private households, and is not intended to cover any of the exclusions otherwise provided for by this Directive. Those services should only be covered by the "light regime".'

4 Under the heading, 'Specific exclusions for service contracts', Article 10(h) of the directive provides:

'This Directive shall not apply to public service contracts for:

…

(h) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3 [firefighting and rescue services], 75251000-0 [fire services], 75251100-1 [firefighting services], 75251110-4 [fire prevention services], 75251120-7 [forest fire-fighting services], 75252000-7 [emergency/rescue services], 75222000-8 [civil protection services], 98113100-9 [nuclear safety services] and 85143000-3 [ambulance services] except patient transport ambulance services;

…'

5 Chapter I on 'Social and other specific services' under Title III, headed 'Particular procurement regimes', of the directive comprises Articles 74 to 77.

6 Article 77 of Directive 2014/24, entitled 'Reserved contracts for certain services':

'1. Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74, which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8.

2. An organisation referred to in paragraph 1 shall fulfil all of the following conditions:

(a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1;

(b) profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;

(c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and

(d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

…'

German law

7 Paragraph 107(1)(4) of the Gesetz gegen Wettbewerbsbeschränkungen (Law against Restrictions of Competition) of 26 June 2013, (BGB1. I, p. 1750), in the version applicable to the case in the main proceedings ('the GWB'), provides:

'General exclusions

1. This [fourth] part shall not apply to public procurement or the grant of concessions relating to:

…

(4) civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8. 98113100-9 and 85143000-3, except for patient transport ambulance services. Non-profit organisations or associations within the meaning of this provision include, in particular, public aid associations which are recognised under federal or regional law as associations involved in civil and disaster protection.'

8 In accordance with Article 2(1) of the Gesetz über den Rettungsdienst sowie die Notfallrettung und den Krankentransport durch Unternehmer (Rettungsgesetz NRW — RettG NRW) (Law of the *Land* of North Rhine-Westphalia on emergency services as well as emergency rescue and patient transport by contractors) of 24 November 1992, emergency services cover emergency interventions, transport by ambulance and the care of a large numbers of sick or injured persons in the event of major disasters. According to the first sentence of Paragraph 2(2) of that law, emergency rescue interventions have the aim of carrying out measures *in situ* to save the lives of patients in an emergency situation, making them fit for transport, maintaining their fitness for transport, and preventing further harm, including transporting them in an emergency doctor's vehicle or by ambulance to an appropriate hospital where further care can be provided. According to Paragraph 2(3), the transport by ambulance is designed to provide appropriate care to sick or injured persons or other persons needing help who are not covered by Paragraph 2(2) of the same law, including transporting them, inter alia, by ambulance under supervision by qualified personnel.

9 Paragraph 26(1), second sentence, of the Zivilschutz- und Katastrophenhilfegesetz (Law on civil protection and disaster response), of 25 March 1997 (BGB1. I, p. 726), in the version applicable in the case in the main proceedings, ('the Law on civil protection'), provides that the Arbeiter-Samariter-Bund (Workers' Samaritan Federation), the Deutsche Lebensrettungsgesellschaft (German Life Saving Association), the Deutsche Rote Kreuz (German Red Cross), the Johanniter-Unfall-Hilfe (St. John's Accident Assistance) and the Malteser-Hilfsdienst (Maltese Aid Service) are particularly suitable for collaboration in fulfilling the tasks under that legislation.

10 The first sentence of Paragraph 18(1) and Paragraph 18(2) of the Gesetz über den Brandschutz, die Hilfeleistung und den Katastrophenschutz (Law on protection from fire, aid and civil defence) of 17 December 2015 ('the Law on fire protection') reads as follows:

'(1) Private associations for public aid help with accidents and public emergencies, major operations and disasters, if they have declared to the highest supervisory authority their readiness to cooperate and that authority has determined their general suitability for cooperation and there is a need for such cooperation (recognised aid associations). …

2. For the organisations listed in the second sentence of Paragraph 26(1) of the [Law on civil protection] no declaration of willingness to cooperate or general suitability is required.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 The City of Solingen decided, in March 2016, to renew the award of the contract for emergency services for a period of five years. The planned contract concerned in particular the use of municipal ambulances, first, for emergency rescue, with the care and treatment of emergency patients by emergency worker assisted by a paramedic as the primary task, and, second, the transport by ambulance, the primary task being the care of patients by a paramedic assisted by medical assistant.

12 The City of Solingen did not publish a contract notice in the *Official Journal of the European Union*. Instead, on 11 May 2016, it invited four public aid associations, including the three parties intervening before the referring court, to submit a tender.

13 After tenders were received, Arbeiter-Samariter-Bund Regionalverband Bergisch Land eV and Malteser Hilfsdienst eV were each awarded one of the two lots comprising the contract at issue.

14 Falck Rettungsdienste, a provider of emergency and health services, and the Falck A/S Group, to which Falck Rettungsdienste belongs (together ‘Falck and Others’) criticise the City of Solingen for having awarded the contract without prior publication of a contract notice in the *Official Journal of the European Union*. Falck and Others therefore lodged, before the Vergabekammer Rheinland (Public Procurement Tribunal for the Rhineland, Germany), an action seeking a declaration that the de facto award breached their rights and that the City of Solingen was required, if it maintained its intention to award the contract at issue, to award it upon conclusion of a public procurement procedure that complied with EU law.

15 By decision of 19 August 2016, that tribunal rejected the action as inadmissible.

16 Falck and Others brought an appeal against the decision of the Public Procurement Tribunal for the Rhineland before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany). They reproach the tribunal for having failed to interpret the first sentence of Paragraph 107(1)(4) of the GWB, the wording of all points of which is consonant with Article 10(h) of Directive 2014/24, consistently with that directive.

17 Before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), Falck and Others submit that the rescue services at issue in the main proceedings do not constitute services of danger prevention. The concept of ‘danger prevention’ refers only to prevention of danger to large groups of people in extreme situations with the result that it does not have an independent meaning and that it does not cover the protection against danger to life and health of individuals. It follows, according to Falck and Others, that transport by qualified ambulance, which includes, in addition to the provision of transport, care by a paramedic assisted by an medical assistant (‘transport by qualified ambulance’), is not covered by the exclusion laid down in Article 10(h) of Directive 2014/24 because it constitutes merely a patient transport ambulance service.

18 Furthermore, according to Falck and Others, the national legislature was not entitled to decide that the three intervening parties before the referring court are non-profit organisations or associations merely because they are recognised in national law as public aid associations, in accordance with the second sentence of Paragraph 107(1)(4) of the GWB. The conditions under EU law for classification as a ‘non-profit organisation’ are stricter, having regard to the judgments of 11 December 2014, *Azienda sanitaria locale n. 5 ‘Spezzino’ and Others* (C-113/13, EU:C:2014:2440) and of 28 January 2016, *CASTA and Others* (C-50/14, EU:C:2016:56) or, at the very least, Article 77(1) of Directive 2014/24.

19 The referring court considers that the appeal brought by Falck and Others could be upheld if at least one of the conditions required for the exclusion laid down in Paragraph 107(1)(4) of the GWB was not satisfied. It was therefore necessary to determine, first, whether the contract at issue covers danger prevention services, secondly, from what date the conditions for the status of non-profit organisation or association are deemed to be satisfied and, thirdly, the nature of the services covered by the phrase ‘patient transport ambulance services’ used in that provision.

20 According to the referring court, while civil defence covers unforeseeable large-scale emergencies during peacetime, the concept of civil protection relates to the protection of the civilian population during wartime. The concept of ‘danger prevention services’ could however include services for the prevention of danger to the health and life of individuals, where those services are mobilised against an imminent danger from normal risks such as fire, illness or accidents. That interpretation of the concept of ‘danger prevention’ is more attractive than the restrictive notion contended for by Falck and Others which does not confer any independent regulatory content upon it, since it may be confused with the concept of ‘civil defence’ and also ‘civil protection’.

21 Furthermore, the objective of the exclusion laid down in Article 10(h) of Directive 2014/24, as the first sentence of recital 28 of the directive clarifies, is to enable non-profit organisations to continue to work in the emergency services sector for the well-being of citizens without the risk of being excluded from the market because the competition from commercial companies is too great. However, since non-profit organisations or associations act essentially in the area of daily emergency services for individuals, that exclusion would not achieve its aim if it applied only to services for the prevention of major disasters.

22 The referring court also wonders whether the rule laid down in the second sentence of Paragraph 107(1)(4) of the GWB is compatible with the concept of non-profit organisations or associations contained in Article 10(h) of Directive 2014/24 to the extent that the legal recognition, in national law, of the status of an organisation for civil protection and civil defence does not necessarily depend on whether the organisation is a non-profit one.

23 In that regard, the referring court has doubts as to the submission made by Falck and Others that the non-profit organisation must satisfy other conditions set out in Article 77(2) of Directive 2014/24, or even in the judgments of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440) and of 28 January 2016, *CASTA and Others* (C-50/14, EU:C:2016:56).

24 The referring court also observes that danger prevention services, covered by CPV code 85143000-3 (ambulance services), are covered by the exclusion laid down in Article 10(h) of Directive 2014/24 ('the exclusion'), with the exception of 'patient transport ambulance services' ('the exception to the exclusion'). In that regard, the question arises as to whether this exception to the exclusion covers only the transport of a patient in an ambulance without any medical care, or whether it also covers transport by qualified ambulance, where the patient receives medical assistance.

25 In those circumstances, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the care and treatment of emergency patients in an ambulance by an emergency worker/paramedic, on the one hand, and the care and treatment of patients in a patient transport ambulance by a paramedic/medical assistant, on the other hand, constitute "civil defence, civil protection, and danger prevention services" within the meaning of Article 10(h) of Directive [2014/24] which come under CPV codes 75252000-7 (rescue services) and 85143000-3 (ambulance services)?

(2) Can Article 10(h) of Directive [2014/24] be understood as meaning that "non-profit organisations or associations" include, in particular, aid organisations that are recognised under national law as civil defence and civil protection organisations?

(3) Are "non-profit organisations or associations" within the meaning of Article 10(h) of Directive [2014/24] those whose mission is fulfilled in the achievement of tasks in the public good, which do not operate with a view to making a profit and which reinvest any profits in order to realise the mission of the organisation?

(4) Is the transport of a patient in an ambulance while care is provided by a paramedic/medical assistant (so-called transport by qualified ambulance) a "patient transport ambulance service" within the meaning of Article 10(h) of Directive [2014/24], which is not covered by the exclusion and to which Directive [2014/24] applies?'

Consideration of the questions referred

The first and fourth questions

26 As a preliminary matter, it is appropriate to underline, as the referring court observes, that the care of patients in an emergency situation in a rescue vehicle by an emergency worker/paramedic and the transport by qualified ambulance do not constitute either 'civil defence services' or 'civil protection services'.

27 Therefore, the referring court must be regarded as asking, by its first and fourth questions, which it is appropriate to examine together, in essence, whether Article 10(h) of Directive 2014/24 must be interpreted as meaning that, first, the care of patients in an emergency situation in a rescue vehicle by an emergency worker/paramedic and, second, transport by qualified ambulance fall within the concept of 'danger prevention services' and the CPV codes 75252000-7 (emergency/rescue services) and 85143000-3 (ambulance services) respectively and, therefore, that they are excluded from the field of

application of that directive, or whether those services are ‘patient transport ambulance services’, which are subject, on that basis, to a special regime established for social and other specific services.

28 It must be observed that Directive 2014/24 does not define the concept of ‘danger prevention’ and that, according to established case-law, it follows from the need for the uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see, inter alia, judgments of 18 January 1984, *Ekro*, 327/82, EU:C:1984:11, paragraph 11, and of 19 September 2000, *Linster*, C-287/98, EU:C:2000:468, paragraph 43).

29 While it is true that the concepts of ‘civil protection’ and ‘civil defence’ refer to situations in which it is necessary to respond to mass harm, such as, for example, an earthquake, a tsunami or even a war, it does not necessarily follow that the concept of ‘danger prevention’, which is also referred to in Article 10(h) of Directive 2014/24, must have such a collective dimension.

30 It follows from both a literal and contextual interpretation of Article 10(h) of Directive 2014/24 that ‘danger prevention’ covers both collective and individual risks.

31 First, the wording of that provision refers to various CPV codes referring to dangers irrespective of whether they are collective or individual. That is the case, inter alia, as regards CPV codes 75250000-3 (firefighting and rescue services), 75251000-0 (fire services), 75251100-1 (firefighting services), 75251110-4 (fire prevention services) and, more specifically, having regard to the subject matter of the case in the main proceedings, codes 75252000-7 (emergency/rescue services) and 85143000-3 (ambulance services).

32 Secondly, to require danger prevention to have a collective dimension would prevent that concept having any independent content, since it would be systematically confused with either civil protection or civil defence. Where a provision of EU law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness (judgment of 24 February 2000, *Commission* v *France*, C-434/97, EU:C:2000:98, paragraph 21).

33 Thirdly, having regard to the context, that interpretation of Article 10(h) of Directive 2014/24 is confirmed by recital 28 thereof. The first sentence of that recital states that ‘this directive should not apply to certain emergency services where they are performed by non-profit organisations or associations, since the particular nature of those organisations would be difficult to preserve if the service providers had to be chosen in accordance with the procedures set out in this directive’. In that regard, it must be emphasised that the exclusion of the application of that directive is not restricted only to emergency services that are provided when collective danger arises. Furthermore, it must be observed, as the order for reference states, that the primary activity carried out by the public aid associations in question in the main proceedings relate to emergency services which, as a general rule, deal with individual and daily interventions. It is precisely as a result of the experience thus acquired by performing those day-to-day emergency services that those non-profit organisations or associations are in the position, according to the referring court, of being operational when they are required to provide ‘civil protection’ and ‘civil defence’ services.

34 Fourthly, and as the German Government submitted in its written observations, if danger prevention and, hence, the general exclusion referred to in Article 10(h) of Directive 2014/24, was limited to emergency interventions in extreme situations, the EU legislature would not have cited solely transport by ambulance in the exception from the exclusion. In that regard, as the Advocate General noted in point 48 of his Opinion, it must be observed that if the EU legislature judged it useful to make reference to ‘patient transport ambulance services’, it was because those services would otherwise have been construed as being covered by the exclusion laid down in that provision.

35 It follows that the objective referred to in recital 28 of Directive 2014/24 would not be achieved if the concept of ‘danger prevention’ must be understood as covering only the prevention of collective danger.

36 Having regard to all the foregoing considerations, it must be concluded that, both the care of patients in an emergency situation in a rescue vehicle by an emergency worker/paramedic and transport by qualified ambulance fall within the concept of ‘danger prevention’, for the purposes of Article 10(h) of Directive 2014/24.

37 It remains to be determined whether both of those services are covered by one of the CPV codes listed in that provision.

38 As a preliminary matter, it is necessary to refer to the structure of Article 10(h) of Directive 2014/24 which contains an exclusion and an exception to the exclusion. That provision excludes from the scope of the usual rules on public procurement, public contracts for services relating to civil defence, civil protection and danger prevention, subject to two conditions, namely that those services correspond to the CPV codes referred to in that provision and that they are provided by non-profit organisations or associations. That exclusion from the application of the rules on public procurement contains an exception, however, in that it does not apply to patient transport ambulance services, which are covered by the simplified regime for public procurement laid down in Articles 74 to 77 of Directive 2014/24.

39 The objective of the exclusion is, as is clear from recital 28 of the directive, to preserve the particular nature of non-profit organisations or associations by avoiding applying the procedures set out in the directive to them. That said, the same recital states that that exclusion must not be extended beyond what is strictly necessary.

40 In that context, and as the Advocate General indicated, in essence, in point 64 of his Opinion, there is no doubt that the care of patients in an emergency situation, carried out moreover in a rescue vehicle by an emergency worker/paramedic is covered by CPV code 75252000-7 (rescue services).

41 It is therefore necessary to assess whether transport by qualified ambulance is also capable of being covered by the same code or by CPV code 85143000-3 (ambulance services).

42 In that regard, from the formulation of the first question referred it seems that transport by qualified ambulance does not correspond to the transport of patients in emergency situations. As the Advocate General observes in point 33 of his Opinion, the referring court has distinguished between the care of patients in emergency situations by a rescue vehicle, and the care of patients in an ambulance by a paramedic/medical assistant. It must therefore be held that the latter service, which the referring court classifies as transport by qualified ambulance, is not carried out by means of a rescue vehicle, with all the specialised medical equipment that that implies, but by means of an ambulance which may only be a mere transport vehicle.

43 It is clear from Article 10(h) of Directive 2014/24, read in the light of recital 28 thereof, that the exclusion from the public procurement rules laid down in that provision in favour of danger prevention services only benefits certain emergency services provided by non-profit organisations or associations and that it must not go beyond what is strictly necessary.

44 It follows that the inapplicability of the public procurement rules laid down in Article 10(h) of that directive is inextricably linked to the existence of an emergency service.

45 It follows that the presence of qualified personnel on board an ambulance cannot suffice to establish, in itself, the existence of an ambulance service covered by CPV code 85143000-3.

46 An emergency may, despite everything, be shown to exist, at least potentially, where it is necessary to transport a patient whose state of health is at risk of deterioration during that transport. It is only in those circumstances that transport by qualified ambulance could fall within the scope of the exclusion from the application of the public procurement rules laid down in Article 10(h) of directive 2014/24.

47 In that regard, it must be emphasised that, at the hearing before the Court, both the City of Solingen and the German Government explained, in essence, that transport by qualified ambulance is characterised by the fact that, due to the state of the patient’s health, an emergency situation could arise at any time in the transport vehicle.

48 It is therefore on the ground that there is a risk of deterioration in the state of the patient's health during his transport that personnel properly trained in first aid must be on board that vehicle in order to be able to care for the patient and, if necessary, provide the urgent medical care that he may require.

49 It is necessary, in addition, to clarify that it must be possible for the risk of deterioration in the patient's state of health to be, in principle, objectively assessed.

50 It follows that transport by qualified ambulance is only capable of constituting an 'ambulance service' covered by CPV code 85143000-3, within Article 10(h) of Directive 2014/24, where, first, it is in fact undertaken by personnel properly trained in first aid and, second, it is provided to a patient whose state of health is at risk of deterioration during that transport.

51 Therefore, the answer to the first and fourth questions is that Article 10(h) of Directive 2014/24 must be interpreted as meaning that the exclusion from the application of the public procurement rules that it lays down, covers the care of patients in an emergency situation in a rescue vehicle by an emergency worker/paramedic, covered by CPV code 75252000-7 (rescue services) and transport by qualified ambulance covered by CPV code 85143000-3 (ambulance services), provided that, as regards transport by qualified ambulance, it is in fact undertaken by personnel properly trained in first aid and, second, it is provided to a patient whose state of health is at risk of deterioration during that transport.

The second and third questions

52 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 10(h) of Directive 2014/24 must be interpreted as meaning, first, that it precludes public aid associations recognised in national law as civil protection and defence organisations from being regarded as 'non-profit organisations or associations', within the meaning of that provision, in so far as, under national law, recognition as having public aid association status is not subject to not having a profit-making purpose and, second, the organisations and associations whose purpose is to undertake social tasks, which have no commercial purpose and which reinvest any profits in order to achieve the objective of that organisation or association constitute 'non-profit organisations or associations' within the meaning of that provision.

53 In the first place, it suffices to observe that it is clear from the order for reference itself that the legal recognition in German law, on the basis of the first sentence of Paragraph 107(1)(4), second sentence, of the GWB, of the status of a civil protection and defence organisation does not necessarily depend upon whether the organisation concerned is a non-profit organisation.

54 Paragraph 26(1), second sentence, of the Law on civil protection merely affirms that the Workers' Samaritan Federation, the German Life Saving Association, the German Red Cross, St. John's Accident Assistance and the Maltese Aid Service are particularly suitable for collaboration in fulfilling the tasks under that legislation. The certificate of suitability thus issued to those five associations, in accordance with Paragraph 18(2) of the Law on fire protection, recognises their general suitability to participate in rescue operations or assist in the event of public accidents or emergencies, mass interventions or disasters.

55 It appears, moreover, that neither Paragraph 26(1), second sentence, of the Law on civil protection, nor Paragraph 18(2) of the Law on fire protection indicates whether, and to what extent, the not-for-profit aim of the service is to be taken into account or whether it is a condition for the recognition of status as a public aid association.

56 In those circumstances, the attribution under German law of the status of 'civil protection and civil defence organisation' cannot guarantee with certainty that the beneficiary entities of that status do not pursue a profit-making purpose.

57 It should however be noted that, in its written observations, Arbeiter-Samariter-Bund Regionalverband Bergisch-Land (the Bergisch-Land Regional Workers' Samaritan Federation) submitted that, on pain of having its status as a non-profit organisation withdrawn, a person must, pursuant to Paragraph 52 of the Abgabenordnung (Tax Code), constantly carry out an activity intended to bring about, in a disinterested way, material, spiritual or moral benefits for the community.

58 In that regard, it is for the referring court to determine whether Paragraph 107(1)(4), second sentence, of the GWB, read in conjunction with Paragraph 52 of the Tax Code, may be interpreted consistently with the requirements flowing from Article 10(h) of Directive 2014/24.

59 In the second place, organisations and associations whose purpose is to undertake social tasks, which have no commercial purpose and which reinvest any profits in order to achieve the objective of that organisation or association constitute ‘non-profit organisations or associations’, within the meaning of Article 10(h) of Directive 2014/24.

60 In that regard, it must be held, as the Advocate General observed in points 74 to 77 of his Opinion, that non-profit organisations or associations referred to in recital 28 of Directive 2014/24 are not required also to satisfy the conditions laid down in Article 77(2) of that directive. There is no equivalence between, on the one hand, those organisations and associations referred to in recital 28 and, on the other hand, the ‘organisations which are based on employee ownership or active employee participation in their governance’ and ‘existing organisations such as cooperatives’, which are referred to in recital 118 of the same directive. Therefore, there also cannot be equivalence between Article 10(h) of Directive 2014/24, which excludes certain activities of non-profit organisations or associations from the scope of that directive, and Article 77 of the directive, which subjects certain activities of organisations based on employee ownership or employee participation in the organisation’s governance and existing organisations, such as cooperatives, to the light regime laid down in Articles 74 to 77 of Directive 2014/24.

61 Consequently, the answer to the second and third questions is that Article 10(h) of Directive 2014/24 must be interpreted as meaning, first, that it precludes public aid associations recognised in national law as civil protection and defence associations from being regarded as ‘non-profit organisations or associations’, within the meaning of that provision, in so far as, under national law, recognition as having public aid association status is not subject to not having a profit-making purpose and, second, that organisations or associations whose purpose is to undertake social tasks, which have no commercial purpose and which reinvest any profits in order to achieve the objective of that organisation or association constitute ‘non-profit organisations or associations’ within the meaning of that provision.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 10(h) of Directive 2004/24/EU, of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, must be interpreted as meaning that the exclusion from the application of the public procurement rules that it lays down, covers the care of patients in an emergency situation in a rescue vehicle by an emergency worker/paramedic, covered by CPV [Common Procurement Vocabulary] code 75252000-7 (rescue services) and transport by qualified ambulance, which comprises, in addition to the provision of transport, the care of patients in an ambulance by a paramedic assisted by a medical assistant, covered by CPV code 85143000-3 (ambulance services), provided that, as regards transport by qualified ambulance, it is in fact undertaken by personnel properly trained in first aid and, second, it is provided to a patient whose state of health is at risk of deterioration during that transport.**

2. **Article 10(h) of Directive 2014/24 must be interpreted as meaning, first, that it precludes public aid associations recognised in national law as civil protection and defence associations from being regarded as ‘non-profit organisations or associations’, within the meaning of that provision, in so far as, under national law, recognition as having public aid association status is not subject to not having a profit-making purpose and, second, that organisations or associations whose purpose is to undertake social tasks, which have no**

commercial purpose and which reinvest any profits in order to achieve the objective of that organisation or association constitute 'non-profit organisations or associations' within the meaning of that provision.

[Signatures]

---

* Language of the case: German.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 14 November 2018 (1)

Case C-465/17

Falck Rettungsdienste GmbH,

Falck A/S

v

Stadt Solingen,

interveners:

Arbeiter-Samariter-Bund Regionalverband Bergisch Land e.V.,

Malteser Hilfsdienst e.V.,

Deutsches Rotes Kreuz, Kreisverband Solingen

(Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany))

(Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Specific exclusions relating to service contracts — Civil defence, civil protection and danger prevention services — Non-profit organisations or associations — Ambulance services)

1. According to Article 10(h) of Directive 2014/24/EU, (2) that directive is not to apply to public contracts for certain civil defence, civil protection and danger prevention services that are provided by non-profit organisations or associations.

2. This reference for a preliminary ruling seeks to ascertain whether that exclusion includes ‘ambulance services’ and what interpretation is to be given to the concept of ‘non-profit organisations or associations’. The issue arises as to whether the laws of the Member States are to be taken into account in defining the meaning of that expression.

I. Legislative framework

A. EU law

1. Directive 2014/24

3. Recitals 28 and 118 of that directive read as follows:

‘(28) This Directive should not apply to certain emergency services where they are performed by non-profit organisations or associations, since the particular nature of those organisations would

be difficult to preserve if the service providers had to be chosen in accordance with the procedures set out in this Directive. However, that exclusion should not be extended beyond that strictly necessary. It should therefore be set out explicitly that patient transport ambulance services should not be excluded. In that context it is furthermore necessary to clarify that CPV [*Common Procurement Vocabulary*] Group 601 “Land Transport Services” does not cover ambulance services, to be found in CPV class 8514. It should therefore be clarified that services, which are covered by CPV code 85143000-3, consisting exclusively of patient transport ambulance services, should be subject to the special regime set out for social and other specific services (the “light regime”). Consequently, mixed contracts for the provision of ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services.

…

(118) In order to ensure the continuity of public services, this Directive should allow that participation in procurement procedures for certain services in the fields of health, social and cultural services could be reserved for organisations which are based on employee ownership or active employee participation in their governance, and for existing organisations such as cooperatives to participate in delivering these services to end users. This provision is limited in scope exclusively to certain health, social and related services, certain education and training services, library, archive, museum and other cultural services, sporting services, and services for private households, and is not intended to cover any of the exclusions otherwise provided for by this Directive. Those services should only be covered by the light regime.’

4. In accordance with Article 10, Directive 2014/24 is not to apply to public service contracts for:

‘…

(h) civil defence, civil protection, and danger prevention services (3) that are provided by non-profit organisations or associations, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3, except patient transport ambulance services;

…’

5. Article 76 provides:

‘1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.

2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.’

6. Article 77 provides:

‘1. Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74, which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4 and 98133110-8.

2. An organisation referred to in paragraph 1 shall fulfil all of the following conditions:

(a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1;

(b) profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;

(c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and

(d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

…'

B. National law

7. In accordance with Paragraph 107(1), point 4, first part, of the Gesetz gegen Wettbewerbsbeschränkungen, (4) that Law is not to apply to the award of contracts for civil defence, civil protection and danger prevention services that are provided by non-profit organisations or associations and that are covered by CPV codes 7520000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3, except patient transport ambulance services.

8. By that provision, the German legislature transposed into its national law Article 10(h) of Directive 2014/24, but it added a second part worded as follows:

'[N]on-profit organisations or associations within the meaning of this point shall be, in particular, aid organisations recognised as civil defence and civil protection organisations under federal or *Land* law'.

9. According to Paragraph 2(1) of the Gesetz über den Rettungsdienst sowie die Notfallrettung und den Krankentransport durch Unternehmer, (5) emergency medical services include emergency response, patient transport and the provision of care to large numbers of sick and injured in the event of exceptional disasters.

10. The first sentence of Paragraph 2(2) of the RettG NRW states that the emergency response service has the task of performing life-saving measures on emergency patients at the site of an emergency and, while making and keeping them fit to be transported and preventing any further harm to them, transporting them by emergency doctor's vehicle or ambulance to a hospital suitable for the provision of further care.

11. Pursuant to Paragraph 2(3) of the RettG NRW, the patient transport service has the task of providing professional help to the sick and injured or other persons in need of help who are not covered by subparagraph 2 and transporting them by ambulance under the care of medically qualified personnel.

12. The second sentence of Paragraph 26(1) of the Zivilschutz- und Katastrophenhilfegesetz (6) states that organisations eligible to work alongside their public-sector counterparts in performing the tasks provided for in that Law include in particular the Arbeiter-Samariter-Bund, the Deutsche Lebensrettungsgesellschaft, the Deutsches Rotes Kreuz (German Red Cross), the Johanniter-Unfall-Hilfe and the Malteser-Hilfsdienst.

13. Paragraph 18(1), first sentence, and (2) of the Gesetz über den Brandschutz, die Hilfeleistung und den Katastrophenschutz (7) provides:

'1. Private aid organisations shall lend assistance in the event of accidents and public emergencies, major relief operations and disasters, if they have registered their willingness to work with the public services with the highest supervisory authority and the latter has recognised both their eligibility to do so and the need for their assistance (recognised aid organisations). …

2. In the case of the organisations referred to in the second sentence of Paragraph 26(1) of the [ZSKG] …, a registration of willingness to work alongside the public services and a general recognition of eligibility to do so shall not be required.'

II. Facts and questions referred

14. In March 2016, the City of Solingen (Germany) decided to award a new five-year contract for the provision of municipal emergency services. (8) Instead of publishing the contract notice, the municipal body invited tenders from four aid organisations. Finally, it awarded two of the tenderers (Arbeiter-Samariter-Bund and Malteser Hilfdienst) one each of the two lots into which the contract was divided.

15. Falck Rettungsdienste and Falck, undertakings providing emergency response and patient care services, submitted before the Vergabekammer Rheinland (Public Procurement Tribunal for the Rhineland, Germany) an objection to the effect that the aforementioned award should have complied with the public procurement procedures under EU law.

16. The Tribunal dismissed the challenge on 19 August 2016, on the ground that Paragraph 107(1), point 4, of the GWB was applicable.

17. That decision was appealed to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), which has referred to the Court of Justice for a preliminary ruling the following questions:

‘(1) Do the care and treatment of emergency patients in an ambulance by an emergency worker/paramedic and the care and treatment of patients in a patient transport ambulance by a paramedic/medical assistant constitute “civil defence, civil protection, and danger prevention services” within the meaning of Article 10(h) of Directive 2014/24 which come under CPV codes 75252000-7 (rescue services) and 85143000-3 (ambulance services)?

(2) Can Article 10(h) of Directive 2014/24 be understood as meaning that “non-profit organisations or associations” include, in particular, aid organisations that are recognised under national law as civil defence and civil protection organisations?

(3) Are “non-profit organisations or associations” within the meaning of Article 10(h) of Directive 2014/24 those whose mission is fulfilled in the achievement of tasks in the public good, which do not operate with a view to making a profit and which reinvest any profits in order to realise the mission of the organisation?

(4) Is the transport of a patient in an ambulance while care is provided by a paramedic/medical assistant (so-called qualified patient transport) a “patient transport ambulance service” within the meaning of Article 10(h) of Directive 2014/24, which is not covered by the exclusion and to which Directive 2014/24 applies?’

III. Procedure before the Court of Justice and positions of the parties

18. The reference for a preliminary ruling was registered at the Court of Justice on 2 August 2017. Written observations have been lodged by Arbeiter-Samariter-Bund, Falck Rettungsdienste, Malteser Hilfsdienst, the German Red Cross, the City of Solingen, the German, Norwegian and Romanian Governments and the Commission. With the exception of the Norwegian and Romanian Governments, all the parties attended the public hearing held on 5 September 2018.

19. Falck Rettungsdienste submits as a preliminary point that Article 10(h) of Directive 2014/24 is contrary to primary law, inasmuch as it establishes an exclusion based on a personal rather than a material criterion. That provision must therefore be interpreted in such a way as to bring it into line with the rules of EU law, and so as to clarify the conditions which primary law attaches to the direct award of contracts to non-profit associations.

20. In the view of Falck Rettungsdienste:

— The first question must be answered in the negative. It advocates a restrictive interpretation of the exclusion on the basis of which danger prevention would be confined to the largest and most serious emergencies.

— The second question must also be answered in the negative, since, under German law, recognition of the status of civil protection and civil defence organisations is not subject to their being non-profit-making.

— The third question also warrants an answer in the negative, since the conditions which the national legislation attaches to the definition of an organisation as non-profit-making are not consistent with the case-law of the Court of Justice.

— The fourth question must be answered in the affirmative, as is clear from the wording of Article 10(h) and recital 28 of Directive 2014/24.

21. The City of Solingen:

— Argues, in relation to the first question, that ‘danger prevention’ should be interpreted as including any act aimed at preventing an individual from being exposed to risk and/or harm, which would include transport by qualified ambulance.

— Submits, in connection with the second question, that the German legislature’s reference to public aid associations is simply an ‘instance’ which does not prevent other bodies from asserting their status as ‘non-profit organisations’ within the meaning of Directive 2014/24.

— Construes that term, in response now to the third question, as requiring only the disinterested performance of public-service tasks.

— Contends that the answer to the fourth question should be that the exception to the exclusion in Article 10(h) of Directive 2014/24 does not include transport by qualified ambulance. In particular, emergency response and qualified transport form an organisational unit that calls for uniform treatment.

22. Arbeiter-Samariter-Bund shares, in essence, the position adopted by the City of Solingen with respect to the first, third and fourth questions. As regards the second question, it submits that the national legislature used the discretion available to it in transposing the concept of non-profit organisation. The same arguments are advanced by Malteser Hilfdienst.

23. The German Red Cross, which begins by expressing its disagreement with the preliminary observations made by Falck Rettungsdienste, adopts a position similar to that of City of Solingen in relation to the first and third questions. On the second question, it, like Arbeiter-Samariter-Bund, contends that the Member States have some discretion in defining non-profit organisations. In connection with the fourth question, it submits that qualified patient transport is a crucial component not only of civil defence and civil protection but also of danger prevention. In its view, such transport falls within the scope *ratione materiae* of the exclusion at issue.

24. In the view of the German Government:

— As regards the first question, danger prevention should be interpreted extensively so as to include assistance to patients involved in individual accidents and emergencies, as compared with situations of large-scale damage that are more typical of civil defence and civil protection.

— On the second question, it shares the position of the City of Solingen, and points out the fact that the concept of non-profit organisation must be understood in the light of recital 28 of Directive 2014/24. The ‘particular nature’ of such organisations can be determined only within the legal and material framework of the Member State in which they perform their tasks.

— As for the third question, it submits that the national legislature has defined the non-profit nature of organisations as lying, on the one hand, in the fact that they act, in the interests of the well-being and security of citizens, in the areas of non-police damage prevention, civil defence and civil protection, and, on the other hand, in the fact that many of their tasks are entrusted to volunteers; the consequences of this approach, it submits, are no different from those that would follow from applying different or additional criteria.

— The fourth question warrants an answer in the negative, on account of the difference between basic patient transport and transport by qualified ambulance.

25. The Norwegian Government:

— Submits that damage prevention services are not confined to those provided in the event of major disasters but include situations such as that described by the referring court in the first question, which, it argues, in answer to the fourth question, does not constitute a ‘patient transport ambulance service’.

— On the second and third questions, it contends that the concept of non-profit organisation warrants an independent interpretation and is capable of including an organisation recognised as such by national law, in so far as the latter is consistent with that interpretation. Nonetheless, the assessment as to whether an organisation is non-profit-making varies according to the divergent traditions of the Member States, to which it is appropriate in principle to entrust such an assessment, rather than to impose on them a definition which goes beyond that which would follow from a ‘natural interpretation’ of the directive. On a natural interpretation, non-profit organisations perform public-service tasks, have no commercial purpose and reinvest any profits they generate in pursuit of the objectives they serve.

26. The Romanian Government has commented only on the first and fourth questions, which it has examined jointly. In its opinion, civil defence, civil protection and danger prevention services encompass assistance both to groups of individuals in extreme situations and to individuals under threat to life or health from common dangers. An interpretation of Article 10(h) of Directive 2014/24 in the light of recital 28 thereof calls for emphasis to be placed on the concept of exclusive transport rather than on the type of response personnel or on the care received during transport.

27. From that point of view, ambulance services include both emergency medical response and non-emergency unassisted patient transport. In the first category, there is no difference between transport by ambulance in the charge of an emergency doctor and paramedic and transport by ambulance in the care of a paramedic and a medical assistant, since both services exhibit features of emergency medical response and are exclusively concerned with the end objective of preventing danger. The second category, on the other hand, consists of services which, being provided by ambulances that are not equipped for emergency medical intervention and are driver-only operated, such that they do not fall within the scope of civil defence, civil protection or danger prevention.

28. According to the Commission:

— In relation to the first question, danger prevention is not confined to exceptional emergencies or dangers affecting large groups of people.

— The second and third questions warrant a joint examination that supports the inference of answers in the negative and affirmative respectively. Non-profit organisations cannot be regarded as having to be ones recognised by national law as having public service status, but are, rather, those which exhibit the characteristics listed in the third question raised by the referring court.

— On the fourth question, the difference between the exclusion and the exception to that exclusion in Article 10(h) of Directive 2014/24 lies in whether the contract provides only for patient transport or also for other services such as medical assistance during transport. The distinction must be drawn at the time of selecting the procurement procedure rather than in the context of an emergency or in the course of transporting the patient.

IV. Analysis

29. The questions referred by the national court seek, in essence, to ascertain what conditions an ambulance service must fulfil in order to be included in or excluded from the scope of Directive 2014/24. Those conditions concern: (a) the nature of that service itself, viewed objectively; and (b) a specific personal or subjective feature of the provider of the service, which must be a non-profit organisation or association.

30. The first and fourth questions raised by the referring court have to do with the *objective* activity of the ambulance service. In principle, such a service will be excluded from the scope of Directive 2014/24 only if, being amenable to classification in the category of 'civil defence, civil protection and danger prevention services', it is not simply a 'patient transport ambulance service'. The latter services make up the exception to the exclusion and, as such, are subject to the general public procurement rules.

31. The second and third questions relate to the *subjective* status of the ambulance service provider, which has to be a 'non-profit organisation or association'. This issue, in particular, is whether this is an independent concept of EU law.

A. The ambulance service in the context of Directive 2014/24 (first and fourth questions)

32. The referring court wishes to ascertain whether the following two specific services fall within the category of 'civil defence, civil protection and danger prevention services':

— Emergency care and treatment of patients who have been involved in an accident or similar event ('Notfallpatienten'), which is provided in an emergency ambulance ('Rettungswagen') 'by an emergency worker/paramedic'.

— Patient care and treatment provided in a patient transport ambulance ('Krankentransportwagen') by a paramedic/medical assistant'.

33. Although both services provide care and treatment to patients, they differ in relation to the criterion of 'emergency', which, from the point of view of both the characteristics of the vehicle and the situation of the person being attended to, is met only in the context of the former. In the case of the former service, therefore, the ambulance is [literally] a '*rescue* vehicle', while, in the case of the latter, it is only a '*transport*' vehicle.

34. The referring court is clear that the aforementioned services 'are neither civil defence nor civil protection' services. (9) In its view, which is shared by those who have participated in the proceedings, those services might, 'at most', (10) come under the heading of 'danger prevention'.

35. Directive 2014/24 does not define 'danger prevention', nor does it expressly refer to the right of Member States to determine its meaning. The view must therefore be taken, in accordance with the case-law of the Court of Justice, that that concept calls for an independent interpretation that is uniform throughout the European Union. (11)

36. In order to find the independent meaning that must be given to *danger prevention*, it is appropriate to start with the literal wording of Article 10(h) of Directive 2014/24. In this regard, mention must almost inevitably be made of Article 196 TFEU, which, as Falck Rettungsdienste has submitted, uses the term 'risk prevention' in the context of 'civil protection' to refer to 'natural or man-made disasters'. (12) This would support the idea that that term cannot accommodate emergency services provided in situations involving danger to individuals.

37. It is my view, however, that, just as, in Article 196 TFEU, danger prevention is associated with civil protection, (13) Article 10(h) of Directive 2014/24 employs that term in reference to an activity with connotations of its own which are not necessarily identifiable with civil protection.

38. After all, in Article 10(h) of Directive 2014/24, danger prevention appears to be different from civil protection and civil defence and therefore falls to be interpreted as an independent activity. As the referring court points out, if this were not the case, danger prevention services would always be civil defence or civil protection services. (14)

39. In fact, the conceptual autonomy of danger prevention would stand in opposition to civil protection and civil defence as activities geared towards the management of disasters affecting large numbers of people. In contrast to such situations of collective impact, the danger prevention to which Directive 2014/24 relates would be that in which individuals are in a situation of personal danger.

40. There is, however, a problem with the interpretation thus advocated by the referring court. The term 'prevention' in its most common sense, as Falck Rettungsdienste has emphasised, (15) denotes the

anticipation of a risk or danger. It therefore implies protection which is *preventive* rather than *reactive* to a risk which has been realised by, and damage which has been caused by, the materialisation of a danger.

41. If that semantic issue were to prevail, the ambulance service at issue in these proceedings would be excluded, almost in principle, from the scope of 'danger prevention'. Only by way of a highly contrived interpretation could it be said that transporting the sick or injured by ambulance is an act of *preventing* the risk of a deterioration in their state of health that would exist if that transport were not available.

42. The misgivings prompted by a literal interpretation can, however, be overcome by a schematic interpretation of Article 10(h) of Directive 2014/24. That provision does not as a matter of general and abstract principle exclude from the scope of Directive 2014/24 all 'civil defence, civil protection and danger prevention' services, but only those included in certain CPV codes.

43. Among the services covered by those codes are some which fall within the concept of prevention in a technical or strict sense (16) and others which, being essentially reactive rather than preventive (for example, 'rescue services'), (17) may be provided both in disaster situations and in cases of harm or danger to individuals.

44. If, as Falck Rettungsdienste submits, (18) the concepts of 'civil protection, civil defence and danger prevention' were 'material criteria' for identifying, from among all the services covered by the CPV codes mentioned in Article 10(h) of Directive 2014/24, those provided in disaster situations, the only 'rescue services' under CPV code 75252000-7 to be excluded from the scope of the directive would, in consequence, be those delivered to large numbers of people, not those provided in an emergency response for the benefit of a single individual.

45. Now, the CPV codes listed in Article 10(h) of Directive 2014/24 specifically include code 85143000-3, which designates 'ambulance services'. There would appear to be no reason not to apply in this case the 'material criterion' advocated by Falck Rettungsdienste and to conclude that the exclusion provided for in that provision relates only to ambulance services in disaster situations.

46. However, Article 10(h) of Directive 2014/24 defines ambulance services in such a way that that term is not only inconsistent with that 'material criterion' but actually contradicts it.

47. In providing that 'civil defence, civil protection and danger prevention services … which are covered by CPV code … 85143000-3 (ambulance services) … *except patient transport ambulance services* (19) fall outside the scope of Directive 2014/24, Article 10(h) of that directive specifies an exclusion which, if that provision were subject to the criterion that it relates only to disaster situations, would be unnecessary, as the German Government submits. (20)

48. If the legislature thought it relevant to refer to 'patient transport ambulance services', it was because those services would otherwise have to be construed as being covered by the exclusion provided for in Article 10(h) of Directive 2014/24 (CPV 85143000-3). It is clear, moreover, that the mere *transport* of *patients* is incongruous with a disaster situation, those affected by which, rather than as patients, are more appropriately described as injured persons or victims requiring urgent transfer to hospital under optimum medical care, not transport alone.

49. That conclusion is confirmed by a teleological interpretation of that provision. From this point of view, particular relevance attaches to recital 28 of Directive 2014/24, which states that the latter 'should not apply to certain emergency services where they are provided by non-profit organisations or associations, since the particular nature of those organisations would be difficult to preserve if the service providers had to be chosen in accordance with the procedures set out in this directive'.

50. Two aspects of that statement strike me as significant. First, the fact that the legislature refers to 'certain *emergency* services'. And, secondly, the fact that those services are identified in relation to 'non-profit organisations or associations' the 'particular nature' of which the legislature wishes to preserve. The exclusion is thus defined by reference to the provider of the service rather than by reference to the scale of the situation in which that provider must act.

51. In other words, whether the situation in question is an emergency involving a single individual or one of large-scale damage, what matters is that it should be an emergency of the kind usually responded to by non-profit organisations or associations. The purpose of that provision of Directive 2014/24 is to preserve those organisations, the continued existence of which could be threatened if they had to submit to the procurement procedures laid down in that directive.

52. In short, what matters is not so much to determine whether an emergency has arisen from a catastrophic event or from a situation involving danger to an individual (road traffic accident, house fire), as to identify the types of emergency that are the principal focus of non-profit organisations traditionally working in the field of healthcare and even humanitarian relief.

53. Thus, as the referring court points out, 'non-profit organisations and associations not only provide services in the areas of civil defence and civil protection [but] are also *and primarily* active in the area of providing daily emergency response services to individuals'. (21)

54. To the extent that the intention set out in recital 28 is given normative expression in Article 10(h) of Directive 2014/24, it is my view that the 'civil defence, civil protection and danger prevention services' mentioned in that article are to be regarded as being equivalent to the 'emergency services' referred to in that recital, and must therefore be identified by reference to 'non-profit organisations or associations'.

55. In effect, recital 28 foreshadows the exclusion which, for our purposes here, Article 10(h) of Directive 2014/24 creates for ambulance services provided by non-profit organisations or associations when responding to the types of emergency that represent the customary focus of their work.

56. That recital states that the exclusion of emergency services provided by non-profit organisations 'should not be extended beyond that strictly necessary', there being a need to 'set out explicitly that patient transport ambulance services should not be excluded'.

57. The issue, then, is how to distinguish between an ambulance service provided in response to an emergency and the *mere* transport of patients by ambulance. It is this issue which the fourth question addresses when asking whether the transport of a patient in an ambulance while care is provided by a paramedic/medical assistant (so-called 'transport by qualified ambulance') may be regarded as a 'patient transport ambulance service' within the meaning of Article 10(h) of Directive 2014/24.

58. The legislature's intention was to confine the exclusion (that is to say, the exemption from the ordinary rules of Directive 2014/24) to *emergency* services. (22) Symmetrically, in referring to 'patient transport ambulance services' as an exception to the exclusion, the legislature makes those services subject to (simplified) public procurement procedures in cases where their purpose is not to respond to an emergency but only to facilitate the transport of a patient by ambulance.

59. Read in this way, Directive 2014/24 will not apply to general ambulance services which, as well as performing a mere transport function, deliver medical or healthcare assistance appropriate to the proper attendance of patients in emergency situations; appropriate, that is to say, to the provision of a service which no other alternative means of transport could provide.

60. After stating that Directive 2014/24 is not applicable to 'patient transport ambulance services', recital 28 is at pains to point out that those services 'should be subject to the special regime set out for social and other specific services (the "light regime")'. In order to give effect to the application of that light regime, the same recital states that patient transport ambulance services do not form part of the '[road] transport services' group, (23) which is subject to the general regime under the directive.

61. There are thus two co-existent categories of service:

— general 'ambulance services' (covered by code 851430000-3), which are exempt from the discipline of Directive 2014/24; and

— 'passenger transport ambulance services', which come under a specific heading in that directive, known as the *light* regime. (24) They would otherwise appear, by virtue of their nature, under the heading 'road transport'.

62. In other words, if ‘transport’ is removed as an inherent component of the ambulance service, the component that remains in CPV code 85143000-3 (that is to say, the service excluded from the application of Directive 2014/24/EU) is characterised predominantly by healthcare. Whether it is administered by a doctor, a healthcare technician or a paramedic, what matters, in my opinion, is that the necessary assistance provided should be essential to enabling the patient to be (urgently) transferred to hospital in such a way as to ensure that he receives the medical care necessary to save his life and preserve his health or well-being in as short a time as possible; essential, in other words, to being able to respond to an *emergency situation*, the exclusion from Directive 2014/24 being applicable, in accordance with recital 28 thereof, only to ‘emergency services’, as I have said before.

63. The two particular scenarios described by the referring court can be assessed on those premisses.

64. The first concerns transport and emergency care and treatment of patients who have been involved in an accident or similar incident (‘Notfallpatienten’), which is provided in an emergency ambulance (‘Rettungswagen’) ‘by an emergency worker/paramedic’. I don’t think there is any issue in assigning these services to CPV code 85143000-3 (ambulance services) and in stating, therefore, that Directive 2014/24 does not apply to them, provided that they are delivered by non-profit organisation or association.

65. The second scenario (fourth question) concerns care and treatment of patients which is provided in a patient transport ambulance (‘Krankentransportwagen’) ‘by a paramedic/medical assistant’. This, therefore, is a ‘patient transport ambulance service’ even where it is provided with the *assistance* of the aforementioned healthcare professionals. In my opinion, there is no emergency properly so-called here: patients can ask someone to travel with them in the transport vehicle, but they do not require emergency medical care. (25) The exception to the exclusion, provided for in Article 10(h), *in fine*, of Directive 2014/24/EU, is therefore applicable.

B. The concept of a non-profit organisation in the context of Directive 2014/24 (second and third questions)

66. As with ‘danger prevention’, (26) once we have determined the meaning of ‘non-profit organisations or associations’ as referred to in Article 10(h) of Directive 2014/24, we must adopt an independent definition of that expression that is uniform across the European Union.

67. The German Government submits that the decisive factor is not so much the concept of ‘non-profit organisations or associations’ as the ‘particular nature’ of those bodies, which, it contends, Directive 2014/24 seeks to ‘preserve’ by excluding them from its scope (recital 28).

68. According to the German Government, in order to identify the particular nature of such organisations, regard must perforce be had to the legislative and substantive framework of the State in which they operate, since it is the Member States which are best placed to assess which organisations fit that description. (27) In its submission, the proposition that observance of national law is key to assessing whether an organisation is non-profit-making is borne out by two judgments of the Court of Justice. (28)

69. However, neither of those judgments recognised the Member States as having any discretion to prescribe the definition of non-profit organisations, recognising only their discretion ‘to decide the level of protection of public health and to organise [their] social security system[s]’, and to state, on the basis of that information, ‘that recourse to voluntary associations is consistent with the social purpose of a medical transport service and may help to control costs relating to that service’. (29)

70. In truth, the concept of ‘non-profit organisations or associations’ is precise enough not to necessitate the grant of a margin of discretion. The fact that an organisational structure is based on voluntary activity may indicate that it is not profit-making, but not necessarily. What matters for our purposes here is that the bodies providing the services at issue *are* non-profit-making. A literal interpretation of the formulation ‘non-profit …’ is therefore sufficient.

71. The referring court proposes a definition which seems reasonable to me. (30) Non-profit organisations, it states, are ones which carry on an activity by which ‘they do not seek to make a profit’ but which they pursue ‘for the benefit of the community without thereby obtaining any financial gain’. (31)

72. Strictly speaking, the notions of ‘benefit [to] the community’ and ‘achievement of tasks in the public good’, to use the expression contained in the third question, are redundant. After all, recital 28 of Directive 2014/24 speaks of non-profit organisations or associations *which perform emergency services*, that is to say, services which fulfil a purpose in the general public interest in their own right.

73. The decisive factor, I would reiterate, is that organisations or associations which provide the services referred to in recital 28 and Article 10(h) of Directive 2014/24 should not seek to make a profit from the pursuit of such emergency activities. (32)

74. This feature aside, the aforementioned organisations do not, in my opinion, also have to satisfy the conditions laid down in Article 77(2) of Directive 2014/24.

75. According to paragraph 1 of that article, Member States’ contracting authorities may *reserve* to certain organisations the right to participate in procedures for the award of contracts exclusively for certain health, social and cultural services, (33) if they fulfil the conditions listed in paragraph 2.

76. None of those conditions includes the non-existence of a profit-making aim. In fact, one of them is based on the contrary assumption. This is true of the condition relating to the distribution of profits, which requires the organisations referred to in paragraph 1 to distribute profits on the basis of participatory considerations. (34)

77. It is my view, therefore, that the distinctive feature of a non-profit organisation or association is precisely that it should not seek to make a profit and, if it generates profits inadvertently (that is to say, without having set out to do so), that it should use these to pursue its social activities; in this instance, to provide emergency healthcare services.

78. The national legislation provides that ‘non-profit organisations or associations [within the meaning of the exclusion provided for in Article 10(h) of Directive 2014/24] shall be, in particular, aid organisations recognised as civil protection and civil defence organisations under federal or *Land* law’. (35)

79. In the view of the German Government, that provision does not lay down a *numerus clausus* with respect to the organisations to which the exclusion provided for in Article 10(h) of Directive 2014/24 applies. Recognition as an ‘aid association’ is not therefore an essential condition which a non-profit body must fulfil in order to benefit from the aforementioned exclusion. (36)

80. What matters here, however, is not so much that the national legislation does not prohibit the recognition as non-profit-making of bodies that satisfy the definition of ‘non-profit organisations or associations’ within the meaning of Article 10(h) of Directive 2014/24, (37) as the fact that it attributes that status to organisations which do not fit the definition of that term.

81. After all, as the referring court states, ‘statutory recognition as civil protection and civil defence organisations under national law does not necessarily depend … on whether the organisation is non-profit-making’. (38)

82. If that were the case, which it falls to the national court to determine, recognition as an aid organisation under national law would not be sufficient to support the view that an organisation or association is non-profit-making within the meaning of Article 10(h) of Directive 2014/24. The latter status is subject to proof that the organisation or association looking to acquire it does not seek to make a profit and, if it does generate profits inadvertently, it uses them to pursue its social mission.

V. Conclusion

83. In the light of the foregoing, I propose that the Court of Justice reply to the Oberlandesgericht Düsseldorf (Higher Regional Court, Dusseldorf, Germany) as follows:

> Article 10(h) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that:

— The urgent transport of patients in an emergency ambulance in which care and treatment are provided by an emergency worker/paramedic must be classified as an ‘ambulance service’ (CPV code 85143000-3) the public procurement of which may not be made subject to the procedures laid down in Directive 2014/24, provided that that service is delivered by a non-profit organisation or association.

— The non-urgent transport of patients in a patient transport ambulance by a paramedic/medical with a paramedic/medical assistant must be classified as a ‘patient transport ambulance service’ which does not fall within the scope of the exclusion applicable to ‘ambulance services’ in general.

— ‘Non-profit organisations or associations’ are those which do not seek to make a profit and, if they do generate profits inadvertently, use these to pursue their social activities. An organisation may not be granted that status on the sole basis of its recognition as an aid association under national law.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

3 For some incomprehensible reason, the Spanish version uses the adjective ‘laborales’ (industrial) to qualify the noun ‘danger’, which is not qualified by an adjective in any other language version. Hereafter, therefore, I shall refer only to ‘danger prevention’.

---

4 Law against restrictions of competition (‘GWB’).

---

5 Law governing the Emergency Medical Service as well as Emergency Rescue and Patient Transport by Contractors of [the *Land* of] North Rhine-Westphalia (‘RettG NRW’).

---

6 Law on civil protection and civil defence (‘ZSKG’), as last amended by Paragraph 2, point 1, of the Law of 29 July 2009.

---

7 Law on fire protection, emergency relief and civil protection (‘BHKG’).

---

8 According to the order for reference, ‘the procurement procedure, which was divided into two lots, had as its subject matter the provision of personnel for a number of municipal emergency ambulances … and patient transport ambulances … and the provision of vehicle locations … It was concerned with the deployment on emergency response calls of municipal ambulances tasked principally with the care and treatment of emergency patients by an emergency worker acting with the support of paramedics, and the deployment of patient transport ambulances tasked principally with the care and treatment of patients by a paramedic acting with the support of a medical assistant.

---

9 Paragraph 14 of the order for reference.

---

10 Cited above.

---

11 See, inter alia, judgment of 21 December 2011, *Ziolkowski and Szeja* (C-424/10 and C-425/10, EU:C:2011:866), paragraph 32.

---

12 The terminological equivalence as between Article 196 TFEU and Article 10(h) of Directive 2014/24 [which exists in Spanish, but not in English, where 'danger prevention' is used in Article 10(h) of Directive 2014/24, but 'risk prevention' is used in Article 196 TFEU] is, however, only partial, since the former refers to 'civil protection' ('Katastrophenschutz', 'protection civile') and ('risk prevention') ('Risikoprävention', 'prévention des risques'), but not also to 'civil defence', as the latter does.

---

13 Under the heading to Title XXIII of Part III of the TFEU of 'Civil protection', Article 196(1) defines civil protection services as 'systems for preventing and protecting against natural or man-made disasters'. Encouragement from the European Union in that context comes in the form of support for the measures adopted by the Member States 'in risk prevention, in preparing their civil-protection personnel and in responding to … disasters' (Article 196(1)(a)). Danger *prevention*, staff *training* and *response* thus make up the sequence of physical processes comprising a comprehensive disaster management service.

---

14 Paragraph 14 of the order for reference. In the view of the referring court, it is '[m]ore logical … to assume that danger prevention refers to something that is not covered by the concepts of civil defence and civil protection because the damage is not caused by the man-made accidents and disasters, natural disasters and terrorist or military threats or risks causing serious harm to human life which those concepts encompass'.

---

15 Paragraph 55 of its observations.

---

16 Thus, CPV 75251110-4 ('fire-prevention services') or CPV 981131000-9 ('nuclear safety services').

---

17 CPV 75252000-7.

---

18 Paragraph 61 Falck Rettungsdienste's observations.

---

19 Emphasis added.

---

20 Paragraph 24 of the German Government's observations.

---

21 Paragraph 14 of the order for reference. Emphasis added. The same argument was put forward by the City of Solingen in paragraph 31 of its written observations.

---

22 That is to say, emergency services *provided by non-profit organisations or associations*.

---

23 This group comprises a total of 15 codes, from 60100000-9 ('road transport services') to 60183000-4 ('hire of vans with driver'), including 'taxi services' (60120000-5), 'special-purpose road-passenger transport services' (60130000-8) and 'non-scheduled passenger transport' (60140000-1).

---

24 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43), which is the immediate precursor to Directive 2014/24, also

distinguished between those two types of ambulance service. As the Court of Justice held in its judgment of 11 December 2014, *Azienda sanitaria locale n.º 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraphs 33 and 34), Directive 2004/18 applies to public service contracts, which Article 1(2)(d) thereof defines as public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II thereto, which is divided into two parts (A and B). Urgent and emergency ambulance services are covered by Category 2 in Annex II A as regards the transport aspects of those services, and Category 25 in Annex II B as regards the medical aspects thereof.

Now, whereas, according to Article 22 of Directive 2004/18, contracts which also have as their object services which appear in those two annexes are to be awarded in accordance with the common procedure (where the value of the services listed in Annex II is greater than the value of the services listed in Annex II B) or (otherwise) in accordance with a light procedure, recital 28 of Directive 2014/24 provides that 'mixed contracts for the provision of ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services'. For the reasons I shall explain at length, those 'other ambulance services' can only be healthcare services provided otherwise than in emergency situations.

---

25 This would be the scenario, for example, in the case of patients transported to hospital for dialysis, check-ups, whether regular or otherwise, diagnostic tests, clinical analyses or any other type of medical examination. At the hearing, there was general agreement that transport of this kind could not be caught by the exception to the exclusion. The City of Solingen stated, moreover, that such transport was not included in the contract at issue.

---

26 See point 36 above.

---

27 Paragraph 45 of the German Government's observations.

---

28 Judgments of 11 December 2014, *Azienda sanitaria locale n.º5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440), paragraph 61, and of 28 January 2016, *CASTA and Others* (C-50/14, EU:C:2016:56), paragraph 64. Both judgments confirm that, from the point of view of EU primary law, there are no grounds for challenging the validity of this type of direct award. In the operative part of the former, the Court held that 'Articles 49 TFEU and 56 TFEU must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which provides that the provision of urgent and emergency ambulance services must be entrusted on a preferential basis and awarded directly, without any advertising, to the voluntary associations covered by the agreements, in so far as the legal and contractual framework in which the activity of those associations is carried out actually contributes to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that legislation is based'. That ruling is reiterated, with very slight variations, in the latter judgment.

---

29 Judgment of 28 January 2016, *CASTA and Others* (C-50/14, EU:C:2016:56), paragraph 62.

---

30 An opinion which, from its submissions at the hearing, the German Government appears to share.

---

31 Paragraph 15 of the order for reference.

---

32 Such organisations or associations could operate via agencies trading in the legal form, for example, of limited liability companies, provided that the latter are non-profit-making. The referring court will, if necessary, have to ascertain whether this is the case here.

---

33 The relationship between Article 10(h) and recital 28 of Directive 2014/24 is reproduced in the case of Article 77(1) and recital 118 of the same directive. While recital 28 refers to ‘non-profit organisations or associations’ as entities whose emergency services are excluded from the scope of Directive 2014/24 by virtue of Article 10(h) of that directive, recital 118 refers to ‘organisations which are based on employee ownership or active employee participation in their governance’ and ‘existing organisations such as cooperatives [which] participate in delivering [certain health, social and cultural] services to end users’; these organisations must fulfil the conditions set out in Article 77(2) of Directive 2014/24 in order for the Member States to be able to reserve the right for them to participate in procedures for the award of public contracts. There is no equivalence, therefore, between the organisations mentioned in recital 28 and those mentioned in recital 118. There is, in consequence, no such equivalence between Article 10(h) (which excludes certain activities pursued by the former organisations from the scope of Directive 2014/24) and Article 77 (which allows certain activities pursed by the latter organisations to have that directive applied to them in a particular way).

---

34 Article 77(2)(b) of Directive 2014/24. It is true that this provision requires that ‘profits [be] reinvested with a view to achieving the organisation’s objective’; it does not, however, rule out their existence or, in particular, prohibit their distribution, albeit on the basis of ‘participatory considerations’.

---

35 Paragraph 107(1), point 4, second part, of the GWB.

---

36 Paragraph 40 of the German Government’s observations. At the hearing, there was some debate as to whether that limit on numbers, which the national legislation itself does not lay down (by virtue of the use of the expression ‘in particular’), exists in fact.

---

37 That is the situation in this case, according to the City of Solingen in paragraphs 37 and 38 of its written observations.

---

38 Paragraph 15 of the order for reference.

JUDGMENT OF THE COURT (Ninth Chamber)

25 October 2018 (*)

(Reference for a preliminary ruling — Public supply contract for medical diagnostic equipment and materials — Directive 2014/24/EU — Article 42 — Award — Margin of appreciation of the contracting authority — Detailed formulation of the technical specifications)

In Case C-413/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania), made by decision of 30 June 2017, received at the Court on 10 July 2017, in the proceedings brought by

‘Roche Lietuva’ UAB

in the presence of:

Kauno Dainavos poliklinika VšĮ,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, E. Juhász (Rapporteur) and C. Vajda, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– ‘Roche Lietuva’ UAB, by G. Balčiūnas and K. Karpickis, advokatai,

– Kauno Dainavos poliklinika VšĮ, by K. Laurynaitė and J. Judickienė, advokatai,

– the Lithuanian Government, by D. Kriaučiūnas and K. Dieninis, and by D. Stepanienė, acting as Agents,

– the Greek Government, by M. Tassopoulou and A. Magrippi, and by K. Georgiadis, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

– the European Commission, by A. Steiblytė and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2 and 23 and of Annex VI to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the

coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings brought by ‘Roche Lietuva’ UAB, an unsuccessful tenderer in a procedure for the award of a public procurement contract organised by Kauno Dainavos poliklinika VšĮ, a public polyclinic established in Kaunas (Lithuania) (‘the Polyclinic for the Dainava District of Kaunas’), regarding the technical specifications of that contract.

Legal context

European Union law

3 Directive 2004/18 was repealed, with effect from 18 April 2016, by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65), in accordance with Article 91(1) of the latter directive.

4 Recital 74 of Directive 2014/24 states:

‘(74) The technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services.

Consequently, technical specifications should be drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows that objective to be achieved in the best way possible. Functional and performance-related requirements are also appropriate means to favour innovation in public procurement and should be used as widely as possible. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements should be considered by contracting authorities. It should be the responsibility of the economic operator to prove equivalence with the requested label.

…’

5 Article 18(1) of that directive, entitled ‘Principles of procurement’, provides:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

6 Article 42 of the directive, entitled ‘Technical specifications’, provides:

‘1. The technical specifications as defined in point 1 of Annex VII shall be set out in the procurement documents. The technical specifications shall lay down the characteristics required of a works, service or supply.

Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance, provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

…

2. Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

(a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when any of those do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words “or equivalent”;

(c) in terms of performance or functional requirements referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;

(d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

4. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words “or equivalent”.

…’

7 Annex VII to Directive 2014/24, entitled ‘Definition of certain technical specifications’, provides in its first paragraph:

‘For the purpose of this Directive:

1. “technical specification” means one of the following:

(a) ...

(b) in the case of public supply or service contracts a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures.’

Lithuanian law

8 Articles 2 and 23 of, and Annex VI to, Directive 2004/18 have been transposed into Lithuanian law by Articles 3 and 25 of, and Appendix 3 to, the Lietuvos Respublikos viešųjų pirkimų įstatymas (Law on Public Procurement of the Republic of Lithuania). As regards Directive 2014/24, it was transposed by law XIII-327 of 2 May 2017. That law entered into force on 1 July 2017.

The dispute in the main proceedings and the question referred for a preliminary ruling

9 It appears from the file before the Court that on 22 June 2016, the Polyclinic for the Dainava District of Kaunas published public procurement procedure entitled ‘Procurement of services concerning the rental of laboratory diagnostic equipment for human health care and procurement of materials and services to ensure the operation of such equipment’. That procurement was divided into 13 lots. The value of the part of the lot at issue amounts to EUR 250 000.

10 On 4 July 2016, Roche Lietuva argued, in the context of a complaint, that the technical specifications set out in Annex 1 to the contract documents unreasonably restricted competition among suppliers due to their high specificity and in reality corresponded to the products of specific manufacturers of blood analysers. The Polyclinic for the Dainava District of Kaunas, by a decision of 14 July 2016, amended certain provisions of the technical specifications.

11 On 28 July 2016, unsatisfied with the amendments brought to the tender specifications following its complaint, Roche Lietuva brought an application before the national courts.

12 The first-instance court as well as the appellate court dismissed Roche Lietuva’s application, on 6 October and 14 December 2016 respectively, namely on the grounds that the Polyclinic for the Dainava District of Kaunas had correctly exercised its discretion in laying down the detailed technical specifications in the light of its requirements based on the quality of testing and the value of health care, and that the applicant in the main proceedings had failed to prove that the tender specifications at issue corresponded to specific devices or manufacturers.

13 On 28 December 2016, the Polyclinic for the Dainava District of Kaunas terminated the procurement procedure concerned following a request to that effect by the Viešųjų pirkimų tarnyba (Public Procurement Office, Lithuania) that authority having found the infringement of applicable provisions other than the ones indicated in the request for a preliminary ruling.

14 On 17 January, 2017, Roche Lietuva filed an appeal in cassation before the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania), which examined that case on 17 May 2017. By order of 19 June 2017, that court decided ex officio to re-open the case. It informed the parties of its intention to go beyond the ambit of the appeal in cassation and invited them, as well as the Public Procurement Office, to submit their observations on the provisions of the procurement specifications defining not the requirements applicable to the services (medical analyses), but to the requirements concerning the materials necessary for the provision of those services.

15 The referring court raises the question of the limits to the margin of appreciation of a contracting authority, such as the defendant in the main proceedings, regarding the laying down, in the procurement documents, of specific characteristics of supplies of medical equipment to be acquired not for the independent purpose of having them at one’s disposal but for the purpose of carrying out medical tests. In that regard, the referring court asks whether that contracting authority would comply with the legal requirements if the functioning of the equipment was defined as a functional requirement, regarding not the isolated functioning of the equipment or its characteristics, but rather the result of that functioning, namely as regards the speed or reliability of the tests and of the methods used.

16 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Should Articles 2 and 23 of, and Annex VI to, Directive 2004/18 (whether together or separately, but without limitation to those provisions), be interpreted and understood as meaning that, in the case where a contracting authority — a human health care institution — intends to acquire supplies (medical diagnostic equipment and materials) or specific rights thereto by way of a public procurement

procedure in order to be able to carry out tests by itself, its discretion includes the right to lay down in the technical specifications only such requirements for those supplies as do not describe in isolation the individual operational (technical) and use-related (functional) characteristics of the equipment and/or materials but instead define the qualitative parameters of the tests to be carried out as well as the performance of the testing laboratory, the content of which must be separately described in the specifications of the public procurement procedure in question?'

Preliminary observations

17 The referring court refers to certain provisions of Directive 2004/18 in its question. As regards the *ratione temporis* applicability of that directive, it should be noted that the notice of procurement at issue in the main proceedings was published on 22 June 2016, that is after the date that the repeal of that directive took effect, that date having been fixed on 18 April 2016, in accordance with Article 91(1) of Directive 2014/24.

18 According to established case-law, the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for tenders to be issued for the award of a public procurement contract (judgment of 14 September 2017, *Casertana Costruzioni*, C-223/16, EU:C:2017:685, paragraph 21 and the case-law cited).

19 It should be added that Articles 2 and 23 of Directive 2004/18 were substantially reproduced in, respectively, Article 18(1) and in Articles 42 to 44 of Directive 2014/24. The content of Annex VI to Directive 2004/18 was substantially reproduced in Annex VII to Directive 2014/24. The conditions applicable to the technical specifications defining the required characteristics of the works, services or supplies that are the object of a contract are more specifically governed by Article 42 of that latter directive.

20 It follows that the relevant provisions of Directive 2014/24 should be interpreted in order to provide a useful answer to the referring court.

Consideration of the question referred

21 In light of the above, it must be noted that, by its question, the referring court asks, in essence, to what extent, under Articles 18 and 42 of Directive 2014/24, and according to the principles of equal treatment and proportionality, a contracting authority must attach importance to the individual characteristics of the devices or to the result of the functioning of those devices when establishing technical specifications in a procurement procedure regarding the acquisition of medical supplies.

22 As a preliminary point, the European Commission wonders whether that question is admissible in the light of the fact that the tender procedure, which was the object of the dispute in the main proceedings, was terminated, so that the question is rendered hypothetical.

23 In that regard, it is necessary to state that in accordance with the settled case-law of the Court, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling and the relevance of the questions which it submits to the Court. Consequently, where the questions referred by national courts concern the interpretation of a provision of European Union law, the Court is, in principle, bound to give a ruling. In the context of the procedure for cooperation between the Court of Justice and national courts that is established by Article 267 TFEU, questions concerning EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court under Article 267 TFEU only where, for instance, the requirements concerning the content of a request for a preliminary ruling set out in Article 94 of the Rules of Procedure of the Court of Justice are not satisfied, or where it is quite obvious that the interpretation of a provision on EU law, or the assessment of its validity, which is sought by the national court, bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical (judgment of 25 July 2018,

Confédération paysanne and Others, C-528/16, EU:C:2018:583, paragraphs 72 and 73, and the case-law cited).

24 In the present case, the referring court provided in its request for a preliminary ruling several grounds indicating the reasons why, despite the termination of the procurement procedure, there remains, according to national law, a legal interest in the resolution of the dispute. In those circumstances, it should be declared that the question referred is not of hypothetical nature and must, consequently, be considered admissible.

25 On the substance, in accordance with Article 42(1) of Directive 2014/24, the technical specifications defined in paragraph 1 of Annex VII to that directive are set out in the procurement documents, and lay down the required characteristics of the works, services or supplies.

26 Under Article 42(3) of that directive, the technical specifications can be formulated in several ways, either in terms of performance or functional requirements, or by reference to technical specifications, and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when any of those do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies, or a combination of both ways.

27 In this regard, it should be noted that Article 42(3), which provides that the technical specifications shall be formulated in terms of performance or functional requirements that are sufficiently precise or by reference to technical specifications and to various standards, does not exclude the specification, in a procurement procedure regarding medical supplies intended to carry out medical examinations, of the individual operational and use-related characteristics of the materials.

28 Furthermore, the wording of Article 42(3) of Directive 2014/24 does not establish a hierarchy among the methods of formulation of technical specifications and does not prioritise either of those methods.

29 Moreover, it appears from that provision that the Union legislation relating to technical specifications allows broad discretion for the contracting authority in the formulation of the technical specifications of a procurement contract.

30 That margin of appreciation is justified by the fact that the contracting authorities are better placed to know which supplies they need and to determine the requirements necessary to achieve the desired results.

31 Nonetheless, Directive 2014/24 sets certain limits that the contracting authority must comply with.

32 In particular, Article 42(2) of Directive 2014/24 requires that the technical specifications afford equal access of economic operators to the procurement procedure and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

33 That requirement implements the principle of equality of treatment set out in the first subparagraph of Article 18(1) of that directive for the purpose of the formulation of technical specifications. According to this provision, contracting authorities are to treat economic operators equally and without discrimination and are to act in a transparent and proportionate manner.

34 As the Court has previously held, the principles of equality of treatment, non-discrimination and transparency are of crucial importance so far as concerns technical specifications, in the light of the risks of discrimination related either to the choice of specifications or their formulation (see, as regards Directive 2004/18, judgment of 10 May 2012, *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 62).

35 It is, in addition, stated in the second subparagraph of Article 18(1) of Directive 2014/24 that the design of a procurement is not to be made with the intention of excluding it from the scope of that directive or of artificially narrowing competition, and that competition is to be considered to be

artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

36 Similarly, recital 74 of Directive 2014/24 specifies that technical specifications should be ‘drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator’. Also according to that recital, ‘it should be possible to submit tenders that reflect the diversity of technical solutions standards and technical specifications in the marketplace’.

37 Complying with those requirements is all the more important when, as in the present case, the technical specifications listed in the procurement documents are formulated in a particularly detailed manner. Indeed, the more detailed the technical specifications, the higher the risk of favouring the products of a given manufacturer will be.

38 As follows from Article 42(4) of Directive 2014/24, it is possible, on an exceptional basis and where a sufficiently precise and intelligible description of the subject matter pursuant to Article 42(3) of that directive is not possible, to refer to a specific make or source, or a particular process, which characterises the products of services provided by a specific economic operator, or to trade marks or patents, to the extent that it is justified by the subject matter and that the conditions laid out in Directive 2014/24 are complied with, in particular that such reference is accompanied, in the contract documents, by the words ‘or equivalent’. Nonetheless, since that provision constitutes a derogation, the conditions in which the contracting authority may make use of such a possibility must be strictly interpreted.

39 According to previous case-law on public supply contracts, the failure to add the words ‘or equivalent’ after the designation, in the contract documents, of a particular product, may not only deter economic operators using systems similar to that product from taking part in the procurement procedure, but may also impede the flow of imports in intra-Union trade, by reserving the contract exclusively to suppliers intending to use the product specifically indicated (see, to that effect, order of 3 December 2001, *Vestergaard*, C-59/00, EU:C:2001:654, paragraph 22 and the case-law cited).

40 In the light of the above factors, it is for the referring court to determine if, taking into account the contracting authority’s margin of appreciation in laying down the technical specifications according to the qualitative requirements related to the subject matter of the procurement contract at issue, the particularly detailed character of the technical specifications at issue does not indirectly favour a tenderer.

41 It is also necessary that the level of detail of the technical specifications complies with the principle of proportionality, which implies, in particular, an examination of the question establishing whether that level of detail is necessary to achieve the desired objectives.

42 That being said, it should be noted that the principle of proportionality is applied in a particular manner in the sensitive area of public health. The Court has consistently held that, in order to assess whether a Member State has observed the principle of proportionality in the area of public health, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty FEU and that it is for the Member States to determine the degree of protection which they wish to afford to public health and the way in which that degree of protection is to be achieved. Since that level may vary from one Member State to another, Member States should be allowed a measure of discretion (see judgment of 8 June 2017, *Medisanus*, C-296/15, EU:C:2017:431, paragraph 82 and the case-law cited).

43 It should also be noted in this context that, as recalled in paragraph 11 of the recommendations to national courts and tribunals in relation to the initiation of preliminary ruling processings (OJ 2018 C 257, p. 1) although, in order to deliver its decision, the Court necessarily takes into account the legal and factual context of the dispute in the main proceedings, as defined by the referring court or tribunal in its request for a preliminary ruling, it does not itself apply EU law to that dispute. When ruling on the interpretation or validity of EU law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but it is for the referring court or tribunal to

draw concrete conclusions. For those reasons, the interpretation provided by the Court is usually expressed *in abstracto*.

44 Here, it is for the referring court, in the light of the elements of interpretation stated above, to concretely assess the conformity of the technical specifications at issue in the main proceedings with the principles of equality of treatment and proportionality.

45 In the light of all the foregoing considerations, the answer to the question referred is that Articles 18 and 42 of Directive 2014/24 must be interpreted as not imposing on the contracting authority, in establishing technical specifications in a procurement procedure concerning the acquisition of medical supplies, by principle, prioritising either the importance of the individual characteristics of the medical supplies or the importance of the result of their functioning, but requiring that the technical specifications, as a whole, comply with the principles of equality of treatment and proportionality. It is for the national court to assess whether, in the dispute before it, the technical specifications at issue comply with those requirements.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Articles 18 and 42 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as not imposing on the contracting authority, in establishing technical specifications in a procurement procedure concerning the acquisition of medical supplies, by principle, prioritising either the importance of the individual characteristics of the medical supplies or the importance of the result of their functioning, but requiring that the technical specifications, as a whole, comply with the principles of equality of treatment and proportionality. It is for the national court to assess whether, in the dispute before it, the technical specifications at issue comply with those requirements.

[Signatures]

---

* Language of the case: Lithuanian.

EU:C:2019:161

JUDGMENT OF THE COURT (Ninth Chamber)

28 February 2019 (*)

(Reference for a preliminary ruling — Public procurement procedures in the transport sector — Directive 2004/17/EC — Scope — Article 5 — Activities relating to the provision or operation of networks to provide a service to the public in the field of transport by railways — Award, by a public national railway undertaking providing transport services, of cleaning service contracts for trains belonging to that undertaking — No prior publication)

In Case C-388/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), made by decision of 21 June 2017, received at the Court on 29 June 2017, in the proceedings

Konkurrensverket

v

SJ AB,

THE COURT (Ninth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Tenth Chamber, acting as President of the Ninth Chamber, E. Juhász and C. Vajda, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 13 June 2018,

after considering the observations submitted on behalf of:

– the Konkurrensverket, by N. Otte Widgren, P. Karlsson and K. Sällfors, acting as Agents,

– for SJ AB, by A. Ulfsdotter Forsell, advokat and M. Bogg, lawyer,

– the European Commission, by E. Ljung Rasmussen, G. Tolstoy, P. Ondrůšek and K. Simonsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(1) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

2 The request has been made in proceedings between the Konkurrensverket (Competition Authority, Sweden) and SJ AB concerning the alleged disregard by that company of the rules on public

procurement procedures when awarding contracts for cleaning services.

Legal context

European Union law

Directive 2004/17

3 Article 2 of Directive 2004/17, entitled, ‘Contracting entities’, provides in paragraph 2:

‘This directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

(b) which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 3 to 7, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.’

4 Article 5 of Directive 2004/17, entitled ‘Transport services’, provides:

‘1. This directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

2. This directive shall not apply to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC [of the Council of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84)] pursuant to Article 2(4) thereof.’

Directive 2012/34/EU

5 Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32), brings together in one instrument several directives on rail transport which were recast. Those directives include Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ 2001 L 75, p. 29), as amended by Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 (OJ 2007 L 315, p. 44). Directive 2012/34 entered into force on 15 December 2012 in accordance with Article 66 of that directive.

6 Article 3 of that directive, headed ‘Definitions’, provides:

‘For the purposes of this directive, the following definitions apply:

(1) “railway undertaking” means any public or private undertaking licensed according to this directive, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only;

(2) “infrastructure manager” means any body or firm responsible in particular for establishing, managing and maintaining railway infrastructure, including traffic management and control-command and signalling; the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or firms;

…

(18) “allocation” means the allocation of railway infrastructure capacity by an infrastructure manager;

…

(20) “congested infrastructure” means an element of infrastructure for which demand for infrastructure capacity cannot be fully satisfied during certain periods even after coordination of the different requests for capacity;

…

(22) “coordination” means the process through which the infrastructure manager and applicants will attempt to resolve situations in which there are conflicting applications for infrastructure capacity;

…

(25) “network” means the entire railway infrastructure managed by an infrastructure manager;

(26) “network statement” means the statement which sets out in detail the general rules, deadlines, procedures and criteria for charging and capacity-allocation schemes, including such other information as is required to enable applications for infrastructure capacity;

(27) “train path” means the infrastructure capacity needed to run a train between two places over a given period;

…’

7 Under Article 27 of Directive 2012/34, entitled ‘Network statement’, which reproduces, in essence, the provisions of Article 3 of Directive 2001/14, as amended by Directive 2007/58:

‘1. The infrastructure manager shall, after consultation with the interested parties, develop and publish a network statement which shall be obtainable against payment of a fee which shall not exceed the cost of publication of that statement. The network statement shall be published in at least two official languages of the Union. The content of the network statement shall be made available free of charge in electronic format on the web portal of the infrastructure manager and accessible through a common web portal. That web portal shall be set up by the infrastructure managers in the framework of their cooperation in accordance with Articles 37 and 40.

2. The network statement shall set out the nature of the infrastructure which is available to railway undertakings, and contain information setting out the conditions for access to the relevant railway infrastructure. The network statement shall also contain information setting out the conditions for access to service facilities connected to the network of the infrastructure manager and for supply of services in these facilities or indicate a website where such information is made available free of charge in electronic format. The content of the network statement is laid down in Annex IV.

3. The network statement shall be kept up to date and amended as necessary.

4. The network statement shall be published no less than four months in advance of the deadline for requests for infrastructure capacity.’

8 Article 44 of Directive 2012/34, entitled ‘Applications’, provides in paragraphs 1 and 2 thereof:

‘1. Applicants may apply under public or private law to the infrastructure manager to request an agreement granting rights to use railway infrastructure against a charge as provided for in Section 2 of Chapter IV.

2. Requests relating to the regular working timetable shall comply with the deadlines set out in Annex VII.’

9 Article 45 of that directive, entitled ‘Scheduling’, provides in paragraphs 1 and 2 thereof:

‘1. The infrastructure manager shall, as far as possible, meet all requests for infrastructure capacity including requests for train paths crossing more than one network, and shall, as far as possible, take account of all constraints on applicants, including the economic effect on their business.

2. The infrastructure manager may give priority to specific services within the scheduling and coordination process but only as set out in Articles 47 and 49.’

10 Article 46 of the directive, ‘Coordination process’, provides:

‘1. During the scheduling process referred to in Article 45, where the infrastructure manager encounters conflicts between different requests, it shall attempt, through coordination of the requests, to ensure the best possible matching of all requirements.

2. Where a situation requiring coordination arises, the infrastructure manager shall have the right, within reasonable limits, to propose infrastructure capacity that differs from that which was requested.

3. The infrastructure manager shall attempt, through consultation with the appropriate applicants, to resolve any conflicts. Such consultation shall be based on the disclosure of the following information within a reasonable time, free of charge and in written or electronic form:

…’

11 In accordance with Article 47 of that directive, entitled ‘Congested infrastructure’:

‘1. Where, after coordination of the requested train paths and consultation with applicants, it is not possible to satisfy requests for infrastructure capacity adequately, the infrastructure manager shall immediately declare that section of infrastructure on which this has occurred to be congested. This shall also be done for infrastructure which can be expected to suffer from insufficient capacity in the near future.

2. Where infrastructure has been declared to be congested, the infrastructure manager shall carry out a capacity analysis as provided for in Article 50, unless a capacity-enhancement plan, as provided for in Article 51, is already being implemented.

…

4. The prioritising criteria are to take account of the importance of a service to society relative to any other service which will consequently be excluded.

In order to guarantee the development of adequate transport services within this framework, in particular to comply with public-service requirements or to promote the development of national and international rail freight, Member States may take any measures necessary, under non-discriminatory conditions, to ensure that such services are given priority when infrastructure capacity is allocated.

Member States may, where appropriate, grant the infrastructure manager compensation corresponding to any loss of revenue related to the need to allocate a given capacity to certain services pursuant to the second subparagraph.

Those measures and that compensation shall include taking account of the effect of this exclusion in other Member States.

…’

12 Annex IV to that directive, headed ‘Content of the network statement’, provides:

‘The network statement referred to in Article 27 shall contain the following information:

(1) A section setting out the nature of the infrastructure which is available to railway undertakings and the conditions of access to it. The information in this section shall be made consistent, on an annual basis, with, or shall refer to, the rail infrastructure registers to be published in accordance with Article 35 of Directive 2008/57/EC.

(2) A section on charging principles and tariffs. This shall contain appropriate details of the charging scheme as well as sufficient information on charges as well as other relevant information on access applying to the services listed in Annex II which are provided by only one supplier. It shall detail the methodology, rules and, where applicable, scales used for the application of Articles 31 to 36, as regards both costs and charges. It shall contain information on changes in charges already decided upon or foreseen in the next five years, if available.

(3) A section on the principles and criteria for capacity allocation. This shall set out the general capacity characteristics of the infrastructure which is available to railway undertakings and any restrictions relating to its use, including likely capacity requirements for maintenance. It shall also specify the procedures and deadlines which relate to the capacity-allocation process. It shall contain specific criteria which are employed during that process, in particular:

(a) the procedures according to which applicants may request capacity from the infrastructure manager;

(b) the requirements governing applicants;

(c) the schedule for the application and allocation processes and the procedures which shall be followed to request information on the scheduling and the procedures for scheduling planned and unforeseen maintenance work;

(d) the principles governing the coordination process and the dispute resolution system made available as part of this process;

(e) the procedures which shall be followed and criteria used where infrastructure is congested;

(f) details of restrictions on the use of infrastructure;

(g) conditions by which account is taken of previous levels of utilisation of capacity in determining priorities for the allocation process.

…’

Swedish law

13 Lagen (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster (Law (2007:1092) on procurement in the water, energy, transport and postal services sectors; ‘the Law on procurement’) transposes the provisions of Directive 2004/17 in Swedish law.

14 The first subparagraph of Chapter 1, Paragraph 8, of the Law on procurement provides that the provision or operation of public networks in the form of transport by, inter alia, railway is covered by the law. It follows from the second subparagraph of Chapter 1, Paragraph 8, that a network intended to provide a public service in the field of transport services is deemed to exist if the service is provided in accordance with conditions which are laid down by a competent authority and which relate to the routes to be served, the transport capacity to be made available, the frequency of the service and similar conditions.

15 Chapter 7, Paragraph 1, of the Law on procurement provides that the contracting entity intending to award a contract or conclude a framework agreement must, without exception, publish the contract notice.

16 Under Chapter 17, Paragraphs 1 and 2, of the Law on procurement, the supervisory authority may apply to the Administrative Court for an order that a contracting entity pay a special fine if the entity has concluded a contract with a supplier without prior publication of the contract notice.

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 SJ is a limited company, wholly owned by the Swedish State, which pursues the activity of rail transport. In January 2012, SJ concluded two contracts of 56 and 60 million Swedish Crowns (SEK) respectively (approximately EUR 5 502 306 and EUR 5 895 328), by which it awarded cleaning contracts for the trains operated by it, without having initiated a tendering procedure for the award of those contracts.

18 In January 2013, the Konkurrensverket brought an action before the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm, Sweden) for an order imposing a fine on SJ on the ground that that undertaking was bound to comply with publication requirements when awarding public contracts since it was active in the provision or operation of public transport networks within the meaning of Chapter 1, Paragraph 8, of the Law on procurement. SJ, taking the view that its activity does not fall within the scope of Paragraph 8 thereof, contested the findings of the Konkurrensverket. The court upheld the arguments of SJ.

19 The appeal brought by the Konkurrensverket before the Kammarrätten i Stockholm (Stockholm Administrative Court of Appeal, Sweden) was also dismissed.

20 That court held, as did the court of first instance, that, since the Trafikverket (Transport Administration, Sweden), as the infrastructure manager, granted the train paths required for the activity of rail transport as such, with limited ability actively to influence how SJ provides its transport services, that administration could not be regarded as being an authority imposing conditions on that company for the performance of its activities. Accordingly, the appeal court took the view that the services provided by SJ could not be regarded as being provided under conditions determined by a competent authority within the meaning of Chapter 1, Paragraph 8, of the Law on procurement. It concluded therefrom that that company was not therefore required to comply with the Law on procurement when concluding the contracts in question.

21 The Konkurrensverket brought an appeal in cassation against that judgment before the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), requesting that court to refer the matter to the Court of Justice for a preliminary ruling.

22 In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must the second subparagraph of Article 5(1) of Directive 2004/17 be interpreted as meaning that there is a network in the field of transport services when transport services on a State-administered rail network for national and international rail traffic are provided in accordance with provisions in national legislation which implement Directive 2012/34, which involve the allocation of railway infrastructure capacity on the basis of requests from railway companies and a requirement that all requests are to be met so far as possible?

(2) Must the first subparagraph of Article 5(1) of Directive 2004/17 be interpreted as meaning that an activity which is carried out by a railway company such as is referred to in Directive 2012/34 and which entails the provision of transport services to the public on a rail network constitutes the provision or operation of a network as referred to in that provision of the directive?’

The request for the oral procedure to be reopened

23 Following the delivery of the Opinion of the Advocate General, by a document lodged at the Registry of the Court on 3 October 2017, SJ requested the Court to reopen the oral part of the procedure on the ground that points 81 and 82 of the Opinion were based on certain aspects that had not been addressed

in the written and oral phases of the present preliminary ruling proceedings, in particular Article 30 of Directive 2004/17.

24 In that regard, Article 83 of the Rules of Procedure of the Court permits the Court, after hearing the Advocate General, to order at any time the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of a legal argument which has not been debated between the parties.

25 In the present case, the Court considers that it has all the information necessary to rule on the request for a preliminary ruling before it and that the case does not have to be decided on the basis of the argument submitted in the application for reopening of the oral procedure on the potential application of Article 30 of Directive 2004/17.

26 Accordingly, there is no need to order that the oral part of the procedure be reopened.

Consideration of the questions referred

Preliminary observations

27 By its questions, the referring court seeks, in essence, to determine whether SJ was required to initiate a tendering procedure for the award of service contracts for the cleaning of trains operated by it.

28 In that regard, as the Advocate General recalls in point 46 of his Opinion, it is not in dispute that SJ, as a company wholly owned by the State, is a public undertaking within the meaning of Article 2(1)(b) of Directive 2004/17. If the view can be taken that SJ carries out one of the activities referred to in Article 5 of that directive, it can be regarded as being a contracting entity within the meaning of Article 2(2)(a) of that directive.

29 SJ maintains that it does not carry out such activities. First, it argues that it does not operate on a ‘network’ within the meaning of the second subparagraph of Article 5(1) of that Directive. Second, it submits that its activities relating to the provision of transport services do not constitute activities of ‘provision’ or ‘operation’ of the network within the meaning of that article.

The first question

30 By its first question, the referring court asks, in essence, whether the second subparagraph of Article 5(1) of Directive 2004/17 must be interpreted as meaning that there is a network of rail transport services, within the meaning of that provision, where transport services are provided, in application of national legislation transposing Directive 2012/34, on a railway infrastructure managed by a national authority which allocates that infrastructure capacity and is required to meet the requests of railway undertakings provided that the limits of that capacity are not reached.

31 In accordance with the second indent of Article 5(1) of Directive 2004/17, ‘as regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service’.

32 In order to assess whether such conditions exist in the case before it, the referring court asks what is the effect of the obligation on the Trafikverket, as the competent authority within the meaning of Article 5 of Directive 2004/17, to satisfy all requests for allocation of transport capacity submitted by railway undertakings provided that the limits of that capacity are not reached.

33 SJ notes that it provides rail transport services in full competition on the market and does not receive any State funding, that it obtains its revenue from the sale of tickets, that it has no priority as regards railway capacity when requesting train paths and that all the transport which it operates results from its own decisions.

34 However, those elements alone, even if established, cannot exclude that the conditions under which a railway undertaking, such as SJ, provides its services were determined by a competent authority.

35 In fact, examination of the legislation applicable shows this to be the case.

36 It must be pointed out that Article 27(1) and (2) of Directive 2012/34 provides that the infrastructure manager, in the present case the Trafikverket, is to draw up and publish a network statement setting out the characteristics of the infrastructure and containing information setting out the conditions for access to the railway infrastructure. The content of the network statement is defined in Annex IV to that directive.

37 In accordance with Annex IV, that document contains the principles and criteria for capacity allocation, including the requirements which candidates must meet, the procedures to be followed and the criteria to be used where infrastructure is congested or details of restrictions on the use of infrastructure.

38 Thus, any request for infrastructure capacity must, under Directive 2012/34, be submitted to the infrastructure manager by a railway undertaking in accordance with the network statement drawn up by it and must comply with the principles and criteria set out in that document. It follows from those factors that the award of rights to use the railway infrastructure is subject to compliance by the applicant undertakings with requirements relating to both their capacity to submit an application and the conditions under which they will use that infrastructure. Consequently, such requirements significantly reduce the commercial freedom of applicant undertakings.

39 Regarding the procedure for the examination of applications as such, although the railway infrastructure manager must, pursuant to Article 45 of Directive 2012/34, endeavour as far as possible to meet all requests for infrastructure capacity, it is required, in accordance with Article 46 of that directive, in the case of competing requests, to coordinate those requests in order to ensure the best match between them. It may thus, within reasonable limits, propose capacity that differs from that which was requested or may be unable to respond favourably to certain applications.

40 Article 47 of Directive 2012/34 lays down provisions for the event that the railway infrastructure is congested, in the context of which the infrastructure manager may establish prioritising criteria.

41 In those circumstances, while accepting that the railway undertaking has a certain freedom to determine the conditions for the exercise of its transport activity, it must be held, having regard to the obligations and restrictions on it, taken as a whole, in particular the obligation of obtaining train paths and the conditions attached thereto, that the conditions under which it provides the transport service are laid down by a competent authority of a Member State, in this case the Trafikverket in the main proceedings, acting as the infrastructure manager.

42 That assessment is also corroborated by the analysis of the legislative history of the second subparagraph of Article 5(1) of Directive 2004/17.

43 Indeed, as the European Commission points out, Article 2(2)(c) of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1), which, in essence, Article 5(1) of Directive 2004/17 reproduces, was introduced to make the procurement of bus transport services subject to the provisions of Directive 90/531 and clarified that a transport network exists not only if it consists of a physical infrastructure such as railways, but also by a coordinated system of lines under specific conditions, such as in the field of transport by bus. By contrast, the EU legislature did not intend to limit, by that provision, the scope of public procurement procedures in the field of transport carried out on a physical network.

44 Consequently, the answer to the first question is that the second subparagraph of Article 5(1) of Directive 2004/17 must be interpreted as meaning that there is a network of rail transport services, within the meaning of that provision, where transport services are provided, in application of national legislation transposing Directive 2012/34, on a railway infrastructure managed by a national authority which allocates infrastructure capacity even if that authority is required to meet the requests of railway undertakings provided that the limits of that capacity are not reached.

The second question

45 By its second question, the referring court asks, in essence, whether the first subparagraph of Article 5(1) of Directive 2004/17 must be interpreted as meaning that the activity pursued by a railway undertaking, consisting of providing public transport services using the rail network, constitutes a ‘provision’ or ‘operation of networks’ for the purposes of that directive.

46 In accordance with the first subparagraph of Article 5(1) of Directive 2004/17, that directive is to apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

47 Consequently, that provision covers two types of activities, namely, on the one hand, the provision of networks and, on the other, the operation of networks.

48 According to settled case-law, the meaning and scope of terms for which EU law provides no definition must be determined according to their meaning in everyday language whilst considering the context in which they occur and the purposes of the rules of which they form part (judgment of 12 June 2018, *Louboutin and Christian Louboutin,* C-163/16, EU:C:2018:423, paragraph 20).

49 In that regard, the term ‘operation’ must be understood, in accordance with its usual meaning, as referring to the use of an object or the exercise of a right to earn income. Thus, the operation of networks by a railway undertaking consists of its exercise of the right to use the railway infrastructure to earn income.

50 Such a definition differs from that which it is appropriate to give to the ‘provision of networks’.

51 Indeed, as observed by the Advocate General in point 65 of his Opinion, the ‘provision of networks’ is a prerogative of the infrastructure manager and not of the railway undertaking.

52 As the Commission has pointed out, the ‘provision of networks’ was not included in the directives which preceded Directive 2004/17, namely Directive 90/531 and Directive 93/38, since that term was introduced in Directive 2004/17 to ensure that the procurement procedures for which it provides also apply to the management of physical networks, such as railways, railway facilities, tunnels, bridges and level crossings.

53 In the light of the foregoing, it must be held that the activity of the ‘operation of networks’ refers to the exercise of the right of use of the railway network for the provision of transport services, while the activity of ‘provision of networks’ refers to the management of the network.

54 In the light of the foregoing considerations, the answer to the second question is that the first subparagraph of Article 5(1) of Directive 2004/17 must be interpreted as meaning that the activity pursued by a railway undertaking, which consists of providing transport services to the public in exercising a right of use of the railway network, is an ‘operation of networks’ for the purposes of that directive.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. The second subparagraph of Article 5(1) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as meaning that there is a network of rail transport services, within the meaning of that provision, where transport services are provided, in application of national

legislation transposing Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, on a railway infrastructure managed by a national authority which allocates infrastructure capacity even if that authority is required to meet the requests of railway undertakings provided that the limits of that capacity are not reached.

2. **The first subparagraph of Article 5(1) of Directive 2004/17 must be interpreted as meaning that the activity pursued by a railway undertaking, which consists of providing transport services to the public in exercising a right of use of the railway network, is an 'operation of networks' for the purposes of that directive.**

[Signatures]

---

* Language of the case: Swedish.

OPINION OF ADVOCATE GENERAL

M. CAMPOS SÁNCHEZ-BORDONA

delivered on 19 September 2018(1)

Case C-388/17

Konkurrensverket

v

SJ AB

(Request for a preliminary ruling from the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden))

(Preliminary ruling — Public contracts in the rail transport sector — Activities relating to the provision or operation of networks — Definition of network — Award of a train-cleaning contract by a railway undertaking wholly owned by the State — No prior call for tenders)

1. SJ AB ('SJ') is a public limited company which provides rail passenger services and which is wholly owned by the Swedish State. In 2012, SJ concluded two contracts for the cleaning of its trains without having first issued a public call for tenders in respect of those contracts; that conduct is considered by the Konkurrensverket (Competition Authority, Sweden) to be contrary to Directive 2004/17/EC. (2)

2. The dispute between the public undertaking and the Konkurrensverket concerns the interpretation of Article 5(1) of Directive 2004/17. In particular, the referring court, which has to adjudicate on that dispute, seeks clarification of terms used in that article, the interpretation of which will enable it to determine whether a public undertaking providing rail transport services falls within the scope of that directive.

3. In that connection, there are two matters at issue:

— First, the definition of rail transport 'network' for the purposes of that provision.

— Second, in cases where a network exists, the meaning of the phrase 'the provision or operation of networks' used in that provision.

I. Legislative framework

A. EU law

1. Directive 2004/17

4. In accordance with Article 2:

'1. For the purposes of this directive'

…

(b) a “public undertaking” is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

– hold the majority of the undertaking’s subscribed capital, or

…

2. This directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

…’

5. Article 5 states:

‘1. This directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

…’

6. Article 30 reads:

‘1. Contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to this directive if, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.

…

5. When the legislation of the Member State concerned provides for it, the contracting entities may ask the Commission to establish the applicability of paragraph 1 to a given activity by a Decision in conformity with paragraph 6 …

…’

2. Directive 2012/34/EU (3)

7. Pursuant to Article 1:

‘1. This directive lays down:

(a) the rules applicable to the management of railway infrastructure and to rail transport activities of the railway undertakings established or to be established in a Member State as set out in Chapter II;

(b) the criteria applicable to the issuing, renewal or amendment of licences by a Member State intended for railway undertakings which are or will be established in the Union as set out in Chapter III;

(c) the principles and procedures applicable to the setting and collecting of railway infrastructure charges and the allocation of railway infrastructure capacity as set out in Chapter IV.

2. This directive applies to the use of railway infrastructure for domestic and international rail services.'

8. Article 3 provides:

'For the purpose of this directive, the following definitions apply:

(1) "railway undertaking" means any public or private undertaking licensed according to this directive, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only;

(2) "infrastructure manager" means any body or firm responsible in particular for establishing, managing and maintaining railway infrastructure, including traffic management and control-command and signalling; the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or firms;

(3) "railway infrastructure" means the items listed in Annex I;

…

(24) "infrastructure capacity" means the potential to schedule train paths requested for an element of infrastructure for a certain period;

(25) "network" means the entire railway infrastructure managed by an infrastructure manager;

…

(27) "train path" means the infrastructure capacity needed to run a train between two places over a given period;

(28) "working timetable" means the data defining all planned train and rolling-stock movements which will take place on the relevant infrastructure during the period for which it is in force;

…'

9. Article 10 stipulates:

'1. Railway undertakings shall be granted, under equitable, non-discriminatory and transparent conditions, the right to access to the railway infrastructure in all Member States for the purpose of operating all types of rail freight services. That right shall include access to infrastructure connecting maritime and inland ports and other service facilities referred to in point 2 of Annex II, and to infrastructure serving or potentially serving more than one final customer.

…'

10. Under Article 27:

'1. The infrastructure manager shall, after consultation with the interested parties, develop and publish a network statement …

2. The network statement shall set out the nature of the infrastructure which is available to railway undertakings, and contain information setting out the conditions for access to the relevant railway infrastructure. The network statement shall also contain information setting out the conditions for access to service facilities connected to the network of the infrastructure manager and for supply of services in these facilities or indicate a website where such information is made available free of charge in electronic format. The content of the network statement is laid down in Annex IV.

…'

11. Article 44 provides:

‘1. Applicants may apply under public or private law to the infrastructure manager to request an agreement granting rights to use railway infrastructure against a charge as provided for in Section 2 of Chapter IV.

…’

12. Article 45 reads:

‘1. The infrastructure manager shall, as far as possible, meet all requests for infrastructure capacity …

2. The infrastructure manager may give priority to specific services within the scheduling and coordination process but only as set out in Articles 47 and 49.

3. The infrastructure manager shall consult interested parties about the draft working timetable and allow them at least one month to present their views. Interested parties shall include all those who have requested infrastructure capacity and other parties who wish to have the opportunity to comment on how the working timetable may affect their ability to procure rail services during the working timetable period.

…’

13. Article 46 stipulates:

‘1. During the scheduling process referred to in Article 45, where the infrastructure manager encounters conflicts between different requests, it shall attempt, through coordination of the requests, to ensure the best possible matching of all requirements.

2. Where a situation requiring coordination arises, the infrastructure manager shall have the right, within reasonable limits, to propose infrastructure capacity that differs from that which was requested.

…’

B. National law

1. Lagen (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster (4)

14. Under Chapter 2, Paragraph 20, contracting entities include, inter alia, any undertaking over which a contracting authority may exercise a dominant influence. Dominant influence is to be presumed where a contracting authority, directly or indirectly, with regard to an undertaking, holds more than half of the shares in the undertaking, or controls a majority of the votes because of its shareholding or similar, or may nominate more than half of the members of the company’s supervisory board or corresponding governing body.

15. The first subparagraph of Chapter 1, Paragraph 8, provides that an activity is covered by the law if it constitutes the provision or operation of public networks in the form of transport by, inter alia, railway.

16. Under the second subparagraph of Chapter 1, Paragraph 8, a network in the field of transport services is deemed to exist if the service is provided in accordance with conditions which are laid down by a competent authority and which relate to the routes to be served, the capacity to be made available, the frequency of the service and similar conditions.

2. Järnvägslagen (2004:519) (5)

17. Under Chapter 5, Paragraph 2, a railway undertaking with its head office in a State within the EEA or in Switzerland is entitled to operate and organise services on the Swedish rail network.

18. Chapter 6, Paragraph 7, states that any entity which is entitled to operate or organise services on the Swedish rail network may request from an infrastructure manager an allocation of infrastructure capacity as regards train paths in accordance with the description of the rail network.

19. Chapter 6, Paragraphs 1 and 7, and Chapter 6, Paragraph 9, deal with requests for information about infrastructure capacity and also with the handling and determination of the allocation of infrastructure in response to requests for such capacity.

20. Chapter 6, Paragraph 9, provides that the infrastructure manager must prepare a draft working timetable on the basis of the requests which have been received.

21. It follows from Chapter 6, Paragraph 10, that the infrastructure manager is to attempt, by coordination, to resolve any conflicts of interest which arise in the allocation of capacity. Where that is impossible, the infrastructure manager is to provide an expedited dispute resolution procedure (Chapter 6, Paragraph 12).

22. Chapter 6, Paragraphs 14 and 15, concern the priority criteria stated in the description of the rail network.

II. Facts of the dispute and the questions referred for a preliminary ruling

23. In January 2012, SJ concluded two contracts for the provision of cleaning services on its trains (the values of which were SEK 56 million and SEK 60 million respectively) without holding a public procurement procedure in respect of those contracts.

24. In January 2013, the Konkurrensverket lodged an application with the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm, Sweden) for an order that SJ pay a penalty fine on the grounds that that undertaking carried out an activity covered by Chapter 1, Paragraph 8, of the Law on procurement. SJ contested the form of order sought by the applicant, which was dismissed.

25. The Konkurrensverket lodged an appeal against the first-instance judgment with the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden), which was also dismissed.

26. The Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), which is seised of an appeal against the judgment of the appellate court, has referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must the second subparagraph of Article 5(1) of Directive 2004/17 be interpreted as meaning that there is a network in the field of transport services when transport services on a State-administered rail network for national and international rail traffic are provided in accordance with provisions in national legislation which implement Directive 2012/34, which involve the allocation of rail infrastructure capacity on the basis of requests from railway companies and a requirement that all requests are to be met so far as possible?

(2) Must the first subparagraph of Article 5(1) of Directive 2004/17 be interpreted as meaning that an activity which is carried out by a railway company such as is referred to in Directive 2012/34 and which entails the provision of transport services to the public on a rail network constitutes the provision or operation of a network as referred to in that provision of the directive?’

III. Summary of the parties’ observations

A. The first question referred

27. The Konkurrensverket submits that, as Directive 2004/17 does not define what is to be understood by transport service ‘network’ or by ‘provision or operation of networks’, the meaning and scope of those terms reflect their usual meaning in everyday language, in accordance with the context in which they are used and the aims pursued.

28. The Konkurrensverket draws attention to the risk that public contracting entities, influenced by States, may tend to favour national undertakings in breach of the provisions of the FEU Treaty governing free movement and competition. The procurement procedures provided for in Directive 2004/17 are intended to neutralise that risk. Without such provisions, the reduction in competition which results from the limits inherent in network capacity would enable contracting entities to overlook financial considerations when awarding a contract and to focus on criteria of national preference.

29. The Konkurrensverket contends that Directive 2012/34 governs access by railway undertakings (like SJ) to a technical network of limited capacity. When the infrastructure manager allocates train paths on that network, it stipulates the conditions concerning, inter alia, the routes to be served, the transport capacity to be made available and the frequency of the service. The fact that the network manager must endeavour to meet requests made by railway undertakings does not alter the limited capacity of that network.

30. The Konkurrensverket acknowledges that, in accordance with Article 30 of Directive 2004/17, activities which fall within the scope of the directive are not subject thereto where those activities are directly exposed to competition on markets to which access is not restricted. However, that possibility requires a Commission Decision, after the relevant procedure has been held, which has not occurred in this instance.

31. SJ observes that, unlike other States, in which rail transport is still subject to a monopoly, rail transport in Sweden is completely deregulated and operates under an equal competition regime.

32. SJ states that, despite being a company which is wholly owned by the Swedish State, it does not receive any funding or any other State advantages. Its revenue comes from the sale of tickets and it does not benefit from any preferential treatment when it comes to the allocation of train paths.

33. SJ submits that the second subparagraph of Article 5(1) of Directive 2004/17 must be interpreted strictly, as is clear from the Court's case-law. (6) It is not sufficient that an entity is subject to a dominant influence of the kind referred to in Article 2(1)(b) of Directive 2004/17. The conditions set out in the second subparagraph of Article 5(1) must be laid down unilaterally by the competent authority of the Member State; those conditions are of immediate and essential concern to potential users in that they directly and specifically affect the manner in which the train service is provided by the railway undertaking.

34. SJ adds that both it and the other railway undertakings operating in Sweden determine themselves, on the basis of commercial criteria, the train paths, the trains they use, the timetables, the number of departures, the stops and the ticket prices. The infrastructure manager does not have any powers beyond those granted by Directive 2012/34 and its tasks are confined to ensuring access to the railway infrastructure on an equal basis but not to stipulating the specific conditions applicable to transport services provided by railway undertakings.

35. In the Commission's submission, the wording of the second subparagraph of Article 5(1) of Directive 2004/17 was intended to convey a broad definition of 'network'. A network can exist not only where there is physical infrastructure (as is the case of railway tracks and tram tracks) but also where there is no physical infrastructure, provided that there is a network of connected lines used by vehicles in accordance with the conditions laid down by the authorities. (7)

36. The Commission cites Directive 2012/34 as the instrument which, in addition to defining the actors involved in rail traffic, makes it possible to ensure that railway undertakings have transparent and non-discriminatory access to railway infrastructure. The Commission draws particular attention to Chapter IV, Section 3, which deals with the allocation of infrastructure capacity and describes the manner in which conditions like those laid down in the second subparagraph of Article 5(1) of Directive 2004/17 should be stipulated.

37. The Commission asserts that, since the Trafikverket (Transport Authority, Sweden) approves the network statement, decides on the allocation of train paths and determines the working timetable, it sets the conditions relating to the use of the railway infrastructure. The fact that that authority must, so far as possible, meet the requests of interested parties in no way precludes that assertion.

B. The second question referred

38. The Konkurrensverket submits that a transport services network exists for the purposes of the second subparagraph of Article 5(1) of Directive 2004/17 where the movement of trains requires access to a technical network of limited capacity. The term ‘operation’ refers to the implementation in the strict sense of traffic on the railway network. (8)

39. SJ maintains that it is not in charge of railway infrastructure and that its activity is confined to providing transport services to the public who travel on that infrastructure. Accordingly, it is not involved in the provision or operation of the Swedish railway network, meaning that its activities do not fall within the scope of Directive 2004/17.

40. The Commission observes that the first subparagraph of Article 5(1) differentiates between the provision and operation of networks. Neither the first Procurement Directive (Directive 90/531/EEC) (9) nor Directive 93/38/EEC (10) used the term ‘provision’. It was Directive 2004/17 which included that term in order to cover the management of the physical network and distinguish between the two activities, which are normally assigned to different operators, thereby ensuring that both activities fall within the scope of the directive.

41. The Commission submits that the ‘operation of networks’ covers the actual provision of rail transport, whereas the ‘provision’ of networks refers to the possibility of access to the network so that it can be used by a third party.

IV. Procedure before the Court of Justice

42. The order for reference was received by the Registry of the Court on 29 June 2017.

43. Written observations were lodged by the Konkurrensverket, SJ and the European Commission; all those parties attended the hearing held on 13 June 2018.

V. Assessment

44. The parties to the proceedings and the referring court rely on Directive 2012/34 to delimit the dispute and *understand* the meaning of the terms used in Article 5(1) of Directive 2004/17.

45. I believe that that approach is correct. However, Directive 2012/34 of 21 November 2012 cannot, as such, apply *ratione temporis* to contracts such as those at issue in these proceedings, which were signed in January 2012. That argument is overturned by the fact that Directive 2012/34 ‘recast and merged into a single act in the interest of clarity’ (11) other earlier directives which were in force when those contracts were concluded.

46. Moreover, it is common ground that SJ is a railway undertaking in accordance with the definition in Article 3(1) of Directive 2012/34, and that, as a company wholly owned by the State, it can be a contracting entity (specifically, a public undertaking, within the meaning of Article 2(1)(b) of Directive 2004/17).

47. However, the national court is unsure whether SJ’s activity is covered by the description in Article 5(1) of Directive 2004/17. Only if the answer to that question is in the affirmative will Directive 2004/17 be applicable to SJ, since Article 2(2)(a) of the directive requires that contracting entities must pursue one of the activities referred to in Articles 3 to 7 thereof.

A. The first question referred

48. Article 5(1) of Directive 2004/17 creates a connection between the concept of transport network (‘a network shall be considered to exist’) and the provision of a service ‘under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service’.

49. By its first question, the referring court seeks to clarify whether, by exercising its powers, the railway infrastructure manager, which is responsible for the allocation of train paths, in fact imposes conditions on

railway undertakings which may affect matters such as routes to be served, the capacity to be made available or the frequency of the service.

50. The question relates to a situation in which railway undertakings, whether public or private, provide a transport service in a commercial manner (12) but are not themselves rail network managers. It is necessary, therefore, to examine first of all the definition of 'network', before going on to consider its effect on these proceedings. (13)

1. Management of the network and allocation of infrastructure capacity

51. Directive 2012/34 contains provisions applicable to the management of railway infrastructure, on the one hand, and the activities of railway undertakings, on the other. The latter provisions include those laying down the legal rules for obtaining licences and the allocation of infrastructure capacity to railway undertakings, which are required to pay infrastructure charges.

52. Naturally, rail infrastructure has a limited capacity (14) because it is a 'natural monopoly' (15) the deployment of which it would make no sense to increase. Rather than defining railway infrastructure, Directive 2012/34 prefers to describe the elements of which it is composed, and those are set out in Annex I thereto. (16) The concept of network is linked to railway infrastructure: the rail network is 'the entire railway infrastructure managed by an infrastructure manager'. (17)

53. Railway infrastructure (which is linked to the concept of train path) (18) is managed by the infrastructure manager, which is responsible for its operation, maintenance and renewal. Undertakings which have first obtained a licence designating them as railway undertakings must apply to the infrastructure manager for the right to use a certain infrastructure capacity.

54. The procedure for allocating railway infrastructure capacity is preceded by what is known as the 'network statement', in which the infrastructure manager sets out the general rules, time-limits, procedures and criteria governing the allocation of capacity. Directive 2012/34 leaves the specification of a wide range of matters in that connection to the discretion of the infrastructure manager. (19)

55. The basic principle is that the infrastructure manager must, as far as possible, meet all the requests for infrastructure capacity it receives. If that is not possible, it must apply other allocation criteria. (20) It must also prepare the draft working timetable and send it to the interested parties so that they may present their views.

56. The entirety of the decisions taken (21) on the award of infrastructure capacity enables the working timetable to be finalised through the planning of train and rolling stock movements on the infrastructure during the period that timetable is in force. Annex VII, paragraph 2, of Directive 2012/34 provides for the situation where the working timetable is changed or adjusted, which gives an idea of its flexibility and adaptability to changing circumstances.

2. Application to the instant case

57. As I have observed, SJ maintains that, in Sweden, railway undertakings determine the routes on which their trains will travel, their timetables, the number of departures and the stopping places. SJ argues that if that capacity is limited, it is simply because that is dictated by the limited physical capacity of the infrastructure but not because the infrastructure manager is vested with the power to determine unilaterally the manner in which the service provided by railway undertakings is managed.

58. I do not find SJ's line of reasoning persuasive. The infrastructure manager operates on the basis of a situation which offers limited options (in terms of space and time) for meeting the requests of undertakings. Given that routes are restricted to where the railway tracks are laid and are dependent on the performance of service facilities, the infrastructure manager must of necessity coordinate the transport services provided by all railway undertakings. That also occurs on the Swedish State network.

59. The freedom of railway undertakings, like SJ, to offer the public the routes which they prefer and the train timetables which best suit them is compatible with the fact that those offers are subject to the coordination decisions of the infrastructure manager. It is the infrastructure manager, therefore, which

ultimately ‘lays down’ (even when it is meeting requests from undertakings) the so-called ‘operating conditions’ of the service.

60. Directive 2012/34 includes many cases in which the infrastructure manager is granted powers in relation to those conditions. The definitions laid down in Article 3, relating to ‘alternative route’, ‘viable alternative’ and ‘congested infrastructure’, are echoed later in the rules pursuant to which the infrastructure manager may — and must — be involved in setting the conditions for use of the rail network where these concern the ‘capacity to be made available’, the ‘routes to be served’ and the ‘frequency of the service’, in order to prevent duplication and congestion. (22)

61. The network statement, which has to be published by the infrastructure manager, also enables the infrastructure manager to modify aspects which cannot be determined a priori. The infrastructure manager may also allocate capacity which differs from that requested, which shows that the degree of latitude of undertakings providing rail transport services is restricted by finite possibilities, inherent in the scarcity of available resources, which the infrastructure manager must manage.

62. Lastly, it is acceptable to impose public-service obligations on rail transport, and those may further affect the conditions governing access to the infrastructure. Directive 2012/34 provides for open access services and services under public service contracts to co-exist on the rail networks of the Member States, with the option for prioritised criteria to be set in cases where infrastructure is congested. (23)

63. In short, the need to manage and allocate limited rail resources means that the infrastructure manager must have the power to impose on undertakings which use those resources conditions governing the provision of their services, as regards the capacity to be made available, the routes to be served and the frequency of services. That is specifically what Article 5(1) of Directive 2004/17 requires in order for a transport network to be considered to exist.

B. The second question referred

64. The referring court seeks to ascertain the meaning of the expression ‘the provision or operation of networks’ used in Article 5(1) of Directive 2004/17. In particular, the referring court asks whether, because rail undertakings provide rail transport services, their activities are covered by one of those terms.

65. The uncertainties relate to the ‘operation of networks’. It appears to be common ground that the ‘provision of networks’ is a prerogative of the infrastructure manager, not the transport undertakings. I shall therefore focus on the interpretation of the term ‘operation’.

66. The Commission’s suggestion is thought-provoking in its clarity: the ‘provision’ of networks refers to the duties of the infrastructure manager, whereas the ‘operation of networks’ is an activity of railway undertakings. That is confirmed by the legislative evolution which led to the wording of Article 5(1) of Directive 2004/17: unlike the related articles of the earlier directives on the award of contracts in specific sectors, (24) which referred exclusively to the ‘operation of networks’, in 2004 the word ‘provision [of those networks]’ was added.

67. The Commission submits that the word ‘provision’ was inserted to cover the management of the physical network and to distinguish between two different activities: the ‘operation of networks’ covers the actual provision of rail transport services, which is performed by undertakings, whereas the ‘provision’ of networks refers to the possibility of accessing the network so that it can be used by a third party.

68. However, the Commission’s argument encounters an obstacle: Directive 2012/34 clearly differentiates between ‘the provision of transport services’, on the one hand, and ‘the operation of infrastructure’, on the other. (25) The latter is the responsibility of the infrastructure manager, whereas the provision of transport services is performed by undertakings which are granted a licence for that purpose.

69. Directive 2012/34 refers more than once to the notion of ‘operating rail transport services’, which it identifies with the activities of entities which are licensed as railway undertakings and provide those services to the public. However, according to the terminology of that directive, the ‘operation of the service’ is not the same as the ‘operation of infrastructure’.

70. Under Directive 2012/34, the ‘operation of infrastructure’ is exclusively the task of the infrastructure manager, which not only makes that infrastructure available to undertakings providing rail transport services but also maintains (26) and manages it, using the network to carry out the functions assigned to infrastructure managers under Article 7 of that directive.

71. That bipartite scheme was already apparent in the definitions contained in the original version of Directive 2012/34. The definition of ‘network’ in that directive (27) suggested that its operation was the responsibility of the infrastructure manager. Subsequent provisions have advanced on the same lines:

— First, Implementing Regulation 2015/909, applicable to the calculation of the operating costs defrayed through the infrastructure charge, (28) creates a link between railway undertakings and the operation of rail services (recital 18), as opposed to the infrastructure manager-operation of the network relationship referred to in recital 2 (‘Infrastructure managers are under the obligation to operate networks’).

— Second, the amendment of Directive 2012/34 in 2016 added new wording to Article 3(2), in accordance with which ‘“operation of the railway infrastructure” means train path allocation, traffic management and infrastructure charging’. (29) Those tasks are assigned to the infrastructure manager and not to transport undertakings.

72. In those circumstances, there are two options as regards interpretation. The first is to interpret Article 5(1) of Directive 2004/17 in the light of later legislation which specifically governs the single railway area (in particular, Directive 2012/34 and the amendments thereof).

73. If that approach is taken, it will be necessary to bring the term ‘operation of [rail] networks’, used in Article 5(1) of Directive 2004/17, into line with the term ‘operation of [railway] infrastructure’ used in Directive 2012/34. Operation of the rail service is not covered by that term if regard is had to the definition (now) provided by Article 3(2b) of Directive 2012/34, as amended by Directive 2016/2370. In other words, operation of the network does not encompass operation of the rail service, which relates to the provision of transport services by railway undertakings.

74. The second option favours an autonomous interpretation of the term ‘operation of networks’ in Article 5(1) of Directive 2004/17, which is unaffected by the legislative vicissitudes to which I referred above. (30) In line with that interpretation, there is nothing to preclude railway undertakings from also ‘operating’ the network, in the sense that they enjoy the benefit of it, take advantage of it or use it to provide rail transport.

75. A number of arguments tend to support that second option. First, there is the argument put forward by the Commission regarding the origins of Article 5(1) of Directive 2004/17, which, by introducing the ‘provision of the network’ as a separate concept distinct from the operation of the network, appears to extend the semantic scope of the latter expression.

76. Second, from a literal point of view, the different meanings of the word ‘operation’ include that which identifies it with the action of deriving benefit from something by using it. Undertakings providing rail services to travellers ‘operate’ the network on which their trains travel; that is, they use it or take advantage of it to obtain from it the benefit inherent in their public service activity.

77. Third, taking a systematic approach, it would make little sense if Article 5(1) of Directive 2004/17 were to exclude generally from its scope undertakings providing transport services, on the basis that that activity does not constitute operation of the network, only then to go on (Article 5(2)) to state straightaway that the directive is not to apply ‘to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof.’ The reason that explicit statement is needed is because other undertakings which provide transport services are, in principle, covered by Directive 2004/17.

78. Fourth and finally, Directive 2004/17 includes ‘the non-exhaustive lists of contracting entities within the meaning of this Directive [which] are contained in Annexes I to X.’ (31) Thus, Annex IV, which concerns contracting entities in the field of rail services, lists the public undertakings in the different Member States which provide those services. In particular, as regards Sweden, such undertakings include ‘public entities

operating railway services in accordance with the järnvägslagen (2004:519) and järnvägsförordningen (2004:526).' (32)

79. The inclusion of that class of entity (to which SJ belongs) in Annex IV to Directive 2004/17 reveals that the EU legislature considers that the activities of undertakings which provide transport services to the public using the rail network come within the concept of the operation of that network, for the purposes of Article 5(1) of that directive, meaning that, where the other conditions are satisfied, the procurement procedures laid down in Directive 2004/17 must be used. (33)

80. In short, while recognising that there is a certain lack of consistency between the terms used in the provisions relating to the single European railway area (Directive 2012/34 and concordant provisions) and those used in Directive 2004/17, the interpretation of the phrase 'operation of networks' in Article 5(1) of the latter directive is not dependent on the terms defined in the former.

81. Finally, SJ has stressed that it is an undertaking which operates for strictly commercial ends, in competition with other rail operators, which, it submits, precludes it from being regarded as a contracting entity covered by the provisions of Directive 2004/17.

82. Directive 2004/17 provides for that situation in Article 30 ('Procedure for establishing whether a given activity is directly exposed to competition'). Suffice it to state that, in this case, there is no evidence that that procedure has been used, from which it follows that the application of that directive cannot be excluded.

VI. Conclusion

83. In the light of the foregoing considerations, I propose that the Court of Justice reply as follows to the questions referred for a preliminary ruling by the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden):

> Article 5(1) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as meaning that:
>
> – there is a 'network' when State-administered rail infrastructure is made available to undertakings providing transport services, under operating conditions laid down by the competent authority of that State, even if that authority is required to meet, so far as possible, all requests for the allocation of capacity submitted by those undertakings.
>
> – the activity carried out by a public undertaking, consisting of the provision of public transport services using the rail network, constitutes the 'operation of networks' for the purposes of Directive 2004/17/EC.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

---

3 Directive of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32).

---

4 Law (2007:1092) on procurement in the water, energy, transport and postal services sectors; the 'Law on procurement'.

---

5 Law (2004:519) on railways.

---

6 SJ cites the judgment of 10 April 2008, *Ing. Aigner*, C-393/06, EU:C:2008:213, paragraphs 27 and 29.

---

7 The Commission refers in that connection to its Communication on the Community rules for public procurement in excluded sectors: water, energy, transport and telecommunications (COM/88/376).

---

8 The Konkurrensverket relies on point 48 of the Opinion of Advocate General Mischo in *Concordia Bus Finland*, C-513/99, EU:C:2001:686, according to which 'to operate a network means to run it oneself, generally using one's own workforce and buses.'

---

9 Council Directive of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1).

---

10 Council Directive of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

---

11 Recital 1, *in fine*.

---

12 Recital 5 of Directive 2012/34 states that '[i]n order to render railway transport efficient and competitive with other modes of transport, Member States should ensure that railway undertakings have the status of independent operators behaving in a commercial manner and adapting to market needs.'

---

13 Although SJ mentions that there are more than 320 railway infrastructure managers in Sweden, it must be noted that the network at issue in these proceedings is a State network. That follows from Paragraph 2, point 9, of the förordningen (2010:185) med instruktion för Trafikverket (Ordinance (2010:185) laying down instructions for the Trafikverket [Swedish Transport Authority]), in accordance with which, if no other decision is adopted, the infrastructure manager for the rail network belonging to the Swedish State is the Trafikverket. The latter is the competent authority for the allocation of infrastructure in the main proceedings (paragraph 27 of the order for reference).

---

14 Recital 58 of Directive 2012/34 points out as much, stating that '[t]he charging and capacity-allocation schemes should take account of the effects of increasing saturation of infrastructure capacity and, ultimately, the scarcity of capacity.'

---

15 Recital 71 of Directive 2012/34.

---

16 Those items include the physical base required to establish the rail network and the rail service, such as ground area, track and track bed, passenger and goods platforms, four-foot way and walkways, enclosures, protections, engineering structures (bridges and tunnels), level crossings, superstructure, access way for passengers and goods, safety, signalling and telecommunications installations on the open track, in stations and in marshalling yards, lighting installations, plant for transforming and carrying electric power for train haulage, and buildings used by the infrastructure department.

---

17 Article 3(25) of Directive 2012/34.

---

18 Infrastructure capacity means ‘the potential to schedule train paths requested for an element of infrastructure for a certain period’ (Article 3(24) and (27)).

---

19 For example, the laying down of rules for the determination of charges (Article 29(3)), the setting of requirements to be met by applicants (Article 41(2)), the establishment of the principles governing the coordination process and the dispute resolution system (Article 46(4) and (6)), and, finally, in relation to congested infrastructure, the procedures to be followed and the criteria to be used and the setting of the minimum use quota (Article 47(6) and Article 52(2)).

---

20 When the infrastructure manager identifies conflicts between different requests, it must attempt, through coordination of the requests, to ensure the best possible matching of all requirements and it has the right, within reasonable limits, to propose infrastructure capacity that differs from that which was requested.

---

21 Although the directive does not refer explicitly to decisions on the allocation of infrastructure capacity, the adoption of such decisions is implied. Article 46(6) provides for a dispute resolution system (without prejudice to the relevant appeal procedure under Article 56).

---

22 Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (OJ 2016 L 352, p. 1) confirms that approach. Recital 28 of that directive states that ‘Member States may attach specific conditions to the right of access to the infrastructure in order to allow for the implementation of an integrated timetable scheme for domestic passenger services by rail.’

---

23 The second subparagraph of Article 47(4) of Directive 2012/34 refers to public-service requirements. In the same vein, recital 24 of Directive 2016/2370 confirms the option of Member States to limit the right of access ‘where it would compromise the economic equilibrium of … public service contracts’.

---

24 Directive 90/531 and Directive 93/38.

---

25 Recital 6 of Directive 2012/34. Also in that connection, recital 26 states: ‘a distinction should be made between the provision of transport services and the operation of service facilities’.

---

26 However, Article 7(1) allows Member States to ‘assign to railway undertakings or any other body the responsibility for contributing to the development of the railway infrastructure, for example through investment, maintenance and funding.’

---

27 ‘The entire railway infrastructure managed by an infrastructure manager’.

---

28 Commission Implementing Regulation of 12 June 2015 on the modalities for the calculation of the cost that is directly incurred as a result of operating the train service (OJ 2015 L 148, p. 17).

---

29 Article 3(2b), inserted by Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 (OJ 2016 L 352, p. 1).

---

30 The Commission adopted that position at the hearing.

---

31 Article 8 (‘List of contracting entities’) of Directive 2004/17.

---

32 Commission Decision of 9 December 2008 amending the Annexes to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards their lists of contracting entities and contracting authorities (OJ 2008 L 349, p. 1).

---

33 Although in the judgment of 5 October 2017, *LitSpecMet*, C-567/15, EU:C:2017:736, it did not address the issue raised in these proceedings, with which the reference for a preliminary ruling in that case was not concerned, the Court held that, in the circumstances of the case and subject to certain exceptions, the activity of a subsidiary wholly owned by the Lithuanian rail company, to which it provided the rail equipment necessary for it to carry on its rail transport activity, intended to meet needs in the general interest, was covered by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). In my Opinion in that case (C-567/15, EU:C:2017:319), I argued, in response to the submission of one of the parties which claimed that Directive 2004/17 was applicable, that, ‘since Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18 contain identical definitions of “bodies governed by public law”, … the questions raised by the Vilniaus apygardos teismas (Regional Court, Vilnius) can be answered without making a prior determination on the applicability of either directive.’

JUDGMENT OF THE COURT (Third Chamber)

28 November 2018 (*)

(Reference for a preliminary ruling — Public procurement — Review procedures — Directive 89/665/EEC — Article 1(3) — Directive 92/13/EEC –Article 1(3) — Right to bring proceedings subject to the condition that a tender was submitted in a procurement procedure)

In Case C-328/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Liguria (Regional Administrative Court, Liguria, Italy), made by decision of 8 February 2017, received at the Court on 31 May 2017, in the proceedings

Amt Azienda Trasporti e Mobilità SpA,

Atc Esercizio SpA,

Atp Esercizio Srl,

Riviera Trasporti SpA,

Tpl Linea Srl

v

Atpl Liguria — Agenzia regionale per il trasporto pubblico locale SpA,

Regione Liguria,

THE COURT (Third Chamber),

composed of M. Vilaras, President of the Fourth Chamber, acting as President of the Third Chamber, J. Malenovský, L. Bay Larsen, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 26 April 2018,

after considering the observations submitted on behalf of:

– the Italian Government, by G. Palmieri, acting as Agent, and C. Colelli, avvocato dello Stato,

– the Czech Government, by M. Smolek, J. Vláčil and T. Müller, acting as Agents,

– the Spanish Government, by M.J. García-Valdecasas Dorrego, acting as Agent,

– the European Commission, by G. Gattinara and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 July 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) to (3) and Article 2(1) (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').

2 The request has been made in proceedings between Amt Azienda Trasporti e Mobilità SpA, Atc Esercizio SpA, Atp Esercizio Srl, Riviera Trasporti SpA and Tpl Linea Srl ('Amt and Others') and Atpl Liguria Agenzia regionale per il trasporto pubblico locale SpA (Regional Agency for Local Public Transport, Italy, 'the Agency') concerning the decision of the latter to launch an informal tender procedure for the award of public transport services in the Regione per la Liguria (Region of Liguria, Italy, the 'Region of Liguria').

Legal context

European Union law

Directive 89/665

3 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [(OJ 2004 L 134, p. 114)], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed [EU] law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing [EU] law and other national rules.

3. Member States shall ensure that review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

…'

4 Article 2(1) of that directive which concerns '[r]equirements for review procedures' states:

'The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

…

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

…'

Directive 92/13

5 Entitled ‘Scope and availability of review procedures’, Article 1(3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14) as amended by Directive 2007/66 (‘Directive 92/13’), provides:

‘Member States shall ensure that review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.’

Directive 2004/17

6 Article 1 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), on ‘basic terms’, provided in paragraph 3(b) thereof:

‘A “service concession” is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.’

7 Article 5 of that directive, entitled ‘Transport services’, provided in paragraph 1 thereof:

‘This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.’

8 Article 18 of that directive, entitled ‘Works and service concessions’, was worded as follows:

‘This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.’

Regulation No 1370/2007

9 Article 5 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1), entitled ‘Award of public service contracts’, is worded as follows:

‘1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives [2004/17] or [2004/18] for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply.

…

7. Member States shall take the necessary measures to ensure that decisions taken in accordance with paragraphs 2 to 6 may be reviewed effectively and rapidly, at the request of any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, on the grounds that such decisions have infringed [EU] law or national rules implementing that law.

…’

Italian law

10 Article 100 of the codice di procedura civile (Italian Code of Civil Procedure), in the version applicable at the material time, provides that ‘in order to bring or oppose a claim, a party must have sufficient legal interest in that claim’.

11 Article 39(1) of Annex 1 to decreto legge n. 104/2010 — Codice del processo amministrativo (Decree Law No 104 on the Administrative Procedure Code) of 2 July 2010 (Ordinary Supplement to GURI No 156 of 7 July 2010) provides: ‘For any matter that is not regulated by this Code the provisions of the Italian Code of Civil Procedure should be applied as far as they are compatible or express general principles.’

12 Article 3a of decreto legge n. 138 (Decree Law No 138) of 13 August 2011 (GURI No 188 of 13 August 2011) amended and converted into law by Law No 148 of 14 September 2011 (‘Decree Law No 138/2011’) states that, in principle, local public services must be operated at provincial level.

13 Under Article 9(1) and Article 14(1) of the Legge regionale n. 33 (Riforma del Sistema del trasporto pubblio regionale e locale) (Regional law No 33 (Reform of the system of regional and local public transport) of 7 November 2013 (‘Regional law No 33/2013’), public transport services in the Region of Liguria had to be award in one single lot relating to the entire region with the possibility of extension also to rail transport.

14 Taking effect on 12 August 2016, the legge regionale n. 19 Modifiche alla [legge regionale n. 33] (Regional Law No 19 amending Regional Law No 33) of 9 August 2016 (‘Regional Law No 19/2016’) amended Articles 9 and 14 of Regional law No 33/2013. That law provides that henceforward land and sea transport services are no longer required to be awarded in a single lot covering all the territory of the Region of Liguria, but may be awarded in four lots concerning four homogenous territorial areas.

The dispute in the main proceedings and the question referred for a preliminary ruling

15 Amt and Others brought an action before the Tribunale Amministrativo Regionale per la Liguria (Regional Administrative Court, Liguria, Italy) seeking the annulment of various acts by which the Agency launched the informal tender procedure for public transport services in the Region of Liguria.

16 Those companies, which were until then operators of local public transport services at provincial or sub-provincial levels, challenge, as a matter of principle, the detailed rules for the launch and conduct of the tendering procedure. Their action is aimed specifically at the notice for the selection of economic operators. The Agency specified therein that regional public transport services would from then on be awarded in one single lot covering the whole territory of the Region of Liguria.

17 Taking the view that it would be impossible for any of the plaintiffs to provide public transport services individually at regional level, Amt and Others did not submit tenders. However, they brought an action before the referring court challenging the decision of the Agency, in its capacity of contracting authority, to award the contract at issue in the main proceedings as one single lot covering the whole territory of the Region of Liguria. In their view, that decision is contrary to Article 3a of Decree-Law No 138/2011, under which local public services must, in principle, be operated at provincial level, but also various articles of the Italian Constitution and Articles 49 and 56 TFEU.

18 In support of their action, Amt and Others argue that an economic operator which challenges, as a matter of principle, the terms of a tendering procedure in which it has not participated has a right to a remedy under Article 1(3) and Article 2(1)(b) of Directive 89/665 if, in the light of the legislation relating to the tendering procedure, it is certain or highly likely that it will be impossible for that operator to be awarded the contract.

19 According to the referring court, if the territorial framework had been set at provincial level, Amt and Others would have had a good chance of winning the contract at issue, as they provided regional public transport services when, prior to the launch of the tendering procedure at issue in the main proceedings, it was organised at provincial level. However, by specifying that that procedure was to consist of one single lot covering the whole of the territory of the region, the tender notice reduced the chances that one of the plaintiffs in the main proceedings would be awarded the contract to almost zero.

20 Therefore, taking the view that they should be granted a right to bring an action, the referring court, by Order No 95 of 21 January 2016, asked the Corte costituzionale (Constitutional Court, Italy) about the constitutionality of Article 9(1) and Article 14(1) of Regional Law No 33/2013.

21 However, before the Corte costituzionale (Constitutional Court) gave judgment, the Region of Liguria adopted Regional Law No 19/2016. That law amended the provisions whose constitutionality was challenged and provides that land and sea transport services are no longer required to be awarded in one single lot covering the whole of the territory of the Region of Liguria, but in four lots corresponding to four homogenous territorial areas. Furthermore, the lots to be awarded must be defined so as to ensure the widest possible participation in the call for tenders. According to the referring court, by the adoption of Law No 19/2016, the regional legislature has responded to the complaints expressed by Amt and Others.

22 In spite of the amendment to Articles 9 and 14 of Regional Law No 33/2013, the Corte costituzionale (Constitutional Court) examined the constitutionality of those articles in accordance with the principle *tempus regit actum*.

23 In its judgment No 245 of 22 November 2016, it judged the questions on constitutionality to be inadmissible after stating, inter alia, that 'according to settled case-law on administrative law, an undertaking which does not take part in a call for tenders cannot challenge a tender procedure nor the award of the contract to a third company, because its legal position is not sufficiently distinct and concerns a purely factual interest …'.

24 However, that rule may be derogated from if the plaintiff company challenges, inter alia, the clauses of the tender notice which directly exclude it or clauses imposing obligations which are clearly unreasonable, totally disproportionate, or which make it impossible to submit a tender.

25 In its judgment No 245, the Corte costituzionale (Constitutional Court) held that 'it is clear from the grounds of the order for reference that the case before this court is not one of those exceptional cases, as it is stated therein that the provisions challenged affect the plaintiffs' chances of being awarded the tender which "were reduced to almost zero" whereas if the contract was organised on a provincial basis and divided into lots, those companies "would have a very good chance of being awarded the contract, if only because of the advantage of having being the previous operators of that service". Such reasoning does not disclose any certain and present obstacle to participation in the procedure, but only a possibility of damage which may be relied on only by a party which has taken part in the procedure and only at the end of that procedure, as a result of the failure to award that contract to the applicant'.

26 The referring court points out that, according to the interpretation of the procedural requirement to have an interest in bringing proceedings, adopted in the judgment of the Corte costituzionale (Constitutional Court), an action brought by a company which has not taken part in a tender procedure is inadmissible if it is very likely, but not absolutely certain that, because of the way in which the contracting authority has presented and organised the tendering procedure, in particular by dividing the tender into lots or the rules which are applicable to it, that company cannot be awarded the contract concerned. It infers that access to legal protection would therefore be almost systematically subject to participation in the tender procedure, which would in itself generate significant expenses, even if the company intended to challenge the legality of the tender procedure itself on the ground that it excessively restricted competition.

27 Notwithstanding the Agency's decision not to proceed with the tender procedure after the adoption of Law No 19/2016, the referring court asks the Court whether Article 1(3) and Article 2(1)(b) of Directive 89/665 must be interpreted, in the circumstances of the case in the main proceedings, as conferring a right to bring proceedings on an economic operator who did not submit a tender on the ground that it was certain or very likely that it could not win the contract at issue.

28 The answer of the Court will be decisive for the determination of the admissibility of the original action and, therefore, the allocation of costs in the main proceedings.

29 In that context, the Tribunale amministrativo regionale per la Liguria (Regional Administrative Court, Liguria) decided to stay its proceedings and to refer the following question to the Court of Justice for a

preliminary ruling:

‘Do Article 1(1), (2) and (3) and Article 2(1)(b) of Directive 89/665 … preclude a national law which recognises only economic operators that applied to take part in a tendering procedure as being able to challenge the documents relating to a tendering procedure, even when the action challenges the tendering procedure as a matter of principle because the rules of the tendering procedure make it highly unlikely that the economic operator would be awarded the contract?’

Consideration of the question referred

Admissibility

30 In their written submissions both the Italian and Spanish Governments and the European Commission argued that the request for a preliminary ruling is inadmissible on the ground that the question referred is hypothetical, as the dispute in the main proceedings has become devoid of purpose after the contracting authority indicated that the tender procedure would be discontinued. The Italian Government also submitted that the request for a preliminary ruling is inadmissible on the ground that doubts remain as to the nature of the contract that the Agency wished to conclude with the contracting party following the tender procedure.

The hypothetical nature of the question referred for a preliminary ruling

31 It must be recalled that, according to settled case-law, in the context of cooperation between the Court and national courts as provided for by Article 267 TFEU, it is solely for the national court, which alone has direct knowledge of the facts of the case and of the arguments put forward by the parties, and which must bear the responsibility for the subsequent decision, is in the best position to determine, in the light of the special features of each case and with full knowledge of the matter before it, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, in particular, to that effect, judgments of 22 June 2000, *Marca Mode*, C-425/98, EU:C:2000:339, paragraph 21, and of 1 April 2008, *Gouvernement de la Communauté française and Gouvernement wallon*, C-212/06, EU:C:2008:178, paragraph 28).

32 Consequently, where the questions concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling (judgment of 17 April 2007, *AGM-COS.MET*, C-470/03, EU:C:2007:213, paragraph 44).

33 It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of EU law referred to in the questions bears no relation to the actual facts of the main action or to its purpose (see, in particular, judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 61; of 7 September 1999, *Beck and Bergdorf*, Case C-355/97, EU:C:1999:391, paragraph 22, and of 1 April 2008, *Gouvernement de la Communauté française and Gouvernement wallon*, C-212/06, EU:C:2008:178, paragraph 29).

34 A reference by a national court can be rejected only if it appears that the procedure laid down by Article 267 TFEU has been misused and a ruling from the Court elicited by means of a contrived dispute, or it is obvious that EU law cannot apply, either directly or indirectly, to the circumstances of the case referred to the Court (see, to that effect, judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraph 40, and of 17 July 1997, *Leur-Bloem*, C-28/95, EU:C:1997:369, paragraph 26).

35 In the present case, there is no argument that the question whether the plaintiffs in the main proceedings had the right to bring an action against the call for tenders published by the Agency on the basis of EU law would be the condition for the admissibility of the action before the referring court. It is true, by reason of the Agency’s decision not to pursue the call for tenders after the adoption of Law No 19/2016, that the main subject matter of the dispute has disappeared.

36 However, unlike the circumstances of the case which gave rise to the order of the Court of 14 October 2010, *Reinke* (C-336/08, not published, EU:C:2010:604), the merits of the dispute in the main proceedings have not been adjudicated on.

37 Finally, although the examination of the question whether, in the circumstances of the dispute in the main proceedings, economic operators which consciously decided not to take part in a tender procedure had a right to bring proceedings under Article 1(3) of Directive 89/665 or Article 1(3) of Directive 92/13, is only intended to enable the referring court to adjudicate on the allocation of costs in the dispute in the main proceedings, it is undeniably a question relating to the interpretation of EU law to which the Court must respond in order to maintain the uniformity of application of that law.

38 To that extent, it must be held that the request for a preliminary ruling is admissible.

Failure to identify the nature of the contract at issue in the main proceedings

39 It is true, as the Italian Government submits in its written observations, that it is unclear from the order for reference whether the call for tenders issued by the Agency covered the award of a concession for transport services or a public services contract. In the first case, whether the plaintiffs in the main proceedings had an interest in bringing proceedings would be determined with regard to Article 5(7) of Regulation No 1370/2007, whereas in the second case, it would be examined in the light of Article 1(3) of Directive 92/13.

40 However, without there being any need to try to determine the nature of that contract, which is a matter for the referring court, it suffices to state, as the Advocate General observed in point 63 of his Opinion, that Article 1(3) of Directive 92/13 and Article 5(7) of Regulation No 1370/2007 establish systems of remedies analogous to the system in Directive 89/665, to which the question from the referring court relates.

41 In those circumstances, the right to legal protection which is equivalent protection in the three texts of secondary law in question in the preceding paragraph, the answer of the Court to the question referred cannot vary according to the classification of the contract at issue in the main proceedings.

42 Therefore, the request for a preliminary ruling must also be declared admissible to that extent.

Substance

43 By its question, the referring court asks essentially whether both Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13 preclude national legislation, such as that at issue in the main proceedings, which does not allow economic operators to bring an action against decisions of the contracting authority relating to a tender procedure in which they have decided not to participate on the ground that the legislation applicable to that procedure made it very unlikely that they would be awarded the public contract concerned.

44 In accordance with Article 1(3) of Directive 89/665, the Member States are required to ensure that the review procedures provided for are available ‘at least’ to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of the EU law on public procurement or national rules transposing that law (see, to that effect, judgments of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 25, and of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 23).

45 Therefore, Member States are not obliged to make those review procedures available to any person wishing to obtain a public contract, but they may require that the person concerned has been or risks being harmed by the infringement he alleges (see, to that effect, judgments of 19 June 2003, *Hackermüller*, C-249/01, EU:C:2003:359, paragraph 18, and of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 26).

46 Participation in a contract award procedure may, in principle, with regard to Article 1(3) of Directive 89/665, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly

unlawful nature of the decision to award that contract. If he has not submitted a tender it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision (judgment of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 27).

47 However, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, it would be too much to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665 against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications (judgment of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraphs 28 and 29).

48 In the judgment of 12 February 2004, *Grossmann Air Service* (C-230/02, EU:C:2004:93), the finding that the chances of Grossman Air Service being awarded the contract were non-existent was related to the fact, set out in paragraph 17 of that judgment, that it did not have large aircraft available to it, so that it was not in a position to provide all the services requested by the contracting authority.

49 The findings derived from the judgment of 12 February 2004, *Grossmann Air Service* (C-230/02, EU:C:2004:93), are applicable *mutatis mutandis* in the present case.

50 It is clear both from the case-law of the Consiglio di Stato (Council of State, Italy) and judgment No 245/2016 of the Corte costituzionale (Constitutional Court) that exceptionally an economic operator which has not submitted a tender may be held to have an interest in bringing proceedings ‘in the case in which the complaints of the plaintiff company concern the absence of a call for tender, its scheduling, or clauses which were immediately exclusive or imposing obligations which are manifestly unreasonable to totally disproportionate or which make the submission of such a tender impossible’.

51 Therefore, it must be held that the requirements laid down in Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13 are satisfied if an operator which has not submitted a tender has a right to bring proceedings, inter alia, where it considers that the specifications contained in the documents relating to the call for tenders makes it impossible to submit a tender.

52 It must be pointed out that, so as not to undermine the objectives of speed and effectiveness laid down by Directive 89/665 and Directive 92/13, such an action cannot be brought after notification of the decision awarding the contract has been adopted by the contracting authority (see, to that effect, judgment of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 37).

53 Furthermore, since it is only in exceptional cases that a right to bring proceedings is given to an operator which has not submitted a tender, it cannot be regarded as excessive to require that operator to demonstrate that the clauses in the call for tenders make it impossible to submit a tender.

54 However, although the stringency of the evidential requirements is not in itself contrary to EU law on public procurement, it is possible that, having regard to the specific circumstances of the case in the main proceedings, its application may lead to an infringement of the right to bring proceedings that the plaintiffs in the main proceedings derive from Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13.

55 In that connection, it is for the referring court to make a detailed assessment, taking account of all the relevant information characterising the context of the case brought before it, of whether the application of the Italian legislation relating to the capacity to bring proceedings, as interpreted by the Consiglio di Stato (Council of State) and the Corte constituzionale (Constitutional Court) is in practice liable to affect the right of the plaintiffs in the main proceedings to effective judicial protection.

56 However, based on the information in the file, the Court may provide the referring court with valuable guidance for the assessment it is to carry out.

57 In that connection, first, account must be taken of the fact that Amt and Others provided regional transport services before the contracting authority launched the tendering procedure and then decided to discontinue it. Since, Regional Law No 33/2013 states that regional public transport services would be awarded henceforward in one single lot covering the whole territory of the Region of Liguria, even though Article 3a of Decree-Law No 138/2011 provides that, in principle, local public services must be operated at provincial level, the referring court is to examine whether the regional legislature set out the reasons for which it considered that it was preferable from that time on to organise transport services at regional level and no longer at provincial level. Lastly, taking account of the freedom of the contracting authority in the assessment of its needs, it is possible that the Region of Liguria's decision to organise transport services at regional level was legitimate in that, for example, it was based on economic considerations, such as the commitment to achieving economies of scale.

58 Having regard to the foregoing considerations, the answer to the question referred is that both Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13 must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which does not allow economic operators to bring an action against the decisions of a contracting authority relating to a tendering procedure in which they have decided not to participate on the ground that the legislation applicable to that procedure made the award to them of the contract concerned very unlikely.

However, it is for the competent national court to make a detailed assessment, taking account of all the relevant information characterising the context of the case brought before it, as to whether the application of that legislation in practice is liable to affect the right of the economic operators concerned to the right to effective judicial protection.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Both Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, and Article 1(3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which does not allow economic operators to bring an action against the decisions of a contracting authority relating to a tendering procedure in which they have decided not to participate on the ground that the legislation applicable to that procedure made the award to them of the contract concerned very unlikely.

However, it is for the competent national court to make a detailed assessment, taking account of all the relevant information characterising the context of the case brought before it, as to whether the application of that legislation in practice is liable to affect the right of the economic operators concerned to the right to effective judicial protection.

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 5 July 2018 (1)

Case C-328/17

Amt Azienda Trasporti e Mobilità SpA,

Atc Esercizio SpA,

Atp Esercizio Srl,

Riviera Trasporti SpA,

Tpl Linea Srl

v

Atpl Liguria — Agenzia regionale per il trasporto pubblico locale SpA,

Regione Liguria

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale della Liguria (Regional Administrative Court, Liguria, Italy))

(Reference for a preliminary ruling — Public procurement — Admissibility — Dispute having become devoid of purpose — Directive 89/665/EEC — Review procedures — Need to have participated in the call for tenders in order to be able to seek review — Tenderer's standing in the event of absolute certainty as to ineligibility)

1. In a case which no longer needs to be settled by way of judgment because it has become (legally) devoid of purpose in the absence of any further substantive dispute between the parties, may the judge who was to adjudicate in that case make a reference for a preliminary ruling confined exclusively to determining who should pay the costs of the proceedings?

2. The Court of Justice has two options:

– On the one hand, it can adhere to the precedent which it established in *Reinke* (2) and find that, in those circumstances, there is no longer any need to answer the question referred for a preliminary ruling, which is inadmissible.

– On the other hand, it can overcome that obstacle, in which case its reply to the referring court will have to provide an interpretation of the directives on review procedures in the award of public contracts. (3) That interpretation is sought from the Court of Justice so that the referring court can compare it with that supported by the highest courts in Italy (the Council of State and the Constitutional Court) in connection with the standing of an undertaking to challenge the documents relating to a tendering procedure in which it did not participate. According to the

referring court, the award of costs in the dispute in the main proceedings will depend on the answer given to this question.

I. Legal framework

A. EU law

1. Directive 89/665 and Directive 92/13 (4)

3. Article 1 (‘Scope and availability of review procedures’) provides:

‘1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [(OJ 2004 L 134, p. 114)], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive [Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive].

Contracts within the meaning of this Directive include public contracts [supply, works and service contracts], framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC [Directive 2004/17/EC], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…’

4. Article 2 (‘Requirements for review procedures’) states:

‘1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

…

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure [in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question].

…’

2. Regulation No 1370/2007 (5)

5. Article 5 (‘Award of public service contracts’) provides:

‘1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply.

…

7. Member States shall take the necessary measures to ensure that decisions taken in accordance with paragraphs 2 to 6 may be reviewed effectively and rapidly, at the request of any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, on the grounds that such decisions have infringed Community law or national rules implementing that law.

…’

B. Italian law

1. Decree Law No 138 of 13 August 2011 (6)

6. Article 3a thereof provides that, as a general rule, the province is the territorial unit of reference for the provision of local public services.

2. Liguria Regional Law No 33 of 7 November 2103 (7)

7. According to Articles 9(1) and 14(1), service contracts are to be awarded by determining a single lot covering the entirety of the regional territory. (8)

3. Codice del processo amministrativo (Code of Administrative Procedure) (9)

8. Article 26 (‘Court costs’) provides:

‘1. When giving judgment, the judge shall also make a decision on procedural costs, in accordance with Articles 91, 92, 93, 94, 96 and 97 of the Code of Civil Procedure, taking into account also respect for the principles of clarity and concision referred to in Article 2(3). In any event, the court may also, of its own motion, order the unsuccessful party to pay the other party a sum determined in accordance with the principle of equity, up to a maximum of twice the amount of the costs paid, where the grounds therefor are manifestly unfounded.

…’

9. Article 39(1) provides:

‘Any matters not regulated in this Code shall be subject to the provisions of the Code of Civil Procedure, in so far as these are compatible or give expression to general principles.’

4. Codice di procedura civile (Code of Civil Procedure) (10)

10. Article 91 establishes the principle that the payment of costs is to be subject to the objective success or otherwise of the parties to the proceedings.

11. Article 92 states:

‘In a judgment given in accordance with the foregoing article, the court may rule out recovery of the costs which the successful party has incurred if it considers them to be excessive or unnecessary; …

Should the action be partially upheld, should the matter in issue be entirely new or should there be a change of case-law in relation to the matters forming the subject of the proceedings, the court may order that all or some of the costs be shared between the parties.

…'

12. Article 100 reads:

'A party bringing or opposing a claim must have an interest in that claim.'

II. Facts of the dispute and question referred

13. Regione Liguria (Region of Liguria), acting through the Agenzia regionale per il transporto pubblico locale (Regional Agency for Local Public Transport) published in the *Official Journal of the European Union* of 3 June 2015 (11) a 'notice for the identification of economic operators' to provide a public passenger transport services by land within its territory, in accordance with Liguria Regional Law No 33/2013 and Regulation No 1370/2007.

14. A number of undertakings (referred to collectively as 'AMT') that provided public passenger transport services by land in the region at provincial or sub-provincial level challenged the documents relating to the procurement procedure before the Tribunale Amministrativo Regionale della Liguria (Regional Administrative Court, Liguria, Italy). (12) In support of their claim, they argued that, since the region had been established as the sole territorial unit for the provision of such services, they stood practically no chance of being awarded the contract.

15. The applicants having called into question the compatibility of Liguria Regional Law No 33/2013 with the Italian Constitution, the TAR, Liguria, raised a 'question of constitutional legitimacy' before the Corte Costituzionale (Constitutional Court, Italy) on 21 January 2016.

16. While the constitutional legitimacy proceedings were pending, Regione Liguria adopted a new law (13) abolishing the definition of the region as the geographical unit for the provision of transport services by land. In the light of that abolition, the competent authority elected not to take forward the tendering procedure and cancelled it.

17. Notwithstanding the foregoing, the Corte Costituzionale (Constitutional Court) delivered judgment No 245/2016 of 22 November 2016, in which it declared inadmissible the question raised by the TAR, Liguria, because AMT lacked standing to seek review of the documents relating to the tendering procedure, in which it had not taken part.

18. The Corte Costituzionale (Constitutional Court) gave the following as the grounds for its ruling:

'According to the submissions of the referring court, the applicants, undertakings which already held contracts for public transport services at provincial level, did not participate in the informal call for tenders issued by the regional administration in accordance with Article 30 of Legislative Decree No 163 of 2006, [(14)] but simply challenged the notice for the identification of economic operators inviting expressions of interest inasmuch as it states that the contract is to be awarded at regional level and in a single lot.

According to the settled case-law of the administrative courts, an undertaking which does not participate in a tendering procedure cannot challenge that procedure or the award of the contract to other undertakings, because its substantive legal position is not sufficiently differentiated, but is attributable only to a factual interest (judgment No 2507 of the Council of State, Third Section, of 10 June 2016; judgment No 491 of the Council of State, Third Section, of 2 February 2015; judgment No 6048 of the Council of State, Sixth Section, of 10 December 2014; judgment No 9 of the Council of State, sitting in Plenary, of 25 February 2014; and judgment No 4 of the Council of State, sitting in Plenary, of 7 April 2011).

There is also settled case-law to the effect that “calls for tender and competition and notices inviting expressions of interest are normally challenged together with the documents that give effect to them, since it is these documents which specifically identify the persons harmed by the procedure and which give actual and concrete form to the harm caused to the subjective position of the person concerned” (judgment No 1 of the Plenary of the Council of State of 29 January 2003).

Constituting an exception to those rules, which derive from the straightforward application to tendering procedures of the general principles of standing and the need to have an interest in bringing proceedings, are situations in which the challenge is directed against the fact that no call for tenders has been issued or its scheduling, or the specifications in the contract notice that are immediately exclusive or, finally, against specifications which impose burdens that are manifestly incomprehensible or totally disproportionate or that make it impossible to submit a bid (judgment No 2507 of the Council of State, Third Section, of 10 June 2016; judgment No 5862 of the Council of State, Fifth Section, of 30 December 2015; judgment No 5181 of the Council of State, Fifth Section, of 12 November 2015; judgment No 9 of the Council of State, sitting in Plenary, of 25 February 2014; and judgment No 4 of the Council of State, sitting in Plenary, of 7 April 2011).

In such cases, the request to participate in the procedure is irrelevant for the purposes of the challenge, either because no call for tenders has actually been issued or because the challenge to the call for tenders in principle or the impossibility of participating in it make apparent in and of themselves a differentiated legal position (on the part of an undertaking whose legal relationship is incompatible with the launch of the new procedure and a sectoral undertaking which has been prevented from participating, respectively) and the actual and concrete harm occasioned to such an undertaking (judgment No 4 of the Council of State, sitting in Plenary, of 7 April 2011).

The fact that the case before the national court does not fall within the scope of one of the aforementioned exceptional situations follows from the reasoning set out in the order for reference itself, which states that the contested specifications would affect the applicants’ chances of being awarded the contract, which “would virtually be reduced to zero”, whereas, in a call for tenders issued at provincial level and divided into lots, the applicants “would stand a very good chance of being awarded the contract for the service, if only because of the advantage of having managed that service previously”.

That reasoning points not towards a real and present impediment to participation in the call for tenders but towards the prospect of only potential harm, which those who have participated in the procedure may challenge, only at the end thereof, if the contract has not been awarded to them.’

19. The TAR, Liguria, is uncertain whether that interpretation of the Corte Costituzionale (Constitutional Court) is consistent with Directive 89/665. For that reason, notwithstanding that the call for tenders was cancelled, it considers it useful to obtain a preliminary ruling from the Court of Justice for the purposes of making a decision on the costs of the proceedings.

20. The referring court envisages two potential situations:

– ‘if it is concluded that the action for annulment aimed at obtaining a review of the entirety of the tendering procedure is one of the exceptional situations in which an economic operator which has not participated in the procedure is considered to have standing to bring the action, the proceedings should culminate in a judgment declaring the dispute to have become devoid of purpose as a result of the adoption of Liguria Regional Law No 19/2016 … The costs of the proceedings and the standard fee … would be payable … by the defendant and, therefore, reimbursed to the applicants …’;

– ‘if, on the other hand, the proper interpretation were that given in judgment No 245/2016 of the Corte Costituzionale and the view were therefore taken that the applicant companies do not have standing to challenge the documents relating to the tendering procedure, the proceedings would have to conclude with a declaration that the claim is inadmissible because the applicants have no interest in bringing the action, and the costs would therefore be shared between the applicants.’

21. It was in the foregoing circumstances that the TAR, Liguria, referred the following question for a preliminary ruling:

> ‘Do Article 1(1), (2) and (3) and Article 2(1)(b) of Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, preclude a national law which recognises only economic operators that applied to take part in a tendering procedure as being able to challenge the documents relating to a tendering procedure, even where the action criticises the tendering procedure as a matter of principle because the rules of the tendering procedure make it highly unlikely that the economic operator would be awarded the contract?’

III. Summary of the observations of the parties

22. The Italian Government refutes the admissibility of the question referred for a preliminary ruling on the basis of the following arguments:

– First, because Article 1(1) of Directive 89/665 defines its scope of application by reference to Directive 2004/18. Given that the tendering procedure at issue had as its purpose to award a concession for public transport services by land, Directive 2004/18 is not applicable, and neither is Directive 89/665.

– Secondly, even if Directive 89/665 were considered to be applicable, its application rests on an infringement of the substantive rules of Directive 2004/18. The national court has not indicated which provisions have been infringed, but refers vaguely to a possible excessive restriction of competition, without specifying the provisions of EU law breached.

23. As regards the merits of the case, the Italian Government submits that the general rule is that anyone who has freely and voluntarily refrained from taking part in a procurement procedure does not have standing to seek the annulment of that procedure. Exceptions do apply, however, in the case of challenges to: i) the issue of the call for tenders as a matter of principle; ii) the failure to issue a call for tenders, because the administration has awarded the contract directly; and iii) one or more of the specifications of the contract notice, on the ground that they are immediately exclusive. It considers this regime to be perfectly compatible with the case-law principles established in the judgment in *Grossmann Air Service*. (15)

24. The Italian Government concludes that, in this particular case, the Corte Costituzionale (Constitutional Court) took the view that, since ATM’s chances were not non-existent but only reduced, its eligibility could be determined only on conclusion of the procurement procedure, in which it should have taken part.

25. The Government of the Czech Republic, also relying on the judgment in *Grossmann*, argues that, if potential tenderers are in a discriminatory situation, they must be recognised as having standing to challenge the specifications giving rise to discrimination. A finding upholding their action would enable them to take part in the procedure for the award of the contract and to have the tender documents revised at the initial stage of the procedure, without having to wait for the latter to be definitively completed.

26. For the Spanish Government, Directive 89/665 establishes various minimum levels of access to review procedures, it being for the national legal systems to define these within the limits of the principles of equivalence and effectiveness. It focuses its analysis on the principle of effectiveness and rejects the proposition that this has been infringed, since Article 1(3) of Directive 89/665 requires that the person concerned should have been harmed or be at risk of being harmed by an alleged infringement of Community law. This is not true of the applicant in relation to the documents concerning a tendering procedure in which it did not participate.

27. The Spanish Government points up the fact that the Italian legislation and the case-law interpreting it provide means of challenging a call for tenders without needing to take part in the tendering procedure, and that the applicant passed up the opportunity to seek review of the contract notice. There is therefore no reason why it should now take action against the documents relating to a tendering procedure in which it was not involved.

28. The Commission considers that the question referred for a preliminary ruling is inadmissible because hypothetical, inasmuch as the dispute in the main proceedings has become devoid of purpose.

29. As regards the substance of the case, the Commission analyses the judgment in *Grossmann* and reasons that the national rules governing the bringing of actions must respect the principle of effectiveness and must not run counter to the practical effect of Directive 89/665, which is strengthened by Article 47 of the Charter of Fundamental Rights of the European Union.

30. According to the Commission, the position of the Corte Costituzionale (Constitutional Court) is contrary to that principle inasmuch as it requires absolute certainty of being excluded from the tendering procedure as a condition of invoking the exceptions to the standing of an applicant which has not taken part in that procedure. The Court of Justice did not require proof of absolute certainty of exclusion, but only of a likelihood thereof.

IV. Procedure before the Court of Justice

31. The reference for a preliminary ruling was received at the Court Registry on 31 May 2017.

32. Written observations have been lodged by the Italian, Spanish and Czech Governments and by the European Commission. Only the Italian Government and the Commission attended the hearing held on 26 April 2018.

V. Assessment

A. Admissibility of the question referred

33. The main focus of the question referred is the standing to bring proceedings by persons who, like AMT, did not submit a bid in a public call for tenders because they considered it highly likely that they would be unsuccessful.

34. As I have already explained, the dispute before the national court became devoid of purpose as a result of a legislative reform following which the contracting authority cancelled the call for tenders. The national court submits, however, that it still requires a preliminary ruling from the Court of Justice in order to be able to make a decision on the costs of the proceedings.

35. According to the scheme of Article 267 TFEU, the purpose of the reference for a preliminary ruling is to provide the national court with the guidance it needs in order to be able to settle a dispute in which there is some uncertainty as to the interpretation of EU law.

36. I recalled at the outset of this Opinion that the Court of Justice has had occasion to adjudicate in a similar case in which the dispute in the main proceedings had become devoid of purpose and the preliminary ruling was useful only for the purposes of the decision as to costs.

37. Thus, the order in *Reinke* states that, in such circumstances, the decision on costs is subordinate to the resolution of the dispute in the main proceedings in the course of which the questions referred were raised. That dispute having been resolved, there was no longer any need to answer the questions raised solely in connection with the costs. (16)

38. In my view, the reasoning in the order in *Reinke* is flawless (17) and is consistent with other expressions of the same principle (Article 58 of the Statute of the Court of Justice, for example, provides that an appeal on points of law may not relate only to the amount of costs or the party ordered to pay them). If the proceedings in which the provision of EU law was to be applied later becomes devoid of purpose, the dispute between the parties is extinguished and the interpretation of a provision of EU law by the Court of Justice is simply no longer needed because it can have no bearing on the (non-existent) dispute.

39. The TAR, Liguria, nonetheless states that an assessment by the Court of Justice with respect to an applicant’s standing to challenge a call for tenders in which it has not participated would be relevant

inasmuch as it would enable it to determine which party should be ordered to pay the costs of the proceedings which have been extinguished, and in what amount.

40. To my mind, however, that indirect link is not sufficient to support the view that there is an adequate connection with EU law. Technically, the matter at issue now falls within the sphere not of public procurement but of the rules governing the costs of judicial proceedings. Unless costs are subject to a particular provision of EU law (as is the case in certain subject areas, to which I shall refer immediately hereafter), the decision on costs will be based exclusively on national law, not EU law.

41. The idea underpinning the order in *Reinke* is linked to the function of the reference for a preliminary ruling: since the interpretation of EU law must be essential to enable the national court to resolve the dispute before it (paragraph 13 of the order), the disappearance of that dispute renders the answer to the question referred unnecessary (paragraph 16).

42. EU law does not contain harmonised rules on procedural costs, the management of which is exclusively within the competence of the Member States. It is only in certain spheres that the EU legislature has made clear its wish to intervene in such matters, be it in order to avoid excessively onerous costs that might impede access to justice in a particular area of EU law, (18) or in order to ensure, once again in certain specific subject areas, that anyone whose rights have been infringed receives payment for proportionate and reasonable procedural costs from the other party. (19)

43. Even in cases where EU law lays down rules governing the costs of the proceedings, the Court of Justice has held that, 'where EU law lacks precision, it is for the Member States, when they transpose a directive, to ensure that it is fully effective and they retain a broad discretion as to the choice of methods'. In relation to the situation at issue in those proceedings, which concerned environmental law, it stated that 'account must be taken of all the relevant provisions of national law and, in particular, of a national legal aid scheme as well as of a costs protection regime', as well as of 'significant differences between national laws in that area'. (20)

44. If that broad discretion, combined with recognition of the fact that each national scheme has its own unique features, exists in cases where EU law intervenes in the regulation of procedural costs, the freedom enjoyed by the Member States will be more extensive still in an area not governed by Community rules.

45. In this case, any dispute over costs (21) would be strictly confined to an interpretation of the domestic rules governing the distribution of costs between the parties, as well as of the court's powers to adjust those rules. In such a dispute relating only to the costs of the proceedings, the guidance necessary to settle the dispute will have to come from national law, not EU law, which, I would reiterate, does not lay down such guidance in this subject area.

46. It could be that, notwithstanding the absence of any Community harmonisation in relation to the costs applicable to disputes of this kind, the features of the dispute in the main proceedings are such as to jeopardise respect for the fundamental rules and fundamental principles of the FEU Treaty. For this to be the case, however, one of the basic freedoms would have to be under threat, and of this there is not so much as an intimation in the order for reference.

47. In short, without wishing to usurp the assessments that fall to be made by the national court or to interfere in its freedom to choose from the options available to it under its national law, I would make the point that the aforementioned rules of the Italian codes of civil and administrative procedure provide sufficient support to enable the national court, irrespective of any adjudication that might be made in respect of the applicant's standing, to settle the matter of the award of costs on a basis separate from that issue.

48. It is sufficient to recall here that Italian domestic law provides that, where 'the matter at issue in a dispute is completely new' or where 'there is a change in the case-law relating to the matters at issue', (22) the national court may order that the costs be shared in full or in part between the parties. It thus has full freedom of choice in this regard, irrespective of whether, in accordance with the judgment of the Corte Costituzionale (Constitutional Court), it finds that AMT does not have standing to seek review or finds that it does.

49. I therefore take the view that the question referred for a preliminary ruling is inadmissible, since an answer from the Court of Justice is not necessary and the latter lacks jurisdiction to rule on the application of the Italian system for the award of procedural costs, which is a purely domestic matter.

B. Substance

50. In the event that the Court agrees to dispose of the substance of the question referred for a preliminary ruling, I shall set out my view in the alternative. In so doing, I shall begin by attempting to define the legal regime applicable and then go on to propose a response to the issue raised.

1. Legal regime applicable

51. The purpose of the call for tenders at issue was to award a contract for the provision of public passenger transport services by land. This type of service falls within the specific scope of Regulation No 1370/2007, Article 5 of which governs the 'award of public service contracts' in the transport sector.

52. From the information contained in the order for reference, it is not possible to infer with any certainty whether the contract in question was a 'service concession contract' or a 'public service contract'. The two types of contract share similar features, (23) the difference between them lying in the consideration, which, in the case of concessions, consists in the right (either as such, or in conjunction with payment) to exploit the service and, in the case of service contracts, is paid by the contracting authority to the service provider. (24)

53. The decision as to which of those two categories the contract at issue falls into is a matter for the national court, which, unlike the Court of Justice, has at its disposal all the facts necessary to enable it to make that decision. The classification of that contract will be relevant in determining the legal regime applicable to it, given the wording of Article 5(1) of Regulation No 1370/2007. (25)

54. I shall therefore turn to the issue of standing to seek review in those two scenarios.

(a) Public transport service concession

55. The first scenario is that the contract at issue was for a service concession, as some of the written observations argue and as might be inferred from the contract notice, inasmuch as it makes reference to Article 30 of the Public Procurement Code, which specifically governs 'service concessions'. (26)

56. The Italian Government cites the existence of a concession as grounds for calling into question the reliance on Directive 89/665. It argues that, since Article 1(1) thereof defines its scope by reference to Directive 2004/18, Directive 89/665 is not applicable to such concessions.

57. The Commission, on the other hand, submits that, in Italy, Article 30(7) of the Public Procurement Code extends the application of Directive 89/665 to public service concessions. There is, therefore, in its contention, a Community link between the national legislation and EU law such as to sustain the jurisdiction of the Court of Justice to give a preliminary ruling, in accordance with settled case-law. (27)

58. This might open the way for the applicability of Directive 89/665. However, 'consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations, to which it is applicable only through the operation of the national legislation, is a matter for domestic law and hence falls within the exclusive jurisdiction of the courts of the Member State'. (28)

59. Furthermore, the specific provisions on public passenger transport services by land which are laid down in Regulation No 1370/2007 make the award of the corresponding concessions subject to the rules contained in Article 5(2) to (6) of that regulation, which goes on to say, in paragraph 7, that decisions taken in accordance with those paragraphs must be capable of being 'reviewed effectively and rapidly, at the request of any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, on the grounds that such decisions have infringed Community law or national rules implementing that law'.

60. It is therefore apparent that the provisions of Regulation No 1370/2007 and those of Article 1(3) of Directive 89/665 are essentially the same in this regard. Indeed, recital 21 of that regulation states that

‘effective legal protection should be guaranteed, not only for awards falling within the scope of [Directives 2004/17 and 2004/18] but also for other contracts awarded under this Regulation. An effective review procedure is needed and should be comparable, where appropriate, to the relevant procedures set out in … Directive 89/665/EEC … and … Directive 92/13/EEC …’.

61. In short, the outcome arrived at, albeit via a different route, is the same, that is to say an obligation to establish effective review procedures. On that basis, the dispute lies in determining to what extent those review procedures must be made available to undertakings which did not take part in the tendering procedure.

(b) Transport service contract

62. The second scenario is that the legal transaction at issue fell within the category of transport service contracts. Indeed, the ‘periodic indicative notice’ of 22 February 2014 refers exclusively to Directive 2004/17 (29) and lays down as the award criterion the economically most advantageous offer. Similarly, point 2 of the contract notice of 29 May 2015 refers to consideration payable to the successful tenderer that is to be definitively specified in the letters of invitation to submit the financial offer mentioned in point 6 thereof.

63. It could therefore be argued that, in the light of those features, the contract at issue is not a transport service concession as defined in Article 1(3)(b) of Directive 2004/17, (30) but a transport service contract. If that were the case, Article 5(1) of Regulation No 1370/2007 would pave the way for the application of Directive 2004/17 and, therefore, for the review regime provided for in Articles 1 and 2 of Directive 92/13, which is analogous to the corresponding regime under Directive 89/665, with which the referring court’s question is concerned.

2. Answer to the question referred

64. Although the nub of the debate centres on standing to seek review of the tendering procedure and, therefore, on the right of access to the review system, the order for reference extends that debate to other areas by the somewhat generic reference to Article 1(1), (2) and (3) and Article 2(1)(b) of Directive 89/665.

65. The Corte Costituzionale (Constitutional Court) relies on the case-law of the Consiglio di Stato (Council of State) in order, in judgment No 245/2016, to lay down a premiss which I find difficult to refute: anyone who has voluntarily and freely refrained from participating in a procurement procedure has no standing, in principle, to seek the annulment of that procedure. This view is consistent with that expressed by the Court of Justice in the judgment in *Grossmann* when interpreting Article 1(3) of Directive 89/665. (31)

66. The supreme Italian courts accept, however, that review procedures may also be open to persons who did not take part in the tendering procedure, in certain exceptional circumstances. These include, in the words of judgment No 245/2016, situations in which the challenge is directed against the fact that no call for tenders has been issued or its scheduling, or the specifications in the contract notice that are immediately exclusive or, finally, against specifications which impose burdens that are manifestly incomprehensible or totally disproportionate or that make it impossible to submit a bid’.

67. Once again, the recognition of standing to seek review seems to me to be consistent with the standing recognised by the Court of Justice in cases where the specifications in the invitation to tender or in the contract documents were, in and of themselves, discriminatory to such an extent as to preclude the participation of one or more undertakings. (32) If ‘[the aforementioned undertakings’] chances of being awarded the contract are *non-existent* by reason of the existence of those [discriminatory] specifications’, (33) they must be recognised as having standing to seek review without having to have participated in the tendering procedure beforehand. (34)

68. I do not therefore see any discrepancies between the interpretation of Directive 89/665 which has been adopted by the Court of Justice, on the one hand, and the supreme Italian courts’ interpretation of their domestic legislation, on the other, so far as concerns the standing of persons who, although not having participated in the tendering procedure, seek to challenge discriminatory specifications that close off all access to that procedure.

69. If the question referred for a preliminary ruling is confined to resolving the hypothetical opposition between Directive 89/665 and the national legislation in the abstract, the foregoing is sufficient to demonstrate that no such incompatibility exists. The referring court frames that question in terms that do not truly reflect all the nuances of the position adopted by the Italian supreme courts, as this emerges from national case-law. (35)

70. If the answer to that question is extended to the specific features of the dispute in the main proceedings, in which the judgment on AMT's lack of standing has become final, it must be noted that it is, to say the least, debatable (36) whether the fact that the land transport services were put out to tender at regional level (instead of being subdivided into lots at a provincial or lower level) was, in and of itself, *discriminatory*. The fact that small undertakings lacked the means to take part in such a tendering procedure, which tends to be an inherent feature of large-scale invitations to tender, is a different matter.

71. In any event, the view taken by the Corte Costituzionale (Constitutional Court) was that, in the material circumstances, the call for tenders made it highly unlikely that AMT would be awarded the contract, but not absolutely impossible. (37) It thus dismissed the proposition that there was 'a real and actual impediment to participation in the call for tenders'. Inasmuch as they constitute a now final adjudication upon the substance of the specifications concerned, those findings cannot but be binding on the referring court and must also be adhered to by the answer to the question referred for a preliminary ruling.

72. The Commission relies on the judgment in *Grossmann* in order to argue that there is no requirement of absolute certainty as to exclusion from a call for tenders, the mere possibility of exclusion being sufficient to enable the undertaking concerned to challenge that call for tenders without needing to have participated in it.

73. My reading of the judgment in *Grossmann* does not in any way tally with the Commission's. I consider it dangerous to make the calculation of probabilities the only decisive factor in the resolution of this dispute. If that *were* the only decisive factor, any undertaking could claim that the specifications in a call for tenders (even if not discriminatory) would *probably* have the effect of excluding it from the procedure, which would open the door for potentially frivolous challenges from operators having elected not to participate in the award procedure.

74. In any event, however, I would reiterate that it is not for the Court of Justice to determine whether the Corte Costituzionale (Constitutional Court) was wrong to find that AMT did not have standing in this *particular* case. What matters — and I would emphasise that the referring court's question is concerned with the compatibility of the national legislation with Directive 89/665 — is whether the *general* position which the supreme Italian courts have adopted on the standing of economic operators which have not participated in a call for tenders to seek review of that procedure (which is that they do not have it in principle but may be afforded it in certain cases) is consistent with EU law, as I think it is.

VI. Conclusion

75. In the light of the foregoing considerations, I propose that the Court of Justice:

(1) Declare the question referred for a preliminary ruling by the Tribunale Amministrativo Regionale della Liguria (Regional Administrative Court, Liguria, Italy) to be inadmissible;

(2) In the alternative, declare that Article 1(1), (2) and (3) and Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts do not preclude national legislation, as interpreted by the highest courts of the State concerned, under which:

– anyone who has voluntarily and freely refrained from participating in a contract award procedure does not, in principle, have standing to seek the annulment of that procedure;

– situations in which the challenge is directed against the fact that no call for tenders has been issued or that one has been issued, against specifications in the contract notice that are immediately exclusive or, finally, against specifications which impose burdens that are

manifestly incomprehensible or totally disproportionate or that make it impossible to submit a bid are exempt from that rule.

---

1 Original language: Spanish.

---

2 Order of 14 October 2010 (C-336/08, not published, ‘order in *Reinke*’, EU:C:2010:604).

---

3 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

---

4 Wording taken from Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31). I have inserted between square brackets the differences between the text of Directive 92/13 and the corresponding wording of Directive 89/665.

---

5 Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations 1191/69 and 1107/70) (OJ 2007 L 315, p. 1).

---

6 *Gazzetta Ufficiale* No 188 of 13 August 2011, ratified, with amendments, by Law No 148 of 14 September 2011.

---

7 *Bollettino Ufficiale* No 17 of 8 November 2013; ‘Liguria Regional Law No 33/2013’.

---

8 These articles were revoked by Regional Law No 19 of 9 August 2016 introducing ‘amendments to Regional Law No 33 of 7 November 2013 (Reform of the regional and local public transport system) and other legislative amendments in matters of local public transport’ (*Gazzetta Ufficiale* No 11 of 18 March 2017; ‘Liguria Regional Law No 19/2016’).

---

9 Legislative Decree No 104 of 2 July 2010 (*Gazzetta Ufficiale* No 156 of 7 July 2010).

---

10 Regio Decreto No 1443 of 28 October 1940 (*Gazzetta Ufficiale* No 253 of 28 October 1940).

---

11 OJ 2015/S 105-191825. That notice was preceded by another ‘indicative notice’ of 18 February 2014 (2014/S 038-063550), which made reference to Directive 2004/17.

---

12 ‘TAR, Liguria’.

---

13 See footnote 8.

---

14 Decreto legislativo 12 aprile 2006, n. 163. Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 of 12 April 2006 (*Gazzetta Ufficiale* No 100 of 2 May 2006; 'Legislative Decree No 2006' or 'Public Procurement Code').

15 Judgment of 12 February 2004 (C-230/02, 'judgment in *Grossmann*', EU:C:2004:93).

16 Paragraph 16.

17 It could of course be argued that the circumstances in *Reinke* were not identical to those in this case. I take the view, however, that, notwithstanding a number of incidental differences, the analogy between the two is indisputable.

18 Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) and Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26).

19 Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45); and Article 6(3) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (OJ 2011 L 48, p. 1).

20 Judgment of 11 April 2013, *Edwards*, (C-260/11, EU:C:2013:221, paragraphs 37 and 38).

21 The referring court does not provide any insight into the disagreement between the parties with respect to the award and amount of the (future) costs of the proceedings. What is more, the parties to those proceedings all declined to take part in the preliminary ruling proceedings, a fact which, to my mind, does not indicate much of an interest in their outcome.

22 The order for reference states that the legislation and the previous case-law of the Consiglio di Stato (Council of State) on the standing to seek review enjoyed by a person who has not participated in the call for tenders used to be 'in line with Community case-law'. That situation changed, according to the referring court, as a result of constitutional judgment No 245/2016, a 'supremely binding' precedent which has been followed by subsequent judgments of the Consiglio di Stato (Council of State).

23 See the Opinion of Advocate General Sharpston in *Hörmann Reisen* (C-292/15, EU:C:2016:480, point 26); and the Opinion of Advocate General Cruz Villalón in *Norma-A and Dekom* (C-348/10, EU:C:2011:468, point 39 et seq.).

24 The service provider must also take on the risk of operating the service. See the judgment of 10 November 2011, *Norma-A and Dekom* (C-348/10, EU:C:2011:721, paragraph 44).

25 'Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives.'

26 According to that article, ‘the provisions of the Public Procurement Code shall not apply to service concessions other than in the circumstances provided for in this article’. Paragraph 3 of that article provides for the possibility of employing an ‘informal procedure whereby tenders are invited from at least five competitors’ as a means of procuring a supplier for the service, which is the procedure that the contracting authority planned to use in this case.

---

27 ‘Thus, an interpretation, by the Court, of provisions of EU law in situations outside its scope is justified where those provisions have been made applicable to such situations by national law directly and unconditionally, in order to ensure that those internal situations and situations governed by national law are treated in the same way’ [judgment of 19 October 2017, *Solar Electric Martinique* (C-303/16, EU:C:2017:773, paragraph 27 and case-law cited)].

---

28 Judgment of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraphs 41 and 42).

---

29 Such notices are dealt with in Article 41 of that directive.

---

30 ‘A “service concession” is a contract of the same type as a service contract except for the fact that the concession for the provision of services consists either solely in the right to exploit the service or in that right together with payment.’

---

31 Judgment in *Grossmann*, paragraph 27: ‘participation in a contract award procedure may, in principle, … validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he risks suffering harm as a result of the allegedly unlawful nature of the decision to award the contract. If he has not submitted a tender, it will be difficult for such a person to show that he has an interest in challenging that decision or that he has been harmed or risks being harmed as a result of that award decision.’

---

32 *Ibidem*, paragraph 28: ‘where an undertaking has not submitted a tender because there were *allegedly discriminatory* specifications in the documentation relating to the invitation to tender or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested’, that undertaking ‘would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated’ (my emphasis).

---

33 *Ibidem*, paragraph 29 (my emphasis).

---

34 *Ibidem*, paragraph 30: ‘[i]t must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated.’

---

35 See the account given of that position in point 18 of this Opinion.

---

36 Reasons of efficiency or economies of scale may dictate that public road transport services be provided at a certain level (regional, for example), instead of being broken down into lots at lower levels. The choice between those two options falls to the competent authorities, which must also consider whether opting for a single lot would create disproportionate barriers to entry for smaller economic operators. In this case, the Competition and Markets Authority, on 25 June 2015, asked the Liguria Regional Agency for Local Public Transport to set up ‘a number of lots so as to ensure the broadest possible participation in the competitive procedure’.

---

37 In its action before the TAR, Liguria, AMT stated that the contract notice ‘significantly restricted the scope for participation … by small and medium-sized operators such as local public transport undertakings, compelling these to look for joint ventures with larger operators at any cost’ (page 51 of the application) (my emphasis).

JUDGMENT OF THE COURT (Third Chamber)

7 August 2018 (*)

(Reference for a preliminary ruling — Public procurement — Review procedures — Directive 89/665/EC — Action for damages — Article 2(6) — National rules making the admissibility of any action for damages subject to a prior and definitive determination of the illegality of the decision of the contracting authority giving rise to the damage alleged — Actions for annulment — Prior action before an arbitration committee — Judicial review of arbitral decisions — National rules excluding pleas not raised before the arbitration committee — Charter of Fundamental Rights of the European Union — Article 47 — Right to effective judicial protection — Principles of effectiveness and equivalence)

In Case C-300/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kúria (Supreme Court, Hungary), made by decision of 11 May 2017, received at the Court on 24 May 2017, in the proceedings

Hochtief AG

v

Budapest Főváros Önkormányzata,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, M. Safjan, D. Šváby and M. Vilaras (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing of 30 April 2018,

after considering the observations submitted on behalf of

– Hochtief AG, by A. László, ügyvéd, and I. Varga, konzulens,

– the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,

– the Greek Government, by M. Tassopoulou, D. Tsagkaraki, E. Tsaousi and K. Georgiadis, acting as Agents,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by P. Ondrůšek and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 June 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1; 'Directive 89/665').

2 The request has been made in the course of proceedings between Hochtief AG and Budapest Főváros Önkormányzata (Local Government for Budapest, Hungary; 'the contracting authority') in the context of a claim for compensation for damage which Hochtief suffered as a result of an infringement of public procurement rules.

Legal context

European Union law

3 The fourth subparagraph of Article 1(1) of Directive 89/665 provides:

'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU [of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65)] or Directive [2014/23], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.'

4 Article 1(3) of that directive provides:

'Member States shall ensure that review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.'

5 Article 2(1), (2) and (6) of Directive 89/665 provides:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

…

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

…

6. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.'

Hungarian law

6 Article 108(3) of the közbeszerzésekről szóló 2003. évi CXXIX. törvény (Law No CXXIX of 2003 on public procurement, *Magyar Közlöny* 2003/157; 'the Law on public contracts') provides:

‘Candidate tenderers may revise their request to participate until the time limit for submitting the request has expired.’

7 Article 350 of that Law provides:

‘The possibility of asserting any civil claim based on an infringement of provisions relating to public contracts or to the procedure for awarding them shall be subject to the requirement that the public procurement arbitration committee or a court (hearing an appeal against a decision of the public procurement arbitration committee) has made a final declaration that a provision has been infringed.’

8 Article 351 of that Law is worded as follows:

‘If a tenderer’s claim for damages from the contracting authority is limited to recovering the expenses incurred in connection with the preparation of the tender and with participation in the contract award procedure, it shall be sufficient for the tenderer to prove, for the purposes of asserting the claim for compensation:

(a) that the contracting authority infringed any provision of the law on public contracts or the procedure for awarding them;

(b) that the tenderer had a real chance of being awarded the contract; and

(c) that the infringement reduced its chances of being awarded the contract.’

9 Article 339/A of the Polgári perrendtartásról szóló 1952. évi III. törvény (Law No III of 1952 instituting the Code of civil procedure; ‘the Code of civil procedure’) provides:

‘Except as otherwise provided for by law, the court shall review the administrative decision on the basis of the legislation in force and the factual situation existing at the time of its adoption.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 On 5 February 2005 the contracting authority published an invitation to participate in a procedure for the award of a public works contract for an amount exceeding the threshold laid down by EU law, following the negotiated procedure with prior publication of a contract notice. Five applications were received by the deadline, including that of the ‘HOLI’ consortium (‘the consortium’), led by Hochtief.

11 On 19 July 2005, the contracting authority informed the consortium that its application was invalid owing to a conflict of interest and that it had been rejected. The reason for that decision was the fact that the consortium had designated as project leader an expert who had participated in the preparation of the call for tenders with the contracting authority.

12 By decision of 12 September 2005 the Közbeszerzési Döntőbizottság (Public Procurement Arbitration Committee, Hungary) (‘the arbitration committee’) dismissed the action brought by the consortium against that decision. That committee took the view that the designation of the expert in the application to participate could not be regarded as an administrative error as Hochtief claimed. Although it took the view that, if Hochtief were allowed to correct this error, that would entail an amendment of the application to participate, which is excluded by Article 108(3) of the Law on public contracts. The arbitration committee also took the view that the contracting authority had not acted unlawfully by continuing the procedure with only two candidates, since, under Article 130(7) of that Law, if there were, among the candidates, a sufficient number of participants who had submitted an appropriate application within the range set, they must be invited to submit a tender.

13 By judgment of 28 April 2006, the Fővárosi Bíróság (Budapest Municipal Court, Hungary) dismissed the action brought by the consortium against the decision of 12 September 2005.

14 By decision of 13 February 2008, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary), hearing the appeal proceedings brought by the consortium against the judgment of 28 April

2006, referred to the Court a request for a preliminary ruling which gave rise to the judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627).

15 In the course of 2008, the Commission found, in the examination of the procurement procedure at issue in the main proceedings, that the contracting authority had breached the public procurement rules, on the one hand, by publishing a notice of negotiated procedure and, on the other, by excluding one of the candidates during the pre-selection procedure, without having given it an opportunity, in accordance with the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127) to show that the participation of the expert designated as project manager was not such as to distort competition.

16 On 20 January 2010, following the judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627), the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) delivered a judgment confirming the judgment of 28 April 2006. It stated, inter alia, that it was not examining whether the contracting authority, in finding that the consortium's application was vitiated by a conflict of interest, was in breach by failing to give the consortium the opportunity to defend itself, since that complaint was not referred to in the application at first instance. It is only on appeal that Hochtief claimed, for the first time, that the prohibition raised against the consortium constituted a disproportionate restriction on its right to submit an application and tender, contrary to Article 220 EC, Article 6 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and the case-law of the Court.

17 By judgment of 7 February 2011 the Legfelsőbb Bíróság (previous title of the Supreme Court, Hungary) upheld the judgment of the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) of 20 January 2010.

18 On 11 August 2011, Hochtief, relying on the findings of the Commission, initiated a review procedure against that judgment of the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal).

19 On 6 June 2013, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary) adopted an order dismissing the appeal, confirmed by order of the Fővárosi Törvényszék (Budapest Municipal Court, Hungary), ruling at final instance.

20 Continuing to rely on the Commission's findings, Hochtief then brought an action seeking an order against the contracting authority to pay compensation of Hungarian Forints (HUF) 24 043 685 (approximately EUR 74 000) corresponding to the expenses which it incurred in respect of its participation in the procedure for the award of the public contract.

21 That action having been dismissed at first instance and on appeal, Hochtief brought an appeal in cassation before the referring court, claiming, inter alia, an infringement of Article 2(1) of Directive 89/665 and Article 2(1) of Council Directive 92/13/EEC of 25 February 1992 on the coordination of laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

22 The referring court states, in essence, that it follows from Directive 89/665 that actions for damages may be conditional on the prior annulment of the contested decision by an administrative authority or court (judgment of 26 November 2015, *MedEval*, C-166/14, EU:C:2015:779, paragraph 35), with the result that Article 2 of that directive does not appear, in principle, to preclude a national legislative provision such as Article 350 of the Law on public contracts. However, the application of that provision, in conjunction with other provisions of the Law on public contracts and the Code of civil procedure, could have the effect of hindering the ability of a tenderer excluded from a negotiated procedure for the award of a public contract, such as Hochtief, to bring an action for damages because it is unable to rely on a decision definitively finding an infringement of the public procurement rules. It would, in those circumstances, be justified either to provide for the possibility of adducing evidence of such an infringement by other means, or to exclude the domestic rule for the sake of the principle of effectiveness, or, further, to interpret that rule in the light of EU law.

23 It is in those circumstances that the Kúria (Supreme Court, Hungary) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does EU law preclude a procedural provision of a Member State which makes the possibility of asserting any civil right of action resulting from an infringement of a public procurement provision conditional on a final declaration by [an arbitration committee] or a court (hearing an appeal against a decision of the [arbitration committee]) that the provision has been infringed?

(2) Can a provision of national law providing, as a precondition for being able to assert a claim for compensation, that [an arbitration committee] or a court (hearing an appeal against a decision of the [arbitration committee]) must have made a final declaration that a provision has been infringed be replaced by another provision taking account of EU law or, in other words, can the injured party prove the infringement of the provision by other means?

(3) In an action seeking compensation, is a procedural provision of a Member State which allows judicial proceedings to be brought against an administrative decision only on the basis of the legal arguments submitted in proceedings before the public procurement arbitration committee — and the injured party can rely, as a ground for the alleged infringement, on the unlawfulness, in accordance with the case-law of the Court of Justice, of his exclusion on the basis of a conflict of interest only in a manner which, in accordance with the actual rules of the negotiated procedure for the award of a public contract, would result in his exclusion from the contract award procedure for another reason, as there has been a change in his application — contrary to EU law and, in particular, to the principles of effectiveness and equivalence, or capable of having an effect which runs counter to that law or those principles?’

The application to reopen the oral part of the procedure

24 By letters lodged at the Court Registry on 12 and 27 July 2018, Hochtief applied for an order that the oral part of the procedure be reopened, by application of Article 83 of the Rules of Procedure of the Court.

25 In support of its application, Hochtief relies first of all on the request for a preliminary ruling made by the Székesfehérvári Törvényszék (Székesfehérvár Local Court, Hungary), by decision of 6 December 2017, received by the Court on 5 June 2018 and registered under case number C-362/18. It argues, in essence, that the answer to the questions referred in the present case depends on the answer to the questions referred in Case C-362/18 and that, in order to guarantee uniformity of the case-law, it is appropriate to give the parties the opportunity of presenting their viewpoint on the latter case.

26 Next, Hochtief submits that, in order for the Court to be in a position to rule on the present request for a preliminary ruling, it is appropriate to take account of elements which were not debated between the parties. In particular, it wishes to submit observations on a statement, made by the agent of the Hungarian Government at the hearing, that the judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627), delivered while the proceedings before the Hungarian courts were ongoing, was the subject of a decision by those courts. It is of the opinion that it is of decisive importance, in order to answer the first two questions referred in the present reference for a preliminary ruling, to ascertain the assessment made by those courts of that judgment.

27 In that regard, it must be borne in mind that, in accordance with Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

28 In the present case, the Court considers, after hearing the Advocate General, that it has all the information necessary to rule on the request for a preliminary ruling and that there is no need to respond to that request on the basis of an argument which was not debated before it.

29 Firstly, contrary to Hochtief’s submissions, the answer to be given to the questions referred in the present case do not depend on that to be given to the questions referred in Case C-362/18. In fact,

although the disputes in the main proceedings in the present case and in Case C-362/18 arise in a similar context, the fact remains that the questions referred in Case C-362/18 which, as Hochtief itself notes in its application, relate principally to the liability of a Member State for a breach of EU law committed by a national court ruling at last instance, differ from those referred in the present case, which concern the conditions for admissibility of an action for damages against a contracting authority.

30 Secondly, it does not appear that the present request for a preliminary ruling must be examined in the light of an element which was not debated between the parties. In particular, the judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627), relied on by Hochtief in support of its application for the reopening of the oral part of the procedure, was referred to by the referring court in its request for a preliminary ruling and the parties to the main proceedings, like the interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union, had the opportunity of presenting both written and oral observations in that regard.

31 Having regard to the foregoing conclusions, the Court considers that there is no need to order the reopening of the oral part of the procedure.

The first and second questions

32 By its first two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(6) of Directive 89/665 must be interpreted as precluding a national procedural rule, such as that at issue in the main proceedings, which makes the possibility of asserting a claim under civil law in the event of an infringement of the rules governing public procurement and the award of public contracts subject to the condition that the infringement be definitively established by the Public Procurement Arbitration committee or, in the context of judicial review of a decision of that arbitration committee, by a court.

33 It is appropriate to recall, first of all, that, under Articles 2d to 2f of Directive 89/665, the Member States may provide that, where damages are claimed on the ground that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers to that effect.

34 In consequence, it follows from the very wording of that provision that the Member States are, in principle, able to adopt a national procedural provision such as Article 350 of the Law on public contracts, which makes the possibility of asserting a claim under civil law in the event of an infringement of the rules governing public procurement and the award of public contracts subject to the condition that the infringement be definitively established by an arbitration committee, such as that in the main proceedings, or, in the context of judicial review of the decision made by such an arbitration committee, by a court (see, by analogy, judgment of 26 November 2015, *MedEval*, C-166/14, EU:C:2015:779, paragraph 36).

35 Secondly, it must be recalled that, as the Court has repeatedly held, Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement (see, inter alia, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 42 and the case-law cited).

36 Article 2(6) of Directive 89/665 thus merely provides the Member States with the option to make the introduction of an action for damages subject to the annulment of the contested decision by a body empowered to do so, without giving the slightest indication of any conditions or limits which may, as appropriate, be attached to the transposition and implementation of that provision.

37 It follows that, as the Advocate General has, in essence, observed in point 39 of his Opinion, the Member States remain free to determine the conditions under which the national rules transposing Article 2(6) of Directive 89/665 must be applied in their legal order and the limits, exceptions or derogations that, as necessary, may be connected with that application.

38 Indeed, as the Court has held on many occasions, it is for the Member States, when defining the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities, to ensure that neither the effectiveness of Directives 89/665 nor the rights conferred on individuals by EU law are undermined (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraphs 43 and 44).

39 In that regard, the Court has held that the faculty granted to the Member States by Article 2(6) of Directive 89/665 was not without limits and remained subject to the condition that the action for annulment prior to any action for damages must be effective (see, to that effect, judgment of 26 November 2015, *MedEval*, C-166/14, EU:C:2015:779, paragraphs 36 to 44). They must, in particular, ensure full compliance with the right to an effective remedy and to a fair hearing, in accordance with the first and second paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’) (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 46).

40 In the present case, it must be held that the national procedural rule which makes the possibility of asserting a claim under civil law in the event of an infringement of the rules governing public procurement and the award of public contracts subject to the condition that the infringement be definitively established in advance does not deprive the tenderer concerned of the right to an effective remedy.

41 Consequently, the answer to the first two questions is that Article 2(6) of Directive 89/665 must be interpreted as not precluding a national procedural rule, such as that at issue in the main proceedings, which makes the possibility of asserting a claim under civil law in the event of an infringement of the rules governing public procurement and the award of public contracts subject to the condition that the infringement be definitively established by an arbitration committee or, in the context of judicial review of the decision of that arbitration committee, by a court.

The third question

42 By its third question, the referring court asks, in essence, whether EU law must be interpreted as meaning that, in the context of an action for damages, it precludes a national procedural rule which limits judicial review of arbitral decisions issued by an arbitration committee responsible, at first instance, for the review of decisions adopted by contracting authorities in public procurement procedures, examining only the pleas raised before that committee.

43 In that regard, as regards the main proceedings, it must be noted first of all that, as is apparent from the request for a preliminary ruling, the national courts responsible for reviewing decisions of an arbitration committee called upon to examine, at first instance, actions for annulment against decisions adopted by contracting authorities in public procurement procedures must, under Article 339/A of the Code of civil procedure, dismiss as inadmissible any new plea in law which was not raised before that committee.

44 It is pursuant to that provision that the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest) dismissed the appeal brought by the appellant in the main proceedings against the judgment of the Fővárosi Bíróság (Budapest Municipal Court) dismissing the appeal against the initial arbitral decision of the arbitration committee. It is also on the basis of that provision that the Legfelsőbb Bíróság (former title of the Supreme Court) dismissed the appeal in cassation brought by the appellant in the main proceedings against the judgment of the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest).

45 According to the referring court, a combined application of Article 339/A of the Code of civil procedure and Article 350 of the Public Procurement Code could, however, have an effect contrary to EU law.

46 It points out, in that regard, referring to paragraph 39 of the judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779), that the degree of necessity for legal certainty concerning the conditions for the admissibility of actions is not identical for actions for damages and actions seeking to have a contract declared ineffective. Indeed, in the light of the requirements of the legal certainty which

contractual relations must be able to enjoy, the legal remedies intended to declare ineffective contracts concluded between contracting authorities and successful tenderers for public contracts must be formulated restrictively (primary legal protection). However, in so far as actions for damages (secondary legal protection), do not, in principle, have any bearing on the effectiveness of contracts which have already been concluded, there is no justification for submitting those actions to procedures as stringent as those applicable to actions concerning the very existence or the performance of such contracts.

47 It is appropriate to recall, in that regard, that the Court did indeed hold, in paragraphs 41 to 44 of the judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779), that the principle of effectiveness precludes, in certain circumstances, national procedural rules making the admissibility of actions for damages in the context of public procurement procedures subject to a prior finding of illegality of the contract award procedure concerned.

48 It must, however, be pointed out that the Court reached that conclusion in a very specific context, characterised by the fact that the action concerning the prior finding of the unlawfulness of the contract award procedure, alleging that there was no prior publication of any contract notice, was subject to a limitation period of six months which began to run from the day after the date of the award of the public contract in question, irrespective of whether the injured party was in a position to know of the illegality affecting that award decision or not. In such a context, a period of six months was likely not to allow the injured party to gather the necessary information with a view to challenging the lawfulness of the contract award procedure concerned, which therefore prevented the introduction of that action and was, therefore, liable to render practically impossible or excessively difficult the exercise of the right to bring an action for damages.

49 However, the situation at issue in the main proceedings clearly differs from that at issue in the case which gave rise to the judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779).

50 It is appropriate to point out that, unlike the limitation rule at issue in the case which gave rise to the judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779), the procedural rule laid down in Article 339/A of the Code of civil procedure does not undermine, as the Advocate General noted in points 47 to 49 of his Opinion, the right to an effective remedy and of access to an impartial court, guaranteed by the first and second paragraphs of Article 47 of the Charter (see, by analogy, judgment of 26 September 2013, *Texdata Software*, C-418/11, EU:C:2013:588, paragraph 87).

51 Although, furthermore, it is true that that national procedural rule lays down a requirement that the pleas raised before the arbitration committee and those raised before the courts responsible for reviewing the decisions of that committee must be strictly the same, therefore making it impossible for a person involved to raise a new plea during that procedure, the fact remains that it contributes, as the Advocate General noted in point 49 of his Opinion, to maintaining the effectiveness of Directive 89/665, the objective of which is, as the Court has already held, to ensure that decisions taken unlawfully by contracting authorities may be reviewed effectively and as rapidly as possible (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 43 and the case-law cited).

52 In that regard, it is appropriate to recall that the Court has held that the principle that it is for the parties to proceedings to take the initiative, which means that the court is bound by the obligation to keep to the subject matter of the dispute and to base its decision on the facts put before it and to refrain from acting of its own motion, except in exceptional cases to safeguard the public interest, the rights of the defence and ensure the proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas (see, to that effect, judgments of 14 December 1995, *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:441, paragraphs 20 and 21, and of 7 June 2007, *van der Weerd and Others*, C-222/05 to C-225/05, EU:C:2007:318, paragraphs 34 and 35).

53 In the present case, as is apparent from the file submitted to the Court, Hochtief has not been unable to bring an action for annulment against the decision of the contracting authority removing it from the procedure, either before the arbitration committee, or, subsequently, before the national courts responsible for the judicial review of the decision made by that committee.

54 Nor can the view be taken that Hochtief was unable to raise, in due time, the plea alleging, in essence, that it had not had the opportunity of adducing evidence that, in the present case, the participation of the expert whom it had designated as project manager and who had worked with the contracting authority was not such as to distort competition, in line with paragraphs 33 to 36 of the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127).

55 In accordance with the settled case-law of the Court, an interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives of a rule of EU law, clarifies and defines, where necessary, the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force (see, inter alia, judgments of 27 March 1980, *Denkavit italiana*, 61/79, EU:C:1980:100, paragraph 16, and of 13 January 2004, *Kühne & Heitz*, C-453/00, EU:C:2004:17, paragraph 21).

56 It follows that, in a situation such as that at issue in the main proceedings, a tenderer, such as Hochtief, was able to raise the complaint alleging that it had not had the opportunity of establishing that the fact that it had designated as project leader an expert who had participated in the preparation of the call for tenders with the contracting authority was not such as to distort competition, even in the absence of any relevant case-law of the Court in that regard.

57 Furthermore, although it is true that the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), was not available in the Hungarian language until after Hochtief brought its action before the arbitration committee and even its action against the committee's decision before the national court of first instance, that cannot, however, by itself, allow the conclusion that it was absolutely impossible for Hochtief to raise such a complaint.

58 It follows from the foregoing that EU law, and in particular Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as meaning that, in the context of an action for damages, it does not preclude a national procedural rule, such as that at issue in the main proceedings, which restricts the judicial review of arbitral decisions issued by an arbitration committee responsible at first instance for the review of decisions taken by contracting authorities in public procurement procedures to examine only the pleas raised before that committee.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 2(6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, must be interpreted as not precluding a national procedural rule, such as that at issue in the main proceedings, which makes the possibility of asserting a claim under civil law in the event of an infringement of the rules governing public procurement and the award of public contracts subject to the condition that the infringement be definitively established by an arbitration committee or, in the context of judicial review of an decision of that arbitration committee, by a court.**

2. **European Union law, and in particular Article 1(1) and (3) of Directive 89/665, as amended by Directive 2014/23, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in the context of an action for damages, it does not preclude a national procedural rule, such as that at issue in the main proceedings, which restricts the judicial review of arbitral decisions issued by an arbitration committee responsible at first instance for the review of decisions taken by contracting**

authorities in public procurement procedures to examine only the pleas raised before that committee.

[Signatures]

---

* Language of the case: Hungarian.

OPINION OF ADVOCATE GENERAL

WATHELET

delivered on 7 June 2018 (1)

Case C-300/17

Hochtief AG

v

Budapest Főváros Önkormányzata (Local Government for Budapest, Hungary)

(Request for a preliminary ruling from the Kúria (Supreme Court, Hungary))

(Reference for a preliminary ruling — Directive 89/665/EEC — Procedures for the award of public supply contracts and public works contracts — Review procedures — Article 2(6) — Claim for damages — Precondition that the decision by the contracting authority be declared unlawful — Exclusion of legal arguments not submitted before an arbitration committee — Article 47 of the Charter of Fundamental Rights of the European Union — Right to effective judicial protection — Principles of effectiveness and equivalence)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (2) as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. (3)

2. The request has been made in proceedings between Hochtief AG and Budapest Főváros Önkormányzata (Local Government for Budapest, Hungary, 'the BFÖ') concerning a claim for damages for infringement of public procurement rules.

3. By its request for a preliminary ruling the Kúria (Supreme Court, Hungary) enquires what effect a combination of national procedural rules may have on the right to an effective remedy even though those rules do not necessarily present any difficulties when viewed separately.

II. Legal context

A. EU law

4. The fourth paragraph of Article 1(1) of Directive 89/665 provides:

'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions

set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.'

5. Under Article 2(1), (2), (6) and (9) of Directive 89/665:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

…

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

…

6. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

…

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU] and independent of both the contracting authority and the review body.'

B. Hungarian law

1. Law No CXXIX of 2003 on the award of public contracts

6. The facts at issue in the main proceedings occurred in 2005. They were at that time governed by the közbeszerzésekről szóló 2003. évi CXXIX. törvény (Law No CXXIX of 2003 on the award of public contracts, 'the Law on public contracts').

7. Under Article 108(3) of the Law on public contracts, 'candidate tenderers may revise their request to participate until the time limit for submitting the request has expired'.

8. Article 350 of the Law on public contracts provides:

'The possibility of asserting any civil claim based on an infringement of provisions relating to public contracts or to the procedure for awarding them shall be subject to the requirement that the public procurement arbitration committee or a court(hearing an appeal against a decision of the public procurement arbitration committee) has made a final declaration that a provision has been infringed.'

9. However, under Article 351 of the same law:

'If a tenderer's claim for damages from the contracting authority is limited to recovering the expenses incurred in connection with the preparation of the tender and with participation in the contract award procedure, it shall be sufficient for the tenderer to prove, for the purposes of asserting the claim for compensation:

(a) that the contracting authority infringed any provision of the law on public contracts or the procedure for awarding them;

(b) that the tenderer had a real chance of being awarded the contract; and

(c) that the infringement reduced its chances of being awarded the contract.'

2. Law III of 1952 on civil procedure

10. Article 339/A of the Polgári perrendtartásról szóló 1952. évi III. törvény (Law No III of 1952 on civil procedure, 'the Law on civil procedure') provides:

'Except as otherwise provided for, the court shall review the administrative decision on the basis of the legislation in force and the factual situation existing at the time of its adoption.'

III. The facts in the main proceedings

11. On 5 February 2005, the BFÖ launched a negotiated procedure with the publication of a contract notice for works with a value exceeding the maximum limit under EU law. Five applications were received within the period laid down for that purpose, one of them submitted by the HOLI consortium ('the consortium'), managed by Hochtief.

12. On 19 July 2005, the BFÖ informed the consortium that its application could not be accepted as there was a conflict of interest and that it had been excluded from the procedure. The BFÖ justified that decision on the ground that the consortium had appointed as head of the project one of the experts who had participated in preparing the call for tenders alongside the contracting authority.

13. The consortium challenged that decision before the Közbeszerzési Döntőbizottság (Public procurement arbitration committee, Hungary; 'the arbitration committee'). The committee dismissed the application by an award of 12 September 2005. The committee found that the appointment of the expert in the request to participate could not be regarded as an administrative error, as Hochtief asserted, since not taking that expert into account would have meant changing the request to participate, which was not permissible under Article 108(3) of the Law on public contracts. The committee also held that the contracting authority had not acted unlawfully by continuing the procedure with only two candidates, in so far as Article 130(7) of the Law on public contracts provided that, if there were a number within the prescribed range of candidates who had correctly submitted an application, they must be invited to submit a tender.

14. The consortium brought proceedings against the decision of the arbitration committee. The Fővárosi Bíróság (former name of the Fővárosi Törvényszék, Budapest Municipal Court, Hungary) dismissed its application by a judgment of 28 April 2006. Hearing an appeal against that judgment, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal, Hungary), stayed the proceedings and requested a preliminary ruling, giving rise to the judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627).

15. As a result of that judgment, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) confirmed the judgment of 28 April 2006 by a judgment of 20 January 2010.

16. Before that court, the appellant had claimed, inter alia, relying on the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), that it had been unable to make any observations on the circumstances of the case or to prove that having recourse to the expert could not distort fair and transparent competition.

17. That judgment, which predated the BFÖ's decision, was therefore in existence when Hochtief made its application to the arbitration committee. However, it was 'made available' in the Hungarian version only after that date. (4) In its judgment, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) nevertheless stated that it did not examine that plea because it was not included in the application at first instance. According to the referring court, the issue of whether the contracting authority had committed an infringement by declaring the existence of a conflict of interest without affording the appellant in the main

proceedings an opportunity to defend itself was not included in the application. The referring court added that it was only on appeal that the appellant, for the first time, claimed that the prohibition to which it was subject was a disproportionate limitation of its right to submit an application or to submit a tender, contrary to Article 220 EC, Article 6 of Directive 93/37/EEC (5) and the case-law of the Court of Justice.

18. By judgment of 7 February 2011, the Legfelsőbb Bíróság (former name of the Kúria (Supreme Court)) confirmed the judgment of 20 January 2010 of the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal).

19. At the same time as those proceedings, during 2008, the European Commission Directorate-General responsible for regional policy carried out an audit of the contested procurement procedure. It found that the contracting authority had infringed the public procurement rules by, on the one hand, launching a negotiated procedure and, on the other, excluding one of the candidates at the pre-selection stage without giving it an opportunity, in accordance with the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), to submit evidence to the contrary, that is to say, to prove that the involvement of the expert appointed as head of the project was not such as to distort competition.

20. On 11 August 2011, on the basis of the Commission's findings, Hochtief brought an appeal on a point of law against the judgment of the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal). By order of 6 June 2013, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) delivered a decision dismissing the appeal on a point of law, and that decision was confirmed by order of the Fővárosi Törvényszék (Budapest Municipal Court), ruling at final resort.

21. Relying on the Commission's findings, Hochtief brought fresh proceedings seeking an award of compensation from the contracting authority, corresponding to the expenses it incurred in connection with its participation in the public procurement procedure.

22. Those proceedings having been dismissed at first instance and on appeal, Hochtief brought an appeal on a point of law to the referring court, claiming, inter alia, infringement of Article 2(1) of Directive 89/665.

23. The referring court states, in essence, that it is clear from Directive 89/665 that the bringing of actions for damages may be subject to the prior setting aside of the contested decision by an administrative authority or court (judgment of 26 November 2015, *MedEval*, C-166/14, EU:C:2015:779, paragraph 35), and therefore Article 2 of that directive does not, in principle, appear to preclude a national legislative provision such as Article 350 of the Law on public contracts. However, application of that provision, in conjunction with other provisions of the Law on public contracts and the Law on civil procedure, may prevent an unsuccessful tenderer in a negotiated public procurement procedure, such as the appellant in the main proceedings, from bringing an action for damages because it is unable to adduce a final declaration that the public procurement rules were infringed. In those circumstances, it may be justified either to allow other means of proving such an infringement, to disregard the national provision in the interests of the principle of effectiveness, or to interpret that provision in the light of EU law.

24. The Kúria (Supreme Court) accordingly decided to stay the proceedings and to make a reference to the Court of Justice for a preliminary ruling.

IV. The request for a preliminary ruling and the procedure before the Court of Justice

25. By decision of 11 May 2017, received at the Court of Justice on 24 May 2017, the Kúria (Supreme Court) therefore decided to refer the following questions to the Court for a preliminary ruling:

'(1) Does EU law preclude a procedural provision of a Member State which makes the possibility of asserting any civil right of action resulting from an infringement of a public procurement provision conditional on a final declaration by a public procurement arbitration committee or a court (hearing an appeal against a decision of the public procurement arbitration committee) that the provision has been infringed?

(2) Can a provision of national law providing, as a precondition for being able to assert a claim for compensation, that a public procurement arbitration committee or a court (hearing an appeal against a decision of the public procurement arbitration committee) must have made a final

declaration that a provision has been infringed be replaced by another provision taking account of EU law or, in other words, can the injured party prove the infringement of the provision by other means?

(3) In an action seeking compensation, is a procedural provision of a Member State which allows judicial proceedings to be brought against an administrative decision only on the basis of the legal arguments submitted in proceedings before the public procurement arbitration committee — and the injured party can rely, as a ground for the alleged infringement, on the unlawfulness, in accordance with the case-law of the Court of Justice, of his exclusion on the basis of a conflict of interest only in a manner which, in accordance with the actual rules of the negotiated procedure, would result in his exclusion from the contract award procedure for another reason, as there has been a change in his application — contrary to EU law and, in particular, to the principles of effectiveness and equivalence, or capable of having an effect which runs counter to that law or those principles?'

26. The appellant in the main proceedings, the Hungarian, Greek, Austrian and Polish Governments and the Commission submitted written observations. The appellant in the main proceedings, the Hungarian Government and the Commission also made submissions at the hearing on 30 April 2018.

V. Analysis

A. Preliminary remarks on methodology

27. The request for a preliminary ruling made by the Kúria (Supreme Court) in the main proceedings raises two preliminary methodological issues: on the one hand, how the referring court's question should be approached and, on the other, under which provision the issues should be examined.

1. How the questions referred for a preliminary ruling are to be understood

28. The request for a preliminary ruling comprises three separate questions. However, it soon emerges that examining each of those questions individually does not necessarily reveal any difficulties in terms of the right to an effective remedy. The combination of the procedural rules in question, however, is more problematic.

29. It therefore seems appropriate, even necessary, to look at the three questions referred together even if, ultimately, they can be answered separately.

30. At the outset, I would also clarify that to my mind the clarification made in the second part of the third question referred is irrelevant. The fact that the party which suffered damage can only advance a plea alleging unlawfulness which would, in any event, lead to it being excluded from the procurement procedure does not affect the legal reasoning which needs to be conducted in order to answer that third question. How a ground for exclusion affects the outcome of the main proceedings is a matter that can arise only at a later stage and is for the referring court alone to determine. (6) I will therefore disregard that issue.

31. My analysis will therefore be in three stages. First of all, I will examine whether proceedings for damages can be conditional on the allegedly unlawful decision having first been set aside (and therefore, a fortiori, on a declaration that it is unlawful). I will then address the issue that the review of lawfulness was limited to the legal and factual framework defined by the appellant in its application instigating proceedings. Lastly, I will analyse the consequences of importing those two procedural limitations from the action to set aside into the action for damages in terms of effective judicial protection.

2. The provisions governing the review

32. It is also necessary to determine the provision under which the issues should be examined. In its third question, the referring court mentions the principles of equivalence and effectiveness which traditionally circumscribe the Member States' procedural autonomy. However, as the grounds for its reference for a preliminary ruling, it relies on Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') which enshrines in EU law the right to an effective remedy and to a fair trial. (7)

33. To my mind, that latter approach is preferable. Indeed, it is now established that, on the one hand, the obligation on Member States in Article 19(1) TEU to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law corresponds to Article 47 of the Charter (8) and, on the other, it follows that, when the Member States set out the procedural rules governing the remedies intended to protect rights conferred by a provision of EU law such as Directive 89/665, they must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter. The characteristics of a remedy such as that under Article 1(1) of Directive 89/665 must therefore be determined in a manner consistent with Article 47 of the Charter. (9)

34. That is moreover the approach that the Court of Justice has already followed in interpreting Directive 89/665, Article 1 of which, the Court has on several occasions held, '*must* be interpreted in the light of the fundamental rights set out in [the] Charter, in particular the right to an effective remedy before a court or tribunal, laid down in Article 47 thereof'. (10) That means in practice that, when the Member States lay down detailed procedural rules for legal actions intended to ensure that rights conferred by Directive 89/665 on candidates and tenderers harmed by decisions of contracting authorities are protected, the Member States must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter. (11)

35. I will therefore examine the referring court's questions referred for a preliminary ruling in the light of the requirements of Article 47 of the Charter.

B. Whether proceedings for damages can be conditional on the allegedly unlawful decision having first been set aside

36. Under the fourth subparagraph of Article 1(1) of Directive 89/665, Member States must take the measures necessary to ensure that the decisions taken by the contracting authorities in contract award procedures falling within the scope of Directive 2014/24/EU (12) or Directive 2014/23 may be reviewed effectively and, in particular, as rapidly as possible.

37. Under Article 2(1) of Directive 89/665, it must be possible for three kinds of measure to be taken concerning those review procedures: firstly, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned; secondly, the setting aside of unlawful decisions and, thirdly, the award of damages to persons harmed by an infringement of the applicable rules.

38. In relation to that last kind of measure, Article 2(6) of Directive 89/665 states that the Member States may require that in order for a claim for damages to be made, the allegedly unlawful decision be first set aside. However, that article does not specify the conditions for such actions to be admissible. The Court of Justice inferred from this that '*in principle*, … Article 2(6) of Directive 89/665 [did] not preclude a provision of national law … under which a claim for damages is admissible only if there has been a prior finding of an infringement of procurement law'. (13) I will call that the principle that actions concerning lawfulness have precedence over actions for reparation.

39. Since it is merely an option — in so far as Article 2(6) of Directive 89/665 uses the word 'may' instead of 'must' — Member States who avail themselves of that possibility are free to alter it. (14) They can therefore establish situations in which the fact that no decision has first been set aside does not render the action for damages inadmissible. (15)

40. In any event, application of the principle that actions concerning lawfulness have precedence over actions for reparation cannot have the effect, in conjunction with another procedural rule, of depriving the person harmed not only of the possibility of having the contracting authority's decision set aside, but also of the other remedies provided for in Article 2(1) of Directive 89/665. Such a 'regime' would indeed be contrary to the principle of effectiveness. (16) That principle is seen as one of the 'requirements [that] *embody* the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law', (17) enshrined in Article 47 of the Charter.

41. In the present case, it is the combined application of Article 350 of the Law on public contracts and Article 339/A of the Law on civil procedure which may be likely to pose a problem in relation to Article 47 of the Charter.

C. The fact that the review of lawfulness was confined to the legal and factual framework defined by the appellant

42. Article 339/A of the Law on civil procedure provides that a court can review an administrative decision only on the basis of the legislation in force and the factual situation existing at the time of its adoption.

43. Specifically, in relation to disputes concerning public procurement decisions, that means that the national courts called upon to review decisions of the arbitration committee are supposedly not entitled to examine any new plea that was not raised before that committee.

44. Article 1(1) of Directive 89/665 requires the Member States to take the measures necessary to ensure that decisions of the contracting authorities that are incompatible with EU law are reviewed effectively and as rapidly as possible.

45. So that they can do so, Article 2(2) of Directive 89/665 authorises the Member States to confer powers to set aside decisions and grant reparation to separate bodies that are not necessarily courts. (18) In other respects, Directive 89/665 contains no provisions specifically governing the conditions on which those remedies can be sought. (19) Directive 89/665 therefore leaves Member States a discretion in the choice of the procedural guarantees for which it provides, and the formalities relating thereto. (20)

46. Consistent case-law has held that it is for each Member State, in accordance with the principle of procedural autonomy, to lay down the detailed rules of administrative and judicial procedures to ensure that rights which individuals derive from EU law are safeguarded. However, those detailed procedural rules must not compromise the effectiveness of Directive 89/665. (21)

47. Against that background, it does not seem to me that a rule such as Article 339/A of the Law on civil procedure, of itself, is contrary to EU law when it is applied in the context of the review by the arbitration committee and, subsequently, the courts, of the lawfulness of the decision.

48. Indeed, it can be seen from the third recital of Directive 89/665 that one of its priority objectives is to make ‘effective and *rapid* remedies’ available. (22)The legislature itself emphasised the importance of that latter quality in so far as, in the fourth paragraph of Article 1(1) of that directive, it expressly requires Member States to take ‘measures to ensure that decisions taken by contracting authorities may be reviewed effectively and, *in particular*, as rapidly as possible’. (23)

49. Confining the judicial review to the pleas raised before the arbitration committee on the basis of the legislation in force and the factual situation existing at the time the decision was adopted contributes to the achievement of that objective of speed without thereby substantially compromising the right to an effective remedy. (24)

50. On the one hand, that rule prevents the procedure from being delayed by ensuring that no new exchange of arguments — which would necessarily have to be *inter partes* and disposed of on conclusion of a reasoned decision — is commenced before the reviewing court. It thereby contributes to the proper administration of justice for the benefit of individuals (25) and consolidates the requirement for legal certainty which must prevail in an action seeking to have a contract declared ineffective. (26) On the other hand, that rule does not deprive the individual of access to justice. It confines that access within the limits that the individual itself has established, for which it is solely responsible.

51. In that regard, asked about the consequences of a procedural rule that limits a court’s action to the arguments relied upon by the parties, the Court of Justice has held that the principle of effectiveness did not impose a duty on national courts to raise, of their own motion, a plea based on a provision of EU law, irrespective of the importance of that provision to the EU legal order, where the parties were given a genuine opportunity to raise a plea based on EU law before a national court. (27)

52. That being so, whilst it is true that a procedural rule which has the effect of confining the dispute solely to the pleas advanced before the arbitration committee limits the right to an effective remedy before a court or tribunal within the meaning of Article 47 of the Charter, it is justified within the meaning of Article 52(1) of the Charter, provided it is established by legislation, respects the essence of the right to an

effective remedy and complies with the objective of Directive 89/665 of a swift remedy, which contributes to the proper administration of justice and the requirement for legal certainty.

D. Importing the procedural limits relating to the action concerning lawfulness into the action for reparation

53. It is clear from the foregoing considerations that the right to an effective remedy precludes neither a provision establishing that actions concerning lawfulness have precedence over actions for reparation, nor a provision which prevents a new plea in law from being raised after proceedings have been brought, where those provisions are considered separately.

54. However, the application of Article 350 of the Law on public contracts in conjunction with Article 339/A of the Law on civil procedure has the effect of making an action for damages inadmissible unless a decision has first been obtained declaring the contract in question to be unlawful, independently of whether, in practice, the applicant for damages had a genuine opportunity to raise the relevant plea of unlawfulness in the proceedings relating to lawfulness.

55. Such a consequence is, in my view, contrary to Article 47 of the Charter, in so far as it infringes the right to an effective remedy which that article guarantees, by making an action for damages impossible in practice, but it is not justified by an objective in the general interest, contrary to the requirements of Article 52(1) of the Charter.

1. Infringement of the right to an effective remedy

56. The requirement for judicial protection implies that it must be possible to obtain reparation for loss suffered where EU law is infringed. Indeed, where a measure whose validity is in dispute has been applied, annulment of that measure cannot always ensure full reparation of the damage suffered. (28) Whilst rendering the measure inapplicable paralyses its effects in the situation brought before the court, awarding damages compensates for any loss it may have caused. Fully protecting the individual therefore requires both. (29)

57. Under those circumstances, although the principle, authorised by Article 2(6) of Directive 89/665, that actions concerning lawfulness have precedence over actions for reparation can be explained and justified by reasons of economy of procedure and, ultimately, legal certainty, (30) the rule embodying that principle must be precluded where it is shown that it was not possible to have the contested decision declared unlawful on a legitimate ground unrelated to the appellant's behaviour.

58. The individual would otherwise be deprived of any judicial protection whatsoever because, in those particular circumstances, an action in damages is 'the last line of defence for individuals when … other legal remedies have not provided them with effective protection'. (31)

59. That peculiar feature of actions for reparation informs all the Court of Justice's case-law on the interrelation between remedies and their impact on effective judicial protection, whether in response to the strict admissibility requirements for actions to set aside in proceedings concerning the legality of EU acts, (32) to mitigate the fact that directives do not have direct horizontal effect (33) or when redress is no longer available where a final judicial decision has infringed rights under EU law.

60. In the latter situation, although EU law does not require a judicial body automatically to go back on a judgment having the force of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court after that judgment was delivered, 'individuals cannot be deprived of the possibility of rendering the State liable in order to obtain legal protection of their rights'. (34)

61. That logic was applied to find that courts of last instance are liable where EU law is infringed. Accordingly, 'in the light of the essential role played by the judiciary in the protection of the rights derived by individuals from rules [of EU law], the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of [EU] law attributable to a decision of a court of a Member State adjudicating at last instance'. (35)

62. In order to achieve full effectiveness of EU law and protection of the rights under that law, which underpin that case-law, that approach must also be adopted where a combination of procedural rules has the effect of 'immunising' a contracting authority against any liability notwithstanding an infringement of EU law committed by it. The intention of the EU legislature to ensure adequate procedures to permit the compensation of persons harmed by an infringement of public procurement rules (36) corroborates that interpretation.

63. That interpretation also helps guarantee the primacy of EU law, in so far as the Court of Justice has held that, if the findings made by a national court appear to be contrary to EU law, EU law requires that a different national court, even if it is, according to domestic law, unconditionally bound by the first court's interpretation of EU law, must, of its own motion, refuse to apply the domestic law rule under which it is required to comply with the interpretation of EU law made by that first court. (37)

64. In the problematic relationship between procedural rules that concerns us, it seems that if the applicant for reparation did not have a genuine opportunity, in the proceedings relating to lawfulness, to raise the plea that it wished to rely upon in support of its action for damages, it will not be possible to remedy the incorrect application of EU law. In order to ensure the primacy of EU law, the national court must, within the limits of its jurisdiction, take all measures necessary to ensure that it is possible to do so. (38) It follows from the foregoing that, where it has been shown that it was not possible to have the contracting authority's decision declared unlawful on a ground unrelated to the applicant's behaviour, the national court having jurisdiction must disapply the rule embodying the principle that actions concerning lawfulness have precedence over actions for reparation.

2. The lack of justification

65. When I examined whether a rule, which prevents a plea in law from being relied upon unless it was raised in the application instigating proceedings, was compliant with EU law, I found that the objective of speed pursued by Directive 89/665 did justify that rule being applicable in proceedings to review the lawfulness of public procurement decisions, because it is in the interests of the proper administration of justice and consolidates the requirement for legal certainty which must prevail in an action seeking to have a contract declared ineffective.

66. That said, as the Court of Justice observed, 'the degree of necessity for legal certainty concerning the conditions for the admissibility of actions is not identical for actions for damages and actions seeking to have a contract declared ineffective. Rendering a contract concluded following a public procurement procedure ineffective puts an end to the existence and possibly the performance of that contract, which constitutes a significant intervention by the administrative or judicial authority in the contractual relations between individuals and State bodies. Such a decision can thus cause considerable upset and financial losses not only to the successful tenderer for the public contract in question, but also to the awarding authority and, consequently, to the public, the end beneficiary of the supply of work or services under the public contract in question. As is apparent from recitals 25 and 27 in the preamble to Directive [2007/66/EC] (39) the EU legislature placed greater importance on the requirement for legal certainty as regards actions for a declaration that a contract is ineffective than as regards actions for damages.' (40)

67. Moreover, a combination of procedures such as that at issue in the main proceedings is not such as to delay conclusion of the contract award procedure or undermine legal certainty. Indeed, the exclusion decision whose unlawfulness gave rise to the damage claimed became final following the final dismissals of appeals against the arbitration committee's decision and of the appeal on a point of law against the judgment of the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) delivered in the same proceedings.

68. Authorising the court that is hearing the claim for damages to declare the decision causing the alleged damage to be unlawful, on the basis of a plea which was not examined in the proceedings to set aside, cannot, to my mind, have the effect of depriving the contested decision of effect.

69. Furthermore, the fact that it can do so does not equate to the court hearing the action for damages questioning *res judicata*,since the action for damages does not have the same subject matter as the proceedings to set aside and because those latter proceedings did not concern the same question of law. On the contrary, the Court of Justice has already held in similar circumstances that the principle of legal certainty

could not justify a national rule which prevented the national court from drawing all the consequences of a breach of a provision of the Treaty because of a decision of a national court, which was *res judicata.* (41)

3. Application to this case

70. Awarding damages to persons harmed by an infringement of the public procurement rules constitutes one of the remedies guaranteed under EU law (42). To paraphrase the wording used by the Court in paragraph 43 of its judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779), the combination of procedural rules applicable to the dispute in the main proceedings could cause the person harmed to be deprived not only of the possibility of having the awarding authority's decision annulled, but also of all the remedies provided for in Article 2(1) of Directive 89/665.

71. A similar finding is therefore necessary in this case. The right to an effective remedy, enshrined in Article 47 of the Charter, precludes a regime, such as that in the case in the main proceedings, which infringes that right by making it impossible to bring an action for damages because of a prohibition on taking into account a plea in law of which the individual, without any fault of or negligence by it, could not have been aware before bringing its application to set aside, or, in the words of the judgment of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318), which the individual had no genuine opportunity to raise before a national court.

72. In the present case, the infringement of EU law which Hochtief adduced for the first time before the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) is based on the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), the Hungarian version of which was apparently only made 'available' after the proceedings before the arbitration committee had been commenced. (43)

73. It remains to be seen whether an undertaking such as Hochtief, a German company having its registered office in Germany, truly was unable to have access to a judgment of the Court of Justice before it was translated into Hungarian. The fact that the Court Registry gave the information about the availability in Hungarian of the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), in German, following a request in German from the German head office of Hochtief, is certainly a factor to take into consideration. Nevertheless, since that is a question of fact, it is for the referring court to determine whether Hochtief had a *genuine opportunity* to raise that plea before the arbitration committee (or before the appeal court if the arbitration committee should not be classed as a court or tribunal within the meaning of Article 267 TFEU (44)). If it did not, its action for damages should be admitted even though the contracting authority's decision had not been set aside.

VI. Conclusion

74. In the light of the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling by the Kúria (Supreme Court, Hungary) as follows:

(1) EU law does not preclude a national procedural provision which makes the bringing of an action for damages conditional on a prior final declaration by a body having the necessary powers within the meaning of Article 2(6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts that the decision of a contracting authority is unlawful.

(2) Article 2(6) of Directive 89/665 does not preclude the Member States from making provision for situations in which the fact that the decision has not first been set aside is not grounds for the inadmissibility of an action for damages based on the irregularity of a contracting authority's decision.

(3) Article 47 of the Charter of Fundamental Rights of the European Union does preclude national legislation which makes bringing an action for damages based on the infringement of a rule of public procurement law subject to a prior finding that the public procurement procedure for the contract in question was unlawful where the applicant for reparation did not have a genuine

opportunity to raise before a national court the plea that it wishes to rely upon in support of its action for damages.

---

1 Original language: French.

---

2 OJ 1989 L 395, p. 33.

---

3 OJ 2014 L 94, p. 1.

---

4 According to a letter that the Registry of the Court of Justice sent to Hochtief on 22 September 2010, the Court Registry received the Hungarian translation of the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), on 2 October 2006. The Court Registry stated, however, that it was impossible to determine exactly the date it went online on the Court's website.

---

5 Council Directive 93/37/EEC of 14 June 1993 on the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

---

6 With all the more reason in so far as Hochtief (paragraph 34 of its written observations) and the Hungarian Government (paragraphs 13 to 15 of its written observations) dispute the thesis that the appellant in the main proceedings can rely on the 'new' plea only by amending its application, which would supposedly be a ground for excluding it from the procedure.

---

7 Paragraph 22 of the order for reference.

---

8 See, to that effect, the judgments of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 44); of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 30), and of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 58).

---

9 See, to that effect, in relation to Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60), the judgment of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 31) and, in relation to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), the judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraphs 59 and 60).

---

10 Judgment of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 49); emphasis added.

---

11 See, to that effect, judgment of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 46).

---

12 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ 2014 L 94, p. 65).

---

13 Judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 36); emphasis added.

14 See, to that effect, judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 35).

15 Conversely, that option to derogate from the general rule cannot, in my view, be turned into an obligation since it would otherwise render the principle that actions concerning lawfulness have precedence over actions for reparation authorised by Article 2(6) of Directive 89/665 substantially less meaningful.

16 The Court of Justice accordingly held that 'EU law, in particular the principle of effectiveness, precludes national legislation which makes bringing an action for damages in respect of the infringement of a rule of public procurement law subject to a prior finding that the public procurement procedure for the contract in question was unlawful because of the lack of prior publication of a contract notice, where the action for a declaration of unlawfulness is subject to a six-month limitation period which starts to run on the day after the date of the award of the public contract in question, irrespective of whether or not the applicant in that action was in a position to know of the unlawfulness affecting the decision of the awarding authority' (judgment of 26 November 2015, *MedEval*, C-166/14, EU:C:2015:779, paragraph 46 and operative part).

17 Judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 47), emphasis added. See, also, judgments of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 49), and of 14 September 2016, *Martínez Andrés and Castrejana López* (C-184/15 and C-197/15, EU:C:2016:680, paragraph 59).

18 In such a case, Article 2(9) of Directive 89/665 nevertheless requires that any illegal measure taken by those non-judicial 'review bodies' or any alleged defect in the exercise of their powers can be the subject of judicial review (or review by another body which is a court or tribunal within the meaning of Article 267 TFEU and independent of the contracting authority and the review body in question).

19 See, to that effect, judgment of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 42).

20 See, to that effect, judgment of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 44).

21 See, to that effect, judgments of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 40); of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 47); of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688, paragraph 43); and of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268, paragraph 33).

22 Emphasis added.

23 Emphasis added.

24 See, to that effect, point 90 of the Opinion of Advocate General Mengozzi in *Texdata Software* (C-418/11, EU:C:2013:50) according to which 'the barring of new arguments on appeal … is a prohibition common to the legal systems of various Member States, and … does not compromise the effectiveness of the appeal either'. The Court of Justice confirmed that view and that such a rule is theoretically lawful. Indeed, in paragraph 87 of its judgment of 26 September 2013, *Texdata Software* (C-418/11, EU:C:2013:588), the Court held, in response to the allegation relating to the barring of new pleas at the appeal stage, that there was 'no

evidence before the Court that raises any doubts as to the conformity of the system of penalties at issue with the principles of effective judicial protection and respect for the rights of the defence'.

---

25 The Court of Justice thus held that a financial condition could be 'a measure liable to discourage frivolous challenges and ensure that all individuals have their actions dealt with as rapidly as possible, in the interest of the proper administration of justice, in accordance with Article 47, first and second paragraphs, of the Charter' (judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 54).

---

26 See, to that effect, judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 40).

---

27 See, to that effect, judgment of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraph 41).

---

28 See, to that effect, judgment of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraph 49).

---

29 See, to that effect, in relation to legislative provisions, Dubouis, L., 'La responsabilité de l'État législateur pour les dommages causés aux particuliers par la violation du droit communautaire and son incidence sur la responsabilité de la Communauté', *Revue française de droit administratif*, No 3, 1996, pp. 583 to 601.

---

30 Indeed, that principle is intended to ensure that it is specialised review bodies that review public procurement rules. It is a matter of ensuring that any question of law concerning the infringement of public procurement law arising in other proceedings has been finally decided by the specialised body designated for that purpose.

---

31 On actions for non-contractual liability, Berrod, Fr., *La systématique des voies de droit communautaire*, Paris, Dalloz, 2003, no 946.

---

32 See, to that effect, judgment of 12 September 2006, *Reynolds Tobacco and Others* v *Commission* (C-131/03 P, EU:C:2006:541, paragraph 82).

---

33 See, to that effect, amongst others, judgments of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraphs 42 and 43), and of 26 March 2015, *Fenoll* (C-316/13, EU:C:2015:200, paragraph 48).

---

34 Judgment of 6 October 2015, *Târşia* (C-69/14, EU:C:2015:662, paragraph 40).

---

35 Judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 33). See, also, judgment of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391, paragraph 31).

---

36 See, to that effect, sixth recital of Directive 89/665.

---

37 See, to that effect, order of 15 October 2015, *Naderhirn* (C-581/14, not published, EU:C:2015:707, paragraph 35).

---

38 See, to that effect, order of 15 October 2015, *Naderhirn* (C-581/14, not published, EU:C:2015:707, paragraph 37).

---

39 Directive of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

---

40 Judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraphs 39 and 40).

---

41 See, to that effect, judgment of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraph 45).

---

42 Judgment of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 43).

---

43 Contrary to Hochtief's assertions at the hearing on 30 April, the argument based on the judgment of 3 March 2005, *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127), is, to my mind, very different from that raised initially in the application instigating proceedings. The legal issue raised in that judgment relates not to the issue of a conflict of interest affecting the tender as such, but to the rights of the defence.

---

44 Whether a body is a 'court or tribunal' within the meaning of Article 267 TFEU depends on a number of factors, such as whether the body in question is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, inter alia, judgment of 17 September 1997, *Dorsch Consult*, C-54/96, EU:C:1997:413, paragraph 23, and, for a recent application, judgment of 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, paragraph 17). The Court of Justice has already had the opportunity on several occasions of finding that bodies such as the arbitration committee should be categorised as 'courts or tribunals' within the meaning of Article 267 TFEU, provided that they satisfy those requirements. In that respect, see, in addition to the two judgments cited above, judgments of 4 February 1999, *Köllensperger and Atzwanger* (C-103/97, EU:C:1999:52); of 18 November 1999, *Unitron Scandinavia and 3-S* (C-275/98, EU:C:1999:567); of 18 June 2002, *HI* (C-92/00, EU:C:2002:379); of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801); of 18 September 2014, *Bundesdruckerei* (C-549/13, EU:C:2014:2235); of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347); of 27 October 2016, *Hörmann Reisen* (C-292/15, EU:C:2016:817); and of 8 June 2017, *Medisanus* (C-296/15, EU:C:2017:431).

JUDGMENT OF THE COURT (Fourth Chamber)

21 March 2019 (*)

(Reference for a preliminary ruling — Transport — Public passenger transport services by rail and by road — Regulation (EC) No 1370/2007 — Article 5(1) and (2) — Direct award – Contracts for public passenger transport services by bus and tram — Conditions — Directive 2004/17/EC — Directive 2004/18/EC)

In Joined Cases C-266/17 and C-267/17,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), made by decisions of 3 May 2017, received at the Court on 17 May 2017, in the proceedings

Rhein-Sieg-Kreis

v

Verkehrsbetrieb Hüttebräucker GmbH,

BVR Busverkehr Rheinland GmbH,

interveners:

Regionalverkehr Köln GmbH (C-266/17),

and

Rhenus Veniro GmbH & Co. KG

v

Kreis Heinsberg,

intervener:

WestVerkehr GmbH (C-267/17),

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe, C. Lycourgos, E. Juhász (Rapporteur) and C. Vajda, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 31 May 2018,

after considering the observations submitted on behalf of:

– Rhein-Sieg-Kreis, by G. Landsberg and J. Struß, Rechtsanwälte,

– Rhenus Veniro GmbH & Co. KG, by C. Antweiler, Rechtsanwalt,

– Verkehrsbetrieb Hüttebräucker GmbH, by C. Antweiler, Rechtsanwalt,

– BVR Busverkehr Rheinland GmbH, by W. Tresselt, Rechtsanwalt,

– Kreis Heisberg, by S. Schaefer, M. Weber and D. Marszalek, Rechtsanwälte,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by W. Mölls, P. Ondrůšek and J. Hottiaux, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2018,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 5(1) and (2) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1).

2 The requests have been made in two sets of proceedings between, first, Rhein-Sieg-Kreis (the Rhein-Sieg District, Germany), of the one part, and Verkehrsbetrieb Hüttebräucker GmbH and BVR Busverkehr Rheinland GmbH, of the other, and, between secondly, Rhenus Veniro GmbH & Co. KG (‘Rhenus Veniro’) and Kreis Heinsberg (Heinsberg District, Germany), concerning intended direct awards of public contracts for passenger transport services by bus.

Legal context

Regulation 1370/2007

3 Article 1 of Regulation No 1370/2007, entitled ‘Purpose and scope’, provides:

‘1. The purpose of this Regulation is to define how, in accordance with the rules of Community law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed.

To this end, this Regulation lays down the conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public service obligations.

2. This Regulation shall apply to the national and international operation of public passenger transport services by rail and other track-based modes and by road, except for services which are operated mainly for their historical interest or their tourist value. …

…’

4 Article 2 of that regulation, entitled ‘Definitions’, is worded as follows:

‘For the purpose of this Regulation:

(a) “public passenger transport” means passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis;

(b) “competent authority” means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority;

(c) “competent local authority” means any competent authority whose geographical area of competence is not national;

…

(h) “direct award” means the award of a public service contract to a given public service operator without any prior competitive tendering procedure;

(i) “public service contract” means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority:

– taking the form of an individual legislative or regulatory act, or

– containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator;

(j) “internal operator” means a legally distinct entity over which a competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments;

…’

5 Article 5 of that regulation, entitled ‘Award of public service contracts’, provides:

‘1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directive [2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)] or [Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)] for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives [2004/17] or [2004/18], the provisions of paragraphs 2 to 6 of this Article shall not apply.

2. Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services, may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments. Where a competent local authority takes such a decision, the following shall apply:

(a) for the purposes of determining whether the competent local authority exercises control, factors such as the degree of representation on administrative, management or supervisory bodies, specifications relating thereto in the articles of association, ownership, effective influence and control over strategic decisions and individual management decisions shall be taken into consideration. In accordance with Community law, 100% ownership by the competent public authority, in particular in the case of public-private partnerships, is not a mandatory requirement for establishing control within the meaning of this paragraph, provided that there is a dominant public influence and that control can be established on the basis of other criteria;

(b) the condition for applying this paragraph is that the internal operator and any entity over which this operator exerts even a minimal influence perform their public passenger transport activity within the territory of the competent local authority, notwithstanding any outgoing lines or other ancillary elements of that activity which enter the territory of neighbouring competent local

authorities, and do not take part in competitive tenders concerning the provision of public passenger transport services organised outside the territory of the competent local authority;

(c) notwithstanding point (b), an internal operator may participate in fair competitive tenders as from two years before the end of its directly awarded public service contract under the condition that a final decision has been taken to submit the public passenger transport services covered by the internal operator contract to fair competitive tender and that the internal operator has not concluded any other directly awarded public service contract;

(d) in the absence of a competent local authority, points (a), (b) and (c) shall apply to a national authority for the benefit of a geographical area which is not national, provided that the internal operator does not take part in competitive tenders concerning the provision of public passenger transport services organised outside the area for which the public service contract has been granted;

(e) if subcontracting under Article 4(7) is being considered, the internal operator shall be required to perform the major part of the public passenger transport service itself.

3. Any competent authority which has recourse to a third party other than an internal operator, shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 4, 5 and 6. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.

…’

6 Article 7 of that regulation, entitled ‘Publication’, provides in paragraph 2:

‘Each competent authority shall take the necessary measures to ensure that, at least one year before the launch of the invitation to tender procedure or one year before the direct award, the following information at least is published in the *Official Journal of the European Union*:

(a) the name and address of the competent authority;

(b) the type of award envisaged;

(c) the services and areas potentially covered by the award.

Competent authorities may decide not to publish this information where a public service contract concerns an annual provision of less than 50 000 kilometres of public passenger transport services.

…’

Directive 2004/17

7 Article 1 of Directive 2004/17, entitled ‘Definitions’, provides:

‘1. For the purposes of this Directive, the definitions set out in this Article shall apply.

2. (a) “Supply, works and service contracts” are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers;

…

(d) “Service contracts” are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.

…

3. ...

(b) A “service concession” is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.

…’

8 Article 5 of that directive, entitled ‘Transport services’, provides, in paragraph 1:

‘This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.’

9 Article 18 of that directive, entitled ‘Works and service concessions’, states:

‘This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.’

10 Article 31 of that directive, entitled ‘Service contracts listed in Annex XVII A’, provides:

‘Contracts which have as their object services listed in Annex XVII A shall be awarded in accordance with Articles 34 to 59.’

11 Article 32 of Directive 2004/17, entitled ‘Service contracts listed in Annex XVII B’, provides:

‘Contracts which have as their object services listed in Annex XVII B shall be governed solely by Articles 34 and 43.’

12 Article 34 of that directive, entitled ‘Technical specifications’, establishes in particular the detailed rules in accordance with which the technical specifications must be formulated in the contract documentation.

13 Under Article 43 of that directive, entitled ‘Contract award notices’:

‘1. Contracting entities which have awarded a contract or a framework agreement shall, within two months of the award of the contract or framework agreement, send a contract award notice as referred to in Annex XVI under conditions to be laid down by the Commission in accordance with the procedure referred to in Article 68(2).

…

4. In the case of contracts awarded for services listed in Annex XVII B, the contracting entities shall indicate in the notice whether they agree to publication.

…’

14 Annexes XVII A and XVII B to Directive 2004/17, entitled ‘Services within the meaning of Article 31’ and ‘Services within the meaning of Article 32’ respectively, both contain a table which refers, with regard to each of the categories of service which it defines, to the United Nations Central Product Classification reference numbers (‘the CPC reference numbers’). As regards category 2 of Annex XVII A, which corresponds to ‘Land transport services’, the CPC reference numbers are 712 (except 71235), 7512 and 87304. As for category 18 of Annex XVII B, which corresponds to ‘Rail transport services’,

the CPC reference number is 711. The CPC reference number 712 relates, in particular, to urban and suburban regular and special passenger transportation and to regular interurban passenger transportation other than the interurban, urban and suburban railway transport services of passengers, to which the CPC reference number 711 relates.

Directive 2004/18

15 Article 1 of Directive 2004/18, entitled ‘Definitions’, provides:

‘1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

2. ...

(d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

…

4. “Service concession” is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

…’

16 Under Article 3 of that directive, entitled ‘Granting of special or exclusive rights: non-discrimination clause’:

‘Where a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted shall provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the entity concerned must comply with the principle of non-discrimination on the basis of nationality.’

17 Article 12 of that directive, entitled ‘Contracts in the water, energy, transport and postal services sectors’, provides in the first paragraph thereof:

‘This Directive shall not apply to public contracts which, under [Directive 2004/17], are awarded by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of that Directive and are awarded for the pursuit of those activities, or to public contracts excluded from the scope of that Directive under Article 5(2) and Articles 19, 26 and 30 thereof.’

18 Article 17 of Directive 2004/18, entitled ‘Service concessions’, is worded as follows:

‘Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4).’

19 Article 20 of that directive, entitled ‘Service contracts listed in Annex II A’, states:

‘Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.’

20 Article 21 of that directive, entitled ‘Service contracts listed in Annex II B’, provides:

‘Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).’

21 Annexes II A and II B to that same directive contain a table similar to those in Annex XVII A and Annex XVII B to Directive 2004/17.

Directive 2014/24/EU

22 In accordance with Article 91 thereof, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65), repealed and replaced Directive 2004/18 with effect from 18 April 2016.

23 Article 12 of Directive 2014/24, entitled ‘Public contracts between entities within the public sector’, provides:

‘1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.

2. Paragraph 1 also applies where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

3. A contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying this Directive where all of the following conditions are fulfilled.

(a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments;

(b) more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

For the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;

(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and

(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities;

4. A contract concluded exclusively between two or more contracting authorities shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

(b) the implementation of that cooperation is governed solely by considerations relating to the public interest; and

(c) the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

5. For the determination of the percentage of activities referred to in point (b) of the first subparagraph of paragraph 1, point (b) of the first subparagraph of paragraph 3 and point (c) of paragraph 4, the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity-based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections.'

Directive 2014/25/EU

24 In accordance with Article 107 thereof, Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 (OJ 2014 L 94, p. 243), repealed and replaced Directive 2004/17 with effect from 18 April 2016.

25 Article 28 of Directive 2014/25, entitled 'Contracts between contracting authorities', contains provisions in essence similar to those of Article 12 of Directive 2014/24.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-266/17

26 The Rhein-Sieg District, a local authority having the status of competent authority within the meaning of Article 2(b) of Regulation No 1370/2007, set up, in conjunction with other local authorities having that same status, the Zweckverband Verkehrsverbund Rhein-Sieg (Rhein-Sieg special purpose transport association, Germany), for the purposes of shared performance of tasks specified in the Gesetz über den öffentlichen Personennahverkehr in Nordrhein-Westfalen (Law on local public passenger transport in North Rhine-Westphalia).

27 Under its rules, that special purpose transport association is responsible, inter alia, for establishing the amount of tariffs.

28 Regionalverkehr Köln GmbH is a public transport company which is directly or indirectly owned by passenger transport authorities, which include the Rhein-Sieg District.

29 Regionalverkehr Köln provides public transport services for the Rhein-Sieg District, and for other authorities having an indirect or direct holding in Regionalverkehr Köln, on the basis of the tasks conferred before Regulation No 1370/2007 entered into force. In addition to those activities, it provides bus transport services for four municipalities in which there is a 'municipal bus' service, on the basis of contracts from the period before the entry into force of that regulation, which were not awarded on the basis of a competitive tender procedure.

30 On 21 August 2015, the shareholders' meeting of the Regionalverkehr Köln amended the latter's articles of association, so that in relation to the conclusion, amendment or termination of a transport contract the only shareholder entitled to vote is one which itself or whose indirect or direct owner awards a transport services contract referred to in Article 5(2) of Regulation No 1370/2007. According to the order for reference, that resolution is temporarily ineffective pursuant to final judgment of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany).

31 It is apparent from the documents before the Court that, in accordance with Article 7(2) of Regulation No 1370/2007, on 30 September 2015 the Rhein-Sieg District had published in the Supplement to the *Official Journal of the European Union* a prior information notice concerning the intended direct award of a contract for the provision of public passenger transport services by bus not taking the form of a service concession contract for the purposes of Directives 2004/17 and 2004/18.

32 That contract, which concerned the annual provision of several million kilometres of journeys, was to be awarded to Regionalverkehr Köln as internal operator, in accordance with Article 5(2) of Regulation No 1370/2007, for a duration of 120 months as from 12 December 2016.

33 Following the publication of that notice, Verkehrsbetrieb Hüttebräucker and BVR Busverkehr Rheinland challenged the intended direct award before the Vergabekammer (Public Procurement Chamber, Germany), contending in particular that the contract at issue in the main proceedings did not fall within the scope of Article 5(2) of Regulation No 1370/2007, since it did not take the form of a service concession contract.

34 The Vergabekammer (Public Procurement Chamber) prohibited the contract at issue in the main proceedings from being directly awarded to Regionalverkehr Köln, on the ground that the conditions for the application of Article 5(2) of Regulation No 1370/2007 were not satisfied. To that effect, it found that the control which the Rhein-Sieg District ought to have exercised over that company did not exist and that, in addition, that company provided public passenger transport services in territories other than that administered by the contracting authority, which was likely to preclude any direct award of the transport contract.

35 The Rhein-Sieg District appealed to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf).

36 The Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) states that, as regards transport services contracts not taking the form of service concessions contracts, Article 5(2) of Regulation No 1370/2007 is the subject of diverging case-law at the national level.

37 According to some courts, those provisions are not intended to apply to contracts for passenger transport services by bus and tram which do not take the form of service concessions contracts, since Article 5(1) of Regulation No 1370/2007 expressly provides that those contracts remain governed by Directives 2004/17 and 2004/18, which does not, however, preclude them from being awarded directly, in accordance with the general regime established on the basis of those directives.

38 Conversely, other courts, including the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) itself, consider that, inasmuch as direct contract awards are not subject to the provisions of Directives 2004/17 and 2004/18, Article 5(2) of Regulation No 1370/2007 which governs the direct award of contracts for passenger transport services must, as a special rule and in accordance with the judgment of 27 October 2016, *Hörmann Reisen* (C-292/15, EU:C:2016:817), apply to direct awards of contracts for passenger transport services by bus even when those contracts do not take the form of public service concessions.

39 Given such a difference in interpretation, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) asks whether Article 5(2) of Regulation No 1370/2007 is, as a rule, applicable in a case such as that in the main proceedings.

40 In addition, should the answer be in the affirmative, that court is uncertain whether that provision is indeed intended to apply to the case in the main proceedings, having regard to the specific and concrete circumstances mentioned in the order for reference, and raises the question of the date on which the conditions for the application of the provision must be met.

41 In those circumstances the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 5(2) of Regulation No 1370/2007 apply to contracts which are not contracts which, within the meaning of the first sentence of Article 5(1) of Regulation No 1370/2007, take the form of service concessions contracts as defined in Directives [2004/17] or [2004/18]?

If Question 1 is answered in the affirmative:

(2) Where an individual competent authority awards a public service contract directly to an internal operator in accordance with Article 5(2) of Regulation No 1370/2007, is the joint exercise of control by that authority together with the other shareholders of the internal operator precluded if the power to intervene in public passenger transport in a given geographical area (Article 2(b) and (c) of Regulation No 1370/2007) is divided between the individual competent authority and a group of authorities which provides integrated public passenger transport services, for example where the power to award public service contracts to an internal operator remains with the individual competent authority but the responsibility for tariffs is transferred to a special purpose transport association to which, in addition to the individual authority, further authorities competent in their geographical areas belong?

(3) Where an individual competent authority awards a public service contract directly to an internal operator in accordance with Article 5(2) of Regulation No 1370/2007, is the joint exercise of control by that authority together with the other shareholders of the internal operator precluded if, according to that operator’s articles of association, in the case of resolutions concerning the conclusion, amendment or termination of a public service contract referred to in Article 5(2) of Regulation No 1370/2007, the only shareholder entitled to vote is the one which itself or whose indirect or direct owner awards a public service contract to the internal operator in accordance with Article 5(2) of Regulation No 1370/2007?

(4) Does point (b) of the second sentence of Article 5(2) of Regulation No 1370/2007 permit the internal operator also to perform public passenger transport services for other competent local authorities within their territory (including through routes or other part services which enter the territory of neighbouring competent local authorities) if these are not awarded through organised competitive tender procedures?

(5) Does point (b) of the second sentence of Article 5(2) of Regulation No 1370/2007 permit the internal operator also to perform public passenger transport activity outside the territory of the commissioning authority for other authorities on the basis of public service contracts covered by the transitional provisions of Article 8(3) of Regulation No 1370/2007?

(6) On which date must the requirements of Article 5(2) of Regulation No 1370/2007 be satisfied?’

Case C-267/17

42 The Heinsberg District, a local authority having the status of competent authority within the meaning of Article 2(b) of Regulation No 1370/2007 is a member, together with other local authorities, of the Zweckverband Aachener Verkehrsverbund (Aachen special purpose transport association, Germany), formed to promote and support local public transport passenger services for its members.

43 It is apparent from the documents before the Court that, in accordance with Article 7(2) of Regulation No 1370/2007, on 15 March 2016 the Heinsberg District had published in the Supplement to the *Official Journal of the European Union* a prior information notice concerning the intended direct award of a contract for the provision of public passenger transport services by bus and other motor vehicles.

44 It was envisaged in that prior information notice that that contract, which was for several million kilometres of journeys to be provided from 1 January 2018, would be awarded directly to an internal operator, in this case WestVerkehr GmbH, in accordance with Article 5(2) of Regulation No 1370/2007.

45 Rhenus Veniro brought an action before the Vergabekammer Rheinland (Public Procurement Board of the Land of Rhineland-Palatinate, Germany) against the planned direct award, which that board dismissed.

46 Rhenus Veniro brought an appeal before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), arguing that, as regards public transport services by bus or by tram, Article 5(2) of Regulation No 1370/2007 is intended to apply only in cases where the contracts concerned take the form of service concessions contracts.

47 For the same reasons as those referred to in Case C-266/17, that court asks whether Article 5(2) of Regulation No 1370/2007 is, as a rule, applicable in a case such as that in Case C-267/17.

48 In addition, should the answer be in the affirmative, that court is uncertain whether that provision is indeed intended to apply to the case in the main proceedings, having regard to the specific and concrete circumstances mentioned in the order for reference, and raises the question of the date on which the conditions for the application of the provision must be met.

49 In those circumstances the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 5(2) of Regulation No 1370/2007 applicable to directly awarded public service contracts within the meaning of Article 2(i) of the regulation which do not, for the purposes of the second sentence of Article 5(1) of the regulation, take the form of service concessions contracts under Directives [2004/17] or [2004/18]?

And if Question 1 is answered in the affirmative:

(2) Do Article 2(b) and Article 5(2) of Regulation No 1370/2007 presume, as is conveyed by the word “or”, an exclusive competence either of an individual authority or of a group of authorities, or do those provisions also permit an individual authority to be a member of a group of authorities and to assign specific tasks to the group but at the same time to retain the power to intervene under Article 2(b) and to be the competent local authority within the meaning of Article 5(2) of the regulation?

(3) Does point (e) of the second sentence of Article 5(2) of Regulation No 1370/2007, which lays down the requirement to perform the major part of the public passenger transport service itself, prevent the internal operator from having that major part of the services performed by a wholly owned subsidiary?

(4) At what point in time must the conditions governing direct awards laid down in Article 5(2) of Regulation No 1370/2007 be met: at the time of publication of an intended direct award pursuant to Article 7 of Regulation No 1370/2007 or not until the time of the direct award itself?’

50 By decision of the President of the Court of 6 March 2018, Cases C-266/17 and C-267/17 were joined for the purposes of the oral part of the procedure and of the judgment.

The request to have the oral part of the procedure reopened

51 By documents lodged at the Court Registry on 20 September 2018, Verkehrsbetrieb Hüttebräucker and BVR Busverkehr Rheinland, in Case C-266/17, and Rhenus Veniro, in Case C-267/17, requested the Court to order the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court.

52 In support of their requests, Verkehrsbetrieb Hüttebräucker and Rhenus Veniro submit that the interpretation of Article 5(2) of Regulation No 1370/2007, as adopted by the Advocate General in his Opinion, does not take sufficient account of the arguments that were submitted, in particular, at the hearing and which militate against that interpretation. In addition, some of the arguments developed in their written observations, in particular on the importance of Article 9(1) of Regulation No 1370/2007 for the interpretation of Article 5(2) of that regulation were not debated at the hearing.

53 BVR Busverkehr Rheinland, for its part, claims that the Advocate General was wrong to consider that the third question raised by the referring court in Case C-266/17 could be hypothetical, when the amendment to the articles of association of Regionalverkehr Köln on 21 August 2015 is now applicable.

54 In that regard, it must be borne in mind, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court of Justice make no provision for the interested parties referred to in Article 23 of the Statute to submit observations in response to the Advocate General's Opinion (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 26 and the case-law cited).

55 Secondly, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's conclusion or by the reasoning which led to that conclusion. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he examines in his Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 27 and the case-law cited).

56 Nevertheless, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated between the interested persons (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 28 and the case-law cited).

57 In the present case, it must be pointed out that, in order to request the reopening of the oral part of the procedure, Verkehrsbetrieb Hüttebräucker, BVR Busverkehr Rheinland and Rhenus Veniro dispute the Advocate General's Opinion by using arguments already developed in their written observations or at the hearing.

58 Since the Court has therefore all the information necessary to rule on the requests for a preliminary ruling, it must, having heard the Advocate General, refuse the requests for the oral part of the procedure to be reopened.

Admissibility

59 In Case C-266/17, the Republic of Austria submits that the request for a preliminary ruling is inadmissible, on the ground that the referring court has failed to state, in the order for reference, the means of transport concerned by the public contract at issue in the main proceedings and that it is, therefore, impossible to ascertain whether the transport concerned is a transport service by rail or by bus, or indeed a service combining both those means of transport.

60 In Case C-267/17, the Republic of Austria contends that the request for a preliminary ruling is in part inadmissible, since, according to the referring court's findings, the public contract at issue in the main

proceedings relates not only to buses, but also to other motor vehicles. Rhenus Veniro also contends that the first question referred in that case is inadmissible, on the ground that it is hypothetical.

61 In the present case, as regards Case C-266/17, it is true that the order for reference does not expressly specify that the contract at issue in the main proceedings relates to a contract for transport services by bus.

62 However, it is apparent from the documents before the Court, and in particular from the prior information notice of 30 September 2015 mentioned in the order for reference, that Case C-266/17 relates to a contract for passenger transport services by bus.

63 As regards Case C-267/17, while the contract at issue in the main proceedings does indeed relate to a passenger transport service by bus and 'by other motor vehicles', it is still the case that the request for a preliminary ruling remains relevant as regards passenger transport by bus, so that the Court's answer shall be given on the basis of that premiss.

64 In addition, contrary to Rhenus Veniro's claims, the order for reference demonstrates the relevance of the first question referred in that case, since the referring court states that it must decide on the challenge to the direct award of a contract for passenger transport services by bus and that it is unsure which legal rules are applicable to such a direct award.

65 It follows that both requests for a preliminary ruling are admissible.

Consideration of the questions referred

66 By its first question in Case C-266/17 and its first question in Case C-267/17, the referring court asks, in essence, whether Article 5(2) of Regulation No 1370/2007 applies to the direct award of contracts for public passenger transport services by bus which do not take the form of service concessions contracts for the purposes of Directives 2004/17 and 2004/18.

67 In that regard, the Court points out that, while the first sentence of Article 5(1) of Regulation No 1370/2007 provides that 'public service contracts shall be awarded in accordance with the rules laid down in this Regulation', the second sentence of Article 5(1) adds that, 'however, service contracts or public service contracts as defined in Directives [2004/17] or [2004/18] for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives', and the third sentence of Article 5(1) states that 'where contracts are to be awarded in accordance with Directives [2004/17] or [2004/18], the provisions of paragraphs 2 to 6 of this Article shall not apply'.

68 In this instance, in both cases in the main proceedings, the referring court seems to envisage that the direct award of contracts for public passenger transport services by bus is governed, where those contracts do not take the form of service concessions contracts, not by the public procurement rules laid down by Directives 2004/17 and 2004/18, but by those of Article 5(2) of Regulation No 1370/2007, with those latter provisions, as *lex specialis*, intended to replace the general rules for direct awards.

69 It must, however, be pointed out that the general scheme and origin of EU public procurement legislation cannot lead to such an interpretation.

70 In that regard, it must be found that, as the Commission stated in its observations, pursuant to Articles 5 and 31 of Directive 2004/17, read in conjunction with category 2 of Annex XVII A to that directive, and to Articles 12 and 20 of Directive 2004/18, read in conjunction with category 2 of Annex II A to that directive, contracts for transport services by bus and by tram are subject to the entirety of the public procurement procedures laid down in those directives. By contrast, transport services by rail and by metro are subject, pursuant to Articles 5 and 32 of Directive 2004/17, read in conjunction with category 18 of Annex XVII B to that directive, and to Article 21 of Directive 2004/18, read in conjunction with category 18 of Annex II B to that directive, only to a very limited number of those directives' provisions, in particular to Articles 34 and 43 of Directive 2004/17 and to Articles 23 and 35

of Directive 2004/18. As regards transport service concessions contracts, they are not subject to any provision of Directive 2004/17, pursuant to Article 18 of that directive, and are subject only to Article 3 of Directive 2004/18, pursuant to Article 17 of that directive.

71 Article 5(1) of Regulation No 1370/2007 makes concessions contracts and contracts for passenger transport services by rail and by metro subject to the rules laid down in Article 5(2) to (6) of that regulation whereas, for contracts for transport services by bus and by tram, it refers to Directives 2004/17 and 2004/18.

72 It follows from this that, since there are no rules in those directives specifically governing the award of public contracts in relation to contracts for passenger transport services by rail and by metro, and the award of contracts in the form of services concessions, the EU legislature, in the context of Article 5(2) to (6) of Regulation No 1370/2007, introduced a specific body of award rules applicable to those contracts and concessions, including as regards the direct award of such contracts.

73 Since contracts for public passenger transport services by bus and by tram not relating to concessions had already been made subject, as is apparent from paragraph 70 above, to Directives 2004/17 and 2004/18 prior to the adoption of Regulation No 1370/2007, new legislation was not felt to be necessary for the awards of such contracts which, therefore, remain as a matter of course subject, as the case may be, to the application of Directive 2004/17 or Directive 2004/18.

74 In that regard, the Court points out that the case-law on the direct award of public contracts has been developed on the basis, and in consideration, of those directives, which implies that the origin and rationale of the direct award regime is to be found there.

75 According to the Court's case-law, the direct awards regime which applies to the situations falling within the scope of Directives 2004/17 and 2004/18 constitutes an exception to the application of the procedures provided for by those directives (see, to that effect, judgment of 8 May 2014, *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303, paragraph 25) and is, therefore, intrinsically linked to those two directives and their legal regime.

76 In the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 50), which was the first to acknowledge that the specific nature of direct awards gives grounds for not applying the public procurement rules, the Court held that while, for the purposes of applying those rules in accordance with Article 1(a) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority, the position can be otherwise in the case where the public authority, which is a contracting authority, exercises over the separate entity in question a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities. Following that judgment, the Court made clear the conditions for applying that regime, in particular in the judgments of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5), and of 11 May 2006, *Carbotermo and Consorzio Alisei* (C-340/04, EU:C:2006:308), and then in the context of Directives 2004/17 and 2004/18, in the judgments of 10 September 2009, *Sea* (C-573/07, EU:C:2009:532), and of 8 May 2014, *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:303).

77 In addition, it must be pointed out that Directives 2014/24 and 2014/25, which repealed and replaced Directives 2004/18 and 2004/17 respectively, both (in Article 12 of Directive 2014/24 and Article 28 of Directive 2014/25), codified and made clear the Court's case-law on direct awards.

78 Even though that codification of the general regime for direct awards does not apply *ratione temporis* to the disputes in the main proceedings, it demonstrates that the EU legislature intended that regime to be linked to Directives 2014/24 and 2014/25.

79 That incorporation of the direct award regime within the scope of the public procurement directives means that, in practice, any recourse to that type of award presupposes the application of those directives.

80 It follows from this that Article 5(2) of Regulation No 1370/2007 does not apply to the direct award of contracts for public passenger transport services by bus which do not take the form of service concessions contracts.

81 In the light of the foregoing, the answer to the first question in Case C-266/17 and the first question in Case C-267/17 is that Article 5(2) of Regulation No 1370/2007 does not apply to the direct award of contracts for public passenger transport services by bus which do not take the form of service concessions contracts for the purposes of Directives 2004/17 and 2004/18.

82 Since the first question in Case C-266/17 and the first question in Case C-267/17 have been answered in the negative, there is no need to answer the other questions referred.

Costs

83 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 5(2) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road does not apply to the direct award of contracts for public passenger transport services by bus which do not take the form of service concessions contracts for the purposes of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

[Signatures]

---

* Language of the case: German.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 13 September 2018 (1)

Joined Cases C-266/17 and C-267/17

Rhein-Sieg-Kreis

v

Verkehrsbetrieb Hüttebräucker GmbH,

BVR Busverkehr Rheinland GmbH (C-266/17),

intervener:

Regionalverkehr Köln GmbH

and

Rhenus Veniro GmbH & Co. KG

v

Kreis Heinsberg (C-267/17),

intervener:

WestVerkehr GmbH

(Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany))

(Reference for a preliminary ruling — Transport — Public passenger transport services by road — Direct award of public service contracts: internal operator — Conditions for the application of Regulation (EC) No 1370/2007 — Similar control — Further direct award by the internal operator — Point at which the conditions for direct award must be assessed)

1. At the root of these two references for a preliminary ruling are two contracts for public passenger transport services by bus which were directly awarded (or are in the course of being directly awarded) by German local authorities to their respective ‘internal operators’. The referring court emphasises that neither of those contracts takes the legal form of a transport services concession.

2. The proliferation of the aforementioned direct award mechanism, which dispenses with free competition and favours municipal transport undertakings, is a cause for concern to the other, privately-owned, undertakings in the sector concerned, whose market share is being eroded while that of publicly-capitalised undertakings is stable or growing.

3. The referring court wishes to ascertain, first and foremost, whether the direct award of those contracts to internal operators is governed by the *lex specialis*, which, in this case, would be Article 5 of Regulation No 1370/2007, (2) by the general public procurement directives or by the rules of the FEU Treaty. In addition to that principal point of uncertainty, it also raises questions concerning other aspects of the relationship between local authorities and their internal operators.

I. EU legal framework. Regulation No 1370/2007

4. Article 2 reads:

‘For the purposes of this Regulation:

…

(b) “competent authority” means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or anybody vested with such authority;

(c) “competent local authority” means any competent authority whose geographical area of competence is not national;

…

(h) “direct award” means the award of a public service contract to a given public service operator without any prior competitive tendering procedure;

(i) “public service contract” means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; …

(j) “internal operator” means a legally distinct entity over which a competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments;

...’.

5. Pursuant to Article 4:

‘…

7. ... If subcontracting takes place, the operator entrusted with the administration and performance of public passenger transport services in accordance with this Regulation shall be required to perform a major part of the public passenger transport services itself. ...’

6. Article 5 states:

‘1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)] or 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) (‘together the procurement directives’)] for public passenger transport services by bus or tram shall be awarded in accordance with the procedure provided for under those directives where such contracts do not take the form of service concessions contracts as defined in those directives. Where contracts are to be awarded in accordance with Directives [2004/17] or [2004/18], the provisions of paragraphs 2 to 6 of this Article shall not apply.

2. Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services, may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments. Where a competent local authority takes such a decision, the following shall apply:

(a) for the purposes of determining whether the competent local authority exercises control, factors such as the degree of representation on administrative, management or supervisory bodies, specifications relating thereto in the articles of association, ownership, effective influence and control over strategic decisions and individual management decisions shall be taken into consideration. In accordance with Community law, 100% ownership by the competent public authority, in particular in the case of public-private partnerships, is not a mandatory requirement for establishing control within the meaning of this paragraph, provided that there is a dominant public influence and that control can be established on the basis of other criteria;

(b) the condition for applying this paragraph is that the internal operator and any entity over which this operator exerts even a minimal influence perform their public passenger transport activity within the territory of the competent local authority, notwithstanding any outgoing lines or other ancillary elements of that activity which enter the territory of neighbouring competent local authorities, and do not take part in competitive tenders concerning the provision of public passenger transport services organised outside the territory of the competent local authority;

(c) notwithstanding point (b), an internal operator may participate in fair competitive tenders as from two years before the end of its directly awarded public service contract under the condition that a final decision has been taken to submit the public passenger transport services covered by the internal operator contract to fair competitive tender and that the internal operator has not concluded any other directly awarded public service contract;

…

(e) if subcontracting under Article 4(7) is being considered, the internal operator shall be required to perform the major part of the public passenger transport service itself.

3. Any competent authority which has recourse to a third party other than an internal operator shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 4, 5 and 6. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.

…’

7. Article 7 provides:

‘…

2. Each competent authority shall take the necessary measures to ensure that, at least one year before the launch of the invitation to tender procedure or one year before the direct award, the following information at least is published in the *Official Journal of the European Union*:

(a) the name and address of the competent authority;

(b) the type of award envisaged;

(c) the services and areas potentially covered by the award.

…’

8. Article 8 stipulates:

‘…

2. Without prejudice to paragraph 3, the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019. During this transitional period Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity.

Within six months after the first half of the transitional period, Member States shall provide the Commission with a progress report, highlighting the implementation of any gradual award of public service contracts in line with Article 5. On the basis of the Member States’ progress reports, the Commission may propose appropriate measures addressed to Member States.

3. In the application of paragraph 2, no account shall be taken of public service contracts awarded in accordance with Community and national law:

(a) before 26 July 2000 on the basis of a fair and competitive tendering procedure;

(b) before 26 July 2000 on the basis of a procedure other than a fair competitive tendering procedure;

(c) as from 26 July 2000 and before 3 December 2009 on the basis of a fair competitive tendering procedure;

(d) as from 26 July 2000 and before 3 December 2009 on the basis of a procedure other than a fair competitive tendering procedure.

The contracts referred to in (a) may continue until they expire. The contracts referred to in (b) and (c) may continue until they expire, but for no longer than 30 years. The contracts referred to in (d) may continue until they expire, provided they are of limited duration comparable to the durations specified in Article 4.

Public service contracts may continue until they expire where their termination would entail undue legal or economic consequences and provided that the Commission has given its approval.

…’

II. Facts of the dispute and questions referred for a preliminary ruling

A. Case C-266/17

9. Rhein-Sieg-Kreis (District of Rhein-Sieg) is a local authority in the *Land* of North Rhine-Westphalia which, under national law, has the status of a competent authority within its geographical area for the purposes of the Regulation.

10. Rhein-Sieg-Kreis has an internal operator (Regionalverkehr Köln GmbH, ‘RV Köln’) with its own legal personality. (3) According to the order for reference, Rhein-Sieg-Kreis exerts over RV Köln a control ‘similar to that which it exercises over its own departments, in the form of shared control with the other shareholders’. (4)

11. In addition, Rhein-Sieg-Kreis, together with a number of other local authorities, established a management consortium (Verkehrsverbund Rhein-Sieg) which is responsible in particular for setting tariffs but does not engage in any transport activities.

12. Rhein-Sieg-Kreis announced that, (5) acting in accordance with Article 5(2) of the Regulation, it was going to make a direct award of the contract for providing public passenger transport services ‘within its geographical area, including on routes running into neighbouring geographical areas’. (6)

13. RV Köln holds the contract for providing public passenger transport services in the territory of Rhein-Sieg-Kreis, as well as on outgoing lines and in connection with other ancillary elements of that activity which enter the territory of neighbouring local authorities. (7)

14. The announcement of that award was challenged by Verkehrsbetrieb Hüttebräucker GmbH and BVR Busverkehr Rheinland GmbH before the Vergabekammer Rheinland (Public Procurement Chamber for the Rhineland, Germany), which prohibited that contract from being directly awarded to the internal operator because the conditions for the application of Article 5(2) of the Regulation were not satisfied: the local authority did not exercise control over the operator and the public passenger transport services were provided in territories other than that administered by the contracting authority.

15. The decision of the Vergabekammer Rheinland was appealed to the referring court. That court highlights the fact that there are differences of opinion among the German courts as regards contracts for passenger transport by road that do not take the form of service concessions:

– For some courts, a concession alone justifies the application of the Regulation. In the absence of a concession, the general regime laid down in the procurement directives applies.

– For others, Article 5(2) of the Regulation establishes a special regime that takes precedence over the general rules. The reference in Article 5(1) to the procurement directives is devoid of purpose in cases such as this, since internal awards are not subject to those directives.

16. It was in those circumstances that the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 5(2) of Regulation (EC) No 1370/2007 apply to contracts which are not contracts which, within the meaning of the first sentence of Article 5(1) of Regulation (EC) No 1370/2007, take the form of service concession contracts as defined in Directives 2004/17/EC or 2004/18/EC?

If Question 1 is answered in the affirmative:

(2) Where an individual competent authority awards a public service contract directly to an internal operator in accordance with Article 5(2) of Regulation (EC) No 1370/2007, is the joint exercise of control by that authority together with the other shareholders of the internal operator precluded if the power to intervene in public passenger transport in a given geographical area (Article 2(b) and (c) of Regulation (EC) No 1370/2007) is divided between the individual competent authority and a group of authorities which provides integrated public passenger transport services, for example where the power to award public service contracts to an internal operator remains with the individual competent authority but the responsibility for tariffs is transferred to a special purpose transport association to which, in addition to the individual authority, further authorities competent in their geographical areas belong?

(3) Where an individual competent authority awards a public service contract directly to an internal operator in accordance with Article 5(2) of Regulation (EC) No 1370/2007, is the joint exercise of control by that authority together with the other shareholders of the internal operator precluded if, according to that operator’s articles of association, in the case of resolutions concerning the conclusion, amendment or termination of a public service contract referred to in Article 5(2) of Regulation (EC) No 1370/2007, the only shareholder entitled to vote is the one which itself or whose indirect or direct owner awards a public service contract to the internal operator in accordance with Article 5(2) of Regulation (EC) No 1370/2007?

(4) Does point (b) of the second sentence of Article 5(2) of Regulation (EC) No 1370/2007 permit the internal operator also to perform public passenger transport services for other competent local authorities within their territory (including outgoing lines and ancillary elements of that activity which enter the territory of neighbouring competent local authorities) if these are not awarded through organised competitive tender procedures?

(5) Does point (b) of the second sentence of Article 5(2) of Regulation (EC) No 1370/2007 permit the internal operator also to perform public passenger transport activity outside the territory of the commissioning authority for other authorities on the basis of public service contracts covered by the transitional provisions of Article 8(3) of Regulation (EC) No 1370/2007?

(6) On which date must the requirements of Article 5(2) of Regulation (EC) No 1370/2007 be satisfied?'

B. Case C-267/17

17. Kreis Heinsberg (District of Heinsberg) is a local authority in the *Land* of North Rhine-Westphalia. Together with the city of Aachen, the metropolitan area of Aachen and the Kreis Düren (District of Düren), it is a member of the Aachener Verkehrsverbund, a consortium of municipal authorities governed by public law, which was formed to promote and support local public passenger transport services for its members. (8)

18. On 15 March 2016, Kreis Heinsberg announced (9) that it would be making a direct award, without call for competition, of the contract for public passenger transport services by bus and other vehicles under Article 5(2) of the Regulation.

19. The internal operator (10) to which Kreis Heinsberg intended to award the contract for those services, with effect from 1 January 2018 for a period of 120 months, was WestVerkehr GmbH, a company which had pursued its activities principally through its wholly-owned subsidiary, Kreisverkehrsgesellschaft Heinsberg mbH, and intended to carry on doing so after the direct award.

20. Rhenus Veniro GmbH challenged that award before the Vergabekammer Rheinland (Public Procurement Chamber for the Rhineland), which dismissed its application on 11 November 2016, whereupon that company brought an action before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), claiming (a) that Article 5(2) of the Regulation is not applicable and (b) in the alternative, that Kreis Heinsberg, as a member of the Aachener Verkehrsverbund, is not competent to make a direct award of the contract in question, since competence to do so lies with an individual authority or a group of authorities, but not with an authority in its capacity as a member of the group.

21. It was in those circumstances that the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 5(2) of Regulation (EC) No 1370/2007 applicable to directly awarded public service contracts within the meaning of Article 2(i) of the regulation which do not, for the purposes of the second sentence of Article 5(1) of the regulation, take the form of service concessions contracts under Directives 2004/17/EC or 2004/18/EC?

(2) Do Article 2(b) and Article 5(2) of Regulation (EC) No 1370/2007 presume, as is conveyed by the word "or", an exclusive competence either of an individual authority or of a group of authorities, or do those provisions also permit an individual authority to be a member of a group of authorities and to assign specific tasks to the group but at the same time to retain the power to intervene under Article 2(b) and to be the competent local authority within the meaning of Article 5(2) of the regulation?

(3) Does point (e) of the second sentence of Article 5(2) of Regulation (EC) No 1370/2007, which lays down the requirement to perform the major part of the public passenger transport service itself, prevent the internal operator from having the major part of the services performed by a wholly-owned subsidiary?

(4) At what point in time must the conditions governing direct awards laid down in Article 5(2) of Regulation (EC) No 1370/2007 be met: at the time of publication of an intended direct award pursuant to Article 7 of Regulation (EC) No 1370/2007 or not until the time of the direct award itself?'

III. Procedure before the Court of Justice

22. The orders for reference were received at the Registry of the Court of Justice on 17 May 2017, after which the decision was made to join the two cases.

23. Written observations have been submitted by Verkehrsbetrieb Hüttebräucker GmbH, Rhenus Veniro GmbH, Rhein-Sieg-Kreis, Kreis Heisenberg, the Austrian Government and the European Commission.

24. Verkehrsbetrieb Hüttebräucker GmbH, Rhenus Veniro GmbH, BVR Busverkher Rhineland GmbH, Rhein-Sieg-Kreis, Kreis Heisenberg and the European Commission attended the hearing on 31 May 2018.

IV. Analysis

A. Application of the Regulation (first question in Cases C-266/17 and C-267/17)

25. The premiss from which we must start is that, in these two disputes, the legal relationship between the contracting authority and the operator entrusted with the provision of public passenger transport services by road is not, according to the referring court, a public service concession but a public service contract.

26. If that is the case, the applicable provision is Article 5(1) of the Regulation. This means that the public service contract in question should in principle be awarded in accordance with Directives 2004/17/EC and 2004/18/EC. (11)

27. The problem is that those two directives, unlike the later 2014 directives, (12) do not make any provision for the direct award of such contracts to internal operators (also known as in-house operators). In those circumstances, the dilemma faced is whether to:

– rely on the case-law which, (13) under the legislation prior to the 2014 procurement directives, set out a framework for direct selection in cases where the supplier was simply an agency internal to the contracting authority department that exercised control over it. The *Teckal* case-law, which was specifically established as an exception to the application of Directives 2004/17 and 2004/18, provides a number of guidelines, derived from other case-law, whereby public authorities may entrust such tasks to their agencies; or

– apply the specific rules which the Regulation lays down with respect to awards made to internal operators in this way.

28. As is apparent from the difference of opinion among the German courts to which the orders for reference refer, there is no obvious solution to this problem and the disparity between legal regimes based on one or other of the aforementioned propositions is significant. It would be different if the 2014 Directives could be applied in the disputes giving rise to the present references for a preliminary ruling, inasmuch as those directives, barring a few minor exceptions, have, in essence, formally incorporated the *Teckal* case-law into their provisions. (14)

29. In that event, it could readily be accepted that the reference to the 2004 Directives in Article 5(1) of the Regulation should be understood as relating to the 2014 Directives once they are in force. (15) And since those directives already expressly lay down the rules governing the award of public contracts to in-house operators, it would fall to be determined whether those rules take precedence over the rules in Article 5(2) of the Regulation. (16) However, the application of the 2014 Directives is not feasible, *ratione temporis*, in this case. (17)

30. The Court of Justice has held that ‘the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract (judgment [of 11 July 2013,] *Commission* v *Netherlands*, C-576/10, EU:C:2013:510, paragraph 52 and the case-law cited). Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, to that effect, the judgment [of 5 October 2000,] *Commission* v *France*, C-337/98, EU:C:2000:543, paragraphs 41 and 42)’. (18)

31. The two orders for reference show that the direct award announcements were made prior to the deadline for the transposition of the 2014 Directives. (19) There is, moreover, no objective evidence to support the inference that the option pursued by the contracting authority was any different from that which it had indicated in those announcements.

32. Consequently, we must turn our attention back to the dilemma I mentioned earlier without the option of using the rules laid down in the 2014 Directives on direct awards to internal operators.

33. The procedures provided for in Directives 2004/17/EC and 2004/18/EC are not applicable to this type of in-house award. As I have said in other Opinions, '[u]nder the in-house system, the contracting authority does not, from a functional point of view, contract with a separate body but, in effect, contracts with itself, given the nature of the connection with the formally separate body. Strictly speaking, there is no award of a contract, but simply an order or task, which the other 'party' cannot refuse to undertake, whatever the name given to it. [...] The absence of a real relationship between two distinct parties explains why a contracting authority is not required to comply with public procurement procedures where it is using its own resources to perform its tasks'. (20)

34. The award to internal operators will therefore have to be governed either by the *Teckal* case-law or by the special rules contained in Article 5(2) of the Regulation (for cases involving land transport services).

35. While I recognise the weight of the arguments to the contrary, I incline to the view that Article 5(2) of the Regulation should prevail. To my mind, there are various arguments to support that position.

36. The first is consistent with a literal interpretation of the third sentence of Article 5(1), read *a sensu contrario*. If paragraphs 2 to 5 of that article cede, exceptionally and to a limited extent, (21) only where service contracts 'are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC', they will become fully applicable again if those directives do not provide for direct awards to internal operators, as is the case here. I have already made the point that, for the Court of Justice, in-house commissions are excluded from those two directives.

37. That literal interpretation is corroborated by the wording of Article 5(1): public service contracts for passenger transport by bus 'shall be awarded in accordance with the procedures provided for under … Directives [2004/17/EC and 2004/18/EC]', where they do not take the form of service concessions contracts. If, as is the case, those directives do not provide for any *procedure* for awards to internal operators, which are more in the nature of mechanisms for self-provision by contracting authorities, the reference to such procedures is devoid of purpose and meaning.

38. The same would not be true of competitive awards (that is to say, awards not made to internal operators), in respect of which that reference is entirely valid. Where a public authority wishes to award to third parties a contract of this kind that does not take the form of a concession, it must do so by way of the competitive *procedures* for which Directives 2004/17/EC and 2004/18/EC do indeed provide.

39. The second argument is drawn from a systemic assessment of the applicable rules, combined with the rule of specialty. If in 2007 (that is to say, after the adoption of the 2004 Directives) the EU legislature sought to introduce a dedicated scheme for the in-house award of contracts for land transport services, it is my opinion that, in the event of doubt, that scheme, as set out in Article 5(2) of the Regulation, must be regarded as taking precedence over the (general) scheme arising from the *Teckal* case-law.

40. The third and final argument takes into account the purpose intended to be served by Article 5(2) of the Regulation. In the light of the particular features of passenger transport by road, the EU legislature sought to ensure that 'any local authority … [could] provide its own public passenger transport services in the area it administers or to entrust them to an internal operator without competitive tendering'. The conditions for using the latter mechanism are fairly precise and reflect the balance between that objective and the objective of 'ensur[ing] a level playing field'. (22)

41. It is more in keeping with that purpose to give priority to the dedicated rules contained in the Regulation, which are tailored to the features of passenger transport by bus, than to adhere to the principles laid down in the *Teckal* case-law, which apply to any other services sector. Prominent among those rules is that which allows (and, to some extent, encourages) local authorities to form groups for the purposes of

awarding such contracts to an internal operator over which they exercise a control similar to that which they exercise over their own departments.

42. In short, a local authority planning to award directly to an internal operator a contract for public passenger transport services by bus must do so in accordance with the conditions laid down in Article 5(2) of the Regulation.

B. Intervention by the local authority in the award of the contract and in the control over the internal operator (second question in Cases C-266/17 and C-267/17 and third question in Case C-266/17)

43. The local authorities (Kreise (Districts)) which awarded (or intended to award) contracts to their internal operators in these two cases had joined together with other similar authorities to form management consortia (Verkehrsverbund) operating at a higher territorial level. The powers assigned to such consortia include setting common tariffs for passenger transport services in their respective territories. (23)

44. The referring court wishes to ascertain whether that fact precludes the two local authorities (Kreise (Districts)) comprising the consortia from awarding their respective contracts.

45. As I have already said, the first subparagraph of Article 5(2) of the Regulation allows local authorities, either independently or in conjunction with others, to award contracts directly to internal operators, provided that they 'exercise … control similar to that [exercised] over their own departments'.

46. In the abstract, I see no reason why giving the management consortium the power to adopt tariffs should undermine the 'similar control' exercised by the individual authorities over their own internal operators. I therefore concur with the opinion expressed by the referring court in that regard. The establishment of a common tariff decided upon by the consortium provides users with an integrated transport service by enabling them to buy a single ticket irrespective of the internal operator providing that service and irrespective of the local authority to which that internal operator is attached.

47. The material point here is whether or not the 'similar control' exercised by each local authority (or, as the case may be, the joint control exercised by the group) over the internal operator continues in being. Depending on how it is done, giving powers to the management consortium could reduce the local authority's powers to such an extent that the latter no longer exercises over the internal operator a control comparable with that which it exercises over its own departments.

48. If the question referred is confined to the transfer of tariff-setting powers to the consortium, I do not consider that this fact necessarily entails an abdication of control over the internal operator. Furthermore, the fact that each Kreis (District), as a local authority forming part of the management consortium, participates in the tariff-setting decisions adopted by the latter, shows that it retains — albeit on a shared basis — control even over that aspect of the services in question.

49. Of course, the ultimate assessment as to whether, in the specific circumstances of the two disputes, control over the internal operator continues to be exercised by the Kreise (Districts), whether individually or as part of a group, is a matter which falls to be determined by the national court, which alone has before it the evidence necessary to enable it to make that assessment. (24) The fact is that the orders for reference do not provide enough detail to be able to form a true and full picture of the relationships between the local authorities and the internal operator.

50. In that same context, the third question referred for a preliminary ruling in Case C-266/17 refers to an amendment to RV Köln's articles of association, adopted at the general shareholders' meeting on 21 August 2015, that would restrict the right to vote to shareholders that award a contract under Article 5(2) of the Regulation. The referring court wishes to ascertain whether that amendment to the articles of association might have an effect on the control exercised by the local contracting authority.

51. The wording of the order for reference makes for difficult reading in this regard. In any event, paragraph 21 thereof states that 'it is at present unclear whether the additional party's articles of association will continue in their existing version or whether the amended version of 21 August 2015 will take effect',

the reason for this being, as explained previously (in paragraph 6 of the order), that the amendment decision of 21 August 2015 was challenged and 'suspended pursuant to a final judgment'.

52. That being the case, (25) this question might perhaps be said to be hypothetical, since it deals with an element of fact (the amendment to the articles of association) which the referring court itself does not consider relevant to the judgment it must give because that amendment is not in force.

53. In any event, the new wording of RV Köln's articles of association would, in this case, serve only to confirm that the Kreis (District), because it *was* the authority that awarded the contract to that operator, is entitled to vote at its general shareholders' meeting, which is to say that it is able to exercise the control vested in it over the operating company. As the referring court rightly points out, the amendment to the third sentence of Paragraph 17(1) of the articles of association 'strengthens the influence of the shareholder which awards the public service contract and on whose territory the passenger transport activities are intended to be performed'.

C. The territory in which the internal operator may provide transport services (fourth and fifth questions in Case C-266/17)

54. By its fourth question in Case C-266/17, the referring court seeks to ascertain whether an internal operator to which a contract has been directly awarded may provide passenger transport services by land not only in the territory of the local contracting authority but also in that of other local authorities within the group of which the contracting authority is a member.

55. Again, the order for reference is not very clear in this regard. Its wording might once again support the inference that this question is hypothetical, since:

– in the award announcement, the local authority stated that the service in question was going to be provided 'within its territory, including on routes running into neighbouring geographical areas' (paragraph 10 of the order); and

– the referring court itself confirms that information by stating that 'those services (apart from through routes or other part services which enter the territory of neighbouring competent local authorities) are provided within the territory of the contracting authority' (paragraph 22 of the order).

56. The fact remains, however, that the purpose of the question could be to determine — regardless of whether the award of the contract in question to RV Köln complied with that rule — whether that company is prevented from providing its services to other local authorities, that is to say from carrying out its activities in the territories of those authorities.

57. According to Article 5(2)(b) of the Regulation, the internal operator may pursue its public passenger transport services only within the territory of the competent local authority. That authority may, however, be both an individual local authority and a group of local authorities. (26) There is, therefore, nothing to stop one or more members of a group of local authorities from entrusting those services to a single operator, common to all of them, over which they exercise a control similar to that which they exercise over their own departments. In that event, the internal operator may carry out its activities in each of the territories administered by the (group of) local authorities which have entrusted the aforementioned services to it.

58. What is more, that possibility is not a new development confined to the Regulation. In building on its *Teckal* case-law, the Court of Justice has allowed some public authorities to discharge their public service functions in collaboration with others by availing themselves of a common entity over which they exercise a control similar (but not identical) to that which they exercise over their own departments. (27)

59. In the judgment in *Coditel Brabant*, (28) the Court considered the case of a local authority which 'sought to join a grouping composed of other public authorities, such as an inter-municipal cooperative society', for the purposes of performing its tasks. The Court recognised the joint control exercised by those local authorities, and that such control did not have to be individual. (29)

60. In short, if the internal operator is an entity common to a number of local authorities, which exercise over it a (joint) control similar to that which they exercise over their own departments, the territory referred to in Article 5(2)(b) of the Regulation must be construed as being the territory administered by each of those authorities.

61. In the fifth question, the national court seems to be referring now not to the territory of the group of local authorities but to that of any other 'commissioning authorities' which might hypothetically have concluded with RV Köln transport services contracts which predate 3 December 2003, that is to say which are subject to transitional arrangements under Article 8 of the Regulation.

62. That article provided for a series of measures gradually introducing the contract award rules laid down in the Regulation itself. Since there is no need to examine that article in detail, it is sufficient to note that public service contracts awarded in accordance with Community or national law, on the basis of the procedures and in the periods specified in Article 8(3), could continue until they expired, subject to certain limits.

63. As the order for reference provides no further details, I am of the view that any contracts predating those referred to are in force, pursuant to the transitional rules laid down in Article 8 that are mentioned in the question. Consequently, since the Regulation makes explicit provision for the continued existence of those contracts, the territorial restriction imposed in Article 5(2)(b) of that regulation must be interpreted as not encompassing them.

D. Point at which the conditions laid down in Article 5(2) of the Regulation must be fulfilled (sixth question in Case C-266/17 and fourth question in Case C-267/17)

64. The referring court is uncertain whether the conditions applicable under Article 5(2) of the Regulation must be fulfilled (a) at the time of the direct award or (b) at the time when it falls to the competent authority, in accordance with Article 7(2) of that regulation, to publish in the *Official Journal of the European Union* the information relating to the direct award which it is planning to make.

65. When setting out the information which the competent authority must include in its announcement (at least one year before the direct award), Article 7(2) of the Regulation does not require that authority to specify the identity of the future recipient of the award. There is nothing to stop the local authority, in the interval between the announcement and the award itself, from structuring its agencies one way or another: what matters is that the internal operator finally selected should satisfy the conditions laid down by law (in particular the condition that it must be under the control of the authority that entrusts the services to it).

66. In my estimation, on a combined reading of Article 5(2) and Article 7(2) of the Regulation, the point at which the conditions laid down in the first of those provisions must be fulfilled is indeed the point at which the direct award is made. Only then will the identity of the operator selected be known, and it is this piece of information which is crucial to determining whether, in the circumstances, the competent authority exercises over that operator a control similar to that which it exercises over its own departments, and whether or not that operator is in one of the situations referred to in Article 5(2)(b) and (c) of the Regulation.

E. Provision of the service by the internal operator via a subsidiary (third question in Case C-267/17)

67. In practice, the internal operator WestVerkehr GmbH provides the public transport services entrusted to it via a wholly-owned subsidiary. In the light of that fact, and the wording of Article 5(2)(e) of the Regulation ('if subcontracting … is being considered, the internal operator shall be required to perform the major part of the public passenger transport itself'), the referring court asks whether that provision allows the services to be entrusted to the subsidiary.

68. The Regulation provides for subcontracting as a means to open up the provision of services to undertakings other than the recipient of the award which are linked to that recipient by contract. Subcontractors may not, however, carry out more than a limited percentage of the service in question, thus:

– if the supplier awarded the contract is an autonomous undertaking, that is to say not an internal operator, it 'shall be required to perform *a major part* of the public passenger transport services

itself' (Article 4(7)); (30)

– if, on the other hand, the supplier awarded the contract is an internal operator, 'it shall be required to perform *the major part* of the service itself' (Article 5(2)(e)).

69. To my mind, however, a situation such as that here cannot properly be described as subcontracting. I concur with the proposition put forward by Kreis Heinsberg in its written observations to the effect that the relationship between a subsidiary which is wholly owned by the internal operator that controls it and that internal operator is not one established by a subcontract. Subcontracting requires two autonomous undertakings (31) which, 'from a position of equality rather than dependence or hierarchical subordination', (32) agree between them the conditions that will govern their contractual relationship.

70. The subcontracting provided for by the aforementioned articles of the Regulation will take place in circumstances where the internal operator decides to use a third party external to its corporate structure to provide the services in question. (33) If, however, the entity which the internal operator uses to that end is a wholly-owned subsidiary company over which it exercises full control, to the extent of dictating its business decisions, then, from a functional point of view, those services are effectively being provided by the same economic and operational unit. There is, therefore, no real *third party* with which to subcontract.

71. In those circumstances, the in-house link between Kreis Heinsberg and its internal operator (WestVerkehr GmbH) extends to the latter's wholly-owned subsidiary, over which the local authority also exercises a (secondary) control equivalent to that which it exercises over its (other) departments.

72. Consequently, point (e) of the second sentence of Article 5(2) of the Regulation does not preclude an internal operator from entrusting to a subsidiary in which it has a 100% shareholding and over which it exercises full control the provision of the major part of the services awarded to it.

V. Conclusion

73. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) as follows:

(1) Article 5(2) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and 1107/70:

– is applicable to a direct award made by the competent local authorities to an internal operator over which they exercise a control similar to that which they exercise over their own departments, where that award relates to contracts for public passenger transport services which do not take the form of service concessions contracts within the meaning of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, or Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;

– does not preclude local authorities from conferring on a consortium of local authorities of which they form part the power to set common tariffs for the services in question, provided that such empowerment does not prevent those authorities from exercising over the internal operator a control similar to that which they exercise over their own departments, which it is for the referring court to determine;

– does not preclude the internal operator to which a competent local authority has awarded the contract for providing the services in question from providing those services via a subsidiary over which the internal operator exercises full control, on which it can impose its decisions and in which it has a 100% shareholding;

– allows the internal operator, in its capacity as an entity acting on behalf of all members of the group of local authorities, to provide public passenger transport services in each of the territories administered by those authorities; and

– also authorises the internal operator to continue to provide its services outside the territorial competence of the contracting local authority, provided that it does so under contracts subject to the transitional arrangements provided for in Article 8(3) of Regulation No 1370/2007.

(2) The conditions governing the direct award of contracts to an internal operator under Article 5(2) of Regulation No 1370/2007 must be satisfied at the time when the direct award is actually made.

---

1 Original language: Spanish.

---

2 Regulation (EC) of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and road and repealing Council Regulations (EEC) No 1191/69 and 1107/70 (OJ 2007 L 315, p. 1) (‘the Regulation’).

---

3 RV Köln is a limited liability company whose shares are held by a number of public entities including Rhein-Sieg-Kreis (which has an indirect shareholding via a wholly-owned subsidiary).

---

4 Paragraph 20 of the order for reference.

---

5 Communication published in the Supplement to the *Official Journal of the European Union* of 30 September 2015.

---

6 Paragraph 10 of the order for reference.

---

7 *Ibidem*, paragraph 22.

---

8 Paragraph 10 of the consortium’s articles of association, entitled ‘Formation of a group of authorities’, provides that ‘the consortium members shall form a group of authorities within the meaning of the first sentence of Article 5(2) of [the Regulation]. Its members shall be entitled to make direct awards of public service contracts to internal operators. Internal operators may perform public passenger transport services in the territories of all the consortium members, including on outgoing lines. To that end, it shall be necessary in each individual case to obtain the consent of a consortium member not participating in the internal operator to provide the public passenger transport services by road envisaged for its territory. For the purposes of these articles of association, direct awards shall be considered to have been made by all consortium members’. It goes on to say that ‘conduct of the procurement procedures as a contracting authority under Article 5(2) of [the Regulation] shall fall in principle to the member exercising control over the internal operator for the purposes of that provision’.

---

9 Announcement published in the supplement to the *Official Journal of the European Union* of 15 March 2016.

---

10 At the hearing, one of the parties expressed reservations about whether the undertaking awarded the contract could be classified as an internal operator. In the opinion of the referring court, however, its status as such is not a matter for debate.

---

11 According to that provision, ‘service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts *do not take the form of service concessions contracts* as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply’. Emphasis added.

---

12 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243) (‘the 2014 Directives’).

---

13 Judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562; ‘*Teckal* case-law’).

---

14 Thus, Article 12 of Directive 2014/24 regulates ‘public contracts between entities within the public sector’. Article 28 of Directive 2014/25 governs ‘contracts between contracting authorities’.

---

15 The Communication from the Commission on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road (OJ 2014 C 92, p. 1) states that, ‘since the directives referred to in Regulation (EC) No 1370/2007 (Directive 2004/17/EC and Directive 2004/18/EC) have been repealed and replaced by … [D]irectives [2014/24 and 2014/25], the references in Regulation (EC) No 1370/2007 should be understood as relating to the new directives’ (paragraph 2.1.1).

---

16 At the hearing, it was debated whether one or other set of rules could be applied simultaneously or in parallel. To my mind, however, now is not the time to be having that debate, although the same will not be true of in-house awards made after 18 April 2016.

---

17 According to the Commission, Article 5(2) is not applicable in these circumstances, since it is confined to concessions. The Commission’s position effectively brings forward the application of the in-house rules laid down in the 2014 Directives to facts subject to the 2004 Directives. Paradoxically, when the Commission analyses in detail the second and subsequent questions referred for a preliminary ruling in Case C-267/17, it relies on the content of Article 5(2) to support its arguments.

---

18 Judgment of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 31). See also the judgment of 27 October 2016, *Hörmann Reisen* (C-292/15, EU:C:2016:817, paragraph 32), which cites the judgment of 7 April 2016, *Partner Apelski Dariusz* (C-324/14, EU:C:2016:214, paragraph 83).

---

19 These were to be transposed by 18 April 2016 at the latest and the award announcements in the disputes in the main proceedings were made on 30 September 2015 and 16 March 2016.

---

20 Opinion in *LitSpecMet* (**C-567/15,** EU:C:2017:319, points 70 and 71).

---

21 See the judgment of 27 October 2016, *Hörmann Reisen* (C-292/15, EU:C:2016:817, paragraph 39).

---

22 Recital 18 of the Regulation.

---

23 The orders for reference do not describe the scope of those powers in detail. The referring court refers only to the setting of tariffs.

---

24 The factors that must be taken into account 'for the purposes of determining whether [that] control [exists]' are spelled out in Article 5(2)(a) of the Regulation.

---

25 In its written observations, the Rhein-Sieg-Kreis states that, 'contrary to what the referring court states, the new version of the articles of association of 21 August 2015 … is intended to apply in full' (paragraph 29).

---

26 See expressly to this effect the first subparagraph of Article 5(2).

---

27 Judgment of 19 April 2007, *Asemfo* (C-295/05, EU:C:2007:227, paragraph 62): 'it follows from the case-law that, where several authorities control an undertaking, that condition [that the essential part of the undertaking's activities must be carried out with the authority or authorities which own it] may be met if that undertaking carries out the essential part of its activities not necessarily with any one of those authorities but with all of those authorities together ([judgment of 11 May 2006,] *Carbotermo and Consorzio Alisei* [C-340/04, EU:C:2006:308], paragraph 70)'.

---

28 Judgment of 13 November 2008 (C-324/07, EU:C:2008:621).

---

29 *Ibidem*, paragraph 54 and the operative part of the judgment: 'where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be'.

---

30 In the judgment of 27 October 2016, *Hörmann Reisen* (C-292/15, EU:C:2016:817), the Court considered the application of that article to a tendering procedure subject to Directive 2004/18 and held that the setting of 70% as the proportion of the service that must be provided by the operator was not at odds with Article 7(4) of the Regulation.

---

31 When referring to subcontracting, recital 19 of the Regulation has in mind the participation of undertakings '*other than* the public service operator'. Emphasis added.

---

32 I refer to my Opinion in *LitSpecMet* (**C-567/15,** EU:C:2017:319, point 71 et seq.).

---

33 I put forward the same argument in my Opinion in *LitSpec Met* (**C-567/15,** EU:C:2017:319, point 79): 'the contracting authority can make use of proxy entities, within the limits already mentioned, by entrusting them with particular tasks which should, in principle, be the subject of public procurement procedures but which are exempted. … However, where such proxy entities do not have the resources needed to carry out themselves the tasks assigned by the contracting authority and are obliged to have recourse to *third parties* in order to do so, the reasons for relying on the *in-house* exemption disappear and what emerges is actually a hidden public (sub-) procurement where the contracting authority, through an intermediary (the proxy entity) obtains goods and services from third parties without being subject to the directives which should govern the award'.

JUDGMENT OF THE COURT (Ninth Chamber)

25 October 2018 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Article 10(g) — Exclusions from its scope — Employment contracts — Definition — Decisions of public hospitals to conclude fixed-term labour contracts for the purposes of catering, the provision of meals and cleaning — Directive 89/665/EEC — Article 1 — Right to an effective remedy)

In Case C-260/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Symvoulio tis Epikrateias (Council of State, Greece), made by decision of 11 May 2017, received at the Court on 16 May 2017, in the proceedings

Anodiki Services EPE

v

GNA, O Evangelismos — Ofthalmiatreio Athinon — Polykliniki,

Geniko Ogkologiko Nosokomeio Kifisias — (GONK) 'Oi Agioi Anargyroi',

intervener:

Arianthi Ilia EPE,

Fasma AE,

Mega Sprint Guard AE,

ICM — International Cleaning Methods AE,

Myservices Security and Facility AE,

Kleenway OE,

GEN — KA AE,

Geniko Nosokomeio Athinon 'Georgios Gennimatas',

Ipirotiki Facility Services AE,

THE COURT (Ninth Chamber),

composed of C. Lycourgos, President of the Tenth Chamber, acting as President of the Ninth Chamber, E. Juhász and C. Vajda (rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– Anodiki Services EPE, by Z. Zouganeli, dikigoros,

– GNA, O Evangelismos — Ofthalmiatreio Athinon — Polykliniki, by G. Statharas, dikigoros,

– Geniko Nosokomeio Athinon ‘Georgios Gennimatas’, by M. Antonopoulou and N. Nikolopoulos, dikigoroi,

– Fasma AE, by N. Mourdoukoutas, dikigoros,

– Mega Sprint Guard AE, by S. Konstantopoulos, N. Meligos and G. Christodoulopoulos, dikigoroi,

– ICM — International Cleaning Methods AE and Kleenway OE, by E. Anagnostou, dikigoros,

– Myservices Security and Facility AE, by A. Virvilios, dikigoros,

– GEN — KA AE, by C. Pelekis, dikigoros,

– the Greek Government, by M. Tassopoulou, A. Magreppi et E. Tsaousi, acting as Agents,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by M. Patakia and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 10(g) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5) (‘Directive 2014/24’), and Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) (‘Directive 89/665’).

2 The request has been made in two sets of proceedings between, in the first set of proceedings, on the one hand, Anodiki Services EPE and, on the other, GNA, O Evangelismos — Ofthalmiatreio Athinon — Polykliniki, (‘GNA Evangelismos’) and, in the second set of proceedings, on the one hand, Anodiki Services EPE and, on the other, Geniko Ogkologiko Nosokomeio Kifisias — (GONK) ‘Oi Agioi Anargyroi’ (‘GONK Agioi Anargyroi’), concerning decisions taken by the administration boards of those public hospitals to conclude a number of fixed-term labour contracts under private law in order to meet their needs in relation to catering, the provision of meals and cleaning.

Legal context

EU law

3 Recital 5 of Directive 2014/24 states:

‘It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. The provision of services based on laws, regulations or employment contracts should not be covered. In some Member States, this might for example be the case for certain administrative and government services such as executive and legislative services or

the provision of certain services to the community, such as foreign affairs services or justice services or compulsory social security services.’

4 Article 1(4) of that directive provides:

‘This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.’

5 Article 4(b) of that directive sets a threshold for its application of EUR 135 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities. Article 4(d) sets a threshold of EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV of that directive. Catering services are specifically mentioned in that annex.

6 Article 10 of Directive 2014/24 provides:

‘This Directive shall not apply to public service contracts for:

…

(g) employment contracts;

…’

7 Under Article 1(1) of Directive 89/665:

‘This Directive applies to contracts referred to in [Directive 2014/24], unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

…

Contracts within the meaning of this Directive include public contracts, framework agreements, works and services concessions, and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of [Directive 2014/24], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed [EU] law in the field of public procurement or national rules transposing that law.’

8 Article 2(1)(a) and (b) of Directive 89/665 provide:

‘The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure.’

Greek law

9 Article 103(2) of the Greek Constitution provides:

‘No one may be appointed as a civil servant to an established post which has not been provided for by law. Special laws may provide for exceptions in order to cover unforeseen and urgent needs with personnel hired for a certain period of time on a private law contract.’

10 Article 63(1) of Law 4430/2016 (FEK A’ 205) provides:

‘By decision of their relevant, single member or collective, governing body, the central and decentralised services, and all the general services of the ministries and the public law legal persons (PuLLP) and private law legal persons (PrLLP) under the authority of the ministries may, in order to meet the cleaning needs of the buildings for which they are responsible and their outdoor spaces, and the catering, meal provision and security needs, conclude fixed-term individual labour contracts under private law if the existing staff is not sufficient and in the event of emergency or unforeseen circumstances. For indicative purposes only, the following shall be regarded as such circumstances: (a) a legal or factual impediment to the unhindered provision of those services by legal or natural third persons, which is not caused by the recipients of those services, (b) the making of budgetary savings due to the conclusion of the labour contracts referred to in the present provision compared with other means. A finding that there are emergency or unforeseen circumstances requires a reasoned assessment by the above mentioned administrations. The above mentioned contracts shall be concluded in accordance with the provisions of this article, notwithstanding any other general or special legal provision. The derogating provisions under this article may be applied until 31 December 2018.’

11 Under Article 63(2) of that law, those contracts have a maximum duration of 24 months and may not be converted into permanent contracts.

12 Under Article 63(3) of that law, a provisional ranking list must be drawn up for the purposes of selecting the persons concerned by awarding them points based on how long they have been unemployed or their work experience.

13 Article 107(1) of Law 4461/2017 (FEK A’ 38) specifically governs certain issues relating to the application of Article 63 of Law 4430/2016 to legal persons, regardless of their form, which are under the authority of the Ministry of Health, in relation to awarding points to candidates on the basis of how long they have been unemployed, whether they have dependent children and their professional experience.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 It is clear from the order for reference that the fact that it was not possible to create statutory posts in accordance with Article 103(2) of the Greek Constitution, due to the economic crisis in Greece and its international commitments, led that Member State to adopt certain independent legal provisions.

15 In that regard, Law 4430/2016 was adopted in order to address certain exceptional circumstances, qualified as ‘unforeseen’ and ‘urgent’, and in view of the serious failings affecting the award and performance of public service contracts. According to the explanatory memorandum to Law 4430/2016, as reproduced in the order for reference, that law is intended to ensure that a financial benefit will ensue from the considerable reduction in the budget of the administrations in question, to improve the working conditions of the workers in the undertakings concerned and to address the urgent and unforeseen needs of the recipients of the services in a way that is compatible with the Constitution and EU law. Article 63 of that law makes it possible for legal persons under public law to conclude individual fixed-term contracts under private law in order to meet their needs, in particular in relation to catering, the provision of meals and cleaning.

16 By decisions taken in November 2016, the administration boards of GNA Evangelismos and GONK Agioi Anargyroi decided to conclude a number of fixed-term individual labour contracts under private law pursuant to Article 63 in order to meet the respective needs in catering, meal provision and cleaning at the hospitals which they manage.

17 Anodiki Services brought actions against those decisions before the referring court, the Symvoulio tis Epikrateias (Council of State, Greece). It claims that those decisions concern the provision of services which should have been subject to the public procurement procedures laid down in Directive 2014/24. In that regard, it claims that the value of the contracts which are the subject of those decisions, that is to say, between EUR 1 894 402.56 and EUR 2 050 418.16 over 24 months for the decision of GNA Evangelismos and EUR 550 000 per annum for the decision of GONK Agioi Anargyroi, is greater than the relevant thresholds laid down in Article 4 of that directive.

18 The referring court is unsure whether contracts such as those covered by the decisions of the administration boards of GNA Evangelismos and of GONK Agioi Anargyroi come under the notion of 'employment contracts' in Article 10(g) of Directive 2014/24, so that the public procurement contracts relating to the conclusion of those contracts is excluded from the scope of that directive.

19 It also asks whether Article 63 of Law 4430/2016, in so far as it allows such contracts to be concluded without using the procedures laid down in Directive 2014/24, infringes the provisions of that directive, those of the TFEU relating to freedom of establishment and freedom to provide services, Articles 16 and 52 of the Charter of Fundamental Rights of the European Union ('the Charter'), and the principles of equal treatment, non-discrimination, transparency and proportionality. In that regard, the referring court considers that, in view of the purpose and estimated cost of the labour contracts, there can be no doubt that a public procurement procedure with the same purpose would be the subject matter of a cross-border interest.

20 That court also wishes to know whether the decision of a public authority not to use a public procurement procedure in accordance with Directive 2014/24, on the ground that the contract in question does not come within the scope of that directive, is open to judicial review under Directive 89/665.

21 In those circumstances the Symvoulio tis Epikrateias (Council of State) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) For the purposes of Article 10(g) of Directive [2014/24], is it sufficient ground, for the classification of a contract as an 'employment contract' under that provision, that it constitutes a contract with an employer-employee relationship or is it necessary that that contract have particular characteristics (for example with respect to the nature of the work, the contract terms, the qualifications of candidates, the procedural rules for their selection), so that the selection of each employee should be the result of an individualised judgment and subjective assessment of his or her personal qualities by the employer?

Can fixed term labour contracts which are allocated on the basis of objective criteria, such as the length of time the candidate has been unemployed, the candidate's previous experience or the number of minor children he or she has, as the result of a formal check of supporting documents and a predetermined weighting of the above criteria, such as contracts under Article 63 of Law 4430/2016, be regarded as "employment contracts" within the meaning of Article 10(g) of Directive 2014/24?

(2) For the purposes of the provisions of Directive [2014/24] (Articles 1(4), 18(1) and (2), 19(1), 32 and 57, read in conjunction with recital (5) of that directive), of the Treaty on the Functioning of the European Union (Articles 49 and 56) and of the [Charter] (Articles 16 and 52), and the principles of equal treatment, transparency and proportionality, is it permitted for public authorities to have recourse to other means, including employment contracts, to the exclusion of public procurement contracts, in order to meet the same public interest requirements, and if so, on what conditions, when that recourse is not part of the recurrent organisation of the public service, but — as in the case of Article 63 of Law 4430/2016 — takes place for a defined period of time and to deal with extraordinary circumstances, as well as for reasons that relate to the effectiveness of competition or the legitimacy of the operations of undertakings which are active in the public procurement market?

Can reasons of that kind, as well as circumstances such as the weakness of the unhindered performance of public contracts or the realisation of greater financial benefit compared with a

public contract, be regarded as overriding reasons in the public interest, which justify the adoption of a measure which leads to a serious restriction, in extent and duration, on business activity in the field of public procurement?

(3) For the purposes of Article 1 of Directive [89/665] … does the scope of that provision exclude judicial protection against the decision of a public authority, such as the contested decisions in the main proceedings, with respect to the award of contracts that are treated as not falling within the scope of Directive 2014/24 (for example, as an 'employment contract'), when an action is brought by an economic operator which would have a legal right to be awarded a comparable public contract and which claims that Directive [2014/24] has been unlawfully not implemented on the ground that its non-implementation was permissible?'

Procedure before the Court

22 In its request for a preliminary ruling, the referring court requested that the case be determined under an expedited procedure provided for in Article 105(1) of the Rules of Procedure of the Court of Justice. That request was refused by order of the President of the Court of 13 July 2017, *Anodiki Services* (C-260/17, not published, EU:C:2017:560).

Consideration of the questions referred

The first question

23 By its first question, the referring court asks, in essence, whether Article 10(g) of Directive 2014/24 must be interpreted to the effect that the notion of 'employment contracts' referred to in that provision covers labour contracts, such as those at issue in the main proceedings, that is to say, fixed-term labour contracts which are concluded with persons selected on the basis of objective criteria, such as the duration of unemployment, previous experience and the number of minor dependent children they have.

24 It should be pointed out that, although in accordance with Article 10(g) of Directive 2014/24, public service contracts dealing with labour contracts are excluded from the scope of that directive, the notion of 'employment contracts', as it appears in that provision, is not defined by that directive. Nor does that article make any reference to the laws of the Member States concerning such a definition.

25 In accordance with the Court's settled case-law, the need for a uniform application of EU law requires that, where a provision of EU law makes no reference to the law of the Member States with regard to a particular concept, that concept must be given an independent and uniform interpretation throughout the European Union. That interpretation must be sought having regard not only to the wording of the provision at issue but also to its context and to the objective pursued by the legislation in question (see, to that effect, inter alia, judgments of 19 December 2013, *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 42, and of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraph 24).

26 In that regard, first, it is apparent from recital 5 of Directive 2014/24 that that directive does not oblige Member States to contract out or externalise the provision of services which they wish to provide themselves or to organise by means other than public procurement contracts, within the meaning of that directive, and that the provision of services based on laws, regulations or employment contracts should not be covered by that directive. Accordingly, the conclusion of employment contracts is a means for the public authorities in Member States to provide services themselves and is therefore excluded from the obligations relating to public procurement contracts under that directive.

27 Contrary to what Anodiki Services submits in its written observations, the possibility for public authorities to meet some of their needs themselves by concluding employment contracts is not limited to the cases mentioned in the last sentence of that recital. In that respect, as regards that discretion which should be available to public authorities, the fact that the recital stipulates that 'this might for

example be the case for' the services which it lists after those words sufficiently demonstrates that that list is not exhaustive.

28 Secondly, it must be observed that the conclusion of an employment contract, by its nature, gives rise to an employment relationship between the employee and the employer. In the broader context of EU law, it is settled case-law that the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another in return for which he receives remuneration (see, inter alia, judgments of 3 July 1986, *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 17, and of 19 July 2017, *Abercrombie & Fitch Italia*, C-143/16, EU:C:2017:566, paragraph 19 and the case-law cited).

29 It follows from those considerations that the notion of 'employment contracts', for the purposes of Article 10(g) of Directive 2014/24, covers all contracts by which a public authority employs natural persons in order to provide services itself, and which give rise to an employment relationship by which those persons, for a certain period of time, perform services for and under the direction of that public authority in return for which they receive remuneration.

30 For the purposes of that definition, the manner in which those persons are employed is therefore irrelevant. In particular, although it is true that an employment relationship, as Anodiki Services stated in its written observations, may be based on a special relationship of mutual trust between the employer and the worker, it does not follow that only contracts concluded on the basis of subjective criteria as regards the persons employed, to the exclusion of contracts arising from a selection made using purely objective criteria, constitute 'employment contracts', for the purposes of that provision.

31 In addition, in accordance with the definition of 'employment relationship' referred to in paragraph 28 above, in so far as the worker performs services for and under the direction of his employer 'for a certain period of time', fixed-term labour contracts cannot be excluded from the notion of 'employment contracts' for the purposes of Article 10(g) of Directive 2014/24 on the ground that the length of the employment relationship which they create is limited in time.

32 It is ultimately for the referring court to assess, in the light of those considerations, whether the contracts at issue in the main proceedings are 'employment contracts' for the purposes of that provision. In particular, as the Commission stated in its written observations, it is necessary to ascertain whether they are genuine individual labour contracts concluded by the public hospitals at issue in the main proceedings and the persons recruited. However, nothing in the file submitted to the Court indicates that that is not the case.

33 In view of the foregoing, the answer to the first question is that Article 10(g) of Directive 2014/24 must be interpreted to the effect that the notion of 'employment contracts' referred to in that provision covers labour contracts, such as those at issue in the main proceedings, that is to say, fixed-term, individual labour contracts which are concluded with persons selected on the basis of objective criteria, such as the duration of unemployment, previous experience and the number of minor dependent children they have.

The second question

34 By its second question, the referring court asks, in essence, whether the provisions of Directive 2014/24, Articles 49 and 56 TFEU, the principles of equal treatment, transparency and proportionality, and Articles 16 and 52 of the Charter preclude a decision of a public authority to make use of employment contracts such as those at issue in the main proceedings in order to perform certain tasks falling within its public interest obligations.

35 In the first place, in view of the answer to the first question, it should be noted that the provisions of Directive 2014/24 do not apply to employment contracts such as those at issue in the main proceedings.

36 In the second place, with regard to Articles 49 and 56 TFEU and the principles of EU law referred to in the second question, it should be recalled that, although in the field of public procurement the principle of equal treatment and the specific expressions of that principle, namely the prohibition of discrimination on grounds of nationality and Articles 49 and 56 TFEU, are to be applied in cases where

a public authority entrusts the supply of economic activities to a third party, it is nevertheless not appropriate to apply EU law on public procurement in a case where a public authority performs tasks in the public interest for which it is responsible by its own administrative, technical and other means, without calling upon external entities (see, to that effect, judgments of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 48, and of 13 October 2005, *Parking Brixen*, C-458/03, EU:C:2005:605, paragraph 61).

37 Accordingly, those provisions of the TFEU and those principles of EU law do not apply to the circumstances of the main proceedings, in that the public hospitals in question in that action decided to meet some of their needs themselves when performing the tasks in the public interest for which they are responsible by entering into employment contracts.

38 In the third place, as regards Articles 16 and 52 of the Charter, it should be recalled that, in accordance with Article 51(1), the provisions of the Charter are addressed to the Member States only when they are implementing EU law. Under Article 51(2), the Charter does not extend the scope of EU law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret EU law, in the light of the Charter, within the limits of the powers conferred on it (judgment of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 78 and the case-law cited).

39 As is apparent from paragraphs 35 to 37 above, the public hospitals' decisions to conclude the employment contracts at issue in the main proceedings do not fall within the implementation of EU law within the meaning of Article 51 of the Charter, so that the conformity of those decisions with fundamental rights cannot be examined by reference to the rights established by the Charter.

40 Consequently, the answer to the second question is that the provisions of Directive 2014/24, Articles 49 and 56 TFEU, the principles of equal treatment, transparency and proportionality, and Articles 16 and 52 of the Charter do not apply to a decision of a public authority to make use of employment contracts such as those at issue in the main proceedings in order to perform certain tasks falling within its public interest obligations.

The third question

41 By its third question, the referring court asks in essence whether Article 1(1) of Directive 89/665 must be interpreted to the effect that a decision of a contracting authority to conclude employment contracts with natural persons for the provision of certain services without using a public procurement procedure in accordance with Directive 2014/24, on the ground that, in its opinion, those contracts do not fall within the scope of that directive, may be challenged under that provision by an economic operator with an interest in participating in a public procurement procedure with the same purpose as those contracts and which considers that those contracts do fall within the scope of that directive.

42 The wording of Article 1(1) of Directive 89/665 assumes, by using the words 'as regards procedures', that every decision of a contracting authority falling under EU rules in the field of public procurement and liable to infringe them is subject to the judicial review provided for in Article 2(1)(a) and (b) of that directive. That provision thus refers generally to the decisions of a contracting authority, without distinguishing between those decisions according to their content or time of adoption (see judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 26 and the case-law cited).

43 That broad construction of the concept of a 'decision' taken by a contracting authority is confirmed by the fact that Article 1(1) of Directive 89/665 does not lay down any restriction with regard to the nature or content of the decisions to which it refers. Moreover, a restrictive interpretation of that concept would be incompatible with the terms of Article 2(1)(a) of that directive which requires Member States to make provision for interim relief procedures in relation to any decision taken by the contracting authorities (see judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 27 and the case-law cited).

44 In addition, it must be noted that any act of a contracting authority adopted in relation to a public service contract within the material scope of Directive 2014/24 and capable of producing legal effects

constitutes a decision amenable to review within the meaning of Article 1(1) of Directive 89/665, regardless of whether that act is adopted outside a formal award procedure or as part of such a procedure (judgment of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 34).

45 In that regard, where a contracting authority decides not to initiate an award procedure on the ground that the contract in question does not, in its opinion, fall within the scope of the relevant EU rules, such a decision is open to judicial review (see, to that effect, judgment of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 33).

46 An approach in which Directive 89/665 does not require judicial protection outside a formal award procedure, so that neither the contracting authority's decision not to initiate such a procedure, nor the decision as to whether a public contract falls within the scope of the relevant EU rules, cannot be the subject of review, would have the effect of making the application of the relevant EU rules optional, at the option of every contracting authority, even though that application is mandatory where the conditions of application are satisfied (see, to that effect, judgment of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 36 and 37).

47 Consequently, the answer to the third question is that Article 1(1) of Directive 89/665 must be interpreted to the effect that a decision of a contracting authority to conclude employment contracts with natural persons for the provision of certain services without using a public procurement procedure in accordance with Directive 2014/24, on the ground that, in its opinion, those contracts do not fall within the scope of that directive, may be challenged under that provision by an economic operator with an interest in participating in a public procurement procedure with the same purpose as those contracts and which considers that those contracts do fall within the scope of that directive.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **Article 10(g) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015, must be interpreted to the effect that the notion of 'employment contracts', referred to in that provision, covers labour contracts such as those at issue in the main proceedings, that is to say, fixed-term, individual labour contracts which are concluded with persons selected on the basis of objective criteria, such as the duration of unemployment, previous experience and the number of minor dependent children they have.**

2. **The provisions of Directive 2014/24, as amended by Delegated Regulation 2015/2170, Articles 49 and 56 TFEU, the principles of equal treatment, transparency and proportionality, and Articles 16 and 52 of the Charter of Fundamental Rights of the European Union do not apply to a decision of a public authority to make use of employment contracts such as those at issue in the main proceedings in order to perform certain tasks falling within its public interest obligations.**

3. **Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, must be interpreted to the effect that a decision of a contracting authority to conclude employment contracts with natural persons for the provision of certain services without using a public procurement procedure in accordance with Directive 2014/24, as amended by Delegated Regulation 2015/2170, on the ground that, in its opinion, those contracts do not**

fall within the scope of that directive, may be challenged under that provision by an economic operator with an interest in participating in a public procurement procedure with the same purpose as those contracts and which considers that those contracts do fall within the scope of that directive.

[Signatures]

---

* Language of the case: Greek.

EU:C:2018:1034

JUDGMENT OF THE COURT (Eighth Chamber)

19 December 2018 (*)

(Reference for a preliminary ruling — Directive 2004/18/EC — Article 1(5) — Article 32(2) — Award of public works contracts, public supply contracts and public service contracts — Framework agreements — Clause extending the framework agreement to other contracting authorities — Principles of transparency and equal treatment of economic operators — No determination of the quantity covered by subsequent public procurement contracts or determination by reference to the usual requirements of the contracting authorities that are not signatories to the framework agreement — Prohibition)

In Case C-216/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 9 March 2017, received at the Court on 24 April 2017, in the proceedings

Autorità Garante della Concorrenza e del Mercato — Antitrust,

Coopservice Soc. coop. arl

v

Azienda Socio-Sanitaria Territoriale della Vallecamonica — Sebino (ASST),

Azienda Socio-Sanitaria Territoriale del Garda (ASST),

Azienda Socio-Sanitaria Territoriale della Valcamonica (ASST),

intervener:

Markas Srl,

ATI - Zanetti Arturo & C. Srl e in proprio,

Regione Lombardia,

THE COURT (Eighth Chamber),

composed of J. Malenovský, acting as President of the Chamber, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 12 July 2018,

after considering the observations submitted on behalf of

– Coopservice Soc. coop. arl, by P. S. Pugliano, avvocato,

– Markas Srl, by F.G. Scoca, P. Adami and I. Tranquilli, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by B. Tidore and P. Palmieri, avvocati dello Stato,

– the Czech Government, by M. Smolek, J. Vláčil and T. Müller, acting as Agents,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the European Commission, by G. Gattinara and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 October 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(5) and Article 32 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44) and Article 33 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65).

2 The request has been made in the context of two actions, which were joined by the referring court, between, in the case of the first action, the Autorità Garante della Concorrenza e del Mercato (Competition and Markets Authority, Italy; 'the AGCM') and, in the case of the second action, Coopservice Soc. coop. arl, the appellants in the main proceedings, and the Azienda Socio-Sanitaria Territoriale della Vallecamonica — Sebino (Regional Health and Social Care Authority of Valcamonica — Sebino, Italy; 'the ASST of Valcamonica'), with regard to the latter's decision to accede to the contract for environmental sanitation, collection and waste services ('the initial contract') concluded during 2012 by the Azienda Socio-Sanitaria Territoriale del Garda (Regional Health and Social Care Authority of Lake Garda, Italy; 'the ASST of Lake Garda') and ATI - Zanetti Arturo & C. Srl, an ad hoc association of undertakings comprising Markas Srl and Zanetti Arturo ('ATI Markas').

Legal context

Directive 2004/18

3 Recitals 11 and 15 of Directive 2004/18 state:

'(11) [An EU] definition of framework agreements, together with specific rules on framework agreements concluded for contracts falling within the scope of this Directive, should be provided. Under these rules, when a contracting authority enters into a framework agreement in accordance with the provisions of this Directive relating, in particular, to advertising, time limits and conditions for the submission of tenders, it may enter into contracts based on such a framework agreement during its term of validity either by applying the terms set forth in the framework agreement or, if all terms have not been fixed in advance in the framework agreement, by reopening competition between the parties to the framework agreement in relation to those terms. The reopening of competition should comply with certain rules the aim of which is to guarantee the required flexibility and to guarantee respect for the general principles, in particular the principle of equal treatment. For the same reasons, the term of the framework agreements should not exceed four years, except in cases duly justified by the contracting authorities.

…

(15) Certain centralised purchasing techniques have been developed in Member States. Several contracting authorities are responsible for making acquisitions or awarding public contracts/framework agreements for other contracting authorities. In view of the large volumes purchased, those techniques help increase competition and streamline public purchasing.

Provision should therefore be made for a Community definition of central purchasing bodies dedicated to contracting authorities. A definition should also be given of the conditions under which, in accordance with the principles of non-discrimination and equal treatment, contracting authorities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with this Directive.'

4 Under the heading 'Definitions', Article 1(5) of that directive provides:

'A "framework agreement" is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.'

5 Article 2 of Directive 2004/18, which is headed 'Principles of awarding contracts', states:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

6 Article 9 of that same directive, headed 'Methods for calculating the estimated value of public contracts, framework agreements and dynamic purchasing systems', provides:

'1. The calculation of the estimated value of a public contract shall be based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

…

3. No works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent its coming within the scope of this Directive.

…

7. In the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

(a) either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, if possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;

(b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year if that is longer than 12 months.

The choice of method used to calculate the estimated value of a public contract may not be made with the intention of excluding it from the scope of this Directive.

…

9. With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.'

7 Article 32 of Directive 2004/18, which concerns 'framework agreements', provides:

'1. Member States may provide that contracting authorities may conclude framework agreements.

2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 53.

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities and the economic operators originally party to the framework agreement.

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

The term of a framework agreement may not exceed four years, save in exceptional cases duly justified in particular by the subject of the framework agreement.

Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

4. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria.

Contracts based on framework agreements concluded with several economic operators may be awarded either:

– by application of the terms laid down in the framework agreement without reopening competition, or

– where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

…’

8 Article 35 of that directive, headed ‘Notices’, provides in paragraph 4:

‘Contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

In the case of framework agreements concluded in accordance with Article 32 the contracting authorities are not bound to send a notice of the results of the award procedure for each contract based on that agreement.

…’

9 Annex VII A to that directive, concerning ‘information which must be included in public contract notices’, states:

‘…

Contract Notices

…

3. ...

(c) Where appropriate, indicate whether a framework agreement is involved;

…

6. ...

(c) Public service contracts:

– category and description of service. Nomenclature reference number(s). Quantity of services to be provided. Indicate in particular options concerning supplementary purchases and, if known, the provisional timetable for recourse to these options as well as the number of renewals, if any. In the case of renewable contracts over a given period, an estimate of the time frame, if known, for subsequent public contracts for purchase of intended services,

in the event of a framework agreement, indication also of the planned duration of the framework agreement, the estimated total value of the services for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded,

– …

18. Where there is a framework agreement: the number and, where appropriate, proposed maximum number of economic operators who will be members of it, the duration of the framework agreement provided for, stating, if appropriate, the reasons for any duration exceeding four years.

…’

Italian law

National law

10 The last part of paragraph 449 of Article 1 of legge n. 296 (Law No 296) of 27 December 2006 (ordinary supplement No 244 published in GURI No 299 of 27 December 2006) provides:

‘National health service bodies shall, in all circumstances, be required to obtain supplies through agreements concluded by the competent regional authorities, or, where no regional agreements are in force, through framework agreements concluded by the central purchasing body of the [Italian public administration].’

11 The decreto legislativo n. 163 (Legislative Decree No 163) of 12 April 2006 (ordinary supplement No 107 to GURI No 100 of 2 May 2006), which was in force at the time of the facts at issue in the main proceedings, had the objective, inter alia, of transposing Directive 2004/18.

12 Article 3(13) of that decree states:

‘A “framework agreement” is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.’

13 The functioning of a framework agreement concluded with a single economic operator was described in Article 59 of that decree. Paragraphs 2 to 4 of that provision set out verbatim the first to third subparagraphs of Article 32(2) and Article 32(3) of Directive 2004/18. However, it omitted to transpose the fourth and fifth subparagraphs of Article 32(2) of that directive, which, respectively, have the objectives of limiting the term of a framework agreement to four years, except for in duly justified exceptional cases, and prohibiting contracting authorities from using framework agreements improperly or in such a way as to prevent, restrict or distort competition.

14 Article 1(12) of the decreto-legge 6 luglio 2012 n. 95, convertito con modificazioni dalla legge 7 agosto 2012, n. 135 (Decree Law No 95 of 6 July 2012 (ordinary supplement No 141 to GURI No 156 of 6 July 2012), amended and converted into law by Law No 135 of 7 August 2012, ordinary supplement No 173 to GURI No 189 of 14 August 2012), allows the terms of a public procurement contract to be amended during performance in order to improve the contract terms established by the initial tendering procedure.

15 Under Article 15(13)(b) of that decree law, a contract for the supply of goods or services that has become too onerous, in the light of the terms established by law, can be rescinded with a view to concluding, without the need for a new tendering procedure, a new contract the terms of which are consistent with those contained in ongoing contracts with other undertakings.

Regional law

16 In Lombardy (Italy), Article 3(7) of the legge regionale n. 14 (Regional Law No 14) of 19 May 1997 obliges all regional authorities to use centralised procurement methods, including the regional purchasing body.

17 Regional Council Decision No 2633 of 6 December 2011 reiterates the obligation on ASSTs to place group orders and use central purchasing bodies.

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 The origin of the dispute in the main proceedings is Decree No 1158/2015, which was issued on 30 December 2015 by the Director-General of the ASST of Valcamonica for the purposes of acceding to the initial contract, without a new public tendering procedure, in respect of the period from 1 February 2016 to 15 February 2021.

19 For that purpose, the Director-General of the ASST of Valcamonica requested an extension of the public contract initially awarded to ATI Markas by Decree No 828/2011 issued on 4 November 2011 by the Director-General of the ASST of Lake Garda (‘Decree No 828/2011’).

20 That decree allocated to ATI Markas certain environmental sanitation, collection and waste services for a period of 108 months, which is 9 years, from 16 February 2012 to 15 February 2021. Paragraph 5 of the tender specifications relating to that public contract included a clause headed ‘Extension of the contract’ (‘the extension clause’), which allowed one or more of the bodies referred to in that clause to request that the successful bidder extend the contract to cover them ‘subject to conditions identical to those of the relevant procurement contract’. That clause, which referred, inter alia, to the ASST of Valcamonica, specified that the successful bidder was not obliged to accept the request for extension. Further, on the basis of that clause, an ‘independent contractual relationship’ arose, which covered the remaining part of the contract period set out in the initial contract.

21 Coopservice, which had until then provided cleaning services for the premises of the ASST of Valcamonica, and AGCM each brought a claim before the Tribunale amministrativo regionale della Lombardia (Regional Administrative Court, Lombardy, Italy) seeking, inter alia, annulment of Decree No 1158/2015, Decree No 828/2011 and the extension clause on the ground that those measures would allow a new services contract to be awarded in breach of both national and EU competition law and, in particular, of the obligation to organise a tendering procedure.

22 By judgment of 7 November 2016, the Tribunale amministrativo regionale della Lombardia (Regional Administrative Court, Lombardy) dismissed those two actions on the ground that a framework agreement may be concluded between a given economic operator and a single contracting authority acting on its own behalf and on behalf of other contracting authorities which, although mentioned in the agreement, are not parties to it directly. In addition, it held that it is not necessary that a framework agreement mention, expressly and at the outset, the quantity of services that may be required by the contracting authorities that may have recourse to the extension clause, as that quantity can be deduced by reference to their usual requirements.

23 Coopservice and the AGCM then brought an appeal against that judgment before the referring court, the Consiglio di Stato (Council of State, Italy).

24 Before that court, Markas, which intervened in support of the ASST of Valcamonica, claims that its accession to the initial contract complied with Article 33 of Directive 2014/24 and requests that a reference for a preliminary ruling be made to the Court of Justice for an interpretation of that provision.

25 In that regard, the referring court arrived at three sets of findings.

26 In the first place, it takes the view that Article 32 of Directive 2004/18 applies to the case in the main proceedings. However, given that, first, that directive was repealed with effect from 18 April 2016 by Directive 2014/24 and, second, the provisions of the latter that are relevant to the outcome of the dispute in the main proceedings are the same as those in Directive 2004/18, the referring court concludes that it is appropriate to adopt a combined interpretation of Directives 2004/18 and 2014/24.

27 In the second place, the referring court takes the view that it is correct, in principle, to classify the initial contract as a 'framework agreement' within the meaning of Directives 2004/18 and 2014/24.

28 In the third place, the referring court finds that a 'framework agreement' within the meaning of Article 1(5) and Article 32 of Directive 2004/18 has two main characteristics. First, the call for tenders is supposed to be launched beforehand, at the time when the successful bidder is named, and should therefore not be necessary for the purpose of concluding each of the contracts awarded under the framework agreement with the economic operator who was successful at the end of the public tendering procedure that led to the conclusion of that framework agreement ('the subsequent contracts'). Second, having regard to the adverbial phrase 'where appropriate' in Article 1(5) of Directive 2004/18, a framework agreement need not necessarily set out the quantities that it will cover.

29 According to the referring court, although the position of the Tribunale amministrativo regionale della Lombardia (Regional Administrative Court, Lombardy) may be justified in the light of the objective of promoting the group purchasing procedures endorsed by the Italian legislature, such a position does not, in any event, comply with EU law. Further, that court notes the lack of relevant case-law from the Court of Justice on this matter.

30 In that regard, the Consiglio di Stato (Council of State) takes the view that the interpretation given to the adverbial phrase 'where appropriate' by the Tribunale amministrativo regionale della Lombardia (Regional Administrative Court, Lombardy) is too broad. From the referring court's point of view, the extension clause should be limited in two ways. Its standpoint, as reflected in a number of its judgments, is that, on a subjective level, that clause should identify the contracting authorities that can have recourse to it, while, on an objective level, it should set out the economic value of any extension, including a maximum amount. Any interpretation to the contrary would render it lawful for an unlimited series of contracts to be awarded directly, which would infringe the basic principles of EU law, under which public contracts are to be awarded through public tendering procedures, and would therefore undermine competition.

31 The referring court is therefore inclined to give that adverbial phrase a restrictive interpretation, in accordance with which the framework agreement determines, 'where appropriate', the quantity of the services that it will cover. That detail should be omitted only where the services themselves are clearly and unequivocally determined or determinable, bearing in mind the factual or legal situation which the parties to the framework agreement are aware of, even if they have not expressly included it in the agreement itself.

32 In reply to a request for clarification sent by the Court to the referring court, in accordance with Article 101 of the Rules of Procedure, in order to ascertain the reasons why that court classified the contract concluded between the original contracting authority and ATI Markas as a framework agreement within the meaning of Article 1(5) and Article 32 of Directive 2004/18, despite the fact that that public contract was for a term of nine years, the referring court explained in a decision of 20 February 2018 that it was obliged, as an administrative court, to comply with the principle that the parties delimit the subject matter of the proceedings and that a court could raise matters of its own motion only where an administrative measure is vitiated by defects that are so serious as to justify its

annulment. According to the referring court, ‘it is manifestly appropriate … to conclude that a term longer than the maximum term provided by law does not constitute a defect of such seriousness as to justify the annulment of the measure, which the court could therefore, theoretically, raise of its own motion.’ In addition, the referring court notes that, in the light of its particular purpose, which is to guarantee the proper functioning of several hospitals, the initial contract could be covered by the derogation set out in the fourth subparagraph of Article 32(2) of Directive 2004/18.

33 In those circumstances, the Consiglio di Stato (Council of State) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article [1](5) and Article 32 of Directive 2004/18 and Article 33 of Directive 2014/24 repealing Directive 2004/18 be interpreted as allowing the conclusion of a framework agreement in which:

– a contracting authority acts on its own behalf and on behalf of other contracting authorities specifically indicated, which are not, however, direct parties to the framework agreement;

– the quantity of services that may be required by the non-signatory contracting authorities when they enter into the subsequent contracts envisaged in the framework agreement itself is not determined?

(2) If the answer to question (1) should be in the negative, must Article [1](5) and Article 32 of Directive 2004/18 and Article 33 of Directive 2014/24 be interpreted as allowing the conclusion of a framework agreement in which:

– a contracting authority acts on its own behalf and on behalf of other contracting authorities specifically indicated, which are not, however, direct parties to the framework agreement;

– the quantity of services that may be required by the non-signatory contracting authorities when they enter into the subsequent contracts envisaged in the framework agreement itself is determined by reference to their usual requirements?’

Admissibility of the request for a preliminary ruling

34 It is apparent from the request for a preliminary ruling that the reasoning of the referring court is based on the premiss that the initial contract should be classified as a ‘framework agreement’ within the meaning of Article 1(5) and Article 32 of Directive 2004/18.

35 However, Coopservice and the European Commission question the validity of that premiss. They submit that the initial contract infringes the fourth subparagraph of Article 32(2) of Directive 2004/18, under which the term of a framework agreement cannot exceed four years, save ‘in exceptional cases duly justified in particular by the subject of the framework agreement’. No explanation has been put forward to justify why the four-year maximum period has not been complied with. They argue that it follows that that agreement cannot be classified as a ‘framework agreement’ within the meaning of Directive 2004/18 and, consequently, that the request for a preliminary ruling should be declared inadmissible.

36 By failing to set out the reasons why the initial contract, which had a term of nine years, could be covered by the derogation set out in the fourth subparagraph of Article 32(2) of Directive 2004/18, the referring court has neither defined the factual and legislative context of the questions that it has referred to the Court nor explained the factual circumstances on which those questions are based, contrary to the requirements of Article 94 of the Rules of Procedure of the Court.

37 In that regard, it should be noted that it is apparent from the Court’s case-law that, in the context of the cooperation between the latter and national courts, instituted by Article 267 TFEU, the need to provide an interpretation of EU law which can be of use to the referring court means that it is necessary for that court to define the factual and legislative context of the questions referred or, at the very least, to explain the factual circumstances on which those questions are based. The Court of Justice is

empowered to rule on the interpretation or validity of EU provisions only on the basis of the facts which the national court puts before it (see, recently, in the context of freedom of establishment, order of 31 May 2018, *Bán*, C-24/18, not published, EU:C:2018:376, paragraph 14 and the case-law cited).

38 That being said, in accordance with the Court's settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts, by means of which the former provides the latter with the points of interpretation of EU law necessary in order for them to decide the disputes before them (see, in particular, to that effect, judgments of 16 July 1992, *Meilicke*, C-83/91, EU:C:1992:332, paragraph 22, and of 20 December 2017, *Global Starnet*, C-322/16, EU:C:2017:985, paragraph 24).

39 In the context of that cooperation, questions relating to EU law enjoy a presumption of relevance, which means that the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgments of 5 December 2006, *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, paragraph 25, and of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraph 42).

40 Moreover, EU law does not require national courts to raise of their own motion an issue concerning the breach of provisions of EU law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim (see, to that effect, judgment of 14 December 1995, *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:441, paragraphs 21 and 22).

41 However, it is for the referring court to examine whether, as the Advocate General points out in point 77 of his Opinion, it is not possible for it to assess the compatibility of the term laid down in the initial contract with the fourth subparagraph of Article 32(2) of Directive 2004/18, since the parties to the main proceedings appear to have relied on paragraph 6(c), headed 'Public service contracts', under the heading 'Contract Notices' in Annex VII A to that directive. The latter provision mentions, amongst the information that must always be included in public service contract notices, the estimated total value of the services for the entire duration of the framework agreement.

42 Moreover, it has not been established that a public contract, such as the initial contract, cannot be classified as a 'framework agreement' within the meaning of Article 1(5) and the fourth subparagraph of Article 32(2) of Directive 2004/18 simply on the basis that its term was greater than four years and the contracting authority has failed duly to justify why the term exceeds that limit. In a situation such as that in the main proceedings, it cannot be ruled out, in particular, that a contact such as the initial contract constitutes a valid framework agreement within the meaning of the latter provision during the first four years of its application and expires at the end of that period.

43 Consequently, the request for a preliminary ruling is admissible.

Consideration of the questions referred

44 In the questions that it puts before the Court, the referring court cites at the same time Directives 2004/18 and 2014/24.

45 In that regard, it should be recalled, as a preliminary point, that, in accordance with the Court's settled case-law, the applicable directive is, as a rule, the one in force when the contracting authority chose the type of procedure to be followed and decides definitively whether it is necessary for a prior call for tenders to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, to that effect, judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 31, and of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83).

46 In the case in the main proceedings, the initial contract took the form of Decree No 828/2011, adopted on 4 November 2011, whereas Directive 2014/24 repealed Directive 2004/18 with effect only from 18 April 2016.

47 Consequently, at the material time in the main proceedings, Directive 2004/18 was still applicable, which means that it is necessary to interpret the request for a preliminary ruling as seeking to obtain an interpretation of that directive rather than Directive 2014/24 (see, by analogy, order of 10 November 2016, *Spinosa Costruzioni Generali and Melfi,* C-162/16, not published, EU:C:2016:870, paragraph 21).

48 Therefore, it seems that, by its two questions, which it is appropriate to examined together, the referring court asks, in essence, whether Article 1(5) and Article 32 of Directive 2004/18 must be interpreted as allowing the conclusion of a framework agreement in which, first, a contracting authority acts on its own behalf and on behalf of other contracting authorities specifically indicated, which are not, however, direct parties to the framework agreement and, second, the quantity of services that may be required by the non-signatory contracting authorities when they conclude the subsequent contracts envisaged in the framework agreement itself is not determined or is determined by reference to their usual requirements.

Whether a contracting authority has the power to act on its own behalf and on behalf of other contracting authorities specifically indicated, which are not, however, direct parties to the framework agreement

49 Under the second subparagraph of Article 32(2) of Directive 2004/18, contracts based on a framework agreement are to be awarded in accordance with the procedures that may be applied only between the contracting authorities and the economic operators originally party to that agreement.

50 As the wording of that provision in isolation does not allow it to be determined whether the requirement to be an original party to the framework agreement applies to both contracting authorities and economic operators or solely to the latter, it is necessary to take into account not only the terms of that provision, but also its context and the objectives pursued by the legislation of which it is a part (see, to that effect, judgment of 17 November 1983, *Merck*, 292/82, EU:C:1983:335, paragraph 12).

51 In that regard, it is appropriate, first, to note that the second subparagraph of Article 32(4) of Directive 2004/18, read in the light of recital 11 of that directive, provides that, where a framework agreement has been concluded with several successful bidders, subsequent contracts are to be concluded after competition has been reopened between the parties to the framework agreement in relation to the terms that have not been fixed. Further, paragraph 18, under the heading ‘Contract Notices’, in Annex VII A to that directive obliges the contracting authority that is an original party to the framework agreement to indicate the ‘the number and, where appropriate, proposed maximum number of economic operators who will be members of it …’.

52 It follows from those provisions that the requirement to be an original party to the framework agreement applies only to economic operators, as it is out of the question that contracting authorities would be required to compete amongst themselves.

53 In addition, such an interpretation helps to ensure that practical effect is given to Article 1(5) and Article 32 of Directive 2004/18, the objective of which is, inter alia, to streamline public purchasing by encouraging, through framework agreements, collective public purchasing in order to achieve economies of scale.

54 Further, that interpretation is borne out, as the Advocate General noted in point 62 of his Opinion, by the wording of the second subparagraph of Article 32(2) of Directive 2014/24, in accordance with which the procedures for the awarding of contracts based on a framework agreement may be applied only between, on the one hand, those contracting authorities specifically identified for this purpose in the invitation to tender or in the invitation to confirm interest and, on the other hand, those economic operators party to the framework agreement as concluded.

55 It follows from the findings above that the purpose of the second subparagraph of Article 32(2) of Directive 2004/18 is to allow a contracting authority to give other contracting authorities access to a framework agreement that it is proposing to conclude with the economic operators who will be original parties thereto.

56 It is not, therefore, a requirement of the second subparagraph of Article 32(2) of Directive 2004/18 that a 'secondary' contracting authority, such as the ASST of Valcamonica in the main proceedings, be a signatory to the framework agreement in order for it to be able to award a subsequent contract at a later date. It is sufficient that such a contracting authority appear as a potential beneficiary of that framework agreement from the date on which it is concluded by being clearly identified in the tender documents with an explicit reference that makes both the 'secondary' contracting authority itself and any interested operator aware of that possibility. That reference can appear either in the framework agreement itself or in another document, such as an extension clause in the tender specifications, as long as the requirements as to advertising and legal certainty and, consequently, those relating to transparency are complied with.

Whether it is possible for contracting authorities that are not signatories to a framework agreement to refrain from determining the quantity of services that may be required when they conclude subsequent contracts or to determine that quantity by reference to their usual requirements

57 It is apparent from Article 1(5) of Directive 2004/18 that the purpose of a framework agreement is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.

58 Indeed, it could be inferred from the adverbial phrase 'where appropriate' that an indication of the quantity of the services which the framework agreement covers is merely optional.

59 That interpretation cannot, however, be accepted.

60 First, it follows from some of the other provisions of Directive 2004/18 that a framework agreement must, at the outset, determine the maximum volume of supplies or services that may form the subject of subsequent contracts. In particular, Article 9(9) of that directive, which sets out, inter alia, the methods for calculating the estimated value of framework agreements, provides that the value to be taken into consideration is the maximum estimated value net of VAT of all the contracts envisaged for the total term of that agreement. Paragraph 6(c), headed 'Public service contracts', under the heading 'Contract Notices' in Annex VII A to Directive 2004/18 also requires that the contract notice relating to such an agreement specify the estimated total value of the services for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded. As the Commission submits, in essence, and as the Advocate General noted in point 78 of his Opinion, although the contracting authority that is an original party to the framework agreement is subject only to a requirement to use best endeavours with regard to the value and frequency of each of the subsequent contracts to be awarded, it is nevertheless imperative that that authority state the total quantity which the subsequent contracts may comprise.

61 Second, under Article 32(3) of Directive 2004/18, where a framework agreement is concluded with a single economic operator, contracts based on that agreement must be awarded within the limits of the terms laid down in the agreement. It follows that the contracting authority that is an original party to the framework agreement can make commitments on its own behalf or on behalf of the potential contracting authorities that are specifically indicated in that agreement only up to a certain quantity and once that limit has been reached the agreement will no longer have any effect.

62 Third, that interpretation ensures that the fundamental principles governing the awarding of public contracts, which apply to the conclusion of framework agreements in accordance with the first subparagraph of Article 32(2) of Directive 2004/18, are observed. Generally, a framework agreement falls within the concept of public procurement to the extent that it turns into a whole the various specific contracts that it governs (see, to that effect, judgments of 4 May 1995, *Commission* v *Greece*, C-79/94, EU:C:1995:120, paragraph 15; of 29 November 2007, *Commission* v *Italy*, C-119/06, not published, EU:C:2007:729, paragraph 43; and of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 36).

63 Not only the principles of equal treatment and non-discrimination, but also the principle of transparency that stems from them (see, to that effect, judgment of 17 December 2015, *UNIS and Beaudout Père et Fils*, C-25/14 and C-26/14, EU:C:2015:821, paragraph 38) imply that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (see, to that effect, judgment of 13 July 2017, *INGSTEEL and Metrostav*, C-76/16, EU:C:2017:549, paragraph 34).

64 The principles of transparency and equal treatment of economic operators with an interest in the conclusion of a framework agreement, as established, inter alia, by Article 2 of Directive 2004/18, would be affected if the contracting authority that is an original party to the framework agreement did not set out the total quantity which such an agreement covers.

65 The obligation of transparency is particularly important in the context of a subsequent contract, given that, in accordance with the second subparagraph of Article 35(4) of Directive 2004/18, contracting authorities are not bound to send a notice of the results of the award procedure for each contract based on the framework agreement.

66 Further, if the contracting authority that was an original party to the framework agreement were not obliged to indicate at the outset the quantity and maximum amount of services that will be covered by that agreement, the conclusion of the agreement could be used to divide a contract up artificially so that it remains below the thresholds laid down by Directive 2004/18, which is prohibited by Article 9(3) of that directive.

67 Additionally, even if it could be assumed that a reference to the usual requirements of contracting authorities specifically indicated in the framework agreement may prove to be sufficiently explicit for national economic operators, it cannot be assumed that the same can necessarily be said for an economic operator established in another Member State.

68 Finally, if the total quantity of services that those usual requirements represents is common knowledge, it should not be difficult to refer to it in the framework agreement itself or in another published document, such as the tender specifications, and, by doing so, ensure full observance of the principles of transparency and equal treatment.

69 Fourth, a requirement that the contracting authority that is an original party to the framework agreement indicate therein the quantity and amount of the services that that agreement will cover is a manifestation of the prohibition on using framework agreements improperly or in such a way as to prevent, restrict or distort competition, as laid down in the fifth subparagraph of Article 32(2) of Directive 2004/18.

70 Therefore, the reply to the questions referred is that Article 1(5) and the fourth subparagraph of Article 32(2) of Directive 2014/18 must be interpreted as meaning that:

– a contracting authority may act on its own behalf and on behalf of other contracting authorities that are specifically indicated but are not direct parties to a framework agreement, provided that the requirements as to advertising and legal certainty and, consequently, those relating to transparency are complied with; and

– it cannot be accepted that contracting authorities that are not signatories to the framework agreement refrain from determining the quantity of services that may be required when they conclude contracts pursuant to the framework agreement or determine that quantity by reference to their usual requirements, because, if they do so, the principles of transparency and equal treatment of economic operators with an interest in the conclusion of that framework contract will be infringed.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 1(5) and the fourth subparagraph of Article 32(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that:

– **a contracting authority may act on its own behalf and on behalf of other contracting authorities that are specifically indicated but are not direct parties to a framework agreement, provided that the requirements as to advertising and legal certainty and, consequently, those relating to transparency are complied with; and**

– **it cannot be accepted that contracting authorities that are not signatories to the framework agreement refrain from determining the quantity of services that may be required when they conclude contracts pursuant to the framework agreement or determine that quantity by reference to their usual requirements, because, if they do so, the principles of transparency and equal treatment of economic operators with an interest in the conclusion of that framework contract will be infringed.**

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 3 October 2018(1)

Case C-216/17

Autorità Garante della Concorrenza e del Mercato — Antitrust,

Coopservice Soc. coop. arl

v

Azienda Socio-Sanitaria Territoriale della Valcamonica — Sebino (ASST),

Azienda Socio-Sanitaria Territoriale del Garda (ASST),

Azienda Socio-Sanitaria Territoriale della Valcamonica (ASST)

Third parties:

Markas Srl,

ATI — Zanetti Arturo & C. Srl e in proprio,

Regione Lombardia

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling — Public works contracts, public supply contracts and public service contracts — Directive 2004/18/EC — Framework agreements — Extension clause)

1. The Consiglio di Stato (Council of State, Italy) once again seeks a preliminary ruling from the Court of Justice on the interpretation of Directive 2004/18/EC. (2) On this occasion, the referring court's uncertainties concern whether a public health body acting as a contracting authority was, in 2015, entitled to award a contract for the provision of certain services directly to the successful tenderer with which another similar public body had previously (in 2011) concluded a similar contract, which the referring court describes as a framework agreement for the purposes of that directive.

2. The referring court also asks whether, in those same circumstances, it is mandatory for the framework agreement to state the quantity of services that contracting authorities may require when concluding subsequent contracts and, if so, whether that information may be provided by reference to their 'usual requirements'.

I. Legislative framework

A. EU law: Directive 2004/18

3. Recitals 11, 15 and 36 of Directive 2004/18 state:

‘(11) A Community definition of framework agreements, together with specific rules on framework agreements concluded for contracts falling within the scope of this Directive, should be provided. Under these rules, when a contracting authority enters into a framework agreement in accordance with the provisions of this Directive relating, in particular, to advertising, time limits and conditions for the submission of tenders, it may enter into contracts based on such a framework agreement during its term of validity either by applying the terms set forth in the framework agreement or, if all terms have not been fixed in advance in the framework agreement, by reopening competition between the parties to the framework agreement in relation to those terms. The reopening of competition should comply with certain rules the aim of which is to guarantee the required flexibility and to guarantee respect for the general principles, in particular the principle of equal treatment. For the same reasons, the term of the framework agreements should not exceed four years, except in cases duly justified by the contracting authorities.

…

(15) Certain centralised purchasing techniques have been developed in Member States. Several contracting authorities are responsible for making acquisitions or awarding public contracts/framework agreements for other contracting authorities. In view of the large volumes purchased, those techniques help increase competition and streamline public purchasing. Provision should therefore be made for a Community definition of central purchasing bodies dedicated to contracting authorities. A definition should also be given of the conditions under which, in accordance with the principles of non-discrimination and equal treatment, contracting authorities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with this Directive.

…

(36) To ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community. The information contained in these notices must enable economic operators in the Community to determine whether the proposed contracts are of interest to them. For this purpose, it is appropriate to give them adequate information on the object of the contract and the conditions attached thereto …’

4. In accordance with Article 1(5) of Directive 2004/18:

‘A “framework agreement” is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.’

5. Article 2 of Directive 2004/18 provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

6. Article 9 of Directive 2004/18 provides:

‘1. The calculation of the estimated value of a public contract shall be based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

…

3. No works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent its coming within the scope of this Directive.

…

7. In the case of public supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

(a) either the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year adjusted, if possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;

(b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year if that is longer than 12 months.

The choice of method used to calculate the estimated value of a public contract may not be made with the intention of excluding it from the scope of this Directive.

…

9. With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.'

7. Article 32 of Directive 2004/18 states:

'1. Member States may provide that contracting authorities may conclude framework agreements.

2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 53.

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities and the economic operators originally party to the framework agreement.

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

The term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

4. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria.

Contracts based on framework agreements concluded with several economic operators may be awarded either:

– by application of the terms laid down in the framework agreement without reopening competition, or

– where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;

(b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;

(c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired;

(d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.'

8. Article 35 of Directive 2004/18 is worded as follows:

'…

2. Contracting authorities which wish to award a public contract or a framework agreement by open, restricted or, under the conditions laid down in Article 30, negotiated procedure with the publication of a contract notice or, under the conditions laid down in Article 29, a competitive dialogue, shall make known their intention by means of a contract notice.

…

4. Contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

In the case of framework agreements concluded in accordance with Article 32 the contracting authorities are not bound to send a notice of the results of the award procedure for each contract based on that agreement.

…'

9. Pursuant to Article 36(1) of Directive 2004/18:

'Notices shall include the information mentioned in Annex VII A and, where appropriate, any other information deemed useful by the contracting authority in the format of standard forms adopted by the Commission in accordance with the procedure referred to in Article 77(2).'

10. Annex VII A governs 'Information which must be included in public contract notices', in the following terms:

'…

Contract notices

…

3. ...

(c) Where appropriate, indicate whether a framework agreement is involved.

…

6. ...

(c) Public service contracts.

– Category and description of service. Nomenclature reference number(s). Quantity of services to be provided. Indicate in particular options concerning supplementary purchases and, if known, the provisional timetable for recourse to these options as well as the number of renewals, if any. In the case of renewable contracts over a given period, an estimate of the time frame, if known, for subsequent public contracts for purchase of intended services,

in the event of a framework agreement, indication also of the planned duration of the framework agreement, the estimated total value of the services for the entire duration of the framework agreement and, as far as possible, the value and the frequency of the contracts to be awarded,

…

18. Where there is a framework agreement: the number and, where appropriate, proposed maximum number of economic operators who will be members of it, the duration of the framework agreement provided for, stating, if appropriate, the reasons for any duration exceeding four years.

…’

B. Italian law

11. The decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 163 establishing the code of public works contracts, public service contracts and public supply contracts) of 12 April 2006, (3) which was in force at the material time, transposed Directive 2004/18 into Italian law. Article 3(13) thereof defines ‘framework agreement’ in the same terms as Article 1(5) of Directive 2004/18.

12. Article 59 of that legislative decree reproduces Article 32 of Directive 2004/18, but it does not provide that the term of a framework agreement may not exceed four years, save in exceptional cases. Nor does it expressly prohibit contracting authorities from using framework agreements improperly or in such a way as to prevent, restrict or distort competition.

13. The last part of Article 1(449) of legge n. 296 — Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (Law 296 — laying down provisions for drawing up the annual and pluriannual budget of the State) of 27 December 2006 (4) requires the bodies of the Servizio Sanitario Nazionale (National Health Service; ‘SSN’) to make purchases through central purchasing bodies.

14. Article 1(12) of Decreto legislativo n. 95 — Disposizioni urgenti per la revisione della spesa pubblica con invarianza dei servizi ai cittadini (Legislative Decree No 95 — Urgent provisions for reviewing public spending while maintaining services for citizens) of 6 July 2012 (5) allows, without the launching of a new tendering procedure and in order to make savings, subsequent amendments which improves the contract terms laid down in the initial tendering procedure.

15. Article 15(13)(b) of Decree-Law No 95 of 2012 provides for the rescission of a contract for the supply of goods or the provision of services which has become too onerous, and for the conclusion, without the need for a new tendering procedure, of a new contract the terms of which are the same as those contained in an ongoing contract with other undertakings.

II. Facts

16. Aziende socio sanitarie territoriali (local health and social care bodies; ‘ASSTs’) are regional public bodies which ensure that citizens receive assistance under the SSN. It is common ground that they qualify as contracting authorities within the meaning of Directive 2004/18.

17. For reasons relating to the adjustment of the budgetary balance and as a measure aimed at containing costs, the Italian legislature made it compulsory for SSN bodies, except in very limited circumstances, to purchase goods and services as a group through central purchasing bodies.

18. Against that background, following a restricted procedure, the ASST di Desenzano del Garda (which was subsequently taken over by the ASST del Garda), by Decree No 828 of 4 November 2011, awarded an ad hoc tendering consortium, consisting of Markas Srl and Zanetti Arturo & C. Srl, a contract for environmental sanitation, collection and disposal of waste services. (6) The contract term was 108 months, starting on 1 December 2011.

19. The ASST di Desenzano del Garda included in the tender specifications for that contract a clause entitled 'Extension of the contract', (7) which provided for the possibility of 'subsequent accession' by certain specified ASSTs which had previously concluded an agreement (8) for group purchasing of goods and services.

20. That clause, in point 2.5 of the special tender specifications (Annex 3), stipulated as follows:

- 'Entities identified as successful tenderers may be requested to extend the contract to one or more undertakings' listed at the end of the clause;
- the duration of the extension is to be equal to the remaining duration of the contractual period established by the original tendering procedure;
- every ASST is entitled to a single accession during the contractual period 'on the same conditions as the award in question';
- however, the successful tenderer is not obliged to accept the request for extension. If it does accept the request, it will result in 'an independent contractual relationship', distinct from the relationship relating to the original award.

21. The contract listed by name 18 'aziende ospedaliere/sanitarie' (hospitals and health centres) which were entitled to rely on the extension clause. These included the Azienda Sanitaria Locale della Valcamonica — Sebino (now called Azienda Socio-Sanitaria Territoriale della Valcamonica (ASST)), which is a respondent in the main proceedings.

22. By Decision No 1158 of 30 December 2015, the ASST della Valcamonica exercised the option to accede to a contract provided for in the clause described, in respect of the period from 1 February 2016 to 15 February 2021. Consequently, it concluded for that period a contract for the provision of sanitation services with Markas, without carrying out a further tendering procedure in addition to that initially carried out by the ASST di Desenzano del Garda.

23. Two actions were brought before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy) against that decision by the operator which had provided the services until then, Coopservice Soc. coop. arl ('Coopservice'), and by the Autorità garante della concorrenza e del mercato (Competition and Markets Authority; 'AGCM'), respectively.

24. The first-instance court dismissed both actions and the applicants appealed against those decisions to the Consiglio di Stato (Council of State), which has made the reference for a preliminary ruling.

III. Questions referred

25. The following questions have been submitted by the referring court:

'(1) Must Article [1](5) [(9)] and Article 32 of Directive 2004/18 and Article 33 of Directive 2014/24 [(10)] be interpreted as allowing the conclusion of a framework agreement in which:

- a contracting authority acts on its own behalf and on behalf of other contracting authorities specifically indicated, which are not, however, direct parties to the framework agreement;

– the quantity of services that may be required by the non-signatory contracting authorities when they enter into the subsequent contracts envisaged in the framework agreement itself is not determined?

(2) If the answer to question 1 should be in the negative:

Must Article [1](5) [(11)] and Article 32 of Directive 2004/18 and Article 33 of Directive 2014/24 be interpreted as allowing the conclusion of a framework agreement in which:

– a contracting authority acts on its own behalf and on behalf of other contracting authorities specifically indicated, which are not, however, direct parties to the framework agreement;

– the quantity of services that may be required by the non-signatory contracting authorities when they enter into the subsequent contracts envisaged in the framework agreement itself is determined by reference to their usual requirements?'

IV. Procedure before the Court and summary of the parties' submissions

26. The reference for a preliminary ruling was received at the Registry of the Court of Justice on 24 April 2017. Written observations were lodged by Coopservice, Markas, the Italian, Czech, Austrian and Finnish Governments and the European Commission.

27. The hearing, held on 12 July 2018, was attended by Markas, the Italian Government and the Commission.

28. Coopservice points out, first, that the Consiglio di Stato (Council of State) annulled the extension clause at issue in an action brought in relation to another award made under that clause (by the ASST Carlo Poma).

29. Coopservice submits that the reference for a preliminary ruling is inadmissible because: (a) the alleged framework agreement exceeds, without justification, the period of four years stipulated in Article 32 of Directive 2004/18; (b) the clause at issue has already been annulled by the referring court; and (c) there are no other statutory conditions which would enable an award procedure of the kind at issue in the main proceedings to be classified as a framework agreement.

30. In the alternative, Coopservice proposes that the two questions referred should be answered in the negative because, it argues, not only is the quantity of services not determined but the conditions for finding that there is a framework agreement are not met either.

31. Markas questions the relevance of the first question, arguing that it is inaccurate to state that the ASSTs which relied on the extension clause did not participate in the formation stage of the framework agreement. That agreement is the result of concerted action from the outset.

32. At all events, Markas contends that the first question should be answered in the affirmative. A procurement procedure involving an extension clause is a form of contract entailing a subsequent grouping together, which has many similarities to central purchasing. Both are protracted procedures involving a stage in which the contractor is selected by a single contracting entity which acts as a (potentially) broader contracting authority, and a subsequent accession stage which is open to other entities. The only difference, which in Markas' submission is irrelevant, is that the central purchasing body only acts as such but does not itself use the services it purchases under the framework agreement.

33. As regards the second question, Markas submits that it is not obligatory to determine exact quantities in advance; those quantities may vary depending on the entities' specific requirements. In this case, it is sufficient that the ASST del Garda indicated the value of the contract intended to cover its own requirements without having also to include the value of possible subsequent accessions.

34. The Italian Government, which does not accept that the case concerns a framework agreement within the meaning of Article 32 of Directive 2004/18, contends that the reference for a preliminary ruling is

inadmissible. In the alternative, it maintains that the first question should be answered in the negative, since the fact that there is nothing which would enable the subject matter of subsequent services (in other words, services which may be required through the conclusion of subsequent implementation agreements) to be determined is not compatible with the framework agreement model.

35. The Italian Government submits that the second question should also be answered in the negative. It argues, like the Czech and Austrian governments, that the general reference to the 'requirements' of contracting authorities is insufficient in view of the vagueness of the term and because it entails an 'evolving concept' linked to the temporal context of the case.

36. The Austrian Government proposes that the two questions be examined together. In its submission, the conditions for the existence of a framework agreement set out in Directives 2004/18 and 2014/24 are not fulfilled. Even if it were accepted that such an agreement exists, for the purpose of EU law, the conduct at issue in this case would, nevertheless, be unlawful.

37. The unlawfulness flows from the fact that, first, the parties were not identified from the outset, as both directives require. Since a tenderer is entitled to refuse the accession of other contracting authorities, there is no mutually binding contractual relationship with all the entities benefiting under the extension clause. Second, it is alleged that the method used by the ASST del Garda and by the ASSTs which relied on that clause deprives of any substance the provisions relating to the calculation of the estimated value of the contracts and framework agreement.

38. The Czech Government maintains that EU law precludes a framework agreement to which the contracting authorities entitled to benefit thereunder, pursuant to an extension clause like that at issue, are not parties from the outset. The Czech Government contends, moreover, that it is essential that the substance of the service to be provided is established, at least in outline, during the procedure which led to the conclusion of the framework agreement. That is the only way of enabling potential tenderers to identify whether the contract is of interest to them and of making it possible to determine the estimated value of the contract, which is dependent on the maximum estimated value of all the contracts envisaged throughout the total term of the framework agreement.

39. The Finnish Government argues, in relation to the first question, that Directive 2004/18 permits a framework agreement under which: (a) a contracting authority acts on its own behalf and on behalf of other contracting authorities which are specifically mentioned but which are not directly parties to that framework agreement; and (b) the quantity of services which may be required by the non-signatory contracting authorities when they enter into the subsequent contracts provided for by the framework agreement is not determined. However, the entire term of that framework agreement must have been specified in accordance with the requirements of the directive and the various subsequent contracts entered into must not exceed that term overall.

40. As regards the second question, the Finnish Government argues that, in many cases, it is possible to establish, for supplies and services, a particular quantity by reference to the usual requirements of the contracting authorities. It is sufficient that the contracting authority uses as a reference the volume of purchases in previous years, adjusted, where appropriate, by an estimate of possible fluctuations in quantity. That information should be included in the tender documents, for, otherwise, former contractors would be placed at an advantage. If that is not the case, the Finnish Government submits that the question should be answered in the negative.

41. The Commission points out that Directive 2014/24 is inapplicable *ratione temporis*, before going on to observe also that the framework agreement at issue exceeds the period of four years laid down in Directive 2004/18. Since the questions submitted by the referring court do not relate to that point and it is not possible to ascertain whether it has been addressed in the main proceedings, the Commission does not formally submit that the reference for a preliminary ruling should be ruled inadmissible.

42. As regards the substance, the Commission states that the second subparagraph of Article 32(2) of Directive 2004/18 does not provide that contracting authorities who were 'originally' parties to the agreement must have signed it. It will be enough if those authorities are referred to as potential beneficiaries under the agreement from the date of its conclusion, and an explicit reference in the tender documents or the specifications will suffice.

43. As far as the quantity of services is concerned, the Commission submits that the phrase ‘where appropriate’ (Article 1(5) of Directive 2004/18) does not imply that this is an optional matter. The intention is to make clear that, for certain subsequent contracts, it might be impossible to state the quantities to be provided, as would occur with the supply of spare parts for vehicles used for municipal transport services. That is not the case with regard to services such as those at issue in the present case, where the total quantity of the services should be expressly indicated in the framework agreement or the tender specifications, even if it is not possible to show the specific value of each subsequent contract. Thus, ‘usual requirements’ may be an acceptable criterion provided that these are defined with sufficient clarity, precision and transparency.

V. Analysis

A. Preliminary observation: the relevant directive for the purpose of the reference for a preliminary ruling

44. Although the questions refer to both Directive 2004/18 and Directive 2014/24, I agree with the Commission that it is not necessary to provide an interpretation of Directive 2014/24 because it is inapplicable *ratione temporis*, and that it is only necessary to interpret Directive 2004/18.

45. According to the information in the order for reference, both the original award of the contract (decree of 4 November 2011) and the accession of the contract (decree of 30 December 2015) took place before the period for transposition of Directive 2014/24 had expired, that is, before 18 April 2016.

B. Admissibility of the reference for a preliminary ruling

46. One of the grounds put forward by Coopservice in support of its argument that the reference for a preliminary ruling is inadmissible is that the initial contract exceeds the period of four years laid down in the fourth subparagraph of Article 32(2) of Directive 2004/18, (12) which means that it does not qualify as a ‘framework agreement’ within the meaning of that directive. The Commission, without formally proposing that the reference for a preliminary ruling should be ruled inadmissible, also draws attention to that fact.

47. When asked by the Court of Justice to explain the reasons why, despite having been entered into for a period of nine years, that contract may be classified as a framework agreement within the meaning of Article 1(5) of Directive 2004/18, the Consiglio di Stato (Council of State) stated that the parties concerned did not invoke the term of the agreement as a possible ground for annulment. In accordance with the principle that the subject matter of an action is defined by the parties, on which its jurisdiction is based, the referring court states that it is not even entitled to examine that issue of its own motion because it is not a sufficiently serious irregularity for a finding that the agreement is null and void. (13) The referring court takes the view that the fact that Article 32 of Directive 2004/18 allows a term of more than four years in exceptional circumstances shows that failure to observe that term is not an invalidating defect. (14)

48. In any event, the referring court maintains that, ‘bearing in mind its particular purpose, which is to ensure the proper functioning of a number of hospitals, the agreement at issue could be covered by that exception’. (15)

49. It is settled case-law that the Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (16)

50. In fact, both Coopservice’s plea relating to the term of the initial contract and the plea relating to failure to comply with other conditions necessary for classification as a ‘framework agreement’ — raised also by the Italian and Austrian Governments — contend that the referring court was incorrect in so classifying the agreement.

51. The Consiglio di Stato (Council of State) has not referred to the Court any questions concerning the legal nature of the contract awarded in 2011. Furthermore, given that it takes it as given that that contract constitutes a framework agreement within the meaning of Article 1(5) of Directive 2004/18, the referring

court's doubts are confined to whether, under that directive, it was actually possible for the agreement to be concluded under the circumstances concerned (without the signatures of all the contracting authorities and without a precise determination of the quantity of services which non-signatories may subsequently require).

52. I, like the Commission, believe that the reply to the questions referred must be confined to those two specific issues and that it is for the referring court, as the court adjudicating on the facts and primary interpreter of the applicable law, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to be able to decide the case before it and the relevance of the questions which it submits to the Court. (17)

53. In this case, those questions are based on the premiss that, in principle, there was a framework agreement within the meaning of Directive 2004/18. That is clearly the interpretation of the referring court, in the light of the facts of the dispute.

54. It should be noted, however, that doubt could be cast on that premiss during the main proceedings if, following appropriate discussion instigated by the parties or as a result of a reconsideration by the referring court, of its own motion, of its original conclusion, (18) the referring court were to find that the agreement concerned raises difficulties as regards its compatibility with Directive 2004/18 other than those which led that court to initiate the present preliminary-ruling proceedings.

55. The third plea of inadmissibility put forward by Coopservice (the referring court already annulled in other proceedings the clause enabling accession) cannot be upheld either. Only the national court seised of the main proceedings can assess whether that annulment took place and, if so, what effect it may have on the proceedings in which it has decided to make the present reference for a preliminary ruling.

C. Substance

56. The two questions referred by the Consiglio di Stato (Council of State) are based on the premiss that there is a 'framework agreement under which a contracting authority may act on its own behalf and on behalf of other contracting authorities specifically indicated, which do not, however, play a direct part in the conclusion of that framework agreement'.

57. Since the referring court's uncertainties do not extend to that issue, I shall refrain from setting out my reservations about whether the formula used in the November 2011 contract genuinely satisfies the definition of a framework agreement within the meaning of Directive 2004/18.

58. In any event, I must make clear that, should the Consiglio di Stato (Council of State) persist with its classification, it will have to establish whether, as a result of its specific features, the effect of that framework agreement is to 'prevent, restrict or distort competition' (Article 32(2) of Directive 2004/18). (19)

59. The premiss is, therefore, that there was an initial framework agreement and that contracting authorities which, although mentioned in that agreement, did not play a direct part in the conclusion of that agreement, are active 'parties' to it. That raises the difficulty of whether Article 1(5) and Article 32 of Directive 2004/18 permit the conclusion of a framework agreement without the signatures of all the contracting authorities which later seek to rely on its provisions.

60. The substance of the second parts of each of the two questions is also the same, in that they relate to the determination of 'the quantity of services that may be required by the non-signatory contracting authorities when they enter into the subsequent contracts envisaged in the framework agreement itself'. Two questions are asked:

– first, whether it is possible under Directive 2004/18 for that quantity not to be determined at all;

– second, whether the quantity can be specified by reference to the 'usual requirements' of the non-signatory contracting authorities.

1. Extension of the contract to a contracting authority which did not sign the framework agreement

61. In accordance with the second subparagraph of Article 32(2) of Directive 2004/18, contracts based on a framework agreement must be awarded in accordance with certain procedures (laid down in paragraphs 3 and 4 of that article) which 'may be applied only between the contracting authorities and the economic operators originally party to the framework agreement.'

62. It could be argued that, grammatically speaking, given its position in the sentence, the adverb 'originally' refers only to economic operators and not to contracting authorities. A number of reasons militate in favour of that interpretation, the most relevant of which is, perhaps, its subsequent confirmation by the corresponding article of Directive 2014/24. (20)

63. In any event, whatever the interpretation of the second subparagraph of Article 32(2) of Directive 2004/18 may be, considered in isolation, I believe that contracting authorities which occupy an *active* position in a framework agreement must also be a *party* to that agreement. By its very nature, a 'framework agreement' is, according to Article 1(5) of Directive 2004/18, an agreement concluded 'between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded'.

64. A separate matter is whether that status can be attributed only to a contracting authority which has played a direct part in the conclusion of the framework agreement or also to a contracting authority which, while not playing 'a direct part in the conclusion' of that agreement, is specifically indicated in it. That is the uncertainty with which the first question is concerned.

65. There is no reason why the status of party to a framework agreement should mean that a party that has that status must have signed the agreement or even have played a direct part in its conclusion. As the Consiglio di Stato (Council of State) points out, (21) the provisions of civil law governing representation and *negotiorum gestio* permit a person (in this case, an ASST) to conclude a binding agreement on behalf of others where those others have entrusted that person with this task or ratify it a posteriori.

66. To my mind, when it refers to 'other contracting authorities which are not … direct parties to the framework agreement', the referring court is not alluding to the signing of the agreement in the sense of formally signing a legal act but rather to the 'conclusion' of an agreement in whose formation they are directly involved and to which they are therefore a *party*.

67. However, the status of party may be acquired without having to sign the framework agreement or even having been directly involved in its conclusion: it will suffice if a party seeking that status has agreed to be bound by the terms and conditions of that agreement. (22)

68. The decisive point is that contracting authorities other than the contracting authority which signed the framework agreement should be identified as 'potential beneficiaries' (23) at the time when the agreement was entered into and were aware of its contents. If the conclusion of the framework agreement is preceded by a collective decision, in which a number of contracting authorities agree to make group purchases of certain goods or services, that prior collective decision can be used as the basis for a framework agreement signed by just one of those authorities on behalf (or with the consent) of them all.

69. There is a relationship of continuity and dependence between a framework agreement in the strict sense and the subsequent contracts concluded on the basis of the terms laid down therein. Those contracts are not concluded *ex novo* or in a vacuum but rather in accordance with the conditions laid down in the framework agreement, which must of necessity comply with the requirements of Directive 2004/18. Being made subject to those requirements is a necessary condition for the lawfulness of the subsequent contracts, in so far as they are compatible with the EU public procurement legislation.

70. The close relationship between a framework agreement and the contracts concluded pursuant to that agreement means that the authorities which award those contracts must be those indicated in the framework agreement, even if they have not signed that agreement themselves. In my view, that is the most appropriate interpretation of the second subparagraph of Article 32(2) of Directive 2004/18.

71. In summary, it is important, therefore, that the framework agreement stipulate, exhaustively, which contracting authorities are entitled to accede to public contracts concluded thereunder. While that stipulation must, in all cases, be clear and precise, there is no reason why it must be included in the text of the

framework agreement itself and, instead, it may be included in one of the clauses of the tender specifications, like the clause in the specifications at issue in the main proceedings.

72. Therefore, I propose that the first question be answered to the effect that Article 1(5) and the second subparagraph of Article 32(2) of Directive 2004/18 do not preclude a framework agreement under which a contracting authority which did not play a direct part in the conclusion of that agreement and was not a signatory to it may accede to contracts based on the agreement, provided that that contracting authority is identified in the framework agreement itself or in a document incorporated into the tender specifications, in accordance with the requirements of Directive 2004/18.

2. The indication of the quantity of services that may be required by contracting authorities which were not signatories to the framework agreement

73. The referring court seeks to ascertain whether it is compatible with Directive 2004/18 for a framework agreement not to state 'the quantity of services' that may be required by the non-signatory contracting authorities when they enter into subsequent contracts based on the framework agreement.

74. Pursuant to Article 1(5) of Directive 2004/18, the terms governing contracts to be awarded during the (limited) term of a framework agreement include those relating 'to price and, where appropriate, the quantity envisaged.'

75. In my view, the use of the phrase 'where appropriate' does not mean that of the 'quantity envisaged' is an optional matter. It is, on the contrary, a mandatory requirement, albeit subject to the degree of precision with which the volume of services can be anticipated in the framework agreement, having regards to the nature of the services with which the subsequent contracts will be concerned.

76. Any other interpretation would suggest that the original terms of the framework agreement are excessively vague as regards one of its most important elements, with a twofold negative effect: first, it would discourage the involvement of potentially interested economic operators who, owing to the lack of a precise definition of the subject matter of the contract, would refrain from participating in the procedure; second, the prohibition on inserting in the contracts awarded 'substantial amendments to the terms laid down in [the] framework agreement' (third subparagraph of Article 32(2) of Directive 2004/18) would be ineffective.

77. Paragraph 6(c) of Annex VII A to Directive 2004/18, to which Article 36(1) of the directive refers, sets out the information to be included in contract notices prior to the award of a framework agreement. In particular, it is necessary to include 'the estimated total value of the services for the entire duration of the framework agreement (24) and, as far as possible, the value and the frequency of the contracts to be awarded'.

78. Therefore, the framework agreement must indicate the total value of all the services required. It must include an estimated value of the subsequent contracts by which the different parts into which all the services required are split will be awarded individually in succession. That, I repeat, is the only way of implementing the principles of transparency and equal treatment of the operators interested in participating in the framework agreement and the contracts *derived* therefrom. If the indication of the (estimated) total quantity of services is not included or the bases for calculating those services are hypothetical, it will be difficult for candidates to assess whether it is worth their while taking part in the tendering procedure. (25)

79. In my submission, the words 'as far as possible' are not intended to provide for an exception to compliance with that obligation. If that obligation were disregarded, it would not be possible to calculate, by aggregation, the total value of the services required for the whole duration of the framework agreement. That expression does, however, allow a certain amount of flexibility when it comes to specifying the number of contracts into which it is foreseeable that the totality of the services covered by the framework agreement will be split; in other words, by anticipating the 'frequency' with which contracts will be awarded, which will depend on the quantity of services with which each contract will be concerned.

80. The Consiglio di Stato (Council of State) also asks whether it is possible to calculate the quantity of services to be provided under subsequent contracts by reference to the 'usual requirements' of the contracting authorities.

81. In my view, which is shared by the Finnish Government and the Commission, there is nothing to preclude the use of that reference, provided that those requirements are defined clearly and precisely in the framework agreement itself or in the relevant tender specifications. The wording used must include terms which are accessible to all potential interested parties.

82. In that connection, 'usual requirements' may be those which can be assumed taking into account the quantities purchased in previous years. However, requirements which, without that historical basis, arise unexpectedly during the term of the framework agreement are not usual requirements. Otherwise, there would be scope for vagueness, which is not compatible with the principles of equal treatment, non-discrimination and transparency laid down in Article 2 of Directive 2004/18.

83. In accordance with those principles, the (mandatory) information about the value of the services must be equally accessible to all economic operators, if not in exact terms then at least approximately. If the value of those services is estimated in relation to the requirements which the contracting authority has had to meet in the past, the information which establishes the (actual and certain) value of those historical requirements must be indicated, together with such updates and corrections as may be necessary (as an estimated value), in the documents incorporated into the framework agreement. Otherwise, I repeat, the 'usual requirements' will actually be a mystery to all economic operators apart from the operator who was awarded previous contracts for the same services.

84. Accordingly, I suggest that Articles 1(5) and 32 of Directive 2004/18 should be interpreted as not precluding the quantity of services that may be required by a contracting authority which did not play a part in the conclusion of a framework agreement and did not sign that agreement but has unquestionably been a party to that agreement from the outset being determined by reference to its usual requirements, provided that these can be ascertained from clear, precise and transparent information concerning requirements which the contracting authority has had to meet in the past.

VI. Conclusion

85. In the light of the foregoing considerations, I propose that the Court reply as follows to the Consiglio di Stato (Council of State, Italy):

> Articles 1(5) and 32 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as:
>
> – not precluding a framework agreement under which a contracting authority which was not a direct party to the conclusion of that agreement and was not a signatory to it may be a party to the public contracts based on that agreement, provided that that contracting authority is identified in the framework agreement itself or in a document incorporated into the tender specifications, as required by Directive 2004/18;
>
> – precluding a situation where the quantity of services that may be required by that contracting authority, when concluding the subsequent contracts provided for in the framework agreement, is not determined in that agreement or cannot be determined unambiguously;
>
> – not precluding the quantity of those services being determined by reference to the contracting authority's usual requirements, provided that the framework agreement provides clear, precise and transparent information concerning the requirements which that contracting authority has had to meet in the past.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

3 GURI No 100 of 2 May 2006.

4 GURI No 299 of 27 December 2006.

5 GURI No 156 of 6 July 2012, now Law No 135 of 7 August 2012 (GURI No 189 of 14 August 2012).

6 The award criterion was the most economically advantageous tender.

7 The clause stated that it was based on the agreement for ‘activating procedures for group purchasing’, in accordance with the principles enshrined in the Lombardy Regional Health and Social Care Plan 2002-2004, ‘which advocate group purchasing arrangements between bodies forming part of the regional health scheme’, and with the corresponding agreements of the Lombardy Regional Council. The clause also referred, without citing them, to subsequent agreements of the Lombardy Regional Council which ‘placed an emphasis on open tendering procedures that provided for subsequent accessions’.

8 The ASST del Garda and the ASST della Valcamonica, among others, were members of the AIPEL Consortium (East Lombardy), which was created as a result of the ‘Accordo interaziendale tra le aziende ospedaliere e le aziende sanitarie locali (AIPEL) [...] per la disciplina delle forme aggregate riguardanti la fornitura di beni e l’appalto di servizi’.

9 The order for reference cites Article 2, undoubtedly in error.

10 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

11 See footnote 9.

12 ‘The term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.’

13 Paragraph 27 of the Order of 20 February 2018, made by the Consiglio di Stato (Council of State) in response to the Court’s question.

14 Ibid., paragraph 28.

15 Ibid.

16 In that connection, see, inter alia, judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraphs 24 and 25); of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraphs 15 and 16); of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 19); of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 54); and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraphs 50 and 155).

17 See, inter alia, judgment of 26 June 2007, *Ordre des barreaux francophones et germanophone and Others* (C-305/05, EU:C:2007:383, paragraph 18).

---

18 The order of 20 February 2018 appears to dismiss that option. However, it will be sufficient if the Court refers in its judgment to the time limit laid down in the fourth subparagraph of Article 32(2) of Directive 2004/18 in order for the Consiglio di Stato (Council of State) to perhaps reconsider its initial reluctance to examine the effect of that factor on the proceedings; clearly, it must do so in accordance with the requirements and procedural guarantees laid down in national law.

---

19 That is the view of the AGCOM, which argues that clause 2.5 of the original contract and the accession to that contract of the ASST della Valcamonica — Sebino infringe the principles of 'fair competition and impartiality', preventing 'transparent competition'.

---

20 In accordance with Article 33(2) of Directive 2014/24, '[c]ontracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this paragraph and in paragraphs 3 and 4. Those procedures may be applied only between those contracting authorities clearly identified for this purpose in the call for competition or the invitation to confirm interest and *those economic operators party to the framework agreement as concluded*' (emphasis added).

---

21 Paragraphs 7 and 8 of the order for reference.

---

22 It is clear that such consent must have been given prior formal expression in some way and that, for that purpose, the signature of those who have consented will, ultimately, be essential. However, there is no reason why they must be signatories of the agreement in which the status of party is acquired; they need only be signatories of the legal act expressing that consent, to which the framework agreement must refer and make an integral part of its contents.

---

23 I am using the expression used by the Commission in paragraph 37 of its written observations.

---

24 The duration of the framework agreement is, therefore, one of the key factors for determining the total value of the services, as an essential element of the call for tenders. That is why, in establishing whether a framework agreement can be said to exist in the instant case, the referring court must take that into account, which may give it grounds for assessing whether there was compliance with the fourth subparagraph of Article 32(2) of Directive 2004/18 or whether the contracting authorities duly explained in the agreement itself the objective reasons for extending the four-year term. It could therefore be argued that, as they had discussed how to determine the quantities required, the parties themselves indirectly raised the issue of the duration of the framework agreement, without which it is not possible to estimate the total value of those quantities.

---

25 That uncertainty increases in circumstances like those in the present case because the extension clause of the framework agreement permits ASSTs, on an optional basis, to decide whether or not to accede, during the term of the agreement, to the original contract; it also allows the original contractor to refuse a subsequent request for accession made by the ASSTs mentioned.

Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

19 April 2018 (*)

(Reference for a preliminary ruling — Procurement procedures of entities operating in the water, energy, transport and postal services sectors — Directive 2004/17/EC — Obligation to review prices after the award of the contract — No such obligation in Directive 2004/17/EC or arising from the general principles underlying Article 56 TFEU and Directive 2004/17/EC — Cleaning and maintenance services linked to railway transport operations — Article 3(3) TEU — Articles 26, 57, 58 and 101 TFEU — Lack of sufficient information concerning the factual context of the dispute in the main proceedings and the reasons justifying the need for a reply to the questions referred — Inadmissibility — Article 16 of the Charter of Fundamental Rights of the European Union — Provision of national law not implementing EU law — Lack of jurisdiction)

In Case C-152/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 24 November 2016, received at the Court on 24 March 2017, in the proceedings

Consorzio Italian Management,

Catania Multiservizi SpA

v

Rete Ferroviaria Italiana SpA

THE COURT (Ninth Chamber),

composed of C. Vajda (Rapporteur), President of the Chamber, E. Juhász and C. Lycourgos, Judges,

Advocate General : M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– Consorzio Italian Management and Catania Multiservizi SpA, by E. Giardino and A. Cariola, avvocati,

– Rete Ferroviaria Italiana SpA, by U. Cossu, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and S. Fiorentino, avvocato dello Stato,

– the Spanish Government, by M.J. García-Valdecasas Dorrego, acting as Agent,

– the European Parliament, by L. Visaggio and R. van de Westelaken, acting as Agents,

– the Council of the European Union, by E. Moro and M. Balta, acting as Agents,

– the European Commission, by G. Gattinara and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(3) TEU, Articles 26, 56 to 58 and 101 TFEU, Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter') and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43) ('Directive 2004/17'), and the assessment of the validity of Directive 2004/17.

2 The request has been made in proceedings between Consorzio Italian Management and Catania multiservizi SpA on the one hand, and Rete Ferroviaria Italiana SpA ('RFI') on the other, concerning the latter's refusal to grant the former's request for a review of the contract price, after the award of a contract for, inter alia, cleaning services at railway stations.

Legal context

EU law

3 Directive 2004/17 coordinates procurement procedures in specific sectors, as referred to in Articles 3 to 7 of that directive, including transport services.

4 Article 10 of Directive 2004/17 which is in Chapter III, entitled 'General principles', of Title I, entitled 'Principles of awarding contracts', provides:

'Contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Under Article 16 of that directive, entitled 'Contract Thresholds':

'Save where they are ruled out by the exclusions in Articles 19 to 26 or pursuant to Article 30, concerning the pursuit of the activity in question, this Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:

(a) EUR 400 000 in the case of supply and service contracts;

...'

6 Article 20 of that directive, under the heading 'Contracts awarded for purposes other than the pursuit of an activity covered or for the pursuit of such an activity in a third country', provides in paragraph 1 thereof:

'This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 …'

7 Article 55 of Directive 2004/17, entitled 'Contract award criteria', provides in paragraph 1 thereof as follows:

'Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall:

(a) where the contract is awarded on the basis of the most economically advantageous tender from the point of view of the contracting entity, be various criteria linked to the subject matter of the

contract in question, such as delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, environmental characteristics, technical merit, after-sales service and technical assistance, commitments with regard to parts, security of supply, and price or otherwise

(b) the lowest price only.'

8 According to Article 94 of the Rules of Procedure of the Court of Justice:

'In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

...

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.'

Italian law

9 Article 2(4) of decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006) ('Legislative Decree No 163/2006') provides:

'In the absence of any express provisions in this Code, the contractual arrangements of the persons referred to in the first article shall also be regulated according to the provisions laid down in the Civil Code.'

10 Under Article 115 of Legislative Decree No 163/2006, entitled 'Price adjustment':

'1. All contracts for the supply of goods or services on an ongoing basis must include a clause providing for periodic review of the price. The revision shall be carried out on the basis of an investigation by the managers responsible for the acquisition of goods and services on the basis of the data referred to in Article 7(4)(c) and (5).'

11 Article 115 of that Legislative Decree was one of the provisions which, under Article 206 thereof, were applicable to public contracts in the special sectors corresponding to those referred to in Articles 3 to 7 of Directive 2004/17.

12 Article 1664 of the Codice Civile (Civil Code), entitled 'Onerous financial burdens or difficulties in performance', provides, in paragraph 1 thereof:

'When, as a result of unforeseeable circumstances, there are increases or decreases in the cost of labour or materials which give rise to an increase or decrease of more than one-tenth of the overall price agreed, the contractor or developer may seek review of that price. The review may be granted only in respect of the difference which exceeds one-tenth.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 RFI awarded the applicants in the main proceedings a contract for the provision of services relating to the cleaning and maintenance of the decoration of the premises and other areas which are open to the public, as well as ancillary services at stations, installations, offices and workshops at various sites throughout the territory covered by the Direzione Compartimentale Movimento de Cagliari (Cagliari

Regional Operations Division, Italy). The contract contained a specific clause laying down the procedures for review of the agreed price, which derogated from Article 1664 of the Civil Code.

14 During the performance of that contract, the applicants in the main proceedings submitted a request to RFI for a review of the previously agreed contract price in order to take account of higher contract costs resulting from an increase in staff costs. By decision of 22 February 2012, RFI refused that request.

15 Following that decision, the applicants in the main proceedings brought proceedings before the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia, Italy) seeking annulment of that decision.

16 By judgment of 11 June 2014, the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia) dismissed the action. That court held that Article 115 of Legislative Decree No 163/2006 was not applicable to contracts relating to special sectors, such as the contract at issue in the main proceedings. That court took the view that the supply of cleaning services at stations, installations, offices and workshops was ancillary to the performance of activities covered by special sectors, in that those services related to elements forming an essential part of the rail transport network. The court added that price review was not mandatory under Article 1664 of the Civil Code, as the parties to a contract may derogate from that provision by inserting in the contract a contract term limiting price review, which was the case in the main proceedings.

17 The applicants in the main proceedings appealed against that judgment before the referring court, claiming, in their first and second pleas, that Article 115 of Legislative Decree No 163/2006 or, in the alternative, Article 1664 of the Civil Code is, contrary to the finding of the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia), applicable to the contract at issue in the main proceedings. In addition, the applicants in the main proceedings have claimed that Articles 115 and 206 of Legislative Decree No 163/2006, in particular, do not comply with EU law, arguing that those provisions, in so far as they seek to exclude price review in the transport sector, particularly in linked contracts for cleaning, are contrary to Article 3(3) TEU, Articles 26 and 101 TFEU et seq. and Directive 2004/17. They contend that the national legislation is excessive and unjustified compared to EU legislation. That legislation is also unjustly disproportionate and likely to place an undertaking that has been awarded a contract for the provision of cleaning services in a position of subordination and weakness, as compared to a public undertaking, which results in a disproportionate and unfair contractual imbalance and ultimately alters the rules governing the functioning of the market. Finally, they submit that if price review may be excluded in all contracts concluded and implemented in the special sectors as a direct result of Directive 2004/17, then that directive is invalid.

18 As regards the first plea in law raised by the applicants in the main proceedings, the referring court has indicated that it intends to reject it, confirming the view taken by the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia) that, since it is functionally linked to special sectors, the contract at issue in the main proceedings is covered by the provisions of Legislative Decree No 163/2006 applicable to those sectors. The referring court states that it also intends to reject the second plea raised by the applicants in the main proceedings, on the grounds that those provisions, which are mandatory in nature, take precedence over Article 1664 of the Civil Code, that the parties in the main proceedings provided a special rule derogating from that article and that the condition relating to ‘unforeseeable circumstances’ referred to in that article was not satisfied in the present case. The referring court nonetheless considers, since it is a court of last instance and the applicants in the main proceedings have made a submission to that effect, that it is its duty to verify the compliance with EU law of, in particular, Article 206 of Legislative Decree No 163/2006, in so far as it precludes the application of Article 115 of that decree not only to contracts in the special sectors but also, as a result of judicial interpretation, service contracts which, even if they are not covered by special sectors, are functionally linked to these sectors. In addition, the referring court considers that it is required, according to the case-law of the Court, to refer the question of the validity of Directive 2004/17 raised by the applicants in the main proceedings.

19 In those circumstances, the Consiglio di Stato (Council of State, Italy) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is an interpretation of national law that excludes price review in contracts relating to 'special sectors', particularly as regards contracts with a different object from those to which the Directive 2004/17 refers, but which are functionally linked to those sectors, compatible with EU law, in particular, Article 3(3) TEU, Articles 26, 56 to 58 and 101 TFEU, and Article 16 of the Charter and Directive 2004/17?;

(2) Is Directive 2004/17 (if it should be considered that price review may be excluded, in all contracts concluded and implemented within 'special sectors' as a direct result of that directive compatible with the principles of the European Union, in particular Articles 3(1) TEU, Articles 26, 56 to 58 and 101 TFEU, and Article 16 of the Charter, 'in the light of the unfairness, disproportionality and distortion of contractual balance and, therefore, of the rules governing an efficient market'?'

Consideration of the questions referred

The first question

20 By its first question, the referring court asks, in essence, whether Article 3(3) TEU, Articles 26, 56 to 58 and 101 TFEU, Article 16 of the Charter and Directive 2004/17 must be interpreted as precluding national rules, such as those at issue in the main proceedings, which do not provide for periodic review of prices after a contract has been awarded in the sectors covered by that directive.

21 As a preliminary point, it should be recalled that, according to the Court's settled case-law, in the context of the cooperation between the Court of Justice and the national courts, the need to provide an interpretation of EU law which will be of use to the national court means that the national court is bound to observe scrupulously the requirements concerning the content of a request for a preliminary ruling, expressly set out in Article 94 of the Rules of Procedure of the Court of Justice of which the national court is presumed to be aware (judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraph 27 and the case-law cited). Moreover, those requirements are set out in the Court's recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2012 C 338, p. 1).

22 Thus, it is essential, as is stated in Article 94(a) and (c) of the Rules of Procedure, that the reference for a preliminary ruling itself contain a summary of the relevant findings of fact, or at least, an account of the facts on which the questions are based, and a statement of the reasons which prompted the national court to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings (see, to that effect, judgment of 26 July 2017, *Persidera*, C-112/16, EU:C:2017:597, paragraphs 28 and 29 and the case-law cited).

23 It should be noted, in that regard, that the order for reference gives no explanation of the relevance of the interpretation of Article 3(3) TEU or Articles 26, 57, 58 and 101 TFEU for the resolution of the dispute in the main proceedings. The same is true of Article 56 TFEU, in so far as it relates to aspects other than those which are examined by the Court in paragraph 32 above.

24 It follows that the first question is, to that extent, inadmissible.

25 First, as regards the interpretation of Directive 2004/17 and of the underlying general principles, the referring court considers that the contract at issue in the main proceedings falls within the scope of that directive, since it was awarded by a contracting authority within the meaning of that directive, namely RFI, and that it is functionally linked to rail transport operations falling within the scope of that directive.

26 In that regard, it follows from the Court's case-law that Directive 2004/17 in fact applies not only to contracts awarded in the sphere of one of the activities expressly listed in Articles 3 to 7 thereof, but

also to contracts which, even though they are different in nature and could as such normally fall within the scope of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), are used in the exercise of activities defined in Directive 2004/17. Consequently, where a contract awarded by a contracting entity is connected with an activity which that entity carries out in the sectors listed in Articles 3 to 7 of that directive, that contract is subject to the procedures laid down in that directive (see, to that effect, judgment of 10 April 2008, *Ing Aigner*, C-393/06, EU:C:2008:213, paragraphs 56 to 59).

27 Moreover, although the order for reference does not contain any evidence on the value of the contract at issue in the main proceedings, it is apparent from the documents in the file before the Court that that value exceeds the relevant threshold for the application of that directive, set at EUR 400 000 under Article 16 (a) thereof.

28 Directive 2004/17 is therefore relevant for the purposes of the answer to be given to the first question.

29 In this respect, it should be noted that it is not apparent from any provision of that directive that it must be interpreted as precluding rules of national law, such as Article 115, in conjunction with Article 206, of Legislative Decree No 163/2006, which do not provide for periodic review of prices after contracts are awarded in the sectors covered by the directive, since the latter does not impose any specific obligation on Member States to lay down provisions requiring the contracting entity to grant its contractual partner an upwards review of the price after the contract has been awarded.

30 Similarly, the general principles underlying Directive 2004/17, in particular the principle of equal treatment and the consequent obligation of transparency enshrined in Article 10 of that directive do not preclude such rules either. On the contrary, it cannot be ruled out that a price review after the contract has been awarded may run counter to that principle and that obligation (see, by analogy, judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 40). Indeed, as the Commission points out in its written observations, the contract price is an element of great importance in the assessment of tenders by a contracting entity, as well as in its decision to award the contract to an operator. This is also clear from the reference to the price in both of the criteria for the award of contracts mentioned in Article 55(1) of Directive 2004/17. In those circumstances, rules of national law which do not provide for periodic price review after the award of contracts in the sectors covered by that directive are, in fact, likely to encourage compliance with those principles.

31 It follows from those considerations that Directive 2004/17 and the general principles that underlie it are to be interpreted as not precluding national rules, such as those at issue in the main proceedings, which do not provide for periodic price review after a contract has been awarded in the sectors covered by that directive.

32 Secondly, as regards the interpretation of Article 56 TFEU, it should be noted that that article enshrines, with regard to freedom to provide services, the principles of equal treatment and non-discrimination and the obligation of transparency, with which the compatibility of national rules such as those at issue in the main proceedings has already been examined in paragraph 30 above. Therefore, there is no need to give an interpretation again, in that regard, of that article.

33 Thirdly, as regards the interpretation of Article 16 of the Charter, it must be recalled that, under Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing EU law. Under Article 51(2) of the Charter, the Charter does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret EU law, in the light of the Charter, within the limits of the powers conferred on it (see judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 32 and the case-law cited).

34 In that regard, it should be borne in mind that the concept of ‘implementing Union law’ within the meaning of Article 51 of the Charter presupposes a degree of connection between the measure of EU law and the national measure at issue. In particular, the Court has ruled that fundamental European Union rights could not be applied in relation to national legislation because the provisions of EU law in the area concerned did not impose any specific obligation on Member States with regard to the

situation at issue in the main proceedings (see judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraphs 34 and 35 and the case-law cited).

35 In the present case, since it is apparent from paragraphs 29 and 30 above that neither Directive 2004/17 nor its underlying general principles impose on Member States a specific obligation to lay down provisions requiring the contracting entity to grant its contractual partner an upwards price review after the award of a contract, the provisions of Legislative Decree No 163/2006 at issue in the main proceedings, in so far as they do not provide for periodic price review within the sectors covered by that directive, do not have any connection with that directive and cannot, therefore, be regarded as implementing EU law.

36 In the light of the foregoing considerations, the answer to the first question is that Directive 2004/17 and the general principles underlying that directive are to be interpreted as not precluding national rules such as those at issue in the main proceedings, which do not provide for periodic price review after a contract has been awarded in the sectors covered by that directive.

The second question

37 It is apparent from the case-law of the Court that where it is quite obvious that the interpretation of a provision of EU law or the assessment of its validity, which is sought by the national court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical, the Court may reject as inadmissible a request made by that national court (see, to that effect, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 50 and the case-law cited).

38 In this respect, it should be noted that the second question, by which the referring court questions the validity of Directive 2004/17, is based on the premiss that the provisions of Legislative Decree No 163/2006 at issue in the main proceedings, in so far as they do not provide for periodic price review within the sectors covered by that directive, constitute an implementation of the directive.

39 However, since it is clear from the examination of the first question that neither Directive 2004/17 nor the general principles underlying it preclude national rules, such as those at issue in the main proceedings, which do not provide for periodic price review after a contract has been awarded in the sectors covered by this directive, that question is a hypothetical one.

40 In those circumstances, it must be held that the second question is inadmissible.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011, and the general principles underlying that directive are to be interpreted as not precluding national rules, such as those at issue in the main proceedings, which do not provide for periodic price review after a contract has been awarded in the sectors covered by that directive.

[Signatures]

---

* Language of the case: Italian.

JUDGMENT OF THE COURT (Sixth Chamber)

8 February 2018 (*)

(Reference for a preliminary ruling — Public procurement — Articles 49 and 56 TFEU — Directive 2004/18/EC — Reasons for exclusion from a tendering procedure — Insurance services — Participation of several Lloyd's of London syndicates in the same tendering procedure — Signature of tenders by the Lloyd's of London General Representative for the country concerned — Principles of transparency, equal treatment and non-discrimination — Proportionality)

In Case C-144/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Calabria (Regional Administrative Court, Calabria, Italy), made by decision of 22 February 2017, received at the Court on 22 March 2017, in the proceedings

Lloyd's of London

v

Agenzia Regionale per la Protezione dell'Ambiente della Calabria,

THE COURT (Sixth Chamber),

composed of C.G. Fernlund, President of the Chamber, J.-C. Bonichot and E. Regan (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Lloyd's of London, by R. Villata, A. Degli Esposti and P. Biavati, avvocati,

– Agenzia Regionale per la Protezione dell'Ambiente della Calabria, by V. Zicaro, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by E. De Bonis, avvocato dello Stato,

– the European Commission, by N. Khan, G. Gattinara and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principles of transparency, equal treatment and non-discrimination which derive from Articles 49 and 56 TFEU and are referred to in Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between Lloyd's of London ('Lloyd's') and the Agenzia Regionale per la Protezione dell'Ambiente della Calabria (Calabria Regional Environmental Protection Agency, Italy) ('Arpacal'), concerning the decision of the latter to exclude two syndicates of Lloyd's from the procedure for the award of a public service contract for insurance.

Legal context

European Union law

Directive 2004/18

3 As stated in recital 46 of Directive 2004/18:

'Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. …'

4 Article 2 of that directive provided:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Article 45 of the directive specified the reasons for excluding an economic operator from participation in a tendering procedure.

6 Directive 2004/18 was repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ 2014 L 94, p. 65). Under Article 90(1) of Directive 2014/24, the Member States were to bring into force the measures necessary to comply with that directive by 18 April 2016 at the latest. Pursuant to Article 91 of that directive, the repeal of Directive 2004/18 took effect on the same date.

Directive 2009/138/EC

7 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, p. 1), provides, in Article 145(2), entitled 'Conditions for branch establishment', as follows:

'Member States shall require every insurance undertaking that proposes to establish a branch within the territory of another Member State to provide the following information when effecting the notification provided for in paragraph 1:

…

(c) the name of a person who possesses sufficient powers to bind, in relation to third parties, the insurance undertaking or, in the case of Lloyd's, the underwriters concerned and to represent it or them in relations with the authorities and courts of the host Member State (the authorised agent);

…

With regard to Lloyd's, in the event of any litigation in the host Member State arising out of underwritten commitments, the insured persons shall not be treated less favourably than if the litigation had been brought against businesses of a conventional type.'

8 Annex III to Directive 2009/138, entitled 'Legal Forms of Undertakings', contains, in each of its parts A to C on the forms of life insurance, non-life insurance and reinsurance undertakings, a point 27 which mentions, with regard to the United Kingdom, the association of underwriters known as Lloyd's.

Italian law

9 The Decreto Legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 — Code on public works contracts, public service contracts and public supply contracts implementing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006), as amended by Decree-Law No 135 of 25 September 2009 (GURI No 223 of 25 September 2009), converted into law by Law No 166 of 20 November 2009 (GURI No 274 of 24 November 2009) ('Legislative Decree No 163/2006'), governed, in their entirety, the procedures in Italy for the award of public works contracts, public service contracts and public supply contracts.

10 Article 38(1)(m), quater, of that legislative decree provided that tenderers which '… are, in relation to another participant in the same tendering procedure, in a situation of control for the purposes of Article 2359 of the Codice civile (Civil Code), or in any relationship, including a de facto relationship, where the situation of control or relationship means that the tenders are attributable to a single decision-making centre' would be excluded from participation in a procedure for the award of concessions and of public works, supply and service contracts, and could not conclude contracts pertaining thereto or sub-contracts.

11 As regards, in particular, the declarations that candidates or tenderers must submit, Article 38(2) of Legislative Decree No 163/2006 provided:

'For the purposes of paragraph (1)(m), quater, the tenderer shall attach one of the following declarations:

(a) a declaration that it is not in a situation of control for the purposes of Article 2359 of the Civil Code in relation to any person, and that it is submitting the tender independently;

(b) a declaration that it is not aware of the participation in the procedure of persons that are, in relation to the tenderer, in any of the situations of control referred to in Article 2359 of the Civil Code, and that it is submitting the tender independently; or

(c) a declaration that it is not aware of the participation in the procedure of persons that are, in relation to the tenderer, in any of the situations of control referred to in Article 2359 of the Civil Code, and that it is submitting the tender independently.

In the situations described in points (a), (b) and (c), the contracting authority shall exclude those tenderers in respect of which it establishes that the tenders are attributable to a single decision-making centre, on the basis of unambiguous evidence. Verification shall take place and any tenders be excluded after the opening of the envelopes containing the financial bid.'

The dispute in the main proceedings and the question referred for a preliminary ruling

12 On 13 August 2015, Arpacal launched an open tendering procedure for the award of a contract for insurance cover services, with a view to covering risk linked to the agency's civil liability towards third parties and workers for the period covering the years 2016 to 2018. The contract was to be awarded on the basis of the most economically advantageous tender (MEAT) criterion.

13 Amongst others, two Lloyd's syndicates, Arch and Tokio Marine Kiln, participated in the call for tenders. The tenders were both signed by the Special Agent of Lloyd's General Representative for Italy.

14 By decisions of 29 September 2015 and 1 October 2016, Arpacal excluded those two syndicates from the procedure, on the ground of infringement of Article 38(1)(m), quater, of Legislative Decree No 163/2006.

15 Seised by Lloyd's through its General Representative for Italy, the referring court, the Tribunale amministrativo regionale per la Calabria (Regional Administrative Court, Calabria, Italy), censured each of those two decisions by judgments, respectively, of 19 January and 21 November 2016 and ordered, at the end of each judgment, that the two syndicates be readmitted to the tendering procedure.

16 By two decisions adopted on 14 December 2016, Arpacal again excluded the two syndicates from the procedure for infringement of Article 38(1)(m), quater, of Legislative Decree No 163/2006 on the ground that the tenders were objectively attributable to a single decision-making centre, since the technical and economic tenders had been submitted, drafted and signed by one and the same person, namely the Special Agent of Lloyd's General Representative for Italy (hereinafter 'the decisions at issue').

17 Still through its General Representative for Italy, Lloyd's brought fresh proceedings against the decisions at issue before the referring court. In support of those proceedings, Lloyd's submitted that it is a 'collective legal person with multiple structures', forming a recognised grouping of natural and legal persons (the members) who act independently within individual groups, called syndicates, which operate independently from one another and in competition with one another whilst belonging to the same organisation. It argued that none of the internal structures has autonomous legal personality but acts through the General Representative who, for each country, is the sole representative for all syndicates operating in that territory.

18 Arpacal argued, for its part, that several factors suggest that both tenders are attributable to a single decision-making centre, namely the use of identical forms, the single signature of the same person as the Special Agent of the General Representative for Italy, the fact that the official stamps on both financial tenders bear consecutive numbers and the fact that the statements and declarations are identical. This, it was claimed, resulted in infringement of the principles of the confidentiality of tenders, fair and free competition, and equal treatment of tenderers.

19 The referring court observes that, according to national case-law, where several syndicates of Lloyd's participate in the same call for tenders, the fact that the applications to participate in the tender and the financial tenders of those syndicates are signed by Lloyd's General Representative for Italy entails no infringement either of Article 38(1)(m), quater, and (2) of Legislative Decree No 163/2006, or of the principles of competition, independence and the confidentiality of tenders. That case-law has, in this regard, highlighted the particular structure of Lloyd's which, in accordance with United Kingdom rules and regulations, operates in different countries through a single General Representative. Likewise, in its Opinion No 110 of 9 April 2008, the Autorità di Vigilanza sui Contratti Pubblici (Supervisory Authority for Public Contracts, Italy), which has since become the Autorità Nazionale Anticorruzione (National Anti-Corruption Agency, Italy), stated that the independence of syndicates and competition between them serve to ensure free competition and the equal treatment of candidates.

20 The referring court is uncertain, however, as to whether the Italian legislation at issue, as interpreted by national case-law, complies with EU law. Admittedly, Directive 2009/138 recognises Lloyd's as a particular form of insurance undertaking, the members of which are authorised to operate within the European Union through the intermediary of a single General Representative for the Member State concerned. However, even if the syndicates of Lloyd's operate independently of one another and in competition with one another, the fact remains that tendering procedures are governed by mandatory rules intended to ensure observance of equal treatment. It is certain that, when Lloyd's General Representative signs tenders submitted by syndicates, he is aware of their content. Consequently, the fact that the same person signs several tenders submitted by different tenderers may undermine the independence and confidentiality of those tenders and, as a result, infringe the principle of competition laid down, in particular, in Articles 101 and 102 TFEU.

21 In those circumstances, the Tribunale amministrativo regionale per la Calabria (Regional Administrative Court, Calabria) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do the principles laid down by EU competition rules, as set out in the FEU Treaty, and the principles deriving therefrom, such as the independence and confidentiality of tenders, preclude national legislation, as interpreted by case-law, which allows the simultaneous participation, in the same tendering procedure launched by a contracting authority, of several syndicates of Lloyd's of London, whose tenders are signed by a single person, namely the General Representative for the Member State concerned?'

Consideration of the question referred

22 It should be noted that, in the procedure established by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it (see, in particular, judgment of 11 March 2008, *Jager*, C-420/06, EU:C:2008:152, paragraph 46).

23 In this case, the main proceedings concern a public service contract for insurance, in respect of which it is not specified whether the value reaches the threshold set by Directive 2004/18. It should be noted, however, that the award of contracts which, in view of their value, do not fall within the scope of that directive is nonetheless subject to the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts have certain cross-border interest in the light of certain objective criteria (judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 16).

24 Consequently, it must be considered that, by its question, the referring court is asking, in essence, whether the principles of transparency, equal treatment and non-discrimination, which derive from Articles 49 and 56 TFEU and are referred to in Article 2 of Directive 2004/18, must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow two syndicates of Lloyd's to be excluded from participation in the same procedure for the award of a public service contract for insurance merely because their tenders were each signed by Lloyd's General Representative for that Member State.

25 In this regard, it should be stated at the outset that, while Directive 2004/18 was repealed by Directive 2014/24 with effect from 18 April 2016, it is apparent from settled case-law of the Court that the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, inter alia, judgment of 14 September 2017, *Casertana Costruzioni*, C-223/16, EU:C:2017:685, paragraph 21).

26 The tendering procedure at issue in the main proceedings was launched on 13 August 2015, whereas Directive 2014/24 was adopted on 26 February 2014 and, in any event, the time period for its transposition expired on 18 April 2016. Consequently, Directive 2004/18 is applicable *ratione temporis* to the main proceedings.

27 It is common ground between all interested persons having submitted written observations that Lloyd's is a recognised grouping of members that are natural and legal persons, which members, whilst acting through individual groups — the syndicates — operate independently from one another and in competition with one another. However, given that none of the internal structures has autonomous legal personality, syndicates may only act through the General Representative, who is the sole representative for each country. Lloyd's also stated that these syndicates constitute neither a fixed structure nor a stable association of members but rather a grouping of members, the composition of which may vary, and that they each operate through a specific management body which issues decisions that are binding on them, although they do not have their own legal personality.

28 It is apparent from the order for reference that although, according to the actual wording of the question referred for a preliminary ruling, the national legislation at issue in the main proceedings allows two syndicates of Lloyd's to participate in the same tendering procedure relating to insurance, even when their tenders have each been signed by Lloyd's General Representative for Italy, the main proceedings follow the adoption of several decisions, including the decisions at issue, whereby Arpacal excluded those two syndicates from the procedure on the ground, specifically, that as their tenders had each been signed by the Special Agent of that Representative, the latter must have been aware of the content of those tenders.

29 In this regard, it must be noted that Article 45 of Directive 2004/18, which specifies the grounds for the exclusion of an economic operator from participation in a tendering procedure, does not provide for

a ground for exclusion such as that at issue in the main proceedings, which is intended to prevent any risk of collusion between entities that are members of the same organisation. The grounds for exclusion provided for in that provision relate only to the professional qualities of the persons concerned (see, to that effect, judgment of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraphs 42 and 43).

30 However, it is clear from the case-law of the Court that Article 45 of Directive 2004/18 does not preclude the option for Member States to maintain or establish, in addition to those grounds for exclusion, substantive rules intended, in particular, to ensure, with regard to public procurement, observance of the principles of equal treatment of all tenderers and of transparency, which constitute the basis of the EU directives on public procurement procedures, provided that the principle of proportionality is observed (judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 21).

31 It is clear that national legislation such as that at issue in the main proceedings, which is intended to prevent any potential collusion between participants in the same procedure for the award of a public contract, seeks to safeguard the equal treatment of candidates and the transparency of the procedure (see, by analogy, judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 22).

32 In accordance with the principle of proportionality, which constitutes a general principle of EU law, such legislation must not go beyond what is necessary to achieve the intended objective (see, to that effect, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraphs 23 and 24; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 33; and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 29).

33 It should be recalled, in this connection, that the EU rules on public procurement were adopted in pursuance of the establishment of a single market, the purpose of which is to ensure freedom of movement and eliminate restrictions on competition (see, to that effect, judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 25).

34 In that context, it is the concern of EU law to ensure the widest possible participation by tenderers in a call for tenders (see, to that effect, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 26; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 40; and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 36).

35 It thus follows, according to settled case-law of the Court, that the automatic exclusion of candidates or tenderers that are in a relationship of control or of association with other competitors goes beyond that which is necessary to prevent collusive behaviour and, as a result, to ensure the application of the principle of equal treatment and compliance with the obligation of transparency (see, to that effect, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 28; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 38 and 40; and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraphs 36 and 38).

36 Such an automatic exclusion constitutes an irrebuttable presumption of mutual interference in the respective tenders, for the same contract, of undertakings linked by a relationship of control or of association. Accordingly, it precludes the possibility for those candidates or tenderers of showing that their tenders are independent and is therefore contrary to the EU interest in ensuring the widest possible participation by tenderers in a call for tenders (see, to that effect, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraphs 29 and 30; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 39 and 40; and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 36).

37 It should be pointed out in this regard that the Court has already held that groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts. Relationships between undertakings in the same group may in fact be governed by specific provisions such as to guarantee both independence and confidentiality in the drawing-up of tenders which may be submitted

simultaneously by the undertakings in question in the same tendering procedure (judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 31).

38 Observance of the principle of proportionality therefore requires that the contracting authority be required to examine and assess the facts, in order to determine whether the relationship between two entities has actually influenced the respective content of the tenders submitted in the same tendering procedure, a finding of such influence, in any form, being sufficient for those undertakings to be excluded from the procedure (see, to that effect, judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 32).

39 As a result, in this case, the mere fact that tenders such as those in the main proceedings have been signed by the same person, namely the Special Agent of Lloyd's General Representative for Italy, cannot justify their automatic exclusion from the tendering procedure at issue.

40 The distinction made in that regard by Arpacal in its written observations, dependent on whether the signature relates to the candidates' applications to participate in the tender procedures or to the financial tenders themselves, is irrelevant. In any event, such a signature, even assuming that it involves the Special Agent and/or Lloyd's General Representative being aware of the content of the tenders, does not prove *per se* that the syndicates consulted one another as to the content of their respective tenders and that, as a result, the relationships between them, together with the involvement of the Special Agent for Lloyd's General Representative, actually influenced those tenders. The same applies to the other factors raised by Arpacal, at paragraph 18 of the present judgment.

41 In taking as their sole basis for excluding the syndicates the fact that the tenders were signed by the Special Agent of Lloyd's General Representative for Italy, the decisions at issue thus presumed there to be collusion, without the syndicates having the possibility of proving that their respective tenders had been drawn up wholly independently of one another.

42 In that regard, it is clear from Directive 2009/138, and in particular from Article 145(2)(c), that the EU law applicable to insurance activities expressly allows Lloyd's to be represented with regard to third parties by a single General Representative for each Member State, in such a way that Lloyd's may exercise its insurance activities in Member States only through the competent General Representative, including in the case of participation in calls for tenders concerning the award of public service contracts for insurance, in the context of which tenders submitted by syndicates must be signed and submitted by the General Representative.

43 In its written observations, Lloyd's stated in this regard, which is a matter to be determined by the referring court, that the General Representative for the Member State concerned confines himself, in accordance with Lloyd's internal procedures, to transmitting on headed paper, without participating in the decision-making process of each syndicate, the content of the model response to a call for tenders and standard forms completed and approved by each syndicate, which, it is argued, guarantees that each syndicate operates in complete autonomy in relation to other syndicates through its own management bodies.

44 In those circumstances, EU law precludes the automatic exclusion of the syndicates of Lloyd's from the call for tenders at issue in the main proceedings merely because their respective tenders were signed by the Special Agent of Lloyd's General Representative for Italy. However, the referring court must be satisfied that the tenders in question were submitted independently by each syndicate.

45 Nevertheless, it must be noted, as the European Commission has submitted in its written observations, that the national legislation at issue in the main proceedings does not appear to allow such an automatic exclusion, but nonetheless allows the contracting authority to exclude tenderers where it finds, on the basis of unambiguous evidence, that their tenders were not drawn up independently, which is a matter that falls to be determined by the referring court.

46 Consequently, the answer to the question referred is that the principles of transparency, equal treatment and non-discrimination which derive from Articles 49 and 56 TFEU and are referred to in Article 2 of Directive 2004/18 must be interpreted as meaning that they do not preclude legislation of a Member State, such as that at issue in the main proceedings, which does not allow two syndicates of Lloyd's of

London to be excluded from participation in the same procedure for the award of a public service contract for insurance merely because their respective tenders were each signed by the General Representative of Lloyd's of London for that Member State but instead allows their exclusion if it appears, on the basis of unambiguous evidence, that their tenders were not drawn up independently.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

The principles of transparency, equal treatment and non-discrimination which derive from Articles 49 and 56 TFEU and are referred to in Article 2 of Directive 2004/18/EC of the Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that they do not preclude legislation of a Member State, such as that at issue in the main proceedings, which does not allow two syndicates of Lloyd's of London to be excluded from participation in the same procedure for the award of a public service contract for insurance merely because their respective tenders were each signed by the General Representative of Lloyd's of London for that Member State, but instead allows their exclusion if it appears, on the basis of unambiguous evidence, that their tenders were not drawn up independently.

[Signatures]

---

* Language of the case: Italian.

EU:C:2018:855

JUDGMENT OF THE COURT (Fourth Chamber)

24 October 2018 (*)

(Reference for a preliminary ruling — Directive 2014/24/EU — Article 57 — Directive 2014/25/EU — Article 80 — Public procurement — Procedure — Exclusion grounds — Maximum duration of the exclusion period — Obligation for the economic operator to collaborate with the contracting authority in order to demonstrate its reliability)

In Case C-124/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria, Germany), made by decision of 7 March 2017, received at the Court on 10 March 2017, in the proceedings

Vossloh Laeis GmbH

v

Stadtwerke München GmbH,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe, C. Lycourgos, E. Juhász (Rapporteur) and C. Vajda, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 21 February 2018,

after considering the observations submitted on behalf of:

– Vossloh Laeis GmbH, by K. Fischer and H.-J. Hellmann, Rechtsanwälte,

– Stadtwerke München GmbH, by H. Kern and M. Winstel, Rechtsanwälte,

– the German Government, by T. Henze and D. Klebs, acting as Agents,

– the Greek Government, by M. Tassopoulou, A. Magrippi, D. Tsagaraki and K. Georgiadis, acting as Agents,

– the Hungarian Government, by M.Z. Fehér, G. Koós and E. Sebestyén, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by A.C. Becker and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 80 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), read in conjunction with Article 57(4), (6) and (7) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Vossloh Laeis GmbH and Stadtwerke München GmbH concerning the former's exclusion from the qualification system put in place by the latter company, in connection with the award of public procurement contracts in the field of the provision of railway material.

Legal context

European Union law

Directive 2014/24

3 Recital 102 of Directive 2014/24 states:

'(102) Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.'

4 Article 57 of Directive 2014/24, headed 'Exclusion grounds', provides:

'1. Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

…

2. An economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.

Furthermore, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure an economic operator where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions

due, including, where applicable, any interest accrued or fines.

…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

(a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);

(b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations;

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

(e) where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures;

(f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 41, cannot be remedied by other, less intrusive measures;

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or

(i) where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Notwithstanding point (b) of the first subparagraph, Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator which is in one of the situations referred to in that point, where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business in the case of the situations referred to in point (b).

…

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.’

Directive 2014/25

5 Article 77 of Directive 2014/25, which is headed ‘Qualification systems’, provides:

‘1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

2. The system under paragraph 1 may involve different qualification stages.

Contracting entities shall establish objective rules and criteria for the exclusion and selection of economic operators requesting qualification and objective criteria and rules for the operation of the qualification system, covering matters such as inscription in the system, periodic updating of the qualifications, if any, and the duration of the system.

Where those criteria and rules include technical specifications, Articles 60 to 62 shall apply. The criteria and rules may be updated as required.

…’

6 Article 80 of Directive 2014/25, entitled ‘Use of exclusion grounds and selection criteria provided for under Directive 2014/24/EU’, provides:

‘1. The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships may include the exclusion grounds listed in Article 57 of Directive 2014/24/EU on the terms and conditions set out therein.

Where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 57(1) and (2) of Directive 2014/24/EU on the terms and conditions set out in that Article.

If so required by Member States, those criteria and rules shall, in addition, include the exclusion grounds listed in Article 57(4) of Directive 2014/24/EU on the terms and conditions set out in that Article.

…

3. For the purpose of applying paragraphs 1 and 2 of this Article, Articles 59 to 61 of Directive 2014/24/EU shall apply.'

German law

7 Directive 2014/24 was transposed into German law by the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition, 'the GWB').

8 Paragraph 124 of the GWB provides:

'(1) Contracting authorities may, acting with due regard for the principle of proportionality, exclude an undertaking from participation in a public procurement procedure at any time during that procedure where:

…

3. the undertaking has, in the course of business, demonstrably engaged in serious misconduct calling into question the undertaking's integrity; Paragraph 123(3) shall apply by analogy,

4. the contracting authority has sufficient indications to support the conclusion that the undertaking has concluded with other undertakings agreements or arrangements having the object or effect of impeding, restricting or distorting competition.

…'

9 Paragraph 125 of the GWB states:

'(1) Contracting authorities shall not exclude from the procurement procedure an undertaking caught by a ground for exclusion provided for in Paragraph 123 or Paragraph 124 where that undertaking has proved that it:

1. has paid or undertaken to pay compensation for damage caused by an act constituting a criminal offence or misconduct;

2. has comprehensively clarified the facts and circumstances by actively cooperating with the investigating authorities and the contracting authority; and

3. has adopted specific technical, organisational and personnel measures to prevent further criminal offences or further misconduct.

…'

10 Paragraph 126 of the GWB is worded as follows:

'Where an undertaking caught by a ground for exclusion has adopted no or insufficient measures to reform itself in the manner laid down in Paragraph 125, it may:

1. if caught by a ground for exclusion provided for in Paragraph 123, be excluded from participation in procurement procedures for no more than five years from the date of the conviction by final judgment;

2. if caught by a ground for exclusion provided for in Paragraph 124, be excluded from participation in procurement procedures for no more than three years from the relevant event.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 The dispute in the main proceedings is between Vossloh Laeis and Stadtwerke München, as the contracting authority, regarding the exclusion of that company from the qualification system, within the meaning of Article 77 of Directive 2014/25, put in place in the course of 2011 by that contracting authority in connection with the award of public procurement contracts in the field of the provision of railway material. Having been extended several times, the latest being on 22 December 2015, that qualification system expired at the end of 2016.

12 Vossloh Laeis manufactures railway material, particularly rails and other steel construction material, necessary for railway installations. In March 2016, the Bundeskartellamt (Federal Cartel Office, Germany) imposed on it a fine for having participated, until 2011, in agreements falling within the law on cartels, which concerned switches (‘the rail cartel’), while at the same time applying to it a leniency rule to take account of the cooperation which it had displayed in order to help that office to clarify its collusive conduct. Stadtwerke München, which is a body that is likely to have suffered harm because of the rail cartel, brought a civil action for damages against Vossloh Laeis.

13 Following the submission of a tender by Vossloh Laeis in connection with another tendering procedure, Stadtwerke München expressed, by letter of 15 June 2016, doubts about the reliability of that tendering undertaking, based on its participation in the rail cartel. In response to that letter, Vossloh Laeis set out, on 16 June 2016, the organisational and personnel ‘measures to reform itself’ which it had taken in order to prevent the repetition of unlawful cartels and unfair competitive conduct. Moreover, Vossloh Laeis expressed its willingness to make good the damage caused to Stadtwerke München owing to its unlawful conduct.

14 However, Vossloh Laeis refused to forward to Stadtwerke München the decision of the Federal Cartel Office imposing on it a fine, which it had been asked to disclose by that contracting authority, so that it could examine it and, by that collaboration, clarify the infringement of antitrust law by that company. In that regard, Vossloh Laeis asserted that, in its view, collaboration with the Federal Cartel Office was sufficient for the purposes of voluntary remediation.

15 Considering that the explanations provided by Vossloh Laeis did not establish that that undertaking had taken sufficient measures, for the purpose of Paragraph 125 of the GWB, Stadtwerke München informed Vossloh Laeis, on 4 November 2016, that it was permanently excluded with immediate effect from the qualification procedure concerned, pursuant to points 3 and 4 of Paragraph 124(1) of the GWB.

16 On 17 November 2016, Vossloh Laeis brought an action against the decision pronouncing that exclusion before the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria, Germany). It takes the view that the contracting authority erroneously interpreted points 1 and 2 of Paragraph 125(1) of the GWB and that it did not state sufficient reasons for that decision, based on the fact that Article 57(6) of Directive 2014/24 requires only collaboration with the investigating authorities and not with the contracting authority. Moreover, according to point 2 of Paragraph 126 of the GWB, exclusion from the public procurement procedure is possible only in the three years following the facts which constitute a ground for exclusion. However, in this case, those facts occurred more than three years before that exclusion.

17 In those circumstances, the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is legislation of a Member State that makes successful voluntary remedial measures (Selbstreinigung) by an economic operator subject to the condition that it clarifies the facts and circumstances relating to the criminal offence or the misconduct and the damage caused by it in a comprehensive manner by actively cooperating not only with the investigating authorities, but also with the contracting authority, compatible with the provisions of Article 80 of Directive [2014/25] in conjunction with the second subparagraph of Article 57(6) of Directive [2014/24]?

(2) If Question (1) is answered in the negative: Must the second subparagraph of Article 57(6) of Directive [2014/24] be interpreted, in that context, as meaning that the relevant economic operator is, for there to be successful voluntary remedial measures, in any event required to clarify the facts for the contracting authority to such an extent that the latter may assess whether the measures taken (technical, organisational and personnel measures and compensation for damage) are appropriate and sufficient?

(3) For the optional grounds for exclusion laid down in Article 57(4) of Directive [2014/24], the maximum period or time limit of exclusion is, pursuant to Article 57(7) of Directive [2014/24], three years from the date of the relevant event. Is the fulfilment of the optional grounds for exclusion laid down in Article 57(4) of Directive [2014/24] to be understood as the relevant event or is the relevant date that on which the contracting entity has certain and reliable knowledge of the existence of the ground for exclusion?

(4) Accordingly, for the fulfilment of the conditions for exclusion under Article 57(4)(d) of Directive [2014/24] through participation of an economic operator in a cartel, is the relevant event within the meaning of Article 57(7) of Directive [2014/24] the termination of participation in the cartel or the contracting entity's acquisition of certain and reliable knowledge of the participation in the cartel?'

The first and second questions

18 By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 80 of Directive 2014/25, read in conjunction with Article 57(6) of Directive 2014/24, must be interpreted as precluding a provision of national law which requires an economic operator wishing to demonstrate its reliability despite the existence of a relevant ground for exclusion to clarify the facts and circumstances relating to the criminal offence or the misconduct in a comprehensive manner by actively cooperating not only with the investigating authority, but also with the contracting authority, in order to provide it with proof of the re-establishment of its reliability.

19 Article 57 of Directive 2014/24, to which Article 80 of Directive 2014/25 refers, imposes or gives the contracting authority the power to exclude an economic operator from participation in a public procurement procedure in the event that there is one of the exclusion grounds listed in paragraphs 1, 2 and 4 of that article.

20 According to the wording of the second subparagraph of Article 57(6) of Directive 2014/24, an economic operator wishing to establish its reliability despite the existence of a relevant ground for exclusion referred to in paragraphs 1 and 4 of that article is to prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

21 So far as concerns the context of that provision, it should, in the first place, be observed that, according to the first subparagraph of Article 57(6) of Directive 2014/24, if the evidence submitted by the economic operator is considered as sufficient in the light of the relevant rules of national law for that purpose, the economic operator is not to be excluded from the procurement procedure. By contrast, pursuant to the third subparagraph of Article 57(6) of that directive, where the measures taken are considered to be insufficient, the economic operator is to receive a statement of the reasons for that decision.

22 In the second place, it is apparent from recital 102 of Directive 2014/24 that, where an economic operator has adopted compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour, offering sufficient guarantees, that operator should no longer be excluded on that ground alone. According to that recital, economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. In addition, that recital states that it is for the Member States to determine the exact procedural and substantive conditions

applicable in such cases and that they should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.

23 Evidence that measures referred to in the second subparagraph of Article 57(6) of Directive 2014/24 have been adopted, including, in particular, collaboration with the investigating authorities, must therefore be adduced, on the basis of the national regulations, in the context of the relationship with the same contracting authority which decides on the exclusion under Article 57 of that directive. Thus, where the Member States authorise the contracting authority to carry out the relevant evaluations, it is for the contracting authority to assess not only whether there exists a ground for exclusion of an economic operator, but also whether, as the case may be, that economic operator has actually re-established its reliability.

24 In order to verify the existence of certain grounds for exclusion, the contracting authorities may, in given circumstances, be led to carrying out searches and verifications. Thus, pursuant to Article 57(4)(a) of Directive 2014/24, a contracting authority can demonstrate ‘by any appropriate means’ that an economic operator has failed to fulfil its obligations applicable in the fields of environmental, social and labour law, established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions. Likewise, according to Article 57(4)(c) of Directive 2014/24, the contracting authority can demonstrate ‘by appropriate means’ that an economic operator is guilty of grave professional misconduct, which renders its integrity questionable. The carrying out of a verification by the contracting authority may also be necessary, for example, in order to establish the existence of one of the exclusion situations set out in Article 57(4)(g) and (i) of that directive.

25 Nonetheless, in situations such as that at issue in the main proceedings, in which there is a specific procedure regulated by Union law or by national law for pursuing certain offences and in which specific bodies are entrusted with carrying out investigations in this connection, the contracting authority must, within the context of the assessment of the evidence provided, rely in principle on the outcome of such a procedure.

26 In that context, it is important to take account of the respective duties of the contracting authorities and the investigating authorities. Whereas the latter have the task of determining the responsibility of certain actors in the commission of a breach of a rule of law, by establishing, with impartiality, the truth of facts capable of constituting such a breach, and of penalising the past wrongful conduct of those actors, the contracting authorities must assess the risks which they could face by awarding a contract to a tenderer the integrity or reliability of which is subject to doubt.

27 It follows, as the European Commission has observed, that the clarification of the facts and circumstances by the investigating authorities, as provided for in Article 57(6) of Directive 2014/24, does not relate to the same objective as that pursued by the examination of the reliability of the economic operator which adopted measures provided for in that provision and which must provide the contracting authority with evidence demonstrating that they are sufficient for the purpose of its admission to the procurement procedure. Thus, in so far as the respective duties of the contracting authority and of the investigating authorities so require, and to that extent, the economic operator wishing to establish its reliability despite the existence of a relevant ground for exclusion must collaborate effectively with the authorities to which those respective duties have been entrusted, regardless of whether this is the contracting authority or the investigating authority.

28 However, that collaboration with the contracting authority must be limited to the measures which are strictly necessary for the effective pursuit of the objective of the examination of the reliability of the economic operator, mentioned in Article 57(6) of Directive 2014/24.

29 In particular, in a situation such as that at issue in the main proceedings, the tenderer is required, inter alia, to prove that it clarified, in a comprehensive manner, the facts and circumstances of the cartel in which it participated by actively collaborating with the competition authority entrusted with investigating such facts.

30 In that regard, it should be noted that the contracting authority must be able to ask an economic operator which has been held responsible for a breach of competition law to provide the decision of the

competition authority concerning it. The fact that the transmission of such a document might facilitate the introduction of a civil liability action by the contracting authority against that economic operator is not such as to call that finding into question. It must be borne in mind that, among the measures which an economic operator must take in order to establish its reliability is the provision of evidence that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct which it committed.

31 In addition, it should be noted that, in principle, the transmission to the contracting authority of the decision establishing the infringement of the competition rules by the tenderer, but applying a leniency rule to the tenderer on the ground that it collaborated with the competition authority, should be sufficient to prove to the contracting authority that that economic operator clarified, in a comprehensive manner, the facts and circumstances by collaborating with that authority, this, however, being a matter for the referring court to ascertain.

32 Moreover, in so far as the contracting authority may also ask the economic operator to provide evidence of the measures which it adopted and which are such as to prevent the infringements found from being repeated, it should be observed that the contracting authority may require that economic operator to provide elements of a factual nature making it possible to show that the measures on which it relies are indeed appropriate to avoid a repetition of the conduct complained of, having regard to the specific circumstances in which those infringements were committed. The fact that the evidence to be provided, in that regard, by the economic operator has already been requested by the competition authority in the course of its investigation does not, by itself, justify that economic operator being exempted from providing that evidence to the contracting authority, unless the facts or circumstances in respect of which evidence is thereby requested follow sufficiently clearly from other documents provided by the economic operator, in particular from the decision establishing the infringement of the competition rules.

33 In the light of the foregoing considerations, the answer to the first and second questions is that Article 80 of Directive 2014/25, read in conjunction with Article 57(6) of Directive 2014/24, must be interpreted as not precluding a provision of national law which requires an economic operator wishing to demonstrate its reliability despite the existence of a relevant ground for exclusion to clarify the facts and circumstances relating to the criminal offence or the misconduct committed in a comprehensive manner by actively cooperating not only with the investigating authority, but also with the contracting authority, in the context of the latter’s specific role, in order to provide it with proof of the re-establishment of its reliability, to the extent that that cooperation is limited to the measures strictly necessary for that examination.

The third and fourth questions

34 By its third and fourth questions, which it is appropriate to examine together, the referring court essentially asks whether Article 57(7) of Directive 2014/24 must be interpreted as meaning that, where an economic operator has been engaged in conduct falling within the ground for exclusion referred to in Article 57(4)(d) of that directive, which has been penalised by a competent authority, the maximum period of exclusion must be calculated from the date of the decision of that authority.

35 According to the information set out in the request for a preliminary ruling, the Federal Cartel Office imposed on Vossloh Laeis a penalty for its participation, until 2011, in agreements with the aim of distorting competition, in connection with the rail cartel. That undertaking asserts that the ‘relevant event’ within the meaning of Article 57(7) of that directive, from which the maximum period of exclusion is calculated, is constituted by the end of participation in the cartel. The referring court observes that the considerations of the GWB in relation to Paragraph 126 of that law, which seeks to transpose Article 57(7) of Directive 2014/24, could support the view that that event is constituted by the decision of the competent competition authority.

36 First of all, in the words of Article 57(7) of Directive 2014/24, Member States are to determine the maximum period of exclusion if no measures as specified in Article 57(6) of that directive have been taken by the economic operator to demonstrate its reliability, and, where the period of exclusion has not

been set by final judgment, that period is not to exceed three years from the date of the relevant event in the exclusion situations referred to in Article 57(4) of that directive.

37 Although Article 57(7) of Directive 2014/24 does not specify the nature of the ‘relevant event’ or, in particular, the time at which it occurs, it should be observed that that provision provides, for the obligatory grounds for exclusion referred to in paragraph 1 of that article and where the period of exclusion has not been set by final judgment, that the duration of five years must be calculated from the date of the conviction by that final judgment, without taking into account the date on which the facts giving rise to that conviction occurred. Thus, for those grounds for exclusion, that duration is calculated from a date which, in certain cases, occurs well after the commission of the facts which constitute the infringement.

38 In the present case, the conduct falling within the relevant ground for exclusion was penalised by a decision of the competent authority, delivered within the context of a procedure regulated by Union law or by national law and resulting in the finding of conduct which infringes a rule of law. In that situation, for reasons of consistency with the detailed rules for calculating the time limit laid down for the obligatory grounds for exclusion, but also for reasons of foreseeability and legal certainty, it must be held that the duration of three years referred to in Article 57(7) of Directive 2014/24 is calculated from the date of that decision.

39 That solution appears to be all the more justified where, as observed by the Advocate General in points 83 to 85 of his Opinion, the existence of conduct restrictive of competition may be regarded as proved only after the adoption of such a decision, which legally classifies the facts to that effect.

40 Moreover, as noted by the Commission, the interested economic operator retains the power, during that period, to adopt measures referred to in Article 57(6) of Directive 2014/24 with a view to demonstrating its reliability, if it nevertheless wishes to participate in a public procurement procedure.

41 As a consequence, the period of exclusion must be calculated not as from the participation in the cartel, but from the date on which the conduct was the subject of a finding of infringement by the competent authority.

42 It follows that the answer to the third and fourth questions is that Article 57(7) of Directive 2014/24 must be interpreted as meaning that, where an economic operator has been engaged in conduct falling within the ground for exclusion referred to in Article 57(4)(d) of that directive, which has been penalised by a competent authority, the maximum period of exclusion is calculated from the date of the decision of that authority.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 80 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, read in conjunction with Article 57(6) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, must be interpreted as not precluding a provision of national law which requires an economic operator wishing to demonstrate its reliability despite the existence of a relevant ground for exclusion to clarify the facts and circumstances relating to the criminal offence or the misconduct committed in a comprehensive manner by actively cooperating not only with the investigating authority, but also with the contracting authority, in the context of the latter’s specific role, in order to provide it with proof of the re-establishment of its**

reliability, to the extent that that cooperation is limited to the measures strictly necessary for that examination.

2. **Article 57(7) of Directive 2014/24 must be interpreted as meaning that, where an economic operator has been engaged in conduct falling within the ground for exclusion referred to in Article 57(4)(d) of that directive, which has been penalised by a competent authority, the maximum period of exclusion is calculated from the date of the decision of that authority.**

[Signatures]

---

* Language of the case: German.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 16 May 2018 (1)

Case C-124/17

Vossloh Laeis GmbH

v

Stadtwerke München GmbH

(Request for a preliminary ruling
from the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria, Germany))

(Reference for a preliminary ruling — Public procurement — Procedure — Directives 2014/24/EU and 2014/25/EU — Grounds for exclusion — Obligation of the economic operator to collaborate with the contracting authority in order to demonstrate its reliability before the end of the period of exclusion — Concept of 'investigating authorities'— Calculation of the maximum period of exclusion)

1. An economic operator may be temporarily excluded from public procurement procedures if it has engaged in any of the behaviours set out in Article 57 of Directive 2014/24/EU. (2) However, that period of exclusion may be reduced if the economic operator can demonstrate to the contracting authority that, notwithstanding its previous misconduct, it has successfully reformed itself.

2. In order to be able to prove that it is again reliable, paragraph 6 of that article establishes, among other conditions, that the economic operator must 'clarif[y] the facts and circumstances in a comprehensive manner by actively collaborating with the *investigating authorities*'. (3) The interpretation of that phrase forms much of the subject matter of this dispute.

3. When incorporating Directive 2014/24 into national law, the German legislature provided that that collaboration must be afforded not only to the investigating authorities but also to the contracting authority.

4. In that context, the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria, Germany) has raised with the Court of Justice two issues which the Court has not previously addressed:

— First, it wishes to ascertain whether the additional requirement of collaboration (with the contracting authority) imposed by the domestic legislature is compatible with EU law;

— Secondly, it seeks to determine the start date of the maximum period of exclusion (three years) provided for in Article 57(7) of Directive 2014/24 in the event that that period has not been set by final judgment and must run from 'the date of the relevant event'.

I. Legislative framework

A. EU law

1. Directive 2014/24

5. Recital 102 states:

‘Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.’

6. Article 57 (‘Exclusion grounds’) provides:

‘1. Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:

(a) participation in a criminal organisation …;

(b) corruption …;

(c) fraud …;

(d) terrorist offences or offences linked to terrorist activities, … or inciting or aiding or abetting or attempting to commit an offence …;

(e) money laundering or terrorist financing …;

(f) child labour and other forms of trafficking in human beings …;

…

2. An economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that [it] is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect …

Furthermore, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure an economic operator where the contracting authority can demonstrate by any appropriate means that [it] is in breach of its obligations relating to the payment of taxes or social security contributions.

This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

…

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

(a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);

(b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations;

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

(e) where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures;

(f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 41, cannot be remedied by other, less intrusive measures;

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or

(i) where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Notwithstanding point (b) of the first subparagraph, Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator which is in one of the situations referred to in that point, where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business in the case of the situation referred to in point (b).

…

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to

be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.'

2. Directive 2014/25/EU (4)

7. According to Article 77 ('Qualification systems'):

'1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

2. The system under paragraph 1 may involve different qualification stages.

Contracting entities shall establish objective rules and criteria for the exclusion and selection of economic operators requesting qualification and objective criteria and rules for the operation of the qualification system, covering matters such as inscription in the system, periodic updating of the qualifications, if any, and the duration of the system.

Where those criteria and rules include technical specifications, Articles 60 to 62 shall apply. The criteria and rules may be updated as required.

…'

8. Article 80 ('Use of exclusion grounds and selection criteria provided for under Directive 2014/24/EU') provides:

'1. The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships may include the exclusion grounds listed in Article 57 of Directive 2014/24/EU on the terms and conditions set out therein.

Where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 57(1) and (2) of Directive 2014/24/EU on the terms and conditions set out in that Article.

If so required by Member States, those criteria and rules shall, in addition, include the exclusion grounds listed in Article 57(4) of Directive 2014/24/EU on the terms and conditions set out in that Article.

…'

B. National law

9. Paragraph 124 of the Gesetz gegen Wettbewerbsbeschränkungen (5) (Law against restrictions on competition) provides:

‘(1) Contracting authorities may, acting with due regard for the principle of proportionality, exclude an undertaking from participation in a public procurement procedure at any time during that procedure where:

…

3. the undertaking has, in the course of business, demonstrably engaged in serious misconduct calling into question the undertaking’s integrity; …

4. the contracting authority has sufficient indications to support the conclusion that the undertaking has concluded with other undertakings agreements or arrangements having the object or effect of impeding, restricting or distorting competition,

…’

10. Paragraph 125 provides:

‘(1) Contracting authorities shall not exclude from the procurement procedure an undertaking caught by a ground for exclusion provided for in Paragraph 123 or Paragraph 124 where that undertaking has proved that it:

1. has paid or undertaken to pay compensation for damage caused by an act constituting a criminal offence or misconduct;

2. has comprehensively clarified the facts and circumstances by actively cooperating with the investigating authorities and the contracting authority; and

3. has adopted specific technical, organisational and personnel measures to prevent further criminal offences or further misconduct.

…’

11. In accordance with Paragraph 126:

‘Where an undertaking caught by a ground for exclusion has adopted no or insufficient measures to reform itself in the manner laid down in Paragraph 125, it may:

1. if caught by a ground for exclusion provided for in Paragraph 123, be excluded from participation in procurement procedures for no more than five years from the date of the conviction by final judgment;

2. if caught by a ground for exclusion provided for in Paragraph 124, be excluded from participation in procurement procedures for no more than three years from the relevant event.’

II. Facts

12. In 2011, Stadtwerke München GmbH (‘Stadwerke München’ or ‘the contracting authority’) established a ‘qualification system’, within the meaning of Article 77 of Directive 2014/25, the purpose of which was to select undertakings to supply it with railway lines. (6)

13. On 4 November 2016, the undertaking Vossloh Laeis GmbH was excluded from that system on the ground that, on 9 March 2016, it had been fined by the Bundeskartellamt (Federal Competition Authority, Germany) for having participated in an active cartel for a number of years up until spring 2011.

14. Those adversely affected by the collusive conduct of the members of the cartel included Stadtwerke München itself, which, for that reason, brought a civil action for damages against Vossloh Laeis.

15. According to the order for reference, Vossloh Laeis had not collaborated with the contracting authority in order to clarify the infringements of the rules on anticompetitive practices. In particular:

— Following the discovery of the cartel in 2011, Vossloh Laeis had not approached the contracting authority or taken the initiative to clarify the facts in full.

— Not until 2016 had it stopped denying to the contracting authority that it had participated in the relevant collusive practices, although it pointed out that it had challenged the decision imposing a fine and described the organisational and personnel measures it had taken in order to clarify the facts and ensure that there would be no repetition of these in the future. It added that it would pay compensation for the damage caused by its unlawful conduct.

16. Nonetheless, Vossloh Laeis would not agree to forward the decision imposing a fine to the contracting authority so that it could examine it. Neither would it agree to cooperate with the contracting authority in order to clarify the offence committed, having taken the view that its cooperation with the competition authority was sufficient.

17. The referring court does not dispute (because the decision imposing a fine itself stated as much) that Vossloh Laeis had afforded ongoing and unrestricted collaboration to the German competition authority during the proceedings before it.

18. The contracting authority took the view that the explanations provided by Vossloh Laeis did not demonstrate that it had taken sufficient steps to reform itself in the manner provided for in Paragraph 125 of the GWB. For that reason, it finally informed the undertaking on 4 November 2016 that it was excluded from the qualification system with immediate effect.

19. Vossloh Laeis challenged that decision before the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria), which made a reference for a preliminary ruling to the Court of Justice.

III. Questions referred

20. The questions referred for a preliminary ruling are worded as follows:

‘(1) Is legislation of a Member State that makes successful voluntary remedial measures (Selbstreinigung) by an economic operator subject to the condition that it clarifies the facts and circumstances relating to the criminal offence or the misconduct and the damage caused by it in a comprehensive manner by actively cooperating not only with the investigating authorities, but also with the contracting authority, compatible with the provisions of Article 80 of Directive [2014/25] in conjunction with the second subparagraph of Article 57(6) of Directive [2014/24]?

(2) If [Question 1] is answered in the negative: Must the second subparagraph of Article 57(6) of Directive [2014/24] be interpreted, in that context, as meaning that the relevant economic operator is, for there to be successful voluntary remedial measures, in any event required to clarify the facts for the contracting authority to such an extent that the latter may assess whether the measures taken (technical, organisational and personnel measures and compensation for damage) are appropriate and sufficient?

(3) For the optional grounds for exclusion laid down in Article 57(4) of Directive [2014/24], the maximum period or time limit of exclusion is, pursuant to Article 57(7) of Directive [2014/24], three years from the date of the relevant event. Is the fulfilment of the optional grounds for exclusion laid down in Article 57(4) of Directive [2014/24] to be understood as the relevant event or is the relevant date that on which the contracting entity has certain and reliable knowledge of the existence of the ground for exclusion?

(4) Accordingly, for the fulfilment of the conditions for exclusion under Article 57(4)(d) of Directive [2014/24] through participation of an economic operator in a cartel, is the relevant event within the meaning of Article 57(7) of Directive [2014/24] the termination of participation in the cartel or the contracting entity’s acquisition of certain and reliable knowledge of the participation in the cartel?’

IV. Procedure before the Court of Justice and the positions of the parties

21. The reference for a preliminary ruling was registered at the Court on 10 March 2017.

22. Written observations have been lodged by Vossloh Laeis, Stadtwerke München, the German, Greek, Hungarian and Polish Governments and the European Commission, all of which, with the exception of Stadtwerke München and the Polish Government, attended the public hearing held on 21 February 2018.

V. Analysis

23. As a preliminary point, it is appropriate to recall the fact, albeit not called into question by any of the parties, that the classification of the Vergabekammer Südbayern (Procurement Board for Southern Bavaria) as a court or tribunal within the meaning of Article 267 TFEU was recognised by the Court of Justice in the judgment of 27 October 2016, *Hörmann Reisen*. (7)

24. The four questions raised in these proceedings may be grouped into two. The first and second questions seek to determine whether the collaboration required by the second subparagraph of Article 57(6) of Directive 2014/24 (in order to demonstrate the renewed reliability of an economic operator caught by one of the grounds for exclusion laid down in paragraphs 1 and 4 of that provision) has to be afforded only to the 'investigating authorities' or also to the contracting authority if this is provided for in the domestic legislation of a Member State.

25. The remaining two questions have to do with the period of exclusion that may apply to an economic operator which has not adopted the voluntary remedial measures set out in Article 57(6) of Directive 2014/24. In particular, it falls to be clarified what the 'relevant event' is to which paragraph 7 of that provision refers as the starting point for that period.

A. The concept of 'investigating authorities' within the meaning of the second subparagraph of Article 57(6) of Directive 2014/24 (first and second questions)

1. Summary of the arguments of the parties

26. Vossloh Laeis maintains that, in requiring active collaboration with the contracting authority, the German legislation imposed a condition additional to voluntary remediation, given that the second subparagraph of Article 57(6) of Directive 2014/24 refers only to active collaboration with the investigating authorities.

27. In its view, the terms 'contracting authority' and 'investigating authority' refer in EU law to different actors performing different functions: while the former awards public contracts, the latter is tasked with investigating criminal offences or any misconduct generally.

28. Vossloh Laeis submits that Article 57 of Directive 2014/24 distinguishes between the remedial measures adopted by the economic operator, on the one hand, and evidence of their effectiveness, on the other. The rationale behind that provision is that the economic operator should adopt the voluntary remedial measures necessary and, then, in the event of participating in a public procurement procedure (be this at the award or pre-qualification stage), should prove to the contracting authority that those measures have been effective. The German legislature departed from that scheme by extending the collaboration requirement, contrary to Directive 2014/24.

29. The Greek Government's position is, in essence, the same as that adopted by Vossloh Laeis.

30. In the view of Stadtwerke München and the German and Hungarian Governments, on the other hand, the fact that the German legislation has not transposed verbatim the wording of Article 57(6) of Directive 2014/24 is not in any way problematic. The addition of the reference to the contracting authority served to take into account the fact that, in German law, the expression 'investigating authorities' could be interpreted as relating only to those responsible for prosecuting criminal offences. In order to avert inadequate transposition, it was essential that that expression be used in its broadest sense, and it was for this reason that the national legislature made it clear that the economic operator has an obligation to collaborate

simultaneously with the ‘investigating authorities’ in a strict sense and with the contracting authority as an ‘investigating authority’ in a loose sense. The latter also ‘investigates’ in cases where, in accordance with Article 57(5) and (6) of Directive 2014/24, it examines whether a tenderer is caught by an optional ground for exclusion or satisfies the remediation criteria.

31. At the hearing, the German Government’s representative nonetheless qualified its initial position by stating that the joint reference to the investigating authorities and the contracting authority in the national legislation is not intended to duplicate the same obligation.

32. Stadtwerke München submits that, even if the extension of the duty to collaborate is considered not to be covered by Article 57(6) of Directive 2014/24, EU law does not preclude Member States from adopting stricter measures in this regard. This follows from the spirit, purpose and function of the grounds for exclusion from public procurement.

33. In this connection, it contends that the approach taken by the national legislature is transparent and non-discriminatory. Moreover, the directive does not expressly prohibit the adoption of stricter measures. Finally, the involvement of the contracting authorities in the voluntary remediation process is also necessary, since it is up to them to verify whether economic operators must be excluded from the procedure and, if so, to verify also the voluntary remedial measures which they have put into effect.

34. The Commission maintains that, unlike the term ‘contracting authority’ used in Article 2(1) of Directive 2014/24, the concept of ‘investigating authority’ has not been defined either by that directive or by Directive 2014/25. In its opinion, although the same authority may intervene simultaneously as contracting authority and as investigating authority, the reference to the latter in Article 57(6) of Directive 2014/24 does not appear to be a reference to the contracting authority.

35. The Commission submits that it follows from a schematic interpretation of the provision at issue that, in addition to collaboration with the investigating authorities, there is also a duty to collaborate with the contracting authority, albeit that the latter is of a different nature. In any event, collaboration with the two authorities must not lead to a duplication or repetition of the same obligations.

36. The Commission also takes the view that the cooperation which economic operators may be called upon to afford to each of the two authorities has unique features, which is to say that it is not identical in both cases. The aim pursued by the investigating authorities in conducting their procedures (to detect offences) differs from that of the examination for which the contracting authorities are responsible (to ensure that an economic operator is reliable). The former seek to determine the culpability of the parties involved for past offences. The latter seek to analyse the risks potentially associated with awarding a public contract to a particular tenderer in the future.

2. Assessment

37. Article 57 of Directive 2014/24 contains a series of grounds for excluding economic operators from public procurement procedures. Paragraph 1 sets out the mandatory grounds (‘contracting authorities *shall exclude*’) and paragraph 4 the optional grounds (‘contracting authorities *may exclude*’).

38. The optional grounds include the collusive conduct referred to in subparagraph (d): ‘where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition’, it may deny that economic operator the right to participate in one of those procedures.

39. Unless that disqualification has been ordered by final judgment — in which case it lasts for as long as the court order directs —, the economic operator may make use of the possibility afforded to it by Article 57(6) of Directive 2014/24, that is to say to terminate the *normal* period of exclusion (8) before it runs its full course.

40. In order to benefit from that possibility, the aforementioned economic operator must show that, ‘despite the existence of a relevant ground for exclusion’ (first subparagraph of Article 57(6) of Directive 2014/24), its later conduct has made it ‘reliable’. In order to ‘demonstrate its reliability’ (ibid.), it ‘may

provide evidence to the effect that measures taken by [the economic operator] are sufficient' (ibid.) for those purposes.

41. The reliability referred to in that provision is a quality which the contracting authority must necessarily assess in accordance with the guidelines contained in the second subparagraph of paragraph 6. It may consider such reliability to have been demonstrated only if the economic operator has: (a) paid — or undertaken to pay — compensation for the damage caused by the offence on account of which it was excluded; (b) clarified the facts and circumstances in a comprehensive manner; and (c) adopted concrete (technical, organisational and personnel) measures that are appropriate to prevent further offences.

42. The referring court's doubts are concerned only with the second of those conditions and are based on the discrepancy between the second subparagraph of Article 57(6) of Directive 2014/24 (according to which the economic operator must demonstrate that it has 'clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities') and Paragraph 125(1), point 2, of the GWB (pursuant to which the active collaboration must be with 'the investigating authorities and [with] the contracting authority').

43. The reference to 'contracting authority' was added to the reference which the EU legislature made to 'investigating authorities' with a view, according to Stadtwerke München, to avoiding a restrictive interpretation of Article 57(6) of Directive 2014/24 that would limit the duty incumbent upon the economic operator to collaborate exclusively with the 'investigating authorities' in a strict sense (that is to say, with the authorities that prosecute criminal offences or misconduct), thus leaving out of account the fact that, in a broad sense, the contracting authority also *investigates* in cases where it examines whether an economic operator is caught by a ground for exclusion or has successfully demonstrated, notwithstanding its exclusion, that it is reliable.

44. In my view, however, there is no risk of any misunderstanding due to the presumed imprecision of the second subparagraph of Article 57(6) of Directive 2014/24, in the light of its various language versions.

45. The German version uses the term 'Ermittlungsbehörden', which corresponds exactly to that used in other language versions such as the Spanish ('autoridades investigadoras'), the English ('investigating authorities'), the French ('autorités chargées de l'enquête'), the Italian ('autorità investigative'), the Portuguese ('autoridades responsáveis pelo inquérito') or the Dutch ('onderzoekende autoriteiten'). In all the language versions, moreover, the authorities and bodies that award public contracts or organise procurement procedures are referred to by equally unequivocal terms: 'poder adjudicador' in Spanish and 'öffentliche Auftraggeber' in German.

46. The issue, then, does not lie in the imprecision of the terms used by Article 57 of Directive 2014/24 to describe *bodies* of a different nature. The fact is that that same provision confers on contracting authorities, too, certain *functions* having investigative connotations. Thus, for example:

— Pursuant to paragraph 1, contracting authorities must exclude an economic operator 'where they have *established* … or are aware … that that economic operator has been the subject of a conviction by final judgment for [certain] reasons'.

— By the same token, the second subparagraph of paragraph 2 refers to the situation where 'the contracting authority *can demonstrate* by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions'.

— Finally, other situations listed in paragraph 4 require some *investigation* (9) by the contracting authorities. For example, pursuant to subparagraph (c), the latter may '*demonstrate* by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable'.

47. In my view, the performance of those functions does not convert the contracting authority into one of the 'investigating authorities' referred to in the second subparagraph of Article 57(6) of Directive 2014/24.

48. It is true that the contracting authority must necessarily engage in some investigative activity (in the sense indicated above) in order to establish whether any of the grounds for exclusion referred to in

paragraphs 1 and 4 of Article 57 of Directive 2014/24 are applicable. However, the intention behind paragraph 6 of that provision is henceforth not that the contracting authority should *determine by itself* and in every case the facts capable of triggering exclusion, but that, once the economic operator has been excluded, *it should evaluate the evidence presented* bythe operator claiming to have reformed itself.

49. The task of the contracting authority in the evaluation of that evidence is therefore *passive*, while the task that falls to the economic operator is *active*. The latter must provide the evidential material on the basis of which the contracting authority will make an adjudication, without — I would reiterate — being compelled on every occasion to engage in investigative activity in order to be able to do so.

50. An economic operator which claims to have reformed itself must demonstrate, inter alia, that it has 'clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities'. Logically, it must demonstrate this to the contracting authority, that is to say to the body which, after weighing up the evidence, will decide whether the tenderer has adequately shown itself to be reliable and can therefore be readmitted to procurement procedures.

51. Generally speaking, therefore, the 'investigating authorities' to which the second subparagraph of Article 57(6) of Directive 2014/24 refers will not be the same as the contracting authorities. It is to the latter that the tenderer (or the undertaking wishing to join a qualification system, as in this case) has to demonstrate that it has collaborated actively and comprehensively with the investigating authorities in order to clarify the facts. It must, however, necessarily afford that collaboration to an institution other than the contracting authority itself, since its collaboration would otherwise, from the point of view of the latter authority, be a known fact requiring no evidence whatsoever.

52. That conclusion is borne out by the time sequence of the actions to which Article 57(6) refers. What the economic operator has to demonstrate to the contracting authority comprises facts that lie in the past, that is to say at a point in time prior to that when it asks the contracting authority to recognise its reformed status.

53. Thus, the economic operator must have paid or undertaken to pay compensation for the damage caused and must already have adopted appropriate measures to prevent new offences. For exactly the same reason, the clarifications (of the facts and circumstances of the conduct warranting exclusion) must at the time have been offered to an authority other than the contracting authority, to which it need only be demonstrated that those clarifications — as to the payment of compensation or the adoption of appropriate measures, for example — had already been provided.

54. This, in my opinion, is the most plausible interpretation of Article 57(6) of Directive 2014/24. And it is, more specifically, the interpretation best suited to a situation such as that at issue here, in which the conduct giving rise to exclusion (the undertaking's participation in a cartel) had been assessed and penalised by an 'investigating authority': the Federal Competition Authority.

55. In that situation, it does not make any sense to duplicate the obligation to collaborate by also imposing a duty to do so with the contracting authority, as would be the case if an economic operator seeking reformed status after having been excluded were compelled to clarify the same facts and the same circumstances before two different authorities.

56. However, it could be argued (as Stadtwerke München does) that EU law does not preclude Member States from introducing stricter criteria against which economic operators must demonstrate their renewed reliability during the exclusion period. It is therefore feasible to require them to collaborate not only with investigating authorities but also with the contracting authority.

57. That position is supported by not insignificant arguments. On the one hand, Article 57(7) of Directive 2014/24 provides that 'Member States shall specify the implementing conditions for this Article'. On the other hand, the Court has held, (10) with respect to the optional grounds for exclusion, (11) that the Public Procurement Directive 'does not provide for uniform application at EU level …, since the Member States may choose not to apply those grounds for exclusion, or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level'.

58. In my opinion, this would be possible only in the case of collaboration different from that, complained of, with the investigating authorities. Thus, the view might be taken that the collaboration with the

contracting authority provided for in Paragraph 125(1), point 2, of the GWB does not have the same focus as that which an economic operator is required to afford to the investigating authorities, being concerned rather with conduct the examination and assessment of which as a ground for exclusion is a matter for the contracting authority itself.

59. From this point of view, the provision contained in Paragraph 124(4) of the GWB (12) would make sense: the economic operator must actively collaborate with the contracting authority in order: (i) to clarify the facts and circumstances which may have prompted that authority to form the view that the ground for exclusion which it is responsible for assessing is applicable; and (ii) to persuade the authority that, notwithstanding the foregoing, it is capable of reform.

60. Conversely, an interpretation of the national provision as meaning that the economic operator must cooperate on an equal (and twofold) basis with the contracting authority and the investigating authorities in order to clarify the same facts and circumstances in connection with the same ground for exclusion would give rise to a result not compatible in my opinion with Article 57(6) of Directive 2014/24:

— on the one hand, it would lead to a duplication of obligations owed to institutions, such as the investigating authorities and the contracting authorities, which perform different functions;

— on the other hand, it could leave the economic operator all but defenceless in the case where, in circumstances such as those at issue here, the contracting authority claims to have suffered damage, as a result of the offending conduct on account of which the economic operator was excluded, for which it is seeking compensation. (13)

61. After all, such a duplication of obligations fails to take into account the differences between the antitrust functions of the investigating authorities and the functions performed by the contracting authorities. Moreover, if a contracting authority were put in the position of having to determine whether or not the facts on account of which it considers itself to have suffered damage have been duly clarified, and its role were not therefore confined to ascertaining whether the economic operator collaborated in a comprehensive manner with the investigating authorities in order to clarify those facts, it might not be best placed to adjudicate on the application for recognition of its reformed status with the neutrality and impartiality required.

B. The concept of 'relevant event' within the meaning of Article 57(7) of Directive 2014/24 (third and fourth questions)

62. Article 57(7) of Directive 2014/24 provides that Member States 'shall … determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability'.

63. However, Member States do not have absolute freedom in this regard, since that provision attaches certain limits to the length of the maximum period. In particular:

— If the period of exclusion has been set by final judgment, that period must be observed in any event.

— If, notwithstanding the existence of a final judgment, that judgment has not specified the period of exclusion, the latter may not last longer than five years from the time of the conviction, in cases involving mandatory grounds for exclusion (provided for in paragraph 1 of that article).

— If there is no final judgment, or that delivered does not indicate the maximum period of exclusion, that period is confined to 'three years from the date of the relevant event in the cases referred to in paragraph 4' (optional grounds for exclusion).

64. The foregoing qualification forms the subject matter of the last two questions raised by the referring court, which seeks to dispel doubts about the notion of 'relevant'.

1. Summary of the observations of the parties

65. Vossloh Laeis submits that the expression at issue refers to the objective existence of the ground for exclusion. If the legislature had preferred that account be taken of the contracting authority's subjective knowledge, it would have used a form of words to that effect. That inference is supported by the schematic interpretation of that provision, as the date would otherwise fall to be determined by each contracting authority, which would be incompatible with legal certainty.

66. In the view of Stadtwerke München, the decisive point in time is not that at which the conduct giving rise to the optional exclusion takes place (or stops), but when the conditions of exclusion, which include the subjective component (knowledge of the ground for exclusion by the contracting authority) are fully met. On that premiss, the relevant event would normally be the date on which the contracting authority has reliable information on the presence of a ground for exclusion.

67. The position taken by the German and Hungarian Governments is essentially the same. The 'relevant event', they contend, is determined by the point at which the contracting authority has certain and reliable information on the existence of the ground for exclusion, that is to say, in the submission of the Hungarian Government, the point at which there is a final decision on the matter.

68. The Greek Government is in favour of applying to the scope of public procurement the provisions of Article 25(2) of Regulation (EC) No 1/2003, (14) so as to ensure that there are no differences with the corresponding administrative or criminal proceedings. It infers from this that what is 'relevant' is the point at which the event giving rise to exclusion occurred, rather than when that event came to the knowledge of the contracting authority.

69. In the view of the Polish Government, which has submitted observations in relation to this question alone, the 'relevant event' is the conclusion of the agreement which sought to distort competition. If the date of that agreement cannot be specified, regard must be had to the date of the event supporting the likelihood that such an agreement was concluded (this might be, for example, the end date of the procurement procedure during which it was established that the participating economic operators had attempted to distort competition).

70. The Commission considers that account might be taken of three different dates: (1) the date of the behaviour constituting a ground for exclusion; (2) the point at which the criteria governing the application of one of those grounds for exclusion are fulfilled, which, in the case of Article 57(4)(c) and (d) of Directive 2014/24, would be when the contracting authority is able to demonstrate, or has sufficiently plausible indications of, the economic operator's misconduct; and (3) the date on which the investigating authority established by final decision the existence of improper conduct.

71. For the Commission, legal certainty (the reason behind the time limits on the grounds for exclusion) militates in favour of the first of those three options. However, the risk that the public contract will be awarded to a person who has committed acts of professional misconduct (the very reason for the grounds for exclusion provided for in Directive 2014/24) argues in favour of the second.

72. At the hearing, the Commission invoked the provisions regulating public contracts concluded by the EU institutions, in particular Article 106(14) and (15) of Regulation (EU, Euratom) No 966/2012, (15) which it considered useful for the purposes of interpreting Article 57 of Directive 2014/24 given that there has to be a degree of harmony between the latter and the former provisions. It infers from this that, ultimately, the maximum period for which an economic operator may be excluded is three years from the final decision imposing a penalty adopted by an investigating authority.

2. Assessment

73. As I have already pointed out, Article 57(7) *in fine* of Directive 2014/24 takes into account, for the purposes of determining the start of the maximum period of exclusion in cases where the latter has not been specified by final judgment, 'the relevant event in the cases referred to in paragraph 4'. (16) In principle, therefore, this concept includes the conduct or the circumstance described in each of the various situations provided for in the aforementioned Article 57(4).

74. The question, raised by the referring court, as to whether the period of exclusion must be counted from the date on which that conduct or circumstance actually occurs or from the point at which the contracting

authority has certain and verifiable information on its existence, is a separate issue.

75. The parties represented in these preliminary ruling proceedings have adopted positions ranging from an objective interpretation predicated on the materialisation of the 'relevant event' and a subjective interpretation based on knowledge of that event by the awarding authority.

76. As the Commission has pointed out, while the first position gives priority to ensuring legal certainty, the second is focused on protecting procurement procedures against the risk inherent in admitting tenderers caught by grounds for exclusion.

77. In order to answer the referring court's question, however, it is not essential to carry out an exhaustive analysis of the timings of the exclusion periods provided for in Directive 2014/24, it being sufficient to have regard to the ground for exclusion specifically at issue here.

78. More particularly, so far as concerns Vossloh Laeis's participation in a cartel, proved and penalised by the German competition authority, the dispute turns on whether the three-year period starts: (i) when its participation took place or ended (objective approach); or (ii) when the authority, be it the investigating authority or the contracting authority, acquired reliable evidence of the unlawful conduct or imposed a penalty for it (subjective approach).

79. The Greek Government regards as relevant the form of words adopted in Article 25(2) of Regulation No 1/2003 in connection with the starting point for the limitation period applicable to unlawful conduct in matters of competition. That period 'shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases'.

80. One might indeed take the view that, if the EU legislature chose to give priority to the offender's legal certainty over the effectiveness of the Commission's power to impose penalties, the same criteria can be extrapolated to the start date for the period of exclusion in public procurement procedures.

81. To my mind, however, this is an incomplete view. If that analogy were applied, it would have to be so to its full extent, meaning that — as with limitation periods applicable to conduct that is restrictive of competition — the maximum period of exclusion, once it has started to run, might be interrupted. (17) It might then extend beyond the three years laid down as a limit by Article 57(7) of Directive 2014/24. (18)

82. I am of the view, therefore, that the solution may be arrived at by way of analogy but in accordance with the aforementioned method of applying the rule with due regard to the remaining provisions of the article. It is apparent from those provisions that, where the ground for exclusion is unlawful conduct established by a judgment which does not specify the length of the period of exclusion, the five-year period of exclusion actually starts to run from the date of *conviction*.

83. That same criterion can in my opinion be applied, without interpretational difficulties, to conduct restrictive of competition the existence of which may be regarded as proved (account being taken of the presumption of innocence) only by way of decision of a court or administrative authority. In that situation, which is the situation at issue here, it is the date of that decision (the *conviction* in a loose sense) which operates as the 'relevant event' for the purposes of establishing the starting point for the three-year period of exclusion.

84. In the circumstances of this case, therefore, Article 57(7) of Directive 2014/24 does not take into account as the 'relevant event' the collusive conduct itself but the legal establishment of the existence of that conduct; or, to put it differently, the legal classification of an action for which the authority has already imposed a penalty on the ground that it is unlawful.

85. In other words, where there has been a decision explicitly assessing an economic operator's participation in a cartel, the 'relevant event' which the contracting authority — in receipt of the order or option, as the case may be, to exclude that economic operator — must use to calculate the maximum period of disqualification is not the offending undertaking's material conduct itself but its classification and punishment as conduct that is restrictive of competition.

86. In my opinion, which happens to be the same as that expressed by the Hungarian Government and, certainly at the hearing, by the Commission, it is that factor which the contracting authority must take as 'relevant' for the purposes of determining the maximum period of exclusion applicable to the economic operator in question. In the light of the penalty imposed by the competition authority, the contracting authority needs nothing further, having already been given legal notice of the existence of conduct warranting exclusion. The period of exclusion starts to run from then, that is to say from the date on which the corresponding decision imposing a penalty was issued.

VI. Conclusion

87. In the light of the foregoing, I propose that the Court's reply to the Vergabekammer Südbayern (Public Procurement Board for Southern Bavaria, Germany) should be as follows:

(1) Article 80 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, in conjunction with the second subparagraph of Article 57(6) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC:

– preclude an economic operator seeking to demonstrate its reliability notwithstanding the existence of a relevant ground for exclusion from having to collaborate actively with the contracting authority in order to clarify in a comprehensive manner the facts and circumstances in the context of which it acted as joint author of agreements intended to distort competition, where that same operator, by clarifying its circumstances in a comprehensive manner, had already actively collaborated with the competition authority which investigated and penalised those facts;

– do not preclude a Member State from requiring such active collaboration with the contracting authority as a condition of the economic operator's being able to demonstrate its reliability and bring to an end its exclusion from the procurement procedure, in the case of offending conduct the facts and circumstances of which have to be determined by the contracting authority itself.

(2) Where an economic operator is caught by the ground for exclusion provided for in Article 57(4)(d) of Directive 2014/24 for having concluded agreements intended to distort competition which have already been the subject of a decision imposing a penalty, the maximum period of exclusion is calculated from the date of that decision.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

3 No italics in the original.

---

4 Directive of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

---

5 In the version published on 26 June 2013 (BGBl. I, p. 1750, 3245), as last amended by the Law of 13 October 2016 (BGBl. I, p. 2258) ('the GWB').

---

6 The qualification system at issue was later ended by order of 28 December 2016.

---

7 Case C-292/15, EU:C:2016:817, paragraph 29.

---

8 Article 57(7) of Directive 2014/24 provides that, in the absence of a final judgment determining its maximum duration, that period is not to last longer than five or three years, depending on the circumstances defined in that provision.

---

9 I use this adjective in the sense in which it is employed in legal process, that is to say to denote a procedure which the investigating body conducts of its own motion by gathering inculpatory or exculpatory evidence of a particular behaviour.

---

10 Judgment of 20 December 2017, *Impresa di Costruzioni Ing. E. Mantovani and Guerrato* (C-178/16, EU:C:2017:1000, paragraph 31).

---

11 It has in mind those included in Article 45(2) of Directive 2004/18/CE of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). I should recall, however, that Article 57(6) of Directive 2014/24 talks of 'the situations referred to in paragraphs 1 and 4 [of Article 57 itself]', that is to say both the mandatory and the optional grounds for exclusion.

---

12 Under that provision, an undertaking may be excluded where the contracting authority has evidence plausible enough to support the conclusion that that undertaking has entered into collusive arrangements.

---

13 The collaboration which the economic operator is required to afford to the contracting authority might be prejudicial to the economic operator where, as here, they are both parties to civil proceedings brought by the contracting authority on the ground that it was harmed by the conduct on the part of the tendering undertaking (that is to say, its participation in the cartel) that gave rise to the exclusion in relation to which the economic operator seeks reformed status.

---

14 Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

---

15 Regulation of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), as amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 (OJ 2015 L 286, p. 1).

---

16 There will be situations in which some form of court order is in existence (such as, for example, in the case of insolvency or winding-up proceedings, the situation provided for in subparagraph (b)) but others in which a ground for exclusion is applicable without the need for any such court order to have been made (as in the case where the economic operator has attempted to obtain confidential information, the situation provided for in subparagraph (i)).

---

17 According to Article 25(3) and (5) of Regulation No 1/2003, 'any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified

to at least one undertaking or association of undertakings which has participated in the infringement. … Each interruption shall start time running again’.

---

18 Provision which, unlike Article 106 of Regulation No 966/2012, does not specifically lay down a limitation period for exclusion.

Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

19 April 2018 (*)

(Reference for a preliminary ruling — Public service contracts — Health and social services — Award contrary to the rules on public procurement — Requirement to comply with the principles of transparency and equal treatment — Concept of 'certain cross-border interest' — Directive 92/50/EEC — Article 27)

In Case C-65/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 7 June 2016, received at the Court on 6 February 2017, in the proceedings

Oftalma Hospital Srl

v

Commissione Istituti Ospitalieri Valdesi (CIOV),

Regione Piemonte

intervener:

Azienda Sanitaria Locale di Torino (TO1)

THE COURT (Ninth Chamber),

composed of C. Vajda, President of the Chamber, E. Juhász (Rapporteur) and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Oftalma Hospital Srl, by M. Moretto and P. Bianco, avvocati,

– the Regione Piemonte, by M. Scisciot, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and F. Sclafani, avvocato dello Stato,

– the European Commission, by G. Gattinara and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) (‘Directive 92/50’).

2 The request has been made in proceedings between Oftalma Hospital Srl (‘Oftalma’) and the Commissione Istituti Ospitalieri Valdesi (Commission for Waldensian Hospital Institutions, Italy; ‘CIOV’) and the Regione Piemonte (Region of Piedmont, Italy) concerning payment for care services provided by Oftalma under a contract entered into with CIOV (‘the contract at issue’).

Legal context

EU law

Directive 92/50

3 Title II of Directive 92/50 defines ‘two-tier’ applications. Under Article 8, contracts which have as their object services listed in Annex I A to that directive are to be awarded in accordance with the provisions of Titles III to VI thereof, that is, Articles 11 to 37 of that directive. On the other hand, under Article 9 of that directive, ‘contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16’.

4 Article 14 of Directive 92/50 appears under Title IV of that directive, which concerns the common rules in the technical field.

5 Article 16 of that directive, which falls within Title V thereof, headed ‘Common advertising rules’, provides in paragraph 1 that contracting authorities which have awarded a public contract or have held a design contest are to send a notice of the results of the award procedure to the Publications Office of the European Union.

6 Article 27(3) of Directive 92/50 provides that:

‘Where the contracting authorities award a contract by negotiated procedure as referred to in Article 11(2), the number of candidates admitted to negotiate may not be less than three, provided that there is a sufficient number of suitable candidates.’

7 Annex I B to that directive lists a series of categories of services, which includes, under category 25, health and social services.

Directive 2004/18/EC

8 Under Articles 20 and 21 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), contracts which have as their object services listed in Annex II A to the directive are to be awarded in accordance with Articles 23 to 55 thereof, whereas contracts which have as their object services listed in Annex II B to that directive are to be subject solely to Article 23 and Article 35(4) thereof.

9 Annex II B to that directive lists a series of categories of services, which includes, under category 25, health and social services.

10 Article 82 of Directive 2004/18, headed ‘Repeals’, provides, inter alia, that Directive 92/50 is to be repealed from 31 January 2006 and that references to that Directive are to be construed as being made to Directive 2004/18.

Italian law

11 Article 3 of the decreto-legislativo n. 157 — Attuazione della direttiva 92/50/EEC in materia di appalti pubblici di servizi (Legislative Decree No 157 implementing Directive 92/50/EEC on public service

contracts) of 17 March 1995 (Ordinary Supplement to GURI No 104 of 6 May 1995), in the version applicable at the time of the facts in the main proceedings ('Legislative Decree No 157/95'), provides:

'1. Public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority as referred to in Article 2 relating to the provision of the services set out in Annexes 1 and 2.

2. For the service contracts referred to in Annex 2 and those in which the value of those services exceeds that of the services listed in Annex 1, this decree shall apply only to Article 8(3), Article 20 and Article 21.'

12 Article 7(1) of that legislative decree provides:

'Contracts that are subject to this decree may be negotiated privately, following publication of a contract notice, in the following cases:

(a) in the event of irregular tenders submitted following an invitation to tender, a restricted invitation to tender or a call for competitive tenders or in the event of tenders that are unacceptable under the provisions of Articles 11, 12(2), 18, 19 and 22 to 25, provided that the conditions of the contract are not substantially altered; contracting authorities shall publish, in such cases, a contract notice, unless they admit to the negotiated procedure all the undertakings satisfying the criteria laid down in Articles 11 to 16 that, during the procedures referred to above, submitted tenders in accordance with the formal requirements of the tendering procedure;

(b) in exceptional cases, when the nature of the services or the risks involved do not permit prior overall pricing;

(c) where, due to the nature of the services covered by the contracts, particularly if the services are of an intellectual nature or fall within Category 6 of Annex 1, it is impossible to determine the specifications of the contracts with adequate precision to enable them to be awarded by selection of the best tender according to the rules of open or restricted procedures.'

13 Article 22(3) of Legislative Decree No 157/95 provides:

'In a privately negotiated procedure initiated pursuant to Article 7(1), the number of candidates may not be less than three, provided that there is a sufficient number of suitable candidates.'

14 Annex 2 to Legislative Decree No 157/95 refers to 'Health and social services' under category 25 thereof.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 By the contract at issue, dated 2 January 1999, which was amended by a supplementary agreement in 2004 by which Oftalma waived the right to use the payment order procedure, CIOV entrusted to Oftalma the provision of specialist ophthalmological services at the ophthalmological centre of the Ospedale evangelico valdese di Torino (Waldensian Evangelical Hospital, Turin, Italy).

16 On 21 April 2005, the Tribunale di Torino (District Court, Turin, Italy) ordered CIOV and the Regione Piemonte to pay to Oftalma the sum of EUR 1 727 886.36, plus interest, by way of remuneration for care services provided in the course of 2004.

17 CIOV and the Regione Piemonte each applied to have the order for payment set aside before the Tribunale di Torino (District Court, Turin). Before that court, the Regione Piemonte argued, inter alia, that the contract at issue was invalid, since, in its view, it had been entered into in breach of public procurement procedures as governed by Legislative Decree No 157/95.

18 By judgment of 5 December 2007, the Tribunale di Torino (District Court, Turin) dismissed the applications brought by CIOV and the Regione Piemonte and, accordingly, upheld Oftalma's claims.

19 Prior to that first action, Oftalma had, in 2004 brought another action before the Tribunale di Torino (District Court, Turin) for an order that CIOV and the Regione Piemonte pay Oftalma the sum of EUR 1 226 535.07 by way of an adjustment based on the tariffs applicable to care services provided during 2002, 2003 and the first half of 2004.

20 By judgment of 9 October 2007, the Tribunale di Torino (District Court, Turin) dismissed Oftalma's action.

21 Oftalma and the Regione Piemonte lodged appeals against the two judgments referred to above.

22 After joining those two sets of proceedings, by judgment of 7 June 2010, the Corte d'appello di Torino (Court of Appeal, Turin, Italy) declared the contract at issue void and, accordingly, ordered Oftalma to repay the sums received under the order for payment.

23 That court took the view that the contract at issue had been entered into in breach of Directive 92/50 and Legislative Decree No 157/95, which had transposed it, since no tendering procedure had taken place before the contract was concluded, despite the fact that CIOV was, pursuant to Article 2 of Legislative Decree No 157/95, read in the light of Article 1 of Directive 92/50, a body governed by public law with the status of a contracting authority.

24 Oftalma brought an appeal before the referring court, the Corte suprema di cassazione (Supreme Court of Cassation, Italy) against that judgment.

25 In that respect, the referring court observes, in particular, that Article 3(2) of Legislative Decree No 157/95, like Directive 92/50, does not require any advertising or tendering procedure prior to the conclusion of contracts for the provision of health care services and that that legislative decree does not expressly provide that the award of such contracts is subject to the principles of effectiveness, impartiality, equal treatment and transparency being complied with.

26 That court has doubts about the validity of the case-law of the Italian administrative courts according to which contracts for the provision of health care services, although not directly covered by the legislation applicable in the field of public service contracts, are nonetheless subject to prior recourse to competitive tendering, even if informal, under the general rules of national law and EU law principles deriving from Articles 49, 56 and 106 TFEU.

27 That court observes, however, that Article 22(3) of Legislative Decree No 157/95, which transposes Article 27(3) of Directive 92/50, provides that, even if the call for tenders is limited, the number of candidates may not be less than three. While noting that those provisions are intended to apply to service contracts that are entirely subject to the provisions of that directive, it nevertheless submits that such a national provision 'may be regarded as the expression of a general principle' the application of which also extends to the provision of services that are only partially subject to the directive. According to that court, such an interpretation is consistent with the objectives of Directive 92/50, which aims to complete the internal market through good coordination of procedures for the award of public service contracts.

28 The referring court adds that that interpretation is consistent with one of the objectives of Directive 92/50, which is to harmonise the rules for awarding contracts with those relating to works and supply contracts. In that respect, it notes that both Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ 1971 L 185, p. 5), as amended by Council Directive 89/440/EEC of 18 July 1989 (OJ 1989 L 210, p. 1), and Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), require contracting authorities to ensure genuine competition, including in negotiated procedures.

29 That court points out that, subjecting contracts for the provision of health services to such obligations is consistent with the Court's case-law, according to which the fundamental principles of the TFEU are applicable to service contracts excluded from the scope of Directive 92/50.

30 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. On a proper construction of Article 9 of [Directive 92/50], which provides that contracts which have as their object services listed in Annex I B [to that directive] are to be awarded in accordance with Articles 14 and 16 [of that directive], do such contracts in any case remain subject to the principles of freedom of establishment and freedom to provide services, equal treatment and the prohibition of discrimination on grounds of nationality, transparency and non-discrimination, as referred to in Articles 49, 56 and 106 TFEU?

2. If the first question should be answered in the affirmative, must Article 27 of Directive 92/50, which provides that where a contract is awarded by negotiated procedure the number of candidates admitted to negotiate may not be less than three, provided that there is a sufficient number of suitable candidates, be interpreted as applying likewise to contracts having as their object services listed in Annex I B to that directive?

3. Does Article 27 of Directive 92/50, which provides that where a contract is awarded by negotiated procedure the number of candidates admitted to negotiate may not be less than three, provided that there is a sufficient number of suitable candidates, preclude the application of a national law that, for public contracts signed before Directive [2004/18] was adopted and relating to services listed in Annex I B to Directive 92/50, does not guarantee the opening up of public procurement to competition if the negotiated procedure is used?’

Consideration of the questions referred

The first question

31 By its first question, the referring court asks, in essence, whether, when it awards a public service contract that falls within the scope of Article 9 of Directive 92/50 and, consequently, is in principle subject only to Articles 14 and 16 of that directive, a contracting authority is nonetheless also required to comply with the fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency.

32 According to the wording of Article 9 of Directive 92/50, ‘contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16’. Those articles contain obligations relating, respectively, to the technical specifications of a contract and the sending of a notice of the results of the procedure for the award of a contract.

33 In that regard, the Court has held that, where contracts concern services referred to in Annex I B, the contracting authorities are bound only by the obligations to define the technical specifications by reference to national standards implementing European standards, which must be given in the general or contractual documents relating to each contract, and to send a notice of the results of the award procedure for those contracts to the Publications Office of the European Union (judgment of 17 March 2011, *Strong Segurança*, C-95/10, EU:C:2011:161, paragraph 34).

34 The Court has also held that the classification of services in Annexes I A and I B to Directive 92/50 is in accordance with the system laid down by that directive, which envisages the application of the provisions of that directive on two levels (judgment of 17 March 2011, *Strong Segurança*, C-95/10, EU:C:2011:161, paragraph 33 and the case-law cited).

35 The Court has stated that the EU legislature assumed that contracts for the services referred to in Annex I B to Directive 92/50 are, in principle, in the light of their specific nature, not of sufficient cross-border interest to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender (judgment of 17 March 2011, *Strong Segurança*, C-95/10, EU:C:2011:161, paragraph 35 and the case-law cited).

36 However, the Court has held that such contracts, where they nevertheless have a certain cross-border interest, are subject to the fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency (see, to that effect, judgment of 17 March 2011, *Strong Segurança*, C-95/10, EU:C:2011:161, paragraph 35 and the case-law cited). Without necessarily requiring that an invitation to tender be launched, that obligation implies a degree of advertising sufficient to ensure, first, the opening-up to competition and, second, the review of the impartiality of the procurement procedure (judgment of 13 November 2008, *Coditel Brabant*, C-324/07, EU:C:2008:621, paragraph 25 and the case-law cited).

37 In the absence of special circumstances, none of which are apparent from the case file, the assessment of whether there is certain cross-border interest must be carried out, for reasons of legal certainty, on the date of the award of the public contract at issue (see, by analogy, judgment of 10 November 2005, *Commission* v *Austria*, C-29/04, EU:C:2005:670, paragraph 38). In that regard, the fact that, in the main proceedings, the contract was subsequently amended by a supplementary agreement is not capable of altering the date on which it must be determined whether there was such an interest, where such a supplementary agreement is not of a nature substantially to alter the general scheme of the contract at issue, which remains, however, a matter for the referring court to verify.

38 It is thus for the referring court to carry out a detailed assessment of all the relevant evidence concerning the contract at issue so as to verify whether there was certain cross-border interest on the date on which the contract at issue in the main proceedings was awarded.

39 In that regard, it must be pointed out that, in the course of that assessment, a conclusion that there is certain cross-border interest cannot be inferred hypothetically from certain factors which, considered in the abstract, could constitute evidence to that effect, but must be the positive outcome of a specific assessment of the circumstances of the contract at issue in the main proceedings. This means that it cannot be held that certain cross-border interest is established on the basis of factors that do not rule out its existence, but that such an interest must be considered as having been established when its cross-border nature is proved on the basis of objective and consistent factors (see, to that effect, judgment of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 22).

40 The Court has previously held that the value of the contract at issue, in conjunction with the place where the work is to be carried out or the technical nature of the contract and the specific characteristics of the goods concerned, could constitute objective criteria capable of indicating the existence of certain cross-border interest. In that context, it is also possible to take account of the fact that complaints have been made by operators situated in Member States other than that of the contracting authority, provided that it is established that those complaints are real and not fictitious (judgment of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 20 and the case-law cited). Moreover, the fact that, at the time of the award of the contract at issue in the main proceedings, similar health care services may previously have been provided by entities established in other Member States may also be taken into account.

41 However, it must be noted that, as regards, more particularly, health care services, the Court has held, in an action for failure to fulfil obligations, that certain cross-border interest was not established solely on the basis of the fact that the contracts at issue were of significant economic value (see, to that effect, judgment of 29 April 2010, *Commission* v *Germany*, C-160/08, EU:C:2010:230, paragraphs 18, 54 and 123).

42 In the present case, as Oftalma pointed out in its written observations, the order for reference contains nothing to suggest that the contract at issue in the main proceedings had certain cross-border interest on the date when it was awarded.

43 In the event that it is nevertheless established that there was certain cross-border interest and, consequently, a lack of transparency could have given rise to a difference in treatment to the detriment of undertakings situated in a Member State other than that of the contracting authority, such a difference in treatment may be justified by objective circumstances (see, to that effect, judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 52 and the case-law cited).

44 With regard to such a justification, Oftalma relies, in its written observations, on paragraph 57 of the judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440), in which the Court found that the objective of maintaining, on grounds of public health, a balanced medical and hospital service open to all may fall within one of the derogations on the grounds of public health.

45 In the event that certain cross-border interest is established, it is for the referring court, taking account of the case-law set out in the two preceding paragraphs, to examine whether the award of the contract at issue in the main proceedings was justified.

46 In the light of all the considerations set out above, the answer to the first question is that, when it awards a public service contract that falls within the scope of Article 9 of Directive 92/50 and is, consequently, in principle, subject only to Articles 14 and 16 of that directive, a contracting authority is nonetheless also required to comply with the fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and non-discrimination on the grounds of nationality and the consequent obligation of transparency, provided that, at the date of its award, the contract had certain cross-border interest, which it is for the referring court to verify.

47 Moreover, in the same context, Oftalma objects to the claims of the Regione Piemonte and CIOV, and refers to the principle of *nemo auditur propriam turpitudinem allegans*. It states that, if the conclusion of the contract entered into with it is unlawful, such unlawfulness is attributable to the Regione Piemonte and CIOV. It further submits that a rejection of its claim for remuneration of services actually and duly provided by it would confer an undue advantage on CIOV.

48 In that regard, it must be noted that such principles must be assessed by the referring court through the application of national law.

The second and third questions

49 By its second and third questions, the referring court asks, in essence, whether Article 27(3) of Directive 92/50 must be interpreted as applying to public service contracts referred to in Annex I B to that directive.

50 It must be noted that, by adopting Article 9 of Directive 92/50, the EU legislature expressly provided that only Articles 14 and 16 of that directive were applicable to the services listed in Annex I B. In the absence of any indication to the contrary, it must be concluded that this is the case even if a public contract in respect of such a service has certain cross-border interest.

51 It follows that subjecting the services listed in Annex I B to Directive 92/50 to articles other than those expressly referred to in Article 9 of that directive would lead to an interpretation that contradicts the clear wording of that article and would therefore be contrary to the intention of the EU legislature.

52 It is clear that the obligations arising from Article 27(3) of that directive do not apply to a public contract in respect of a service listed in Annex I B thereto, even if the contract does have certain cross-border interest.

53 Thus, compliance with the fundamental rules and general principles of the Union and the obligations arising therefrom, as recognised, with regard to public contracts having certain cross-border interest, in the case-law cited in paragraph 36 above, does not entail, as such, the admission of a minimum number of candidates in a negotiated procedure, as referred to in Article 27(3).

54 Further, adopting an interpretation that, even where there is certain cross-border interest, Article 27(3) of Directive 92/50 would apply in a case such as the one in the main proceedings, could lead to other provisions of that directive that are applicable only to the services referred to in Annex I A to that directive being applied to service contracts under Annex I B, which would risk rendering entirely ineffective the distinction drawn between the services referred to in Annex I A and those in Annex I B to the directive (see, to that effect, with regard to Annexes II A and II B of Directive 2004/18, which correspond to Annexes I A and I B of Directive 92/50, judgment of 17 March 2011, *Strong Segurança*, C-95/10, EU:C:2011:161, paragraph 42).

55 In the light of all the above considerations, the answer to the second and third questions is that Article 27(3) of Directive 92/50 must be interpreted as not applying to public service contracts referred to in Annex I B to that directive.

Limitation of the temporal effects of the judgment to be delivered

56 In its observations, Oftalma asks the Court to limit the temporal effects of the judgment to be delivered in the event that the fundamental rules and the general principles of EU law and the consequent obligation of transparency are interpreted as meaning that the award of a contract such as that at issue in the main proceedings must be preceded by a sufficient degree of advertising where such a contract has certain cross-border interest. According to Oftalma, such a judgment could call into question the validity of all agreements for the provision of care services entered into by private institutions and public authorities and, accordingly, destabilise the entire Italian health system.

57 It should be recalled in this connection that it is only exceptionally that, in application of a general principle of legal certainty which is inherent in the EU legal order, the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relations established in good faith. Such a restriction may, according to the Court's settled case-law, be allowed only in the actual judgment ruling upon the interpretation sought (judgment of 17 July 2008, *Krawczyński*, C-426/07, EU:C:2008:434, paragraphs 42 and 43).

58 As is apparent from paragraph 36 above, the Court has previously held that contracts relating to services referred to in Annex I B to Directive 92/50, where they have certain cross-border interest, are subject to the fundamental rules and general principles arising under the FEU Treaty, from which the obligation of transparency flows.

59 Accordingly, there is no need to limit the temporal effects of the present judgment.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **When awarding a public service contract that falls within the scope of Article 9 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, and is, consequently, in principle, subject only to Articles 14 and 16 of that directive, a contracting authority is nonetheless also required to comply with the fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and non-discrimination on the grounds of nationality and the consequent obligation of transparency, provided that, at the date of its award, the contract had certain cross-border interest, which it is for the referring court to verify.**

2. **Article 27(3) of Directive 92/50 must be interpreted as not applying to public service contracts referred to in Annex I B to that directive.**

[Signatures]

---

* Language of the case: Italian.

EU:C:2017:557

ORDONNANCE DE LA COUR (sixième chambre)

13 juillet 2017 (*)

« Renvoi préjudiciel – Article 99 du règlement de procédure de la Cour – Marchés publics – Principes de passation des marchés – Égalité de traitement des soumissionnaires – Durée de validité de la soumission et de la caution – Prorogation non explicitement prévue – Exclusion du marché »

Dans l'affaire C-35/17,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par la Krajowa Izba Odwoławcza (chambre nationale de recours, Pologne), par décision du 16 janvier 2017, parvenue à la Cour le 24 janvier 2017, dans la procédure

Saferoad Grawil sp. z o.o.,

Saferoad Kabex sp. z o.o.

contre

Generalna Dyrekcja Dróg Krajowych i Autostrad Oddział w Poznaniu,

en présence de :

Przedsiębiorstwo Budownictwa Drogowego S.A.,

Zakład Bezpieczeństwa Ruchu Drogowego (Zaberd) S.A.,

LA COUR (sixième chambre),

composée de M. E. Regan, président de chambre, MM. J.-C. Bonichot et S. Rodin (rapporteur), juges,

avocat général : M. M. Campos Sánchez-Bordona,

greffier : M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 2 de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO 2004, L 134, p. 114).

2 Cette demande a été présentée dans le cadre d'un litige opposant Saferoad Grawil sp. z o.o. et Saferoad Kabex sp. z o.o. agissant ensemble en tant que soumissionnaire unique (ci-après, ensemble, « Saferoad ») à la Generalna Dyrekcja Dróg Krajowych i Autostrad Oddział w Poznaniu (direction générale des routes nationales et des autoroutes de Poznań, Pologne) (ci-après le « pouvoir adjudicateur »), soutenu par Przedsiębiorstwo Budownictwa Drogowego S.A. et Zakład Bezpieczeństwa Ruchu Drogowego (Zaberd) S.A., au sujet de la décision du pouvoir adjudicateur d'attribuer un marché public à Zaberd.

Le cadre juridique

Le droit de l'Union

3 L'article 2 de la directive 2004/18, intitulé « Principes de passation des marchés », prévoit que les pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité, de manière non discriminatoire et agissent avec transparence. Cette disposition correspond matériellement à celle de l'article 10 de la directive 2004/17/CE du Parlement européen et du Conseil, du 31 mars 2004, portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des services postaux (JO 2004, L 134, p. 1).

Le droit polonais

4 L'article 2 de la directive 2004/18 et l'article 10 de la directive 2004/17 sont mis en œuvre en droit polonais par l'article 7, paragraphe 1, de la ustawa z dnia 29 stycznia 2004 r. – Prawo zamówień publicznych (Dz.U. z 2004 r., nr 19, poz. 177) (ci-après la « loi sur les marchés publics » du 29 janvier 2004). Aux termes de cette disposition, dans la version applicable au litige au principal, les pouvoirs adjudicateurs établissent et appliquent les procédures de passation de marchés de manière à garantir le respect d'une concurrence loyale et l'égalité de traitement des opérateurs économiques.

5 S'agissant de la prorogation de la durée de validité de la soumission, l'article 85, paragraphe 1, de la loi sur les marchés publics dispose qu'un soumissionnaire est lié par son offre pendant le délai indiqué dans le cahier des charges, mais sans que ce délai puisse excéder, en fonction de la valeur d'un marché, 30, 60 ou 90 jours. Aux termes du paragraphe 2 de cet article, un soumissionnaire a la possibilité de proroger la durée de validité de la soumission, de sa propre initiative ou à la demande du pouvoir adjudicateur. Or, ce dernier ne peut le demander qu'une fois et pour la période ne dépassant pas 60 jours. Conformément au paragraphe 4, ladite prorogation doit être suivie par la prorogation parallèle de la période de validité de la caution de soumission ou, si cela s'avère impossible, par le versement d'une nouvelle caution de soumission.

6 L'article 24, paragraphe 2, point 2, de la loi sur les marchés publics énumère les hypothèses d'exclusion d'un soumissionnaire. Parmi celles-ci, figure la situation dans laquelle le soumissionnaire a refusé de proroger la durée de validité de sa soumission à la demande du pouvoir adjudicateur. En revanche, il ressort de la demande de décision préjudicielle qu'une telle conséquence ne serait prévue ni à cet article 24 ni à d'autres articles, concernant l'absence de prorogation de la durée de validité de la soumission dans d'autres cas, à savoir sans aucune demande de la part du pouvoir adjudicateur.

7 S'agissant de la caution de soumission, selon l'article 45 de la loi sur les marchés publics, lorsque la valeur d'un marché est égale ou supérieure aux seuils définis dans la loi, le pouvoir adjudicateur demande aux soumissionnaires de verser la caution de soumission. Celle-ci doit être versée avant l'expiration du délai de dépôt des offres.

8 L'article 46, paragraphe 1, de la loi sur les marchés publics dispose que, à la suite de la sélection de l'offre la plus avantageuse ou de l'annulation de la procédure de passation du marché concerné, le pouvoir adjudicateur verse la caution de soumission immédiatement à tous les soumissionnaires, excepté au soumissionnaire dont l'offre a été sélectionnée.

9 L'article 184 de ladite loi impose au soumissionnaire dont l'offre a été sélectionnée une obligation de proroger la validité de la caution de soumission pour la période de procédure de recours.

Le litige au principal et les questions préjudicielles

10 Le pouvoir adjudicateur a attribué le marché public en cause à Zaberd. Saferoad, en tant que soumissionnaire, conteste cette attribution.

11 Le marché concerné avait pour objet le service de maintien d'une voie rapide autour de Poznań (Pologne). Conformément à l'avis de marché, publié au cours de l'année 2015, la valeur du marché dépassait le seuil prévu à l'article 7 de la directive 2004/18. Selon cet avis, le délai minimum pendant

lequel chaque soumissionnaire était tenu de maintenir son offre s'élevait à 90 jours à compter de la date limite de réception des offres. De plus, afin de participer à la procédure de passation de marché, chaque soumissionnaire était tenu de verser une caution de soumission.

12 En réponse audit avis, huit soumissionnaires ont déposé leurs offres, dont Saferoad et Zaberd. Dans le cadre de la procédure de passation de marché, le pouvoir adjudicateur a demandé aux soumissionnaires de proroger la durée de validité de leurs soumissions pour une période de 60 jours. Un soumissionnaire, qui ne s'est pas conformé à cette demande, a été exclu du marché. Les autres ont prorogé la durée de validité de leurs soumissions pour la période demandée. Celle-ci a néanmoins expiré sans que la procédure ait abouti. Toutefois, la majorité des soumissionnaires, dont Zaberd, ont continué, de leur propre initiative, à proroger les périodes de validité de leurs soumissions, ainsi que la validité de leurs cautions de soumission, jusqu'à la date de prise de décision du pouvoir adjudicateur. Finalement, le marché a été attribué à Zaberd.

13 Dans ce contexte, Saferoad a introduit un recours contre la décision d'attribution du marché. Elle a fait valoir, notamment, que les soumissionnaires qui n'avaient pas prorogé, de leur propre initiative, après la période supplémentaire de 60 jours, la durée de validité de leur soumission, auraient dû également être exclus du marché. Dans ce cas, en vertu des règles de pondération des critères prévues dans l'avis de marché, le marché concerné aurait dû être attribué à Saferoad.

14 Dans ces conditions, la Krajowa Izba Odwoławcza (chambre nationale de recours, Pologne) a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes :

« 1) L'article 2 de la directive 2004/18, compte tenu également du principe de proportionnalité, doit-il être interprété en ce sens que :

a) cette disposition permet d'exclure un opérateur économique de la procédure ou de rejeter son offre, en raison de l'expiration du délai de validité de celle-ci, lorsqu'une telle sanction ne découle pas explicitement et directement des dispositions de la loi ni des conditions d'attribution du marché décrites par le pouvoir adjudicateur dans l'avis de marché ou dans le cahier des charges, et que l'opérateur économique reste intéressé par la conclusion du contrat,

b) même en l'absence de décision formelle d'exclure l'opérateur économique de la procédure ou de rejeter son offre, au sens du point [a)], cette disposition permet de constater que l'offre de l'opérateur économique n'est plus valable, en raison de l'expiration de son délai de validité, de telle sorte qu'elle a cessé d'exister dans le cadre de la procédure d'attribution du marché, et que le contrat ne peut donc pas être conclu avec cet opérateur économique (interdiction de conclure le contrat), bien que celui-ci reste intéressé par la conclusion du contrat, lorsque la constatation de l'expiration du délai de validité de l'offre et de l'interdiction de conclure le contrat ne découle pas explicitement et directement des dispositions de la loi ni des conditions d'attribution du marché décrites par le pouvoir adjudicateur dans l'avis de marché ou dans le cahier des charges ?

2) L'article 2 de la directive 2004/18, compte tenu également du principe de proportionnalité, doit-il être interprété en ce sens qu'il permet aux pouvoirs adjudicateurs d'exiger des opérateurs économiques qu'ils maintiennent la validité du cautionnement constitué pour garantir l'offre, sans possibilité d'interruption, jusqu'au moment de la conclusion du contrat, alors que les dispositions de l'avis de marché ou du cahier des charges n'imposent aux opérateurs économiques aucune durée maximale raisonnable de maintien de la validité du cautionnement ? »

Sur les questions préjudicielles

15 Conformément à l'article 99 du règlement de procédure de la Cour, lorsqu'une question posée à titre préjudiciel est identique à une question sur laquelle la Cour a déjà statué, lorsque la réponse à une telle question peut être clairement déduite de la jurisprudence ou lorsque la réponse à la question posée à titre préjudiciel ne laisse place à aucun doute raisonnable, la Cour peut, à tout moment, sur proposition du juge rapporteur, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée.

16 La réponse aux questions posées par la juridiction de renvoi pouvant être clairement déduite de la jurisprudence de la Cour et, en particulier, de son arrêt du 2 juin 2016, Pizzo (C-27/15, EU:C:2016:404), il y a lieu de faire application de la disposition procédurale susmentionnée.

17 Par ses deux questions, qu'il convient d'examiner ensemble, la juridiction de renvoi demande, en substance, d'une part, si l'article 2 de la directive 2004/18, le principe d'égalité de traitement et l'obligation de transparence permettent d'exclure, de rejeter ou de déclarer non valable l'offre du soumissionnaire qui n'a pas prorogé la durée de validité de son offre, alors que de telles conséquences ne sont pas expressément prévues par les documents afférents à la procédure de passation d'un marché public, et, d'autre part, si le pouvoir adjudicateur peut, dans de telles conditions, exiger des soumissionnaires qu'ils maintiennent la validité du cautionnement constitué pour garantir l'offre, sans possibilité d'interruption, jusqu'à la date de la conclusion du contrat.

18 À cet égard, il convient de rappeler, d'une part, que le principe d'égalité de traitement impose que les soumissionnaires disposent des mêmes chances dans la formulation des termes de leurs offres et implique donc que ces offres soient soumises aux mêmes conditions pour tous les soumissionnaires. D'autre part, l'obligation de transparence, qui en constitue le corollaire, a pour but de garantir l'absence de risque de favoritisme et d'arbitraire de la part du pouvoir adjudicateur. Cette obligation implique que toutes les conditions et les modalités de la procédure d'attribution soient formulées de manière claire, précise et univoque dans l'avis de marché ou dans le cahier des charges, de façon, premièrement, à permettre à tous les soumissionnaires raisonnablement informés et normalement diligents d'en comprendre la portée exacte et de les interpréter de la même manière et, deuxièmement, à mettre le pouvoir adjudicateur en mesure de vérifier effectivement si les offres des soumissionnaires correspondent aux critères régissant le marché en cause (voir, en ce sens, arrêts du 6 novembre 2014, Cartiera dell'Adda, C-42/13, EU:C:2014:2345, point 44 et jurisprudence citée, ainsi que du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 36).

19 La Cour a également jugé que les principes de transparence et d'égalité de traitement qui régissent toutes les procédures de passation de marchés publics exigent que les conditions de fond et de procédure concernant la participation à un marché soient clairement définies au préalable et rendues publiques, en particulier les obligations pesant sur les soumissionnaires, afin que ceux-ci puissent connaître exactement les contraintes de la procédure et être assurés du fait que les mêmes exigences valent pour tous les concurrents (voir, en ce sens, arrêts du 9 février 2006, La Cascina e.a., C-226/04 et C-228/04, EU:C:2006:94, point 32, ainsi que du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 37).

20 En outre, la directive 2004/18 prévoit, au point 17 de son annexe VII A, portant sur les informations qui doivent figurer dans les avis pour les marchés publics, dans sa partie relative aux « [a]vis de marchés », que les « [c]ritères de sélection concernant la situation personnelle des opérateurs économiques qui peuvent entraîner l'exclusion de ces derniers » de la procédure de passation du marché en cause doivent être énoncés dans l'avis de marché (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 38).

21 Ainsi, conformément à une jurisprudence constante de la Cour, en vertu de l'article 2 de la directive 2004/18, il incombe à un pouvoir adjudicateur d'observer strictement les critères qu'il a lui-même fixés (arrêts du 10 octobre 2013, Manova, C-336/12, EU:C:2013:647, point 40 ; du 6 novembre 2014, Cartiera dell'Adda, C-42/13, EU:C:2014:2345, point 42, ainsi que du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 39).

22 Par ailleurs, une condition relative à l'expiration du délai de validité d'une offre dans le cadre d'une procédure de marché public qui découlerait de l'interprétation jurisprudentielle du droit national et de la pratique d'une autorité est particulièrement préjudiciable pour les soumissionnaires établis dans d'autres États membres, dans la mesure où leur niveau de connaissance du droit national et de son interprétation ainsi que de la pratique des autorités nationales ne peut être comparé à celui des soumissionnaires nationaux (voir, en ce sens, arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 46).

23 Il ressort de la décision de renvoi que, dans l'affaire au principal, l'exclusion d'un opérateur économique de la procédure, en raison de l'expiration du délai de validité de son offre, n'est pas

explicitement prévue par la loi applicable ni dans l'avis de marché ou dans le cahier des charges.

24 Ainsi que le souligne la juridiction de renvoi, malgré plusieurs années de contentieux relatif à la loi sur les marchés publics et, notamment, à la question de l'expiration du délai de validité de l'offre, la jurisprudence polonaise a développé deux analyses différentes en parallèle, entraînant ainsi une situation d'insécurité juridique tant pour les opérateurs économiques que pour les pouvoirs adjudicateurs.

25 À cet égard, la Cour a déjà jugé que le principe d'égalité de traitement et l'obligation de transparence doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un opérateur économique de la procédure de passation d'un marché public à la suite du non-respect, par celui-ci, d'une obligation qui résulte non pas expressément des documents afférents à cette procédure ou de la loi nationale en vigueur, mais d'une interprétation de cette loi et de ces documents ainsi que du comblement des lacunes, de la part des autorités ou des juridictions administratives nationales, présentées par lesdits documents (voir, en ce sens, arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 51).

26 A fortiori, ces principes s'opposent à l'exclusion d'un opérateur économique de la procédure de passation d'un marché public, lorsque, en raison d'une jurisprudence nationale divergente, la condition dont le respect est exigé ne ressort même pas de l'interprétation des règles pertinentes par les juridictions compétentes.

27 Eu égard à l'ensemble des considérations qui précèdent, il convient de répondre aux questions posées que l'article 2 de la directive 2004/18, le principe d'égalité de traitement et l'obligation de transparence doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un opérateur économique de la procédure de passation d'un marché public à la suite du non-respect, par cet opérateur, d'une obligation qui ne résulte pas expressément des documents afférents à cette procédure.

Sur les dépens

28 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, la Cour (sixième chambre) dit pour droit :

L'article 2 de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services, le principe d'égalité de traitement et l'obligation de transparence doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un opérateur économique de la procédure de passation d'un marché public à la suite du non-respect, par cet opérateur, d'une obligation qui ne résulte pas expressément des documents afférents à cette procédure.

Signatures

---

* Langue de procédure : le polonais.

EU:C:2018:568

JUDGMENT OF THE COURT (Fourth Chamber)

12 July 2018 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/17/EC — Article 34 — Supply of spare parts for buses and trolley-buses — Technical specifications — Equivalent products — Whether proof of equivalence may be provided after the contract has been awarded)

In Case C-14/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 17 November 2016, received at the Court on 11 January 2017, in the proceedings

VARSrl,

Azienda Trasporti Milanesi SpA (ATM)

v

Iveco Orecchia SpA,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, E. Juhász (Rapporteur), K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2017,

after considering the observations submitted on behalf of:

– VAR Srl, by M. Goria and S.E. Viscio, avvocati,

– Azienda Trasporti Milanesi SpA (ATM), by M. Zoppolato and A. Rho, avvocati,

– Iveco Orecchia SpA, by F. Brunetti and F. Scanzano, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli and C. Pluchino, avvocati dello Stato,

– the European Commission, by G. Gattinara and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 February 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 34 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

2 The request has been made in proceedings between, on the one hand, VAR Srl and Azienda Trasporti Milanesi SpA ('ATM') and, on the other, Iveco Orecchia SpA concerning the award of a contract for the supply of original or equivalent spare parts for buses and trolley-buses bearing the IVECO mark.

Legal context

EU law

3 Recital 42 of Directive 2004/17 states:

'The technical specifications drawn up by purchasers should allow public procurement to be opened up to competition. To this end, it should be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it should be possible to draw up the technical specifications in terms of functional performance and requirements and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety should be considered by the contracting entities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting entities should be able to provide a reason for any decision that equivalence does not exist in a given case. ...'

4 Article 10 of that directive, entitled 'Principles of awarding contracts', provides:

'Contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Article 34 of the directive, entitled 'Technical specifications', provides:

'1. Technical specifications as defined in point 1 of Annex XXI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening-up of public procurement to competition.

3. Without prejudice to legally binding national technical rules, to the extent that they are compatible with [EU] law, the technical specifications shall be formulated:

(a) either by reference to technical specifications defined in Annex XXI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words "or equivalent";

(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting entities to award the contract;

(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

4. Where a contracting entity makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the ground that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting entity, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

5. Where a contracting entity uses the option provided for in paragraph 3 of laying down performance or functional requirements, it may not reject a tender for products, services or works which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard, or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In his tender, the tenderer shall prove to the satisfaction of the contracting entity and by any appropriate means that the product, service or work in compliance with the standard meets the performance or functional requirements of the contracting entity.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

…

7. "Recognised bodies", within the meaning of this Article, are test and calibration laboratories, and certification and inspection bodies which comply with applicable European standards.

Contracting entities shall accept certificates from recognised bodies established in other Member States.

8. Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words "or equivalent."'

6 Article 49 of Directive 2004/17, entitled 'Information to applicants for qualification, candidates and tenderers', provides, in the second indent of its paragraph 2:

'On request from the party concerned, contracting entities shall, as soon as possible, inform:

…

– any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 34(4) and (5), the reasons for their decision of non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements.'

7 Paragraph 3 of Article 51 of the directive, entitled 'General provisions', provides:

'Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 55 and 57.'

Italian law

8 Article 68 of decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163,

establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (GURI No 100 of 2 May 2006), in the version in force at the time of the facts in the main proceedings, ('Legislative Decree No 163/2006') provides:

'1. Technical specifications as defined in point 1 of Annex VIII shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. Whenever possible these technical specifications must be defined so as to take into account accessibility criteria for people with disabilities or design for all users and the protection of the environment.

2. Technical specifications must afford equal access for tenderers and must not have the effect of creating unjustified obstacles to the opening-up of public procurement to competition.

3. Without prejudice to legally binding national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

(a) either by reference to technical specifications defined in Annex VIII and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words "or equivalent";

…

4. Where a contracting authority makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the ground that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in its tender to the satisfaction of the contracting authority, by whatever appropriate means, that the solutions which it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

5. An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.

6. An economic operator proposing equivalent solutions to the requirements defined by the technical specifications shall make this known by a separate declaration, which it shall attach to its tender.

…

13. Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraphs 3 and 4 is not possible and on condition that such reference shall be accompanied by the words "or equivalent."'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 By a contract notice published in the *Official Journal of the European Union* on 25 February 2015, ATM launched an open public procurement procedure for the award of a contract for the 'supply of original spare parts and/or original equipment and/or equivalent for buses and trolley-buses manufactured by Iveco'.

10 The value of the contract was estimated at EUR 3 350 000 plus value added tax (VAT). The tenders were to be assessed according to the criterion of the lowest price, with the possibility of a further bid after the initial tenders, the basis for reopening the competition being the best tender submitted.

11 The spare parts to be supplied were set out in a list drawn up by ATM. That list referred expressly to parts of a specific make (FIAT/IVECO). The number of distinct spare parts to be offered in the tender was approximately 2 200.

12 According to the specifications in the contract documentation, ‘original spare parts’ meant parts made by the vehicle manufacturer itself, but also those made by the vehicle manufacturer’s suppliers in a position to certify that the parts had been made in compliance with the specifications and manufacturing standards defined by the vehicle manufacturer. ‘Equivalent spare parts’ were defined as spare parts made by any undertaking which certifies that the quality of those parts matches that of components used for the assembly of the vehicle and the spare parts supplied by the vehicle manufacturer.

13 So far as the detailed rules governing the tender are concerned, the contract documentation specified that each product tendered as an ‘equivalent’ to IVECO’s spare part had to be designated by the tenderer by the acronym ‘EQ’.

14 The contract documents also specified that, in the event of the contract being awarded, the supply of equivalent parts would be accepted by ATM only if those parts were the subject of certifications or certificates of equivalence to the originals of the products tendered.

15 Two undertakings participated in the procedure: Iveco Orecchia, which, as the exclusive concessionaire of the group manufacturing the spare parts concerned for north-west Italy, was in a position to offer original spare parts, and VAR. At the end of the tendering procedure, VAR was placed first in the ranking.

16 Iveco Orecchia brought an action for annulment of the decision awarding the contract to VAR before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy), which upheld the action. That court thereby annulled the decision on the ground, inter alia, that VAR had not, either when it submitted its tender or during the procurement procedure, provided proof that the products which it offered were equivalent to the original spare parts. VAR, supported by ATM, appealed against that judgment to the Consiglio di Stato (Council of State, Italy). ATM, supported by VAR, also appealed against the judgment to that court, which proceeded to join the cases.

17 The Consiglio di Stato (Council of State) points out that neither the wording of the specific rules governing the procurement procedure nor that of Article 68(13) of Legislative Decree No 163/2006 provides that the proof that the product is equivalent to the original must be provided by the tenderer at the time of the call for tenders. In that regard, Article 68(13) of Legislative Decree No 163/2006, which transposes Article 34(8) of Directive 2004/17 into national law, is to be distinguished from the case in which the contracting authority defines the products which are the subject matter of the tender in accordance with Article 68(3) of that legislative decree, namely, where the tenderer is required to prove at the tendering stage that the solutions which it proposes satisfy in an equivalent manner the requirements defined by the technical specifications. In addition, that court points out that account should also be taken of the technical specifications in the contract documentation, which provide that, in the case of equivalent products, equivalence must be attested by an appropriate certificate from the manufacturer, to be presented to the contracting authority at ‘the time of the first delivery of an equivalent spare part’. However, a systematic interpretation of Article 34(8) of Directive 2004/17 could require proof of equivalence to be furnished at the time when a tender is submitted.

18 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 34(8) of Directive 2004/17 be interpreted as meaning that it requires that proof that the products to be supplied are equivalent to the original products be presented at the stage of submission of the tender?

(2) In the alternative, if the answer to the first question is in the negative, which steps are required to ensure that there is respect for the principles of equal treatment and impartiality, of open competition and sound administration, and for other tenderers’ rights of defence and right to be heard?’

Consideration of the questions referred

The first question

19 By its first question, the referring court asks whether Article 34(8) of Directive 2004/17 must be interpreted as meaning that, when the technical specifications in the contract documentation refer to a specific mark, origin or production, the contracting authority must require the tenderer to submit, as part of its tender, proof that the products which it proposes are equivalent to those defined in the technical specifications.

20 According to Article 34(2) of Directive 2004/17, technical specifications must afford equal access for tenderers and must not have the effect of creating unjustified obstacles to the opening-up of public procurement to competition.

21 It is in the light of that objective that Article 34(8) of Directive 2004/17 provides that technical specifications may not refer to a specific make or source, or to a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products, unless they are justified by the subject matter of the contract. Such a reference is to be permitted on an exceptional basis only, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to Article 34(3) and (4) is not possible, and it must be accompanied by the words ‘or equivalent’.

22 That provision does not state at what point in time or by what means the ‘equivalent’ nature of a product offered by a tenderer must be proved.

23 In that regard, Article 34(3) to (5) of Directive 2004/17 expressly states that, where the technical specifications are determined by reference to certain standards or in terms of performance or functional requirements, or to a combination of those standards or requirements, the tenderer must prove in its tender that it satisfies the requirements in the contract documentation. It also follows from that article that proof can be provided by ‘any appropriate means’ and that, in that regard, ‘an appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body’.

24 It thus follows from paragraphs 3 to 5 of Article 34 of Directive 2004/17 that those paragraphs define general rules concerning the formulation of the technical specifications, the means by which the tenderer can prove that its tender satisfies the requirements in those specifications and the stage at which that proof must be provided.

25 In relation to those general rules, Article 34(8) lays down specific rules governing the conditions under which a particular way of defining the content of the technical specifications, inter alia the reference to a specific make or source, or to a particular process, or to trade marks, patents, types or a specific origin or production, is permitted.

26 The exception which it establishes, which, by its very nature, must be interpreted narrowly, does not cover the point in time at which the tenderer must prove that its tender satisfies the requirements in the technical specifications or the means of proof available to it. Those criteria therefore remain subject to the general rules set out in Article 34(3) to (5) of Directive 2004/17.

27 It follows that, when the contracting authority makes use of the option available to it under the second sentence of Article 34(8) of that directive, it must require the tenderer which wishes to avail itself of the possibility of tendering products equivalent to those defined by reference to a specific mark, origin or production to provide, at the time of submission of its tender, proof of the equivalence of the products concerned.

28 That interpretation is supported by several provisions of Directive 2004/17 and by the principles governing that directive.

29 First of all, the principle of equal treatment and the duty of transparency enshrined in Article 10 of that directive require, in particular, that tenderers must be in a position of equality both when they formulate

their tenders and when those tenders are being assessed by the contracting authority, and constitute the basis of the EU rules on procedures for the award of public contracts (judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 37).

30 If a tenderer, in a procedure in respect of which the technical specifications have been defined in accordance with the specific method on an exceptional basis provided for in Article 34(8) of Directive 2004/17, were permitted to prove the equivalence of its products after it had submitted its tender, the tenders submitted by all of the tenderers would not be subject to the same conditions at the time when they are assessed.

31 Article 51(3) of Directive 2004/17 provides that contracting entities must verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders. Likewise, it is apparent from the second indent of Article 49(2) and from recital 42 of that directive that contracting entities should be able to provide a reason for any decision that equivalence does not exist.

32 Such verification and the possible adoption of a decision that equivalence does not exist can, however, take place only after the tenders have been opened, when they are assessed by the contracting entity, which means that that entity must have evidence that enables it to assess whether and to what extent the tenders submitted satisfy the requirements in the technical specifications, as otherwise it will run the risk that the principle of equal treatment may be infringed and that the tendering procedure may be vitiated by an irregularity.

33 With regard to the means by which tenderers can prove the equivalence of the solutions which they propose, the provisions of Article 34(4) and (5) of Directive 2004/17 are also applicable in procedures where the specific method of formulating the technical specifications, provided for in Article 34(8), has been adopted, which means that the use of any appropriate means is permitted.

34 As a result, although the contracting entity cannot permit tenderers to prove the equivalence of the solutions which they propose after they have submitted their tenders, that entity has a discretion in determining the means that may be used by tenderers to prove such equivalence in their tenders. That discretion must, however, be exercised in such a way that the means of proof allowed by the contracting entity actually enable that entity to carry out a meaningful assessment of the tenders submitted to it and do not go beyond what is necessary in order to do so, by preventing those means of proof from creating unjustified obstacles to the opening-up of public procurement to competition, in breach of Article 34(2) of Directive 2004/17.

35 In the light of the foregoing, the answer to the first question is that Article 34(8) of Directive 2004/17 must be interpreted as meaning that, when the technical specifications in the contract documentation refer to a specific mark, origin or production, the contracting authority must require the tenderer to submit, already in its tender, proof that the products which it proposes are equivalent to those defined in the technical specifications.

The second question

36 In the light of the answer to the first question, there is no need to answer the second question.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 34(8) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as meaning that, when the technical specifications in the contract documentation refer to a specific mark, origin or production, the contracting authority must

require the tenderer to submit, already in its tender, proof that the products which it proposes are equivalent to those defined in the technical specifications.

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 28 February 2018(1)

Case C-14/17

VAR, Srl

v

Iveco Orecchia SpA,

intervener:

Azienda de Trasporti Milanesi SpA — (ATM)

(Request for a preliminary ruling
from the Consiglio di Stato (Council of State, Italy))

(Preliminary-ruling proceedings — Transport contract — Supply of spare parts for buses, trolley-buses and tramways — Technical specifications — Products equivalent to those covered by a specific trade mark — Proof of equivalence — National law pursuant to which proof of equivalence may be provided after the contract is awarded)

1. Contracting authorities are required to define, in the contract documents they publish, the characteristics of the works, services or supplies of goods which they propose to purchase in the context of public procurement. Those characteristics may include the ‘technical specifications’ of the goods or services concerned.

2. A biased description of those technical specifications may, at the very least, amount to a significant ‘barrier to entry’ for certain tenderers and, in extreme cases, predetermine (including fraudulently) the final choice of successful tenderer if characteristics of products or services are stipulated which that tenderer alone is in a position to supply.

3. The concern to prevent these irregular practices and the intention to ‘allow public procurement to be opened up to competition’ (2) led the EU legislature to lay down legislative provisions in this area. Those provisions include Article 34(8) of Directive 2004/17/EC, (3) which is applicable to these proceedings and provides that, on an exceptional basis, it is possible to ‘refer … to trade marks, patents, types or a specific origin or production’, provided that such reference is accompanied by the words ‘or equivalent’.

4. In the proceedings to be decided by the Italian court, the contract documents used that derogating provision, stating that the contract was for the ‘supply of original spare parts and/or original equipment and/or equivalent for buses, trolley-buses and tramways manufactured by Iveco’.

5. The dispute does not concern the validity of that technical specification as such (since it respected the right to supply equivalent parts) but rather the time when a tenderer must provide the certificate of equivalence of the parts.

6. According to the contract documents, proof of equivalence could be presented to the contracting authority after the award of the contract, at ‘the time of the first delivery of an equivalent spare part’. However, the referring court wonders whether that clause may be incompatible with Article 34 of Directive 2004/17. That would be the case if, in accordance with that provision, proof of equivalence must be attached to the tender or, in any event, must be furnished before the contract is awarded.

I. Legal framework

A. EU law. Directive 2004/17

7. Article 34 provides:

‘1. Technical specifications as defined in point 1 of Annex XXI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to legally binding national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

(a) either by reference to technical specifications defined in Annex XXI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words “or equivalent”;

(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting entities to award the contract;

(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

4. Where a contracting entity makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the ground that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting entity, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

…

8. Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such

reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words “or equivalent”.’

8. Under the heading ‘Criteria for qualitative selection’, Article 54 provides:

‘1. Contracting entities which establish selection criteria in an open procedure shall do so in accordance with objective rules and criteria ...’

B. Italian law

9. In accordance with Article 68(13) of Legislative Decree No 163 of 2006: (4)

‘Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such references are permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraphs 3 and 4 is not possible, on condition that they are accompanied by the expression “or equivalent”.’

II. Facts of the dispute and questions referred for a preliminary ruling

10. The Azienda Trasporti Milanese (‘ATM’) launched an open procedure (5) for the award of a contract for the ‘supply of original spare parts and/or original equipment and/or equivalent for buses, trolley-buses and tramways manufactured by Iveco’.

11. The value of the contract was EUR 3 350 000.00 plus VAT, for the supply of 2 195 IVECO/FIAT-branded spare parts, or equivalent. The award criterion was the lowest price, with the possibility of a further bid after the initial tenders and between the tenderers placed first in the ranking.

12. The contract documents stipulated that:

– ‘Original spare parts’ meant either spare parts ‘made by the vehicle manufacturer itself’ or spare parts ‘made by the vehicle manufacturer’s suppliers … which are certified by the producer as having been manufactured according to the specifications and production standards defined by the vehicle manufacturer’.

– ‘Equivalent spare parts’ were defined as spare parts ‘made by any undertaking which certifies that the quality of those parts matches that of components used for the assembly of the vehicle and the spare parts supplied by the vehicle manufacturer’. (6)

13. The contract documents stated that ‘at the time of the first delivery of an equivalent spare part, the supplier must provide the certificate of equivalence to the original, this being a necessary condition for acceptance of the product’. (7)

14. Only VAR, s.r.l., tendering for equivalent spare parts, and Iveco Orecchia, s.p.a., tendering for original spare parts, took part in the tendering procedure. The contract was awarded to VAR.

15. Iveco Orecchia contested that decision before the Tribunal Amministrativo Regionale della Lombardia — Milano (Regional Administrative Court of Lombardy — Milan, Italy), which, by judgment No 679 of 11 April 2016, upheld the action.

16. The lower court held that it was the responsibility of the tenderer, pursuant to Article 68 of Legislative Decree No 163 of 2006, to prove, during the procedure, that the spare parts proposed were equivalent to the originals. Accordingly, VAR should be excluded since it had stated its willingness to supply spare parts equivalent to the originals (as permitted by the *lex specialis*) without providing, either with its tender or during the course of the tendering procedure, the certificates of equivalence to the original products or any other proof.

17. That judgment is the subject of an appeal before the Consiglio di Stato (Council of State, Italy), which points out that the contract documents did not require the tenderer to provide proof of equivalence before the contract was awarded but rather at the time of the first delivery of the spare parts.

18. That court takes the view that, since the Italian provision implementing Directive 2004/17 is a verbatim copy of Article 34(8) of that directive, any conflict between national law and EU law can, in principle, be ruled out. However, the referring court is uncertain whether Directive 2004/17 should be interpreted systematically, such that, pursuant to it, proof of equivalence must be furnished at the time when the tender is submitted.

19. Against that background, the Consiglio di Stato (Council of State) seeks a preliminary ruling from the Court on the following questions:

‘(a) Must Article 34(8) of Directive 2004/17/EC be interpreted as meaning that it requires that proof that the products to be supplied are equivalent to the original products be presented at the stage of submission of the tender?

(b) In the alternative, in the event that Question (a) on interpretation is to be answered in the negative: Which steps are required to ensure that there is respect for the principles of equal treatment and impartiality, of open competition and sound administration, and for other tenderers’ rights of defence and right to be heard?’

III. Summary of the parties’ observations

20. VAR and the ATM submit that the first question must be answered in the negative. Relying on the fact that the interpretation of provisions of EU law must take account not only of the wording of those provisions but also of their context and the aim which they pursue, VAR and the ATM argue that:

– Article 34(8) of Directive 2004/17 contains no requirement that tenderers must present proof of equivalence with their tenders.

– In the cases referred to in Article 34(3) and (4) of Directive 2004/17, the quality of the goods to be supplied is described. Accordingly, a tender who proposes to submit a tender relating to the goods referred to in paragraph 4, whose technical features do not match those set out in the technical specifications of the contract documents, will have to prove that the alternatives he proposes are functionally equivalent in order to meet the contracting authority’s requirements.

– However, in the case referred to in Article 34(8) of Directive 2004/17, the features, functions and performance of the product to be supplied are not described; all that is required is the supply of the product defined in the contract documents, albeit from a source different to that of the product made by the original manufacturer because these are cases where such a description is not possible without reference to a specific trade mark.

– In that situation, in order to protect free competition, tenderers are allowed to tender for equivalent products, even though these are covered by a different trade mark, without having to present proof of equivalence under Article 34(3) and (4) of Directive 2004/17. A converse interpretation would lead to unfair outcomes and it would be difficult to understand why, where the contracting authority used a reference to a trade mark with the intention of simplifying the procedure, the tenderer should be in a more unfavourable situation than if the traditional methods of defining the technical features had been used.

– the requirement that proof of equivalence must be provided with the tender is incompatible with the objective of enabling the opening-up of public procurement to competition, for it means that proof of equivalence must be available in advance, in relation to a large number (sometimes thousands) of products which, ultimately, the administrative authorities may not purchase. It is, therefore, an unnecessary and onerous burden which makes it excessively difficult for the suppliers of ‘equivalent products’ to participate in such procedures, to the benefit of distributors of original spare parts and vehicle manufacturers.

– The Commission notice of 28 May 2010 on Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (8) confirms, as regards competition policy in the motor vehicle sector, the need to protect access by spare parts manufacturers to the second-hand market. That ensures that competing brands of spare parts continue to be available to both independent and authorised repairers, as well as to wholesale distributors.

21. As regards the second question, VAR and the ATM submit that the mechanisms for guaranteeing respect for the principles which the referring court cites are derived from the documents governing the tendering procedure, as determined by the contracting authority.

22. Iveco Orecchia, the Italian Government and the Commission maintain that Article 34(8) of Directive 2004/17 does not require that proof of equivalence be furnished with the tender but, interpreted systematically, it leads to that conclusion.

23. Iveco Orecchia and the Italian Government submit that proof of equivalence must be presented with the tender, whereas the Commission submits that it is sufficient if proof is presented during the tendering procedure, provided this is done before the contract is awarded. Their arguments may be summarised as follows:

– Although Article 34(4) and (5) of Directive 2004/17 indicates the tender as the stage when a tenderer must provide proof of equivalence, the fact that Article 34(8) remains silent on that point does not meant that there is a derogation from that rule.

– The purpose of Article 34(8) of Directive 2004/17 is, first, to prohibit the use in the tender documents of technical specifications referring to a specific make or source and, second, to indicate the exceptional circumstances in which such wording is permitted. Since that is the specific content given to the provision by the EU legislature, it is unsurprising that the legislature did not find it necessary to state, in addition, the time when proof of equivalence must be included.

– Regardless of the subject matter of the contract, proof of equivalence is aimed at enabling the contracting authority to verify the extent to which a tenderer is capable of complying with the contractual conditions. That proof must be provided during the procedure for the award of the contract, for, at the end of that procedure, the contracting authority must decide on the award of the contract on the basis of the tender which best satisfies the terms of the conditions governing the invitation to tender.

– A different interpretation would lead to conflict between Article 34(4) and (5), on the one hand, and Article 34(8), on the other, of Directive 2004/17, contrary to the principle of equal treatment. If tenderers were permitted to provide proof of equivalence after the contract had been awarded, the tenders would no longer be comparable and some tenders might have presented such evidence whilst others might have chosen to do so later.

– More important still, the contracting authority would run the risk of undertaking to purchase products not suitable for meeting its requirements, which would leave it with the only option of declaring the contract null and void, which, Iveco Orecchia, the Italian Government and the Commission state, was not the EU legislature's intention when it drafted Directive 2004/17.

– That interpretation is confirmed by other provisions of Directive 2004/17, such as Article 49(2), second indent, which provides that 'contracting entities shall, as soon as possible, inform … any unsuccessful tenderer of the reasons for the rejection of his tender, including … the reasons for their decision of non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements'. Naturally this means that the examination of the equivalence of the product, to the product described in the contract documents, through the use of technical specifications, must take place before the contract is awarded.

– Article 51(3) of Directive 2004/17 takes the same line. Proof of equivalence is essential in order to verify that the tender complies with the technical specifications, which must be done, in all

cases, before the contract is awarded.

IV. Procedure before the Court of Justice

24. The order for reference was received at the Registry of the Court on 11 January 2017.

25. Written observations were lodged by VAR, Iveco Orecchia, the ATM, the Italian Government and the European Commission. All those parties, with the exception of the Italian Government, attended the hearing held on 6 December 2017.

V. Assessment

A. Introductory remarks

26. As I have pointed out above, the formulation of technical specifications in the terms governing public procurement procedures may have a significant (possibly negative) effect on competition, by erecting unjustified barriers to the participation of economic operators.

27. The EU legislature's concern in that regard is quite clear and that is why it included in Article 34(2) of Directive 2004/17 the rule that 'technical specifications shall … not have the effect of creating unjustified obstacles to the opening up of public procurement to competition'. (9)

28. Since the contract at issue concerns the supply of spare parts for motor vehicles, I believe it is helpful, before analysing Directive 2004/17, to recall that, in the motor vehicle sector, the EU legislature combined the protection of competition with a system of block exemptions, reflected in Regulation (EC) No 1400/2002. (10) Within the framework of that regulation, the EU legislature sought specifically to preserve competition (11) between original spare parts and spare parts of matching quality. (12)

29. The Commission shares that aim, which led it to adopt, in 2010, supplementary guidelines on Regulation No 461/2010. In point 18 of those guidelines the Commission points out that their objective is 'to protect access by spare parts manufacturers to the motor vehicle aftermarkets, thereby ensuring that competing brands of spare parts continue to be available to both independent and authorised repairers, as well as to parts wholesalers'.

30. The Commission observes in those guidelines that 'the availability of [spare parts] brings considerable benefits to consumers, especially since there are often large differences in price between parts sold or resold by a car manufacturer and alternative parts'. (13) The restriction of competition may harm consumers in particular by 'limiting the choice of products, lowering their quality or reducing the level of product innovation'. (14)

31. Whilst the protection of competition in relation to vertical agreements focuses on the market power of producers and its effect in controlling supply, public procurement is more concerned with the sphere of demand. However, the same effect of limiting supply may be felt from the perspective of a contracting authority which demands goods or services if it sets out technical specifications which unjustifiably reduce the pool of potential tenderers. On that basis, the benefits of competition in the area of private contracts may be transposed to the area of public contracts.

32. The legislative intervention referred to suggests that, in the sector of private procurement of motor vehicle spare parts, the principle of opening-up to competition must foster a trend whereby original spare parts and spare parts of matching quality can be supplied on an equal footing. That same trend must, a fortiori, apply to public procurement.

B. The first question

33. The inclusion, in invitations to tender for public contracts or in the relevant contract documents, of technical specifications which refer to a specific trade mark was examined by the Court before the adoption of the 2004 directives on public procurement.

34. While Directive 77/62/EEC (15) was in force, the Court examined, in *Commission* v *Netherlands*, (16) a term in a public contract which named the UNIX operating system without including the words 'or equivalent'. The Court found that 'the fact that the term UNIX was not followed by the words "or equivalent" may … deter economic operators using systems similar to UNIX from taking part in the tendering procedure'.

35. That line of case-law continued while Directive 93/37/EEC was in force. (17) In *Commission* v *Austria*, (18) the Court upheld the Commission's complaint that Austria's wording of the technical specification in the contract documents for a public contract 'had the effect of favouring "Unix products"', thereby infringing Article 10(6) of Directive 93/37.

36. The idea underpinning those judgments was that where, on an exceptional basis, it is permitted to use a trade mark to define the technical specifications, the category of persons targeted needs to be widened through use of the words 'or equivalent'. That enables the participation of tenderers other than those who manufacture the original articles, thus helping to prevent the creation of unjustified obstacles to the opening-up of public procurement to competition.

37. Article 34(8) of Directive 2004/17 contains no legislative direction regarding the time when proof of equivalence of spare parts must be provided to the contracting authority. That silence allows Member States to lay down rules of national law governing this matter in accordance with their own criteria, either using a general provision or granting discretion to their contracting authorities. However, they must be guided by the basic principles underpinning public procurement. (19)

38. Must Article 34(8) of Directive 2004/17, in conjunction with Article 34(3) and (4) thereof, be interpreted as meaning that the certificate of equivalence must, of necessity, be provided with a tenderer's tender? The arguments relied on by those who opt for that approach are not without merit from the perspective of ensuring that the right contractor is selected. (20)

39. Such proof of equivalence is one of the criteria by means of which the contracting authority establishes whether a tenderer is in a position to meet his contractual obligations. It must, therefore, be provided before the contract is awarded because otherwise the only option would be to terminate the contract on the grounds that the contractor is in breach of his obligations.

40. Furthermore, given that Article 34(8) of Directive 2004/17 simply lays down the general prohibition of technical specifications which refer to a specific trade mark and defines the exceptional circumstances in which that is permitted, it is necessary to apply the same criteria as those in paragraphs 3 and 4. In line with those criteria, it appears that proof must accompany the tender.

41. Whilst that line of reasoning is acceptable, it is possible that it does not take into account other elements of the decision-making process. In particular, Article 34(3) and (4) of Directive 2004/17 allows contracting authorities considerable latitude, when drawing up technical specifications, to deal with the objectives of a contract from a functional point of view, meaning that tenderers may submit alternatives which satisfy those objectives, including, obviously, solutions *equivalent* to those sought in the contract documents. That is why it makes sense that, in those cases, the contracting authority should have the assessment criteria for the different tenders, including proof of equivalence, at its disposal from the outset.

42. The situation changes slightly when the technical specifications refer directly to a trade mark or a product model, as in this case. The general rule, laid down in Article 34(4) of 2004/17, that technical specifications must be openly worded is reaffirmed in Article 34(8), which prohibits the unjustified restriction of the field of assessment.

43. The reason for a specific reference to a trade mark, patent or similar concept (provided that the words 'or equivalent' are added) is that the scope for vagueness disappears. Where, for example, it is only possible to supply vehicle spare parts covered by a single trade mark (in this case, IVECO), or their equivalent, the contracting authority has already chosen to provide 'a sufficiently precise and intelligible description of the subject matter of the contract'. That is the crucial difference vis-à-vis Article 34(3) and (4) of Directive 2004/17, which allows the requirements concerning certificates of equivalence to be treated differently. (21)

44. It is the contracting authority which is best placed to define its requirements by means of technical specifications. In a situation like that in the main proceedings, where the only option is to supply spare parts for a specific type of vehicle, the definition by reference to a trade mark appears to be appropriate and no one disputes it.

45. The Commission draws attention to the fact that the lack of prior certification of equivalence creates the risk for the contracting authority of purchasing a number of unsuitable products and being obliged to terminate the contract. To bolster its argument regarding selection of the best candidate, the Commission cites the judgment in *CoNISMa*, (22) in which the Court held that the harmonisation of the directives on procurement was also carried out in the interests of contracting authorities.

46. That judgment undoubtedly draws attention to the position of the public procuring entity, which is required to uphold the general interest. However, like others before and after it, the judgment also points out that 'one of the primary objectives of Community rules on public procurement is to attain the widest possible opening-up to competition … and that it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders'. (23) In addition, I repeat, while that judgment refers to the interest of the contracting authority, it does so in so far as wider participation allows the contracting authority 'greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question'. (24)

47. Nevertheless, neither that judgment nor those cited above directly address the issue raised in this reference for a preliminary ruling: when, in accordance with Directive 2004/17, is a tenderer who tenders for equivalent spare parts required to provide documentary proof that those spare parts match the originals?

48. The concern not to undermine the success of the procedure is of course legitimate and that could occur where a contracting authority which has not required such proof at the outset is ultimately faced with the fact that the successful tenderer is not able to prove the equivalence of its spare parts.

49. However, that concern cannot override the fundamental principles of public procurement, in particular, the principle that tenderers must be guaranteed equal access and must not be faced with 'unjustified obstacles to the opening up of public procurement to competition'. I shall refer to both of these principles below.

50. The principle of equal treatment is not infringed if all tenderers are afforded the opportunity to provide their certificates of equivalence at the time of delivery of spare parts. Contrary to what one of the parties has argued, that requirement does not *destabilise* the position of tenderers, who are free, at their own choice, to attach that proof to their tenders or to wait until the outcome of the award procedure. All that is required of them, from that perspective, is that they comply with the relevant term, which must be clear and must be applied without exceptions. (25)

51. I do not believe, therefore, that the equal treatment of tenderers is jeopardised because proof of equivalence may be submitted during the stage of performance of the contract. On the contrary, requirement of such proof at an earlier stage could discriminate against tenderers by giving a manufacturer of original spare parts an advantage over a tenderer who tenders for equivalent spare parts, where the latter has not already made those parts. It must be assumed that, in many cases (and this would be one), a tenderer who tenders for equivalent spare parts is not in possession, beforehand, of all the certificates relating to each model.

52. There was a debate at the hearing regarding how a contracting authority could evaluate the quality of the products to be supplied before the award of the contract if proof that those products are not of 'matching quality' is not provided. It is helpful to refer to the Supplementary Guidelines for a clearer definition of the term 'matching quality' as applied to motor vehicle spare parts. (26)

53. Those guidelines establish a rebuttable presumption of qualitative suitability, in accordance with which the recipient of spare parts (in this case, the contracting authority) can be confident that the products made available to him, even though they are of equivalent quality, will meet the necessary requirements for the assigned function. When applied to the area of public procurement, that presumption helps to place all suppliers on an equal footing. (27)

54. An analysis from the perspective of the widest possible opening-up of procurement to competition supports that view: the duty to provide certificates of equivalence before the contract is awarded may, depending on the circumstances of each call for tenders, become a disproportionate obstacle which impedes the participation of economic operators seeking to tender for their products. (28)

55. The contract announced by ATM is a good example of a tendering procedure in which the contracting authority may reasonably be allowed sufficient latitude to set the standard of *ex post facto* proof that it stipulated in the contract documents. If it had imposed the obligation to provide the certificate of equivalence with the tender, a candidate tendering for non-original spare parts would have been obliged either to manufacture each of the parts (in the main proceedings, 2 195) 'as a precaution' or to have certificates (in the same amount) for all the parts to be supplied. However, a manufacturer of original spare parts would have the advantage of all the parts already being made.

56. According to the contract documents, the decisive criterion in the call for tenders published by ATM was the 'most economically advantageous tender', which was identified following the bids of the two tenderers which submitted tenders. Before that time, the contracting authority was required to weigh up each tenderer's suitability by evaluating, inter alia other factors, their technical ability to perform the contract.

57. In fact, the arguments put forward by those who maintain that the certificates of equivalence should, of necessity, have been submitted before the award of the contract make proof of equivalence the decisive driver in the evaluation of technical ability.

58. I believe, however, that a contracting authority may use other criteria to evaluate candidates' technical ability, (29) even if the certificates of equivalence for each of the parts sought in the call for tenders are not provided at the outset. To put it another way, proof that a manufacturer or supplier of non-original spare parts has the necessary technical ability to perform the contract may be provided by other means (for example, by requiring a certain amount of previous experience in the manufacture or supply of spare parts, even if these are covered by other trade marks).

59. Indeed, the tender specifications published by ATM contained a reference to the 'information and formalities required for evaluating conformity with the criteria' relating to technical ability. (30) In those tender specifications, candidates were asked, inter alia other requirements, for documentary proof that they had 'carried out successfully in the last three years (2012-2013-2014) the supply of original spare parts … or equivalent for buses, trolley-buses or commercial vehicles manufactured by IVECO' and that they had 'concluded successfully in the last three years … at least two contracts for the supply of the abovementioned products, for a value exceeding EUR 750 000'. (31)

60. Tender specifications worded in that way are, in themselves, restrictive, for they limit the class of person targeted to those who have already made spare parts under the IVECO brand, whether original or equivalent, which prevents other manufacturers from participating. In my view, the contracting authority, which had already imposed those strict conditions, could reasonably have taken them into account as criteria for evaluating the technical ability of the tenderers, without having to impose on them the additional requirement that they provide, at the outset, certificates of equivalence for the 2 195 parts to which the supply contract refers. (32)

61. Those considerations lead me to propose a negative answer to the first question referred for a preliminary ruling: limiting the uncertainty of the Consiglio di Stato (Council of State) to the question of whether Article 34(8) of Directive 2004/17 *requires* that proof of equivalence be presented at the stage of submission of the tender, the answer must be not necessarily.

62. That provision does not lay down such an obligation because it leaves the Member State (or, if the national legislation allows, the contracting authority) free to stipulate when certificates of equivalence must be presented. It does not predetermine a single solution because the legislature decided, wisely, that it should be the Member States and their contracting authorities which weigh up the advantages and disadvantages of choosing one or other solution.

63. In a situation like that in the instant case, in view of the number of spare parts for which certificates of equivalence were required, I believe it is appropriate that submission of the relevant certificates of

equivalence should be accepted at a time after submission of the initial tenders or even after the award of the contract, since the contract documents include strict criteria for confirming the technical ability of tenderers.

64. I must add a final point, in line with those I made in the Opinion in *Specializuotas transportas*, (33) concerning a requirement 'which is not set out in the contract documents, is not provided for in national law and is not laid down in Directive 2004/18'. Where a tenderer has relied on the terms of the tender specifications which allow him, expressly, to provide the certificates of equivalence subsequently, refusal to allow those certificates to be provided subsequently will not pass the transparency test which the Court required, observing that 'the principles of transparency and equal treatment which govern all procedures for the award of public contracts require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates'. (34)

65. I therefore propose a negative reply to the first question referred for a preliminary ruling.

C. The second question

66. The second question is raised in case the first question is answered in the negative, as I propose. The Consiglio di Stato (Council of State) asks the Court how respect for the principles of equal treatment and impartiality, of open competition and sound administration, and for other tenderers' rights of defence and right to be heard are to be ensured.

67. The question is excessively general and the order for reference does not explain why those principles would be jeopardised if the certificate of equivalence were accepted after submission of the tender.

68. The order for reference (correctly) emphasises the issues of interpretation relating to the various articles of Directive 2004/17, but, I repeat, it includes no *actual* reference (by the referring court) (35) to those principles.

69. The Court's role in references for preliminary rulings is not to make abstract declarations concerning how certain general principles might be applied but rather to provide the national court with an interpretation of EU law which may be useful to it when it decides on the proceedings before it.

70. From that point of view, the considerations which I set out when proposing the answer to the first question already provide the referring court with sufficient interpretative guidance on the application to the instant case of at least some of the principles to which it refers: equal treatment, promotion of competition and impartiality of the contracting authority.

71. As regards the remaining principles referred to, I fail to see why the rights of defence and the principle that all tenderers (and perhaps all litigants) should be heard would be affected, whatever the reply to the first question. The two operators which took part in the tendering procedure at issue were able to explain their arguments, in favour of or against ATM's decision, before the national courts, without any infringement of their rights to a fair trial and to judicial protection (which, obviously, does not have to coincide with the success of their respective claims in the proceedings).

72. As regards the right to sound administration, presumably, in the context of the reference for a preliminary ruling, the Consiglio di Stato (Council of State) was seeking to refer to the principle of good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union. Suffice it to state, in that connection, that that right may be exercised as against institutions, bodies, offices and agencies of the European Union and, therefore, may not be relied on as against a transport undertaking of a Member State which operates as a company limited by shares, as is the case of ATM (even if it could be treated in the same way as a public authority under national law).

73. In those circumstances, I believe that it is not necessary to reply to the second question.

VI. Conclusion

74. In the light of the foregoing considerations, I propose that the Court reply as follows to the Consiglio di Stato (Council of State, Italy):

> Article 34(3), (4) and (8) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as meaning that it does not require a tenderer to provide with his tender certificates confirming that motor vehicle spare parts are equivalent to the originals where:
>
> – the technical specifications in the contract documents have been expressed, on an exceptional basis, by a reference to a specific trade mark ‘or equivalent’; and
>
> – the contract documents have also stipulated that those certificates may be submitted at the time of the first delivery of an equivalent spare part.

---

1 Original language: Spanish.

---

2 Recital 29 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors(OJ 2004 L 134, p. 1).

---

4 Legislative Decree of 12 April 2006 implementing Directives 2004/17 and 2004/18 (GURI No 100 of 2 May 2006).

---

5 The contract notice was published in the Official Journal of the European Union on 25 February 2015 (2015/S 039-067523).

---

6 Document entitled ‘specifica tecnica’, paragraphs 2.1 and 2.2.

---

7 Ibid., paragraph 5.

---

8 (OJ 2010 C 138, p. 16; ‘Supplementary Guidelines’).

---

9 Article 60(2) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 is identically worded (OJ 2014 L 94, p. 243).

---

10 Commission Regulation of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (known as the ‘Monti Regulation’; OJ 2002 L 203, p. 30), which was replaced, following its expiry on 31 May 2010, by Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ 2010 L 129, p. 52).

---

11 Recital 23 of Regulation No 1400/2002 states: ‘In order to ensure effective competition on the repair and maintenance markets and to allow repairers to offer end users competing spare parts such as original spare parts and spare parts of matching quality, the exemption should not cover vertical agreements which restrict the ability of authorised repairers within the distribution system of a vehicle manufacturer, independent distributors of spare parts, independent repairers or end users to source spare parts from the manufacturer of such spare parts or from another third party of their choice.’ Recital 17 in the preamble to Regulation No 461/2010 is similarly worded, albeit from the perspective of restricting spare parts manufacturers’ ability to sell spare parts and not from that of the ability to purchase spare parts.

---

12 According to Article 1(1)(u) of Regulation No 1400/2002, ‘“spare parts of matching quality” means exclusively spare parts made by any undertaking which can certify at any moment that the parts in question match the quality of the components which are or were used for the assembly of the motor vehicles in question’.

---

13 Supplementary Guidelines, point 18.

---

14 Ibid., point 28.

---

15 Council Directive of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1).

---

16 Judgment of 24 January 1995 (C-359/93, EU:C:1995:14, paragraphs 23 to 28). The subsequent order of 3 December 2001, *Vestergaard* (C-59/00, EU:C:2001:654, paragraph 22), refers to that judgment.

---

17 Council Directive of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

---

18 Judgment of 28 October 1999 (C-328/96, EU:C:1999:526, paragraph 68, in conjunction with paragraph 78).

---

19 Recital 9 of Directive 2004/17 refers to the opening up to competition of public procurement contracts, and respect for the principle of equal treatment, of which the principle of non-discrimination is no more than a specific expression, the principle of mutual recognition, the principle of proportionality, as well as the principle of transparency.

---

20 The rules governing technical specifications have not altered in Directive 2014/25 (Article 60), for, in addition to the general rule (paragraph 3), there remains the exceptional rule (paragraph 4) which permits reference to be made to a trade mark ‘where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to [the general rule] is not possible’, and requires that such reference be accompanied by the words ‘or equivalent’. Paragraphs 5 and 6 provide that proof of equivalence must be furnished in the tender in the case referred to in paragraph 3 but not in the cases referred to in paragraph 4.

---

21 Those same considerations are applicable, *mutatis mutandis*, to Articles 49 and 51 of Directive 2004/17, relied on by one of the parties in the proceedings.

---

22 Judgment of 23 December 2009 (C-305/08, EU:C:2009:807).

---

23 Ibid., paragraph 37.

---

24 Ibid., paragraph 37 *in fine*.

---

25 The Court repeated in the judgment of 13 July 2017, *Ingsteel and Metrostav*, C-76/16, EU:C:2017:549, paragraph 34, that 'the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the bids of all tenderers must be subject to the same conditions. Second, the obligation of transparency, which is its corollary, is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36 and the case-law cited).'

---

26 Points 19 and 20 of those guidelines differentiate between 'original' spare parts and those of 'matching quality'. The latter are spare parts 'of a sufficiently high quality that their use does not endanger the reputation of the authorised network in question. As with any other selection standard, the motor vehicle manufacturer may bring evidence that a given spare part does not meet this requirement'.

---

27 The use of 'self-declarations' or similar legal forms, by means of which economic operators declare, in the initial stage, that they are in a position to supply the goods tendered for, subject to later final verification by the authorities, is permitted in a number of articles of Directive 2014/24.

---

28 In that connection, see recital 84 in the preamble to Directive 2014/24: 'Many economic operators, and not least SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example through use of a European Single Procurement Document (ESPD) consisting of an updated self-declaration, could result in considerable simplification for the benefit of both contracting authorities and economic operators.'

---

29 Directive 2014/24 includes an Annex XII, concerning 'means of proof of selection criteria', part II of which refers specifically to 'means providing evidence of the economic operators' technical abilities, as referred to in Article 58'.

---

30 Paragraph III.2.3 of the document entitled 'Aviso di gara- Settori speciale'.

---

31 Paragraph 6.1.A. points III and IV of the document 'disciplinare di gara'.

---

32 Iveco Orecchia has merely drawn attention to the (alleged) obligation to attach the certificate of equivalence to the tender, without calling into question its competitor's technical ability to perform the contract.

---

33 C-531/16, EU:C:2017:883, paragraphs 47 and 48.

---

34 Judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404, paragraph 37).

---

35 In fact, the Consiglio di Stato (Council of State) merely accepts the proposal to refer a number of the questions formulated by Iveco Orecchia. In particular, it does not explain why it accepts, as the second question, the question at b1) of that proposal.

EU:C:2018:142

JUDGMENT OF THE COURT (Third Chamber)

1 March 2018 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Tendering procedure for public contracts for farm advisory services — Whether or not there is a public contract — Scheme for obtaining services open to any economic operator who satisfies previously established conditions — Scheme not subsequently open to other economic operators)

In Case C-9/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland), made by decision of 22 December 2016, received at the Court on 9 January 2017, in the proceedings brought by

Maria Tirkkonen,

intervener:

Maaseutuvirasto,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, M. Safjan, D. Šváby (Rapporteur) and M. Vilaras, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– Ms Tirkkonen, by A. Kuusniemi-Laine, asianajaja,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the European Commission, by A. Tokár and I. Koskinen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings brought by Ms Maria Tirkkonen concerning the rejection by the Maaseutuvirasto (Agency for Rural Affairs, Finland) (‘the Agency’) of the tender which she had presented in order to be selected as an advisor in the field of ‘livestock, health welfare plans’, in the

context of the '*Neuvo 2020 — Maatilojen neuvontajärjestelmä*' (Neuvo 2020 — Farm Advisory Scheme) ('the Neuvo 2020 Farm Advisory Scheme').

Legal context

EU law

Directive 2004/18

3 Article 1 of Directive 2004/18, entitled 'Definitions', provides, inter alia:

'…

2. (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

5. A "framework agreement" is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

…'

4 Entitled '[f]ramework agreements' Article 32 of that directive provides, inter alia:

'…

2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 53.

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities and the economic operators originally party to the framework agreement.

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

…

4. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators that satisfy the selection criteria and/or of admissible tenders that meet the award criteria.

Contracts based on framework agreements concluded with several economic operators may be awarded either:

– by application of the terms laid down in the framework agreement without reopening competition, or

– where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;

(b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;

(c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired;

(d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.'

Regulation (EU) No 1305/2013

5 Article 15 of Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 (OJ 2013 L 347, p. 487), in relation to '[a]dvisory services, farm management and farm relief services', provides, in paragraph 3:

'The authorities or bodies selected to provide advice shall have appropriate resources in the form of regularly trained and qualified staff and advisory experience and reliability with respect to the fields in which they advise. The beneficiaries under this measure shall be chosen through calls for tenders. The selection procedure shall be governed by public procurement law and shall be open to both public and private bodies. It shall be objective and shall exclude candidates with conflicts of interest.

…'

Regulation (EU) No 1306/2013

6 Article 12(1) of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549, and corrigendum OJ 2016 L 130, p. 13) provides:

'Member States shall establish a system for advising beneficiaries on land management and farm management ("farm advisory scheme") …'

7 Article 13 of that regulation, entitled 'Specific requirements relating to the farm advisory scheme', states in paragraph 1:

'Member States shall ensure that advisors working within the farm advisory scheme are suitably qualified and regularly trained.'

Implementing Regulation (EU) No 808/2014

8 Under Article 7 of Commission Implementing Regulation (EU) No 808/2014 of 17 July 2014 laying down rules for the application of Regulation No 1305/2013 (OJ 2014 L 227, p. 18), which relates to the '[s]election of authorities or bodies offering advisory services':

'The calls for tenders referred to in Article 15(3) of Regulation (EU) No 1305/2013 shall follow the applicable Union and national public procurement rules. In that context, due consideration must be given to the degree of attainment by the applicants of the qualifications referred to in that article.'

Directive 2014/24/EU

9 Under Article 91 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65), Directive 2004/18 was repealed as of 18 April 2016.

Finnish law

10 Directive 2004/18 was transposed into Finnish law by the Laki julkisista hankinnoista (348/2007) (Law on public procurement (348/2007)) ('the Law on public procurement').

11 Moreover, Article 45(1) of the Laki maatalouden tukien toimeenpanosta (192/2013) (Law on the implementation of agricultural aid (192/2013)), in the version applicable to the dispute in the main proceedings, provides that advisors are selected in compliance with the provisions of public procurement law and for a period ending on the expiry of the 2014-2020 Rural Development Programme for Mainland Finland. Under Paragraph 45(2) of the law, a condition of selection and admittance is that the advisor possesses adequate expertise in terms of the status and scope of the advisory task and that he must, furthermore, meet the conditions as to suitability referred to in Article 46 of that law.

12 Under Paragraph 45(3) of that law, the advisor must maintain and develop the professional knowledge required for the farm advisory service.

The dispute in the main proceedings and the question referred for a preliminary ruling

13 The order for reference indicates that the Republic of Finland has established a Rural Development Programme for Mainland Finland 2014-2020, for which the Agency, by a contract notice published on 16 September 2014, launched a tender procedure in order to conclude contracts for advisory services, under the Neuvo 2020 Farm Advisory Scheme, for the period from 1 January 2015 to 31 December 2020.

14 The provision of advisory services at issue in the main proceedings is subject to the conditions laid down in a draft framework agreement annexed to the invitation to tender.

15 The advisory services referred to in that contract notice are offered to farmers and other land managers who have entered into an environmental agreement concerning the payment of environmental compensation payments. Farmers who fulfil that condition and who wish to request advice are free to contact an advisor of their choice, who is a member of the Neuvo 2020 Farm Advisory Scheme. That advisor is then paid according to the work carried out, by way of an hourly rate excluding value added tax (VAT) paid by the Agency, the farmer only bearing the amount of VAT.

16 In order to allow the selection of farm advisory service providers and in accordance with the requirements of Article 15(3) of Regulation No 1305/2013 and Article 13(1) of Regulation No 1306/2013, the Agency required applicants wishing to be admitted under this scheme to demonstrate that they were qualified, duly trained and experienced as advisers in the fields in which they intended to provide advice.

17 As the referring court notes, the Agency initially adopted, on 18 December 2014, a conditional award decision ('the contested decision') admitting all advisors who had applied and had met the aptitude criteria as well as the minimum requirements required in the call for tenders and its annexes. In a second step, the Agency selected, in a final award decision, those candidates who had passed the examination mentioned in the annex to the tender.

18 Ms Tirkkonen was not among the advisors conditionally admitted by the contested decision, on the ground that she had not completed point 7 of the tender form, entitled 'Compliance of tender with the formal requirements and with the invitation to tender', in which the service provider must indicate whether he accepts the terms of the draft framework agreement annexed to the invitation to tender by ticking the 'yes' box or the 'no' box. Considering that it was imperative to accept the terms of that draft framework agreement, the Agency, by the contested decision, rejected Ms Tirkkonen's application and did not authorise her to adjust her tender by marking the box 'yes' in point 7 of that form.

19 The latter then challenged that decision before the Markkinaoikeus (Market Court, Finland) in order to obtain the right to complete her tender documents and to fill out point 7 of that form. To that end, it alleged that the invitation to tender at issue in the main proceedings constituted a licensing scheme and was therefore not covered by the concept of a public contract. Accordingly, she argued that she should have been allowed to complete her bid.

20 The case having been dismissed by a judgment of 7 September 2015, Ms Tirkkonen lodged an appeal before the Korkein hallinto-oikeus (Supreme Administrative Court, Finland).

21 The referring court asks about the applicability of public procurement law to the dispute in the main proceedings, in so far as it is apparent from the judgment of 2 June 2016, *Falk Pharma* (C-410/14, EU:C:2016:399) that the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the concept of 'public contract' within the meaning of Article 1(2)(a) of Directive 2004/18. Nevertheless, in so far as the tenderers had to pass an examination described in the invitation to tender, before finally being admitted to the framework agreement annexed to the invitation to tender, the referring court notes that those requirements could constitute decisive characteristics within the meaning of the judgment of 26 March 2015, *Ambisig* (C-601/13, EU:C:2015:204, paragraphs 31 and 32), and, therefore may be characterised as a 'public contract' within the meaning of Article 1(2)(a) of Directive 2004/18.

22 At the same time, however, the referring court notes, first, that the invitation to tender at issue in the main proceedings lays down no award criteria on the basis of which the tenders submitted would have been compared with each other and, secondly, that the Agency did not award points to the bids or make a comparison of them. Thus, according to the referring court, all the tenderers satisfying the requirements of that invitation to tender and having passed the examination mentioned in the annex to that invitation to tender, were admitted to the framework agreement.

23 The referring court points out, however, that although the number of providers eligible to join the framework agreement is not limited in advance in the tender documents, it is factually limited by means of the obligation to fulfil those requirements.

24 The referring court points out, moreover, that a specific feature of the contractual scheme that gave rise to the judgment of 2 June 2016, *Falk Pharma* (C-410/14, EU:C:2016:399), was that it remained permanently open to interested operators during its whole period of validity, which was sufficient to distinguish that scheme from a framework agreement within the meaning of Directive 2004/18. In the present case, an advisory service provider could no longer join the Neuvo 2020 Farm Advisory Scheme after the adoption, by the Agency, of the final award decision, which, it is claimed, limited the number of economic operators who could provide the advisory service.

25 It was in that context that the Korkein hallinto-oikeus (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 1(2)(a) of Directive 2004/18 to be interpreted as meaning that the definition of "public contract" within the meaning of that directive encompasses a scheme

– by which a public body seeks to obtain services in the market for a contractual period limited in advance by entering into contracts, subject to the conditions of a draft framework agreement annexed to the invitation to tender, with all economic operators who meet the individual requirements laid down in the tender documents in regard to the suitability of the service provider and to the service offered, and pass an exanimation more particularly described in the invitation to tender, and

– which can no longer be joined during the validity period of the contract?'

Consideration of the question referred

26 By its question, the referring court asks essentially whether Article 1(2)(a) of Directive 2004/18 is to be interpreted as meaning that a farm advisory scheme, such as that at issue in the main proceedings,

through which a public entity admits all the economic operators, provided that they meet the suitability requirements set out in an invitation to tender and pass the examination referred to in that invitation to tender, and which does not admit any new operator during the limited validity period of that farm advisory scheme, must be classified as a public contract within the meaning of that directive.

27 As a preliminary point, it must be pointed out that as Directive 2004/18 was repealed after the date of adoption of the contested decision, its interpretation remains relevant to enable the referring court to resolve the dispute in the main proceedings.

28 As the European Commission has pointed out, the farm advisory scheme leads to the conclusion of contracts for a pecuniary interest between a public entity, which could be a contracting authority within the meaning of Directive 2004/18, and economic operators whose objective is to supply services, which corresponds to the definition of ‘public contracts’ laid down in Article 1(2)(a) of that directive.

29 It is important to remember, however, that the objective of Directive 2004/18 was to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities. That risk is closely connected to the exclusivity which will result from the award of the contract concerned to the operator whose tender has been accepted or to the economic operators whose tenders have been accepted, in the case of a framework agreement, constituting the objective of a public procurement procedure (see, to that effect, judgment of 2 June 2016, *Falk Pharma*, C-410/14, EU:C:2016:399, paragraphs 35 and 36).

30 In that regard, the Court has already pointed out that the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of ‘public contract’ within the meaning of Article 1(2) of that directive (see, to that effect, judgment of 2 June 2016, *Falk Pharma*, C-410/14, EU:C:2016:399, paragraph 38).

31 It follows that the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators (see, to that effect, judgment of 2 June 2016, *Falk Pharma*, C-410/14, EU:C:2016:399, paragraph 37).

32 In the present case, it is therefore necessary to determine whether the Agency has chosen a tender from among all those which satisfied the conditions it had laid down in its invitation to tender.

33 In that regard, it is apparent from the decision to refer that the Agency intends to set up a large pool of advisers who must fulfil a number of conditions. However, in so far as the Agency admits all the candidates who satisfy those requirements, it is clear, as the Advocate General has pointed out in point 39 of his Opinion, that it makes no selection among the admissible tenders and that it confines itself to ensuring that qualitative criteria are respected.

34 The fact that, as is clear from the decision to refer, access to the farm advisory scheme at issue in the main proceedings is limited to a preliminary period, which ends when the examination is organised or, at the latest, when the final award decision is published, and that it is therefore not possible for an adviser, such as Ms Tirkkonen, to join that farm advisory scheme, cannot call that assessment into question.

35 As the Advocate General has pointed out in points 51 and 52 of his Opinion, the fact that, unlike the context that gave rise to the judgment of 2 June 2016, *Falk Pharma* (C-410/14, EU:C:2016:399), a farm advisory scheme, such as that at issue in the main proceedings, is not permanently open to interested economic operators is irrelevant. In the present case, the decisive factor is that the contracting authority has not referred to any award criteria for the purpose of comparing and classifying admissible tenders. In the absence of that factor, which is, as is apparent from paragraph 38 of the judgment of 2 June 2016, *Falk Pharma* (C-410/14, EU:C:2016:399), intrinsically linked to the regulation of public contracts, a farm advisory scheme, such as that at issue in the main proceedings, cannot constitute a public contract within the meaning of Article 1(2)(a) of Directive 2004/18.

36 Furthermore, it should be recalled that, even if the verification of the tenderers' suitability and the award of the contract are carried out simultaneously, those two operations must be regarded as two different operations governed by different rules (see, to that effect, judgments of 20 September 1988, *Beentjes*, 31/87, EU:C:1988:422, paragraphs 15 and 16, and of 24 January 2008, *Lianakis and Others*, C-532/06, EU:C:2008:40, paragraph 26).

37 Accordingly, criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' suitability to perform the contract in question, cannot be regarded as 'award criteria'. Criteria relating mainly to the experience, qualifications and means to ensure the proper performance of the contract concerned were considered to relate to the suitability of tenderers to perform that contract and not as 'award criteria', even though the contracting authority had classified them as such (see, to that effect, judgment of 24 January 2008, *Lianakis and Others*, C-532/06, EU:C:2008:40, paragraphs 30 and 31).

38 Finally, that conclusion is in no way affected by the solution adopted in the judgment of 26 March 2015, *Ambisig* (C-601/13, EU:C:2015:204, paragraphs 31 to 34), in which the Court pointed out, in essence, that the skills and experience of the members of the team assigned to performing the public contract may be included as award criteria in the contract notice or in the tender specifications, in so far as the quality of the performance of a contract may depend decisively on the 'professional merit' of the people entrusted with its performance, which is made up of their professional experience and background, particularly where the contract covers the provision of services of an intellectual nature and relates to training and advisory services.

39 That assessment must, however, be understood in the light of the circumstances of the case which gave rise to that judgment, that is, in the light of the contracting authority's choice of the tender which it intended to accept from several admissible tenders. In so doing, unlike the case at issue in the main proceedings, the contracting authority, in the case that gave rise to the judgment of 26 March 2015, *Ambisig* (C-601/13, EU:C:2015:204, paragraphs 11, 13 and 28 to 34), made a real comparison of the admissible tenders in order to identify the most economically advantageous tender. In the latter case, the experience of the proposed technical team was an intrinsic feature of the tender and was not merely a criterion for assessing the tenderers' suitability.

40 It follows from the foregoing considerations that the requirements set out in the invitation to tender published by the Agency cannot constitute award criteria within the meaning of Directive 2004/18.

41 In the light of all the foregoing considerations, the answer to the question referred is that Article 1(2)(a) of Directive 2004/18 is to be interpreted as meaning that a farm advisory scheme, such as that at issue in the main proceedings, through which a public entity accepts all the economic operators who meet the suitability requirements set out in the invitation to tender and who pass the examination referred to in that invitation to tender, even if no new operator can be admitted during the limited validity period of that scheme, does not constitute a public contract within the meaning of that directive.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that a farm advisory scheme, such as that at issue in the main proceedings, through which a public entity admits all the economic operators who meet the suitability requirements set out in the invitation to tender and who pass the examination referred to in that invitation to tender, even if no new operator can be admitted during the

limited validity period of that scheme, does not constitute a public contract within the meaning of that directive.

[Signatures]

---

* Language of the case: Finnish.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 13 December 2017 (1)

Case C-9/17

Maria Tirkkonen

intervening party:

Maaseutuvirasto

(Request for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland))

(Reference for a preliminary ruling — Directive 2004/18/EC — Tendering procedure for public contracts for farm advisory services — Whether or not there is a public contract — Scheme for obtaining services under contracts governed by a framework agreement and open to any economic operator who satisfies previously established conditions — Scheme not subsequently open to other economic operators)

1. The support for rural development financed by the European Agriculture Fund for Rural Development (EAFRD) includes aid schemes which are intended to provide advisory services to farmers. The national authorities select the advisors who are to give their professional advice to those farmers by means of procedures which are open, in principle, to all those who satisfy the appropriate requirements for carrying out that task.

2. In one of those selection procedures, Ms Tirkkonen submitted her application to be included in the list of rural advisors, by completing the requisite form. However, she omitted to fill in the point in which she had to indicate whether she accepted the ‘conditions of the draft framework agreement’, which led the contracting authority to reject her application.

3. According to the order of the reference, that omission could be rectified if the national law governing relations between the public administration and the public were applied. However, if it were governed by the national law on public procurement, it seems that the defect would be irreparable. That, at least, was stated by both the Finnish Administration and the court of first instance which confirmed the decision.

4. In those circumstances, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) wishes to know, in essence, whether the mechanism for selecting rural advisors which is the subject of the dispute constitutes a ‘public contract’ within the meaning of Article 1(2)(a) of Directive 2004/18/EC. (2)

5. In replying to its doubts, it will be necessary to take account of the case-law, in relation to that concept, of the Court of Justice in the *Falk Pharma* case, (3) which, in my view, provides sufficient guidance for settling the dispute.

I. Law

A. EU law

1. Directive 2004/18

6. Article 1 (‘Definitions’) provides:

‘…

2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

5. A “framework agreement” is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

…’

7. Article 32 (‘Framework agreements’) states:

‘…

2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 53.

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities and the economic operators originally party to the framework agreement.

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

…

4. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators that satisfy the selection criteria and/or of admissible tenders that meet the award criteria.

Contracts based on framework agreements concluded with several economic operators may be awarded either:

– by application of the terms laid down in the framework agreement without reopening competition, or

– where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;

(b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject matter of the contract and the time needed to send in tenders;

(c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired;

(d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.'

8. Article 53 ('Contract award criteria') provides:

'1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the most economically advantageous tender from the point of view of the contracting authority, various criteria linked to the subject matter of the contract in question: for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or

(b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

The weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.'

2. Regulation (EU) No 1305/2013 (4)

9. Article 15(3) provides:

'The authorities or bodies selected to provide advice shall have the appropriate resources in the form of regularly trained and qualified staff and advisory experience and reliability with respect to the fields in which they advise. The beneficiaries under this measure shall be chosen through calls for tenders. The selection procedure shall be governed by public procurement law and shall be open to both public and private bodies. It shall be objective and shall exclude candidates with conflicts of interest.

…'

3. Implementing Regulation (EU) No 808/2014 (5)

10. Article 7 provides:

'The calls for tenders referred to in Article 15(3) of Regulation (EU) No 1305/2013 shall follow the applicable Union and national public procurement rules. They shall give due consideration to the degree of attainment by the applicants of the qualifications referred to in that Article.'

B. National law

11. Directive 2004/18 was transposed in Finland by the Law on public procurement (Law 348/2007).

12. Under Article 45(1) of the Law on the implementation of agricultural aid (Law 192/2003, as amended by Law 501/2014), advisors are selected in compliance with the provisions of the Law on public procurement and for a period ending on the expiry of the 2014-2020 Rural Development Programme for Mainland Finland.

13. Under Article 45(2), a condition of selection and admittance is that the advisor has adequate expertise in terms of the status and scope of the advisory task. He must also satisfy the conditions as to capability.

II. The facts

14. On 16 September 2014, the Maaseutuvirasto (Finnish Agency for Rural Affairs, 'the Agency') issued an invitation to tender for farm advisory services for the period 2015-2020 to be carried out as a framework agreement in an open procedure.

15. It was stated in the contract notice that the procedure was open to public and private advisors and that its aim was to have service providers who satisfied the conditions of Article 15(3) of Regulation No 1305/2013 and Article 13(1) of Regulation (EU) No 1306/2013, (6) and who also had advisory experience.

16. The system of selection was based on a framework agreement, in accordance with the public procurement law, in such a way that the service providers would be included in the agreement under an open procedure pursuant to Article 65 of that law.

17. The framework agreement set out the principal conditions for provision of the service. The subsequent contracts were awarded without a specific award procedure, in such a way as to permit the farmer/land user entitled to advisory services to obtain them from the person whom he considered would best fulfil his needs. In principle, advisors in nearby areas were called upon to provide services, but on proper grounds other advisors could also be used.

18. The advisors were to be paid an hourly rate by the Agency (not including VAT, which would be paid by the farmer who received the services).

19. Having regard to the need for the advisory service, all the advisors who met the conditions as to capability and the minimum requirements laid down in the annexes to the framework agreement would be selected. In addition, the candidates had to pass a separate examination, as part of the selection procedure.

20. By the decision of 18 December 2014, the Agency excluded the application submitted by Ms Tirkkonen, on the ground that she had not filled in Point 7 of the tender form entitled 'Observance of the formal requirements of the bid and compliance with tender conditions' (Annex 2 to the tender). In that paragraph, she should have indicated, by marking 'yes' or 'no', whether she 'accepted the tender conditions of the draft framework agreement appended to the tender'.

21. Ms Tirkkonen challenged the Agency's decision before the Markkinaoikeus (Market Court, Finland), maintaining that the procedure did not concern the award of a public contract. Accordingly, public procurement law was not applicable, but rather administrative law, which required the Agency to request her to complete her documentation.

22. Following the dismissal of her action, on 7 September 2015, by the Markkinaoikeus (Market Court), Ms Tirkkonen brought an appeal before the Korkein hallinto-oikeus (Supreme Administrative Court), which raises the question for a preliminary ruling.

23. According to the order for reference, the issue is whether 'the scheme of the [Agency] concerning an advisory service is a public contract falling within the scope of Procurement Directive 2004/18 and thus also of national public procurement law'. (7)

III. The question referred

24. The question referred is worded as follows:

> 'Is Article 1(2)(a) of Procurement Directive 2004/18/EC to be interpreted as meaning that the definition of 'public contract' within the meaning of that directive encompasses a scheme

– by which a public body seeks to obtain services in the market for a contractual period limited in advance by entering into contracts, subject to the conditions of a draft framework agreement annexed to the invitation to tender, with all economic operators who meet the individual requirements laid down in the tender documents in regard to the suitability of the service provider and to the service offered, and pass an examination more particularly described in the invitation to tender, and

– which can no longer be joined during the validity period of the contract?'

IV. Proceedings before the Court of Justice and position of the parties

25. The reference for a preliminary ruling was lodged at the Court Registry on 9 January 2017. Written observations have been submitted by Ms Tirkkonen, the Finnish Government and the Commission. It has not been considered necessary to hold an oral hearing.

26. Ms Tirkkonen maintains that, of the three stages of any tendering procedure (verification of the capability of the tenderers; evaluation of compliance of the tenders with the tender notice; selection of the tender on the basis of the criterion of the lowest price or cost-effectiveness), in this procedure the third has not been carried out, since the tenders were not compared with each other and it was for the farmer to select the service provider. In particular, she points out that the 140 advisors initially chosen took the examination and that 138 passed it, without that examination actually making it possible to classify them in order of merit. The lack of selection between the tenders received precludes the existence of a public contract.

27. The Finnish Government stresses the relevance of the case-law laid down in the judgment in *Falk Pharma*, but points out that, in this case, the scheme is not permanently open to new tenderers. It is of the opinion that the fact that the awarding authority 'imposes on service providers numerous specific requirements which are based on legislation' (8) brings that scheme close to the concept of a public contract. Application of the legislation on public contracts would be justified by the need to ensure that the selection criteria are not fixed in a discriminatory manner.

28. The Finnish Government claims, furthermore, that of the 163 tenders received only 140 were conditionally admitted, and 138 finally accepted. This demonstrates the selective nature of the procedure and the intention of the awarding authority to accept only the best tenders, and also the dissuasive nature of the conditions imposed on tenderers.

29. Finally, for the Finnish Government, the six-year period of validity of the scheme means that, during that time, new advisors may not be admitted, which differentiates the disputed procedure from a mere licensing system.

30. The Commission believes that the specific requirements of the tender notice concerning the suitability of the tenderer and the service, as set out by the referring court, do not constitute an award criterion but merely a selection criterion.

31. The Commission takes the view that the procedure contained no award criteria and the Agency could neither exclude nor reject a competent advisor chosen by a farmer. In short, only selection criteria were used in the procedure.

32. In those circumstances, the Commission maintains that the case is similar to that resolved in the judgment in *Falk Pharma*, the case-law of which has been confirmed by Directive 2014/14/EU. (9) In its view, it is immaterial that the scheme is not open permanently to interested parties, since the lack of selection is a sufficient reason for ruling out classification as a public contract.

V. Assessment

33. According to the referring court, the Finnish Administration has implemented a programme based on Regulation No 1305/2013, Article 15(3) of which states that the selection procedure is to be governed by

public procurement law. Therefore the question referred for a preliminary ruling must be answered on the basis of the legislation concerning public contracts.

34. I think that that reference to public procurement law must be interpreted as meaning that the procedure for selecting farm advisors must comply with the principles (of non-discrimination, equal treatment and transparency) which govern that section of the legal code. It is not, in my view, a requirement which involves adhering to each and every one of the provisions of the EU directives on procurement by public bodies.

35. Specifically, the referring court wishes to know whether a scheme such as that at issue in the present case falls 'within the scope of Procurement Directive 2004/18'. I should point out that the purpose of the scheme is to have an indefinite number of persons to provide farm advisory services to farmers, selecting them by means of a procedure, subject to the conditions contained in a framework agreement, in which all those who satisfy the conditions laid down in the tender documents and pass an examination may participate. The scheme is applicable for a limited period, during which no new advisors may join.

36. From the information provided by the referring court it is apparent, as the Commission points out, (10) that, at first sight, the characteristics of contracts as defined by Article 1(2)(a) of Directive 2004/18 would seem to be present. It is, in fact, a contract governed by a framework agreement, concluded in writing between an economic operator (the advisor) and a contracting authority (the Agency), the object of which is the provision of services for pecuniary interest. The latter point is particularly clear since, according to the referring court, (11) the advisory services are, of course, of benefit to the farmer who receives them, but also to the Agency which pays for them and on whose behalf they are provided, as part of its administrative powers.

37. However, it should not be forgotten that, for the Court of Justice, 'the choice of the tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by [Directive 2004/18] and, consequently, to the concept of "public contract" within the meaning of Article 1(2) of that directive'. (12)

38. I do not consider that this approach taken in the judgment in *Falk Pharma* is excessively reductionist. It is sought to indicate that, ultimately, in public contracts subject to Directive 2004/18, there must be a final successful tenderer, who is preferred to all his competitors on the basis of the qualities of his tender. This is a key element which is applicable 'for every contract, framework agreement, and the establishment of any dynamic purchasing system', in respect of which 'the contracting authorities are to draw up a written report which is to include *the name of the successful tenderer and the reasons why his tender was selected*' [Article 43, first paragraph, (e) of Directive 2004/18; emphasis added]. (13)

39. In my view, in the scheme at issue it is not possible to identify the existence of *criteria for the award* of advisory service contracts, but only *criteria for the selection* of economic operators capable of offering those services.

40. As Advocate General Wathelet pointed out in the Opinion in *Ambisig*, (14) the Court of Justice has been careful to distinguish two kinds of criteria. 'The examination of the suitability of contractors to perform the contracts to be awarded' and 'the award of the contract' are two different operations. 'Whilst selection of a tenderer concerns its personal situation and its ability to engage in the professional activity in question, the contract is awarded to the tenderer which submitted the tender that is most economically advantageous from the point of view of the contracting authority (Article 53(1)(a) of Directive 2004/18) or which offers the lowest price (Article 53(1)(b))'.

41. In other words, while the aim of the *selection* criteria is to assess the *tenderers* according to their suitability, the aim of the award criteria is to *identify* and choose the most advantageous *tender* of those submitted by the various tenderers. As the objective is 'the opening-up of public procurement to competition', (15) economic operators must compete with each other, as rivals, to provide the service.

42. I consider that, from that point of view, a key element is the assertion of the referring court that 'the invitation to tender lays down no award criteria on the basis of which the tenders submitted could be compared with each other, and the [Agency] did not award points to the tenders or make a comparison of them', but that 'all tenderers satisfying the requirements of the invitation to tender concerning inter alia training and professional experience were admitted to the framework agreement, provided that they passed the examination more particularly described in the invitation to tender'. (16)

43. The Finnish Government maintains that the admission criteria did indeed make the procedure selective in nature. Firstly, the fact that they were made public in advance could have dissuaded interested persons who thought that they did not satisfy those criteria to refrain from submitting a tender. Secondly, the conditions were so strict that not everybody could fulfil them, so that the procedure was in fact restricted to a 'selected group'. (17) Therefore, according to the Finnish Government, the selective nature of the procedure makes it essential that the criteria which confer that quality are not established in a discriminatory manner, which would lead to the application of public procurement legislation.

44. There is no doubt that to impose conditions of skill and merit for entry to the scheme at issue involves a certain selection mechanism. However, what is decisive, as regards contracts subject to Directive 2004/18, is not confirmation that the tenderers are capable of providing the advisory service (selection criterion), but the differences between the tenders of those tenderers, once their capability has been established, with the aim of making the final selection of the person or persons to whom that provision will be assigned (award criterion).

45. Of course, the conditions for access to the farm advisory scheme based on technical capacity (including the passing of an examination) make it possible to select candidates by reference to a pre-established threshold. However, the relevant selection, for the purposes of the concept of public contracts in Directive 2004/18, is that which results from comparing the capabilities and merits of the tenders of the different candidates. That is to say, the crucial point is the final *award*, by comparison or by weighing up differences, to the best tender, not the initial *selection* made in relation to a threshold which may be passed with no competition whatsoever between the candidates.

46. The referring court mentions the *Ambisig* case, (18) in which it was held that it is the abilities and experience of the members of a team which is to perform a contract concerning training and advisory services which are 'decisive for the evaluation of the professional quality of the team' and that 'that quality may be an intrinsic characteristic of the tender and linked to the subject matter of the contract for the purposes of Article 53(1)(a) of Directive 2004/18', (19) so that 'that quality may be included as an award criterion in the contract notice or in the relevant tendering specifications'. (20)

47. However, that statement of the Court of Justice was made in a context in which the contracting authority chose one of the competing tenderers and excluded another, rightly using as a criterion the quality of their respective teams.

48. In the present case, on the contrary, the referring court assures us that the Agency did not limit *ab initio* the number of possible service providers, (21) or compare the tenders or make a final selection of one or more, on the basis of a comparative assessment of their respective contents, to the exclusion of the others. (22)

49. This, therefore, is a situation in which the case-law laid down in the *Falk Pharma* case is applicable, namely, that 'where a public entity seeks to conclude supply contracts with all the economic operators wishing to supply the goods concerned in accordance with the conditions specified by that entity, the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding the contract in favour of national operators'. (23)

50. Both the Finnish Government (24) and the referring court agree that the case-law to which reference has just been made is relevant to the present case. Their only doubt, which in the case of Korkein hallinto-oikeus (Supreme Administrative Court) appears to be that which has led it to make the reference for a preliminary ruling, (25) is that, unlike what happened in the judgment in *Falk Pharma*, the scheme designed by the Agency is not permanently open to all interested economic operators during its period of validity.

51. It is true that, strictly speaking, by limiting the procurement scheme, during its period of validity, to the economic operators initially admitted by the Agency (which precludes the subsequent access of other advisors) a second quantitative restriction is imposed. However, this is only the consequence of the clear and strict temporal restriction of the advisory aid scheme and of the 2014-2020 Rural Development Programme for Mainland Finland.

52. Furthermore, the reference of the Court of Justice in the judgment in *Falk Pharma* to the permanent availability of the contractual scheme to new tenderers was not, in my view, the *ratio decidendi* of that judgment, but a statement made for the sake of completeness. The key issue, therefore, was that the contracting authority had not awarded the contract exclusively to one of the tenderers. (26)

53. In the present case, as in the *Falk Pharma* case, there has also been no element of genuine competition between candidates, in order to assess which of the tenders is the best and at the same time to reject the others.

54. Furthermore, as the Court of Justice pointed out in the *Falk Pharma* judgment, (27) that essential element is expressly set out in the definition of the concept of 'procurement' in Directive 2014/24, and the fact that it is not applicable to the case *ratione temporis* does not render it unworthy of mention, if only because it expresses the intention of the legislature to state explicitly a feature of public contracts which, according to the Court, is intrinsic to its nature. (28)

55. The importance, both positive and negative, of that factor is clearly demonstrated when, in recital 4 of Directive 2014/24, it is stated that situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, 'should not be understood as being procurement'.

VI. Conclusion

56. In the light of the foregoing, I propose that the Court of Justice reply as follows to the Korkein hallinto-oikeus (Supreme Administrative Court, Finland):

> Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, is to be interpreted as meaning that a system for selecting providers of farm advisory services such as that which is the subject matter of the main proceedings, by which a public body admits all economic operators fulfilling the conditions of suitability and pass an examination, without awarding provision of the service exclusively to one or more of those advisors in a competitive procedure, does not constitute a public contract within the meaning of that directive. It is irrelevant for this purpose that the scheme has a limited period of validity, during which other advisors are not admitted.

---

1 Original language: Spanish.

---

2 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 Judgment of 2 June 2016, *Falk Pharma* (C-410/14, EU:C:2016:399) ('the judgment in *Falk Pharma*').

---

4 Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 (OJ 2013 L 347, p. 487).

---

5 Commission Regulation 17 July 2014 laying down rules for the application of Regulation (EU) No 1305/2013 of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2014 L 227, p. 18).

---

6 Regulation of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EC)

No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549).

---

7 The national court points out that the purpose of the reference is not to assess whether the Agency 'proceeded in the manner prescribed in the procurement legislation' (paragraph 8 of the order for reference). In any event, it might be of interest to note that, if Directive 2004/18 were applicable, it may be inferred that the awarding authority may allow, in a procurement procedure, the rectification of formal irregularities which do not amount to the submission of a new tender or significantly amend the terms of the original tender. I refer, on this point, to my Opinion in *M.A.T.I. SUD* and *DUEMMESGR*, (C-523/16 and C-536/16 EU:C:2017:868).

---

8 Paragraph 22 of the written observations.

---

9 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

10 Paragraphs 27 and 28 of the Commission's written observations.

---

11 Paragraph 56 of the order for reference: 'it may be assumed that the service relating to the provision of the services at issue is of immediate economic benefit to the Maaseutuvirasto'.

---

12 Judgment in *Falk Pharma*, paragraph 38.

---

13 Ibid., paragraph 39.

---

14 Case C-601/13, EU:C:2014:2474, points 17 and 19.

---

15 Recital 2 of Directive 2004/18.

---

16 Order for reference, paragraph 59.

---

17 Paragraph 38 of the observations of the Finnish Government. It points out that, of a total of 163 tenders, 140 were admitted provisionally and 138 definitively, which was 85% of the candidates.

---

18 Judgment of 26 March 2015 (C-601/13, EU:C:2015:204).

---

19 Ibid., paragraph 33.

---

20 Ibid., paragraph 34.

---

21 According to the referring court, the Agency stated that 'as big a group of service providers as possible is needed to ensure that the users of services reliably receive the service they need' (paragraph 50 of the order for reference).

---

22 Furthermore, the *final* selection of the person who is to provide the service, in each case, is not made by the Agency, but by the farmers who join the consultancy scheme. They may choose the advisor who is best suited to their needs, choosing as a rule those who offer their advice in the local area, although other advisors may be used in justified cases. See, to that effect, paragraph 14 of the order for reference.

---

23 As the Court of Justice pointed out in paragraph 35 of that judgment, 'the purpose of Directive 2004/18 is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by contracting authorities'. A risk which, it was then said (paragraph 36), 'is closely connected to the selection which the contracting authority intends to make from the admissible tenders and to the exclusivity which will result from the award of the contract concerned to the operator whose tender has been accepted or to the economic operators whose tenders have been accepted, in the case of a framework agreement, that constituting the objective of the public procurement procedure'.

---

24 According to the Finnish Government, that factor distinguishes this procedure from a mere licensing system and brings it closer to the status of 'public contract' within the meaning of Directive 2004/18.

---

25 For the referring court, the doubt lies in deciding 'whether it follows from the … characteristic of the scheme being closed to other operators that it may be a public contract for the purposes of Article 1(2)(a) of the Procurement Directive' (order for reference, paragraph 63).

---

26 Judgment in *Falk Pharma*, paragraph 38.

---

27 Ibid., paragraph 40.

---

28 Under Article 1(2) of Directive 2014/24, 'procurement … is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators *chosen* by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose'. (Emphasis added).

EU:C:2018:752

JUDGMENT OF THE COURT (Fourth Chamber)

20 September 2018 (*)

(Reference for a preliminary ruling — Article 267 TFEU — Jurisdiction of the Court — Whether the referring body qualifies as a court or tribunal — Directive 2014/24/EU — Public procurement procedures — Open procedure — Award criteria — Technical evaluation — Minimum score threshold — Price-based evaluation)

In Case C-546/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country, Spain), made by decision of 21 October 2016, received at the Court on 28 October 2016, in the proceedings

Montte SL

v

Musikene,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda (Rapporteur), E. Juhász, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Szpunar,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure,

having regard to the order opening the oral procedure of 6 March 2018 and further to the hearing on 16 April 2018,

after considering the observations submitted on behalf of:

– the Spanish Government, by A. Gavela Llopis, acting as Agent,

– the Greek Government, by A. Dimitrakopoulou and K. Georgiadis, acting as Agents,

– the European Commission, by E. Sanfrutos Cano and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 June 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings between Montte SL and Musikene concerning a public procurement procedure.

Legal context

European Union law

3 Recital 90 of Directive 2014/24 is worded as follows:

‘Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender. It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions.

…’

4 Under recital 92 of that directive:

‘When assessing the best price-quality ratio contracting authorities should determine the economic and qualitative criteria linked to the subject-matter of the contract that they will use for that purpose. Those criteria should thus allow for a comparative assessment of the level of performance offered by each tender in the light of the subject-matter of the contract, as defined in the technical specifications. In the context of the best price-quality ratio, a non-exhaustive list of possible award criteria which include environmental and social aspects is set out in this Directive. Contracting authorities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.

The chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective and fair competition and be accompanied by arrangements that allow the information provided by the tenderers to be effectively verified.

To identify the most economically advantageous tender, the contract award decision should not be based on non-cost criteria only. Qualitative criteria should therefore be accompanied by a cost criterion that could, at the choice of the contracting authority, be either the price or a cost-effectiveness approach such as life-cycle costing. However, the award criteria should not affect the application of national provisions determining the remuneration of certain services or setting out fixed prices for certain supplies.’

5 Article 18 of that directive, entitled ‘Principles of procurement’, provides, in paragraph 1 thereof:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

6 Under Article 27 of that directive, entitled ‘Open procedure’:

‘1. In open procedures, any interested economic operator may submit a tender in response to a call for competition.

The minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent.

The tender shall be accompanied by the information for qualitative selection that is requested by the contracting authority.

2. Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders, as laid down in the second subparagraph of paragraph 1 of this Article, may be shortened to 15 days, provided that all of the following conditions are fulfilled:

(a) the prior information notice included all the information required for the contract notice in section I of part B of Annex V, in so far as that information was available at the time the prior information notice was published;

(b) the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

3. Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in the second subparagraph of paragraph 1, it may fix a time limit which shall be not less than 15 days from the date on which the contract notice was sent.

4. The contracting authority may reduce by five days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 of this Article where it accepts that tenders may be submitted by electronic means in accordance with the first subparagraph of Article 22(1), and Article 22(5) and (6).'

7 Article 29 of Directive 2014/24, entitled 'Competitive procedure with negotiation', provides, in paragraph 6 thereof:

'Competitive procedures with negotiation may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document. In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority shall indicate whether it will use that option.'

8 Article 30 of that directive, entitled 'Competitive dialogue', states, in paragraph 4 thereof:

'Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria laid down in the contract notice or in the descriptive document. In the contract notice or the descriptive document, the contracting authority shall indicate whether it will use that option.'

9 Article 31 of that directive, entitled 'Innovation partnership', provides, in paragraph 5 thereof:

'Negotiations during innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in the procurement documents. In the contract notice, the invitation to confirm interest or in the procurement documents, the contracting authority shall indicate whether it will use that option.'

10 Under Article 66 of that directive, entitled 'Reduction of the number of tenders and solutions':

'Where contracting authorities exercise the option of reducing the number of tenders to be negotiated as provided for in Article 29(6) or of solutions to be discussed as provided for in Article 30(4), they shall do so by applying the award criteria stated in the procurement documents. In the final stage, the number arrived at shall make for genuine competition in so far as there are enough tenders, solutions or qualified candidates.'

11 Article 67 of Directive 2014/24, entitled ‘Contract award criteria’, provides, in paragraphs 1, 2 and 4 thereof:

‘1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.

2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. Such criteria may comprise, for instance:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;

(b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

(c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

…

4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.’

Spanish law

12 According to Article 40(6) of the Texto Refundido de la Ley de Contratos del Sector Público (consolidated text of the Law on Public Sector Contracts), resulting from Real Decreto Legislativo 3/2011 por el que se aprueba el Texto Refundido de la Ley de Contratos del Sector Público (Royal Legislative Decree 3/2011 approving the consolidated text of the Law on Public Sector Contracts) of 14 November 2011 (Boletín Oficial del Estado No 276 of 16 November 2011, p. 117729), a special appeal in public procurement proceedings is optional prior to the bringing of an administrative-law action.

13 The first subparagraph of Article 150(4) of the consolidated text of the Law on Public Sector Contracts provides as follows:

‘Where more than one criterion needs to be taken into consideration, it will be necessary to specify the relative weighting attributed to each criterion, which may be expressed by establishing a sufficiently broad band of values. If the award procedure is divided into several stages, it will also be necessary to indicate in which stages the various criteria will be applied, and the minimum number of points that must be obtained by the tenderer in order that he may continue to participate in the selection process.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Musikene is a public-sector foundation in the Comunidad Autónoma de Euskadi (Autonomous Community of the Basque Country, Spain). In July 2016 it launched a tendering procedure for the award of a public contract relating to the 'supply of furniture and signage, specific musical equipment, musical instruments, electro-acoustic, recording and audiovisual equipment, computer equipment and reprographics' under the open procedure. The estimated value of the contract was EUR 1 157 430.59. The procurement documents were approved by Musikene's management on 14 July 2016 and the contract notice was published in the *Official Journal of the European Union* (2016/S 142-257363) on 26 July 2016.

15 The contract award criteria are set out in Annex VII – A to the particular administrative specifications governing the contract, as follows:

'(a) "Presentation and description of the project", with a weighting of 50 points out of 100, broken down into different subcriteria or secondary criteria for each of the five lots into which the contract is divided. In addition, the following clause applies to all lots:

"Minimum score threshold required to continue to participate in the selection process: tenderers who do not obtain 35 points in relation to the technical tender will not proceed to the economic stage."

(b) For all lots, the reduction offered in relation to the tender budget, with a weighting of 50 points out of 100, [will be decided] according to the following scale:

"A maximum of 50 points will be awarded. A tender of an amount equal to the tender budget will be awarded 0 points.

5 points will be applied for each 1% reduction in relation to the tender budget, so that:

1% reduction in relation to the tender budget: 5 points

5% reduction in relation to the tender budget: 25 points

10% reduction in relation to the tender budget: 50 points".'

16 On 11 August 2016 Montte lodged a special appeal against those procurement documents with the Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country, Spain). Montte argues that the condition which states that it is necessary to reach a minimum score threshold at the end of the technical stage in order to continue to participate in the selection process must be annulled, because it restricts tenderers' access to the economic stage of the procurement procedure and renders the joint weighting of the technical and economic criteria laid down in those procurement documents entirely meaningless in practice. Montte submits that, unlike the price criterion, which is applied automatically by using a formula, the technical criteria, which are assessed by means of a less objective qualitative evaluation, are, in practice, assigned a weighting of 100% of the total points. Therefore, according to Montte, by applying such criteria, tenderers may not be judged equally depending on the price of their tender and Musikene may accordingly be unaware of the most advantageous tender after weighing all the criteria.

17 For its part, Musikene contends that that condition is justified. It argues that, given that the public contract at issue in the main proceedings concerns the installation of equipment that will be part of a building, it is acceptable to require tenderers to submit tenders that meet certain minimum requirements connected with compliance with time limits and the technical quality of the services provided.

18 The referring court considers that the national legislation and practice at issue in the main proceedings could be contrary to Directive 2014/24. In that regard, it notes, first of all, that that directive seems to allow contract award criteria to be established which apply during successive eliminatory stages only in the procedures in respect of which such a possibility is expressly laid down therein, and not in open and restricted procedures, which are governed by rules that state precisely how such procedures are to be conducted. Next, it considers that the system of contract award criteria which applies during successive eliminatory stages in open procedures may, contrary to Article 66 of Directive 2014/24, hinder genuine

competition where the application of thresholds considerably reduces the number of tenderers in the final stage. Lastly, it considers that the eliminatory threshold at issue in the main proceedings, which requires a minimum of 35 out of 50 points in the technical evaluation, may prevent the most competitive tenders in terms of price from being analysed and evaluated.

19 In those circumstances, the Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Directive [2014/24] preclude national legislation, such as Article 150(4) of the [consolidated text of the Law on Public Sector Contracts], or a practice for interpreting and implementing that legislation, which authorises contracting authorities to establish in the documents governing an open tendering procedure award criteria which apply in successive elimination stages for tenders which do not exceed a predetermined minimum score threshold?

(2) If the answer to Question 1 is in the negative, does the aforementioned Directive 2014/24 preclude national legislation, or a practice for interpreting and implementing that legislation, which uses the aforementioned system of award criteria which apply in successive elimination stages in such a way that in the last stage there are not sufficient tenders to ensure “genuine competition”?

(3) If the answer to Question 2 is in the affirmative, does the aforementioned Directive 2014/24 preclude, because it does not ensure genuine competition or circumvents the mandate to award the contract to the tender with the best price-quality ratio, a clause such as that at issue, in which the price factor is evaluated only for tenders which have obtained 35 out of 50 points in the technical criteria?’

Admissibility of the request for a preliminary ruling

20 It is necessary at the outset to examine the question whether the Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country) fulfils the necessary criteria to be regarded as a national court or tribunal for the purposes of Article 267 TFEU.

21 In that regard, it should be borne in mind that, in accordance with settled case-law, in order to assess whether a body making a reference is a ‘court or tribunal’, which is a question governed by EU law alone, the Court will take account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 23 and the case-law cited).

22 In the present case, first, it is apparent from the order for reference that the referring body is a permanent, independent body established under a legal provision which adopts its decisions on the basis of exclusively legal criteria following an *inter partes* procedure. Regarding, more specifically, that body’s independence, that order explains that that body, inasmuch as it is not subject to any hierarchical constraint and does not receive instructions from third parties, carries out its functions objectively, impartially and entirely autonomously.

23 Second, as regards whether the referring body’s jurisdiction is compulsory for the purposes of the case-law of the Court concerning Article 267 TFEU, it is true that that body’s jurisdiction is, under Article 40(6) of the consolidated text of the Law on Public Sector Contracts, only optional. Thus, a person who wishes to contest the lawfulness of a public procurement procedure may choose between a special appeal before the referring body and an administrative-law action.

24 Nevertheless, it is apparent from the order for reference that the decisions of the referring body, whose jurisdiction does not depend on the parties’ agreement, are binding on the parties. In those circumstances, that body also fulfils the criterion of compulsory jurisdiction (see, to that effect,

judgment of 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, paragraphs 23 to 25).

25 Accordingly, the Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country) fulfils the necessary criteria to be regarded as a national court or tribunal for the purposes of Article 267 TFEU, and the questions referred to the Court are admissible.

Consideration of the questions referred

The first question

26 By its first question, the referring court asks, in essence, whether Directive 2014/24 is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which allows contracting authorities to lay down, in the documents governing an open procurement procedure, minimum requirements as regards the technical evaluation, so that the tenders submitted which do not reach a predetermined minimum score threshold at the end of that evaluation are excluded from the subsequent evaluation based on both technical criteria and price.

27 Although the first subparagraph of Article 27(1) of Directive 2014/24 provides that, in open procedures, any interested economic operator may submit a tender in response to a call for competition, that directive allows contracting authorities to lay down, in the context of such procedures, minimum requirements in relation to the technical evaluation.

28 In that regard, as was noted by the Advocate General in point 37 of his Opinion, Article 27 of Directive 2014/24 does not contain any rule as to how the tendering procedure is to be conducted, with the exception of those relating to the minimum time limit for the receipt of tenders from the date on which the contract notice was sent.

29 In addition, recital 90 of that directive recalls that contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions, while recital 92 thereof specifies that the purpose of that directive is to encourage contracting authorities to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.

30 For its part, Article 67(1) of Directive 2014/24 states that contracting authorities are to base the award of public contracts on the most economically advantageous tender. Article 67(2) of that directive provides that the most economically advantageous tender from the point of view of the contracting authority is to be identified on the basis of the price or cost and may include the best price-quality ratio, which is to be assessed on the basis of criteria which comprise, inter alia, qualitative aspects such as quality, including technical merit.

31 It should be added that those criteria must, as can be seen from recital 90 of that directive and Article 67(4) thereof, ensure compliance with the principles of transparency, non-discrimination and equal treatment, so as to guarantee an objective comparison of the relative merits of the tenders and, accordingly, effective competition. That would not be the case for criteria having the effect of conferring on the contracting authority an unrestricted freedom of choice (see, by analogy, as regards Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), judgment of 10 May 2012, *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 87).

32 Consequently, contracting authorities are to be free, provided that they comply with the requirements set out in paragraph 31 above, to determine, according to their needs, the level of, inter alia, technical merit that the submitted tenders must provide depending on the characteristics and the subject matter of the contract in question and to establish a minimum threshold which those tenders must comply with from a technical point of view. To that end, as was argued by the Commission in its written observations, Article 67 of Directive 2014/24 does not preclude the possibility, at the contract award

stage, of excluding, as a first step, submitted tenders which do not reach a predetermined minimum score threshold as regards the technical evaluation. In that regard, it appears that a tender which does not reach such a threshold does not correspond, in principle, to the needs of the contracting authority and must not be taken into account for the determination of the most economically advantageous tender. The contracting authority is thus not required, in such a case, to determine whether the price of such a tender is lower than the prices of tenders not eliminated which reach that threshold and thus correspond to the needs of the contracting authority.

33 In that context, it should also be specified that if the contract is awarded after the technical evaluation, the contracting authority will necessarily have to take account of the price of tenders which reach the minimum threshold from a technical point of view.

34 The finding in paragraph 32 above is not undermined by the fact, referred to by the referring court, that Directive 2014/24 expressly provides for the possibility of certain procurement procedures other than open procedures being conducted in successive stages, which is the case for the competitive procedure with negotiation (Article 29(6)), the competitive dialogue procedure (Article 30(4)), or the innovation partnership procedure (Article 31(5)).

35 As was noted, in essence, by the Advocate General in point 48 of his Opinion, the fact that Directive 2014/24 provides for the possibility of certain procedures, such as those referred to in Article 29(6), Article 30(4) and Article 31(5) thereof, being conducted in successive stages, does not permit the conclusion that a two-step evaluation of tenders during the contract award stage would be inadmissible in the case of an open procedure such as that at issue in the main proceedings.

36 In that regard, it should be noted that, as was argued by the Commission in its written observations, the possibility which those provisions offer the contracting authority to reject tenders which, although meeting the minimum requirements, are not among the best, is justified by the specific nature of the procedures concerned, in which it could prove difficult to conduct negotiations or dialogues if an excessive number of tenders or solutions were to be retained until the final stage of the procurement procedure.

37 However, the case in the main proceedings concerns a different situation from those referred to in the provisions mentioned in paragraph 34 above. It is not apparent from the public procurement documents at issue in the main proceedings that the contracting authority would be able to reject tenders fulfilling the award criteria and select only the best tenders. On the contrary, according to those documents, the only tenders which the contracting authority is authorised to exclude from the price-based evaluation are those which do not meet the minimum requirements relating to the technical evaluation and thus do not meet the needs of the contracting authority. Such an approach is not intended to limit the number of tenders subjected to the price-based evaluation, given that all the tenders submitted may, in principle, meet those minimum requirements.

38 In any event, it should be borne in mind that the contracting authorities must, throughout the procedure, observe the principles of procurement set out in Article 18 of Directive 2014/24, which include the principles of equal treatment, transparency and proportionality.

39 In the light of the foregoing, the answer to the first question is that Directive 2014/24 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows contracting authorities to lay down, in the documents governing an open procurement procedure, minimum requirements as regards the technical evaluation, so that the tenders submitted which do not reach a predetermined minimum score threshold at the end of that evaluation are excluded from the subsequent evaluation based on both technical criteria and price.

The second question

40 By its second question, the referring court asks, in essence, whether, in the event that the answer to the first question is in the negative, Article 66 of Directive 2014/24 is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which allows contracting authorities to lay down, in the documents governing an open procurement procedure, minimum requirements as regards the technical evaluation, so that the tenders submitted which do not reach a predetermined

minimum score threshold at the end of that evaluation are excluded from the subsequent stages of the procurement procedure, regardless of the number of tenderers remaining.

41 In that regard, provided that, in the case at hand, the conditions laid down by Directive 2014/24, in particular in Articles 18 and 67 thereof, have been applied correctly, it must be held that the contracting authority has ensured that there is effective competition. In addition, it must be stated from the outset that even if, following the technical evaluation, there is only one tender left for the contracting authority to consider, that authority is in no way required to accept that tender (see, by analogy, judgment of 16 September 1999, *Fracasso and Leitschutz*, C-27/98, EU:C:1999:420, paragraphs 32 to 34). In such circumstances, if the contracting authority considers that the procurement procedure is, in view of the specificities and the subject matter of the contract concerned, characterised by a lack of effective competition, it is open to that authority to terminate that procedure and, if necessary, to launch a new procedure with different award criteria.

42 It is true that, under Article 66 of Directive 2014/24, contracting authorities, where they exercise the option of reducing the number of tenders to be negotiated as provided for in Article 29(6) of that directive, or that of reducing the number of solutions to be discussed as provided for in Article 30(4) thereof, must do so by applying the award criteria stated in the procurement documents, so that the number of tenders selected in the final stage makes for genuine competition in so far as there are enough tenders that meet the necessary requirements.

43 Nevertheless, for the reasons stated in paragraph 37 above, the case in the main proceedings concerns a different situation from those referred to in Article 29(6) and Article 30(4) of Directive 2014/24, so that it is not covered by Article 66 of that directive. Accordingly, the need to ensure genuine competition until the final stage of the procedure referred to in that article does not concern open procedures such as that at issue in the main proceedings.

44 In the light of the foregoing, the answer to the second question is that Article 66 of Directive 2014/24 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows contracting authorities to lay down, in the documents governing an open procurement procedure, minimum requirements as regards the technical evaluation, so that the tenders submitted which do not reach a predetermined minimum score threshold at the end of that evaluation are excluded from the subsequent stages of the procurement procedure, regardless of the number of tenderers remaining.

The third question

45 As the third question was referred only in the event of the Court answering the second question in the affirmative, there is no need to answer that third question.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows contracting authorities to lay down, in the documents governing an open procurement procedure, minimum requirements as regards the technical evaluation, so that the tenders submitted which do not reach a predetermined minimum score threshold at the end of that evaluation are excluded from the subsequent evaluation based on both technical criteria and price.**

2. **Article 66 of Directive 2014/24 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows contracting authorities to lay down, in the documents governing an open procurement procedure, minimum requirements as regards the technical evaluation, so that the tenders submitted which do not reach a predetermined minimum score threshold at the end of that evaluation are excluded from the subsequent stages of the procurement procedure, regardless of the number of tenderers remaining.**

[Signatures]

---

* Language of the case: Spanish.

OPINION OF ADVOCATE GENERAL

SZPUNAR

delivered on 26 June 2018 (1)

Case C-546/16

Montte SL

v

Musikene

(Request for a preliminary ruling
from the Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi
(Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country, Spain))

(Reference for a preliminary ruling — Public procurement — Open procedure — Award criteria — Staged evaluation of tenders — Minimum score threshold)

I. Introduction

1. The present case concerns, in particular, the degree of freedom enjoyed by the Member States when implementing the provisions of Directive 2014/24/EU (2) into national law with regard to public procurement contracts awarded under an open procedure.

2. More precisely, the first question concerns whether national legislation may entitle contracting authorities to carry out a two-stage evaluation of tenders in an open procedure in such a way that in the second stage (economic stage) only those tenders that have obtained the required number of points in the first stage (technical stage) are evaluated. The second question concerns whether such national legislation relating to the open procedure must impose on the contracting authority an obligation to ensure that a certain number of tenders will be evaluated in the final stage of the procedure. Lastly, the third question concerns the compatibility with Directive 2014/24 of an approach which assumes that in the first stage (technical stage) of such a procedure a tender must obtain a certain number of points in order to be evaluated during the second stage (economic stage).

II. Legal framework

A. EU law

3. Pursuant to Article 26(1) and (2) of Directive 2014/24:

‘1. When awarding public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 32, a call for competition has been published in accordance with this Directive.

2. Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive.'

4. Article 27 of that directive, entitled 'Open procedure', sets out the time limits within which interested economic operators may submit a tender in public procurement procedures where the contracting authority has used the open procedure.

5. Article 66 of Directive 2014/24 states:

'Where contracting authorities exercise the option of reducing the number of tenders to be negotiated as provided for in Article 29(6) or of solutions to be discussed as provided for in Article 30(4), they shall do so by applying the award criteria stated in the procurement documents. In the final stage, the number arrived at shall make for genuine competition in so far as there are enough tenders, solutions or qualified candidates.'

6. Pursuant to Article 67(1), (2) and (4) of that directive:

'1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.

2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. …

…

4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria …'

B. Spanish law

7. Article 150(4) of the Texto Refundido de la Ley de Contratos del Sector Público (consolidated text of the Spanish Law on Public Sector Contracts) ('the TRLCSP') states:

'Where more than one criterion needs to be taken into consideration, it will be necessary to specify the relative weighting attributed to each criterion, which may be expressed by establishing a sufficiently broad band of values. If the award procedure is divided into several stages, it will also be necessary to indicate in which stages the various criteria will be applied, and the minimum number of points that must be obtained by the tenderer in order that he may continue to participate in the selection process.'

8. Article 22(1)(d) of Real Decreto 817/2009, de 8 de mayo, por el que se desarrolla parcialmente la Ley 30/2007, de 30 de octubre, de Contratos del Sector Público (Royal Decree No 817/2009 of 8 May 2009 partially implementing Law No 30/2007 of 30 October 2007 on Public Sector Contracts), which governs the functions of the Mesas de Contratación (Procurement Boards), these being collegiate bodies that advise the contracting authorities, states in particular that:

'Without prejudice to the remaining functions entrusted to it by the Law on Public Sector Contracts and its additional provisions, the Procurement Board shall fulfil the following functions in open tendering procedures:

…

(d) Where the evaluation procedure [for submitted tenders] is divided into several stages, it will decide which tenderers are to be excluded for not obtaining the minimum number of points that a

tenderer must obtain in order to continue to participate in the selection process.

…’

III. Facts of the dispute which is the subject of the main proceedings

9. Musikene (‘the contracting authority’) is a public-sector foundation in the Autonomous Community of the Basque Country, which organised an open procedure for the award of a supply contract described as ‘furniture and signage, specific musical equipment, musical instruments, electro-acoustic, recording and audiovisual equipment, computer equipment and reprographics’. The value of the contract was estimated to exceed the threshold that obliged the contracting authority to apply the provisions implementing Directive 2014/24 into Spanish law.

10. The call for tenders under the open procedure within the meaning of Article 27 of Directive 2014/24 was published in the *Official Journal of the European Union* on 26 July 2016.

11. The procurement documents specified the procurement procedure as well as the tender evaluation criteria. In simple terms, the documents distinguished two stages, referred to as the technical stage and the economic stage. In each of those stages, a tender could receive a maximum score of 50 points.

12. In the technical stage, a weighted criterion — ‘Presentation and description of the project’, broken down into various sub-criteria for each of the lots comprising the contract — was applied. In the economic stage, the price criterion was evaluated. This consisted in the award of points for a reduction in the tender price relative to the value of the contract.

13. In addition, the procurement documents required a minimum number of points to be obtained in the technical stage in order to be able to participate in the economic stage. Only those tenderers which had obtained at least 35 points in the technical stage could proceed to the economic stage.

14. The Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country, Spain) (‘the OARC’) is a permanent body which deals with appeals in the field of public procurement.

15. On 11 August 2016 the OARC received an appeal from Montte, SL (‘the appellant’) regarding the procurement documents. In its appeal, the appellant challenged those documents in so far as they require a minimum number of points to be obtained during the technical stage. According to the appellant, such a requirement should be deemed inadmissible, since it renders meaningless the weighting of technical and economic criteria as provided for in the procurement documents. That requirement leads to a situation in which the contracting authority is unable to evaluate the tenders on the basis of the price offered, and is unable to select the most advantageous offer.

16. By contrast, the contracting authority is of the view that it was necessary to establish that requirement due to the subject matter of the contract, which concerned the supply of equipment that forms an integral part of a building. For that reason, a tender could proceed to the economic stage if it met certain minimum requirements, thereby ensuring that the contract would be performed within the established time limits and to the appropriate technical standards.

IV. The questions referred and the proceedings before the Court

17. In those circumstances, the OARC decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Directive [2014/24] preclude national legislation, such as Article 150(4) of the TRLCSP, or a practice for interpreting and implementing that legislation, which authorises contracting authorities to establish in the documents governing an open tendering procedure award criteria which apply in successive elimination stages for tenders which do not exceed a predetermined minimum score threshold?

(2) If the answer to Question 1 is in the negative, does the aforementioned Directive 2014/24 preclude national legislation, or a practice for interpreting and implementing that legislation, which uses the aforementioned system of award criteria which apply in successive elimination stages in such a way that in the last stage there are not sufficient tenders to ensure "genuine competition"?

(3) If the answer to Question 2 is in the affirmative, does the aforementioned Directive 2014/24 preclude, because it does not ensure genuine competition or circumvents the mandate to award the contract to the tender with the best price-quality ratio, a clause such as that at issue, in which the price factor is evaluated only for tenders which have obtained 35 out of 50 points in the technical criteria?'

18. The request for a preliminary ruling was lodged at the Court Registry on 28 October 2016.

19. Written observations have been submitted by the Spanish and Greek Governments and by the European Commission. Those governments and the Commission also took part in the hearing held on 16 April 2018.

V. Analysis

A. Admissibility

20. In its request for a preliminary ruling, the OARC begins by considering whether it can be regarded as a 'court or tribunal' for the purposes of Article 267 TFEU. I will therefore begin by addressing this issue.

21. According to settled case-law, in order to determine whether a given national body is a 'court or tribunal' for the purposes of Article 267 TFEU, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. (3) Moreover, a national body may refer a question to the Court only if it is called upon to give a ruling in proceedings intended to lead to a decision of a judicial nature. (4) Those factors are indicative in the sense that they are neither decisive nor exhaustive. They provide a point of reference for determining the judicial nature of the referring body. (5)

22. Importantly, even if a body is regarded under the law of a given Member State as an administrative body, that fact is not, in itself, conclusive for the purpose of determining whether the body concerned is a 'court or tribunal' for the purposes of Article 267 TFEU. (6)

23. It follows from the information referred to in the request for a preliminary ruling that the OARC is a permanent appeal body that was established on the basis of laws of general application. The OARC's jurisdiction to hear appeals in cases concerning public procurement does not depend on the parties' agreement. (7) The decisions of that body are binding on the parties. Furthermore, the OARC decides cases brought before it on the basis of rules of law, following *inter partes* proceedings. Lastly, the OARC is an independent body that is not subject to any external instructions.

24. In the light of those observations, I believe that the OARC fulfils the criteria allowing it to be regarded as a 'court or tribunal' for the purposes of Article 267 TFEU.

B. The first question referred

25. By its first question, the referring court seeks to determine whether Directive 2014/24 precludes legislation which implements that directive into national law from authorising a contracting authority to establish a staged evaluation of tenders in documents governing the award of a contract under an open procedure, provided that in successive stages only those tenders that have reached the specified score threshold in previous stages are evaluated.

26. The referring court states that doubts as to the possibility of carrying out a staged evaluation of tenders in the context of an open procedure arise for several reasons.

27. First, the referring court states that Article 66 of Directive 2014/24 provides for the possibility of reducing the number of tenders and solutions by allowing competitive procedures with negotiation (Article 29(6) of Directive 2014/24) and competitive dialogues (Article 30(4) of that directive) to take place in successive stages as part of the public procurement procedure. Directive 2014/24 does not, however, contain an analogous provision for the open procedure referred to in Article 27 of that directive.

28. In that context, the referring court points out that the possibility of establishing stages in a public procurement procedure applies only to those procedures where it is possible to negotiate the tenders originally submitted. Consequently, the referring court is of the view that it is possible to defend the view that a contracting authority is not permitted to establish stages in public procurement procedures where it is not possible to negotiate tenders. Such procedures include the open procedure.

29. Secondly, the referring court points out that the content of recitals 90, 92 and 104 of Directive 2014/24 could also be an argument against the introduction of stages in the open procedure. According to the referring court, those recitals concern the function performed by the award criteria. Those criteria make it possible to compare tenders such that they can be assessed objectively. However, the purpose of the award criteria is not to eliminate tenders. This is done instead by the criteria that verify a tenderer's ability to perform a contract or by the criteria that relate to the minimum technical requirements as set out in the procurement documents.

30. Third and lastly, the referring court points out that a staged evaluation of tenders, carried out in a manner corresponding to that used in the national procedure, could lead to a situation in which the most economically advantageous tender would not be considered by the contracting authority. As a consequence, the contract would be awarded without taking into account the price criterion, which could prove contrary to Article 67(2) of Directive 2014/24 in particular.

1. Positions of the parties

31. Regarding the doubts of the referring court, the Spanish Government points out, first, that the EU legislature has not fully harmonised the rules governing the open procedure. A Member State may therefore freely regulate in national law issues related to the conduct of an open procedure, provided that the adopted national rules do not undermine the effectiveness of the provisions of Directive 2014/24.

32. Secondly, the Spanish Government disagrees with the interpretation of the referring court, which considers that the staged evaluation of tenders under the open procedure is intended to reduce the number of candidates or tenders. According to the Spanish Government, the purpose of establishing a two-stage evaluation of tenders in the national procedure was to ensure that only tenders which met the needs of the contracting authority would be taken into consideration.

33. Third and lastly, according to the Spanish Government, it is true that the contracting authority cannot determine the award criteria in such a way as to give itself unrestricted freedom. Nevertheless, it follows from Article 67(2) of Directive 2014/24 that the most economically advantageous tender may be selected on the basis of a criterion relating to the best price-quality ratio.

34. As regards the first question, the Greek Government and the Commission, in essence, take the same position as the Spanish Government.

2. Analysis

35. In my view, the doubts of the referring court, to which the parties refer in their observations, give rise to three issues. The first issue concerns the extent to which Member States are free to regulate the open procedure in national law. Secondly, the doubts of the referring court also concern whether a two-stage evaluation of tenders, carried out in a similar manner to the evaluation to which the main proceedings relate, leads to a situation in which the purpose of the tender evaluation criteria is, in essence, to eliminate tenders, whereas their purpose should be to evaluate them. Thirdly, the referring court asks whether the staged evaluation of tenders leads to circumventing the price criterion when awarding a contract. In the next section of this Opinion, I shall address each of these issues in turn.

(a) The extent to which Member States are free to regulate the open procedure

(1) Introductory remarks

36. Pursuant to Article 26(1) of Directive 2014/24, when awarding public contracts, contracting authorities are to apply the national procedures *adjusted* to be in conformity with that directive. Furthermore, pursuant to Article 26(2) of Directive 2014/24, Member States have an obligation to provide that contracting authorities may apply the open procedure *as regulated* in that directive. (8)

37. In that context, it should be noted that Directive 2014/24 does not regulate exhaustively the manner in which the open procedure is to be conducted. The Spanish and Greek Governments and the Commission also point to this. While it is true that Article 27 of Directive 2014/24 specifies the time limits within which tenders must be submitted in an open procedure, that directive does not contain any provisions concerning the procurement procedure that is to be carried out under that open procedure.

38. Given that, on the one hand, Member States are required to ensure that contracting authorities are able to use the open procedure and, on the other, that that procedure is *adjusted* to be in conformity with Directive 2014/24 and may be applied *as regulated* in that directive, it is for national legislators to lay down appropriate rules for the conduct of such a procedure, since that procedure is regulated only to a very limited extent by EU law.

39. Of course, the freedom of national legislators is not unrestricted in this regard. National legislation must not give rise to procedures under which contracting authorities would regularly infringe the principles of procurement laid down in Article 18 of Directive 2014/24 and the general principles of EU law. Nor must national legislation undermine the effectiveness of the provisions of that directive (*effet utile*). (9) In my view, this is how the requirement that procedures should be *adjusted* to be in conformity with Directive 2014/24, and may be applied *as regulated* in that directive, should be understood.

40. In the light of the foregoing considerations, it is necessary to consider whether, given the silence of Directive 2014/24 on the admissibility of a staged evaluation of tenders in the context of an open procedure, it is appropriate to conclude that authorising contracting authorities to provide for such a solution in public procurement documents is contrary to the provisions of that directive. In that context, as regards the doubts of the referring court, reference must be made to a systematic interpretation of Directive 2014/24, in the light of Article 66 thereof.

(2) The role of Article 66 of Directive 2014/24 in the light of other provisions of that directive

41. The referring court states that its doubts concerning the possibility of establishing a two-stage tender evaluation in the documents governing an open tendering procedure derive from the inclusion in Directive 2014/24 of a provision that expressly permits solutions or tenders under certain procedures to be evaluated in stages (Article 66), whereas there is no analogous provision in that directive in relation to the open procedure.

42. I do not share the doubts of the referring court in this regard.

43. The establishment of an explicit rule that permits solutions or tenders to be evaluated in stages using award criteria in competitive procedures with negotiation and competitive dialogues is, in my view, dictated by the fact that it is possible in those procedures to negotiate the tenders originally submitted (Article 29(5) of Directive 2014/24) and to clarify, specify and optimise such tenders (Article 30(6) of that directive).

44. On the one hand, negotiating a large number of tenders or solutions could in some cases be problematic for contracting authorities. The Commission drew attention to this in its written observations. By reducing the number of tenders or solutions in successive stages of the procedure, only those that meet the needs of the contracting authorities can be negotiated.

45. On the other hand, as a result of dividing the procedure into successive stages in order to reduce the number of tenders or discussed solutions, it could transpire that only those tenderers whose tenders or solutions had not been eliminated in previous stages of the procedure would actually be able to negotiate the tender and conclude a contract with the contracting authority on the basis of that negotiation. This could give rise to doubts as to whether the principles of procurement laid down in Article 18 of Directive 2014/24 were

being observed. The main principles at issue here are equal and non-discriminatory treatment, the obligation of transparency, and the prohibition on the artificial narrowing of competition.

46. For this reason, the EU legislature made it clear that the staged evaluation of tenders is admissible in procedures which provide for the possibility of negotiating tenders. In this way, doubts were removed as to the admissibility of establishing stages in such procedures. (10)

47. Such doubts do not arise, however, with regard to the open procedure, which does not provide for the possibility of negotiating the tenders originally submitted. (11) Therefore, in the absence of a provision analogous to Article 66 of Directive 2014/24 concerning the open procedure, it cannot be inferred that, in the context of such a procedure, it is inadmissible to introduce stages that relate to particular award criteria.

48. To conclude: it cannot be inferred from the inclusion in Directive 2014/24 of a provision such as Article 66 of that directive concerning competitive procedures with negotiation and competitive dialogues that the staged evaluation of tenders in an open procedure is inadmissible, provided that it does not infringe the principles of procurement laid down in Article 18 of that directive and the general principles of EU law, and that it does not undermine the effectiveness of the provisions of that directive.

(b) The nature and role of the award criteria

49. In its request for a preliminary ruling, the referring court expresses doubts as to whether the establishment of a staged open procedure, such as the one referred to in the procurement documents contested in the main proceedings, means that in practice the purpose of the award criteria is to verify a tenderer's ability to perform the contract and to eliminate tenders.

50. In order to address the doubts raised by the referring court, it seems necessary to explain the essence of the criteria used in the award of contracts under procedures falling within the scope of Directive 2014/24.

51. In Article 56 of Directive 2014/24, the EU legislature clearly distinguished two types of criteria, namely: the criteria for qualitative selection, which principally include the grounds for exclusion and the selection criteria that verify the economic operators' ability to perform the contract to be awarded (see Articles 57 and 58 of that directive), and the award criteria, which relate to the tenders themselves. Unlike the criteria for qualitative selection, the award criteria are objective in the sense that they are criteria linked to the subject matter of the contract in question (first sentence, *in fine*, of Article 67(2) thereof). (12)

52. An analysis of the reference for a preliminary ruling leads to the conclusion that the criteria applied in both stages of the open procedure concerned the tenders (award criteria) and not the economic operators' ability to perform the contract to be awarded (criteria for qualitative selection). Indeed, according to the information provided by the referring court, criteria referring to the presentation and description of the project were applicable at the technical stage.

53. While it is true that the application of award criteria in the way in which this was done in the national procedure means that in practice certain tenders are not considered by the contracting authority in subsequent stages of the procedure, in my view this is not about preselecting tenderers, but about improving the way in which the weighting of each of the award criteria is determined.

54. It is conceivable that the contracting authority could assess the technical and economic criteria under the open procedure without dividing it into stages. This would require the weighting of the various criteria in the procurement documents to be determined in such a way that a tender which did not meet certain technical requirements could not in practice obtain enough points to be selected by the contracting authority.

55. In my view, the solution described in the previous point, and the two-stage evaluation of tenders which is contested by the appellant in the main proceedings, are not in themselves contrary to Directive 2014/24. With respect to both of those solutions, the award criteria should of course, pursuant to Article 67(4) of that directive, be defined in such a way as to ensure the possibility of effective competition. Importantly, in this context, the appellant does not appear to contest in the main proceedings the proportionality of the contracting authority's expectations which led to the establishment of a 35-point threshold at the technical stage for the evaluation of tenders in qualitative terms.

56. I therefore consider that Directive 2014/24 does not preclude the specification of award criteria in the procurement documents, in accordance with Article 67(2) and (4) of that directive, in such a way that only those tenders which have obtained a certain number of points in the previous stages will be evaluated in the subsequent stages of the open procedure.

(c) The role of price as an award criterion

57. The referring court also points out that a staged evaluation of tenders, such as that provided for in the documents contested by the appellant, may lead to the contract being awarded with the omission of the price element. According to the referring court, this could be contrary to Directive 2014/24.

58. Indeed, the second sentence of recital 90 of Directive 2014/24 states that an assessment based on the best price-quality ratio should always include a price or cost element.

59. However, Article 67(1) of Directive 2014/24 provides that contracting authorities are to base the award of public contracts on the most economically advantageous tender. This means, pursuant to Article 67(2) of that directive, the most economically advantageous tender *from the point of view of the contracting authority*, and the most economically advantageous tender *may* include the best price-quality ratio. (13)

60. Furthermore, according to the second paragraph of recital 90 of Directive 2014/24, a greater quality orientation of public procurement is to be encouraged. For this reason, Member States should be permitted to prohibit or *restrict* use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate. In addition, according to the fourth sentence of the first paragraph of recital 92 of that directive, contracting authorities should be encouraged to choose award criteria *that allow them to obtain high-quality* works, supplies and services that are *optimally suited to their needs*.

61. This does not mean that contracting authorities have unrestricted freedom to determine the award criteria. In this regard, the aforementioned Article 67(4) of Directive 2014/24 applies. It imposes an obligation on contracting authorities to define the award criteria in such a way as to ensure the possibility of effective competition.

62. The obligation arising from Article 67(4) of Directive 2014/24 must, however, be respected by contracting authorities regardless of whether they establish a staged evaluation of tenders in the procurement documents. That obligation would therefore also apply if, in the procurement documents contested by the appellant, there had been a decision to assess the qualitative and economic criteria without distinguishing individual stages. The staged evaluation of tenders does not have the effect of adding to the obligations of the contracting authority under Article 67(4) of Directive 2014/24 in such a way that the contracting authority is compelled to assign a special role to the price criterion.

63. To conclude: first, it cannot be inferred from the inclusion of Article 66 in Directive 2014/24 that it is not possible to establish a staged evaluation of tenders in documents governing the award of a contract under an open procedure, provided that it does not infringe the principles of procurement laid down in Article 18 of that directive and the general principles of EU law, and that it does not undermine the effectiveness of the provisions of the directive. Secondly, the criteria used in such a staged evaluation of tenders remain award criteria provided that they comply with Article 67(2) and (4) of Directive 2014/24. Thirdly, this kind of staged evaluation of tenders does not mean that the contracting authority does not base the award of the contract on the most economically advantageous tender.

64. In the light of those considerations, I propose that the Court should answer the first question as follows: Directive 2014/24 must be interpreted as not precluding a contracting authority from being entitled, by using award criteria in accordance with Article 67(2) and (4) of that directive, to establish a staged evaluation of tenders in the documents governing the award of a contract under an open procedure.

C. The second question referred

65. The second question was formulated in the event that the Court's answer to the first question should mean that the national legislature could authorise contracting authorities to establish a staged evaluation of tenders in documents governing the award of a contract under the open procedure. By its second question, the

referring court, in essence, seeks clarification as to whether Directive 2014/24 precludes a situation where a contracting authority is not obliged, in the final stage of the procedure, to arrive at a sufficient number of tenders to ensure ‘genuine competition’ within the meaning of Article 66 of that directive.

66. The Spanish Government considers that the second question is hypothetical. In that government’s view, there is nothing to suggest that the staged evaluation of tenders in the national procedure could have led to the contract being awarded in the absence of competition. In addition, the Spanish Government points out that the issue in the main proceedings is the assessment of the procurement documents contested by the appellant. The Greek Government and the Commission, by contrast, take the view that the requirement to ensure ‘genuine competition’ does not apply in relation to the open procedure.

1. Admissibility

67. It is necessary to begin by addressing the doubts of the Spanish Government regarding the admissibility of the second question.

68. The provisions of Spanish law that refer to the open procedure do not lay down a requirement of ‘genuine competition’. There is no indication that such a requirement was laid down in the procurement documents contested by the appellant.

69. In my view, the referring court is asking whether there is a need to comply with the requirement of ‘genuine competition’ in the context of a staged evaluation of tenders under the open procedure in view of the wording of Article 66 of Directive 2014/24, which is referred to several times in the reference for a preliminary ruling. If it transpired that the requirement laid down in Article 66 of Directive 2014/24 was also applicable directly or by analogy to open procedures in which tenders are evaluated in stages, the referring court would have to examine whether the procurement documents enabled the contracting authority to ensure ‘genuine competition’ in the final stage of the procedure.

70. In the light of the foregoing considerations, the second question is admissible.

2. Substance

71. In order to answer this question it is necessary to determine whether Article 66 of Directive 2014/24 applies either directly or by analogy to open procedures in which tenders are evaluated in stages.

72. In my view, Article 66 of Directive 2014/24 cannot be applied to open procedures.

73. First, Article 66 of Directive 2014/24 refers exclusively to competitive procedures with negotiation and competitive dialogues. It is not, however, applicable in the case of open procedures. (14) Moreover, a contracting authority may continue an open procedure even if the award criteria mean that only a small number of economic operators may tender for the contract. (15)

74. Secondly, the second sentence of Article 66 of Directive 2014/24 provides that the number of tenders or solutions arrived at in the final stage must ensure genuine competition *in so far as there are enough tenders, solutions or qualified candidates*.

75. It follows from the wording of that provision that the requirement to ensure a certain number of tenders and solutions in the final stage of the procedure is not an absolute requirement. It is applicable where it is possible to arrive at an appropriate number of tenders, solutions or qualified candidates. (16) I consider, therefore, that the aim of arriving at a number that ensures *genuine competition* in the final stage of a competitive procedure with negotiation and competitive dialogue is to avoid a situation where the tenderer or candidate concerned would not be interested in negotiating the tender because it would be the only economic operator taken into consideration by the contracting authority, even though other economic operators could offer the contracting authority a tender that would meet its expectations and needs.

76. Therefore, in my view, there is no need to apply Article 66 of Directive 2014/24 by analogy in the case of an open procedure in which tenders are evaluated in stages. At subsequent stages of such a procedure situations arise in which only those tenders that meet the needs and expectations of the contracting authority are taken into account. However, there is no possibility to negotiate them.

77. In the light of the foregoing considerations, the requirement to arrive at a certain number of tenders in the final stage of an open procedure such that that number ensures ‘genuine competition’ within the meaning of Article 66 of Directive 2014/24 is not applicable either directly or by analogy in an open procedure such as that referred to in the procurement documents contested by the appellant.

78. Therefore, I propose that the Court should answer the second question as follows: Directive 2014/24 must be interpreted as not precluding a situation where a contracting authority which establishes a staged evaluation of tenders in the documents governing a contract awarded under an open procedure is not obliged, in the final stage of such a procedure, to arrive at a number of tenders sufficient to ensure ‘genuine competition’ within the meaning of Article 66 of that directive.

D. The third question referred

79. By its third question, the referring court, in essence, seeks clarification as to whether a requirement such as that contested by the appellant is contrary to Directive 2014/24 because it is not possible to ensure genuine competition or to award a contract to the economic operator that has submitted the tender with the best price-quality ratio.

80. The third question was formulated in the event that the answer to the second question was in the affirmative. Such an answer would mean that the requirement to arrive at a sufficient number of tenders in the final evaluation stage to ensure genuine competition within the meaning of Article 66 of Directive 2014/24 is also applicable in an open procedure.

81. In the light of my proposed answer to the second question, there is no need to answer the third question. However, in the event that the Court does not share my position in regard to the second question, I shall also briefly refer to the third question.

82. In the context of the requirement to arrive at a sufficient number of tenders in the final stage of the procedure to ensure genuine competition, it should be borne in mind that even if such a requirement were to be deduced from Article 66 of Directive 2014/24 applied directly or by analogy, it is not an absolute requirement. It would apply only in so far as the number of appropriate tenders would allow it. (17) In any event, the final assessment in this regard would have to be left to the referring court.

83. As regards the award of a contract to the economic operator that has submitted the tender with the best price-quality ratio, Directive 2014/24 requires contracting authorities to award contracts on the basis of the most economically advantageous tender. However, that criterion cannot be interpreted to mean that the contracting authority is obliged to select the most advantageous tender in terms of price, even if that tender does not meet that authority’s quality requirements as specified in the procurement documents. The freedom of contracting authorities to set award criteria is, however, restricted by Article 67(4) of Directive 2014/24. (18) It is for the referring court to decide whether the contracting authority has complied with the requirements laid down in that provision.

VI. Conclusions

84. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country, Spain) as follows:

(1) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as not precluding a contracting authority from being entitled, by using award criteria in accordance with Article 67(2) and (4) of that directive, to establish a staged evaluation of tenders in the documents governing the award of a contract under an open procedure.

(2) Directive 2014/24 must be interpreted as not precluding a situation where a contracting authority which establishes a staged evaluation of tenders in the documents governing a contract awarded under an open procedure is not obliged, in the final stage of such a procedure, to arrive at a

number of tenders sufficient to ensure ‘genuine competition’ within the meaning of Article 66 of that directive.

---

1 Original language: Polish.

---

2 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

3 See judgments of 31 May 2005, *Syfait and Others* (C-53/03, EU:C:2005:333, paragraph 29), and of 31 January 2013, *Bełov* (C-394/11, EU:C:2013:48, paragraph 38).

---

4 Judgments of 31 May 2005, *Syfait and Others* (C-53/03, EU:C:2005:333, paragraph 29), and of 31 January 2013, *Bełov* (C-394/11, EU:C:2013:48, paragraphs 39 and 40).

---

5 See my Opinion in *Ascendi* (C-377/13, EU:C:2014:246, point 33).

---

6 See judgment of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 17).

---

7 I note in passing that in its judgment of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664), the Court interpreted the provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), which preceded Directive 2014/24, in the context of questions referred by a Catalan appeal body. It is true that reference was made in that context to a provision of Spanish law which provides that a special appeal in public procurement proceedings is optional prior to an administrative-law action. I cannot rule out the possibility that that provision of Spanish law may apply to the main proceedings, which also concern an appeal body of another Autonomous Community. However, in its judgment of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraphs 22 to 25), the Court held that the Catalan appeal body also satisfied the criterion of compulsory jurisdiction, despite the fact that a person bringing proceedings in a public procurement case may choose between a special appeal to the referring body and an administrative-law action. The decisive factor is that the jurisdiction of the referring body does not depend on the parties’ agreement and its decisions are binding on the parties.

---

8 Emphasis added.

---

9 In this spirit, with reference to Directive 2004/18, see judgment of 28 February 2018, *MA.T.I. SUD* and *Duemme SGR* (C-523/16 and C-536/16, EU:C:2018:122, paragraph 48). With reference to the national procedural rules governing legal actions in the field of public procurement, see judgment of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268, paragraph 33).

---

10 Moreover, unlike the open procedure, the competitive procedure with negotiation and competitive dialogue can be applied so long as certain conditions are met. In addition, the EU legislature has regulated those procedures more restrictively than in the case of the open procedure. In legal academic writings, this is explained by the fact that the risk of restricting competition is generally higher when a contracting authority uses such special procedures as opposed to the open procedure. For the legal status quo prior to the adoption of Directive 2014/24, see Bovis, C., *Public Procurement in the European Union*, Palgrave, New York, 2005, pp. 132 and 133.

---

11 See González García, J., in Caranta, R., Edelstam, G., and Trybus, M. (editors), *EU Public Contract Law: Public Procurement and Beyond*, Bruylant, Brussels, 2013, Chapter 3, point 4. Indeed, authorising a contracting authority to conduct negotiations could lead to an infringement of the principles of equal treatment and non-discrimination and the obligation of transparency. See judgment of 7 April 2016, *Partner Apelski Dariusz* (C-324/14, EU:C:2016:214, paragraph 62 and the case-law cited).

---

12 Importantly, in the context of the statement concerning the objective character of the award criteria, those criteria may also apply to staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract. See Article 67(2)(b) of Directive 2014/24. See also judgment of 26 March 2015, *Ambisig* (C-601/13, EU:C:2015:204, paragraphs 33 and 34). It is worth noting, also against the background of Article 66 of Directive 2014/24, which is referred to several times in the request for a preliminary ruling, that a reduction in the number of tenders or solutions is achieved by dividing the competitive procedure with negotiation or competitive dialogue through the use of award criteria, and not criteria for qualitative selection. See Pawelec, J. (editor), *Dyrektywa Parlamentu Europejskiego i Rady 2014/24/UE w sprawie zamówień publicznych, uchylająca dyrektywę 2004/18/WE. Komentarz*, C.H. Beck, Warsaw, 2017, p. 315; Sánchez Graells, A., *Public Procurement and the EU Competition Rules*, Hart Publishing, Oxford — Portland, 2015, p. 312.

---

13 Emphasis added.

---

14 See point 47 of this Opinion.

---

15 In that spirit, see judgment of 17 September 2002, *Concordia Bus Finland* (C-513/99, EU:C:2002:495, paragraph 85). Moreover, in the judgment of 16 September 1999, *Fracasso and Leitschutz* (C-27/98, EU:C:1999:420, paragraphs 32 to 34), regarding the legal status quo prior to the entry into force of Directive 2014/24, the Court pointed out that if, on conclusion of a public procurement procedure, there is only one tender remaining, the contracting authority is not required to award the contract to the tenderer which submitted that tender. It does not follow, however, that the contracting authority has to annul such a procedure.

---

16 In accordance with the explanatory note on competitive dialogue drafted by the Commission (European Commission Directorate-General Internal Market and Services Public Procurement Policy, *Explanatory Note — Competitive Dialogue — Classic Directive*, accessible via the webpage ec.europa.eu, pp. 8 and 9), reducing the number of solutions may lead to only one solution being considered in the final stage of the procedure. However, this does not prevent the contracting authority from continuing the procedure. In this spirit, see also the second sentence of recital 41 of Directive 2004/18, which clarifies that a reduction in the number of tenders to be discussed or negotiated in the case of competitive dialogues and negotiated procedures with publication of a contract notice should, *in so far as the number of appropriate solutions or candidates allows*, ensure that there is genuine competition.

---

17 See point 75 of this Opinion.

---

18 See points 61 and 62 of this Opinion.

JUDGMENT OF THE COURT (Fourth Chamber)

17 May 2018 (*)

(Reference for a preliminary ruling — Directive 2004/18/EC — Procedures for the award of public works contracts, public supply contracts and public service contracts — Links between tenderers having submitted separate tenders in the same procedure — Obligations of the tenderers, of the contracting authority and of the national court)

In Case C-531/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania), made by decision of 11 October 2016, received at the Court on 18 October 2016, in the proceedings

Šiaulių regiono atliekų tvarkymo centras,

'Ecoservice projektai' UAB, formerly 'Specializuotas transportas' UAB,

interveners:

'VSA Vilnius' UAB,

'Švarinta' UAB,

'Specialus autotransportas' UAB,

'Ecoservice' UAB,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, E. Juhász (Rapporteur), K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– Šiaulių regiono atliekų tvarkymo centras, by L. Songaila, advokatas,

– 'Ecoservice projektai' UAB, by J. Elzbergas, advokatas, and V. Mitrauskas,

– 'VSA Vilnius' UAB, by D. Krukonis, advokatas,

– 'Švarinta' UAB, par K. Smaliukas, advokatas,

– the Lithuanian Government, by D. Kriaučiūnas, G. Taluntytė and R. Butvydytė, acting as Agents,

– the Czech Government, by M. Smolek, T. Müller and J. Vláčil, acting as Agents,

– the European Commission, by A. Tokár and A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 45, 56 and 101 TFEU, of Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), and of the third subparagraph of Article 1(1) and Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 89/665’).

2 The request has been made in proceedings between ‘VSA Vilnius’ UAB and Šiaulių regiono atliekų tvarkymo centras (centre for waste management for the region of Šiauliai, Lithuania) concerning the award, by that centre, of a public service contract relating to the collection of communal waste of the municipal authority of Šiauliai and its transportation to the place of treatment.

Legal context

Directive 89/665

3 The third paragraph of Article 1(1) of Directive 89/665 provides as follows:

‘Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed [EU] law in the field of public procurement or national rules transposing that law.’

4 Under Article 2(1)(b) of that directive:

‘Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

…

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

…’

Directive 2004/18

5 Article 2 of Directive 2004/18 is worded as follows:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

6 Article 45(2) of that directive states:

‘Any economic operator may be excluded from participation in a contract where that economic operator:

(a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

(c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 On 9 July 2015, the centre for waste management for the region of Šiauliai announced a public call for tenders for the provision of services relating to the collection of communal waste of the municipal authority of Šiauliai and its transportation to the place of treatment.

8 Four tenderers submitted tenders: 'Specializuotas transportas' UAB ('tenderer B'), 'Ekonovus' UAB, 'Specialus autotransportas' UAB ('tenderer A') et and the group of operators VSA Vilnius and 'Švarinta' UAB.

9 Tenderers A and B are subsidiaries of 'Ecoservice' UAB, which holds 100% and 98.2%, respectively, of the shares of those undertakings. The Boards of Directors of tenderers A and B are made up of the same persons.

10 The national legislation applicable at the time of publication of the call for tenders did not expressly provide that a tenderer is obliged to disclose its links with other operators participating in the same tendering procedure, or that the contracting authority is obliged to verify, assess or take account of those links for the purpose of its decisions. Nor were those obligations provided for in the tender specifications.

11 Nonetheless, tenderer B submitted, along with its tender, a declaration of honour to the effect that it was taking part in the tendering procedure autonomously and independently of any other economic operators that might be connected to it, and it requested the contracting authority to treat all other operators as competitors. It further stated that it undertook, should it be so required by the contracting authority, to provide a list of economic operators connected to it.

12 On 24 September 2015, the contracting authority rejected tenderer A's tender on the ground that the engines of two of its collection vehicles did not meet the required quality standards. Tenderer A did not contest that decision.

13 On 22 October 2015, the contracting authority informed the tenderers of the classification of the tenders and the award of the contract to tenderer B.

14 VSA Vilnius, which had been classified directly after tenderer B, filed a complaint with the contracting authority, arguing that the tenderers' offers had not been properly evaluated and that the principles of equal treatment and transparency had been infringed. It considered that tenderers A and B had acted as an association of undertakings, that their offers constituted variants and that, given that the call for tenders prohibited the submission of variants, their offers should have been rejected by the contracting authority.

15 Following the rejection of its complaint by the contracting authority, VSA Vilnius brought an action before the Šiaulių apygardos teismas (Regional Court, Šiauliai, Lithuania). By judgment of 18 January 2016, that court annulled the decisions of the contracting authority establishing a classification of the tenders and awarding the contract to tenderer B. On 5 April 2016, the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania) confirmed that judgment.

16 The courts of first instance and appeal considered that the contracting authority, although it was aware of the link between tenderers A and B, took no steps to determine the influence of that link on whether the competition between those tenderers was genuine. Although national legislation does not provide for such an obligation, since tenderers A and B were each aware of the other's participation in the tendering procedure, they should have disclosed their links to the contracting authority. The declaration of honour submitted by tenderer B was insufficient to establish that that obligation had been properly performed.

17 VSA Vilnius and tenderer B both subsequently appealed on a point of law to the referring court.

18 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the free movement of persons and services provided for in Articles 45 TFEU and 56 TFEU respectively, the principles of equality of tenderers and of transparency provided for in Article 2 of Directive 2004/18 and the principle, which flows from those principles, of free and fair competition between economic operators (together or separately, but without limitation to those provisions) be understood and interpreted as meaning that:

if related tenderers, whose economic, management, financial or other links may give rise to doubts as to their independence and the protection of confidential information and/or may provide the preconditions (potential) for them to have an advantage over other tenderers, have decided to submit separate (independent) tenders in the same public procurement procedure, are they, in any event, obliged to disclose those links between them to the contracting authority, even if the contracting authority does not inquire of them separately, irrespective of whether or not the national legal rules governing public procurement state that such an obligation does in fact exist?

(2) If the answer to the first question:

(a) is in the affirmative (that is to say, tenderers must in any event disclose their links to the contracting authority), is the circumstance that that obligation was not performed in such a case, or that it was not properly performed, sufficient for the contracting authority to take the view, or for a review body (court) to decide, that related tenderers having submitted separate tenders in the same public procurement procedure are participating without genuinely being in competition (and are engaged in sham competition)?

(b) is in the negative (that is to say, tenderers have no obligation to disclose their links other than that laid down in legislation or in the tendering conditions), must the risk posed by participation of related economic operators and the risk of the consequences flowing from this then be borne by the contracting authority, if the contracting authority did not indicate in the public tendering documentation that tenderers had such an obligation of disclosure?

(3) Irrespective of the answer to the first question, and having regard to the judgment of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166), must the provisions of law referred to in the first question and the third subparagraph of Article 1(1) of Directive 89/665 and Article 2(1)(b) of that

directive (together or separately, but without limitation to those provisions) be understood and interpreted as meaning that:

(a) if, in the course of the public procurement procedure, it becomes clear, in whatever way, to the contracting authority that significant links (connections) exist between certain tenderers, that contracting authority must, irrespective of its own assessment of that fact and (or) of other circumstances (for example, the formal and substantive dissimilarity of the tenders submitted by the tenderers, the formal undertaking given by a tenderer to engage in fair competition with other tenderers, etc.), separately address the related tenderers and request them to clarify whether, and if so how, their personal situation is compatible with free and fair competition between tenderers?

(b) if the contracting authority has such an obligation but fails to perform it, is there a sufficient basis for the court to declare that the contracting authority has acted unlawfully, having failed to ensure procedural transparency and objectivity, and having failed to request evidence from the applicant or having failed to take a decision, on its own initiative, as to the possible influence that the personal situation of related persons might have on the outcome of the tendering procedure?

(4) Must the legal provisions referred to in the third question and Article 101(1) TFEU (together or separately, but without limitation to those provisions), be understood and interpreted, in the light of the judgments of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166); of 21 January 2016, *Eturas and Others* (C-74/14, EU:C:2016:42); and of 21 July 2016, *VM Remonts and Others* (C-542/14, EU:C:2016:578), as meaning that:

(a) where a tenderer (the applicant) has become aware of the rejection of the lowest-priced tender submitted by one of two related tenderers in a public tendering procedure (tenderer A) and of the fact that the other tenderer (tenderer B) has been declared the successful tenderer, and also having regard to other circumstances connected with those tenderers and their participation in the tendering procedure (the fact that tenderers A and B have the same board of directors; the fact that they have the same parent company, which did not take part in the tendering procedure; the fact that tenderers A and B did not disclose their links to the contracting authority and did not separately provide additional clarifications as to those links, inter alia because no inquiries had been made of them; the fact that tenderer A provided, in its tender, inconsistent information on the compliance by the proposed means of transport (refuse lorries) with the EURO V condition of the call for tenders; the fact that that tenderer, which submitted the lowest-priced tender, which was rejected because of deficiencies identified in it, first, did not challenge the contracting authority’s decision and, second, lodged an appeal against the judgment of the court of first instance, in which appeal, inter alia, it [challenged] the lawfulness of the rejection of its tender; etc.), and where, in respect of all of those circumstances, the contracting authority did not take any action, is that information alone sufficient to found a claim addressed to the review body that it should regard as unlawful the actions of the contracting authority in failing to ensure procedural transparency and objectivity, and, in addition, in not requiring the applicant to provide concrete evidence that tenderers A and B were acting unfairly?

(b) tenderers A and B did not prove to the contracting authority that they were genuinely and fairly taking part in the public tendering procedure solely because tenderer B voluntarily submitted a declaration of genuine participation, the management quality standards for participating in public tendering were applied by tenderer B, and, in addition, the tenders submitted by those tenderers were not formally and substantively identical?

(5) Can the actions of mutually related economic operators (both of which are subsidiaries of the same company) which are participating separately in the same tendering procedure, the value of which reaches the value for international competitive tendering, and where the seat of the contracting authority which announced the tendering procedure and the place where the services are to be provided are not very far distant from another Member State (the Republic of Latvia), be in principle assessed — regard being had to, inter alia, the voluntary submission by one of those

economic operators that it would be engaging in fair competition — under the provisions of Article 101 TFEU and the case-law of the Court of Justice which interprets those provisions?'

Consideration of the questions referred

19 At the outset, it must be noted that, in the questions referred for a preliminary ruling, the referring court refers to Articles 45 and 56 TFEU, without however explaining to what extent the interpretation of those articles is necessary for the purpose of answering those questions. In addition, as is apparent from the order for reference, Directive 2004/18 is relevant to the resolution of the dispute in the main proceedings. In those circumstances, there is no need to interpret Articles 45 and 56 TFEU.

The first and second questions

20 By its first and second questions, the referring court asks, in essence, whether Article 2 of Directive 2004/18 must be interpreted as meaning that, failing any express legislative provision or specific condition in the call for tenders or in the tender specifications governing the conditions for the award of a public contract, related tenderers submitting separate offers in the same procedure are obliged to disclose, on their own initiative, the links between them to the contracting authority.

21 In that regard, it should be recalled, first of all, that EU law, Directive 2004/18 specifically, does not generally prohibit related undertakings from submitting offers in a public procurement procedure. In addition, according to case-law, in the light of EU interest in ensuring the widest possible participation by tenderers in a tendering procedure, it would run counter to the effective application of EU law to exclude systematically related undertakings from participating in the same public procurement procedure (see, to that effect, judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraphs 26 and 28).

22 The Court has also pointed out that groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts. Moreover, relationships between undertakings in the same group may be governed by specific provisions, for example of a contractual nature, such as to guarantee both independence and confidentiality in the drawing-up of tenders to be submitted simultaneously by the undertakings in question in the same tendering procedure (judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 31).

23 Next, with regard to whether, failing any express legislative provision or specific condition in the call for tenders or the tender specifications governing the conditions for the award of a public contract, tenderers are nonetheless obliged to disclose the links between them to the contracting authority, it must be noted that the Court has stated that the principles of transparency and equal treatment which govern all public procurement procedures require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 37 and the case-law cited).

24 Requiring tenderers to disclose, on their own initiative, their links to other tenderers, although neither applicable national legislation nor the call for tenders or the tender specifications provide for such an obligation, does not constitute a clearly defined condition for the purpose of the case-law in the previous paragraph. In those circumstances, it would be difficult for tenderers to determine the exact scope of that obligation, all the more so since it is not always possible, due to the very nature of a public procurement procedure, to know the identity of all the tenderers in the same procedure before the closing date for the submission of tenders.

25 In addition, it should be noted that, failing any obligation imposed on the tenderers to inform the contracting authority of any links they may have to other tenderers, the contracting authority must treat the concerned tenderer's offer, throughout the procedure, as an offer that complies with Directive

2004/18, provided that there is no evidence that tenders submitted by related tenderers are coordinated or concerted.

26 In the light of the foregoing considerations, the answer to the first and second questions is that Article 2 of Directive 2004/18 must be interpreted as meaning that, failing any express legislative provision or specific condition in the call for tenders or in the tender specifications governing the conditions for the award of a public contract, related tenderers submitting separate offers in the same procedure are not obliged to disclose, on their own initiative, the links between them to the contracting authority.

The third to fifth questions

27 By its third to fifth questions, the referring court asks, in essence, whether, in circumstances such as those in the main proceedings, Article 101 TFEU is applicable and whether Article 2 of Directive 2004/18 and the third subparagraph of Article 1(1) and Article 2(1)(b) of Directive 89/665 must be interpreted as meaning that the contracting authority, when it has evidence that calls into question the autonomous character of the tenders submitted by certain tenderers, is obliged to verify, requesting, where appropriate, additional information from those tenderers, whether their offers are in fact autonomous and, if it fails to do so, whether the contracting authority's failure to act is capable of vitiating the ongoing public procurement procedure.

28 It must be borne in mind that Article 101 TFEU does not apply where the agreements or practices it prohibits are carried out by undertakings which constitute an economic unit (see, to that effect, judgments of 4 May 1988, *Bodson*, 30/87, EU:C:1988:225, paragraph 19, and of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro*, 66/86, EU:C:1989:140, paragraph 35). It is, however, for the referring court to verify whether tenderers A and B constitute an economic unit.

29 Where the companies concerned do not constitute an economic unit, that is to say, where the parent company does not have a determining influence on its subsidiaries, it should be noted that, in all events, the principle of equal treatment under Article 2 of Directive 2004/18 would be infringed if related tenderers were allowed to submit coordinated or concerted tenders, that is to say, tenders that are neither autonomous nor independent, which would be likely to give them unjustified advantages in relation to the other tenderers, without there being any need to examine whether the submission of such tenders constitutes conduct in breach of Article 101 TFEU.

30 Consequently, in order to answer the third to fifth questions, Article 101 TFEU need not be applied or interpreted in the present case.

31 As regards the obligations of contracting authorities under Article 2 of Directive 2004/18, the Court has already stated that contracting authorities are assigned an active role in the application of the principles of public procurement set out in that article (see, to that effect, judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 42).

32 Since that obligation relates to the very essence of the public procurement directives, the Court has ruled that the contracting authority is, at all events, required to determine whether any conflicts of interests concerning the contracting authority's expert exist and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them (judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 43).

33 That case-law is, in the light of the findings in paragraph 29 of the present judgment, applicable to situations such as that at issue in the main proceedings where related tenderers are participants in a public procurement procedure. Therefore, a contracting authority that acquaints itself with objective evidence calling into question the autonomous and independent nature of a tender is obliged to examine all the relevant circumstances having led to the submission of the tender concerned in order to prevent and detect the elements capable of vitiating the tendering procedure and remedy them, where appropriate, requesting the parties to provide certain information and evidence (see, by analogy, judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 44).

34 As far as concerns the evidence capable of demonstrating whether tenders submitted by related tenderers are autonomous and independent, it appears from the order for reference that the referring court is uncertain, inter alia, whether any kind of evidence, or direct evidence in the context of judicial proceedings only, may be taken into account.

35 The third subparagraph of Article 1(1) and Article 2(1)(b) of Directive 89/665, to which the third and fourth questions refer, merely require, in particular, Member States to set up rapid and efficient review procedures in the field of public procurement. Neither those provisions of Directive 89/665, nor any other provision of that directive or Directive 2004/18, lay down rules governing the taking and assessment of evidence of a breach of the EU rules governing public procurement.

36 In those circumstances and in accordance with settled case-law of the Court, failing any EU rules governing the matter, it is for every Member State to lay down the detailed rules of administrative and judicial procedures for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 39 and the case-law cited).

37 As concerns the standard of proof required in order to determine that a tender is neither autonomous nor independent, the principle of effectiveness requires that a breach of the EU rules governing public procurement may be proved not only by direct evidence, but also through indicia, provided that they are objective and consistent and that the related tenderers are in a position to submit evidence in rebuttal (see, by analogy, judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 37).

38 As regards a case such as that in the main proceedings, the finding that the links between tenderers had a bearing on the content of the tenders they submitted during the same procedure suffices, in principle, for those tenders not to be taken into consideration by the contracting authority, as tenders by related undertakings must be submitted completely autonomously and independently. However, a mere finding of a relationship of control between the undertakings concerned, by reason of ownership or the number of voting rights exercisable at ordinary shareholders' meetings, is not sufficient for the contracting authority to exclude automatically those tenders from the procedure for the award of the contract, without ascertaining whether such a relationship had a specific effect on the independence of those tenders (see, by analogy, judgment of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 32).

39 It is for the referring court, in the light of the circumstances of the dispute in the main proceedings, to carry out the necessary verifications and assessments in that regard, as well as with regard to the circumstances in paragraph (a) of the fourth question and to the probative value of the spontaneous declaration made by a tenderer, mentioned in paragraph (b) of that question. In the event that that court should come to the conclusion, following those verifications and assessments, that the tenders at issue in the main proceedings were not submitted autonomously and independently, it is to be recalled that Article 2 of Directive 2004/18 must be interpreted as precluding the award of the contract to the tenderers having submitted those tenders.

40 In the light of the foregoing considerations, the answer to the third to the fifth questions is that Article 2 of Directive 2004/18 must be interpreted as meaning that the contracting authority, when it has evidence that calls into question the autonomous and independent character of the tenders submitted by certain tenderers, is obliged to verify, requesting, where appropriate, additional information from those tenderers, whether their offers are in fact autonomous and independent. If the offers prove not to be autonomous and independent, Article 2 of Directive 2004/18 precludes the award of the contract to the tenderers having submitted those tenders.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that:

- failing any express legislative provision or specific condition in the call for tenders or in the tender specifications governing the conditions for the award of a public contract, related tenderers submitting separate offers in the same procedure are not obliged to disclose, on their own initiative, the links between them to the contracting authority;

- the contracting authority, when it has evidence that calls into question the autonomous and independent character of the tenders submitted by certain tenderers, is obliged to verify, requesting, where appropriate, additional information from those tenderers, whether their offers are in fact autonomous and independent. If the offers prove not to be autonomous and independent, Article 2 of Directive 2004/18 precludes the award of the contract to the tenderers having submitted those tenders.

[Signatures]

---

* Language of the case: Lithuanian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 22 November 2017(1)

Case C-531/16

Šiaulių regiono atliekų tvarkymo centras,

‘Ecoservice projektai’ UAB, formerly ‘Specializuotas transportas’ UAB

interveners:

‘VSA Vilnius’ UAB,

‘Švarinta’ UAB,

‘Specialus autotransportas’ UAB,

‘Ecoservice’ UAB

(Request for a preliminary ruling
from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania))

(Preliminary ruling — Directive 2004/18/EC — Procedures for the award of public works contracts, public supply contracts and public service contracts — Equal treatment — Transparency — Genuine competition between tenderers — Links between tenderers which submit separate tenders in the same procedure — Duty to disclose links between tenderers — Obligations of the contracting authority and the national court)

1. When two or more related tenderers submit tenders in procedures for the award of public contracts, the suspicion may arise that they are acting in a coordinated (or even collusive) way, to the detriment of transparency and other rules or principles of EU law by which such procedures must be governed.

2. That is the context of the questions referred for a preliminary ruling by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), in view of the fact that two subsidiaries of a third company sought, inter alia, to win the contract for collection and transportation of waste in a Lithuanian municipality.

3. By its questions the referring court seeks to ascertain, in short, whether, even in the absence of a specific legislative provision, those tenderers are obliged to disclose the connections between them to the contracting authority and how the contracting authority must act when it has evidence of the existence of those connections.

4. The reference for a preliminary ruling therefore provides the Court with the opportunity to supplement its case-law on the principles of equal treatment and transparency in procedures governed by Directive 2004/18/EC, (2) where participants in those procedures belong to the same group of companies.

I. Legislative framework

A. ***EU law***

1. *Directive 2004/18*

5. Recital 46 states:

‘Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition ...’

6. In accordance with Article 2:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

7. According to Article 45(2):

‘Any economic operator may be excluded from participation in a contract where that economic operator:

(a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

(c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.’

2. *Directive 89/665/EEC* (3)

8. The third subparagraph of Article 1(1) provides:

‘Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.’

9. Article 2(1)(b) stipulates:

‘1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

…

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure.’

B. ***National law***

1. Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on Public Contracts) (4)

10. Pursuant to Article 3(1):

‘The contracting authority shall ensure that, during procedures relating to procurement and the award of contracts, the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency are observed.’

2. Lietuvos Respublikos konkurencijos įstatymas (Law of the Republic of Lithuania on Competition) (5)

11. In accordance with Article 3(14):

‘“group of related economic operators” [means] two or more economic operators which, in so far as they are controlled or owned by each other and are in a position to engage in concerted action, are deemed to form a single economic operator for the purposes of calculating their gross revenue and market share. Unless there is evidence to the contrary, a group of related economic operators will be deemed to be formed by every economic operator concerned and

…

(2) economic operators which are jointly managed with it or which share administrative services with it and whose supervisory board, board of directors or other management body is composed, as to at least half, of the same members as those of the economic operator concerned;

(3) economic operators in which the economic operator concerned holds at least one third of the capital or one third of all the voting rights or which have a duty to coordinate their financial decisions with it, are answerable to it for the fulfilment of their obligations to third parties, are required to transfer to it all or part of their profits or have authorised it to use at least one third of their assets;

…’

12. Article 5(1) reads:

‘1. Agreements the purpose of which is to restrict competition or which restrict or are liable to restrict competition are prohibited and shall be void from the time of their conclusion, in particular:

(1) agreements which directly or indirectly fix the price of certain goods or other conditions of purchase or sale;

…’

II. Facts

13. On 9 July 2015, the Viešoji įstaiga Šiaulių regiono atliekų tvarkymo centras (the Centre for Waste Management for the Region of Šiauliai; ‘the waste management centre’) announced a call for tenders for the provision of municipal waste collection and transportation services in the municipality of Šiauliai.

14. According to the information in the order for reference, the invitation to tender prohibited tenderers from submitting variants of their tenders. (6)

15. Four tenderers submitted tenders:

(A) Specialus autotransportas UAB (‘tenderer A’).

(B) Specializuotas transportas UAB (‘tenderer B’).

(C) Ekonovus UAB.

(D) Commercial group VSA Vilnius UAB (‘VSA Vilnius’) and Švarinta UAB.

16. Tenderers A and B are subsidiaries of Ecoservice UAB (‘Ecoservice’). (7)

17. Along with its tender,(8) tenderer B voluntarily submitted a declaration of honour to the effect that it was taking part in the call for tenders on an autonomous basis and independently of any other economic operators which might be connected to it, and it requested the waste management centre to treat all other persons as competitors. It further stated that it undertook, should it be so required, to provide a list of economic operators connected to it.

18. The waste management centre rejected tenderer A’s tender on the ground that it did not comply with one of the conditions set out in the tender specifications; (9) tenderer A did not contest that decision. (10)

19. The contract was ultimately awarded to tenderer B.

20. VSA Vilnius submitted a complaint, arguing that the tenders submitted by tenderers A and B had not been properly evaluated and that the principles of transparency and equality before the law had been infringed.

21. Following the rejection of its complaint, VSA Vilnius brought an action (11) which was essentially upheld by the Šiaulių apygardos teismas (Regional Court, Šiauliai, Lithuania) by judgment of 18 January 2016; that judgment was confirmed by the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) by order of 5 April 2016.

22. The waste management centre and tenderer B appealed in cassation to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), which has made this reference for a preliminary ruling.

III. The questions referred

23. The questions are worded as follows:

‘(1) Must the free movement of persons and services set out, respectively, in Articles 45 TFEU and 56 TFEU, the principles of equality of tenderers and of transparency set out in Article 2 of Directive 2004/18 and the principle, which flows from the aforementioned principles, of free and fair competition between economic operators (together or separately, but without limitation to those provisions) be understood and interpreted as meaning that:

if related tenderers, whose economic, management, financial or other links may give rise to doubts as to their independence and the protection of confidential information and/or may provide the preconditions (potential) for them to have an advantage over other tenderers, have decided to submit separate (independent) tenders in the same public procurement procedure, are they, in any event, under a duty to disclose those links between them to the contracting authority, even if the contracting authority does not inquire of them separately, irrespective of whether or not the national legal rules governing public procurement state that such a duty does in fact exist?

(2) If the answer to the first question:

(a) is in the affirmative (that is to say, tenderers must in any event disclose their links to the contracting authority), is the circumstance that that duty was not complied with in such a case, or that it was not properly complied with, sufficient for the contracting authority to take the view, or for a review body (court) to decide, that related tenderers which have submitted separate tenders in the same public procurement procedure are participating without being genuinely in competition (and are engaged in a pretence of competition)?

(b) is in the negative (that is to say, tenderers do not have any additional duty — which is not laid down in legislation or in the tendering conditions — to disclose their links), must the risk posed by participation of related economic operators and the risk of the consequences flowing from this then be borne by the contracting authority, if the contracting authority did not indicate in the public tendering documentation that tenderers were under such a duty of disclosure?

(3) Irrespective of the answer to the first question, and having regard to the judgment of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166), must the provisions of law referred to in the first question and the third subparagraph of Article 1(1) of Directive 89/665 and Article 2(1)(b) of that directive (together or separately, but without limitation to those provisions) be understood and interpreted as meaning that:

(a) if, in the course of the public procurement procedure, it becomes clear, in whatever way, to the contracting authority that significant links (connections) exist between certain tenderers, that contracting authority must, irrespective of its own assessment of that fact and (or) of other circumstances (for example, the formal and substantive dissimilarity of the tenders submitted by the tenderers, the public commitment given by a tenderer to engage in fair competition with other tenderers, and so forth), separately address the related tenderers and request them to clarify whether and how their personal situation is compatible with free and fair competition between tenderers?

(b) if the contracting authority has such a duty but fails to discharge it, is there a sufficient basis for the court to declare the actions of that contracting authority to be unlawful, as having failed to ensure procedural transparency and objectivity, and as having failed to request evidence from the applicant or having failed to take a decision, on its own initiative, as to the possible influence that the personal situation of related persons might have on the outcome of the tendering procedure?

(4) Must the legal provisions referred to in the third question and Article 101(1) TFEU (together or separately, but without limitation to those provisions), be understood and interpreted, in the light of the judgments of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166), of 21 January 2016, *Eturas and Others* (C-74/14, EU:C:2016:42), and of 21 July 2016, *VM Remonts and Others* (C-542/14, EU:C:2016:578), as meaning that:

(a) where a tenderer (the applicant) has become aware of the rejection of the lowest-priced tender submitted by one of two related tenderers in a public tendering procedure (tenderer A) and of the fact that the other tenderer (tenderer B) has been declared the successful tenderer, and also having regard to other circumstances connected with those tenderers and their participation in the tendering procedure (the fact that tenderers A and B have the same board of directors; the fact that they have the same parent company, which did not take part in the tendering procedure; the fact that tenderers A and B did not disclose their links to the contracting authority and did not separately provide additional clarifications as to those links, *inter alia* because no inquiries had been made of them; the fact that tenderer A provided, in its tender, inconsistent information on the compliance by the proposed means of transport (refuse lorries) with the EURO V condition of the call for tenders; the fact that that tenderer, which submitted the lowest-priced tender, which was rejected because of deficiencies identified in it, first, did not challenge the contracting authority's decision and, second, lodged an appeal against the judgment of the court of first instance, in which appeal, *inter alia*, it [challenged] the lawfulness of the rejection of its tender; etc.), and where, in respect of all of those circumstances, the contracting authority did not take any

action, is that information alone sufficient to found a claim addressed to the review body that it should regard as unlawful the actions of the contracting authority in failing to ensure procedural transparency and objectivity, and, in addition, in not requiring the applicant to provide concrete evidence that tenderers A and B were acting unfairly?

(b) tenderers A and B did not prove to the contracting authority that they were genuinely and fairly taking part in the public tendering procedure solely because tenderer B voluntarily submitted a declaration of genuine participation, the management quality standards for participating in public tendering were applied by tenderer B, and, in addition, the tenders submitted by those tenderers were not formally and substantively identical?

(5) Can the actions of mutually related economic operators (both of which are subsidiaries of the same company) which are participating separately in the same tendering procedure, the value of which reaches the value for international competitive tendering, and where the seat of the contracting authority which announced the tendering procedure and the place where the services are to be provided are not very far distant from another Member State (the Republic of Latvia), be in principle assessed — regard being had to, *inter alia*, the voluntary submission by one of those economic operators that it would be engaging in fair competition — under the provisions of Article 101 TFEU and the case-law of the Court of Justice which interprets those provisions?'

IV. Proceedings before the Court of Justice and the positions of the parties

24. The reference for a preliminary ruling was received by the Court Registry on 18 October 2016.

25. Written observations were lodged by the waste management centre, VSA Vilnius, Ecoservice projektai UAB (formerly tenderer B), the Lithuanian and Czech governments, and the Commission. It was not considered necessary to hold a hearing.

26. The waste management centre has not specifically stated its position on each of the five questions submitted by the referring court and has confined itself to stating that it was aware of the links between the tenderers as this was public knowledge and that at no time was it misled when it took its decisions.

27. The waste management centre submits that, quite apart from the relationship between the tenderers, which does not of itself imply an absence of competition, there are a number of objective factors in the instant case which enabled it to conclude that those tenderers were in competition with one another.

28. In relation to the first question, all the parties except VSA Vilnius propose a negative answer. They contend in short that neither the TFEU nor Directive 2004/18 preclude the submission of tenders by related undertakings or prohibit a tenderer from submitting more than one tender. Further, EU legislation does not provide for any process whereby operators are informed about the identities of other tenderers, which would enable tenderers to check if there are any links between other tenderers and notify these to the contracting authority. As regards the principles of transparency, equal treatment and non-discrimination, these principles cannot be interpreted as meaning that tenderers are under a duty to declare their mutual links on their own initiative, without prejudice to the duty to provide such information as the contracting authority may require from them.

29. VSA Vilnius, on the other hand, proposes an affirmative answer to Question 1, which leads it to consider the first situation referred to in Question 2. VSA Vilnius contends that it would be disproportionate if tenderers were unable to overturn the presumption of concerted action based on the fact that they failed to declare the links between them. However, their passivity or failure to provide information in that regard may be interpreted, in conjunction with other evidence or other additional proof, as establishing uncompetitive conduct.

30. In relation to the second situation referred to in Question 2, Ecoservice projektai and the Lithuanian Government favour an affirmative reply, drawing attention to the contracting authority's obligation to ensure substantive and not strictly formal compliance with the principles set out in Article 2 of Directive 2004/18.

31. VSA Vilnius maintains that the contracting authority is required to bear the risk of participation by related tenderers only if it becomes aware by other means of the existence of that relationship but does not take steps to examine the circumstances surrounding the participation of those tenderers.

32. The Commission submits that if the contracting authority is not able to prove that a tenderer has committed grave professional misconduct, it cannot prevent that tenderer from participating in the procedure.

33. The parties have examined Questions 3, 4 and 5 together.

34. Ecoservice projektai contends that the contracting authority only has to request information from tenderers if it has reasons to doubt that they are participating in the procedure in a competitive manner, without the circumstances referred to in Question 4 being sufficient for a declaration that the contracting authority's conduct is unlawful. Ecoservice projektai submits that Article 101 TFEU does not justify the examination of the acts of related operators which participate separately in the procedure.

35. VSA Vilnius puts forward the opposite view. VSA Vilnius argues, inter alia, that, according to the Court, contracting authorities must play an active role in the application of the principles which govern public procurement. That duty includes the duty to make enquiries of related operators about the form of their participation in the procedure, since, otherwise, the burden of proving their unfair conduct would rest, unreasonably, on the other tenderers. In VSA Vilnius' submission, the obligation to establish the existence of genuine competition lies with the related operators, without prejudice to the obligation of the contracting authority to demand that they dispel any doubts regarding the nature of their involvement in the procedure.

36. The Lithuanian Government submits that the contracting authority has a duty actively to check that the procedure is carried out transparently. In the case of related tenderers, the contracting authority has to verify whether that relationship affects the content of their respective tenders. If there is objective evidence capable of casting doubt on the transparency of the procedure, the contracting authority should examine all the relevant circumstances and, if appropriate, request information from the parties.

37. The Lithuanian Government further contends that, if steps to ensure transparency are not taken, the contracting authority's conduct will be illegal in two cases: where the contracting authority knew or could have known that two related tenderers might participate but fails to take steps to ensure that their respective tenders are separate, and where, despite having taken those steps, the contracting authority later finds that its action was not sufficient.

38. Lastly, the Lithuanian Government argues that it is apparent from the facts of the situation at issue that the related tenderers form an 'economic unit', with the result that Article 101 TFEU is not applicable.

39. In the Czech Government's submission, the mere existence of links between tenderers is not sufficient to justify their exclusion from the procedure. What matters is whether the links are liable to affect the outcome of the procedure, and this requires the contracting authority to examine the specific situation of the tenderers. Given that the protection of competition in the sphere of public contracts is guaranteed by secondary legislation, it is not necessary to rely on Article 101 TFEU.

40. The Commission observes that the information which a contracting authority may request from tenderers in accordance with Directive 2004/18 does not include a declaration of their links with other tenderers, although the contracting authority does have a duty to confirm that there are no reasons for exclusion. With regard to the case-law of the Court cited by the referring court in its third and fourth questions, the Commission submits that it is not relevant for the purposes of replying to the questions referred.

41. As concerns Article 101 TFEU, the Commission maintains that that article is not applicable to agreements or concerted practices between a parent company and its subsidiary, or between subsidiaries in the same group, and nor does it apply to a parent company which has a decisive influence on its subsidiaries. In the circumstances of the present dispute, subject to the decision adopted by the referring court, tenderers A and B constitute an economic unit, which rules out the application of that provision.

V. Assessment

42. The questions submitted by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) may be grouped together in the manner I suggested at the beginning of this Opinion:

– First (Questions 1 and 2), it is necessary to determine whether related tenderers which submit separate tenders are under a duty, in all cases, to disclose that relationship to the contracting authority and, if so, what the consequences of failure to do so are.

– Second (Questions 3, 4 and 5), it is necessary to establish how the contracting authority — and any court which reviews its actions — must proceed where it becomes aware of the existence of important links between certain tenderers.

A. ***The duty of tenderers to disclose their links with other tenderers to the contracting authority (Questions 1 and 2)***

43. The referring court seeks to ascertain, first, whether related tenderers which participate in a procedure for the award of a public contract are under a duty to disclose that relationship 'even if the contracting authority does not inquire of them separately, irrespective of whether or not the national legal rules governing public procurement state that such a duty does in fact exist'. (12)

44. Of course, the presumption underlying the question — and, in general, the observations of the parties — is that it is not possible simply to prohibit related tenderers from submitting their own tenders in a procedure of that kind. The Court stated as much in the judgment in *Assitur*, (13) without there being any dispute about that presumption.

45. On that basis, the duty to disclose those links does not appear in Directive 2004/18 (or in the Lithuanian Law on public contracts), a matter on which all the parties are also agreed.

46. VSA Vilnius alone contends that that duty is imposed indirectly or implicitly by the need to overturn the presumption that, as a result of the lack of autonomy they entail, links between tenderers are liable to jeopardise the transparency of procurement procedures and distort competition.

47. From the outset, VSA Vilnius' position is faced with a serious obstacle, since the Court has specifically stated that 'the principles of transparency and equal treatment which govern all procedures for the award of public contracts require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates'. (14)

48. A *requirement* (the alleged duty to declare links with other companies) which is not set out in the contract documents, is not provided for in national law and is not laid down in Directive 2004/18 does not pass the transparency test referred to by the Court. The reply to the first question must therefore be that, in the absence of an express legislative provision (of EU law or of national law), related tenderers are not under a duty to disclose the relationship between them to the contracting authority.

49. Is it possible to argue, in line with the argument put forward by VSA Vilnius, (15) that, although not explicit, that duty is apparent from the case-law of the Court on public contracts?

50. I do not believe so, for that case-law acknowledged that undertakings which are part of a group of undertakings may enjoy 'a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts' and be 'governed by specific provisions, for example, of a contractual nature, such as to guarantee both independence and confidentiality in the drawing-up of tenders to be submitted simultaneously … in the same tendering procedure.' (16)

51. In my view, it may be inferred from those assertions that, in the absence of an express provision which requires them to do so, where related undertakings are of the opinion that their tenders are separate, they do not necessarily have to disclose their corporate links to the contracting authority.

52. Further, if — hypothetically — the line of argument advanced by VSA Vilnius were accepted, the duty would not be derived from the inclusion in the contract documents of a '*clearly* defined condition', which is what the Court has required. It would, in those circumstances, be a duty which could be inferred to a greater or lesser extent from the interpretation of EU law and, therefore, would not necessarily be known to tenderers in general. (17)

53. The problem could, perhaps, be approached from another angle, in view of the fact that the tender specifications in this case specifically prohibited (18) the submission of alternative or 'variant' tenders by the same tenderer. (19)

54. Is it possible to infer from that prohibition that tenderers A and B were required to disclose the links between them to the contracting authority? Furthermore, were they under a duty to provide evidence that, notwithstanding their relationship, both tenders were separate and could not be regarded as variants? (20)

55. In fact, that clause of the tender specifications complies with Article 24(2) of Directive 2004/18, applicable to public service contracts, pursuant to which '[c]ontracting authorities shall indicate in the contract notice whether or not they authorise variants: variants shall not be authorised without this indication.' (21) It is appropriate to conclude, therefore, that alternative or variant tenders are prohibited in principle, (22) unless, in the case of certain contracts, the contracting authority allows them.

56. However, I find it difficult to agree that it is possible to infer from the prohibition on the submission of variants — both where it is set out in the tender specifications (as occurred in this case) and where it is not — an implicit duty that related tenderers must disclose their corporate links to the contracting authority.

57. At most, that prohibition requires related tenderers to establish that their tender is not a mere variant or alternative of another competitor's tender. Accordingly, it is not a question of fulfilling a general obligation to disclose the fact that they are related undertakings, since there is no obligation of that kind in EU law. Directive 2004/18 does not in principle prohibit related economic operators from participating in the same tendering procedure; it does so only where there is a 'real risk of occurrence of practices capable of jeopardising transparency and distorting competition between tenderers'. (23)

58. Following that line of reasoning, it is only in such extreme cases that the clause prohibiting variants laid down in the tender specifications would entail the need for tenderers to disclose the links between them to the contracting authority, in order to remove that risk.

59. However, few practical consequences for the outcome of the dispute can be derived from that line of interpretation of Directive 2004/18, for two reasons.

60. First, in its voluntary declaration of honour, tenderer B guaranteed that it would participate separately and independently of any other economic operators which might be linked to it, and it asked the waste management centre to treat all other tenderers as competitors. The fact that it did not refer expressly to tenderer A in that declaration is irrelevant for the present purposes, since, as the waste management centre has asserted, (24) the connection between the two companies was public knowledge. The important point, in my view, is that, in declaring that its tender was separate, tenderer B may be deemed to have been seeking to comply with the clause of the tender specifications which prohibited the submission of alternative tenders.

61. Second, the purpose of disclosure to the waste management centre would have been to ensure that the latter was aware of the corporate links between the tenderers so that it could scrutinise their tenders more closely and identify any concerted practices. Since, as has been stated, the waste management centre admits that, in this case, it was aware of those links because they were well known, and it concluded without difficulty that, through their tenders (which were different in content), both operators were genuinely in competition, (25) the disclosure was superfluous.

62. Quite apart from those specific circumstances, which are closely connected to the facts, I believe that, for the present purposes, that interpretation of Directive 2004/18 is rather convoluted, to the extent that it is not compatible with the clarity which the case-law of the Court requires of the definition of the substantive and procedural conditions relating to participation in tendering procedures. (26)

63. Accordingly, I suggest that the answer to Question 1 should be that Articles 45 TFEU and 56 TFEU and Article 2 of Directive 2004/18 should be interpreted as meaning that, in the absence of an express provision or specific requirement in the clauses governing the procedure, related tenderers which submit separate tenders are not under a duty to disclose their links to the contracting authority.

64. The reply to Question 2 follows from the reply to Question 1. In that same situation (no express provision or specific requirement in the clauses governing the procurement procedure), as the referring court states, 'the risk posed by participation of related economic operators and the risk of the consequences flowing from this [must] then be borne by the contracting authority'.

65. However, I would not refer to the *bearing of the risk* by the contracting authority but rather to the duty of the contracting authority to guarantee the equal treatment of tenderers and the transparency of the procedure. In discharging that duty, the contracting authority must ensure that the participation of related tenderers is not detrimental to other tenderers by distorting the competition required between all tenderers. According to the contracting authority itself, that is what occurred in this case.

B. ***The duties of the contracting authority where there is a relationship between tenderers (Questions 3, 4 and 5)***

66. I agree with the Commission's view that Questions 3, 4 and 5 may be answered together, although the rewording I propose is not exactly the same as that proposed by the Commission. (27)

67. In my view, by those questions the referring court wishes to know whether, in circumstances such as those of the main proceedings, the contracting authority is under a duty to ask related tenderers to provide evidence that their situation does not run counter to the principle of competition. The question extends to whether inactivity on the part of the contracting authority would be sufficient for a declaration that its conduct in the procedure is unlawful.

68. As indicated above, it is not disputed that tenderers A and B were related operators or that, from the point of view of the waste management centre, that relationship was public knowledge (which is why it did not consider it necessary to ask them to make a declaration about the matter).

69. Furthermore, all the indications are that the two tenderers, A and B, form an economic unit on account of the fact that they are subsidiaries of the same parent company, in circumstances from which it may be presumed that the latter exercises a decisive influence over both of them. (28) Since that is the case, it will be sufficient, as most of the parties have observed, to conclude that Article 101 TFEU is not applicable to this case.

70. It is well known that, in accordance with the case-law of the Court, that article does not apply where the agreements or practices it prohibits are carried out by undertakings which constitute an economic unit. (29)

71. In the area of tendering procedures, the aim is not so much to protect the (general) competition between independent operators in the internal market as to protect the (more specific) competition which must operate in procedures for the award of public contracts. (30) From that perspective, what really matters is the separateness of and *genuine* difference between the respective tenders (which will enable the contracting authority to choose the tender most favourable to public interests), whether the tenderers are independent or related economic operators. That is why, as the Czech Government states, (31) the protection of competition in tendering procedures must be sought, first, in secondary legislation; in this case, Directive 2004/18. (32)

72. The inapplicability of Article 101 TFEU to the instant case does not mean, however, that the case-law invoked by the referring court in its third and fourth questions is irrelevant.

73. Although *eVigilo* (33) concerned a conflict of interests between the contracting authority and the experts who had evaluated the tenders submitted, the Court made a statement of principle in that case which may be applied to the present case. The Court declared that, where there is objective evidence calling into question the impartiality of an expert, 'it is for that contracting authority to examine all the relevant circumstances having led to the adoption of the decision relating to the award of the contract in order to

prevent and detect conflicts of interests and remedy them, including, where appropriate, requesting the parties to provide certain information and evidence.' (34)

74. The Court pointed out that that obligation is a consequence of the 'active role' assigned to the contracting authority for the purpose of applying the principles of public procurement, on account of the duty to treat economic operators equally and to act in a transparent way, as required by Article 2 of Directive 2004/18. (35) The Court observed that that duty 'relates to the very essence of the public procurement directives (see judgment of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 45)'. (36)

75. The judgments in *Eturas and Others* (37) and *VM Remonts and Others*, (38) as the Commission rightly observes, (39) concerned collusion on prices between independent undertakings and the liability of a tenderer for the acts of an independent provider supplying it with services. Nevertheless, a number of the assertions made in those judgments regarding proof of collusive behaviour may be helpful in this case.

76. For example, the judgment in *Eturas and Others* states that 'the principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent.' (40) The judgment in *VM Remonts and Others* states that, in the absence of EU rules on the matter, 'the rules relating to the assessment of evidence and the requisite standard of proof … are covered … by the procedural autonomy of the Member States'. (41)

77. Applying that case-law to the facts at issue in the main proceedings, where the contracting authority is aware that related tenderers are participating in the procedure, the 'active role' expected of it, as the guarantor of genuine competition between tenderers, should normally lead it to make certain that the tenders submitted by those tenderers are separate. (42)

78. In short, that requirement is just one of the measures aimed at '[examining] all the relevant circumstances … in order to prevent and detect conflicts of interests and remedy them, including, where appropriate, requesting the parties to provide certain information and evidence.' (43)

79. However, the contracting authority may, in cases such as the present one, dispense with a communication to the related tenderers, asking them, in the words of the question from the referring court, 'to clarify whether and how their personal situation is compatible with free and fair competition between tenderers'. Clearly, 'where appropriate, requesting the parties to provide certain information and evidence' may be important if the information and evidence available to the contracting authority is not sufficient for it to form a view regarding the risk that the tenders are not separate and distort competition.

80. Therefore, what matters is not that the contracting authority contacts the related tenderers, asking them for information about their relationship and seeking their view regarding the protection of the principle of competition between tenderers. The decisive factor is, rather, that the contracting authority is in a position to conclude that the simultaneous participation of those related operators does not jeopardise competition. The contracting authority may, of course, reach that conclusion by requesting that information or that view from the tenderers but it may also do so by referring to the information already available in the procedure and therefore without the need to approach the tenderers.

81. The Court has also held that 'the question whether the relationship of control at issue influenced the respective content of the tenders submitted by the undertakings concerned in the same public procurement procedure requires an examination and assessment of the facts which it is for the contracting authorities to carry out.' (44)

82. As the waste management centre states in its written observations, its examination and assessment of the facts led it to declare that, since it was aware — because it was well known — of the connection between tenderers A and B, it was able to conclude that their respective tenders were competitive based on a number of objective factors:

– The fact that one of the related tenderers voluntarily declared that its tender was independent constituted 'conduct that was fair and compatible with the provisions' of national legislation.

– The tenderers submitted by the related tenderers were different in form and content.

– The tender submitted by tenderer A was rejected ‘completely independently of its wishes, in other words, on the initiative of the contracting authority’. (45)

83. Based on the information in its possession, the waste management centre took the view that there was no risk of distortion of competition between tenderers A and B. The waste management centre added that, if it had found that those tenderers ‘were behaving in a way which demonstrated that they did not wish to be awarded the contract’, that fact ‘could constitute evidence which might lead it to investigate their links and consider that their conduct during the procurement procedure might constitute a concerted practice’. (46)

84. It could be debated whether the information held by the waste management centre was sufficient to rule out any risk to competition between the tenderers, but that is an assessment which at all events falls to the waste management centre, subject to subsequent review by the national court which, if called on to do so, must scrutinise its decisions.

85. To my mind, the Court should not intervene in the dispute regarding the extent of the probative value to be attributed to the evidence to which the referring court refers in Question 4(a) and (b). That is an adjudication on factual circumstances and on the assessment of the evidence in proceedings which must be resolved exclusively by the national court, in accordance with the rules of reasoned opinion and applying its domestic provisions on evidence. (47)

86. Returning, therefore, to the question whether the contracting authority is under an ineluctable duty to make enquiries of the related operators in the manner set out above, I believe that that question should be answered in the negative, both in general terms and in this particular instance. Everything will depend on the sufficiency or insufficiency of the available evidence and, therefore, on the objective soundness of the contracting authority’s decision to allow related tenderers to participate in the tendering procedure, on which it ultimately falls to the national court to rule.

VI. Conclusion

87. In the light of the foregoing considerations, I propose that the Court reply as follows to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania):

Articles 45 TFEU and 56 TFEU and Article 2 of Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that, in circumstances such as those of the main proceedings:

(1) in the absence of an express legislative provision or a specific requirement in the specifications governing the conditions for the award of a service contract, related tenderers which submit separate tenders in the same procedure are not under an ineluctable duty to disclose their links to the contracting authority;

(2) the contracting authority will be obliged to request from those tenderers the information it considers necessary if, in the light of the evidence available in the procedure, it harbours doubts concerning the risk that the simultaneous participation of those tenderers will undermine transparency and distort competition between operators tendering to provide the service.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works

contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and No 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

4 Law of 13 August 1996 (Žin., 1996, No 84-2000).

5 Law of 23 March 1999 (Žin., 1999, No 30-856).

6 Clause 39 of the tender specifications, which contained that prohibition, is transcribed in tenderer B's written observations (point 34).

7 According to the order for reference (paragraph 10 of the French version), the parent company holds 100% and 98.12%, respectively, of the shares in tenderers A and B, whose boards of directors are made up of the same persons.

8 In it, tenderer B referred to a subcontractor which is also a subsidiary of Ecoservice and whose board of directors comprises the same natural persons as the boards of tenderers A and B.

9 Specifically, that it did not satisfy the requirement that, for the purpose of providing the service, specific vehicles would be used whose engines were compliant with at least the Euro 5 standard.

10 However, subsequently, when the court of first instance allowed an action brought by an independent tenderer, tenderer A appealed against that judgment.

11 VSA Vilnius contended in its action that, as subsidiaries of Ecoservice, tenderers A and B had to be regarded as related undertakings within the meaning of Article 3(14) of the Law on Competition and that their tenders had to be treated as variants. It further argued that those companies had not participated in the tendering procedure in conditions of genuine competition and had acted in collusion. In view of the fact that variants were prohibited under the tendering conditions, it argued that the tenders submitted by tenderers A and B should be rejected.

12 Question 1, second paragraph, *in fine*.

13 Judgment of 19 May 2009 (C-538/07, EU:C:2009:317, paragraph 28): 'it would run counter to the effective application of Community law to exclude systematically undertakings affiliated to one another from participating in the same procedure for the award of a public contract. Such a solution would considerably reduce competition at Community level'.

14 Judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404, paragraph 37).

15 Point 18 of its written observations.

16 Judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317, paragraph 31).

17 The Court referred to the criterion of the reasonably well-informed tenderer acting with normal diligence in, for example, the judgment of 4 December 2003, *EVN and Wienstrom* (C-448/01, EU:C:2003:651, paragraph 57).

---

18 See point 14 of this Opinion. The national court refers to that prohibition in paragraph 18 of the order for reference (in the French version of that document).

---

19 On alternative or variant tenders, see, for example, Arrowsmith, S.; *The Law of Public Utilities Procurement*, vol. 1, Sweet & Maxwell, London, 3rd ed., 2014, 7-246 to 7-251.

---

20 As Sánchez Graells, A., *Public Procurement and the EU Competition Rules*, Hart, Oxford, 2nd ed., 2015, p. 341, maintains, the basic rule in this area is the prohibition of multiple proposals by a single entity. A corollary of that rule is that that prohibition is extended to entities belonging to the same group**.**

---

21 According to paragraph 1 of that article, variants may be submitted only where the criterion for award of the contract is that of the most economically advantageous tender.

---

22 SeeArrowsmith, S., *The Law of Public Utilities Procurement*, op. cit., 7-247.

---

23 Judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317, paragraph 30).

---

24 Second paragraph of its observations.

---

25 Fourth paragraph of its observations.

---

26 I refer again to the judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404, paragraph 37).

---

27 The Commission recommends that the three questions should be reworded to the effect that ‘the national court seeks to ascertain whether Article 101 TFEU applies to this case and whether Article 101 TFEU (if it is applicable), the provisions of Directives 89/665/EC and 2004/18/EC and the case-law, in particular the judgments in *eVigilo*, *Eturas* and *VM Remonts*, are to be interpreted as meaning that the contracting authority must continue scrutinising the existence of links between two tenderers in the case examined by the national court’ (point 42 of the Commission’s observations).

---

28 See, for example the judgment of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission* (C-155/14 P, EU:C:2016:446, paragraph 28).

---

29 In that connection, see the judgments of 4 May 1989, *Bodson* (30/87, EU:C:1988:225, paragraph 19), and of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro* (66/86, EU:C:1989:140, paragraph 35).

---

30 Naturally, there may be collusive conduct between unrelated undertakings seeking to distort competition in public procurement procedures by agreeing not to submit a tender or to do so in conditions unlawfully agreed between them.

---

31 Point 10 of its written observations.

32 As I pointed out above, that directive does not preclude the participation of related tenderers in principle.

33 Judgment of 12 March 2015 (C-538/13, EU:C:2015:166).

34 Judgment of 12 March 2015, *eVigilio* (C-538/13, EU:C:2015:166, paragraph 44).

35 Ibid., paragraph 42.

36 Ibid., paragraph 43.

37 Judgment of 21 January 2016 (C-74/14, EU:C:2016:42).

38 Judgment of 21 July 2016 (C-542/14, EU:C:2016:578).

39 Points 46 and 47 of its written observations.

40 Judgment of 21 January 2016, *Eturas and Others* (C-74/14, EU:C:2016:42, paragraph 37).

41 Judgment of 21 July 2016, *VM Remonts and Others* (C-542/14, EU:C:2016:578, paragraph 21).

42 A wide range of tenders is likely to increase competition between tenderers, so that each tender is genuinely ‘contestable’ (to use an expression from competition law) by the others and the contract is awarded to whoever deserves it on his own merits.

43 Judgment of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 44).

44 Judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317, paragraph 32).

45 Fourth paragraph of the waste management centre’s observations.

46 Sixth paragraph of the contracting authority’s observations. In the same paragraph, the contracting authority goes on to state that concerted practices are possible not only between related operators but also between operators which formally compete with one another but enter into agreements prohibited by competition law.

47 I refer to the judgment of 21 July 2016, *VM Remonts and Others* (C-542/14, EU:C:2016:578, transcribed at point 76).

JUDGMENT OF THE COURT (Eighth Chamber)

28 February 2018(*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Article 51 — Rectification of procedural shortfalls in tenders — Directive 2004/17/EC — Clarification of tenders — National legislation making the rectification by tenderers of the documentation submitted subject to the payment of a financial penalty — Principles relating to the award of public works contracts — Principle of equal treatment — Principle of proportionality)

In Joined Cases C-523/16 and C-536/16,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) made by decisions of 13 and 15 July 2016, received at the Court on 12 and 24 October 2016 respectively, in the proceedings

MA.T.I. SUD SpA

v

Centostazioni SpA,

intervener:

China Taiping Insurance Co. Ltd (C-523/16),

and

Duemme SGR SpA

v

Associazione Cassa Nazionale di Previdenza e Assistenza in favore dei Ragionieri e Periti Commerciali (CNPR) (C-536/16),

THE COURT (Eighth Chamber),

composed of J. Malenovský, President of the Chamber, D. Šváby and M. Vilaras (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– Duemme SGR SpA, by F. Brunetti and F. Scanzano, avvocati,

– the Associazione Cassa Nazionale di Previdenza e Assistenza in favore dei Ragionieri e Periti Commerciali (CNPR), by M. Brugnoletti, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by F. Sclafani, avvocato dello Stato,

– the European Commission, by A. Tokár and C. Zadra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 November 2017,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 45 and 51 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and of the principles of the maximum possible competition, of proportionality, of equal treatment and of non-discrimination in matters concerning the procedures for the award of public works contracts, public supply contracts and public service contracts.

2 In Case C-523/16, the request for a preliminary ruling has been made in proceedings between MA.T.I. SUD SpA and Centostazioni SpA concerning a procedure for the award of a public contract for ‘integrated routine and non-routine maintenance activities and the provision of energy services at the premises of railway station buildings which form part of Centostazioni’s network’.

3 In Case C-536/16, the request for a preliminary ruling has been made in proceedings between DuemmeSGR SpA (‘Duemme’) and the Associazione Cassa Nazionale di Previdenza e Assistenza in favore dei Ragionieri e Periti Commerciali (CNPR) (National Welfare and Assistance Fund for Accountants (CNPR)) in connection with an open procedure for the conclusion of a framework agreement on the management of CNPR’s securities portfolio.

Legal context

EU law

Directive 2004/17/EC

4 Recital 9 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) states as follows:

‘In order to guarantee the opening-up to competition of public procurement contracts awarded by entities operating in the water, energy, transport and postal services sectors, it is advisable to draw up provisions for Community coordination of contracts above a certain value. Such coordination is based on the requirements inferable from Articles 14, 28 and 49 of the EC Treaty and from Article 97 of the Euratom Treaty, namely the principle of equal treatment, of which the principle of non-discrimination is no more than a specific expression, the principle of mutual recognition, the principle of proportionality, as well as the principle of transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

…’

5 Article 10 of that directive, headed ‘Principles of awarding contracts’, provides:

‘Contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

Directive 2004/18

6 Recital 2 of Directive 2004/18 states:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law …, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom,

such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and with other rules of the Treaty.'

7 Article 2 of that directive, also entitled 'Principles of awarding contracts', provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

8 Article 45 of the directive provides:

'1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

(a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA [of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (OJ 1998 L 351, p. 1)];

(b) corruption, as defined in Article 3 of the Council Act of 26 May 1997 [drawing up, on the basis of Article K.3(2)(c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ 1997 C 195, p. 1),] and Article 3(1) of Council Joint Action 98/742/JHA [of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector (OJ 1998 L 358, p. 2)];

(c) fraud within the meaning of Article 1 of the Convention [drawn up on the basis of Article K.3 of the Treaty on European Union] on the protection of the financial interests of the European Communities [(OJ 1995 C 316, p. 49)];

(d) money laundering, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [(OJ 1991 L 166, p. 77)].

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

2. Any economic operator may be excluded from participation in a contract where that economic operator:

(a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, who has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proved by any means which the contracting authorities can demonstrate;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

3. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs 1 or 2(a), (b), (c), (e) or (f) applies to the economic operator:

(a) as regards paragraphs 1 and 2(a), (b) and (c), the production of an extract from the "judicial record" or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met;

(b) as regards paragraph 2(e) and (f), a certificate issued by the competent authority in the Member State concerned.

Where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1 and 2(a), (b) and (c), they may be replaced by a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.

4. Member States shall designate the authorities and bodies competent to issue the documents, certificates and declarations referred to in paragraph 3 and shall inform the Commission thereof. Such notification shall be without prejudice to data protection law.'

9 Article 51 of the directive provides:

'The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.'

Italian law

10 Article 38(2a) of Decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 adopting the Code on public works contracts, public service contracts and public supply contracts and

transposing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (ordinary supplement to GURI No 100 of 2 May 2006) ('the Public Procurement Code') provided:

'Any absence, incompleteness or any other substantial irregularity in the elements and replacement declarations referred to in paragraph 2 shall oblige the tenderer responsible to pay the contracting authority the financial penalty specified in the contract notice, the amount of which cannot be less than 0.1% or more than 1% of the value of the contract and must not exceed EUR 50 000, the payment of which shall be guaranteed by the provisional security. In such cases, the contracting authority shall grant the tenderer a period of not more than 10 days in which to submit, complete or rectify the declarations required and shall state their content and the persons obliged to make them. In the case of non-substantial irregularities or the absence or incompleteness of non-essential declarations, the contracting authority shall not require their rectification or impose any penalty. If the period mentioned in the second sentence is exceeded, the tenderer shall be excluded from the tendering procedure. Any amendment to the tender, including following a judicial decision, after the admission, rectification or exclusion of tenders shall not be relevant for the calculation of averages in the procedure or for the determination of the anomaly threshold of tenders.'

11 Article 46 of that code provided that 'within the limits laid down in Articles 38 to 45, the contracting authorities, should they deem it necessary, are to ask tenderers to supplement or clarify the certificates, documents or declarations submitted'.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-523/16

12 By a notice published in the *Official Journal of the European Union* on 8 January 2016, Centostazioni, part of the Ferrovie dello Stato Italiane SpA group, launched an open tendering procedure for the award of a public contract of an estimated value of EUR 170 864 780.81 excluding value added tax (VAT), for 'integrated routine and non-routine maintenance activities and the provision of energy services at the premises of railway station buildings' forming part of its network for a period of 36 months. This contract was divided into four geographical lots (south, south-central, north-central and north-west, north-central and north-east) to be awarded according to the criterion of the most economically advantageous tender.

13 Point VI.3(w) of the contract notice made it possible for a contracting authority to ask for the rectification, on pain of exclusion from the procedure, of any incomplete or irregular tender, and consequently the payment of a financial penalty of EUR 35 000 by the tenderer invited to rectify its tender, in accordance with Article 38(2a) of the Public Procurement Code.

14 Point 1.1(G) of the tender specifications relating to that contract stated that a tender submitted by a temporary association of undertakings not yet incorporated as a legal person had to be accompanied, as part of the requisite administrative documentation, by a special ad hoc declaration containing a commitment in the event that a lot was awarded to it to grant a special collective mandate giving powers of representation to the lead undertaking, which was to be expressly identified ('the declaration of commitment'). This declaration had to be signed by all the undertakings making up the association, it being noted that, where a tenderer participated in several lots in a different form, it had to submit a declaration of commitment for each lot.

15 MA.T.I. SUD, in its capacity as manager of the temporary joint venture formed with Graded SpA ('the Association'), submitted an application for lots 1 and 2 of the call for tenders.

16 On 16 March 2016, the procurement committee noted that the declaration of commitment required for the award of lot 2, designating MA.T.I. SUD as the lead undertaking of the Association, lacked the signature of its legal representative. Accordingly, the contracting authority, in accordance with Article 38(2a) of the Public Procurement Code, requested that the Association remedy that irregularity within seven days, on pain of exclusion from the tender procedure, and that it pay a financial penalty of EUR 35 000.

17 On 21 March 2016, MA.T.I. SUD forwarded the requested declaration of commitment signed by the legal representatives of the two companies constituting the Association. It also requested the annulment of the financial penalty imposed, on the ground that the declaration in question was ‘neither missing nor incomplete nor vitiated by a substantial irregularity’. It argues, in that regard, that the tender specifications in question required a declaration of commitment for each lot only where the association intended to participate ‘in a different form’. However, the Association, in this instance, stated its intention to participate in the tender for lots 1 and 2 in the same form, with MA.T.I. SUD as the lead undertaking, by submitting a declaration of commitment for lot 1 containing all the elements required.

18 On 30 March 2016, the contracting authority served notice on MA.T.I. SUD to pay the amount of the financial penalty imposed, stating that, otherwise, that amount would be levied on the provisional security.

19 On 7 April 2016, MA.T.I. SUD brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) requesting the suspension and annulment of that financial penalty, submitting inter alia that it had not committed any substantial irregularity in the presentation of preliminary documents for participation in the tendering procedure.

20 The referring court questions the compatibility of the mechanism of paid assistance in compiling the documentation established by Article 38(2a) of the Public Procurement Code with EU law, in particular with Article 51 of Directive 2004/18 which provides for the possibility of supplementing or clarifying the certificates and documents accompanying the tenders submitted in the context of a procedure for the award of a public contract, but without imposing any penalties, and with the principles of proportionality, exhaustiveness of the grounds of exclusion, the greatest possible participation in the tendering procedure and the maximum possible competition.

21 It points out that, although in general, the mechanism of assistance in compiling the documentation appears to be compatible with Article 51 of Directive 2004/18, of which it is an iteration, this is not the case for the financial penalty that accompanies it. This particular aspect of the mechanism, moreover, encourages a kind of ‘quest for errors’ on the part of contracting authorities, while also discouraging tenderers from participating in tender procedures, since they risk incurring large fines merely because substantial irregularities are found in their offer, irrespective of whether or not they intend to make use of assistance in compiling the documentation.

22 The referring court points out, in particular, that this penalty is set in advance by the contracting authority, albeit with a minimum range of 0.1% to a maximum of 1.0% and with an absolute maximum of EUR 50 000, in a largely discretionary way, it may not be adjusted according to the seriousness of the irregularity committed, and that it is applied automatically to every substantial irregularity found.

23 That court also notes that the introduction of the paid assistance in compiling the documentation, provided for in Article 38(2a) of the Public Procurement Code, aims to ensure the soundness of the requests to participate and the tenders submitted, and thus place the responsibility on tenderers with respect to the submission of documents relating to the call for tenders, and to compensate the contracting authority for the increase of its monitoring activities.

24 It believes, however, that, having regard to the characteristics of the penalty it lays down, that mechanism is not compatible with the principle of proportionality, in so far as its implementation may lead to the payment to the contracting authority of compensation manifestly disproportionate to the additional activities which it may have to assume. A significant economic penalty is all the more disproportionate given that the period within which the documents are to be completed is short (10 days) and does not, therefore, entail an excessive prolongation of the tendering procedure. It is also incompatible with the principle of equal treatment, since a penalty in the same amount may be imposed on a tenderer who has committed a substantial irregularity, but of limited scope, and a tenderer who has committed serious breaches of the requirements of the contract notice. This mechanism also undermines the principle of the maximum possible competition by its deterrent effects on the participation of enterprises, in particular small and medium-sized undertakings, in public procurement procedures.

25 In those circumstances the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Even if the Member States have the ability to require payment for assistance in establishing the documentation with remedial effect (*soccorso istruttorio*), is Article 38(2a) of [the Public Procurement Code] in the version in force at the time of the tendering procedure in question …, which makes provision for the payment of a “financial penalty”, in so far as that penalty must be fixed by the contracting authority (“not less than 0.1% and not more than 1% of the value of the contract and in any event not more than EUR 50 000, the payment of which shall be guaranteed by the provisional security”), contrary to EU law in view of the excessively high amount and the predetermined nature of that penalty, which cannot be adjusted according to the specific situation to be regulated or the seriousness of the irregularity to be remedied?

(2) Is Article 38(2a) of [the Public Procurement Code], rather, contrary to EU law, in that that requirement to pay for *soccorso istruttorio* may be regarded as contrary to the principle of opening up the market to competition as widely as possible, an aim which that mechanism is intended to achieve, so that the tasks of the procurement committee in that regard are to be attributed to it by law in the public interest in achieving that aim?’

Case C-536/16

26 By a notice published in the *Official Journal of the European Union* in October 2014, the CNPR launched an open call for tenders with a view to the conclusion of a framework agreement on the management of its securities portfolio, of an estimated value of EUR 20 650 000.00 excluding VAT, which it wished to assign to five entities.

27 The contract notice relating to that call for tenders provided, pursuant to Article 38(2a) of the Public Procurement Code, that in the case of missing or incomplete declarations and in all other cases of substantial irregularity, the tenderer would be required to pay a fine of EUR 50 000, and that it would have a period of 10 days in which to complete and/or rectify the declaration by the submission of missing documents.

28 The specifications relating to the contract in question stated that the tenderers were required to submit, on pain of exclusion, a declaration on honour that the conditions laid down in Article 38 of the Public Procurement Code had been met.

29 At its first session, the procurement committee concerned opened the official envelopes and discovered that Duemme had failed to attach the aforementioned declarations on honour attesting that its vice-chairperson and its general manager had not been the subject of any conviction by final judgment. It therefore requested that Duemme, pursuant to Article 38(2a) of the Public Procurement Code and Article 7 of that specification, supply the missing declarations and pay the corresponding financial penalty, namely EUR 50 000.

30 Duemme provided the missing documents required within the prescribed period, but refused to pay the financial penalty, disputing the principle. The CNPR thereupon sent Duemme a formal notice to pay that fine, informing it that failure to do so would result in a levy on the provisional security.

31 On 9 January 2015, Duemme brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) seeking annulment of that financial penalty, on the basis, in particular, of the incompatibility of Article 38(2a) of the Public Procurement Code with Article 51 of Directive 2004/18. At the same time, the tenderer paid EUR 8 500 to the contracting authority for the payment of the reduced penalty, which was accepted by the latter as partial payment.

32 In those circumstances the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer for a preliminary ruling two questions which are identical to those referred in Case C-523/16.

33 By decision of 15 November 2016, the President of the Court decided to join Cases C-523/16 and C-536/16 for the purposes of the written procedure, the oral procedure and the judgment.

Preliminary observations

34 It should be noted, at the outset, that although in both Case C-523/16 and Case C-536/16 the questions raised by the referring court relate in a very general way to the interpretation of EU law, without further precision, it has however raised, in its orders for reference, doubts as to the compatibility of Article 38(2a) of the Public Procurement Code, with, on the one hand, Article 51 of Directive 2004/18 and the principles of the maximum possible competition, equal treatment, transparency and proportionality and, on the other hand, the second subparagraph of Article 59(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65).

35 However, in the light of the dates of publication of the contract notices at issue in the main proceedings, namely in January 2016 (Case C-523/16) and October 2014 (Case C-536/16), Directive 2014/24 — the transposition period for which expired, in accordance with Article 90 of the directive, on 18 April 2016 — is not applicable ratione temporis to the dispute in the main proceedings.

36 Those dates are necessarily after the time when the contracting authority selected the type of procedure which it intended to pursue and determine conclusively whether or not there was an obligation to conduct a prior call for competition for the award of the public contract in question. According to the settled case-law of the Court, the applicable directive in the field of public procurement procedures is, as a rule, the one in force when the contracting authority makes such a choice. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, to that effect, judgments of 5 October 2000, *Commission* v *France*, C-337/98, EU:C:2000:543, paragraphs 36, 37, 41 and 42; of 11 July 2013, *Commission* v *Netherlands*, C-576/10, EU:C:2013:510, paragraphs 52 to 54; of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraphs 31 to 33; of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83; and of 27 October 2016, *Hörmann Reisen*, C-292/15, EU:C:2016:817, paragraphs 31 and 32).

37 It should also be noted that, in view of the subject matter of the contract at issue in the main proceedings in Case C-523/16, it is Directive 2004/17 and not Directive 2004/18 which, as the Commission has pointed out, is most likely to apply.

38 However, Directive 2004/17 does not contain any provisions equivalent to those of Article 51 of Directive 2004/18.

39 However, it should be borne in mind, in this regard, that, notwithstanding the absence of any express provision to that effect in Directive 2004/17, the Court has acknowledged that the contracting authority can ask a tenderer to clarify a tender or to correct an obvious clerical error contained therein, subject to the fulfilment of certain requirements, in particular that such an invitation is sent to all tenderers in the same situation, that all tenderers are treated equally and fairly, and that that clarification or correction may not be equated with the submission of a new tender (see, to that effect, judgment of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 29 to 39 and the case-law cited).

40 Moreover, it is apparent from the observations submitted to the Court that Article 230 of the Public Procurement Code provides that Article 38(2a) of that code applies to the special sectors covered by Directive 2004/17.

41 Finally, even if, as has been recalled in paragraph 34 above, the national court has formally limited its request for a preliminary ruling to the interpretation of Article 51 of Directive 2004/18, that does not preclude the Court from providing it with all the elements of interpretation of EU law which may enable it to rule on the cases before it, whether or not reference is made thereto in the question referred (see, to that effect, judgments of 12 December 1990, *SARPP*, C-241/89, EU:C:1990:459, paragraph 8, and of 24 January 2008, *Lianakis andOthers*, C-532/06, EU:C:2008:40, paragraph 23).

42 In those circumstances, it being noted that it is for the national court to determine which directive is applicable in Case C-523/16, the questions referred to the Court in the two requests for a preliminary ruling before it must be understood as covering not only Article 51 of Directive 2004/18 but also, more generally, the principles of public procurement, in particular the principles of equal treatment and of transparency, referred to in both Article 10 of Directive 2004/17 and Article 2 of Directive 2004/18, and the principle of proportionality.

Consideration of the questions referred

43 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether EU law, in particular Article 51 of Directive 2004/18, the principles relating to the award of public contracts, including the principles of equal treatment and transparency referred to in Article 10 of Directive 2004/17 and Article 2 of Directive 2004/18, and the principle of proportionality must be interpreted as precluding national legislation establishing a mechanism of assistance in compiling the documentation, under which the contracting authority may in a procedure for the award of a public contract, invite any tenderer whose tender is vitiated by serious irregularities within the meaning of that regulation to rectify its tender, subject to the payment of a financial penalty, the high amount of which, set in advance by the contracting authority and guaranteed by the provisional security, cannot be adjusted according to the gravity of the irregularity that it remedied.

44 In the first place, it is to be borne in mind, that, according to Article 51 of Directive 2004/18, the contracting authority may, in a procedure for the award of a public contract, invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50 of that directive.

45 That provision thus confines itself to laying down the mere possibility for the contracting authority to invite tenderers submitting a tender in a tendering procedure to supplement or clarify the documentation to be provided for the purposes of assessing whether their tender fulfils the conditions of admissibility, demonstrating their economic and financial capacity and their professional and technical knowledge or ability. Neither that provision nor any other provision of Directive 2004/18 contains details on how such a rectification may take place or on the conditions to which it may be subject.

46 It follows that, in the context of the measures transposing Directive 2004/18 that Member States must adopt, they are in principle, as the Advocate General observed in point 57 of his Opinion, not only free to include such a possibility of rectifying tenders in their national law (see, to that effect, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 35), but also to regulate it.

47 Member States may therefore decide to subject that possibility of rectification to the payment of a financial penalty, as provided for in the present case by Article 38(2a) of the Public Procurement Code.

48 However, when they implement the possibility provided for in Article 51 of Directive 2004/18, the Member States must ensure that they do not jeopardise the attainment of the objectives pursued by that directive or undermine the effectiveness of its provisions and other relevant provisions and principles of EU law, particularly the principles of equal treatment and non-discrimination, transparency and proportionality (see to that effect, judgment of 2 June 2016, *Falk Pharma*, C-410/14, EU:C:2016:399, paragraph 34).

49 It must also be borne in mind that Article 51 of Directive 2004/18 cannot be interpreted as allowing the contracting authority to accept any rectification of omissions which, as expressly provided for in the contract documentation, had to lead to the exclusion of the tenderer (judgments of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 46, and of 10 November 2016, *Ciclat*, C-199/15, EU:C:2016:853, paragraph 30).

50 In the second place, although Directive 2004/17 does not contain a provision equivalent to Article 51 of Directive 2004/18, the Court has held that neither of those two directives precluded the possibility that data relating to the tender of a tenderer may be corrected on specific points, particularly when it is

clear that such data require mere clarification, or to correct obvious clerical errors, subject, however, to the fulfilment of certain requirements (judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 40, and of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraph 29 and the case-law cited).

51 The Court has thus held, inter alia, that a request for clarification cannot make up for the lack of a document or information whose production was required by the contract documents, the contracting authority being required to comply strictly with the criteria which it has itself laid down (see, to that effect, judgments of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 40, and of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraph 33).

52 In addition, such a request may not lead to the submission by a tenderer of what would appear in reality to be a new tender (see judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 40, and of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraph 31).

53 In the third place, it must be noted that, in accordance with the principle of proportionality, which constitutes a general principle of EU law and with which the award of contracts concluded in the Member States must comply, as is apparent from recital 9 of Directive 2004/17 and from recital 2 of Directive 2004/18, the measures adopted by the Member States must not go beyond what is necessary in order to achieve that objective (see, to that effect, judgments of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraphs 48 and 61; of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraphs 21 and 23; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 33; and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 29).

54 It is in the light of the foregoing considerations that it is for the referring court, which alone has jurisdiction to find and assess the facts of the disputes in the main proceedings, to examine whether, in the light of the circumstances of the two cases in the main proceedings, the rectifications requested by the contracting authorities concerned the producton of documents whose absence had to lead to the exclusion of the tenderers or whether, on the contrary, they were clearly mere requests for clarification of tenders needing correction or completion on some specific points or a correction of obvious clerical errors.

55 However, it should be noted that, as observed by the Advocate General in points 60 and 61 of his Opinion, the very concept of substantial irregularity, which is not defined in Article 38(2a) of the Public Procurement Code, does not appear to be compatible with Article 51 of Directive 2004/18 or with the requirements to which the clarification of a tender in the context of a public contract falling within the scope of Directive 2004/17 is subject, according to the case-law of the Court referred to in paragraphs 49 to 52 above.

56 It follows that the mechanism of assistance in compiling the documentation provided for in Article 38(2a) of the Public Procurement Code is not applicable if the tender submitted by a tenderer cannot be rectified or clarified within the meaning of the case-law referred to in paragraphs 49 to 52 above, and that, consequently, no penalty can be imposed on the tenderers in such a case.

57 In those circumstances, it is only in the event that the referring court comes to the conclusion that the rectification or clarification requests made by the contracting authorities fulfil the requirements set out in paragraphs 49 to 52 above that it should consider whether the financial penalties in the two cases in the main proceedings under Article 38(2a) of the Public Procurement Code were imposed in compliance with the principle of proportionality.

58 However, to provide the referring court with a useful answer to its questions, the Court has jurisdiction to give guidance based on the documents in the main proceedings and on the written and oral observations which have been submitted to it, enabling it to give judgment (see, to that effect, judgments of 30 March 1993, *Thomas and Others*, C-328/91, EU:C:1993:117, paragraph 13; of 14 March 2017, *G 4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 36; and of 21 September 2017, *SMS group*, C-441/16, EU:C:2017:712, paragraph 48).

59 In the present case, it should be noted that, in accordance with Article 38(2a) of the Public Procurement Code, it is for the contracting authority to fix, within the limits of the range defined in this provision, the amount of the financial penalty that may be imposed on the tenderer requested to rectify its tender.

60 The referring court asks the Court to take into account that the financial penalty is set in advance by the contracting authority and that the amount is high and cannot be adjusted according to the gravity of the irregularity rectified. It states, furthermore, that the introduction of such a penalty is justified by the need, first, to place the responsibility on tenderers and to encourage them to prepare their tender carefully and diligently and, secondly, to offset the financial burden that any rectification represents for the contracting authority.

61 In that regard, it should be noted, first, that the setting in advance by the contracting authority of the amount of the penalty in the contract notice does indeed fulfil, as the Commission observed in its written observations, the requirements arising from the principles of equal treatment of tenderers, transparency and legal certainty, in that it is objectively such as to avoid any arbitrary or discriminatory treatment of tenderers by that contracting authority.

62 The fact remains, however, that the automatic application of the penalty thus set in advance, irrespective of the nature of the rectifications made by the errant tenderer and therefore also in the absence of any specific reasons, does not appear to be compatible with the requirements deriving from the principle of proportionality.

63 It should be noted, secondly, that the imposition of a financial penalty is indeed an appropriate means of achieving the legitimate objectives pursued by the Member State related to the need to place responsibility on the tenderers in submitting their tenders and to offset the financial burden that any regularisation represents for the contracting authority.

64 However, as the Advocate General noted in point 74 of his Opinion, the amounts of penalties such as those set out in the contract notices by the contracting authorities in the two cases in the main proceedings appear manifestly disproportionate as such, taking into account the limits placed on the rectification of a tender under Article 51 of Directive 2004/18 and on the clarification of a tender within the framework of Directive 2004/17. That is, in particular, the case of a penalty such as that imposed by the contracting authority in Case C-523/16, which appears manifestly excessive in the light of the facts complained of, namely the absence of a signature on a declaration of commitment nominating the lead company of the association submitting the tender.

65 Having regard to the foregoing considerations, the questions referred should be answered as follows:

– EU law, in particular Article 51 of Directive 2004/18, the principles relating to the award of public contracts, including the principles of equal treatment and transparency referred to in Article 10 of Directive 2004/17 and Article 2 of Directive 2004/18, and the principle of proportionality must be interpreted as not precluding, in principle, national legislation establishing a mechanism of assistance in compiling the documentation, under which the contracting authority may, in a procedure for the award of a public contract, invite any tenderer whose tender is vitiated by serious irregularities within the meaning of that regulation to rectify its tender, subject to the payment of a financial penalty, provided that the amount of that penalty is consistent with the principle of proportionality, which it is for the referring court to determine.

– However, those provisions and principles must be interpreted as precluding national legislation establishing a mechanism of assistance in compiling the documentation under which the contracting authority may require a tenderer, on payment of a financial penalty, to remedy the lack of a document which, according to the express provisions in the contract documentation, must result in the exclusion of that tenderer, or to eliminate the irregularities affecting its tender such that any corrections or changes would amount to a new tender.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

European Union Law, in particular Article 51 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts**, the principles relating to the award of public contracts, including the principles of equal treatment and transparency referred to in Article 10 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Article 2 of Directive 2004/18, and the principle of proportionality must be interpreted as not precluding, in principle, national legislation establishing a mechanism of assistance in compiling the documentation, under which the contracting authority may in a procedure for the award of a public contract, invite any tenderer whose tender is vitiated by serious irregularities within the meaning of that regulation to rectify its tender, subject to the payment of a financial penalty, provided that the amount of that penalty is consistent with the principle of proportionality, which it is for the referring court to determine.**

However, those provisions and principles must be interpreted as precluding national legislation establishing a mechanism of assistance in compiling the documentation under which the contracting authority may require a tenderer, on payment of a financial penalty, to remedy the lack of a document which, according to the express provisions in the contract documentation, must result in the exclusion of that tenderer, or to eliminate the irregularities affecting its tender such that any corrections or changes would amount to a new tender.

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 15 November 2017 (1)

Joined Cases C-523/16 and C-536/16

MA.T.I. SUD S.p.A.

v

Società Centostazioni S.p.A. (C-523/16),

interveners:

China Taiping Insurance Co. Ltd

and

Duemme SGR S.p.A.

v

Associazione Cassa Nazionale di Previdenza e Assistenza in favore dei Ragionieri e Periti Commerciali (CNPR) (C-536/16)

(Requests for a preliminary ruling
from the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy))

(Questions referred for a preliminary ruling — Public procurement — Tenderer who has submitted incomplete documentation — National legislation making the possibility of supplementing it subject to payment of a fine — Proportionality)

1. Italian law transposed Article 51 of Directive 2004/18/EC (2) in a manner which enabled tenderers for public contracts to remedy any irregularities in their tenders but at the same time imposed on them a financial penalty proportional to the value of the contract.

2. The referring court asks the Court, in essence, whether the power to impose a penalty and the rules for fixing the amount of the fine, within the framework of the mechanism for ‘remedying procedural shortcomings in return for payment’, are compatible with the provisions of EU law.

I. Legal framework

1. EU law: Directive 2004/18

3. According to Article 2:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

4. Article 51 provides:

‘The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.’

2. Italian law

(1) Legislative Decree No 163 of 2006 adopting the Code on public works contracts, public service contracts and public supply contracts and transposing Directives 2004/17/EC and 2004/18/EC (3) (‘the Code’)

5. Article 38(2a) provides:

‘Any absence, incompleteness or any other substantial irregularity in the information and replacement declarations referred to in paragraph 2 shall require payment, to the contracting authority, by the tenderer responsible therefor of the financial penalty specified in the contract notice, the amount of which cannot be less than 0.1% or more than 1% of the value of the contract and must not exceed EUR 50 000, the payment of which shall be guaranteed by the provisional security.

In such cases, the contracting authority shall grant the tenderer a period of not more than ten days in which to submit, supplement or rectify the declarations required and shall state their content and the persons obliged to make them.

In the case of non-substantial irregularities, that is, any non-essential absence or incompleteness of declarations, the contracting authority shall not require the remedying thereof or impose any penalty.

If the period granted is exceeded, the tenderer shall be excluded from the tendering procedure.’

6. Article 46 provides that, within the limits laid down in Articles 38 to 45, the contracting authorities, should they deem it necessary, are to ask tenderers to supplement or clarify the certificates, documents or declarations submitted.

7. Article 230(1), concerning public works, public service and public supply contracts in special sectors, provides that Article 38 of the Code is to be applicable to them.

(2) Legislative Decree No 50/2016 of 18 April, amending the Public Contracts Code (4)

8. The reformed Code, which has been in force since 2016, relaxed, in Article 83(9) thereof, the conditions for requiring the fine (imposing it only if rectification is required) and reduced its maximum ceiling (from EUR 50 000 to EUR 5 000). (5)

II. Facts of the disputes and question referred for a preliminary ruling

1. Case C-523/16.

9. In January 2016, Società Centostazioni S.p.A., which forms part of the Ferrovie dello Stato Italiane S.p.A. group, launched an open procedure for the award of contracts for the carrying on of routine and non-routine maintenance activities and for the provision of energy services at the premises of its railway station buildings, with an estimated value of EUR 170 864 780.81.

10. The contract notice referred to Articles 38(2a) and 46(1c) of the Code, as regards remedying substantial irregularities in the tenderers’ bids. A tenderer intending to remedy an irregularity would be obliged to pay to the contracting authority the amount of EUR 35 000 for each lot by way of a financial penalty.

11. Società Centostazioni, as the contracting authority, established that the documentation submitted by the temporary joint venture constituted by Ma.t.i. Sud S.p.A. and Graded S.p.A. (‘Ma.t.i. Sud’), contained some essential irregularities. (6) It urged the tenderer to remedy the shortcomings by 23 March 2016 and imposed on it a penalty of EUR 35 000.

12. Ma.t.i. Sud, when remedying the defect, indicated its disagreement with that measure and sought to have that penalty annulled. The contracting authority rejected its claim and demanded payment from the tenderer, warning that it would otherwise enforce the provisional security submitted.

13. Ma.t.i. Sud lodged an appeal against that decision before the referring court.

2. Case C-536/16

14. In October 2014, the Associazione Cassa Nazionale di Previdenza e Assistenza in favore dei Ragionieri e Periti Commerciali (CNPR) launched an open procedure for the conclusion of a framework agreement on the appointment of five managers of its securities portfolio.

15. The contract notice referred to Articles 38(2a) of the Code, as regards remedying substantial irregularities in the tenderers' bids. In the case of any absence, incompleteness or other essential irregularity in the information or declarations submitted, the tenderer would be penalised by a fine of EUR 50 000 and would be given a period of ten days to remedy the shortcoming.

16. The contracting authority noted that there was a substantial irregularity in the documentation of Duemme SGR S.p.A, (7) the remedying of which also required the imposition on it of a fine of EUR 50 000.

17. As Duemme SGR refused to pay the penalty, the contracting authority ordered it to do so, warning that the amount would otherwise be deducted from its provisional security.

18. On 9 January 2015, Duemme SGR lodged an appeal before the referring court against the decision imposing the penalty.

3. Questions referred

19. The Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) has referred, in both cases, the following questions for a preliminary ruling:

> '(1) Although the Member States have the ability to require payment for soccorso istruttorio, a procedure whereby the tenderer is given an opportunity to remedy shortcomings in its tendering documentation, which has the effect of remedying any irregularity, is Article 38(2a) of Legislative Decree No 163 of 2006, in the version in force at the time of the tendering procedure in question …, which makes provision for the payment of a "pecuniary penalty", in so far as that penalty must be fixed by the contracting authority ("not less than 0.1% and not more than 1% of the value of the contract and in any event not more than EUR 50 000, the payment of which shall be guaranteed by the provisional security"), contrary to EU law in view of the excessively high amount and the predetermined nature of that penalty, which cannot be adjusted according to the specific situation to be regulated or the seriousness of the irregularity to be remedied?
>
> (2) Is Article 38(2a) of Legislative Decree No 163 of 2006 (in the version in force at the time indicated above) contrary to EU law, in that that requirement to pay for soccorso istruttorio may be regarded as contrary to the principle of opening up the market to competition as widely as possible, an aim which the soccorso istruttorio mechanism is intended to achieve, the facility which the contracting authority is required to offer in that regard therefore being a logical consequence of the duties imposed on that authority by law in the light of the public interest in achieving that aim?'

III. Summary of the parties' observations

20. Duemme SGR considers that, in general, Directive 2004/18 precludes the remedying of procedural shortcomings in return for payment as laid down in Article 38(2a) of the Code.

21. It claims that that mechanism is contrary to the principle of opening up contracts to competition as widely as possible, as it restricts the participation of undertakings, especially small and medium-sized undertakings. (8) Small and medium-sized undertakings have a more limited economic capacity than large

undertakings, so that difficulties in paying the penalty caused by their liquidity may constitute an obstacle to free competition.

22. It adds that, although Articles 49 TFEU and 56 TFEU permit the existence of restrictive national measures, those measures must not be discriminatory, must be justified by overriding reasons relating to the general interest and must be appropriate and proportionate to the objective pursued. In its view, the remedying of procedural shortcomings in return for payment is an unjustified obstacle to free competition.

23. Duemme SGR asks whether the fine of EUR 50 000 and the scope for adjustment provided for in Article 38(2a) of the Code are compatible with the principle of proportionality, since they do not allow for any variation in the light of the specific circumstances of the infringement committed.

24. Finally, even if the Italian State is authorised to require payment for the remedying of procedural shortcomings, Article 38(2a) goes beyond what is required by the aims and objectives of Article 51 of Directive 2004/18 (which, it should be remembered, has been repealed).

25. The CNPR considers that the legislation at issue aims to open up administrative contracting procedures to more competition. In contrast to the previous rules (under which substantial irregularities necessarily and automatically resulted in the exclusion of the tenderer concerned), such shortcomings may be remedied since the reform introduced by Decree-Law No 90 of 2014. Thus, the substantive conditions for participation in that type of procedure take precedence over formal aspects relating to the submission of any required documents.

26. The financial penalty imposed on any persons who fail to fulfil their documentation obligations constitutes the quid pro quo for that opening up to competition. That penalty, which appears in the tender specifications, is intended to compensate for the additional work involved for the contracting authority because of the tenderer’s negligent conduct.

27. The CNPR considers that determination of the amount of the fine in the tender specifications ensures that full information is given and complies with the principles of equal treatment and transparency. Both the procedural and substantive requirements for participation in the procurement process must be made public in advance and in a clear manner, so that tenderers are aware of their obligations, including the obligation to submit essential documentation, and of the consequences of failing to fulfil them.

28. In the CNPR’s view, establishing the penalty according to the value of the contract and on the basis of the seriousness of the irregularity ensures the proportionality of that penalty. Establishing a minimum and maximum percentage (with a ceiling of EUR 50 000) enables the contracting authority to take account of the aspects of the specific case, and it should not be forgotten that the penalty may be imposed only for substantial irregularities.

29. Finally, the CNPR points out that, even accepting that Article 38(2a) of the Code goes beyond the limits of Article 51 of Directive 2004/18, the Court recognises that the Member States have a certain discretion for the purpose of adopting measures to ensure observance of the principles of transparency and equal treatment. (9)

30. The Italian Government, after stating that the legislation at issue has been amended, focuses on its compatibility with EU law. In its view, the doubts of the referring court are based on the argument that Article 51 of Directive 2004/18 does not provide for any penalty, and on the possibility that the risk of being penalised hinders participation in procurement procedures.

31. It claims that the first argument must be rejected, since the Member States might not provide for a rectification mechanism or may provide for one which has a narrower or broader scope. It also does not agree with the second argument, for various reasons:

– Because the fine is not a deterrent which affects tenderers in all cases but is only a possibility which depends on their free will, since they can easily avoid it by scrupulously fulfilling their obligations.

– Because that mechanism promotes competition and reinforces respect for the rules of participation in the tendering process by preventing the rectification of irregular tenders free of charge from becoming an instrument of discrimination against diligent undertakings. That objective is achieved by reasonable means, as the penalty is imposed only on tenderers committing substantial irregularities. Accordingly, it also encourages undertakings to be responsible, since it encourages them to submit full and correct tenders. Finally, the contracting authority is compensated for the additional work involved in administering irregular tenders.

– Because Article 38(2a) does not establish the penalty as a fixed amount and that penalty cannot be considered excessive. On the contrary, it allows the contracting authority discretion in determining the amount of the fine between a maximum and a minimum in relation to the value of the contract, which enables it to adjust the penalty according to the circumstances of the specific case and in accordance with the principle of proportionality.

– Because the fact that the penalty must be provided for in the contract notice does not imply that it should be expressed as a single amount. However, even assuming that this were so, proportionality is guaranteed not only by establishing the amount of the penalty according to the value of the contract, but also by excluding non-substantial irregularities. The amount is not excessive in so far as, although it is a deterrent, it is tailored to the individual concerned.

– Because the amount of the penalty is calculated according to the value of the contract, within the stated range, and is subject to judicial review. Italian law authorises the courts to exercise their powers of unlimited jurisdiction, so that a court may directly determine the amount of the penalty and reduce a penalty regarded as excessive.

32. The Commission, first, points out that, although the procurement procedure in Case C-523/16 falls within the scope of Directive 2004/17, (10) the request for a preliminary ruling is relevant because, according to Article 230 of the Code, Article 51 of Directive 2004/18 must be applied to the special sectors of Directive 2004/17/EC. (11)

33. It also observes that the remedying of procedural shortcomings in return for payment is consistent with Article 51 of Directive 2004/18, an article which the Member States have the option of applying. Since the national legislature decided to transpose that provision, it must be examined whether the penalty regime established by it ensures the correct application of that option.

34. The Commission agrees with the referring court's approach where it maintains that the Italian legislation must be considered in the light of the principle of proportionality and of opening up the market to competition. It doubts, however, whether the principles of equal treatment and non-discrimination are relevant since, from the time when penalty is determined in the contract notice, it applies without distinction to all candidates. Moreover, that manner of establishing the amount of the penalty is aimed, precisely, at preventing arbitrariness and discrimination.

35. From that perspective, the Commission considers that the raison d'être of Article 51 of Directive 2004/18 is to accord the contracting authorities a margin of discretion in assessing merely formal irregularities in order not to exclude suitable tenderers. To that extent, it is instrumental in achieving the objectives of EU law on public procurement, which are intended to ensure the widest opening-up of tendering procedures to competition.

36. The Commission points out that the Court has stated that that possibility is intended to correct or supplement minor irregularities relating to particulars or information which can be objectively shown to pre-date the deadline for submitting tenders, which are authorised by the contract notice and which potentially apply to all tenderers. (12) In its view, this applies in both the present cases.

37. In the Commission's view, a Member State making use of the option afforded by Article 51 of Directive 2004/18 is obliged to guarantee its practical effectiveness ('effectiveness') by ensuring that tenderers can fully exercise the rights conferred on them by the directive. The penalty mechanism provided for in Article 38(2a) of the Code may be regarded as lawful only if it serves a legitimate purpose, does not constitute an obstacle to the attainment of the objectives of Article 51 of the directive or to the exercise of the

rights provided for therein and respects the principles of establishment, freedom to provide services and proportionality.

38. The Commission considers that a financial penalty imposable on tenderers, whose participation in the process is subject to the condition of supplementing or rectifying the declarations or documents submitted, may hinder or make less attractive the exercise of the freedoms guaranteed by Articles 49 TFEU and 56 TFEU, thereby discouraging the widest possible participation of tenderers. As the referring court itself points out, the contrast between paying a fine for a minor irregularity and the uncertainty of being awarded a contract may cause tenderers, especially small and medium-sized undertakings, not to participate in tenders or, where applicable, to withdraw their participation after the tenders have been submitted.

39. However, that restriction may be justified, provided that it pursues a legitimate objective of general interest. Such objectives may include both the aim of making undertakings behave responsibly (encouraging them to act seriously and promptly when supplying the documentation for their tenders) and that of financially compensating the contracting authority for the work involved in the more complicated and extended procedure of remedying procedural shortcomings.

40. Nonetheless, the Commission does not consider that Article 38(2a) of the Code is an appropriate instrument for attaining the objective pursued for two reasons. The first concerns the establishment of the maximum ceiling of the penalty and the second concerns the contracting authority's discretion in setting the amount of the fine.

41. Thus, the first reason starts from the basis that the irregularities to be remedied in the context of Article 38(2a) of the Code are normally limited to cases which do not give rise to particular difficulties and are to be amended within the short period of ten days. However, the Italian legislature does not state how the establishment of an absolute maximum limit of EUR 50 000 will assist the smooth running of the tendering process. On the contrary, that amount, owing to its deterrent nature, may undermine the effectiveness of the option provided for in Article 51 of Directive 2004/18. The Commission remarks that a maximum ceiling of EUR 5 000, such as that adopted by the new Public Contracts Code, is more reasonable. In any event, it is for the national court to assess the proportionality of the EUR 50 000 limit in relation to the additional burden on the contracting authority and whether it is justified.

42. As to the second reason, the Commission considers that Article 38(2a) of the Code does not refer either to the principle of proportionality or to any obligation on the contracting authority to state reasons in the tender specifications for the amount of the penalty imposed in line with the number and type of irregularities to be remedied. In particular, it considers that the amounts of EUR 50 000 and EUR 35 000, imposed in the main proceedings, were calculated in a random and disproportionate manner.

43. The Commission therefore concludes that the establishment of those amounts is not attributable either to the wording of Article 38(2a) of the Code or to its specific application by the contracting authority. It will be for the referring court to decide whether that article can be interpreted and applied in accordance with the principle of proportionality and in a manner guaranteeing the effectiveness of Article 51 of Directive 2004/18.

IV. Procedure before the Court

44. The orders for reference were received at the Registry of the Court on 12 and 24 October 2016.

45. On 15 November 2016, Cases C-523/16 and C-536/16 were joined.

46. Duemme SGR, the CNPR, the Italian Government and the European Commission have submitted written observations. It was not considered necessary to hold an oral hearing.

V. Assessment

47. By means of the mechanism for 'remedying procedural shortcomings in return for payment', which is the subject matter of these references for a preliminary ruling, Italian law allowed tenderers for public

contracts to amend specific shortcomings in their tenders. Where those irregularities were substantial, the contracting authority imposed a fine on the tenderer in question.

48. The initial draft of the Code did not allow substantial irregularities to be remedied. (13) The rule was amended in 2014 precisely in order to allow for that possibility, albeit on condition that the tenderer responsible for them would be penalised by a fine with the following characteristics: (i) its amount would range from 0.1 to 1 per cent of the value of the contract and could not exceed the maximum ceiling of EUR 50 000; (ii) that amount would be established in advance in the contract notice, in an equal amount for all tenderers; and (iii) recovery of the penalty would be guaranteed, as the contracting authority could deduct its amount from the provisional security provided for participation in the procedure.

49. It must now be examined whether that mechanism, as contained in the national law, complies with the provision (Article 51) of Directive 2004/18, under which the contracting authority may invite tenderers to 'supplement or clarify the certificates and documents' submitted with their tenders.

1. Preliminary remarks

50. The referring court mentions Directive 2014/24/EU, (14) because, although it had not yet been transposed into Italian law, it was in force when Article 38(2a) of the Code was adopted. I believe, however, that that directive is not applicable to either of the two disputes.

51. The Court has held that 'the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time'. (15)

52. As the contract notices which are the subject matter of the dispute were published in October 2014 and January 2016, before Directive 2014/24 was incorporated into Italian law (which occurred on 18 April 2016, the day on which the transposition deadline expired), the application of that case-law requires that Directive 2004/18 must be taken into account in both cases.

53. The Commission does not question the applicability to Case C-536/16 of Directive 2004/18, (16) but argues, as stated above, that the call for tenders in Case C-523/16 falls within the scope of Directive 2004/17 (concerning special sectors). However, it adds that, as the Code extends the application of Article 38 thereof to the aforementioned special sectors, the problem is resolved by reversion to the general rule which in Italy has transposed Article 51 of Directive 2004/18.

54. In neither situation do I see any problem as regards the admissibility of the two references for a preliminary ruling, and I consider it appropriate to resolve them by providing the national court with the guidance it requests on the interpretation of Directive 2004/18.

55. Lastly, I consider it more logical to reverse the order of the answers to the questions referred, as the first question (on the conditions determining the amount of the fine) presupposes that the second question (on the Member State's power to impose that penalty) is answered in the affirmative.

2. The Member State's power to establish a mechanism for 'remedying procedural shortcomings in return for payment'

56. Without prejudice to what I shall forthwith point out concerning the limits to the possibility of remedying certain shortcomings in tenders, according to the case-law of the Court on Directive 2004/18, I can find nothing in that case-law which might preclude the Member States from providing for contracting authorities to charge a certain amount (in this case, as a penalty) (17) to tenderers who have placed themselves in that situation.

57. Article 51 of Directive 2004/18 provides that contracting authorities 'may invite economic operators' to supplement or clarify certain certificates or documents. (18) It says nothing about the means by which such provision should be made, leaving it to the discretion of the Member States. In my view, the Member States enjoy significant freedom to choose the means, in accordance with their own legislative options, (19) provided that the legislation which they adopt does not conflict with that provision or with the rest of EU law.

58. Within that freedom, the national legislation may, in my view, authorise the remedying of formal shortcomings in the tenders, while imposing on the tenderers a certain economic burden in order to encourage them to submit their tenders correctly and to pass on to them the additional cost (if any) arising from the procedure for remedying shortcomings. However, national legislation of that kind, which, owing to the magnitude of that burden, constitutes a not easily surmountable obstacle to the participation of undertakings (in particular, small and medium-sized ones) in public procurement procedures, would run counter to Directive 2004/18 and to the principles underlying it; (20) moreover, this would also undermine the competition to be desired in respect of those procedures. (21)

59. I do not consider, therefore, that objections *of principle* can be raised to a mechanism which makes the correction of shortcomings in the submission of a tender subject to a payment by the person responsible for those shortcomings and required to remedy them. I shall return to that question when examining the characteristics of the *onus* imposed by the Italian legislation.

60. However, Article 38(2a) of the Code refers to 'substantial irregularities' as shortcomings which may be remedied. That provision might cause difficulties if it paved the way for the continued participation in the tendering procedure of tenderers who should have been excluded because they did not comply with the obligation to submit the documents required in the contract notice at the proper time and in due form. Those difficulties are compounded when the Court's case-law on that point is considered.

61. This is a controversial (and delicate) subject concerning which the Court has held that, as a rule, Article 51 of Directive 2004/18 'cannot be interpreted as permitting that authority to accept any rectification of omissions which, as expressly provided for in the contract documentation, must result in the exclusion of the [tenderer]'. (22)

62. The judgment of 4 May 2017, *Esaprojekt*, (23) has recently helped to determine the scope for remedying irregularities. The following extracts are worthy of special mention:

– 'First, the principles of equal treatment and non-discrimination require tenderers to be afforded equality of opportunity when formulating their bids, which therefore implies that the bids of all tenderers must be subject to the same conditions. Second, the principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority'.(24)

– Furthermore, those principles 'preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification'. (25)

– 'However, the Court has explained that Article 2 of Directive 2004/18 does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors'. (26)

63. A 'clarification made on a limited or specified basis or a correction of obvious material errors' is therefore accepted, but not a 'substantive and significant amendment of the initial bid, which is more akin to the submission of a new tender'. The provision of 'documents which are not included in the initial bid' is also ruled out where their subsequent submission would, in reality, amount to the making of a new bid. (27)

64. Nor would it be possible to remedy irregularities 'if the contract documents required provision of the missing particulars or information, on pain of exclusion[, since] it falls to the contracting authority to comply strictly with the criteria which it has itself laid down'. (28)

65. The referring court will therefore have to assess, in accordance with that guidance on the interpretation of Article 51 of Directive 2004/18 and in the circumstances of these two cases, (a) whether the required rectification of the documents is concerned with purely formal irregularities, so that it does not amount to the submission of a new bid or give the tenderer an additional advantage over competitors, (29) and (b) whether or not it is contrary to what was clearly stated in the tender specifications as being a reason for exclusion.

3. The amount of the penalty and the principle of proportionality

66. The view that a mechanism for ‘remedying procedural shortcomings in return for payment’ is, in principle, compatible with Article 51 of Directive 2004/18 must immediately be accompanied by a specific analysis of the particular characteristics of the penalty provided for in Article 38(2a) of the Code, in the version prior to the reform of 2016, as applied in national practice and illustrated by the two cases which are the subject of the two disputes.

67. Before undertaking that analysis, I consider it appropriate to refer to a legislative point from which the referring court might, in theory, infer consequences going beyond those expressed by it (in its view, ‘the new Code is not applicable to the call for tenders in question, which was announced before its entry into force’). I am referring, specifically, to the reform of Article 38(2a) of the Code promulgated in 2016. (30)

68. The national court might, if appropriate, apply the principle of retroactivity *in melius* to proceedings which are still pending, and governed by the legislation most unfavourable to the penalised party, in the event of fulfilment of the twofold condition that, (a) in its domestic system, that principle is applied to administrative penal law, and (b) the penalty imposed by that article of the Code really is of a punitive nature.

69. If such retroactive application is not possible (quite apart from the fact that the disappearance of the national provision applied in these two cases means that the judgment to be delivered by the Court will have very limited general scope), (31) it will be necessary to examine whether the characteristics of the penalty, as applied in these two cases, actually fulfil the objectives justifying it, in terms which conform to the principle of proportionality.

70. In the observations of the CNPR, the Italian Government and the Commission, it is pointed out that the establishment of the penalty for substantial irregularities aims, first, to make the tenderer responsible for acting diligently when producing the documentation which will accompany his tender and, second, to compensate the contracting authority for the additional work involved in administering a procurement procedure which allows for the possibility of remedying those irregularities.

71. The two criticisms of that instrument, as established in the Code, are, on the one hand, that the amount of the penalty is determined a priori, in the contract notice itself, without attempting to assess the magnitude of the irregularities committed or the infringing tenderer’s economic circumstances, and, on the other hand, that the resulting amounts (up to a maximum of EUR 50 000) do not comply with the principle of proportionality. Moreover, the exorbitant amount of the penalty is such as to deter participation in the tendering process, especially by small and medium-sized undertakings, thereby restricting competition.

72. I consider that the objectives which might justify the imposition of the penalties are not consistent with the minimum and maximum amounts of those penalties, as provided for in the Code before its reform of 2016. Perhaps that reform, by significantly reducing the absolute maximum ceiling to EUR 5 000, was a response to the national legislature’s belief that that ceiling had been excessive, as the referring court implies.

73. Of course, the argument of higher administrative costs does not justify such substantial amounts: it should be borne in mind that even the minimum of 0.1 per cent (and *a fortiori* 1 per cent), in contracts subject to Community directives, is in itself high, given the lower thresholds for the application of those directives. That argument is also not consistent with a single amount which is established a priori and consists in a percentage of the amount of the contract, since it would be logical, following that line of thought, to tailor to each individual case to the resulting higher costs.

74. The disproportionate nature of the penalties is evident in the present two cases, which merely arise from the practical application of the legal provision: an executive’s forgetting to sign and the failure to provide a sworn statement regarding a criminal record result in fines of EUR 35 000 and EUR 50 000 respectively. I find it difficult to accept that the higher cost to the contracting authorities, merely for detecting those two anomalies and for inviting the tenderers to remedy them, (32) corresponds to those amounts, which seem rather to be designed to increase their revenue. (33) I agree with the referring court (which is ultimately responsible for making the assessment concerning proportionality) that such amounts may be described as ‘objectively exorbitant in relation to the [contracting authority’s] additional activity’.

75. Nor does the aim of ensuring the seriousness of tenders justify such large fines. In the first place, because such fines are imposed (as stated in the tender specifications) regardless of the number of irregularities, that is, regardless of the type of information or document which is missing or must be supplemented and of its greater or lesser significance. The provision treats the offences in a uniform manner and allows their level of complexity to be disregarded. (34)

76. In the second place, that aim must be weighed against that of promoting the widest possible participation of tenderers, resulting in greater competition and, in general, the best service to public interests. (35) An excessive penalty will probably deter (36) undertakings with smaller financial resources from participating in calls for tenders for high-value contracts, given the percentage limits stated above. They might also be deterred from participating in future calls for tenders which include the same penalty provision.

77. Moreover, such a burden will be even more of a deterrent to ‘tenderers established in other Member States, inasmuch as their level of knowledge of national law and the interpretation thereof and of the practice of the national authorities cannot be compared to that of national tenderers’. (37)

78. In short, a provision the purpose of which was, precisely, to help to remedy formal errors made by tenderers (by amending the previous national rule) and, thereby, to increase their chances of successfully participating in public procurement procedures ultimately deters such participation by imposing financial burdens which are disproportionate to its objective.

79. On the basis of the above arguments, I am inclined to consider that, in that respect, the application of the national provision, which is no longer in force, fails to comply with the principle of proportionality.

VI. Conclusion

80. In the light of the foregoing, I propose that the Court provide the following answer to the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy):

(1) Article 51 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts does not preclude a national provision making the remedying of certain formal irregularities committed by the tenderer when formulating his proposal subject to the payment of an amount, provided that it ensures compliance with the principles of transparency and equal treatment, that the remedying of those irregularities does not make possible the submission of what, in reality, would be a new tender and that the burden is proportionate to the objectives justifying it.

(2) In circumstances such as those in the present proceedings, Article 51 of Directive 2004/18, interpreted in accordance with the principles of EU law underlying the provisions applicable to public contracts, does not allow for the imposition on tenderers of financial penalties the amount of which cannot be less than 0.1% or more than 1% of the value of the contract, with a maximum ceiling of EUR 50 000.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 In the version arising from Decree-Law No 90 of 2014 (Decreto-legge 24 giugno 2014, n. 90, misure urgenti per la semplificazione e la trasparenza amministrativa e per l'efficienza degli uffici giudiziari (14G00103) (GU No 144 of 24 June 2014), endorsed by Law No 114/2014 (Legge 11 agosto 2014, n. 114, conversione in legge, con modificazioni, del decreto-legge 24 giugno 2014, n. 90) (GU No 190 of 18 August 2014)).

4 Legislative Decree No 50 of 18 April 2016, Codice dei contratti pubblici (GU No 91 of 19 April 2016).

5 Although it can have no bearing on the consideration of the questions referred, since, given the date of its publication (later than the closure of the written procedure before the Court), it did not form the subject matter of the *inter partes* proceedings, in contrast to what happened with the reform of 2016, it should be noted that a further, more radical amendment of the Code in that respect occurred in 2017. In fact, Legislative Decree No 56/2017 of 19 April issued a new draft of Article 89(3) which definitively removed the requirement to pay for the remedying of shortcomings upon its entry into force (20 May 2017). Since then, economic operators have been able to rectify the absence of any formal element from their proposals (except those relating to the economic and technical aspects of the tender) without incurring any kind of penalty or other similar charge.

6 Specifically, it pointed out that the declaration containing the undertaking to grant a special collective power of representation to the principal undertaking of the group (Ma.t.i. Sud) had not been signed by the legal representative of that undertaking.

7 Specifically, it had not incorporated the sworn statements that its vice-president and director general had no criminal record, as requested in the tender specifications.

8 It relies on the ‘Green Paper on the modernisation of EU public procurement policy’ (COM/2011/15.final), stating that the provision in the Code runs counter to the objective of ‘reducing administrative burdens in the selection phase’, which aims to improve access by small and medium-sized undertakings to selection processes.

9 It relies on the judgment of 22 October 2015, *Impresa Edilux and SICEF* (C-425/14, EU:C:2015:721, paragraphs 26 and 28).

10 Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

11 In the Commission’s view (footnote 5 of its written observations), in Case C-536/16, ‘the contracting authority appears to be among those listed in Annex IV to Directive 2004/17, and the subject matter of that invitation to tender appears to fall within the scope of Articles 3(1) and 20(1) of that directive’.

12 It cites the judgment of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647).

13 Only ‘simple’ irregularities could be remedied under Article 46(1) of the preceding version of the Code.

14 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

15 Judgment of 7 April 2016, *Partner Apelski Dariusz* (C-324/14, EU:C:2016:214, paragraph 83).

16 That statement might need to be qualified in the light of the subjective characteristics (the organising body was a social welfare and assistance association representing accountants and chartered accountants, with legal personality governed by private law) and the objective features of the call for tenders (it was published in order to select five securities managers for that association). However, the application to that case of Directive 2004/18 is not questioned in the observations of any party, perhaps because the CNPR undertook in the tender specifications 'to act, for these purposes, as a body governed by public law' and because the call for tenders consistently referred to the legal rules governing public procurement in Italy, the decisions of that *body* having been contested before the national administrative courts.

---

17 In the observations of Duemme SGR, an account is given of the discussion among the Italian authorities themselves as to the true nature of that charge: for some, it clearly constitutes an administrative penalty, as its name suggests; for others, (in particular, the National Anti-Corruption Authority, according to its agreement of 8 January 2015), it is merely a compensatory instrument. The referring court also echoes 'some commentators' and the judgment of another administrative court, according to which the penalty might rather be 'redefined' as compensation.

---

18 Article 56(3) of the (subsequent) Directive 2014/24 is more precise on this matter: 'Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency'.

---

19 A number of options have found favour in Italy; as is attested by Opinion No 855/2016 of 1 April 2016, which was delivered before the adoption of Legislative Decree No 50 of 2016, in which the Consiglio di Stato (Council of State, Italy) proposed that the Government remove the requirement to pay for the remedying of procedural shortcomings. That recommendation was not adopted in its entirety at that time (although the penalties were reduced), in contrast to what would subsequently occur, in 2017, when the above-mentioned Decree Law No 56/1017 was adopted.

---

20 In particular, 'the principles of freedom of establishment and freedom to provide services as well as … those deriving therefrom', as referred to in the judgment of 10 November 2016, *Ciclat* (C-199/15, EU:C:2016:853, paragraph 25). Moreover, under Article 2 of Directive 2004/18, contracting authorities must treat economic operators equally and non-discriminatorily and act in a transparent way. Those principles are emphasised in recitals 2 and 46 of that directive.

---

21 The Court has held in the judgment of 23 December 2009, *CoNISMa* (C-305/08, EU:C:2009:807, paragraph 37), that 'one of the primary objectives of Community rules on public procurement is to attain the widest possible opening-up to competition (see, inter alia, to that effect[, judgment of 13 December 2007,] *Bayerischer Rundfunk and Others*, [C-337/06, EU:C:2007:786,] paragraph 39) and that it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders ([judgment of 19 May 2009,] *Assitur*,[C-538/07 [EU:C:2009:317], paragraph 26). It should be added that the widest possible opening-up to competition is contemplated not only from the point of view of the Community interest in the free movement of goods and services but also the interest of the contracting authority concerned itself, which will thus have greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question.'

---

22 That form of words is repeated in the judgments of 6 November 2014, *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345, paragraph 46), and of 10 November 2016, *Ciclat* (C-199/15, EU:C:2016:853, paragraph 30). The judgments of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191); of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647), and of 7 April 2016, *Partner*

Apelski Dariusz (C-324/14, EU:C:2016:214), inter alia, have also considered the problems raised by the application of Article 51 of Directive 2004/18.

---

23 Case C-387/14, EU:C:2017:338.

---

24 Ibid., paragraph 36.

---

25 Ibid., paragraph 37.

---

26 Ibid., paragraph 38.

---

27 In my opinion, paragraph 45 of the judgment of 4 May 2017, *Esaprojekt* (C-387/14, EU:C:2017:338), must be interpreted in that manner, because, in that case, the omission affected precisely the documentation accrediting experience, in accordance with the requirements of the tender specifications, which was remedied in terms which had little to do with the initial bid. On other occasions (judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 39 and 40), the Court accepted that the contracting authority could request new documents, such as a published balance sheet, containing the 'correction or amplification of details of such an application, on a limited and specific basis, so long as that request relates to particulars or information … which can be objectively shown to pre-date the deadline for applying to take part in the tendering procedure concerned'.

---

28 Judgment of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647, paragraph 40). In similar terms, the judgment of 6 November 2014, *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345) held that the tenderer's exclusion was valid as it was required by the terms of the tender specifications. In that judgment, the Court examined the possibility of rectifying omissions under Articles 2 and 51 of Directive 2004/18 in connection with Article 38 of the Code in the version prior to its reform of 2014. It considered that Article 2 of Directive 2004/18 did not preclude exclusion because it was stated in the tender specifications: 'in particular, in so far as the contracting authority takes the view that that omission is not a purely formal irregularity, it cannot allow the tenderer subsequently to remedy the omission in any way after the expiry of the deadline for submitting bids' (paragraph 45).

---

29 The absence of the signature of the tendering undertaking's legal representative in Case C-523/16 may have that characteristic. As regards Case C-536/16, the lack of a sworn statement that the person concerned does not have a criminal record might be akin to the shortcoming (declared irremediable) which was the subject matter of the judgment of 6 November 2014, *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345). However, as was pointed out in the previous footnote, the legal framework at that time was different and, in particular, the irremediable nature of the irregularity arose from the tender specifications themselves, in contrast with the situation in this case.

---

30 As I have already observed, the amendment consisted, as far as is relevant here, in reducing the absolute maximum limit to EUR 5 000 and in providing that the fine would be imposed only in the event of rectification. The provision that the fine is covered by the tenderer's provisional security is also removed.

---

31 The Court must, of course, provide an answer to the referring court. However, that answer concerns, in reality, the compliance of national legislation and a national practice which are no longer in force with a directive (Directive 2004/18) which has also been repealed.

---

32 The contracting authority must, in any event, examine the documents submitted and the tender's conformity with the tender specifications. Where an irregularity is detected, if the tenderer is invited to

remedy it, he is given ten days to do so. The additional work involved cannot, therefore, be deemed to be excessive.

---

33 The order for reference goes so far as to state that the measure adopted would seem to ‘encourage contracting authorities to play “spot the mistake”’.

---

34 The referring court also points out that the ‘blame’ for the error attributed to the candidate may sometimes be related to the ‘degree of descriptive clarity’ with which the requirements laid down by the contracting authority are set out.

---

35 See, to that effect, point 58 and the case-law cited in footnote 21.

---

36 In its Opinion No 855/2016, the Consiglio di Stato (Council of State) referred to the ‘undoubtedly deterrent’ effect of the mechanism.

---

37 Judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404, paragraph 46).

EU:C:2017:940

JUDGMENT OF THE COURT (Eighth Chamber)

6 December 2017 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Scope — Regulation (EC) No 1083/2006 — European Regional Development Fund, European Social Fund and Cohesion Fund — Finance agreement for the construction of a motorway concluded with the European Investment Bank before the accession of the Member State to the European Union — Concept of 'irregularity' within the meaning of Regulation No 1083/2006)

In Case C-408/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania), made by decision of 20 May 2016, received at the Court on 21 July 2016, in the proceedings

Compania Naţională de Administrare a Infrastructurii Rutiere SA, formerly Compania Naţională de Autostrăzi şi Drumuri Naţionale din România SA,

v

Ministerul Fondurilor Europene — Direcţia Generală Managementul Fondurilor Externe,

THE COURT (Eighth Chamber),

composed of J. Malenovský, President of the Chamber, D. Šváby (Rapporteur) and M. Vilaras, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Compania Naţională de Administrare a Infrastructurii Rutiere SA, by C. Homor, A. Docu, R. Simionescu, I.L. Axente and N.C. Mărgărit and by A. Filipescu, H. Nicolae and M. Curculescu,

– the Ministerul Fondurilor Europene — Direcţia Generală Managementul Fondurilor Externe, by D.C. Dinu, acting as Agent,

– the European Commission, by B.-R. Killmann and A. Tokár and by L. Nicolae, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 15 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), and of Articles 2(7), 9(5) and 60(a) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the

European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).

2 The request has been made in proceedings between Compania Naţională de Administrare and Infrastructurii Rutiere SA, formerly Compania Naţională de Autostrăzi şi Drumuri Naţionale of România SA ('the CNADNR'), and the Ministerul Fondurilor Europene - Direcţia Generală Managementul Fondurilor Externe (Ministry of European Funds - Directorate-General of Foreign Funds Management, Romania) concerning a decision of the Autoritatea de Management pentru Programul Operaţional Sectorial 'Transport' (Management Authority Sectoral Operational Programme 'Transport', Romania, 'the AMPOST'), applying a financial correction for infringement of Directive 2004/18 in connection with the award of a public contract for co-financed works, initially by the European Investment Bank (EIB), then in full and retrospectively by the European Union by way of the European Regional Development Fund (ERDF) and the Cohesion Fund.

Legal context

EU law

The Adhesion Protocol

3 Article 2 of the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union (OJ 2005 L 157, p. 29, 'the Adhesion Protocol'), provides:

'From the date of accession, … the acts adopted by the institutions before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in the [Treaty Establishing a Constitution for Europe], in the EAEC Treaty and in this Protocol.'

4 The fourth part of that protocol, headed 'Temporary provisions', includes Title III, on 'Financial provisions', which contains Article 27, which states, in paragraph 2:

'Financial commitments made before accession under the pre-accession financial instruments referred to in paragraph 1 as well as those made under the Transition Facility referred to in Article 31 after accession, including the conclusion and registration of subsequent individual legal commitments and payments made after accession shall continue to be governed by the rules and regulations of the pre-accession financing instruments and be charged to the corresponding budget chapters until closure of the programmes and projects concerned. Notwithstanding this, public procurement procedures initiated after accession shall be carried out in accordance with the relevant Union provisions.'

5 The fifth part of that protocol, headed 'Provisions relating to the implementation of this protocol' includes Title II, entitled 'Applicability of the acts of the institutions', and includes Article 53, which provides, in paragraph 1:

'Bulgaria and Romania shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of European framework laws and those European regulations which are binding as to the result to be achieved but leave the national authorities the choice of form and methods within the meaning of Article I-33 of the [Treaty establishing a Constitution for Europe] and of directives and decisions within the meaning of Article 249 [EC] and of Article 161 of the EAEC Treaty, unless another time limit is provided for in this Protocol. They shall communicate those measures to the Commission at the latest by the date of accession or, where appropriate, by the time limit provided for in this Protocol.'

Directive 2004/18

6 Recital 22 of Directive 2004/18 states:

'Provision should be made for cases in which it is possible to refrain from applying the measures for coordinating procedures … because specific rules on the awarding of contracts … which are specific to

international organisations are applicable.’

7 Article 15 of that directive, headed ‘Contracts awarded pursuant to international rules’, provides:

‘This Directive shall not apply to public contracts governed by different procedural rules and awarded:

…

(c) pursuant to the particular procedure of an international organisation.’

Regulation No 1083/2006

8 Recital 22 of Regulation No 1083/2006 states:

‘The activities of the Funds and the operations which they help to finance should be consistent with the other Community policies and comply with Community legislation.’

9 Article 2 of that regulation provides:

‘For the purposes of this Regulation:

…

(7) “irregularity”: any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget.’

10 Article 9(5) of that regulation provides:

‘Operations financed by the Funds shall comply with the provisions of the Treaty and of acts adopted under it.’

11 In Section 2 of Chapter II of Title III of Regulation No 1083/2006, entitled ‘Main projects’, Article 39 of that regulation provides:

‘As part of an operational programme, the ERDF and the Cohesion Fund may finance expenditure in respect of an operation comprising a series of works, activities or services intended in itself to accomplish an indivisible task of a precise economic or technical nature, which has clearly identified goals and whose total cost exceeds EUR 25 million in the case of the environment and EUR 50 million in other fields (hereinafter referred to as major projects).’

12 Article 41 of that regulation, headed ‘Decisions of the Commission’, states:

‘1. The Commission shall appraise the major project, if necessary consulting outside experts, including the EIB, in the light of the factors referred to in Article 40, its consistency with the priorities of the operational programme, its contribution to achieving the goals of those priorities and its consistency with other Community policies.

2. The Commission shall adopt a decision as soon as possible but no later than three months after the submission by the Member State or the managing authority of a major project, provided that the submission is in accordance with Article 40. That decision shall define the physical object, the amount to which the co-financing rate for the priority axis applies, and the annual plan of financial contribution from the ERDF or the Cohesion Fund.

3. Where the Commission refuses to make a financial contribution from the Funds to a major project, it shall notify the Member State of its reasons within the period and the related conditions laid down in paragraph 2.’

13 Article 60 of Regulation No 1083/2006 is worded as follows:

‘The Managing Authority shall be responsible for managing and implementing the operational programme in accordance with the principle of sound financial management and in particular for:

(a) ensuring that operations are selected for funding in accordance with the criteria applicable to the operational programme and that they comply with applicable Community and national rules, for the whole of their implementation period;

…’

14 Article 98(2) of that regulation provides:

‘Member States shall make the financial corrections required in connection with individual or systemic irregularities detected in operations or operational programmes. The corrections made by a Member State shall consist of cancelling all or part of the public contribution to the operational programme. Member States shall take into account the nature and gravity of the irregularities and the financial loss to the Fund.

The resources from the Funds released in this way may be reused by the Member State until 31 December 2015 for the operational programme concerned in accordance with the provisions referred to in paragraph 3.’

EIB Guide to Procurement

15 The EIB has a ‘Guide to procurement for projects financed by the EIB’. That guide, in its 2004 version (‘the EIB Guide’), is intended to inform the promoters of a project whose contracts are financed in whole or in part, by the EIB, of the arrangements to be made for procuring works, goods and services required for the project concerned and receiving financing from the EIB. It is structured in three chapters and distinguishes between the rules governing operations within the Union, which are the subject of Chapter 2 and those governing operations outside the Union, which are the subject of Chapter 3. Chapter 3 of the EIB Guide states that ‘accession States … are progressively incorporating [EU] directives into their legislation. In [this] guide, those countries come under the provisions laid down in Chapter 3, “Operations outside the European Union …”, until the deadline when they were committed to applying the EU Directives on procurement as agreed during their negotiations with the Commission to the extent that they have transposed these Directives into their national legislation at that moment. Thus the provisions of Chapter 2, “Operations within the European Union” apply to them.’

Romanian law

OUG No 34/2006

16 Directive 2004/18 was transposed into Romanian law by the Ordonanța de urgență a Guvernului nr. 34/2006 din 19 aprilie 2006 privind atribuirea contractelor de achiziție publică, a contractelor de concesiune de lucrări publice și a contractelor de concesiune de servicii (Government Emergency Order No 34/2006 on the award of procurement contracts, public works concession contracts and service concession contracts, published in the *Monitorul Oficial al României*, Partea I, No 418 of 15 Mai 2006, ‘OUG No 34/2006’). Article 14(1) of that Order provides:

‘The present Emergency Order shall not apply where the public contract is awarded following:

…

(c) the application of a specific procedure of an international body or institution;

…’

OUG No 72/2007

17 The Ordonanţa de urgenţă a Guvernului nr. 72/2007 din 28 iunie 2007 privind unele măsuri derogatorii de la OUG nr. 34/2006 (Government Emergency Order No 72/2007 laying down measures derogating

from OUG No 34/2006, *Monitorul Oficial al României,* Partea I*,* No 441 of 29 June 2007, 'OUG No 72/2007', has a single article, under which:

'By way of derogation from the provisions of [OUG No 34/2006] … for the purposes of the procedure for the award of public works contracts …, EIB Loan VI, signed in December 2006, relating to the Arad-Timișoara-Lugoj motorway …, the [CNADNR] shall apply the provisions of the [EIB Guide], Chapter 3; …'

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 The project for the construction of the Arad-Timişoara-Lugoj motorway was initially the subject of a finance agreement concluded on 23 December 2003 between Romania, the EIB and the CNADNR, the contracting authority for the works contract at issue in the case in the main proceedings.

19 On the basis of that agreement, a loan agreement to finance the construction of several sections of motorway was concluded, between the same parties, on 2 December 2004. That agreement states that 'the CNADNR shall comply with the EIB's procedures for the procurement of goods, the guarantee of services and the undertaking of works necessary for the projects, [that it] negotiates and concludes the agreements in accordance with the provisions of [that finance agreement]', namely 'through international calls for tender open to candidates from all countries'.

20 In the context of that loan agreement and with a view to organising the award of the public works contract for the construction of the Arad-Timişoara-Lugoj motorway, the CNADNR awarded a contract on 28 February 2006 to provide the consulting services necessary for the preparation of the procurement file for that contract. As Romania was not yet a member of the Union, the procurement file was drawn up in accordance with Chapter 3 of the EIB Guide, entitled 'Operations outside the European Union …'.

21 It is apparent from the order for reference that, first, the procedure for the award of the public works contract for the construction of the Arad-Timişoara-Lugoj motorway began on 17 July 2007 in the form of a restricted call for tenders with pre-selection by the publication of the pre-selection notice, and, second, that that contract was awarded on 15 December 2008.

22 On 27 October 2009, Romania requested the Commission that the planned construction of the Arad-Timişoara-Lugoj motorway benefit, in the context of the Sectoral Operational Programme 'Transport 2007-2013', from retrospective financing by way of the ERDF and the Cohesion Fund as a 'major project' within the meaning of Article 39 of Regulation No 1083/2006.

23 By two successive decisions, adopted in 2010 and 2014 respectively, the Commission approved the full financing of that project by way of the ERDF and the Cohesion Fund. A finance agreement has thus amended the source of funding for that project so that it now benefits from non-reimbursable European funds under the Sectoral Operational Programme 'Transport 2007-2013'.

24 In order to reimburse the costs incurred by the contracting authority and taking into account the Commission's recommendations concerning compliance with EU public procurement rules in the event of retrospective project financing, the AMPOST reviewed the file for the award of the works contract at issue in the case in the main proceedings. At the end of that review, AMPOST declared irregularities by a memorandum of 29 June 2015 and by a decision of 24 August 2015 applied a financial correction of 10% of the value of the eligible costs of the works contract concluded on 15 December 2008.

25 AMPOST justified that financial correction by pointing out, in the first place, that in order to grant non-reimbursable European financing to an operation, the Commission requires that the directives on public procurement in force on the date of publication of the invitation to participate in the procurement procedure concerned be respected. In that regard, AMPOST took the view that Directive 2004/18 was applicable to the procedure for the award of the works contract at issue in the case in the main proceedings, since the latter began solely after Romania's accession to the European Union. In the second place, AMPOST noted that three pre-selection criteria laid down by that contract were more restrictive than those provided for by Directive 2004/18, namely, firstly, a criterion relating to the

candidate's personal situation and in particular, the background of non-performance of contracts, which is contrary to Articles 44 and 45 of Directive 2004/18, and secondly, a criterion relating to the applicant's financial situation which is contrary to Article 47 of Directive 2004/18 and, thirdly, a criterion relating to the applicant's experience which does not comply with Article 48 of that directive. In the last place, AMPOST nevertheless noted that the use of those criteria had been authorised under national law, namely OUG No 72/2007, which expressly derogated from OUG No 34/2006, an order transposing Directive 2004/18.

26 The CNADNR brought an action before the referring court seeking the annulment of AMPOST's decision of 24 August 2015 and of the memorandum declaring irregularities and setting financial corrections of 29 June 2015, issued concerning the construction project of the Arad-Timişoara-Lugoj motorway.

27 In support of its action, the CNADNR takes the view that the financial correction of 10% of the value of the eligible expenses of the works contract for the construction of the Arad-Timişoara Lugoj motorway is based on a misinterpretation of the provisions of OUG No 34/2006, of OUG No 72/2007 as well as of Directive 2004/18. The CNADNR submits that the contracting authority cannot be criticised for having set pre-selection criteria that were unlawful or restrictive in the light of that directive, in so far as, *ab initio*, the award of that contract was carried out in accordance with Chapter 3 of the EIB Guide.

28 The Ministry for European Funds — Directorate-General for the management of external finances maintains that the reviews were carried out by AMPOST in accordance with Directive 2004/18, precisely because the procurement procedure for the contract concerned derogated from the application of OUG No 34/2006. In view of the change to the source of funding, since the operation was then financed by the Cohesion Fund under the Sectoral Operational Programme 'Transport 2007-2013', AMPOST had to ensure that the award of that contract respects the provisions of EU law and, in particular, the public procurement rules.

29 The referring court questions, in the first place, the applicable rules *ratione temporis* and refers, in that regard, not only to Article 27 of the Protocol of Accession, which concerns the financial commitments made by the Member States concerned before their accession to the European Union, but also Article 53 of that protocol, which provides for the immediate entry into force, from the date of accession of those Member States to the European Union, of secondary legislation.

30 In the second place, the referring court asks whether Article 15(c) of Directive 2004/18 may be interpreted as meaning that that directive does not apply to public contracts governed by different procedural rules and awarded under the particular procedure of an international body, as authorising a Member State to not apply that directive, after that Member State's accession to the European Union, in so far as that Member State is bound by a finance agreement concluded with the EIB before its accession to the European Union, and under which the public procurement procedures comply with specific criteria which are more restrictive than those provided for by that directive.

31 The referring court also questions whether Directive 2004/18 precludes a legislative measure of national law, adopted by the Member State concerned after its accession to the European Union, which requires the contracting authority to follow the EIB Guide by derogation from the legislative measure transposing that directive.

32 In that regard, the referring court takes the view that, after accession to the Union, a candidate State which has received funding for the duration of the negotiations is no longer subject to Chapter 3 of the EIB Guide, as regards operations outside the European Union, but is then subject to Chapter 2, entitled 'Operations within the European Union', of that guide, which confirms that Directive 2004/18 is applicable.

33 In the third place, in so far as AMPOST pointed out that some of the pre-selection criteria provided for by the works contract at issue in the case in the main proceedings were more restrictive than those laid down by Directive 2004/18, the referring court asks, in that context, whether such a contract may be considered to comply with EU rules and be eligible for non-reimbursable European funding granted retrospectively.

34 In those circumstances, the Curtea de Apel București (Court of Appeal, Bucharest, Romania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is Article 15(c) of Directive 2004/18 to be interpreted as permitting a Member State not to apply the directive, following its accession to the … Union, if it has the benefit of a finance agreement concluded with the [EIB] which was signed before the accession and under which specific requirements imposed by the lending institution, such as those at issue in the present case, which are more restrictive than those laid down by the directive, are applied to public contracts to be awarded?

(2) Is Directive 2004/18 to be interpreted as precluding a legislative measure under national law, such as [OUG] No 72/2007, which provides for the application of the [EIB Guide], by way of derogation from the legislative measure by which the directive was transposed into national law, namely, in the present case, [OUG] No 34/2006, on grounds such as those set out in the explanatory memorandum [relating to the former OUG], for the purpose of compliance with the finance agreement concluded prior to accession?

(3) On a proper interpretation of Article 9(5) and Article 60(a) of Regulation No 1083/2006, may such a public contract, concluded in compliance with the [EIB Guide] and with national law, be regarded as consistent with EU law and eligible for European non-reimbursable financial support, granted retrospectively?

(4) In the event that Question 3 is answered in the negative, if such a public contract was nonetheless considered to be consistent with EU law at the time the check was carried out to verify compliance with the qualification requirements for the Sectoral Operational Programme "Transport 2007-2013", does such an alleged breach of EU public procurement law (determination of certain pre-selection criteria for the tenderers which are similar to those set out in the [EIB Guide] and more restrictive than those laid down in Directive 2004/18 …) constitute an "irregularity" within the meaning of Article 2(7) of Regulation No 1083/2006, giving rise to an obligation on the part of the Member State concerned to make a financial correction/percentage reduction pursuant to Article 98(2) of the regulation?'

Consideration of the questions referred

Preliminary observations

35 In order to answer the questions referred, it is necessary, first of all, to determine that Directive 2004/18 is in fact applicable *ratione temporis* insofar as certain facts mentioned by the referring court have taken place before Romania's accession to the European Union. It follows from Article 2 of the Protocol of Accession that from the day of that accession acts adopted by the EU institutions before accession are to be binding on Romania and are to be applicable in that State, under the conditions laid down in the Treaties and that protocol.

36 In that regard, it follows from Article 53(1) of that protocol that Romania is to put into effect the measures necessary for it to comply, from the date of its accession to the European Union, with the provisions of directives which are binding as to the result to be achieved but leave the national authorities the choice of form and methods unless another time limit is provided for in that protocol.

37 It must be stated that no such time limit has been provided for transposing Directive 2004/18 into national law. Romania therefore had to comply with that directive as from its accession to the European Union in accordance with the principle that the provisions of EU law apply *ab initio* and *in toto* to new Member States (see, to that effect, judgment of 3 December 1998, *KappAhl*, C-233/97, EU:C:1998:585, paragraph 15).

38 That being said, it must be ensured that Directive 2004/18 is in fact applicable to a procedure for the award of public works contracts such as that at issue in the case in the main proceedings.

39 In that regard, according to settled case-law, the directive applicable to a public contract is, as a rule, the one in force on the date when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of that contract (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83).

40 Where a public procurement procedure is the subject of publication of a contract notice, it must be considered that the date on which the contracting authority definitively decides whether it is necessary for a prior call for competition to be issued for the award of that contract is that of the day of that publication. Therefore, it is on that date that the lawfulness of the conditions relating to a procedure for awarding a public contract must be assessed.

41 In the present case, the procedure for the award of the public works contract at issue in the case in the main proceedings was the subject of a contract notice published in the supplement to the *Official Journal of the European Union* on 17 July 2007, that is, after the accession of Romania to the European Union. Since the Accession Protocol did not provide for any transitional measure capable of postponing the application of Directive 2004/18, it must therefore be considered that it is applicable *ratione temporis* to a public procurement procedure such as that at issue in the case in the main proceedings.

The first and second questions

42 By its first and second questions, which must be examined jointly, the referring court asks, in essence, whether Directive 2004/18, and in particular Article 15(c) thereof, must be interpreted as meaning that it precludes a Member State's legislation that provides, for the purposes of a public procurement procedure initiated after the date of its accession to the European Union, in order to complete a project started on the basis of a finance agreement concluded with the EIB prior to that accession, the application of the specific criteria laid down by the provisions of the EIB Guide which do not comply with the provisions of that directive.

43 Article 15(c) of Directive 2004/18 states that that directive does not apply to public contracts governed by particular procedural rules of an international organisation.

44 In addition, it should be noted that that article, read in conjunction with recital 22 of Directive 2004/18, lists three cases of public contracts to which that directive does not apply to the extent that those public contracts are governed by different procedural rules. Moreover, it is clear that that article forms part of Section 3, entitled 'Excluded contracts', of Chapter II, entitled 'Scope', of Title II, itself entitled 'Rules on public contracts' of Directive 2004/18.

45 It thus follows both from the wording of Article 15(c) of Directive 2004/18 and from the context in which it appears, that that article constitutes an exception to the material scope of that directive. Such an exception must necessarily be interpreted strictly (see, to that effect, order of 20 June 2013, *Consiglio Nazionale degli Ingegneri*, C-352/12, not published, EU:C:2013:416, paragraph 51 and the case-law cited).

46 In order to assess whether a public procurement procedure such as that at issue in the case in the main proceedings, governed by Chapter 3 of the EIB Guide, may fall within the exception provided for in Article 15(c) of Directive 2004/18, it is necessary to determine whether such a procedure can be considered to be governed by particular procedural rules of an international organisation.

47 As has been stated in paragraph 41 of the present judgment, the contract notice at issue in the case in the main proceedings was published subsequent to Romania's accession to the European Union.

48 In those circumstances, a procedure such as that at issue in the case in the main proceedings cannot be regarded as being governed by particular rules of procedure of an international organisation within the meaning of Article 15(c) of Directive 2004/18.

49 Therefore, after the date of its accession to the European Union, Romania cannot rely on the exception relating to compliance with the particular rules of an international organisation provided for in Article 15(c) of Directive 2004/18.

50 Moreover, as the referring court has pointed out, such an interpretation is supported by the wording of the EIB Guide under which, after accession to the Union, a candidate State which has received EIB funding to complete a project is no longer subject to Chapter 3 of the EIB Guide, as regards operations outside the European Union, but is then subject to Chapter 2 concerning operations within the European Union, and must apply the directives on public procurement procedures.

51 It follows from the foregoing that Directive 2004/18 precludes the existence of a legislative act of national law, such as OUG No 72/2007, which provides that the provisions of Chapter 3 of the EIB Guide are to apply by way of derogation from the provisions of that directive.

52 In the light of the foregoing considerations, the answer to the first and second questions referred is that Directive 2004/18, and in particular Article 15(c) thereof, must be interpreted as meaning that it precludes a Member State's legislation that provides, for the purposes of a public procurement procedure initiated after the date of its accession to the European Union, in order to complete a project started on the basis of a finance agreement concluded with the EIB prior to that accession, the application of the specific criteria laid down by the provisions of the EIB Guide which do not comply with the provisions of that directive.

The third and fourth questions

53 By its third and fourth questions, which should be examined together, the referring court asks, in essence, whether Articles 9(5) and 60(a) of Regulation No 1083/2006 must be interpreted as meaning that a public procurement procedure such as that at issue in the case in the main proceedings, in which more restrictive criteria than those laid down in Directive 2004/18 have been applied, may be considered to comply with EU law and be eligible for non-reimbursable European funding, granted retrospectively, and whether, where appropriate, Article 2(7) of Regulation No 1083/2006 must be interpreted as meaning that the use of pre-selection criteria of tenderers that are more restrictive than those provided for in Directive 2004/18 constitutes an 'irregularity', within the meaning of Article 2(7), justifying the application of a financial correction pursuant to Article 98 of that regulation.

54 As regards the first aspect, it is apparent from the wording of Article 9(5) of Regulation No 1083/2006, read in the light of recital 22 of that regulation, that the European Funds are intended to finance only operations that comply with the provisions of the Treaty and the acts adopted under it.

55 In addition, under Article 60(a) of Regulation No 1083/2006, it is the responsibility of the managing authority to ensure that operations selected for funding comply with applicable EU and national rules for the whole of their implementation period.

56 Accordingly, Regulation No 1083/2006 forms part of the mechanism designed to ensure the proper management of EU funds and the safeguarding of the European Union's financial interests (see, to that effect, judgment of 26 May 2016, *Judeţul Neamţ and Judeţul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, paragraph 34).

57 It follows that the role of the European Union is to finance through its funds only actions conducted in complete conformity with EU law, including the rules applicable to public procurement (see to that effect, judgment of 14 July 2016, *Wrocław — Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 43 and the case-law cited).

58 In the present case, it is common ground that, for the purposes of the pre-selection of tenderers, the CNADNR followed the rules of Chapter 3 of the EIB Guide. In that regard, the fact of following the rules of that guide cannot rule out, *ab initio*, that the EU rules as they result from Directive 2004/18 are observed. Nevertheless, it is clear from the referring court's statements that the pre-selection criteria at issue in the case in the main proceedings are more restrictive than those set out in Articles 44, 45 and 47 of Directive 2004/18.

59 In view of the above, a public procurement procedure such as that at issue in the case in the main proceedings, in which more restrictive criteria than those laid down in Directive 2004/18 have been applied, cannot be considered as having been conducted in complete conformity with EU law.

60 As regards the second aspect referred to in paragraph 53, it follows from the definition in Article 2(7) of Regulation No 1083/2006 that an infringement of EU law constitutes an ‘irregularity’, within the meaning of that provision, only if it has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to that budget. Therefore, the Court has held that such an infringement is to be considered to be an irregularity only in so far as it was capable, as such, to have a budgetary impact. By contrast, there is no requirement that the existence of a specific financial impact be shown (judgment of 14 July 2016, *Wrocław — Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 44 and the case-law cited).

61 Consequently, it should be considered that a failure to comply with the public procurement rules constitutes an ‘irregularity’ within the meaning of Article 2(7) of Regulation No 1083/2006 in so far as the possibility may not be excluded that that failure will have an impact on the budget of the Funds concerned (judgment of 14 July 2016, *Wrocław — Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 45).

62 In the present case, the use of pre-selection criteria for tenderers that are more restrictive than those provided for by Directive 2004/18 constitutes an ‘irregularity’ within the meaning of Article 2(7) of Regulation No 1083/2006, provided that it cannot be ruled out that such use has had an impact on the budget of the Funds at issue.

63 In that regard, it is clear from the order for reference that, in the main proceedings, AMPOST has shown that the pre-selection criteria for tenderers were more restrictive than those laid down in Directive 2004/18 and that they had the effect of restricting the circle of participants in the public procurement procedure at issue in the case in the main proceedings so that the impact on the budget of the Funds cannot be ruled out, which it is for the national court to determine.

64 Finally, as to whether that irregularity justifies the application of a financial correction pursuant to Article 98 of Regulation No 1083/2006, it is appropriate to note that it is for the Member States to make a financial correction, provided that an irregularity has been established.

65 For that purpose, Article 98(2) thereof also requires the competent national authority to calculate the amount of the correction to apply by taking into account three criteria, namely the nature and gravity of the irregularities and the resulting financial loss to the Funds (judgment of 14 July 2016, *Wrocław — Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 47).

66 Where, as in the case at issue in the main proceedings, a specific, and not a systematic, irregularity is concerned, that requirement necessarily involves a case-by-case examination, taking into account all of the relevant circumstances in the light of one of those three criteria.

67 In the present case, the fact that the CNADNR acted in accordance with the national legislation which required it to derogate from Directive 2004/18, so that it had no discretion as to the public procurement award procedure to follow, is a circumstance likely to affect the final amount of the financial correction to be applied, which it is for the national court to determine in the light of the specific circumstances of the case.

68 In the light of the above considerations, the answer to the third to fourth questions is:

– Articles 9(5) and 60(a) of Regulation No 1083/2006 must be interpreted as meaning that a public procurement procedure such as that at issue in the case in the main proceedings, in which criteria more restrictive than those laid down in Directive 2004/18 have been applied, cannot be considered as having been conducted in complete conformity with EU law and is not eligible for non-reimbursable European funding, granted retrospectively.

– Article 2(7) of Regulation No 1083/2006 must be interpreted as meaning that the use of pre-selection criteria for tenderers that are more restrictive than those provided for by Directive 2004/18 constitutes an ‘irregularity’, within the meaning of that article, justifying the application of a financial correction pursuant to Article 98 of that regulation, provided that it cannot be ruled out that such use had an impact on the budget of the Funds at issue, which it is for the national court to determine.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and in particular Article 15(c) thereof, must be interpreted as meaning that it precludes a Member State's legislation that provides, for the purposes of a public procurement procedure initiated after the date of its accession to the European Union in order to complete a project started on the basis of a finance agreement concluded with the European Investment Bank prior to that accession, the application of the specific criteria laid down by the provisions of the European Investment Bank's public procurement guide which do not comply with the provisions of that directive.**

2. **Articles 9(5) and 60(a) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 must be interpreted as meaning that a public procurement procedure such as that at issue in the case in the main proceedings, in which criteria more restrictive than those laid down in Directive 2004/18 have been applied, cannot be considered as having been conducted in complete conformity with EU law and is not eligible for non-reimbursable European funding, granted retrospectively.**

Article 2(7) of Regulation No 1083/2006 must be interpreted as meaning that the use of pre-selection criteria for tenderers that are more restrictive than those provided for by Directive 2004/18 constitutes an 'irregularity', within the meaning of that article, justifying the application of a financial correction pursuant to Article 98 of that regulation, provided that it cannot be ruled out that such use had an impact on the budget of the Funds at issue, which it is for the national court to determine.

[Signatures]

---

* Language of the case: Romanian.

EU:C:2017:685

JUDGMENT OF THE COURT (First Chamber)

14 September 2017 (*)

(Reference for a preliminary ruling — Directive 2004/18/EC — Articles 47(2) and 48(3) — Tenderer relying on the capacities of other entities to meet the requirements of the contracting authority — Loss by those entities of the capacities required — National legislation providing for the exclusion of the tenderer from the call for tenders and for the award of the contract to a competitor)

In Case C-223/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 3 November 2015, received at the Court on 20 April 2016, in the proceedings

Casertana Costruzioni Srl

v

Ministero delle Infrastrutture e dei Trasporti — Provveditorato Interregionale per le opere pubbliche della Campania e del Molise,

Agenzia Regionale Campana per la Difesa del Suolo — A.R.Ca.Di.S.,

third parties:

Consorzio Stabile Infratech,

W.E.E. Water Environment Energy SpA,

Massimo Fontana,

Studio Tecnico Associato Thinkd,

Claudio Della Rocca,

Nicola Maione,

Vittorio Ciotola,

Fin.Se.Co. SpA,

Edilgen SpA,

Site Srl,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan, A. Arabadjiev, C.G. Fernlund and S. Rodin (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 15 March 2017,

after considering the observations submitted on behalf of:

– Casertana Costruzioni Srl, by E. Sticchi Damiani and G. Ceceri, avvocati,

– Consorzio Stabile Infratech, by L. Lentini and F. Migliarotti, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and C. Colelli, avvocato dello Stato,

– the European Commission, by G. Gattinara and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 47 and 48 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and Article 63 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

2 The request has been made in proceedings brought by Casertana Costruzioni Srl (‘Casertana’) against the Ministero delle Infrastrutture e dei Trasporti — Provveditorato Interregionale per le opere pubbliche della Campania e del Molise (Ministry for Infrastructure and Transport — Interregional Authority for Public Works in Campania and Molise, Italy) and the Agenzia Regionale Campana per la Difesa del Suolo — A.R.Ca.Di.S. (Campania Regional Agency for Soil Protection) regarding the tendering procedure for the executive design, for safety coordination at the planning stage and for the execution of works relating to the project called ‘La Bandiera Blu’ on the Domitian coast.

Legal context

EU law

Directive 2004/18

3 Article 47(2) of Directive 2004/18 provided:

‘An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.’

4 Article 48(3) of that directive was worded as follows:

‘An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.’

5 Directive 2004/18 was repealed by Directive 2014/24.

Directive 2014/24

6 Article 63(1) of Directive 2014/24 states as follows:

‘With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. … Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

The contracting authority shall, in accordance with Articles 59, 60 and 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57. The contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

…’

Italian law

7 Article 40(1) and (2) of decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006) provides:

‘1. Entities carrying out public works in any capacity must be duly authorised and must ensure that their activities comply with the principles of quality, professionalism and fairness. To that end, the goods, processes, services and business quality control systems used by those entities shall be subject to a system of certification in accordance with the legislation in force.

2. The regulation set out in Article 5 shall govern the single certification scheme for any entities carrying out, in any capacity, public works for an amount exceeding EUR 150 000, on the basis of the type and amount of the works. The regulation under Article 5 also allows the categories of certification to be periodically reviewed and possible new categories to be provided for.’

8 Article 49 of that decree provides:

‘The tenderer, be it an individual tenderer or a member of a consortium or group within the meaning of Article 34, in a specific tendering procedure for a public works, services or supply contract, may fulfil the requirements relating to possession of economic, financial, technical and organisational capacity, or possession of an SOA certificate [a Certification Body certificate], by relying on the capacity of another entity or the SOA certificate of another entity.’

The dispute in the main proceedings and the question referred for a preliminary ruling

9 It follows from the order for reference that, in the course of June 2013, the Interregional Authority for Public Works in Campania and Molise, on behalf of the Campania Regional Agency for Soil Protection, launched an open tendering procedure of EU interest for the executive design, for safety coordination at the planning stage and for the execution of works relating to the project ‘La Bandiera Blu’ on the Domitian coast.

10 The tender specifications stated that, in order to take part in the call for tenders, it was necessary to obtain a certificate from the Società Organismo di Attestazione (Certification Body) relating to the

qualifications required to provide design and execution services falling within certain categories.

11 Casertana participated in the call for tenders within the framework of an ad hoc tendering consortium under formation, as lead company, and declared that it relied, as regards the qualifications required by Legislative Decree No 163, on those of two auxiliary undertakings, one being Consorzio Stabile GAP.

12 In the course of the procedure and after the end of the stage of admission to the call for tenders, that auxiliary undertaking lost qualification for the required category of services, thus becoming qualified for a lower category of services only.

13 By decision of 8 October 2014, the contract was awarded to the ad hoc tendering consortium led by Consorzio Stabile Infratech, while the consortium led by Casertana was ranked second.

14 Casertana brought an action before the Tribunale amministrativo regionale per la Campania (Campania Regional Administrative Court, Italy), contesting several aspects of the final award decision for the contract at issue.

15 Subsequently, the ad hoc tendering consortium to which the contract was awarded brought a counterclaim intended to preclude the action brought by the applicant in the main proceedings, arguing that it should have been excluded from the call for tenders on the ground that its auxiliary undertaking had, in the course of the tendering procedure, lost the classification required for participating in the call for tenders. In defence, the applicant in the main proceedings stated that the loss of rank attributable to the auxiliary undertaking amounted to a case of *force majeure* and could not result in the automatic exclusion of its consortium.

16 By judgment of 27 March 2015, the Tribunale amministrativo regionale per la Campania (Campania Regional Administrative Court) granted the counterclaim brought by the ad hoc tendering consortium that had been awarded the contract; it upheld the first plea in law, holding that the loss in the course of the tendering procedure of qualification for the classification required of the auxiliary undertaking had the effect of excluding the consortium of the applicant in the main proceedings from that procedure. In addition, that court took the view that the arguments of the applicant in the main proceedings regarding the occurrence of a case of *force majeure* were irrelevant.

17 On 8 July 2015, Casertana brought an appeal against the judgment of the Tribunale amministrativo regionale per la Campania (Campania Regional Administrative Court). In essence, the applicant in the main proceedings considers that the tenderer, trusting that the auxiliary undertaking had the required qualifications, cannot be called upon to answer for the loss of that qualification as long as that loss cannot be attributed to it. It is impossible to identify a ‘fault’ attributable to the tenderer and that court should, consequently, have recognised the tenderer’s right to replace the auxiliary undertaking, a right which follows from the Court’s case-law, as well as from Article 63 of Directive 2014/24, which expressly lays down that right.

18 In those circumstances, the Consiglio di Stato (Council of State, Italy) decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

‘Do Article 47(2) and Article 48(3) of Directive [2004/18], as replaced by Article 63 of Directive [2014/24], preclude national rules which exclude, or may be construed as excluding, any possibility for an economic operator, that is to say a tenderer, of appointing another undertaking to replace the undertaking originally selected as “auxiliary undertaking” where the latter no longer has the capacity to participate or that capacity is diminished, thus resulting in the economic operator being excluded from the tendering procedure for reasons that are neither objectively nor subjectively imputable to it?’

Consideration of the question referred

19 By its question, the referring court asks, in essence, whether Articles 47(2) and 48(3) of Directive 2004/18, read in the light of Article 63 of Directive 2014/24, must be interpreted as precluding national legislation which excludes the possibility for an economic operator taking part in a tendering procedure

to replace an auxiliary undertaking that has lost required qualifications after the submission of the tender and which results in the automatic exclusion of that operator.

Applicability of Article 63(1) of Directive 2014/24

20 The referring court raises the question of whether Article 48(3) of Directive 2004/18 should be interpreted by taking Article 63(1) of Directive 2014/24 into consideration.

21 In order to answer that question, it must be recalled, as a preliminary point, that, according to settled case-law, the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU;C:2014:2067, paragraph 31 and the case-law cited, and of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83).

22 In the main proceedings, the contract notice was sent to the *Official Journal of the European Union* on 7 June 2013 and published in the *Gazzetta Ufficiale della Repubblica Italiana* (Official Gazette of the Italian Republic) on 10 June 2013, whereas Directive 2014/24 was adopted on 26 February 2014 and, in any event, the period for transposing it expired, in accordance with Article 90 thereof, on 18 April 2016.

23 That being so, when the call for tenders at issue in the main proceedings was published in June 2013, Directive 2014/24 was not applicable *ratione temporis*.

24 As for the question whether Article 48(3) of Directive 2004/18 must be interpreted by taking into consideration the content of Article 63(1) of Directive 2014/24, which is the provision corresponding inter alia to Article 48(3) of Directive 2004/18, it must be observed that Article 48(3) is formulated in general terms and does not expressly set out the detailed rules in accordance with which an economic operator may rely on the capacities of other entities in a public procurement procedure (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraphs 87 and 88).

25 On the other hand, Article 63(1) of Directive 2014/24 now provides that economic operators may ‘only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required’ (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 89) and that ‘the contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion’.

26 Although it is true that, as stated, inter alia, in recital 2 thereof, Directive 2014/24 aims to clarify basic notions and concepts to ensure legal certainty, and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union, the fact remains that Article 63 of that directive introduces substantial amendments as regards the right of an economic operator to rely on the capacities of other entities in the context of public contracts (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 90).

27 Far from preserving the continuity of Article 48(3) of Directive 2004/18 and clarifying its scope, Article 63(1) of Directive 2014/24 introduces new conditions which were not provided for under the previous legislation (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 91).

28 Accordingly, that provision of Directive 2014/24 cannot be used as a criterion for the interpretation of Article 48(3) of Directive 2004/18 since there is no question in the present case of dispelling a problem of interpretation concerning the content of the latter provision (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 92).

Articles 47(2) and 48(3) of Directive 2004/18

29 According to settled case-law, Articles 47(2) and 48(3) of Directive 2004/18 confer on every economic operator the right to rely, for a particular contract, on the capacities of other entities, regardless of the nature of the links which it has with them, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract (judgment of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 29).

30 Those provisions do not lay down any general prohibition regarding a tenderer's reliance on the capacities of one or more third-party entities in addition to its own capacities in order to fulfil the criteria set by a contracting authority. In addition, the Court has expressly referred to an economic operator's right to use resources belonging to one or more other entities, possibly in addition to its own resources, in order to carry out a contract (judgment of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 30 and 32).

31 Such an interpretation is consistent with the objective pursued by the directives in this area of attaining the widest possible opening up of public contracts to competition to the benefit not only of economic operators but also of contracting authorities. In addition, that interpretation also facilitates the involvement of small and medium-sized undertakings in the contracts procurement market, an aim also pursued by Directive 2004/18, as stated in recital 32 thereof (judgment of 10 October 2013, *Swm Costruzioni 2 and MannocchiLuigino*, C-94/12, EU:C:2013:646, paragraph 34).

32 In the present case, Casertana disputes the assessment of the Tribunale amministrativo regionale per la Campania (Campania Regional Administrative Court) that it was automatically excluded from the procurement procedure at issue in the main proceedings because Consorzio Stabile GAP had lost its qualification for classification in the service category concerned.

33 In this regard, it must be recalled that, in accordance with recital 46 and Article 2 of Directive 2004/18, contracting authorities are required to afford economic operators equal, non-discriminatory and transparent treatment (judgments of 7 April 2016, *Partner Apelski Dariusz,* C-324/14, EU:C:2016:214, paragraph 60, and of 4 May 2017, *Esaprojekt*, C-387/14, EU:C:2017:338, paragraph 35).

34 Thus, first, the principles of equal treatment and non-discrimination require tenderers to be afforded equality of opportunity when formulating their bids, which therefore implies that the bids of all tenderers must be subject to the same conditions. Secondly, the obligation of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (judgments of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 61 and the case-law cited, and of 4 May 2017, *Esaprojekt*, C-387/14, EU:C:2017:338, paragraph 36).

35 Furthermore, it is apparent from the Court's case-law that the principles of equal treatment and non-discrimination and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification (judgments of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 62 and the case-law cited, and of 4 May 2017, *Esaprojekt*, C-387/14, EU:C:2017:338, paragraph 37).

36 However, the Court has explained that Article 2 of Directive 2004/18 does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious clerical errors (judgments of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 63 and the case-law cited, and of 4 May 2017, *Esaprojekt*, C-387/14, EU:C:2017:338, paragraph 38).

37 As regards amendments relating to successful tenderers, the Court has already held that the decision authorising the change in composition of the consortium to which the contract was awarded necessitates an amendment of the award decision which may be regarded as substantial if, in the light of the particular features of the procurement procedure in question, it relates to one of the essential elements that were decisive in the adoption of the award decision. In that situation, the relevant measures provided for by national law would have to be taken to remedy that irregularity, which might extend to organisation of a new award procedure (judgment of 8 May 2014, *Idrodinamica Spurgo Velox and Others*, C-161/13, EU:C:2014:307, paragraph 39 and the case-law cited).

38 In addition, in the field of concession contracts, the Court has held that a change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute a substantial amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract (judgment of 13 April 2010, *Wall*, C-91/08, EU:C:2010:182, paragraph 39).

39 In the main proceedings, as the Advocate General observed in point 47 of his Opinion, the possibility afforded, unpredictably, exclusively to a consortium of undertakings to replace a third-party undertaking which belongs to that consortium and has lost a qualification that is required in order not to be excluded would amount to a substantial change of the tender and the very identity of the consortium. Indeed, such a change of the tender would compel the contracting authority to carry out new checks whilst at the same time granting a competitive advantage to that consortium which might attempt to optimise its tender in order to deal better with its competitors' tenders in the procurement procedure at issue.

40 Such a situation would be contrary to the principle of equal treatment which requires that tenderers be afforded equality of opportunity when formulating their bids and which implies that the bids of all tenderers must be subject to the same conditions, and would amount to a distortion of healthy and effective competition between undertakings participating in a public procurement procedure.

41 Finally, regarding the *force majeure* argument relied on by Casertana, it must be noted that, although Directive 2004/18, as has been stated in paragraphs 30 and 31 of the present judgment, enables a tenderer to rely on the capacities of one or more third party entities in addition to its own capacities in order to fulfil the criteria set by a contracting authority, that tenderer remains responsible, in its capacity as the lead undertaking in a consortium of undertakings, for the compliance of those undertakings with the obligations and conditions for participation in the call for tenders laid down by the contracting authority in the documents relating to the procurement procedure at issue.

42 In the light of the foregoing, the answer to the question referred is that Articles 47(2) and 48(3) of Directive 2004/18 must be interpreted as not precluding national legislation which excludes the possibility for an economic operator taking part in a tendering procedure to replace an auxiliary undertaking that has lost required qualifications after the submission of its tender and which results in the automatic exclusion of that operator.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Articles 47(2) and 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as not precluding national legislation which excludes the possibility for an economic operator taking part in a tendering procedure to replace an auxiliary undertaking that has lost required qualifications after the submission of its tender and which results in the automatic exclusion of that operator.

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

WAHL

delivered on 11 May 2017 (1)

Case C-223/16

Casertana Costruzioni Srl

v

Ministero delle Infrastrutture e dei Trasporti — Provveditorato Interregionale per le opere pubbliche della Campania e del Molise

Azienda Regionale Campana per la Difesa del Suolo — A.R.CA.DI.S.

joined parties:

Consorzio Stabile Infratech,

W.E.E. Water Environment Energy SpA,

Massimo Fontana,

Studio Tecnico Associato Thinkd,

Claudio Della Rocca,

Nicola Maione,

Vittorio Ciotola,

FIN.SE.CO SpA,

Edilgen SpA,

Site Srl

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Public procurement — Article 47(2) and Article 48(3) of Directive 2004/18/CE — Article 63 of Directive 2014/24/EU — Reliance by tenderers on the capacities of other entities — National legislation providing for the automatic exclusion, from the tendering procedure, of a tenderer that relies on the capacities of another entity which, during that procedure, ceases to have the required capacities — Interpretation of national law in conformity with EU law — Principle of proportionality — Force majeure)

1. This request for a preliminary ruling concerns the interpretation of Article 47(2) and Article 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination

of procedures for the award of public works contracts, public supply contracts and public service contracts. (2)

2. In essence, the present proceedings concern the question whether those provisions preclude a national rule which provides for the automatic exclusion, from the tendering procedure, of a tenderer that has relied on the capacities of another entity which, during that procedure, ceases to have the required capacities ('the national rule in question').

I. Legal framework

A. EU law

1. Directive 2004/18

3. Article 47(2) of Directive 2004/18 ('Economic and financial standing'), provides:

> 'An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.'

4. Article 48(3) of the same directive ('Technical and/or professional ability'), states:

> 'An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.'

2. Directive 2014/24

5. Article 63(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (3) ('Reliance on the capacities of other entities'), states:

> 'With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.
>
> The contracting authority shall, in accordance with Articles 59, 60 and 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57. The contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.
>
> ...'

6. Under Article 90(1) of that directive ('Transposition and transitional provisions'):

‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016 …’

B. National law

7. Article 40 of Decreto legislativo 12 aprile 2006, n. 163, Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 of 12 April 2006, Code of public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC), (4) (‘Eligibility to carry out public works’), provides, inter alia, that:

‘1. Entities carrying out public works in any capacity must be duly authorised and must ensure that their activities comply with the principles of quality, professionalism and fairness. To that end, the goods, processes, services and business quality control systems used by those entities shall be subject to a system of certification in accordance with the legislation in force.

2. The regulation set out in Article 5 shall govern the single certification scheme for any entities carrying out, in any capacity, public works for an amount exceeding EUR 150 000, on the basis of the type and amount of the works. The regulation under Article 5 also allows the categories of certification to be periodically reviewed and to provide for possible new categories.’

8. Article 49 of Legislative Decree No 163/2006 (‘Reliance on the capacity of other entities’), provides, inter alia, that:

‘The tenderer, be it an individual or a member of a consortium or group within the meaning of Article 34, in a specific tendering procedure for a public works, services or supply contract, may fulfil the requirements relating to possession of economic, financial, technical and organisational capacity, or possession of an SOA certificate [a Certification Body certificate], by relying on the capacity of another entity or the SOA certificate of another entity.’

II. Facts, procedure and the question referred

9. By invitation to tender transmitted to the *Official Journal of the European Union* on 7 June 2013 and published in the *Gazzetta Ufficiale della Repubblica Italiana* (the Italian official journal) on 10 June 2013, the Provveditorato Interregionale per le opere pubbliche della Campania e del Molise (Interregional Authority for Public Works in Campania and Molise), launched an open tendering procedure for the award of a contract for the executive design, safety coordination at the planning stage and the execution of works for the project called ‘La Bandiera Blu’ relating to the Domitian coast area, to be awarded on the basis of the most economically advantageous tender. The works concerned mainly sewage and purification infrastructures.

10. Under that procedure, tenderers were required to demonstrate their technical and professional ability by presenting an SOA certificate corresponding to the nature and value of the works covered by the contract works falling under categories OG 6, Class VII (main category), and OS 22, Class VII.

11. The Raggruppamento Temporaneo d’Imprese (an ad hoc tendering consortium, ‘RTI’), formed by Casertana Costruzioni Srl and Qatar Costruzioni Srl, participated in that procedure. In order to meet the requirement concerning the relevant class of SOA certificate, they relied on the SOA certificates of two third-party undertakings. One of those undertakings was the Consorzio Stabile Grandi Attività Progettuali (‘Consorzio Stabile GAP’), which held the SOA certificate as regards category OS 22, Class VII.

12. On completion of the tendering procedure, the contract was awarded to the RTI Consorzio Stabile Infratech — SIBA SpA — Idroeco Srl, while the RTI Casertana Costruzioni — Qatar Costruzioni was ranked second best tenderer.

13. Casertana Costruzioni brought an action against that decision before the Tribunale amministrativo regionale per la Campania (Regional Administrative Court, Campania, Italy, ‘TAR Campania’), alleging that the successful tenderer should have been excluded from the tendering procedure. Consorzio Stabile Infratech

joined the proceedings and brought a counterclaim, maintaining that the RTI Casertana Costruzioni — Qatar Costruzioni ought to have been excluded from the tendering procedure because, in the course of that procedure, Consorzio Stabile GAP (the auxiliary undertaking of the principal Qatar Costruzioni), had ceased to be eligible for classification in relation to category OS 22, Class VII. By judgment of 27 March 2015, the TAR Campania upheld the counterclaim brought by Consorzio Stabile Infratech and thus dismissed Casertana Costruzioni's action.

14. Casertana Costruzioni lodged an appeal against the judgment of the TAR Campania before the Consiglio di Stato (Council of State, Italy). Before that court, Casertana Costruzioni alleged that an automatic exclusion of its RTI during the tendering procedure, on the ground that one of the auxiliaries had lost the required certification, without the possibility of replacing that undertaking, is incompatible with the EU rules on public procurement. In particular, Casertana Costruzioni invoked Article 47 of Directive 2004/18 and Article 63 of Directive 2014/24 as well as the principle of proportionality.

15. In those circumstances, having doubts as to the correct interpretation of EU law, the referring court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

> 'Do Article 47(2) and Article 48(3) of Directive 2004/18/EC, as replaced by Article 63 of Directive 2014/24/EU, preclude national rules which exclude, or may be construed as excluding, any possibility for an economic operator, that is to say a tenderer, of appointing another undertaking to replace the undertaking originally relied upon as "auxiliary undertaking" where the latter no longer has the capacity to participate or that capacity is diminished, thus resulting in the economic operator being excluded from the tendering procedure for reasons that are neither objectively nor subjectively imputable to it?'

16. Written observations have been submitted by Casertana Costruzioni, Consorzio Stabile Infratech, the Italian Government and the Commission. Consorzio Stabile Infratech and the Commission also presented oral argument at the hearing held on 15 March 2017.

III. Analysis

17. A number of preliminary remarks seem appropriate in order to identify the legal issues raised by the present proceedings.

18. Before the referring court, as well as in these proceedings, Casertana Costruzioni essentially argues that the EU rules on public procurement preclude national rules which provide for the automatic exclusion from the tendering procedure of a tenderer that has relied on the capacity of another entity which, in the course of that procedure, has lost the required capacity. In the view of Casertana Costruzioni, EU law requires Member States to permit the substitution of that entity with one which possesses the required capacity.

19. To my mind, the question whether a tenderer should be permitted to replace a third party on whose capacity it has relied cannot be examined in general. Three situations should be distinguished, depending on the point in time at which the loss of the required capacity occurs.

20. However, as regards the tender procedure at issue in the main proceedings, it is not clear exactly when Consorzio Stabile GAP lost the required capacity. This compels me to briefly discuss the three different scenarios below, focusing especially on the one that seems to be the most likely, on the basis of the information contained in the Court's file.

21. First, I would point out that, if a third party loses the required capacity *before* the time limit for receipt of the bids expires, the tenderer may always withdraw its bid and submit a new one in which it relies on the capacity of another third party. If the tenderer does not do that, however, its bid should be excluded: the offer does not meet the criteria and requirements set out in the contract notice.

22. Accordingly, there is no possibility of replacing a third party which, at the expiry of the time limit for receipt of the bids, does not have the required capacity. Permitting a tenderer to do so would be in clear

breach of Article 44(1) of Directive 2004/18. Thus, from that angle, the national rule in question does not appear incompatible with the provisions of Directive 2004/18.

23. Second, a different issue is whether a tenderer that has been awarded a contract is entitled to replace a third party on whose capacity it has relied, when that capacity was lost *after* the award. That is, however, an issue which is not raised in the present proceedings. Indeed, it is undisputed that Consorzio Stabile GAP lost the requisite capacity before the national authorities took any final decision on the award of the contract in question in the main proceedings.

24. A third scenario — which, if my understanding is correct, is the one relevant to the main proceedings — is the situation in which a third party loses the required capacity *after* the expiry of the time limit for receipt of the bids, but *before* the public authority makes the final award.

25. In that regard, I take the view that there is no EU rule or general principle of law that requires national authorities to permit tenderers, in that situation, to replace the third party that has lost the required capacity. For the reasons which follow, my view is that, also analysed from that angle, the national rule in question is compatible with EU law.

A. Applicability of Directive 2014/24

26. At the outset, it should be pointed out that the provisions of Directive 2014/24 are, in the main proceedings, not applicable *ratione temporis*.

27. According to settled case-law, in the field of public procurement the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time. (5)

28. In the main proceedings, the notice of the procurement procedure in question was published in June 2013. Directive 2014/24 was, however, adopted on 26 February 2014 and the period prescribed for its transposition expired on 18 April 2016, that is to say, after the Consiglio di Stato (Council of State) decided to make the present reference for a preliminary ruling.

29. It is, in fact, common ground between the parties that Directive 2014/24 is not applicable in the main proceedings.

B. Article 63 of Directive 2014/24 as a criterion of interpretation

30. Casertana Costruzioni nonetheless takes the view that Article 47(2) and Article 48(3) of Directive 2004/18 should be interpreted *in the light of* Article 63 of Directive 2014/24. It argues that that should be the case, in particular because the latter provision corresponds to Articles 47 and 48 of Directive 2004/18.

31. I do not find Casertana Costruzioni's arguments persuasive.

32. In *Partner Apelski Dariusz*, the Court emphasised that, in principle, an interpretation of an existing legal provision in the light of, for example, a provision not yet in force may be appropriate only where there is a need to '[dispel] a problem of interpretation concerning the content' of the former provision. Conversely, such a method of interpretation is pointless when there is no interpretative doubt concerning the provision in question which needs to be dispelled. (6)

33. That is the precisely the case here. To my mind, there is no need to have recourse to Article 63 of Directive 2014/24 in order to interpret Article 47(2) and Article 48(3) of Directive 2004/18 since the latter provisions are, as will be explained at points 40 to 43 below, by no means ambiguous.

34. Be that as it may, in *Partner Apelski Dariusz* the Court also dismissed an argument very similar to that put forward by Casertana Costruzioni. In that case too, one of the parties contended that Article 48(3) of Directive 2004/18 ought to be interpreted in the light of Article 63(1) of Directive 2014/24.

35. The Court, however, pointed out that ‘Article 63 of [Directive 2014/24] introduces substantial amendments as regards the right of an economic operator to rely on the capacities of other entities in the context of public contracts’. The Court went on to emphasise that ‘far from preserving the continuity of Article 48(3) of Directive 2004/18, and clarifying its scope, Article 63(1) of Directive 2014/24 introduces new conditions which were not provided for under the previous legislation’. In those circumstances, the Court concluded that Article 63(1) of Directive 2014/24 could not be used as a criterion for the interpretation of Article 48(3) of Directive 2004/18. A different approach would have ‘incorrectly anticipate[d] the application of the new legislation which differs from that laid down by Directive 2004/18, and … would be manifestly contrary to the principle of the legal certainty for economic operators’. (7)

36. The same reasoning is, *mutatis mutandis*, valid in the present proceedings. In permitting economic operators to replace entities which are to be excluded or which do not meet the relevant criteria, Article 63(1) of Directive 2014/24 manifestly introduces new elements as compared to the rules laid down in Article 47(2) and Article 48(3) of Directive 2004/18.

37. Nor is it possible to argue that the referring court is under an obligation to interpret the old directive in conformity with the new directive pursuant to the *Inter-Environnement Wallonie* case-law. (8) It is true that, in that line of case-law, the Court has held that, during the period prescribed for transposition of a directive, Member States must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive. (9)

38. However, that obligation to refrain from taking measures liable seriously to compromise the attainment of the result prescribed by a directive during its period for transposition cannot be understood as requiring the applicable national rules to be interpreted in conformity with that directive. As the Court made clear in *Adeneler*, ‘the general obligation owed by national courts to interpret domestic law in conformity with [a non-transposed] directive exists only once the period for its transposition has expired’. (10) In doing so, the Court refused to endorse the view of some Advocates General, who had suggested — precisely on the basis of the *Inter-Environnement Wallonie* case-law — that the obligation to interpret domestic law in conformity with non-transposed directives should apply even before expiry of the period prescribed for their implementation. (11)

39. Accordingly, in the present proceedings, Article 63 of Directive 2014/24 cannot be used as a criterion for the interpretation of Article 47(2) and Article 48(3) of Directive 2004/18.

C. Article 47(2) and Article 48(3) of Directive 2004/18

40. Article 47(2) and Article 48(3) of Directive 2004/18 confer on every economic operator the right to rely on, for a particular contract, the capacities of other entities, regardless of the nature of the links it has with them, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract. (12)

41. However, Directive 2004/18 does not contain any provision which expressly requires Member States to allow tenderers to replace economic entities on whose capabilities they have relied, when those entities are to be excluded or do not meet the relevant criteria. Nor is there any provision, in that directive, that could be read as implicitly containing such a rule or principle.

42. Thus, the possible replacement of third parties on which a tenderer has relied for the purposes of Articles 47(2) and 48(3) of Directive 2004/18 is an aspect which is, in principle, for the Member States to regulate. (13) It should not be forgotten, in this context, that Directive 2004/18 is an instrument of minimum harmonisation, (14) which leaves some regulatory discretion to the Member States for what is not expressly regulated therein.

43. Against that background, one could, however, wonder whether the national rule in question might nevertheless infringe Directive 2004/18, in particular in the light of the general principles of EU law.

44. That question should, to my mind, be answered in the negative. The arguments of Casertana Costruzioni, which invokes primarily the provisions of Directive 2004/18 as well as the principle of proportionality and a claim of *force majeure*, are unconvincing. On the contrary, it seems to me that such a rule is wholly in keeping with the provisions of Directive 2004/18, as interpreted by the Court.

1. The principles of equal treatment and transparency

45. According to settled case-law, the principles of equal treatment and non-discrimination and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure. That means, as a general rule, that a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification. (15)

46. However, the Court has explained that Directive 2004/18 does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious clerical errors. (16)

47. To my mind, allowing a tenderer to replace an entity on whose capabilities it sought to rely cannot be regarded either as a clarification of, or as the correction of clerical errors in, its tender. In point of fact, such a change appears to constitute an amendment of an important element of the tender which is, therefore, in principle not permissible.

48. That position has also been expressed in the recent Opinion of Advocate General Bobek in *Esaprojekt*,in which he approached the issue from the angle of Article 51 of Directive 2004/18. (17) He took the view that ‘a tenderer, in principle, cannot be permitted to demonstrate that it fulfils the technical and professional requirements of a tender by relying on the experience of third parties not referred to prior to the submission deadline’. In his view, by relying on a different third party, the tenderer alters ‘the very identity of the entities carrying out the work, or at least whose experience is being called upon to do so’. That constitutes, in his opinion, ‘a material change affecting a key element of the procedure’. (18)

49. Moreover, he considered that such a change may lead to the contracting authority being required to carry out additional checks and could even affect the choice of candidates being invited to present an offer. Furthermore, he noted that giving a tenderer a second chance to decide on which entities’ capabilities it wishes to rely, ‘could certainly procure it an advantage that would be at odds with the requirement of equal treatment’. (19)

50. I agree. I would also add that upholding Casertana Costruzioni’s argument would essentially amount to creating a judge-made rule that grants the possibility of amending bids at a late stage, a possibility which, in the light of the applicable national and EU rules, was not foreseeable by the other tenderers. As mentioned, that would hardly be reconcilable with the principle of equal treatment. Nor would it be compatible with the obligation of transparency incumbent upon the public authorities. Indeed, neither the Italian nor the EU rules in force at the material time provided for such a possibility. Nor was a specific provision on this point included in the invitation to tender.

51. In that regard, it should be pointed out that the principle of equal treatment ‘requires tenderers to be afforded equality of opportunity when formulating their bids, which therefore implies that the bids of all tenderers must be subject to the same conditions’. In turn, the obligation of transparency ‘is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question.’ (20)

52. That interpretation of Article 47(2) and Article 48(3) of Directive 2004/18 is, in my view, borne out by other judgments of the Court.

53. First, in *Wall*, the Court held that ‘a change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute [a substantial] amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract’. (21) In that regard, it is worthy of note that, in that case, the Court was dealing with a service concession contract: a sector not governed by any of the directives by which the EU legislature has regulated

the field of public procurement. Therefore, its findings on that point were based only on (now) Articles 49 and 56 TFEU. (22)

54. Interestingly, in his Opinion in the same case, Advocate General Bot emphasised that the change of a subcontractor (despite having been permitted in the contract) could be considered '[to alter] an essential term of the concession and [thus necessitate] a new tender procedure' because, in particular, 'the concession-holder [had] relied on the reputation and technical expertise of the subcontractor when submitting its tender'. (23)

55. The reasoning followed by the Court in *Wall* is a fortiori applicable in the present case. Indeed, the sector concerned by the main proceedings is governed by a specific directive: at the material time, Directive 2004/18. In addition, the loss of the required capacity occurred not after the award but at an earlier stage.

56. More importantly, as in *Wall*, in the main proceedings the change of a third party might have altered an essential term of the bid: Casertana Costruzioni needed to rely on the capabilities of that third party in order to be able to qualify for the tender.

57. Second, in *Idrodinamica Spurgo Velox and Others*,the Court ruled that a 'decision authorising the change in composition of the consortium to which the contract had been awarded necessitates an amendment of the award decision which may be regarded as substantial if, in the light of the particular features of the tender award procedure in question, it alters one of the essential elements that were decisive in the adoption of the award decision. In that situation, all relevant measures provided for by national law would have to be taken to remedy that irregularity, which might extend to a new award procedure.' (24)

58. The logic behind the Court's decision is the same as that in *Wall*. A tenderer may not alter an essential element of its bid after the submission. To my mind, the capabilities of a third party which allow a tenderer to participate in a tender procedure can hardly be regarded as a non-essential element of a bid. The conclusion might have been different, obviously, if the tenderer had itself the required capabilities or if it had relied, for the same requirement, on more than one entity having those capabilities. (25)

59. It is true that, in *Forposta*, the Court held that the EU rules on public procurement do not allow, in certain situations, national rules 'requiring the contracting authorities to automatically exclude an economic operator from a procedure for the award of a public contract'. (26) However, in that case, the national rules at issue went against the very wording of Directive 2004/18. (27)

60. Indeed, the legislation reviewed by the Court provided that a situation of 'grave professional misconduct' would lead to the automatic exclusion of an economic operator from a procedure for the award of a public contract in progress, when, owing to circumstances for which that economic operator was responsible, the contracting authority had annulled or terminated a contract with that economic operator in the framework of a previous public contract. That situation was, however, expressly regulated in point (d) of the first subparagraph of Article 45(2) of Directive 2004/18. Thus, by altering the scope of the exclusion laid down in that provision, the Member State in question had exceeded the discretion it enjoyed under that directive.

61. Therefore, *Forposta* does not support the interpretation of Article 47(2) and Article 48(3) of Directive 2004/18 suggested by Casertana Costruzioni.

D. The principle of proportionality

62. Next, Casertana Costruzioni argues that the national rule in question infringes the principle of proportionality. It takes the view that such a rule goes beyond what is necessary to achieve the aims pursued by Directive 2004/18, including that of opening up the public procurement market for all economic operators, regardless of their size.

63. In that regard, it suffices to observe that, if the public procurement rules do pursue the aim of opening up the public procurement market for all economic operators, including small and medium-sized enterprises (SMEs), (28) that aim is obviously to be reconciled with the other aims pursued by that directive as well as with certain key principles underlying the legal framework which that directive brings about.

64. As explained in points 45 to 51 above, the interpretation of Article 47(2) and Article 48(3) of Directive 2004/18 proposed by Casertana Costruzioni does not appear to be consistent with the principles of equal treatment and transparency. Those are two principles of the utmost importance in the context of the EU public procurement rules. (29)

65. In any event, I can hardly see how the principle of proportionality can lend support to the interpretation of Article 47(2) and Article 48(3) of Directive 2004/18 put forward by Casertana Costruzioni. To put it very simply, Casertana Costruzioni does not actually propose reading those provisions in the light of that principle. Rather, it refers to that principle as a means of introducing a new rule which does not flow from those provisions: a rule which has, in fact, only been introduced by Directive 2014/24.

E. Force majeure

66. Last, it is only in passing that I shall deal with the argument, put forward by Casertana Costruzioni, concerning a possible situation of *force majeure*. In essence, that undertaking argues that a tenderer cannot be held responsible for the loss by a third party of the required capacity during the course of the tender process, when that loss is due to events which the tenderer cannot foresee and which are beyond its control.

67. That argument deserves short shrift. The threshold for a case of *force majeure* — if that principle is at all applicable to the situation at hand, which I doubt — is very high, and clearly not met in the present case.

68. According to settled case-law, *force majeure* ‘presupposes that the external cause relied on by individuals has consequences which are inexorable and inevitable to the point of making it objectively impossible for the persons concerned to comply with their obligations’. (30)

69. It seems obvious to me that tenderers are — and should be — responsible for the choices they make as regards the entities on whose capabilities they wish to rely. Those choices are business decisions of great significance. A prudent tenderer needs to assess carefully and verify the capabilities of its potential business partners. In relying on them, it makes a commitment vis-à-vis the contracting authority. It cannot be argued that the possibility that a third party might lose the capabilities required for a certain public certification is inexorable or inevitable.

70. As the Court held in *Swm Costruzioni 2 and Mannocchi Luigino*, Article 47(2) and Article 48(3) of Directive 2004/18 permit tenderers to rely on the capacities of more than one third-party entity in order to prove that they meet a minimum capacity level. Thus, a prudent tenderer might consider, when submitting a bid, relying on the capabilities of more than one entity in order to avoid the negative consequences that would arise in the event of one of those entities losing the required capacity. (31)

71. A lax attitude towards the possibility for tenderers of changing their business partners would in fact give an unfair advantage to irresponsible and negligent undertakings over prudent and observant ones. Arguably, retaining an undertaking capable of ensuring — not only for the present but also for the future — the necessary solidity, stability and professionalism may be more expensive than retaining an undertaking which does not have those qualities.

72. In the light of the foregoing, I take the view that a national provision such as the national rule in question is not precluded by Articles 47 and 48 of Directive 2004/18.

IV. Conclusion

73. In conclusion, I propose that the Court answer the question referred for a preliminary ruling by the Consiglio di Stato (Council of State, Italy) as follows:

> On a proper construction, Articles 47 and 48 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts do not preclude a national rule which automatically excludes, from the tendering procedure, a tenderer that has relied on the capacities of another entity where that entity subsequently loses the required capacities.

1 Original language: English.

2 OJ 2004 L 134, p. 114, and corrigendum, OJ 2004 L 351, p. 44.

3 OJ 2014 L 94, p. 65.

4 GURI General Series No 100 of 2 May 2006.

5 See judgment of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 31 and the case-law cited. So far as concerns Directive 2014/24, see judgments of 26 March 2015, *Ambisig*, C-601/13, EU:C:2015:204, paragraph 24; and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 31.

6 Judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 92.

7 Ibid., paragraphs 87 to 94.

8 Judgment of 18 December 1997, *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628.

9 Ibid., paragraph 45. More recently, see also judgment of 4 May 2016, *Commission* v *Austria*, C-346/14, EU:C:2016:322, paragraph 50.

10 Judgment of 4 July 2006, *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraph 115.

11 See Opinion of Advocate General Jacobs in *Hansa Fleisch Ernst Mundt*, C-156/91, EU:C:1992:279, point 23; Opinion of Advocate General Tizzano in *Mangold*, C-144/04, EU:C:2005:420, point 120; and Opinion of Advocate General Kokott in *Adeneler and Others*, C-212/04, EU:C:2005:654, point 42 et seq.

12 Judgment of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 29.

13 See, to that effect, by analogy, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 35.

14 Opinion of Advocate General Trstenjak in *Commission* v *Germany*, C-160/08, EU:C:2010:67, footnote 43 and the case-law cited.

15 See judgments of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 31; and of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 62.

16 See, inter alia, judgment of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 40.

17 Article 51 of Directive 2004/18 (‘Additional documentation and information’) provides: ‘The contracting authority may invite economic operators to supplement or clarify the certificates and documents

submitted pursuant to Articles 45 to 50.’

---

18 Opinion of Advocate General Bobek in *Esaprojekt*, C-387/14, EU:C:2016:899, points 29 and 30.

---

19 Ibid., point 31.

---

20 See judgment of 6 November 2014, *Cartiera dell’Adda*, C-42/13, EU:C:2014:2345, paragraph 44 and the case-law cited.

---

21 Judgment of 13 April 2010, *Wall*, C-91/08, EU:C:2010:182, paragraph 39.

---

22 Ibid., paragraph 33.

---

23 See Opinion of Advocate General Bot in *Wall*, C-91/08, EU:C:2009:659, points 63 to 67.

---

24 Judgment of 8 May 2014, *Idrodinamica Spurgo Velox and Others*, C-161/13, EU:C:2014:307, paragraph 39.

---

25 See, by analogy, judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraphs 43 and 44.

---

26 Judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 41.

---

27 Ibid., paragraphs 37 to 40.

---

28 See, for example, Opinion of Advocate General Jääskinen in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:130, point 33.

---

29 See, for example, Article 2 of Directive 2004/18.

---

30 See, inter alia, judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 31 and the case-law cited.

---

31 Judgment of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 30 to 32.

EU:C:2018:194

JUDGMENT OF THE COURT (Grand Chamber)

20 March 2018 (*)

(Failure of a Member State to fulfil obligations — Directives 92/50/EEC and 2004/18/EC — Public service contracts — State printing office — Production of identity documents and other official documents — Award of contracts to an undertaking governed by private law without a procurement procedure first being conducted — Special security measures — Protection of the essential interests of the Member States)

In Case C-187/16,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 4 April 2016,

European Commission, represented by A. Tokár and B.-R. Killmann, acting as Agents,

applicant,

v

Republic of Austria, represented by M. Fruhmann, acting as Agent,

defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, L. Bay Larsen (Rapporteur), T. von Danwitz, J.L. da Cruz Vilaça, A. Rosas and J. Malenovský, Presidents of Chambers, E. Juhász, A. Borg Barthet, D. Šváby, M. Berger, A. Prechal, C. Lycourgos, M. Vilaras and E. Regan, Judges,

Advocate General: J. Kokott,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 7 June 2017,

after hearing the Opinion of the Advocate General at the sitting on 20 July 2017,

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that, first, by awarding service contracts for the production of documents such as chip passports, emergency passports, residence permits, identity cards, fireworks display permits, credit card-sized driving licences and credit card-sized vehicle registration certificates directly to Österreichische Staatsdruckerei GmbH (‘ÖS’) and, second, by maintaining national provisions which require contracting authorities to award those service contracts directly to that company, the Republic of Austria has failed to fulfil its obligations under Articles 49 and 56 TFEU, Article 4 and Article 8 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), read in conjunction with Articles 11 to 37 of that directive, and Article 14 and Article 20 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), read in conjunction with Articles 23 to 55 of that directive.

Legal context

EU law

2 For the award of public contracts which have as their object ‘publishing and printing services on a fee or contract basis’, both Directive 92/50 and Directive 2004/18 require the conduct of award procedures in accordance with EU law.

Directive 92/50

3 The 14th recital of Directive 92/50 is worded as follows:

‘Whereas … in the field of services, the same derogations as in [Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682)] and [Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1)] should apply as regards State security or secrecy and the priority of other procurement rules such as those pursuant to international agreements, those concerning the stationing of troops, or the rules of international organisations’.

4 Article 1(a) of that directive provides, inter alia, that ‘*public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority’.

5 Article 3(1) of that directive states:

‘In awarding public service contracts … contracting authorities shall apply procedures adapted to the provisions of this Directive.’

6 Article 4(2) of that directive provides:

‘This Directive shall not apply to services which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State’s security so requires.’

7 Article 8 of Directive 92/50 provides:

‘Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.’

8 Titles III to VI contain Articles 11 to 37 of that directive.

9 Annex I A to that directive covers inter alia, in Category No 15, ‘Publishing and printing services on a fee or contract basis’.

Directive 2004/18

10 Article 14 of Directive 2004/18, entitled ‘Secret contracts and contracts requiring special security measures’, provides:

‘This Directive shall not apply to public contracts when they are declared to be secret, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of that Member State so requires.’

11 Article 20 of that directive, entitled ‘Service contracts listed in Annex II A’, provides:

‘Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.’

12 That annex covers inter alia, in Category No 15, ‘Publishing and printing services on a fee or contract basis’.

Regulation (EC) No 2252/2004

13 In accordance with Article 3(2) of Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ 2004 L 385, p. 1):

‘Each Member State shall designate one body having responsibility for printing passports and travel documents. It shall communicate the name of that body to the Commission and the other Member States. The same body may be designated by two or more Member States. Each Member State shall be entitled to change its designated body. It shall inform the Commission and the other Member States accordingly.’

Austrian law

The StDrG

14 Paragraph 1a of the Bundesgesetz zur Neuordnung der Rechtsverhältnisse der Österreichischen Staatsdruckerei (Federal law on the reorganisation of the legal relationships of the ÖS, *Bundesgesetzblatt* I, 1/1997, ‘the StDrG’) is worded as follows:

‘… The company … shall trade under the name “Österreichische Staatsdruckerei GmbH”; it shall undertake the manufacture of print products for the federal offices in the manufacturing process for which secrecy or compliance with security rules (security printing) is necessary. …’

15 Paragraph 2(2) of the StDrG provides:

‘The company shall undertake, in any event, the following tasks:

> 1. The manufacture of print products for the federal offices in the manufacturing process for which secrecy or compliance with security rules (security printing) is necessary …’

16 Paragraph 2(3) of the StDrG provides:

‘The federal bodies shall entrust [ÖS] exclusively … with the manufacture of the products referred to in Paragraph 2(2)(1) … unless, for factual or legal reasons, [that] company is unable duly to carry out these tasks at a reasonable price, or if the product in question is offered to a federal body by a third party, with the same supply and contractual conditions, at a lower price. …’

17 Under the heading ‘Supervision of security printing’, Paragraph 6(1) of the StDrG provides that business and work processes relating to the manufacture, processing and storage of security printing products are subject to supervision by the federal minister responsible for the security printing product in question.

18 In accordance with Paragraph 6(2) of the StDrG, ÖS is required to take all security measures in connection with the manufacture, processing and storage of security printing products that are necessary to prevent abuse.

19 Pursuant to Paragraph 6(3) of that law, ÖS must grant the federal minister responsible for the security printing product in question access to its business premises and an opportunity to inspect the relevant business records in so far as is necessary for the purposes of supervision.

The ministerial regulation relating to passports

20 The production of chip passports, which include service passports and diplomatic passports, of identity cards and of emergency passports is governed by the Verordnung der Bundesministerin für Inneres über die Gestaltung der Reisepässe und Passersätze (Regulation of the Federal Minister for the Interior on

the design of passports and passport substitutes, *Bundesgesetzblatt* 861/1995, ‘the ministerial regulation relating to passports’).

21 Annexes A, D and E to the ministerial regulation relating to passports contain specimens of the passports, service passports and diplomatic passports to be produced, which contain on their last page the reference ‘PRINT by ÖSD’.

22 As regards, more specifically, identity cards, Paragraph 5 of the ministerial regulation relating to passports provides for their protection against counterfeiting or forgery.

23 It thus follows from an application of Paragraph 2(3) of the StDrG in conjunction with the ministerial regulation relating to passports that, subject to the exceptions set out in that provision, chip passports, identity passports and emergency passports must be produced by ÖS.

The ministerial regulation relating to residence permits

24 Pursuant to Paragraph 3(3), Paragraph 10a(2) and Paragraph 10c(2) of the Verordnung der Bundesministerin für Inneres zur Durchführung des Niederlassungs- und Aufenthaltsgesetzes (Regulation of the Federal Minister for the Interior implementing the Law on settlement and residence, *Bundesgesetzblatt* II, 451/2005), registration certificates, documents certifying permanent residence, certificates attesting submission of an application and documents certifying lawful residence must be produced exclusively by ÖS.

The ministerial regulation relating to credit card-sized driving licences

25 The format of credit card-sized driving licences is governed by the Verordnung des Bundesministers für Wissenschaft und Verkehr über die Durchführung des Führerscheingesetzes (Regulation of the Federal Minister for Science and Transport on the implementation of the Law on driving licences, *Bundesgesetzblatt* II, 320/1997).

26 In accordance with Paragraph 1(2) of that ministerial regulation, driving licences must contain features protecting them against counterfeiting or forgery.

27 That provision also states that credit card-sized driving licences can be produced only by a service provider designated by the competent federal minister.

28 In view of Paragraph 2(3) of the StDrG, subject to the exceptions set out in that provision, that service provider can only be ÖS.

The ministerial regulation relating to credit card-sized vehicle registration certificates

29 The format of credit card-sized vehicle registration certificates is governed by the Verordnung des Bundesministers für Wissenschaft und Verkehr, mit der Bestimmungen über die Einrichtung von Zulassungsstellen festgelegt werden (Regulation of the Federal Minister for Science and Transport on the establishment of vehicle registration offices, *Bundesgesetzblatt* II, 464/1998).

30 Paragraph 13(1a) of that ministerial regulation provides for features protecting those vehicle registration certificates against counterfeiting or forgery.

31 Paragraph 13(3) of that ministerial regulation states that vehicle registration certificates can be produced only by a service provider designated by the competent federal minister.

32 In view of Paragraph 2(3) of the StDrG, subject to the exceptions set out in that provision, that service provider can only be ÖS.

The ministerial regulation relating to fireworks display permits

33 In accordance with Paragraph 8 of the Verordnung der Bundesministerin für Inneres über die Durchführung des Pyrotechnikgesetzes 2010 (Regulation of the Federal Minister for the Interior on the implementation of the Law on fireworks 2010, *Bundesgesetzblatt* II, 499/2009), the application form

for a fireworks display permit must conform to the specimen in Annex II to that regulation. That specimen requires the application to be addressed to ÖS.

34 Paragraph 9 of that regulation provides for the protection of fireworks display permits against counterfeiting or forgery.

Pre-litigation procedure

35 By its letter of formal notice dated 6 April 2011, the Commission made the Republic of Austria aware of its doubts as to the compatibility with the FEU Treaty and with Directives 92/50 and 2004/18 of the direct award to ÖS of certain public service contracts relating to the printing of official documents, namely, chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences, paper and credit card-sized vehicle registration certificates, fireworks display permits, boatmasters' certificates, security document forms, labels for narcotic substances and moped licences.

36 In that regard, the Commission specified that ÖS, a company governed by private law, provided, by the printing of those documents, a supply of services which should have been awarded in accordance with Directive 92/50 or Directive 2004/18, to the extent that the supply falls within the scope of one of those directives, or in conformity with the freedom of establishment and the freedom to provide services as enshrined in Articles 49 and 56 TFEU, to the extent that it does not fall within the scope of those directives.

37 In its reply of 7 June 2011, the Republic of Austria argued that the service contracts in question protect its essential security interests and consequently do not fall within the scope of either the FEU Treaty or Directives 92/50 and 2004/18. It added that the direct award to ÖS alone of the printing contracts for the documents in question was justified by the need to protect secret information, to safeguard the authenticity and veracity of those documents, to ensure the provision of those documents and to guarantee the protection of sensitive data.

38 By letters of 17 July 2012 and 28 March 2013, the Republic of Austria supplemented its reply to the letter of formal notice.

39 Taking the view that the responses provided by that Member State were unsatisfactory, the Commission, by letter of 11 July 2014, sent it a reasoned opinion. In that reasoned opinion, the Commission stated that the Republic of Austria had not proved that the direct award to ÖS of the printing contracts for chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences, credit card-sized vehicle registration certificates and fireworks display permits was justified by the protection of its security interests, and that it was possible to organise a public call for tenders in such a way that only undertakings which specialised in the printing of documents subject to special security requirements and were supervised accordingly could be considered.

40 On the other hand, the Commission withdrew its complaints in relation to moped licences, paper vehicle registration certificates, boatmasters' certificates, security document forms and labels for narcotic substances, either because those documents had been abolished or because their production was put out to tender.

41 The Republic of Austria responded to the reasoned opinion by letter of 10 September 2014. In essence, that Member State again relied on national security interests and emphasised that the performance of the printing contracts in question was closely linked to public order and the institutional operation of that State. It argued in particular that the observance of security requirements could be enforced against undertakings other than ÖS only by means of civil law, whereas, by law, the Austrian public authorities enjoyed special supervisory powers in relation to ÖS.

42 As regards the printing contracts for fireworks display permits, the Republic of Austria stated that the value of those contracts is so small that their performance is not of interest to other undertakings, with the result that the award of those contracts does not fall within the scope of the freedoms enshrined in the FEU Treaty.

43 Since it was not satisfied with the responses provided by the Republic of Austria, the Commission brought the present action.

The action

44 The action brought by the Commission relates to, first, printing service contracts for chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences and credit card-sized vehicle registration certificates and, second, a printing service contract for fireworks display permits.

The printing service contracts for chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences and credit card-sized vehicle registration certificates

Arguments of the parties

45 The Commission notes that, since the estimated value of the contracts in question exceeds the thresholds applicable pursuant to Directives 92/50 and 2004/18, those contracts fall within the material scope of those directives. Consequently, in relation to those contracts, the procurement procedures provided for in Article 8 of Directive 92/50, read in conjunction with Articles 11 to 37 of that directive, and in Article 20 of Directive 2004/18, read in conjunction with Articles 23 to 55 of that directive, should have been applied by the Republic of Austria.

46 The Commission argues, in essence, that the derogations laid down in Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, relied on by the Republic of Austria, must be interpreted strictly.

47 Furthermore, those articles cannot confer on the Member States the power to derogate from the provisions of the FEU Treaty or from Directives 92/50 and 2004/18 by simply invoking their essential security interests.

48 Accordingly, the mere assertion by the Republic of Austria that the service contracts in question require special security measures or that a derogation from the provisions of EU law is necessary to protect the essential security interests of that Member State is insufficient to show the existence of circumstances justifying the application of Article 4(2) of Directive 92/50 or Article 14 of Directive 2004/18.

49 Furthermore, the Commission states that ÖS is a limited liability company governed by private law, the sole shareholder of which is Österreichische Staatsdruckerei Holding AG whose shares are listed on the stock market and held by private individuals. Moreover, unlike the earlier legislative provisions, the StDrG no longer contains any special mechanism for State supervision. At the hearing, the Commission explained in that regard that the Austrian authorities are vested with supervisory powers which are stipulated in a contract entered into with ÖS.

50 According to the Commission, the Republic of Austria does not show that a call for tenders is completely impossible on the basis that it would seriously undermine compliance with the obligation of confidentiality and the security and supervision arrangements. Whilst the need to safeguard the authenticity and veracity of documents serving as proof of the identity of individuals, to protect personal data, and to guarantee supply for the purposes of the printing of the documents concerned is a matter of public interest, such an interest, however, does not systematically correspond to an essential security interest.

51 As regards the need for a guaranteed supply of official documents, pleaded by the Republic of Austria, the Commission considers that such a guarantee is not a security interest and may be achieved, where appropriate, by entering into a number of framework contracts.

52 The Commission accepts that a Member State may take measures to avoid the forgery of official documents. Nevertheless, there is nothing to indicate that those objectives would be undermined if the printing of documents were assigned to other printing companies, even those located in other Member States, since the confidentiality of the processed data necessary for the printing of those documents

may be guaranteed by an obligation of confidentiality on the part of the undertakings taking part in an award procedure.

53 The centralised performance of the contracts in question can be achieved by making the printing of all secure documents subject to a call for tenders since the opportunities for supervision by the Austrian authorities can be included in the contract entered into with the successful undertaking.

54 As regards confidence in the undertaking carrying out the printing service in relation to residence permits, the Commission contends that the argument put forward by the Republic of Austria cannot be accepted since the Austrian authorities can also award printing contracts for secure documents to undertakings other than ÖS, in particular when the latter is not in a position to perform those contracts.

55 The Republic of Austria disputes the claim that it has failed to fulfil its obligations. It argues that, pursuant to Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, the contracts in question do not fall within the scope of those directives. It is entitled to protect its essential security interests and to attach special security measures to the performance of the contracts in question, in accordance with the legal and administrative provisions in force in Austria.

56 At the hearing, the Republic of Austria stated that the derogations laid down in Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18 apply irrespective of the derogation laid down in Article 346(1)(a) TFEU.

57 It notes, in essence, that security policy is an essential element of State sovereignty and that it is for the Member States to define their essential security interests and to determine whether security measures are necessary, the Member States having wide discretion in that regard.

58 The Republic of Austria highlights certain aspects of its essential interests in the field of public security which are important when printing secure documents. In that regard, it is necessary, according to it, first, to safeguard the authenticity and veracity of the documents serving to prove the identity of a person since identity documents are documents which are closely linked to the public order and institutional operation of the State. Next, it is necessary to ensure the protection of the sensitive personal data. Lastly, it is also a question of ensuring security of supply.

59 In the first place, as regards the need to safeguard the authenticity and veracity of identity documents, the Republic of Austria argues that that imperative requires a high technical level of security to be set in order to avoid any risk of forgeries, in particular in the context of the fight against terrorism and crime.

60 In the second place, as regards the protection of sensitive personal data, since identity documents contain such information, in particular biometric data, the protection of those documents requires high security requirements. In that regard, the Republic of Austria disputes the Commission’s argument that only individual interests are at issue here since, according to that Member State, interference with such data should, on the contrary, be regarded as being, in particular in the context of the fight against terrorism, a threat to internal public security and accordingly should be prevented by all possible means.

61 In the third place, the quick receipt of the official documents in question requires the State to have a guaranteed supply. If undertakings other than ÖS were entrusted with the printing of identity documents that would have a lasting negative effect on the Republic of Austria’s security strategy since, if it were impossible to provide the number of passports necessary, provisional passports would admittedly be printed, but in less secure conditions.

62 The Republic of Austria submits that, in a context of terrorist threats and activity, only a printing company under the effective supervision of the State must be empowered to produce identity documents.

63 The Republic of Austria notes that the centralisation of all relevant supplies in the field of security in the hands of a single supplier also constitutes an essential element of security strategy. In that regard, it argues that it is clear from Article 3(2) of Regulation No 2252/2004 and, more specifically, from the requirement to designate ‘one body having responsibility for printing passports and travel documents’,

that such documents cannot be manufactured by more than one body. Furthermore, in order to avoid sensitive security information from being spread, a centralisation of printing for the documents in question is an appropriate measure.

64 According to the Republic of Austria, the strategy that it pursues, which consists in awarding the contracts at issue to a single contractor having its production site or sites in Austria, seeks, in the first place, to prevent knowledge of the security measures being spread among other contractors, whether they operate in Austria or in another Member State.

65 In the second place, such an award has the objective of more effective supervision of that printing company by the national authorities in the exercise of their administrative supervisory powers. The Republic of Austria argues that supervision implemented judicially, which would result in penalties for a failure to comply with the security conditions under contractual provisions following potentially protracted proceedings, would not be as effective as State supervision.

66 With regard to the Commission's complaint that it is for the Republic of Austria to show that a call for tenders is completely impossible, that Member State argues that neither Article 4(2) of Directive 92/50 nor Article 14 of Directive 2004/18 contains such a condition.

67 Furthermore, the Republic of Austria did not merely invoke interests relating to its security, but identified the interests to be protected and the measures taken for the protection of those interests.

68 Lastly, at the hearing, the Republic of Austria argued that the contracts in question cannot be performed in the context of a call for tenders since undertakings established in other Member States cannot entirely escape intervention by the authorities of their respective States and those undertakings are sometimes required to cooperate with those authorities or the intelligence services of those States, which would be the case even if they performed the contracts from an establishment located in Austria, with the result that sensitive information would be at risk of being disclosed.

Findings of the Court

69 It should be noted at the outset that, as is clear from the case file before the Court, since the first contracts awarded to ÖS which are the subject matter of the present action date from 2004, those contracts may fall within the scope of Directive 92/50, while the contracts awarded to that undertaking between 31 January 2006 and 12 September 2014, when the period prescribed in the reasoned opinion expired, may fall within the scope of Directive 2004/18, the latter directive having repealed and replaced the relevant provisions of Directive 92/50 from 31 January 2006.

70 Moreover, first, the contracts in question are contracts which have as their object services referred to in Annex I A to Directive 92/50 and Annex II A to Directive 2004/18 and, more specifically, publishing and printing services on a fee or contract basis. Second, it is agreed between the parties that the estimated value of those contracts exceeds the thresholds for the application of those directives.

71 Pursuant to Article 8 of Directive 92/50, read in conjunction with Articles 11 to 37 of that directive, and Article 20 of Directive 2004/18, read in conjunction with Articles 23 to 55 of that directive, given that the printing of the documents in question constitutes a publishing and printing service on a fee or contract basis, that service is, in principle, subject to the obligation to conduct a procurement procedure in accordance with the requirements of those articles.

72 However, first, under Article 346(1)(a) TFEU, no Member State is to be obliged to supply information the disclosure of which it considers to be contrary to its essential security interests. As the Advocate General observed in point 42 of her Opinion, that provision, given the general nature of its wording, is intended to apply, inter alia, in the field of non-military public contracts, such as the printing contracts in question in the present action.

73 Second, it is clear from Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, which are drafted in almost identical terms, that those directives do not apply to services when, inter alia, their execution must be accompanied by special security measures in accordance with the laws, regulations

or administrative provisions in force in the Member State concerned or when the protection of that Member State's essential interests so requires.

74 Those derogations are relied on in the present proceedings by the Republic of Austria in order to justify the direct award to ÖS of the printing service contracts in question.

75 In that regard, it should be noted that, as the Republic of Austria argues, it is for the Member States to define their essential security interests and, in the present case, for the Austrian authorities to define the security measures necessary for the protection of the public security of that Member State in the context of the printing of identity documents and other official documents such as those at issue in the present case (see, by analogy, judgment of 16 October 2003, *Commission* v *Belgium*, C-252/01, EU:C:2003:547, paragraph 30).

76 Nevertheless, it should also be noted that, as the Court has previously held, measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of EU law solely because they are taken, inter alia, in the interests of public security (see, to that effect, judgment of 8 April 2008, *Commission* v *Italy*, C-337/05, EU:C:2008:203, paragraph 42 and the case-law cited).

77 Moreover, the derogations at issue in the present action must, in accordance with the settled case-law relating to derogations from fundamental freedoms, be interpreted strictly (see, by analogy, as regards Article 346(1)(b) TFEU, judgment of 7 June 2012, *Insinööritoimisto InsTiimi*, C-615/10, EU:C:2012:324, paragraph 35 and the case-law cited).

78 Furthermore, even though Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, upon which the Republic of Austria principally relies, afford the Member States discretion in deciding the measures considered to be necessary for the protection of their essential security interests, those articles cannot, however, be construed as conferring on Member States the power to derogate from the provisions of the FEU Treaty simply by invoking those interests. A Member State which wishes to avail itself of those derogations must show that such derogation is necessary in order to protect its essential security interests. Such a requirement also applies to the extent that that Member State relies, in addition, on Article 346(1)(a) TFEU (see, by analogy, judgment of 4 September 2014, *Schiebel Aircraft*, C-474/12, EU:C:2014:2139, paragraph 34).

79 Accordingly, a Member State which wishes to avail itself of those derogations must establish that the protection of such interests could not have been attained within a competitive tendering procedure as provided for by Directives 92/50 and 2004/18 (see, by analogy, judgment of 8 April 2008, *Commission* v *Italy*, C-337/05, EU:C:2008:203, paragraph 53).

80 In the present case, although the Republic of Austria has admittedly identified the essential security interests which it considers must be protected and the guarantees inherent in the protection of those interests, it is however necessary to verify, having regard to what is noted in paragraph 75 and 76 above, whether that Member State has shown that the objectives it pursues could not have been attained within a competitive tendering procedure as provided for by those two directives.

81 In that regard, the Republic of Austria submits, in the first place, that the protection of essential national security interests necessitates the centralised performance of the printing contracts for official documents by means of their award to a single undertaking.

82 While accepting that the centralised performance of the contracts in question could be regarded, for the reasons put forward by the Republic of Austria, as a means of protecting its essential national security interests, it should be noted that compliance with the procurement procedures laid down, respectively, in Article 8 of Directive 92/50, read in conjunction with Articles 11 to 37 of that directive, and in Article 20 of Directive 2004/18, read in conjunction with Articles 23 to 55 of that directive, does not preclude the performance of the contracts in question from being entrusted to a single operator.

83 Although, as the Republic of Austria notes, the Member States have an obligation to comply with the requirements of Article 3(2) of Regulation No 2252/2004, which requires them to designate a single body having responsibility for printing passports and travel documents, that provision confines itself to

laying down an obligation to designate such a single body, without ruling out in any way a procurement procedure first being conducted for the purposes of such designation.

84 As regards, in the second place, the Republic of Austria's argument alleging the need for the Austrian authorities to be able to ensure, in the exercise of the powers conferred on them by Paragraph 6(3) of the StDrG, effective administrative supervision of a single contractor having its production and storage premises in the territory of that Member State, in the present case supervision of ÖS, it should be noted that, although, admittedly, the contractor entrusted with performance of the printing contract in question must meet the security requirements in order to ensure the confidentiality of the information to be protected, the Republic of Austria does not show that the administrative supervision of ÖS that may be carried out by the Austrian authorities pursuant to that provision is the only means of ensuring that confidentiality and that it is necessary, to that end, to dispense with the application of the provisions relating to public procurement laid down by Directives 92/50 and 2004/18.

85 In that regard, it does not appear that such administrative supervision could not be exercised over undertakings established in Austria other than ÖS. Furthermore, the Republic of Austria does not show that verification of respect for the confidentiality of the information which would be communicated for the printing of the official documents at issue would be less well safeguarded if that printing were awarded, in the context of a tendering procedure, to other undertakings having confidentiality and security arrangements imposed on them under a contractual mechanism subject to the rules of private law, whether those undertakings are established in Austria or in other Member States.

86 In particular, it would be possible to require the contractual partner chosen in the context of a procurement procedure to accept security controls, visits or inspections at the premises of that undertaking, regardless of whether the undertaking is established in Austria or in another Member State, or to comply with technical requirements as regards confidentiality, even particularly high ones, in the performance of the contracts in question.

87 As regards, in the third place, the requirement, relied on by the Republic of Austria, to ensure guaranteed provision, it should be noted that, whilst the official documents in question are closely linked to public order and the institutional operation of the State, which require that guaranteed provision be ensured, that Member State has, however, failed to show that the supposed objective could not be ensured in the context of a call for tenders and that such guaranteed provision would be jeopardised if the printing of those documents were entrusted to other undertakings, including, as the case may be, undertakings established in other Member States.

88 As regards, in the fourth place, the need to guarantee the trustworthiness of the successful tenderer, although the Member States need to be able to satisfy themselves that, for the award of public contracts such as those at issue in the present case, only reliable undertakings are awarded those contracts within the framework of a system which ensures compliance with special secrecy and security standards as regards the printing of the documents in question, the Republic of Austria has not, however, established that the confidentiality of the data communicated could not be sufficiently guaranteed if the printing of those documents were awarded to an undertaking other than ÖS following a tendering procedure.

89 In that regard, it should be noted that the Court has held that the requirement to impose an obligation of confidentiality does not in itself prevent the use of a competitive tendering procedure for the award of a contract (see, to that effect, judgment of 8 April 2008, *Commission* v *Italy*, C-337/05, EU:C:2008:203, paragraph 52).

90 Furthermore, the Court has also held that the confidential nature of data can be protected by a duty of secrecy, without it being necessary to contravene public procurement procedures (see, by analogy, judgment of 5 December 1989, *Commission* v *Italy*, C-3/88, EU:C:1989:606, paragraph 15).

91 As the Advocate General noted in point 68 of her Opinion, there is nothing to prevent the contracting authority from imposing particularly high requirements for the suitability and reliability of contractors, formulating tender specifications and service contracts accordingly and requiring the necessary proof from potential candidates.

92 In that regard, the Republic of Austria argued at the hearing that there is a risk that sensitive information will be disclosed since undertakings established outside that Member State cannot entirely escape intervention by the authorities of their respective Member States, inasmuch as, in some cases, they are themselves required, pursuant to the laws applicable in those States, to cooperate with those authorities or with the intelligence services of those States, even when performing public contracts from an establishment located in Austria.

93 It must, however, be pointed out that it is permissible for the Austrian authorities to insert into the conditions governing calls for tenders for the award of the contracts in question clauses obliging the successful tenderer to maintain general confidentiality, and to stipulate that a candidate undertaking which is not in a position, due in particular to the law of its Member State, to provide sufficient guarantees as regards compliance with that obligation vis-à-vis the authorities of that State will be excluded from the award procedure. It is also permissible for the Austrian authorities to provide for the application of penalties against the successful tenderer, in particular contractual penalties, if there is a failure to comply with such an obligation during the performance of the contract in question.

94 In that regard, the Republic of Austria has not shown that the objective of preventing the disclosure of sensitive information relating to the production of the official documents in question could not have been achieved within a competitive tendering procedure as provided for, respectively, in Article 8 of Directive 92/50, read in conjunction with Articles 11 to 37 of that directive, and in Article 20 of Directive 2004/18, read in conjunction with Articles 23 to 55 of that directive.

95 It follows that the failure to comply with the procurement procedures laid down by those directives is disproportionate having regard to that objective.

96 In the light of all of the foregoing, Article 346(1)(a) TFEU, Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18 cannot be effectively relied on by the Republic of Austria in order to justify the failure to comply with the procurement procedures laid down by those two directives.

The printing service contract for fireworks display permits

Arguments of the parties

97 The Commission argues that, in so far as the value of the contract for producing fireworks display permits does not exceed the thresholds laid down by those directives, it must nonetheless be entered into in conformity with the principles laid down by the FEU Treaty, in particular the principles of freedom of establishment and the freedom to provide services.

98 According to the Commission, the general principles of equal treatment and non-discrimination on grounds of nationality, from which the obligation of transparency arises, require that that contract be the subject of a notice with a sufficient degree of publicity.

99 The Commission explains that, even if the value of a contract for the production of fireworks display permits seems relatively low, such a contract could, taking account of its technical characteristics, attract interest from undertakings in other Member States. There is therefore certain cross-border interest since the market of undertakings which produce secure identity documents is specialised, limited and internationalised and geographic proximity does not constitute a requirement for the performance of a contract for the production of secure documents.

100 Furthermore, the Commission highlights the fact that ÖS itself has been entrusted by a number of Member States with the printing of visas and passports, which is a strong indication of the existence of certain cross-border interest.

101 The Republic of Austria contends that, as regards a contract with a value below the threshold laid down by EU law, the fundamental principles relied on by the Commission do not apply. In view of the low value of that contract, certain cross-border interest is not established by the Commission.

102 In addition, the fact that ÖS manufactures secure documents for other Member States does not show that there is certain cross-border interest in the printing service contracts relating to fireworks display

permits.

Findings of the Court

103 It is agreed between the parties that the estimated value of the contract for the production of fireworks display permits is EUR 56 000, namely, an amount which is well below the thresholds laid down by Directives 92/50 and 2004/18 for public service contracts. Accordingly, there was no obligation flowing from those directives to conduct a procurement procedure.

104 Nonetheless, according to settled case-law, the award of contracts which, in view of their value, do not fall within the scope of the directives on the award of public contracts is subject to the fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts have certain cross-border interest (judgment of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 19 and the case-law cited).

105 In that regard, it should be noted that it is for the Commission to establish that the contract in question has certain interest for an undertaking located in a Member State other than that of the contracting authority in question, and the Commission is unable to rely on any presumption for that purpose (see, to that effect, judgment of 13 November 2007, *Commission* v *Ireland*, C-507/03, EU:C:2007:676, paragraphs 32 and 33 and the case-law cited).

106 With regard to the objective criteria which may indicate certain cross-border interest, the Court has previously held that such criteria may be, inter alia, the fact that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract and the specific characteristics of the products concerned (see, to that effect, judgment of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 20 and the case-law cited).

107 Whilst, as the Commission argued, the existence of such cross-border interest cannot be determined solely on the basis of the value of the contract, an overall assessment of other criteria and of all the relevant circumstances of the case being necessary, it should be noted that the contract for the production of fireworks display permits is distinguished not only by its relatively low value but also by its very technical nature, furthermore requiring compliance with special security measures with the costs that the implementation of such measures entails.

108 The argument put forward by the Commission, that the fact that ÖS has been entrusted by a number of foreign States with the printing of visas and passports is a strong indication of the existence of certain cross-border interest, is irrelevant with regard to the printing of fireworks display permits.

109 In those circumstances, the information provided by the Commission is not sufficient to show that that contract had certain cross-border interest.

110 Since the Commission has failed to prove its contentions, its action must be dismissed inasmuch as it relates to the printing service contract for the fireworks display permits in question.

111 In the light of all of the foregoing, it must be held that, first, by having awarded, without an EU-wide call for tenders, service contracts for the production of chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences and credit card-sized vehicle registration certificates directly to ÖS and, second, by maintaining national provisions which require contracting authorities to award those service contracts directly to that company, the Republic of Austria has failed to fulfil its obligations under Article 4(2) and Article 8 of Directive 92/50, read in conjunction with Articles 11 to 37 of that directive, and Article 14 and Article 20 of Directive 2004/18, read in conjunction with Articles 23 to 55 of that directive.

112 The action must be dismissed as to the remainder.

Costs

113 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

114 In the present case, the Commission and the Republic of Austria applied, respectively, for the other party to be ordered to pay the costs.

115 Under Article 138(3) of the Rules of Procedure, if it appears justified in the circumstances of the case, the Court may order one party, in addition to bearing its own costs, to pay a proportion of the other party's costs. In the present case, since the Commission's action has been successful, save as regards printing service contracts for fireworks display permits, the Republic of Austria should be ordered, pursuant to that provision, to bear its own costs and to pay four fifths of the Commission's costs.

116 The Commission must bear one fifth of its own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that, by having awarded, without an EU-wide call for tenders, service contracts for the production of chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences and credit card-sized vehicle registration certificates directly to Österreichische Staatsdruckerei GmbH and by maintaining national provisions which require contracting authorities to award those service contracts directly to that company, without an EU-wide call for tenders, the Republic of Austria has failed to fulfil its obligations under Article 4(2) and Article 8 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, read in conjunction with Articles 11 to 37 of that directive, and Article 14 and Article 20 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read in conjunction with Articles 23 to 55 of that directive;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Republic of Austria to bear its own costs and to pay four fifths of the costs of the European Commission, and the Commission to bear one fifth of its own costs.**

[Signatures]

---

* Language of the case: German.

EU:C:2017:578

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 20 July 2017 (1)

Case C-187/16

European Commission

v

Republic of Austria

(Failure of a Member State to fulfil obligations — Public service contracts — Directives 92/50/EEC, 2004/18/EC and 2009/81/EC — Article 346 TFEU — Need for special security measures — Protection of the State's essential security interests — Manufacture of identity documents and other official documents — Award of a contract to Österreichische Staatsdruckerei without first conducting a procurement procedure)

I. Introduction

1. It goes without saying that official documents such as biometric passports, identity cards, driving licences and residence permits must be manufactured in compliance with particular secrecy and security requirements, as the issue of such documents is an expression of the exercise of fundamental State functions. The documents are used as part of everyday life and the importance of public confidence in their authenticity and veracity is not to be underestimated. Consequently, highest priority is given to security of supply, protection against counterfeiting and responsible handling of these documents, including of data processed in their manufacture, and abuse must be effectively prevented. (2)

2. In these infringement proceedings, however, the Court will be required to clarify whether such considerations justify entrusting the manufacture of such documents, without any procurement procedure, exclusively to a certain undertaking which is considered to be particularly trustworthy.

3. Specifically, the European Commission alleges that, by reserving the manufacture of security-related documents exclusively for Österreichische Staatsdruckerei GmbH, a formerly State-owned undertaking which has now been privatised, the Republic of Austria has infringed EU public procurement law.

4. Going beyond the case at issue, the present proceedings are also significant because in them the Court will once again shed light on the leeway available to Member States to derogate from EU law where they rely on their essential national security interests within the meaning of Article 346(1) TFEU. At a time when the threat from international terrorism and organised crime and the question of effective control of migration flows are a focus of public interest everywhere, this case could scarcely be more timely.

II. Legislative framework

A. EU law

5. The EU law framework for the present case is defined, first, by the provisions of primary law contained in Articles 49, 56 and 346(1)(a) TFEU (formerly Articles 43, 49 and 296(1)(a) EC) and, second, by a number of rules of secondary law in Directives 92/50/EEC (3) and 2004/18/EC, (4) the former directive being relevant for the period up to 31 January 2006 and the latter for all periods thereafter.

The directives relating to the award of public service contracts

6. For the award of public service contracts concerning 'publishing and printing services on a fee or contract basis', both Directive 92/50 and Directive 2004/18 require in principle that a procurement procedure be conducted in accordance with EU law. This is clear from Article 3(1), Article 11(1), Article 8 and Article 15(2) of, in conjunction with Annex IA(15) to, Directive 92/50 and from Article 20 of, in conjunction with Annex II(A)(15) to, Directive 2004/18.

Derogations from the duty to conduct a procurement procedure

7. However, both Directive 92/50 and Directive 2004/18 exclude from their scope secret contracts and contracts requiring special security measures.

In the case of Directive 92/50, such provision is made in Article 4(2), which reads as follows:

'This Directive shall not apply to services which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State's security so requires.'

A substantively identical provision is contained in Article 14 of Directive 2004/18:

'This Directive shall not apply to public contracts when they are declared to be secret, when their performance must be accompanied by special measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of the Member State so requires.'

8. The background to this exclusion from the scope of the procurement procedures laid down in EU law for public service contracts is explained for the first time in the 14th recital of Directive 92/50:

'Whereas, in the field of services, the same derogations as in Directives 71/305/EEC and 77/62/EEC should apply as regards State security or secrecy and the priority of other procurement rules such as those pursuant to international agreements, those concerning the stationing of troops, or the rules of international organisations'.

9. In recital 22 of Directive 2004/18 this derogation for State security and State secrecy is updated as follows:

'Provision should be made for cases in which it is possible to refrain from applying the measures for coordinating procedures on grounds relating to State security or secrecy, or because specific rules on the awarding of contracts which derive from international agreements, relating to the stationing of troops, or which are specific to international organisations are applicable.'

10. Reference should also be made to Article 10 of Directive 2004/18, which was given the following wording by Directive 2009/81/EC (5) for 'contracts in the fields of defence and security':

'Subject to [Article 346 TFEU], this Directive shall apply to public contracts awarded in the fields of defence and security, with the exception of contracts to which Directive 2009/81/EC … applies.

This Directive shall not apply to contracts to which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof.'

11. Under Article 13(a) of Directive 2009/81, which is headed 'Specific exclusions', that directive does not apply to 'contracts for which the application of the rules of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security'.

12. The period for the transposition of Directive 2009/81 expired on 21 August 2011, as provided for in Article 72(1) of that directive.

Special rules of EU law for passports and identity cards

13. Furthermore, specifically with respect to passports and identity cards, reference should be made to Regulation (EC) No 2252/2004. (6) As regards the object of that regulation, it is worth noting recital 4 thereof, which contains these explanations:

> ‘This Regulation is limited to the harmonisation of the security features including biometric identifiers for the passports and travel documents of the Member States. The designation of the authorities and bodies authorised to have access to the data contained in the storage medium of documents is a matter of national legislation, subject to any relevant provisions of Community law, EU law or international agreements.’

14. Article 3 of Regulation No 2252/2004 then provides as follows:

> ‘1. In accordance with the procedure referred to in Article 5(2) [(7)] it may be decided that the specifications referred to in Article 2 [(8)] shall be secret and not be published. In that case they shall be made available only to the bodies designated by the Member States as responsible for the printing and to persons duly authorised by a Member State or the Commission.
>
> 2. Each Member State shall designate one body having responsibility for printing passports and travel documents. It shall communicate the name of that body to the Commission and the other Member States. The same body may be designated by two or more Member States. Each Member State shall be entitled to change its designated body. It shall inform the Commission and the other Member States thereof.’

B. National law

15. Österreichische Staatsdruckerei (9) is incorporated in private law in the form of a Gesellschaft mit beschränkter Haftung (limited liability company, GmbH). The sole shareholder in the GmbH is Österreichische Staatsdruckerei Holding AG, whose shares are listed on the stock market and held by private individuals.

16. On the basis of the factual and legal situation as at 12 September 2014, (10) the manufacture of chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences, credit card-sized vehicle licences and fireworks display permits is entrusted to Staatsdruckerei.

17. Under the second sentence of Paragraph 1a and Paragraph 2(2)(1) of the Staatsdruckereigesetz 1996 (Law on the State Printing Office 1996), (11) Staatsdruckerei is responsible in particular for ‘the manufacture of print products for the federal offices in the manufacturing process for which secrecy or compliance with security rules (security printing) is necessary’. Furthermore, Paragraph 2(3) of the Staatsdruckereigesetz 1996 provides that the federal bodies are required to ‘entrust [Staatsdruckerei] exclusively’ with the manufacture of the abovementioned print products. (12)

18. Under the heading ‘Supervision of security printing’, Paragraph 6(1) of the Staatsdruckereigesetz 1996 further provides that business and work processes relating to the manufacture, processing and storage of security printing products are subject to supervision by the Federal Minister responsible for the security printing product in question. Under Paragraph 6(2) of that law, Staatsdruckerei is required to take all security measures necessary to prevent abuse in connection with the manufacture, processing and storage of security printing products. Lastly, under Paragraph 6(3) of that law, Staatsdruckerei must grant the Federal Minister responsible for the security printing product in question, to the extent necessary for supervision, access to its business premises and an opportunity to inspect the relevant business records.

III. Facts and pre-litigation procedure

19. By letter of formal notice of 6 April 2011, the Commission made Austria aware of concerns regarding the compatibility with the provisions of the TFEU and of Directives 92/50 and 2004/18 of the direct award of certain service contracts for the printing of official documents to Staatsdruckerei. The documents concerned at the time were chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences, paper and card-sized vehicle licences, fireworks display permits, boatmasters' certificates, security document forms, labels for narcotic substances and moped licences.

20. In its reply of 7 June 2011, Austria relied on the protection of essential national security interests. Protection of secret information, safeguarding of the authenticity and veracity of the documents concerned, security of supply and guaranteed protection of sensitive data justified awarding the printing contracts exclusively to Staatsdruckerei, as Staatsdruckerei alone demonstrated the appropriate organisational, technical and structural security measures for performing those contracts. By letters of 17 July 2012 and 28 March 2013, Austria supplemented its arguments in this regard.

21. On 10 July 2014, the Commission issued a reasoned opinion. In that opinion, the Commission emphasised that it was perfectly possible to organise a public invitation to tender in such a way that only undertakings which specialised in the manufacture of documents subject to special security requirements and were supervised accordingly could be successful.

22. Austria responded to the reasoned opinion on 10 September 2014. In essence, the Member State relied again on its national security interests and emphasised that the performance of the printing contracts was closely linked to public order and the institutional operation of the State. Their direct award to Staatsdruckerei was justified by the need for a guaranteed supply and for production conditions which ensured compliance with special secrecy and security rules. Observance of security requirements by undertakings other than Staatsdruckerei could be enforced only by means of civil law, whereas the Austrian State authorities enjoyed special supervisory powers vis-à-vis Staatsdruckerei by law.

23. In the course of the pre-litigation procedure, the Commission gradually withdrew its complaints in relation to moped licences, paper vehicle licences, boatmasters' certificates, security document forms and labels for narcotic substances, as in some cases those documents were abolished and in some cases their manufacture was put out to competitive tender. (13) In all other respects, however, it maintained its complaints and stated that it was for Austria to prove the need for a direct award of the printing contracts at issue to Staatsdruckerei.

IV. Forms of order sought and procedure before the Court

24. By written pleading of 4 April 2016, the Commission brought the present action at the Court pursuant to the second paragraph of Article 258 TFEU. It claims that the Court should:

1. declare that

   – by awarding public service contracts for the manufacture of certain documents, such as chip passports, emergency passports, residence permits, identity cards, fireworks display permits, credit card-sized driving licences and credit card-sized vehicle licences, under and above the thresholds applicable under Directive 92/50 and Directive 2004/18 in the time before and after the transposition of Directive 2004/18 directly to Österreichische Staatsdruckerei GmbH, and

   – by maintaining national provisions, such as in particular Paragraph 2(3) of the Bundesgesetz zur Neuordnung der Rechtsverhältnisse der Österreichischen Staatsdruckerei (Federal Law on the reorganisation of the legal relationships of Österreichische Staatsdruckerei), which require contracting authorities to award such public service contracts exclusively to Österreichische Staatsdruckerei GmbH,

   the Republic of Austria has failed to fulfil its obligations under Articles 49 and 56 TFEU or under Article 4 read in conjunction with Articles 11 to 37 of Directive 92/50/EEC and Articles 14, 20 and 23 to 55 of Directive 2004/18/EC;

2. order the Republic of Austria to pay the costs.

25. The Republic of Austria contends that the Court should:

– dismiss the action brought by the Commission in the present case; and

– order the applicant to pay the costs.

26. The action brought by the Commission was examined before the Court on the basis of the written documents and at the hearing on 7 June 2017.

V. Assessment

27. At the present stage, the subject matter of these infringement proceedings is now confined only to the manufacture of chip passports, emergency passports, identity cards, residence permits, credit card-sized driving licences, credit card-sized vehicle licences and fireworks display permits. In the course of the extrajudicial pre-litigation procedure the Commission withdrew its complaints in relation to the manufacture of paper vehicle licences, boatmasters' certificates, labels for narcotic substances, security document forms and moped licences.

28. The action brought by the Commission is well founded if and in so far as certain requirements existed under EU law for the award of the printing contracts at issue (see immediately below, section A), with which Austria failed to comply and which it could not evade by relying on essential national security interests (see further below, section B).

29. It is noted for the sake of completeness that in this case it is not possible to apply the case-law concerning 'in-house' transactions, (14) as the Republic of Austria no longer controls Staatsdruckerei like it does its own departments. Rather, Staatsdruckerei is an undertaking incorporated purely under private law and is wholly privately owned.

A. Duties under EU law in respect of the award of public service contracts by national authorities

30. The printing contracts at issue are undeniably public service contracts under the EU public procurement law applicable in the material period. Specifically, this follows for the period up to 31 January 2006 from Annex IA(15) to Directive 92/50 and for the period thereafter from Annex II(A)(15) to Directive 2004/18, each of which classify 'publishing and printing services on a fee or contract basis' as priority services. For such services both directives lay down detailed rules for contracting authorities regarding the procurement procedure to be applied.

1. Duty under secondary law to conduct a procurement procedure for the printing of all documents except for fireworks display permits

31. The parties agree that the values of all the printing contracts at issue except for the contract for the manufacture of fireworks display permits were above the thresholds for public service contracts laid down in Directives 92/50 and 2004/18.

32. Consequently, there was in principle — subject to the question of protection of essential national security interests which will be discussed below (15) — a duty to conduct a procurement procedure in accordance with EU secondary law for all of those contracts. This is clear from Article 3(1), Article 11(1), Article 8 and Article 15(2) of, in conjunction with Annex IA(15) to, Directive 92/50 and from Article 20 of, in conjunction with Annex II(A)(15) to, Directive 2004/18.

2. No duty under primary law to produce a minimum amount of publicity for the contract for the printing of fireworks display permits

33. As regards the contract for the printing of fireworks display permits, on the other hand, whose estimated value was only EUR 56 000 and thus well below the thresholds for public service contracts laid down in Directives 92/50 and 2004/18, there was no obligation under secondary law to conduct a procurement procedure.

34. It is true that this does not mean that such public contracts would fall completely outside the scope of EU law. Rather, it is established case-law (16) that the fundamental freedoms of the European internal market — in this case the freedom of establishment and the freedom to provide services (Articles 43 and 49 EC for the period before 1 December 2009 and Articles 49 and 56 TFEU since 1 December 2009) — and in particular the duty of transparency implicit in those fundamental freedoms require that a sufficient degree of advertising is also ensured before the award of public service contracts below the threshold, provided that the contract in question is of certain cross-border interest.

35. In the present case, however, the Commission and Austria disagree on whether the contract at issue for the printing of fireworks display permits was actually of such certain cross-border interest.

36. As Austria rightly states, the low value of a contract is an indication that there is no certain cross-border interest. The Commission is correct to state that the existence or non-existence of such cross-border interest cannot be determined on the basis of the value of the contract alone, but that an overall assessment of all the relevant circumstances of the individual case is essential. (17) In my view, however, such an overall assessment also shows that there is no certain cross-border interest in the present case.

37. The market for the manufacture of counterfeit-proof documents is certainly characterised in general by a high degree of specialisation and international integration. Under these circumstances it cannot be ruled out that even smaller contracts from a Member State may attract considerable cross-border interest elsewhere in the European Union or in the European Economic Area (EEA). The Commission has nevertheless failed to explain adequately in the present case to what extent the printing of Austrian fireworks display permits which, according to the undisputed submissions of Austria, are manufactured in volumes of approximately 400 per year and at a unit price of EUR 35, might be of certain cross-border interest.

38. The fact cited by the Commission that Staatsdruckerei has also been commissioned by a number of foreign States to manufacture visas and passports casts little light on the matter, as visas and passports are printed in much larger volumes and according to uniform EU rules, unlike fireworks display permits. The cross-border interest in printing contracts for visas and passports is thus much greater and not comparable with the interest in printing contracts for fireworks display permits.

39. All in all, the circumstances invoked by the Commission do not therefore clearly indicate the existence of cross-border interest in the printing contract for fireworks display permits. Consequently, the Commission has not complied in this regard with the burden of proof on it. (18) Austria cannot therefore be considered to have been required by EU primary law to produce a minimum amount of publicity before the award of the printing contract for fireworks display permits. Austria was thus permitted, from the point of view of EU law, to award that contract directly to Staatsdruckerei without first considering other undertakings as contractors.

B. Derogations from the duties under EU law

40. With regard to the part of the Commission's action which is *not* concerned with fireworks display permits, it must now be considered whether and to what extent the undeniably sensitive nature of the printing contracts at issue could mean that Austria was permitted to award those contracts directly to Staatsdruckerei, in derogation from the abovementioned duties under EU law, without considering other undertakings as contractors in any manner.

41. Austria cites Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18 in this connection. Article 346(1)(a) TFEU (formerly Article 296(1)(a) EC), which has also been the subject of intensive discussion between the parties, is *not* relied on by Austria here, as was made clear at the hearing. (19) I nevertheless consider it appropriate to include consideration of Article 346(1)(a) TFEU hereinafter, as all the abovementioned directive provisions can ultimately be traced back to it and are closely connected with it.

1. General remarks

42. Article 346(1)(a) TFEU makes clear at the level of primary law that no Member State is to be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security. Unlike the subsequent point (b) of that article, point (a) is not restricted, according to its wording, only to arms, munitions and war material, but offers general protection to the essential security interests of the Member States and may therefore also be applied to non-military procurement processes such as the printing

contracts at issue here. (20) If a Member State refuses to invite tenders for or otherwise publicise a public contract, it ultimately withholds relevant information regarding a forthcoming procurement project from the interested public. It thus departs from its duty to supply information which is laid down by EU law for this area in Article 346(1)(a) TFEU.

43. In secondary law, the possibility set out in Article 346(1)(a) TFEU to derogate from duties under EU law is fleshed out for public procurement law, on the one hand, in Article 13(a) of Directive 2009/81 and, on the other, in Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18. The latter two provisions each stipulate, using substantively identical wordings, that the rules in those directives do not apply to public contracts

– when they are declared to be secret,

– when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned,

– or when the protection of the essential interests of that Member State so requires.

44. Austria relies only on the latter two variants of Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, that is to say, it considers that the printing contracts at issue must be accompanied by special security measures (second variant) and the protection of essential security interests of the State is concerned (third variant). On the other hand, Austria does *not* assert any need for secrecy in respect of the printing contracts (first variant).

45. In essence, Article 4(2) of Directive 92/50, Article 14 of Directive 2004/18 and Article 346(1)(a) TFEU all express the same legal principle, namely that Member States are permitted to depart from the obligations actually incumbent on them under EU law in order to protect essential national security interests. It is therefore appropriate to assess all these exceptions together, the extensive case-law on Article 346(1) TFEU — on point (b) in particular — also providing guidance for the interpretation of Article 4(2) of Directive 92/50 and of Article 14 of Directive 2004/18.

2. Discretion of Member States as to their essential security interests

46. Essential national security interests constitute a concept of EU law which must be given an autonomous interpretation. That concept covers both the Member State's internal security and its external security. (21)

47. It has been acknowledged that each Member State must be granted a wide discretion in the definition of its essential security interests; (22) this is shown by the use of the words 'as it considers necessary' in Article 346(1) TFEU.

48. The provisions of EU law on the protection of essential national security interests cannot, however, be read in such a way as to confer on Member States a power to depart from their duties under EU law based on no more than reliance on those interests. (23) Rather, it is for the Member States in each case to offer substantiated evidence to show precisely which national security interests are affected and to what extent compliance with certain obligations under EU law would in practice be contrary to those security interests.

49. Austria argues convincingly in this case that the issue of the official documents in question affects fundamental functions of the State. (24) For example, passports and identity cards are used to prove a person's identity, nationality and age. In practice, the presentation of such documents ensures the holders' right to participate in elections and their freedom to travel, to reside in other Member States of the European Union or in other EEA Member States and possibly to study or work there. A driving licence provides information about its holder's entitlement to drive motor vehicles and thus to make active use of the roads; in some cases it may even be recognised as proof of identity.

50. As Austria rightly states, in printing these and similar documents it must be ensured, first, that their authenticity and protection against counterfeiting are guaranteed, second, that unauthorised parties do not become aware of the security arrangements for their manufacture, third, that the reliable supply of public

bodies with the documents concerned is guaranteed and, fourth, that a high level of protection is provided for personal data processed in the manufacture of the documents.

51. Even if the Commission is correct and there is doubt whether and to what extent this latter aspect of data protection can specifically be regarded as a matter of national security, (25) it is nevertheless undeniable that in any case all the other factors mentioned — authenticity and protection against counterfeiting for official documents, protection of the security arrangements for their manufacture and guaranteed security of supply — can affect essential national security interests.

52. In principle, Austria may therefore rely on its essential national security interests and the measures necessary for their protection, as mentioned in Article 346(1)(a) TFEU, Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18. However, the resolution of the present case hinges on the question whether those security interests and measures can justify completely dispensing with the practice prescribed by EU law for the award of public contracts. I will now turn to this question.

3. Exceptional character of measures for the protection of essential national security interests and the principle of proportionality

53. As Article 346(1)(a) TFEU permits derogations from fundamental freedoms, which are of basic importance in the system established by the treaties, it is an exception which is to be interpreted strictly. (26) The same applies to Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18, which provide for exclusions from the scope of EU public procurement law and thus ultimately also exceptions to the fundamental freedoms under the treaties. (27)

54. Where recourse is had to such exceptions, even though the Member State concerned is accorded a wide discretion in security matters, it is not entirely free, but is subject to review by the Court. In particular, it is for that Member State to prove that it is *necessary* to have recourse to the measures taken by it in order to protect its essential national security interests. (28) The Member State concerned must therefore ultimately undergo a proportionality test.

55. Austria essentially invokes three arguments in this regard to justify a direct award of the printing contracts at issue to Staatsdruckerei. First, the protection of essential national security interests necessitates the centralised performance of the printing contracts by a single undertaking; second, effective official controls are necessary in connection with the implementation of security-related printing contracts; and, third, the contractor as such must be trustworthy. As I will explain below, I do not think that any of these arguments stands up to closer scrutiny in the case at issue.

(a) The need for the centralised performance of the printing contracts

56. First of all, Austria relies on the need for the centralised performance of the printing contracts at issue by a single undertaking. This makes it easier for the Austrian authorities to monitor the proper performance of the contracts in compliance with the necessary secrecy and security arrangements. In addition, it reduces the risk of unauthorised parties becoming aware of those security arrangements or of sensitive materials (such as forms for passports or residence permits) falling into the hands of unauthorised parties.

57. The centralised performance of the contract may, in a case like the present one and for the reasons cited by Austria, be regarded as contributing to the protection of essential national security interests, and possibly also as contributing to data protection. However, the centralisation argument can ultimately only explain why the printing contracts at issue are *only ever awarded to a single undertaking* (and not to several at the same time). On the other hand, there is no plausible justification, based on the need for centralisation, why it should be necessary, in order to protect essential national security interests, to commission *only ever the same undertaking*, namely Staatsdruckerei.

58. Nothing else follows from Article 3(2) of Regulation No 2252/2004, which is cited by Austria. It is true that that provision requires Member States to designate one *body having responsibility* for printing passports and travel documents. The provision does not, however, indicate how that body having responsibility should be selected by Member States. In particular, it certainly does not preclude a procurement procedure first being conducted in accordance with the requirements of EU law. This is also confirmed by a glance at the overall context of that provision. According to recital 4 thereof, Regulation

No 2252/2004 is limited to the harmonisation of the security features for passports and travel documents, while the designation of the responsible authorities and bodies by the Member States is expressly subject to any relevant provisions of EU law. These provisions of EU law, compliance with which is not affected by Regulation No 2252/2004, include in particular public procurement law, as expressed in the fundamental freedoms and Directives 92/50 and 2004/18.

(b) The need for effective official controls

59. Second, Austria stresses the importance of effective official controls in connection with the manufacture of the documents in question. For this reason too, it is justified to award the printing contracts at issue to Staatsdruckerei.

60. It should be noted in this regard that the sensitive nature of these printing contracts may undoubtedly necessitate the implementation of strict official controls on the undertaking commissioned, including unannounced controls. However, in this context Austria is permitted to take only measures which are actually necessary to ensure the effectiveness of those controls. A practice whereby all potential tenderers other than Staatsdruckerei are excluded a priori from the award of contract goes beyond what is necessary in order to attain the legitimate objective of effective controls.

61. Austria objects that, on the basis of the applicable law — and more precisely Paragraph 6(3) of the Staatsdruckereigesetz 1996 — its authorities have *public* supervisory powers only vis-à-vis Staatsdruckerei and not vis-à-vis other undertakings. In particular, if problems arose, action could not be taken against foreign undertakings on the basis of public powers, but at best under civil law.

62. I do not find this objection convincing, however. It cannot be disputed that public supervisory powers may specifically be necessary for the protection of essential national security interests because they are more effective than rights of supervision simply agreed in a civil-law contract. Nevertheless, this does not, in itself, justify disregarding the existing EU public procurement rules entirely and only ever considering a *certain undertaking* — Staatsdruckerei — a priori as a contractor.

63. Rather, the Member State in question — in this case Austria — must ensure as careful a balance as possible between its security-related supervision requirements and its obligations under EU law. In this connection, much less restrictive measures would be possible, in the light of public procurement law, which would have permitted undertakings other than Staatsdruckerei to apply for the printing contracts at issue:

– Rather than excluding undertakings established in other EEA Member States entirely from the award of the contract, Austria could, if necessary, stipulate for all interested parties that the printing contracts at issue, if awarded, must be carried out from a permanent establishment in Austria, (29) that data obtained in connection with the contracts must be processed solely in Austria and that neither such data nor security-related information may be transmitted via foreign data cables or servers or passed on to parts of the undertaking located abroad or to foreign authorities.

– And rather than providing for public supervisory powers such as those in Paragraph 6(3) of the Staatsdruckereigesetz 1996 solely vis-à-vis Staatsdruckerei, the Austrian legislature could authorise the competent State bodies in general to exercise such supervision of all undertakings with permanent establishments in Austria if they perform security-related printing contracts there.

(c) The need for the trustworthiness of the contractor

64. Third and last, Austria submits that Staatsdruckerei was entrusted with the printing contracts at issue specifically because there was a special relationship of trust between that undertaking and the competent State bodies.

65. It is correct that it may be necessary, for the protection of a Member State’s essential security interests, to restrict the list of possible candidates for the award of a public contract to undertakings which are regarded as particularly reliable and trustworthy.

66. However, it would run flagrantly counter to the basic principle underpinning the European internal market in general and public procurement law in particular (30) if a Member State almost arbitrarily classified a single undertaking — especially its formerly State-owned and now privatised 'historic' provider in a certain area — as particularly reliable and trustworthy according to the motto 'tried and tested', whilst a priori denying or at least questioning the reliability and trustworthiness of all other undertakings.

67. This is demonstrated not least by a comparison with public contracts in the military and security fields, which also relate to highly sensitive matters and are nevertheless, as a rule, subject to a procurement procedure under the rules of EU law. (31) In particular, the Court has ruled that the requirement to impose an obligation of confidentiality in no way prevents the use of a competitive tendering procedure for the award of a contract. (32) The EU public procurement rules allow contracting authorities sufficient leeway for the necessary security and secrecy arrangements in sensitive areas, whether in the procedure to select the most suitable contractor or at the later stage of contract performance.

68. There is thus nothing to prevent the contracting authority, in connection with the award of sensitive public contracts like those at issue for the manufacture of official documents, imposing particularly high requirements for the suitability and reliability of contractors, formulating tender specifications and service contracts accordingly and requiring the necessary proof from candidates. In addition, conditions may be imposed on contractors relating to the performance of the printing contracts, covering in particular data protection, secrecy and security arrangements and the applicable official controls, including a security review of all employees involved in the performance of the contract. However, all this does not make the manufacture of official documents a contract *intuitu personae* which can be performed only by one very specific person.

69. At the hearing, Austria stated that foreign undertakings were not entirely outside the control of the authorities of their respective country of origin and in some cases were even required to cooperate with the intelligence services there, even if they carried out public contracts from a permanent establishment in Austria. Such undertakings could not therefore be considered as contractors for sensitive printing contracts like those at issue.

70. As I have already stated elsewhere, (33) certain derogations from the procurement procedures prescribed by EU law may actually be justified by the fact that a Member State does not wish simply to disclose security-related information to foreign undertakings or undertakings controlled by foreign nationals, in particular undertakings or persons from non-member countries. A Member State can also legitimately ensure that it does not become dependent on non-member countries or on undertakings from non-member countries for its supplies of sensitive goods.

71. According to settled case-law, however, a measure is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. (34) In the present case, Austria has not, as far as can be seen, taken precautions which could effectively prevent Staatsdruckerei falling under the control of foreign shareholders or becoming a subsidiary of a foreign legal person. The Austrian State has neither stipulated, for reasons of security, voting rights in Staatsdruckerei in the form of a special share ('golden share') (35) nor made the sale of shares in Staatsdruckerei subject to any restrictions on security grounds.

72. Under these circumstances, there is no security-related justification for Austria's categorical refusal to consider other undertakings, whether other Austrian undertakings or undertakings from other EEA Member States, as contractors in addition to its 'historic' provider.

C. Conclusion

73. All in all, the action brought by the Commission must therefore be dismissed in so far as the award of printing contracts for fireworks display permits is concerned. In respect of all other parts of the subject matter of the proceedings, on the other hand, its action must be granted in its entirety and it should be declared that Austria has failed to fulfil its obligations as alleged by the Commission.

VI. Costs

74. In principle, pursuant to the first sentence of Article 138(3) of the Rules of Procedure, where, as in this case, each party succeeds on some and fails on other heads, the parties must bear their own costs. However, on the basis of the second sentence of that provision, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

75. According to my proposed solution, the Commission is largely successful, whereas Austria's arguments can be upheld in respect of only a small part of the subject matter of the proceedings, namely the fireworks display permits. Accordingly, it would seem appropriate in the present case to order Austria, in addition to bearing its own costs, to pay three quarters of the costs of the Commission, while the Commission should bear one quarter of its own costs.

VII. Conclusion

76. In the light of the foregoing, I propose that the Court should:

(1) declare that

– first, by maintaining national legislation such as Paragraph 2(3) of the Staatsdruckereigesetz 1996, under which contracting authorities have a duty to award printing contracts for the manufacture of certain official documents to Österreichische Staatsdruckerei GmbH, and

– second, by awarding specific service contracts for the manufacture of chip passports, emergency passports, residence permits, identity cards, credit card-sized driving licences and credit card-sized vehicle licences directly to Österreichische Staatsdruckerei without a procurement procedure,

the Republic of Austria has failed to fulfil its duties under Directives 92/50/EEC and 2004/18/EC;

(2) dismiss the action as to the remainder;

(3) order the Republic of Austria to bear its own costs and to pay three quarters of the costs of the European Commission. The European Commission must bear one quarter of its own costs.

---

1 Original language: German.

---

2 See, for example, the Action plan to strengthen the European response to travel document fraud**,** which the European Commission outlined in its Communication of 8 December 2016 to the European Parliament and the Council (COM(2016) 790 final).

---

3 Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

---

4 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

5 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76).

---

6 Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ 2004 L 385, p. 1).

---

7 This is a ‘comitology procedure’ under Articles 5 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23).

---

8 This refers to technical specifications relating to additional security features and requirements, the storage medium of the biometric features and their security, and requirements for quality and common standards for the facial image and the fingerprint.

---

9 Austrian State Printing Office; also ‘Staatsdruckerei’.

---

10 On 12 September 2014, the period laid down by the Commission in its reasoned opinion in accordance with the first paragraph of Article 258 TFEU expired.

---

11 BGBl. I No 1/1997.

---

12 For chip passports, emergency passports and identity cards such provision is also made in the Regulation of the Federal Minister for the Interior on the design of passports and passport substitutes, for residence permits in the Regulation of the Federal Minister for the Interior on the implementation of the Law on Settlement and Residence, for credit card-sized driving licences in the Regulation of the Federal Minister for Science and Transport on the implementation of the Law on driving licences, for credit card-sized vehicle licences in the Regulation of the Federal Minister for Science and Transport on the establishment of vehicle licencing offices, and for fireworks display permits in the Regulation of the Federal Minister for the Interior on the implementation of the Law on fireworks 2010. Where the obligation to assign the contract to Staatsdruckerei is not expressly laid down in those regulations, it follows from the requirement to protect those documents against counterfeiting in conjunction with Paragraph 2(3) of the Staatsdruckereigesetz 1996.

---

13 According to the documents before the Court, on 17 July 2012 Austria had envisaged abolishing moped licences and conducting an open award procedure for fireworks display permits, paper vehicle licences, boatmasters’ certificates, security document forms and labels for narcotic substances. On 28 March 2013, Austria eventually confirmed to the Commission that it had abolished moped licences and implemented its announcement regarding security document forms and labels for narcotic substances. It asserted that the Commission’s complaints regarding boatmasters’ certificates had also been remedied, as the Commission expressly stated in the application.

---

14 See in this regard, inter alia, judgments of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 50); of 8 April 2008, *Commission* v *Italy* (C-337/05, EU:C:2008:203, paragraph 36); and of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935, paragraph 31). The exception for ‘in-house’ transactions applies in cases covered by the public procurement directives as well as in cases which are to be assessed solely by reference to the fundamental freedoms of the European internal market: judgments of 13 October 2005, *Parking Brixen* (C-458/03, EU:C:2005:605, paragraphs 60 to 62); of 29 November 2012, *Econord* (C-182/11 and C-183/11, EU:C:2012:758, paragraph 26); and of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935, paragraph 24).

---

15 See below, points 40 to 72 of this Opinion.

---

16 Judgments of 7 December 2000, *Telaustria and Telefonadress* (C-324/98, EU:C:2000:669, paragraphs 60 to 62); of 18 June 2002, *HI* (C-92/00, EU:C:2002:379, paragraphs 42, 45 and 46); of 13 November 2007, *Commission* v *Ireland* (C-507/03, EU:C:2007:676, paragraphs 29 to 31); of 17 December 2015, *UNIS and Beaudout Père et Fils* (C-25/14 and C-26/14, EU:C:2015:821, paragraphs 27, 38 and 39); and of 6 October 2016, *Tecnoedi Costruzioni* (C-318/15, EU:C:2016:747, paragraph 19).

---

17 See, to that effect, judgment of 6 October 2016, *Tecnoedi Costruzioni* (C-318/15, EU:C:2016:747, paragraph 20).

---

18 With regard to the burden of proof on the Commission, see for example judgment of 13 November 2007, *Commission* v *Ireland* (C-507/03, EU:C:2007:676, paragraph 32).

---

19 Austria relies on Article 346(1)(a) TFEU only with regard to the previously discussed fireworks display permits.

---

20 As the Commission makes clear in its Interpretative communication of 7 December 2006 on the application of Article 296 of the Treaty in the field of defence procurement (COM(2006) 779 final, also '2006 Communication'); it states that Article 296(1)(a) EC (now Article 346(1)(a) TFEU) 'goes beyond defence, aiming in general at protecting information which Member States cannot disclose to anyone without undermining their essential security interests' (section 1 of the Communication). Advocate General Ruiz-Jarabo Colomer also seems to take a similar approach in his Opinion in *Commission* v *Finland and Others* (C-284/05, C-294/05, C-372/05, C-387/05, C-409/05, C-461/05 and C-239/06, EU:C:2009:67, point 106).

---

21 Judgments of 26 October 1999, *Sirdar* (C-273/97, EU:C:1999:523, paragraph 17), and of 11 January 2000, *Kreil* (C-285/98, EU:C:2000:2, paragraph 17); in the same vein, judgments of 10 July 1984, *Campus Oil and Others* (72/83, EU:C:1984:256, paragraphs 34 to 36); of 4 October 1991, *Richardt and 'Les Accessoires Scientifiques'* (C-367/89, EU:C:1991:376, paragraph 22); and of 15 December 2009, *Commission* v *Denmark* (C-461/05, EU:C:2009:783, paragraph 51, first sentence).

---

22 Judgment of 30 September 2003, *Fiocchi munizioni* v *Commission* (T-26/01, EU:T:2003:248, paragraph 58); see also the 2006 Communication (cited in footnote 20), according to which Article 296 EC (now Article 346 TFEU) 'has been acknowledged to grant to Member States a broad degree of discretion' in deciding how to protect their essential security interests (section 4 of the Communication) and '[i]t is the Member States' prerogative to define their essential security interests' (section 5 of the Communication).

---

23 Judgments of 16 September 1999, *Commission* v *Spain* (C-414/97, EU:C:1999:417, paragraphs 22 and 24); of 15 December 2009, *Commission* v *Finland* (C-284/05, EU:C:2009:778, paragraph 47); of 7 June 2012, *Insinööritoimisto InsTiimi* (C-615/10, EU:C:2012:324, paragraph 35); and of 4 September 2014, *Schiebel Aircraft* (C-474/12, EU:C:2014:2139, paragraph 34).

---

24 Similarly, see the statements made by the Court in the judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4, paragraph 24), regarding the tasks transferred to Staatsdruckerei.

---

25 The Commission points out that data protection is an important public interest, but not a matter of national security.

---

26 Judgments of 15 December 2009, *Commission* v *Finland* (C-284/05, EU:C:2009:778, paragraph 48), of 15 December 2009, *Commission* v *Denmark* (C-461/05, EU:C:2009:783, paragraph 52); and of 7 June

2012, *Insinööritoimisto InsTiimi* (C-615/10, EU:C:2012:324, paragraph 35).

---

27 See, to that effect, judgment of 7 June 2012, *Insinööritoimisto InsTiimi* (C-615/10, EU:C:2012:324, paragraph 35), in relation to Article 10 of Directive 2004/18.

---

28 Judgments of 16 September 1999, *Commission* v *Spain* (C-414/97, EU:C:1999:417, paragraphs 22 and 24); of 15 December 2009, *Commission* v *Finland* (C-284/05, EU:C:2009:778, paragraphs 48 and 49); of 8 April 2008, *Commission* v *Italy* (C-337/05, EU:C:2008:203, in particular paragraph 53); of 2 October 2008, *Commission* v *Italy* (C-157/06, EU:C:2008:530, paragraph 31); and of 7 June 2012, *Insinööritoimisto InsTiimi* (C-615/10, EU:C:2012:324, paragraph 45); similarly, see the 2006 Communication (cited in footnote 20, section 5), according to which it must be demonstrated why the non-application of public procurement rules in the specific case is *necessary* for the protection of an essential security interest.

---

29 While such a requirement of a permanent establishment in national territory is de factothevery negation of the freedom to provide services, Member States may nevertheless impose such a requirement, very exceptionally, if they show that it is indispensable to the necessary controls (see judgment of 4 December 1986, *Commission* v *Germany*, 205/84, EU:C:1986:463, paragraph 52 in conjunction with paragraph 54, last sentence).

---

30 It is settled case-law that the primary aim of the rules of EU law in the field of public contracts is the attainment of freedom of establishment and free movement of goods and services and the opening-up of undistorted competition in all the Member States; see, inter alia, judgments of 16 December 2008, *Michaniki* (C-213/07, EU:C:2008:731, paragraphs 39 and 53), and of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935, paragraph 28).

---

31 See Article 10 of Directive 2004/18 and, in general, Directive 2009/81.

---

32 Judgments of 8 April 2008, *Commission* v *Italy* (C-337/05, EU:C:2008:203, paragraph 52), and of 2 October 2008, *Commission* v *Italy* (C-157/06, EU:C:2008:530, paragraph 30); in the same vein, judgment of 7 June 2012, *Insinööritoimisto InsTiimi* (C-615/10, EU:C:2012:324, end of paragraph 45).

---

33 See my Opinion in *Insinööritoimisto InsTiimi* (C-615/10, EU:C:2012:26, point 66).

---

34 Judgments of 10 March 2009, *Hartlauer* (C-169/07, EU:C:2009:141, paragraph 55), of 17 November 2009, *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709, paragraph 42); and of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 33). This case-law on the fundamental freedoms must also apply to secondary legislation on public procurement, particularly since the latter is intended to give effect to the fundamental freedoms (see also my Opinion in *Persidera*, C-112/16, EU:C:2017:250, point 66 with footnote 46).

---

35 See, for example, judgment of 4 June 2002, *Commission* v *Belgium* (C-503/99, EU:C:2002:328).

JUDGMENT OF THE COURT (Fourth Chamber)

20 December 2017 (*)

(Reference for a preliminary ruling — Public works contracts — Directive 2004/18/EC — Article 45(2) and (3) — Conditions for exclusion from participation in public procurement — Declaration regarding the absence of convictions of former directors of the tendering company — Criminal conduct of a former director — Criminal conviction — Actual and complete dissociation between the tendering company and that director — Evidence — Assessment by the contracting entity of the requirements relating to that obligation)

In Case C-178/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 1 December 2015, received at the Court on 24 March 2016, in the proceedings

Impresa di Costruzioni Ing. E. Mantovani SpA,

Guerrato SpA

v

Provincia autonoma di Bolzano,

Agenzia per i procedimenti e la vigilanza in materia di contratti pubblici di lavori servizi e forniture (ACP),

Autorità nazionale anticorruzione (ANAC),

intervening parties:

Società Italiana per Condotte d'Acqua SpA,

Inso Sistemi per le Infrastrutture Sociali SpA,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, E. Juhász (Rapporteur), K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 April 2017,

after considering the observations submitted on behalf of:

– Impresa di Costruzioni Ing. E. Mantovani SpA and Guerrato SpA, by M.A. Sandulli and L. Antonini, avvocati,

– the Provincia autonoma di Bolzano and the Agenzia per i procedimenti e la vigilanza in materia di contratti pubblici di lavori servizi e forniture (ACP), by C. Guccione, avvocato, R. von Guggenberg, Rechtsanwältin, L. Fadanelli, A. Roilo and S. Bikircher, avvocati,

– Società Italiana per Condotte d'acqua SpA, by A. Guarino and C. Martelli, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by C. Pluchino and P. Grasso, avvocati dello Stato,

– the European Commission, by G. Gattinara and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 June 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45(2)(c) and (g) and Article 45(3)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and of certain general principles of EU law.

2 The request has been made in proceedings between Impresa di Costruzioni Ing. E. Mantovani SpA ('Mantovani') and Guerrato SpA, the former acting in its own name and capacity as lead contractor of the temporary association of undertakings to be established with Guerrato, and the Provincia autonoma di Bolzano (Autonomous Province of Bolzano, Italy; 'the Province of Bolzano'), the Agenzia per i procedimenti e la vigilanza in materia di contratti pubblici di lavori servizi e forniture (ACP) (Agency in charge of the procedures governing and monitoring of public works contracts, public service contracts and public supply contracts (ACP)) and the Autorità nazionale anticorruzione (ANAC) (National Anti-Corruption Authority (ANAC)) concerning the exclusion of Mantovani from the tender procedure relating to the award of a works contract for the financing, design of the final executive project, construction and management of the new Bolzano correctional facility.

Legal context

European Union law

3 Recital 2 of Directive 2004/18 states:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. ...'

4 Article 45 of Directive 2004/18, headed 'Personal situation of the candidate or tenderer', provides as follows:

'1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

…

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if

appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

2. Any economic operator may be excluded from participation in a contract where that economic operator:

…

(c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proved by any means which the contracting authorities can demonstrate;

…

(g) is guilty of serious misrepresentation in supplying the information required under this Section, or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

3. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs 1 or 2(a), (b), (c), (e) or (f) applies to the economic operator:

(a) as regards paragraphs 1 and 2(a), (b) and (c), the production of an extract from the "judicial record" or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met;

…'

Italian law

5 Decreto legislativo No 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163/2006 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006), as amended by Decree-Law No 70 of 13 May 2011 (GURI No 110 of 13 May 2011, p. 1), converted into law by Law No 106 of 12 July 2011 (GURI No 160 of 12 July 2011, p. 1) ('Legislative Decree No 163/2006'), governs, in their entirety, the procedures in Italy for the award of public works contracts, public service contracts and public supply contracts.

6 Legislative Decree No 163/2006 contains, in Part II thereof, Article 38, which lays down the general requirements for taking part in procedures for the award of concessions and public works contracts, public service contracts and public supply contracts. Article 38(1)(c) of the decree provides:

'The following persons shall be excluded from any participation in procedures for the award of concessions and public works contracts, public service contracts and public supply contracts, and are prohibited from taking part as subcontractors or from concluding any related contract:

…

(c) any person who has been the subject of a conviction that has the force of res judicata or a criminal order against which no appeal lies, or who has been the subject of a judgment implementing a sentence resulting from a negotiated plea, as provided for in Article 444 of the Code of Criminal Procedure, in respect of the commission of grave professional conduct offences to the detriment of the State or the Community; the following constitute, in any event, grounds for exclusion: a conviction set out in a judgment which has the force of res judicata for one or more offences relating to participation in a criminal organisation, corruption, fraud or money

laundering, as defined by the Community measures cited in Article 45(1) of Directive 2004/18; the exclusion and prohibition shall apply if the judgment or order was made against: the owner or the technical director, if the case involves a sole trader; partners or the technical director, if the case involves a general partnership; the general partners or the technical director, if the case involves a semi-limited partnership; directors with powers of representation, the technical director or the natural person sole shareholder, or the majority shareholder in the case of a company with less than four shareholders, if the case involves another type of company or consortium. In any event, the exclusion and prohibition shall also apply to persons dismissed from their posts in the year preceding the date of publication of the contract notice, where the undertaking does not show that it has fully and effectively dissociated itself from the criminal conduct sanctioned; the exclusion and prohibition in any event shall not be effective where the offence was decriminalised or if rehabilitation has been deemed to have occurred, namely where the conviction was declared spent or where the conviction has been overturned; ...'

The dispute in the main proceedings and the question referred for a preliminary ruling

7 By a notice published in the *Official Journal of the European Union* on 27 July 2013 (S 145-251280), the Province of Bolzano launched an open tendering procedure for the award of a public works contract concerning the financing, design of the final executive project, construction and management of the new Bolzano correctional facility. The estimated amount of the works was EUR 165 400 000.

8 Mantovani submitted a request for participation on 16 December 2013 in its own name and as lead contractor of a temporary association of undertakings which was to be established. That undertaking produced two declarations concerning compliance with the general requirements laid down in Article 38 of Legislative Decree No 163/2006. On 4 December 2013, it stated that Mr B., in his capacity as Chairman of the Board, Managing Director and legal representative who had ceased to perform his duties on 6 March 2013, had not been the subject of a conviction having the force of res judicata. On 16 December 2013, Mantovani reiterated that declaration.

9 At its meeting on 9 January 2014, the contracting authority conditionally authorised Mantovani's application, while awaiting it to provide further information with respect to Mr B. An article in the local press, published on 6 December 2013, revealed that Mr B. had been the subject of a criminal prosecution, for having instigated a system of false invoices, and had negotiated a plea entailing a conviction and sentence of 1 year and 10 months' imprisonment.

10 Subsequently, the contracting authority obtained Mr B.'s criminal record, which showed that that conviction was handed down on 5 December 2013, and became final on 29 March 2014. At its meeting on 29 May 2014, the contracting authority requested Mantovani to provide it with details of that conviction.

11 Mantovani replied by claiming, inter alia, that Mr B.'s conviction had become final following its own declarations of 4 and 16 December 2013, the judgment of 6 December 2013 having been given in camera without any public hearing, and its publication having occurred only on 3 February 2014. Mantovani further stated that, in order to fully and effectively dissociate the company from Mr B.'s actions, the latter was immediately removed from his management role in the Mantovani group, the management bodies of the company had been reorganised, Mr B.'s shares had been bought back and an action for damages had been brought against him.

12 After having established a classification in which Mantovani was conditionally positioned in fifth place, the contracting authority requested an opinion from the ANAC concerning the lawfulness of a possible exclusion of Mantovani. The ANAC replied, in essence, that although, in the absence of a final judgment, Mantovani's statement could not be classified as a 'misrepresentation', the lack of timely notification of criminal proceedings concerning one of the persons mentioned in Article 38(1)(c) of Legislative Decree No 163/2006 may constitute an infringement of the obligation of sincere cooperation with the contracting authority, and accordingly impede the full and effective dissociation from the person concerned.

13 In those circumstances, the contracting authority decided, at its meeting of 27 February 2015, to exclude Mantovani from the tender procedure. According to the minutes of that meeting, it was found that the general requirements laid down in Article 38 of Legislative Decree No 163/2006 were not met 'because of the late and inadequate information provided by the company in order to prove that it had dissociated itself from the criminal conduct of the person having ceased to perform management functions' and that the conviction 'was handed down prior to the statement submitted in the tender procedure and could, as such, have been notified by Mantovani at the stage when its participation was being assessed'.

14 Mantovani brought an action before the Tribunale regionale di giustizia amministrativa, Sezione Autonoma di Bolzano (Regional Administrative Court, Autonomous Division of Bolzano, Italy) against that exclusion decision. By judgment of 27 August 2015, that court confirmed the lawfulness of the exclusion, on the basis that Mr B.'s conviction could have been the subject of a declaration during the tendering procedure and that only a tenderer who submitted factually accurate statements without misleading the contracting authority was entitled to claim the benefit of the dissociation referred to in Article 38(1)(c) of Legislative Decree No 163/2006.

15 Mantovani appealed against that judgment before the Consiglio di Stato (Council of State, Italy) on the ground, inter alia, that Article 38 of Legislative Decree No 163/2006 is contrary to EU law, and applied for a request for a preliminary ruling to be referred to the Court.

16 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it contrary to the correct application of Article 45(2)(c) and (g) and Article 45(3)(a) of Directive 2004/18, and of the EU law principles of protection of legitimate expectations and legal certainty, equal treatment, proportionality and transparency, of the prohibition of making the procedure more cumbersome, and of the greatest possible openness to competition of public tender procedures, as well as of the principle of completeness and accuracy of the requirements governing the implementation of penalties, for national legislation such as Article 38(1)(c) of Legislative Decree [No 163/2006] to extend the legal obligation to make a declaration regarding the absence of convictions by way of final judgment (including judgments implementing a sentence resulting from a negotiated plea), for the offences referred to in that provision, to office holders in the companies intending to submit a tender who ceased to hold office in the year preceding the publication of the tender notice, which amounts to a corresponding ground for exclusion of that company from the call for tenders if the undertaking fails to show that there has been complete and genuine dissociation from the conduct which carries criminal sanctions, where assessment of compliance with the dissociation requirement is a matter for the contracting authority, which contracting authority can effectively introduce certain obligations entailing the exclusion of the tenderer in the event that they are not fulfilled, namely:

(i) an obligation to provide information and make declarations relating to criminal activities not yet settled by a final judgment (and the outcome of which is therefore uncertain), not laid down in the Legislative Decree, even in respect of office holders;

(ii) an obligation of voluntary dissociation, without describing the kind of conduct which would be exculpatory, the period to be taken into account (including whether it must occur before the criminal conviction becomes final) and the stage of the proceedings at which those obligations must be implemented;

(iii) an obligation of sincere cooperation, not clearly defined, except with reference to the general principle of good faith?'

Consideration of the question referred

Admissibility

17 The Province of Bolzano takes the view that the reference for a preliminary ruling is inadmissible. In its view, the Court of Justice has already ruled, in the judgment of 10 July 2014, *Consorzio Stabile*

Libor Lavori Pubblici (C-358/12, EU:C:2014:2063), on an issue relating to the interpretation of Article 45(2) of Directive 2004/18 which is similar to that raised in the present case.

18 In that regard, it is sufficient to note that a request for a preliminary ruling on interpretation is not inadmissible simply because it is similar to a request for a preliminary ruling on which the Court has already ruled. In any event, the case which gave rise to the judgment referred to in the previous paragraph concerned a different legal situation, characterised by the exclusion of a tenderer for non-payment of social security contributions in the context of a tendering procedure to which only the fundamental rules and general principles of the FEU Treaty were applicable, since the threshold laid down in Article 7(c) of Directive 2004/18 had not been reached.

19 The Province of Bolzano is of the opinion, moreover, that the question referred for a preliminary ruling has no connection with the main proceedings, since the exclusion was not a penalty for breach of the requirement governing notification or reporting, but for the lack of full and effective dissociation between Mantovani and the conduct of Mr B., its former director. Moreover, the reference to the ground for exclusion relating to misrepresentation referred to in Article 45(2)(g) and (3) of Directive 2004/18 is neither relevant nor decisive.

20 In that regard, it should be recalled that questions concerning EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 30 and the case-law cited).

21 In the present case, the referring court stated that, admittedly, the statements made by Mantovani on 4 and 16 December 2013 concerning the lack of a judgment having the force of res judicata cannot be described as a ‘misrepresentation’ within the meaning of Article 45(2)(g) of Directive 2004/18. Nonetheless, that court stated that it was faced with the question of whether EU law permits the taking into consideration of the absence of a declaration concerning criminal proceedings against former directors of the tendering company, who have not yet been the subject of a final judgment.

22 In those circumstances, it is not clear that the question referred has no bearing on the actual situation or on the subject matter of the main proceedings.

23 The request for a preliminary ruling is therefore admissible.

Substance

24 By its question, the referring court asks, in essence, whether Directive 2004/18, in particular Article 45(2)(c) and (g) and Article 45(3)(a) thereof, and the principles of protection of legitimate expectations, legal certainty, equal treatment, proportionality and transparency are to be interpreted as meaning that they preclude national legislation allowing the contracting authority to take into consideration, under the conditions established by that authority, the criminal conviction of the director of a company for an offence relating to the professional conduct of that undertaking, where that director ceased to perform his duties in the year preceding the publication of the tender notice and to exclude that undertaking from participating in the public tender procedure at issue, on the ground that, by failing to declare the conviction which was not yet final, it had not fully and effectively dissociated itself from the activities of that director.

25 As a preliminary point, it should be noted that the referring court refers, in the wording of the question referred, to the grounds for exclusion laid down in Article 45(2)(c) and (g) of Directive 2004/18, relating to the exclusion of a tenderer who has been the subject of a judgment which has the force of res judicata in accordance with the legislation of the country concerned in respect of an offence concerning his professional conduct, and of a tenderer who is guilty of misrepresentation in supplying the information required under Section 2 of Chapter VII of that directive or has not supplied that information.

26 As is apparent from the information contained in the order for reference, Mantovani was excluded from the tendering procedure on the ground that it had submitted, late and incomplete, the evidence which proved that it had dissociated itself from the conduct of its director. It was in particular criticised for not having indicated, in its statements of 4 and 16 December 2013, that its former director was the subject of criminal proceedings which resulted in a conviction negotiated in camera on 6 December 2013.

27 Therefore, as submitted by the European Commission, it could be held that the facts in the main proceedings may fall within the ground for exclusion laid down in Article 45(2)(d) of Directive 2004/18, which allows the exclusion of a tenderer who is guilty of grave professional misconduct, of which the contracting authorities may provide evidence by any means.

28 According to settled case-law, the fact that the referring court's question refers to certain provisions of EU law does not mean that the Court may not provide the national court with all the guidance on points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question. It is, in that regard, for the Court to extract from all the information provided by the referring court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, inter alia, judgment of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 20 and the case-law cited).

29 In those circumstances, it must be held that the request for a preliminary ruling also seeks the interpretation of the optional grounds for exclusion contained in Article 45(2)(d) of Directive 2004/18.

30 As regards the optional grounds of exclusion, it should be noted at the outset that, in accordance with the last subparagraph of Article 45(2) of Directive 2004/18, it is for the Member States, in compliance with EU law, to lay down 'the implementing conditions'.

31 In accordance with settled case-law, Article 45(2) of Directive 2004/18 does not provide for uniform application at EU level of the grounds of exclusion it mentions, since the Member States may choose not to apply those grounds of exclusion, or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context, Member States have the power to make the criteria laid down in Article 45(2) less onerous or more flexible (judgment of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 29 and the case-law cited).

32 Member States therefore enjoy some discretion in determining the requirements governing the application of the optional grounds for exclusion laid down in Article 45(2) of Directive 2004/18.

33 As regards the optional ground for exclusion provided for in Article 45(2)(c) of the directive, which authorises contracting authorities to exclude from participation in a tendering procedure a tenderer who has been the subject of a judgment which has the force of res judicata, in accordance with the legislation of the country at issue, relating to an offence concerning the professional conduct of the tenderer, it should be noted, first, that it does not specify to what extent the offences committed by managers or directors of a legal person may result in the exclusion of that legal person under that provision.

34 However, as noted by the Advocate General in points 54 and 58 of his Opinion, EU law is based on the premiss that legal persons act through their representatives. Conduct contrary to the professional ethics of those representatives may thus constitute a relevant factor in assessing the professional conduct of an undertaking. It is thus perfectly permissible for Member States to retain, as part of the exercise of their powers to determine the requirements governing the application of the optional grounds for exclusion, among the relevant factors in assessing the integrity of the tendering company, the possibility that certain actions of directors of that company are contrary to professional ethics.

35 In that regard, Article 45(1), in fine, of Directive 2004/18 acknowledges, in the context of the mandatory grounds for exclusion, that national law may take into account the existence of wrongdoing on the part of the directors of the legal person. There is therefore nothing to preclude Member States,

when implementing the ground for exclusion laid down in Article 45(2)(c) of Directive 2004/18, from considering that acts of a director representing the tendering company are imputable to that company.

36 The taking into account, in the context of the ground for exclusion laid down in Article 45(2)(c) of Directive 2004/18, of the conduct of the directors of a tenderer constituted as a legal person cannot therefore be regarded as an ‘extension’ of the scope of that ground for exclusion; it constitutes an implementation of that scope which maintains the effectiveness of that ground for exclusion.

37 Next, the fact that the factual elements which may lead to the exclusion of the tenderer, as a result of the conduct of a director who had ceased to hold office on the date of the submission of the application to take part in the tender procedure, does not preclude the application of that ground for exclusion.

38 That ground for exclusion relates, self-evidently, to the wrongful conduct of an economic operator before the procedure for the award of a public contract. It is up to the Member States to determine, taking into account the principle of proportionality, the date from which such conduct may justify the exclusion of the tenderer.

39 As regards, moreover, the question whether or not an offence affected the professional conduct of the tendering company, it should be noted that participation in the issuing of false invoices by the director of a company may be regarded as an offence involving professional misconduct.

40 Finally, as regards the requirement that the judgment must have the force of res judicata, it should be noted that that condition was fulfilled in the case in the main proceedings, given that the decision to exclude was taken after the judgment relating to Mr B. had acquired the force of res judicata.

41 In accordance with the case-law cited in paragraph 31 of the present judgment, the Member State is entitled to ease the requirements governing the application of the optional grounds for exclusion and, thus, to waive the application of a ground for exclusion in the event of a dissociation between the tenderer and the conduct constituting an offence. In the present case, it is also entitled to determine the requirements governing that dissociation and to require, as Italian law does, that the tenderer inform the contracting authority of a conviction of its director, even if the conviction is not yet final.

42 The tendering company, which must meet those requirements, may submit all the evidence which, in its view, is evidence of such a dissociation.

43 If that dissociation cannot be proved to the satisfaction of the contracting authority, the necessary consequence is the application of the ground for exclusion.

44 Having regard to what was established in paragraph 27 of the present judgment, in a situation where the judgment relating to an offence concerning the professional conduct of the director of a tendering company is not yet final, Article 45(2)(d) of Directive 2004/18 may apply. That provision makes it possible to exclude a tendering company which has been found guilty of grave professional misconduct, established by any means which the contracting authorities can provide proof of.

45 In that respect, it should be noted that the considerations set out in paragraphs 34 to 43 of the present judgment are valid and applicable mutatis mutandis in respect of grave professional misconduct.

46 In relation to the application of Article 45(2)(c) of Directive 2004/18, one of the differences lies in the fact that the contracting authority may provide proof ‘by any means’ of the existence of such grave professional misconduct.

47 To that effect, a judicial decision, even though it is not yet final may, depending on the subject of the decision, provide the contracting authority with the appropriate means by which to substantiate the existence of grave professional misconduct, its decision being, in any event, open to judicial review.

48 It should be added that, under Article 45(2)(g) of Directive 2004/18, a tenderer may be excluded if it is guilty of misrepresentation, but also where it does not provide the information required pursuant to Section 2 of Chapter VII of Title II of that directive, namely the ‘criteria for qualitative selection’. Thus, failure to inform the contracting authority of the criminal conduct of the former director may also

make it possible to exclude, under that provision, a tenderer from participating in a procedure for the award of a public works contract.

49 As regards Article 45(3)(a) of the directive, it is sufficient to note that the referring court does not explain how the interpretation of that provision is necessary in the light of the facts in the main proceedings.

50 The national court, in its reference for a preliminary ruling, further refers to several principles, of which only some have been elevated to principles of EU law, without explaining precisely how, having regard to the facts of the case, they may be relevant and preclude the national legislation at issue in the main proceedings.

51 As regards the principle of equal treatment, it is sufficient, in those circumstances, to point out that, in view of the objective of that legislation, which is to protect the integrity of the public procurement procedure, the situation of a tendering company whose director has committed an offence relating to the professional conduct of that undertaking or grave professional misconduct cannot be regarded as comparable to that of a tenderer whose director is not guilty of such conduct.

52 As regards the principle of legal certainty, of the protection of legitimate expectations and of the principle of transparency, the request for a preliminary ruling gives no indication of how those principles may need to be interpreted in the light of the case in the main proceedings.

53 As regards the principle of proportionality, it is necessary to examine its application in the light of the impact of the date from which the wrongful conduct of the administrator may be regarded as leading to the exclusion of the tendering company. If the intervening period is too significant, the national legislation is likely to reduce the scope of the EU directives on public procurement.

54 In that context, the taking into account of wrongful conduct during the year preceding the date of publication of the tender notice does not appear to be disproportionate, especially since the legislation at issue in the main proceedings provides that an undertaking may prove that it effectively and completely dissociated itself from the conduct of its director.

55 In the light of all of the foregoing considerations, the answer to the question referred is that Directive 2004/18, in particular Article 45(2)(c), (d) and (g) of that directive, and the principles of equal treatment and proportionality, must be interpreted as not precluding national legislation which allows the contracting authority:

– to take into consideration, in accordance with the conditions it has laid down, a criminal conviction of the director of a tendering company, even if the conviction is not yet final, in respect of an offence concerning the professional conduct of that company where the director ceased to perform his duties in the year preceding the publication of the tender notice, and

– to exclude that company from taking part in the tendering procedure at issue, on the ground that, by failing to declare the conviction which was not yet final, it had not fully and effectively dissociated itself from that director’s activities.

Costs

56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in particular Article 45(2)(c), (d) and (g) of that directive, and the principles of equal

treatment and proportionality, must be interpreted as not precluding national legislation which allows the contracting authority:

– **to take into consideration, in accordance with the conditions it has laid down, a criminal conviction of the director of a tendering company, even if the conviction is not yet final, for an offence concerning the professional conduct of that company where the director ceased to perform his duties in the year preceding the publication of the tender notice, and**

– **to exclude that company from taking part in the tendering procedure at issue, on the ground that, by failing to declare the conviction which was not yet final, it had not fully and effectively dissociated itself from that director's activities.**

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 21 June 2017 (1)

Case C-178/16

Impresa di Costruzioni Ing. E. Mantovani SpA,

Guerrato SpA

v

Provincia autonoma di Bolzano,

Agenzia per i procedimenti e la vigilanza in materia di contratti pubblici di lavori servizi e forniture (ACP),

Autorità nazionale anticorruzione (ANAC)

intervening parties:

Società Italiana per Condotte d'Acqua SpA,

Inso Sistemi per le Infrastrutture Sociali SpA

(Request for a preliminary ruling
from the Consiglio di Stato (Council of State, Italy))

(Public procurement — Declaration that former directors of the tendering company have no final criminal convictions — Requirement that the company show complete and genuine dissociation from the conduct of the former director in order to avoid exclusion — Assessment by the contracting authority of the conditions relating to that requirement)

1. The Italian legislation on public procurement states that (subject to the qualifications that shall be examined subsequently) public contracts are not be awarded to persons who have been convicted of serious professional conduct offences against the State 'or the Community'. This prohibition extends to undertakings whose directors are convicted of such offences, unless those undertakings can show that they have completely and genuinely dissociated themselves from the criminal conduct of their directors.

2. The Consiglio di Stato (Council of State, Italy) is being called upon to decide an appeal against a judgment upholding the decision of a contracting authority to exclude from a procurement procedure a tendering company whose director was convicted of one of those offences. In order to resolve the dispute, it is asking the Court of Justice, in essence, whether the Italian legislation under which the exclusion was effected is compatible with Directive 2004/18/EC. (2)

3. The reference for a preliminary ruling will allow the Court of Justice to refine its case-law on the ability of Member States to determine and vary the content of the optional grounds for excluding tenderers that are set out in Directive 2004/18.

I. Legislative framework

A. European Union law

Directive 2004/18

4. By virtue of Article 45 (‘Personal situation of the candidate or tenderer’):

‘1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

(a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/773/JHA;

(b) corruption, as defined in Article 3 of the Council Act of 26 May 1997 … and Article 3(1) of Council Joint Action 98/742/JHA … respectively;

(c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities;

(d) money laundering, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

2. Any economic operator may be excluded from participation in a contract where that economic operator:

…

(c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

…

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.’

5. By virtue of Article 45(3):

‘Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in [paragraph] … 2 … (c) … applies to the economic operator:

(a) ... the production of an extract from the ‘judicial record’ or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met;

...’

B. Italian law

6. The order for reference indicates that Article 38(1)(c) of Legislative Decree No 163/2006, (3) in the version applicable at the material time, provides that the ground for exclusion [from participating in procedures for the award of public works contracts, public supply contracts and public service contracts] consisting of a conviction by final judgment or the issuing of a judgment imposing a sentence that has been negotiated between the parties pursuant to Article 444 of the Codice di procedura penale (Code of Criminal Procedure), for the offences specified, (4) ‘applies also in respect of persons having ceased to hold [managerial] office in the year preceding the date of publication of the contract notice, if the undertaking does not show that there has been complete and genuine dissociation from the conduct which carries criminal sanctions’.

7. Article 38(1)(f) and (h) of the Legislative Decree No 163/2006 also provide for the exclusion from this type of competitive tendering of: (i) persons guilty of serious professional error, established by the contracting authority using any means of proof; and (ii) persons who have submitted false statements or documents concerning the criteria and requirements for participation in public tendering procedures.

II. Facts of the case and the question referred for a preliminary ruling

8. On 27 July 2013 a contract notice was published in the *Official Journal of the European Union* (5) for the financing, definitive planning and final design, construction and management of a new prison in Bolzano. The value of the contract was EUR 165 400 000.

9. Impresa di Costruzioni Ing. E. Mantovani SpA (‘Mantovani’) responded to the invitation to tender both on its own behalf and as part of a temporary association of undertakings and submitted two declarations (dated 4 and 16 December 2013) stating that it satisfied the general requirements in the invitation to tender.

10. In particular, Mantovani stated (in the first declaration) that Mr B., formerly chairman of the board of directors and [managing] director of the company, with powers to act on its behalf, had ceased to hold office on 6 March 2013 and that Mantovani was not aware of any judgment of the type referred to in Article 38(1)(c) of the Legislative Decree No 163/2006 having been issued. The second declaration was similarly worded.

11. At a meeting held on 9 January 2014, the contracting authority conditionally authorised Mantovani to take part in the procedure, pending certain clarifications, since it was ‘common knowledge’ according to a story published in a local newspaper, that, having been accused of running a system of false invoices, Mr B had negotiated a sentence of one year and 10 months’ imprisonment.

12. In the course of verifying that the requirements had been met, the contracting authority obtained an extract from the judicial record in relation to Mr B., which stated that he had been sentenced to one year and 10 months’ imprisonment for various offences that he had committed (judgment of the Tribunale di Venezia (District Court, Venice, Italy) of 5 December 2013, which became final on 29 March 2014).

13. At a meeting held on 29 May 2014, the contracting authority decided not to lift the condition relating to Mantovani’s authorisation to take part in the procedure and on 3 June 2014 it requested Mantovani to give further details regarding the judgment in question.

14. By statements of 10 June 2014 and 17 October 2014, Mantovani provided the further details requested, claiming that:

– the judgment had been published and become final only after it had submitted the statements concerning compliance with the general requirements;

– it had put in place a series of measures demonstrating that it had promptly, genuinely and completely dissociated itself from the conduct of Mr B. The latter had been immediately removed from all positions of responsibility in the Mantovani group, which had implemented an internal restructuring of the company's management bodies, recovered the shares held by Mr B. and brought an action for damages against him.

15. The contracting authority requested an opinion from the Autorità nazionale anticorruzione (National Anti-Corruption Authority, 'ANAC'), which was issued on 25 February 2015 and stated, in summary, as follows:

– Where the tenderer submits a statement attesting that, in relation to the grounds of exclusion referred to in Article 38(1)(c) of the CCP, persons who have ceased to hold office in the year preceding the date of publication of the contract notice are not covered by those grounds, using the wording 'to the best of its knowledge' and duly identifies such persons, it is for the contracting authority to undertake the necessary checks.

– In this case, there was no misrepresentation as that would have required a final judgment rather than the mere existence of pending criminal proceedings.

– It was for the contracting authority to assess whether the measures taken by Mantovani to demonstrate that the company had genuinely and completely dissociated itself from the criminal activities of the former director were actually effective.

– These measures may have been compromised by Mantovani's failure to declare the conviction in the tendering procedure. According to the case-law, a failure to keep the contracting authority informed in a timely manner of the progress of criminal proceedings involving the persons mentioned in Article 38(1)(c) of the CCP is indicative of a lack of dissociation, as it is contrary to the duty of sincere cooperation.

16. In the light of the opinion issued by ANAC, on 27 February 2015, the contracting entity decided to exclude Mantovani from the tendering procedure on the grounds of its delayed and inadequate disclosure of the evidence required to demonstrate its dissociation from the director who had been convicted. It added that the conviction of the director preceded the submission of the declarations in the tendering procedure and Mantovani could therefore have reported it.

17. Mantovani brought an action in the Tribunale regionale di giustizia amministrativa, Sezione autonoma di Bolzano (Regional Administrative Court, Bolzano autonomous section, Italy) in respect of the exclusion and, by judgment No 270 of 27 August 2015, that court held that the action was inadmissible in so far as it challenged both the opinion of the ANAC (which was merely a procedural step) and the award (which had not yet been put into effect). The judgment also rejected the arguments made for granting access to all the documents on the case-file relating to the tendering procedure and held that the company had failed to show that it had dissociated itself from the former director's criminal conduct.

18. Mantovani brought an appeal against that judgment before the Consiglio di Stato (Council of State), arguing, inter alia, that Article 38 of the CCP is incompatible with EU law and seeking a reference to the Court of Justice for a preliminary ruling.

19. By a decision of 1 December 2015, the Consiglio di Stato (Council of State) referred the following question for a preliminary ruling:

> 'Is it contrary to the correct application of Article 45(2)(c) and (g), and Article 45(3)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts … and of the EU law principles of protection of legitimate expectations and legal certainty, equal treatment, proportionality and transparency, of the prohibition of making the procedure more cumbersome, and of the greatest possible openness to competition of public tender procedures, as well

as of the principle of completeness and accuracy of the requirements governing the implementation of penalties, for national legislation such as Article 38(1)(c) of Legislative Decree No 163 of 12 April 2006 (Code on public works contracts, public service contracts and public supply contracts implementing Directives 2004/17/EC and 2004/18/EC) and subsequent amendments:

– to extend the legal obligation to make a declaration regarding the absence of convictions by way of final judgment (including judgments implementing a sentence resulting from a negotiated plea), for the offences referred to in that provision, to office-holders in the companies intending to submit a tender who ceased to hold office in the year preceding the publication of the tender notice,

– which amounts to a corresponding ground for exclusion of that company from the call for tender if the undertaking fails to show that there has been complete and genuine dissociation from the conduct which carries criminal sanctions,

– where assessment of compliance with the dissociation requirement is a matter for the contracting authority, which contracting authority can effectively introduce certain obligations entailing the exclusion of the tenderer in the event that they are not fulfilled, namely:

(i) an obligation to provide information and make declarations relating to criminal activities not yet settled by a final judgment (and the outcome of which is therefore uncertain), not laid down in the Legislative Decree, even in respect of office holders;

(ii) an obligation of voluntary dissociation, without describing the kind of conduct which would be exculpatory, the period to be taken into account (including whether it must occur before the criminal conviction becomes final) and the stage of the proceedings at which those obligations must be implemented;

(iii) an obligation of sincere cooperation, not clearly defined, except with reference to the general principle of good faith?’

III. Procedure before the Court of Justice

20. The order for reference was received at the Registry of the Court of Justice on 24 March 2016.

21. Written observations were submitted by Mantovani, Provincia Autonoma di Bolzano (Autonomous Province of Bolzano), the Italian Government and the European Commission within the time-limit specified in the second paragraph of Article 23 of the Statute of the Court of Justice.

22. Following the Court’s decision to hold a hearing and in accordance with Article 61(2) of the Rules of Procedure of the Court of Justice, it invited the parties to focus their submissions on the interpretation of Article 45(2)(d) of Directive 2004/18.

23. The hearing took place on 5 April 2017 and was attended by Mantovani, the Autonomous Province of Bolzano, the Italian Government and the European Commission.

IV. Summary of the observations of the parties

24. Mantovani argues that Article 38(1)(c) of the CCP is contrary to Article 45(2) of Directive 2004/18 because it extends the ground of exclusion (based on a criminal conviction) to persons who were company directors until up to one year preceding the publication of the contract notice and because it requires the company to show that it has genuinely dissociated itself from such directors.

25. In its view, once directors are no longer in office, they cease to have any influence in the company, with the result that to require the company to provide information about them would, in addition to being superfluous, be disproportionate and would constitute a burden which is contrary to the aim of opening up public procurement to market forces as much as possible.

26. Even if it were accepted that EU law does not preclude extending the scope of the ground in this way, the additional requirement that the company demonstrate that it has genuinely dissociated itself is unlawful, since it is entirely lacking in precision and it is left to the discretion of the contracting authority to determine whether or not it is met. Legal certainty would be particularly affected in that a judgment need not be final, there is no clear indication as to the manner in which declarations are to be made, the period that they should cover or the stage in the procedure at which they should be submitted. Furthermore, the nature of the tenderer's duty of sincere cooperation is not specified.

27. The Autonomous Province of Bolzano argues that the question referred is inadmissible because:

– it is similar to the question already answered by the Court of Justice in its judgment of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici* (C-358/12, EU:C:2014:2063), particularly paragraph 36 thereof, which refers to the ability of the Member States to incorporate the optional grounds of exclusion into national law and to vary their content;

– Mantovani was not excluded for a breach of the duty to provide information or to make declarations but because the measures taken to demonstrate that it had completely and genuinely dissociated itself from the criminal acts of its former director were taken too late and were inadequate. In that regard, the references to Article 45(2)(g) and Article 45(3)(a) of Directive 2004/18 are irrelevant.

28. On the merits, the Autonomous Province of Bolzano does not perceive any incompatibility between Article 38(1)(c) of the CCP and Directive 2004/18. Article 45 of the directive gives the Member States the freedom both to choose which of the optional grounds of exclusion mentioned in Article 45(2) will operate in their domestic law and to determine the manner in which contracting authorities will assess the elements covered by the grounds selected. The national legislation at issue is consistent with this system.

29. The Italian Government notes that the rationale behind Article 45 of Directive 2004/18 and Article 38 of the CCP is to ensure that those persons proposing to conclude contracts with governments are morally, financially and professionally reliable. The Italian legislature adopted a less stringent system than that of the directive by limiting the range of offences which can form the basis of an exclusion.

30. In the view of the Italian Government, the exclusion of an undertaking due to the conduct of its directors can be justified by that very rationale: without such a provision the contractor could easily elude the assessment of its reliability. Moreover, the tenderer has the opportunity to demonstrate to the contracting authority that it has entirely dissociated itself from the criminal conduct of its directors.

31. The Commission notes that even if the referring court is seeking an interpretation of Article 45(2)(c) and (g) and Article 45(3)(a) of Directive 2004/18, in order to provide it with a helpful answer, it is necessary to have regard to Article 45(2)(d), which relates to grave professional misconduct.

32. Although the order for reference focuses on the fact that the judgment was not final at the time that Mantovani made the declarations, the conduct of its director (issuing false invoices relating to sums in excess of EUR 9 000 000 and criminal association) could be considered grave professional misconduct. Even if the director was no longer in office when the tendering procedure took place, Article 45(2)(d) of Directive 2004/18 also covers the past conduct of an operator and encompasses all wrongful conduct which has an impact on the professional credibility of that operator. (6) Consequently, the conduct of directors only recently removed from office may affect the contracting authority's assessment of professional credibility.

33. According to the Commission, the fact that the director's conviction did not have the force of *res judicata* at the time the declarations were submitted is immaterial. It has been stated in the case-law of the Court of Justice that the grounds of exclusion set out in Article 45(2)(d) and (g) of Directive 2004/18 do not require the economic operator to have been convicted by a judgment that has become final. (7) Both EU law and national law allow grave professional misconduct to be proven by any means, so that the mere fact that criminal proceedings are pending may be sufficient.

34. The Commission goes on to state that, in assessing whether there was grave professional misconduct, the contracting authority should have taken account of the measures that Mantovani had taken to dissociate itself from the criminal conduct of its director.

35. The fact that Mantovani may not have been aware of the criminal proceedings involving its director might also form part of the ground of exclusion under Article 45(2)(g) of Directive 2004/18. The duty of the tenderer to declare grave professional misconduct is separate from the review and verification powers given to the contracting authority under Article 45(3) and Article 51 of Directive 2004/18, since the latter are concerned only with a purely formal verification or confirmation of matters already established.

36. Finally, the Commission asserts that, in the circumstances of the case, it is not contrary to the principle of proportionality to apply those grounds of exclusion.

V. Analysis

A. Preliminary remark

37. The questions referred by the Consiglio di Stato (Council of State) principally concern the compatibility of a provision of Italian law (Article 38(1)(c) of the CCP) with Directive 2004/18. Nevertheless, both in the dispute before that court and in the observations of some of the parties over the course of the preliminary ruling proceedings, the debate has extended to include the interpretation (and application) of the national provision, an issue over which the Court of Justice has no jurisdiction.

38. The answer provided by the Court of Justice must be limited to the interpretation of Directive 2004/18, in order to clarify for the benefit of the referring court whether the provision of domestic law, as described by the national court, is contrary to EU law. If it is established that it is compatible, then it is for the national court to explain how the various paragraphs of Article 38 of the CCP are to be interpreted and applied.

39. I shall be examining how the Italian legislature has a large measure of discretion when it comes to adopting the optional grounds of exclusion referred to in Directive 2004/18 and determining their content. It is for the Member States to decide, in accordance with their own legislative policies, the content of the relevant national legislation, provided that it does not contravene that directive.

40. The fact that, in previous preliminary ruling proceedings, the Court of Justice has already answered certain questions relating to the optional grounds of exclusion is not a sufficient reason to hold that the question now being referred is inadmissible, as the Autonomous Province of Bolzano alleges, as there are specific features that distinguish it from previous cases. (8)

B. The wording of the question referred for a preliminary ruling

41. It may be inferred from the account provided by the Consiglio di Stato (Council of State) that Mantovani was excluded from the tendering procedure due to its late and inadequate disclosure of the evidence required to prove its dissociation from the conduct of its director, who had been convicted prior to submission of the declarations to the contracting authority.

42. From the account of the facts it is already possible to state that the first of the EU law provisions to which the request for a preliminary ruling relates (Article 45(2)(c) of Directive 2004/18) can be of little relevance.

43. This provision refers to an economic operator who ‘has been convicted by a judgment which has the force of *res judicata* … of any offence concerning his professional conduct’. Prima facie, the contracting authority’s decision does not seem to be based on that premiss, perhaps because the director’s conviction became final on 29 March 2014, after Mantovani had submitted its declarations concerning the general requirements contained in the contract notice (on 4 and 16 December 2013).

44. Indeed, a reading of the grounds of the administrative decision excluding Mantovani shows that the contracting authority did not rely directly on the criminal conviction of Mr B., but on the late and inadequate disclosure (by Mantovani) of the evidence required to prove its dissociation from the criminal conduct of its director. The decisive factor was therefore the failure of the tenderer properly to report the existence of Mr B.’s criminal conviction, as evidence, pursuant to national case-law, of the severing of ties between the undertaking and its director.

45. This might suggest, as the Commission argues, that the real ground of exclusion does not fall under Article 45(2)(c) of Directive 2004/18, although it does relate to it. However, the conduct of Mantovani could be seen as potentially falling under Article 45(2)(d), namely 'grave professional misconduct proven by any means which the contracting authorities can demonstrate'.

46. The fact is, however, that even though the ground of exclusion based on 'grave misconduct' was incorporated into Italian law under Article 38(1)(f) of the CCP, the question raised by the Consiglio di Stato (Council of State) does not mention this ground. Nevertheless, there is nothing to prevent the Court of Justice from examining this ground in its answer. (9)

47. As the Court of Justice has repeatedly held, 'the fact that the referring court's question refers only to certain provisions of EU law does not mean that the Court may not provide the national court with all the guidance on points of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question. It is, in this regard, for the Court to extract from all the information provided by the referring court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute'. (10)

48. In this regard, and specifically in relation to Directive 2004/18, the Court of Justice saw fit in its judgment in the *Croce Amica One Italia* case, (11) to point out to the referring court that, although that court appeared to associate 'the conduct of [the] legal representative [of …] only with the grounds for exclusion relating to criminal law and entailing a conviction by a judgment that has become final … the grounds for exclusion set out in Article 45(2)(d) and (g) of the directive also give contracting authorities the power to exclude any economic operator who has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate … without there being any need for the economic operator concerned to have been convicted by a judgment that has become final'.

49. It might therefore be helpful for the Court's answer to address not only the ground of exclusion set out in Article 45(2)(c) and (g) (which are the subject matter of the question being referred) but also the ground set out in Article 45(2)(d). The Court would essentially be clarifying whether a provision of national law such as the one at issue is precluded by these provisions of Directive 2004/18.

50. It is worth repeating that if the question of the compatibility of the Italian legislation with Directive 2004/18 is answered in the affirmative, it will be for the national court to decide whether, in the light of the circumstances of the case, it was lawful for the contracting authority to exclude Mantovani from the contract for failing to pass on the information concerning the conviction of its former director, who had been removed from office less than one year prior to publication of the contract notice.

C. The optional grounds of exclusion

51. On the subject of the discretion enjoyed by contracting authorities in relation to the optional grounds of exclusion set out in Article 45(2) of Directive 2004/18, I drew attention in my Opinion in the *Connexxion Taxi Services* case (12) to the statements already made by the Court in the judgment in *La Cascina and Others* (13) under Directive 92/50/EEC (14) (Article 29 of which is worded in a similar way to Article 45(2) of Directive 2004/18), to the effect that application of the cases of optional exclusion are to be left to the assessment of the Member States, as shown by the phrase 'may be excluded from participation in a contract', which appears at the beginning of Article 29. The Member States cannot add grounds of exclusion to those referred to in the provision, but Article 29 of Directive 92/50 does not provide for uniform application of those grounds of exclusion.

52. After Directive 2004/18 came into force, the Court of Justice pursued the same line of reasoning in *Consorcio Stabile Libor Lavori Publicci*, (15) restating in paragraph 35 of the judgment the points made in *La Cascina and Others*. (16) It reiterated that the Member States must specify, in accordance with their national law and having regard to EU law, the implementing conditions for Article 45(2) of Directive 2004/18. The Court therefore again endorsed the power of the Member States to apply the exclusion criteria and, should they so wish, make them more flexible, and repeated this in its judgment of 14 December 2016, *Connexxion Taxi Services*. (17)

53. As I highlighted in my Opinion in that case, (18) it follows from the judgment in *Consorcio Stabile Libor Lavori Publicci* (19) that the exercise of that power by Member States is not, however, unconditional. First, the European Union attaches great importance to freedom of establishment and freedom to provide services, which impels it to facilitate opening up procurement procedures as far as possible, an aim which could be hindered by application of the optional grounds for exclusion. Secondly, it is legitimate to justify the grounds for exclusion in terms of general interest objectives, such as guarantees of the tenderer's reliability, diligence, professional honesty and seriousness. In order to balance those interests, the Court applies the principle of proportionality.

D. Impact on the tendering company of the criminal acts of its directors (Article 45(2)(c) of Directive 2004/18)

54. At the root of the lack of reliability of the tenderer in the present case is the criminal conduct of a former director at the time he was managing the company. Can the consequences of that offence extend to the company of which he was a director? EU law provides that this is indeed the case, based on the premiss that legal persons can only act through their officers. It follows, therefore, that any assessment of the credibility of a legal person should take into consideration the criminal acts of those in whose hands its management rests.

55. By virtue of the final sentence of Article 45(1) of Directive 2004/18, requests for information concerning the ground of exclusion for certain serious offences (which is a mandatory rather than an optional ground) may relate to 'legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer'.

56. This provision shows that certain criminal acts committed by those managing a legal person are important enough to exclude that legal person from participation in a public tendering procedure. It seems to me that there can be no objection from an EU law perspective to the same principle being extended (albeit optionally) to other types of offences and even to irregularities in the conduct of directors of legal persons, to the extent that they have repercussions which concern the professional conduct of such legal persons.

57. Admittedly, Article 45(2) of Directive 2004/18, unlike Article 45(1), does not contain a specific provision to that effect. However, I do not think that this omission necessarily precludes national law from associating one of the optional grounds for excluding legal persons with irregular conduct on the part of their directors.

58. As I have mentioned, the final subparagraph of Article 45(2) of Directive 2004/18 gives the Member States wide discretion to determine the 'implementing conditions' for the optional grounds of exclusion. In exercising that freedom, the national legislation containing the specific content of certain grounds (such as those relating to the probity of the tendering company) may include the unprofessional conduct of company directors as a relevant factor.

59. By the same token, based on the discretion of Member States to shape their legislation, there is nothing to prevent domestic law from providing that, when assessing optional grounds of exclusion, the failure of the undertaking to dissociate itself from the criminal behaviour of its director should be taken into consideration where this '[concerns] his professional conduct'. It is also for the national legislature and, where relevant, the court called upon to decide the case, to determine what indicators or relevant factors may be relied on to ascertain whether or not that dissociation took place.

60. Those factors include those mentioned by the referring court, namely the voluntary nature of the dissociation, 'the extent to which exculpatory conduct is described', the relative timing and the stage of the procedure at which such dissociation should occur. It is, I repeat, for the national courts to define the scope of these factors, which are in reality simply 'clarifications' introduced by the national legislature in order to define the parameters of the optional grounds of exclusion and the evidence needed to establish them. (20)

61. The question referred by the Consiglio di Stato (Council of State), is framed so as to emphasise that Article 38(1)(c) of the CCP on the one hand 'extends' the obligation to disclose convictions by making it cover situations where senior office-holders of tendering companies have been convicted and, on the other hand, '[treats .. as a ground for exclusion]' the fact that the 'undertaking does not show' that it has dissociated itself from the criminal conduct of such persons.

62. This reasoning leads me to assert that there is nothing in Directive 2004/18 to prevent the national legislature from clarifying this optional ground of exclusion in the way that the CCP has done. I do not see how this might harm the freedom of establishment or the freedom to provide services. Furthermore, this ground of exclusion is likely to protect the general interest which underlies the requirement that tenderers should be reliable, diligent and honest in their professional dealings.

63. In this regard, I do not think that the referring court's appeal (in rather general and unreasoned terms) to the 'EU law principles of protection of legitimate expectations and legal certainty, equal treatment, proportionality and transparency, of the prohibition of making the procedure more cumbersome, and of the greatest openness of the public procurement market …' adds anything significant to the debate.

64. In conclusion, the fact that Article 45(2)(c) of Directive 2004/18 does not specifically refer to the undertaking dissociating itself from the offences committed by its directors does not mean that the national legislature cannot incorporate this factor into the relevant provision of the CCP. As I have already mentioned several times, it is for the Member States to define the 'implementing conditions' for Article 45(2) of Directive 2004/18 in its domestic law.

65. Consequently, a provision such as Article 38(1)(c) of the CCP, by virtue of which it is possible to exclude from participating in a tendering procedure undertakings that fail to show that there has been complete and genuine dissociation from certain offences (21) previously committed by their directors, is compatible with EU law.

E. Exclusion of an economic operator for having failed to supply the contracting authority with the appropriate information (Article 45(2)(g) of Directive 2004/18)

66. The referring court refers to the 'discretion of the contracting authority' which allows it to 'introduce effectively' an obligation on tendering undertakings to provide information which is 'not laid down in the Legislative Decree'. The contracting authority is also supposed to have introduced 'obligations of sincere cooperation, not clearly defined, except with reference to the general clause of good faith'.

67. In so far as these comments made by the Consiglio di Stato (Council of State) call into question the actions of an administrative body which is subject to judicial review by the Consiglio di Stato (Council of State) itself, then it is for that court to draw any conclusions as far as domestic law is concerned. (22) The answer provided in preliminary ruling proceedings should not affect the jurisdiction of the national courts.

68. I should also point out that the question has been referred for a preliminary ruling in order to identify any incompatibility between national legislation and Directive 2004/18. With that in mind, when answering the question, the wording of Article 38(1)(h) of the CCP should be analysed in comparison with Article 45(2)(g) of Directive 2004/18.

69. However, the fact is that (as noted in the observations of the Autonomous Province of Bolzano) the exclusion was not based on those grounds, but rather on the grounds that the silence of the tenderer indicated that it had not dissociated itself from the criminal conduct of the director. It does not seem that it is therefore strictly necessary to interpret Article 45(2)(g) of Directive 2004/18, since the national legislation transposing that particular provision of the directive has not been applied in this case.

70. Even so, I do not think that the national provision can be criticised for being incompatible in this respect, since its wording is substantially the same as that of the EU provision which it transposes. Both require that the information supplied by tenderers to the contracting authority should not contain any misrepresentations. Article 45(2)(g) of Directive 2004/18 adds that tenderers can be excluded not only for misrepresentations but also where they fail to supply information relating to the 'criteria for qualitative selection' (Section II of Chapter VII, under Title II of the directive).

71. However, concealing the criminal acts of a former director from the contracting authority may also constitute a factor to be considered by the national court when assessing whether there has been grave professional misconduct, which I will now proceed to assess.

F. Exclusion of an economic operator for grave professional misconduct (Article 45(2)(d) of Directive 2004/18)

72. Even though the question referred by the Consiglio di Stato (Council of State) does not, strictly speaking, relate to this ground of exclusion, as I have already explained, there is nothing to prevent the Court of Justice offering its observations on the subject. The submissions of the parties at the hearing focused on precisely this aspect, as requested by the Court of Justice itself.

73. The professional misconduct to which Article 45(2)(d) of Directive 2004/18 refers covers all wrongful conduct which has an impact on the professional credibility of the operator. (23) The concept of 'grave misconduct' refers to conduct which denotes a wrongful intent or negligence of a certain [gravity]. (24) A conviction, even one that has not become final, (25) is a good indicator that acts which amount to a criminal offence should be assessed in terms of grave professional misconduct. (26) The conviction itself is a justifiable means of objectively establishing the way in which the tendering company was being run.

74. On that basis, and having regard to the nature of the offences of which the director was convicted, which were unquestionably indicative of a lack of business ethics in his professional conduct, the failure of Mantovani to dissociate itself from that conduct might legitimately be covered by that ground of exclusion.

75. In this regard, it is necessary to make a distinction between questions of substance and those relating to proving the facts. In terms of the latter, Article 45(3) of Directive 2004/18 is of assistance in seeing the logic and system of the different methods of obtaining information that may be used by the contracting authority to assess the tenderer's reliability.

76. This provision requires contracting authorities to accept, by way of evidence, the methods specified therein in respect of the situations referred to in Article 45(1) and Article 45(2)(a), (b), (c), (e) and (f). These are situations in which there is a (relatively simple) way of officially establishing the conduct by means of registers or certificates issued by public bodies.

77. By contrast, in relation to the other situations (namely, those relating to Article 45(2)(d) and (g) of Directive 2004/18), I am not aware of any such means by which to obtain documentation. This is only logical since in respect of these grounds of exclusion (grave professional misconduct and misrepresentation or failure to supply the required information) the means of establishing the facts are more varied. It is unlikely that there is a sufficient degree of convergence, in the different Member States, in respect of the legal mechanisms making it possible to record officially those circumstances in a harmonised manner.

78. When it comes to the optional grounds of exclusion in respect of which no official method of recording a finding is specified, as is the case for grave professional misconduct, the discretion of the contracting authority is not confined to any particular document or certificate. The misconduct can be assessed on the basis of the contracting authority's knowledge of the relevant facts, however that knowledge was obtained.

79. As far as the evidence is concerned, it should be borne in mind that, in this case, the existence of the conviction (under the negotiated procedure) of the director of Mantovani for offences concerning his professional conduct at the time he was in office was properly documented and has not been called into question.

80. In the light of that incontrovertible fact, it is for the national courts before which Mantovani's claim has been brought, to ascertain whether or not the tendering company had genuinely and completely dissociated itself from the criminal conduct of its director. The debate on this question then becomes one of substance, as I have called it, and is no longer simply procedural.

81. In that debate, the conduct of Mantovani must be assessed not only from the viewpoint of characterising the actual conduct, but also from the perspective of the proportionality of the contracting authority's response. One factor which may be important in this context is the length of time between the criminal conduct, the conduct of the undertaking and the date of the contract notice.

82. It seems to me that the period of time referred to in the CCP (the year preceding the date of publication of the contract notice) is reasonable for assessing the connection between the conduct of the director and the undertaking, in relation to the acts immediately prior to the tendering procedure. Moreover, that period of time does not mean that there is an absolute presumption that the company had been involved in the activities

of the director, since the company may show that it had genuinely and completely dissociated itself from the director.

83. Finally, I do not think that the discretion granted to the contracting authority by the national legislation necessarily leads to a disproportionate result. On the contrary, I think that Article 38(1)(c) of the CCP respects the necessary balance between the means used and the objective sought, which is simply to exclude from such selection procedures any tenderers that are untrustworthy, precisely because they have failed to dissociate themselves within a defined period from the earlier criminal conduct of their directors.

84. Thus, the exclusion of the tenderer is not automatic, (27) but is the result of a careful assessment of the particular case, which the contracting authority must carry out. Neither is the tenderer put in a compromising position as far as protection of its legal position is concerned, since there is always the possibility of an effective review by the courts of the exercise of the public authority's powers to evaluate how the operator has satisfied its professional obligations.

85. In short, I can find no basis on which to hold that the national legislation which is the subject matter of the referring court's question is incompatible with EU law.

VI. Conclusion

86. In the light of the foregoing, I suggest that the Court reply to the Consiglio di Stato (Council of State, Italy) in the following terms:

> It is not contrary to Article 45(2)(c), (d) and (g), and to Article 45(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts for a provision of national law to permit a contracting authority to:
>
> – take into consideration the criminal conviction of a director of a tendering company for an offence concerning his professional conduct in the case where that director ceased to hold office during the year preceding the publication of the contract notice, even if the conviction had not become final at that time;
>
> – exclude the tendering company from participating in the procurement on the basis that it had failed to dissociate itself completely and genuinely from the criminal conduct of the director.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 Decreto legislativo n. 163, Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163, Code on public works contracts, public service contracts and public supply contracts implementing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (GURI No 100 of 2 May 2006), ('the CCP').

---

4 Namely the offences of 'participation in a criminal organisation, corruption, fraud and money laundering, as defined in the provisions referred to in Article 45(1) of Directive 2004/18'.

---

5 S 145-251280.

---

6 On this point, the Commission cites the judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801), paragraph 27.

---

7 Judgment of 11 December 2014, *Croce Amica One Italia* (C-440/13, EU:C:2014:2435), paragraph 28.

---

8 The point made at the hearing by the Autonomous Province of Bolzano and also raised in the opinion of the ANAC of 25 February 2015 to the effect that the Consiglio di Stato (Council of State) has already ruled in a similar case, in which the exclusion of Mantovani from another public procurement for similar reasons was upheld, does not constitute an obstacle to the admissibility of the question either. That judgment of 22 December 2014 (number 6284), delivered by the Consiglio di Stato (Council of State) sitting in a formation (the fourth section) which differed from the formation which is now making the reference for a preliminary ruling (the sixth section) held that it was lawful to exclude Mantovani from the tendering procedure for having failed to show genuine disassociation from the criminal conduct of directors by not disclosing their convictions.

---

9 The observations made at the hearing indicate that there would be no procedural obstacles under domestic law to the referring court taking this part of the Court's answer into consideration when ultimately deciding the case.

---

10 Judgment of 22 October 2015, *Impresa Edilux and SICEF* (C-425/14, EU:C:2015:721), paragraph 20 and the case-law referred to therein.

---

11 Judgment of 11 December 2014 (C-440/13, EU:C:2014:2435), paragraph 28.

---

12 C-171/15, EU:C:2016:506, paragraph 41 et seq.

---

13 Judgment of 9 February 2006 (C-226/04 and C-228/04, EU:C:2006:94), paragraphs 21 and 23.

---

14 Council Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

---

15 Judgment of 10 July 2014 (C-358/12, EU:C:2014:2063).

---

16 Judgment of 9 February 2006 (C-226/04 and C-228/04, EU:C:2006:94).

---

17 C-171/15, EU:C:2016:948, paragraph 29.

---

18 *Connexxion Taxi Services* (C-171/15, EU:C:2016:506), paragraph 44.

---

19 Judgment of 10 July 2014 (C-358/12, EU:C:2014:2063), paragraphs 29, 31 and 32.

---

20 I will be referring to evidence, in connection with Article 45(3) of Directive 2004/18, when analysing exclusion for professional misconduct in point 75 et seq. of this Opinion.

---

21 These are listed in footnote 4. All concern the professional conduct of the offenders.

---

22 At the hearing, some of the parties relied on Article 38(2) and Article 46 of the CCP, claiming that they demonstrate that tenderers have a duty to disclose in the declarations made to the contracting authority any judgments by which they were convicted. The Consiglio di Stato (Council of State) referred to the same provisions in the judgment of 22 December 2014 cited in footnote 8.

---

23 Mantovani submits that, under Italian law, the only grave misconduct that meets the conditions of Article 38(1)(f) of the CCP is that which occurs in the context of its previous relationships with contracting authorities (although it accepts that it could be extended to other areas, such as breaches of competition law). Even if this were the case (and this argument is rejected by the Autonomous Province of Bolzano), this would not affect the reply to the question referred, which only concerns the interpretation of Article 45(2)(d) of Directive 2004/18, to which this supposed restriction clearly does not apply. Furthermore, it should also be noted that the Consiglio di Stato (Council of State) has confirmed that the wording of Article 38(1)(f) of the CCP ‘reproduces that of the Community legislation, which therefore makes all professional misconduct relevant (judgment of section 5 of the Consiglio di Stato (Council of State) of 20 November 2015, No 5299, issued in respect of Case No 7974 of 2012).

---

24 Judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801), paragraphs 27, 30 and 31.

---

25 In paragraph 28 of the judgment of 11 December 2014, *Croce Amica One Italia* (C-440/13, EU:C:2014:2435), the Court of Justice indicated that, in the case of grave professional misconduct, there is no need for the economic operator concerned to have been convicted by a judgment that has become final.

---

26 Judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801), paragraph 28.

---

27 It follows from the judgment of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801), paragraph 31 that automatic exclusion (in relation to a tenderer guilty of grave misconduct) may go beyond the discretion given to the Member States under Article 45(2) of Directive 2004/18.

EU:C:2016:870

ORDONNANCE DE LA COUR (sixième chambre)

10 novembre 2016 (*)

« Renvoi préjudiciel – Article 99 du règlement de procédure de la Cour – Marchés publics – Directive 2004/18/CE – Directive 2014/24/UE – Participation à un appel d'offres – Soumissionnaire ayant omis de mentionner dans l'offre les charges d'entreprise concernant la sécurité au travail – Obligation prétorienne de porter cette mention – Exclusion du marché sans possibilité de rectifier cette omission »

Dans l'affaire C-162/16,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Tribunale amministrativo regionale per il Molise (tribunal administratif régional du Molise, Italie), par décision du 27 janvier 2016, parvenue à la Cour le 18 mars 2016, dans la procédure

Spinosa Costruzioni Generali SpA,

Melfi Srl

contre

Comune di Monteroduni,

en présence de :

I.c.i Impresa Costruzioni Industriali Srl e.a.,

Alba Costruzioni ScpA,

Ottoerre Group Srl,

LA COUR (sixième chambre),

composée de M. A. Arabadjiev, faisant fonction de président de chambre, MM. C. G. Fernlund et S. Rodin (rapporteur), juges,

avocat général : M. M. Campos Sánchez-Bordona,

greffier : M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation des principes de protection de la confiance légitime et de sécurité juridique, lus en combinaison avec les principes de la libre circulation des marchandises, de la liberté d'établissement, de la libre prestation de services, d'égalité de traitement, de non-discrimination, de reconnaissance mutuelle, de proportionnalité, de transparence, repris par la directive 2014/24/UE, du Parlement européen et du Conseil, du 26 février 2014 sur la passation des marchés publics et abrogeant la directive 2004/18/CE (JO 2014, L 94, p. 65).

2 Cette demande a été présentée dans le cadre de deux litiges opposant, respectivement, Spinosa Costruzioni Generali SpA et Melfi Srl au Comune di Monteroduni (commune de Monteroduni, Italie) au sujet des décisions relatives à l'attribution d'un marché public de travaux.

Le cadre juridique

Le droit de l'Union

3 L'article 2 de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO 2004, L 134, p. 114), disposait :

« Les pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité, de manière non discriminatoire et agissent avec transparence. »

4 Aux termes de l'article 18, paragraphe 1, premier alinéa, de la directive 2014/24 :

« Les pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité et sans discrimination et agissent d'une manière transparente et proportionnée. »

5 L'article 56, paragraphe 3, de cette directive prévoit :

« Lorsque les informations ou les documents qui doivent être soumis par les opérateurs économiques sont ou semblent incomplets ou erronés ou lorsque certains documents sont manquants, les pouvoirs adjudicateurs peuvent, sauf disposition contraire du droit national mettant en œuvre la présente directive, demander aux opérateurs économiques concernés de présenter, compléter, clarifier ou préciser les informations ou les documents concernés dans un délai approprié, à condition que ces demandes respectent pleinement les principes d'égalité de traitement et transparence. »

Le droit italien

6 L'article 86, paragraphe 3 bis, du decreto legislativo n. 163 – Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (décret législatif n° 163, portant sur le code des marchés publics de travaux, de services et de fournitures en application des directives 2004/17/CE et 2004/18/CE), du 12 avril 2006 (supplément ordinaire à la GURI n° 100, du 2 mai 2006), tel que modifié par le decreto legislativo n° 152 (décret législatif n° 152), du 11 septembre 2008 (supplément ordinaire à la GURI n° 231, du 2 octobre 2008) (ci-après le « décret législatif n° 163/2006 »), dispose :

« Lors de la préparation des appels d'offres et pour l'évaluation de l'anomalie des offres dans les procédures de passation de marchés publics de travaux, de fournitures et de services, les entités adjudicatrices sont tenues de déterminer si la valeur économique est adéquate et suffisante au regard du coût du travail et du coût afférent à la sécurité, lequel doit être spécifiquement mentionné et être raisonnable au regard de l'ampleur et des caractéristiques des travaux, des services ou des fournitures. Aux fins du présent paragraphe, le coût du travail est fixé périodiquement, dans des tableaux spéciaux, par le ministre du Travail et de la Prévoyance sociale, sur la base des valeurs économiques prévues par la négociation collective conclue par les syndicats comparativement les plus représentatifs, des normes en matière de prévoyance et d'assistance, des différents secteurs commerciaux et des différentes zones territoriales. En l'absence de convention collective applicable, le coût du travail est établi en fonction de la convention collective du secteur commercial le plus proche de celui concerné. »

7 Aux termes de l'article 87, paragraphe 4, du décret législatif n° 163/2006 :

« Ne sont pas admises les justifications concernant les charges de sécurité au titre de l'article 131, ainsi que le plan de sécurité et de coordination visé à l'article 12 du décret législatif n° 494 du 14 août 1996, et l'évaluation y afférente des coûts au sens de l'article 7 du décret n° 222 du président de la République du 3 juillet 2003. Lors de l'évaluation de l'anomalie, le pouvoir adjudicateur tient compte

des coûts afférents à la sécurité, qui doivent être spécifiquement mentionnés dans l'offre et être raisonnables au regard de l'ampleur et des caractéristiques des services ou des fournitures. »

8 L'article 26, paragraphe 6, du decreto legislativo n. 81 – Attuazione dell'articolo 1 della legge 3 agosto 2007, n. 123, in materia di tutela della salute e della sicurezza nei luoghi di lavoro (décret législatif n° 81, – Mise en œuvre de l'article 1 de la loi du 3 août 2007, n° 123, dans le cadre de la réglementation concernant la protection de la santé des travailleurs et de la sécurité sur les lieux de travail), du 9 avril 2008, dispose :

« Lors de la préparation des appels d'offres et pour l'évaluation de l'anomalie des offres dans les procédures de passation des marchés publics de travaux, de fournitures et de services, les entités adjudicatrices sont tenues de déterminer si la valeur économique est adéquate et suffisante au regard du coût du travail et du coût afférent à la sécurité, lequel doit être spécifiquement mentionné et être raisonnable au regard de l'ampleur et des caractéristiques des travaux, des services ou des fournitures. Aux fins du présent paragraphe, le coût du travail est fixé périodiquement, dans des tableaux spéciaux, par le ministre du Travail, de la Santé et des Politiques sociales, sur la base des valeurs économiques prévues par la négociation collective conclue par les syndicats comparativement les plus représentatifs, des normes en matière de prévoyance et d'assistance, des différents secteurs commerciaux et des différentes zones territoriales. En l'absence de convention collective applicable, le coût du travail est établi en fonction de la convention collective du secteur commercial le plus proche de celui concerné. »

Les litiges au principal et la question préjudicielle

9 La commune de Monteroduni a lancé une procédure d'appel d'offres ouverte, complétée ultérieurement, aux fins de l'attribution d'un marché public de travaux ayant pour objet la « réalisation de la viabilité et des services en réseaux de la zone pour les installations de production » situés sur son territoire. Le cahier des charges de ce marché prévoyait que pouvaient participer à cette procédure les entreprises détenant la qualification dite « SOA », inscrites dans certaines catégories.

10 Quatre concurrents ont participé à l'appel d'offres. Par une décision du 5 août 2015, le marché a été attribué à l'association temporaire d'entreprises en constitution, composée d'I.c.i. Impresa Costruzioni Industriali Srl et d'Alba Costruzioni ScpA.

11 Spinosa Costruzioni Generali a été classée en deuxième position et Melfi a été classée en troisième position.

12 Spinosa Costruzioni Generali et Melfi ont chacune saisi le Tribunale amministrativo regionale per il Molise (tribunal administratif régional du Molise, Italie) d'un recours tendant à l'annulation de cette décision, à la réadmission à la procédure d'appel d'offres ainsi qu'à la réparation du préjudice qu'elles estiment avoir subi.

13 Par un arrêt n° 3 du 20 mars 2015, rendu en assemblée plénière, le Consiglio di Stato (Conseil d'État, Italie) aurait considéré que, dans le cadre des procédures de passation de marchés publics de travaux, les soumissionnaires devaient obligatoirement mentionner, dans leur « offre économique », les coûts internes de sécurité au sein de l'entreprise, sous peine d'exclusion de la procédure, et cela même si cette obligation et les conséquences de son non-respect n'étaient pas prévues dans les documents de marché.

14 Par un arrêt n° 9 du 2 novembre 2015, l'assemblée plénière du Consiglio di Stato (Conseil d'État), confirmant son interprétation, aurait précisé que, « en cas de défaut de mention des coûts de l'entreprise afférents à la sécurité, les pouvoirs relatifs à l'assistance à l'établissement du dossier ne peuvent pas être valablement exercés, notamment pour les procédures dans lesquelles la phase de la soumission des offres s'est achevée avant la publication de l'arrêt de l'assemblée plénière n° 3 de 2015 ».

15 Dans ces conditions, le Tribunale amministrativo regionale per il Molise (tribunal administratif régional du Molise) a décidé de surseoir à statuer et de poser à la Cour la question préjudicielle suivante :

« Les principes communautaires de protection de la confiance légitime et de sécurité juridique, en combinaison avec les principes de libre circulation des marchandises, de liberté d'établissement et de libre prestation de services, qui sont énoncés dans le traité FUE, ainsi que les principes qui en découlent, tels que l'égalité de traitement, la non-discrimination, la reconnaissance mutuelle, la proportionnalité et la transparence, énoncés (en dernier lieu) dans la directive 2014/24, s'opposent-ils à une réglementation nationale, comme la réglementation italienne résultant des dispositions combinées de l'article 87, paragraphe 4, et de l'article 86, paragraphe 3 bis, du décret législatif n° 163/2006 ainsi que de l'article 26, paragraphe 6, du décret législatif n° 81 de 2008, telles qu'interprétées par les arrêts n^{os} 3 et 9 rendus en 2015 par l'assemblée plénière du Consiglio di Stato (Conseil d'État) dans sa fonction d'interprétation uniforme du droit, conformément à l'article 99 du code de procédure administrative, en vertu de laquelle le défaut de mention, dans les offres économiques d'une procédure de passation de marchés publics de travaux, des coûts de sécurité au sein de l'entreprise entraîne en tout état de cause l'exclusion de l'entreprise soumissionnaire, même dans le cas où l'obligation de mention séparée n'a été spécifiée ni dans la réglementation de l'appel d'offres ni dans le formulaire annexé à remplir pour la soumission des offres, et même indépendamment de la circonstance que, du point de vue substantiel, l'offre respecte les coûts minimums de sécurité au sein de l'entreprise ? »

Sur la question préjudicielle

Observations liminaires

16 Conformément à l'article 99 du règlement de procédure de la Cour, lorsqu'une question posée à titre préjudiciel est identique à une question sur laquelle celle-ci a déjà statué, lorsque la réponse à une telle question peut être clairement déduite de la jurisprudence ou lorsque la réponse à la question posée à titre préjudiciel ne laisse place à aucun doute raisonnable, la Cour peut, à tout moment, sur proposition du juge rapporteur, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée.

17 Dans son arrêt du 2 juin 2016, Pizzo (C-27/15, EU:C:2016:404), la Cour a été amenée à statuer sur des questions en substance identiques à celles qui sont soulevées dans la présente affaire par le Tribunale amministrativo regionale per il Molise (tribunal administratif régional du Molise).

18 Les réponses apportées par cet arrêt étant pleinement transposables à la présente affaire, il y a lieu de faire application de la disposition procédurale susmentionnée.

Sur la directive applicable

19 À titre liminaire, il convient de rappeler que l'arrêt du 2 juin 2016, Pizzo (C-27/15, EU:C:2016:404), procède à l'interprétation des dispositions de la directive 2004/18. Cette directive a été abrogée par la directive 2014/24, avec effet au 18 avril 2016.

20 L'article 90 de la directive 2014/24 dispose que les États membres doivent mettre en vigueur les dispositions législatives, réglementaires et administratives nécessaires pour se conformer à cette directive au plus tard le 18 avril 2016, sous réserve de certaines exceptions dont, notamment, celles relatives aux marchés publics électroniques, pour lesquelles le délai de transposition est fixé au 18 octobre 2018.

21 En conséquence, à la date des faits en cause au principal, la directive 2004/18 était encore applicable, de sorte qu'il convient d'interpréter la demande de décision préjudicielle comme visant à l'interprétation de celle-ci et non à celle de la directive 2014/24.

Sur le fond

22 Par sa question, la juridiction de renvoi demande, en substance, si le principe d'égalité de traitement et l'obligation de transparence, tels que mis en œuvre par la directive 2004/18, doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un soumissionnaire de la procédure de passation d'un marché public à la suite du non-respect, par celui-ci, de l'obligation d'indiquer de façon distincte dans l'offre les charges d'entreprise concernant la sécurité au travail – dont le non-respect est sanctionné par l'exclusion de la procédure – qui résulte non pas expressément des documents de marché ou de la

réglementation nationale, mais d'une interprétation de cette réglementation ainsi que du comblement des lacunes présentées par lesdits documents, par la juridiction nationale.

23 Afin de répondre à cette question, il importe, à titre liminaire, de rappeler, d'une part, que le principe d'égalité de traitement impose que les soumissionnaires disposent des mêmes chances dans la formulation des termes de leurs offres et implique donc que ces offres soient soumises aux mêmes conditions pour tous les soumissionnaires. D'autre part, l'obligation de transparence, qui en constitue le corollaire, a pour but de garantir l'absence de risque de favoritisme et d'arbitraire de la part du pouvoir adjudicateur (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 36 et jurisprudence citée).

24 Cette obligation implique que toutes les conditions et les modalités de la procédure d'attribution soient formulées de manière claire, précise et univoque dans l'avis de marché ou dans le cahier des charges, de façon, premièrement, à permettre à tous les soumissionnaires raisonnablement informés et normalement diligents d'en comprendre la portée exacte et de les interpréter de la même manière et, deuxièmement, à mettre le pouvoir adjudicateur en mesure de vérifier effectivement si les offres des soumissionnaires correspondent aux critères régissant le marché en cause (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 36 et jurisprudence citée).

25 De même, la Cour a précisé que les principes de transparence et d'égalité de traitement exigent que les conditions de fond et de procédure concernant la participation à un marché soient clairement définies au préalable et rendues publiques, en particulier les obligations pesant sur les soumissionnaires, afin que ceux-ci puissent connaître exactement les contraintes de la procédure et être assurés du fait que les mêmes contraintes valent pour tous les concurrents (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 37 et jurisprudence citée).

26 En outre, il y a lieu de relever que la directive 2004/18, à son annexe VII A portant sur les informations qui doivent figurer dans les avis pour les marchés publics, dans sa partie relative aux « Avis de marchés », point 17, prévoit que les « [c]ritères de sélection concernant la situation personnelle des opérateurs économiques qui peuvent entraîner l'exclusion de ces derniers et [les] informations requises prouvant qu'ils ne relèvent pas des cas justifiant l'exclusion » de la procédure de passation du marché en cause doivent être énoncés dans l'avis de marché (voir arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 38).

27 Dans les litiges au principal, la juridiction de renvoi précise que l'obligation d'indiquer de manière distincte dans l'offre les coûts de l'entreprise concernant la sécurité au travail, sous peine d'exclusion de la procédure de passation du marché, n'était prévue ni dans l'avis de marché ni explicitement dans la loi.

28 Ainsi que l'expose cette juridiction, cette obligation résulterait de l'interprétation de la réglementation nationale par le Consiglio di Stato (Conseil d'État).

29 Il convient de relever que, en application de l'article 27, paragraphe 1, de la directive 2004/18, le pouvoir adjudicateur peut indiquer ou peut être obligé par un État membre d'indiquer dans le cahier des charges l'organisme ou les organismes auprès desquels les candidats ou les soumissionnaires peuvent obtenir les informations pertinentes sur les obligations relatives à la fiscalité, à la protection de l'environnement, aux dispositions de protection et aux conditions de travail qui sont en vigueur dans l'État membre. Toutefois, il ne résulte pas des dispositions de cette directive, notamment des articles 49 à 51 de celle-ci, que l'absence d'indications par les soumissionnaires du respect de ces obligations entraînerait automatiquement l'exclusion de la procédure de passation (voir, en ce sens, arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 43).

30 Une condition subordonnant le droit de participer à une procédure de marché public qui découlerait de l'interprétation du droit national et de la pratique d'une autorité, telle que celle en cause au principal, serait particulièrement préjudiciable pour les soumissionnaires établis dans d'autres États membres, dans la mesure où leur niveau de connaissance du droit national et de son interprétation ainsi que de la pratique des autorités nationales ne peut être comparé à celui des soumissionnaires nationaux (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 46).

31 Dans l'hypothèse où, comme dans les litiges au principal, une condition de participation à la procédure de passation du marché, sous peine d'exclusion de cette dernière, n'est pas expressément prévue par les documents du marché et où cette condition ne peut être identifiée que par une interprétation jurisprudentielle du droit national, le pouvoir adjudicateur peut accorder au soumissionnaire exclu un délai suffisant pour régulariser son omission (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 50).

32 Il résulte de l'ensemble des considérations qui précèdent qu'il convient de répondre à la question posée que le principe d'égalité de traitement et l'obligation de transparence, tels que mis en œuvre par la directive 2004/18, doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un soumissionnaire de la procédure de passation d'un marché public à la suite du non-respect par celui-ci de l'obligation d'indiquer de façon distincte dans l'offre les charges d'entreprise concernant la sécurité au travail – dont le non-respect est sanctionné par l'exclusion de la procédure – qui résulte non pas expressément des documents de marché ou de la réglementation nationale, mais d'une interprétation de cette réglementation et du comblement des lacunes présentées par lesdits documents, par la juridiction nationale statuant en dernier ressort. Les principes d'égalité de traitement et de proportionnalité doivent également être interprétés en ce sens qu'ils ne s'opposent pas au fait d'accorder à un tel soumissionnaire la possibilité de remédier à la situation et de satisfaire à ladite obligation dans un délai fixé par le pouvoir adjudicateur.

Sur les dépens

33 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, la Cour (sixième chambre) dit pour droit :

Le principe d'égalité de traitement et l'obligation de transparence, tels que mis en œuvre par la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services, doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un soumissionnaire de la procédure de passation d'un marché public à la suite du non-respect par celui-ci de l'obligation d'indiquer de façon distincte dans l'offre les charges d'entreprise concernant la sécurité au travail – dont le non-respect est sanctionné par l'exclusion de la procédure – qui résulte non pas expressément des documents de marché ou de la réglementation nationale, mais d'une interprétation de cette réglementation et du comblement des lacunes présentées par lesdits documents, par la juridiction nationale statuant en dernier ressort. Les principes d'égalité de traitement et de proportionnalité doivent également être interprétés en ce sens qu'ils ne s'opposent pas au fait d'accorder à un tel soumissionnaire la possibilité de remédier à la situation et de satisfaire à ladite obligation dans un délai fixé par le pouvoir adjudicateur.

Signatures

---

* Langue de procédure : l'italien.

ORDONNANCE DE LA COUR (sixième chambre)

10 novembre 2016 (*)

« Renvoi préjudiciel – Article 99 du règlement de procédure de la Cour – Marchés publics – Directive 2004/18/CE – Directive 2014/24/UE – Participation à un appel d'offres – Soumissionnaire ayant omis de mentionner dans l'offre les charges d'entreprise concernant la sécurité au travail – Obligation prétorienne de porter cette mention – Exclusion du marché sans possibilité de rectifier cette omission »

Dans l'affaire C-140/16,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Tribunale amministrativo regionale per le Marche (tribunal administratif régional des Marches, Italie), par décision du 5 février 2016, parvenue à la Cour le 7 mars 2016, dans la procédure

Edra Costruzioni Soc. coop.,

Edilfac Srl

contre

Comune di Maiolati Spontini,

en présence de :

Torelli Dottori SpA,

LA COUR (sixième chambre),

composée de M. A. Arabadjiev, faisant fonction de président de chambre, MM. C. G. Fernlund et S. Rodin (rapporteur), juges,

avocat général : M. M. Campos Sánchez-Bordona,

greffier : M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation des principes de protection de la confiance légitime et de sécurité juridique, lus en combinaison avec les principes de la libre circulation des marchandises, de la liberté d'établissement, de la libre prestation de services, d'égalité de traitement, de non-discrimination, de reconnaissance mutuelle, de proportionnalité, de transparence, repris par la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE (JO 2014, L 94, p. 65).

2 Cette demande a été présentée dans le cadre de deux litiges opposant, respectivement, Edra Costruzioni Soc. coop. et Edilfac Srl au Comune di Maiolati Spontini (commune de Maiolati Spontini, Italie) au sujet des décisions d'exclusion de ces sociétés de la procédure de passation d'un marché public et de l'attribution de ce marché à une entreprise tierce.

Le cadre juridique

Le droit de l'Union

3 L'article 2 de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO 2004, L 134, p. 114), disposait :

« Les pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité, de manière non discriminatoire et agissent avec transparence. »

4 Aux termes de l'article 18, paragraphe 1, premier alinéa, de la directive 2014/24 :

« Les pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité et sans discrimination et agissent d'une manière transparente et proportionnée. »

5 L'article 56, paragraphe 3, de cette directive prévoit :

« Lorsque les informations ou les documents qui doivent être soumis par les opérateurs économiques sont ou semblent incomplets ou erronés ou lorsque certains documents sont manquants, les pouvoirs adjudicateurs peuvent, sauf disposition contraire du droit national mettant en œuvre la présente directive, demander aux opérateurs économiques concernés de présenter, compléter, clarifier ou préciser les informations ou les documents concernés dans un délai approprié, à condition que ces demandes respectent pleinement les principes d'égalité de traitement et transparence. »

Le droit italien

6 L'article 86, paragraphe 3 bis, du decreto legislativo n. 163 – Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (décret législatif n° 163, portant sur le code des marchés publics de travaux, de services et de fournitures en application des directives 2004/17/CE et 2004/18/CE), du 12 avril 2006 (supplément ordinaire à la GURI n° 100, du 2 mai 2006), tel que modifié par le decreto legislativo n. 152 (décret législatif n° 152), du 11 septembre 2008 (supplément ordinaire à la GURI n° 231, du 2 octobre 2008) (ci-après le « décret législatif n° 163/2006 »), dispose :

« Lors de la préparation des appels d'offres et pour l'évaluation de l'anomalie des offres dans les procédures de passation de marchés publics de travaux, de fournitures et de services, les entités adjudicatrices sont tenues de déterminer si la valeur économique est adéquate et suffisante au regard du coût du travail et du coût afférent à la sécurité, lequel doit être spécifiquement mentionné et être raisonnable au regard de l'ampleur et des caractéristiques des travaux, des services ou des fournitures. Aux fins du présent paragraphe, le coût du travail est fixé périodiquement, dans des tableaux spéciaux, par le ministre du Travail et de la Prévoyance sociale, sur la base des valeurs économiques prévues par la négociation collective conclue par les syndicats comparativement les plus représentatifs, des normes en matière de prévoyance et d'assistance, des différents secteurs commerciaux et des différentes zones territoriales. En l'absence de convention collective applicable, le coût du travail est établi en fonction de la convention collective du secteur commercial le plus proche de celui concerné. »

7 Aux termes de l'article 87, paragraphe 4, du décret législatif n° 163/2006 :

« Ne sont pas admises les justifications concernant les charges de sécurité au titre de l'article 131, ainsi que le plan de sécurité et de coordination visé à l'article 12 du décret législatif n° 494 du 14 août 1996, et l'évaluation y afférente des coûts au sens de l'article 7 du décret n° 222 du président de la République du 3 juillet 2003. Lors de l'évaluation de l'anomalie, le pouvoir adjudicateur tient compte des coûts afférents à la sécurité, qui doivent être spécifiquement mentionnés dans l'offre et être raisonnables au regard de l'ampleur et des caractéristiques des services ou des fournitures. »

8 L'article 26, paragraphe 6, du decreto legislativo n. 81 – Attuazione dell'articolo 1 della legge 3 agosto 2007, n. 123, in materia di tutela della salute e della sicurezza nei luoghi di lavoro (décret législatif n° 81, – Mise en œuvre de l'article 1 de la loi du 3 août 2007, n° 123, dans le cadre de la

réglementation concernant la protection de la santé des travailleurs et de la sécurité sur les lieux de travail), du 9 avril 2008, dispose :

« Lors de la préparation des appels d'offres et pour l'évaluation de l'anomalie des offres dans les procédures de passation des marchés publics de travaux, de fournitures et de services, les entités adjudicatrices sont tenues de déterminer si la valeur économique est adéquate et suffisante au regard du coût du travail et du coût afférent à la sécurité, lequel doit être spécifiquement mentionné et être raisonnable au regard de l'ampleur et des caractéristiques des travaux, des services ou des fournitures. Aux fins du présent paragraphe, le coût du travail est fixé périodiquement, dans des tableaux spéciaux, par le ministre du Travail, de la Santé et des Politiques sociales, sur la base des valeurs économiques prévues par la négociation collective conclue par les syndicats comparativement les plus représentatifs, des normes en matière de prévoyance et d'assistance, des différents secteurs commerciaux et des différentes zones territoriales. En l'absence de convention collective applicable, le coût du travail est établi en fonction de la convention collective du secteur commercial le plus proche de celui concerné. »

Le litige au principal et la question préjudicielle

9 Par un avis de marché du 22 avril 2015, la commune de Maiolati Spontini a lancé une procédure d'appel d'offres ouverte en vue de l'attribution d'un marché public de travaux ayant pour objet la construction du nouveau complexe scolaire. La valeur de base de ce marché était de 3 250 179,50 euros. Le critère d'attribution retenu était celui de l'offre économiquement la plus avantageuse.

10 Le délai de dépôt des offres a expiré le 22 juin 2015.

11 Edra Costruzioni et Edilfac ont rédigé leurs offres selon les indications figurant dans le cahier des charges du marché en cause.

12 Après l'évaluation de leurs offres techniques, Edra Costruzioni et Edilfac ont été exclues de la procédure de passation, au seul motif que leurs offres économiques ne mentionnaient pas les coûts internes de sécurité au travail. L'obligation de faire figurer ces coûts dans les offres n'était pas prévue dans les documents de marché, mais résulterait, selon la juridiction de renvoi, de la réglementation nationale telle qu'elle a été interprétée par le Consiglio di Stato (Conseil d'État, Italie) dans son arrêt n° 3 du 20 mars 2015, rendu en assemblée plénière.

13 Par cet arrêt, le Consiglio di Stato (Conseil d'État) aurait considéré que, dans le cadre des procédures de passation de marchés publics de travaux, les soumissionnaires devaient obligatoirement mentionner, dans leur « offre économique », les coûts internes de sécurité au sein de l'entreprise, sous peine d'exclusion de la procédure, et cela même si cette obligation et les conséquences de son non-respect n'étaient pas prévues dans les documents de marché.

14 Par un arrêt n° 9 du 2 novembre 2015, l'assemblée plénière du Consiglio di Stato (Conseil d'État), confirmant son interprétation, aurait précisé :

« En cas de défaut de mention des charges de sécurité de l'entreprise, les pouvoirs relatifs à l'assistance à l'établissement du dossier ne peuvent pas être valablement exercés, notamment pour les procédures dans lesquelles la phase de la soumission des offres s'est achevée avant la publication de l'arrêt de l'assemblée plénière n° 3 de 2015. »

15 La commune de Maiolati Spontini, en application de cet arrêt du 2 novembre 2015, a refusé aux requérantes au principal, lors de l'adjudication définitive du marché en cause, l'exercice de l'assistance à l'établissement du dossier.

16 Edra Costruzioni et Edilfac ont, chacune, formé un recours devant le Tribunale amministrativo regionale per le Marche (tribunal administratif régional des Marches, Italie) aux fins d'obtenir l'annulation des décisions les excluant de la procédure de passation du marché en cause et de celle attribuant le marché à une entreprise tierce, la réadmission à la procédure d'appel d'offres ainsi que la réparation du préjudice qu'elles estiment avoir subi.

17 Cette juridiction précise qu'elle a rejeté la demande en référé formée par Edra Costruzioni, dans la mesure où les décisions du pouvoir adjudicateur dont la suspension était demandée procédaient de la stricte application des arrêts susmentionnés du Consiglio di Stato (Conseil d'État).

18 Dans ces conditions, le Tribunale amministrativo regionale per le Marche (tribunal administratif régional des Marches) a décidé de surseoir à statuer et de poser à la Cour la question préjudicielle suivante :

« Les principes communautaires de protection de la confiance légitime et de sécurité juridique, en combinaison avec les principes de libre circulation des marchandises, de liberté d'établissement et de libre prestation de services, qui sont énoncés dans le traité FUE, ainsi que les principes qui en découlent, tels que l'égalité de traitement, la non-discrimination, la reconnaissance mutuelle, la proportionnalité et la transparence, énoncés (en dernier lieu) dans la directive 2014/24, s'opposent-ils à une réglementation nationale, comme la réglementation italienne résultant des dispositions combinées de l'article 87, paragraphe 4, et de l'article 86, paragraphe 3 bis, du décret législatif n° 163/2006 ainsi que de l'article 26, paragraphe 6, du décret législatif n° 81 de 2008, telles qu'interprétées par les arrêts n^{os} 3 et 9 rendus en 2015 par l'assemblée plénière du Consiglio di Stato (Conseil d'État) dans sa fonction d'interprétation uniforme du droit, conformément à l'article 99 du code de procédure administrative, en vertu de laquelle le défaut de mention, dans les offres économiques d'une procédure de passation de marchés publics de travaux, des coûts de sécurité au sein de l'entreprise entraîne en tout état de cause l'exclusion de l'entreprise soumissionnaire, sans la possibilité d'une assistance à l'établissement du dossier et [d'une procédure] contradictoire, même dans le cas où l'obligation de mention séparée n'a été spécifiée ni dans la réglementation de l'appel d'offres ni dans le formulaire annexé à remplir pour la soumission des offres, et même indépendamment de la circonstance que, du point de vue substantiel, l'offre respecte effectivement les coûts minimums de sécurité au sein de l'entreprise ? »

Sur la question préjudicielle

Observations liminaires

19 Conformément à l'article 99 du règlement de procédure de la Cour, lorsqu'une question posée à titre préjudiciel est identique à une question sur laquelle celle-ci a déjà statué, lorsque la réponse à une telle question peut être clairement déduite de la jurisprudence ou lorsque la réponse à la question posée à titre préjudiciel ne laisse place à aucun doute raisonnable, la Cour peut, à tout moment, sur proposition du juge rapporteur, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée.

20 Dans son arrêt du 2 juin 2016, Pizzo (C-27/15, EU:C:2016:404), la Cour a été amenée à statuer sur des questions en substance identiques à celles qui sont soulevées dans la présente affaire par le Tribunale amministrativo regionale per le Marche (tribunal administratif régional des Marches).

21 Les réponses apportées par cet arrêt étant pleinement transposables à la présente affaire, il y a lieu de faire application de la disposition procédurale susmentionnée.

Sur la directive applicable

22 À titre liminaire, il convient de rappeler que l'arrêt du 2 juin 2016, Pizzo (C-27/15, EU:C:2016:404), procède à l'interprétation des dispositions de la directive 2004/18. Cette directive a été abrogée par la directive 2014/24, avec effet au 18 avril 2016.

23 L'article 90 de la directive 2014/24 dispose que les États membres doivent mettre en vigueur les dispositions législatives, réglementaires et administratives nécessaires pour se conformer à cette directive au plus tard le 18 avril 2016, sous réserve de certaines exceptions dont, notamment, celles relatives aux marchés publics électroniques, pour lesquelles le délai de transposition est fixé au 18 octobre 2018.

24 En conséquence, à la date des faits en cause au principal, la directive 2004/18 était encore applicable, de sorte qu'il convient d'interpréter la demande de décision préjudicielle comme visant à

l'interprétation de celle-ci et non à celle de la directive 2014/24.

Sur le fond

25 Par sa question, la juridiction de renvoi demande, en substance, si le principe d'égalité de traitement et l'obligation de transparence, tels que mis en œuvre par la directive 2004/18, doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un soumissionnaire de la procédure de passation d'un marché public à la suite du non-respect, par celui-ci, de l'obligation d'indiquer de façon distincte dans l'offre les charges d'entreprise concernant la sécurité au travail – dont le non-respect est sanctionné par l'exclusion de la procédure – qui résulte non pas expressément des documents de marché ou de la réglementation nationale, mais d'une interprétation de cette réglementation et du comblement des lacunes présentées par lesdits documents, par la juridiction nationale.

26 Afin de répondre à cette question, il importe, à titre liminaire, de rappeler, d'une part, que le principe d'égalité de traitement impose que les soumissionnaires disposent des mêmes chances dans la formulation des termes de leurs offres et implique donc que ces offres soient soumises aux mêmes conditions pour tous les soumissionnaires. D'autre part, l'obligation de transparence, qui en constitue le corollaire, a pour but de garantir l'absence de risque de favoritisme et d'arbitraire de la part du pouvoir adjudicateur (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 36 et jurisprudence citée).

27 Cette obligation implique que toutes les conditions et les modalités de la procédure d'attribution soient formulées de manière claire, précise et univoque dans l'avis de marché ou dans le cahier des charges, de façon, premièrement, à permettre à tous les soumissionnaires raisonnablement informés et normalement diligents d'en comprendre la portée exacte et de les interpréter de la même manière et, deuxièmement, à mettre le pouvoir adjudicateur en mesure de vérifier effectivement si les offres des soumissionnaires correspondent aux critères régissant le marché en cause (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 36 et jurisprudence citée).

28 De même, la Cour a précisé que les principes de transparence et d'égalité de traitement exigent que les conditions de fond et de procédure concernant la participation à un marché soient clairement définies au préalable et rendues publiques, en particulier les obligations pesant sur les soumissionnaires, afin que ceux-ci puissent connaître exactement les contraintes de la procédure et être assurés du fait que les mêmes contraintes valent pour tous les concurrents (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 37 et jurisprudence citée).

29 En outre, il y a lieu de relever que la directive 2004/18, à son annexe VII A portant sur les informations qui doivent figurer dans les avis pour les marchés publics, dans sa partie relative aux « Avis de marchés », point 17, prévoit que les « [c]ritères de sélection concernant la situation personnelle des opérateurs économiques qui peuvent entraîner l'exclusion de ces derniers et [les] informations requises prouvant qu'ils ne relèvent pas des cas justifiant l'exclusion » de la procédure de passation du marché en cause doivent être énoncés dans l'avis de marché (voir arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 38).

30 Dans les litiges au principal, la juridiction de renvoi précise que l'obligation d'indiquer de manière distincte dans l'offre les coûts de l'entreprise concernant la sécurité au travail, sous peine d'exclusion de la procédure de passation du marché, n'était prévue ni dans l'avis de marché ni explicitement dans la loi.

31 Ainsi que l'expose cette juridiction, cette obligation résulterait de l'interprétation de la réglementation nationale par le Consiglio di Stato (Conseil d'État).

32 Il convient de relever que, en application de l'article 27, paragraphe 1, de la directive 2004/18, le pouvoir adjudicateur peut indiquer ou peut être obligé par un État membre d'indiquer dans le cahier des charges l'organisme ou les organismes auprès desquels les candidats ou les soumissionnaires peuvent obtenir les informations pertinentes sur les obligations relatives à la fiscalité, à la protection de l'environnement, aux dispositions de protection et aux conditions de travail qui sont en vigueur dans l'État membre. Toutefois, il ne résulte pas des dispositions de cette directive, notamment des articles 49 à 51 de celle-ci, que l'absence d'indications par les soumissionnaires du respect de ces obligations

entraînerait automatiquement l'exclusion de la procédure de passation (voir, en ce sens, arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 43).

33 Une condition subordonnant le droit de participer à une procédure de marché public qui découlerait de l'interprétation du droit national et de la pratique d'une autorité, telle que celle en cause au principal, serait particulièrement préjudiciable pour les soumissionnaires établis dans d'autres États membres, dans la mesure où leur niveau de connaissance du droit national et de son interprétation ainsi que de la pratique des autorités nationales ne peut être comparé à celui des soumissionnaires nationaux (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 46).

34 Dans l'hypothèse où, comme dans les litiges au principal, une condition de participation à la procédure de passation du marché, sous peine d'exclusion de cette dernière, n'est pas expressément prévue par les documents du marché et où cette condition ne peut être identifiée que par une interprétation jurisprudentielle du droit national, le pouvoir adjudicateur peut accorder au soumissionnaire exclu un délai suffisant pour régulariser son omission (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 50).

35 Il résulte de l'ensemble des considérations qui précèdent qu'il convient de répondre à la question posée que le principe d'égalité de traitement et l'obligation de transparence, tels que mis en œuvre par la directive 2004/18, doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un soumissionnaire de la procédure de passation d'un marché public à la suite du non-respect par celui-ci de l'obligation d'indiquer de façon distincte dans l'offre les charges d'entreprise concernant la sécurité au travail – dont le non-respect est sanctionné par l'exclusion de la procédure – qui résulte non pas expressément des documents de marché ou de la réglementation nationale, mais d'une interprétation de cette réglementation et du comblement des lacunes présentées par lesdits documents, par la juridiction nationale statuant en dernier ressort. Les principes d'égalité de traitement et de proportionnalité doivent également être interprétés en ce sens qu'ils ne s'opposent pas au fait d'accorder à un tel soumissionnaire la possibilité de remédier à la situation et de satisfaire à ladite obligation dans un délai fixé par le pouvoir adjudicateur.

Sur les dépens

36 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, la Cour (sixième chambre) dit pour droit :

Le principe d'égalité de traitement et l'obligation de transparence, tels que mis en œuvre par la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services, doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un soumissionnaire de la procédure de passation d'un marché public à la suite du non-respect par celui-ci de l'obligation d'indiquer de façon distincte dans l'offre les charges d'entreprise concernant la sécurité au travail – dont le non-respect est sanctionné par l'exclusion de la procédure – qui résulte non pas expressément des documents de marché ou de la réglementation nationale, mais d'une interprétation de cette réglementation et du comblement des lacunes présentées par lesdits documents, par la juridiction nationale statuant en dernier ressort. Les principes d'égalité de traitement et de proportionnalité doivent également être interprétés en ce sens qu'ils ne s'opposent pas au fait d'accorder à un tel soumissionnaire la possibilité de remédier à la situation et de satisfaire à ladite obligation dans un délai fixé par le pouvoir adjudicateur.

Signatures

* Langue de procédure : l’italien.

EU:C:2017:358

JUDGMENT OF THE COURT (Eighth Chamber)

11 May 2017 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/17/EC — Principles of awarding contracts — Article 10 — Principle of equal treatment of tenderers — Requirement for contracting authorities to request tenderers to amend or supplement their tender — Right of the contracting authority to retain the bank guarantee in the event of refusal — Directive 92/13/EEC — Article 1(3) — Review procedures — Decision to award a public contract — Exclusion of a tenderer — Actions for annulment — Interest in bringing proceedings)

In Case C-131/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland), made by decision of 19 February 2016, received at the Court on 1 March 2016, in the proceedings

Archus sp. z o.o.,

Gama Jacek Lipik

v

Polskie Górnictwo Naftowe i Gazownictwo S.A.,

intervener:

Digital-Center sp. z o.o.,

THE COURT (Eighth Chamber),

composed of M. Vilaras, President of the Chamber (Rapporteur), M. Safjan and D. Šváby, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Polskie Górnictwo Naftowe i Gazownictwo S.A., by A. Olszewska,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by F. Di Matteo, avvocato dello Stato,

– the European Commission, by K. Herrmann and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 10 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Article 1(3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 92/13’).

2 The request has been made in proceedings between Archus sp. z o.o. and Gama Jacek Lipik (together, ‘Archus and Gama’) and Polskie Górnictwo Naftowe i Gazownictwo S.A. (Polish oil extraction and gas industry company) concerning that company’s decisions rejecting their tender in the procedure for the award of a public service contract and accepting the tender submitted by Digital-Center sp. z o.o.

Legal context

European Union law

3 Article 10 of Directive 2004/17 provides:

‘Contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

4 Article 1(3) of Directive 92/13 provides:

‘Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.’

5 The third paragraph of Article 2a(2) of Directive 92/13 provides as follows:

‘Candidates shall be deemed to be concerned if the contracting entity has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.’

Polish law

6 Article 25 of the Ustawa z dnia 29 stycznia 2004 r. — Prawo zamówień publicznych (Dz. U. 2015, position 2164) (law of 29 January on public procurement) (‘the Pzp’) provides:

‘1. In the procedure for the award of a contract the contracting authority may request from economic operators only declarations and documents necessary to conduct the procedure. The declarations and documents proving that:

(1) the conditions for participation in the procedure have been fulfilled, and

(2) the tendered supplies, services or works satisfy the requirements laid down by the contracting authority,

shall be indicated by the contracting authority in the contract notice, the tender specifications or the invitation to tender.

2. The President of the Council of Ministers shall determine, by order, the kinds of documents which a contracting authority can request from an economic operator and the forms in which those documents may be submitted ...’

7 Article 26(3) of the Pzp states:

‘The contracting authority shall request economic operators which within the period laid down did not submit the declarations or documents referred to in Article 25(1) required by the contracting authority, or which did not submit authorisations, which submitted declarations or documents referred to in Article 25(1) required by the contracting authority that contain errors, or which submitted incorrect authorisations, to submit them within a specified period unless, notwithstanding the submission thereof, the economic operator’s tender is to be rejected or it would be necessary to annul the procedure. The declarations and documents submitted at the request of the contracting authority must prove that the economic operator fulfils the conditions for participation in the procedure and that the tendered supplies, services or works fulfil the requirements laid down by the contracting authority, no later than on the date on which the period for submitting applications to participate in the procedure or the period for submitting tenders expires.’

8 Article 46(4)(a) of the Pzp is worded as follows:

‘The contracting authority shall retain the guarantee and interest if the economic operator, in reply to the invitation referred to in Article 26(3), has not provided, for reasons for which it is responsible, the documents or declarations referred to in Article 25(1), the authorisations, the list of entities belonging to the same group referred to in Article 24(2)(5), or the information that they do not belong to a group, or if they have not consented to the correction of an error referred to in Article 87(2)(3), which has made it impossible to select its tender as being the most advantageous.’

9 Article 87 of the Pzp provides:

‘1. During the examination and assessment of tenders the contracting authority may request an economic operator to clarify the content of submitted tenders. Negotiations between the contracting authority and an economic operator concerning the submitted tender and, subject to paragraphs 1a and 2, any changes to the content thereof shall not be permitted.

1a. During the examination and assessment of tenders in a competitive dialogue procedure the contracting authority may request economic operators to clarify and improve the content of tenders and to provide additional information; however, fundamental changes to the content of tenders or changes to the requirements contained in the tendering specifications shall not be permitted.

2. The contracting authority shall correct in the tender:

(1) obvious drafting errors,

(2) obvious calculation errors, having regard to the calculation consequences of the corrections made,

(3) any other errors consisting of inconsistency of the tender with the tendering specifications not giving rise to fundamental changes to the content of the tender — informing the economic operator whose tender has been corrected thereof without delay.’

10 Article 179(1) of the Pzp provides:

‘The legal protection measures laid down in this section shall be available to an economic operator, competition participant or other person where it has, or has had, an interest in obtaining a particular contract or sustained, or may sustain, damage as a result of the breach of the provisions of this Law by the contracting authority.’

11 Article 180(1) of the Pzp states:

‘An appeal shall be available only against action taken by the contracting authority in the procedure for the award of a contract which is inconsistent with this Law or failure to take the action which the contracting authority is required to take under this Law.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 On 3 June 2015 Polskie Górnictwo Naftowe i Gazownictwo published in the *Official Journal of the European Union*, under number 2015/S 105-191838, a notice of a restricted invitation to tender for the award of a public service contract for the digitalisation of documents in its central geological archives and the preparation of an electronic version of the documents available on its internal network. The subject matter of the contract consisted of scanning the paper documents in those archives, digitally processing the scanned documents and recording them on durable data carriers in common use in given digital formats and in the form of microfilms.

13 Paragraph 4.1 of the tender specification stated that tenderers had to attach two documents to their tender. One was to be a scanned copy of a document prepared by the contracting authority, recorded on a durable medium and edited in accordance with a detailed description in paragraph 4.1(a) of the specification. The other was to be a sample of 35mm microfilm containing the exposed result of the work submitted for quality assessment in A4 format and an enlargement thereof (16 times) to A O format, together with a description of the microfilming method and the technical parameters specified in paragraph 4.1(b) of the specification (‘the microfilm sample’).

14 The quality of the first document was to be assessed under the tender evaluation criteria, while the quality of the microfilm sample was to be assessed according to the ‘satisfies/does not satisfy’ rule, it being stipulated that if the sample was not satisfactory the offer was to be rejected pursuant to Article 89(1)(2) of the Pzp.

15 Tenders were also required to secure their tender by means of a deposit in the amount of PLN 20 000.

16 Two tenders were submitted in that procedure, one jointly by Archus and Gama, the other by Digital-Center.

17 On 15 October 2015 Archus and Gama, stating that there had been an inadvertent mistake, sent the contracting authority a request for correction of their tender, pursuant to Article 87(2)(3) of the Pzp, seeking to substitute a new microfilm sample for that annexed to their tender, which did not conform to the tender specifications.

18 On 17 November 2015 the contracting authority replied to that request, stating that it considered that the new microfilm sample supplemented the documents sent, pursuant to Article 26(3) of the Pzp. However, it also informed them that they had not provided information on the method for microfilming the sample and the technical parameters required in accordance with paragraph 4(1)(b) of the tender specification and, therefore, invited them to supplement that information.

19 After examination of the two microfilm samples provided by Archus and Gama, the contracting authority finally rejected their tender as not being in accordance with paragraph 4(1)(b) of the tender specification. It took the view that the samples of microfilm submitted by those companies were not readable at a minimum resolution of 200 dots per inch (dpi) from a microfilmed copy of an A O sheet. In addition, it considered that the tender submitted by Digital-Center was the most favourable.

20 Archus and Gama then brought an action before the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland) against the decisions of the contracting authority rejecting their tender and accepting Digital-Center’s tender.

21 The referring court argues, in essence, that under the national legislation on public procurement the contracting authority may require tenderers to present ‘documents and declarations’ and samples of the products which are to be supplied in connection with the call for tenders. It is also required to ask them to supplement, where appropriate, documents which are missing or which contain errors so that they comply with the requirements of the tender specification, except where the bid ought to be rejected for other reasons or where it is necessary to cancel the procedure.

22 The referring court expresses uncertainty, first, on the lawfulness of the requirement imposed on the contracting authority to invite a tenderer to supplement a document required by the tender specification or to submit a new sample in accordance with that specification, as in the case in the main proceedings,

in so far as that may lead that tenderer to alter the content of his tender, which would be detrimental to the transparency of the procurement procedure. It is also uncertain as to the lawfulness of the retention of the guarantee paid by the tenderer where the tenderer does not take up the contracting authority's invitation to supplement such a document. Lastly, it questions the legal interest of Archus and Gama in the cancellation of Digital-Center's tender.

23 In those circumstances, the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can Article 10 of [Directive 2004/17] be interpreted as meaning that the contracting authority can be required to invite economic operators which have not submitted within the prescribed period (that is to say, the period specified for submitting tenders) "declarations or documents" requested by the contracting authority proving that the tendered supplies, services or works satisfy the requirements laid down by the contracting authority (that term also covering samples of the subject matter of the contract), or which submitted "declarations or documents" requested by the contracting authority containing errors, to submit "declarations or documents" (samples) which are missing or which correct errors within a specified additional period, without laying down a prohibition under which supplemented "declarations or documents" (samples) cannot alter the content of the tender?

(2) Can Article 10 of [Directive 2004/17] EC be interpreted as meaning that the contracting authority can retain the deposit lodged by the economic operator if that operator, in response to the contracting authority's invitation to supplement the tender, did not submit "documents or declarations" (samples) proving that the tendered supplies, services or works satisfy the requirements laid down by the contracting authority, where that supplementation would result in a change to the content of the tender, or did not consent to the contracting authority's correction of the tender, which made it impossible to select the tender submitted by the economic operator as being the most advantageous?

(3) Must Article 1(3) of [Directive 92/13] be interpreted as meaning that "a particular contract", as referred to in that provision in the phrase "interest in obtaining a particular contract", means "a particular procedure carried out for the award of a public contract" (in this case: that published in the notice of 3 June 2015), or "the particular subject matter of the contract" (in this case: the service of digitising the contracting authority's archive documents), irrespective of whether, as a consequence of an appeal being allowed, the contracting authority will be required to annul the procedure for the award of a public contract and possibly to initiate a subsequent procedure for the award of a public contract?'

The first question

24 By its first question, the referring court asks, in essence, whether the principle of equal treatment of economic operators laid down in Article 10 of Directive 2004/17 must be interpreted as precluding, in the context of a call for tenders, a contracting authority from inviting tenderers to provide the required declarations or documents which were not supplied by them within the prescribed period for the submission of tenders or to correct those declarations or documents in case of errors, without that contracting authority also being required to point out to those tenderers that they are prohibited from altering the content of the tenders submitted.

25 In that regard, it must be recalled, first of all, that the requirement for the contracting authority to observe the principle of equal treatment of tenderers which has the aim of promoting the development of healthy and effective competition between undertakings taking part in a public procurement procedure (see, inter alia, judgments of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 110, and of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 33) and which lies at the very heart of the EU rules on public procurement procedures (see, inter alia, judgments of 22 June 1993, *Commission* v *Denmark*, C-243/89, EU:C:1993:257, paragraph 33; of 25 April 1996, *Commission* v *Belgium*, C-87/94, EU:C:1996:161, paragraph 51; and of 18 October 2001, *SIAC Construction*, C-19/00, EU:C:2001:553, paragraph 33)

means, inter alia, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (see judgments of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 45, and of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 37).

26 That principle requires, in particular, that all tenderers are afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions (judgments of 25 April 1996, *Commission* v *Belgium*, C-87/94, EU:C:1996:161, paragraph 54; of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 93, and of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 33).

27 The principle of equal treatment and the obligation of transparency also preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer (see, to that effect, judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 36, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 31).

28 To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment (judgment of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 37).

29 However, the Court has also previously held that the principle of equal treatment does not preclude the correction or amplification of details of a tender, where it is clear that they require clarification or where it is a question of the correction of obvious clerical errors, subject, however, to the fulfilment of certain requirements (see, to that effect, in the context of tendering procedures under Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraphs 35 to 45, concerning the evaluation of offers stage, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 30 to 39, concerning the stage of pre-selection of tenderers).

30 First of all, a request for clarification of a tender, which may not be made until after the contracting authority has looked at all the tenders, must, as a general rule, be sent in an equivalent manner to all undertakings which are in the same situation and must relate to all sections of the tender which require clarification (see judgments of 29 March 2012, *SAG ELV Slovenskoand Others*, C-599/10, EU:C:2012:191, paragraphs 42 to 44, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 34 and 35).

31 In addition, that request may not lead to the submission by a tenderer of what would appear in reality to be a new tender (see judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 40, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 36).

32 Lastly, as a general rule, when exercising its discretion as regards the right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome (see judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 41, and of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 37).

33 A request for clarification cannot, however, make up for the lack of a document or information whose production was required by the contract documents, the contracting authority being required to comply

strictly with the criteria which it has itself laid down (see, to that effect, judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 40).

34 In the present case, the referring court stated, in its request for a preliminary ruling, that the tenderers had to include, as an annex to their bid, samples of digitised archive documents, which had to be prepared following the instructions set out at paragraph 4.1 of the tender specification, and had to indicate the process for the digitisation and its quality.

35 In the circumstances of the main proceedings, it was Archus and Gama as tenderers who sent the contracting authority a request for their tender to be corrected, based on Article 87(2)(3) of the Pzp, in order to replace the sample which they had annexed to their bid, which did not comply with the specifications in the tender specification, with a new microfilm sample.

36 In accordance with the case-law referred to in paragraph 29 above, a request sent by the contracting authority to a tenderer to supply the declarations and documents required cannot, in principle, have any other aim than the clarification of the tender or the correction of an obvious error vitiating the tender. It cannot, therefore, permit a tenderer generally to supply declarations and documents which were required to be sent in accordance with the tender specification and which were not sent within the time limit for tenders to be submitted. Nor can it, in accordance with the case-law referred to in paragraph 31 above, result in the presentation by a tenderer of documents containing corrections where in reality they constitute a new tender.

37 In any event, the obligation which a contracting authority may have under national law, to invite tenderers to submit the declarations and documents required which they have not sent within the time limit given for the submission of offers, or to correct those declarations and documents in the event of errors, cannot be permitted except in so far as the additions or corrections made to the initial tender do not result in a substantial amendment of that tender. It is apparent from paragraph 40 of the judgment of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191) that the initial tender cannot be amended to correct obvious clerical errors other than exceptionally and where that amendment does not result, in reality, in the proposal of a new tender.

38 It is for the referring court to determine whether, in the circumstances of the main proceedings, the substitution made by Archus and Gama remained within the limits of the correction of an obvious error vitiating its tender.

39 Consequently, the answer to the first question referred is that the principle of equal treatment of economic operators set out in Article 10 of Directive 2004/17 must be interpreted as precluding, in a public procurement procedure, the contracting authority from inviting a tenderer to submit declarations or documents whose communication was required by the tender specification and which have not been submitted within the time limit given for the submission of tenders. On the other hand, that article does not preclude the contracting authority from inviting a tenderer to clarify a tender or to correct an obvious clerical error in that tender, on condition, however, that such an invitation is sent to all tenderers in the same situation, that all tenderers are treated equally and fairly and that that clarification or correction may not be equated with the submission of a new tender, which is for the referring court to determine.

The second question

40 By its second question, the referring court asks, in essence, whether Article 10 of Directive 2004/17 must be interpreted as not precluding, in circumstances such as those of the main proceedings, the contracting authority from retaining the guarantee lodged by a tenderer in a public procurement procedure, where the tenderer either did not submit the documents showing that its tender satisfied the requirements set in the tender specification by the contracting authority, because that would change the content of its offer, or did not consent to the contracting authority correcting its tender, with the consequence that its tender could not be selected.

41 According to settled case-law, the procedure laid down in Article 267 TFEU is an instrument of cooperation between the Court and the national courts, by means of which the former provides the

latter with the points of interpretation of European Union law which they need in order to decide the disputes before them (see, inter alia, judgments of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, point 30; of 15 September 2011, *Unió de Pagesos de Catalunya*, C-197/10, EU:C:2011:590, paragraph 16; and of 19 June 2012, *Chartered Institute of Patent Attorneys*, C-307/10, EU:C:2012:361, paragraph 31).

42 In the context of that cooperation, questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, judgments of 21 January 2003, *Bacardi-Martini and Cellier des Dauphins*, C-318/00, EU:C:2003:41, paragraph 43; of 15 September 2011, *Unió de Pagesos de Catalunya*, C-197/10, EU:C:2011:590, paragraph 17, and of 19 June 2012, *Chartered Institute of Patent Attorneys*, C-307/10, EU:C:2012:361, paragraph 32).

43 The Court's function in preliminary rulings is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, inter alia, judgments of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 32, and of 15 September 2011, *Unió de Pagesos de Catalunya*, C-197/10, EU:C:2011:590, paragraph 18).

44 It must be noted that, as is apparent from the order for reference, the circumstances of the main proceedings clearly do not correspond to either of the two scenarios envisaged by the referring court in its second question.

45 The dispute in the main proceedings essentially relates, as is clear from the consideration of the first question, to whether the contracting authority may, without disregarding the principle of equal treatment set out in Article 10 of Directive 2004/17, allow a tenderer, after his tender has been lodged, to replace a document which was required to be produced by the tender specification, in the present case a microfilm sample, where the sample sent had allegedly been sent in error. It is in no way apparent from the order for reference that Archus and Gama failed to provide the documents required by the specification or refused to consent to the contracting authority correcting their tender. It must therefore be held that the issue raised by the referring court in its second question is hypothetical.

46 The second question of the referring court must, in those circumstances, be declared to be manifestly inadmissible.

The third question

47 By its third question, the referring court asks, in essence, whether Article 1(3) of Directive 92/13 must be interpreted as meaning that the concept of 'a particular contract' within the meaning of that provision refers to a specific public procurement procedure or the actual subject matter of the contract which is to be awarded following a public procurement procedure, in a situation where only two tenders have been submitted and where the tenderer whose tender has been rejectedmay be regarded as having an interest in seeking the rejection of the tender of the other tenderer and, as a result, the initiation of a new public procurement procedure.

48 The referring court pointed out in that regard that an economic operator who has submitted a tender in a public procurement procedure does not, where his tender is rejected, have an interest in bringing proceedings against the decision awarding the public contract. Consequently, whilst a tenderer like Archus and Gama clearly has an interest in challenging a decision rejecting his tender, in so far as in such a case he retains the opportunity to be awarded the contract, on the other hand he no longer has any interest in the result of the public procurement procedure, since his tender was definitively rejected, at least where several tenders were submitted and selected.

49 It is in that context that the referring court asks whether the concept of 'a particular contract' within the meaning of Article 1(3) of Directive 92/13 relates to the possible initiation of a new public procurement procedure.

50 It should be recalled, in that connection, that Article 1(3) of Directive 92/13 provides that Member States must ensure that review procedures are available, under detailed rules which they themselves may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

51 When called upon to interpret the equivalent provisions of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), the Court has previously held that, in a public procurement procedure, tenderers have a legitimate interest in the exclusion of the bids submitted by the other tenderers with a view to obtaining the contract (see, to that effect, judgments of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33; of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 27; and of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich*, C-355/15, EU:C:2016:988, paragraph 29), whatever the number of participants in the procedure and the number of participants who have instigated review procedures (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 29).

52 On the one hand, the exclusion of one tenderer may lead to the other being awarded the contract directly in the same procedure. On the other, if all tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly (see judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 27).

53 The principle of case-law established by the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448) and 5 April 2016, *PFE* (C-689/13, EU:C:2016:199) applies to the situation at issue in the main proceedings.

54 In connection with a public procurement procedure in which two tenders have been submitted and the contracting authority has adopted two simultaneous decisions rejecting the tender of one of the tenderers and awarding the contract to the other, an action has been brought before the referring court by the unsuccessful tenderer concerning those two decisions. In that action, the unsuccessful tenderer seeks the exclusion of the tender of the successful tenderer on the ground that it does not comply with the tender specifications.

55 In such a situation, the tenderer who has brought the action must be regarded as having a legitimate interest in the exclusion of the bid submitted by the successful tenderer, which may lead, where appropriate, to a finding that the contracting authority is unable to select a lawful bid (see, to that effect, judgments of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33, and of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 24).

56 That interpretation is confirmed by the provisions of Article 2a(1) and (2) of Directive 92/13, which expressly provide a right of review for tenderers who are not definitively excluded against, inter alia, award decisions taken by contracting authorities.

57 Admittedly, the Court ruled in its judgment of 21 December 2016, *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (C-355/15, EU:C:2016:988, paragraphs 13 to 16, 31 and 36), that a tenderer whose offer had been excluded by the contracting authority from a public procurement procedure could be refused access to a review of the decision awarding the public contract. However, the decision to exclude that tenderer had, in that case, been confirmed by a decision that had the force of *res judicata* before the court hearing the review of the contract award decision gave its decision, so that that tenderer had to be regarded as definitively excluded from the public procurement procedure at issue.

58 In the main proceedings, on the other hand, Archus and Gama brought an action against the decision excluding their tender and against the decision awarding the contract, which were adopted simultaneously, and cannot therefore be considered to be definitively excluded from the public procurement procedure. In such a situation, the concept of ‘a particular contract’ within the meaning of Article 1(3) of Directive 93/13 may, where appropriate, apply to the possible initiation of a new public procurement procedure.

59 It follows from the foregoing considerations that Directive 92/13 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings in which in a public procurement procedure two tenders have been submitted and the contracting authority has adopted two simultaneous decisions rejecting the offer of one tenderer and awarding the contract to the other, the unsuccessful tenderer who brings an action against those two decisions must be able to request the exclusion of the tender of the successful tenderer, so that the concept of 'a particular contract' within the meaning of Article 1(3) of Directive 92/13 may, where appropriate, apply to the possible initiation of a new public procurement procedure.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **The principle of equal treatment of economic operators set out in Article 10 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as precluding, in a public procurement procedure, the contracting authority from inviting a tenderer to submit declarations or documents whose communication was required by the tender specification and which have not been submitted within the time limit given for the submission of tenders. On the other hand, that article does not preclude the contracting authority from inviting a tenderer to clarify a tender or to correct an obvious clerical error in that tender, on condition, however, that such an invitation is sent to all tenderers in the same situation, that all tenderers are treated equally and fairly, and that that clarification or correction may not be equated with the submission of a new tender, which is for the referring court to determine.**

2. **Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted as meaning that, in a situation such as that at issue in the main proceedings in which, in a public procurement procedure two tenders have been submitted and the contracting authority has adopted two simultaneous decisions rejecting the offer of one tenderer and awarding the contract to the other, the unsuccessful tenderer who brings an action against those two decisions must be able to request the exclusion of the tender of the successful tenderer, so that the concept of 'a particular contract' within the meaning of Article 1(3) of Directive 92/13, as amended by Directive 2007/66, may, where appropriate, apply to the possible initiation of a new public procurement procedure.**

[Signatures]

---

* Language of the case: Polish.

EU:C:2017:549

JUDGMENT OF THE COURT (Second Chamber)

13 July 2017 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Article 47(1), (4) and (5) — Economic and financial standing of the tenderer — Directives 89/665/EEC and 2007/66/EC — Judicial review of a decision to exclude a tenderer from a tendering procedure — Charter of Fundamental Rights of the European Union — Article 47 — Right to an effective remedy)

In Case C-76/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic), made by decision of 28 January 2016, received at the Court on 11 February 2016, in the proceedings

Ingsteel spol. s r. o.,

Metrostav a.s.

v

Úrad pre verejné obstarávanie,

intervener:

Slovenský futbalový zväz,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Slovak Government, by B. Ricziová, acting as Agent,

– the European Commission, by A. Tokár, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 47(1)(a), (4) and (5) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p 114); Articles 1(1) and 2(3) and (6) to (8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative

provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 89/665’); and Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in proceedings between, on the one hand, Ingsteel spol. s r. o. and Metrostav a.s. (together, ‘the unsuccessful tenderer’) and, on the other hand, l’Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority, Slovak Republic) concerning a public procurement procedure launched by Slovenský futbalový zväz (Slovak Football Federation, ‘the contracting authority’).

Legal context

EU law

Directive 2004/18

3 Pursuant to Article 91 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65), Directive 2004/18 was repealed as of 18 April 2016. Given the date of the material facts in the main proceedings, the present reference for a preliminary ruling will be considered by reference to Directive 2004/18, as in force before its repeal.

4 Recital 39 of Directive 2004/18 read as follows:

‘Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.’

5 Article 44 of Directive 2004/18, entitled ‘Verification of the suitability and choice of participants and award of contracts’, provided in the second paragraph thereof as follows:

‘The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

These minimum levels shall be indicated in the contract notice.’

6 Article 47 of that directive, entitled ‘Economic and financial standing’, provided:

‘1. Proof of an economic operator’s economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of professional risk indemnity insurance;

…

4. Contracting authorities shall specify, in the contract notice or in the invitation to tender, which reference or references mentioned in paragraph 1 they have chosen and which other references must be provided.

5. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

7 Article 48 of that directive set out the conditions relating to the technical and/or professional abilities of the economic operators.

Directives 89/665 and 2007/66

8 Recital 36 of Directive 2007/66 states:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the [Charter]. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.'

9 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'1. This Directive applies to contracts referred to in Directive [2004/18], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…

5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

…

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.'

10 Article 2 of that directive, which governs the requirements for review procedures, states:

'1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

…

6. Member States may provide that, where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

8. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of [Article 267 TFEU] and independent of both the contracting authority and the review body.

…’

Slovak law

11 According to Article 9(3) of Law No 25/2006 on public procurement, in the version applicable in the case under consideration:

‘In procedures for the award of public contracts, the principles of equal treatment, non-discrimination between tenderers and competitors, transparency, economy and effectiveness shall apply.’

12 Article 27 of that law, entitled ‘Economic and financial standing’, provides as follows:

‘1. Financial and economic standing shall generally be proved by:

(a) a statement made by a bank or a statement by a branch of a foreign bank, such as a loan commitment by the bank or a branch of a foreign bank.

…

3. If the tenderer or competitor, for objective reasons, is not in a position to demonstrate his economic and financial standing by means of financial or economic references, the contracting authority may agree to such proof being provided by means of any other document.’

13 Article 32(1)(b) of that law is worded as follows:

‘The contracting authority shall specify in the contract notice the selection criteria concerning

…

(b) economic and financial standing and references referred to in Article 27

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 By notice published on 16 November 2013 in the supplement to *Official Journal of the European Union* No 223/2013 and in the *Slovak Official Journal for Procurement Notices* of the same date under reference 18627-MSP, the contracting authority launched a call for tenders with a view to the award of a public contract relating to restructuring, modernisation and construction works at 16 football stadiums (‘the contract’).

15 According to the information provided by the referring court in answer to a request for clarification, the value of the contract was EUR 25 500 000, plus value added tax (VAT).

16 As regards the requirements in respect of economic and financial standing, the contract notice, with reference to Article 27(1)(a) of Law No 25/2006, required the participants in the tendering procedure to provide a statement from a Slovak bank or a Slovak branch office of a foreign bank confirming that it would grant them credit in the amount of at least EUR 3 000 000, a sum which should be available to them throughout the entire duration of the contract. That statement was to be in the form of a loan agreement or credit facility agreement and have been given by a person authorised to commit the bank in question.

17 The unsuccessful tenderer took part in that call for tenders. To show that it met the requirements referred to in the preceding paragraph, it provided a statement, given by a bank, which contained information on the opening of a current-account credit facility for an amount exceeding EUR 5 000 000, and a sworn statement from the tenderer certifying that, if its bid was successful, it would have available in its current account, at the time of conclusion of the contract for works and throughout the period of performance of the contract, a minimum amount of EUR 3 000 000.

18 The unsuccessful tenderer claimed that it was objectively impossible for it to satisfy the requirements relating to economic and financial standing set by the contracting authority in any other way, drawing on statements made by Slovak banks questioned by the latter to the effect that a binding undertaking to grant credit, such as that required by the contract notice, could be issued only after approval of the transaction covered by the credit and satisfaction of all the requirements laid down by the bank for the conclusion of a loan agreement.

19 Taking the view that the unsuccessful tenderer had not satisfied the requirements, particularly those in respect of economic and financial standing referred to in Article 27(1)(a) of Law No 25/2006, the contracting authority decided to exclude it from the tendering procedure. That decision was confirmed by the Public Procurement Regulatory Authority. The Krajský súd de Bratislava (Bratislava Regional Court, Slovakia) having dismissed the action brought against that decision by judgment of 13 January 2015, the unsuccessful tenderer brought an appeal against that judgment before the referring court, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic).

20 The referring court questions the legality of the decision of the contracting authority which — despite the fact that the unsuccessful tenderer had, at the time of the tendering procedure, a commitment from a bank for the provision of credit in the amount of EUR 5 000 000 — considered that it did not fulfil the criterion with regards to economic and financial standing laid down in the contract notice.

21 The referring court is also uncertain whether economic and financial standing could be shown by other means and, if so, whether a sworn statement provided by the unsuccessful tenderer certifying that, should its bid be successful, it would, at the time of conclusion of the contract for works and throughout the period of performance of the contract, have available in its account a minimum amount of EUR 3 000 000, would suffice for that purpose.

22 Lastly, the referring court is uncertain whether the judicial remedy available to the unsuccessful tenderer at national level may be regarded as 'effective' within the meaning of EU law, since the subject matter of the action has ceased to exist, the successful tenderer having performed the contract almost in its entirety.

23 In those circumstances, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) May the conduct of a national authority, which finds that a tenderer for a contract with an estimated value of EUR 3 000 000 does not satisfy the selection criterion relating to economic and financial standing, even though a sworn statement submitted by the tenderer and a statement provided by its bank certify that it will be able to draw on funds under a secured loan, which can be used for any purpose, up to a maximum amount exceeding the value of the contract, be considered compatible with the objective in particular of Article 47(1)(a) and (4) of Directive [2004/18]?

(2) Where, in a binding undertaking to grant credit, a bank operating on the banking-services market of a Member State, makes the release of funds conditional upon fulfilment of conditions for granting credit which are not specifically indicated in the loan agreement at the time of the tendering procedure, does such conduct constitute, for the purpose of Article 47(5) of Directive 2004/18, a "valid reason" why the tenderer cannot produce the references requested by the contracting authority, so that it is possible for the tenderer to prove its economic and financial standing by means of a sworn statement to the effect that its credit arrangement with the bank is sufficient for the purpose in question?

(3) In an action for review of the decision of a national authority responsible for public tendering procedures to exclude a tenderer, may the fact that the successful tenderer has almost completed performance of the various contracts be regarded as an objective impediment precluding the national court from giving effect to the provisions of Article 47(1) and (2) of the [Charter], in conjunction with Article 1(1) and Article 2(3) and (6) to (8) of Directive [89/665]?'

Consideration of the questions referred

The first question

24 By its first question, the referring court asks, in essence, whether Article 47(1)(a) and (4) of Directive 2004/18 must be interpreted as meaning that a contracting authority may not exclude a tenderer from a tendering procedure on the ground that it does not fulfil the criterion regarding economic and financial standing laid down in the contract notice with respect to the provision of a statement given by a bank undertaking to grant credit in the amount specified in the contract notice and to guarantee that that amount will be available to the tenderer throughout the period of performance of the contract.

25 As a preliminary point, it should be noted that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions. The Court may, however, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court

with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions (judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 71 and the case-law cited).

26 Article 44 of Directive 2004/18 provides that the contracting authority may require the tenderers to satisfy minimum capacity levels. Such minimum capacity levels must be indicated in the contract notice.

27 In this regard, Article 47(1) of the same directive lists the references that may, as a general rule, be required from an economic operator to demonstrate its economic and financial standing. Those references are intended to establish that the tenderer has the necessary means to perform a public contract. Among those references is listed ‘appropriate statements from banks’.

28 In accordance with Article 47(4) of Directive 2004/18, the contracting authorities must specify in the contract notice the references that they have chosen from that list as well as the references that must be provided.

29 In the present case, as a criterion for proving economic and financial standing, the contract notice at issue in the main proceedings required the tenderers to provide a document issued by a bank certifying that it had been granted credit of a minimum amount of EUR 3 000 000 that would be available throughout the period of performance of the contract, namely 48 months.

30 It is apparent from the documents submitted to the Court that the unsuccessful tenderer provided a statement, given by a bank, that included information on its financial situation and a declaration confirming the opening of a current-account credit facility for an amount exceeding EUR 5 000 000. The unsuccessful tenderer also provided a sworn statement attesting that, should its bid be successful, it would have a minimum of EUR 3 000 000 available in its account throughout the period of performance of the contract.

31 The contracting authority considered, however, that the unsuccessful tenderer had not met the economic and financial standing requirements since its economic and financial situation did not satisfy the condition for participation requiring the submission of evidence with the content and in the form prescribed.

32 In this respect it must be noted that Article 47 of Directive 2004/18 leaves a fair degree of freedom to the contracting authorities, which is apparent, in particular, from the expression ‘as a general rule’ in that provision. As is clear from the Court’s case-law, unlike Article 48 of that directive, which establishes a closed system limiting the methods of assessment and verification available to those authorities and, therefore, limits their opportunities to lay down requirements, Article 47(4) expressly authorises contracting authorities to choose the references that must be produced by candidates or tenderers in order to prove their economic and financial standing. As Article 44(2) of Directive 2004/18 refers to Article 47 thereof, the same freedom of choice exists as regards the minimum levels of economic and financial standing (see, to that effect, judgment of 18 October 2012, *Édukövízig and Hochtief Construction*, C-218/11, EU:C:2012:643, paragraph 28).

33 That said, it is expressly stated in the second subparagraph of Article 44(2) of Directive 2004/18 that the minimum levels of ability required for a specific contract must be related and proportionate to the subject matter of the contract. It follows that the requirements in terms of economic and financial standing must be objectively such as to provide information on such standing of an economic operator and must be adapted to the size of the contract concerned in that they constitute objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose (see, to that effect, judgment of 18 October 2012, *Édukövízig and Hochtief Construction*, C-218/11, EU:C:2012:643, paragraph 29).

34 Furthermore, it must be noted, first, that the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the bids of all tenderers must be subject to the same conditions. Second, the obligation of transparency, which is its corollary, is intended to preclude any risk of favouritism or arbitrariness on the part of the

contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36 and the case-law cited).

35 As regards, first, the requirement expressly laid down in the contract notice that the financial guarantee should be provided 'to ensure performance of the contract', it appears from the wording of the first question referred that the contracting authority believed that that requirement was not satisfied since the credit granted to the tenderer, although exceeding the amount required by the contract notice, was a current-account credit facility that was not tied to performance of the contract.

36 In this respect, it must be noted that a requirement to obtain a loan tied to performance of the contract is, objectively, a reasonable means of obtaining information on the economic ability of the tenderer to perform the contract successfully. As the European Commission noted, the grant of a loan is an appropriate means of establishing that the tenderer has at its disposal resources which it does not itself own and which are necessary for the performance of the contract (see, to that effect, judgment of 2 December 1999, *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 29). It is, however, once again for the referring court to confirm that the amount required in the contract notice is proportionate to the subject matter of the contract.

37 In respect, second, of the requirement, also laid down in the contract notice, regarding the grant of credit in a minimum amount of EUR 3 000 000 'for the period of performance of the contract (48 months)', although, admittedly Article 47 of Directive 2004/18 does not expressly provide that the contracting authority may require a tenderer to have at its disposal the resources necessary for the performance of the contract throughout the duration of the performance of the contract, it must be noted, as the Advocate General observed in point 46 of his Opinion, that the contracting authority's verification of the tenderer's compliance with the economic and financial criteria in a tendering procedure, is intended to provide that authority with the assurance that the successful tenderer will indeed be able to use whatever resources it relies on throughout the period covered by the contract (see, to that effect, judgment of 14 January 2016, *Ostas celtnieks*, C-234/14, EU:C:2016:6, paragraph 26 and the case-law cited).

38 Moreover, the continued availability of the amount required throughout the period of performance of the contract is a useful tool in assessing, in a tangible manner, the economic and financial standing of the tenderer with respect to its commitments. The proper performance of the contract is indeed intrinsically linked to whether the tenderer has the financial means for the execution of the contract.

39 Therefore, in the present case, the condition requiring the tenderer to have the funds available throughout the period of performance of the contract is appropriate for securing the objectives of Article 47(1) of Directive 2004/18.

40 However, it is for the national court to determine the relevance of the evidence provided by the tenderer for that purpose, in particular the contract opening a current-account credit facility.

41 It follows from the foregoing that the answer to the first question is that Article 47(1)(a) and (4) of Directive 2004/18 must be interpreted as meaning that a contracting authority may exclude a tenderer from a tender procedure on the ground that it does not fulfil the criterion regarding economic and financial standing laid down in the contract notice with respect to the provision of a statement given by a bank undertaking to grant credit in the amount specified in the contract notice and to guarantee that that amount will be available to the tenderer throughout the period of performance of the contract.

The second question

42 By its second question, the referring court seeks to ascertain, in essence, whether, when a contract notice requires the provision of a statement given by a bank undertaking to grant credit in the amount specified in the contract notice and to guarantee that that amount will be available to the tenderer throughout the duration of the performance of the contract, the fact that the banks approached by the

tenderer consider themselves unable to provide the tenderer with a statement in the terms specified by the contract notice may constitute a ‘valid reason’, within the meaning of Article 47(5) of Directive 2004/18, allowing the tenderer, where appropriate, to prove its economic and financial standing by any other document considered appropriate by the contracting authority, such as a sworn statement certifying that, should its bid be selected, its current account will be credited with an amount corresponding to the amount specified in the contract notice from the time of conclusion of the contract and throughout the duration of performance of the contract.

43 Article 47(5) of Directive 2004/18 allows tenderers that are unable for any valid reason to provide the references required by the contracting authority to prove their economic and financial standing by any other document, provided that the contracting authority considers such a document to be appropriate for this purpose.

44 In the present case, the unsuccessful tenderer provided a sworn statement certifying that, should its bid be selected, its account would be credited with at least EUR 3 000 000 throughout the duration of the performance of the contract, claiming that it was impossible to obtain a statement from a bank undertaking to grant it credit in the amount specified by the contract notice.

45 In this regard, it is for the referring court to determine whether it was objectively impossible for the unsuccessful tenderer to provide the references required by the contracting authority. This would be the case, in particular, as the Advocate General noted in point 53 of his Opinion, if, in Slovakia, the tenderer was not able to obtain the references required in the contract notice.

46 Only if the referring court should find that that was objectively impossible would that court be required to determine whether the contracting authority was entitled to take the view that the sworn statement provided by the tenderer was not an appropriate document to prove its economic and financial standing. It would also be for the referring court to determine, in accordance with Article 44(2) of Directive 2003/18, read in the light of recital 39 thereof, whether the extent of the information and the competence required were related and proportionate to the subject matter of the contract and whether the selection criteria were applied in a non-discriminatory way.

47 With regard to factual considerations, it is for the referring court to determine whether it was objectively impossible for the unsuccessful tenderer to provide the references required by the contracting authority and, if so, whether the contracting authority was entitled to consider that the sworn statement provided by the tenderer was not an appropriate document for proving its economic and financial standing.

48 Therefore, the answer to the second question is that Article 47(5) of Directive 2004/18 must be interpreted as meaning that, when a contract notice requires the production of a statement given by a bank undertaking to grant credit in the amount specified by the contract notice and to guarantee that that amount will be available to the tenderer throughout the duration of the performance of the contract, the fact that the banks approached by the tenderer consider themselves unable to provide the tenderer with a statement in the terms specified by the contract notice may constitute a ‘valid reason’, within the meaning of that article, allowing the tenderer, where appropriate, to prove its economic and financial standing by any other document considered appropriate by the contracting authority, provided that it was objectively impossible for the tenderer to provide the references required by the contracting authority, which is a matter for the referring court to determine.

The third question

49 In accordance with the Court’s settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, inter alia, order of 8 September 2016, *Caixabank and Abanca Corporación Bancaria*, C-91/16 and C-120/16, not published, EU:C:2016:673, paragraph 13 and the case-law cited).

50 In this respect, the Court has noted many times that the need to provide an interpretation of EU law which will be of use to the national court means that the national court must define the factual and legal

context of the questions it is asking or, at the very least, explain the assumptions of fact on which those questions are based (see, inter alia, order of 8 September 2016, *Caixabank and Abanca Corporación Bancaria*, C-91/16 and C-120/16, not published, EU:C:2016:673, paragraph 14 and the case-law cited).

51 The requirements concerning the content of a request for a preliminary ruling are set out expressly in Article 94 of the Rules of Procedure of the Court of Justice as well as in paragraph 15 of the Recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2016 C 439, p. 1), according to which any request for a preliminary ruling must contain ‘a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at the very least, an account of the facts on which the questions are based’, ‘the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law’ as well as ‘a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings’ (see, to that effect, order of 20 July 2016, *Stanleybet Malta and Stoppani*, C-141/16, not published, EU:C:2016:596, paragraphs 8 and 9 and the case-law cited).

52 In the present case, the order for reference does not give any indication of the national provisions intended to transpose those of Directive 89/665 relating to review procedures and their effects, as amended by Directive 2007/66. It fails, in particular, to state whether the Slovak Republic provided, as established under Article 2(6) of that directive, that the contested decision must first be set aside so that damages can be claimed, or whether, as the second subparagraph of Article 2(7) of that directive allows, it provided that after the conclusion of the contract the powers of the body responsible for review procedures are limited to awarding damages.

53 Moreover, the order for reference lacks precision as regards the facts of the main proceedings with respect to the appeal brought by the unsuccessful tenderer and the reasons why the tendering procedure continued despite the fact that an appeal against the decision of the contracting authority was pending.

54 Without this information the Court is unable to give a useful answer to the third question referred, which, as a result, is inadmissible.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 47(1)(a) and (4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that a contracting authority may exclude a tenderer from a tendering procedure on the ground that it does not fulfil the criterion regarding economic and financial standing laid down in the contract notice with respect to the provision of a statement given by a bank undertaking to grant credit in the amount specified in the contract notice and to guarantee that that amount will be available to the tenderer throughout the period of performance of the contract.**

2. **Article 47(5) of Directive 2004/18 must be interpreted as meaning that, when a contract notice requires the provision of a statement given by a bank undertaking to grant credit in the amount specified in the contract notice and to guarantee that that amount will be available to the tenderer throughout the duration of the performance of the contract, the fact that the banks approached by the tenderer consider themselves unable to provide the tenderer with a statement in the terms specified by the contract notice may constitute a ‘valid reason’, within the meaning of that article, allowing the tenderer, where appropriate, to prove its economic and financial standing by any other document considered appropriate**

by the contracting authority, provided that it was objectively impossible for the tenderer to provide the references required by the contracting authority, which is a matter for the referring court to determine.

[Signatures]

---

* Language of the case: Slovak.

OPINION OF ADVOCATE GENERAL

Campos Sánchez-Bordona

delivered on 21 March 2017 (1)

Case C-76/16

INGSTEEL spol. s r.o.,

Metrostav, as

v

Úrad pre verejné obstarávanie

(Request for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic)

(Public procurement — Qualitative selection criteria — Proof of an economic operator's economic and financial standing — Judicial review of a decision to exclude an economic operator from a tendering procedure)

1. In its reference to the Court of Justice for a preliminary ruling, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) has referred three questions on the interpretation of the European Union provisions relating to the criteria for the award of public contracts and the procedures for review of decisions of contracting authorities.

2. The first two questions concern proof of the economic and financial standing of tenderers, within the meaning of Directive 2004/18/EC. (2) The referring court's uncertainties concern proof of economic and financial standing and the time to which that proof has to relate. The third question concerns the review mechanisms provided for in Directive 89/665/EEC, (3) in relation to which the Najvyšší súd (Supreme Court) asks, in short, whether these remain effective where performance of the contract is almost complete by the time a ruling has to be given on the challenge.

I – **Legal framework**

A – *EU law*

1. The Charter of Fundamental Rights of the European Union

3. The first and second paragraphs of Article 47 provide:

> 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'

2. Directive 2004/18

4. In accordance with recital 33 in the preamble:

‘Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.’

5. Recital 39 in the preamble states:

‘Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.’

6. Article 26 (‘Conditions for performance of contracts’) provides:

‘Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.’

7. Article 44, headed ‘Verification of the suitability and choice of participants and award of contracts’, provides in paragraph (2):

‘The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

These minimum levels shall be indicated in the contract notice.’

8. Article 47 (‘Economic and financial standing’) stipulates:

‘1. Proof of an economic operator’s economic and financial standing may, as a general rule, be furnished by one or more of the following references:

a) appropriate statements from a bank or, where appropriate, evidence of professional risk indemnity insurance;

…

4. Contracting authorities shall specify, in the contract notice or in the invitation to tender, which reference or references mentioned in paragraph 1 they have chosen and which other references must be provided.

5. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document

which the contracting authority considers appropriate.’

3. Directive 89/665 (4)

9. Article 1 (‘Scope and availability of review procedures’) provides in paragraph (1):

‘…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.’

10. Article 2 (‘Requirements for review procedures’) states:

‘1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

c) award damages to persons harmed by an infringement.

…

4. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

…

6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

7. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

8. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

…’

11. Article 2d (‘Ineffectiveness’) reads:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/18/EC;

b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/18/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

c) in the cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

3. Member States may provide that the review body independent of the contracting authority may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.

Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

…’

B – *Slovak law*

1. Law on Public Contracts (‘LPC’)

12. Article 27, entitled ‘Economic and financial standing’, reads:

‘1. Financial and economic standing shall generally be proved by:

a) a statement made by a bank or a statement by a branch of a foreign bank, such as a loan commitment by the bank or a branch of a foreign bank,

…

3. If the tenderer or competitor, for objective reasons, is not in a position to demonstrate his economic and financial standing by means of financial or economic references, the contracting authority may agree to such proof being provided by means of any other document.’

II – **Facts of the dispute and the questions referred for a preliminary ruling**

13. The Slovenský futbalový zväz (Slovak Football Federation) issued an invitation to tender (5) for a contract for ‘restructuring, modernisation and construction of football stadiums’ (‘the contract’), (6) the object of which was to erect stands in 16 football stadiums (eight of which were category 2, seven category 3 and one category 4). (7)

14. According to the contract notice, candidates were required to provide proof of their economic and financial standing by means of 'the presentation of a statement made by a bank or a statement by a branch of a foreign bank concerning the grant of credit of a minimum amount of EUR 3 000 000 for the period of performance of the contract (48 months).' (8)

15. In particular, the contract notice required a 'statement by the bank (loan agreement or credit facility agreement) recording the bank's undertaking to the effect that the tenderer, in the event of acceptance of its tender, will be in a position to provide a guarantee of EUR 3 000 000 to ensure performance of the contract. The evidence must show that the funds will be available to the tenderer after conclusion of the contract. The evidence must be certified by a person authorised by the bank for that purpose.'

16. The companies INGSTEEL spol. s r.o. and Metrostav, a.s ('Ingsteel and Metrostav') participated in the procurement procedure as a group of economic operators. The Regulatory Authority confirmed the rejection of their joint application because it did not satisfy the condition set out in clause III.2.2 of the contract notice.

17. Specifically, the Regulatory Authority did not accept as evidence of the economic and financial standing of Ingsteel and Metrostav the bank declaration confirming that the tender fulfilled all relevant requirements (which also contained information concerning the opening of a current-account credit facility for an amount exceeding EUR 5 000 000), or the sworn statement given by those companies stating that, if they were awarded the contract, they would have in their account, at the time of conclusion of the contract and throughout the period of performance of the contract, a minimum amount of EUR 3 000 000.

18. Ingsteel and Metrostav brought an action before the Krajský súd Bratislava (Regional Court, Bratislava, Slovak Republic) seeking annulment of the decision excluding them from the tendering procedure. The action was dismissed by judgment of 13 January 2015.

19. An appeal against the judgment at first instance was brought before the Najvyšší súd (Supreme Court), which has expressed doubts concerning the interpretation of Article 47 of Directive 2004/18, in particular, paragraphs 1(a) and (4) thereof. The Najvyšší súd (Supreme Court) questions whether the Regulatory Authority's conduct is compatible with those provisions when, on the basis of the documents provided by the tenderer, it took the view that the tenderer had not established that its economic and financial standing satisfied the conditions set out in the contract notice.

20. The Najvyšší súd (Supreme Court) focuses its attention on the necessity of submitting, as evidence of economic and financial standing, a binding undertaking to grant credit and on the refusal to accept a statement by a national bank, formally lodged as such a binding undertaking to grant credit, that makes the grant of that credit conditional on the fulfilment of certain conditions set out in a subsequent contract. The referring court asks whether, in those circumstances, economic and financial standing can be proved by alternative means and whether a sworn statement confirming the existence of a credit arrangement with a bank, for an amount higher than that required in the contract notice, is sufficient.

21. Lastly, the referring court asks whether the fact that the contract has been almost completely performed is an impediment to the grant of the judicial protection required by Directive 89/665, in conjunction with Article 47 of the Charter.

22. The Najvyšší súd (Supreme Court) has therefore referred the following questions to the Court of Justice for a preliminary ruling:

'(1) May the conduct of a national authority, which finds that a tenderer for a contract with an estimated value of EUR 3 million does not satisfy the selection criterion relating to economic and financial standing, even though a sworn statement submitted by the tenderer and a declaration provided by its bank, certify that it will be able to draw on funds under a secured loan which can be used for any purpose up to a maximum amount exceeding the value of the contract, be considered compatible with the objective of Article 47, in particular Article 47(1)(a) and (4), of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts?

(2) Where, in a binding undertaking to grant credit, a bank operating on the banking-services market of a Member State, makes the release of funds conditional upon fulfilment of conditions for granting credit which

are not specifically indicated in the loan agreement at the time of the tendering procedure, does such conduct constitute, for the purpose of Article 47(5) of Directive 2004/18, a valid reason why the tenderer cannot produce the references requested by the contracting authority, so that it is possible for the tenderer to prove its economic and financial standing by means of a sworn statement to the effect that its credit arrangement with the bank is sufficient for the purpose in question?

(3) In an action for review of the decision of a national authority responsible for public tendering procedures to exclude a tenderer, may the fact that the successful tenderer has almost completed performance of the various contracts be regarded as an objective impediment precluding the national court from giving effect to the provisions of Article 47(1) and (2) of the Charter of Fundamental Rights of the European Union, in conjunction with Article 1(1) and Article 2(3), (6), (7) and (8) of Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts?'

III – **Proceedings before the Court of Justice**

23. The order for reference was received at the Registry of the Court of Justice on 11 February 2016.

24. On 23 March 2016, the Court asked the Najvyšší súd (Supreme Court) to specify the value of the contract at issue in the proceedings. The reply, dated 25 April 2016, stated that the value was EUR 25 500 000 plus VAT.

25. The Slovak Government and the European Commission lodged written observations. Ingsteel and Metrostav declined to participate in the preliminary-ruling proceedings. It was not considered necessary to hold a hearing.

IV – **Summary of the observations of the parties**

A – *The first question*

26. The Slovak Government argues that the statement made by a bank that the tenderers had to provide included a guarantee of more than EUR 3 000 000 for the whole period of performance of the contract (48 months). The Slovak Government states that, although the wording of Article 47(1) and (4) of Directive 2004/18 does not provide for such a condition, the scheme and aim of the directive support the proposition that the tenderer is required to have available the necessary funds during the period of performance of the contract. That follows, by analogy, from Article 47(2) of that directive, which permits tenderers to rely on the capacities of other entities for performance of the contract.

27. The Slovak Government submits that it is contrary to the principle of effectiveness of the tendering procedure for a tenderer to participate in that procedure if the contracting authority may not require proof of genuine economic and financial standing, in order for performance of the contract to be guaranteed.

28. The Commission contends that Article 47 of Directive 2004/18 relates to the economic and financial standing of the tenderer at the time of award of the contract. However, the tenderer's economic and financial standing during performance of the contract is governed by Article 26 of that directive, concerning conditions for performance of the contract. At all events, in the light of the wording of the question, the Commission suggests that the condition imposed on the tenderer should be examined under both Article 26 and Article 47 of Directive 2004/18.

29. According to the Commission, Article 26 of Directive 2004/18 provides that the conditions for performance must appear in the contract notice, a requirement fulfilled in this case, and must be compatible with EU law. Citing the case-law of the Court, the Commission argues that, as Directive 2004/18 does not exhaustively govern the special conditions for performance, those conditions may be assessed in accordance with primary EU law.

30. Having considered the difficulty in the light of Article 47 of Directive 2004/18, the Commission, after accepting that the contracting authority has broad discretion, points out that the difficulty lies in the method of providing evidence of economic and financial standing. The Commission questions whether the contract notice expressed clearly the necessity of having available a loan assigned to performance of the contract

(which would afford the contracting authority certainty that the financial resources provided by the bank would actually be used for performance of the contract). In its opinion, given that the conditions for participation must be set out so clearly and precisely in the contract notice, a tenderer may not be excluded for failing to provide evidence of the grant of credit assigned to performance of the contract, unless such a requirement was precisely and unequivocally indicated in the contract notice.

B – *The second question*

31. The Slovak Government states that the group composed of Ingsteel and Metrostav lodged the documents substantiating its economic and financial standing on the date for submission of tenders, but did not prove that it would have funds during the period of performance of the contract, from which it followed that it did not satisfy the conditions of the tender.

32. As regards the question whether a sworn statement is acceptable as a means of proving economic and financial standing in accordance with Article 47(5) of Directive 2004/18, the Slovak Government denies that there were circumstances justifying this, for which purpose it relies on an examination of Slovak banking practice in relation to securing loans allocated for a specific purpose.

33. The Commission cites as sufficient reason for the application of Article 47(5) of Directive 2004/18 the existence of objective facts that cannot be attributed to the tenderer and prevent it from submitting the documents required by the contracting authority to guarantee its economic and financial standing.

C – *The third question*

34. The Slovak Government takes as its starting-point the fact Directive 89/665 does not provide for review proceedings against decisions on the award of public contracts to have suspensive effect and establishes mechanisms for annulment of the decision to award or formally execute the contract and for the award of damages.

35. The Commission submits that, by the third question, the referring court asks whether performance of the contract, even though the decision to exclude a tenderer has been challenged, is sufficient reason to stay the court proceedings. The Commission contends that Directive 89/665 does not provide a sufficient basis for such a stay.

V – **Assessment**

A – *The first question*

36. Although a dividing line, if there is one, cannot easily be drawn between the application, on the one hand, and the interpretation, on the other, of the legal provisions, it is for the referring court to apply its national law (including, in this case, the clauses of the invitation to tender) and for the Court of Justice to provide the national court with an interpretation of Article 47(1)(a) and (4) of Directive 2004/18. It is not the task of the Court of Justice but of the national court to determine whether the documents submitted by Ingsteel and Metrostav as evidence of their economic and financial standing complied with the contract notice.

37. I make that point because, in the first question, the referring court states that the national contracting authority took the view that the tender submitted by Ingsteel and Metrostav did not satisfy one of the criteria in the contract notice. The issue of whether or not that decision was legally correct is a matter which only the national courts can determine. By interpreting Directive 2004/18, the Court of Justice can provide the national courts with certain guidance as to interpretation, but cannot replace those courts for the purposes of carrying out their own tasks, which include that of analysing in detail the documents submitted by the excluded tenderer and establishing whether those documents satisfy the specific terms of the invitation to tender.

38. In accordance with Articles 44 and 47 of Directive 2004/18, in order to verify the suitability of tenderers, they may be asked for minimum levels of economic and financial standing, which they must prove either by means of the references stipulated in the contract notice (Article 47(1) and (4)) or by means of such other documents as the contracting authority considers appropriate (Article 47(5)).

39. In accordance with the Court's settled case-law, Article 47 of Directive 2004/18 'leaves a fair degree of freedom to the contracting authorities', for, unlike Article 48, it 'expressly authorises contracting authorities to choose the probative references which must be produced by candidates or tenderers to furnish proof of their economic and financial standing. As Article 44(2) of Directive 2004/18 refers to Article 47, the same freedom of choice exists as regards the minimum levels of economic and financial standing'. (9)

40. Clause III.2.2 of the contract notice required, as evidence of a tenderer's economic and financial standing, the statement made by a bank concerning the grant of credit for a minimum amount of EUR 3 000 000 to state that that credit would remain effective 'for the period of performance of the contract (48 months)'.

41. There is no dispute between the parties regarding the necessary level of economic and financial standing (which is reflected in the amount of the bank credit) or regarding the requirement that it should be proved by means of a document issued by a financial institution. Rather, the dispute concerns the temporal scope of the bank loan required in the contract notice: the credit was to remain available 'for the period of performance of the contract', that is, for the 48 months during which the contract was to be performed. Does that specific requirement infringe Articles 44 and 47 of Directive 2004/18? For the reasons I shall set out below, I think not.

42. As I have already observed, the Commission distinguishes the rules laid down in Article 26 from those laid down in Article 47 of Directive 2004/18: the latter is concerned with proof of the economic and financial standing of the tenderer *at the time the contract is awarded*, whereas Article 26 is appropriate for stipulating the conditions relating to the *period of its performance*.

43. I do not share that view. Article 26 of Directive 2004/18 focuses on certain special conditions for performance of the contract and applies, in particular, to social and environmental objectives. The wording of recital 33 in the preamble to the directive (10) is illuminating when it suggests that conditions for performance of the contract 'may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment.'

44. However, in requiring certain minimum levels of economic and financial standing, the presumption in Articles 44 and 47 of Directive 2004/18 is that the proof of that standing must refer to the period of performance of the contract. It would not be reasonable to require economic and financial standing only at the time of award of the contract and for the contracting authority not to have the right to request guarantees that the future successful contractor will retain its economic and financial standing during the period of performance of the contract.

45. In my view, it is consistent with that interpretation for Article 47(4) of Directive 2004/18 to permit, as an expression of the broad discretion granted to the contracting authority, the addition to the means of furnishing proof provided for in Article 47(1) of 'which other references', and for Article 47(2) to authorise a tenderer to 'rely on the capacities of other entities', if it proves to the contracting authority that, with their assistance, it will have the resources to carry out its undertaking.

46. The case-law of the Court provides valuable information about the aim of that legislation. While Directive 92/50/EEC was in force, (11) the judgment in *Holst Italia* (12) stated that 'the contracting authority is required to verify the suitability of the service providers in accordance with the criteria laid down. That verification is intended, in particular, to enable the contracting authority to ensure that the successful tenderer will indeed be able to use whatever resources it relies on throughout the period covered by the contract.' That judgment went on to state, in relation to resources resulting from links to other entities that, 'in order to prove its financial, economic and technical standing with a view to being admitted to participate in a tendering procedure, … it must establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract'. (13)

47. That finding that economic and financial standing must be assessed as an indicator of suitability for correct performance of the contract remains present in the case-law on the interpretation of Directive 2004/18. In the judgment of 18 October 2012, *Édukövízig and Hochtief Solutions*, (14) the Court observed that the aspects chosen by the contracting authority (in that case, aspects of the balance sheets of the undertakings) 'to establish a minimum level of economic and financial standing must be objectively such as

to provide information on such standing of an economic operator and … the threshold thus fixed must be adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis *for the performance of that contract*'. (15)

48. Lastly, in other cases in which the right for tenderers to rely upon the capacities of third parties was analysed, the Court made that possibility conditional on those tenderers proving to the contracting authority that they would have at their disposal the resources necessary for performance of the contract. (16) When financial or economic resources are concerned, it is reasonable that these should not be ephemeral but should last until the contractual obligations have been performed.

49. To my mind, Articles 44 and 47 of Directive 2004/18, while enabling contracting authorities to require of tenderers a minimum level of economic and financial standing, also authorise those authorities to require, in the relevant contract notice, the provision of certain evidence establishing a sufficient economic and financial basis for the performance of the contract throughout the period of performance provided for. As I have already stated, the contracting authorities have broad discretion when it comes to giving concrete expression to that requirement.

50. Relying upon that freedom to formulate the conditions governing economic and financial standing and the means of furnishing proof of that standing, I believe that, in this case, the contract awarder was entitled to request the banking documents in the terms set out in clause III.2.2 of the invitation to tender, because:

– The amount of credit of up to EUR 3 000 000 was related and proportionate to the subject-matter of the contract (the overall value of which came to more than EUR 25 000 000), as stipulated in Article 44(2) of Directive 2004/18.

– The period to be covered by that guarantee of economic and financial standing, backed by a bank, was the same as the period of performance of the contract, which, I repeat, is consistent (and reasonable) in the light of the above considerations.

51. Those propositions having been set down, it is for the national court to establish whether, specifically, the documentary evidence furnished by Ingsteel and Metrostav satisfied the terms of the invitation to tender relating to their economic and financial capacity, including the term relating to the temporal scope of the bank credit and the assigning of that credit for performance of the contract throughout the period necessary for the contract to be performed.

B – *The second question*

52. Article 47(5) of Directive 2004/18 states that '[i]f, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

53. The application of that provision to the instant case would make it necessary to establish that Ingsteel and Metrostav were not in a position to accept the 'normal' conditions which the contracting authority had stipulated for providing proof of their economic and financial standing. That would be the case if, in Slovakia, a tenderer was unable to obtain from a financial institution credit linked to performance of the contract in accordance with the requirements of clause III.2.2 of the contract notice.

54. In those circumstances, the referring court asks whether a sworn statement by the tenderer stating that, if it were awarded the works contract, it would have available in its account a minimum amount of EUR 3 000 000, corresponding to the amount of credit required, both when the contract was concluded with the contract awarder and throughout the period of performance of the contract, is valid.

55. Application of Article 47(5) of the directive means, first, that the economic operator is unable to obtain the references requested by the contracting authority. Second, it means that that inability is due to a 'valid reason'. Only if both criteria are satisfied can recourse be had to other means of proving economic and financial standing.

56. In the instant case, therefore, the 'objective' impossibility (17) of obtaining from a bank credit assigned to performance of the contract, throughout the period of performance of the contract, would have to

be established. This is purely a finding of fact that must be made by the national court. That court must examine whether banking practice in Slovakia precludes undertakings bidding for contracts, like Ingsteel and Metrostav, from obtaining a statement made by a bank in the terms set out in the contract documents. (18)

57. If the solution reached by the referring court is that in that country such an undertaking by a bank can be obtained, the argument in support of the application of Article 47(5) of Directive 2004/18 would simply not exist.

58. If, on the other hand, such an undertaking by a bank cannot be obtained, it will be possible to move on to the assessment of the alternative evidence of its economic and financial standing furnished by the tenderer. However, inability to provide the references required in the contract documents must be examined from an objective point of view: the mere fact that, owing to particular circumstances characterised specifically by a lack of economic resources, the tenderers could not obtain credit from a bank in accordance with the terms of the contract documents will not be a 'valid reason'.

59. According to the order for reference, the tenderer provided, as an alternative reference, the sworn statement to which I referred above. The validity of that self-declaration of economic and financial standing must be examined, first, by the contracting authority, for it is that authority that, under Article 47(5), *in fine*, of Directive 2004/18, has the power to examine whether the document is 'appropriate' for that task.

60. The decision not to accept that document may, as is logical, be challenged before the national court which, in turn, must examine the grounds and the reasoning for the decision when determining whether the contracting authority exceeded the discretion granted to it by Article 47(5), *in fine*, to '[consider] appropriate' the alternative proof submitted by the tenderer. Again, the Court may not replace the national court for the purpose of making that decision, which is closely connected to factual elements, or for the purpose of determining whether the sworn statement of the tenderer is, in a specific situation, a sufficient economic and financial guarantee for performance of the contract.

C – *The third question*

61. I agree with the Slovak Government that there is a certain lack of clarity in the third question referred by the Najvyšší súd (Supreme Court), in terms both of the facts it describes and of its content.

62. As regards the facts, the referring court transcribes, first, the view of the Regulatory Authority to the effect that the situation was 'irreversible, and cannot be changed even in the event of a decision reviewing the award of the contract by the Board of the regulatory authority' because performance of the contracts was already under way. (19) Second, the order accepts, as a premiss for the question referred for a preliminary ruling, the hypothesis that 'the object of the initial administrative action, that is to say, taking part in the public procurement contract, has ceased to exist, and the tendering procedure cannot be relaunched because the contract has been performed by the successful tenderer.'

63. Following that approach, the referring court appears to ask, in short, whether, under Article 47 of the Charter, in conjunction with Article 1(1) and Article 2(3), (6), (7) and (8) of Directive 89/665, the fact that the performance of the contract has almost been completed is an impediment preventing the excluded tenderer from bringing the relevant action (review proceedings) against the award decision, including seeking annulment of that decision.

64. The articles of Directive 89/665 transcribed by the referring court are from its original version, no longer in force when the invitation to tender was issued (16 November 2013). Accordingly, the references to legislation must be brought into line with the consolidated text following the entry into force of the amendments introduced by Directive 2007/66. (20)

65. In the Opinion in *Connexxion Taxi Services*, (21) I pointed out that '[w]ith regard to the decisions of contracting authorities (in so far as they concern, obviously, contracts falling within the scope of Directive 2004/18), Member States must ensure that the persons concerned have available review mechanisms suitable for determining, quickly and effectively, whether they have infringed EU law on public procurement or national rules transposing EU law into their respective legal systems. That is, ultimately, the purpose of Directive 89/665.'

66. With that general aim, Article 2 of Directive 89/665 provides for two different procedural situations: (a) interlocutory proceedings enabling interim measures to be adopted in the period before the contract is concluded, and (b) the other types of review procedure, aimed at securing annulment of the administrative act awarding the contract and, where appropriate, the award of damages; the order for reference refers only to the latter.

67. The action brought by Ingsteel and Metrostav before the Slovak courts being an action for annulment of the decision, if they should be successful in their claims that would, in principle, mean that the decision awarding the contract would be declared null and void. (22) However, the referring court assumes (23) that annulment would not, in practice, lead to retroaction of the procedure so that the situation created could be reversed.

68. As Article 2(4) of Directive 89/665 provides that a review procedure does not have automatic suspensive effect, it is logical that the directive should provide for the possibility that an action for annulment can be brought in relation to a contract which is either being performed or has already been performed.

69. In fact, Directive 89/665 does not provide for an unequivocal solution in that regard. In some cases (Articles 2d to 2f) the rules laid down in the directive are applied, (24) which even provide that national review bodies may not consider a contract ineffective, even though it has been awarded illegally, if there are overriding reasons relating to a general interest requiring the effects of the contract to be maintained, without prejudice to the imposition of the appropriate penalties and the award of damages. (25) However, in other cases (Article 2(7) of the directive), it is the rules of national law that determine the effect that review procedures are to have on concluded contracts.

70. Within that range of possibilities which the referring court (or the review body at first instance) will have to consider, it would be unacceptable for the *de facto* situation regarding the performance of the contract to be treated as an insurmountable obstacle to determining whether the decision excluding the tenderer was lawful. Whatever the procedural solution may be that is most compatible with Directive 89/665 (and with the national law transposing that directive), and its practical consequences for the effects of the contract, the appellants still have an interest in obtaining the appropriate judgment, at least with a view to obtaining damages, if their action is successful, for the loss and harm suffered as a result of having been unlawfully excluded from the selection process.

71. Once again, it is for the national court to assess the consequences of the possible annulment of the decision for the award of the contract concluded.

VI – **Conclusion**

72. In the light of the arguments set out, I propose that the Court reply as follows to the questions referred by the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic):

(1) Article 47, in particular Article 47(1)(a) and (4), of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, does not preclude including in a contract notice, as selection criteria relating to economic and financial standing, the criteria included in the contract notice giving rise to the main proceedings. It is for the national court to establish whether the excluded tenderers satisfied those criteria.

(2) It is for the referring court to determine whether there was a “valid reason”, for the purposes of Article 47(5) of Directive 2004/18/EC, precluding a tenderer from providing the references requested by the contracting authority. If that should be the case, the referring court must also determine whether, in accordance with Slovak law, a sworn statement by the tenderer concerning its economic and financial standing is acceptable as an appropriate economic and financial guarantee.

(3) The fact that the successful tenderer has almost completed performance of the contract does not prevent the excluded tenderers bringing the appropriate proceedings, in accordance with the first and second paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union, in conjunction with Articles 1 and 2 of Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and

administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

---

1 – Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

---

4 The wording is transcribed as it results from Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

---

5 Although the Slovenský futbalový zväz (Slovak Football Federation) acted as the contract awarder, in the last stage of the procedure the Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority; 'the Regulatory Authority') took part.

---

6 The contract notice was published on 16 November 2013 in the supplement to the *Official Journal of the European Union* No 223/2013 and in the *Slovak Official Journal for Procurement Notices* (reference 18627-MSP).

---

7 The classification of football stadiums is set out in the UEFA Regulations approved at the meeting of 24 March 2010. Four categories are stipulated in ascending order from 1 to 4, on the basis of criteria relating to the area allocated to players and officials (including parking capacity), spectators and the media.

---

8 Clause III.2.2.

---

9 Judgment of 18 October 2012, *Édukövízig and Hochtief Solutions*, C-218/11, EU:C:2012:643, paragraph 28.

---

10 Expressly referred to by the Court in its judgment of 17 November 2015, *RegioPost*, C-115/14, EU:C:2015:760, paragraph 56.

---

11 Council Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

---

12 Judgment of 2 December 1999, *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 28. Emphasis added.

---

13 The Opinion of Advocate General Léger in *Holst Italia* (C-176/98, EU:C:1999:447) contains, in points 24 to 26, useful guidance on the powers of the contracting authority to evaluate the suitability of

tenderers to perform the contract in the required manner That is the objective of Articles 31 and 32 of Directive 92/50 (concerning economic and financial standing and technical capability, respectively) in seeking to 'protect the interests of the contracting authority against applications from economic operators more concerned about securing lucrative contracts than about the main task, that is to say, performing them scrupulously.'

---

14 Case C-218/11, EU:C:2012:643, paragraph 29.

---

15 No italics in the original. That was the *ratio decidendi* of the judgment and was reflected in the answers to the questions referred for a preliminary ruling.

---

16 Judgments of 10 October 2013, *Swm Costruzioni and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 29; of 14 January 2016, *Ostas celtnieks*, C-234/14, EU:C:2016:6, paragraph 23; and of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 33.

---

17 Paragraph 16 of the order for reference specifically uses the words 'objective impossibility of obtaining the references required by the contract awarder'.

---

18 According to paragraph 20 of the order for reference, 'the regulatory authority relied on the statements of two Slovak banks, which gave their views on the possibility of obtaining a non-binding undertaking to provide credit and a binding undertaking, and the difference between those two options.'

---

19 The order sets out these remarks by the Regulatory Authority: 'The contract awarder, on 3 August 2014, concluded a framework agreement by virtue of which four contracts for work were concluded for construction of the following stadiums: NTC Poprad on 15 August 2014. Baredejov football stadium on 24 February 2015. Zvolene football stadium [on] 20 May 2015. Podbrezová football stadium on 22 May 2015.'

---

20 See footnote 4 of this Opinion.

---

21 Case C-171/15, EU:C:2016:506.

---

22 In the Opinion in *Prezes Urzędu Komunikacji Elektronicznej and Petrotel*, C-231/15, EU:C:2016:440, points 62 to 69, I stated that, as a general rule, the annulment of an administrative decision leads to the creation of retroactive effects so that, in the absence of an interim measure suspending the effectiveness of that decision, the invalidity of the administrative decision entails the obligation to undo, from the outset, its effects. However, that general rule is open to a number of exceptions which are not unknown in EU law, and I mentioned specifically the scope of the award of public contracts and the review system introduced into Directive 89/665 by Directive 2007/66.

---

23 As transcribed in paragraph 23 of the order for reference, the Regulatory Authority stated that 'once the decision of the regulatory authority on the complaint became final, the contract awarder decided to resume the tendering procedure'.

---

24 On actions for annulment and the ineffectiveness of concluded contracts, the judgment of 11 September 2014, *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 42, states that, 'in the situations contemplated, in particular, in Article 2d of Directive 89/665, the measures that may be taken for the

purposes of actions brought against the contracting authorities are to be determined solely by the rules laid down in that directive.’

---

25 Article 2d(3). In accordance with Article 2d(2), ‘[n]ational law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed.’

JUDGMENT OF THE COURT (Ninth Chamber)

13 July 2017 (*)

(Reference for a preliminary ruling — Public procurement — Transport — Definition of "exploitation of a geographical area for the purpose of the provisions of airports or other terminal facilities to carriers by air" — Directives 2004/17/EC and 96/67/EC — National legislation which does not require a tendering procedure to be conducted prior to the allocation of areas within an airport)

In Case C-701/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy), made by decision of 4 November 2015, received at the Court on 31 December 2015, in the proceedings

Malpensa Logistica Europa SpA

v

Società Esercizi Aeroportuali SpA (SEA),

intervening party:

Beta-Trans SpA,

THE COURT (Ninth Chamber),

composed of E. Juhász (Rapporteur), President of the Chamber, C. Vajda and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 15 February 2017,

after considering the observations submitted on behalf of:

– Malpensa Logistica Europa SpA, by G. Greppi, P. Ferraris, G. Razeto and A. Bazzi, avvocati,

– Società Esercizi Aeroportuali SpA (SEA), by R. Bertani, E. Raffaelli and A. Pavan, avvocati,

– Beta—Trans SpA, by C. Mele and M. Giordano, avvocati,

– the European Commission, by C. Zadra, W. Mölls and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 May 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

2 The request has been made in proceedings between Malpensa Logistica Europa SpA and Società Esercizi Aeroportuali SpA (SEA), the manager of Milan's Malpensa Airport (Italy) ('Malpensa Airport'), concerning the allocation of areas for the provision of groundhandling services within that airport without any prior tendering procedure.

Legal context

European Union law

Directive 96/67/EC

3 Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36), applies, as stated in Article 1(1) thereof, to 'any airport located in the territory of a Member State, subject to the provisions of the Treaty, and open to commercial traffic in the following circumstances'.

4 Article 6 of Directive 96/67, headed 'Groundhandling for third parties', provides in paragraphs 1 and 2 thereof:

'1. Member States shall take the necessary measures … to ensure free access by suppliers of groundhandling services to the market for the provision of groundhandling services to third parties.

…

2. Member States may limit the number of suppliers authorised to provide the following categories of groundhandling services:

– baggage handling,

– ramp handling,

– fuel and oil handling,

– freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft.

They may not, however, limit this number to fewer than two for each category of groundhandling service.'

5 Article 9 of Directive 96/67, under the heading 'Exemptions', provides in paragraph 1 thereof as follows:

'Where at an airport, specific constraints of available space or capacity, arising in particular from congestion and area utilization rate, make it impossible to open up the market and/or implement self-handling to the degree provided for in this Directive, the Member State in question may decide:

(a) to limit the number of suppliers …'

6 Article 11 of Directive 96/67, headed 'Selection of suppliers', states in paragraph 1 thereof:

'Member States shall take the necessary measures for the organization of a selection procedure for suppliers authorized to provide groundhandling services at an airport where their number is limited in the cases provided for in Article 6(2) or Article 9. …'

7 Article 16 of Directive 96/67, headed 'Access to installations', provides, in paragraph 2 thereof:

'The space available for groundhandling at an airport must be divided among the various suppliers of groundhandling services and self-handling airport users, including new entrants in the field, to the

extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria.'

Directive 2004/17

8 Article 1 of Directive 2004/17, headed 'Definitions', provides as follows:

'1. For the purposes of this Directive, the definitions set out in this Article shall apply.

2. (a) "Supply, works and service contracts" are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers.

…

(d) "Service contracts" are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.

…

3. …

(b) A "service concession" is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.'

9 Article 2 of that directive, entitled 'Contracting entities', provides in paragraph 2(a) thereof:

'This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7.'

10 Article 7 of Directive 2004/17, headed 'Exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports', is worded as follows:

'This Directive shall apply to activities relating to the exploitation of a geographical area for the purpose of:

…

(b) the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.'

11 Article 18 of that directive, headed 'Works and service concessions', states as follows:

'This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.'

Italian law

12 Directive 96/67 was transposed into Italian law by decreto legislativo n. 18 — Attuazione della direttiva 96/67/CE relativa al libero accesso al mercato dei servizi di assistenza a terra negli aeroporti della Comunità (Legislative Decree No 18 implementing Directive 96/67/EC on access to the groundhandling market at Community airports) of 13 January 1999 (GURI No 28, 4 February 1999) ('Legislative Decree No 18/1999'). Articles 4 and 11 of that decree transpose, respectively, Articles 16 and 11 of Directive 96/67.

13 Article 4 of Legislative Decree No 18/1999 grants free access to the groundhandling market to any service provider, on the basis of the criteria set out in Article 13 of the legislative decree, at an airport in which the annual volume of traffic is not less than 3 million passenger movements or 75 000 tonnes of freight or which has recorded traffic of not less than 2 million passenger movements or 50 000 tonnes of freight during the six-month period prior to 1 April or 1 October of the previous year. Article 4(2) of Legislative Decree No 18/1999 empowers the Ente Nazionale per l'aviazione civile (ENAC) (National Civil Aviation Authority) to limit the number of suppliers on the ground that there are specific constraints of space, available capacity or safety, and Article 12 thereof also imposes restrictions on access to the market.

14 Pursuant to Article 11 of Legislative Decree No 18/1999, an invitation for tenders must be published, which is open to all interested suppliers, solely for the purpose of identifying suppliers of groundhandling services whose access to the market is subject to limitations or derogations.

15 Directive 2004/17 was transposed into Italian law by Articles 207 et seq. of decreto legislative n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 establishing the Code on public works contracts, public service contracts and public supply contracts and transposing Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (GURI No 100, 2 May 2006). Article 213 of that legislative decree transposed Article 7 of Directive 2004/17.

The dispute in the main proceedings and the question referred for a preliminary ruling

16 SEA, as the managing body responsible for Malpensa airport, awarded a hangar at that airport, with an area of approximately 1 000 square metres, to Beta-Trans for the provision of groundhandling services.

17 By application lodged on 18 April 2015 before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy), Malpensa Logistica Europa, a concession company for airport areas intended for the performance of groundhandling activities at Malpensa Airport, sought the suspension and annulment of the measure granting that award.

18 According to Malpensa Logistica Europa, that measure is vitiated by unlawfulness because it was adopted without any prior tendering procedure. In particular, that company argues that it had insufficient space at its disposal at the Malpensa Airport site to pursue its groundhandling activities. Accordingly, it was entitled to entertain the same expectations as Beta-Trans as regards the new areas to be allocated, and the decision by which SEA awarded the area in question, which was originally intended to be used as a hangar, directly to Beta-Trans, without any tendering procedure, caused it to suffer loss.

19 SEA and Beta-Trans have argued before the referring court that the contested area was made available to Beta-Trans only temporarily, in order to enable it, as a new operator, to begin its activity as supplier of groundhandling services at Malpensa Airport pending completion of the fitting out of the areas allocated to Beta-Trans at the conclusion of a public tendering procedure in which Malpensa Logistica Europa had also participated. Moreover, according to SEA and Beta-Trans, Malpensa Logistica Europa already had at its disposal a storage area of approximately 18 000 square metres, as well as two covered areas of 2 700 and 3 227 square metres, respectively, for the temporary storage of cargo where it could be protected in bad weather.

20 The referring court stated that two national legal provisions, transposing Directive 2004/17 and Directive 96/67 respectively, would appear to be applicable, *in abstracto*, to the facts of the case.

21 With regard to the applicability of Directive 2004/17, the referring court considers that SEA, as manager of Malpensa Airport, is a contracting authority that is required to comply with public procurement rules in special sectors. Moreover, the activity pursued by SEA falls within the category of activities relating to the exploitation of a geographical area for the purpose of the provision of airports to air carriers, in accordance with Article 7 of Directive 2004/17. That court explains that, according to national case-law, the exploitation of airport areas (geographical areas), including, therefore, internal

areas, in connection with the activities usually performed by air carriers falls within the material scope of the rules governing special sectors.

22 The referring court concludes from this that the provision of groundhandling services in airports, by the exploitation of geographical areas, also falls within the material scope of those rules

23 However, according to the national court, the applicability of Directive 2004/17 might be at odds with the specific provisions of Legislative Decree No 18/1999, which transposed Directive 96/67. On the basis of that legislation, the requirement to launch a prior public tendering procedure is applicable only to the selection of suppliers falling within categories of groundhandling services whose access to the market is subject to restrictions and derogations.

24 The referring court states in that regard that, according to the information available to it, those restrictions and derogations are not currently in force in so far as Malpensa Airport is concerned. As a consequence, it is necessary, according to that court, to accept the applicability of Article 4(1) of Legislative Decree No 18/1999, which grants free access by suppliers to the market for the provision of groundhandling services without the need for any prior public tendering procedure, provided that the space available at the airport is divided among the various suppliers of groundhandling services and self-handling airport users ‘to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria’, as required pursuant to Article 16(2) of Directive 96/67.

25 In the light of the foregoing considerations, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does Article 7 of Directive 2004/17, which requires the application of the EU rules governing the award of public contracts to activities relating to the exploitation of a geographical area for the purpose of the provision of airports to air carriers, as defined in the national case-law referred to in paragraphs 6.4 and 6.5 [of the order for reference], preclude national provisions, such as those set out in Articles 4 and 11 of Legislative Decree No 18/1999, which do not require a prior public selection procedure to be conducted for every allocation, including temporary allocations, of areas within airports for the purpose of such activities?’

Consideration of the question referred

26 By its question, the referring court seeks to ascertain, in essence, whether Article 7 of Directive 2004/17 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which does not require a selection procedure to be conducted prior to every allocation, including temporary allocations, of areas within airports to be used for the provision of groundhandling services.

27 Article 7 of Directive 2004/17 provides that the activities to which the directive applies include activities relating to the exploitation of a geographical area for the purpose of providing airports to air carriers.

28 However, it is necessary to consider whether the contract for the allocation of airport areas at issue in the main proceedings falls within the scope of Directive 2004/17.

29 As observed by, inter alia, the Commission, the contract at issue in the main proceedings, as described by the referring court, cannot be classified as a ‘services contract’, as the managing body responsible for Malpensa Airport did not acquire a service provided by the supplier in return for remuneration.

30 Moreover, it is not necessary to consider whether that contract may be classified as a ‘concession’, given that, under Article 18 of Directive 2004/17, services concessions relating to the exploitation of a geographical area for the purpose of providing airports to air carriers fall, in any event, outside the scope of that directive.

31 As a consequence, in the light of the information provided by the referring court, it does not appear that the award at issue in the main proceedings falls within the scope of Directive 2004/17.

32 On the other hand, a body responsible for the management of an airport, such as SEA, is subject to the provisions of Directive 96/67.

33 It is apparent from Article 16(2) of Directive 96/67 that the managing body concerned must comply with the requirements laid down in that provision, under which the space available for groundhandling at an airport must be divided among the various suppliers of groundhandling services and self-handling airport users, including new entrants in the field, to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria. That body is not obliged, however, to organise a prior tendering procedure.

34 It is therefore for the referring court to verify whether, in the case before it, the requirements set out in the above paragraph have been met.

35 In the light of the foregoing considerations, the answer to the question referred is that Article 7 of Directive 2004/17 is to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which does not require a public selection procedure to be conducted prior to the allocation, including a temporary allocation, of areas within airports to be used for the provision of groundhandling services for which no remuneration is to be paid by the manager of the airport.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 7 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors is to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which does not require a public selection procedure to be conducted prior to the allocation, including a temporary allocation, of areas within airports to be used for the provision of groundhandling services for which no remuneration is to be paid by the manager of the airport.

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 3 May 2017 (1)

Case C-701/15

Malpensa Logistica Europa SpA

v

SEA — Società Esercizi Aeroportuali SpA,

intervener:

Beta-Trans SpA

(Request for a preliminary ruling
from the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court of Lombardy, Italy))

(Public procurement — Transport — Exploitation of a geographical area for the purpose of making it available to air carriers at airports or other terminal facilities — Directives 2004/17/EC and 96/67/EC — National legislation not requiring any selection procedure for the allocation of areas within airports)

1. The dispute forming the subject matter of this reference for a preliminary ruling arises in the context of dealings between the managing body of Milan's Malpensa airport (2) and two companies providing groundhandling services. One of them (Malpensa Logistica Europa SpA, 'Malpensa Logistica') challenges SEA's decision to make available, on a temporary basis, directly to the other (Beta-Trans SpA, 'Beta-Trans') certain airport facilities, without any prior tendering procedure.

2. The Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court of Lombardy, Italy), which has to decide on the dispute, is dealing with national rules governing the award of public contracts which, in its opinion, are at odds with the rules governing groundhandling services at airports. Since those rules transpose, respectively, Directives 2004/17/EC (3) and 96/67/EC (4), the national court has asked the Court to interpret EU law in order to determine whether the allocation of the area assigned to Beta-Trans ought to have been preceded by a selection procedure subject to the rules on public procurement.

I. Legal framework

A. EU law

1. Directive 2004/17

3. Article 1 ('Definitions') provides:

‘1. For the purposes of this Directive, the definitions set out in this Article shall apply.

2. (a) “Supply, works and service contracts” are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers.

…

(d) “Service contracts” are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.

…

3. …

(b) A “service concession” is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.’

4. Paragraph 2 of Article 2 (‘Contracting entities’) provides:

‘This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

…’

5. Article 7, entitled ‘Exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports’, states:

‘This Directive shall apply to activities relating to the exploitation of a geographical area for the purpose of:

…

(b) the provision of airports … or other terminal facilities to carriers by air…’

6. According to Article 18 (‘Works and service concessions’):

‘This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.’

2. Directive 96/67

7. The recitals state that:

‘(5) … the opening-up of access to the groundhandling market should help reduce the operating costs of airline companies and improve the quality of service provided to airport users;

(6) … in the light of the principle of subsidiarity it is essential that access to the groundhandling market should take place within a Community framework, while allowing Member States the possibility of taking into consideration the specific nature of the sector;

(7) … in its communication of June 1994 entitled “The way forward for civil aviation in Europe” the Commission indicated its intention of taking an initiative before the end of 1994 in order to achieve access to the groundhandling market at Community airports; … the Council, in its resolution of 24 October 1994 on the situation in European civil aviation …, confirmed the need to take account of the imperatives linked to the situation of airports when opening up the market;

…

(11) … for certain categories of groundhandling services access to the market and self-handling may come up against safety, security, capacity and available-space constraints; … it is therefore necessary to be able to limit the number of authorised suppliers of such categories of groundhandling services; … it should also be possible to limit self-handling; … in that case, the criteria for limitation must be relevant, objective, transparent and non-discriminatory;

…

(14) … in certain cases these constraints can be such that they may justify restrictions on market access or on self-handling to the extent that these restrictions are relevant, objective, transparent and non-discriminatory;

…

(16) … if effective and fair competition is to be maintained where the number of suppliers of ground-handling services is limited, the latter need to be chosen according to a transparent and impartial procedure; … airport users should be consulted when it comes to selecting suppliers of ground-handling services, since they have a major interest in the quality and price of the ground-handling services which they require;

…

(25) … access to airport installations must be guaranteed to suppliers authorised to provide ground-handling services and to airport users authorised to self-handle, to the extent necessary for them to exercise their rights and to permit fair and genuine competition; … it must be possible however, for such access to give rise to the collection of a fee'.

8. Article 2 ('Definitions') provides:

'For the purposes of this Directive:

…

(c) "managing body of the airport" means a body which, in conjunction with other activities or not as the case may be, has as its objective under national law or regulation the administration and management of the airport infrastructures, and the coordination and control of the activities of the different operators present in the airport or airport system concerned;

…

(e) "groundhandling" means the services provided to airport users at airports as described in the Annex;

…

(g) "supplier of groundhandling services" means any natural or legal person supplying third parties with one or more categories of groundhandling services.'

9. Under paragraphs 1 and 2 of Article 6 ('Groundhandling for third parties'):

'1. Member States shall take the necessary measures … to ensure free access by suppliers of groundhandling services to the market for the provision of groundhandling services to third parties.

…

2. Member States may limit the number of suppliers authorised to provide … groundhandling services.'

10. Paragraph 1 of Article 9 (‘Exemptions’), provides:

‘Where at an airport, specific constraints of available space or capacity, arising in particular from congestion and area utilisation rate, make it impossible to open up the market and/or implement self-handling to the degree provided for in this Directive, the Member State in question may decide:

(a) to limit the number of suppliers … of groundhandling services …’.

11. According to paragraph 1(b) of Article 11 (‘Selection of suppliers’):

‘Member States shall take the necessary measures for the organisation of a selection procedure for suppliers authorised to provide groundhandling services at an airport where their number is limited in the cases provided for in Article 6(2) or Article 9. This procedure must comply with the following principles:

…

(b) An invitation to tender must be launched and published in the *Official Journal of the European Communities*, to which any interested supplier of groundhandling services may reply;

…’

12. Article 16 (‘Access to installations’) provides:

‘…

2. The space available for groundhandling at an airport must be divided among the various suppliers of groundhandling services …, including new entrants in the field, to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria.

3. Where access to airport installations gives rise to the collection of a fee, the latter shall be determined according to relevant, objective, transparent and non-discriminatory criteria.’

B. Italian law

1. Legislative Decree No 163/2006 (5)

13. Article 213 (‘Ports and airports’) provides:

‘The provisions of this part shall apply to activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.’

2. Legislative Decree No 18/1999 (6)

14. Article 4(1) provides that there is, ordinarily, to be free access to the groundhandling market for service providers, subject solely to the requirements laid down in Article 13.

15. Under Article 4(2), it is possible for free access to be restricted ‘on proper grounds relating to security, capacity or the available space at the airport’.

16. Article 12(1) lays down the derogations from free access, defined as ‘specific constraints of available space or capacity, arising in particular from congestion and the area utilisation rate, notified by the managing body’.

17. Article 11 imposes an obligation to conduct a prior public selection procedure ‘to identify providers of the categories of groundhandling services access to which is subject to restrictions or derogations’.

II. Proceedings before the Court

18. The request for a preliminary ruling was lodged at the Court Registry on 31 December 2015.

19. Written observations were submitted by Malpensa Logistica, Beta-Trans, SEA and the European Commission.

20. A public hearing was held on 25 May 2016, which Malpensa Logistica and Beta-Trans declined to attend. The hearing was, however, attended by SEA and the European Commission.

III. Background to the case and question referred for a preliminary ruling

21. SEA, as the managing body of Milan's Malpensa airport, awarded a hangar at that airport with an area of approximately 1 000 square metres to Beta-Trans for the provision of groundhandling services.

22. It is apparent from the written observations and information supplied at the hearing that, prior to the award of the hangar to Beta-Trans, a competitive procedure had been conducted in order to allocate certain areas within the airport to groundhandling operators. Both Beta-Trans and Malpensa Logistica submitted bids in that selection procedure for the performance of handling activities at the airport. The former was successful.

23. Beta-Trans was unable to occupy the area assigned to it because the space was not yet ready and had to be fitted out. SEA therefore gave Beta-Trans the temporary use of a hangar of 1 000 square metres so that it could commence its groundhandling activities immediately. The allocation of the area was therefore merely temporary until the 'final area' was ready for use (scheduled for July 2017).

24. On 18 April 2015, Malpensa Logistica applied for the annulment of the decision awarding the hangar to Beta-Trans. It claimed that since, like Beta-Trans, it also needed more space, both undertakings ought to have been treated equally within the framework of a public selection procedure.

25. The court which has been called upon to decide on the dispute states that, in principle, Legislative Decree No 163/2006 applies because, according to the case-law of the Consiglio di Stato (Council of State, Italy), (7) domestic public procurement legislation governs concessions of areas within airports for the provision of groundhandling services. Since the award of areas comes within the material scope of the legislation on special sectors, a public selection procedure has to be conducted.

26. However, the referring court is confronted with the fact that another set of domestic rules (Legislative Decree No 18/1999 governing groundhandling services at airports) takes a different approach in that it does not require a selection procedure to be conducted.

27. In so far as these two Italian legislative instruments transpose Directives 2004/17 and 96/67, respectively, the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court of Lombardy) considers it necessary to refer the following question to the Court for a preliminary ruling:

> 'Does Article 7 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, which requires the application of the EU rules governing the award of public contracts to activities relating to the exploitation of a geographical area for the purpose of the provision of airports to air carriers, as defined in the national case-law referred to in paragraphs 6.4 and 6.5 [of the order for reference], preclude national provisions, such as those set out in Articles 4 and 11 of Legislative Decree No 18/1999, which do not require a prior public selection procedure to be conducted for every allocation, including temporary allocations, of areas within airports for the purpose of such activities?'

IV. Summary of the arguments of the parties

28. Malpensa Logistica submits that Directive 96/67 was guided by the need to open up the market for groundhandling services, removing them from the monopolistic influence of airport managing bodies at a

time when the allocation of areas within airports by those bodies fell within the scope of the ‘special sectors’ covered by the rules on public procurement.

29. Directive 2004/17, which was adopted at a later point in time, governs the procedures for the award of contracts in the special sectors and provides that its principles are to apply to contracts on the provision of airports (Article 7) for purposes directly related to the pursuit of an airport activity (Article 20). Specifically, Article 10 of that directive requires contracting entities to treat economic operators on non-discriminatory and equal terms, while Article 31 provides that contracts which have as their object services listed in Annex XVII A are to be awarded in accordance with Articles 34 to 59.

30. In Italy, responsibility for making awards lies with airport concession holders and those contracts are directly related to the activities of the managing body. SEA is therefore under an obligation to allocate the areas necessary for the exploitation of services relating to airport management in accordance with the procedures laid down in Directive 2004/17.

31. Malpensa Logistica argues that this system is on a different level from the system set out in Directive 96/67, the aim of which was not to abolish managing bodies’ monopoly, but to establish equal treatment for all operators seeking to exploit areas within an airport. Under Community principles, such equality is ensured by means of selection procedures that are open to competition.

32. In Malpensa Logistica’s opinion, there is no conflict between Directives 96/67 and 2004/17, which are different in scope. Since the entry into force of Directive 2004/17 and its transposing legislation, providers of services directly related to airport activities have had to access the exploitation of the areas assigned to them through open and transparent selection procedures.

33. Lastly, Malpensa Logistica considers the fact that the disputed award was only temporary to be irrelevant as it also had an interest in the temporary allocation of the area at issue, which should have been effected by means of a selection procedure.

34. Beta-Trans submits, in the first place, that the hangar was made available to it because it had previously been awarded, as a result of a competitive procedure, similar facilities still under construction. The disputed assignment was for a limited time, until those facilities were ready for use.

35. Beta-Trans refers to the commercial context of the dealings between it, Malpensa Logistica and a former client of the latter (Nippon Cargo Airlines) to assert that, even though Malpensa Logistica had vastly more space at the airport, Beta-Trans had succeeded in establishing commercial links with Nippon Cargo Airlines, which it could not have done without the disputed award. In its view, SEA’s approach ensures access to the market for new operators, as well as effective and genuine competition, since it makes it easier for third parties to choose freely between different suppliers of services at airports. In that connection, it stresses the importance of Article 16 of Directive 96/67, in so far as it helps open the market up to new operators, such as itself.

36. Lastly, Beta-Trans focuses its analysis on Directive 96/67 and Legislative Decree No 18/1999, which transposes that directive into Italian law, to submit that the general rule of free access is subject to exceptions (including lack of space) which may justify restrictions on the number of service providers and the requirement that such providers be appointed by means of competitive selection procedures.

37. SEA contends that Directive 2004/17 does not apply in this case, which is governed by Directive 96/67, pursuant to the principle that special rules override general rules. It argues that, when Directive 96/67 was approved, sectors such as air transport were already regulated by Directive 531/90/EEC, (8) which Directive 2004/17 later replaced with substantially the same provisions as far as their scope was concerned. Accordingly, by approving Directive 96/67, the Community legislature was aware of the existence of such provisions on public procurement in the special sectors, despite which it established a special set of rules for groundhandling services at airports.

38. From a different angle, SEA states that Directive 2004/17 necessarily presupposes that the contract concluded between the contracting entity and the contractor, (9) under which the former gives the latter remuneration in payment for the service it receives, is for pecuniary interest. This element is lacking in the

instant case, in which it is the successful tenderer who pays the other party a fee as consideration for the occupation of a publicly owned area. Directive 2004/17 does not, therefore, apply to the dispute.

39. SEA then turns its attention to the possibility under Directive 96/67 of imposing limits on the access by suppliers of groundhandling services, in which case a public selection procedure must be conducted. This possibility does not necessarily mean that a selective process must also be conducted for the assignment of areas to be used in such activities.

40. The Commission, taking the same approach as SEA, argues that Directive 2004/17 does not apply because the requirement under Article 1(2)(c) and (d) thereof that the contract be for pecuniary interest is not met, there being no remuneration from the contracting authority to the contractor in exchange for the provision of a service by the contractor. The relationship between them falls within the ambit of service concessions, which are excluded from the scope of Directive 2004/17 by Article 18 thereof.

41. Even if it were to be accepted that the concession of areas within airports was governed by Directive 2004/17, it would fall within category 20 of Annex XVII B, with the result that the managing body would not be under an obligation to organise a selection procedure.

42. In short, the Commission states that Directive 96/67 is the point of reference and it can be inferred from that directive alone that the managing body is required to divide the space available among the different operators, to the extent necessary for the exercise of their rights and to allow effective and fair competition based on relevant, objective, transparent and non-discriminatory rules and criteria. The national court must determine whether, in this specific case, those criteria were met, even in the absence of a selection procedure.

V. Assessment

43. As a preliminary observation, it is pertinent to note that the Court's answer to the referring court cannot play a part in the debate on the interpretation of the domestic rules which, according to the referring court, could be used 'in the abstract' (10) to decide on the case.

44. It is for the referring court (and, as the case may be, the court that may have to review its judgment) to clarify whether Legislative Decree No 163/2006 (on public procurement), as general legislation, takes precedence over the provisions of Legislative Decree No 18/1999 (governing groundhandling services at airports) in order to determine whether, under Italian law and in accordance with those legal instruments, the allocation of areas within airports must be preceded by a public selection procedure.

45. The fact that both sets of national provisions 'are derived from EU law', as the referring court states, (11) does not prevent the Italian legislature from requiring that public selection procedures apply in the case of allocations of areas within airports, such as the area in the present case, allocations which, as I will argue below, are not covered by Directive 2004/17. Whilst that directive certainly requires that contracts falling within its scope be awarded in accordance with its provisions, there is nothing to prevent a Member State from deciding, on its own initiative, to extend those rules to other contractual arrangements.

46. Leaving aside the indisputable jurisdiction of the Italian courts to determine whether, under Italian law, the award of areas within airports must always be preceded by a public selection procedure, I will confine myself to providing some interpretative guidelines on the two directives in question. After identifying the directive which I consider applies from the standpoint of EU law, it will be necessary to examine whether Italian law conflicts with that directive in any way.

A. The application of Directive 2004/17

47. The first point to be addressed is the classification of the relationship between the managing body of the airport and the suppliers of groundhandling services, in order to determine whether it constitutes a public service contract or a service concession, with a public property element. In the latter situation, Directive 2004/17 would not apply, in accordance with Article 18 thereof.

48. The case-law of the Court (12) lays down the basis for distinguishing between these categories. Although its decisions relate to the interpretation of Directive 2004/18/EC, (13) I am of the view that they

may be applied to Directive 2004/17, in view of the similarities between the relevant provisions of those directives.

49. The Court has held that 'it follows from a comparison of the definitions of a public service contract and a service concession provided, respectively, by Article 1(2)(a) and (d) and by Article 1(4) of Directive 2004/18 [corresponding to Article 1(2)(a) and (d) and Article 1(3)(b) of Directive 2004/17] that the difference between a public service contract and a service concession lies in the consideration for the provision of services. A service contract involves consideration which, although it is not the only consideration, is paid directly by the contracting authority to the service provider, while, for a service concession, the consideration for the provision of services consists in the right to exploit the service, either alone, or together with payment.' (14)

50. The Court has also found that the classification of a relationship as a service concession 'implies that the service supplier takes the risk of operating the services in question and that the absence of a transfer to the service provider of the risk connected with operating the service shows that the transaction concerned is a public service contract and not a service concession'. (15)

51. In the context of groundhandling services, the close relationship between the managing body of the airport and the supplier of those services to airlines is given concrete expression in the surrender by the former to the latter of the relevant airport land and facilities. In exchange for public property being made available in this way, the managing body receives remuneration (usually in the form of a fee) from the operator. In turn, the operator uses the assigned areas in its commercial dealings with third parties, namely with users who agree to pay the operator for the services performed. (16) The operator bears the commercial risk associated with the pursuit of its business.

52. At the hearing, it was confirmed that this basic arrangement is precisely the one in use at Milan's Malpensa airport. The suppliers of groundhandling services pay SEA, as managing entity, an annual fee based on the number of square metres of the facilities they occupy. This remuneration takes the form of consideration for the use of areas at the airport and is based on Article 16(3) of Directive 96/67. (17)

53. A concession of airport facilities to a supplier so that the latter can provide groundhandling services to third parties cannot be classified as a public service contract for the purpose of Article 1(2)(a) and (d) of Directive 2004/17, with the result that the relationship referred to in the main proceedings falls outside the scope of that directive.

54. Lastly, as the Commission points out, if it is accepted that the award of this type of facilities, which enable groundhandling services to be provided, is subject to the requirements of Directive 2004/17, it would come under supporting and auxiliary transport services (category 20 of Annex XVII B to Directive 2004/17). Article 32 of Directive 2004/17 provides that the award of contracts which have as their object that category of services is 'governed solely by Articles 34 and 43' (technical specifications and contract award notices, respectively), that is, not by the remaining general rules.

B. The possible application of both Directive 2004/17 and Directive 96/67

55. If, hypothetically speaking, the award of areas within airports to suppliers of groundhandling services was of the same nature as a contract for the provision of services (*quod non*), both Directive 2004/17 and Directive 96/67 would apply to the same factual situation. The first directive requires that the award be preceded by a formal selection procedure while the second does not, with the result that the conflict is evident.

56. As the Commission noted in its written observations and recalled at the hearing, managing bodies such as SEA have a distinctive structure which allows them to act either as contracting authorities, under Directive 2004/17, or as administrators of airport infrastructure, a status which, under Directive 96/67, empowers them to coordinate and control the activities of the different operators present at the airport. This dual role calls for an examination of the duties performed in each case.

57. Awards such as that at issue in the main proceedings fall within the second category of functions, governed by Directive 96/67, and are not subject to the procedures set out in Directive 2004/17, as I have just pointed out. This conclusion can be drawn, in my opinion, simply by considering the scope of each directive,

without it being necessary to resort to criteria of interpretation based on the *lex generalis/lex specialis* pairing.

58. If those criteria had to be applied, the case-law of the Court would enable the conflict between the two sets of rules to be resolved. In such cases, the Court has diffused any legislative friction by having recourse to the principle that special rules override general rules, which in turn is related to the principle of legal certainty 'requir[ing] that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law'. (18)

59. Particularly apposite is the recent judgment of 27 October 2016 in *Hörmann Reisen*, (19) in which the apparent overlap, also in the transport field, occurred between Regulation (EC) No 1370/2007 (20) and the directives on public procurement. (21)

60. The Court, in setting out the premiss of its decision, stated that 'Directive 2004/18 … is of general application, whereas Regulation No 1370/2007 applies only to public passenger transport services by rail and road'. Based on that finding, and bearing in mind that both Regulation No 1370/2007 and Directive 2004/18 'contain rules on subcontracting, the view must be taken that the first provision constitutes a special rule with respect to the rules laid down in the second provision, and, as a *lex specialis*, takes precedence over the latter'.

61. Malpensa Logistica nonetheless argues that Directive 2004/17 applies as it postdates Directive 96/67. However, an analysis of the time sequence leads instead to the opposite conclusion, since the wording of Directive 2004/17 is the same, in this respect, as that of its predecessor, Directive 90/531/EEC, (22) which already included airports within its scope (Article 2(2)(b)(ii)), under the same terms as Article 7(b) of Directive 2004/17. Accordingly, when it approved Directive 96/67, the Community legislature was fully aware of the specific nature of the rules it was establishing, which differed from those set out in the directive on procurement in the special sectors.

62. The uniqueness of the rules relating to airports is justified by Directive 96/67 itself, where it makes clear in its recitals (23) that the objectives of the directive are to help reduce the operating costs of airlines and improve the quality of service provided to users by opening up access to the groundhandling market, (24) at the same time as acknowledging the possibility for the Member States to take the specific nature of the sector into account and the need to weigh up the imperatives linked to the situation of airports when such opening-up occurs.

63. From that perspective, also, the application of Directive 2004/17 would be excluded in favour of the application of Directive 96/67.

C. The consequences of the foregoing assessment for the answer to the question referred for a preliminary ruling

64. The question referred by the national court is confined to ascertaining only whether Article 7 of Directive 2004/17 'preclude[s]' national provisions (Articles 4 and 11 of Legislative Decree No 18/1999) which do not require a public tendering procedure in the case of the award of areas within airports.

65. In the light of the above assessment, my view is that the answer to that question, as it is worded, should be in the negative. To that end, it would be sufficient to state that Directive 2004/17 does not apply to awards of this kind, notwithstanding the fact that the national legislature may, if it considers it appropriate and acting on its own authority, make them subject to rules similar to those governing public contracts in the special sectors. To the extent that Legislative Decree No 18/1999 does not require there to be a formal tendering system for the award of the use of such areas, it does not conflict with Directive 2004/17.

66. However, that answer might be insufficient and detract from the two-way process of preliminary rulings, since the referring court, in its meticulous presentation of the applicable law, also mentioned Directive 96/67 and the legislation transposing it into Italian law. An answer which did not examine the effect of that directive on the main proceedings would, in my view, be incomplete.

67. In addition, as the Court has repeatedly held, 'the fact that the referring court's question refers only to certain provisions of EU law does not mean that the Court may not provide the national court with all the

guidance on points of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question'. (25)

68. It is therefore appropriate to address the problems raised in the order for reference also from the standpoint of Directive 96/67.

D. The allocation of areas within airports under Directive 96/67

69. Pursuant to Directive 96/67, access by suppliers of groundhandling services to the market for the provision of services to third parties at airports is free (Article 6). However, in keeping with its recitals, (26) Directive 96/67 allows the Member States, in specified circumstances, to reduce the number of suppliers authorised to provide groundhandling services (Article 6(2) in conjunction with Article 9). In those circumstances, it is necessary to initiate a competitive procedure to select operators, which is governed by the same directive (Article 11).

70. In both scenarios (unrestricted access or selective access), (27) the chosen suppliers must obviously have access to airport facilities, which the managing body provides to them. Under Article 16(2) of Directive 96/67, the space available for groundhandling services at an airport must be divided among the various suppliers 'to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of the relevant, objective, transparent and non-discriminatory rules and criteria'.

71. This provision therefore requires the managing body to observe, when allocating areas or facilities within airports, the abovementioned 'relevant, objective, transparent and non-discriminatory rules and criteria', but it does not require that body to have recourse to a formal public tendering procedure similar to that in place for the award of contracts covered by Directive 2004/17.

72. The fact that Directive 96/67 does not require the managing entity to initiate a selection procedure in order to award areas within airports to suppliers obviously does not mean that the managing entity is not able to organise such a procedure. What is more, an open tendering procedure between authorised operators may undoubtedly be one of the mechanisms (not necessarily the only mechanism) suitable for distributing areas, if it is implemented in accordance with the criteria of objectivity, transparency and non-discrimination referred to in Article 16(2) of that directive.

73. Indeed, according to the documents in the case and information provided at the hearing, SEA awarded Beta-Trans the *definitive* airport facilities as the result of a competitive selection procedure in which Malpensa Logistica also participated. (28) As indicated above, the assignment of the temporary hangar, which is the only matter in dispute, came about because the area which had been definitively awarded was not ready.

74. These factors (the temporary nature of the hangar and the existence of an earlier competitive procedure) may be relevant in determining whether SEA complied with Article 16(2) of Directive 96/67. Since this provision allows the managing body a broad discretion, subject to the limits mentioned above, responsibility for assessing it lies with the national courts.

75. It should also be borne in mind that the objectives of Directive 96/67 include encouraging the presence of new suppliers of groundhandling services and that one of the criteria for assigning available space within airports is to promote 'effective and fair' competition between all operators, 'including new entrants in the field'. Effective competition precisely requires the removal of barriers preventing the entry of new operators. From that perspective, the principles of objectivity, transparency and non-discrimination may justify decisions on the allocation of areas which take account of the situation of suppliers of groundhandling services already in place and their possible dominance in the provision of those services at a given airport. (29)

76. I therefore suggest a twofold answer to the question referred for a preliminary ruling:

– First, it must be acknowledged that the national rules, which do not require a prior public selection procedure to be conducted for every award, including temporary awards, of areas within airports for the purpose of providing groundhandling services (Articles 4 and 11 of Legislative Decree No 18/1999), are compatible with Article 7 of Directive 2004/17.

– Secondly, it must be pointed out to the referring court that Article 16(2) of Directive 96/67 requires managing bodies to distribute available space under the terms examined above.

VI. Conclusion

77. In the light of the foregoing, I propose that the Court give the following answer to the question referred for a preliminary ruling by the Tribunale Amministrativo Regionale per la Lombardia (Regional Administrative Court of Lombardy, Italy):

(1) Article 7 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as not precluding national provisions, such as those set out in Articles 4 and 11 of Legislative Decree No 18/1999, which do not require a prior public selection procedure to be conducted for every award, including temporary awards, of areas within airports for the purpose of providing groundhandling services.

(2) The award must comply with Article 16(2) of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, so that those areas are divided among the various suppliers of groundhandling services, including new entrants in the field, to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of relevant, objective, transparent and non-discriminatory rules and criteria, this being a matter for the national court to determine.

---

1 Original language: Spanish.

---

2 Società Esercizi Aeroportuali SpA (‘SEA’).

---

3 Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

---

4 Council Directive of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36).

---

5 This decree transposes Directives 2004/17/EC and 2004/18/EC into Italian law (Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (GURI No 100 of 2 May 2006)).

---

6 This decree transposes Directive 96/67 into Italian law (Attuazione della direttiva 96/67/CE relativa al libero accesso al mercato dei servizi di assistenza a terra negli aeroporti della Comunità (GURI No 28 of 4 February 1999)).

---

7 According to the case-law of the Consiglio di Stato (Council of State) cited by the referring court (judgments 4934/2013 and 2026/2014), Article 213 of Legislative Decree No 163/2006 covers not only the operations of take-off, landing and management of aircraft, but also activities relating to passenger transit and security, baggage sorting and, in general, all services which are ordinarily complementary thereto. It has also been held that the concession of areas within airports for the provision of groundhandling services, as a form of exploitation of airport areas in connection with the activities normally carried on by air carriers, falls within the material scope of the legislation on special sectors.

---

8 Council Directive of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1).

---

9 It distinguishes between *passive* public contracts (inter alia, those governed by Directive 2004/17), which represent a source of expenditure for contracting entities that purchase goods or services, and *active* public contracts, which include concessions over publicly owned property, for which the authorities receive income.

---

10 Paragraph 6.2 of the order for reference.

---

11 Ibidem.

---

12 Judgments of 10 March 2011, *Privater Rettungsdienst und Krankentransport Stadler* (C-274/09, EU:C:2011:130), paragraphs 24 and 26, and of 8 September 2016, *Politanò* (C-225/15, EU:C:2016:645), paragraphs 29 to 31.

---

13 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

14 Judgment of 8 September 2016, *Politanò* (C-225/15, EU:C:2016:645), paragraph 30.

---

15 Ibidem, paragraph 31. The EU legislature included these defining features of service concessions in Article 5(1)(b) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

---

16 The economic content of the relationship between the parties involved is set out, in some countries, in a document approved by the managing body. That document usually specifies the amount of the fee (or similar financial obligation, of a public nature) to be paid (or performed) by the operator, in proportion to the areas assigned and, where appropriate, the different kinds of service provided. It may also establish the rate, or maximum price, that the operator may charge its customers, depending on the nature of the services they request, including handling services.

---

17 In its judgment of 16 October 2003, *Flughafen Hannover-Langenhagen* (C-363/01, EU:C:2003:548), the Court held that Article 16(3) of Directive 96/67 enables the managing body of an airport to charge a fee for the use of airport facilities which takes account of that body's interest in achieving a profit and which must be calculated in accordance with the criteria laid down in that article.

---

18 Judgment of 12 February 2015, *Parliament* v *Council* (C-48/14, EU:C:2015:91), paragraph 45, citing judgments of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811), paragraph 100, and of 31 January 2013, *LVK-56* (C-643/11, EU:C:2013:55), paragraph 51.

---

19 Case C-292/15, EU:C:2016:817.

---

20 Regulation of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1).

21 The problem arose due to the differing scope of subcontracting, depending on whether Directive 2004/18 or Regulation No 1370/2007 applied.

22 Council Directive of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1990 L 297, p. 1).

23 Recitals 5 to 7, reproduced in point 7 of this Opinion.

24 The Court drew attention to this objective in its judgment of 11 September 2014, *Commission* v *Portugal* (C-277/13, EU:C:2014:2208), paragraph 48.

25 Judgment of 22 October 2015, *Impresa Edilux and SICEF* (C-425/14, EU:C:2015:721), paragraph 20 and the case-law cited.

26 Recitals 11, 14 and 16 provide for the limitation of the number of suppliers for reasons of safety, security, capacity and available space, provided that those constraints are relevant, objective, transparent and non-discriminatory, in which case suppliers must be chosen on the basis of a transparent and impartial procedure.

27 According to information provided by SEA at the hearing, the access by suppliers of groundhandling services to Milan's Malpensa airport is not subject to any prior selection procedure.

28 There is no record of Malpensa Logistica having challenged that award.

29 According to the order for reference (paragraph 3), SEA and Beta-Trans had claimed that Malpensa Logistica already had a storage area of 18 000 square metres, as well as a further 2 700 square metres of covered area, and that the managing body, in response to Malpensa Logistica's requests, had ordered the construction of an additional covered area of 3 327 square meters to store cargo where it could be 'protected from the weather'.

EU:C:2016:867

ORDONNANCE DE LA COUR (sixième chambre)

10 novembre 2016 (*)

« Renvoi préjudiciel – Article 99 du règlement de procédure de la Cour – Marchés publics – Directive 2004/18/CE – Directive 2014/24/UE – Participation à un appel d'offres – Soumissionnaire ayant omis de mentionner dans l'offre les charges d'entreprise concernant la sécurité au travail – Obligation prétorienne de porter cette mention – Exclusion du marché sans possibilité de rectifier cette omission »

Dans l'affaire C-697/15,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Tribunale amministrativo regionale per il Piemonte (tribunal administratif régional du Piémont, Italie), par décision du 11 novembre 2015, parvenue à la Cour le 28 décembre 2015, dans la procédure

MB Srl

contre

Società Metropolitana Acque Torino (SMAT) SpA,

en présence de :

De Campo Egidio Eredi di De Campo Danilo & C.,

LA COUR (sixième chambre),

composée de M. A. Arabadjiev, faisant fonction de président de chambre, MM. C. G. Fernlund et S. Rodin (rapporteur), juges,

avocat général : M. M. Campos Sánchez-Bordona,

greffier : M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation des principes de protection de la confiance légitime et de sécurité juridique, lus en combinaison avec les principes de la libre circulation des marchandises, de la liberté d'établissement, de la libre prestation de services, d'égalité de traitement, de non-discrimination, de reconnaissance mutuelle, de proportionnalité, de transparence, repris par la directive 2014/24/UE du Parlement européen et du Conseil, du 26 février 2014, sur la passation des marchés publics et abrogeant la directive 2004/18/CE (JO 2014, L 94, p. 65).

2 Cette demande a été présentée dans le cadre d'un litige opposant MB Srl à Società Metropolitana Acque Torino (SMAT) SpA, au sujet d'une décision de cette dernière, en sa qualité de pouvoir adjudicateur, d'exclure MB de la procédure de passation d'un marché public de travaux.

Le cadre juridique

Le droit de l'Union

3 L'article 2 de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO 2004, L 134, p. 114), disposait :

« Les pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité, de manière non discriminatoire et agissent avec transparence. »

4 Aux termes de l'article 18, paragraphe 1, premier alinéa, de la directive 2014/24 :

« Les pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité et sans discrimination et agissent d'une manière transparente et proportionnée. »

5 L'article 56, paragraphe 3, de cette directive prévoit :

« Lorsque les informations ou les documents qui doivent être soumis par les opérateurs économiques sont ou semblent incomplets ou erronés ou lorsque certains documents sont manquants, les pouvoirs adjudicateurs peuvent, sauf disposition contraire du droit national mettant en œuvre la présente directive, demander aux opérateurs économiques concernés de présenter, compléter, clarifier ou préciser les informations ou les documents concernés dans un délai approprié, à condition que ces demandes respectent pleinement les principes d'égalité de traitement et transparence. »

Le droit italien

6 L'article 86, paragraphe 3 bis, du decreto legislativo n. 163 – Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (décret législatif n° 163, portant sur le code des marchés publics de travaux, de services et de fournitures en application des directives 2004/17/CE et 2004/18/CE), du 12 avril 2006 (supplément ordinaire à la GURI n° 100, du 2 mai 2006), tel que modifié par le decreto legislativo n. 152 (décret législatif n° 152), du 11 septembre 2008 (supplément ordinaire à la GURI n° 231, du 2 octobre 2008) (ci-après le « décret législatif n° 163/2006 »), dispose :

« Lors de la préparation des appels d'offres et pour l'évaluation de l'anomalie des offres dans les procédures de passation de marchés publics de travaux, de fournitures et de services, les entités adjudicatrices sont tenues de déterminer si la valeur économique est adéquate et suffisante au regard du coût du travail et du coût afférent à la sécurité, lequel doit être spécifiquement mentionné et être raisonnable au regard de l'ampleur et des caractéristiques des travaux, des services ou des fournitures. Aux fins du présent paragraphe, le coût du travail est fixé périodiquement, dans des tableaux spéciaux, par le ministre du Travail et de la Prévoyance sociale, sur la base des valeurs économiques prévues par la négociation collective conclue par les syndicats comparativement les plus représentatifs, des normes en matière de prévoyance et d'assistance, des différents secteurs commerciaux et des différentes zones territoriales. En l'absence de convention collective applicable, le coût du travail est établi en fonction de la convention collective du secteur commercial le plus proche de celui concerné. »

7 Aux termes de l'article 87, paragraphe 4, du décret législatif n° 163/2006 :

« Ne sont pas admises les justifications concernant les charges de sécurité au titre de l'article 131, ainsi que le plan de sécurité et de coordination visé à l'article 12 du décret législatif n° 494 du 14 août 1996, et l'évaluation y afférente des coûts au sens de l'article 7 du décret n° 222 du président de la République du 3 juillet 2003. Lors de l'évaluation de l'anomalie, le pouvoir adjudicateur tient compte des coûts afférents à la sécurité, qui doivent être spécifiquement mentionnés dans l'offre et être raisonnables au regard de l'ampleur et des caractéristiques des services ou des fournitures. »

8 L'article 26, paragraphe 6, du decreto legislativo n. 81 – Attuazione dell'articolo 1 della legge 3 agosto 2007, n. 123, in materia di tutela della salute e della sicurezza nei luoghi di lavoro (décret législatif n° 81, – Mise en œuvre de l'article 1 de la loi du 3 août 2007, n° 123, dans le cadre de la réglementation concernant la protection de la santé et de la sécurité sur les lieux de travail), du 9 avril 2008, dispose :

« Lors de la préparation des appels d'offres et pour l'évaluation de l'anomalie des offres dans les procédures de passation des marchés publics de travaux, de fournitures et de services, les entités adjudicatrices sont tenues de déterminer si la valeur économique est adéquate et suffisante au regard du coût du travail et du coût afférent à la sécurité, lequel doit être spécifiquement mentionné et être raisonnable au regard de l'ampleur et des caractéristiques des travaux, des services ou des fournitures. Aux fins du présent paragraphe, le coût du travail est fixé périodiquement, dans des tableaux spéciaux, par le ministre du Travail, de la Santé et des Politiques sociales, sur la base des valeurs économiques prévues par la négociation collective conclue par les syndicats comparativement les plus représentatifs, des normes en matière de prévoyance et d'assistance, des différents secteurs commerciaux et des différentes zones territoriales. En l'absence de convention collective applicable, le coût du travail est établi en fonction de la convention collective du secteur commercial le plus proche de celui concerné. »

Le litige au principal et la question préjudicielle

9 Par lettres d'invitation du 22 juin 2015, SMAT, une société à capital entièrement public qui gère les services des eaux, d'assainissement et d'épuration des communes de l'arrière-pays turinois, a lancé une procédure restreinte simplifiée en vue de l'attribution d'un marché public de travaux ayant pour objet l'extension du « réservoir des Vallées » et le raccordement du réseau communal à celui d'Andrate (Italie). Il ressort de la décision de renvoi que les documents afférents à cette procédure prévoyaient que le critère d'attribution du marché en cause était celui du prix le plus bas, avec application de la procédure d'exclusion automatique des offres qui auraient présenté un pourcentage de rabais égal ou supérieur à un certain seuil, qualifié de seuil d'anomalie.

10 MB a présenté une offre au moyen d'un formulaire, prévu à cet effet, qui avait été joint en annexe de la lettre d'ouverture de la procédure. Son offre ayant été retenue, elle a été désignée comme adjudicataire provisoire par SMAT.

11 Toutefois, par une note du 13 octobre 2015, SMAT, sans accorder préalablement un délai pour régulariser l'offre et sans avoir vérifié si, effectivement, l'offre en question respectait ou non les prescriptions requises en matière de sécurité, a retiré sa décision portant adjudication provisoire du marché à MB et a exclu cette société de la procédure de passation de ce marché, au seul motif que l'offre qu'elle avait présentée ne mentionnait pas les coûts internes de sécurité au travail. L'obligation de faire figurer ces coûts dans les offres résulterait, selon la juridiction de renvoi, de la réglementation nationale telle qu'elle a été interprétée par le Consiglio di Stato (Conseil d'État, Italie) dans son arrêt n° 3 du 20 mars 2015, rendu en assemblée plénière.

12 Par cet arrêt, le Consiglio di Stato (Conseil d'État) aurait considéré que, dans le cadre des procédures de passation de marchés publics de travaux, les soumissionnaires devaient mentionner, dans leur « offre économique », les coûts internes de sécurité au sein de l'entreprise, sous peine d'exclusion de la procédure, et cela même si cette obligation d'une telle mention et les conséquences de son non-respect n'étaient pas prévues dans les documents de marché.

13 Par un arrêt n° 9, du 2 novembre 2015, l'assemblée plénière du Consiglio di Stato (Conseil d'État), confirmant son interprétation, aurait précisé :

« En cas de défaut de mention des charges de sécurité de l'entreprise, les pouvoirs relatifs à l'assistance à l'établissement du dossier ne peuvent pas être valablement exercés, notamment pour les procédures dans lesquelles la phase de la soumission des offres s'est achevée avant la publication de l'arrêt de l'assemblée plénière n° 3 de 2015. »

14 De Campo Egidio Eredi di De Campo Danilo & c. Snc a été déclarée adjudicataire provisoire du marché public en cause au principal.

15 MB a alors formé devant le Tribunale amministrativo regionale per il Piemonte (tribunal administratif régional du Piémont, Italie) un recours tendant à l'annulation de la décision l'excluant de la procédure d'adjudication et de l'ensemble des actes liés à cette décision d'exclusion.

16 Au soutien de son recours, MB fait valoir que l'obligation d'indiquer de manière distincte dans l'offre les charges d'entreprise concernant la sécurité au travail, sous peine d'exclusion de la procédure de passation du marché, ne ressortait pas des documents du marché. Elle n'était en effet prévue ni dans l'invitation à participer au marché ni dans le formulaire à remplir pour présenter l'offre, fourni par le pouvoir adjudicateur.

17 Dans ces conditions, le Tribunale amministrativo regionale per il Piemonte (tribunal administratif régional du Piémont) a décidé de surseoir à statuer et de poser à la Cour la question préjudicielle suivante :

« Les principes communautaires de protection de la confiance légitime et de sécurité juridique, en combinaison avec les principes de libre circulation des marchandises, de liberté d'établissement et de libre prestation de services, qui sont énoncés dans le traité FUE, ainsi que les principes qui en découlent, tels que l'égalité de traitement, la non-discrimination, la reconnaissance mutuelle, la proportionnalité et la transparence, énoncés (en dernier lieu) dans la directive 2014/24, s'opposent-ils à une réglementation nationale, comme la réglementation italienne résultant des dispositions combinées de l'article 87, paragraphe 4, et de l'article 86, paragraphe 3 bis, du décret législatif n° 163/2006 ainsi que de l'article 26, paragraphe 6, du décret législatif n° 81 de 2008, telles qu'interprétées par les arrêts n^{os} 3 et 9 rendus en 2015 par l'assemblée plénière du Consiglio di Stato (Conseil d'État) dans sa fonction d'interprétation uniforme du droit, conformément à l'article 99 du code de procédure administrative, en vertu de laquelle le défaut de mention, dans les offres économiques d'une procédure de passation de marchés publics de travaux, des coûts de sécurité au sein de l'entreprise entraîne en tout état de cause l'exclusion de l'entreprise soumissionnaire, sans la possibilité d'une assistance à l'établissement du dossier et [d'une procédure] contradictoire, même dans le cas où l'obligation de mention séparée n'a été spécifiée ni dans la réglementation de l'appel d'offres ni dans le formulaire annexé à remplir pour la soumission des offres, et même indépendamment de la circonstance que, du point de vue substantiel, l'offre respecte effectivement les coûts minimums de sécurité au sein de l'entreprise ? »

Sur la question préjudicielle

Observations liminaires

18 Conformément à l'article 99 du règlement de procédure de la Cour, lorsqu'une question posée à titre préjudiciel est identique à une question sur laquelle celle-ci a déjà statué, lorsque la réponse à une telle question peut être clairement déduite de la jurisprudence ou lorsque la réponse à la question posée à titre préjudiciel ne laisse place à aucun doute raisonnable, la Cour peut, à tout moment, sur proposition du juge rapporteur, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée.

19 Dans son arrêt du 2 juin 2016, Pizzo (C-27/15, EU:C:2016:404), la Cour a été amenée à statuer sur des questions en substance identiques à celles qui sont soulevées dans la présente affaire par le Tribunale amministrativo regionale per il Piemonte (tribunal administratif régional du Piémont).

20 Les réponses apportées par cet arrêt étant pleinement transposables à la présente affaire, il y a lieu de faire application de la disposition procédurale susmentionnée.

Sur la directive applicable

21 À titre liminaire, il convient de rappeler que l'arrêt du 2 juin 2016, Pizzo (C-27/15, EU:C:2016:404), procède à l'interprétation des dispositions de la directive 2004/18. Cette directive a été abrogée par la directive 2014/24, avec effet au 18 avril 2016.

22 L'article 90 de la directive 2014/24 dispose que les États membres doivent mettre en vigueur les dispositions législatives, réglementaires et administratives nécessaires pour se conformer à cette directive au plus tard le 18 avril 2016, sous réserve de certaines exceptions dont, notamment, celles relatives aux marchés publics électroniques, pour lesquelles le délai de transposition est fixé au 18 octobre 2018.

23 En conséquence, à la date des faits en cause au principal, la directive 2004/18 était encore applicable, de sorte qu'il convient d'interpréter la demande de décision préjudicielle comme visant à l'interprétation de celle-ci et non à celle de la directive 2014/24.

Sur le fond

24 Par sa question, la juridiction de renvoi demande, en substance, si le principe d'égalité de traitement et l'obligation de transparence, tels que mis en œuvre par la directive 2004/18, doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un soumissionnaire de la procédure de passation d'un marché public à la suite du non-respect, par celui-ci, de l'obligation d'indiquer de façon distincte dans l'offre les charges d'entreprise concernant la sécurité au travail – dont le non-respect est sanctionné par l'exclusion de la procédure – qui résulte non pas expressément des documents de marché ou de la réglementation nationale, mais d'une interprétation de cette réglementation et du comblement des lacunes présentées par lesdits documents, par la juridiction nationale.

25 Afin de répondre à cette question, il importe, à titre liminaire, de rappeler, d'une part, que le principe d'égalité de traitement impose que les soumissionnaires disposent des mêmes chances dans la formulation des termes de leurs offres et implique donc que ces offres soient soumises aux mêmes conditions pour tous les soumissionnaires. D'autre part, l'obligation de transparence, qui en constitue le corollaire, a pour but de garantir l'absence de risque de favoritisme et d'arbitraire de la part du pouvoir adjudicateur (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 36 et jurisprudence citée).

26 Cette obligation implique que toutes les conditions et les modalités de la procédure d'attribution soient formulées de manière claire, précise et univoque dans l'avis de marché ou dans le cahier des charges, de façon, premièrement, à permettre à tous les soumissionnaires raisonnablement informés et normalement diligents d'en comprendre la portée exacte et de les interpréter de la même manière et, deuxièmement, à mettre le pouvoir adjudicateur en mesure de vérifier effectivement si les offres des soumissionnaires correspondent aux critères régissant le marché en cause (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 36 et jurisprudence citée).

27 De même, la Cour a précisé que les principes de transparence et d'égalité de traitement exigent que les conditions de fond et de procédure concernant la participation à un marché soient clairement définies au préalable et rendues publiques, en particulier les obligations pesant sur les soumissionnaires, afin que ceux-ci puissent connaître exactement les contraintes de la procédure et être assurés du fait que les mêmes contraintes valent pour tous les concurrents (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 37 et jurisprudence citée).

28 En outre, il y a lieu de relever que la directive 2004/18, à son annexe VII A portant sur les informations qui doivent figurer dans les avis pour les marchés publics, dans sa partie relative aux « Avis de marchés », point 17, prévoit que les « [c]ritères de sélection concernant la situation personnelle des opérateurs économiques qui peuvent entraîner l'exclusion de ces derniers et [les] informations requises prouvant qu'ils ne relèvent pas des cas justifiant l'exclusion » de la procédure de passation du marché en cause doivent être énoncés dans l'avis de marché (voir arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 38).

29 Dans l'affaire au principal, la juridiction de renvoi précise que l'obligation d'indiquer de manière distincte dans l'offre les coûts de l'entreprise concernant la sécurité au travail, sous peine d'exclusion de la procédure de passation du marché, n'était prévue ni dans l'avis de marché ni explicitement dans la loi.

30 Ainsi que l'expose cette juridiction, cette obligation résulterait de l'interprétation de la réglementation nationale par le Consiglio di Stato (Conseil d'État).

31 Il convient de relever que, en application de l'article 27, paragraphe 1, de la directive 2004/18, le pouvoir adjudicateur peut indiquer ou peut être obligé par un État membre d'indiquer dans le cahier des charges l'organisme ou les organismes auprès desquels les candidats ou les soumissionnaires peuvent obtenir les informations pertinentes sur les obligations relatives à la fiscalité, à la protection de l'environnement, aux dispositions de protection et aux conditions de travail qui sont en vigueur dans l'État membre. Toutefois, il ne résulte pas des dispositions de cette directive, notamment des articles 49

à 51 de celle-ci, que l'absence d'indications par les soumissionnaires du respect de ces obligations entraînerait automatiquement l'exclusion de la procédure de passation (voir, en ce sens, arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 43).

32 Une condition subordonnant le droit de participer à une procédure de marché public qui découlerait de l'interprétation du droit national et de la pratique d'une autorité, telle que celle en cause au principal, serait particulièrement préjudiciable pour les soumissionnaires établis dans d'autres États membres, dans la mesure où leur niveau de connaissance du droit national et de son interprétation ainsi que de la pratique des autorités nationales ne peut être comparé à celui des soumissionnaires nationaux (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 46).

33 Dans l'hypothèse où, comme dans l'affaire au principal, une condition de participation à la procédure de passation du marché, sous peine d'exclusion de cette dernière, n'est pas expressément prévue par les documents du marché et où cette condition ne peut être identifiée que par une interprétation jurisprudentielle du droit national, le pouvoir adjudicateur peut accorder au soumissionnaire exclu un délai suffisant pour régulariser son omission (arrêt du 2 juin 2016, Pizzo, C-27/15, EU:C:2016:404, point 50).

34 Il résulte de l'ensemble des considérations qui précèdent qu'il convient de répondre à la question posée que le principe d'égalité de traitement et l'obligation de transparence, tels que mis en œuvre par la directive 2004/18, doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un soumissionnaire de la procédure de passation d'un marché public à la suite du non-respect par celui-ci de l'obligation d'indiquer de façon distincte dans l'offre les charges d'entreprise concernant la sécurité au travail – dont le non-respect est sanctionné par l'exclusion de la procédure – qui résulte non pas expressément des documents de marché ou de la réglementation nationale, mais d'une interprétation de cette réglementation et du comblement des lacunes présentées par lesdits documents, par la juridiction nationale statuant en dernier ressort. Les principes d'égalité de traitement et de proportionnalité doivent également être interprétés en ce sens qu'ils ne s'opposent pas au fait d'accorder à un tel soumissionnaire la possibilité de remédier à la situation et de satisfaire à ladite obligation dans un délai fixé par le pouvoir adjudicateur.

Sur les dépens

35 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, la Cour (sixième chambre) dit pour droit :

Le principe d'égalité de traitement et l'obligation de transparence, tels que mis en œuvre par la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services, doivent être interprétés en ce sens qu'ils s'opposent à l'exclusion d'un soumissionnaire de la procédure de passation d'un marché public à la suite du non-respect par celui-ci de l'obligation d'indiquer de façon distincte dans l'offre les charges d'entreprise concernant la sécurité au travail – dont le non-respect est sanctionné par l'exclusion de la procédure – qui résulte non pas expressément des documents de marché ou de la réglementation nationale, mais d'une interprétation de cette réglementation et du comblement des lacunes présentées par lesdits documents, par la juridiction nationale statuant en dernier ressort. Les principes d'égalité de traitement et de proportionnalité doivent également être interprétés en ce sens qu'ils ne s'opposent pas au fait d'accorder à un tel soumissionnaire la possibilité de remédier à la situation et de satisfaire à ladite obligation dans un délai fixé par le pouvoir adjudicateur.

Signatures

* Langue de procédure : l’italien.

JUDGMENT OF THE COURT (Fourth Chamber)

5 October 2017 (*)

(Reference for a preliminary ruling — Public works contracts, public supply contracts and public service contracts — Directive 2004/18/EC — Article 1(9) — Concept of contracting authority — Company wholly owned by a contracting authority — Transactions internal to the group)

In Case C-567/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania), made by decision of 21 October 2015, received at the Court on 2 November 2015, in the proceedings

'LitSpecMet' UAB

v

'Vilniaus lokomotyvų remonto depas' UAB,

intervening party:

'Plienmetas' UAB,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Fourth Chamber, E. Juhász (Rapporteur), C. Vajda and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and following the hearing of 9 February 2017,

after considering the observations submitted on behalf of:

– 'LitSpecMet' UAB, by C. Maczkovics, R. Martens and V. Ostrovskis, advokatai,

– 'Vilniaus lokomotyvų remonto depas' UAB, by D. Soloveičik, advokatas, and G. Jokubauskas, representative of the undertaking,

– the Lithuanian Government, by D. Kriaučiūnas and by D. Stepanienė and R. Butvydytė, acting as Agents,

– the German Government, by J. Möller, acting as Agent,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and F. Batista, acting as Agents,

– the European Commission, by A. Tokár and A. Steiblytė and J. Jokubauskaitė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43; 'Directive 2004/18').

2 The request has been made in proceedings between 'LitSpecMet' UAB ('LSM') and 'Vilniaus lokomotyvų remonto depas' UAB ('VLRD') concerning a contract for the supply of ferrous metal bars awarded in part by VLRD to LSM.

Legal context

European Union law

3 Directive 2004/18 was repealed and replaced, with effect from 18 April 2016, by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65).

4 Article 1(2)(c) of Directive 2004/18 defined 'Public supply contracts' as public contracts other than public works contracts having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products.

5 Article 1(9) of that directive stated:

'"Contracting authorities" means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A "body governed by public law" means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

…'

6 Article 7 of Directive 2004/18, entitled 'Threshold amounts for public contracts', provided as follows:

'This directive shall apply to public contracts which are not excluded in accordance with the exceptions provided for in Articles 10 and 11 and Articles 12 to 18 and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

…

(b) EUR 200 000:

– for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV,

…'

Lithuanian law

7 The Lietuvos Respublikos viešųjų pirkimų įstatymas (Lithuanian Law on public contracts), which transposes Directive 2004/18 into Lithuanian law, provides in Article 4, entitled ‘Contracting authorities’:

‘1. A contracting authority is:

(1) a State or local authority;

(2) a legal person governed by public or private law meeting the conditions set out in paragraph 2 of this article;

(3) an association of authorities referred to in subparagraph 1 of this paragraph and/or of the legal persons governed by public or private law referred to in point 2 of this paragraph;

(4) the contracting undertakings operating in the water, energy, transport and postal services sectors referred to in points 2 to 4 of Article 70(1) of this law.

2. A legal person governed by public or private law (other than national or local governments) established for the purpose of specifically meeting needs in the general interest, not having an industrial or commercial character, and which satisfies at least one of the following conditions is a contracting authority if:

(1) more than 50% of its activity is financed from State or local authority budgets or from other resources of the State or local authorities or from the funds of other legal persons governed by public or private law referred to in this paragraph;

(2) it is controlled (managed) by national or local government or by other legal persons governed by public or private law referred to in this paragraph;

(3) more than half of the members of its administrative, managerial or supervisory board are appointed by national or local government or by legal persons governed by public or private law referred to in this paragraph. ...’

8 Article 10(5) of the Lithuanian Law on public contracts provides:

‘The provisions of this law are not applicable where the contracting authority concludes an agreement with an entity that is legally separate, over which the contracting authority exercises an exclusive control which is similar to that which it exercises over its own departments or organs (or in respect of which the contracting authority is the only shareholder and exercises the rights and duties of the State or of a local authority) and where at least 90% of the turnover of the controlled entity in the previous accounting period (or in the period since its creation if it has been operating for less than a full accounting period) has been generated through activities intended to meet the needs of the contracting authority or to enable it to perform its functions.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 VLRD is a commercial company which was established in 2003, following a restructuring of ‘Lietuvos geležinkeliai’ AB (Lithuanian Railways, the State railway company; ‘LG’), and its object is the manufacture and maintenance of locomotives and railway carriages.

10 VLRD is a subsidiary of LG, which is its only partner company. LG was, at the material time, the main client of VLRD, its orders representing nearly 90% of the turnover of VLRD.

11 In 2013, VLRD published a notice of a simplified tendering procedure for the procurement of bars of ferrous metals to which LSM responded before being awarded the contract in respect of part of its bid.

12 LSM sought the annulment of that contract and the publication of a new notice which complied with the Lithuanian Law on public contracts on the ground that, in its view, VLRD was a contracting authority within the meaning of the Lithuanian Law on public contracts.

13 LSM argued, in essence, firstly, that VLRD had been established to meet the needs of LG, which was an undertaking financed by the State and which had a public service remit, and, secondly, that the conditions under which VLRD governing the services and sales which it carried out to the benefit of its parent company did not reflect normal competitive conditions. According to LSM, those elements were a sufficient indication of the fact that the activity of VLRD was intended to meet needs in the general interest, not having an industrial or commercial character, and that it was therefore a contracting authority and subject to the rules on public procurement.

14 The Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania) rejected LSM's claims. That decision was upheld by the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania).

15 In confirming the decision given at first instance, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) noted in particular that VLRD had been established to carry out commercial activity and make profits, which was shown by the fact that it alone bore the risks of its activity without the State covering its losses. The Court of Appeal also considered that VLRD's activity could not be regarded as meeting a need in the general interest of all citizens, since it had been shown that VLRD was developing in a competitive environment and that although, at the material time, almost all its sales were concluded with LG, the projections made showed that, in 2016, those sales would no longer represent more than 15% of VLRD's commercial transactions.

16 The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) overturned the decision of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania).

17 To that effect, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) took as its basis the premiss that the resolution of the dispute before it depended on the interpretation to be given to the expression 'body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character' used in the second subparagraph, (a), of Article 1(9) of Directive 2004/18 and repeated in Article 4 of the Lithuanian Law on public contracts.

18 In that regard, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) pointed out in particular that the functional approach to the concept of 'body governed by public law' adopted by the Court led to various factors being taken into account to determine whether a person was a contracting authority, such as whether or not there was competition in the market in which it operates, the circumstances in which the entity under consideration was established, whether or not it is possible to replace that entity by another operator or whether or not that entity bore the risks engendered by its activity.

19 The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) has stated, in essence, that both the court of first instance and the appeal court had failed to examine the specific nature of the economic activities carried out by VLRD, in particular as regards the intensity of the competition prevalent in the economic sector in which that company was developing. It took the view that those courts had attributed too great an importance to the legal form of VLRD, that of a commercial company, to find that VLRD was not a contracting authority.

20 The Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) noted in addition that VLRD carried out on average 15 internal transactions per year in favour of its parent company which, for that type of transactions, was exempted from the rules on public contracts. In that regard, it pointed out that, if the parent company itself carried out the activities undertaken by its subsidiary, it would be subject to those rules as regards the purchase of vehicles, materials and other supplies necessary to the maintenance of locomotives and rolling stock or to other work, in accordance with the Lithuanian Law on public contracts. It stated that, in such a situation, it was necessary to analyse whether the fact that a parent company used the services of a subsidiary to carry out economic transactions in the general interest was not such as to permit circumvention of the legislation on public contracts.

21 The case was referred back to the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) which, after having set aside the decision of the Vilniaus apygardos teismas (Regional Court, Vilnius), referred the matter back to it.

22 Under those circumstances, the Vilniaus apygardos teismas (Regional Court, Vilnius) decided to stay its proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 1(9) of Directive 2004/18 be interpreted as meaning that a company:

– which has been founded by a contracting authority which engages in activity in the field of rail transport, namely: management of public railway infrastructure; passenger and freight transportation;

– which independently engages in business activity, establishes a business strategy, adopts decisions concerning the conditions of the company’s activity (product market, customer segment and so forth), participates in a competitive market throughout the European Union and outside the EU market, providing the services of rolling stock manufacture and rolling stock repair, and participates in procurement procedures connected with that activity, seeking to obtain orders from third parties (not the parent company);

– which provides rolling stock repair services to its founder on the basis of in-house transactions and the value of those services represents 90 per cent of the company’s entire activity;

– whose services provided to its founder are intended to ensure the founder’s passenger and freight transportation activity;

is not to be considered to be a contracting authority?

(2) If the Court determines that the company is to be considered to be a contracting authority in the circumstances set out above, must Article 1(9) of Directive 2004/18 be interpreted as meaning that the company loses the status of contracting authority where the value of the rolling stock repair services provided on the basis of in-house transactions to the contracting authority which is the company’s founder falls and constitutes less than 90% or not the main part of the total financial turnover from the company’s activity?’

Consideration of the questions referred

23 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether the second subparagraph of Article 1(9) of Directive 2004/18 must be interpreted as meaning that a company which, firstly, is wholly owned by a contracting authority the activity of which is to meet needs in the general interest and which, secondly, carries out both transactions for that contracting authority and transactions on the competitive market may be classified as a ‘body governed by public law’ within the meaning of that provision and if so, in that regard, what is the effect of the fact that the value of the in-house transactions may in future represent less than 90% or not the main part of the total financial turnover of the company.

24 As a preliminary point, it is appropriate to note that the referring court does not give any indication in the present case as regards the value of the contract at issue in the main proceedings, so that it is not possible to determine with certainty whether or not the value of that contract exceeds the threshold set in Article 7(b) of Directive 2004/18 and, in consequence, whether or not one of the essential conditions for the application of that directive is satisfied in the case giving rise to the main proceedings.

25 By reason of the spirit of cooperation in relations between the national courts and the Court of Justice in the context of the procedure for a preliminary ruling, the lack of such preliminary findings by the referring court does not lead to the request being inadmissible if, in spite of those failings, the Court, having regard to the information available from the file, considers that it is in a position to provide a useful answer to the referring court. That is the case, in particular, where the order for reference contains sufficient relevant information for it to be determined whether the conditions for application of a measure of secondary legislation are likely to be satisfied. Nevertheless, the answer provided by the Court is given subject to the proviso that the referring court has found that those conditions are met

(see, by analogy, judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 48).

26 It is therefore for the referring court to ascertain whether, in the present case, the condition concerning the threshold of EUR 200 000, as laid down in Article 7(b) of Directive 2004/18, is met.

27 It is not in dispute that the activity of LG, which includes the supply of public passenger transport services, is regarded as being carried out to meet needs in the general interest and that that company must be classified as a 'body governed by public law' and, accordingly, a 'contracting authority'.

28 Thus, the first question seeks to clarify whether VLRD must also be classified as a 'body governed by public law'.

29 Under the second subparagraph, points (a) to (c), of Article 1(9) of Directive 2004/18, a 'body governed by public law' is any body which, firstly, was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, secondly, has legal personality and, thirdly, is financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

30 As the Court has consistently held, the conditions set out in that article are cumulative, so that if a single one of those conditions is unfulfilled a body cannot be regarded as a 'body governed by public law' and, therefore, as a 'contracting authority' within the meaning of Directive 2004/18 (see, to that effect, judgments of 22 May 2003, *Korhonen and Others*, C-18/01, EU:C:2003:300, paragraph 32, and of 10 April 2008, *Ing.Aigner*, C-393/06, EU:C:2008:213, paragraph 36 and the case-law cited.

31 The concept of 'contracting authority', including that of 'body governed by public law', must, in the light of the objectives of the directives on public procurement, seeking to exclude both the risk of preferring national tenderers or bidders in any contract award made by the contracting authorities and the possibility that a body financed or controlled by the State, regional authorities or other bodies governed by public law may be guided by considerations other than economic ones, must be interpreted in functional terms and broadly (see, to that effect, judgment of 15 May 2003, *Commission* v *Spain*, C-214/00, EU:C:2003:276, paragraph 53 and the case-law cited).

32 It must be noted that VLRD appears to satisfy the conditions laid down in the second subparagraph, (b) and (c), of Article 1(9) of Directive 2004/18. It is not, in fact, in dispute that it has legal personality. In addition, the referring court has noted that VLRD is a wholly owned subsidiary of LG and that it is 'controlled' by the latter company.

33 Consequently, the only question which needs to be analysed concerns whether or not VLRD constitutes a 'body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character' within the meaning of the second subparagraph, (a), of Article 1(9) of Directive 2004/18.

34 It is clear from the wording of the second subparagraph, (a), of Article 1(9) of Directive 2004/18 that the requirement laid down therein must be satisfied by the entity whose classification is being examined and not by another entity, even if the latter is the parent company of the former which supplies the latter with goods or services. It is therefore not sufficient that an undertaking was established by a contracting authority or that its activities are financed by funds derived from activities pursued by a contracting authority in order for it to be regarded as a contracting authority itself (judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others*, C-44/96, EU:C:1998:4, paragraph 39).

35 In addition, it is necessary to take into consideration the fact that the use of the term 'specific' shows the EU legislature's intention to make only entities established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, the activity of which meets such needs, subject to the binding rules on public contracts.

36 Accordingly, it is necessary to determine, first of all, whether VLRD was established for the specific purpose of meeting needs in the general interest, the activity of which meets such needs before, if necessary, examining whether or not those needs have an industrial or commercial character (see, to that effect, judgment of 22 May 2003, *Korhonen and Others*, C-18/01, EU:C:2003:300, paragraph 40).

37 In the present case, it is apparent from the terms of the first question that VLRD supplies goods and services to 'enable [its parent company] to carry out its activity of passenger and freight transportation'.

38 It is apparent from the order for reference that VLRD was established after the restructuring of LG and that 'both the establishment of [VLRD] and its activity remain devoted to meeting its founder's needs, namely needs in the general interest'. In that regard, it must be noted that, in the main proceedings, VLRD's activity, in particular the manufacture and maintenance of locomotives and rolling stock and the supply of those goods and services to LG, appears necessary for LG to be able to carry out its activity intended to meet needs in the general interest.

39 It therefore appears that VLRD was established with the specific aim of meeting its parent company's needs and that the needs which VLRD was tasked with meeting constitute a condition necessary to the parent company's carrying out of activities in the general interest, which it is, however, for the referring court to ascertain.

40 It must be noted that it is irrelevant that, in addition to the activities intended to meet needs in the general interest, the entity in question also carries out other activities for profit on the competitive market (see, to that effect, judgments of 15 January 1998, *Mannesmann Anlagenbau Austria and Others*, C-44/96, EU:C:1998:4, paragraph 25, and of 10 April 2008, *Ing. Aigner*, C-393/06, EU:C:2008:213, paragraph 47 and the case-law cited).

41 Thus, the fact that VLRD does not carry out only activities intended to meet needs in the general interest through internal transactions with LG, so that LG may carry out its transport activities, but also other profit-making activities is irrelevant in that regard.

42 In order to assess whether a body is covered by the concept of a 'body governed by public law' within the meaning of the second subparagraph, (a), of Article 1(9) of Directive 2004/18, it is also necessary for it to meet needs in the general interest, not having an industrial or commercial character.

43 In that regard, it is appropriate to note that in the assessment of that character account must be taken of relevant legal and factual circumstances, such as those prevailing when the body concerned was formed and the conditions in which it carries on its activity, including, inter alia, lack of competition on the market, the fact that its primary aim is not the making of profits, the fact that it does not bear the risks associated with the activity, and any public financing of the activity in question.

44 As the Court has held, if, with regard to the activities intended to meet needs in the general interest, the body operates in normal market conditions, aims to make a profit and bears the losses associated with the exercise of its activity, it is unlikely that the needs it seeks to meet are not of an industrial or commercial nature (judgment of 16 October 2003, *Commission* v *Spain*, C-283/00, EU:C:2003:544, paragraphs 81 and 82 and the case-law cited).

45 That being the case, the existence of significant competition does not, of itself, allow the conclusion to be drawn that there is no need in the general interest, which is not of an industrial or commercial character.

46 In those circumstances, it is for the referring court to ascertain, on the basis of all the legal and factual circumstances of the case, whether, at the time of the award of the contract at issue in the main proceedings, the activities carried out by VLRD, seeking to meet needs in the general interest, were exercised in competitive conditions and in particular whether VLRD was able, having regard to the circumstances of the present case, to be guided by non-economic considerations.

47 The fact raised by the referring court, in the order for reference, that the extent of the internal transactions with LG in relation to the overall turnover of VLRD could diminish in future is irrelevant

in that regard, given that it is for that referring court to examine the situation of that company at the time of award of the contract in question.

48 Consequently, the answer to the questions referred is that the second subparagraph of Article 1(9) of Directive 2004/18 must be interpreted as meaning that a company which, on the one hand, is wholly owned by a contracting authority whose activity consists of meeting needs in the general interest and which, on the other, carries out both internal transactions for that contracting authority and transactions on the competitive market must be classified as a 'body governed by public law' within the meaning of that provision, provided that the activities of that company are necessary for the contracting authority to exercise its own activity and, in order to meet needs in the general interest, that company is able to be guided by non-economic considerations, which it is for the referring court to ascertain. The fact that the value of the internal transactions may in future represent less than 90% or an insignificant part of the overall turnover of the company is irrelevant in that regard.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

The second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011, must be interpreted as meaning that a company which, on the one hand, is wholly owned by a contracting authority whose activity consists of meeting needs in the general interest and which, on the other, carries out both transactions for that contracting authority and transactions on the competitive market must be classified as a 'body governed by public law' within the meaning of that provision, provided that the activities of that company are necessary for the contracting authority to exercise its own activity and, in order to meet needs in the general interest, that company is able to be guided by non-economic considerations, which it is for the referring court to ascertain. The fact that the value of the internal transactions may in future represent less than 90% or an insignificant part of the overall turnover of the company is irrelevant in that regard.

[Signatures]

---

* Language of the case: Lithuanian.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 27 April 2017 (1)

Case C-567/15

LitSpecMet UAB

v

Vilniaus lokomotyvų remonto depas UAB

intervening party:

Plienmetas UAB

(Request for a preliminary ruling from the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania))

(Preliminary ruling — Public works contracts, public supply contracts and public service contracts — Directive 2004/18/EC — Public contracts in the water, energy, transport and telecommunications sectors — Directive 2004/17/EC — Concept of contracting authority — Company wholly owned by the State through another State-owned company — 'in-house' exemption)

1. This reference for a preliminary ruling provides the Court of Justice with the opportunity to develop its case-law in the field of public procurement procedures. In particular, it will be necessary to further clarify the concept of 'contracting authority' within the meaning of Directive 2004/17/EC (2) and Directive 2004/18/EC. (3)

2. The questions submitted by the national court have arisen in the context of proceedings to challenge a tendering procedure commenced without regard to those directives by a company (4) which is wholly owned by the Lithuanian State railway company (5) (whose status as a contracting authority is not disputed), to which the aforementioned company supplies certain goods and services. The subsidiary claims that, despite its links with the parent company, it is not a 'public body' within the meaning of the procurement directives since it was not established 'for the … purpose of meeting needs in the general interest, not having an industrial or commercial character'.

3. Initially the debate focussed on the activity in which VLRD is engaged, with a view to ascertaining whether its purpose is *directly* to meet a need in the general interest that does not have either an industrial or a commercial character. During the proceedings before the Court of Justice the debate also covered the issue of whether, by selling goods or services to a body (LG) which does meet needs of that kind, VLRD is also, in an *indirect* way, meeting those needs and might therefore be considered a contracting authority within the meaning of the directives in question.

I. Legislative framework

A. EU law

1. Directive 2004/17

4. Article 2 states:

'1. For the purposes of this Directive,

(a) "Contracting authorities" are State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.

"A body governed by public law" means any body:

– established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,

– having legal personality and

– financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

…

2. This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

…'.

5. Article 5 provides:

'1. This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

2. This Directive shall not apply to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC [(6)] pursuant to Article 2(4) thereof.'

2. Directive 2004/18

6. Under Article 1(9):

'"Contracting authorities" means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A "body governed by public law" means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.'

3. Directive 2014/24/EU (7)

7. Recital 10 states:

'The notion of "contracting authorities" and in particular that of "bodies governed by public law" have been examined repeatedly in the case-law of the Court of Justice of the European Union. To clarify that the scope of this Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case-law. For that purpose, it should be clarified that a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a "body governed by public law" since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.

Similarly, the condition relating to the origin of the funding of the body considered, has also been examined in the case-law, which has clarified inter alia that being financed for "the most part" means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law.'

8. Article 2(1)(4) contains a definition of 'bodies governed by public law' which is similar to that set out in Article 1(9) of Directive 2004/18.

9. Article 12(1) provides:

‘A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no [direct] private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority.’

B. National law

10. The Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on Public Procurement; ‘the LPP’) transposes Directive 2004/18 into Lithuanian law.

11. Article 4 states

‘1. The following are contracting authorities:

(1) a State or local authority;

(2) a legal person governed by public or private law meeting the conditions set out in paragraph 2 of this article;

(3) an association of authorities referred to in subparagraph 1 of this paragraph and/or of the legal persons governed by public or private law referred to in subparagraph 2 of this paragraph;

(4) the contracting undertakings operating in the water, energy, transport and postal services sectors referred to in subparagraphs 2 to 4 of Article 70(1) of this law.

2. A legal person governed by public or private law (other than national or local governments) established for the purpose of specifically meeting needs in the general interest, not having an industrial or commercial character, and which satisfies at least one of the following conditions:

(1) more than 50% of its activity is financed from State or local authority budgets or from other resources of the State or local authorities or from the funds of other legal persons governed by public or private law referred to in this paragraph;

(2) it is controlled (managed) by national or local government or by other legal persons governed by public or private law referred to in this paragraph;

3) more than half of the members of its administrative, managerial or supervisory board are appointed by national or local government or by legal persons governed by public or private law referred to in this paragraph.

…’

12. Article 10(5) states:

‘The provisions of this law are not applicable where the contracting authority concludes an agreement with an entity that is legally separate, over which the contracting authority exercises an exclusive control which is similar to that which it exercises over its own departments or organs (or in respect of which the contracting authority is the only shareholder and exercises the rights and duties of the State or of a local authority) and where at least 90% of the turnover of the controlled entity in the previous accounting period (or in the period since its creation if it has been operating for less than a full accounting period) has been generated through activities intended to meet the needs of the contracting authority or to enable it to perform its functions. In the circumstances referred to in this paragraph, a request for tenders may be issued only with the prior consent of the Public Procurement Office …’

II. Facts

13. VLRD was set up in 2003, following a restructuring of the State railway company, LG, as a wholly owned subsidiary of that company.

14. The object of VLRD is the manufacture and maintenance of locomotives and railway carriages. At the material time for the purposes of the litigation, orders from LG accounted for almost 90% of VLRD’s turnover.

15. In 2013, VLRD published notice of a simplified open tendering procedure for the procurement of bars of ferrous metals (‘the Tendering Procedure’). The tender specifications stated that the Tendering Procedure would be carried out in accordance with VLRD’s Interim Procurement Regulations.

16. LitSpecMet UAB (‘LitSpecMet’) submitted a tender in the Tendering Procedure and was awarded a contract for the supply of some but not all of the goods in question.

17. However, LitSpecMet sought to have the Tendering Procedure declared invalid and a new procedure started under the LPP. In support of the claim, it argued that VLRD had been established to meet the needs of LG, which was an undertaking financed by the State and which had a public service remit; furthermore, it argued that the conditions under which VLRD provided goods and services to its parent company did not reflect normal competitive conditions. According to LitSpecMet, this indicates that the activity of VLRD was intended to meet needs in the general interest, not having an industrial or commercial character, and that it was therefore a contracting authority and subject to the rules on public procurement.

18. LitSpecMet’s claims were rejected by the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania) in a judgment of 2 June 2014, which was upheld by the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) in a judgment of 25 September 2014.

19. Both courts took the view that, under Article 4(2) of the LPP, for a person governed by public or private law to be considered a contracting authority, it is not sufficient to show that it is connected with or controlled by a public-sector undertaking. It is also necessary to show that its activity is intended to meet general interests not having an industrial or commercial character, which would not be true of VLRD, since it was a company that was founded to carry out a commercial activity and to make a profit, whilst bearing the associated risks.

20. By a judgment of 27 May 2015, the civil chamber of the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) overturned the judgment given on appeal. It held that neither of the two lower courts had adequately assessed the circumstances of VLRD’s establishment, the specific nature of its activities and its relationship to the parent company.

21. The case was referred back to the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania), which, by a judgment of 14 July 2015, set aside the decision of the Vilniaus apygardos teismas (Regional Court, Vilnius) of 2 June 2014 and referred the case back to that court, which is now making a reference for a preliminary ruling to the Court of Justice.

III. The question referred for a preliminary ruling

22. The question referred was lodged on 9 November 2015 and is worded as follows:

‘Must Article 1(9) of Directive 2004/18/EC be interpreted as meaning that a company:

– which has been founded by a contracting authority which engages in activity in the field of rail transport, namely: management of public railway infrastructure; passenger and freight transportation;

– which independently engages in business activity, establishes a business strategy, adopts decisions concerning the conditions of the company’s activity (product market, customer segment and so forth), participates in a competitive market throughout the European Union and outside the EU market, providing the services of rolling stock manufacture and rolling stock repair, and participates in procurement procedures connected with that activity, seeking to obtain orders from third parties (not the parent company);

– which provides rolling stock repair services to its founder on the basis of in-house transactions and the value of those services represents 90 per cent of the company’s entire activity;

– whose services provided to its founder are intended to ensure the founder’s passenger and freight transportation activity;

is not to be considered to be a contracting authority?

If the Court of Justice of the European Union determines that the company is to be considered to be a contracting authority in the circumstances set out above, must Article 1(9) of Directive 2004/18/EC be interpreted as meaning that the company loses the status of contracting authority where the value of the rolling stock repair services provided on the basis of in-house transactions to the contracting authority which is the company’s founder falls and constitutes less than 90 per cent or not the main part of the total financial turnover from the company’s activity?’

IV. Procedure before the Court of Justice and submissions of the parties

23. LitSpecMet, VLRD, the Lithuanian and Portuguese Governments and the Commission submitted written observations and attended the hearing held on 9 February 2017, which was also attended by the German Government.

24. LitSpecMet argues that the maintenance activity carried out by VLRD falls under general interest, in that it enables LG to ensure provision of the public service for which it is responsible, namely the management of railway infrastructure and the provision of passenger transport. In its view, this activity is not of an industrial or commercial nature, since LG is the only undertaking in Lithuania engaged in it, which means that it can easily operate according to considerations which are not purely economic. To accept

that public procurement rules do not apply to VLRD would mean that a contracting authority (LG) would be able to avoid those rules simply by setting up a subsidiary (VLRD) for in-house transactions.

25. LitSpecMet therefore maintains that VLRD is a contracting authority within the meaning of Article 1(9) of Directive 2004/18, the proportion of in-house transactions conducted with the parent company being immaterial. In the alternative, it could also be considered a contracting authority within the meaning of Article 2(1)(a) of Directive 2004/17, as this is the directive that is actually applicable here, given LG's activity and in the light of the interpretation of Articles 3 to 7 of that directive in the judgment of the Court of Justice of 10 April 2008, *Ing. Aigner*. (8)

26. VLRD asserts that it was not established in order to fulfil a specific general interest remit for the benefit of citizens in general, but in order to supplement LG's commercial activities in the field of passenger transport. In its view, the fact that it enters into in-house transactions with LG, which is a contracting authority within the meaning of Article 2(1) of Directive 2004/17, does not mean that it is itself a contracting authority.

27. The Lithuanian Government makes reference to the judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others*, (9) in which the Court of Justice relied on the 'infection theory', holding that a body which performs an activity only a part of which meets needs in the general interest, not having an industrial or commercial character, can also be considered a contracting authority. However, the Lithuanian Government is of the view that the 'infection theory' does not apply vertically and that the nature of the activity carried out by a company is not dependent on whether it was established by a contracting authority with which it engages in in-house transactions.

28. The German Government advocates a functional approach to interpretation and believes that, in the circumstances, this offers sufficient indicators that VLRD is carrying on an activity in the general interest, since, while not being directly involved in the transport activity performed by LG, it is engaged in an activity which is closely linked to it: the manufacture of locomotives. On the commercial nature of VLRD's activities the German Government believes that the decisive factor is whether it meets its objectives in a competitive market, which it does not, since 90% of its business is with LG, such that it does not assume a genuine commercial risk. In short, the German Government posits that the subsidiary of a contracting authority is also a contracting authority where the purpose of its activities is to meet the needs in the general interest served by its parent company. Furthermore, in the light of Directive 2014/24 (which, although not applicable *ratione temporis* can be used as guidance), a subsidiary cannot be a contracting authority if its business with the parent company does not exceed 80%.

29. The Portuguese Government observes that, although VLRD appears to have been set up for general interest purposes, its activity is industrial and commercial in character, since VLRD fully assumes the risks of its activities. Under the case-law established in the judgment of 16 October 2003, *Commission* v *Spain*, (10) and referred to in recital 10 of Directive 2014/24, VLRD should not be considered a contracting authority.

30. The Commission submits that only Directive 2004/18 should be taken into consideration in this case, as VLRD supplies goods and services to the Lithuanian State railway company and it is immaterial that the activities of the latter company (LG) fall within the scope of Directive 2004/17.

31. According to the Commission, VLRD is not subject to Directive 2004/18, inasmuch as it is not a 'body governed by public law' within the meaning of Article 1(9), since it was established to serve the specific interests of LG — making it an internal supplier of that company — rather than the general interest. It argues that the fact that LG's object is to meet a need in the general interest and that it has had recourse to VLRD for this purpose, is irrelevant because the conclusive factor is that the sole object of VLRD's activities is to look after the specific interests of the parent company.

32. The Commission therefore questions whether VLRD was established specifically to meet needs in the general interest, although it makes the point that only the national court is in a position to evaluate all the circumstances of the case and to confirm that the pre-eminent non profit-making goal at the time of its establishment does not have precedence over the commercial environment in which it operates.

V. Assessment

A. Introductory remarks

33. The referring court and most of the parties participating in the preliminary ruling proceedings assume that Directive 2004/18 governs this case. LitSpecMet, however, suggests, albeit only in the alternative, that it is Directive 2004/17 (known as the 'Sectoral Directive' in relation to public procurement) that is in fact applicable.

34. In practice, since Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18 contain identical definitions of 'bodies governed by public law', (11) the questions raised by the Vilniaus apygardos teismas (Regional Court, Vilnius) can be answered without making a prior determination on the applicability of either directive.

35. The second point to be noted is that, although the case file does not state the sum involved in the tendering procedure, VLRD's legal representative asserted at the hearing that it was EUR 600 000 or 700 000 and, as such, it exceeds the threshold for application of the relevant European Union provisions. It is for the referring court to investigate this point. (12)

36. Thirdly and finally, the Court must necessarily give its answer on the basis of the factual information pertaining to VLRD provided by the referring court. It is, however, possible that this information has not been reviewed by the court of first instance, after the case was referred back to it, in quite the manner indicated by the judgment of the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) of 27 May 2015. (13)

B. The first question referred for a preliminary ruling

1. Directly (or indirectly) meeting needs in the general interest, not having an industrial or commercial character

37. It is common ground between the parties that VLRD meets two of the three conditions necessary to be considered a 'body governed by public law' (and therefore a 'contracting authority') under Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18.

38. Of the three conditions, which must be met cumulatively, (14) VLRD satisfies the second and third: it has legal personality and it cannot be disputed that another body governed by public law (LG) has a role in its financing, the supervision of its management or the composition of its administrative, managerial or supervisory board.

39. There is, however, no agreement with respect to the requirement that VLRD should have been 'established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character'.

40. The written observations of the parties are dedicated to analysing whether the activity of VLRD itself addresses needs in the general interest that do not have an industrial or commercial character, the majority arguing that it does not. At the hearing, the debate was extended, at the request of the Court, to the issue of whether VLRD indirectly meets needs of this kind, in that it provides goods or services to a body governed by public law, LG, which does so. The positions of the parties on this point were substantially aligned with those taken in relation to the question of whether the activity carried out by VLRD is in the general interest.

41. According to the information provided by the referring court, LG is a public company which operates a rail transport network. As I have already mentioned, there is no doubt that it is a contracting authority within the meaning of Directive 2004/17. (15) VLRD, on the other hand, is engaged in the manufacture and maintenance of locomotives and rolling stock. In other words, its role, although closely linked to rail transport, does not consist of 'the provision or operation of networks providing a service to the public in the field of transport by railway', which is the activity to which Article 5(1) of Directive 2004/17 is restricted.

42. LitSpecMet maintains that, in any event, VLRD performs an essential task in relation to 'the provision or operation' of the Lithuanian rail network such that it also meets the general interest needs served by LG. Not to be overlooked, it argues, is the fact that under Article 5(1) of Directive 2001/14/EC, (16) railway undertakings are entitled to what is called 'the minimum access package and track access to service facilities' that are described in Annex II to the directive, point 2(h) of which refers to 'maintenance and other technical facilities'. It therefore concludes that 'in the absence of realistic alternatives in the market', VLRD is 'obliged to provide rolling stock maintenance services to … LG, disregarding all commercial considerations'. (17)

43. I do not agree with LitSpecMet on that point, since it is the facilities in which maintenance services are provided that Directive 2001/14 makes part of the 'access package' rather than the maintenance services themselves. So, if VLRD does serve a need in the general interest in an immediate and direct way, it is not the need addressed by the activity specifically referred to in Article 5 of that directive.

44. The analysis must therefore focus on the interpretation of Directive 2004/18, with a view to clarifying whether VLRD meets the needs in the general interest (other than those of an industrial or commercial nature) that are inherent to public works contracts, public supply contracts and public service contracts.

45. By the use of logical reasoning, we must, first of all, determine whether needs in the general interest are being met in this case; the second step, assuming that the answer is in the affirmative, is to determine whether their commercial or industrial character predominates over any other.

46. From that standpoint, it does not seem to me that simply manufacturing and repairing rolling stock in the rail transport sector has, in itself, the purpose of meeting needs that are closely linked to the institutional operation of the State, (18) the promotion and development of the conditions of social welfare which it is the duty of the State to provide, (19) or other similar purposes.

47. It can, of course, be argued, as the German Government does, that in providing its parent company with goods and services which enable that company to meet its own needs — which are in the general interest — VLRD is also, indirectly, meeting the need served by LG.

48. This approach to the problem, however, encounters certain difficulties, at least from a general point of view.

49. If it is in general hard to ascertain whether the purpose of an economic activity is to meet needs in the general interest (a term with various meanings to start off with), then it is harder still to determine the extent to which an activity which is in principle private and commercial in nature might, by virtue of its connection to activities which are inherently in the general interest, take on the nature of the latter. The consequences of this assimilation are not insignificant: as the Lithuanian Government observed at the hearing, a private operator could, possibly without realising it, become a provider of services in the general interest by virtue of its necessary association with a contracting authority.

50. The level of interconnection and interdependence of all public and private economic activities is so great in the market economy of today that it would be difficult to prevent 'meeting needs in the general interest' from growing uncontrollably if it were to be accepted that this concept also covers private activities which are, *to some extent*, necessary in order to meet those needs. Furthermore, this would give rise to the very problematic issue of the *extent* to which this relationship of necessity would be relevant in each case.

51. However, even working on the assumption that the activity carried out by VLRD does have the purpose of meeting needs in the general interest, this would not be a sufficient basis on which to conclude that VLRD is a 'body governed by public law' within

the meaning of Directive 2004/18. The reason for this is that meeting needs in the public interest is not enough: those needs must also not be industrial or commercial in character. The case-law of the Court of Justice has stated that for this to be the case, those needs must be met under conditions which are not subject to market forces.

52. As the Court of Justice affirmed in its judgment of 22 May 2003, *Korhonen and Others*, the point is to 'avert both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by other than economic considerations'. (20)

53. Working from those assumptions, a body which aims to meet needs of this kind (which should not be mistaken for needs which cannot be met by private undertakings) (21) might easily fall victim to that risk if it operates outside market conditions, in the sense of not being subject to free competition. On the other hand, if it operates under competitive pressure from its rivals, (22) it is less likely to run this risk, since any behaviour motivated by considerations other than economic ones would eventually cause it to be expelled from the market.

54. In other words, the key factor in answering the question is not so much the public nature of the need to be met but the conditions in which this is done. When interpreting the expression 'needs in the general interest, not having an industrial or commercial character' it is essential to ascertain on what terms these are to be met.

55. It is worth repeating that this is so because, according to the spirit of the procurement directives, what is important is to safeguard competition in the market and to prevent it being altered or distorted by participants who do not operate according to free trade principles. Consequently, the determining factor is not whether, by supplying goods and services to LG, VLRD is itself meeting a need in the general interest, or whether it does so indirectly, but whether, in either case, it is operating under the same conditions as any private competitors, that is to say, without incentives to offer unfair advantages to national producers.

56. As noted by the referring court, for these purposes it is necessary to take into account multiple legal and factual circumstances, amongst which the Court of Justice has mentioned, by way of example, the circumstances prevailing when the body concerned was formed (23) and matters such as 'the fact that it does not aim primarily at making a profit, the fact that it does not bear the risks associated with [its] activity, and any public financing of the activity in question'. (24)

57. It is my view that only the referring court is in a position to determine whether, in the light of all the relevant legal and factual circumstances, VLRD meets a need in the general interest, not having an industrial or commercial character. Although it may be inferred from the wording of the question (25) that the Vilniaus apygardos teismas (Regional Court, Vilnius) is inclined towards its original conclusion, which was upheld by the appeal court but not by the Lithuanian Supreme Court, the fact is that the order for reference really goes no further than setting out the dispute between the parties and the reasoning behind the three judgments given to date in the case, and does not include any analysis of its own of the 'relevant circumstances' (26) in the dispute which might enable a definitive answer to be provided.

58. This being the case, the Court of Justice should perhaps confine itself to informing the referring court that it should pay particular attention to the question of whether VLRD operates under market conditions, (27) and, beyond that, to factors such as whether or not it is largely publicly financed, whether it aims to make a profit and whether it bears the risks (and the losses) associated with its activity, these being matters on which the referring court has shed little light but which cannot be sidestepped when ruling on the nature of this company's activities.

59. It seems, however, from the information on the case file and that produced at the hearing that the essential part of VLRD's activity (90% of it at the relevant time) is carried out against an economic backdrop characterised by the monopoly in supplying LG with railway equipment, that is, in conditions which are not those of the free market. LG is supplied with railway equipment by its subsidiary, without going through the public procurement procedures which would increase competitive pressure on VLRD. VLRD is thus able to operate according to considerations other than those of the market, safe in the knowledge (or without incurring any risk in that respect) that it will be able to meet its orders, which will always be forthcoming from LG.

2. Meeting needs in the general interest, not having an industrial or commercial character, in the context of in-house transactions

60. The foregoing would suggest that VLRD can be considered a contracting authority, within the meaning given. It is possible, however, to see the question that has been referred from another point of view. Leaving to one side for the moment the nature of the activities carried out by VLRD and LG, the relationship between these two companies should be examined in order to determine whether the former is a proxy entity of the latter (or its own resource) which can use the 'in-house exemption'. I therefore propose analysing the substantive issue from an *organic perspective* as opposed to the *perspective of the activity*.

61. From that point of view, the order for reference of the Vilniaus apygardos teismas (Regional Court, Vilnius) contains two paragraphs that are of interest. The first is paragraph 23, which states that 'around 90 per cent of the subsidiary's [VLRD's] revenue comes from the parent company [LG] under transactions between the two legal persons', leading to the conclusion that 'the activities of the defendant [VLRD] and of the company controlling it [LG] are closely connected'.

62. This point was fundamental in the decision of the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) to overturn the decision of the appeal court. According to the same paragraph of the order for reference, that fact was basis enough not to 'reject as unfounded the applicant's [LipSpecMet's] claim that the founding of VLRD, which followed [LG's] reorganisation, did not actually create qualitatively new legal and economic relations between separate economic operators but was more of *a change in the form of organisation of the latter company's activity*'. (28)

63. The second paragraph of the order for reference to note is paragraph 25, which states that VLRD ‘entered into an average of 15 in-house transactions per year with [LG] in the period from 2011 to 2014’; transactions which, the order continues, ‘under the case-law of the Court of Justice are not to be classified as public procurement contracts’. (29)

64. The national court’s references to the in-house contracting system did not go unnoticed by the parties to the preliminary ruling proceedings. In particular, the Commission has argued (30) that VLRD is an internal supplier to LG and that, consequently, transactions concluded between them are not subject to procurement procedures but are covered by the ‘in-house exemption’. (31)

65. The Lithuanian Government likewise referred to the in-house system in its written observations, (32) specifically mentioning Article 12(1) of Directive 2014/24. (33) The German Government also made reference to these rules in its oral submissions.

66. At the hearing, the legal representative of VLRD was asked about the intended use of the goods involved in the tendering procedure in question and replied that they were intended for use in the manufacture of equipment ordered by LG under their in-house arrangements.

67. As the Court of Justice has repeatedly stated, the in-house exemption ‘is justified by the consideration that a public authority which is a contracting authority has the possibility of performing its public-interest tasks by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments, and that that exception may be extended to situations in which the other contracting party is an entity legally distinct from the contracting authority, where the latter exercises control over the contractor similar to that which it exercises over its own departments and that contractor carries out the essential part of its activities with the contracting authority or authorities which own it’, as it is possible in such a situation to regard ‘the contracting authority … as employing its own resources’. (34)

68. It must therefore be concluded that the establishment of VLRD as an instrument of LG, although resulting in the creation of a separate entity, in a formal sense, (they are actually two legally distinct companies), seems, from a functional point of view, to have perpetuated the previous position. Ultimately, it was done in order to reorganise the activities of the Lithuanian State railway company. (35)

69. If the two bodies are analysed functionally, they ultimately belong under the ‘in-house exemption’. (36) This, which automatically entails exemption from the procurement directives, reflects the fact that a public authority has the right to organise itself in such a way that certain tasks are entrusted to the proxy entities through which it operates (where it exercises the same control over them as it does over its own departments), without having to go to the market for the relevant works, services or supplies.

70. Under the in-house system, the contracting authority does not, from a functional point of view, contract with a separate body but, in effect, contracts with itself, given the nature of its connection with the formally separate body. Strictly speaking, there is no award of a contract, but simply an order or task, which the other ‘party’ cannot refuse to undertake, whatever the name given to it.

71. The absence of a real relationship between two distinct parties explains why a contracting authority is not required to comply with public procurement procedures where it is using its own resources to perform its tasks, in other words, where it makes use of undertakings that, over and above their separate legal personality, merge with it *in a material sense*. Procurement procedures make sense only between two separate and autonomous bodies, since what those procedures seek to do is precisely to create between them the kind of bilateral legal relationship that is essential for concluding a contract for consideration (37) on equal terms rather than those of dependence or subordination in a hierarchy.

72. It is therefore logical that — within the strict limits set by the case-law of the Court of Justice — economic relationships between a contracting authority and a body that is subordinated to it, acting simply as its proxy and controlled by it in the same way as the authority controls its (other) departments, should be exempted from the formal procurement procedures of the directives. Neither would it be sensible to turn the procurement procedure into a procedure for the internal regulation of the workings of the authority in question by applying it in cases where it has chosen to use only its own resources.

73. Consequently, working from the single effective identity principle at the root of the in-house exemption, it is my view that, if the exemption was applicable to the transactions concluded between LG and VLRD, in the manner set out in the order for reference, this is because the two companies meet the conditions already mentioned which have been established in the case-law (and which have now been *crystallised* in Article 12(1) of Directive 2014/24). This is ultimately a matter for the referring court to determine.

74. The Commission submits that the fact that VLRD is an internal supplier to LG does not of itself make it a contracting authority, although it offers very few reasons in support of this assertion. (38) It could, in fact, be said that, in general, subordinated in-house bodies qualify as ‘bodies governed by public law’ within the meaning of Directives 2004/18 and 2004/17 only where they themselves meet the three cumulative conditions mentioned.

75. This assertion, however, should be immediately qualified by making a distinction between ‘marginal’ activities and the ‘essential’ activities of proxy entities which justify the application of the in-house exemption. With respect to the former, (39) I do not think that there can be any difficulty in accepting the Commission’s position, since in relation to these activities the undertaking is operating within the market and can compete on an equal footing with rival economic operators.

76. In my opinion, the same is not true of the ‘essential’ tasks which have been entrusted or assigned to the subordinate undertaking by the contracting authority under the in-house system. Where in order to carry out those tasks the undertaking (VLRD in this case) needs to obtain goods, services or supplies from third parties to a value which exceeds the level for harmonised procurement, then the public procurement directives apply.

77. Any other interpretation would give rise not only to inconsistency but to a potential circumvention of the law; the former because it would be inconsistent with the *single* effective identity of the two bodies, which was acknowledged for the purposes of

exempting them from procurement procedures when dealing with each other, and the latter because it would make it easy to escape the application of the EU public procurement rules.

78. The relationship between LG and VLRD already gives rise to an exception concerning the application of Union rules to *in-house* transactions between them, which are deemed not to be contractual. If, in addition, VLRD were exempted from the obligation to comply with those rules in respect of transactions which are formally *external*, which are concluded with third parties but are actually part of the turnover of the LG/VLRD unit, then the in-house exemption might take on unforeseen proportions.

79. In other words, the contracting authority can make use of proxy entities, within the limits already mentioned, by entrusting them with particular tasks which should, in principle, be subject to public procurement procedures but which are exempted. This exception is not, of itself, open to question, legally speaking, in the light of the case-law of the Court of Justice (and, now, Article 12(1) of Directive 2014/24). However, where such proxy entities do not have the resources needed to themselves carry out the tasks assigned by the contracting authority and are obliged to have recourse to third parties in order to do so, the reasons for relying on the in-house exemption disappear and what emerges is actually a hidden public (sub-)procurement where the contracting authority, through an intermediary (the proxy entity) obtains goods and services from third parties without being subject to the directives which should govern the award.

80. This is what would happen in this case. Transactions of LG which would necessarily have had to comply with public procurement legislation if VLRD had not existed (and the State body had carried them out directly) would escape those rules by virtue of the argument that they are attributable to a different company, which is, however, so closely connected to the former that both companies can use the in-house exception when dealing with each other. (40)

81. It seems to me that if the connection between LG and VLRD is such as to justify the application of the in-house exemption to transactions between them, then the external transactions that are essential to the performance of the tasks entrusted to VLRD by LG cannot avoid being caught by the procurement directives (provided they are in excess of the relevant value threshold). Otherwise, simply by *reorganising* the activities of LG through the establishment of VLRD, LG would be able to avoid the consequences that flow from its status as a contracting authority.

82. I therefore do not think that it is essential to determine whether VLRD is a body governed by public law due to the fact that it, itself, meets needs that are inherently in the general, non-industrial or commercial interest, since it must be concluded that VLRD does this in so far as it is functionally part of a company (LG) which meets this type of need and on behalf of which it acts under the in-house system.

83. As for the question of precisely which directive governs the contracts entered into by VLRD, it should be noted that ‘contracts awarded in the sphere of one of the activities expressly listed in Articles 3 to 7 of Directive 2004/17 and contracts which, although different in nature and thus capable normally, as such, of falling within the scope of Directive 2004/18, are used in the exercise of activities defined in Directive 2004/17 fall within the scope of the latter directive’. (41) It is therefore for the referring court, which did not raise this issue with the Court of Justice, to determine which directive would be applicable, depending on the subject matter of the contract at issue in the main proceedings.

84. In conclusion, I propose that the answer to the first question raised by the Vilniaus apygardos teismas (Regional Court, Vilnius) should be that Article 2(1)(a) of Directive 2004/17 and the second subparagraph of Article 1(9) of Directive 2004/18 must be interpreted as meaning that a company that is connected in terms of substance and function to a contracting authority such that the in-house exemption is justified in respect of their mutual transactions, is subject to those directives when concluding works, supply and service contracts with third parties for the purpose of performing the task entrusted to it by the contracting authority.

C. The second question referred for a preliminary ruling

85. In the event that the Court of Justice decides to answer the previous question in the affirmative, as I am proposing, the Vilniaus apygardos teismas (Regional Court, Vilnius) would like to know whether a company such as VLRD would lose the status of contracting authority if the value of the services which it provides on the basis of in-house transactions to LG were to fall to the point of constituting less than 90% or not the main part of the total financial turnover from its activity.

86. The question is a purely hypothetical one (and, to that extent, inadmissible), since what the main proceedings are attempting to resolve is not some future situation but the situation which existed at the time when VLRD published the invitation to tender for the supply of bars of ferrous metals (2013). The original proceedings are concerned only with the annulment of that specific tendering procedure, which has been challenged by LitSpecMet.

87. The relevant time to be considered for the purposes of resolving the dispute is right at the beginning, as may be inferred from the case-law of the Court of Justice. This states that the principle of legal certainty requires Community rules to be clear and their application foreseeable by all those affected by them, (42) and as a result of that requirement, and of the requirements on the protection of the interests of tenderers, it is necessary for a body which is a contracting authority on the date of the commencement of a procurement procedure to remain subject to the requirements of the public procurement directives until the relevant procedure has been completed. (43)

88. As I have explained, in determining whether the public procurement directives applied to VLRD, the relevant consideration is whether the 2013 invitation procedure concerned goods supplied by third parties and used in performing the task that LG had entrusted to it in the context of their in-house relationship.

89. Obviously, if at a later date, some years into the future, that were no longer to be the case and, whether due to the circumstances mentioned by the referring court (namely if the ‘essential’ part of the activity of VLRD were no longer to be serving

the purposes of LG), (44) or for some other reason of that kind, VLRD were to lose its status as a proxy entity of LG and start to operate in the free market, then it would be necessary to evaluate the new circumstances and decide accordingly.

90. The legislation applicable in this hypothetical future scenario would be Directive 2014/24, and it would be necessary to determine in accordance with the criteria and requirements of that directive whether VLRD should still, at that time, be considered a contracting authority.

VI. Conclusion

91. In the light of the foregoing, I propose that the Court of Justice reply to the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania) as follows:

> Article 2(1)(a) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that:
>
> (a) a company that is connected to a contracting authority in terms of substance and function such that the in-house exemption is justified in respect of their mutual transactions, is subject to those directives when concluding works, supply and service contracts with third parties for the purpose of performing the task entrusted to it by that contracting authority; and
>
> (b) in any event, that company should be considered a body governed by public law where it has legal personality, is controlled by a contracting authority and the essential part of its activity is to supply the contracting authority, free of any pressure from competitors and not in free market conditions, with railway equipment to enable the authority to provide its designated service of transporting passengers and freight.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

---

3 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

4 Vilniaus lokomotyvų remonto depas UAB (‘VLRD’).

---

5 Lietuvos Geležinkeliai AB (‘LG’).

---

6 Council Directive of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

---

7 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

8 C-393/06, EU:C:2008:213.

---

9 C-44/96, EU:C:1998:4.

---

10 C-283/00, EU:C:2000:544.

---

11 Judgment of 10 April 2008, *Ing. Aigner* (C-393/06, EU:C:2008:213), paragraph 35.

---

12 Judgment of 11 December 2014, *Azienda sanitaria locale n. 5 ‘Spezzino’ and Others* (C-113/13, EU:C:2014:2440), paragraph 43.

---

13 This point is made by the Lithuanian Government at the end of paragraph 7 of its written observations when it states that it is not clear from the case file submitted by the referring court whether the latter had taken into consideration the ‘relevant

circumstances' indicated by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) when it referred the case back to the lower courts for fresh consideration.

14 See, inter alia, judgment of 12 September 2013, *IVD* (C-526/11, EU:C:2013:543), paragraph 19.

15 LG is listed as a contracting authority in Annex IV (Contracting entities in the field of rail services) to Commission Decision 2008/963/EC of 9 December 2008 amending the Annexes to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards their lists of contracting entities and contracting authorities (OJ 2008, L 349, p. 1). Also included in that Annex, without naming them, are 'other entities in compliance with the requirements of Article 70(1) and (2) of the Law on Public Procurement of the Republic of Lithuania (*Official Gazette*, No 84-2000, 1996; No 4-102, 2006) and operating in the field of railway services in accordance with the Code of Railway Transport of the Republic of Lithuania (*Official Gazette*, No 72-2489, 2004)'.

16 Directive of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2001 L 75, p. 29);

17 Written observations of LitSpecMet, paragraph 33.

18 Judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4), paragraph 24.

19 The list of such needs in the case-law of the Court of Justice is very long. It covers, for example, matters ranging from the provision of heating by means of an environmentally friendly process (judgment of 10 April 2008, *Ing. Aigner*, C-393/06, EU:C:2008:213, paragraph 39) to promoting the location of private undertakings on a particular territory (judgment of 22 May 2003, *Korhonen and Others*, C-18/01, EU:C:2003:300, paragraph 48).

20 C-18/01, EU:C:2003:300, paragraph 52, citing, in particular, the judgments of 3 October 2000, *University of Cambridge* (C-380/98, EU:C:2000:529), paragraph 17; of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746), paragraph 52; and of 27 February 2003, *Adolf Truley* (C-373/00, EU:C:2003:110), paragraph 4. To the same effect, see judgment of 13 December 2007, *Bayerischer Rundfunk and Others* (C-337/06, EU:C:2007:786), paragraph 36.

21 Judgment of 10 April 2008, *Ing. Aigner* (C-393/06, EU:C:2008:213), paragraph 40.

22 According to the judgment of 22 May 2003, *Korhonen and Others* (C-18/01 EU:C:2003:300), paragraph 49, 'the existence of such competition may… be an indication that a need in the general interest has an industrial or commercial character'.

23 See, for example, judgment of 16 October 2003, *Commission* v *Spain* (C-283/00, EU:C:2000:544), paragraph 81.

24 See, once again, judgment of 22 May 2003, *Korhonen and Others* (C-18/01 EU:C:2003:300), paragraph 59.

25 The referring court notes in the second indent of its question that VLRD 'independently engages in business activity, establishes a business strategy, adopts decisions *concerning* the conditions of the company's activity …, participates in a competitive market throughout the European Union and outside the EU market, … and participates in procurement procedures connected with that activity, seeking to obtain orders from third parties (not the parent company)' (emphasis added).

26 See, to that effect, the observations of the Lithuanian Government referred to in footnote 13.

27 It is stated in paragraph 24 of the description of the '[facts and procedure in the main proceedings]' set out in the order for reference that 'the in-house relationships between LG and VLRD demonstrate not only the … close economic ties between those undertakings but *perhaps* also the fact that VLRD essentially does not operate under free market conditions' (emphasis added).

28 Emphasis added.

29 The order for reference then goes on to cite several judgments of the Court of Justice in which the in-house exception has been applied: judgments of 18 November 1999, *Teckal* (C-107/98, ECLI:EU:C:1999:562), and of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, ECLI:EU:C:2005:5).

30 Paragraphs 21 and 22 of its written observations.

---

31 This would be confirmed by the data provided by Kanapinskas, V., Plytnikas, Z., and Tvaronavičienė, A., 'In-house procurement exception: Threat for sustainable procedure of public procurement?', *Journal of Security and Sustainability Issues* (http://dx.doi.org/10.9770/jssi.2014.4.2(4), which for 2011 gives VLRD 39.2% of all contracts awarded by LG under the in-house system; in 2013 this rose to 74%.

---

32 Paragraphs 31 to 36.

---

33 Directive 2014/24, and Article 12(1) in particular, which is based on the case-law of the Court of Justice in this area (although it deviates from this in certain important respects), does not apply *ratione temporis* to the main proceedings.

---

34 Judgment of 8 May 2014, *Datenlotsen Informationssysteme* (C-15/13, EU:C:2014:303), paragraph 25 and the case law cited. More recent is the judgment of 8 December 2016, *Undis Servizi* (C-553/15, EU:C:2016:935), paragraph 30.

---

35 The referring court itself takes the view that the establishment of VLRD was an attempt to *reorganise* the activities of LG (paragraph 26 of the order for reference).

---

36 See, in general, Sánchez Graells, A., *Public procurement and the competition rules*, 2nd edition, Hart, Oxford, 2015, pp. 265 to 272.

---

37 The Court of Justice referred to consideration as a feature which distinguishes contracts governed by Directive 2004/18 in its judgment of 8 September 2016, *Politanò* (C-225/15 EU:C:2016:645), paragraphs 29 to 31.

---

38 Paragraph 23 of the written observation of the Commission.

---

39 In the judgment of 11 May 2006, *Carbotermo and Consorzio Alisei* (C-340/04,ECLI:EU:C:2006:308), the Court of Justice reiterated what it had already stated in the judgment of 18 November 1999, *Teckal* (C-107/98, ECLI:EU:C:1999:562), namely that the subordinate body must carry out 'the essential part of its activities with the controlling authority or authorities' (paragraph 59), stating that the activity must be 'devoted principally to that authority and any other activities are only of *marginal* significance' (paragraph 63, without emphasis in the original version). Article 12(1) of Directive 2014/24 has (controversially) set the limits of what is 'essential' and what is 'marginal' at 80% and 20% respectively.

---

40 On the risk that subcontracting may be used under the in-house system as a means of avoiding the rules on free competition, see the report of the Comisión Nacional de la Competencia (National Competition Commission, Spain) entitled *Los medios propios y las encomiendas de gestión:implicaciones de su uso desde la óptica de la promoción de la competencia*, pp. 30 to 57. (https://www.cnmc.es/Portals/0/Ficheros/Promocion/Informes_y_Estudios_Sectoriales/2013/2014_MediosPropios_Inf_sectorial.PDF).

---

41 Judgment of 10 April 2008, *Ing. Aigner* (C-393/06, EU:C:2008:213), paragraph 57.

---

42 See, for example, judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4), paragraph **34.**

---

43 Judgment of 3 October 2000, *University of Cambridge* (C-380/98, EU:C:2000:529), paragraph 43.

---

44 However, according to the information made available at the hearing, in fact, 85% of the supplies effected by VLRD in 2016 were still to LG and, of these, two thirds were under in-housearrangements.

EU:C:2016:730

ORDONNANCE DE LA COUR (septième chambre)

28 septembre 2016 (*)

« Renvoi préjudiciel – Article 99 du règlement de procédure de la Cour – Questions préjudicielles identiques – Articles 49 et 56 TFUE – Liberté d'établissement – Libre prestation de services – Jeux de hasard – Restrictions – Raisons impérieuses d'intérêt général – Proportionnalité – Marchés publics – Conditions de participation à un appel d'offres et évaluation de la capacité économique et financière – Exclusion du soumissionnaire pour défaut de présentation d'attestations de sa capacité économique et financière, délivrées par deux établissements bancaires distincts – Directive 2004/18/CE – Article 47 – Applicabilité »

Dans l'affaire C-542/15,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Tribunale di Santa Maria Capua Vetere (tribunal de Santa Maria Capua Vetere, Italie), par décision du 10 septembre 2015, parvenue à la Cour le 16 octobre 2015, dans la procédure pénale contre

Angela Manzo,

LA COUR (septième chambre),

composée de M^me^ C. Toader (rapporteur), président de chambre, M. A. Rosas et M^me^ A. Prechal, juges,

avocat général : M. N. Wahl,

greffier : M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation des articles 49 et 56 TFUE ainsi que de l'article 47 de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO 2004, L 134, p. 114).

2 Cette demande a été présentée dans le cadre d'une procédure pénale engagée contre M^me^ Angela Manzo en raison d'une infraction à législation italienne régissant la collecte de paris.

Le litige au principal et les questions préjudicielles

3 L'affaire au principal s'inscrit dans un cadre juridique et factuel pour l'essentiel analogue à celui des affaires ayant donné lieu aux arrêts du 12 septembre 2013, Biasci e.a. (C-660/11 et C-8/12, EU:C:2013:550), ainsi que du 8 septembre 2016, Politanò (C-225/15, EU:C:2016:645).

4 Ainsi qu'il ressort du dossier soumis à la Cour, un contrôle effectué le 24 septembre 2013 par la Guardia di Finanza di Mondragone (police douanière et financière de Mondragone, Italie) dans les locaux d'un centre de transmission de données géré par M^me^ Manzo et affilié à UniqGroup ltd., une société de droit maltais, a permis de mettre à jour l'existence, dans ce centre, d'une activité non

autorisée de collecte de paris. À la suite de ce contrôle, il a été procédé à la saisie conservatoire de certains équipements utilisés pour la collecte de paris.

5 Une procédure pénale a été également engagée à l'encontre de M^me^ Manzo.

6 Devant la juridiction de renvoi elle a soutenu que sa conduite n'est pas constitutive d'une infraction, car la collecte de paris sur des événements sportifs pour le compte d'UniqGroup doit être considérée comme licite dans la mesure où la législation interne est contraire aux articles 49 et 56 TFUE.

7 Elle soutient à cet égard que UniqGroup a été exclue de la procédure d'appel d'offres lancée au cours de l'année 2012, au motif qu'elle n'aurait pas présenté deux attestations de capacité économique et financière délivrées par deux établissements bancaires différents.

8 Dans ces conditions, le Tribunale di Santa Maria Capua Vetere (tribunal de Santa Maria Capua Vetere) a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes, qui sont partiellement identiques à celles posées dans les affaires ayant donné lieu aux arrêts du 12 septembre 2013, Biasci e.a. (C-660/11 et C-8/12, EU:C:2013:550), ainsi que du 8 septembre 2016, Politanò (C-225/15, EU:C:2016:645).

« 1) Les articles [49 et 56 TFUE] ainsi que les principes de l'égalité de traitement et d'effectivité doivent-ils être interprétés en ce sens qu'ils s'opposent à une législation nationale en matière de jeux de hasard qui, pour l'octroi de concessions, met en place une nouvelle procédure d'appel d'offres [...] qui, sans prévoir à cet égard d'autre critère que deux références bancaires provenant de deux établissements financiers différents, contient une clause d'exclusion pour défaut de capacité économique et financière ?

2) L'article 47 de la directive 2004/18/CE [...] doit-il être interprété en ce sens qu'il s'oppose à une législation nationale en matière de jeux de hasard qui, pour l'octroi de concessions, met en place une nouvelle procédure d'appel d'offres [...] qui, sans prévoir à cet égard d'autres documents ni options, comme le fait la législation supranationale, [contient une clause d'exclusion pour défaut] de capacité économique et financière ?

3) Les articles [49 et 56 TFUE] s'opposent-ils à une législation nationale qui empêche de fait toute activité transfrontalière dans le secteur des jeux, indépendamment de la forme sous laquelle cette activité s'exerce et, en particulier [selon les termes de l'arrêt du 12 septembre 2013, Biasci e.a. (C-660/11 et C-8/12, EU:C:2013:550)], dans les cas où les intermédiaires de l'entreprise présents sur le territoire national peuvent être soumis à un contrôle physique à des fins de police ? »

Sur les questions préjudicielles

9 Conformément à l'article 99 du règlement de procédure de la Cour, lorsqu'une question posée à titre préjudiciel est identique à une question sur laquelle la Cour a déjà statué ou lorsque la réponse à une telle question peut être clairement déduite de la jurisprudence, la Cour peut, à tout moment, après avoir entendu l'avocat général, statuer par voie d'ordonnance motivée.

10 Il convient de faire application de cette disposition dans le cadre de la présente affaire.

11 À titre liminaire, il y a lieu de relever que si, certes, la juridiction de renvoi s'est référée, dans le libellé de la première question, aux principes d'égalité de traitement et d'effectivité, il convient de constater que la décision de renvoi ne contient aucune précision sur les raisons qui ont conduit ladite juridiction à s'interroger sur l'interprétation de ces principes dans le cadre de l'affaire au principal ni sur le lien entre ces principes et la législation nationale en cause au principal.

12 Eu égard à ce qui précède, il y a lieu de considérer que, par sa première question, la juridiction de renvoi cherche en substance à savoir si les articles 49 et 56 TFUE doivent être interprétés en ce sens qu'ils s'opposent à une disposition nationale, telle que celle en cause au principal, qui impose aux opérateurs désireux de répondre à un appel d'offres visant à l'octroi de concessions en matière de jeux et de paris, l'obligation d'apporter la preuve de leur capacité économique et financière au moyen de

déclarations délivrées par au moins deux établissements bancaires, sans permettre que cette capacité puisse également être autrement établie.

13 Dans la mesure où, au point 50 de l'arrêt du 8 septembre 2016 Politanò (C-225/15, EU:C:2016:645), la Cour a répondu, s'agissant de l'article 49 TFUE, à une question identique à la première question posée dans la présente affaire, la réponse apportée par la Cour dans ledit arrêt est pleinement transposable à cette première question en ce qui concerne l'article 49 TFUE.

14 Par ailleurs, ainsi que la Cour l'a rappelé au point 37 de l'arrêt du 8 septembre 2016, Politanò (C-225/15 EU:C:2016:645), doivent être considérées comme des restrictions à la liberté d'établissement et/ou à la libre prestation de services toutes les mesures qui interdisent, gênent ou rendent moins attrayant l'exercice des libertés garanties par les articles 49 et 56 TFUE.

15 Une disposition d'un État membre, telle que celle en cause au principal, est susceptible de dissuader les opérateurs économiques de participer à une procédure d'appel d'offres et est, dès lors, susceptible de constituer également une restriction à la libre prestation de services au sens de l'article 56 TFUE.

16 S'agissant de la justification d'une telle restriction, les considérations évoquées aux points 39 à 49 de l'arrêt du 8 septembre 2016, Politanò (C-225/15 EU:C:2016:645) dans le contexte de la liberté d'établissement apparaissent pleinement transposables à la libre prestation de services.

17 Eu égard à l'ensemble des considérations qui précèdent, il convient de répondre à la première question que les articles 49 et 56 TFUE doivent être interprétés en ce sens qu'ils ne s'opposent pas à une disposition nationale, telle que celle en cause au principal, qui impose aux opérateurs désireux de répondre à un appel d'offres visant à l'octroi de concessions en matière de jeux et de paris l'obligation d'apporter la preuve de leur capacité économique et financière au moyen de déclarations délivrées par au moins deux établissements bancaires, sans permettre que cette capacité puisse également être autrement établie, dès lors qu'une telle disposition est susceptible de satisfaire aux conditions de proportionnalité établies par la jurisprudence de la Cour, ce qu'il appartient à la juridiction de renvoi de vérifier.

18 Par sa deuxième question, la juridiction de renvoi demande, en substance, si l'article 47 de la directive 2004/18 doit être interprété en ce sens qu'il s'oppose à une disposition nationale, telle que celle en cause au principal, qui impose aux opérateurs désireux de répondre à un appel d'offres visant à l'octroi de concessions en matière de jeux et de paris l'obligation d'apporter la preuve de leur capacité économique et financière au moyen de déclarations délivrées par au moins deux établissements bancaires, sans permettre que cette capacité soit établie par tout autre document.

19 Dans la mesure où, au point 34 de l'arrêt du 8 septembre 2016 Politanò (C-225/15, EU:C:2016:645), la Cour a répondu à une question identique à la deuxième question posée dans la présente affaire, la réponse apportée par la Cour dans ledit arrêt est pleinement transposable à cette deuxième question.

20 Dans ces conditions, il convient de répondre à la deuxième question que la directive 2004/18, en particulier son article 47, doit être interprétée en ce sens qu'une réglementation nationale régissant l'octroi de concessions dans le domaine des jeux de hasard, telle que celle en cause au principal, ne relève pas de son champ d'application.

21 S'agissant de la troisième question, il y a lieu de relever que ni sa formulation, au demeurant peu claire, ni les explications fournies par la juridiction de renvoi dans sa décision de renvoi ne permettent de déceler clairement en quoi cette question comporte une interrogation distincte de celle de la première question portant, elle aussi, sur l'interprétation des articles 49 et 56 TFUE au regard de la même disposition de droit national. Dans ces conditions, cette troisième question n'appelle pas de réponse distincte de celle qui a déjà été apportée à la première question.

Par ces motifs, la Cour (septième chambre) dit pour droit :

1) Les articles 49 et 56 TFUE doivent être interprétés en ce sens qu'ils ne s'opposent pas à une disposition nationale, telle que celle en cause au principal, qui impose aux opérateurs

désireux de répondre à un appel d'offres visant à l'octroi de concessions en matière de jeux et de paris l'obligation d'apporter la preuve de leur capacité économique et financière au moyen de déclarations délivrées par au moins deux établissements bancaires, sans permettre que cette capacité puisse également être autrement établie, dès lors qu'une telle disposition est susceptible de satisfaire aux conditions de proportionnalité établies par la jurisprudence de la Cour, ce qu'il appartient à la juridiction de renvoi de vérifier.

2) **La directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services, en particulier son article 47, doit être interprétée en ce sens qu'une réglementation nationale régissant l'octroi de concessions dans le domaine des jeux de hasard, telle que celle en cause au principal, ne relève pas de son champ d'application.**

Signatures

---

* Langue de procédure : l'italien.

JUDGMENT OF THE COURT (Fourth Chamber)

5 April 2017 (*)

(Reference for a preliminary ruling — Public procurement — Review procedures — Directive 89/665/EEC — Article 1(1) — Article 2(1) — Decision of a contracting authority allowing an economic operator to participate in a procurement procedure — Decision not amenable to review under the applicable national legislation)

In Case C-391/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia, Spain), made by decision of 9 July 2015, received at the Court on 20 July 2015, in the proceedings

Marina del Mediterráneo SL and Others

v

Agencia Pública de Puertos de Andalucía,

intervening parties:

Consejería de Obras Públicas y Vivienda de la Junta de Andalucía,

Nassir Bin Abdullah and Sons SL,

Puerto Deportivo de Marbella SA,

Ayuntamiento de Marbella,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Bobek,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 29 June 2016,

after considering the observations submitted on behalf of:

– Marina del Mediterráneo SL and Others, by J.L. Torres Beltrán, procurador, and A. Jiménez-Blanco, abogado,

– the Agencia Pública de Puertos de Andalucía, by J.M. Rodríguez Gutiérrez, abogado,

– the Consejería de Obras Públicas y Vivienda de la Junta de Andalucía, by I. Nieto Salas, abogada,

– the Spanish Government, by M.A. Sampol Pucurull and M.J. García-Valdecasas Dorrego, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Pucciariello and F. Di Matteo, avvocati dello Stato,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by E. Sanfrutos Cano and M.A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').

2 The request has been made in proceedings between Marina del Mediterráneo SL and Others, a temporary consortium known as 'Marina Internacional de Marbella', and the Agencia Pública de Puertos de Andalucía (Ports Agency of Andalusia; the 'Agency'), concerning the lawfulness of a decision by which that Agency allowed another temporary consortium to submit a tender in a public procurement procedure it had launched for the award of a public works concession contract.

Legal context

EU law

3 Recital 2 of Directive 89/665 states:

'… the existing arrangements at both national and Community levels for ensuring the [effective application of directives on public procurement] are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected'.

4 Article 1 of that directive, headed 'Scope and availability of review procedures', provides in paragraphs 1 and 3:

'1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [(OJ 2004 L 134, p. 114)], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

5 Article 2 of Directive 89/665, headed 'Requirements for review procedures', provides in paragraph 1:

‘Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.’

6 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) was repealed by Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (OJ 2014 L 94, p. 243). Articles 3 to 7 in Section 2 of Chapter II of Title I of Directive 2014/25 set out the activities to which it applies.

7 Directive 2004/18 was repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ 2014 L 94, p. 65). Article 57 of Directive 2004/18, entitled ‘Exclusions from the scope’, which is included in Title III, headed ‘Rules on public works concessions’, provides:

‘This Title shall not apply to public works concessions which are awarded:

(a) in the cases referred to in Articles 13, 14 and 15 of this Directive in respect of public works contracts;

(b) by contracting authorities exercising one or more of the activities referred to in Articles 3 to 7 of Directive 2004/17/EC where those concessions are awarded for carrying out those activities.

However, this Directive shall continue to apply to public works concessions awarded by contracting authorities carrying out one or more of the activities referred to in Article 6 of Directive 2004/17/EC and awarded for those activities, insofar as the Member State concerned takes advantage of the option referred to in the second subparagraph of Article 71 thereof to defer its application.’

Spanish law

8 Section 25(1) of Ley 29/1998 reguladora de la Jurisdicción Contencioso-administrativa (Law 29/1998 governing administrative courts) of 13 July 1998 (BOE No 167 of 14 July 1998, p. 23516) sets out what may be the subject of a review in the context of contentious administrative proceedings and, more specifically, the administrative acts open to challenge as follows:

‘Administrative appeal proceedings are admissible in respect of provisions of a general nature and express and implicit measures, whether definitive or procedural, adopted by the public authority which bring an end to the administrative procedure, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence, or cause irreparable harm to legitimate rights or interests.’

9 Section 107(1) of Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (Law 30/1992 on the legal provisions governing public authorities and ordinary administrative procedure) of 26 November 1992 (BOE No 285 of 27 November 1992, p. 40300), as amended by Ley 4/1999 (Law 4/1999) of 13 January 1999 (BOE No 12 of 14 January 1999, p. 1739) (‘Law 30/1992’), provides:

‘The parties concerned may seek review of decisions and administrative acts which decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests, which may be based on any of the grounds of invalidity or annulment provided for in Sections 62 and 63 of this Law.

The parties concerned may challenge the remaining preparatory acts for consideration in the decision bringing the procedure to an end.’

10 The Ley 30/2007 de Contratos del Sector Público (Law 30/2007 on public procurement) of 30 October 2007 (BOE No 261 of 31 October 2007, p. 44336), was amended by Ley 34/2010 (Law 34/2010) of 5 August 2010 (BOE No 192 of 9 August 2010, p. 69400) (‘Law 30/2007’), with the objective of including, in Sections 310 to 320, provisions relating to the special application in procurement proceedings.

11 Section 310(2) of Law 30/2007, which specifically relates to public procurement and implements the general rule laid down in Section 107(1) of Law 30/1992, provides:

‘The following acts may be the subject of an application:

(a) Contract notices, specifications and contractual documents laying down the conditions which will govern the procurement procedure;

(b) Preparatory acts adopted in the tendering procedure, provided that they decide, directly or indirectly, the award of the contract, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests. Acts of the procurement board which decide to exclude tenderers will be considered preparatory acts which make it impossible to continue the procedure;

(c) Award decisions adopted by the contracting authorities.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 On 12 April 2011, Marina del Mediterráneo SL and Others lodged, with the competent administrative body, a special application in procurement proceedings against the decision of the procurement board to allow the temporary consortium comprised of Nassir bin Abdullah and Sons SL, Puerto Deportivo de Marbella SA and l’Ayuntamiento de Marbella (Marbella City Council, Spain) (‘the second temporary consortium’) to submit a tender in the public procurement procedure for the award of the public works concession contract known as ‘Extension of the port of Marbella “la Bajadilla”’.

13 That procurement procedure was launched by the Agency, a special purpose public entity with operational autonomy and its own legal personality, forming part of the Consejería de Obras Públicas y Vivienda de la Junta de Andalucía (Department of Public Works and Housing of Andalucía, Spain). The call for tenders was published on 27 November 2010. According to statements made at the hearing before the Court, the value of that contract is EUR 77 000 000.

14 The two temporary consortia at issue in the main proceedings were the only tenderers that participated in the procurement procedure.

15 In their application, Marina del Mediterráneo and Others claimed, in essence, that the participation of the second temporary consortium in the procurement procedure infringed both national legislation and EU legislation, since, first, Marbella City Council is a public authority which does not have the status of an undertaking within the meaning of national legislation and which cannot be considered an economic operator without distorting the rules of free competition and equality of tenderers, and, secondly, that temporary consortium does not fulfil the requirements of economic and financial solvency in so far as the financial risks it takes are covered by the budget of that City Council.

16 By decision of 3 May 2011, the executive director of the Agency dismissed the application. In that decision, he referred to the case-law of the Court and, in particular, the judgment of 23 December 2009,

CoNISMa (C-305/08, EU:C:2009:807), which confers the status of tenderer to any public entity or group consisting of such entities offering services on the market, even if only occasionally. In addition, the executive director took the view that the financial solvency of the second temporary consortium had been established on account of Marbella City Council's revenue budget.

17 As is apparent from the documents before the Court, the public contract at issue in the main proceedings was awarded, by decision of 6 June 2011, to the second temporary consortium. An action brought against that decision by Marina del Mediterráneo and Others was dismissed by decision of 11 July 2011.

18 By letter of 5 July 2011, Marina del Mediterráneo and Others lodged a contentious administrative appeal with the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia, Spain) against the decision of 3 May 2011 of the executive director of the Agency. In the appeal, that temporary consortium, on the basis of the same arguments it put forward before the Agency in the context of the special application in procurement proceedings, seeks annulment of that decision and, accordingly, annulment of the measures that followed it, particularly the decision of 6 June 2011 awarding the contract at issue to the second temporary consortium.

19 By decision of 19 February 2015, the national court hearing the case informed the parties to the main proceedings that there might be grounds for inadmissibility of the contentious administrative appeal on the basis of national legislation which defines the acts that may be the subject of a special application in procurement proceedings. In accordance with that legislation, preparatory acts which decide, directly or indirectly, the award of the contract, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests, may be the subject of an action in procurement proceedings.

20 Accordingly, the decision of a procurement board which does not exclude a tenderer but which, on the contrary, admits the tender and allows the tenderer to participate in the procurement procedure that has been initiated does not constitute a decision-making act which is open to review; that does not, however, prevent the person concerned from reporting any irregularities noted and using them subsequently when challenging the act awarding the contract at issue, which is indeed a decision-making act.

21 The referring court entertains doubts as to whether this national legislation is compatible with EU public procurement law as interpreted by the Court, in particular in its judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5).

22 In the light of those considerations, the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia) decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

‘1. In the light of the principles of sincere cooperation and the effectiveness of directives, are Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 to be interpreted as precluding national legislation such as Section 310(2) of Law 30/2007 … in so far as it prevents access to the special application in procurement proceedings in respect of the preparatory acts of the procurement board, such as the decision to admit a tender from a tenderer which, it is alleged, fails to comply with the provisions concerning proof of technical and economic solvency laid down in the national and EU legislation?

2. If the reply to the first question is in the affirmative, do Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 have direct effect?’

Consideration of the questions referred

Preliminary observations

23 As a preliminary point, in relation to the doubts expressed by the Spanish Government concerning the admissibility of the request for a preliminary ruling in the present case, it must be borne in mind that, in

accordance with the first and second subparagraphs of Article 1(1) of Directive 89/665, read in the light of recital 2 of Directive 2007/66, Directive 89/665 applies, in a context such as that in the main proceedings, only to contracts falling within the scope of Directive 2004/18, unless, however, such contracts are excluded in accordance with Articles 10 to 18 of that directive. The following considerations are therefore based on the premiss that Directive 2004/18 is applicable to the contract at issue in the main proceedings and, therefore, that Directive 89/665 is also applicable to the procedure in the main proceedings, which it is for the referring court to ascertain.

The first question

24 By its first question, the referring court asks, in essence, whether Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 must be interpreted as precluding national legislation under which a decision allowing a tenderer to participate in a procurement procedure — a decision allegedly adopted in breach of EU public procurement law or the national legislation transposing it — is not classed among the preparatory acts of a contracting authority which may be subject to an independent judicial review.

25 Article 310(2)(b) of Law 30/2007 allows an independent review to be sought of preparatory acts which decide, directly or indirectly, the award of a contract, make it impossible to continue a procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests; however, any other preparatory acts, such as a decision allowing a tenderer to participate in a procurement procedure, may, as is apparent from the file submitted to the Court, be challenged only in the context of a review of a decision awarding a public contract.

26 It should be noted that the wording of Article 1(1) of Directive 89/665 assumes, by using the words ‘as regards … procedures’, that every decision of a contracting authority falling under EU rules in the field of public procurement and liable to infringe them is subject to the judicial review provided for in Article 2(1)(a) and (b) of that directive. That provision thus refers generally to the decisions of a contracting authority without distinguishing between those decisions according to their content or time of adoption (see judgment of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 28 and the case-law cited).

27 That broad construction of the concept of a ‘decision’ taken by a contracting authority is confirmed by the fact that Article 1(1) of Directive 89/665 does not lay down any restriction with regard to the nature or content of the decisions it refers to. Moreover, a restrictive interpretation of that concept would be incompatible with the terms of Article 2(1)(a) of that directive which requires Member States to make provision for interim relief procedures in relation to any decision taken by the contracting authorities (see, to that effect, judgment of 11 January 2005, *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 30 and the case-law cited).

28 It follows that a decision allowing a tenderer to participate in a public procurement procedure, such as that at issue in the main proceedings, constitutes a decision within the meaning of Article 1(1) of Directive 89/665.

29 That interpretation of the concept of ‘decisions taken by the contracting authorities’ which are amenable to review is not called into question by the fact that the Court held, in paragraph 35 of the judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5), that acts which form part of the internal reflections of the contracting authority with a view to a public award procedure are not amenable to review. As regards the decision at issue in the main proceedings to admit the tender submitted by a tenderer, it must be held that such a decision, by its very nature, falls outside the internal reflections of the contracting authority. Moreover, that decision was communicated to Marina del Méditerraneo and Others.

30 As regards the time from which review procedures must be available, it is appropriate to recall that, as is apparent from its first and second recitals, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and EU levels, to ensure the effective application of the directives relating to public procurement, in particular at a stage when infringements can still be corrected. To that effect, the third subparagraph of Article 1(1) of that directive requires Member States ‘to ensure that … decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly

as possible' (see judgment of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 74).

31 As the Court has already held, although Directive 89/665 has not formally laid down the time from which the possibility of review, as provided for in Article 1(1), must be open, the objective of that directive, as referred to in the preceding paragraph, does not authorise Member States to make the exercise of the right to apply for review conditional on the fact that the public procurement procedure in question has formally reached a particular stage (see, to that effect, judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 38).

32 It is settled case-law that, in the absence of EU rules laying down the time from which a possibility of review must be open, it is for national law to lay down the detailed rules of judicial procedures governing actions for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (judgments of 30 September 2010, *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 34; 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 46; and 26 November 2015, *MedEval*, C-166/14, EU:C:2015:779, paragraphs 32, 35 and 37).

33 In particular, the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities must not compromise the effectiveness of Directive 89/665 (see, to that effect, judgments of 3 March 2005, *Fabricom*, C-21/03 and C-34/03, EU:C:2005:127, paragraph 42; 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 47; and 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 43).

34 As regards, more specifically, a decision such as that at issue in the main proceedings allowing a tenderer to participate in a public procurement procedure, the fact that the national legislation at issue in the main proceedings requires, in all cases, a tenderer to wait for a decision awarding the contract in question before it may apply for a review of a decision allowing another tenderer to participate in that procurement procedure infringes the provisions of Directive 89/665.

35 That interpretation is not called into question by the finding that full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements (judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 51 and the case-law cited). That finding concerns the justification of reasonable time limits for applying for review of decisions which may be challenged and not the barring of an independent review of a decision allowing a tenderer to participate in a public procurement procedure, such as follows from the legislation at issue in the main proceedings.

36 Furthermore, it is for the referring court to determine whether the other conditions relating to the availability of review procedures, as provided for in Directive 89/665, are satisfied. In that regard, it should be noted that, in accordance with the third subparagraph of Article 1(1) and Article 1(3) of that directive, in order for the review of decisions taken by a contracting authority to be regarded as effective, review procedures must be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement of EU public procurement law or rules transposing that law (see, to that effect, judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 23). It is therefore, more specifically, for the national court to determine, in the context of the main proceedings, whether Marina del Mediterráneo and Others have or have had an interest in obtaining the contract in question and have been or risk being harmed by the decision of the Agency to admit the tender of the second temporary consortium.

37 It follows from all of the foregoing considerations that the answer to the first question is that, in a situation such as that in the main proceedings, Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 must be interpreted as precluding national legislation under which a decision allowing a tenderer to participate in a procurement procedure — a decision allegedly adopted in breach of EU public

procurement law or the national legislation transposing it — is not classed among the preparatory acts of a contracting authority which may be subject to an independent judicial review.

The second question

38 By its second question, the referring court asks whether Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 have direct effect.

39 In that regard, it should be recalled that the Court has already held that Articles 1(1) and 2(1)(b) of that directive are unconditional and sufficiently clear to create rights for individuals on which they may rely, where necessary, against contracting authorities (see judgment of 2 June 2005, *Koppensteiner*, C-15/04, EU:C:2005:345, paragraph 38).

40 As the Advocate General noted in point 70 of his Opinion, such an assessment applies equally to Article 2(1)(a) of Directive 89/665 in the light of both its clear and precise wording and the proximity of its subject matter to that of Article 2(1)(b) of the directive.

41 It follows from all of the foregoing considerations that the answer to the second question is that Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 have direct effect.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Articles 1(1) and 2(1)(a) and (b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted as precluding national legislation under which a decision allowing a tenderer to participate in a procurement procedure — a decision allegedly adopted in breach of EU public procurement law or the national legislation transposing it — is not classed among the preparatory acts of a contracting authority which may be subject to an independent judicial review.**

2. **Articles 1(1) and 2(1)(a) and (b) of Directive 89/665, as amended by Directive 2007/66, have direct effect.**

[Signatures]

** Language of the case: Spanish.

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 8 September 2016 (1)

Case C-391/15

Marina del Mediterráneo, SL,

Marina del Mediterráneo Duquesa, SL,

Marina del Mediterráneo Estepona, SL,

Marina del Mediterráneo Este, SL,

Marinas del Mediterráneo Torre, SL,

Marina del Mediterráneo Marbella, SL,

Gómez Palma, SC,

Enrique Alemán, SA,

Cyes Infraestructuras, SA,

Cysur Obras y Medioambiente, SA

v

Consejería de Obras Públicas y Vivienda de la Junta de Andalucía,

Agencia Pública de Puertos de Andalucía,

Nassir Bin Abdullah and Sons, SL,

Puerto Deportivo de Marbella, SA,

Ayuntamiento de Marbella

(Request for a preliminary ruling from the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia, Spain))

(Reference for a preliminary ruling — Public procurement — Award procedure — Decision of admission of a candidate — Alleged illegality — Preparatory act — Immediate or deferred review — Direct effect)

I – Introduction

1. Marina del Mediterráneo, SL and others (the applicants) applied for a public works concession contract for the expansion of a port in Spain. A second group of undertakings also applied for the contract. The applicants considered that the second group did not fulfil the conditions for submitting a bid. They

therefore challenged the admission of the second group of undertakings to the tendering procedure by way of a special application in public procurement proceedings. However, the referring court informed the applicants that a contentious administrative appeal such as that of the applicants might be inadmissible on the grounds that its subject matter was a mere preparatory act, namely, the admission of a candidate.

2. In the present case, the Court is called upon to determine the standard set by EU law for the review of preparatory acts, such as a decision to admit an undertaking to submit a bid in a public procurement procedure. More particularly, does Directive 89/665/EEC (2) ('the Remedies Directive') require Member States to provide for *immediate* and *autonomous* review of *any* decision of the contracting authority or is it possible to *defer* review until a later stage of the award procedure?

II – **Legal background**

A – *EU law*

3. The Remedies Directive, as amended by Directive 2007/66/EC, (3) aims at ensuring the application of EU directives on public procurement by imposing obligations on Member States to provide for effective and speedy remedies in the case of infringement of EU law or of national rules implementing EU law.

4. Recital 2 of that directive states that 'the existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected'.

5. Article 1 of the Remedies Directive reads as follows:

> '1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, (4) unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.
>
> Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.
>
> Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.
>
> …
>
> 3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

6. Article 2(1) requires Member States to:

> 'ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:
>
> (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
>
> (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
>
> (c) award damages to persons harmed by an infringement.'

7. Council Directive 92/13/EEC of 25 February 1992, as amended by Directive 2007/66, coordinates the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors. (5)

8. Article 1 of Directive 92/13 corresponds to Article 1 of Directive 89/665 but entails two differences: first, it applies to the sectors regulated by Directive 2004/17/EC (6) (instead of Directive 2004/18); second, it does not explicitly concern public works concessions.

9. Article 2(1) of Directive 92/13 also corresponds to a large extent to Article 2(1) of the Remedies Directive, but the former explicitly includes, under (b), the possibility to set aside discriminatory technical, economic and financial specifications that are to be found in the notice of contract, the periodic indicative notice and the notice on the existence of a system of qualification, whereas the latter does not.

B – *National law*

10. The administrative activity which is open to challenge is defined in Section 25(1) of Ley 29/1998 reguladora de la Jurisdicción Contencioso-administrativa (Law governing Administrative Courts), of 13 July 1998, which provides that: 'administrative appeal proceedings are admissible in respect of provisions of a general nature and express and implicit measures, whether definitive or preparatory, adopted by the public authority which bring an end to the administrative procedure, if they decide, directly or indirectly, the substantive issues, render it impossible to continue the procedure, render it impossible to conduct a defence or cause irreparable harm to legitimate rights or interests'.

11. Section 107(1) of Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo común (Law No 30/1992 on the legal provisions governing public authorities and ordinary administrative procedure) of 26 November 1992, as amended by Ley 4/1999 of 13 January 1999, limits access to administrative appeals in the following terms:

> 'The parties concerned may seek review of decisions and administrative acts which decide, directly or indirectly, the substance of the case, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests, which may be based on any of the grounds of invalidity or annulment provided for in Sections 62 and 63 of this Law.
>
> The parties concerned may challenge the remaining preparatory acts for consideration in the decision bringing the procedure to an end.'

12. Ley 30/2007 de Contratos del Sector Público (Law on Public Procurement) of 30 October 2007, as amended by Ley 34/2010 of 5 August 2010, establishes the rules relating to special applications which may be made in public procurement proceedings. Section 310(2) is the expression, in the context of public procurement, of the general rule laid down in Section 107(1) of the aforementioned Ley 30/1992. It provides that 'the following acts may be the subject of the application:

> (a) Contract notices, specifications and contractual documents laying down the conditions which will govern the procurement procedure;
>
> (b) Preparatory acts adopted in the tendering procedure, provided that they decide, directly or indirectly, the award of the contract, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests. Acts of the procurement board which decide to exclude tenderers will be considered preparatory acts which make it impossible to continue the procedure;
>
> (c) Award decisions adopted by the contracting authorities

III – **The dispute in the main proceedings and the questions referred to the Court**

13. The Agencia Pública de Puertos de Andalucía (Ports Agency of Andalusia) is a special purpose (ad hoc) entity with operational autonomy and its own legal personality. It forms part of the Consejería de Obras Públicas y Vivienda de la Junta de Andalucía (Department of Public Works and Housing of Andalusia).

14. The Ports Agency of Andalusia launched a tendering procedure for the award of a public works concession contract for the expansion of the port of La Bajadilla, in Marbella. In the course of the tendering procedure, the procurement board admitted the participation of two groups of undertakings: (i) Marina del Mediterráneo, SL and others, which is a 'union temporal de empresas' (temporary business association) operating under the name Marina internacional de Marbella and (ii) another temporary business association made up of the Ayuntamiento de Marbella (Marbella City Council), the municipal company Puerto Deportivo de Marbella, SA and the commercial company Nasir Bin Abdullah and Sons, SL

15. The decision of the procurement board to admit the second temporary business association to submit a bid was contested by the applicants before the Director Gerente de la Agencia Pública de Puertos de Andalucía (Head of the Ports Agency of Andalusia) by way of a special application in procurement proceedings (*recurso especial en materia de contratación*), lodged on 12 April 2011.

16. The applicants considered that there had been an infringement of EU and national legislation. In their view, the second temporary business association should not have been admitted as a tenderer, because (a) the Marbella City Council is a public authority that does not have the status of 'undertaking' to which national law refers when defining the term 'tenderer'; (b) the second temporary business association does not fulfil the requirements of economic and financial solvency; and (c) the Marbella City Council cannot be considered as an economic operator because that would distort the rules of free competition and equality of tenderers.

17. On 3 May 2011, the Head of the Ports Agency of Andalusia issued the contested decision dismissing the applicants' claims, holding that, first, public authorities may participate in a tendering procedure without undermining the principle of free competition and second, the solvency of the second temporary business association had been established.

18. Marina del Mediterráneo, SL and others then brought a contentious administrative appeal before the referring court on 5 July 2011. They seek annulment of the contested decision and of the measures that followed it, particularly the decision to award the contract to the second temporary business association. They also request to be declared as the sole tenderer and awarded compensation for the harm suffered.

19. By order of 19 February 2015, the referring court informed the parties that there might be grounds for inadmissibility of their contentious administrative appeal because national legislation precludes the review of merely preparatory acts. According to that national legislation, a decision of a procurement board which does not exclude a tenderer but which admits a tenderer to participate in the procurement procedure is not an act that may be challenged judicially.

20. By order of 9 July 2015, the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia, Spain) stayed its proceedings and referred the following questions to the Court:

'(1) In the light of the principles of sincere cooperation and the effectiveness of directives, are Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 to be interpreted as precluding national legislation such as Section 310(2) of Ley 30/2007, de 30 de octubre, de Contratos del Sector Público (now Section 40(2) RDLeg 3/2011, que aprueba el texto refundido de la Ley de Contratos del Sector Público), in so far as it prevents access to the special application in procurement proceedings in respect of the preparatory acts of the procurement board, such as the decision to admit a tender from a tenderer which, it is alleged, fails to comply with the provisions concerning proof of technical and economic solvency laid down in the national and EU legislation?

(2) If the reply to the first question is in the affirmative, do Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 have direct effect?'

21. Marina del Mediterráneo, SL and others, the Department of Public Works and Housing of Andalusia, the Ports Agency of Andalusia, the Austrian, Italian and Spanish Governments and the European Commission submitted written observations. All of the participants to the written procedure except the Italian Government presented oral arguments at the hearing held on 29 June 2016.

IV – **Assessment**

22. Two preliminary issues have to be addressed at the outset. First, as stated at the hearing, the value of the public contract in this case is EUR 77 000 000. Therefore it appears that the contract value thresholds laid down in Article 7 of Directive 2004/18 and Article 16 of Directive 2004/17 have been met.

23. Second, the Spanish Government submits that the present request for a preliminary ruling should nevertheless be declared inadmissible because the Remedies Directive is only applicable to the contracts referred to in Directive 2004/18, which governs classic public sector procurement. It argues that the situation at hand instead falls within the scope of Directive 2004/17 (and is therefore governed by Directive 92/13) since Article 7(b) of Directive 2004/17 provides that it shall apply to activities relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

24. It is up to the national court to determine, in full knowledge of the facts of the case, the details of the public contract at issue and the precise nature of the activity envisaged by that contract, which of the two directives — the Remedies Directive or Directive 92/13 — is applicable in the present case. In this Opinion, given that the referring court asked its questions expressly on the basis of the Remedies Directive, I will confine myself to the interpretation of that directive. However, it should also be kept in mind that the relevant provisions of both directives are, to a great extent, similar.

A – *Question 1*

25. The first question referred by the national court asks, in essence, whether the Remedies Directive requires the *immediate* review of *any* decision of the contracting authority, including preparatory acts such as the admission of a candidate to submit a bid in a tendering procedure.

26. In answering that question, this part proceeds as follows: after setting out some general observations (Section 1), I will explain why, in my opinion, the Remedies Directive generally permits the deferral of the review of mere preparatory acts of a contracting authority (Section 2). The decision to admit another competitor to an open competition would qualify as such a preparatory act (Section 3).

1. General considerations

27. First, the Spanish Government claims that the Court has already decided in *Commission* v *Spain* (7) that Section 310(2) of the Law on Public Procurement (or rather its legislative predecessor, worded in similar terms) is not contrary to the Remedies Directive.

28. In that case, the Commission argued that Spain had infringed the Remedies Directive by, inter alia, failing to ‘allow review to be sought of all decisions adopted by the contracting authorities, including *all procedural measures, during the procedure for the award of public contracts*’. In rejecting that particular claim, the Court stated: ‘the Commission has not established that that legislation does not provide adequate judicial protection for individuals harmed by infringements of the relevant rules of Community law or of the national rules transposing that law’. (8)

29. It is my understanding of *Commission* v *Spain* that the Court, without passing any judgment on the merits of the Commission’s claim, simply dismissed it because the Commission had failed to adduce satisfactory evidence to prove the existence of a breach of EU law. Thus, that decision cannot be read, in my view, as a declaration of the compliance of Spanish law with EU law. That question was left open.

30. Second, it should be stressed that the question asked in the present request for a preliminary ruling is not about the *exclusion* of review of preparatory acts. It concerns the possibility of *deferral* of review until a later stage. Under the relevant Spanish legislation, mere preparatory acts cannot be challenged autonomously by making the special (judicial) application in public procurement proceedings. As stated by the Spanish Government, this exclusion is meant to serve the objective of procedural economy. It is intended to avoid undue delays in the award procedure. However, it has also been pointed out that this exclusion does not prevent the assessment of preparatory acts at a later stage, when the final award decision is being reviewed.

31. Third, the first question of the referring court invokes only Article 1(1) and Article 2(1)(a) and (b) of the Remedies Directive. However Article 1(3) of the Remedies Directive is also relevant in the present case. There is a logical connection between the notion of a reviewable decision taken by the contracting authority

and the issue of standing. Pursuant to Article 1(3) of the Remedies Directive, Member States shall ensure that review procedures are available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

32. The question to be assessed in the following section is thus whether those three provisions, taken together, require *immediate* and *autonomous* review of *any* decision of the contracting authority, including preparatory acts such as the admission of a candidate to submit a bid.

2. The deferral of the review of preparatory acts under the Remedies Directive

33. It is true that, if taken to its literal limit, the second part of Article 1(3) could be interpreted as requiring that *any* decision taken in the course of an award procedure should be reviewable as long as the two conditions relating to standing are fulfilled: the applicant must (i) have an interest in obtaining a particular contract *and* (ii) have been or risk being harmed by an alleged infringement.

34. However, such an interpretation would have far-reaching consequences. Defining standing in such a broad and rather limitless way would mean that every single decision, however marginal and ancillary, could be immediately attacked, and the award procedure effectively halted. Yet, in my view, a reasonable balance must be struck between the different interests at stake in public procurement procedures, (9) namely, the right of access to court and judicial review to challenge aspects of the procedure, on the one hand, and effectiveness of the overall procedure and judicial expediency, on the other.

35. Admittedly, as claimed by the Commission, the Court has adopted a broad interpretation of the notion of 'decisions taken by contracting authorities'. The Court has stated that: Article 1(1) of the Remedies Directive does not lay down any restriction with regard to the nature and content of those decisions; (10) the scope of the judicial review cannot be interpreted restrictively; (11) and any act of the contracting authority adopted in relation to a public service contract within the material scope of public procurement directives and capable of producing legal effects constitutes a decision amenable to review within the meaning of Article 1(1). (12)

36. However, 'amenable to review' does not, from my perspective, necessarily amount to 'amenable to an *immediate* and *autonomous* review'. I do not think that the Remedies Directive requires Member States to provide for immediate review of every step of the award procedure, such as the admission of a candidate to tender. This follows from the wording, nature, evolution and purpose of the Remedies Directive.

37. First, it should be borne in mind that the relatively broad definition of standing in Article 1(3) of the Remedies Directive is preceded by an important qualification: 'Member States shall ensure that the review procedures are available, *under detailed rules which the Member States may establish*, at least to …' (13)

38. This wording, containing an explicit referral to the laws of the Member States, confirms the nature of the Remedies Directive as a tool of minimum harmonisation. The aim of the Remedies Directive is, as its title suggests, that of *coordinating* the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. It does not expressly define the scope of the remedies which Member States must establish for that purpose. (14) It only lays down the minimum conditions to be satisfied by the review procedures established in national legal systems so as to ensure compliance with the requirements of EU law on public contracts. (15)

39. Accordingly, Member States enjoy a wide discretion in the choice of the procedural guarantees mentioned in the Remedies Directive. (16) In the absence of EU rules governing the matter, it is for each Member State, in accordance with Article 1(3) of the Remedies Directive and the principle of procedural autonomy of the Member States, to lay down *detailed* administrative and judicial procedures which safeguard the rights which individuals derive from EU law. However, Member States must exercise their discretion in accordance with the principle of effectiveness. They cannot therefore render the exercise of rights derived from EU law by an individual practically impossible or excessively difficult. (17)

40. In particular, the Court has accepted that domestic law can make the review of public procurement acts subject to certain conditions, such as a time limit beyond which it is no longer possible to challenge decisions of the contracting authority, (18) or other kinds of procedural limitations, including concentration of proceedings. (19)

41. By the same token, Member States may also, while exercising their procedural autonomy, provide for rules preventing applicants from challenging, at any time, certain acts in public procurement procedures, since the Remedies Directive does not impose specific timings for the conduct of review. (20) Far from requiring *immediate* review of *any* type of act during the award procedure, the directive only states, in the second recital, that compliance with the relevant EU provisions must be ensured 'at a stage when infringements can be corrected'. That statement has been interpreted by the Court, in accordance with other linguistic versions, as meaning 'when infringements can *still* be rectified' or 'corrected'. (21)

42. Thus, if the second part of Article 1(3) of the Remedies Directive is considered in the light of its wording, broader context and the case-law of the Court, it does not appear to require immediate review of any potential illegality at any moment. Review can be carried out at a later stage, provided that the alleged illegality can still be rectified.

43. Second, the genesis and evolution of the directive indicate that the EU legislator did not intend to require immediate review for every single act adopted throughout the course of the award procedure.

44. In its original proposal, the Commission drafted Article 1(1) in the following way: 'Member States shall take the measures necessary to ensure, *at all stages of the contract award procedure*, effective administrative and/or judicial remedies …' (22) Following the Opinion of the European Parliament after its first reading, the Commission kept a similar formulation in its amended proposal. (23) It could be argued that if the original wording had been retained, it would indeed mean that any act adopted during the award procedure should be immediately challengeable. However, as the Council ultimately abandoned the requirement 'at all stages of the contract award procedure', it seems that the final legislative intent was rather the opposite.

45. In addition, this legislative intent has not changed over time, as illustrated by Directive 2007/66, which amended the Remedies Directive. Indeed, Directive 2007/66 did not single out any particular weaknesses in the review mechanisms offered by Member States *before* the award decision. Directive 2007/66 primarily provided for a minimum standstill period starting immediately after the decision to award the contract in order to avoid a rush to sign the contract and to ensure the effective review of the award decision itself.

46. Third, both in written observations as well as at the oral hearing, much was said about the purpose of the Remedies Directive. Would the overall purpose, or the *effet utile,* of the Remedies Directive be impaired if *any* single act adopted during the award procedure could (or could not) be immediately challenged?

47. The answer to that question naturally depends on what *the* purpose of the Remedies Directive is. It will not come as a surprise that the specific purpose of the Remedies Directive is to provide undertakings with effective remedies, so that, as stated in the recitals to the directive, they are not deterred from submitting tenders because of a lack of remedial protection, and to provide for stronger guarantees of transparency and non-discrimination in procurement procedures.

48. However, as in any other area of law, any procedure and procedural rights guaranteed thereby must remain linked to the substance and the overall purpose of the procedure. Procedural rights should not be allowed to mutate into a set of free-floating rights, cut loose from any discernible connection to the legal position of the concrete individual. Put in a metaphorical nutshell: procedure may be a good servant, but a bad master.

49. In my opinion, the Remedies Directive and the rights it sets out are not ends in themselves. They are a means to an end: an advised, fair, competitive, transparent and non-discriminatory decision on the award of a public contract, delivered, if possible, in a reasonably speedy manner. Restated in such general terms, it is apparent that in order to achieve that end, a balance must be struck between, on the one hand, access to effective judicial review and, on the other, conclusion of a contract within a reasonable time frame.

50. If, as suggested by the Commission, it ought to be possible to judicially challenge any act at any time, the speed of public procurement procedures (which arguably in a number of Member States is not currently among the fastest administrative procedures (24)) would hardly improve. Furthermore, the possibility of attacking any preparatory act individually would not actually lead to increased effective judicial protection

but rather congestion of the system. (25) As the Court itself made clear, the full implementation of the objective sought by the Remedies Directive would be undermined if candidates and tenderers were allowed to invoke, *at any stage of the award procedure*, infringements of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements. (26)

51. Lastly, when seeking a reasonable balance between the conflicting interests of unfettered access to judicial review, on the one hand, and judicial economy and overall effectiveness of the procedure, on the other, it might be useful to recall that neither EU law, nor Member States' legal systems in general, (27) require immediate review of preparatory acts.

52. As far as preparatory acts adopted by the European Union are concerned, whilst measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step. (28)

53. Equally, as far as Member States are concerned, the Court has held, in the context of domestic acts that have been taken during an award procedure, that national law should safeguard the possibility of raising pleas in law alleging a breach of EU law by a prior decision of the contracting authority in support of applications for review of other decisions of the contracting authority. (29)

54. In conclusion, I do not think that national rules that defer the judicial review of preparatory acts until a later stage should be per se considered incompatible with the Remedies Directive, subject to the condition that effective review of those acts is made available at a later stage and at the very least when the award decision — 'the most important decision of the contracting authority' (30) — is made.

3. A decision to admit a participant to the tendering procedure

55. If the deferral of review of certain types of preparatory acts is deemed compatible with the Remedies Directive, the next key question is determining what types of acts may be deferred.

56. In my opinion, the dividing line between acts which have to be immediately reviewable and those which do not, should be between acts which have *adverse legal effects* on undertakings and those that do not produce such effects. Immediate review must be provided for the former but does not necessarily have to be provided for the latter.

57. In *Stadt Halle*, the Court already distinguished between mere preparatory acts that are not amenable to review — such as preliminary studies of the market or acts which are purely preparatory and form part of the internal reflections of the contracting authority (31) — and decisions by the contracting authority that must be challengeable. It held in particular that the latter kinds of decisions are those that are *capable of producing legal effects*. The Court did not provide further details of that holding in the context of that case. (32)

58. Developing the approach of the Court in *Stadt Halle* further, I would suggest that, under the Remedies Directive, Member States are obliged to provide for immediate review of unlawful acts that adversely affect the legal position of a would-be tenderer in such a way that it makes it excessively difficult or impossible for that tenderer to meaningfully further participate in a tendering procedure, thus compromising the transparency of, and fair competition within, the tendering procedure.

59. That would notably be the case when an undertaking can no longer effectively take part in the competition or, if it still can, where the competition will be significantly distorted as a result of the disputed act. (33) In *Grossmann Air Service*, the Court held that a person should immediately seek review of an allegedly discriminatory decision of the contracting authority determining the specifications of an invitation to tender in so far as it effectively disqualifies him from participating in the award procedure. Making a person wait until the notification of the decision awarding the contract before being able to challenge the legality of the specifications was found not to be in keeping with the objectives of speed and effectiveness of the Remedies Directive. Such a delay in the commencement of review procedures was held to impair the effective implementation of the directives on the award of public contracts. (34)

60. When specifically applied to the decision to admit a candidate to submit a bid, it appears that such a decision does not adversely affect the legal situation of the other candidates, especially in an open procedure

where competition must be as broad as possible.

61. In this regard, adverse *legal* effects that have immediate repercussions on the legal position of an undertaking are to be distinguished from mere *factual* implications for an undertaking partaking in a tender. I readily acknowledge that the decision to admit another competitor to an open competition may have some factual repercussions on the position of other competitors. They might be obliged to react in some ways and possibly to adapt their strategy. But, unless all public procurement rules are construed as maxims of objective, abstract legality, that may be enforced by any would-be competitor as their subjective right, the decision to admit a candidate does not (yet) adversely affect their legal position.

62. Finally, the deferral of the review of a decision to admit a candidate finds further support in the fact that the distinction between selection criteria and award criteria seems to be gradually vanishing. In open procedures, the new public procurement directives explicitly allow the examination of the tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria. (35) Also, certain elements that are usually part of the selection procedure of candidates, such as the organisation, qualification and experience of staff, can now be assessed at the award stage. (36)

63. It would therefore go also against the more recent approach of the EU legislator to hold that autonomous review of the decision to admit a candidate, separate from the review of the decision to award a contract, should follow from the existence of a separate, autonomous step in the award procedure if the two steps are actually getting closer. (37)

64. For these reasons, I am of the opinion that the Remedies Directive does not oblige a Member State to provide for immediate and autonomous review of a decision to admit another competitor to an open public procurement procedure. However, the Member State's rules must guarantee that a plea of illegality relating to that decision can be made in support of an action against the final decision awarding the contract taken on the basis of prior decisions to admit candidates.

65. As for Section 310(2) of the Spanish Law on Public Procurement, I note that it makes a distinction between two types of preparatory acts adopted in tendering procedures: (i) those that decide, directly or indirectly, the award of the contract, make it impossible to continue the procedure or to put up a defence, or cause irreparable harm to legitimate rights or interests; and (ii) others that do not fulfil any of those three criteria. The former may be subject to immediate review through the special application in procurement proceedings. The latter may not.

66. It is not up to the Court to interpret national law in order to determine whether the entirety of Section 310(2) and all potential preparatory acts that might fall within or beyond that provision are compatible with EU law. The answer suggested in this Opinion relates only to one type of preparatory act: a decision to admit a competitor to an open public procurement procedure. As for other preparatory acts that can be adopted under Spanish law, it is a matter for the national court to decide *in concreto* whether Section 310(2) hinders the immediate review of preparatory acts that produce adverse legal effects on undertakings.

67. Therefore, I am of the opinion that Article 1(1), Article 1(3) and Article 2(1) of the Remedies Directive do not preclude national legislation, such as that at issue in the main proceedings, provided that:

– the national legislation does not hinder immediate review of preparatory acts that produce adverse legal effects on undertakings;

– a plea of illegality of preparatory acts that do not produce adverse legal effects on undertakings, such as a decision to admit a candidate to a tendering procedure, can be made in support of an action against the final decision awarding the contract taken on the basis of those preparatory acts.

B – *Question 2*

68. In view of my suggested answer to the first question posed by the referring court, there is, at least according to the express formulation of the questions by the referring court, no need to provide an answer to the second question. However, for the sake of completeness and in order to fully assist the Court, my concise answer to the second question, concerning the direct effect of Articles 1(1) and 2(1)(a) and (b) of the Remedies Directive, would be as follows:

69. In *Koppensteiner*, the Court has already held that Articles 1(1) and 2(1)(b) of the Remedies Directive are unconditional and sufficiently clear as to create rights for individuals on which they may rely. (38) Thus, those provisions undoubtedly have direct effect.

70. In view of the clear and precise wording of Article 2(1)(a), as well as its functional proximity to Article 2(1)(b), I see no reason why the same conclusion should also not apply to Article 2(1)(a).

71. Thus, in my view, all three provisions, namely Articles 1(1) and 2(1)(a) and (b) of the Remedies Directive, have direct effect.

C – *A post scriptum*

72. The Remedies Directive requires effective review, but not necessarily uniform review. A balance needs to be struck between unfettered access to courts during the award procedure and procedural and judicial economy in order to guarantee *effective* judicial protection. What ultimately matters is effective and swift review of the award decision itself, in the course of which all prior steps may be called into question to ensure that any illegality can be fixed in due time.

73. The Remedies Directive thus sets a minimal threshold. For the reasons set out above, I do not think that the obligation to make any decision of the contracting authority subject to immediate and autonomous review is necessary to meet that minimum standard.

74. Indeed a number of models are conceivable which would comply with the minimum standards laid down by the Remedies Directive: a Member State may choose to concentrate review as much as possible to one point of time, in one final decision. Conversely, another Member State may decide to allow for review of every individual step of the procedure, but then exclude those issues already dealt with previously from the potential review of the final decision. There is thus some flexibility, providing that there is effective and swift judicial review of all of the steps of the award procedure at some stage.

75. At the same time, the fact that Member States are not obliged to do something under a minimal harmonisation threshold in no way prevents them from doing so. In particular, Member States are certainly not precluded from providing for more extensive remedies, including autonomous and immediate judicial review of preparatory acts that may be adopted in the course of an award procedure, should they choose to do so.

V – **Conclusion**

76. In the light of the foregoing considerations, I recommend to the Court to answer Question 1 referred to it by the Tribunal Superior de Justicia de Andalucía (High Court of Justice of Andalusia, Spain) as follows:

> Article 1(1), Article 1(3) and Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts do not preclude national legislation, such as that at issue in the main proceedings, provided that:

– the national legislation does not hinder immediate review of preparatory acts that produce adverse legal effects on undertakings;

– a plea of illegality of preparatory acts that do not produce adverse legal effects on undertakings, such as a decision to admit a candidate to a tendering procedure, can be made in support of an action against the final decision awarding the contract taken on the basis of those preparatory acts.

---

1 – Original language: English.

---

2 – Council Directive of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

3 – Directive of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665 and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

4 – OJ 2004 L 134, p. 114.

5 – OJ 1992 L 76, p. 14.

6 – Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

7 – See judgment of 15 May 2003, *Commission* v *Spain* (C-214/00, EU:C:2003:276).

8 – Judgment of 15 May 2003, *Commission* v *Spain* (C-214/00, EU:C:2003:276, paragraph 80).

9 – See judgment of 11 September 2014, *Fastweb* (C-19/13, EU:C:2014:2194, paragraph 63); and order of 23 April 2015, *Commission* v *Vanbreda Risk & Benefits* (C-35/15 P(R), EU:C:2015:275, paragraphs 31 and 34).

10 – See judgment of 28 October 1999, *Alcatel Austria and Others* (C-81/98, EU:C:1999:534, paragraph 35).

11 – See judgment of 18 June 2002, *HI* (C-92/00, EU:C:2002:379, paragraph 61).

12 – See judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 34).

13 – Emphasis added.

14 – See judgment of 18 June 2002, *HI* (C-92/00, EU:C:2002:379, paragraphs 58 to 59).

15 – See judgments of 27 February 2003, *Santex* (C-327/00, EU:C:2003:109, paragraph 47), and of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 46).

16 – See judgments of 18 June 2002, *HI* (C-92/00, EU:C:2002:379, paragraph 62); of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751, paragraph 57); and of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 44).

17 – See judgment of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 46 and the case-law cited).

18 – See judgment of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746, paragraph 79).

19 – See judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751).

---

20 – See judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 38).

---

21 – See judgments of 28 October 1999, *Alcatel Austria and Others* (C-81/98, EU:C:1999:534, paragraph 33); of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746, paragraph 74); and of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 39). Emphasis added.

---

22 – COM(87) 134 final (OJ 1987 C 230, p. 6). Emphasis added.

---

23 – COM(88) 733 final (OJ 1989 C 15, p. 8): ‘Member States shall take the measures necessary to ensure, *at all stages of the procedure for the award of public contracts*, that any contractor … taking part in a procedure for the award of a public … contract, or any third person entitled to tender for such an award, can seek effective and rapid administrative and judicial remedies in respect of any decision by a contracting authority … which infringes Community or national rules on public procurement’ (emphasis added).

---

24 – For a general comparative overview, see, for example, the individual country reports and the general report in Neergaard, U., et al. (eds), *Public Procurement Law: Limitations, Opportunities and Paradoxes: The XXVI FIDE Congress in Copenhagen 2014, Congress Publications Vol. 3*, DJØF Publishing, Copenhagen, 2014; also, Delvolvé, P., (ed.), ‘Le contentieux des contrats publics en Europe’, *Revue française de droit administratif*, 2011, No 1, p. 1 et seq.

---

25 – Thus not really limiting propositions that complex procedures ‘make building a bungalow in the 20th century slower than building a cathedral in the 12th century’ to the realm of political satire (‘Yes Minister’, Series 1, Episode 1: Open Government, first aired on BBC on 25 February 1980).

---

26 – See judgment of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746, paragraph 75).

---

27 – See, for instance, for France: Guyomar, M., and Seiller, B., *Contentieux administratif*, 3rd ed., Dalloz, 2014, p. 295 et seq.; for Germany: Maurer, H., *Allgemeines Verwaltungsrecht*, 12th ed., Verlag C.H. Beck, Munich, 1999, p. 181 et seq. and p. 480 et seq.; for Italy: Gallo, C.E., *Manuale di Giusitizia Amministrativa*, 6th ed., G. Giappichelli Editore, Turin, 2012, p. 143 et seq.; for Spain, García de Enterría, E., and Fernández, T.R., *Curso de Derecho Administrativo I*, 15th ed., Civitas, 2011, p. 595 et seq.

---

28 – See judgments of 11 November 1981, *IBM* v *Commission* (60/81, EU:C:1981:264, paragraph 12), and of 18 March 1997, *Guérin automobiles* v *Commission* (C-282/95 P, EU:C:1997:159, paragraph 34).

---

29 – See judgment of 27 February 2003, *Santex* (C-327/00, EU:C:2003:109, paragraphs 64 to 65).

---

30 – See judgment of 28 October 1999, *Alcatel Austria and Others* (C-81/98, EU:C:1999:534, paragraph 38). Also, pursuant to recital 13 of Directive 2007/66, an illegal direct award of contracts amounts to the ‘most serious breach of Community law in the field of public procurement’.

---

31 – See judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 35).

32 – See judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 34).

33 – See judgment of 12 February 2004, *Grossmann Air Service* (C-230/02, EU:C:2004:93).

34 – See judgment of 12 February 2004, *Grossmann Air Service* (C-230/02, EU:C:2004:93, paragraphs 37 to 38).

35 – See notably Article 56(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2014/18/EC (OJ 2014 L 94, p. 65). See also Article 76(7) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2014/17/EC (OJ 2014 L 94, p. 243).

36 – See Article 67(2)(b) of Directive 2014/24 and Article 82(2)(b) of Directive 2014/25.

37 – In its explanatory memorandum on the draft directive, the Commission stated that ‘the distinction between selection of tenderers and award of the contract which is often a source of errors and misunderstandings has been made flexible’ (Proposal for a directive of the European Parliament and of the Council on public procurement, COM(2011) 896 final, p. 9).

38 – See judgment of 2 June 2005, *Koppensteiner* (C-15/04, EU:C:2005:345, paragraphs 38 to 39).

JUDGMENT OF THE COURT (Eighth Chamber)

21 December 2016 (*)

(Reference for a preliminary ruling — Public procurement — Directive 89/665/EEC — Review procedures in the area of public procurement — Article 1(3) — Legal interest in bringing proceedings — Article 2a(2) — Concept of a 'tenderer concerned' — Right of a tenderer definitively excluded by the contracting authority to seek review of a subsequent award decision)

In Case C-355/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria), made by decision of 20 May 2015, received at the Court on 13 July 2015, in the proceedings

Bietergemeinschaft Technische Gebäudebetreuung GesmbH und Caverion Österreich GmbH

v

Universität für Bodenkultur Wien,

VAMED Management und Service GmbH & Co. KG in Wien,

THE COURT (Eighth Chamber),

composed of M. Vilaras, President of the Chamber, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Bietergemeinschaft Technische Gebäudebetreuung GesmbH und Caverion Österreich GmbH, by J. Schramm, Rechtsanwalt,

– Universität für Bodenkultur Wien, by O. Sturm, Rechtsanwalt,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Varone, avvocato dello Stato,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by B.-R. Killmann and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative

provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 89/665’).

2 The request has been made in proceedings between Bietergemeinschaft Technische Gebäudebetreuung GesmbH und Caverion Österreich GmbH (‘the consortium’), and Universität für Bodenkultur Wien (University of Natural Resources and Life Sciences, Vienna, Austria, ‘the BOKU Wien’) concerning the latter’s award of a framework contract for public services to VAMED Management und Service GmbH & Co. KG in Wien (‘Vamed’).

Legal context

EU law

Directive 89/665

3 Recitals 3, 4, 6, 8, 18, 25 and 27 of Directive 2007/66, the directive amending the original Directive 89/665, states:

‘(3) Consultations of the interested parties and the case-law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms established [in particular by Directive 89/665] do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. …

…

(4) The weaknesses which were noted include in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question. This sometimes results in contracting authorities and contracting entities who wish to make irreversible the consequences of the disputed award decision proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those tenderers who have not yet been definitively excluded, it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended …

…

(6) The standstill period should give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure. When the award decision is notified to them, the tenderers concerned should be given the relevant information which is essential for them to seek effective review. …

…

(8) ... [A] standstill period is not necessary if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned. In this case there is no other person remaining in the tendering procedure with an interest in receiving the notification and in benefiting from a standstill period to allow for effective review.

…

(18) In order to prevent serious infringements of the standstill obligation and automatic suspension, which are prerequisites for effective review, effective sanctions should apply. Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle if they are combined with infringements [in particular of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and

public service contracts (OJ 2004 L 134, p. 114, and corrigendum, OJ 2004 L 351, p. 44) to the extent that those infringements have affected the chances of the tenderer applying for review to obtain the contract.

…

(25) … The need to ensure over time the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a reasonable minimum period of limitation on reviews seeking to establish that the contract is ineffective.

…

(27) ... For reasons of legal certainty the enforceability of the ineffectiveness of a contract is limited to a certain period. The effectiveness of these time limits should be respected.'

4 Article 1 of Directive 89/665 is worded as follows:

'1. This Directive applies to contracts referred to in Directive [2004/18], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

...'

5 Directive 89/665 provides for several cases in which, after the decision awarding the contract has been adopted, the contracting authority is temporarily prohibited from concluding a contract with the successful tenderer. Such a prohibition stems in particular from the automatic suspensive effect attaching to any applications for review lodged beforehand with the contracting authority, in accordance with Article 1(5) of that directive, and to applications for review to a first-instance review body, in accordance with Article 2(3) of that directive. Those prohibitions supplement the obligation imposed on the contracting authority, under Article 2a of that directive, to observe a standstill period between the adoption of the decision awarding the contact and the conclusion of the contract with the successful tenderer. Article 2a provides:

'1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive [2004/18] before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

…

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

– a summary of the relevant reasons …, and

– a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.'

6 Under the first paragraph of Article 2b of Directive 89/665:

'Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

…

(b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;

…'

7 Article 2d(1) of that directive provides:

'Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

…

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive [2004/18], if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

…'

Directive 2004/18

8 In accordance with Article 7(b) of Directive 2004/18, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 17) ('Directive 2004/18'), that directive is to apply to public service contracts awarded by contracting authorities other than Central Government authorities, which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than EUR 200 000.

9 Article 44(1) of that directive provides:

'Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.'

Austrian law

10 Paragraph 331 of the Bundesvergabegesetz 2006 (the 2006 Federal Law on public procurement, BGBl. I, 17/2006), in the version applicable to the main proceedings, appears in the part of that law relating to declaratory procedures. Paragraph 331(1) provides:

‘An undertaking which had an interest in the conclusion of a contract falling within the scope of this Federal Law may, in so far as it has suffered harm or is at risk of suffering harm in consequence of the alleged infringement, apply for a declaration that …’

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 In October 2012, BOKU Wien issued a call for tenders in the form of a negotiated procedure with prior publication of a contract notice, with a view to concluding with a single successful tenderer a framework agreement for the technical management, maintenance, repair and servicing of its buildings and laboratory facilities.

12 Only the consortium and Vamed submitted a tender within the deadline set.

13 By a decision of 20 December 2013, notified to the consortium, the latter was excluded from the tendering procedure because the original of the proof of a bank guarantee had not been submitted in good time.

14 The application brought by the consortium against that decision was dismissed by a judgment of the Bundesverwaltungsgericht (Federal Administrative Court, Austria) of 31 January 2014. The extraordinary appeal on a point of law against that judgment was also dismissed by an order of the Verwaltungsgerichtshof (Administrative Court, Austria) of 25 May 2014.

15 By an award decision of 14 March 2014, notified to Vamed, the BOKU Wien accepted its bid. The framework contract was subsequently concluded and Vamed began to perform the services concerned.

16 The consortium brought an action against that award decision before the Bundesverwaltungsgericht (Federal Administrative Court). That action was dismissed by a judgment of 8 August 2014 on the ground that the rights of a tenderer whose bid has been properly excluded cannot be infringed by illegalities relating to the procedure followed to select another bid for the purposes of awarding the contract.

17 In the appeal on a point of law brought against that judgment before the referring court, the consortium submits that the situation at issue in the main proceedings and the case giving rise to the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), are similar. In both cases, only two tenderers were present and, although the consortium was indeed excluded, it submits that the Vamed’s bid ought to have been rejected because the business management calculations at key points in its bid are neither explicable nor comprehensible. Consequently, as in the abovementioned judgment, there are two tenderers both of which have an equivalent economic interest in the other tenderer’s bid being excluded and could assert that interest even if their own bid must be rejected.

18 The referring court states that, in accordance with Paragraph 331 of the 2006 Federal Law on Public Procurement, in order for an application for a declaration that a public procurement decision is unlawful to be admissible, the economic operator bringing proceedings must have had an interest in the conclusion of the contract concerned and the unlawfulness must have harmed or risks harming it.

19 Examining the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), the referring court observes that, in the context of that judgment, it was not the contracting authority which found, in the procurement procedure concerned, that the bid of the tenderer bringing the legal proceedings was unlawful, but that unlawful nature came to light in the legal proceedings brought by that tenderer with a view to challenging the decision to award the contract to another tenderer. The referring court notes that, in paragraph 33 of that judgment, the Court of Justice held that, where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings and on identical grounds, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other. It follows from this that, in that situation, the unsuccessful tenderer whose bid has been rejected

enjoys judicial protection, although that bid does not comply with all the technical rules for the contract at issue.

20 The referring court is uncertain whether the principles laid down in the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), also apply when, after two tenderers have initially submitted bids, the tenderer which intends to challenge the award decision has already been definitively excluded by the contracting authority itself. Its doubts are based on various factors which it identifies in Directive 89/665, chief among which is the concept of the 'tenderer concerned' within the meaning of Article 2a(2) of that directive.

21 However, although it appears to the referring court that that directive does not protect definitively excluded tenderers against the illegalities which may vitiate the decision awarding the contract after they have been definitively excluded, it asks whether the principle of equal treatment applicable to tenderers could nonetheless give grounds for granting such a definitively excluded tenderer a right to seek review of the award decision when it benefits the only other tenderer competing.

22 In addition, if the tenderer definitively excluded from the tender procedure still has a right to seek review of the award decision, the referring court explains, first, that the Bundesverwaltungsgericht (Federal Administrative Court) also took the view that there was no need to take into account the grounds for excluding Vamed's bid alleged by the consortium since they were not readily apparent from the case-file. However, such a position could be justified by the need for reviews to be carried out as rapidly as possible, referred to in Article 1(1) and (3) of Directive 89/665. Secondly, the referring court is unsure as to the significance, in the context of the right to effective judicial protection, of the fact that the grounds on which the two bids present should be rejected are the same or different.

23 In those circumstances the Verwaltungsgerichtshof (Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the light of the judgment of the Court of Justice of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), is Article 1(3) of Directive 89/665 … to be interpreted as meaning that a tenderer whose bid was definitively excluded by the contracting authority and who is therefore not a tenderer concerned within the meaning of Article 2a of Directive 89/665 may be refused access to a review of the award decision (decision on the conclusion of a framework agreement) and of the conclusion of the contract (including the award of damages required under Article 2(7) of the Directive), even where only two tenderers submitted bids and the bid submitted by the successful tenderer, to whom the contract was awarded, should, in the submission of the tenderer not concerned [who sought that review], also have been excluded?

(2) If the answer to Question 1 is in the negative, in the light of the … judgment of the Court of Justice of 4 July 2013 in *Fastweb* (C-100/12, EU:C:2013:448), is Article 1(3) of Directive 89/665 to be interpreted as meaning that the tenderer not concerned (within the meaning of Article 2a of the Directive) must be granted access to a review only:

(a) where it is apparent from the documents forming part of the review procedure that the successful tenderer's bid is not valid; or

(b) where the successful tenderer's bid is not valid on identical grounds?'

Consideration of the questions referred

24 First of all, it is to be noted that, in accordance with Article 1(1) of Directive 89/665, that directive applies only to reviews relating to public procurement procedures referred to in Directive 2004/18 not excluded from the scope of that directive by Articles 10 to 18 thereof.

25 Although the order for reference does not indicate the value of the framework contract at issue in the main proceedings in the light of the threshold for applying Directive 2004/18, set at EUR 200 000 for public service contracts awarded by contracting authorities other than Central Government authorities in accordance with Article 7(b) of that directive, it is apparent from various pieces of information in the

file for the national proceedings that that threshold has been largely exceeded as regards that framework contract, which must, however, be verified by the referring court.

26 Since the framework contract does not indeed by its nature fall within the exclusions laid down in Articles 10 to 18 of Directive 2004/18, there is nothing to preclude the Court from answering the questions raised.

The first question

27 By its first question, the referring court asks, in essence, whether Article 1(3) of Directive 89/665 must, in the light of the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), be interpreted as precluding a tenderer who has been excluded from a public procurement procedure by a decision of the contracting authority which has become final, and who is therefore not a tenderer concerned within the meaning of Article 2a of that directive, from being refused access to a review of the decision awarding the public contract concerned and of the conclusion of the contract where only that unsuccessful tenderer and the successful tenderer submitted bids and the unsuccessful tenderer maintains that the successful tenderer's bid should also have been rejected.

28 In that regard, it should be noted that, in accordance with the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665, in order for the review of decisions taken by contracting authorities to be regarded as effective, review procedures must be available at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement (judgment of 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 23).

29 In paragraphs 26 and 27 of that judgment, the Court emphasised that the judgment of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), gave concrete expression to the requirements of the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 in a situation in which, following a public procurement procedure, two tenderers bring an action for review, each seeking the exclusion of the other. In such a situation, both of the tenderers have an interest in obtaining a particular contract.

30 However, the situation at issue in the main proceedings is very clearly distinguishable from the situations at issue in the two cases giving rise to the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), and 5 April 2016, *PFE* (C-689/13, EU:C:2016:199).

31 First, the bids of the tenderers concerned in the cases giving rise to those two judgments had not been the subject of an exclusion decision of the contracting authority, unlike the bid submitted by the consortium in the main proceedings in the present case.

32 Secondly, it was in the course of the same, single set of review proceedings relating to the award decision that, in both cases, each tenderer challenged the validity of the other tenderer's bid, each competitor having a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid (see, to that effect, judgments of 4 July 2013, *Fastweb*, C-100/12, EU:C:2013:448, paragraph 33, and 5 April 2016, *PFE*, C-689/13, EU:C:2016:199, paragraph 24). In the main proceedings in the present case, by contrast, the consortium brought an action, first, against the exclusion decision adopted in respect of it and, secondly, against the award decision, and it is in the course of that second set of proceedings that it contends that the successful tenderer's bid is unlawful.

33 It follows that the principle of case-law stemming from the judgments of 4 July 2013, *Fastweb* (C-100/12, EU:C:2013:448), and 5 April 2016, *PFE* (C-689/13, EU:C:2016:199), does not apply to the procedure and litigation at issue in the main proceedings.

34 It is also to be noted that, as is apparent from Article 1(3) and Article 2a of Directive 89/665, that directive ensures effective review of unlawful decisions adopted in the context of a public procurement procedure, by enabling any excluded tenderer to challenge not only the exclusion decision, but also, as long as that challenge has not been resolved, the subsequent decisions which would harm it if its exclusion were annulled.

35 In those circumstances, Article 1(3) of that directive cannot be interpreted as precluding a tenderer such as the consortium from being refused access to the review of the award decision, provided that it must be considered a definitively excluded tenderer within the meaning of the second subparagraph of Article 2a(2) of that directive.

36 In the light of all of the foregoing considerations, the answer to the question referred is that Article 1(3) of Directive 89/665 must be interpreted as not precluding a tenderer who has been excluded from a public procurement procedure by a decision of the contracting authority which has become final from being refused access to a review of the decision awarding the public contract concerned and of the conclusion of the contract where only that unsuccessful tenderer and the successful tenderer submitted bids and the unsuccessful tenderer maintains that the successful tenderer's bid should also have been rejected.

The second question

37 In the light of the answer to the first question, there is no need to answer the second question.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted as not precluding a tenderer who has been excluded from a public procurement procedure by a decision of the contracting authority which has become final from being refused access to a review of the decision awarding the public contract concerned and of the conclusion of the contract where only that unsuccessful tenderer and the successful tenderer submitted bids and the unsuccessful tenderer maintains that the successful tenderer's bid should also have been rejected.

[Signatures]

---

* Language of the case: German.

JUDGMENT OF THE COURT (Fifth Chamber)

5 April 2017 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/17/EC — Contract not reaching the threshold laid down by that directive — Articles 49 and 56 TFEU — Limit on reliance on subcontracting — Submission of a common tender — Professional capacities of the tenderers — Changes to the tender specifications)

In Case C-298/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania), made by decision of 12 June 2015, received at the Court on 18 June 2015, in the proceedings

'Borta' UAB

v

Klaipėdos valstybinio jūrų uosto direkcija VĮ,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President de la Cour, A. Borg Barthet, E. Levits and F. Biltgen, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 1 June 2016, after considering the observations submitted on behalf of:

– 'Borta' UAB, by V. Kilišauskaitė, advokatė,

– Klaipėdos valstybinio jūrų uosto direkcija VĮ, by N. Šilaika, advokatas, and by A. Vaitkus, A. Kamarauskas, I. Vaičiulis and L. Rudys,

– the Lithuanian Government, by D. Kriaučiūnas and by A. Svinkūnaitė and R. Butvydytė, acting as Agents,

– the European Commission, by J. Jokubauskaitė and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 December 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), as amended by Commission Regulation (EU) No 1336/2013 of 13 December 2013 (OJ 2013 L 335, p. 17) ('Directive 2004/17').

2 The reference has been made in proceedings between ‘Borta’ UAB (‘Borta’) and Klaipėdos valstybinio jūrų uosto direkcija VĮ (Klaipėda State Seaport Authority, Lithuania) (‘the port authority’) concerning the legality of the tender specifications for a public works contract concerning the reconstruction of the quays of that port.

Legal context

EU law

3 Recital 9 of Directive 2004/17 states:

‘(9) In order to guarantee the opening up to competition of public procurement contracts awarded by entities operating in the water, energy, transport and postal services sectors, it is advisable to draw up provisions for Community coordination of contracts above a certain value. …

For public contracts the value of which is lower than that triggering the application of provisions of Community coordination, it is advisable to recall the case-law developed by the Court of Justice according to which the rules and principles of the Treaties … apply.’

4 Article 16 of that directive provides:

‘… [T]his Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:

…

(b) EUR 5 186 000 in the case of works contracts.’

5 Article 37 of that directive is worded as follows:

‘In the contract documents, the contracting entity may ask, or may be required by a Member State to ask, the tenderer to indicate in his tender any share of the contract he intends to subcontract to third parties and any proposed subcontractors. This indication shall be without prejudice to the question of the principal economic operator’s liability.’

6 Article 38 of Directive 2004/17 provides that:

‘Contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the notice used as a means of calling for competition or in the specifications. …’

7 Article 54 of that directive states:

‘1. Contracting entities which establish selection criteria in an open procedure shall do so in accordance with objective rules and criteria which are available to interested economic operators.

…

6. Where the criteria referred to in [paragraph 1] include requirements relating to the technical and/or professional abilities of the economic operator, the latter may where necessary and for a particular contract rely on the abilities of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that for the performance of the contract those resources will be available to it, for example by delivering an undertaking by those entities to make the necessary resources available to the economic operator.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the abilities of participants in the group or of other entities.’

8 Annex XVI of that directive, entitled ‘Information to be included in the contract award notice’, provides, in Part I thereof:

‘I. Information for publication in the *Official Journal of the European Union*:

…

10. State, where appropriate, whether the contract has been, or may be, subcontracted.

…

13. Optional information:

– value and share of the contract which has been or may be subcontracted to third parties,

…’

Lithuanian law

Lithuanian Law on public procurement

9 Article 24(5) of Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on Public Procurement) (‘the Law on public procurement’) provides:

‘The procurement documents may require that the candidate or tenderer specify in its tender any proposed subcontractors … and may require the candidate or tenderer to specify the share of the contract that it is intended to subcontract to those subcontractors … However, where subcontractors are invited to carry out a works contract, the main works, as specified by the contracting authority, must be performed by the tenderer. …’

10 Under Article 27(4) of the Law on public procurement:

‘The contracting authority may, of its own motion, at any time prior to the deadline for the submission of tenders, clarify the procurement documents.’

11 Article 32(3) of the Law on public procurement provides that, where necessary in a specific tendering context, a tenderer may rely on the capacities of other economic operators, irrespective of the nature of its legal relationship with them. In this case, the tenderer must prove to the contracting authority that those resources will be available to it to carry out the contract. A group of economic operators may, under the same conditions, rely on the capacities of members of the group or on those of other economic operators.

The tender specifications at issue in the main proceedings

12 Under Clause 3.2.1 of the tender specifications at issue in the main proceedings, concerning the requirements relating to the professional capacities of tenderers:

‘Tenderer’s average annual volume of work relating to the main construction and installation work (seaport quay construction or reconstruction) over the last five years or over the period since the date of registration of the tenderer (in the case where the tenderer has operated for less than five years) shall correspond to a value of at least LTL 5 000 000 (EUR 1 448 100.09), excluding VAT.’

13 Clause 4.2.3 of the tender specifications regulating the presentation of several subcontractors of a common tender under a joint-activity agreement, provides:

‘… the commitments of the partners operating under a joint-activity agreement in relation to the implementation of the contract [must be specified], and [must] state that this division of the volume of services applies only to the partners and creates no obligations for the client (the port authority)’.

14 Clause 4.3 of the tender specifications in the version resulting from its successive amendments, provides:

‘Where the bid is submitted by tenderers operating under a joint-activity agreement, the requirements of [paragraph 3.2.1] must be satisfied by at least one partner engaged in the joint-activities or by all of the partners operating under the joint-activity agreement taken together. … A partner’s contribution (volume of work completed) under the joint-activity agreement must be proportionate to its contribution to satisfying the requirement under paragraph 3.2.1 … and to the volume of work that will actually be carried out by it in the event of a successful bid (contract implementation). … Pursuant to Article 24(5) of [the Law on public procurement], the Seaport Authority indicates that the main works consist of Item 1.2.8 in the Construction Section of the Bill of Quantities and, therefore, this work must be carried out by the tenderer itself.’

15 Clause 4.4 of the tender specifications provides that if the tenderer wishes to rely on subcontractors it must indicate the volume of work that the latter are to carry out, which is to be limited to works defined as ‘subsidiary’, adding that the experience of those subcontractors is not taken into account for the verification of the requirements laid down in Clause 3.2.1.

16 Clause 7.2 of the tender specifications allows the port authority to clarify, on its own initiative, the procurement documents before the expiry of the time limit for submitting tenders.

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 On 2 April 2014, the port authority published a call for tenders under an open procedure for the award of a public works contract for the reconstruction of the quays of the national seaport of Klaipėda (Lithuania). That call for tenders was also published in the *Official Journal of the European Union* on 5 April 2014. Borta participated in the award procedure for that contract.

18 In its initial version, the tender specifications at issue in the main proceedings reproduced, in Clause 4.3 thereof, the provisions of Article 24(5) of the Law on public procurement concerning subcontracting work and also provided that where several tenderers submit a common tender under a joint-activity agreement, pursuant to Clause 4.2.3 thereof (‘the common tender’), the requirements applicable regarding professional capacities laid down in Clause 3.2.1 thereof were to be satisfied either by all the subcontractors considered together, or by one of them.

19 Following two successive revisions, one carried out on the initiative of the port authority and the other after complaints made by Borta, Clause 4.3 adds to the requirements that, where such a common tender is submitted, the contribution of each tenderer, in order to satisfy the abovementioned criteria, must correspond proportionally to the share of the work that it undertakes to perform under the joint-activity agreement and that it will actually perform if the contract is awarded.

20 On account of those changes, published in the *Official Journal of the European Union*, the Seaport Authority extended the time limit for submitting tenders.

21 As the port authority dismissed the further complaints made by Borta with regard to the most recent changes, that company brought an action before the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania) seeking annulment of the abovementioned Clause 4.3, challenging the legality of its content and the possibilty for the authority to change it. As the action was dismissed by that court by decision of 18 August 2014, which was confirmed on appeal by an order of the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania) of 13 November 2014, Borta brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania).

22 In order to decide the dispute before it, that court asks about the compatibility with EU law, and with Directive 2004/17 in particular, of Article 24(5) of the Law on public procurement, to which Clause 4.3 of the tender specifications at issue in the main proceedings refers, in so far as that article prohibits reliance on subcontracting activities for works defined by the contracting authority as ‘main works’. In the light of that directive, it also expresses doubts as to the legality of Clause 4.3, as amended, where a common tender is submitted by a number of tenderers, as that clause requires, in order to satisfy the

applicable requirements regarding professional capacities, that the contribution of each tenderer must correspond proportionally to the share of the works it will actually perform if the contract is awarded. In that context, the referring court also asks whether the port authority was able to change the first version of that clause after the publication of the contract notice without infringing that directive and, in particular, the principle of equal treatment and the obligation of transparency which derives from it.

23 That court considers that the Court of Justice has jurisdiction to give a preliminary ruling on those questions. It is true that the value of the contract at issue in the main proceedings is less than the threshold of EUR 5 186 000 laid down in Article 16(b) of Directive 2004/17, below which the latter is not applicable. However, first, that contract has a certain cross border interest, as evidenced by the participation in the award procedure of two foreign companies, which include the successful tenderer, and the publication of the call for tenders in the *Official Journal of the European Union*. Second, in any event, the port authority intended to make the call for tenders subject to the rules applicable to public procurement referred to in Directive 2004/17, and the Lithuanian legislature chose to extend certain rules laid down by that directive to contracts with a value less than the abovementioned threshold.

24 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must the provisions of Articles 37, 38, 53 and 54 of Directive 2004/17 be understood and interpreted, whether together or separately (but without limitation to those provisions), as meaning that:

(a) they preclude a national rule under which, in the case where subcontractors are invited to perform a works contract, the main work, as identified by the contracting authority, must be carried out by the successful tenderer?

(b) they preclude a scheme, laid down in the procurement documents, for combining the professional capacities of successful tenderers, such as that specified by the contracting authority in the contested tender specification, which requires that the share representing the professional capacity of the relevant economic operator (a joint-activity partner) must correspond to the share of the specific work which it will actually carry out under the public procurement contract?

(2) Must the provisions of Articles 10, 46 and 47 of Directive 2004/17 be understood and interpreted, whether together or separately (but without limitation to those provisions), as meaning that:

(a) the principles of equal treatment of tenderers and transparency are not infringed in the case where the contracting authority:

– provides beforehand, in the procurement documents, a general option of combining the professional capacities of tenderers, but does not set out the scheme for implementing this option;

– subsequently, in the course of the public procurement procedure, it defines in greater detail the requirements governing the appraisal of the qualifications of tenderers by laying down certain restrictions on combining the professional capacities of tenderers;

– because of this more detailed definition of the content of the qualification requirements, it extends the deadline for tender submissions and announces this extension in the *Official Journal* [*of the European Union*]?

(b) a restriction on the combining of tenderers’ capacities does not have to be clearly indicated in advance if the specific character of the contracting authority’s activities and the special features of the public procurement contract make such a restriction foreseeable and justifiable?’

Consideration of the questions referred

Preliminary observations

25 In its written observations and at the hearing, the Lithuanian Government submitted that, in order to answer the questions referred, it is appropriate to take into account Directive 2004/17 and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), as the Lithuanian legislature chose to include certain provisions of Directive 2014/25 into its domestic law even before its adoption, in particular Article 79(3) thereof relating to subcontracting activities.

26 The European Commission takes the opposite view, arguing that there is no need to interpret Directive 2004/17 or Directive 2014/25, but that it is appropriate to answer the questions referred in the light of the fundamental rules and general principles of the FEU Treaty.

27 First, as regards Directive 2014/25, it must be recalled, as a preliminary point, that according to settled case-law the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, to that effect, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83 and the case-law cited).

28 In the present case, the call for tenders at issue in the main proceedings was published on 2 April 2014, whereas Directive 2014/25 entered into force on 17 April 2014 and repealed Directive 2004/17 with effect from 18 April 2016, the date on which its period for transposition expired. Furthermore, although the Lithuanian Government claims to have incorporated into its national law certain provisions of Directive 2014/25 even before its adoption, that government also acknowledges in its written submissions that that directive had not yet been transposed at the material time.

29 In those circumstances, Directive 2014/25 cannot be taken into consideration in order to answer the questions referred.

30 Second, as regards Directive 2004/17, it is apparent from the decision to refer that the contract at issue in the main proceedings has a value which is less than the threshold of EUR 5 186 000 laid down in Article 16(b) of Directive 2004/17. Therefore, that directive is not applicable to the contract (see, by analogy, judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 15 and the case-law cited).

31 The referring court considers nonetheless that the Court of Justice has jurisdiction to give a ruling on the questions referred and that the interpretation of the provisions of that directive is justified for the reasons set out in paragraph 23 of the present judgment.

32 At the hearing, the Lithuanian Government, which shares the referring court's view, stated that under Lithuanian law the contracting entity can choose to make the award procedure for a contract with a value below the threshold mentioned above subject either to the rules laid down by Directive 2004/17 or to the simplified procedure laid down by national law for that type of contract. If, as in the present case, that entity chooses the first option, it is required, according to the Lithuanian Government, to apply all the provisions of that directive.

33 In that connection, it must be recalled that where, in regulating situations outside the scope of the EU measure concerned, national legislation seeks to adopt the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from that measure should be interpreted uniformly (see, to that effect, judgments of 18 October 2012, *Nolan*, C-583/10, EU:C:2012:638, paragraph 46, and of 7 November 2013, *Romeo*, C-313/12, EU:C:2013:718, paragraph 22).

34 Thus, an interpretation by the Court of provisions of EU law in situations outside its scope is justified where those provisions have been made applicable to such situations by national law in a direct and unconditional way in order to ensure that internal situations and situations governed by EU law are treated in the same way (see, to that effect, judgments of 18 October 2012, *Nolan*, C-583/10, EU:C:2012:638, paragraph 47; of 7 November 2013, *Romeo*, C-313/12, EU:C:2013:718, paragraphs 22 and 23; and of 14 January 2016, *Ostas celtnieks*, C-234/14, EU:C:2016:6, paragraph 20).

35 That being the case, it is also clear from settled case-law that, where the conditions set out in the two preceding paragraphs of the present judgment are not met, in order to provide a useful answer to a national court which has referred a question to it, the Court may deem it necessary to consider rules of EU law to which the national court has not referred in its request for a preliminary ruling (judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 17 and the case-law cited).

36 More particularly, with respect to the award of a contract which, having regard to its value, does not come within the scope of Directive 2004/17, the Court may take account of the fundamental rules and general principles of the FEU Treaty, in particular Articles 49 and 56 thereof and the principles of equal treatment and non-discrimination and the obligation of transparency which derive from them, provided that it is of certain cross-border interest. Although not covered by Directive 2004/17, such contracts are still subject to compliance with those rules and principles (see, to that effect, judgments of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 22 to 24; of 18 December 2014, Gennerali-Providencia *Biztositó*, C-470/13, EU:C:2014:2469, paragraph 27; and of 6 October 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, paragraph 19).

37 It is in the light of the foregoing that each of the questions referred must be examined to determine whether the interpretation of the provisions of Directive 2004/17 is justified in the present case, having regard to the considerations set out in paragraphs 33 and 34 of the present judgment, or whether those questions must be answered in the light of the fundamental rules and general principles in the FEU Treaty mentioned above, taking account of the considerations in paragraphs 35 and 36 of this judgment.

Question 1(a)

38 By Question 1(a), the referring court asks essentially whether Directive 2004/17 must be interpreted as precluding a provision of a national law, such as Article 24(5) of the Law on public procurement, which states that where subcontractors are invited to carry out a works contract, the main works, as defined by the contracting entity, must be performed by the successful tenderer itself.

39 As a preliminary point, it must be held that, as regards reliance on subcontracting activities, Directive 2004/17 merely lays down, in Article 37 and Annex XVI thereof, certain obligations relating to information and the liability of the tenderer. In Article 38, it adds that the contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with EU law.

40 However, as the referring court observed, that directive does not contain any provision having contents analogous to those in Article 24(5) of the Law on public procurement. Furthermore, according to that court, the Lithuanian legislature has not indicated that it took account of that directive when it adopted the latter provision.

41 In those circumstances, where Article 24(5) of the Law on public procurement applies to contracts which do not fall within the scope of Directive 2004/17, it cannot be held that that provision makes a direct and unconditional reference to the directive within the meaning of the case-law set out in paragraph 34 of the present judgment (see, by analogy, judgment of 7 July 2011, *Agafiţei and Others*, C-310/10, EU:C:2011:467, paragraph 45).

42 It follows that the interpretation of that directive is not required in order to answer Question 1(a).

43 However, as set out in paragraphs 35 and 36 of the present judgment, in order to provide a useful answer to the referring court, the Court may take account of the fundamental rules and general principles of the FEU Treaty, in particular Articles 49 and 56 thereof and the principles of equal

treatment and non-discrimination and the obligation of transparency which derive from them, provided that the contract at issue has a certain cross border interest.

44 A contract may have such interest, having regard in particular to the fact that is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract. The referring court may, in its overall assessment of the existence of certain cross-border interest, also take account of the existence of complaints brought by operators situated in other Member States, provided that it is determined that those complaints are real and not fictitious (see, to that effect, judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 20 and the case-law cited).

45 In the present case, the referring court has established that the contract at issue in the main proceedings had a certain cross-border interest. As the Advocate General observed, in point 37 of her Opinion, the value of that contract, although below the thresholds laid down in Article 16(b) of Directive 2004/17, is relatively significant. Furthermore, as the Lithuanian Government stated, that contract concerns the construction of quays of a seaport of strategic importance for national security. It is also apparent from the order for reference that two foreign undertakings, including the successful tenderer, participated in the call for tenders.

46 It follows that Question 1(a) must be answered in the light of the fundamental rules and general principles of the FEU Treaty, in particular Articles 49 and 56 thereof. Specifically, in order to give a useful answer to the referring court, it must be determined whether a provision of national law, such as Article 24(5) of the Law on public procurement, may constitute an unjustified impediment to the freedom of establishment and freedom to provide services.

47 For that purpose, it must be recalled that Articles 49 and 56 TFEU preclude any national measure which, even if it applies without discrimination as to nationality, prohibits, impedes or renders less attractive the freedom of establishment and/or the freedom to provide services (judgments of 27 October 2005, *Contse and Others*, C-234/03, EU:C:2005:644, paragraph 25; of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 41; and of 8 September 2016, *Politanò*, C-225/15, EU:C:2016:645, paragraph 37).

48 As regards public contracts, it is the concern of the European Union to ensure the widest possible participation by tenderers in a call for tenders, including contracts which are not covered by Directive 2004/17 (see, to that effect, judgments of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 29, and of 28 January 2016, *CASTA and Others*, C-50/14, EU:C:2016:56, paragraph 55). The use of subcontractors, which is likely to facilitate access of small and medium-sized undertakings to public contracts, contributes to the pursuit of that objective.

49 A national measure, such as Article 24(5) of the Law on public procurement, is liable to prohibit, impede or render less attractive the participation of economic operators established in other Member States in the award procedure or the performance of a public contract, such as that at issue in the main proceedings, since it prevents them either from subcontracting to third parties all or part of the works identified as the ‘main works’ by the contracting entity, or from proposing their services as subcontractors for that part of the works.

50 Therefore, that provision constitutes a restriction on the freedom of establishment and the freedom to provide services.

51 However, such a restriction may be justified in so far as it pursues a legitimate objective in the public interest, and to the extent that it complies with the principle of proportionality in that it is suitable for securing the attainment of that objective and does not go beyond what is necessary in order to attain it (see, to that effect, judgments of 27 October 2005, *Contse and Others*, C-234/03, EU:C:2005:644, paragraph 25, and of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 44).

52 In the case in the main proceedings, it is clear from the documents before the Court, first, that Article 24(5) of the Law on public procurement aims to ensure that the works are properly executed. Thus, it was adopted specifically with the aim of preventing a current practice which consists in a

tenderer claiming to have professional capacities solely in order to win the contract concerned, not with the intention of performing the works itself, but of entrusting all or most of those works to subcontractors, a practice which affects the quality of the works and their proper performance. Second, by limiting the reliance on subcontractors to works identified as ‘subsidiary’, Article 24(5) of the Law on public procurement aims to encourage the participation of small and medium-sized undertakings in public contracts as joint-tenderers in a group of economic operators rather than as subcontractors.

53 First, as regards the objective of the proper execution of the works, it must be held that it is legitimate.

54 However, it is possible that such an objective may justify certain limits on the use of subcontracting (see, to that effect, judgments of 18 March 2004, *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 45, and of 14 July 2016, *Wrocław - Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 34), it must be held that a provision of a national law, such as Article 24(5) of the Law on public procurement, goes beyond what is necessary in order to achieve that objective, in that it prohibits in a general manner reliance on subcontractors for works treated as ‘main’ works by the contracting entity.

55 That prohibition applies whatever the economic sector concerned by the contract at issue, the nature of the works and the qualifications of the subcontractors. Furthermore, such a general prohibition does not allow for any assessment on a case-by-case basis by that entity.

56 It is true that the contracting entity is free to specify which works are to be treated as ‘main’ works. However, it must still stipulate, with respect to all contracts, that those works are to be carried out by the tenderer itself. Thus, Article 24(5) of the Law on public procurement prohibits reliance on subcontractors for those works, including in situations in which the contracting entity is able to verify the capacities of the subcontractors concerned and to take the view, after that verification, that such a prohibition is unnecessary for the proper execution of the works having regard, in particular, to the nature of the tasks that the tenderer plans to delegate to those subcontractors.

57 Thus, as the Advocate General observed in point 51 of her Opinion, an alternative less restrictive measure which guarantees the achievement of the objective pursued would have been to require the main contractor to indicate in their tender the proportion of the contract that they intend to contract out, the proposed subcontractors and their capacities. It might also be possible for the contracting entity to prohibit tenderers from changing subcontractors if that entity was not able beforehand to verify the identity and capacity of the latter.

58 Moreover, in so far as the referring court and the Lithuanian Government submit that Article 24(5) of the Law on public procurement was adopted in order to prevent a current practice by which tenderers claim to have professional capacities solely in order to win the contract concerned with the intention of entrusting the largest part or most of the works to subcontractors, it must be observed that that provision does not specifically target that practice. Thus, it prohibits the tenderer from delegating the performance of all the works identified as the ‘main’ works by the contracting entity, including the tasks which represent, proportionally, only a small part of those works. Therefore, that provision goes beyond what is necessary to prevent the abovementioned practice.

59 Second, as regards the justification based on the encouragement of small and medium-sized undertakings to participate in a contract as tenderers rather than subcontractors, it is of course conceivable that such an objective may, in certain circumstances and under certain conditions, constitute a legitimate objective (see, by analogy, judgment of 25 October 2007, *Geurts and Vogten*, C-464/05, EU:C:2007:631, paragraph 26).

60 However, and in any event, none of the evidence before the Court explains how a provision of national law, such as Article 24(5) of the Law on public procurement, is necessary in order to achieve that objective.

61 Having regard to the foregoing considerations, the answer to Question 1(a) is that, as regards a public contract which is not covered by the scope of Directive 2004/17, but which has a certain cross-border interest, Articles 49 and 56 TFEU must be interpreted as precluding a provision of national law, such as Article 24(5) of the Law on public procurement, which provides that, where subcontractors are relied

on for the performance of a public works contract, the tenderer is required to carry out the main works itself, as defined by the contracting entity.

The second question

62 By the second question, the referring court asks essentially whether Directive 2004/17 and, in particular, the principles of equal treatment and non-discrimination and the obligation of transparency which derives from that directive must be interpreted as meaning that they allow the contracting entity, after publication of the tender notice, to change certain clauses in the tender specifications, such as Clause 4.3 at issue in the main proceedings, if that entity has, on account of the changes made which have been announced by publication in the *Official Journal of the European Union*, extended the time limit for submission of tenders.

63 As a preliminary point, it must be observed that such a possibility to amend the procurement documents is provided for in Article 27(4) of the Law on public procurement.

64 As the referring court states in its reference for a preliminary ruling, Directive 2004/17 does not contain any provision in that respect.

65 In those circumstances, it cannot be held that Article 27(4) of the Law on public procurement, when it applies to contracts falling outside the scope of that directive, makes a direct and unconditional reference to it within the meaning of the case-law set out in paragraph 34 of the present judgment (see, by analogy, judgment of 7 July 2011, *Agafiţei and Others*, C-310/10, EU:C:2011:467, paragraph 45).

66 It follows that the interpretation of that directive is not necessary in order to answer the second question.

67 That being the case, in order to provide a useful answer to the referring court, for the reasons set out in paragraphs 43 to 45 of the present judgment, that question must be answered in the light of the fundamental rules and general principles of the FEU Treaty, among which are the principles of non-discrimination and equal treatment and the obligation of transparency which derive, in particular, from Articles 49 and 56 TFEU, and to which the national court refers.

68 In that connection, it must be recalled that, according to settled case-law, those principles and that obligation require, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority. The obligation of transparency aims more specifically to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (see, to that effect, judgments of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44, and of 14 July 2016, *TNS Dimarso*, C-6/15, EU:C:2016:555, paragraph 22).

69 Those principles and that obligation require, in particular, that the subject matter and the award criteria for the contract concerned are clearly determined from the beginning of the award procedure for that contract and that the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question (see, to that effect, judgments of 10 May 2012, *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraphs 56, 88 and 109; of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44; and of 14 July 2016, *TNS Dimarso*, C-6/15, EU:C:2016:555, paragraph 23). The obligation of transparency also means that the subject matter and the award criteria must be adequately publicised by the contracting authorities (see, to that effect, judgment of 24 January 2008, *Lianakis and Others*, C-532/06, EU:C:2008:40, paragraph 40).

70 It is also clear from the case-law of the Court that the contracting authority cannot, in principle, during an award procedure, amend the scope of the essential conditions of the contract, which include the technical specifications and the award criteria, and on which the economic operators concerned have legitimately relied in order to take the decision to prepare the submission of a tender, or to the contrary

to decide not to participate in the award procedure for the contract concerned (see, to that effect, judgments of 10 May 2012, *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 55, and of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraphs 27 to 29).

71 That being the case, it does not follow that any amendment to the tender specifications after the publication of the tender notice would, as a matter of principle and in all circumstances, be prohibited.

72 Thus, the contracting authority has the possibility, on an exceptional basis, to correct or amplify the information in the tender specifications which require mere clarification, or to correct obvious material errors, provided that all the tenderers are informed (see, by analogy, judgment of 29 March 2012, *SAG ELV Solvensko and Others*, C-599/10, EU:C:2012:191, paragraph 40).

73 That entity must also be authorised to make certain amendments to the tender specifications, in particular as regards the conditions and the scheme for combining professional capacities, provided that the principles of non-discrimination and equal treatment and the obligation of transparency are respected.

74 That stipulation requires, first, that the amendments concerned, although they may be substantial, must not be so substantial that they have attracted potential tenderers which, in the absence of such changes, would not be in a position to submit a tender. That might be the case, in particular, where the changes make the contract noticeably different in nature from the way it was initially described.

75 Second, it requires that those changes are adequately publicised, so as to enable all those potential tenderers which are reasonably informed and exercising ordinary care to become acquainted with it under the same conditions and at the same time.

76 Third, that stipulation also requires, first, that those changes are made before the tenderers submit their bids and, second, that the time limit for the submission of those tenders is extended where those changes are substantial, the length of the extension depending on the extent of those changes and that it is sufficient to allow the economic operators concerned to adapt their tender as a consequence.

77 Having regard to the foregoing considerations, the answer to the second question is that, as regards a public contract which is not covered by the scope of Directive 2004/17, but which has a certain cross-border interest, the principles of equal treatment and non-discrimination and the obligation of transparency which derive from Articles 49 and 56 TFEU must be interpreted as meaning that they do not preclude the contracting entity from making changes to a clause in the tender specifications, after publication of the tender notice, relating to the conditions and scheme for combining professional capacities, such as Clause 4.3 at issue in the main proceedings, provided, first, that the changes made are not so substantial that they have attracted potential tenderers which, in the absence of such changes, would not be in a position to submit a tender, second, they are adequately publicised and, third, they are made before the tenderers submit their bids, that the time limit for submitting those tenders is extended when the changes concerned are substantial, the length of that extension depending on the extent of those changes, and that the length of time is sufficient to allow the economic operators concerned to adapt their tender as a consequence, which is for the referring court to ascertain.

Question 1(b)

78 By Question 1(b), the referring court asks essentially whether Directive 2004/17 must be interpreted as precluding a clause in tender specifications, such as Clause 4.3 at issue in the main proceedings, which, in circumstances in which a common tender is submitted by several tenderers, requires that the contribution of each of them in order to satisfy the requirements applicable with regard to professional capacities corresponds proportionally to the share of the works they will actually carry out if the relevant contract is awarded to them.

79 As a preliminary point, the port authority stated essentially at the hearing that Clause 4.3 of the tender specifications at issue in the main proceedings had to be read together with Clause 4.2.3 thereof. According to the latter clause, tenderers wishing to submit a common tender must indicate in a joint-association agreement the share of works that each of them undertakes to perform, it being stated that that division is freely determined by those tenderers. Clause 4.3 enables the contracting authority to

verify when examining the tenders that each of the tenders concerned has professional capacities corresponding proportionally to the share of the works it undertakes to perform in accordance with that contract, and that it will actually execute if the contract is awarded.

80 As the Advocate General pointed out in point 56 of her Opinion, Clause 4.3 of the tender specifications at issue in the main proceedings concerns the award of the contract and, more specifically, the possibility for tenderers to submit a common tender to combine their professional capacities in order to satisfy the requirements of those specifications.

81 Such a possibility is provided for in Article 32(3) of the Law on public procurement.

82 It is apparent from the decision to refer that that provision, which applies to all works contracts, whatever their value, faithfully reproduces the content of Article 54(6) of Directive 2004/17. Furthermore, the referring court indicated that, during the transposition of that directive into Lithuanian law, the national legislature chose to extend some of its provisions to contracts with a value less than the thresholds established in Article 16(b) thereof, in particular, by laying down similar provisions *expressis verbis* to those in that directive.

83 In those circumstances, it must be held that Article 54(6) of Directive 2004/17 was made applicable directly and unconditionally to contracts excluded from its scope by Article 32(3) of the Law on public procurement.

84 Therefore, having regard to the case-law set out in paragraphs 33 and 34 of the present judgment, Question 1(b) must be examined in the light of Article 54(6) of Directive 2004/17.

85 That provision recognises the right of every economic operator, where the contracting entity lays down a qualitative selection criterion consisting of requirements relating to technical or professional abilities, to rely for a particular contract upon the capacities of other entities, regardless of the nature of the links which it has with them, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the performance of the contract (see, by analogy, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 33 and the case-law cited). In accordance with that provision, that right extends to groups of economic operators submitting a common tender, which may, under the same conditions, rely on the capacities of their participants or of other entities.

86 Therefore, Directive 2004/17 does not preclude the exercise of the right established in Article 54(6) thereof from being limited in exceptional circumstances (see, by analogy, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 39).

87 In particular, it is conceivable that, in specific circumstances, having regard to the nature and objectives of a particular contract, the capacities of a third party entity, which are necessary for the performance of a particular contract, cannot be transferred to the tenderer. Accordingly, in such circumstances, the tenderer may rely on those capacities only if the third party entity directly and personally participates in the performance of the contract concerned (see, to that effect, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 41).

88 In such circumstances, the contracting entity may, for the purposes of the proper performance of the contract concerned, expressly set out in the tender notice or the tender specifications the specific rules authorising an economic operator to rely on the capacities of other entities, provided that those rules are related and proportionate to the subject matter and objectives of that contract (see, to that effect, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraphs 54 to 56).

89 Likewise, it cannot be excluded from the outset that, in specific circumstances, having regard to the nature of the works concerned and the subject matter and purpose of the contract, the capacities of the various participants of a group of economic operators submitting a common tender which are necessary for the proper execution of that contract cannot be transmitted to those participants. In such a case, the contracting entity is therefore justified in requiring each of the participants to execute the works corresponding to its own capacities.

90 In the present case, the port authority and the Lithuanian Government submit essentially that Clause 4.3 of the tender specifications at issue in the main proceedings aims to avoid the situation in which, in order to win the contract, a tenderer relies on capacities that he does not intend to use or, conversely, that a tenderer may be awarded a contract and perform part of the works without having the capacities and resources necessary for the proper performance of those works.

91 In that connection, it is of course possible that, taking account of the technical nature and size of the works at issue in the main proceedings, their proper performance requires that, in cases in which a common tender is submitted by several tenderers, each one of them performs specific tasks corresponding to its own professional capacities, having regard to the subject matter or the nature of those works or tasks.

92 However, that does not appear to be the scope of Clause 4.3 of the tender specifications at issue in the main proceedings. As the Advocate General noted essentially, in points 63 and 64 of her Opinion, that clause requires there to be an arithmetic correspondence between the contribution of each of the tenderers concerned to satisfy the requirements applicable with regard to professional capacity and the share of the works that that tenderer undertakes to perform and that it will in fact perform if the contract is awarded. However, that clause does not take account of the nature of the tasks to be carried out or to the technical capacities specific to each of them. In those circumstances, Clause 4.3 does not prevent one of the tenderers concerned from carrying out specific tasks for which it does not in fact have the experience or capacities required.

93 Furthermore, the port authority and the Lithuanian Government stated that Clause 4.3 of the tender specifications at issue in the main proceedings does not prevent the tenderers concerned from relying on subcontractors for carrying out works defined as ‘subsidiary’ and that, in accordance with Clause 4.4 of the tender specifications, the professional capacities of the subcontractors are not verified. If such is the case, which is for the referring court to ascertain, it must be held, first, that Clause 4.3 does not guarantee that the tenderers will actually use the capacities that they have declared in the procurement procedure and which were taken into consideration by the port authority for the purpose of examining the bids. Second, it does not prevent works defined as ‘subsidiary’ from being carried out by subcontractors without the professional capacities required.

94 It follows that Clause 4.3 of the tender specifications at issue in the main proceedings is not appropriate to ensure the attainment of the objectives pursued.

95 Therefore, it must be held that the limit on the right laid down in Article 54(6) of Directive 2004/17 resulting from that clause in unjustified having regard to the subject matter and purpose of the contract at issue in the main proceedings.

96 In those circumstances, the answer to Question 1(b) is that Article 54(6) of Directive 2004/17 must be interpreted as precluding a clause in tender specifications, such as Clause 4.3 at issue in the main proceedings, which, in a case where a common tender is submitted by several tenderers, requires that the contribution of each of them in order to satisfy the requirements applicable with regard to professional capacities correspond, proportionally, to the share of the works that it will actually perform if that bid is successful.

Costs

97 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **As regards a public contract which is not covered by the scope of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, as amended by Commission Regulation (EU) No 1336/2013 of 13 December**

2013, but which has a certain cross-border interest, Articles 49 and 56 TFEU must be interpreted as precluding a provision of national law, such as Article 24(5) of the Lietuvos Respublikos viešųjų pirkimų įstatymas (Law on public procurement), which provides that, where subcontractors are relied on for the performance of a public works contract, the tenderer is required to perform itself the main works, as defined by the contracting entity.

2. **As regards such a public contract, the principles of equal treatment and non-discrimination and the obligation of transparency which derive from Articles 49 and 56 TFEU must be interpreted as meaning that they do not preclude the contracting entity from making changes to a clause in the tender specifications, after publication of the tender notice, relating to the conditions and scheme for combining professional capacities, such as Clause 4.3 at issue in the main proceedings, provided, first, that the changes made are not so substantial that they have attracted potential tenderers which, in the absence of such changes, would not be in a position to submit a tender, second, they are adequately publicised and, third, they are made before the tenderers submit their bids, that the time limit for submitting those tenders is extended when the changes concerned are substantial, the length of that extension depending on the extent of those changes, and that the length of time is sufficient to allow the economic operators concerned to adapt their tender as a consequence, which is for the referring court to ascertain.**

3. **Article 54(6) of Directive 2004/17, as amended by Regulation No 1336/2013, must be interpreted as precluding a clause in tender specifications, such as Clause 4.3 at issue in the main proceedings, which, in a case where a common tender is submitted by several tenderers, requires that the contribution of each of them in order to satisfy the requirements applicable with regard to professional capacities correspond, proportionally, to the share of the works that it will actually perform if that bid is successful.**

[Signatures]

---

* Language of the case: Lithuanian.

OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 1 December 2016 (1)

Case C-298/15

UAB “Borta”

(Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania))

(Public contracts – Qualitative selection criteria – Requirement for the successful tenderer to carry out ‘the main work’ itself – Demonstration of professional capacity – Tender submitted by a group of operators – Requirement that each partner’s contribution be proportionate to its contribution in demonstrating professional capacity – Contract award procedure – Modification of tender specifications in the course of the procedure – Principles of equal treatment and transparency)

1. This request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) concerns a tender specification for the award of a public works contract for constructing a quay at the port of Klaipėda (Lithuania). The specification in question contains provisions governing tenders submitted by joint-activity partners. These require each partner to *perform* a proportion of the contract equivalent to its contribution to establishing the partnership’s professional experience, at the level of the *award* of the public contract. The referring court has doubts as to whether such a requirement is compatible with the rules on the pooling of professional capacities under EU public procurement law. Since the contested specification was only made known several weeks after the call for tenders had been published, the referring court also seeks guidance on whether (and if so in what circumstances) contracting authorities may change the tender specifications during the course of the contract award procedure. It also raises of its own motion the question whether EU public procurement law precludes a provision of Lithuanian law that prohibits subcontracting ‘the main work’ in the context of public works contracts.

2. An initial difficulty arises as to the Court’s jurisdiction to answer those questions. The referring court expresses its concerns in the context of Directive 2004/17/EC. (2) However, it is common ground that the estimated value of the public contract at issue does not reach the relevant threshold and that that directive therefore does not apply in the main proceedings. Has that directive been rendered directly and unconditionally applicable to the contract by Lithuanian law? If so, it is settled case-law that the Court has jurisdiction to interpret the relevant provisions of that directive. Alternatively, if the contract at issue has a clear cross-border interest, its award will be subject to the fundamental rules and general principles of the TFEU (in particular the free movement principles in Articles 49 and 56 TFEU) and it is then the Court’s duty to provide useful guidance to the referring court on that basis.

Legal background

EU law

3. Recital 9 of Directive 2004/17 states:

> ‘In order to guarantee the opening-up to competition of public procurement contracts awarded by entities operating in the water, energy, transport and postal services sectors, it is advisable to draw up provisions for Community coordination of contracts above a certain value. Such coordination is based

on the requirements inferable from Articles 14, 28 and 49 of the EC Treaty and from Article 97 of the Euratom Treaty, namely the principle of equal treatment, of which the principle of non-discrimination is no more than a specific expression, the principle of mutual recognition, the principle of proportionality, as well as the principle of transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

…'

4. Recital 43 indicates that it is advisable to include provisions on subcontracting in order to encourage small and medium-sized undertakings to become involved in the public contracts procurement market.

5. Article 10 provides that 'contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way'.

6. Article 11(2) states:

'Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting entities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent to which this change is necessary for the satisfactory performance of the contract.'

7. Article 37 ('Subcontracting') provides:

'In the contract documents, the contracting entity may ask, or may be required by a Member State to ask, the tenderer to indicate in his tender any share of the contract he intends to subcontract to third parties and any proposed subcontractors. This indication shall be without prejudice to the question of the principal economic operator's liability.'

8. Pursuant to Article 38 ('Conditions for performance of contracts'):

'Contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with [EU] law and are indicated in the notice used as a means of calling for competition or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

9. Article 53 ('Qualification systems') provides in particular:

'1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

…

2. The system under paragraph 1 may involve different qualification stages.

It shall be operated on the basis of objective criteria and rules for qualification to be established by the contracting authority.

…

5. Where the criteria and rules for qualification referred to in paragraph 2 include requirements relating to the technical and/or professional abilities of the economic operator, the latter may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to make the necessary resources available to the economic operator.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the abilities of participants in the group or of other entities.

…’

Lithuanian law

10. Article 2(29) of the Lietuvos Respublikos Viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on Public Procurement; ‘the Law on public procurement’) defines a supplier in general terms as any economic operator, whether a natural person, a private legal person, a public legal person, other organisations or branches thereof, or a group of such persons, which is able to offer, or is offering, goods, services or works.

11. According to Article 24(5) of the Law on public procurement, the procurement documents require the candidate or tenderer to specify in its tender any proposed subcontractors and may require the candidate or tenderer to specify the share of the contract that it is intended to subcontract to those subcontractors. However, where subcontractors are invited to carry out a works contract, the main work, as specified by the contracting authority, must be performed by the supplier.

12. According to Article 27(4) of the Law on public procurement the contracting authority may, of its own motion, at any time prior to the deadline for the submission of tenders, clarify the procurement documents.

13. Article 32(3) of the Law on public procurement states that, where necessary in a specific tendering context, a supplier may rely on the capacities of other economic operators, irrespective of the nature of its legal relationship with them. In this case, the supplier must prove to the contracting authority that those resources will be available to it to carry out the contract. A group of economic operators may, under the same conditions, rely on the capacities of members of the group or on those of other economic operators.

Factual background, procedure and questions referred

14. On 2 April 2014, VĮ Klaipėdos valstybinio jūrų uosto direkcija (Klaipėda State Seaport Authority; ‘the Seaport Authority’), a Lithuanian public undertaking, published an open call for tenders for ‘Construction work relating to “Reconstruction of Quays No 67 and No 68. Stage 1”’. That call for tenders was also published in the *Official Journal of the European Union* on 5 April 2014. (3)

15. Paragraph 3.2.1 of the tender specifications included the following requirement: ‘Suppliers’ average annual volume of work relating to the main construction and installation work (seaport quay construction or reconstruction) over the last five years or over the period since the date of registration of the supplier (in the case where the supplier has operated for less than five years) shall correspond to a value of at least LTL 5 000 000 (EUR 1 448 100.09), excluding VAT.’

16. Paragraph 4.2.3 of the tender specifications required any tender ‘to specify the commitments of the partners operating under a joint-activity agreement in relation to the implementation of the contract, together with the percentage share of those commitments, and to state that this division of the volume of services applies only to the partners and creates no obligations for the client (contracting authority)’.

17. The original version of paragraph 4.3 of the tender specifications provided as follows:

‘Where the tender is submitted by suppliers operating under a joint-activity agreement, the requirements of [paragraph 3.2.1] must be satisfied by at least one partner engaged in the joint-activities or by all of the partners operating under the joint-activity agreement taken together. … Pursuant to Article 24(5) of [the Law on public procurement], [the Seaport Authority] states that the main work consists of Item 1.2.8 in the Construction Section of the Bill of Quantities and, therefore, this work must be carried out by the supplier itself.’ (4)

18. The Seaport Authority, acting of its own motion, issued a first amendment to paragraph 4.3 of the specifications on 24 April 2014. That new version, which was published in the *Official Journal of the European Union*, provided, in particular, that, where the tender was submitted by suppliers operating under a joint-activity agreement, each partner engaged in the joint-activities had to satisfy at least 50% of the

requirement under paragraph 3.2.1. As a result of that change, the Seaport Authority extended the deadline for submitting tenders.

19. On 3 May 2014, UAB Borta, a limited company incorporated under Lithuanian law, challenged that redefinition before the Seaport Authority. As a result, the Seaport Authority, by decision of 9 May 2014, amended paragraph 4.3 of the tender specifications for the second time. (5) The new (and final) version of that paragraph provided as follows:

> ‘Where the tender is submitted by suppliers operating under a joint-activity agreement, the requirements of paragraphs 3.2.1 … must be satisfied by at least one partner engaged in the joint activities or by all of the partners operating under the joint-activity agreement taken together. A partner’s contribution (volume of work completed) under the joint-activity agreement must be proportionate to its contribution to satisfying the requirement under paragraph 3.2.1 … and to the volume of work that will actually be carried out by it in the event of a successful bid (contract implementation) [(6)] … Pursuant to Article 24(5) of [the Law on public procurement], [the Seaport Authority] states that the main work consists of Item 1.2.8 in the Construction Section of the Bill of Quantities and, therefore, this work must be carried out by the supplier itself.’

20. As a result of that last change, which was published in the *Official Journal of the European Union*, the deadline for submitting tenders was extended for the second time and fixed as 12 June 2014.

21. Borta submitted a tender on 12 June 2014, in which it proposed to carry out these works for the equivalent in LTL of approximately EUR 4 761 460. That was the most expensive bid. (7)

22. Borta however contested the final version of paragraph 4.3 of the tender specifications before the Seaport Authority and, following rejection of that challenge, before the Klaipėdos apygardos teismas (Klaipėda Regional Court). The Klaipėda Regional Court dismissed that action on 18 August 2014. Borta appealed against that decision to the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania), which rejected the appeal on 13 November 2014. Both courts considered in essence that the contested tender specification was justified by the nature of the subject matter of the contract and its significance for the public interest, and that the joint and several liability of joint-activity partners vis-à-vis the Seaport Authority did not, by itself, guarantee successful implementation of the public procurement contract. They also rejected the claim that successive changes in the tender specifications were illegal, as Article 27(4) of the Law on public procurement expressly entitled the Seaport Authority to clarify those specifications.

23. Borta appealed on a point of law against the judgment of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), which stayed the proceedings and requested a preliminary ruling on the following questions:

‘(1) Must the provisions of Articles 37, 38, 53 and 54 of Directive 2004/17 be understood and interpreted, whether together or separately (but without limitation to those provisions), as meaning that:

(a) they preclude a national rule under which, in the case where subcontractors are invited to perform a works contract, the main work, as identified by the contracting authority, must be carried out by the supplier? [(8)]

(b) they preclude a scheme, laid down in the procurement documents, for combining the professional capacities of suppliers, such as that specified by the contracting authority in the contested tender specification, which requires that the portion representing the professional capacity of the relevant economic operator (a joint-activity partner) must correspond to the portion of the specific work which it will actually carry out under the public procurement contract?

(2) Must the provisions of Articles 10, 46 and 47 of Directive 2004/17 be understood and interpreted, whether together or separately (but without limitation to those provisions), as meaning that:

(a) the principles of equal treatment of suppliers and transparency are not infringed in the case where the contracting authority:

– provides beforehand, in the procurement documents, a general option of combining the professional capacities of suppliers, but does not set out the scheme for implementing this option;

– subsequently, in the course of the public procurement procedure, it defines in greater detail the requirements governing the appraisal of the qualifications of suppliers by laying down certain restrictions on combining the professional capacities of suppliers;

– because of this more detailed definition of the content of the qualification requirements, it extends the deadline for tender submissions and announces this extension in the *Official Journal [of the European Union]*?

(b) a restriction on the combining of suppliers' capacities does not have to be clearly indicated in advance if the specific character of the contracting authority's activities and the special features of the public procurement contract make such a restriction foreseeable and justifiable?'

24. The Seaport Authority, the Lithuanian Government and the European Commission have submitted written observations. The same parties and Borta presented oral argument at the hearing on 1 June 2016.

Assessment

Preliminary remarks

25. The Lithuanian Government submitted at the hearing that Article 24(5) of the Law on public procurement transposed the new rule on subcontracting in Article 79(3) of Directive 2014/25/EU (9) before the expiry of the period prescribed for transposing that directive and that, consequently, the Court should examine the present reference from the perspective of that directive only. (10) The Seaport Authority took a similar position. The Commission argued that, on the contrary, Directive 2014/25 could not be taken into account. First, Article 24(5) of the Law on public procurement was passed before that directive was adopted. Second, Lithuania had omitted to notify the measures transposing Directive 2014/25 into Lithuanian law to the Commission.

26. According to settled case-law, the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether a prior call for competition must be issued for the award of a public contract. Conversely, a directive is *not* applicable if the period prescribed for its transposition expired after that point in time. (11)

27. Directive 2014/25 repealed Directive 2004/17 with effect from 18 April 2016. It therefore does not apply to the main proceedings, in which the call for tenders was published on 2 April 2014. As the Court has held recently in relation to Directive 2014/24, to apply that directive before the expiry of the period prescribed for its transposition would prevent not only the Member States but also contracting authorities and economic operators from benefiting from a sufficient period in which to adapt to the new provisions it introduced. (12) In my view, to do so would also be inconsistent with the principle of legal certainty. (13) The same applies by analogy to Directive 2014/25.

28. Next, it is common ground that the value of the contract at issue (which can presumably be assessed by reference to the most expensive bid submitted, that is to say, the equivalent in LTL of EUR 4 761 459.72) is below the threshold of EUR 5 186 000 set out for works contracts, at the material time, in Article 16(b) of Directive 2004/17. As the referring court observes, the public contract at issue thus falls outside the scope of Directive 2004/17.

29. The referring court however submits that the Court has jurisdiction to answer the questions referred. First, the Seaport Authority clearly intended to regard the call for tenders as having international scope by publishing it and the subsequent amendments to the tender specifications in the *Official Journal of the European Union*. That is confirmed by the fact that two non-Lithuanian companies submitted tenders. The referring court also indicates in essence that the Lithuanian legislature, when it transposed Directive 2004/17 in the Law on public procurement, decided to apply certain rules laid down in that directive to procurement procedures falling outside the directive's scope of application.

30. At the hearing, the Lithuanian Government added that Lithuanian law requires contracting authorities to make a procedural choice when they organise an award procedure for a contract whose estimated value is below the relevant threshold. They may decide to apply either the simplified procedure under national law for such contracts or the procedure applicable to public contracts above the relevant threshold. In that latter case, and applying the EU legislation in force at the material time, the provisions of – depending on the subject matter of the public contract – Directive 2004/17 or Directive 2004/18/EC (14) would have become binding on the contracting authority. The national courts would also have been under a duty to apply them.

31. In certain circumstances, the purely internal nature of a situation does not prevent the Court from replying to a question referred pursuant to Article 267 TFEU. (15) That is so, in particular, where national law requires the referring court to allow a national of the Member State of its jurisdiction to enjoy the same rights as those which a national of another Member State would derive from EU law in the same situation, or where the request for a preliminary ruling concerns provisions of EU law to which the national law of a Member State refers in order to determine the rules applicable to a purely internal situation within that State. (16)

32. As regards the latter situation, the Court's jurisdiction extends to questions concerning provisions of EU law where the facts of the main proceedings are outside the scope of EU law but where those provisions have been rendered *directly* and *unconditionally* applicable by domestic law, in order to ensure that internal situations and situations governed by EU law are treated in the same way. (17) It is indeed in the European Union's interest that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly where, in regulating situations outside the scope of the EU measure concerned, national legislation seeks to adopt the same solutions as those adopted in that measure, in order to ensure that internal situations and situations governed by EU law are treated in the same way, irrespective of the circumstances in which the provisions or concepts taken from EU law are to apply. (18)

33. In the present case, however, there are no sufficiently precise indications to suggest that the provisions of EU law cited have been 'rendered directly and unconditionally applicable by domestic law', in order to ensure that internal situations and situations governed by EU law are all subject to the same rules. (19) In particular, neither the referring court nor the Lithuanian Government have identified for the Court any specific provision of Lithuanian law making Directive 2004/17 directly and unconditionally applicable to public contracts with a value below the relevant threshold laid down in Article 16 of that directive. (20) I therefore conclude that the Court has no jurisdiction to interpret Directive 2004/17 in the context of the present proceedings.

34. The questions referred seek interpretation of Directive 2004/17 only. However, in order to provide a useful answer to a national court which has referred a question to it, the Court may deem it necessary to consider rules of EU law to which the national court has not referred in its request for a preliminary ruling. (21)

35. It is therefore necessary to ascertain whether the Court has jurisdiction to answer the questions referred on the basis of the general principles of the TFEU, in particular the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency. That presupposes, according to settled case-law, that the contract concerned has a clear cross-border interest in the light of, inter alia, its value and the place where it is carried out. (22) The existence of such a cross-border interest must be assessed on the basis of all the relevant factors, such as the financial value of the contract, the place where it is to be performed or its technical features, and having regard to the particular characteristics of the contract concerned. (23)

36. The Court has already held that the existence of a cross-border interest may be established, in particular, by the fact that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract. (24) Thus, a works contract can be of cross-border interest because of its estimated value in conjunction with its technical complexity or the fact that the works are to be located in a place which is likely to attract the interest of foreign operators. (25)

37. The Court will on occasion leave it to the national court to ascertain the existence of a cross-border interest. (26) In the present case, however, there are sufficient elements available to the Court to conclude that the public contract at issue does indeed have such a cross-border interest. First, the estimated value of the

contract is significant. (27) Moreover, Klaipėda seaport is one of the major ports of the Baltic Sea. Seaport quay construction such as that envisaged by the contract award procedure at issue moreover requires high technical skills which only a limited number of undertakings can be assumed to possess. Lastly, this public contract's attractiveness for foreign operators is confirmed by the fact that two non-Lithuanian undertakings submitted tenders, (28) one of which ultimately obtained the contract.

38. The questions referred must therefore be examined against the background of the general principles of transparency and equal treatment arising from Articles 49 and 56 TFEU, which must be respected when awarding public contracts. (29) Given that Articles 49 and 56 TFEU apply to a contract such as the contract at issue in the main proceedings, the Seaport Authority is required to respect the prohibition on discrimination on the grounds of nationality and the obligation as to transparency which those articles lay down. (30)

The restriction on subcontracting in Article 24(5) of the Law on public procurement (point (a) in question 1)

39. By point (a) in the first question, the referring court asks whether EU law precludes a provision such as Article 24(5) of the Law on public procurement, which requires that, in the case of public works contracts, the tenderer itself should carry out the 'main work', as identified by the contracting authority.

40. Borta did not challenge the lawfulness of that restriction on subcontracting in its appeal on a point of law before the referring court. The latter has raised the question 'of its own motion' in the public interest. It is, indeed, not immediately clear whether the facts in the main proceedings involve subcontracting. A tender submitted under a joint-partnership agreement may imply that, where that tender is successful, all partners become individual parties to the public contract with the contracting authority. Such a situation does not involve subcontracting, which occurs only where (all or part of) the contract is carried out by third parties to the contract. (31) Conversely, a joint-partnership agreement would involve subcontracting if only one of the partners were formally to operate as the tenderer but all of them perform the contract or if they set up a joint venture company, which will become the signatory to the contract in place of the partners themselves. Only limited information is available about the tender Borta submitted and it is not for this Court to ascertain whether that tender actually or potentially involved subcontracting.

41. According to settled case-law, the Court cannot give a ruling on a question referred by a national court where it is quite obvious that the interpretation or the assessment of the validity of a provision of EU law sought by the national court bears no relation to the actual nature of the case or to the subject matter of the main action. (32) That is not however the case here. Paragraph 4.3 of the tender specifications, which lies at the centre of the dispute in the main proceedings, contains an express reference to Article 24(5) of the Law on public procurement. Against that background, it does not appear that point (a) in the first question manifestly bears no relation to the actual nature or the subject matter of the action and that question is therefore admissible. (33)

42. I turn now to the substance.

43. According to settled case-law, Articles 49 and 56 TFEU preclude any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to prohibit, impede or render less attractive the exercise by nationals of the European Union of the freedom of establishment and the freedom to provide services guaranteed by those provisions. (34)

44. As regards public contracts and the freedom of establishment and the freedom to provide services, the European Union is concerned to ensure the widest possible participation by tenderers in a call for tenders, even where directives on public procurement are not applicable. (35) That is in the interest of the contracting authority itself, which will thus have greater choice as to the most advantageous tender which is most suitable for its needs. (36) One of the principal functions of the principle of the equal treatment of tenderers and the corollary obligation of transparency is thus to ensure the free movement of services and the opening-up of undistorted competition in all the Member States. (37)

45. Subcontracting contributes to those objectives as it is likely to encourage small and medium-sized undertakings to get involved in the public contracts procurement market and therefore to increase the number of potential candidates for the award of public contracts. (38)

46. In the present case, a provision such as Article 24(5) of the Law on public procurement clearly limits the possibility for undertakings established in other Member States to exercise their rights under Articles 49 and 56 TFEU, in so far as it precludes them, if they tender for the contract, from either subcontracting all or part of 'the main work' as defined by the contracting authority or proposing their own services as subcontractors for that part of the contract. As the Commission correctly submits, Article 24(5) of the Law on public procurement therefore restricts the freedom to provide services and the freedom of establishment.

47. However, such a restriction may be justified in so far as it pursues a legitimate objective in the public interest, and to the extent that it complies with the principle of proportionality in that it is suitable for securing the attainment of that objective and does not go beyond what is necessary in order to attain it. (39)

48. The Lithuanian Government explains that the restriction on subcontracting at issue was introduced in order to make it easier for contracting authorities to protect their interests and to ensure that subcontracted works are properly executed. That restriction was aimed in particular at addressing the common situation where economic operators participated in tendering procedures with a view, if successful, to subcontracting the major part of the contract. Lower quality work or difficulties in their execution was often the result. The Lithuanian Government argues in addition that Article 24(5) of the Law on public procurement is in line with the common position reached on similar issues within the Council and which resulted, in particular, on the rule now contained in Article 79(3) of Directive 2014/25. (40) At the hearing, the Seaport Authority submitted, in essence, that it had a legitimate interest in ensuring that public works such as those at issue in the main proceedings, which are of strategic importance for national security, were correctly executed.

49. A contracting authority may legitimately seek to ensure that a public work contract will be effectively and properly carried out. (41) That applies in particular where the works in question are deemed necessary for safeguarding national security, which, according to Article 4(2) TEU, is among the essential State functions that the European Union must respect. (42) Thus, a tenderer may be required to produce evidence that it actually has available to it the resources of the entities or undertakings on which it relies, which it does not itself own, and which are necessary for the performance of the contract. (43) Accordingly, the contracting authority is entitled to prohibit the use of subcontractors whose capacities could not be verified during the examination of tenders and selection of the contractor for the performance of essential parts of the contract. (44)

50. However, the restriction on the freedom to provide services and freedom of establishment that Article 24(5) of the Law on public procurement involves does not appear proportionate to that objective.

51. First, that restriction applies even where the contracting authority is in fact in a position to verify the technical and economic capacity of subcontractors during the contract award procedure. An alternative to that restriction would (for example) have been to require the main contractor to identify subcontractors when submitting his tender and to demonstrate both that he will actually have available to him the resources of those subcontractors necessary for the performance of the contract and that those subcontractors are suitable for carrying out the tasks he intends to entrust to them.

52. Second, Article 24(5) is also both *too rigid* and *too vague* to satisfy the proportionality test. Although contracting authorities appear to enjoy flexibility when defining, for each contract, what 'the main work' is, the restriction on subcontracting resulting from that provision is defined in particularly broad terms. It applies regardless of the subject matter of the public works contract and is binding upon contracting authorities when they conclude any type of public works contract, even when they may consider that there is no obvious reason for imposing such a restriction at all.

53. As the Commission submits, the restriction on subcontracting in Article 24(5) of the Law on public procurement differs in that regard from Article 79(3) of Directive 2014/25. That provision merely *enables* a contracting authority, in particular, to require that certain *critical* tasks be performed directly by the tenderer itself. Contracting authorities may thus assess whether such a limitation is opportune, depending on the circumstances. It follows that, even if, as the Lithuanian Government submits, Article 24(5) of the Law on public procurement were to be regarded as transposing Article 79(3) of Directive 2014/25 into Lithuanian law, (45) that transposition would be incorrect.

54. For those reasons, I consider that, in the context of a public contract not subject to Directive 2004/17 or Directive 2004/18, but which has a clear cross-border interest, the prohibition on discrimination on the

grounds of nationality and the obligation of transparency which arise under Articles 49 and 56 TFEU preclude a national rule such as that contained in Article 24(5) of the Law on public procurement, under which the tenderer has itself to carry out the 'main work', as identified by the contracting authority, without it being possible to subcontract that part of the contract.

Lawfulness of paragraph 4.3 of the tender specifications (point (b) in question 1)

55. Point (b) in the first question raises the issue whether EU law precludes tender specifications requiring that, where partners propose to combine their professional capacities by submitting a common tender, there must be an arithmetic correspondence between the proportion of the contract which each joint-activity partner performs and its contribution in fulfilling a condition concerning professional experience.

56. In the case before the national court, paragraph 4.3 of the tender specifications relates to the award of the public contract. That specification must be read together with point 4.2.3 of the tender specifications, which requires tenders submitted by joint-activity partners to indicate the commitments (works or services) that will be carried out by each of them and the percentage share of those commitments. The contracting authority is thus in a position to verify, when examining the tenders and selecting the successful tender, that each partner will be responsible for a part of the work or services corresponding to its contribution to the requirement relating to professional experience in point 3.2.1 of the tender specifications.

57. The principles that I have set out above regarding subcontracting are equally relevant to joint-activity partners pooling their capacities. (46)

58. As I see it, a requirement such as that laid down in paragraph 4.3 of the tender specifications is liable to limit the flexibility of joint-activity partners. It not only affects how they agree to share responsibilities at the time of submitting their common tender but also precludes them from modifying each partner's contribution to the works contract at a later stage if the contract is attributed to them.

59. Thus, the requirement in paragraph 4.3 of the tender specifications is capable of having a dissuasive effect on economic operators established in other Member States. It will affect operators wishing to establish themselves in the Member State concerned through the establishment of a permanent consortium, possibly composed of national and foreign companies. It will also affect operators wishing to offer their services by joining consortia of that kind already in existence, in order to be able to participate more easily in public tendering procedures launched by the contracting authorities of that Member State. (47) Such specification therefore constitutes a restriction within the meaning of Articles 49 and 56 TFEU.

60. The Seaport Authority and the Lithuanian Government submit, in essence, that paragraph 4.3 of the tender specifications merely seeks to ensure that each joint-activity partner has the professional capacity to perform that part of the public works contract for which it will be responsible.

61. I have already indicated that the objective of ensuring proper performance of a public contract can justify a (non-discriminatory) restriction to the freedom to provide services and freedom of establishment. (48) Partners acting under a joint-activity agreement may be able to satisfy *collectively* the condition(s) relating to professional capacity (including professional experience) stipulated by the contracting authority when they submit a tender. That however offers no guarantee that each partner will then actually be entrusted with those specific tasks for which its professional capacity has been verified prior to the award of that contract. Articles 49 and 56 TFEU do not therefore in principle preclude a contracting authority from requiring tenders submitted under joint-activity agreements to specify how the various tasks will be distributed among the partners, from verifying the capacity of each partner to carry out the tasks for which it will be responsible and from monitoring that, following the award of the contract, each partner duly performs those tasks for which its professional capacity has been demonstrated. (49)

62. However, paragraph 4.3 of the tender specifications at issue here is not suitable for ensuring attainment of that objective.

63. That paragraph requires there to be an arithmetic correspondence between the contribution of each partner to the professional experience requirement in paragraph 3.2.1 and the 'volume' (or money value) of tasks effectively carried out by that partner when performing the contract.

64. As the Commission correctly submits, that specification is *unrelated* to the *specific works or services* required to perform the public contract at issue properly. For example, each partner under a joint-activity agreement might be able to demonstrate that it has acquired experience in seaport quay construction or reconstruction over the last 5 years. Collectively, the partners thus fulfil the professional experience requirement in paragraph 3.2.1 of the tender specifications. However, each of them might specialise in a different aspect of seaport quay construction, such as dredging harbour basins, laying foundation works, building grooved steel walls, or supplying and installing seaport quay equipment. The requirement set out in paragraph 4.3 does not preclude an individual partner from carrying out specific tasks for which it actually has no such experience (although, in arithmetical terms, those tasks might correspond to its contribution in fulfilling the requirement in paragraph 3.2.1 of the tender specifications and thus comply with paragraph 4.3 thereof).

65. I therefore consider that the objective of ensuring proper performance of the public contract cannot, in a situation such as that in the main proceedings, justify the restriction on freedom to provide services and freedom of establishment which results from paragraph 4.3 of the tender specifications. That is all the more the case since even tasks which represent a small proportion of the total value of the contract may be critical to its proper performance. (50)

66. The Seaport Authority argues that compliance with the principles of equal treatment of tenderers and transparency requires that only professional capacities that will effectively be utilised for performing the public contract can be taken into account when assessing the professional capacity of individual joint-activity partners.

67. Although these objectives are legitimate, (51) that argument cannot succeed. In answer to a question from the Court at the hearing, the Seaport Authority explained that the tender specifications did not preclude partners tendering under a joint-activity agreement, in the same ways as other tenderers, from subcontracting performance of the public works contract (with the exception of the ‘main work’) and that, in those circumstances, subcontractors’ professional experience did *not* have to be declared when the joint tender was submitted. Therefore, contrary to the submission made by the Seaport Authority, the tender specifications in the main proceedings did not in fact ensure that professional capacities that partners declared they possessed when submitting a common tender and that the contracting authority had verified would effectively be utilised to carry out the public works contract at issue.

68. I therefore conclude that, in the context of a public contract with a value below the threshold laid down in Directive 2004/17 or Directive 2004/18, but with a clear cross-border interest, the prohibition on discrimination on the grounds of nationality and the obligation of transparency which flow from Articles 49 and 56 TFEU preclude a tender specification such as paragraph 4.3 of the tender specifications at issue, which requires that, where partners propose to combine their professional capacities by submitting a common tender, there must be an arithmetical correspondence between the proportion of the contract which each joint-activity partner performs and its contribution in fulfilling a condition concerning professional experience.

Lawfulness of the changes to paragraph 4.3 of the tender specifications in the course of the contract award procedure (question 2)

69. Did the principles of equal treatment and of non-discrimination on grounds of nationality flowing from Articles 49 and 56 TFEU, and the consequent obligation of transparency, preclude the Seaport Authority from modifying clause 4.3 of the tender specifications as it did?

70. The Court’s case-law interpreting Article 2 of Directive 2004/18 offers useful guidance to answer that question. According to that provision, ‘contracting authorities shall treat economic operators equally and non-discriminatorily, and shall act in a transparent way’. That provision is therefore based on the principles of equal treatment and non-discrimination and the obligation of transparency which arise from the TFEU. (52)

71. Thus, the Court has held that both the principle of equal treatment and the obligation of transparency which flows from it require the subject matter of each contract and the criteria governing its award to be clearly defined from the beginning of the award procedure. (53) Equal treatment requires tenderers to be afforded equality of opportunity when formulating their bids. That implies that the bids of all tenderers must be subject to the same conditions. (54) Furthermore, the obligation of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It means that all the conditions

and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question. (55)

72. Therefore, a contracting authority cannot, even by means of corrections, change the meaning of the essential contractual conditions as they were formulated in the specifications, upon which the economic operators concerned legitimately relied in taking the decision to prepare to submit a tender or, on the other hand, not to participate in the procurement procedure concerned. (56)

73. The same principles apply where a contract not governed by Directive 2004/18 has a clear cross-border interest. In *Enterprise Focused Solutions*, (57) the Court held that a contracting authority cannot, after publication of a contract notice, amend the technical specification in respect of an element of the contract in breach of the principles of equal treatment and of non-discrimination and the obligation of transparency. (58) That is consistent with other judgments where the Court has made clear that the principle of equal treatment and the obligation of transparency, as a general rule, preclude a tender from being amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned, unless the amendment corrects an obvious material error or clarifies a point of detail in the tender. (59)

74. In the present case, the Seaport Authority acted in breach of those principles in twice amending paragraph 4.3 of the tender specifications.

75. First, as the Commission submits, those amendments cannot be regarded as minor clarifications of that paragraph or corrections of a clerical error. The original version of paragraph 4.3 clearly allowed the professional capacity requirement laid down in point 3.2.1 of the tender specifications to be satisfied by at least one partner engaged in the joint activities *or* by all of the partners taken together. Both modifications (on 24 April and on 9 May 2014) introduced restrictions concerning the demonstration of professional capacity in the case of joint-partnership. Those restrictions plainly did not form part of the original version of that paragraph. On the contrary, they altered the essence of paragraph 4.3 of the tender specifications, on which the operators concerned were already legitimately relying in taking the decision to prepare to submit a tender or not to participate in the procurement procedure. For that reason, I disagree with the Seaport Authority's submission that reasonably informed tenderers could anticipate the changes in question.

76. Furthermore, the Seaport Authority has not advanced any objective justification to explain why it twice made substantial modifications to paragraph 4.3 of the tender specifications after publishing the initial call for tenders. Thus, whilst this is ultimately a matter for the referring court to verify, as sole judge of fact, nothing in the material available to the Court suggests that those amendments were rendered necessary by a fundamental change of the circumstances under which the public contract at issue was to be awarded or performed since the call for tenders was published.

77. It is possible to imagine circumstances in which such a fundamental change might occur and in which the contracting authority would be faced with the dilemma of either restarting the tender procedure *ab initio* or changing the tender specifications. Either solution would entail disadvantages, in terms of wasted costs for those already engaged in the original tendering process; and obvious issues would arise, particularly as regards the risk of abuse or manipulation, the need for transparency and equality of treatment between (potential) tenderers and (possibly) reimbursement of (some part of) wasted costs. Fortunately, none of those thorny points require to be decided by the Court here and I do not propose to explore them further.

78. In the circumstances of the present case, I therefore conclude that the prohibition on discrimination on the grounds of nationality and the obligation of transparency which flow from Articles 49 and 56 TFEU preclude changes of the tender specifications such as those at issue in the main proceedings, which introduce restrictions concerning the demonstration of professional capacity by joint-activity partners that were plainly not included in the original version of the specifications.

79. That conclusion is not called into question by the fact that the changes took place before any tender was submitted or by the fact that the Seaport Authority both published the changes in the *Official Journal of the European Union* and extended the deadline for submitting tenders. As I have explained, the successive amendments of paragraph 4.3 of the tender specifications by the Seaport Authority entailed an essential

modification of the conditions under which a tender could be submitted by joint-activity partners, without objective justification. (60)

80. Finally, I would emphasise that the analysis I offer here flows from the specific situation in the main proceedings. It therefore does not in any way prejudge how the principles of equal treatment and non-discrimination and the obligation of transparency arising from the TFEU would apply in different circumstances.

Conclusion

81. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) to the following effect:

(1) In the context of a public contract not subject to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors or to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, but which has a clear cross-border interest, the prohibition on discrimination on the grounds of nationality and the obligation of transparency which arise under Articles 49 and 56 TFEU must be interpreted as precluding a national rule, such as that contained in Article 24(5) of the Lietuvos Respublikos Viešųjų pirkimų įstatymas (Law on public procurement), under which the tenderer has itself to carry out itself the 'main work', as identified by the contracting authority, without it being possible to subcontract that part of the contract.

(2) In the same context, the prohibition on discrimination on the grounds of nationality and the obligation of transparency which flow from Articles 49 and 56 TFEU preclude a tender specification such as paragraph 4.3 of the tender specifications at issue in the main proceedings, which requires that, where partners propose to combine their professional capacities by submitting a common tender, there must be an arithmetic correspondence between the proportion of the contract which each joint-activity partner performs and its contribution in fulfilling a condition concerning professional experience.

(3) The prohibition on discrimination on the grounds of nationality and the obligation of transparency which arise under Articles 49 and 56 TFEU preclude changes of the tender specifications such as those at issue in the main proceedings, which introduce without objective justification restrictions concerning the demonstration of professional capacity by joint-activity partners that were plainly not included in the original version of the specifications.

---

1 – Original language: English.

---

2 – Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1). The relevant version of that directive is that last amended by Commission Regulation (EU) No 1336/2013 of 13 December 2013 (OJ 2013 L 335, p. 17).

---

3 – OJ 2014/S 68-117458.

---

4 – The referring court explains that this main work consists, inter alia, in building a grooved steel wall supported by positional girders.

---

5 – At the same time, the contracting authority slightly redrafted of its own motion paragraph 4.2.3 of the tender specifications. That change to the tender specification is however not at issue in the main proceedings.

---

6 – I shall refer to that latter requirement as the ‘correspondence requirement’. The ‘volume of work’ is presumably measured in money terms.

7 – The successful tenderer’s bid amounted to the equivalent in LTL of approximately EUR 3 168 400.

8 – The order for reference records that that court has raised that question ‘of its own motion’ for the protection of the public interest.

9 – Directive of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 (OJ 2014 L 94, p. 243). Pursuant to that provision, ‘in the case of works contracts, service contracts and siting and installation operations in the context of a supply contract, contracting entities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 37(2), a participant in that group’. A similar rule is laid down in Article 63(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

10 – It appears from the Lithuanian Government’s written submissions that, at the material time, Directive 2014/25 had not yet been fully transposed into Lithuanian law.

11 – Judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 31 and the case-law cited, and of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83.

12 – Judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 86.

13 – See, by analogy, judgment of 15 October 2009, *Hochtief and Linde-Kca-Dresden*, C-138/08, EU:C:2009:627, paragraph 29 and the case-law cited. See also judgment of 5 October 2000, *Commission* v *France*, C-337/98, EU:C:2000:543, paragraph 40.

14 – Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

15 – See, inter alia, order of 3 July 2014, *Tudoran*, C-92/14, EU:C:2014:2051, paragraph 38.

16 – See, inter alia, orders of 3 July 2014, *Tudoran*, C-92/14, EU:C:2014:2051, paragraph 39 and the case-law cited, and of 12 May 2016, *Security Service and Others*, C-692/15 to C-694/15, EU:C:2016:344, paragraph 27.

17 – Judgments of 22 December 2008, *Les Vergers du Vieux Tauves*, C-48/07, EU:C:2008:758, paragraph 21 and the case-law cited, and of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 23.

18 – Judgment of 7 November 2013, *Romeo*, C-313/12, EU:C:2013:718, paragraph 22 and the case-law cited.

19 – See, inter alia, judgment of 18 October 2012, *Nolan*, C-583/10, EU:C:2012:638, paragraph 51. In its judgment of 14 January 2016, *Ostas celtnieks* (C-234/14, EU:C:2016:6, paragraphs 19 to 21), the Court agreed to interpret Directive 2004/18 taking into account, in particular, the submission made by the Latvian Government that the Latvian law on public works contracts was applicable to public works contracts of an amount less than the threshold laid down by Directive 2004/18. The Court however accepted its jurisdiction to answer the question referred only 'subject to the verifications to be made by the referring court'.

---

20 – See, by analogy, judgment of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 25.

---

21 – See, inter alia, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 24 and the case-law cited, and of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 17 and the case-law cited.

---

22 – See, inter alia, judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 23; of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 24; and of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 27.

---

23 – See, most recently, judgment of 14 July 2016, *Promoimpresa and Others*, C-458/14 and C-67/15, EU:C:2016:558, paragraph 66 and the case-law cited. See also my Opinion in *Commission v Finland*, C-195/04, EU:C:2007:28, point 55.

---

24 – Judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 20.

---

25 – See judgments of 15 May 2008, *SECAP and Santorso*, C-147/06 and C-148/06, EU:C:2008:277, paragraph 24, and of 17 November 2015, *RegioPost*, C-115/14, EU:C:2015:760, paragraph 51.

---

26 – See, inter alia, judgments of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 25, and of 14 November 2013, *Belgacom*, C-221/12, EU:C:2013:736, paragraph 30 and the case-law cited.

---

27 – See, by analogy, judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 20.

---

28 – See judgments of 15 May 2008, *SECAP and Santorso*, C-147/06 and C-148/06, EU:C:2008:277, paragraph 24, and of 17 November 2015, *RegioPost*, C-115/14, EU:C:2015:760, paragraph 51.

---

29 – See, inter alia, judgments of 13 November 2007, *Commission v Ireland*, C-507/03, EU:C:2007:676, paragraph 26, and of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 27. The Court has held on many occasions that the purpose of coordinating the procedures for the award of public contracts at EU level is precisely to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State (see, for example, judgments of 3 October 2000, *University of Cambridge*, C-380/98, EU:C:2000:529, paragraph 16; of 18 October 2001, *SIAC Construction*, C-19/00, EU:C:2001:553, paragraph 32; and of 24 January 2008, *Lianakis and Others*, C-532/06, EU:C:2008:40, paragraph 39).

---

30 – See, by analogy, judgment of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 32 and the case-law cited.

---

31 – See, as regards that distinction, the Opinion of Advocate General Jääskinen in *Partner Apelski Dariusz*, C-324/14, EU:C:2015:558, point 22.

---

32 – See, inter alia, judgment of 12 May 2011, *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291, paragraph 33.

---

33 – See, by analogy, judgment of 12 May 2011, *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291, paragraph 34.

---

34 – Judgments of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 41, and of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 28 and the case-law cited.

---

35 – See judgments of 23 December 2009, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 37; of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 29; and of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 51 and the case-law cited.

---

36 – Judgment of 23 December 2009, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 37 and the case-law cited.

---

37 – Judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 28.

---

38 – See, by analogy, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 34, and of 14 January 2016, *Ostas celtnieks*, C-234/14, EU:C:2016:6, paragraph 24. See also my Opinion in *Wrocław - Miasto na prawach powiatu*, C-406/14, EU:C:2015:761, point 30.

---

39 – See, inter alia, judgments of 27 October 2005, *Contse and Others*, C-234/03, EU:C:2005:644, paragraph 25, and of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 31. See also, on the principle of proportionality applied as a general principle of EU law in the context of contract award procedures falling outside the scope of Directive 2004/17 or Directive 2004/18, judgment of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 29.

---

40 – Directive 2004/17 contains no rule comparable to that provision.

---

41 – See, by analogy, judgment of 14 July 2016, *Wrocław - Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 34 and the case-law cited. See also my Opinion in that case, EU:C:2015:761, point 32 and the case-law cited.

---

42 – Whether considerations of national security might be such as to justify a restriction to the Treaty principles relevant to the present proceedings is a different question which does not require to be addressed here.

---

43 – See, by analogy, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 37 and the case-law cited.

---

44 – See, by analogy, judgments of 18 March 2004, *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 45, and of 14 July 2016, *Wrocław - Miasto na prawach powiatu*, C-406/14, EU:C:2016:562, paragraph 34.

---

45 – See point 25 above.

---

46 – See points 43 to 45, 47 and 49 of this Opinion.

---

47 – See, by analogy, judgment of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 42.

---

48 – See point 49 of this Opinion.

---

49 – The underlying rationale is the same as in the context of subcontracting. See point 49 of this Opinion and the case-law cited by analogy in footnotes 43 and 44.

---

50 – For example, water proofing an infrastructure.

---

51 – See to that effect judgments of 23 December 2009, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 31 and 32 and the case-law cited, and of 22 October 2015, *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 36.

---

52 – Judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 34.

---

53 – Judgments of 10 December 2009, *CommissionvFrance*, C-299/08, EU:C:2009:769, paragraph 41, and of 10 May 2012, *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 56.

---

54 – Judgment of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44.

---

55 – See, inter alia, judgment of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44 and the case-law cited; see also judgment of 10 May 2012, *Commission v Netherlands*, C-368/10, EU:C:2012:284, paragraph 88.

---

56 – Judgment of 10 May 2012, *Commission v Netherlands*, C-368/10, EU:C:2012:284, paragraph 55.

---

57 – Judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228.

---

58 – Judgment of 16 April 2015, *Enterprise Focused Solutions*, C-278/14, EU:C:2015:228, paragraph 29.

---

59 – See, inter alia, judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 31 and 32.

60 – See points 75 and 76 above.

JUDGMENT OF THE COURT (Third Chamber)

8 June 2017 (*)

(Reference for a preliminary ruling — Public procurement — Medicinal products for human use — Directive 2004/18/EC — Article 2 and Article 23(2) and (8) — Articles 34 and 36 TFEU — Public contract for supplying a hospital — National legislation requiring that hospitals are to be supplied as a matter of priority with medicinal products obtained from national plasma — Principle of equal treatment)

In Case C-296/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia), made by decision of 14 May 2015, received at the Court on 18 June 2015, in the proceedings

Medisanus d.o.o.

v

Splošna Bolnišnica Murska Sobota

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 22 September 2016,

after considering the observations submitted on behalf of:

– Medisanus d.o.o., by A. Godec, odvetnik, G. Backmann and M. Žlebnik,

– the Slovenian Government, by A. Grum, acting as Agent,

– the Spanish Government, by A. Gavela Llopis, acting as Agent,

– the European Commission, by G. Braga da Cruz, A. Sipos and B. Rous Demiri, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 December 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2 and Article 23(2) and (8) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum, OJ 2004 L 351, p. 44), read in conjunction with Article 83 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67) as

amended by Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 (OJ 2003 L 33, p. 30) ('Directive 2001/83'), with Article 4(2) of Directive 2002/98 and with Article 18 TFEU.

2 The request has been made in proceedings between Medisanus d.o.o. and Splošna Bolnišnica Murska Sobota (Murska Sobota General Hospital, Slovenia) ('the hospital') concerning the legality of a clause in the tender specifications relating to a public procurement procedure launched by that hospital for the supply of medicinal products.

Legal context

EU law

Directive 2004/18

3 Directive 2004/18, which applies *ratione temporis* to the dispute in the main proceedings, was repealed as from 18 April 2016 by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ 2014 L 94, p. 65). Article 1(2)(a) of Directive 2004/18 defined public contracts as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this directive'.

4 Article 2 of the directive, headed 'Principles of awarding contracts', provided that contracting authorities were to treat economic operators equally and non-discriminatorily and act in a transparent way.

5 Under Article 23 of the directive:

'…

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

…

8. Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words "or equivalent".'

6 The meaning of 'technical specification' was defined in paragraph 1 of Annex VI to the directive. With regard in particular to public supply and public service contracts, paragraph 1(b) of that annex defined such a specification as one set out 'in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures'.

Rules of EU law concerning human blood

7 According to recitals 2, 4, 23 and 32 of Directive 2002/98, which governs various operations in relation to human blood:

'(2) The availability of blood and blood components used for therapeutic purposes is dependent largely on Community citizens who are prepared to donate. …

…

(4) ... Furthermore, Member States should take measures to promote Community self-sufficiency in human blood or blood components and to encourage voluntary unpaid donations of blood and blood components.

…

(23) Voluntary and unpaid blood donations are a factor which can contribute to high safety standards for blood and blood components and therefore to the protection of human health. The efforts of the Council of Europe in this area should be supported and all necessary measures should be taken to encourage voluntary and unpaid donations through appropriate measures and initiatives and through ensuring that donors gain greater public recognition, thereby also increasing self-sufficiency. …

…

(32) ... The objectives of this directive, namely to contribute to general confidence both in the quality of donated blood and blood components and in the health protection of donors, to attain self-sufficiency at a Community level and to enhance confidence in the safety of the transfusion chain among the Member States ...'

8 Article 2(1) of Directive 2002/98 defines the scope of that directive as follows:

'This Directive shall apply to the collection and testing of human blood and blood components, whatever their intended purpose, and to their processing, storage, and distribution when intended for transfusion.'

9 Article 4(2) of the directive provides as follows:

'This directive shall not prevent a Member State from maintaining or introducing in its territory more stringent protective measures which comply with the provisions of the Treaty.

In particular, a Member State may introduce requirements for voluntary and unpaid donations, which include the prohibition or restriction of imports of blood and blood components, to ensure a high level of health protection and to achieve the objective set out in Article 20(1), provided that the conditions of the Treaty are met.'

10 Under Article 20(1) of the directive:

'Member States shall take the necessary measures to encourage voluntary and unpaid blood donations with a view to ensuring that blood and blood components are in so far as possible provided from such donations.'

11 Recital 19 of Directive 2001/83, a directive which concerns, essentially, industrially manufactured medicinal products for human use, states:

'The Community entirely supports the efforts of the Council of Europe to promote voluntary unpaid blood and plasma donation to attain self-sufficiency throughout the Community in the supply of blood products, and to ensure respect for ethical principles in trade in therapeutic substances of human origin.'

12 Article 1 of that directive contains, inter alia, the following definitions:

'10. Medicinal products derived from human blood or human plasma:

Medicinal products based on blood constituents which are prepared industrially by public or private establishments, such medicinal products including, in particular, albumin, coagulating factors and immunoglobulins of human origin;

…

17. Wholesale distribution of medicinal products:

All activities consisting of procuring, holding, supplying or exporting medicinal products, apart from supplying medicinal products to the public. Such activities are carried out with manufacturers or their depositories, importers, other wholesale distributors or with pharmacists and persons authorised or entitled to supply medicinal products to the public in the Member State concerned;

…’

13 Article 83 of Directive 2001/83, which is part of Title VII on the wholesale distribution and brokering of medicinal products, provides:

‘The provisions of this Title shall not prevent the application of more stringent requirements laid down by Member States in respect of the wholesale distribution of:

…

– medicinal products derived from blood,

…’

14 In Title X of Directive 2001/83, which concerns specific provisions on medicinal products derived from human blood and human plasma, Article 109 provides:

‘For the collection and testing of human blood and human plasma, Directive [2002/98] shall apply.’

15 Under Article 110 of Directive 2001/83:

‘Member States shall take the necessary measures to promote Community self-sufficiency in human blood or human plasma. For this purpose, they shall encourage the voluntary unpaid donation of blood and plasma and shall take the necessary measures to develop the production and use of products derived from human blood or human plasma coming from voluntary unpaid donations. They shall notify the Commission of such measures.’

Slovenian law

Law on medicinal products

16 Concerning the definition of the principle of priority supply of medicinal products manufactured industrially from plasma collected in Slovenia, Article 6(71) of the Zakon o zdravilih (Law on medicinal products) (Uradni list RS, No 17/14) provides:

‘The priority supply of medicinal products industrially manufactured from Slovenian plasma (that is to say, from frozen fresh plasma for processing, collected in the Republic of Slovenia) constitutes a principle whereby medicinal products obtained from foreign plasma which originate in the European Union are to be supplied on the basis of a marketing authorisation, in the event that medicinal products prepared from Slovenian plasma fail to cover the total demand for such products in the Republic of Slovenia, except where the introduction or importation of a specific medicinal product obtained from foreign plasma is justified on scientific or strategic grounds, as defined by the Strateški svet za zdravila [(Strategic Council for pharmaceutical products, Slovenia)] and by the Strokovni svet za preskrbo s krvjo in z zdravili iz plazme [(Scientific Council for the supply of blood and medicinal products obtained from plasma, Slovenia)].’

17 Article 6(106) of the Law on medicinal products defines ‘medicinal products obtained from blood or plasma’ as follows:

‘Medicinal products obtained from blood or plasma are industrially manufactured medicinal products, such as, for example, medicinal products containing, in particular, albumin … and immunoglobulin of human origin, which are manufactured by specialist operators using blood components collected in accordance with the rules governing the supply of blood and blood products and the rules governing medicinal products.’

18 Article 11(6) of the Law on medicinal products defines the scope of that law as follows:

‘The provisions of the present law shall not apply to … blood, plasma or blood cells which are subject to the legislation on the supply of blood, with the exception of plasma which is prepared using a method involving an industrial process and used in the manufacture of medicinal products.’

The Law on the supply of blood

19 Article 2 of the Zakon o preskrbi s krvjo (Law on the supply of blood) (Uradni list RS, No 104/06) provides as follows:

‘1. The supply of blood under this Law forms part of transfusion activities, which include planning, collection, processing, testing, storage, distribution and medical treatment as well as the regular and sufficient supply of blood and blood products to the population and the marketing of such products.

2. The activities referred to in the previous paragraph shall be carried out in accordance with the principles of national self-sufficiency and of voluntary unpaid blood donation, in order to guarantee a sufficient number of donors and the safety of blood transfusions.

…’

20 In Article 3(11), (12), (13), (18) and (27) of that law, the following terms are defined as follows:

– ‘blood’ is defined as ‘whole human blood’;

– ‘blood component’ is defined as ‘an active component of blood (... plasma), which may be prepared from blood by various methods’;

– ‘blood product’ is defined as ‘any therapeutic product (component or agent) which is derived from human blood or human plasma’;

– ‘self-sufficiency’ is defined as ‘the principle relating to the supply of blood and blood products under which the State is to meet its demand for blood and blood products using its own resources’; and

– ‘blood-based medicinal product’ is defined as ‘any medicinal product obtained from human blood or human plasma’.

21 Article 5(1) of that law, which concerns, in particular, blood collection, provides:

‘The activity of collecting and testing blood and blood components, whatever their intended purpose, and their processing, storage and distribution, when intended for transfusion, shall constitute a public service. The service shall be performed by the institute of transfusion or by the transfusion centre designated and licensed by the Agency.’

22 Article 10(1) and (2) of that law determines the function of the Zavod Republike Slovenije za transfuzisko medecino (Institute of Transfusion Medicine of the Republic of Slovenia) (‘the Institute’) in the following terms:

‘1. The [Institute] is … responsible at national level for the supply of blood and blood products to professional bodies, and for the integration of transfusion medicine in hospital practice.

2. The [Institute] shall coordinate all activities concerning donor selection, the collection, testing, processing, storage and distribution of blood and blood products, the clinical use of blood …’

The dispute in the main proceedings and the question referred for a preliminary ruling

23 By decision of 14 January 2015, the hospital launched a public procurement procedure for the purchase of two types of medicinal products derived from plasma, namely human albumin, 200 mg/ml infusion solution, and human immunoglobulin for intravenous administration, 50 mg/ml or 100 mg/ml.

24 It was specified in the tender specifications that the medicinal products that were the subject matter of the contract were to be ‘obtained from Slovenian plasma’. On enquiry from an economic operator, that requirement was justified by reference to the principle that supplies must come as a matter of priority from medicinal products manufactured industrially from plasma collected in Slovenia, as set out in Article 6(71) of the Law on medicinal products.

25 Disputing that national origin requirement for medicinal products derived from plasma, Medisanus requested the hospital to withdraw the requirement and amend the tender specifications accordingly. Indeed, since the Institute enjoys a monopoly for blood collection in Slovenia, by definition it is the only body that is able to supply medicinal products obtained from plasma collected in Slovenia and thus satisfy the national origin requirement for the plasma as prescribed in the tender specifications. However, according to Medisanus, such a requirement infringes EU law.

26 The hospital rejected Medisanus’s request on the ground that the requirements stemmed from national legislation, that they were justified from a scientific point of view and that, in addition, they were consistent with an objective of EU self-sufficiency set out in Article 110 of Directive 2001/83. The contracting authority also pointed out that medicinal products derived from Slovenian plasma failed to meet the total demand of the Slovenian population for medicinal products derived from plasma. Part of that demand would therefore be covered by a call for tenders relating to the purchase of medicinal products obtained from blood originating in various Member States.

27 Medisanus then challenged the decision to reject its request before the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia).

28 That body is a special national authority governed by the Zakon o pravnem varstvu v postopkih javnega naročanja (Law on appeals in public procurement procedures) (Uradni list RS, No 43/11), with exclusive jurisdiction to rule on the legality of decisions adopted by contracting authorities in the context of public procurement procedures.

29 In the context of the application for review pending before it, the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal) has doubts whether the Slovenian origin requirement for the plasma used to manufacture the medicinal products covered by the public procurement at issue in the main proceedings is compatible with Articles 2 and 23 of Directive 2004/18, in so far as that requirement might infringe the principle of equal treatment and respect for competition between economic operators.

30 The referring tribunal observes, however, that that requirement is based on Slovenian law. In the first place, Article 6(71) of the Law on medicinal products requires that supplies must come as a matter of priority from medicinal products manufactured industrially from plasma collected in Slovenia. In the second place, the Law on the supply of blood lays down the principle of self-sufficiency, pursuant to which the Republic of Slovenia has decided to meet its demand for blood and medicinal preparations obtained from human blood and plasma by using its own resources. In the third place, that law entrusts the Institute with carrying out the public service relating to the activity of collecting and testing blood and blood components, whatever their intended purpose, and to their processing, storage and distribution, when intended for transfusion.

31 In that context, the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must Directive [2004/18], in particular Article 23(2), Article 23(8) and Article 2 thereof, read in conjunction with

– Directive [2001/83], in particular Article 83 thereof;

– Directive [2002/98], in particular Article 4(2) thereof; and

– the FEU Treaty, in particular Article 18 thereof,

be interpreted as precluding a specification that industrially manufactured medicinal products must be obtained from “Slovenian plasma” (a requirement based on the domestic legislation ...)?’

Consideration of the question referred

Admissibility

32 At the outset, consideration should be given to whether the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal) meets the criteria for being regarded as a ‘national court or tribunal’ for the purposes of Article 267 TFEU.

33 Whether a body making a reference is a ‘court or tribunal’ within the meaning of Article 267 TFEU depends on a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, to that effect, judgment of 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, paragraph 17 and the case-law cited).

34 In the present case, on the basis of the information provided by the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal) in the annex to the order for reference, it is clear that that body has no connection with the public authorities whose decisions it reviews. Furthermore, its members enjoy the safeguards laid down in the Zakon o sodniški službi (Law on the duties of a judge) concerning their appointment, their term of office and the grounds for removal from office, so that their independence is guaranteed.

35 Moreover, the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal) is provided for by the Law on appeals in public procurement procedures, which makes it permanent and its jurisdiction mandatory.

36 Also, not only does that body rule on the basis of that law, but it also applies the *Zakon o pravdnem postopku* (Law on Civil Procedure) and its own rules of procedure, which were published in the *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*). In addition, referrals to that body are made by appeals and its decisions have the force of *res judicata*.

37 Lastly, the parties and, as the case may be, the tenderer whose bid is accepted are entitled to present their views in the course of the proceedings and to comment on the evidence and arguments presented by the other parties and by the representative of the public interest. The procedure before the referring body is therefore *inter partes*.

38 It follows that the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal) meets the criteria for being regarded as a ‘national court or tribunal’ for the purposes of Article 267 TFEU and that the question referred by it to the Court is admissible.

Substance

Preliminary observations

39 The purpose of the question referred is, in essence, to determine whether the requirement to manufacture medicinal products from plasma collected in Slovenia is compatible, first, with Article 2 and Article 23(2) and (8) of Directive 2004/18, read in conjunction with Article 83 of Directive 2001/83 and Article 4(2) of Directive 2002/98 and, secondly, with Article 18 TFEU.

40 It is apparent from the order for reference that, with regard to medicinal products manufactured industrially from human plasma, the Slovenian legislature established a system based on the following

elements.

41 In the first place, Article 3(18) of the Law on the supply of blood lays down a principle of self-sufficiency in human blood and in components and medicinal products obtained from human blood or human plasma, under which the Slovenian State is to meet by using its own resources the demand for blood, and for medicinal products obtained from blood or plasma, of patients being treated in its territory (‘the national self-sufficiency principle’).

42 Under Article 2 of that law, the national self-sufficiency principle must be observed in all transfusion activities, namely, inter alia, the collection, processing, distribution and supply to the population of blood and of components or medicinal products obtained from blood and plasma as well as the marketing of such components and medicinal products.

43 Article 2 of that law also lays down the principle of voluntary unpaid blood donation. It states that the combined application of the national self-sufficiency principle and the principle of voluntary unpaid donation is aimed at guaranteeing both a sufficient number of donors and the safety of blood transfusions.

44 In the second place, Article 10 of the Law on the supply of blood provides that the Institute, a public body, is, inter alia, responsible at national level for the supply of blood and of components and medicinal products obtained from blood and plasma. It also coordinates activities concerning, inter alia, the collection, processing and distribution of such components and medicinal products.

45 In the third place, Article 6(71) of the Law on medicinal products lays down the principle that supplies must come as a matter of priority from medicinal products manufactured industrially from plasma collected in Slovenia (‘Slovenian plasma’). Accordingly, the marketing of medicinal products derived from plasma collected outside Slovenia is authorised, as a matter of principle, only in the event that the medicinal products derived from Slovenian plasma do not meet the total demand (‘the priority supply principle’).

46 Therefore, it follows from that principle that the demand of Slovenian hospitals for medicinal products derived from plasma is to be met as a matter of priority by medicinal products obtained from Slovenian plasma (‘the national origin requirement’) and, where medicinal products of Slovenian origin are not sufficient, if necessary by using medicinal products obtained from plasma collected in other Member States.

47 In practice, the Institute allocates the quantities of Slovenian plasma that are not used for transfusion purposes to the manufacture of medicinal products. To this end, the Institute organises procedures for public service contracts with a view to selecting the economic operator that will undertake the manufacturing process, while the Institute will continue to own the plasma and become the owner of the medicinal products obtained from that plasma. The Institute then supplies those medicinal products to hospitals against payment of an amount equivalent to their production costs.

48 In addition, in order to meet the demand for medicinal products obtained from plasma that is not satisfied by the medicinal products derived from Slovenian plasma, the Institute, jointly with Slovenian hospitals, organises procedures for public supply contracts.

49 It is in that context that the public procurement procedure at issue in the main proceedings takes place, by which the hospital seeks to purchase medicinal products obtained from plasma that, under the priority supply principle, must be of Slovenian origin and for which the Institute is the only possible supplier.

The categorisation of human blood and components thereof

50 Both in its written observations and at the hearing the Slovenian Government relied on Article 168(7) TFEU to argue that human blood and components thereof are ‘resources’ and not goods for the purpose of Article 34 TFEU.

51 Under Article 168(7) TFEU, admittedly, the allocation of resources is included in the Member States' responsibilities regarding the definition of their health policy, as are the organisation and delivery of health services and medical care.

52 However, the wording of Article 168(7) TFEU provides no ground for inferring that the drafters of the Treaties intended the generic term 'resources' to specifically cover blood or components thereof.

53 In addition, nothing precludes medicinal products derived from human blood or human plasma from coming under the definition of 'goods' for the purposes of the provisions of the FEU Treaty on the free movement of goods, given the particularly broad interpretation of that term in the Court's case-law on, inter alia, medicinal products and blood and blood components (see, to that effect, judgments of 11 September 2008, *Commission* v *Germany*, C-141/07, EU:C:2008:492, paragraphs 27 to 32, and of 9 December 2010, *Humanplasma*, C-421/09, EU:C:2010:760, paragraphs 27 and 30). It follows that medicinal products derived from human blood or human plasma are 'goods' for the purpose of Article 34 TFEU.

54 Moreover, as the Advocate General has pointed out in points 62 to 66 of his Opinion, the medicinal products at issue in the main proceedings are 'products' within the meaning of Article 1(2)(a) and (c) of Directive 2004/18 that can be valued in money and thus be the subject of commercial transactions.

The applicable provisions

55 It should be recalled that a question referred for a preliminary ruling must be examined in the light of all the provisions of the Treaties and of secondary legislation which may be relevant to the issue raised (see, to that effect, judgment of 11 July 1985, *Mutsch*, 137/84, EU:C:1985:335, paragraph 10). The fact that a national court's question refers to certain provisions of EU law does not mean therefore that the Court of Justice may not provide the national court with all the guidance on points of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question (see, to that effect, judgment of 12 December 1990, *SARPP*, C-241/89, EU:C:1990:459, paragraph 8).

56 With regard to the provisions of EU law that the referring tribunal has asked the Court of Justice to interpret, consideration should be given, as a preliminary point, to whether Article 83 of Directive 2001/83, Article 4(2) of Directive 2002/98 and Article 18 TFEU apply to a situation such as that at issue in the main proceedings.

57 In the first place, Article 83 of Directive 2001/83 authorises Member States to apply more stringent requirements in respect of the wholesale distribution of medicinal products derived from blood than those which govern, on the one hand, the wholesale distribution of other medicinal products and, on the other hand, other distribution methods for medicinal products not covered by that provision.

58 'Wholesale distribution of medicinal products' is defined in Article 1(17) of Directive 2001/83 as 'all activities consisting of procuring, holding, supplying or exporting medicinal products, apart from supplying medicinal products to the public. Such activities are carried out with manufacturers or their depositories, importers, other wholesale distributors or with pharmacists and persons authorised or entitled to supply medicinal products to the public in the Member State concerned'.

59 The substance of the hospital's activities is clearly different. It follows that Article 83 of Directive 2001/83 does not apply in circumstances such as those of the dispute in the main proceedings.

60 In the second place, under Article 4(2) of Directive 2002/98 a Member States may prohibit or restrict imports of blood and blood components with a view to encouraging the voluntary unpaid donation of blood and blood components.

61 In that respect, the Court notes that Article 2(1) of Directive 2002/98 governs the distribution of human blood and blood components only 'when intended for transfusion'. Since medicinal products derived from plasma have a different purpose, Article 4(2) of Directive 2002/98 does not apply in circumstances such as those of the dispute in the main proceedings.

62 In the third place, and as the Advocate General has explained in points 37 and 38 of his Opinion, it should be borne in mind that Article 18 TFEU is to apply independently only to situations governed by EU law in regard to which the Treaty lays down no specific prohibition of discrimination (see, inter alia, to that effect, judgments of 21 June 1974, *Reyners*, 2/74, EU:C:1974:68, paragraphs 15 and 16; of 30 May 1989, *Commission* v *Greece*, 305/87, EU:C:1989:218, paragraphs 12 and 13; and of 18 December 2014, *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 31).

63 In the circumstances of the main proceedings and to the extent that the free movement of goods is concerned, the Court finds that the national origin requirement falls within the scope of Article 34 TFEU, which prohibits obstacles to the free movement of goods.

64 In that regard, it must be borne in mind that the Court has consistently held that the prohibition, laid down in Article 34 TFEU, of measures having equivalent effect to quantitative restrictions covers any measure of the Member States that is capable of hindering, directly or indirectly, actually or potentially, imports between Member States (judgment of 19 October 2016, *Deutsche Parkinson Vereinigung*, C-148/15, EU:C:2016:776, paragraph 22 and the case-law cited).

65 Read in conjunction with Article 36 TFEU, Article 34 thereof prohibits, inter alia, all discriminatory obstacles to the free movement of goods and thus provides for a specific prohibition of discrimination as against Article 18 TFEU.

66 It follows that, in circumstances such as those at issue in the main proceedings, Article 83 of Directive 2001/83, Article 4(2) of Directive 2002/98 and Article 18 TFEU do not apply to the main proceedings.

Whether a national origin requirement for medicinal products derived from plasma such as the requirement at issue in the main proceedings is compatible with Articles 2 and 23 of Directive 2004/18 and Article 34 TFEU

67 In the light of the above, the question referred should be understood as seeking to ascertain whether Article 2 and Article 23(2) and (8) of Directive 2004/18, and Article 34 TFEU read in conjunction with Article 36 TFEU, must be interpreted as precluding a clause in the tender specifications for a public contract which, in accordance with the law of the Member State to which the contracting authority belongs, requires medicinal products derived from plasma, which are the subject matter of the public contract at issue, to be manufactured from plasma collected in that Member State.

68 In the present case, clearly, the national origin requirement is inherently discriminatory. Indeed, the requirement that supplies must be obtained as a matter of priority from medicinal products derived from Slovenian plasma precludes any undertaking with medicinal products derived from plasma collected in another Member State of the European Union from tendering effectively in response to calls for tenders such as that issued by the hospital.

69 In that respect, the Court notes, as the Advocate General has observed in point 94 of his Opinion, that Directive 2004/18 does not bring about exhaustive harmonisation of the aspects relating to the free movement of goods. That finding follows in particular from the wording of Article 23(8) of the directive, in that it accepts that technical specifications may be justified by the subject matter of the contract.

70 Moreover, on the one hand, the contracting authority in the main proceedings is subject to the requirements for the award of public contracts, namely those under Article 2 and Article 23(2) and (8) of Directive 2004/18; on the other hand, it must bear in mind Article 110 of Directive 2001/83, pursuant to which Member States are to take the necessary measures to promote EU self-sufficiency in human blood and human plasma. The latter provision states that, for this purpose, the Member States are to encourage the voluntary unpaid donation of blood and plasma and take the necessary measures to develop the production and use of products derived from human blood or human plasma coming from voluntary unpaid donations.

71 With regard to the Member States' powers and responsibilities under Article 168(7) TFEU in respect, inter alia, of blood donations, in the field of health policy, of the management of health services and medical care and of the allocation of the resources assigned to them, it must be noted that in exercising

those powers, especially in the context of public procurement, Member States must comply with EU law, in particular the provisions on the free movement of goods (see, to that effect, judgment of 11 September 2008, *Commission* v *Germany*, C-141/07, EU:C:2008:492, paragraphs 22 to 25 and the case-law cited).

72 It follows that, with regard to both the discriminatory obstacles to the free movement of goods and the grounds for their justification, examination of the national origin requirement at issue in the main proceedings, according to which medicinal products derived from plasma must be obtained from plasma collected in Slovenia, cannot be limited to an assessment under Directive 2004/18; it must also take the provisions of primary law into account.

73 With regard to Directive 2004/18, the finding in paragraph 68 of the present judgment is sufficient to establish non-compliance with Article 2 of the directive, which requires that the contracting authority is, inter alia, to treat economic operators equally and non-discriminatorily.

74 It should be noted, moreover, that under Article 23(2) of Directive 2004/18 technical specifications that are set out in the public contract documentation should afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

75 It is apparent, however, that the conditions laid down in Article 23(8) of Directive 2004/18 are not satisfied in circumstances such as those at issue in the main proceedings.

76 It is clear from the wording of Article 23(8) of Directive 2004/18 that a technical specification may not refer to a specific source unless this is justified by the subject matter of the public contract, and that this is permitted on an exceptional basis only. In any event, any reference to a technical specification, such as a specific source or origin, must be accompanied by the words ‘or equivalent’ (see, to that effect, judgment of 22 September 1988, *Commission* v *Ireland*, 45/87, EU:C:1988:435, paragraph 22).

77 With regard to the main proceedings, by not adding the words ‘or equivalent’ after imposing the national origin requirement, the hospital may not only have deterred economic operators with analogous medicinal products from taking part in the tendering procedure, but also have impeded the flow of imports in trade between Member States by reserving the contract for medicinal products derived from Slovenian plasma exclusively to the Institute. In so doing, the hospital has failed to comply with Article 2 of Directive 2004/18, Article 23(2) and (8) thereof and Article 34 TFEU (see, by analogy, judgment of 24 January 1995, *Commission* v *Netherlands*, C-359/93, EU:C:1995:14, paragraph 27).

The justification for the obstacle to the free movement of goods

78 In order to determine whether a clause in the tender specifications for a public contract that imposes a national origin requirement for medicinal products derived from plasma, such as that at issue in the main proceedings, constitutes a restriction that is prohibited under Article 34 TFEU, the Court must examine whether it can be justified on grounds of public health protection, as the Slovenian Government and the Commission in particular have submitted (see, by analogy, judgment of 9 December 2010, *Humanplasma*, C-421/09, EU:C:2010:760, paragraph 31).

79 As a preliminary point, the Court notes that in the main proceedings the contracting authority is subject to two potentially conflicting requirements, as mentioned in paragraph 70 of the present judgment. Indeed, the contracting authority must comply with Article 6 of the Law on medicinal products, which lays down the principles of priority supply and national self-sufficiency, the latter stemming from Article 2 of the Law on the supply of blood. At the same time, the contracting authority must, pursuant to Article 2 of Directive 2004/18, afford equal access to public procurement and, accordingly, ensure non-discriminatory treatment of economic operators that have medicinal products derived from plasma.

80 In the present case, since the national origin requirement is discriminatory, as established in paragraph 68 of the present judgment, the Slovenian legislation can be justified only on one of the grounds listed in Article 36 TFEU (see, inter alia, by analogy, judgments of 17 June 1981, *Commission* v *Ireland*, 113/80, EU:C:1981:139, paragraphs 7, 8, 10 and 11, and of 30 November 1995, *Gebhard*, C-55/94, EU:C:1995:411, paragraph 37).

81 In that regard, the Slovenian Government takes the view that the system for the collection of human blood and human plasma at issue in the main proceedings is justified on grounds of public health.

82 The Court has consistently held that, in order to assess whether a Member State has observed the principle of proportionality in the field of public health, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the FEU Treaty and that it is for the Member States to determine the degree of protection which they wish to afford to public health and the way in which that degree of protection is to be achieved. Since the degree of protection may vary from one Member State to another, Member States must be allowed a measure of discretion (see, inter alia, judgments of 11 September 2008, *Commission* v *Germany*, C-141/07, EU:C:2008:492, paragraph 51; of 19 May 2009, *Apothekerkammer des Saarlandes and Others*, C-171/07 and C-172/07, EU:C:2009:316, paragraph 19; of 21 June 2012, *Susisalo and Others*, C-84/11, EU:C:2012:374, paragraph 28; of 5 December 2013, *Venturini and Others*, C-159/12 to C-161/12, EU:C:2013:791, paragraph 59; and of 19 October 2016, *Deutsche Parkinson Vereinigung*, C-148/15, EU:C:2016:776, paragraph 30).

83 However, it is apparent also from the Court's case-law that legislation that is capable of restricting a fundamental freedom guaranteed by the FEU Treaty, such as the free movement of goods, can be properly justified only if it is appropriate for securing the attainment of the legitimate objective pursued and does not go beyond what is necessary in order to attain it (see, to that effect, in the context of human health, judgments of 11 September 2008, *Commission* v *Germany*, C-141/07, EU:C:2008:492, paragraph 48, and of 9 December 2010, *Humanplasma*, C-421/09, EU:C:2010:760, paragraph 34).

84 As a first step, it is therefore necessary to examine whether the national origin requirement at issue in the main proceedings pursues a legitimate objective.

85 According to the Slovenian Government, the national origin requirement is intended (a) to encourage voluntary unpaid blood donations and (b) to ensure observance of the principle of national self-sufficiency. The Slovenian Government, which underlines the overlapping nature of the two objectives, draws attention to the fact that the strict conditions surrounding voluntary unpaid blood donations have a considerable impact on the quantities of human blood and blood components collected, which has an effect on self-sufficiency in blood supplies and, therefore, on the supply of blood components.

86 The Court notes, as a preliminary point, that the fact that the two objectives put forward by the Slovenian Government overlap follows from the very wording of Article 110 of Directive 2001/83. As provided in that article, 'Member States shall take the necessary measures to promote Community self-sufficiency in human blood or human plasma. For this purpose, they shall encourage the voluntary unpaid donation of blood and plasma ...'.

87 Encouraging voluntary unpaid blood donations is a way of addressing public health concerns such as those referred to in Article 36 TFEU. Therefore, that objective is, in principle, capable of justifying a restriction on the free movement of goods (see, to that effect, judgment of 9 December 2010, *Humanplasma*, C-421/09, EU:C:2010:760, paragraph 33).

88 Since the second objective put forward by the Slovenian Government consists in ensuring compliance with the principle of national self-sufficiency, it is necessary to examine whether national legislation, such as that at issue in the main proceedings, which pursues that objective contributes to the promotion of EU self-sufficiency in human blood and human plasma, referred to in Article 110 of Directive 2001/83.

89 In the first place, since the EU legislature did not set out detailed rules on how to attain EU self-sufficiency in human blood and human plasma, it may be accepted, as the Commission has, that as EU law currently stands EU self-sufficiency is achieved through the pursuit by each Member State of a national objective of self-sufficiency.

90 In the second place, the Court notes that the EU legislature uses various terms to define the scope of EU self-sufficiency. Whereas Article 110 of Directive 2001/83 mentions only human blood and human plasma, Article 20(1) of Directive 2002/98, read in the light of recital 4 thereof, requests Member States

to take the necessary measures to encourage voluntary unpaid donations with a view to ensuring that blood and blood components are in so far as possible provided from such donations.

91 The scope of the principle of EU self-sufficiency is made even broader in recital 19 of Directive 2001/83, which refers to 'self-sufficiency throughout the Community in the supply of blood products'.

92 Since the intended objective of ensuring EU self-sufficiency in the supply of blood products is to protect public health, its scope must be interpreted broadly.

93 Consequently, national legislation such as that at issue in the main proceedings pursues legitimate objectives of public health protection.

94 As a second step, it is necessary to assess whether such legislation is proportionate in achieving the objective of public health protection.

95 Since Article 36 TFEU is an exception, to be interpreted strictly, to the free movement of goods within the European Union, any national legislation must be necessary to achieve the declared objective and it must not be possible to achieve that objective by prohibitions or restrictions that are less extensive or have less effect on trade within the European Union (see, to that effect, judgment of 11 September 2008, *Commission* v *Germany*, C-141/07, EU:C:2008:492, paragraph 50).

96 In that regard, the material before the Court clearly does not lead to the conclusion that the priority supply principle for medicinal products manufactured industrially from Slovenian plasma collected from Slovenian hospitals contributes decisively to encouraging the Slovenian population to make voluntary unpaid blood donations.

97 It is true that recital 19 and Article 110 of Directive 2001/83 are both in line with the concept of solidarity. Since they are not paid, all blood donors act in the interest of all individuals with whom they share the same interests, by making it possible, together, inter alia, to guard against risks of insufficient quantities of medicinal products derived from blood or plasma. However, the priority supply principle at issue in the main proceedings, in that it excludes economic operators wishing to import into Slovenia medicinal products derived from plasma coming also from voluntary unpaid blood donations, collected in other Member States, is in clear contradiction to that concept underlying the objective of EU self-sufficiency. Accordingly, inasmuch as (a) the blood donors' motivation is the same in other Member States as in Slovenia and (b) all donors in the Member States have objectively concurring interests with regard to the manufacture and use of products derived from human blood and human plasma coming from such voluntary unpaid donations, there is no reason to consider, as the Slovenian Government claims, that conditions based on a purely national concept of solidarity are the only ones liable to have a major impact, in Slovenia, on the quantities of human blood and blood components collected and, thus, on the quantities of blood products derived from such donations.

98 It is not therefore evident that the objective of encouraging and maintaining a high level of voluntary unpaid blood donations necessarily requires recourse to the national origin requirement at issue in the main proceedings. In those circumstances, the Court finds that the priority supply principle is disproportionate.

99 That finding cannot be called into question by the argument that a system of priority supply, such as that described in paragraphs 41 to 48 of the present judgment, may be regarded as the least detrimental solution to the free movement of goods, having regard in particular to the fact that the medicinal products are supplied to hospitals against payment of an amount corresponding exclusively to their production costs.

100 It is true that a system of plasma collection such as that at issue in the main proceedings has been established in a global context characterised by a prolonged and undeniable shortage of quality blood and plasma and by a highly concentrated sector for industrial processing of blood and plasma into medicinal products. Moreover, as the Commission has pointed out in its written observations, that continuing tendency induces the few undertakings working in that field to prefer selling medicinal products derived from plasma in countries that can pay a higher price or buy them on a larger scale, and smaller States are thus facing a significantly higher price for medicinal products derived from plasma.

101 Admittedly, interests of an economic nature that aim at maintaining a quality hospital service that is safe and accessible to all may come within the derogation on grounds of public health set out in Article 36 TFEU, to the extent that they contribute to the attainment of a high level of health protection (see, to that effect, judgment of 11 September 2008, *Commission* v *Germany*, C-141/07, EU:C:2008:492, paragraph 60).

102 However, a system of priority supply of medicinal products manufactured industrially from Slovenian plasma, such as that at issue in the main proceedings, cannot be considered to be necessary to avoid higher costs for medicinal products derived from plasma, since the price of all medicinal products manufactured industrially from plasma, whether in Slovenia or in another Member State, is set on the same basis, namely voluntary unpaid blood donations.

103 Having regard to all of the foregoing considerations, the Court finds that a restriction such as that stemming from the national legislation at issue in the main proceedings has not been shown to be an appropriate means of attaining the objectives invoked and cannot therefore be regarded as justified by the achievement of those objectives.

104 Consequently, the answer to the question referred is that Article 2 and Article 23(2) and (8) of Directive 2004/18, and Article 34 TFEU read in conjunction with Article 36 TFEU, must be interpreted as precluding a clause in the tender specifications for a public contract which, in accordance with the law of the Member State to which the contracting authority belongs, requires medicinal products derived from plasma, which are the subject matter of the public procurement at issue, to be obtained from plasma collected in that Member State.

Costs

105 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national tribunal, the decision on costs is a matter for that tribunal. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 2 and Article 23(2) and (8) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and Article 34 TFEU read in conjunction with Article 36 TFEU, must be interpreted as precluding a clause in the tender specifications for a public contract which, in accordance with the law of the Member State to which the contracting authority belongs, requires medicinal products derived from plasma, which are the subject matter of the public procurement at issue, to be obtained from plasma collected in that Member State.

[Signatures]

---

* Language of the case: Slovenian.

OPINION OF ADVOCATE GENERAL

SAUGMANDSGAARD ØE

delivered on 1 December 2016 (1)

Case C-296/15

Medisanus d.o.o.

v

Splošna Bolnišnica Murska Sobota

(Request for a preliminary ruling from the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of awards of public procurement procedures, Slovenia))

(Reference for a preliminary ruling — Article 267 TFEU — Status of a 'court or tribunal' — Directive 2004/18/EC — Public procurement — Articles 2 and 23 — Equal treatment and non-discrimination — Directive 2001/83/EC– Medicinal products for human use — Medicinal products derived from industrially prepared plasma — Directive 2002/98/EC — Human blood and blood components — National rules requiring supplies to be obtained as a matter of priority from medicinal products manufactured on the basis of plasma collected in the territory of the Member State concerned — Article 34 TFEU — Free movement of goods — Discrimination between imports — Article 36 TFEU — Justification — Promotion of blood donations — National self-sufficiency — Autarky)

I – **Introduction**

1. By decision of 14 May 2015, received at the Court on 18 June 2015, the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of awards of public procurement procedures, Slovenia) requested the Court to give a preliminary ruling on the interpretation of Article 2 and Article 23(2) and (8) of Directive 2004/18/EC, (2) Article 83 of Directive 2001/83/EC, (3) Article 4(2) of Directive 2002/98/EC (4) and Article 18 TFEU.

2. That request was submitted in the context of an action brought by Medisanus d.o.o. against the Splošna Bolnišnica Murska Sobota (Murska Sobota general hospital, Murska Sobota, Slovenia) concerning the legality of a clause in the tender specifications relating to a public procurement procedure for the supply of medicinal products launched by that hospital. Under that clause, the medicinal products forming the subject matter of that procedure had to be manufactured on the basis of Slovenian plasma ('the national origin requirement').

3. That clause was introduced by the Murska Sobota general hospital in order to comply with national rules under which imports of medicinal products manufactured on the basis of plasma collected in another Member State may be authorised only if the medicinal products manufactured on the basis of plasma collected in the national territory are not sufficient to cover the needs of the national population ('the priority supply principle').

4. For the reasons which I shall set out below, I consider that Directive 2004/18 and Articles 34 and 36 TFEU must be interpreted as meaning that they preclude both the priority supply principle and the national origin requirement.

II – **Legal framework**

A – *EU law*

1. Directive 2004/18

5. Article 1(2)(a) Directive 2004/18 defines ‘public contracts’ as ‘contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive’.

6. Article 2 of that directive, entitled ‘Principles of awarding contracts’, states that contracting authorities are to treat economic operators equally and non-discriminatorily and are to act in a transparent way.

7. Article 23 of that directive concerns technical specifications.

8. That concept of ‘tender specifications’ is defined in point 1 of Annex VI to that directive. As regards, in particular, public supply and public service contracts, point 1(b) contains the following definition:

> ‘… a specification in a document defining the required characteristics of a product or service, such as quality and environmental performance levels, design for all requirements (including accessibility for people with disabilities), and conformity-assessment, performance, use of the product, its safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production methods and procedures, as well as conformity assessment procedures’.

9. In the words of Article 23 of that directive:

> ‘…
>
> 2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.
>
> …
>
> 8. Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. …’

2. Directive 2002/98

10. Article 2(1) of Directive 2002/98 defines the scope of that directive as follows:

> ‘This Directive shall apply to the collection and testing of human blood and blood components, whatever their intended purpose, and to their processing, storage, and distribution when intended for transfusion.’

11. Article 4(2) of that directive provides:

> ‘This directive shall not prevent a Member State from maintaining or introducing in its territory more stringent protective measures which comply with the provisions of the Treaty.
>
> In particular, a Member State may introduce requirements for voluntary and unpaid donations, which include the prohibition or restriction of imports of blood and blood components, to ensure a high level of health protection and to achieve the objective set out in Article 20(1), provided that the conditions of the Treaty are met.’

12. In the words of Article 20(1) of that directive:

‘Member States shall take the necessary measures to encourage voluntary and unpaid blood donations with a view to ensuring that blood and blood components are in so far as possible provided from such donations.’

3. Directive 2001/83

13. Article 1 of Directive 2001/83 contains, in particular, the following definitions:

‘2. Medicinal product:

(a) Any substance or combination of substances presented as having properties for treating or preventing disease in human beings, or;

(b) Any substance or combination of substances which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis.

…

10. Medicinal products derived from human blood or human plasma: Medicinal products based on blood constituents which are prepared industrially by public or private establishments, such medicinal products including, in particular, albumin, coagulating factors and immunoglobulins of human origin.

…

17. Wholesale distribution of medicinal products: All activities consisting of procuring, holding, supplying or exporting medicinal products, apart from supplying medicinal products to the public. Such activities are carried out with manufacturers or their depositories, importers, other wholesale distributors or with pharmacists and persons authorised or entitled to supply medicinal products to the public in the Member State concerned.’

14. According to Article 2(1) of Directive 2001/83, that directive is to apply to medicinal products for human use intended to be placed on the market in Member States and either prepared industrially or manufactured by a method involving an industrial process.

15. Article 83 of Directive 2001/83, which is part of Title VII, on wholesale distribution and brokering of medicinal products, provides:

‘The provisions of this Title shall not prevent the application of more stringent requirements laid down by Member States in respect of the wholesale distribution of:

…

– medicinal products derived from blood,

…’

16. Article 109 of Directive 2001/83, under Title X on special provisions on medicinal products derived from human blood and plasma, states that Directive 2002/98 is to apply for the collection and testing of human blood and human plasma.

17. In the words of Article 110 of Directive 2001/83:

‘Member States shall take the necessary measures to promote Community self-sufficiency in human blood or human plasma. For this purpose, they shall encourage the voluntary unpaid donation of blood and plasma and shall take the necessary measures to develop the production and use of products derived from human blood or human plasma coming from voluntary unpaid donations. They shall notify the Commission of such measures.’

B – *Slovenian law*

1. The Law on medicinal products

18. Concerning the definition of the priority supply principle in medicinal products industrially manufactured from plasma collected in Slovenia, Article 6(71) of the Zakon o zdravilih (Law on medicinal products) of 4 March 2014 (Uradni list RS, No 17/2014) provides:

> ‘The priority supply of medicinal products industrially manufactured from Slovenian plasma (that is to say, from frozen fresh plasma for processing, collected in Slovenia) constitutes a principle whereby medicinal products obtained from foreign plasma originating in the European Union are to be supplied on the basis of a marketing authorisation, in the event that medicinal products prepared from Slovenian plasma fail to cover the total demand for such products in Slovenia, except where the introduction or importation of a specific medicinal product obtained from foreign plasma is justified on scientific or strategic grounds, as defined by the Strateški svet za zdravila (Strategic Council for pharmaceutical products) and by the Strokovni svet za preskrbo s krvjo in z zdravili iz plazme (Scientific Council for the supply of blood and medicinal products obtained from plasma)’.

19. Paragraph 106 of that article defines ‘medicinal products obtained from blood or plasma’ as follows:

> ‘Medicinal products obtained from blood or plasma are industrially manufactured pharmaceutical products, such as, for example, medicinal products containing, in particular, human albumin and human immunoglobulin, which are produced for that purpose by specialist operators using blood compounds which are obtained in accordance with the rules governing the supply of blood and blood products and the rules governing medicinal products.’

20. Article 11(6) of the Law on medicinal products defines the scope of that law as follows:

> ‘The provisions of the present law shall not apply to … blood, plasma or blood cells, which are subject to the legislation on the supply of blood, with the exception of plasma which is prepared using a method involving an industrial process and is used in the manufacture of medicinal products’.

2. The Law on the supply of blood

21. The Zakon o preskrbi s krvjo (Law on the supply of blood) of 5 October 2006 (Uradni list RS, No 104/2006) contains the following definitions in Article 3(11) to (13), (18) and (27), respectively:

‘11. Blood: whole human blood; …

12. blood component: active component of blood (… plasma), which may be prepared from blood by various methods;

13. blood product: any therapeutic product (component or agent) which is derived from human blood or human plasma;

…

18. self-sufficiency: principle relating to the supply of blood and blood products under which the State is to meet its demand for blood and blood products using its own resources;

…

27. blood-based medicinal product: any medicinal product prepared from human blood or human plasma.’

22. Article 2 of that Law, relating to the supply of blood, is worded as follows:

> ‘The supply of blood forms part of transfusion activities, including the planning, collection, processing, testing, storage, distribution, treatment and regular, adequate supply of blood and blood products to the population, and the marketing of blood and such products. Those activities shall be carried out in accordance with the principles of national self-sufficiency and the voluntary unpaid donation of blood, in order to guarantee an adequate number of donors and the safety of blood transfusions.’

23. Article 5(1) of that Law, which concerns, in particular, the collection of blood, provides:

> ‘The activity of collecting and testing human blood and blood components, whatever their intended purpose, and their processing, storage and distribution when intended for transfusion shall constitute a public service. The service shall be performed by the Institute [of Transfusion Medicine] or by the transfusion centre designated and licensed by the Agency.’

24. Article 10(1) and (2) of that Law determines the function of the Zavod Republike Slovenije za transfuzisko medecino (Institute of Transfusion Medicine of the Republic of Slovenia, ‘the ZTM’) as follows:

‘1. The [ZTM] is a transfusion institute responsible at national level for the supply of blood and blood products to professional bodies, and for the integration of transfusion medicine in hospital practice.

2. The [ZTM] shall coordinate all activities concerning donor selection, the collection, testing, processing, storage and distribution of blood and blood products, and the clinical use of blood.’

III – **The main proceedings and the question for a preliminary ruling**

25. On 14 January 2015, Murska Sobota general hospital decided to launch a tendering procedure for the supply of medicinal products.

26. It is apparent from the tender specifications for the call for tenders that that public contract concerned medicinal products having the following characteristics:

– ‘human blood albumin 200 mg/ml infusion solution, obtained from Slovenian plasma’,

– ‘human immunoglobulin for intravenous administration, 50 mg/ml or 100 mg/ml, obtained from Slovenian plasma’.

27. In answer to an economic operator which had objected to the national origin requirement, Murska Sobota general hospital claimed that that requirement was consistent with the priority supply principle in medicinal products manufactured industrially on the basis of Slovenian plasma, as provided for in Article 6(71) of the Law on medicinal products. It stated, moreover, that another call for tenders had been published jointly with the Ministry of Health concerning human albumin and human immunoglobulin obtained from foreign plasma.

28. On 25 February 2015, Medisanus, a company having its seat in Ljubljana (Slovenia), requested the contracting authority to review the tender specifications. In support of its request, Medisanus claimed that only the ZTM was in a position to satisfy the national origin requirement as it had an exclusive right in respect of blood collected in Slovenia, from which it followed that the ZTM was the only operator able to supply medicinal products obtained from plasma collected in Slovenia. Medisanus was therefore of the view that such a requirement was incompatible with EU law, as regards industrially-manufactured medicinal products.

29. On 23 March 2015, Murska Sobota general hospital rejected that request for review as unfounded, for the following reasons. First of all, the national origin requirement followed from domestic law. Next, that requirement was scientifically justified. Last, the requirement was consistent with an objective of self-sufficiency promoted within the European Union. In the latter regard, the hospital in question referred to Article 83 of Directive 2001/83 and stated that the objective pursued was to ensure not absolute territorial self-sufficiency but the adequate use, limited to certain medicinal products, of the proportion of plasma collected in Slovenia that is available for the production of medicinal products derived from blood. It further stated that a certain percentage of its needs was covered by a call for tenders relating to the acquisition of medicinal products derived on blood from other Member States.

30. Following the rejection of its request, Medisanus submitted a request for revision to the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of awards of public procurement procedures). That commission has doubts as to the compatibility of the national origin requirement with Articles 2 and 23 of Directive 2004/18, in that it might give rise to a breach of the principle of equal treatment and respect for competition between economic operators.

31. That commission observes, however, that that requirement is based on Slovenian law. Article 6(71) of the Law on medicinal products imposes a priority supply of medicinal products produced industrially from plasma collected in Slovenia. Furthermore, the Law on the supply of blood establishes the principle of self-sufficiency, under which the Republic of Slovenia is to cover its needs for blood by its own resources. That law entrusts the ZTM with carrying out the public service relating to the activity of collecting and testing blood and blood components, independently of their intended use, and also with their preparation, storage and distribution when they are intended for transfusion.

32. In that context, the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of awards of public procurement procedures) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

> ‘Must Directive 2004/18, in particular Article 23(2), Article 23(8) and Article 2 thereof, read in conjunction with
>
> – Directive 2001/83, in particular Article 83 thereof,
>
> – Directive 2002/98, in particular Article 4(2) thereof, and with
>
> – the TFEU, in particular Article 18 thereof,
>
> be interpreted as precluding a specification that industrially manufactured medicinal products must be obtained from “Slovenian plasma” (a requirement based on the domestic legislation …)?’

IV – **Procedure before the Court**

33. The request for a preliminary ruling was lodged at the Court Registry on 18 June 2015.

34. Written observations have been submitted by Medisanus, the Slovenian and Spanish Governments and the European Commission.

35. The representatives of Medisanus, the Slovenian Government and the Commission appeared at the hearing on 22 September 2016 and presented oral argument.

V – **Analysis of the question for a preliminary ruling**

36. I consider that the question for a preliminary ruling referred by the referring body should be reformulated, for the following reasons.

37. First of all, the question submitted to the Court refers to the principle of non-discrimination as provided for in Article 18 TFEU. However, it follows from its wording that that provision is to apply without prejudice to any special provisions contained in the Treaties. Consequently, and as the Court has explained on numerous occasions, that article is to apply independently only to situations governed by EU law in regard to which the Treaty lays down no specific prohibition of discrimination. (5)

38. In fact, it has consistently been held that Article 34 TFEU reflects, inter alia, the obligation to comply with the principle of non-discrimination. (6) Since the priority supply principle and the national origin requirement come under Article 34 TFEU, (7) I shall examine them in the light of that article, as the Commission has suggested.

39. Next, the question refers to Article 4(2) of Directive 2002/98 and Article 83 of Directive 2001/83. For the reasons which I shall set out in points 155 to 164 of this Opinion, I consider that those provisions are not relevant in the circumstances of the main proceedings.

40. Last, it is necessary to take account of the respective scope of Directive 2004/18 and of Article 34 TFEU and also of the existence of two national measures at issue in the main proceedings:

– the priority supply principle and

– the national origin requirement.

41. The priority supply principle cannot be appraised, as such, by reference to Directive 2004/18, which applies only in the context of public contracts. Conversely, that principle must be appraised by reference to Article 34 TFEU, which guarantees the free movement of goods. (8)

42. On the other hand, the national origin requirement comes within the scope of both Directive 2004/18 and Article 34 TFEU. (9)

43. In the light of the foregoing, I propose that the question for a preliminary ruling should be reformulated as follows. By its question, the referring body asks the Court:

– whether Articles 34 and 36 TFEU must be interpreted as meaning that they preclude the priority supply principle; and

– whether Article 2 and Article 23(2) and (8) of Directive 2004/18 and Articles 34 and 36 TFEU must be interpreted as meaning that they preclude the national origin requirement.

44. For the reasons which I shall set out below, I consider that the abovementioned provisions must be interpreted as meaning that they preclude both the priority supply principle and the national origin requirement.

45. Before addressing those questions, however, I must ascertain whether the Court has jurisdiction to answer the question referred, by examining the status as a ‘court or tribunal’ within the meaning of Article 267 TFEU of the referring body. I shall then set out a number of considerations on the factual and legal context of the main proceedings.

A – *The jurisdiction of the Court*

46. It follows from Article 267 TFEU that the Court has jurisdiction only to answer questions referred by ‘courts or tribunals’.

47. In accordance with settled case-law, in order to determine whether a body making a reference is a ‘court or tribunal’ for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. (10)

48. I consider that it follows from the following factors, communicated by the referring body, that the latter does indeed have the status of a ‘court or tribunal’ for the purposes of Article 267 TFEU:

– it was set up by the national legislation on public contracts;

– it is permanent;

– its jurisdiction is compulsory, since its competence does not depend on the parties’ agreement and its decisions are binding; (11)

– the procedure before it is *inter partes*;

– it applies rules of law; and

– the guarantees of its independence and the independence of its members are analogous to those applicable to the ordinary courts and tribunals.

49. In addition, it should be borne in mind that, when appraising the legal status of national non-judicial bodies referred to in Article 2(9) of Directive 89/665/EEC (12) responsible for public procurement review procedures, the Court has already confirmed that several other national bodies essentially comparable to the referring body in the present case were ‘courts or tribunals’. (13)

50. Consequently, I consider that the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of awards of public procurement procedures) has the status of a

‘court or tribunal’ for the purposes of Article 267 TFEU and that the Court therefore has jurisdiction to answer the question referred by that body.

B – *Considerations concerning the factual and legal context of the main proceedings*

51. Before answering the question submitted by the referring body, it seems to me to be important to provide certain information, derived from the observations submitted to the Court, concerning the legal and factual context of the main proceedings.

52. I recall that the call for tenders at issue in the main proceedings related to the acquisition not of blood or blood components but rather of medicinal products manufactured industrially on the basis of plasma. The national origin requirement was imposed by the awarding authority in order to comply with the priority supply principle provided for in Article 6(71) of the Zakon o zdravilih (Law on medicinal products).

53. Within the system established by the Law on the supply of blood, and in particular by Article 10 thereof, the ZTM is responsible at national level for the supply of blood and blood products to bodies and for the integration of transfusion medicine in hospital practice.

54. According to the observations submitted by Medisanus, the Slovenian Government and the Commission, that law confers exclusive competence on the ZTM for the collection of blood and blood products in the territory of the Republic of Slovenia. It follows from that exclusive competence that only the ZTM is authorised to supply medicinal products based on Slovenian plasma, in such a way that the ZTM was in practice the only operator capable of supplying medicinal products in conformity with the national origin requirement.

55. The Slovenian Government has explained that the blood collected by the ZTM is primarily intended to be used for transfusion purposes. Only the surplus amounts of blood collected are intended to be processed into medicinal products such as human albumin or human immunoglobulin, which form the subject matter of the call for tenders at issue in the main proceedings.

56. It also follows from the observations submitted by the Slovenian Government that the ZTM does not itself process the blood collected in Slovenian territory into medicinal products, but sends that blood to a private operator which manufacturers the medicinal products by means of an industrial process. The ZTM selects that operator within the framework of an open procurement procedure in accordance with Directive 2004/18.

57. The medicinal products thus obtained are intended exclusively for the Slovenian market. The ZTM distributes those medicinal products to other public health services in Slovenia, and in particular to the hospitals. By way of consideration, the ZTM receives only the costs of manufacturing the medicinal products and does not make a profit.

58. Furthermore, it is only if and in so far as the quantity of medicinal products manufactured on the basis of Slovenian plasma is not sufficient to satisfy the needs of the Slovenian population that medicinal products manufactured on the basis of foreign plasma are bought, within the framework of an open public procurement procedure in accordance with Directive 2004/18.

C – *The infringement of Directive 2004/18*

59. In this section, I shall consider whether Article 2 and Article 23(2) and (8) of Directive 2004/18 must be interpreted as meaning that they preclude the national origin requirement.

60. In order to do so, it is necessary to assess (i) the applicability of Directive 2004/18 in the circumstances of the main proceedings and (ii) the existence of an infringement of the abovementioned provisions.

1. The applicability of Directive 2004/18

61. In the first place, it is clear from the Slovenian Government’s observations that Murska Sobota general hospital is a public body created by the Republic of Slovenia. On that basis, it must be regarded as a

‘contracting authority’ within the meaning of Article 1(9) of Directive 2004/18; moreover, that capacity has not been disputed by any of the parties which have submitted observations to the Court.

62. Nor, in the second place, to my mind, can it be disputed that the medicinal products at issue in the main proceedings constitute ‘products’ within the meaning of Article 1(2)(a) and (c) of Directive 2004/18.

63. Admittedly, the Slovenian Government has claimed that those medicinal products were not ‘products’ within the meaning of that directive or ‘goods’ for the purposes of Article 34 TFEU, on the ground that the ZTM and the Slovenian hospitals together provided a public service of general interest consisting in the supply of medicinal products manufactured on the basis of plasma.

64. In that regard, I would emphasise that the Court established long ago a particularly broad definition of ‘goods’ for the purposes of the FEU Treaty provisions on the free movement of goods, as referring to any product that can be valued in money and thus be the subject of commercial transactions. (14) In the absence of a different definition within Directive 2004/18, that definition seems to me to be capable of being transposed to the concept of ‘product’ within the meaning of that directive.

65. To my mind, there is scarcely any doubt that the medicinal products at issue in the main proceedings are products that can be valued in money and as such be the subject of commercial transactions. The fact that the supply of such medicinal products pursues an objective of general interest is not in my view capable of calling in question the quality of ‘products’ or ‘goods’ of the medicinal products at issue, but may, if appropriate, be taken into consideration at the justification stage.

66. My conviction in that respect is borne out by the Court’s case-law on the free movement of goods. The Court has considered on numerous occasions that medicinal products came within the scope of Articles 34 and 36 TFEU. (15) Furthermore, the Court held in the judgment in *Humanplasma* that a prohibition on the importation and marketing of blood and blood components obtained from paid blood donations constituted a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 34 TFEU. (16)

67. In the third place, the Slovenian Government has disputed the pecuniary nature, for the purposes of Article 1(2)(a) of Directive 2004/18, of the supply of medicinal products manufactured on the basis of Slovenian plasma, relying on the fact that the ZTM was prohibited from making a profit on that supply. (17)

68. I recall, in that regard, that a contract cannot fall outside the definition of ‘public contract’ merely because the remuneration remains limited to reimbursement of the expenditure incurred in providing the agreed good or service. (18) In the present case it is apparent from the observations submitted by the Slovenian Government, that the ZTM requests, by way of consideration for the supply of the medicinal products manufactured on the basis of Slovenian plasma, reimbursement of the costs of manufacturing the medicinal products. In doing so, it passes on to the purchasers the expenditure incurred in the processing, by a third operator, of the surplus blood collected in Slovenian territory. Accordingly, the supply of medicinal products manufactured on the basis of Slovenian plasma must, in those circumstances, be characterised as a ‘contract for pecuniary interest’.

69. In the fourth place, under the first indent of Article 7(b), the applicability of Directive 2004/18 is also subject to the condition that the estimated value, exclusive of value added tax (VAT), of the public contract must be equal to or greater than a threshold of EUR 207 000, that being the threshold applicable in the case of public supply contracts awarded by contracting authorities other than those referred to in Annex IV, such as Murska Sobota general hospital.

70. In answer to a question for clarification addressed to it by the Court, the referring body stated that the estimated value, exclusive of VAT, of the public contract at issue in the main proceedings was EUR 791 476. That contract is therefore above the threshold provided for in the first indent of Article 7(b) of Directive 2004/18.

71. In the fifth place, the Slovenian Government has also relied on the exception established by the Court in the judgment of 9 June 2009, *Commission* v *Germany*, (19) in support of its contention that Directive 2004/18 is not applicable. To my mind, however, that exception does not seem to be applicable to the circumstances of the main proceedings.

72. That judgment concerned a contract concluded for a period of 20 years between the City of Hamburg (Germany) and four Landkreise, for the purpose of establishing long-term cooperation between those local authorities for reciprocal treatment of waste. Thus, that contract, which had been concluded without launching a call for tenders, formed both the basis and the legal framework for the future construction and operation of facility intended to perform a public service, namely thermal incineration of waste. The Court held that such a contract was not required to be the subject matter of a prior call for tenders. (20)

73. Admittedly, the circumstances of the main proceedings bear certain resemblances to those of the judgment in *Commission* v *Germany*, and in particular the public nature of the contracting parties, namely Murska Sobota general hospital and the ZTM. However, in that judgment it was not the Court's intention to exclude all contracts between public entities (21) from the rules applicable to public contracts, but only those forming both the basis and the legal framework for long-term co-operation with the intention of carrying out a public service. That is not the case of the contract at issue in the main proceedings, the object of which is limited to the occasional supply of medicinal products manufactured on the basis of human plasma.

74. Consequently, I consider that the contract at issue in the main proceedings does not come within the exception established by the Court in the judgment in *Commission* v *Germany*.

75. It follows from the foregoing that Directive 2004/18 is applicable in circumstances such as those of the main proceedings.

2. The existence of an infringement of Article 2 of Directive 2004/18

76. Under Article 2 of Directive 2004/18, the contracting authorities are required to treat economic operators equally and non-discriminatorily.

77. According to the Court's case-law, in application of the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions. (22)

78. Strictly speaking, the national origin requirement distinguishes not between economic operators but between products, by excluding medicinal products not manufactured on the basis of Slovenian plasma.

79. Nonetheless, it has consistently been held that the principle of equal treatment, of which Article 2 of that directive is a particular expression, prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result. (23)

80. A clause requiring that a medicinal product be manufactured on the basis of plasma collected in the national territory is liable to operate mainly to the detriment of economic operators of other Member States, since they will find it more difficult to have access to plasma collected in the national territory than the economic operators of the Member State concerned. (24)

81. In the circumstances of the main proceedings, the discriminatory effects of that national origin requirement are all the more apparent because the ZTM, a Slovenian body, is in practice the only economic operator capable of supplying medicinal products manufactured on the basis of Slovenian plasma, which precludes all operators in other Member States.

82. I conclude from the foregoing that Article 2 of Directive 2004/18 of Directive 2004/18 must be interpreted as meaning that it precludes the national origin requirement. (25)

3. The existence of an infringement of Article 23(2) and (8) of Directive 2004/18

83. Article 23 of Directive 2004/18 imposes a number of obligations in relation to technical specifications. According to the definition provided in point 1(b) of Annex VI to that directive, 'technical specification' covers, in particular, any specification defining 'the required characteristics of a product or service', including requirements relevant to the product as regards 'production processes and methods'.

84. In the light of that definition, it seems indisputable — and, moreover, it has not been disputed by the parties which have submitted observations to the Court — that the national origin requirement is a technical specification for the purposes of Article 23 of Directive 2004/18.

85. According to Article 23(2) of that directive, technical specifications are to afford equal access for tenderers and are not to have the effect of creating unjustified obstacles to the opening up of public procurement to competition. For the reasons set out in points 79 to 81 of this Opinion, I consider that the national origin requirement does not permit equal access for tenderers within the meaning of that provision.

86. In addition, that requirement is contrary to Article 23(8) of Directive 2004/18, in that it refers to a specific source or origin, which has the effect of eliminating medicinal products manufactured on the basis of plasma of foreign origin.

87. I conclude from the foregoing that Article 2 and Article 23(2) and (8) of Directive 2004/18 must be interpreted as meaning that they preclude the national origin requirement. (26)

D – *The infringement of Article 34 TFEU*

88. In the context of this section, I shall consider whether Article 34 TFEU must be interpreted as meaning that it precludes the priority supply principle and the national origin requirement. (27)

89. In order to do so, it is necessary to assess (i) the applicability of Article 34 TFEU in the circumstances of the main proceedings and (ii) the existence of an infringement of that article.

1. The applicability of Article 34 TFEU

90. A number of questions must be examined before it can be concluded that Article 34 TFEU is applicable.

91. In the first place, it is necessary to assess whether Article 34 TFEU is still applicable in the circumstances of the main proceedings when it has just been established that there has been an infringement of Article 2 and Article 23(2) and (8) of Directive 2004/18.

92. I would emphasise in that regard that the scope of the priority supply principle, as provided for in Article 6(71) of the Law on medicinal products, is not limited to the sphere of public contracts. It is therefore necessary to determine whether that principle is compatible with Article 34 TFEU in all situations not coming under Directive 2004/18.

93. Furthermore, as regards the situations that do come within the scope of Directive 2004/18, it is necessary to determine whether that directive brings about exhaustive harmonisation, which would mean that the national measures in question could not be assessed in the light of the provisions of primary law. (28)

94. I consider that Directive 2004/18 does not bring about exhaustive harmonisation of the aspects relating to the free movement of goods, (29) in such a way that the national origin requirement may be assessed in the light of Article 34 TFEU. (30) The Commission has rightly claimed, in that regard, that that requirement was imposed by a public body, namely Murska Sobota general hospital, (31) which as such is subject to the obligations arising under the free movement of goods. (32)

95. In the second place, the Slovenian Government has claimed that the priority supply principle comes within an exclusive power afforded to the Member States by Article 168(7) TFEU in connection with the allocation, use, processing and distribution of human blood.

96. In that regard, the Court has already had occasion to rule that, in accordance with Article 168(7) TFEU, EU law does not affect the power of the Member States to adopt provisions intended to organise health services. In exercising that power, however, the Member States must respect EU law, in particular the FEU Treaty provisions on freedoms of movement. (33)

97. Contrary to what the Slovenian Government's apparent contention, therefore, Article 168(7) TFEU does not confer on the Member States any exemption from the obligations imposed on them by Article 34

TFEU or other provisions of EU law.

98. In the third place, I would observe that, for the reasons set out in points 62 to 66 of this Opinion, medicinal products manufactured on the basis of blood or blood components are ‘goods’ within the meaning of Article 34 TFEU.

99. Consequently, it is necessary to consider whether the priority supply principle and the national origin requirement establish a difference in treatment prohibited by Article 34 TFEU.

2. The existence of an infringement of Article 34 TFEU

100. It is apparent from the observations submitted by the Slovenian Government and from those submitted by the Commission that the medicinal products manufactured on the basis of Slovenian plasma are prepared not in Slovenian territory, but in another Member State. As the Republic of Slovenia does not have plasma fractionation facilities in its territory, the ZTM has the surplus blood collected processed by a private operator established in another Member State. (34)

101. Accordingly, the priority supply principle does not distinguish between medicinal products manufactured in the Republic of Slovenia and those imported from other Member States, but, rather, distinguishes between medicinal products imported from other Member States. Among the latter medicinal products, only those manufactured on the basis of Slovenian plasma at the request of the ZTM can be freely imported, whereas other medicinal products, manufactured on the basis of foreign plasma, can be imported only if the former do not permit the needs of the Slovenian population to be covered.

102. Such a difference in treatment, which leads to the channelling of imports in the sense that only certain economic operators can import the products concerned while others are precluded from doing so, constitutes a measure having equivalent effect to a quantitative restriction on imports, as the Commission has claimed. (35)

103. For the same reasons, the national origin requirement also constitutes a measure having equivalent effect to a quantitative restriction on imports, since only suppliers of medicinal products manufactured on the basis of Slovenian plasma are authorised to participate in the public procurement procedure at issue in the main proceedings.

104. I conclude from the foregoing that Article 34 TFEU must be interpreted as meaning that it precludes the priority supply principle and the national origin requirement.

E – *The existence of justification on the basis of Article 36 TFEU*

105. After having established that Article 2 and Article 23(2) and (8) of Directive 2004/18 and Article 34 TFEU must be interpreted as meaning that they preclude the priority supply principle and the national origin requirement, it remains to be ascertained whether those measures may be justified by an objective recognised as legitimate by EU law.

106. As regards the differences in treatment prohibited by the provisions of Directive 2004/18, I would observe that that directive does not effect an exhaustive harmonisation of the aspects relating to the grounds of justification, in such a way that those differences may be assessed, in that regard, in the light of the relevant provisions of primary law and the relevant case-law of the Court. (36)

107. In the judgment in *Humanplasma*, (37) the Court set out the principles applicable to the grounds of justification based on the protection of health and life of humans referred to in Article 36 TFEU.

108. First of all, public health ranks foremost among the assets or interests protected by Article 36 TFEU and it is for the Member States, within the limits imposed by the Treaty, to decide on the degree of protection which they wish to afford to human health and on the way in which that protection is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed some measure of discretion. (38)

109. Next, it follows from the case-law that a provision which is capable of restricting a fundamental freedom guaranteed by the Treaty, such as the free movement of goods, can be properly justified only if it is appropriate for securing the attainment of the legitimate objective pursued and does not go beyond what is necessary in order to attain it. (39)

110. Last, as regards, more specifically, the assessment of the proportionate nature of the provision at issue, it follows from the Court's case-law that since Article 36 TFEU constitutes an exception, which is to be strictly interpreted, to the rule of free movement of goods within the European Union, it is for the national authorities to demonstrate that that provision is necessary in order to achieve the declared purpose and that that objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on trade between Member States. (40)

111. In application of that case-law, it is appropriate to examine the legitimacy of the objectives put forward by the Slovenian Government and also the appropriateness and necessity, in the light of those objectives, of the priority supply principle and the national origin requirement imposed in the call for tenders at issue in the main proceedings.

112. The Slovenian Government has invoked the objective of encouraging voluntary unpaid blood donations in the national territory and also the objective of national self-sufficiency in blood and in blood products, including medicinal products manufactured on the basis of blood. The Commission has, in essence, examined the same grounds of justification under the more general objective of protection of the health and life of humans referred to in Article 36 TFEU.

113. I would emphasise that the Slovenian Government has not claimed, as a ground of justification, that medicinal products manufactured on the basis of non-Slovenian plasma might be dangerous. I also note, in that regard, that the competent authorities import such medicinal products when the medicinal products manufactured on the basis of Slovenian plasma are exhausted. (41)

114. I shall examine separately the two objectives invoked by the Slovenian Government, in the light of the case-law cited above.

1. The objective of encouraging voluntary unpaid blood donations

115. In the first place, to my mind there is scarcely any doubt that encouraging voluntary unpaid blood donations is a legitimate objective forming part of the more general objective of protecting the health and life of humans.

116. I would emphasise that that objective has been supported on many occasions by the Parliament, the Council and the Commission since the 1990s, (42) following, in particular, the 'contaminated blood' affair in France. (43)

117. Encouraging blood donations is a legitimate objective having regard to the considerable therapeutic importance of blood and blood products. In a communication of 21 December 1994, the Commission wrote in that respect:

> 'Blood and the products derived from it have become an indispensable facet of modern medicine. Their use has brought about dramatic advances in therapy and surgery, saved countless lives, and improved significantly the longevity as well as the quality of life for those who suffer from long-term blood disorders such as haemophilia. Ensuring the safety and the supply of blood and blood products, therefore, is of vital importance. …' (44)

118. As emphasised in recital 2 of Directive 2002/98, the availability of blood and blood components used for therapeutic purposes is dependent largely on Community citizens who are prepared to donate.

119. In addition, the voluntary and unpaid nature of these donations is the consequence of ethical and sanitary considerations put forward by the Slovenian Government. First of all, the principle of inalienability and non-commercialisation of the human body operates against the purchase and sale of blood. (45) Next, the fact that no payment is made for donations makes it possible to preserve the health of donors by ensuring that they are not exploited, in particular those among the most vulnerable categories of the population. (46) Last, the fact

that no payment is made makes it possible to protect the health of recipients, by eliminating the risk that a donor may conceal certain relevant medical information in order to receive payment. (47)

120. That political will was implemented by a legal obligation which is now found in Article 20 of Directive 2002/98 and Article 110 of Directive 2001/83, which require Member States to take the necessary measures to encourage voluntary and unpaid blood donations. (48)

121. Having regard to the foregoing, encouraging voluntary and unpaid blood donations constitutes a legitimate objective with regard to Article 36 TFEU.

122. As regards, in the second place, the appropriateness of the measures at issue in the main proceedings, it must be ascertained whether the priority supply principle and the national origin requirement are capable of achieving that legitimate objective of encouraging voluntary and unpaid blood donations.

123. I must confess to having serious doubts in that regard. I see no obvious relationship between those measures, which seek to steer national *demand* towards products manufactured on the basis of national plasma, and the objective of promoting voluntary and unpaid donations, which seeks to increase the *supply* of blood and blood components in the national territory.

124. More specifically, how can the fact that Murska Sobota general hospital is required to obtain its supplies from medicinal products manufactured on the basis of national plasma, as is the case in the main proceedings, encourage potential donors to make voluntary and unpaid donations of blood or blood components?

125. The Slovenian Government has claimed, in that regard, that it is important to prohibit the commercial exploitation of the blood and blood components collected, in order to preserve the motivation of potential donors.

126. From that viewpoint, the priority supply principle and the national origin requirement again seem to me to be incapable of achieving the objective ascribed to them, since those measures do not directly or indirectly prohibit the commercial exploitation of the blood collected in the national territory. Furthermore, those measures fail the necessity test, since it is sufficient in that regard to impose a ban on commercial exploitation on the ZTM and on any other person involved in the collection, processing or distribution of the blood collected.

127. Having regard to the foregoing, I consider that the priority supply principle and the national origin requirement cannot be justified by the objective of encouraging voluntary and unpaid donations of blood.

2. The objective of national self-sufficiency (or sufficiency)

128. The Slovenian Government has also relied on the objective of national self-sufficiency in blood and blood products in order to justify the priority supply principle and the national origin requirement.

129. Like the promotion of voluntary and unpaid donations, the objective of self-sufficiency in blood and in blood products has been supported on many occasions by the Parliament, the Council and the Commission. (49)

130. That political will has also been implemented by a legal obligation, now provided for in Article 110 of Directive 2001/83, (50) which provides that Member States are to take the necessary measures to promote EU self-sufficiency in human blood or in human plasma.

131. However, the concept of ‘self-sufficiency’ contains two ambiguities that affect its ability to justify the priority supply principle and the national origin requirement. It should be emphasised in that regard that that concept has not been defined by the EU legislature, in particular not in either Directive 2001/83 or Directive 2002/98.

132. The first ambiguity concerns the territorial scale of the objective of self-sufficiency in blood and blood products. Must that objective be pursued at EU level or may it be pursued at national level? I note that that question is not novel within the EU. (51)

133. None of the parties which have submitted observations to the Court has disputed the fact that self-sufficiency in blood and blood products is a legitimate objective at EU level. (52) However, although the objective of self-sufficiency at EU level may justify restrictions on products imported from third countries, (53) it cannot readily justify a restriction on imports between Member States, such as those at issue in the main proceedings.

134. Therefore, the question that arises in the context of the present case is that of the legitimacy of the objective of self-sufficiency pursued *at national level*. I consider that that objective of national self-sufficiency is legitimate for the following reasons.

135. First, I recall the considerable therapeutic importance assumed by the use of blood and blood products. (54) In the light of the objective of protecting the health and life of humans referred to in Article 36 TFEU, it is therefore legitimate for a State to ensure that the health services in its territory have sufficient quantities of blood and blood products, without being dependent in that regard on any imports from other Member States.

136. Second, it is apparent from the Commission's observations that lightly populated States, such as the Republic of Slovenia, may encounter difficulties in obtaining supplies on the international markets. According to the Commission, the tendency on those markets, on which the demand for medicinal products derived from blood exceeds the supply of plasma, should encourage undertakings to sell the final product, out of preference, in countries that can pay a higher price or that buy larger quantities. Accordingly, it is legitimate for a lightly populated State to adopt measures to ensure that it is self-sufficient in blood and blood products.

137. Third, and as the Commission has claimed, in the absence of harmonisation at EU level, the objective of self-sufficiency pursued at the level of each State contributes indirectly to the self-sufficiency of the European Union in blood and blood products, an objective the legitimacy of which is not disputed.

138. Fourth, I note that a number of documents issued by the EU institutions approve of the objective of self-sufficiency in blood and in blood products pursued at Member State level. (55)

139. Having regard to the foregoing, I consider that national self-sufficiency in blood and in blood products constitutes a legitimate objective in the light of Article 36 TFEU.

140. A second ambiguity concerns the material scope of the concept of 'self-sufficiency', which may be interpreted in two appreciably different ways. According to a first, more moderate, approach, the objective of national self-sufficiency consists in promoting the capacity of the population of a Member State to satisfy its needs, whether by means of its own resources or by means of imports.

141. According to a second, more radical, approach, that objective means that the needs of the population of a Member State are satisfied solely by means of its own resources, to the exclusion of any imports. This second approach to national self-sufficiency thus promotes an objective of autarky, namely satisfaction, in a closed circuit, of national demand by national supply. (56)

142. I would emphasise that, in a recent working document of the Commission's services, (57) these two approaches were designated respectively by the expressions 'national sufficiency' (58) and 'national self-sufficiency' (59) and, in the interest of clarity, I shall use those terms.

143. It should be strongly emphasised that the objective of national self-sufficiency, based on the idea of autarky, represents the simple negation of the freedoms of movement and the internal market. Since exceptions to the free movement of goods must be interpreted strictly, (60) it does not seem to me to be possible to describe that objective as 'legitimate' in the light of Article 36 TFEU.

144. Admittedly, I cannot rule out the possibility that the second sentence of Article 4(2) of Directive 2002/98 allows Member States to pursue such an objective by prohibiting imports of blood. However, that provision refers to blood and blood products *to the exclusion* of medicinal products manufactured industrially on the basis of plasma, such as those at issue in the main proceedings. (61)

145. I recall, moreover, that such medicinal products come under Directive 2001/83 and, accordingly, under the rules of free movement based on mutual recognition of marketing authorisations as provided for in Articles 28 to 39 of that directive. (62) The fact that those medicinal products are included in those rules on free movement shows that the EU legislature did not intend to allow Member States to pursue an objective of autarky with respect to those products.

146. To my mind, therefore, it must be precluded that the objective of national self-sufficiency, based on the idea of autarky, may constitute a legitimate objective in the case of medicinal products manufactured industrially on the basis of plasma, such as those at issue in the main proceedings.

147. On the other hand, I consider that the objective of national sufficiency, conceived as the promotion of the capacity of the population of a Member State to satisfy its needs, whether by means of its own resources or by means of imports, represents such a legitimate objective, for the reasons set out in points 135 to 138 of this Opinion.

148. In addition, that approach seems to me to be consistent with the ultimate objective of the blood policy conducted by the EU and the Member States, which is to ensure the availability of blood products. The fact of authorising imports of blood products makes it possible to counteract, to a certain degree, the risks affecting the collection of blood in the national territory. In other words, the availability of blood and blood products seems to me to be better ensured where there are two supply channels, the national offer and imports from other Member States. (63)

149. It nonetheless remains to be ascertained whether that objective of national sufficiency, conceived as promoting the ability of the population of a Member State to satisfy its needs, whether by means of its own resources or by means of imports, may justify the priority supply principle and the national origin requirement.

150. To my mind, those measures are not appropriate for the pursuit of that objective.

151. The priority supply principle and the national origin requirement have the effect of restricting imports of medicinal products manufactured on the basis of plasma collected in another Member State. By limiting the potential of that first channel of the supply of blood products, those measures reduce the ability of the national population to satisfy its needs.

152. Furthermore, the priority supply principle and the national origin requirement do not have a positive impact on the second channel of supply of blood products, namely the national offer. I have already set out the reasons why those measures, which seek to steer national demand towards products manufactured on the basis of national plasma, are not in my view capable of promoting the collection of blood in the national territory. (64)

153. Consequently, I consider that the priority supply principle and the national origin requirement cannot be justified by the objective of national self-sufficiency in blood products.

154. Having regard to the foregoing, I consider that the infringements of Article 2 and Article 23(2) and (8) of Directive 2004/18 and of Article 34 TFEU, which result from those measures, are not justified in the light of the objective of protection of the health and life of humans referred to in Article 36 TFEU.

3. The irrelevance of Article 4(2) of Directive 2002/98 and Article 83 of Directive 2001/83

155. The question for a preliminary ruling expressly mentions Article 4(2) of Directive 2002/98 and Article 83 of Directive 2001/83. Both of those provisions permit the Member States to introduce more stringent requirements or measures than those laid down in those directives.

156. In the interest of completeness, I wish to set out briefly the reasons why those provisions are not relevant in the circumstances of the main proceedings.

157. As regards Directive 2002/98, it follows from Article 2(1) thereof that the distribution of medicinal products manufactured industrially on the basis of plasma, such as those at issue in the main proceedings, does not fall within the scope of that directive.

158. As the Court explained in the judgment in *Octapharma France*, (65) the collection and testing of plasma fall within the scope of Directive 2002/98 even where an industrial process is involved, as confirmed by Article 109 of Directive 2001/83. On the other hand, the intervention of an industrial process removes the processing, storage and distribution of plasma from the scope of Directive 2002/98.

159. Consequently, Article 4(2) of Directive 2002/98 is not applicable in the circumstances of the main proceedings, as Medisanus, the Spanish Government and the Commission have claimed. I find confirmation of that interpretation in the wording of the second sentence of Article 4(2) of Directive 2002/98, which provides that a Member State may prohibit or restrict 'imports of blood and blood components'. That provision cannot be interpreted as referring to the import of medicinal products manufactured industrially on the basis of plasma, such as those at issue in the main proceedings.

160. As regards Directive 2001/83, it cannot be disputed that the medicinal products at issue in the main proceedings fall within its scope, since they constitute medicinal products based on blood components and prepared industrially. That solution follows from Article 2(1) of that directive, which defines its scope, and also from the definitions in Article 1(1) and (10) of that directive. (66)

161. Article 83 of Directive 2001/83 comes under Title VII of that directive, which lays down certain requirements that must be met when carrying out the activities of wholesale distribution and brokerage of medicinal products. In particular, Article 77 requires Member States to ensure that wholesale distribution is subject to the requirement of an authorisation, while the conditions on which such authorisation may be granted are defined in Articles 79 and 80.

162. It is in that context that Article 83 of Directive 2001/83, which allows Member States to impose more stringent requirements in respect of the wholesale distribution of certain medicinal products, including medicinal products derived from blood, must be interpreted. In fact, that article refers only to the conditions of the exercise of the activity of wholesale distribution, as defined in the provisions of Title VII of that directive, and which may be supplemented by other obligations determined by the Member States, as confirmed in recital 38 of that directive.

163. The priority supply principle and the national origin requirement relate not to the conditions of the activity of wholesale distribution of medicinal products derived from blood, but to the conditions in which such medicinal products may be imported from another Member State. Consequently, Article 83 of Directive 2001/83 is not relevant in the circumstances of the main proceedings, as Medisanus, the Slovenian and Spanish Governments and the Commission have correctly maintained.

164. It follows from the foregoing that neither Article 4(2) of Directive 2002/98 nor Article 83 of Directive 2001/83 is relevant in the circumstances of the main proceedings.

VI – **Conclusion**

165. Having regard to the foregoing, I propose that the Court should answer the question for a preliminary ruling referred by the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of awards of public procurement procedures, Slovenia) as follows:

– Articles 34 and 36 TFEU must be interpreted as meaning that they preclude national rules authorising the import of medicinal products manufactured on the basis of plasma collected in another Member State only if the medicinal products manufactured on the basis of plasma collected in the national territory are not sufficient to cover the needs of the national population, and

– Article 2 and Article 23(2) and (8) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts must be interpreted as meaning that they preclude a clause requiring, in accordance with those national rules, medicinal products forming the subject matter of a public supply contract procedure to be manufactured on the basis of plasma collected in the national territory.

---

1 Original language: French.

---

2 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44), as most recently amended by Commission Regulation (EU) No 1336/2013 of 13 December 2013 (OJ 2013 L 335, p. 17) (‘Directive 2004/18’).

---

3 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as most recently amended by Directive 2012/26/EU of 25 October 2012 (OJ 2012 L 299, p. 1) (‘Directive 2001/83’).

---

4 Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC (OJ 2003 L 33, p. 30), as most recently amended by Regulation (EC) No 596/2009 of the European Parliament and of the Council of 18 June 2009 (OJ 2009 L 188, p. 14) (‘Directive 2002/98’).

---

5 See, in particular, judgments of 14 July 1994, *Peralta* (C-379/92, EU:C:1994:296, paragraph 18); of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809, paragraphs 54 and 55); and of 16 December 2010, *Josemans* (C-137/09, EU:C:2010:774, paragraphs 51 and 52 and the case-law cited).

---

6 See, to that effect, judgments of 7 May 1997, *Pistre and Others* (C-321/94 to C-324/94, EU:C:1997:229, paragraphs 49 and 54); of 2 December 2010, *Ker-Optika* (C-108/09, EU:C:2010:725, paragraph 48); and of 26 April 2012, *ANETT* (C-456/10, EU:C:2012:241, paragraph 33).

---

7 See points 90 to 99 of this Opinion.

---

8 See points 91 and 92 of this Opinion.

---

9 See points 93 and 94 of this Opinion.

---

10 Judgments of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 17 and the case-law cited), and of 24 May 2016, *MTHøjgaard and Züblin* (C-396/14, EU:C:2016:347, paragraph 23).

---

11 See in that regard judgment of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 23 and the case-law cited).

---

12 Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as most recently amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1).

---

13 See, in particular, judgments of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraphs 22 to 38); of 4 February 1999, *Köllensperger and Atzwanger* (C-103/97, EU:C:1999:52, paragraphs 16 to 25); of 18 September 2014, *Bundesdruckerei* (C-549/13, EU:C:2014:2235, paragraphs 20 to 23); and of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraphs 17 to 27).

---

14 Judgment of 10 December 1968, *Commission* v *Italy* (7/68, EU:C:1968:51, p. 626). This judgment concerned a tax imposed by the Italian Republic on exports of objects of artistic or historic interest.

---

15 See, in particular, judgments of 20 May 1976, *de Peijper* (104/75, EU:C:1976:67); of 28 February 1984, *Commission* v *Germany* (247/81, EU:C:1984:79); of 1 June 1994, *Commission* v *Germany* (C-317/92, EU:C:1994:212); and of 11 September 2008, *Commission* v *Germany* (C-141/07, EU:C:2008:492).

---

16 Judgment of 9 December 2010, *Humanplasma* (C-421/09, EU:C:2010:760, paragraphs 24 and 30).

---

17 It will be recalled that, in practice, the ZTM is the only operator able to supply medicinal products that conform to the national origin requirement and therefore to participate in the call for tenders at issue in the main proceedings. See point 54 of this Opinion.

---

18 See, in particular, judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817, paragraph 29), and of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraph 37).

---

19 C-480/06, EU:C:2009:357.

---

20 Judgment of 9 June 2009, *Commission* v *Germany* (C-480/06, EU:C:2009:357, paragraphs 5, 6, 31, 37, 44 and 49).

---

21 It will be recalled that contracts between public entities are not for that reason excluded from the scope of the EU legislation on public contracts. See the definition of 'economic operator' provided for in Article 1(8) of Directive 2004/18 and also the judgment of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 34 and the case-law cited).

---

22 Judgment of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 33 and the case-law cited).

---

23 See, to that effect, judgments of 5 December 1989, *Commission* v *Italy* (C-3/88, EU:C:1989:606, paragraph 8); of 26 September 2000, *Commission* v *France* (C-225/98, EU:C:2000:494, paragraph 80); of 21 February 2008, *Commission* v *Italy* (C-412/04, EU:C:2008:102, paragraph 66); and of 17 July 2008, *ASM Brescia* (C-347/06, EU:C:2008:416, paragraph 60).

---

24 See, by analogy with the criterion of residence on the national territory, judgment of 16 January 2003, *Commission* v *Italy* (C-388/01, EU:C:2003:30, paragraph 14).

---

25 As regards the existence of possible justification, see points 105 to 164 of this Opinion.

---

26 As regards the existence of possible justification, see points 105 to 164 of this Opinion.

---

27 I would point out that I have reformulated the question for a preliminary ruling, which referred to Article 18 TFEU, for the reasons set out in points 36 to 43 of this Opinion.

---

28 On the concept of ‘exhaustive harmonisation’, see, in particular, judgments of 14 December 2004, *Swedish Match* (C-210/03, EU:C:2004:802, paragraph 81); of 16 July 2015, UNIC *and Uni.co.pel* (C-95/14, EU:C:2015:492, paragraph 33); and of 12 November 2015, *Visnapuu* (C-198/14, EU:C:2015:751, paragraph 40).

---

29 I find confirmation of that interpretation in recital of Directive 2004/18, which states that that directive lay downs coordinating provisions which are to be interpreted in accordance with the principle of free movement of goods

---

30 This approach was taken by the Court in the judgment of 22 June 1993, *Commission* v *Denmark* (C-243/89, EU:C:1993:257), in which it was found that there had been an infringement of both the EU legislation on public contracts and Article 34 TFEU. In the judgment of 9 December 2010, *Humanplasma* (C-421/09, EU:C:2010:760), which also concerned a call for tenders for the supply of blood products, the Court held that there had been an infringement of Article 34 EU, but was not asked whether there had been an infringement of EU law relating to public contracts.

---

31 See point 61 of this Opinion.

---

32 According to settled case-law, the obligations arising under the free movement of goods also apply to autonomous bodies established by the State. See, to that effect, judgments of 18 June 1975, IGAV (94/74, EU:C:1975:81, paragraph 11); of 13 December 1983, *Apple and Pear Development Council* (222/82, EU:C:1983:370, paragraph 17); of 12 December 1990, *Hennen Olie* (C-302/88, EU:C:1990:455, paragraphs 13 to 16); and of 5 November 2002, *Commission* v *Germany* (C-325/00, EU:C:2002:633, paragraphs 17 to 20).

---

33 See, as regards freedom of establishment, judgment of 26 September 2013, *Ottica New Line* (C-539/11, EU:C:2013:591, paragraph 24 and the case-law cited). See also judgment of 21 June 2012, *Susisalo and Others* (C-84/11, EU:C:2012:374, paragraphs 26 and 27 and the case-law cited). That broad interpretation of the scope of the freedoms of movement is not limited to the areas referred to in Article 168(7) TFEU. See, in particular, judgments of 27 January 2011, *Commission* v *Luxembourg* (C-490/09, EU:C:2011:34, paragraph 32) and of 4 February 2015, *Melchior* (C-647/13, EU:C:2015:54, paragraph 21), and order of 17 November 2015, *Plaza Bravo* (C-137/15, EU:C:2015:771, paragraph 19).

---

34 See point 56 of this Opinion.

---

35 See, in that regard, judgments of 11 July 1974, *Dassonville* (8/74, EU:C:1974:82, paragraphs 8 and 9), and of 20 May 1976, *de Peijper* (104/75, EU:C:1976:67, paragraph 13).

---

36 See the case-law on the concept of ‘exhaustive harmonisation’ cited in footnote 28. Only Article 23(8) of Directive 2004/18 refers to the possibility of justification ‘by the subject matter of the contract’, which has not been relied on as such in the observations submitted to the Court. I observe that the Court examined the grounds of justification based on the provisions of primary law, when faced with a national measure contrary to EU legislation on public service contracts, in the judgment of 29 April 2010, *Commission* v *Germany* (C-160/08, EU:C:2010:230, paragraphs 73 to 86 and 125 to 130).

---

37 Judgment of 9 December 2010, *Humanplasma* (C-421/09, EU:C:2010:760).

---

38 Judgment of 9 December 2010, *Humanplasma* (C-421/09, EU:C:2010:760, paragraphs 32 and 39 and the case-law cited). See also judgments of 11 September 2008, *Commission* v *Germany* (C-141/07,

EU:C:2008:492, paragraphs 46 and 51) and of 19 October 2016, *Deutsche Parkinson Vereinigung* (C-148/15, EU:C:2016:776, paragraph 30).

---

39 Judgment of 9 December 2010, *Humanplasma* (C-421/09, EU:C:2010:760, paragraph 34 and the case-law cited). See also judgment of 11 September 2008, *Commission* v *Germany* (C-141/07, EU:C:2008:492, paragraph 48).

---

40 Judgment of 9 December 2010, *Humanplasma* (C-421/09, EU:C:2010:760, paragraph 38 and the case-law cited). See also judgment of 11 September 2008, *Commission* v *Germany* (C-141/07, EU:C:2008:492, paragraph 50).

---

41 See point 58 of this Opinion.

---

42 See, in particular, Resolution of the Parliament of 14 September 1993 on self-sufficiency in and safety of blood and its derivatives in the European Community (OJ 1993 C 268, p. 29); Resolution of the Parliament of 18 November 1993 on safe blood transfusions and use of blood derivatives (OJ 1993 C 329, p. 268); Council Conclusions of 13 December 1993 on self-sufficiency in blood in the European Community (OJ 1994 C 15, p. 6); Communication from the Commission of 25 May 1993 on blood self-sufficiency in the European Community (COM(93) 198 final); Communication from the Commission of 21 December 1994 on Blood safety and self-sufficiency in the European Community (COM(94) 652 final); Council Resolution of 2 June 1995 on blood safety and self-sufficiency in the Community (OJ 1995 C 164, p. 1); Resolution of the Parliament of 14 July 1995 on blood safety in the European Union (OJ 1995 C 249, p. 231); Resolution of the Parliament of 17 April 1996 on the communication from the Commission on blood safety and self-sufficiency in the European Community (OJ 1996 C 141, p. 131); and Council Resolution of 12 November 1996 on a strategy towards blood safety and self-sufficiency in the European Community (OJ 1996 C 374, p. 1).

---

43 This affair, which concerned inoculation with the AIDS virus in the course of blood transfusions in the 1980s, was revealed by the press in the course of 1991.

---

44 Communication COM(94) 652 final, p. 2. See also 2nd Report from the Commission of 23 March 2011 on Voluntary and Unpaid Donation of Blood and Blood Components (COM (2011) 138 final), p. 3.

---

45 See, in particular, Resolution of the Parliament of 14 September 1993 on self-sufficiency in and safety of blood and its derivatives in the European Community, point F; Communication COM(94) 652 final, p. 8; Resolution of the Parliament of 17 April 1996 on the communication from the Commission on blood safety and self-sufficiency in the European Community, point 7.

---

46 See, in particular, Communication COM(93) 198 final, p. 4, and Communication COM(94) 652 final, p. 8.

---

47 See, in particular, Communication COM(93) 198 final, p. 4; Report from the Commission of 21 April 2016 on the implementation of Directives 2002/98/EC, 2004/33/EC, 2005/61/EC and 2005/62/EC setting standards of quality and safety for human blood and blood components (COM(2016) 224 final), p. 10.

---

48 See also recital 19 of Directive 2001/83 and recital 23 of Directive 2002/98.

---

49 See documents cited in footnote 42.

50 This provision was first introduced into the EU legal order by Article 3(4) of Council Directive 89/381/EEC of 14 June 1989 extending the scope of Directives 65/65/EEC and 75/319/EEC on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products and laying down special provisions for medicinal products derived from human blood or human plasma (OJ 1989 L 181, p. 44).

51 See written question E-146/95 submitted by José Valverde Lopez (PPE) to the Commission on 8 February 1995, on difficulties with interpretation of the concept of blood self-sufficiency (OJ 1995 C 152, p. 34).

52 As regards human blood and human plasma, that objective is clear from Article 110 of Directive 2001/83.

53 See, in particular, Resolution of the Parliament of 14 July 1995 on blood safety in the European Union, point 3.

54 See point 117 of this Opinion.

55 See, in particular, Resolution of the Parliament of 14 September 1993 on self-sufficiency in and safety of blood and its derivatives in the European Community points D and 2; Communication COM(93) 198 final, p. 8; Council conclusions of 13 December 1993 on self-sufficiency in blood in the European Community; Council Resolution of 2 June 1995 on blood safety and self-sufficiency in the Community.

56 The Republic of Slovenia adopted this second approach when defining the concept of self-sufficiency provided for in Article 3(18) of the Law on the supply of blood.

57 Commission Staff working document of 21 April 2016 on the implementation of the principle of voluntary and unpaid donation for human blood and blood components as foreseen in Directive 2002/98/EC on setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC [SWD(2016) 130 final].

58 Ibid., p. 4: ‘National sufficiency means fulfilling the needs of blood, blood components and plasma derivatives for medical application of the resident population by accessing resources from within the country and through regional/international co-operation’. See also the answer to the written question E-146/95, submitted by José Valverde Lopez (PPE) to the Commission on 8 February 1995, on difficulties with interpretation of the concept of blood self-sufficiency (OJ 1995 C 152, p. 34): ‘The concept of Community self-sufficiency implies that patients should always have access to the medicinal products they need’.

59 Ibid.: ‘National self-sufficiency means fulfilling the needs of human blood, blood components and plasma derivatives for medical application of the resident population by accessing resources from within the country’s population’. See also Communication COM(93) 198 final, p. 7: ‘Self-sufficiency — Provision of human blood and blood products from within a population to satisfy the clinical needs of that population’.

60 See 110 of this Opinion.

61 See points 157 to 159 of this Opinion.

62 See point 160 of this Opinion.

---

63 On the positive effect of trade between Member States on safety of supply in blood and blood products, see, in particular, Resolution of the Parliament of 14 September 1993 on self-sufficiency in and safety of blood and its derivatives in the European Community, points B and 3(i); Resolution of the Parliament of 14 July 1995 on blood safety in the European Union, point 1; and Resolution of the Parliament of 17 April 1996 on the communication from the Commission on blood safety and self-sufficiency in the European Community, point 1.

---

64 See points 122 to 127 of this Opinion.

---

65 Judgment of 13 March 2014, *Octapharma France* (C-512/12, EU:C:2014:149, paragraph 40): ‘plasma from whole blood which is prepared by a method involving an industrial process and which is intended for transfusions comes, in accordance with Article 109 of Directive 2001/83, within the scope of Directive 2002/98 with respect to its collection and testing, and within the scope of Directive 2001/83, as amended by Directive 2004/27, with respect to its processing, storage and distribution, on condition that it satisfies the definition of a medicinal product under Article 1(2) of the latter directive.’

---

66 See also judgment of 13 March 2014, Octapharma *France* (C-512/12, EU:C:2014:149, paragraphs 38 and 39).

JUDGMENT OF THE COURT (Second Chamber)

8 September 2016 (*)

(Reference for a preliminary ruling — Article 49 TFEU — Freedom of establishment — Betting and gambling — Restrictions — Overriding reasons of public interest — Proportionality — Public procurement — Conditions for participating in a call for tenders and assessment of economic and financial standing — Exclusion of the tenderer for not presenting certificates of economic and financial standing issued by two different banks — Directive 2004/18/EC — Article 47 — Applicability)

In Case C-225/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale di Reggio Calabria (District Court, Reggio Calabria, Italy), made by decision of 28 February 2015, received at the Court on 15 May 2015, in the criminal proceedings against

Domenico Politanò,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, C. Toader (Rapporteur), A. Rosas, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: N. Wahl,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 13 April 2016,

after considering the observations submitted on behalf of:

– Mr Politanò, by D. Agnello and D. Neto, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and C. Colelli, avvocato dello Stato,

– the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents, and P. Vlaemminck, R. Verbeke and B. Van Vooren, advocaten,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by E. Montaguti, H. Tserepa-Lacombe and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 June 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU, the principles of equal treatment and effectiveness and Article 47 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in criminal proceedings against Mr Domenico Politanò for failing to comply with the Italian legislation governing the collection of bets.

Legal context

EU law

3 Under Article 1(2)(a) and (d) and (4) of Directive 2004/18:

‘2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

...

(d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

...

4. “Service concession” is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.’

4 Article 17 of that directive, entitled ‘Service concessions’, provided:

‘Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4).’

5 Article 47 of that directive, entitled ‘Economic and financial standing’, was worded as follows:

‘1. Proof of the economic operator’s economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking’s overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, insofar as information on such turnovers is available.

2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.

4. Contracting authorities shall specify, in the contract notice or in the invitation to tender, which reference or references mentioned in paragraph 1 they have chosen and which other references must be provided.

5. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

6 Directive 2004/18 was repealed by Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 (OJ 2004 L 94, p. 65).

Italian law

7 Article 10(9g) and (9h) of decreto-legge n. 16 — Disposizioni urgenti in materia di semplificazioni tributarie, di efficientamento e potenziamento delle procedure di accertamento (Decree-Law No 16 laying down urgent provisions related to fiscal simplification, improving effectiveness and reinforcing monitoring procedures) of 2 March 2012 (GURI No 52, of 2 March 2012, p. 1), converted into statute, after amendment, by Law No 44 of 26 April 2012 (Ordinary Supplement to GURI No 99, of 28 April 2012) ('the 2012 Decree-Law') provides:

'9g As part of a reform of the legislation relating to public gambling, including that relating to the collection of bets on sporting events, including horse racing, and non-sporting events, the provisions of the present paragraph have the aim of promoting that reorganisation, through an initial alignment of the expiry dates of the licences for the collection of bets in question, while observing the requirement that the national rules on the selection of persons who, on behalf of the State, collect bets on sporting events, including horse racing, and non-sporting events, are adjusted to the principles laid down by the judgment of the Court of Justice of the European Union, on 16 February 2012, in Joined Cases C-72/10 and C-77/10. To that end, in view of the impending expiry of a group of licences for the collection of those bets, the Independent Authority for the Administration of State Monopolies shall immediately, and in any event by 31 July 2012 at the latest, initiate a call for tenders for the selection of persons who are to collect such bets with due regard, at the very least, to the following criteria:

(a) the possibility of participation for persons already carrying out an activity related to the collection of bets in one of the States of the European Economic Area, as a result of having their legal and operational seat there, on the basis of a valid and effective authorisation issued under the provisions in force in the law of that State and who fulfil the requirements as to reputation, reliability and financial standing specified by the Independent Authority for the Administration of State Monopolies, account being taken of the provisions in this matter referred to in Law No 220 of 13 December 2010, and in Decree-Law No 98 of 6 July 2011, converted, after amendment, into statute by Law No 111 of 15 July 2011;

(b) the award of a licence, expiring on 30 June 2016, for the collection, exclusively in a physical network, of bets on sporting events, including horse racing, and non-sporting events, from agencies, up to a maximum of 2 000, whose sole activity is the marketing of public gambling products, without restriction as to the minimum distances between those agencies or with respect to other collection points, which are already active, for identical bets;

(c) provision, as a price component, for a basic contract value of EUR 11 000 for each agency;

(d) the conclusion of a licence agreement whose content is consistent with any other principle laid down in the abovementioned judgment of the Court of Justice of the European Union of 16 February 2012 and with the compatible national provisions in force regarding public gambling;

(e) the possibility of managing agencies in any municipality or province, without numerical limits on a territorial basis or more favourable conditions by comparison with licensees who are already authorised to collect identical bets or which may, in any event, be favourable to those licensees;

(f) the lodging of deposits consistent with the provisions of Article 24 of Decree-Law No 98 of 6 July 2011, converted, after amendment, into statute by Law No 111 of 15 July 2011.

9h The licensees who are to collect bets referred to in paragraph 9g, whose contracts expire on 30 June 2012, shall continue their collection activities until the date of the conclusion of the licence

contracts awarded in accordance with the above paragraph. The following paragraphs are repealed: paragraphs 37 and 38 of Article 24 of Decree-Law No 98 of 6 July 2011, converted, after amendment, into statute by Law No 111 of 15 July 2011, subparagraph e of paragraph 287 of Article 1 of Law No 311 of 30 December 2004, and subparagraph e of paragraph 4 of Article 38 of Decree-Law No 223 of 4 July 2006, converted, after amendment, into statute by Law No 248 of 4 August 2006.'

8 In accordance with the provisions of the 2012 Decree-Law, tendering procedures were launched by the Italian authorities in the course of 2012. Article 3.2 of the Administrative Rules for the awarding of concessions and the signature of agreements annexed to the corresponding contract notice ('the Monti contract notice') required tenderers which had been formed for less than two years and whose overall revenues linked to the activity of gaming operator were below two million euros during the two most recent business years to submit statements issued by at least two banks, in order to prove their economic and financial standing.

9 Directive 2004/18 was transposed into Italian law by decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006).

10 Under Article 41 of that legislative decree, the conditions to be satisfied in order to prove the economic and financial standing to carry out the service are to be specified by the contracting authority. However, according to the same article, a candidate who, for valid reasons, is unable to submit the requisite bank or accounting references may prove his economic and financial standing by producing any other document which the contracting authority considers appropriate.

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 On 6 February 2015, during a check carried out in the business premises called 'Betuniq' in Polistena (Italy), which is managed by Mr Politanò and affiliated to UniqGroup Ltd, a Maltese company, the administrative police from the Questura di Reggio Calabria (police headquarters of Reggio Calabria, Italy) established that the activity of collecting bets was being carried out there without a concession first having been issued.

12 Accordingly, by decision of 13 February 2015, the Giudice per le indagini preliminari (judge responsible for preliminary investigations) of the Tribunale di Palmi (District Court, Palmi, Italy) ordered the preventive sequestration of the assets used for that activity.

13 Following that decision, Mr Politanò brought an action against the sequestration before the referring court, claiming that certain clauses of the Monti contract notice were incompatible with Articles 49 TFEU and 56 TFEU.

14 According to the applicant in the main proceedings, therefore, his conduct does not constitute an offence, since the collecting of bets on sporting events on behalf of the Maltese company UniqGroup must be considered to be lawful, in so far as the domestic legislation is contrary to Articles 49 TFEU and 56 TFEU.

15 He maintains in that regard that UniqGroup was excluded from the tendering procedure launched in 2012 on the ground that it had not submitted two certificates of economic and financial standing issued by two different banks, as required by Article 3.2 of the Administrative Rules annexed to the Monti contract notice.

16 According to the referring court, a tendering procedure involving gambling operators established in different Member States, such as that at issue in the main proceedings, was necessarily required to comply with Article 47 of Directive 2004/18, which provides for the possibility of evaluating economic and financial standing 'by any other document which the contracting authority considers appropriate'.

17 The definition by the Italian authorities of strict conditions for participation in the tendering procedure had to be reconciled with the principle of the widest possible participation in the tendering procedure, and any interested parties should be guaranteed the possibility of proving his economic and financial standing by any document — other than those requested by the contracting authority — considered appropriate.

18 According to the referring court, it follows that those authorities were required to state expressly the criteria considered appropriate and effective for demonstrating the requisite economic and financial standing, so that each tenderer may in any event prove such standing effectively.

19 That court considers that, in this instance, the Administrative Rules annexed to the Monti contract notice did not allow UniqGroup to prove, other than by producing the documents specified therein, its economic and financial standing.

20 In those circumstances, the Tribunale di Reggio Calabria (District Court, Reggio Calabria, Italy) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 49 TFEU, as well as the principles of equal treatment and effectiveness, be interpreted as precluding national legislation in the field of betting and gambling which provides for the organisation of a fresh call for tenders (as governed by Article [10(9g) of the 2012 Decree-Law]) for the award of licences that includes clauses excluding from the tendering procedure undertakings which have failed to meet the condition relating to economic and financial standing as a result of the failure to provide for criteria other than the requirement of two bank references from two separate banks?

(2) Must Article 47 of Directive 2004/18/EC ... be interpreted as precluding national legislation in the field of betting and gambling which provides for the organisation of a fresh call for tenders (as governed by Article [10(9g) of the 2012 Decree-Law]) for the award of licences [that includes clauses excluding from the tendering procedure undertakings which have failed to meet the condition] relating to economic and financial standing, as a result of the failure to provide for alternative documentation and options, as laid down under [EU] legislation?’

Consideration of the questions referred

Admissibility

21 The Italian Government and, as regards the second question only, the European Commission submit that the request for a preliminary ruling should be declared inadmissible, since the order for reference does not set out the factual context sufficiently so as to allow the Court to provide a useful answer.

22 In that regard, it should be noted that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 26 and the case-law cited).

23 It is also settled case-law that the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for that court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 27 and the case-law cited).

24 Moreover, the Court has found that the requirements recalled in paragraphs 22 and 23 above may be satisfied more easily where the request for a preliminary ruling comes within a context that is already largely familiar (see, in particular, order of 17 July 2014, *3D I*, C-107/14, not published, EU:C:2014:2117, paragraph 12 and the case-law cited).

25 However, it is apparent from the order for reference, first, that it describes with sufficient clarity and precision the legal and factual context of the case in the main proceedings and, secondly, that the information it contains allow the scope of the questions asked to be determined, as evidenced, moreover, by the written observations of the various governments and the Commission.

26 In those circumstances, the request for a preliminary ruling must be held to be admissible.

The second question

27 By its second question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 47 of Directive 2004/18 must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which imposes on operators wishing to respond to a call for tenders for the grant of concessions in the field of betting and gambling the obligation of providing evidence of their economic and financial standing by means of statements issued by at least two banks, without allowing that standing to be proved by any other document.

28 As a preliminary point, it should be ascertained whether the directive in question is applicable in a case such as that at issue in the main proceedings.

29 In that regard, it must be pointed out that Directive 2004/18 involves procedures for the award of public service contracts and not those relating to service concessions, which are excluded from the scope of that directive pursuant to Article 17 thereof. That provision actually expressly excludes service concessions, which are defined in Article 1(4) of that directive as contracts of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.

30 According to the case-law of the Court, it follows from a comparison of the definitions of a public service contract and a service concession provided, respectively, by Article 1(2)(a) and (d) and by Article 1(4) of Directive 2004/18 that the difference between a public service contract and a service concession lies in the consideration for the provision of services. A service contract involves consideration which, although it is not the only consideration, is paid directly by the contracting authority to the service provider, while, for a service concession, the consideration for the provision of services consists in the right to exploit the service, either alone, or together with payment (see judgment of 10 March 2011, *Privater Rettungsdienst und Krankentransport Stadler*, C-274/09, EU:C:2011:130, paragraph 24 and the case-law cited).

31 It also follows from that case-law that, while the method of remuneration is, therefore, one of the determining factors for the classification of a service concession, such a classification implies that the service supplier takes the risk of operating the services in question and that the absence of a transfer to the service provider of the risk connected with operating the service shows that the transaction concerned is a public service contract and not a service concession (see, to that effect, judgment of 10 March 2011, *Privater Rettungsdienst und Krankentransport Stadler*, C-274/09, EU:C:2011:130, paragraph 26 and the case-law cited).

32 However, as was observed by the Advocate General in point 51 of his Opinion, in the case in the main proceedings, the service provider receives no remuneration from the contracting authority and bears the entire risk associated with the activity of collecting and transmitting bets.

33 It follows that a concession relating to the organisation of bets, such as that at issue in the main proceedings, cannot be classified as a public contract for services within the meaning of Article 1(2)(a) and (b) of Directive 2004/18.

34 Having regard to the foregoing, the answer to the second question is that the directive in question, in particular Article 47, must be interpreted as meaning that national legislation governing the grant of

concessions in the field of betting and gambling, such as that at issue in the main proceedings, does not fall within its scope.

The first question

35 As a preliminary point, it must be pointed out that although the referring court did make reference, in the formulation of the first question, to the principles of equal treatment and effectiveness, the order for reference contains no details on the reasons that prompted it to inquire about the interpretation of those principles in the context of the case in the main proceedings or on the relationship between those principles and the national legislation at issue in the main proceedings.

36 Having regard to the foregoing, it must be considered that, by its first question, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which imposes on operators wishing to respond to a call for tenders for the grant of concessions in the field of betting and gambling the obligation of providing evidence of their economic and financial standing by means of statements issued by at least two banks, without also allowing that standing to be proved by other means.

37 First of all, it is settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedoms guaranteed by Articles 49 TFEU and 56 TFEU must be regarded as restrictions on the freedom of establishment and/or the freedom to provide services (see judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 45 and the case-law cited).

38 A provision of a Member State, such as that at issue in the main proceedings, which subjects the exercise of an economic activity to the obtaining of a concession and subjects, in that context, tenderers to the obligation of producing certificates from two different banking providers, might dissuade economic operators from participating in a tendering procedure and is therefore capable of constituting a restriction of the freedom of establishment within the meaning of Article 49 TFEU.

39 Next, it is appropriate to bear in mind that legislation on betting and gambling is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of harmonisation on the issue at EU level, the Member States enjoy a wide discretion as regards choosing the level of consumer protection and the preservation of order in society which they deem the most appropriate (see, to that effect, judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraphs 51 and 52 and the case-law cited).

40 The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that the Member States impose must satisfy the conditions laid down in the case-law of the Court as regards inter alia their justification by overriding reasons in the general interest and their proportionality (see, to that effect, judgment of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International*, C-42/07, EU:C:2009:519, paragraph 59 and the case-law cited).

41 It is appropriate, therefore, to determine whether a restriction, such as that at issue in the main proceedings, may be allowed as a derogation, on grounds of public policy, public security or public health, as expressly provided for under Articles 51 TFEU and Article 52 TFEU, which are also applicable in the area of freedom to provide services by virtue of Article 62 TFEU, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (judgment of 12 June 2014, *Digibet and Albers*, C-156/13, EU:C:2014:1756, paragraph 22 and the case-law cited).

42 In the present case, the Italian Government submits that the restrictive provision at issue is justified, as part of the objective of combating criminality linked to betting and gambling, by the interest in ensuring the continuation of the lawful activity of collecting bets in order to curb the growth of parallel illegal activities and by the interest in protecting consumers. Thus, it is essential that the economic and financial capacities of concession holders enable them to carry out their activity on the market over the longer term.

43 In that regard, it is worthwhile bearing in mind that such an objective may be a reason of overriding public interest capable of justifying a restriction on fundamental freedoms, such as that at issue in the main proceedings (see, to that effect, judgment of 28 January 2016, *Laezza*, C-375/14, EU:C:2016:60, paragraphs 34 and 35). The Court has, moreover, previously held that the objective of combating criminality linked to betting and gambling is capable of justifying restrictions on fundamental freedoms under restrictive rules (see, to that effect, judgments of 12 September 2013, *Biasci and Others*, C-660/11 and C-8/12, EU:C:2013:550, paragraph 23, and of 28 January 2016, *Laezza*, C-375/14, EU:C:2016:60, paragraph 32).

44 However, it is still necessary to determine whether the restriction at issue in the main proceedings is suitable for ensuring the attainment of the objective pursued and does not go beyond what is necessary in order to achieve that objective, including by ensuring that the national legislation at issue genuinely reflects a concern to attain it in a consistent and systematic manner (see, to that effect, judgment of 12 July 2012, *HIT and HIT LARIX*, C-176/11, EU:C:2012:454, paragraph 22 and the case-law cited).

45 In relation to the question of whether that restriction is suitable for ensuring the attainment of the objective pursued, it should be noted that bank statements from two different banks, such as those required by the provision at issue in the main proceedings, are able to prove the economic and financial standing of the tenderer to exercise the activity of collecting bets.

46 The obligation of providing statements from two banks is manifestly capable of ensuring that the economic operator has an economic and financial standing enabling him to fulfil the obligations he may contract towards winning gamblers. In that regard, the Court has previously held that the requirement for a share capital of a certain amount may prove to be of use in order to ensure such an economic and financial standing (see, to that effect, judgment of 15 September 2011, *Dickinger and Ömer*, C-347/09, EU:C:2011:582, paragraph 77).

47 Furthermore, it must be determined whether, given the wide discretion enjoyed in the non-harmonised area of betting and gambling by national authorities for determining what is required in order to ensure consumer protection and the preservation of order in society (see, to that effect, judgment of 12 June 2014, *Digibet and Albers*, C-156/13, EU:C:2014:1756, paragraph 32 and the case-law cited), the obligation of producing two statements from two different banks does not go beyond what is necessary in order to achieve the objective pursued, as such an assessment must be carried out solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure (see judgment of 15 September 2011, *Dickinger and Ömer*, C-347/09, EU:C:2011:582, paragraph 46 and the case-law cited).

48 In that context, it is appropriate to note, as the Advocate General observed, in essence, in points 80 and 81 of his Opinion, that, in view of the particular nature of economic activities in the betting and gambling sector, the requirement imposed on tenderers which had been formed for less than two years and whose overall revenues linked to the activity of gaming operator were below two million euros during the two most recent business years to provide appropriate statements issued by at least two banks does not appear to go further than is necessary in order to achieve the objective pursued.

49 However, it is for the referring court, taking account of the indications given by the Court of Justice, to verify, in an overall assessment of the circumstances surrounding the grant of the new licences, whether the restrictions imposed by the Member State concerned satisfy the conditions laid down in the Court's case-law concerning their proportionality (see, to that effect, judgment of 12 June 2014, *Digibet and Albers*, C-156/13, EU:C:2014:1756, paragraph 40 and the case-law cited).

50 In the light of all the foregoing considerations, the answer to the first question is that Article 49 TFEU must be interpreted as not precluding a national provision, such as that at issue in the main proceedings, which imposes on operators wishing to respond to a call for tenders for the grant of concessions in the field of betting and gambling the obligation of providing evidence of their economic and financial standing by means of statements issued by at least two banks, without also allowing that standing to be proved by other means, where such a provision is capable of satisfying the conditions of proportionality laid down by the case-law of the Court, which is for the referring court to ascertain.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in particular Article 47, must be interpreted as meaning that national legislation governing the grant of concessions in the field of betting and gambling, such as that at issue in the main proceedings, does not fall within its scope.**

2. **Article 49 TFEU must be interpreted as not precluding a national provision, such as that at issue in the main proceedings, which imposes on operators wishing to respond to a call for tenders for the grant of concessions in the field of betting and gambling the obligation of providing evidence of their economic and financial standing by means of statements issued by at least two banks, without also allowing that standing to be proved by other means, where such a provision is capable of satisfying the conditions of proportionality laid down by the case-law of the Court, which is for the referring court to ascertain.**

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL

WAHL

delivered on 16 June 2016 (1)

Case C-225/15

Domenico Politanò

(Request for a preliminary ruling from the Tribunale di Reggio Calabria (District Court, Reggio Calabria, Italy))

(Reference for a preliminary ruling –Article 49 TFEU — Freedom of establishment — Principles of equivalence and of effectiveness — Betting and gaming — Restrictions — Conditions of participation in the call for tenders and assessment of economic and financial standing — Exclusion of tenderer for failure to submit certificates of economic and financial standing issued by two separate banks — Overriding reasons of public interest — Proportionality — Applicability of Article 47 of Directive 2004/18/EC)

1. The present request for a preliminary ruling concerns the interpretation of Article 49 TFEU, the principles of equal treatment and effectiveness and Article 47 of Directive 2004/18/EC. (2) It forms part of the long series of references to the Court for a preliminary ruling involving various aspects of the Italian legislation in the betting and gaming sector, (3) and, in particular, the conditions imposed on tenderers in the tendering procedure launched in 2012 (4) (also referred to as 'the Monti contract notice') at issue in the cases giving rise to the judgments of 22 January 2015, *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25), and of 28 January 2016, *Laezza* (C-375/14, EU:C:2016:60).

2. In accordance with what is now a familiar pattern in contentious matters, that request was submitted in the context of criminal proceedings against the applicant in the main proceedings, Mr Politanò, for failure to comply with the Italian legislation governing the collection of bets on sporting or other events. Mr Dominico Politanò, who is accused, first, of not having the necessary authorisation to exercise the activity of collecting and transmitting bets under national law and, second, of not being linked with an operator holding a concession, maintains, in essence, that the obligations imposed on the company applying for a concession to which he is linked, under the Administrative Rules annexed to the Monti contract notice, are contrary to a number of rules and principles of EU law.

3. The present case gives the Court the opportunity to specify the factors to be taken into account and the obligations placed on the national courts when they prepare a request for a preliminary ruling — in particular, in the description of the relevant factual and legal framework — so that the Court may be able to provide them with a helpful answer. It also provides the opportunity for the Court to redefine the terms of the debate in which we must engage here and to recall the need for the Court not to be led to rule on questions originating primarily in the attempt of certain operators to avoid certain criminal penalties and not in the desire to ensure the effectiveness of EU law.

I – **Legal framework**

A – *EU law*

4. In the words of Article 1(2)(a) and (d) of Directive 2004/18:

‘(a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

(d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.’

5. Article 1(4) of Directive 2004/18 provides:

> ‘“Service concession” is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.’

6. Article 17 of that directive, entitled ‘Service concessions’, provides:

> ‘Without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4).’

7. Article 47 of that directive, entitled ‘Economic and financial standing’, is worded as follows:

> ‘1. Proof of the economic operator’s economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of balance sheets or extracts from balance sheets, where publication of the balance sheet is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking’s overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, in so far as information on such turnovers is available.

> 2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.
>
> 3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.
>
> 4. Contracting authorities shall specify, in the contract notice or in the invitation to tender, which reference or references mentioned in paragraph 1 they have chosen and which other references must be provided.
>
> 5. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.’

B – *Italian law*

8. The Italian regulatory framework is now well known to the Court, which, as I mentioned in the introduction to this Opinion, has on a number of occasions been led to rule on the compatibility with EU law of the Italian regulatory provisions governing the collection of bets.

9. The Italian legislation essentially provides that participation in the organising of betting and gaming, including the collection of bets, is subject to possession of a licence and a police authorisation.

10. Under Article 88 of Royal Decree No 773 of 18 June 1931 approving a consolidated version of the laws on public security, (5) as amended by Article 37(4) of Law No 338 of 23 December 2000, (6) a police authorisation is granted only where a licence has been obtained from the Agenzia della Dogane e dei Monopoli di Stato (State Customs and Monopolies Agency, 'the ADM'). That police authorisation entitles holders to collect bets within a particular area. Failure to obtain a licence therefore precludes obtaining a police authorisation. Engaging in the activity of collecting bets in the absence of a licence or police authorisation is punishable as a criminal offence.

11. In 1999 the Italian authorities awarded under a public tendering procedure 1 000 licences for the management of sports betting operations. At the same time, 671 new licences were granted, also by public tender, for the management of bets on horse racing events and 329 existing licences were automatically renewed. Under the legislation in force at that date, operators in the form of capital companies whose shares were quoted on the regulated markets were excluded from participating in tendering procedures, since in their case the precise identification of individual shareholders was not possible on an ongoing basis. That exclusion was held to be unlawful under Articles 43 EC and 49 EC in the judgment in *Placanica and Others*, (7) in particular.

12. Decree-Law No 223 (8) reformed the betting and gaming sector in Italy with the aim of bringing it into line with the requirements arising under EU law. That decree provided for the award of some 16 300 new betting and gaming licences in addition to the other licences granted in 1999.

13. Following, in particular, the judgment in *Costa and Cifone*, (9) the betting and gaming sector was again reformed by Decree-Law No 16. (10)

14. So far as the organisation of calls for tender for the award of licences for the collection of bets is concerned, Article 10(9g) and (9h) of the 2012 Decree-Law provides:

> '9g As part of a reform of the legislation relating to public gambling, including that relating to the collection of bets on sporting events, including horse racing, and non-sporting events, the provisions of the present paragraph have the aim of promoting that reorganisation, through an initial alignment of the expiry dates of the licences for the collection of bets in question, while observing the requirement that the national rules on the selection of persons who, on behalf of the State, collect bets on sporting events, including horse racing, and non-sporting events, are adjusted to the principles laid down by the judgment of the Court of Justice of the European Union of 16 February 2012, [*Costa and Cifone* (C-72/10 and C-77/10, EU:C:2012:80)]. To that end, in view of the impending expiry of a group of licences for the collection of those bets, the [ADM] shall immediately, and in any event by 31 July 2012 at the latest, initiate a call for tenders for the selection of persons who are to collect such bets with due regard, at the very least, to the following criteria:

(a) the possibility of participation for persons already carrying out an activity related to the collection of bets in one of the States of the European Economic Area, as a result of having their legal and operational seat there, on the basis of a valid and effective authorisation issued under the provisions in force in the law of that State and who fulfil the requirements as to reputation, reliability and financial standing specified by the Independent Authority for the Administration of State Monopolies, account being taken of the provisions in this matter referred to in Law No 220 [(11)] … and in Decree-Law No 98 of 6 July 2011, converted, after amendment, into statute by Law No 111 of 15 July 2011;

(b) the award of a licence, expiring on 30 June 2016, for the collection, exclusively in a physical network, of bets on sporting events, including horse racing, and non-sporting events, from agencies, up to a maximum of 2 000, whose sole activity is the marketing of public gambling products, without restriction as to the minimum distances between those agencies or with respect to other collection points, which are already active, for identical bets;

(c) provision, as a price component, for a basic contract value of EUR 11 000 for each agency;

(d) the conclusion of a licence agreement whose content is consistent with any other principle laid down in the abovementioned judgment of the Court of Justice of the European Union of 16 February 2012 and with the compatible national provisions in force regarding public gambling;

(e) the possibility of managing agencies in any municipality or province, without numerical limits on a territorial basis or more favourable conditions by comparison with licensees who are already authorised to collect identical bets or which may, in any event, be favourable to those licensees;

(f) the lodging of deposits consistent with the provisions of Article 24 of Decree-Law No 98 of 6 July 2011, converted, after amendment, into statute by Law No 111 of 15 July 2011.

> 9h The licensees who are to collect bets referred to in paragraph 9g, whose contracts expire on 30 June 2012, shall continue their collection activities until the date of the conclusion of the licence contracts awarded in accordance with the above paragraph. The following paragraphs are repealed: paragraphs 37 and 38 of Article 24 of Decree-Law No 98 of 6 July 2011, converted, after amendment, into statute by Law No 111 of 15 July 2011, subparagraph e of paragraph 287 of Article 1 of Law No 311 of 30 December 2004, and subparagraph e of paragraph 4 of Article 38 of [Decree-Law No 223 of 4 July 2006 laying down urgent measures for economic and social revival, for the control and rationalisation of public expenditure, and providing for initiatives in relation to tax revenue and the combating of tax evasion], converted, after amendment, into statute by Law No 248 of 4 August 2006.'

15. The provisions of that decree were implemented through tendering procedures held by the ADM during the course of 2012. Under Article 3.2 of the Administrative Rules annexed to the Monti contract notice, tenderers which had been formed for less than two years and whose overall revenues linked to the activity of gaming operator were below two million euros during the two most recent business years were required to submit appropriate statements issued by at least two banks, in order to prove their economic and financial standing.

16. Directive 2004/18 was transposed into Italian law by Legislative Decree No 163/2006 of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006), which codifies the rules governing public procurement.

17. In accordance with Article 41 of that decree-law, the conditions to be satisfied in order to prove the economic and financial standing to carry out the service are to be specified by the contracting authority. However, according to that article, a candidate who, for valid reasons, is unable to submit the requisite bank or accounting references may prove his economic and financial standing by any other document which the contracting authority considers appropriate.

II – **The facts of the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court**

18. On 6 February 2015, following checks carried out by a team of administrative police from the Questura (police headquarters) of Reggio Calabria (Italy) in the business premises called 'Betuniq' in Polistena (Italy) managed by Mr Politanò and affiliated to the Maltese company UniqGroup Ltd, the competent authorities established that the activity of collecting bets was being carried out there without a concession, authorisation or a licence.

19. By decision of 13 February 2015, the Giudice delle indagini preliminari (judge responsible for preliminary investigations) of the Tribunale di Palmi (District Court, Palmi, Italy) made an order against Mr Politanò, ordering the preventive sequestration of the assets used for that activity.

20. Mr Politanò brought an action against that decision before the referring court, claiming that certain clauses of the Monti contract notice were incompatible with Articles 49 TFEU and 56 TFEU.

21. Thus, according to the applicant in the main proceedings, his conduct does not constitute an offence, since the collecting of bets on sporting events on behalf of UniqGroup must be considered to be lawful, in so far as the national legislation is contrary to Articles 49 TFEU and 56 TFEU.

22. Mr Politanò maintains that UniqGroup was excluded from the 2012 call for tenders, even though it had duly submitted a request to participate, on the ground that it had not submitted two certificates of economic and financial standing issued by two different banks, as required by Article 3.2 of the Administrative Rules annexed to the Monti contract notice. He states that UniqGroup has challenged that contract notice before the Italian administrative courts in that that contract notice contained no arrangement

for foreign undertakings which, for valid reasons, are unable to submit the financial guarantees required by that contract notice.

23. According to the referring court, a tendering procedure involving gaming operators established in different countries, such as that at issue in the main proceedings, was necessarily required to comply with the principle arising under Article 47 of Directive 2004/18, in particular the possibility of evaluating economic and financial standing 'by any other document which the contracting authority considers appropriate'.

24. The need for the administration to impose strict conditions for participation necessarily had to be reconciled with the principle of the widest possible participation in the tendering procedure, and any person concerned should be guaranteed the possibility of proving his economic and financial standing by any other document considered appropriate.

25. It follows that the competent authority was required to state expressly the other criteria deemed appropriate and effective for the purpose of demonstrating the requisite standing, so that each tenderer could in any event effectively prove that he had the requisite standing.

26. The referring court considers that, in this instance, the Administrative Rules annexed to the Monti contract notice did not allow UniqGroup to prove its economic and financial standing in any other way. It therefore does not appear that companies such as that involved in the main proceedings benefited from clear and evident opportunities to prove, due account being taken of the public interest at stake, their economic soundness and their creditworthiness.

27. In those circumstances, the Tribunale di Reggio Calabria (District Court, Reggio Calabria) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Article 49 TFEU, as well as the principles of equal treatment and effectiveness, be interpreted as precluding national legislation in the field of betting and gambling which provides for the organisation of a fresh call for tenders (as governed by Article [10(9g)] of Law No 44 of 26 April 2012) for the award of licences that includes clauses excluding from the tendering procedure undertakings which have failed to meet the condition relating to economic and financial standing as a result of the failure to provide for criteria other than the requirement of two bank references from two separate banks?

2. Must Article 47 of Directive 2004/18 … be interpreted as precluding national legislation in the field of betting and gambling which provides for the organisation of a fresh call for tenders (as governed by Article [10(9g)] of Law No 44 of 26 April 2012) for the award of licences [that includes clauses excluding from the tendering procedure undertakings which have failed to meet the condition] relating to economic and financial standing, as a result of the failure to provide for alternative documentation and options, as laid down under international legislation?'

28. Written observations have been submitted by the Italian, Belgian, German and Polish Governments and by the European Commission.

29. A hearing was held on 13 April 2016, in which Mr Politanò, the Italian and Belgian Governments and the Commission took part.

III – **Analysis**

30. As was already the position in the *Laezza* case (judgment of 28 January 2016, C-375/14, EU:C:2016:60), the present case does not concern the legality of the 2012 Decree-Law, but a different measure, situated downstream, contained in the Administrative Rules supplementing the Monti contract notice. (12)

31. Although the Court may usefully benefit from the information obtained from the judgment of 28 January 2016 in *Laezza* (C-375/14, EU:C:2016:60) as regards the analysis grid that should be employed, the present case relates to a different provision, concerning the obligation which the Monti contract notice places on new tenderers to provide evidence of their financial soundness by statements issued by at least two banks, if they are unable to prove a turnover of a minimum amount of two million euros over two years.

32. Before all else, I must address the issue of admissibility, which is questioned by certain interveners.

A – *Admissibility*

33. The Italian Government and, as regards the second question, the Commission submit that the request for a preliminary ruling should be declared inadmissible, since the order for reference does not describe the factual background in sufficient detail to enable the Court to give a useful answer.

34. I largely share the concerns expressed by the interveners.

35. The information supplied by the referring court seems to me to be incomplete in many respects and, to a certain degree, might be considered not to satisfy the requirements consistently stated by the Court. In that regard, it is well established that the decision for reference must give the precise reasons which prompted the national court to raise the question of the interpretation of EU law and to consider it necessary to refer a question to the Court for a preliminary ruling. (13)

36. As regards the first question, and following on from the questions which I raised in my Opinion in *Laezza*, (14) the question thus referred appears to be based on factual representations that are not directly supported by the documents in the main proceedings. (15)

37. First of all, it is not easy to determine on what grounds the measure at issue, namely *the possibility* for a tenderer in the Monti contract notice procedure to prove his economic and financial standing by 'producing appropriate statements issued by at least two banks' is directly challenged in the main proceedings. Unlike the situations at issue in the *Costa and Cifone* (16) and *Stanley International Betting and Stanleybet Malta* cases, (17) it is not the reorganisation of the system through a fresh call for tenders — in the present case the call for tenders arranged following intervention by the legislature in the form of the 2012 Decree-Law — in its entirety that is called in question. In that context, it is for the referring court alone to determine whether, in the light of the relevant rules of national law, the measure at issue may indeed have a bearing on the position of the applicant in the main proceedings under criminal law. (18)

38. Next, it is difficult to understand to what extent the rule at issue constituted for UniqGroup, to which the applicant in the main proceedings seems to be linked, a real barrier to its participation in the Monti contract notice procedure.

39. As is apparent from the case-file, and as stated at the hearing, the reason why UniqGroup, to which the applicant in the main proceedings is allegedly linked, was unable to provide a certificate from another bank is unexplained. On that point, the referring court merely observed that 'by email of 15 January 2013, the Banca di Valletta explained that it was unable to provide any statement other than those [already provided] … as it was required to comply with the standards applicable in Malta'. That observation, which states only the reasons why that bank could not supply more precise information, has no bearing on the reason why UniqGroup was unable to obtain a statement from another bank.

40. In addition, it seems to me — and it was confirmed at the hearing — that the applicant in the main proceedings, as conveyed on this point by the referring court, is more concerned with challenging the constraints faced by UniqGroup in Malta when obtaining the requisite certificates than with challenging the obligation for tenderers in the Monti contract notice procedure to supply those certificates.

41. Furthermore, it is apparent from the file that UniqGroup was excluded from the call for tenders not only because it had not produced the two requisite certificates but also because the content of the only certificate produced was insufficient. Thus, even on the assumption that the obligation for persons wishing to participate in the call for tenders at issue to produce statements from two banks must be condemned from the viewpoint of compliance with EU law, it would not assist the case put forward by the applicant in the main proceedings. I would point out, moreover, that the referring court has not mentioned, in that context, the other possible means whereby UniqGroup could, if necessary, have demonstrated its economic and financial capacity.

42. As regards the second question, it is even less easy to understand the reason why Directive 2004/18 constitutes a relevant provision in the present case. For my part, I find it difficult to understand the assertion in the order for reference that 'the applicant reasonably submits that, as this was [a] … tender, in which

gambling operators from different countries were competing, it was necessary to comply with the principle arising from Article 47 of Directive 2004/18'. I shall return to this point in the observations below.

43. In such circumstances, the formal validity of the order for reference may seriously be in doubt and the question referred may, as a result, be regarded as inadmissible. Although it is for the national court alone to assess, in the light of the particular circumstances of the case, the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, and the stage in the proceedings at which those questions should be referred, (19) the Court must also have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (20) In particular, the referring court is required, at least, to explain the factual circumstances on which the questions for a preliminary ruling are based. (21)

44. However, the Court may, following the approach taken in the past, (22) decide, on the basis of a comprehensive assessment of the requirements placed on the national court, that the decision for referral sufficiently describes the legal and factual context of the main proceedings and that the information supplied by that court enables the scope of the questions referred to be determined. The Court might, in that regard, take the view that the referring court's questions are based therefore on the assumption that, for the purposes of imposing a criminal penalty, Mr Politanò cannot be faulted for not holding a licence — and hence a police authorisation — in the context of a call for tenders organised according to rules and conditions that are contrary to EU law. (23)

45. Thus I shall concentrate in the following observations on the answers which must in my view be given to the substance of the questions referred.

B – *Substance*

46. I shall examine first of all whether Directive 2004/18, in particular Article 47, may preclude the measure at issue, and then address the question whether that measure is consistent with freedom of establishment and the principles of effectiveness and equivalence.

1. First aspect (second question): the applicability of Directive 2004/18

47. I shall not linger over this aspect of the order for reference, which does not seem to me to raise any particular difficulty.

48. As I mentioned earlier, the referring court has called in question the compatibility of the measure at issue, namely the measure requiring a tenderer to prove his financial solvency by producing two bank certificates, with Article 47 of Directive 2004/18 without explaining the reasons that prompted it to do so.

49. To my mind, there is scarcely any doubt that that directive, in particular Article 47, does not apply in the main proceedings, which relate to a system of concessions which cannot be qualified as 'public contracts' within the meaning of Article 1(2)(a) of Directive 2004/18 or as 'public works concessions' within the meaning of Article 1(3) of that directive.

50. It is important to bear in mind that Directive 2004/18 applies only to service contracts, that is to say, to contracts for pecuniary interest concluded between a contracting authority and an economic operator, having as their object the provision of the services referred to in Annex II to that directive (see Article 1(2)(d) of Directive 2004/18). Conversely, in accordance with Article 17, Directive 2004/18 is not to apply to service concessions, which are defined as contracts of the same type as a public service contract except for the fact that the consideration for the provision of services referred to consists solely in the right to exploit the service in question, together with payment or without payment. (24)

51. It appears that the concession relating to the organisation of bets, such as that at issue in the main proceedings, is not a public contract for services within the meaning of Article 1(2)(d) of Directive 2004/18. Not only is the 'service' referred to here not provided on behalf of the contracting authority, but, in addition, the economic operator-tenderers receive no remuneration from public funds. Furthermore, the tenderer bears the entire risk associated with the activity of collecting and transmitting bets.

52. More generally, it should be borne in mind that, as EU law currently stands, service concession contracts are not governed by any of the directives designed to harmonise the field of public procurement. (25) Those contracts might, on the other hand, fall within the scope of Directive 2014/23/EU, (26) which entered into force on 23 June 2014 and was to be transposed into national law by 18 April 2016. Although that directive has not been relied on and in fact does not appear to have been applicable at the material time, it is interesting to note that, under Article 38(1) of that directive, 'contracting authorities and contracting entities shall verify the conditions for participation relating to the professional and technical ability and *the financial and economic standing* of the candidates or tenderers, *on the basis of self-declarations*, reference or references to be submitted as proof in accordance with the requirements specified in the concession notice' (emphasis added).

53. Ultimately, Directive 2004/18 is therefore not applicable in the present case and there is thus no need to consider whether the measure at issue is consistent with Article 47 of that directive.

2. Second aspect: the existence of a restriction incompatible with the freedom of establishment enshrined in Article 49 TFEU and with the principles of equal treatment and effectiveness

54. The first question, which is central to the case referred to the Court, asks the Court to determine whether the measure at issue, which provides that the tenderer must prove his economic and financial standing by producing appropriate statements issued by at least two banks, constitutes an unjustified and disproportionate restriction of freedom of establishment.

55. First of all, and although it is not the Court's place to call into question the referring court's interpretation of the relevant national law, I must say that I am perplexed by the way in which the obligations imposed on tenderers for the purpose of establishing their economic and financial standing are presented.

56. The referring court seems to proceed from the assumption that failure to comply with the requirement to submit two statements of ad hoc opening of credit from at least two banks justifies in itself the exclusion from participation in the Monti contract notice procedure of tenderers established for less than two years. Owing to that requirement, 'historic' operators are alleged to benefit from an advantage by comparison with operators who have not yet benefited from concessions, contrary to EU law.

57. However, if I confine myself to a simple reading of the provision at issue, provided for in point 3.2 of the Administrative Rules annexed to the contract notice, it appears that that requirement is laid down for only as an alternative to the obligation for the tenderer to show that the overall revenues linked with the activity of gaming operator have not been below two million euros during the last two business years completed before the date of submission of the application. (27)

58. That having been said, and in accordance with the analysis grid traditionally employed for the purpose of determining whether a restrictive measure is consistent with the freedoms provided for in the FEU Treaty, I shall examine the problem referred to the Court in three stages, by, first, identifying a restriction imposed in a discriminatory manner; second, evaluating the reasons put forward in support of the restriction; and, third, examining the proportionality of the measure at issue.

59. In the first place, it is appropriate to ascertain whether the provision at issue constitutes a potential restriction of the freedom of establishment enshrined in Article 49 TFEU and, if so, whether it was imposed in a discriminatory manner.

60. In view of the broad definition of what, according to the Court's case-law, constitutes 'a restriction', in particular in the betting and gaming sector where all measures which appear, directly or indirectly, to be disadvantageous to economic operators wishing to engage in the activity of collecting bets have been held to be restrictive, (28) I am of the view that that question should be answered in the affirmative.

61. Indeed, the measure at issue, which imposes on tenderers in the Monti contract notice procedure particular obligations in order to demonstrate their financial soundness, is likely to influence the possibilities of participating in that call for tenders and, thus, potentially constitutes a restriction on freedom of establishment. (29)

62. As the Commission has pointed out in its observations, because the potential tenderer concerned is required to adduce evidence of his financial soundness by means of statements issued by at least two banks, he is required to establish a banking credit relationship with two separate operators. That is a condition that not all new tenderers are able to satisfy, because compliance with that condition is not essential for the exercise of their activities in other contexts and because it may give rise to particular problems.

63. As to whether that restriction was imposed in a discriminatory manner, it must be stated that it has not been established — or, to my mind, even claimed — that the measure at issue was imposed only on operators taking part in the 2012 call for tenders who are established in other Member States. On the contrary, it seems clear from the evidence submitted to the Court that the measure at issue was imposed on all operators who wished to take part in the call for tenders launched in 2012, irrespective of their place of establishment.

64. Likewise, and in the absence of information to the contrary, it appears that the requirement to submit statements from two banks is applied in the same way to all participants in that call for tenders.

65. In the second place, it is necessary to ascertain whether the grounds on which the national authorities rely in order to justify the obligations imposed on tenderers in order to demonstrate their financial solvency are of such a kind as to justify that restriction.

66. In that regard, it is well established that restrictions on betting and gaming may be justified by overriding reasons in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling. As regards the Italian legislation on betting and gaming, the Court has held that the general objective of combating criminality linked to betting and gaming is capable of justifying restrictions under the applicable national legislation, (30) provided that those restrictions satisfy the principle of proportionality and in so far as the means put in place in that regard are examined in a global, consistent and systematic manner. (31)

67. It is incumbent, in particular, on the Member States concerned to ensure that the means put in place in the context of a system of concessions are appropriate for ensuring access to and the exercise of the economic activity in the sector concerned in equivalent conditions and in an effective manner.

68. In the present case, I would point out that it is not the system of concessions taken as a whole that is at issue, but the obligations imposed on tenderers, under point 3.2 of the Administrative Rules annexed to the Monti contract notice, to establish their economic and financial soundness.

69. To my mind, there is scarcely any doubt that those requirements, which are intended not only to channel the supply of betting and gaming — and, in fact, to limit organised crime and fraud linked with the clandestine organisation of gambling — but also to exercise a certain amount of control in the interest of gamblers, pursue a legitimate objective. I recall on that point that the Court has already referred to an Italian Government inquiry which shows that ‘the activities of clandestine betting and gaming, prohibited as such, are a considerable problem in Italy, which it may be possible to solve through the expansion of authorised and regulated activities’. (32)

70. Therefore, in the third and last place, the question arises whether the measure at issue was imposed in accordance with the principle of proportionality.

71. I shall address, first, the question of the *appropriateness* of the measure at issue, and then, second, the question of its proportionality.

72. As regards, first of all, the appropriateness of the obligation at issue, it seems quite clear to me that bank statements, such as those required by the provisions at issue, are capable of establishing the tenderer’s financial capacity to exercise the activity of collecting bets in the event that such activity should be entrusted to him.

73. Like the requirement, referred to in the *Dickinger and Ömer* case, (33) that the holder of a betting and gaming monopoly must have share capital of a certain amount, the obligation to provide statements from two banks is capable of ensuring that the economic operator has a financial capacity that will enable him to meet his obligations towards winning gamblers.

74. As the Belgian Government stated in its written submissions, any efficient and coherent rules in relation to betting and gaming necessarily contain provisions to ensure that tenderers have the necessary financial standing.

75. As regards, next, the *proportionality* of the measure at issue, it will be recalled that it is for the referring court, in principle, to determine whether, in the light of all the evidence before it, the measure at issue does not go further than is necessary in order to achieve the objective pursued. (34) That is all the more so when the decision for reference contains little information in that respect.

76. In order to provide the referring court with the most useful answer possible, the Court might however give the following information on the factors that must guide the analysis.

77. In the first place, it is for the national court to determine whether obtaining the requisite bank statements is liable to entail particular financial burdens or real organisational difficulties for undertakings which intend to participate in a tendering procedure with a view to obtaining a concession to operate in the betting and gaming sector.

78. In this instance, I would observe that there is no reason to conclude that the obligation to produce two statements issued by European banks is an insurmountable requirement for a reliable operator wishing to engage in the activity of collecting bets. On that aspect, I recall that the referring court merely indicated that the applicant in the main proceedings had been unable ‘for valid reasons’ to submit the two bank references required. However, it is possible to have doubts as to the nature of those reasons and to wonder whether the real reason for the applicant’s claimed inability to produce those references does not in reality lie in the fact that its financial credibility is lacking. It is apparent from the case file that the sole reference submitted by UniqGroup was not in any event capable of establishing its economic and financial standing.

79. In the second place, it is for the national court to examine whether, in the light of the obligations actually imposed on tenderers, it may be alleged that, having regard to the discretion which Member States must be recognised as enjoying when organising the betting and gaming sector, the requirement at issue goes further than is necessary.

80. On the latter point, it seems to me to be appropriate to point out that the particular nature of economic activities in the betting and gaming sector, which is consistently recognised by the Court and which, moreover, explains why that sector has not yet been the subject of harmonisation measures, must allow the Member States to put in place appropriate instruments of such a kind as to make the activity secure both from the point of view of consumer protection and in order to prevent fraud and the development of criminal activities.

81. In such a context, to my mind the contracting authorities cannot be criticised for not being satisfied with just any statements and certificates for the purposes of being sure of the economic and financial standing of applicants for concessions. Statements from banks, such as those required by the measure at issue, are in principle more reliable than those originating with the applicant for a concession in the betting and gaming sector.

IV – **Conclusion**

82. In the light of the foregoing developments, I propose that the Court should answer the questions submitted by the Tribunale di Reggio Calabria (District Court, Reggio Calabria, Italy) as follows:

> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in particular Article 47, does not apply to national legislation governing, in the betting and gaming sector, the tendering procedure for the grant of concessions, such as that referred to in the main proceedings.
>
> The freedom of establishment enshrined in Article 49 TFEU and the principles of equivalence and effectiveness must be interpreted as meaning that they do not preclude national legislation which, for the purpose of granting concessions in the betting and gaming sector, excludes from the tendering procedure operators who have been unable to provide statements from two separate banks, in so far as

that condition satisfies the principle of proportionality. It is for the national court to ascertain whether such a requirement is, in the light of all of the circumstances of the case, justified and proportionate to the objective pursued.

---

1 – Original language: French.

---

2 – Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 – For a more detailed account of this case-law, reference should be made to my Opinion in *Laezza* (C-375/14, EU:C:2015:788, point 2).

---

4 – Notice published in GURI No 88, of 30 July 2012, 5th Special Series, p. 15, and in the *Official Journal of the European Union*, S 145, of 23 July 2012.

---

5 – GURI No 146 of 26 June 1931.

---

6 – Ordinary Supplement to GURI No 302 of 29 December 2000.

---

7 – Judgment of 6 March 2007, C-338/04, C-359/04 and C-360/04, EU:C:2007:133.

---

8 – Decree-Law of 4 July 2006 laying down urgent measures for economic and social revival, for the control and rationalisation of public expenditure, and providing for initiatives in relation to tax revenue and the combating of tax evasion, converted into statute by Law No 248 of 4 August 2006 (GURI No 18 of 11 August 2006).

---

9 – Judgment of 16 February 2012, C-72/10 and C-77/10, EU:C:2012:80.

---

10 – Decree-Law of 2 March 2012 laying down urgent provisions related to fiscal simplification, improving effectiveness and reinforcing monitoring procedures (GURI No 52 of 2 March 2012, p. 1), converted into statute, after amendment, by Law No 44 of 26 April 2012 (GURI No 99 of 28 April 2012, and Ordinary Supplement to GURI No 85, p. 1 et seq.; consolidated text, p. 23 et seq.; ‘the 2012 Decree-Law’).

---

11 – Law laying down provisions for the establishment of the annual and long-term State budget (2011 Stability Law) (legge n. 220 — Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2011)) of 13 December 2010 (Ordinary Supplement to GURI No 297 of 21 December 2010).

---

12 – See my Opinion in *Laezza* (C-375/14, EU:C:2015:788, points 27 and 28).

---

13 – See, in particular, judgment of 22 January 2015 in *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25, paragraph 27 and the case-law cited).

---

14 – C-375/14, EU:C:2015:788, paragraphs 40 to 45.

15 – See, to that effect, my Opinion in *Laezza* (C-375/14, EU:C:2015:788, point 44).

16 – Judgment of 16 February 2012, C-72/10 and C-77/10, EU:C:2012:80.

17 – Judgment of 22 January 2015, C-463/13, EU:C:2015:25.

18 – See, to that effect, my Opinion in *Laezza* (C-375/14, EU:C:2015:788, points 41 and 43).

19 – See, to that effect, in particular, judgments of 27 October 1993, *Enderby* (C-127/92, EU:C:1993:859, paragraph 10); of 26 October 2010, *Schmelz* (C-97/09, EU:C:2010:632, paragraph 28); and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 15).

20 – See, in particular, judgment of 22 December 2008, *Les Vergers du Vieux Tauves* (C-48/07, EU:C:2008:758, paragraph 17).

21 – See, in particular, judgment of 26 January 1993, *Telemarsicabruzzo and Others* (C-320/90 to C-322/90, EU:C:1993:26; paragraph 6), and orders of 9 April 2008, *RAI* (C-305/07, not published, EU:C:2008:208, paragraph 16); of 17 September 2009, *Investitionsbank Sachsen-Anhalt* (C-404/08 and C-409/08, not published, EU:C:2009:563, paragraph 29); and of 3 July 2014, *Talasca* (C-19/14, EU:C:2014:2049, paragraph 17).

22 – See, in particular, judgment of 28 January 2016, *Laezza* (C-375/14, EU:C:2016:60).

23 – See, to that effect, my Opinion in *Laezza* (C-375/14, EU:C:2015:788, point 46).

24 – As concerns the difference between ‘public service contract’ and ‘service concession’, particular reference is made to the judgment of 10 March 2011, *Privater Rettungsdienst und Krankentransport Stadler* (C-274/09, EU:C:2011:130, paragraphs 23 and 29 and the case-law cited).

25 – See judgment of 3 June 2010, *Sporting Exchange* (C-203/08, EU:C:2010:307, paragraph 39 and the case-law cited).

26 – Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

27 – In the present case, the applicant in the main proceedings stated at the hearing that in the last business year it recorded a turnover of EUR 14 million.

28 – See, to that effect, my Opinion in *Laezza* (C-375/14, EU:C:2015:788, points 56 to 58 and the case-law cited).

29 – See, to that effect, my Opinion in *Laezza* (C-375/14, EU:C:2015:788, point 64).

30 – See, in particular, judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25, paragraphs 48 and 49 and the case-law cited).

---

31 – See judgment of 28 January 2016, *Laezza* (C-375/14, EU:C:2016:60, paragraph 36 and the case-law cited).

---

32 – See judgment of 6 March 2007, *Placanica and Others* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 56).

---

33 – Judgment of 15 September 2011, C-347/09, EU:C:2011:582, paragraph 77.

---

34 – See, in particular, judgment of 28 January 2016, *Laezza* (C-375/14, EU:C:2016:60, paragraph 37 and the case-law cited).

EU:C:2016:853

JUDGMENT OF THE COURT (Ninth Chamber)

10 November 2016 (*)

(Reference for a preliminary ruling — Directive 2004/18/EC — Article 45 — Articles 49 and 56 TFEU — Public procurement — Conditions for exclusion from a procedure for the award of public works contracts, public supply contracts and public service contracts — Obligations relating to the payment of social security contributions — Social security contributions payment certificate — Correction of irregularities)

In Case C-199/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (State Council, Italy), made by decision of 3 February 2015, received at the Court on 29 April 2015, in the proceedings

Ciclat Soc. coop.

v

Consip SpA,

Autorità per la Vigilanza sui Contratti Pubblici di lavori, servizi e forniture,

intervening parties:

Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL),

Team Service SCARL, as the representative of ATI-Snam Lazio Sud Srl and Ati-Linda Srl,

Consorzio Servizi Integrati,

THE COURT (Ninth Chamber),

composed of C. Vajda (Rapporteur), acting as President of the Chamber, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Ciclat Soc. coop., by S. Sticchi Damiani, avvocato,

– Consip SpA, by A. Clarizia, avvocato,

– the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL), by L. Frasconà and G. Catalano, avvocati,

– Consorzio Servizi Integrati, by G. Viglione, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Varone and C. Colelli, avvocati dello Stato,

– the European Commission, by G. Gattinara and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), and Articles 49 and 56 TFEU.

2 The request has been made in proceedings between the consortium Ciclat Soc. coop. ('Ciclat'), on the one hand, and Consip SpA and the Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture (Supervisory Authority for public works contracts, public supply contracts and public service contracts), on the other hand, concerning a procedure for the award of contracts for cleaning and other services for maintaining the buildings, educational establishments and training centres of the public authorities.

Legal context

EU law

3 Recital 2 of Directive 2004/18 states:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.'

4 Article 45 of Directive 2004/18 concerns the criteria for qualitative selection relating to the personal situation of the candidate or tenderer. Article 45(2) and (3) thereof provides:

'(2) Any economic operator may be excluded from participation in a contract where that economic operator:

…

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

…

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

(3) Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs 1 or 2(a), (b), (c), (e) or (f) applies to the economic operator:

(a) …

(b) as regards paragraph 2(e) and (f), a certificate issued by the competent authority in the Member State concerned.

…’

5 Under Article 51 of Directive 2004/18:

‘The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.’

6 Article 93 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65) states:

‘This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.’

Italian law

7 The decreto legislative n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006), as amended by Decree-Law No 70 of 13 May 2011 (GURI No 110 of 13 May 2011, p. 1), converted into law by Law No 106 of 12 July 2011 (GURI No 160 of 12 July 2011, p. 1) (‘Legislative Decree No 163/2006’), governs, in their entirety, the procedures in Italy for the award of public works contracts, public service contracts and public supply contracts.

8 Legislative Decree No 163/2006 contains, in Part II thereof, Article 38, which lays down the general requirements for participation in procedures for the award of concessions and contracts for works, supplies and services. Article 38(1)(i) of that decree provides:

‘(1) Persons shall be excluded from participation in procedures for the award of concessions and contracts for works, supplies and services, cannot be awarded subcontracts and cannot enter into related contracts, if:

…

(i) they have committed serious infringements, definitively established, of the rules governing the payment of social security contributions, under Italian law or that of the State in which they are established’.

9 According to Article 38(2), (4) and (5) of Legislative Decree No 163/2006:

‘(2) The candidate or tenderer shall certify that he satisfies the relevant requirements by producing a sworn statement, in accordance with the conditions laid down in the consolidated statutory and regulatory provisions relating to administrative documents, as required by Decree No 445 of the President of the Republic of 28 December 2000, and shall set out in that statement all his previous convictions, including those which have not been entered in the judicial record.

… For the purposes of Article 38(1)(i) of the decree, failures are to be regarded as serious if they preclude the issue of a social security contributions payment certificate [documento unico di regolarità contributiva]] …

(4) For the purposes of checks relating to the grounds of exclusion referred to in the present article, the contracting authorities request, as the case may be, the candidates or tenderers not established in Italy to submit the supporting documents required and may, in addition, request the cooperation of the competent authorities.

(5) Where the Member State of the European Union concerned does not issue such documents or certificates, they may be replaced by a declaration on oath or, in Member States where there is no

provision for declarations on oath, by a solemn declaration made by the person concerned before a judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes'.

10 The infringements which preclude the issue of a social security contributions payment certificate (the 'DURC') are identified by the decreto del ministero del lavoro e della previdenza sociale — che disciplina il documento unico di regolarità contributiva (Decree of the Ministry of Labour and Social Security governing the social security contributions payment certificate) of 24 October 2007 (GURI No 279 of 30 November 2007, p. 11).

11 Article 8(3) of that ministerial decree provides:

'For the sole purposes of participation in the tender procedure, a non-serious difference between the sums owed and those paid with regard to each social security institution and each construction fund shall not preclude the issue of a DURC. A difference equal to or less than 5% between the sums owed and those paid in respect of each payment or contribution period or, in any event, a difference less than EUR 100, shall not be regarded as serious, without prejudice to the obligation to pay that amount within 30 days of the DURC being issued.'

12 The DURC which is issued to the undertaking is valid for a period of three months.

13 According to Article 7(3) of that ministerial decree, it is also laid down that, in the event of a failure to comply with the conditions for regularity with regard to social contributions, the relevant bodies 'request the party concerned to correct its situation within 15 days'. The national case-law has however made clear that the above request does not apply where the DURC is requested by the contracting authority.

The dispute in the main proceedings and the question referred for a preliminary ruling

14 By notice published in the *Official Journal of the European Union* on 14 July 2012, Consip launched a tender procedure for the award of a contract for cleaning and other services for maintaining the decorative and technical elements of the buildings, all types and levels of educational establishments and training centres of the public authorities. It was possible to participate in the tender procedure for that contract, divided into 13 lots, by submitting independent tenders. It is apparent from the file sent to the Court that the deadline for submitting tenders was 26 September 2012.

15 The notice expressly required each tenderer to declare, on pain of exclusion, that it satisfied the general requirements for participation in the tender procedure laid down in Article 38 of Legislative Decree No 163/2006.

16 Ciclat, a consortium created by workers' production cooperatives, submitted a tender in relation to lot No 7, the basic amount of which for the tender procedure was EUR 91 200 000, and lot No 12, the basic amount of which for the tender procedure was EUR 89 800 000, by providing, in the first case, a provisional deposit of EUR 912 000 in relation to lot No 7 and of EUR 898 000 in relation to lot No 12.

17 Since Ciclat is a consortium, it indicated in its tender the cooperatives that would carry out the work if it were to be awarded the contract, and among them it referred in particular to Ancora Soc. coop. On 10 September 2012, the latter declared, referring to the relevant passage of Article 38 of Legislative Decree No 163/2006, that it 'had not committed any serious infringements or definitively established infringements of the rules regarding social security and welfare contributions such as would prevent the issue of a DURC …'.

18 On completion of the tender procedure, Ciclat was placed top of the provisional list for lot No 7, and second for lot No 12.

19 On 12 June 2013, in response to Consip's request in the context of verifications, the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL) issued a certificate in which it concluded that, at the time of its declaration on 10 September 2012, Ancora had failed to pay social security

contributions, in relation to the payment of insurance premiums, that company having failed to pay the third instalment of those premiums in the context of the reverse charge scheme expiring on 16 August 2012, amounting to EUR 33 148.28. That third instalment was paid with the fourth and final instalment on 5 December 2012, that is to say before those verifications were carried out and before the result of the tender procedure was known.

20 Since Consip subsequently decided to exclude Ciclat from the tender procedure, the latter brought proceedings before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Lazio, Italy) against that exclusion and against the subsequent measures to enforce provisional deposits. That court dismissed the action.

21 Ciclat appealed against that decision before the referring court. It contended that the failure to pay, within the time-limit set, one of the tranches of a self-assessed premium cannot be classified as a 'serious and definitively established infringement', in the light, in particular, of the spontaneous payment of the contribution with the fourth and final tranche. It also stated that INAIL failed to fulfil its obligation to inform it of irregularities in accordance with Article 7 of the Ministerial Decree of 24 October 2007, in so far as that obligation applies also in the event of a request made by the DURC office on its own initiative during the verification decided by the contracting authority.

22 The Consiglio di Stato (State Council, Italy) has doubts concerning the validity of the Italian rules at issue. It considers that they could be contrary to EU law, in particular to Article 45 of Directive 2004/18 and Articles 49 and 56 TFEU.

23 In those circumstances, the Consiglio di Stato (State Council) decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Article 45 of Directive 18/2004, read also in the light of the principle of reasonableness, and Articles 49 and 56 TFEU preclude national legislation which, in relation to a threshold-based procurement procedure, allows a request to be made by the contracting authority on its own initiative for the certificate issued by the social security institutions ('DURC') and obliges that authority to exclude the tenderer if the certificate discloses an earlier failure to pay contributions, in particular one existing at the time of participation but not known to that operator, which took part on the strength of a positive currently valid DURC, but that infringement in any case no longer exists at the time of the award or of the verification carried out on the contracting authority's own initiative?'

The question referred for a preliminary ruling

24 By its question, the referring court asks, in essence, whether Article 45 of Directive 2004/18 and Articles 49 and 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which obliges a contracting authority to consider an infringement relating to the payment of social security contributions, recorded in a certificate requested by a contracting authority on its own initiative and issued by the social security institutions to be a ground for exclusion, where that infringement existed on the date of the participation in a tender procedure, even if it no longer existed on the date of the award or of the verification carried out on the contracting authority's own initiative.

25 First of all, it should be noted that, as is apparent from the order for reference, Directive 2004/18 is applicable to the facts at issue in the main proceedings. In addition, it should be pointed out that the provisions of that directive must, in accordance with recital 2 thereof, be interpreted in accordance with the principles of freedom of establishment and freedom to provide services as well as with those deriving therefrom. It is, therefore, not necessary to examine separately the national legislation at issue in the main proceedings in the light of Articles 49 and 56 TFEU.

26 Moreover, it should be noted that Directive 2014/24, referred to in the order for reference, had still not entered into force at the time of the facts at issue in the main proceedings, as is apparent from Article 93 of that directive and it is therefore not applicable *ratione temporis*.

27 In the first place, it is necessary to examine whether Article 45 of Directive 2004/18 precludes national legislation, such as that at issue in the main proceedings, which considers an infringement relating to the payment of social security contributions which existed on the date of the participation in a tender procedure to be a ground for exclusion, although the amount of the contributions was put in order before the award or the verification carried by the contracting authority on its own initiative.

28 In that regard, it should be noted, first, that Article 45(2) of Directive 2004/18 leaves it to the Member States to determine the period within which the persons concerned must comply with their obligations relating to the payment of social security contributions and may make subsequent regularisations, on condition that that period respects the principles of transparency and equal treatment (see, to that effect, judgment of 9 February 2006, *La Cascina and Others*, C-226/04 and C-228/04, EU:C:2006:94, paragraphs 31 and 32).

29 Secondly, although a contracting authority may request the correction or amplification of data relating to an offer, such corrections or additions may relate only to data which can be objectively shown to pre-date the deadline for applying to take part in the tendering procedure concerned and may not relate to information which must be communicated, failing which the tender will be excluded (see, to that effect, judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 39 and 40).

30 Furthermore, Article 51 of Directive 2004/18, which provides that the contracting authority may invite operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50 of that directive, cannot be interpreted as permitting that authority to accept any rectification of omissions which, as expressly provided for in the contract documentation, must result in the exclusion of the tenderer (see, to that effect, judgment of 6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 46).

31 It follows that Article 45 of Directive 2004/18 does not preclude national legislation, such as that at issue in the main proceedings, which holds an infringement relating to social security contributions which existed on the date of the participation in a tendering procedure to be a ground for exclusion, although the amount of the contributions was put in order before the award or the verification carried by the contracting authority on its own initiative.

32 It is necessary to determine whether that conclusion applies also where national legislation, such as that at issue in the main proceedings, provides that the question whether an economic operator is in compliance with its obligations relating to the payment of social security contributions on the date of its participation in a tendering procedure, is determined by a certificate issued by the social security institutions and requested by the contracting authority on its own initiative. The referring court notes, in that regard, that the social security institutions are not obliged, under Article 7(3) of the ministerial decree of 24 October 2007, to warn the economic operator concerned of the irregularity prior to issuing such a certificate.

33 It should be noted, first, that Article 45(2)(e) of Directive 2004/18 allows Member States to exclude any economic operator from participation in a public contract, where that operator fails to fulfil his obligations relating to the payment of social security contributions. Moreover, under Article 45(3) of Directive 2004/18, the contracting authorities accept as sufficient evidence that the economic operator is not in the situation referred to in Article 45(2)(e), a certificate issued by the competent authority in the Member State concerned and from which it is apparent that those requirements are satisfied. It in no way follows from the wording of those provisions that the competent authorities are prohibited from requesting the certificate required from the social security institutions on their own initiative.

34 Secondly, it is of little consequence if an economic operator has not been warned of such an irregularity as long as he has the possibility to verify, at any time, the regularity of his situation with the competent authorities. If that is indeed the case, which it is for the national court to determine, an economic operator may not rely on a certificate issued by the social security institutions obtained before his tender was submitted and certifying that he complied with his obligations relating to the payment of social security contributions during a period before that tender was submitted, while being aware, as the case may be, after making enquiries with the competent authorities, that he no longer complies with such obligations on the date his tender was submitted.

35 In the second place, it is necessary to examine whether Article 45 of Directive 2004/18 precludes national legislation, such as that at issue in the main proceedings, which obliges the contracting authorities to consider an infringement relating to the payment of social security contributions, recorded in a certificate requested by a contracting authority on its own initiative and issued by the social security institutions, where that infringement existed on the date of the participation in a tender procedure, to be a ground for exclusion, thereby entirely excluding the contracting authorities' discretion.

36 It should be noted that Article 45(2) of Directive 2004/18 does not provide for uniform application at EU level of the grounds of exclusion it mentions, since the Member States may choose not to apply those grounds of exclusion at all or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level (judgment of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 36 and the case-law cited). That provision does not therefore oblige the Member States to grant the contracting authority freedom of appreciation in that regard.

37 It follows that Article 45 of Directive 2004/18 does not preclude national legislation, such as that at issue in the main proceedings, which obliges the contracting authorities to consider an infringement relating to the payment of social security contributions, recorded in a certificate requested by a contracting authority on its own initiative and issued by the social security institutions, where that infringement existed on the date of the participation in a tender procedure, to be a ground for exclusion, thereby entirely excluding the contracting authorities' discretion.

38 In the third and last place, it is necessary to examine the referring court's questions concerning whether national legislation, such as that at issue in the main proceedings, introduces discrimination between undertakings established in Italy and those established in other Member States. In that context, the referring court notes that, for the latter, Article 38(4) and (5) of Legislative Decree No 163/2006 provides that the contracting authority must request those undertakings to supply themselves the supporting documents required and that, if the Member State concerned fails to issue that type of document or certificate, a sworn declaration or a solemn declaration is regarded as sufficient proof.

39 In that regard, it should be noted that it is not apparent from the order for reference that undertakings established in other Member States submitted tenders in the main proceedings. It follows that the question whether national legislation, such as that at issue in the main proceedings, introduces discrimination between undertakings established in Italy and those established in other Member States is irrelevant to the outcome of the dispute in the main proceedings.

40 In the light of the foregoing considerations, the answer to the question referred is that Article 45 of Directive 2004/18 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which obliges a contracting authority to consider an infringement relating to the payment of social security contributions, recorded in a certificate requested by a contracting authority on its own initiative and issued by the social security institutions, to be a ground for exclusion, where that infringement existed on the date of the participation in a tender procedure, even if it no longer existed at the time of the award or of the verification carried out on the contracting authority's own initiative.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 45 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which obliges a contracting authority to consider an infringement relating to

the payment of social security contributions, recorded in a certificate requested by a contracting authority on its own initiative and issued by the social security institutions, to be a ground for exclusion, where that infringement existed on the date of the participation in a tender procedure, even if it no longer existed at the time of the award or of the verification carried out on the contracting authority's own initiative.

[Signatures]

---

* Language of the case: Italian.

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

14 December 2016 (*)

(Reference for a preliminary ruling — Public service contracts — Directive 2004/18/EC — Article 45(2) — Personal situation of the candidate or tenderer — Optional grounds of exclusion — Grave professional misconduct — National legislation providing for a case-by-case assessment in accordance with the principle of proportionality — Decisions of the contracting authorities — Directive 89/665/EEC — Judicial review)

In Case C-171/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court, Netherlands), made by decision of 27 March 2015, received at the Court on 15 April 2015, in the proceedings

Connexxion Taxi Services BV

v

Staat der Nederlanden (Ministerie van Volksgezondheid, Welzijn en Sport),

Transvision BV,

Rotterdamse Mobiliteit Centrale RMC BV,

Zorgvervoercentrale Nederland BV,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), C. Vajda, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 27 April 2016,

after considering the observations submitted on behalf of:

– Connexxion Taxi Services BV, by J. van Nouhuys, advocaat,

– Transvision BV, Rotterdamse Mobiliteit Centrale RMC BV and Zorgvervoercentrale Nederland BV, J.P. Heering and P. Heemskerk, advocaten,

– the Netherlands Government, by H.M. Stergiou, M.K. Bulterman, A.M. de Ree and J. Langer, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, S. Varone and F. Di Matteo, avvocati dello Stato,

– the European Commission, by A. Tokár and S. Noë, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 June 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the provisions of Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and the general principles of equal treatment and proportionality and the extent of judicial review of the powers of contracting authorities.

2 The request has been made in proceedings between Connexxion Taxi Services BV ('Connexxion') and the Staat der Nederlanden — Ministerie van Volksgezondheid, Welzijn en Sport (Netherlands State — Ministry of Health, Welbeing and Sport, 'the Ministry') and the tender group constituted by Transvision BV, Rotterdamse Mobiliteit Centrale RMC BV and Zorgvervoercentrale Nederland BV ('the Tender Group') concerning the lawfulness of the Ministry's decision to award a public services contract to the Tender Group.

Legal context

EU law

3 Recital 2 of Directive 2004/18 states:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.'

4 Article 2 of that directive, entitled 'Principles of awarding contracts' provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Under Title II, Section 2 of Chapter VII of that directive concerns 'Criteria for qualitative selection'. It includes Article 45, entitled 'Personal situation of the candidate or tenderer'. Article 45(1) lists the reasons for which a candidate or tenderer must be excluded from participating in a contract. Article 45(2) lists the reasons for which a candidate or tenderer may be excluded from participation in a contract and was worded as follows:

'Any economic operator may be excluded from participation in a contract where that economic operator:

…

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

…

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.'

6 Annex VII A to that directive, entitled ' Information which must be included in public contract notices' refers, in point 17, to 'selection criteria regarding the personal situation of economic operators that may lead to their exclusion, and required information proving that they do not fall within the cases justifying exclusion …'.

7 Under the heading 'Scope and availability of review procedures', Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) provides in paragraph 1(3) thereof:

'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the ground that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.'

8 Directive 2004/18 was replaced by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65). In accordance with Article 91 of Directive 2014/24, Directive 2004/18 was repealed with effect from 18 April 2016.

Netherlands law

9 Directive 2004/18 was transposed into Netherlands law by the Besluit houdende regels betreffende de procedures voor het gunnen van overheidspdrachten voor werken, lveringen en diensten (Decree relating to the rules on the award of public contracts) of 16 July 2005 (Stb. 2005, p. 408 'the Decree').

10 Article 45(2)(d) of that directive was transposed into Netherlands law by Article 45(3)(d) of the Decree which states as follows:

'The contracting authority may exclude from participation in a public contract any economic operator:

…

(d) which has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate.

…'

11 The Explanatory Memorandum to the decree states, with regard to Article 45(3) thereof:

'The assessment of whether exclusion should actually take place and for how long that exclusion should last should, having regard to the general principles of Directive 2004/18, always be proportionate and non-discriminatory. "Proportionate" means that the exclusion and its length must be proportional to the gravity of the misconduct. In the same way, the exclusion and its length must be proportionate to the size of the public contract. Setting a mandatory period in which an undertaking which acted unlawfully is excluded from the outset from all public procurement procedures by the State is not, therefore, consistent with the principle of proportionality. That also means that the assessment is made on an individual basis, because the contracting authority must always verify on a case-by-case basis for each public contract whether, in a specific case, a particular undertaking must be excluded (in accordance with the nature and size of the contract, the nature and extent of the fraud and the measures that the undertaking has adopted in the meantime).'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 On 10 July 2012, the Ministry launched a contract award procedure for the supply of 'socio-recreational interregional transport services for persons with reduced mobility'. The service is intended to enable persons with reduced mobility to travel freely by giving them a transport budget each year expressed in taxi kilometres. The contract has a minimum duration of three years and nine months and is valued annually at approximately EUR 60 000 000.

13 The award procedure for that contract is described in detail, in a document called 'Descriptive document', the paragraph of which entitled 'Grounds for Exclusion and Suitability Requirements' states inter alia as follows in point 3.1:

'A Tender to which a Ground for Exclusion applies shall be set aside and shall not be eligible for further (substantive) assessment.'

14 As far as concerns the grounds for exclusion, the Descriptive document refers to a 'self-declaration' that tenderers must make and attach to their tender as an annex. The descriptive document states:

'The tenderer hereby declares … that no grounds for exclusion (see paragraphs 2 and 3 of the declaration) apply to him; this is confirmed by signature of the Uniform Self-declaration — Tenders.'

15 By that declaration, the tenderer declares, inter alia, that 'neither his company nor any manager has been guilty of grave professional misconduct'.

16 Connexxion and the Tender Group were among the companies that participated in the award procedure for that contract. By letter of 8 October 2012, the Ministry informed Connexxion that its bid was in second position, but that the Ministry intended to award the contract to the Tender Group.

17 On 20 November 2012, the Nederlandse Medeingingsautoriteit (Netherlands Competition Authority) imposed fines on two undertakings in the Tender Group and on the managers of those undertakings for infringement of Netherlands competition law. The infringements established concerned agreements concluded with other undertakings during the periods from 18 December 2007 to 27 August 2010 and from 17 April 2009 to 1 March 2011. The Ministry took the view that this constituted grave professional misconduct but maintained its decision to award the contract to the Tender Group, on the ground that the Tender Group's exclusion on the basis of such misconduct would be disproportionate.

18 In proceedings for interim measures, Connexxion sought an order prohibiting the Ministry from awarding the contract to the Tender Group. By decision of 17 April 2013, the voorieningenrechter te Den Haag (the court hearing the application for interim measures, The Hague) upheld Connexxion's request, taking the view that the Ministry, having established that the Tender Group had been guilty of grave professional misconduct, no longer had any latitude to carry out a review of proportionality.

19 By decision of 3 September 2013, the Gerechtshof Den Haag (Court of Appeal, The Hague, Netherlands) set aside the decision of the court hearing the application for interim relief and authorised the Ministry to award the contract at issue in the main proceedings to the Tender Group. It held, first, that EU law does not preclude a contracting authority from assessing, in accordance with the principle of proportionality, whether a tenderer to which an optional ground of exclusion applies must be excluded and, second, that by carrying out such an examination of proportionality, the Ministry has not acted in disregard of the principles of equal treatment and transparency.

20 Connexxion brought an appeal against that decision before the Hoge Raad der Nederlanden (Supreme Court, Netherlands).

21 That court observes that the case in the main proceedings is characterised, first, by the fact that, in the tender conditions, the contracting authority stated that the tender to which a ground of exclusion applies is to be rejected without consideration of the substance and, second, that the decision to award the contract to a particular tenderer was nevertheless maintained after the contracting authority established that that tenderer had been guilty of grave professional misconduct for the purposes of the tender conditions.

22 The referring court states that Article 45(3) of the Decree reproduces in their entirety the optional grounds of exclusion laid down in Article 45(2), first subparagraph, of Directive 2004/18. As far as concerns the application of the grounds of exclusion, it is clear from the Explanatory Memorandum regarding that provision of the Decree that, taking account of the general principles of the directive, the question whether a tenderer is to be excluded must always be determined in a proportionate and non-discriminatory manner. Thus, contracting authorities should assess, on a case-by-case basis, whether an undertaking must be excluded from the relevant public procurement procedure, taking account of the nature and size of the contract, the nature and extent of the fraud, and the measures that the undertaking has taken in the meantime.

23 Accordingly, national law requires the contracting authority, after it has established that a tenderer has been guilty of grave professional misconduct, to decide, in accordance with the principle of proportionality, whether the perpetrator of that misconduct must in fact be excluded.

24 Therefore, the obligation to carry out an assessment of proportionality may be regarded as making the criteria for the application of the optional grounds of exclusion more flexible, as provided for by national law, within the meaning of the judgments of 9 February 2006, *La Cascina and Others* (C-226/04 and C-228/04, EU:C:2006:94, paragraph 21), and of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici* (C-358/12, EU:C:2014:2063, paragraphs 35 and 36). In accordance with Article 45(2), second subparagraph, of Directive 2004/18 such flexibility, provided for by national law, should comply with EU law and, in particular, with the principles of equal treatment and transparency. In the case in the main proceedings, the Ministry, as the contracting authority, after establishing that the tenderer had been guilty of grave professional misconduct, assessed, in accordance with the principle of proportionality, whether the professional honesty and reliability of the Tender Group could be guaranteed in the performance of the contract concerned. The Tender Group has taken measures to that effect.

25 The referring court points out that to date, the Court has not yet adjudicated on whether EU law, in particular Article 45(2) of that directive, precludes a contracting authority from being obliged to assess under national law, and in accordance with the principle of proportionality, whether a tenderer which has been guilty of grave professional misconduct should be excluded from a contract. The Court has also not adjudicated on the importance to be attached, in that regard, to the fact that, in the tender conditions, the contracting authority has provided for the rejection, without any examination of the substance, of any tender to which a ground of exclusion applies. Furthermore, that directive does not contain any provision concerning the extent of judicial review of the decisions taken by the contracting authorities.

26 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court, Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1(a) Does EU law, in particular Article 45(2) of Directive 2004/18, preclude national law from obliging a contracting authority to assess, by application of the principle of proportionality, whether a tenderer which has been guilty of grave professional misconduct must indeed be excluded?

1(b) Is it significant in this regard that a contracting authority has stated in the tender conditions that a tender to which a ground for exclusion applies must be set aside and is not to be eligible for further substantive assessment?

2. If the answer to Question 1(a) is in the negative: does EU law preclude a situation in which the national courts fail to carry out an unrestricted judicial review of an assessment conducted on the basis of the principle of proportionality, such as the assessment conducted by a contracting authority in the present case, but merely carry out a (“marginal”) review as to whether the contracting authority could reasonably have come to the decision not to exclude a tenderer notwithstanding the fact that that tenderer has been guilty of grave professional misconduct within the meaning of the first subparagraph of Article 45(2) of Directive 2004/18?’

Consideration of the questions referred

27 As a preliminary point, it must be stated that the facts at issue in the main proceedings, as set out in paragraphs 12 to 17 above, arose before the expiry on 18 April 2016 of the period within which the Member States were to transpose Directive 2014/24. It follows that the questions referred for a preliminary ruling must be determined *ratione temporis* solely in the light of Directive 2004/18, as interpreted by the case-law of the Court.

Consideration of Question 1(a)

28 According to settled case-law, as regards public contracts falling within the scope of Directive 2004/18, Article 45(2) thereof leaves the application of the seven grounds for excluding candidates from participation in a contract, relating to their professional honesty, solvency and reliability, to the determination of the Member States, as evidenced by the phrase ‘may be excluded from participation in a contract’, which appears at the beginning of that provision (see, as far as concerns Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), judgment of 9 February 2006, *La Cascina and Others*, C-226/04 and C-228/04, EU:C:2006:94, paragraph 21). Furthermore, pursuant to Article 45(2), second subparagraph, the Member States must specify the conditions for applying paragraph 2, in accordance with their national law and in compliance with EU law (judgment of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici,* C-358/12, EU:C:2014:2063, paragraph 35).

29 Therefore, Article 45(2) of Directive 2004/18 does not provide for uniform application at EU level of the grounds of exclusion it mentions, since the Member States may choose not to apply those grounds of exclusion at all or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context, the Member States have the power to make the criteria laid down in Article 45(2) less onerous or more flexible (judgment of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, paragraph 36 and the case-law cited).

30 In the present case, it must be observed that, as far as concerns the option to exclude an economic operator which has been guilty of grave professional misconduct, the Kingdom of the Netherlands has not set out in its legislation the conditions of applicability in Article 45(2), second subparagraph, of that directive, but, by the Decree, has conferred the exercise of that option on the contracting authorities. The Netherlands legislation at issue in the main proceedings gives the contracting authorities the choice to declare the optional grounds of exclusion, laid down in Article 45(2) of that directive, to be applicable to an award procedure for a public contract.

31 As far as concerns the grounds for excluding a tenderer which has been guilty of grave professional misconduct from a contract, it is clear from the order for reference that that legislation requires the contracting authority concerned, which establishes that the tenderer has been guilty of such misconduct, to determine, in accordance with the principle of proportionality, whether the tenderer should in fact be excluded.

32 Thus, it appears that that assessment of the proportionality of the exclusion makes the application of the ground of exclusion relating to grave professional misconduct laid down in Article 45(2)(d) of Directive 2004/18 more flexible, in accordance with the case-law cited in paragraph 29 of the present judgment. Furthermore, it follows from recital 2 thereof that the principle of proportionality applies in a general manner to public procurement procedures.

33 Therefore, the answer to Question 1(a) is that EU law, in particular Article 45(2) of Directive 2004/18, does not preclude national legislation, such as that at issue in the main proceedings, which requires a contracting authority to assess, in accordance with the principle of proportionality, whether it is in fact appropriate to exclude from a public contract a tenderer which has been guilty of grave professional misconduct.

Consideration of Question 1(b)

34 By Question 1(b), the referring court asks essentially whether the provisions of Directive 2004/18, read in the light of the principle of equal treatment, and the obligation of transparency deriving from it, must be interpreted as meaning that they preclude a contracting authority from deciding to award a public contract to a tenderer which has been guilty of grave professional misconduct, on the ground that

the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality, although, according to the conditions in the call for tenders for that contract, a tenderer who has been guilty of grave professional misconduct must necessarily be excluded without taking into account the proportionality of that sanction.

35 It is clear from the national legislation at issue in the main proceedings that the contracting authorities have a wide margin of discretion regarding the inclusion of the conditions of applicability in Article 45(2) of Directive 2004/18, providing for the optional ground of exclusion of an economic operator which has been guilty of grave professional misconduct, in the tendering documents and their application in practice.

36 It is conceivable that, when the contract documents are drafted, the contracting authority concerned may take the view, in accordance with the nature of that contract, the sensitive nature of the services which are its subject, and the requirements of professional honesty and reliability of the economic operators which arise from that, that the commission of grave professional misconduct must result in the automatic rejection of the tender and the exclusion of the tenderer at fault, provided that the principle of proportionality is observed when the seriousness of that misconduct is assessed.

37 Such a clause, inserted into the contract documents in unambiguous terms, as is the case with regard to the contract documents at issue in the main proceedings, enables all economic operators which are reasonably well informed exercising ordinary care to be apprised of the requirements of the contracting authority and the conditions of the contract so they may act accordingly.

38 As far as concerns whether, pursuant to the relevant national legislation, the contracting authority must or may assess, after the submission of the tenders or even after the selection of tenderers, whether an exclusion made in accordance with an exclusion clause on the ground of grave professional misconduct complies with the principle of proportionality, even though, according to the conditions of the call for tenders for that contract, a tenderer who has been guilty of grave professional misconduct must necessarily be excluded without taking account of the proportionality of that sanction, it must be recalled that the contracting authority must comply strictly with the criteria which it has itself laid down (see, to that effect, judgment of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraph 40 and the case-law cited) in the light, in particular, of Annex VII A, paragraph 17, to Directive 2004/18.

39 Furthermore, the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the bids of all tenderers must be subject to the same conditions (see, to that effect, judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36).

40 Likewise, the obligation of transparency requires that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (see, to that effect, judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36 and the case-law cited).

41 As regards the examination of the proportionality of the exclusion at issue in the main proceedings, it must be observed that some of the economic operators concerned, although aware of the exclusion clause in the contract documents and knowing that they have been guilty of professional misconduct likely to be considered to be grave, may be tempted to submit a tender in the hope of being exempt from the exclusion on the basis of a subsequent assessment of their situation in the application of the principle of proportionality, pursuant to the national legislation at issue in the main proceedings, while others, in a comparable situation, will not submit such a tender based on the terms of the exclusion clause which does not mention such an examination of proportionality.

42 The latter situation, in particular, is likely to concern the economic operators from other Member States who are less familiar with the terms and detailed rules of application of the relevant national legislation. That is particularly true in a situation, such as that at issue in the main proceedings, in

which the contracting authority's obligation to carry out such an assessment of proportionality of an exclusion for grave professional misconduct does not derive from the terms of Article 45(3) of the Decree, but only from the Explanatory Memorandum relating to that provision. According to the information provided by the Netherlands Government in the proceedings before the Court, the Explanatory Memorandum is not binding itself, but must only be taken into consideration for the interpretation of that provision.

43 Therefore, the assessment of the exclusion at issue in the light of the principle of proportionality, where the tender conditions of the contract concerned provide for the rejection of tenders which are covered by such an exclusion clause without any assessment of that principle, is liable to place the economic operators concerned in an uncertain position and adversely affect the principle of equal treatment and compliance with the obligation of transparency.

44 Having regard to the foregoing considerations, the answer to Question 1(b) is that the provisions of Directive 2004/18, in particular those of Article 2 of and Annex VII A, point 17, thereto, read in the light of the principle of equal treatment and the obligation of transparency deriving from that, must be interpreted as precluding a contracting authority from deciding to award a public contract to a tenderer which has been guilty of grave professional misconduct on the ground that the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality, even though, according to the tender conditions of that contract, a tenderer which has been guilty of grave professional misconduct must necessarily be excluded, without consideration of the proportionality of that sanction.

The second question

45 Since the answer to Question 1(b) provides the information necessary for the national court to decide the dispute before it, there is no need to answer the second question.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **EU law, in particular Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, does not preclude national legislation, such as that at issue in the main proceedings, which requires a contracting authority to assess, in accordance with the principle of proportionality, whether it is in fact appropriate to exclude from a public contract a tenderer which has been guilty of grave professional misconduct.**

2. **The provisions of Directive 2004/18, in particular those of Article 2 of and Annex VII A, point 17, thereto, read in the light of the principle of equal treatment and the obligation of transparency which derives from that, must be interpreted as precluding a contracting authority from deciding to award a public contract to a tenderer which has been guilty of grave professional misconduct on the ground that the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality, even though, according to the tender conditions of that contract, a tenderer which has been guilty of grave professional misconduct must necessarily be excluded, without consideration of the proportionality of that sanction.**

[Signatures]

** Language of the case: Dutch.

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 30 June 2016 (1)

Case C-171/15

Connexxion Taxi Services BV

v

Staat der Nederlanden,

Transvision BV,

Rotterdamse Mobiliteit Centrale RMC BV,

and

Zorgvervoercentrale Nederland BV

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands)

(Public procurement — Selection procedure — Criteria for qualitative selection — Optional grounds for exclusion — Grave professional misconduct — Principle of proportionality — Discretion which is not provided for in the descriptive document — Scope of judicial review)

The question referred for a preliminary ruling from the

1. Hoge Raad der Nederlanden (Supreme Court of the Netherlands) is concerned, first, with one of the most common problems in the interpretation of Directive 2004/18/EC, (2) that is, the powers of Member States to exclude certain tenderers from public contracts. The referring court also enquires as to the scope of the judicial review in the context of the review procedures brought under Directive 89/665/EEC. (3)

2. In this case, one of the tenderers had been guilty of grave professional misconduct, conduct referred to in the 'descriptive document' (4) for the tender as a ground for (automatic?) exclusion. The contracting authority, however, not only allowed it to participate, but ultimately also awarded the contract to it.

3. Directive 2004/18 (specifically, Article 45(2)(d)) authorises Member States to incorporate, on an optional basis, that clause in the national rules governing public procurement. The Hoge Raad (Supreme Court) seeks to ascertain whether the contracting authority is empowered, notwithstanding the terms of the descriptive document, to assess the tenderer's misconduct in the light of the principle of proportionality and even to determine that such behaviour does not have an exclusionary effect.

4. If the contracting authority is found to have that power, the referring court enquires next as to the intensity of the judicial review of the decision taken. More specifically, it asks whether it is compatible with EU law for the court to carry out, in those circumstances, a review limited to assessing only the 'reasonableness' of the administrative decision.

I – **Legislative framework**

A – *EU law*

Directive 2004/18

5. According to Article 45:

‘2. Any economic operator may be excluded from participation in a contract where that economic operator:

…

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

…’

6. According to the final subparagraph of Article 45(2):

‘Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.’

Directive 89/665

7. The third subparagraph of Article 1(1) provides:

‘Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.’

8. Article 2(1) provides:

‘Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.’

B – *National law*

Besluit aanbestedingsregels voor overheidsopdrachten (5)

9. Article 45(3) reproduces the optional grounds for exclusion contained in Article 45(2) of Directive 2004/18.

10. In accordance with the ‘Nota van toelichting’ (explanatory note) (6) attached to the BAO, the assessment of whether a tenderer must actually be excluded, having regard to the general principles of Directive 2004/18, must always be proportional and be carried out in a non-discriminatory manner. The contracting authorities must examine in each particular case, on the basis of the nature and size of the public contract, the type and scope of the misconduct and the measures taken in the meantime by the undertaking, whether that undertaking should be excluded from the invitation to tender.

II – Facts in the main proceedings and questions referred for a preliminary ruling

11. On 10 July 2012 the Ministerie van Volksgezondheid, Welzijn en Sport ('the Ministry') launched a European call for tenders for the award of 'socio-recreational interregional transport services for persons with reduced mobility' ('the contract'). The contract had a duration of over three years and its annual value was approximately EUR 60 000 000.

12. According to paragraph 3.1 ('Grounds for exclusion and suitability requirements') of the descriptive document, 'A tender to which a ground for exclusion applies shall be set aside and shall not be eligible for further (substantive) assessment'.

13. The descriptive document refers to the annex 'Uniform self-declaration — Tenders' (which must be added as a mandatory annex to the tender) the requirements imposed on tenderers.

14. According to the descriptive document, 'the tenderer … declares … that no grounds for exclusion … apply to him; this is confirmed by signature of the Uniform self-declaration — Tenders'.

15. The Uniform self-declaration refers, in turn, to Article 45 of the BAO and specifies which optional grounds for exclusion apply. The tenderer is required, inter alia, to declare that 'neither his company nor any manager has been guilty of grave professional misconduct'.

16. Among those taking part in the procurement procedure were Connexxion Taxi Services BV ('Connexxion') and the Tender Group, comprising Transvision, RMC and ZCN ('the Tender Group').

17. By letter of 8 October 2012, the Ministry informed Connexxion that its tender had been placed in second position and that the intention was to award the contract to the Tender Group.

18. On 20 November 2012, the Nederlandse Mededingingsautoriteit (Netherlands Competition Authority) imposed a number of penalties on RMC and the BIOS Group, of which ZCN formed part, pursuant to the Mededingingswet (Law on Competition), in relation to acts which took place between 17 April 2009 and 1 March 2011 relating to taxi services in the Rotterdam region.

19. By letter of 18 February 2013, the Ministry informed Connexxion that it stood by its decision to award the contract to the Tender Group, because, although the latter had been guilty of 'grave professional misconduct', its exclusion would be disproportionate.

20. Connexxion brought legal proceedings against the decision of the Ministry, seeking an order prohibiting the State from awarding the contract to the Tender Group, which opposed that claim.

21. The Voorzieningenrechter te Den Haag (the court hearing the application for interim measures, The Hague) upheld Connexxion's claim, taking the view that the Ministry, having established that the Tender Group had been guilty of grave professional misconduct, no longer had any latitude to carry out a review of proportionality.

22. An appeal having been brought before it, the Gerechtshof Den Haag (Court of Appeal, The Hague) set aside the decision of the court hearing the application for interim measures and ordered the State, if it still wished to do so, to award the contract to the Tender Group.

23. The Gerechtshof (Court of Appeal) held that Directive 2004/18 gives the Member States the latitude to act as the Netherlands legislature did, that is to say to transpose in full Article 45(2) of that directive into Article 45(3) of the BAO and then to delegate to the contracting authorities the power to define in more detail the grounds for exclusion.

24. The Gerechtshof (Court of Appeal) ruled that, regardless of whether EU law concerning the award of public contracts requires a review of proportionality, EU law does not prohibit one. Furthermore, it follows from the Netherlands legislation that exclusion must not be automatic and that a contracting authority must assess whether it would be proportionate.

25. The Gerechtshof (Court of Appeal) added that the decision of the Ministry had to be evaluated with caution, *a fortiori* as the grave professional misconduct at issue had not (yet) been irrevocably established. The essential question is whether the Ministry could reasonably have reached the conclusion that excluding the Tender Group was disproportionate. It held that it was not relevant that the descriptive document includes as a reason for eliminating a tenderer the existence of a ground for exclusion and stated that the decision of the Ministry could withstand the 'marginal' (7) review of the court.

26. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), hearing an appeal against the judgment of the appellate court, notes certain tensions between: (a) on the one hand, the obligation imposed by law on the contracting authority to make the optional grounds for exclusion subject to an assessment of proportionality in order to determine whether they must have an exclusionary effect; and, (b) on the other hand, the descriptive document for the contract, under which tenders to which a ground for exclusion applies must be rejected.

27. The referring court has doubts as to whether application of the proportionality test observes the principles of equality, transparency and public access, when that test has not been expressly incorporated in the descriptive document.

28. Furthermore, according to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), although the court must adjudicate on the content of the decision of the administrative body, Netherlands law limits the powers of the court to a 'marginal' review of the decision of the contracting authority, which is confined to determining whether that contracting authority could reasonably have come its decision.

29. Against that background, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred the following questions to the Court for a preliminary ruling:

'(1) (a) Does EU law, in particular Article 45(2) of Directive 2004/18/EC [of the European Parliament and of the Council of 31 March 2004] on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, preclude national law from obliging a contracting authority to assess, by application of the principle of proportionality, whether a tenderer which is guilty of grave professional misconduct must indeed be excluded?

(b) Is it significant in this regard that a contracting authority has stated in the tender conditions that a tender to which a ground for exclusion applies must be set aside and is not to be eligible for further substantive assessment?

(2) If the answer to Question 1(a) is in the negative: does EU law preclude a situation in which the national courts fail to carry out an 'unrestricted' judicial review of an assessment conducted on the basis of the principle of proportionality, such as the assessment conducted by a contracting authority in the present case, but merely carry out a ('marginal') review as to whether the contracting authority could reasonably have come to the decision not to exclude a tenderer notwithstanding the fact that that tenderer was guilty of grave professional misconduct within the meaning of the first subparagraph of Article 45(2) of Directive 2004/18/EC?'

III – **Summary of the arguments of the parties**

A – *The first question referred for a preliminary ruling*

30. According to Connexxion, the contracting authority is not in a position to make an assessment of proportionality having found that the tenderer has been guilty of grave professional misconduct. That assessment has already been carried out by inclusion of the misconduct as a ground for exclusion in the descriptive document. Given the wording of the latter, it would be contrary to the principles of public access, transparency and equality in matters of administrative procurement for the contracting authority to have the power to assess the proportionality of the ground for exclusion.

31. All the other parties take the contrary view. Whether or not to incorporate the optional grounds for exclusion is a matter for the Member States, which enjoy discretion in that regard. Within that discretion, Directive 2004/18 does not preclude making the exclusion of tenderers to which one of the optional grounds for exclusion applies subject to a prior assessment of proportionality. As to the fact that the descriptive

document considers grave professional misconduct as sufficient grounds for rejecting the perpetrator, this does not prevent the contracting authority from applying the general rule, namely, to make application of that ground for exclusion subject to an assessment of proportionality.

B – *The second question referred for a preliminary ruling*

32. Connexxion is in favour of allowing the court to carry out a full review of the administrative decision.

33. The Netherlands Government and the Tender Group argue, however, that the judicial review should be limited to a *marginal* examination of the reasonableness of the decision of the contracting authority.

34. According to the Commission, the court's review must be wider in scope, allowing the court to examine the accuracy of the facts and the absence of manifest error of assessment, as well as to ensure that the facts supporting the decision of the contracting authority are accurate, complete and reliable.

35. According to the Italian Government, it is for the national legislature to establish the appropriate form of review, as EU law does not require that the assessment by the referring court should fully reproduce the substantive examination by the contracting authority.

IV – **Assessment**

A – *Part (a) of the first question referred for a preliminary ruling*

36. Is it consistent with Directive 2004/18 for a Member State to require contracting authorities to make the possible exclusion of tenderers who have been guilty of grave professional misconduct subject to an assessment of proportionality?

37. Before answering that question two clarifications should be made. According to the information contained in the order for reference, on both the date on which the tenders were submitted and the date of the decision of the contracting authority (8 October 2012), the Tender Group had not been penalised as the perpetrator of any grave misconduct. It was at a later date (on 20 November 2012) that the Netherlands competition authority imposed a number of penalties on some of its members, for concerted practices which occurred years earlier. It is for the referring court to decide whether those penalties, subsequent to the date of submission of the tenders and the initial award decision, can be regarded as a valid ground for excluding a perpetrator which had already submitted its tender (obviously, without referring in it to any grave misconduct, which had not until then been established by law).

38. If the referring court considers, nonetheless, that the penalty imposed on the tenderer justifies the latter being classified (8) as the perpetrator of 'grave professional misconduct', there arises the question of the application of that ground for exclusion, that is whether it should apply with automatic effect or only following a review of its proportionality.

39. The second clarification concerns the interpretation of the national rules, which falls exclusively to the referring court. In the order for reference, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) states that 'national law obliges a contracting authority, in the case where one of the optional grounds for exclusion in Article 45(3) of the BAO is applicable, to determine on the basis of the principle of proportionality whether exclusion of the tenderer concerned must in fact follow'. As regards the preliminary ruling procedure, and in so far as national law is concerned, this resolves the dispute as to the adequacy of the legal basis of the 'obligation' to assess proportionality (and indirectly, as to the effect of the explanatory note to the BAO).

40. Following those clarifications, the answer to the question referred may be inferred without major difficulties from the case-law of the Court both prior and subsequent to Directive 2004/18. (9)

41. Under Directive 92/50/EEC (10) (Article 29 of which is worded in a similar way to Article 45(2) of Directive 2004/18), the Court held in the judgment in *La Cascina and Others* (11) that application of the cases of optional exclusion are to be left to the assessment of the Member States, as shown by the phrase 'may be excluded from participation in a contract', which appears at the beginning of Article 29. The

Member States cannot add grounds of exclusion to those referred to in the provision, (12) but Article 29 of Directive 92/50 does not provide for uniform application of those grounds for exclusion. (13)

42. When Directive 2004/18 came in force, the Court followed the same approach in the judgment in *Consorcio Stabile Libor Lavori Publicci*, (14) paragraph 35 of which reproduces the arguments contained in the judgment in *La Cascina and Others*. (15) It reiterated that the Member States must specify, in accordance with their national law and having regard to EU law, the implementing conditions for Article 45(2) of Directive 2004/18. The Court therefore again endorsed the power of the Member States to apply the exclusion criteria and, should they so wish, make them more flexible.

43. If it is for Member States to define which grounds for exclusion – among those laid down as optional in Directive 2004/18 – are to apply in their own legal systems, it is logical that they are also entitled to specify the conditions or requirements for their application. They may, therefore, define those grounds more or less strictly, so that if they prefer to subject each, or only some, of them to a case-by-case review or comparison of proportionality, nothing in Directive 2004/18 prevents this.

44. It follows from the judgment in *Consorcio Stabile Libor Lavori Publicci* (16) that the exercise of that power by Member States is not, however, unconditional. First, the European Union attaches great importance to freedom of establishment and freedom to provide services, which serves as a reason for it to facilitate opening up procurement procedures as far as possible, an aim which could be hindered by application of the optional grounds for exclusion. Secondly, it is legitimate to justify the grounds for exclusion in terms of general interest objectives, such as guarantees of the tenderer's reliability, diligence, professional honesty and seriousness. In order to balance those interests, the Court applies the principle of proportionality.

45. The corollary of that case-law is that a national law under allowing a contracting authority to reject tenderers guilty of grave professional misconduct only if their exclusion, for that reason, is deemed to be consistent with the principle of proportionality does not infringe Article 45(2) of Directive 2004/18 or EU law.

B – *Part (b) of the first question referred for a preliminary ruling*

46. The descriptive document for the contract does not make exclusion of a tenderer who is guilty of grave professional misconduct subject to an assessment of proportionality. Hence the uncertainty of the referring court: is the actual wording of that descriptive document relevant in the present case?

47. The answer to that question must be based on the foregoing. A case-by-case assessment of proportionality relating to the optional grounds for exclusion is required by the Netherlands rules applicable to public procurement (specifically, the BAO) and is also not contrary to EU law. Nevertheless, should the legal provision laying down that rule in general terms take precedence or, on the contrary, is the contracting authority bound by a particular clause in a descriptive document which, in this specific invitation to tender, excludes a tenderer who has committed a serious infringement?

48. The Court, I repeat, cannot take the place of the referring court in the interpretation of national law. However, strictly from the perspective of national law, I think it is possible to make the clause in the descriptive document consistent with the general rule. Otherwise, it would be tantamount to allowing, in a particular case, derogation from certain inviolable provisions applicable to public procurement by means of a specific measure which fails to comply with them.

49. The clause in the descriptive document can be interpreted in a manner consistent with the BAO, without excessive interpretative difficulties, if the starting point is an overall assessment of the entirety of the rules applicable to public procurement. The optional grounds for exclusion operate not in a vacuum but within a predetermined legal framework, with which they must comply. They are effective, therefore, only where the legally established requirements for their application are fulfilled. One such requirement is that conduct must be assessed in the light of the principle of proportionality, in so far as infringements by tenderers are concerned.

50. Where the contracting authority acts in accordance with that criterion, it does so in a manner entirely consistent with the general rules governing public procurement in the Netherlands, as set out in the BAO and its explanatory note. Hence, even if the descriptive document does not expressly provide that the contracting

authority has the power to assess the infringement committed by the tenderer in the light of the principle of proportionality, that power must be understood to be implicit.

51. The requirement included in paragraph 3.1 of the descriptive document ('a tender to which a ground for exclusion applies must be set aside'), precisely because of its quasi-regulatory nature, must, in my view, be read in the light of the interpretative rules applicable to all subordinate legal rules, which cannot disregard the more general rules which govern them. If the BAO provides that exclusion on the ground of grave professional misconduct requires that the contracting authority examine each particular case 'on the basis of the nature and size of the public contract, the type and scope of the misconduct and the measures taken in the meantime by the undertaking', the fact that the descriptive document is silent as to that necessary and individual application of the principle of proportionality cannot result in that principle being disregarded.

52. That approach is confirmed from the perspective of EU law. The case-law of the Court on the optional grounds for exclusion, rejecting their automatic application, confirms the need for that consistent interpretation. It follows from the judgment in *Forposta and ABC Direct Contact* (17) that automatic exclusion (of a tenderer guilty of grave misconduct) could go beyond the discretion conferred on Member States by Article 45(2) of Directive 2004/18.

53. According to that judgment, at the outset, it is necessary to carry out 'a specific and individual assessment of the conduct of the economic operator concerned'. (18) Because it failed to comply with that criterion, the Court declared incompatible with EU law a national law which 'require[s] the contracting authority … to exclude an economic operator from a … procedure for the award of a contract …, without allowing the contracting authority the power to assess, on a case-by-case basis, the gravity of the allegedly wrongful conduct of that operator'. Although the circumstances of the case which gave rise to the judgment in *Forposta and ABC Direct Contact* (19) differ from those in this case, the line of argument then adopted by the Court is applicable to this case as an interpretative criterion.

54. In summary, in addition to reasons relating to the internal legal system (the fact that the BAO takes precedence, as the general law governing Netherlands public contracts), which it is for the referring court to assess, it is also necessary to consider the case-law of the Court which is contrary, in principle, to automatic exclusion when that ground for exclusion is assessed.

55. I suggest, therefore, as an answer to the question referred, that the clause in the descriptive document cannot be used to avoid the case-by-case assessment of proportionality concerning the tenderer's misconduct, for the purpose of determining whether or not to exclude it from the contract.

56. The objections to that approach, based on the principles of public access, equal treatment and transparency (to which both the referring court and Conexxion refer, citing the judgment in *Commission* v *CAS Succhi di Frutta* (20)), though of some weight, do not convince me. In accordance with the case-law of the Court recalled in that judgment, (21) all tenderers must be governed by the same requirements, without distinction. However, in the case before the Court, application of the principle of proportionality, as well as being supported by the general rules applicable to public procurement in the Netherlands, would have been extended equally to all the tenderers to which that ground for exclusion applied. There could have been discrimination if one of them, guilty of a similar serious infringement, had, unlike the Tender Group, been automatically excluded from the tender, that is without the prior assessment of proportionality. However, that did not happen.

57. The line of case-law which includes the judgment in *Commission* v *CAS Succhi de Frutta* (22) does not, in my opinion, rule out the answer which I propose. Application of the principles of equality, public access and transparency regarding certain clauses in the descriptive document, which must be interpreted in the light of the general rules applicable to public procurement, does not preclude the contracting authority from assessing whether, in a particular case, the tenderer's misconduct, evaluated in accordance with the criterion of proportionality, prevents it from being awarded the contract which it seeks and with a view to the award of which it has submitted a better proposal than the other tenderers.

58. In the invitation to tender at issue, the conditions and the selection procedure, the same for all applicants, were not modified. The contracting authority checked that their tenders satisfied the criteria applicable to the contract (23) and applied no ground for exclusion which was not provided for in the descriptive document. (24) The fact that, in order to assess one of those grounds for exclusion expressly

included in that document it applied the criterion of proportionality, which was not expressly referred to in the descriptive document but is required by the general Netherlands rules on public procurement (as well as by the case-law of the Court), is, in my view, consistent with the principle of equal treatment and its corollary, the obligation to act transparently.

59. It is plausible that the Court should insist (most recently in the judgment in *Pizzo* (25)) on respect for the contract documents or similar documents as a guarantee of equal treatment of tenderers. However, like all rules, that rule has its limits and cannot magnify the significance of the contract documents (or similar documents) to the point of simply dispensing with the requirements of public contracts laid down in the legislation of each Member State. It should be noted that, in that manner, certain contracting authorities could be tempted to omit from contract documents certain requirements, lawfully established by the national legislature, with which they may not agree or simply prefer to avoid (including ones of benefit to a potential applicant), and will have the assurance that the contract documents so drawn up will be, in practice, unchallengeable. Although it is important to maintain equality of tenderers, it is no less important that they, and the contracting authority itself, should not be exempt from the rules and general criteria which, in each Member State, govern this area, including, in particular, the criterion of proportionality, which is applicable to the ground for exclusion at issue in this dispute.

C – *The second question referred for a preliminary ruling*

60. Although the referring court does not expressly refer to it, I take the view that the Court is asked to interpret Directive 89/665, which coordinates national rules for the review procedures concerning the award of public contracts.

61. With regard to the decisions of contracting authorities (in so far as they concern, obviously, contracts falling within the scope of Directive 2004/18), Member States must ensure that the persons concerned have available review mechanisms suitable for determining, quickly and effectively, whether they have infringed EU law on public procurement or national rules transposing EU law into their respective legal systems. That is, ultimately, the purpose of Directive 89/665.

62. The analysis which I propose to carry out will address, first, whether Directive 89/665 and the case-law which has interpreted it provide guidelines for determining the level or intensity with which review bodies must assess the decisions of contracting authorities. If such guidelines exist, they must then be compared with those in force under Netherlands law, which the referring court mentions.

63. Next, it will be ascertained whether the intensity of the judicial review must be the same in the two types of procedures referred to in Article 2 of Directive 89/665, that is: (a) interlocutory procedures which allow interim measures to be taken in the stage prior to the conclusion of the contract; and (b) other review procedures, aimed at obtaining annulment of the administrative award measure and compensation for damages. In this case, (26) Connexxion challenged the Ministry's decision to award the contract to the Tender Group, requesting that the Voorzieningenrechter te Den Haag (the court hearing the application for interim measures, The Hague) revoke it. Connexxion's action therefore fell within the scope of Article 2(1)(a) of Directive 89/665.

64. Finally, I shall consider whether, given the circumstances of the dispute in the main proceedings, it is possible to assert, as the Netherlands Government maintains, that the judicial review carried out by the respective courts, at first instance and on appeal, met the standard of review laid down by Directive 89/665.

1. The intensity of the judicial review of decisions of contracting authorities

65. In matters of public procurement, the same trend which is observable in other areas of European public law is clearly discernible: although the Court was initially content to refer to the procedural autonomy of the Member States and to use, as a corrective, the principles of equivalence and effectiveness as minimum requirements of the national systems of judicial review in disputes involving EU law, gradually, requirements specific to 'judicial protection' or supervision have gained ground, so as to increase, at the same time, the intensity of that review. (27)

66. The trend is, as is logical, more pronounced where the EU legislature has adopted harmonising provisions, specifically in relation to the judicial review of certain decisions of national authorities. This

applies, in particular, in the field of public procurement, since Directive 89/665 and subsequent reforms to it have been based on an awareness that Community legislation would become worthless without review mechanisms which, as well as being harmonised, are effective and ensure compliance with the applicable rules. Those mechanisms have the purpose not only of protecting tenderers' rights, but also of improving the entire system of public procurement, whose economic importance for the internal market cannot be overemphasised.

67. It is not surprising, therefore, that both the order for reference and the observations of the parties repeatedly cite the judgments in *HI* (28) and *Croce Amica One Italia*, (29) in which the Court ruled on the scope of the powers of courts and tribunals to review the activities of contracting authorities.

68. In the first of those judgments, the Court held that Directive 89/665 precludes national legislation from limiting review 'of the legality of the withdrawal of an invitation to tender to mere examination of whether it was arbitrary'. (30) In the judgment in *Croce Amica One Italia*, (31) the Court picked up that line of argument where it had been left in the judgment in *HI*; the Court recalled that the review of legality cannot be confined to an examination of whether the decisions of contracting authorities are arbitrary and went further, stating that the legislature may grant its country's national courts and tribunals the power to review whether a measure was expedient.

69. In the same vein, this reference for a preliminary ruling gives the Court the opportunity to clarify whether a review which is merely 'marginal' (that is the term used by the referring court) fulfils the requirements of Directive 89/665. The referring court is not overly explicit in describing the features of the system of 'marginal' review, and it is possible to infer from the order for reference only that the Netherlands court limits its assessment solely to determining the 'reasonableness' of the decision taken by the contracting authority.

70. At first sight, almost intuitively, it might be thought that if this is the general system of judicial review of administrative measures in force in the Netherlands (and not only with regard to public procurement, but also in other areas of public law), the procedural autonomy of that State should prevail, unless a harmonising provision requires a 'comprehensive' and not merely 'marginal' review by the courts.

71. Notwithstanding what I shall subsequently assert in connection with the interim stage of the review, I nonetheless take the view that a judicial review which, in that regard, is restricted to an evaluation of the 'reasonableness' of the decision awarding the contract is not compatible with Article 2 of Directive 89/665. As stated in the judgment in *Alcatel Austria and Others*, (32) the arrangements for challenging such decisions must ensure effective application of EU provisions on public contracts, 'in particular at the stage where infringements can still be rectified'. The review must ensure that, if the relevant conditions are met, an applicant may obtain the setting aside of 'the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract'. A mere test of reasonableness does not ensure that that decision complied strictly with the procurement rules themselves.

72. A contracting authority may adopt, in principle, several equally 'reasonable' solutions, which would not cease to be so because ultimately just one of them is the best solution, namely the one which is most consistent with the terms of the invitation to tender. An examination by a court which is limited to verifying the 'reasonableness' of a measure is not, in the final analysis, qualitatively very different from an examination as to whether that measure is arbitrary. It would be a standard of review close to that rejected in the judgment in *HI*, (33) which limited the assessment solely to determining whether or not the contested decision was arbitrary.

73. For my part, I consider that the judicial review imposed by Directive 89/665 requires something more to deserve that name. The assessment by the court cannot end with a mere assessment of the 'reasonableness' of the contested decisions, especially as those decisions must comply with detailed rules covering formal and substantive matters. A court hearing an application in this field will have to assess whether the disputed award observed the rules of the invitation to tender and whether the successful tenderer's application can withstand the critical analysis which its competitors present in the action. That assessment will require, in many cases, verification of the decisive facts (which the administration may have determined incorrectly), as well as evidence concerning the relative merits of the various applications. It will also involve gauging whether the administrative action is duly reasoned and whether it is in line or at variance with the objectives which underlie it (in other words, whether there is evidence of misuse of powers) and the other legal

provisions which govern it. Examination of all that evidence goes beyond, I repeat, a mere assessment of the 'reasonableness' of the contested measure and involves matters of fact and law of a more 'technical' and usually more complex nature, which every court having jurisdiction to review administrative acts usually carries out.

74. Accordingly, my view is that, if it is understood in the sense set out above, a merely 'marginal' review of the decisions of the contracting authority, which is limited to assessing their 'reasonableness', as described by the referring court, is not consistent with the requirement for judicial review laid down in Directive 89/665. However, do those considerations apply at the interim stage of reviews brought against those decisions?

2. Judicial review at the interim stage

75. As I have already indicated, the proceedings at first instance were concerned with the measure by which the Ministry selected the tenderer, but the action brought before the Voorzieningenrechter te Den Haag (the court hearing the application for interim measures, The Hague) was initiated in the context of interlocutory proceedings. (34) Accordingly, this dispute is specifically concerned with the interim protection provided for in Article 2(1)(a) of Directive 89/665. In the Netherlands system (35) there is a division of jurisdiction according to whether an interim action is brought or whether substantive proceedings are initiated to challenge the administrative decision. (36)

76. The presence of this interim or provisional element could be relevant to the answer to the second question referred: the intensity of the judicial review of decisions of contracting authorities need not be the same at the interim stage as when giving final judgment on the substance of the dispute. At the first stage, the court's knowledge of the case is usually limited, (37) to the extent that its interim decision often does not have the force of *res judicata* and may subsequently be amended in the substantive proceedings.

77. The particular position of the court hearing the application for interim measures, from the perspective of Directive 89/665, means, therefore, that the measures which it adopts are temporary in nature, pending definitive resolution of the dispute, and that those measures 'do … not finally determine the legal situation'. (38) Accordingly, and because the interpretation of Directive 2004/18 undertaken at the interim stage may, subsequently, be 'classified as erroneous by the court hearing the substance of the case', (39)it follows that interim proceedings, as such, are regarded in the case-law of the Court as a mere preliminary to the subsequent proceedings and that only the latter proceedings must end with a decision on the substance, so that, once the dispute has been presented in its entirety, the legal relationship at issue can be fully defined.

78. The level of judicial review to which I referred earlier would need to be undertaken in full only during the subsequent proceedings and not at the preliminary stage. The court hearing the application for interim measures could therefore assess the administrative measure with less intensity than the court which must give judgment on the substance. It would be permissible, in particular, to apply a simple test of the reasonableness of the opposing claims and of the award measure, similar to that which governs other forms of interim relief (assessment of whether there is a prima facie case or a risk of harm in the event of delay and the balancing of the conflicting interests).

79. Such a line of argument, which I consider valid, in principle, for the purpose of providing a response to the referring court, could be called into question, however, by a set of factual circumstances which cannot be disregarded. The fact is that, according to data obtained in relation to Netherlands practice, (40) the overwhelming majority of reviews concerning public contracts (some 92% between 2004 and 2009) are resolved at the interim stage, when applicants seek interim measures to prevent the contract from being concluded. The interim decision is usually, in Netherlands procedural practice, 'the sole and final ruling on a procurement dispute'. (41)

80. If that is the true situation concerning review procedures in the Netherlands, the Netherlands court hearing the application for interim measures is almost the sole, and final, guarantor within the judicial system for addressing to challenges to acts of the contracting authority brought under Directive 89/665. Accordingly, there has been a blurring of the distinction which exists, in the abstract, between the interim and final stages of those review procedures.

81. In those circumstances, full review by the courts of decisions of contracting authorities would be weakened and replaced by a merely ‘marginal’ assessment of those decisions by courts hearing applications for interim measures. The review mechanisms would probably gain in efficiency and speed, while, simultaneously, losing their responsiveness to all kinds of possible irregularities in the decisions of the contracting authority, which would be freed from the necessary scrutiny to which those decisions should be subject under Directive 89/665. In other words, that directive would not be complied with in full.

3. The judicial review carried out in the main proceedings

82. The considerations set out above have served to answer the second question referred in rather abstract terms, in line with the wording used by the referring court in that question. A detailed analysis of the events in the main proceedings reveals, however, that both the review by the court hearing the application for interim measures and the review by the Gerechtshof Den Haag (Court of Appeal, the Hague) exceeded, in my opinion, a ‘marginal’ level of judicial review, if that word is to be understood in the sense previously discussed.

83. Indeed, the court hearing the application for interim measures not only considered the reasonableness of the decision of the Ministry, but also assessed it in the light of the ‘positive’ rules applicable to the invitation to tender (in particular the descriptive document, which it regarded as prevailing) when ruling that the selected tenderer should be excluded. Moreover, as regards the Court of Appeal, I agree with the assessment of the Netherlands Government (42) when it maintains that the review conducted by that court was ‘exhaustive’, that is that it ‘took into consideration all the aspects on the basis of which the Ministry had decided not to exclude definitively’ the Tender Group, after interpreting, in a manner contrary to the court hearing the application for interim measures, the applicable body of legislation.

84. If that is so, as I believe, the second question referred may well be classed as purely hypothetical (since it asks whether it is possible to carry out a ‘marginal’ review which did not in fact take place during either of the preceding procedural stages) or call for a negative response, which is what I suggest, qualified by specific reference to the circumstances of the proceedings before the Netherlands courts. It cannot be inferred from the information available in the present case that the judicial review carried out by the courts involved in the main proceedings was limited to such an assessment.

V – **Conclusion**

85. In the light of the foregoing reasoning, I propose that the Court reply to the questions raised by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

(1) Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts does not preclude a national measure, such as that at issue in this case, under which the contracting authority must apply the principle of proportionality for the purpose of excluding a tenderer who has been guilty of grave professional misconduct, even when that option is not expressly referred to in the descriptive document for the contract.

(2) Articles 1 and 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts are not compatible with legislation, or the usual practice, of a Member State which limits the scope of the review procedures to a review merely of the reasonableness of the decisions of contracting authorities.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) (‘Directive 2004/18’).

---

3 Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665'), applicable, ratione temporis, to this case.

---

4 The term 'descriptive document' is contained in Directive 2004/18 and combined, depending on the circumstances, with 'contract notice' (Article 29) or with 'specifications' and 'any supporting documents' (Article 40).

---

5 Decree relating to the rules on the award of public contracts; 'the BAO'. At the time of the contract award which is the subject matter of the dispute, the Wet van 1 november 2012, houdende nieuwe regels omtrent aanbestedingen (Law on public procurement of 1 November 2012) had not yet entered into force.

---

6 In response to a question put to it by the Court, the Netherlands Government stated that the note does not form part of the text of the BAO, although it is published together with it in the same official gazette. The note reflects, by way of a preamble, the reasons for the approved text. Although not legally binding, it has 'an important and relevant significance, from a legal standpoint, for interpreting the provision'.

---

7 The translation into Spanish contains the adjective 'sumario', while in the original Dutch the word 'marginal' (marginale) is used. I shall use the latter term, which is that used in the question referred.

---

8 In my view, until the penalty is imposed, an economic operator enjoys the presumption of innocence and cannot be classified as a perpetrator of grave misconduct, even if the acts constituting the infringement (but not yet established as such) occurred prior to the date of the invitation to tender.

---

9 The order for reference and the observations of the parties cite as an additional interpretative criterion recital 101 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65). According thereto, in applying the facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Although, ratione temporis, Directive 2014/24 cannot have effect in this dispute, its preamble reflects the case-law of the Court on this matter.

---

10 Council Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

---

11 Judgment of 9 February 2006, C-226/04 and C-228/04 (EU:C:2006:94, paragraphs 21 and 23).

---

12 Paragraph 22.

---

13 Paragraph 23, '… the Member States may choose not to apply those grounds of exclusion at all and opt for the widest possible participation in procedures for the award of public contracts or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context the Member States have the power to make the criteria laid down in Article 29 of the Directive less onerous or more flexible'.

---

14 Judgment of 10 July 2014, C-358/12 (EU:C:2014:2063).

---

15 Judgment of 9 February 2006, C-226/04 and C-228/04 (EU:C:2006:94).

16 Judgment of 10 July 2014, C-358/12 (EU:C:2014:2063, paragraphs 29, 31 and 32).

17 Judgment of 13 December 2012, C-465/11 (EU:C:2012:801).

18 Judgment of 13 December 2012, Forposta and ABC Direct Contact(C-465/11, EU:C:2012:801, paragraph 31).

19 Judgment of 13 December 2012, C-465/11 (EU:C:2012:801).

20 Judgment of 29 April 2004, C-496/99 P (EU:C:2004:236).

21 Judgment of 29 April 2004, Commission v CAS Succhi di Frutta(C-496/99 P, EU:C:2004:236, paragraphs 108 to 111). According to the Court, ‘under the principle of equal treatment as between tenderers … [there is] an obligation of transparency in order to permit verification that it has been complied with [and] all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions’.

22 Judgment of 29 April 2004, C-496/99 P (EU:C:2004:236). In that case, the Court was adjudicating on a situation in which the contracting authority changed the general tender system, unilaterally modifying one of its terms, which was regarded as essential, because, if it had appeared in the contract notice, it would have allowed the candidates to submit a substantially different tender. However, none of this is true of the case now before the Court.

23 See judgment of 6 November 2014, Cartiera dell’Adda(C-42/13, EU:C:2014:2345, paragraph 44), which cites the judgment of 29 April 2004, Commission v CAS Succhi di Frutta (C-496/99 P, EU:C:2004:236, paragraphs 108 to 111).

24 Unlike the situation in the case giving rise to the judgment of 2 June 2016, Pizzo (C-27/15, EU:C:2016:404).

25 Judgment of 2 June 2016, C-27/15 (EU:C:2016:404).

26 See points 20 and 21 of this Opinion.

27 The legal literature of the last few years provides abundant analysis on this subject. See an up-to-date description of the status quaestionis in Jans, J.H., Prechal, S., and Widdershoven, R.J.G.M., The Europeanisation of Public Law, 2nd ed., Groningen, 2015, p. 399 et seq.

28 Judgment of 18 June 2002, C-92/00 (EU:C:2002:379).

29 Judgment of 11 December 2014, C-440/13 (EU:C:2014:2435).

30 Judgment of 18 June 2002, HI(C-92/00, EU:C:2002:379, paragraph 64). In the Court's view, having regard to the aim of strengthening remedies pursued by Directive 89/665, and in the absence of indications to the contrary, the scope of the judicial review to be exercised in the context of the review procedures referred to therein cannot be interpreted restrictively.

---

31 Judgment of 11 December 2014, C-440/13 (EU:C:2014:2435).

---

32 Judgment of 28 October 1999, C-81/98 (EU:C:1999:534, paragraphs 33 and 43).

---

33 Judgment of 18 June 2002, C-92/00 (EU:C:2002:379).

---

34 This is expressly stated in paragraph 3.2.1 of the order for reference.

---

35 In the judgment of 9 December 2010, Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others(C-568/08, EU:C:2010:751, paragraph 45), and in the Opinion of Advocate General Cruz Villalón which preceded it (C-568/08, EU:C:2010:515), the Netherlands law applicable at that time was analysed. According to paragraph 11 of that judgment, 'the award of public contracts is a matter for private law, the award of a public contract constitutes an act of private law, and decisions preliminary to the award of a public contract taken by administrative bodies are regarded as preparatory acts of private law. The civil courts have jurisdiction to hear disputes on the award of public contracts as regards both the adoption of protective measures and the procedure on the substance. The administrative courts do not have jurisdiction, unless a law provides otherwise.' The Netherlands Government acknowledged at the hearing that the subsequent approval of the Wet van 28 januari 2010 tot implementatie van de rechtsbeschermingsrichtlijnen aanbesteden (Law transposing the directive on review procedures of 28 January 2010) has not, in essence, amended that legislative framework

---

36 Hebly, Jan M., and Folkert, Wilman G.: 'Damages for breach of procurement law: The Dutch situation', pp. 75 to 88, in Public Procurement Law: Damages as an Effective Remedy, Fairgrieve, Duncan and Lichère, François (ed.), Hart Publishing, Oxford, 2011.

---

37 In the judgment of 9 December 2010, Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others(C-568/08, EU:C:2010:751, paragraph 77), the Court held: 'the possibility cannot be excluded that the court hearing an application for interim measures and the court dealing with the substance, called upon successively to deal with the same dispute, might give a divergent interpretation of the relevant EU legal rules. On the one hand, the court hearing an application for interim measures is called upon to give a decision in the context of an urgent procedure in which both the gathering of evidence and the examination of the pleas of the parties is necessarily more cursory than in the context of the proceedings on the substance. On the other hand, the intervention of the court hearing an application for interim measures is not designed, like that of the court hearing the substance, to rule definitively on the claims presented to it but to protect provisionally the interests at stake, possibly by balancing them.'

---

38 Judgment of 9 December 2010, Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others (C-568/08, EU:C:2010:751), paragraph 77.

---

39 Judgment of 9 December 2010, Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others (C-568/08, EU:C:2010:751), paragraph 80.

---

40 I have taken these figures from the report on public procurement in the Netherlands drawn up by Van de Meent, Gert-Wim & Manunza, Elisabetta R., in Public Procurement Law: Limitations, Opportunities and

Paradoxes. The XXVI FIDE Congress in Copenhagen, 2014, Congress Publications, vol. 3. DJOF Publishing, p. 641 et seq., Copenhagen, 2014. The authors, in turn, cite as their source the Aanbestedingsrechtspraak in Nederland: 1 september 2004 — 31 augustus 2009, Final report, June 2010, Van Doorne NV / Ministry of Economic Affairs.

---

41 Ibid., footnote 131: ‘In the Dutch legal system it is not required to follow-up with another proceedings for the interim relief judgment to have binding force; therefore, often, in practice, the interim judgment contains the sole and final ruling on a procurement dispute (barring appeal of the interim judgment), as losing parties tend to resign themselves to this verdict’.

---

42 Paragraph 56 of its written observations.

Provisional text

JUDGMENT OF THE COURT (Third Chamber)

21 December 2016 (*)

(References for a preliminary ruling — Article 4(2) TEU — Respect for the national identity of Member States inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government — Internal organisation of the Member States — Regional authorities — Legal instrument creating a new public-law entity and organising the transfer of powers and responsibilities for the performance of public tasks — Public procurement — Directive 2004/18/EC — Article 1(2)(a) — Concept of 'public contract')

In Case C-51/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Celle (Higher Regional Court of Celle, Germany), made by decision of 17 December 2014, received at the Court on 6 February 2015, in the proceedings

Remondis GmbH & Co. KG Region Nord

v

Region Hannover,

intervening parties:

Zweckverband Abfallwirtschaft Region Hannover,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 20 April 2016,

after considering the observations submitted on behalf of:

– Remondis GmbH & Co. KG Region Nord, by M. Figgen and R. Schäffer, Rechtsanwälte,

– the Region Hannover, by H. Jagau, Regionspräsident, and R. Van der Hout, advocaat, and by T. Mühe and M. Fastabend, Rechtsanwälte,

– the Zweckverband Abfallwirtschaft Region Hannover, by W. Siederer and L. Viezens, Rechtsanwälte,

– the French Government, by D. Colas and J. Bousin, acting as Agents,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by A.C. Becker and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 June 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum in OJ 2004 L 351, p. 44).

2 The request has been made in proceedings between Remondis GmbH & Co. KG Region Nord ('Remondis') and the Region Hannover (Region of Hannover, Germany) regarding the lawfulness of the transfer by the Region of Hannover of waste treatment tasks that were its responsibility to a public body, the Zweckverband Abfallwirtschaft Region Hannover (a special-purpose association for waste management created by local authorities in the Region of Hannover; 'the RH Special-Purpose Association').

Legal context

EU law

3 Under Article 1(2)(a) of Directive 2004/18, applicable to the main proceedings for the purposes of that directive, '"public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive'.

4 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) repealed Directive 2004/18 with effect from 18 April 2016.

5 Recital 4 in the preamble to Directive 2014/24 states:

'The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC. The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. …'

6 Article 1(6) of that directive provides as follows:

'Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or groupings of contracting authorities and do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive.'

German law

7 Under the federal legislation on waste and the Niedersächsische Abfallgesetz (Lower Saxony Law on waste), both in the version which was in force on the date the RH Special-Purpose Association, intervener in the main proceedings, was formed, and in the version currently in force, waste treatment is the responsibility of the regional authorities designated thereby or of the special-purpose associations formed by those districts.

8 The Niedersächsisches Zweckverbandsgesetz (Lower Saxony Law on special-purpose associations), in the version which was in force on the date the RH Special-Purpose Association was formed, provided in Paragraph 1 that municipalities could, with a view to the joint performance of certain tasks which

they were entitled or required to carry out, form voluntary special-purpose associations or be formed into compulsory special-purpose associations. In that case, under Paragraph 2(1) of that law, the rights and obligations to perform those duties are transferred to the association.

9 Under Paragraph 4 of that law, special-purpose associations are public authorities which are self-managed under their own responsibility.

10 Paragraph 29(1) of that law requires regional authorities that are members of a special-purpose association to pay annually determined contributions in so far as the association's other revenue is not sufficient to cover the costs associated with its duties.

11 The Niedersächsisches Gesetz über die kommunale Zusammenarbeit (Lower Saxony Law on inter-municipal cooperation), currently in force, contains comparable provisions, including provision that authorities that transfer duties to an association are, to the extent that they do so, released from the obligation to perform them.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 Under the federal legislation and the legislation of the *Land* Niedersachsen (*Land* of Lower Saxony), the Region of Hannover and the Stadt Hannover (City of Hannover) were entrusted with waste disposal and treatment tasks in the former Landkreis Hannover (District of Hannover) and the City of Hannover respectively.

13 In view of a reorganisation planned by those two authorities, initially, on 29 November 2002, the City of Hannover transferred its responsibility for waste disposal tasks to the Region of Hannover. In a second stage, on 19 December 2002, those authorities jointly adopted the Verbandsordnung des Zweckverbandes Abfallwirtschaft Region Hannover (articles of association for the special-purpose association for waste management created by local authorities in the Region of Hannover; 'the articles of association of the RH Special-Purpose Association), by which they organised the operation of the association, a public-law corporation that the two founding authorities vested with various tasks, some of which were initially common to both authorities and others allocated to each of them, and which in particular took the place of the Region of Hannover for waste disposal. That entity was formed on 1 January 2003.

14 In order to enable the RH Special-Purpose Association to carry out the tasks with which it was entrusted, under Article 5 of the articles of association of the RH Special-Purpose Association, the Region of Hannover and the City of Hannover transferred to the RH Special-Purpose Association, at no cost, their respective bodies responsible for waste disposal, street cleaning and winter road maintenance tasks and 94.9% of the shares in Abfallentsorgungsgesellschaft Region Hannover mbH (Region of Hannover limited company for waste treatment), a company providing waste treatment services for the Region of Hannover which was up to then wholly owned by the Region of Hannover.

15 To the same end, Article 4(5) of the articles of association of the RH Special-Purpose Association also allow it to have recourse to the services of third parties for the performance of its tasks and to that end acquire holdings in undertakings and entities, as allowed under paragraph 22 of the Kreislaufwirtschaftsgesetz (Law on closed cycle management).

16 Article 4(4) of those articles of association provides that the RH Special-Purpose Association is to dispose of waste for recovery and, for that purpose, may enter into dual system contracts ('Duale Systeme') for the collection of packaging, which tasks may be transferred to the Abfallentsorgungsgesellschaft Region Hannover.

17 Under Article 4(6) of those articles of association, the RH Special-Purpose Association is empowered to adopt statutes and regulations on inter alia the imposition of fees.

18 Under Article 7 of the articles of association of the RH Special-Purpose Association the general meeting of the RH Special-Purpose Association involves the chief administrative officers of the Region of Hannover and of the City of Hannover, who are bound by the instructions given by the authority

they represent. Those officers are entitled to vote in the general meeting on tasks transferred by the authority they represent.

19 Article 8 of the articles of association provides that the general meeting has the power inter alia to amend the articles of association and to appoint the RH Special-Purpose Associations managing director (Geschäftsführerin/führer)

20 Under Article 16 of the articles of association, the RH Special-Purpose Association must, in the long term, at least ensure that its expenditure is covered by its revenue. However, in so far as its revenue is not sufficient to cover the costs of its tasks, the two constituent authorities are required to pay contributions to be determined annually.

21 The order for reference indicates that the transfer of tasks to the RH Special-Purpose Association releases the transferring member authorities from the obligation to carry out the tasks concerned.

22 In 2011, the ninth year in which the RH Special-Purpose Association was in operation, the RH Special-Purpose Association and Abfallentsorgungsgesellschaft Region Hannover jointly generated a turnover of EUR 189 020 912, of which EUR 11 232 173.89 (approximately 6%) came from commercial transactions with third-party entities and, according to forecasts for 2013, those amounts would be EUR 188 670 370.92 and EUR 13 085 190.85 respectively.

23 Remondis, a commercial company active in the waste sector, made an application for review of the award of the public contract, which is currently pending before the referring court.

24 Remondis asserts that the overall operation, consisting in the formation of the RH Special-Purpose Association and the concomitant transfer of tasks to it by the regional authorities, constitutes a public contract within the meaning of, inter alia, Article 1(2)(a) of Directive 2004/18 even though initially it did not come within the scope of the rules governing public contracts because it fell within the exception established in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562, paragraph 50). The two conditions for EU rules on public procurement not to apply were met at the time, it being a situation where a public entity exercises over the entity which provides it supplies or services a control which is similar to that which it exercises over its own departments and, at the same time, the latter entity carries out the essential part of its activities with the controlling public entity or entities. However, Remondis claims that, given the significant turnover achieved by the RH Special-Purpose Association since 2013 with third-party entities, it no longer carries out the essential part of its activities with the authorities that formed it. It infers therefrom that the overall operation should now be regarded as an unlawful award and therefore invalid. Consequently, the Region of Hannover, which is the public-law entity responsible for waste disposal, should organise a tendering procedure in so far as it does not intend itself to provide those services.

25 The Region of Hannover and the RH Special-Purpose Association assert that the creation of the RH Special-Purpose Association and the transfer of tasks to it do not fall within the scope of public procurement law.

26 The creation and the transfer were, in their submission, based on a statutory decision and not on an administrative contract or agreement. They refer to Directive 2014/24, in particular Article 1(6), relating to mechanisms for transferring powers and responsibilities for the performance of public tasks.

27 The referring court states that the outcome of the main proceedings turns firstly on the question whether the creation by the Region of Hannover and the City of Hannover of the RH Special-Purpose Association and the transfer of certain public tasks to it constituted a public contract within the meaning of Article 1(2)(a) of Directive 2004/18. It does not question that the transfer was effected for pecuniary interest given, on the one hand, the transfer, free of charge, of resources previously used by those two regional authorities to perform the public tasks transferred to the association and, on the other hand, the undertaking of those authorities to cover any cost overruns the association might incur in relation to its revenues.

28 The referring court states that such an operation might nevertheless be held not to be the award of a public contract. There is in fact no contract and no undertaking is involved. It is, moreover, a measure

of internal State organisation that is constitutionally guaranteed as a matter of municipal autonomy, consisting in a reallocation of powers amongst regional authorities, as a result of which the authorities initially responsible for the tasks in question are completely relieved of those tasks.

29 The referring court has doubts, however, as to the relevance of that view in the light of the Court's case-law, including the judgment of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385), under which the very existence of a delegation of tasks, entailing release of the authority initially responsible, has no bearing on categorisation as a public contract.

30 It can also be inferred from that judgment that only two exceptions to the application of the rules governing public contracts must be taken into consideration, being the one identified in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), and the so-called inter-municipal 'horizontal' agreements. Consequently, it could be argued that, as the creation of a special-purpose association accompanied by a transfer of tasks to that association does not fall under either of those exceptions, public procurement law is applicable to that type of operation.

31 Conversely, however, the referring court observes, firstly, that such an operation is strictly the result of a horizontal agreement between a number of public entities and not of an agreement concluded between those entities and the RH Special-Purpose Association.

32 Secondly, not only may the decision to create a special-purpose association be taken freely by those regional authorities, it may also be imposed on those authorities by their supervisory authority. In such a scenario, there is no contract, with the result that it is difficult to see how there could be a public contract. The question arises as to whether an operation of that nature, being a transfer of tasks to a public special-purpose association, could be treated differently, depending on whether the transfer is voluntary or imposed.

33 The referring court then asks about the potential consequences of a finding that an overall operation such as that at issue in the main proceedings constitutes a public contract, in particular whether such a contract should be considered from the angle of the exception identified in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), or rather viewed as a form of cooperation between regional authorities for the performance of tasks incumbent on them.

34 In those circumstances, the Oberlandesgericht Celle (Higher Regional Court of Celle, Germany) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does an agreement between two regional authorities — on the basis of which the regional authorities form, by constituent statutes, a common special-purpose association with separate legal personality, which from that point on carries out, under its own responsibility, certain duties which hitherto were incumbent on the regional authorities concerned — constitute a "public contract" within the meaning of Article 1(2)(a) of [Directive 2004/18] in the case where that transfer of duties concerns services within the meaning of that directive and is effected for consideration, the special-purpose association carries out activities going beyond the ambit of the exercise of duties previously incumbent on the regional authorities concerned and the transfer of duties does not belong to "the two types of contracts" which, although entered into by public entities, do not, according to the case-law of the Court of Justice (most recently, judgment of 13 June 2013, *Piepenbrock*, C-386/11, EU:C:2013:385, paragraph 33 et seq.), come within the scope of European Union public procurement law?

2. If the answer to Question 1 is in the affirmative: does the question whether the creation of a special-purpose association and the related transfer of duties to that association exceptionally does not come within the scope of European Union public procurement law depend on the principles which the Court of Justice has developed with regard to contracts concluded by a public entity with a person legally distinct from that entity — principles in accordance with which an application of European Union public procurement law is excluded — in the case where, at the same time, that entity exercises over the person concerned a control which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or with the entities which control it (see, to that effect, inter

alia, judgment of 18 November 1999, *Teckal*, C-107/98, EU:C:1999:562, paragraph 50), or, by contrast, do the principles which the Court of Justice has developed concerning contracts which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out apply (in that respect, judgment of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 34 et seq.) …?'

Consideration of the questions referred

The first question

35 By its first question, the referring court asks, in essence, whether Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that an agreement concluded by two regional authorities, such as that at issue in the main proceedings, on the basis of which they adopt constituent statutes forming a special-purpose association with legal personality governed by public law and transfer to that new public entity certain competences previously held by those authorities and henceforth belonging to that special-purpose association constitutes a 'public contract'.

36 Article 1(2)(a) defines 'public contracts' as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of [Directive 2004/18]'.

37 For possible categorisation of a multi-stage operation as a public contract under that definition, the operation must be examined as a whole, taking account of its purpose (see, to that effect, judgment of 10 November 2005, *Commission* v *Austria*, C-29/04, EU:C:2005:670, paragraph 41).

38 In the present case, therefore, it is necessary to take into account, as a whole, the various stages of the operation at issue in the main proceedings. It is apparent from the order for reference that the Region of Hannover and the City of Hannover decided together to create, by regulatory act, a new entity governed by public law in order to confer on it certain competences, some of them common to those authorities and some of them belonging to each of them individually. At the same time, they conferred on that new entity certain powers in order to enable it to perform the tasks for which it was now competent. In effect they gave it the means they had hitherto had when so competent and undertook to cover any budgetary shortfalls of that entity, which was also given the power to charge and collect fees and the right to engage in certain activities not strictly within the remit of the competences transferred to it but being of the same type as certain activities performed as part of the tasks entrusted to it. Lastly, the new entity is characterised by autonomy in the performance of its tasks but must abide by the decisions of a general meeting of representatives of its two founding authorities, which is a body of the association and is responsible, inter alia, for appointing its managing director.

39 In that context, it should be noted, as a preliminary point, that the referring court's indication that the activities at issue in the main proceedings constitute 'services' within the meaning of Directive 2004/18 is aimed solely at clarifying that the application of that directive cannot be dismissed in that regard. On the other hand, the fact that an activity coming within a public authority's competence constitutes a service covered by that directive is not in itself sufficient to make that directive applicable, as public authorities are free to decide whether or not to have recourse to the contract mechanism in the accomplishment of their public interest tasks (see, to that effect, judgment of 9 June 2009, *Commission* v *Germany*, C-480/06, EU:C:2009:357, paragraph 45 and the case-law cited).

40 Moreover, it should be borne in mind, first of all, that the division of competences within a Member State benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including local and regional self-government (see, to that effect, judgment of 12 June 2014, *Digibet and Albers*, C-156/13, EU:C:2014:1756, paragraph 34).

41 Moreover, as that division of competences is not fixed, the protection conferred by Article 4(2) TEU also concerns internal reorganisations of powers within a Member State, as observed by the Advocate

General in points 41 and 42 of his Opinion. Such reorganisations, which may take the form of reallocations of competences from one public authority to another imposed by a higher-ranking authority or voluntary transfers of competences between public authorities, have the consequence that a previously competent authority is released from or relinquishes the obligation or power to perform a given public task, whereas another authority is henceforth entrusted with that obligation or power.

42 Secondly, such a reallocation or transfer of competence does not meet all of the conditions required to come within the definition of public contract.

43 Only a contract concluded for pecuniary interest may constitute a public contract coming within the scope of Directive 2004/18, the pecuniary nature of the contract meaning that the contracting authority which has concluded a public contract receives a service which must be of direct economic benefit to that contracting authority (see, to that effect, judgment of 25 March 2010, *Helmut Müller*, C-451/08, EU:C:2010:168, paragraphs 47 to 49). The synallagmatic nature of the contract is thus an essential element of a public contract, as observed by the Advocate General in point 36 of his Opinion.

44 Moreover, irrespective of the fact that a decision on the allocation of public competences does not fall within the sphere of economic transactions, the very fact that a public authority is released from a competence with which it was previously entrusted by that self-same fact eliminates any economic interest in the accomplishment of the tasks associated with that competence.

45 Consequently, the reassignment of resources used to perform the tasks associated with the competence, which are transferred by the authority that ceases to be competent to the authority that acquires competence, cannot be analysed as a payment of a price, but on the contrary is the logical — and even necessary — consequence of the voluntary transfer or imposed reallocation of that competence from the first authority to the second.

46 Similarly, nor does the fact that the authority that takes the initiative to transfer a competence or decides on the reassignment of a competence undertakes to cover potential cost overruns in relation to revenues that may arise as a result of the exercise of that competence constitute remuneration. That is a guarantee intended for third parties, the necessity of which follows, in the present case, from the principle that a public authority cannot be sued in insolvency proceedings. The existence of such a principle itself follows from the internal organisation of a Member State.

47 It must be emphasised, however, as a third point, that in order to be considered an internal organisation measure and, accordingly, come under the freedom of Member States guaranteed by Article 4(2) TEU, a transfer of competence between public authorities must meet certain conditions.

48 In that regard, a situation such as that at issue in the main proceedings is not identical to the scenario referred to in the judgment of 20 October 2005, *Commission* v *France* (C-264/03, EU:C:2005:620). That case involved a determination of whether the type of mandate concerned constituted a specific transfer by a public authority to an entity for the completion of a project in principle coming within the competence of another entity and not a transfer of that competence itself. Nevertheless, those various types of transfers are identical in nature, although of different magnitudes, with the result that the essential point of that judgment on this point can be extrapolated for the purposes of the present case.

49 As observed by the Advocate General in point 53 of his Opinion, in order to be considered as such, a transfer of competence must concern not only the responsibilities associated with the transferred competence, including the obligation to perform the tasks that competence entails, but also those powers that are the corollary thereof. This requires that the public authority on which competence has been conferred has the power to organise the performance of the tasks coming within that competence and to draw up the regulatory framework for those tasks, and that it has financial autonomy allowing it to ensure the financing of those tasks. That is not the case, however, where the authority initially competent retains primary responsibility over those tasks, retains financial control over them or must give prior approval for decisions envisaged by the entity on which it has conferred powers.

50 In that regard, a situation such as that at issue in the main proceedings is readily distinguishable from that at the heart of the case which gave rise to the judgment of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385), in which a regional authority merely entrusted another regional entity with the

performance of certain material tasks, in return for financial compensation, whilst reserving the power to supervise the proper execution thereof, as held by the Court in paragraph 41 of that judgment.

51 There can thus be no transfer of competence if the newly competent public authority does not act autonomously and under its own responsibility in the performance of its tasks.

52 As observed by the Advocate General in point 56 of his Opinion, such autonomy of action does not mean that the newly competent entity must be shielded from any influence whatsoever by another public entity. An entity that transfers competence may retain a certain degree of influence over the tasks associated with the public service. That influence does, however, in principle, preclude any involvement in the actual performance of the tasks coming within the transferred competence. In a situation such as that in the main proceedings, that influence may be brought to bear through a body, such as the general meeting, made up of representatives of the previously competent regional authorities.

53 Nor does autonomy of action mean that an imposed reassignment or voluntary transfer of competence must be irreversible. As observed in paragraph 41 above, the division of competences within a Member State cannot be regarded as fixed, so successive reorganisations are entirely possible. Moreover, the situations at issue in the judgment of 20 October 2005, *Commission* v *France* (C-264/03, EU:C:2005:620), were not permanent in nature, involving as they did specific transfers of public authority to an entity for the purposes of a project that, in principle, fell within the competence of another entity that retained its general competence. Those situations should have been held to fall outside the sphere of public procurement law had they not borne the hallmarks highlighted by the Court in paragraph 54 of that judgment, which led it to conclude that there was no genuine transfer in that case. Consequently, as observed by the Advocate General in point 54 of his Opinion, there is nothing precluding a competence transferred or reassigned as part of a reorganisation of public services from being subsequently retransferred or reassigned again under a later reorganisation.

54 Lastly, in order to address all of the aspects referred to by the referring court, it must be remembered that the authorisation or prohibition for public entities of Member States or certain categories thereof to engage in an activity on the market lying outside their general interest sphere of action is a matter that comes under the domestic rules of the Member States, to whom it falls to determine whether or not such an activity is compatible with their objectives as an institution and those laid down in their statutes (see, to that effect, judgment of 23 December 2009, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 48). Thus, the fact that the public entities concerned by a transfer of competence may or may not pursue certain activities on the market also comes within the internal organisation of the Member States and is, moreover, of no import for the nature of such a transfer once the conditions set out in paragraphs 47 to 51 of this judgment are satisfied.

55 In the light of all the foregoing considerations, the answer to the question referred is that:

– Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that an agreement concluded by two regional authorities, such as that at issue in the main proceedings, on the basis of which they adopt constituent statutes forming a special-purpose association with legal personality governed by public law and transfer to that new public entity certain competences previously held by those authorities and henceforth belonging to that special-purpose association, does not constitute a ‘public contract’.

– However, such a transfer of competences concerning the performance of public tasks exists only if it concerns both the responsibilities associated with the transferred competence and the powers that are the corollary thereof, so that the newly competent public authority has decision-making and financial autonomy, which it is for the referring court to verify.

The second question

56 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that an agreement concluded by two regional authorities, such as that at issue in the main proceedings, on the basis of which they adopt constituent statutes forming a special-purpose association with legal personality governed by public law and transfer to that new public entity certain competences previously held by those authorities and henceforth belonging to that special-purpose association, does not constitute a 'public contract'.

However, such a transfer of competences concerning the performance of public tasks exists only if it concerns both the responsibilities associated with the transferred competence and the powers that are the corollary thereof, so that the newly competent public authority has decision-making and financial autonomy, which it is for the à the referring court to verify.

[Signatures]

** Language of the case: German.

OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 30 June 2016 (1)

Case C-51/15

Remondis GmbH & Co. KG Region Nord

v

Region Hannover

(Request for a preliminary ruling from the Oberlandesgericht Celle (Higher Regional Court of Celle, Germany))

(Reference for a preliminary ruling — Article 4(2) TEU — Respect for the national identity of Member States inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government — Internal organisation of the Member States — Regional authorities — Legal instrument creating a new public-law entity and organising the transfer of powers and responsibilities for the performance of public tasks — Public procurement — Directive 2004/18/EC — Article 1(2)(a) — Concept of 'public contract')

In the present case, which concerns a request for a preliminary ruling made by the

1. Oberlandesgericht Celle (Higher Regional Court of Celle, Germany), the Court will have the opportunity to examine the delicate matter of the interaction between the Member States' power of reorganisation and EU rules on public procurement. More specifically, the Court will have to clarify whether, and possibly under what conditions, acts effecting transfers of powers between administrative authorities may constitute a public contract and thus be subject to the relevant EU rules. This is a matter of significant practical importance which has attracted interest in legal literature, particularly in Germany, and which the Court has not yet had an opportunity to examine directly.

2. The questions raised by the referring court in this case arise in a dispute between an undertaking which provides waste disposal services, Remondis GmbH & Co. KG Region Nord ('Remondis'), and Region Hannover (the Region of Hannover, Germany) regarding the lawfulness of the transfer by the Region of Hannover of waste treatment tasks that were its responsibility to a public body, the Zweckverband Abfallwirtschaft Region Hannover (a special-purpose association for waste management created by local authorities in the Region of Hannover; 'the Special-Purpose Association'), which it formed for that purpose with the Landeshauptstadt Hannover (capital of the Land of Hannover, Germany; 'the City of Hannover').

3. The referring court asks the Court, in essence, whether such an operation constitutes a public contract within the meaning of Article 1(2)(a) of Directive 2004/18/EC (2) and, if so, whether such an operation may fall outside the scope of EU public procurement law by virtue of the 'in house' exception set out in Teckal (3) or the exception for contracts which establish cooperation between public entities set out in Ordine degli Ingegneri della Provincia di Lecce and Others. (4)

I – **Legislative framework**

A – *EU law*

4. Article 4(2) TEU provides:

> ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. …’

5. Under Article 1(2)(a) of Directive 2004/18, public contracts are, for the purposes of that directive, contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of the directive.

6. Directive 2004/18 was repealed by Directive 2014/24, (5) which, in accordance with Article 90(1) thereof, must be transposed by the Member States by 18 April 2016 at the latest.

7. Recital 4 of Directive 2014/24 provides that ‘[t]he increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not, however, broaden the scope of this Directive compared to that of Directive 2004/18/EC. The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract’.

8. Article 1(6) of Directive 2014/24 provides that ‘[a]greements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or groupings of contracting authorities and do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by this Directive’.

B – *National law*

9. In Germany, federal rules impose waste disposal obligations on the public-law corporations on which those obligations are incumbent under the law of the Länder. (6) For the Land of Lower Saxony, the Lower Saxony Law on waste designates rural districts and urban districts as the public authorities responsible for waste treatment and provides that they are to be supplemented by special-purpose associations formed by those authorities for purposes of waste treatment where the special-purpose association’s articles of association so provide. (7)

10. Under the Lower Saxony Law on special-purpose associations, as it was in force on the date the Special-Purpose Association was formed, (8) municipalities are able, with a view to the joint performance of certain tasks which they are entitled or required to carry out, to form voluntary special-purpose associations or may be formed into compulsory special-purpose associations. Special-purpose associations are public authorities which are self-managed under their own responsibility. Where a special-purpose association is formed, the right and the obligation conferred on municipalities participating in a special-purpose association to perform the duty entrusted to the association are transferred to that association. In addition, the statutes of the special-purpose association must regulate coverage of needs in connection with the task such that, in so far as other revenue of the special-purpose association is not sufficient to cover the cost of its tasks, the members of the association are required to pay contributions, which are to be determined annually.

11. The Lower Saxony Law on inter-municipal cooperation, as it was in force when the order for reference was made, (9) provides, inter alia, that the transfer of a public task to a special-purpose association is to be accompanied by the transfer of all rights and obligations connected with the performance of the task and that the special-purpose association is to collect a contribution from its members in so far as other revenue is not sufficient to cover its financial needs.

II – **Facts, national procedure and questions referred**

A – *The formation of the Special-Purpose Association and its articles of association*

12. Before the Special-Purpose Association was formed, under the legislation on waste of the Federal Republic of Germany and of the Land of Lower Saxony, the Region of Hannover and the City of Hannover

were entrusted with waste disposal and treatment tasks in the district of Hannover and the City of Hannover respectively.

13. Following certain legislative amendments concerning the Region of Hannover and in view of a reorganisation of that task, on 29 November 2002 the Region of Hannover and the City of Hannover concluded an agreement by which the latter transferred to the Region of Hannover the tasks incumbent on it as the public-law entity responsible for waste disposal.

14. Shortly after, on 19 December 2002, the Region of Hannover and the City of Hannover jointly adopted the Verbandsordnung des Zweckverbandes Abfallwirtschaft Region Hannover (articles of association for the special-purpose association for waste management created by local authorities in the Region of Hannover; 'the articles of association of the Special-Purpose Association'). (10) By those articles of association, they formed the Special-Purpose Association, organised its operation and assigned various tasks to it.

15. Under the articles of association, the Special-Purpose Association is a public-law corporation (Article 2(3)), which takes the place of the Region of Hannover as the public-law entity responsible for waste disposal under the relevant legislation (Article 4(1)). Aside from waste disposal (type B task), the Special-Purpose Association is also assigned other functions, some of which relate only to the City of Hannover (type C tasks), while others are common to both its members (type A tasks). (11)

16. Under the articles of association, the Special-Purpose Association also disposes of waste for recovery and, for that purpose, may enter into dual system contracts ('Duale Systeme', Article 4(4)). It may have recourse to the services of third parties for the performance of its tasks and to that end acquire holdings in undertakings and entities (Article 4(5)). In addition, the Special-Purpose Association is to adopt statutes and regulations on the use of its public infrastructures and on the imposition of fees, contributions and cost reimbursements (Article 4(6)).

17. Under Article 5 of the articles of association of the Special-Purpose Association, the Region of Hannover and the City of Hannover are to transfer to the Special-Purpose Association, at no cost, their respective bodies which previously performed waste disposal, street cleaning and winter road maintenance tasks and 94.9% of the shares in Abfallentsorgungsgesellschaft Region Hannover mbH (Region of Hannover limited company for waste treatment; 'ARH'), a company providing waste treatment services for the Region of Hannover which was up to then wholly owned by the Region of Hannover.

18. The general meeting of the Special-Purpose Association involves the chief administrative officers of the Region of Hannover and of the City of Hannover, who are bound by the instructions given by the member territorial entity which they represent (Article 7(1) and (3)). In votes on type A tasks, representatives of the two Special-Purpose Association members are entitled to vote in the general meeting. On the other hand, in votes on type B or C tasks, either representatives of the Region of Hannover (for type B tasks) or representatives of the City of Hannover (for type C tasks) are entitled to vote (Article 7(2)). Under Article 8 of the articles of association, the general meeting has the power inter alia to amend the articles of association and to appoint the Special-Purpose Association's managing director (Geschäftsführerin/führer). (12)

19. Last, Article 16(1) of the articles of association of the Special-Purpose Association provides that the Special-Purpose Association must, in the long term, at least ensure that its expenditure is covered by its revenue. However, under Article 16(2), in so far as its revenue is not sufficient to cover the costs of its tasks, the two constituent entities are required to pay contributions to be determined annually.

20. It is apparent from the documents before the Court that in 2011 the Special-Purpose Association and ARH jointly generated a turnover of EUR 189 020 912, of which EUR 11 232 173 (approximately 6%) came from commercial transactions with third-party entities and that, according to forecasts for 2013, those amounts would be EUR 188 670 370.92 and EUR 13 085 190.85 respectively.

B – *National procedure and questions referred*

21. Given the size of the turnover now derived by the Special-Purpose Association from activities involving third parties distinct from its two members, Remondis made an application for review (Nachprüfungsantrag) to the Vergabekammer (Public Procurement Board). In its application, Remondis claims that the conditions which permit a call for tenders not to be made on the basis of an 'in house' award

in accordance with the judgment in Teckal (13) are no longer met. Remondis asserts that the formation of the Special-Purpose Association and the concomitant transfer of tasks to the Special-Purpose Association should now therefore be regarded as a 'de facto unlawful award' and that, because of that invalidity, the role of public-law entity responsible for waste disposal reverted to the Region of Hannover. It follows, according to Remondis, that in so far as the Region of Hannover does not intend itself to provide the corresponding services for which it is responsible, it is required to organise a tendering procedure.

22. After the application was dismissed by the Public Procurement Board, (14) Remondis brought the matter to the referring court and sought the annulment of the decision dismissing its application. Before that court, Remondis claimed, inter alia, that the formation of the Special-Purpose Association and the concomitant transfer of tasks to it constitute a public contract within the meaning of Article 1(2)(a) of Directive 2004/18. The Region of Hannover and the Special-Purpose Association assert that the creation of the Special-Purpose Association and the transfer of tasks to it do not fall within the scope of public procurement law, as the creation and the transfer were based on a statutory decision and not on an administrative contract or agreement.

23. The referring court states that the outcome of the dispute before it hinges on the response to Remondis' argument mentioned in the preceding point. It states that, according to the strongly predominant view in German legal literature, the formation of special-purpose associations and the transfer of tasks to them are exempt from the requirement to call for tenders, since such operations do not constitute a public contract, but give rise only to a reallocation of powers which constitutes a measure of internal State organisation that is constitutionally guaranteed. However, the referring court has doubts that this view is consistent with the Court's case-law, according to which agreements concluded by several public bodies to perform a public task within the context of inter-municipal cooperation also come, in principle, within the scope of public procurement law, unless specified exceptions obtain.

24. In the present case, the formation of the Special-Purpose Association and the concomitant transfer of tasks to it were based on the agreement of its members pursuant to a contract governed by public law. If it transpired that that formation and that transfer constitute a public contract within the meaning of Directive 2004/18, that directive would be applicable in so far as all the other conditions required for its application are met. In particular, on account of the provisions contained in Articles 5 and 16 of the articles of association, the referring court considers that the public contract is one 'for pecuniary interest'.

25. The referring court also considers that in the event that the operation at issue constitutes a public contract within the meaning of Directive 2004/18, it must be determined whether the principles of 'in house award' in accordance with the judgment in Teckal (15) should be applied to that contract or those of cooperation between public entities in accordance with the judgment in Ordine degli Ingegneri della Provincia di Lecce and Others. (16)

26. In these circumstances, by order of 17 December 2014, the referring court deemed it necessary to stay the proceedings pending before it and to refer the following questions to the Court for a preliminary ruling:

'(1) Does an agreement between two regional authorities — on the basis of which the regional authorities form, by constituting statutes, a common special-purpose association with separate legal personality, which from that point on carries out, under its own responsibility, certain tasks which hitherto were incumbent on the regional authorities concerned — constitute a "public contract" within the meaning of Article 1(2)(a) of Directive 2004/18 … in the case where that transfer of tasks concerns services within the meaning of that directive and is effected for consideration, the special-purpose association carries out activities going beyond the ambit of the exercise of tasks previously incumbent on the regional authorities concerned and the transfer of tasks does not belong to "the two types of contracts" which, although entered into by public entities, do not, according to the case-law of the Court of Justice …, come within the scope of European Union public procurement law?

(2) If the answer to Question 1 is in the affirmative: Does the question whether the creation of a special-purpose association and the related transfer of tasks to that association exceptionally do not come within the scope of European Union public procurement law depend on the principles which the Court of Justice has developed with regard to contracts concluded by a public entity with a person legally distinct from that entity — principles in accordance with which the application of European Union public procurement law is excluded — in the case where, at the same time, that entity exercises over the person concerned a control

which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or with the entities which control it (see, to that effect, inter alia, judgment in Teckal, C-107/98, EU:C:1999:562, paragraph 50), or, by contrast, do the principles which the Court of Justice has developed concerning contracts which establish cooperation between public entities with the aim of ensuring that a task in the public interest that they all have to perform is carried out apply (in that respect, see judgment in Ordine degli Ingegneri della Provincia di Lecce and Others, C-159/11 EU:C:2012:817, paragraph 34 and following)?'

III – **Procedure before the Court**

27. The order for reference was received at the Court Registry on 6 February 2015. Observations were submitted by Remondis, the Region of Hannover, the Special-Purpose Association, the French and Austrian Governments and the European Commission. Remondis, the Region of Hannover, the Special-Purpose Association and the Commission took part in the hearing, which was held on 20 April 2016.

IV – **Legal assessment**

A – *The first question*

28. By its first question, the referring court asks, in essence, whether an agreement, such as that at issue in the main proceedings, between two regional authorities on the basis of which they created, by constituting statutes, a common special-purpose association with separate legal personality, which carries out, under its own responsibility, certain tasks which hitherto were incumbent on the regional authorities concerned, constitutes a public contract within the meaning of Article 1(2)(a) of Directive 2004/18 and, as such, is subject to the provisions of that directive.

29. In its question, the referring court also highlights four aspects which, in its view, characterise the operation in question: first, the transfer of tasks concerns services within the meaning of Directive 2004/18; second, that transfer is effected for consideration; third, the special-purpose association carries out activities going beyond the ambit of the exercise of tasks previously incumbent on the regional authorities concerned; fourth, the transfer of tasks does not belong to 'the two types of contracts' which, although entered into by public entities, do not, according to the Court's case-law, come within the scope of EU public procurement law.

30. The first question thus seeks to enable the national court to assess whether the operation challenged before it by Remondis, namely the creation of the Special-Purpose Association by the Region of Hannover and the City of Hannover and the concomitant transfer to it of the tasks initially assigned to them must be classified as a public contract within the meaning of Directive 2004/18.

31. The parties which submitted observations to the Court take opposing stances in this regard. On the one hand, the Region of Hannover, the Special-Purpose Association and the French and Austrian Governments take the view that a transfer of powers such as that which took place in the operation at issue is not, in principle, a matter of public procurement. On the other, the Commission and Remondis adopt the opposite view, that a situation such as that at issue in the main proceedings falls within the scope of Directive 2004/18.

32. The Court has not yet had the opportunity to examine specifically whether, and possibly under what conditions, a transfer of powers between public authorities may constitute a public contract. Nevertheless, the existence of a transfer of powers has been mentioned in several judgments, in particular in Commission v France (17) and Piepenbrock, (18) which provide useful points of analysis. Reference will therefore be made to that guidance in answering the first question asked by the referring court.

1. The relationship between the concept of a public contract and transfers of powers between public authorities

33. Article 1(2)(a) of Directive 2004/18 defines a public contract as a contract for pecuniary interest concluded in writing between an economic operator and a contracting authority and having as its object the execution of works, the supply of products or the provision of services within the meaning of the directive itself.

34. Of the various principles developed by the Court with regard to the definition of public contract, it must first be borne in mind, for the purposes of the present case, that, according to case-law, the legal classification of an operation as a public contract falls under EU law and any classification given to an operation under national law is not decisive for that purpose. (19) It follows that, in this case, even if the operation at issue is not classified as a public contract in German law, that fact does not preclude such classification in EU law.

35. It is also clear from the case-law that where a public contract was awarded within the framework of a legal arrangement comprising a number of operations, in order to safeguard the effectiveness of the EU rules on public procurement, the award of the contract must be examined taking into account all those stages as well as their purpose. (20) Accordingly, an operation such as that in the main proceedings which is conducted in several stages and involves, among other things, the creation of a legal entity, must be assessed globally in order to determine whether or not it gives rise to the award of a public contract which falls under EU rules.

36. In addition, it is clear from the very wording of the abovementioned definition of public contract in Directive 2004/18, which refers to ‘a contract for pecuniary interest’, that an essential element of that concept is the creation of legally binding reciprocal obligations. A public contract is characterised by an exchange of services between the contracting authority, which pays a price, and the contractor, who, in exchange for that price, undertakes to execute a work or works or to provide services. (21) The concept of public contract therefore presupposes and applies to operations involving the acquisition by the contracting authority of works, supplies or services for consideration. (22)

37. With specific regard to whether there is pecuniary interest, as is rightly stated by the referring court, according to the case-law a contract cannot fall outside the concept of a public contract merely because there is remuneration which is limited to reimbursement of the expenditure incurred to provide the agreed service. (23)

38. It is nevertheless clear from the case-law that the internal organisation of the State does not fall under EU law. The Court has recognised on several occasions that each Member State is free to delegate powers internally as it sees fit (24) and that the question of how the exercise of public powers is organised within the State is solely a matter for the constitutional system of each Member State. (25)

39. Moreover, that case-law is consistent, first, with the second sentence of Article 4(2) TEU, under which the Union must respect essential State functions, which undoubtedly include what might be defined as the State’s internal self-organisation. Second, it is consistent with the principle of conferral of powers laid down in Article 5(1) and (2) TEU, no provision having conferred on the Union the power to intervene in the internal organisation of its Member States.

40. In that regard, in a case which, like this one, concerned the Federal Republic of Germany, the Court expressly stated that EU law cannot call into question the division of competences between regional authorities, since it benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect the national identity of Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. (26)

41. As acts of secondary legislation, such as Directive 2004/18 in this case, must be in conformity with primary law, such acts cannot be interpreted as permitting interference in the institutional structure of the Member States. Accordingly, acts of internal reorganisation of the powers of the State remain outside the scope of EU law and, more specifically, EU rules on public procurement.

42. An act by which a public authority, unilaterally in the context of its institutional powers, or several public authorities, in the context of an agreement governed by public law, make a transfer of certain public powers from one public entity to another public entity constitutes an act of internal reorganisation of the Member State. Such an act therefore, in principle, falls outside the scope of EU law and, more specifically, the EU rules on public procurement. (27)

43. Furthermore, it is clear from the very wording of the abovementioned definition of public contract that that concept does not relate to acts by which public authorities transfer powers, in particular for the performance of public service tasks in the context of a reorganisation of those tasks. Such transfers of powers do not concern ‘acquisitions for pecuniary interest’ of goods or services, but go beyond that, giving rise to a

transfer of the obligations and rights to perform the tasks in question, including official authority to establish the regulatory framework for the performance of those tasks. Such acts do not therefore come under the principal objective of the rules of EU law on public procurement, that is, the opening-up of undistorted competition in all the Member States with regard to the execution of works, the supply of products or the provision of services. (28)

44. That interpretation is now expressly confirmed by Article 1(6) of Directive 2014/24, which excludes from the scope of that directive, as acts which are a matter of internal organisation of the Member State, legal instruments that organise, without remuneration given for contractual performance, the transfer of powers and responsibilities for the performance of public tasks between contracting authorities.

45. It should be noted that it certainly cannot be inferred from the fact that Directive 2014/24 is not applicable ratione temporis in the present case and that Directive 2004/18 did not contain any similar provision that the principle set forth in Article 1(6) of Directive 2014/24 was not applicable to the concept of public contract within the meaning of Directive 2004/18.

46. Not only is it consistent with the Court's interpretation of primary law in its case-law prior to the adoption of Directive 2014/24, as has been explained, that acts of internal organisation of Member States making transfers of powers should fall outside the scope of the EU rules on public procurement, but it is also clear from recital 4 of Directive 2014/24 that the clarification given by that directive of the concept of public contract does not broaden the scope compared to that of Directive 2004/18. It follows that Article 1(6) of Directive 2014/24 merely clarifies the concept of a public contract without altering its scope compared to that which existed under Directive 2004/18.

47. Although it is clear from the foregoing that acts of internal organisation of the Member States do not fall within the scope of EU rules on public procurement, this does not alter the fact that, as is evident from the Court's settled case-law, public authorities may not contrive to circumvent the rules on public procurement in order to avoid the obligations stemming from those rules. (29) Accordingly, operations which relate in essence to the acquisition of goods or services for consideration by one or more contracting authorities fall under the EU rules on public procurement because the conditions governing the application of those rules are met, even if they might have been formally classified as an act of internal reorganisation, (30) such an approach also being consistent with the case-law mentioned in point 34 of this Opinion.

2. The essential features of transfers of powers

48. Although the concept of a legal instrument that organises the transfer of powers is now explicitly mentioned in Article 1(6) of Directive 2014/24/, it is not circumscribed by any rule of EU law. The reason is that, since it is for each Member State to determine the internal organisation of the State, the definition of the conditions and procedures for transfers of powers is a matter for national law. In these circumstances, I am not sure that the concept of a legal instrument that organises a transfer of power should be circumscribed as an autonomous concept in EU law. Nevertheless, the essential features of transfers of powers should be outlined in order to be able to identify the circumstances in which a legal instrument gives rise to such a transfer and ought therefore to be considered to fall outside the scope of the rules of EU law, in particular the rules on public procurement.

49. Legal instruments that organise transfers of powers between public authorities can take very different forms, varying according to the specific characteristics of each Member State and/or authority concerned. Such instruments may include, for example, legislative or regulatory acts, decisions by an authority, or agreements governed by public law concluded between several authorities. A transfer of powers may be 'vertical', where it relates to a transfer from the State to a regional authority at a lower level. It may also be 'horizontal', where several regional authorities create a common structure on which are conferred powers previously exercised by those regional authorities. In addition, a horizontal transfer of powers may take place 'voluntarily', on the basis of a joint decision of the regional authorities concerned, or can be 'compulsory', that is to say, imposed by an authority at a higher level. (31)

50. In Commission v France (32) the Court provided some useful guidance for identifying the essential features of transfers of powers. In that case an action was brought by the Commission seeking a declaration by the Court that the French Republic had failed to fulfil some of its obligations under the EU rules on public procurement in force at the time. In its judgment, in response to an argument put forward by the Member

State to justify the national legislation at issue, the Court held that the legislation did not give rise to a transfer of public powers. (33)

51. In reaching that conclusion, the Court relied on three considerations. (34) First, the public authority that was originally competent could not relinquish its power, as the relevant national rules did not permit it to do so. Second, the entity on which the power was conferred could act only after the authority that was originally competent had given its approval, so that it did not have autonomy in the execution of the tasks connected with that power. Third, the performance of the task was financed by the public authority that was originally competent, and consequently the entity on which the power was conferred had no discretion in that regard.

52. An analysis of the statements made by the Court in that judgment allow certain elements to be identified which characterise transfers of powers, in particular horizontal transfers, the category that may be relevant in the present case.

53. First, it is clear, from the requirement highlighted by the Court that the transferring authority must relinquish its power, that if a transfer of powers is to be genuine, it must be comprehensive. (35) The entity to which powers are transferred must thus hold all the powers and responsibilities necessary to perform fully and autonomously the public task for which the powers have been conferred on it. It must, inter alia, have the power to determine the regulatory framework and procedures for the performance of that task. Following the transfer, the transferring authority must, in contrast, completely relinquish the powers relating to the public service task in question.

54. In this regard, however, I do not think that for a genuine transfer of powers to have taken place, it is necessary to provide for the irreversibility of the transfer. Nevertheless, a restoration of powers to the transferring authority cannot depend on the exercise of a unilateral power of termination conferred on that authority in the event of improper implementation of the task. Such a possibility is a feature of contractual arrangements that seems to me to be alien to transfers of powers. On the other hand, a restoration of powers may result from a further reorganisation of the public tasks in question.

55. Second, it is clear, from the requirement highlighted by the Court that the entity to which powers are transferred is not to act after the transferring authority has given its approval, that, if the transfer is to be genuine, that entity must be able to carry out the task for the performance of which powers have been conferred on it in full autonomy. The transferring authority no longer having any power in the field in question, it must no longer be able to interfere in the performance of the task for which the entity to which powers are transferred is now fully competent.

56. However, in the case of a transfer of powers relating to the performance of a public service task, that requirement does not necessarily mean that a regional authority which transfers such powers to a new entity should not have any relationship with that entity. Because of the regional authority's political responsibility to citizens for the performance of the public service remit in its area, it seems to me that it should be able to retain a degree of influence over the new entity, which could be described as 'political' control. (36) For the transfer of power to be genuine, however, the transferring authority must not retain powers in connection with the actual performance of the public task.

57. Third, the Court highlighted the requirement that the entity to which powers are transferred has financial autonomy in the performance of the public task for which powers are transferred to it. It thus must not depend financially on the transferring authority in the performance of that task. That authority, or any other authority involved in the internal reorganisation of the public powers in question, must provide it with the necessary resources to perform the task. Such provision constitutes the necessary corollary of the transfer of powers. On the other hand, it must not correspond to the remuneration to be given for contractual performance in the context of a relationship entailing reciprocal obligations. (37)

58. It will be necessary to determine, on the basis of an overall assessment of the structure of the operation and taking into account the above considerations, whether an operation such as that at issue in the main proceedings gave rise to a genuine transfer of powers which, as such, does not fall under the rules on public procurement or whether, instead, it gave rise to a relationship entailing reciprocal obligations involving the acquisition of services by the regional authorities concerned.

59. In that regard, whilst the national court, which has exclusive jurisdiction to assess the facts of the dispute in the main proceedings, must ultimately assess whether the operation at issue falls within the concept of a public contract or gave rise to a genuine transfer of powers, the Court of Justice, which is called on to provide answers that may be of use to the national court, may provide guidance in order to enable it to give judgment. (38) With this in mind, on the basis of the information in the file, I will simply make the following points.

3. Classification of an operation like that at issue in the main proceedings as a public contract or as a transfer of powers

60. As regards the classification of an operation like that challenged by Remondis in the main proceedings, it should be stated, first, that it is clear from the order for reference that in this case the creation of the Special-Purpose Association gave rise to a genuine transfer of powers which resulted in the Region of Hannover relinquishing its powers and responsibilities in relation to waste disposal.

61. This assessment follows from the wording of the question referred itself, which states that the Special-Purpose Association acts ‘under its own responsibility’, and is expressly confirmed by the referring court in the order for reference. It also follows from the wording of Article 4(1) of the articles of association of the Special-Purpose Association, mentioned in point 15 of this Opinion, and the relevant provisions of national law mentioned in points 10 and 11 of this Opinion.

62. The Special-Purpose Association thus performs the waste disposal task under its own responsibility. It is vested, under Article 4(6) of the articles of association of the Special-Purpose Association, with the power to enact statutes necessary to perform that task and under Article 4(5) of the articles of association it may have recourse to the services of third parties, in which case it acts as the contracting authority.

63. Second, with regard specifically to whether the operation at issue is for pecuniary interest, the national court, referring to the case-law mentioned in point 37 of this Opinion, considers that it is able to make inferences from Articles 5 and 16(2) of the articles of association of the Special-Purpose Association. However, for reasons I will explain in the following points, I do not think that those provisions can form the basis for a finding that the operation is for pecuniary interest in the sense that it involves remuneration being given for contractual performance.

64. As regards the transfer, at no cost, to the Special-Purpose Association of the bodies which previously performed the tasks covered by the transfer of powers — as provided for by Article 5 — it is clear that, such a transfer is consistent with the requirement, referred to in point 57 of this Opinion, that, in a transfer of powers, the new competent entity should be provided with the material and human resources necessary to perform the task for which powers are conferred on it. Furthermore, such a transfer constitutes proof that the two regional entities concerned wholly relinquished the public tasks in question.

65. The obligation to pay contributions under Article 16 of the articles of association of the Special-Purpose Association constitutes a statutory financial guarantee of the solvency of the Special-Purpose Association. (39) It would seem that the contribution could be defined as ‘subsidiary’ and is made only if the Special-Purpose Association is unable to cover the costs of the public service performed by it from its revenue. (40) Such a contribution cannot call into question the financial autonomy of the Special-Purpose Association, which, on the contrary, under Article 4(6) of the articles of association, has the power to adopt statutes and regulations on fees, contributions and cost reimbursements connected with the tasks performed by it. Moreover, the Court has ruled that the mere fact that funding arrangements exist as between two public bodies in respect of the exercise of a public service task performed under specific powers does not imply that the services provided by one of those entities must be regarded as having been performed pursuant to a public contract. (41)

66. In any event, the transfer and the guarantee under the two provisions mentioned by the referring court (Article 5 and Article 16 of the articles of association of the Special-Purpose Association) cannot, in my view, be construed in any manner as remuneration for the Special-Purpose Association for the services it provides to its members.

67. In fact, the operation at issue, as presented to the Court, does not seem at all to involve the acquisition of services by the two members of the Special-Purpose Association in return for remuneration. The reciprocal

aspect, which, as I mentioned in point 36 of this Opinion, characterises the concept of a public contract appears to be absent in this case.

68. Third, it would appear prima facie from the information available in the file that the Special-Purpose Association has not only financial autonomy, but also full autonomy in the performance of the public tasks entrusted to it, in particular in waste disposal activities. It is true, as was highlighted by Remondis and by the Commission, that under Article 7 of the articles of association of the Special-Purpose Association the Region of Hannover is represented in the general meeting of the Special-Purpose Association and, in votes on tasks relating solely to waste disposal activities, only representatives of that Region are entitled to vote. However, Article 8 of the articles of association of the Special-Purpose Association seems to indicate that the powers of the general meeting do not apply to the actual performance of public services, but are limited to institutional matters or matters connected with legal compliance. Such influence seems to be more a question of the 'political' control mentioned in point 56 of this Opinion than of exerting influence over strategic objectives or significant decisions of the Special-Purpose Association in the performance of the public services tasks falling within its competence. (42) The referring court must nevertheless determine whether this is the case and whether the Special-Purpose Association actually has full autonomy in the performance of the public services at issue, without requiring the approval of the Region of Hannover.

69. The above considerations demonstrate the substantial differences between the present case and Piepenbrock (43) mentioned by the referring court. In that case, the Court had made clear that the public authority (the Kreis Düren, that is, the district of Düren) which had assigned to another regional authority (the Stadt Düren, the city of Düren) the task of cleaning certain of its buildings had reserved the right to supervise the proper execution of that task and unilaterally to terminate the contract governed by public law at issue in the event of improper performance. Although the contract was described as a delegating agreement, in essence that contractual relationship between the two local entities did not constitute a genuine transfer of powers, but a reciprocal relationship consisting in the simple provision of services for the Kreis Düren in return for financial compensation. It is thus wrong, in my view, to interpret that judgment, as has been done by some of the German legal literature mentioned in the order for reference and as Remondis claims, to the effect that the Court confirmed that transfers of powers were subject to the EU rules on public procurement. (44)

70. In the light of all the above considerations, the factual accuracy of which must be verified by the referring court, it would seem that, in this case, the operation at issue in the main proceedings gave rise to a genuine transfer of powers between public authorities which, as an act of internal organisation of the Member State, falls outside the scope of the EU rules on public procurement.

71. In this connection, I think that some remarks are needed on the fact that, in this case, the conditions required for the existence of a public contract are not met. First, I do not believe that, as the Commission claims, the concept of a contract in written form should be extended to include an operation such as that undertaken in this case. The Commission seems to have proposed such an extension based on a fear of circumvention of the competitive tendering obligation imposed by the EU rules on public procurement. Although, as is clear from point 47 of this Opinion, such fears may prove to be perfectly relevant in some circumstances, it should nevertheless be stated that there is nothing in the documents before the Court to justify such fears in this case. Accordingly, there does not seem to be any justification in the present case for extending the concept of an agreement in written form as proposed by the Commission when there is no such agreement between the Region of Hannover and the Special-Purpose Association.

72. Second, whilst it is true, as the referring court and the Commission note, that waste disposal services do not come under the prerogatives of a public authority and may constitute services in category 16 of Annex II A of Directive 2004/18, it must be stated that the object of the operation at issue is not the mere provision of services but concerns the genuine transfer of the power to perform the public service task that consists in waste disposal.

73. Third, the fact that the Special-Purpose Association carries out activities going beyond the ambit of the tasks previously incumbent on the regional authorities concerned does not seem to me to be relevant to the classification of the operation at issue as a public contract.

74. In the light of the above, I consider that the first question referred should be answered to the effect that an agreement between two regional authorities on the basis of which they create, by constituting statutes, a

public-law entity with separate legal personality, to which they transfer the powers for the performance of service tasks which hitherto were incumbent on the regional authorities concerned, without providing for remuneration to be given for contractual services, does not constitute a public contract within the meaning of Article 1(2)(a) of Directive 2004/18, but constitutes an act which is a matter of internal organisation of the Member State concerned, which, as such, falls outside the scope of the EU rules on public procurement.

B – *The second question*

75. Since the referring court puts its second question to the Court only in the event that the Court answers the first question in the affirmative and in view of my suggested answer to that first question, I consider that there is no need to answer that second question.

76. So far as is relevant, I would simply state that in the case of a genuine transfer of power there is neither an in house award of a contract, as the legal instrument that organises the transfer of powers does not provide for the performance of services for consideration, nor cooperation between public entities in accordance with Ordine degli Ingegneri della Provincia di Lecce and Others case-law, (45) given that that instrument effects a transfer of public powers and does not involve cooperation between authorities.

V – **Conclusion**

77. On the basis of the foregoing, I propose that the Court answer the questions referred by the Oberlandesgericht Celle (Higher Regional Court of Celle, Germany) as follows:

> An agreement between two regional authorities on the basis of which they form, by constituting statutes, a public-law entity with separate legal personality, to which they transfer the powers for the performance of service tasks which hitherto were incumbent on the regional authorities concerned, without providing for remuneration to be given for contractual services, does not constitute a public contract within the meaning of Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts but constitutes an act which is a matter of internal organisation of the Member State concerned, which, as such, falls outside the scope of the EU rules on public procurement.

---

1 Original language: French.

---

2 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44).

---

3 Judgment of 18 November 1999 in Teckal, C-107/98, EU:C:1999:562.

---

4 Judgment of 19 December 2012 in Ordine degli Ingegneri della Provincia di Lecce and Others, C-159/11, EU:C:2012:817.

---

5 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

6 See Paragraphs 17(1) and 20(1) of the Kreislaufwirtschaftsgesetz (KrWG — Law on closed cycle management) and Paragraphs 13 and 15 of the Kreislaufwirtschafts- und Abfallgesetz (KrW-/AbfG — Law on closed cycle management and waste), which were in force on the date the Special-Purpose Association was formed.

---

7 See Paragraph 6 of the Niedersächsische Abfallgesetz (Lower Saxony Law on waste), in the version of 14 July 2003, and Paragraph 6(1) of the version of 14 October 1994, which was in force on the date the Special-Purpose Association was formed.

---

8 Niedersächsisches Zweckverbandsgesetz of 7 June 1939. See in particular Paragraphs 1,2(1), 4 and 29(1) of that Law.

---

9 Niedersächsisches Gesetz über die kommunale Zusammenarbeit of 21 December 2011. See in particular Paragraphs 1, 2, 7, 8, 9 and 16.

---

10 ABl. für den Regierungsbezirk Hannover 2002, p. 766.

---

11 More specifically, Article 4(2) of the articles of association of the Special-Purpose Association provides that type C tasks, which the Special-Purpose Association performs for the City of Hannover within its area, concern street cleaning, winter road maintenance and fleet management and that type A tasks, common to both members, also concern waste disposal and street cleaning.

---

12 According to the order for reference, the general meeting of the Special-Purpose Association is also responsible, among other things, for electing its own chairman, for matters decided by the council or the management committee pursuant to Lower Saxony's municipal legislation and for matters not falling within the responsibility of the managing director under the articles of association.

---

13 Judgment of 18 November 1999 in Teckal, C-107/98, EU:C:1999:562. According to paragraph 50 of that judgment, EU law on public procurement is not applicable in the case where a public entity exercises over the entity which provides it supplies or services a control which is similar to that which it exercises over its own departments and, at the same time, the latter entity carries out the essential part of its activities with the controlling public entity or entities.

---

14 The Public Procurement Board ruled that turnover from transactions with third parties of the Special-Purpose Association did not exceed the threshold above which it would no longer be acting mainly for the contracting authority in accordance with the judgment in Teckal, C-107/98, EU:C:1999:562.

---

15 Judgment of 18 November 1999 in Teckal, C-107/98, EU:C:1999:562.

---

16 Judgment of 19 December 2012 in Ordine degli Ingegneri della Provincia di Lecce and Others, C-159/11, EU:C:2012:817.

---

17 Judgment of 20 October 2005 in Commission v France, C-264/03, EU:C:2005:620. See specifically paragraph 54.

---

18 Judgment of 13 June 2013 in Piepenbrock, C-386/11, EU:C:2013:385.

---

19 Judgment of 29 October 2009 in Commission v Germany, C-536/07, EU:C:2009:664, paragraph 54 and the case-law cited.

---

20 See, to that effect, judgment of 10 November 2005 in Commission v Austria, C-29/04, EU:C:2005:670, paragraph 41 et seq.

---

21 See judgment of 25 March 2010 in Helmut Müller, C-451/08, EU:C:2010:168, paragraph 62, and point 77 of my Opinion in the same case (EU:C:2009:710). See also Opinion of Advocate General Jääskinen in Commission v Spain (C-306/08, EU:C:2010:528, points 84 and 87) and Opinion of Advocate General Trstenjak in Commission v Germany, C-536/07, EU:C:2009:340, point 47.

---

22 See explicitly, in this regard, recital 4 of Directive 2014/24/EU. With regard to its relevance to the present case, see points 45 and 46 of this Opinion.

---

23 See judgments of 19 December 2012 in Ordine degli Ingegneri della Provincia di Lecce and Others, C-159/11, EU:C:2012:817, paragraph 29; of 13 June 2013 in Piepenbrock, C-386/11, EU:C:2013:385, paragraph 31, and of 11 December 2014 in Azienda sanitaria locale n. 5 ‘Spezzino’ and Others, C-113/13, EU:C:2014:2440, paragraph 37.

---

24 See judgments of 3 April 2014 in Cascina Tre Pini, C-301/12, EU:C:2014:214, paragraph 42; of 4 October 2012 in Commission v Belgium, C-391/11, EU:C:2012:611, paragraph 31, and of 16 July 2009 in Horvath, C-428/07, EU:C:2009:458, paragraph 50.

---

25 See, to that effect, judgment in Horvath, C-428/07, EU:C:2009:458 paragraph 49, and, specifically with regard to the Federal Republic of Germany, judgment of 12 June 2014 in Digibet and Albers, C-156/13, EU:C:2014:1756, paragraph 33.

---

26 Judgment in Digibet and Albers, C-156/13, EU:C:2014:1756, paragraph 34.

---

27 It should be noted in this regard that the Commission has already closed infringement proceedings brought against the Federal Republic of Germany, taking the view that the complete transfer of a public task from one public entity to another, to be performed by the transferee in full independence and under its own responsibility, constitutes an act of internal organisation of the public administration of the Member State in question and as such is not subject to the application of EU law. See Press release of 21 March 2007, IP/07/357.

---

28 Judgment of 8 May 2014 in Datenlotsen Informationssysteme, C-15/13, EU:C:2014:303, paragraph 22 and the case-law cited. See also, in this regard, judgment of 9 June 2009 in Commission v Germany, C-480/06, EU:C:2009:357, paragraph 47.

---

29 See, inter alia, judgments of 9 June 2009 in Commission v Germany, C-480/06, EU:C:2009:357, paragraph 48, and of 10 September 2009 in Sea, C-573/07, EU:C:2009:532, paragraph 71.

---

30 That was the case in Piepenbrock (C-386/11, EU:C:2013:385). See point 64 and footnote 44 of this Opinion.

---

31 Thus, under the Lower Saxony Law on special-purpose associations mentioned in point 10 of this Opinion, the creation of the special-purpose association may be ‘voluntary’ or ‘compulsory’.

---

32 Judgment of 20 October 2005 in Commission v France, C-264/03, EU:C:2005:620.

33 Judgment of 20 October 2005, Commission v France (C- 264/03, EU:C:2005:620). See specifically paragraph 54 of that judgment and point 41 of the Opinion of Advocate General Poiares Maduro in that case (C-264/03, EU:C:2004:747).

34 In the Working Paper of 4 October 2011 (SEC(2011) 1169 final) concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation'), the Commission gives an interpretation of that judgment (see point 4.1, p 19).

35 See, also, page 20 of the Commission document mentioned in the preceding footnote.

36 In the document mentioned in footnote 34, the Commission similarly considers that this possibility of influence may, for example, take the form of officials of the body which transfers the competence being members of the executive or management bodies of the authority to which the competence is transferred or the transferring authority retaining the right to receive certain information (see page 20).

37 See, in this regard, the wording of Article 1(6) of Directive 2014/24/EU and points 44 to 46 of this Opinion.

38 Judgment of 1 October 2015 in Trijber and Harmsen, C-340/14 and C-341/14, EU:C:2015:641, paragraphs 54 and 55.

39 See Paragraph 29 of the Lower Saxony Law on special-purpose associations mentioned in point 10 of this Opinion and Paragraph 16 of the Lower Saxony Law on inter-municipal cooperation mentioned in point 11 of this Opinion. In addition, according to the observations submitted to the Court, under the Niedersächsisches Gesetz über die Insolvenzunfähigkeit juristischer Personen des öffentlichen Rechts (Lower Saxony Law on exemption from insolvency of public-law corporations) 'insolvency proceedings may not be brought in respect of the assets of public-law corporations over which the Land exercises control'.

40 In this regard the Region of Hannover stated in its observations that such contributions were never actually made.

41 Judgment of 18 December 2007 in Commission v Ireland, C-532/03, EU:C:2007:801, paragraph 37.

42 This fact distinguishes the present case from Coditel Brabant (C-324/07, EU:C:2008:621, see, inter alia, paragraph 34), to which the national court refers. It should also be noted in this regard that in Coditel Brabant the regional authority concerned had not envisaged any transfer of powers. That case concerned the conclusion of a standard service concession contract and the factual background was completely different from that of the present case.

43 Judgment of 13 June 2013 in Piepenbrock, C-386/11, EU:C:2013:385.

44 In my view, Piepenbrock is, implicitly, in the line of the case-law mentioned in point 47 of this Opinion prohibiting public authorities from contriving to circumvent the rules on public procurement (in this case by a classification) in order to avoid the obligations stemming from those rules. In this regard, see the doubts expressed by the referring court itself in paragraph 24 of that judgment.

45 Judgment in Ordine degli Ingegneri della Provincia di Lecce and Others, C-159/11, EU:C:2012:817.

JUDGMENT OF THE COURT (Fifth Chamber)

7 July 2016 (*)

(References for a preliminary ruling — Public procurement — Directive 2004/18/EC — Article 48(2)(a)(ii), second indent — Technical abilities of economic operators — Direct effect — Means of evidence — Hierarchical relationship between the private purchaser's certification and the tenderer's unilateral declaration — Principle of proportionality — Prohibition on introducing substantive changes to the means of evidence provided for)

In Case C-46/15,

REQUEST for a preliminary ruling under Article 267 TFEU from Tribunal Central Administrativo Sul (Administrative Court of Appeal, South, Portugal), made by decision of 29 January 2015, received at the Court on 5 February 2015, in the proceedings

Ambisig — Ambiente e Sistemas de Informação Geográfica SA

v

AICP — Associação de Industriais do Concelho de Pombal,

intervener:

Índice — ICT & Management Lda,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, F. Biltgen, A. Borg Barthet and M. Berger, Judges,

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 January 2016,

after considering the observations submitted on behalf of:

– Ambisig — Ambiente e Sistemas de Informação Geográfica SA, by H. Rodrigues da Silva, advogado,

– the Portuguese Government, by L. Inez Fernandes and F. Batista, acting as Agents,

– the European Commission, by G. Braga da Cruz and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 March 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the second indent of Article 48(2)(a)(ii) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the

coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between Ambisig — Ambiente e Sistemas de Informação Geográfica SA (‘Ambisig’) and AICP — Associação de Industriais do Concelho de Pombal (‘AICP’) concerning AICP’s decision to exclude Ambisig’s application from a tendering procedure with a view to the award of a public service contract.

Legal context

EU law

3 Recitals 1, 2, 4, 32 and 46 of Directive 2004/18 state:

‘(1) On the occasion of new amendments being made to Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 1999, p. 1) and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which are necessary to meet requests for simplification and modernisation made by contracting authorities and economic operators alike in their responses to the Green Paper adopted by the Commission on 27 November 1996, the Directives should, in the interests of clarity, be recast. ...

(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. ...

[…]

(4) Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.

...

(32) In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.

...

(46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. ...’

4 Article 1(9) of that directive provides:

‘“Contracting authorities” means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A “body governed by public law” means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. Member States shall periodically notify the Commission of any changes to their lists of bodies and categories of bodies.'

5 Article 48 of that directive, entitled 'Technical and/or professional ability', provides:

'1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

(a) (i) ...

ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:

– ...

– where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator;

...'

Portuguese law

6 Directive 2004/18 was transposed into Portuguese law by the Código dos Contratos Públicos (the Public Procurement Code), approved by Decree-Law No 18/2008 of 29 January 2008, as amended and republished as an annex to Decree-Law No 287/2009 of 2 October 2009 (*Diário da República*, 1st series, No 192, 2 October 2009).

7 Article 165 of that code is worded as follows:

'1 -The minimum requirements concerning technical ability referred to in point (h) of paragraph 1 of the preceding article must be adapted to the nature of the services forming the subject-matter of the contract to be concluded and must describe the circumstances, qualities, characteristics or other factual elements relating to, in particular:

(a) the professional experience of the candidates;

(b) the human, technological, equipment-based or other resources used, in any way, by the candidates;

(c) the organisational model and capacity of the candidates, particularly as regards the management and integration of specialist knowledge, IT support systems and quality control systems;

(d) the ability of candidates to take environmental management measures in the context of performance of the contract to be concluded;

(e) the information appearing in the database of the *Instituto da Construção e do Imobiliário, I. P.* concerning the traders, where the award of a works contract or a public works concession is involved.

...

5 — The minimum requirements concerning technical ability referred to in paragraph 1 and the “f” factor referred to in point (i) of paragraph 1 of the preceding article may not be established in a discriminatory manner.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 According to the documents in the case-file submitted to the Court, on 10 December 2013, AICIP, in its capacity as the contracting authority, launched a tendering procedure restricted by prior qualification intended to award a service contract for the ‘Implementation of Systems for Environmental Management, Quality and Technology Platform in 13 undertakings’.

9 Article 12(1)(c) and (f) of the contract notice provided as follows:

‘In order to be selected, the candidates must submit the following application documents:

...

(c) a declaration by the client on headed, stamped paper confirming implementation of the environmental and/or quality management system by the candidate, in accordance with the model declaration in Annex VIII to this contract notice. The declaration must bear a signature certified by a notary, lawyer or other competent entity, specifying the capacity of the person signing;

...

(f) a declaration by the client on headed, stamped paper confirming the implementation of management systems, of development and the bringing into use of an online technology platform, of management software and of coordination measures by the candidate, indicating the relevant amount, in accordance with the model declaration in Annex IX to this contract notice. The declaration must bear a signature certified by a notary, lawyer or other competent entity, specifying the capacity of the person signing; ...’

10 By decision of 27 March 2014, AICP approved the final report drawn up by the selection board selecting, for the bidding stage, Índice ICT & Management Lda. and excluding, in particular, Ambisig’s application on the ground that, first, Ambisig had failed to demonstrate, by means of a private purchaser’s declaration certified in accordance with Article 12 of the contract notice, that the requirements for technical abilities had been met and, secondly, it had failed to demonstrate or argue that it was impossible or very difficult for it to produce such a declaration.

11 In the action brought by Ambisig against that decision, by judgment of 11 June 2014 the Tribunal Administrativo e Fiscal de Leiria (Leiria Administrative and Tax Court, Portugal) upheld in part the pleas in law relied on by Ambisig, annulled AICIP’s decision and ordered AICIP to approve a new contract notice within 20 days.

12 Ambisig challenged that judgment before the collegiate formation of that court on the ground that it had wrongly rejected the pleas in law alleging, in particular, that the rules laid down by the contracting authority relating to the evidence of the candidates’ technical abilities were incompatible with the requirements laid down in that regard in Article 48 of Directive 2004/18.

13 Since the collegiate formation of the Tribunal Administrativo e Fiscal de Leiria (Leiria Administrative and Tax Court) rejected that complaint by judgment of 6 August 2014, Ambisig brought an action before the referring court, on the ground that that judgment had not acknowledged that the rules set by the contracting authority as regards the method of adducing evidence of the candidates’ technical abilities were unlawful in the light of Article 48 of Directive 2004/18.

14 In those circumstances the Tribunal Central Administrativo Sul (Administrative Court of Appeal, South, Portugal) decided to stay the proceedings and to refer the following questions to the Court of

Justice for a preliminary ruling:

‘(1) Since Portuguese legislation does not regulate the matters covered by Article 48(2)(a)(ii), second indent, of Directive 2004/18 …, is that provision directly applicable in the Portuguese legal order in the sense that it confers on individuals a right that they may assert against contracting authorities?

(2) Must Article 48(2)(a)(ii), second indent, of Directive 2004/18 be interpreted to the effect that it precludes the application of rules laid down by a contracting authority which do not allow an economic operator to provide evidence of the provision of services by a declaration signed by that operator, unless the latter proves that it is impossible or very difficult to obtain a certification from the private purchaser?

(3) Must Article 48(2)(a)(ii), second indent, of Directive 2004/18 be interpreted to the effect that it precludes the application of rules laid down by the contracting authority, which, on pain of exclusion, require the private purchaser’s certification to contain authentication of the signature by a notary, lawyer or other competent entity?’

Consideration of the questions referred

The first question

15 By its first question, the referring court essentially asks whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 is to be interpreted as meaning that, even if not transposed into domestic law, it satisfies the conditions for conferring rights on individuals that they may assert against a contracting authority before the national courts.

16 First of all, it should be recalled that, according to settled case-law of the Court, where the State has failed to implement a directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly, only the provisions of that directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise may be relied on by individuals before national courts against the State (see, to that effect, judgments of 12 December 2013 in *Portgás*, C-425/12, EU:C:2013:829, paragraph 18 and the case-law cited; 14 January 2014 in *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 31; and 15 May 2014 in *Almos Agrárkülkereskedelmi*, C-337/13, EU:C:2014:328, paragraph 31).

17 It must be found, as the Advocate General observed in point 25 of his Opinion, that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 satisfies those criteria, since, first, it lays down an obligation which is not coupled with any additional requirement or subject to the adoption of an act of the EU institutions or the Member States and, secondly, it states fully and clearly the evidence which may be required from the economic operators in order to prove their technical abilities in public tendering procedures.

18 The Court has indeed also ruled to that effect as regards Directive 92/50, which was repealed and replaced by Directive 2004/18.

19 Consequently, in paragraphs 46 and 47 of the judgment of 24 September 1998 in *Tögel* (C-76/97, EU:C:1998:432), the Court held that the provisions of Title VI of Directive 92/50 — which included inter alia Article 32(2) of that directive, the content of which was reproduced in the second indent of Article 48(2)(a)(ii) of Directive 2004/18 in almost identical terms — were capable of having direct effect.

20 However, it must also be clarified, for the purposes of providing a useful answer to the first question, whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 may be relied upon against any entity classified as a ‘contracting authority’, within the meaning of Article 1(9) of that directive.

21 In that regard, it must be borne in mind that, according to settled case-law of the Court, although a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such

against an individual (see, in particular, judgments of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 37 and the case-law cited, and 15 January 2015 in *Ryanair*, C-30/14, EU:C:2015:10, paragraph 30), where a person is able to rely on a directive not as against an individual but as against the State he may do so regardless of the capacity in which the latter is acting. It is necessary to prevent the State from taking advantage of its own failure to comply with EU law (see, to that effect, judgments of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 38 and the case-law cited, and 12 December 2013 in *Portgás*, C-425/12, EU:C:2013:829, paragraph 23).

22 Consequently, the entities against which reliance may be placed on the provisions of a directive that are capable of having direct effect include not only a public entity but also a body, whatever its legal form, which has been given responsibility, pursuant to a measure adopted by the State, for providing a public-interest service under the control of the State and which has, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals (judgment of 12 December 2013 in *Portgás*, C-425/12, EU:C:2013:829, paragraph 24 and the case-law cited).

23 In the present case, as regards AICP's situation, it seems to follow from the clarifications from the Portuguese Government at the hearing before the Court that that entity, while coming within the concept of 'contracting authority' within the meaning of Article 1(9) of Directive 2004/18, constitutes a private-law association of undertakings, which does not meet the abovementioned conditions in order for the provisions of that directive to be capable of being relied on against it, because it does not provide a public-interest service under the control of the State and does not have special powers beyond those which result from the normal rules applicable in relations between individuals; it is, however, for the referring court to ascertain whether that is the case.

24 In such a situation, it will nonetheless be for that court to interpret domestic law, so far as possible, in the light of the wording and the purpose of Directive 2004/18 in order to achieve the result sought in the second indent of Article 48(2)(a)(ii) of that directive and consequently comply with the third paragraph of Article 288 TFEU (see, to that effect, judgments of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited, and 19 April 2016 in *DI*, C-441/14, EU:C:2016:278, paragraph 31).

25 In that regard, it must be noted that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is, however, limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem* (see, to that effect, judgments of 24 January 2012 in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 25 and the case-law cited, and 19 April 2016 in *DI*, C-441/14, EU:C:2016:278, paragraph 32).

26 Consequently, where national law cannot be interpreted consistently with Directive 2004/18, the party adversely affected by the incompatibility of national law with EU law may rely upon the case-law deriving from the judgment of 19 November 1991 in *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428) in order to obtain, if appropriate, compensation for any damage suffered (see, to that effect, judgment of 26 March 2015 in *Fenoll*, C-316/13, EU:C:2015:200, paragraph 48 and the case-law cited).

27 In the light of all the foregoing considerations, the answer to the first question is that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 must be interpreted as meaning that, even if not transposed into domestic law, it satisfies the conditions for conferring rights on individuals that they may assert against a contracting authority before national courts, provided that that authority is a public entity or has been given responsibility, pursuant to a measure adopted by the State, for providing a public-interest service under the control of the State and which has, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals.

The second question

28 By its second question, the referring court asks essentially whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 precludes the application of rules laid down by a contracting authority which do not allow an economic operator to provide evidence of his technical abilities by means of a

unilateral declaration, unless he proves that it is impossible or very difficult to obtain a certification from the private purchaser.

29 In that regard, it must be borne in mind, first of all, that Article 48(2)(a)(ii) of Directive 2004/18 provides that evidence of the economic operators' technical abilities may be furnished by a list of the principal deliveries effected or the main services provided in the three years preceding the publication of the contract notice.

30 Where the recipient of those deliveries or services is a private purchaser, the second indent of Article 48(2)(a)(ii) lays down that proof of those deliveries or services may be furnished by two different means, namely 'by the purchaser's certification or, failing this, simply by a declaration by the economic operator'.

31 The question raised by the referring court relates precisely to the relationship between those two means of evidence, in that it seeks to determine whether they are on an equal footing, so that the operator is equally at liberty to prove his technical abilities either by a private purchaser's certification or a simple declaration drafted by himself or whether, on the contrary, the EU legislature established a hierarchy between those means of evidence, so that an operator may have recourse to such a unilateral declaration only in those cases where he is unable to obtain that certification.

32 In that regard, it must be noted that the second indent of Article 48(2)(a)(ii) is formulated in terms which, in accordance with their usual meaning in everyday language, leave no room for any reasonable doubt.

33 Indeed, as the Advocate General underlined in point 43 of his Opinion, the term 'failing this' used in that provision refers, in accordance with its common meaning, to a relationship not of equivalence but rather one of subsidiarity between the means of evidence concerned.

34 It follows that, in accordance with a literal interpretation, the second indent of Article 48(2)(a)(ii) of Directive 2004/18 must be understood as meaning that an economic operator may be authorised by the contracting authorities to provide evidence of his technical abilities by means of a unilateral declaration only if he cannot obtain the private purchaser's certification.

35 Such an interpretation is indeed borne out by the context in which the terms of that article occur and the purposes of Directive 2004/18 (see, to that effect, judgment of 22 March 2012 in *GENESIS*, C-190/10, EU:C:2012:157, paragraph 41 and the case-law cited).

36 As regards, first, the context of the second indent of Article 48(2)(a)(ii) of Directive 2004/18, it is apparent from the case-law of the Court that that provision establishes a closed system which limits the methods of assessment and verification available of technical capacity to the contracting authorities (see, to that effect, judgment of 18 October 2012 in *Édukövízig and Hochtief Construction*, C-218/11, EU:C:2012:643, paragraph 28). It follows that although new means of evidence may not be established in the matter by those authorities, nor can those authorities limit the scope of the evidence already provided for.

37 The literal interpretation of the second indent of Article 48(2)(a)(ii) of Directive 2004/18, as is apparent from paragraph 34 above, is the only one consistent with that context. It is not disputed that an alternative reading of that provision, according to which the contracting authorities should allow any economic operator to choose freely between either one of the means of evidence concerned would undermine effectiveness and, therefore, the very scope of the means of evidence based on the certification from the private purchaser, since each operator would probably be content in all cases with producing a unilateral declaration in order to comply with that provision.

38 As regards, secondly, the aims of Directive 2004/18, it is important to note that the system established by it is intended, in particular, as apparent from recitals 2, 4 and 46 thereof, to avoid distortion of competition between private tenderers and ensure compliance with the principles of transparency, non-discrimination and equal treatment.

39 As it is, a literal interpretation of the second indent of Article 48(2)(a)(ii) of Directive 2004/18, as is apparent from paragraph 34 above, intended to favour the means of evidence based on a certification from the private purchaser of the economic operator concerned, also proves consistent with the pursuit of the objectives referred to in the preceding paragraph, in that, first, it guarantees more transparency and legal certainty as regards the reality of that operator's technical abilities and, secondly, it anticipates the *ex post facto* checking of the declarations provided by each economic operator which the contracting authority is required to carry out, pursuant to Article 44(1) and 45(2)(g) of Directive 2004/18.

40 In accordance with the principle of proportionality, which constitutes a general principle of EU law, the contracting authorities' rules related to the application of the two means of evidence referred to in the second indent of Article 48(2)(a)(ii) of Directive 2004/18 must not go beyond what is necessary to achieve the intended objectives of that directive (see, to that effect, judgment of 22 October 2015 in *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 29 and the case-law cited).

41 It follows that, as the Advocate General observed in point 50 of his Opinion and the Commission noted in its written observations, rules in a contract notice allowing an economic operator to produce a unilateral declaration in order to prove his technical abilities only if he proves that it is absolutely impossible to obtain a private purchaser's certification would prove disproportionate. Such rules would place an excessive burden on him in relation to what is necessary in order to avoid distortion of competition and ensure compliance with the principles of transparency, non-discrimination and equal treatment in the sphere of public contracts.

42 By contrast, rules in a contract notice according to which an economic operator is justified in relying upon such a unilateral declaration also where he proves, by means of objective evidence to be checked on a case-by-case basis, that there is a serious difficulty preventing him from obtaining such a certification, due for example to the bad faith of the private purchaser concerned, are consistent with the principle of proportionality, since they do not place an excessive burden of proof on the operator in question in relation to the pursuit of those objectives.

43 That appears to be the case, subject to verification by the referring court, of the rules in the contract notice drawn up by AICP which are challenged in the main proceedings.

44 In the light of the foregoing considerations, the answer to the second question is that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 must be interpreted as meaning that it does not preclude the application of rules laid down by a contracting authority, such as those at issue in the main proceedings, which do not allow an economic operator to provide evidence of his technical abilities by a unilateral declaration, unless he proves that it is impossible or very difficult to obtain a certification from the private purchaser.

The third question

45 By its third question, the referring court asks essentially whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 precludes the application of rules laid down by a contracting authority which, on pain of exclusion of the tenderer's application, require that the private purchaser's certification contains authentication of the signature by a notary, lawyer or other competent entity.

46 In that regard, it must be noted that, in its Portuguese-language version, the expression 'purchaser's certification', in the second indent of Article 48(2)(a)(ii) of Directive 2004/18, is worded '*declaração reconhecida do adquirente*' ('certified declaration of the purchaser'), which suggests that, in order to be valid, the private purchaser's declaration must contain an authenticated signature.

47 However, as all the parties who have submitted written observations state, the wording of most of the other language versions of that provision is expressed differently, which seems to result in a less restrictive interpretation of the scope of such a means of evidence. It is apparent in particular from the German-language version ('*vom Erwerber ausgestellte Bescheinigung*'), Spanish-language version ('*certificado del comprador*'), Italian-language version ('*attestazione dell'acquirente*') and English-language version ('*purchaser's certification*') that the expression 'purchaser's certification' must be understood as meaning that an economic operator is allowed to provide evidence of his technical

abilities by means of a simple document drafted without any specific formalities by one or more of his private purchasers, attesting to the principal deliveries effected or the main services provided in the past three years and stating the amounts and dates involved.

48 It should be noted, with regard to that linguistic divergence, that, according to settled case-law of the Court, the wording used in one language versions of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. The provisions of EU law must be interpreted and applied in a uniform manner, in the light of the versions established in all the languages of the European Union. Where there is a divergence between the various language versions of a provision of EU law, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (judgment of 15 October 2015 in *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraph 42 and the case-law cited).

49 As regards the general scheme of the second indent of Article 48(2)(a)(ii) of Directive 2004/18, as noted in paragraph 36 above, that provision establishes a closed system which limits the possibility for contracting authorities of providing for new means of evidence or formulating additional requirements introducing a substantive change to the nature or the conditions for the production of evidence already provided for.

50 It must be found that requiring the signature on the private purchaser's certification to be authenticated would introduce a formality amounting to such a substantive change to the first of the two means of evidence referred to in the second indent of Article 48(2)(a)(ii) of Directive 2004/18, making more burdensome the steps which must be taken by an economic operator in order to discharge his burden of proof, which would be contrary to the general scheme of that article.

51 As regards the purpose of Directive 2004/18, it must be borne in mind that, as is apparent from recitals 1 and 2 thereof, that directive lays down coordinating rules intended, in particular, to simplify and modernise the national procedures for the award of public contracts, in order to facilitate the freedom of movement of goods, freedom of establishment, the freedom to provide services and the opening-up of such contracts to competition.

52 In particular, as is apparent from the case-law of the Court, that directive seeks to facilitate the involvement of small- and medium-sized undertakings in the public contracts procurement market, as stated in recital 32 of that directive (see, to that effect, judgments of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 34, and 7 April 2016 in *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 34).

53 However, as the Advocate General observed in points 80 and 81 of his Opinion, making the evidential value of the private purchaser's certification conditional on its signature being authenticated by a third party would introduce a formality likely not to open up public contracts to the broadest competition possible, but to restrict and limit the involvement of economic operators, in particular foreigners, in such contracts.

54 Because of the short time limits normally set for the submission of applications in contract notices and the divergences between the various national laws as to the authentication of the signature of documents, it cannot be excluded that many operators, above all foreigners, may be dissuaded from submitting their tenders in view of the practical difficulty of producing, in the Member State concerned by the procurement, a certification bearing a duly authenticated signature.

55 Consequently, the general scheme and purpose of Directive 2004/18 endorse the interpretation that the private purchaser's 'certification', like the 'certified declaration' in the Portuguese-language version of the second indent of Article 48(2)(a)(ii) of that directive, requires only that a certificate drafted by that purchaser is produced and cannot be made subject to any other formality by the contracting authorities, such as the authentication of the purchaser's signature by a competent entity.

56 In the light of the foregoing considerations, the answer to the third question is that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 must be interpreted as meaning that it precludes the application of rules laid down by a contracting authority, such as those at issue in the main proceedings,

which, on pain of exclusion of the tenderer's application, require the private purchaser's certification to contain authentication of the signature by a notary, lawyer or other competent entity.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **The second indent of Article 48(2)(a)(ii) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that, even if not transposed into national law, it satisfies the conditions for conferring on individuals rights that they may assert against a contracting authority before national courts, provided that that authority is a public entity or has been given responsibility, pursuant to a measure adopted by the State, for providing a public-interest service under the control of the State and which has, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals.**

2. **The second indent of Article 48(2)(a)(ii) of Directive 2004/18 must be interpreted as meaning that it does not preclude the application of rules laid down by a contracting authority, such as those at issue in the main proceedings, which do not allow an economic operator to provide evidence of his technical abilities by a unilateral declaration, unless he proves that it is impossible or very difficult to obtain a certification from the private purchaser.**

3. **The second indent of Article 48(2)(a)(ii) of Directive 2004/18 must be interpreted as meaning that it precludes the application of rules laid down by a contracting authority, such as those at issue in the main proceedings, which, on pain of exclusion of the tenderer's application, require the private purchaser's certification to contain authentication of the signature by a notary, lawyer or other competent entity.**

[Signatures]

---

* Language of the case: Portuguese.

OPINION OF ADVOCATE GENERAL

WATHELET

delivered on 3 March 2016 (1)

Case C-46/15

Ambisig — Ambiente e Sistemas de Informação Geográfica SA

v

AICP — Associação de Industriais do Concelho de Pombal

(Request for a preliminary ruling from the Tribunal Central Administrativo Sul (Central Administrative Court, Southern Division, Portugal))

(Reference for a preliminary ruling — Public contracts — Directive 2004/18/EC — Article 48(2)(a)(ii) — Direct effect — Award procedures — Economic operators — Technical and/or professional abilities — Evidence)

I – Introduction

1. This request for a preliminary ruling has arisen in an action between Ambisig — Ambiente e Sistemas de Informação Geográfica, SA ('Ambisig') and AICP — Associação de Industriais do Concelho de Pombal ('AICP').

2. It concerns the interpretation of the second indent of Article 48(2)(a)(ii) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (2)

3. This provision deals with evidence of the technical and/or professional abilities of operators interested in the contract at issue. By the questions referred for a preliminary ruling, the Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division, Portugal) asks the Court about the possible direct effect of the provision and the structuring of the detailed evidential rules laid down therein.

II – Legal framework

A – *EU law*

4. Title II of Directive 2004/18 lays down the rules applicable to public contracts. The criteria for qualitative selection are fleshed out in Section 2 of Chapter VII which includes, inter alia, Articles 45 and 48.

5. Article 45(2)(g) of Directive 2004/18 provides that any economic operator who 'is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information' may be excluded from participation in the contract in question.

6. Article 48 of Directive 2004/18, entitled 'Technical and/or professional ability' is worded as follows:

> '1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

…

(ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:

– where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority,

– where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator;

…'

B – *Portuguese law*

1. The Public Procurement Code

7. Directive 2004/18 was transposed into Portuguese law by the Public Procurement Code (Código dos Contratos Públicos), approved by Decree-Law No 18/2008 of 29 January 2008, as amended and republished as an annex to Decree-Law No 278/2009 of 2 October 2009 (Diário da República, 1re série, No 192 of 2 October 2009; 'the Public Procurement Code').

8. Article 165 of the Public Procurement Code is worded as follows:

'1. The minimum requirements concerning technical ability referred to in point (h) of paragraph 1 of the preceding article must be adapted to the nature of the services forming the subject matter of the contract to be concluded and must describe the circumstances, qualities, characteristics or other factual elements relating to, in particular:

(a) the professional experience of the candidates;

(b) the human, technological, equipment-based or other resources used, in any way, by the candidates;

(c) the organisational model and capacity of the candidates, particularly as regards the management and integration of specialist knowledge, IT support systems and quality control systems;

(d) the ability of candidates to take environmental management measures in the context of performance of the contract to be concluded;

(e) the information appearing in the database of the Instituto da Construção e do Imobiliário, I. P. concerning the traders, where the award of a works contract or a public works concession is involved.

…

5. The minimum requirements concerning technical ability referred to in paragraph 1 and the "f" factor referred to in point (i) of paragraph 1 of the preceding article may not be established in a discriminatory manner.'

2. The contract notice

9. Article 12 of the contract notice provides:

'In order to be selected, the candidates must submit the following application documents:

…

(c) a declaration by the client on headed, stamped paper confirming implementation of the environmental and/or quality management system [required by Article 8 of the contract notice] by the candidate, in accordance with the model declaration in Annex VIII to this contract notice. The declaration must bear a signature certified by a notary, lawyer or other competent entity, specifying the capacity of the person signing.

…

(f) a declaration by the client on headed, stamped paper confirming the implementation of management systems, of development and the bringing into use of an online technology platform, of management software and of coordination measures [required by Article 8 of the contract notice] by the candidate, indicating the relevant amount, in accordance with the model declaration in Annex IX to this contract notice. The declaration must bear a signature certified by a notary, lawyer or other competent entity, specifying the capacity of the person signing; …'

III – **Factual background to the dispute in the main proceedings**

10. According to the order for reference, on 23 April 2013 AICP decided to launch a tendering procedure restricted by prior qualification intended to award a service contract for the implementation of environmental and quality management systems and a technology platform.

11. Under Article 8(1)(a) to (c) of the contract notice, candidates had to satisfy several cumulative conditions relating to their technical ability.

12. Article 12(1)(c) and (f) of the contract notice stated that, in order to be selected, candidates had to demonstrate that they met these conditions by providing declarations by clients on headed, stamped paper. The declarations also had to bear a signature certified by a notary, lawyer or other competent entity, specifying the capacity of the person signing.

13. In the context of this tendering procedure, on 30 August 2013 AICP approved the final selection report drawn up by the selection board. The report selected 'Índice ICT & Management, Lda.' and excluded the two other applications, including that submitted by Ambisig.

14. For reasons not mentioned in the order for reference, this decision was annulled on 14 November 2013 by judgment of the Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division). The judgment also ordered AICP to adopt, within 20 days, a new decision on the choice of procedure; to issue a new contract notice, with the illegalities that had been held to exist deleted; and to take all associated steps and measures.

15. In accordance with this judgment, on 10 December 2013 AICP decided to launch a new tendering procedure restricted by prior qualification intended to award a service contract for the implementation of environmental and quality management systems and a technology platform in 13 undertakings.

16. At the end of the new selection procedure, on 27 March 2014 AICP's management decided to approve the final selection report drawn up by the selection board which selected 'Índice ICT & Management, Lda.' and excluded Ambisig's application.

17. Ambisig brought an action against that decision before the Tribunal Administrativo e Fiscal de Leiria (Leiria Administrative and Tax Court, Portugal), resulting in the decision being annulled on 11 June 2014. However, Ambisig challenged the ruling before the collegiate formation of the court on the ground that it had wrongly rejected the pleas in law alleging, in particular, that Article 12(1)(c) and (f) of the contract notice was incompatible with the evidential requirements laid down in Article 48 of Directive 2004/18 as well as with the principles of competition, impartiality and proportionality flowing from the Public Procurement Code.

18. By judgment of 6 August 2014, the Tribunal Administrativo e Fiscal de Leiria (Leiria Administrative and Tax Court) rejected Ambisig's complaint and, consequently, confirmed its decision of 11 June 2014. Ambisig decided to challenge the judgment before the Tribunal Administrativo Central Sul (Central Administrative Court — Southern Division).

19. It is in the context of that action that the present request for a preliminary ruling has arisen. The Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division) has some concerns as regards the scope of the evidential requirements laid down in Article 48 of Directive 2004/18 and the conformity of the requirements of the contract notice with this article.

IV – **The request for a preliminary ruling and the procedure before the Court**

20. By decision of 29 January 2015, received at the Court on 5 February 2015, the Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division) therefore decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Since Portuguese legislation does not regulate the matters covered by Article 48(2)(a)(ii), second indent, of Directive 2004/18 …, is that provision directly applicable in the Portuguese legal order in the sense that it confers on individuals a right that they may assert against contracting authorities?

(2) Must Article 48(2)(a)(ii), second indent, of Directive 2004/18 be interpreted to the effect that it precludes the application of rules laid down by a contracting authority which do not allow an economic operator to provide evidence of the provision of services by a declaration signed by that operator, unless the latter proves that it is impossible or very difficult to obtain a certification from the private purchaser?

(3) Must Article 48(2)(a)(ii), second indent, of Directive 2004/18 be interpreted to the effect that it precludes the application of rules laid down by the contracting authority, which, on pain of exclusion, require the private purchaser’s certification to contain authentication of the signature by a notary, lawyer or other competent entity?’

21. Written observations were submitted by Ambisig, the Portuguese Government and the European Commission. The Portuguese Government and the Commission also presented oral arguments at the hearing which took place on 28 January 2016.

V – **Analysis**

A – *The first question referred*

22. By its first question, the referring court essentially asks whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 is to be interpreted as meaning that, in the absence of transposition into domestic law, that provision is capable of conferring rights on individuals which they may assert against contracting authorities in the context of proceedings brought before the national courts. It is therefore necessary to determine whether this provision has direct effect.

1. Whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 has direct effect

23. The conditions for and limits on recognising the direct effect of provisions of a directive are well known. According to the settled case-law of the Court, whenever the provisions of a directive are, so far as their content is concerned, unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the State has failed to transpose the directive into national law within the time-limit or has transposed it incorrectly. (3)

24. A provision of EU law is considered to be unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure by the institutions of the European Union or by the Member States. (4)

25. In my view, the second indent of Article 48(2)(a)(ii) of Directive 2004/18 satisfies the abovementioned requirements of being unconditional and precise. This provision does not require any additional measure for its implementation in that, first, it provides that evidence of economic operators’ technical abilities may be furnished by a list of the principal deliveries effected or the main services provided in the past three years indicating the sums, dates and public or private recipients involved, and, second, states that where the recipient was a private purchaser, evidence of the service provided is to be given by the purchaser’s certification or, failing this, simply by a declaration by the economic operator.

26. The Court has, furthermore, already had occasion to hold that Article 26 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (5) could be relied on by an individual before the national courts, 'since no specific implementing measure is necessary for compliance with [the] requirements [set out therein]'. (6) Even though Article 26 of Directive 71/305 only concerned works contracts and not service contracts, the rules on evidence of technical abilities laid down in this provision may be regarded as similar, in so far as they are unconditional and precise, to those of Article 48 of Directive 2004/18.

27. Lastly, I note that the Court has also held, in general terms, that the provisions of Title VI of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (7) could be relied on by an individual before a national court 'if it is clear from an individual examination of their wording that they are unconditional and sufficiently clear and precise' (Judgment in *Tögel* (C-76/97, EU:C:1998:432, paragraph 47)).These provisions included Article 32, which even then stated, in paragraph 2 thereof, that evidence of the service provider's technical ability could be furnished by 'a list of the principal services provided in the past three years, with the sums, dates and recipients, public or private, of the services provided [and that] where provided to private purchasers, delivery [was] to be certified by the purchaser or, failing this, simply declared by the service provider to have been effected'.

28. It must be stated that Article 48(2) of Directive 2004/18 reproduces this provision almost word for word. I therefore consider it to be unconditional and sufficiently precise so that it can be relied on before the national courts.

2. The necessity for the contracting authority to be classified as a 'State'

29. However, in order for Ambisig to be able to rely on the second indent of Article 48(2)(a)(ii) of Directive 2004/18 before the national court, it is for the referring court to satisfy itself that the contracting authority in question in the main proceedings is not an 'individual'.

30. According to settled case-law, a directive may not of itself impose obligations on an individual. It cannot therefore be relied upon as such against an individual before a national court. (8)

31. However, although the provisions of a directive having direct effect may, consequently, be relied on only against a State, the capacity in which the State acts is irrelevant. (9)

32. Thus, according to settled case-law, 'the entities against which reliance may be placed on the provisions of a directive that are capable of having direct effect include a body, whatever its legal form, which has been given responsibility, pursuant to a measure adopted by the State, for providing a public-interest service under the control of the State and which has, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals'. (10)

33. It appears from the name of the contracting authority in question in the main proceedings that it is a purely private association of undertakings which does not provide any public-interest services and does not have, in any case, special powers to perform its tasks.

34. In response to the questions put by the Court during the hearing held on 28 January 2016, the representative of the Portuguese Government confirmed that AICP was an association governed by private law which did not exercise and had not been entrusted with any tasks in the public interest. He explained that public procurement legislation would only apply if AICP's activities were financed, for the most part, out of the public purse. (11)

35. That being said, it is for the Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division) to establish whether, at the time of the facts at issue in the main proceedings, AICP was a body which had been given responsibility for providing, under the control of a public authority, a public-interest service and whether this association of undertakings had, for that purpose, special powers. (12)

36. If the answer is in the negative, the second indent of Article 48(2)(a)(ii) of Directive 2004/18 cannot be relied upon against AICP. In that event, it would nevertheless be for the referring court to apply the principle of interpreting national law in conformity with EU law and to interpret all relevant rules of national

law, so far as possible, in the light of the wording and the purpose of Directive 2004/18 in order to achieve the result sought by it and, consequently, comply with the third paragraph of Article 288 TFEU. (13)

B – *The second question referred*

37. By its second question, the referring court asks whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 precludes the application of rules laid down by a contracting authority which do not allow an economic operator to provide evidence of his technical abilities by a declaration signed by that operator, unless the latter proves that it is impossible or very difficult to obtain a certification from the private purchaser.

38. The referring court therefore asks the Court about the possible order of precedence of the forms of evidence permitted under the second indent of Article 48(2)(a)(ii) of Directive 2004/18.

39. Article 48(2)(a)(ii) of Directive 2004/18 provides that evidence of economic operators' technical abilities may be furnished by a list of the principal deliveries effected or the main services provided in the past three years. If the recipient was a private purchaser, the second indent of this provision provides for two forms of evidence to demonstrate that the transactions (deliveries or services) actually occurred, that is, 'the purchaser's certification or, *failing this*, simply … a declaration by the economic operator'. (14)

40. The Court has repeatedly held that when interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. (15)

41. That said, as Advocate General Trstenjak pointed out in point 37 of her Opinion in *Agrana Zucker* (C-33/08, EU:C:2009:99), 'the wording of a provision … is invariably *the starting point* and at the same time the limit of any interpretation'. (16) I also agree with the clarification provided by Advocate General Léger to the effect that methods of interpretation other than those relating to the wording of a provision are not necessary where the text in question is absolutely clear and unambiguous. 'In that case, the provisions of [EU] law are sufficient in themselves'. (17)

42. In the present case, it must be stated that Article 48(2)(a)(ii) of Directive 2004/18 has the required level of clarity and unambiguity in all language versions.

43. The term 'failing this' used in this provision means 'in the absence of', (18) 'in place of' or even 'for lack of something'. (19) Therefore, the only way in which it can be interpreted is in the sense of establishing an order of precedence. Specifically, the form of evidence which follows the words 'failing this' — namely the declaration by the economic operator — is thus necessarily subsidiary to the preceding form of evidence, namely the purchaser's certification.

44. Some language versions are even more explicit in that they do not simply use wording analogues to 'failing this', but permit the straightforward declaration by the operator expressly in the absence of the purchaser's certification, referred to before. (20)

45. Furthermore, if the economic operator were free to choose the form of evidence from those permitted under the second indent of Article 48(2)(a)(ii) of Directive 2004/18, the words 'failing this' would be meaningless. Indeed, it would always be easier for the economic operator to draw up a declaration himself rather than request a certification from a third party.

46. The economic operator's declaration is therefore a subsidiary form of evidence, to be used where it has not been possible to obtain the purchaser's certification. In those circumstances, it is for the economic operator to show that he was unable to obtain such a certification.

47. Since Article 45(2)(g) of Directive 2004/18 permits the exclusion of an economic operator from a contract if he 'is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information', the contracting authority must be in a position to check the veracity of this information or of the reason for its absence.

48. This possibility for the contracting authority to carry out a check is particularly necessary because the Court has already held that, in accordance with the principle of equal treatment and the obligation of transparency flowing from it, to which the contracting authorities are subject under Article 2 of Directive 2004/18, those authorities must 'comply strictly with the criteria which [they have themselves] established, so that [they are] required to exclude from the contract an economic operator who has failed to provide a document or information which he was required to produce under the terms laid down in the contract documentation, on pain of exclusion'. (21)

49. However, as the Commission points out in its written submissions, this additional requirement must comply with the principle of proportionality.

50. This means that recourse to a declaration by the economic operator cannot be restricted to cases where it is absolutely impossible to obtain a certification from the purchaser (such as in the case of bankruptcy, for example). An impediment to securing such certification, such as a straightforward refusal by the purchaser without giving reasons or a demand by the purchaser for payment in return, could suffice. It also means than the evidence of this impossibility must be assessed in the light of the specific circumstances of each case. Thus, whilst submission of an official document may be required in the case of bankruptcy, a straightforward exchange of letters or a failure to reply (evidenced by one or more reminders, for instance) could be sufficient to demonstrate bad faith on the part of the purchaser.

51. To conclude, I consider that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 does not preclude the application of rules laid down by a contracting authority which allow an economic operator to provide evidence of his technical abilities by a declaration signed by that operator only if he proves that it is impossible or very difficult to obtain a certification from the private purchaser.

C – *The third question referred*

52. By its third question, the referring court asks whether the second indent of Article 48(2)(a)(ii) of Directive 2004/18 precludes the application of rules laid down by a contracting authority which, on pain of exclusion, require the private purchaser's certification to bear a signature certified by a notary, lawyer or other competent entity.

53. The referring court's uncertainty derives from the wording of the second indent of Article 48(2)(a)(ii) of Directive 2004/18 in Portuguese. That provision refers to a 'declaração *reconhecida* do adquirente', (22) that is to say a 'recognised' or 'certified' declaration. No such adjective appears in the other language versions of the second indent of Article 48(2)(a)(ii) of that directive.

54. According to the settled case-law of the Court, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. (23)

55. This principle of linguistic equality or equivalence does not however go so far as to prevent the Court from disapplying the language version of a provision which is inconsistent with the ordinary meaning shared by the other language versions, on the basis of a contextual and/or teleological interpretation of the provision. (24)

56. In the present case, the ordinary meaning of the wording used in the other language versions clearly does not, in itself, enable a firm reply to be given to the question referred for a preliminary ruling. However, the context of which Article 48 of Directive 2004/18 forms part and its development, as well as its teleological interpretation, lead me to adopt the interpretation that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 does not require the production of a certification from the private purchaser bearing a signature certified by a notary, lawyer or any other competent entity.

1. The wording of the second indent of Article 48(2)(a)(ii) of Directive 2004/18

57. If we compare the different language versions of the second indent of Article 48(2)(a)(ii) of Directive 2004/18, we see that although the qualifier ‘reconhecida’ (‘recognised’ or ‘certified’) only appears in the Portuguese version, this is also the only version which uses the same word for both forms of evidence envisaged.

58. In the other language versions, the word ‘declaration’ is used in the second situation (the declaration by the economic operator) whilst the first situation refers to the purchaser’s ‘certification’ of deliveries or services. Thus, in the Spanish, German, English and French versions, we find the words ‘certificado’ and ‘declaración’, ‘Bescheinigung’ and ‘Erklärung’, ‘certification’ and ‘declaration’, and ‘certification’ and ‘déclaration’. (25)

59. The use of a different word for each of the two situations referred to in the second indent of Article 48(2)(a)(ii) of Directive 2004/18 could reflect the EU legislature’s intention to distinguish between the burden of proof applying to them. The distinction between ‘certification’ and ‘declaration’ would thus connote the idea of a higher level of formality in the first situation. This interpretation would be confirmed by the wording of the provision in Portuguese, which uses the word ‘declaration’ in both situations but with the addition of the adjective ‘recognised’ or ‘certified’ only in the first.

60. However, I cannot completely disregard the fact that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 permits evidence of the services which the economic operator claims to have provided to be given by *the purchaser’s* certification, without reference to any official document or the involvement of a third party. In the absence of such a detail, the ordinary meaning of the word ‘certification’ is nothing more than the act of giving a written assurance of something . (26)

61. I must therefore conclude that a literal analysis of the provision in question does not, in itself, enable it to be interpreted with the required level of certainty.

2. Systematic interpretation of the second indent of Article 48(2)(a)(ii) of Directive 2004/18

62. First of all, the Court has consistently held that Article 48 of Directive 2004/18 establishes a closed system which limits the methods of assessment and verification available to contracting authorities and, therefore, limits *their opportunities to lay down requirements*. (27)

63. The Court has also stated that even within the framework of an open system (such as that laid down in Article 47(4) of Directive 2004/18 as regards the economic and financial standing of candidates), contracting authorities’ freedom is not unlimited and the aspects chosen must be ‘objectively such as to provide information on such standing … without, however, going beyond what is reasonably necessary for that purpose’. (28)

64. The same considerations apply, *a fortiori*, to the requirements laid down in the closed evidential system under Article 48 of Directive 2004/18. In my opinion, requiring authentication of the signature of a private purchaser attesting to a delivery effected or a service provided by an economic operator who has applied for a contract goes beyond what is necessary to prove the technical ability of the operator in question and is excessively formalistic when compared to the straightforward declaration by the economic operator, which is the subsidiary form of evidence permitted under the second indent of Article 48(2)(a)(ii) of Directive 2004/18.

65. If the contracting authority has concerns about the veracity of the document submitted to it, it may also, in my view, request additional information to demonstrate the authenticity of the certification provided. Indeed, as part of the contextual analysis, it must be recalled that Article 45(2)(g) of Directive 2004/18 makes it possible to exclude from the contract any operator who ‘is guilty of serious misrepresentation in supplying the information required’.

66. Secondly, the development of the applicable legislation also militates in favour of a non-formalistic interpretation of the necessary certification.

67. The idea underpinning the second indent of Article 48(2)(a)(ii) of Directive 2004/18 was already present in Directive 92/50, although the wording used was slightly different. Under the second indent of

Article 32(2)(b) of Directive 92/50, the delivery on which the economic operator relied to prove his technical ability had to be 'certified *by the purchaser*'. (29)

68. Whilst the idea of 'certification' is found in the verb 'to certify', the absence of any involvement of institutional third parties was, by contrast, even clearer, as the emphasis was patently on the actions of the purchaser, the delivery having to be certified *by* him.

69. It can also be noted that the Portuguese version of Directive 92/50 used the word 'declaração' even then for both evidential situations, but without the addition of any adjective in the first situation.

70. The wording of Article 32(2) of Directive 92/50 was not, initially, the subject of any amendments in the proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM/2000/0275 final) (30) resulting in Article 48(2) of Directive 2004/18.

71. It was only after the inclusion of the Parliament's amendments regarding economic operators tendering as a group and concerns relating to the environment and workers' health and safety that the second indent of Article 48(2)(a)(ii) took on its current form. (31)

72. It is therefore not possible to base any argument on the amendments to the wording of the disputed provision, as the considerations which resulted in those changes are unrelated to any intention on the part of the legislature to increase the evidential formalities associated with the certification, by the purchaser, of the services provided by the economic operator.

73. On the contrary, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/ (32) goes even further in the sense of reducing evidential formalities by removing all references to certification by the purchaser.

74. From now on, Article 60(4) of that directive — which replaces Article 48(2) of Directive 2004/18 — simply provides that 'evidence of the economic operators' technical abilities may be provided by one or more of the means listed in Annex XII Part II, in accordance with the nature, quantity or importance, and use of the works, supplies or services'.

75. Under Annex XII Part II(a)(ii) of Directive 2014/24, the means of evidence attesting to economic operators' technical abilities are 'a list of the principal deliveries effected or the main services provided over at the most the past three years, with the sums, dates and recipients, whether public or private, involved. Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account'. The need for this list to be accompanied by a certification from the purchaser has therefore disappeared.

76. Even though Directive 2014/24 does not apply to the dispute in the main proceedings, this new directive, which repeals Directive 2004/18, is relevant in that it expresses the current intention of the EU legislature. It may therefore be of assistance in ascertaining the current meaning of an earlier, similar provision, provided, however, that such interpretation is not *contra legem*.

77. In the present case, it seems to me that Directives 92/50 and 2014/24 confirm the EU legislature's continuing intention not to make evidence of the technical ability of an economic operator subject to any specific formality and do so in a way that does not conflict with the wording of the applicable provision.

78. In other words, viewed in its context and from a historical perspective, the second indent of Article 48(2)(a)(ii) of Directive 2004/18 imposes no other requirement than the assurance or confirmation, by the purchaser, that the service on which the economic operator relies with a view to securing the contract was actually provided.

3. Teleological interpretation of the second indent of Article 48(2)(a)(ii) of Directive 2004/18

79. This interpretation is also consistent with the purpose of Directive 2004/18, which is to facilitate freedom of movement of goods, freedom of establishment and freedom to provide services as well as, more

generally, the opening-up of public procurement to competition. (33)

80. Making the acceptance of a purchaser's certification conditional on its authentication by a notary, lawyer or any other competent entity is, to my mind, likely to run counter to that objective.

81. Such a requirement would be liable to deter some potential candidates who, when faced with the practical difficulty (due to the time-limits set in the contract notice, for example) of satisfying this additional condition, would forgo submitting a tender.

4. Conclusion on the third question referred for a preliminary ruling

82. To conclude, I find that the contextual and teleological interpretations of the second indent of Article 48(2(a)(ii) of Directive 2004/18 confirm the ordinary meaning of the term 'certification' appearing therein and it is not appropriate to draw specific inferences from the addition of the word 'reconhecida' in the Portuguese version.

83. The context of which the second indent of Article 48(2)(a)(ii) of Directive 2004/18 forms part and its development, as well as its teleological interpretation, lead me to adopt the interpretation that the word 'certification' or the term 'certified declaration' used in the Portuguese version do not require any particular formality.

84. Consequently, I consider that the second indent of Article 48(2)(a)(ii) of Directive 2004/18 precludes the application of rules laid down by a contracting authority which, on pain of exclusion, require the private purchaser's certification to bear a signature certified by a notary, lawyer or other competent entity.

VI – **Conclusion**

85. In the light of the foregoing considerations, I propose that the Court give the following replies to the questions referred for a preliminary ruling by the Tribunal Central Administrativo Sul (Central Administrative Court — Southern Division):

(1) The second indent of Article 48(2)(a)(ii) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that, in the absence of transposition into domestic law, that provision is capable of conferring rights on individuals which they may assert against contracting authorities in the context of proceedings brought before the national courts, provided that the contracting authority in question falls within the notion of State within the meaning of the case-law of the Court.

(2) The second indent of Article 48(2)(a)(ii) of Directive 2004/18 does not preclude the application of rules laid down by a contracting authority which allow an economic operator to provide evidence of his technical abilities by a declaration signed by that operator only if he proves that it is impossible or very difficult to obtain a certification from the private purchaser.

(3) The second indent of Article 48(2)(a)(ii) of Directive 2004/18 precludes the application of rules laid down by a contracting authority which, on pain of exclusion, require the private purchaser's certification to bear a signature certified by a notary, lawyer or other competent entity.

---

1 – Original language: French.

---

2 – OJ 2004 L 134, p. 114.

---

3 – See, to that effect, among many other examples, judgment in *Portgás* (C-425/12, EU:C:2013:829, paragraph 18 and the case-law cited).

---

4 – See, to that effect, judgments in *Almos Agrárkülkereskedelmi* (C-337/13, EU:C:2014:328, paragraph 32) and *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 49).

---

5 – OJ, English Special Edition 1971 (II), p. 682.

---

6 – Judgment in *Beentjes* (31/87, EU:C:1988:422, paragraph 43).

---

7 – OJ 1992 L 209, p. 1.

---

8 – See, to that effect, judgments in *Marshall* (152/84, EU:C:1986:84, paragraph 48); *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 20); and *Portgás* (C-425/12, EU:C:2013:829, paragraph 22).

---

9 – See, to that effect, judgment in *Portgás* (C-425/12, EU:C:2013:829, paragraph 23).

---

10 – Judgment in *Portgás* (C-425/12, EU:C:2013:829, paragraph 24 and the case-law cited).

---

11 – Under Article 1(9) of Directive 2004/18.

---

12 – See, to that effect, judgment in *Portgás* (C-425/12, EU:C:2013:829, paragraph 31).

---

13 – See, to that effect, judgment in *Dominguez* (C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited). In its judgment in *Fenoll* (C-316/13, EU:C:2015:200), the Court expressly confirmed the existence of an order of precedence as regards the courses of action available in disputes between individuals: ‘if national law cannot be interpreted in conformity with the directive [in question] — which it is for the referring court to ascertain — [the relevant article] of that directive may not be invoked in a dispute between individuals … in order to ensure the full effect of [the] right [it confers] and to render inapplicable any conflicting provision of national law. Moreover, in such a situation the party adversely affected by the incompatibility of national law with EU law may nevertheless rely upon the case-law [on the non-contractual liability of the Member States for infringements of EU law] deriving from the judgment in *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428) in order to obtain, if appropriate, compensation for any damage suffered (see judgment in *Dominguez*, C-282/10, EU:C:2012:33, paragraph 43)’ (paragraph 48). In other words, if, in a dispute between individuals, the national court does not succeed in interpreting national law in conformity with the applicable directive, it will not be able to apply this directive but neither will it be able to disapply the conflicting national law. In those circumstances, the only palliative available to the injured party is to seek to establish the liability of the Member State for infringing EU law.

---

14 – My emphasis.

---

15 – See, in particular, judgments in *Yaesu Europe* (C-433/08, EU:C:2009:750, paragraph 24); *Brain Products* (C-219/11, EU:C:2012:742, paragraph 13); *Koushkaki* (C-84/12, EU:C:2013:862, paragraph 34); and *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 35).

---

16 – My emphasis.

---

17 – Opinion of Advocate General Léger in *Schulte* (C-350/03, EU:C:2004:568, point 88). Also see, by way of an interpretation *a contrario*, judgment in *Tecom Mican and Arias Domínguez* (C-223/14, EU:C:2015:744, paragraph 35).

---

18 – According to the definition in the dictionary *Le Petit Robert*, 2014.

---

19 – According to the definition in the dictionary *Larousse.fr*.

---

20 – See, in particular, the Spanish version in which Article 48(2)(a)(ii) of Directive 2004/18 is worded thus: ‘cuando el destinatario sea un comprador privado, mediante un certificado del comprador o, *a falta de este certificado* [failing this], simplemente mediante una declaración del operador económico’ (my emphasis). The Italian version also uses the wording ‘in mancaza di tale attestazione’. Lastly, in the German version, the EU legislature refers to the situation where ‘falls eine derartige Bescheinigung nicht erhältlich ist’. The Greek version is even more explicit in that it refers to the ‘impossibility’ of obtaining a certification from the purchaser: ‘*εάν ο αποδέκτης είναι ιδιωτικός φορέας, με βεβαίωση του αγοραστή ή, εάν τούτο δεν είναι δυνατόν* [where this is not possible], *με απλή δήλωση του οικονομικού φορέα*’ (my emphasis).

---

21 – Judgment in *Cartiera dell’Adda* (C-42/13, EU:C:2014:2345, paragraph 42). Also see paragraph 43 of this judgment for reference to the principles of equal treatment and transparency, as well as Article 2 of Directive 2004/18.

---

22 – My emphasis.

---

23 – See, to that effect, judgment in *Léger* (C-528/13, EU:C:2015:288, paragraph 35 and the case-law cited).

---

24 – See, to that effect, Lenaerts K. and Guttiérrez-Fons J.A., ‘To say what the law of the EU is: Methods of interpretation and the European Court of Justice’, *Columbia Journal of European Law*, 2014, 20th Anniversary Issue, pp. 3 to 61, especially p. 14 and the authors cited in the footnote on p. 78.

---

25 – I note that the Slovakian version uses the words ‘potvrdením’, which may be translated as ‘confirmation’ rather than ‘certification’, and ‘vyhlásením’.

---

26 – According to the dictionary *Le Petit Robert*, 2014, certification is, in the first place, a legal term meaning ‘an assurance given in writing’. In Spanish, according to the online dictionary of the Real Academia Española, the entry for ‘certificado’ refers to the word ‘certificación’, which may be defined as a document in which an assurance is given as to the veracity of a fact.

---

27 – See, to that effect, judgment in *Édukövízig and Hochtief Construction* (C-218/11, EU:C:2012:643, paragraph 28).

---

28 – Judgment in *Édukövízig and Hochtief Construction* (C-218/11, EU:C:2012:643, paragraph 29).

---

29 – My emphasis.

---

30 – OJ 2001 C 29 E, p. 11. See Article 49(3) of the proposal.

31 – See the amended proposal for a European Parliament and Council Directive concerning the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (COM/2002/0236 final), OJ 2002 C 203 E, p. 210, especially pp. 223 and 224.

32 – OJ 2014 L 94, p. 65.

33 – See recital 2 in the preamble to Directive 2004/18.

JUDGMENT OF THE COURT (Sixth Chamber)

2 June 2016 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Participation in a call for tenders — Possibility of relying on the capacities of other undertakings in order to satisfy the necessary criteria — Failure to pay a fee not expressly provided for — Exclusion from the contract without the possibility of rectifying that omission)

In Case C-27/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy), made by decision of 10 December 2014, received at the Court on 22 January 2015, in the proceedings

Pippo Pizzo

v

CRGT Srl,

Interested parties and interveners:

Autorità Portuale di Messina,

Messina Sud Srl,

Francesco Todaro,

Myleco Sas,

THE COURT (Sixth Chamber),

composed of A. Arabadjiev, President of the Chamber, S. Rodin (Rapporteur) and E. Regan, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Italian Government, by G. Palmieri, acting as Agent, assisted by C. Colelli, avvocato dello Stato,

– the European Commission, by L. Cappelletti and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 January 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 47 and 48 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and of principles of EU law concerning public procurement.

2 The request has been made in proceedings between Mr Pippo Pizzo, acting in his capacity as owner of the undertaking Pizzo and as the authorised representative of the temporary joint venture formed with Onofaro Antonino ('Pizzo'), and CRGT Srl concerning the exclusion of a tenderer from a tendering procedure for the award of a public service contract for the management of waste and cargo residues on board ships.

Legal context

EU law

3 Article 2 of Directive 2004/18 provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

4 Article 47(2) of that directive provides:

'An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.'

5 Article 48(3) of Directive 2004/18 provides:

'An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.'

6 Article 63(1), first and third subparagraphs, and Article 63(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, pp. 65 to 242), which are referred to by the referring court, state:

'1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. … Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

…

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

…

2. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 19(2), by a participant in that group.'

Italian law

7 Article 49 of decreto legislativo No 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 on the Code on public works contracts, public service contracts and public supply contracts in implementation of Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006), as amended by decreto legislativo No 152 (Legislative Decree No 152) of 11 September 2008 (Ordinary Supplement to GURI No 231 of 2 October 2008) ('Legislative Decree No 163/2006'), entitled 'Reliance on the capacities of third parties', transposes Articles 47 and 48 of Directive 2004/18 into Italian law.

8 Article 49(1) of Legislative Decree No 163/2006 provides:

'The tenderer, whether an individual or a member of a consortium or group within the meaning of Article 34, in a specific tendering procedure for a public works, services or supply contract, may fulfil the requirements relating to the economic, financial, technical and organisational criteria, that is to say, obtain an SOA certificate, by relying on the capacities of another entity or the SOA certificate of another entity.'

9 Article 49(6) of Legislative Decree No 163/2006 provides:

'Reliance on several auxiliary undertakings shall be permitted, subject to the prohibition on the divided use by the tenderer of the individual economic-financial and technical-organisational criteria referred to in Article 40(3)(b), on the basis of which the certificate for that category was issued.'

10 Under the first subparagraph of Article 1(67) of the Legge finanziaria 2006 (2006 Finance Law No 266, Ordinary Supplement to GURI No 211 of 29 December 2005) of 23 December 2005 ('Law No 266/2005'):

'… [t]he Supervisory Authority on Public Works … shall determine, on an annual basis, the amount of the fees payable to it by the public and private persons which are subject to its supervision and the fee collection procedures, including the obligation of economic operators to pay the fee as a condition for tenders to be admissible to procedures for the carrying out of public works.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 In November 2012, the Autorità Portuale di Messina (Port Authority of Messina, Italy) launched an open tendering procedure, of EU interest, for the award of a four-year public service contract for the management of waste and cargo residues, produced on board ships calling at ports within the Port Authority of Messina's territorial jurisdiction. That service was previously run by CRGT.

12 On 16 May 2013, the tender assessment committee of the Port Authority of Messina took note that four tenders had been submitted.

13 On 4 June 2013, CRGT, which had signed with RIAL Srl a contract of reliance upon RIAL Srl's capacities, and two other tenderers learned that they had been excluded from that tendering procedure on account of the fact that they had not paid to the Autorità per la vigilanza sui contratti pubblici (the Supervisory Authority on Public Procurement) ('the AVCP') the fee required by Law No 266/2005.

14 The contract was therefore awarded to Pizzo, the sole remaining tenderer in the tendering procedure.

15 CRGT brought an action before the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court for Sicily, Italy) seeking the annulment of that decision to exclude it from the procedure and compensation for the damage suffered as a result of that exclusion.

16 Pizzo filed a counterclaim in which it submitted that CRGT should also have been excluded from that tendering procedure for having failed to submit two separate bank references in order to prove its economic and financial standing.

17 The Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court for Sicily), by judgment No 1781/2014, held that CRGT's action was admissible and well founded and that that company had been wrongly excluded from the tendering procedure at issue. It held in that regard that the documents relating to that procedure did not provide for the tendering undertakings to pay a mandatory fee to the AVCP because the payment of such a fee, which is provided for by Law No 266/2005, applies expressly to public works contracts but not to service contracts. Furthermore, that court stated that the imposition of the payment of that fee on undertakings tendering for the award of a service contract is the result of a broad interpretation, first, of Law No 266/2005 by the AVCP, and, secondly, of the administrative case-law, according to which the necessity of that payment condition implies, by operation of the mechanism by which provisions are automatically incorporated in administrative measures, that all undertakings tendering for the award of public contracts should be required to pay that fee.

18 In addition, the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court for Sicily) dismissed the counterclaim filed by Pizzo, on the ground that CRGT could, as it had done, rely on the economic and financial standing of a third-party undertaking with which it had concluded a contract to that effect.

19 Pizzo brought an appeal before the referring court.

20 In those circumstances the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Articles 47 and 48 of Directive [2004/18] be interpreted as precluding national legislation, like [that] described [in the order for reference], which allows divided reliance upon the capacities of other entities, on the terms set out above, in respect of services?

(2) Do the principles of EU law, and, in particular, those of protection of legitimate expectations, legal certainty and proportionality, preclude a legal rule of a Member State which permits the exclusion from a public tendering procedure of an undertaking which did not understand, because this was not expressly provided in the tender documents, that it was obliged, on pain of exclusion from that procedure, to fulfil the obligation to pay a sum in order to participate in that procedure, even though the existence of that obligation cannot be clearly deduced from the wording of the law in force in the Member State, but can nevertheless be inferred, by means of a twofold legal operation, which involves, first, interpreting extensively certain provisions of that Member State's positive law and, then, incorporating — in accordance with the outcome of that broad interpretation — the mandatory provisions in the tendering documents?'

Consideration of the questions referred

The first question

21 By its first question the referring court asks, in essence, whether Articles 47 and 48 of Directive 2004/18 are to be interpreted as precluding national legislation which allows an economic operator to rely on the capacities of one or more third-party entities for the purpose of satisfying the minimum requirements for participating in a tendering procedure which are only partially satisfied by that operator.

22 Article 47(2) and Article 48(3) of Directive 2004/18 expressly provide, in almost identical terms, that 'an economic operator may … rely on the capacities of other entities' in order to establish that it satisfies the requirements with regard to economic and financial standing and technical and professional ability required by the contract in question.

23 The Court has held that EU law does not require that, in order to be classified as an economic operator qualifying for tendering, a person wishing to enter into a contract with a contracting authority must be capable of direct performance using his own resources (see, to that effect, judgment of 23 December 2009 in *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 41).

24 The Court has held, in that respect, that Article 47(2) and Article 48(3) of Directive 2004/18 does not lay down any general prohibition regarding a candidate or tenderer's reliance on the capacities of one or more third-party entities in addition to its own capacities in order to fulfil the criteria set by a contracting authority (see judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 30).

25 According to that same case-law, those provisions recognise the right of every economic operator to rely, for a particular contract, upon the capacities of other entities, 'regardless of the nature of the links which it has with them', provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the performance of the contract (see judgment of 14 January 2016 in *Ostas celtnieks*, C-234/14, EU:C:2016:6, paragraph 23).

26 It must therefore be held that Directive 2004/18 permits the combining of the capacities of more than one economic operator for the purpose of satisfying the minimum capacity requirements set by the contracting authority, provided that the candidate or tenderer relying on the capacities of one or more other entities proves to that authority that it will actually have at its disposal the resources of those entities necessary for the execution of the contract (see judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 33).

27 Such an interpretation is consistent with the objective pursued by the directives in this area of attaining the widest possible opening-up of public contracts to competition to the benefit not only of economic operators but also contracting authorities (see, to that effect, judgment of 23 December 2009 in *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 37 and the case-law cited). In addition, that interpretation also facilitates the involvement of small- and medium-sized undertakings in the contracts procurement market, an aim also pursued by Directive 2004/18, as stated in recital 32 thereof (see judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 34).

28 The Court has, however, pointed out that there may be works the special requirements of which necessitate a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate. It has thus acknowledged that, in such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or by relying on a limited number of economic operators as long as that requirement is related and proportionate to the subject matter of the contract at issue. The Court has, however, stated that since those circumstances represent an exception, the requirements in question cannot be made general rules under national law (see, to that effect, judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 35 and 36).

29 It is apparent from the order for reference that, according to Pizzo, CRGT could not rely on the capacities of another operator in order to fulfil the criteria for the award of the contract as issue in the main proceedings. However, it is apparent from Article 47(2) and Article 48(3) of Directive 2004/18 that they expressly provide for the possibility for a tenderer to rely on the capacities of other entities. It is, however, for the referring court to ascertain whether the call for tenders and the contract documents in respect of the contract at issue expressly stipulated that, in the light of the special requirements of the services forming the subject matter of that contract, a minimum capacity level should have been achieved by a single economic operator.

30 As regards Pizzo's argument that CRGT should have proved its economic and financial standing by the provision of references from at least two banking institutions, it must be pointed out that to preclude the possibility for an undertaking which relies on the capacities of a third-party undertaking to use the bank reference of that undertaking would manifestly result in rendering ineffective the possibility afforded by Article 47(2) and Article 48(3) of Directive 2004/18 of relying on the capacities of third parties. Those provisions must therefore be interpreted as meaning that economic operators may, with regard to a particular contract, rely on the capacities of other entities, and that includes the use of their bank references.

31 The referring court also raises the question of whether Article 63(1), third subparagraph, and Article 63(2) of Directive 2014/24 introduce limits on the possibility of relying on the capacity of other

undertakings. It must, however, be stated that, under Article 90 of that directive, Member States had to comply with the provisions of that directive by 18 April 2016. Consequently, the provisions of that directive are not applicable *ratione temporis* to the case in the main proceedings.

32 Although the case-law of the Court requires Member States to refrain, during the period prescribed for transposition of a directive, from taking any measures liable seriously to compromise the result prescribed by that directive (see judgment of 18 December 1997 in *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 45), that case-law does not make it possible to impose on a tenderer, before that period has expired, constraints which do not derive from EU law as interpreted by the case-law of the Court.

33 Furthermore, it must be pointed out that the specific provisions referred to by the referring court provide that it is possible for the contracting authority to require that the entity which is relied on to satisfy the conditions laid down with regard to economic and financial standing is to be jointly liable (Article 63(1), third subparagraph, of Directive 2014/24) or to require that, with regard to certain types of contracts, certain critical tasks are to be performed directly by the tenderer (Article 63(2) of that directive). Those provisions do not therefore impose specific limits on the possibility of divided reliance on the capacities of third-party undertakings and, in any event, such limits should have been expressly set out for in the call for tenders in respect of the contract at issue, which is not the case in the main proceedings.

34 In the light of the foregoing, the answer to the first question is that Articles 47 and 48 of Directive 2004/18 must be interpreted as not precluding national legislation which allows an economic operator to rely on the capacities of one or more third-party entities for the purpose of satisfying the minimum requirements for participating in a tendering procedure which are only partially satisfied by that operator.

The second question

35 By its second question, the referring court asks, in essence, whether the principle of equal treatment and the obligation of transparency are to be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and from the incorporation of provisions into those documents by the national authorities or administrative courts.

36 In that regard, it must be borne in mind, first, that the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all tenderers must be subject to the same conditions. Second, the obligation of transparency, which is its corollary, is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (see, to that effect, judgment of 6 November 2014 in *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44 and the case-law cited).

37 The Court has also held that the principles of transparency and equal treatment which govern all procedures for the award of public contracts require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates (see, to that effect, judgment of 9 February 2006 in *La Cascina and Others*, C-226/04 and C-228/04, EU:C:2006:94, paragraph 32).

38 Furthermore, it is apparent from point 17 of the section relating to 'Contract notices' in Annex VII A to Directive 2004/18, relating to information which must be included in public contract notices, that '[s]election criteria regarding the personal situation of economic operators that may lead to their

exclusion' from the procedure for the award of the contract in question must be set out in the contract notice.

39 Consequently, in accordance with the settled case-law of the Court, pursuant to Article 2 of Directive 2004/18, a contracting authority must comply strictly with the criteria which it has itself established (see, inter alia, judgment of 10 October 2013 in *Manova*, C-336/12, EU:C:2013:647, paragraph 40, and judgment of 6 November 2014 in *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraphs 42 and 43).

40 It is apparent from the file submitted to the Court that the documents relating to the procedure for the award of the contract at issue in the main proceedings did not expressly require tenderers, on pain of exclusion from that procedure, to pay a fee to the AVCP.

41 As the referring court points out, the existence of that obligation is inferred from the AVCP's broad interpretation of Law No 266/2005 and from the national administrative case-law. It states that the AVCP takes the view that failure to pay that fee results in the exclusion of the tenderer from the public procurement procedure, regardless of the type of contract which forms the subject matter of the call for tenders. That court also states that it is apparent from the national administrative case-law that an undertaking may be excluded from a public tendering procedure if it does not prove that it satisfies a condition which is not expressly required by the tendering procedure rules, if the necessity of that condition may be inferred from the 'mechanism by which mandatory provisions are automatically inserted into administrative measures'.

42 As has been pointed out in paragraph 39 of the present judgment, a contracting authority must comply strictly with the criteria which it has itself established. That consideration applies *a fortiori* where an exclusion from the procedure is concerned.

43 It must be pointed out that, although Article 27(1) of Directive 2004/18 does not require the contract documents to specify in detail all the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, those obligations, unlike the fee at issue in the case in the main proceedings, do not automatically result in exclusion from the procedure with regard to the admissibility of the tender.

44 In view of the principle of equal treatment and the obligation of transparency, which is its corollary, to which contracting authorities are subject pursuant to Article 2 of Directive 2004/18, Article 27 of that directive cannot be interpreted as meaning that it allows those contracting authorities to derogate from the strict obligation to comply with the criteria which they have themselves established.

45 However, in the case in the main proceedings, the alleged obligation to pay a fee to the AVCP can be identified only by the interaction between the 2006 Finance Law, the AVCP's decision-making practice and the judicial practice of the Italian administrative courts in applying and interpreting Law No 266/2005.

46 As the Advocate General points out, in essence, at point 65 of his Opinion, a condition governing the right to participate in a public procurement procedure which arises out of the interpretation of national law and the practice of an authority, such as that at issue in the main proceedings, would be particularly disadvantageous for tenderers established in other Member States, inasmuch as their level of knowledge of national law and the interpretation thereof and of the practice of the national authorities cannot be compared to that of national tenderers.

47 As regards the argument that CRGT had previously already provided the services forming the subject matter of the call for tenders and could therefore be aware of the existence of the fee at issue in the main proceedings, it is sufficient to state that the principle of equal treatment and the obligation of transparency, which is its corollary, would clearly not be complied with if such an operator were subject to criteria which are not established by the call for tenders and would not be applicable to new operators.

48 Furthermore, it is apparent from the order for reference that there is no possibility of rectifying non-compliance with that condition that a fee must be paid.

49 According to paragraph 46 of the judgment of the Court of 6 November 2014 in *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345), the contracting authority may not accept any rectification of omissions which, as expressly provided for in the contract documentation, must result in the exclusion of the bid. The Court stated, in paragraph 48 of that judgment, that the obligation concerned was clearly laid down in the contract documentation, on pain of exclusion.

50 However, in a situation where, as in the case in the main proceedings, a condition for participating in a procedure for the award of a contract, on pain of exclusion from that procedure, is not expressly laid down in the contract documentation and that condition can be identified only by a judicial interpretation of national law, the contracting authority may grant the excluded tenderer a sufficient period of time in order to rectify its omission.

51 In the light of all of those considerations, the answer to the second question is that the principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or administrative courts. Accordingly, the principles of equal treatment and of proportionality must be interpreted as not precluding an economic operator from being allowed to regularise its position and comply with that obligation within a period of time set by the contracting authority.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1. **Articles 47 and 48 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as not precluding national legislation which allows an economic operator to rely on the capacities of one or more third-party entities for the purpose of satisfying the minimum requirements for participating in a tendering procedure which are only partially satisfied by that operator.**

2. **The principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or administrative courts. Accordingly, the principles of equal treatment and of proportionality must be interpreted as not precluding an economic operator from being allowed to regularise its position and comply with that obligation within a period of time set by the contracting authority.**

[Signatures]

---

* Language of the case: Italian

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 21 January 2016 (1)

Case C-27/15

Pippo Pizzo and Others

v

CRGT srl

(Request for a preliminary ruling
from the Consiglio di Giustizia Amministrativa per la Regione siciliana (Italy))

(Public contracts — Directive 2004/18/EC — Participation in a tendering procedure — Whether the capacities of other undertakings may be relied upon in order to satisfy the necessary conditions — Failure to pay a fee not explicitly provided for — Exclusion of tenderer)

1. The present reference for a preliminary ruling provides the Court with a fresh opportunity of developing its case-law on procedures for the award of public contracts, in particular, its case-law on Directive 2004/18/EC. (2)

2. On the one hand, this case raises again the question whether a tenderer may rely upon the capacities of third parties in order to satisfy the conditions for participation in a procurement procedure, an issue which can relatively simply be resolved in the light of the Court's case-law.

3. On the other hand, and this is a more complex issue, the referring court asks whether it is permissible for certain conditions of admissibility governing participation in a tendering procedure not to be expressly included in the tender notice or the contract documents, but instead to be inferred from generally applicable national provisions.

4. In relation to that second issue, I shall propose to the Court a nuanced reading of its case-law on the need for the contract documents to set out explicitly all the conditions of the tender. I shall do so by relying upon the logic I consider to be inherent in the notion of a 'reasonably informed tenderer exercising ordinary care' as a criterion determining the spirit of that case-law.

I – **Legislative framework**

A – *EU law*

1. Directive 2004/18

5. Article 2 of Directive 2004/18 provides that '[c]ontracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

6. Article 47 of the directive states:

‘1. Proof of the economic operator’s economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of professional risk indemnity insurance;

(b) the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking’s overall turnover and, where appropriate, of turnover in the area covered by the contract …

2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

…’

7. According to Article 48 of Directive 2004/18:

‘1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

…

3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

…’

2. Directive 2014/24/EU (3)

8. Pursuant to Article 63 of Directive 2014/24:

‘1. With regard to criteria relating to economic and financial standing … and to criteria relating to technical and professional ability … an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. … Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

…

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

…

2. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 19(2), by a participant in that group.’

B – *National law*

1. Legislative Decree No 163 of 12 April 2006 (4)

9. Article 49 of Legislative Decree No 163 provides:

> ‘1. The tenderer, ‘acting alone or as a member of a consortium or of a group within the meaning of Article 34, in a specific tendering procedure for a public works, services or supply contract, may fulfil the economic, financial, technical and organisational conditions, in other words, obtain an SOA [SOA: Società Organismi di Attestazione, or attestation organisations] certificate …, by relying upon the capacity of another entity or upon the SOA certificate of another entity.
>
> …
>
> 6. For works contracts, the tenderer may rely upon the capacities of only one auxiliary undertaking for every qualification category. The invitation to tender may permit reliance upon the capacity of more than one auxiliary undertaking having regard to the value of the contract or the special nature of the services to be provided …’

2. Law No 266 of 23 December 2005 (5)

10. Under Article 1(67), first subparagraph, of Law No 266, ‘[t]he Supervisory Authority on Public Procurement … shall determine annually the amount of the fees payable to it by the public and private persons subject to its supervision and the fee collection procedures, including the obligation of economic operators to pay the fee as a condition for tenders to be admissible to procedures for the carrying out of public works’.

II – **Facts**

11. In November 2012, the Port Authority of Messina (Italy) launched an open tendering procedure, of EU interest, for the award of a four-year public service contract for the management of waste and residues from ships calling at ports within its territorial jurisdiction. The service had previously been run by CRGT srl (‘CRGT’).

12. The service was awarded to the temporary joint venture Pippo Pizzo and Onofaro Antonino (‘Pizzo’), after it was noted that other companies bidding for the contract, including CRGT, had not paid the Supervisory Authority on Public Procurement (Autorità di vigilanza dei contratti pubblici) (‘AVCP’) the fee provided for in Law No 266/2005 as a condition of the admissibility of their tenders; those companies were therefore excluded from the tendering procedure.

13. CRGT brought an action contesting its exclusion before the Tribunale Amministrativo Regionale Sicilia (Regional Administrative Court of Sicily, ‘the TAR’) (Catania Division, Fourth Chamber). Pizzo raised a preliminary objection, arguing that CRGT also ought to have been excluded for providing only one of the two declarations by a bank required in the invitation to tender in order to certify its economic and financial standing.

14. The TAR upheld the action brought by CRGT, holding that the latter’s exclusion from the tendering procedure was unlawful on the grounds that: a) the documents relating to the call for tenders did not provide for payment of the fee referred to in Law No 266/2005; b) that fee applies explicitly to public works contracts but not to service contracts; and c) that fee may be applied to service contracts only by means of a broad interpretation of Law No 266/2005, which, in accordance with the principle that the grounds for exclusion must be exhaustive, may not place at a disadvantage those tenderers who, through no fault of their own, believed that the fee at issue was not applicable in the circumstances.

15. In addition, the lower court dismissed the preliminary objection raised by Pizzo, declaring that CRGT might, as indeed it had, rely upon the economic and financial standing of an auxiliary undertaking with which it had concluded a contract for that purpose.

16. Pizzo lodged an appeal with the Consiglio di Giustizia Amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily); that appeal was contested by CRGT which again put forward other pleas raised at first instance that are not relevant to these proceedings.

17. In those circumstances, the Consiglio di Giustizia Amministrativa per la Regione siciliana decided to seek a preliminary ruling.

III – **The questions referred**

18. The questions in the reference for a preliminary ruling, which was received at the Court Registry on 22 January 2015, are worded as follows:

‘(1) Must Articles 47 and 48 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts be interpreted as precluding national legislation, like the Italian legislation described above, which allows divided reliance upon the capacities of other entities, on the terms set out above, in respect of services?

(2) Do the principles of EU law, and, in particular, those of protection of legitimate expectations, legal certainty and proportionality, preclude a legal rule of a Member State which permits the exclusion from a public tendering procedure of an undertaking which did not understand, because this was not expressly provided in the tender documents, that it was obliged, on pain of exclusion from that procedure, to fulfil the obligation to pay a sum in order to participate in that procedure, even though the existence of that obligation cannot be clearly deduced from the wording of the law in force in the Member State, but can nevertheless be inferred, by means of a twofold legal operation, which involves, first, interpreting extensively certain provisions of that Member State’s positive law and, then, incorporating — in accordance with the outcome of that broad interpretation — the mandatory provisions in the tendering documents?’

19. As far as the first question is concerned, the referring court takes the view that Directive 2014/24 could have fixed limits to the right to rely upon the capacities of a third party in order to meet the criteria of the invitation to tender.

20. As regards the second question, the Consiglio di Giustizia asks also whether the principles of the protection of legitimate expectations, proportionality, legal certainty and *favor participationis* should lead to the company concerned being granted a short period in which to remedy the failure to comply with the obligation to pay.

IV – **The procedure before the Court of Justice. The submissions of the parties**

21. Written observations were lodged by the Italian Government and the Commission.

A – *First question*

22. The Italian Government maintains that the admissibility of the first question raised by the referring court is arguable, for that court has not set out the factual case on which the question is based and has not, therefore, provided the Court of Justice or the parties with the tools necessary for taking a position on the issue raised.

23. The Italian Government submits that the reference to Directive 2014/24 is out of place, because that directive is not applicable to the case and in view of the fact that the period laid down for its transposition has not yet expired. In any case, the Italian Government maintains that that directive is no less favourable than Directive 2004/18 to reliance upon the capacities of third parties.

24. As to the substance, the Italian Government contends that the issue can be resolved in the light of the principles laid down in the judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, (6) which concerned a situation not, in legal terms, significantly different from that at issue in the present case.

25. The Italian Government maintains, therefore, that the rules of national law in Article 49 of Legislative Decree No 163/2006 are not incompatible with Directive 2004/18.

26. The Commission concurs with the Italian Government that the answer to the first question may be inferred from the case-law laid down in *Swm Costruzioni*. The Court has accepted that an economic operator

may, in addition to his own capacities, rely upon the capacities of one or more third parties in order to satisfy the minimum conditions required and not satisfied by him in their entirety.

27. The Commission also concurs with the Italian Government in observing that Directive 2014/24 is not applicable *ratione temporis* to this case.

28. Accordingly, the Commission asserts that Articles 47 and 48 of Directive 2004/18 must be interpreted as meaning that they do not preclude a national provision like that invoked by the referring court.

B – *Second question*

29. As regards the second question, the Italian Government does not believe that any of the principles set out in the order for reference has been infringed. The Italian Government observes that, in addition to the grounds laid down in the legislative decree itself and in the notice of invitation to tender, Article 46(1a) of Legislative Decree No 163/2006 recognises as grounds for exclusion the grounds laid down 'in other legal provisions in force'. It follows, in the Italian Government's submission, that the fact that the *lex specialis* did not mention, as a ground for exclusion, failure to pay the fee to the AVCP is not a factor justifying non-compliance by the tenderer. The tenderer must be aware of all the rules constituting the whole body of mandatory grounds for exclusion, which precisely fill any gaps in that regard in the invitation to tender.

30. The Italian Government likewise contends that tenderers may not remedy shortcomings in their bids after the period prescribed for the submission of those bids has expired, and that only corrections or amplifications made on a limited and specific basis, within the meaning of the judgment in *Manova*, (7) are permissible. The contracting authority may allow tenderers to rectify certain omissions regarding the subjective conditions for participation, but not to remedy a failure to pay a fee. Otherwise, the contracting authority would be permitting late fulfilment of a condition of admissibility had not been satisfied at the appropriate time, thereby compromising the principles of equal treatment, impartiality and transparency.

31. For the Italian Government, it is only in the case of merely formal failure to satisfy a condition (use of a different method of payment from that legally required or failure to certify that payment was made at the time and in the manner prescribed) that the tenderer could be given the opportunity of certifying that he had in fact satisfied the condition concerned.

32. Accordingly, the Italian Government proposes, in answer to the second question, that the principles invoked by the referring court do not preclude national legislation that permits the exclusion of a tenderer who has failed to fulfil an obligation which, while not expressly laid down in law for the type of public contract at issue, can be inferred from the settled interpretation of certain legal provisions by the administrative authorities of the State concerned.

33. The Commission, for its part, submits that the second question is specifically concerned with the interpretation of the principle of equal treatment and the obligation of transparency. In the Commission's submission, those principles mean that the contracting authority must state clearly the conditions of the tendering procedure, so that a reasonably informed tenderer exercising ordinary care may be aware of those conditions. The Commission further states that Directive 2004/18 provides that the grounds for exclusion must be set out in the contract notice.

34. The Commission maintains that those requirements are not satisfied when an obligation (in the present case, the payment of a fee to an administrative authority), in respect of which the penalty for non-compliance is exclusion, is not explicitly provided for in the tender documents and cannot be inferred from national statutory law, but can be deduced only from a broad interpretation of that law making it possible to fill the lacuna that would otherwise appear in those documents. The Commission contends that that is a situation particularly prejudicial not only to national economic operators but also to operators established in other Member States, who are thus at risk of finding themselves at a disadvantage.

35. The Commission further submits that the principles of equal treatment and proportionality must be interpreted as not precluding a contracting authority from giving an economic operator the opportunity of fulfilling, within a period fixed by the former, the obligation to pay at issue.

V – **Assessment**

A – *First question*

36. Although the Italian Government casts doubt on the admissibility of the question, it does not go so far as to propose that the question should be ruled inadmissible. Certainly, there are no grounds for dismissing at the outset the question referred by the Consiglio di Giustizia Amministrativa per la Regione siciliana concerning the compatibility with Articles 47 and 48 of Directive 2004/18 of the national provision which, in the context of a procedure for the award of a public services contract, permits divided reliance by an economic operator upon the capacities of another operator in order to satisfy the criteria for participation in the procurement procedure.

37. However, I agree with the Italian Government and the Commission regarding the application to the instant case of the case-law of the Court in *Smw Costruzzioni*, because the two cases are, as far as the legal details at issue are concerned, essentially identical.

38. In *Smw Costruzzioni*, the Court observed that Articles 47(2) and 48(3) of Directive 2004/18 'do not prohibit, in principle, candidates or tenderers from relying on the capacities of more than one third-party entity in order to prove that they meet a minimum capacity level. *A fortiori*, those provisions do not lay down any general prohibition regarding a candidate or tenderer's reliance on the capacities of one or more third-party entities in addition to its own capacities in order to fulfil the criteria set by a contracting authority'. (8)

39. According to the Court, that possibility is not unconditional, but rather is dependent on 'the candidate or tenderer relying on the capacities of one or more other entities [proving] to [the contracting authority] that it will actually have at its disposal the resources of those entities necessary for the [performance] of the contract'. (9)

40. Admittedly, the Court found that it was true that there could be 'works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate', (10) circumstances in which it is possible to '[require] that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44(2) of Directive 2004/18, as long as that requirement is related and proportionate to the subject matter of the contract at issue.' (11) However, the Court held that 'those circumstances constitute an exception' (12) and observed that, consequently, 'Directive 2004/18 precludes that requirement being made a general rule under national law, which is the effect of a provision such as Article 49(6) of Legislative Decree No 163/2006'. (13)

41. In the light of the foregoing, the question referred by the Consiglio di Giustizia Amministrativa per la Regione siciliana can be answered in the same terms as the ruling of the Court in *Smw Costruzioni*. It must also be observed, as the Commission does, (14) that in this case the exceptional circumstances which, in accordance with paragraph 35 of that judgment, make it possible to '[require] that the minimum capacity level concerned be achieved by a single economic operator' are not present in this case, since the capacity at issue is of a purely economic nature.

42. The referring court argues that, beyond what may be inferred from Directive 2004/18, Directive 2014/24 could have imposed stricter limits on the right to rely on the capacities of third parties to fulfil the award criteria. For their part, the Italian Government and the Commission agree that the latter directive is not applicable to the situation at issue. I fully concur with that view.

43. The referring court admits that the period prescribed for transposition of Directive 2014/24 has not yet expired, sufficient reason to set aside the application of that directive in this case, but the referring court invokes 'the obligation for national courts to select and prefer, among all the possible interpretations of the domestic law, only an interpretation in conformity with the EU rules to be transposed'. (15)

44. The Court's case-law obliges Member States to 'refrain from taking any measures liable seriously to compromise the result prescribed' by the directive during the period prescribed for transposition, (16) but does not go so far as to require national courts to interpret their own domestic law in terms that fully comply with a directive for which the period fixed for transposition has not yet ended.

45. Moreover, the assertion of the Consiglio di Giustizia Amministrativa per la Regione siciliana, to the effect that Directive 2014/24 is more restrictive than Directive 2004/18 as regards the right to rely upon the capacities of third parties, is debatable; however, that is a subject of which I do not believe any substantive clarification is necessary, given its irrelevance to the case.

46. Accordingly, it is my view that Articles 47 and 48 of Directive 2004/18 do not preclude national legislation that, in the circumstances of the case at issue in the main proceedings, permits divided reliance upon the capacities of other entities in order to fulfil the selection criteria.

B – *Second question*

47. To my mind, the second question from the referring court is trickier. The different positions adopted by the Italian Government and the Commission bear testimony to the difficulty of the question. Whereas the Italian Government maintains that the excluded operator could not have been unaware of the applicability of the disputed condition (prior payment of the fee to the AVCP), the Commission submits that that condition could be applied only if it were expressly included in the tender documents or could be clearly inferred from the statutory law in force.

48. My view is that, in fact, those two positions are closer than might be imagined. In that connection, the Italian Government has focused on the criterion of the requirement of knowledge of the disputed condition, while the Commission has focused on the criterion of publication of that condition. In short, the two perspectives are complementary, for publication of the condition leads to knowledge of the condition and that is feasible (and may be required) only if the condition has been properly published.

49. The case-law of the Court insists that it is necessary that ‘all the conditions and detailed rules of the award procedure [should] be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question’. (17)

50. The obligation of ‘clear, precise and unequivocal’ publication is imposed, first, by the principle of equal treatment, which ‘requires tenderers to be afforded equality of opportunity when formulating their bids, which therefore implies that the bids of all tenderers must be subject to the same conditions’, (18) and, second, by the principle of transparency, the aim of which is ‘to preclude any risk of favouritism or arbitrariness on the part of the contracting authority’. (19) Article 2 of Directive 2004/18 refers to the principle of equal treatment and the obligation to act transparently as ‘[p]rinciples of awarding contracts’ that must be observed by contracting authorities.

51. There is no doubt, therefore, that tenderers must be in a position to be informed of all the conditions of the tender, a requirement that satisfies the basic principles of equality and transparency. However, greater doubt surrounds the extent to which *all* the requirements for participation in the tendering procedure must be explicitly stated in the contract notice or specifications, or whether, on the other hand, certain general requirements may be deemed to be well known, even if they are not explicitly set out in those documents.

52. In my opinion, given the aim of the obligation to publish the conditions, which is to ensure that the content and significance of those conditions are understood by ‘all reasonably informed tenderers exercising ordinary care’, it would be illogical for all contracting authorities to be obliged also to specify those conditions the fulfilment of which is required by generally applicable legislative provisions of which a reasonably informed tenderer exercising ordinary care cannot be unaware. I am thinking, for example, of the basic conditions which, in the context of civil and commercial law, affect the legal capacity of individuals and companies, conditions of which no economic operator may be ignorant or require the explicit, detailed inclusion in documents relating to a public procurement procedure.

53. It is true that uncertainty may arise in relation to other less ‘obvious’, or, to put it another way, less ‘logical’ or ‘natural’, conditions which, never the less, reasonably informed tenderers exercising minimum care are required to be aware of. To my mind, the levels of care and information that may be reasonably required of a tenderer constitute the decisive criteria for the purposes of a proper understanding of the intended spirit of Article 2 of Directive 2004/18 and the way the Court interprets the principles of equality and transparency in that context. (20)

54. The Italian Government argues in its written observations (21) that Article 46(1a) of Legislative Decree No 163/2006 defines as exclusion clauses, in addition to those provided for in the legislative decree itself and in the contract notice, those clauses laid down by ‘other legal provisions in force’. Those ‘other legal provisions’ may include provisions relating to tax obligations common to all tenderers, in respect of which tenderers must make payment or risk exclusion from the tendering procedure.

55. Article 27(1) of Directive 2004/18 does not specifically require tender specifications to specify in detail all ‘the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State’. Tenderers or candidates continue to be bound by those obligations — failure to fulfil which may lead to their exclusion — even if the obligations are not set out in the tender documents.

56. It is for Italian law, as interpreted by the Italian courts, to determine whether payment of the fee to the AVCP may, on account of its characteristics, be classified as an obligation relating to taxes in the broad sense. It is likewise for the Italian courts (confirming or rejecting the interpretation of the public authority to which payment of the fee must be made) to determine the subjective and objective scopes of Articles 65 and 67 of Law No 266/2005, governing the fee failure to pay which led to the exclusion of CRGT from the tendering procedure.

57. The Court ought not to take part in the debate — which it would regard as purely an internal matter — concerning whether the Italian administrative and judicial authorities have given a broader, or less broad, interpretation of the provisions of Law No 266/2005. If, according to what may be deduced from the order for reference, the AVCP has consistently interpreted Law No 266/2005 as meaning that the requirement to pay the fee is applicable to service contracts, and that view has been endorsed by the Consiglio di Stato as the court of last instance in matters of national law, that interpretation must be respected.

58. Those same considerations are applicable to the exclusionary effect of failure to pay the fee. Again — according to the information available in the case-file — both the AVCP and the courts which have supported its view have held that failure to fulfil the obligation to pay that fee, laid down in the mandatory provision but not in the tender specifications, leads unavoidably to exclusion from the tendering procedure.

59. All the indications are that the interpretation of the legality underpinning the application of Articles 65 and 67 of Law No 266/2005 to service contracts is derived from a statement of the law laid down by the competent administrative authority, the AVCP, at least as long ago as 2008. That interpretation appears to have been endorsed by the highest national administrative court in a line of case-law beginning on a date which has not been specified in these proceedings. In any case, it might logically be concluded that the case-law concerned is regularly applied by the AVCP in all procurement procedures for the award of service contracts (in fact, the Italian Government refers to a number of decisions adopted in consecutive years by the AVCP in that regard). Finally, it must be presumed that the excluded economic operator in the main proceedings (CRGT), which previously ran the service covered by the invitation to tender, knew or was in a position to have known about it.

60. Subject to those reservations, the exclusion clause is therefore one which, if not explicitly included in the contract notice or tender specifications, is formulated as a result of the settled, judicially authorised interpretation of a legislative provision. The interpretation adopted by the AVCP and endorsed by the courts favours the inadmissibility of bids submitted without payment of the fee.

61. I accept that, theoretically, the condition concerned could be categorised as one that is difficult to identify, meaning that, in principle, its application is not compatible with the relevant case-law of the Court. However, I believe that it may be regarded differently if we confine ourselves to the criterion of the reasonably informed tenderer exercising minimum care, although, as I shall explain below, the Court may perhaps not be in the best position to observe this.

62. Only the referring court is in a position to determine whether, in the specific circumstances of the case, the tenderer excluded could have been unaware of the interpretation of Law No 266/2005 or the practice followed in the type of tendering procedure concerned, consolidated by settled administrative application and pursuant to which the fee must also be paid to the AVCP in relation to service contracts. For the purposes of the referring court’s determination, it may be helpful to ascertain whether the excluded tenderer has

participated in tendering procedures with the same features, in which the clause at issue was considered to be applicable on the basis of the interpretation of Law No 266/2005 adopted by the AVCP.

63. In short, it is for the referring court to determine whether undertakings tendering for public contracts are sufficiently familiar with the statement of the law adopted by the AVCP and the case-law of the Consiglio di Stato to suggest that a reasonably informed tenderer exercising normal care could not have been ignorant of it.

64. That assertion leads to another, which I believe is relevant from the point of view of the principle of equal treatment. That is, if it were to be concluded that, in practice, tenderers in general are aware of the interpretation of the law adopted by the AVCP and, therefore, duly pay the disputed fee, it would constitute discrimination to waive compliance with that obligation in relation to a particular tenderer.

65. Admittedly, as the Commission has pointed out, (22) the application of a clause of the kind at issue in this case may be particularly disadvantageous for tenderers established in other Member States, whose level of knowledge of national law and the valid interpretation thereof may not be comparable to that of national tenderers. However, the criterion of the reasonably informed tenderer exercising ordinary care, which is crucial to the solution I propose, makes it possible to overcome that difficulty, for the level of information and care must in each case be adapted to the features of the tenderer concerned, so that, in the instant case, ignorance that would be inexcusable in CRGT could perhaps be excused in a foreign tenderer.

66. All that remains is the uncertainty whether failure to fulfil the obligation to pay the fee laid down in Law No 266/2005 may be remedied. In that connection, I, like the Commission, take the view that, if the referring court accepts that a reasonably informed tenderer exercising ordinary care was unaware of the existence of that obligation, the contracting authority must grant the tenderer a sufficient period in which to remedy the defect. That is a consequence which follows, *a contrario*, from the case-law of the Court, according to which a contracting authority is not required to accept ‘any rectification of omissions which, as expressly provided for in the contract documentation, must result in the exclusion of the bid.’ (23) That would be the case of an infringement of an obligation that cannot be inferred from that which is ‘expressly provided for in the contract documentation’.

67. In summary, EU law does not preclude national legislation that permits the exclusion from a public procurement procedure of a tenderer having failed to fulfil an obligation of a tax nature which, even though it is not expressly set out in the contract notice or the tender specifications, is imposed as a result of the settled, judicially sanctioned, administrative interpretation of the applicable national legislation, provided that that obligation is not one of which a reasonably informed tenderer exercising ordinary care could have been unaware, a matter which it is for the national court to determine. If it is established that knowledge of that obligation may not be required, the contracting authority must grant the excluded tenderer a sufficient period in which to remedy its omission.

VI – **Conclusion**

68. In the light of the considerations set out, I propose that the Court should reply as follows to the questions referred for a preliminary ruling:

(1) Articles 47 and 48 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as not precluding national legislation that, in the circumstances of the case at issue in the main proceedings, permits divided reliance upon the capacities of other entities, on the terms set out above, in the sphere of services.

(2) The principles of EU law, in particular the principles of equal treatment and transparency, do not preclude national legislation that permits the exclusion from a public procurement procedure of a tenderer having failed to fulfil an obligation of a tax nature which, even though it is not expressly set out in the contract notice or the tender specifications, is imposed as a result of the settled, judicially sanctioned, administrative interpretation of the applicable national legislation, provided that that obligation is not one of which a reasonably informed tenderer exercising ordinary care could have been unaware, a matter which it is for the national court to determine. If it is established that knowledge of that obligation may not be required,

the contracting authority must grant the excluded tenderer a sufficient period in which to remedy its omission.

---

1 Original language: Spanish.

---

2 Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

4 Code on public works contracts, public service contracts and public supply contracts in implementation of Directives 2004/17/EC and 2004/18/EC (Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE) (GURI No 100 of 2 May 2006, Ordinary Supplement No 107), as amended by Legislative Decree No 152 of 11 September 2008 (GURI No 231 of 2 October 2008, Ordinary Supplement No 227); 'Legislative Decree No 163/2006'.

---

5 2006 Finance Law (Legge finanziaria 2006; GURI No 302 of 29 December 2005, Ordinary Supplement No 211). 'Law No 266/2005'.

---

6 Judgment in *Swm Costruzioni2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646; '*Swm Costruzioni*'.

---

7 Judgment in *Manova* (C-336/12, EU:C:2013:647, paragraph 32).

---

8 Judgment in *Smw Costruzzioni* (C-94/12, EU:C:2013:646, paragraph 30).

---

9 Judgment in *Smw Costruzzioni* (C-94/12, EU:C:2013:646, paragraph 33).

---

10 Judgment in *Smw Costruzzioni* (C-94/12, EU:C:2013:646, paragraph 35).

---

11 Loc. cit.

---

12 Judgment in *Smw Costruzzioni* (C-94/12, EU:C:2013:646, paragraph 36).

---

13 Loc. cit.

---

14 Paragraph 30 of its written observations.

---

15 Point C1 of the order for reference.

---

16 Judgment in *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628, paragraph 45).

---

17 Judgment in *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345, paragraph 44), citing the judgment in *Commission* v *CAS Succhi di Frutta* (C-496/99 P, EU:C:2004:236, paragraphs 108 to 111).

---

18 Loc. cit.

---

19 Loc. cit.

---

20 In addition to the judgments in *Cartiera del'Adda* (C-42/13, EU:C:2014:2345), and *Commission* v *CAS Succhi di Frutta* (C-496/99 P, EU:C:2004:236), reference should also be made to, inter alia, the judgments in *SIAC Construction* (C-19/00, EU:C:2001:553); *La Cascina* (C-226/04 and C-228/04, EU:C:2006:94); *Manova* (C-336/12, EU:C:13:647); and *eVigilo* (C-538/13, EU:C:2015:166).

---

21 Point 66.

---

22 Point 38, *in fine*, of its written observations.

---

23 Judgment in *Cartiera del'Adda* (C-42/13, EU:C:2014:2345, paragraph 46).

JUDGMENT OF THE COURT (Fourth Chamber)

14 July 2016 (*)

(Reference for a preliminary ruling — Public supply contracts — Directive 2004/18/EC — Article 53(2) — Award criteria — Most economically advantageous tender — Method of evaluation — Weighting rules — Obligation for the contracting authority to specify in the call for tenders the weighting of the award criteria — Scope of the obligation)

In Case C-6/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Belgium), made by decision of 6 January 2015, received at the Court on 12 January 2015, in the proceedings

TNS Dimarso NV

v

Vlaams Gewest,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Lycourgos, E. Juhász (Rapporteur), C. Vajda and K. Jürimäe, Judges,

Advocate General: P. Mengozzi,

Registrar: I. Illéssy, administrator,

having regard to the written procedure and further to the hearing on 13 January 2016,

after considering the observations submitted on behalf of:

– TNS Dimarso NV, by P. Flamey, G. Verhelst and A. Lippens, advocaaten,

– the Belgian Government, by J.-C. Halleux, N. Zimmer and C. Pochet, acting as Agents, and R. Vander Hulst, D. D'Hooghe and N. Kiekens, advocaten,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

– the European Commission, by E. Manhaeve and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 March 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 53(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), read in the light of the principle of equal treatment of tenderers and of the ensuing obligation of transparency.

2 That request was made in the context of a dispute between TNS Dimarso NV (‘Dimarso’) and the Vlaams Gewest (Flemish Region) concerning the lawfulness of the method used to evaluate bids submitted by tenderers in a procedure for the award of a public service contract organised by the Flemish Region.

Legal context

EU law

3 Recital 46 of Directive 2004/18 states:

‘Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: “the lowest price” and “the most economically advantageous tender”.

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting authorities may derogate from indicating the weighting of the criteria for the award in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.

Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.

…’

4 Article 2 of Directive 2004/18 provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

5 Article 53 of that directive, entitled ‘Contract award criteria’, provides:

‘1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion;

(b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents

or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.'

Belgian law

6 Article 16 of the Law of 24 December 1993 on public procurement and certain contracts for works, supplies and services, in the version in force at the material time, provides:

'In a restricted or public call for tenders, the contract must be awarded to the tenderer which submitted the lawful tender presenting the best value for money, taking into account the award criteria which have to be set out in the special tender specifications or, if appropriate, in the contract notice. The contract must be awarded to the tenderer who submitted the most advantageous lawful tender, taking account of the award criteria set out in the tender specifications or, if appropriate, in the contract notice. The award criteria must relate to the subject matter of the contract, for example, the quality of the goods or services, price, technical merit, aesthetic and functional characteristics, environmental characteristics, social and ethical considerations, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion. …'

7 Article 115 of the Royal Decree of 8 January 1996 on public works, supply and service contracts and on public works concessions, in the version in force at the material time, provides:

'The contracting authority shall choose the lawful tender which it deems to present the best value for money, on the basis of various criteria depending on the contract. … Without prejudice to the laws, regulations or administrative provisions on the remuneration of certain services, the contracting authority shall set out in the special tender specifications and, where necessary, in the contract notice, all the award criteria, if possible in descending order of the importance attributed to them, which shall in that case be made clear in the special tender specifications. Otherwise, the award criteria shall be of equal value.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 By a notice published in the *Official Journal of the European Union* of 31 January 2012, the Flemish Region launched a tendering procedure for the conclusion of a service contract, entitled 'Woonsurvey 2012: survey naar de woning en de woonconsument in Vlaanderen', for the performance of a large-scale survey of housing and housing consumers in Flanders (Belgium). The estimated value of that contract was EUR 1 400 000, including value added tax (VAT).

9 The call for tenders relating to that procedure referred to the following two award criteria:

'1 Quality of the tender (50/100)

Quality of the preparation, organisation and execution of the work on the ground, and of the encryption and initial data processing. The services proposed must be described in as much detail as possible. It must be clear from the tender that the tenderer is capable of taking on the whole contract (minimum 7 000 samples / maximum 10 000 samples) within the prescribed 12-month delivery deadline.

2 Price (50/100)

Cost of delivering the contract in relation to the basic sample (7 000 samples) and cost per additional batch of 500 addresses supplied (amounts inclusive of VAT).'

10 Four tenderers submitted tenders, which, according to the report on the qualitative selection, met the minimum requirements in regard to technical competence. The method used to evaluate the tenders was set out as follows in the award report of 23 March 2012:

‘The committee then evaluated the tenders.

The four tenders were evaluated and compared with each other on the basis of the criteria set out above. First, the tenders were examined and evaluated on the basis of the “quality” criterion. For this, each tender was unanimously assigned a given score (high — satisfactory — low). Then, the price criterion was applied.

On the basis of those scores, a final ranking was then established.’

11 It is apparent from the award report that, as regards the first criterion, namely the quality of the tenders, Dimarso and two other tenderers were awarded a ‘high’ score, while the fourth tenderer was assessed as ‘low’. With respect to the second criterion, namely price, the award report contains the following indications:

‘Overview:

The following overview replicates prices for, on the one hand, the implementation of the basic contract (7 000 samples) and, on the other, the carrying out of interviews in batches of 500 (price including VAT):

Tender	Criterion 2(a) — Price (including VAT) base sample (N= 7 000)	Criterion 2(b) — Price (including VAT) batch of 500 additional samples
[Dimarso]	[EUR] 987 360.00	[EUR] 69 575.00
Ipsos Belgium NV	[EUR] 913 570.00	[EUR] 55 457.00
New Information & Data NV	[EUR] 842 607.70	[EUR] 53 240.00
Significant GfK NV	[EUR] 975 520.15	[EUR] 57 765.40

12 Pursuant to those two criteria, the final ranking of the tenderers in the award report was as follows:

Ranking	Tender	Criterion 1	Criterion 2(a)	Criterion 2(b)
1	Ipsos Belgium NV	high	[EUR] 913,570.00	[EUR] 55,457.00
2	Significant GfK NV	high	[EUR] 975 520.15	[EUR] 57 765.40
3	[Dimarso]	high	[EUR] 987 360.00	[EUR] 69 575.00
4	New Information & Data NV	low	[EUR] 842 607.70	[EUR] 53 240.00

13 By decision of the Flemish Region of 11 April 2012, the contract was awarded, by the Flemish Minister for Energy, Housing, Urban Policy and the Social Economy, to Ipsos Belgium. Dimarso’s

action, brought on 14 June 2012, seeks the annulment of that decision. According to the applicant, the contested decision appears to have assessed the tenders on the basis of the weighting ‘high — satisfactory — low’ not mentioned in the call for tenders with respect to the criterion of the quality of the tenders, and on the basis of the ‘price’ components stated with respect to the price criterion, without conducting a sufficient examination, comparison and final assessment of the tenders taking account of the award criteria as set out in the tender specification, including the weighting of ‘50/100’ for each of the award criteria as specified in the tender specifications.

14 The Raad van State (Council of State, Belgium) notes that both recital 46 and Article 53(2) of Directive 2004/18 refer only to the ‘criteria’ and the ‘relative weighting’ given to each of them, and that the method of evaluation and weighting rules are not expressly mentioned anywhere. The referring court states that the choice of method of evaluation is not neutral and may, on the contrary, play a decisive role in the outcome of the evaluation of the tenders on the basis of the award criteria. It refers, in that regard, to the example of the price award criterion, under which the contracting authority may opt, for example, either to apply the principle of proportionality, or to award the maximum score to the lowest-priced tender or a zero score to the highest-priced tender and apply a linear interpolation to intermediate tenders, or to look most favourably on the tender with the median price.

15 According to the referring court, in the judgment of 24 January 2008 in *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraphs 38, 44 and 45), the Court held that Article 36(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which provision is essentially similar to Article 53(2) of Directive 2004/18, precludes the contracting authority from setting, subsequently to the publication of the tender specifications or the contract notice, the weighting rules and factors and sub-criteria for the award criteria set out in either of those documents, where those weighting rules and factors and sub-criteria were not previously notified to the tenderers. The Court thus held that it is the ex post determination not only of the ‘weighting factors’, but also of the ‘sub-criteria’ which is incompatible with EU law.

16 The Raad van State (Council of State) observes that the question in the present case is whether the Court, by that additional reference to ‘sub-criteria’, was also referring to the manner in which the award criteria were assessed, which would be akin to weighting rules. Consequently, it is not easy to dismiss the argument that the Court, by using the term ‘sub-criteria’, was also referring to the method of evaluation. However, it is not clear that it follows from the judgment of 24 January 2008 in *Lianakis and Others* (C-532/06, EU:C:2008:40) that the assessment method itself should also be notified to the tenderers, and still less that that method should always be established in advance. In any event, it is possible to conclude that the question which was raised in the case giving rise to that judgment did not specifically concern the establishment a posteriori of a method of evaluation and that therefore it did not have the same scope as the question that arises in the present case.

17 According to the referring court, the Court did not explicitly address that point in its judgment of 21 July 2011 in *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, not published, EU:C:2011:512), in which, referring to the judgment of 24 January 2008 in *Lianakis and Others* (C-532/06, EU:C:2008:40), the Court stressed that the lawfulness of the use of sub-criteria and their corresponding weighting should always be considered in the light of the principle of equal treatment and the consequent obligation of transparency. Accordingly, in the referring court’s opinion, those judgments do not provide an answer, or at least no decisive answer, to the question which arises in the case in the main proceedings, namely whether the method of evaluation of the tenders, namely the actual method which will be used by the contracting authority to assess those tenders, must also be notified in advance to the tenderers.

18 In the light of those considerations, the Raad van State (Council of State) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘Must Article 53(2) of Directive 2004/18 …, both in isolation and in conjunction with the scope of the principles laid down by European law concerning equality and transparency in the field of public procurement, be interpreted as meaning that, if the contract is awarded to the tenderer who submits the most economically advantageous tender from the point of view of the contracting authority, the contracting authority is always required to establish in advance, and indicate in the contract notice or

contract documents, the method of assessment or the weighting rules, irrespective of their scope, predictability or commonness, in the light of which the tenders will be assessed in accordance with the award criteria or sub-criteria,

or,

if no such general obligation exists, that there are circumstances, such as, inter alia, the scope, unpredictability or uncommonness of these weighting rules, in which this obligation does apply?'

Consideration of the question referred

19 By its question, the referring court asks, in essence, whether Article 53(2) of Directive 2004/18, read in the light of the principle of equal treatment and of the consequent obligation of transparency, must be interpreted as meaning that, in the case of a public service contract to be awarded pursuant to the criterion of the most economically advantageous tender in the opinion of the contracting authority, that authority is always required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation or the weighting rules on the basis of which tenders will be assessed in the light of the award criteria published in those documents or, where no such general obligation exists, if the specific circumstances of the relevant contract may impose such an obligation.

20 In order to answer that question, it should be noted that where the contracting authority decides to award a contract to the most economically advantageous tender, under Article 53(2) of Directive 2004/18, it must specify in the contract notice or the tender specification the relative weighting it gives to each of the award criteria chosen in order to determine the most economically advantageous tender. That weighting may be expressed by providing for a range with an appropriate maximum spread. Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or tender specifications or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.

21 As stated in recital 46 of Directive 2004/18, the purpose of those requirements is to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. In addition, they reflect the duty of the contracting authorities under Article 2 of the directive to treat economic operators equally and non-discriminatorily and to act in a transparent way.

22 According to settled case-law, the principle of equal treatment and the obligation of transparency entail, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (see, to that effect, judgments of 24 November 2005 in *ATI EAC e Viaggi di Maio and Others*, C-331/04, EU:C:2005:718, paragraph 22, and 24 May 2016 in *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 37 and the case-law cited).

23 Thus, the Court has held that the subject matter of each contract and the criteria governing its award must be clearly defined from the beginning of the award procedure (judgment of 10 May 2012 in *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 56) and that a contracting authority cannot apply, by way of award criteria, sub-criteria which it has not previously brought to the tenderers' attention (judgment of 21 July 2011 in *Evropaïki Dynamiki* v *EMSA*, C-252/10 P, not published, EU:C:2011:512, paragraph 31). Similarly, the contracting authority must interpret the award criteria in the same way throughout the procedure (judgment of 18 October 2001 in *SIAC Construction*, C-19/00, EU:C:2001:553, paragraph 43 and the case-law cited).

24 Those requirements apply, in principle, mutatis mutandis to contracting authorities' obligation to indicate, in the contract notice or the tender specifications, the 'relative weighting' of each of the award criteria. Thus, the Court has held that a contracting authority may not, in principle, apply weighting rules which it has not previously brought to the tenderers' attention (see, to that effect, judgment of 24 January 2008 in *Lianakis and Others*, C-532/06, EU:C:2008:40, paragraphs 38 and 42).

25 In particular, the relative weighting of each of the award criteria must, subject to the third subparagraph of Article 53(2) of Directive 2004/18, be clearly defined from the beginning of the award procedure, thus enabling tenderers to establish objectively the actual importance given to an award criterion relative to another during their subsequent evaluation by the contracting authority. Similarly, the relative weighting of each of the award criteria cannot be changed throughout the procedure.

26 Nonetheless, the Court has accepted that it is possible for a contracting authority to determine, after expiry of the time limit for submitting tenders, weighting factors for the sub-criteria which correspond in essence to the criteria previously brought to the tenderers' attention, provided that three conditions are met, namely that that subsequent determination, first, does not alter the criteria for the award of the contract set out in the tender specifications or contract notice; secondly, does not contain elements which, if they had been known at the time the tenders were prepared, could have affected their preparation; and, thirdly, was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers (see judgment of 21 July 2011 in *Evropaïki Dynamiki* v *EMSA,* C-252/10 P, not published, EU:C:2011:512, paragraph 33 and the case-law cited).

27 However, neither Article 53(2) of Directive 2004/18 nor any other provision thereof lays down an obligation on the contracting authority to bring to the attention of potential tenderers, by publication in the contract notice or in the tender specifications, the method of evaluation applied by the contracting authority in order to effectively evaluate and assess the tenders in the light of the award criteria of the contract and of their relative weighting established in advance in the documentation relating to the contract in question.

28 Nor is such a general obligation apparent from the case-law of the Court.

29 The Court has held that an evaluation committee must be able to have some leeway in carrying out its task and, thus, it may, without amending the contract award criteria set out in the tender specifications or the contract notice, structure its own work of examining and analysing the submitted tenders (see judgment of 21 July 2011 in *Evropaïki Dynamiki* v *EMSA*, C-252/10 P, not published, EU:C:2011:512, paragraph 35).

30 That leeway is also justified by practical considerations. The contracting authority must be able to adapt the method of evaluation that it will apply in order to assess and rank the tenders in accordance with the circumstances of the case.

31 In accordance with the principles governing the award of contracts provided for in Article 2 of Directive 2004/18 and in order to avoid any risk of favouritism, the method of evaluation applied by the contracting authority in order to specifically evaluate and rank the tenders cannot, in principle, be determined after the opening of the tenders by the contracting authority. However, in the event that the determination of that method is not possible for demonstrable reasons before the opening of the tenders, as noted by the Belgian Government, the contracting authority cannot be criticised for having established it only after that authority, or its evaluation committee, reviewed the content of the tenders.

32 In any event, pursuant to the principles governing the award of contracts and what has been found in paragraphs 24 and 25 of the present judgment, the determination by the contracting authority of the method of evaluation after the publication of the contract notice or the tender specifications cannot have the effect of altering the award criteria or their relative weighting.

33 In the present case, the question arises whether the award procedure at issue complied with the obligations under Article 53(2) of Directive 2004/18, given that, on the one hand, the contracting authority only indicated, in the call for tenders, two award criteria, namely quality and price, with the indication '(50/100)' in respect of each criteria and that, on the other, the evaluation committee used a scale ranging from 'high' to 'low' through 'satisfactory' for the evaluation of the criterion of the quality of the tenders without a scale for the price award criterion.

34 In that regard, it should be noted that the two '(50/100)' indications mean, according to the statements of the referring court, that the two award criteria are of equal importance.

35 It appears that that procedure did not make it possible to reflect, when ranking the tenderers in order to identify the most economically advantageous tender, differences in the quality of their tenders relative to their price, while taking account of the relative weighting of the award criteria resulting from the indication '(50/100)'. In particular, it appears that that procedure was capable of affecting the price criterion by giving it decisive weight relative to the tenders ranked in the scale of quality referred to in paragraph 33 of the present judgment. It is for the referring court to ascertain whether the relative weighting of each of the award criteria published in the contract notice was in fact complied with by the contracting authority during the evaluation of the tenders.

36 While the contracting authority may use a scale for the evaluation of one of the award criteria without it being published in the call for tenders or the tender specifications, that scale may not, however, as was noted in paragraph 32 of the present judgment, have the effect of altering the relative weighting of the award criteria published in those documents.

37 Consequently, in the light of all the foregoing considerations, the answer to the question referred for a preliminary ruling is that Article 53(2) of Directive 2004/18, read in the light of the principle of equal treatment and of the consequent obligation of transparency, must be interpreted as meaning that, in the case of a public service contract to be awarded pursuant to the criterion of the most economically advantageous tender in the opinion of the contracting authority, that authority is not required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation used by the contracting authority in order to specifically evaluate and rank the tenders. However, that method may not have the effect of altering the award criteria and their relative weighting.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 53(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read in the light of the principle of equal treatment and of the consequent obligation of transparency, must be interpreted as meaning that, in the case of a public service contract to be awarded pursuant to the criterion of the most economically advantageous tender in the opinion of the contracting authority, that authority is not required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation used by the contracting authority in order to specifically evaluate and rank the tenders. However, that method may not have the effect of altering the award criteria and their relative weighting.

[Signatures]

---

* Language of the case: Dutch.

C00062015IVENL_Cnc_Mess_Fr.xmlTRA-DT-FR-CONCL-C-0006-2015-201601094-01_00.xmlCNCRPLitige0DEFPROVISIONAL TEXT OF 03/03/2016ÉDITION PROVISOIRE DU 05/01/20161Texte pour publication00-0Document301P1C:\Users\vk\AppData\Local\Temp\canevas\Litige.xml2/29/2016False0CNC§108;pos=43644:lng=EN^CONVERSION^blackma@TRA-DOC-EN-CONCL-C-0006-2015-201601094-06_90Doc2XML_2003_TRAD_SUIVI2C:\Documents and Settings\gti_prod\Application Data\Doc2XML\PR_Doc2XML_2003_TRAD_SUIVI2.xmlO:\GTiWebTools\Automates\Suivi_II\conversion\doc2xml_trad\In\OFFICIALNormalIRECFalseFalse()Doc SV2_PUBC:\Documents and Settings\gti_prod\Application Data\Doc2XML\PR_Doc2XML_2003_SV2_PUB.xmlP:\GTiWebTools\Automates\Suivi_II\conversion\doc2xml_pub\In\OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 10 March 2016 (2)

Case C-6/15

TNS Dimarso NV

v

Vlaams Gewest

(Request for a preliminary ruling from the Raad van State van België (Belgian Council of State))

(Reference for a preliminary ruling — Directive 2004/18/EC — Article 53 — Criteria for the award of contracts — Tenderers — Equal treatment — Most economically advantageous tender — Evaluation of tenders)

I – Introduction

1. By the present reference for a preliminary ruling, the Raad van State van België (Belgian Council of State) seeks, in essence, to ascertain whether Article 53(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, (3) read in the light of the principles of equal treatment and transparency, requires that a contracting authority should always, or, if not, in certain circumstances, make known in advance, in the contract notice or the contract documents, the method of evaluation or weighting rules used to assess tenderers' bids.

2. That request was made in the context of a dispute between TNS Dimarso NV ('Dimarso') and Vlaams Gewest (Flemish Government Housing Agency, 'the Housing Agency') concerning the lawfulness of the method used to evaluate bids submitted by tenderers in a procedure for the award of a public service contract organised by the Housing Agency.

3. In summary, it is clear from the order for reference that, through a call for tenders published in the *Official Journal of the European Union* of 31 January 2012, the Housing Agency launched a procedure for the award of a service contract for the performance of a large-scale survey of housing and housing consumers in Flanders. The estimated value of that contract was EUR 1 400 000, including VAT.

4. The contract documents relating to that procedure referred to the following two award criteria:

'1 Quality of the tender (50/100)

Quality of the preparation, organisation and execution of the work on the ground, and of the encryption and initial data processing. The services proposed must be described in as much detail as possible. It must be clear from the tender that the tenderer is capable of taking on the whole contract (minimum 7 000 samples / maximum 10 000 samples) within the prescribed 12-month delivery deadline.

2 Price (50/100)

Cost of delivering the contract in relation to the basic sample (7 000 samples) and cost per additional batch of 500 addresses supplied (amounts inclusive of VAT).'

5. Four tenderers submitted tenders, which, according to the evaluation committee's report on the qualitative selection, met the minimum requirements in regard to technical competence. The method used to evaluate the tenders was set out as follows in the evaluation committee's award report of 23 March 2012:

'The committee then evaluated the tenders.

The four tenders were evaluated and compared with each other on the basis of the criteria set out above. First, the tenders were examined and evaluated on the basis of the "quality" criterion. For this, each tender was unanimously assigned a given score (high — satisfactory — low). Then, the price criterion was applied.

On the basis of those scores, a final ranking was established.'

6. It is clear from the award report that, as regards the first criterion, namely the quality of the tenders, Dimarso and two other tenderers were rated 'high', while the fourth tenderer was assessed as 'low'. As regards the second criterion, namely price, while the fourth tenderer's offer was lowest, Dimarso's was highest.

7. On 11 April 2012, the contract was finally awarded to one of the tenderers which had been rated 'high' and whose price offer was lower than Dimarso's.

8. In support of its action for annulment of the contract award decision, Dimarso submits before the referring court that the evaluation committee appears to have evaluated the tenders on the basis of the 'high — satisfactory — low' scale, not referred to in the contract documents, in relation to the tender quality criterion, whereas, according to Dimarso, it is clear from the contract documents that a score of 0 to 50 points should have been allocated to each tender. As regards the price criterion, the evaluation committee also failed to carry out an adequate examination, comparison and final assessment of the tenders taking into account the award criteria as set out in the contract documents, including the "50/100" weighting given to each of the award criteria in the call for tenders.

9. The referring court notes first of all, in rejecting the first part of the action brought before it by Dimarso, that it is not unreasonable to interpret the '50/100' weighting, given to each of the award criteria in the contract documents, as meaning that it seeks only to indicate that each of the two criteria must be regarded as having the same value and that each of them will therefore determine half of the ranking of the tenders.

10. It notes next that both recital 46 and Article 53(2) of Directive 2004/18 refer only to the 'criteria' and the 'relative weighting' given to each of them, the method of evaluation and weighting rules not being expressly mentioned anywhere. The national court states that the method of evaluation is not neutral but may, on the contrary, play a decisive role in the outcome of the evaluation of the tenders on the basis of the award criteria. It cites the example of the price award criterion, in connection with which the contracting authority may, inter alia, opt to apply the principle of proportionality, award the maximum score to the lowest-priced tender or a zero score to the highest-priced, applying a linear interpolation to the intermediate tenders, or look most favourably on the tender with the median price.

11. The national court points out, lastly, that neither the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraphs 38, 44 and 45), which was concerned with the interpretation of Article 36(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, (4) the content of which is, in essence, the same as that of Article 53(2) of Directive 2004/18, nor the judgment in *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512), provide an answer, or at least not a decisive answer, to the question arising in the case in the main proceedings, that is to say whether

the method of evaluation, that is to say the specific method to be used by the contracting authority to score the tenders, must be made known to tenderers in advance, like the award criteria and sub-criteria and the 'weighting factors'.

12. In the light of those considerations, the Raad van State van België (Belgian Council of State) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Must Article 53(2) of Directive 2004/18/EC …, both in isolation and in conjunction with the scope of the principles laid down by European law concerning equality and transparency in the field of public procurement, be interpreted as meaning that, if the contract is awarded to the tenderer who submits the most economically advantageous tender from the point of view of the contracting authority, the contracting authority is always required to establish in advance, and indicate in the contract notice or contract documents, the method of assessment or the weighting rules, irrespective of their scope, predictability or commonness, in the light of which the tenders will be assessed in accordance with the award criteria or sub-criteria,

or, if no such general obligation exists, that there are circumstances, such as, inter alia, the scope, unpredictability or uncommonness of these weighting rules, in which this obligation does apply?'

13. That question was the subject of written observations submitted by Dimarso, the Belgian and Italian Governments and the European Commission. Those parties also presented oral argument at the hearing on 13 January 2016, with the exception of the Italian Government, which was not represented.

II – Analysis

14. By the question referred to it in the present case, the Court is asked to define the scope of Article 53(2) of Directive 2004/18. More specifically, the Court is asked whether, in the light of the principles of equal treatment and transparency, that provision requires the contracting authority, when awarding a service contract to the most economically advantageous tender, to inform tenderers, in the contract notice or the contract documents, of the method of evaluation used to assess tenderers' bids.

15. As a preliminary point, it is important to say that it is common ground that the service contract at issue in the case in the main proceedings falls squarely within the scope of Directive 2004/18 and that, in particular, Article 53 of that directive is fully applicable to that contract.

16. First, under Article 20 of Directive 2004/18, contracts which have as their object services listed in Annex II A to that directive, which include, in Category 10, contracts relating to 'Market research and public opinion polling services', are awarded in accordance with the provisions of Articles 23 to 55 of that directive. Secondly, the service contract in the case in the main proceedings significantly exceeded the threshold of EUR 200 000, referred to in Article 7(b) of Directive 2004/18, applicable at the time when the contract notice was published by the Housing Agency.

17. In accordance with Article 53 of Directive 2004/18, entitled 'Contract award criteria', public contracts are awarded either to the tender which proposes 'the lowest price', or to the 'tender most economically advantageous from the point of view of the contracting authority', that is to say, as the third sentence of recital 46 of that directive states, and as the Court has further noted, the tender which 'offers the best value for money' from the point of view of the contracting authority. (5)

18. Where the latter option is selected, as it was in the case of the service contract at issue in the case in the main proceedings, Article 53(1)(a) of Directive 2004/18 establishes a non-exhaustive list of criteria linked to the subject matter of the public contract in question which the contracting authority is entitled to take into account. (6) Those criteria include quality and price, which, as the contract documents in the case in the main proceedings indicate, are the only two criteria that were taken into account by the Housing Agency when awarding the contract at issue in the main proceedings.

19. In the aforementioned situation of a contract awarded to the most economically advantageous tender, the first subparagraph of Article 53(2) of Directive 2004/18 provides that the contracting authority is to specify in the contract notice or the contract documents 'the relative weighting which it gives to each of the criteria chosen to determine [that] tender'. The second subparagraph of the same provision states that that weighting can be expressed by providing for a range with an appropriate maximum spread. According to the third subparagraph of that provision, where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the latter is to indicate in the contract notice or contract documents the criteria in descending order of importance.

20. It should be observed here and now that the obligation to indicate not only the award criteria but also, since the adoption of Directive 2004/18, the relative weighting given to each of those criteria, except where there are good reasons why weighting is not possible, at the time of publication of the contract notice or contract documents, as laid down in Article 53(2) of that directive, serves to fulfil the requirement of compliance with the principle of equal treatment and the associated obligation of transparency. (7)

21. As regards the need to disclose the weightings given to the award criteria, it is important to note that Article 53(2) of Directive 2004/18 marks a notable change from the former legal regime applicable to the award of public service contracts.

22. After all, under the legal regime in place before the entry into force of that act, Article 36(2) of Council Directive 92/50 required the contracting authorities only to indicate, in the contract documents or the contract notice, the award criteria which they intended to apply, 'where possible in descending order of importance'.

23. Now, however, the contracting authorities have an obligation to indicate the weightings of the award criteria in the contract notice or the contract documents. It is only in the event that this proves impossible, for demonstrable reasons, that those entities may opt to prioritise those criteria, which prioritisation must in any event be adequately disclosed in the contract notice or the contract documents.

24. As I shall say when I come back to this point later, that change has some bearing on the resolution of the case in the main proceedings.

25. At this stage, it should be observed that, in the case in the main proceedings, it is common ground that the contract documents referred to '50/100' in connection with each of the two criteria used by the contracting authority. The referring court held that that reference could reasonably be interpreted as meaning that each of the two criteria was to be regarded as having the same value and each therefore determined half of the ranking of the tenders.

26. It is important to note that that assessment is final. It is after all unambiguously clear from the request for a preliminary ruling, and was confirmed by Dimarso at the hearing before the Court, that the referring court rejected the first part of the action brought before it by Dimarso, to the effect, in essence, that the '50/100' reference should have been interpreted as meaning that the 'quality' criterion should have been evaluated by awarding each tender a score from 0 to 50 points. The referring court therefore accepted, in essence, that the weighted value of each of those two contract award criteria, as given in the contract documents, was identical, namely 50%, a fact which reasonably well-informed and normally diligent tenderers were able to interpret in the same way. (8)

27. It is therefore common ground that the award criteria for the public contract in question and the relative weighting given to each of those criteria were communicated to the tenderers in the contract documents and, therefore, in advance of the award of the contract, in accordance, prima facie, with Article 53(2) of Directive 2004/18.

28. The referring court wishes to ascertain, however, whether the latter provision, read in the light of the principle of equal treatment and the obligation of transparency, requires the contracting authority, either systematically or, at the very least, in certain circumstances, to inform tenderers in advance of the method to be used to evaluate tenders against the award criteria, in particular, so far as concerns the case in the main proceedings, the method used to assess compliance with the 'quality' criterion published by the Housing Agency, that is to say a ranking scale of three ratings or scores ('low — medium — high').

29. That question must be understood in the context of Dimarso's argument that, in essence, the method of evaluation used ('low — medium — high') was so vague that it prompted the contracting authority to downgrade the assessment of the 'quality' criterion relative to that of the 'price' criterion, since the second criterion alone was actually capable of eliminating three of the four tenders submitted. In reality, therefore, Dimarso contends, the price criterion benefited from a higher relative weighting than the 50% previously announced in the contract documents. In other words, Dimarso submits that, if the method of evaluation had been

made known to tenderers in advance, at the stage when the contract documents were published, it would inevitably have had an effect on the preparation of the tenders.

30. I am by no means insensitive to that argument. It is important, however, to think it through in stages.

31. First of all, as I have already pointed out, Article 53(2) of Directive 2004/18 requires the contracting authority to make known to tenderers, either in the contract notice or the contract documents, the award criteria it intends to use and the relative weightings attached to them.

32. However, there would be no point in scouring the wording of Article 53(2) of Directive 2004/18 for a general obligation requiring the contracting authority to set out in the contract notice or the contract documents the method to be used to evaluate tenders in the light of the award criteria and their relative weightings, that is to say all of the rules and processes in accordance with which a contracting authority or a pared-down version of one, such as an evaluation committee, will attribute a given score or rating to the various tenders depending on the extent to which those tenders meet one of the criteria (and/or, where appropriate, sub-criteria) for the award of a public contract.

33. Article 53(2) of Directive 2004/18 does not therefore require that the use of such a method, by an evaluation committee, for analysing tenders in the light of the criteria for the award of a public contract and their relative weightings should, in principle, be communicated to tenderers in advance in the contract notice or the contract documents.

34. The Court's case-law also confirms that principle.

35. First, it should be recalled that the Court has on several occasions recognised as lawful the conduct of a contracting authority which had weighted the subheadings of an award criterion *after* tenders were submitted but *before* they were opened, which necessarily implies that the contracting authority is not systematically required to make known in advance the weightings thus given to the award sub-criteria in the contract notice or the contract documents. (9)

36. That assessment may, *a fortiori*, be extended to the adoption of a method for evaluating tenders in the light of award criteria and their relative weightings.

37. Secondly, in the judgment in *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512, paragraph 35), the Court accepted — in the context of applying the rules for the award of public service contracts by the institutions of the European Union, (10) very similar to the context of applying the provisions of Directive 2004/18, and in the course of considering which information need not be communicated in advance by the contracting authority to tenderers — that an evaluation committee must be able to have some leeway in carrying out its task and to structure its own work of examining and analysing the submitted tenders. (11)

38. In all of those cases, the Court nonetheless stated that the leeway enjoyed by the contracting authority is subject to compliance with certain conditions.

39. Those conditions do not, however, appear to be entirely uniform.

40. Thus, in cases where a contracting authority has determined weighting factors for award sub-criteria after tenders have been submitted, the Court has held, as the referring court rightly pointed out, that such ex post determination is lawful provided that it meets three conditions, namely:

– that it does not alter the criteria for the award of the contract set out in the contract documents or the contract notice,

– that it does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation, and

– that it was not adopted taking into account matters likely to give rise to discrimination against one of the tenderers. (12)

41. If one of those conditions is not met, that case-law supports the inference that determining the weighting of sub-criteria after publication of the contract notice or the contract documents renders the procedure for awarding the contract unlawful. In other words, the contracting authority should have determined the weighting of the sub-criteria relating to the contract award criteria in advance and should have ensured that that weighting had been communicated to tenderers in the contract notice or the contract documents.

42. Furthermore, as regards an evaluation committee's leeway in structuring its own work of analysing and examining the submitted tenders, the Court stated, in paragraph 35 of the judgment in *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512), that such leeway must not prompt the contracting authority to 'amend[…] the contract award criteria set out in the contract documents or the contract notice'.

43. By confining itself to referring only to compliance with one (the first) of the three conditions listed in point 40 of this Opinion, the Court appears to wish to confer a broader discretion on the contracting authority in the ex post determination of a method for analysing or evaluating tenders only in cases where the contracting authority decides to determine weighting factors for the sub-criteria corresponding to award criteria that were made known to tenderers in advance.

44. Although the case in the main proceedings called for the strict application of the clarification made in paragraph 35 of the judgment in *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512), there is nothing in the information provided at this stage by the referring court that would support the view that the method of evaluation adopted by the evaluation committee to assess the 'quality' criterion could have altered that criterion or, *a fortiori*, the second award criterion, both of which had been made known to tenderers in advance in the contract notice.

45. I doubt, however, that, by the clarification it gave in paragraph 35 of the judgment in *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512), in the form, moreover, of an *obiter dictum*, the Court meant to confine that restriction to the leeway enjoyed by the contracting authority in determining a method for evaluating the tenders submitted. After all, other than in the event of any particularly serious errors, it is difficult to imagine how such a method of evaluation would be capable of altering the criteria for awarding a public contract themselves or how an unsuccessful tenderer would be able to furnish so much as *indicia*, let alone actual proof, of such an effect on the award criteria.

46. This is one of the reasons why I am more inclined to share the view of the interested parties which submitted, in particular at the hearing, that it is not inconceivable that a method of evaluation may have an effect not so much on the award criteria themselves as on the weighting of those criteria and, as such, may contain elements which would have been capable of influencing the preparation of tenders if that method had been made known to tenderers in advance, within the meaning of the second condition laid down by the Court's case-law as reproduced in point 40 of this Opinion. In that event, the ex post determination of such a method for evaluating tenders by a contracting authority would be unlawful and should, therefore, have been disclosed in advance in the contract notice or the contract documents.

47. I am therefore largely in agreement with the line of argument, put forward in particular by the Commission, that the lawfulness of a method for evaluating tenders which is determined by a contracting authority ex post depends on whether the three conditions established by the Court's case-law and reproduced in point 40 above are met. It would then fall to the referring court to verify whether those conditions have been met in the case in the main proceedings.

48. To my mind, however, the present case also offers the Court an opportunity to refine that case-law, particularly in relation to the scope of the first condition.

49. After all, as I emphasised earlier, since the entry into force of Article 53(2) of Directive 2004/18, both the award criteria and their relative weightings (or, where they cannot be weighted, their prioritisation) must be adequately disclosed in the contract notice or the contract documents.

50. The ex post alteration of either, no matter the means by which it is achieved, must therefore, in my view, be penalised in the same way.

51. Just as there is no reason to accept the proposition that a method for evaluating tenders is capable of altering *a posteriori* award criteria that were communicated to tenderers in advance, the proposition that such a method is capable of altering the weighting of those criteria is equally intolerable. If this is the consequence of the ex post determination of a method for evaluating tenders, that method should have been communicated to tenderers in advance and the tendering procedure at issue is unlawful.

52. Consequently, I suggest that the first condition listed in point 40 of this Opinion, derived from the Court's case-law relating to the legal regime governing the award of public contracts that was in place prior to the adoption of Directive 2004/18, be worded in such a way as also to include the weighting of the award criteria, so as to take into account the change in that regime following the entry into force of Article 53(2) of Directive 2004/18.

53. It will then be for the referring court to examine, in the case in the main proceedings, whether the method for evaluating tenders in the light of the 'quality' criterion, set out in the documents relating to the contested contract, altered ex post the weightings attached to the award criteria for that contract. If it did, that method should have been made known to potential tenderers in advance in the contract notice or the contract documents.

54. I suspect, however, that, in the light of the circumstances and information communicated by the referring court, this may have been the case.

55. Since three of the four tenders, including Dimarso's, were rated 'high' for compliance with the 'quality' criterion, but did not receive scores which would have made it possible to differentiate and rank the tenders according to their inherent qualities, the 'price' criterion was therefore decisive in the award of the contested contract, as all the interested parties agreed at the hearing. In so far as the method chosen by the evaluation committee effectively downgraded the assessment of the 'quality' criterion relative to that of the 'price' criterion, that latter criterion seems therefore to have benefited from a higher relative weighting in the choice of tenderer than the 50% weighting announced in the contract documents might reasonably have suggested. It is therefore plausible that, if the tenderers had been informed in advance that that was the chosen method for evaluating tenders for compliance with the 'quality' criterion, they would have focused more effort on the price of their services.

56. To illustrate my point more specifically, let us imagine that, of the tenders submitted, one was far superior, in terms of quality, to the other three, including those that were rated 'high'. In other words, one of those tenders could have been ranked 'excellent' in the assessment of the 'quality' criterion. The price proposed by that tenderer would then have reflected the excellence of the quality of the services proposed by it and would therefore in all probability have been higher than the prices offered by the other tenderers. However, since 'excellent' did not feature on the range of scores (low — satisfactory — high) chosen by the evaluation committee, that tender of excellent quality could not but be rated 'high', at the very most, in relation to the 'quality' criterion. Since the price proposed by the tenderer of that bid was higher than those proposed by the others, possibly even by some tens or hundreds of euros, that bid had to be rejected.

57. In short, in that situation, which is not necessarily Dimarso's situation but might just as well have been, the contracting authority might have been deprived of the tender representing the best value for money, contrary to the spirit in which the selection of tenderers on the basis of the most economically advantageous tender takes place. (13)

58. Thus, the method of evaluation which the contracting authority chose ex post is, in my view, capable of having altered the weightings attached to the award criteria by lending greater weight to one criterion than to another, whereas the information available to tenderers at the time when they submitted their tenders clearly indicated that those criteria were to be assessed on the basis of the same relative weightings, namely 50% each.

59. Consequently, I consider that, if a method of evaluation adopted after tenders have been submitted is capable of leading to such a result, that method should have been made known to tenderers at the time when the contracting authority published the contract notice or communicated the contract documents.

60. In any event, although the Court held that the first judicial condition referred to in point 40 of this Opinion should not be extended to the weighting of award criteria, the likelihood is, in my opinion, that, if the method for evaluating tenders in the light of the 'quality' criterion, as established by the contracting authority, had been known in advance by the potential tenderers, it would have been capable of affecting the preparation of their tenders within the meaning of the second condition listed in point 40 of this Opinion.

61. After all, as I have already said, if the tenderers had realised, before submitting their tenders, that the second award criterion, namely the 'price' criterion, might be decisive, as all the interested parties conceded at the hearing, in the choice of the economically most advantageous tender, they would certainly have prepared their tenders differently in order to respond more effectively to the guidance thus given by the contracting authority.

62. In general, it is true that such a limit on the leeway enjoyed by the contracting authority in determining a method of evaluation after tenders have been submitted seems to have the ultimate effect of compelling it to identify the method or methods for evaluating award criteria which it intends to choose at a very early stage in all cases, in order to guard against the possibility that those methods will be capable of having an impact on the preparation of the bids of potential tenderers. It will otherwise be bound to conclude that those methods need to be published either in the contract notice or in the contract documents.

63. In short, therefore, that requirement appears to mean that the contracting authority (to which it will fall to ensure that the tendering procedure benefits from maximum legal certainty and to protect itself against actions for the annulment of that procedure) must determine the method or methods to be used to evaluate tenders in the light of the award criteria as early as possible. It would be reasonable to suggest, then, that, if that is the case, there does not appear to be any overriding reason such as to justify a refusal by the contracting authority to make known to potential tenderers the methods of evaluation in question, which it will in any event already have had to determine before the call for tenders.

64. Such an approach appears, in practice, to be a reversal of the theoretical 'exception-to-the-rule' principle that stems from the application of the Court's case-law to the effect that the contracting authority is not, in principle, under any obligation to communicate the method to be used to evaluate tenders in advance to potential tenderers, unless, or provided that, that method contains no elements which, had the method been known in advance, could have affected the preparation of tenders.

65. It seems to me, however, that that risk can largely be mitigated if the contracting authorities opt to disclose not only the award criteria and their relative weightings, as required by Directive 2004/18, but also the sub-criteria relating to those criteria and the relative weightings of those sub-criteria, an approach which the Court's case-law is strongly inclined to favour.

66. In other words, the making available to tenderers in the contract notice or the contract documents of clear, comprehensible and detailed information on all the matters mentioned above diminishes the risk, in my view, that the method for analysing tenders chosen by the evaluation committee may be capable of altering the award criteria or sub-criteria and their weightings, or of causing tenderers to be treated unequally. To my mind, avoiding that risk is part and parcel of the 'active role' which Directive 2004/18, as interpreted by the Court, assigns to the contracting authorities in the application of the essential principles governing the award of public contracts, that is to say observance of the transparency of the procedure and equal treatment as between tenderers. (14)

67. The further point must be made that, in such circumstances, the tenderers will all have had an opportunity to know in advance the relative weightings of all of the matters taken into consideration by the contracting authority. As a rule, this serves to ensure that the specific method of analysing tenders adopted by the contracting authority does not contain any elements which, had they been known at the time when the tenders were prepared, could have affected their preparation.

68. However, where, as in the case in the main proceedings, the award criteria are weighted equally in the contract documents, any sub-criteria listed in those documents are not weighted and the method of evaluation adopted, after tenders were submitted, for the purposes of assessing whether either of the two award criteria has been met is highly generic and does not allow a sufficiently precise distinction to be drawn between the quality of one tender submitted and another, there is a significantly greater risk that the method of evaluation would have been capable of affecting the preparation of the tenderers' bids if it had been made known to them in the contract notice or the contract documents.

69. It is true that the second condition referred to in point 40 of the present Opinion seems to be particularly flexible and easily met, since there would always appear to be scope for arguing that each element taken into account by the contracting authority would have been *capable* of having an effect or impact on the preparation of tenders if it had been communicated to tenderers in advance.

70. It was perhaps its awareness of that flexibility which prompted the Court, in the judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697, paragraph 48), to make the existence of such an effect on the preparation of tenders subject to its being 'significant', a condition which enabled it to dismiss in part the action for annulment brought by the Commission.

71. Although paragraph 48 of the judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697) claims to be of a piece with the Court's earlier case-law, inasmuch as it refers explicitly to paragraph 32 of the judgment in *ATI EAC e Viaggi di Maio and Others* (C-331/04, EU:C:2005:718), that judgment, like the other later judgments already cited, does not specify that the effect on the preparation of tenders should have been 'significant'. That said, the criterion introduced by the Court in paragraph 48 of the judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697) may nonetheless stem, in my view, from the fact that the public service contract in question was not fully governed by the provisions of Directive 2004/18, in particular Article 53(2).

72. If that is indeed the sense to be ascribed to paragraph 48 of the judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697), there is, as I see it, no particular reason, in the present case, to adopt the criterion of the 'significance' of the effect on the preparation of tenders contained in that paragraph of the aforementioned judgment, or, therefore, to alter the scope of the second condition laid down in the Court's case-law, referred to in point 40 of this Opinion.

73. In any event, it is my view that the flexibility of that second condition may be greatly mitigated by the obligation incumbent on the unsuccessful tenderer, which bears the burden of proof, to demonstrate, by reference to specific examples in its legal action, the differences (substantive as well as purely formal) which its tender would have exhibited if the elements of the method of evaluation in question or the method itself, which the contracting authority neglected to communicate, had been adequately disclosed before the tenders were prepared.

74. Before concluding, I would add that all of the foregoing considerations are based on the assumption, which follows implicitly from the order for reference, that the method of evaluating tenders in relation to the 'quality' criterion which was used by the evaluation committee in the case in the main proceedings was determined *after* the time limit for the submission of tenders expired but *before* those tenders were opened.

75. In the aforementioned case-law concerning the determination of the weighting of sub-criteria relating to the award criteria, the Court held, in essence, that determining the weighting of such sub-criteria *after the opening of tenders* or expressions of interest, as the case may be, was contrary in particular to the principle of equal treatment and the obligation of transparency. (15) Furthermore, the Court censured the alteration which an evaluation committee had made to the weighted values of the award criteria after an initial review of the tenders in a case where Article 53(2) of Directive 2004/18 did not apply to the public service contract in question, and did so, moreover, without requiring that the discriminatory effect of that practice on one of the tenderers should be demonstrated, pointing out further in this regard that it is sufficient that it cannot be ruled out that, at the time the alteration was made, it might have had such an effect. (16)

76. After all, if the contracting authority took note of the identity of the tenderers and of the content of the tenders when altering the weightings of the award criteria and/or sub-criteria, it runs a genuine risk of giving the impression that that alteration seeks to favour one of the tenderers and therefore to breach the equal treatment afforded to them.

77. In such a situation, any alteration made in this way is quite simply unlawful, not least on the ground of being presumed to constitute favouritism. It seems clear that the weighting which was actually applied and which rendered the tendering procedure unlawful should have been made known to the tenderers in the contract documentation. Such a finding, however, is not essential to the resolution of the dispute.

78. In its observations, the Belgian Government mentioned that there are some situations, although it did not say which, where the method of evaluating tenders may be determined only after the tenders have been opened. Consequently, that government submits in essence that the Court's case-law censuring the ex post determination of the weighting of award criteria and determination of the weightings applied to the sub-criteria relating to those award criteria *after* the tenders have been opened should not be extended to the situation in which an evaluation committee adopts a method of evaluating tenders after these have been opened.

79. The question referred by the national court does not relate *stricto sensu* to that situation.

80. However, the information provided by the referring court does not entirely rule out the possibility that the method of evaluation at issue in the case in the main proceedings was established after the tenders were opened.

81. That possibility raises the further question, in my view, of whether the referring court still needs to verify that the three conditions laid down by case-law and listed in point 40 of the present Opinion are satisfied in order to be able to conclude that the contracting authority should have made that method of evaluation known to the tenderers or whether it could simply find that such a practice can to some extent be presumed to constitute favouritism towards one or more tenderers and, as such, render the tendering procedure unlawful.

82. Without taking a general view on the situations alluded to but not specified by the Belgian Government, I doubt that, in the case in the main proceedings, the method for evaluating the 'quality' criterion, given its very basic and highly generic — not to say imprecise — nature, could be determined only after the tenders submitted had been opened.

83. I can see no reason, not least of a technical or financial order, why a contracting authority should not be able either to make known to tenderers a method which simply states that the 'quality' of the tenders will be assessed on the basis of a ranking scale of 'low — satisfactory — high', or to establish that method, at the latest, before the tenders are opened, provided that it complies with the conditions which I have already examined, that is to say, in particular, without altering the contract award criteria or their weightings.

84. I therefore take the view that, if the method of evaluation at issue in the case in the main proceedings was adopted after the tenders were opened, which it would fall to the national court to verify, it would have to be presumed that that method was determined in the light of matters capable of having a discriminatory effect on one or more of the unsuccessful tenderers, which presumption, if appropriate, would have to be rebutted by the contracting authority.

III – Conclusion

85. In the light of all of the foregoing considerations, I propose that the Court's answer to the question referred by the Raad van State van België (Belgian Council of State) should be as follows:

Article 53(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011, read in the light of the principle of equal treatment and the obligation of transparency, must be interpreted as meaning that the contracting authority is not required to make known to potential tenderers, in the contract notice or the contract documents, the method to be used to evaluate tenders with a view to assessing whether the award criteria published in advance in the contract notice or the contract documents have been met, provided that such a method, adopted after the time limit for the submission of tenders has expired but before those tenders are opened, (a) does not alter the contract award criteria and the relative weightings of those criteria as set out in the contract notice or the contract documents, (b) contains no elements which, had they been known at the time when the tenders were prepared, could have affected their preparation, and (c) was not adopted in the light of matters capable of having a discriminatory effect on one of the tenderers. It is for the national court to verify whether those conditions are met in the case in the main proceedings.

---

2 – . Original language: French.

---

3 –

. OJ 2004 L 134, p. 114. Directive as modified by Commission Regulation (EU) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contract (OJ 2011 L 319, p. 43, 'Directive 2004/18').

4 –
. OJ 1992 L 209, p. 1.

5 –
. See judgment in *Ambisig* (C-601/13, EU:C:2015:204, paragraph 29).

6 –
. The non-restrictive nature of those criteria has regularly been recalled by the Court: see, recently, the judgments in *eVigilo* (C-538/13, EU:C:2015:166, paragraph 61) and *Ambisig* (C-601/13, EU:C:2015:204, paragraph 30).

7 –
. See, to that effect, the judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697, paragraph 43). I would recall, to the extent necessary, that it is settled case-law that, under the principle of equal treatment between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions [see, to that effect, in particular, the judgments in *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345, paragraph 44) and *eVigilo* (C-538/13, EU:C:2015:166, paragraph 33)]. The Court has also stated that the obligation of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority with respect to certain tenderers or certain tenders [see, in that regard, the judgments in *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345, paragraph 44) and *eVigilo* (C-538/13, EU:C:2015:166, paragraph 34)].

8 –
. The standard of the reasonably well-informed and normally diligent tenderer stems from the Court's case-law: see, in that regard, the judgments in *SIAC Construction* (C-19/00, EU:C:2001:553, paragraph 42) and *eVigilo* (C-538/13, EU:C:2015:166, paragraph 54).

9 –
. See the judgments in *ATI EAC e Viaggi di Maio and Others* (C-331/04, EU:C:2005:718, paragraph 32); *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 43); and *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512, paragraphs 32 and 33).

10 –
. The case in question concerned the interpretation of Article 97 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) and Article 138 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Regulation No 1605/2002 (OJ 2002 L 357, p. 1).

11 –
. See also, in the same legal context, the judgment in *bpost* v *Commission* (T-514/09, EU:T:2011:689, paragraph 86).

12 –
. See the judgments in *ATI EAC e Viaggi di Maio and Others* (C-331/04, EU:C:2005:718, paragraph 32); *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 43); and *Evropaïki Dynamiki* v *EMSA* (C-252/10 P, EU:C:2011:512, paragraph 33).

13 –
. In the judgment in *Ambisig* (C-601/13, EU:C:2015:204, paragraph 29), the Court pointed out, in essence, that the award of a contract to the most economically advantageous tender, which enables contracting authorities to seek the best value for money, tends to reinforce the importance of quality in the award criteria for public contracts.

14 –
. See, in that regard, in another context, the judgment in *eVigilo* (C-538/13, EU:C:2015:166, paragraph 42).

15 –
. See, in particular, the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 44).

16 –
. Judgment in *Commission* v *Ireland* (C-226/09, EU:C:2010:697, paragraphs 57 to 63).

Machine Translated by Google

COUNCIL OF STATE, ADMINISTRATIVE LAW DIVISION

XIIth CHAMBER

A R R E S T

No. 239.937 of 23 November 2017 in case
A. 204.650/XII-6931

In his case: NV TNS DIMARSO assisted
and represented by lawyer Peter Flamey,
with offices in Antwerp,
2018
Jan Van Rijswijcklaan 16
where residence is chosen

in return for:

the FLEMISH REGION assisted
and represented by lawyer Jens Debièvre,
with offices at 1000 Brussels

Havenlaan 86 C b113
where place of residence is chosen

I. Subject of the appeal

1. The appeal, lodged on 14 June 2012, seeks the annulment of “the decision of the Flemish Government Housing Agency - Flanders, through the Flemish Minister of Energy, Housing, Cities and Social Economy dated 11 April 2012, whereby the government contract 'Housing Survey 2012': survey of housing and housing consumers in Flanders according to specifications no. AWB/VS/501-5-112 is awarded to Ipsos Belgium nv and whereby an amount of EUR 1,400,000, including VAT, is set on the basic allocation to finance the assignment”.

Machine Translated by Google

II. Course of proceedings

2. In the interim judgment no. 229.723 of 6 January 2015, amended by judgment no. 230.602 of 24 March 2015, the Council of State has preliminary question referred to the Court of Justice of the European Union – hereinafter the Court of Justice.

The Court of Justice answered this preliminary question in judgment C-6/15 of 14 July 2016.

At the request of the auditor-reporter, the applicant and the defendant submitted a supplementary memorandum.

Auditor Inge Vos has drawn up a supplementary report.

The applicant and the defendant have a last memorandum submitted

The parties have been summoned to the hearing, which has took place on September 26, 2017.

Councillor of State Pierre Barra has reported.

Attorney Evi Mees, who appears on behalf of the requesting party as deputy attorney Peter Flamey, and attorney Evi Degroodt, who appears on behalf of the requesting party as deputy attorney Jens Debièvre appears on behalf of the defending party and has been heard.

Auditor Inge Vos has given an opinion that agrees with this judgment datum.

The provisions on the use of the languages, contained in Title VI, Chapter II, of the laws on the Council of State, coordinated on 12 January 1973.

Machine Translated by Google

III. Facts

3.1. The defending party prescribes a government contract services with the subject “Housing Survey 2012: survey of the home and the residential consumer in Flanders”. The purpose of the assignment is to carry out a large-scale survey of housing and residential consumers in Flanders.

The general award method is chosen request for quotation.

3.2. The assignment will be announced in the Bulletin der Tenders and also in the Official Journal of the European Union.

3.3. The applicable specification AWB/VS/501-5-112 specifies the following award criteria:

> “1. Quality of the offer (50/100)
> The quality of the preparation, organisation and execution of the fieldwork, the coding and the first data processing. The expected performances must be described in as much detail as possible. The offer must clearly show that the contractor is able to execute the entire assignment (minimum 7,000 sample units/maximum 10,000 sample units) within the foreseen execution period of 12 months.
>
> 2. Price (50/100)
> The cost price for carrying out the basic sample assignment (7,000 sample units) and the cost price per tranche of 500 additional addresses made available (amounts including VAT)”.

3.4. Four bids are submitted, specifically by the requesting party, Ipsos Belgium NV, New Information & Data NV and nv Significant GfK.

3.5. In the report on the qualitative selection of 22 March 2012 it is determined that all necessary documents were delivered and that is met the minimum requirements regarding technical competence.

Machine Translated by Google

It is decided that the four offers can thus be substantively examined in a subsequent phase. are being assessed.

3.6. In the award report – according to the inventory of the administrative strative file – dated 23 March 2012, the method of assessment by the assessment committee explained as follows:

> "The committee then proceeded to assess the tenders.
> The 4 offers were evaluated and compared with each other on the basis of the above-mentioned criteria. Initially, the offers were discussed and assessed on the basis of the criterion 'quality'. Each offer was unanimously given a specific score (high - sufficient - low). The price criterion followed in the second instance.
>
> Based on these scores a final ranking was drawn up.
>
> The substantive assessment of the tenders in the award report is as follows:
> 'Criterion
> 1: quality of the tender (50/100)
> The offer from TNS Dimarso fully complies with the provisions of the specifications. The preparation phase is well-developed. It is clearly explained how the programming will proceed. The interaction with the client is strongly emphasized. The organization and follow-up of the fieldwork is well-structured (including the availability of a secure web environment). Extensive quality control is provided (including 100% non-response). The offer discusses the aspect of reporting in detail. The offer scores HIGH on the quality criterion.
>
> The offer from Ipsos Belgium also fully complies with the specifications. The various aspects in the context of the preparation and organisation phase are well elaborated. The follow-up of the fieldwork is carried out in a structured and clear manner (the offer also refers to a complaints handling procedure). The offer also complies with the specifications regarding implementation. It is indicated in detail how the quality control of the fieldwork will proceed (including a large number of on-site checks). The offer is quoted HIGH.
>
> The offer from New Information & Data contains several points of attention and is therefore considered inadequate. The proposed performances meet the specifications but are not described in detail. This remark applies to various aspects of both the preparation phase and the organisation and implementation phase.
>
> The programming aspect is not sufficiently explained. There is no provision for a helpdesk function. Question marks are also placed on the feasibility of involving energy experts. The quotation is therefore quoted LOW.

Machine Translated by Google

The offer from Significant GFK fully complies with the provisions of the specifications. The preparation phase (cf. pilot phase) is well developed. The programming is clearly explained. The organisational and follow-up aspects are also clearly described. The offer focuses strongly on cooperation with the client. The offer is given a HIGH score for this criterion.

Overview:

offers	Criterion 1 - Quality
TNS Tuesday	HIGH
Ipsos Belgium	HIGH
New Information & Data	LOW
Significant GfK	HIGH

Criterion 2: price (50/100)

Overview:

The overview below shows the prices for the execution of the basic assignment (7,000 sample units) on the one hand, and for the execution per tranche of 500 additional completed interviews on the other hand (amounts include VAT):

offers	Criterion 2(a) – Price (incl. VAT) basic sample (N=7,000)	Criterion 2(b) – Price (incl. VAT) Disk of 500 additional samples
TNS Tuesday	€ 987.360,00 €	€69,575.00
Ipsos Belgium	913.570,00 €	€55,457.00
New Information & Data	842.607,70	€53,240.00
Significant GfK	€ 975.520,15	€ 57.765,40

FINAL RANKING:

RANK offered		Criterium 1	Criterium 2(a)	Criterium 2(b)
	Ipsos Belgium HIGH € 913,570.00 € 55,457.00 Significant GfK HIGH € 975,520.15			
1	€ 57,765.40 TNS Dimarso HIGH € 987,360.00 € 69,575.00 New Information &			
2	LOW € 842,607.70 € 53,240.00 Data			
3 4				

3. Conclusion

In view of the findings of the assessment committee and the above final ranking, the Housing Policy Department — as the commissioning authority — proposes to carry out the assignment 'Housing Survey 2012:

Machine Translated by Google

survey of housing and residential consumers in Flanders' (specification no. AWB/VS/501-5-112) to be awarded to Ipsos Belgium nv'"

3.7. On April 11, 2012, the Flemish Minister of Energy decided, Housing, Cities and Social Economy to award the contract to Ipsos NV Belgium. It is expressly pointed out that the award report forms an integral part of the decision and that the reasoning and decision thereof are fully endorsed.

This is the contested decision.

3.8. By registered letter – according to the inventory of the administrative file – dated 13 April 2012, the defending party informs the requesting party that its offer was not selected. Attached is a copy of the award decision and the award report attached.

3.9. By registered letter dated April 28, 2012 TNS Dimarso NV demands suspension in case of extreme urgency of the execution of the contested decision.

By judgment No 219.515 of 29 May 2012, the Council of State this claim.

3.10 In its judgment no. 229.723 of 6 January 2015, the Council of State on the admissibility of the appeal and finds the first part of the sole remedy is unfounded. The objection raised by the defendant exception of lack of interest in the second ground of appeal is raised by the Council of State rejected in the aforementioned judgment.

In the context of the assessment of the merits of the the second part of the sole remedy the Council of State submits to the Court of Justice of the European Union the following preliminary question:

Machine Translated by Google

“1/ Should Article 53(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 ‘on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts’, taken in isolation and in conjunction with the scope of the principles of European law on equality and transparency in public procurement, be interpreted as meaning that, if the contract is awarded to the tenderer who, from the point of view of the contracting authority, has the most economically advantageous tender, the contracting authority is always obliged to determine in advance and include in the notice or the specifications the assessment methodology or balancing rules, regardless of their foreseeability, common practice or scope, on the basis of which the tenders will be assessed in accordance with the award criteria or sub-award criteria, 2/ or, if there is no such general obligation, that there are circumstances, such as, inter alia, the scope, lack of foreseeability or lack of common practice of these balancing rules in which this obligation does apply?”

3.11. The Court answered this preliminary question in its judgment C-6/15 of 14 July 2016:

“Article 53(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read in the light of the principle of equality and the obligation of transparency arising from it, must be interpreted as meaning that, where a service contract is to be awarded on the basis of the criterion of the most economically advantageous tender from the point of view of that authority, the contracting authority is not required to inform potential tenderers, in the notice of the contract in question or in the corresponding specifications, of the method by which it will assess and rank the tenders in concrete terms. However, that method may not have the effect of altering the award criteria and their relative weighting.”

Machine Translated by Google

IV. Examination of the merits of the second part of the sole plea

A. Second part

4. For the explanation of the positions of the parties of before the judgment of the Court of Justice on the second part of the single means, reference is made to judgment no. 229.723 of 6 January 2015.

This second ground of appeal was already dealt with in the aforementioned judgment found admissible, so it suffices to refer to it.

Also with regard to the assessment of the merits of the second part of the sole remedy refers to what has already been said on this matter noted in the judgment of the Council of State no. 229.723 of 6 January 2015.

Position of the parties following the judgment of the Court of Justice C-6/15 of 14 July 2016

5. In its supplementary memorandum, the applicant first states her interpretation of the judgment of the Court of Justice and the conclusion of the Advocate General again.

According to her, it is irrefutably established that the method used the assessment method “low-sufficient-high” was not known to the applicants during the preparation of their tenders and therefore before the opening of the term for submitting the tenders.

Having regard to the judgment of the Court of Justice and the preceding conclusion of the Advocate General, according to the applicant, there are two crucial elements that still need to be investigated, namely, on the one hand, the exact time at which the assessment method for the award criterion

Machine Translated by Google

“quality” was determined precisely and completely and, on the other hand, the impact of this assessment method based on the relative weight of the award criteria.

As regards the first element, she emphasises that the possibility- the right of the contracting authority to grant a contract not included in the tender documents announced assessment method to be determined afterwards, but is open until the opening of the tenders. The burden of proof thereof lies with the contracting authority. She points out that the Advocate General in his conclusion of 10 March 2016 correctly noted that, given the data of the file and given the very elementary and extremely general and even the vague nature of the scale used, it is highly doubtful that this assessment method is clear, unambiguous and not for in a contestable manner before the opening of the tenders.

The Belgian government's argument before the Court of Justice that there are situations in which the method for assessing the quotations can only be determined after the quotations have been opened, without, however, to specify which “situations” this would concern, is convincing according to the the requesting party does not. Such a claim does not alter the fact that there is a irrevocable impression of favoritism is created when a assessment method is only determined after the tender has been opened.

The contracting authority must therefore provide proof of the exact time at which the assessment method with scale “low - sufficient - high” was finalized and finally established, which was based on the the administrative file is not available. Consequently, it must be based on an irrevocable suspicion of favoritism.

To the extent that the Council were to consider that the contracting authority sufficiently demonstrates that the contested assessment method was established before the opening of the tenders, then according to the requesting party to be determined that the threefold condition has not been met,

Machine Translated by Google

namely that this subsequent determination (1°) does not change the specifications or criteria laid down in the contract notice for the award of the contract (2°) does not contain any elements which, if they were preparation of the quotations had been known, this preparation had can influence, and (3°) has not been carried out on the basis of elements that may have a discriminatory effect against one of the applicants.

With regard to the first condition, she says account must be taken of the conclusion of the Advocate General in which it is explicitly stated that there are indications that there is indeed a change in the weighting has taken place. She refers to the recitals 53 to 58 of the Opinion.

According to the requesting party, it is not possible to avoid the determination that three out of four offers are in line with the “quality” criterion received exactly the same rating, namely the scale “high”. It follows from this, as the Advocate General quite rightly stated indicates that the price has become a decisive factor in the ranking of the applicants, which is also evident from the table in the award report.

She points out that all interested parties who appeared at the hearing of the Court of Justice, acknowledged that the second award criterion of the price when choosing the economic most advantageous tender could be decisive.

The Court of Justice – recital no. 35 – also agrees with the the applicant shares the same view, as it expressly finds that “this method [...] could have an impact on the price criterion in particular by to give this decisive weight in relation to the ranking of the tenders according to the [...] quality scale mentioned”.

Machine Translated by Google

As regards the second condition, the applicant notes that the Advocate General has rightly noted that it is likely that if the potential bidders had been informed in advance of the assessment method chosen by the contracting authority for the criterion "quality", which could have influenced the preparation of their tenders the sentence of the second of the in the case-law of the Court of Justice developed conditions.

The applicant emphasises that if it had known that the price criterion would ultimately have been decisive, she submitted her offer would have prepared a different way and would have made a different offer submitted.

She concludes that the requirements set out in the case law have not been met the conditions developed by the Court of Justice and that the contracting authority government-used assessment method with a scale of "low – sufficient – high" should then have been made known to the applicants at the latest before the opening of the tenders.

6. According to the defendant, the Court of Justice states in its judgment clearly states that a contracting authority is not obliged to assessment methodology on the basis of which the quotations will be assessed *in concrete terms* are assessed and ranked, to be indicated in the announcement of the assignment or in the specifications.

Nor does the defendant argue that there is an obligation to establish the assessment methodology before the opening of the tenders. The According to her, the Court of Justice clarified in the judgment of 14 July 2016 that the contracting authority must have the necessary freedom to determine its own activities for the investigation and assessment of the submitted tenders to structure so that the assessment method can also be used after the tenders have been opened may be determined. The determination of the assessment method after the

Machine Translated by Google

However, according to her, the opening of the tenders should not lead to the award criteria or their relative weight, as included in the specifications, are changed.

The defending party notes in advance that the the applicant party in its supplementary memorandum mainly relies on the advice of Advocate General Mengozzi to dismiss her second ground of appeal substantiate and ignore the fact that there is no basis for that advice binding force. Only the answer given in the judgment of the Court of Justice may bind the Council in the further assessment of the request for annulment of the applicant.

The applicant's position that the assessment method prior to the opening of tenders must be established, according to the defending party contrary to the wording of the judgment of 14 July 2016. According to the defendant, the judgment expressly states that a contracting authority the government has no obligation to include the assessment methodology in the announcement of the order or to be included in the specifications. The Court clarifies according to furthermore, that Article 2 of the European Directive 2004/18, which establishes the principle of equality and non-discrimination, does not oppose a assessment method may be determined after the tenders have been opened.

The defendant points out that *in this case* it was not before the opening of the tenders could have known that the assessment method had to be specified in a rating on the scale “low-sufficient-high” to correct and representative assessment and comparison of the quotations let. The method in which each quotation is given a distinct numerical score on points, it turned out that after the tenders were opened, the tender was too refined assessment method, given the great similarities between the offers with regard to the quality of the services offered. From the According to her, the award report shows that three of the four tenders were receive a “high” rating for the “quality” award criterion. She notes

Machine Translated by Google

that she therefore chose to follow the ARGUS method
to use an ordinal scale “low-sufficient-high”.

The defendant further argues that this ARGUS method
was introduced to her in the period 2001-2002 and was frequently used
used in the assessment of tenders for service contracts. The ARGUS
software fell into disuse after a few years, but the logic of ordinal
scales to be used. This was also the case for the award of the
government contract “Housing Survey 2005”, this is the predecessor of the government
mandate which is the subject of the current procedure before the Council. This
“Housing Survey 2005” was awarded to the requesting party at the time. In this
The ordinal scale “low-sufficient-” was also used in the assignment
high”, without this assessment method being announced in the specifications. In
According to her, it is remarkable that the requesting party uses this method
now disputed.

The defendant acknowledges that the judgment of the Court of
Justice of 14 July 2016 hereby sets the restriction that the determination of the
assessment methodology after the announcement of the announcement of the
the order or the specifications may not result in the award criteria or the
relative weight thereof are changed. Such a change takes place *in this case*
according to the defendant, however, this did not take place. The award criteria are not
adjusted and remain unchanged “quality” – first award criterion – and
“price” – second award criterion. Nor is the relative weight of the
award criteria have been adjusted according to her. After all, it is clear that the
award criteria “price” and “quality” are equivalent and they have an equal
have a relative value, namely half each. She points out that the Council has
as already stated in the interlocutory judgment of 6 January 2015. The Court of Justice also
confirms this relative value according to the defendant.

According to the defendant, the second ground of appeal must
therefore be rejected as unfounded.

Machine Translated by Google

7. In the last memorandum after the supplementary report of the investigation of the case by the auditor charged with the matter, in which the auditor reaches the conclusion that the second part of the sole ground of appeal is well-founded, The defendant further makes the following observations. First, it argues if the assessment method is not available for demonstrable reasons before the opening of the offers could be determined. Secondly, that the application of the assessment method “low-moderate-high” has not led to a change in the relative weight of the award criteria “price” and “quality”.

Beforehand she reiterates that only the answer given in the judgment of the Court of Justice No 6/15 of 14 July 2016 is binding and that of the Opinion of an Advocate General at the Court of Justice has no binding force goes out. The defending party therefore states that it only takes into account the arrest.

7.1. According to the defendant, the first conclusion of the auditor's report, namely that the method of ordinal scales by the the defendant was only established after the opening of the tenders without there are demonstrable reasons why this determination could not have been made before the opening, which is contrary to the principle of transparency, for the following reasons.

From the combination of Article 2 of Directive 2004/18 and recitals 27 to 31 of the judgment of the Court of Justice of 18 November 2010, Commission v Ireland, Case C-226/09, may, according to the the defendant cannot be inferred that the statement in the judgment that “each risk of favoritism” associated with the adoption of an assessment method after the opening of the tenders, implies that “the discriminatory effect thereof on the subscribers” must not be demonstrated. If not, there will be after all, a presumption that any determination of an assessment method after the opening of the submitted tenders was discriminatory and therefore unacceptable intervention is. Such an interpretation detracts from the clear consideration of the aforementioned judgment, which considers that the assessment methodology

Machine Translated by Google

not be stated in advance in the announcement of the order or the specifications announced.

It is furthermore not clear to the defendant how Recital 63 of the aforementioned judgment of 18 November 2010 C-226/09 shows that that the establishment of an assessment method after the opening of the tenders in any case entails a discriminatory effect. The aforementioned consideration deals only with the discriminatory effect caused by the relative weight as specified in the contract notice or in the order documents, is changed. *In this case,* there is no such change talk.

Nor can the judgment of 14 July 2016, according to the defending party it can be inferred that there must be “unforeseeable” reasons are specified so that it can be accepted that the contracting authority may establish an assessment method after the opening of the tenders. The the defendant had to choose between the tenders submitted before opening them an almost unlimited range of assessment methods – a numerical rating expressed in points or percentages, the use of an ordinal scale where the scales used can vary from “low-moderate-high” to a more detailed scale “very low - medium low - moderate - high - very high - excellent, etc.” Given this differentiation, it was therefore for her impossible to assess the tenders submitted before opening them method to determine precisely and decide to use the scale “low-moderate-high”. From the judgment of the Court of Justice of 14 July 2016, it may be the defending party believes that it can only be inferred that the determination of a assessment method after the opening of the tenders may not lead to the principle of equal treatment and the obligation of transparency. According to her, there is no question of favoritism *in this case .* She reiterates that the decision to use the ordinal scale “low-moderate-high” to be used, results from the equality of the offers in terms of the award criterion “quality”; this method is the same for the four bidders

Machine Translated by Google

application and to the benefit of each of them as their offers are qualitative were equivalent. Using a numerical assessment method, would, according to her, have led to her artificially searching must go into the submitted offers for differences (plus points or minus points) to justify a minuscule difference in points. In this In the event it could very well have been the case that all the registrants had received the same score, so the criticism would have been just as great that only the price criterion is decisive.

7.2. Furthermore, the defendant disputes the second conclusion of the auditor's report, namely that there would be some change in the relative weight of the award criteria because, through the method of the to apply ordinal scales to the award criterion "quality", the price criterion became decisive. A mere hypothetical possibility that the relative weight could be changed, is sufficient according to the the defending party does not. It believes that if the award criterion is also "quality" would have been assigned a point score instead of an ordinal classification, the general comparison and ranking of the offers *de facto* would not have looked any different. Even then it would have been apparent that the quotes from the requesting party, of the nv Ipsos Belgium and the nv Significant GfK would have achieved the same score for the award criterion "quality" and that New Information & Data has the same award criterion "quality" would have achieved a lower score.

Judgement

8. In the judgment of 14 July 2016, TNS Dimarso nv against the Flemish Region, case C-6/15, clarifies the Court of Justice in Recital 27 that "neither Article 53(2) of Directive 2004/18 nor any other provision thereof […] imposes an obligation on the contracting authority to the method by which he will assess the quotations in concrete terms and rank based on the criteria for awarding the contract and the

Machine Translated by Google

relative weight thereof, which are predetermined in the relevant
tender documents, by means of a notice in the announcement of the
to bring the order or specifications to the attention of potential tenderers". "A
such a general obligation" follows according to the Court of Justice –
recital 28 – "nor from the case-law of the Court".

However, in paragraph 31 the Court points out that "[a]ccording to the
principles laid down in Article 2 of Directive 2004/18 concerning the award of
assignments […] the method used by the contracting authority to prepare the tenders
to be assessed and ranked in concrete terms in principle not after the opening of
the quotes by this service [could] be determined, this to avoid any risk of
to exclude favoritism. However, if this method is not suitable for demonstrable reasons
cannot be determined before this opening, […] the contracting authority may
not be accused of having established this only after he, or his
assessment committee, has taken note of the content of the tenders".

"In any event", according to the Court – paragraph 32 – "it may
fact that the contracting authority uses the assessment method after the announcement
of the notice of the contract or the specifications, taking into account the
principles relating to the award of contracts and to the provisions set out in points 24 and
25 of the […] judgment has been established, does not have the effect of affecting the award
criteria or their relative weight are changed".

9. In the light of the aforementioned considerations of the judgment of
In the present case, the Court of Justice must, in the context of the second ground of appeal,
component must therefore still be examined whether the
assessment method used "high-sufficient-low" before the opening of
the quotations were determined and if this were not the case, or the
whether or not the defending party makes it plausible that this method
demonstrable reasons could not be established before this opening.

Machine Translated by Google

Contrary to what the defendant argues in its supplementary memorandum and in its final memorandum, it is apparent from recital 31 of the judgment of the Court of Justice has made it clear that the Court considers that the assessment method in principle not after the opening of the tenders by the contracting authority may be determined, in order to avoid any risk of favouritism to exclude. Recital 27 of the aforementioned judgment, which states that that the assessment methodology was not included in the announcement of the order or the specifications must be made known, does not affect this in any way detriment. In its final memorandum, the defending party loses the distinction from the eye between, on the one hand, the publication of the assessment method and, on the other hand, its determination. The Court of Justice provides for the determination which must in principle be made before the opening of tenders, also in recital 31 of the judgment, only in one exception, more determined when the method is not used before this opening for “demonstrable reasons” can be determined.

In paragraph 29 of the judgment, the Court of Justice refers although according to its case law an assessment committee must be able to have a certain freedom to perform its task and thus, without to make a change to the criteria for the award of the contract that are established in the specifications or the notice of the order, its own activities for the investigation and assessment of the submitted tenders may structure. The defending party states in its supplementary memorandum and in her last memorandum appears that the aforementioned authority for the assessment committee would simply mean that it would assess the method may in principle also be determined after the opening of the tenders, unless “its discriminatory effect on the tenderers” would be demonstrated. However, this argument goes against the clear wording already quoted above things of recital 31 that “[a]ccording to Article 2 of Directive 2004/18 principles laid down for the award of contracts […] the method by which the contracting authority uses to assess and approve the tenders *in concrete* terms

Machine Translated by Google

in principle do not rank after the opening of the tenders by this service
[can] be determined, in order to exclude any risk of favoritism”.

Consequently, the only conclusion that can be drawn from those words is that,
“in order to exclude any risk of favoritism”, it is in principle prohibited to
to determine the assessment method after the opening of the tenders, without
it must be demonstrated that this determination was made after the opening of the tenders
has had a discriminatory effect on one of the applicants. However, it does accept
the Court the possibility that there may be “demonstrable reasons” why the
method could not be determined before opening.

10. In this regard, the administrative file does not show anywhere that the
assessment method for the award criterion quality based on a
The “high-sufficient-low” scale was established before the opening of tenders.
Even after an explicit request to do so from the auditor-reporter by letter
of September 19, 2016, no request is made by the defendant to this effect
supporting documents submitted. She submits only a general additional document
explanation of the ARGUS method, dating from October 2000. It appears
However, this document does not assume that the contracting authority is in the current
case, let alone that this document seems to contain a decision on the matter to be
use assessment method in the context of the current assignment.

In her supplementary memorandum and in her final memorandum,
the defendant itself also expressly points out that it is for her
it was impossible to obtain the tender before the tenders were opened
to determine the assessment method precisely and to decide on the scale
“Low-sufficient-high” to be used. She indicates that she only decided to do so
after it became apparent that there were “great similarities between the quotes with
regarding the quality of the services offered”. Thus, the
the defendant itself stated that it only opted for this assessment method after the
opening of the tenders.

Machine Translated by Google

However, the defending party does not make it plausible that this method “for demonstrable reasons”, as required by the Court, not before this opening could be determined.

The argument put forward by the defending party in its additional memorandum explaining why such a general assessment method is appropriate after the opening of the tenders could be determined, namely "to ensure a correct and to allow a representative assessment and comparison of the offers”, does not convince as a “demonstrable reason”. The finding that there is a great deal of similarities between the quotes with regard to quality had previously should give reason to choose a more “refined” method in order to prevent qualitative differences between the offers leveled out and the price criterion *de facto* becomes decisive, regardless of the any quality difference between the quotes.

The argument in the last memorandum that a numerical assessment would not have made a difference, cannot be supported either. The application of a “more refined” method, which obviously entails that the defending party should award the points more precisely – in more detail – should have been accounted for on the basis of – possibly limited – “differences (plus points or minus points)” do not in any way amount to a “artificial” operation. The mere assertion that “it very well [could] be the case could have been that all applicants would have received the same score,” without prejudice to the finding that the application of the used The “high-sufficient-low” assessment method allows less selection of offers to rank their substantive properties than the application of “a numerical assessment expressed in points or percentages” or the use of “a more detailed scale “very low - medium low - moderate - high - very high – excellent”. If this more detailed scale had been used, one of the three “highly” ranked offers when assessing the criterion “quality” can be defined as “very high” or “excellent” for example ranked. However, since these qualifications are not included in the defendant's

Machine Translated by Google

party chosen scoring scale, such a quote could
necessarily for the criterion “quality” a maximum score of “high”
obtain just as two other quotes have obtained. The application of
a numerical assessment would then again have to be taken into account in the current case
brought about that the applicant's offer on the award criterion
quality should have scored only 3.74 out of 50 points more to match the
selected bidder to be ranked on an equal footing. The Council of State
nor the defending party can anticipate an adjusted comparison
of the quotations according to such more refined methods nor on the
arrangement that would have resulted from it.

Finally, the fact that the defendant party confirms this
ARGUS method has already been applied before, before the application of
this method could be established before the opening of the tenders, then
this shows that it was impossible to determine the assessment method
before the opening of tenders.

It must therefore be decided that the defending party does not
makes it plausible that this method is not suitable for demonstrable reasons
opening of the tenders could be determined, so that the requested
transparency principle has been violated.

11. Furthermore, in its judgment on the second
considered place – no. 32 – that “the fact that the contracting authority
assessment method after the announcement of the contract notice
or the specifications determine […] may not result in the award criteria
or its relative weight be changed”.

In the context of this section, the Council must therefore
It must still be investigated whether the aforementioned condition has been met and
or the defendant's choice of the “high-

Machine Translated by Google

sufficient-low” when assessing the award criterion “quality of the “offer” has not changed the award criteria and their relative weight.

There are no indications in this regard that the chosen assessment method for the criterion “quality of the offer” this criterion, let alone the award criterion "price", has changed. Both criteria were also already announced in the specifications.

The question remains whether the defendant's choice of the “high-sufficient-low” assessment method when assessing the award criterion “quality of the tender” the relative weight of the has changed the award criteria.

12. In its assessment of the first this question has not yet been answered in the judgment no. 229.723 of January 6, 2015.

In the first part of the plea, the applicant submitted that essence that the defendant has made an unauthorized change carried out by the relative weighting of the award criteria during the assessment of the award criterion 'quality' a scale of "high-sufficient-low" and not to use any numerical data as announced in the specifications expressed score from 0 to 50 points.

According to the applicant, the reference was 50/100 in the specifications not only the mutual relationship between the award criteria indicated – each being equal – but also the degree of nuance that the bidders could expect when their bid was assessed per award criterion. By an ordinal scale with classes “low-sufficient-high” the defendant would have acted in violation of the cutlery which, according to the applicant, provided for the award of a numerical score from 0 to 50 points.

Machine Translated by Google

This interpretation of the specifications by the requesting party
However, the Council of State did not follow this approach when assessing the first
part of the appeal in judgment no. 229.723 of 6 January 2015. The Council stated in
the aforementioned judgment already established with the auditorate that it limits the limits of a reason-
the assessment does not exceed the mention of “50/100” in the specifications
to be interpreted in each of the award criteria in the sense that only
intended to indicate that each of the two criteria is considered to be of equal value
considered and will therefore each determine half of the ranking.

The Council subsequently held that the applicant had not
demonstrates that the assessment methodology used deviates from the specifications, even if
can the requesting party agree to the application of a
rating with a point scale of 0 to 50 points is a more common
assessment methodology is then the use of an assessment methodology
where only three scales are used for an award criterion that
represents a weighting of 50 out of 100.

In view of the interpretation given by the Council of State in the
the aforementioned judgment in its assessment of the first ground of appeal has already
given to the contested specification provision, when assessing the
second ground of appeal it should still be examined whether the assessment method
“high-sufficient-low” when assessing the award criterion “quality
of the tender” has changed the relative weight of the award criteria
as announced in the specifications in the sense that each of the two criteria as
are considered equal and will therefore each be decisive for half
for the ranking.

13. In its judgment the Court of Justice finds that in this case,
on the one hand, the contracting authority only includes two award criteria in the specifications
has mentioned, namely the quality and the price, each time stating
“(50/100)”, and that, on the other hand, the assessment committee used a scale of “high-
used “sufficient-low” for the assessment of the “quality” criterion

Machine Translated by Google

of the tenders", without a scale being used for the award criterion "price".

The Court further notes that the Council of State has already held that the two entries "(50/100)" mean that the two award criteria have the same weight.

However, according to the Court, this method did not offer the possibility, when ranking the applicants with a view to the determination of the most economically advantageous tender, differences in the to express the quality of the quotes compared to their price comply with the requirements set out in the "(50/100)" indication relative weight of the award criteria. This method could in particular have an impact on the price criterion, which would therefore have a decisive weight receive in relation to the ranking of the offers according to the applied raw quality scale. According to the Court, it is also up to the referring judge to determine whether the contracting authority has complied with the notice of the assignment announced relative weight of each of the award criteria actually taken into account when assessing the tenders.

14. The Council of State notes in this regard that three of the four offers, including the offer of the requesting party, for the criterion "quality" have been given the score "high", and no scores have been given to to distinguish the quotations from each other and their content to rank properties, the "price" criterion when awarding the assignment was decisive. This changed the scope of the criterion "quality" flattened with respect to the "price" criterion, so that the latter criterion for choosing the person to whom the contract was awarded a relatively has had a higher weight than the 50% weight stated in the specifications could reasonably have expected. It is plausible that, if the tenderers had been informed in advance about the choice of this method for

Machine Translated by Google

the assessment of the offers against the criterion "quality", they focus more on the price would have directed their services.

15. The defending party refers in its supplementary memorandum to the interpretation of the specifications by the Council of State in its judgment of January 6, 2015 in the sense that the mention of “50/100” implies that they each be charged for half. By that mere reference the the defendant party does not, however, indicate that it has complied with the specifications relative weight of each of the award criteria, each for 50%, also actually taken into account when assessing the tenders. The mere mention of “50/100” in the award criteria in the award report and the fact that the assessments of both award criteria in the award report are included next to that they are included in each other do not demonstrate this either.

In its statement of defence, the defending party further states: that the applicant party has not stated anywhere in its application, for example, that a numerical calculation, shows that the defending party has the indicated award criteria were not taken into account on a half-way basis. In this regard, the Council of State notes that it is rather the defending party appears to be the one who has failed to provide clear and complete information in the award report to clearly demonstrate that this is the case by the methods it uses method whereby, on the one hand, it has only two award criteria in the specifications mentioned, namely the quality and the price, each time with the mention “(50/100)”, and, on the other hand, the assessment committee a scale “high- used “sufficient-low” for the assessment of the “quality” criterion of the tenders”, without a scale being used for the award criterion “price” and without a total score being made for the two criteria together.

Based on the motivation in the award report, only it is being investigated why the defendant has compromised the quality of the quotations rated three bidders as “high”, being the maximum score within the ordinal scale used.

Machine Translated by Google

The fact that there are great similarities between these three quotations exist with regard to their quality, does not rule out that there are also – they the possibly limited – qualitative differences. In any case, the the defending party never denied this in *tempora non suspecto .* This is also evident also from the motivation as included in the award report. The mere claim of the defendant in the last memorandum that “if there is also for the award criterion 'quality' would have been awarded a points score instead of an ordinal classification, the general comparison and ranking of the quotes would not have looked any different *in fact ”* and that “even then it would have been it turned out that [these quotes] would have achieved the same score for the award criterion 'quality'” is not convincing. As already noted, it cannot be are anticipated on the result of a comparison and ranking at the application of a more differentiated assessment method that the defending party itself recognizes as more “refined”.

The chosen general assessment method with only three scores also appear to have resulted in the three quotations with evaluation “high” were not classified further according to their substantive properties, so that, as far as these three offers are concerned, the criterion of “price” is unmistakably has been decisive. Even a minuscule price advantage of 1 euro, given the assessment method subsequently chosen by the defendant for the award criterion “quality” is sufficient to be the first in the world ranked once a certain level of quality was reached. Conversely, could, in terms of the quality criterion, have a minimal difference of a few points at 50 are sufficient, given the minimal difference in points for the prize, to influence the ranking.

In its supplementary memorandum, the defending party notes moreover, that they are used as an assessment method for the award criterion “quality” has chosen to use a “high-sufficient-low” scale given on the great similarities between the quotes with regard to the quality of the services offered. In doing so, it implicitly indicates that, given the large

Machine Translated by Google

similarities in quality, she wishes to give priority to the award
criterion "price". As a result, the criterion "price" appears to have a heavier impact
weighed up more than was previously announced in the specifications, which only mentioned
was 50%.

The assessment method subsequently chosen by the defending party
method appears to have changed the weighting of the award criteria.
Consequently, it is unlawful for this method to be used for the assessment of the
quotes by the defendant party was subsequently determined and this method had
must be made known in advance in the announcement of the order or the specifications
made.

16. The second part of the sole remedy is in the discussed
to any extent whatsoever.

B. Third part

17. In the third ground of appeal, the applicant submits, in
extremely subordinate order, to. Since the second part of the remedy in the
discussed extent has been found to be well-founded, the third ground of appeal should not be further discussed
to be assessed.

V. Kosten

18.1. In its final memorandum, the applicant requests that the
the defendant would be ordered to pay an increased
legal costs of 2,800 euros.

18.2. Article 30/1 of the coordinated laws, as inserted by Article 11 of the
Act of 20 January 2014 'reforming the competence, procedural arrangements and
organisation of the Council of State', entered into force
pursuant to Article 9 of the Royal Decree of 28 March 2014 'concerning the legal costs
referred to in Article 30/1 of the coordinated laws on

Machine Translated by Google

the Council of State of 12 January 1973' entered into force on 2 April 2014, date of publication in the Belgian Official Gazette, and applies “to every application for suspension or interim measures filed on grounds of extreme urgency, from that date, and which does not constitute an ancillary application to an action for annulment filed before that date,
as well as to any application, difficulty and appeal referred to in Articles 11, 12, 13, 14 and 16, 1° to 8°, of the coordinated laws, filed from that date, and to any additional applications filed simultaneously or subsequently claims".

It follows that, given the temporal scope of application of the aforementioned Royal Decree of 28 March 2014, the invoked Article 30/1 these, more specifically on an appeal such as the present one, lodged on 14 June 2012, i.e. before 2 April 2014, is not applicable. The Council of State may therefore not to make a ruling on the requested legal costs.

DECISION

1. The Council of State annuls the decision of the Flemish Minister of Energy, Housing, Cities and Social Economy of April 11, 2012, in which the assignment 'Housing survey 2012: survey of the home and the housing consumer in Flanders' according to specification no. AWB/VS/501-5-112 is awarded to the nv Ipsos Belgium.

2. The defendant is ordered to pay the costs of the appeal annulment, estimated at a fee of 175 euros.

Machine Translated by Google

This judgment was pronounced in Brussels, in open court on 23 November 2017, by the Council of State, XIIth Chamber, composed of:

Dierk Verbiest,	Speaker of the House,
Johan Bovin,	council of state,
Pierre Barra,	council of state,

assisted by

Silja Doms,	clerk.

The clerk **The Chairman**

Silja Doms **Dierk Verbiest**

EU:C:2016:634

JUDGMENT OF THE COURT (Eighth Chamber)

7 September 2016 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Article 2 — Principle of equal treatment — Obligation of transparency — Contract for the supply of a complex communications system — Difficulties in performance of the contract — Disagreement of the parties in regard to areas of responsibility — Settlement — Reduction in the scope of the contract — Transformation of a rental of equipment into a sale of equipment — Material amendment to a contract — Justification by the objective expediency of achieving a settlement agreement)

In Case C-549/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Højesteret (Supreme Court, Denmark), made by decision of 27 November 2014, received at the Court on 2 December 2014, in the proceedings

Finn Frogne A/S

v

Rigspolitiet ved Center for Beredskabskommunikation,

THE COURT (Eighth Chamber),

composed of D. Šváby (Rapporteur), President of the Chamber, J. Malenovský and M. Vilaras, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Finn Frogne A/S, by K. Dyekjær, C. Bonde, P. Gjørtler, H.B. Andersen and S. Stenderup Jensen, advokater, and J. Grayston, Solicitor,

– the Danish Government, by C. Thorning, acting as Agent, and P. Hedegaard Madsen, advokat,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Grasso, avvocato dello Stato,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by L. Grønfeldt and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for

the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum, OJ 2004 L 351, p. 44).

2 The request has been made in proceedings between Finn Frogne A/S ('Frogne') and Rigspolitiet ved Center for Beredskabskommunikation (Centre for Emergency Communication of the National Police, Denmark; 'CFB') concerning the propriety of a settlement agreement concluded by CFB, in its capacity as the contracting authority, and Terma A/S, the successful tenderer for a public contract, in connection with the performance of that contract.

Legal context

EU law

3 According to recital 2 of Directive 2004/18:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.'

4 Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts', provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Article 28 of that directive provides:

'In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. … In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.'

6 Article 31 of Directive 2004/18 is worded as follows:

'Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:

(1) for public works contracts, public supply contracts and public service contracts:

…

(c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice as referred to in Article 30 cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;

…

(4) for public works contracts and public service contracts:

(a) for additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services:

– when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities,

or

– when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works or services may not exceed 50% of the amount of the original contract;

…’

7 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 89/665’), includes an Article 2d, entitled ‘Ineffectiveness’. According to that article:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/18/EC;

…

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

– the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/18/EC,

– the contracting authority has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,

– the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

…’

The dispute in the main proceedings and the question referred for a preliminary ruling

8 In 2007, the Danish State initiated a procedure for the award of a public contract, in the form of a competitive dialogue, for the supply of a global communications system common to all emergency response services and for the maintenance of that system for several years. CFB subsequently became the competent public authority for that contract.

9 That contract was awarded to Terma. The contract with Terma, concluded on 4 February 2008, involved a total amount of 527 million Danish kroner (DKK) (approximately EUR 70 629 800), DKK 299 854 699 (approximately EUR 40 187 000) of which related to a minimum solution which was

described in the tender specifications, with the remainder relating to options and services which would not necessarily be subject to a request for performance.

10 In the course of the performance of that contract, difficulties arose in meeting delivery deadlines, with CFB and Terma both disagreeing as to which party was responsible for making it impossible to perform the contract as stipulated.

11 Following negotiations, the parties agreed to a settlement under which the scope of the contract was to be reduced to the supply of a radio communications system for regional police forces, worth approximately DKK 35 million (approximately EUR 4.69 million), while CFB would acquire two central server farms, worth approximately DKK 50 million (approximately EUR 6.7 million), which Terma had itself acquired with a view to leasing them to CFB in performance of the original contract. As part of that settlement, each party intended to waive all rights arising from the original contract other than those resulting from the settlement.

12 Before finalising that settlement, CFB published on 19 October 2010, in the *Official Journal of the European Union*, a notice for voluntary ex ante transparency regarding the settlement agreement which it intended to conclude with Terma, pursuant to Article 2d(4) of Directive 89/665.

13 Frogne, which had not applied for pre-selection to participate in the tendering procedure for the original contract, brought an action before the Klagenævnet for Udbud (Complaints Board for Public Procurement, Denmark) (the 'Complaints Board'). Before ruling on the merits, the latter, by decision of 10 December 2010, refused to allow that action to have suspensive effect.

14 The settlement was concluded on 17 December 2010.

15 Frogne's action before the Complaints Board was dismissed by decision of 3 November 2011.

16 The legal action brought by Frogne following this decision was also dismissed by a decision of the Østre Landsret (Eastern Regional Court, Denmark) of 20 December 2013.

17 In the first place, the Østre Landsret (Eastern Regional Court) held that the amendment of the original contract as put in place by the settlement concluded between CFB and Terma constituted a material amendment to that contract, as defined in the case-law of the Court of Justice.

18 In the second place, the Østre Landsret (Eastern Regional Court) took the view, however, first, that that settlement had not been the result of an intention on the part of Terma and CFB to renegotiate the material terms of the original contract in order to optimise their subsequent collaborative effort under materially altered terms, but had rather been a settlement of the dispute between the parties in place of a termination of that contract in circumstances where the performance of that contract appeared impossible, a settlement in which each party agreed to significant waivers with a view to achieving an acceptable solution, of an order of magnitude significantly smaller in comparison with that contract, while allowing each of them to avoid the risk of what were likely to be disproportionate losses. Second, there was no basis on which to assume that the intention of CFB or Terma had been to circumvent the public procurement rules.

19 In those circumstances, the Østre Landsret (Eastern Regional Court) took the view that the principles of equal treatment and transparency did not preclude the conclusion of this settlement provided that there was a close link between the original contract and the services provided in connection with it. This was the case with regard to the provision of a radio communications system for regional police forces, but not with regard to the sale of the two central server farms. In respect of the latter aspect, that court held that CFB's decision to resort to the settlement agreement at issue and the conclusion of that agreement were contrary to the principle of equal treatment and the obligation of transparency. The fact that the conclusion of that agreement allowed the contracting authority to address risks related to a situation of conflict was deemed irrelevant to the legality of that conclusion.

20 However, the Østre Landsret (Eastern Regional Court) ruled that CFB's assessment to the effect that the conclusion of the settlement agreement with Terma was permitted without prior publication of a notice of contract under the EU rules was not manifestly wrong. Taking into consideration the notice

for voluntary ex ante transparency which the contracting authority had published in the *Official Journal of the European Union* regarding the settlement the conclusion of which was envisaged under Article 2d(4) of Directive 89/665, and the fact that, before concluding it, it had waited not only for the expiry of the 10-day period provided for in that provision, but also for the Complaints Board's ruling on the possible suspensive effect of Frogne's action before it, the Østre Landsret (Eastern Regional Court) found that that agreement could not be declared invalid, with the result that the action before it should not be upheld.

21 Before the Højesteret (Supreme Court, Denmark), to which it has appealed, Frogne argues that the question as to whether a public contract intended as part of a settlement relating to an original public contract must be the subject of a tendering procedure depends solely on whether or not such an amendment to the original contract is material. In the present case, it submits, the change is material, whether it relates to the subject matter of the contract as amended or to the contract's significantly reduced value, since the amended contract was likely to interest smaller undertakings. Furthermore, it submits, neither economic considerations nor the protection of the situation of the successful tenderer may be relied on to justify an infringement of the principle of equal treatment and of the obligation of transparency.

22 CFB considers the two aspects of the settlement. With respect, first, to the limitation of the contract's scope to the supply of a radio communications system for the regional police forces alone, it draws attention to the importance of the fact that the amendment consisted in a significant reduction in the services to be supplied, a situation which, it claims, is not governed by EU law. As regards, second, the acquisition of the central server farms, only the lease of which was provided for in the original contract, it considers, in essence, that the fact that such equipment was sold rather than leased did not constitute a material change in that contract.

23 More generally, CFB believes that where the performance of a contract gives rise to difficulties — which, it submits, is not unusual in certain types of contracts, such as those relating to the development of IT systems — the contracting authority must be allowed a broad discretion to enable it to reach a reasonable solution in the event of difficulties in performance. Otherwise, the contracting authority would be obliged either to refrain from making reasonable adjustments or to terminate the contract, with the risks and losses which this would entail. Interpreting Directive 2004/18 as meaning that a new tendering procedure is required in such a case would, in practice, prevent a settlement from being concluded, thus amounting to an interference with the law of obligations which is not permitted by the Treaties.

24 The Højesteret (Supreme Court) is unsure as to the scope of Article 2 of Directive 2004/18, in particular as to whether the principle of equal treatment and the obligation of transparency imply that a contracting authority cannot consider entering into a settlement to resolve the difficulties arising from the performance of a public contract without this automatically giving rise to the obligation to organise a new tendering procedure relating to the terms of that settlement.

25 According to the Højesteret (Supreme Court), the new element in comparison with the situations previously examined by the Court lies in those difficulties in performing the contract, the attribution of fault for which to one or other of the parties being disputed, and, ultimately, the relevant question is whether it is possible to have recourse to a settlement in order to bring an end to those difficulties without having to organise a new tendering procedure.

26 In those circumstances, the Højesteret (Supreme Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 2 of Directive 2004/18, read in conjunction with the judgments of the Court of Justice of the European Union of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351), and of 13 April 2010, *Wall* (C-91/08, EU:C:2010:182), to be interpreted as meaning that a settlement agreement which introduces limitations on and amendments to the services to be provided as originally agreed by the parties under a contract previously put out to tender and also mutual agreement to waive the application of remedies for breach in order to avoid subsequent litigation constitutes a contract which in itself requires a tendering procedure, in a situation where performance of the original contract has encountered difficulties?'

The question referred for a preliminary ruling

27 By its question, the referring court asks, in essence, whether Article 2 of Directive 2004/18 must be interpreted as meaning that, following the award of a public contract, a material amendment cannot be made to it without a new tendering procedure being initiated, even in the case where the amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute with an uncertain outcome, which arose from the difficulties encountered in the performance of that contract.

28 It follows from the Court's case-law that the principle of equal treatment and the obligation of transparency resulting therefrom preclude, following the award of a public contract, the contracting authority and the successful tenderer from amending the provisions of that contract in such a way that those provisions differ materially in character from those of the original contract. Such will be the case if the proposed amendments would either extend the scope of the contract considerably to encompass elements not initially covered or to change the economic balance of the contract in favour of the successful tenderer, or if those changes are liable to call into question the award of the contract, in the sense that, had such amendments been incorporated in the documents which had governed the original contract award procedure, either another tender would have been accepted or other tenderers might have been admitted to that procedure (see, to that effect, inter alia, judgment of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraphs 34 to 37).

29 As regards the latter case, it must be noted that an amendment of the elements of a contract consisting in a reduction in the scope of that contract's subject matter may result in it being brought within reach of a greater number of economic operators. Provided that the original scope of the contract meant that only certain undertakings were capable of presenting an application or submitting a tender, any reduction in the scope of that contract may result in that contract being of interest also to smaller economic operators. Moreover, since the minimum levels of ability required for a specific contract must, pursuant to the second subparagraph of Article 44(2) of Directive 2004/18, be related and proportionate to the subject matter of the contract, a reduction in that contract's scope is capable of resulting in a proportional reduction of the level of the abilities required of the candidates or tenderers.

30 In principle, a substantial amendment of a contract after it has been awarded cannot be effected by direct agreement between the contracting authority and the successful tenderer, but must give rise to a new award procedure for the contract so amended (see, by analogy, judgment of 13 April 2010, *Wall*, C-91/08, EU:C:2010:182, paragraph 42). The position would be otherwise only if that amendment had been provided for by the terms of the original contract (see, to that effect, judgment of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraphs 37, 40, 60, 68 and 69).

31 However, it follows from the order for reference that, according to the analysis of the Østre Landsret (Eastern Regional Court), to which the Højesteret (Supreme Court) refers, the particular aspect of the situation at issue in the main proceedings lies in the fact that the amendment of the contract, described as material, arose not out of the desire of the parties to renegotiate the essential terms of the contract by which they were originally bound, as defined in the abovementioned case-law of the Court, but out of objective difficulties, with unpredictable consequences, encountered in the performance of that contract, difficulties which certain interested parties who submitted observations to the Court also state are unpredictable where complex contracts are concerned, such as contracts involving the development of IT systems, as is the case here.

32 However, it must be held that neither (i) the fact that a material amendment of the terms of a contract results not from the deliberate intention of the contracting authority and the successful tenderer to renegotiate the terms of that contract, but from their intention to reach a settlement in order to resolve objective difficulties encountered in the performance of the contract nor (ii) the objectively unpredictable nature of the performance of certain aspects of the contract can provide justification for the decision to carry out that amendment without respecting the principle of equal treatment from which all operators potentially interested in a public contract must benefit.

33 As regards, first, the reasons that may lead the contracting authority and the successful tenderer to contemplate a substantial amendment to that contract involving the initiation of a new award procedure, it must be noted, first, that the reference to the deliberate intention of the parties to renegotiate the

terms of that contract is not a decisive factor. It is true that the Court refers to such an intention in paragraph 44 of the judgment of 5 October 2000, *Commission* v *France* (C-337/98, EU:C:2000:543), the first judgment in which the Court examined this issue. However, as is clear from paragraphs 42 to 44 of that judgment, that formulation related to the specific factual context of the case giving rise to that judgment. On the other hand, the question whether there has been a material amendment must be analysed from an objective point of view, on the basis of the criteria set out in paragraph 28 above.

34 Second, it follows from paragraph 40 of the judgment of 14 November 2013, *Belgacom* (C-221/12, EU:C:2013:736) that the principles of equal treatment and non-discrimination and the obligation of transparency which is to be inferred from those principles, arising from the FEU Treaty, cannot be disregarded where there is an intention to modify substantially a service concession contract or grant exclusive rights with the aim of providing for a reasonable solution designed to bring an end to a dispute which has arisen between public entities and an economic operator, for reasons outside their control, as to the scope of the agreement by which they are bound. Since those principles and that obligation form the basis of Article 2 of Directive 2004/18, as is apparent from a reading of recital 2 of that directive, that standard also applies in the context of the application of that directive.

35 As regards, second, the objectively unpredictable nature of certain matters which may form the subject matter of a public contract, it must, admittedly, be recalled that, in accordance with Article 31 of Directive 2004/18, contracting authorities can opt for a direct award of a contract, that is to say, negotiating the terms of the contract with a selected economic operator without prior publication of a contract notice, in various cases, many of which are characterised by the unforeseeability of certain circumstances. However, as is clear from the wording of the last sentence of the second paragraph of Article 28 of that directive, Article 28 may be applied only in the specific cases and circumstances referred to expressly in Article 31, with the result that the list of exceptions concerned must be regarded as exhaustive. It does not, however, appear that the situation at issue in the main proceedings corresponds to one of those situations.

36 Furthermore, the very fact that, because of their subject matter, certain public contracts may immediately be categorised as being unpredictable in nature means that there is a foreseeable risk that difficulties may occur at the implementation stage. Accordingly, in respect of such a contract, it is for the contracting authority not only to use the most appropriate procurement procedures, but also to take care when defining the subject matter of that contract. Furthermore, as is clear from paragraph 30 above, the contracting authority may retain the possibility of making amendments, even material ones, to the contract, after it has been awarded, on condition that this is provided for in the documents which governed the award procedure.

37 Although the principle of equal treatment and the obligation of transparency must be guaranteed even in regard to specific public contracts, this does not mean that the particular aspects of those contracts cannot be taken into account. That legal imperative and that practical necessity are reconciled, first, through strict compliance with the conditions of a contract as they were laid down in the contract documents up to the end of the implementation phase of that contract, but also, second, through the possibility of making express provision, in those documents, for the option for the contracting authority to adjust certain conditions, even material ones, of that contract after it has been awarded. By expressly providing for that option and setting the rules for the application thereof in those documents, the contracting authority ensures that all economic operators interested in participating in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders (see, by analogy, judgment of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraphs 112, 115, 117 and 118).

38 By contrast, where such contingencies are not provided for in the contract documents, the requirement to apply, in respect of a given public contract, the same conditions to all economic operators makes it necessary, in the case of a material amendment to that contract, to initiate a new tendering procedure (see, by analogy, judgment of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 127).

39 Lastly, it is necessary to make it clear that all of those developments are without prejudice to the potential consequences of the notice for voluntary ex ante transparency which has been published in

connection with the contract at issue in the main proceedings.

40 In the light of the foregoing, the answer to the question is that Article 2 of Directive 2004/18 must be interpreted as meaning that, following the award of a public contract, a material amendment cannot be made to that contract without a new tendering procedure being initiated even in the case where that amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute the outcome of which is uncertain, which arose from the difficulties encountered in the performance of that contract. The position would be different only if the contract documents provided for the possibility of adjusting certain conditions, even material ones, after the contract had been awarded and fixed the detailed rules for the application of that possibility.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that, following the award of a public contract, a material amendment cannot be made to that contract without a new tendering procedure being initiated even in the case where that amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute the outcome of which is uncertain, which arose from the difficulties encountered in the performance of that contract. The position would be different only if the contract documents provided for the possibility of adjusting certain conditions, even material ones, after the contract had been awarded and fixed the detailed rules for the application of that possibility.

[Signatures]

---

* Language of the case: Danish.

ORDONNANCE DE LA COUR (neuvième chambre)

7 avril 2016 (*)

«Renvoi préjudiciel – Article 99 du règlement de procédure de la Cour – Directive 89/665/CEE – Marchés publics – Législation nationale – Frais d'accès à la justice administrative dans le domaine des marchés publics – Droit à un recours effectif – Frais dissuasifs – Contrôle juridictionnel des actes administratifs – Principes d'effectivité et d'équivalence»

Dans l'affaire C-495/14,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Tribunale regionale di giustizia amministrativa di Trento (tribunal administratif régional de Trente, Italie), par décision du 25 septembre 2014, parvenue à la Cour le 6 novembre 2014, dans la procédure

Antonio Tita,

Alessandra Carlin,

Piero Costantini

contre

Ministero della Giustizia,

Ministero dell'Economia e delle Finanze,

Presidenza del Consiglio dei Ministri,

Segretario Generale del Tribunale regionale di giustizia amministrativa di Trento (TRGA),

LA COUR (neuvième chambre),

composée de M. C. Lycourgos, président de chambre, MM. E. Juhász (rapporteur) et C. Vajda, juges,

avocat général: M. M. Bobek,

greffier: M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 1er de la directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO L 395, p. 33), telle que modifiée par la directive 2007/66/CE du Parlement européen et du Conseil, du 11 décembre 2007 (JO L 335, p. 31, ci-après la «directive 89/665»).

2 Cette demande a été présentée dans le cadre d'un litige opposant M. Tita, Mme Carlin ainsi que M. Costantini, avocats associés (ci-après le «cabinet d'avocats»), au Ministero della Giustizia

(ministère de la Justice), au Ministero dell'Economia e delle Finanze (ministère de l'Économie et des Finances), à la Presidenza del Consiglio dei Ministri (Présidence du Conseil des ministres) et au Segretario Generale del Tribunale regionale di giustizia amministrativa di Trento (TRGA) (secrétaire général du tribunal régional administratif de Trente) au sujet de la légalité de la décision adoptée par ce dernier, relative aux frais de justice à verser pour l'introduction d'un recours juridictionnel administratif en matière de marchés publics.

Le cadre juridique

Le droit de l'Union

3 Aux termes du troisième considérant de la directive 89/665, l'ouverture des marchés publics à la concurrence de l'Union nécessite un accroissement substantiel des garanties de transparence et de non-discrimination et il importe, pour qu'elle soit suivie d'effets concrets, qu'il existe des moyens de recours efficaces et rapides en cas de violation du droit de l'Union en matière de marchés publics ou des règles nationales transposant ce droit.

4 L'article 1er de cette directive, intitulé «Champ d'application et accessibilité des procédures de recours», dispose:

«1. La présente directive s'applique aux marchés visés par la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services [(JO L 134, p. 114)], sauf si ces marchés sont exclus en application des articles 10 à 18 de ladite directive.

Les marchés au sens de la présente directive incluent les marchés publics, les accords-cadres, les concessions de travaux publics et les systèmes d'acquisition dynamiques.

Les États membres prennent, en ce qui concerne les procédures de passation des marchés publics relevant du champ d'application de la directive 2004/18/CE, les mesures nécessaires pour garantir que les décisions prises par les pouvoirs adjudicateurs peuvent faire l'objet de recours efficaces et, en particulier, aussi rapides que possible, dans les conditions énoncées aux articles 2 à 2 septies de la présente directive, au motif que ces décisions ont violé le droit [de l'Union] en matière de marchés publics ou les règles nationales transposant ce droit.

[...]

3. Les États membres s'assurent que les procédures de recours sont accessibles, selon des modalités que les États membres peuvent déterminer, au moins à toute personne ayant ou ayant eu un intérêt à obtenir un marché déterminé et ayant été ou risquant d'être lésée par une violation alléguée.

[...]»

5 L'article 7 de la directive 2004/18, intitulé «Montant des seuils des marchés publics», fixe les seuils des valeurs estimées à partir desquels l'attribution d'un marché doit être effectuée conformément aux règles de cette directive. Ces seuils sont modifiés à des intervalles réguliers par des règlements de la Commission européenne et adaptés aux circonstances économiques.

Le droit italien

6 L'article 13, paragraphe 1, du décret du président de la République n° 115, du 30 mai 2002, tel que modifié (ci-après le «décret»), a établi un régime de taxation des actes judiciaires, constitué par une contribution unifiée, fixée en proportion de la valeur du litige.

7 En ce qui concerne les procédures juridictionnelles administratives, l'article 13, paragraphe 6 bis, du décret fixe le montant de la contribution unifiée indépendamment de la valeur du litige.

8 Selon ledit article 13, paragraphe 6 bis, en cas de recours introduits devant les tribunaux administratifs régionaux et devant le Consiglio di Stato (Conseil d'État), le montant de la contribution unifiée s'élève, en règle générale, à 650 euros. Cependant, cette même disposition fixe, pour des matières particulières, des montants différents, qui peuvent être réduits ou majorés.

9 Ainsi, aux termes dudit article 13, paragraphe 6 bis, la contribution en matière de marchés publics s'élève à:

– 2 000 euros lorsque la valeur du marché est égale ou inférieure à 200 000 euros;

– 4 000 euros pour les litiges dont la valeur est comprise entre 200 000 et 1 000 000 euros, et

– 6 000 euros pour ceux d'une valeur supérieure à 1 000 000 euros.

10 Selon l'article 13, paragraphe 1 bis, du décret, pour les procédures d'appel en matière de passation de marchés publics, ces montants sont majorés de 50 %.

11 Il découle de l'article 14, paragraphe 3 ter, du décret que la valeur du litige correspond non pas à la marge bénéficiaire qui peut être tirée de l'exécution du marché établi par les entités adjudicatrices, mais au montant de la valeur de base de ce marché.

Le litige au principal et la question préjudicielle

12 Le cabinet d'avocats a saisi la juridiction de renvoi d'un recours ayant pour objet une procédure de passation d'un marché public relatif à des services de consultation juridique, à laquelle il a participé.

13 Le cabinet d'avocats a versé, au titre de la contribution unifiée, un montant de 650 euros, correspondant au coût d'introduction d'un recours administratif ordinaire.

14 Par décision du 6 mai 2014, le secrétaire général du tribunal administratif régional de Trente a invité ledit cabinet à compléter ce paiement, au motif que le litige avait trait à la passation de marchés publics et que la contribution unifiée à acquitter pour ce type de litiges s'élevait à 2 000 euros.

15 Par un nouveau recours, le cabinet d'avocats a, notamment, attaqué cette décision, en invoquant une violation des principes généraux de l'ordre juridique de l'Union, de l'article 47 de la charte des droits fondamentaux de l'Union européenne (ci-après la «Charte»), des articles 6 et 13 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950, ainsi que des dispositions des directives 89/665 et 2007/66.

16 La juridiction de renvoi considère que le cabinet d'avocats dispose d'un intérêt matériel et procédural à s'opposer à la décision du 6 mai 2014 qui lui impose un paiement additionnel au titre de la contribution unifiée.

17 Cette juridiction souligne le fait que, d'une part, en ce qui concerne les procédures juridictionnelles administratives, contrairement à ce qui est prévu pour les procédures civiles, le montant de la contribution unifiée n'est pas lié à la valeur du litige et, d'autre part, cette contribution s'élève à des montants spécifiques lorsqu'il s'agit de recours portant sur certaines matières particulières de droit administratif.

18 À cet égard, la juridiction de renvoi relève que, dans le domaine des procédures de passation de marchés publics, le montant de la contribution unifiée est considérablement plus important que celui demandé pour les litiges administratifs soumis à la procédure ordinaire.

19 Cette juridiction considère que la taxation des recours devant le juge administratif, surtout en matière de passation de marchés publics, est susceptible de dissuader les entreprises de poursuivre leur action juridictionnelle et pose, dès lors, des problèmes de conformité avec les principes de l'ordre juridique de l'Union.

20 Ladite juridiction expose que, à son estime, le bénéfice perçu par l'adjudicataire d'un marché public atteint, généralement, à peine 10 % du montant du marché concerné et considère que le versement anticipé d'une contribution unifiée dépassant le montant d'un tel bénéfice peut amener l'adjudicataire à renoncer, en tant que justiciable, à certains mécanismes procéduraux.

21 Ainsi, selon la juridiction de renvoi, le décret limite le droit d'agir en justice, porte atteinte aux droits de la défense et à l'accessibilité des voies de recours, restreint l'effectivité du contrôle juridictionnel des actes administratifs, discrimine les opérateurs de faible capacité financière par rapport aux opérateurs disposant d'une capacité financière importante et les défavorise par rapport à ceux qui, dans le cadre de leurs activités, saisissent les juridictions civiles et commerciales.

22 La contribution unifiée applicable aux recours introduits devant les tribunaux administratifs serait excessive par rapport aux frais de justice prévus en droits allemand, espagnol ou français lors de l'introduction d'un recours juridictionnel. Le caractère élevé de ces frais dissuaderait les opérateurs économiques des autres États membres de participer à des procédures d'appel d'offres en Italie, de sorte que ces frais seraient incompatibles avec la liberté d'établissement et la libre prestation des services.

23 La juridiction de renvoi est d'avis que le coût supporté par l'État aux fins du fonctionnement de la justice administrative en matière de marchés publics n'est pas sensiblement différent, distinct ou plus élevé que celui relatif aux procédures liées à d'autres types de contentieux. Elle fait référence à la doctrine selon laquelle le législateur national a certainement souhaité alléger le poids de l'arriéré judiciaire et faciliter tant la réalisation de travaux publics que l'acquisition publique de biens et de services.

24 Cette juridiction considère que les principes d'efficacité, de célérité, de non-discrimination et d'accessibilité, figurant à l'article 1er de la directive 89/665, sont applicables à l'affaire dont elle est saisie et que le décret enfreint ces principes ainsi que le droit à un recours effectif, réaffirmé à l'article 47 de la Charte.

25 Il découlerait, par ailleurs, du principe d'efficacité des moyens de recours que les frais d'accès au juge doivent être viables et proportionnés par rapport à l'intérêt que le requérant espère tirer de la procédure judiciaire.

26 Dans ces conditions, le Tribunale regionale di giustizia amministrativa di Trento (tribunal administratif régional de Trente) a décidé de surseoir à statuer et de poser à la Cour la question préjudicielle suivante:

«Les principes fixés par les directives 2007/66, 89/665 et 92/13/CEE [du Conseil, du 25 février 1992, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des règles communautaires sur les procédures de passation des marchés des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications (JO L 76, p. 14)], en ce qui concerne l'amélioration de l'efficacité des procédures de recours en matière de passation de marchés publics, s'opposent-ils à une réglementation nationale [...] qui impose des montants élevés au titre de la contribution unifiée pour accéder à la justice administrative en matière de procédures de passation de marchés publics?»

Sur la question préjudicielle

27 En vertu de l'article 99 de son règlement de procédure, lorsque la réponse à une question posée à titre préjudiciel peut être clairement déduite de la jurisprudence, la Cour peut à tout moment, sur proposition du juge rapporteur, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée.

28 Il convient de faire application de cet article dans la présente affaire.

29 À titre liminaire, il y a lieu d'indiquer, d'une part, que, bien qu'elle fasse référence à la directive 92/13, la demande de décision préjudicielle ne comporte aucun élément susceptible de démontrer la pertinence de celle-ci aux fins de la solution du litige au principal, litige qui a pour objet une procédure de

passation de marchés publics relatifs aux services de consultation juridique et qui est initié par un cabinet d'avocats.

30 D'autre part, il convient de relever que la valeur du marché public en cause au principal ne figure pas dans la décision de renvoi. Or, la valeur estimée d'un marché constitue un élément décisif en vue de déterminer si ce marché est visé ou non par les directives 2004/18 et 89/665. Il appartient à la juridiction de renvoi de vérifier si ledit marché relève du champ d'application de ces directives, en tenant compte du seuil d'application pertinent, énoncé à l'article 7 de la directive 2004/18, qui était en vigueur à l'époque des faits au principal.

31 Par sa question, la juridiction de renvoi demande, en substance, si l'article 1er de la directive 89/665 ainsi que les principes d'équivalence et d'effectivité doivent être interprétés en ce sens qu'ils s'opposent à une réglementation nationale, telle que celle en cause au principal, qui impose, lors de l'introduction de recours dans les procédures juridictionnelles administratives en matière de marchés publics, l'acquittement de frais de justice plus élevés que dans d'autres matières.

32 La Cour a déjà eu l'occasion, dans l'arrêt Orizzonte Salute (C-61/14, EU:C:2015:655), de se prononcer sur la compatibilité de la contribution unifiée en cause au principal avec cet article et lesdits principes.

33 Il ressort en effet des points 43 et 44 de cet arrêt ainsi que de la jurisprudence de la Cour qui y est citée que, si l'article 1er, paragraphes 1 et 3, de la directive 89/665 impose aux États membres de prendre les mesures nécessaires garantissant l'existence de recours efficaces et aussi rapides que possible contre les décisions des pouvoirs adjudicateurs incompatibles avec le droit de l'Union et assurant une large accessibilité de ces recours à toute personne ayant ou ayant eu un intérêt à obtenir un marché déterminé et ayant été ou risquant d'être lésée par une violation alléguée, cette directive laisse aux États membres un pouvoir dans le choix des garanties de procédure qu'elle prévoit et des formalités y afférentes.

34 Notamment, la directive 89/665 ne contient aucune disposition ayant trait spécifiquement aux frais de justice à verser par les justiciables lorsqu'ils introduisent, conformément à l'article 2, paragraphe 1, sous b), de ladite directive, un recours en annulation contre une décision prétendument illégale se rapportant à une procédure de passation de marchés publics (arrêt Orizzonte Salute, C-61/14, EU:C:2015:655, point 45).

35 Conformément à une jurisprudence constante de la Cour, en l'absence de réglementation de l'Union en la matière, il appartient à chaque État membre, en vertu du principe d'autonomie procédurale des États membres, de régler les modalités de la procédure administrative et celles de la procédure juridictionnelle destinées à assurer la sauvegarde des droits que les justiciables tirent du droit de l'Union. Ces modalités procédurales ne doivent, toutefois, pas être moins favorables que celles concernant des recours similaires prévus pour la protection des droits tirés de l'ordre juridique interne (principe d'équivalence) et ne doivent pas rendre pratiquement impossible ou excessivement difficile l'exercice des droits conférés par l'ordre juridique de l'Union (principe d'effectivité) (arrêt Orizzonte Salute, C-61/14, EU:C:2015:655, point 46 et jurisprudence citée).

36 En outre, dès lors que de tels frais de justice constituent des modalités procédurales de recours en justice destinés à assurer la sauvegarde des droits conférés par le droit de l'Union aux candidats et aux soumissionnaires lésés par des décisions des pouvoirs adjudicateurs, ils ne doivent pas porter atteinte à l'effet utile de la directive 89/665 (arrêt Orizzonte Salute, C-61/14, EU:C:2015:655, point 47 et jurisprudence citée).

37 Le principe d'effectivité implique une exigence de protection juridictionnelle, consacrée à l'article 47 de la Charte, que le juge national est tenu de respecter (arrêt Orizzonte Salute, C-61/14, EU:C:2015:655, point 48 et jurisprudence citée).

38 Ainsi, l'article 1er de la directive 89/665 doit nécessairement être interprété à la lumière des droits fondamentaux qui sont inscrits dans ladite Charte, en particulier le droit à un recours effectif devant un tribunal, prévu à son article 47 (arrêt Orizzonte Salute, C-61/14, EU:C:2015:655, point 49 et jurisprudence citée).

39 Dans de telles conditions, à l'instar de ce que la Cour a considéré au point 50 de l'arrêt Orizzonte Salute (C-61/14, EU:C:2015:655), il convient de vérifier si, en l'occurrence, une réglementation telle que celle en cause au principal peut être considérée comme conforme aux principes d'équivalence et d'effectivité ainsi qu'à l'effet utile de la directive 89/665.

40 En ce qui concerne le principe d'effectivité, il y a lieu de rappeler que le régime des frais de justice en cause au principal comprend trois montants fixes de contribution unifiée s'élevant à 2 000 euros, à 4 000 euros et à 6 000 euros, pour les trois catégories de marchés publics, à savoir ceux d'une valeur égale ou inférieure à 200 000 euros, ceux dont la valeur se situe entre 200 000 et 1 000 000 euros, et ceux d'une valeur dépassant 1 000 000 euros.

41 La Cour a constaté, aux points 56 et 58 de l'arrêt Orizzonte Salute (C-61/14, EU:C:2015:655), que les frais de justice dus sur cette base sont proportionnels à la valeur des marchés publics relevant de ces trois catégories de marchés publics, qu'ils présentent un caractère dégressif et qu'ils ne sont pas susceptibles de rendre pratiquement impossible ou excessivement difficile l'exercice des droits conférés par l'ordre juridique de l'Union en matière des marchés publics.

42 À ce dernier égard, la Cour a également déjà constaté, aux points 60 et 61 de l'arrêt Orizzonte Salute (C-61/14, EU:C:2015:655), en ce qui concerne le fait que la contribution unifiée est fixée en fonction non pas du bénéfice que l'entreprise participant à l'appel d'offres est en droit d'attendre de ce marché, mais de la valeur du marché en cause au principal, que plusieurs États membres reconnaissaient la possibilité de calculer les frais de procédure à acquitter en se basant sur la valeur de l'objet sur lequel porte le litige et que, dans le domaine des marchés publics, une règle nécessitant des calculs spécifiques pour chaque appel d'offres et pour chaque entreprise, dont le résultat serait susceptible d'être contesté, s'avérerait compliquée et imprévisible.

43 Aux points 62 à 64 de cet arrêt, la Cour a considéré, s'agissant de l'application de la contribution unifiée au détriment éventuel des opérateurs économiques de faible capacité financière, que cette contribution est imposée indistinctement, quant à sa forme et à son montant, au regard de tous les justiciables souhaitant former un recours contre une décision adoptée par les pouvoirs adjudicateurs, qu'un tel système ne crée pas de discrimination entre les opérateurs exerçant dans le même secteur d'activité et que la participation d'une entreprise à un marché public présuppose une capacité économique et financière appropriée.

44 Enfin, au point 65 dudit arrêt, la Cour a constaté que bien que la partie requérante ait l'obligation d'avancer la contribution unifiée lors de l'introduction de son recours judiciaire contre une décision en matière de marchés publics, la partie qui succombe est en principe tenue de rembourser les frais de justice avancés par la partie qui obtient gain de cause.

45 Quant au principe d'équivalence, la Cour a jugé, au point 66 de ce même arrêt, que la circonstance selon laquelle, dans le domaine des procédures de passation de marchés publics, la contribution unifiée est plus importante que celle applicable, d'une part, aux litiges administratifs soumis à la procédure ordinaire et, d'autre part, aux procédures civiles ne saurait en soi démontrer une violation dudit principe.

46 En effet, le principe d'équivalence implique un traitement égal entre les recours fondés sur une violation du droit national et ceux, similaires, fondés sur une violation du droit de l'Union, et non l'équivalence des règles procédurales nationales applicables à des contentieux de nature différente, tels que le contentieux civil, d'un côté, et le contentieux administratif, de l'autre, ou à des contentieux relevant de deux branches de droit différentes (voir, en ce sens, arrêt Orizzonte Salute, C-61/14, EU:C:2015:655, point 67 et jurisprudence citée).

47 En l'occurrence, il ne ressort pas de la décision de renvoi que le système de la contribution unifiée s'applique différemment aux recours fondés sur les droits que les justiciables tirent du droit de l'Union relatif aux marchés publics et à ceux fondés sur la méconnaissance du droit interne ayant le même objet.

48 Ainsi que la Cour l'a déjà constaté au point 69 de l'arrêt Orizzonte Salute (C-61/14, EU:C:2015:655), il convient d'en conclure que des frais de justice à acquitter lors de l'introduction d'un recours dans les

procédures juridictionnelles administratives en matière de marchés publics, tels que la contribution unifiée en cause au principal, ne portent atteinte ni à l'effet utile de la directive 89/665 ni aux principes d'équivalence et d'effectivité.

49 En outre, s'agissant de la considération émise par la juridiction de renvoi selon laquelle les frais de justice en cause au principal sont susceptibles d'être considérés comme constituant des entraves à la liberté d'établissement ou à la libre prestation des services incompatibles avec le traité FUE, force est de constater que, à supposer même que tel soit le cas, de telles entraves seraient de nature à être justifiées au vu des éléments exposés aux points 41 à 44 de la présente ordonnance.

50 Dans ces conditions, il y a lieu de répondre à la question posée que l'article 1er de la directive 89/665 ainsi que les principes d'équivalence et d'effectivité doivent être interprétés en ce sens qu'ils ne s'opposent pas à une réglementation nationale qui impose l'acquittement de frais de justice, tels que la contribution unifiée en cause au principal, lors de l'introduction, devant les juridictions administratives, d'un recours en matière de marchés publics.

Sur les dépens

51 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, la Cour (neuvième chambre) dit pour droit:

L'article 1er de la directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux, telle que modifiée par la directive 2007/66/CE du Parlement européen et du Conseil, du 11 décembre 2007, ainsi que les principes d'équivalence et d'effectivité doivent être interprétés en ce sens qu'ils ne s'opposent pas à une réglementation nationale qui impose l'acquittement de frais de justice, tels que la contribution unifiée en cause au principal, lors de l'introduction, devant les juridictions administratives, d'un recours en matière de marchés publics.

Signatures

---

* Langue de procédure: l'italien.

EU:C:2016:688

JUDGMENT OF THE COURT (Third Chamber)

15 September 2016 (*)

(Reference for a preliminary ruling — Directives 89/665/EEC and 92/13/EEC — Public procurement — Review procedures — National legislation making the admissibility of appeals against the acts of a contracting authority subject to giving a 'good conduct guarantee' — Charter of Fundamental Rights of the European Union — Article 47 — Right to an effective remedy)

In Joined Cases C-439/14 and C-488/14,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania) and the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania), by judgments of 19 September 2014 and 8 October 2014, received at the Court on 24 September 2014 and 4 November 2014 respectively, in the proceedings

SC Star Storage SA

v

Institutul Naţional de Cercetare-Dezvoltare în Informatică (ICI) (C-439/14),

and

SC Max Boegl România SRL,

SC UTI Grup SA,

Astaldi SpA,

SC Construcţii Napoca SA

v

RA Aeroportul Oradea,

SC Porr Construct SRL,

Teerag-Asdag Aktiengesellschaft

SC Col-Air Trading SRL,

AVZI SA,

Trameco SA,

Iamsat Muntenia SA (C-488/14),

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, D. Šváby, J. Malenovský, M. Safjan and M. Vilaras (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 14 January 2016,

after considering the observations submitted on behalf of:

– SC Star Storage SA, by A. Fetiță, avocate,

– SC Max Boegl România SRL, by F. Irimia, avocat,

– the Romanian Government, by R.-H. Radu, R. Haţieganu, D. Bulancea and M. Bejenar, acting as Agents,

– the Greek Government, by K. Georgiadis and K. Karavasili, acting as Agents,

– the European Commission, by A. Tokár and I. Rogalski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 April 2016,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 1(1) to (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 89/665’), and Article 1(1) to (3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66 (‘Directive 92/13’), and Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The requests have been made, in Case C-439/14, in proceedings between SC Star Storage SA and the Institutul Naţional de Cercetare-Dezvoltare în Informatică (ICI) (National Institute for Research and Development in Informatics (ICI)) concerning a procedure for the award of a public contract for the acquisition of an information technology infrastructure and services relating to the preparation, the management, development and completion of a cloud computing platform and, in Case C-488/14, proceedings between SC Max Boegl România SRL, SC UTI Grup SA, Astaldi SpA and SC Construcţii Napoca SA (‘Max Boegl and others’) and RA Aeroportul Oradea SA, SC Porr Construct SRL, Teerag-Asdag Aktiengesellschaft, SC Col-Air Trading SRL, AZVI SA, Trameco SA and Iamsat Muntenia SA concerning a procedure for the award of a public contract relating to extension work and modernisation of the infrastructure of Oradea Airport (Romania).

Legal context

EU law

Directive 89/665

3 Paragraphs 1 to 3 of Article 1 of Directive 89/665, which is entitled ‘Scope and availability of review procedures’, provide:

‘1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [(OJ 2004 L 134, p. 114)], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

Directive 92/13

4 Paragraphs 1 to 3 of Article 1 of Directive 92/13, which is also entitled 'Scope and availability of review procedures', provide:

'1. This Directive applies to contracts referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [(OJ 2004 L 134, p. 1)], unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive.

Contracts within the meaning of this Directive include supply, works and service contracts, framework agreements and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/17/EC, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim in respect of harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

Directive 2007/66

5 Recital 36 of Directive 2007/66 states:

'This Directive respects the fundamental rights and observes the principles recognised by the [Charter]. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the [Charter].'

Directive 2004/17

6 Article 16(b) of Directive 2004/17 provides:

‘Save where they are ruled out by the exclusions in Articles 19 to 26 or pursuant to Article 30, concerning the pursuit of the activity in question, this Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:

…

(b) EUR 5 186 000 in the case of works contracts.’

Directive 2004/18

7 Article 7(b) and (c) of Directive 2004/18 provides as follows:

‘This Directive shall apply to public contracts which are not excluded in accordance with the exceptions provided for in Articles 10 and 11 and Articles 12 to 18 and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

…

(b) EUR 207 000:

– for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV,

– for public supply contracts awarded by contracting authorities which are listed in Annex IV and operate in the field of defence, where these contracts involve products not covered by Annex V,

– for public service contracts awarded by any contracting authority in respect of the services listed in Category 8 of Annex IIA, Category 5 telecommunications services the positions of which in the CPV are equivalent to CPC reference Nos 7524, 7525 and 7526 and/or the services listed in Annex II B;

(c) EUR 5 186 000 for public works contracts.’

Romanian law

8 Articles 271a and 271b of the Ordonanţă de Urgenţă a Guvernului nr. 34/2006, privind atribuirea contractelor de achiziţie publică, a contractelor de concesiune de lucrări publice şi a contractelor de concesiune de servicii (Government Emergency Ordinance No 34/2006 on the procedures for the award of public supply, works and services contracts) as amended and supplemented by the Ordonanţă de Urgenţă a Guvernului nr. 51/2014 (Government Emergency Ordinance No 51/2014) (the ‘OUG’) provides:

‘Article 271a

(1) For the purpose of protecting the contracting authority against the risk of any improper conduct, the party challenging the decision shall be required to provide a good conduct guarantee covering the entire period from the date on which the challenge/application/action is lodged to the date on which the decision of the National Council for Dispute Resolution/the judgment of the competent judicial authority has become final.

(2) The challenge/application/action shall be dismissed if the party challenging the decision fails to furnish proof that the guarantee referred to in paragraph 1 has been provided.

(3) The good conduct guarantee shall be provided by means of bank transfer or a guarantee instrument issued in compliance with legal requirements by a banking institution or an insurance company; the original guarantee shall be lodged at the offices of the contracting authority and a copy with the National Council for Dispute Resolution or the judicial authorities at the same time as the challenge/application/action is lodged.

(4) The total amount of the good conduct guarantee shall be determined by reference to the estimated value of the contract to be awarded, in accordance with the following rules:

(a) 1% of the estimated value, if this is lower than the threshold amounts provided for in Article 55(2)(a) and (b);

(b) 1% of the estimated value, if this is lower than the threshold amounts provided for in Article 55(2)(c), but not greater than the equivalent in [Romanian lei (RON)] of EUR 10 000, according to the exchange rate of the Romanian National Bank applicable at the date on which the guarantee is provided;

(c) 1% of the estimated value, if this is equal to or greater than the threshold amounts set out in Article 55(2)(a) and (b), but not greater than the equivalent in RON of EUR 25 000 according to the exchange rate of the Romanian National Bank applicable at the date on which the guarantee is provided;

(d) 1% of the estimated value, if this is equal to or greater than the threshold amounts set out in Article 55(2)(c), but not greater than the equivalent in RON of EUR 100 000 according to the exchange rate of the Romanian National Bank applicable at the date on which the guarantee is provided.

(5) The good conduct guarantee must be valid for a period of at least 90 days, be irrevocable and provide for unconditional payment upon first request of the contracting authority where the challenge/application/action is rejected.

(6) If, on the day on which the good conduct guarantee is due to expire, the decision of the National Council for Dispute Resolution or the judgment of the judicial authority has not become final and the party challenging the decision has failed to extend the validity of the good conduct guarantee in accordance with the requirements laid down in paragraphs 1 to 5, the contracting authority shall retain the guarantee. The provisions set out in Article 271b(3) to (5) shall apply *mutatis mutandis*.

(7) The provisions set out in paragraphs 1 to 6 shall also apply *mutatis mutandis* where the action against the decision of the National Council for Dispute Resolution is brought by a person other than the contracting authority or the party challenging the decision, in accordance with Article 281.

Article 271b

(1) If the challenge is dismissed by the National Council for Dispute Resolution or by the judicial authority, where the party challenging the decision has brought proceedings directly before the latter, the contracting authority shall be required to retain the good conduct guarantee as from the time at which the decision of the National Council for Dispute Resolution/the judgment of the judicial authority becomes final. The requirement to retain the guarantee shall apply to the parts of the contract in respect of which the challenge has been dismissed.

(2) Paragraph 1 shall also apply where the party challenging the decision withdraws the challenge/application/action.

(3) The measure referred to in paragraph 1 shall not apply where the National Council for Dispute Resolution/the judicial authority dismisses the challenge as devoid of purpose or where the challenge/application/action is withdrawn following the adoption, by the contracting authority, of corrective measures necessary under Article 256c(1).

(4) Where the National Council for Dispute Resolution upholds the challenge, or the competent judicial authority upholds the action brought against the National Council for Dispute Resolution’s decision to dismiss the challenge, the contracting authority shall be required to return the good conduct guarantee to the party challenging the decision no later than five days following the date on which the decision/judgment has become final.

(5) Where the party challenging the decision has brought proceedings directly before the judicial authority and the latter upholds the action, paragraph 4 shall apply *mutatis mutandis*.

(6) The amounts received by the contracting authority under the good conduct guarantee shall be classified as income of that contracting authority.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-439/14

9 On 1 April 2014, the ICI, as the contracting authority, published in the Sistemul Electronic de Achiziţii Publice (Electronic Public Procurement System, 'the EPPS') a notice concerning the opening of a call for tenders for the award of a public contract for the acquisition of an information technology infrastructure and services relating to the preparation, management, development and completion of a cloud computing platform and the corresponding tender documents. The award criterion for that contract, with an estimated value of RON 61 287 713.71 (approximately EUR 13 700 000), net of value added tax (VAT) was that of 'the lowest price'.

10 Following requests from economic operators, the ICI published a number of explanatory notes regarding the stipulations in the tender documents in the EPPS.

11 On 30 June 2014, Star Storage challenged Explanatory Notes No 4 and No 5 of 24 June 2014 and No 7 of 26 June 2014 before the Consiliul Naţional de Soluţionare a Contestaţiilor (National Council for Dispute Resolution, 'the CNSC').

12 By decision of 18 July 2014, the CNSC, based, inter alia, on Article 271a(2) of the OUG No 34/2006, dismissed that challenge as inadmissible, on the ground that Star Storage had not provided a good conduct guarantee.

13 On 5 August 2014, Star Storage brought an appeal before the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania), seeking, inter alia, the annulment of that decision, arguing that the obligation to provide a good conduct guarantee laid down by Romanian law was contrary to the Romanian Constitution and EU law.

14 The referring court considers, due to its amount and the rules governing it, that the good conduct guarantee is liable to seriously undermine the right of economic operators to effective review procedures against the acts of the contracting authorities.

15 In those circumstances, the Curtea de Apel Bucureşti (Court of Appeal, Bucharest) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are the provisions in the third subparagraph of Article 1(1) and Article 1(3) of [Directive 89/665] to be interpreted as precluding a rule under which a "good conduct guarantee" must be lodged as a prerequisite for being granted access to procedures for reviewing the decisions of contracting authorities, such as the rule laid down in Article 271a and 271b of [the OUG] No 34/2006?'

Case C-488/14

16 On 21 January 2014, RA Aeroportul Oradea, in its capacity as the contracting authority, published a call for tenders in the EPPS for the award of a public contract for extension works and the modernisation of the infrastructures of Oradea Airport (Romania). The estimated amount of the contract is RON 101 232 054 (approximately EUR 22 800 000) net of value added tax, the award criterion adopted being 'most economically advantageous tender'.

17 According to the report drawn up after the tender assessment, the bid submitted by the consortium of SC Max Boegl România SRL, SC UTI Grup SA and Astaldi SpA, was held to be ineligible, while that submitted by the consortium of SC Construcţii Napoca SA, SC Aici Cluj SA and CS Icco Energ SRL was ranked second in accordance with the award criterion adopted.

18 Those two tendering consortia have each challenged that report before the CNSC. By its decision of 10 July 2014, those challenges were dismissed as being unfounded. As a consequence, those two consortia each brought an appeal against that decision before the Curtea de Apel Oradea (Court of Appeal, Oradea).

19 At the hearing, on 10 September 2014, that court drew the attention of the applicants in the main proceedings to the fact that, having regard to the entry into force on 1 July 2014 of Articles 271a and 271b of the OUG No 34/2006, they were required to provide a 'good conduct guarantee'. Max Boegl and others then requested that an objection of unconstitutionality of those provisions be heard by the Curtea Constituţională (Constitutional Court, Romania) and that a request for a preliminary ruling be made to the Court of Justice.

20 In those circumstances, the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania) stayed those proceedings and requested a preliminary ruling on the following question:

'Must Article 1(1), (2) and (3) of [Directive 89/665] and Article 1(1), (2) and (3) of [Directive 92/13] be interpreted as precluding legislation which makes access to review procedures of decisions of contracting authorities subject to an obligation to deposit beforehand a "good conduct guarantee" such as that governed by Articles 271a and 271b of [the OUG No 34/2006]?'

Procedure before the Court

21 By orders of 13 November 2014 and 10 December 2014, the President of the Court rejected the requests from the Curtea de Apel Bucureşti (Court of Appeal, Bucharest) and the Curtea de Apel Oradea (Court of Appeal, Oradea) that Cases C-439/14 and C-488/14 be determined by the expedited procedure laid down by Article 105(1) of the Rules of Procedure of the Court of Justice.

22 By order of the President of the Court of Justice of 13 November 2014, Cases C-439/14 and C-488/14 were joined for the purposes of the written and oral procedure and judgment.

23 By judgment No 5 of 15 January 2015, the Curtea Constituţională (Constitutional Court) partially upheld the objection of unconstitutionality of Articles 271a and 271b of the OUG No 34/2006 raised by Star Storage and Max Boegl and others respectively.

24 By letter of 21 July 2015, the Court, in accordance with Article 101 of its Rules of Procedure, sent the Curtea de Apel Bucureşti (Court of Appeal, Bucharest) and the Curtea de Apel Oradea (Court of Appeal, Oradea) a request for clarifications, asking them to submit their observations on the judgment of the Curtea Constituţională (Constitutional Court) No 5 of 15 January 2015 and its possible impact on their respective requests for a preliminary ruling.

25 By letter of 11 August 2015, received at the Court on 26 August 2015, the Curtea de Apel Oradea (Court of Appeal, Oradea) stated essentially that the judgment of the Curtea Constituţională (Constitutional Court) No 5 of 15 January 2015 had upheld the objection of unconstitutionality relating to the provisions of Article 271b(1) and (2) of the OUG No 34/2006, but had rejected that relating to the provisions of Article 271a and Article 271b(3) to (6) of the OUG No 34/2006, so that its request for a preliminary ruling no longer concerned the latter provisions.

26 By letter of 14 September 2015, received at the Court on 23 September 2015, the Curtea de Apel Bucureşti (Court of Appeal, Bucharest) also stated essentially that the judgment of the Curtea Constituţională (Constitutional Court) No 5 of 15 January 2015 had confirmed the constitutionality of the obligation to provide a good conduct guarantee as a condition of admissibility of any action and that, therefore, it was still necessary to examine whether the provisions of Articles 271a and 271b of the OUG No 34/2006, declared to be compatible with the Romanian Constitution, which make recourse to review procedures in award procedures for public contracts subject to the provision of a 'good conduct guarantee', may be regarded as compatible with the principle of effective judicial protection, as recognised by Article 1(1) to (3) of Directive 89/665 and Article 1(1) to (3) of Directive 92/13, read together with Article 47 of the Charter.

27 It also considers that the Romanian legislation requires an in-depth analysis of the fact that the good conduct guarantee must be provided in addition to the ‘tendering guarantee’ that the tenderer must also provide, in accordance with Article 43a of the OUG No 34/2006, which represents up to 2% of the estimated value of the contract, and the fact that it is not possible either to vary the amount of the good conduct guarantee which is, in accordance with Article 271a(4) of the OUG No 34/2006, fixed automatically at 1% of the estimated value of the contract to be concluded up to a maximum amount equivalent to EUR 100 000, or to give a reduction or to agree on payment by instalment, according to the specific circumstances of a particular case.

28 Therefore, the Curtea de Apel Bucureşti (Court of Appeal, Bucharest) asks the Court to answer the following question:

‘Must Article 1(1), (2) and (3) of [Directive 89/665] and Article 1(1), (2) and (3) of [Directive 92/13], read together with Article 47 of the Charter, be interpreted as precluding legislation which makes access to review procedures of decisions of contracting authorities subject to an obligation to deposit beforehand a “good conduct guarantee” such as that governed by Articles 271a and 271b of [the OUG No 34/2006]?’

29 Finally, by judgment No 750 of 4 November 2015, the Curtea Constituţională (Constitutional Court) also declared incompatible with the Romanian Constitution Article 271a(5) of the OUG No 34/2006 which provided for the unconditional payment upon first request of the good conduct guarantee to the contracting authority where the challenge/application/action was rejected.

Preliminary observations

30 It must be held that, as the public contract at issue in Case C-439/14 concerns supplies and services, the value of which exceeds the threshold laid down by Article 7(b) of Directive 2004/18, Directive 89/665 is applicable in the dispute in the main proceedings.

31 However, the Romanian Government and the European Commission disagree as to the nature of the public contract at issue in Case C-488/14, the former taking the view that that contract is covered by Directive 2004/18 and, therefore, Directive 89/665, the latter considering that that contract is covered by Directive 2004/17 and, therefore, by Directive 92/13.

32 In that connection, it must be noted that, as the referring court in Case C-488/14 provides very little information as to the public contract at issue in the main proceedings, it is not possible for the Court to determine whether it falls within Directive 2004/17 or Directive 2004/18.

33 Nevertheless, although it is for the referring court to give a ruling on that issue, that uncertainty has no effect on the request for a preliminary ruling in Case C-488/14 because, as the Advocate General observed in point 25 of her Opinion, the value of the public contract at issue reaches the thresholds fixed for public works contracts by Article 7(c) of Directive 2004/18 and by Article 16(b) of Directive 2004/17.

34 The Court will therefore answer both the question referred in Case C-439/14 and that in Case C-488/14 simultaneously, since the provisions of Directives 89/665 and 92/13 whose interpretation is sought are, in any event, drafted in absolutely identical terms.

Consideration of the questions referred for a preliminary ruling

35 It should be observed, first of all, as is clear from the explanations provided by the two referring courts in response to the request for clarifications from the Court of Justice and the observations submitted at the hearing, that the provisions of Article 271b(1) and (2) and those of Article 271a(5), last sentence, of the OUG No 34/2006 were declared to be contrary to the Romanian Constitution by the judgments of the Curtea Constituţională (Constitutional Court) No 5 of 15 January 2015 and No 750 of 4 November 2015 respectively.

36 The two referring courts have indicated that therefore they could no longer apply those provisions, which the Romanian Government confirmed at the hearing. However, they have expressly stated that they maintain their questions for a preliminary ruling as the other provisions of Romanian law at issue in the main proceedings were still applicable.

37 In those circumstances, while it is for the referring courts alone to draw conclusions from the judgments of the Curtea Constituţională (Constitutional Court) No 5 of 15 January 2015 and No 750 of 4 November 2015, for the resolution of the disputes before them, it must be held that the requests for a preliminary ruling concern solely the provisions of Romanian law relating to the good conduct guarantee held to be compatible with the Romanian Constitution.

38 It follows that, by their question, the referring courts ask essentially whether Article 1(1) to (3) of Directive 89/665 and Article 1(1) to (3) of Directive 92/13, read together with Article 47 of the Charter, must be interpreted as meaning that they preclude national legislation, such as that at issue in the main proceedings, which makes the admissibility of all actions against the acts of a contracting authority subject to the obligation for the applicant to provide a good conduct guarantee to the contracting authority, which must be refunded to the applicant whatever the outcome of the action.

39 In that connection, it must be recalled that Article 1(1) of Directive 89/665 and Article 1(1) of Directive 92/13 require the Member States to adopt the measures necessary to ensure that the decisions taken by the contracting authorities in public contract award procedures falling within the scope of Directives 2004/17 and 2004/18 may be reviewed effectively and, in particular, as rapidly as possible, on the ground that they have infringed EU law on public procurement or the national rules transposing that law.

40 Both Article 1(3) of Directive 89/665 and Article 1(3) of Directive 92/13 also lay down the obligation for the Member States to ensure, under detailed rules which the Member States may establish, that the review procedures are available, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

41 Those provisions, which are intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are thus designed to reinforce the existence, in all Member States, of effective remedies, so as to ensure the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (see, to that effect, judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 71; of 11 September 2014, *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 34, and of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 50).

42 However, neither Directive 89/665 nor Directive 92/13 contains any provisions specifically governing the conditions under which those review procedures may be used. Thus, the Court has already held that Directive 89/665 laid down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement (see, in particular, judgments of 27 February 2003, *Santex*, C-327/00, EU:C:2003:109, paragraph 47; of 19 June 2003, *GAT*, C-315/01, EU:C:2003:360, paragraph 45; and of 30 September 2010, *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 33).

43 However, according to settled case-law, the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities, must not compromise the effectiveness of Directives 89/665 and 92/13, the objective of which is to ensure that decisions taken unlawfully by contracting authorities may be reviewed effectively and as rapidly as possible (see, in particular, judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 72; of 27 February 2003, *Santex*, C-327/00, EU:C:2003:109, paragraph 51; of 3 March 2005, *Fabricom*, C-21/03 and C-34/03, EU:C:2005:127, paragraph 42; order of 4 October 2007, *Consorzio Elisoccorso San Raffaele*, C-492/06, EU:C:2007:583, paragraph 29; judgments of 12 March 2015, *eVigilio*, C-538/13, EU:C:2015:166, paragraph 40; and of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 47).

44 In particular, care must be taken to ensure that the effectiveness of Directives 89/665 and 92/13 are not undermined (see judgments of 18 June 2002, *HI*, C-92/00, EU:C:2002:379, paragraphs 58 and 59, and

of 11 December 2014*, Croce Amica One Italia*, C-440/14, EU:C:2014:2435, paragraph 40) or the rights conferred on individuals by EU law (judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 72, and of 28 January 2010, *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 49).

45 Furthermore, it must be recalled, as is clear from recital 36 of Directive 2007/66, and therefore Directives 89/665 and 92/13 that it amended and supplemented, that they seek to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second paragraphs of Article 47 of the Charter.

46 Accordingly, when they set out detailed procedural rules for legal actions intended to ensure the protection of rights conferred by Directives 89/665 and 92/13 on candidates and tenderers harmed by the decisions of contracting authorities, the Member States must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter.

47 In the present case, Article 271a(1) to (5) of the OUG No 34/2006 requires any person taking part in an award procedure for public contracts and intending to challenge a decision of the contracting authority, either before the CNSC or directly before a court, to provide a good conduct guarantee as the condition of admissibility of any action. That guarantee, of an amount corresponding to 1% of the estimated value of the public contract concerned, limited to EUR 25 000 for public supply and services contracts and EUR 100 000 for public works contracts, must be provided to the contracting authority either by bank transfer or by a guarantee instrument issued by a banking establishment or an insurance company for a period of at least 90 days.

48 However, that guarantee must be refunded if the appeal is upheld, at the latest five days after the date on which the decision become definitive, in accordance with Article 271b(4) and (5) of the OUG No 34/2006, and also if the appeal is withdrawn or dismissed, the retention of the guarantee by the contracting authority being henceforth without a legal basis, having regard to the judgments of the Curtea Constituţională (Constitutional Court) No 5 of 15 January 2015 and No 750 of 4 November 2015.

49 As the Advocate General pointed out in point 37 of her Opinion, the good conduct guarantee thereby constitutes, as a pre-condition for getting any challenge examined, a limitation on the right to an effective remedy before a tribunal within the meaning of Article 47 of the Charter which, in accordance with Article 52(1) of the Charter can therefore be justified only if it is provided for by law, if it respects the essence of that right and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others (see judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 160).

50 It must be held that, in the cases in the main proceedings, the legal basis for the good conduct guarantee is clearly and precisely defined by the OUG No 34/2006, so that it must be regarded as being provided for by the national legislation (see judgments of 27 May 2014, *Spasic*, C-129/14 PPU, EU:C:2014:586; of 6 October 2015, *Delvigne*, C-650/13, EU:C:2015:648, paragraph 47; and of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 81). Furthermore, the fact that the good conduct guarantee may reach the substantial amount of EUR 25 000 or EUR 100 000 cannot lead to the conclusion that the obligation to give such a guarantee undermines the fundamental content of the right to an effective remedy since, in any event, that guarantee, cannot be kept by the contracting authority, whatever the outcome of the action.

51 Nonetheless, it must still be verified whether the good conduct guarantee corresponds to an objective in the general interest and whether, in the affirmative, it complies with the principle of proportionality within the meaning of Article 52(1) of the Charter.

52 Article 271a(1) of the OUG No 34/2006 states that the aim of the good conduct guarantee is to protect the contracting authority from the risk of inappropriate conduct. The Romanian Government indicated, in its written submissions and at the hearing, that the good conduct guarantee was mainly intended to facilitate the conduct of award procedures for public contracts by preventing the improper use of remedies and any delays to the conclusion of the contract.

53 In that connection, it must be held that combating the abuse of remedies is, as the Advocate General noted in point 44 of her Opinion, a legitimate objective which contributes not only to the attainment of the objectives pursued by Directives 89/665 and 92/13, but also, more widely, to the proper administration of justice.

54 A financial condition such as the good conduct guarantee at issue in the main proceedings is a measure liable to discourage frivolous challenges and ensure that all individuals have their actions dealt with as rapidly as possible, in the interest of the proper administration of justice, in accordance with Article 47, first and second paragraphs, of the Charter.

55 However, although the interest of the proper administration of justice may justify the imposition of a financial restriction on the access by a person to a remedy, that restriction must however retain a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (see, to that effect, judgment of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraphs 47 and 60).

56 In that connection, it must be observed that, although the obligation to provide a good conduct guarantee is a less dissuasive measure in its current version than in its initial version, since it can no longer be automatically and unconditionally kept by the contracting authority in the case that the appeal is rejected or withdrawn, that obligation is still able to achieve the objective of combating frivolous actions pursued by the Romanian legislation.

57 First, as the Advocate General observed in point 55 of her Opinion, providing a good conduct guarantee involves a financial burden for the applicant, whether he makes a bank transfer or gives a bank guarantee.

58 The amount of the good conduct guarantee is fixed as a percentage of the price of the public contract considered which may reach EUR 25 000 for public supply and public service contracts and EUR 100 000 for public works contracts.

59 Mobilising a sum of that amount by bank transfer, like the requirement to take the steps necessary to constitute a bank guarantee and pay the fees relating to it are such as to encourage applicants to carefully consider bringing an action. Furthermore, in so far as it undermines the applicant’s resources or, at least, its ability to obtain credit until that guarantee is refunded, the good conduct guarantee is of such a nature that it encourages applicants to act prudently in the proceedings they bring, consistent with the requirement in Article 1(1) of Directive 89/665 and Article 1(1) of Directive 92/13 that the review procedures referred to therein are conducted as rapidly as possible. As the Romanian Government submitted at the hearing, it is conceivable that such a financial condition will encourage potential litigants to seriously evaluate their interest in bringing legal proceedings and their chance of winning and thereby dissuade them from bringing claims which are manifestly unfounded or which only seek to delay the award of a contract (see, by analogy, judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 73).

60 Second, pursuant to the judgments of the Curtea Constituţională (Constitutional Court) No 5 of 15 January 2015 and No 750 of 4 November 2015, as the automatic and unconditional retention of the good conduct guarantee by the contracting authority and its payment upon the first request are no longer possible, it cannot be held that the obligation to constitute that guarantee in itself, as a condition for the admissibility of all actions, goes beyond what is necessary to achieve the objective of combating improper actions that it pursues.

61 The good conduct guarantee of 1% of the value of the public contract, limited in accordance with the type of contract remains modest (see judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 58), in particular for tenderers which must normally demonstrate a certain financial capacity. That guarantee may, next, and in any event, be constituted in the form of a bank guarantee. Finally, it has to be constituted only for the period between the filing of the application and final judgment.

62 Lastly, in its answer to the request for clarifications sent by the Court, the Curtea de Apel Bucureşti (Court of Appeal, Bucharest) requested the Court to answer its question taking account of the guarantee

of good conduct and the tendering guarantee that the tenderer must also constitute under Article 43a of the OUG No 34/2006. However, it has not provided any information in that regard either concerning the current tendering guarantee scheme or its relationship to the good conduct guarantee. In those circumstances, the Court is unable to express a view on that matter.

63 Having regard to the foregoing considerations, the answer to the questions referred is that Article 1(1) to (3) of Directive 89/665 and Article 1(1) to (3) of Directive 92/13, read in the light of Article 47 of the Charter, must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which makes the admissibility of any action against an act of the contracting authority subject to the obligation for the applicant to constitute a good conduct guarantee that it provides to the contracting authority, if that guarantee must be refunded to the applicant whatever the outcome of the action.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the actions before the national courts, the decisions on costs are a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 1(1) to (3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, and Article 1(1) to (3) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66, and read in the light of Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that they do not preclude national legislation, such as that at issue in the main proceedings, which makes the admissibility of any action against an act of the contracting authority subject to the obligation for the applicant to constitute a good conduct guarantee that it provides to the contracting authority, if that guarantee must be refunded to the applicant whatever the outcome of the action.

[Signatures]

---

* Language of the case: Romanian.

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 28 April 2016 (1)

Joined Cases C-439/14 and C-488/14

SC Star Storage SA

v

Institutul Naţional de Cercetare-Dezvoltare în Informatică (ICI)

(Request for a preliminary ruling from the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania))

and

SC Max Boegl România SRL

SC UTI Grup SA,

Astaldi SpA,

SC Construcții Napoca SA

v

RA Aeroportul Oradea

SC Porr Construct SRL

Teerag-Asdag Aktiengesellschaft

SC Col-Air Trading SRL

AVZI SA

Trameco SA

Iamsat Muntenia SA

(Request for a preliminary ruling from the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania))

(Public procurement — Directives 89/665/EEC and 92/13/EEC –National law requiring a ‘good conduct guarantee’ to access review procedures — Procedural autonomy of the Member States — Principles of equivalence and effectiveness — Articles 47 and 52 of the Charter — Right to an effective remedy — Limitation — Proportionality)

1. In the present cases the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania) and the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania) essentially seek guidance from the Court as to whether EU law precludes a Member State from requiring an applicant to lodge a ‘good conduct guarantee’

in order to access review procedures for public procurement decisions by contracting authorities. Under the national legislation at issue in the main proceedings, contracting authorities retain the good conduct guarantee where the body competent to review their decisions rejects the challenge or where the applicant abandons it.

2. The references therefore concern the scope of the right of access to an effective remedy in the context of public procurement, a right which is not only guaranteed under Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') but also finds specific expression in EU directives governing public contract award procedures. How far can the Member States set up financial requirements for challenging contracting authorities' decisions in order to reduce the risk of frivolous challenges, that is to say, challenges that are inherently likely to be unsuccessful and whose purpose is merely to impede the public contract award procedure?

Legal background

EU law

3. The first subparagraph of Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. Under Article 52(1) of the Charter, any limitation on the exercise of a Charter right must be provided for by law and respect the essence of the right in question. Subject to the principle of proportionality, such limitation is possible only if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

4. According to the third recital of Council Directive 89/665/EEC, (2) opening up public procurement to EU competition necessitates a substantial increase in the guarantees of transparency and non-discrimination. Effective and rapid remedies should therefore be available in the case of infringements of EU law on public procurement or national rules implementing that law.

5. Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

> '1. This Directive applies to contracts referred to in Directive 2004/18/EC …, [(3)] unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.
>
> Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.
>
> Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed [EU] law in the field of public procurement or national rules transposing that law.
>
> 2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing [EU] law and other national rules.
>
> 3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.
>
> …'

6. The fifth recital of Council Directive 92/13/EEC (4) states that opening up procurement in the water, energy, transport and postal services sectors to EU competition implies that appropriate review procedures are available to suppliers or contractors in the event of infringement of the relevant EU law or national rules implementing that law.

7. The first three paragraphs of Article 1 of Directive 92/13, entitled ‘Scope and availability of review procedures’, correspond in essence to the first three paragraphs of Article 1 of Directive 89/665. (5)

Romanian law

8. Pursuant to Article 43a of Emergency Ordinance No 34/2006 concerning the award of public supply contracts, public works contracts and public services contracts (Ordonanţa de urgenţă a Guvernului nr. 34/2006; ‘the OUG No 34/2006’), any would-be tenderer must lodge a guarantee (‘the tendering guarantee’) in order to participate in the procedure in all cases in which the OUG No 34/2006 requires the contracting authority to publish an invitation to tender or a call for proposals. The tendering guarantee, which can represent up to 2% of the public contract’s estimated value, is intended to protect the contracting authority against the risk of improper conduct by the tenderer throughout the entire period preceding the conclusion of the contract.

9. Under Article 256(1) of the OUG No 34/2006, a party who considers that he has been adversely affected shall have the right to refer the matter to the National Council for Dispute Resolution (Consiliului Naţional de Soluţionare a Contestaţiilor, ‘the CNSC’). Pursuant to Article 281(1), decisions of the CNSC may be subject to an appeal before a judicial authority.

10. Article 278(1) of the OUG No 34/2006 states that the CNSC or the competent court is to adjudicate as a preliminary matter on any procedural or substantive objections. If it decides that these are well founded, it will not examine the substance of the dispute.

11. Article 278a of the OUG No 34/2006 provided that the contracting authority had to retain part of the tendering guarantee if the CNSC or the competent court dismissed a challenge initiated by the tenderer or the tenderer abandoned his challenge.

12. Emergency Ordinance No 51/2014 (Ordonanţa de urgenţă a Guvernului nr. 51/2014; ‘the OUG No 51/2014’) repealed Article 278a of the OUG No 34/2006 and introduced the following provisions into that legislation: (6)

> ‘Article 271a
>
> 1. For the purpose of protecting the contracting authority against the risk of any improper conduct, the applicant shall be required to provide a good conduct guarantee covering the entire period from the date on which the appeal/application/complaint is lodged to the date on which the decision of the [CNSC]/the judgment of the competent judicial authority has become final.
>
> 2. The [challenge] shall be [rejected] if the applicant fails to furnish proof that the guarantee referred to in paragraph 1 has been deposited.
>
> 3. The good conduct guarantee shall be provided by means of bank transfer or a guarantee instrument issued in compliance with legal requirements by a banking institution or an insurance company; the original guarantee shall be lodged at the offices of the contracting authority and a copy with the [CNSC] or the judicial authorities at the same time as the [challenge] is lodged.
>
> 4. The total amount of the good conduct guarantee shall be determined by reference to the estimated value of the contract to be awarded, in accordance with the following rules:
>
> (a) 1% of the estimated value, if this is lower than the threshold amounts provided for in Article 55(2)(a) and (b); [(7)]
>
> (b) 1% of the estimated value, if this is lower than the threshold amounts provided for in Article 55(2)(c), [(8)] but not greater than the equivalent in RON of EUR 10 000, according to the exchange rate … applicable at the date on which the guarantee is provided;
>
> (c) 1% of the estimated value, if this is equal to or greater than the threshold amounts set out in Article 55(2)(a) and (b), but not greater than the equivalent in RON of EUR 25 000 according to the exchange rate … applicable at the date on which the guarantee is provided;

(d) 1% of the estimated value, if this is equal to or greater than the threshold amounts set out in Article 55(2)(c), but not greater than the equivalent in RON of EUR 100 000 according to the exchange rate … applicable at the date on which the guarantee is provided.

5. The good conduct guarantee must be valid for a period of at least 90 days, be irrevocable and provide for unconditional payment upon first request of the contracting authority where the [challenge] is [rejected].

6. If, on the day on which the good conduct guarantee is due to expire, the decision of the [CNSC] or the judgment of the judicial authority has not become final and the party challenging the decision has failed to extend the validity of the good conduct guarantee in accordance with the requirements laid down in paragraphs 1 to 5, the contracting authority shall retain the guarantee. The provisions set out in Article 271b(3) to (5) shall apply mutatis mutandis.

…

Article 271b

1. If the challenge is dismissed by the [CNSC] or by the judicial authority, where the party challenging the decision has brought proceedings directly before the latter, the contracting authority shall be required to retain the good conduct guarantee as from the time at which the decision of the [CNSC]/the judgment of the judicial authority becomes final. The requirement to retain the guarantee shall apply to the parts of the contract in respect of which the challenge has been dismissed.

2. Paragraph 1 shall also apply where the party challenging the decision withdraws the [challenge].

3. The measure referred to in paragraph 1 shall not apply where the [CNSC]/judicial authority dismisses the challenge as devoid of purpose or where the [challenge] is withdrawn following the adoption, by the contracting authority, of corrective measures necessary under Article 256c(1).

4. Where the [CNSC] upholds the challenge, or the competent judicial authority upholds the action brought against the [CNSC's] decision to dismiss the challenge, the contracting authority shall be required to return the good conduct guarantee to the party challenging the decision no later than five days following the date on which the decision/judgment has become final.

5. Where the party challenging the decision has brought proceedings directly before the judicial authority and the latter upholds the action, paragraph 4 shall apply mutatis mutandis.

6. The amounts received by the contracting authority under the good conduct guarantee shall be classified as income of that contracting authority.'

13. In answer to a request for clarification from the Court, the referring courts confirmed that, in a judgment delivered on 15 January 2015, the Curtea Constituțională (Constitutional Court, Romania) had declared unconstitutional Article 271b(1) and (2) of the OUG No 34/2006. The Constitutional Court reached that conclusion essentially on the ground that those provisions required the contracting authority to retain the good conduct guarantee where the challenge was rejected or withdrawn, without giving the CNSC or the court deciding on the challenge any flexibility to take the applicant's behaviour into account. Only inappropriate behaviour would justify losing the good conduct guarantee. On 4 November 2015, the Constitutional Court declared unconstitutional, on essentially similar grounds, Article 271a(5) of the OUG No 34/2006 to the extent that that provision required the good conduct guarantee to provide for unconditional payment, if the challenge was rejected, upon the first request of the contracting authority.

14. At the hearing, the Romanian Government explained that Articles 271a and 271b of the OUG No 34/2006 are still in force to the extent that they were not declared unconstitutional. It confirmed that the remaining provisions (9) still require the applicant to lodge a good conduct guarantee, but that there is no longer a legal basis for the contracting authority to retain it. As a result, the contracting authority must now return the good conduct guarantee to the applicant at the end of the procedure, regardless of the challenge's outcome and, *a fortiori*, whether the application was frivolous or not.

Factual background, procedure and questions referred

Case C-439/14

15. The Institutul Naţional de Cercetare-Dezvoltare în Informatică (National Institute for Research and Development in Informatics, 'the INCDI') organised a procedure to award a public supply and services contract for the development and completion of a cloud computing platform. The estimated value of the contract, net of Value Added Tax (VAT), was RON 61 287 713.71 (approximately EUR 13 700 000). The INCDI prepared the relevant tender documents and published a call for tenders, on 1 April 2014, in the Sistemul Electronic de Achiziţii Publice (Electronic Public Procurement System). The award criterion was that of 'the lowest price'.

16. Several economic operators asked the INCDI to clarify the rules set out in the tender documents. The INCDI responded by publishing several explanatory notes in the Electronic Public Procurement System.

17. On 30 June 2014, SC Star Storage SA ('Star Storage') challenged three of those explanatory notes before the CNSC. On 18 July 2014, the CNSC dismissed that application as inadmissible as Star Storage had not provided a good conduct guarantee. (10) Star Storage appealed against that decision to the Curtea de Apel Bucureşti (Court of Appeal, Bucharest), which has stayed the proceedings and requested a preliminary ruling on the following question:

> 'Are the provisions in the third subparagraph of Article 1(1) and Article 1(3) of [Directive 89/665] to be interpreted as precluding a rule under which a "good conduct guarantee" must be lodged as a prerequisite for being granted access to procedures for reviewing the decisions of contracting authorities, such as the rule laid down in Article 271a and 271b of [the OUG No 34/2006]?'

Case C-488/14

18. On 21 January 2014, RA Aeroportul Oradea ('Oradea Airport') published a contract notice in the Electronic Public Procurement System for the award of a public contract to extend and modernise that airport. The estimated value of the contract, net of VAT, was RON 101 232 054 (approximately EUR 22 800 000). The award criterion was that of 'the most economically advantageous tender'.

19. Four economic operators submitted tenders. According to the tender assessment report of 28 March 2014, the tender submitted by the consortium of SC Max Boegl România SRL ('Max Boegl'), SC UTI Grup SA and Astaldi SpA was declared ineligible. The same report indicated that the tender submitted by the consortium of SC Construcţii Napoca SA ('Construcţii Napoca'), SC Aici Cluj SA and CS Icco Energ SRL was ranked second.

20. On 10 July 2014, the CNSC rejected as unfounded the challenges which those two consortia lodged against the tender assessment report.

21. The consortium of which Max Boegl is a member and Construcţii Napoca appealed against those decisions to the Curtea de Apel Oradea (Court of Appeal, Oradea). At the hearing on 10 September 2014, the Curtea de Apel Oradea (Court of Appeal, Oradea) drew the appellants' attention to the requirement to lodge a good conduct guarantee following the entry into force, on 30 June 2014, of Articles 271a and 271b of the OUG No 34/2006. (11) The Curtea de Apel Oradea (Court of Appeal, Oradea) stayed those proceedings and requested a preliminary ruling on the following question:

> 'Must Article 1(1), (2) and (3) of [Directive 89/665] and Article 1(1), (2) and (3) of [Directive 92/13] be interpreted as precluding legislation which makes access to review procedures of decisions of contracting authorities subject to an obligation to deposit beforehand a "good conduct guarantee" such as that governed by Articles 271a and 271b of [the OUG No 34/2006]?'

22. On 13 November 2014, the President of the Court joined the two cases for the purposes of both the written and oral proceedings and the judgment. Star Storage, the Greek and Romanian Governments and the European Commission have submitted written observations. Max Boegl, the Romanian Government and the European Commission presented oral argument at the hearing on 14 January 2016.

Analysis

Preliminary remarks

23. The value of the public contract in issue in Case C-439/14 is higher than the relevant threshold amount set out in Article 7(b) of Directive 2004/18 for public supply and service contracts. Directive 89/665 therefore applies to those proceedings. (12) Likewise, the value of the public contract in issue in Case C-488/14 reaches the thresholds for public works contracts in both Article 7(c) of Directive 2004/18 and Article 16(b) of Directive 2004/17.

24. However, the Romanian Government and the Commission disagree on the legal background relevant to the main proceedings in Case C-488/14. The Romanian Government submits that they are governed only by Directive 2004/18 and, by extension, Directive 89/665. The Commission argues that because the contract award procedure at issue concerned extending and improving airport facilities, it falls within the scope of Directive 2004/17 (13) and is therefore governed by Directive 92/13. (14)

25. In my view, the Court lacks sufficient information about that contract to determine whether Directive 89/665 or Directive 92/13 applies to the procedure for its award. That creates no difficulty here, however. On the one hand, it is clear from the facts in the main proceedings in Case C-488/14 that the question which the Curtea de Apel Oradea (Court of Appeal, Oradea) submits to the Court is not hypothetical in so far as it concerns Directive 92/13. On the other hand, the first three paragraphs of Article 1 of that directive essentially correspond to the first three paragraphs of Article 1 of Directive 89/665. The two questions raised by the referring courts are therefore in essence the same and should be addressed jointly.

26. Next, the impact on the main proceedings of the judgments of the Curtea Constituțională (Constitutional Court) delivered on 15 January and 4 November 2015 is unclear. At the hearing, the Romanian Government submitted that the referring courts will now have to apply the transitional regime. The Commission, on the other hand, sought to draw a distinction between the two cases. In Case C-488/14, the requirement for the good conduct guarantee arose for the first time before the referring court. That court will thus have to apply the *transitional* regime. By contrast, in Case C-439/14, the requirement initially arose in the proceedings before the CNSC — that is, prior to the Constitutional Court's judgments. The Commission therefore submits that the referring court in that case will have to apply the *original* regime after receiving the Court's answer.

27. According to settled case-law, it is not for the Court to rule on the applicability of provisions of national law which are relevant to the outcome of the main proceedings. Rather, the Court must take account, under the division of jurisdiction between the EU Courts and the national courts, of the legislative context, as described in the order for reference, in which the question put to it is set. (15) The Court is, however, competent to give the national court full guidance on how to interpret EU law in order to enable that court to determine the issue of compatibility of national law with EU law in the case before it. (16) Since it is uncertain whether the original regime or the transitional regime applies to the main proceedings in Case C-439/14, I shall examine both in this Opinion.

28. Last, the information available to the Court indicates that, pursuant to the OUG No 34/2006, a challenge can be initiated either before the CNSC (whose decisions can then be appealed before a court of appeal) or directly before a court. Since a good conduct guarantee is required in every case, that does not affect the reasoning which follows. (17)

Methodology of the analysis

29. The first and second recitals of Directive 89/665 and the first, second and third recitals of Directive 92/13 make it clear that those directives are intended to strengthen the existing mechanisms, both at national and EU levels, in order to ensure that directives relating to public procurement apply effectively, in particular at a stage when it is still possible to remedy infringements. (18) To that effect, Article 1(1) of each directive requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible. (19) They must ensure that such review is widely available to any person who has or has had an interest in obtaining a particular contract and who has been or risks being harmed by the alleged infringement. (20)

30. However, those directives lay down only the minimum conditions which the review procedures under domestic law must satisfy in order to comply with EU public procurement law. (21) If no specific provision governs the matter, it is for each Member State to lay down the detailed rules of administrative and judicial procedures governing actions for safeguarding rights which individuals derive from EU public procurement law. Those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of those rights (principle of effectiveness). (22) The latter requirement is essential to achieving EU public procurement law's main objective of opening up public procurement to undistorted competition in all the Member States. (23)

31. As the Commission points out, neither Directive 89/665 nor Directive 92/13 contains rules on financial requirements which economic operators may have to fulfil in order to obtain access to review procedures against decisions of contracting authorities. National provisions such as those at issue in the main proceedings therefore fall within the procedural autonomy of the Member States, subject to the principles of equivalence and effectiveness. I shall examine the questions referred in the light of those principles. (24)

32. Each of those directives nonetheless gives specific expression, in the particular sphere of public procurement, to the general principle of EU law enshrining the right to an effective remedy. (25) This raises two closely related issues concerning the scope of the principle of effectiveness.

33. First, can that principle be limited to verifying that a national procedural requirement such as that at issue in the main proceedings renders *practically impossible or excessively difficult* the exercise of the right to review procedures set out in Articles 1 of Directive 89/665 and Directive 92/13? Or is it broader in that it requires *any national rule which undermines* those provisions to be set aside?

34. The Court has on several occasions examined whether national procedural rules governing remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities compromised the effectiveness of Directive 89/665. (26) However, there is no uniform approach in the case-law on how that test of effectiveness relates to the procedural autonomy of the Member States and the principle of effectiveness which limits it. (27) In some cases, the analysis was focused exclusively on the effectiveness of Directive 89/665, without referring to procedural autonomy and the limits to it. (28) Other cases suggest that the effectiveness test supplements the procedural autonomy test where there is no specific provision governing the matter in Directive 89/665. (29) Sometimes, the wording used indicates that the effectiveness test forms part of (and gives special content to) the procedural autonomy test. (30)

35. In my view, what matters ultimately is to ensure that the rights which EU law confers on individuals receive more, rather than less, protection. Article 1 of Directive 89/665 and Article 1 of Directive 92/13 give specific expression to the right to an *effective* remedy. It is therefore not possible to limit the analysis of the principle of effectiveness to whether a procedural requirement such as that in issue in the main proceedings is liable to render practically impossible or excessively difficult the exercise of that right. Rather, in that specific context, the effectiveness test must surely involve examining whether such a requirement is liable to *undermine* the right to effective review procedures which those provisions guarantee.

36. Second, what impact does the fundamental right to an effective remedy under Article 47 of the Charter have on the principle of effectiveness as a limit to the procedural autonomy of the Member States?

37. Procedural rules such as those at issue in the main proceedings clearly come within the scope of Article 1 of Directive 89/665 and Article 1 of Directive 92/13. Moreover, the fundamental right to an effective remedy to which those provisions give specific expression covers such rules. (31) Consequently, Article 47 of the Charter applies in the main proceedings. (32) Providing the good conduct guarantee is a pre-condition for getting any challenge examined. (33) That requirement therefore constitutes a limitation on the right to an effective remedy before a tribunal within the meaning of Article 47. (34) Such a limitation can therefore be justified only if it is provided for by law, if it respects the essence of that right and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. (35) That test is similar to the test that the Strasbourg Court applies when it examines whether financial restrictions on access to courts are compatible with Article 6(1) of the ECHR. (36)

38. Again, this Court's case-law does not offer clear guidance in that regard. (37) As I see it, in cases such as the present, the assessment set out in Article 52(1) of the Charter is required in order to satisfy the level of protection which Article 47 of the Charter confers on individuals. Applying a different methodology would have the surprising (and in my view unacceptable) effect that Member States would be able to escape that test solely because they were acting, within the scope of their procedural autonomy, in a domain where the EU legislature has given specific expression to the right to an effective remedy.

39. In what follows, I shall therefore examine whether national rules such as those in issue in the main proceedings, which fall under the procedural autonomy of the Member States, comply with the principles of equivalence and effectiveness. However, given that Article 1(1) and (3) of both Directive 89/665 and Directive 92/13 govern such rules and that those provisions express, in the particular sphere of public procurement, the fundamental right to an effective remedy guaranteed by Article 47 of the Charter, I shall do so on the basis that the principle of effectiveness requires exploring whether those national rules, which limit that right, satisfy the proportionality test set out in Article 52(1) of the Charter. If they do not, they undermine the effectiveness of Article 1(1) and (3) of each directive.

The original regime

40. Article 1(2) of Directive 89/665 and Article 1(2) of Directive 92/13 give specific expression to the principle of equivalence. That principle requires that the national rule in question applies, without distinction, to actions based on infringement of EU law and those based on infringement of national law having a similar purpose and cause of action. (38)

41. I do not agree with Star Storage when it contends that national rules such as those in issue in the main proceedings are incompatible with that principle. Whilst it is true that they create a specific financial burden for initiating review procedures relating to public procurement, the principle of equivalence does not require equal treatment of national procedural rules applicable to proceedings of a different nature (such as civil proceedings, on the one hand, and administrative proceedings, on the other), or applicable to proceedings falling within two different branches of law. (39) At the hearing, moreover, the Romanian Government confirmed that the national provisions in issue in the main proceedings apply to all review procedures initiated against decisions of contracting authorities, whether or not EU public procurement rules govern the contract award procedure.

42. What of the principle of effectiveness and the proportionality test set out in Article 52(1) of the Charter?

43. It is not in dispute that the limitation resulting from Articles 271a and 271b of the OUG No 34/2006 is *provided by law*.

44. The second condition of the proportionality test is that the measure has to pursue a *legitimate objective* (that is, an objective of general interest recognised by the EU or the need to protect the rights and freedoms of others). It is common ground that the good conduct guarantee is a source of income for the contracting authority where the latter retains it. That guarantee does not therefore serve to finance the judicial system. (40) Rather, the national provisions establishing the good conduct guarantee are intended in essence to protect contracting authorities, the CNSC and courts from frivolous challenges which economic operators (including those who are not tenderers) might initiate for purposes other than those for which the review procedures were established. (41) Such an objective is undeniably legitimate. (42) In particular, discouraging frivolous challenges enables the bodies in charge of reviewing decisions of contracting authorities to concentrate on 'genuine' challenges. That is likely to contribute to satisfying the requirement that Member States must ensure that decisions of contracting authorities may be reviewed effectively and, in particular, as rapidly as possible where it is claimed that such decisions infringe EU public procurement law or national rules transposing that law. (43)

45. The next question is whether national provisions such as those in issue in the main proceedings are *capable of achieving that objective*.

46. As those proceedings illustrate, (44) such provisions can give rise to substantial costs for an economic operator who either loses his challenge or withdraws it. (45) These costs may reach the equivalent of EUR 25 000 for public supply and public service contracts and EUR 100 000 for public works contracts, in

addition to the costs associated with lodging the guarantee. (46) At the hearing, the Romanian Government confirmed that, under the original regime, the applicant lost the whole amount of the good conduct guarantee because the contracting authority is required to retain it. The CNSC or the court deciding on the challenge is not empowered to order the contracting authority to retain only part of the good conduct guarantee, based on the specific circumstances of the case.

47. In my view, costs of that magnitude are such as to deter the lodging of frivolous challenges because the latter are, by their very nature, likely to be rejected and, therefore, to result automatically in loss of the entire good conduct guarantee and the associated costs. (47) The fact that, as the Court recalled in *Orizzonte Salute*, (48) undertakings wishing to participate in public contracts governed by EU public procurement rules are required to have an appropriate economic and financial capacity does not call that conclusion into question. First, the national provisions at issue in the main proceedings apply to all economic operators challenging contracting authorities' decisions and thus not only to tenderers. Next, the requirement that tenderers must have economic and financial capacity is not absolute. Article 47(2) of Directive 2004/18 provides that an economic operator may rely on the capacities of other entities, regardless of the nature of the links which it has with them, in order to establish that capacity. (49) Accordingly, a party may not be eliminated from a procedure for the award of a public contract solely because it proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities. (50) Finally, the Court's statement about economic and financial capacity in *Orizzonte Salute* was made in relation to far smaller financial limitations on access to review procedures than those in issue in the present cases. (51)

48. The final part of the proportionality test is that the measures at issue must *not go further than is necessary* to attain their objective. (52) When there is a choice between several appropriate measures, the Member State must have recourse to the least onerous one, and the disadvantages caused must not be disproportionate to the aims pursued. (53)

49. Under the original regime, the applicant automatically loses the good conduct guarantee where his challenge is rejected or where he withdraws it. That is also true where there are no elements present suggesting an abuse of the review procedure (for example because the challenge is manifestly ill founded, or was lodged with the sole purpose of delaying the contract award procedure). For reasons similar to those which I have set out above, (54) the original regime thus significantly impedes access to review procedures against decisions of contracting authorities for persons who (even if their challenge ultimately fails) have 'arguable claims'. (55) It is therefore liable to discourage a substantial proportion of potential litigants from lodging a challenge if they cannot be reasonably certain that it will be successful. Examples of such circumstances would, I suggest, include where there is no settled case-law on the point at issue or where the challenge seeks to call into question an assessment of the contracting authority for which the latter enjoys a wide margin of appreciation.

50. It seems to me that it would have been possible to avoid that adverse effect (and the significant interference with the right to an effective remedy) without undermining the objective of discouraging frivolous challenges. Where a challenge was rejected or withdrawn, the CNSC or the competent court might for example have been given latitude to ascertain whether that challenge was frivolous or not, taking into account all relevant circumstances, (56) and to decide in consequence whether retaining (all or part of) the good conduct guarantee was justified.

51. I therefore agree with Star Storage, Max Boegl and the Commission that the original regime involves a disproportionate limitation on the right to an effective remedy protected under Article 47 of the Charter and therefore undermines the effectiveness of Article 1(1) and (3) of Directive 89/665 and Article 1(1) and (3) of Directive 92/13. That regime also affects the essence of that right because it is liable in practice to deprive economic operators having or having had an interest in obtaining a particular contract from accessing a remedy against allegedly illegal decisions of contracting authorities.

52. For those reasons, I conclude that Article 1(1) and (3) of Directive 89/665 and Article 1(1) and (3) of Directive 92/13, read in the light of Article 47 of the Charter, preclude national legislation such as that in issue in the main proceedings, which requires an applicant to lodge a 'good conduct guarantee' in order to obtain access to review of a contracting authority's decisions relating to public procurement and under which the contracting authority must retain that guarantee if the challenge is rejected or withdrawn, regardless of whether or not the challenge is frivolous.

The transitional regime

53. I now turn to the transitional regime, which differs from the original regime in that the applicant gets back the good conduct guarantee irrespective of the challenge's outcome.

54. The reasoning on equivalence which I have set out above is equally applicable here. (57)

55. As regards effectiveness, it is clear that a procedural requirement such as that resulting from Article 271a(1) of the OUG No 34/2006 necessarily limits in itself the right of access to review procedures against contracting authorities' decisions. That requirement is a pre-condition for examining the merits of a challenge. (58) Moreover, although the applicant gets back the good conduct guarantee at the end of his challenge, lodging it necessarily involves a financial burden for him. Thus, the first sentence of Article 271a(3) of the OUG No 34/2006 describes two methods for providing the good conduct guarantee. If the applicant makes a bank transfer, he is deprived of the use of a potentially significant sum for the entire period from the date on which the challenge is initiated to the date on which the decision of the CNSC or the judgment of the competent court becomes final. The applicant thus incurs the opportunity cost of not being able to use those funds for other purposes. If the applicant opts instead for a guarantee instrument provided by a bank or an insurance company, he has to bear the costs related to that instrument. (59)

56. It seems clear to me, moreover, that such a procedural requirement does not protect contracting authorities adequately from frivolous challenges. Under the transitional regime, the contracting authority has to return the good conduct guarantee to the applicant within five days following the date on which the decision of the CNSC or the judgment has become final, even where the applicant manifestly abused his right to access review procedures. The costs which the transitional regime involves may therefore not be such as to discourage an economic operator from lodging a challenge that pursues an objective other than those for which the review procedures are established — for example, harming a competitor. They may nevertheless prove an obstacle to an economic operator with an arguable claim but limited means.

57. Finally, the transitional regime — like the original regime — draws no distinction between arguable claims and frivolous ones. For that reason, the limitation on access to review procedures which it involves clearly goes beyond what is necessary to achieve the objective of dissuading frivolous challenges.

58. I therefore conclude that Article 1(1) and (3) of Directive 89/665 and Article 1(1) and (3) of Directive 92/13, read in the light of Article 47 of the Charter, preclude national legislation such as the transitional regime, which requires an applicant to lodge a 'good conduct guarantee' in order to obtain access to review of a contracting authority's decisions and under which that applicant automatically gets back the guarantee at the end of the challenge, whatever its outcome.

Conclusion

59. In the light of the foregoing considerations, I suggest that the Court should answer the questions referred by the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania) and the Curtea de Apel Oradea (Court of Appeal, Oradea, Romania) as follows:

– Article 1(1) and (3) of Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended and Article 1(1) and (3) of Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, read in the light of Article 47 of the Charter, preclude national legislation such as that in issue in the main proceedings, which requires an applicant to lodge a 'good conduct guarantee' in order to obtain access to review of a contracting authority's decisions relating to public procurement and under which the contracting authority must retain that guarantee if the challenge is rejected or withdrawn, regardless of whether or not the challenge is frivolous.

– The same provisions of EU law also preclude national legislation which requires an applicant to lodge a 'good conduct guarantee' in order to obtain access to review of a contracting authority's decisions and under which that applicant automatically gets back the guarantee at the end of the challenge, whatever its outcome.

1 – Original language: English.

2 – Of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31).

3 – Of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

4 – Of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

5 – Save that Article 1 of Directive 92/13 cross-refers to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) rather than to Directive 2004/18.

6 – In what follows, I shall refer to those provisions as the ‘original regime’.

7 – Article 55(2)(a) and (b) of the OUG No 34/2006 concerns public supply and public service contracts.

8 – Article 55(2)(c) of the OUG No 34/2006 concerns public works contracts.

9 – The ‘remaining provisions’ (as I understand it) are in essence Article 271a except the requirement of unconditional payment in paragraph 5 thereof, and Article 271b(3) to (5) of the OUG No 34/2006. In this Opinion, I shall refer to these provisions as the ‘transitional regime’ and distinguish it from both the ‘original regime’ and the new regime which, as the Romanian Government indicated at the hearing, the Romanian legislature envisages adopting at some point in the future.

10 – The amount of the guarantee due was the equivalent in RON of EUR 25 000.

11 – It appears from the information before the Court that the amount of each good conduct guarantee required in the proceedings before the national court was the equivalent in RON of EUR 100 000.

12 – Article 1(1) of Directive 89/665.

13 – Article 7(b) of Directive 2004/17.

14 – Article 1(1) of Directive 92/13.

15 – See, inter alia, judgment of 17 July 2008 in *Corporación Dermoestética*, C-500/06, EU:C:2008:421, paragraph 20 and the case-law cited.

---

16 – Judgment of 16 December 2008 in *Michaniki*, C-213/07, EU:C:2008:731, paragraph 51 and the case-law cited.

---

17 – See in particular Articles 271a(1) and 271b(1) and (5) of the OUG No 34/2006.

---

18 – See, inter alia, judgments of 28 October 1999 in *Alcatel Austria and Others*, C-81/98, EU:C:1999:534, paragraph 33; 19 June 2003 in *GAT*, C-315/01, EU:C:2003:360, paragraph 44 and the case-law cited; and 28 January 2010 in *Uniplex(UK)*, C-406/08, EU:C:2010:45, paragraph 26.

---

19 — See, inter alia, judgments of 19 June 2003 in *Hackermüller*, C-249/01, EU:C:2003:359, paragraph 22 and the case-law cited, and 19 June 2003 in *GAT*, C-315/01, EU:C:2003:360, paragraph 44 and the case-law cited.

---

20 – Judgment of 26 November 2015 in *MedEval*, C-166/14, EU:C:2015:779, paragraph 28 and the case-law cited.

---

21 — Judgment of 30 September 2010 in *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 33 and the case-law cited. See also, to that effect, judgment of 24 September 1998 in *EvoBus Austria*, C-111/97, EU:C:1998:434, paragraph 16.

---

22 – See, inter alia, judgments of 11 September 2003 in *Safalero*, C-13/01, EU:C:2003:447, paragraph 49, and 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 46 and the case-law cited.

---

23 – See, to that effect, judgment of 14 February 2008 in *Varec*, C-450/06, EU:C:2008:91, paragraphs 33 and 34.

---

24 – See points 40 to 58 of this Opinion.

---

25 – See, to that effect, order of 23 April 2015 in *Commission* v *Vanbreda Risk & Benefits*, C-35/15 P(R), EU:C:2015:275, paragraph 28. The origins of that reasoning can be traced back to judgment of 15 May 1986 in *Johnston*, 222/84, EU:C:1986:206, paragraphs 18 and 19.

---

26 — See, inter alia, judgments of 12 December 2002 in *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraphs 71 and 72; 28 January 2010 in *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 27; and 30 September 2010 in *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 34.

---

27 – That lack of uniformity makes it difficult to predict which methodology the Court will follow in any particular case. See Prechal, S., Widdershoven, R., ‘Redefining the Relationship between “Rewe-effectiveness” and Effective Judicial Protection’, 4 *Review of European Administrative Law* (2011), p. 39.

---

28 – See, for example, judgments of 12 December 2002 in *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 71, and 28 January 2010 in *Uniplex (UK)*, C-406/08, paragraphs 26 to 28.

---

29 – Judgments of 30 September 2010 in *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 34, and 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraphs 47, 50 and 72.

---

30 – Judgment of 12 March 2015 in *eVigilo*, C-538/13, EU:C:2015:166, paragraphs 40 (see especially the introductory words 'in particular …') and 41. In judgment of 15 April 2008 in *Impact* (C-268/06, EU:C:2008:223, paragraphs 47 and 48), the Court held that the requirements of equivalence and effectiveness *embodied* the general obligation on the Member States to ensure judicial protection of an individual's rights under EU law. The same formula was repeated in the order of 24 April 2009 in *Koukou* (C-519/08, EU:C:2009:269, paragraph 98). The Court similarly merged the principle of effectiveness as a limit to procedural autonomy and the right to an effective remedy under Article 47 of the Charter in judgment of 6 October 2015 in *East Sussex County Council* (C-71/14, EU:C:2015:656, paragraph 52 and the case-law cited).

---

31 – See, inter alia, judgments of 15 April 2008 in *Impact*, C-268/06, EU:C:2008:223, paragraph 44 and the case-law cited, and 17 July 2014 in *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 35 and the case-law cited.

---

32 – See, to that effect, judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 49. See also, by analogy, judgment of 17 December 2015 in *Tall*, C-239/14, EU:C:2015:824, paragraph 51. To the extent that it applies to the Member States, Article 47 of the Charter echoes the second subparagraph of Article 19(1) TEU and gives specific expression to the principle of sincere cooperation laid down in Article 4(3) TEU. On the latter point, see judgment of 13 March 2007 in *Unibet*, C-432/05, EU:C:2007:163, paragraph 37.

---

33 – Article 271a(2) of the OUG No 34/2006.

---

34 – See, by analogy, Opinion of Advocate General Jääskinen in *Orizzonte Salute*, C-61/14, EU:C:2015:307, point 37. The European Court of Human Rights ('the Strasbourg court') regards a court fee or security for costs as interfering in principle with the right of access to a court protected by Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') if payment is a pre-condition for examining the case. See, inter alia, judgments of the Strasbourg Court of 13 July 1995 in *Tolstoy Miloslavski v. the United Kingdom*, CE:ECHR:1992:0220DEC00181399, §§ 59 to 67; 4 May 2006 in *Weissman and Others v. Romania*, CE:ECHR:2006:0524JUD006394500, §§ 32 to 44; and 12 July 2007 in *Stankov v. Bulgaria*, CE:ECHR:2007:0712JUD006849001, § 53.

---

35 – See, inter alia, the judgment of 17 September 2014 in *Liivimaa Lihaveis*, C-562/12, EU:C:2014:2229, paragraph 72, and my Opinion in *Ordre des barreaux francophones et germanophone and Others*, C-543/14, EU:C:2016:157, point 80.

---

36 — The Strasbourg Court has made it clear that, whereas Member States enjoy a certain margin of appreciation permitting them to impose such restrictions, those restrictions must not restrict or reduce access to a court in such a way that the very essence of the right is impaired, they must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim pursued. See, to that effect, judgments of the Strasbourg Court of 13 July 1995 in *Tolstoy Miloslavski v. the United Kingdom*, CE:ECHR:1992:0220DEC00181399, §§ 59 to 67, and 19 June 2001 in *Kreuz v. Poland*, CE:ECHR:2001:0619JUD002824995, §§ 54 and 55 (cited in judgment of 22 December 2010 in *DEB*, C-279/09, EU:C:2010:811, paragraph 47). See also judgment of the Strasbourg Court of 14 December 2006 in *Markovic and Others v. Italy*, CE:ECHR:2006:1214JUD000139803, § 99.

---

37 – In *Orizzonte Salute*, the Court made clear that Article 1 of Directive 89/665 must be interpreted in the light of Article 47 of the Charter. However, it limited its analysis of the principle of effectiveness to verifying that the court fee system there at issue was not liable to render practically impossible or excessively difficult the exercise of the rights conferred by EU public procurement law (judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraphs 49 and 72). The Court did not conduct a proportionality test under Article 52(1) of the Charter. By contrast, in other cases, the Court has applied the proportionality test to assess limitations on the right to an effective remedy before a tribunal under Article 47 of the Charter. See, inter alia, the judgments of 18 March 2010 in *Alassini and Others*, C-317/08 to C-320/08, EU:C:2010:146, paragraphs 61 to 66, and 26 September 2013 in *Texdata Software*, C-418/11, EU:C:2013:588, paragraphs 84 to 88.

---

38 – See, most recently, judgment of 12 February 2015 in *Surgicare*, C-662/13, EU:C:2015:89, paragraph 30.

---

39 – Judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 67 and the case-law cited.

---

40 – That distinguishes the good conduct guarantee from the court fees in issue in the judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655.

---

41 – According to the introduction to the OUG No 51/2014, challenges which are manifestly unfounded or which seek only to delay proceedings have several harmful consequences. Thus, contracting authorities may lose external (including EU) funding due to abnormal delays in contract award procedures and be unable to carry out important projects of public interest. Furthermore, frivolous challenges overburden staff involved in defending contracting authorities before the CNSC or courts and more generally undermine the CNSC's efficiency.

---

42 – See, by analogy, judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraphs 73 and 74. That is also the position of the Strasbourg court. See, inter alia, judgments of the Strasbourg Court of 12 July 2007 in *Stankov v. Bulgaria*, CE:ECHR:2007:0712JUD006849001, § 57, and 3 June 2014, *Harrison McKee v. Hungary*, CE:ECHR:2014:0603JUD002284007, § 27.

---

43 – Third subparagraph of Article 1(1) of Directive 89/665 and of Directive 92/13.

---

44 – See footnotes 10 and 11.

---

45 – Save where the contracting authority must not retain the good conduct guarantee pursuant to Article 271b(3).

---

46 – See point 55 below.

---

47 – That is all the more so for tenderers, who are required in addition to lodge a tendering guarantee of up to 2% of the estimated contract value (Article 43a of the OUG No 34/2006). Although the Romanian Government submitted at the hearing that the two guarantees serve different purposes, the fact remains that a tenderer may lose both of them in the course of a single contract award procedure.

---

48 – Judgment of 6 October 2015 in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 64.

---

49 – See also Article 63(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65).

---

50 – Judgments of 2 December 1999 in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 26; 18 March 2004 in *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 43; and 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 32.

---

51 – The standard court fees examined in that case amounted to EUR 2 000, EUR 4 000 or EUR 6 000 depending on the value of the public contract.

---

52 – See, to that effect, the judgment of 17 December 2015 in *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 74.

---

53 – See, inter alia, the judgment of 29 April 2015 in *Léger*, C-528/13, EU:C:2015:288, paragraph 58 and the case-law cited.

---

54 – Point 46 of this Opinion.

---

55 – I borrow that expression from the Strasbourg court's case-law, under which the purpose of Article 13 ECHR is to guarantee an effective remedy for 'arguable claims'. See, inter alia, judgment of the Strasbourg Court of, 23 June 2011 in *Diallo v. the Czech Republic*, CE:ECHR:2011:0623JUD002049307, § 56.

---

56 – Those circumstances might include whether case-law is settled on a particular point of law, whether the challenge merely repeats a previous one or whether it is based on a plainly wrong reading of the challenged measure or on a manifestly wrong factual premiss.

---

57 – See points 40 and 41 above.

---

58 – Article 271a(2) of the OUG No 34/2006.

---

59 – It is unclear whether the applicant would be reimbursed for those costs by the contracting authority where the CNSC or the court upholds the challenge. Even if that is the case, the successful applicant would still have had to incur the costs initially in order to obtain access to the review procedure. Thus, the requirement to provide a guarantee will still have constituted an obstacle to access.

JUDGMENT OF THE COURT (Fifth Chamber)

2 June 2016 (*)

(Reference for a preliminary ruling — Public contracts — Directive 2004/18/EC — Article 1(2)(a) — Concept of 'public contract' — Scheme for acquiring goods consisting of the authorisation as a supplier of any economic operator who meets the predetermined criteria — Supply of medicinal products that are refundable under a general social security scheme — Contracts concluded between a statutory health insurance fund and all the suppliers of medicinal products based on a given active ingredient who consent to a rebate on the sale price at a predetermined rate — Legislation providing, in principle, for the substitution of a refundable medicinal product marketed by an operator not having concluded such a contract by a medicinal product of the same type marketed by an operator having concluded such a contract)

In Case C-410/14

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), made by decision of 13 August 2014, received at the Court on 29 August 2014, in the proceedings

Dr. Falk Pharma GmbH

v

DAK-Gesundheit,

intervener:

Kohlpharma GmbH,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Šváby (Rapporteur), A. Rosas, E. Juhász and C. Vajda, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Dr. Falk Pharma GmbH, by M. Ulshöfer, Rechtsanwalt,

– DAK-Gesundheit, by A. Csaki, Rechtsanwalt,

– Kohlpharma GmbH, by C. Stumpf, Rechtsanwalt,

– the German Government, by T. Henze and A. Lippstreu, acting as Agents,

– the Greek Government, by K. Nasopoulou and S. Lekkou, acting as Agents,

– the Swedish Government, by A. Falk, C. Meyer-Seitz, U. Persson, N. Otte Widgren and by E. Karlsson, L. Swedenborg and F. Sjövall, acting as Agents,

– the European Commission, by C. Hermes and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum in OJ 2004 L 351, p. 44).

2 The reference has been made in proceedings between Dr. Falk Pharma GmbH ('Falk') and DAK-Gesundheit ('DAK') a statutory health insurance fund, with Kohlpharma GmbH as a joined party, concerning a procedure carried out by DAK in order to conclude rebate contracts with undertakings marketing a medicinal product whose active ingredient is mesalazine and which led to such an agreement being reached with Kohlpharma.

Legal context

EU law

3 Recitals 2 and 3 of Directive 2004/18 state as follows:

'(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

(3) Such coordinating provisions should comply as far as possible with current procedures and practices in each of the Member States.'

4 Recital 11 of that directive states:

'A Community definition of framework agreements, together with specific rules on framework agreements concluded for contracts falling within the scope of this Directive, should be provided. Under these rules, when a contracting authority enters into a framework agreement in accordance with the provisions of this Directive relating, in particular, to advertising, time limits and conditions for the submission of tenders, it may enter into contracts based on such a framework agreement during its term of validity either by applying the terms set forth in the framework agreement or, if all terms have not been fixed in advance in the framework agreement, by reopening competition between the parties to the framework agreement in relation to those terms. ...'

5 Article 1(2)(a) of the Directive provides that 'Public contracts' are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of [that] Directive'.

6 Article 1(5) defines 'framework agreement' in the following terms:

‘A “framework agreement” is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.’

7 Article 2 of that directive is worded as follows:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

8 Article 32 of Directive 2004/18 provides:

‘...

2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with Article 53.

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities and the economic operators originally party to the framework agreement.

...

4. Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria.

Contracts based on framework agreements concluded with several economic operators may be awarded either:

– by application of the terms laid down in the framework agreement without reopening competition, or,

– where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

...’

9 Under the first paragraph of Article 43 of that directive:

‘For every contract, framework agreement, and every establishment of a dynamic purchasing system, the contracting authorities shall draw up a written report which shall include at least the following:

...

(e) the name of the successful tenderer and the reasons why his tender was selected and, if known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties;

...’

10 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65), the implementing measures for which must, in accordance with Article 90(1) of that directive, come into force by 18 April 2016, defines procurement in the following terms in Article 1(2):

‘Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.’

National law

11 Under Paragraph 129(1) of the Sozialgesetzbuch, Fünftes Buch — Gesetzliche Krankenversicherung (Social Security Code, Fifth Book — Statutory Health Insurance) (‘SGB V’), in the case of the supply of a medicinal product which has been prescribed by indicating its active ingredient and whose replacement by a medicinal product with an equivalent active ingredient is not excluded by the prescribing doctor, pharmacists must replace the medicinal product prescribed with another medicinal product with an equivalent active ingredient in respect of which a rebate contract has been concluded, within the meaning of Paragraph 130a(8) of the SGB V.

12 In accordance with that provision, the health insurance funds or their associations may enter into two-year agreements with pharmaceutical undertakings discounting the sale price of medicinal products which are issued and chargeable by those funds.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 On 28 August 2013, DAK published in the supplement to the *Official Journal of the European Union* a notice concerning an ‘authorisation procedure’ for the conclusion of rebate contracts, in accordance with Paragraph 130a(8) of the SGB V, concerning medicinal products whose active ingredient is mesalazine. The rebate rate was fixed at 15% of the ‘ex-factory’ price and the period covered ran from 1 October 2013 to 30 September 2015.

14 That procedure provided for the authorisation of all interested undertakings meeting the authorisation criteria and for the conclusion with each of those undertakings of identical contracts whose terms were fixed and non-negotiable. Furthermore, any other undertaking fulfilling those criteria also had the opportunity of acceding on the same terms to the rebate contract scheme during the contract period.

15 The notice of 28 August 2013 indicated that that procedure was not subject to public procurement law.

16 Kohlpharma was the only undertaking which expressed its interest in response to that notice. A contract was concluded with that undertaking on 5 December 2013. The substitution mechanism provided for in Paragraph 129(1) of the SGB V was implemented from 1 January 2014 in the computer system used by pharmacies. The conclusion of that contract was the subject of a notice in the *Official Journal* on 22 February 2014.

17 On 17 January 2014, Falk brought proceedings before the Vergabekammer des Bundes (Federal Public Procurement Board, Germany) seeking a declaration that the authorisation procedure initiated by DAK and the only contract award which resulted from that procedure were incompatible with public procurement law. The Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) is hearing that case on appeal.

18 In those proceedings, Falk maintains that public procurement law applies where a body classified as a contracting authority procures goods on the market and that law requires that there be a call for tenders, which implies the conclusion of exclusive contracts.

19 Conversely, DAK considers that in order to acquire the goods and services which it requires a contracting authority can have recourse not only to public procurement but also to other models and is, therefore, free to award the contract on an exclusive basis following a selection decision but also to conclude contracts with all the interested undertakings without a selection process. The existence of a selection decision is a constituent element of the concept of ‘public contract’ within the meaning of Directive 2004/18 and of EU law on the subject, with the result that, in the absence of selection, a contract, such as that at issue in the main proceedings, would not be a public contract.

20 Kohlpharma takes the view that a contracting authority's freedom of choice concerning the type of contract necessary to fulfil a public service obligation is contained in the Court's case-law concerning the award of service contracts.

21 The referring court states that the admissibility of the action brought by Falk depends on whether a standard rebate contract, within the meaning of Paragraph 130a(8) of the SGB V, concluded in an authorisation procedure with all interested economic operators, without a selection decision, constitutes a public contract within the meaning of Article 1(2)(a) of Directive 2004/18. In other words, the issue is whether a public contract is characterised by a selection made by the contracting authority which implies that the operator selected has exclusivity. If that were the case, an authorisation procedure for the conclusion of contracts with all interested economic operators would not constitute a procedure for the award of a public contract.

22 That court notes that the national case-law is divided on this question. For certain courts a public contract is a contract which gives the chosen operator exclusivity, so that a contract which is concluded with all the operators who wish to conclude such a contract does not constitute a public contract. Other courts take the view that all contracts concluded by a contracting authority are public contracts and that the choice of one of the tenderers, and therefore the grant of exclusivity, is an obligation of a contracting authority.

23 The referring court is inclined to the view that rebate contracts such as those at issue in the main proceedings are not public contracts. On account of the award of those contracts to all operators who fulfil the fixed terms and who ask to be included, there is no selection, no award of an economic advantage to an operator and, therefore, no risk of discrimination. As is apparent from recital 2 and Article 2 of Directive 2004/18, the law of public procurement has as its specific objective the avoidance of the abuses linked to those sort of risks.

24 That court refers in support of those considerations, first, to the judgment of 10 September 2009 in *Eurawasser* (C-206/08, EU:C:2009:540) from which it infers that a contract must not necessarily be awarded in the form of a public service contract where there is a legal alternative, which, in the case in the main proceedings giving rise to that judgment, was recourse to the use of a service concession. Neither primary law nor secondary legislation seems to imply, to the national court, that any acquisition must be the subject of a public procurement contract. It considers that although a distinction exists between public contract and service concession because of the nature of the consideration provided for in the contract, nothing precludes the existence or not of a choice between the interested economic operators being based on another distinction. That court takes the view that the judgment of 15 July 2010 in *Commission* v *Germany* (C-271/08, EU:C:2010:426) could indirectly confirm that conclusion in that the Court held, in paragraph 73, that public procurement directives have the objective of excluding the risk that a preference might be given to national tenderers or candidates in any procurement carried out by contracting authorities.

25 Secondly, the national court refers to Directive 2014/24, especially the definition of the concept of 'public procurement' introduced in that directive, which expressly refers to the choice of economic operators and the second paragraph of recital 4 of that directive, which excludes from the concept of public contract cases in which all operators fulfilling certain conditions are entitled to perform a given task without any selectivity, one of the examples given appearing to refer to a scheme comparable to that at issue in the main proceedings. The national court considers that, although in this case Directive 2014/24 does not apply *ratione temporis*, the definition of the concept of 'public procurement' which it contains, where Directive 2004/18 does not define that concept, does not introduce any change. EU law on public contracts has always been characterised by an element of competition.

26 If selection is a characteristic of a public contract and, therefore, an authorisation procedure for a rebate contract scheme, such as that at issue in the main proceedings, is not, in principle, a public procurement procedure, the national court is of the view that it is necessary to specify the conditions governing such an authorisation procedure which must be met in order for a contracting authority to be able to forgo a procurement procedure implying the selection of one or more operators.

27 That court states that the principles of non-discrimination and equality of treatment and the requirement of transparency, which are to be inferred above all from primary law, impose procedural

and substantive requirements which also apply to that authorisation procedure, so as to guarantee that that procedure is in fact exempt from all selectivity, not giving any competitive advantage to any operator. However, the way in which an authorisation procedure is organised may give rise to discrimination and unequal treatment.

28 The requirements of such a procedure could be EU-wide publication of the opening of that procedure and of the contracts concluded in that procedure, clarity of the rules governing authorisation, the fixing a priori of the standard-form rebate contracts and the possibility of acceding to the contract at any time.

29 That possibility of acceding at any time distinguishes an authorisation procedure, such as that at issue in the main proceedings, from a procedure for the award of a framework agreement governed by Article 32 of Directive 2004/18. The requirement imposed by Article 32(2), second subparagraph, that contracts based on a framework agreement can only be concluded between economic operators who are parties to that framework agreement, stems from the selective nature of that type of agreement. According to the referring court, to impose such a restriction on an authorisation procedure by fixing a time limit beyond which an operator can no longer accede to a rebate contract scheme would have a discriminatory effect since it would give a competitive advantage to operators who had acceded to that scheme.

30 That court takes the view that the mechanism for substituting a medicinal product laid down in Paragraph 129 of the SGB V does not give such a competitive advantage in the case of accession to a rebate contract scheme within the meaning of Paragraph 130a(8) of the SGB V. The situation is different where such a rebate contract is concluded in a procedure for the award of a public contract. In that situation, the exclusivity from which the successful tenderer benefits has the consequence that that tenderer enjoys a special competitive position, the award of the contract having a decisive effect on competition. By contrast, where such contracts are concluded with all interested operators, the substitution of a medicinal product takes place on the basis of a choice made not by the contracting authority but by the pharmacist or the patient depending on the sale conditions proposed by the operators who have acceded to the rebate contract scheme. Accordingly, it is possible that some of the contracting operators may see their product sold only rarely. It is the same if, as in the present case, a single operator has contracted. In granting the right to contract at any moment to any interested operator, the contracting authority refrains from exercising an influence on the competitive situation, which depends not on the possibility of substituting the contracting operator’s medicinal products but on the decision taken by each operator who is potentially interested in participating or not in the rebate contract scheme.

31 In those circumstances, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the concept of a “public contract” under Article 1(2)(a) of Directive 2004/18/EC no longer apply if a contracting authority carries out an authorisation procedure in which it awards the contract without selecting one or more economic operators?

(2) If the answer to question 1 is that the selection of one or more economic operators is a characteristic of a public contract, ... must the characteristic of the selection of economic operators [which would imply in that situation the concept of “public contract”] within the meaning of Article 1(2)(a) of Directive 2004/18/EC be interpreted, in the light of Article 2 of that directive, as meaning that contracting authorities may refrain from selecting one or more economic operators by way of an authorisation procedure only if the following conditions are satisfied:

– the carrying out of an authorisation procedure is published at European level,

– clear rules concerning the conclusion of the contract and acceding to the contract are set,

– the terms of the contract are set in advance in such a way that no economic operator is able to influence the content of the contract,

– economic operators are granted the right to accede to the contract at any time;

– the contracts concluded are published at European level?’

Consideration of the questions referred

The first question

32 By its first question the referring court asks, in essence, whether Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a contract scheme, such as that at issue in the main proceedings, through which a public entity intends to acquire goods on the market by contracting throughout the period of validity of that scheme with any economic operator who undertakes to provide the goods concerned on fixed terms, without choosing between the interested operators, and allows those operators to accede to that scheme throughout its period of validity, must be classified as a public contract within the meaning of that directive.

33 Admittedly, as certain interested parties who presented their written observations to the Court note, such a scheme leads to the conclusion of contracts for a pecuniary interest between a public entity, which could be a contracting authority within the meaning of Directive 2004/18, and economic operators whose objective is to supply goods, which corresponds to the definition of ‘public contracts’ laid down in Article 1(2)(a) of that directive.

34 However, it should be noted, first, according to recital 2 of that directive, the coordinating provisions which it establishes must be interpreted in accordance with the principles of the FEU Treaty, in particular the principles of the free movement of goods, freedom of establishment and freedom to provide services and the principles that derive therefrom, such as equality of treatment, non-discrimination, mutual recognition, proportionality and transparency to which the award of public contracts in Member States are subject.

35 Secondly, the coordination at EU level of the procedures for the award of public service contracts being, therefore, to protect the interests of economic operators established in a Member State who wish to offer goods or services to contracting authorities established in another Member State, the purpose of Directive 2004/18 is to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities (see to that effect, concerning the directive relating to public service contracts previously in force, judgment of 10 November 1998 in *BFI Holding*, C-360/96, EU:C:1998:525, paragraphs 41 and 42 and the case-law cited).

36 Essentially, the risk of favouring national economic operators which that directive seeks to preclude is closely connected to the selection which the contracting authority intends to make from the admissible tenders and to the exclusivity which will result from the award of the contract concerned to the operator whose tender has been accepted or to the economic operators whose tenders have been accepted, in the case of a framework agreement, that constituting the objective of a public procurement procedure.

37 Consequently, where a public entity seeks to conclude supply contracts with all the economic operators wishing to supply the goods concerned in accordance with the conditions specified by that entity, the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators.

38 It is therefore apparent that the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of ‘public contract’ within the meaning of Article 1(2) of that directive.

39 That finding is supported by Article 43, first paragraph, (e) of Directive 2004/18, which provides that for every contract, framework agreement, and every establishment of a dynamic purchasing system, the contracting authorities are to draw up a written report which is to include the name of the successful tenderer and the reasons why his tender was selected.

40 It must, moreover, be pointed out that that principle is expressly set out in the definition of the concept of ‘procurement’, now set out in Article 1(2) of Directive 2014/24, in respect of which one aspect is the choice by the contracting authority of the economic operator from whom it will acquire by means of a public contract the works, supplies or services which are the subject matter of that contract.

41 Lastly, it should be noted that the special feature of a contractual scheme, such as that at issue in the main proceedings, namely its permanent availability for the duration of its validity to interested operators and, therefore, its not being limited to a preliminary period in the course of which undertakings are invited to express their interest to the public entity concerned, suffices to distinguish that scheme from a framework agreement. In accordance with Article 32(2), second subparagraph, of Directive 2004/18, contracts based on a framework agreement can only be awarded to economic operators who are originally parties to that framework agreement.

42 The answer to the first question, therefore, is that Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a contract scheme, such as that in the main proceedings, through which a public entity intends to acquire goods on the market by contracting throughout the period of validity of that scheme with any economic operator who undertakes to provide the goods concerned in accordance with predetermined conditions, without choosing between the interested operators, and allows them to accede to that scheme throughout its validity, does not constitute a public contract within the meaning of that directive.

The second question

43 By its second question, the referring court asks, in essence, what conditions under EU law govern the validity of an authorisation procedure for a contract scheme, such as that at issue in the main proceedings.

44 It should be noted that such a procedure, in so far as its subject matter is of certain cross-border interest, is subject to the fundamental rules of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination between economic operators and the consequent obligation of transparency, that obligation requiring that there be adequate publicity. In that regard, Member States have some latitude in a situation such as that at issue in the main proceedings for the purpose of adopting measures intended to ensure observance of the principles of equal treatment and the obligation of transparency.

45 However, the requirement of transparency implies publicity which allows potentially interested economic operators to apprise themselves properly of the conduct and the essential characteristics of an authorisation procedure such as that at issue in the main proceedings.

46 It is for the referring court to assess whether the authorisation procedure at issue in the main proceedings satisfies those requirements.

47 The answer to the second question is therefore that in so far as the subject matter of an authorisation procedure, such as that at issue in the main proceedings, is of certain cross-border interest, that procedure must be conceived and organised in accordance with the fundamental rules of the FEU Treaty, in particular, the principles of non-discrimination and equal treatment between economic operators and the consequent obligation of transparency.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber), hereby rules:

1. Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts,

public supply contracts and public service contracts must be interpreted as meaning that a contract scheme, such as that in the main proceedings, through which a public entity intends to acquire goods on the market by contracting throughout the period of validity of that scheme with any economic operator who undertakes to provide the goods concerned in accordance with predetermined conditions, without choosing between the interested operators and, allows them to accede to that scheme throughout its validity, does not constitute a public contract within the meaning of that directive.

2. **In so far as the subject matter of an authorisation procedure, such as that at issue in the main proceedings, is of certain cross-border interest, that procedure must be conceived and organised in accordance with the fundamental rules of the FEU Treaty, in particular, the principles of non-discrimination and equal treatment between economic operators and the consequent obligation of transparency.**

[Signatures]

---

*Language of the case: German.

JUDGMENT OF THE COURT (Third Chamber)

14 July 2016 (*)

(Reference for a preliminary ruling — Directive 2004/18/EC — Public works contracts — Regularity of the obligation imposed on tenderers to perform a certain percentage of the contract without using subcontractors — Regulation (EC) No 1083/2006 — General provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund — Obligation for the Member States to carry out a financial correction in relation to the irregularities identified — Concept of 'irregularity' — Need for a financial correction in the event of infringement of EU law on public procurement)

In Case C-406/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland), made by decision of 3 June 2014, received at the Court on 27 August 2014, in the proceedings

Wrocław — Miasto na prawach powiatu

v

Minister Infrastruktury i Rozwoju,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, D. Šváby (Rapporteur), J. Malenovský, M. Safjan and M. Vilaras, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Wrocław — Miasto na prawach powiatu, by W. Szuster, radca prawny,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by B.-R. Killmann and A. Tokár and by M. Owsiany-Hornung, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 25 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004

L 134, p. 114, corrigendum OJ 2004 L 351, p. 44), as amended by Commission Regulation (EC) No 2083/2005 of 19 December 2005 (OJ 2005 L 333, p. 28) ('Directive 2004/18'), and of Article 98 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).

2 The request has been made in proceedings between the Wrocław — Miasto na prawach powiatu (City of Wrocław, Poland) and the Minister Infrastruktury i Rozwoju (Minister for Infrastructure and Development) concerning a decision imposing on the former a financial correction as a result of the alleged infringement of Directive 2004/18 in the context of the award of a public works contract relating to works co-financed by European Union funds.

Legal context

EU law

Directive 2004/18

3 In accordance with Article 7(c) of Directive 2004/18, it was applicable, at the time of the facts at issue in the main proceedings, to public works contracts which are not excluded and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than EUR 5 278 000.

4 The possibility for a tenderer to subcontract a share of the contract to third parties is envisaged, in particular, in Article 25 of that directive in the following terms:

'In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.

This indication shall be without prejudice to the question of the principal economic operator's liability.'

5 Article 26 of Directive 2004/18, entitled 'Conditions for performance of contracts' provides:

'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

6 That provision is explained by recital 33 to that directive, which states that the contract performance conditions are compatible with that directive 'provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the conditions — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation'.

7 Directive 2004/18 also sets out qualitative selection criteria which make it possible to determine the candidates admitted to participate in the procedure for the award of a public contract. Article 48 of that directive, relating to technical and professional abilities, is worded as follows:

'…

(2) Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or

services:

…

(b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;

…

(i) an indication of the proportion of the contract which the services provider intends possibly to subcontract;

…

(3) An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

…

(5) In procedures for awarding public contracts having as their object supplies requiring siting or installation work, the provision of services and/or the execution of works, the ability of economic operators to provide the service or to execute the installation or the work may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

(6) The contracting authority shall specify, in the notice or in the invitation to tender, which references under paragraph 2 it wishes to receive.'

Regulation No 1083/2006

8 Recital 66 to Regulation No 1083/2006 states:

'The obligations on the Member States as regards management and control systems, the certification of expenditure, and the prevention, detection and correction of irregularities and infringements of Community law should be specified to guarantee the efficient and correct implementation of operational programmes. …'

9 Article 1 of that regulation provides:

'This Regulation lays down the general rules governing the European Regional Development Fund (ERDF), the European Social Fund (ESF) (hereinafter referred to as the Structural Funds) and the Cohesion Fund …

…

To this end, this Regulation lays down the principles and rules on partnership, programming, evaluation, management, including financial management, monitoring and control on the basis of responsibilities shared between the Member States and the Commission.'

10 Article 2(7) of that regulation defines 'irregularity' as 'any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget'.

11 In accordance with Article 9(5) of Regulation No 1083/2006, operations financed by the Structural Funds or the Cohesion Fund must be compatible in particular with the provisions of secondary

legislation.

12 Article 98 of that regulation, entitled ‘Financial corrections by Member States’ provides:

‘(1) The Member States shall in the first instance bear the responsibility for investigating irregularities, acting upon evidence of any major change affecting the nature or the conditions for the implementation or control of operations or operational programmes and making the financial corrections required.

(2) The Member State shall make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. The corrections made by a Member State shall consist of cancelling all or part of the public contribution to the operational programme. The Member State shall take into account the nature and gravity of the irregularities and the financial loss to the Fund.

…’

Polish law

13 It follows from the order for reference that Article 36(5) of the ustawa z dnia 29 stycznia 2004 r.– Prawo zamówień publicznych (Law on public contracts), of 29 January 2004 (‘the p.z.p.’), in the version applicable at the time of the facts in the main proceedings, was drafted as follows:

‘The contracting authority may specify in the tender specifications which share of the contract cannot be subcontracted.’

14 That provision was subsequently amended so that an economic operator may subcontract performance of a public contract which was awarded to him, other than where, on account of the specific nature of the object of the contract, the contracting authority stipulates in the tender specifications that that contract, in whole or in part, cannot be subcontracted.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 On 18 May 2007, the competent department of the City of Wrocław initiated a restricted procedure for the award of a public contract relating to the partial construction of a bypass. That project, the cost of which was approximately EUR 65 million, benefited from Union financial support in accordance with the operational programme of Community support for the Republic of Poland relating to infrastructure and the environment, in the context of the ‘Convergence’ objective, co-financed by the Cohesion Fund and the ERDF.

16 Out of the seven operators who applied to participate in that procedure, five were invited to submit a tender. The tender specifications sent to those five operators contained a stipulation worded as follows:

‘The economic operator is obliged to perform at least 25% of the works covered by the contract using its own resources.’

17 On 1 August 2008, the City of Wrocław concluded a public contract with the operator it had selected.

18 Following an administrative procedure subsequent to the performance of that contract, brought by the national authorities responsible for monitoring the lawfulness of certain actions co-financed by the Union, the City of Wrocław was subject to a claim for a financial correction of 8 600 473.38 Polish zlotys (PLN) (approximately, EUR 1 960 000) in principal, corresponding to 5% of the amount of costs borne by public funds, as a result of the alleged irregularity of that stipulation in the light of Directive 2004/18, applicable to the contract at issue given the value thereof.

19 According to the order for reference, at the final stage of that administrative procedure, the competent authority justified that financial correction, first, by the fact that the contested stipulation limited the use of subcontractors without respecting Article 36(5) of the p.z.p. The objective of that provision is to ensure that the parts of a contract requiring specific knowledge and skills, and the quality of

performance of which depends therefore on the specific skills of the performer, are effectively carried out by the economic operator whose skills were evaluated in the context of the procurement procedure. That objective is particularly important since the provisions of national law applicable on the date of the facts in the main proceedings do not allow economic operators to rely on the capacities of third parties in order to show that they satisfy the capacity criteria so as to participate in the procedure for the award of a public contract.

20 According to that authority, the contracting authority pursuant to Article 36(5) of the p.z.p. was therefore required to state specifically which parts of the contract at issue must be performed personally by the contractor. A stipulation such as that at issue in the main proceedings, which merely implicitly laid down a percentage of the works corresponding to a part thereof which must be performed by the contractor, does not allow it to be determined, in infringement of the objective of Article 36(5) of the p.z.p., whether the restriction on the use of subcontractors concerns works which require specific skills. That infringement of national law amounts also to an infringement of Article 25 of Directive 2004/18, that authority referring, in that regard, to the judgment of 18 March 2004 in *Siemens and ARGE Telekom* (C-314/01, EU:C:2004:159).

21 Secondly, despite the fact that the alleged infringement of EU law has no effect on the award of the contract at issue in the main proceedings, the limitation on the use of subcontractors has a detrimental effect on the general budget of the Union. That limitation created a potential disturbance of the competitive balance capable of resulting in an increase of the prices offered in the tenders, such a risk sufficing to constitute an irregularity within the meaning of Article 2(7) of Regulation No 1083/2006.

22 It is apparent from the elements of the file before the Court that the rate of the financial correction applied in this case was calculated by means of a scale used by the competent authority.

23 The City of Wrocław brought an action against the decision imposing the financial correction before the referring court, contesting the merits of the two grounds on which that decision is based. As regards the lawfulness of the contested stipulation of the tender specifications, it claims that Article 36(5) of the p.z.p., in the version in force at the time of the facts in the main proceedings, contained the principle that the contractor must perform the contract itself, the use of subcontractors constituting an exception, and it is on that basis that the contracting authority could authorise it to do so, but it is not required to do so. The referring court appears to agree with that interpretation of the provision at issue.

24 The latter considers that it is necessary for the determination of the dispute before it to receive from the Court the interpretation, first, of Article 25 of Directive 2004/18, in particular the terms ‘share of the contract’, in order to determine whether that provision precludes a contracting authority from fixing a maximum percentage of the share of the contract that the future contractor will be able to subcontract. That court also questions whether such a limitation could be affected by Article 26 of that directive, as a condition for performance within the meaning of that provision.

25 That court considers that it follows from the judgment of 18 March 2004 in *Siemens and ARGE Telekom* (C-314/01, EU:C:2004:159), that Directive 2004/18 allows the use of subcontractors for the performance of public contracts to be limited on condition that that did not prevent economic operators who wish to rely on the technical and economic capacities of subcontractors from participating in a tender procedure. However, that judgment does not address the question whether a contracting authority is authorised to express as a percentage the volume of works which the contractor must perform personally.

26 Moreover, the referring court questions whether a stipulation such as that at issue in the main proceedings, by restricting the possibility for small- and medium-sized enterprises (SMEs) to participate in the performance of works in the context of a public contract, is not capable of infringing the principle of the opening of public contracts to undistorted competition, since that opening concerns all enterprises, whatever their size, it seeming that particular attention should be paid in that regard to SMEs. That court refers, in that regard, to the Court’s case-law, in particular to the judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraph 33).

27 Secondly, that court considers that it is also necessary to receive clarification regarding the concept of ‘irregularity’ within the meaning of Regulation No 1083/2006, so that it can determine whether, in the light of the circumstances of the case before it, the importance of the potential infringement of EU law which affected the procurement procedure at issue requires a financial correction.

28 In that regard, it questions whether all infringements of EU law in the field of public contracts constitute such an irregularity which must result in a financial correction or whether it is necessary to take into account the specific circumstances of each case, in particular the effects of a possible infringement of that law. As regards those specific circumstances, it notes, in this case, that the applicable law was interpreted as not excluding a stipulation such as that at issue in the main proceedings, that that stipulation nevertheless authorised the use of subcontractors for 75% of the works subject to the contract, that it was uncontested and that the call for tenders led to a high level of competition.

29 In that context, the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In the light of Article 25 of Directive 2004/18 ... is the contracting authority allowed to stipulate in the tender specifications that the economic operator is required to perform at least 25% of the works covered by the contract using its own resources?

(2) If the answer to the first question is in the negative, does the application of the requirement described in that question in a procedure for the award of a public contract result in an infringement of provisions of EU law which justifies the need to make a financial correction pursuant to Article 98 of Regulation No 1083/2006?’

Consideration of the questions referred

The first question

30 By its first question, the referring court asks, in essence, whether Directive 2004/18 must be interpreted as meaning that a contracting authority is authorised to require, by means of a stipulation in the contract documents for a public works contract, that the future successful tenderer for that contract perform using its own resources a certain percentage of the works under that contract.

31 Pursuant to the first paragraph of Article 25 of Directive 2004/18, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.

32 As the Court stated in paragraph 31 of the judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646), by that article, Directive 2004/18 provides for the use of subcontractors without imposing any limit in that regard.

33 On the contrary, to the extent that Article 48(3) of that directive provides for the possibility, for tenderers, to prove that they meet the minimum levels of technical and professional capacities fixed by the contracting authority by relying on the capacities of third party entities, in so far as they establish that they indeed have the necessary means for the performance of the contract which they do not themselves own if that contract is awarded to them, establishes the possibility, for tenderers, to use subcontractors for the performance of a contract, and that in a way which is, in principle, unlimited.

34 Nevertheless, where the procurement documents require tenderers to indicate, in their tenders, the share of the contract they may intend to subcontract and the proposed subcontractors, in accordance with the first paragraph of Article 25 of Directive 2004/18, the contracting authority is entitled to prohibit use of subcontractors whose capacities could not be verified at the level of examination of tenders and selection of the contractor, for the performance of essential parts of the contract (see, to that effect, judgment of 18 March 2004 in *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 45).

35 Such is not however the effect of a stipulation such as that at issue in the main proceeding, which imposes limitations on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, and that irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks which would be concerned. In all those respects, such a stipulation is incompatible with Directive 2004/18, which is relevant in the context of the main proceedings.

36 Moreover, as the Advocate General stated in point 41 of her Opinion, such a stipulation, assuming it constitutes a condition for the performance of the contract for the purposes of Article 26 of Directive 2004/18, cannot be accepted under that article, by reason of the very terms thereof, since it is contrary to Article 48(3) of that directive, and thus is contrary to EU law.

37 Therefore, the answer to the first question is that Directive 2004/18 must be interpreted as meaning that a contracting authority is not authorised to require, by a stipulation in the tender specifications of a public works contract, that the future contractor of that contract perform with its own resources a certain percentage of the works covered by that contract.

The second question

38 By its second question, the referring court asks, in essence, whether Article 98 of Regulation No 1083/2006, read in conjunction with Article 2(7) of that regulation, must be interpreted as meaning that the fact that a contracting authority imposed a requirement, in the context of a public works contract relating to a project receiving EU financial aid, that the future contractor perform by means of its own resources at least 25% of those works, in infringement of Directive 2004/18, constitutes in circumstances such as those at issue in the main proceedings, an ‘irregularity’ within the meaning of Article 2(7) of that regulation, justifying the need to apply a financial correction under Article 98 thereof.

39 Concerning the specific circumstances of this case, the referring court notes that the applicable national law was interpreted as not precluding a stipulation such as that at issue in the main proceedings, that that stipulation nevertheless authorised the use of subcontracting for 75% of the works covered by the contract, that it did not elicit any challenge on the part of candidates who were invited to submit a tender, and who were the only parties to have knowledge of that fact, and that the call for tenders led to a high level of competition.

40 The question referred has therefore two aspects, the first relating to the concept of ‘irregularity’ within the meaning of Article 2(7) of Regulation No 1083/2006 and, the second, to the financial correction mechanism to be implemented by the national authorities in the event of irregularity, in accordance with Article 98 of that regulation.

41 In the first place, that concept of ‘irregularity’ covers, in accordance with Article 2(7) of Regulation No 1083/2006, any infringement of a provision of EU law resulting from an act or omission of an economic operator which has, or would have, the effect of prejudicing the general budget of the Union by charging an unjustified item of expenditure to the budget.

42 It should be noted that it is the last part of that definition which gives rise to doubts on the part of the referring court, given that, in this case, the stipulation which must be considered to be contrary to EU law in the light of the answer to the first question appears to that court not to have had a material consequence.

43 In that regard, it should be noted that, admittedly, as the Advocate General stated in points 53 to 55 of her Opinion, referring in particular to Article 9(5) of Regulation No 1083/2006 and, by analogy, to the judgment of 21 December 2011 in *Chambre de commerce et d’industrie de l’Indre* (C-465/10, EU:C:2011:867, paragraphs 46 and 47), it is the role of the Union to finance, by the Structural Funds or the Cohesion Fund, only actions conducted in complete conformity with EU law.

44 However, it follows from the definition in Article 2(7) of that regulation that an infringement of EU law constitutes an irregularity within the meaning of that provision only if it has, or would have, the effect of prejudicing the general budget of the Union by charging an unjustified item of expenditure to

that budget. Therefore, such an infringement must be considered to be an irregularity in so far as it is capable, as such, to have a budgetary impact. By contrast, there is no requirement that the existence of a specific financial impact be shown (see, by analogy, judgment of 21 December 2011 in *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 47).

45 Consequently, it should be considered that a failure to comply with the public procurement rules constitutes an irregularity within the meaning of Article 2(7) of Regulation No 1083/2006 in so far as the possibility cannot be excluded that that failure will have an impact on the budget of the Funds.

46 In the second place, as regards the financial correction mechanism provided for in Article 98 of Regulation No 1083/2006, it should be noted that Article 98(1) and (2) of that regulation requires Member States to make a financial correction where an irregularity has been established.

47 However, the first paragraph of Article 98(2) thereof also requires the competent national authority to calculate the amount of the correction to apply by taking into account three criteria, namely the nature and gravity of the irregularities and the resulting financial loss to the Funds.

48 Where, as in the case at issue in the main proceedings, a specific, and not a systematic, irregularity is at issue, that requirement necessarily involves a case-by-case examination, taking all of the circumstances of each relevant case into account in the light of one of those three criteria.

49 Therefore, although, as the Advocate General pointed out in point 60 of her Opinion, that does not preclude a first approach from being carried out on the basis of a scale which respects the principle of proportionality, the fact remains that the calculation of the final amount of the correction to be applied must take account of all of the characteristics of the irregularity found in relation to the elements taken into consideration for the establishment of that scale, which can justify the application of an increased or, on the contrary, a reduced correction.

50 Therefore, circumstances such as the compliance of a stipulation such as that at issue in the main proceedings with national law, the obligation to perform using its own resources a limited share of the contract and the fact that only a risk, which is possibly weak, of a financial impact has been established are capable of influencing the final amount of the financial correction to be applied.

51 The answer to the second question must therefore be that Article 98 of Regulation No 1083/2006, read in conjunction with Article 2(7) of that regulation, must be interpreted as meaning that the fact that a contracting authority imposed a requirement, in the context of a public works contract relating to a project receiving EU financial aid, that the future contractor perform by means of its own resources at least 25% of those works, in infringement of Directive 2004/18, constitutes an 'irregularity' within the meaning of Article 2(7) of that regulation, justifying the need to apply a financial correction under Article 98 thereof, in so far as it cannot be excluded that that infringement had an impact on the budget of the Fund at issue. The amount of that correction must be calculated by taking into account all of the specific circumstances which are relevant in the light of the criteria referred to in the first paragraph of Article 98(2) of that regulation, namely the nature and gravity of the irregularity and the resulting financial loss to the Fund concerned.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EC) No 2083/2005 of 19 December 2005, must be interpreted as meaning that a contracting authority is not authorised to require, by a stipulation in the tender specifications of a**

public works contract, that the future contractor of that contract perform with its own resources a certain percentage of the works covered by that contract.

2. **Article 98 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, read in conjunction with Article 2(7) of that regulation, must be interpreted as meaning that the fact that a contracting authority imposed a requirement, in the context of a public works contract relating to a project receiving EU financial aid, that the future contractor perform by means of its own resources at least 25% of those works, in infringement of Directive 2004/18, constitutes an 'irregularity' within the meaning of Article 2(7) of that regulation, justifying the need to apply a financial correction under Article 98 thereof, in so far as it cannot be excluded that that infringement had an impact on the budget of the Fund at issue. The amount of that correction must be calculated by taking into account all of the specific circumstances which are relevant in the light of the criteria referred to in the first paragraph of Article 98(2) of that regulation, namely the nature and gravity of the irregularity and the resulting financial loss to the Fund concerned.**

[Signatures]

---

* Language of the case: Polish.

OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 17 November 2015 (1)

Case C-406/14

Wrocław - Miasto na prawach powiatu

v

Minister Infrastruktury i Rozwoju

(Request for a preliminary ruling from the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland))

(Public procurement contracts — Directive 2004/18/EC — Tender specifications — Restriction on the use of subcontracting — Regulation (EC) No 1083/2006 — 'Irregularity' giving rise to compulsory financial corrections by the competent national authorities — Infringement of the procedure for the award of a public works contract)

1. The present request for a preliminary ruling arises out of a procedure initiated in May 2007 for the award of a public contract for the construction of a ring road in Wrocław (Poland). The project benefited from EU financial assistance. The City of Wrocław stipulated in the tender specifications that the successful tenderer was to perform at least 25% of the works covered by the contract using its own resources. The public authority in Poland competent to verify proper use of the EU funding took the view that that stipulation infringed the principle of fair competition and therefore was inconsistent with Directive 2004/18/EC. (2) As a consequence, that authority imposed on the City of Wrocław a flat rate correction of 5% of the amount of eligible costs borne by public funds.

2. The City of Wrocław challenges the financial correction before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw; 'the referring court'). The referring court seeks guidance, first, on whether Directive 2004/18, which aims in particular to guarantee the opening-up of public procurement to competition, precludes contracting authorities from restricting successful tenderers in their use of subcontracting. If a restriction on subcontracting such as that in issue in the main proceedings is inconsistent with that directive, the referring court also wonders whether Council Regulation (EC) No 1083/2006 (3) requires the financial assistance awarded to that authority to be reduced even where it is not possible to determine precisely the loss suffered by the European Regional Development Fund, the European Social Fund or the Cohesion Fund ('the Funds').

European Union law

Directive 2004/18

3. Directive 2004/18 coordinates at EU level national procedures for the award of public contracts above a certain value. (4) It aims to ensure the effects of the principles of freedom of movement of goods, freedom of establishment, and freedom to provide services and the principles deriving therefrom, including the principles of equal treatment, non-discrimination and transparency. It also aims to guarantee the opening-up of public procurement to competition. (5)

4. Directive 2004/18 contains provisions on subcontracting in order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market. (6)

5. Article 1(2)(a) defines '[p]ublic contracts' as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of

works, the supply of products or the provision of services within the meaning of [Directive 2004/18]'. Pursuant to Article 1(11)(b), '[r]estricted procedures' are 'those procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender'.

6. Article 23(2) ('Technical specifications') provides: 'Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening-up of public procurement to competition.'

7. Pursuant to the first paragraph of Article 25 ('Subcontracting'), '[i]n the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors'.

8. Under Article 26 ('Conditions for performance of contracts'), '[c]ontracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with [EU] law and are indicated in the contract notice or in the specifications …'.

9. Article 44(2) ('Verification of the suitability and choice of participants and award of contracts') states that contracting authorities may require candidates and tenderers to meet minimum capacity levels which are related and proportionate to the subject-matter of the contract. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them, in order to demonstrate both its economic and financial standing (Article 47(2)) and its technical and/or professional ability (Article 48(3)). In that latter case, it must prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example by producing an undertaking by those entities. Evidence of the economic operators' technical abilities may be furnished, inter alia, by an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those upon whom the contractor can call in order to carry out the work in the case of public works contracts, or by an indication of the proportion of the contract which the services provider intends possibly to subcontract (Article 48(2)(b) and (i)).

Regulation No 2988/95

10. Article 1(1) of Council Regulation (EC, Euratom) No 2988/95 (7) provides: 'For the purposes of protecting the [European Union's] financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to [EU] law.' Article 1(2) defines 'irregularity' as 'any infringement of a provision of [EU] law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the [European Union] or budgets managed by [it], either by reducing or losing revenue accruing from own resources collected directly on behalf of the [European Union], or by an unjustified item of expenditure'.

11. Article 2 provides in particular:

> '1. Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of [EU] law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the [European Union's] financial interests.
>
> 2. No administrative penalty may be imposed unless [an EU act] prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in [EU] rules, the less severe provisions shall apply retroactively.
>
> 3. [EU] law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.
>
> …'

Regulation No 1083/2006

12. Regulation No 1083/2006 lays down general rules governing the Funds, including principles and rules on financial management, monitoring and control on the basis of responsibilities shared between the Member States and the European Commission (Article 1).

13. According to Article 3(1), action taken by the European Union under what is now Article 174 TFEU must be designed to strengthen the economic and social cohesion of the enlarged European Union in order to promote the harmonious, balanced and sustainable development of the Union. That action must be aimed at reducing the economic, social and territorial disparities which have arisen particularly in countries and regions whose development is lagging behind and in connection with economic and social restructuring and the ageing of the population. (8)

14. Article 2(7) defines ‘irregularity’ as ‘any infringement of a provision of [EU] law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget’.

15. Article 9(2) states in particular that the Commission and the Member States must ensure that assistance from the Funds is consistent with the activities, policies and priorities of the European Union. According to Article 9(5), operations which the Funds finance must therefore comply with the Treaties and acts adopted under them. (9)

16. The first subparagraph of Article 14(1) states that the EU budget allocated to the Funds must be implemented within the framework of shared management between Member States and the Commission, in accordance with Article 53(1)(b) of the Financial Regulation. (10) According to the second subparagraph of Article 14(1), the principle of sound financial management is to be applied in accordance with Article 48(2) of the Financial Regulation. Under that latter provision, the Member States must cooperate with the Commission so that the appropriations are used in accordance with the principle of sound financial management.

17. Pursuant to Article 98(1), which is in Title VII (‘Financial management’), the Member States bear in the first instance responsibility for investigating irregularities, acting upon evidence of any major change affecting the nature or the conditions for the implementation or control of operations or operational programmes and making the financial corrections required. (11) Pursuant to Article 98(2), the Member State must make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. Those corrections consist of cancelling all or part of the public contribution to the operational programme, taking into account the nature and gravity of the irregularities and the financial loss to the Funds.

18. Article 99(1), which is also in Title VII, entitles the Commission to make financial corrections by cancelling all or part of the EU contribution to an operational programme in particular where, after carrying out the necessary examination, it concludes that a Member State has not complied with its obligations under Article 98 prior to the opening of the correction procedure.

Polish law

19. Pursuant to Article 7(1) of the Law on public contracts (Ustawa Prawo Zamówień Publicznych) of 29 January 2004, in the version relevant for the main proceedings, contracting authorities must prepare and conduct contract award procedures in a manner which preserves fair competition and equal treatment of economic operators.

20. According to Article 36(4) of the Law on public contracts, the contracting authority requests the operator to indicate in its tender what proportion of the contract he may intend to subcontract. The contracting authority may, pursuant to Article 36(5), stipulate in the tender specifications which part of the contract cannot be subcontracted.

Facts, procedure and questions referred

21. On 18 May 2007, the Roads and Maintenance Board of the City of Wrocław initiated a restricted procedure for the award of a public contract for the construction of the Northern City Centre Ring Road. That project benefited from EU financial assistance under the ‘Infrastructure and Environment’ operational programme (‘the operational programme’). (12)

22. Whilst seven economic operators requested to take part to that procedure, the City of Wrocław invited only five of them to tender. The tender specifications which were sent together with the invitation to tender contained the following stipulation: ‘The economic operator is required to perform at least 25% of the works covered by the contract using its own resources’ (‘the 25% requirement’). Three economic operators submitted a tender.

23. On 1 August 2008, the City of Wrocław concluded a public works contract with the operator it had selected to implement the first part of the project (‘the public works contract’ or ‘the contract’).

24. In 2010, the City of Wrocław concluded an agreement with the director of the Centre for EU Transport Projects (Centrum Unijnych Projektów Transportowych; the 'CUPT') and the director of the City of Wrocław's Office for the Management of EU Funds (Biuro Zarządzania Funduszami Europejskimi Urzędu Miasta Wrocławia) in order to benefit from EU funding. The CUPT was responsible for monitoring the use of financial assistance awarded to the City of Wrocław under the operational programme,

25. The CUPT took the view that the City of Wrocław had infringed the principle of fair competition by imposing the 25% requirement. According to the CUPT, neither EU law nor national law authorised such a limitation on subcontracting. The CUPT therefore informed the City of Wrocław, on 24 May 2012, that it would apply a financial correction of 5% of the amount of the eligible costs borne by public funds (that is to say PLN 8 600 473.38, plus interest). The material before the Court indicates that the CUPT applied the 'Taryfikator', a table setting out different levels of flat rate financial correction depending on the type of irregularity. (13) On 5 July 2012, the Minister for Transport, Construction and Maritime Affairs confirmed that correction.

26. The Minister for Regional Development rejected the City of Wrocław's appeal against the financial correction on 30 September 2013. According to the order for reference, she considered that contracting authorities were not authorised, under Article 36(5) of the Law on public contracts, to require the successful tenderer itself to carry out part of the contract specified in abstract terms as a percentage. The 25% requirement was also, in her view, at odds with Article 25 of Directive 2004/18. That irregularity justified making a financial correction under Regulation No 1083/2006.

27. The City of Wrocław's appeal against that decision is now pending before the referring court, which has stayed the proceedings and requested a preliminary ruling on the following questions:

'(1) In the light of Article 25 of Directive 2004/18 ... is the contracting authority allowed to stipulate in the tender specifications that the economic operator is required to perform at least 25% of the works covered by the contract using its own resources?

(2) If the answer to the first question is in the negative, does the application of the requirement described in that question in a procedure for the award of a public contract result in an infringement of provisions of EU law which justifies the need to make a financial correction pursuant to Article 98 of [Regulation No 1083/2006] ...?'

28. Written observations have been submitted by the City of Wrocław, the Austrian and Polish Governments and the Commission. No hearing has been requested and none has been held.

Analysis

Question 1: Restrictions on subcontracting under Directive 2004/18

29. It is common ground that the public works contract in issue in the main proceedings falls within the scope of Directive 2004/18. The City of Wrocław indicates that the successful tenderer proposed a gross price of PLN 257 565 599.68 (14) for those works, which is above the threshold that applied at the material time. (15)

30. Directive 2004/18 is designed not only to avoid obstacles to freedom to provide services in the award of public service contracts or public works contracts but also to guarantee the opening-up of public procurement to competition. (16) Recital 32 in the preamble to that directive states that the possibility of subcontracting is liable to encourage small and medium-sized undertakings to get involved in the public contracts procurement market. Subcontracting enables such undertakings to participate in tendering procedures and to be awarded public contracts regardless of the size of those contracts. (17) Subcontracting thus contributes to achieving the directive's objectives by increasing the number of potential candidates for the award of public contracts.

31. Accordingly, Article 25 of Directive 2004/18 not only envisages that a tenderer may subcontract part of the contract but also sets no limit in that regard. (18) Indeed, Directive 2004/18 confirms explicitly that an economic operator may, where appropriate and for a particular contract, rely on the economic, financial, technical and/or professional capacities of other entities, regardless of the legal nature of the links which it has with them. (19) Consequently, a party may not be eliminated from a procedure for the award of a public service contract solely because it proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities. (20)

32. That said, contracting authorities do have a legitimate interest in ensuring that the contract will be effectively and properly carried out. Where an economic operator intends to rely on capacities of other economic operators in a tendering procedure, it must therefore establish that it actually will have at its disposal the resources

of those operators which it does not itself own and whose participation is necessary to perform the contract. (21) A tenderer claiming to have at its disposal the technical and economic capacities of third parties on which it intends to rely if it obtains the contract may be excluded by the contracting authority only if it fails to meet that requirement. (22)

33. The contracting authority may not always be in a position to verify the technical and economic capacities of the subcontractors when examining the tenders and selecting the lowest tenderer. The Court has held that in such cases Directive 2004/18 does not preclude a prohibition or a restriction on subcontracting the performance of essential parts of the contract. (23) Such a prohibition or restriction is justified by the contracting authority's legitimate interest in ensuring that the public contract will be effectively and properly carried out. Directive 2004/18 does not require a contracting authority to accept performance of *essential parts* of the public contract by entities whose capacities and qualities it has been unable to assess during the contract award procedure. (24)

34. In my view, considering the essential role subcontracting plays in promoting the objectives of Directive 2004/18, (25) no other prohibition or restriction is permissible. It is true that, in *Swm Costruzioni 2 and Mannocchi Luigino*, the Court considered that there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator which individually would be unable to perform that work. In those specific circumstances, the Court has held that the contracting authority is justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44(2) of Directive 2004/18, as long as that requirement is related and proportionate to the subject-matter of the contract at issue. (26) However, that is not a specific ground for prohibiting or restricting subcontracting as such. Nothing precludes that 'single economic operator' or 'limited number of economic operators' from being a subcontractor or subcontractors of the successful tenderer(s).

35. It follows that a stipulation such as that in issue in the main proceedings is clearly not consistent with Directive 2004/18.

36. First, the 25% requirement formed part of the tender specifications which the City of Wrocław addressed to a limited number of economic operators together with the invitation to tender. It therefore restricted recourse to subcontracting at the level of examination of tenders and selection of the successful tenderer.

37. The City of Wrocław submits that it had a legitimate interest in ensuring that the successful tenderer itself enjoyed the technical capacities and human resources necessary to implement at least part of the public works contract because the Law on public contracts did not enable it to verify the technical capacity and financial situation of subcontractors when comparing tenders. That submission cannot be upheld. If that is an accurate description of Polish law applicable at the relevant time, (27) such a rule limited economic operators' ability in practice to rely on the capacities of other entities in procedures for the award of public contracts, which would have been inconsistent with Articles 47(2) and 48(3) of Directive 2004/18.

38. Second, the 25% requirement does not concern performance of well-defined tasks but merely a percentage of the overall contract value. That requirement was therefore not such as to enable the contracting authority to ensure effective and proper performance of the essence of that contract.

39. Although the present proceedings concern Directive 2004/18, it is interesting to observe that the same rationale appears in Article 63(2) of its successor, Directive 2014/24. According to that provision, contracting authorities may require certain critical tasks to be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators, by a participant in that group. Whilst that provision now expressly allows restrictions on subcontracting during the examination and selection phase, such restrictions are acceptable only in so far as they concern well-defined tasks regarded as 'critical' for implementing the contract.

40. The conclusion which I have drawn is not called into question either by the fact that the 25% requirement applied only to a limited number of economic operators, who had received an invitation to tender in the context of a restricted procedure, or by the circumstance that none of them either contested it or submitted a tender in which subcontracting exceeded the ceiling. Those circumstances do not alter the nature of the restriction in dispute. For the reasons I have explained, that restriction falls foul of Directive 2004/18.

41. It is likewise immaterial that the restriction on subcontracting in issue constitutes a special condition relating to the performance of the contract within the meaning of Article 26 of Directive 2004/18. Contracting authorities may impose such special conditions only if they are compatible with EU law. That is not the case here.

42. Lastly, I do not agree with the City of Wrocław's submission that that interpretation of Directive 2004/18 cannot be relied upon against it because Article 36(5) of the Law on public contracts, in the version applicable at the material time, authorised contracting authorities to decide freely which parts of the public contract could not be subcontracted. The City of Wrocław, as a local authority, is among the organs of the State against which the sufficiently clear, precise and unconditional provisions of a directive have direct effect. (28) In any event, it is settled case-law that, when applying domestic law and, in particular, legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, national courts are bound to interpret that law, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result sought by the latter and thus to comply with the third paragraph of Article 288 TFEU. (29) Although applying national law in the main proceedings is a matter for the referring court, it does not seem to me impossible to construe Article 36(5) of the Law on public contracts in conformity with Directive 2004/18, as I have interpreted it above.

43. I therefore conclude that Directive 2004/18 precludes a contracting authority from stipulating in the tender specifications of a public works contract that the successful tenderer is required to perform part of the works covered by that contract, specified in abstract terms as a percentage, using its own resources.

Question 2: Financial correction under Article 98(2) of Regulation No 1083/2006

44. It is common ground that Regulation No 1083/2006 applies in the main proceedings, which concern a project that benefited from EU financial assistance through the operational programme.

45. By its second question, the referring court wishes to know whether an infringement of EU public procurement rules such as that identified above constitutes an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006, giving rise to an obligation on the part of the Member State concerned to impose a financial correction on the basis of Article 98(2) of that regulation.

46. The definition of 'irregularity' in Article 2(7) of Regulation No 1083/2006 contains three elements: (i) there must be an act or an omission by an economic operator, (ii) which results in an infringement of a provision of EU law and (iii) which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget.

47. The first two conditions are clearly fulfilled in the main proceedings. It is common ground that a contracting authority such as the City of Wrocław, notwithstanding its status as a legal person governed by public law, can be regarded as an 'economic operator' within the meaning of Article 2(7) of Regulation No 1083/2006 when it conducts a procedure for the award of a public contract. (30) As is clear from the answer that I propose to Question 1, I consider that the second condition is also satisfied here.

48. The difficulty concerns the third requirement.

49. The City of Wrocław submits that, even if the restriction on subcontracting which it imposed was inconsistent with Directive 2004/18, there was no resulting distortion of competition in the main proceedings and therefore no prejudice to the EU general budget within the meaning of Article 2(7) of Regulation No 1083/2006. The 25% requirement appeared in the tender specifications addressed to the five economic operators invited to tender and none of them challenged it. Each of the three operators which submitted a tender proposed using subcontractors for significantly less than 75% of the total value of its bid. The Polish Government and the Commission submit in essence that a financial correction is justified even where there is only a risk of prejudice to the EU general budget.

50. As a preliminary point, I do not agree with the City of Wrocław that the restriction on subcontracting necessarily had no effect on the procedure for the award of the public works contract. In the absence of that restriction, the tenderers would have been able to propose subcontracting more than 75% of the contract. (31) As the Polish Government and the Commission rightly point out, that might have resulted in different offers (in terms of, for example, the price or the timeframe for completing the works). Moreover, it appears from the material before the Court that only three out of the five economic operators invited to tender actually submitted a tender. The 25% requirement may, potentially, have influenced the two remaining operators not to tender. A possible loss to the Funds cannot therefore be ruled out.

51. That said, I regard these matters as immaterial in my opinion when addressing the issue whether Article 98(2) of Regulation No 1083/2006 requires a financial correction in a situation such as that in the main proceedings.

52. The Court's case-law interpreting the concept of 'irregularity' in Regulation No 2988/95 provides helpful guidance in this context. First, that regulation defines the concept of an 'irregularity' in a way similar to Regulation No 1083/2006. (32) Second, Regulation No 2988/95 lays down general principles relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to EU law, which are to be observed in all areas in which the European Union's financial interests are potentially threatened. (33)

53. Thus, *Chambre de commerce et d'industrie de l'Indre* (34) concerned recovery of EU subsidies awarded under the Structural Funds as a result of a failure to comply with EU public procurement rules. The Court emphasised in that judgment that the Structural Funds may not be used to finance operations carried out in breach of those rules. (35) Consequently, the fact that the recipient of a subsidy from the European Regional Development Fund, in its capacity as contracting authority, had violated procurement rules on public contracts when implementing a subsidised operation involved an unjustified item of expenditure and thus prejudiced the EU budget. (36) The Court observed that 'even irregularities having no specific financial impact may be seriously prejudicial to the financial interests of the [European Union]'. (37)

54. In my view, the same principles are relevant when interpreting the concept of 'irregularity' in Regulation No 1083/2006.

55. First, both recital 22 and Article 9(2) and (5) of that regulation confirm that the activities of the Funds and the operations which they help to finance should be fully consistent with EU law, including EU public procurement rules. Granting financial assistance to a project which does not comply in all respects with those rules therefore involves charging an (at least partly) unjustified item of expenditure to the EU budget. Second, applying a financial correction in those circumstances is consistent with the principle laid down in Article 2(1) of Regulation No 2988/95 that administrative measures adopted in order to ensure the proper application of EU law should be dissuasive. That is all the more important in a context where it may not prove easy or even possible to demonstrate and quantify the precise prejudice which the irregularity caused to the EU budget. Lastly, the reference to 'financial loss to the Funds' in Article 98(2) of Regulation No 1083/2006 does not call that interpretation into question. Whether actual, quantifiable financial loss has occurred is only one of the factors which the Member States are required to take into account when they impose financial corrections on the basis of that provision.

56. In my view, an infringement of EU public procurement rules such as that in issue in the main proceedings therefore constitutes an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006 which requires the competent authority in the Member State concerned to impose a financial correction on grounds of Article 98(2) of that regulation even if the infringement did not result in any quantifiable financial loss to the Funds.

57. The City of Wrocław submits that the CUPT violated Article 98(2) of Regulation No 1083/2006 when it calculated the financial correction mechanically on the basis of the 'Taryfikator', thus failing to take into account the negligible gravity of that irregularity and the absence of quantifiable loss to the Funds.

58. Can the competent national authorities apply pre-defined, flat-rate corrections when they identify irregularities in procedures for the award of public contracts?

59. Although the referring court does not expressly seek guidance on how any financial correction applicable should be calculated, the question is one that requires exploration.

60. Article 98(2) of Regulation No 1083/2006 requires a Member State, when calculating a financial correction, to take into account the nature and gravity of the irregularities and the financial loss to the Funds. That provision leaves a wide margin to the Member State subject to compliance with the twin principles of equivalence and effectiveness and with the principle of proportionality. The proportionality requirement results in particular from Article 2(1) of Regulation No 2988/95, which requires administrative checks, measures and penalties to be introduced 'in so far as they are necessary to ensure the proper application of [EU] law' and to be 'effective, proportionate and dissuasive so that they provide adequate protection for the [European Union's] financial interests'. (38) Financial corrections should therefore not go beyond what is actually necessary given the nature and gravity of the infringements. (39)

61. The Court has made clear moreover in the context of measures aimed at protecting the European Union's financial interests that the Commission may consider using a flat-rate correction where it is not possible to determine precisely the losses suffered by the European Union. (40) I consider that the same principle should apply to the Member States when they act on the basis of Article 98 of Regulation No 1083/2006. It follows that the competent national authorities may apply flat-rate corrections when they identify an infringement to EU public procurement rules. This is a situation where it is often difficult if not impossible to determine precisely the ensuing

losses for the Funds. The use of flat-rate corrections is likely both to facilitate the task of those authorities and to reinforce legal certainty by making such corrections easier to predict. Flat-rate corrections must of course reflect appropriately the nature and gravity of the various irregularities to which they apply and must not result in disproportionate corrections. (41) Circumstances may thus sometimes require adjusting the flat-rate correction applicable for a given irregularity. For example, if the contracting authority was acting in conformity with national rules that were not (fully) consistent with EU law, that would tend to affect the gravity of the irregularity and hence the appropriate level of financial correction.

Temporal effects of the judgment

62. The Polish Government submits that the judgment should produce effects only for the future if the Court concludes that Article 25 of Directive 2004/18 does not preclude a contracting authority from imposing a restriction on subcontracting such as that in issue in the main proceedings. Contracting authorities might otherwise claim reimbursement of financial corrections imposed on them since 2008 on grounds similar to those advanced in these proceedings. Verifying financial corrections imposed on these grounds would involve recalculating the amounts of public spending already notified by the Polish authorities to the Commission. The Polish authorities might then not be able to claim from the Commission the amounts of financial assistance they have advanced.

63. If the Court agrees with the answer which I have suggested to the first question, it is not necessary to address that request. If the Court were to reach the opposite conclusion, however, I see no reason to limit the temporal effects of the judgment.

64. According to settled case-law, the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines where necessary the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. As a result, the rule so interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied. (42)

65. Against that background, the Court only exceptionally grants requests such as that made by the Polish Government. The Court has taken such a step only in certain specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of the rules considered to be validly in force, and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of EU provisions, to which the conduct of other Member States or the Commission may have contributed. (43) In contrast, the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling. (44)

66. In the present case, the Polish Government argues in essence that a judgment interpreting Directive 2004/18 as set out at point 62 above might entail significant financial consequences for it. Considering the principles that I have just recalled, that argument cannot succeed. In any case, the Polish Government has not submitted any material which would enable the Court to consider whether the Republic of Poland actually risks incurring serious economic repercussions. In particular, the Polish Government has not indicated how many financial corrections imposed in that Member State on grounds analogous to those in issue in the main proceedings are liable to be called into question by such judgment. Nor does it provide any information about the total amount of those corrections.

Conclusion

67. In the light of the foregoing considerations, I suggest that the Court should answer the questions referred by the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) as follows:

(1) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts precludes a contracting authority from stipulating in the tender specifications of a public works contract that the successful tenderer is required to perform part of the works covered by that contract, specified in abstract terms as a percentage, using its own resources.

(2) If a contracting authority disregards that prohibition in the context of a procedure for the award of a public contract benefiting from an operational programme governed by Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and

the Cohesion Fund and repealing Regulation (EC) No 1260/1999, it commits an ‘irregularity’ within the meaning of Article 2(7) of that regulation. In those circumstances, Article 98(2) of Regulation No 1083/2006 requires the competent national authority to impose a financial correction on that contracting authority, even if the irregularity did not result in any quantifiable loss to the Funds.

---

1 – Original language: English.

---

2 – Of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). The version of Directive 2004/18 relevant to the facts in the main proceedings is that last amended by Council Directive 2006/97/EC of 20 November 2006 (OJ 2006 L 363, p. 107). Directive 2004/18 will be repealed and replaced, from 18 April 2016, by Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

---

3 – Of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25). The version last amended by Council Regulation (EC) No 1989/2006 of 21 December 2006 (OJ 2006 L 411, p. 6) applied at the time of the facts in the main proceedings. Regulation No 1083/2006 was repealed, from 1 January 2014, by Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agriculture Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320).

---

4 – At the material time, Directive 2004/18 applied to public works contracts which had an estimated value of at least EUR 5 278 000 exclusive of VAT (Article 7(c)).

---

5 – Recital 2.

---

6 – Recital 32.

---

7 – Of 18 December 1995 on the protection of the European Communities’ financial interests (OJ 1995 L 312, p. 1).

---

8 – See also recital 1.

---

9 – See also recital 22.

---

10 – Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1). See also recital 28 in the preamble to Regulation No 1083/2006.

---

11 – See also recital 65.

---

12 – Both the Cohesion Fund and the European Regional Development Fund financed the operational programme. See www.ec.europa.eu/regional_policy/fr/atlas/programmes/2007-2013/poland/operational-programme-infrastructure-and-environment.

---

13 – The Commission submits that the level of financial correction applied in the main proceedings is consistent with its Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement (Cocof 07/0037/03, 29 November 2007). Those Guidelines are available at: www.ec.europa.eu/regional_policy/sources/docoffic/official/guidelines/financial_correction/correction_2007_en.pdf.

---

14 – That is approximately EUR 60 750 000 at the exchange rate applicable at the time of writing.

---

15 – See footnote 4 above.

---

16 – Recital 2.

---

17 – See also Opinion of Advocate General Jääskinen in *Swm Costruzioni and Mannocchi Luigino*, C-94/12, EU:C:2013:130, point 33.

---

18 – Judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 31. See also the judgments in *Ordine degli Architetti and Others*, C-399/98, EU:C:2001:401, paragraph 90 (interpreting Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54)), and *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 41.

---

19 – Articles 47(2), first sentence, 48(2)(b) and (i) and 48(3), first sentence, of Directive 2004/18.

---

20 – Judgments in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 26, *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 43, and *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 32.

---

21 – Articles 47(2), second sentence, and 48(3), second sentence, of Directive 2004/18. See also the judgments in *Holst Italia*, C-176/98, EU:C:1999:593, paragraphs 28 and 29, and *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 44. See also Opinion of Advocate General Wathelet in *Ostas celtnieks*, C-234/14, EU:C:2015:365, point 40.

---

22 – Judgment in *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 46.

---

23 – Judgment in *Siemens and ARGE Telekom*, C-314/01, EU:C:2004:159, paragraph 45.

---

24 – Opinion of Advocate General Geelhoed in *Siemens and ARGE Telekom*, C-314/01, EU:C:2003:628, point 82.

---

25 – See points 30 and 31 above.

---

26 – Judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 35.

---

27 – The order for reference indicates that the Minister for regional development explained in his decision of 30 September 2013 that the Law on public contracts did not allow economic operators to rely on the experience of third persons to demonstrate that they met the conditions for participating in the tendering procedure.

---

28 – See the judgment in *Costanzo*, 103/88, EU:C:1989:256, paragraphs 31 and 32. See also, by analogy, the judgment in *Portgás*, C-425/12, EU:C:2013:829, paragraph 38.

---

29 – See, inter alia, the judgments in *von Colson and Kamann*, 14/83, EU:C:1984:153, paragraph 26, and *Impact*, C-268/06, EU:C:2008:223, paragraph 98 and the case-law cited.

---

30 – See, to that effect, the judgment in *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 45.

---

31 – The fact that their tenders proposed no more than 32.13% subcontracting is immaterial in this respect.

---

32 – Article 1(2) of Regulation No 2988/95.

---

33 – See, to that effect, the judgments in *Handlbauer*, C-278/02, EU:C:2004:388, paragraph 31, and *Jager*, C-420/06, EU:C:2008:152, paragraph 61 and the case-law cited. The Court has however made clear that, since Regulation No 2988/95 merely lays down general rules, it is on the basis of other provisions, namely, where appropriate, on the basis of sector-specific provisions (such as Article 98(2) of Regulation No 1083/2006), that the recovery of misused funds must be carried out (judgment in *Somvao*, C-599/13, EU:C:2014:2462, paragraph 37 and the case-law cited).

---

34 – C-465/10, EU:C:2011:867.

---

35 – The Court there referred to Article 7(1) of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9), as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5). Article 7(1) provided that '[m]easures financed by the Structural Funds or receiving assistance from the [European Investment Bank] or from another existing financial instrument shall be in conformity with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning … the award of public contracts …'.

---

36 – Judgment in *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 46.

---

37 – Judgment in *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:867, paragraph 47 and case-law cited. See also my Opinion in *Chambre de commerce et d'industrie de l'Indre*, C-465/10, EU:C:2011:596, points 59 to 65.

---

38 – Regulation No 1303/2013 now explicitly requires the Member States to apply financial corrections which are 'proportionate' (see Article 143(2)).

---

39 – See Opinion of Advocate General Jääskinen in *Denmark* v *Commission*, C-417/12 P, EU:C:2014:286, point 76 (concerning financial corrections applied by the Commission).

---

40 – See, in particular, the judgments in *United Kingdom* v *Commission*, C-346/00, EU:C:2003:474, paragraph 53, *Belgium* v *Commission*, C-418/06 P, EU:C:2008:247, paragraph 136, and *Denmark* v *Commission*, C-417/12 P, EU:C:2014:2288, paragraph 105. See also Article 99(2) of Regulation No 1083/2006.

---

41 – See point 60 above.

---

42 – See, for example, the judgments in *Roders and Others*, C-367/93 to C-377/93, EU:C:1995:261, paragraph 42 and the case-law cited, and *Richardson*, C-137/94, EU:C:1995:342, paragraph 31.

---

43 – Judgment in *Roders and Others*, C-367/93 to C-377/93, EU:C:1995:261, paragraph 43 and the case-law cited.

---

44 – See, inter alia, the judgments in *Bidar*, C-209/03, EU:C:2005:169, paragraph 68, *Linneweber and Akritidis*, C-453/02 and C-462/02, EU:C:2005:92, paragraph 44, and *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 62.

JUDGMENT OF THE COURT (Grand Chamber)

24 May 2016 (*)

(Reference for a preliminary ruling — Article 267 TFEU — Jurisdiction of the Court — Status of the referring body as a court or tribunal — Procurement procedure in railway infrastructure sector — Negotiated procedure — Directive 2004/17/EC — Article 10 — Article 51(3) — Principle of equal treatment of tenderers — Group composed of two companies and admitted as such as a tenderer — Tender submitted by one of the two companies, in its own name, the other company having been declared insolvent — Company considered to be capable, by itself, of being admitted as a tenderer — Contract awarded to that company)

In Case C-396/14,

REQUEST for a preliminary ruling under Article 267 TFEU made by Klagenævnet for Udbud (the Public Procurement Complaints Board, Denmark), by decision of 18 August 2014, received at the Court on 20 August 2014, in the proceedings

MT Højgaard A/S,

Züblin A/S

v

Banedanmark,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça and A. Arabadjiev, Presidents of Chambers, E. Juhász (Rapporteur), A. Borg Barthet, J. Malenovský, E. Levits, J.-C. Bonichot, C.G. Fernlund and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: I. Illéssy, administrator,

having regard to the written procedure and further to the hearing on 8 September 2015,

after considering the observations submitted on behalf of:

– MT Højgaard A/S and Züblin A/S, by T. Høg, advokat,

– the Danish Government, by C. Thorning, acting as Agent, and by R. Holdgaard, advokat,

– the European Commission, by L. Grønfeldt, M. Clausen and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 November 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principle of equal treatment of economic operators, stated in Article 10 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water,

energy, transport and postal services sectors (OJ 2004, L 134, p. 1), read together with Article 51 of that directive.

2 The request has been made in the context of proceedings between MT Højgaard A/S and Züblin A/S, on the one hand, and Banedanmark, the railway infrastructure operator in Denmark, on the other, on whether a public contract was correctly awarded by Banedanmark, as the contracting entity, to Per Aarsleff A/S.

Legal context

EU law

3 Recital 9 in the preamble of Directive 2004/17 states:

‘In order to guarantee the opening up to competition of public procurement contracts awarded by entities operating in the water, energy, transport and postal services sectors, it is advisable to draw up provisions for Community coordination of contracts above a certain value. Such coordination is based on the requirements inferable from Articles 14, 28 and 49 of the EC Treaty and from Article 97 of the Euratom Treaty, namely the principle of equal treatment, of which the principle of non-discrimination is no more than a specific expression, the principle of mutual recognition, the principle of proportionality, as well as the principle of transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

...’

4 Article 10 of that directive, headed ‘Principles of awarding contracts’, provides:

‘Contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

5 Article 11(2) of that directive, that article being headed ‘Economic operators’, provides:

‘Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting entities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent to which this change is necessary for the satisfactory performance of the contract.’

6 As part of Chapter VII of that directive, Article 51, headed ‘General provisions’, provides:

‘1. For the purpose of selecting participants in their award procedures:

(a) contracting entities having provided rules and criteria for the exclusion of tenderers or candidates in accordance with Article 54(1), (2) or (4) shall exclude economic operators which comply with such rules and meet such criteria;

(b) they shall select tenderers and candidates in accordance with the objective rules and criteria laid down pursuant to Article 54;

(c) in restricted procedures and in negotiated procedures with a call for competition, they shall where appropriate reduce in accordance with Article 54 the number of candidates selected pursuant to subparagraphs (a) and (b).

...

3. Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 55 and 57.’

7 Article 54 of Directive 2004/17, headed ‘Criteria for qualitative selection’, provides:

‘1. Contracting entities which establish selection criteria in an open procedure shall do so in accordance with objective rules and criteria which are available to interested economic operators.

2. Contracting entities which select candidates for restricted or negotiated procedures shall do so according to objective rules and criteria which they have established and which are available to interested economic operators.

3. In restricted or negotiated procedures, the criteria may be based on the objective need of the contracting entity to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the procurement procedure with the resources required to conduct it. The number of candidates selected shall, however, take account of the need to ensure adequate competition.

...’

Danish law

8 The first subparagraph of Article 2 of the lov om visse erhvervsdrivende virksomheder (Law on certain commercial activities), published by Consolidation Act No 1295 of 15 November 2013, contains the following definition, established pursuant to case-law and academic writing:

‘For the purposes of this law, ‘partnership’ means an undertaking in which all members are personally and jointly and severally liable, without limitation, for the debts and obligations of the undertaking.’

The main proceedings and the question referred for a preliminary ruling

9 By means of a notice published in January 2013 Banedanmark commenced a negotiated procedure with a prior call for competition, within the meaning of Article 47 of Directive 2004/17, for the award of a public contract for the construction of a new railway line between Copenhagen and Ringsted, a project called ‘TP 4 Urban Tunnels’. For the purposes of the award of the contract, the criterion adopted was that of the tender offering the best value for money.

10 According to the contract notice, Banedanmark’s intention was to invite four to six candidates to submit tenders and to carry out, if the number of candidates was greater than six, a pre-selection. Further, it is apparent from the tendering specifications that under the procedure commenced it was envisaged that the tenderers would be invited to lodge three successive tenders in the course of the procedure. There would be negotiation after the lodging of the first two tenders, the third and last leading to the award of the contract.

11 Five economic operators sought an invitation to take part in the procedure in the pre-selection phase. Those five candidates included the group consisting of MT Højgaard and Züblin (‘the Højgaard and Züblin group’) and the group consisting of Per Aarsleff and E. Pihl og Søn A/S (‘the Aarsleff and Pihl group’). Banedanmark pre-selected all five candidates and invited them to submit tenders.

12 In June 2013 one of the undertakings withdrew from the procedure, and consequently only four pre-selected tenderers remained.

13 The contract constituting the Aarsleff and Pihl group was entered into by the two companies on 26 August 2013. On that same date, the court with jurisdiction delivered a judgment declaring E. Pihl og Søn to be insolvent. Banedanmark was informed of that judgment in the afternoon of the same day and immediately sought clarification from Per Aarsleff on the effect of that judgment on the ongoing procurement procedure. Notwithstanding that declaration of insolvency, the Aarsleff and Pihl group submitted on 27 August 2013 a first tender, signed by the two companies but not by the liquidator.

14 On 15 October 2013 Banedanmark informed all the tenderers of its decision to allow Per Aarsleff to continue to take part, alone, in the procedure. Banedanmark explained that decision by stating that Per

Aarsleff, which was the leading contracting company in Denmark in terms of turnover for the financial years 2012 and 2013, satisfied the conditions required for participation in the negotiated procedure, even in the absence of the technical and financial capacities of E. Pihl og Søn. In addition, Per Aarsleff had taken over the contracts of more than 50 salaried staff of E. Pihl og Søn, including the individuals who were key to the implementation of the project concerned.

15 Per Aarsleff submitted a second tender, in its own name, stating that it was submitting that tender as the successor of the Aarsleff and Pihl group, that the liquidator had not indicated that he intended to maintain the joint venture contract and that, consequently, Per Aarsleff had terminated that contract. After the assessment of the second tenders received, Banedanmark decided, in accordance with the conditions of the contract notice, to choose three tenders with a view to determining which of them offered the best value for money and asked the three tenderers chosen to submit a third and final tender. The three tenderers included Per Aarsleff and the Højgaard and Züblin group. Those final tenders were lodged by the three tenderers on 12 December 2013.

16 On 20 December 2013 Banedanmark informed the three chosen tenderers that it had decided to award the contract to Per Aarsleff, whose tender was, in terms of quality and price, the tender offering the best value for money. That tender was for a sum of DKK 920 300 000 (Danish krone; approximately EUR 123 402 000).

17 Following that decision, MT Højgaard and Züblin brought proceedings before Klagenævnet for Udbud (the Public Procurement Complaints Board, Denmark), claiming inter alia that, by allowing Per Aarsleff to participate in the procedure in the place of the Aarsleff and Pihl group, although Per Aarsleff had not itself been pre-selected, Banedanmark was in breach of the principles of equal treatment and transparency laid down in Article 10 of Directive 2004/17. MT Højgaard and Züblin therefore claimed that Klagenævnet for Udbud (the Public Procurement Complaints Board) should annul the decision to award the contract to Per Aarsleff, and order the execution of that decision to be suspended.

18 Klagenævnet for Udbud (Public Procurement Complaints Board) first decided not to declare that the action had suspensive effect. The Board then held, in its order for reference, that on the basis of the information provided concerning Per Aarsleff, that company would have been pre-selected if it had sought an invitation to take part in its own name instead of doing so through the intermediary of the Aarsleff and Pihl group. Klagenævnet for Udbud (the Public Procurement Complaints Board) also states that there is no provision of Danish law that prohibits an alteration being made, after the submission of tenders, to the composition of a group of undertakings that is participating in a public procurement procedure.

19 Klagenævnet for Udbud (the Public Procurement Complaints Board) further observes that, in the contract notice, Banedanmark did not lay down minimum conditions as to quality with respect to the technical capacities of the tenderers and was to undertake a qualitative assessment of the applications only if their number was greater than six. Per Aarsleff could therefore have been pre-selected in its own name, without being part of the Aarsleff and Pihl group. The fact that Per Aarsleff took the place of that group had, moreover, no effect on the situation of tenderers, in so far as none of the candidates was excluded in the pre-selection phase and none would have been rejected if Per Aarsleff itself had applied for an invitation to take part. In addition, a distinction needs to be made between the situation where an alteration to a group is made before the award of the contract and the situation where that alteration is made after that award.

20 Nonetheless, Klagenævnet for Udbud (the Public Procurement Complaints Board) has some reservations in relation to the compatibility of the procedure followed with the principle of equal treatment, while pointing out that, as regards public contracts in the activity sectors falling within the scope of Directive 2004/17, the EU legislature did not lay down rules with respect to the application of that principle that were as detailed as those in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004, L 134, p. 114).

21 In the light of the foregoing, Klagenævnet for Udbud (the Public Procurement Complaints Board) decided to stay the proceedings and to refer to the Court the following question for a preliminary ruling:

‘Is the principle of equal treatment in Article 10 of Directive 2004/17, read together with Article 51 thereof, to be interpreted as precluding, in a situation such as that in the main proceedings, a contracting authority from awarding a contract to a tenderer which had not applied for pre-selection and therefore was not pre-selected?’

The jurisdiction of the Court

22 In paragraph 15 of the judgment of 18 November 1999, *Unitron Scandinavia and 3-S* (C-275/98, EU:C:1999:567), the Court accepted that Klagenævnet for Udbud (the Public Procurement Complaints Board) was a ‘court or tribunal’, within the meaning of Article 267 TFEU. The Danish Government states, however, that the Court, in the judgment of 9 October 2014, *TDC* (C-222/13, EU:C:2014:2265), nonetheless found that Teleklagenævnet (the Telecommunications Complaints Board, Denmark) was not a ‘court or tribunal’, and consequently asks the Court to clarify further the relevant criteria and to confirm, if appropriate, that Klagenævnet for Udbud (the Public Procurement Complaints Board) is a ‘court or tribunal’.

23 In that regard, it must be recalled that, in accordance with settled case-law, in order to assess whether a body making a reference is a ‘court or tribunal’, which is a question governed by EU law alone, the Court will take account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 6 October 2015, *Consorci Sanitari del Maresme* C-203/14, EU:C:2015:664, paragraph 17 and the case-law cited).

24 In the main proceedings, there is no indication in the file submitted to the Court that the referring body does not meet the criteria relating to whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, and whether it applies rules of law.

25 As regards the criterion of independence, a criterion which Teleklagenævnet (the Telecommunications Complaints Board) did not meet, as held by the Court in the judgment of 9 October 2014, *TDC* (C-222/13, EU:C:2014:2265), to which the Danish Government draws attention, it is clear, first, that, unlike that other complaints board, Klagenævnet for Udbud (the Public Procurement Complaints Board) is not a party in cases brought before the ordinary courts against its decisions. It follows that it acts as a third party in relation to the parties to the proceedings, in particular in relation to the authority that adopted the decision against which a complaint is brought before it.

26 It must further be observed that, as stated by the Advocate General in point 44 of his Opinion, it is apparent from the file that Klagenævnet for Udbud (the Public Procurement Complaints Board) has no functional link with the Danish Ministry for Business and Growth. The fact that the secretariat of that body is attached to that ministry is not such as to call into question that finding. Moreover, that body carries out its functions in a wholly independent manner, does not occupy a hierarchical or subordinate position and does not take orders or instructions from any source whatsoever (see, to that effect, judgment of 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, paragraph 19 and case-law cited).

27 As regards the independence of the members of the referring body, it must be stated that, under Article 1(4) of bekendtgørelse nr. 887 om Klagenævnet for Udbud med senere ændringer (Order No 887 on the Public Procurement Complaints Board, as amended), of 11 August 2011, the members are bound to perform their duties in an independent manner.

28 It is apparent from the file that the referring body is composed, in accordance with Article 9(1) of the lov nr. 492 om håndhævelse af udbudsreglerne med senere ændringer (Law No 492 on the implementation of the public procurement rules, as amended), of 12 May 2010 (‘Law No 492’), of a president and a number of vice-presidents, who form the presidency, and a number of expert members. The presidency is occupied, in accordance with the second subparagraph of Article 9(2) of Law No 492, by judges of the district courts and higher regional courts.

29 Klagenævnet for Udbud (Public Procurement Complaints Board) is composed of both lawyers and lay members. In its ordinary composition, it comprises one member of the presidency acting as president and one expert member. Further, under Article 10(5) of Law No 492, its decisions are adopted on a simple majority of votes, the president having the deciding vote in the event of a tie. Consequently, the members of that body who come from the ranks of Danish judges have in any circumstances the majority of votes and, accordingly, the greater weight in the decisions adopted by that body.

30 The members of the referring body who are members of the judiciary enjoy, in that capacity, the particular protection against dismissal laid down in Article 64 of the Danish Constitution, a protection which also extends to the performance of the tasks of a member of the presidency of the referring body.

31 Given that the votes of the members of the referring body, who, as members of the judiciary, enjoy that particular protection, have the greater weight, the fact that the expert members of that body do not enjoy the same protection cannot, in any event, call into question the independence of that body.

32 In the light of the foregoing, it can be confirmed that Klagenævnet for Udbud (Public Procurement Complaints Board) also meets the criterion of independence and must, therefore, be accorded the status of a ‘court of tribunal’, within the meaning of Article 267 TFEU.

33 Consequently, the Court has jurisdiction to answer the question referred.

Consideration of the question referred for a preliminary ruling

34 By its question, the referring court seeks, in essence, to ascertain whether the principle of equal treatment of economic operators, stated in Article 10 of Directive 2004/17, read together with Article 51 of that directive, must be interpreted as precluding a contracting entity from allowing an economic operator that is a member of a group of two undertakings which was pre-selected and which submitted the first tender in a negotiated procedure for the award of a public contract, to continue to take part in that procedure in its own name, after the dissolution of that group.

35 In order to answer that question, it must be observed that Directive 2004/17 does not lay down any rules specifically relating to alterations made to the composition of a group of economic operators that has been pre-selected as a tenderer for a public contract, and consequently rules about such a situation are a matter for the Member States (see, to that effect, judgment of 23 January 2003, *Makedoniko Metro and Michaniki*, C-57/01, EU:C:2003:47, paragraph 61).

36 Neither the Danish legislation nor the contract notice concerned in the main proceedings contains any specific rules on that subject. That being the case, the question of whether a contracting entity may allow such an alteration must be examined with regard to the general principles of EU law, in particular the principle of equal treatment and the duty of transparency that flows from it, and the objectives of that law in relation to public procurement.

37 In that regard, it must be recalled that the principle of equal treatment and the duty of transparency mean, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority, and constitute the basis of the EU rules on procedures for the award of public contracts (see, to that effect, judgment of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 45 and case-law cited).

38 The principle of equal treatment of tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, requires that all tenderers must be afforded equality of opportunity when formulating their tenders, and therefore implies that the tenders of all competitors must be subject to the same conditions (judgments of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 110, and of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 33).

39 A strict application of the principle of equal treatment of tenderers, as expressed in Article 10 of Directive 2004/17, read together with Article 51 of that directive, would lead to the conclusion that

only those economic operators who have been pre-selected can in that capacity submit tenders and be awarded contracts.

40 That approach is based on Article 51(3) of Directive 2004/17, which states that the contracting entities are to 'verify that the tenders submitted by the selected tenderers comply [with the rules and requirements applicable to tenders] …', which presupposes, as stated by the Advocate General in point 63 of his Opinion, that the pre-selected economic operators and those who submit tenders are legally and substantively the same.

41 However, the requirement of legal and substantive identity referred to in the preceding paragraph of this judgment may be qualified in order to ensure, in a negotiated procedure, adequate competition, as required by Article 54(3) of Directive 2004/17.

42 In the main proceedings, as is apparent from paragraph 10 of this judgment, the contracting entity considered that there should be at least four candidates in order to ensure such competition.

43 If, however, an economic operator is to continue to participate in the negotiated procedure in its own name, following the dissolution of the group of which it formed part and which had been pre-selected by the contracting entity, that continued participation must take place in conditions which do not infringe the principle of equal treatment of the tenderers as a whole.

44 In that regard, a contracting entity is not in breach of that principle where it permits one of two economic operators, who formed part of a group of undertakings that had, as such, been invited to submit tenders by that contracting entity, to take the place of that group following the group's dissolution, and to take part, in its own name, in the negotiated procedure for the award of a public contract, provided that it is established, first, that that economic operator by itself meets the requirements laid down by the contracting entity and, second, that the continuation of its participation in that procedure does not mean that the other tenderers are placed at a competitive disadvantage.

45 In the main proceedings, it must, first, be stated that it is apparent from the order for reference that had Per Aarsleff, alone, made an application for an invitation to take part in the procedure, it would have been pre-selected (see paragraph 18 of this judgment).

46 That said, having regard to information in the file which indicates that, first, the contract constituting the Aarsleff and Pihl group was concluded on the very day when the judgment declaring E. Pihl og Søn insolvent was delivered, and, second, that group's first tender was lodged the following day without the signature of the liquidator of E. Pihl og Søn, it must further be stated that it is for the referring court to determine that the lodging of that first tender was not vitiated by an irregularity that was such as to preclude Per Aarsleff continuing to take part, in its own name, in the negotiated procedure concerned.

47 Last, as regards the fact that, after the dissolution of the Aarsleff and Pihl group, Per Aarsleff took on the contracts of 50 salaried staff of E. Pihl og Søn, including individuals who were key to the implementation of the construction project concerned, it is for the referring court to determine whether Per Aarsleff thereby acquired a competitive advantage at the expense of the other tenderers.

48 In the light of the foregoing, the answer to the question referred is that the principle of equal treatment of economic operators, stated in Article 10 of Directive 2004/17, read together with Article 51 of that directive, must be interpreted as meaning that a contracting entity is not in breach of that principle where it permits one of two economic operators who formed part of a group of undertakings that had, as such, been invited to submit tenders by that contracting entity, to take the place of that group following the group's dissolution and to take part, in its own name, in a negotiated procedure for the award of a public contract, provided that it is established, first, that that economic operator by itself meets the requirements laid down by the contracting entity and, second, that the continuation of its participation in that procedure does not mean that other tenderers are placed at a competitive disadvantage.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The principle of equal treatment of economic operators, stated in Article 10 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, read together with Article 51 of that directive, must be interpreted as meaning that a contracting entity is not in breach of that principle where it permits one of two economic operators who formed part of a group of undertakings that had, as such, been invited to submit tenders by that contracting entity, to take the place of that group following the group's dissolution and to take part, in its own name, in a negotiated procedure for the award of a public contract, provided that it is established, first, that that economic operator by itself meets the requirements laid down by the contracting entity and, second, that the continuation of its participation in that procedure does not mean that other tenderers are placed at a competitive disadvantage.

[Signatures]

---

* Language of the case: Danish.

OPINION OF ADVOCATE GENERAL

MENGOZZI

delivered on 24 November 2015 (1)

Case C-396/14

MT Højgaard A/S

Züblin A/S

v

Banedanmark

(Request for a preliminary ruling from Klagenævnet for Udbud (Denmark))

(Reference for a preliminary ruling — Article 267 TFEU — Jurisdiction of the Court — Status of the referring body as a court or tribunal — Independence — Directive 2004/17/EC — Public procurement — Negotiated procedure — Principle of equal treatment — Change to a group of economic operators in the course of a procurement procedure — Award of the contract to a company which had not been pre-selected)

1. Where a group of economic operators has been pre-selected and has submitted a tender in connection with a public procurement procedure and, subsequently, before the contract is awarded, that group is dissolved because of the insolvency of one of its two members, can the contracting authority, in the light of the principle of equal treatment, allow the remaining member, which did not submit an application as such and was therefore not pre-selected, to continue with the procedure and ultimately award it the contract?

2. That is, essentially, the novel question referred to the Court by Klagenævnet for Udbud (the Public Procurement Complaints Board, Denmark) in a dispute between MT Højgaard A/S and Züblin A/S (collectively 'MTHZ'), a group of economic operators which took part in a procurement procedure, and Banedanmark, the Danish rail infrastructure manager and contracting authority in that procedure. Before the referring court, MTHZ claims that, in allowing Per Aarsleff A/S ('Aarsleff'), the remaining member of a group that had been dissolved during the procedure, to take part in the tendering process in place of the group, even though Aarsleff had not been pre-selected, Banedanmark infringed the principle of equal treatment laid down in Article 10 of Directive 2004/17/EC. (2)

3. In the present case, the Court is first requested by the Danish Government to state the reasons why Klagenævnet for Udbud constitutes a court or tribunal for the purposes of Article 267 TFEU. Then, as regards the response to the substance of the question raised by the referring court, the Court will be called upon to strike a fair balance between, on the one hand, the public interest of contracting authorities in ensuring that public procurement procedures are characterised by the widest possible opening-up to competition so that as many tenderers as possible participate in a tendering process, and, on the other hand, the interest — or rather, the right — of all tenderers taking part in a tendering process that when they participate in the procedure there is strict observance of equality of opportunity for all tenderers.

I – **Legal framework**

A – *EU law*

4. The contract at issue in the main proceedings concerns the construction of railway tracks and is therefore governed by the provisions of Directive 2004/17, commonly referred to as the ‘sectoral directive’.

5. Recital 9 of Directive 2004/17 states that ‘[i]n order to guarantee the opening up to competition of public procurement contracts awarded by entities operating in the … transport … sectors, it is advisable to draw up provisions for Community coordination of contracts above a certain value. Such coordination is based on the requirements inferable from Articles 14, 28 and 49 of the EC Treaty and from Article 97 of the Euratom Treaty, namely the principle of equal treatment, of which the principle of non-discrimination is no more than a specific expression … In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility. …’.

6. Article 10 of Directive 2004/17, entitled ‘Principles of awarding contracts’, provides that ‘[c]ontracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way’.

7. Article 11(2) of the Directive provides that ‘[g]roups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting entities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent to which this change is necessary for the satisfactory performance of the contract.’

8. Forming part of Chapter VII of Directive 2004/17, entitled ‘Conduct of the procedure’, Article 51 is entitled ‘General provisions’ and provides as follows:

> ‘1. For the purpose of selecting participants in their award procedures:
>
> (a) contracting entities having provided rules and criteria for the exclusion of tenderers or candidates in accordance with Article 54(1), (2) or (4) shall exclude economic operators which comply with such rules and meet such criteria;
>
> (b) they shall select tenderers and candidates in accordance with the objective rules and criteria laid down pursuant to Article 54;
>
> (c) in restricted procedures and in negotiated procedures with a call for competition, they shall where appropriate reduce in accordance with Article 54 the number of candidates selected pursuant to subparagraphs (a) and (b).
>
> …
>
> 3. Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 55 and 57.’

9. Article 54 of Directive 2004/17 lays down the rules governing the criteria for qualitative selection which are established by contracting entities, and provides, in the last sentence of paragraph 3, that in restricted or negotiated procedures the ‘number of candidates selected shall … take account of the need to ensure adequate competition’.

10. Directive 2004/17 is to be repealed, with effect from 18 April 2016, by Directive 2014/25/EU. (3)

B – *National law*

11. Klagenævnet for Udbud was established by Lov nr. 344 af 06/06/1991 om Klagenævnet for Udbud (Law No 344 of 6 June 1991 on the Public Procurement Complaints Board). Its organisation and activities are governed by Lov nr. 492 af 12. maj 2010 om håndhævelse af udbudsreglerne med senere ændringer (Law No 492 of 12 May 2010 on the implementation of procurement rules, as amended; ‘the Law on public procurement’) and by Bekendtgørelse nr. 887 af 8/11/2011 om Klagenævnet for Udbud med senere

ændringer (Decree No 887 of 8 November 2011 on the Public Procurement Complaints Board, as amended; 'Decree No 887').

12. The first paragraph of Article 2 of the Lov om visse erhvervsdrivende virksomheder (Law on certain commercial undertakings), published by Consolidated Law No 1295 of 15 November 2011, defines the concept of 'interessentskab' (partnership, 'I/S') as 'an undertaking in which all participants are personally liable, jointly and severally and without limit, for the obligations of the partnership'. An I/S is an independent legal entity and a person with legal capacity.

II – **Facts, national procedure and question referred**

13. In January 2013 Banedanmark published, in accordance with Directive 2004/17, a negotiated procurement procedure notice for the construction of a project entitled 'TP 4 Urban Tunnels' in connection with the building of a new railway track between Copenhagen and Ringsted.

14. It is clear from the documents for that contract that the procedure required the submission of three tenders and that negotiation would take place after submission of the first two tenders, with the contract to be awarded on the basis of the third and final tender. The contract notice also stated that Banedanmark intended to invite four to six candidates to submit tenders, and if there were more than six candidates it would conduct a preliminary selection on the basis of references for similar works. There was no minimum requirement in order to be pre-selected.

15. Five economic operators submitted applications and Banedanmark pre-selected all five. However, in June 2013, one of the undertakings withdrew, leaving only four pre-selected tenderers.

16. Among those was a partnership composed of E. Pihl & Søn A/S ('Pihl') and Aarsleff, which had applied for pre-selection as a consortium in the form of an I/S called 'JV Pihl — Aarsleff — TP 4 Urban Tunnel I/S'. Pihl and Aarsleff were among the largest building and construction companies in Denmark. The contract constituting the I/S was concluded between Pihl and Aarsleff on 26 August 2013.

17. However, on that same date — 26 August 2013 — an insolvency order was delivered in respect of Pihl. Banedanmark learned of the insolvency order that afternoon and immediately asked Aarsleff about the significance of the insolvency for the ongoing procurement procedure.

18. Despite the insolvency order the previous day, the I/S submitted its first tender on 27 August 2013, signed by Aarsleff and Pihl, but not by the latter's liquidator.

19. After lengthy correspondence with Aarsleff about how to manage the consequences of Pihl's insolvency, on 15 October 2013 Banedanmark informed all tenderers of its decision to allow Aarsleff to continue to participate in the procurement procedure on its own, despite Pihl's insolvency.

20. In its notice, Banedanmark based its decision on the fact that Aarsleff fulfilled the requirements to participate in the tender without the economic and technical capacity of Pihl and that it had not been significant for the decision to invite the group to participate in the tender that Pihl was part of the group. In the notice, Banedanmark also put emphasis on the fact that Pihl would not be replaced by a new tenderer in the joint venture and that the selected tenderers would thus remain the same, as no new operator was permitted to participate in the tendering. Banedanmark also pointed out that Aarsleff had taken over the contracts of fifty salaried employees from Pihl after the insolvency proceedings began, including key persons for the completion of the project that was the subject of the call for tenders.

21. Aarsleff thereupon submitted a second tender in its own name and gave notice that it was submitting the tender as the continuing contractor from the group constituted with Pihl, that the insolvency estate had not given notice that it wished to continue the contract constituting the group, and that Aarsleff had therefore terminated that contract. On the basis of its assessment of the second tenders received, Banedanmark selected — in accordance with the tender specifications — the three economically most advantageous tenders and asked the three tenderers selected to submit a third and final tender. They included Aarsleff and the MTHZ partnership. The final tenders were submitted on 12 December 2013.

22. On 20 December 2013, Banedanmark notified the three selected tenderers that it had decided to award the contract to Aarsleff, whose tender was, as a whole, the most economically advantageous in terms of quality and price.

23. Following that decision, MTHZ filed a complaint with the referring court, asking it, inter alia, to find that Banedanmark had acted contrary to the principles of equal treatment and transparency provided for in Article 10 of Directive 2004/17 by allowing Aarsleff, which had not been pre-selected, to take part in the tendering process in place of the group it had constituted with Pihl. It also requested that the decision to award the contract to Aarsleff be annulled.

24. It is evident from the order for reference that, in its decision of 28 January 2014, the referring court refused to attach suspensive effect to the complaint brought by MTHZ because the condition of urgency was not met. In that decision, the referring court did, however, consider that the *fumus boni juris* condition was met since, in its view, prima facie assessment of the complaint suggested that it was likely that MTHZ's request for annulment would ultimately be successful. In that regard, the referring court first of all pointed out that a distinction should be drawn between a situation in which a group changed before the contract was awarded and a situation where the change occurred after the award. Secondly, it considered that the fact that a contracting authority has pre-selected a group does not mean that the individual members of the group have each been pre-selected, irrespective of whether the contracting authority was able to understand, on the basis of the tender, that each of the members on their own satisfied the relevant requirements.

25. In its order for reference Klagenævnet for Udbud first points out that there is no provision of Danish law which prohibits a change in the composition of a group of contractors taking part in a public procurement procedure which occurs after submission of tenders. It goes on to observe that, in the contract notice, Banedanmark did not set any qualitative minimum requirements for tenderers' technical aptitude, and it was only required to conduct a qualitative assessment if there were more than six applications to participate. That being so, on the basis of the information available concerning Aarsleff, it should be regarded as established that Aarsleff would have been pre-selected if it had applied for pre-selection on its own instead of as part of the group it constituted with Pihl.

26. However, Klagenævnet for Udbud has doubts as to whether the procedure followed was compatible with the principle of equal treatment. In those circumstances, it decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

> 'Is the principle of equal treatment in Article 10 of Directive 2004/17, read in conjunction with Article 51 … to be interpreted as precluding, in a situation such as the one at issue here, a contracting authority from awarding the contract to a tenderer which had not applied for pre-selection and therefore was not pre-selected?'

III – **Proceedings before the Court of Justice**

27. The order for reference was received at the Court Registry on 20 August 2014. At the hearing on 8 September 2015, MTHZ, the Danish Government and the European Commission lodged observations and presented oral argument.

IV – **Legal assessment**

28. Before answering the question referred for a preliminary ruling by the referring court, the question raised by the Danish Government concerning the jurisdiction of the Court of Justice must be dealt with first.

A – *The jurisdiction of the Court*

29. In the view of the Danish Government, although the Court has already recognised, in the judgment in *Unitron Scandinavia and 3-S*, (4) that the referring body in the present case, Klagenævnet for Udbud, constitutes a 'court or tribunal' for the purposes of Article 267 TFEU, in view of the factors taken into consideration by the Court in the recent judgment in *TDC*, (5) where the problem was whether the status as a court or tribunal of another Danish complaints board, Teleklagenævnet (the Complaints Board for Telecommunications), could be established, it appears necessary to clarify whether and on what grounds Klagenævnet for Udbud may be recognised as having that status.

30. In that regard, it should be recalled that, according to settled case-law, in order to determine whether a body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. (6)

31. As regards the criteria of whether the referring body is established by law, whether it is permanent, whether its procedure is inter partes and whether it applies rules of law, there is nothing in the documents to cast doubt on the nature of Klagenævnet for Udbud as a court or tribunal for the purposes of Article 267 TFEU, as recognised by the Court in the judgment in *Unitron Scandinavia and 3-S*, (C-275/98, EU:C:1999:567) cited above. On the basis of the information supplied to the Court in the present proceedings, however, a more detailed examination is needed of the criteria relating to whether its jurisdiction is compulsory and whether it is independent, the latter criterion being the one on which the Court based its decision to deny Teleklagenævnet the status of a court or tribunal in the judgment in *TDC*, (C-222/13, EU:C:2014:2265) cited above.

32. As regards, first of all, whether the jurisdiction of Klagenævnet for Udbud is compulsory, I would merely observe that the fact that this body has exclusive jurisdiction only during a 'standstill' period (7) and that, at the end of that period, its jurisdiction becomes alternative to that of the courts does not appear to cast doubt on its status as a court or tribunal.

33. It is clear from the case-law that the existence of an alternative remedy to court proceedings does not necessarily mean that the body offering that alternative remedy cannot be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, provided that the decision of the referring body is binding — which is not in doubt in the present case (8) — and the body in question is established by law and its jurisdiction is independent of the wishes of the parties. (9) Furthermore, since the main action was brought during the standstill period, the jurisdiction of Klagenævnet for Udbud was compulsory at that point.

34. As regards, secondly, the criterion of independence, it should be remembered that the concept of independence, which is inherent to the task of adjudication, implies above all that the body in question must act as a third party in relation to the authority which adopted the decision complained of. It is evident from the case-law that this concept includes an external aspect, requiring the body to be protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them, and an internal aspect, which is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. (10)

35. In the judgment in *TDC*, referred to by the Danish Government, the Court held that Teleklagenævnet did not constitute a court or tribunal for the purposes of Article 267 TFEU, considering that the body did not meet the criterion of independence. The Court based its finding on two factors. First, as regards the external aspect of independence, the Court pointed out that, although Danish legislation made provision for specific guarantees for the dismissal of judges of the ordinary courts, the conditions for the dismissal of members of the Teleklagenævnet, on the other hand, were not subject to any specific rules, other than the general rules of administrative law and employment law which apply in the event of an unlawful dismissal. (11) Secondly, as regards the internal aspect of independence, the Court held that Teleklagenævnet was not acting as a third party in relation to the interests at stake, finding that, if an appeal against one of its decisions was made before the ordinary courts, Teleklagenævnet was involved in the proceedings as defendant. (12)

36. However, according to the information available to the Court, neither of the two factors taken into consideration by the Court in the judgment in *TDC* applies to Klagenævnet for Udbud.

37. As far as concerns, first, the internal aspect of independence, the Danish Government expressly stated both in its written observations and at the hearing that, unlike Teleklagenævnet, Klagenævnet for Udbud is not a party in cases brought before the ordinary courts against its decisions. There is therefore no reason to doubt that it acts as a third party in relation to the interests involved.

38. Secondly, as far as the external aspect of independence is concerned, it should be pointed out that it is clear from the documents available to the Court that there are appreciable differences between Teleklagenævnet and Klagenævnet for Udbud as regards their composition, guarantees against the dismissal of their members and their operation.

39. Thus, it is clear from the relevant provisions of the Law on public procurement that Klagenævnet for Udbud — which was set up in order, among other things, to implement Directive 89/665 (13) — is composed of a president and a number of vice-presidents (who form the presidency), as well as a number of expert members, all appointed by the Erhvervs- og vækstministeren (Minister for Enterprise and Growth) for a period of up to 4 years. (14)

40. However, unlike Teleklagenævnet, the presidency of Klagenævnet for Udbud must be composed of district court and higher regional court judges. (15) As the Court pointed out in the judgment in *TDC*, (16) those judges are specifically protected against dismissal. That protection, which is based on Article 64 of the Danish Constitution, appears to extend also, according to statements made at the hearing, to the presidency of the Complaints Boards.

41. Furthermore, it appears from an examination of the provisions of the Law that members of the presidency may play a considerably greater role than the expert members in the decision-making of Klagenævnet for Udbud. In its ordinary composition, Klagenævnet for Udbud comprises one member of the presidency, acting as president, and one expert member. In the event of a split vote in the adoption of a decision, the president has the deciding vote. (17) Moreover, members of the presidency may adopt certain decisions without the involvement of the expert members (18) and they have a majority say in the adoption of decisions in more complex cases or cases involving matters of principle. (19)

42. Admittedly, for some members of Klagenævnet for Udbud — the expert members — just as for the members of Teleklagenævnet, Danish law does not appear to lay down any specific rules concerning their dismissal, with only the general rules of administrative law and employment law applying in the event of an unlawful dismissal.

43. In that connection I would observe, however, that, while it is true that in certain decisions the Court has stated that, in order to consider the condition regarding the independence of the body making the reference as met, the case-law requires, inter alia, that dismissals of members of that body should be determined by express legislative provisions, (20) it must be said that in those cases, the finding that there were no such rules was just one — albeit very important — factor to be assessed as part of an overall examination (21) of the factors characterising the referring body in question. It was after considering all those factors as a whole that the Court decided, in those cases, that the bodies in question were not a court or tribunal. (22) In some cases, however, particularly as regards national bodies responsible for reviewing the award of public contracts under Directive 89/665, the Court recognised a referring body as a court or tribunal without questioning whether such rules existed. (23)

44. In the present case it should be stated that not only are a large proportion of members of Klagenævnet for Udbud, and, in particular, the members likely to play a more important role in decision-making, covered by a specific — constitutional — guarantee against dismissal, but it is clear from the documents before the Court that other factors enhance the independence of that body from any improper outside pressure and intervention. Thus, Klagenævnet for Udbud is acting as a third party in relation to the authority which adopted the decision challenged in the main proceedings. (24) In particular, there is no functional link with the Erhvervsstyrelsen (the Danish Business Authority), which provides the secretariat, or with the contracting authorities whose decisions are challenged before it. (25) Moreover, Klagenævnet for Udbud carries out its functions in a wholly independent manner, does not occupy a hierarchical or subordinate position in relation to any other body and does not take orders or instructions from any source whatsoever. (26) All its members are required to perform their duties independently. (27) Furthermore, in so far as Klagenævnet for Udbud can, among other things, establish the illegality of unlawful contract decisions or awards, as well as issuing directions in connection with contract awards, it is fundamentally exercising a judicial function. (28)

45. Finally, it should be recalled that the Court, in assessing the legal status of the national bodies mentioned in Directive 89/665, which are responsible for reviewing the award of public contracts, has already confirmed the status as a ‘court or tribunal’ for the purposes of Article 267 TFEU of a number of other national bodies that are in essence comparable to the referring body in the present case. (29)

46. In the light of all these considerations, there is no reason, in my view, to call into question the Court's finding in the judgment in *Unitron Scandinavia and 3-S* that Klagenævnet for Udbud has the status of 'court or tribunal' for the purposes of Article 267 TFEU.

B – *The question referred*

47. In the question which it has referred, the referring court asks whether the principle of equal treatment in Article 10 of Directive 2004/17, in conjunction with Article 51, is to be interpreted as precluding, in a situation such as the one at issue here, a contracting authority from awarding the contract to a tenderer which had not applied for pre-selection and therefore was not pre-selected.

48. The factual context of the question is that a group of two undertakings, constituted in the form of a commercial company and having been pre-selected in a procurement procedure, was dissolved following the insolvency of one of its two members, and the contracting authority allowed the remaining member to continue to take part in the procedure in place of the group and ultimately awarded it the contract, despite the fact that that member as such had not been pre-selected. This is the 'situation such as the one at issue here' to which the referring court refers in its question.

49. The question referred thus essentially concerns whether it is possible, in the light of the principle of equal treatment, for a contracting authority to allow a member of a group of economic operators which has not been pre-selected on its own to take the group's place in the course of a procurement procedure.

1. Legal framework

50. It should be noted, first of all, that Directive 2004/17 does not contain any specific rule about changes to the composition of a group of economic operators.

51. The only provision of the directive which relates to groups of economic operators is Article 11(2), (30) but this does not concern changes to them in the course of a procurement procedure. Since the directive does not contain any provision governing such changes, therefore, it must be concluded that rules about them are a matter for the Member States. (31) That being so, it may be for the national legislature, on a general level, or for the contracting authority in a particular case to lay down rules on the subject. (32)

52. In this connection, it should also be pointed out that, in the judgment in *Makedoniko Metro and Michaniki*, (33) the Court held that Directive 93/37 concerning procedures for the award of public works contracts (34) did not preclude national rules which prohibit a change in the composition of a group of contractors taking part in a procedure for the award of a public works contract which occurs after submission of tenders.

53. In the present case, however, it is clear from the order for reference, first, that Danish legislation does not contain any specific rules about changes in the composition of groups of economic operators and, second, that the contracting authority also did not lay down any specific rules on the subject in the contract notice.

54. That being so, the permissibility of changes in the composition of groups of economic operators in the course of a procurement procedure will be subject to the general principles of law which form part of the EU legal order, including, in particular, the principle of equal treatment and transparency, provided for in Article 10 of Directive 2004/17 and is circumscribed by the need to observe those principles.

2. The principle of equal treatment in public procurement procedures

55. According to settled case-law, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. (35)

56. The Court has stated on a number of occasions that the principle of equal treatment for tenderers and the duty of contracting authorities to ensure that it is observed lie at the heart of the rules of EU law on public procurement. (36)

57. Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions. (37) That principle implies that tenderers must be in a position of equality *throughout the procurement procedure*, in particular both when they formulate their tenders and when those tenders are being assessed by the contracting authority. (38)

58. It is, admittedly, true that the Court has held that one of the objectives of those public procurement rules is to attain the widest possible opening-up to competition and that it is the concern of EU law to ensure the widest possible participation by tenderers in a call for tenders, (39) and that the widest possible opening-up to competition is contemplated not only from the point of view of the Union interest in the free movement of goods and services but also the interest of the contracting authority concerned itself, which will thus have greater choice as to the tender offering the best value for money which best meets the needs of the public authority in question. (40)

59. However, in public procurement, account must be taken both of the concern to guarantee effective competition and of respect for the principle of equality between tenderers. Thus, although the Court has stated that the application of the principle of equal treatment to public procurement procedures does not constitute an end in itself, but must be viewed in the light of the aims that it is intended to achieve, (41) the implementation and the attainment of the objective of promoting the widest possible competition can, however, be pursued only if the economic operators participating in the public contract are able to do so on an equal footing, without any discrimination whatsoever. (42). Given that the promotion of effective competition forms part of a wider objective of promoting competition which has to be healthy before it can be effective, its pursuit is necessarily circumscribed by the need to comply with the principle of equal treatment between tenderers. (43)

60. In that regard, it should also be noted that, as some of the interveners have pointed out, the principle of equal treatment for tenderers is likely to play a fundamental role before the contract is awarded, when the various tenderers are competing with each other. Once the contract has been awarded, however, interest is focused on the implementation of the contract. In such a context, events such as a change to the group which won the contract do not in principle raise issues of equal treatment between tenderers, but rather issues concerning a possible change to the essential terms of the contract in question (44) or the jeopardising of its satisfactory performance. (45)

61. It is in the light of those principles that the Court must examine the limits placed by the principle of equal treatment, in a situation such as the present case, on the option of a contracting authority, before the contract is awarded, to allow an economic operator which had not initially been pre-selected to succeed and take the place of another operator, in particular the pre-selected partnership of which it was a member.

3. The possibility of allowing an economic operator which has not been pre-selected to succeed and take the place of another operator in a procurement procedure

62. The interveners evidently agree that, as a general rule, in invitations to tender with pre-selection, only tenderers which have been pre-selected may submit tenders and may thus be awarded the contract.

63. I share that view, which, as MTHZ rightly pointed out, has an express legal basis in Article 51(3) of Directive 2004/17. In providing that contracting entities ‘shall verify that the tenders submitted by the *selected* tenderers comply …’, that provision assumes that the pre-selected operators and the operators submitting tenders are the same. (46) The principle, therefore, is that the pre-selected economic operator and the economic operator submitting the tender, to which the contract might be awarded, must be legally and substantively the same.

64. In that connection, it should be noted that, contrary to the Commission’s claims at the hearing, in my view there can be no doubt that, in the present case, the group constituted in the form of an I/S and Aarsleff are neither legally nor substantively the same. Although Aarsleff was one of the participants in the I/S, there is no doubt that it is a legal entity which is substantively and legally separate from the group of which it was a member.

65. Having clarified that point, the question arises whether, in the light of the principles referred to in points 55 to 59 of this Opinion, there may be exceptions to the principle that the pre-selected tenderer must correspond to the tenderer submitting the tender, particularly in circumstances such as those in the main proceedings.

66. In my view, that principle cannot be absolute and permit no exceptions. I consider that it is possible to contemplate cases, albeit limited ones, where a change in a tenderer's identity in the course of the procedure should be allowed, particularly with reference to the need to maintain the widest possible opening-up to competition in a procurement procedure.

67. However, as I pointed out in point 59 of this Opinion, as that need is circumscribed by the need to comply with the principle of equal treatment, a contracting authority may not discriminate between tenderers by claiming, as justification for doing so, that there is a need to open up the procurement procedure as much as possible to competition. Any exceptions to the principle that the pre-selected tenderer must correspond to the tenderer submitting the tender — which, moreover, as exceptions to a general principle, must be interpreted strictly (47) — is thus circumscribed without qualification by the requirement that the principle of equal treatment between tenderers must be observed.

68. With those principles established, the question arises as to which approach is best capable of reconciling the requirements — which in a case such as the present are apparently conflicting — flowing from strict observance of equality of opportunity between tenderers and the widest possible opening-up to competition?

69. The interveners each propose a different approach.

70. First of all, for the reasons which I have just explained in point 66 of this Opinion, I would tend to rule out the approach apparently advocated by MTHZ in which exceptions should never be made to the principle that the pre-selected operator should correspond to the operator submitting the tender.

71. As for the Commission, it essentially considers that if an operator which has not been pre-selected — particularly, in a situation such as here, the remaining member of a group — meets the tendering specifications, the principle of equal treatment does not prevent the contracting authority from allowing it to continue with the procedure. However, that approach cannot guarantee that the need for equality of opportunity between tenderers will be strictly observed.

72. The fact that a new operator meets the tendering specifications, (48) although a precondition for ensuring that there is no discrimination between tenderers, does not as such mean that, in being allowed to take part in the tendering process at a later point than the other tenderers, the new operator will not benefit, at the time when it joins in the procedure, from competitive advantages, such as information not available to the other tenderers (49) when they decided to participate in the procurement procedure. (50)

73. The Danish Government considers that, in a case such as the present, the principle of equal treatment does not prevent a contracting authority from being able to accept changes in a tenderer's identity between pre-selection and the award of the contract if two conditions are met. First, the remaining part of the tenderer whose identity has changed must itself meet the capability requirements laid down for pre-selection, and second, the change in the tenderer's identity must have no effect on the list of candidates pre-selected, in the sense that, even if the remaining part of the tenderer had taken part in the pre-selection phase from the beginning in its new form, the pre-selected candidates would still have been the same.

74. This approach is also not satisfactory, in my view. The first condition appears to me to correspond, essentially, to the requirement in the approach proposed by the Commission. As for the second condition, I do not think that requiring that the change of subject should have no effect on the list of pre-selected candidates is enough to guarantee strict observance of equality of opportunity between tenderers. For the same reasons set out in point 72 of this Opinion, I consider that the fact that no operator was either improperly excluded from the procedure or improperly allowed to take part in it, although this too is a precondition for avoiding discrimination, is not enough to guarantee compliance with the requirement that tenderers should have equality of opportunity.

75. In my view, in the absence of express rules laid down in advance by the legislature or the contracting authority, it is desirable that the contracting body should conduct a specific examination of each individual case, based on all the facts at its disposal, in order to ascertain whether the change of subject at issue results in a situation where the tenderers are not on an equal footing throughout the procurement procedure, particularly, but not only, in formulating their tenders. That examination should aim in particular to ascertain whether the change results in a competitive advantage for the new tenderer, thereby distorting the competitive process.

76. It is possible to envisage various alteration scenarios in the abstract, and these need not be examined in the present context. I would simply point out that, where a change of the subject's identity is purely formal, rather than substantive, since it only involves a change of form or internal reorganisation, for example, which has no substantial consequences, (51) it will be unlikely that such a change could create a situation resulting in inequality of opportunity.

77. However, in my view, a situation such as in the main proceedings, where a group constituted in the form of a legal entity separate from the economic operators in that group is dissolved and replaced in the procedure by the remaining member of the group, does not constitute a change of subjective identity which is purely formal, rather than substantive.

78. That being so, I consider that it is for the referring court to establish, on the basis of the facts available to it, whether, in the present case, Banedanmark's decision resulted in a breach of the principle of equal treatment between the various tenderers taking part in the procedure and, in particular, whether Aarsleff benefited from competitive advantages over the other tenderers at the point when it was allowed to replace the I/S in the procedure.

79. In that regard, on the basis of the information before the Court, I will confine myself to the following considerations.

80. First of all, the referring court underlines that it must be regarded as established that if Aarsleff had submitted an application on its own instead of through the dissolved partnership, it would still have been pre-selected. However, in my opinion, that fact does not mean that, in the present case, there might not have been a breach of the principle of equal treatment. The decisive question here is not (or not only) whether, in theory, Aarsleff might or might not have been pre-selected on its own, but whether it benefited from different treatment which gave it a competitive advantage at the point when it was allowed to take part in the procedure on its own, without having first been pre-selected.

81. Next, it appears that Aarsleff may have decided to participate in the tender on its own on the basis of information not available to the other tenderers when they decided to take part. (52) In particular, MTHZ claimed that when Aarsleff, following Pihl's insolvency and the consequent dissolution of the group created in order to take part in the procedure, was able to take that decision, it knew exactly how many undertakings participating in the procedure had submitted a tender and, even, that the tender submitted by the group of which Aarsleff was a member had been assessed as the second best tender. Furthermore, in addition to all these factors, Aarsleff had been able, after Pihl became insolvent, to take over the contracts of fifty salaried workers from Pihl, including key persons for the completion of the project that was the subject of the tendering process. (53)

82. A situation in which two economic operators decide, before the start of a procurement procedure, to create a group for the sole purpose of taking part in that procedure implies that the two operators, after assessing the opportunities and risks associated with the project, took the commercial decision to participate in the tendering process together and to share the benefits and risks. That being so, it must be examined whether the opportunity given to one of those two operators, at a later stage in the procedure when there are fewer uncertainties about the course that the procedure will follow, to amend that commercial decision by allowing it to take part in the procedure on its own, does not give rise to different treatment in respect of the other tenderers and result in a competitive advantage. It must be ascertained whether that subsequent commercial decision was actually taken on the basis of different information from that available to the other tenderers when they made a decision to take part in the procedure in a particular form or composition, without subsequently having the opportunity to change it.

V – **Conclusion**

83. In the light of the foregoing considerations, I propose that the Court should answer the question raised by Klagenævnet for Udbud to the following effect:

> Article 51(3) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector is to be interpreted as meaning that, as a general rule, an economic operator pre-selected in a procurement procedure with pre-selection must be legally and substantively the same as the economic operator submitting a tender in the same procedure.
>
> In a situation such as that in the main proceedings, where two economic operators have constituted a group in the form of a commercial company in order to take part in a public procurement procedure, and one of the two, after the group has been pre-selected but before the contract is awarded, has been the subject of insolvency proceedings so that the group has been dissolved, Article 10 of Directive 2004/17 is to be interpreted as meaning that it is for the contracting body to conduct a specific examination, based on all the facts at its disposal, to ascertain whether the permission given to the remaining member of the group, which had not been pre-selected, to continue to take part in the procedure in place of the group results in a situation where the tenderers are not on an equal footing throughout the procedure, particularly in formulating their tenders. That will specifically be the case where the remaining member of the group may have taken decisions in the context of the procurement procedure on the basis of information not available to the other tenderers at the point when they had to take the same decision, and where it had the opportunity, after the procedure was initiated, to acquire key elements for the completion of the project which were not available to it at the point when it should have been pre-selected.

---

1 Original language: French.

---

2 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

---

3 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

---

4 C-275/98, EU:C:1999:567. See in particular paragraph 15, which refers to points 17 and 18 of Advocate General Alber’s Opinion in the same case (C-275/98, EU:C:1999:384)

---

5 C-222/13, EU:C:2014:2265.

---

6 See, among others, the judgments in *TDC* (C-222/13, EU:C:2014:2265, para. 27) and *Bundesdruckerei* (C-549/13, EU:C:2014:2235, para. 21).

---

7 See Articles 3(1) and 5(1) of the Law on public procurement.

---

8 Under Articles 13, 14 and 16 to 18 of the Law on public procurement, the Klagenævnet for Udbud can, inter alia, annul unlawful decisions or contract awards, issue directions, impose financial penalties, grant compensation and declare contracts invalid.

---

9 See the judgment in *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paras 22 and 23 and the case-law cited therein), as well as the comprehensive analysis of the case-law on this issue in Advocate

General Jääskinen's Opinion in the same case (EU:C:2015:445, point 40 et seq.).

10 See, among others, the judgment in *Wilson* (C-506/04, EU:C:2006:587, paragraphs 49 to 53 and the case-law cited therein).

11 Judgment in *TDC* (C-222/13, EU:C:2014:2265, paragraphs 34 to36).

12 Ibidem (paragraph 37).

13 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended.

14 See Article 9(1) and (2), first sentence, of the Law on public procurement.

15 See Article 9(2), second sentence, of the Law on public procurement.

16 Judgment in *TDC* (C-222/13, EU:C:2014:2265, paragraph 35).

17 See Article 10(4), first sentence, and (5) of the Law on public procurement. Under the first provision, except for the situation described in Article 10(6), one member of the presidency and one expert member are involved in dealing with an individual case. Under the second provision, the decisions of the Klagenævnet for Udbud are taken by a simple majority and the president has the deciding vote if the vote is split.

18 See Article 10(6) of the Law on public procurement.

19 See Article 10(4) of the Law on public procurement, under which the President of the Klagenævnet for Udbud may, in special cases, decide to increase the number of members of the presidency and expert members involved in dealing with a case. In such a situation, the number of members of the presidency must then be the same as the number of expert members. It is clear from this provision, which is used in more complex cases or cases involving matters of principle, that in those types of particularly important cases too, the Klagenævnet for Udbud will have an equal number of presidency members and expert members, which means that, since the president has the deciding vote, the presidency members will have a majority say in the adoption of the decision.

20 Order in *Pilato* (C-109/07, EU:C:2008:274, paragraph 24 in fine), and judgment in *TDC* (C-222/13, EU:C:2014:2265, paragraph 32).

21 See the judgment in *Syfait and Others* (C-53/03, EU:C:2005:333, paragraph 37).

22 See the Court's analysis in the judgments in *Schmid* (C-516/99, EU:C:2002:313, paragraphs 37 to 43), *Syfait and Others* (C-53/03, EU:C:2005:333, paragraphs 30 to 37) and in the order in *Pilato* (C-109/07, EU:C:2008:274, paragraphs 25 to 30). Even in the judgment in *TDC* (C-222/13, EU:C:2014:2265) the Court based its analysis on two factors, relating to the internal and external aspects, in deciding that the Teleklagenævnet was not independent (see point 35 of this Opinion).

23 See, for example, the judgment in *HI* (C-92/00, EU:C:2002:379, paragraphs 24 to 28).

24 See the judgment in *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 19 and the case-law cited therein).

25 See, on the other hand, the judgment in *Schmid* (C-516/99, EU:C:2002:313, paragraphs 37 to 40).

26 See the judgment in *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 19 and the case-law cited therein).

27 See Article 1(4) of Decree 887 of 11 August 2011 on the Public Procurement Complaints Board. For the relevance of this factor, see the judgment in *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 35).

28 Ibidem (paragraph 37).

29 See the judgment in *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 26 and the case-law cited therein).

30 See point 7 of this Opinion. This article is essentially reproduced in Article 37(2) and (3) of Directive 2014/25.

31 See, by analogy, in relation to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), the judgment in *Makedoniko Metro and Michaniki* (C-57/01, EU:C:2003:47, paragraph 61).

32 When drawing up these rules the legislature or the contracting authority will always have to respect the general principles of law. In that regard, see recital 9 of Directive 2004/17 and, even more expressly, recital 2 of Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). See also recital 2 of the new Directive 2014/25.

33 Judgment in *Makedoniko Metro and Michaniki* (C-57/01, EU:C:2003:47, paragraphs 61 and 63).

34 Cited in footnote 31 of this Opinion.

35 See, among others, the judgments in *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127, paragraph 27 and the case-law cited therein) and *Manova* (C-336/12, EU:C:2013:647, paragraph 30).

36 See, to that effect, the judgments in *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127, paragraph 26) and *Michaniki* (C-213/07, EU:C:2008:731, paragraph 45 and the case-law cited therein).

37 See, to that effect, the judgments in *Commission* v *CAS Succhi di Frutta* (C-496/99 P, EU:C:2004:236, paragraph 110) and *eVigilo* (C-538/13, EU:C:2015:166, paragraph 33).

38 See, to that effect, the judgments in *SIAC Construction* (C-19/00, EU:C:2001:553, paragraphs 33 and 34), *Michaniki* (C-213/07, EU:C:2008:731, paragraph 45 and the case-law cited therein) and the order in *Vivaio dei Molini Azienda Agricola Porro Savoldi* (C-502/11, EU:C:2012:613, paragraph 38). Italics added.

---

39 See, to that effect, the judgments in *Assitur* (C-538/07, EU:C:2009:317, paragraph 26) and *CoNISMa* (C-305/08, EU:C:2009:807, paragraph 37).

---

40 Judgment in *CoNISMa* (C-305/08, EU:C:2009:807, paragraph 37). In negotiated procedures, the need for 'adequate' competition is, moreover, expressly highlighted in Article 54(3) of Directive 2004/17, referred to in point 9 of this Opinion.

---

41 See, to that effect, the judgment in *Manova* (C-336/12, EU:C:2013:647, paragraph 29).

---

42 See the Opinion of Advocate General Léger in *Fabricom* (C-21/03 and C-34/03, EU:C:2004:709, paragraph 22) and the Opinion of Advocate General Poiares Maduro in *Michaniki* (C-213/07, EU:C:2008:544, paragraph 23).

---

43 See, to that effect, the Opinion of Advocate General Poiares Maduro in *La Cascina and Others* (C-226/04 and C-228/04, EU:C:2005:524, paragraph 26).

---

44 See the judgment in *Pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351, paragraph 40 et seq.).

---

45 In that regard, it should be noted that the new Directive 2014/25 lays down express rules, in Article 89(1)(d)(ii), governing cases where the contractor changes after the contract has been awarded. That provision provides that there is no need to conduct a new procurement procedure in particular where a new contractor replaces the one to which the contracting entity had initially awarded the contract 'as a consequence of universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive'.

---

46 In the legislation on negotiated procedures with prior call for competition, Article 47(2) of the new Directive 2014/25 is even clearer on this subject, since it provides that '[o]nly those economic operators invited by the contracting entity following its assessment of the information provided may participate in the negotiations'.

---

47 See, to that effect, the judgments in *Honyvem Informazioni Commerciali* (C-465/04, EU:C:2006:199, paragraph 24) and *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 52 and the case-law cited therein).

---

48 Moreover, it is not clear whether, under that proposal, the new operator should meet the specifications at the point when the change occurs, or whether it should have met them at the point when all the other tenderers were pre-selected.

---

49 For a case where the Court took account of the possible competitive advantages resulting from information which a tenderer could have obtained about the public contract in question, see the judgment in *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127, paragraph 29).

---

50 It should also be noted that the Commission itself accepts in its observations that the criterion which it proposes cannot guarantee in every case that there will be no risk of distortion of competition.

---

51 See, by analogy, the judgment in *Pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351, paragraphs 43 to 45).

---

52 In that regard, see footnote 49 of this Opinion.

---

53 In that regard, it is relevant to note that it is clear from the letter sent by Banedanmark to the other tenderers (referred to in point 20 of this Opinion) that it took that fact into account when it decided to allow Aarsleff to take the place of the now dissolved group.

EU:C:2017:388

JUDGMENT OF THE COURT (Fifth Chamber)

4 May 2017 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Principles of equal treatment, non-discrimination and transparency — Technical and/or professional abilities of economic operators — Article 48(3) — Possibility to rely on the capacities of other entities — Article 51 — Possibility to supplement the tender — Article 45(2)(g) — Exclusion from participation in a public contract for serious misconduct)

In Case C-387/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland), made by decision of 25 July 2014, received at the Court on 14 August 2014, in the proceedings

Esaprojekt sp. z o.o.

v

Województwo Łódzkie,

third party

Konsultant Komputer sp. z o.o.,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, M. Berger, A. Borg Barthet and F. Biltgen, Judges,

Advocate General: M. Bobek,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 21 September 2016,

after considering the observations submitted on behalf of:

– Województwo Łódzkie, by M. Popielarczyk and A. Faliszek-Rosiak, radcy prawni, and by P. Krystynowicz and M. Kaczmarczyk, acting as Agents,

– the Polish Government, by B. Majczyna and D. Lutostańska, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and C. Colelli, avvocato dello Stato,

– the European Commission, by J. Hottiaux and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 November 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 concerning the coordination of procedures

for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between Esaprojekt sp. z o.o. and Województwo Łódzkie (Voïvode (district authority), Łódz, Poland, ‘the contracting authority’) concerning the conditions for selecting a tender submitted by the economic operator Konsultant Komputer sp. z o.o. in a procedure for the award of a public contract for the provision of IT systems for hospitals in Poland.

Legal context

EU law

3 Recital 46 of Directive 2004/18 states:

‘Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: “the lowest price” and “the most economically advantageous tender”.

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. …’

4 Article 1(2)(a) of the directive reads as follows:

‘“Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.’

5 Article 2 of Directive 2004/18, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

6 Article 44 of Directive 2004/18 entitled ‘Verification of the suitability and choice of participants and award of contracts’ states as follows:

‘1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject matter of the contract.

These minimum levels shall be indicated in the contract notice.

…’

7 Article 45 of that directive, headed ‘Personal situation of the candidate or tenderer’, provides in paragraph 2:

‘Any economic operator may be excluded from participation in a contract where that economic operator:

…

(g) is guilty of serious misrepresentation in supplying the information required under this Section, or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.'

8 Article 48 of that directive, entitled 'Technical and/or professional ability', states as follows:

'1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

(a) …

(ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. …

…

3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.'

4. Under the same conditions a group of economic operators as referred to Article 4 may rely on the abilities of participants in the group or in other entities.

…'

9 Article 51 of Directive 2004/18, headed 'Additional documentation and information', is worded as follows:

'The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.'

Polish law

10 Directive 2004/18 was transposed into the Polish national legal system by the Ustawa Prawo zamówień publicznych (Law on public contracts, codified text Dz. U of 2013, headings 907, 984, 1047 and 1473, and Dz. U of 2014, heading 423, 'Law on public contracts').

11 Article 24(2)(3) and (4) of the Law on public contracts is worded as follows:

'The following shall also be excluded from procedures for the award of public contracts:

3. economic operators which have submitted incorrect information which affects, or may affect, the result of the ongoing procedure;

4. has not proved that it has satisfied the conditions for participating in that procedure.'

12 Article 26(2b) and (4) of that law provides:

'2b An economic operator may rely on the knowledge, experience, technical abilities and persons able to perform the contract or the financial capacities of other bodies, regardless of the legal nature of the

links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, in particular by producing for that purpose a written undertaking by those entities that they will make available to it the necessary resources for the period during which they are used to perform the contract.

4. Within a time limit specified by it the contracting authority shall also request clarifications concerning declarations or documents referred to in Paragraph 25(1).'

13 Article 93(1)(7) of that law states:

'The contracting authority shall annul the procedure for the award of the contract where … the award procedure is vitiated by an irreparable defect which prevents the conclusion of a non-annullable public contract.'

14 Article 1(6) of the Rozporządzenie Prezesa Rady Ministrów z dnia 19 lutego 2013 r. w sprawie rodzajów dokumentów, jakich może żądać zamawiający od wykonawcy, oraz form, w jakich te dokumenty mogą być składane (Regulation of the President of the Council of Ministers of 19 February 2013 on the type of documents which may be required by the contracting authority from an economic operator and the method of production of those documents (Dz. U. of 2013, heading 231)), is worded as follows:

'If, in order to establish that it meets the conditions referred to in Article 22(1) of the [Law on public contracts], an economic operator relies on the capacities of other entities pursuant to the provisions of Article 26(2b) of the [Law on public contracts], the contracting authority, in order to determine whether the economic operator will have capacities of other bodies to the extent necessary for the proper performance of the contract or whether the link between the economic operator and those entities does in fact ensure access to those capacities may require:

(1) with regard to the conditions referred to in Article 22(1)(4) of the [Law on public contracts], the documents listed in Article 22(1)(9) to (11), and the same for other documents relating to the economic and financial standing, as laid down in the tender notice or the tender specifications;

(2) documents relating in particular to:

(a) the extent of the resources of another entity which the economic operator is able to access;

(b) the rules governing the use by the economic operator of the resources of another entity in order to perform the contract;

(c) the nature of the link between an operator and another entity; and

(d) the extent and duration of the participation of another entity in the performance of the contract.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 It is apparent from the decision to refer that the contracting authority opened an award procedure for a public contract concerning the 'modernisation of the existing IT systems and the installation of new systems in hospitals run by the Voïvode (district authority) of Łódz (Poland) as part of the project entitled 'Services of a Regional Medical Information System (RMIS services)'. The call for tenders was published in the *Official Journal of the European Union* of 29 November 2013, under number 2013/S 232-402292.

16 For the purposes of the award of the contract, the contracting authority chose to conduct an open procedure and divided the subject matter of the contract in several lots covering different establishments. Thus, it enabled the economic operators interested to submit bids, not only for the whole contract, but also for a part of it.

17 The dispute in the main proceedings specifically concerns the award of lot No 3, relating to the purchase and supply of a hospital integrated system to serve the (grey) administrative sector and the (white) medical sector at the Nicolaus Copernicus Independent Provincial Hospital in Piotrków Tribunalski (Poland). The contract is for standard software that the economic operator is to deliver, install and configure in order to execute the contract.

18 As provided in Point 6.1 and subparagraph 6.1.2 of the tender specifications, in order to prove its experience, each candidate/tenderer submitting a bid for lot No 3 had to prove, inter alia, that it had performed at least two contracts, both consisting in the supply, installation, configuration and implementation of an integrated hospital system (HIS) in the white and grey departments of a hospital with a minimum of 200 beds and having a value of not less than 450 000 Polish zlotys (PLN) (approximately EUR 101 676.08) including value added tax (VAT).

19 For that purpose, each economic operator had to provide, inter alia, a list of the main supplies made in the three years preceding the expiry of the time limit for submitting bids or, if appropriate, a shorter period of activity, indicating the subject matter, value, date of performance and the entities for which those supplies were made and attaching proof that they were, or are being, duly provided.

20 The economic operator Konsultant Komputer submitted in its tender a list of supplies, including two headings concerning the delivery, installation, configuration and implementation of two integrated hospital systems and performed for the J. Korczak specialist regional hospital in Słupsk (Poland) and the J. Śniadecki specialist hospital in Nowy Sącz (Poland), by the consortium composed of Konsultant IT sp. z o.o. and Konsultant Komputer.

21 The contracting authority selected Konsultant Komputer’s bid, considering it to be the most economically advantageous for lot No 3.

22 As a candidate excluded from that procedure, Esaprojekt brought an action before the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland) against the decision of the contracting authority selecting Konsultant Komputer’s bid. In essence, Esaprojekt criticised the contracting authority for failing to establish that the bid in question was based on incorrect information and failed to meet the conditions laid down in subparagraph 6.1.2 of the tender specifications. Consequently, that bid should have been rejected in accordance with Article 24(2)(3) of the Law on public contracts.

23 By decision of 7 April 2014, the Krajowa Izba Odwoławcza (National Appeal Chamber) ordered the contracting authority to annul its acceptance of the most advantageous bid for lot No 3 and to request Konsultant Komputer to provide further information about the scope of the contracts which it had mentioned in its bid, pursuant to Article 26(4) of the Law on public contracts. The contracting authority therefore annulled its decision and asked Konsultant Komputer to supplement the documents in order to prove that the condition relating to knowledge and experience required to be a candidate, laid down in subparagraph 6.1.2 of the tender specifications, had been met.

24 In response to that request, by letter of 29 April 2014, Konsultant Komputer indicated, first, that the contract it had relied on concerned the services that the contracting authority had defined as the grey sector and, second, that the list of supplies annexed to its tender concerned the execution of two contracts, namely, Contract No 51/2/2010 of 5 October 2010 and Contract No 62/2010 of 6 December 2010.

25 However, it was clear from the information provided by Konsultant Komputer that, in reality, the supplies of services relating to the J. Korczak specialist hospital in Słupsk had been performed within the framework of two separate contracts, one of which did not include the white sector, while the other did not include the grey sector.

26 In the light of those clarifications, the contracting authority took the view that the services supplied to the J. Korczak specialist regional hospital in Słupsk did not fulfil the conditions laid down in subparagraph 6.1.2 of the tender specifications, according to which each contract had to contain all the elements listed therein, specifically, supply, installation, configuration and implementation of an integrated hospital system (HIS) in the white and grey sectors. Therefore, the contracting authority requested Konsultant Komputer to supplement the documents in that regard.

27 For that purpose, Konsultant Komputer provided a new list of supplies in which it relied on the experience of another entity, Medinet Systemy Informatyczne sp. z o.o. concerning two supplies, the first for the Independent Public Healthcare Establishment in Janów Lubelski, and the second for the District Railway Hospital in Lublin (Poland). It also sent an undertaking from Medinet Systemy Informatyczne to provide, as an advisor and consultant, the resources necessary for the performance of the contract and, again listed the supply to the J. Śniadecki specialist hospital in Nowy Sącz.

28 Satisfied with that response, the contracting authority again selected Konsultant Komputer's bid, since it was the most economically advantageous for lot No 3.

29 Esaprojekt brought an action before the Krajowa Izba Odwoławcza (National Appeal Chamber) seeking annulment of the contracting authority's decision, a fresh evaluation of the bids, and the exclusion of Konsultant Komputer on the ground that it had submitted false information and had failed to prove that it had fulfilled the conditions for participation in the procedure, in particular, those set out in subparagraph 6.1.2 of the tender specifications.

30 According to the Krajowa Izba Odwoławcza (National Appeal Chamber), the case in the main proceedings, first, raises the question whether Articles 2 and 51 of Directive 2004/18 preclude an economic operator, when it supplements documents at the request of the contracting authority, from relying on supplies of services other than those it included in its initial bid or from being able to rely, in that regard, on supplies of services made by another entity on whose resources it did not rely in its initial bid.

31 Second, that court is unsure whether, in the circumstances of the case in the main proceedings, the economic operator is able to rely on the right laid down in Article 48(3) of Directive 2004/18 to rely on the capacities of other entities where it does not itself fulfil the minimum conditions required in order to take part in the tender procedure for a service contract.

32 Moreover, the Krajowa Izba Odwolawcza (National Appeal Chamber) also asks in which circumstances an economic operator may be held liable for serious misconduct and, therefore, be excluded from taking part in a public contract for the purposes of Article 45(2)(g) of Directive 2004/18.

33 In those circumstances, the Krajowa Izba Odwoławcza (National Appeal Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 51 of [Directive 2004/18], in conjunction with the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 thereof, allow an economic operator, when clarifying or supplementing documents, to refer to the performance of contracts (that is to say, supplies provided) other than those which it referred to in the list of supplies attached to the tender, and in particular can it refer to the performance of contracts by another entity the use of whose resources it did not refer to in the tender?

(2) In the light of the judgment of 10 October 2013, *Manova* [(C-336/12, EU:C:2013:647)], according to which "the principle of equal treatment must be interpreted as not precluding a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation — such as a copy of its published balance sheet — which can be objectively shown to predate that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected", must Article 51 of Directive 2004/18 be interpreted as meaning that the supplementing of documents is possible only when it involves documents which can be objectively shown to predate the deadline for submitting tenders or requests to participate in the procedure, or that the Court of Justice stated only one of the possibilities and the supplementing of documents is possible also in other cases, for example by attaching documents which did not predate the deadline but which objectively confirm fulfilment of a condition?

(3) If the answer to Question 2 is to the effect that the supplementing of documents other than as stated in the judgment of 10 October 2013, *Manova* [(C-336/12, EU:C:2013:647)] is possible, is it possible to supplement by adding documents drawn up by the economic operator,

subcontractors or other entities on whose capacities the economic operator relies, if they were not submitted together with the tender?

(4) Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators set out in Article 2, allow reliance on the resources of another entity, as referred to in Article 48(3), by combining the knowledge and experience of two entities, which, individually, do not have the knowledge and experience required by the contracting authority, where that experience cannot be divided (that is to say, the condition for participation in the procedure must be fulfilled in its entirety by the economic operator) and performance of the contract cannot be divided (constitutes a single whole)?

(5) Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2, allow reliance on the experience of a group of economic operators in such a way that an economic operator which performed a contract as one of a group of economic operators can rely on the performance by that group, regardless of what its participation in the performance of that contract was, or can it rely only on the experience it itself has actually acquired in performing the relevant part of the contract which was assigned to it within that group?

(6) Can Article 45(2)(g) of [Directive 2004/18], which states that any economic operator which is guilty of serious misrepresentation in supplying or not supplying information can be excluded from the procedure, be interpreted as excluding from the procedure an economic operator which submitted incorrect information which affected, or could affect, the result of the procedure, in that the guilt for misrepresentation lies in the very supply to the contracting authority of the factually inaccurate information which affects the decision of the contracting authority concerning exclusion of the economic operator (and rejection of its tender), regardless of whether the economic operator did so knowingly and wilfully, or unknowingly, through recklessness, negligence or failure to exercise due diligence? Is it possible to regard as "guilty of serious misrepresentation in supplying the information required … or [not having] supplied such information" only an economic operator which has submitted incorrect (factually inaccurate) information, or also one which has submitted information which is correct, but has done so in such a way as to satisfy the contracting authority that it fulfils the requirements laid down by the contracting authority it, even though it does not?

(7) Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2, allow reliance by an economic operator on experience in such a way that it relies jointly on two or more contractual agreements as a single public contract, despite the fact that the contracting authority did not refer to such a possibility in the contract notice or the tender specifications?'

Consideration of the questions referred

Questions 1 to 3

34 By Questions 1 to 3, which must be examined together, the referring court asks essentially whether Article 51 of Directive 2004/18, in conjunction with Article 2 thereof, must be interpreted as precluding an economic operator, in order to prove that it satisfies the conditions for participating in a public procurement procedure, from submitting to the contracting authority, after the expiry of the period prescribed for applications to take part in a public tender procedure, documents not included in its initial bid, such as a contract performed by another entity and the undertaking by the latter to place at the disposal of that operator the capacities and resources necessary for the performance of the relevant contract.

35 In order to answer those questions, it must be recalled that, in accordance with recital 46 and Article 2 of Directive 2004/18, the contracting authorities are required to afford economic operators equal, non-discriminatory and transparent treatment (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 60).

36 Thus, first, the principles of equal treatment and non-discrimination require tenderers to be afforded equality of opportunity when formulating their bids, which therefore implies that the bids of all tenderers must be subject to the same conditions. Second, the principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 61 and the case-law cited).

37 Furthermore, as the Court has already held, the principles of equal treatment and non-discrimination and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 62 and the case-law cited).

38 However, the Court has explained that Article 2 of Directive 2004/18 does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 63 and the case-law cited).

39 To that end, the contracting authority must ensure, in particular, that the request for clarification does not lead to the submission, by a tenderer, of what would appear in reality to be a new tender (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 64 and the case-law cited).

40 Furthermore, when exercising its right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 65 and the case-law cited).

41 In the present case, Konsultant Komputer submitted documents to the contracting authority which were not included in its initial bid after the expiry of the time limit laid down for submitting applications for the public tender concerned. In particular, as stated in paragraph 27 of the present judgment, it relied on a contract performed by another entity and the undertaking by the latter to place at the disposal of that operator the resources necessary for the performance of the contract at issue in the main proceedings.

42 Such further information, far from being merely a clarification made on a limited or specific basis or a correction of obvious material errors, within the meaning of the case-law set out in paragraph 38 of the present judgment, is in reality a substantive and significant amendment of the initial bid, which is more akin to the submission of a new tender.

43 As the Advocate General noted, in substance, in point 30 of his Opinion, such a communication directly affects the essential elements of the award procedure, namely the very identity of the economic operator which may be awarded the public contract concerned, and the verification of the capacities of that operator and, therefore, its ability to perform the contract concerned within the meaning of Article 44(1) of Directive 2004/18.

44 In those circumstances, by allowing the presentation by the economic operator concerned of the documents in question in order to supplement its original tender, the contracting authority unduly favours that operator as compared with other candidates and, thereby, breaches the principles of equal treatment and non-discrimination of economic operators and the obligation of transparency which

derives from them, to which the contracting authorities are subject by virtue of Article 2 of Directive 2004/18.

45 It is clear from the foregoing that the answer to Questions 1 to 3 is that Article 51 of Directive 2004/18, in conjunction with Article 2 thereof, must be interpreted as precluding an economic operator from submitting to the contracting authority, in order to prove that it satisfies the conditions for participating in a public tender procedure, documents which were not included in its initial bid, such as a contract performed by another entity and the undertaking of the latter to place at the disposal of that operator the capacities and resources necessary for the performance of the contract concerned after the expiry of the time limit laid down for submitting tenders for a public contract.

Question 4

46 By Question 4, the referring court asks essentially whether Article 44 of Directive 2004/18, in conjunction with Article 48(2) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it allows an economic operator to rely on the capacities of another entity, within the meaning of Article 48(3) thereof, by combining the knowledge and experience of the two entities, which separately do not have the capacities required to perform a particular contract, if the contracting authority takes the view that the contract concerned cannot be divided and must, therefore, be performed by a single operator.

47 In order to answer that question it should be recalled that, according to the Court's settled case-law, Article 47(2) and Article 48(3) of Directive 2004/18 recognise the right of every economic operator to rely, for a particular contract, upon the capacities of other entities, regardless of the nature of the links which it has with them, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the performance of the contract (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 33 and the case-law cited).

48 However, the Court has already held that the provisions of Directive 2004/18 do not preclude the exercise of the right established in Article 47(2) and Article 48(3) thereof from being limited in exceptional circumstances (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 39 and the case-law cited).

49 It is conceivable that there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator which, on its own would be inadequate. In such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44(2) of Directive 2004/18, as long as that requirement is related and proportionate to the subject matter of the contract at issue (judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 40 and the case-law cited).

50 In the present case, as stated in paragraph 18 of the present judgment, the specifications of the public contract at issue in the main proceedings required the tenderers to present at least two contracts performed in a specific sector.

51 Following the request of the contracting authority, in order to prove that it had the necessary skill to perform the public contract at issue in the main proceedings, Konsultant Komputer relied on the experience of another entity consisting in two supplies, as set out in paragraph 27 of the present judgment, performed by Medinet Systemy Informatyczne.

52 However, as the Advocate General noted, in point 46 of his Opinion, the question referred for a preliminary ruling is based on the premiss, confirmed by the referring court, that the public contract at issue in the main proceedings cannot be divided, so that the minimum level of capacity concerned must be attained by a single economic operator and not by relying on the capacities of several economic operators. Moreover, as is apparent from the decision to refer, the Krajowa Izba Odwoławcza (National Appeal Chamber) considers that the exclusion of the possibility to rely on the experience of several economic operators is related and proportionate to the subject matter of the contract concerned.

53 In those circumstances and having regard to the case-law set out in paragraphs 48 and 49 of the present judgment, the economic operator concerned cannot rely on the capacities of another entity in order to prove that it has the capacities necessary for the performance of the public contract at issue in the main proceedings.

54 Consequently, the answer to the fourth question referred is that Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 thereof, must be interpreted as meaning that it does not allow an economic operator to rely on the capacities of another entity, within the meaning of Article 48(3) of that directive, by combining the knowledge and experience of two entities which, individually, do not have the capacities required for the performance of a particular contract, where the contracting authority considers that the contract concerned cannot be divided, in that it must be performed by a single operator, and that such exclusion of the possibility to rely on the experience of several economic operators is related and proportionate to the subject matter of the contract which must be therefore performed by a single operator.

Question 5

55 By Question 5, the referring court asks essentially whether Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it enables an economic operator which participates individually in an award procedure for a public contract, to rely on the experience of a group of undertakings, of which it was part in connection with another public contract, irrespective of the nature of its participation in the performance of the latter.

56 That question relates to the fact, set out in paragraph 20 of the present judgment that, in the case in the main proceedings, the supply of hospital integrated systems for the hospitals concerned was carried out by a group composed of two undertakings, namely Konsultant Komputer and Konsultant IT.

57 In order to answer those questions it must be recalled, that, according to Article 44(1) of Directive 2004/18, it is for the contracting authorities to check the suitability of the candidates or tenderers in accordance with the criteria referred to in Articles 47 to 52 thereof.

58 Furthermore, under Article 44(2) of Directive 2004/18, a contracting authority may require candidates or tenderers to meet minimum levels of economic and financial standing and technical and professional ability in accordance with Articles 47 and 48 thereof.

59 In particular, Article 48(2)(a) of Directive 2004/18 provides that evidence of the technical and/or professional abilities of economic operators may be furnished, taking account in particular of the nature and importance of the supplies of services made, by the presentation of the list of works carried out during the last five years and by the presentation of a list of the principle deliveries effected or main services supplied in the last three years.

60 In accordance with the case-law set out in paragraph 47 of the present judgment, Article 48(3) of that directive allows an economic operator, for a particular contract, to rely on the capacities of other entities, such as a group of undertakings of which it is a member, so long as it proves to the contracting authority that that operator will have at its disposal the resources necessary for the execution of the contract.

61 In that connection, the experience acquired by an economic operator constitutes a particularly important criterion for the qualitative selection of that operator, as it enables the contracting authority to check the ability of the candidates or tenderers to execute a specific public contract, in accordance with Article 44(1) of Directive 2004/18.

62 Therefore, where an economic operator relies on the experience of a group of undertakings in which it has participated, that experience must be assessed in relation to the effective participation of that operator and, therefore, to its actual contribution to the performance of an activity required of that group in the context of a specific public contract.

63 As the Polish Government rightly observed in its written submissions, in practice an economic operator acquires experience not by the mere fact of being a member of a group of undertakings without any regard for its contribution to that group, but only by directly participating in the performance of at least part of the contract, the whole of which is to be performed by that group.

64 It follows that an economic operator cannot rely on the supplies of services by other members of a group of undertakings in which it has not actually and directly participated as experience required by the contracting authority.

65 Having regard to the foregoing, the answer to Question 5 is that Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it does not allow an economic operator, which has individually participated in an award procedure for a public contract, to rely on the experience of a group of undertakings of which it was a member, in connection with another public contract, if it has not actually and directly participated in the performance of the latter.

Question 6

66 By Question 6, the referring court asks essentially whether Article 45(2)(g) of Directive 2004/18, which allows an economic operator to be excluded from participating in a public contract, inter alia, if it is guilty of serious misrepresentation when supplying information requested by the contracting authority, must be interpreted as meaning that that provision may be applied where the information is of such a nature as to affect the outcome of the call for tenders, irrespective of whether the economic operator acted intentionally or not.

67 In order to answer that question, it must be recalled that Article 45(1) and (2) of Directive 2004/18 lays down a series of obligatory and optional grounds by which a tenderer may be excluded from participation in a public contract, which relate to its personal situation.

68 In particular, for the purposes of Article 45(2)(g) of that directive, an economic operator may be excluded from participating in a public contract if it is guilty of ‘serious misrepresentation’ in supplying the information required by the contracting authority, or has not supplied such information.

69 By its question, the Krajowa Izba Odwoławcza (National Appeal Chamber) asks, for the purposes of the application of that provision, whether it is necessary that the candidate/tenderer acted intentionally, and whether it is necessary that the information submitted to the contracting authority has or could have affected the outcome of the call for tenders.

70 In that connection, it must be observed, as a preliminary point, that the wording of Article 45(2)(g) of Directive 2004/18 does not contain any reference to intentional behaviour by the economic operator. Therefore, the establishment of such conduct cannot be regarded as being an element necessary for the exclusion of such an operator from participating in a public contract.

71 To the contrary, in order to consider the candidate/tenderer as being guilty of ‘serious misrepresentation’ within the meaning of that provision in order to exclude it from a public contract, it is sufficient if the candidate/tenderer is guilty of some degree of negligence which may have a decisive effect on the decisions to exclude candidates from being selected or awarded as public contract.

72 Therefore, in order to sanction an economic operator which has submitted false declarations by excluding its participation in a public contract, the contracting authority is not required, contrary to the submissions, inter alia, of the Polish Government and the European Commission, to provide evidence of the existence of wilful misconduct on the part of that economic operator.

73 Second, it must be observed that, in accordance with Article 45(2), second subparagraph, of Directive 2004/18, the Member States must specify, in accordance with their national law and having regard for Community law, the implementing conditions for that paragraph.

74 It follows that the concepts in Article 45(2), first paragraph, including ‘serious misrepresentation’, can be specified and explained in national law, provided that it has regard for EU law (see, to that effect,

judgment of 13 December 2012, *Forposat and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 26).

75 In the present case, Article 24(2)(3) of the Law on public contracts provides for the possibility to exclude from the award of a contract, any economic operator which has submitted false information which affects, or is of such a nature as to affect, the result of the ongoing tender procedure.

76 As is clear from the decision to refer, the declarations and information provided by the economic operator concerned did in fact affect the outcome of the award procedure for the contract at issue in the main proceedings. According to the Krajowa Izba Odwoławcza (National Appeal Chamber), it is specifically on the basis of those declarations and that information that Konsultant Komputer was awarded the tender.

77 In those circumstances, it must be held that, by providing such declaration and information, the economic operator concerned was guilty of negligence which had a decisive effect on the decisions to exclude, select or award the public contract concerned, so that that operator may be regarded as being guilty of 'serious misrepresentation' for the purposes of Article 45(2)(g) of Directive 2004/18. Therefore, such an attitude is able to justify the decision of the contracting authority to exclude that operator from the public contract concerned.

78 Having regard to the foregoing considerations, the answer to Question 6 is that Article 45(2)(g) of Directive 2004/18, which allows the exclusion of an economic operator from participation in a public contract, in particular if it is guilty of 'serious misrepresentation' for making false declarations when submitting the information requested by the contracting authority, must be interpreted as meaning that it may be applied where the operator concerned is guilty of a certain degree of negligence, that is to say negligence of a nature which may have a decisive effect on decisions concerning exclusion, selection or award of a public contract, irrespective of whether there is a finding of wilful misconduct on the part of that operator.

Question 7

79 By Question 7, the referring court asks essentially whether Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it allows an economic operator to rely on experience by relying simultaneously on two or more contracts as a single contract, although the contracting authority has not expressly provided for such a possibility either in the contract notice or in the tender specifications.

80 In order to answer that question, it must be observed, as a preliminary point, as set out in paragraph 57 of the present judgment, pursuant to Article 44(1) of Directive 2004/18, the contracting authority is required to check the suitability of candidates or tenderers to perform the contract concerned in accordance with the requirements laid down in Articles 47 to 52 of that directive.

81 The candidates or tenderers themselves must prove to the contracting authority that they have or will have the capacities necessary to ensure the proper performance of the public contract concerned.

82 In that connection, the contracting authority is justified in expressly setting out, in principle in the tender notice or the tender specifications, the requirement to provide evidence of specific capacities and practical arrangements by which the candidate/tenderer must demonstrate its suitability to be awarded and perform the contract concerned. Likewise, it is conceivable that, in specific circumstances, having regard to the nature of the works concerned and the subject matter and purpose of the contract, the contracting authority may lay down limits, in particular regarding the use of a limited number of economic operators, pursuant to Article 44(2) of Directive 2004/18 (see, to that effect, judgments of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraphs 39 to 41, and of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraph 90 and the case-law cited).

83 However, if the contracting authority decides to make use of such a possibility, it must ensure that the rules it adopts are related and proportionate to the subject matter and objectives of that contract (see, to

that effect, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraphs 40 and 56).

84 In the present case, as is clear from the decision to refer, although it is true that the contracting authority has not expressly provided in the contract documents for the possibility for the candidate/tenderer to rely on two or more contracts as a single contract, the fact remains that such a possibility was not expressly excluded, either in the contract notice or in the tender specifications.

85 In those circumstances, it is conceivable prima facie that the experience necessary for the performance of the contract concerned, acquired by the economic operator in the performance of not one, but two or more different contracts, may be regarded as sufficient by the contracting authority and thereby enables that operator to win the public contract concerned.

86 As the Advocate General noted, in paragraph 62 of his Opinion, if the requirements of a specific contract can be fulfilled by bringing together capacities or experience split between different operators, a fortiori, it would simply be illogical to exclude, as a matter of principle, the possibility of bringing together capacities or experience gained by the same operator in relation to different contracts.

87 Therefore, as in the case in the main proceedings, in so far as the possibility to rely on experience acquired in relation to several contracts has not been excluded either in the contract notice or in the tender specifications, it is for the contracting authority, subject to review by the competent national courts, to check whether the experience gained from two or more contracts, having regard to the nature of the works concerned and the subject matter and purpose of the contract concerned, ensures the proper performance of that contract.

88 Having regard to the foregoing, the answer to Question 7 is that Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it allows an economic operator to rely on experience derived from two or more contracts treated as a single contract, unless the contracting authority has excluded such a possibility pursuant to requirements which are related and proportionate to the subject matter and purpose of the public contract concerned.

Costs

89 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 51 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 concerning the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in conjunction with Article 2 thereof, must be interpreted as precluding an economic operator from submitting to the contracting authority, in order to prove that it satisfies the conditions for participating in a public tender procedure, documents which were not included in its initial bid, such as a contract performed by another entity and the undertaking of the latter to place at the disposal of that operator the capacities and resources necessary for the performance of the contract concerned after the expiry of the time limit laid down for submitting tenders for a public contract.**

2. **Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it does not allow an economic operator to rely on the capacities of another entity, within the meaning of Article 48(3) of that directive, by combining the knowledge and experience of two entities which, individually, do not have the capacities required for the performance of a particular contract, where the contracting authority considers that the contract concerned cannot be divided, in that it must be performed by a single operator,**

and that such exclusion of the possibility to rely on the experience of several economic operators is related and proportionate to the subject matter of the contract which must be performed by a single operator.

3. **Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it does not allow an economic operator, which has individually participated in an award procedure for a public contract, to rely on the experience of a group of undertakings of which it was a member, in connection with another public contract, if it has not actually and directly participated in the performance of the latter.**

4. **Article 45(2)(g) of Directive 2004/18, which allows the exclusion of an economic operator from participation in a public contract, in particular if it is guilty of 'serious misrepresentation' for making false declarations when submitting the information requested by the contracting authority, must be interpreted as meaning that it may be applied where the operator concerned is guilty of a certain degree of negligence, that is to say negligence of a nature which may have a decisive effect on decisions concerning exclusion, selection or award of a public contract, irrespective of whether there is a finding of wilful misconduct on the part of that operator.**

5. **Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2 of that directive, must be interpreted as meaning that it allows an economic operator to rely on experience derived from two or more contracts treated as a single contract, unless the contracting authority has excluded such a possibility pursuant to requirements which are related and proportionate to the subject matter and purpose of the public contract concerned.**

[Signatures]

---

* Language of the case: Polish.

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 24 November 2016 (1)

Case C-387/14

Esaprojekt Sp. z o.o.

v

Województwo Łódzkie

(Request for a preliminary ruling from the Krajowa Izba Odwoławcza (National Appeals Chamber, Poland))

(Directive 2004/18/EC — Principles of non-discrimination and transparency — Submission by the tenderer of additional information concerning supplies not referred to in the initial offer — Possibility of combining the experience of two entities — Possibility to rely on experience obtained as member of a group of undertakings — Possibility to combine experience from multiple contracts — Serious misrepresentation)

I – **Introduction**

1. The present case concerns a public tender to supply hospital IT systems in Poland. The company Komputer Konsult Sp. z o.o. ('KK') was initially awarded that tender. Esaprojekt Sp. z o.o. ('Esaprojekt'), which had also submitted a bid, challenged that award before the national courts. The award was annulled because the experience relied on by KK was insufficient. KK was invited to clarify its list of experience. KK's amended list relied on new, third-party experience. KK was again awarded the contract. Esaprojekt again appealed, leading to the request for a preliminary ruling in this case.

2. The national court puts to the Court a series of questions that seek to determine, first, the conditions under which tenderers can modify their list of experience and rely on the experience of third parties. Second, the national court seeks clarification of the conditions under which information provided by a tenderer amounts to a 'misrepresentation' under Article 45(2)(g) of Directive 2004/18/EC. (2) Third, the national court asks whether experience obtained under separate contracts can be jointly relied on to meet a tender requirement, where such a possibility was not explicitly envisaged by the contracting authority.

II – **Legal framework**

A – *EU law*

3. Article 2 of Directive 2004/18 ('the Directive') lays down the principle of transparency and non-discrimination in tenders for public works, public supply and public service contracts.

4. Article 44(1) states that contracts shall be awarded, among others, in accordance with the criteria of professional and technical knowledge or ability referred to in Article 48. Article 44(2) provides that any minimum capacity requirements imposed 'must be related and proportionate to the subject matter of the contract'.

5. Article 45(2)(g), which appears in the section entitled ‘Criteria for qualitative selection’, provides that an economic operator may be excluded from participation in a tender where it is ‘guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information’ and, in relation to Article 45(2) generally, that ‘Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph’.

6. Article 48(2) sets out ways in which experience may be evidenced, which includes at point (a) in particular, lists of works carried out, principal deliveries effected or main services provided.

7. Article 48(3) foresees that an economic operator ‘may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them’. In such cases, the operator must prove that it has ‘at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator’.

8. Article 51, entitled, ‘Additional documentation and information’ states that a contracting authority ‘may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50’.

B – *National law*

9. Article 2(13) of the Ustawa Prawo zamówień publicznych (Law on public contracts) (‘the Ustawa PZP’), defines the notion of ‘public contracts’ as ‘contracts for pecuniary interest concluded between a contracting authority and an economic operator whose subject is services, supplies or works’.

10. Article 24(2)(3) of the Ustawa PZP provides for the exclusion of economic operators which ‘… have submitted incorrect information which affects, or may affect, the result of the procedure carried out ...’.

11. Article 26 of the Ustawa PZP foresees the possibility for the contracting authority to request tenderers to supply missing information, correct errors or clarify declarations or documents.

III – **Facts, procedure and questions referred**

12. The present case concerns a public tender for a contract for public hospital IT systems in the Province of Łódź (Poland). The relevant part of the tender relates to the purchase and supply of a hospital integrated system (HIS) to serve the (grey) administrative sector and the (white) medical sector at the Samodzielny Szpital Wojewódzki im. Mikołaja Kopernika (Nicolaus Copernicus Independent Provincial Hospital).

13. According to the tender specifications, applications for the award of the contract could be made by economic operators that were able to demonstrate, among others, that they had performed at least two contracts covering (in respect of each of the contracts referred to): the supply, installation, configuration and implementation of a HIS in the white and grey sectors, for a healthcare establishment with at least 200 beds, and having a value of not less than PLN 450 000 gross.

14. In order to demonstrate that they fulfilled the above condition, economic operators had to submit a declaration and a list of ‘principal supplies’ of HISs in the white and grey sectors.

15. In its tender KK listed two entries for supplies of a HIS in the white and grey sectors to hospitals in (i) Słupsk (the ‘Słupsk Supply’) and (ii) Nowy Sącz (the ‘Nowy Sącz Supply’). Both supplies were carried out by a consortium of Konsultant IT Sp. z o.o. (‘KIT’) and KK.

16. KK won the tender for the purchase and supply of the HIS. Esaprojekt challenged that decision, essentially claiming that the contracts listed by KK did not fulfil the tender requirements in terms of HIS experience.

17. The appeal was successful. The contracting authority was ordered to request that KK submit, in accordance with the procedure laid down in Article 26(4) of the Ustawa PZP, clarifications concerning the scope of the contracts specified in order to prove that the condition for participation in the procedure in terms of knowledge and experience was fulfilled.

18. Following the request for clarification, it transpired that the Słupsk Supply was made within the framework of two tender procedures and two separate contractual agreements. One of those agreements did not cover the white sector, and the other did not cover the grey sector. The contracting authority held that the Słupsk Supply did not respect the tender specifications mentioned above at point 13 of this Opinion, because the Słupsk Supply was not a single 'public contract', as defined in Article 2(13) of the Ustawa PZP. Instead, it involved two separate contracts. The contracting authority therefore asked KK to supplement the documents proving that it fulfilled the tender conditions.

19. In supplementing the documents, KK submitted a new list of supplies. That list included, as before, the Nowy Sącz Supply. In addition two new supplies were added, both of which were carried out by a third party, Medinet Systemy Informatyczne Sp. z o.o. ('Medinet') ('the Medinet Supplies'). KK also submitted an undertaking by Medinet to make available the resources necessary to perform the contract and to participate in the performance of the contract as an adviser and consultant.

20. The contracting authority accepted the modified tender submitted by KK. Esaprojekt again lodged an appeal against the Województwo Łódzkie before the Krajowa Izba Odwoławcza (National Appeals Chamber, Poland). In those circumstances, that court decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'Question 1:

Does Article 51 of [Directive 2004/18], in conjunction with the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 thereof, allow an economic operator, when clarifying or supplementing documents, to refer to the performance of contracts (that is to say, supplies provided) other than those which it referred to in the list of supplies attached to the tender, and in particular can it refer to the performance of contracts by another entity the use of whose resources it did not refer to in the tender?

Question 2:

In the light of the judgment of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647), according to which "the principle of equal treatment must be interpreted as not precluding a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation —— such as a copy of its published balance sheet — which can be objectively shown to predate that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected", must Article 51 of [Directive 2004/18] be interpreted as meaning that the supplementing of documents is possible only when it involves documents which can be objectively shown to predate the deadline for submitting tenders or requests to participate in the procedure, or that the Court of Justice stated only one of the possibilities and the supplementing of documents is possible also in other cases, for example by attaching documents which did not predate the deadline but which objectively confirm fulfilment of a condition?

Question 3:

If the answer to Question 2 is to the effect that the supplementing of documents other than as stated in the judgment in Case C-336/12 *Manova* is possible, is it possible to supplement by adding documents drawn up by the economic operator, subcontractors or other entities on whose capacities the economic operator relies, if they were not submitted together with the tender?

Question 4:

Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators set out in Article 2, allow reliance on the resources of another entity, as referred to in Article 48(3), by combining the knowledge and experience of two entities, which, individually, do not have the knowledge and experience required by the contracting authority, where that experience cannot be divided (that is to say, the condition for participation in the procedure must be fulfilled in its entirety by the economic operator) and performance of the contract cannot be divided (constitutes a single whole)?

Question 5:

Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2, allow reliance on the experience of a group of economic operators in such a way that an economic operator which performed a contract as one of a group of economic operators can rely on the performance by that group, regardless of what its participation in the performance of that contract was, or can it rely only on the experience it itself has actually acquired in performing the relevant part of the contract which was assigned to it within that group?

Question 6:

Can Article 45(2)(g) of [Directive 2004/18], which states that any economic operator which is guilty of serious misrepresentation in supplying or not supplying information can be excluded from the procedure, be interpreted as excluding from the procedure an economic operator which submitted incorrect information which affected, or could affect, the result of the procedure, in that the guilt for misrepresentation lies in the very supply to the contracting authority of the factually inaccurate information which affects the decision of the contracting authority concerning exclusion of the economic operator (and rejection of its tender), regardless of whether the economic operator did so knowingly and wilfully, or unknowingly, through recklessness, negligence or failure to exercise due diligence? It is [sic] possible to regard as "guilty of serious misrepresentation in supplying the information required … or [not having] supplied such information" only an economic operator which has submitted incorrect (factually inaccurate) information, or also one which has submitted information which is correct, but has done so in such a way as to satisfy the contracting authority that it fulfils the requirements laid down by the contracting authority it, even though it does not?

Question 7:

Does Article 44 of [Directive 2004/18], in conjunction with Article 48(2)(a) thereof and the principle of equal treatment of economic operators in Article 2, allow reliance by an economic operator on experience in such a way that it relies jointly on two or more contractual agreements as a single public contract, despite the fact that the contracting authority did not refer to such a possibility in the contract notice or the tender specifications?'

21. Written observations have been submitted by the Polish and Italian Governments and the Commission. The Polish Government, the Commission and the Województwo Łódzkie, defendant in the main proceedings, participated at the hearing held on 21 September 2016.

IV – **Assessment**

A – *Question 1 (and questions 2 and 3)*

22. The referring court's first question aims at determining whether, in the light of Articles 2 and 51 of the Directive, it is possible for a tenderer, after the tender's submission deadline, to make a reference to the experience of a third party, which was not referred to in the initial tender.

23. The second and third questions aim at determining whether, in the light of the judgment in *Manova*, (3) a tenderer can present documents that evidence its ability to rely on that third-party experience after the submission deadline (in the present case, the Medinet undertaking).

24. As regards the first question, I consider that the addition of such references is generally not possible for the reasons set out below. That answer renders any detailed consideration of the second and third questions redundant.

25. Article 51 of the Directive provides that contracting authorities may invite tenderers to 'supplement or clarify' the documents they have submitted. Those words, 'supplement or clarify', are arguably rather flexible. However, according to established case-law, (4) the principle of equal treatment and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure. Therefore, as a general rule, where the contracting authority regards a tender as

imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification, or even create the impression that it would allow a tender to be amended. (5)

26. Notwithstanding, the Directive 'does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors' as long as they do not amount to a new tender. (6) Due diligence can be expected from tenderers, (7) but excessive formalism is to be avoided. (8) That is particularly important given the need to ensure that tenders remain open and competitive.

27. The possibility for submitting additional information after the deadline for submission is therefore considered exceptional, but not non-existent. The question then becomes where precisely to draw the line.

28. In my view, the approach of the Court could perhaps best be captured by a metaphor: the information and documentation submitted by a tenderer upon the lapse of the submission deadline represents a snapshot. Only the information and documentation already contained in that picture may be taken into account by the contracting authority. This does not prevent the contracting authority from zooming in on any details in the picture that were a bit blurry and requesting an increase in the picture's resolution in order to see the detail clearly. But the basic information must already have been, albeit in low resolution, in the original snapshot.

29. Following that logic, I consider that a tenderer, in principle, cannot be permitted to demonstrate that it fulfils the technical and professional requirements of a tender by relying on the experience of third parties not referred to prior to the submission deadline. That information was simply not contained in the original picture.

30. Therefore, such reliance on a third party does not amount to a mere clarification or formality. It constitutes in fact a significant change to the tender. The very identity of the entities carrying out the work, or at least whose experience is being called upon to do so, is being altered. That is a material change affecting a key element of the procedure. (9) Moreover, as pointed out by the Commission, such a change may lead to extra verifications being required by the contracting authority and could even affect the choice of candidates being invited to present an offer.

31. More generally, to allow such modifications can certainly have an influence on the competitive process. A tenderer's decision to rely on its own experience or to call on that of a third party must be made at a certain moment in time and on the basis of information in its possession at that time. Giving a tenderer a second chance to take that business decision, when time has moved on, could certainly procure it an advantage that would be at odds with the requirement of equal treatment. For example, knowledge of the number or identity of competitors in the race or a downturn in the market may encourage the tenderer to seek to co-opt a partner with greater experience, to help increase its chances. (10)

32. Further support for this conclusion can be found by analogy with cases involving the modification of the composition of bidding consortia after the submission deadline. In the recent *Højgaard* case, a consortium of two companies was preselected and submitted a bid for a public tender, but was subsequently dissolved before the contract was awarded. One of the companies, Aarsleff, then sought to replace the consortium as a preselected bidder in the procedure. That change was accepted and Aarsleff went on to win the contract. The award was challenged before the national courts and a question referred to this Court on the compatibility with the principle of equal treatment of a change in consortia composition.

33. In its judgment the Court stated that rules about changes in the composition of consortia during tender procedures are generally a matter for the Member States. (11) However, in order to ensure respect of the principle of equal treatment, Aarsleff must have been in a position to meet the preselection criteria on its own merits. (12)

34. Similarly, where a contracting authority requires a tenderer to remove items from its list of experience, it can of course continue to rely on the remaining items. However, it cannot add to the list new, third-party experience. (13)

35. I therefore propose to reply to the national court's first question in the sense that an economic operator cannot rely on third-party experience for the first time after the submission deadline. Given that response, the national court's second and third questions (relating to the conditions under which evidence of such third-

party experience can be submitted) largely fall away. Indeed, where an operator cannot rely on a third party at all, it would make no sense for it to present undertakings by that third party, or evidence of the third party's experience.

36. In the light of the foregoing, I propose to provide the following answer to the national court's first three questions:

> Article 51 of Directive 2004/18, in conjunction with the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 thereof, do not allow an economic operator, when clarifying or supplementing documents, to refer to the performance of contracts by third parties, which it did not refer to in the list of supplies attached to the tender, or to submit an undertaking by such third party to put its resources at the disposal of the tenderer.

B – *Question 4*

37. The fourth question relates to the fact that, in the main case, the tender specifications require tenderers to have performed 'at least two contracts' each covering the white and grey sectors, as set out above, in point 13 of this Opinion. Following the contracting authorities' request for clarification, KK listed the two Medinet Supplies and the Nowy Sącz Supply.

38. Against that backdrop, the national court in essence seeks to determine whether the experience resulting from the Medinet Supplies and the Nowy Sącz Supply can be relied on to fulfil the requirement of 'at least two contracts' having been performed, in compliance with Articles 44 and 48(2)(a) of the Directive and the principle of equal treatment in Article 2 of the Directive.

39. The text of the Directive makes it clear that, in the context of public tenders, economic operators may as a general rule rely on the capacities of other entities. (14) That general rule is also consistent with the objective of opening up public contracts to competition (15) and has been iteratively confirmed by the Court. (16) Capacities relied on by an operator can therefore be 'fragmented' or 'split' among different actors, provided of course that the operator will in practice have at its disposal the necessary resources of those other entities. (17)

40. Nonetheless, in order to ensure 'minimum capacity requirements' or 'minimum levels of ability', (18) reliance on third parties may exceptionally be limited. That is so in the case of 'works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate'. Such requirements must be 'related and proportionate to the subject matter of the contract at issue'. (19)

41. In the present case, the tender specifications require 'at least two contracts' covering a specific field (HIS). It follows from the points discussed above that that requirement can be imposed as a minimum, and exclude reliance on third parties, provided that it is 'related and proportionate to the subject matter of the contract at issue'.

42. Whether or not that is the case is a question of fact for the national court to decide.

43. Nonetheless, the national court implies that there is a qualitative difference between tender specifications that require, on the one hand, accumulated, repeat experience in one area and, on the other, experience in a series of discrete fields.

44. I agree that there is, intuitively, such a difference. Combining experience from different sectors is not always possible — cross-sectoral experience or full experience of integrated systems may be irreplaceable. However, such interdisciplinary combinations are arguably less problematic than simply adding up years of experience or single contracts. A company executing a second contract in the same field will do so against the backdrop of its previous experience, potentially with new and different insights. (20)

45. Ultimately, however, the legal rule remains the same in both cases. The extent to which experience of one operator having performed two contracts is substitutable by two operators having performed one contract each is a question of fact for the national court to determine.

46. In its question, the national court states explicitly that the relevant experience and performance of the contract ‘cannot be divided’. That implies that the national court has already concluded that (a) the possibility of joint reliance on experience has been excluded and (b) that exclusion is ‘related and proportionate to the subject matter of the contract at issue’. To the extent that that is indeed the case, the provisions of the Directive cited by the national court allow the contracting authority to exclude reliance on the resources of another entity by combining the knowledge and experience of two entities.

47. In the light of the above, I propose to reply to the national court’s fourth question as follows:

> Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) and the principle of equal treatment in Article 2 thereof, do not allow an economic operator to rely, in the sense of Article 48(3) of that directive, on the knowledge and experience of another entity, where such reliance has been expressly excluded by the contracting authority. However, any such exclusion must be related and proportionate to the subject matter of the contract at issue.

C – *Question 5*

48. By its fifth question, the national court requests clarification of the conditions under which an economic operator may rely on prior experience obtained by a group of companies of which it was a member. That question relates to the fact that, in the main case, the Nowy Sącz Supply and the Słupsk Supply were both carried out by a consortium of two companies, KK and KIT. I understand then that the national court is seeking to determine whether KK can rely on that experience unconditionally to support its bid, or whether the role KK played in the supply is material. (21)

49. I consider that the specific role and associated experience of a consortium member is indeed crucial.

50. Articles 44 and 48(2)(a) of the Directive foresee the assessment of bids on the basis of, among others, experience, as evidenced by lists of works and supplies carried out in recent years. Having the experience necessary to execute a contract is obviously not the same as knowing someone who does. Similarly, experience cannot be acquired simply by being formally a party to a contract or of a consortium.

51. The referring court aptly illustrates that point with the example of a consortium of three companies constructing a motorway: a bank (financing the operation), a construction company (doing the actual building) and a service provider (providing legal, administrative and accounting support). Clearly financing such an operation does not provide the bank with the experience necessary to build a motorway.

52. Ultimately, however, each company’s precise role and the experience it obtains depend on specific circumstances. It is possible, for example, that the bank took the lead on financing, but that the service provider was closely associated with that part of the operation, thus gaining some level of experience in that field. Such a level of experience might be entirely appropriate and sufficient in the context of another tender procedure for a different project. Or it might not be. These are questions of fact.

53. Similarly, the precise role played by KK in the Nowy Sącz Supply (and the Słupsk Supply) (22) and whether that corresponds to the requirement of experience in the tender notice is a question of fact for the national court.

54. Finally, the above observations relate to a situation where an economic operator presents previous supplies carried out by a group of operators *specifically as its own experience*. Those observations are without prejudice to the possibility for an economic operator to rely on the capacities of third parties, as provided for, for example, in Article 48(3) of the Directive and discussed in more detail above at point 39.

55. In the light of the foregoing, I propose to respond to the national court’s fifth question as follows:

> Articles 44 and 48(2)(a) of Directive 2004/18 must be interpreted in such a way that an economic operator, which has performed a contract as one of a group of economic operators, can rely as its own experience only on the experience it has acquired itself in the performance of that contract. That conclusion is without prejudice to the possibility for the economic operator to rely on the capacities of third parties, under the conditions provided for in the Directive.

D – *Question 7*

56. The seventh question relates to the fact that, in the main case, the Słupsk Supply consisted of two separate contracts conferring complementary experience (in the white and grey sectors), whereas the contract notice and tender documents refer to contracts involving both the white and grey areas together. (23)

57. Against that background, the national court requests clarification of the conditions under which experience acquired in the context of two separate contracts can be presented jointly, in order to satisfy a requirement that was not explicitly presented as being divisible.

58. For reasons developed further below, I consider that the answer to this question is that operators should generally be able to draw together 'fragmented' experience in this way. Complete exclusion of such a possibility by the contracting authority should be exceptional.

59. It follows, among others, from the responses proposed to questions 4 and 5 above that the Directive does not dictate precisely how or by whom relevant experience must have been garnered. Thus, subject to certain conditions, it is for example generally possible for an operator to rely on experience acquired: (a) in the context of contracts signed by it alone; (b) in the context of contracts signed by a group of operators of which it forms part; or (c) by third-parties.

60. What is critical is whether the overall experience that the economic operator can genuinely rely on, being either its own or of a third party, is sufficient to carry out the contract.

61. Consequently, the fact that experience has been obtained technically through two or more separate contracts and not a single contractual agreement should normally be immaterial. If the combined experience is sufficient to carry out the contract, that ought to suffice.

62. Indeed, the requirements of a tender can be fulfilled by bringing together capacities or experience split between *different operators*. A fortiori, it would simply be illogical to exclude, as a matter of principle, the possibility of bringing together capacities or experience gained by the *same operator* in relation to *different contracts*.

63. Limitations to the combining of experience of different operators can be imposed where they are 'related and proportionate to the subject matter of the contract at issue'. (24) In my view, that reasoning and those limitations can be applied by analogy to the fragmentation of experience over different contracts executed by the same operator. Thus, for example, a contracting authority may, in principle, state that certain requirements of experience can only be satisfied by relying on individual contracts which each involve experience from different areas. However, such a requirement must also be necessary, proportionate and related to the subject matter of the contract.

64. It is up to the referring court to determine whether the experience being requested in the specific tender at issue fulfils those conditions. However, the following general points are worth highlighting.

65. First, tenders should, in principle, be open to competition. (25) Reflecting that purpose, exclusion of reliance on third-party experience is the exception. Exclusion of 'fragmented' experience should be too. As a result, in the absence of any such exclusion in the contract notice or specifications, that exclusion cannot simply be assumed. It must be clearly stated.

66. Second, the national court specifically refers to Article 2 of the Directive that sets out also the principle of equal treatment. In my opinion, the latter should not raise any concerns in respect of the joint reliance on experience gained in separate contracts to the extent that either (a) *any* economic operator submitting a tender is, in principle, allowed jointly to rely on such contracts; or (b) *no* economic operators can do so (where such a possibility has been excluded by the contracting authority).

67. Third, to the extent that joint reliance has not been excluded, it falls to the contracting authority, subject to review by the national courts, to determine whether the combined experience of two or more contracts is, in a concrete case, sufficient to satisfy the requirements laid down in the tender specifications. Indeed, even where two or more contracts can in principle be combined, it may be that in a specific case the overall experience is simply inadequate. In making this assessment, all relevant elements should be taken into

account, including, for example, the relationship between the various contracts (26) and the specific requirements. (27)

68. In the light of the above, I propose to reply to the national court's seventh question as follows:

> Articles 44 and 48(2)(a) of Directive 2004/18, in conjunction with the principle of equal treatment in Article 2 of that directive, allow reliance by an economic operator on experience in such a way that it relies jointly on two or more contractual agreements as a single public contract, unless such joint reliance has been expressly excluded by the contracting authority. Any such exclusion must be related and proportionate to the subject matter of the contract at issue.

E – *Question 6*

69. By its sixth question, the national court asks whether a tenderer can be excluded as being 'guilty of serious misrepresentation' (by supplying or failing to supply information) under Article 45(2)(g) of the Directive, irrespective of state of mind. It also asks whether the provision enables exclusion of the tender if the tenderer does not actually meet the tender conditions but has creatively presented information that is technically correct to give the impression of meeting the conditions.

70. The wording of Article 45(2)(g) creates a possibility (28) for a Member State to exclude tenderers in certain cases of misrepresentation. Such misrepresentation can occur where information 'required', for example to evidence its abilities, is supplied or is omitted.

71. On the natural meaning of the words, Article 45(2)(g) is therefore concerned with situations where an operator omits or includes certain information that leads the contracting authority to have an incorrect understanding of its abilities.

72. Not every misrepresentation constitutes grounds for exclusion. Use of the words 'serious' or 'seriously' implies that the mere provision of incorrect information is insufficient to trigger Article 45(2)(g) and that a certain threshold of seriousness must be met.

73. However, it is unclear how to establish seriousness. Comparison of different language versions only increases ambiguity in this regard. In some language versions the word connoting gravity or seriousness attaches to the term 'guilty', (29) which could arguably be read as requiring a certain state of mind or degree of negligence. In other language versions, the word connoting gravity or seriousness attaches to the misrepresentation, implying that the focus is on the act itself and/or its consequences. (30)

74. The final paragraph of Article 45(2) of the Directive may provide some assistance. It requires Member States to specify under national law the 'implementing conditions' of Article 45(2). Thus, Article 45(2)(g) may be read as laying down minimum conditions to establish misrepresentation that is serious enough to allow Member States to exclude a tenderer. It does not, however, seek to fully harmonise the notion. (31) This reading also corresponds with a narrow reading of the grounds for exclusion and the need to evaluate each operator's case on an individual basis.

75. What does that minimum degree of seriousness correspond to? For the following reasons, I consider that 'seriousness' should relate to the (objective) consequences of the provision or omission of information, irrespective of the (subjective) state of mind or intent of the person providing them.

76. In my view, *only* acts or omissions that result in a competitive advantage that keeps an operator in the tender procedure, when it would otherwise not stay in it, can fall under Article 45(2)(g). (32) In other words, where a misrepresentation (by provision or omission of information) is incapable of having an effect on the outcome, it cannot constitute a valid justification to exclude the operator. I refer to this hereafter as the 'Outcome Condition'.

77. That reading is supported by language versions that emphasise the seriousness of the misrepresentation. It can be seen as compatible with versions that emphasise seriousness of 'guilt'. It also reflects the objective of openness to competition and is in line with a narrow reading of the grounds for exclusion. If a tenderer is the best placed to execute the contract, whether on the basis of best price or most

advantageous offer, (33) then excluding it would go against the purpose of the Directive to ensure contracts are awarded on the basis of objective criteria, obtaining the best value for money. (34)

78. It follows that the Outcome Condition is a condition *sine qua non* for any exclusion on the basis of misrepresentation.

79. Moreover, I consider that Article 45(2)(g) can in theory be triggered in *every case* where the Outcome Condition is met. Indeed, if the provision or omission of certain information can affect the outcome, it is already *serious in itself*. In that regard, it may be that in particular circumstances an 'obvious' or 'minor' mistake or 'mere clerical error' could have the unexpected consequence of materially changing the outcome of a tender. Such errors may be entirely unintentional. However, they are clearly not minor or trivial mistakes in the eyes of a competitor that loses a tender or is put at a significant disadvantage as a result.

80. I therefore consider that fulfilment of the Outcome Condition alone is *sufficient to allow exclusion* for misrepresentation, without the need for further conditions to be met. This reading of the notion of misrepresentation, namely, freed of any subjective elements of intent on the part of the tenderer, under Article 45(2)(g), is supported by three further arguments.

81. First, Article 45(2)(g) of the Directive does not even refer to state of mind generally, or intention, recklessness or negligence specifically, let alone attempt to flesh out those notions. Under such conditions, it is inappropriate to attempt to define the scope of Article 45(2)(g) on the basis of such complex notions that would effectively have to be pulled out of thin air. That fact alone pleads for an objective reading of the provision, such as the one I have suggested here. Moreover, Article 45(2) only sets out the basic conditions under which EU law creates a *possibility* to exclude tenderers. In doing so, it explicitly refers to national law to specify the conditions of implementation, which might involve, for example, notions of negligence or intention in national law.

82. Second, this relates to a practical point: could it really reasonably be expected that an administrative authority in the context of a public procurement procedure, often acting under significant time pressure and potentially faced with a number of voluminous submissions, should be asked to inquire into and to establish corporate intent? It is quite clear that such a proposition is not a workable one.

83. Third, even if an administrative authority were able to ascertain corporate intent, how useful would it in fact be? Operators participating in tenders are generally expected to exercise due diligence. (35) A professional is simply presumed to know and act with due care. This implies that in addition to intent, other forms of negligence would also likely be considered. Should that indeed be the case, then state of mind would in fact not constitute any genuine distinguishing criterion.

84. The Outcome Condition is therefore a condition *sine qua non* and is also sufficient on its own to trigger Article 45(2)(g). However, that only opens up the *possibility* for Member States to exclude an operator. In accordance with the final paragraph of Article 45(2), it is at the national level that the detailed conditions under which operators should in practice be excluded is determined.

85. By way of a final remark in relation to Article 45(2)(g) of the Directive, the national court has explicitly raised the question of whether that provision can be triggered by *correct* information that is presented in a tendentious way. In other words, in a way that makes it look like the requirements of the tender are satisfied, when in reality they are not. The national court's question in this regard envisages a situation where an operator does not fulfil the tender requirements.

86. In such a situation the operator would normally be excluded, simply because it does not fulfil the tender requirements. Such a tenderer should only continue in the procedure if its tender is modified in such a way that it *does* fulfil the requirements. It is also only in such a scenario that exclusion on the basis of Article 45(2)(g) of the Directive would need to be considered at all.

87. As set out in my assessment of question 1, there are clearly limits to acceptable post-deadline tender modifications. Such limits may very well be exceeded where modifications make a major difference such as the one at hand (that is, the difference between non-fulfilment of the tender requirements before the modification, and fulfilment of those requirements after the modification).

88. However, assuming that such modifications are possible in theory could the relevant operator nonetheless be excluded for misrepresentation in its initial bid?

89. I consider that the answer to that question is yes, such an operator could *potentially* be excluded. That is because (a) it initially failed to provide information that is required under Article 48(2)(a) (which is one of the types of misrepresentation referred to in Article 45(2)(g) of the Directive) and (b) that omission was material in the sense that it could have an effect on the outcome of the tender (Outcome Condition).

90. The issue is therefore less that the operator arguably engaged in some 'borderline marketing' of its actual experience. Rather it is that, no matter how its experience was dressed up, the operator initially omitted to provide the 'required' information under Article 48(2)(a), and subsequent provision of that information changed the outcome of the tender.

91. In the light of the foregoing, I propose to reply to the national court's sixth question as follows:

> An economic operator can be found guilty of serious misrepresentation under Article 45(2)(g) of Directive 2004/18 only in cases where the alleged misrepresentation can affect the decision of the contracting authority by keeping it in the procedure when it would otherwise not be. Application of that provision is conditional upon the supply or failure to supply information required under Chapter VII, Section 2 of Directive 2004/18. Application of Article 45(2)(g) of that directive is not conditional on the supply of factually incorrect information or any specific state of mind of the economic operator.

V – **Conclusion**

92. I propose that the Court answers the questions referred to it by the Krajowa Izba Odwoławcza (National Appeals Chamber) as follows:

> Questions 1-3:
>
> Article 51 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ('Directive 2004/18'), in conjunction with the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 thereof, do not allow an economic operator, when clarifying or supplementing documents, to refer to the performance of contracts by third parties, which it did not refer to in the list of supplies attached to the tender, or to submit an undertaking by such third party to put its resources at the disposal of the tenderer.
>
> Question 4:
>
> Article 44 of Directive 2004/18, in conjunction with Article 48(2)(a) and the principle of equal treatment in Article 2 thereof, do not allow an economic operator to rely, in the sense of Article 48(3) of that directive, on the knowledge and experience of another entity, where such reliance has been expressly excluded by the contracting authority. However, any such exclusion must be related and proportionate to the subject matter of the contract at issue.
>
> Question 5:
>
> Articles 44 and 48(2)(a) of Directive 2004/18 must be interpreted in such a way that an economic operator, which has performed a contract as one of a group of economic operators, can rely as its own experience only on the experience it has acquired itself in the performance of that contract. That conclusion is without prejudice to the possibility for the economic operator to rely on the capacities of third parties, under the conditions provided for in the Directive.
>
> Question 6:
>
> An economic operator can be found guilty of serious misrepresentation under Article 45(2)(g) of Directive 2004/18 only in cases where the alleged misrepresentation can affect the decision of the contracting authority by keeping it in the procedure when it would otherwise not be. Application of that

provision is conditional upon the supply or failure to supply information required under Chapter VII, Section 2 of Directive 2004/18. Application of Article 45(2)(g) of that directive is not conditional on the supply of factually incorrect information or any specific state of mind of the economic operator.

Question 7:

Articles 44 and 48(2)(a) of Directive 2004/18, in conjunction with the principle of equal treatment in Article 2 of that directive, allow reliance by an economic operator on experience in such a way that it relies jointly on two or more contractual agreements as a single public contract, unless such joint reliance has been expressly excluded by the contracting authority. Any such exclusion must be related and proportionate to the subject matter of the contract at issue.

---

1 – Original language: English.

---

2 – Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 – Judgment of 10 October 2013, (C-336/12, EU:C:2013:647).

---

4 – See judgments of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 36); of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647, paragraph 31); and of 7 April 2016, *Partner Apelski Dariusz* (C-324/14, EU:C:2016:214, paragraph 62).

---

5 – Judgment of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 41).

---

6 – See judgments of 7 April 2016, *Partner Apelski Dariusz* (C-324/14, EU:C:2016:214, paragraphs 63 and 64); of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 40); and of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647, paragraphs 32 to 36).

---

7 – Judgment of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 38).

---

8 – Judgment of 6 November 2014, *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345, paragraph 45).

---

9 – See, by analogy, judgment of 6 November 2014, *Cartiera dell'Adda* (C-42/13, EU:C:2014:2345, paragraph 45), where changes regarding the identity of the person designated as technical director were considered to be more than merely formal and, as such, constituted a sufficient basis to exclude the tenderer.

---

10 – See, by analogy, Opinion of Advocate General Mengozzi in *MT Højgaard and Züblin* (C-396/14, EU:C:2015:774, point 80 et seq.).

---

11 – Judgment of 24 May 2016, *MT Højgaard and Züblin* (C-396/14, EU:C:2016:347, paragraph 35).

---

12 – See also judgment of 23 January 2003, *Makedoniko Metro and Michaniki* (C-57/01, EU:C:2003:47). In that case, a bidding consortium had sought to *expand* its membership following the submission of tenders.

It was formally precluded from doing so by national law. The Court concluded that such a prohibition was compatible with Council Directive 92/50/EEC **of 18 June 1992 relating to the coordination of procedures for the award of public service contracts** (OJ 1992 L 209 p. 1) (predecessor of Directive 2004/18).

---

13 – Although not the issue in the present case, I do not exclude the possibility that the tenderer could be permitted to rely on other experience *of its own*.

---

14 – See, for example, Article 4(2) (recourse to consortia), Article 25 (subcontracting) and Article 48(3) (reliance on third parties) of the Directive.

---

15 – See judgment of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraph 34 and the case-law cited).

---

16 – See, for example, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraphs 30 to 32); of 2 December 1999, *Holst Italia* (C-176/98, EU:C:1999:593, paragraphs 26 and 27); and of 18 March 2004, *Siemens and ARGE Telekom* (C-314/01, EU:C:2004:159, paragraph 43).

---

17 – Article 48(3) of the Directive.

---

18 – See Article 44(2) of the Directive.

---

19 – Judgment of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraph 35), reflecting the wording of Article 44(2) of the Directive.

---

20 – To illustrate that point, if I seek to hire a lawyer with nine years' experience in tax, company, and commercial law, I may accept three lawyers, each with nine years' experience in respectively, tax, company, and commercial law. However, I may be more hesitant about hiring three lawyers each with three years' experience in all three fields combined. And I would certainly not hire nine lawyers with one year's experience each.

---

21 – It is clear from the request that KK does not in any way seek to rely on KIT's experience as an "other entity" in the sense of Article 48(3) of the Directive, but rather presents experience gained within the consortium as its own.

---

22 – It was confirmed by Województwo Łódzkie at the oral hearing that KK no longer formally relies on the Słupsk Supply.

---

23 – To the extent that KK would no longer rely on the Słupsk Supply, this question could potentially be considered hypothetical. However, since absence of continued reliance on the Słupsk Supply is unclear from the request for a preliminary ruling, the general presumption of relevance of the question applies.

---

24 – See above, point 40.

---

25 – See above point 25.

---

26 – Any formal links between the contracts and similarities in terms of scope, customer or time period for execution, etc.

---

27 – Integrated nature of requested service, time period for delivery and any corresponding minimal capacity requirements, etc.

---

28 – ‘Any economic operator *may* be excluded …’ (emphasis added).

---

29 – In French, Italian, Spanish and Dutch respectively: ‘gravement coupable’; ‘gravamente colpevole’; ‘gravamente culpable’; ‘in ernstige mate schuldig’.

---

30 – In English, German and Czech respectively: ‘guilty of serious misrepresentation’; ‘in erheblichem Maße falscher Erklärungen schuldig’; ‘který se dopustil vážného zkreslení‘. Yet other language versions, notably the Slovak one, omit any reference to gravity at all, be it in relation to state of mind or the consequences of the act — ‘bol uznaný vinným zo skresľovanie skutočností’.

---

31 – See also Article 45(2)(d) of the Directive which foresees possible exclusion where economic operators are ‘guilty of serious professional misconduct’. As observed by the Commission, the Court’s case-law interpreting that provision refers to the role of the Member States in defining that notion but also to the need for a minimum degree of seriousness before the provision can be triggered.

---

32 – Which materially affect, for example, preselection or the contract award.

---

33 – See Article 53(1) of the Directive.

---

34 – See, for example, recital 46 of the Directive.

---

35 – See judgment of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 38).

JUDGMENT OF THE COURT (First Chamber)

7 April 2016 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Technical and/or professional abilities of economic operators — Article 48(3) — Possibility to rely on the capacities of other entities — Conditions and procedures — Nature of the links between the tenderer and the other entities — Amendment of the tender — Annulment and repetition of an electronic auction — Directive 2014/24/EU)

In Case C-324/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland), made by decision of 18 June 2014, received at the Court on 7 July 2014, in the proceedings

Partner Apelski Dariusz

v

Zarząd Oczyszczania Miasta,

intervening parties:

Remondis sp. z o.o.,

MR Road Service sp. z o.o.,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, E. Levits, M. Berger and S. Rodin, Judges,

Advocate General: N. Jääskinen,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 7 May 2015,

after considering the observations submitted on behalf of:

– Partner Apelski Dariusz, by T. Krześniak, adwokat,

– Zarząd Oczyszczania Miasta, by K. Wąsik, radca prawny,

– Remondis sp. z o.o. and Mr Road Service sp. z o.o., by K. Kamiński and K. Dajczer, radcowie prawni,

– the Polish Government, by B. Majczyna ainsi que by M. Szwarc and D. Lutostańska, acting as Agents,

– the Spanish Government, by J. García-Valdecasas Dorrego, acting as Agent,

– the Latvian Government, by I. Kalniņš and I. Ņesterova, acting as Agents,

– the European Commission, by K. Herrmann and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2, 44 and 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between Partner Apelski Dariusz (‘Partner’) and Zarząd Oczyszczania Miasta (Warsaw municipal cleansing authority) concerning its exclusion from the procedure for the award of a public contract for the comprehensive mechanical cleansing of roadways of the city of Warsaw (Poland) in the years from 2014 to 2017.

Legal context

EU law

Directive 2004/18

3 Recital 46 of the contested directive reads as follows:

‘Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: “the lowest price” and “the most economically advantageous tender”.

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. …’

4 Article 2 of that directive, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

5 Article 44 of that directive, entitled ‘Verification of the suitability and choice of participants and award of contracts’, provides:

‘1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject matter of the contract.

These minimum levels shall be indicated in the contract notice.

…’

6 Article 47(2) of Directive 2004/18 entitled ‘Economic and financial standing’, provides:

‘An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.’

7 Article 48 of Directive 2004/18 entitled ‘[t]echnical and/or professional ability’ states:

‘1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of the economic operators’ technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

(a) …

(ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. …

…

…

3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

…’

8 Article 51 of Directive 2004/18, headed ‘Additional documentation and information’, is worded as follows:

‘The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.’

9 Article 54 of Directive 2004/18 entitled ‘Use of electronic auctions’ states:

‘1. Member States may provide that contracting authorities may use electronic auctions.

…

4. Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them.

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; …

…

8. After closing an electronic auction contracting authorities shall award the contract in accordance with Article 53 on the basis of the results of the electronic auction.

Contracting authorities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject matter of the contract, as put up for tender in the published contract notice and defined in the specification.’

Directive 2014/24/EU

10 Recital 2 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) reads as follows:

‘… the public procurement rules adopted pursuant to Directive 2004/17/EC … should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement … There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.’

11 Article 63 of Directive 2014/24, entitled ‘Reliance on the capacities of other entities’, states as follows:

‘1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

…

2. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself …’

12 Under Article 90(1) of that directive:

‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016. …’

Polish law

13 Directive 2004/18 was transposed into the Polish national legal system by the Law on public contracts (codified text DZ. U of 2013, headings 907, 984, 1047 and 1473, and Dz. U of 2014, heading 423, ‘Law on public contracts’).

14 Article 26(2b) of the Law on public contracts provides:

‘The economic operator may rely on the knowledge and experience, technical capacity, staff able to perform the contract or financial capacities of other entities, regardless of the legal nature of the links which it has with them. In that case the economic operator is required to prove to the contracting authority that it will have at its disposal the resources necessary to perform the contract, inter alia by producing for that purpose a written undertaking by those entities that they will make available to it the necessary resources for the period during which they are used to perform the contract. …’

15 Article 83(2) and (3) of the Law on public contracts states:

‘2. The contracting authority may permit the submission of tenders for lots, where the subject matter of the contract can be divided.

3. In the case referred to in paragraph 2 the economic operator may submit tenders for one or more lots, unless the contracting authority has specified a maximum number of lots for which one economic operator may submit tenders.’

16 Article 91b(1) of the Law on public contracts provides:

‘The contracting authority shall invite electronically all the economic operators which have submitted non-rejected tenders to take part in an electronic auction.’

17 According to Article 93(1)(7) of the Law on public contracts:

‘The contracting authority shall annul the procedure for the award of the contract where … the award procedure is vitiated by an irreparable defect which prevents the conclusion of a non-annullable public contract.’

18 Article 1(6) of the Regulation of the president of the Council of Ministers of 19 February 2013 on the type of documents which may be required by the a contracting authority from an economic operator and the method of production of those documents (Dz. U. of 2013, heading 231) is worded as follows:

‘If, in order to establish that it meets the conditions referred to in Article 22(1) of the [Law on public contracts], an economic operator relies on the capacities of other entities pursuant to the provisions of Article 26(2b) of the [Law on public contracts], the contracting authority, in order to determine whether the economic operator will have capacities of other bodies to the extent necessary for the proper performance of the contract or whether the link between the economic operator and those entities does in fact ensure access to those capacities may require:

(1) with regard to the conditions referred to in Article 22(1)(4) of the [Law on public contracts], the documents listed in Article 22(1)(9) to (11), and the same for other documents relating to the economic and financial standing, as laid down in the tender notice or the tender specifications;

(2) documents relating in particular to:

(a) the extent of the resources of another entity which the economic operator is able to access;

(b) the rules governing the use by the economic operator of the resources of another entity in order to perform the contract;

(c) the nature of the link between an operator and another entity; and

(d) the extent and duration of the participation of another entity in the performance of the contract.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 It is apparent from the order for reference that, in December 2013, the Warsaw municipal cleansing authority initiated a procedure for the award of a public contract for the comprehensive mechanical cleansing of roadways in Warsaw in the winter and summer seasons of 2014 to 2017. The winter cleansing, which is the subject of that contract consists essentially in preventing and removing ice by salting and using snow-ploughs on certain categories of municipal roadways. Summer cleansing involves sweeping and wet cleaning of roadways.

20 The Warsaw municipal cleansing authority chose to conduct a tendering procedure which was to close with an electronic auction. The subject matter of the contract was divided into eight lots, corresponding to different districts of Warsaw, thereby allowing each tenderer either to submit a tender for the whole of that contract or a partial tender.

21 As provided for in the tender specifications, in order to demonstrate its technical abilities, each tenderer was required to submit a list of winter maintenance services for roadways with pre-wetting technology provided in the three years prior to the expiry of the deadline for submitting the tender. The total value of those services had to be at least PLN 1 000 000 (approximately EUR 224 442) for each of the eight lots of the contract at issue. Therefore, in order to submit a tender for the whole contract, a tenderer had to prove that it had provided services with a value of at least PLN 8 000 000 (approximately EUR 1 795 537).

22 Following the publication in the *Official Journal of the European Union* of the tender notice, Partner put itself forward as a candidate for the whole contract, stating that in the previous 3 years it had supplied 14 services, including 12 based on its own experience and 2 based on the experience of PUM z o.o. ('PUM'), which is established in Grudziądz (Poland), a town situated approximately 230 km from Warsaw.

23 In addition, it attached to its tender an undertaking by PUM, by which the latter made its capacities available to Partner, in particular, its consulting services including, among others, training for Partner's employees and help to resolve any problems which might arise at the performance stage of the contract. Partner also stated that, for the purposes of the performance of the contract that cooperation was to be governed by a contract between the two undertakings.

24 On 26 February 2014, the Warsaw municipal cleansing authority invited Partner to provide further details of the activities that PUM carried out and the effect that those activities might have on the quality and efficiency of the services provided in Warsaw, taking account, in particular, of the distance between Grudziądz and Warsaw.

25 Since it was not satisfied by Partner's answer, and it took the view that PUM's knowledge and experience could not be made available without the personal, actual participation of that company in the performance of the contract at issue, by letter of 11 March 2014, the Warsaw municipal cleansing authority requested Partner to supplement the documents in that respect.

26 In its answer of 18 March 2014, Partner challenged the approach adopted by the Warsaw municipal cleansing authority, and requested that its tender be taken into consideration when awarding each of the eight lots of that contract in a certain order of priority.

27 The Warsaw municipal cleansing authority nonetheless rejected Partner's tender in its entirety and closed the procurement procedure at issue after holding an electronic auction.

28 Therefore, Partner brought an action before the Krajowa Izba Odwoławcza (National Appeal Chamber) in order to obtain the annulment of the decision by which it has been excluded from the procurement procedure at issue and that which adopted the most advantageous offers for the various lots of that contract. Furthermore, it requested that the tenders submitted in that procurement procedure be re-examined and that it be allowed to take part in a new electronic auction.

29 In those circumstances, Krajowa Izba Odwoławcza (National Appeal Chamber), decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can Article 48(3) of Directive 2004/18 in conjunction with Article 2 thereof, be interpreted, where it states that "where appropriate" an economic operator may rely on the capacities of other entities, as covering any situation where a particular economic operator does not have the skills required by the contracting authority and wishes to rely on the capacities of other entities? Or must the indication that an economic operator may rely on the resources of other entities only "where appropriate" be regarded as a restriction indicating that such reliance may be had only exceptionally and not as a rule when providing evidence of the skills of economic operators in procedures for the award of public contracts?

(2) Can Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, be interpreted as meaning that reliance by an economic operator on the capacities of other entities in terms of their knowledge and experience "regardless of the legal nature of the links which it has with them" and "having at its disposal the resources" of those entities denote that during performance of the contract an economic operator need not have links with those entities or can have very loose and vague links, that is to say, it can perform the contract independently (without the involvement of another entity) or such participation can consist of "advice", "consultation", "training" and the like? Or must Article 48(3) be interpreted as meaning that the entity on whose capacities the economic operator relies must actually and personally perform the contract in so far as its capacities were declared?

(3) Can Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, be interpreted as meaning that an economic operator which has its own experience but to a lesser degree than it would like to indicate to the contracting authority (for example, insufficient experience to submit a tender for the whole contract) may rely additionally on the capacities of other entities to improve its situation in the procedure?

(4) Can Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, be interpreted as meaning that in the contract notice or the tendering specifications the contracting authority can (or even must) lay down the rules under which the economic operator may rely on the capacities of other entities, for example in what way the economic operators must participate in the performance of the contract, in what way the capacity of the economic operator and another entity can be combined, and whether the other entity will bear joint and several liability with the economic operator for the due performance of the contract in so far as the economic operator has relied on its capacities?

(5) Does the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 allow reliance on the capacities of another entity under Article 48(3) where the capacities of two or more entities which do not have the capacities in terms of knowledge and experience required by the contracting authority are combined?

(6) Therefore, does the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 allow an interpretation of Articles 44 and 48(3) of Directive 2004/18 to the effect that the conditions for participation in the procedure that are laid down by the contracting authority may be fulfilled just formally for the purposes of participating in the procedure and regardless of the actual skills of the economic operator?

(7) Where it is permitted to submit a tender for lots, does the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 allow an economic operator, after the submission of tenders, to state — for example in the context of the supplementing or explaining of documents — to which lot the resources specified by it in order to prove that the conditions for participation in the procedure have been fulfilled are to be assigned?

(8) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 of Directive 2004/18 allow an auction which has been carried out to be annulled and an electronic auction to be repeated where it was carried out improperly in an essential respect, for example where not all economic operators which submitted admissible tenders were invited to participate?

(9) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 of Directive 2004/18 allow a contract to be awarded to an economic operator whose tender was selected as a result of such an auction without it being repeated, where it is not possible to determine whether or not the participation of the economic operator which was not taken into consideration would have altered the result of the auction?

(10) In interpreting the provisions of Directive 2004/18, is it permitted to use as a guide to interpretation the content of the provisions of Directive 2014/24 and of the preamble thereto, even though the period for implementing it has not expired, in so far as it explains certain assumptions and intentions of the EU legislature and is not contrary to Directive 2004/18?’

Consideration of the questions referred for a preliminary ruling

Questions 1 to 3, 5 and 6

30 By questions 1 to 3, 5 and 6, which it is appropriate to examine together, the referring court asks the Court of Justice essentially to determine the conditions which must be met in order for an economic operator to rely on the capacities of other entities, within the meaning of Article 48(3) of Directive 2004/18, and to clarify the detailed rules according to which the necessary resources of those entities

are to be made available and, therefore, their possible participation in the performance of the contract concerned.

31 In order to answer those questions it must be recalled, as a preliminary point, that, according to Article 44(1) of Directive 2004/18, it is for the contracting authorities to check the suitability of the candidates or tenderers in accordance with the criteria referred to in Articles 47 to 52 thereof.

32 Furthermore, under Article 44(2) of Directive 2004/18 a contracting authority may require candidates or tenderers to meet minimum levels of economic and financial standing and technical and professional ability in accordance with Articles 47 and 48 of that directive.

33 According to the Court's settled case-law, Articles 47(2) and 48(3) of Directive 2004/18 recognise the right of every economic operator to rely, for a particular contract, upon the capacities of other entities, regardless of the nature of the links which it has with them, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the performance of the contract (see, to that effect, judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 29 and 33).

34 Such an interpretation is consistent with the aim of the widest possible opening-up of public contracts to competition pursued by the relevant directives to the benefit not only of economic operators but also of contracting authorities. In addition that interpretation also facilitates the involvement of small- and medium-sized undertakings in the contracts procurement market, an aim also pursued by Directive 2004/18, as stated in recital 32 thereof. (judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 34 and the case-law cited).

35 It follows that, taking account of its importance in the EU legislation on public procurement, the right established in Articles 47(2) and 48(3) of that directive constitutes a general rule which the contracting authorities must take into account when they exercise their powers of verification of the suitability of the tenderer to perform a specific contract.

36 In those circumstances, the fact that, under Article 48(3) of Directive 2004/18, an economic operator may rely on the resources of other entities 'where appropriate' cannot be interpreted as the referring court, in particular, appears to suggest, as meaning that it is only exceptionally that such an operator may rely on the resources of third party entities.

37 That being said, it must be stated, first, that, although it is free to establish links with the entities on whose resources it relies, and to choose the legal nature of those links, the tenderer is nonetheless required to produce evidence that it actually has available to it the resources of those entities or undertakings, which it does not itself own, and which are necessary for the performance of the contract (see to that effect, judgment in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 29 and the case-law cited).

38 Thus, in accordance with Articles 47(2) and 48(3) of Directive 2004/18, a tenderer may not rely on the resources of other entities in order to satisfy in a purely formal manner the conditions required by the contracting authority.

39 Second, as the Court has already held, the provisions of Directive 2004/18 do not preclude the exercise of the right established in Articles 47(2) and 48(3) thereof from being limited in exceptional circumstances (see, to that effect, judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 36).

40 It is conceivable that there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate. In such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44(2) of Directive 2004/18, as long as that requirement is related and proportionate to the subject matter of the contract at issue (judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 35).

41 Likewise, it is conceivable that, in specific circumstances, having regard to the nature and objectives of a particular contract, the capacities of a third party entity, which are necessary for the performance of a particular contract, cannot be transferred to the tenderer. Accordingly, in such circumstances, the tenderer may rely on those capacities only if the third party entity directly and personally participates in the performance of the contract concerned.

42 In the present case, the referring court expresses doubts as to whether PUM's capacities may genuinely be transferred to Partner so that the resources necessary for the performance of the contract at issue in the main proceedings may be placed at Partner's disposal in accordance with the terms of Article 48(3) of Directive 2004/18, given the fact that the resources in that case are made available simply by providing consultation and training services, without any direct participation by PUM in the performance of that contract.

43 In that connection, it must be observed that the public contract at issue in the main proceedings, described in paragraph 19 of the present judgment, is for the comprehensive mechanical cleansing of the roadways of Warsaw in winter and summer for four consecutive years.

44 In particular, as regards winter cleansing, it is apparent from the order for reference that that service requires specific skills and a detailed knowledge of the topography of the city of Warsaw and, above all, the ability to react immediately in order to attain specific maintenance standards for the roadways within a specific period.

45 Furthermore, that service is based on the use of specific technology requiring a level of experience and a high degree of skill in using it, which alone enables the contract at issue in the main proceedings to be performed properly while avoiding dangerous consequences for road traffic.

46 In those circumstances, the actual performance of such a contract requires the involvement of experienced staff who, inter alia, by directly observing the state of the surface of the roadways and carrying out on-the-spot tests are able to anticipate or, in any event, respond appropriately to the specific needs of that contract.

47 Taking account of the subject matter of the contract at issue in the main proceedings and its objectives, it is conceivable that PUM's proposed involvement, consisting simply in the provision of consultation and training services, cannot be regarded as sufficient in order to guarantee that Partner would have at its disposal the resources necessary for the performance of that contract within the meaning of the case-law set out in paragraph 33 of the present judgment. That is further justified by the fact that, as is apparent from the order for reference, PUM's registered office is situated in the city of Gurdziądz, approximately 230 km from Warsaw.

48 In those circumstances, it is for the referring court, taking account of all the specific facts of the contract at issue in the main proceedings, to determine whether resources would be made available to the tenderer in such a way as to meet the requirements laid down by that case-law.

49 Having regard to the foregoing considerations, the answer to questions 1 to 3, 5 and 6 is that Articles 47(2) and 48(3) of Directive 2004/18, read together with Article 44(2) thereof, must be interpreted as meaning that:

– they recognise the right of all economic operators, as regards a specific contract, to rely on the capacities of other entities, whatever the nature of the links existing between it and those entities, provided that it is proved to the contracting authority that the candidate or tenderer will have at its disposal the resources of those entities necessary for the performance of that contract, and

– it is conceivable that the exercise of that right may be limited, in specific circumstances, having regard to the subject matter of the contract concerned and its objectives. Such is the case, in particular, where the capacities that a third party entity has, which are necessary for the performance of that contract, cannot be transferred to the candidate or the tenderer, so that the latter may rely on those capacities only if that third party entity directly and personally participates in the performance of that contract.

The fourth question

50 By its fourth question, the referring court asks essentially whether Article 48(2) and (3) of Directive 2004/18 must be interpreted as meaning that the contracting authority has the possibility to expressly set out, in the tender notice or the tender specifications, the precise rules under which an economic operator may rely on the capacities of other entities.

51 In order to answer that question, it must be recalled, as stated in paragraphs 33 and 49 of the present judgment, that Articles 47(2) and 48(3) of Directive 2004/18 recognise the right of all economic operators to rely on the capacities of other entities, provided that it is proved to the contracting authority that the candidate or tenderer will have at its disposal the resources necessary for the performance of the contract concerned.

52 For that purpose, although the tenderer must prove that it will actually have at its disposal the resources of the other entity, which it does not itself own and which are necessary for the performance of the contract, it is nonetheless free to choose the legal nature of the links it intends to establish with the other entities on whose capacities it relies in order to perform a particular contract and, on the other, the type of proof of the existence of those links (judgment in *Ostas celtnieks*, C-234/14, EU:C:2016:6, paragraph 28).

53 Therefore, the contracting authority cannot, in principle, impose express conditions which may impede the exercise of the right of all economic operators to rely on the capacities of other entities, in particular, by indicating in advance the detailed rules according to which the capacities of those other entities may be relied on. That finding applies especially since, in practice, as the European Commission rightly observes, it appears difficult or even impossible for an economic operator to foresee, a priori, all the possible scenarios in which the capacities of other entities may be used.

54 That being said, as acknowledged in answer to questions 1 to 3, 5 and 6, having regard to the subject matter of the contract concerned and its objectives, the exercise of such a right may be limited in specific circumstances such as those set out in paragraphs 39 to 41 of the present judgment.

55 In such circumstances, it cannot be excluded from the outset that the contracting authority may, for the purposes of the proper performance of the contract concerned, expressly set out, in the tender notice or the tender specifications, the specific rules authorising an economic operator to rely on the capacities of other entities.

56 However, if the contracting authority decides to make use of such a possibility, it must ensure that the rules it adopts are related and proportionate to the subject matter and objectives of that contract.

57 Furthermore, such a requirement also helps to ensure compliance with the principle of transparency as regards the rules adopted by the contracting authority, while allowing economic operators the possibility to propose to the contracting authority alternative ways of relying on the capacities of other entities which ensure that those capacities are in fact made available.

58 Accordingly, the answer to question 4 is that Article 48(2) and (3) of Directive 2004/18 must be interpreted as meaning that, having regard to the subject matter of a particular contract and its objectives, the contracting authority may, in specific circumstances, for the purpose of the proper performance of that contract, expressly set out in the tender notice or the tender specifications the specific rules in accordance with which an economic operator may rely on the capacities of other entities, provided that those rules are related and proportionate to the subject matter and objectives of that contract.

The seventh question

59 By question 7, the referring court asks essentially whether the principles of equal treatment and non-discrimination of economic operators, laid down in Article 2 of Directive 2004/18, must be interpreted as meaning that they preclude a contracting authority, after the opening of the tenders submitted in a public procurement procedure, from allowing the request of an economic operator, which has submitted

a tender for the whole of the contract concerned, to consider its tender solely for the award of certain lots of that contract.

60 In order to answer that question, it must be recalled that, in accordance with recital 46 and Article 2 of Directive 2004/18, the contracting authorities are required to afford economic operators equal, non-discriminatory and transparent treatment.

61 Thus, first, the principles of equal treatment and non-discrimination require tenderers to be afforded equality of opportunity when formulating their bids, which therefore implies that the bids of all tenderers must be subject to the same conditions. Second, the principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract (see, to that effect, judgment in *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44 and the case-law cited).

62 Furthermore, as the Court has already held, the principles of equal treatment and non-discrimination and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification (judgment in Manova, C-336/12, EU:C:2013:647, paragraph 31 and the case-law cited).

63 However, the Court has explained that Article 2 of Directive 2004/18 does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors (judgment in *Manova*, C-336/12, EU:C:2013:647, paragraph 32 and the case-law cited).

64 To that end, the contracting authority must ensure, in particular, that the request for clarification does not lead to the submission, by a tenderer, of what would appear in reality to be a new tender (see, to that effect, judgment in *Manova*, C-336/12, EU:C:2013:647, paragraph 36).

65 Furthermore, when exercising its right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome (judgment in *Manova*, C-336/12, EU:C:2013:647, paragraph 37).

66 In the present case, as is apparent from the order for reference, the Warsaw municipal cleansing authority, having doubts as to whether Partner had the resources necessary for the performance of the contract at issue in the main proceedings, requested that company, after it had submitted its tender, to specify the nature of PUM's participation in the performance of the contract.

67 In answer to that request for clarification, Partner asked the Warsaw municipal cleansing authority, in the event that it considered the experience shown to be insufficient, to allocate the resources Partner relied on to each of the eight lots of the contract at issue in the main proceedings in a certain order of priority, so that a possible rejection would not concern the whole contract, but only the lots in respect of which it did not meet the conditions required.

68 It is common ground that such communication, by which an economic operator indicates to the contracting authority, after the opening of the tenders, the order of priority of the lots of the contract concerned according to which its tender should be assessed, far from being merely a clarification made on a limited or specific basis or a correction of obvious material errors, within the meaning of the case-law set out in paragraph 63 of the present judgment, constitutes, in reality, a substantive amendment which is more akin to the submission of a new tender.

69 It follows that the contracting authority cannot allow an economic operator to clarify its initial offer in such a way without infringing the principles of equal treatment and non-discrimination of economic operators and the obligation of transparency deriving from that, to which the contracting authority is subject under Article 2 of Directive 2004/18 (see, to that effect, judgment in *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 43).

70 It follows from the foregoing that the answer to question 7 is that the principles of equal treatment and non-discrimination of economic operators, set out in Article 2 of Directive 2004/18, must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, they preclude a contracting authority, after the opening of the tenders submitted in a public procurement procedure, from acceding to the request of an economic operator which has submitted a tender for the whole of the contract concerned, to take its offer into consideration for the purpose of awarding only certain lots of that contract.

Questions 8 and 9

71 By questions 8 and 9, which it is appropriate to examine together, the referring court asks essentially whether the principle of equal treatment and non-discrimination of economic operators, set out in Article 2 of Directive 2004/18, must be interpreted as meaning that they require the annulment and repetition of an electronic auction in respect of which an economic operator which submitted an admissible tender was not invited to participate, even if it cannot be established that the participation of the excluded operator would have changed the outcome of the auction.

72 In accordance with recital 14 and Article 1(7) of Directive 2004/18, recourse to electronic auctions enables contracting authorities, after an initial full evaluation of the tenders, to ask tenderers to submit new prices, revised downwards, and when the contract is awarded to the most economically advantageous tender, also to improve elements of the tenders other than prices.

73 In such a procedure, as that recital provides, Directive 2004/18 requires that electronic auctions operate in full accordance with the principles of equal treatment, non-discrimination and transparency.

74 For that purpose, first, Article 54(4) of Directive 2004/18 provides for the right of all tenderers which have submitted an admissible tender to be invited to participate in the electronic auction in order to submit new prices and/or new values.

75 Second, Article 54(8), second subparagraph, of that directive explicitly requires the contracting authorities, where they decide to organise an electronic auction, not to have recourse to such a procedure so as to prevent, restrict or distort competition or to change the subject matter of the contract as put up for tender in the published contract notice and defined in the specification.

76 It follows that, when a tenderer submits an admissible tender and thereby satisfies the criteria set out in the tender notice, the contracting authority must, in accordance with Article 54(4) of Directive 2004/18, ensure the tenderer is able to exercise its right to take part where appropriate, in the electronic auction.

77 Therefore, where such a tenderer is not invited to take part in that auction, as the Advocate General observed in paragraph 52 of his Opinion, the principles of equal treatment and non-discrimination, laid down in Article 2 of Directive 2004/18, require the contracting authority to annul and repeat the electronic auction.

78 In that connection, it must be stated that that applies independently of whether its participation would have altered the outcome of the auction or not.

79 The exercise of the tenderer's right to take part in an electronic auction cannot be subject in any way to the result proposed by it and thus, cannot be excluded from the outset by reason of hypothetical considerations expressed by the contracting authority.

80 In other words, as the Krajowa Izba Odwolawcza (National Chamber of Appeal) also pointed out in its order for reference, it is possible that an economic operator which has not been allowed to take part in

an electronic auction may have submitted the most advantageous tender, so that the error committed by the contracting authority necessarily requires the annulment and repetition of the auction.

81 Therefore, the answer to questions 8 and 9 is that the principles of equal treatment and non-discrimination of economic operators laid down in Article 2 of Directive 2004/18 must be interpreted as meaning that they require the annulment and repetition of an electronic auction in which an economic operator having submitted an admissible tender has not been invited to take part, even if it cannot be established that the participation of that operator would have altered the outcome of the auction.

Question 10

82 By question 10, the referring court asks essentially whether the provisions of Directive 2004/18 can be interpreted in the light of those of Directive 2014/24, even though the period within which to transpose the latter has not yet expired and provided that its provisions are not contrary to those of Directive 2004/18.

83 In order to answer that question, it must be recalled, as a preliminary point, that, according to settled case-law, the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (judgment in *Impresa Pizzarotti*, C-213/13, EU;C:2014:2067, paragraph 31 and the case-law cited).

84 In the case in the main proceedings, the procurement procedure in question was published on 24 December 2013 while Directive 2014/24 was adopted only on 26 February 2014 and, in any event, the period prescribed for its transposition will expire, in accordance with Article 90 thereof, on 18 April 2016.

85 In those circumstances, Directive 2014/24 is not applicable, *ratione temporis*, in the main proceedings.

86 Furthermore, to apply Directive 2014/24 which, as appears from its title, repeals Directive 2004/18, before the expiry of its period prescribed for transposition would prevent the Member States, as well as contracting authorities and economic operators from benefitting from a sufficient period in which to adapt to the new provisions introduced by it.

87 That being said, it must be observed, as is clear from the order for reference that, by its question, the referring court asks, inter alia, whether Article 48(3) of Directive 2004/18, which recognises the right of all economic operators to rely on the capacities of other entities for a particular contract, must be interpreted as taking into consideration the content of Article 63(1) of Directive 2014/24, which is the provision corresponding to Article 48.

88 In that connection, it must be observed, as the referring court noted, that Article 48(3) of Directive 2004/18 is formulated in general terms and does not expressly set out the detailed rules according to which an economic operator may rely on the capacities of other entities in a public procurement procedure.

89 However, Article 63(1) of Directive 2014/24 now provides that economic operators may ‘only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required’.

90 Although it is true, as stated, inter alia, by recital 2 of Directive 2014/24, Directive 2014/24 aims to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union, the fact remains that Article 63 of that directive introduces substantial amendments as regards the right of an economic operator to rely on the capacities of other entities in the context of public contracts.

91 Far from preserving the continuity of Article 48(3) of Directive 2004/18, and clarifying its scope, Article 63(1) of Directive 2014/24 introduces new conditions which were not provided for under the previous legislation.

92 In those circumstances, that provision of Directive 2014/24 cannot be used as a criterion for the interpretation of Article 48(3) of Directive 2004/18 since there is no question in the present case of dispelling a problem of interpretation concerning the content of the latter provision.

93 Another approach might in some way incorrectly anticipate the application of the new legislation which differs from that laid down by Directive 2004/18, and would be manifestly contrary to the principle of the legal certainty for economic operators, which, as is clear inter alia from recital 2 thereof, is a principle that Directive 2014/24 expressly intends to ensure is observed.

94 In view of the foregoing, the answer to question 10 is that, in circumstances such as those in the main proceedings, the provisions of Article 48(3) of Directive 2004/18 cannot be interpreted in the light of those of Article 63(1) of Directive 2014/24.

Costs

95 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Articles 47(2) and 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read together with Article 44(2) thereof, must be interpreted as meaning that:**

– **they recognise the right of all economic operators, as regards a specific contract, to rely on the capacities of other entities, whatever the nature of the links existing between it and those entities, provided that it is proved to the contracting authority that the candidate or tenderer will have at its disposal the resources of those entities necessary for the performance of that contract, and**

– **it is conceivable that the exercise of that right may be limited, in specific circumstances, having regard to the subject matter of the contract concerned and its objectives. Such is the case, in particular, where the capacities that a third party entity has, which are necessary for the performance of that contract, cannot be transferred to the candidate or the tenderer, so that the latter may rely on those capacities only if that third party entity directly and personally participates in the performance of that contract.**

2. **Article 48(2) and (3) of Directive 2004/18 must be interpreted as meaning that, having regard to the subject matter of a particular contract and its objectives, the contracting authority may, in specific circumstances, for the purpose of the proper performance of that contract, expressly set out in the tender notice or the tender specifications the specific rules in accordance with which an economic operator may rely on the capacities of other entities, provided that those rules are related and proportionate to the subject matter and objectives of that contract.**

3. **The principles of equal treatment and non-discrimination of economic operators, set out in Article 2 of Directive 2004/18, must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, they preclude a contracting authority, after the opening of the tenders submitted in a public procurement procedure, from acceding to the request of an economic operator which has submitted a tender for the whole of the contract concerned, to take its offer into consideration for the purpose of awarding only certain lots of that contract.**

4. **The principles of equal treatment and non-discrimination of economic operators laid down in Article 2 of Directive 2004/18 must be interpreted as meaning that they require the annulment and repetition of an electronic auction in which an economic operator having submitted an admissible tender has not been invited to take part, even if it cannot be**

established that the participation of that operator would have altered the outcome of the auction.

5. In circumstances such as those in the main proceedings, the provisions of Article 48(3) of Directive 2004/18 cannot be interpreted in the light of those of Article 63(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18.

[Signatures]

---

* Language of the case: Polish.

OPINION OF ADVOCATE GENERAL

JÄÄSKINEN

delivered on 8 September 2015 (1)

Case C-324/14

Partner Apelski Dariusz

v

Zarząd Oczyszczania Miasta

(Request for a preliminary ruling from the Krajowa Izba Odwoławcza (Poland))

(Public procurement — Directive 2004/18/EC — Article 48(3) — Technological and professional capacity of an economic operator — Reliance by tenderers 'where appropriate' on the capacities of other entities — Character of the links between the tenderer and these other entities — Form and degree of the use of the capacities of other entities — Details required in the contract notice — Pertinence of Directive 2014/24/EU to the interpretation of Directive 2004/18)

I – Introduction

1. This request for a preliminary ruling from the Krajowa Izba Odwoławcza (National Appeal Chamber) concerns two legal issues that are relevant to the field of public procurement law, and a third that concerns the broader issue of the extent to which a directive that has not yet entered into force in the relevant period *ratione temporis*, and the implementation period of which has not expired, can be used as an aid to interpretation of a directive that it will ultimately replace.

2. In substance, the Zarząd Oczyszczania Miasta (the municipal cleansing authority; 'the contracting authority'), an organisational unit of the capital city of Warsaw, excluded Partner Dariusz Apelski (hereafter 'Partner') from the procedure for the award of a public contract for mechanical cleaning of the roads of Warsaw. It did so because it was not persuaded that Partner would duly perform the contract, given that part of its tender included services to be provided by a third party located in another and relatively remote Polish town.

3. In the first group of questions referred by the Krajowa Izba Odwoławcza the Court is asked essentially, if not exclusively, about the proof required from an economic operator when it relies on 'the capacities of other entities' for a particular contract pursuant to Article 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (2) These questions include queries about the content of the contract notice and clarification of the tender. The second group of questions asks about the circumstances in which an electronic auction already completed by a contracting authority is to be annulled for irregularities in the tendering process.

4. Finally, by the last question, the Court is asked whether Directive 2014/24/EU of the European Parliament and of the Council 26 February 2014 on public procurement and repealing Directive 2004/18/EC (3) can be used as a guide to interpretation of Directive 2004/18 in order to solve the problems to hand, even though Directive 2014/24 had not yet entered into force at the date the contract award procedure was published.

II – **Legal framework**

A – *Directive 2004/18*

5. Article 2 of Directive 2004/18 entitled ‘[p]rinciples of awarding contracts’ states that ‘[c]ontracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

6. Article 44 of Directive 2004/18 entitled ‘[v]erification of the suitability and choice of participants and award of contracts’ states as follows:

> ‘1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.
>
> 2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.
>
> The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.
>
> These minimum levels shall be indicated in the contract notice.
>
> …’

7. Article 48 of Directive 2004/18 entitled ‘[t]echnical and/or professional ability’ states that:

> ‘1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.
>
> 2. Evidence of the economic operators’ technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:
>
> (a) (i) …
>
> (ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved
>
> …
>
> 3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.
>
> …’

8. Article 51 of Directive 2004/18 entitled ‘[a]dditional documentation and information’ states that the ‘contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50’.

9. Article 54 of Directive 2004/18 entitled ‘use of electronic auctions’ states:

> ‘1. Member States may provide that contracting authorities may use electronic auctions.
>
> …’

4. Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them.

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; …

…

8. After closing an electronic auction contracting authorities shall award the contract in accordance with Article 53 on the basis of the results of the electronic auction.

Contracting authorities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject-matter of the contract, as put up for tender in the published contract notice and defined in the specification.'

B – *Directive 2014/24*

10. Article 63 of Directive 2014/24 is entitled 'reliance on the capacities of other entities', and states as follows:

'1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

…

2. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself …'

11. Article 90(1) of Directive 2014/24 entitled '[t]ransposition and transitional provisions' states that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016. They shall forthwith communicate to the Commission the text of those measures.' Pursuant to Article 93 Directive 2014/24 entered into force on the twentieth day following that of its publication in the Official Journal, which took place on 28 March 2014.

III – **Facts, procedure and questions referred**

12. The contracting authority conducted a procedure for the award of a public contract for 'comprehensive mechanical cleansing of roadways of the capital city of Warsaw in the winter and summer season in the years 2014-17 — Stage I'. The procedure was published in the *Official Journal of the European Union* of 24 December 2013, since the value exceeded EU thresholds. The contracting authority divided the contract into eight lots covering the separate districts of Warsaw and allowed tenders for lots without limiting the number of lots for which an economic operator could tender. It conducted an open procedure (open tendering), which provided for the holding of an electronic auction.

13. Winter cleansing consists in preventing and removing icy conditions by salting and ploughing national, regional, district and municipal roadways used by urban public transport. Summer cleansing involves sweeping and wet cleaning of roadways. According to the tendering specifications, economic operators had to demonstrate that in the three years prior to the time-limit for submitting tenders, or, where the period during which the activity was carried on was shorter, in that period, they had performed, or were

performing, a service or services consisting in the winter maintenance of roadways having a total value of at least PLN 1 000 000.

14. The contracting authority indicated that in evaluating whether that condition had been fulfilled it would take account solely of services using pre-wetting technology to prevent or remove icy conditions. (4) The contracting authority also indicated that where tenders for more than one lot were submitted, the economic operator had to carry out work with a correspondingly higher value, that is to say PLN 1 000 000 multiplied by the number of lots for which it tendered. Therefore, an economic operator which tendered for eight lots must have proven services with a value of at least PLN 8 000 000. (5)

15. In the list of services attached to the tender Partner referred to 14 services, 12 of which were based on its own experience, and two on the experience of PUM Sp. z o.o. ('PUM'), an undertaking established in Grudziądz (some 227 kilometres from Warsaw) as another entity on whose resources Partner relied. Partner attached to the tender an undertaking by PUM to 'make available the necessary resources'. The undertaking set out the way in which the resources made available would be used, namely advisory services covering, inter alia, training of the economic operator's workers, and providing the economic operator with consultation, including help to resolve any problems which might arise at the performance stage of the contract.

16. After the contracting authority had informed Partner on 11 March 2014 that it considered the economic operator as not having the necessary means for executing the contract Partner replied on 18 March 2014 that, if the contracting authority considered that the experience demonstrated was insufficient, its other experience should have been attributed in the following order: lots V, I, II, III, VIII, IV, VII, VI. In that respect it argued that where an economic operator submits a tender for several lots, the tender can be treated separately in relation to each of them. Therefore, any exclusion of an economic operator and rejection of its tender may not relate to the entire contract but only to the individual lots thereof in relation to which the economic operator failed to fulfil the conditions.

17. The contracting authority did not take account of the partial experience of Partner, and excluded it from the procedure in respect of each lot pursuant to Article 24(2)(4) of the Law on Public Contracts (Ustawa PZP) (6) on the ground that it had failed to prove that it had fulfilled the conditions for participation in the procedure. The contracting authority considered that, having regard to the specific nature of the work, the familiarity with the topography of the city, and the time requirements for attaining the specific winter maintenance standards etc., it would not be possible to reliably satisfy the obligation arising from the procedure carried out without the personal participation of PUM in the performance of the contract requirements. Thereafter the contracting authority organised an electronic auction to which Partner was not invited to participate.

18. In the appeal lodged with the Krajowa Izba Odwoławcza Partner alleged that the contracting authority had carried out a defective examination and evaluation of the tenders. It argued that the contracting authority had not pointed out in the tendering specifications that fulfilment of the condition relating to relevant knowledge and experience is contingent on the personal participation in the performance of the contract of the entity which made knowledge and experience available to Partner, or that the experience must relate to specific topographic knowledge.

19. The Krajowa Izba Odwoławcza referred the following questions to the Court under Article 267 TFEU.

'(1) Can Article 48(3) of Directive 2004/18 … in conjunction with Article 2 thereof, be interpreted, where it states that "where appropriate" an economic operator may rely on the capacities of other entities, as covering any situation where a particular economic operator does not have the skills required by the contracting authority and wishes to rely on the capacities of other entities? Or must the indication that an economic operator may rely on the resources of other entities only "where appropriate" be regarded as a restriction indicating that such reliance may be had only exceptionally and not as a rule when providing evidence of the skills of economic operators in procedures for the award of public contracts?

(2) Can Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, be interpreted as meaning that reliance by an economic operator on the capacities of other entities in terms of their knowledge and experience "regardless of the legal nature of the links which it has with them" and "having at its disposal the resources" of those entities denote that during performance of the contract an economic operator need not

have links with those entities or can have very loose and vague links, that is to say, it can perform the contract independently (without the involvement of another entity) or such participation can consist of “advice”, “consultation”, “training” and the like? Or must Article 48(3) be interpreted as meaning that the entity on whose capacities the economic operator relies must actually and personally perform the contract in so far as its capacities were declared?

(3) Can Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, be interpreted as meaning that an economic operator which has its own experience but to a lesser degree than it would like to indicate to the contracting authority (for example, insufficient experience to submit a tender for the whole contract) may rely additionally on the capacities of other entities to improve its situation in the procedure?

(4) Can Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, be interpreted as meaning that in the contract notice or the tendering specifications the contracting authority can (or even must) lay down the rules under which the economic operator may rely on the capacities of other entities, for example in what way the economic operators must participate in the performance of the contract, in what way the capacity of the economic operator and another entity can be combined, and whether the other entity will bear joint and several liability with the economic operator for the due performance of the contract in so far as the economic operator has relied on its capacities?

(5) Does the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 allow reliance on the capacities of another entity under Article 48(3) where the capacities of two or more entities which do not have the capacities in terms of knowledge and experience required by the contracting authority are combined?

(6) Therefore, does the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 allow an interpretation of Articles 44 and 48(3) of Directive 2004/18 to the effect that the conditions for participation in the procedure that are laid down by the contracting authority may be fulfilled just formally for the purposes of participating in the procedure and regardless of the actual skills of the economic operator?

(7) Where it is permitted to submit a tender for lots, does the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 allow an economic operator, after the submission of tenders, to state — for example in the context of the supplementing or explaining of documents — to which lot the resources specified by it in order to prove that the conditions for participation in the procedure have been fulfilled are to be assigned?

(8) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 of Directive 2004/18 allow an auction which has been carried out to be annulled and an electronic auction to be repeated where it was carried out improperly in an essential respect, for example where not all economic operators which submitted admissible tenders were invited to participate?

(9) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 2 of Directive 2004/18 allow a contract to be awarded to an economic operator whose tender was selected as a result of such an auction without it being repeated, where it is not possible to determine whether or not the participation of the economic operator which was not taken into consideration would have altered the result of the auction?

(10) In interpreting the provisions of Directive 2004/18, is it permitted to use as a guide to interpretation the content of the provisions of Directive 2014/24 … and of the preamble thereto, even though the period for implementing it has not expired, in so far as it explains certain assumptions and intentions of the EU legislature and is not contrary to Directive 2004/18?’

20. Written observations were received from Partner, Remondis sp.z o.o. and Mr Road Service sp. Z o.o., intervening in the main proceedings, the Governments of Spain, Latvia and Poland, along with the Commission. All of them, aside from the Government of Latvia, participated in the hearing that took place on 7 May 2015, as did the contracting authority, although it had not filed written observations.

IV – **Analysis**

A – *Questions concerning reliance on another economic operator's technical and professional capacities (Questions 1, 2, 3, 5 and 6)*

21. Pursuant to these questions, which I will consider together, the national referring court is essentially asking for guidance on the circumstances in which a tenderer may, for a particular contract, rely on the capacities of other entities with regard to technological and/or professional ability when tendering for a given contract. This facility is provided for under Article 48(3) of Directive 2004/18. In my opinion these questions cover basically three problems. They are (1) a tenderer's entitlement to rely on external capacities to fulfil contract requirements with respect to technical and/or professional ability; (2) the reality of reliance on third party capacities, and; (3) whether such capacities are transferable in the sense they may be relied on in the light of the nature and objective of the contract concerned. It goes without saying that Article 2, which embodies the general principle of non-discrimination and transparency, is pertinent to answering all the questions.

22. At the outset it is useful to underscore the difference between reliance on the capacities of other entities under Article 48(3) of Directive 2004/18, and subcontracting as provided in Article 25 thereof. As pointed out in the written observations of Spain, these legal arrangements are different in two respects. With respect to reliance on third party capacities, these are integrated with those of the tenderer prior to the award of the contract, while subcontracting is concluded at the point of the contract's execution. Secondly, subcontracting is subject to limitations that do not apply to reliance on the capacities of third parties. (7)

1. An economic operator's entitlement to rely on external capacities

23. As far as the words 'where appropriate' in Article 48(3) of Directive 2004/18 are concerned, they impose no substantive limitation on the circumstances in which an economic operator can call on the resources of a third party when tendering for a public contract.

24. I pointed out in my Opinion in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:130) that the wording of Article 48(3) of Directive 2004/18 is suggestive of a right of economic operators to choose this method of fulfilling the selection criteria, provided they can prove they actually have at their disposal the resources of the other entities concerned that are necessary to carry out the contract in question. (8) This interpretation is most in conformity with the goal of opening up public contracts to the widest possible competition, and the encouragement of access thereto of small and medium sized undertakings.

25. Furthermore, it was found by the Court in *Holst Italia* (C-176/98, EU:C:1999:593), and later confirmed in Article 48(3) of Directive 2004/18, that the nature of the legal links between the economic operator and the third entity or entities on which it seeks to rely is irrelevant. (9)

26. Hence, in the light of the Court's case-law, there can in principle be no objection to a tenderer relying additionally on the capacities of other entities to improve its situation in the contract procedure. This is subject, however, to the limitations I shall discuss below. As pointed out in the written observations of the Commission, what counts is that the tenderer *actually has at its disposal* the capacities of other entities in order to properly execute the contract. This 'disposition' needs to take no particular legal form.

2. The reality of third party capacities relied on by the tenderer

27. Notwithstanding what has been said in the preceding paragraphs, the onus rests on tenderers who rely on the capacities of others entities to prove to the contracting authority that they in fact are available to them. (10) From this perspective, Article 48(3) of Directive 2004/18 might best be viewed as one imposing an evidential requirement, and one in which the assessment of that proof is left to the contracting authority. Pursuant to Article 44(1) of Directive 2004/18, it is for the contracting authorities to check the suitability of candidates or tenderers in accordance with the criteria referred to in Articles 47 to 52 of Directive 2004/18. (11) In other words, as emphasised by the contracting authority and Poland at the hearing, a contracting authority is bound by an obligation to ensure that the successful tenderer is actually able to properly execute the contract.

28. The goal of the provisions of Directive 2004/18 concerning the participation of third parties in the execution of public contracts is to avoid the situation in which an undertaking would be entitled to have

access to a contract award even though it doesn't have the necessary means to execute the contract. Hence, Article 48(3) of Directive 2004/18 precludes a contracting authority from taking a purely formal approach to the proof supplied by a tenderer, due to the duties by which it is bound. In other words, it is not acceptable that tenderers refer to third party capacities if it is done only for the purpose of formally fulfilling the minimum capacity condition set out in the contract notice.

3. Transferability of technological and/or professional abilities

29. In *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646) the Court interpreted Articles 47(2) and 48(3) of Directive 2004/18, read in conjunction with Article 44(2) of Directive 2004/18, as precluding a general rule prohibiting economic operators participating in a tendering procedure for a public works contract from relying on the capacities of more than one undertaking for the same qualification category. However, the Court also observed that 'there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator' and that 'in such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator'. (12)

30. That said, the problem in issue is, however, whether the capacities relating to technological and professional ability specified in the contract award notice are transferable. If they are not, Partner would not qualify as a tenderer.

31. Transferability of technological capacities relates to the question of whether technology or know-how can meaningfully be transferred from one economic operator to another, for example by means of consultations and the provision of advice. In the written observations there are also points which rather relate to the issue of whether such capacities of different entities can be added on in general, which in my opinion is the approach taken by the EU legislature in Article 48 of Directive 2004/14. However, in the main proceedings the real dispute concerns the issue whether the technological ability of PUM was transferable to Partner without the first mentioned economic operator itself participating directly in the execution of the contract. The dispute is not about simply adding similar capacities to those that Partner already has.

32. Much depends on the facts and the nature and object of the contract. Capacities exist that are transferrable. Let us imagine a contract award by a public health service provider concerning screening for a form of cancer using a standard technology, and which is to be provided to a defined group of people. Let us further imagine that the terms of the contract award state that in unclear cases the findings must be confirmed by a specialist having certain and superior professional qualifications. In such circumstances there should be no reason why a tenderer could not rely on a third party who is to provide the necessary consultation. However, if the contract concerned screening by means of a new and non-standard methodology, the contracting authority could reasonably require that the tenderer itself possesses relevant capacity. Here we are faced with a question of the factual circumstances of the contract award.

33. Thus, as I have already mentioned, account must be taken of the nature of each contract and the need to be fulfilled. This is a question to be assessed by the national court.

34. Whether or not a contracting authority may require the participation of a third party entity in the execution of the contract, as the sole means of proving that the relevant capacities are at the disposal of the tenderer concerned, this is also a question to be assessed on a case-by-case basis. It will all depend on the nature and objective of the contract. In my opinion it is easy to envisage scenarios in which the commitment concerned is of such a degree of technical difficulty that it must be executed by the third party possessing the relevant expertise if its capacity is relied upon, rather than on the basis of advice and counselling on the part of such an entity, with the relevant commitment being executed by the tenderer itself.

4. Intermediary conclusion

35. On the basis of the observations above, Questions 1, 2, 3, 5 and 6 can be answered as follows: Articles 44 and 48(3) of Directive 2004/18, read in conjunction with Article 2 thereof, are to be interpreted in the sense that the term 'where appropriate' imposes no substantive limitation on the circumstances in which an economic operator may rely on the capacities of other entities in order to prove to a contracting authority that it will have the technological and/or professional ability necessary for the execution of a given public contract. The nature of the legal links between the economic operator and the third party entity is irrelevant,

but the economic operator must be able to prove to the contracting authority that it in fact has at its disposal all the means to execute the terms of the contract. A tenderer may rely on the capacities of other entities to prove its technological and/or professional ability, subject to the limitations flowing from the nature and objective of the contract, the execution of which is required.

B – *Contract notice, tendering specifications and joint and several liability (Question 4)*

36. Question 4 essentially asks whether the contracting authority can, (or even must), in the contract notice or tendering specifications lay down the rules under which tenderers may or may not rely on the capacities of other entities. To be more specific, can the contracting authority stipulate the way in which the tenderer is bound to participate in the performance of the contract, the manner in which the capacities of the tenderer concerned and other entities can be combined, and whether the other entity will bear joint and several liability with the tenderer for the due performance of the contract in so far as the tenderer has relied on its capacities?

37. Spain states in its written observations that the contract notice or tender specifications should stipulate the rules pursuant to which a tenderer can rely on the capacities of other entities, provided that these requirements are proportionate and are directly connected to the object of the contract concerned. The written observations of Poland also argue in this sense.

38. However, in my opinion the correct position is the one defended by the Commission. It points out in its written observations that because tenderers are entitled to rely on the capacities of third party entities, contracting authorities are precluded from imposing any express conditions that may impede that right. The tenderer is entitled to determine how it will access these capacities. The Commission rightly adds that, for practical reasons, it might be nearly impossible for the contracting authority to fix, in advance, specifications on the ways in which the capacities of others can be relied upon; it cannot predict in advance all possible scenarios for the use of capacities of others. This is, of course, subject to the absence of criteria set out in the *Swm 2 costruzione* case-law concerning situations where such reliance is excluded.

39. The general principles developed by the Court concerning the contract notice and tendering specifications and the *principle of transparency* are relevant to this question. I recall that the obligation of transparency is intended to preclude any risk of arbitrariness on the part of the contracting authority, (13) and that the principle of equal treatment and the obligation of transparency prohibit the contracting authority from rejecting a tender which satisfies the requirements of the invitation to tender on grounds which are not set out in the tender specifications. (14) I also note that Article 23(2) of Directive 2004/18 states that technical specifications ‘shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition’ while pursuant to Article 23(3)(c), technical requirements can include performance requirements.

40. In my opinion, if the particular conditions set out in the judgment in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraph 35) arise, and the contracting authority imposes, *as a condition of the contract award procedure,* that the minimum capacity level concerned be achieved by a single economic operator, then it is required to state this beforehand in the contract notice and/or tendering specifications. In such circumstances, the facility for reliance on third party capacity in Article 48(3) of Directive 2004/18 is excluded. This would seem to be the only means of complying with the obligation of transparency in the examination of the suitability of the candidates because otherwise potential tenderers would not be informed of all obligatory and unconditional requirements relating to minimum capacities. (15)

41. This is, however, a different question than the appreciation of whether a tenderer relying on third party capacities *in fact* satisfies the conditions of technological and/or professional ability required in the tender notice. This matter can only be examined on the basis of the tenders when compared to the suitability requirements stated in the tender notice and tendering specifications, in light of the criteria described above in the context of Questions 1, 2, 3, 5 and 6.

42. Finally, with respect to joint and several liability, the written observations of the Commission have sought to rely on Article 63(1), third line, of Directive 2014/24 in order to support an argument in its favour. Partner and Spain, on the other hand, argue that the imposition of joint and several liability is not possible, given that it is only the tenderer who has participated in the tendering procedure that is responsible for the contract’s execution, and not any third entity on whose capacities it has relied.

43. For the reasons that I shall set out in my answer to Question 10, no unconditional rules can be derived from Directive 2014/24 in applying Directive 2004/18, when they are either absent from Directive 2004/18 or impose more detailed norms or requirements than the corresponding provisions thereof. Therefore, imposition of joint and several liability should be excluded before the period for implementing Directive 2014/24 expires.

44. For these reasons the Court should respond to Question 4 in the sense that Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, must be interpreted as meaning that, in the contract notice or the tendering specifications, the contracting authority is required to specify any condition entailing the preclusion of recourse to Article 48(3) of Directive 2004/18 for demonstrating fulfillment of requirements relating to minimum capacities. The contracting authority is otherwise precluded from laying down in the contract notice or the tendering specifications express conditions or rules concerning if and how tenderers may rely on the capacities of other entities.

C – *Clarification of the tender (Question 7)*

45. Question 7 essentially asks about the extent to which dialogue can be entered into between the contracting authority and the tenderer, for example in the context of supplementing or explaining documents after the submission of tenders, when it is possible to tender in lots. I recall in this respect that according to Article 51 of Directive 2004/18 the contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50 thereof.

46. In my opinion the Court can supply a short answer to this question. The Court has already excluded any negotiation between the contracting authority and one or other of the tenderers. Contracting authorities may not request clarification of tenders which it regards as imprecise or as failing to meet the technical requirements of the tender specification before such tenders are rejected. (16)

47. Once a tender is made, it cannot be modified, either at the initiative of the tenderer or the contracting authority. (17) The latter can exceptionally request amplification of details, such as mere clarification or corrections of obvious material errors, without requesting or accepting any amendment to the tender. (18)

48. In my opinion providing information concerning the order of priority of lots covered by a tender after the submission of the tenders is not a mere precision but a material change to the tender. Accepting it would amount to a breach of the principles of fair competition. This does not fall within the exceptional set of circumstances in which clarifications of tenders is permissible.

49. Thus, in my opinion Question 7 should be answered in the sense that, where it is permitted to submit a tender for lots, the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 does not allow an economic operator, after the submission of tenders, to state to which lot the resources specified by it in order to prove that the conditions for participation in the procedure have been fulfilled are to be attributed.

D – *Irregularities in electronic auction (Questions 8 and 9)*

50. Questions 8 and 9 concern the consequences that follow, in the terms of the award of a contract, when all suitable tenderers have not been allowed to participate in an electronic auction.

51. Here I recall at the outset that in accordance with Article 54(4), second subparagraph, of Directive 2004/18 ‘[a]ll tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values’. Article 54(8) of Directive 2004/18 precludes recourse to electronic auctions to, inter alia, prevent or distort competition. I observe further that the national court is not querying the remedies available to the economic operators in relation to an irregular electronic auction, (19) but the obligations of the contracting authority under Directive 2004/18 in such a situation.

52. In my opinion, if a suitable tenderer fulfilling the criteria set out in the contract notice and technological specifications should have been invited to take part in the electronic auction, pursuant to Article 54(4) of Directive 2004/18, but was not, then it follows from the requirement of equal and non-discriminatory treatment as set out in Article 2 of Directive 2004/18 that the auction should be repeated. This applies independently of whether its participation would have altered the outcome of the auction or not. (20)

This means that the contract cannot be awarded on the basis of illegal or irregular electronic auctions of this kind.

53. I therefore propose that Questions 8 and 9 are answered in the sense that Article 2 of Directive 2004/18 requires the annulment and repetition of an electronic auction if a candidate fulfilling the criteria of participation in the contract award was not invited to the electronic auction.

E – *Can Directive 2014/24 be taken into account in the interpretation of Directive 2004/18? (Question 10)*

54. The referring national court queries in Question 10 whether, in interpreting the provisions of Directive 2004/18, it is permitted to use as a guide to interpretation the content of the provisions of Directive 2014/24, and of the preamble thereto, even though the period for implementing it has not expired, in so far as it explains certain assumptions and intentions of the EU legislature and is not contrary to Directive 2004/18.

55. This issue is related to the fact that Article 63(1) of Directive 2014/24 is entitled 'reliance on the capacities of other entities' and provides rules applicable to this situation that are more detailed than those which appear in Directive 2004/18. Article 63(1) of Directive 2014/24, like Article 48(3) of Directive 2004/18, provides that the 'legal nature' of the links between the entities is immaterial. However, Article 63(1) of Directive 2014/24 adds that when the operator concerned is dependent on 'educational and professional qualifications', or 'professional experience', it may only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Moreover, Article 63(2) of Directive 2014/24 states that the contracting authorities may require that certain critical tasks be performed directly by the tenderer itself.

56. I note at the outset that the problem the national court is faced with concerns the interaction *between two EU legislative acts*. Therefore the case-law concerning Member States' obligations during the period prescribed for transposition of a directive (21) on interpretation of national law during that period (22) is not pertinent.

57. Furthermore, I recall that the Court has recently held that in circumstances in which Directive 2014/24/EU entered into force after the facts in the main proceedings in issue, it could not be applicable to that dispute. (23) This is consistent with its previous findings in the context of the transition period between Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (24) and Directive 2004/18. In a case in which a bid was excluded from the procedure for the award of a contract before the date on which the period for transposition of Directive 2004/18 had expired, the Court held that it would 'be contrary to the principle of legal certainty to determine the law applicable to the case in the main proceedings by reference to the date of the award of the contract'. (25) It therefore held that 'Directive 2004/18 is not applicable to a decision taken by a contracting authority when awarding a public works contract before the period for transposition of that directive has expired'. (26) However, the national court in the case to hand is not asking in detail about the relationship between the particular provisions of the older and new directives, and seeks only general guidance.

58. This said, the Court has on at least one occasion relied on both a recital and provision of Directive 2014/24 in interpreting Directive 2004/18. However, it did not explain the reasons for so doing. (27)

59. In my opinion the relationship between two successive EU legislative acts in terms of interpretation must be addressed with due regard to the legislative intent. However, the formulation of Question 10 is not helpful in this respect because it is not clear whether the reference to 'certain assumptions and intentions of the EU legislature' refers to those in the context of Directive 2014/24 or Directive 2004/18.

60. For me it is evident that Directive 2014/24 cannot explain the legislative intent of Directive 2004/18. However, it may stem from the preamble and provisions of Directive 2014/24 that the legislative intent relating to certain of its provisions was to codify the existing case-law in which Directive 2004/18 has been applied. In such situations there is no obstacle to taking into account the later directive in the interpretation of the former. On the other hand, if the legislative intent is to depart from the provisions of Directive 2004/18, or the existing case-law, then the new directive cannot serve as a guide to interpretation of the previous one.

61. At the other end of the scale, the national referring court mentions a proviso. Question 10 implies that the taking into account of Directive 2014/24/EU will be precluded if it is 'contrary to Directive 2004/18'.

This stems, of course, from the principle of legal certainty which prohibits retroactive application of an instrument which is not applicable *ratione temporis*. (28)

62. At the heart of the question are, however, the provisions of Directive 2014/24 which add detail to Directive 2004/18 or case-law where it is applied where there is no logical contradiction between the acts, Directive 2004/18 being silent or imprecise on the matter concerned.

63. In my opinion, it follows from the principle of legal certainty that unconditional rules or conditions based on Directive 2014/24 cannot be applied as 'interpretations' of Directive 2004/18 to the detriment of economic operators participating in contract award procedures. However, if the legislative intent behind the relevant provisions of Directive 2014/24 is rather to further develop harmonisation of the existing legislation and case-law, and not to rupture it, then there is no obstacle to using them as a guide in interpretation of Directive 2004/18.

64. For these reasons I propose that Question 10 be answered in the sense that in interpreting the provisions of Directive 2004/18 it is permitted to use as a guide to interpretation the content of the provisions of Directive 2014/24, and of the preamble thereto, even though the period for implementing it has not expired, in so far as it codifies case-law applying Directive 2004/18, or adds detail thereto, but is neither contrary to Directive 2004/18 nor sets out unconditional rules or conditions to the detriment of economic operators.

V – **Conclusion**

65. On the basis of the preceding reasons, I propose that the Court give the following answers to the questions referred by the Krajowa Izba Odwoławcza:

Questions 1, 2, 3, 5 and 6

Articles 44 and 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read in conjunction with Article 2 thereof, are to be interpreted in the sense that the term 'where appropriate' imposes no substantive limitation on the circumstances in which an economic operator may rely on the capacities of other entities in order to prove to a contracting authority that it will have the technological and/or professional ability necessary for the execution of a given public contract. The nature of the legal links between the economic operator and the third party entity is irrelevant, but the economic operator must be able to prove to the contracting authority that it in fact has at its disposal all the means to execute the terms of the contract. A tenderer may rely on capacities of other entities to prove its technological and/or professional ability, subject to the limitations following from the nature and objective of the contract, the execution of which is required.

Question 4

Article 48(3) of Directive 2004/18, in conjunction with Article 2 thereof, must be interpreted as meaning that, in the contract notice or the tendering specifications, the contracting authority is required to specify any condition entailing the preclusion of recourse to Article 48(3) of Directive 2004/18 for demonstrating fulfilment of requirements relating to minimum capacities. The contracting authority is otherwise precluded from laying down in the contract notice, or the tendering specifications, express conditions or rules concerning if and how tenderers may rely on the capacities of other entities.

Question 7

Where it is permitted to submit a tender for lots, the principle of equal and non-discriminatory treatment of economic operators set out in Article 2 of Directive 2004/18 does not allow an economic operator, after the submission of tenders, to state to which lot the resources specified by it in order to prove that the conditions for participation in the procedure have been fulfilled are to be attributed.

Questions 8 and 9

Article 2 of Directive 2004/18 requires the annulment and repetition of an electronic auction if a candidate fulfilling the criteria of participation in the contract award was not invited to the electronic auction.

Question 10

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC can be used as guide to interpreting Directive 2004/18, even though the period for implementing Directive 2014/24 is yet to expire, but only in so far as it codifies case-law in which Directive 2004/18 has been applied, or adds detail thereto, and that the relevant provisions of Directive 2014/24 are neither contrary to Directive 2004/18 nor set out obligatory rules or conditions to the detriment of economic operators.

---

1 – Original language: English.

---

2 – OJ 2004 L 134, p. 114.

---

3 – OJ 2014 L 94, p. 65.

---

4 – That is to say sodium chloride or a mixture of sodium chloride and calcium chloride, which is wetted when sprayed and turns into salt solution.

---

5 – The order for reference states that, at the hearing before the national court, the contracting authority stated that it evaluated fulfilment of that condition by aggregating the value of the services which were demonstrated and accepted and dividing it by 1 000 000, thus obtaining the number of lots in respect of which the economic operator had fulfilled that condition.

---

6 – Ustawa Prawo zamówień publicznych (Law on public contracts) (consolidated text, *Dziennik Ustaw* of 2013, heading 907). Article 24(2)(4) states that: ‘[T]he following shall also be excluded from procedures for the award of public contracts … economic operators which have failed to demonstrate that they fulfil the conditions for participation in the procedure …’

---

7 – Article 25 of Directive 2004/18 states that, in the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors. The provision goes on to state that this shall be without prejudice to the question of the principal economic operator’s liability.

---

8 – Ibid., paragraph 24. See also notably judgment in *Siemens and ARGE Telekom* (C-314/01, EU:C:2004:159), paragraph 46, and judgments in *Ballast Nedam Groep* (C-389/92, EU:C:1994:133) and *Ballast Nedam Groep* (C-5/97, EU:C:1997:636).

---

9 – Opinion of Advocate General Jääskinen in *Swm Costruzioni and Mannocchi Luigino* (C-94/12, EU:C:2013:130), point 22. This position built on the findings of the Court in judgments in *Ballast Nedam Groep* (C-5/97, EU:C:1997:636) and *Ballast Nedam Groep* (C-389/92, EU:C:1994:133), in which the legal relations in issue concerned companies in the same group. See points 20 to 22 of the Opinion.

---

10 – See my Opinion in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:130) point 23.

---

11 – Judgment in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646), paragraph 26. See similarly judgment in *Holst Italia* (C-176/98, EU:C:1999:593), paragraph 28.

---

12 – Judgment in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646), paragraph 35.

---

13 – Judgment in *SC Enterprise Focused Solutions* (C-278/14, EU:C:2015:228), paragraph 26 and case-law cited.

---

14 – Ibid., paragraph 28.

---

15 – See by analogy the case law on award criteria, for example judgment in *Commission* v *France* (C-299/08, EU:C:2009:769), paragraph 41, where the Court held that 'both the principle of equal treatment and the obligation of transparency which flows from it require the subject-matter of each contract and the *criteria governing its award* to be clearly defined' (my emphasis). See also judgment in *ATI EAC e Viaggi di Maio and Others* (C-331/04, EU:C:2005:718), which established, at paragraph 32, limits on attaching specific weight to the subheadings of award criteria, and judgment in *Universale-Bau and Others* (C-470/99, EU:C:2002:746), paragraph 100, in which the contracting authority was required to state, in the contract notice or tender documents, rules for weighting the criteria for selecting candidates who would be invited to tender.

---

16 – Judgment in *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191), paragraphs 36 and 37. I recall that there is provision in Directive 2004/18 for competitive dialogue with respect to particularly complex contracts (Article 29) and negotiated procedures (Article 30). These provisions are, however, irrelevant to the case to hand.

---

17 – See judgment in *Manova* (C-336/12, EU:C:2013:647) where the Court held at paragraph 31 that 'the principle of equal treatment and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification'.

---

18 – Judgment in *SAG ELV Slovensko and* Others (C-599/10, EU:C:2012:191), paragraphs 40 and 41. See also judgment in *Manova* (C-336/12, EU:C:2013:647), paragraph 32.

---

19 – These are provided in Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

---

20 – PARTNER stated at the hearing that it was not invited to participate in the electronic auction for the award of the contract in issue.

---

21 – See e.g. recently the Opinion of Advocate General Sharpston in *bpost* (C-340/13, EU:C:2014:2302), point 29, citing the judgments in *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628), paragraph 45;

ATRAL (C-14/02, EU:C:2003:265), paragraph 58, and *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10, EU:C:2012:560), paragraph 57.

---

22 – Ibid., citing judgment in *Adeneler and Others* (C-212/04, EU:C:2006:443) paragraphs 122 and 123.

---

23 – Judgment in *Ambisig* (C-601/13, EU:C:2015:204), paragraph 24.

---

24 – OJ 1993 L 199, p. 54.

---

25 – Judgment in *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627), paragraph 29.

---

26 – Ibid., paragraph 30. This approach, I add, is consistent with that employed by the Court in judgments in *Monsees* (C-350/97, EU:C:1999:242), paragraph 27, and *Commission* v *France* (C-337/98, EU:C:2000:543), paragraphs 38 and 39.

---

27 – Judgment in *Generali-Providencia Biztosító* (C-470/13, EU:C:2014:2469), paragraph 37. I also note that Advocate General Kokott in her Opinion in *Auroux and Others* (C-220/05, EU:C:2006:410), point 50 referred to a provision of Directive 2004/18 to confirm an interpretation of Directive 93/37, even though the former was not yet relevant *ratione temporis*. The Court, however, observed at paragraph 61 of its judgment in *Auroux and Others* (C-220/05, EU:C:2007:31) that the provision in question of Directive 2004/18 was 'not applicable *ratione temporis* to the facts in the main proceedings'. See also an observation in the Opinion of Advocate General Wahl in Opinion of Advocate General Wahl in *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:291) point 40, and the exclusion by the Court of the pertinence of Directive 2014/24 at paragraph 8 of the judgment in judgment in *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440).

---

28 – Here I recall the classic formulation of the Court in its judgment in *Fédesa and Others* (C-331/88, EU:C:1990:391), paragraph 45, where it was held that 'in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected'. Those necessary conditions for retroactivity do not arise in this case.

EU:C:2015:228

JUDGMENT OF THE COURT (Fifth Chamber)

16 April 2015 (*)

(Reference for a preliminary ruling — Public procurement — Supply — Technical specifications — Principles of equal treatment and of non-discrimination — Obligation of transparency — Reference to a product of a particular brand — Assessment of the equivalence of the product offered by a tenderer — Reference product no longer in production)

In Case C-278/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Alba Iulia (Romania), made by decision of 21 March 2014, received at the Court on 6 June 2014, in the proceedings

SC Enterprise Focused Solutions SRL

v

Spitalul Județean de Urgență Alba Iulia,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász and D. Šváby (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by L. Nicolae and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 23(8) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43; ‘Directive 2004/18’).

2 The request has been made in proceedings between SC Enterprise Focused Solutions SRL (‘EFS’) and Spitalul Județean de Urgență Alba Iulia (Alba Iulia District Emergency Hospital) concerning the latter’s decision rejecting the tender submitted by EFS in the context of a procedure for the award of a public contract.

Legal context

3 Recital 2 in the preamble to Directive 2004/18 is worded as follows:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.’

4 Article 2 of Directive 2004/18, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

5 In accordance with the first indent of Article 7(b) of Directive 2004/18, the directive is, inter alia, applicable to public supply contracts which have a value, exclusive of value added tax (‘VAT’), equal to or greater than EUR 200 000 in the case of contracts awarded by contracting authorities other than the central government authorities listed in Annex IV to that directive.

6 ‘Technical specifications’ are defined as follows in point 1(b) of Annex VI to Directive 2004/18:

‘“technical specification”, in the case of public supply or service contracts, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures.’

7 According to Article 23 of that directive:

‘…

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

(a) either by reference to technical specifications defined in Annex VI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words “or equivalent”;

(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming

conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

…

8. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words "or equivalent".'

The dispute in the main proceedings and the question referred for a preliminary ruling

8 On 20 November 2013, Spitalul Județean de Urgență Alba Iulia launched an online call for tenders for the conclusion of a contract for the supply of computing systems and equipment. The estimated value of the contract was RON 259 750, excluding VAT. That figure corresponds to approximately EUR 58 600.

9 As regards the central unit of the computing system, the tender documentation stated that the processor was required to correspond 'at least' to an 'Intel Core i5 3.2 GHz or equivalent' processor.

10 The tender submitted by EFS included a Quad Core A8-5600k type processor of the AMD brand with six cores, a standard speed of 3.6 GHz and a 'turbo' frequency of 3.9 GHz.

11 That tender was rejected on the ground that it did not comply with the technical specifications of the contract. The contracting authority reached that conclusion after establishing, having consulted the Intel website, that first and second-generation Core i5 processors with a speed of 3.2 GHz (Core i5-650) were no longer in production or supported by that manufacturer, albeit still commercially available, and that the same type of processor now being produced by that manufacturer and having a speed of at least 3.2 GHz was the third-generation processor. It was by reference to that third-generation processor, whose performance is superior to that of the processor offered by EFS, that EFS was declared not to have complied with the technical specifications of the contract.

12 EFS filed a complaint before the Consiliul Național de Soluționare a Contestațiilor (National Council for the Settlement of Complaints) against the decision rejecting its tender, claiming that the performance of the processor offered in that tender is superior to that of the processor specified in the technical specifications of the contract, the Intel Core i5-650 3.2 GHz. It is common ground that the processor offered by EFS is indeed superior to the Core i5-650 type processor of the Intel brand. Since the complaint was rejected by decision of 11 February 2014, the applicant in the main proceedings lodged an appeal against that decision with the Curtea de Apel Alba Iulia (Alba Iulia Court of Appeal).

13 In those circumstances, the Curtea de Apel Alba Iulia decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'May Article 23(8) of Directive 2004/18… be interpreted as meaning that, when a contracting authority defines the technical specifications of the product which is the subject of a procurement contract by reference to a particular brand, the characteristics of the "equivalent" product offered [by a tenderer and presented as such] must be established solely by reference to the [characteristics] of products [of the manufacturer whose product served as a reference for the technical specification concerned that are] still in production, or may they be established by reference to products [of that manufacturer] which are on the market but no longer in production?'

The question referred for a preliminary ruling

14 As a preliminary point, it should be noted that the referring court is proceeding on the basis that Directive 2004/18 is applicable in the context of the dispute in the main proceedings, without, however, providing information from which the applicability of that act of secondary legislation might be inferred.

15 It must be noted that the strict special procedures prescribed by the EU directives coordinating public procurement procedures apply only to contracts whose value exceeds a threshold expressly laid down in each of those directives. Accordingly, the rules in those directives do not apply to contracts with a value below the threshold set by those directives (judgment in *SECAP and Santorso*, C-147/06 and C-148/06, EU:C:2008:277, paragraph 19 and the case-law cited). Consequently, Article 23(8) of Directive 2004/18, which the Court has been asked to interpret, is not applicable in the context of the dispute in the main proceedings. The value, exclusive of VAT, of the public contract concerned is in the order of EUR 58 600, whereas the relevant threshold for the application of that directive set by Article 7(b) thereof is EUR 200 000.

16 It should be noted, however, that the award of contracts which, in view of their value, do not fall within the scope of that directive is none the less subject to the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts have a certain cross-border interest in the light of certain objective criteria (see, to that effect, judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 23 and the case-law cited).

17 Although the referring court does not refer directly to the fundamental rules and general principles of EU law in the order for reference, it is settled case-law that in order to provide a useful answer to a national court which has referred a question to it, the Court may deem it necessary to consider rules of EU law to which the national court has not referred in its request for a preliminary ruling (see, to that effect, judgment in *Medipac — Kazantzidis*, C-6/05, EU:C:2007:337, paragraph 34).

18 It should be noted in that regard that the referring court has not established the findings necessary for the Court to ascertain whether, in the case in the main proceedings, there is certain cross-border interest. It must be borne in mind that, as is clear from Article 94 of the Rules of Procedure of the Court of Justice, the Court must be able to find in a request for a preliminary ruling a summary of the facts on which the questions are based and the connection, inter alia, between those facts and the questions. Therefore, the findings necessary to verify the existence of certain cross-border interest, and more generally all the findings to be made by the national courts and on which the applicability of an act of secondary and primary legislation of the European Union depends, must be made before the questions are referred to the Court (see judgment in *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 47).

19 However, because of the spirit of cooperation in relations between the national courts and the Court of Justice in the context of the preliminary ruling procedure, the lack of such preliminary findings by the referring court relating to the existence of certain cross-border interest does not necessarily lead to the request being inadmissible if the Court, having regard to the information available from the file, considers that it is in a position to give a useful answer to the referring court. That is the case, in particular, where the order for reference contains sufficient relevant information for the existence of such an interest to be determined. Nevertheless, the Court's answer is given subject to the proviso that, on the basis of a detailed assessment of all the relevant facts in the case in the main proceedings, certain cross-border interest in the case in the main proceedings is established by the referring court (see, to that effect, judgment in *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 48 and the case-law cited).

20 As regards the objective criteria that may indicate the existence of certain cross-border interest, the Court has already held that such criteria may be, in particular, that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract. The referring court may, in its overall assessment of the existence of certain cross-border interest also take account of the existence of complaints brought by operators situated in other Member States, provided that it is determined that those complaints are real and not

fictitious (see judgment in *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 49 and the case-law cited).

21 In the present case, despite the low value of the contract and the lack of any explanation by the referring court, it must be held that the contract at issue in the main proceedings could have certain cross-border interest in the light of the facts of the case in the main proceedings, particularly the fact that that case concerns the supply of computing systems and equipment with the reference processor being that of an international brand.

22 It is therefore for the referring court to make a detailed assessment, taking into account all the relevant information characterising the context of the case brought before it, as to whether the contract at issue in the main proceedings does indeed have certain cross-border interest. The following considerations are subject to that reservation.

23 The question referred must accordingly be understood as relating — in the context of a contract that is not subject to Directive 2004/18 but which has certain cross-border interest — to the implications of the fundamental rules and general principles of the Treaty and, in particular, of the principles of equal treatment and of non-discrimination and of the consequent obligation of transparency.

24 It should also be pointed out that, in the case in the main proceedings, the fact that the product is no longer in production but continues to be available on the market applies not to the product put forward by a tenderer but to the product referred to in the technical specification at issue. Consequently, the relevant question is not whether, in addition to any detailed information in that respect in the tender documentation at issue in the main proceedings, the contracting authority can require that the product offered by a tenderer be one that is still in production, but whether a contracting authority which has defined a technical specification by reference to a product of a particular brand may, where that product is no longer in production, modify that specification by referring to a comparable product of the same brand which is now in production but which has different characteristics.

25 As regards the principles of equal treatment and of non-discrimination and the obligation of transparency, the Member States must be recognised as having a certain amount of discretion for the purpose of adopting measures intended to ensure compliance with those principles, which are binding on contracting authorities in any procedure for the award of a public contract (see judgment in *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraphs 31 and 32).

26 The obligation of transparency is in particular intended to preclude any risk of arbitrariness on the part of the contracting authority (see, with regard to Article 2 of Directive 2004/18, judgment in *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 25 and the case-law cited).

27 That objective would not be achieved if the contracting authority were able to disregard the conditions it had itself imposed. Accordingly, it is prohibited from amending the award criteria during the award procedure. The principles of equal treatment and of non-discrimination and the obligation of transparency have the same effect in that respect with regard to the technical specifications.

28 Consequently, the principle of equal treatment and the obligation of transparency prohibit the contracting authority from rejecting a tender which satisfies the requirements of the invitation to tender on grounds which are not set out in the tender specifications (judgment in *Medipac — Kazantzidis*, C-6/05, EU:C:2007:337, paragraph 54).

29 The contracting authority cannot, therefore, after publication of a contract notice, amend the technical specification in respect of an element of the contract in breach of the principles of equal treatment and of non-discrimination and the obligation of transparency. It is irrelevant, in that regard, whether or not the element to which that specification refers is still in production or available on the market.

30 The answer to the question referred is, therefore, that Article 23(8) of Directive 2004/18 is not applicable to a public contract with a value below the threshold for application laid down by that directive. In the context of a public contract not subject to that directive but which has certain cross-border interest, which it is for the referring court to ascertain, the fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination

and the consequent obligation of transparency, must be interpreted as meaning that the contracting authority cannot reject a tender which satisfies the requirements of the contract notice on grounds which are not set out in that notice.

Costs

31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 23(8) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011, is not applicable to a public contract with a value below the threshold for application laid down by that directive. In the context of a public contract not subject to that directive but which has certain cross-border interest, which it is for the referring court to ascertain, the fundamental rules and general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination and the consequent obligation of transparency, must be interpreted as meaning that the contracting authority cannot reject a tender which satisfies the requirements of the contract notice on grounds which are not set out in that notice.

[Signatures]

---

* Language of the case: Romanian.

EU:C:2015:329

ARRÊT DE LA COUR (septième chambre)

21 mai 2015 (*)

«Renvoi préjudiciel – Marchés publics – Directive 2004/18/CE – Article 1er, paragraphe 4 – Concession de services – Notion – Ensemble contractuel entre une autorité de sécurité sociale et des sociétés de taxis prévoyant une procédure électronique de compensation directe des coûts de transport des assurés et un système de réservation des moyens de transport»

Dans l'affaire C-269/14,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Korkein hallinto-oikeus (Finlande), par décision du 26 mai 2014, parvenue à la Cour le 30 mai 2014, dans la procédure engagée par

Kansaneläkelaitos,

LA COUR (septième chambre),

composée de M. J.-C. Bonichot, président de chambre, MM. A. Arabadjiev et C. Lycourgos (rapporteur), juges,

avocat général: M. Y. Bot,

greffier: M. A. Calot Escobar,

vu la procédure écrite,

considérant les observations présentées:

– pour le Kansaneläkelaitos, par M^es^ I. Aalto-Setälä et E.-R. Siivonen, asianajajat,

– pour la Suomen Taksiliitto ry, par M^e^ K. Duncker, asianajaja,

– pour la Commission européenne, par MM. A. Tokár et I. Koskinen, en qualité d'agents,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 1^er^, paragraphe 4, de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 114).

2 Cette demande a été présentée dans le cadre d'un litige concernant le Kansaneläkelaitos (organisme national de sécurité sociale) et Suomen Palvelutaksit ry ainsi que Oulun Taksipalvelut Oy, sociétés de taxis, au sujet de la mise en œuvre sans appel d'offres d'un ensemble contractuel relatif à une procédure électronique de compensation directe des frais de transport en taxi liés aux traitements médicaux.

Le cadre juridique

Le droit de l'Union

3 L'article 1er de la directive 2004/18, intitulé «Définitions», prévoit, à ses paragraphes 2, sous a), et 4:

«2. a) Les 'marchés publics' sont des contrats à titre onéreux conclus par écrit entre un ou plusieurs opérateurs économiques et un ou plusieurs pouvoirs adjudicateurs et ayant pour objet l'exécution de travaux, la fourniture de produits ou la prestation de services au sens de la présente directive.

[…]

4. La 'concession de services' est un contrat présentant les mêmes caractéristiques qu'un marché public de services, à l'exception du fait que la contrepartie de la prestation des services consiste soit uniquement dans le droit d'exploiter le service, soit dans ce droit assorti d'un prix.»

Le droit finlandais

4 La loi sur les marchés publics [hankintalaki (348/2007)] a transposé la directive 2004/18 en droit finlandais. L'article 5 de celle-ci, intitulé «Définitions», prévoit, à ses paragraphes 1 et 6:

«Dans cette loi, on entend par

1) 'marché public' un contrat écrit passé entre un ou plusieurs pouvoirs adjudicateurs et un ou plusieurs opérateurs et ayant pour objet l'exécution de travaux, la fourniture de produits ou la prestation de services, en échange d'une contrepartie économique;

[…]

6) 'concession de services' un contrat présentant les mêmes caractéristiques qu'un marché public de services, mais dont la contrepartie de la prestation des services consiste soit uniquement dans le droit d'exploiter le service, soit dans ce droit assorti d'un prix.»

5 Sous le titre 2 de la loi sur l'assurance maladie [sairausvakuutuslaki (1224/2004)], l'article 1er, paragraphe 1, de celle-ci prévoit que «sont remboursés à l'assuré en tant que dépenses médicales, dans les conditions définies ci-après, […] les frais de transport liés au traitement médical».

6 Sous le titre 4 de cette loi, intitulé «Remboursements des frais de transports», l'article 7 de celle-ci dispose que «[l]es frais de transport d'un assuré sont remboursés en totalité pour ce qui est de la partie du montant dépassant 14,25 euros pour un trajet simple (montant correspondant à la franchise à la charge de l'assuré). Le remboursement est cependant tout au plus égal au montant fixé comme base de remboursement pour les frais de transport».

7 Le titre 15 de ladite loi, relatif à la procédure de compensation directe, comporte l'article 9 de celle-ci, aux termes duquel, si «[…] un prestataire de services de transport a facturé à l'assuré le prix du voyage à hauteur de la franchise à la charge de l'assuré conformément au titre 4, article 7, le remboursement peut être versé […] au prestataire de services sur la base du décompte effectué par ce dernier et selon des modalités spécifiques convenues».

8 L'article 15 de la loi sur les prestations de rééducation et les prestations financières y afférentes servies par le Kansaneläkelaitos [laki Kansaneläkelaitoksen kuntoutusetuuksista ja kuntoutus-rahaetuuksista (566/2005)], intitulé «Frais de transport», dispose:

«Les patients bénéficiant de mesures de réadaptation ainsi que les membres de la famille ou autres proches bénéficiant de ces mesures conformément aux articles 9 et 12 sont remboursés en ce qui concerne les frais de transport nécessaires et raisonnables dans le cadre de cette réadaptation, dans les conditions prévues au titre 4 de la loi sur l'assurance maladie. […]»

Le litige au principal et les questions préjudicielles

9 Le Kansaneläkelaitos est un pouvoir adjudicateur au sens de la loi sur les marchés publics. Conformément à la réglementation finlandaise, celui-ci rembourse aux assurés la partie des frais de transport en taxi liés aux traitements médicaux qui excède la franchise restant à la charge desdits assurés. L'organisation de ces transports ne relève pas de la responsabilité du Kansaneläkelaitos.

10 Le Kansaneläkelaitos et la Suomen Taksiliitto ry (Union des taxis de Finlande), au nom et sur mandat des sociétés de taxis relevant de cette union, ont signé, le 4 février 2010, une convention-cadre, qui prévoit que le remboursement des frais de transport en taxi liés aux traitements médicaux pour les personnes assurées en Finlande, accordé conformément aux dispositions de la loi sur l'assurance maladie et de la loi sur les prestations de rééducation et les prestations financières y afférentes servies par le Kansaneläkelaitos, est versé directement au chauffeur de taxi, selon une procédure électronique de compensation.

11 En application de cette convention-cadre, les délégations locales du Kansaneläkelaitos désignent, dans chaque circonscription sanitaire, une seule société de taxis en tant que centre de réservations, avec laquelle elles concluent un contrat portant sur la procédure électronique de compensation directe.

12 Grâce à ce système de compensation directe, les réservations des trajets en taxi remboursés par le Kansaneläkelaitos sont regroupées dans chaque circonscription sanitaire auprès d'un centre unique de réservations. Celui-ci communique les réservations effectuées par les assurés aux chauffeurs de taxis qui participent audit système. L'assuré paie la part du prix de la course qui reste à sa charge au chauffeur de taxi, qui communique au centre de réservations, par voie électronique, les données afférentes à ce prix. Ce centre de réservations transmet ensuite ces données au Kansaneläkelaitos. Après traitement des demandes de compensation, ce dernier renvoie les sommes à rembourser audit centre de réservations, qui les fait parvenir aux chauffeurs de taxis.

13 Si un assuré ne réserve pas un taxi par l'intermédiaire du centre de réservations désigné, il paie l'intégralité du prix de la course et doit demander ensuite directement au Kansaneläkelaitos le remboursement de la somme qui dépasse la franchise restant à sa charge.

14 Aux termes de la convention-cadre, l'objectif de la procédure de compensation directe est d'améliorer le service rendu aux usagers, en facilitant le système de remboursement, et de réaliser des économies en regroupant les réservations de taxis. En effet, la société de taxis qui a conclu un contrat de compensation directe avec la délégation locale du Kansaneläkelaitos s'engage à regrouper les réservations des assurés qui vont au même moment dans la même direction.

15 Selon la convention-cadre, chacun des cocontractants assume ses propres frais liés à la mise en œuvre et au fonctionnement de la procédure électronique de compensation directe. À cet égard, la société de taxis locale désignée en tant que centre de réservations a le droit de prélever auprès des chauffeurs de taxis adhérant au système une compensation raisonnable, afin de lui permettre de remplir les obligations qui lui sont imposées par le contrat de compensation directe. Ces centres de réservations perçoivent également une redevance, à la charge des assurés, sur les réservations téléphoniques.

16 Le Kansaneläkelaitos compte 25 délégations locales, dont 7 ont conclu des contrats spécifiques portant sur la procédure électronique de compensation directe avec 7 sociétés de taxis locales. Les arrangements et la procédure électronique de compensation directe visés dans ces contrats n'ont pas fait l'objet d'un appel d'offres.

17 Il découle des contrats relatifs à la procédure de compensation directe qu'il appartient aux sociétés de taxis signataires, notamment, de centraliser les réservations, de regrouper les transports en taxi lorsque les véhicules automobiles vont au même moment dans la même direction, d'enregistrer sur un serveur les données et les paiements relatifs aux réservations ainsi que de verser les compensations aux chauffeurs de taxi participant à cette procédure.

18 Suomen Palvelutaksit ry, Oulun Taksipalvelut Oy et Turun Seudun Invataksit ry ont introduit devant le markkinaoikeus (tribunal des affaires économiques) des recours contre l'ensemble contractuel relatif à la procédure électronique de compensation directe.

19 Le markkinaoikeus a considéré que la convention-cadre conclue entre le Kansaneläkelaitos et la Suomen Taksiliitto ry ainsi que les contrats de compensation directe conclus sur la base de cette convention constituaient un seul ensemble contractuel, qui devait être qualifié de «concession de services», au sens de l'article 5, paragraphe 6, de la loi sur les marchés publics. Selon cette juridiction, une telle qualification s'imposait en raison du fait que les conditions relatives à l'existence d'une contrepartie et au transfert du risque d'exploitation économique étaient remplies.

20 Le Kansaneläkelaitos a alors formé un pourvoi contre la décision du markkinaoikeus devant le Korkein hallinto-oikeus (Cour administrative suprême). Ce dernier nourrit des doutes quant à la qualification juridique de l'ensemble contractuel en cause au principal.

21 Dans ces conditions, le Korkein hallinto-oikeus a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes:

«1) Convient-il d'interpréter la jurisprudence de la Cour de justice relative aux concessions de services en ce sens que ce régime ne s'applique pas à un arrangement global comportant, d'une part, le paiement de compensations, qui relève de la responsabilité de l'autorité, au moyen d'un arrangement de compensation directe, et, d'autre part, un arrangement relatif à la réservation de moyens de transport, ce qui ne relève pas de la responsabilité de cette autorité?

2) Quelle importance faut-il attribuer à la conséquence, découlant indirectement de cet arrangement global, que le but de l'arrangement relatif aux réservations est de réduire le coût des transports que le Kansaneläkelaitos doit payer sur les fonds publics?»

Sur les questions préjudicielles

22 Par ses questions, qu'il convient de traiter ensemble, la juridiction de renvoi demande, en substance, si l'article 1er, paragraphe 4, de la directive 2004/18 doit être interprété en ce sens qu'un ensemble contractuel, tel que celui en cause au principal, constitue une «concession de services», au sens de cette disposition.

23 Il ressort des éléments du dossier transmis à la Cour par la juridiction de renvoi que cet ensemble contractuel est constitué, d'une part, par la convention-cadre signée entre le Kansaneläkelaitos et la Suomen Taksiliitto ry, au nom et sur mandat des sociétés de taxis relevant de cette union, ainsi que, d'autre part, par les contrats portant sur la procédure électronique de compensation directe que les délégations locales du Kansaneläkelaitos ont conclus avec les sociétés de taxis membres de ladite union qui ont été désignées comme centres de réservations.

24 La juridiction de renvoi indique, à cet égard, que, si le Kansaneläkelaitos a l'obligation légale de rembourser aux assurés les frais de transport en taxi liés aux traitements médicaux, hormis une franchise qui reste à la charge desdits assurés, il ne lui incombe cependant pas d'organiser ces transports.

25 Il y a lieu de relever, à titre liminaire, qu'il n'appartient pas à la Cour de qualifier concrètement l'opération en cause au principal, une telle qualification relevant de la seule compétence du juge national. Le rôle de la Cour se cantonne à fournir à ce dernier une interprétation du droit de l'Union utile pour la décision qu'il lui revient de prendre dans le litige dont il est saisi (voir, notamment, arrêts Privater Rettungsdienst und Krankentransport Stadler, C-274/09, EU:C:2011:130, point 36, ainsi que Norma-A et Dekom, C-348/10, EU:C:2011:721, point 57).

26 Conformément à l'article 1er, paragraphe 4, de la directive 2004/18, la «concession de services» est un contrat présentant les mêmes caractéristiques qu'un marché public de services, à l'exception du fait que la contrepartie de la prestation de services consiste soit uniquement dans le droit d'exploiter le service, soit dans ce droit assorti d'un prix.

27 Il convient de constater, en premier lieu, que la circonstance que le Kansaneläkelaitos ne soit pas responsable de l'organisation des transports en taxi n'implique pas que, au regard des caractéristiques propres de l'ensemble contractuel en cause au principal, ce pouvoir adjudicateur n'ait pas confié la

prestation d'un service à ses cocontractants dans le cadre dudit ensemble contractuel. En effet, il résulte des contrats relatifs à la procédure électronique de compensation directe et conclus sur la base de la convention-cadre que les sociétés de taxis désignées en tant que centres de réservations fournissent un ensemble de services nécessaires à la mise en œuvre de cette procédure, tels que, notamment, la centralisation des réservations et le regroupement des transports en taxi, l'enregistrement sur un serveur des données et des paiements relatifs aux réservations ainsi que le versement des compensations aux chauffeurs de taxi participant à cette procédure. L'ensemble contractuel en cause au principal permet ainsi au Kansaneläkelaitos de réaliser des économies et de remplir d'une manière plus efficace sa mission légale de remboursement des frais de transport en taxi liés aux traitements médicaux des assurés.

28 En ce qui concerne la contrepartie de la prestation des services, il y a lieu de relever, en deuxième lieu, que la Cour a déjà jugé que le fait que le prestataire de services est rémunéré par des paiements provenant de tiers au contrat, en l'occurrence les usagers du service concerné, est l'une des formes que peut prendre l'exercice du droit, reconnu au prestataire, d'exploiter le service. Ainsi, dans le cadre d'un contrat portant sur des services, la circonstance que le cocontractant n'est pas directement rémunéré par le pouvoir adjudicateur, mais qu'il est en droit de percevoir une rémunération auprès de tiers, répond à l'exigence de contrepartie, prévue à l'article 1er, paragraphe 4, de la directive 2004/18 (voir, en ce sens, arrêt Eurawasser, C-206/08, EU:C:2009:540, points 53 et 57).

29 Dans le cadre de leurs prestations de services, telles que rappelées au point 27 du présent arrêt, les sociétés de taxis désignées en tant que centres de réservations sont directement rémunérées non pas par le pouvoir adjudicateur, mais par une contribution raisonnable des chauffeurs de taxi ayant adhéré au système de compensation directe ainsi que par une redevance téléphonique à la charge des assurés pour l'utilisation des services de réservations.

30 Il apparaît, par conséquent, que l'ensemble contractuel en cause au principal remplit l'exigence de contrepartie, prévue à l'article 1er, paragraphe 4, de la directive 2004/18.

31 Afin que ledit ensemble contractuel puisse être qualifié de concession de services, encore faut-il, en troisième lieu, et conformément à une jurisprudence constante, que le concessionnaire du service prenne en charge le risque lié à l'exploitation des services en question (voir, en ce sens, arrêt Eurawasser, C-206/08, EU:C:2009:540, point 59).

32 Il en va ainsi même si ce risque est très limité, pourvu que le pouvoir adjudicateur ait transféré au concessionnaire l'intégralité ou, tout au moins, une part significative du risque d'exploitation qu'il encourt (voir, en ce sens, arrêts Eurawasser, C-206/08, EU:C:2009:540, point 77, ainsi que Norma-A et Dekom, C-348/10, EU:C:2011:721, point 45).

33 Un tel risque doit être compris comme étant le risque d'exposition aux aléas du marché, lequel peut notamment se traduire par le risque de concurrence de la part d'autres opérateurs, le risque d'une inadéquation entre l'offre et la demande de services, le risque d'insolvabilité des débiteurs du prix des services fournis, le risque d'absence de couverture des dépenses d'exploitation par les recettes ou encore le risque de responsabilité d'un préjudice lié à un manquement dans le service (arrêt Norma-A et Dekom, C-348/10, EU:C:2011:721, point 48).

34 S'il appartient à la juridiction de renvoi de vérifier l'existence d'un transfert de l'intégralité ou d'une part significative du risque lié à l'exploitation du service (arrêt Eurawasser, C-206/08, EU:C:2009:540, point 78), il apparaît que le pouvoir adjudicateur, dans l'affaire au principal, par l'intermédiaire de ses délégations locales, a transféré aux sociétés de taxis ayant été désignées en tant que centres de réservations une partie de l'exécution technique, administrative et financière relative à la procédure électronique de compensation directe desdits frais, dont il avait la charge, conformément à l'article 9 du titre 15 de la loi sur l'assurance maladie.

35 Dans une telle situation, il semble ressortir des éléments dont dispose la Cour que, dans le cadre de la fourniture des services associés à la mise en œuvre de cette procédure, lesdites sociétés de taxis soient susceptibles d'être exposées aux aléas du marché et que, partant, elles aient pris en charge le risque lié à l'exploitation de ces services, au sens de la jurisprudence citée aux points 32 et 33 du présent arrêt.

36 À cet égard, il importe de relever que, conformément aux obligations contractuelles prévues par les contrats relatifs à la procédure électronique de compensation directe en cause au principal, et tel qu'il a été rappelé au point 27 du présent arrêt, il appartient aux sociétés de taxis agissant en tant que centres de réservations, notamment, d'enregistrer sur un serveur les données et les paiements relatifs aux réservations effectuées par les assurés ainsi que de verser les compensations aux chauffeurs de taxi participant à cette procédure.

37 Ainsi que l'expose la juridiction de renvoi, le Kansaneläkelaitos n'assure pas, dès lors, la charge de la gestion d'un grand nombre de contrats, qui avaient été signés directement avec les différents chauffeurs de taxi en vertu de l'ancienne procédure de remboursement des frais de transports en taxi liés aux traitements médicaux.

38 Par ailleurs, eu égard au mode de rémunération de ces sociétés de taxis, prévu par l'ensemble contractuel en cause au principal, celles-ci pourraient éventuellement être exposées au risque de non-paiement des contributions provenant des chauffeurs de taxi et, par conséquent, au risque d'absence de couverture des dépenses d'exploitation encourues.

39 En outre, il découle des informations fournies par la juridiction de renvoi que ces mêmes sociétés de taxis sont susceptibles d'être confrontées aux risques liés à une baisse de la demande de leurs services de la part des assurés pouvant bénéficier du remboursement des frais de transport en taxi liés aux traitements médicaux.

40 Eu égard à tout ce qui précède, il convient de relever qu'il ne ressort d'aucun des éléments du dossier soumis à la Cour que le pouvoir adjudicateur n'ait pas transféré le risque d'exploitation économique aux sociétés qui fournissent les services nécessaires à la mise en œuvre de la procédure électronique de compensation directe.

41 Par conséquent, il résulte des considérations qui précèdent que l'article 1er, paragraphe 4, de la directive 2004/18 doit être interprété en ce sens qu'un ensemble contractuel, tel que celui en cause au principal, peut être considéré comme constituant une «concession de services», au sens de cette disposition, à la condition que le pouvoir adjudicateur ait transféré l'intégralité ou une part significative du risque d'exploitation économique qu'il encourt, ce qu'il appartient à la juridiction de renvoi de vérifier en tenant compte de toutes les caractéristiques inhérentes aux opérations visées par cet ensemble contractuel.

Sur les dépens

42 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (septième chambre) dit pour droit:

L'article 1er, paragraphe 4, de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services, doit être interprété en ce sens qu'un ensemble contractuel, tel que celui en cause au principal, peut être considéré comme constituant une «concession de services», au sens de cette disposition, à la condition que le pouvoir adjudicateur ait transféré l'intégralité ou une part significative du risque d'exploitation économique qu'il encourt, ce qu'il appartient à la juridiction de renvoi de vérifier en tenant compte de toutes les caractéristiques inhérentes aux opérations visées par cet ensemble contractuel.

Signatures

* Langue de procédure: le finnois.

EU:C:2016:360

JUDGMENT OF THE COURT (Fifth Chamber)

26 May 2016 (*)

[Text rectified by order of 29 June 2016]

(Reference for a preliminary ruling — Protection of the financial interests of the European Union — Regulation (EC, Euratom) No 2988/95 — European Regional Development Fund (ERDF) — Regulation (EC) No 1083/2006 — Award of a contract by the beneficiary of funds acting as contracting authority for the performance of the action eligible for funding — Definition of 'irregularity' — Criterion relating to 'breach of EU law' — Tendering procedures contrary to national law — Nature of financial corrections adopted by Member States –Administrative measures or penalties)

In Joined Cases C-260/14 and C-261/14,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bacău (Appeal Court, Bacău, Romania), made by decisions of 8 May 2014, received at the Court on 30 May 2014, in the proceedings

Judeţul Neamţ (C-260/14)**,**

Judeţul Bacău (C-261/14)

v

Ministerul Dezvoltării Regionale şi Administraţiei Publice,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, F. Biltgen, A. Borg Barthet, E. Levits (Rapporteur) and M. Berger, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

– [as rectified by order of 29 June 2016] the Romanian Government, by R.H. Radu, V. Angelescu, and D.M. Bulancea, acting as Agents,

– the Hungarian Government, by Z. Fehér, G. Koós and A. Pálfy, acting as Agents,

– the Netherlands Government, by M. Bulterman and B. Koopman, acting as Agents,

– the European Commission, by B.-R. Killmann and A. Ştefănuc, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2016,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 1(2) and (4) and Article 5(c) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection

of the European Communities' financial interests (OJ 1995 L 312, p. 1) and Article 2(7) and Article 98 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).

2 The requests have been made in two sets of proceedings between the Judeţul Neamţ (County of Neamţ) and the Judeţul Bacău (County of Bacău), respectively, and the Ministerul Dezvoltării Regionale şi Administraţiei Publice (Ministry for Regional Development and Public Administration) concerning the validity of two administrative measures addressed to them by that ministry requiring them, in their capacity as contracting authorities which had organised public procurement procedures relating to operations eligible for grants, to repay part of the grants they had received.

Legal context

EU law

3 Article 1 of Regulation No 2988/95 provides as follows:

'1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. "Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.'

4 Article 2 of Regulation No 2988/95 states as follows:

'1. Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of Community law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities' financial interests.

2. No administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively.

3. Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.

4. Subject to the Community law applicable, the procedures for the application of Community checks, measures and penalties shall be governed by the laws of the Member States.'

5 Article 4 of Regulation No 2988/95 is worded as follows:

'1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

– by an obligation to pay or repay the amounts due or wrongly received,

– by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance.

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis.

3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.

4. The measures provided for in this Article shall not be regarded as penalties.'

6 Article 5 of Regulation No 2988/95 provides as follows:

'1. Intentional irregularities or those caused by negligence may lead to the following administrative penalties:

(a) payment of an administrative fine;

(b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; this additional sum shall be determined in accordance with a percentage to be set in the specific rules, and may not exceed the level strictly necessary to constitute a deterrent;

(c) total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage;

…'

7 The last paragraph of Article 1 of Regulation No 1083/2006 states as follows:

'… this Regulation lays down the principles and rules on partnership, programming, evaluation, management, including financial management, monitoring and control on the basis of responsibilities shared between the Member States and the Commission.'

8 Article 2(7) of Regulation No 1083/2006 provides as follows:

'For the purposes of this Regulation, the following terms shall have the meanings assigned to them here:

…

(7) "irregularity": any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget.'

9 Article 98 of Regulation No 1083/2006 is worded as follows:

'1. The Member States shall in the first instance bear the responsibility for investigating irregularities, acting upon evidence of any major change affecting the nature or the conditions for the implementation or control of operations or operational programmes and making the financial corrections required.

2. The Member State shall make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. The corrections made by a Member State shall consist of cancelling all or part of the public contribution to the operational programme. Member States shall take into account the nature and gravity of the irregularities and the financial loss to the Fund.

The resources from the Funds released in this way may be reused by the Member State until 31 December 2015 for the operational programme concerned in accordance with the provisions referred to in paragraph 3.

3. The contribution cancelled in accordance with paragraph 2 may not be reused for the operation or operations that were the subject of the correction, nor, where a financial correction is made for a

systemic irregularity, for existing operations within the whole or part of the priority axis where the systemic irregularity occurred.

…’

10 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320) replaced Regulation No 1083/2006 with effect from 1 January 2014.

11 Article 2(36) of Regulation No 1303/2013 reads as follows:

‘For the purposes of this Regulation, the following definitions apply:

…

(36) “irregularity” means any breach of Union law, or of national law relating to its application, resulting from an act or omission by an economic operator involved in the implementation of the (European Structural and Investment) Funds, which has, or would have, the effect of prejudicing the budget of the Union by charging an unjustified item of expenditure to the budget of the Union.’

12 Recital 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ 2007 L 317, p. 34) (‘Directive 2004/18’), states as follows:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the above-mentioned rules and principles and with other rules of the Treaty.’

13 Article 7 of Directive 2004/18, entitled ‘Threshold amounts for public contracts’, provides as follows:

‘This Directive shall apply to public contracts which are not excluded in accordance with the exceptions provided for in Articles 10 and 11 and Articles 12 to 18 and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

(a) EUR 133 000 for public supply and service contracts other than those covered by point (b), third indent, awarded by contracting authorities which are listed as central government authorities in Annex IV; …

(b) EUR 206 000

– for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV,

– for public supply contracts awarded by contracting authorities which are listed in Annex IV and operate in the field of defence, where these contracts involve products not covered by

Annex V,

– for public service contracts awarded by any contracting authority in respect of the services listed in Category 8 of Annex IIA, Category 5 telecommunications services the positions of which in the [Common Procurement Vocabulary] are equivalent to reference Nos 7524, 7525 and 7526 and/or the services listed in Annex IIB;

(c) EUR 5 150 000 for public works contracts.'

Romanian law

14 Article 1 of Ordonanţă Guvernului nr. 79/2003 privind controlul şi recuperarea fondurilor comunitare, precum şi a fondurilor de cofinanţare aferente utilizate necorespunzător (Government Ordinance No 79/2003 on the control and recovery of Community funds and associated co-financing funds that have been misused) (*Monitorul Oficial al României*, Part I, No 622, 30 August 2003), in the version at the time of the funding agreements and the procurement procedures organised for the performance of the actions eligible for grants at issue in the main proceedings ('OG No 79/2003') states as follows:

'This ordinance regulates the establishment and recovery of sums wrongly paid from the financial contribution allocated to Romania on an unsecured basis by the European Community and/or related co-financing funds, as a result of irregularities.'

15 Article 2 of OG No 79/2003 provides as follows:

'For the purposes of this ordinance, the following definitions shall apply:

(a) "irregularity" means any breach of legality, regularity and compliance, in relation to the provisions of national and/or Community law, and of the terms of agreements or contracts, or of any other legal commitment entered into on the basis of such provisions which, as a result of the charging of an unjustified item of expenditure, has an adverse effect on the general budget of the European Communities and/or the budgets managed by or on behalf of the Communities, and the budgets from which the related co-funding derives;

…

(d) "credit entries resulting from irregularities" means sums to be restored to the general budget of the European Communities and/or the budgets managed by the European Communities or on their behalf, or the budgets from which the related co-financing derives, as a consequence of the improper use of Community funds and the related co-financing amounts and/or as a consequence of the fact that sums have been received which were not due under measures forming part of the system for financing such funds in whole or in part;

…'

16 Article 4 of OG No 79/2003 states as follows:

'1. Amounts unduly paid from Community funds and/or associated co-financing, banking costs, including incidental charges, and other amounts imposed on the debtor by law shall be the subject of recovery of credit entries deriving from irregularities.

…'

17 At the time of the checks carried out by the competent authorities of the actions eligible for grants in question, Ordonanţă de urgenţă a Guvernului nr. 66/2011 privind prevenirea, constatarea şi sancţionarea neregulilor apărute în obţinerea şi utilizarea fondurilor europene şi/sau a fondurilor publice naţionale aferente acestora (Government Emergency Ordinance No 66/2011 regarding prevention, ascertainment and penalisation of irregularities associated with the collection and use of European funds and/or national public funds relating thereto) (*Monitorul Oficial al României*, Part I, No 461, 30 June 2011) ('OUG No 66/2011') had replaced OG No 79/2003.

18 Article 2 of OUG No 66/2011 provides as follows:

‘For the purposes of this emergency ordinance, the following definitions shall apply:

(a) “irregularity” means any breach of legality, regularity and compliance, in relation to the provisions of national and/or European law, and of the terms of agreements or contracts, or of any other legal commitment entered into on the basis of those provisions resulting from an action or an omission on the part of the beneficiary or of the authority competent to manage the European funds which, as a result of the charging of an unjustified item of expenditure, has had or may have an adverse effect on the general budget of the European Union, the budgets of public international contributors and/or related national public funds;

…

(h) “activity of ascertaining irregularities” means activities of control/investigation undertaken by the competent authorities in accordance with the provisions of the present ordinance, in order to ascertain the existence of any irregularity;

(i) “activity of determining credit entries deriving from irregularities” means the activity by means of which the obligation to pay resulting from the irregularities ascertained is established and described in detail, with the issue of a credit instrument;

…

(o) “application of financial corrections” means administrative measures adopted by the competent authorities, in conformity with the provisions of the present ordinance, which consist of excluding from financing out of European funds and/or national public funds relating thereto expenditure in relation to which an irregularity has been established;

…’

19 Article 27(1) of OUG No 66/2011 is worded as follows:

‘If irregularities are ascertained in the application by beneficiaries of the provisions concerning public procurement procedures, either with regard to the national rules in force regarding public contracts or with regard to specific contract procedures applicable to private beneficiaries, a note shall be issued recording the irregularities and determining financial corrections, in accordance with the provisions of Articles 20 and 21.’

20 Article 28 of OUG No 66/2011 provides as follows:

‘The value of the credit entry established on the basis of Article 27 shall be calculated by determining the financial corrections in accordance with the provisions in the Annex.’

21 In the table in the Annex to OUG No 66/2011 relating to contracts which have a value below the threshold established by national public procurement legislation for the purpose of determining whether it is necessary to publish a notice in the *Official Journal of the European Union*, point 2.3 provides, in respect of breaches consisting in applying unlawful criteria for qualification and selection or unlawful assessment factors, for the application of corrections/reductions of 10% of the value of the contract in question or of a 5% reduction in line with the seriousness of the non-compliance.

The actions in the main proceedings and the questions referred for a preliminary ruling

22 As part of Regional Operational Programme 2007-2013, two neighbouring Romanian local authorities, Judeţul Neamţ (County of Neamţ) (Case C-260/14) and Judeţul Bacău (County of Bacău) (Case C-261/14), received funding from the European Regional Development Fund (ERDF). The funding was granted by means of a funding agreement between the Ministerul Dezvoltarii Regionale şi Turismului (Ministry for Regional Development and Tourism), as authority responsible for managing Regional Operational Programme 2007-2013, and the two respective local authorities.

23 In Case C-260/14, the funding agreement relates to the refurbishment, extension and modernisation of a school centre in Roman (Romania), a town situated about 40 kilometers north of Bacău (Romania). Bacău is approximately 300 km to the north of Bucharest (Romania), 370 km from the border with Bulgaria, beyond the eastern Carpathians, and close to the borders with Moldavia to the east and Ukraine to the north. The County of Neamț, which received the funds in its capacity as contracting authority, organised a tendering procedure for the award of a public audit services contract with an estimated value of EUR 20 264.18, as a result of which a contract for the provision of audit services with a value of EUR 19 410.12 was concluded.

24 In Case C-261/14, the funding agreement concerns the refurbishment of a municipal road. The County of Bacău organised an open tendering procedure for the award of a public works contract with a value of EUR 2 820 515, as a result of which a works contract was concluded on 17 September 2009.

25 It is apparent from the information provided to the Court that, in both those tendering procedures, the Ministry for Regional Development and Public Administration considered that the conditions imposed by both the County of Neamț and the County of Bacău were unlawful under national public procurement law. In those circumstances, the Ministry applied a financial correction representing 5% of the respective amounts of the contracts in question.

26 The County of Neamț and the County of Bacău subsequently lodged appeals against the decisions applying the respective financial corrections. As the Ministry for Regional Development and Public Administration rejected the appeals, the applicants in the main proceedings brought actions before the referring court seeking the annulment of those decisions.

27 In those proceedings, the referring court is required to rule, inter alia, on whether there is an ‘irregularity’ within the meaning of Regulation No 2988/95 or Regulation No 1083/2006 and, if appropriate, on the nature of the financial corrections applied by the ministry in question.

28 In those circumstances, the Curtea de Apel Bacău (Appeal Court, Bacău, Romania) decided to stay proceedings and to refer to the Court for a preliminary ruling the following questions, the first of which relates to Case C-260/14 alone, and the second to fourth of which are, for all essential purposes, the same in Case C-260/14 and C-261/14.

‘(1) Does the failure of a contracting authority, the beneficiary of a Structural Fund grant, to comply with rules concerning the award of a public contract of an estimated value lower than the threshold provided for by Article 7(a) of Directive 2004/18 in connection with the award of a contract for the performance of the action eligible for the grant, constitute an “irregularity” within the meaning of Article 1 of Regulation No 2988/95 or an “irregularity” within the meaning of Article 2(7) of Regulation No 1083/2006?

(2) Must the second sentence of the first subparagraph of Article 98(2) of Regulation No 1083/2006 be interpreted as meaning that financial corrections by Member States, if applied to co-financed expenditure under Structural Funds for failure to comply with rules concerning public contracts, are administrative measures within the meaning of Article 4 of Regulation No 2988/95 or administrative penalties within the meaning of Article 5(c) of that regulation?

(3) If the answer to the second question is to the effect that financial corrections by Member States are administrative penalties, should the principle of retroactive application of the less severe penalty referred to in the second sentence of Article 2(2) of Regulation No 2988/95 be applied?

(4) In circumstances in which financial corrections have been applied to co-financed expenditure under Structural Funds for failure to comply with rules on public contracts, does Article 2(2) of Regulation No 2988/95 in conjunction with the second sentence of the first subparagraph of Article 98(2) of Regulation No 1083/2006, having regard also to the principles of legal certainty and protection of legitimate expectations, prevent a Member State from applying financial corrections governed by an internal legislative measure which entered into force after the alleged infringement of the rules on public contracts occurred?’

29 By decision of the President of the Court of 16 July 2014, Cases C-260/14 and C-261/14 were joined for the purposes of the written and oral procedure and judgment.

Consideration of the questions referred

The first question in Case C-260/14

30 By its first question in Case C-260/14, the referring court seeks to ascertain, in essence, whether Article 1(2) of Regulation No 2988/95 and Article 2(7) of Regulation No 1083/2006 are to be interpreted as meaning that failure to comply with national provisions by a contracting authority, the beneficiary of a Structural Fund grant, in connection with the award of a public contract of an estimated value below the threshold laid down in Articled 7(a) of Directive 2004/18 may constitute, at the time the contract is awarded, an 'irregularity' within the meaning of Article 1(2) of Regulation No 2988/95 or Article 2(7) of Regulation No 1083/2006.

31 It should be noted, as a preliminary point, that as the value of the contract at issue in the main proceedings is below the threshold set in Article 7(a) and (c) of Directive 2004/18, that contract falls outside the scope of the procedures laid down by the directive.

32 It must be noted that Regulation No 2988/95 merely lays down general rules for supervision and penalties for the purpose of safeguarding the European Union's financial interests. Misused funds must be recovered on the basis of other provisions, that is to say, where appropriate, on the basis of sector-specific provisions (see judgment of 18 December 2014 in *Somvao*, C-599/13, EU:C:2014:2462, paragraph 37 and the case-law cited).

33 Those sector-specific provisions are covered, as the Advocate General observed at point 46 of his Opinion, by Regulation No 1083/2006.

34 However, as Regulation Nos 2988/95 and 1083/2006 form part of the same mechanism designed to ensure the proper management of EU funds and the safeguarding of the European Union's financial interests, the term 'irregularity' within the meaning of Article 1(2) of Regulation No 2988/95 and Article 2(7) of Regulation No 1083/2006 must be interpreted in a uniform manner.

35 That said, it should be borne in mind that, according to the Court's settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it forms part (see, to that effect, judgment of 3 September 2015 in *Sodiaal International*, C-383/14, EU:C:2015:541, paragraph 20 and the case-law cited).

36 Accordingly, while it is apparent from the wording of Article 1(2) of Regulation No 2988/95 and of Article 2(7) of Regulation No 1083/2006 that a breach of EU law constitutes an irregularity, the possibility cannot be ruled out that such an irregularity may also arise as a result of a breach of national law.

37 In that regard, as the operations concerned in the main proceedings benefited from EU funding, those operations are subject to the application of EU law. It follows that the term 'irregularity' within the meaning of Article 1(2) of Regulation No 2988/95 and Article 2(7) of Regulation No 1083/2006 must be interpreted as covering not only any breach of EU law but also any breach of the provisions of national law which contribute to ensuring that EU law relating to the management of projects financed by EU funds is properly applied.

38 Such an interpretation of the term 'irregularity' is confirmed by an examination of the legislative context of Article 2(7) of Regulation No 1083/2006 and by the objective of that regulation.

39 As regards, first, the legislative context of Article 2(7) of Regulation No 1083/2006, the objective of that regulation, as set out in Article 1, is, inter alia, to lay down the principles on management, monitoring and control of operations receiving funding from the ERDF on the basis of responsibilities shared between the Member States and the Commission.

40 Those management, monitoring and control tasks are specified in Title VI of Regulation No 1083/2006, whereas tasks relating to financial management are covered by the provision of Title VII of the regulation, Chapter 2 of which deals specifically with financial corrections. It is clear from this that it is incumbent on the Member State in the first instance to make the necessary financial corrections, if appropriate, and, therefore, to ensure that the operations in question comply with all the rules applicable at both EU and national level.

41 As regards, second, the objective of Regulation No 1083/2006, the purpose of the rules laid down in that regulation is, inter alia, as noted in paragraph 34 above, to ensure that Structural Funds are used properly and effectively in order to safeguard the financial interests of the European Union.

42 Given that it cannot be ruled out that breaches of the provisions of national law may jeopardise the effective intervention of the funds concerned, an interpretation to the effect that such breaches cannot amount to an ‘irregularity’ within the meaning of Article 2(7) of Regulation No 1083/2006 would fail to guarantee the full attainment of the objective pursued by the EU legislature in this area.

43 In the light of the foregoing considerations, the term ‘irregularity’ as defined in Article 2(7) of Regulation No 1083/2006 and Article 1(2) of Regulation No 2988/95 must be interpreted as also referring to breaches of provisions of national law applicable to operations funded under the Structural Funds.

44 That interpretation is also confirmed by the definition of ‘irregularity’ in Article 2(36) of Regulation No 1303/2013, which repealed Regulation No 1083/2006 with effect from 1 January 2014.

45 That definition, which is set out in paragraph 11 above, now refers expressly to any breach of EU law or national law relating to its application. Read in the light of the foregoing considerations, that elucidation concerning breaches of national law clarifies the scope of the term ‘irregularity’ in Article 2(7) of Regulation No 1083/2006 (see, to that effect, a contrario, judgment of 7 April 2016 in *PARTNER Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraphs 90 and 91).

46 Accordingly, the answer to the first question in Case C-260/14 is that Article 1(2) of Regulation No 2988/95 and Article 2(7) of Regulation No 1083/2006 must be interpreted as meaning that failure to comply with national provisions by a contracting authority, the beneficiary of Structural Funds, in connection with the award of a public contract of an estimated value below the threshold laid down in Article 7(a) of Directive 2004/18 may constitute, at the time the contract is awarded, an ‘irregularity’ within the meaning of Article 1(2) of Regulation No 2988/95 or Article 2(7) of Regulation No 1083/2006, if that breach has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure.

The second question in Case C-260/14 and the first question in Case C-261/14

47 By its second question in Cases C-260/14 and its first question in C-261/14, the referring court seeks to ascertain, in essence, whether the second sentence of the first subparagraph of Article 98(2) of Regulation No 1083/2006 is to be interpreted as meaning that financial corrections by Member States, if applied to co-financed expenditure under Structural Funds for failure to comply with rules concerning the award of public contract, are administrative measures within the meaning of Article 4 of Regulation No 2988/95 or, on the other hand, administrative penalties within the meaning of Article 5(c) of that regulation.

48 It should be noted, first of all, that the first subparagraph of Article 98(2) of Regulation No 1083/2006 provides that the financial corrections which Member States must make if they detect irregularities in operations or operational programmes consist of cancelling all or part of the public contribution to the operational programme concerned. Furthermore, according to the second subparagraph of Article 98(2) of the regulation, the resources from the Funds released in this way may, under certain conditions, be reused by the Member State concerned.

49 Next, it is clear from the very wording of that provision, read in conjunction with the first indent of Article 4(1) of Regulation No 2988/95, that the purpose of the financial corrections which Member States are required to make if they detect irregularities in operations or operational programmes is to

secure the withdrawal of an advantage improperly received by the economic operator concerned, inter alia by obliging the operator to repay the sums wrongly paid.

50 Lastly, as the Advocate General observed in point 105 of his Opinion, the Court has previously held on many occasions that the obligation to give back an advantage improperly received by means of an irregularity is not a penalty, but simply the consequence of a finding that the conditions required to obtain the advantage derived from EU rules have not been observed, so that that advantage becomes an advantage wrongly received (see, to that effect, judgments of 4 June 2009 in *Pometon*, C-158/08, EU:C:2009:349, paragraph 28; 17 September 2014 in *Cruz & Companhia*, C-341/13, EU:C:2014:2230, paragraph 45 and the case-law cited, and 18 December 2014 in *Somvao*, C-599/13, EU:C:2014:2462, paragraph 36). The fact pointed out by the referring court that the full amount to be repaid may, in any individual case, not coincide exactly with the loss actually incurred by the Structural Funds cannot alter that conclusion.

51 It is therefore apparent from the foregoing that the answer to the second question in Case C-260/14 and the first question in Case C-261/14 is that the second sentence of the first subparagraph of Article 98(2) of Regulation No 1083/2006 is to be interpreted as meaning that financial corrections by Member States, if applied to co-financed expenditure under Structural Funds for failure to comply with rules concerning the award of public contract, are administrative measures within the meaning of Article 4 of Regulation No 2988/95.

The third question in Case C-260/14 and the second question in Case C-261/14

52 In the light of the answer given to the referring court in paragraph 51 above, there is no need to answer the third question in Case C-260/14 or the second question in C-261/14.

The fourth question in Case C-260/14

53 By its fourth question in Case C-260/14, the referring court asks, in essence, whether, in the circumstances of the main proceedings, the principles of legal certainty and protection of legitimate expectations must be interpreted as precluding a Member State from applying financial corrections governed by an internal legislative measure which entered into force after the alleged breach of rules governing public contracts occurred.

54 In that regard, it is established case-law that where Member States adopt measures by which they implement EU law, they are required to respect the general principles of that law, which include, inter alia, the principles of legal certainty and protection of legitimate expectations (see, inter alia, judgment of 3 September 2015 in *A2A*, C-89/14, EU:C:2015:537, paragraphs 35 and 36 and the case-law cited).

55 Moreover, it should also be borne in mind that, according to that same line of case-law, whilst the principle of legal certainty precludes a regulation from being applied retroactively, namely to a situation which arose prior to the entry into force of that regulation, and irrespective of whether such application might produce favourable or unfavourable effects for the person concerned, the same principle requires that any factual situation should normally, in the absence of any express contrary provision, be examined in the light of the legal rules existing at the time when the situation obtained. However, if the new law is thus valid only for the future, it also applies, save for derogation, to the future effects of situations which came about during the period of validity of the old law (see, inter alia, judgment of 3 September 2015 in *A2A*, C-89/14, EU:C:2015:537, paragraph 37 and the case-law cited).

56 Likewise, as is apparent from that same line of case-law, the scope of the principle of protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules (see, inter alia, judgment of 3 September 2015 in *A2A*, C-89/14, EU:C:2015:537, paragraph 38 and the case-law cited).

57 It follows from the foregoing that the answer to the fourth question in Case C-260/14 is that the principles of legal certainty and protection of legitimate expectations must be interpreted as not precluding a Member State from applying financial corrections governed by an internal legislative measure which entered into force after an alleged breach of the rules governing public contracts occurred, provided that it is a question of the application of new rules to the future effects of situations

which arose under the earlier rules, which is a matter to be determined by the national court, taking into account all the relevant circumstances of the proceedings before it.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests and Article 2(7) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 must be interpreted as meaning that failure to comply with national provisions by a contracting authority, the beneficiary of Structural Funds, in connection with the award of a public contract of an estimated value below the threshold laid down in Article 7(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007, may constitute, at the time the contract is awarded, an 'irregularity' within the meaning of Article 1(2) of Regulation No 2988/95 or Article 2(7) of Regulation No 1083/2006, if that breach has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure.**

2. **The second sentence of the first subparagraph of Article 98(2) of Regulation No 1083/2006 is to be interpreted as meaning that financial corrections by Member States, if applied to co-financed expenditure under Structural Funds for failure to comply with rules concerning the award of public contract, are administrative measures within the meaning of Article 4 of Regulation No 2988/95.**

3. **The principles of legal certainty and protection of legitimate expectations must be interpreted as not precluding a Member State from applying financial corrections governed by an internal legislative measure which entered into force after an alleged breach of the rules governing public contracts occurred, provided that it is a question of the application of new rules to the future effects of situations which arose under the earlier rules, which is a matter to be determined by the national court, taking into account all the relevant circumstances of the proceedings before it.**

[Signatures]

---

* Language of the case: Romanian.

OPINION OF ADVOCATE GENERAL

BOT

delivered on 14 January 2016 (1)

Joined Cases C-260/14 and C-261/14

Județul Neamț (C-260/14),

Județul Bacău (C-261/14)

v

Ministerul Dezvoltării Regionale și Administrației Publice

(Requests for a preliminary ruling from the Curtea de Apel Bacău (Court of Appeal, Bacău, Romania))

(Reference for a preliminary ruling — Protection of the EU's financial interests — Regulation (EC, Euratom) No 2988/95 — European Regional Development Fund (ERDF) — Regulation (EC) No 1083/2006 — Award of a contract, by the beneficiary of funds acting as a contracting authority, for the performance of the action covered by the grant — Term 'irregularity' — Meaning of the criterion of 'infringement of EU law' — Selection criteria contrary to national law in the tendering procedure — Nature of the financial corrections adopted by Member States — Administrative measures or penalties)

1. Does failure by a contracting authority, the beneficiary of a Structural Fund grant, to comply with national rules concerning the award of public contracts in connection with the award of a contract for the performance of the action covered by the grant, constitute an 'irregularity' within the meaning of Regulation (EC, Euratom) No 2988/95 (2) or Regulation (EC) No 1083/2006? (3)

2. If appropriate, do the financial corrections effected by Member States in order to withdraw the advantage unduly obtained constitute administrative measures or penalties within the meaning of those regulations?

3. Those, in essence, are the questions referred by the Curtea de Apel Bacău (Court of Appeal, Bacău) in the present cases.

4. The questions were raised in proceedings between the Județul Neamț (the District of Neamț) (Case C-260/14) and the Județul Bacău (District of Bacău) (Case C-261/14), respectively, which are beneficiaries of a grant from the European Regional Development Fund (ERDF), and the Ministerul Dezvoltării Regionale și Administrației Publice (the Ministry for Regional Development and Public Administration), which is the authority responsible for managing and controlling the use of that grant at regional level. That ministry took the view that the District of Neamț and the District of Bacău had failed to comply with the national rules on public procurement in the awarding of public contracts in connection with the performance of the operations covered by the grant and consequently decided to withdraw and recover 5% of the financial assistance granted. The District of Neamț and the District of Bacău therefore challenged the lawfulness of those financial corrections, pointing out that, under Regulations Nos 2988/95 and 1083/2006, an 'irregularity' means, inter alia, infringement of a provision of EU law.

5. In the cases in the main proceedings the referring court seeks to ascertain whether, in view of the provisions of Article 1(2) of Regulation No 2988/95 and those of Article 2(7) of Regulation No 1083/2006,

the failure of a beneficiary of a Structural Fund grant acting as a contracting authority to comply with national rules alone may be classified as an irregularity entailing the adoption of financial corrections.

6. In this Opinion I shall set out the reasons why irregularity of an operation co-financed by the Structural Funds cannot, in my view, be limited to infringement of EU law *sensu stricto*.

7. Protecting the financial interests of the European Union and ensuring the effectiveness of operational programmes (4) through the legal and regular use of the Structural Funds are objectives which can be attained effectively only if the grants awarded relate to acts and expenditure the legality of which cannot be challenged either under EU law or under national law.

8. I shall therefore propose that the Court should rule that the failure of a contracting authority, the beneficiary of a Structural Fund grant, to comply with national rules relating to the award of public contracts in connection with the award of a contract for the performance of the action covered by the grant, constitutes an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006 in so far as that act has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to it.

9. I shall state in that regard that such an interpretation merely anticipates the amendments introduced in the context of the new Structural Fund regulations.

10. As regards the nature of the financial corrections which Member States are required to adopt under Article 98(2) of Regulation No 1083/2006, I shall refer to the settled case-law of the Court according to which the obligation to return an advantage improperly received by means of an irregular practice is not a penalty.

I – **EU law**

A – *Protection of the financial interests of the European Union*

11. The second to the fifth recitals of Regulation No 2988/95 read as follows:

> 'Whereas more than half of Community expenditure is paid to beneficiaries through the intermediary of the Member States;
>
> Whereas detailed rules governing [the] decentralised [financial] administration and the monitoring of their use are the subject of differing detailed provisions according to the Community policies concerned; whereas acts detrimental to the Communities' financial interests must, however, be countered in all areas;
>
> Whereas the effectiveness of the combating of fraud against the Communities' financial interests calls for a common set of legal rules to be enacted for all areas covered by Community policies;
>
> Whereas irregular conduct, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with this Regulation.'

12. Under Title I, entitled 'General principles', Article 1 of that regulation provides:

> '1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.
>
> 2. "Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.'

13. Article 2 of that regulation sets out the rules applying to adoption of administrative measures and penalties. It reads as follows:

‘1. Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of Community law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities’ financial interests.

2. No administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively.

3. Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.

...’

14. Under Title II, entitled ‘Administrative measures and penalties’, Article 4 of Regulation No 2988/95 sets out the rules applying to administrative measures as follows:

‘1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

– by an obligation to pay or repay the amounts due or wrongly received,

– by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance.

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis.

3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.

4. The measures provided for in this Article shall not be regarded as penalties.’

15. Article 5 of that regulation, which lays down the rules applying to administrative penalties, provides as follows:

‘1. Intentional irregularities or those caused by negligence may lead to the following administrative penalties:

(a) payment of an administrative fine;

(b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate ...

(c) total or partial removal of an advantage granted by Community rules, ...

...’

B – *The rules applicable to operations co-financed by the Structural Funds*

16. The ERDF is one of the Structural Funds set up by the European Commission to strengthen economic, social and territorial cohesion in the European Union, in accordance with the objective referred to in Article 174 TFEU. That Fund contributes essentially to reducing economic, social and territorial disparities which have arisen, particularly in regions whose development is lagging behind and in those undergoing economic conversion and those facing structural difficulties, by co-financing, inter alia, national investment in firms and infrastructure linked to research and innovation, the environment, energy, transport and to health and education services.

17. Like its predecessor — Regulation (EC) No 1260/1999 (5) — Regulation No 1083/2006 lays down a set of rules and procedures applicable to assistance by the ERDF, the European Social Fund (ESF) and the Cohesion Fund.

18. The Structural Funds coming under shared management, the Member States and the Commission are responsible for the management and control of funding. Nonetheless, it is in the first place the Member States that have primary responsibility for putting in hand and controlling operations carried out in the context of operational programmes, and for pursuing and correcting irregularities.

19. In Article 2(7) of Regulation No 1083/2006, the EU legislature defines ‘irregularity’ as ‘any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget’.

20. In Articles 60 and 61 of that regulation, the EU legislature lays down the principles applicable to national management and control systems.

21. It then, in Article 98 of that regulation, lays down the rules applicable to financial corrections adopted by Member States. The first subparagraph of Article 98(2) reads as follows:

> ‘The Member State shall make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. The corrections made by a Member State shall consist of cancelling all or part of the public contribution to the operational programme. Member States shall take into account the nature and gravity of the irregularities and the financial loss to the Fund.’

22. The detailed rules for the application of Regulation No 1083/2006 are laid down in Regulation (EC) No 1828/2006. (6)

23. Regulation No 1083/2006 was repealed, with effect from 1 January 2014, by Regulation (EU) No 1303/2013, (7) which I shall consider briefly before concluding my analysis.

II – **The cases in the main proceedings and the questions referred for a preliminary ruling**

24. On 12 July 2007, the Commission approved, for the period 2007-2013, the Regional Operational Programme for Romania under the ERDF. The total budget for that programme is close to EUR 4.38 billion and Community aid amounts to EUR 3.7 billion. (8)

25. It is clear from the documents on the national file (9) that the ERDF’s co-financing rate in the regional operational programme is 84% (EUR 3 726 021 762). In the present cases, the financing in question is to contribute to achievement of Priority Axis No 3 of that programme (EUR 657 530 000), which is designed, inter alia, to improve health and education infrastructure in order to increase access by the population to essential services.

26. The District of Neamț (Case C-260/14) and the District of Bacău (Case C-261/14) concluded with the Ministry for Regional Development and Tourism (Ministerul Dezvoltarii Regionale şi Turismului), as the authority managing the regional operational programme, a financing contract to carry out two operations.

27. In the context of Case C-260/14, the financing contract covers the refurbishment, extension and modernisation of a school centre. The District of Neamț, a beneficiary of funds acting as a contracting authority, held a tendering procedure for the award of a public audit services contract, the amount of which was in the region of EUR 20 264.18, following which an audit services contract was concluded amounting to EUR 19 410.12.

28. It is clear from the material put before the Court that, in the context of that procedure, the District of Neamț imposed conditions relating to the professional competence of the tenderers, held unlawful under national law by the Ministry for Regional Development and Public Administration.

29. The award of the contract in question was made conditional, first, on submission by the tenderer of a contract concluded in the previous three years having the same subject-matter as the contract covered by the award procedure at issue and, secondly, the presence of a building quality management systems administrator.

30. The Ministry for Regional Development and Public Administration held that the first condition was contrary to the principle of free competition, taking the view that every economic operator must be allowed, within the specific area of the contract, to take part in the award procedure, without the contracting authority, as the beneficiary of the funding in question, using the source of funding as an eligibility criterion. As for the second condition, it held that, having regard to the nature of the public contract, it was not relevant. In those circumstances, the Ministry for Regional Development and Public Administration adopted a financial correction representing 5% of the amount of the contract in question.

31. In Case C-261/14, the financing contract relates to the repairing of a main road. The District of Bacău held an open tendering procedure for the award of a public works contract valued at EUR 2 820 515, following which a contract for the execution of works was concluded on 17 September 2009.

32. It is clear from the material put before the Court that in connection with that procedure the District of Bacău used inappropriate technical specifications, which also were held to infringe national law. In those circumstances, the Ministry for Regional Development and Public Administration also adopted a financial correction representing 5% of the amount of the contract in question.

33. The District of Neamț and the District of Bacău then brought an action against those decisions applying financial corrections. In those proceedings the referring court is called upon in particular to rule on whether there is an 'irregularity', within the meaning of Regulation No 2988/95 or Regulation No 1083/2006, and, if appropriate, on the nature of the financial corrections adopted by the managing authority.

34. Faced with certain doubts as to how those regulations should be interpreted, the Curtea de Apel Bacău (Appeal Court, Bacău) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling: (10)

'(1) Does the failure of a contracting authority, the beneficiary of a Structural Fund grant, to comply with rules concerning the award of a public contract of an estimated value lower than the threshold provided for by Article 7(a) of Directive [2004/18/EC] [(11)] in connection with the award of a contract for the performance of the action covered by the grant, constitute an "irregularity" within the meaning of Article 1 of Regulation No 2988/95 or an 'irregularity' within the meaning of Article 2(7) of Regulation No 1083/2006?

(2) In the event of an affirmative answer to the first question, must the second sentence of Article 98(2) of Regulation No 1083/2006 be interpreted as meaning that financial corrections by Member States, if applied to co-financed expenditure under Structural Funds for failure to comply with rules concerning public contracts, are "administrative measures" within the meaning of Article 4 of Regulation No 2988/95 or whether they are administrative penalties within the meaning of Article 5(1)(c) of that regulation?

(3) If the answer to the second question is to the effect that financial corrections by Member States are administrative penalties, is the principle of retroactive application of the less severe penalty referred to in the second sentence of Article 2(2) of Regulation No 2988/95 applicable?

(4) [If the answer to the second question is to the effect that financial corrections by Member States are administrative penalties], (12) in circumstances in which financial corrections have been applied to co-financed expenditure under Structural Funds for failure to comply with rules on public contracts, does Article 2(2) of Regulation No 2988/95 in conjunction with the second sentence of Article 98(2) of Regulation No 1083/2006, having regard also to the principles of legal certainty and protection of legitimate expectations, prevent a Member State from applying financial corrections governed by an internal legislative measure which entered into force after the alleged infringement of the rules on public contracts took place?'

35. Written observations were submitted by the parties in the main proceedings, the Romanian, Hungarian and Netherlands Governments and the European Commission.

III – **My analysis**

A – *The first question: whether the infringements in question are to be classified as 'irregularities'*

36. By its first question, the referring court asks, in essence, whether the failure of a beneficiary of funds acting as a contracting authority, to comply with national law in the context of the award of a public contract for the performance of an operation co-financed by the Structural Funds, constitutes an 'irregularity', within the meaning of Article 1(2) of Regulation No 2988/95 or of Article 2(7) of Regulation No 1083/2006.

37. It should be borne in mind that Article 1(2) of Regulation No 2988/95 provides that 'irregularity' means 'any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure'.

38. The definition of 'irregularity' adopted for Regulation No 1083/2006 is that taken from Article 1(2) of Regulation No 2988/95. The words are to some extent the same, since, according to Article 2(7) of Regulation No 1083/2006, 'irregularity' means 'any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget'.

39. In order to answer the question put to the Court by the referring court, it is necessary, first of all, to determine which of those two regulations is applicable, inasmuch as the definition of irregularity adopted by the EU legislature forms part of a set of rules and principles relating to the subject-matter covered by the regulation.

1. The regulation applicable

40. Must the acts in question be considered from the point of view of the rules on the protection of the financial interests of the European Union or of those containing general provisions governing the Structural Funds?

41. The case-law of the Court is well established on this point.

42. The acts in question must be assessed in the light of the provisions of Article 2(7) of Regulation No 1083/2006, which, unlike Regulation No 2988/95, constitute sectoral rules.

43. In its judgment in *Somvao* (13) the Court took care to refer to Article 1(1) and the third, fourth and fifth recitals of Regulation No 2988/95, when it held that that regulation lays down general rules relating to checks and penalties in order to protect the European Union's financial interests from irregularities, enacting a common set of legal rules for all areas covered by Community policies. (14)

44. Regulation No 2988/95 thus contains a set of principles that must be observed in connection with the enactment of sectoral rules. As is clear from Article 2(3) and the third, fifth and eighth recitals of that regulation, it is actually in the context of the sectoral rules, laid down by the EU legislature according to the Community policies concerned, that detailed rules governing the decentralised administration of the budget, the rules and principles applicable to national systems of administration and monitoring, irregular conduct and administrative measures and penalties are laid down.

45. The competent national authorities must therefore make reference to the sectoral provisions in order to determine whether conduct constitutes an 'irregularity' and it is on the basis of those provisions that they must, where appropriate, recover funds incorrectly used. (15)

46. That is the purpose of Regulation No 1083/2006.

47. As is clear from the fourth paragraph of Article 1 of that regulation, the latter sets out the principles applicable to use of the Structural Funds, by laying down, inter alia, rules on partnership, programming and evaluation, stipulating the obligations incumbent on Member States with regard to control of operations and setting out the principles applicable to the detection and correction of irregularities.

48. The definition of ‘irregularity’ taken from Article 1(2) of Regulation No 2988/95 was adapted for reasons of consistency and legal clarity with regard to the functioning and the specific principles of structural policies. (16)

49. In view of those factors, and in particular the settled case-law of the Court, it is in the light of Article 2(7) of Regulation No 1083/2006, which, unlike Regulation No 2988/95 constitutes a sectoral rule, that it is to be assessed whether the practices at issue in the cases in the main proceedings constitute irregularities.

50. Any other interpretation would, in my view, have the effect of rendering Regulation No 1083/2006 ineffective and would be detrimental to the proper use of the Structural Funds.

51. It is now appropriate to determine whether those practices constitute ‘irregularities’, within the meaning of Article 2(7) of Regulation No 1083/2006.

2. Meaning of the term ‘irregularity’, within the meaning of Article 2(7) of Regulation No 1083/2006

52. I would recall that Article 2(7) of Regulation 1083/2006 defines ‘irregularity’ as any infringement of a provision of EU law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget.

53. The EU legislature therefore defines in those terms the circumstances in which an infringement of the relevant law may lead Member States or the Commission to make the financial corrections referred to, inter alia, in Articles 98 to 100 of Regulation No 1083/2006.

54. In the present cases, the question is whether the acts in question, which do not fall within the scope of Directive 2004/18, may nonetheless be linked to infringement of EU law.

55. It is common ground that measures financed from the European Union budget must be carried out in full compliance with EU law.

56. The principle of the compatibility with EU law of an operation financed by the Structural Funds is a fundamental principle governing the eligibility of the operation for European funding.

57. That principle is laid down in Article 9(5) of Regulation No 1083/2006, which comes under Title I of that regulation, entitled ‘Objectives and general rules on assistance’. That provision states that ‘operations financed by the [Structural] Funds shall comply with the provisions of the Treaty and of acts adopted under it’.

58. That principle also appears in recital 22 of that regulation. It is restated in Article 11 of the ERDF standard agreement for grants (17) and, in so far as it constitutes a key element of a grant application, in all information handbooks for project organisers, (18) and in all funding agreements concluded with the beneficiaries of the funds too.

59. In the context of the cases in the main proceedings, the principle of the compatibility with EU law of an operation financed by the Structural Funds appears in the guide drawn up by the Ministry for Development, Public Works and Housing (Ministerul Dezvoltarii, Lucrărilor Publice şi Locuinţelor) concerning implementation of Priority Axis No 3 of regional operational programme 2007-2013 and is clear, inter alia, from the eligibility criteria for funding. (19)

60. According to that principle, every operation financed by the Structural Funds, and in consequence every item of expenditure relating to it, must be consistent with EU law and be compatible with the policies and actions undertaken by the EU legislature.

61. Thus, if, when carrying out an operation co-financed by the Structural Funds, the beneficiary of the funds, acting as a contracting authority, fails to comply with the rules on public procurement laid down in

Directive 2004/18 as it is required to do, that act is liable to constitute an ‘irregularity’, within the meaning of Article 2(7) of Regulation No 1083/2006, in that it infringes a rule of EU law.

62. However, what is the case when, in circumstances such as those at issue in the main proceedings, the value of the contracts is lower than the thresholds laid down in Article 7 of Directive 2004/18, (20) so that the award of those contracts is not subject to the rules and principles laid down in that instrument?

63. Do negligence, breach of obligations or wrongful acts committed by a beneficiary of Structural Funds escape being classified as ‘irregularities’, within the meaning of Article 2(7) of Regulation No 1083/2006, on the grounds that such acts do not constitute infringement of a provision of EU law?

64. I think not. It must be possible for such infringements to be covered by the concept of ‘irregularity’.

65. First, although in the cases in the main proceedings the beneficiaries of the grant, in their capacity as contracting authorities, were not bound to comply with the rules laid down in Directive 2004/18 owing to the value of the contracts, nonetheless, the award of those contracts, like any State measure laying down the conditions to which the provision of economic activities is subject, must observe the principles laid down in the Treaty on the Functioning of the European Union and is subject to the requirements deriving from it, as set out in the case-law of the Court.

66. The EU legislature, in recital 2 of Directive 2004/18, thus took care to specify that, whatever the value of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law, the award procedure is subject to observance of the principles of the Treaty on the Functioning of the European Union, in particular, of the principles of freedom of movement of goods, freedom of establishment and freedom to provide services, and of the principles deriving therefrom, such as those of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

67. As the Court further noted in its judgment in *Impresa Edilux and SICEF*, (21) that obligation applies to the award of public contracts which have a ‘certain cross-border interest’, (22) that is to say, which might potentially be of interest to economic operators situated in other Member States.

68. The existence of a certain cross-border interest is determined in the light of certain objective criteria, such as the financial value of the contract, the place where it is to be performed or its technical characteristics. (23)

69. In the present cases, it will therefore be for the referring court to carry out a detailed assessment of all the relevant facts at its disposal in order to determine whether the contracts in question had such an interest. (24)

70. In my view, in the light of the limited evidence at my disposal, it is unlikely that the contract awarded by the District of Neamț (Case C-260/14) would have been of interest to undertakings established in other Member States, given the limited financial value of the contract and the place where it was to be performed. The town of Piatra Neamţ (Romania) is located 433 km from the Bulgarian border and the amount of the contract was EUR 19 410.

71. However, I take a more qualified view of the contract awarded by the District of Bacău (Case C-261/14). Although the town of Bacău is located approximately 370 km from the Bulgarian border, the amount of the contract was EUR 2 820 515. That is by no means an insignificant amount. It cannot therefore be excluded that undertakings established in Bulgaria, in particular, might have shown an interest in it.

72. If the referring court were to take the view that one or other of those contracts might have been of interest to undertakings established in other Member States, the infringements in question might then constitute an ‘irregularity’, within the meaning of Article 2(7) of Regulation No 1083/2006, in so far as they constitute a breach of the principles of the Treaty on the Functioning of the European Union. It would nonetheless be for the referring court to determine whether those acts did actually prejudice the general budget of the European Union by charging an unjustified item of expenditure to it.

73. Secondly, it is important not to lose sight of the fact that, irrespective of the nature of the infringement, the unlawful act takes place in the context of an operation benefiting from European funding. That funding

necessarily brings the operation and all the rules of national law applicable to it within the scope of EU law.

74. Consequently, I think that the criterion based on infringement of EU law must be interpreted broadly, as covering infringements of EU law *sensu stricto* and infringements of national law relating to the application of EU law.

75. The objectives and scheme of Regulation No 1083/2006 moreover support that interpretation.

76. The ERDF, in so far as it commits funds of the European Union, is based, in the first place, on the principle of sound financial management, which requires budgetary appropriations to be used in accordance with the principles of economy, efficiency and effectiveness.

77. That principle, which applies to all areas of the budget which employ shared management, is laid down in Article 317 TFEU (25) and is recognised consistently in case law. (26) It is one of the basic principles underlying Regulation No 2988/95 and its scope was defined in Chapter 7 of Title II of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, (27) and in particular Article 27 thereof.

78. According to the principle of sound financial management, the objective of the rules laid down within the framework of Regulation No 1083/2006 is to ensure that Member States are using the Structural Funds in a legal and regular manner, in order, first, to protect the financial interests of the European Union and, secondly, to ensure the efficient implementation of operational programmes. (28)

79. That objective can be attained only if grants awarded by the Structural Funds relate to acts and expenditure the legality of which cannot be challenged either under EU law or under national law. It is only on that condition that the efficiency of action by the Structural Funds can be guaranteed, by making sure that those Funds do not provide financing for fraudulent operations, involving on occasion acts of favouritism or corruption.

80. Thus, in the context of the tendering procedures in question, it cannot be excluded that, in using such restrictive selection criteria in breach of national public procurement rules, the beneficiaries of the grant, acting as a contracting authority, did not intend to exclude certain tenderers from the contract or, on the other hand, to favour a particular tenderer. Those criteria certainly prevented, or at least deterred, certain economic operators from tendering for the contracts in question and therefore reduced significantly the number of economic operators qualifying to perform the contracts. In such situations, which are particularly frequent in the case of the award of public contracts, (29) the selection criteria in question may confer an undue advantage on one undertaking, contrary to the very purpose of European funding. In those circumstances, failure to comply with national law constitutes an act that may adversely affect the financial interests of the European Union, in the same way as an act infringing the rules of EU law. In paragraph 45 of its judgment in *Baltlanta*, (30) the Court took care to note that the general budget of the European Union must be protected against ‘any act or omission which could be detrimental to it’. The only difference will perhaps lie in the gravity of the infringement, the significance of the consequent financial implications and the extent of the financial correction to be adopted.

81. At all events, and according to the principle *fraus omnia corrumpit*, infringement of national law will make the operation ineligible for European funding.

82. In order to protect the financial interests of the European Union from any fraud and to ensure full attainment of the objectives pursued by the EU legislature in the context of assistance from the Structural Funds, infringements of national law in connection with a co-financed operation must be penalised in the same way as infringement of the rules of EU law would be penalised, and it must therefore be possible to classify them as ‘irregularities’ within the meaning of Article 2(7) of Regulation No 1083/2006.

83. It is moreover in the light of those objectives that the Court held in paragraph 48 of the judgment in *Baltlanta* (C-410/13, EU:C:2014:2134), that the concept of ‘irregularity’ refers to the ‘unlawful use of European Union funds’. The unlawful use of European Union funds can result not only from infringement of the rules of EU law, but also from infringement of the rules of national law.

84. A broad, dynamic interpretation of the criterion based on infringement of a provision of EU law is called for also in the light of the scheme of Regulation No 1083/2006, and in particular of the national systems of management and control which it puts in place.

85. In order to ensure that the Structural Funds are used efficiently and properly, Member States are required, in accordance with the principle of sound financial management, (31) to put in place good management and control systems to ensure that a beneficiary of funds has carried out the obligations entitling it to allocation of the proposed financial assistance in accordance with EU law and the relevant national law. (32)

86. Article 60(a) and (b) of Regulation No 1083/2006 thus states that the managing authority is to be responsible, in accordance with the principle of sound financial management, both for ensuring that operations 'comply with applicable Community and national rules for the whole of their implementation period' and for verifying that the expenditure declared by the beneficiaries 'complies with Community and national rules'.

87. Similarly, Article 61(b)(ii) of that regulation states that the certifying authority of an operational programme is required to certify that 'the expenditure declared complies with applicable Community and national rules and has been incurred in respect of operations selected for funding in accordance with the criteria applicable to the programme and complying with Community and national rules'.

88. The same obligations are incumbent on the audit authority under Article 62(1) of that regulation, read in conjunction with Article 16(2) of Regulation No 1828/2006.

89. Member States are thus required to discontinue all or part of the European funding where they find shortcomings in the application of EU regulations or of national law, the compatibility of the operation with applicable Community and national provisions being a condition for the operation's eligibility for funding.

90. The financial corrections Member States are required to adopt under Article 98 of Regulation No 1083/2006 are intended, moreover, 'to restore a situation where all of the expenditure declared for co-financing from the Structural Funds is legal and regular, in line with the applicable national and Union rules and regulations'. (33)

91. As I see it, the purpose of the controls incumbent on Member States is therefore to ensure the lawfulness and regularity of all operations (34) in the light, not only of EU law, but also of national law, and as regards all aspects of those operations, whether administrative, financial, technical or physical. (35)

92. In that context, it would seem to me to be contradictory to limit the scope of the concept of 'irregularity' merely to infringements of 'EU law' *sensu stricto* and it might, moreover, render the control procedures established under Regulation No 1083/2006 ineffective.

93. Furthermore, that interpretation appears to me to be artificial. All the factors I have just mentioned go to show that co-financing is part of a single, indivisible operation the lawfulness of which can only be viewed as a whole, that is to say from the point of view of the rules of EU law 'and' of applicable national law. If the operation was conducted or the expenditure incurred in breach of the rules of national law, it is no longer eligible for funding from the ERDF. Compliance with Community and national rules is part of the same objective. There would be no point in distinguishing as to whether the infringement falls within the scope of EU law or national law.

94. Those factors derived from the actual scheme of Regulation No 1083/2006 support a broad interpretation of the criterion based on infringement of EU law as referring to infringement not only of EU law but also of the provisions of national law falling within the scope of EU law.

95. Moreover, that interpretation merely anticipates the amendments introduced by the EU legislature in Regulation No 1303/2013, in particular in connection with defining the term 'irregularity'.

96. That regulation, it will be recalled, repealed Regulation No 1083/2006 with effect from 1 January 2014.

97. The term ‘irregularity’ now covers, in Article 2, point 36, of Regulation No 1303/2013, ‘any breach of Union law, *or of national law relating to its application*’. (36)

98. The principle of compatibility of the operation, laid down in Article 6 of that regulation, entitled ‘Compliance with Union and national law’, now provides that operations supported by the Structural Funds must ‘comply with applicable Union law *and the national law relating to its application*’. (37)

99. Furthermore, under Article 125(4)(a) of that regulation, managing and certifying authorities are now responsible for verifying that the co-financed products and services have been delivered and that the associated expenditure complies with applicable EU law and with the national law relating to its application.

100. The ‘national law relating to [the] application [of EU law]’ is comprised of all the rules of the domestic legal order for the application and implementation of the law of the European Union. That form of words refers not only to the national law resulting from the transposition of EU law, but also to all the rules for implementing EU law at national level, such as the national rules governing the eligibility of expenditure for European funding.

101. In view of all those factors, I think therefore that the failure of a contracting authority, a beneficiary of a Structural Fund grant, to comply with national rules relating to the award of public contracts in connection with the award of a contract for the performance of the action covered by the grant, is liable to constitute an ‘irregularity’ within the meaning of Article 2(7) of Regulation No 1083/2006, in so far as that act has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to it.

B – *Second question: the nature of the financial corrections*

102. By its second question, the referring court asks about the nature of the financial corrections which Member States are required to adopt under the first subparagraph of Article 98(2) of Regulation No 1083/2006.

103. According to that provision, ‘the Member State shall make the financial corrections required in connection with the individual or systemic irregularities detected in operations or operational programmes. The corrections made by a Member State shall consist of cancelling all or part of the public contribution to the operational programme. Member States shall take into account the nature and gravity of the irregularities and the financial loss to the Fund’.

104. The referring court seeks to ascertain, in particular, whether those corrections are ‘administrative measures’ within the meaning of Article 4 of Regulation No 2988/95 or whether they are ‘administrative penalties’ within the meaning of Article 5(c) of that regulation.

105. The Court has previously held on numerous occasions that ‘the obligation [to make restitution for an advantage improperly received by means of an irregular practice] is not a penalty, but simply the consequence of a finding that the conditions required to obtain the advantage derived from the EU rules had not been observed, so that that advantage becomes an advantage wrongly received’. (38)

106. I see no reason to depart from that case-law.

107. I therefore propose that the Court should rule that the first subparagraph of Article 98(2) of Regulation No 1083/2006 must be interpreted as meaning that the financial corrections that Member States are required to adopt due to an irregularity affecting the co-financed operation are ‘administrative measures’ within the meaning of Article 4 of Regulation No 2988/95.

108. In view of the answer I propose to give, there is no need to examine the third and fourth questions raised by the referring court. As is clear from the wording of those questions and from the grounds of the orders for reference, the Curtea de Apel Bacău (Appeal Court, Bacău) put those questions in case the Court were to take the view that financial corrections adopted by Member States under the first subparagraph of Article 98(2) of Regulation No 1083/2006 were ‘administrative penalties’, within the meaning of Article 2(2) of Regulation No 2988/95.

IV – **Conclusion**

109. In the light of the foregoing, I propose that the Court should answer the questions referred by the Curtea de Apel Bacău (Appeal Court, Bacău) as follows:

(1) The failure of a contracting authority, a beneficiary of a Structural Fund grant, to comply with national rules relating to the award of public contracts in connection with the award of a contract for the performance of the action covered by the grant, is liable to constitute an 'irregularity' within the meaning of Article 2(7) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, in so far as that act has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to it.

(2) Article 98(2) of Regulation No 1083/2006 must be interpreted as meaning that the financial corrections that Member States are required to adopt due to an irregularity affecting the co-financed operation are 'administrative measures' within the meaning of Article 4 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests.

---

1 – Original language: French.

---

2 – Council Regulation of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

---

3 – Council Regulation of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).

---

4 – An 'operational programme', as defined in Article 2(1) of Regulation No 1083/2006, is a 'document submitted by a Member State and adopted by the Commission setting out a development strategy with a coherent set of priorities to be carried out with the aid of a Fund, or, in the case of the Convergence objective, with the aid of the Cohesion Fund and the ERDF'.

---

5 – Council Regulation of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1).

---

6 – Commission Regulation of 8 December 2006 setting out rules for the implementation of Regulation No 1083/2006 and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund (OJ 2006 L 371, p. 1, and corrigendum OJ 2007 L 45, p. 3), as amended by Commission Regulation (EC) No 846/2009 of 1 September 2009 (OJ 2009 L 250, p. 1, 'Regulation No 1828/2006').

---

7 – Regulation of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Regulation No 1083/2006 (OJ 2013 L 347, p. 320).

---

8 – Information on that programme is contained in the national case file and is available on the Commission website (http://ec.europa.eu/regional_policy/en/atlas/programmes/2007-2013/romania/operational-

programme-regional-operational-programme?countryCode=RO&regionId= 389) and, in Romanian, on the website http://www.inforegio.ro/en/regio-2007-2014-en/documente-de-programare.html.

---

9 – See, inter alia, document from the Neamţ District Council, entitled ‘Achizitie publică de servicii — Achiziţionarea serviciilor de audit în cadrul proiectului: “Reabilitarea, extinderea şi modernizarea Centrului Şcolar pentru Educaţie Incluzivă Roman”’, May 2011, paragraph 1.1. That document is contained in the national case file. See, also, with regard to the implementation of Priority Axis No 3 of Regional Operational Programme 2007-2013, Section I.4 of the Applicant’s Guide available, in Romanian, on the website: http://www.inforegio.ro/ro/axa-3.html under ‘Major intervention area 3.1’.

---

10 – With the exception of the first question, which is raised only in Case C-260/14, the referring court has referred the same questions in both cases.

---

11 – Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

12 – I should point out that although this sentence does not appear in the wording of the fourth question referred in Case C-260/14, it does appear expressly in the wording of the same question referred in Case C-261/14. That sentence is, moreover, perfectly consistent given the substance of the question.

---

13 – C-599/13, EU:C:2014:2462.

---

14 – Paragraphs 32 and 33 and the case law cited.

---

15 – Paragraph 37 and the case law cited.

---

16 – See, in that regard, footnote 1 to the Commission document entitled ‘Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement’ (COCOF 07/0037/03).

---

17 – Article 11 of that agreement mentions the irregularities that can lead to recovery of all or part of the grant as a result of controls, including breach of European obligations.

---

18 – See, inter alia, Guide de renseignement d’un dossier de demande de subvention du FEDER, available on the website of the Région Centre (France) at the following address: http://www.europe-centre.eu/fr/53/PO_FEDER_Centre.html.

---

19 – See second document in footnote 9, Section I.5, under ‘Eligibility criteria’ (Cheltuieli eligibile), p. 8, and Section II, p. 13. See also the internet address given in footnote 8 (p. 155 of the document).

---

20 – Under Article 7(a) and (c) of that directive, the latter applies both to public supply and service contracts which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than EUR 162 000 and to public works contracts which have a value exclusive of VAT estimated to be equal to or greater than EUR 6 242 000.

---

21 – C-425/14, EU:C:2015:721.

---

22 – Paragraph 21 and the case law cited. That case law is cited by the Commission in point 1.3 of its interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006 C 179, p. 2) and on p. 11 of the abovementioned Commission Guidelines for determining financial corrections to be made to expenditure co-financed by the Structural Funds or the Cohesion Fund for non-compliance with the rules on public procurement.

---

23 – Judgments in *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817, paragraph 23 and the case law cited), and *Belgacom* (C-221/12, EU:C:2013:736, paragraph 29 and the case law cited).

---

24 – Judgment in *Belgacom* (C-221/12, EU:C:2013:736, paragraph 30 and the case law cited).

---

25 – The first paragraph of Article 317 TFEU provides: ‘The Commission shall implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management. Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management.’

---

26 – See, inter alia, judgment in *Ireland* v *Commission* (C-199/03, EU:C:2005:548, paragraph 25).

---

27 – OJ 2002 L 248, p. 1. Regulation as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1, ‘Regulation No 1605/2002’).

---

28 – See, inter alia, recitals 61 and 66 of that regulation.

---

29 – See report drawn up by the Court of Auditors of the European Union, entitled ‘Optimiser l’utilisation des fonds de l’UE: analyse panoramique des risques pensant sur la gestion financière du budget de l’UE’, *Publications Office of the European Union,* 2014, especially p. 100, paragraph 14.

---

30 – C-410/13, EU:C:2014:2134. In the case giving rise to that judgment, the Court was asked to interpret the concept of ‘irregularity’, for the purposes of Article 38(1)(e) of Regulation No 1260/1999 concerning the financial control which Member States must exercise in respect of assistance from the Structural Funds (the rules laid down in that provision now appear in Articles 60 and 61 of Regulation No 1083/2006).

---

31 – See judgment in *Italy* v *Commission* (T-308/05, EU:T:2007:382, paragraph 109).

---

32 – See, in that regard, judgment in *Baltlanta* (C-410/13, EU:C:2014:2134), in which the Court expressly referred to Article 4 of Commission Regulation (EC) No 438/2001 of 2 March 2001 laying down detailed rules for the implementation of Regulation No 1260/1999 as regards the management and control systems for assistance granted under the Structural Funds (OJ 2001 L 63, p. 21). That Article 4 stated very clearly that management and control systems relating to the implementation of an operational programme were to include procedures to ensure that the services co-financed complied with applicable national and Community rules on, in particular, the eligibility of expenditure for support from the Structural Funds under the assistance concerned and the rules on public procurement. Since Regulations Nos 1260/1999 and 438/2001 were repealed by Regulation No 1083/2006, those rules now appear in Articles 60 and 61 of the latter regulation.

33 – See recital 3 of the Commission Decision of 19 October 2011 on the approval of guidelines on the principles, criteria and indicative scales to be applied in respect of financial corrections made by the Commission under Articles 99 and 100 of Regulation No 1083/2006 (C(2011) 7321 final). See also p. 2 of the Guidelines on the principles, criteria and indicative scales to be applied by Commission departments in determining financial corrections under Article 39(3) of Regulation (EC) No 1260/1999 (C(2001) 476).

34 – See recital 66 of Regulation No 1083/2006. See, also, Articles 28a(2)(d) and 53b(2) of Regulation No 1605/2002 (Article 59(2) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Regulation No 1605/2002 (OJ 2012 L 298, p. 1)) and the Communication from the Commission to the European Parliament and the Council, entitled ‘The respective responsibilities of the Member States and the Commission in the shared management of the Structural Funds and the Cohesion Fund — Current situation and outlook for the new programming period after 2006’ (COM(2004) 580 final).

35 – Article 13(2) of Regulation No 1828/2006.

36 – Emphasis added.

37 – Idem.

38 – See judgment in *Somvao* (C-599/13, EU:C:2014:2462, paragraph 36 and the case law cited).

JUDGMENT OF THE COURT (First Chamber)

14 January 2016 (*)

(Reference for a preliminary ruling — Public procurement contracts — Directive 2004/18/EC — Economic and financial standing — Technical and/or professional ability — Articles 47(2) and 48(3) — Tender specifications laying down the obligation for a tenderer to conclude a cooperation agreement or to set up a partnership with the entities on whose capacities it relies)

In Case C-234/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākās tiesa (Supreme Court, Latvia), made by decision of 23 April 2014, received at the Court on 12 May 2014, in the proceedings

Ostas celtnieks SIA

v

Talsu novada pašvaldība,

Iepirkumu uzraudzības birojs

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, E. Levits, M. Berger and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 16 April 2015,

after considering the observations submitted on behalf of:

– ‘Ostas celtnieks’ SIA, by J. Ešenvalds, advokāts,

– the Latvian Government, by I. Kalniņš and L. Skolmeistare, acting as Agents,

– the Greek Government, by K. Georgiadis and S. Lekkou, acting as Agents,

– the European Commission, by A. Tokár and A. Sauka, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 June 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between ‘Ostas celtnieks’ SIA (‘Ostas celtnieks’) and the Talsu novada pašvaldība (Municipality of Talsi) and the Iepirkumu uzraudzības birojs (Office for the

Supervision of Public Contracts) concerning the requirements set out in the tender specifications relating to a procurement procedure for a public works contract.

The legal framework

EU law

3 Recital 32 in the preamble to Directive 2004/18 is worded as follows:

‘In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.’

4 Article 7 of that directive sets the threshold amounts from which the measures for coordinating procedures for the award of public works contracts, public supply contracts and public service contracts which it lays down apply. For public works contracts, Article 7(c) of that directive sets the threshold at EUR 5 186 000.

5 Article 44 of the directive provides:

‘1. Contracts shall be awarded ... after the suitability of the economic operators not excluded ... has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52 ...

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

...’

6 Article 47(2) of Directive 2004/18, entitled ‘Technical and/or professional ability’:

‘An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.’

7 Article 48(3) of Directive 2004/18, entitled ‘Technical and/or professional ability’:

‘An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.’

Latvian law

8 It is clear from the request for a preliminary ruling that Articles 41(3) (‘Economic and financial standing’) and 42(3) (‘Technical and professional ability’) in the Law on Public Procurement (Publisko iepirkumu likums, Latvijas Vestnesis, 2006, No 65), which transposes Directive 2004/18 into Latvian law, provide that the tenderer may, if this is necessary for the performance of a particular contract, rely on the capacities of other contractors, regardless of the legal nature of the links which it has with them. In such a case, the tenderer must prove to the contracting authority that it will have at its disposal the necessary resources, by producing those contractors’ attestations or agreements.

9 The basic rules for cooperation agreements are laid down in Chapter 16 of the Civil Code, while the conditions imposed on economic operators for the establishment and operation of partnerships are set out in Title IX of the Commercial Code.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 As is apparent from the documents submitted to the Court, in November 2011, the Municipality of Talsi launched a procedure for the award of a public works contract for the improvement of the road infrastructure in the City of Talsi in order to promote accessibility (‘the contract at issue’).

11 Paragraph 9.5 of the tender specifications for that procedure provided:

‘... in the event of the tenderer relying on the capacities of other contractors, it must mention all those contractors and provide evidence that it has the necessary resources at its disposal. If that tenderer is to be awarded the contract, it must have concluded a cooperation agreement with the contractors concerned before the award and forwarded this to the contracting authority. [That agreement] must include the following:

(1) a clause stipulating that each party is to be jointly and severally liable for the performance of the contract;

(2) the indication of the main operator authorised to sign the public contract and to direct its performance;

(3) a description of the part of the works to be completed by each of the participants;

(4) the volume of the works which each participant is to carry out, expressed as a percentage.

The conclusion of a cooperation agreement may be replaced by the setting up of a partnership.’

12 Before the Office for the Supervision of Public Contracts, Ostas celtnieks challenged, inter alia, Paragraph 9.5 of the tender specifications. However, by decision of 13 February 2012, the latter rejected the arguments raised by Ostas celtnieks in support of its complaint, holding that, under that paragraph, the contracting authority had legitimately set out the detailed rules according to which the tenderer had to demonstrate that it had the necessary resources at its disposal to perform the contract at issue.

13 Ostas celtnieks brought an appeal against that decision before the Administratīvā rajona tiesa (Local Administrative Court) which upheld that appeal by judgment of 7 May 2013. In its judgment, that court observed, inter alia that, as regards Paragraph 9.5 of the tender specifications, it did not follow from the Law on public contracts or from Directive 2004/18 that the contracting authority may impose on a tenderer the obligation to produce an undertaking to conclude a cooperation agreement with other entities on whose capacities it relies for the execution of the contract at issue and require the tenderer to enter into such an agreement or set up a partnership with those entities.

14 That decision was the subject of appeals in cassation brought by the Municipality of Talsi and the Office for the Supervision of Public Contracts before the Augstākās tiesa (Supreme Court). In support of their appeals, those authorities argue, in particular, that the requirements laid down in Paragraph 9.5 of the tender specifications are justified by the need to reduce the risk of non-performance of the contract at issue.

15 The referring court considers in essence that, for the purposes of awarding a public contract, the contracting authority must be able to verify the ability of the tenderer to perform the contract at issue. However, it asks whether, to that end, Directive 2004/18 authorises the contracting authority to require tenderers to conclude a cooperation agreement or partnership agreement with the other contractors on whose capacities they rely in support of their own tender, or whether those tenderers are free to choose the manner in which they will engage the participation of those other contractors in the performance of the contract.

16 In those circumstances, the Augstākās tiesas (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must the provisions of Directive 2004/18/EC be interpreted as meaning that, in order to reduce the risk of non-performance of the contract, they authorise the insertion in the tender specifications of the condition that, in the event of the contract being awarded to a tenderer which relies on the capacities of other contractors, that tenderer must, before the contract is awarded, conclude with those entities a cooperation agreement (which includes the particular items set out in the specifications), or set up a partnership with them?’

The question referred

Preliminary observations

17 It must be observed from the outset that, while starting from the premiss that Directive 2004/18 is applicable to the dispute in the main proceedings, the order for reference contains no information making it possible to verify whether the market value of the contract at issue reaches the threshold for the application of Article 7(c) of that directive.

18 In answer to a question put by the Court at the hearing, the Latvian Government indicated, however, that the contract at issue was a works contract with a value of approximately EUR 3 million.

19 Furthermore, according to the Latvian Government, the provisions of the Law on public contracts are also applicable to public works contracts, such as the contract at issue, of an amount less than the threshold laid down by Directive 2004/18.

20 It is true that the Court has previously held that the interpretation of provisions of an act of the Union in situations outside that act’s scope is justified where those provisions have been made applicable to such situations by national law directly and unconditionally in order to ensure that internal situations and situations governed by EU law are treated in the same way (judgment in *Generali-Providencia Biztosító*, C-470/13, EU:C:2014:2469, paragraph 23 and the case-law cited).

21 It is clear from the foregoing that, subject to the verifications to be made by the referring court, and in order to provide the latter with an answer useful for the resolution of the dispute in the main proceedings, the question referred for a preliminary ruling must be examined.

The question referred

22 By its question, the referring court asks essentially whether Articles 47(2) and 48(3) of Directive 2004/18 must be interpreted as meaning that they preclude a contracting authority in awarding a public contract from being able to impose on a tenderer which relies on the capacities of other entities the obligation, before the contract is awarded, to conclude with those entities a partnership agreement or to set up a partnership with them.

23 In order to answer that question it should be recalled that according to the Court’s settled case-law, Articles 47(2) and 48(3) of Directive 2004/18 recognise the right of every economic operator to rely, for a particular contract, upon the capacities of other entities, ‘regardless of the nature of the links which it has with them’, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the performance of the contract (see, to that effect, judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 29 and 33).

24 Such an interpretation, as the Court has already held, is consistent with the aim of the widest possible opening-up of public contracts to competition pursued by the relevant directives to the benefit not only of economic operators but also of contracting authorities. In addition, that interpretation also facilitates the involvement of small- and medium-sized undertakings in the contracts procurement market, an aim also pursued by Directive 2004/18, as stated in recital 32 thereof (judgment in *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraph 34 and the case-law cited).

25 Thus, where, in order to prove its financial, economic, technical and/or professional standing with a view to being admitted to participate in a tendering procedure, a company relies on the resources of entities or undertakings with which it is directly or indirectly linked, whatever the legal nature of those

links may be, it must establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract (see, to that effect, judgment in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 29 and the case-law cited).

26 In that connection, it must be observed that, in accordance with Article 44(1) of Directive 2004/18, it is for the contracting authority to verify the suitability of the service providers in accordance with the criteria laid down. That verification is intended, in particular, to enable the contracting authority to ensure that the successful tenderer will be able to use whatever resources it relies on throughout the period covered by the contract. (see, by analogy, judgment in *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 28).

27 In the context of that assessment, Articles 47(2) and 48(3) of Directive 2004/18 do not make it possible either to assume that a tenderer has or has not the means necessary to perform the contract or, *a fortiori*, to exclude *a priori* certain types of proof (see, by analogy, *Holst Italia*, C-176/98, EU:C:1999:593, paragraph 30).

28 It follows that the tenderer is free to choose, on the other hand, the legal nature of the links it intends to establish with the other entities on whose capacities it relies in order to perform a particular contract and, on the other, the type of proof of the existence of those links.

29 Furthermore, as the Advocate General observes, in paragraph 43 of his Opinion, Articles 47(2) and 48(3) of Directive 2004/18 expressly provide that it is only by way of example that the production of an undertaking by other entities to make available to the tenderer the resources necessary for the performance of the contract is acceptable proof of the fact that it actually has those resources. Therefore, those provisions by no means preclude the tenderer from establishing in another way the existence of the links between it and other entities on whose capacities it relies for the proper performance of the contract.

30 In the present case, the Municipality of Talsi, as the contracting authority requires a tenderer, namely Ostas celtnieks, which relies on the capacities of other entities for the performance of the contract concerned, to establish links of a precise legal nature with those entities, so that only those particular links are capable, in the eyes of the contracting authority, of proving that the contract does in fact have the resources necessary to perform that contract.

31 In accordance with Paragraph 9.5 of the tender specifications, the contracting authority requires the tenderer, before the award of the public contract, to conclude a cooperation agreement with those entities or to set up a partnership with them.

32 Paragraph 9.5 of the tender specifications therefore provides for only two methods by which the tenderer may demonstrate that it has the resources necessary for the execution of the relevant contract, to the exclusion of any other type of evidence of legal relationships existing between the tenderer and the entities on whose capacities it relies.

33 In those circumstances, a rule such as that set out in Paragraph 9.5 of the tender specifications manifestly deprives the provisions of Articles 47(2) and 48(3) of Directive 2004/28 of their effectiveness.

34 Having regard to the foregoing, the answer to the question referred is that Articles 47(2) and 48(3) of Directive 2004/18 must be interpreted as meaning that they preclude a contracting authority, in the tender specifications relating to the award of a public contract, from imposing on a tenderer which relies on the capacities of other entities the obligation, before the contract is awarded, to conclude a cooperation agreement with those entities or to form a partnership with them.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting

observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Articles 47(2) and 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that they preclude a contracting authority, in the tender specifications relating to the award of a public contract, from imposing on a tenderer which relies on the capacities of other entities the obligation, before the contract is awarded, to conclude a cooperation agreement with those entities or to form a partnership with them.

[Signatures]

---

* Language of the case: Latvian.

EU:C:2015:365

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 4 June 2015 (1)

Case C-234/14

Ostas celtnieks SIA
v
Talsu novada pašvaldība,
Iepirkumu uzraudzības birojs

(Request for a preliminary ruling from the Augstākā tiesa (Latvia))

(Reference for a preliminary ruling — Public contracts — Directive 2004/18/EC — Articles 47(2) and 48(3) — Economic operator relying on the capacities of other entities — Obligation to conclude a cooperation agreement or form a partnership with those other entities — Clause on the joint and several liability of the tenderer and other entities)

I – Introduction

1. The request for a preliminary ruling, lodged at the Registry of the Court of Justice on 12 May 2014, has been made in proceedings between Ostas celtnieks SIA ('Ostas celtnieks'), on the one hand, and Talsu novada pašvaldība (the municipality of Talsi, 'the Authority') and Iepirkumu uzraudzības birojs (Office for the Supervision of Public Contracts ('the Office'), on the other hand.

2. The Authority launched a public procurement procedure for the improvement of road infrastructures in order to facilitate access to Talsi. The specifications of the call for tenders issued by the Authority provided in particular that, in the event of a tenderer relying on the capacities of other entities, it must, before concluding the contract, conclude a cooperation agreement with those entities or form a partnership. The cooperation agreement must provide in particular for the joint and several liability of the tenderer and the other entities.

3. Ostas celtnieks contests the legality of those tender specification conditions.

4. This request for a preliminary ruling concerns the interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (2) The referring court raises the question, in particular, of whether or not that directive precludes the insertion into tender specifications of conditions such as those provided for in the main proceedings.

II – Legal framework

A – *EU law*

5. Recital 45 in the preamble to Directive 2004/18 states:

‘This Directive allows Member States to establish official lists of contractors, suppliers or service providers or a system of certification by public or private bodies, and makes provision for the effects of such registration or such certification in a contract award procedure in another Member State. As regards official lists of approved economic operators, it is important to take into account Court of Justice case-law in cases where an economic operator belonging to a group claims the economic, financial or technical capabilities of other companies in the group in support of its application for registration. In this case, it is for the economic operator to prove that those resources will actually be available to it throughout the period of validity of the registration. For the purposes of that registration, a Member State may therefore determine the level of requirements to be met and in particular, for example where the operator lays claim to the financial standing of another company in the group, it may require that that company be held liable, if necessary jointly and severally.’

6. Article 4(2) of Directive 2004/18 provides as follows:

‘Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.’

7. According to Article 25 of that directive:

‘In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.

This indication shall be without prejudice to the question of the principal economic operator’s liability.’

8. According to Article 26 of that directive:

‘Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with [Union] law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.’

9. Article 44 of that directive provides:

‘1. Contracts shall be awarded ... after the suitability of the economic operators not excluded ... has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52 ... .

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

...’

10. Article 47(2) and (3) of Directive 2014/18 provides:

‘2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the abilities of participants in the group or of other entities.’

11. Article 48(3) and (4) of that directive provides:

‘3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

4. Under the same conditions a group of economic operators as referred to in Article 4 may rely on the abilities of participants in the group or in other entities.’

B – *National law*

12. The Law on public contracts [Publisko iepirkumu likums, Latvijas Vēstnesis, 2006, No 65 (3433)] transposes Directive 2004/18 into Latvian law.

13. It is clear from the request for a preliminary ruling that that law provides, in Article 41 (‘Economic and financial standing’), paragraph 3, and Article 42 (‘Technical and/or professional ability’), paragraph 3, that a successful tenderer may rely on the capacities of other contractors, regardless of the legal nature of the links which it has with them, where this is necessary for the performance of a particular contract. In such a case, the successful tenderer must prove to the contracting authority that it will have at its disposal the necessary resources, by producing those contractors’ attestations or agreements. (3)

14. The basic rules for cooperation agreements are laid down in the Latvian Civil Code, and the conditions imposed on economic operators for the establishment and operation of partnerships are set out in Title IX of that code.

III – The facts in the main proceedings and the question referred for a preliminary ruling

15. The Authority launched a public procurement procedure for the improvement of road infrastructures.

16. Paragraph 9.5 of the tender specifications, approved on 29 November 2011, is worded as follows:

‘… in the event of the tenderer relying on the capacities of other contractors, it must indicate all the contractors involved and provide evidence that it will have at its disposal the resources necessary. If it is decided that the contract is to be awarded to that tenderer, it must, prior to the award of the contract, conclude a cooperation agreement with the contractors concerned and forward that agreement to the contracting authority.’

17. According to the referring court, the cooperation agreement must include:

‘(1) a clause stipulating that each party is to be jointly and severally liable for the performance of the contract;

(2) [an indication of] the main economic operator, which shall have all the necessary powers to sign the contract and to direct its performance;

(3) a description of the part of the works to be completed by each of the participants;

(4) the volume of the works which each participant is to carry out, expressed as a percentage.

The conclusion of a cooperation agreement may be replaced by the formation of a partnership.’

18. Ostas celtnieks challenged before the Office several conditions in the tender specifications and, in particular, paragraph 9.5.

19. By decision of 13 February 2012, the Office upheld the Ostas celtnieks’ objections to some of the paragraphs, but dismissed those relating to paragraph 9.5 of the specifications. The Office stated that, by that paragraph, the contracting authority in fact lays down the manner in which the successful

tenderer may demonstrate to the contracting authority that it will have at its disposal for the duration of the contract the necessary resources which it is relying on.

20. Ostas celtnieks lodged an administrative appeal before the Administratīvā rajona tiesa (District Administrative Court) seeking a declaration that the Office's decision was unlawful in certain respects and, in particular, with reference to paragraph 9.5 of the tender specifications.

21. By judgment of 7 May 2013, the Administratīvā rajona tiesa declared that paragraph 9.5 of the tender specifications was in part unlawful.

22. According to that court, it is not clear either from the Latvian Law on public contracts or from Directive 2004/18 that the contracting authority may impose on a tenderer an obligation to produce an undertaking that it will conclude a cooperation agreement with other entities on whose capacities it is relying or require the tenderer to conclude such an agreement or form a partnership with those entities. The Administratīvā rajona tiesa considers that an economic operator may rely on the capacities of other entities for a particular contract, regardless of the legal nature of the links which it has with them.

23. The Authority and the Office brought appeals on a point of law against that decision before the referring court. They claim in those appeals that paragraph 9.5 of the tender specifications is justified in order to reduce the risk of non-performance of the contract, since, without the requirement to conclude an agreement, the adjudicating authority cannot verify that the contract will be performed in accordance with the tender submitted and that the contractors on whose capacities the tenderer is relying will abide by their undertakings.

24. The Authority and the Office consider that the wording 'regardless of the legal nature of the links which it has with them', (4) refers generally to the links existing between a tenderer and the contractor whose capacities it is relying on. They take the view that the Latvian Law on public contracts does not state in what manner the tenderer may prove to the contracting authority that it will have at its disposal the necessary resources and that this matter is therefore left to the discretion of the contracting authority.

25. They consider, in addition, that, since the Latvian Law on public contracts transposed the provisions of Directive 2004/18, it is also necessary to take into account the interpretation of the provisions of that directive in the Court's case-law. They also point out that, in the judgments in *Ballast Nedam Groep* (C-389/92, EU:C:1994:133) and *Ballast Nedam Groep* (C-5/97, EU:C:1997:636), the Court held that, in order to minimise the risks run by the contracting authority, that authority should verify that the tenderers actually have the relevant resources at their disposal.

26. The referring court states that it is clear from a number of judgments of the Court that the contracting authority should also check the subcontractors' capacity to perform the contract. (5)

27. It notes, in particular, that, in paragraph 33 of the judgment in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646), the Court held 'that Directive 2004/18 permits the combining of the capacities of more than one economic operator for the purpose of satisfying the minimum capacity requirements set by the contracting authority, provided that the candidate or tenderer relying on the capacities of one or more other entities proves to that authority that it will actually have at its disposal the resources of those entities necessary for the performance of the contract'.

28. In the referring court's view, the contracting authority not only may but must verify the tenderer's capacity to perform the contract. However, it considers that it has not been clearly settled whether the contracting authority may decide that the only permissible procedures for obtaining extra capacity are the formation of a certain type of company or the conclusion of a cooperation agreement or whether, on the contrary, the tenderer is free to choose the manner in which it will obtain the extra capacity.

29. In those circumstances, the Augstākā tiesa has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must the provisions of Directive 2004/18/EC be interpreted as meaning that, in order to reduce the risk of non-performance of the contract, they do not preclude the specifications from containing the condition that, in the event of the contract being awarded to a tenderer which relies on the capacities of other contractors, that tenderer must, before the contract is awarded, conclude with those entities a cooperation agreement (which includes the particular items set out in the specifications), or set up a partnership with them?’

IV – Procedure before the Court

30. Written observations have been submitted by the Latvian and Greek Governments and by the European Commission. At the hearing held on 16 April 2015, Ostas celtnieks, the Latvian Government and the Commission presented oral argument.

V – Analysis

A – *Preliminary observations*

31. It should be noted that, although the question addressed to the Court of Justice by the referring court does not specify any particular provision of Directive 2004/18, the request for a preliminary ruling refers to Article 25 (‘Subcontracting’), Article 26 (‘Conditions for performance of contracts’), Article 47 (‘Economic and financial standing’) and Article 48 (‘Technical and/or professional ability’) thereof and to recital 45 in the preamble thereto.

32. It is also clear from the order for reference that the dispute in the main proceedings concerns only paragraph 9.5 of the tender specifications at issue, which provides that, in the event of the tenderer relying on the capacities of other entities, it must indicate all the entities involved and provide evidence to the contracting authority that it will have at its disposal all the resources necessary for the execution of the contract, by producing an undertaking from those entities to conclude a cooperation agreement (6) or form a partnership with the tenderer before the contract is awarded.

33. I therefore consider that the question referred to the Court by the referring court is aimed at determining whether Article 47(2) of Directive 2004/18 (on the economic and financial standing of economic operators participating in an award procedure) and Article 48(3) thereof (on the technical and/or professional ability of those operators) preclude a tender specification clause which imposes on a tenderer relying on the capacities of other entities an obligation to conclude a cooperation agreement or form a partnership with them before the contract is awarded.

34. However, in the Commission’s view, the wording of that paragraph of the tender specifications suggests that the specific provision on the conclusion of a cooperation agreement or the formation of a partnership concerns only the stage following selection and prior to the award of the contract and relates only to the successful tenderer to which the contracting authority intends to award the contract. Therefore, that specific provision is consistent with the conditions relating to the performance of a contract as laid down in Article 26 of Directive 2004/18.

35. I consider, subject to verification by the referring court, that the requirements laid down by paragraph 9.5 of the tender specifications relate to the minimum levels, first, of economic and financial standing and, secondly, of technical and/or professional ability required by the contracting authority, for the purposes of Articles 44(2), 47 and 48 of Directive 2004/18, which a tenderer must satisfy for its tender to be taken into consideration (7) and not to the conditions for performance of contracts, for the purposes of Article 26 of that directive. Although, pursuant to that Article 26, the contracting authorities may lay down special conditions on performance in the contract notice or tender specifications, it appears that, in view of the examples which it gives of performance conditions, namely that they ‘may, in particular concern social and environmental considerations’, (8) that article does not concern the economic and financial standing or the technical and/or professional ability of the tenderer to perform the contract, requirements which are covered by Articles 44(2), 47 and 48 of Directive 2004/18.

36. Moreover, the obligations of a tenderer relying on the capacities of other entities, first, to prove to the contracting authority that it will have at its disposal all the resources necessary for the execution of the contract by producing an undertaking from those entities to conclude a cooperation agreement

and, secondly, to conclude a cooperation agreement or form a partnership with those entities before the contract is awarded are closely linked and must not be artificially separated.

37. Those obligations concern the tenderer's economic and financial standing and its technical and professional ability and, in particular, the manner in which, under Articles 47 and 48 of Directive 2004/18, the tenderer must prove that it will have at its disposal the resources necessary for the execution of the contract, if, inter alia, it uses subcontractors. Non-compliance with those obligations is a reason for its exclusion from the contract award procedure.

B – *Articles 47(2) and 48(3) of Directive 2004/18*

38. The EU rules do not require that a person who enters into a contract with a contracting authority must be capable of direct performance using his own resources. The person in question need only be able to arrange for execution of the works in question and to furnish the necessary guarantees in that connection. It follows from both EU rules and the Court's case-law that any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract, either directly or by using subcontractors, is eligible to submit a tender or put itself forward as a candidate for a public contract. Whether such an entity is actually able to satisfy the conditions laid down in the contract notice must be assessed at a later stage in the procedure, by applying the criteria set out in Articles 44 to 52 of Directive 2004/18. (9)

39. 'Under the first subparagraph of Article 44(2) of Directive 2004/18, a contracting authority may require candidates or tenderers to meet minimum levels of economic and financial standing and technical and professional ability in accordance with Articles 47 and 48 of that directive. For that purpose, the contracting authority must take account *of the right* conferred on every economic operator by Articles 47(2) and 48(3) of Directive 2004/18 to rely on, for a particular contract, the capacities of other entities, *regardless of the nature of the links which it has with them*, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract'. (10)

40. I note, in that regard, that, although every economic operator has the right to rely on, for a particular contract, the capacities of other entities, it must establish that it actually has at its disposal the means and resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract. (11)

41. As Article 44(1) of Directive 2004/18 states, the contracting authority must verify the tenderer's ability to provide it with an assurance that it will indeed be able to use whatever resources it relies on throughout the period covered by the contract. (12)

42. In the context of that verification, Directive 2004/18 does not permit the exclusion, without due analysis, of specific types of proof or the assumption that the tenderer has available to it the resources needed to perform the contract. (13)

43. Although Articles 47(2) and 48(3) of Directive 2004/18 state that, 'for example', producing an undertaking by other entities that they will make the necessary resources available to the tenderer is an acceptable form of proof, those provisions in no way exclude other forms of proof. (14)

C – *Paragraph 9.5 of the tender specifications*

44. By obliging a tenderer to conclude a cooperation agreement with the entities on whose capacities it wishes to rely or to form a company with them before the contract is awarded, paragraph 9.5 of the tender specifications leaves the tenderer only one way of proving that it has at its disposal the resources of other entities.

45. That obligation seems to me to be contrary to the very wording of Articles 47(2) and 48(3) of Directive 2004/18, which cites, by way of example, a form of proof which can be used by an economic operator relying, for a specific contract, on the capacities of other entities, which, by definition, not only does not impose that form of proof but does not exclude any other form.

46. Moreover, by imposing that obligation, paragraph 9.5 of the tender specifications prohibits the use of the form of proof cited in Articles 47 and 48 of Directive 2004/18.

47. I also consider that, by imposing on the tenderer just one way of proving that it is qualified and that it has at its disposal the resources of other entities, paragraph 9.5 of the tender specifications infringes the principle of proportionality. (15)

48. Although the objective of ensuring performance of the contract is a legitimate objective in the public interest, the obligation imposed by paragraph 9.5 of the tender specifications clearly goes beyond what is necessary to achieve that objective. By imposing between the tenderer and the other entities to which it has recourse a limitation based on the legal form of their relationship which is not provided for in Articles 47(2) and 48(3) of Directive 2004/18, paragraph 9.5 of the tender specifications has the effect of substantially and unjustifiably limiting a tenderer's right to rely on the capacities of those entities and, consequently, the widest possible participation by tenderers (16) in public procurement procedures, whereas it is the concern of the European Union, in relation to the freedom of establishment and the freedom to provide services, to ensure the widest possible opening-up of a call for tenders to competition. (17)

49. Moreover, the tenderer's obligations to conclude a cooperation agreement or form a partnership with the entities on whose technical and/or professional ability, for example, it relies before the contract is awarded and to include in the cooperation agreement a clause stipulating that the tenderer and the other entities are jointly and severally liable for the performance of the contract, regardless of the share of the contract that it intends to subcontract, clearly have a deterrent effect on that form of economic cooperation. (18) One might even question the effectiveness of the measure for achieving the objective of ensuring the performance of the contract, as it is difficult to imagine that the undertaking with the technical and professional ability relied upon will accept joint financial liability even though only a minimal share of the contract will be subcontracted to it.

50. Finally, paragraph 9.5 of the tender specifications, by infringing, for example, a tenderer's right under Article 25 of Directive 2004/18 to subcontract part of the performance of the contract in question, limits the involvement of small- and medium-sized undertakings in the contracts procurement market. (19)

D – *Subcontracting or group of economic operators*

51. The Latvian Government considers that operators, as well as any subcontractors on whose capacities the tenderer relies, constitute, from the contracting authority's viewpoint, a group of economic operators which is potentially the undertaking performing the contract. It points out that, under Article 4(2) of Directive 2004/18, 'these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that that change is necessary for the satisfactory performance of the contract'. The Latvian Government states that it is clear from that provision that, in order to ensure that the contract is performed, the contracting authority is entitled to ask the group of operators to assume a specific legal form. In other words, on that basis, it is lawful, in practice, for paragraph 9.5 of the tender specifications at issue to impose on economic operators intending to rely on subcontractors (20) the obligation to form a group of economic operators with those subcontractors.

52. I note, first of all, that, as laid down in Article 4(2) of Directive 2004/18, the obligation of groups of economic operators to assume a specific legal form after the contract has been awarded '*to the extent that this change is necessary for the satisfactory performance of the contract*' (21) is, in my view, an exceptional requirement which is imposed only where it is objectively necessary and in accordance with the principle of proportionality. Neither of these factors is relied on in the present case.

53. More fundamentally, although contracting authorities may, in certain cases, require a specific legal form after awarding the contract to a group of economic operators, they cannot impose the formation of such a group by a tenderer and the subcontractors on which it relies, as Directive 2004/18 leaves it to the tenderer to decide whether to subcontract a share of the contract to third parties (Article 25) or to form with other entities a group of economic operators and to tender jointly for a specific contract (Article 4(2)).

54. Paragraph 9.5 of the tender specifications links those two possibilities which are clearly distinct (22) and, at the very least, according to the Latvian Government's argument, would oblige a tenderer which relies on subcontractors to change that form of cooperation into a group of economic operators.

55. Finally, under Articles 47(2) and 48(3) of Directive 2004/18, a tenderer participating in the selection procedure has the right to choose the form of cooperation with other entities for the purpose of meeting the economic and financial standing requirements in question.

56. It follows that paragraph 9.5 deprives Articles 47(2) and 48(3) of Directive 2004/18 of any practical effect and inappropriately applies the provisions of Article 4(2) of that directive.

VI – Conclusion

57. In the light of the foregoing considerations, I propose that the Court of Justice should reply to the question referred for a preliminary ruling by the Augstākā tiesa (Latvia) as follows:

Articles 47(2) and 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that they preclude a condition in the tender specifications imposing on a tenderer which relies on the capacities of other entities the obligation to conclude a cooperation agreement or form a partnership with them before the contract is awarded.

---

1 Original language: French.

---

2 OJ 2009 L 134, p. 114, and corrigendum OJ 2009 L 351, p. 44.

---

3 It should be noted that the dispute in the main proceedings does not concern the conformity of the provisions of national law with EU law. Ostas celtnieks only disputes the legality of some of the tender specification conditions for the contract in question. See points 16 to 18 of this Opinion. Moreover, in response to a question put by President Tizzano at the hearing, the Latvian Government informed the Court that the contract in question in the main proceedings was a works contract with a value of around EUR 3 million, which is lower than the threshold laid down by the directive for that type of contract (see Article 7(c) of Directive 2004/18). However, the Latvian Government stated that the Latvian legislation made Directive 2004/18 applicable to a works contract for an amount such as that of the contract in question.

---

4 See Article 41 ('Economic and financial standing'), paragraph 3, and Article 42 (Technical and/or professional ability'), paragraph 3, of the Latvian Law on public contracts, and Articles 47(2) and 48(3) of Directive 2004/18.

---

5 See, in particular, judgments in *Ballast Nedam Groep* (C-389/92, EU:C:1994:133, paragraph 16) and *Holst Italia* (C-176/98, EU:C:1999:593, paragraphs 28 and 29).

---

6 The Latvian Government states that '"[a] partnership is a union of two or more persons on the basis of a partnership agreement aimed at achieving common objectives using common means or resources". Article 2257 of the Latvian Civil Code regulates the liability of participants in a partnership to the effect that commitments entered into by a partnership are jointly and severally binding on all of its members with respect to third persons'.

---

7 See, by analogy, judgment in *Commission* v *Netherlands* (C-368/10, EU:C:2012:284, paragraphs 103 and 104). It seems, subject to verification by the referring court, that paragraph 9.5 refers, in particular, to the

requirements of Annex 1 to the tender specifications entitled ‘Financial tender’ and to Annex 2 thereto entitled ‘Qualification’.

---

8 See, to that effect, judgment in *Commission* v *Netherlands* (C-368/10, EU:C:2012:284, paragraph 76).

---

9 See, to that effect, judgment in *CoNISMa* (C-305/08, EU:C:2009:807, paragraphs 41 and 42 and the case-law cited).

---

10 See judgment in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraphs 28 and 29). Emphasis added. Articles 47(2) and 48(3) of Directive 2004/18 codify the settled case-law of the Court relating to earlier public procurement directives. See Opinion of Advocate General Jääskinen in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:130, point 20).

---

11 See, to that effect, judgments in *Holst Italia* (C-176/98, EU:C:1999:593, paragraph 29) and *Siemens and ARGE Telekom* (C-314/01, EU:C:2004:159, paragraphs 43 and 44). It follows that the burden of proof falls on the tenderer relying on the capacities of third persons. In paragraph 35 of the judgment in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646), the Court held that ‘it is true that there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator. In such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44(2) of Directive 2004/18, as long as that requirement is related and proportionate to the subject-matter of the contract at issue.’ It follows that the Court accepts that there may be exceptional circumstances where, in view of the very nature of the contract at issue, a tenderer’s reliance on the capacities of other entities may be limited. The request for a preliminary ruling makes no reference to the existence of such exceptional circumstances in the main proceedings.

---

12 See, to that effect, judgment in *Holst Italia* (C-176/98, EU:C:1999:593, paragraph 28).

---

13 Ibid. (paragraph 30).

---

14 ‘Both Articles 47(2) and 48(3) of Directive 2004/18 provide in almost identical terms that “an economic operator may … rely on the capacities of other entities”. The wording suggests the recognition of a right of economic operators to choose this method of fulfilling the selection criteria, provided that they can prove that they actually have at their disposal the resources of the other entities necessary for executing the contract.’ See Opinion of Advocate General Jääskinen in Case *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:130, point 24).

---

15 In accordance with the principle of proportionality, which constitutes a general principle of EU law, the measures adopted by the Member States must not go beyond what is necessary to achieve a legitimate objective. See, to that effect, judgment in *Serrantoni and Consorzio stabile edili* (C-376/08, EU:C:2009:808, paragraph 33 and the case-law cited).

---

16 See, by analogy, judgment in *CoNISMa* (C-305/08, EU:C:2009:807, paragraph 37).

---

17 See, to that effect, judgments in *Consorzio Stabile Libor Lavori Pubblici* (C-358/12, EU:C:2014:2063, paragraph 29) and *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraph 34). ‘The objective of widest possible opening-up to competition is regarded not only from the interest in the free movement of goods and services, but also in regard to the interest of contracting authorities, who will thus

have greater choice as to the most advantageous tender'. See Opinion of Advocate General Jääskinen in Case *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:130, point 32).

---

18 It should be noted that Article 63(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) provides that '[w]here an economic operator relies on the capacities of other entities with regard to criteria relating to *economic and financial standing*, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract'. Emphasis added. However, I note, first, that that provision, which must be transposed by the Member States by 18 April 2016 pursuant to Article 90 of Directive 2014/24, is not applicable *ratione temporis* to the dispute in the main proceedings and, secondly, that the provision only concerns circumstances in which the tenderer relies on the capacities of other entities in respect of criteria relating to economic and financial standing and not those relating to technical and/or professional ability. Moreover, that provision requires only that the tenderer and the other entities be jointly liable for the performance of the contract without imposing, as in the main proceedings, a particular legal form of cooperation between them. It is also logical that only reliance on 'economic and financial standing' should be linked to joint liability.

---

19 See, to that effect, judgment in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12, EU:C:2013:646, paragraph 34 and the case-law cited).

---

20 See, to that effect, judgment in *Ordine degli Architetti and Others* (C-399/98, EU:C:2001:401, paragraphs 90 and 91).

---

21 Emphasis added.

---

22 See, to that effect, judgment in *Holst Italia* (C-176/98, EU:C:1999:593, paragraph 24). See also Articles 47(3) and 48(4) of Directive 2004/18.

JUDGMENT OF THE COURT (Grand Chamber)

6 October 2015 (*)

(Reference for a preliminary ruling — Article 267 TFEU — Jurisdiction of the Court — Status of the referring body as a court or tribunal — Independence — Compulsory jurisdiction — Directive 89/665/EEC — Article 2 — Bodies responsible for review procedures — Directive 2004/18/EC — Articles 1(8) and 52 — Public procurement procedures — Meaning of 'public entity' — Public authorities — Inclusion)

In Case C-203/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Català de Contractes del Sector Públic (Spain), made by decision of 25 March 2014, received at the Court on 23 April 2014, in the proceedings

Consorci Sanitari del Maresme

v

Corporació de Salut del Maresme i la Selva,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz, A. Ó Caoimh, J.-C. Bonichot, C. Vajda and S. Rodin, Presidents of Chambers, A. Arabadjiev, M. Berger (Rapporteur), E. Jarašiūnas, C.G. Fernlund, J.L. da Cruz Vilaça and F. Biltgen, Judges,

Advocate General: N. Jääskinen,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 12 May 2015,

after considering the observations submitted on behalf of:

– the Spanish Government, by M. Sampol Pucurull, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

– the European Commission, by A. Tokár and D. Loma-Osorio Lerena, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 1(8) and 52 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between the Consorci Sanitari del Maresme (Maresme Health Consortium) and the Corporació de Salut del Maresme i la Selva (the Health Services Corporation for the districts of Maresme and la Selva) concerning a decision refusing to admit that consortium to a tendering procedure relating to nuclear magnetic resonance services for healthcare centres managed by the Corporació de Salut del Maresme i la Selva.

Legal context

EU law

3 Recital 4 in the preamble to Directive 2004/18 states:

‘Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.’

4 Article 1(8) of that directive provides as follows:

‘The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term “economic operator” shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

…’

5 Under Article 2 of Directive 2004/18, which is entitled ‘Principles of awarding contracts’:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

6 Article 52(1) of Directive 2004/18, which is entitled ‘Official lists of approved economic operators and certification by bodies established under public or private law’, provides:

‘1. Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established [under] public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 45(1), Article 45(2)(a) to (d) and (g), Article 46, Article 47(1), (4) and (5), Article 48(1), (2), (5) and (6), Article 49 and, where appropriate, Article 50.

…

5. For any registration of economic operators of other Member States in an official list or for their certification by the bodies referred to in paragraph 1, no further proof or statements can be required other than those requested of national economic operators and, in any event, only those provided for under Articles 45 to 49 and, where appropriate, Article 50.

However, economic operators from other Member States may not be obliged to undergo such registration or certification in order to participate in a public contract. The contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.

6. Economic operators may ask at any time to be registered in an official list or for a certificate to be issued. They must be informed within a reasonably short period of time of the decision of the authority drawing up the list or of the competent certification body.

…’

7 Article 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31; 'Directive 89/665'), provides:

'1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

…

9. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU] and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.'

Spanish law

8 Under Article 40(1) and (6) of Royal Legislative Decree 3/2011 of 14 November 2014 adopting the consolidated text of the Law on Public Sector Contracts (Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público) ('Legislative Decree 3/2011'), the special appeal provided for in matters relating to public procurement, prior to commencement of an administrative-law action, is optional.

9 Article 62 of Legislative Decree 3/2011, which is entitled 'Suitability requirement', provides:

'1. In order to conclude contracts with the public sector, contractors must demonstrate that they have satisfied the minimum conditions regarding economic, financial and professional or technical suitability, as determined by the contracting authority. This requirement shall be replaced by the classification requirement where classification is prescribed by this Law.

2. The minimum conditions regarding suitability which must be met by the contractor and the documents that are required in order to demonstrate that suitability shall be stated in the contract notice and set out in greater detail in the contract documents. Those conditions must be related to the subject-matter of the contract and proportionate to it.'

10 Article 65 of Legislative Decree 3/2011, which is entitled ‘Requirement for classification’, provides:

‘1. In order to conclude contracts with public authorities for the performance of works contracts the estimated value of which is EUR 350 000 or more, or service contracts whose estimated value is EUR 120 000 or more, the contractor must, without fail, be duly classified. …

…

5. Public sector entities that are not public authorities may require that tenderers have a particular classification in order to define the conditions regarding suitability that must be met in order to conclude the contract concerned.’

11 Article 8 of Decree 221/2013 of the Generalitat de Catalunya, of 3 September 2013, concerning the establishment, organisation and functioning of the Tribunal Català de Contractes del Sector Públic (Catalan Public Sector Contracts Board) (*Diari Oficial de la Generalitat de Catalunya* No 6454, of 5 September 2013), which is entitled ‘Personal status’, provides:

‘The personal status of the members of the Tribunal shall be as follows:

1. The members of the Tribunal shall be subject to the same rules on disqualification as senior civil servants of the Generalitat.

...

4. The members of the Tribunal shall be appointed on a permanent basis, although they may be dismissed or cease to hold office if any of the following occur:

– death;

– expiry of the term of office without renewal;

– resignation ...

– loss of the status of civil servant;

– serious breach of duty;

…

– inability to carry out duties …

– loss of nationality.

...’

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 The Maresme Health Consortium sought to participate in a tendering procedure for the award of nuclear magnetic resonance services for healthcare centres managed by the Corporació de Salut del Maresme i la Selva. The contract documents relating to the call for tenders required the tenderers to establish their capacity to contract by producing a certificate referred to as a ‘classification’ certificate.

13 When the evaluation committee opened the tenders, it found that the Maresme Health Consortium had not submitted the required certificate and asked the consortium to produce it. The consortium failed to produce the certificate but did provide a declaration whereby it undertook to allocate for the purposes of the relevant contract the resources of a commercial entity and also provided a declaration attesting to its status as a public entity. In those circumstances, the contracting authority, on 28 November 2013, notified the Maresme Health Consortium that it would not be admitted to the procedure as it had not

remedied, in the manner required and within the time allowed, the defects in the documentation submitted.

14 On 10 December 2013 the Maresme Health Consortium brought the special appeal provided for in respect of public procurement matters, challenging the contracting authority's decision before the referring body. The consortium argued that, because of its status as a public authority, the requirement for a business classification does not apply to it. It has requested (i) that it be admitted to the tendering procedure in question and (ii) that that procedure be suspended.

15 In those circumstances, the Tribunal Català de Contractes del Sector Públic decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) For the purposes of Directive 2004/18, must public authorities be regarded as public entities?

(2) If so, for the purposes of Directive 2004/18, must public authorities be regarded as economic operators, and therefore as being permitted to participate in public tenders?

(3) If so, for the purposes of Directive 2004/18, may and must public authorities be included in the official lists of approved contractors, suppliers or service providers or be certified by certification bodies established under public or private law, known under Spanish law as a business classification system?

(4) For the purposes of Directive 2004/18, has Legislative Decree 3/2011 incorrectly transposed that directive into Spanish law, and if this is the case, has the Spanish legislature, through Articles 62 and 65 of that decree, limited the access of public authorities to the business classification registers?

(5) If public authorities may participate in tendering procedures but may not be accepted for business classification — in accordance with Directive 2004/18/EC — by what means may they establish their suitability to contract?'

Consideration of the questions referred for a preliminary ruling

The Court's jurisdiction

16 Before addressing the questions raised, consideration must be given to whether the Court has jurisdiction to answer them.

17 As regards, first, the assessment of whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court will take account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, inter alia, judgments in *Vaassen-Göbbels*, 61/65, EU:C:1966:39, and *Umweltanwalt von Kärnten*, C-205/08, EU:C:2009:767, paragraph 35 and the case-law cited). Thus, even though, as the order for reference indicates, the Tribunal Català de Contractes del Sector Públic is regarded under Spanish law as an administrative body, that fact is not, in itself, conclusive for the purpose of the Court's assessment.

18 With regard (i) to the criteria concerning whether the body making the reference is established by law, whether it is permanent, whether its procedure is *inter partes* and whether it applies rules of law, the documents before the Court contain nothing which suggests that the Tribunal Català de Contractes del Sector Públic is not a 'court or tribunal' within the meaning of Article 267 TFEU.

19 So far as (ii) the criterion of independence is concerned, it is apparent from the documents before the Court that the Tribunal Català de Contractes del Sector Públic acts as a third party in relation to the authority which adopted the decision challenged in the main proceedings (see judgments in *Corbiau*, C-24/92, EU:C:1993:118, paragraph 15, and *Wilson*, C-506/04, EU:C:2006:587, paragraph 49). In that regard, it would appear that the Tribunal carries out its functions in a wholly independent manner, not

occupying a hierarchical or subordinate position in relation to any other body and not taking orders or instructions from any source whatsoever (see judgment in *Torresi*, C-58/13 and C-59/13, EU:C:2014:2088, paragraph 22); it is thus protected against external intervention or pressure liable to jeopardise the independent judgment of its members (judgments in *Wilson*, C-506/04, EU:C:2006:587, paragraph 51, and *TDC*, C-222/13, EU:2014:2265, paragraph 30).

20 Nor is it disputed that the Tribunal Català de Contractes del Sector Públic complies, when performing its duties, with the requirement for objectivity and impartiality vis-à-vis the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. Furthermore, under Article 8(4) of Decree 221/2013 of the Generalitat de Catalunya, the members of the Tribunal are appointed on a permanent basis and cease to hold office only in the circumstances expressly set out in Article 8 (see judgments in *Wilson*, C-506/04, EU:C:2006:587, paragraphs 52 and 53, and *TDC*, C-222/13, EU:2014:2265, paragraphs 31 and 32).

21 The referring body therefore satisfies the criterion of independence.

22 As regards (iii) whether the jurisdiction of the body making the reference is compulsory within the meaning of the Court's case-law on Article 267 TFEU, it is true that, under Article 40(6) of Legislative Decree 3/2011, the referring body's jurisdiction is optional. Thus, a person bringing proceedings in a public procurement case may choose between a special appeal to the referring body and an administrative-law action.

23 In this regard, it must nevertheless be observed that the decisions of the referring body, whose jurisdiction does not depend on the parties' agreement, are binding on the parties (see order in *Merck Canada*, C-555/13, EU:C:2014:92, paragraph 18 and the case-law cited; and judgment in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, EU:C:2014:1754, paragraph 28).

24 Moreover, the Spanish Government explained at the hearing that, in practice, tenderers in public procurement procedures do not generally avail themselves of the possibility of directly initiating an administrative-law action, without having first brought a special appeal of the kind in the main proceedings before the Tribunal Català de Contractes del Sector Públic. Essentially, the administrative courts are thus, as a general rule, involved at second instance, with the result that, in the Autonomous Community of Catalonia, primary responsibility for ensuring that EU public procurement law is observed lies with the referring body.

25 In those circumstances, the Tribunal Català de Contractes del Sector Públic also satisfies the criterion of compulsory jurisdiction.

26 Finally, it should be recalled that the Court, in assessing the legal status of the national bodies mentioned in Article 2(9) of Directive 89/665, which are responsible for reviewing the award of public contracts, has already confirmed the status as a 'court or tribunal' of a number of other national bodies that are in essence comparable to the referring body in the present case (see, inter alia, *Dorsch Consult*, C-54/96, EU:C:1997:413, paragraphs 22 to 38; *Köllensperger and Atzwanger*, C-103/97, EU:C:1999:52, paragraphs 16 to 25; and *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraph 22 and the case-law cited).

27 The Tribunal Català de Contractes del Sector Públic therefore has the status of a 'court or tribunal' within the meaning of Article 267 TFEU.

28 Secondly, the Spanish Government submits that the requirement for classification laid down by Spanish law does not apply to undertakings established in Member States other than the Kingdom of Spain. It argues that the questions referred are thus a purely internal matter and that it is not necessary either to apply or to interpret EU law in order to resolve them.

29 So far as this point is concerned, it must be recalled that the Court does not, in principle, have jurisdiction to reply to a question referred for a preliminary ruling where it is obvious that the rule of EU law referred to it for interpretation is incapable of applying (judgments in *Caixa d'Estalvis i Pensions de Barcelona*, C-139/12, EU:C:2014:174, paragraph 41, and *Wojciechowski*, C-408/14,

EU:C:2015:591, paragraph 26; see, also, orders in *Parva Investitsionna Banka and Others*, C-488/13, EU:C:2014:2191, paragraph 26, and *De Bellis and Others*, C-246/14, EU:C:2014:2291, paragraph 14).

30 However, the fact that the requirement for classification at issue in the main proceedings does not apply to undertakings established in Member States other than the Kingdom of Spain does not affect the Court's jurisdiction. The Court has already held that nothing in Directives 89/665 and 2004/18 permits the inference that their applicability is dependent on the existence of an actual link with free movement between Member States. Those directives do not make the applicability of their provisions to procedures for the award of public contracts contingent on any condition relating to the nationality or the place of establishment of the tenderers (see, to that effect, judgment in *Michaniki*, C-213/07, EU:C:2008:731, paragraph 29).

31 Accordingly, the Court has jurisdiction to answer the questions referred.

The first and second questions

32 By its first and second questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 1(8) of Directive 2004/18 must be interpreted as meaning that the term 'economic operator' in the second subparagraph of that provision, encompasses public authorities and whether the latter may, on that account, participate in public tenders.

33 In that regard, it follows both from recital 4 in the preamble to Directive 2004/18, which explicitly mentions the possibility of a 'body governed by public law' participating as a tenderer in a procedure for the award of a public contract, and from Article 1(8) of the directive, which specifically acknowledges that any 'public entity' may have the status of 'economic operator', that Directive 2004/18 does not prevent public authorities from participating in tendering procedures.

34 Moreover, the Court has held that any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract, either directly or by using subcontractors, is eligible to submit a tender or put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is consistently active on the market or only on an occasional basis and whether or not it is subsidised by public funds (see judgments in *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 42, and, to that effect, *Data Medical Service*, C-568/13, EU:C:2014:2466, paragraph 35).

35 If and to the extent that certain entities are authorised to offer services in return for remuneration on the market, even occasionally, the Member States may not prevent those entities from participating in tendering procedures for the award of public contracts relating to the provision of those services (see, to that effect, judgments in *CoNISMa*, C-305/08, EU:C:2009:807, paragraphs 47 to 49; *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 27; see also, to that effect, with regard to the corresponding provisions of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), judgment in *Data Medical Service*, C-568/13, EU:C:2014:2466, paragraph 36).

36 Consequently, the answer to the first and second questions is that Article 1(8) of Directive 2004/18 must be interpreted as meaning that the term 'economic operator' in the second subparagraph of that provision encompasses public authorities, which may therefore participate in public tendering procedures if and to the extent that they are authorised to offer certain services in return for remuneration on a market.

The third question

37 By its third question, the referring court asks, in essence, whether Article 52 of Directive 2004/18 must be interpreted as meaning that national public authorities may be included in official lists of approved contractors, suppliers or service providers or certified by certification bodies established under public or private law.

38 As regards Member States which have chosen either to establish official lists of approved contractors, suppliers or service providers or to establish certification by certification bodies established under

public or private law, it should be stated that although paragraphs 1 and 5 of Article 52 of Directive 2004/18 include certain requirements concerning the determination of the conditions for registration on those lists and for that certification, the directive does not establish (i) whether public entities may be registered on the official lists concerned or be certified or (ii) whether or not the registration or certification in question is compulsory.

39 However, as follows, in essence, from paragraph 36 of this judgment, public entities which, under national law, are authorised to offer the works, products or services covered by the contract notice concerned are also entitled to participate in public tendering procedures.

40 National rules which would bar public authorities that are authorised, as economic operators, to offer the works, products or services covered by the contract notice concerned from registration on the lists or from the certification in question, whilst reserving the right to participate in a tendering procedure to other economic operators which are registered on those lists or which benefit from certification, would negate the right of those public entities to participate in the tendering procedure concerned and therefore cannot be regarded as compatible with EU law.

41 Accordingly, the answer to the third question is that Article 52 of Directive 2004/18 must be interpreted to the effect that — although it includes certain requirements with regard to the determination of the conditions for registration of economic operators on the national official lists and for certification — it does not exhaustively define either (i) the conditions for registration of those economic operators on the national official lists or the conditions for their certification or (ii) the rights and obligations of public entities in that respect. In all events, Directive 2004/18 must be interpreted as precluding national rules under which, on the one hand, national public authorities that are authorised to offer the works, products or services covered by the contract notice concerned may not be registered on those lists, or may not obtain certification, while, on the other hand, the right to participate in the tendering procedure concerned is afforded only to operators which are included on those lists or which have obtained certification.

The fourth question

42 By its fourth question, the referring court asks whether Legislative Decree 3/2011 correctly transposed Directive 2004/18 into Spanish law and whether the Spanish legislature, through Articles 62 and 65 of that decree, limited the access of public authorities to the business classification registers.

43 In that regard, it must be recalled that, according to settled case-law, it is not for the Court, in preliminary ruling proceedings, to rule upon the compatibility of provisions of national law with EU law or to interpret national legislation or regulations (see, inter alia, *Ascafor and Asidac*, C-484/10, EU:C:2012:113, paragraph 33 and the case-law cited).

44 Consequently, the Court does not have jurisdiction to answer the fourth question.

The fifth question

45 By its fifth question, the referring court asks, in essence, by what means public authorities may — in the event that they are entitled to participate in public tendering procedures, but may not be registered on an official list of approved economic operators or certified by a certification body — establish their suitability to enter into a given contract under Directive 2004/18.

46 By that question, the referring court merely seeks, in the event of Spanish law having to be interpreted in conformity with EU law, an interpretation of Directive 2004/18 in general, without specifying whether, in its view, Spanish law cannot be interpreted in a manner consistent with EU law and, if not, why not. Nor does the referring court mention any specific provisions of that directive whose interpretation by the Court of Justice is necessary in order to enable it to give a decision in the case before it.

47 Consequently, this question does not fulfil the conditions laid down in Article 94(c) of the Rules of Procedure of the Court of Justice, pursuant to which a request for a preliminary ruling must contain a statement of the reasons which prompted the referring court or tribunal to inquire about the

interpretation of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

48 In those circumstances, the fifth question must be declared inadmissible.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 1(8) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that the term 'economic operator' in the second subparagraph of that provision encompasses public authorities, which may therefore participate in public tendering procedures if and to the extent that they are authorised to offer certain services in return for remuneration on a market.**

2. **Article 52 of Directive 2004/18 must be interpreted to the effect that — although it includes certain requirements with regard to the determination of the conditions for registration of economic operators on the national official lists and for certification — it does not exhaustively define (i) the conditions for registration of those economic operators on the national official lists or the conditions for their certification or (ii) the rights and obligations of public entities in that respect. In all events, Directive 2004/18 must be interpreted as precluding national rules under which, on the one hand, national public authorities that are authorised to offer the works, products or services covered by the contract notice concerned may not be registered on those lists, or may not obtain certification, while, on the other hand, the right to participate in the tendering procedure concerned is afforded only to operators which are included on those lists or which have obtained certification.**

[Signatures]

---

* Language of the case: Spanish.

EU:C:2015:445

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 7 July 2015 (1)

Case C-203/14

Consorci Sanitari del Maresme
v
Corporació de Salut del Maresme i la Selva

(Request for a preliminary ruling from the Tribunal Català de Contractes del Sector Públic (Spain))

(Reference for a preliminary ruling — Jurisdiction of the Court — Concept of 'court or tribunal of a Member State' within the meaning of Article 267 TFEU — Tribunal Català de Contractes del Sector Públic — Compulsory jurisdiction of the referring body — Directive 89/665/EEC — Effect on the interpretation of Article 267 TFEU)

I – Introduction

1. The present case arises from a request for a preliminary ruling made by the Tribunal Català de Contractes del Sector Públic (Spain) (Catalan Public Sector Contracts Board) in the context of a special administrative appeal relating to public procurement.

2. In the course of the proceedings before the Court of Justice, doubts arose concerning the Court's jurisdiction in light of the characteristics of the Tribunal Català de Contractes del Sector Públic. Of the criteria established in the Court's case-law for deciding whether a body making a reference is a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, the criterion of the 'compulsory jurisdiction' of the referring body aroused the Court's concern in particular.

3. The Tribunal Català de Contractes del Sector Públic is in fact a specialised collegiate administrative body with jurisdiction to hear special appeals relating to public procurement matters. Being a specialised body, it is not a court *stricto sensu* under national law, although its decisions are final in so far as concerns administrative remedies. Moreover, bringing an appeal before that body is optional, which raises the question of whether it may be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU. That question requires the Court to interpret, in particular, its complex case-law relating to the 'compulsory jurisdiction' of the referring body.

4. In accordance with the request made by the Court following its decision to open the oral procedure and the reallocation of the case, this Opinion will specifically address this criterion of the 'compulsory jurisdiction' of the referring body, which the Court wishes to consider in particular, and briefly examine the remaining criteria. I shall therefore not deal with the substantive questions asked by the referring body.

II – Facts and procedure before the Court

5. The Consorci Sanitari del Maresme wished to participate in the tendering procedure relating to nuclear magnetic resonance services organised by the Corporació de Salut del Maresme i la Selva. On 10 December 2013, it brought a special appeal before the Tribunal Català de Contractes del Sector Públic challenging the decision of the assessment board of the contracting authority, so that it might be admitted to the tendering procedure. (2)

6. In the context of that special appeal, the Tribunal Català de Contractes del Sector Públic decided to refer five questions to the Court of Justice for a preliminary ruling. (3)

7. By decision of 13 January 2015, the Court referred the case to the Sixth Chamber and decided, pursuant to Article 76(2) of its Rules of Procedure, not to hold a hearing. The Court also decided that the case would be determined without the Opinion of an Advocate General.

8. However, the judicial status of the body making the request for a preliminary ruling gave rise to uncertainty regarding the Court's jurisdiction.

9. Accordingly, on 9 February 2015, the Court requested clarification from the Tribunal Català de Contractes del Sector Públic, which replied by letter of 12 February 2015, received at the Court on 17 February 2015.

10. The Court took the view that it was necessary for it to hear detailed argument on whether the Tribunal Català de Contractes del Sector Públic could be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU and reallocated the case to the Grand Chamber. The Court decided that it was necessary to organise a hearing in order to permit the parties to express their views, if any, on the admissibility of the request for a preliminary ruling made by the Tribunal Català de Contractes del Sector Públic and consequently ordered the reopening of the oral procedure for the purpose of examining its jurisdiction in this case.

11. The hearing was held on 12 May 2015 in the presence of the Spanish Government and the European Commission. The Italian Government, which had submitted written observations on the substantive questions, was not represented at the hearing.

III – The Court's jurisdiction to give a ruling on the questions referred for a preliminary ruling

A – *Observations on the legal framework*

12. According to the settled case-law of the Court, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. (4) Moreover, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. (5)

13. It must be emphasised in this connection that the fact that a national body is not described as a court or tribunal *stricto sensu* under national law is not in itself conclusive, since the notion of a 'court or tribunal' within the meaning of Article 267 TFEU is an autonomous concept of EU law. Indeed, the Court has held that that concept may also include bodies that are not courts or tribunals under national law (6) and are not part of the judicial system of a Member State. (7) Thus, the Court attaches importance not to the formal designation of the body in question, but rather to its substantive characteristics, (8) and this calls for an assessment of the structural and functional characteristics of the referring body.

14. At the hearing, the Spanish Government confirmed that the Tribunal Català de Contractes del Sector Públic is a 'review body' within the meaning of the first subparagraph of Article 2(9) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (9) which may, according to that provision, be non-judicial in

character. (10) It is also clear from the information provided to the Court that decisions of the Tribunal Català de Contractes del Sector Públic conclude the 'administrative proceedings'.

15. In my view, those aspects derived from national law are not conclusive if the characteristics of the referring body demonstrate that it fulfils the criteria established in the case-law of the Court in order to be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, that is to say, the criteria which I mentioned in point 12 of this Opinion.

16. In so far as concerns the particular legal framework for public procurement, in view of the importance of this area for the internal market, and in particular for the observance of the fundamental freedoms of movement, the EU legislature has harmonised national law in this field to a large extent. Exceptionally, the judicial protection afforded to individuals has also been substantially harmonised by the provisions of Directive 89/665 and consequently that is no longer a matter solely for the procedural autonomy of the Member States, as limited by the principles of effectiveness and equivalence. (11)

17. Accordingly, the third subparagraph of Article 1(1) of Directive 89/665 provides that the Member States are to take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of Directive 89/665 where such decisions have infringed EU law in the field of public procurement or national rules transposing that law. Such remedies may include actions before national courts as well as applications to quasi-judicial bodies as referred to in the first subparagraph of Article 2(9) of Directive 89/665.

18. Given that, the question arises of whether account must be taken, when interpreting the concept of a 'court or tribunal' for the purposes of Article 267 TFEU, of the fact that the body in question has been established in order to enable the Member State to fulfil its obligations under Directive 89/665. In fact, it is often such bodies of a quasi-judicial nature that are called upon to interpret EU public procurement law, often almost exclusively so, where their decisions are not in practice appealed before an ordinary court.

19. It should be noted that, in its case-law on the interpretation of Article 267 TFEU, which has been established in judgments for the most part handed down after the adoption of Directive 89/665, the Court has already applied the criteria for defining a 'court or tribunal' within the meaning of Article 267 TFEU in a flexible fashion. (12) This has enabled a variety of review bodies, including bodies created by the Member States in the public procurement sector, to refer questions to the Court for a preliminary ruling. (13) Adopting this flexible approach to its requirements for considering a body to be a 'court or tribunal', the Court has also held to be a court or tribunal for the purposes of Article 267 TFEU administrative bodies that act at last instance in various fields of EU law. (14)

20. Since the Court has, it seems to me, already adopted in this area an interpretation of Article 267 TFEU that is sufficiently flexible to ensure that provisions of EU law are interpreted uniformly at national level, I take the view that the provisions of Directive 89/665 and the fact that the Tribunal Català de Contractes del Sector Públic has express jurisdiction in public procurement matters have no particular bearing on the application of Article 267 TFEU to the present case.

B – *The recognised criteria, other than the 'compulsory jurisdiction' of the referring body, for determining whether a referring body is a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU*

1. The establishment by law and the permanence of the body

21. As regards the question whether the Tribunal Català de Contractes del Sector Públic was established by law, it is clear both from the reply which that body gave to the Court's request for information and from the submissions made by the Spanish Government at the hearing that the Tribunal Català de Contractes del Sector Públic was created by the Autonomous Community of Catalonia in the exercise of the special legislative competence provided for under Spanish law. (15)

22. The Tribunal Català de Contractes del Sector Públic was originally established as a single-member body named the 'Órgano Administrativo de Recursos Contractuales de Cataluña' (the Administrative Body for Contractual Appeals of Catalonia) by the fourth additional provision of Law 7/2011 of 27 July 2011 on fiscal and financial measures. (16) Because of the increasing volume and special nature of the cases falling within the competence of the Órgano Administrativo de Recursos Contractuales de Cataluña, it was transformed into a collegiate body, named the Tribunal Català de Contractes del Sector Públic, by Decree 221/2013 of 3 September 2013. (17) That decree contains provisions concerning, in particular, the establishment, jurisdiction and composition of the Tribunal Català de Contractes del Sector Públic. Thus, the criterion of the body's establishment by law is clearly satisfied.

23. Moreover, as a component in the system for judicial resolution of disputes in the area of public procurement, the Tribunal Català de Contractes del Sector Públic satisfies the requirement for permanence. (18) Indeed, although the members of that body are appointed for a renewable term of five years, (19) it is nevertheless permanent as a body governed by public law and therefore not an ad hoc body convened for the purposes of an individual dispute.

2. *Inter partes* procedure and the application of rules of law

24. As regards, first of all, the *inter partes* nature of the procedure initiated by special application to the Tribunal Català de Contractes del Sector Públic, it must be recalled at the outset that the requirement that the procedure be *inter partes* is not an absolute requirement. (20) However, in accordance with Article 46 of Royal Legislative Decree 3/2011, the parties do have the opportunity to make submissions and present evidence to the body having jurisdiction to settle the dispute. In so far as the Tribunal Català de Contractes del Sector Públic is concerned, in accordance with Article 14 of Decree 221/2013, the procedure applicable to special appeals in public procurement matters is governed by the basic rules of the legislation relating to public procurement, by the rules implementing that legislation, by the procedural rules set out in Decree 221/2013 and by the legal rules governing public authorities and general administrative procedure.

25. Moreover, since in special appeals in public procurement matters the Tribunal Català de Contractes del Sector Públic clearly has before it cases involving a contracting authority as respondent and a tenderer as appellant, I consider that the requirement that the procedure be *inter partes* is satisfied in this case.

26. Secondly according to the information provided by the referring body itself, it carries out reviews of the legality of decisions in public procurement matters. It must be borne in mind that bodies such as the Tribunal Català de Contractes del Sector Públic have been established in Spain in order to fulfil the obligations arising under Directive 89/665, in particular the obligation to ensure that decisions taken by contracting authorities in procedures for the award of public contracts are amenable to effective review on the ground of infringement of EU public procurement law or national rules transposing that law. Thus, the Tribunal Català de Contractes del Sector Públic, as a body having jurisdiction to hear such actions, clearly applies rules of law.

3. Independence

27. In accordance with the case-law of the Court, the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision. (21) There are two aspects to that concept. The first aspect, which is external, entails the body being protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. (22)

28. Those guarantees of independence and impartiality require rules — particularly as regards the composition of the body and the appointment and length of service of its members and the grounds for the withdrawal, rejection and removal of its members — in order to dismiss any reasonable doubt in the

minds of individuals as regards the imperviousness of that body to external factors and its neutrality with respect to the interests before it. (23) The condition regarding the independence of the body making the reference is regarded, in case-law, as being met only if the grounds for the removal of members of that body are determined by express legislative provisions. (24)

29. It seems to me that the requirements for the independence of the referring body are satisfied in this case. Indeed, Article 2 of Decree 221/2013, which is entitled 'Legal nature' and concerns the establishment of the Tribunal Català de Contractes del Sector Públic, provides that '[t]he Tribunal is a specialised collegiate administrative body. In exercising its powers it shall act in a wholly independent manner and with complete objectivity and impartiality. It shall have no hierarchical superiors and shall not receive instructions from any relevant public authorities'.

30. As regards the composition of the referring body, Article 5 of Decree 221/2013 provides that it is to be composed of a chairman and two persons sitting as assessors, who are appointed by the person responsible for the competent service for establishing the criteria for, and directing and monitoring the award of public contracts. The requirements which must be satisfied in order to be a member are listed in Article 6 of Decree 221/2013. I would point out that members are appointed for a renewable term of five years, (25) during which period the officials appointed as members of the Tribunal remain on secondment, that is to say, they devote themselves entirely to their duties within the Tribunal Català de Contractes del Sector Públic. (26) Under Article 8(4) of Decree 221/2013, the members of the Tribunal are appointed on a permanent basis. However, they may be dismissed or have their appointment revoked on certain grounds expressly set out in Article 8. (27) Article 11 of Decree 221/2013 contains the specific rules governing the reasons for the withdrawal or rejection of members.

31. Although there is a connection between the Tribunal Català de Contractes del Sector Públic and 'the competent service for establishing the criteria for, and directing and monitoring the award of public contracts', it has no hierarchical superiors and does not receive instructions from any relevant public authorities. (28) When reaching decisions, the Tribunal Català de Contractes del Sector Públic acts as a third party in relation to the interests at stake and possesses the necessary impartiality. (29)

32. Lastly, it must be observed that the Tribunal Català de Contractes del Sector Públic does not have the status of defendant in the event that its decisions are challenged. (30) Admittedly, the decisions and acts of the Tribunal may form the subject-matter of an administrative-law action, but that is a case of judicial protection at second instance and does not deprive the decisions of that body of their judicial nature for the purposes of Article 267 TFEU. The decisions of the referring body cannot be the subject of administrative review. (31)

33. In my view, the referring body thus fulfils the criterion of independence as established in the case-law of the Court.

C – *The 'compulsory jurisdiction' of the referring body*

34. It was the issue of the 'compulsory jurisdiction' of the referring body, within the meaning of the case-law on Article 267 TFEU, that first aroused the Court's concern regarding the status of the Tribunal Català de Contractes del Sector Públic as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU. I would point out that the essential question in this regard is whether the fact that an appeal to the referring body is not the only available remedy means that, notwithstanding the legally binding force of its decisions, that body cannot be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU.

35. It is in fact clear from the information before the Court that an appeal to the Tribunal Català de Contractes del Sector Públic is an *alternative* remedy. According to that body, an applicant may *choose* (32) between bringing a special appeal before the Tribunal Català de Contractes del Sector Públic and commencing an administrative-law action. That decision will bind the authority, which has no power to override it. (33) On the other hand, in the particular sectors governed by Law 31/2007 of 30 October 2007 on procurement procedures in the water, energy, transport and postal services sectors, (34) the option of directly initiating an administrative-law action does not exist. In those sectors, therefore, the special appeal is not an alternative, since it is necessary for a dispute to be

brought before a review body, such as the Tribunal Català de Contractes del Sector Públic, before proceedings may be commenced before the ordinary administrative court having jurisdiction.

36. In the present case, the dispute in the main proceedings does not relate to one of the particular sectors governed by Law 31/2007, which I mentioned in point 35 of this Opinion, and it therefore seems to me that the normal regime must apply.

37. It is important to bear in mind that the question whether a body is entitled to refer a question to the Court of Justice is determined on the basis of criteria relating both to the constitution of that body and to its function. In that connection, a national body may be classified as 'a court or tribunal of a Member State', within the meaning of Article 267 TFEU, when it is performing judicial functions, but when it is exercising other functions, of an administrative nature, for example, it cannot be recognised as such. (35) It follows that, in order to establish whether a national body that is entrusted by law with functions of a different nature is to be regarded as a 'court or tribunal of a Member State', within the meaning of Article 267 TFEU, it is necessary to determine in what specific capacity it is acting within the particular legal context in which it seeks a ruling from the Court. (36)

38. Like the other criteria for determining whether a body is a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, the criterion of the 'compulsory jurisdiction' of the body has been developed in the Court's case-law. However, it must be observed that the use of this concept in the Court's case-law has not always been very consistent. Frequently, the Court has not referred to the criterion expressly and, in the French language at least, the use of this concept is not without its difficulties. I believe that the 'compulsory jurisdiction' of the referring body was used for the first time, as a concept, in the judgment in *Dorsch Consult*, (37) although similar expressions had been used prior to that in order to support the finding that the referring body was indeed a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU. (38)

39. In its judgment in *Dorsch Consult*, (39) the Court identified two aspects of the 'compulsory' nature of the body's jurisdiction: first, the body dealing with the case in fact offered the only remedy available and, secondly, its determinations were binding. (40) In that case, however, it was unnecessary for the Court to give a clear and precise definition of the criterion or to give preference to one or other meaning, since the jurisdiction of the body in question was 'compulsory' in both senses. (41)

40. Like Advocates General Ruiz-Jarabo Colomer, Kokott and Szpunar, I believe that the word 'compulsory' refers more to the fact that the decisions of the referring body have binding force rather than to the fact that the body in question offers the only legal remedy available. (42)

41. Indeed, in its judgment in *Emanuel*, (43)the Court regarded as a court or tribunal of a Member State, within the meaning of Article 267 TFEU, the person appointed to hear appeals against trade mark registration decisions, who *shared that jurisdiction with an ordinary court* and to whom an appeal was referred at the appellant's discretion, in that he was entitled to choose the jurisdiction before which he brought his appeal. The decisions of the appointed person had binding force. (44)

42. Similarly, in its judgment in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, (45) the Court regarded as 'compulsory' the jurisdiction of the Tribunal Arbitral Tributário (Portugal), which offered an alternative means of resolving tax disputes and whose decisions were binding on the parties. In taxation matters, as in the case which gave rise to that judgment, the taxable person could decide either to bring proceedings before an administrative court or to request the constitution of a tax arbitration tribunal, and the tax authorities had to comply with that decision. Therefore, tax arbitration was not an additional legal remedy in the hands of the taxable person, but a genuine *alternative to the traditional courts*. (46)

43. It is therefore clear from the abovementioned judgments that, according to the Court, the existence of an alternative remedy to court proceedings *stricto sensu* does not necessarily mean that the body offering that alternative remedy cannot be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU. (47) The alternative remedy may be different in nature from traditional remedies, just as arbitration in tax matters is different from an action before an administrative court. While the existence of a single remedy has been mentioned in a number of the Court's judgments, where the remedy at issue was effectively the only remedy available, the Court has

never taken the view that a referring body could not be regarded as a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU solely on the ground that, as regards the matter at issue, various remedies were available. (48)

44. Moreover, it seems to me that, since the beginning, the Court has relied on this criterion in order to exclude private arbitration tribunals in the usual sense, even if it did not refer to the criterion of ‘compulsory jurisdiction’ as such. (49) According to the case-law, an arbitration tribunal constituted pursuant to an agreement between the parties is not a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU since the parties are under *no obligation*, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are neither involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator. (50) However, the Court has held admissible questions referred to it for a preliminary ruling by an arbitration tribunal where that tribunal had been established by law, its decisions were binding on the parties and its jurisdiction did not depend on their agreement. (51)

45. Consequently, the fact that the decisions of the referring body have binding force is indeed a necessary requirement in order for that body to be regarded as a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU. However, that fact alone does not render the jurisdiction of the referring body ‘compulsory’ within the meaning of the case-law on Article 267 TFEU. For that, it is also necessary for the body in question to be a body established by law whose jurisdiction is independent of the wishes of the parties. (52) I would reiterate that, in my view, it is not necessary, however, for an action or appeal before such a body to be the only available remedy.

46. If the converse view were taken, then, in theory, a question could arise as to the ‘compulsory jurisdiction’ of the Spanish administrative courts in the context of administrative-law actions relating to public procurement brought directly before them, as ordinary administrative courts. It seems to me that, in such a situation, it would not then be possible to regard the jurisdiction of an administrative court as ‘compulsory’ because an administrative-law action would not be the only remedy available. (53)

47. For my part, it seems that the advantages of interpreting Article 267 TFEU in such a way that a referring body such as the Tribunal Català de Contractes del Sector Públic may be regarded as a ‘court or tribunal of a Member State’, despite the availability of alternative remedies, outweigh the possible disadvantages. Indeed, the ability to choose between several legal remedies enables individuals to choose the remedy that seems to them to be the most appropriate in the circumstances. (54) The bodies responsible for specialised appeals, as is the Tribunal Català de Contractes del Sector Públic in public procurement matters, may have considerable expertise, allowing them to settle disputes brought before them rapidly and expertly. It is possible, however, even in public procurement matters, that certain cases centre upon questions of general administrative law. In such cases an obligation to refer the matter to a specialised body would be unhelpful if the ordinary administrative courts were better qualified to settle the dispute. (55)

48. It should be noted that the decisions of the Tribunal Català de Contractes del Sector Públic are binding on the parties and enforceable. (56) They therefore have the same effects as decisions handed down by administrative courts of first instance, even though proceedings are brought before a corresponding higher administrative court. It seems to me that, where no action is brought before an administrative court, a decision of the Tribunal Català de Contractes del Sector Públic will constitute a final and binding solution of a dispute between a contracting authority and a tenderer. (57) Its decisions therefore have an authority comparable to the effect of the principle of *res judicata*.

49. It follows from all the foregoing that the Tribunal Català de Contractes del Sector Públic, a specialised collegiate administrative body created by national legislation, whose statutory jurisdiction is independent of the wishes of the parties and whose decisions are binding, fulfils the criteria laid down in the case-law in order to be regarded as a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU. A case is pending before it and it is called upon to rule in proceedings intended to lead to a decision of a judicial nature. Therefore, the Court has jurisdiction to answer the questions referred to it by that body for a preliminary ruling and the request for a preliminary ruling is admissible.

IV – Conclusion

50. In the light of the foregoing considerations, I suggest that the Court of Justice declare that it has jurisdiction to answer the questions referred for a preliminary ruling by the Tribunal Català de Contractes del Sector Públic.

---

1 – Original language: French.

---

2 – For a brief summary of the facts of the case in the main proceedings, see the order in *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:279, paragraph 2).

---

3 – The questions concern, inter alia, the issue of whether public authorities must be regarded as economic operators for the purposes of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), their inclusion in the official lists of approved contractors and their certification by certification bodies established under public or private law.

---

4 – See, inter alia, judgments in *Vaassen-Göbbels* (61/65, EU:C:1966:39), *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 23); *Österreichischer Gewerkschaftsbund* (C-195/98, EU:C:2000:655, paragraph 24); *Syfait and Others* (C-53/03, EU:C:2005:333, paragraph 29); *Emanuel* (C-259/04, EU:C:2006:215, paragraph 19); *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 17); *Belov* (C-394/11, EU:C:2013:48, paragraph 38 and the case-law cited); and *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraph 23).

---

5 – See, inter alia, judgments in *Job Centre* (C-111/94, EU:C:1995:340, paragraph 9); *Victoria Film* (C-134/97, EU:C:1998:535, paragraph 14); *Österreichischer Gewerkschaftsbund* (C-195/98, EU:C:2000:655, paragraph 25); *Syfait and Others* (C-53/03, EU:C:2005:333, paragraph 29); and *Belov* (C-394/11, EU:C:2013:48, paragraph 39).

---

6 – See, inter alia, judgments in *Vaassen-Göbbels* (61/65, EU:C:1966:39); *Broekmeulen* (246/80, EU:C:1981:218, paragraphs 11 and 17); *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 38); *Jokela and Pitkäranta* (C-9/97 and C-118/97, EU:C:1998:497, paragraph 24); and *Abrahamsson and Anderson* (C-407/98, EU:C:2000:367, paragraph 38). See also the Opinion of Advocate General Tesauro in *Dorsch Consult* (C-54/96, EU:C:1997:245, point 20).

---

7 – See, in this connection, the Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster* (C-17/00, EU:C:2001:366, points 53 to 57 and the case-law cited).

---

8 – Opinion of Advocate General Tesauro in *Dorsch Consult* (C-54/96, EU:C:1997:245, point 23).

9– OJ 1989 L 395, p. 33, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

---

10 – The first subparagraph of Article 2(9) provides that, '[w]here bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU] and independent of both the contracting authority and the review body'.

---

11 – Regarding the concept of the procedural autonomy of the Member States and the principles of EU law which limit that autonomy, see, in particular, judgments in *Club Hotel Loutraki and Others* (C-145/08 and C-149/08, EU:C:2010:247, paragraph 74 and the case-law cited), and *eVigilo* (C-538/13, EU:C:2015:166, paragraph 39). As regards the principles of effectiveness and equivalence in the context of Directive 89/665, see, in particular, my Opinion in *Orizzonte Salute* (C-61/14, EU:C:2015:307, points 20 to 26, 33 and 34).

---

12 – Advocate General Ruiz-Jarabo Colomer strongly criticised this case-law, which he described as 'too flexible and not sufficiently consistent', in his Opinions in *De Coster* (C-17/00, EU:C:2001:366, points 13, 14 and 58 to 64); *Ing. Aigner* (C-393/06, EU:C:2007:706, points 22 to 29); and *Österreichischer Rundfunk* (C-195/06, EU:C:2007:303, points 27 to 29).

---

13 – See, in particular, judgments in *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraphs 23 to 38); *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4); *HI* (C-258/97, EU:C:1999:118, paragraph 18); *Unitron Scandinavia and 3-S* (C-275/98, EU:C:1999:567, paragraph 15); *HI* (C-92/00, EU:C:2002:379, paragraphs 26 to 28); *Felix Swoboda* (C-411/00, EU:C:2002:660, paragraphs 26 to 28); *Ing. Aigner* (C-393/06, EU:C:2008:213); *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801, paragraph 18); and *Bundesdruckerei* (C-549/13, EU:C:2014:2235, paragraph 22). See also the Opinion of Advocate General Léger in *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1997:402, points 34 to 44); the Opinion of Advocate General Saggio in *HI* (C-258/97, EU:C:1998:457, points 11 to 15); the Opinion of Advocate General Mischo in *Felix Swoboda* (C-411/00, EU:C:2002:238, points 13 to 20); and the Opinion of Advocate General Ruiz-Jarabo Colomer in *Ing. Aigner* (C-393/06, EU:C:2007:706, points 22 to 29).

---

14 – See, to that effect, judgments in *Broekmeulen* (246/80, EU:C:1981:218, paragraphs 15 and 17), and *Handels- og Kontorfunktionærernes Forbund i Danmark* (109/88, EU:C:1989:383, paragraphs 7 and 9), and the Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster* (C-17/00, EU:C:2001:366, point 82).

---

15 – It is clear from the information provided by the referring body that, in Spain, the bodies specialising in matters concerning public procurement were created by Royal Legislative Decree 3/2011 of 14 November 2011 adopting the consolidated text of the Law on Public Sector Contracts (*Boletín Oficial del Estado*, No 276 of 16 November 2011, p. 117729, hereinafter 'Royal Legislative Decree 3/2011'). Royal Legislative Decree 3/2011 created the Tribunal Administrativo Central de Recursos Contractuales (the central body) and conferred power on the Autonomous Communities to create corresponding review bodies in the Autonomous Communities.

---

16 – *Diari Oficial de la Generalitat de Catalunya* No 5931 of 29 July 2011. In accordance with the first paragraph of the fourth additional provision, '[t]his body shall be a specialised administrative body. It shall exercise its powers in a wholly independent manner.'

---

17 – Decree 221/2013 on the establishment, organisation and functioning of the Tribunal Català de Contractes del Sector Públic (*Diari Oficial de la Generalitat de Catalunya* No 6454 of 5 September 2013). According to the Spanish Government, these rules govern the organisation and functioning of the Tribunal Català de Contractes del Sector Públic in exactly the same way as the rules which govern the Tribunal Administrativo Central de Recursos Contractuales, laid down in Royal Legislative Decree 3/2011.

---

18 – Regarding this criterion of permanance, see, in particular, the judgment in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraphs 25 and 26) and the Opinion of Advocate General Léger in *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1997:402, paragraph 38).

---

19 – Article 7 of Decree 221/2013.

20 – Judgments in *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 31), and *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145, paragraph 37).

21 – Judgments in *Corbiau* (C-24/92, EU:C:1993:118, paragraph 15); *Wilson* (C-506/04, EU:C:2006:587, paragraph 49); *RTL Belgium* (C-517/09, EU:C:2010:821, paragraph 38); and *TDC* (C-222/13, EU:C:2014:2265, paragraph 29).

22 – Judgments in *Wilson* (C-506/04, EU:C:2006:587, paragraphs 51 and 52 and the case-law cited); *RTL Belgium* (C-517/09, EU:C:2010:821, paragraphs 39 and 40); and *TDC* (C-222/13, EU:C:2014:2265, paragraphs 30 and 31).

23 – Judgments in *Wilson* (C-506/04, EU:C:2006:587, paragraph 53 and the case-law cited), and *TDC* (C-222/13, EU:C:2014:2265, paragraph 32).

24 – Judgment in *TDC* (C-222/13, EU:C:2014:2265, paragraph 32), and order in *Pilato* (C-109/07, EU:C:2008:274, paragraph 24). However, it should be noted that, in its judgment in *Köllensperger and Atzwanger* (C-103/97, EU:C:1999:52, paragraphs 20 to 25), the Court abandoned that requirement and held the body making the reference to be a court or tribunal of a Member State despite the lack of specific provisions on challenges to or withdrawals by members.

25 – See point 23 of this Opinion.

26 – It should be noted that, in its judgment in *Dorsch Consult* (C-54/96, EU:C:1997:413), the Court regarded as a court or tribunal of a Member State a Federal Supervisory Board whose ‘civil servant’ members were also members of the national administrative authority responsible for competition matters and *simultaneously* performed both functions (see the Opinion of Advocate General Tesauro in *Dorsch Consult* (C-54/96, EU:C:1997:245, points 33 and 34)).

27 – It also seems to me that the guarantees that the ‘civil servant’ members in the case in *Dorsch Consult* (C-54/96, EU:C:1997:413) could not be removed from office were weaker than those in the present case, which are set out in Article 8(4) of Decree 221/2013.

28 – See Articles 1 and 2 of Decree 221/2013.

29 – Judgments in *RTL Belgium* (C-517/09, EU:C:2010:821, paragraph 47); *Epitropos tou Elegktikou Synedriou* (C-363/11, EU:C:2012:825, paragraph 21); and *TDC* (C-222/13, EU:C:2014:2265, paragraph 37).

30 – See judgments in *Corbiau* (C-24/92, EU:C:1993:118, paragraphs 16 and 17); *Belov* (C-394/11, EU:C:2013:48, paragraphs 49 and 51); and *TDC* (C-222/13, EU:C:2014:2265, paragraph 37); and order in *MF 7* (C-49/13, EU:C:2013:767, paragraph 19).

31 – See Article 29 of Decree 221/2013. See also, in this connection, the judgment in *Westbahn Management* (C-136/11, EU:C:2012:740, paragraph 30), in which the Court regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU the Schienen-Control Kommission (Austrian Rail Supervisory Commission), which is governed by the ordinary law of administrative procedure and whose decision cannot be set aside by administrative decisions but may be the subject of proceedings before the Verwaltungsgerichtshof (Higher Administrative Court). The Court adopted a similar approach, inter alia, in

its judgment in *Österreichischer Rundfunk* (C-195/06, EU:C:2007:613, paragraphs 20 to 22). See, on this point, the Opinion of Advocate General Ruiz-Jarabo Colomer in *Österreichischer Rundfunk* (C-195/06, EU:C:2007:303, points 32 and 34).

---

32 – According to the Spanish Government, a draft law, which has already been made public, removes this option. If the draft law is approved, it will become necessary first to bring a special appeal before a review body, such as the Tribunal Català de Contractes del Sector Públic.

---

33 – According to the Spanish Government, this option is thus available only to the tenderer and never to the contracting authority, which cannot override the tenderer's decision. However, that factor is not conclusive, inasmuch as the fact that a defendant (the contracting authority) is obliged to accept the applicant's (the tenderer's) choice of forum is an inherent part of jurisdiction (see, to that effect, the Opinion of Advocate General Szpunar in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:246, point 39 and the case-law cited)). On the other hand, it appears to me that the contractor's entitlement *to choose between bringing a special appeal before the referring body and initiating an administrative-law action* means that the contractor itself will be bound by that decision as well as the authority, since the special appeal will become *compulsory for the parties*. It therefore seems to me that the special appeal is a procedure to which *lis pendens* may apply, even though that has not been expressly stated in the information furnished to the Court. The principle of *lis pendens* is a general procedural principle according to which proceedings are not admissible if the same matter is also *sub judice* elsewhere (judgments in *France* v *Parliament* (358/85 and 51/86, EU:C:1988:431, paragraph 12); *Italy* v *Commission* (C-138/03, C-324/03 and C-431/03, EU:C:2005:714, paragraph 64); and *Diputación Foral de Vizcaya and Others* v *Commission* (C-465/09 P to C-470/09 P, EU:C:2011:372, paragraph 58); and the Opinion of Advocate General Kokott in *Belov* (C-394/11, EU:C:2012:585, point 43)).

---

34 – *Boletín Oficial del Estado*, No 276 of 31 October 2007, p. 44436.

---

35 – Judgments in *Epitropos tou Elegktikou Synedriou* (C-363/11, EU:C:2012:825, paragraph 21), and *Belov* (C-394/11, EU:C:2013:48, paragraph 40 and the case-law cited).

---

36 – Judgment in *Belov* (C-394/11, EU:C:2013:48, paragraph 41 and the case-law cited).

---

37 – C-54/96, EU:C:1997:413.

---

38 – See, in this connection, the judgment in *Almelo* (C-393/92, EU:C:1994:171, paragraph 21) and the Opinion of Advocate General Lenz in *X* (228/87, EU:C:1988:276, point 6), in which the term used was 'binding jurisdiction', the Opinion of Advocate General Lenz in *Handels- og Kontorfunktionærernes Forbund i Danmark* (109/88, EU:C:1989:228, point 17), in which the term used was 'mandatory jurisdiction', and the Opinion of Advocate General Darmon in *Almelo* (C-393/92, EU:C:1994:42, points 30 and 32). In the judgment in *Vaassen-Göbbels* (61/65, EU:C:1966:39), the persons in question were 'bound to take any disputes ... to the [referring body] as the proper judicial body'. In Advocate General Gand's Opinion in *Vaassen-Göbbels* (61/65, EU:C:1966:25), the expression 'sole tribunal' was used. See also, in this connection, the Opinion of Advocate General Léger in *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1997:402, points 36, 37 and 40), and also footnote 40 to this Opinion.

---

39 – C-54/96, EU:C:1997:413.

---

40 – The Opinion of Advocate General Léger in *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1997:402, point 36) offers a similar interpretation of the criterion prior to the judgment in *Dorsch Consult* (C-54/96, EU:C:1997:413). According to that Opinion, among the criteria to be considered were the

existence of a ‘compulsory reference to the body in the event of a dispute’ and of ‘competence to resolve disputes by adopting a binding decision’. In its judgment in *Mannesmann Anlagenbau Austria and Others* (C-44/96, EU:C:1998:4), the Court did not address the question of admissibility, but, on examining the questions referred, implicitly regarded the referring body as a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU.

---

41 – Judgment in *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraphs 28 and 29). In its judgment in *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145, paragraphs 35 and 36), the Court again gave consideration to these two aspects of compulsory jurisdiction, both of which were present. Similarly, in its judgment in *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraph 20), the Court found to be ‘compulsory’ the jurisdiction of a body whose jurisdiction was laid down by statute and was not *optional* and whose decisions were enforceable. Once again, the two aspects were present. See also, in this connection, the judgment in *Almelo* (C-393/92, EU:C:1994:171, paragraph 21), and the Opinion of Advocate General Darmon in *Almelo* (C-393/92, EU:C:1994:42, points 30 and 32); the Opinion of Advocate General Kokott in *Belov* (C-394/11, EU:C:2012:585, point 47), and the Opinion of Advocate General Bot in *TDC* (C-222/13, EU:C:2014:1979, point 31).

---

42 – See the Opinion of Advocate General Ruiz-Jarabo Colomer in *Emanuel* (C-259/04, EU:C:2006:50, point 29); the Opinion of Advocate General Kokott in *Belov* (C-394/11, EU:C:2012:585, points 48 and 49); and the Opinion of Advocate General Szpunar in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:246, point 40). The Court regarded as a court or tribunal of a Member State, within the meaning of Article 267 TFEU, the bodies in question in its judgment in *Emanuel* (C-259/04, EU:C:2006:215), and *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754). In its judgment in *Belov* (C-394/11, EU:C:2013:48, paragraph 54), the question of the ‘compulsory jurisdiction’ of the referring body was not examined because its decision were not judicial in nature.

---

43 – C-259/04, EU:C:2006:215.

---

44 – In addition, the decisions of the appointed person were, in principle, final, subject exceptionally to an application for judicial review (judgment in *Emanuel*, C-259/04, EU:C:2006:215, paragraphs 21 to 25).

---

45 – C-377/13, EU:C:2014:1754.

---

46 – Judgment in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraph 29). See also the Opinion of Advocate General Szpunar in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:246, points 38 to 40). Also, in its judgment in *Broekmeulen* (246/80, EU:C:1981:218), the Court allowed a question referred for a preliminary ruling from a professional body even though the applicant had the alternative possibility of bringing the case before an ordinary court. However, it should be noted that that alternative had never been used in practice (see paragraphs 15 and 17 of that judgment). Moreover, in the case which gave rise to the judgment in *TDC* (C-222/13, EU:C:2014:2265), the economic operator was, in theory, free either to appeal to the Teleklagenævnet, a permanent public dispute resolution body, or to bring an action directly before the courts exercising general jurisdiction. According to Advocate General Bot, the existence of that choice did not preclude the Teleklagenævnet from being recognised as exercising compulsory jurisdiction (Opinion of Advocate General Bot in *TDC* (C-222/13, EU:C:2014:1979, points 33 and 38)). However, the Court did not examine whether the Teleklagenævnet’s jurisdiction was compulsory because it did not meet the criterion of independence (paragraph 38 of the judgment).

---

47 – Admittedly, in its recent order in *Emmeci* (C-427/13, EU:C:2014:2121, paragraphs 28 to 31), the Court took into account the optional nature of the remedy and held that the referring body could not be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. However, it must be

emphasised that, in that case, the decisions of the referring body were not binding and consequently its jurisdiction was in no way compulsory in the sense ascribed to that term in the judgment in *Dorsch Consult* (C-54/96, EU:C:1997:413). The same situation pertained in the case which gave rise to the order in *Cafom and Samsung* (C-161/03, EU:C:2003:413, paragraphs 14 and 15).

---

48 – See, in this connection, footnotes 41 and 47 of this Opinion. Nevertheless, at the hearing, the Commission asserted that interpreting this case-law *a contrario* could result in the conclusion that it is necessary for the legal remedy in question to be the only reasonable remedy. According to the Commission, account would nevertheless have to be taken of the particular legal context in which the referring body sought a ruling from the Court of Justice (judgment in *Belov* (C-394/11, EU:C:2013:48, paragraph 41)) in order to avoid such an interpretation. In any event, I do not think that an interpretation *a contrario* of this point is possible, since the Court has never stated that the list of criteria established in the case-law is exhaustive. It has, on the other hand, already held that the *inter partes* nature of the procedure is not an absolute requirement (see point 24 of this Opinion).

---

49 – However, in its judgment in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraph 27), the Court confirmed that this criterion was relied on in its case-law relating to arbitration tribunals appointed by contract.

---

50 – Judgments in *Nordsee* (102/81, EU:C:1982:107, paragraphs 10 to 12); *Denuit and Cordenier* (C-125/04, EU:C:2005:69, paragraphs 13 and 16 and the case-law cited); and *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraph 27). See also the order in *Merck Canada* (C-555/13, EU:C:2014:92, paragraph 17).

---

51 – Judgments in *Handels- og Kontorfunktionærernes Forbund i Danmark* (109/88, EU:C:1989:383, paragraphs 7 to 9) and *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraphs 28 and 29). See also the order in *Merck Canada* (C-555/13, EU:C:2014:92, paragraphs 18 and 19).

---

52 – See, to that effect, the judgment in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraph 29).

---

53 – See, to that effect, the Opinion of Advocate General Kokott in *Belov* (C-394/11, EU:C:2012:585, point 48). On the other hand, if an administrative-law action were brought only after a decision had been given by a special body, such as the Tribunal Català de Contractes del Sector Públic, the problem would not arise because, at that stage, the action before the ordinary administrative courts would unquestionably be compulsory. Nevertheless, it should be noted that, according to the Spanish Government, the decisions of review bodies such as the Tribunal Català de Contractes del Sector Públic are rarely appealed before the administrative courts and thus the decisions of such review bodies are often final.

---

54 – It should not be forgotten that, in civil matters, alternative jurisdictions may exist. See, for examples, Articles 7 and 8 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p.1), which list a number of alternative fora in civil matters.

---

55 – On the specialisation of courts, see the Opinion of Advocate General Szpunar in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:246, point 50).

---

56 – In accordance with Article 26 of Decree 221/2013, the Tribunal Català de Contractes del Sector Públic may find that a determination made by a contracting authority is unlawful and, where appropriate, annul it

and also order the contracting authority to pay compensation to the party concerned for damage suffered. It also has substantive jurisdiction to decide on the adoption of provisional measures before a special appeal in a public procurement matter is lodged and to resolve questions relating to invalidity that are based on specific cases in which contracts are null and void.

---

57 – I would reiterate that, according to the Spanish Government, such decisions are rarely appealed (see point 53 of this Opinion).

EU:C:2015:279

ORDER OF THE COURT (Grand Chamber)

24 April 2015 (*)

(Opening of the oral procedure — Holding of a hearing)

In Case C-203/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Català de Contractes del Sector Públic (Spain), made by decision of 25 March 2014, received at the Court on 23 April 2014, in the proceedings

Consorci Sanitari del Maresme

v

Corporació de Salut del Maresme i la Selva,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz, A. Ó Caoimh, J.-C. Bonichot, C. Vajda, S. Rodin, Presidents of Chambers, A. Arabadjiev, M. Berger (Rapporteur), E. Jarašiūnas, C.G. Fernlund, J.L. da Cruz Vilaça and F. Biltgen, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

after hearing the Advocate General,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 1(8) and 52 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made following a special application in procurement proceedings lodged by the Consorci Sanitari del Maresme (Maresme Health Consortium) seeking, firstly, annulment of the decision of the procurement board of the Corporació de Salut del Maresme i la Selva (Maresme i la Selva Health Corporation) by which it refused to admit the Consorci Sanitari del Maresme to the procurement procedure for the award of contracts concerning nuclear magnetic resonance services for healthcare centres managed by the Corporació de Salut del Maresme i la Selva and, secondly, the admission of that consortium to the procurement procedure.

3 By a decision of 13 January 2015, the Court referred the case to the Sixth Chamber and decided, by application of Article 76(2) of its Rules of Procedure, not to hold a hearing. Furthermore, it decided that the case would be determined without an Opinion of the Advocate General.

4 Since doubts arose as to the jurisdiction of the Court, on 9 February 2015, it sent a request for clarification to the Tribunal Català de Contractes del Sector Públic (Catalan Public Sector Contracts

Court). That court answered that request by letter of 12 February 2015, received at the Court on 17 February 2015.

5 Having regard to the clarifications provided by the Tribunal Català de Contractes del Sector Públic, the Court considers that it is necessary for it to hear detailed argument. It decided to reallocate this case to the Grand Chamber, which will rule after the Advocate General has presented his Opinion.

6 It is apparent from those clarifications that the special application in procurement proceedings, the subject-matter of the main proceedings, is optional in nature, that the decision by which a ruling is given on that application brings the administrative proceedings to an end and that, subsequently, that decision may be subject to appeal in ordinary contentious administrative proceedings (‘contencioso-administrativo’).

7 The question arises whether the Tribunal Català de Contractes del Sector Públic satisfies the criteria laid down by the case-law of the Court in order to be regarded as a court or tribunal for the purposes of Article 267 TFEU.

8 The Court considers, accordingly, that it is necessary to organise a hearing in order to permit the interested persons and bodies referred to in Article 23 of the Statute of the Court of Justice of the European Union to express their views, if any, on the question set out in paragraph 7 of this order.

On those grounds, the Court (Grand Chamber) hereby orders:

1. The oral procedure in Case C-203/14 shall be opened.

2. The date of the hearing shall be fixed by a separate document.

3. The interested persons and bodies referred to in Article 23 of the Statute of the Court of Justice of the European Union shall be invited to express their views, if any, on whether the Tribunal Català de Contractes del Sector Públic (Spain) satisfies the criteria laid down in the case-law of the Court in order to be regarded as a court or tribunal for the purposes of Article 267 TFEU.

4. The costs are reserved.

[Signatures]

---

* Language of the case: Spanish.

JUDGMENT OF THE COURT (Fourth Chamber)

29 October 2015 (*)

(Reference for a preliminary ruling — Value added tax — Directive 2006/112/EC — Article 13(1) — Treatment as a non-taxable person — Concept of 'body governed by public law' — Limited company which is responsible for the provision of services in respect of the planning and management of the health service of the Autonomous Region of the Azores — Determination of the detailed arrangements for those services, including their remuneration, in programme agreements concluded between that company and that region)

In Case C-174/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 12 March 2014, received at the Court on 9 April 2014, in the proceedings

Saudaçor — Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA

v

Fazenda Pública,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber, acting as President of the Fourth Chamber, J. Malenovský, M. Safjan, A. Prechal (Rapporteur) and K. Jürimäe, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 March 2015,

after considering the observations submitted on behalf of:

– Saudaçor — Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA, by G. Leite de Campos, M. Clemente and J. Batista Pereira, advogados,

– the Portuguese Government, by L. Inez Fernandes and R. Campos Laires, acting as Agents,

– the United Kingdom Government, by L. Christie, acting as Agent, and by P. Mantle, Barrister,

– the European Commission, by P. Guerra e Andrade and L. Lozano Palacios, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

(OJ 2004 L 134, p. 114), and of Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between Saudaçor — Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA ('Saudaçor') and the Fazenda Pública (Public Treasury) concerning that company's liability to value added tax (VAT) in respect of its activities concerning the planning and management of the health service of the Autonomous Region of the Azores ('the RAA').

Legal context

EU law

3 Directive 2006/112 repealed and replaced, with effect from 1 January 2007, the existing Community VAT legislation, in particular the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive').

4 According to the first and third recitals in the preamble to Directive 2006/112, the recasting of the Sixth Directive was necessary in order to present all the applicable provisions in a clear and rational manner and in an improved structure and drafting which would not, in principle, bring about material change.

5 Article 2(1)(c) of Directive 2006/112 states:

'The following transactions shall be subject to VAT:

...

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such.'

6 Under Article 9(1) of that directive:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

7 Article 13 of that directive provides:

'1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.

2. Member States may regard activities, exempt under Articles 132 ..., engaged in by bodies governed by public law as activities in which those bodies engage as public authorities.'

8 Pursuant to Article 1(9) of Directive 2004/18:

‘“Contracting authorities” means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A “body governed by public law” means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. ...’

Portuguese Law

Legislation in respect of VAT

9 Article 2(2) of the VAT Code (Código do IVA) provides that the State and other legal persons governed by public law are not taxable persons for VAT purposes where they engage in transactions in the exercise of their powers conferred by public law, even where they collect fees or other consideration in that connection, in so far as their treatment as non-taxable persons does not cause distortions of competition.

10 Article 2(3) of that code provides that the State and other legal persons governed by public law are in any event taxable persons for VAT purposes where they engage in certain activities and for the ensuing taxable transactions, unless it is shown that those activities are negligible.

The legal regime for Saudaçor

11 Saudaçor was created by Regional Legislative Decree No 41/2003/A of the RAA transforming the Institute of Financial Management of the Health Service of the Autonomous Region of the Azores into a limited company with exclusively public capital called SAUDAÇOR — Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA, and amending Regional Legislative Decree No 28/99/A of 31 July (Decreto Legislativo Regional n.° 41/2003/A, Transforma o Instituto de Gestão Financeira da Saúde da Região Autónoma dos Açores em sociedade anónima de capitais exclusivamente públicos, passando a designar-se SAUDAÇOR — Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores, SA, e altera o Decreto Legislativo Regional n.° 28/99/A, de 31 de Julho), of 17 October 2003 (*Diário da República* I, Series A No 257, 6 November 2003, p. 7430), that company being wholly owned by that region.

12 Under Article 2(1) of that regional legislative decree, Saudaçor has the task of providing services of general economic interest in the field of health. The object of that task is the planning and management of the regional health system and associated information systems, infrastructure and facilities and the completion of construction, conservation, rehabilitation and reconstruction work on health establishments and services, in particular in areas covered by natural disasters and in areas regarded as risk areas.

13 Under Article 3 of Regional Legislative Decree No 41/2003/A:

‘In the context of its task of providing services of general economic interest, Saudaçor shall have the following functions:

(a) providing centralised supplies to the regional health service;

(b) providing goods and services to member entities of the regional health service;

(c) granting financing to health establishments in accordance with the health-care objectives to which each establishment has contractually committed;

(d) defining rules and guidelines for budget management of health establishments and monitoring its implementation;

(e) evaluating the economic and financial management of institutions and services forming part of the regional health service or financed by it and drawing up periodic reports on its financial situation and on the management of its human and material resources;

(f) encouraging the development of information systems for institutions under the aegis of the regional health service;

(g) carrying out works on the regional health service which are desirable in the public interest;

(h) providing support to the services and establishments of the regional health service in areas where this proves necessary.'

14 Article 4(1) of that regional legislative decree provides that Saudaçor is governed by that instrument, by the articles of association annexed thereto, by the legal regime for public undertakings as provided for by Decree-Law No 558/99 (Decreto-Lei n.° 558/99) of 17 December 1999 (*Diário da República* I, Series A No 292, 17 December 1999, p. 9012), and by private law. Under Article 4(2) of the same regional legislative decree, in its activities Saudaçor must respect the rules governing the organisation and operation of the regional health service of the RAA.

15 Article 10 of Regional Legislative Decree No 41/2003/A provides that, in the performance of its functions, Saudaçor holds the same powers conferred by public law as the RAA and then lists, by way of example, some of those powers, including the power to carry out expropriations.

16 Under Article 7(3) of Decree-Law No 558/99, as amended, public undertakings are taxed, directly and indirectly, in accordance with the common regime. An identical provision is found in Article 9(2) of Regional Legislative Decree No 7/2008/A governing public sector undertakings of the Autonomous Region of the Azores (Decreto Legislativo Regional n.º 7/2008/A, Regime do sector público empresarial da Região Autónoma dos Açores) of 5 March 2008 (*Diário da República* I, Series A No 58, 24 March 2008, p. 1649), in respect of regional public undertakings.

17 Saudaçor performs its activities within the framework of programme agreements concluded, in accordance with Article 21(1) of its articles of association, with the Government of the RAA, which define, inter alia, the services which it must provide for the planning and management of the regional health service and the compensation, called the 'financial contribution', to be paid by that region in consideration for those services and designed to cover the operating costs of Saudaçor.

18 Thus, a first programme agreement was concluded on 23 July 2004, covering the period 2004–2008, which provided for total compensation of EUR 15 905 000, including a sum of EUR 3 990 000 for 2007 and a sum of EUR 4 050 000 for 2008. Clause 5 of that agreement provided that that total amount could be revised by a joint order issued by the members of the government responsible for finance and health if, on account of a change in circumstances, that amount was manifestly insufficient to allow performance of that agreement. A second programme agreement was concluded on 1 January 2009, covering the period 2009–2012, which provided for annual compensation of EUR 8 500 000 and a revision clause similar to that stipulated in the previous agreement. By joint order of 8 March 2010 issued by the members of the Government of the RAA responsible for finance and health, that amount was reduced to EUR 6 599 147 for 2009.

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 On 2 March 2011, the Public Treasury drew up a draft inspection report proposing corrections concerning the VAT payable by Saudaçor in respect of the financial years 2007 to 2010 totalling EUR 4 750 586.24.

20 On 6 April 2011, the inspection report was adopted, after Saudaçor had been heard.

21 In that report, the Public Treasury held, inter alia, that, in view of its legal regime, Saudaçor could not rely on the rule under which bodies governed by public law are not regarded as taxable persons for VAT purposes, laid down in Article 2(2) of the VAT Code, a provision which seeks to transpose the first subparagraph of Article 4(5) of the Sixth Directive, the content of which is the same as that of the first subparagraph of Article 13(1) of Directive 2006/112.

22 According to the Public Treasury, the services provided by Saudaçor in respect of the planning and management of the regional health service under the programme agreements concern areas of activity involving private initiative, which means that treatment as a non-taxable person for VAT purposes might lead to distortions of competition. That is the case, for example, with the management and maintenance of the computer system for the region's health sector. There is, in actual fact, in the Public Treasury's view, an activity of an economic nature, with the result that the contributions laid down in the programme agreements and paid by the regional authorities in consideration for those services are subject to VAT. Furthermore, Saudaçor had accepted that it was subject to VAT in so far as it claimed a total sum of EUR 2 300 273.17 as VAT deductions on its purchases of goods and services.

23 Saudaçor brought an action before the Tribunal Administrativo e Fiscal de Ponta Delgada (Ponta Delgada Administrative and Tax Court) against the notices requiring payment of VAT and compensatory interest concerning the financial years 2007 to 2010, which demanded that it pay a total of EUR 5 157 249.72.

24 By its judgment, that court dismissed that action on the ground, inter alia, that, for the purpose of interpreting the rule laid down in the first subparagraph of Article 13(1) of Directive 2006/112, under which bodies governed by public law are not regarded as taxable persons for VAT purposes, there is no need to refer to the concept of 'body governed by public law' defined, in the context of public procurement law, in Article 1(9) of Directive 2004/18 since the latter concept is understood in a broad sense, whereas the concept of 'body governed by public law' within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 must be interpreted strictly when applying the rule of treatment as a non-taxable person for VAT purposes because that rule constitutes an exception to the general rule of taxation of any economic activity.

25 According to that court, that rule of treatment as a non-taxable person for VAT purposes does not cover an entity like Saudaçor which, although created by the RAA, is a limited company which is distinct from the region and subject to the rules of private law and which pursues its functions and objectives independently.

26 The Tribunal Administrativo e Fiscal de Ponta Delgada (Ponta Delgada Administrative and Tax Court) also considered that the services provided by Saudaçor in connection with the programme agreements constitute an activity of an economic nature, since they are provided for consideration. According to that court, the contributions paid by the RAA represent consideration for the services provided by Saudaçor and cannot be regarded as constituting budgetary transfers between public entities.

27 Hearing an appeal against that judgment, the referring court considers that the central issue in the case in the main proceedings is whether an entity such as Saudaçor can rely on the rule laid down in Article 2(2) of the VAT Code, the content of which corresponds to that of Article 13(1) of Directive 2006/112, under which bodies governed by public law are not regarded as taxable persons for VAT purposes, and whether the amounts to which the notices of payment of VAT relate constitute budgetary transfers between public entities.

28 It considers that, whilst it is clearly established in the Court's case-law that only the activities of bodies governed by public law acting as public authorities are excluded from liability to VAT, it cannot be determined on the basis of that case-law whether an entity such as Saudaçor, having regard to its legal status as a limited company originating from the transformation of a State entity, comes within that

concept of body governed by public law. The question arises in particular whether the scope of that concept tallies with the scope of the concept of 'body governed by public law' in Article 1(9) of Directive 2004/18 in the context of the definitions of the various categories of 'contracting authorities'.

29 In those circumstances the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the concept of body governed by public law within the meaning of the first paragraph of Article 13(1) of Directive 2006/112 be interpreted ... by reference to the concept of "body governed by public law" [as defined in] Article 1(9) of Directive 2004/18?

(2) Is an entity established as a limited company, with exclusively public capital and 100% owned by the RAA, and whose object is the exercise of consultancy and management activities in matters relating to the regional health service, with the purpose of developing and reorganising it through the performance of programme agreements concluded with that region, which holds by delegation the public-authority powers conferred in those matters on the region which was originally responsible for providing the public health service, covered by the concept of a "body governed by public law" acting as a public authority for the purpose of the first subparagraph of Article 13(1) of Directive 2006/112?

(3) In the light of the provisions of that directive, may the consideration received by that company, which consists in the making available of the financial resources necessary for the performance of those programme agreements, be regarded as payment for the services provided, for the purposes of liability to VAT?

(4) If so, does that company satisfy the requirements necessary in order to be entitled to rely upon the rule governing not being regarded as a taxable person laid down in Article 13(1) of Directive 2006/112?'

Consideration of the questions referred

The third question

30 By its third question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 9(1) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company provides a region with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, constitutes an economic activity within the meaning of that provision.

31 The Court has already ruled that it is clear from the scheme and purpose of that directive, as well as from the place of Article 13 of that directive in the common system of VAT established by the Sixth Directive, that any activity of an economic nature is, in principle, to be taxable. As a general rule and in accordance with Article 2(1) of Directive 2006/112, the supply of services for consideration, including those provided by bodies governed by public law, is to be subject to VAT. Articles 9 and 13 of that directive thus give a very wide scope to VAT (judgment in *Commission* v *Netherlands*, C-79/09, EU:C:2010:171, paragraph 76 and the case-law cited).

32 The possibility of classifying a supply of services as a transaction for consideration requires only that there be a direct link between that supply and the consideration actually received by the taxable person. Such a direct link is established if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for the service supplied to the recipient (see, inter alia, judgment in *Serebryannay vek*, C-283/12, EU:C:2013:599, paragraph 37 and the case-law cited).

33 In view of the nature of the analysis to be carried out and as the Court has already held, it is for the national court to classify the activities at issue in the main proceedings in the light of the criteria adopted by the Court (judgment in *Fazenda Pública*, C-446/98, EU:C:2000:691, paragraph 23, and order in *Gmina Wrocław*, C-72/13, EU:C:2014:197, paragraph 18).

34 In the present case, it is for the referring court to establish whether it is apparent from the documents in the court file and in particular from the programme agreements concluded between Saudaçor and the RAA that the activities of that company are effected for consideration and, therefore, are of an economic nature. None the less, the Court may provide the referring court, in the light of the information in the order for reference, with the points of interpretation which are likely to enable the referring court to give its ruling.

35 In that regard, it is apparent from the order for reference that, in the actual wording of those agreements, the RAA is required to pay to Saudaçor, 'as consideration' for the services in respect of the planning and management of the regional health service to be provided by it, compensation, called the 'financial contribution', the amount of which is stated in those agreements.

36 In the light of the permanent and continuous nature of the planning and management services provided by Saudaçor, the fact that that compensation is determined not on the basis of individualised services but on a flat-rate and annual basis to cover the operating costs of that company is not in itself such as to affect the direct link between the supply of services made and the consideration received, the amount of which is determined in advance on the basis of well-established criteria (see, to that effect, judgment in *Le Rayon d'Or*, C-151/13, EU:C:2014:185, paragraphs 36 and 37).

37 The existence of that direct link also does not appear to be called into question by the fact that the programme agreements concluded between Saudaçor and the RAA contain clauses which stipulate that the amount of compensation payable to Saudaçor may be adjusted where, because of a change of circumstances, that amount is manifestly insufficient to allow for the performance of those agreements.

38 In so far as those clauses seek to determine in advance the level of that compensation on the basis of well-established criteria which ensure that that level is sufficient to cover the operating costs of Saudaçor, it may be held that those clauses are designed to adapt the amount of the flat-rate consideration for the services provided on a continuous and permanent basis by that company. In addition, whilst, as is apparent from the order for reference, for 2009, the annual compensation initially provided for was reduced by the RAA, the Portuguese Government explained at the hearing, without being contradicted by Saudaçor, that the sole purpose of that reduction was to correct a manifest calculation error.

39 The direct link between the supply of services and the consideration received also does not appear to be called into question by the fact that, as Saudaçor maintains, its activity is intended to fulfil a constitutional obligation exclusively and directly incumbent upon the State under the Portuguese constitution, namely the obligation to implement a national health service which is universal and potentially free, to be financed, in essence, by public resources.

40 Under Article 9(1) of Directive 2006/112, a taxable person means any person who, independently, carries out any economic activity, whatever the purpose or results of that activity.

41 Moreover, whilst the objective of the implementation of a national health service which is universal and potentially free, which has to be financed, in essence, by public resources, is taken into account in the common system of VAT, in so far as, under Article 132(1) of that directive, certain provisions of medical care undertaken, in particular, by bodies governed by public law must be exempted from VAT, it is common ground that the activity of planning and managing the regional health service at issue in the main proceedings does not fall within one of those exemptions.

42 Having regard to the foregoing considerations, the answer to the third question is that Article 9(1) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company provides a region with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, constitutes an economic activity within the meaning of that provision.

The first, second and fourth questions

43 By its first, second and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 13(1) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company provides a region with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, falls under the rule of treatment as a non-taxable person for VAT purposes, laid down by that provision, in a situation where that activity constitutes an economic activity within the meaning of Article 9(1) of that directive.

44 In that context, the referring court asks whether, as maintained by Saudaçor, the concept of 'other bodies governed by public law' within the meaning of Article 13(1) of that directive must be interpreted by reference to the definition of the concept of 'body governed by public law' in Article 1(9) of Directive 2004/18.

45 Such an interpretation of Article 13(1) of Directive 2006/112 cannot be accepted.

46 By defining in broad terms the concept of 'body governed by public law' and, as a result, the concept of 'contracting authorities', Article 1(9) of Directive 2004/18 seeks to define the scope of that directive in a sufficiently extensive manner so as to ensure that the rules on, in particular, transparency and non-discrimination which are required in connection with the award of public contracts apply to all State entities which do not form part of the public administration but which are nevertheless controlled by the State, in particular by means of their financing or their management.

47 However, the context of the concept of 'other bodies governed by public law' referred to in Article 13(1) of Directive 2006/112 is fundamentally different.

48 That concept is not intended to define the scope of VAT but, on the contrary, makes an exception to the general rule on which the common system of that tax is based, namely the rule that the scope of that tax is defined very broadly as covering all supplies of services for consideration, including those provided by bodies governed by public law (see, to that effect, judgment in *Commission* v *Netherlands*, C-79/09, EU:C:2010:171, paragraphs 76 and 77).

49 As an exception to the general rule that any activity of an economic nature be subjected to VAT, Article 13(1) of Directive 2006/112 is to be interpreted strictly (see, inter alia, judgment in *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraph 60, and order in *Gmina Wrocław*, C-72/13, EU:C:2014:197, paragraph 19).

50 It follows that, in the absence of any guidance in the wording of Article 13(1) of Directive 2006/112, it is necessary to take into account the scheme and purpose of that directive, as well as the place of that provision in the common system of VAT established by it (see, by analogy, judgment in *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraph 25).

51 As the Court has consistently held, it is clear from Article 13(1) of Directive 2006/112, when examined in the light of the aims of the directive, that two conditions must both be fulfilled for the rule of treatment as a non-taxable person to apply: the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority (see to that effect, inter alia, order in *Mihal*, C-456/07, EU:C:2008:293, paragraph 16 and the case-law cited, and judgment in *Commission* v *Netherlands*, C-79/09, EU:C:2010:171, paragraph 79).

52 In addition, the Court has also consistently held that it follows both from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the objective pursued by the legislation in question (see, inter alia, judgment in *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 42).

53 It must be noted that Article 13(1) of Directive 2006/112 makes no express reference to the law of the Member States.

54 It follows that the concepts referred to in that provision, including that of ‘other bodies governed by public law’, must be given an autonomous and uniform interpretation throughout the European Union.

55 Moreover, since, as has been noted in paragraph 49 of the present judgment, Article 13(1) of Directive 2006/112 must, as an exception, be interpreted strictly, it must be held that the list in that provision is exhaustive, the concept of ‘other bodies governed by public law’ constituting a residual category of bodies falling within the public authority other than those specifically mentioned in that provision.

56 As regards, specifically, the first of the two conditions laid down in Article 13(1) of that directive, namely the condition that the body be governed by public law, the Court has already held that a person which, not being part of the public administration, independently performs acts falling within the powers of the public authority cannot be classified as a body governed by public law within the meaning of that provision (see to that effect, inter alia, order in *Mihal*, C-456/07, EU:C:2008:293, paragraph 18 and the case-law cited).

57 The Court has also made it clear that the status as a ‘body governed by public law’ cannot stem from the mere fact that the activity at issue consists in the performance of acts falling within powers conferred by public law (see to that effect, inter alia, order in *Mihal*, C-456/07, EU:C:2008:293, paragraph 17 and the case-law cited).

58 Nevertheless, whilst the fact that the body in question has, under the applicable national law, powers conferred by public law is not decisive for the purposes of that classification, it does constitute, in so far as it is an essential characteristic specific to any public authority, a factor of definite importance in determining that the body must be classified as a body governed by public law.

59 Article 10 of Regional Legislative Decree No 41/2003/A provides that, in the performance of its functions, Saudaçor holds the same powers conferred by public law as the RAA and then lists, by way of example, some of those powers, including the power to carry out expropriations.

60 In addition, in the light of the Court’s case-law cited in paragraph 56 of the present judgment and having regard to the applicable national law, it does not seem, subject to verification by the referring court, that it can be ruled out that Saudaçor is to be considered to be part of the public administration of the RAA.

61 In that regard, as is apparent from the documents submitted to the Court, in so far as it was established by the State as a limited company following a process of transformation by decentralising the functions of an existing State body, Saudaçor resembles in some respects a legal person governed by private law and enjoys a degree of autonomy vis-à-vis the State in its operation and day-to-day management.

62 However, and still subject to verification by the referring court, some of the characteristics of Saudaçor seem to support its classification as a body governed by public law within the meaning of Article 13(1) of Directive 2006/112.

63 Genuine autonomy on the part of Saudaçor seems limited because of the fact that its capital, which is not open to equity investments by individuals, is 100% owned by the RAA, which, with the exception of services provided to third parties in connection with so-called ‘ancillary’ activities, which, it is undisputed, are of marginal importance, is in addition its only ‘client’. Those considerations are capable of showing that the RAA is in a position to exercise decisive influence over the activities of Saudaçor.

64 This is also confirmed by the fact that, in accordance with Clause 3(a) of the first of the programme agreements concluded between Saudaçor and the RAA and Clause 3(1)(a) of the second of those agreements, Saudaçor is to accomplish its task in accordance with the guidelines set by the RAA and that, pursuant to Clause 3(h) of the first of those agreements and Clause 3(1)(g) of the second of those agreements, Saudaçor is subject to supervision by the RAA.

65 Moreover, Article 4(1) of Regional Legislative Decree No 41/2003/A provides that Saudaçor is governed by that instrument, by the articles of association annexed thereto, by the legal regime for public undertakings as provided for by Decree-Law No 558/99 and by private law. It is apparent that, within that framework, private law is secondary in relation to the rules establishing the legal regime for Saudaçor as a public undertaking.

66 Furthermore, whilst the detailed arrangements for the supply of services in respect of the planning and management of the regional health service must be covered by programme agreements, in particular regarding the compensation payable in respect of those services, which might suggest that Saudaçor operates on the market in question in competition with other private operators, the fact remains that, in the RAA, those services are performed exclusively by Saudaçor in accordance with its task provided for in Article 2(1) of Legislative Decree No 41/2003/A and that they are not awarded to private operators by means of, for example, a tender procedure.

67 In addition, an organisational link seems to exist between Saudaçor and the RAA, if only due to the fact that that company was established by a legislative act adopted by the legislature of the RAA for the purpose of providing that region with ‘services of general economic interest in the field of health’, as is apparent from Article 2(1) of Regional Legislative Decree No 41/2003/A.

68 Subject to the verification of that information by the referring court, it cannot therefore be ruled out that, in the light of an overall assessment taking account of the provisions of national law applicable to Saudaçor, that court will conclude that Saudaçor may be classified as a body governed by public law within the meaning of Article 13(1) of Directive 2006/112.

69 However, as has been noted in paragraph 51 of the present judgment, if the rule of treatment as a non-taxable person for VAT purposes laid down in that provision is to apply, a second condition laid down in that provision must also be satisfied, namely the condition that only activities carried out by a body governed by public law acting as a public authority are to be exempted from VAT.

70 The Court has consistently held that such activities are activities carried out by those bodies under the special legal regime applicable to them and do not include activities pursued by them under the same legal conditions as those that apply to private economic operators.
The Court has also made it clear that the subject-matter or purpose of the activity is in that regard irrelevant and that the fact that the pursuit of the activity at issue in the main proceedings involves the use of powers conferred by public law shows that that activity is subject to a public law regime (see to that effect, inter alia, judgment in *Fazenda Pública*, C-446/98, EU:C:2000:691, paragraphs 17, 19 and 22).

71 In that context, the Court has stated that the exemption provided for in the first subparagraph of Article 13(1) of Directive 2006/112 covers principally activities engaged in by bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of powers conferred by public law (judgment in *Isle of Wight Council and Others*, C-288/07, EU:C:2008:505, paragraph 31).

72 However, that second condition laid down in the first subparagraph of Article 13(1) of that directive would not be satisfied if, as the Portuguese Government submitted and subject to verification by the referring court, the powers conferred by public law available to Saudaçor under Article 10 of Regional Legislative Decree No 41/2003/A did not amount to an instrument that could be used by Saudaçor in order to carry out the activities at issue in the main proceedings, namely the activities concerning the planning and management of the regional health service, the liability of which to VAT is disputed, since they are used for carrying out other activities.

73 Moreover, even if it were to be concluded that Saudaçor is a body governed by public law and it were held that it exercises the economic activity at issue in the main proceedings as a public authority, it follows from the second subparagraph of Article 13(1) of Directive 2006/112 that an entity such as Saudaçor would not, however, be exempted from VAT if it were to be found that its treatment as a non-taxable person would lead to significant distortions of competition.

74 In that regard, the Court has stated that the significant distortions of competition to which treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular, and by reference not only to actual competition, but also to potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical (judgment in *Commission* v *Netherlands*, C-79/09, EU:C:2010:171, paragraph 91).

75 In the light of all of the foregoing considerations, the answer to the first, second and fourth questions is that Article 13(1) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company provides a region with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, falls under the rule of treatment as a non-taxable person for VAT purposes, laid down by that provision, in a situation where that activity constitutes an economic activity within the meaning of Article 9(1) of that directive, if, which it is for the referring court to ascertain, it can be considered that that company must be classified as a body governed by public law and that it carries out that activity as a public authority, in so far as the referring court finds that the exemption of that activity is not such as to lead to significant distortions of competition.

In that context, the concept of ‘other bodies governed by public law’ within the meaning of Article 13(1) of that directive must not be interpreted by reference to the definition of ‘body governed by public law’ in Article 1(9) of Directive 2004/18.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company provides a region with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, constitutes an economic activity within the meaning of that provision.**

2. **Article 13(1) of Directive 2006/112 must be interpreted as meaning that an activity such as that at issue in the main proceedings, whereby a company provides a region with services in respect of the planning and management of the regional health service under the programme agreements concluded between that company and that region, falls under the rule of treatment as a non-taxable person for value added tax purposes, laid down by that provision, in a situation where that activity constitutes an economic activity within the meaning of Article 9(1) of that directive, if, which it is for the referring court to ascertain, it can be considered that that company must be classified as a body governed by public law and that it carries out that activity as a public authority, in so far as the referring court finds that the exemption of that activity is not such as to lead to significant distortions of competition.**

In that context, the concept of ‘other bodies governed by public law’ within the meaning of Article 13(1) of that directive must not be interpreted by reference to the definition of ‘body governed by public law’ in Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

[Signatures]

* Language of the case: Portuguese.

EU:C:2015:430

OPINION OF ADVOCATE GENERAL
Jääskinen
delivered on 25 June 2015 (1)

Case C-174/14

Saudaçor — Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores SA
v
Fazenda Pública

(Request for a preliminary ruling
from the Supremo Tribunal Administrativo (Portugal))

(Reference for a preliminary ruling — VAT — Directive 2006/112/EC — Article 13(1) — Treatment as a non-taxable person — Concept of 'other bodies governed by public law'– Autonomous Region of the Azores — Entity created by the region in the form of a wholly-owned limited company which is responsible for providing the region with services of general economic interest relating to the management of the region's health service — Determination of the detailed arrangements for those services, including their remuneration, in programme agreements concluded between the entity and the region)

I – Introduction

1. The present case concerns the interpretation of Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (2) and, more specifically, the interpretation of the concept of 'other bodies governed by public law'. That article provides that certain transactions engaged in by bodies governed by public law are exempt from VAT.

2. The applicant in the main proceedings, Saudaçor — Sociedade Gestora de Recursos e Equipamentos de Saúde dos Açores SA ('Saudaçor'), is a limited company with exclusively public capital, being 100% owned by the Autonomous Region of the Azores (RAA). Its specific regime, which has both public and private characteristics, has led the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) to have doubts as to its classification as a body governed by public law within the meaning of Article 13(1) of Directive 2006/112.

3. The Court's case-law concerning that provision (previously Article 4(5) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (3)) is plentiful, but it mainly relates to the second cumulative criterion set out by that article, in particular the condition concerning activities and transactions engaged in by bodies governed by public law 'as public authorities'. By contrast, the concept of 'other bodies governed by public law' as such has been examined less often.

II – Legislative framework

A – *Union law*

1. Directive 2004/18

4. Under Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (4)

‘“Contracting authorities” means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A “body governed by public law” means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. ...’

2. Directive 2006/112

5. Directive 2006/112 repealed and replaced, with effect from 1 January 2007, the existing Community VAT legislation, in particular the Sixth Directive. (5)

6. Article 2(1)(c) of Directive 2006/112 provides:

‘The following transactions shall be subject to VAT:

...

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such’.

7. Under Article 9(1) of that directive:

‘“Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

8. Article 13(1) of that directive provides:

‘States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to

significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.'

B – *Portuguese law*

1. VAT legislation

9. Article 2(2) of the VAT Code provides that the State and other legal persons governed by public law are not taxable persons for VAT purposes where they engage in transactions in the exercise of their public-authority powers, even where they collect fees or other consideration in that connection, in so far as their treatment as non-taxable persons does not cause distortions of competition.

10. Article 2(3) of the VAT Code provides that the State and other legal persons governed by public law are in any event taxable persons for VAT purposes where they engage in certain activities and for the ensuing taxable transactions, unless it is shown that those activities are negligible.

2. The legal regime for Saudaçor

11. Saudaçor was created by Regional Legislative Decree No 41/2003/A of the RAA of 17 October 2003 (6) as a limited company with exclusively public capital, being wholly owned by the RAA. Saudaçor was created to transform the Instituto de Gestão Financeira da Saúde da Região Autonoma dos Açores (Institute of Financial Management of the Health Service of the RAA) into a limited company.

12. Under Article 2(1) of Legislative Decree No 41/2003/A, Saudaçor has the task of providing services of general economic interest in the field of health. The object of that task is the planning and management of the regional health system and associated information systems, infrastructure and facilities and the completion of construction, conservation, rehabilitation and reconstruction work on health establishments and services, in particular in regions affected by natural disasters and in areas regarded as risk areas.

13. Under Article 3 of Regional Legislative Decree No 41/2003/A:

'In the context of its task of providing services of general economic interest, Saudaçor shall have the following functions:

(a) providing centralised supplies to the regional health sector;

(b) providing goods and services to member entities of the regional health system [SRS];

(c) granting financing to health establishments in accordance with the health-care objectives to which each establishment has committed under the agreements signed by them;

(d) defining rules and guidelines for budget management of health establishments and monitoring its implementation;

(e) evaluating the economic and financial management of institutions and services forming part of the SRS or financed by it and drawing up periodic reports on its financial situation and on the management of its human and material resources;

(f) encouraging the development of information systems for institutions under the aegis of the SRS;

(g) carrying out works on the SRS which are desirable in the public interest;

(h) providing support to SRS services and establishments in areas where this proves necessary.'

14. Article 4(1) of Regional Legislative Decree No 41/2003/A provides that Saudaçor is governed 'by the provisions of the present instrument, by the articles of association annexed hereto, by the legal regime for the State-owned undertakings sector as enshrined in Decree-Law No 558/99 of 17 December 1999, (7) and by private law'. Under paragraph 2 of that article, in its activities Saudaçor must respect the rules governing the organisation and operation of the regional health service of the RAA.

15. Article 10 of Regional Legislative Decree No 41/2003/A provides that in the performance of its functions Saudaçor holds the same public-authority powers as the RAA and then specifies, by way of example, some of those powers, including expropriation.

16. Under Article 4(1) of Regional Legislative Decree No 41/2003/A, which concerns the creation of Saudaçor, that entity is governed by the legal regime for State-owned undertakings as provided for by Decree-Law No 558/99. Under Article 3 of Decree-Law No 558/99, (8) public undertakings are companies incorporated in accordance with the Commercial Code in which the State or other State-owned public entities individually or jointly exert a controlling influence, directly or indirectly, and entities in the form of undertakings provided for in Chapter III of the regime, known as public business entities.

17. Under Article 7 of Decree-Law No 558/99, without prejudice to the provisions of the legislation applicable to regional, (9) intercommunal and municipal public undertakings, public undertakings are governed by private law, except as provided in the present Decree-Law and in the legislation adopting the articles of association of those undertakings. Public undertakings are taxed, directly and indirectly, in accordance with the common regime. (10)

18. Saudaçor performs its activities within the framework of programme agreements concluded with the RAA, in accordance with Article 20(1) of its articles of association, which define, inter alia, the services to be provided by Saudaçor for the planning and management of the regional health service and the compensation, called the 'financial contribution', to be paid by that region 'in consideration for the services covered by the agreement' and 'considered sufficient to cover the operating costs of Saudaçor'.

19. Thus, a first programme agreement was concluded on 23 July 2004, covering the period 2004–2008, which provided for total compensation of EUR 15 905 000, with a sum of EUR 3 990 000 for 2007 and a sum of EUR 4 050 000 for 2008. A second programme agreement was concluded with effect from 1 January 2009, (11) covering the period 2009–2012, which provided for annual compensation of EUR 8 500 000, reduced by Joint Order of 8 March 2010 (12) to EUR 6 599 147 for 2009. Under Clause 5 of these two programme agreements, those amounts may be revised where, on account of a change of circumstances, that amount is manifestly insufficient to allow performance of the programme agreement.

20. The programme agreements set out Saudaçor's contractual obligations in Clause 3 and the services of general interest provided by Saudaçor in Annex III. Those services of general interest include three kinds of services, namely support for the Regional Health Service Plan, assistance and funding for the regional health service and implementation, management and maintenance of the information and computer system supporting the health sector of the RAA.

III – The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

21. On 2 March 2011, the Portuguese tax authority drew up a draft inspection report proposing corrections concerning the VAT payable by Saudaçor in respect of its activities for the period from 2007 to 2010 in a total amount of EUR 4 750 586.24.

22. On 6 April 2011, that inspection report was adopted, after Saudaçor had been heard.

23. According to the report, cited in the decision referring the case, in the tax years examined, Saudaçor recorded the consideration received from the RAA as grants exempt from VAT. However, during the proceedings, Saudaçor abandoned the 'grant' classification and wished to be designated as a

‘legal person governed by public law’ within the meaning of Article 2(2) of the VAT Code, a provision which seeks to transpose the first subparagraph of Article 4(5) of the Sixth Directive, the content of which is the same as that of the first subparagraph of Article 13(1) of Directive 2006/112.

24. In that inspection report, the tax authority stated, among other things, that in view of its legal regime Saudaçor came under the normal VAT regime and could not rely on the rule laid down in Article 2(2) of the VAT Code under which bodies governed by public law are not regarded as taxable persons. Furthermore, Saudaçor had accepted that it was subject to VAT because it claimed a total sum of EUR 2 300 273.17 as VAT deductions on purchases of goods and services without, however, paying VAT on the amounts received from the RAA.

25. The tax authority referred to Binding Opinion No 1271 of 21 March 2006, (13) according to which Article 2(2) of the VAT Code limits exclusion from VAT, subject to the conditions laid down therein, to the State and to legal persons governed by public law. Other entities may not benefit from exclusion even if they are public undertakings for the purposes of the legal regime for the State-owned undertakings sector, as is the case here with a limited company with exclusively public capital, and even though it has been entrusted with certain operations falling within the exercise of delegated public-authority powers which do not create a distortion of competition.

26. In addition, according to the tax authority, the services provided by Saudaçor in respect of planning and management of the regional health service under the programme agreements concern areas of activity involving private initiative, which also means that treatment as a non-taxable person might lead to distortions of competition. That would be the case, for example, with the implementation, management and maintenance of the computer system for a region’s health sector.

27. Saudaçor was then served recovery notices. On 27 July 2011, it was called to appear in the tax execution procedure for the recovery of VAT and compensatory interest.

28. Saudaçor brought an action at the Tribunal Administrativo e Fiscal de Ponta Delgada (Administrative and Tax Court, Ponta Delgada) against the recovery notices for VAT and compensatory interest concerning the tax years 2007 to 2010, which claimed that it should pay a total amount of EUR 5 157 249.72.

29. That court dismissed the action at first instance on the ground, inter alia, that the rule laid down in the first subparagraph of Article 13(1) of Directive 2006/112, under which bodies governed by public law are not regarded as taxable persons, does not cover an entity like Saudaçor which, although created by the RAA, is a limited company which is distinct from the region and subject to the rules of private law and which pursues its functions and objectives independently.

30. Hearing an appeal against that judgment, the referring court considers that the central issue in the present case is whether an entity like Saudaçor can rely on the rule laid down in Article 2(2) of the VAT Code, the content of which corresponds to Article 13(1) of Directive 2006/112, under which bodies governed by public law are not regarded as taxable persons, and whether the amounts to which the contested VAT recovery notices relate constitute budget transfers between public entities.

31. It considers that whilst it is clearly established in the Court’s case-law that only the activities of bodies governed by public law acting as public authorities are excluded from liability to VAT, it cannot be determined on the basis of that case-law whether an entity like Saudaçor, having regard to its legal status as a limited company originating from the transformation of a State entity, comes within that concept of body governed by public law and whether, in that context, the scope of that concept tallies with the scope of the concept of body governed by public law as defined in Article 1(9) of Directive 2004/18, as is claimed by Saudaçor.

32. Since it has doubts as to the interpretation of Article 13(1) of Directive 2006/112, by decision of 12 March 2014, the Supremo Tribunal Administrativo decided to stay the main proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must the concept of “body governed by public law” within the meaning of the first paragraph of Article 13(1) of [Directive 2006/112] be interpreted by reference to the concept of “body

governed by public law” in Article 1(9) of [Directive 2004/18]?

(2) Is an entity established as a limited company, with exclusively public capital and 100% owned by the Autonomous Region of the Azores, and whose object is the exercise of consultancy and management activities in matters relating to the regional health service, with the purpose of developing and reorganising it through the performance of programme agreements concluded with the Autonomous Region of the Azores, which holds by delegation the public-authority powers conferred in those matters on the Autonomous Region which was originally responsible for providing the public health service, covered by the concept of a “body governed by public law” acting as a public authority for the purpose of the first subparagraph of Article 13(1) of [Directive 2006/112]?

(3) In the light of the provisions of that directive, may the consideration received by that company, which consists in the making available of the financial resources necessary for the performance of those programme agreements, be regarded as payment for the services provided, for the purposes of liability to VAT?

(4) If so, does that company satisfy the requirements necessary in order to be entitled to rely upon the rule governing not being regarded as a taxable person laid down in Article 13(1) of [Directive 2006/112]?’

33. Written observations were submitted by Saudaçor, the Portuguese and United Kingdom Governments and the European Commission, which were all represented at the hearing held on 19 March 2015.

IV – Analysis

A – *Preliminary remarks*

34. Before beginning to examine the questions referred, I will consider the order in which they should be dealt with. Saudaçor has suggested first examining the third question, which asks whether the consideration paid by the RAA is payment for the services provided. According to Saudaçor, this is a question concerning the nature of its activities, which are not ‘economic’ within the meaning of Article 9(1) of Directive 2006/112.

35. Articles 9 and 13 of Directive 2006/112 are part of Title III of that directive, entitled ‘Taxable persons’. Title III contains rules concerning treatment as a taxable person in general and specific cases, such as the VAT grouping and rules concerning the public authorities.

36. I note in this regard that Article 9 of Directive 2006/112 lays down the general rule, while Article 13 is an exemption. (14) According to the Court’s case-law, the application of Article 13(1) of Directive 2006/112 implies a prior finding that the activity considered is of an economic nature. (15)

37. The notion of economic activity in Article 9(1) of Directive 2006/112 is linked to Article 2 of that directive as, for an activity to be classified as economic, it must be effected for consideration. Where a person’s activity consists exclusively in providing services for no direct consideration, there is no basis of assessment and the services are therefore not subject to VAT. The economic activities of taxable persons are necessarily activities which are carried on with the object of obtaining payment of consideration or which are likely to be rewarded by the payment of consideration. (16)

38. Consequently, in my view, the Court has to resolve just two legal questions in order to be able to give helpful answers to the national court.

39. The outcome of the dispute in the main proceedings hinges, first, on the question whether an entity like Saudaçor should be regarded as a taxable person, and the answer to that question hinges in turn on whether or not its activities are economic within the meaning of Article 9(1) of Directive 2006/112. In order to answer that question, it must be examined whether the remuneration paid by the RAA constitutes the consideration received for the services provided by Saudaçor.

40. Second, if Saudaçor must be regarded as a taxable person, it must be examined whether it was nevertheless exempt from VAT pursuant to Article 13(1) of Directive 2006/112 as a body governed by public law engaging in the transactions in question as a public authority.

41. That is the order in which I therefore propose that the questions asked by the Supremo Tribunal Administrativo be dealt with.

42. Furthermore, I note that the Portuguese Government supported its claim that Article 13(1) of Directive 2006/112 is not relevant to the main proceedings by arguing that because Saudaçor performed transactions which, by its own admission, allowed it to deduct VAT in respect of its acquisitions, it can no longer rely on the right not to make those same transactions subject to VAT. In this regard, the Portuguese Government made reference to *Cantor Fitzgerald International* (17) and *MDDP*. (18) However, it seems to me that the information contained in those judgments cannot be applied directly to the present case and is not even relevant to the outcome of the dispute in the main proceedings.

43. In my view, the notion of economic activities within the meaning of Article 9(1) of Directive 2006/112 and the concept of other bodies governed by public law within the meaning of Article 13(1) of that directive are concepts based on objective elements. The conduct of a person, whether a taxable person or not, cannot alter the meaning and scope of those articles. (19)

B – *The economic nature of Saudaçor's activities and its treatment as a taxable person for the purposes of VAT*

44. The referring court's doubts over the nature of the services provided by Saudaçor, as expressed in its third question, stem from Saudaçor's claim that the remuneration paid to it by the RAA corresponds to a budget appropriation of revenue between two legal persons governed by public law which is intended to permit Saudaçor to provide non-market services relating to the implementation and management of the regional health service.

45. On the other hand, according to the other parties which submitted observations, the amounts paid by the RAA to Saudaçor have a direct link with the services that Saudaçor is required to provide to the RAA.

46. It should be recalled that Saudaçor has the task of providing services of general economic interest in the field of health, the object of which is the planning and management of the regional health system and associated information systems, infrastructure and facilities and the completion of construction, conservation, rehabilitation and reconstruction work on health establishments and services. (20)

47. The Portuguese Government has pointed out that the case in the main proceedings concerns only the payments referred to in Clauses 2(a) and 5(1) and Annex I of the programme agreements for the 2004–2008 and 2009–2012 periods in relation to the services which Saudaçor undertook to provide to the RAA, because the VAT recovery notices contested in the main proceedings relate only to those payments. (21) In addition, according to the Portuguese Government, the services in question are only technical and administrative support services, often known as 'back office' services.

48. With regard to the reduction of the financial contribution for 2009 by order of 8 March 2010, the Portuguese Government explained that this was a correction of a material error vitiating the programme agreement for 2009–2012 (22) and not the unilateral fixing by the RAA of the remuneration to be paid to Saudaçor, which has its own autonomous board of directors and full powers of negotiation and contractual powers.

49. It should be noted, first of all, that under the second subparagraph of Article 9(1) of Directive 2006/112, any activity of producers, traders or persons supplying services is to be regarded as 'economic activity' and, in particular, the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis. According to case-law, an analysis of those definitions shows that the scope of the term 'economic activities' is very wide and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results. An activity is thus, as a general rule, categorised as economic where it is permanent

and is carried out in return for remuneration which is received by the person carrying out the activity. (23)

50. According to settled case-law, the possibility of classifying a transaction as a transaction for consideration requires only that there be a *direct link* between the supply of goods or the provision of services and the consideration actually received by the taxable person. Consequently, a supply of services is effected for consideration, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for the service supplied to the recipient. (24)

51. The fact that the activity of an operator consists in the performance of duties which are conferred and regulated by law in the public interest is irrelevant. (25) Thus, a payment made by a public authority in the general interest can constitute consideration for a supply of services for the purposes of Directive 2006/112. The concept of a supply of services does not depend on the use made of a service by the person who pays for it. Only the nature of the undertaking given is to be taken into consideration, with the result that for such an undertaking to be covered by the common system of VAT it must imply consumption. (26)

52. In addition, it is not even a requirement that, for a supply of services to be effected for consideration within the meaning of Directive 2006/112, the consideration for that supply must be obtained directly from the person to whom those services are supplied, since it may be obtained from a third party. (27) However, that is not the case in the main proceedings because the person to whom the services are provided by Saudaçor is the RAA, the public entity responsible for the Azores' regional health system, which makes the payment and is the recipient of those services.

53. Finally, it is clear from the Court's case-law that where the supply of services in question is characterised, in particular, by the permanent availability of the service provider to supply, at the appropriate time, the services required, it is not necessary, in order to recognise that there is a direct link between that service and the consideration received, to establish that a payment relates to a particular supply of services at a specific time. (28)

54. In my view, it is readily apparent from the programme agreements, which expressly provide for compensation 'in consideration for the services covered by the agreement', that there is a direct link between the payments made by the RAA and the services of general interest provided by Saudaçor. I note that the fact that a payment is made by a public authority in the general interest does not mean that it cannot constitute consideration for a supply of services for the purposes of Directive 2006/112. (29)

55. In addition, according to the Court's case-law, consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT. In order to satisfy the requirements of legal certainty, since the contractual position reflects, in principle, the economic and commercial reality of the transactions, the relevant contractual terms normally constitute a factor to be taken into consideration unless it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions. (30) This does not appear to be the case in the main proceedings. The contractual terms are therefore a factor to be taken into consideration.

56. There is also nothing in the present case to indicate that the contribution received by Saudaçor does not manifestly correspond to the actual value of the service provided. (31) On the other hand, under the programme agreements, the amount of the contribution may be revised where it is insufficient to allow performance of the programme agreement. It appears that such revisions increasing the amount were not made in the period from 2007 to 2010. However, the revision of the financial contribution for 2009, in the form of a reduction of that contribution, was made in circumstances where the amounts already charged by Saudaçor, when the programme agreement for the year in question was signed, were almost EUR 2 million less than the amount stipulated in the programme agreement signed in 2010.

57. Saudaçor's activities, consisting in planning, management and consultancy services, are permanent and Saudaçor receives remuneration in consideration for its services. Consequently,

Saudaçor's contested activities are of an economic nature and constitute the supply of services for consideration. In addition, it should be stressed that Saudaçor does not provide any public health services for the residents of the Azores. Such services are provided by the member entities of the regional health system.

58. As the services at issue in the main proceedings supplied by Saudaçor must be considered to be of an economic nature, Saudaçor must be regarded as a taxable person for VAT purposes under Article 9(1) of Directive 2006/112. Accordingly, the concept of body governed by public law in the first subparagraph of Article 13(1) of Directive 2006/112 must be interpreted in order to be able to examine whether Saudaçor may nevertheless be exempt from VAT as a body governed by public law acting as a public authority.

C – *The possibility of applying the exemption provided for in Article 13(1) of Directive 2006/112 to Saudaçor's economic activities*

1. The irrelevance of the concept of 'body governed by public law' within the meaning of Directive 2004/18 for the interpretation of the first subparagraph of Article 13(1) of Directive 2006/112

59. In the main proceedings, Saudaçor proposed, for reasons relating to the internal coherence of the system, that the concept of 'other bodies governed by public law' within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 be interpreted by reference to the concept of 'body governed by public law' within the meaning of Article 1(9) of Directive 2004/18. According to Saudaçor, the concept of body governed by public law is a concept that applies across EU law. By its first question, the referring court is seeking to ascertain whether such an interpretation is conceivable.

60. Like the Portuguese and United Kingdom Governments and the Commission, I take the view that such an interpretation cannot be accepted for the reasons set out below.

61. Articles 9 and 13 of Directive 2006/112 give a very wide scope to VAT. The Court has ruled on several occasions that it is clear from the scheme and purpose of Directive 2006/112, as well as from the place of Article 13 thereof in the common system of VAT established by the Sixth Directive, that any activity of an economic nature is, in principle, to be taxable. (32)

62. The Union legislature intended to limit the scope of the treatment of bodies governed by public law as non-taxable persons, so that the general rule is observed. (33) The objective of Article 13(1) of Directive 2006/112 is thus to exempt from VAT only the exercise of economic activities engaged in by bodies governed by public law as public authorities, to the exclusion of situations where exemption would cause 'significant distortions of competition'. (34)

63. Article 13 has been regarded in the Court's case-law as an exemption which should be placed in the general context of the common system of VAT. (35) Thus, as a derogation from the principle that any activity of an economic nature must be subjected to VAT, the first subparagraph of Article 13(1) of Directive 2006/112 must be *interpreted strictly*. (36) Obviously, this also holds for the interpretation of the concept of 'other bodies governed by public law' in the first subparagraph of Article 13(1).

64. By contrast, in the light of the objectives pursued by the provisions of Union law on the coordination of the procedures for the award of public contracts, and in particular the dual objective of opening up competition and transparency, the concept of 'body governed by public law' within the meaning of Article 1(9) of Directive 2004/18 should be given a broad and functional interpretation. (37)

65. It should be stated that the meanings of, on the one hand, 'body governed by public law' for the purposes of Directive 2004/18 and, on the other, 'other bodies governed by public law' for the purposes of Directive 2006/112 cannot be the same, as those two directives have very different objectives. As the Portuguese Government has stressed, the objectives of the common system of VAT would be undermined if, for the purposes of VAT, it were possible to adopt a broad interpretation of the concept of 'other bodies governed by public law' like that which has been adopted for 'body governed by public law' in Directive 2004/18 for functional reasons relating to observance of the rules on the award of public contracts. Such a parallel would effectively lead to an unjustified exemption from VAT of

economic activities engaged in by the public and private persons mentioned in Article 1(9) of Directive 2004/18.

66. It should be added that, as was rightly pointed out by the United Kingdom Government, the Union legislature made the deliberate choice not to make reference in Directive 2006/112 to the concept of 'body governed by public law' which appears in Directive 2004/18. In other contexts, where it considered that a link should be made between two instruments of EU law, the Union legislature chose to adopt the definition used in Directive 2004/18 by means of a cross-reference. (38)

67. Consequently, the concept of 'other bodies governed by public law' in the first subparagraph of Article 13(1) of Directive 2006/112 should be interpreted solely by reference to the scheme and purpose of that directive, as well as the place of that provision in the common system of VAT established by the Sixth Directive. (39)

2. The interpretation of the concept of 'other bodies governed by public law' and the legal classification of Saudaçor in this regard

68. With regard to the second and fourth questions, the main issue for the purposes of the interpretation of the concept of 'other bodies governed by public law' within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 is whether it is an autonomous concept of EU law, as the United Kingdom Government claims, or an implicit reference to the domestic laws of the Member States.

69. I would point out, first of all, that the Union legislature opted not to define that concept in Directive 2006/112 and not to make a reference to the concept of body governed by public law which appears, inter alia, in Directive 2004/18, as I have already explained in point 66 of this Opinion.

70. The concept of 'other bodies governed by public law' already appeared in the first subparagraph of Article 4(5) of the Sixth Directive, which has the same wording as the first subparagraph of Article 13(1) of Directive 2006/112. That previous article, in its French version, mentioned 'les États, les régions, les départements, les communes et les autres organismes de droit public'.

71. Article 13(1) of Directive 2006/112 and the first subparagraph of Article 4(5) of the Sixth Directive also retained the same wording in this regard in the German and English versions. In German, the list is as follows: 'Staaten, Länder, Gemeinden und sonstige Einrichtungen des öffentlichen Rechts', whilst the English version reads as follows: 'states, regional and local government authorities and other bodies governed by public law'.

72. It should be noted, however, that the various language versions are not completely the same, as the French version lists, in addition to 'autres organismes de droit public', four levels of bodies governed by public law, whereas the German and English versions list only three. As far as the other original language versions of the article are concerned, the Danish and Italian versions list four categories of bodies, like the French version, whilst the Dutch version lists five: 'de Staat, de regio's, de gewesten, de provincies, de gemeenten en de andere publiekrechtelijke lichamen'.

73. The approach taken in drawing up that list was not clarified in the explanatory memorandum for the proposal for the Sixth Directive (40) but several language versions (41) of the initial proposal for the Sixth Directive were amended prior to the adoption of that directive to add the word 'other'. (42)

74. In view of the linguistic differences and the presence of the word 'other' in the list, it seems clear that the purpose of that list is to set out non-exhaustively the bodies which may be exempt from VAT under the first subparagraph of Article 13(1) of Directive 2006/112. Accordingly, states and regional and local government authorities are merely examples of bodies which are capable of being exempt.

75. I therefore consider that the only function of the concept of 'other bodies governed by public law' in the provision in question is to demonstrate the illustrative nature of that provision. The existence of linguistic differences regarding the number and the designation of the bodies or entities capable of being exempt confirms that view.

76. Consequently, it seems that the list in the first subparagraph of Article 13(1) of Directive 2006/112 implicitly makes reference to the laws of the Member States as regards the concept of 'other bodies governed by public law'.

77. During the hearing the United Kingdom Government argued that the concept of body governed by public law is an autonomous concept of EU law. According to the United Kingdom Government, if that concept depended solely on the laws of the Member States, this could give it too broad a scope. The classification of an entity as a body governed by public law under national legislation is not irrelevant, but it is not crucial.

78. It is true that, at first sight, the Court's case-law would seem to support this view taken by the United Kingdom Government. According to the Court, although the designation of a body by the administrative law of a Member State as a body governed by public law is certainly relevant in determining its treatment for VAT purposes, it cannot be considered to be crucial where the actual nature and the substance of the activity engaged in by that body show that the strict conditions for the application of that rule on treatment as a non-taxable person are not met. (43)

79. However, *Commission* v *Spain* concerned a situation where the designation of a body by national legislation as a body governed by public law did not correspond to its nature or the activities actually engaged in by that body, as the operators in question were not part of the public administration and carried on their activities in the exercise of a profession comparable to a liberal profession. Thus, the interpretation adopted in that specific case was necessary to ensure a strict interpretation of any exemption, like that in Article 13(1) of Directive 2006/112. (44)

80. By contrast, it seems hard to imagine that a body governed by private law in accordance with national legislation could be classified as a body governed by public law for the purposes of EU law. As there is no definition of 'public law' in EU law, reference has to be made to the rules of public law of each Member State.

81. As I have already stated in point 63 of this Opinion, as a derogation from the principle that any activity of an economic nature must be subjected to VAT, the first subparagraph of Article 13(1) of Directive 2006/112 must be interpreted strictly. Thus, that provision, together with the cumulative criterion of engaging in activities as a public authority, may limit but not extend classification as a body governed by public law in national law, where this would lead to exemption from VAT which is not in keeping with the spirit of Directive 2006/112 or the objectives of Article 13 thereof.

82. Accordingly, in my view, the first subparagraph of Article 13(1) of Directive 2006/112 cannot be interpreted as meaning that a private body for the purposes of national legislation could be classified as a body governed by public law under EU law. The Member States must be entitled to define 'other bodies governed by public law' strictly, without EU law being able to extend that definition to other bodies which are private under the applicable provisions of national law. I consider that the position taken by the Court in *Commission* v *Spain* (45) does not call that conclusion into question.

83. Furthermore, in the light of all the foregoing considerations, it seems that a national definition of a body governed by public law which did not reflect the actual nature and the substance of the activities of such a body could also be limited by way of the second cumulative condition required to apply the rule of treatment as a non-taxable person, namely the condition that the body in question must be acting 'as a public authority'. Engagement in activities 'as public authorities' within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 is an autonomous concept of EU law. According to *Commission* v *Spain*, for that rule of treatment as a non-taxable person to apply to a body, account should be taken of, in addition to the designation of that body in national law, 'the actual nature and the substance of the activity engaged in by that body'. (46) In my view, the 'substance of the activity' may be understood as a direct reference to the condition concerning engagement in activities 'as a public authority'.

84. With regard to the cumulative criterion of engagement in activities as a public authority, it is clear from settled case-law that activities pursued as public authorities within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 are those engaged in by bodies governed by public law under the special legal regime applicable to them and do not include activities pursued by them

under the same legal conditions as those that apply to private traders. It is for the national court to classify the activity at issue in the main proceedings in the light of that criterion. (47)

85. In this regard, according to case-law, it is the manner in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons. In so far as the first subparagraph of Article 13(1) of Directive 2006/112 makes such treatment of bodies governed by public law conditional upon their acting 'as public authorities', it excludes therefrom activities engaged in by them as bodies governed not by public law but by private law. Consequently, the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law. (48) Thus, the classification of a transaction as an 'activity as a public authority' also depends, to a certain extent, on the applicable national law.

86. It should be borne in mind that case-law clearly lays down the principle that *traders governed by private law* cannot be exempt from VAT under the first subparagraph of Article 13(1) of Directive 2006/112 even if their activities consist in the performance of acts falling within the powers of the public authority. (49) Thus, if a certain trader is not part of the public administration, its activity is pursued not as a body governed by public law, but in the form of an activity carried out in the exercise of a profession comparable to a liberal profession. (50) Article 13(1) of Directive 2006/112 cannot therefore be applied to a private company even if its shares are being held 100% by a body governed by public law. (51)

87. I would observe that under Article 4(1) of Regional Legislative Decree No 41/2003/A Saudaçor is governed, inter alia, by the legal regime for the State-owned undertakings sector and *by private law*. In addition, under Article 7 of Decree-Law No 558/99, which regulates the legal regime for State-owned undertakings, public undertakings are governed *by private law*.

88. Thus, in so far as Saudaçor, as a limited company with exclusively public capital which is not part of the public administration, is governed by private law under the applicable domestic legislation, which must in any event be determined by the referring court, and is taxed in accordance with the common regime, it is clearly a trader governed by private law.

89. Consequently, such a limited company cannot be classified as a body governed by public law within the meaning of the first subparagraph of Article 13(1) of Directive 2006/112 and, accordingly, its activities at issue cannot be exempt from VAT under that article. The fact that Saudaçor holds the same public-authority powers as the RAA in performing some of its tasks has no bearing on that finding.

90. I note that, in order for the first subparagraph of Article 13(1) of Directive 2006/112 to apply, two conditions must both be fulfilled, namely the activities must be carried out by a body governed by public law and they must be carried out by that body acting as a public authority. (52) As the first condition is not fulfilled in the present case, it is not necessary to examine Saudaçor's activities in relation to the second condition.

V – Conclusion

91. In the light of the foregoing considerations, I suggest that the Court answer the questions referred for a preliminary ruling by the Supremo Tribunal Administrativo as follows:

With regard to the third question, in a situation like that at issue in the dispute in the main proceedings, 'financial contributions' paid under a programme agreement 'in consideration for the services covered by the agreement' by a public entity to a limited company governed by private law 100% of whose shares it holds constitute consideration for the services provided by that limited company to that public entity.

With regard to the first question, the concept of 'other bodies governed by public law' within the meaning of the first subparagraph of Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax may not be interpreted by reference to the concept of 'body governed by public law' as defined in Article 1(9) of Directive 2004/18/EC of the European

Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

With regard to the second and fourth questions, pursuant to Directive 2006/112, a limited company with exclusively public capital which is not part of the public administration and which is governed by private law and taxed in accordance with the common regime under the applicable domestic legislation cannot be classified as a body governed by public law within the meaning of the first subparagraph of Article 13(1) of that directive.

---

1 Original language: French.

---

2 OJ 2006 L 347, p. 1.

---

3 OJ 1977 L 145, p. 1, ‘the Sixth Directive’.

---

4 OJ 2004 L 134, p. 114.

---

5 Despite a number of changes in drafting, the relevant provisions of Directive 2006/112 are essentially identical to the corresponding provisions of the Sixth Directive. See, to this effect, judgment in *Le Rayon d’Or* (C-151/13, EU:C:2014:185, paragraph 6).

---

6 *Diário da República* 1, Series A, No 257, 6 November 2003, p. 7430.

---

7 *Diário da República* 1, Series A, No 292, 17 December 1999, p. 9012.

---

8 As amended. That Decree-Law was repealed with effect from 2 December 2013 by Decree-Law No 133/2013 of 3 October 2013 (*Diário da República* 1, Series A, No 191, of 3 October 2013, p. 5988), but the former legislation was in force at the material time of the facts of the main proceedings, namely from 2007 to 2010.

---

9 According to the observations submitted by the Portuguese Government, this reservation does not apply to undertakings created on the initiative of autonomous regions, but to undertakings formed at the initiative of administrative regions, which, at the time of the main proceedings, were not created.

---

10 In addition to this regime for State-owned undertakings, which is applicable to Saudaçor under Article 4(1) of Regional Legislative Decree No 41/2003/A, the European Commission made reference to the legal regime for public undertakings of the RAA, established by Regional Legislative Decree No 7/2008/A (*Diário da República* 1, Series A, No 58, 24 March 2008, p. 1649). Article 9 of that Regional Legislative Decree contains provisions which are, in essence, identical to those of Article 7 of Decree-Law No 558/99.

---

11 However, this second programme agreement was not approved and signed until March 2010.

---

12 Order of the Vice-President of the Regional Government of the Azores and the Regional Health Secretariat.

---

13 The information in this regard contained in the decision referring the case is not very clear, but it seems that this is a binding opinion drawn up by the tax authority in proceedings A200 2005045 on whether the

exercise of Saudaçor's activity was considered to fall within the scope of the public-authority powers under Article 2(2) of the VAT Code or, if not, under what its activity and its undertaking was classified for VAT purposes. During the hearing the Portuguese Government stated that Saudaçor had itself requested this binding opinion.

---

14 See, with regard to Article 4(5) of the Sixth Directive, which corresponds to the current Article 13 of Directive 2006/112, judgment in *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraph 18).

---

15 See, to this effect, judgments in *T-Mobile Austria and Others* (C-284/04, EU:C:2007:381, paragraph 48); *Götz* (C-408/06, EU:C:2007:789, paragraph 15) and *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraphs 34 and 39).

---

16 Judgments in *Hong-Kong Trade Development Council* (89/81, EU:C:1982:121, paragraphs 10 and 11) and *Tolsma* (C-16/93, EU:C:1994:80, paragraph 12).

---

17 According to that judgment (C-108/99, EU:C:2001:526, paragraph 33), a taxable person who, for the purposes of achieving a particular economic goal, has a choice between exempt transactions and taxable transactions must, in his own interest, duly take his decision while bearing in mind the neutral system of VAT. The principle of the neutrality of VAT does not mean that a taxable person with a choice between two transactions may choose one of them and avail himself of the effects of the other.

---

18 In that judgment (C-319/12, EU:C:2013:778, paragraph 56 and operative part), the Court ruled that a taxable person may not claim a right to deduct input value added tax where, as a result of an exemption provided for by national law in infringement of provisions of Union law, the output services supplied are not subject to value added tax.

---

19 It should also be noted that it is, in any event, a matter for the national court to refuse to allow an operator's right to deduct VAT where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends (see, to this effect, judgment in *Fini H*, C-32/03, EU:C:2005:128, paragraphs 33 and 34).

---

20 See point 12 of this Opinion.

---

21 According to the Portuguese Government, Saudaçor can also receive other amounts from the RAA under Clauses 2, 5 and 7 of the programme agreements, in particular the grants paid by the RAA to Saudaçor in order to pursue certain specific objectives in the public interest.

---

22 As that programme agreement was not signed until 5 March 2010, the amount of the contribution in question indicated in the agreement did not correspond to the actual amount already charged monthly and paid for the services actually provided by Saudaçor in 2009.

---

23 Judgments in *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraphs 8, 9 and 15); *Commission* v *Greece* (C-260/98, EU:C:2000:429, paragraphs 26 and 28) and *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraph 37 and cited case-law).

---

24 Judgments in *Apple and Pear Development Council* (102/86, EU:C:1988:120); *Tolsma* (C-16/93, EU:C:1994:80, paragraphs 13 and 14); *Kennemer Golf* (C-174/00, EU:C:2002:200, paragraph 39); *Commission v Finland* (C-246/08, EU:C:2009:671, paragraph 44); *GFKL Financial Services* (C-93/10,

EU:C:2011:700, paragraph 18 and 19) and *Serebryannay vek* (C-283/12, EU:C:2013:599, paragraph 37 and cited case-law).

---

25 Judgments in *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraph 10); *Commission* v *Ireland* (C-358/97, EU:C:2000:425, paragraph 31) and *Commission* v *United Kingdom* (C-359/97, EU:C:2000:426, paragraph 43).

---

26 Judgment in *Landboden-Agrardienste* (C-384/95, EU:C:1997:627, paragraph 20).

---

27 Judgments in *Loyalty Management UK and Baxi Group* (C-53/09 and C-55/09, EU:C:2010:590, paragraph 56) and *Le Rayon d'Or* (C-151/13, EU:C:2014:185, paragraph 34).

---

28 Judgments in *Kennemer Golf* (C-174/00, EU:C:2002:200, paragraph 40) and *Le Rayon d'Or* (C-151/13, EU:C:2014:185, paragraph 36). In the present case, under the programme agreements the contribution from the RAA is paid to Saudaçor in twelfths and, according to the Portuguese Government, the services of Saudaçor are also charged monthly.

---

29 Judgment in *Landboden-Agrardienste* (C-384/95, EU:C:1997:627, paragraph 20).

---

30 Judgment in *Newey* (C-653/11, EU:C:2013:409, paragraphs 42 to 45).

---

31 See, in this regard, judgment in *Commission* v *Finland* (C-246/08, EU:C:2009:671, paragraphs 49 and 51), according to which the link between the legal aid services provided by public legal aid offices and the payment to be made by the recipients was not, in that case, sufficiently direct for that payment to be regarded as consideration for those services and, accordingly, for those services to be regarded as economic activities, as the part payment made to the public offices by recipients depended only in part on the actual value of the services provided.

---

32 Judgments in *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraphs 25 to 28 and 38); *Commission* v *Ireland* (C-554/07, EU:C:2009:464, paragraph 39) and *Commission* v *Netherlands* (C-79/09, EU:C:2010:171, paragraph 76).

---

33 Judgment in *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 38).

---

34 Second subparagraph of Article 13(1) of Directive 2006/112.

---

35 Judgment in *Commission* v *Netherlands* (235/85, EU:C:1987:161, paragraph 18).

---

36 See in this regard judgments in *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 60); *Commission* v *Ireland* (C-554/07, EU:C:2009:464, paragraph 42) and *Commission* v *Spain* (C-154/08, EU:C:2009:695, paragraph 119), and order in *Gmina Wrocław* (C-72/13, EU:C:2014:197, paragraph 19).

---

37 See, inter alia, judgments in *Adolf Truley* (C-373/00, EU:C:2003:110, paragraph 43) and *Commission* v *Spain* (C-214/00, EU:C:2003:276, paragraph 53 and cited case-law).

---

38 See, for example, Article 2(8) of Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ 2012 L 315, p. 1); Article 2(16) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320); and Article 2(i) of Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1). The latter regulation was adopted before the adoption of Directive 2006/112 and the first two legal acts after it was adopted, which shows that the Union legislature's practice in this regard has not changed.

---

39 Judgment in *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 25).

---

40 Explanatory Memorandum, COM(73) 950, 20 June 1973.

---

41 In particular, the French, German, Italian and Dutch versions.

---

42 See the Proposal for a sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes — Common system of value added tax: uniform basis of assessment, submitted to the Council by the Commission on 29 June 1973 (OJ 1973 C 80, p. 1).

---

43 Judgment in *Commission* v *Spain* (C-154/08, EU:C:2009:695, paragraph 119).

---

44 See point 63 of this Opinion. It should be noted, however, that a 'strict' interpretation does not necessarily mean a 'restrictive' interpretation. Exemptions from VAT should be strictly interpreted but should not be whittled away by interpretation. Limitations on VAT exemptions should not be interpreted narrowly, but nor should they be construed so as to go beyond their terms. Both the exemptions and any limitations on them must be interpreted in such a way that the exemption applies to that to which it was intended to apply and no more (see, in this regard, Opinion of Advocate General Jacobs in *Zoological Society* (C-267/00, EU:C:2001:698, point 19)).

---

45 C-154/08, EU:C:2009:695.

---

46 Ibid. (paragraph 119).

---

47 See, inter alia, judgments in *Comune di Carpaneto Piacentino and Others* (231/87 and 129/88, EU:C:1989:381, paragraph 16); *Comune di Carpaneto Piacentino and Others* (C-4/89, EU:C:1990:204, paragraph 8); *Commission* v *France* (C-276/97, EU:C:2000:424, paragraph 40); *Commission* v *Ireland* (C-358/97, EU:C:2000:425, paragraph 38); *Commission* v *United Kingdom* (C-359/97, EU:C:2000:426, paragraph 50); *Fazenda Pública* (C-446/98, EU:C:2000:691, paragraph 17) and *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 21).

---

48 See, to this effect, judgments in *Comune di Carpaneto Piacentino and Others* (231/87 and 129/88, EU:C:1989:381, paragraph 15) and *Comune di Carpaneto Piacentino and Others* (C-4/89, EU:C:1990:204, paragraph 10).

---

49 Judgments in *Commission* v *France* (C-276/97, EU:C:2000:424, paragraphs 45 and 46); *Commission* v *Ireland* (C-358/97, EU:C:2000:425, paragraphs 43 and 44) and *Commission* v *United Kingdom* (C-359/97, EU:C:2000:426, paragraphs 55 and 56).

---

50 Idem, and judgment in *Commission* v *Spain* (C-154/08, EU:C:2009:695, paragraph 115). In the judgment in *CO.GE.P.* (C-174/06, EU:C:2007:634, paragraphs 24 and 25), the Court held that the situation of a public economic entity which acts not in the name of and on behalf of the State but on its own account, by making independent decisions, did not fulfil the cumulative conditions required to apply the rule of treatment as a non-taxable person under Article 4(5) of the Sixth Directive.

---

51 See, in this regard, the Commission Final Report of 1 March 2011 entitled ‘VAT in the public sector and exemptions in the public interest’, Final report for TAXUD/2009/DE/316, p. 41.

---

52 See, inter alia, the judgments in *Commission* v *France* (C-276/97, EU:C:2000:424, paragraph 39) and *Isle of Wight Council and Others* (C-288/07, EU:C:2008:505, paragraph 19).

JUDGMENT OF THE COURT (Fourth Chamber)

17 November 2015 (*)

(Reference for a preliminary ruling — Article 56 TFEU — Freedom to provide services — Restrictions — Directive 96/71/EC — Article 3(1) — Directive 2004/18/EC — Article 26 — Public procurement — Postal services — Legislation of a regional entity of a Member State requiring tenderers and their subcontractors to undertake to pay a minimum wage to staff performing the services covered by the public contract)

In Case C-115/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Koblenz (Higher Regional Court, Koblenz, Germany), made by decision of 19 February 2014, received at the Court on 11 March 2014, in the proceedings

RegioPost GmbH & Co. KG

v

Stadt Landau in der Pfalz,

intervening parties:

PostCon Deutschland GmbH,

Deutsche Post AG,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Third Chamber, acting as President of the Fourth Chamber, J. Malenovský, M. Safjan, A. Prechal (Rapporteur) and K. Jürimäe, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 29 April 2015,

after considering the observations submitted on behalf of:

– RegioPost GmbH & Co. KG, by A. Günther, Rechtsanwalt,

– Stadt Landau in der Pfalz, by R. Goodarzi, Rechtsanwalt,

– PostCon Deutschland GmbH, by T. Brach, Rechtsanwalt,

– Deutsche Post AG, by W. Krohn and T. Schneider, Rechtsanwälte,

– the German Government, by T. Henze and A. Lippstreu, acting as Agents,

– the Danish Government, by C. Thorning and M. Wolff, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and M. Salvatorelli, avvocato dello Stato,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the Norwegian Government, by K. Nordland Hansen and P. Wennerås, acting as Agents,

– the European Commission, by A. Tokár, J. Enegren and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU, read in conjunction with Article 3(1) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), and of Article 26 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43) (‘Directive 2004/18’).

2 The request has been made in proceedings between RegioPost GmbH & Co. KG (‘RegioPost’) and Stadt Landau in der Pfalz (municipality of Landau in the Palatinate, Germany, ‘municipality of Landau’) concerning the obligation, imposed on tenderers and their subcontractors in the context of the award of a public contract for postal services in that municipality, to undertake to pay a minimum wage to staff performing the services covered by that public contract.

Legal context

EU law

Directive 96/71

3 Article 1 of Directive 96/71, entitled ‘Scope’, provides:

‘1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

…

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

…’

4 Article 3 of Directive 96/71, entitled ‘Terms and conditions of employment’, provides as follows in paragraphs 1 and 8:

‘1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision, and/or

– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

…

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

…

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

…

8. “Collective agreements or arbitration awards which have been declared universally applicable” means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

…’

Directive 2004/18

5 Recitals 2, 33 and 34 in the preamble to Directive 2004/18 state:

‘(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

…

(33) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. …

(34) The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance

of a public contract, providing that such rules, and their application, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive [96/71] lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.'

6 Under the first indent of Article 7(b) of Directive 2004/18, the directive is, inter alia, applicable to public service contracts the estimated value of which, exclusive of value added tax, is equal to or greater than EUR 200 000 awarded by contracting authorities other than the central government authorities listed in Annex IV to that directive.

7 Article 26 of Directive 2004/18, entitled 'Conditions for performance of contracts' provides:

'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

8 Article 27 of that directive, entitled 'Obligations relating to taxes, environmental protection, employment protection provisions and working conditions', provides:

'1. A contracting authority may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to … the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

2. A contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided.

…'

German law

Federal law

9 Paragraph 97(4) of the Law against restrictions of competition (Gesetz gegen Wettbewerbsbeschränkungen), in its version of 26 June 2013 (BGBl. 2013 I, p. 1750), as last amended by Paragraph 5 of the Law of 21 July 2014 (BGBl. 2014 I, p. 1066), provides:

'Contracts shall be awarded to skilled, efficient, reliable and law-abiding undertakings. Contractors may be expected to meet other or further requirements involving social, environmental or innovative aspects if these have a direct relation to the subject matter of the contract and are stated in the description of the service to be rendered. Contractors may be expected to meet other or further requirements only if federal law or the laws of a *Land* provide for this.'

10 Pursuant to the Law on mandatory working conditions concerning cross-border services — Posted workers law (Gesetz über zwingende Arbeitsbedingungen bei grenzüberschreitenden Dienstleistungen — Arbeitnehmer-Entsendegesetz) of 26 February 1996 (BGBl. 1996 I, p. 227, 'the AEntG'), a collective agreement setting a mandatory minimum wage for the postal services sector was concluded on 29 November 2007 and was declared universally applicable to all undertakings in that sector by a regulation of 28 December 2007. However, by a judgment of the Bundesverwaltungsgericht

(Federal Administrative Court) of 28 January 2010, that regulation was annulled, so that, at the time of the facts in the main proceedings, there was no mandatory minimum wage for the postal services sector.

11 The Law regulating a general minimum wage (Gesetz zur Regelung eines allgemeinen Mindestlohns) of 11 August 2014 (BGBl. 2014 I, p. 1348) provides, in principle, that all workers, from 1 January 2015, are entitled to a minimum wage of EUR 8.50 gross per hour.

Law of the *Land* of Rhineland-Palatinate

12 Paragraph 1(1) of the Law of the *Land* of Rhineland-Palatinate on guaranteeing compliance with collective agreements and minimum wages in public contract awards (Landesgesetz zur Gewährleistung von Tariftreue und Mindestentgelt bei öffentlichen Auftragsvergaben) of 1 December 2010 ('the LTTG') provides:

'The present Law combats distortions of competition that arise in the award of public contracts because of the use of cheap labour and alleviates the burdens resulting therefrom for social protection systems. To that end, it provides that contracting authorities … may award public contracts, in accordance with the present Law, only to undertakings which pay their employees the minimum wage laid down in the present Law and which comply with collective agreements'.

13 Paragraph 3(1) of the LTTG, entitled 'Minimum wage', provides:

'To the extent that compliance with collective agreements may not be required under Paragraph 4, public contracts may be awarded only to undertakings which, at the time of submitting their tender, undertake in writing to pay their staff, for performing the service, wages of at least EUR 8.50 gross per hour (minimum wage) and to implement, for the benefit of employees, any changes to the minimum wage arising during the period of performance … . … If the declaration relating to the minimum wage is not presented at the time the tender is submitted and is likewise not presented even after it has been requested, the tender shall be excluded from the evaluation. If the [competent] department has published model … declarations relating to minimum remuneration, these may be used'.

14 Following the adoption of the regulation of the Government of the *Land* of Rhineland-Palatinate of 11 December 2012, the minimum hourly wage referred to in Paragraph 3(1) of the LTTG is now EUR 8.70 gross per hour.

15 Under Paragraph 4 of the LTTG, entitled 'Obligation to comply with collective agreements':

'(1) Public contracts which fall within the scope of the Law on mandatory terms of employment for workers posted cross-border and workers regularly working within the national territory [(Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen of 20 April 2009 (BGBl. 2009 I, p. 799))], in the applicable version, may be awarded only to undertakings which undertake in writing, at the time of submitting their tender, to pay their staff, for performing the service, a remuneration which, in its amount and form, corresponds at least to the provisions of the collective agreement by which the undertaking is bound under [that Law].

…

(6) If the declaration relating to compliance with collective agreements is not presented at the time the tender is submitted and is likewise not presented even after it has been requested, the tender shall be excluded from the evaluation. If the [competent] department has published model … declarations relating to compliance with collective agreements, these may be used.'

16 Paragraph 5(2) of the LTTG, entitled 'Subcontractors', provides:

'Where contractual services are to be performed by subcontractors, the undertaking shall ensure that those subcontractors comply with the obligations referred to in Paragraphs 3 and 4 and shall provide

the contracting authority with the subcontractors' declarations regarding the minimum wage and compliance with collective agreements. …'

17 Paragraph 6 of the LTTG, entitled 'Proof and monitoring', imposes certain obligations on the successful tenderer and subcontractors, relating, inter alia, to record-keeping and to the making available of documents and data, in order to enable the contracting authority to monitor compliance with the obligations imposed under the LTTG.

18 Paragraph 7 of the LTTG, entitled 'Penalties', provides:

'(1) In order to ensure compliance with the obligations set out in Paragraphs 3 to 6, the contracting authorities shall agree with the successful tenderer, for each case of culpable failure to fulfil obligations, a contractual penalty of 1% of the value of the contract; in the case of multiple failures to fulfil obligations, the total amount of penalties cannot exceed 10% of the value of the contract. The successful tenderer shall also be obliged to pay the contractual penalty mentioned in the first sentence where the failure to fulfil obligations is attributable to one of the successful tenderer's subcontractors and the successful tenderer was aware or ought to have been aware of that failure. If the contractual penalty is disproportionately high, it may be reduced to an appropriate amount by the contracting authority, at the request of the successful tenderer. …

(2) The contracting authorities shall agree with the successful tenderer that a failure to fulfil obligations that constitutes at least gross and serious negligence by the successful tenderer with regard to the requirements of Paragraphs 3 to 6 shall entitle the contracting authority to terminate the contract without notice on serious grounds.

(3) If the successful tenderer or a subcontractor has failed to fulfil its obligations under the present Law at least as a result of gross negligence or on a repeated basis, the contracting authorities may exclude that tenderer or that subcontractor from the award of public contracts for a period of up to three years.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 The order for reference states that, on 23 April 2013, the municipality of Landau issued a European Union-wide call for tender, under an open procedure, in respect of a public contract — divided into two lots — relating to postal services in that municipality, in particular, for the conclusion of a framework contract for the collection, carriage and delivery of letters, parcels and packages. The planned duration of the contract was two years, the contracting authority being entitled to extend it twice at most, for a period of one year each time.

20 Under point 4 of section III 2.2 of the contract notice, under the heading 'Economic and financial standing', 'the successful tenderer shall comply with the provisions of [the LTTG]'.

21 At the time of the facts in the main proceedings, there was no collective agreement setting a minimum wage and binding the undertakings in the postal services sector under the AEntG. Nor were the undertakings subject, at that time, to the obligation to pay the general minimum wage established by the Law of 11 August 2014 regulating a general minimum wage.

22 Annex E6 to the specifications for the contract at issue in the main proceedings was entitled 'Model declaration under Paragraph 3(1) of the LTTG'. That annex was intended to enable tenderers to present, at the time of submitting their tender, their own declaration relating to the minimum wage and those of their subcontractors.

23 The model declaration was worded as follows:

'I/We hereby undertake:

1. to pay employees for the performance of the contract at least the (gross) hourly remuneration payable under the regulation of the *Land* in force for the purposes of setting the minimum wage referred to in the third sentence of Paragraph 3(2) of [the LTTG], unless the services are provided by trainees;

2. to select subcontractors carefully and in particular to check whether their offers could have been calculated on the basis of the minimum wage to be paid;

3. where the contract is performed by subcontractors or by employees of a temporary employment agency or by employees of a temporary employment agency engaged by the subcontractor, to ensure fulfilment of the obligations under Paragraph 4(1) of the LTTG or Paragraph 3(1) of the LTTG, and to provide the contracting authority with the declarations by which those subcontractors and temporary employment agencies undertake to comply with the minimum remuneration and collective agreements;

4. to have available complete and verifiable documents concerning the employees assigned to the performance of the contract, to present those documents to the contracting authority at its request and to inform employees of the possibility of the contracting authority carrying out checks.'

24 By letter of 16 May 2013, RegioPost complained that the declarations relating to the minimum wage referred to in Paragraph 3 of the LTTG were contrary to public procurement law. It enclosed with its tender, which was submitted within the prescribed period, declarations by its subcontractors, which it had itself drawn up. It did not, however, submit a minimum wage compliance declaration for itself.

25 By e-mail of 25 June 2013, the municipality of Landau gave RegioPost the opportunity to provide, within a period of 14 days, the declarations relating to the minimum wage referred to in Paragraph 3 of the LTTG, while indicating that it would exclude RegioPost's tender if it failed to comply with that request.

26 By letter of 27 June 2013, RegioPost merely reiterated its complaints and stated that, if its tender were excluded, it would seek a review.

27 By letter of 11 July 2013, the municipality of Landau informed RegioPost that because of the failure to provide the declarations relating to the minimum wage referred to Paragraph 3 of the LTTG, its tender could not be assessed. In that same letter, it stated that the first lot of the contract would be awarded to PostCon Deutschland GmbH and the second lot to Deutsche Post AG.

28 By decision of 23 October 2013, the Vergabekammer Rheinland-Pfalz (Public Procurement Board of the *Land* of Rhineland-Palatinate) dismissed the application for review filed by RegioPost on 15 July 2013, on the grounds, inter alia, that the latter's tender had rightly been excluded because of the failure to provide the declarations relating to the minimum wage, which had legitimately been required by the contracting authority.

29 Hearing the dispute on appeal, the referring court considers that the outcome of the proceedings turns on whether it is required to disapply Paragraph 3 of the LTTG on the grounds that that provision is incompatible with EU law.

30 It considers that Paragraph 3(1) of the LTTG contains a special condition relating to the performance of the contract which, under Article 26 of Directive 2004/18, is lawful only if it is compatible with EU law.

31 The referring court considers that it is not in a position to determine that compatibility, even in the light of the case-law of the Court and, in particular, the judgment in *Rüffert* (C-346/06, EU:C:2008:189).

32 The referring court considers that the fact that RegioPost is an undertaking established in Germany and that the other tenderers also have their seat in Germany does not preclude a request for a preliminary ruling, since the question whether a provision of national law must be disapplied because it may be incompatible with EU law is a question of law that arises regardless of the nationality of the parties to the contract award or review procedure.

33 As regards the compatibility with the first paragraph of Article 56 TFEU of the national measure at issue in the main proceedings, the referring court observes that the obligation for undertakings established in Member States other than the Federal Republic of Germany to adjust the wages paid to their employees to the higher level of remuneration applicable in the place where the contract is to be performed in Germany deprives those undertakings of the competitive advantage they derive from their lower wage costs, whereas that advantage is often necessary in order to offset the structural advantages enjoyed by national undertakings and to have access to the contract in question. The obligation to pay the minimum wage laid down in Paragraph 3(1) of the LTTG therefore constitutes an obstacle for undertakings established in those other Member States that is, in principle, prohibited by the first paragraph of Article 56 TFEU.

34 However, the referring court considers that EU law does not preclude the application of Paragraph 3(1) of the LTTG to those undertakings if the conditions for the application of Article 3(1) of Directive 96/71 are satisfied. Nevertheless, according to the referring court, doubts might arise in that regard.

35 On the one hand, that court observes that, although Paragraph 3(1) of the LTTG is indeed a legislative provision which lays down the minimum rate of pay, that provision does not guarantee workers the payment by their employer of the minimum wage. That national provision merely prohibits contracting authorities from awarding a public contract to tenderers that have not undertaken to pay the minimum wage laid down in it to workers assigned to the performance of the public contract in question.

36 On the other hand, the referring court notes that the obligation relating to the minimum wage laid down in Paragraph 3(1) of the LTTG concerns only those workers of the successful tenderer who are assigned to the performance of the public contract concerned. However, a worker assigned to the performance of a private contract is no less deserving of social protection than a worker who is assigned to the performance of a public contract.

37 As regards the lesson to be drawn from the judgment in *Rüffert* (C-346/06, EU:C:2008:189), the referring court observes that, in German academic writings, it has been argued, inter alia, that that judgment must be understood as meaning that Article 3(1) of Directive 96/71 does not preclude a provision such as Paragraph 3(1) of the LTTG, which lays down, in a legislative provision, a minimum rate of pay, even if it has to be complied with in the performance of public contracts only, since the requirement as to universal application does not concern legislative provisions, but only collective agreements.

38 The referring court states, none the less, that is has serious doubts as to whether that proposition is correct. In the case of a restriction on a fundamental freedom such as the freedom to provide services, it considers that it would be illogical to interpret Article 3(1) of Directive 96/71 as meaning that it requires collective agreements setting a minimum wage to be of universal application, including all workers in the sector concerned, whether they be employed in the performance of public contracts or private contracts, while the scope of legislative provisions laying down a minimum wage may be limited to only those workers assigned to the performance of public contracts.

39 The referring court considers that, if it were to be concluded that a national provision such as Paragraph 3(1) of the LTTG, requiring tenderers and their subcontractors to undertake to pay a minimum wage to staff performing the services covered by a public contract, is compatible with Article 56 TFEU, it would be necessary to consider whether the penalty provided for by that national provision should that obligation be infringed, namely, the tenderer’s exclusion from participation in the contract award procedure, is compatible with Article 26 of Directive 2004/18.

40 The referring court considers that that compatibility is doubtful since, although Paragraph 3(1) of the LTTG constitutes a special condition relating to the performance of a contract within the meaning of Article 26 of Directive 2004/18, that directive does not provide for grounds for exclusion from participation in a contract for infringement of such a special condition. Moreover, such grounds for exclusion would be difficult to understand since the question of a tenderer’s compliance with the special conditions with which it has undertaken to comply arises only after the award of the contract to that operator. It is not therefore a qualitative selection criterion that might justify the exclusion of a tenderer.

41 That court considers that the penalty of exclusion of the tender in the event of non-compliance with Paragraph 3(1) of the LTTG is not based on valid grounds, since the undertakings required under that provision are of a declaratory nature only.

42 Moreover, the referring court considers that that penalty is nugatory since, in the context of a procedure for the award of a public contract such as that at issue in the main proceedings, the obligation relating to the payment of the minimum wage laid down in Paragraph 3(1) of the LTTG forms part of the obligations set out both in the contract notice and in the specifications by which the successful tenderer is contractually bound following the award of the contract and in respect of which the contractual penalty imposed in Paragraph 7(1) of the LTTG is intended to ensure compliance.

43 In those circumstances, the Oberlandesgericht Koblenz (Higher Regional Court, Koblenz) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is the first paragraph of Article 56 TFEU, read in conjunction with Article 3(1) of Directive [96/71] to be interpreted as precluding a national provision which makes it mandatory for a contracting authority to award contracts only to undertakings which undertake, and whose subcontractors undertake, in writing, at the time of submitting the tender, to pay their employees who perform the contract a minimum wage fixed by the State for public contracts only but not for private ones, where there is neither a general statutory minimum wage nor a universally binding collective agreement that binds potential contractors and possible subcontractors?

(2) If the first question is answered in the negative:

Is EU law in the area of public procurement, in particular Article 26 of Directive [2004/18] to be interpreted as precluding a national provision such as the third sentence of Paragraph 3(1) of the [LTTG] which provides for the mandatory exclusion of a tender if an economic operator does not, at the time of submitting the tender, undertake in a separate declaration to do something which he would be contractually obliged to do if awarded the contract even without making that declaration?’

Consideration of the questions referred

Admissibility

44 The municipality of Landau and the German and Italian Governments submit that the first question is inadmissible, relying on the lack — confirmed by the referring court — of any cross-border element in the dispute in the main proceedings, in so far as all the undertakings which participated in the procedure for the award of the contract at issue in the main proceedings are established in the territory of the Member State of the contracting authority, namely, the Federal Republic of Germany. They submit that, failing a cross-border element, the Court of Justice does not have jurisdiction to rule on the compatibility of the measure at issue in the main proceedings with Directive 96/71 and/or Article 56 TFEU. The Italian Government also disputes the admissibility of the second question, for similar reasons.

45 Those objections must be rejected.

46 As a preliminary point, it must be recalled that the fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not preclude the Court from providing the national court with all the elements of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is, in this context, for the Court to extract from all the information provided by the national court, in particular from the grounds in the order for reference, the points of EU law that require interpretation, regard being had to the subject-matter of the dispute (see, inter alia, judgment in *Vicoplus and Others*, C-307/09 to C-309/09, EU:C:2011:64, paragraph 22).

47 In order to give a useful answer to the referring court, the first question must in the first place be examined in the light of the provision of EU law that specifically governs it, namely, Article 26 of Directive 2004/18, a provision to which the referring court, moreover, expressly refers in its second question (see, by analogy, judgment in *Rüffert*, C-346/06, EU:C:2008:189, paragraph 18).

48 It is clear from the documents before the Court, in particular, from the decision of the Vergabekammer Rheinland-Pfalz (Public Procurement Board of the *Land* of Rhineland-Palatinate) to which reference is made in paragraph 28 above, that that directive is applicable to the case in the main proceedings, since the value of the public contract in question far exceeds the relevant threshold for the application of that directive, which, at the time of the facts in the main proceedings, was set at EUR 200 000.

49 Since, in this case, Directive 2004/18 is applicable, a point which has not, moreover, been disputed by any of the parties who submitted written observations or were present at the hearing before the Court, a question of interpretation relating to one of its provisions, in this instance, Article 26 thereof, is admissible, even though it is raised, as in the present case, in the context of a dispute all the elements of which are confined within a single Member State.

50 Moreover, even though, in the present case, all the elements of that dispute are confined within a single Member State, the Court has jurisdiction to give a ruling on Article 56 TFEU, to the extent that the degree of harmonisation envisaged in that directive so permits.

51 Thus, the value of the contract at issue in the main proceedings clearly exceeding the relevant threshold for the application of Directive 2004/18, that contract must be regarded as having a certain cross-border interest. It is, therefore, by no means inconceivable that undertakings established in Member States other than the Federal Republic of Germany were interested in participating in that contract following the publication of the contract notice, even though they decided ultimately not to participate for reasons of their own, but which might have included — for some of those undertakings established in Member States in which the cost of living and the minimum rate of pay in force are significantly lower than those prevailing in *Land* of Rhineland-Palatinate — the obligation expressly laid down to comply with the minimum wage imposed in that *Land*.

52 It follows that the first question, reformulated as in the first place concerning the interpretation of Article 26 of Directive 2004/18, is admissible, as is the second question.

Substance

The first question

53 In the light of the foregoing considerations as to the admissibility of the request for a preliminary ruling, the view must be taken that, by its first question, the referring court asks, in essence, whether Article 26 of Directive 2004/18 must be interpreted as precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

54 A national provision such as Paragraph 3 of the LTTG, in so far as it requires all tenderers and subcontractors to undertake to the contracting authority to pay staff called upon to perform the public contract concerned a minimum wage established by law, must be regarded as a ‘special condition relating to the performance of a contract’ concerning ‘social considerations’, within the meaning of Article 26 of that directive.

55 In this case, that special condition was set out in the contract notice and in the specifications, so that the procedural condition as to transparency, laid down in Article 26 of that directive, is satisfied.

56 Moreover, it is clear from recital 33 to that directive that a special condition relating to the performance of a contract is compatible with EU law only in so far as it is not directly or indirectly discriminatory. It is not disputed that a national provision such as that at issue in the main proceedings satisfies that condition.

57 Furthermore, in accordance with the settled case-law of the Court, where a national measure falls within a field that has been exhaustively harmonised at EU level, that measure must be assessed in the light of the provisions of that harmonising measure and not in the light of the primary law of the European Union (see, to that effect, inter alia, judgments in *DaimlerChrysler*, C-324/99, EU:C:2001:682, paragraph 32; *Brzeziński*, C-313/05, EU:C:2007:33, paragraph 44; and *Commission* v *Hungary*, C-115/13, EU:C:2014:253, paragraph 38).

58 Under Article 26 of Directive 2004/18, special conditions relating to the performance of a contract may be laid down 'provided that these are compatible with Community law'.

59 It follows that that directive does not lay down exhaustive rules in respect of special conditions relating to the performance of contracts, so that the legislation at issue in the main proceedings may be assessed in the light of the primary law of the European Union.

60 That being so, in accordance with recital 34 to Directive 2004/18, in examining whether the national measure at issue in the main proceedings is compatible with EU law, it is necessary to determine whether, in cross-border situations in which workers from one Member State provide services in another Member State for the purpose of performing a public contract, the minimum conditions laid down in Directive 96/71 are observed in the host member State in respect of posted workers.

61 In this case, the referring court raises the question of the effects of the national measure at issue in the main proceedings on undertakings established outside Germany that may have been interested in participating in the procedure for the award of the public contract in question and envisaged posting their workers to that territory, on the ground that those undertakings may have decided not to participate because of the obligation placed on them in respect of the minimum wage imposed by the LTTG. Therefore, it is necessary to examine that national measure in the light of Article 3(1) of Directive 96/71.

62 In this connection, it must be stated that a provision such as Paragraph 3 of the LTTG must be regarded as a 'law', for the purposes of the first indent of the first subparagraph of Article 3(1) of Directive 96/71, laying down a 'minimum rate of pay', within the meaning of point (c) of the first subparagraph of Article 3(1) thereof. First, contrary to the Law of the *Land* Niedersachsen on the award of public contracts at issue in the case that gave rise to the judgment in *Rüffert* (C-346/06, EU:C:2008:189), a provision such as Paragraph 3 of the LTTG itself lays down the minimum rate of pay. Secondly, at the time of the facts in the main proceedings, the AEntG did not impose, nor did other national legislation impose, a lower wage for the postal services sector.

63 That categorisation cannot be called in question on the basis that the national measure in question applies to public contracts and not to private contracts, since the condition as to universal application defined in the first subparagraph of Article 3(8) of Directive 96/71 applies only to the collective agreements or arbitration awards referred to in the second indent of the first subparagraph of Article 3(1) of that directive.

64 Moreover, since the national measure at issue in the main proceedings falls within the scope of Article 26 of Directive 2004/18, which permits, subject to certain conditions, the imposition of a minimum wage in public contracts, that measure cannot be required to extend beyond that specific field by applying generally to all contracts, including private contracts.

65 The limitation of the scope of the national measure to public contracts is the simple consequence of the fact that there are rules of EU law specific to that field, in this case, those laid down in Directive 2004/18.

66 It follows that Article 26 of Directive 2004/18, read in conjunction with Directive 96/71, permits the host Member State to lay down, in the context of the award of a public contract, a mandatory rule for minimum protection referred to in point (c) of the first subparagraph of Article 3(1) of that directive, such as that at issue in the main proceedings, which requires undertakings established in other Member States to comply with an obligation in respect of a minimum rate of pay for the benefit of their workers posted to the territory of the host Member State in order to perform that public contract. Such a rule is

part of the level of protection which must be guaranteed to those workers (see, to that effect, judgment in *Laval un Partneri*, C-341/05, EU:C:2007:809, paragraphs 74, 80 and 81).

67 That interpretation of Article 26 of Directive 2004/18 is confirmed, furthermore, by a reading of that provision in the light of Article 56 TFEU, since that directive seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty (see, by analogy, judgment in *Rüffert*, C-346/06, EU:C:2008:189, paragraph 36).

68 It is clear, moreover, from recital 2 to Directive 2004/18, that the coordinating provisions contained in that directive in respect of public contracts above a certain value must be interpreted in accordance with the rules and principles of the Treaty, including those relating to the freedom to provide services.

69 In this regard, according to the case-law of the Court, the imposition, under national legislation, of a minimum wage on tenderers and their subcontractors, if any, established in a Member State other than that of the contracting authority and in which minimum rates of pay are lower constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Consequently, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 56 TFEU (see to that effect, inter alia, judgment in *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraph 30).

70 Such a national measure may, in principle, be justified by the objective of protecting workers (see, to that effect, judgment in *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraph 31).

71 However, as the referring court has observed, the question arises whether it follows from paragraphs 38 to 40 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189) that such a justification cannot be accepted on the grounds that the minimum wage imposed by Paragraph 3(1) of the LTTG applies to public contracts only, and not to private contracts.

72 That question calls for a negative answer.

73 It is clear from paragraphs 38 to 40 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189) that although the Court concluded, in the context of the examination of the national measure at issue in the case that gave rise to that judgment in the light of Article 56 TFEU, that that measure could not be justified by the objective of the protection of workers, it based that conclusion on certain characteristics specific to that measure, which clearly distinguish that measure from the national measure at issue in the main proceedings.

74 Thus, in the judgment in *Rüffert* (C-346/06, EU:C:2008:189), the Court based its conclusion on the finding that what was at issue in the case that gave rise to that judgment was a collective agreement applying solely to the construction sector, which did not cover private contracts and had not been declared universally applicable. Furthermore, the Court observed that the rate of pay set by that collective agreement exceeded the minimum rate of pay applicable to that sector under the AEntG.

75 The minimum rate of pay imposed by the measure at issue in the main proceedings is laid down in a legislative provision, which, as a mandatory rule for minimum protection, in principle applies generally to the award of any public contract in the *Land* of Rhineland-Palatinate, irrespective of the sector concerned.

76 Furthermore, that legislative provision confers a minimum social protection since, at the time of the facts in the main proceedings, the AEntG did not impose, nor did other national legislation impose, a lower minimum wage for the postal services sector.

77 In the light of all the foregoing considerations, the answer to the first question is that Article 26 of Directive 2004/18 must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

The second question

78 By its second question, the referring court asks, in essence, whether Article 26 of Directive 2004/18 must be interpreted as precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which provides for the exclusion from participation in a procedure for the award of a public contract of tenderers and their subcontractors who refuse to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

79 It follows from the answer given to the first question that Article 26 must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

80 Paragraph 3(1) of the LTTG also provides that if no such declaration has been made at the time the tender is submitted and is likewise not presented even after it has been requested, the tender is to be excluded from the evaluation.

81 Furthermore, Paragraph 7 of the LTTG provides for a system of penalties that applies to various situations in which such a written undertaking was enclosed with the tender, but was not complied with in the course of the performance of the public contract. That system is not relevant to the main proceedings, which concern the exclusion of a tenderer that has refused to enclose that undertaking with its tender.

82 In this case, RegioPost was excluded from participation in the procedure for the award of the public contract at issue in the main proceedings after refusing to put its tender in order by appending its written undertaking to comply with the obligation to pay the minimum wage laid down in Paragraph 3(1) of the LTTG.

83 Exclusion from participation in that contract cannot be regarded as a penalty. It is merely the consequence of the failure, characterised by the failure to enclose with the tender the written undertakings required under Paragraph 3(1) of the LTTG, to meet a requirement formulated in a particularly transparent manner in the contract notice and intended to emphasise, from the outset, the importance of compliance with a mandatory rule for minimum protection expressly authorised by Article 26 of Directive 2004/18.

84 Consequently, just as that provision does not preclude a written undertaking as to compliance with that rule being required, Article 26 permits such exclusion.

85 The importance of compliance with that mandatory rule for minimum protection is moreover expressly made clear in recital 34 to Directive 2004/18 in so far as it states that, in the event of non-compliance with the obligations imposed by national law concerning, inter alia, conditions of employment, the Member States may classify such non-compliance as grave misconduct or an offence concerning the professional conduct of the economic operator that is liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

86 Moreover, the burden — on tenderers and their subcontractors, if any — represented by the obligation to include an undertaking to pay a minimum wage, such as that laid down in Paragraph 3(1) of the LTTG, is negligible, particularly since they can simply complete standard forms.

87 The appropriateness and proportionality of the exclusion of an operator from participation in a procedure for the award of a public contract, such as the exclusion provided for in Paragraph 3(1) of the LTTG, are also clear from the fact that that provision expressly provides that such exclusion can be applied only where, after having been invited to supplement its tender by adding the undertaking, the operator concerned refuses to comply, as in the main proceedings.

88 It follows from all the foregoing considerations that the answer to the second question is that Article 26 of Directive 2004/18 must be interpreted as not precluding legislation of a regional entity of a Member

State, such as that at issue in the main proceedings, which provides for the exclusion from participation in a procedure for the award of a public contract of tenderers and their subcontractors who refuse to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.

Costs

89 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 26 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011, must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.**

2. **Article 26 of Directive 2004/18, as amended by Regulation No 1251/2011, must be interpreted as not precluding legislation of a regional entity of a Member State, such as that at issue in the main proceedings, which provides for the exclusion from participation in a procedure for the award of a public contract of tenderers and their subcontractors who refuse to undertake, by means of a written declaration to be enclosed with their tender, to pay staff who are called upon to perform the services covered by the public contract in question a minimum wage laid down in that legislation.**

[Signatures]

---

* Language of the case: German.

EU:C:2015:566

OPINION OF ADVOCATE GENERAL
PAOLO MENGOZZI
delivered on 9 September 2015 (1)

Case C-115/14

RegioPost GmbH & Co. KG
v
Stadt Landau

(Request for a preliminary ruling from the Oberlandesgericht Koblenz (Germany))

(Purely internal situation — National identity — Article 4(2) TEU — Freedom to provide services — Article 56 TFEU — Directive 96/71/EC — Article 3(1) — Directive 2004/18/EC — Article 26 — Public procurement — Postal services — National legislation requiring tenderers and their subcontractors to undertake to pay a minimum wage to the staff performing the services forming the subject-matter of the public procurement contract)

I – Introduction

1. In a procedure for the award of a public procurement contract, does a contracting authority of a Member State have the power, under the provisions of EU law, to require tenderers and their subcontractors to undertake to pay the statutory minimum hourly wage to the personnel who will be responsible for performing the work forming the subject-matter of that contract?

2. That, in essence, is the subject-matter of the questions referred by the Oberlandesgericht Koblenz (Higher Regional Court, Koblenz) (Germany) in the course of proceedings between RegioPost GmbH & Co. KG ('RegioPost'), a postal services provider, and the Stadt Landau in der Pfalz (Town of Landau in der Pfalz), a municipality situated in the *Land* of Rhineland-Palatinate.

3. That issue, with which the Court has previously been faced in the cases giving rise to the judgments in *Rüffert* (C-346/06, EU:C:2008:189) and *Bundesdruckerei* (C-549/13, EU:C:2014:2235), albeit in different legal and factual circumstances, calls, in essence, for an interpretation of the provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (2) and Article 56 TFEU in the context of the freedom to provide services.

4. The order for reference states that, on 23 April 2013, the Stadt Landau in der Pfalz launched an EU-wide call for tenders for a public procurement contract for postal services in that town, divided into two lots.

5. It is common ground that, at the time of the facts of the main proceedings, there was neither a general minimum wage in Germany, the latter having been introduced, at an hourly rate of EUR 8.50 (gross), only from 1 January 2015, nor a binding, universally applicable, collective agreement covering employment conditions in the postal services sector.

6. None the less, the contract notice issued by the Stadt Landau in der Pfalz stated, in connection with the ‘economic and financial standing’ of the successful tenderer, that the latter must comply with the provisions of the Law of the *Land* of Rhineland-Palatinate concerning the guarantee of compliance with collective agreements and the minimum wage in the context of the award of public contracts (Landesgesetz zur Gewährleistung von Tariftreue und Mindestentgelt bei öffentlichen Auftragsvergaben (Landestariftreuegesetz) (‘the LTTG’) of 1 December 2010.

7. Paragraph 1 of the LTTG states that that law is intended to combat distortions of competition in the award of public contracts that result from the use of low-paid personnel, and to alleviate the burden on the social security systems. The contracting authority may thus award public contracts only to undertakings that pay their employees the minimum wage provided for in that law.

8. Paragraph 3(1) of the LTTG states that public contracts may be awarded only to undertakings that, at the time of submitting their tender, undertake in writing to pay their staff, for the performance of the services, wages of at least EUR 8.50 (gross) per hour (minimum wage) and to put into effect, for the benefit of employees, any changes to the minimum wage during the period of performance. At the time of the facts of the case in the main proceedings, the minimum hourly wage referred to in Paragraph 3 of the LTTG had been increased to EUR 8.70 (gross) by regulation of the Government of the *Land* of Rhineland-Palatinate, in accordance with the procedure laid down in Paragraph 3(2) of the LTTG. Furthermore, Paragraph 3(1) of the LTTG also states that, if the declaration relating to the minimum wage is lacking at the time when the tender is submitted and is not forthcoming even after it has been requested, the tender is to be excluded from the evaluation.

9. The specifications for the public contract in question contained a ‘model declaration’ as provided for in Paragraph 3 of the LTTG and asked tenderers to present, at the time of submitting their tender, their own declaration that they undertook to pay the minimum wage and declarations on behalf of their subcontractors.

10. On 16 May 2013, RegioPost complained that the minimum wage declarations referred to in Paragraph 3 of the LTTG were contrary to public procurement law. It enclosed with its tender, which was submitted within the prescribed deadline, declarations by the subcontractors which it had drawn up on their behalf, but did not submit one for itself.

11. On 25 June 2013, the Stadt Landau in der Pfalz gave RegioPost the opportunity of producing the minimum wage declarations referred to in Paragraph 3 of the LTTG retrospectively, within a period of a fortnight, while at the same time pointing out that it would exclude RegioPost’s tender if RegioPost failed to comply with that request.

12. On 27 June 2013, RegioPost, which had not produced the declarations sought by the contracting authority, reiterated its complaints and stated that, if its tender were excluded, it would bring an action.

13. On 11 July 2013, the contracting authority informed RegioPost that, for want of the declarations requested, its tender could not be evaluated. At the same time, it stated that the two lots of the contract in question would be awarded to PostCon Deutschland GmbH and Deutsche Post AG respectively.

14. On 23 October 2013, the Vergabekammer Rheinland-Pfalz (Public Procurement Board of the *Land* of Rhineland-Palatinate) dismissed the application for review made by RegioPost on the grounds, in particular, that the latter’s tender had rightly been excluded because the declarations concerning the minimum wage legitimately requested by the contracting authority had not been produced.

15. Hearing the case on appeal, the referring court takes the view that the resolution of the case turns on whether Paragraph 3 of the LTTG is compatible with EU law.

16. More specifically, it considers that Paragraph 3 of the LTTG contains a ‘special condition relating to the performance of a contract’ which concerns ‘social considerations’ within the meaning of Article 26 of Directive 2004/18, and would be lawful only if compatible with the provisions of EU law concerning the freedom to provide services.

17. The referring court considers itself unable to determine the compatibility of that condition with EU law, even in the light of the Court's case-law, in particular the judgment in *Rüffert* (C-346/06, EU:C:2008:189).

18. As regards the compatibility of Paragraph 3 of the LTTG with the first paragraph of Article 56 TFEU, the referring court observes that the obligation incumbent on undertakings established in other Member States to adjust the wages paid to their employees to the — usually higher — level of remuneration applicable at the place of performance of the contract in Germany deprives those undertakings of a competitive advantage. Consequently, the obligation laid down in Paragraph 3 of the LTTG constitutes an obstacle prohibited, in principle, by the first paragraph of Article 56 TFEU.

19. The referring court takes the view, however, that EU law would not preclude the application of Paragraph 3 of the LTTG to those undertakings if it were to be found that the conditions governing the application of Article 3(1) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (3) had been satisfied.

20. It none the less has doubts in this regard.

21. The referring court points out that, although Paragraph 3 of the LTTG is indeed a legislative provision which itself fixes the minimum rate of pay, that provision does not guarantee all the staff employed by the successful tenderers the payment of such wages. It simply prohibits contracting authorities from awarding a public contract to tenderers who do not undertake to pay the minimum wage to the workers assigned to perform that contract exclusively.

22. The referring court further states that the obligation laid down in Paragraph 3 of the LTTG applies only to public contracts and not to the performance of private contracts. However, a worker assigned to perform such a contract is no less worthy of social protection than a worker performing a public contract. The referring court points out in this regard that the application of the judgment in *Rüffert* (C-346/06, EU:C:2008:189) in a situation such as that at issue in the main proceedings is a matter of debate in Germany. It also expresses serious doubts about the proposition to the effect that the requirement that a minimum rate of pay must be applied generally to all the kinds of contract at issue is confined exclusively to the situation, which gave rise to the judgment in *Rüffert*, in which that rate is fixed by means of collective agreements and not by legislative provisions.

23. Finally, if it were to be concluded that the requirement laid down in Paragraph 3 of the LTTG is compatible with Article 56 TFEU, the referring court takes the view that it would then be necessary to consider whether the penalty provided for in Paragraph 3 of the LTTG, that is to say, the tenderer's exclusion from participation in the procurement procedure, is compatible with Article 26 of Directive 2004/18. In particular, the referring court expresses doubts about whether the condition laid down in Paragraph 3 of the LTTG may be classified as a qualitative selection criterion, any failure to meet which could justify a tenderer's exclusion. Moreover, it considers that the penalty laid down in Paragraph 3 of the LTTG is redundant, for the successful tenderer is contractually bound to pay the statutory minimum wage once the contract has been concluded and any failure to comply with that obligation attracts a penalty as laid down in Paragraph 7 of the LTTG.

24. In those circumstances, the referring court decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the first paragraph of Article 56 TFEU in conjunction with Article 3(1) of Directive 96/71 to be interpreted as precluding a national provision which makes it mandatory for a contracting authority to award contracts only to undertakings which undertake and whose subcontractors undertake in writing, at the time of submitting the tender, to pay their employees who perform the contract a minimum wage fixed by the State for public contracts only but not for private ones, where there is neither a general statutory minimum wage nor a universally binding collective agreement that binds potential contractors and possible subcontractors?

(2) If the first question is answered in the negative:

Is EU law in the area of public procurement, in particular Article 26 of Directive 2004/18 to be interpreted as precluding a national provision such as the third sentence of Paragraph 3(1) of the [LTTG] which provides for the mandatory exclusion of a tender if an economic operator does not, already when submitting the tender, undertake in a separate declaration to do something which he would be contractually obliged to do if awarded the contract even without making that declaration?'

25. Written observations on those questions were submitted by the Stadt Landau in der Pfalz, Deutsche Post AG, the German, Danish, Italian, Austrian and Norwegian Governments and the European Commission. With the exception of the Italian and Austrian Governments, those parties, together with RegioPost, presented oral argument at the hearing of 29 April 2015.

II – Analysis

A – *The first question referred for a preliminary ruling*

26. By its first question, the referring court asks the Court whether legislation adopted by a federal entity of a Member State which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay the staff who will be called upon to perform the work forming the subject-matter of a public contract minimum hourly wages of EUR 8.70 (gross), as fixed by that legislation, is compatible with Article 56 TFEU and Article 3(1) of Directive 96/71.

1. The jurisdiction of the Court

27. The Stadt Landau in der Pfalz and the German and Italian Governments submit that, in so far as all the facts of the case in the main proceedings are confined within the territory of the Federal Republic of Germany, there is no need to answer this question, since the provisions of EU law relating to the freedom to provide services are not applicable to such a situation.

28. In my view, that argument cannot succeed.

29. It is true, as the order for reference makes clear, that all the undertakings which took part in the procedure for the award of the public contract in question are established in Germany, that that contract is to be performed in German territory, and that there is in addition nothing in the documents before the Court to indicate that subcontracting undertakings established in the territory of other Member States have been called upon to participate in the performance of the contract.

30. It is also true that the Treaty provisions relating to the freedom to provide services do not apply to situations in which all the relevant facts are confined within a single Member State. (4)

31. The Court considers, none the less, that it has jurisdiction to answer questions relating in particular to the interpretation of the Treaty provisions on the fundamental freedoms in contexts in which all the facts are confined within a single Member State in three cases: where it is 'far from inconceivable' that nationals of other Member States may, in similar situations, be faced with the contested national measures adopted by the Member State at issue when exercising one of those freedoms, (5) or where the domestic law prohibits 'reverse' discrimination (6) and/or where, in order to settle a purely internal dispute, domestic law makes a *renvoi*, in principle 'directly and unconditionally', to the rules of EU law. (7)

32. In the context of the first stream of case-law which has just been mentioned, the Court made it clear, in its judgments in *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:791, paragraph 26) and *Sokoll-Seebacher* (C-367/12, EU:C:2014:68, paragraph 11), that it had jurisdiction to answer questions referred for a preliminary ruling which, despite the purely internal nature of the situations giving rise to those questions, concerned the compatibility with the freedom of establishment guaranteed by the Treaty of national legislation which was *capable of producing effects* which are not confined to a single Member State. In such circumstances, it was 'far from inconceivable' that nationals of other Member States had been or were interested in exercising the fundamental freedom in question in those cases. (8)

33. Beyond the situation specific to the case in the main proceedings, the Court thus seems to be at pains to establish whether, by virtue of its purpose or its very nature, the national measure at issue is capable of producing cross-border effects. If that is the case, the Court will agree to answer the questions referred to it.

34. That case-law can be applied to the present case.

35. The purpose of the LTTG is to require the successful tenders for the award of public contracts organised by the contracting authorities of the *Land* of Rhineland-Palatinate to pay the minimum wage fixed by that *Land* for the performance of those contracts. Paragraph 3 of the LTTG requires every tenderer and any subcontractors it may engage, irrespective of their nationality or their place of residence, to give an undertaking in writing, at the time when the tender is submitted, to pay that minimum wage if in the end awarded the contract. As such, the LTTG may therefore produce effects beyond German territory, for the requirements which that legislation lays down apply without distinction to all calls for tenders, including those on an EU-wide scale, launched by the contracting authorities of the *Land* of Rhineland-Palatinate.

36. That was, furthermore, the situation at the time of the call for tenders giving rise to the case in the main proceedings. As is clear from the documents communicated by the referring court and as confirmed at the hearing by the Stadt Landau in der Pfalz, the public contract in question was launched on an EU-wide scale and its estimated value far exceeds the threshold of EUR 200 000 provided for in Article 7(b) of Directive 2004/18 that was applicable to public service contracts at the time of the facts of the case in the main proceedings. (9)

37. It is therefore by no means inconceivable that, when it was published in the *Official Journal of the European Union*, that call for tenders was of interest to a certain number of undertakings established in Member States other than Germany, but that those undertakings did not in the end participate in the procurement procedure for reasons which could be linked to the requirements laid down in Paragraph 3 of the LTTG.

38. It is, however, primarily the connection between the case in the main proceedings and the provisions of Directive 2004/18, the applicability of which is not in doubt, which supports my conviction that the objection as to lack of jurisdiction or inadmissibility raised by the Stadt Landau in der Pfalz and the German and Italian Governments must be dismissed. (10)

39. As the referring court has rightly pointed out, Article 26 of that directive grants contracting authorities the right to ‘lay down special conditions relating to the performance of a contract’ which may concern ‘social considerations’, provided that they are indicated in the contract notice or in the specifications and ‘are compatible with [EU] law’.

40. The *renvoi* so made by Article 26 of Directive 2004/18 to the provisions of EU law means that the conditions relating to the obligation to pay a minimum rate of pay laid down in Paragraph 3 of the LTTG, which are linked to the performance of the public contract, must be compatible with those provisions, including, therefore, with the freedom to provide services guaranteed by the Treaty.

41. Furthermore, as the Court has previously held, the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition and lay down criteria for the award of contracts that are intended to ensure such competition. (11)

42. Because the referring court, like the contracting authority, has a duty to ensure equal treatment for tenderers participating in a call for tenders relating to a contract falling within the ambit of Directive 2004/18, the latter therefore requires the referring court, when adjudicating on purely internal situations, to adopt the same solutions as those adopted in EU law in order, in particular, to avoid any discrimination between economic operators or any distortion of competition. (12)

43. That, at all events, is why I am of the opinion that, in so far as the contract notice in the case in the main proceedings falls within the ambit of the provisions of Directive 2004/18, it is primarily the conditions governing the application of Article 26 of that directive which form the true subject-matter

of the interpretation requested by the referring court in its first question. Consequently, if the first question referred by the national court is reworded in such a way as to relate to the interpretation of Article 26 of Directive 2004/18, the Court necessarily has jurisdiction to interpret that article. The applicability of the provisions of Directive 2004/18 does not depend on the existence of an actual link to the freedom of movement between the Member States; those provisions become relevant as soon as the amount of the contract at issue in the main proceedings exceeds the thresholds for the application of that directive, (13) which, in the case in the main proceedings, it does.

44. In those circumstances, I take the view that the Court has jurisdiction to answer the first question referred for a preliminary ruling by the national court. As I have said, in my opinion, its jurisdiction to do so is clear if that question is reworded in such a way as to seek an interpretation of the effect of the conditions laid down in Article 26 of Directive 2004/18.

2. Substance

45. In the light of the foregoing observations concerning the rewording of the question referred by the national court, I consider that that court seeks, in essence, to ascertain whether Article 26 of Directive 2004/18 is to be interpreted as meaning that it precludes the legislation of a regional entity of a Member State that requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay the staff who will be called upon to perform the work forming the subject-matter of a public procurement contract a minimum hourly wage of EUR 8.70 (gross), as fixed by that legislation.

46. Article 26 of Directive 2004/18 authorises contracting authorities to make the performance of the public contract subject to ‘special conditions’ which may concern ‘social considerations’, provided that those conditions are indicated in the contract notice or in the specifications and are ‘compatible with [EU] law’.

47. In this instance, the requirement for the successful tenderer to comply with the provisions of the LTTG, in particular Paragraph 3 thereof, was clearly indicated both in the contract notice and in the specifications in the case in the main proceedings. Moreover, there is no doubt, in my opinion, that the ‘social considerations’ referred to in Article 26 of Directive 2004/18 include the obligation for a successful tenderer and any subcontractors it engages, when performing a public contract, to pay a minimum rate of pay fixed by law for the benefit of the workers assigned to that task.

48. Recital 34 in the preamble to that directive confirms that ‘[t]he laws, regulations …, at … national … level, which are in force *in the areas of employment conditions* … apply during performance of a public contract, providing that such rules, and their application, *comply with [EU] law*’. (14) Compliance with a minimum rate of pay is eminently capable of falling within the category of employment conditions. (15)

49. In accordance with Article 26 of Directive 2004/18, read in the light of recital 34 of that directive, the possibility of requiring observance of such a minimum rate of pay must none the less be compatible with EU law.

50. It is therefore necessary to establish whether a requirement in respect of a minimum rate of pay for the purposes of the performance of a public procurement contract, such as that at issue in the case in the main proceedings, is compatible with the relevant provisions of EU law.

51. In that regard, the referring court and the interested parties take the view that such an examination must be undertaken primarily, if not exclusively, in the light of Article 3(1) of Directive 96/71, in so far as that provision governs the terms and conditions of employment which Member States may require of undertakings that temporarily post workers for the purpose of providing services.

52. I am unpersuaded by that approach.

53. The reason for this is that it is common ground that the case in the main proceedings does not fall within the ambit of any of the measures involving the posting of workers referred to in Article 1(3) of Directive 96/71. In particular, for the purposes of performing the public contract for which it

tendered, RegioPost, which is established in Germany, did not intend either to rely on an establishment or undertaking within its group which would have posted workers to German territory, or even to use the services of a temporary employment undertaking or placement agency which hires out workers from another Member State in order to have such workers posted to Germany.

54. From the point of view of the application of Directive 96/71, the situation giving to rise the present case is not substantially different from that which gave rise to the judgment in *Bundesdruckerei* (C-549/13, EU:C:2014:2235), in which the Court held that it could not examine the compatibility between the provisions of that directive and the legislation of a German *Land* requiring undertakings which had successfully tendered for a public contract to observe a minimum rate of pay fixed by that same legislation, on the ground that the situation at issue in the main proceedings was not covered by one of the three transnational measures referred to in Article 1(3) of Directive 96/71. (16)

55. It was apparent from the request for a preliminary ruling in that case that the undertaking Bundesdruckerei intended to perform the public contract in question (which concerned the digitalisation of documents and the conversion of data for the benefit of a German municipality) not by posting workers to German territory but by entrusting the contract to workers employed by one of its subsidiaries established in the territory of another Member State, namely Poland. (17)

56. In other words, according to the Court's reasoning, even though the situation in question was transnational, it did not involve the temporary posting of workers to German territory for the purpose of providing the services at issue.

57. It is also important to note that, in excluding the application of Directive 96/71, the Court drew attention, not to the situation as it stood when the contracting authority issued its contract notice at EU level, at which time the posting of workers to German territory was still a possibility, but to the specific situation in which Bundesdruckerei found itself and which had given rise to the reference for a preliminary ruling.

58. The Court thus inferred from those circumstances that the interpretation of Article 56 TFEU alone was relevant in *Bundesdruckerei* (C-549/13, EU:C:2014:2235, paragraph 29).

59. In my opinion, that is the approach that must be adopted in the present case too.

60. Consequently, in a situation such as that in the case in the main proceedings, I take the view that the *renvoi* made to EU law by Article 26 of Directive 2004/18 relates exclusively to Article 56 TFEU.

61. In order to ascertain whether a rule of national law such as Paragraph 3 of the LTTG is compatible with Article 56 TFEU, it is necessary, in essence, to determine whether the minimum rate of pay provided for in the legislation of the *Land* of Rhineland-Palatinate constitutes a restriction of the freedom to provide services, that could be justified by the objectives of combating distortions of competition or protecting workers, as both the Stadt Landau in der Pfalz and the German Government have submitted.

62. First of all, in the light of the case-law of the Court, there is no doubt that, in requiring suppliers which have successfully tendered for public contracts and any subcontractors they may engage to observe a minimum hourly rate of pay of EUR 8.70 (gross), legislation such as that of the *Land* of Rhineland-Palatinate may impose on service providers established in Member States other than Germany in which the minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in Germany. Consequently, such a national measure is capable of constituting a restriction within the meaning of Article 56 TFEU. (18)

63. Next, it must be ascertained whether such a national measure may be justified, inter alia, in the light of the objective of protecting workers.

64. In that connection, both RegioPost and the Commission submit, with reference in particular to paragraphs 29 and 39 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189), that this is not the case, since the protection afforded by Paragraph 3(1) of the LTTG does not extend to workers assigned to perform private contracts.

65. I do not share that view.

66. In *Rüffert*, the Court was asked about the compatibility with Article 3(1) of Directive 96/71 and with Article 56 TFEU of the legislation of a German *Land* requiring suppliers which had successfully tendered for public construction contracts and local public transport contracts to observe, when performing those contracts, the rate of pay provided for under a collective agreement referred to by the *Land* legislation in question.

67. In the light of the interpretation of Directive 96/71, which, according to the Court's reasoning in the judgment in *Rüffert* (C-346/06, EU:C:2008:189), is also relevant to the interpretation of Article 56 TFEU, the question thus arose as to whether the collective agreement at issue in that case had been declared universally applicable within the meaning of Article 3(1) of that directive. The Court held that that was not the case and that, consequently, the procedures for fixing the minimum rate of pay provided for by Directive 96/71 had not been observed.

68. Going somewhat beyond that issue (19) and examining the universal and binding effect of a collective agreement such as that at issue in that case, the Court held, in paragraph 29 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189), that such an effect could not be held to exist where, in particular, the 'legislation' of the *Land* in question, which referred to observance of the rate of pay provided for in that agreement, 'applie[d] only to public contracts and not to private contracts'.

69. In paragraph 39 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189), which forms part of the Court's 'confirmatory' reasoning relating to Article 56 TFEU, the Court reiterated word for word the assessment cited above, contained in paragraph 29 of the judgment.

70. None the less, the implications of the assessment contained in paragraphs 29 and 39 of the judgment in *Rüffert* must now be reconsidered in the light of Article 26 of Directive 2004/18, an entirely new provision in EU public procurement law which was not applicable at the time of the facts giving rise to that judgment. (20)

71. As I have already stated, Article 26 of Directive 2004/18 authorises Member States to require suppliers which have successfully tendered for public contracts to comply with *special* conditions, including employment conditions, when performing those contracts. If that authorisation is to continue to be of practical effect, the Member States must, in my view, be empowered to adopt laws, regulations or administrative provisions which, in the specific context of public contracts, lay down employment conditions, including a minimum rate of pay, for the benefit of the workers who provide services in performance of those contracts.

72. It is clear that, in exercising that power, the Member States and the contracting authorities must ensure that the principles of transparency and non-discrimination, as provided for in Article 26 of Directive 2004/18 in reference to EU law, are observed.

73. However, the exercise of that power cannot, in my view, be made subject to the requirement that the employment conditions in question, such as in this instance the minimum rate of pay, must also apply to workers performing private contracts. If that were the case, those conditions would cease to be 'special conditions' within the meaning of Article 26 of Directive 2004/18. Furthermore, a requirement to extend employment conditions to the performance of private contracts in this way would ultimately have the effect of compelling the Member States to introduce a universal minimum rate of pay applicable in some or all parts of their respective territories, which they are currently in no way obliged to do under EU law. (21)

74. In fact, in a context such as that at issue in the case in the main proceedings, such an extension, the reason for which would be concern to ensure the consistency of the *Land* legislation, even seems to me to be potentially prejudicial to the powers of the *Länder*.

75. As several interested parties have emphasised, while the *Länder* have the power under German law to lay down rules governing minimum rates of pay when issuing calls for tenders for public contracts, they have no such powers when it comes to fixing minimum rates of pay for workers as a whole.

76. The outcome of upholding the proposition advanced by RegioPost and the Commission would be that, in a case such as that in the main proceedings, a *Land* would be unable to apply its legislation transposing the authorisation granted by Directive 2004/18 because the scope of such legislation would have to extend beyond the specific public procurement sector in respect of which the *Land* has exercised its powers.

77. As a result, the *Land* would have no option but to refrain from applying that legislation until such time as the Federal State decided to introduce a universally applicable minimum rate of pay.

78. At Federal State level, that approach, which, if the line of argument put forward by RegioPost and the Commission is carried through to its logical conclusion, would have to be adopted in order to comply with the requirement to extend to private contracts the treatment previously reserved for public contracts, would effectively transform the option made available to Member States to introduce a minimum wage in their respective territories into an actual obligation, which, as I have already said, is by no means provided for by EU law as it currently stands.

79. At *Land* level, the introduction of a minimum rate of pay by the Federal State would render superfluous the legislative provisions adopted by the *Land* for the specific purpose of ensuring that successful tenderers fulfilled the obligation to pay a minimum wage to workers performing a public contract in its territory.

80. In such circumstances, the *Land*'s powers in this sphere would be significantly reduced, if not non-existent.

81. It might be argued, it is true, that, in the situation envisaged in the foregoing points of this Opinion, the *Länder* would still be authorised to adopt a (minimum) rate of pay higher than that fixed at Federal level in order, in particular, to take into account local costs of living. However, there would still be the question of whether such a rate would retain the status of a minimum rate of pay and, in particular, whether it would not itself have to be extended to workers assigned to the performance of private contracts. Ultimately, the *Länder* would quite simply have to waive their powers in the public procurement sector and apply the minimum rate of pay adopted at Federal level in that sector.

82. It should be recalled that, under Article 4(2) TEU, the Union is required to respect the national identity of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

83. It is true that Member States with a federal structure, such as the Federal Republic of Germany, may not rely on the internal allocation of competences between the authorities at regional and local level and the Federal authorities with a view to evading compliance with their obligations under EU law. (22) In order to ensure compliance with those obligations, those various authorities are bound to coordinate the exercise of their respective competences. (23)

84. That requirement presupposes, however, that the powers of those authorities can actually be exercised. To my mind, it is clear from Article 4(2) TEU that EU law cannot prevent a regional or local entity from actually exercising the powers vested in it within the Member State concerned. As the preceding submissions serve to demonstrate, however, that would be the ultimate consequence of RegioPost's and the Commission's argument that, in order to be compatible with Article 56 TFEU, the rule laid down in Paragraph 3 of the LTTG for the benefit of workers performing a public contract would have to be extended to workers assigned to the performance of private contracts.

85. It therefore seems to me to be perfectly consistent with the powers exercised by the *Land* of Rhineland-Palatinate that the scope of Paragraph 3 of the LTTG should be confined to workers performing public contracts.

86. As I see it, that approach is also consistent with the Court's case-law in the context of the special environmental considerations, applicable without distinction, which contracting authorities may require to be taken into account. Thus, that case-law recognises in particular that such considerations may be taken into account in the examination of criteria governing the award of public contracts for the provision of urban transport services and be compatible with the principle of non-discrimination,

without need for those considerations to be further extended to urban transport undertakings where these perform private contracts. (24) It is important to make the point that Article 26 of Directive 2004/18 refers to environmental considerations in the same way as to the social considerations examined in the present case. To my mind, the analogy which the German Government draws between those two types of considerations makes readily apparent the need to allow the Member States to adopt measures specific to the economic sector of public procurement.

87. Furthermore, a national measure such as Paragraph 3 of the LTTG seems to me to be entirely proportionate. It requires successful tenderers and any subcontractors they may engage to pay the minimum wage fixed by the *Land* of Rhineland-Palatinate only for the benefit of those of their workers who are assigned to the performance of public contracts, not for the benefit of all their employees.

88. Consequently, it is my view that Paragraph 3 of the LTTG may be justified by the objective of protecting workers and, therefore, that Article 56 TFEU does not preclude the application of a provision of that kind in a situation such as that in the case in the main proceedings, there being no need for the scope of that provision to be extended to private contracts.

89. In the light of all those considerations, I propose that the first question referred for a preliminary ruling by the national court be answered as follows: Article 26 of Directive 2004/18 is to be interpreted as not precluding the legislation of a regional entity of a Member State which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay the staff who will be called upon to perform the work forming the subject-matter of a public procurement contract a minimum hourly wage of EUR 8.70 (gross), fixed by that legislation.

B – *The second question referred for a preliminary ruling*

90. By its second question referred for a preliminary ruling, the national court wishes to ascertain, in essence, whether Article 26 of Directive 2004/18 must nevertheless be interpreted as precluding a provision adopted by a regional entity of a Member State, such as Paragraph 3(1) of the LTTG, which provides that a tender must compulsorily be excluded if the tenderer fails, when submitting its tender, to give an undertaking, in a separate declaration, in respect of the minimum rate of pay laid down by that provision, and which it would be contractually bound to pay in any case if it were awarded the contract.

91. That question calls for an examination, first, of the means by which the Member States are authorised to verify that the conditions laid down in Article 26 of Directive 2004/18 have been satisfied, and secondly, supposing that those conditions are not met, of the issue of whether a penalty, such as exclusion from participating in the public procurement procedure, is appropriate.

92. With the exception of RegioPost, all the parties which have submitted observations on this question contend that the Member States are authorised to review compliance with the conditions laid down in Article 26 of Directive 2004/18, in particular by means of a system whereby the tenderer makes a declaration of its undertaking at the time when it submits its tender, and that, if such a declaration is not produced, the contracting authority is authorised to exclude the tenderer from the procurement procedure.

93. I concur with the position adopted by the latter parties.

94. As regards the first point, it is, to my mind, clear that if, as I consider, the Member States are authorised under EU law to adopt laws or regulations aimed at imposing on successful tenderers special employment conditions such as payment of a minimum rate of pay in the performance of public contracts, that authorisation necessarily implies that the Member States may adopt measures enabling the contracting authority to ensure that the tenderers and their subcontractors are prepared to fulfil those conditions in the event that the contract is awarded to them.

95. In the present case, the measure at issue takes the form of a written declaration of commitment which the tenderer must provide both for itself and, if appropriate, for its subcontractors.

96. Contrary to what appears to have been stated in the contract notice in the case in the main proceedings, that declaration does not appear to be a document relating to the minimum level of economic and financial standing that may be required of the tenderer under Article 47 of Directive 2004/18, which may be demonstrated by one or more of the references listed in that article or by any document deemed appropriate by the contracting authority, in particular the economic operator's balance-sheet or a statement of its overall or sector-specific turnover.

97. It is above all else a declaration of an undertaking to observe the law, that is to say, more specifically, the employment conditions required by the legislation of the *Land* of Rhineland-Palatinate, when performing the work forming the subject-matter of the public contract.

98. It could, it is true, be argued, as the Commission did at the hearing before the Court, that proof that the tenderer or its subcontractors are able to pay the minimum wage fixed by the legislation of the *Land* of Rhineland-Palatinate to the employees assigned to perform the public procurement contract requires a certain financial capacity.

99. Even if the Court were to take the view that the declaration of an undertaking to pay a minimum wage has to do with the tenderer's financial standing, the requirement to submit such a declaration would not be prohibited by Article 47 of Directive 2004/18. The Court has already made it clear that the list of criteria for assessing the minimum level of economic and financial standing required is not exhaustive. (25)

100. At all events, such a declaration of an undertaking to pay the minimum wage fixed by the legislation of the *Land* of Rhineland-Palatinate is not in itself capable of placing on the tenderer an additional burden so intolerable as to render the procurement procedure more onerous than it would be without the requirement to produce that declaration. In asking for that declaration, the contracting authority seeks only to verify that the tenderer undertakes to comply with the condition for the performance of the contract laid down in Paragraph 3 of the LTTG. As the Commission submits, moreover, such a declaration is a proven means of verifying that tenderers and their subcontractors satisfy the conditions governing the performance of public contracts. Requiring the submission of such a declaration also lends transparency to the special conditions set out in the contract notice and/or specifications by alerting tenderers to the importance which the contracting authority attaches to those conditions.

101. As regards the second point, that is to say, exclusion from the procurement procedure if the tenderer refuses to give such a declaration of commitment, I would endorse the Commission's argument that such a refusal supports the assumption that the tenderer does not intend to submit to the condition laid down in Paragraph 3 of the LTTG.

102. Pursuing a procurement procedure with such an economic operator and, if appropriate, awarding the contract to that operator, only to have to impose contractual penalties on it later on account of its failure to observe the condition laid down in Paragraph 3 of the LTTG, would be paradoxical and incompatible with the rational use of public finances.

103. It is important to point out, moreover, that recital 34 of Directive 2004/18 provides in particular that, in the event of non-compliance with the obligations connected with observance of the laws and regulations in force in the sphere, in particular, of conditions of employment, the Member States may classify such non-compliance as grave misconduct or an offence concerning the professional conduct of the economic operator concerned that is liable to lead to the exclusion of that operator from the public procurement procedure.

104. While, in my view, the refusal to submit a declaration of commitment to pay the minimum wage cannot, as such, be regarded as grave misconduct, the idea underlying recital 34 of Directive 2004/18 is indeed that it is recognised that the Member States are entitled to exclude an economic operator who has no intention of complying with the employment conditions applicable in the place of performance of the public contract. In my opinion, the Member States cannot be required to employ such a measure only in situations in which their authorities find that there has been an infringement of the obligations linked to compliance with those employment conditions by the supplier which has tendered for the public procurement contract.

105. Excluding the tenderer from the procurement procedure on the ground that it refuses to submit a declaration of commitment as referred to in Paragraph 3 of the LTTG is therefore, in my opinion, an appropriate means of ensuring that the contracting authority is not prompted to select a candidate which has no intention of satisfying the requirements laid down by that contracting authority with respect to payment of the minimum wage.

106. Finally, as is clear from the facts of the case in the main proceedings, it is important to make the point that the exclusion of a tenderer which has failed to enclose a declaration of commitment to pay the minimum wage when submitting its tender is not automatic. Under Paragraph 3 of the LTTG, the contracting authority is not authorised to exclude such a tender until it has made a further request for the production of the declaration of commitment within a certain period of time. This serves as a remedial measure in cases of forgetfulness or error on the part of the tenderer at the time of submitting the tender. Such an obligation for the contracting authority appears to be a wholly proportionate measure.

107. In the light of those considerations, I propose that the second question referred for a preliminary ruling be answered as follows: Article 26 of Directive 2004/18 is to be interpreted as not precluding the legislation of a regional entity of a Member State which provides for the mandatory exclusion of a tender where a supplier tendering for a public contract fails to give an undertaking, on its own and its subcontractors' behalf, in a separate declaration made at the time of submitting its tender or after having received a further request to that effect from the contracting authority, that it would pay the minimum wage fixed by that legislation if it were to be awarded the task of performing the work forming the subject-matter of the public procurement contract in question.

III – Conclusion

108. In the light of all the foregoing considerations, I propose that the questions referred by the Oberlandesgericht Koblenz be answered as follows:

(1) Article 26 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts is to be interpreted as not precluding the legislation of a regional entity of a Member State which requires tenderers and their subcontractors to undertake, by means of a written declaration to be enclosed with their tender, to pay the staff who will be called upon to perform the work forming the subject-matter of a public procurement contract a minimum hourly wage of EUR 8.70 (gross), fixed by that legislation.

(2) Article 26 of Directive 2004/18 is to be interpreted as not precluding the legislation of a regional entity of a Member State which provides for the mandatory exclusion of a tender where a supplier tendering for a public contract fails to give an undertaking, on its own and its subcontractors' behalf, in a separate declaration made at the time of submitting its tender or after having received a further request to that effect from the contracting authority, that it would pay the minimum wage fixed by that legislation, if it were to be awarded the task of performing the work forming the subject-matter of the public procurement contract in question.

---

1 – Original language: French.

---

2 – OJ 2004 L 134, p. 114, corrigendum in OJ 2004 L 351, p. 4. That directive was last amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC, 2004/18 and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contracts (OJ 2011 L 319, p. 43). It was replaced by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65). However, the latter directive was not applicable at the time of the facts giving rise to the dispute in the main proceedings.

---

3 – OJ 1997 L 18, p. 1.

4 – See, inter alia, the judgment in *Omalet* (C-245/09, EU:C:2010:808, paragraph 12) and the order in *Tudoran* (C-92/14, EU:C:2014:2051, paragraph 37).

5 – See, inter alia, in relation to the freedom of establishment, the judgment in *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 40) and, in the field of the freedom to provide services, the judgments in *Garkalns* (C-470/11, EU:C:2012:505, paragraph 21) and *Citroën Belux* (C-265/12, EU:C:2013:498, paragraph 33).

6 – See in particular the judgments in *Guimont* (C-448/98, EU:C:2000:663, paragraph 23); *Salzmann* (C-300/01, EU:C:2003:283, paragraph 34); *Susisalo and Others* (C-84/11, EU:C:2012:374, paragraphs 21 and 22); and *Ordine degli Ingegneri di Verona e Provincia and Others* (C-111/12, EU:C:2013:100, paragraph 34).

7 – See, inter alia, the judgments in *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360, paragraph 37); *Cicala* (C-482/10, EU:C:2011:868, paragraph 19); *Nolan* (C-583/10, EU:C:2012:638, paragraph 47); and *Romeo* (C-313/12, EU:C:2013:718, paragraph 23).

8 – Judgments in *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:791, paragraphs 25 and 26) and *Sokoll-Seebacher* (C-367/12, EU:C:2014:68, paragraphs 10 and 11).

9 – The services covered by Directive 2004/18 include services for the transport of mail by land, pursuant to point 4 of Annex II A. The threshold of EUR 200 000 referred to in Article 7(b) of Directive 2004/18 was fixed by Article 2(1)(b) of Regulation No 1251/2011.

10 – Although those interested parties submit that the first question is inadmissible, the consequence of a finding that the situation at issue is purely internal would have to prompt the Court to declare, in principle, that it has no jurisdiction to answer the question. That situation is in fact one which, in principle, involves no factor connecting it to EU law and cannot therefore be remedied by the sending of a new request for a preliminary ruling.

11 – See the judgments in *Concordia Bus Finland* (C-513/99, EU:C:2002:495, paragraph 81) and *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127, paragraph 26).

12 – See, by analogy, with regard to the obligation, arising from the application of national legislation, to extend the solutions adopted by EU law to purely internal situations, the judgments in *Modehuis A. Zwijnenburg* (C-352/08, EU:C:2010:282, paragraph 33) and *Isbir* (C-522/12, EU:C:2013:711, paragraph 28).

13 – See, by analogy, with regard to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which was repealed by Directive 2004/18, the judgment in *Michaniki* (C-213/07, EU:C:2008:731, paragraphs 29 and 30).

14 – Emphasis added.

15 – By way of illustration, the first subparagraph of Article 3(1) of Directive 96/71, which lists the ‘terms and conditions of employment’ which the Member States are entitled to require of undertakings posting

workers to their territory for the purpose of providing services, refers, inter alia, to ‘minimum rates of pay’.

---

16 – Judgment in *Bundesdruckerei* (C-549/13, EU:C:2014:2235, paragraph 27).

---

17 – Idem (paragraphs 25 and 26).

---

18 – See the judgment in *Rüffert* (C-346/06, EU:C:2008:189, paragraph 37). See also the judgment in *Bundesdruckerei* (C-549/13, EU:C:2014:2235, paragraph 30).

---

19 – The Court looked at whether the collective agreement in question satisfied the material conditions laid down in Article 3(8) of Directive 96/71, which provision, as the Court itself confirmed in paragraph 27 of the judgment in *Rüffert* (C-346/06, EU:C:2008:189), applies only to Member States which have no system for declaring collective agreements to be of universal application (as was the case with the Kingdom of Sweden in *Laval un Partneri*, C-341/05, EU:C:2007:809). However, since the Federal Republic of Germany did have such a system, there was no need to examine whether the conditions under Article 3(8) of Directive 96/71 were met.

---

20 – While the period prescribed for transposing Directive 2004/18 expired on 31 January 2006, the events giving rise to *Rüffert* took place during the course of 2003 and 2004.

---

21 – On the absence of any such obligation under Directive 96/71 in particular, see the judgment in *Commission* v *Germany* (C-341/02, EU:C:2005:220, paragraph 26) and my Opinion in *Laval un Partneri* (C-341/05, EU:C:2007:291, point 196).

---

22 – See, inter alia, the judgment in *Carmen Media Group* (C-46/08, EU:C:2010:505, paragraph 69 and the case-law cited).

---

23 – See the judgments in *Carmen Media Group* (C-46/08, EU:C:2010:505, paragraph 70) and *Digibet and Albers* (C-156/13, EU:C:2014:1756, paragraph 35).

---

24 – See the judgment in *Concordia Bus Finland* (C-513/99, EU:C:2002:495, paragraphs 83 to 86).

---

25 – See the judgment in *Édukövízig and Hochtief Construction* (C-218/11, EU:C:2012:643, paragraph 28).

JUDGMENT OF THE COURT (Fifth Chamber)

6 October 2015 (*)

(Reference for a preliminary ruling — Directive 89/665/EEC — Public procurement — National legislation — Fees for access to administrative proceedings in the field of public procurement — Right to an effective remedy — Dissuasive fees — Judicial review of administrative decisions — Principles of effectiveness and equivalence — Effectiveness)

In Case C-61/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale regionale di giustizia amministrativa di Trento (Italy), made by decision of 21 November 2013, received at the Court on 7 February 2014, in the proceedings

Orizzonte Salute — Studio Infermieristico Associato

v

Azienda Pubblica di Servizi alla persona San Valentino — Città di Levico Terme,

Ministero della Giustizia,

Ministero dell'Economia e delle Finanze,

Presidenza del Consiglio dei Ministri,

Segretario Generale del Tribunale regionale di giustizia amministrativa di Trento,

intervening parties:

Associazione Infermieristica D & F Care,

Camera degli Avvocati Amministrativisti,

Camera Amministrativa Romana,

Associazione dei Consumatori Cittadini Europei,

Coordinamento delle associazioni e dei comitati di tutela dell'ambiente e dei diritti degli utenti e dei consumatori (Codacons),

Associazione dei giovani amministrativisti (AGAmm),

Ordine degli Avvocati di Roma,

Società italiana degli avvocati amministrativisti (SIAA),

Ordine degli Avvocati di Trento,

Consiglio dell'ordine degli Avvocati di Firenze,

Medical Systems SpA,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász (Rapporteur) and D. Šváby, Judges,

Advocate General: N. Jääskinen,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 11 February 2015,

after considering the observations submitted on behalf of:

– Orizzonte Salute — Studio Infermieristico Associato, by M. Carlin, M. Napoli, M. Zoppolato and M. Boifava, avvocati,

– the Azienda Pubblica di Servizi alla persona San Valentino — Città di Levico Terme, by R. De Pretis, avvocata,

– the Camera degli Avvocati Amministrativisti, by A. Grappelli, M. Ida Leonardo, M. Rossi Tafuri, F. Marascio, M. Martinelli, E. Papponetti and M. Togna, avvocati,

– the Camera Amministrativa Romana, by F. Tedeschini, C. Malinconico, P. Leozappa, F. Lattanzi and A.M. Valorzi, avvocati,

– the Associazione dei Consumatori Cittadini europei, by C. Giurdanella, P. Menchetti, S. Raimondi and E. Barbarossa, avvocati,

– the Coordinamento delle associazioni per la tutela dell'ambiente e dei diritti degli utenti e consumatori (Codacons), by C. Rienzi, G. Giuliano, V. Graziussi and G. Ursini, avvocati,

– the Associazione dei Giovani Amministrativisti (AGAmm), by G. Leccisi and J. D'Auria, avvocati,

– the Ordine degli Avvocati di Roma, by S. Orestano, S. Dore and P. Ziotti, avvocati,

– the Società Italiana degli Avvocati Amministrativisti (SIAA), by F. Lubrano, E. Lubrano, P. De Caterini, A. Guerino, A. Lorang, B. Nascimbene, E. Picozza, F.G. Scocca and F. Sorrentino, avvocati,

– Medical Systems SpA, by R. Damonte, M. Carlin and E. Boglione, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

– the Greek Government, by K. Paraskevopoulou and V. Stroumpouli, acting as Agents,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by F. Moro and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 May 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').

2 This request has been made in proceedings between, on the one hand, Orizzonte Salute — Studio Infermieristico Associato (‘Orizzonte Salute’) and, on the other, the Azienda Pubblica di Servizi alla persona San Valentino — Città di Levico Terme (the San Valentino public personal assistance agency of the city of Levico Terme; the ‘Azienda’), the Ministero della Giustizia (Ministry of Justice), the Ministero dell’Economia e delle Finanze (Ministry of Economic and Financial Affairs), the Presidenza del Consiglio dei Ministri (Presidency of the Council of Ministers) and the Segretario Generale del Tribunale regionale di giustizia amministrativa di Trento (Secretary General of the Regional Administrative Court of Trento), concerning (i) the extension of a contract for the provision of nursing services and a call for tenders issued at a later stage and (ii) court fees for bringing administrative judicial challenges relating to public procurement.

Legal context

EU Law

3 Pursuant to recital 3 in the preamble to Directive 89/665, the opening-up of public procurement to EU competition necessitates a substantial increase in the guarantees of transparency and non-discrimination and, for that to have tangible effects, effective and rapid remedies must be available in the case of infringements of EU law in the field of public procurement or national rules implementing that law.

4 Article 1 of that directive, entitled ‘Scope and availability of review procedures’, provides:

‘1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [OJ 2004 L 134, p. 114], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed [EU] law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing [EU] law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

…’

5 Article 7 of Directive 2004/18, entitled ‘Threshold amounts for public contracts’, establishes the thresholds for the estimated values beyond which the award of a contract must be made in accordance with the rules in that directive.

6 Those thresholds are changed at regular intervals by European Commission regulations and are adapted to the economic circumstances. At the date of the facts in the main proceedings, the threshold concerning service contracts awarded by awarding authorities other than central governmental authorities was set at EUR 193 000 by Commission Regulation (EC) No 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2009 L 314, p. 64).

Italian law

7 Article 13(1) of Decree of the President of the Republic No 115, of 30 May 2002, as amended by Law No 228 of 24 December 2012 ('the decree'), established a fee regime for judicial acts, made up of a standard fee, determined in proportion to the sum involved in the dispute.

8 In contrast with the provisions regarding civil proceedings, Article 13(6a) of the decree fixes the standard fee for administrative proceedings irrespective of the sum involved in the dispute.

9 Pursuant to that article, where an action is brought before a regional administrative court or the Consiglio di Stato (Council of State), the standard fee generally amounts to EUR 650. None the less, in relation to particular subject-matters that article sets the standard fee at different amounts which can be increased or reduced.

10 Article 13(6a)(d) of the decree provides that the standard fee in relation to public procurement litigation amounts to:

– EUR 2 000 where the value of the contract is EUR 200 000 or less;

– EUR 4 000 in cases where the value of the contract is between EUR 200 000 and EUR 1 000 000;

– and EUR 6 000 in cases where it is over EUR 1 000 000.

11 Under Article 13(1a) of the decree, those amounts must be increased by 50% in appeal proceedings relating to the award of public contracts.

12 Pursuant to Article 13(1c) of the decree, where the appeal, even a cross-appeal, is dismissed in its entirety, declared inadmissible or cannot be taken into consideration, the appellant is obliged to pay, in respect of the standard fee, an additional sum of the same amount as that initially paid for the same appeal, whether it be a main appeal or cross-appeal.

13 The order for reference indicates that, under the applicable legislation, the standard fee is payable for the lodging, not only of the application instituting proceedings, but also of a cross-claim or of supplementary pleas introducing new claims.

14 Article 14(3) of the decree provides that the sum involved in the dispute does not correspond to the profit margin which may result from performance of the contract, as determined by the contracting authorities, but rather to the basic value of the contract.

The dispute in the main proceedings and the question referred for a preliminary ruling

15 Orizzonte Salute is an association providing public and private bodies with nursing services. By its action, supplemented by additional pleas on a number of occasions, Orizzonte Salute is challenging, before the referring court, the Azienda's successive awards of the management of nursing services to the Associazione infermieristica D & F Care as well as other decisions taken by the Azienda.

16 The management of those services was awarded, first, by extension of the contract entered into with the Associazione infermieristica D & F Care for an earlier period and, subsequently, following a call for tenders inviting applications from only certain associations accredited by the Infermieri Professionali Assistenti Sanitari Vigilatrici d'Infanzia (IPASVI) (Professional Association of Nurses Specialising in the Care of Infants), with which Orizzonte Salute was not registered.

17 In respect of court fees, Orizzonte Salute paid a standard court fee of EUR 650, the cost of instituting ordinary administrative proceedings.

18 By decision of 5 June 2013, the Segretario Generale del Tribunale regionale di giustizia amministrativa di Trento asked Orizzonte Salute to make an additional payment since, on account of its supplementary

pleas, the dispute now related to public procurement and it was therefore necessary to meet the standard fee for such cases, which amounted to EUR 2 000.

19 By a new action introduced on 2 July 2013, Orizzonte Salute challenged that decision claiming infringement of Article 13(6a) of the decree and the unconstitutionality of that provision.

20 With regard to that action, the State authorities brought an action on the ground that the Tribunale regionale di giustizia amministrativa di Trento (Regional Administrative Court of Trento) lacked jurisdiction, since, in their view, the standard fee constitutes tax revenue and a dispute about tax revenue falls within the competence of the tax court. They also disputed the merits of that application.

21 While accepting that the standard fee is a tax, the referring court states that, in the case pending before it, at issue is a measure adopted by its Segretario Generale, which is an administrative decision. Thus, in its view, the decision of 5 June 2013 must be subject to review by the administrative court. In addition, the referring court takes the view that Orizzonte Salute has an interest in the annulment of the application for payment of the increased court fees.

22 That court notes that, contrary to what is laid down for civil proceedings, in administrative proceedings the amount of the standard fee is not linked to the sum involved in the dispute and, for particular areas of administrative law, specific amounts are set.

23 The referring court observes that, in procedures for the award of public contracts, the standard fee to be paid is considerably larger than the amounts to be paid for administrative disputes in ordinary proceedings.

24 The referring court considers that the taxation of actions before the administrative court, especially so far as concerns the award of public contracts, may dissuade undertakings from pursuing their legal action and therefore poses problems of compliance with the criteria and principles of the EU legal order. The referring court presumes that the undertaking's profit margin amounts, in general, to approximately 10% of the value of the contract and considers that the advance payment of a standard fee exceeding the amount of such a profit may lead individuals to abandon certain procedural mechanisms.

25 Thus, according to the referring court, the national legislation at issue in the main proceedings limits the right to bring legal proceedings, restricts the effectiveness of judicial review, discriminates against operators with weak financial capacity as opposed to operators with significant financial capacity and treats them unfavourably by comparison with operators who, within the context of their activities, bring actions before the civil and commercial courts. The referring court takes the view that the cost borne by the State for the operation of administrative justice so far as concerns public procurement is not significantly different, separate or higher than the cost of proceedings linked to other types of disputes.

26 The referring court makes reference to the theory that the national legislature certainly intended to reduce the weight of the backlog of court cases and facilitate both the carrying out of public works and the public acquisition of goods and services. In that regard, the referring court notes that public procurement litigation significantly decreased as from 2012.

27 The referring court states that the value of the public contract, calculated overall, is higher than the threshold laid down in Directive 2004/18. That court therefore considers that the principles of effectiveness, expediency, non-discrimination and availability set out in Article 1 of Directive 89/665 are applicable to the main proceedings. In its view, the national legislation at issue infringes those principles and the right to an effective remedy, reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

28 In those circumstances, the Tribunale regionale di giustizia amministrativa di Trento decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do the principles laid down in … Directive 89/665 … preclude a provision of national law … which lays down high amounts for the standard fee for access to administrative proceedings relating to public contracts?'

Admissibility of the written observations submitted to the Court by the interveners in the main proceedings

29 The Coordinamento delle associazioni e dei comitati di tutela dell'ambiente e dei diritti degli utenti e dei consumatori (Codacons) (Coordination of the Associations and Committees for the Protection of the Environment and the Rights of Users and Consumers), the Camera Amministrativa Roma (Administrative Chamber of Rome), the Associazione dei Consumatori Cittadini Europei (Association of European Consumers), the Ordine degli Avvocati di Roma (Rome Bar Association), the Associazione dei giovani amministrativisti (Administrative Youth Association) and the Società italiana degli avvocati amministrativisti (Italian Society of Administrative Law Lawyers) (collectively, 'the interveners in the main proceedings') intervened in the main proceedings in order to support Orizzonte Salute and submitted written observations to the Court.

30 The Italian Government contends that the written observations submitted by the interveners after the delivery of the order for reference and the suspension of the main proceedings are inadmissible. According to the Italian Government, that inadmissibility follows from Article 23 of the Statute of the Court of Justice of the European Union and the national court does not have the power, after stay of the proceedings, to assess the admissibility of an intervention made subsequent to the reference. That Government takes the view that the written observations submitted by natural and legal persons other than those in issue on the date when the request for a preliminary ruling was made must be removed from the file in order to prevent the proceedings turning into an *actio popularis*.

31 In that regard, it should be observed that, so far as concerns participation in preliminary ruling proceedings, in accordance with Article 96(1) of the Rules of Procedure read in conjunction with Article 23 of the Statute of the Court, the parties to the main proceedings, the Member States, the Commission and, where relevant, the institution, body, office or agency of the European Union which adopted the act the validity or interpretation of which is in dispute, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and the EFTA Surveillance Authority and the non-Member States concerned are authorised to submit observations to the Court. Since the list contained in those provisions is exhaustive, that right cannot be extended to natural or legal persons not expressly provided for.

32 According to Article 97(1) of the Rules of Procedure, the 'parties to the main proceedings' are determined as such by the referring court or tribunal in accordance with national rules of procedure. Consequently, it is for the referring court to determine, in accordance with national rules of procedure, the parties to the main proceedings pending before it.

33 It is not for the Court to determine whether a decision of the referring court accepting an intervention before it has been taken in accordance with those rules. The Court must abide by such a decision in so far as it has not been overturned in any appeal procedures provided for by national law (see, by analogy, judgments in *Radlberger Getränkegesellschaft and S. Spitz*, C-309/02, EU:C:2004:799, paragraph 26, and *Burtscher*, C-213/04, EU:C:2005:731, paragraph 32).

34 It is not claimed in the present case that the decision relating to the admission of the interveners in the main proceedings was not consistent with the rules governing the proceedings pending before the referring court or that an appeal has been lodged against that decision.

35 The capacity of 'party to the main proceedings' within the meaning of Article 96(1) of the Rules of Procedure read in conjunction with Article 23 of the Statute of the Court of Justice cannot be accorded to a person and that person cannot be admitted in proceedings before the Court referred to in Article 267 TFEU where that person submits to a national court an application to intervene not in order to play an active role in the continuation of the proceedings before the national authority, but for the sole purpose of participating in the proceedings before the Court (see, to that effect, order in *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2009:789, paragraph 9).

36 However, there is nothing in the file to demonstrate that the interveners in the main proceedings do not intend to play an active role in the proceedings before the referring court and seek to express their views exclusively within the context of the proceedings before the Court.

37 Lastly, it would be incompatible with the principle of the sound administration of justice and the requirement that requests for a preliminary ruling be dealt with within a reasonable period of time if, on account of the successive admission of interveners and the period of two months laid down in the second paragraph of Article 23 of the Statute of the Court of Justice for the submission of the written observations of those interveners, the written procedure before the Court could not be closed or the procedure had to be reopened.

38 In those circumstances, Article 97(2) of the Rules of Procedure of the Court provides that, where a referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed.

39 Accordingly, the Court may find it necessary to allow an intervener admitted to the main proceedings to submit written observations only within the time-limit applicable to the interested parties, for the purpose of Article 23 of the Statute of the Court, to which the request for a preliminary ruling was initially notified.

40 It must be stated that, within the context of the present proceedings, the submission of the written observations of the interveners admitted to the main proceedings by the referring court did not amount to a risk to the sound administration of justice or to dealing with the case within a reasonable period of time. The Court has therefore considered that there was no need to make use of the option mentioned in the preceding paragraph of this judgment.

41 In the light of the above, the Court rejects the arguments of the Italian Government seeking to have the written observations submitted by the interveners in the main proceedings declared inadmissible. Those written observations submitted to the Court are admissible.

Consideration of the question referred

42 By its question the referring court asks, in essence, whether Article 1 of Directive 89/665 and the principles of effectiveness and equivalence must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which requires, when actions are brought in administrative judicial proceedings relating to public procurement, the payment of higher court fees than in other matters.

43 Article 1(1) and (3) of Directive 89/665 requires the Member States to take the measures necessary to guarantee reviews which are effective and as rapid as possible against decisions of the contracting authorities which are incompatible with EU law and ensure wide availability of reviews with respect to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

44 That directive leaves Member States a discretion in the choice of the procedural guarantees for which it provides, and the formalities relating thereto (see judgment in *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, C-568/08, EU:C:2010:751, paragraph 57).

45 In particular, Directive 89/665 does not contain any provision relating specifically to the court fees to be paid by individuals when they bring, in accordance with Article 2(1)(b) of that directive, an action for annulment against an allegedly unlawful decision concerning a procedure for the award of public contracts.

46 The Court has consistently held that, in the absence of EU rules governing the matter, it is for each Member State, in accordance with the principle of the procedural autonomy of the Member States, to lay down the detailed rules of administrative and judicial procedures governing actions for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (judgments in *Club Hotel Loutraki and Others*, C-145/08 and C-149/08, EU:C:2010:247, paragraph 74, and *eVigilo*, C-538/13, EU:C:2015:166, paragraph 39).

47 In addition, since such court fees amount to detailed procedural rules governing actions for safeguarding rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities, they must not compromise the effectiveness of Directive 89/665 (see, to that effect, judgments in *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 72, and *eVigilo*, C-538/13, EU:C:2015:166, paragraph 40).

48 As regards the principle of effectiveness, the Court has already held that it implies a requirement of judicial protection, guaranteed by Article 47 of the Charter, that is binding on the national court (see, to that effect, judgment in *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 35 and the case-law cited).

49 Accordingly, Article 1 of Directive 89/665 must be interpreted in the light of the fundamental rights set out in the Charter, in particular the right to an effective remedy before a court or tribunal, laid down in Article 47 thereof (see, to that effect, judgment in *Ryneš*, C-212/13, EU:C:2014:2428, paragraph 29).

50 It is therefore necessary to examine whether legislation such as that at issue in the main proceedings may be considered to be consistent with the principles of equivalence and effectiveness and consistent with the effectiveness of Directive 89/665.

51 The two parts of that investigation concern (i) the amounts of the standard fee to be paid for bringing an action in administrative judicial proceedings relating to public procurement and (ii) cases of a cumulation of such fees paid within the same administrative judicial proceedings relating to public procurement.

The standard fee to be paid for bringing an action in administrative judicial proceedings relating to public procurement

52 At the outset, it is important to recall, as the Austrian Government has observed, that, pursuant to Article 1(1) of Directive 89/665, that directive applies to the contracts referred to in Directive 2004/18, except for cases in which such contracts are excluded in accordance with Articles 10 to 18 of the latter directive.

53 However, according to Article 7, in Chapter II of Directive 2004/18, entitled ‘Scope’, that directive applies only to public contracts which have a value, exclusive of value-added tax, estimated to be equal or greater than the thresholds provided for in that provision.

54 It follows that public service contracts awarded by contracting authorities other than central governmental authorities with a value less than EUR 193 000 are not covered by Directive 2004/18 and, as a result, are also not covered by Directive 89/665.

55 As regards the principle of effectiveness, it should be recalled that the court fee regime at issue in the main proceedings includes three fixed amounts of standard fee amounting to EUR 2 000, EUR 4 000 and EUR 6 000 for the three categories of public contracts, namely those with a value equal to or less than EUR 200 000, those with a value between EUR 200 000 and EUR 1 000 000, and those with a value exceeding EUR 1 000 000.

56 It is apparent from the file placed before the Court that the system of fixed amounts of standard fee is proportional to the value of the public contracts falling within those three different categories and is, as a whole, degressive in nature.

57 In fact, the standard fee to be paid, expressed as a percentage of the ‘limit’ values of the three categories of public contracts, varies from 1.0% to 1.036% of the value of the contract if it is between EUR 193 000 and EUR 200 000, from 0.4% to 2.0% if that value is between EUR 200 000 and EUR 1 000 000, and corresponds to 0.6% of the value of the contract or less if that value exceeds EUR 1 000 000.

58 The court fees to be paid for bringing an action in administrative proceedings relating to public procurement, which do not exceed 2% of the value of the contract concerned, are not liable to render

practically impossible or excessively difficult the exercise of rights conferred by EU public procurement law.

59 None of the factors raised by the referring court or by the interested parties which submitted observations to the Court calls that finding into question.

60 In particular, so far as concerns the fixing of the standard fee depending on the value of the contract at issue in the main proceedings, and not depending on the profit which the undertaking participating in the call for tenders is entitled to expect from that contract, it should be stated, first, that several Member States recognise the possibility of calculating procedural costs on the basis of the value of the subject-matter to which a dispute relates.

61 Secondly, as the Advocate General stated at point 40 of his Opinion, in the field of public procurement, a rule requiring specific calculations for each call for tenders and for each undertaking, the result of which could be challenged, would prove to be complicated and unpredictable.

62 As for the application of the Italian standard fee to the detriment of economic operators with weak financial capacity, it should be observed, first, as has the Commission, that that fee is imposed without distinction, as to its form and its amount, with regard to all individuals intending to bring an action against a decision adopted by contracting authorities.

63 It must be held that such a system does not give rise to discrimination between operators practising in the same sector of activity.

64 Moreover, it is apparent from the provisions of the EU directives on public procurement, such as Article 47 of Directive 2004/18, that the participation of an undertaking in a public contract presupposes an appropriate economic and financial capacity.

65 Lastly, even though an applicant is obliged to pay the standard fee when bringing a court action against a decision relating to public procurement, the unsuccessful party is, as a rule, required to reimburse the court fees paid by the successful party.

66 With regard to the principle of equivalence, the fact that, in the context of procedures for the award of public contracts, the standard fee to be paid is larger than (i) the amounts to be paid for administrative disputes subject to ordinary proceedings and (ii) the court fees charged in civil proceedings cannot in itself demonstrate an infringement of that principle.

67 As has been noted in paragraph 46 of this judgment, the principle of equivalence requires that actions based on an infringement of national law and similar actions based on an infringement of EU law be treated equally and not that there be equal treatment of national procedural rules applicable to proceedings of a different nature such as civil proceedings, on the one hand, and administrative proceedings, on the other, or applicable to proceedings falling within two different branches of law (see judgment in *ÖBB Personenverkehr*, C-417/13, EU:C:2015:38, paragraph 74).

68 In the present case, no factor raised before the Court is capable of substantiating the argument that the Italian standard fee system applies differently to actions based on rights which individuals derive from EU public procurement law than it does to actions based on infringement of national law having the same subject-matter.

69 It must be concluded that court fees to be paid when an action is brought in administrative judicial proceedings relating to public procurement, such as the standard fee at issue in the main proceedings, do not adversely affect the effectiveness of Directive 89/665 or the principles of equivalence and effectiveness.

The cumulation of the standard fees paid within the same administrative judicial proceedings relating to public procurement

70 According to the national legislation, the standard fee is to be paid not only upon registration of the application initiating proceedings against a decision taken by a contracting authority so far as concerns

the award of public contracts, but the same amount must be paid also for cross-claims and supplementary pleas introducing new claims in the course of proceedings.

71 It is apparent from the order for reference that, as set out in a circular of the Segretario Generale della Giustizia Amministrativa of 18 October 2001, only the introduction of procedural steps which are independent of the application initiating proceedings and which are designed to considerably extend the subject-matter of the dispute gives rise to the payment of additional fees.

72 The levying of multiple and cumulative court fees within the same administrative judicial proceedings is not, in principle, contrary to Article 1 of Directive 89/665, read in the light of Article 47 of the Charter, or to the principles of equivalence and effectiveness.

73 As a rule, such levying contributes to the proper functioning of the judicial system, since it amounts to a source of financing for the judicial activity of the Member States and discourages the submission of claims which are manifestly unfounded or which seek only to delay the proceedings.

74 Those objectives justify the multiple application of court fees such as those at issue in the main proceedings only where the subject-matter of the actions or supplementary pleas are in fact separate and amount to a significant enlargement of the subject-matter of the dispute that is already pending.

75 By contrast, if that is not the case, an obligation of additional payment of such court fees because of the submission of such actions or pleas is contrary to the availability of legal remedies ensured by Directive 89/665 and to the principle of effectiveness.

76 Where a person brings several actions before a court or submits several supplementary pleas within the same court proceedings, the mere fact that the ultimate objective of that person is to obtain a given contract does not necessarily mean that the subject-matter of his actions or his pleas are identical.

77 In the event of objections being raised by a party concerned, it is for the national court to examine the subject-matter of the actions submitted by an individual or the pleas raised by that individual within the same proceedings. If the national court finds that their subject-matter is not in fact separate or does not amount to a significant enlargement of the subject-matter of the dispute that is already pending, it is required to relieve that individual of the obligation to pay cumulative court fees.

78 In addition, no factor has been raised before the Court which is capable of calling into question the conformity of the cumulation of standard fees with the principle of equivalence.

79 In the light of the foregoing, the answer to the question referred must be as follows:

– Article 1 of Directive 89/665 and the principles of equivalence and effectiveness must be interpreted as not precluding national legislation which requires the payment of court fees such as the standard fee at issue in the main proceedings when an action relating to public procurement is brought before administrative courts.

– Article 1 of Directive 89/665 and the principles of equivalence and effectiveness do not preclude the charging of multiple court fees to an individual who brings several court actions concerning the same award of a public contract or that individual from having to pay additional court fees in order to be able to raise supplementary pleas concerning the same award of a public contract within ongoing judicial proceedings. However, in the event of objections being raised by a party concerned, it is for the national court to examine the subject-matter of the actions submitted by an individual or the pleas raised by that individual within the same proceedings. If the national court finds that the subject-matter of those actions is not in fact separate or does not amount to a significant enlargement of the subject-matter of the dispute that is already pending, it is required to relieve that individual of the obligation to pay cumulative court fees.

Costs

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, and the principles of equivalence and effectiveness must be interpreted as not precluding national legislation which requires the payment of court fees such as the standard fee at issue in the main proceedings when an action relating to public procurement is brought before administrative courts.**

2. **Article 1 of Directive 89/665, as amended by Directive 2007/66, and the principles of equivalence and effectiveness do not preclude the charging of multiple court fees to an individual who brings several court actions concerning the same award of a public contract or that individual from having to pay additional court fees in order to be able to raise supplementary pleas concerning the same award of a public contract within ongoing judicial proceedings. However, in the event of objections being raised by a party concerned, it is for the national court to examine the subject-matter of the actions submitted by an individual or the pleas raised by that individual within the same proceedings. If the national court finds that the subject-matter of those actions is not in fact separate or does not amount to a significant enlargement of the subject-matter of the dispute that is already pending, it is required to relieve that individual of the obligation to pay cumulative court fees.**

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 7 May 2015 (1)

Case C-61/14

Orizzonte Salute — Studio Infermieristico Associato
v
Azienda Pubblica di Servizi alla persona 'San Valentino' — Città di Levico Terme
Ministero della Giustizia
Ministero dell'Economia e delle Finanze
Presidenza del Consiglio dei Ministri
Segretario Generale del Tribunale Regionale di Giustizia Amministrativa di Trento (TRGA)

(Request for a preliminary ruling from the Tribunale Regionale di Giustizia Amministrativa di Trento (Italy))

(Public procurement — Directive 89/665/EEC — Legislation providing for elevated fees for access to justice in the field of public procurement — Cumulative court fees chargeable upon presentation of new applications on additional grounds within the context of judicial challenge pertaining to a single contract award procedure — Right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights — Dissuasive fees — Access to a court — Principles of effectiveness and equivalence)

I – Introduction

1. The 19th century judge Sir James Matthew is reputed to have said that 'in England, justice is open to all, like the Ritz hotel'. The case to hand provides an opportunity for the Court to consider whether the same applies to judicial proceedings relating to award of public contracts in Italy that are governed by EU public procurement law.

2. Italian law provides that court fees applicable in judicial review proceedings relating to public procurement are considerably higher than those generally applicable in administrative proceedings. Moreover, these fees are cumulatively chargeable for every new procedural step that constitutes, under Italian law, a new plea or application on additional grounds.

3. This raises the question of whether the relevant Italian rules are compatible with the objectives of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. (2) The directive is to be interpreted in the light of principles of effectiveness and equivalence, and Article 47 of the Charter of Fundamental Rights of the European Union ('Charter') and its guarantee of access to justice.

II – Legal framework

A – *EU law*

4. The third recital of Directive 89/665 states as follows;

‘… the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; … for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law’.

5. Article 1 of Directive 89/665, entitled ‘[s]cope and availability of review procedures’, as amended, states:

‘1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [(3)] unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.’

6. Article 2 of Directive 89/665, entitled ‘[r]equirements for review procedures’, states:

‘1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting-aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.’

B – *National law*

7. Article 13(1) of Decree of the President of the Republic No 115/2002, as most recently amended by Law No 228 of 24 December 2012, (4) introduced a court fee regime made up of a standard fee. According to subparagraph 6a of Article 13, in the context of administrative proceedings, the amount of standard fee is linked to the subject-matter of the administrative proceedings. In respect of actions before the administrative courts, the normal standard fee amounts to EUR 650. Different amounts are set for particular subject-matters. (5) As regards the subject-matter of public contracts, the standard fee

ranges as of 1 January 2013 from EUR 2 000 to EUR 6 000, depending on the value of the contract. (6) According to Article 13(6a) 1 the standard fee is payable, for the lodging not only of the application instituting proceedings, but also of a procedural plea or application on additional grounds which introduce new claims.

8. With regard to determination of the amount involved in cases relating to public procurement, under Article 14(3b) of Decree of the President of the Republic No 115/2002, it is to be equal to the basic value of the contract identified by the contracting authorities in the tender documents.

III – Facts in the main proceedings, the question referred and the proceedings before the Court

9. The applicant, Orizzonte Salute — Studio Infermieristico Associato ('Orizzonte Salute') is an association providing public and private bodies with nursing services. It instituted proceedings before the Tribunale Regionale di Giustizia Amministrativa di Trento by an application ('original application'), supplemented by three subsequent applications on additional grounds, contesting certain measures adopted in the period from 21 December 2012 to 23 May 2013 by the defendant, the Azienda Pubblica di Servizi alla Persona 'San Valentino' — Città di Levico Terme ('APSP').

10. The contested measures concerned the extension of a contract for the provision of nursing services for the benefit of another association, and the call for tenders subsequently published by the APSP inviting applications from only certain associations accredited by the IPASVI (Infermieri Professionali Assistenti Sanitari Vigilatrici d'Infanzia) (Professional Association of Nurses Specialising in the Care of Infants), of which Orizzonte Salute was not a member.

11. Orizzonte Salute initially paid a standard court fee of EUR 650 for instituting ordinary administrative proceedings. However, on 5 June 2013 the national referring court asked Orizzonte Salute to make a supplementary payment to meet a standard fee of EUR 2 000, given that its original application fell within the domain of public procurement.

12. By a new application, being the fourth supplementary application on new grounds, introduced on 2 July 2013, Orizzonte Salute challenged this decision. The national referring court decided, for reasons of procedural economy, to rule on this challenge first.

13. The national referring court doubts the compatibility of the Member State court fee scheme with several rules and principles of EU law. It therefore sent the following question for a preliminary ruling.

'Do the principles laid down in Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, as subsequently amended and added to, preclude a provision of national law, such as that set out in Article 13(1a), (1c) and (6a) and in Article 14(3b) of Decree of the President of the Republic No 115 of 30 May 2002 (as progressively amended by subsequent legislative interventions) which laid down high amounts of the standard fee for access to administrative proceedings relating to public contracts?'

14. Written observations were submitted by Orizzonte Salute, Camera Amministrativa Romana, Associazione dei Consumatori Cittadini europei, Coordinamento delle associazioni per la tutela dell'ambiente e dei diritti degli utenti e consumatori (Codacons), Associazione dei Giovani Amministrativisti (AGAmm), Ordine degli Avvocati di Roma, Società Italiana degli Avvocati Amministrativisti (SIAA), (7) along with the Italian, Greek, Austrian and Polish Governments, and the Commission. Of the Member States that deposited written observations only Italy participated at the hearing that was held on 11 February 2015. All of the other above mentioned parties participated at the same hearing, including the Commission, along with Medical Systems SpA, which made oral submissions only.

IV – Admissibility

15. At the outset, I note that both the national referring Court and Orizzonte Salute have drawn the Court's attention to the charges that are levied under Italian law with respect to public procurement

proceedings that go beyond the facts arising in this case, such as, for example, increased standard fees in the case of appeals. The Austrian Government considers the preliminary question to be admissible only in so far as it addresses the fourth application made by Orizzonte Salute directed at the levying of a standard fee of EUR 2 000. Otherwise the Austrian Government takes the view that the question is hypothetical.

16. Further, I note that the question referred by the national court is of a broad and general nature. As pointed out in the written observations of the Commission, the referring court does not explain why an answer to it is necessary for the resolution of the dispute.

17. It is not the function of the Court to formulate consultative opinions on questions that are of a general or hypothetical nature. (8) The reference must be necessary for the effective resolution of a dispute. (9) The proceedings to hand are not in the nature of a direct action brought by the Commission against Italy questioning, *in abstracto*, whether the legal regime in place for the levying of court fees in public procurement cases comply with EU law but preliminary rulings proceedings inextricably linked to the legal issues pertinent to the main proceedings.

18. That said, at this stage the main proceedings are primarily concerned with a narrow issue, namely the fourth additional application by Orizzonte Salute introducing a new ground contesting the legality of the level of the court fee levied for the original application. In relation to this legal question, which the national referring court has decided to examine first, the preliminary question is not hypothetical. Moreover, given that the challenged measure is the fifth court fee levied in the main proceedings, in my opinion the issue of cumulative fees also needs an answer from the Court. If the Court found the Italian system to be incompatible with EU law, the national Court would need to draw appropriate conclusions from that finding with regard to the court fee levied for the original application. Thus, within these parameters, the reference for a preliminary ruling is admissible.

V – Analysis

A – *Preliminary observation — the approach to solving the problem to hand*

19. Article 2(1) of Directive 89/665, as amended, requires the Member States to provide judicial powers for the effective protection of the interested enterprises in the context of public procurement. First, interim measures have to be available to enable early challenge to alleged infringements, and prevention of further damages (point a). Secondly, there is an obligation for the Member States to provide powers for the setting-aside of any unlawful decision relating to the contract award procedure (point b). Thirdly, reparative justice in the form of the award of damages to persons harmed by an infringement must be provided (point c). In factual terms, the main proceedings belong to the second of these categories, given that Orizzonte Salute is challenging the extension of an existing contract for the provision of nursing services for the benefit of another association, and the subsequent call for tenders inviting applications from only certain associations accredited by an organisation, of which Orizzonte Salute was not a member.

20. I recall that Directive 89/665 aims at guaranteeing the existence, in all Member States, of effective remedies for infringement of EU law in the field of public procurement or of the national rules implementing these laws, so as to ensure the effective application of the directives on the coordination of public procurement procedures. (10) Member States are required to take measures to ensure that decisions taken by contracting authorities may be reviewed effectively and, in particular, as rapidly as possible. (11) Finally, Member State procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities must not compromise the effectiveness of Directive 89/665. (12)

21. EU legal acts in the field of public procurement strive to foster access to public sector markets under the conditions of non-discrimination and transparency. Directive 89/665 ensures that private judicial enforcement of these EU law rules is both available and effective. The EU legislature has thus conceived effective judicial protection of the interested economic operators as a means of promoting the *effet utile* of the EU public procurement regime and in consequence, the objectives of the internal market.

22. Therefore, in my opinion, answering the preliminary question boils down to an examination of the scope of the right to effective judicial protection as guaranteed by Directive 89/665 and Article 47 of the Charter. In the light of submissions put forward in the main proceedings, it is also necessary to consider the pertinence of the limitations placed on Member State procedural autonomy by the principles of effectiveness and equivalence to the question of the compatibility of the Italian court fees in issue with EU law.

23. The Court's case-law on Directive 89/665 provides no clear answer on whether the court fees in issue are compatible with remedial provisions of EU public procurement law. (13) Nevertheless, there is no question that the charging of court fees in national proceedings that fall within the scope of Directive 89/665 amounts to an implementation of EU law within the meaning of Article 51 of the Charter. (14)

24. That being so, I will now consider the court fees for their compliance with the fundamental right to an effective remedy under Article 47 of the Charter, and the Court's remedial case-law on the principles of effectiveness and equivalence. As I have said on another occasion, both these principles should be considered beneath the umbrella of Article 47 of the Charter. (15) I will commence with the principle of equivalence before moving on to the pertinent elements of the Court's case-law on 'effectiveness'.

B – *The principle of equivalence*

25. Compliance with the principle of equivalence requires that the national rule in question must apply, without distinction, to actions based on infringement of EU law and those based on infringement of national law having a similar purpose and cause of action. (16)

26. There is little scope for the operation of this principle in the context of public procurement because there are no truly comparable national and EU law situations. Directive 2004/18 applies to all public procurement when the threshold is met, with the exception of exempted contracts. Thus, the applicability of national rules is reserved to contract awards below the thresholds and situations exempted from the scope of the directive. This, to my mind, reflects an assessment of the EU legislature to the effect that these situations are not comparable with those falling within the scope of Directive 2004/18.

27. In any event, the court fees in issue appear to apply to public procurement litigation falling both inside and outside the scope of Directive 2004/18. There would therefore not appear to be any incidence of discrimination between situations under EU law and national law. (17)

28. Moreover, given that public procurement law represents a complex mix of legal relationships between the contracting authority and various public and private actors, I do not accept that court proceedings entailing challenge to decisions made in the course of awarding a public contract could be viewed as being analogous to ordinary public law proceedings before administrative courts, as has been contended by Orizzonte Salute and several others. (18)

29. The Commission claims in its written observations that there might be a problem of equivalence with respect to the point in the scale applicable under Italian law where the court fee increases from EUR 2 000 to EUR 4 000. This occurs when the value of the contract is more than EUR 200 000. According to the Commission this threshold would correspond "in substance" with the threshold in Article 7 of Directive 2004/18 which, subject to control by the national referring court, would entail that proceedings with respect to actions concerning violation of that directive or national rules implementing it would be subject to different and less favourable procedural modalities than purely national proceedings.

30. I disagree with this submission. It is true that the threshold of EUR 200 000, as set out in Article 2 of Regulation No 1251/2011 coincided with the national threshold for a higher court fee. However, the applicability of the court fee of EUR 4 000 or higher is not restricted to cases falling within the scope of Directive 2004/18 but there will obviously be many national cases (exempted contracts) where this higher court fee applies. More generally, the solution adopted by the Italian

legislature to step-up the scale applicable in the determination of the court fees in question at two points is a reasonable means of alleviating the regressive effect of the scale.

31. Furthermore, to my mind EU law would have no objection, in the context of the principle of equivalence, to the fact that Italian law supplies different court fees or bases for court fees in different forms of judicial proceedings. The principle of equivalence requires equal treatment between comparable claims based on national law, on the one hand, and on EU law, on the other, not equivalence between different forms of procedure under national law. (19)

32. For these reasons no objections can be raised against the national rules in issue from the point of view of their compatibility with the principle of equivalence.

C – *The charges in issue in the light of the principle of effectiveness and the right of access to a court*

1. Identifying the relevant test

33. I start by noting that the legal rules applicable to the fundamental right to an effective judicial remedy in the sense of Article 47 of the Charter, or the right to 'judicial control', which have their origins in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), (20) are different from those that arise when the question to be determined is whether a Member State sanction or procedural rule is inconsistent with the principle of effectiveness, in the sense that the rule in question renders rights provided by EU law impossible in practice or excessively difficult to enforce. The latter, rather than being created within EU fundamental rights law, came into being as a function of the limitations placed by EU law on the procedural autonomy of the Member States.

34. However, in the case to hand these two approaches largely converge because the very purpose of Directive 89/665 is to guarantee access to justice for undertakings if substantive or procedural EU law rules on public procurement are violated. In other words, the *effet utile* of this legislative act coincides to a great extent with strict observance of the requirements stemming from Article 47 of the Charter in this field.

35. The principle of effectiveness, in the sense of the *San Giorgio* prohibition on Member State procedural rules rendering EU rights impossible in practice or excessively difficult to enforce, (21) entails no formal proportionality test. However, in determining whether the Member State procedural rule or remedy in question meets its parameters, the provision 'must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.' (22)

36. The right to 'judicial control' and access to justice under Article 47 of the Charter are not assessed in this manner. They are subject to a traditional limitation test, entailing analysis of whether measures restricting it are provided by law, and whether they satisfy requirements stemming from the principle of proportionality, namely pursuit of a legitimate purpose, necessity, aptness for purpose, and confinement to what is required to secure the legitimate purpose. (23) This is now reflected in Article 52(1) of the Charter.

37. It is well established that, depending on all of the circumstances, court fees can amount to a limitation on access to a court, as protected under Article 47 of the Charter. Thus, like restrictions on the availability of legal aid to secure the enforcement of EU rights, (24) the problem to hand is better assessed by reference to the test, described above, that is pertinent to the right to 'judicial control' rather than that applicable to remedies and procedural rules to determine whether they go beyond the limits of Member State procedural autonomy. I will now apply this test to the situation in the main proceedings.

2. Application to the litigation to hand

a) On the level of the standard court fee in administrative proceedings relating to public procurement

38. The question to be analysed is whether the court fees in issue constitute a hindrance to the right of access to a court. (25) As pointed out in the written observations of the Commission, the European Court of Human Rights considered this question in its ruling, for example, in *Stankov v. Bulgaria*. (26) There it was held that the requirement to pay fees in connection with civil cases cannot in and of itself be regarded as a restriction on the right of access to a court that is incompatible per se with Article 6(1) of the ECHR. (27) However, the amount of the fees assessed in the light of the particular circumstances of a given case is a material factor in determining whether or not a person enjoyed his right of access to a court. (28)

39. I shall first discuss the point raised by the national referring court that the standard court fee is based on the value of the litigation in terms of the theoretical value of the contract to be awarded, and not on the real benefit an enterprise participating in the award procedure is entitled to expect. According to the national referring court, this profit would correspond to 10 per cent of the value of the contract and would be in line with the rules applicable to court fees in Italian civil proceedings.

40. I do not see any merit in this argument. It is mathematically irrelevant whether *a standard court fee* is calculated using a 10 per cent profit margin of the value of the contract as starting point, and not the value of the contract as such, if the outcome is the same. On the other hand, a system in which the expected profit was assessed individually for every contract award procedure and/or enterprise participating therein, with the result of *variable court fees*, would be cumbersome and unpredictable.

41. Secondly, even if the level of the standard court fee seems to be relatively high, this finding must be balanced with the simple fact that public procurement is not social policy. It can be expected that enterprises participating in contract award procedures within the scope of Directive 2004/18 have sufficient economic and financial means to execute a contract of a value of EUR 200 000 or more. From this perspective a court fee of EUR 2 000, EUR 4 000 or EUR 6 000, as the case may be, cannot constitute a hindrance to access to a court, even taking into account the necessary lawyer's fees. Nor can it be considered to be unduly restrictive of competition to the detriment of smaller enterprises.

42. Thirdly, to my mind the fact that the proceedings can commence even if the court fee is not paid, (29) which is a factor that the Commission considered to be relevant in its written observations, is not pertinent. This is so because the Italian legislation is obviously built on the assumption that the applicant pays the court fees when they fall due. Also irrelevant, in my opinion, is the fact that the court fees are refunded if the applicant succeeds in his claims. For access to a court to be respected, there must be an avenue available to challenge decisions taken in contract award procedures, even it is not absolutely certain that the action will succeed. Hence, an excessive court fee can amount to a barrier to the right of access to a court as set out in Article 47 of the Charter, even if it could be recovered afterwards.

43. For these reasons I am not concerned by the amount of the EUR 2 000 standard fee that Orizzonte Salute has been charged for the original application. (30) It is true that the court fees in issue are high in comparison with fees charged in Italy in other types of administrative litigation or in civil proceedings. However, the standard court fee (i.e. without any increases) in relation to the value of the contracts within the scope of Directive 2004/18, and in consequence, of Directive 89/665, never exceeds two per cent. This hardly constitutes a barrier to access to a court.

44. Therefore, in my opinion the material factor in issue is the accumulation of court fees within the context of proceedings concerning the same contract award procedure, not their level as such.

b) On cumulative court fees

45. Having concluded that the amount of standard court fees applicable in Italian administrative proceedings on awards of contracts within the scope of Directives 2004/18 and 89/665 does not constitute, in and of itself, a restriction on the right of access to a court, it now falls to be determined whether there is any other reason to doubt their compliance with Article 47 of the Charter, particularly in the light of the accumulative nature of the fees imposed. If there is, a determination will need to be

made as to whether the restriction found is prescribed by law, and is proportionate to the legitimate aim pursued. (31)

46. Here I observe first that the court fees, including cumulative ones, are clearly prescribed by law. As to the legitimacy of the aim pursued, the European Court of Human Rights has held that the 'aims pursued by the general rules on costs can be accepted as compatible with the general administration of justice, for example to fund the functioning of the judicial system and to act as a deterrent to frivolous claims. (32)

47. Within the Italian administrative court system, proceedings relating to public procurement seem to enjoy special treatment, in the sense that they are dealt with more quickly than other actions, and increased court fees contribute to the financing of these courts enabling them to function expeditiously. This is in conformity with both the requirements of Directive 89/665 and the case-law of the European Court of Human Rights.

48. However, at the hearing Orizzonte Salute emphasised that an enterprise which is excluded from the contract award procedure at the beginning of the process has to challenge, under Italian law, both the decision concerning selection of the participant in the contract award procedure, and the award of the contract itself. Moreover, in Italian contract award procedures there are often other decisions of the contracting authority relating, for example, to access to contract documents which need to be challenged separately during the course of the proceedings before the Italian administrative courts. As far as Italian law is concerned, all these amount to applications on new grounds that trigger the levying of a supplementary court fee of the same size as the fee charged for the original application.

49. Orizzonte Salute alleges that it was charged EUR 2 000 for the original application and three times EUR 2 000 for supplementary applications, in addition to the EUR 2 000 payable for the fourth supplementary application that forms the object of this preliminary reference. None of these figures have been contested by the Italian Government or the defendants.

50. The Italian system in issue may render recourse to judicial action futile from an economic point of view, even if they do pursue the legitimate aim of covering the cost of the administration of justice and discouraging frivolous claims. For example, a cumulative court fee of EUR 20 000, (33) when combined with lawyers' fees, may make it economically unviable to challenge contracts close to the threshold for the applicability of the directives in question. (34) In this sense the fees in issue could dissuade undertakings that might otherwise institute legal challenge in the field of public procurement.

51. In my opinion this may conflict with the fundamental right to 'judicial control' guaranteed in Article 47 of the Charter. As the European Court of Human Rights has held, procedural rules are to serve the aim of legal certainty and the proper administration of justice. They are not to 'form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court'. (35)

52. In my opinion Article 2(1)(b) of Directive 89/665, as amended, refers to the 'contract award procedure' as the basic unit for judicial protection. Indeed, an enterprise seeking to participate in a contract award procedure intends to secure the contract for itself. From this perspective it is irrelevant if it has failed at the beginning of the award procedure, i.e. in the selection of the participants, or at the end, in other words, when the contract is awarded to another participant, or somewhere in between.

53. It is within the domain of Member State judicial autonomy to determine how national law on administrative proceedings conceptualises challenges against an individual contract award procedure. For example, whether judicial challenges relating to the later steps of the contract award procedure are conceived as developing on the original application challenging the decision on selection of the participants, or whether they are to be considered as new pleas with additional grounds. However, procedural rules are to serve legal certainty and the proper administration of justice.

54. Therefore it may be incompatible with Article 47 of the Charter to levy several and cumulative courts fees in judicial proceedings, at least if these cumulative fees have a dissuasive effect and are disproportionate when compared with the original fee, given that Article 2(1)(b) of Directive 89/665, as

amended, envisages a single cause and objective, i.e. correcting any irregularity in the contract award procedure to the detriment of the enterprise.

55. It is for the national referring court to conduct the exercise described in paragraph 36 above, in the light of the relevant case-law of the Court (including the judgment in the case to hand) (36) in order to determine whether the restricition on the right to 'judicial control' provided in Article 47 of the Charter caused by cumulative court fees is justified in terms of the proportionality test set out in Article 52(1) of the Charter. (37)

VI – Conclusion

56. For these reasons I propose that the preliminary question of the Tribunale Regionale di Giustizia Amministrativa di Trento be answered as follows:

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended, interpreted in the light of Article 47 of the Charter of Fundamental Rights of the European Union and the principles of equivalence and effectiveness, does not preclude provisions of national law which set out a scale of standard court fees applicable only in administrative proceedings relating to public procurement provided that the level of the court fee does not constitute a barrier to the access to a court or render exercise of public procurement judicial review rights excessively difficult. It is not compatible with Directive 89/665, interpreted in the light of Article 47 of the Charter, to levy several and cumulative courts fees in judicial proceedings, in which an undertaking challenges the legality of a single contract award procedure in the sense of Article 2(1) (b) of Directive 89/665, unless this can be justified in terms of Article 52 (1) of the Charter, which is to be assessed by the national referring court.

---

1 – Original language: English.

---

2 – OJ 1989 L 395, p. 33, as amended by Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ 2007 L 335, p. 31.

---

3 – OJ 1994 L 134, p. 114, as amended by Commission Regulation (EU) 1251/2011 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application of thresholds for the procedures for the awards of contracts, OJ 2011 L 319 p. 43.

---

4 – GURI n. 302, 29.12.2012, Suppl. Ordinario n.212.

---

5 – For example, the reduced amount of EUR 300 for actions concerning residency or citizenship and EUR 325 for those concerning the public service.

---

6 – The standard fee is EUR 2 000 where the value of the contract is EUR 200 000 or less; EUR 4 000 where it is between EUR 200 000 and EUR 1 000 000; and EUR 6 000 where it is over EUR 1 000 000.

---

7 – I observe that the President of the Court accepted the written observations of all of these organisations prior to the oral procedure. That being so, despite the submissions made by the Italian Government, I do not intend to enter into an analysis of whether these observations are admissible.

---

8 – Judgment in *Kamberaj* (C-571/10, EU:C:2012:233), paragraph 41.

---

9 – See for example judgments in *Pohotovosť* (C-470/12, EU:C:2014:101), paragraph 29, and *García Blanco* (C-225/02, EU:C:2005:34), paragraph 28.

---

10 – Judgment in *Universale-Bau and Others* (C-470/99, EU:C:2002:746), paragraph 71.

---

11 – See the third subparagraph of Article 1(1) of Directive 89/665, as amended.

---

12 – Judgment in *Universale-Bau and Others* (C-470/99, EU:C:2002:746), paragraph 72.

---

13 – In contrast see judgment in *Edwards* (C-260/11, EU:C:2013:221) which concerned a situation in which EU measures in the field of environment law specifically required that the legal proceedings were not to be 'prohibitively expensive'.

---

14 – Judgment in *DEB* (C-279/09, EU:C:2010:811).

---

15 – See my Opinion in *Liivimaa Lihaveis* (C-562/12, EU:C:2014:155) and Opinion of Advocate General Bot in *Agrokonsulting* (C-93/12, EU:C:2013:172). For a recent example of consideration by the Court of the principles of effectiveness and equivalence in the context of remedies for the enforcement of EU public procurement rules see judgment in *eVigilo* (C-538/13, EU:C:2015:166).

---

16 – Judgment in *Surgicare — Unidades de Saúde* (C-662/13, EU:C:2015:89), paragraph 30.

---

17 – See eg *Érsekcsanádi Mezőgazdasági* (C-56/13, EU:C:2014:352) paragraph 64.

---

18 – For recent examples of disputes in which the EU and Member State claims in issue were not considered to be 'analogous' see judgments in *Agrokonsulting* (C-93/12, EU:C:2013:432), in particular at paragraphs 40 to 42, and *Baczó and Vizsnyiczai* (C-567/13, EU:C:2015:88), particularly at paragraph 47.

---

19 – See by analogy my opinion in *Târşia* (C-69/14, EU:C:2015:269), paragraphs 50 and 51.

---

20 – See judgment in *Johnston* (222/84, EU:C:1986:206), paragraph 18. See also the explanations accompanying Article 47.

---

21 – Judgment in *San Giorgio* (199/82, EU:C:1983:318).

---

22 – Judgment in *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:441), paragraph 19.

---

23 – Judgment in *DEB* (C-279/09, EU:C:2010:811). I recall that in *DEB* (C-279/09, EU:C:2010:811) the national referring court had formulated its preliminary question in terms of the principle of effectiveness but the Court answered on the basis of Article 47 of the Charter. I also recall that I observed in my Opinion in *Donau Chemie and Others* (C-536/11, EU:C:2013:67) at paragraph 47 that 'due account needs to be taken of Article 19(1) TEU, and the extent to which it supplies a supplementary guarantee to the principle of effectiveness. Pursuant to Article 19(1), Member States are bound to provide remedies 'sufficient to ensure effective legal protection in the fields covered by Union law'. In other words, in the light of that Treaty provision, the standard of effective judicial protection for EU based rights seems to be more demanding than

the classical formula referring to practical impossibility or excessive difficulty. In my opinion this means that national remedies must be accessible, prompt, and reasonably cost effective.'

---

24 – Judgment in *DEB* (C-279/09, EU:C:2010:811).

---

25 – I note that if I were considering this problem by reference to restrictions on Member State procedural autonomy, I would be considering whether the Court fees in issue rendered enforcement of the relevant EU laws impossible in practice or excessively difficult.

---

26 – No. 68490/01, 12 July 2007.

---

27 – Ibid., at paragraph 52.

---

28 – Ibid., and case-law cited.

---

29 – Compare, however, paragraph 53 of *Stankov v. Bulgaria*, no. 68490/01, 12 July 2007.

---

30 – At paragraph 58 of *Stankov v. Bulgaria*, no. 68490/01, 12 July 2007, the European Court of Human Rights, in finding that the court charges in issues breached right of access to a court, noted that 'the court fees' system applied by the Bulgarian courts had the effect of depriving the applicant of almost all of the compensation the State had been ordered to pay him for his unjustified pre-trial detention'.

---

31 – If the Member State court were considering a national rule impeding the principle of effectiveness, they would be bound to consider whether the rule in question rendered EU law impossible in practice or excessively difficult to enforce, in combination with the van Schijndel test reproduced above at paragraph 35.

---

32 – *Stankov v. Bulgaria*, no. 68490/01, 12 July 2007, § 57.

---

33 – A cumulative court fee of EUR 20 000 would be applicable if the value of the contract challenged in Orizzonte Salute's original application were for example EUR 250 000, and the litigant concerned had made the same number of applications as Orizzonte Salute. In such circumstances, five court fees of EUR 4 000 would be charged, even though the standard court fee for contracts with a value between EUR 200 000 and EUR 1 000 000 is EUR 4 000.

---

34 – See extract from *Stankov v. Bulgaria*, no. 68490/01, 12 July 2007, reproduced above at footnote 30 concerning a legal challenge that was not economically viable.

---

35 – *Omerović v. Croatia(no. 2)*, no. 22980/09 2014, § 39, 5 December 2013.

---

36 – See notably judgment in *DEB* (C-279/09, EU:C:2010:811) and judgment in *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146).

---

37 – I note, however, that the Court has held that, in 'in order to assess … proportionality, the national court may … take account of the amount of the costs of the proceedings in respect of which advance payment must

be made and whether or not those costs might represent an obstacle to access to the courts’. See judgment in *DEB* (C-279/09, EU:C:2010:811), paragraph 61.

EU:C:2016:199

JUDGMENT OF THE COURT (Grand Chamber)

5 April 2016 (*)

(Reference for a preliminary ruling — Public service contracts — Directive 89/665/EEC – Article 1(1) and (3) — Review procedures — Application for annulment of the decision awarding a public contract by a tenderer whose bid was not successful — Counterclaim brought by the successful tenderer — Rule derived from national case-law under which the counterclaim must be examined first and, if the counterclaim is well founded, the main action must be dismissed as inadmissible without any examination of the merits — Whether compatible with EU law — Article 267 TFEU — Principle of the primacy of EU law — Principle of law stated by decision of the plenary session of the supreme administrative court of a Member State — National legislation which provides that that decision is binding on the chambers of that court — Obligation on the part of the chamber required to adjudicate on a question of EU law to refer that question to the plenary session if it disagrees with the decision of the plenary session — Whether the chamber has a discretion or is under an obligation to request a preliminary ruling from the Court of Justice)

In Case C-689/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy), made by decision of 26 September 2013, received at the Court on 24 December 2013, in the proceedings

Puligienica Facility Esco SpA (PFE)

v

Airgest SpA,

intervening parties:

Gestione Servizi Ambientali Srl (GSA),

Zenith Services Group Srl (ZS),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, M. Ilešič, T. von Danwitz, J.L. da Cruz Vilaça, D. Šváby and F. Biltgen, Presidents of Chambers, A. Rosas, E. Juhász (Rapporteur), A. Borg Barthet, J. Malenovský, J.-C. Bonichot, C. Vajda, S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Wathelet,

Registrar: I. Illéssy and, subsequently, V. Giacobbo-Peyronnel, Administrators,

having regard to the written procedure and further to the hearing on 11 March 2015,

after considering the observations submitted on behalf of:

– Puligienica Facility Esco SpA (PFE), by U. Ilardo, avvocato,

– Gestione Servizi Ambientali Srl (GSA) and Zenith Services Group Srl (ZS), by D. Gentile and D. Galli, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and S. Varone, avvocato dello Stato,

– the European Commission, by D. Recchia and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 April 2015,

having regard to the order of 16 July 2015 reopening the oral procedure and further to the hearing on 15 September 2015,

after considering the observations submitted on behalf of:

– the Italian Government, by G. Palmieri, acting as Agent, and S. Varone, avvocato dello Stato,

– the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by D. Recchia and A. Tokár, acting as Agents,

after hearing the additional Opinion of the Advocate General at the sitting on 15 October 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 89/665’), of Article 267 TFEU and of the principles of effectiveness and the primacy of EU law.

2 The request has been made in proceedings between Puligienica Facility Esco SpA (PFE) (‘PFE’) and Airgest SpA (‘Airgest’) concerning the lawfulness of the award by Airgest of a public services contract to Gestione Servizi Ambientali Srl (GSA) (‘GSA’) and Zenith Services Group Srl.

Legal context

EU law

3 Article 1 of Directive 89/665, entitled ‘Scope and availability of review procedures’, provides as follows:

‘1. This Directive applies to contracts referred to in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [(OJ 2004 L 134, p. 114)], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of [Directive 2004/18], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

…’

4 Article 2(1) of Directive 89/665 is worded as follows:

‘Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

…

(b) either set aside or ensure the setting aside of decisions taken unlawfully …

…’

Italian law

5 The Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily) was established by Legislative Decree No 654 laying down rules for the exercise in the Region of Sicily of the functions of the Council of State (decreto legislativo n. 654 — Norme per l’esercizio nella Regione siciliana delle funzioni spettanti al Consiglio di Stato) of 6 May 1948 (GURI No 135 of 12 June 1948). It performs in that region the same advisory and judicial functions as the Consiglio di Stato (Council of State).

6 Legislative Decree No 104 implementing Article 44 of the Law No 69 of 18 June 2009 delegating powers to the Government for the reorganisation of administrative procedure’ (decreto legislativo n. 104 — Attuazione dell’articolo 44 della legge 18 giugno 2009, n. 69, recante delega al governo per il riordino del processo amministrativo), of 2 July 2010 (‘Ordinary Supplement to GURI No 156, 7 July 2010) concerns the adoption of the Code of Administrative Procedure.

7 Article 6 of the Code of Administrative Procedure provides as follows:

‘1. The Consiglio di Stato (Council of State) is the administrative court of final instance.

…

6. Appeals against decisions of the Tribunale amministrativo regionale della Sicilia (Regional Administrative Court, Sicily) shall be lodged with the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily) in accordance with the provisions of that region’s Special Statute and the relevant implementing provisions.’

8 Article 42(1) of the Administrative Code of Procedure states as follows:

‘Defendants and intervening parties may submit applications, where the object of such applications is related to the application in the main proceedings, by way of counterclaim.’

9 Article 99 of the Administrative Code of Procedure reads as follows:

‘1. Where the Chamber to which the appeal is assigned considers that the point of law submitted for its consideration has given rise, or might give rise, to divergences in judicial decisions, it may, by order made on application by one of the parties or of its own motion, refer the case to be heard by the court in plenary session. The plenary session may, if it deems appropriate, refer the matter back to the Chamber.

2. Before a decision is delivered, the President of the Consiglio di Stato (Council of State) may, on application by one of the parties or of his own motion, refer any appeal to the court in plenary session for a ruling on questions of principle of particular importance or with a view to resolving divergences in judicial decisions.

3. If the Chamber to which the appeal is assigned does not concur with a principle of law stated by the plenary session, it shall, by reasoned order, refer the decision on the appeal to the plenary session.

4. The plenary session shall rule on the dispute in its entirety unless it decides to state a principle of law and to refer the case, as to the remainder, back to the referring chamber.

5. If it considers the question to be of particular importance, the plenary session may in any event state the relevant principle of law in the interests of the law, even where it rules that the action is in any way inadmissible or unfounded or that the proceedings must be terminated. In such cases, the decision of the plenary session shall have no effect on the contested measure.'

10 Article 100 of the Code of Administrative Procedure provides as follows:

'Appeals against the decisions of regional administrative courts may be brought before the Consiglio di Stato (Council of State) without prejudice to the jurisdiction of the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily) to hear appeals against decisions of the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily).'

11 Legislative Decree No 373 laying down rules for the implementation of the Special Statute of the Region of Sicily with regard to the exercise in that region of the functions assigned to the Consiglio di Stato (decreto legislativo n. 373 — Norme di attuazione dello Statuto speciale della Regione siciliana concernenti l'esercizio nella regione delle funzioni spettanti al Consiglio di Stato) of 24 December 2003 (GURI No 10 of 14 January 2004, p. 4) ('Legislative Decree No 373') provides, in Article 1(2) thereof, that the chambers of the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy) are to function as local chambers of the Consiglio di Stato (Council of State) and, in Article 4(3) thereof, that in judicial matters, the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy) has jurisdiction, as an appellate body, to hear appeals against decisions delivered by the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily).

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 By notice published on 18 January 2012, Airgest, the company responsible for the management of Trapani Birgi civil airport (Italy), launched an open call for tenders for the award of a contract for the provision of cleaning and ground maintenance services at the airport for a period of three years. The contract price, net of value added tax, was EUR 1 995 496.35 and the contract was to be awarded to the most economically advantageous tender. The contract was awarded, by definitive award decision of 22 May 2012, to the temporary joint venture consisting of GSA and Zenith Services Group Srl (ZS).

13 PFE, which participated in the procedure and was ranked second, brought an action before the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily) seeking, inter alia, the annulment of the decision awarding the contract and, as a consequence, an order that the contract be awarded to PFE and the related contract concluded with it. The other tenderers did not challenge the decision awarding the contract.

14 GSA, group leader of the temporary joint venture to which the contract had been awarded, was joined to the proceedings and filed a counter-claim alleging that PFE, the applicant in the main proceedings, had no legal interest in bringing the proceedings as it did not fulfil the eligibility requirements for the tendering procedure and should therefore have been excluded from the procedure. The Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily) examined the arguments of both parties and upheld both actions. Following that decision, Airgest, as contracting authority, excluded the two applicants as well as all the other tenderers who had initially been ranked because their respective bids did not conform to the tendering specifications. Those other tenderers did not appeal against the decision awarding the contract. A further call for tenders by way of negotiated procedure was launched for the award of the contract in question.

15 PFE lodged an appeal against the judgment of the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily) before the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily). GSA, in turn, lodged a cross-appeal before that court on the ground, in particular, that, by examining the submissions in the main proceedings, the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily) had failed to have regard to the rules governing the order in which actions are to be examined laid down by Judgment No 4 of 7 April 2011, delivered by the Consiglio di Stato (Council of State) sitting in plenary session. According to that judgment, if a counterclaim has been brought challenging the main action on the ground that it is inadmissible, the counterclaim must be given precedence and examined before the main action. Under the national legal system, such a counterclaim is classified as 'exclusive' or 'paralysing' on the basis that, where the counterclaim is deemed well founded, the court seised is required to dismiss the main action as inadmissible without assessing its merits.

16 The referring court observes that, in its judgment in *Fastweb* (C-100/12, EU:C:2013:448), delivered after the judgment of the Consiglio di Stato (Council of State) sitting in plenary session referred to above, the Court of Justice held that Article 1(3) of Directive 89/665 is to be interpreted as precluding the rules laid down by the latter judgment set out in the preceding paragraph. The case which gave rise to the judgment in *Fastweb* (C-100/12, EU:C:2013:448) concerned two tenderers who had been selected by the contracting authority and invited to submit tenders. Following the action brought by the unsuccessful tenderer, the successful tenderer lodged a counterclaim, contending that the unsuccessful bid should have been excluded on the ground that it did not satisfy the minimum requirements laid down in the specifications.

17 The referring court is uncertain, first, whether the interpretation given by the Court of Justice in *Fastweb* (C-100/12, EU:C:2013:448) is equally applicable in the present case because, in the case which gave rise to that judgment, only two undertakings submitted tenders and both of them had conflicting interests in the main action for annulment brought by the undertaking whose bid had been unsuccessful and in the counterclaim brought by the successful tenderer, whereas, in the present case, more than two undertakings submitted bids, even though only two of them have brought proceedings.

18 Second, the referring court states that, in accordance with Article 1(2) of Legislative Decree No 373 of 24 December 2003 laying down rules for the implementation of the Special Statute of the Region of Sicily with regard to the exercise in that region of the functions assigned to the Consiglio di Stato, it constitutes a chamber of the Consiglio di Stato (Council of State) and, as such, it is a court against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 267 TFEU. However, it is required, under the procedural rule laid down in Article 99(3) of the Code of Administrative Procedure, to apply the principles of law established by the Consiglio di Stato (Council of State) sitting in plenary session, even in respect of questions concerning the interpretation and application of EU law, subject to the option available to the chamber, where it wishes to depart from those principles, to refer the matter to the plenary session in order to seek a reversal of its decisions.

19 The referring court highlights the conflicts between judgment No 4 of the plenary session of the Consiglio di Stato (Council of State) of 7 April 2011 and the judgment in *Fastweb* (C-100/12, EU:C:2013:448) in order to point out that, if the procedural requirement described in the preceding paragraph were also to be applied to matters governed by EU law, that requirement would be incompatible with the principle that the Court of Justice has sole jurisdiction to interpret EU law and with the obligation all the courts of final instance of the Member States are under to submit a request to the Court of Justice for a preliminary ruling when questions arise concerning the interpretation of that law.

20 In those circumstances, the Consiglio di giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the principles laid down by the Court of Justice in its judgment in *Fastweb* [Case C-100/12, EU:C:2013:448] concerning the specific set of circumstances forming the subject-matter of the request for a preliminary ruling in that case, in which only two undertakings participated in a

public procurement procedure, also apply — given the considerable similarities between those circumstances and the facts in the present case — to the case currently before this Council, in which the undertakings participating in the tendering procedure, even though more than two undertakings were admitted, were all excluded by the contracting authority without those exclusion decisions being challenged by undertakings other than those involved in the present proceedings, with the result that, in the dispute currently before this Council, only two undertakings are concerned?

(2) In respect solely of issues which can be settled through the application of EU law, is it the case that, upon a proper construction of EU law and, in particular, of Article 267 TFEU, Article 99(3) of the Italian Code of Administrative Procedure is precluded to the extent that it makes all principles of law stated by the plenary session of the Consiglio di Stato (Council of State) binding upon all Chambers and Divisions of the Consiglio di Stato, even where it is clearly the case that the plenary session has stated, or may have stated, a principle that is contrary to or incompatible with EU law? Specifically:

– in the event that doubts arise as to whether a principle of law already stated by the Consiglio di Stato (Council of State) in plenary session is in conformity with or is compatible with EU law, is the Chamber or Division of the Consiglio di Stato (Council of State) to which the case is assigned under an obligation to make a reasoned order referring the decision on the appeal back to the plenary session, even before it is able to make a request to the Court of Justice for a preliminary ruling as to whether the principle of law in question is in conformity with or is compatible with EU law; or, instead, may — or, rather, must — the Chamber or Division of the Consiglio di Stato (Council of State), being a national court against whose decisions no appeal lies, independently refer — as an ordinary court applying EU law — a question to the Court of Justice for a preliminary ruling so as to obtain the correct interpretation of EU law?

– In the event that the answer to the question asked in the preceding paragraph is that each Chamber and Division of the Consiglio di Stato (Council of State) is recognised as having the power or the obligation to refer questions directly to the Court of Justice for a preliminary ruling, or in every case in which the Court of Justice has taken a position — especially if it has done so at a time subsequent to the plenary session of the Consiglio di Stato (Council of State) — to the effect that the principle of law stated in the plenary session is not in conformity or not wholly in conformity with the correct interpretation of EU law, may or must each Chamber and each Division of the Consiglio di Stato (Council of State), being ordinary courts applying EU law and against whose decisions no appeal lies, immediately apply the correct interpretation of EU law as provided by the Court of Justice or, instead, are they under an obligation, even in such cases, to make a reasoned order referring the decision on the appeal back to the plenary session of the Consiglio di Stato (Council of State), thereby deferring to the authority of the plenary session of the Consiglio di Stato (Council of State) and to its discretion all assessment of the application of EU law already declared binding by the Court of Justice?

– Lastly, is it not the case that an interpretation of the administrative procedural rules of the Italian Republic as meaning that any potential decision relating to a request to the Court of Justice for a preliminary ruling — or even merely the resolution of the case whenever that flows directly from the application of EU legal principles already set out by the Court of Justice — is a matter exclusively for the plenary session of the Consiglio di Stato (Council of State) constitutes an obstacle, not only to the principles that proceedings are to be concluded within a reasonable period and that a review is to be available speedily in relation to procedures for the award of public contracts, but also to the requirement that EU law is to be promptly applied in full by all courts in all Member States, in a manner which must be consistent with its proper interpretation as provided by the Court of Justice, and moreover for the purposes of ensuring the broadest possible application of the principle of ‘effectiveness’ (*effet utile*) and the principle of the primacy (in terms not only of substance but also of procedure) of EU law over the national law of every single Member State (in the present case: over Article 99(3) of the Italian Code of Administrative Procedure)?’

Question 1

21 By its first question, the referring court seeks to ascertain, in essence, whether the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 are to be interpreted as meaning that a main action for review brought by a tenderer with an interest in obtaining a particular contract who has been or may be adversely affected by an alleged breach of EU public procurement law or rules transposing that law, with a view to excluding another tenderer, cannot be dismissed as inadmissible under national procedural rules which provide that the counterclaim lodged by the other tenderer must be examined first.

22 The referring court seeks to ascertain in particular whether the Court's interpretation of Article 1(3) of Directive 89/665 in its judgment in *Fastweb* (C-100/12, EU:C:2013:448) is applicable in a case in which, although more than two undertakings were originally admitted to the procurement procedure concerned, all the participating undertaking have all been excluded by the contracting authority and proceedings have not been brought by any undertaking other than the two involved in the main action.

23 It should be noted in that regard that, in accordance with the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665, in order for the review of decisions taken by contracting authorities to be regarded as effective, review procedures must be available at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

24 At paragraph 33 of the judgment in *Fastweb* (C-100/12, EU:C:2013:448), the Court considered that a counterclaim filed by the successful tenderer cannot bring about the dismissal of an action for review brought by an unsuccessful tenderer where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings, given that, in such a situation, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid.

25 At paragraph 34 of that judgment, the Court therefore interpreted Article 1(3) of Directive 89/665 as meaning that an action for review by a tenderer whose bid has been unsuccessful cannot be declared inadmissible as a consequence of the examination of the preliminary plea of inadmissibility raised in the counterclaim filed by the successful tenderer, in the absence of a ruling as to whether the contract specifications are met by both the bids submitted.

26 That judgment gives concrete expression to the requirements of the provisions of EU law referred to in paragraph 23 above in a situation in which, following a public procurement procedure, two tenderers bring an action for review, each seeking the exclusion of the other.

27 In such a situation, both of the tenderers have an interest in obtaining a particular contract. On the one hand, the exclusion of one tenderer may lead to the other being awarded the contract directly in the same procedure. On the other, if both tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly.

28 The interpretation given by the Court in *Fastweb* (C-100/12, EU:C:2013:448), referred to in paragraphs 24 and 25 above, is applicable in a context such as that of the main proceedings. First, each of the parties to the proceedings has a legitimate interest in the exclusion of the bids submitted by the other competitors. Second, as observed by the Advocate General at point 37 of his Opinion, it cannot be ruled out that one of the irregularities justifying the exclusion of both the successful tenderer's bid and that of the tenderer challenging the contracting authority's decision may also vitiate the other bids submitted in the tendering procedure, which may result in that authority having to launch a new procedure.

29 The number of participants in the public procurement procedure concerned as well as the number of participants who have instigated review procedures and the differing legal grounds relied on by those participants are irrelevant to the question of the applicability of the principle established by the *Fastweb* (C-100/12, EU:C:2013:448) case-law.

30 In the light of the foregoing considerations, the answer to the first question is that the third subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 are to be interpreted as meaning that a main action for review brought by a tenderer with an interest in obtaining a particular contract who has been or may be adversely affected by an alleged breach of EU public procurement law or rules transposing that law, with a view to excluding another tenderer, cannot be dismissed as inadmissible under national procedural rules which provide that the counterclaim lodged by the other tenderer must be examined first.

Question 2

First part of Question 2

31 By the first part of its second question, the referring court seeks to ascertain, in essence, whether Article 267 TFEU is to be interpreted as precluding a provision of national law, in so far as that provision is interpreted to the effect that, where a question concerning the interpretation or validity of EU law arises, a chamber of a court of final instance must, if it does not concur with the position adopted by decision of that court sitting in plenary session, refer the question to the plenary session and is thus precluded from itself making a request to the Court of Justice for a preliminary ruling.

32 As the Court has repeatedly held, national courts have the widest discretion in referring questions to the Court involving interpretation of relevant provisions of EU law (see, to that effect, judgment in *Rheinmühlen-Düsseldorf*, 166/73, EU:C:1974:3, paragraph 3), that discretion being replaced by an obligation for courts of final instance, subject to certain exceptions recognised by the Court's case-law (see, to that effect, judgment in *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 21 and operative part). A rule of national law cannot prevent a national court, where appropriate, from using that discretion, (see to that effect, judgments in *Rheinmühlen-Düsseldorf*, 166/73, EU:C:1974:3, paragraph 4; *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 42, and *Elchinov*, C-173/09, EU:C:2010:581, paragraph 27) or complying with that obligation.

33 Both that discretion and that obligation are an inherent part of the system of cooperation between the national courts and the Court of Justice established by Article 267 TFEU and of the functions of the court responsible for the application of EU law entrusted by that provision to the national courts.

34 As a consequence, where a national court before which a case is pending considers that a question concerning the interpretation or validity of EU law has arisen in that case, it has the discretion, or is under an obligation, to request a preliminary ruling from the Court of Justice, and national rules imposed by legislation or case-law cannot interfere with that discretion or that obligation.

35 In the present case, a provision of national law cannot prevent a chamber of a court of final instance faced with a question concerning the interpretation of Directive 89/665 from referring the matter to the Court of Justice for a preliminary ruling.

36 In the light of the foregoing considerations, the answer to the first part of the second question is that Article 267 TFEU must be interpreted as precluding a provision of national law, in so far as that provision is interpreted to the effect that, where a question concerning the interpretation or validity of EU law arises, a chamber of a court of final instance must, if it does not concur with the position adopted by decision of that court sitting in plenary session, refer the question to the plenary session and is thus precluded from itself making a request to the Court of Justice for a preliminary ruling.

Second and third parts of Question 2

37 By the second and third parts of its second question, which it is appropriate to examine together, the referring court seeks to ascertain, in essence, whether Article 267 TFEU is to be interpreted as meaning that, after receiving the Court's answer to a question concerning the interpretation of EU law which it has submitted to the Court, or where the Court's case-law already provides a clear answer to that question, the referring court is itself required to do everything necessary to ensure that that interpretation of EU law is applied.

38 It should be noted in that regard that a judgment in which the Court gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings (see, to that effect, judgment in *Elchinov*, C-173/09, EU:C:2010:581, paragraph 29 and the case-law cited). Accordingly, the national court which, adjudicating as court of final instance, has complied with its obligation to make a reference to the Court for a preliminary ruling under the third paragraph of Article 267 TFEU, is bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by the Court and must, if necessary, disregard any national case-law which it considers inconsistent with EU law (see, to that effect, judgment in *Elchinov*, C-173/09, EU:C:2010:581, paragraph 30).

39 It should also be noted that the effectiveness of Article 267 TFEU would be impaired if the national court were prevented from forthwith applying EU law in accordance with the decision or the case-law of the Court (see, to that effect, judgment in *Simmenthal*, 106/77, EU:C:1978:49, paragraph 20).

40 A national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (see, first, judgment in *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 21 and 24, and, most recently, judgment in *A*, C-112/13, EU:C:2014:2195, paragraph 36 and the case-law cited).

41 Any provision of a national legal system and any legislative, administrative or judicial practice that might impair the effectiveness of EU law by withholding from the national court with jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions that might prevent EU rules from having full force and effect are incompatible with those requirements, which are the very essence of EU law (see judgments in *Simmenthal*, 106/77, EU:C:1978:49, paragraph 22, and *A*, C-112/13, EU:C:2014:2195, paragraph 37 and the case-law cited).

42 In the light of the foregoing considerations, the answer to the second and third parts of Question 2 is that Article 267 TFEU is to be interpreted as meaning that, after receiving the Court's answer to a question concerning the interpretation of EU law which it has submitted to the Court, or where the Court's case-law already provides a clear answer to that question, a chamber of a court of final instance is itself required to do everything necessary to ensure that that interpretation of EU law is applied.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The third subparagraph of Article 1(1) and Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, are to be interpreted as meaning that a main action for review brought by a tenderer with an interest in obtaining a particular contract who has been or may be adversely affected by an alleged breach of EU public procurement law or rules transposing that law, with a view to excluding another tenderer, cannot be dismissed as inadmissible under national procedural rules which provide that the counterclaim lodged by the other tenderer must be examined first.**

2. **Article 267 TFEU must be interpreted as precluding a provision of national law, in so far as that provision is interpreted to the effect that, where a question concerning the**

interpretation or validity of EU law arises, a chamber of a court of final instance must, if it does not concur with the position adopted by decision of that court sitting in plenary session, refer the question to the plenary session and is thus precluded from itself making a request to the Court of Justice for a preliminary ruling.

3. **Article 267 TFEU is to be interpreted as meaning that, after receiving the answer of the Court of Justice of the European Union to a question concerning the interpretation of EU law which it has submitted to the Court, or where the case-law of the Court of Justice of the European Union already provides a clear answer to that question, a chamber of a court of final instance is itself required to do everything necessary to ensure that that interpretation of EU law is applied.**

[Signatures]

---

* Language of the case: Italian.

Opinion of Advocate General Wathelet delivered on 15 October 2015.
Puligienica Facility Esco SpA (PFE) v Airgest SpA.
Request for a preliminary ruling from the Consiglio di Giustizia amministrativa per la Regione siciliana.
Reference for a preliminary ruling — Public service contracts — Directive 89/665/EEC – Article 1(1) and (3) — Review procedures — Application for annulment of the decision awarding a public contract by a tenderer whose bid was not successful — Counterclaim brought by the successful tenderer — Rule derived from national case-law under which the counterclaim must be examined first and, if the counterclaim is well founded, the main action must be dismissed as inadmissible without any examination of the merits — Whether compatible with EU law — Article 267 TFEU — Principle of the primacy of EU law — Principle of law stated by decision of the plenary session of the supreme administrative court of a Member State — National legislation which provides that that decision is binding on the chambers of that court — Obligation on the part of the chamber required to adjudicate on a question of EU law to refer that question to the plenary session if it disagrees with the decision of the plenary session — Whether the chamber has a discretion or is under an obligation to request a preliminary ruling from the Court of Justice.
Case C-689/13.

Court reports – general

ECLI identifier: ECLI:EU:C:2015:693

Languages and formats available

	BG	ES	CS	DA	DE	ET	EL	EN	FR	GA	HR	IT*	LV	LT	HU	MT	NL	PL	PT	RO	SK	SL	FI	SV
HTML																								
PDF																								

Document published in the digital reports of cases. They have official status.

Multilingual display

English (en)

Please choose

Please choose

Display

Text

ADDITIONAL OPINION OF ADVOCATE GENERAL

WATHELET

delivered on 15 October 2015 (1)

Case C-689/13

Puligienica Facility Esco SpA (PFE)

v

Airgest SpA

(Request for a preliminary ruling

from the Consiglio di Giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily, Italy))

‘Reopening of the oral procedure — Article 267 TFEU — Concept of ‘court or tribunal’ — Organisational approach — Functional approach’

I – Introduction

1. This Opinion is the second to be delivered in PFE (C-689/13, EU:C:2015:263). The request for a preliminary ruling concerns, first, the interpretation of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (2) as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (3) and, secondly, the interpretation of Article 267 TFEU and the principles of the primacy of EU law and of consistent interpretation.

2. By decision of 20 January 2015, the Court assigned the case to the Fifth Chamber. A hearing took place on 11 March 2015, at which Puligienica Facility Esco SpA (PFE), Gestione Servizi Ambientali Srl, the Italian Government and the European Commission had the opportunity to submit their observations. I delivered my first Opinion in that case on 23 April 2015. (4) On 10 June 2015, however, in the course of its deliberations, that chamber decided, pursuant to Article 60(3) of the Rules of Procedure of the Court, to refer the case to the Court, which reassigned it to the Grand Chamber.

3. By its order in PFE (C-689/13, EU:C:2015:521), the Court thus ordered the reopening of the oral procedure and invited the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union to express their views on the following question: ‘Do the concept of ‘court or tribunal’ within the meaning of Article 267 TFEU and the obligation to apply EU law as interpreted by the Court of Justice of the European Union apply, on the basis of a functional approach, to the chamber of a court or tribunal of a Member State that is seised of a dispute, or, on the basis of an organisational approach, only to that court or tribunal as a whole, of which that chamber is formally part?’

4. In the present Opinion I shall therefore concentrate on that question alone and merely raise points that are relevant to an examination of that question. I note, lastly, that only the Italian, Netherlands and Polish Governments, and the European Commission, replied to the

question put by the Court following the reopening of the oral procedure. Only the Italian Government and the Commission took the opportunity to express their views at the hearing which took place on 15 September 2015.

II – **Legal framework**

5. Legislative Decree No 104 of 2 July 2010 (Ordinary Supplement to GURI No 156 of 7 July 2010) introduced the Code of Administrative Procedure.

6. According to Article 99(3) of that code, '[i]f the chamber to which an action is assigned does not concur with a principle of law stated by the plenary session, it shall, by reasoned order, refer the decision on the appeal to the plenary session'.

7. Article 99(4) of the code provides that '[t]he plenary session shall rule on the dispute in its entirety, unless it decides to state the principle of law and to refer the remainder of the case back to the referring chamber'.

III – **Analysis**

A – *The interpretation suggested in my first Opinion*

8. As a preliminary point, I note that the Italian Government and the two other governments which replied to the question put by the Court support the functional interpretation of the concept of 'court or tribunal'.

9. That is also the position which I adopted, implicitly but definitely, in my first Opinion. At the end of my analysis of the referring court's second question I concluded that 'Article 267 TFEU precludes a provision such as Article 99(3) of the Code of Administrative Procedure, interpreted as requiring the chamber of a court against whose decisions there is no judicial remedy, where it does not concur with a principle of law stated by the plenary session of that same court, to refer to the plenary session the decision under appeal, without first having the opportunity to make a reference to the Court of Justice for a preliminary ruling'. (5)

10. Although I did not expressly put forward the idea of a 'functional' interpretation of 'court or tribunal' within the meaning of Article 267 TFEU, such in interpretation none the less accords with the approach that was advocated. It is also the one which I continue to support in this additional Opinion.

B – *The Consiglio di Giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily) and the impact of Article 99(3) of the Code of Administrative Procedure on the finality of its decisions*

11. The judicial nature of the Consiglio di Giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily), which is composed of two chambers constituting separate chambers of the Consiglio di Stato (Council of State), (6) for the purposes of Article 267 TFEU is therefore, in my view, not in doubt. According to Article 6(1) of the Code of Administrative Procedure, '[t]he Consiglio di Stato (Council of State) is the administrative court of final instance'.

12. The Italian Government confirmed at the hearing on 15 September 2015, first, that there was no judicial remedy available against decisions of the Consiglio di Giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily) and, secondly, nor was there any judicial remedy or procedural sanction available for failure to apply Article 99(3) of the Code of Administrative Procedure. (7)

13. As I pointed out in my first Opinion, the Corte suprema di cassazione (Court of Cassation) itself held in judgment No 2403, delivered in combined chambers on 4 February 2014, that 'within the Italian system of administrative courts it fell to the Consiglio di Stato (Council of State), *its chambers and the plenary session, without distinction*, to adjudicate as the court of final instance for the purposes of the third paragraph of Article 267 TFEU'. (8)

14. Moreover, it is not the first time that that court has referred a question to the Court of Justice for a preliminary ruling, since the Court has already answered several requests for a

preliminary ruling from the Consiglio di Giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily). (9)

15. To adopt an organisational approach to that court would mean therefore that a court or tribunal within the meaning of Article 267 TFEU might *lose* that status as a result of the particular manner in which the courts of a Member State are organised.

C – *The impact of a chamber of a court being relieved of its jurisdiction in favour of the same court with a different composition*

16. It is apparent from the Court's now settled case-law that Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, where the priority nature of that procedure prevents a national court from exercising its right or fulfilling its obligation to refer questions to the Court of Justice for a preliminary ruling both *before* the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, *after* the decision of that court on that question. (10) It follows from that case-law that the court seised of the dispute must always be in a position, at any given time, to refer a question to the Court for a preliminary ruling.

17. In the case at issue, Article 99(3) of the Code of Administrative Procedure does not require referral to another court but to the same court with a different composition. The key factor, in my view, is not that difference but the fact that if the Consiglio di Giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily) (or any other chamber of the Consiglio di Stato (Council of State)) decides, on the basis of Article 99(3) of the Code of Administrative Procedure, to refer the case to the plenary session, it is no longer, in principle, seised of the dispute itself and accordingly can no longer refer a question to the Court of Justice for a preliminary ruling, either at the same time or subsequently. (11)

18. However, there is nothing in Article 99(3) of the Code of Administrative Procedure that would appear to prevent a chamber of the Consiglio di Stato (Council of State) making use of Article 267 TFEU *before* relieving itself of jurisdiction. (12) It is appropriate to note that this is also the interpretation suggested by the Italian Government.

19. In such a situation, it is for that chamber to draw the appropriate conclusions from the judgment given by the Court of Justice or, if appropriate and only at that time, to refer the case to the plenary session of the Consiglio di Stato (Council of State). It will then be for the plenary session to decide the case in line with the judgment of the Court of Justice or to refer another question to that court.

20. That interpretation, moreover, has the advantage of reducing the likelihood of failure to apply, or misapplication, of EU law.

21. I shall conclude these comments regarding divestment of jurisdiction with a thought prompted by the judgment in Syfait and Others (C-53/03, EU:C:2005:333). In my first Opinion I suggested there was a parallel with the approach adopted in the judgment in Parfums Christian Dior (C-337/95, EU:C:1997:517). (13) It also seems to me that a converse inference may be drawn from the judgment in Syfait and Others (C-53/03, EU:C:2005:333).

22. In that case, the Court declined jurisdiction, inter alia, because a competition authority could be relieved of the case by the Commission under Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC]. (14) However, unlike a measure concerning the organisation of the courts, such as that at issue in the main proceedings, in the field of competition the body referring the question for a preliminary ruling does not control either the transfer itself or the time when the case may be transferred. By contrast, in the present case, it is the chamber of the Consiglio di Stato (Council of State) which decides, after making a reference to the Court for a preliminary ruling, whether it will refer the case to

the plenary session. In doing, so it retains its status as a court or tribunal within the meaning of Article 267 TFEU until it takes its own decision to decline jurisdiction.

23. In conclusion, it would seem to me that a court or tribunal should be viewed from a functional perspective, and that it cannot therefore lose that 'status' even though it may be relieved of its jurisdiction, in favour of the same court with a different composition, after the Court has given its ruling.

D – *Additional considerations*

24. For the sake of completeness, I should add that both the objective of cooperation inherent in Article 267 TFEU and the practical difficulty in applying the organisational approach should also lead the Court to reject such a view of a 'court or tribunal' within the meaning of Article 267 TFEU.

1. The principle of cooperation between the Court of Justice and the courts of the Member States

25. First of all, an organisational approach to the concept of 'court or tribunal' within the meaning of Article 267 TFEU would seem to me to conflict with the fact that, according to settled case-law, Article 267 TFEU establishes 'a procedure for direct *cooperation* between the Court and the courts of the Member States'. (15) That notion of cooperation is confirmed by the principle of the same name. As Advocate General Cruz Villalón aptly commented, the principle of sincere cooperation, as set out in Article 4(3) TEU, also applies to courts and tribunals, 'including the two courts concerned in these important proceedings'. (16) I am therefore sympathetic to the Commission's argument that, according to the principle of sincere cooperation, any provision concerning the organisation and procedure of the courts must be interpreted not only in line with Article 267 TFEU, but also in a way that promotes access to the preliminary ruling mechanism provided for in that article. (17)

26. Accordingly, where a court of final instance — which the referring court is under Italian national law (18) — expresses doubts regarding the interpretation of EU law and its application by another court of final instance within its own legal system, or even by its own plenary session, it would seem to me that it is for the Court of Justice to provide it with an answer.

27. As I stated in my first Opinion, to withhold from a chamber of a court against whose decisions there is no judicial remedy under domestic law the possibility of referring a matter to the Court of Justice solely because the plenary session of that same court is required to do so would seem to me to be at odds with the settled case-law of the Court, which has always given 'national courts *the widest* discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case'. (19)

28. In this regard I agree with the position taken by the Polish Government that any gap in that system of cooperation between national courts and the Court of Justice may undermine the very effectiveness of the provisions of the Treaty and of secondary law with regard to which the national court has doubts. (20)

29. An organisational interpretation of the concept of 'court or tribunal' would increase the risk that case-law might come into existence in the Member State in question that is not in accordance with EU law. If a situation arose where the 'chamber' of a court ruling at final instance decided not to refer the case to the plenary session and took a decision that was not in accordance with EU law, no court of whatever composition would be able to set it aside. As I noted in my first Opinion, if national courts against whose decisions there is no judicial remedy under national law are required to make a reference to the Court when faced with a question concerning the interpretation of EU law, it is in order to 'prevent a

body of national case-law that is not in accordance with the rules of [European Union] law from coming into existence in any Member State'. (21)

2. Practical difficulty in applying the organisational interpretation

30. Secondly, I consider that it would be difficult in practice for the Court to adopt an organisational interpretation of the concept of 'court or tribunal' in applying Article 267 TFEU.

31. As I stated previously, the Court has on several occasions answered questions referred for a preliminary ruling by the Consiglio di Giustizia amministrativa per la Regione siciliana (Council of Administrative Justice for the Region of Sicily). (22)

32. Furthermore, it is apparent from the Italian Government's answer to the question put by the Court following the reopening of the oral procedure that the Italian Code of Civil Procedure contains a provision similar to Article 99 of the Code of Administrative Procedure for the Corte suprema di cassazione (Court of Cassation). According to Article 273(3) of the Code of Civil Procedure, 'where a single chamber [of the Corte suprema di cassazione] does not concur with a principle of law stated by the combined chambers, it shall, by reasoned order, refer the decision on the appeal to the combined chambers'. The Court has already responded to a number of references for a preliminary ruling from that court.

33. If the Court were to adopt an organisational approach to the concept of 'court or tribunal' within the meaning of Article 267 TFEU, that would mean that all the courts or tribunals of a Member State which has a similar procedural rule to that established by the Italian Code of Administrative Procedure or the Italian Code of Civil Procedure would be able to refer matters to the Court of Justice only on condition that they did not challenge a principle of law stated by the plenary session of that court or tribunal.

34. Such a definition of a court or tribunal within the meaning of Article 267 TFEU would be impractical in that it would make it difficult for the Court of Justice to ascertain whether it had jurisdiction. It would be possible for that to be ascertained only where the referring court provided comprehensive information concerning its procedural law. The Court is not necessarily informed of all national procedural rules when a reference is made for a preliminary ruling. Moreover, for the Court to lack jurisdiction would require effective application of the procedural rules at issue in the particular case giving rise to the request for a preliminary ruling. To take the hypothesis of the Italian Code of Administrative Procedure, a chamber of the Consiglio di Stato (Council of State) does not necessarily refer a matter to the Court for a preliminary ruling because it considers that a principle of law stated by the plenary session is not in accordance with EU law. However, the Court would lack jurisdiction only in such a case.

35. Such an interpretation would, moreover, conflict with the consistent approach taken by the Court, which views a court as being one and the same entity, whatever its internal organisation. Evidence of that 'comprehensive' view of courts can be seen in the way in which the Court identifies national courts in its judgments. They are referred to exclusively by their 'overall' name, without any reference to their composition (chamber, plenary, etc.).

IV – **Conclusion**

36. In the light of the above considerations and of the analysis in points 63 to 89 of my first Opinion, delivered in the present case on 23 April 2015, I consider that the concept of 'court or tribunal' within the meaning of Article 267 TFEU must be interpreted on the basis of a functional approach. That article refers, therefore, to the court or the chamber of a court of a Member State which is seised of the dispute.

---

(1) Original language: French.

(2) OJ 1989 L 395, p. 33.

(3) OJ 2007 L 335, p. 31.

(4) C-689/13, EU:C:2015:263.

(5) Point 91 of my first Opinion.

(6) According to Article 1(2) of Legislative Decree No 373 of 24 December 2003, entitled ‘Measures for implementing the special statute of the Region of Sicily concerning the exercise in that region of the functions assigned to the Consiglio di Stato’ (Ordinary Supplement to GURI No 10 of 14 January 2004).

(7) The Italian Government had already mentioned that absence of sanctions in its written observations. See point 76 and the case-law of the Consiglio di Stato (Council of State) cited in my first Opinion.

(8) According to the Italian Government’s citation in paragraph 9 of its answer to the question put by the Court following the reopening of the oral procedure (emphasis added).

(9) See judgment in Valvo (C-78/07, EU:C:2008:171); order in Rizzo (C-107/11, EU:C:2012:96), and judgment in Ottica New Line di Accardi Vincenzo (C-539/11, EU:C:2013:591). I note that the last two requests for a preliminary ruling were made after the entry into force of the Code of Administrative Procedure.

(10) Judgment in Melki and Abdeli (C-188/10 and C-189/10, EU:C:2010:363, paragraph 57 and the operative part). See, also, judgment in A (C-112/13, EU:C:2014:2195, paragraph 46 and the operative part).

(11) According to Article 99(4) of the Code of Administrative Procedure, where the plenary session of the Consiglio di Stato (Council of State) is seised of a dispute it is to ‘rule on the dispute in its entirety, unless it decides to state a principle of law and to refer the remainder of the case back to the referring chamber’.

(12) Moreover, according to the conclusion I reached in my first Opinion, another interpretation, which would require ‘the chamber of a court against whose decisions there is no judicial remedy, where it does not concur with a principle of law stated by the plenary session of that same court, to refer to the plenary session the decision under appeal *without first having the opportunity to make a reference to the Court of Justice for a preliminary ruling* (would be incompatible with Article 267 TFEU’ (see point 91 of my first Opinion). Emphasis added.

(13) See points 85 to 89 of my first Opinion.

(14) OJ 2003 L 1, p. 1

(15) Judgment in Gauweiler and Others (C-62/14, EU:C:2015:400, paragraph 15 and the case-law cited). Emphasis added.

(16) Opinion of Advocate General Cruz Villalón in Gauweiler and Others (C-62/14, EU:C:2015:7, point 64).

(17) Paragraph 12 of the Commission’s answer to the question put by the Court following the reopening of the oral procedure.

(18) See points 66 and 69 to 76 of my first Opinion, and points 11 to 13 of the present Opinion.

(19) Judgment in Križan and Others (C-416/10, EU:C:2013:8, paragraph 64 and the case-law cited). Emphasis added. See point 64 of my first Opinion.

(20) See paragraph 5 of the answer of the Polish Government to the question put by the Court following the reopening of the oral procedure.

(21) Judgment in Lyckeskog (C-99/00, EU:C:2002:329, paragraph 14 and the case-law cited).

(22) See the case-law cited in footnote 9.

Top

JUDGMENT OF THE COURT (Fifth Chamber)

26 March 2015 (*)

(Reference for a preliminary ruling — Directive 2004/18/EC — Public service contracts — Conduct of the procedure — Contract award criteria — Qualifications of the staff assigned to performance of the contract)

In Case C-601/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Portugal), made by decision of 24 October 2013, received at the Court on 25 November 2013, in the proceedings

Ambisig — Ambiente e Sistemas de Informação Geográfica SA

v

Nersant — Associação Empresarial da Região de Santarém,

Núcleo Inicial — Formação e Consultoria Lda,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász (Rapporteur) and D. Šváby, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 6 November 2014,

after considering the observations submitted on behalf of:

– Ambisig — Ambiente e Sistemas de Informação Geográfica SA, by H. Rodrigues da Silva, advogado,

– Nersant — Associação Empresarial da Região de Santarém, by A. Robin de Andrade and D. Melo Fernandes, advogadas,

– the Portuguese Government, by L. Inez Fernandes and H. Fragoso, acting as Agents,

– the Greek Government, by F. Dedousi and V. Stroumpouli, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by M. Afonso and S. Delaude, and by A. Tokár and G. Braga da Cruz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 December 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 44 to 48 and 53 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum, OJ 2004 L 351, p. 44).

2 The request has been made in proceedings between Ambisig — Ambiente e Sistemas de Informação Geográfica SA (‘Ambisig’) and Nersant — Associação Empresarial da Região de Santarém (‘Nersant’) concerning the decision by Nersant to award to Iberscal — Consultores Lda (‘Iberscal’), and not to Ambisig, a contract for the supply of training and consultancy services.

Legal context

EU law

Directive 2004/18

3 Recital 46 in the preamble to Directive 2004/18 states that contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in a transparent and objective manner under conditions of effective competition.

4 It is stated in the third paragraph of recital 46 in the preamble to that directive that:

‘Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.’

5 Article 44(1) and (2) of Directive 2004/18 is worded as follows:

‘1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

These minimum levels shall be indicated in the contract notice.’

6 Article 48(1) of Directive 2004/18 provides that the technical and/or professional abilities of the economic operators are to be assessed and examined in accordance with paragraphs 2 and 3 thereof. Article 48(2)(a)(ii) and (e) of that directive provides that evidence of the technical abilities may be furnished by means according to the nature, quantity or importance, and use of the services concerned, including by the presentation of the list of the main services provided in the past three years and by a statement of the educational and professional qualifications of the service provider or contractor and/or those of the undertaking’s managerial staff and, in particular, those of the person or persons responsible for providing the services.

7 Article 53 of Directive 2004/18 provides:

‘1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or;

(b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.’

Portuguese law

8 Under Article 75(1) of the Public Procurement Code (Código dos Contratos Públicos) (‘the CCP’), ‘[t]he factors and any sub-factors corresponding to the criterion for award to the economically most advantageous tender must comprise all aspects, and only those aspects, pertaining to the performance of the contract to be concluded which is put out to tender, as laid down in the tendering specifications, and may not, directly or indirectly, bear upon the situations, qualities, characteristics or other factual aspects relating to the tenderers’.

The dispute in the main proceedings and the question referred for a preliminary ruling

9 By notice published on 24 November 2011, Nersant opened a public tendering procedure for the purchase of training and consultancy services for the implementation of the project ‘MOVE PME, Médio Tejo area of quality, environment, safety and health at work, food safety — SME’.

10 Article 5 of the contract notice stated that the contract would be awarded to the economically most advantageous tender, determined on the basis of the following factors:

‘A. Evaluation of the team — 40%

(i) This factor will be arrived at by taking into account the composition of the team, its proven experience and an analysis of the academic and professional background of its members.

B. Quality and merits of the service proposed — 55%

(i) Overall assessment of the proposed structure including the work programme — 0 to 20%.

(ii) Description of the technical methods to be used and the implementing methodologies — 0 to 15%.

(iii) Description of the methods for checking and monitoring the quality of the work in the various spheres of activity — 0 to 20%.

C. Overall price — 5%

Preference will be given to the tender achieving the highest number of points.’

11 Ambisig submitted a tender under the tendering procedure at issue in the main proceedings. In its preliminary report, the selection board for the procedure ranked Iberscal in first place.

12 On 3 January 2012, Ambisig exercised its right to a prior hearing, challenging the fact that the contract notice in question included in its evaluation criteria the factor relating to evaluation of the team assigned to performance of the contract, provided for in Article 5(A) of that notice.

13 In an addendum of 14 February 2012 to its final report of 4 January 2012, the selection board dismissed the arguments put forward by Ambisig in support of its request for a prior hearing. The selection board stated that the purpose of the factor in Article 5(A) of the contract notice at issue in the main proceedings is to evaluate 'the specific technical team which the tenderer proposes assigning to the work to be carried out' and '[t]he experience of the proposed technical team is, in this specific case, an intrinsic characteristic of the tender and not a characteristic of the tenderer'.

14 By decision of 14 February 2012, on the basis of the board's final report, the Chairman of the Executive Committee of Nersant awarded the contract for services at issue in the main proceedings to Iberscal and approved the draft contract for the relevant provision of services. On 19 March 2012 that contract was concluded between Nersant and Iberscal.

15 Ambisig brought proceedings before the Tribunal Administrativo e Fiscal de Leiria (Administrative and Tax Court, Leiria) seeking the annulment of the decision of 14 February 2012 of the Chairman of the Executive Committee of Nersant awarding the service contract at issue in the main proceedings to Iberscal. In the course of the proceedings, Ambisig also sought and obtained the broadening of the subject-matter of the proceedings to include the annulment of the service contract concluded on 19 March 2012.

16 Since the Tribunal Administrativo e Fiscal de Leiria dismissed the action in its entirety, Ambisig lodged an appeal before the Tribunal Central Administrativo Sul (South Central Administrative Court).

17 In upholding the decision of the court at first instance, the appellate court considered that the factor contained in Article 5(A) of the contract notice at issue in the main proceedings was permissible under Article 75(1) of the CCP, inasmuch as it related to 'the team proposed for the performance of the contract for the provision of services put out to tender and not, directly or indirectly, to situations, qualities or characteristics or other factual aspects of the tenderers'.

18 Ambisig lodged an appeal against the judgment of the Tribunal Central Administrativo Sul before the Supremo Tribunal Administrativo (Supreme Administrative Court), claiming in essence that the factor laid down in Article 5(A) of the contract notice at issue in the main proceedings was unlawful under Article 75(1) of the CCP.

19 According to the order for reference from the Supremo Tribunal Administrativo, the point of law to be settled is whether criteria such as those contained in Article 5(A) of the contract notice at issue in the main proceedings are permissible as award criteria in public procurement procedures for the purchase of training and consultancy services for the purposes of Article 53 of Directive 2004/18.

20 In that regard the Supremo Tribunal Administrativo observes that the European Commission submitted a proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011) 896 final), which constitutes a new factor in relation to the case-law of the Court in this area.

21 In those circumstances, the Supremo Tribunal Administrativo decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'With regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, is it compatible with Directive 2004/18, …, to lay down, among the factors making up the award criterion in relation to tenders in a public tendering procedure, a factor enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract, taking into consideration the composition of the respective teams, their proven experience and an analysis of their academic and professional background?'

The question referred for a preliminary ruling

22 The request for a preliminary ruling concerns, in essence, the question whether, for the award of a procurement contract for the provision of services of an intellectual nature, Article 53(1)(a) of Directive 2004/18 precludes the contracting authority from using an award criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract and which takes into consideration the composition of the team and the experience and academic and professional background of the team members.

23 The referring court found it necessary to refer the question due to a contradiction between, on the one hand, the Court of Justice's case-law on verification of the ability of economic operators for the performance of a contract and criteria for awarding contracts, as resulting from the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40) and, on the other, the Commission's proposal aimed at reforming the legislation on public procurement procedures, and the fact that quality is one of the award criteria provided for by Article 53(1)(a) of Directive 2004/18, a criterion which may be linked to the composition, experience and academic and professional background of the team entrusted with performance of the contract.

24 As a preliminary point, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65), which entered into force subsequently to the facts in the main proceedings, is not applicable to the present case.

25 It should also be noted that the case-law highlighted in the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40) concerns the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which was repealed by Directive 2004/18, and that that judgment does not rule out the possibility that the contracting authority may, in certain circumstances, fix and apply a criterion such as the one contained in the question referred at the stage of awarding the contract.

26 That judgment concerns the staff and experience of the tenderers in general and not, as in present case, the staff and experience of the persons making up a particular team which must actually perform the contract.

27 It should be noted, in relation to the interpretation of Article 53(1)(a) of Directive 2004/18 which is the subject of the referring court's question, that that directive introduced new elements into the Union legislation on public procurement in relation to Directive 92/50.

28 First of all, Article 53(1)(a) of Directive 2004/18 provides that 'the tender most economically advantageous' is to be identified 'from the point of view of the contracting authority', thereby giving the contracting authority greater discretion in its decision-making.

29 Secondly, the third paragraph of recital 46 in the preamble to Directive 2004/18 states that, where the contracting authorities choose to award a contract to the most economically advantageous tender, they are to assess the tenders in order to determine which one 'offers the best value for money', which tends to reinforce the importance of quality in the award criteria for public contracts.

30 Furthermore, Article 53(1) of Directive 2004/18 does not set out an exhaustive list of the criteria which may be used by the contracting authorities in determining the economically most advantageous tender, and therefore leaves it open to the authorities awarding contracts to select the criteria on which they propose to base their award of the contract. Their choice is nevertheless limited to criteria aimed at identifying the tender which is economically the most advantageous (see, to that effect, *Lianakis and Others*, C-532/06, EU:C:2008:40, paragraphs 28 and 29 and the case-law cited). To that end, Article 53(1)(a) of Directive 2004/18 specifically requires that the award criteria be linked to the subject-matter of the contract (see judgment in *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 86).

31 The quality of performance of a public contract may depend decisively on the 'professional merit' of the people entrusted with its performance, which is made up of their professional experience and

background.

32 This is particularly true where the performance of the contract is intellectual in nature and, as in the main proceedings in the present case, concerns training and consultancy services.

33 Where a contract of this nature is to be performed by a team, it is the abilities and experience of its members which are decisive for the evaluation of the professional quality of the team. That quality may be an intrinsic characteristic of the tender and linked to the subject-matter of the contract for the purposes of Article 53(1)(a) of Directive 2004/18.

34 Consequently, that quality may be included as an award criterion in the contract notice or in the relevant tendering specifications.

35 In the light of the foregoing, the answer to the question referred is that, with regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, Article 53(1)(a) of Directive 2004/18 does not preclude the contracting authority from using a criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract and which takes into consideration the composition of the team and the experience and academic and professional background of the team members.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

With regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, Article 53(1)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts does not preclude the contracting authority from using a criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract and which takes into consideration the composition of the team and the experience and academic and professional background of the team members.

[Signatures]

---

* Language of the case: Portuguese.

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 18 December 2014 (1)

Case C-601/13

Ambisig — Ambiente e Sistemas de Informação Geográfica SA
v
Nersant — Associação Empresarial da Região de Santarém

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal))

(Request for a preliminary ruling — Directive 2004/18/EC — Contract for services — Award of contract — Most economically advantageous tender — Contract award criteria — Evaluation of the team assigned to performance of the contract)

1. This case, which was received at the Court on 25 November 2013, concerns the interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (2) The request for a preliminary ruling was submitted in connection with a pre-contractual administrative appeal lodged by Ambisig — Ambiente e Sistemas de Informação Geográfica SA ('Ambisig') against the decision of 14 February 2012 of the Chairman of the Executive Committee of Nersant — Associação Empresarial de Região de Santarém ('Nersant') to award to Iberscal a contract for the purchase of training and consultancy services for the execution of the project 'Move PME, Médio Tejo area of quality, environment, safety and health at work, food safety — SME'.

I – The facts of the dispute in the main proceedings and the question referred for a preliminary ruling

2. On 24 November 2011, (3) the contracting authority Nersant published an invitation to tender for the purchase of training and consultancy services for the execution of the project 'MOVE PME, Médio Tejo area of quality, environment, safety and health at work, food safety — SME'.

3. Article 5 of the contract notice stated that the contract would be awarded to the economically most advantageous tender, determined on the basis of the following factors:

'A. Evaluation of the team – 40%

(i) This factor will be arrived at by taking into account the composition of the team, its proven experience and an analysis of the academic and professional background of its members.

B. Quality and merits of the service proposed – 55%

(i) Overall assessment of the proposed structure including the work programme – 0 to 20%

(ii) Description of the technical methods to be used and the implementing methodologies – 0 to 15%

(iii) Description of the methods for checking and monitoring the quality of the work in the various spheres of activity – 0 to 20%

C. Overall price – 5%

Preference will be given to the tender achieving the highest number of points.'

4. In its preliminary report, the selection board ranked Iberscal in first place.

5. On 3 January 2012, Ambisig, which had submitted a tender, exercised its right to a prior hearing, claiming that Factor A, which formed part of the award criteria, namely evaluation of the team, was unlawful.

6. The board added an addendum dated 14 February 2012 to its final report adopted on 4 January 2012, in which it rejected the arguments put forward by Ambisig at the prior hearing. In the board's opinion, what is assessed by Factor A is 'the specific technical team which the tenderer proposes assigning to the work to be carried out. The experience of the proposed technical team is, in this specific case, an intrinsic characteristic of the tender and not a characteristic of the tenderer'.

7. By decision of 14 February 2012, on the basis of the board's conclusions, the Chairman of the Executive Committee of Nersant awarded the contract for services to Iberscal and approved the draft contract for the provision of services.

8. Ambisig lodged a pre-contractual administrative appeal before the Tribunal Administrativo e Fiscal de Leiria (Administrative and Tax Court, Leiria) (Portugal) seeking both the annulment of the decision awarding the contract and the broadening of the subject-matter of the proceedings to include the annulment of that contract.

9. Since the Tribunal Administrativo e Fiscal de Leiria dismissed the appeal in its entirety, Ambisig lodged an appeal before the Tribunal Central Administrativo Sul (South Central Administrative Court).

10. In upholding the judgment delivered by the court of first instance, the appeal court held that the factor contained in Article 5(A) of the contract notice, which had been challenged as an award criterion, was permissible under Article 75(1) of the Código dos Contratos Públicos (Public Procurement Code, 'the CCP') inasmuch as it related to 'the team proposed for the performance of the contract for the provision of services put out to tender and not directly or indirectly to situations, qualities or characteristics or other factual aspects of the tenderers'.

11. Ambisig lodged an appeal against that judgment before the Supremo Tribunal Administrativo (Supreme Administrative Court), claiming in essence that the contested award criterion was not only unlawful under Article 75(1) of the CCP but also incompatible with the provisions of Directive 2004/18.

12. According to the order for reference from the Supremo Tribunal Administrativo, the point of law to be settled is whether criteria such as those contained in Article 5(A) of the contract notice at issue are permissible as award criteria in public procurement procedures for the purchase of services and consultancy.

13. The Supremo Tribunal Administrativo notes that a new factor has arisen in relation to the case-law of the Court involving the directives on public procurement, in that the Commission has submitted a proposal for a directive which might alter the light in which that question would be examined. (4)

14. It was in those circumstances that the national court decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'With regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, is it compatible with Directive 2004/18 …, as amended, to lay down, among the factors making up the award criterion in relation to tenders in a public tendering procedure, a factor enabling evaluation of the teams specifically put forward by the tenderers for the performance of the

contract, taking into consideration the composition of the respective teams, their proven experience and an analysis of their academic and professional background?'

II – Analysis

15. First of all, it is worth noting that, Nersant, all the Member States that submitted observations in this case, namely the Portuguese, Greek and Polish Governments, and also the Commission, in essence propose that the question referred for a preliminary ruling should be answered in the affirmative. Ambisig for its part has not submitted written observations, but presented oral argument at the hearing held on 6 November 2014.

A – *Preliminary observations*

16. First, my reasoning will be based solely on the provisions of Directive 2004/18, which are the only ones that are relevant *ratione temporis*, since the new directive is in no way applicable to the present case. (5)

17. Second, with regard to the principles at issue, it is important to differentiate between selection criteria and award criteria. Whilst selection of a tenderer concerns its personal situation and its ability to engage in the professional activity in question, the contract is awarded to the tenderer which submitted the tender that is most economically advantageous from the point of view of the contracting authority (Article 53(1)(a) of Directive 2004/18) or which offers the lowest price (paragraph 1(b) of that same article).

18. In other words, it is logical that, when it comes to awarding the contract, it is not (or it is no longer) the tenderer that is evaluated but the tender that it has submitted.

19. Furthermore, according to the case-law of the Court on public procurement procedures, the examination of the suitability of contractors to perform the contracts to be awarded and the awarding of those contracts are two different operations. Even though the relevant directives do not rule out the possibility that examination of the tenderers' suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules (6) and pursue different aims.

20. In that context, Article 44(1) of Directive 2004/18 provides that contracts will be awarded *after* the suitability of the economic operators has been checked in accordance with the criteria of economic and financial standing and of professional and technical knowledge or ability.

21. Although it is true that Directive 2004/18 leaves it open to the authorities awarding contracts to choose the criteria on which they propose to base their award of the contract, nevertheless their choice is limited to criteria aimed at identifying the offer which is economically the most advantageous, (7) and therefore that which offers the best value for money.

B – *The case-law*

22. In connection with Directive 92/50/EEC, (8) the Court has ruled previously on whether, in a procedure for the award of a contract, that directive precludes the contracting authority from taking account of tenderers' experience, manpower and equipment and also their ability to perform the contract by the anticipated deadline, not as qualitative selection criteria but as award criteria.

23. In the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40) (9) the Court held:

'30 … "award criteria" do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question.

31 In the case in the main proceedings, however, the criteria selected as "award criteria" by the contracting authority relate principally to the experience, qualifications and means of ensuring proper performance of the contract in question. Those are criteria which concern the tenderers'

suitability to perform the contract and which therefore do not have the status of "award criteria" for the purposes of Article 36(1) of Directive 92/50.

32 Consequently, the conclusion must be that, in a tendering procedure, a contracting authority is precluded by Articles 23(1), 32 and 36(1) of Directive 92/50 from taking into account as "award criteria" rather than as "qualitative selection criteria" the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline.'

24. In so holding, the Court confirmed its case-law (10) according to which, in public procurement procedures, evaluation of tenderers' suitability to carry out the works to be awarded and the award of the contract are two different operations and are governed by different rules.

25. Moreover, the absence of any distinction between the qualitative selection criteria and the award criteria led the Court to a finding of failure to fulfil obligations in *Commission* v *Greece* (C-199/07, EU:C:2009:693). (11)

26. In that context, it is worth noting that the wording of Article 36(1)(a) of Directive 92/50, entitled 'Criteria for the award of contracts', is in essence identical to the wording of Article 53(1)(a) of Directive 2004/18 (apart from the fact that that directive introduces three new criteria relating to environmental characteristics, running costs and cost effectiveness). (12)

27. However, compared with Directive 92/50, Directive 2004/18 seems to attach greater importance to the qualitative criteria, inasmuch as the third paragraph of recital 46 in the preamble thereto states that '[w]here the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract, since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.' (13)

28. Moreover, (like the Commission) I think that the fact that Article 53(1)(a) of Directive 2004/18 makes no express mention of the academic or professional qualifications of the members of the proposed team or of the relevance of their experience to the performance of the contract cannot be considered decisive, since the award criteria contained in that provision are listed simply as examples. Consequently, it is clear that Article 53(1)(a) of Directive 2004/18 (14) leaves it open to the contracting authority to choose the criteria on which it intends to base its award of the contract, provided that they are aimed at identifying the most economically advantageous offer. In addition, it follows from the case-law, and also from the wording of Article 53(1)(a) of Directive 2004/18, that only award criteria linked to the subject-matter of the contract (15) may be used as a basis for awarding the contract in question.

29. The examples cited in Article 53(1)(a) of Directive 2004/18, where 'the award is made to the tender most economically advantageous' are: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.

30. In that context, in my opinion, the technical team proposed by tenderers in an invitation to tender for the supply of services of an intellectual nature such as, in the present case, training and consultancy services, is an aspect intrinsically linked to the subject-matter of the contract, in particular its quality, inasmuch as that evaluation is not in any way intended to assess the abstract capacity or ability of the *tenderers* to perform the contract, but rather the *tender*, namely the resources (in this case human resources) actually assigned to the performance of the contract.

31. This is all the more relevant in the case of complex services where there is a close connection between inter alia the professional qualifications of the personnel and the economic value of the tenders.

32. In fact, (like the Commission) I think that, in certain cases, the contracting authority could state in the tender notice that the qualifications and experience of the personnel assigned to the performance of the contract may play a decisive role in the evaluation of the economic value of the tenders submitted.

33. That criterion concerning the technical and professional qualifications of the members of the team assigned to the performance of the contract could be applied where, first, the very nature of the contract justifies this and, secondly, the team assigned to perform the contract could be decisive in terms of the economic value that the contracting authority assigns to each tender. The qualifications and experience of the personnel in question would then be taken into account in evaluating the tenders and determining that which offers the best value for money.

34. This is what is indicated by the third paragraph of recital 46 in the preamble to Directive 2004/18, which permits the use of award criteria '[depending] on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, [(16)] as defined in the technical specifications, and the value for money of each tender to be measured'.

35. This means that, in so far as the characteristics and specific qualities of the personnel are a decisive factor in determining the economic value of the tender, the unauthorised replacement of any member of the proposed team during the performance of the contract would be likely to reduce that value *from the point of view of the contracting authority*. I would also point out that the European Union legislature added those words ('from the point of view of the contracting authority') in Article 53(1)(a) of Directive 2004/18 compared with Article 36(1)(a) of Directive 92/50, thus clearly emphasising the degree of discretion allowed to contracting authorities when choosing criteria.

36. In fact, as the Portuguese, Greek and Polish Governments have rightly pointed out, in the case of contracts for intellectual services, the professional experience of the personnel who will be performing the contract has a *direct influence* on the quality of the services provided by those personnel.

37. There can be no doubt that, in contracts for intellectual services, it is not only the tenderer's capacity that is being examined, but also the capacity (or professional experience) of the personnel who will be charged with providing those services, namely the 'key personnel' identified in the tender.

38. The skills, experience and general effectiveness of the project team are therefore intrinsic characteristics of a tender for services such as those at issue in the main proceedings, in so far as they form part of the evaluation of the quality of the tender and not of the tenderer's economic, technical and professional ability to ensure the proper performance of the contract.

39. Consequently, I agree with the statements of the Portuguese, Greek and Polish Governments to the effect that the professional experience of the personnel effectively providing services of this kind may form part of the criteria used to select the most economically advantageous tender referred to in Article 53 of Directive 2004/18.

40. It is worth noting here that this problem was addressed in the request for a preliminary ruling in *Lianakis and Others* (C-532/06, EU:C:2008:40), (17) again in the context of an award criterion and its evaluation. The referring court stated that '[f]urthermore, although the contract notice does require, on pain of disqualification, that a declaration be filed as to the type of contract of employment with staff, the fact that certain members of the project team are listed as permanent associates of the consultancy firm Planitiki does not constitute a shortcoming leading to disqualification, since such a statement adequately defines the relationship of the said members vis-à-vis the consultancy firm; *the question of whether or not it is legal to include the experience of mere associates who are not partners or employees of the consultancy firm or who are not assisting in the project being undertaken for the purpose of evaluating the experience of the consultancy firm is a different matter* …'.

41. In the present case, it would appear from the documents before the Court that what was evaluated by Factor A 'Evaluation of the team proposed' was in effect the specific technical team that each of the tenderers proposed to assign to the performance of the contract — and the board analysed its composition and experience and the profile and scientific and technical competence of each member

of that team — and that, consequently, the experience of the proposed technical team was, in the present case, an intrinsic characteristic *of the tender* and not a characteristic *of the tenderer*.

42. As Nersant explains, the quality of the services provided depended to a large extent on the persons charged with providing those services. In fact, I would point out that here, in the overall score used to determine the most economically advantageous tender, price accounted for only 5% compared with 40% for evaluation of the team and 55% for the qualities and merits of the service proposed (see point 3 of this Opinion). It is clear that quality was a very important criterion in the present case. Consequently, a distinction must be drawn between an abstract analysis of an undertaking's personnel, which may be considered as relating to a characteristic of the tenderer (which would be prohibited when evaluating tenders), and a specific analysis of the experience and skills of the personnel to be assigned to performing the contract in question, which would not be a characteristic of the tenderer, but rather a characteristic of the tender (which, in my opinion, would be perfectly acceptable when evaluating tenders).

43. I even think that this distinction between an abstract and a specific analysis of manpower is not incompatible with the judgments in *Lianakis and Others* (C-532/06, EU:C:2008:40) and *Commission* v *Greece* (C-199/07, EU:C:2009:693).

44. In fact, already in the judgment in *Beentjes* (31/87, EU:C:1988:422), the Court did not rule out the possibility that it was appropriate, at the selection stage, to evaluate the *tenderer's* capacity and, at the award stage, to evaluate the specific competences of the members of the *project team*. In paragraph 30 of the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40), the Court stated that it was inappropriate to treat as an award criterion 'the evaluation of the *tenderers'* ability to perform the contract in question' (paragraph 30) (emphasis added). (18)

45. In any event, it can be argued that the factual circumstances giving rise to the judgments in *Lianakis and Others* (C-532/06, EU:C:2008:40) and *Commission* v *Greece* (C-199/07, EU:C:2009:693) are different from those underlying the present case.

46. In fact, in the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40), the contracting authority had laid down 'experience' as an award criterion, using as a reference the value of projects completed by the tenderer over the previous three years and also 'the firm's manpower and equipment', taking account of the consultancy firm's manpower. (19)

47. Those criteria were very general and related to the tenderer, without reference to the projects actually carried out, unlike the criterion used here, which is much more specific and relates to the technical team to be charged with performing the contract: '(A) Evaluation of the team – 40%. (i) This factor will be arrived at by taking into account the composition of *the team*, its proven experience and an analysis of the academic and professional background of its members' (paragraph 2.2.1. of the request for a preliminary ruling) (emphasis added).

48. On the contrary, regarding experience as an award criterion, in the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40) the contracting authority 'stipulated [that it] should be evaluated by reference to the value of completed projects. Thus, for experience on projects worth up to EUR 500 000, a tenderer would be awarded 0 points; between EUR 500 000 and EUR 1 000 000, 6 points; between EUR 1 000 000 and EUR 1 500 000, 12 points; and so on up to a maximum score of 60 points on projects worth over EUR 12 000 000' (paragraph 14 of that judgment). Only the total value of projects completed was decisive.

49. Regarding the second award criterion, namely the firm's manpower and equipment, the latter 'were to be assessed by reference to the size of the project team. A tenderer would therefore be awarded 2 points for a team of 1 to 5 persons, 4 points for a team of 6 to 10 persons, and so on up to a maximum score of 20 points for a team of more than 45 persons' (paragraph 15 of the judgment in *Lianakis and Others*, C-532/06, EU:C:2008:40). Once again, only the size (whatever its specific composition or experience) was decisive.

50. Lastly, regarding the third award criterion (the firm's ability to complete the project by the anticipated deadline), it 'should be assessed by reference to the value of the firm's commitments.

Accordingly, a tenderer would be awarded the maximum score of 20 points for work worth less than EUR 15 000; 18 points for work worth between EUR 15 000 and EUR 60 000; 16 points for work worth between EUR 60 000 and EUR 100 000; and so on down to a minimum score of 0 points for work worth more than EUR 1 500 000' (paragraph 16 of that judgment). Once again, no specific qualitative factors were to be taken into account.

51. It is therefore clear that, unlike in the present case, in the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40) the evaluation concerned the tenderer (and its general experience) and not the technical team to be assigned to the contract (and its specific experience).

52. Similarly, in the judgment in *Commission* v *Greece* (C-199/07, EU:C:2009:693), the award criterion was based on evaluation of *the tenderer's* general and specific experience, in particular design work on similar projects, and also on its ability to perform the contract by the anticipated deadline.

53. Like Nersant, I consider that, in both cases, the criteria defined concerned tenderers' *abstract* ability or capacity to perform the contract and not the ability or capacity of the *specific* technical teams to be assigned to perform it.

54. Thus, it is my understanding that it does not follow from the judgments in *Lianakis and Others* (C-532/06, EU:C:2008:40) and *Commission* v *Greece* (C-199/07, EU:C:2009:693) that the specific technical team to be assigned to a contract cannot be evaluated as part of the evaluation of tenders, but only that award of the contract cannot be based on a criterion concerned with the tenderer's ability to perform a contract (established on the basis of its capacity defined in abstract terms).

55. Likewise, the evaluation that the contracting authority must make of the team assigned by an economic operator to perform the contract in question, which relates to the provision of services of an intellectual nature, is intended to assess the quality offered by the economic operator of the services to be provided. It therefore relates to a criterion aimed at selecting the tender offering the best value for money.

56. As Hölzl and Friton (20) point out, the permissibility of an award criterion depends on whether it is concerned with evaluating the tenderer's ability to perform the contract in question or whether it is aimed at identifying the most economically advantageous tender. In the latter case, the experience of the team or the personnel assigned to the services that are the subject of the contract in question may in fact be taken into account.

57. The judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40) does not preclude such an interpretation. (21) In fact, in that judgment, the Court held that criteria that are 'essentially linked' to or 'relate principally' to evaluation of the tenderers' ability to perform the contract in question must be excluded as award criteria. This therefore makes it possible to use criteria which, although also concerned with assessing the tenderer's ability to perform the contract, are *principally* aimed at identifying the most economically advantageous tender.

58. It could also be helpful to cite other judgments of the Court and, first of all, the judgment in *GAT* (C-315/01, EU:C:2003:360), delivered prior to the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40). In that case, an Austrian contracting authority had issued an invitation to tender for the supply of a special motor vehicle (a road sweeper) for the Motorway Authority. The invitation to tender stipulated that 'in order to evaluate the tenders so as to determine which offer was the most economically advantageous, the contracting authority had to take account of the number of references relating to the product offered by the tenderers to other customers', the Court making the important point here that this was 'without considering whether the [customers'] experiences of the products purchased had been good or bad' (paragraph 57).

59. In paragraph 64 of that judgment, the Court held that, although Article 26(1) of Directive 93/36/EEC (22) left it to the contracting authority to choose the criteria on which it intended to base its award of the contract, that choice might relate only to criteria aimed at identifying the offer which was the most economically advantageous. However, 'the fact remains that the submission of a list of the principal deliveries effected in the past three years, stating the sums, dates and recipients, public or private, involved is expressly included amongst the references or evidence which, under

Article 23(1)(a) of Directive 93/36, may be required to establish the suppliers' technical capacity' (paragraph 65).

60. Furthermore, 'a simple list of references, such as that called for in the invitation to tender at issue in the main proceedings, which contains only the names and number of the supplier's previous customers without other details relating to the deliveries effected to those customers cannot provide any information to identify the offer which is the most economically advantageous within the meaning of Article 26(1)(b) of Directive 93/36, and cannot therefore in any event constitute an award criterion within the meaning of that provision' (paragraph 66).

61. Consequently, the Court concluded that 'Directive 93/36 precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract' (paragraph 67).

62. In my opinion, it follows from the above that the Court did not in principle rule out the use of lists of references as an award criterion, but only in so far as they provide an indication regarding quality (for example indicating whether the customers' experiences with the products were good or bad (see paragraph 57 of that judgment)), in other words, an indication making it possible to identify the most economically advantageous offer. (23)

63. Furthermore, in its judgment in *Evans Medical and Macfarlan Smith* (C-324/93, EU:C:1995:84), the Court did not require the selection criteria and the award criteria to be mutually exclusive and allowed a criterion focussed on the tenderer (namely its ability to guarantee reliability and continuity of supplies) to be taken into account in the award process.

64. Lastly, it is also worth noting that, although reliability is specifically mentioned in the public procurement directives as a selection criterion, in the judgment in *EVN and Wienstrom* (C-448/01, EU:C:2003:651, paragraph 70) the Court notes that 'reliability of supplies can, in principle, number amongst the award criteria used to determine the most economically advantageous tender'.

65. I would also mention the case-law of the General Court of the European Union in cases relating to public contracts awarded by EU institutions, which is of interest here because those contracts were awarded on the basis of provisions worded in exactly the same way as those of Directive 2004/18 which are applicable to the present case.

66. The judgment in *Evropaïki Dynamiki* v *Commission* (T-589/08, EU:T:2011:73) (examined after the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40); the appeal against the judgment of the General Court was dismissed by the Court in the order in *Evropaïki Dynamiki* v *Commission* (C-235/11 P, EU:C:2011:791)) was concerned with the number of days proposed for the performance of the works in connection with an invitation to tender. The General Court noted that '[i]n its report, the evaluation committee observed that "[t]he suggested number of days to execute the work of the tasks seem[ed] unrealistically low" and that "this raise[d] serious doubts as to whether the objectives [could] be delivered appropriately"' (paragraph 40).

67. In that regard, the General Court recalled that 'in its tender, the applicant had suggested 45 person-days for the management of the project, while the estimate in the tender specifications was 60 person-days. As the evaluation committee noted in its report, the number of person-days suggested by the applicant is therefore 25% lower than the indicative estimate provided in the invitation to tender at issue. The Court considers, and the applicant admitted at the hearing, that such a discrepancy requires a convincing explanation' (paragraph 41). In the General Court's view, the indication of the number of person-days provided for was 'relevant, principally in order to assess the reliability of the applicant's offer' (paragraph 42).

68. What is of interest to us here is that the General Court rightly noted in paragraph 43 that 'the alleged experience of the applicant's experts is also unable to explain that discrepancy. In that regard however, *the Court does not share the Commission's view that the applicant's experience is irrelevant for the assessment of the award criteria. Although it is true, in general, that that factor is taken into account in order to assess whether the bid is able to satisfy the selection criteria and not in the*

assessment of the award criteria, it must be observed that the applicant does not rely on its experience as an award criterion in itself, but only in order to justify the reduced number of person-days provided for. In that context, more experience would, in principle, be able to explain such a difference between their estimates' (emphasis added).

69. As the General Court points out (paragraph 44), in the present case, the applicant had not established that its team had more experience. In those circumstances, the Commission was entitled to take the view that the experience relied on did not enable the team's capacity to perform the required services in 45 days to be ascertained (paragraph 45). (24)

70. In another judgment subsequent to the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40), namely the judgment in *Evropaïki Dynamiki* v *EFSA* (T-457/07, EU:T:2012:671), in connection with a dispute concerning the award of public contracts by a European Union body and in relation to an invitation to tender for the supply of services of a highly technical nature on the basis of a framework contract, the General Court rightly held that it could not be concluded either from the applicable legislation or from the case-law in *Beentjes* (31/87, EU:C:1988:422) and *Lianakis and Others* (C-532/06, EU:C:2008:40) that the use of CVs for evaluation purposes, both at the selection stage and at the award stage, should be ruled out in principle (see paragraph 80 et seq.).

71. In the opinion of the General Court, the use of those documents during the award stage could be justified if it served to identify the most economically advantageous tender and not the tenderers' ability to perform the contract (paragraphs 81 and 82).

72. The General Court particularly highlights the fact the use of a criterion consisting in evaluating the training strategy of a team proposed for the performance of a contract relating to complex services may serve to identify the tender offering the best value for money in so far as it clearly concerns services for which the quality of the tender and that of the team proposed are indisputably linked (paragraph 82).

73. In the judgment in *AWWW* v *Eurofound* (T-211/07, EU:T:2008:240, paragraphs 58 to 63), which is also subsequent to the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40), the General Court again rightly took the view that it was lawful to take account of previous experience as an award criterion in order evaluate the quality of the services to be provided, inasmuch as it held that CVs from the selection procedure could be used and experience could be taken into account in evaluating the quality of the tenderer's ability to perform the specific areas of work covered by the contract. In the same vein, I would once again refer to the judgment in *Evropaïki Dynamiki* v *EMCDDA* (T-63/06, EU:T:2010:368).

74. Even before the judgment in *Lianakis and Others* (C-532/06, EU:C:2008:40), in the judgment in *Renco* v *Council* (T-4/01, EU:T:2003:37), the General Court had already accepted that an undertaking's experience could be used as an award criterion. (25)

C – *The legal literature*

75. A large number of articles in the legal literature also support the view that evaluation of the technical team to be assigned to performing a contract may constitute an aspect of the tender and not a characteristic of the tenderer and that, therefore, that evaluation may be a factor to be taken into account when choosing the most economically advantageous tender. (26)

76. For example, Lee (27) has rightly pointed out that '[e]valuating an entity's ability to perform the contract on the one hand and comparing the strengths of different teams proposed by tenderers are not the same thing. For example, an awarding authority seeking management consultancy services is likely to find that the global consultancy firms have the capacity and manpower to carry out almost any given management consultancy project. However, it is self-evident that the success of the project will depend not on the capacity of the firm but on the specific resources made available by that firm for the project'.

77. Next, as Rubach-Larsen (28) has rightly pointed out, 'the ECJ has opened up for the lawful choice of bidder-related criteria as award criteria, provided that these are not essentially linked to the selection of qualified tenderers, but instead to the evaluation of the offers, and *not principally related to*

the tenderer's experience, qualifications or means, but to the quality of the works, supplies or services they have offered' (emphasis added).

78. As Arrowsmith (29) has also rightly pointed out, '*Lianakis* does not preclude considering either the abilities of the tenderer or the qualities of the individuals or team that will be working on the contract, *to the extent that these are actually relevant to the quality of the work that will be done under the contract i.e. to determining which offer is the most economically advantageous.* In this respect, it can be argued that on the facts of *Lianakis* the experience and manpower of the tenderer was not actually used to assess the quality of the services but in an arbitrary fashion that had no relevance to that question — tenderers were given higher scores for different types and extent of experience without actually considering the relevance of this to the services to be performed (which were actually of relatively low value)' (emphasis added).

79. Lastly, Treumer (30) pertinently cites a decision by the Danish Complaints Board for Public Procurement (31) where '[t]he Board quoted a passage from [an] earlier ruling to the effect that according to the EC public procurement rules it is not excluded that an element can be considered both in the selection and in the award stage. However, according to the Board the condition is that the element according to its content is suited to function as the basis for selection but also — *owing to the character of the supply in question — is suited to assess the economically most advantageous tender*. The Board found that this condition was fulfilled in the concrete case, which concerned a service where an experienced service provider would be of particular value. The Board emphasised in this context that the reliability of supply was of special importance for the task in question, namely out of consideration for maritime safety. The Board therefore found it justified to consider the extent of the experience in the award phase while it at the same time stressed that this normally is to be considered as a selection criterion' (emphasis added).

D – *Conclusion*

80. Although the distinction between the selection stage and the award stage precludes the use of an economic operator's previous *general* experience as an award criterion, it is nonetheless true that the *specific* experience of the particular technical team proposed by that operator may for certain contracts be taken into account for the purpose of evaluating the tender at the award stage.

81. As the Polish Government has rightly pointed out, Article 53 of Directive 2004/18 expressly refers to the quality of the goods or services to be supplied as one of the criteria which the contracting authority may apply. In that regard, Article 53(1)(a) of Directive 2004/18 refers to the tender most economically advantageous *from the point of view of the contracting authority* and not the most advantageous tender based on abstract and objective criteria. In order to select the most economically advantageous tender, the contracting authority must therefore have the option of deciding on the factors that need to be taken into account which, if fulfilled, will enable it to choose the most advantageous tender in the light of its specific needs.

82. I also agree with the Portuguese Government where it emphasises that the option or even the necessity of assessing the technical value and the quality of the proposal in itself in order to award contracts for training and consultancy services of an intellectual nature, as in the present case, must be given concrete expression in the form of objective elements linked to the content of the tender. Moreover, one of those essential elements is precisely an indication of the specific human resources that the tenderers will assign to performance of the contract, such indication obviously constituting a quality or a characteristic not of the tenderers but of the tender itself.

83. It seems to me that that interpretation best conforms to the letter and the spirit of the provisions at issue and to the scheme of Directive 2004/18 (which, we should not forget, is intended to accord greater importance to qualitative criteria) (32) in the case of contracts for the provision of training and consultancy services of an intellectual nature.

84. In the light of Directive 2004/18, the criterion for the award of a public contract may therefore include an evaluation of the technical teams objectively and specifically proposed by the tenderers for the performance of a contract for the supply of services of an intellectual nature, such as training and consultancy services.

85. Lastly, as the Polish Government has rightly pointed out, it would appear from the documents before the Court that, in the present case, the contracting authority met the other requirements laid down by Directive 2004/18 concerning the need to respect the principles of transparency and non-discrimination in the public procurement procedure in question.

86. The answer to the question referred for a preliminary ruling should therefore be that, with regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, under certain circumstances Directive 2004/18 does not preclude the contracting authorities from using, among the factors making up the criterion for awarding a public contract, a factor which enables evaluation of the teams specifically put forward by the tenderers for the performance of the contract, taking into consideration the composition of the teams, their proven experience and an analysis of their academic and other professional qualifications. However, the exercise of that option will be compatible with the objectives of Directive 2004/18 only where the characteristics and specific qualities of the members of the team are a decisive factor in determining the economic value of the tender submitted for evaluation to the contracting authority.

E – *Post scriptum: the new Directive 2014/24*

87. Even though the new Directive 2014/24 is not applicable to the present case *ratione temporis*, (33) I will mention it here for the sake of completeness.

88. It is apparent from Article 67(2)(b) of Directive 2014/24 that the EU legislature considered it necessary to clarify the rules discussed in this Opinion. According to that provision, the contract award criteria that the contracting authority may take into account in order to determine the most economically advantageous tender include: ‘organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract’.

89. That provision is clarified by recital 94 in the preamble to that directive, which is worded as follows:

‘Wherever the quality of the staff employed is relevant to the level of performance of the contract, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this can affect the quality of contract performance and, as a result, the economic value of the tender. This might be the case, for example, in contracts for intellectual services such as consultancy or architectural services. Contracting authorities which make use of this possibility should ensure, by appropriate contractual means, that the staff assigned to contract performance effectively fulfil the specified quality standards and that such staff can only be replaced with the consent of the contracting authority which verifies that the replacement staff affords an equivalent level of quality’.

90. The intention to clarify the rules at issue in this case was already present in the Proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011) 896 final). In fact, the Explanatory Memorandum states that ‘… [t]he distinction between selection of tenderers and award of the contract which is often a source of errors and misunderstandings has been made more flexible, allowing it for contracting authorities to decide on the most practical sequencing by examining award criteria before selection criteria and to take into account the organisation and quality of the staff assigned to performing the contract as an award criterion’.

III – Conclusion

91. Consequently, I propose that the Court answer the question referred by the Supremo Tribunal Administrativo for a preliminary ruling as follows:

With regard to procurement contracts for the provision of services of an intellectual nature, training and consultancy, under certain circumstances Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts does not preclude the contracting authorities from using, among the factors making up the criterion for awarding a public contract, a factor which enables

evaluation of the teams specifically put forward by the tenderers for the performance of the contract, taking into consideration the composition of the teams, their proven experience and an analysis of their academic and other professional qualifications. However, the exercise of that option will be compatible with the objectives of Directive 2004/18 only where the characteristics and specific qualities of the members of the team are a decisive factor in determining the economic value of the tender submitted for evaluation to the contracting authority.

---

1 – Original language: French.

---

2 – OJ 2004 L 134, p. 114.

---

3 – *Diáro da República*, Series 2, No 226.

---

4 – After this case file was received by the Court, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65) was adopted, which came into force in April of the same year.

---

5 – See judgments in *Commission* v *France* (C-337/98, EU:C:2000:543, paragraphs 38 to 40) and *Hochtief and Linde-Kca-Dresden* (C-138/08, EU:C:2009:627). Directive 2014/24 was not yet in force at the time of the events in the main proceedings.

---

6 – See, to that effect, the judgments in *Beentjes* (31/87, EU:C:1988:422, paragraphs 15 and 16) and *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 26).

---

7 – Judgments in *Beentjes* (31/87, EU:C:1988:422, paragraph 19); *Concordia Bus Finland* (C-513/99, EU:C:2002:495, paragraphs 54 and 59); *GAT* (C-315/01, EU:C:2003:360, paragraphs 63 and 64); and *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 29).

---

8 – Council Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 92/50').

---

9 – I note that that judgment was delivered by a Chamber of five judges, without an Opinion.

---

10 – See judgment in *Beentjes* (31/87, EU:C:1988:422).

---

11 – In that context, see also the judgment in *Spain* v *Commission* (C-641/13 P, EU:C:2014:2264).

---

12 – In that context, some authors have, however, emphasised that, in other articles, the two directives differ somewhat regarding this matter. See, for example, M. Burgi and B. Brandmeier, 'Quality as an interacting award criterion under current and future EU law', *European Procurement & Public Private Partnership Law Review*, 2014, vol. 9, No 1, p. 23: 'Taking a close look at the background of these judgments [*Beentjes* (31/87, EU:C:1988:422), *Lianakis and Others* (C-532/06, EU:C:2008:40) and *Commission* v *Greece* (C-199/07, EU:C:2009:693)], … the wording of the previous provisions in Directive 92/50/EC, on which the court based its decision, provided for a much stricter differentiation between the selection and the award stage. … Article 20 stated that selection criteria had to be evaluated before entering the award phase. Apart from the fact that this chronological order never was interpreted in a

strict way …, the legal base for such an assumption was replaced. A provision according to Article 20 of Directive 92/50 no longer exists under current EU law.'

---

13 – M. Burgi and B. Brandmeier, op. cit., in the same article emphasise that 'among the non-exhaustive list of possible award criteria in Article 53(1)(a) of Directive 2004/18/EC, the aspect of "*delivery date and delivery period or period of completion*" was introduced as concreti[s]ation of quality in this regard. … Apart from this, it is striking that the court gave no further justification, in any of these rulings, for the necessity of such a strict differentiation, nor did it take into account the practical need of public entities to make certain tenderer-related aspects part of their awarding decision.'

---

14 – Which covers cases where 'the award is made to the tender most economically advantageous from the point of view of the contracting authority', whilst paragraph (1)(b) covers cases where the contracting authorities award the contract on the basis of 'the lowest price only'.

---

15 – See, to that effect, judgments in *Concordia Bus Finland* (C-513/99, EU:C:2002:495, paragraph 59) and *Lianakis and Others* (C-532/06, EU:C:2008:40, paragraph 29).

---

16 – See P. Lee, 'Implications of the *Lianakis* decision', *Public Procurement Law Review,* 2010, p. 52: 'The recitals in the old directives were silent regarding award criteria. This change clarifies that where criteria are relevant to assess the "performance offered" by each tenderer, it is an appropriate and valid award criteria. This provision changes the emphasis that might have existed in the old directives, and clarifies that criteria, where they assess the "level of performance", must be valid criteria regardless of whether it was also a selection criterion. How else is the anticipated level of performance in a services contract to be evaluated? Does not the experience of the specific personnel offered become a necessary evaluation criterion? Perhaps the anticipated level of performance and the mere ability to perform are different. *A League One soccer player has the ability to "perform" in a soccer match, but the anticipated level of performance would be significantly different from that of a premiership player*' (emphasis added).

---

17 – See F. Pachner, 'Schafft die Entscheidung Lianakis des EuGH Probleme für die Vergabe geistiger Leistungen?', ZVB, 2008, p. 285 et seq.

---

18 – For the same interpretation, see inter alia P. Lee, op. cit. As Lee rightly points out: (i) 'the facts of the case [in *Lianakis and Others*] go some way to undermine the contention that the municipality genuinely examined the project team rather than the firm's size'; (ii) 'there is nothing explicit or implicit in the wording of the directives that leads to the conclusion that the experience of the project team cannot be, or should not be, evaluated at the award stage', and (iii) 'more unfortunately neither in *Beentjes* nor in *Lianakis [and Others]* is there any rationale offered to explain the harm that could arise if "experience" were considered at both stages, in particular where at selection "experience" is of the entity and at award is of the project team'.

---

19 – 'The contract notice referred to the award criteria in order of priority: (1) the proven experience of the expert on projects carried out over the last three years; (2) the *firm's* manpower and equipment; and (3) the ability to complete the project by the anticipated deadline, together with the *firm's* commitments and its professional potential' (paragraph 10 of that judgment) (emphasis added).

---

20 – F.J. Hölzl and P. Friton, 'Entweder — Oder: Eignungs- sind keine Zuschlagskriterien', *Neue Zeitschrift für Baurecht und Vergaberecht*, 2008, pp. 307 and 308.

---

21 – See M. Orthmann, 'The experience of the bidder as award criterion in EU public procurement law', *Humboldt Forum Recht*, 2014, No 1, p. 4. He points out that 'throughout the EU, contracting authorities already seem to have adopted a flexible interpretation of the rule and to follow a pragmatic approach in

dealing with the criterion “experience” … In general, contracting authorities indeed encounter the problem of experience as an award criterion mostly in cases concerning services of a more complex nature … National courts seem to have adopted a soft interpretation of the rule … allowing the contracting authorities to take into account experience where it is linked to the subject-matter of the contract … and has not been established as a selection criterion (Oberlandesgericht München, decision of February 10, 2011, File No Verg 24/10; Oberlandesgericht Düsseldorf, decision of May 5, 2008, File No Verg 5/08; Oberlandesgericht Düsseldorf, decision of April 28, File No Verg 1/08)’.

---

22 – Council Directive of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

---

23 – See also point 51 of the Opinion of Advocate General Geelhoed in *GAT* (C-315/01, EU:C:2002:573): ‘The list of references here in question may say something about the tenderer’s experience and technical expertise, but a list of this kind is not suitable for determining the most advantageous offer. Such a list of references does not, after all, give any indication at all of the services provided, the running costs or other criteria capable of determining which tender will ultimately prove to be economically the most advantageous for the contracting authority’.

---

24 – See Petersen, Refining the rules on the distinction between selection and award criteria — *Evropaïki Dynamiki* v *Commission* (T-589/08), *Public Procurement Law Review*, 2011, p. NA246: ‘The present ruling … interprets [the] case law [of the Court] in a flexible way, as it clearly approved the consideration of the experience and qualifications of the proposed team members when evaluating the relative advantages of the proposed project management within the third award criterion. For the purpose of that evaluation it expressly applied the test whether the applicant’s tender had shown the ability of its proposed team to properly deliver the objectives of the contract … So it seems that the General Court considers the experience and qualifications of the team members offered to perform the specific contract to be admissible considerations for the award decision. The experience and qualifications of the team offered in the tender is, according to the General Court, relevant to establish the tenderer’s ability to properly deliver the contract, which clearly is a quality criterion relevant to identifying the most economically advantageous tender’.

---

25 – No appeals were brought against the judgments of the General Court in *Evropaïki Dynamiki* v *EFSA* (T-457/07, EU:T:2012:671); *AWWW* v *Eurofound* (T-211/07, EU:T:2008:240); *Evropaïki Dynamiki* v *EMCDDA* (T-63/06, EU:T:2010:368); and *Renco* v *Council* (T-4/01, EU:T:2003:37), cited in points 70, 73 and 74 of this Opinion.

---

26 – Several articles are referred to by Orthmann, op. cit.

---

27 – P. Lee, op. cit., pp. 47 and 48.

---

28 – A. Rubach-Larsen, ‘Selection and award criteria from a German public procurement law perspective’, *Public Procurement Law Review*, 2009, pp. 112, 119 and 120.

---

29 – S. Arrowsmith, ‘EU Public Procurement Law: An Introduction’, University of Nottingham, 2010, pp. 173 and 174.

---

30 – See S. Treumer, ‘The distinction between selection and award criteria in EC public procurement law: the Danish approach’, *Public Procurement Law Review*, 2009, No 3, pp. 146 to 154.

---

31 – In *Iver C. Weilbach og CO A/S* v *Kort-og Matrikelstyrelsen*.

32 – See point 27 of this Opinion.

33 – See point 16 of this Opinion.

Acórdãos STA

Acórdão do Supremo Tribunal Administrativo

Processo:	0840/13
Data do Acordão:	30/04/2015
Tribunal:	1 SECÇÃO
Relator:	MARIA BENEDITA URBANO
Descritores:	CONTRATAÇÃO PÚBLICA AQUISIÇÃO DE SERVIÇOS CRITÉRIO DE ADJUDICAÇÃO
Sumário:	Segundo entendimento do TJUE, a fixação, no programa de concurso destinado à aquisição de serviços de formação e consultoria, de um factor 'Avaliação da equipa' (constituição da equipa, experiência comprovada e análise curricular) não ofende o n.º 1 do artigo 75.º do CCP.
Nº Convencional:	JSTA000P18939
Nº do Documento:	SA1201504300840
Data de Entrada:	18/06/2013
Recorrente:	A....., SA
Recorrido 1:	B..... - ASSOCIAÇÃO EMPRESARIAL DA REGIÃO DE ..... E OUTRA
Votação:	UNANIMIDADE
Aditamento:	

Full Text

Full Text:

Agreed in conference at the Administrative Litigation Section of the Supreme Administrative Court:

I – Report

1. A....., SA (A.....), duly identified in the case file, brought the present pre-contractual litigation action before the Administrative and Fiscal Court of Leiria (TAF/Leiria) against B..... – Business Association of the Region of ..... (B.....) and the counter-interested parties C....., Lda; D....., Lda; E....., Lda; F....., Lda; G....., SA; H....., Lda; I....., Lda; J....., SA; L....., SA; M....., Lda; and N....., Lda, also identified in the case file.

In summary, it requests the following (pages 19-20):

(i) The annulment of the award order of the Chairman of the Executive Committee of the defendant entity;

(ii) An order that the defendant entity, through the Jury of the procedure, approve a new evaluation report of the tenders, applying the award criterion purged of the illegal factor, ordering A.'s tender first;

(iii) An order that the defendant entity, through the Chairman of the Executive Committee, issue a new award act in its favour;

(iv) or, if this is not understood, the condemnation of the respondent entity in the approval of a new procedure programme, setting an award criterion in accordance with article 75 of the

PPC, and in the practice of all subsequent acts and diligences of the public tender.

During the course of the action, the Plaintiff extended the request to challenge the contract, which had been entered into in the meantime, a request that was granted by the order of fl. 101.

2. The TAF/Leiria, by judgment of 13.09.12 (fls 168-80), complemented by a decision of 12.10.12 (fls 289-96), dismissed the action in its entirety.

3. A. A....., dissatisfied, appealed to the TCAS (fls 326 et seq.), which, by judgment of 07.02.13 (fls 240-47), declared the contract null and void, but rejected the request for annulment of the award order. This is the content of the decision:

"a) To grant the judicial appeal;
b) To declare null and void the judgment appealed for failure to pronounce and, in place of the appealed
court, c) To declare null and void the contract entered into for breach of the provisions of article 96/1/b) of the PPC;
d) reject the request for annulment of the award order issued on 14/2/2012, by the Chairman of the Executive Committee of the respondent entity, for not having violated the provisions of article 75/1 of the PPC".

4. Dissatisfied, this time with the judgment of the TCAS, A. A....., appealed to this Supreme Court, invoking for this purpose paragraph 1 of article 150 of the Code of Procedure in the Administrative Courts (CPTA).

4.1. The appellant presented its arguments, concluding, nthe essential, as follows (fls 340 et seq.):

"1. The judgment under appeal makes a manifest error in the assessment of the issue underlying the case which, by its evidence, justifies the intervention of the STA, since it is essential to ensure a better application of the law.

2. In addition, the same lower court, in the immediately preceding session, on 24-01-2013, handed down two judgments, in cases no. 09423/12 and no. 09446/12, in which the parties are the same, focusing precisely on the same issue – the conformity of the same 'Proposed Team' factor of the award criterion with article 75, paragraph 1 of the PPC – and in both of them it issued a decision diametrically opposed to the one appealed herein.

3. In those cases, the same South Central Administrative Court not only decided that that factor was illegal, but also considered that such illegality was easy and evident to be verified.

4. This circumstance, capable of shaking the confidence of the citizens who are the recipients of the decisions of the judicial system, is also demonstrative of the imperative of the STA's intervention in order to harmonize the case law so shockingly divergent from the TCA Sul, and as such the conditions provided for in article 150 of the CPTA for the admission of the appeal are met.

5. Contrary to what was decided in the judgment under appeal, the administrative act of award carried out by the respondent entity on 14-2-2012 suffers from serious illegality.

6. Firstly, by determining the award according to the order of the tenders contained in the final report, the contested act proceeds to the material application of the rule of the Tender Programme that contained the award criterion – art. 5.

7. This rule by providing, in factor A), the valuation of the proposed team, proceeding to the assessment of the experience and curricula of the professionals to be assigned to the execution of the contract, is not in accordance with article 75, paragraph 1 of the PPC.

8. The distinction introduced by the judgment under appeal between the curriculum vitae and experience of the competing undertaking and the curriculum vitae and experience of the technicians to be assigned by the competing undertaking (as if the former concerned the capacity of the tenderer and the latter the performance of the contract) is totally artificial and has no substantive basis in law.

9. Since it is obvious that the experience and evaluation of the team concerns who will execute the contract and not any specific aspect of its execution.

10. Moreover, a distinction is as absurd as it would be, from the outset, inapplicable in the event that a natural person presents itself as a competitor, which is perfectly permissible in the light of the PPC and Community law.

11. On the other hand, as the legislator expressly recognises in article 165(1)(a) and (b) of the PPC, applicable to procedures restricted by prior qualification, that the experience and profile of the staff who will be assigned to the execution of the contract are requirements of a subjective nature, which relate to the technical capacity of the tenderers and not to specific aspects of the performance of the contract to be concluded thatand the Tender Specifications has been submitted to the competition.

12. In other words, they concern the tenderers and not the tender, so they are clearly prohibited in the context of the public tender,

by the aforementioned article 75, paragraph 1 of the PPC.

13. By considering the opposite, judging Factor A) of the award criterion to be in accordance with the law, the judgment under appeal blatantly violates this legal precept (Article 75(1) of the PPC), as it ignores the effects of the aforementioned Article 165(1)(a). a) and b) of the same code, which we mentioned above.

14. The action must therefore be upheld and the contested act of award annulled.

15. Consequently, the decision on the request to challenge the contract should also be partially amended, which should be issued again taking into account the derived invalidity resulting from the illegality of the award, by virtue of the provisions of article 283 and not only the invalidity already decreed by the *lower court*.

16. On the other hand, since the knowledge of the condemnatory request brought in the IP was considered prejudiced by the decision given by the judgment under appeal to the challenge request, it should now be judged, and considered valid, by this Court of Review, under the powers conferred on it by article 150, paragraph 3 of the CPTA and by article 726 of the CPC ex vi of article 140 of the CPTA, and the content of pages 17 to 20 and of defences 8 to 10 of the Allegations presented in the first instance under the terms of article 91 paragraph 4 of the CPTA is hereby reproduced".

It ends by arguing for the granting of the present appeal and the revocation of the judgment under appeal, and, consequently, the action must be upheld in its entirety.

5. Duly notified, R.B..... came to produce counter-allegations, concluding, in essence, and with regard to the merits of the case, as follows (fls 375 et seq.):

"1. The ground invoked by the Appellant to support the invalidity of the award act is related to the alleged illegality of one of the factors of the award criterion in the light of article 75(1) of the PPC, and what is at issue in this appeal is whether it is unlawful to define a factor in the award criterion of the most economically advantageous tender that evaluates the team to be allocated to the execution of the contract.

2. The purpose of the factor in question was to evaluate the resources that the tenderers undertook to allocate to the execution of the contract (technical team to be assigned to the contract) and not to assess the technical capacity or abstract experience of the tenderers.

3. The technical team proposed for the execution of the contract that is the subject of the tender is not a characteristic, situation or quality of the tenderer.

4. If only the evaluation of the resources actually committed to the execution of the contract (the technical team that will provide the services) is at stake, it must be understood that what is being evaluated is an aspect of the execution of the contract to be concluded (aspect of the proposal) and not a situationquality, or characteristic of the competitor.

5. In this sense, a Proposal for a Directive of the European Parliament and of the Council on public procurement (which will repeal and replace Directive 2004/18/EC) is under discussion, which dispels any doubts that could arise about the admissibility of the assessment of the technical team proposed for the execution of the contract in the evaluation of tenders, expressly admitting it.

6. Article 66(2) of the Proposal for a Directive, as amended by the Council to the text initially submitted by the Commission, entitled "Award Criteria", provides that: "*In addition to price or costs, these criteria shall include other criteria linked to the subject matter of the public contract in question, namely quality, namely technical value, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character, after-sales service and technical assistance, delivery date and delivery or execution time.* ***Where the quality of the professionals assigned to the contract is likely to have a significant impact on the level of performance of the contract, the organisation, qualifications and experience of the staff assigned to the performance of the contract in question may be taken into consideration***' (...).

7. Since the award criterion is lawful, there is no original illegality in the procedure in question, and consequently there is no defect in the act of award or in the contract concluded.

8. Thus, there is no error of judgment committed by *the lower court,* in having understood, in the judgment under appeal, that the act of award was not unlawful in the light of the award criterion set".

It ends by arguing for the dismissal of the appeal, and the judgment handed down by the lower court should be maintained, with the other legal consequences.

6. By the judgment of the preliminary panel of this Supreme Court (Article 150(5) of the CPTA), dated 23.05.13, the appeal on a point of law was admitted (pages 389 et seq.). There it was

considered that, "One of the problems under discussion is that which concerns the legality of factor A) of the award criterion contained in the tender programme (article 5) in relation to the provisions of article 75(1) of the PPC, as it proceeds to the valuation of the team proposed to carry out the work, considering its constitution, the proven experience of its elements and also the curriculum analysis.
The appellant considers the interpretation made by the judgment under appeal, which held it to be lawful, to be manifestly erroneous.
Regardless of the goodness of that judgment, naturally countered by the defendant's assessment, the truth is, as it also maintains, the assessment of that same problem has raised controversy. An immediate illustration of this controversy is the dissenting opinion drawn up by one of the deputies of the judgment under appeal, referring to the position taken in the case of the same Court no. 9423, on 24.1.2013. And as the appellant also indicates, in that same and in the same Court another judgment was issued, on the same problem, in case 09446/12.
If the issue was of mere divergence, but without substantive importance, it was not relevant for the admission of the journal. However, it conflicts with the important sector of public procurement; and the difficulties it has raised go beyond purely internal differences. In fact, according to the defendant's counter-claims, the matter is to be 'clarified at the level of Community law'. Naturally, it can be clarified, as the defendant argues, in the sense of what was decided in the present case. But this very need for clarification also indicates the fundamental importance of the issue".

7. The Honorable Magistrate of the Public Prosecution Service attached to this Supreme Court, notified under the terms and for the purposes of Articles 146(2) and 147(2), both of the CPTA, did not issue any opinion.

8. By virtue of the request for a preliminary ruling made to the CJEU, a reference decided by judgment of 24.10.13, the suspension of the present proceedings was ordered until the decision on that request (p. 433), which came to be done by means of the judgment of that Court, of 26.03.14, handed down in case no. C-601/13 (cf. p. 552 et seq.).

9. Without visas, given the provisions of Article 36(1)(b) and (2) of the CPTA, the case files come to the conference to decide.

II – Grounds

1. In fact:

1.1. In the judgment under appeal, the following facts were

proven:

(i) By order of 21.11.11, the Chairman of the Executive Committee of B..... – Business Association of the Region of ..... decided to open a 'Public tender for the acquisition of training and consultancy services for the execution of the MOVE SME project, Area of quality, environment, safety and health at work, food safety Médio Tejo – PME'.

(ii) The notice of the above-mentioned public tender was published in part L of the Diário da República, 2nd Series, no. 226, of 24.11.11.

(iii) Article 5 of the Tender Programme establishes, in addition, that "The award criterion shall be that of the most economically advantageous tender.
Factors:

A) Team evaluation – 40%
i) This factor will be obtained taking into account the team composition, proven experience and curriculum analysis.
B) Quality and merit of the proposed service – 55%
i) Overall assessment of the structure including the work programme – 0 to 20%
ii) Description of the techniques to be used and the methodologies of action – 0 to 15%
iii) Description of the methods of verification and control of the quality of the work, within the scope of the various areas of intervention – 0 to 20%
C) Overall price – 5%

The proposal with the highest score will be considered more valuable».

(iv) On 27.12.11, the Jury of the procedure prepared the preliminary report, in which, in addition, it is indicated that C..... She graduated 1st in the public competition in question.

(v) On 03.01.12, the Plaintiff exercised the right to a prior hearing arguing for the illegality of the award criterion.

(vi) On 04.01.12, the Jury of the procedure prepared the final report, in which there is nothing about the prior hearing held by the Plaintiff.

(vii) On 14.02.12, an addendum to the above-mentioned final report was prepared with the purpose of responding to the prior hearing held by the appellant, in which the following is stated:

"This Jury understands that this competitor is not right.
It is true that Article 75(1) of the PPC clearly distinguishes the

activity of qualifying tenderers from the activity of evaluating tenders, preventing any aspect relating to the tenderer (situation, quality, characteristics) from being taken into account in the evaluation of the tender.
The qualification criteria (or, in accordance with Directive 2004/28/EC, qualitative selection criteria) relate to the economic and financial capacity and the technical capacity of the tenderers. The scope of these criteria is essentially to ensure to the contracting authority that the undertaking or group of undertakings with which it is to contract has the necessary means (financial and technical) to ensure the performance of the contract – or, at least, that someone has undertaken to make those resources available to that undertaking or group. It is, strictly speaking, a matter of the competitor's capacity (which can only be considered in procedures where there is a qualification phase, which does not happen in a public tender). The criteria of technical and financial capacity cannot be used as factors for the evaluation of proposals – this is what article 75(1) of the PPC determines.
The award criteria, on the other hand, concern the intrinsic characteristics of the tender, regardless of the ability of the person who submitted them.
However, the specific way in which the factor A) evaluation of the proposed team – 40% – is configured determines its admissibility in the light of the PPC, Directive 2004/18/EC and the understanding adopted by Jurisprudence and Doctrine.
Indeed, what is relevant for the purposes of evaluating the tender in this procedure is not the technical capacity or experience of the tenderer. It is not intended to know whether or not the competitor has the necessary means and experience to the full compliance with the services it proposes to provide. What is intended, through the factor in question, is to know which of the competitors offers the best services in particular – this is, in fact, the reason for the existence of a tender: to choose the best proposal among those who are capable.
What is evaluated in this factor is the specific technical team that the competitor proposes to allocate to the work to be provided. The experience of the proposed technical team is, in the present case, an intrinsic characteristic of the tender and not a characteristic of the tenderer. In these terms, competitor A is not right..... in its pronouncement at a preliminary hearing".

(viii) On 14.02.12, the Chairman of the Executive Committee of the Respondent Entity, approving the final report of the Jury, awarded the contract to the interested party C.....

(ix) On 19.03.12, it was signed between the Respondent Entity and C..... the service contract no. 0058/FP, relating to the public tender indicated in **(i)**.

(x) The draft of the contract for the provision of services referred

to in the case file was approved by order of the Chairman of the Executive Council of B....., dated 14.02.12.

2. By law:

2.1. Como decorre das conclusões das alegações da recorrente A……, é objecto do presente recurso de revista excepcional o alegado erro de julgamento que a mesma imputa ao acórdão recorrido, na parte em que não considerou ilegais o factor e subfactores enunciados na alínea A) do artigo 5.º do Programa do Concurso, aí tidos como elementos densificadores do critério de adjudicação da proposta economicamente mais vantajosa.

2.2. A questão jurídica central que importa apreciar e decidir é, pois, a de saber se no concurso público em causa, destinado à aquisição de serviços de formação e consultoria, os factor e subfactores da alínea A) do artigo 5.º do Programa do Concurso, relacionados com a "Avaliação da equipa", são, ou não, admissíveis enquanto 'critérios de adjudicação'.

2.3. A resolução desta questão prende-se, antes de mais, e em grande medida, com a correcta interpretação do artigo 75.º do Código dos Contratos Públicos (CCP - DL n.º 18/2008, de 29.01), cuja redacção não sofreu até ao momento alterações. Importa, por isso, ter em atenção o disposto neste preceito.

Artigo 75.º (Factores e subfactores)

"1 – The factors and any sub-factors that make up the criterion for awarding the most economically advantageous tender must cover all, and only, the aspects of the performance of the contract to be concluded that are subject to competition by the tender specifications, and may not relate, directly or indirectly, to situations, qualities, characteristics or other factual elements relating to the tenderers.
2 – Only the factors and sub-factors located at the most elementary level of the densification of the award criterion, called elementary factors or sub-factors, may be adopted for the evaluation of the tenders.
3 – The provisions of the final part of paragraph 1 shall not apply in the case of a procedure for the formation of a contract whose object does not cover services typical of public works contracts, public works concessions, public service concessions, lease or acquisition of movable property or the acquisition of services.
4 – Where, by virtue of the provisions of the preceding paragraph, factors and any sub-factors that densify the award criterion refer to facts relating to the tenderers, the rules of this Code relating to the aspects of the performance of the contract to be concluded submitted to competition by the tender specifications shall apply to them, mutatis mutandis".

2.4. The TCAS, in this part, did not depart from the court of first instance (see page 179), considered that the award factor provided for in Article 5(A) of the Tender Programme does not offend the provisions contained in Article 75 of the PPC, as it interprets them (*see* pages 295v and 296).

2.4.1. Appellant A..... disagrees with this understanding, arguing, and this is a fundamental aspect of its argumentation, that in the TCAS there is a jurisprudential orientation different from that at issue in the context of the present case, which interprets domestic law in a divergent way, deciding that the criterion in question is inadmissible, insofar as it does not comply with Article 75(1) of the PPC (examples of this other orientation are the judgments of 06.10.11, of 24.01.12, and of 24.01.13, cases no. 07868/11, 09423/12 and 09446/12, respectively), this approach being the one that, in his opinion, is in line with the case-law of the CJEU (Lianakis judgment, proc. 532/06), and is the only one compatible with the rules of European law.
Such a line of case-law is based on the assumption that Article 44(1) of Directive 2004/18/EC provides that: (i) the verification of the suitability of tenderers and the award of tenders are separate operations governed by different rules; (ii) the verification of the suitability of tenderers is carried out by the contracting authorities in accordance with the criteria of economic, financial and technical standing (so-called "selection criteria") referred to in Articles 45 to 48 of that Directive; (iii) on the other hand, the award is based on the criteria listed in Article 53 of the same Directive, whereas, by virtue of the separation between the operations of checking the suitability of tenderers and the award, the choice cannot be guided by criteria which are not intended to identify the tenderer's suitability.It is economically more advantageous, but is essentially linked to the assessment of the tenderers' ability to perform the contract in question.
Consequently, Directive 2004/18/EC does not allow the contracting authority to establish, as "award criteria", elements such as those contained in Article 5(A) of the Tender Programme – i.e. the composition of the team, proven experience and curriculum analysis – since they are criteria that refer to the suitability of the tenderers, they cannot be considered as "award criteria" within the meaning of Article 53(1) of the above-mentioned Directive.

2.4.2. In turn, the defendant considers, in essence, that: (i) factor A) of the award criteria of article 5 of the Tender Programme "translates into the evaluation of the proposed technical team, in which the experience, profile and technical-scientific competence of the professionals to be effectively allocated by each of the tenderers to the execution of the contract are valued"; (ii) "it is not, therefore, a matter of assessing the experience, profile or technical competence of the competing company, but rather that

of the professionals that it undertakes to assign to the execution of the contract. Thus, it is emphasized that **the evaluation of the teams to be assigned to the execution of the contract is not to be confused with the evaluation of the competitors**"; (iii) therefore, they constitute criteria that, under European law, are admissible as 'award criteria.

2.5. As already mentioned, by judgment of 24.10.13 it was decided to suspend the proceedings and refer the question of the alleged illegality of the award factors and sub-factors provided for in Article 5(A) of the Tender Programme to the CJEU (paragraphs 432 et seq.). Let us see in what terms:

"2.2.4. In this context, since the case-law of the second instance is divided as to the legality of the criteria that, in the present case, were adopted as "award criteria" in Article 5(A) of the Tender Programme, it is up to this Supreme Court to assess the issue, which is decisive for the decision of the present special administrative action, and in the name of the principle of the primacy of European Union Law, it is responsible for ensuring that the solution which it adopts is based on an interpretation of national law which is consistent with Directive 2004/18/EC. Thus, because, in relation to the case-law of the Lianakis judgment and the other judgments cited therein, a new element is invoked – *the alleged content of Commission Proposal 2011/0438, on this point* – and because, under Article 53(1)(a) of Directive 2004/18 EC, the '*quality* of the» is one of the award criteria and it is not unequivocal that, in a contract for the provision of consultancy training services, the specific constitution of the team, the experience and the curricula of those who will actually execute the contract are factors completely disconnected from the criterion of the «*quality*» of the tender, we understand, under Article 267 of the Treaty on the Functioning of the European Union, to refer to the Court of Justice of the European Union, thePreliminary ruling, the assessment of the following question:

'***For the procurement of the provision of intellectual services, training and consultancy, it is compatible with Directive 2004/18/EC of the European Parliament and of the Council of 31 March, as amended, to establish, among the factors which make up the criterion for the award of tenders in a public contract, A factor that evaluates the teams specifically proposed by the tenderers for the execution of the contract, taking into account their respective constitutions, proven experience and curriculum analysis?***»"

To this question the CJEU (Fifth Chamber) replied, in its judgment of 26.03.15, proc. No C-601/13, as follows (p. 560):

"For the conclusion of a contract for the provision of

intellectual, training and consultancy services, Article 53(1) (a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 relating to the coordination of procedures for the award of public works contracts, of public supply contracts and public service contracts, does not preclude the contracting authority from establishing a criterion which makes it possible to assess the quality of the teams actually proposed by the tenderers for the performance of that contract, a criterion which takes into account the composition of the team and the experience and curriculum vitae of its members'"

In reaching that conclusion, the CJEU made a series of considerations which should be noted:

"23 The referring court considered it necessary to refer this question, in view of the contradiction that appears to exist, on the one hand, between the Court's case-law on the verification of the suitability of economic operators to perform a contract and the criteria for the award of contracts, as is apparent from the judgment in *Lianakis and Others*. (C-532/06, EU:C:2008:40), and, on the other hand, the Commission's proposal for the reform of the rules governing public procurement procedures and the fact that quality is one of the award criteria referred to in Article 53(1) (a) of Directive 2004/18, a criterion which may be linked to the composition of the team, the experience and curriculum vitae of the members entrusted with the performance of the contract.

24 It should be noted, as a preliminary point, that Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65), which entered into force after the date of the facts in the main proceedings, is not applicable to the present case.

25 It should also be noted that the case-law arising from the judgment in *Lianakis and Others*. (C-532/06, EU:C:2008:40) concerns the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which was repealed by Directive 2004/18, and which that judgment does not excludel that a contracting authority may, under certain conditions, establish and apply a criterion such as that set out in the question referred for a preliminary ruling at the stage of the award of the contract.

26 That judgment does indeed concern the staff and experience of tenderers in general, and not, as in the present case, the staff and experience of the persons who make up a specific team which is specifically required to perform the contract'.

27 As regards the interpretation of Article 53(1)(a) of Directive 2004/18, about which the referring court is uncertain, it should be noted that that directive has introduced new elements into EU law on public procurement as compared with Directive 92/50.

28 In the first place, Article 53(1)(a) of Directive 2004/18 provides that the 'most economically advantageous tender' must be identified 'from the point of view of the contracting authority' and thus grants that contracting authority a greater margin of discretion.

29 In the second place, the third paragraph of recital 46 in the preamble to Directive 2004/18 states that, in cases where the contract is to be awarded to the candidate who submitted the most economically advantageous tender, the tender which 'offers the best value for money' should be sought, which contributes to reinforcing the weight of quality in the criteria for the award of public contracts.

30 It should also be added that the criteria which may be defined by contracting authorities in order to determine the most economically advantageous tender are not exhaustively listed in Article 53(1) of Directive 2004/18. That provision therefore leaves it to the contracting authorities to choose the criteria for the award of the contract which they wish to define. However, such a choice may be made only from among the criteria intended to identify the most economically advantageous tender (see, to that effect, judgment in *Lianakis and Others*, C-532/06, EU:C:2008:40, n.paragraphs 28 and 29 and the case-law cited). To that end, Article 53(1)(a) of Directive 2004/18 expressly requires that the award criteria be linked to the subject matter of the contract (see judgment *in Commission v Netherlands*, C-368/10, EU:C:2012:284, paragraph 86).

31 The quality of the performance of a public contract may depend decisively on the professional value of the persons responsible for performing it, which is constituted by their professional experience and training.

32. That is particularly the case where the service which is the subject of the contract is of an intellectual nature and concerns, as in the case in the main proceedings, training and consultancy services.

33 Where such a contract is to be performed by a team, the skill and experience of its members are decisive for the purpose of assessing the professional quality of that team. That quality may be an intrinsic feature of the tender and be linked to the subject matter of the contract within the meaning of Article 53(1)(a) of

Directive 2004/18.

<B1108>34 Consequently, that status may be included as an award criterion in the contract notice or contract documents in question.

35 In the light of the foregoing, the answer to the question referred for a preliminary ruling is that, for the purpose of concluding a contract for the provision of intellectual services, training and consultancy, Article 53(1)(a) of Directive 2004/18/EC does not preclude the contracting authority from establishing a criterion for assessing the quality of the teams actually proposed by the tenderers for the performance of that contract, a criterion that takes into account the constitution of the team as well as the experience and curriculum of its members".

2.6. This decision of the CJEU is in line with what was already the understanding of an important part of the national doctrine, as we are told by the judgment of 22.04.15, case no. 835/13-11, recently handed down by this Supreme Court, in which the plaintiff and the defendant entity are the same (see also the judgment of the same date, Proc. No. 1248/13), and in which the issue on which it relates is also the same – that is, the conformity of the 'Proposed Team' factor of the award criterion with Article 75(1) of the PPC. In

fact, some of the doctrine that has been looking into the issue has also considered, arguing Mário Esteves de Oliveira and Rodrigo Esteves de Oliveira that "it is legitimate to adopt such factors to assess the value of proposals that presuppose a judgment on the resources effectively committed to the execution of the contract" (...), also stressing that it may happen that a competitor, holder of large resources [equipment and technical staff] but all assigned to other works of his, leaves "the commitment he will assume with the presentation of the proposal based abstractly on unavailable means and the execution of the contract in charge of a really incapable competitor" (...), so that it would be legitimate to adopt factors of this type [relating to the performance of the contract] allowing a judgment and a balance, in the evaluation of the proposal, on the resources effectively committed to its implementation. Legitimacy that would be – for the same authors – well-founded "especially in those cases in which it is not possible (or very difficult) to assess the technical quality of the same – ['proposals" we add] – or the guarantees of their proper execution except on the basis of the means actually predisposed to the fulfilment of the contract. It seems very risky, in fact, to leave in addition – [note: this is certainly a material slip in writing since the word will be «completely»] – outside the evaluation of the tenders the assessment of the adequacy of these means for the execution of the contract, at least when the quality and punctuality of that execution is greatly linked to the instruments, the resources, available for this purpose, it is true, on the other

hand, that the assessment of the technical capacity of the candidates in the qualification phase of a public procurement procedure is normally carried out in the abstract, in 'gross', (...) without involving any commitment to allocate the resources listed in the application for the performance of the contract' (...).

XXI. In the same sense, Miguel Nogueira de Brito maintains that " [i]n the question is situated in thethe boundary of objective criteria, it seems excessive to consider it as a pure qualitative selection criterion and not as an award criterion and not as an award criterion" (...), Miguel Assis Raimundo also referring in this regard that "the reason for this separation between the assessment of the tenderer and its tender is clear and does not seem to be able to be called into question, in the abstract: it is a matter of equalizing the participants in the procedure" but the "competitor-proposed separation is sometimes not easy in practice", and "[i]n example, the inclusion of a factor in the award criterion that concerns the assignment, by the competitor, of an experienced work team, this criterion being mediated by the team's curricula together, it may be regarded as an aspect relating to the technical capacity of the tenderer and as such incapable of constituting an assessment criterion (...); but looking at the issue from a distance, it would be at least as defensible as this classification if another considered that we are dealing with an essential element to know whether the competitor's proposal has quality, and therefore, with an element likely to enter the evaluation criterion» (...)".

2.7. In the same judgment of 22.04.15, case no. 835/13-11, several relevant considerations were set out and fully transposable to the present case, so that, without further ado, we reproduce them:

"XXII. In the case under analysis, the assessment of the human resources allocated to the execution of the contract cannot fail to be relevant, since it is a tender for the acquisition of training and consultancy services.

XXIII. The composition of the team [of trainers] that the competitor makes available to provide these services can be considered a criterion related to the execution of the contract and not to the quality of the competitors.

XXIV. In a contractual proposal for future training actions, the curricula of the trainers and their experience are, without a doubt, components of the proposal itself, along with the structuring of the actions, number of hours and trainers, etc.

XXV. Hence, it would not make sense, in our understanding, for the value of the quality of teaching associated with the skills of the

teacher to be excluded from the value of the proposal, so that, in these situations, there is, in our view, no violation of the principle of objectivity of the proposal.

XXVI. What the law intends to avoid is that the evaluation of the proposal is distorted by the personal quality of the tenderer, so, in this sense, article 75(no) of the PPC imposes that the proposal is valid in itself [principle of objectivity of proposals], without taking into account the person who offers it, and that only its quality is evaluated. In short, it is forbidden that a bad proposal be benefited by a good bidder.

XXVII. But, in the present case, the skills of the trainers are an element of the proposal itself.

XXVIII. To that extent, it is therefore not absurd to distinguish between the person of the tenderer [a legal entity, moreover, distinct from the trainers] and the human resources placed in the execution of the tender.

XXIX. In our view, it would be incomprehensible to interpret Article 75(1) of the PPC which, in the evaluation of a training project, would prohibit the weighting of the curricula of trainers, namely in the area of their training.

XXX. However, the criterion of point 5.2) of the "PC" is limited to weighing the curricula and experience of the team of trainers who will carry out the training action, that is, to weighing an aspect about the content of the proposed provision, since there must necessarily be a clear relationship between the capacity of the trainers and the subject they will teach, with reflections on the value of the proposal, regardless of who offers it".

2.8. Taking into account the content of the CJEU's decision, and, likewise, relying on the recitals inserted in the paragraph of this STA just reproduced, which, as has been said, we fully endorse, it is impossible not to conclude that the alleged error of judgment imputed by the appellant to the judgment under appeal has not been verified.
Therefore, having attested the conformity of the award factors and sub-factors provided for in Article 5(A) of the Tender Programme with Article 75(1) of the PPC, and with Directive 2004/18/EC, it is necessary to conclude, without further consideration, that the present judicial appeal is dismissed, and the judgment of the TCAS must therefore be maintained.

III – <u>Decision</u>

In the terms and on the grounds set out, the Judges of the Administrative Litigation Section agree in conference to dismiss the appeal on a point of law brought by A....., with all the legal

consequences, and, accordingly, to uphold the judgment under appeal.

Costs for the appellant.

Lisbon, 30 April 2015. – *Maria Benedita Malaquias Pires Urbano* (rapporteur) – *Alberto Acácio de Sá Costa Reis – Alberto Augusto Andrade de Oliveira*.

JUDGMENT OF THE COURT (Fifth Chamber)

18 December 2014 (*)

(Reference for a preliminary ruling — Public service contracts — Directive 92/50/EEC — Articles 1(c) and 37 — Directive 2004/18/EC — First subparagraph of Article 1(8) and Article 55 — Concepts of ‘service provider’ and ‘economic operator’ — Public university hospital — Entity with legal personality and business and organisational autonomy — Principally non-profit-making activity — Institutional purpose of offering health services — Possibility of offering similar services on the market — Admission to participate in a tendering procedure for the award of a public contract)

In Case C-568/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 28 June 2013, received at the Court on 6 November 2013, in the proceedings

Azienda Ospedaliero-Universitaria di Careggi-Firenze

v

Data Medical Service Srl,

intervening parties:

Regione Lombardia,

Bio-Development Srl,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász (Rapporteur) and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 15 October 2014,

after considering the observations submitted on behalf of:

– Azienda Ospedaliero-Universitaria di Careggi-Firenze, by P. Stolzi, avvocato,

– Data Medical Service Srl, by T. Ugoccioni, avvocato,

– Bio-Development Srl, by E. D’Amico and T. Ugoccioni, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Varone, avvocato dello Stato,

– the European Commission, by G. Conte and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 1(c) and 37 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of the first subparagraph of Article 1(8) and Article 55 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between the Azienda Ospedaliero-Universitaria di Careggi-Firenze (university hospital, Careggi) ('the Azienda') and Data Medical Service Srl ('Data Medical Service'), concerning the lawfulness of exclusion of the first entity from a tendering procedure for the award of a public service contract.

Legal context

EU law

3 Article 1(c) of Directive 92/50 provided:

'[*S*]*ervice provider* shall mean any natural or legal person, including a public body, which offers services. …'

4 According to Article 37 of that directive:

'If, for a given contract, tenders appear to be abnormally low in relation to the service to be provided, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received.

The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the method by which the service is provided, or the technical solutions chosen, or the exceptionally favourable conditions available to the tenderer for the provision of the service, or the originality of the service proposed by the tenderer.

If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it considers to be too low.'

5 Recital 1 in the preamble to Directive 2004/18 states that that directive, in the interests of clarity, recasts, in a single text, the previous directives applicable to public service, public supply and public works contracts, and is based on the Court's case-law.

6 Recital 4 in the preamble to that directive states:

'Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.'

7 The first and second subparagraphs of Article 1(8) of that regulation provide:

'The terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term "economic operator" shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.'

8 Article 55 of Directive 2004/18, entitled 'Abnormally low tenders', is worded as follows:

‘1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

(a) the economics of the construction method, manufacturing process or services provided;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid.

2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time-limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.’

Italian law

9 It follows from Article 3 of Legislative Decree No 502 relating to reforms in the area of health (decreto legislativo n. 502 Riordino della disciplina in materia sanitaria) of 30 December 1992 (ordinary supplement to *GURI* No 305 of 30 December 1992), as interpreted by the Corte costituzionale (Italian Constitutional Court), that health care establishments are public economic entities which ‘perform their essentially technical functions under the legal form of public entities with commercial autonomy, on the basis of general instructions contained in regional health plans and implementation instructions which are communicated to them by the Giunte regionali [(regional councils)]’.

10 Under Article 3(1a) of that decree:

‘For the purpose of the pursuit of their institutional objectives, local health units shall be constituted as public-law establishments with legal personality and commercial autonomy; their organisation and functioning shall be governed by an atto aziendale [act defining the responsibilities relating to the management of the entity, in particular concerning the budget] under private law, in compliance with the principles and criteria provided for by regional provisions. The atto aziendale shall define the operational structures which have management and technical-professional autonomy, and which shall be required to submit detailed accounts.’

11 Directive 92/50 was transposed into Italian law by Legislative Decree No 157 of 17 March 1995 (ordinary supplement to *GURI* No 104 of 6 May 1995).

12 Under Article 2(1) of that decree:

‘The administrative bodies of the State, the regions, the autonomous provinces of Trentino and Bolzano, public territorial entities, other non-profit-making public entities, and entities governed by public law, irrespective of their designation, shall be considered to be contracting authorities.’

13 Article 5(2)(h) of that decree provides that it does not apply to:

‘public service contracts awarded to a public entity which is itself a contracting authority within the meaning of Article 2, on the basis of an exclusive right which it enjoys pursuant to legislative,

regulatory or administrative provisions, on condition that those provisions are compatible with the Treaty.'

14 Directive 2004/18 was transposed into Italian law by Legislative Decree No 163/2006 of 12 April 2006 (ordinary supplement to *GURI* No 100 of 2 May 2006), which codifies the rules on public contracts.

15 Article 19(2) of that decree provides:

'The present Code shall not apply to public service contracts awarded by a contracting authority or a contracting public entity to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to published legislative, regulatory or administrative provisions, on condition that those provisions are compatible with the Treaty.'

16 Article 34(1) of that decree designates the persons authorised to take part in tendering procedures for the award of public contracts and is worded as follows:

'The following persons shall be entitled to take part in tendering procedures for the award of public contracts, without prejudice to the restrictions expressly provided for:

(a) individual commercial operators, including artisans, commercial companies and partnerships and cooperatives;

(b) consortia of producers' and workers' cooperatives … and consortia of artisanal/handicraft businesses …;

(c) consortia, constituted as, inter alia, joint venture companies within the meaning of Article 2615b of the Civil Code, between individual contractors (including artisans), commercial companies or partnerships or production and labour cooperatives, in accordance with the provisions of Article 36;

(d) special-purpose groupings of competitors, consisting of the persons referred to in subparagraphs (a), (b) and (c) …;

(e) ordinary consortia of competitors referred to in Article 2602 of the Civil Code, between persons referred to in subparagraphs (a), (b) and (c) of the present paragraph, including in the form of a company within the meaning of Article 2615b of the Civil Code … ;

(e a) the groups of undertakings which are party to a network contract within the meaning of Article 3(4b) of Decree Law No 5 of 10 February 2009 … ;

(f) persons who have concluded a contract for the establishment of a European Economic Interest Grouping (EEIG) within the meaning of Legislative Decree No 240 of 23 July 1991 … ;

(f a) economic operators within the meaning of Article 3(22), established in other Member States and constituted in accordance with the legislation in force in their respective countries.'

17 Paragraph (f a) was included in Article 34(1) of Legislative Decree No 163/2006 by the adoption of Legislative Decree No 152 of 11 September 2008 (ordinary supplement to *GURI* No 231 of 2 October 2008), following infringement proceedings brought against the Italian Republic by the Commission, which had stated that the directives on public contracts do not allow the possibility of participation in invitations to tender to be restricted to certain categories of economic operators.

18 Articles 86 to 88 of Legislative Decree No 163/2006 provide for mechanisms to check for irregularities in tenders, on the basis of which the contracting authority may decide to exclude a tenderer from the procedure for the award of the contract at issue.

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 By a notice published on 5 October 2005, the Regione Lombardia (the Region of Lombardy) issued an invitation to tender for the award, on the basis of the best-value-for-money tender, of the three-year

service contract for processing data for external quality control in relation to medicinal products. The Azienda, which is established and carries out its activities in the Region of Tuscany, participated in that invitation to tender and was classified in first place, principally as a result of the price at which it offered its services, equivalent to 59% lower than that of the second placed tenderer, Data Medical Service. Following an investigation into the potentially abnormal character of that tender, the contract was awarded to the Azienda by decision of the Regione Lombardia of 26 May 2006.

20 Data Medical Service contested the decision to award the contract before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court of Lombardy), claiming that the successful tenderer should have been excluded on the ground that, in accordance with the applicable legislation, a public entity could not participate in an invitation to tender and that, in any event, its tender was abnormally low in view of the size of the discount offered.

21 By judgment of 24 November 2006, the Tribunale amministrativo regionale per la Lombardia upheld the first ground pleaded. On the basis of a combined reading of Article 5(2)(h) of Legislative Decree No 157/1995 and of Articles 19 and 34 of Legislative Decree No 163/2006, that court held that, even if those latter two provisions were, *ratione temporis*, not applicable to the present case, public entities such as the Azienda were formally prohibited from participating in tendering procedures for the award of public contracts, those entities being entitled only, under specified conditions, to be awarded contracts directly. As a public entity which has as its exclusive purpose the management of the public hospital in Florence, the Azienda could not operate under conditions of free competition with private persons.

22 The Azienda appealed against that judgment to the Consiglio di Stato (Council of State), the supreme administrative court in Italy.

23 The Consiglio di Stato points out first of all that, notwithstanding the fact that the contract at issue has in the meantime been performed in full, the Azienda retains an interest in securing recognition of its right to participate in tendering procedures for public contracts.

24 The Consiglio di Stato then goes on to point out that the first question raised in the present case concerns the precise definition of the concept of ‘economic operator’ for the purposes of EU law, and the possibility that this might include a public university hospital. Regarding the nature of those entities within the context of the ‘aziendalizzazione’ process, that is to say, the transition to a commercial model, the Consiglio di Stato points out that that process has resulted in the transformation of existing ‘local health units’, which were originally administrative authorities operating at municipal level, into entities with legal personality and commercial autonomy, namely organisational, financial, accounting and managerial autonomy, which has led some legal writers and national case-law to classify public health entities, including hospitals, as ‘public economic entities’. However, the public nature of those entities is not in question. Their activity is not carried out principally with a view to making a profit and they have administrative powers, in the strict sense, particularly in matters relating to inspections and penalties.

25 The Consiglio di Stato questions, in those circumstances, whether it may always be asserted, as the Tribunal amministrativo regionale per la Lombardia has done, that there exists in Italian law an absolute prohibition on participation by such entities, as public economic entities, in invitations to tender as a ‘straightforward competitor’. In this regard, it refers to the case-law of the Court, in particular to the judgments in *ARGE*, C-94/99, EU:C:2000:677; *CoNISMa,* C-305/08, EU:C:2009:807; and *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, from which it follows that any entity which considers itself capable of performing a public contract has the right to participate, regardless of its status, whether governed by private law or by public law.

26 That case-law, the Consiglio di Stato states, is followed by a majority of Italian courts, which also have stressed that the list set out in Article 34 of Legislative Decree No 163/2006 cannot be regarded as exhaustive. The Consiglio di Stato takes the view that that case-law, both European Union and national, means that Article 5(2)(b) of Legislative Decree No 157/1995 and Article 34 of Legislative Decree No 163/2006 cannot be interpreted as precluding, a priori, the participation of hospitals in tendering procedures. Such a prohibition in principle would no longer serve any purpose.

27 However, according to the Consiglio di Stato, that does not amount to unconditionally authorising such entities to participate in tendering procedures for the award of public contracts. According to that court, that case-law has identified two limitations in that regard, the first being that the activity to which the tendering procedure relates must further the attainment of the institutional objectives of the public entity concerned, and the second being that there must be no specific provision of national law which prohibits that activity, in particular on the ground that competition might thereby be distorted.

28 With regard to the first limitation, the Consiglio di Stato takes the view that public hospitals, *a fortiori* in the case where they are university hospitals, also play a significant role in teaching and research, institutional objectives which it may be claimed correspond to the service concerned by the invitation to tender at issue in the case brought before it, namely data processing. Regarding the second limitation, the Consiglio di Stato considers that the right of an entity in receipt of public funds to participate freely in an invitation to tender raises the issue of equal treatment between disparate competitors, on the one hand those which must be active on the market and, on the other hand, those which can also rely on public funding and are thereby able to submit tenders that no persons governed by private law would ever have been in a position to submit. Consequently, it is necessary to identify corrective mechanisms designed to even out the disparities existing between the various economic operators at the outset, mechanisms which must go further than procedures to check the potentially abnormal character of the tenders.

29 In the light of those considerations, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does Article 1 of Directive [92/50], read also in the light of the later Article 1(8) of Directive [2004/18], preclude national legislation which was interpreted as excluding [the Azienda], by dint of the fact that it is a commercially-run hospital characterisable as a public economic entity, from participating in tendering procedures?

(2) Does EU law on public procurement — in particular, the general principles of freedom of competition, non-discrimination and proportionality — preclude national legislation under which a body such as [the Azienda], which receives public funding on a permanent basis and is directly contracted to provide a public service, is able to derive from that situation a decisive competitive advantage over rival economic operators, as demonstrated by the size of the discount offered, in circumstances in which corrective measures have not been put in place at the same time in order to prevent that kind of distortion of competition?’

The questions referred for a preliminary ruling

The first question

30 This question originates in the doubts expressed by the referring court as to whether the applicable Italian legislation, interpreted as containing a general prohibition precluding all public bodies, including, consequently, university hospitals such as the Azienda, from participating in tendering procedures for the award of public contracts, may be considered to be compatible with the relevant case-law of the Court in the field of public procurement.

31 By its first question, the referring court asks, in essence, whether Article 1(c) of Directive 92/50 precludes national legislation which excludes a public hospital, such as that at issue in the main proceedings, from participating in tendering procedures for the award of public contracts as a result of its status as a public economic entity.

32 It should be pointed out first of all, that, although the question posed by the referring court refers both to Article 1(c) of Directive 92/50 and to the first subparagraph of Article 1(8) of Directive 2004/18, the contract at issue in the main proceedings is, however, governed, *ratione temporis*, by Directive 92/50. It is apparent from paragraph 19 of the present judgment that the Regione Lombardia launched the tendering procedure at issue in the main proceedings by means of a notice published on 5 October 2005. Under Articles 80 and 82 of Directive 2004/18, however, that directive repealed Directive 92/50 only with effect from 31 January 2006. Thus, the public procurement procedure at issue in the main

proceedings is governed by the legal rules which were in force on the date on which the notice of the invitation to tender was published.

33 Next, it should be noted that the possibility for public entities to participate in tendering procedures for public contracts, in parallel to the participation of private economic entities, is already evident from the wording of Article 1(c) of Directive 92/50, according to which 'service provider' is to mean any natural or legal person, including a public body, which offers services. Furthermore, such a possibility to participate was recognised by the Court in the judgment in *Teckal*, C-107/98, EU:C:1999:562, paragraph 51, and was repeated in the subsequent judgments in *ARGE*, EU:C:2000:677, paragraph 40; *CoNISMa*, EU:C:2009:807, paragraph 38; and *Ordine degli Ingegneri della Provincia di Lecce and Others*, EU:C:2012:817, paragraph 26.

34 The Court has also pointed out in this regard that one of the objectives of the EU rules on public procurement is to attain the widest possible opening-up to competition (see, to that effect, the judgment in *Bayerischer Rundfunk and Others*, C-337/06, EU:C:2007:786, paragraph 39), an opening-up which is also in the interest of the contracting authority concerned itself, which will thus have greater choice as to the tender which is most advantageous and most suited to the needs of the public authority in question. The effect of a restrictive interpretation of the concept of 'economic operator' would be that contracts concluded between contracting authorities and entities which are primarily non-profit-making would not be regarded as 'public contracts', could be awarded by mutual agreement and would not be covered by EU rules on equal treatment and transparency, something which would be at odds with the objective of those rules (see, to that effect, the judgment in *CoNISMa*, EU:C:2009:807, paragraphs 37 and 43).

35 The Court has therefore held that it follows from both the EU rules and the case-law that any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract is eligible to submit a tender or to put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis (see, to that effect, the judgment in *CoNISMa*, EU:C:2009:807, paragraph 42).

36 Moreover, as is apparent from the wording of Article 26(2) of Directive 92/50, the Member States do, admittedly, have a discretion as to whether or not to allow certain categories of economic operators to provide certain services. They can regulate the activities of entities, such as universities and research institutes, which are non-profit-making and whose primary object is teaching and research. They can, inter alia, determine whether or not such entities are authorised to operate on the market, according to whether the activity in question is compatible with their objectives as an institution and those laid down in their statutes. However, if and to the extent that such entities are entitled to offer certain services in return for remuneration on the market, even occasionally, the Member States may not prevent those entities from participating in tendering procedures for the award of public contracts relating to the provision of those services. Such a prohibition would not be compatible with Article 1(a) and (c) of Directive 92/50 (see, in relation to the corresponding provisions of Directive 2004/18, the judgments in *CoNISMa*, EU:C:2009:807, paragraphs 47 to 49, and *Ordine degli Ingegneri della Provincia di Lecce and Others*, EU:C:2012:817, paragraph 27).

37 As the representative of the Italian Government pointed out during the hearing before the Court, public university hospitals such as that at issue in the main proceedings, being 'public economic entities', as defined at national level, are authorised to operate on the market for profit, in sectors compatible with their statutory and institutional duties. In the main proceedings, it appears, moreover, that the services which are the subject of the public contract at issue are not incompatible with the institutional and statutory objectives of the Azienda. In those circumstances, which it is for the referring court to assess, the Azienda, according to the Court's case-law cited in paragraph 36 of the present judgment, cannot be prevented from participating in the tendering procedure for that contract.

38 Consequently, the answer to the first question is that Article 1(c) of Directive 92/50 precludes national legislation which excludes a public hospital, such as that at issue in the main proceedings, from participation in tendering procedures for the award of public contracts as a result of its status as a

public economic entity, if and in so far as that entity is authorised to operate on the market in accordance with its institutional and statutory objectives.

The second question

39 By its second question, the referring court asks, in essence, whether the provisions of Directive 92/50, and in particular the general principles of freedom of competition, non-discrimination and proportionality which underlie that directive, must be interpreted as precluding national legislation which allows a public hospital, such as that at issue in the main proceedings, to participate in a tendering procedure and to submit a tender which cannot be matched by any competitors as a result of the public funding which it receives, in circumstances in which corrective measures have not been put in place in order to prevent possible resulting distortions of competition.

40 In the context of the grounds for that question, the Consiglio di Stato expresses doubts as to whether the procedure for examining abnormally low tenders, referred to in Article 37 of Directive 92/50, may be considered to be an adequate method for preventing such distortions of competition.

41 In that regard, even if the referring court considers that it is desirable to identify corrective mechanisms designed to even out the disparities existing between the various economic operators at the outset and which should go further than procedures to check the potentially abnormal character of the tenders, it must be noted that the EU legislature, while being aware of the differences between competitors participating in a public contract, did not make provision for mechanisms other than those designed to check and possibly reject abnormally low tenders.

42 It must also be borne in mind that contracting authorities must treat economic operators equally and in a non-discriminatory manner and must act in a transparent manner.

43 However, the provisions of Directive 92/50 and the Court's case-law do not allow, a priori and without further consideration, a tenderer to be excluded from participation in a procedure for the award of a public contract on the sole ground that, as a result of public subsidies which it receives, it is able to submit tenders at prices which are significantly lower than those of unsubsidised tenderers (see, to that effect, the judgments in *ARGE*, EU:C:2000:677, paragraphs 25 to 27, and *CoNISMa*, EU:C:2009:807, paragraphs 34 and 40).

44 In certain specific circumstances, however, the contracting authorities are required, or at the very least permitted, to take into account the existence of subsidies, and in particular aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid (see, to that effect, the judgments in *ARGE*, EU:C:2000:677, paragraph 29, and *CoNISMa*, EU:C:2009:807, paragraph 33).

45 In that regard, as the Commission stated during the hearing before the Court, the fact that the public entity concerned has separate accounts for its activities on the market and for its other activities may make it possible to establish whether a tender is abnormally low as a result of the effect of an element of State aid. However, the contracting authority may not conclude from the absence of such separate accounts that such a tender was made possible by the grant of a subsidy or State aid which is incompatible with the Treaty.

46 It should be pointed out also that it follows from the wording of the first and third paragraphs of Article 37 of Directive 92/50 that the possibility of rejecting an abnormally low tender is not limited solely to the case in which the low price proposed in that tender is explained by the grant of State aid which is unlawful or incompatible with the internal market. That possibility is more general in character.

47 First, it follows from the wording of that provision that the contracting authority is obliged, when examining tenders which are abnormally low, to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine (see, to that effect, the judgment in *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 28).

48 Accordingly, the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer, to enable the latter to

demonstrate that its tender is genuine, constitutes a fundamental requirement of Directive 92/50, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings (see, to that effect, the judgment in *SAG ELV Slovensko and Others*, EU:C:2012:191, paragraph 29).

49 Secondly, it should be noted that Article 37 of Directive 92/50 does not contain a definition of the concept of an ‘abnormally low tender’. It is thus for the Member States and, in particular, the contracting authorities to determine the method of calculating an anomaly threshold constituting an ‘abnormally low tender’ within the meaning of that article (see, to that effect, the judgment in *Lombardini and Mantovani*, C-285/99 and C-286/99, EU:C:2001:640, paragraph 67).

50 That being the case, the EU legislature made clear in that provision that the abnormally low character of a tender must be assessed ‘in relation to the service to be provided’. Thus, the contracting authority may, in the course of its examination of the abnormally low character of a tender, take into consideration, for the purpose of ensuring healthy competition, not only the situations set out in the second paragraph of Article 37 of Directive 92/50 but also all the factors that are relevant in the light of the service at issue (see, to that effect, the judgment in *SAG ELV Slovensko and Others*, EU:C:2012:191, paragraphs 29 and 30).

51 Consequently, the answer to the second question is that the provisions of Directive 92/50, and in particular the general principles of freedom of competition, non-discrimination and proportionality which underlie that directive, must be interpreted as not precluding national legislation which allows a public hospital, such as that at issue in the main proceedings, participating in a tendering procedure to submit a tender which cannot be matched by any competitors as a result of the public funding which it receives. However, in the course of the examination of the abnormally low character of a tender on the basis of Article 37 of that directive, the contracting authority may take into consideration the existence of public funding which such an entity receives in the light of the option to reject that tender.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 1(c) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts precludes national legislation which excludes a public hospital, such as that at issue in the main proceedings, from participation in tendering procedures for the award of public contracts as a result of its status as a public economic entity, if and in so far as that entity is authorised to operate on the market in accordance with its institutional and statutory objectives.**

2. **The provisions of Directive 92/50, and in particular the general principles of freedom of competition, non-discrimination and proportionality which underlie that directive, must be interpreted as not precluding national legislation which allows a public hospital, such as that at issue in the main proceedings, participating in a tendering procedure to submit a tender which cannot be matched by any competitors as a result of the public funding which it receives. However, in the course of the examination of the abnormally low character of a tender on the basis of Article 37 of that directive, the contracting authority may take into consideration the existence of public funding which such an entity receives in the light of the option to reject that tender.**

[Signatures]

* Language of the case: Italian.

EU:C:2015:713

JUDGMENT OF THE COURT (Fifth Chamber)

22 October 2015 (*)

(Reference for a preliminary ruling — Public service contracts — Directive 2004/18/EC ruling — Article 23(2) — Management of public health services — Provision of health services under the remit of public hospitals in private establishments — Requirement that the services be provided in a particular municipality)

In Case C-552/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Contencioso-Administrativo No 6 de Bilbao (Administrative Court No 6, Bilbao, Spain), made by decision of 30 September 2013, received at the Court on 25 October 2013, in the proceedings

Grupo Hospitalario Quirón SA

v

Departamento de Sanidad del Gobierno Vasco,

Instituto de Religiosas Siervas de Jesús de la Caridad,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Šváby, A. Rosas, E. Juhász (Rapporteur) and C. Vajda, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 April 2015,

after considering the observations submitted on behalf of:

– Grupo Hospitalario Quirón SA, by J. Cabrera Ayala and I. Millán Fernández, abogados,

– the Departamento de Sanidad del Gobierno Vasco, by L. Pérez Ovejero, acting as Agent,

– the Instituto de Religiosas Siervas de Jesús de la Caridad, by L. Galdos Tobalina and A. Arenaza Artabe, abogados,

– the Spanish Government, by L. Banciella Rodríguez-Miñón, acting as Agent,

– the European Commission, by A. Tokár and E. Sanfrutos Cano, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 June 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of European Union public procurement law and, in particular, of Article 23(2) of Directive 2004/18/EC of the European

Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between Grupo Hospitalario Quirón SA ('Grupo Hospitalario Quirón') and the Departamento de Sanidad del Gobierno Vasco (Department of Health of the Basque Government) and the Instituto de Religiosas Siervas de Jesús de la Caridad, concerning the validity of a condition inserted in two public procurement notices published by the Department of Health of the Basque Government.

Legal context

3 Recital 2 in the preamble to Directive 2004/18 states:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. …'

4 Article 1 of that directive, entitled 'Definitions', provides:

'…

2. (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

(d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

…

4. "Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

…'

5 Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts', provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

6 Under Article 7 of Directive 2004/18, entitled 'Threshold amounts for public contracts', as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64), applicable *ratione temporis* to the main proceedings in the present case, that directive applies to public service contracts awarded by contracting authorities other than central government authorities, the estimated value of which, exclusive of value-added tax (VAT), is equal to or greater than EUR 193 000.

7 Article 21 of Directive 2004/18, entitled 'Service contracts listed in Annex II B', is worded as follows:

'Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).'

8 Under Annex II B to that directive, health services fall within Category 25 of that annex, entitled ‘Health and social services’.

9 Article 23 of Directive 2004/18, entitled ‘Technical specifications’, provides at paragraph 2:

‘Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.’

The dispute in the main proceedings and the question referred for a preliminary ruling

10 It is apparent from the documents before the Court that, in the Basque Country (Spain), public health services are provided on the basis of a system of regional organisation and division into health-care districts. Under that system, patients covered by the public health service are served by a public hospital, known as the ‘hospital of reference’, located in the corresponding health-care district.

11 In order to relieve the pressure on public hospitals and to reduce waiting times for patients covered by those establishments who need medical treatment that the public health services cannot provide within a reasonable period, the competent authorities set up a mechanism for cooperation with private health-care establishments and hospitals, under which certain public medical care support services are outsourced and provided by those private establishments, on a contractual basis and following the award of a public service contract. Thus, those private establishments make available to the public health service their infrastructure and technical and human resources, namely, inter alia, nurses and assistants, with a view to contributing to the accomplishment of the tasks of the public health service system. However, the surgical procedures and other medical treatment are carried out by surgeons attached to the public health service, who travel to those private establishments for that purpose.

12 It is in that context that, on 15 December 2010, the Biscay Regional Director of the Department of Health of the Basque Government approved the specifications, expenditure and tender dossier for the contract for the management of public services concerning ‘surgical procedures in the fields of minor, general and digestive tract surgery, gynaecology, urology and traumatology and orthopaedic surgery’ for patients covered by the public hospitals of Basurto, situated in the municipality of Bilbao, and Galdakao, situated in the municipality of Galdakao. The contract was to be awarded on the basis of an open procedure and the notice calling for applications was published in the *Boletín Oficial del País Vasco* (Official Journal of the Basque Country) of 31 January 2011. The estimated maximum value of the contract, taking into account any extensions of time, was EUR 5 841 041.84 (‘contract No 21/2011’).

13 On 10 May 2011, the same public authority approved the specifications, expenditure and tender dossier for the contract for the management of public services concerning ‘surgical procedures in the field of ophthalmology’, for patients covered by the public hospital of Galdakao. The contract was to be awarded on the basis of an open procedure and the notice calling for applications was published in the *Boletín Oficial del País Vasco* of 14 June 2011. The estimated maximum value of the contract, taking into account any extensions of time, was EUR 6 273 219.53 (‘contract No 50/2011’).

14 Under both contract No 21/2011 and contract No 50/2011, the successful tenderer-service provider was to be remunerated directly by the Department of Health of the Basque Government, in its capacity as the contracting authority.

15 The technical specifications concerning those two contracts, in the section relating to minimum requirements entitled ‘Location’, specify:

‘Having regard to the need for those services to be provided with sufficient proximity to patients and their families, the availability of public transport and travelling time, and the need to minimise the necessary travel by the medical staff of the … hospitals, the health-care centres proposed must be situated in the municipality of Bilbao.’

16 Consequently, in accordance with the specifications of those contracts, the place of performance of the services covered by those contracts was to be the municipality of Bilbao exclusively.

17 Grupo Hospitalario Quirón, which owns a private general hospital situated in the municipality of Erandio, challenged the two public calls for tenders concerning contracts No 21/2011 and No 50/2011, initially through administrative channels and then through legal proceedings. It argued that the requirement as to performance of the services covered by those calls for tenders within the municipality of Bilbao was contrary to the principles of equal treatment, freedom of access to public procurement procedures and free competition.

18 The referring court observes that Grupo Hospitalario Quirón's hospital meets all the technical specifications referred to in the contract documents relating to those contracts, with the exception of that concerning location, since that establishment is situated not in the municipality of Bilbao, but in that of Erandio, which is adjacent to the former. However, the municipalities of Bilbao and Erandio, together with other municipalities, form what is known as 'Greater Bilbao' or the 'Metropolitan Area of Bilbao'. Moreover, none of the calls for tenders predating those at issue and relating to the same services, issued by the Department of Health of the Basque Government, contained the obligation to provide the health services concerned within a particular locality.

19 The referring court states that tenderers are not formally required to have available, nor to be the owners of, hospital facilities situated in the municipality of Bilbao, but they are required merely to be in a position to provide the health services that are the subject of contracts No 21/2011 and No 50/2011 in facilities situated in that municipality, irrespective of the legal title under which they have the use of those facilities. However, de facto, the truth is that, leaving aside the costs related to the use of such facilities, the only candidates who may participate in the calls for tenders would be those health-care operators who are established in Bilbao, since any other operators would not be in a position to have available the appropriate facilities and personnel within the periods between the dates of publication of the calls for tenders in respect of those contracts and those stipulated for the submission of tenders.

20 According to the referring court, the condition relating to location included in the specifications of those contracts constitutes a restriction on competition and a breach of the principle of free access by tenderers to public procurement procedures, which cannot be justified by any imperative need. Indeed, the adjacent municipalities of Erandio and Bilbao belonged to the same municipality between 1924 and 1982 and at present form, together with other municipalities, the Metropolitan Area of Bilbao. In addition, Grupo Hospitalario Quirón's hospital is easily accessible by public transport from the municipality of Bilbao.

21 Furthermore, again according to the referring court, the health services that are the subject of contract No 21/2011 are intended not only for patients covered by the public hospital of Basurto, situated in the municipality of Bilbao, but also for patients covered by the public hospital of Galdakao, situated in the municipality of Galdakao, which is separate from the municipality of Bilbao. So far as the services that are the subject of contract No 50/2011 are concerned, those services are intended solely for patients covered by the public hospital of Galdakao. Consequently, it would be highly likely that the patients for whom the services that are the subject of those two contracts are intended reside, in the main, in a municipality other than that of Bilbao, with the result that the argument based on the patients' place of residence is unfounded.

22 Therefore, the referring court reaches the conclusion that the condition at issue in the main proceedings cannot be regarded as being compatible with Article 23(2) of Directive 2004/18.

23 Having regard to those considerations, the Juzgado de lo Contencioso-Administrativo No 6 de Bilbao (Administrative Court No 6, Bilbao), decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the requirement, included in public contracts for the management of public health-care services, that the provision of health services which is the subject-matter of such contracts be carried out only in a determined municipality, which is not necessarily the municipality in which the patients reside, compatible with EU law?'

Consideration of the question referred

24 In the first place, it should be observed that, as is apparent from the documents before the Court, the two contracts, No 21/2011 and No 50/2011, constitute public service contracts within the meaning of Article 1(2)(a) and (d) of Directive 2004/18, the values of which exceed the threshold provided for in Article 7 thereof, and not service concessions within the meaning of Article 1(4) of that directive, since the remuneration of the successful tenderer is paid in its entirety by the contracting authority, which also bears the economic risk.

25 It must also be observed that, as is apparent from paragraphs 7 and 8 above, those contracts, relating to health services, are subject solely to the provisions of Articles 23 and 35(4) of Directive 2004/18.

26 In the second place, it must be noted, first, that Article 23(2) of Directive 2004/18, a provision to which those contracts are subject and which constitutes an expression of the principle of equal treatment, states that technical specifications are to afford equal access for tenderers.

27 Secondly, as is apparent from paragraph 15 above, the technical specifications of the two contracts at issue in the main proceedings refer to the need to ensure the proximity and accessibility of the private support hospital establishment that is to be chosen, in the interests of patients, their families and the medical personnel who are required to travel to that establishment, criteria which are inherent in the nature of the services sought.

28 However, the requirement that such an establishment must imperatively be situated in a given municipality that is to be the place where the medical services concerned are exclusively to be provided, laid down in the special administrative tender specifications and the technical specifications of contracts No 21/2011 and No 50/2011, constitute, having regard to the geographic location in the main proceedings, a territorial constraint on performance, which by its nature is not such as to enable the objective set out in paragraph 27 above to be achieved, namely to ensure the proximity and accessibility of the private support hospital establishment, in the interests of patients, their families and the medical personnel who are required to travel to that establishment, while ensuring equal and non-discriminatory access to those contracts by all tenderers.

29 In the case of the geographic location in question in the main proceedings, a requirement as to geographic location, such as that set out in the special administrative tender specifications and technical specifications of contracts No 21/2011 and No 50/2011, has the effect of automatically excluding those tenderers who cannot provide the services in question in an establishment situated within a given municipality, despite the fact that they may satisfy the other conditions laid down in the contract documents and technical specifications of the contracts under consideration.

30 The referring court observes that the applicant in the main proceedings is in that very position; its establishment satisfies all of the requisite conditions, including those of proximity and accessibility, with the exception of the requirement as to location within the territory of the municipality of Bilbao since that establishment is situated in a municipality adjacent to the latter.

31 It must also be noted in this connection, that, as the referring court observes, many patients who ought to receive the services to be delivered in the successful tenderer’s private hospital establishment reside outside the municipality within the territory of which that establishment has to be situated under the location clause under consideration.

32 Consequently, that requirement does not ensure equal and non-discriminatory access to the two contracts at issue in the main proceedings by all tenderers who might be able to ensure the proximity and accessibility of the private support hospital establishment, since that requirement renders those contracts accessible only to those tenderers who can provide the services in question in an establishment situated within the municipality designated in the corresponding contract notices. That requirement is therefore contrary to Article 23(2) of Directive 2004/18.

33 In the light of the foregoing considerations, the answer to the question referred is that Article 23(2) of Directive 2004/18 precludes a requirement such as that at issue in the main proceedings, expressed as a technical specification in public procurement notices relating to the provision of health services, whereby the medical services that are the subject of the calls for tenders must be provided by private hospital establishments situated exclusively within a given municipality, which is not necessarily that in

which the patients concerned by those services reside, where that requirement involves the automatic exclusion of tenderers who cannot provide those services in such an establishment situated within that municipality but who satisfy all the other conditions of those calls for tenders.

Costs

34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 23(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts precludes a requirement, such as that at issue in the main proceedings, expressed as a technical specification in public procurement notices relating to the provision of health services, whereby the medical services that are the subject of the calls for tenders must be provided by private hospital establishments situated exclusively within a given municipality, which is not necessarily that in which the patients concerned by those services reside, where that requirement involves the automatic exclusion of tenderers who cannot provide those services in such an establishment situated within that municipality but who satisfy all the other conditions of those calls for tenders.

[Signatures]

---

* Language of the case: Spanish.

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 11 June 2015 (1)

Case C-552/13

Grupo Hospitalario Quirón SA
v
Departamento de Sanidad del Gobierno Vasco
and
Instituto de Religiosas Siervas de Jesús de la Caridad

(Request for a preliminary ruling from the
Juzgado de lo Contencioso-Administrativo No 6 de Bilbao (Spain))

Request for a preliminary ruling — Procedures for the award of public contracts — Directive 2004/18/EC — Article 2 and Article 23(2) — Principle of equal treatment of tenderers — Health-care services — Requirement that the services be provided exclusively at facilities located within a particular municipality

I – Introduction

1. Can the technical specifications relating to a public contract for the provision of health-care services include a requirement that those services be provided exclusively at facilities located within a particular municipality? Can that requirement be justified on grounds of accessibility and quality of health care?

2. The foregoing questions illustrate the doubts which prompted the Juzgado de lo Contencioso-Administrativo No 6 de Bilbao (Administrative Court No 6, Bilbao (Spain)) to make a reference to the Court in a case involving two calls for tenders issued by the Basque authorities for the award of contracts for services connected with surgical procedures. The purpose of those contracts was to make operating theatre units located at private hospitals available for procedures carried out by doctors employed at public health service facilities in order to reduce waiting times for those procedures.

II – Legal framework

A – *EU law*

3. Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, (2) entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

4. Article 21 of that directive provides as follows:

‘Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).’

5. Under Article 23(2) of Directive 2004/18:

‘Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.’

6. Annex II B to Directive 2004/18 refers to ‘Health and social services’ (category 25).

B – *Spanish law*

7. Articles 2 and 23(2) of Directive 2004/18 were respectively transposed into Spanish law by Articles 101(2) and 123 of Law 30/2007 of 30 October 2007 on Public Sector Contracts (Ley 30/2007, de 30 de octubre, de Contratos del Sector Público). (3)

III – The main proceedings and the question referred for a preliminary ruling

8. The main proceedings concern the award of two public procurement contracts relating to services provided by hospitals in connection with the performance of procedures in the fields of general surgery, digestive tract surgery, urology, gynaecology, orthopaedic surgery, traumatology, minor surgery and ophthalmology. The contracts in question do not include the actual services provided by the surgeon, who is employed by the public health service and travels to the private hospital selected following the contract award in order to perform the procedure.

9. On 15 December 2010, the Departamento de Sanidad del Gobierno Vasco (Department of Health of the Basque Government; ‘the Departamento de Sanidad’) approved the specifications for public contract No 21/2011 for the performance of public service surgical procedures in the Vizcaya health-care district (a district covered by public hospitals in Basurto and Galdakao). The estimated value of the contract was EUR 5 841 041.84.

10. On 10 May 2011, the Departamento de Sanidad approved the specifications for public contract No 50/2011 relating to the provision of public services in the field of ophthalmic surgery. Those services related to the district covered by the public hospital in Galdakao. The estimated value of the contract was EUR 6 273 219.53.

11. Both tender notices were published in the *Boletín Oficial del País Vasco* (Official Journal of the Basque Country) on 31 January and 14 June 2011 respectively. In section 2(d) of each notice, it was stated that the place of performance of the services was to be Bilbao.

12. In the case of both contracts, Part A of the technical specifications, entitled ‘Structure, equipment and scope of hospital services’, contains the following point 2 relating to minimum requirements and is entitled ‘Location’:

‘Having regard for the need for those services to be provided with sufficient proximity to patients and their families, the availability of public transport and travelling time, and the need to minimise the necessary travel by the medical staff of the hospitals [belonging to the public health service], the health-care centres proposed must be situated within the municipality of Bilbao.’

13. Grupo Hospitalario Quirón SA (‘Grupo Hospitalario Quirón’) is the owner of a general hospital located in the municipality of Erandio. It is apparent from the order for reference that that hospital meets the requirements contained in the technical specifications, except for the fact that it is not located within the municipality of Bilbao but in an adjacent municipality.

14. On 13 September 2011, Grupo Hospitalario Quirón contested the decisions taken by the Departamento de Sanidad in connection with the aforementioned two public calls for tenders, lodging an application with the Juzgado de lo Contencioso-Administrativo No 6, Bilbao. It submitted, inter alia,

that that court should annul the aforementioned decisions and order the issue of new calls for tenders not including the requirement that the services must be provided within Bilbao.

15. The Instituto de Religiosas Siervas de Jesús de la Caridad, which owns a health-care facility in Bilbao, was joined as defendant in the two sets of proceedings, which had been joined by the referring court.

16. In its application, Grupo Hospitalario Quirón submits that the requirement that the services be provided exclusively in facilities located in Bilbao is contrary to the principle of equality, freedom of access to public procurement procedures and the principles of non-discrimination, equal treatment of tenderers and free competition. It points out that, in order to meet that requirement, it is essential to have a complex material infrastructure in Bilbao the establishment of which would require significant investment and time. Such investment would not be justified for the purpose of providing the services covered by the calls for tenders. The only tenderers capable of taking part in the calls for tenders are therefore, it submits, hospitals located within Bilbao.

17. Grupo Hospitalario Quirón submits that, even if account is taken of travel difficulties for patients and surgeons employed at public hospitals in Basurto and Galdakao, the aforementioned requirement is unjustified, particularly in the case of the applicant, which owns a hospital in a municipality adjacent to Bilbao.

18. In reply to the application, the Departamento de Sanidad submits that the contested requirement does not limit the right of any tenderer to participate in the calls for tenders, since it does not require them to have facilities available in Bilbao, but simply that they must be capable of providing services in facilities located within Bilbao if a contract is awarded. It also submits that the condition that the services must be provided in Bilbao is justified by potential travel-related inconvenience for patients. The radial nature of public transport in the metropolitan area of Bilbao, it submits, will therefore make travel easier for them.

19. The referring court points out that it cannot be excluded that the contested requirement may constitute an inadmissible restriction of free competition in the calls for tenders. That court notes that that requirement does not appear to be necessary from a practical point of view. The award of contracts for health services at facilities located in a municipality distinct from the patient's place of residence is a common practice of public health authorities in Spain. Moreover, there are several possible ways of travelling from Bilbao to the hospital owned by Grupo Hospitalario Quirón, by metro and bus, while a journey by private transport takes an average of 14 minutes.

20. The referring court considers that it is necessary to determine, first, whether, in this case, the requirement that the service be carried out exclusively within Bilbao is justified by the subject-matter of the contract and, secondly, whether that requirement constitutes an inadmissible restriction on competition, since it does not appear to be justified by the criterion of patient accessibility to the services. In particular, in that court's opinion, there are no objective grounds for not permitting an entity owning a hospital located in an adjacent municipality to participate in the calls for tenders, where the travel time from a patient's place of residence to the hospital is reasonable. The referring court also points out that the provision of services does not concern exclusively patients resident in the municipality of Bilbao. In its opinion, it cannot therefore be ruled out that the contested requirement contained in the technical specifications of the calls for tenders infringes Articles 2 and 23(2) of Directive 2004/18.

21. In those circumstances, the Juzgado de lo Contencioso-Administrativo No 6, Bilbao decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the requirement, included in public contracts for the management of public health-care services, that the provision of health services which is the subject-matter of such contracts be carried out only in a determined municipality, which is not necessarily the municipality in which the patients reside, compatible with EU law?'

IV – Procedure before the Court

22. The order for reference was received at the Court on 25 October 2013. The Court requested the referring court to provide clarification, which that court provided on 11 April 2014.

23. The defendants in the main proceedings, the Spanish Government and the Commission have submitted written observations. The Departamento de Sanidad and the Spanish Government requested a hearing. Grupo Hospitalario Quirón, the Departamento de Sanidad, the Spanish Government and the Commission took part in the hearing, which was held on 20 April 2015.

V – Analysis

A – *Initial remarks*

24. The main proceedings concern two public calls for tenders relating to public health-care services. It is apparent from the order for reference that those calls for tenders relate to services provided by a hospital in connection with surgical procedures, as part of a special mechanism for cooperation between the public health service and private hospitals designed to reduce patient waiting times in the public health service. The contracts in question do not cover the actual services provided by surgeons, since the procedures are to be performed by doctors employed at public hospitals, who would travel to the private hospital selected following the contract award.

25. It is not clear from the order for reference whether the calls for tenders in question concern public contracts for the supply of services or also contracts for the award of service concessions, which are excluded from the scope of Directive 2004/18. (4)

26. However, it is apparent from the additional clarification provided by the referring court, at the Court's request, and also by the parties at the hearing, that the main proceedings relate to public service contracts coming within the scope of the aforementioned directive.

27. It is apparent from those clarifications that the successful tenderer receives remuneration for the services provided directly from the contracting authority and also does not bear a fundamental part of the economic risk connected with the provision of the services. (5) In particular, as the Departamento de Sanidad pointed out at the hearing, the public health service remains liable for any harm suffered by the patient as a result of a procedure. Similarly, the Spanish Government points out in its written observations that the aforementioned contracts are also classified as contracts for the supply of services under the provisions of national law referred to in the tender notice.

28. It should also be pointed out that the estimated value of each of the contracts significantly exceeds the thresholds indicated in Article 7 of Directive 2004/18.

29. Those circumstances, which it is, of course, for the referring court to establish, indicate clearly that Directive 2004/18 is applicable.

30. However, I would like to point out that the principle of equal treatment of tenderers in the provision of services, which will be the subject of submissions set out below, would also be applicable in the case of contracts awarded as a service concession.

31. Despite the fact that, as European Union (EU) law currently stands, service concession contracts are not governed by Directive 2004/18, public authorities are nevertheless bound to comply with the fundamental rules of the Treaty on the Functioning of the European Union, including Articles 49 TFEU and 56 TFEU, on condition that the contract concerned undoubtedly has a transnational dimension. (6) Furthermore, in the case at issue, as the Spanish Government itself points out in its written observations, it appears likely that, in view of their high estimated value and the geographical position of the Basque Country, the contracts will have a transnational dimension.

32. Services provided as part of a public health-care system, such as those which are the subject of the calls for tenders in the present case, are undoubtedly of fundamental social importance.

33. It should be borne in mind that it follows from both Article 168(7) TFEU and the case-law of the Court that EU law does not detract from the power of the Member States to organise their public

health-care systems. (7)

34. In the exercise of that power, the Member States may not, however, introduce or maintain unjustified restrictions on the exercise of fundamental internal market freedoms. In the assessment of compliance with that prohibition, account must be taken of the fact that the health and life of humans rank foremost among the assets or interests protected by the Treaty and that it is for the Member States, which have a discretion in the matter, to decide on the degree of protection which they wish to afford to public health and on the way in which that degree of protection is to be achieved. (8)

35. Moreover, the way in which health-care systems are organised in individual Member States varies considerably and the transnational dimension of the services provided as part of those systems is of a limited nature.

36. Those circumstances were taken into account by the EU legislature in deciding to place 'health services' within the category of non-priority services listed in Annex II B to Directive 2004/18. (9)

37. The EU legislature has proceeded on the assumption that such services are not a priori of cross-border interest and, for that reason, were not fully covered by the material scope of the directive. (10)

38. According to Article 21 of Directive 2004/18, the services listed in Annex II B, including 'health and social services', are to be subject solely to Article 23 and Article 35(4) of the directive.

39. In the light of the case-law of the Court, Article 21 of Directive 2004/18 does not, however, preclude application of the general and final provisions of that directive, including Article 2 thereof, referred to in the order for reference. (11)

B – *Restriction of access by tenderers to public procurement procedures in the light of Article 2 and Article 23(2) of Directive 2004/18*

40. It should be noted that both Article 2 and Article 23(2) of Directive 2004/18 express the principle of equal treatment of tenderers, which is also a general principle deriving from the fundamental internal market freedoms defined in, inter alia, Article 49 TFEU and Article 56 TFEU. In this regard, the case-law of the Court concerning the interpretation of the fundamental internal market freedoms is also important for the purposes of interpreting the aforementioned provisions of Directive 2004/18.

41. In the analysis of the case at issue in the light of the aforementioned case-law, it should, however, be borne in mind that Directive 2004/18 extends the application of the principle of equal and non-discriminatory treatment of tenderers to internal situations. Since the matter here at issue relates to an area harmonised by EU law, it is not necessary to seek a transnational dimension in order to apply that principle to contracts coming within the scope of the directive.

42. In the light of the general principle expressed in Article 2 of Directive 2004/18, contracting authorities must treat economic operators equally and non-discriminatorily and must act in a transparent way. These principles are of crucial importance with regard to the technical specifications, in the light of the risks of discrimination linked to the choice of those specifications or the manner in which they are formulated. (12)

43. In this regard, Article 23(2) of Directive 2004/18, which defines the rules for drawing up technical specifications and the formulation of requirements by contracting authorities in those specifications, provides that technical specifications must afford equal access for tenderers and must not have the effect of creating unjustified obstacles to the opening-up of public procurement to competition.

44. In the case here at issue, there can be no doubt that the obligation to have a health-care facility available in Bilbao, contained in the technical specifications of both disputed calls for tenders, is liable to hinder access to the public procurement market for potential tenderers which do not have such a facility available.

45. I wish to stress that that requirement does hinder such access, even though it was not used as a qualifying criterion for tenderers, and the availability of a facility is essential only at the stage of performance of the contract.

46. On this point, I disagree with the position of the Departamento de Sanidad, based on the judgment in *Contse and Others*, (13) to the effect that the requirement to have a facility available in the place of performance of the services does not restrict access to a call for tenders if it is formulated as a condition for the performance of the contract.

47. I would mention that the judgment in *Contse and Others* (14) concerned the requirement to have an office available in a particular province in order to participate in a call for tenders for the provision of respiratory treatment services. That requirement was a qualification criterion applicable at the time when tenders were submitted and would probably not have been problematic if it had had to be met only at the stage of performance of the services.

48. Nevertheless, it is clear from the judgment in *Contse and Others* that the requirement to have an office available in a particular province did not require significant investment and also that, in view of its nature, it could easily be met at any time. That is not true in the case here at issue since, as the referring court points out, the creation of hospital infrastructure in Bilbao would require significant investment requiring a great deal of time, which would probably not be cost-effective in view of the limited scope of the services covered by the calls for tenders.

49. As a result of the requirement being contested in the main proceedings, a tenderer must, in order to participate in the calls for tenders, assume the obligation to make the investments necessary to provide the services at facilities within Bilbao.

50. Furthermore, the requirement to have a facility available in the aforementioned municipality, despite the fact that it applies exclusively to the stage at which the contract is being performed, is liable to hinder or make less attractive the exercise of the freedom to provide services guaranteed by the Treaty.

51. In the light of the foregoing considerations, the contested requirement undoubtedly hinders tenderers' access to public procurement procedures within the meaning of Article 2 and Article 23(2) of Directive 2004/18.

C – *Justification by requirements in the general interest*

52. Next, it is necessary to consider whether that requirement may be justified by imperative requirements in the general interest and whether it is compatible with the principle of proportionality.

53. I wish to point out that, if the contested requirement were to constitute a justified restriction, it would, in the light of the principles developed in the case-law of the Court concerning restrictions on the exercise of the fundamental internal market freedoms, also be necessary to consider whether it is compatible with Article 2 and Article 23(2) of Directive 2004/18, since those provisions prohibit the creation of 'unjustified obstacles' to the opening-up of public procurement to competition.

54. It follows from the Court's case-law that the criteria applied when awarding public contracts must comply with the principle of non-discrimination as derived from the provisions of the Treaty relating to freedom to provide services. Moreover, restrictions on the freedom to provide services may be justified if they fulfil the conditions set out in the case-law concerning that freedom. (15)

55. In order to be considered compatible with Article 49 TFEU and Article 56 TFEU, national measures liable to hinder or make less attractive the exercise of fundamental freedoms must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective. (16)

56. The defendants in the main proceedings and the Spanish Government justify the contested requirement by citing the need to ensure high quality and reliability in the operation of the public

health-care system.

57. The Spanish Government maintains that the objective of the contested procedures is to support public health services in the field of surgical procedures. Since these are essential social services provided for the public by the Basque Government, it does not seem surprising that, guided by requirements in the general interest, the latter decided to enter into a contract with a private entity owning a hospital in Bilbao, where a large proportion of the residents of the Province of Vizcaya live. Considerations relating to the quality and reliability of health services provided on behalf and at the expense of the public authorities should be sufficient to justify such a restriction of the freedoms guaranteed by the Treaty.

58. In order to justify the aforementioned requirement, the Departamento de Sanidad cites travel difficulties for surgeons and also for patients and their relatives, pointing out the radial nature of public transport within the metropolitan area of Bilbao and the existence of direct public transport links between Bilbao and other towns in the province. It also points out that the choice of the most suitable location for medical facilities from the patients' point of view is one of the duties devolving on the public health service.

59. Furthermore, the Departamento de Sanidad cites the territorial division established for the purpose of providing public health services. That division, it submits, must also be maintained where public services are supported by private health facilities selected following a call for tenders. As regards the technical specifications of such calls for tenders, the place of performance in a particular health district is an essential requirement applied to the provision of services to support the public services. The Departamento de Sanidad points out that the hospital belonging to the Grupo Hospitalario Quirón is located in Erandio and, therefore, in a municipality which is in a different health district from that of the hospitals in Basurto and Galdakao. The municipality of Erandio is in the district covered by the Cruces public hospital, which is not involved in the contested calls for tenders.

60. To my mind, those arguments are not convincing.

61. With regard to the Departamento de Sanidad's argument concerning the territorial division of the public health service, it should be noted that, according to the settled case-law of the Court, Member States may not justify the restriction of a fundamental freedom by citing considerations of an administrative nature. (17)

62. In the case here at issue, the territorial division of the public health service established by the administration does not therefore constitute a sufficient justification for restrictions on the place of performance of the services which are the subject of the calls for tenders. Such justification must be based on evidence of genuine practical difficulties which require the service in question to be provided at health-care facilities located in Bilbao.

63. Likewise, I am not convinced by the Departamento de Sanidad's argument to the effect that, if the calls for tenders were to be extended to facilities located in other municipalities, it might prove unnecessary to conclude contracts with private entities, since the procedures in question could be carried out at a public hospital belonging to another health district, in particular at the Cruces Hospital, which is not involved in the contested calls for tenders.

64. EU law does not preclude the Departamento de Sanidad from having recourse to a public hospital located in another municipality in the province. A public authority has the possibility of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities and may do so in cooperation with other public authorities. (18)

65. However, since that authority decided that it was necessary to enter into a contract with a private entity by way of a call for tenders, it may not exclude a tenderer by reference exclusively to the administrative division of the territory for the purpose of operating public hospitals.

66. Moreover, with regard to the considerations relating to reliability and high quality in the operation of the health-care system, invoked by the Spanish Government, it should be noted that those

considerations undoubtedly constitute a criterion capable of justifying a restriction on the freedom to provide services.

67. In the light of the settled case-law of the Court, the objective of maintaining a high-quality balanced medical and hospital service open to all may fall within the derogations under Article 52 TFEU in so far as it contributes to the attainment of a high level of health protection. (19)

68. The location of a health-care facility in relation to the patient's place of residence is undoubtedly an important factor in the provision of health services. The need to travel involves additional costs and, in emergencies, even a risk to the patient's health, difficulties for the patient's family and friends and, in the case here at issue, also inconvenience arising from the need for medical staff employed at public hospitals to travel to the private hospital at which the procedure is to be carried out.

69. In my opinion, those circumstances may undoubtedly constitute grounds for restricting the geographical scope of the health service provision covered by the calls for tenders.

70. Nevertheless, a restriction relating to the place of performance of the services must remain compatible with the principle of proportionality and must therefore be appropriate for securing the attainment of the objective pursued and must also not go beyond what is necessary for attaining that objective. (20)

71. In order for the restriction relating to the location of facilities to be capable of attaining the objective of ensuring accessible and high-quality health care, it cannot be based exclusively on the administrative division of the territory, since that division does not generally take account of specific factors arising from the location of health-care facilities and patients' place of residence.

72. In order to select the place of performance of services, an objective assessment must be made of the inconvenience arising as a result of the distance of the health-care facility from the place where patients live.

73. It should also be pointed out that the distance from the health-care facility may be more or less significant depending on the type of services. There is no doubt that distance is of fundamental importance in the case of urgent operations. Nevertheless, in the case of planned procedures, practical difficulties connected with travel times are a less important factor in the provision of health services.

74. In my opinion, the contested requirement is disproportionate, since it prescribes that services be provided within the boundaries of the city of Bilbao, which were established for administrative reasons. That requirement is not based on any objective assessment of difficulties in travelling to the facility, nor does it take account of the nature of the health-care services covered by the calls for tenders.

75. Evidence of the disproportionate nature of that requirement can also be found in the fact that the target patients, as the referring court points out, do not live exclusively in Bilbao but also in other adjacent municipalities and, in the case of one of the contracts, the public hospital which will be supported by the private facilities is Galdakao Hospital, which is located outside the municipality of Bilbao.

76. The Departamento de Sanidad and the Spanish Government maintain that the selection of Bilbao as the place of performance of the services is based on the assumption that that city is a public transport hub and that it is therefore easy to travel to Bilbao from other towns in the province.

77. In my view, that argument is not sufficient to justify the claim that the requirement at issue in the main proceedings is proportionate.

78. First, it cannot be ruled out that travelling from the centre of Bilbao to a private hospital located within the boundaries of the city may give rise to inconvenience similar to that involved in travelling to a hospital located in an adjacent municipality.

79. Secondly, it is apparent from the order for reference that the travel time from the centre of Bilbao to the hospital owned by the applicant, which is located in an adjacent municipality, does not

involve a great deal of difficulty. From the replies given by the parties at the hearing, it is also apparent that the subject-matter of the contracts consists of health services connected with planned procedures.

80. In addition, the referring court points out that public contracts for the provision of health services awarded by the Departamento de Sanidad in the past did not contain any similar requirement concerning the location of facilities, and that the contracting authority's legal department issued an opinion suggesting that that requirement should be removed as it was difficult to reconcile with the principle of equal treatment of tenderers.

81. It should be pointed out that it is for the referring court to establish the factual circumstances and to assess proportionality on the basis of those circumstances.

82. Nevertheless, the facts described in the order for reference indicate that travelling to a hospital located in the municipality of Erandio would not cause excessive difficulties for patients or medical staff. Those facts therefore tend to point to the conclusion that the contested requirement is not proportionate.

83. As the Commission correctly notes in its written observations, it is also necessary to consider whether there are other means of attaining the objective in question which are less restrictive of the freedom to provide services.

84. In the case at issue, it cannot be ruled out that the general interest cited by the Departamento de Sanidad and the Spanish Government could be safeguarded by less restrictive means, for example by a requirement that the services be performed at health-care facilities to which travel by public transport would not cause undue inconvenience to patients and medical staff. A technical specification defined to that effect could also contain an approximate travel time from the centre of Bilbao that the contracting authority considers to be reasonable.

VI – Conclusion

85. In the light of the foregoing considerations, I propose that the Court reply as follows to the question referred by the Juzgado de lo Contencioso-Administrativo No 6, Bilbao (Spain):

Articles 2 and 23(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts preclude the inclusion, in the technical specifications of a public contract for the provision of public health-care services, of a requirement that the services be provided exclusively at health-care facilities located within a given municipality, where that requirement is not based on an objective assessment of travel difficulties for patients, regard being had to the nature of the health-care services which are the subject of the public contract.

---

1 Original language: Polish.

---

2 OJ 2004 L 134, p. 114, as last amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64).

---

3 *Boletín Oficial del Estado* (Official State Journal) of 31 October 2007.

---

4 See Article 1(14) and Article 17 of Directive 2004/18.

---

5 See, to that effect, the judgments in *Contse and Others,* C-234/03, EU:C:2005:644, paragraph 22; *Eurawasser*, C-206/08, EU:C:2009:540, paragraphs 66 and 67; and *Privater Rettungsdienst und Krankentransport Stadler,* C-274/09, EU:C:2011:130, paragraph 37.

---

6 Judgments in *Coname,* C-231/03, EU:C:2005:487, paragraph 16, and in *Privater Rettungsdienst und Krankentransport Stadler,* C-274/09, EU:C:2011:130, paragraph 49. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1) does not apply to the present case, in view both of the deadline for its transposition and of the transitional provisions contained in the second paragraph of Article 54 thereof.

---

7 See the judgment in *Azienda sanitaria locale n. 5 'Spezzino' and Others,* C-113/13, EU:C:2014:2440, paragraph 55 and the case-law cited therein.

---

8 *Ibid.*, paragraph 56 and the case-law cited therein.

---

9 The special regime for health services is also retained by the new Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2004 L 94, p. 65) (Article 74 and Annex XIV), although it is not applicable to the present case *ratione temporis*, and, in relation to the award of concession contracts, by Directive 2014/23 (Article 19 and Annex IV).

---

10 Judgment in *Commission* v *Ireland,* C-507/03, EU:C:2007:676, paragraph 25. This issue has also been analysed in the legal literature; see A. Sołtysińska, *Europejskie prawo zamówień publicznych*, Warsaw, LEX Wolters Kluwer 2012, p. 167.

---

11 See, to that effect, the judgment in *Contse and Others,* C-234/03, EU:C:2005:644, paragraph 47.

---

12 Judgment in *Commission* v *Netherlands,* C-368/10, EU:C:2012:284, paragraph 62.

---

13 Judgment in *Contse and Others,* C-234/03, EU:C:2005:644.

---

14 *Contse and Others*, paragraphs 55 to 57.

---

15 *Contse and Others*, paragraph 49.

---

16 Judgment in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 37.

---

17 See judgment in *Commission* v *Austria*, C-356/08, EU:C:2009:401, paragraph 46 and the case-law cited therein.

---

18 Judgment in *Commission* v *Germany,* Case C-480/06, EU:C:2009:357, paragraph 45.

---

19 See, inter alia, the judgments in *Kohll,* C-158/96, EU:C:1998:171, paragraphs 50 and 51, and in *Smits and Peerbooms*, C-157/99, EU:C:2001:404, paragraphs 73 and 74.

---

20 Judgments in *Commission* v *Spain,* C-158/03, EU:C:2005:642, paragraph 70, and in *Contse and Others,* C-234/03, EU:C:2005:644, paragraph 41. It should be noted that the proportionality test plays a key role in the assessment of the legality of actions by Member States which restrict an internal market freedom;

see A. Frąckowiak-Adamska, *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrzego Wspólnoty Europejskiej*, Warsaw, Wolters Kluwer 2009, Section 3.1.1.

JUDGMENT OF THE COURT (Fifth Chamber)

12 March 2015 (*)

(Reference for a preliminary ruling — Public procurement — Directives 89/665/EEC and 2004/18/EC — Principles of equal treatment and transparency — Connection between the successful tenderer and the contracting authority's experts — Obligation to take that connection into account — Burden of proving bias on the part of an expert — Such bias having no effect on the final result of the evaluation — Time-limit for instituting proceedings — Challenging the abstract award criteria –Those criteria clarified after the exhaustive reasons for the award of the contract had been communicated — Degree of the tenders' conformity with the technical specifications as an evaluation criterion)

In Case C-538/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Lithuania), made by decision of 9 October 2013, received at the Court on 14 October 2013, in the proceedings

eVigilo Ltd

v

Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos,

supported by:

'NT Service' UAB,

'HNIT-Baltic' UAB,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász (Rapporteur) and D. Šváby, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– eVigilo Ltd, by J. Puškorienė, advokatė,

– Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos, by R. Baniulis, acting as Agent,

– 'NT Service' UAB and 'HNIT-Baltic' UAB, by D. Soloveičikas, advokatas,

– the Lithuanian Government, by D. Kriaučiūnas and K. Dieninis and by V. Kazlauskaitė-Švenčionienė, acting as Agents,

– the Greek Government, by K. Paraskevopoulou and V. Stroumpouli, acting as Agents,

– the European Commission, by A. Steiblytė and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the third subparagraph of Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31), ('Directive 89/665') and by Article 2, Article 44(1) and Article 53(1)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between eVigilo Ltd ('eVigilo') and the Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos (General Department of Fire and Rescue at the Ministry of the Interior) ('the contracting authority') concerning the evaluation of tenders in a public procurement procedure.

Legal context

EU law

3 The third subparagraph of Article 1(1) of Directive 89/665 provides:

'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.'

4 Recitals 2 and 46 in the preamble to Directive 2004/18 state as follows:

'(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

…

(46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender".

> To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. …
>
> Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.

…’

5 Under Article 2 of Decision 2004/18:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

6 Article 44(1) of that directive provides:

‘Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.’

7 Article 53(1)(a) of that directive provides:

‘(1) Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.’

Lithuanian law

8 Article 2(17) of Law No VIII-1210, of 13 August 1996, on public contracts (Žin., 1996, No 84-2000) (‘the law on public contracts’), provides:

‘“Declaration of impartiality”: a written declaration from a member of the Public Procurement Commission or an expert, showing that they are impartial vis-à-vis tenderers.’

9 Article 16(5) of that Law provides:

‘No member of the Public Procurement Commission and no expert may participate in the work of that Commission until he has signed a declaration of impartiality and a commitment to respect confidentiality.’

10 Article 3 of that law, entitled ‘Fundamental principles relating to the award of contracts and compliance therewith’, provides in paragraph 1 thereof:

‘(1) The contracting authority shall ensure that, during procedures relating to procurement and the award of contracts, the principles of equality of arms, non-discrimination, proportionality and transparency are observed.’

11 Article 90 of that Law provides:

‘On the basis of the results of the evaluation of the tenders carried out in accordance with the procedure referred to in Article 39(7) of the present law, the supplies, services or work shall be purchased from the tenderer who submitted the most economically advantageous tender or offered the lowest price. During procedures for awarding supply, service or works contracts, the tenders submitted may be evaluated on the basis of the criterion relating to the most economically advantageous tender or the lowest price, or on the basis of criteria relating to the purpose of the contract which are established in the procurement documents of the contracting authority and which may not restrict the access of tenderers to the contract either unlawfully or on the basis of bias or grant privileged access to certain tenderers, thereby infringing the conditions set out in Article 3(1) of the present law.’

12 Article 39(7) of the law on public contracts, in its version which was in force between 1 September 2009 and 2 March 2010, provides:

‘In order to take a decision relating to a successful tender, the contracting authority must:

(1) in accordance with the procedure and with the evaluation criteria established in the procurement documents, evaluate without delay the tenders submitted by the tenderers and establish a preliminary classification thereof (except where a single tenderer is requested to submit a tender, or where a single tenderer submits a tender). The preliminary classification of tenders shall be established in descending order of their economic advantage or in ascending order of their price. If the criterion for evaluating the most economically advantageous tender applies and the tenders submitted by several tenderers present an identical economic advantage, during the preliminary classification of the tenders priority shall be granted to the tenderer whose envelope containing the tenders was registered first or whose tender, made electronically, was submitted the earliest. In the event that the criterion for evaluating the tenders is the lowest price submitted and several tenders contain identical prices, during the preliminary classification, priority shall be granted to the tenderer whose envelope containing the tenders was registered first or whose tender, made electronically, was submitted earliest;

(2) notify without delay all the tenderers who submitted tenders of the preliminary classification of the tenders and all the tenderers whose tenders were not included in that classification, of the grounds for the rejection of their tenders, including the rejection of tenders on the ground of non-equivalence or failure to comply with the functional requirements and the requirements relating to the description of the planned performances, established by the contracting authority in accordance with Article 25 of the present law;

(3) not confirm the classification of the tenders or take a decision relating to the successful tender until it has examined, in accordance with the procedure referred to in the present law, the applications and the actions of the tenderers who submitted tenders (where such actions and applications have been made), and at least 10 days after sending the notification of the preliminary classification of the tenders to the tenderers.’

13 Article 39(7) of the law on public contracts, in the version in force since 2 March 2010, is worded as follows:

‘In order to take a decision on the award of a contract, the contracting authority must, in accordance with the procedure and with the evaluation criteria established in the procurement documents, evaluate without delay the tenders made by the tenderers, in the situation referred to in Article 32(8) of the present law, the conformity of the tenderer, whose tender may be successful on the basis of the results of the evaluation, with the minimum requirements relating to qualification, establish the classification

of the tenders (except where a single tenderer is requested to submit a tender, or where a single tenderer submits a tender) and accept a tender. The preliminary classification of tenders shall be established in descending order of their economic advantage or in ascending order of their price. In the event that the criterion for evaluating the most economically advantageous tender applies and the tenders submitted by several tenderers present an identical economic advantage, during the classification of the tenders priority shall be granted to the tenderer whose envelope containing the tenders was registered first or whose tender, made electronically, was submitted earliest.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 On 22 January 2010, the contracting authority published an open invitation to tender entitled 'for the purchase of a system for warning and informing the public, using the infrastructure of the networks of providers of services relating to public mobile telephone connections', in the context of which eVigilo, together with 'ERP' UAB and 'Inta' UAB, and another consortium composed of 'NT Service' UAB and 'HNIT-Baltic' UAB, submitted their tenders.

15 According to the referring court, the value of the contract in the dispute pending before it being 14 998 972.45 Lithuanian litas (LLT) (approximately EUR 4 344 002), the invitation to tender at issue concerns a purchase coming within the ambit of Directives 2004/18 and 89/665.

16 It is apparent from the case-file submitted to the Court that, in paragraph 67 of the conditions of the invitation to tender there appear, as evaluation criteria, the overall price of that warning system, the number of operators taking part in the project with the tenderer and the general and functional requirements. The latter include the justification for the technical and architectural solution and the particulars of the functional elements and their conformity with the technical specifications and the requirements of the contracting authority; the integrity and compatibility of the system proposed with the technical and information-technology infrastructure used by the contracting authority; the extension of the functional scope of the system and the justification thereof; and the strategy for implementing the project, the effectiveness of the management plan, the description of quality control measures and of the project team.

17 The contracting authority's Public Procurement Commission, having examined the evaluation of the technical tenders carried out by six experts, upheld the results of that evaluation. On 4 November 2010, the contracting authority informed the tenderers of the results of that evaluation.

18 On 2 November 2010, eVigilo brought a first action relating to the lawfulness of the procurement procedures, arguing in particular that the conditions of the call for tenders lacked clarity.

19 Further details were added to the application on 20 December 2010, alleging failings in the experts' evaluation and that the results of that evaluation were groundless.

20 On 31 January 2011, by a second application, eVigilo contested the lawfulness of the actions of the contracting authority, claiming that the third parties' tender should be rejected, because its price exceeded the level of financing allocated to the project at issue.

21 On 8 March 2011, the contracting party and 'NT Service' UAB and 'HNIT-Baltic' UAB concluded the contract, even though the proceedings between eVigilo and the contracting authority were still pending.

22 On 19 March 2012, eVigilo added to its first application relating to the lawfulness of the evaluation of tenders, explaining its arguments concerning the erroneous definition of the criteria in the invitation to tender for evaluating an economic advantage.

23 On 10 April 2012, eVigilo again added to its first application and invoked new facts connected with the bias of the experts who evaluated the tenders, liable to show the existence of professional relations between the latter and the specialists referred to in the third parties' tender.

24 It claimed that the specialists referred to in the tender submitted by the successful tenderers were, at the Technical University of Kaunas (Kauno technologijos universitetas), colleagues of three of the six

experts of the contracting authority who drew up the tender documents and evaluated the tenders.

25 eVigilo's applications were rejected by the courts of first instance and of appeal.

26 By its appeal on a point of law before the Lietuvos Aukščiausiasis Teismas, eVigilo states that those courts incorrectly assessed the connections between the specialists referred to by the successful tenderers and the experts appointed by the contracting authority. It claims also that those courts thereby failed to take account of the experts' bias.

27 Furthermore, eVigilo claims that the contracting authority laid down very abstract criteria for the evaluation of the most economically advantageous tender, in particular the criterion of 'compatibility with the needs of the contracting authority', which had an effect on the tenders made by the tenderers, and on the evaluation of those tenders by the contracting authority. It claims that it was able to understand the award criteria of the most economically advantageous tender only after the contracting authority sent it exhaustive reasons for the refusal to award the contract. It was, therefore, only after that communication had been made that the period for bringing an action ought to have started to run.

28 According to the contracting authority and the successful tenderers, the courts of first instance and of appeal were correct in holding that eVigilo was required not only to show objective connections existing between the successful tenderers' specialists and the experts who evaluated the tenders, but also to prove the subjective fact that the experts were biased. They maintain too that eVigilo challenged out of time the lawfulness of the criteria for the evaluation of the most economically advantageous tender.

29 In addition, the contracting authority and the successful tenderers contest the claim that those criteria for the award of the public contract were inappropriately defined, given that, until the closing date for the submission of tenders, eVigilo had not contested them and had not requested that they be explained.

30 In those circumstances, the Lietuvos Aukščiausiasis Teismas decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Are the public procurement rules of EU law — the third subparagraph of Article 1(1) of [Directive 89/665, as amended by] Directive 2007/66, in which are laid down the principles of effectiveness and expeditiousness with regard to the defence of rights of tenderers which have been infringed, Article 2 of Directive [2004/18], which lays down the principles of equal treatment of tenderers and of transparency, and Articles 44(1) and 53(1)(a) of Directive 2004/18, in which is set out the procedure governing the conclusion of a contract with the tenderer which has submitted the most economically advantageous tender — to be understood and interpreted together or separately (but without a limitation to the aforementioned provisions) as meaning that:

(a) in the case where a tenderer has become aware of a possible significant connection (link) which another tenderer has with the contracting authority's experts who evaluated the tenders, and (or) has become aware of the potentially exceptional position of that tenderer by reason of preparatory work previously performed in connection with the procurement procedure in dispute, and where, in regard to those circumstances, the contracting authority has not undertaken any actions, that information alone is sufficient to establish a claim that the review body should recognise as unlawful the actions of the contracting authority which failed to ensure transparency and objectivity in the procedures, the applicant, moreover, not being required to prove in concrete terms that the experts acted in a biased manner;

(b) the review body, having established that the grounds for the applicant's abovementioned claim are well founded, is not obliged, when ruling on the consequences which those grounds may have for the results of the tendering procedure, to have regard for the fact that the results of the evaluation of the tenders submitted by tenderers would essentially have been the same if there had not been any biased assessors among the experts who evaluated the tenders;

(c) the tenderer becomes (finally) aware of the content of the criteria relating to the most economically advantageous tender, which were formulated in accordance with the qualitative parameters and set out in abstract terms in the tendering conditions (criteria such as completeness and compatibility with the needs of the contracting authority), in respect of which the tenderer was essentially able to submit a tender, only at the time when, in accordance with those criteria, the contracting authority evaluated the tenders submitted by tenderers and provided interested parties with comprehensive information concerning the grounds for the decisions taken, and only from that moment could the limitation period governing the review procedure laid down in national law be applied to that tenderer?

(2) Must Article 53(1)(a) of Directive [2004/18], applied in conjunction with the principles governing the award of a contract set out in [Article] 2 of that directive, be understood and interpreted as meaning that contracting authorities are prohibited from establishing (and applying) a procedure for the evaluation of tenders submitted by tenderers under which the results of the evaluation of tenders depend on how comprehensively tenderers have demonstrated that their tenders satisfy the requirements of the tendering documents, that is to say, the more comprehensively (more extensively) the tenderer has described the conformity of its tender with the tendering conditions, the greater will be the number of marks awarded to its tender?'

Consideration of the questions referred for a preliminary ruling

Question 1(a) and (b)

31 By question 1(a) and (b), the referring court asks, in essence, whether the third subparagraph of Article 1(1) of Directive 89/665 and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18 must be interpreted as precluding a finding that the evaluation of the tenders is unlawful solely because the tenderer has had significant connections with experts appointed by the contracting authority who evaluated the tenders, without other evidence in the proceedings being examined, including the fact that those experts may have been biased had no effect on the decision to award the contract and without the unsuccessful tenderer being required to provide tangible proof that those experts were biased.

32 According to Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts', '[c]ontracting authorities [are to] treat economic operators equally and non-discriminatorily and shall act in a transparent way'.

33 Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions (see, to that effect, judgments in *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 110, and *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44).

34 The obligation of transparency, which is its corollary, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority with respect to certain tenderers or certain tenders (see, to that effect, judgments in *Commission* v *CAS Succhi di Frutta*, EU:C:2004:236, paragraph 111, and *Cartiera dell'Adda*, EU:C:2014:2345, paragraph 44).

35 A conflict of interests entails the risk that the contracting authority may choose to be guided by considerations unrelated to the contract in question and that on account of that fact alone preference may be given to a tenderer. Such a conflict of interests is thus liable to constitute an infringement of Article 2 of Directive 2004/18.

36 In that regard, the fact that the contracting authority appointed experts acting on its mandate in order to evaluate the tenders submitted does not relieve that authority of its responsibility to comply with the requirements of EU law (see, to that effect, judgment in *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 23).

37 The finding of bias on the part of an expert requires in particular the assessment of facts and evidence that comes within the competence of the contracting authorities and the administrative or judicial control authorities.

38 It should be pointed out that neither Directive 89/665 nor Directive 2004/18 contains specific provisions in that regard.

39 The Court has consistently held that, in the absence of EU rules governing the matter, it is for every Member State to lay down the detailed rules of administrative and judicial procedures for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see judgment in *Club Hotel Loutraki and Others*, C-145/08 et C-149/08, EU:C:2010:247, paragraph 74 and the case-law cited).

40 In particular, the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities must not compromise the effectiveness of Directive 89/665 (see judgment in *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 27 and the case-law cited).

41 It is not, as a general rule, contrary to those principles for an expert's bias to be established in a Member State solely on the basis of an objective situation in order to prevent any risk that the public contracting authority could be guided by considerations unrelated to the contract in question and liable, by virtue of that fact alone, to give preference to one tenderer.

42 Concerning the rules on evidence in that regard, it should be pointed out that, in accordance with Article 2 of Directive 2004/18, the contracting authorities are to treat economic operators equally and non-discriminatorily and to act in a transparent way. It follows that they are assigned an active role in the application of those principles of public procurement.

43 Since that duty relates to the very essence of the public procurement directives (see judgment in *Michaniki*, C-213/07, EU:C:2008:731, paragraph 45), it follows that the contracting authority is, at all events, required to determine whether any conflicts of interests exist and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them. It would be incompatible with that active role for the applicant to bear the burden of proving, in the context of the appeal proceedings, that the experts appointed by the contracting authority were in fact biased. Such an outcome would also be contrary to the principle of effectiveness and the requirement of an effective remedy laid down in the third subparagraph of Article 1(1) of Directive 89/665, in light, in particular, of the fact that a tenderer is not, in general, in a position to have access to information and evidence allowing him to prove such bias.

44 Thus, if the unsuccessful tenderer presents objective evidence calling into question the impartiality of one of the contracting authority's experts, it is for that contracting authority to examine all the relevant circumstances having led to the adoption of the decision relating to the award of the contract in order to prevent and detect conflicts of interests and remedy them, including, where appropriate, requesting the parties to provide certain information and evidence.

45 Evidence such as the claims in the main proceedings relating to the connections between the experts appointed by the contracting authority and the specialists of the undertakings awarded the contract, in particular, the fact that those persons work together in the same university, belong to the same research group or have relationships of employer and employee within that university, if proved to be true, constitutes such objective evidence as must lead to a thorough examination by the contracting authority or, as the case may be, by the administrative or judicial control authorities.

46 Subject to compliance with the obligations under EU law, and specifically with those referred to in paragraph 43 above, the concept of 'bias' and the criteria for it are to be defined by national law. The same applies to the rules relating to the legal effects of possible bias. Thus, it is for national law to determine whether, and if so to what extent, the competent administrative and judicial authorities must

take into account the fact that possible bias on the part of the experts had no effect on the decision to award the contract.

47 In the light of the foregoing considerations, the answer to question 1(a) and (b) is that the third subparagraph of Article 1(1) of Directive 89/665 and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18 must be interpreted as not precluding a finding that the evaluation of the tenders is unlawful on the sole ground that the tenderer has had significant connections with experts appointed by the contracting authority who evaluated the tenders. The contracting authority is, at all events, required to determine the existence of possible conflicts of interests and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them. In the context of the examination of an action for annulment of an award decision on the ground that the experts were biased, the unsuccessful tenderer may not be required to provide tangible proof of the experts' bias. It is, in principle, a matter of national law to determine whether, and if so to what extent, the competent administrative and judicial control authorities must take account of the fact that possible bias on the part of experts had an effect on the decision to award the contract.

Question 1(c)

48 By question 1(c), the referring court asks, in essence, whether the third subparagraph of Article 1(1) of Directive 89/665 and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18 must be interpreted as requiring a right to bring an action relating to the lawfulness of the tender procedure to be open, after the expiry of the period prescribed by national law, to a tenderer who could understand the tender conditions only when the contracting authority, after evaluating the tenders, provided exhaustive information relating to the reasons for its decision.

49 That question refers to the period prescribed for bringing an action relating to the lawfulness of a call for tenders provided for by national law. That question starts from the premiss that a legal remedy is available to the tenderers concerned, at the stage of the call for tenders, allowing the lawfulness of the latter to be contested. It relates to the question whether an interested tenderer is prevented by being out of time from bringing an action relating to the lawfulness of a call for tenders which it brought before being informed about the award of the contract at issue.

50 In that regard, it should be noted that the provisions of Directive 89/665, intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are designed to reinforce existing arrangements for ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (judgment in *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 34 and the case-law cited). Article 1(1) and (3) of Directive 89/665 requires effective remedies to be available 'under detailed rules which the Member States may establish', and in particular, as rapidly as possible, in accordance with the conditions set out in Articles 2 to 2f of that directive.

51 In accordance with the Court's case-law, the setting of reasonable limitation periods for bringing proceedings must be regarded as satisfying, in principle, the requirement of effectiveness under Directive 89/665, since it is an application of the fundamental principle of legal certainty. The full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements (judgments in *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraphs 75 and 76 and the case-law cited; *Lämmerzahl*, C-241/06, EU:C:2007:597, paragraphs 50 and 51; and *Commission* v *Ireland*, C-456/08, EU:C:2010:46, paragraphs 51 and 52).

52 According to the Court's case-law, the objective laid down in Article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (see judgments in *Uniplex (UK)*, EU:C:2010:45, paragraph 32, and *Idrodinamica Spurgo Velox and Others*, C-161/13, EU:C:2014:307, paragraph 37).

53 It should be noted that the award criteria for contracts must be stated in the contract notice or in the tender specifications and the fact that they are incomprehensible or lack clarity may constitute an infringement of Directive 2004/18.

54 In paragraph 42 of its judgment in *SIAC Construction*, C-19/00, EU:C:2001:553, the Court held that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

55 It follows that it is for the referring court to assess whether the tenderer concerned was in fact unable to understand the award criteria at issue or whether he should have understood them by applying the standard of a reasonably informed tenderer exercising ordinary care.

56 In the context of that assessment, it is necessary to take into account the fact that the tenderer concerned and the other tenderers were capable of submitting tenders and that the tenderer concerned, before submitting its tender, did not request clarification from the contracting authority.

57 Where it follows from that assessment that the tender conditions were in fact incomprehensible to the tenderer and that the latter was prevented from introducing an application within the period provided for by national law, that tenderer is entitled to bring an action until the period prescribed for bringing proceedings against the decision to award the contract has expired.

58 Consequently, the answer to question 1(c) is that the third subparagraph of Article 1(1) of Directive 89/665 and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18 must be interpreted as requiring a right to bring an action relating to the lawfulness of the tender procedure to be open, after the expiry of the period prescribed by national law, to reasonably well-informed and normally diligent tenderers who could understand the tender conditions only when the contracting authority, after evaluating the tenders, provided exhaustive information relating to the reasons for its decision. Such a right to bring an action may be exercised until the period prescribed for bringing proceedings against the decision to award the contract has expired.

Question 2

59 By question 2, the referring court asks, in essence, whether Articles 2 and 53(1)(a) of Directive 2004/18 must be interpreted as allowing a contracting authority to use, as an evaluation criterion for tenders submitted by the tenderers for a public procurement contract, the degree to which those tenders are consistent with the requirements included in the tender documentation.

60 According to Article 53(1)(a) of Directive 2004/18, the tender most economically advantageous from the point of view of the contracting authority is to be assessed according to various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.

61 According to the case-law, as follows from the use of the phrase ‘for example’, that list is non-exhaustive (see judgment in *Commission* v *Netherlands*, C-368/10, EU:C:2012:284, paragraph 84).

62 Thus, the contracting authority has the power to establish other award criteria, in so far as they are connected with the purpose of the contract and respect the principles set out in Article 2 of Directive 2004/18.

63 It is all the more important that the contracting authority must enjoy such freedom since the most economically advantageous tender is to be assessed ‘from the point of view of the contracting authority’.

64 Subject to the checking by the referring court, it appears that, in the main proceedings, the degree of conformity of the tender with the requirements of the tender documentation is connected with the purpose of the contract and there is nothing to suggest that that award criterion fails to respect the principles set out in Article 2 of Directive 2004/18.

65 Consequently, the answer to question 2 is that Articles 2 and 53(1)(a) of Directive 2004/18 must be interpreted as allowing, in principle, a contracting authority to use, as an evaluation criterion for tenders submitted by the tenderers for a public procurement contract, the degree to which those tenders are consistent with the requirements included in the tender documentation.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **The third subparagraph of Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, must be interpreted as not precluding a finding that the evaluation of the tenders is unlawful solely on the grounds that the tenderer has had significant connections with experts appointed by the contracting authority who evaluated the tenders. The contracting authority is, at all events, required to determine the existence of possible conflicts of interests and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them. In the context of the examination of an action for annulment of an award decision on the ground that the experts were biased, the unsuccessful tenderer may not be required to provide tangible proof of the experts' bias. It is, in principle, a matter of national law to determine whether, and if so to what extent, the competent administrative and judicial control authorities must take account of the fact that possible bias on the part of experts has had an effect on the decision to award the contract.**

   The third subparagraph of Article 1(1) of Directive 89/665, as amended by Directive 2007/66, and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18, must be interpreted as requiring a right to bring an action relating to the lawfulness of the tender procedure to be open, after the expiry of the period prescribed by national law, to reasonably well-informed and normally diligent tenderers who could understand the tender conditions only when the contracting authority, after evaluating the tenders, provided exhaustive information relating to the reasons for its decision. Such a right to bring an action may be exercised until the expiry of the period for bringing proceedings against the decision to award the contract.

2. **Articles 2 and 53(1)(a) of Directive 2004/18 must be interpreted as allowing, in principle, a contracting authority to use, as an evaluation criterion of tenders submitted by the tenderers for a public contract, the degree to which they are consistent with the requirements in the tender documentation.**

[Signatures]

---

* Language of the case: Lithuanian.

JUDGMENT OF THE COURT (Fifth Chamber)

11 December 2014 (*)

(Reference for a preliminary ruling — Public services contracts — Directive 2004/18/EC — Directive 89/665/EEC — Personal situation of the candidate or tenderer — Provisional award of the contract — Criminal investigations initiated in respect of the legal representative of the successful tenderer — Decision by the contracting authority not to proceed with the definitive award of the contract and to withdraw the invitation to tender — Judicial review)

In Case C-440/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 10 July 2013, received at the Court on 2 August 2013, in the proceedings

Croce Amica One Italia Srl

v

Azienda Regionale Emergenza Urgenza (AREU),

intervener:

Consorzio Lombardia Sanità,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász (Rapporteur), and D. Šváby, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 4 September 2014,

after considering the observations submitted on behalf of:

– Croce Amica One Italia Srl, by M. Sica and M. Protto, avvocati,

– the Azienda Regionale Emergenza Urgenza (AREU), by V. Avolio and V. Luciano, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and C. Colelli and L. D'Ascia, avvocati dello Stato,

– the Norwegian Government, by M. Emberland, H. Røstum and I.S. Jansen, acting as Agents,

– the European Commission, by G. Conte and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 41(1), 43 and 45 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between Croce Amica One Italia Srl ('Croce Amica One') and the Azienda Regionale Emergenza Urgenza (AREU) (Regional Emergency services Agency) concerning the lawfulness of the latter's decision, in its capacity as contracting authority, not to proceed with the definitive award of the contract in question to Croce Amica One, to which the contract had been provisionally awarded, and to withdraw the invitation to tender.

Legal framework

EU law

3 Article 41 of Directive 2004/18, headed 'Informing candidates and tenderers', provides in paragraph 1 thereof as follows:

'Contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning … the award of the contract …, including the grounds for any decision not to … award a contract for which there has been a call for competition …; that information shall be given in writing upon request to the contracting authorities.'

4 Article 43 of Directive 2004/18, headed 'Content of reports', is worded as follows:

'For every contract, … the contracting authorities shall draw up a written report which shall include at least the following:

…

(h) if necessary, the reasons why the contracting authority has decided not to award a contract …

…'

5 Article 45 of Directive 2004/18, headed 'Personal situation of the candidate or tenderer', provides as follows:

'1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

(a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA [(OJ 1998 L 351, p.1)];

(b) corruption, as defined in Article 3 of the Council Act of 26 May 1997 [(OJ 1997 C 195, p. 1)] and Article 3(1) of Council Joint Action 98/742/JHA [(OJ 1998 L 358, p. 2)] respectively;

(c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities [(OJ 1995 C 316, p. 48)];

(d) money laundering, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [(OJ 1991 L 166, p. 77), as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 (OJ 2001 L 344, p. 76)].

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

…

2. Any economic operator may be excluded from participation in a contract where that economic operator:

…

(c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

…

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.

…'

6 Article 1 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665'), which is headed 'Scope and availability of review procedures', provides in the third subparagraph of paragraph 1 thereof as follows:

'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.'

Italian law

7 Directive 2004/18 was transposed into Italian law by Legislative Decree No 163/2006 of 12 April 2006 (GURI No 100 of 2 May 2006, Ordinary Supplement), which codifies the rules governing public procurement.

8 Article 38 of Legislative Decree No 163/2006 provides as follows:

'1. The following persons shall be excluded from participation in procedures for the award of … public works contracts, supply contracts and service contracts, and may not … conclude any related contract:

…

(c) any person who has been the subject of a conviction that has the force of *res judicata* or a penal order against which no appeal lies … in respect of serious professional conduct offences to the detriment of the State or the Community; …

…

(f) any person who, in the reasoned assessment of the contracting authority, has been guilty of serious negligence or bad faith in the performance of any contract awarded to that person by the contracting authority which published the contract notice; or any person who has been found guilty of serious professional misconduct on the basis of any evidence which the contracting authority may establish;

…’

9 Article 78(1) of Legislative Decree No 163/2006 is worded as follows:

‘For all contracts … the contracting authorities shall draw up a report containing at least the following information:

…

(h) where necessary, the reasons why the administration has decided not to award a contract …’

10 Article 79(1) of Legislative Decree No 163/2006 provides as follows:

‘The contracting authorities shall notify without delay the candidates and tenderers of decisions taken concerning … the award of a contract … including the grounds of any decision … not to award a contract for which there has been a competitive tendering procedure …’

11 Article 11(9) of Legislative Decree No 163/2006 specifically refers to the administration’s power to withdraw, suspend or modify its own measures in the following terms:

‘Once the final award has taken effect, and subject to the exercise of the administration’s power to withdraw, suspend or modify its own measures in the cases in which it is so authorised by the provisions in force, the contract shall be concluded … within 60 days.’

12 The administration’s power to withdraw its own measures is provided for, as a general principle applicable to all administrative procedures, in Article 21d of legge n. 241 — Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (Law No 241 introducing new provisions relating to administrative procedure and the right of access to administrative documents) (GURI No 192 of 18 August 1990, p. 7). That article is worded as follows:

‘Where so justified on grounds of public interest, where there has been a change in the factual situation or where the initial assessment of the public interest has been reappraised, any administrative measure having long-term effects may be withdrawn by the body which adopted it or by any other body so authorised by law; as a result of the withdrawal, the measure withdrawn shall be ineffective.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 By decision of 28 December 2010, the AREU announced an open tendering procedure for the award of a contract for the supply of ‘services consisting in the transportation by road of organs, tissue, biological material, surgical equipment and patients for transplant operations’. That contract was to be for a two-year period, with the possibility of extending that period by a further 12 months, and was to be awarded on the basis of the economically most advantageous tender.

14 Three of the four companies which participated in the tendering procedure for the award of that contract were rejected by the selection committee after the technical bids had been evaluated. The only company remaining in contention, namely Croce Amica One, was provisionally awarded the contract by decision recorded in a report of 10 May 2011. However, in view of the fact the requirements laid down by national law for the purpose of ‘what is referred to as the “mandatory” verification of any anomaly identified in the tender’ were met in the present case, as the points awarded for the price and those awarded for the other assessment factors were equal to or greater than four-fifths of the corresponding maximum thresholds set out in the call for tenders, the contracting authority requested evidence in support of the technical bid submitted by Croce Amica One. After carrying out that verification, the selection committee concluded, by decision recorded in a report of 23 June 2011, that the tender was anomalous.

15 At the same time, in preliminary criminal law investigations concerning, among others, the legal representative of Croce Amice One in respect of fraud and intentionally false statements, the competent authorities seized documents relating to that company for investigative purposes.

16 By memorandum of 21 July 2011, the AREU notified both Croce Amica One and another company which had participated in the procurement procedure at issue that it had initiated a procedure for the cancellation of the invitation to tender, in accordance with the power available to the administration to withdraw, suspend or modify its own measures.

17 By act of 8 September 2011, the director general of the AREU decided not to proceed with the definitive award of the contract to Croce Amica One and, at the same time, to cancel the entire tendering procedure. By that act, the contracting authority expressed the view that, 'given the circumstances described, apart from the anomalous nature of the tender, the AREU [could] not in any event, for evident reasons of expediency and reasons connected with the principle of sound administration, proceed to award the services contract to the tenderer Croce Amica One … nor, given the vital nature of the services in question, [could] it postpone the award of the contract pending the outcome of the criminal proceedings or even the conclusion of the investigations currently under way'.

18 The contracting authority did not launch a new tendering procedure for the award of the public contract in question and extended the existing service contract with two associations.

19 By action brought on 2 November 2011, Croce Amica One challenged the contracting authority's decision of 8 September 2011 referred to at paragraph 17 above before the referring court, seeking the annulment and provisional stay of the decision. It also lodged a claim for compensation for the damage which, in its view, it had sustained as a result of the decision.

20 By decision of 14 May 2013, the Tribunale di Milano (District Court, Milan) indicted the legal representative of Croce Amica One, along with another accused, in connection, inter alia, with the offence of obstructing a public tendering procedure, on the basis that, in order to be awarded the contract, the person concerned had submitted 15 false statements claiming attendance on a course for the safe driving of ambulances.

21 The referring court considers that, in general terms, without prejudice to the exercise of the power available to the administration to withdraw, suspend or modify its own measures in connection with public contacts, the contracting authority concerned — which was acting, ostensibly, on grounds of administrative expediency deriving from the fact that criminal investigations were ongoing concerning the legal representative of the company to which the contract had been provisionally awarded — failed to have regard to Article 45 of Directive 2004/18, in the light, in particular, of the 'personal situation of the candidate or tenderer' as defined in that provision.

22 The referring court therefore considers that, under that provision, a tenderer may be excluded only where the tenderer has been convicted by a judgment having the force of *res judicata*.

23 The referring court is also uncertain, from an EU law perspective, as to the full extent of its own jurisdiction in that regard, taking the view that its jurisdiction cannot be confined to review of procedural flaws vitiating the exercise of the administration's powers. That court considers that not to accept that the administrative court enjoys extensive powers to review the facts or legal concepts, such as the fact that, in the present case, there has been no definitive finding as to liability in criminal law of the legal representative of the company to which the contract was provisionally awarded, would be totally at odds with the spirit and rationale of Article 45 of Directive 2004/18.

24 In the light of the foregoing considerations, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) has decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is it consistent with Community law for it to be permissible for a contracting authority, in the exercise of its power to withdraw a decision in relation to a public procurement procedure pursuant to Article 21d of Law No 241 of 7 August 1990, to decide not to proceed with the definitive award of the contract merely because criminal investigations are pending vis-à-vis the legal representative of the company to which the provisional award was made?

(2) Is it consistent with Community law for there to be a derogation from the principle of the finality of findings of criminal liability, as expressed in Article 45 of Directive [2004/18], on grounds of

administrative expediency, which is a matter to be determined by the administrative authorities alone?

(3) Is it consistent with Community law for there to be a derogation from the principle of the finality of findings of criminal liability, as expressed in Article 45 of Directive [2004/18], where pending criminal investigations concern offences relating to the tendering procedure covered by the measure adopted by the administration in accordance with its power to withdraw, suspend or modify its own measures?

(4) Is it consistent with Community law for the decisions adopted by a contracting authority in matters of public procurement to be open to unlimited review by a national administrative court, in exercise of the jurisdiction conferred in matters relating to public procurement, covering the reliability and the suitability of the tender, and thus going above and beyond the limited cases of clear absurdity, irrationality, failure to state adequate reasons or error as to the facts?'

Consideration of the questions referred

Questions 1 to 3

25 By questions 1 to 3, which it is appropriate to consider together, the referring court asks, in essence, whether — where the conditions for the application of the grounds for exclusion set out in Article 45 of Directive 2004/18 are not fulfilled — that article precludes the adoption by a contracting authority of a decision not to award a contract for which a procurement procedure has been held and not to proceed with the definitive award of the contract to the sole tenderer remaining in contention to whom the contract had been provisionally awarded.

26 The formulation of those questions and the reference to Article 45 of Directive 2004/18 may be traced back to the fact that, on 8 September 2011, the director general of the AREU decided, first, not to proceed with the definitive award of the contract at issue in the main proceedings to Croce Amica One and, second, to cancel the related tendering procedure.

27 It should be noted at the outset that, notwithstanding the reference in the request for a preliminary ruling to Article 45 of Directive 2004/18, it is apparent from the documents before the Court that the measure contested in the main proceedings is a decision by a contracting authority withdrawing an invitation to tender and cancelling the procurement procedure. That decision is different from a decision relating to the exclusion of a tenderer under Article 45 of the directive.

28 In that context, it should be observed that, while the Court has not been apprised of the precise reasons for the withdrawal of the invitation to tender at issue before the referring court, that court would appear to associate the conduct of Croce Amica One's legal representative only with the grounds for exclusion relating to criminal law and entailing a conviction by a judgment that has become final, namely the grounds set out in Article 45(1) and (2)(c) of Directive 2004/18. It is useful to make clear that the grounds for exclusion set out in Article 45(2)(d) and (g) of the directive also give contracting authorities the power to exclude any economic operator who has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate, who is guilty of serious misrepresentation or who has failed to supply the information required for the qualitative selection of the tenders, without there being any need for the economic operator concerned to have been convicted by a judgment that has become final.

29 A decision to withdraw an invitation to tender for a public contract must comply with Articles 41(1) and 43 of Directive 2004/18.

30 Article 41(1) of Directive 2004/18 requires contracting authorities to inform candidates and tenderers as soon as possible of such decisions and to state the grounds for the decision, while Article 43 of the directive requires them to refer to those reasons in the report which it is obliged to draw up for any public contract. However, Directive 2004/18 does not contain any provision concerning the substantive or formal conditions for such a decision.

31 It should be noted in that regard that, according to the Court's case-law, Article 8(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), a provision similar to Article 41(1) of Directive 2004/18, does not provide that a decision by a contracting authority not to award a public contract is to be limited to exceptional cases or has necessarily to be based on serious grounds (judgment in *Fracasso and Leitschutz*, Case C-27/98, EU:C:1999:420, paragraphs 23 and 25).

32 Similarly, the Court has also held that, although Article 12(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), a provision also similar to Article 41(1) of Directive 2004/18, requires the contracting authority to notify candidates and tenderers of the grounds for its decision if it decides to withdraw the invitation to tender for a public contract, there is no implied obligation on that authority to carry the award procedure to its conclusion (see judgment in *HI*, Case C-92/00, EU:C:2002:379, paragraph 41).

33 However, the Court has been careful to point out that the requirement to communicate the grounds for a decision to withdraw an invitation to tender is dictated by the concern to ensure a minimum level of transparency in public procurement procedures to which EU rules apply, and hence compliance with the principle of equal treatment, which forms the basis of those rules (see, to that effect, judgment in *HI*, EU:C:2002:379, paragraphs 45 and 46 and the case-law cited).

34 The Court has also held that Article 1(1) of Directive 89/665 requires the decision of the contracting authority withdrawing the invitation to tender for a public contract to be open to a review procedure, and to be capable of being annulled, where appropriate, on the ground that it has infringed EU law on public contracts or national rules transposing that law. Furthermore, the Court has stated that, even in cases where the relevant national legislation gives the contracting authorities a wide discretion in relation to the withdrawal of invitations to tender, the national courts must be able, pursuant to Directive 89/665, to check the compatibility of a decision to withdraw an invitation to tender with the relevant rules of EU law (see judgment in *HI*, EU:C:2002:379, paragraphs 55 and 62).

35 Accordingly, EU law does not preclude Member States from providing in their legislation for the possibility of adopting a decision to withdraw an invitation to tender. The grounds for such a decision may thus be based on reasons which reflect, inter alia, the assessment as to whether it is expedient, from the point of view of the public interest, to carry an award procedure to its conclusion, having regard, among other things, to any change that may arise in the economic context or factual circumstances, or indeed the needs of the contracting authority concerned. The grounds for such a decision may also relate to there being an insufficient degree of competition, due to the fact that, at the conclusion of the award procedure in question, only one tenderer was qualified to perform the contract.

36 As a consequence, provided the principles of transparency and equal treatment are complied with, a contracting authority cannot be required to carry to its conclusion an award procedure that has been initiated and to award the contract in question, including where there remains only one tenderer in contention.

37 In view of the foregoing considerations, the answer to Questions 1 to 3 is that Articles 41(1), 43 and 45 of Directive 2004/18 must be interpreted as meaning that, where the conditions for the application of the grounds for exclusion set out in Article 45 are not fulfilled, that article does not preclude the adoption by a contracting authority of a decision not to award a contract for which a procurement procedure has been held and not to proceed with the definitive award of the contract to the sole tenderer remaining in contention to whom the contract had been provisionally awarded.

Question 4

38 By its fourth question, the referring court asks, in essence, whether, under EU law, the competent national court may conduct a review of a decision of a contracting authority in the exercise of its unlimited jurisdiction, that is, a review enabling it to take account of the reliability and suitability of the tenderers' bids and to substitute its own assessment for the contracting authority's evaluation as to the expediency of withdrawing the invitation to tender.

39 According to the Court's case-law, the decision to withdraw an invitation to tender for a public procurement contract is one of those 'decisions taken by the contracting authorities' in relation to which Member States are required, under the third subparagraph of Article 1(1) of Directive 89/665, to establish in their national law review procedures designed to ensure that the relevant substantive rules of EU law on public procurement contracts or the domestic provisions transposing those rules are complied with (see, to that effect, judgments in *HI*, EU:C:2002:379, paragraph 53 to 55, and in *Koppensteiner*, C-15/04, EU:C:2005:345, paragraph 29).

40 Since Directive 89/665 does no more than coordinate existing mechanisms in Member States in order to ensure the full and effective application of the directives laying down substantive rules concerning public contracts, it does not expressly define the scope of the remedies which the Member States must establish for that purpose. Therefore, the question of the extent of the judicial review exercised in the context of the review procedures covered by Directive 89/665 must be examined in the light of the purpose of the latter, care being taken to ensure that its effectiveness is not undermined (judgment in *HI*, EU:C:2002:379, paragraphs 58 and 59).

41 It should be noted, in that regard, that the function of the review system is governed by the third subparagraph of Article 1(1) of Directive 89/665, which provides that Member States are to take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible, on the grounds that such decisions have infringed EU law in the field of public procurement or national rules transposing that law.

42 It follows that the review procedures established by that provision serve to ensure that the relevant rules of EU law, in particular those laid down in Directive 2004/18, or national provisions transposing those rules, are complied with.

43 It must be borne in mind that review of legality cannot be confined to an examination of whether the decisions of contracting authorities are arbitrary (see, to that effect, *HI*, EU:C:2002:379, paragraph 63).

44 Therefore, such remedies entail a review as to whether an act was lawful, not a review of whether the act was expedient.

45 In the absence of specific EU legislation in this field, the detailed provisions governing judicial review must be established by national procedural rules, subject to compliance with the principles of equivalence and effectiveness (see, to that effect, *HI*, EU:C:2002:379, paragraph 68). Accordingly, the national legislature may grant the competent national courts and tribunals more extensive powers for the purpose of reviewing whether a measure was expedient.

46 The answer to Question 4 is therefore that EU public procurement law, in particular the third subparagraph of Article 1(1) of Directive 89/665, must be interpreted as meaning that the review referred to in that provision constitutes a review of the lawfulness of decisions adopted by contracting authorities, the purpose of which is to ensure that the relevant rules of EU law or national provisions transposing those rules are complied with. It is not possible for such review to be confined to a simple examination of whether the decisions adopted by contracting authorities are arbitrary. On the other hand, that does not mean that it is not open to the national legislature to grant the competent national courts and tribunals the power to review whether a measure was expedient.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1) **Articles 41(1), 43 and 45 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that, where the conditions for the application of the grounds for exclusion set out in Article 45 are not fulfilled, that article does not preclude the adoption by a contracting authority of a decision not to award a contract for which a procurement procedure has been held and not to proceed with the definitive award of the contract to the sole tenderer remaining in contention to whom the contract had been provisionally awarded.**

2) **European Union public procurement law, in particular the third subparagraph of Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted as meaning that the review referred to in that provision constitutes a review of the lawfulness of decisions adopted by contracting authorities, the purpose of which is to ensure that the relevant rules of EU law or national provisions transposing those rules are complied with. It is not possible for such review to be confined to a simple examination of whether the decisions adopted by contracting authorities are arbitrary. On the other hand, that does not mean that it is not open to the national legislature to grant the competent national courts and tribunals the power to review whether a measure was expedient.**

[Signatures]

---

* Language of the case: Italian.

JUDGMENT OF THE COURT (Second Chamber)

10 July 2014 (*)

(Reference for a preliminary ruling — Public works contracts — Directive 93/37/EEC — 'Undertaking to let' buildings which have not yet been constructed — Decision of a national court having the authority of res judicata — Scope of the principle of res judicata in the event of a situation which is incompatible with EU law)

In Case C-213/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 11 January 2013, received at the Court on 23 April 2013, in the proceedings

Impresa Pizzarotti & C. SpA

v

Comune di Bari,

Giunta comunale di Bari,

Consiglio comunale di Bari,

intervening parties:

Complesso Residenziale Bari 2 Srl,

Commissione di manutenzione della Corte d'appello di Bari,

Giuseppe Albenzio, acting as *Commissario ad acta*,

Ministero della Giustizia,

Regione Puglia,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts (Rapporteur), Vice-President of the Court, J.L. da Cruz Vilaça, G. Arestis and J.-C. Bonichot, Judges,

Advocate General: N. Wahl,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2014,

after considering the observations submitted on behalf of:

– Impresa Pizzarotti & C. SpA, by R. Mastroianni, D. Vaiano and F. Lorusso, avvocati,

– the Comune di Bari, by A. Loiodice, I. Loiodice and R. Lanza, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the European Commission, by L. Pignataro-Nolin, A. Tokár and A. Aresu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and the scope of the principle of *res judicata* in the event of a situation which is incompatible with EU law.

2 The request has been made in proceedings between Impresa Pizzarotti & C. SpA (‘Pizzarotti’) and the Comune di Bari, the Giunta comunale di Bari and the Consiglio comunale di Bari following the publication of a market investigation notice with a view to providing the Italian judicial authorities with a new single headquarters bringing together all the courts of Bari (Italy).

Legal context

Directive 92/50/EEC

3 Article 1(a) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) provided:

‘For the purposes of this Directive:

(a) *public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

…

(iii) contracts for the acquisition or rental, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights thereon …

…’

Directive 93/37/EEC

4 Article 1(a) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) defined ‘public works contracts’, for the purposes of that directive, as ‘contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in [Article 1(b)], which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in [Article 1(c)], or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority’.

5 The activities referred to in Annex II to that directive include the following activities in Class 50 (‘Building and civil engineering’): ‘[g]eneral building and civil engineering work (without any particular specification)’ (sub-group 500.1) and ‘[c]onstruction of flats, office blocks, hospitals and other buildings, both residential and non-residential’ (group 501).

Directive 2004/18

6 Article 1(2) of Directive 2004/18 provides:

‘(a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) “Public works contracts” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. …

…’

7 Article 16 of that directive, entitled ‘Specific exclusions’, provides:

‘This Directive shall not apply to public service contracts for:

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; …

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 On 14 August 2003, the Comune di Bari (Municipality of Bari) published a ‘market investigation’ notice with the aim of creating, as soon as possible, a new single headquarters which would be suitable and appropriate to host all the courts of Bari. That notice was published in, inter alia, the *Official Journal of the European Union* of 23 August 2003 (OJ S 161).

9 The notice required tenderers to commit themselves to commencing construction of the planned work by 31 December 2003. It required clear and exhaustive indications of the costs to be paid by the municipal authorities and the Ministero della Giustizia (Italian Ministry of Justice), and of the arrangements for payment, having regard to the fact that the public resources available amounted to the EUR 43.5 million already allocated to the project, to which the sum of EUR 3 million was to be added corresponding to the annual rents paid by the Comune di Bari to lease the premises housing the courts concerned. The notice was accompanied by an annex, drawn up by the Corte d’appello di Bari (Court of Appeal, Bari), which was intended to provide an ‘official and exhaustive framework of structural, functional, and organisational requirements’ (‘the framework of requirements’) relating to the creation of the planned judicial complex.

10 Four proposals were submitted. By Decision No 1045/2003 of 18 December 2003, the Comune di Bari selected Pizzarotti’s proposal. That proposal indicated that part of the complex built would be sold to the Comune di Bari for the sum of EUR 43 million and that the remainder would be leased to it for an annual rent of EUR 3 million.

11 By a note dated 4 February 2004, the Ministry of Justice informed the Comune di Bari that the public resources available for the project in question had been reduced to EUR 18.5 million and asked it to verify whether, having regard to the proposals received, it was possible to bring the project to fruition within the limits imposed by that new financial framework. By a note dated 11 February 2004, the Comune di Bari asked Pizzarotti to indicate whether it was prepared to go ahead with the already initiated procedure. Pizzarotti replied to that request in the affirmative, reformulating its proposal to take account of the reduced public resources available.

12 The expected public funding was cut off completely in September 2004.

13 Following the removal of that funding, Pizzarotti submitted a second proposal to the Comune di Bari, setting out the possibility of completing the work intended for letting which was contemplated in its initial proposal.

14 As the authorities took no action, Pizzarotti initiated proceedings before the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia) seeking an order obliging the Comune di Bari to act.

15 After that court dismissed the action, by Judgment No 4267/2007 the Consiglio di Stato (Council of State) upheld the appeal brought by Pizzarotti against the judgment at first instance. Finding that, in the light of the Ministry of Justice's note of 4 February 2004 reacting to the amended financial framework, the procedure had not been brought to an end by the approval of the outcome of the market investigation, the Consiglio di Stato decided that the Comune di Bari, 'in compliance with the principles of reasonableness, good faith and the protection of legitimate expectations, [was obliged], lending cohesion to its actions, [to] bring the procedure to a genuinely appropriate conclusion, examining, in the context of the proposals received, the possibility of the works being accomplished within the constraints of the amended financial framework'.

16 The appeal brought by the Comune di Bari against that judgment was rejected by an order of the Corte suprema di cassazione (Supreme Court of Cassation) of 23 December 2008.

17 Having, in the meantime, received an application seeking enforcement of its Judgment No 4267/2007, by Judgment No 3817/2008 the Consiglio di Stato found that the Comune di Bari had failed to act and ordered it to give full effect to the operative part of Judgment No 4267/2007 within 30 days. It appointed the Prefect of Bari as *Commissario ad acta* so that, in the event of continued non-compliance, he would take — possibly through a delegate — all measures necessary for enforcement of that judgment.

18 On 21 November 2008, the *Commissario ad acta* delegated by the Prefect of Bari acknowledged that Pizzarotti's proposals were valid and, accordingly, found that the procedure initiated by the market investigation notice concerned had achieved a positive outcome.

19 For its part, the Giunta comunale di Bari (Bari Municipal Council) terminated that procedure, claiming that Pizzarotti's second proposal did not comply with the requirements of the notice.

20 Pizzarotti and the Comune di Bari each appealed to the Consiglio di Stato. Pizzarotti claimed that, in the absence of any contractual commitment from the Comune di Bari for the purposes of completion of the new planned judicial complex, the latter had not correctly complied with the Consiglio di Stato's Judgment No 3817/2008. The Comune di Bari criticised the lack of any finding that the conditions for completing the project had worsened, affecting the progress of the procedure.

21 By Enforcement Decision No 2153/2010 of 15 April 2010, the Consiglio di Stato upheld Pizzarotti's appeal and dismissed that of the Comune di Bari. It considered that the action of the *Commissario ad acta* was incomplete, given the absence of any 'genuinely appropriate conclusion' within the meaning of its Judgment No 4267/2007. It ruled that the measures necessary for the specific implementation of Pizzarotti's second proposal had to be adopted, and set a time-limit of 180 days for bringing the procedure to an end.

22 By a document dated 27 May 2010, the *Commissario ad acta* concluded that 'the market investigation notice of August 2003 [had] not had a positive outcome'. He supported that conclusion by arguing, with regard to Pizzarotti's first proposal, as reformulated in 2004, that the loss of part of the public funding made it impossible to achieve the objective pursued by the Comune di Bari. He stated that Pizzarotti's second proposal, concerning the lease of buildings to be created using private funding, was totally inappropriate in the light of that objective.

23 An appeal brought by Pizzarotti against that document was upheld by the Consiglio di Stato by Enforcement Decision No 8420/2010 of 3 December 2010. Emphasising the inconsistent nature of the conclusions concerning the notice which were set out in the documents of 21 November 2008 and 27 May 2010, it took the view that the only valid conclusion was the one contained in the first of those documents. It reaffirmed the need for the *Commissario ad acta* to initiate the procedures necessary for the adoption of Pizzarotti's second proposal and annulled the second of those documents on the ground that it infringed the principle of *res judicata*.

24 Subsequently, the new *Commissario ad acta* appointed by the Prefect of Bari took all the measures necessary for the adoption on 23 April 2012 of a 'town planning modification' in relation to the Comune di Bari's general development plan, with regard to the land affected by the construction of the planned judicial complex.

25 Pizzarotti contested that decision before the Consiglio di Stato on the ground that it was in breach of the principle of *res judicata*.

26 In that context, the Consiglio di Stato asks, first, whether a contract for the lease of a property for future completion, taking the form of an undertaking to let that property, is equivalent, despite the presence of elements characteristic of a lease, to a works contract falling outside the scope of the specific exclusion clause set out in Article 16(1)(a) of Directive 2004/18.

27 Second, if it is assumed that that contract constitutes a public works contract, that court asks whether it may hold that a judgment having the authority of *res judicata* — in the present case its Judgment No 4267/2007 — is ineffective in so far as it has led, by reason of subsequent enforcement decisions and measures by the *Commissario ad acta*, to a situation which is incompatible with EU law on public procurement. It points out in that regard that, by virtue of its own case-law, it may, under certain conditions, supplement the original operative part of one of its judgments by an implementation decision, that possibility giving rise to what it terms 'progressively formed *res judicata*'.

28 In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a contract to be concluded for the lease of something in the future — even in the form, suggested most recently, of an undertaking to let — equivalent to a public works contract, albeit with certain elements characteristic of a lease, with the result that such a contract cannot be included among the contracts which are excluded, under Article 16 of [Directive 2004/18], from the scope of the rules on public procedures?

2. If the answer to Question 1 is in the affirmative, may a national court — specifically, this referring court — hold that the ruling made regarding the events under consideration (as described in [this order for reference]) is ineffective in that it has enabled a situation which is contrary to [EU] law on public procurement to persist and, therefore, is it possible to enforce a final judgment which is contrary to [EU] law?'

Admissibility of the questions referred

29 Pizzarotti gives two reasons for its serious doubts as to the admissibility of the questions referred.

30 First, it submits that the request for a preliminary ruling fails to identify the correct EU legislation to be applied in the main proceedings: it seeks an interpretation of Directive 2004/18, whereas that directive was adopted after the date on which the Comune di Bari decided to publish the market investigation notice concerned, namely 14 August 2003, and is thus not applicable to the main proceedings.

31 In that regard, it should be borne in mind that the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract (judgment in *Commission* v *Netherlands*, C-576/10, EU:C:2013:510, paragraph 52 and the case-law cited). Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, to that effect, the judgment in *Commission* v *France*, C-337/98, EU:C:2000:543, paragraphs 41 and 42).

32 In the present case, Directives 92/50 and 93/37 were applicable on 14 August 2003, the date on which the Comune di Bari published a 'market investigation' notice with the aim of creating a judicial complex in Bari. Those directives were also applicable when, in September 2004, following the amendment to the financial framework in connection with the complete removal of public funding, the

Comune di Bari decided, according to the information which it has submitted to the Court, that it was necessary to initiate a new selection procedure rather than negotiate the conclusion of a contract 'for the lease of something in the future' directly with Pizzarotti without first issuing a new call for competition.

33 By contrast, Directive 2004/18 was not applicable on those dates, as — pursuant to Article 80(1) thereof — the period prescribed for transposition of that directive did not expire until 31 January 2006.

34 That said, the concept of 'public works contracts', which is referred to in the first question, is defined in similar terms in Article 1(a) of Directive 93/37 and Article 1(2)(a) and (b) of Directive 2004/18. In addition, Article 1(a)(iii) of Directive 92/50 and Article 16(a) of Directive 2004/18 use identical wording to define the scope of the exclusion which is also referred to in the first question.

35 In those circumstances, the fact that the referring court erred in identifying the provisions of EU law to be applied to the present case cannot affect the admissibility of the questions referred (see, to that effect, the judgment in *Zurita García and Choque Cabrera*, C-261/08 and C-348/08, EU:C:2009:648, paragraph 39).

36 Second, Pizzarotti submits that the main proceedings are characterised by the presence of judicial decisions of — in particular — the Consiglio di Stato which have the authority of *res judicata*, which makes the request for a preliminary ruling — particularly the first question — manifestly inadmissible. It claims that an answer from the Court to that question can have no effect on the outcome of the main proceedings in view of (i) the significance attributed to the principle of *res judicata* by EU law, at the expense, as the case may be, of remedying a breach of that law, and (ii) the lack of any obligation for an administrative authority to go back on a final decision which proves to be inconsistent with EU law.

37 However, an argument of that kind concerns the substance of the main proceedings and, more specifically, the subject-matter of the second question referred by the Consiglio di Stato.

38 In the light of the foregoing, the questions referred are admissible.

Consideration of the questions referred

Question 1

39 By its first question, which must be rephrased to reflect the provisions of EU law which were applicable to the main proceedings at the material time, the referring court asks, in essence, whether, on a proper construction of Article 1(a) of Directive 93/37, a contract containing an undertaking to let buildings which have not yet been constructed constitutes a public works contract despite having elements characteristic of a lease, and is not, therefore, covered by the exclusion referred to in Article 1(a)(iii) of Directive 92/50.

40 In that regard, it should be borne in mind from the outset, first, that the question whether a transaction constitutes a public works contract for the purposes of EU legislation is one of EU law. The classification of the proposed contract as a 'lease', highlighted by Pizzarotti and the Italian Government, is not decisive in that regard (see, to that effect, the judgment in *Commission* v *Germany*, C-536/07, EU:C:2009:664, paragraph 54 and the case-law cited).

41 Second, where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is necessary to refer to the main object of that contract in order to determine its legal classification and the EU rules applicable (see, to that effect, the judgments in *Auroux and Others*, C-220/05, EU:C:2007:31, paragraph 37; *Commission* v *Italy*, C-412/04, EU:C:2008:102, paragraph 47; and *Commission* v *Germany*, EU:C:2009:664, paragraph 57).

42 In the main proceedings, it can be seen from the case-file before the Court that, at the time when the conclusion of the contract in question was proposed to the Comune di Bari by Pizzarotti, the works for creating the complex referred to in that contract had not yet begun. In those circumstances, the main object of the contract is the creation of that complex, which the subsequent letting of the complex

necessarily presupposes (see, to that effect, the judgment in *Commission* v *Germany*, EU:C:2009:664, paragraph 56).

43 As the German Government has pointed out, it is also necessary, in order for it to be possible to conclude that there is a 'public works contract' for the purposes of Directive 93/37, that the execution of the planned work corresponds to the requirements specified by the contracting authority (judgment in *Commission* v *Germany*, EU:C:2009:664, paragraph 55).

44 Such is the case where that authority has taken measures to define the characteristics of the work or, at the very least, has had a decisive influence on its design (see, to that effect, the judgment in *Helmut Müller*, C-451/08, EU:C:2010:168, paragraph 67).

45 In the main proceedings, recital 10 of the draft 'undertaking to let' — which is mentioned by the referring court as being the latest suggested form of the contract proposed to the Comune di Bari by Pizzarotti — refers to the framework of requirements which had been drawn up by the Corte d'appello di Bari for the purposes of publishing the market investigation notice in question. Article 7 of that draft reserves the right for the authorities to verify, prior to accepting the work, whether it complies with the framework of requirements.

46 That framework specifies the various technical and technological characteristics of the planned work and, on the basis of a set of statistical data relating to judicial activity in the district of Bari (number of civil and criminal cases, number of hearings per week per court, number of judges or prosecutors, number of members of administrative staff, criminal investigation staff or security service staff, number of lawyers admitted to the Bari Bar, and so on), lists the specific requirements of each of the courts coming within that judicial district (number of offices and of courtrooms, conference rooms, meeting rooms and archive rooms required, surface area of rooms, methods of internal communication), along with certain common requirements, such as car park capacity.

47 Contrary to the assertions of Pizzarotti and the Italian Government, that framework of requirements puts the Comune di Bari in a position to have a decisive influence on the design of the work to be constructed.

48 It follows that the main object of the proposed contract in the main proceedings is the execution of a work corresponding to the requirements specified by the contracting authority.

49 It is true that, as the referring court notes, the draft 'undertaking to let' also includes certain elements characteristic of a lease. Before this Court, emphasis has been placed on the fact that the financial consideration to be paid by the authorities corresponds, under Article 5 of that draft, to an 'annual rent' of EUR 3.5 million, to be paid over the 18 years of the contractual term. According to the information provided by Pizzarotti and the Italian Government, this overall consideration, amounting to EUR 63 million, is far lower than the total estimated cost of the work, which is almost EUR 330 million.

50 However, it should be borne in mind in that regard that the decisive element for the purposes of the classification of the contract concerned is the main object of that contract, not the amount paid to the contractor or the arrangements for payment (judgment in *Commission* v *Germany*, EU:C:2009:664, paragraph 61).

51 Moreover, as the discussion at the hearing has shown, neither Article 4 of the draft 'undertaking to let', under which the contract automatically terminates after 18 years, nor the provision of the Italian legislation relating to the General State Accounts Department, highlighted by the Italian Government, which requires contracts concluded by public authorities to have a specific term and duration and which prohibits such contracts from being a continuous burden on the State, are hindrances to the conclusion, upon expiry of the first proposed contract, of one or more subsequent contracts which would guarantee payment to Pizzarotti for all, or a substantial proportion, of the works carried out in creating the complex concerned.

52 In the light of the foregoing, the answer to the first question is that, on a proper construction of Article 1(a) of Directive 93/37, where the main object of a contract is the execution of a work corresponding to the requirements expressed by the contracting authority, that contract constitutes a

public works contract and is not, therefore, covered by the exclusion referred to in Article 1(a)(iii) of Directive 92/50, even if it contains an undertaking to let the work in question.

Question 2

53 By its second question, the referring court asks, in essence, whether it may decide that a ruling which it has made which has led to a situation which is incompatible with the EU legislation on public works contracts is ineffective.

54 In that regard, it should be borne in mind that, in the absence of EU legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, but must be consistent with the principles of equivalence and effectiveness (see, to that effect, the judgment in *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 24 and the case-law cited).

55 In its request for a preliminary ruling, the referring court indicates that, according to its case-law, it may, under certain conditions, supplement the original operative part of one of its judgments by implementation decisions, that possibility giving rise to what it terms 'progressively formed *res judicata*'.

56 If — and it is for the referring court to ascertain whether this is the case — the conditions for applying that procedure are met in respect of the decision in Judgment No 4267/2007, a decision which is mentioned in paragraph 15 of this judgment and which — according to the order for reference — alone has the force of *res judicata* in the present case, it is for that court, having regard to the principle of equivalence, to make use of that procedure, favouring, from among 'the numerous different possibilities of implementation' which it states may be used in respect of that decision, the solution which, in accordance with the principle of effectiveness, ensures compliance with the EU legislation on public works contracts.

57 As has been stated by the Comune di Bari, that solution could consist of an order, supplementing that decision, to terminate the market investigation procedure without accepting any of the proposals, which would then permit the launch of a new procedure, in compliance with the EU legislation on public works contracts.

58 On the other hand, if the referring court is led to the view that the correct application of that legislation conflicts, having regard to the applicable domestic rules of procedure, with its Judgment No 4267/2007 or with its decisions of 15 April and 3 December 2010 implementing that judgment, attention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (judgments in *Kapferer*, C-234/04, EU:C:2006:178, paragraph 20; *Commission* v *Luxembourg*, C-526/08, EU:C:2010:379, paragraph 26; and *ThyssenKrupp Nirosta* v *Commission*, C-352/09 P, EU:C:2011:191, paragraph 123).

59 Therefore, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law (see, to that effect, the judgments in *Eco Swiss*, C-126/97, EU:C:1999:269, paragraphs 46 and 47; *Kapferer*, EU:C:2006:178, paragraphs 20 and 21; *Fallimento Olimpiclub*, EU:C:2009:506, paragraphs 22 and 23; *Asturcom Telecomunicaciones*, C-40/08, EU:C:2009:615, paragraphs 35 to 37; and *Commission* v *Slovakia*, C-507/08, EU:C:2010:802, paragraphs 59 and 60).

60 Accordingly, EU law does not require a judicial body automatically to go back on a judgment having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court after delivery of that judgment.

61 That analysis cannot be undermined by the judgment in *Lucchini* (C-199/05, EU:C:2007:434), cited by the referring court: it was in a highly specific situation, in which the matters at issue were principles governing the division of powers between the Member States and the European Union in the area of

State aid, that the Court found, in essence, that EU law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata*, in so far as the application of that provision would prevent the recovery of State aid which was granted in breach of EU law and which has been found to be incompatible with the common market in a decision of the European Commission which has become final (see, to that effect, the judgment in *Fallimento Olimpiclub*, EU:C:2009:506, paragraph 25). However, issues of that nature, relating to the division of powers, do not arise in the present case.

62 That said, if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue in the main proceedings is brought back into line with the EU legislation on public works contracts.

63 In that regard, it should be emphasised that that legislation contains fundamental rules of EU law in that it is intended to ensure the application of the principles of equal treatment of tenderers and of transparency in order to open up undistorted competition in all the Member States (see, to that effect, the judgments in *Commission* v *Portugal*, C-70/06, EU:C:2008:3, paragraph 40; *Michaniki*, C-213/07, EU:C:2008:731, paragraph 55; *Commission* v *Cyprus*, C-251/09, EU:C:2011:84, paragraphs 37 to 39; and *Manova*, C-336/12, EU:C:2013:647, paragraph 28).

64 In the light of the foregoing, the answer to the second question is that, to the extent that it is authorised to do so by the applicable domestic rules of procedure, a national court — such as the referring court — which has given a ruling at last instance, without a reference having first been made to the Court of Justice under Article 267 TFEU, that has led to a situation which is incompatible with the EU legislation on public works contracts must either supplement or go back on that definitive ruling so as to take into account any interpretation of that legislation provided by the Court subsequently.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **On a proper construction of Article 1(a) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, where the main object of a contract is the execution of a work corresponding to the requirements expressed by the contracting authority, that contract constitutes a public works contract and is not, therefore, covered by the exclusion referred to in Article 1(a)(iii) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, even if it contains an undertaking to let the work in question.**

2. **To the extent that it is authorised to do so by the applicable domestic rules of procedure, a national court — such as the referring court — which has given a ruling at last instance, without a reference having first been made to the Court of Justice of the European Union under Article 267 TFEU, that has led to a situation which is incompatible with the EU legislation on public works contracts must either supplement or go back on that definitive ruling so as to take into account any interpretation of that legislation provided by the Court subsequently.**

[Signatures]

* Language of the case: Italian.

EU:C:2014:335

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 15 May 2014 (1)

Case C-213/13

Impresa Pizzarotti & C. SpA
v
Comune di Bari

(Request for a preliminary ruling from the Consiglio di Stato (Italy))

(Public procurement — Directives 93/37/EEC and 2004/18/EC — Meaning of 'public works contract' — Contract to be entered into for lease of a building yet to be built — Scope of the principle of res judicata in circumstances incompatible with EU law)

1. The project to create a new judicial centre in Bari (Italy), intended to rationalise the use of resources available to the courts within that district by creating a single headquarters for them, has, in a manner which is to say the least paradoxical, been the focus of copious litigation. Evidence of this is the sequence of events leading up to the present request for a preliminary ruling in proceedings between Impresa Pizzarotti & C. SpA ('Pizzarotti') and the Italian local authorities which supervise the project, following a market investigation notice seeking the setting up of the new judicial centre. The request is concurrent with a complaint submitted to the European Commission by the Comune di Bari (Municipality of Bari), which gave rise to the initiation of a Treaty infringement procedure against the Italian Republic on the basis of Article 258 TFEU.

2. In the present case, the Court is called upon to clarify — following on from the guidance laid down in the *KölnMesse* case (2) — whether or not a contract for the leasing of a building yet to be completed, as is the case in the main proceedings, is caught by the rules governing the award of public works contracts. If so, and in the event of the conclusion being reached that such a classification conflicts with judicial decisions which have become *res judicata*, the Court is called upon to rule on the scope of the principle that such decisions are 'untouchable' in a situation regarded as incompatible with EU law.

I – Legal background

3. According to the tenth recital in the preamble to Directive 92/50/EEC, (3) 'contracts relating to the acquisition or rental of immovable property or to rights thereon have particular characteristics, which make the application of procurement rules inappropriate'.

4. Article 1(a) of Directive 92/50 defines 'public service contracts', for the purposes of the directive, as 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of: … (iii) contracts for the acquisition or rental, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights thereon …'.

5. Article 1(a) of Directive 93/37/EEC (4) defines ‘public works contracts’, for the purposes of the directive, as ‘contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority’.

6. The professional activities mentioned in Annex II to that directive include, in Class 50, ‘Building and civil engineering’. That class covers, in particular, ‘General building and civil engineering work (without any particular specification)’ (sub-group 500.1) and ‘Construction of flats, office blocks, hospitals and other buildings, both residential and non-residential’ (group 501).

7. Recital 24 in the preamble to Directive 2004/18/EC (5) states:

‘In the context of services, contracts for the acquisition or rental of immovable property or rights to such property have particular characteristics which make the application of public procurement rules inappropriate.’

8. Article 1(2) of that directive provides:

‘(a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this directive.

(b) “Public works contracts” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. …

…’

9. Article 16 of the directive, entitled ‘Specific exclusions’, provides:

‘This directive shall not apply to public service contracts for:

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; …

…’

II – Facts, the questions referred and procedure before the Court

10. The background to the dispute in the main proceedings, as set out in particular in the order for reference, is rather complex. For the purposes of this analysis, the following points are relevant.

11. The case before the referring court has its origin in the publication on 14 August 2003, by the Comune di Bari, of a public ‘market investigation’ notice with a view to providing the judicial administration, as soon as possible, with a new single headquarters which would be suitable and appropriate to host all the courts of Bari. (6)

12. The notice required tenderers to commit themselves to commencing construction work by 31 December 2003. It also required clear and exhaustive indications of the costs to be paid by the municipal administration and the Italian Ministry of Justice and of the arrangements for payment, having regard to the fact that the available public resources amounted to EUR 43.5 million, already allocated to the project, to which the sum of EUR 3 million was to be added corresponding to the annual rents paid at that time by the Comune di Bari to lease the premises housing the courts concerned. Lastly, that notice was accompanied by a document setting out a framework of requirements, drawn up by the Corte d’appello di Bari (Court of Appeal, Bari) (Italy).

13. Among the four proposals submitted, that of Pizzarotti was selected by the Comune di Bari, by Decision No 1045/2003 of 18 December 2003. That decision indicated that some of the buildings would be sold to the Comune di Bari for the sum of EUR 43 million and that the remainder would be leased to it for an annual rent of EUR 3 million.

14. By a letter of 4 February 2004, the Italian Ministry of Justice informed the Comune di Bari that the public resources available had been reduced to EUR 18.5 million and asked it to verify whether, having regard to the proposals received, it was possible to bring the project to fruition within the limits of that new financial framework. By a note dated 11 February 2004, the Comune di Bari asked Pizzarotti whether it was prepared to go ahead with the procedure already commenced. Pizzarotti replied favourably to that request, reformulating its tender to take account of the reduction of the public resources available.

15. Public financing was completely eliminated in September 2004. Pizzarotti submitted a new proposal to the Comune di Bari, setting out the possibility of carrying out the works intended for letting, as envisaged in its initial proposal.

16. Because of inaction on the part of the municipal authorities, Pizzarotti commenced proceedings for a finding that the administration's silence was unlawful and for an order that the Comune di Bari should take action.

17. Following an unfavourable judgment of the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia) of 8 February 2007, the Consiglio di Stato (Council of State), by judgment No 4267/2007, upheld Pizzarotti's appeal. Taking the view that the procedure had not been brought to an end by the approval of the outcome of the market investigation, it decided that the Comune di Bari, 'in compliance with the principles of reasonableness, good faith and the protection of legitimate expectations, must, lending cohesion to its actions, bring the procedure to a genuinely appropriate conclusion, examining, in the context of the proposals received, the possibility of the works being accomplished within the constraints of the amended financial framework'.

18. In response to an application to enforce its judgment No 4267/2007, the Consiglio di Stato, by judgment No 3817/2008, acknowledged that the Comune di Bari had failed to comply with the earlier judgment and ordered it to give full effect to the operative part of its judgment No 4267/2007 within 30 days. It appointed the Prefect of Bari as *Commissario ad acta*, so that, in the event of continued non-compliance, he would take, possibly through a delegate, all measures needed for enforcement of that judgment.

19. On 21 November 2008, the *Commissario ad acta* appointed by the Prefect of Bari determined that Pizzarotti's proposals were valid and, accordingly, made a finding that the market investigation procedure had achieved a positive outcome.

20. For its part, the Giunta Comunale di Bari (Bari Municipal Council) brought to an end the procedure commenced by the market investigation notice, placing on record that Pizzarotti's latest proposal was not in conformity with the requirements of that notice.

21. Pizzarotti and the Comune di Bari each appealed to the Consiglio di Stato. Pizzarotti claimed that, in the absence of any contractual commitment from the Comune di Bari to rent the property to be built, the latter had not correctly complied with the order contained in judgment No 3817/2008. The Comune di Bari complained of the lack of any finding that the conditions surrounding conduct of the procedure had worsened.

22. By Enforcement Decision No 2153/2010 of 15 April 2010, the Consiglio di Stato upheld Pizzarotti's appeal and dismissed that of the Comune di Bari. It considered that the action of the *Commissario ad acta*, although appropriate, was nevertheless incomplete, in the absence of a 'genuinely appropriate conclusion' within the meaning of judgment No 4267/2007. It therefore set a time-limit of 180 days for closure of the procedure by the adoption of the measures necessary for specific implementation of the Pizzarotti proposal.

23. By a document of 27 May 2010, the *Commissario ad acta* concluded that the 'market investigation notice of August 2003 … ha[d] not had a positive outcome'.

24. Pizzarotti appealed against that measure, and the Consiglio di Stato, by Enforcement Decision No 8420/2010 of 3 December 2010, upheld its appeal. Emphasising the inconsistent nature of the conclusions concerning the market investigation notice which were contained in the document of 21 November 2008 and in that of 27 May 2010, it took the view that the only valid conclusion was the one contained in the first of those measures. As regards the involvement of a third party purchaser and lessor of the premises to be used for the Bari judicial centre, and the commitment to rent, it observed that the appraisal made by the *Commissario ad acta* was not based on a detailed examination and thus infringed the order of the court, which required verification of the factual and legal preconditions for specific execution of the proposal. As regards the alleged lack of conformity of Pizzarotti's proposal with town planning requirements, it reaffirmed the need for the *Commissario ad acta* to initiate the procedures necessary for the adoption of that proposal after verification of the other regulatory requirements. Consequently, the document issued by the *Commissario ad acta* was annulled on the ground that it infringed the principle of *res judicata*.

25. Subsequently, the new *Commissario ad acta* appointed by the Prefect of Bari took all the requisite action for the adoption of his decision of 23 April 2012 effecting a 'town planning modification' in relation to the General Development Plan for the Comune di Bari, with regard to the land affected by construction of the judicial centre.

26. Pizzarotti contested that decision before the Consiglio di Stato on the ground that it sought to circumvent the principle of *res judicata*.

27. The referring court is uncertain, first, whether the lease of a property for future completion, to be concluded in the form of an undertaking to let, is equivalent, despite the presence of elements characteristic of a lease, to a works contract falling outside the scope of the specific exclusion provided for in Article 16(1)(a) of Directive 2004/18. It enquires, in particular, as to the scope of the term 'other immovable property' contained in that provision, and also as to the meaning of recital 24 in the preamble to that directive.

28. Second, if it is assumed that the contract in question constitutes a works contract, the referring court is uncertain whether it may hold that the decision having become *res judicata* in the present case by its judgment No 4267/2007 is ineffective in so far as the latter has led, by reason of subsequent enforcement decisions and measures by the *Commissario ad acta*, to a situation incompatible with EU law on public procurement. It emphasises in that regard that, by virtue of its own case-law, it can add to the original operative part of a decision adopted by it by means of an implementation decision, giving rise to 'progressively formed *res judicata*'. It adds that, by virtue of the case-law of the Court, the principle of *res judicata*, as recognised by Article 2909 of the Italian Civil Code, does not impede the correct application of EU law to a situation covered by that principle.

29. It was in those circumstances that the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is a contract to be concluded for the lease of something in the future — even in the form, suggested most recently, of an undertaking to let — equivalent to a public works contract, albeit with certain elements characteristic of a lease, with the result that such a contract cannot be included among the contracts which are excluded, under Article 16 of Directive 2004/18/EC, from the scope of the rules on public procedures?

(2) If the answer to Question 1 is in the affirmative, may a national court — specifically, this referring court — hold that the ruling made regarding the events under consideration (as described [in the present request for a preliminary ruling]) is ineffective in that it has enabled a situation which is contrary to [EU] law on public procurement to persist and, therefore, is it possible to enforce a final judgment which is contrary to [EU] law?'

30. Written observations have been submitted by the parties to the main proceedings, by the Italian and German Governments, and by the Commission.

31. A hearing was held on 27 February 2014, in which the parties to the main proceedings, the Italian and German Governments and the Commission participated.

III – Analysis

A – *Admissibility*

32. Pizzarotti entertains doubts as to the admissibility of the present request for a preliminary ruling, for two reasons.

33. First, it submits that Directive 2004/18, the only measure referred to in the present request for a preliminary ruling, is not applicable *ratione temporis* to the case before the referring court.

34. Second, Pizzarotti contends that the answer given by the Court could have no effect on the outcome of the main proceedings, which are characterised by the existence of a number of judicial decisions (7) that have become *res judicata* under Italian national law.

35. I am not convinced by either of the grounds of inadmissibility put forward by Pizzarotti.

36. As regards, first, the alleged inapplicability to this case of Directive 2004/18, the only instrument mentioned by the referring court, this ground seems to me to be hardly sufficient to justify declaring the present request for a preliminary ruling inadmissible.

37. Admittedly, as pointed out in particular by Pizzarotti and the Commission, it is well-established case-law (8) that the relevant date for identifying the legislation applicable to a public contract is the date on which the contracting authority chooses the type of procedure to be followed and decides definitively whether or not it is necessary for a prior call for tenders to be issued for the award of a public contract. It follows, in this case, that it is the decision of 14 August 2003 which is relevant. (9) However, on that date, only Directive 93/37, read in conjunction with Directive 92/50, was applicable.

38. I am, however, of the opinion that this error in identifying the EU legislation applicable in this instance is of only relative importance and has no repercussions for this case. The relevant provisions, namely Article 1(a) of Directive 93/37 and Article 1(a)(iii) of Directive 92/50, were repeated in very similar terms in Directive 2004/18, the latter consisting essentially of a recasting and simplification of the rules in force until then.

39. In those circumstances, which clearly do not entail modification of the legal problem raised in the order for reference or examination of matters of law not discussed in the main proceedings, (10) I am of the opinion that a reformulation of the question as seeking in fact to obtain an interpretation of the provisions of Directive 93/37 is perfectly envisageable.

40. Nor, second, is it possible to uphold the ground of inadmissibility concerning the existence of judicial decisions which have become *res judicata*, thus depriving the answers from the Court of any useful purpose for the decision to be given in the main proceedings. Evaluation of the consequences of the authority or force of *res judicata* attaching to the decisions mentioned by the referring court is right at the core of the problem raised in the second question. Even if it is assumed that, by its argument, Pizzarotti seeks in reality also to challenge the relevance of the questions submitted, it need only be pointed out that, in proceedings before them, it is, in principle, a matter for the national courts alone to assess the relevance of the questions which they refer to the Court. The Court will proceed otherwise only where it is ‘quite obvious’ that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (11) That does not seem to me to be the case here.

41. In those circumstances, I consider that the request for a preliminary ruling must be considered admissible.

B – *The first question: the existence of a public works contract within the meaning of Directive 93/37*

1. Summary of the issues

42. By its first question, the referring court seeks clarification as to the legal classification, having regard to the EU legislation on public contracts, of a contract described by the referring court as a ‘contract to be concluded for the lease of something in the future, even in the form suggested most recently of an undertaking to let’.

43. It is necessary, more specifically, to determine whether the proposal sent by the Comune di Bari to Pizzarotti, following removal of the public financing initially envisaged (see points 14 and 15 of the present Opinion), must be seen as calling for the conclusion of a lease transaction falling outside the scope of EU legislation on public contracts or whether, on the contrary, it is such as to bind the Comune di Bari to award a public works contract, and therefore to require the commencement of a new procedure.

44. In essence, there are two conflicting views.

45. Pizzarotti and the Italian Government, supported in certain respects by the German Government, contend that the contract envisaged in the main proceedings does not meet the criteria for a works contract, as set out in the applicable rules and clarified by the Court. That contract falls, in their view, within the exemption provided for in Article 1(a)(iii) of Directive 92/50 and Article 16(a) of Directive 2004/18.

46. They submit, firstly, that the main proceedings are not concerned with the carrying out of works but with the lease of real estate. That is clear, in particular, from the market investigation notice and the decision of the Comune di Bari of 18 December 2003 and also from the inherent characteristics of the contract, which are typical of a lease within the meaning of Article 1571 of the Italian Civil Code and are clearly distinct from those at issue in the case giving rise to the *KölnMesse* judgment.

47. They contend, secondly, that in the main proceedings the Comune di Bari is not required to give any financial consideration in return for a supply of construction works reflecting its direct economic interest, which means that the contract is not of a pecuniary nature.

48. Pizzarotti and the Italian Government maintain, thirdly, that the Comune di Bari has no power to compel Pizzarotti, by judicial means, to execute the works.

49. They claim, fourthly, that the Comune di Bari did not attach to the document prepared by the *Commissione di manutenzione* of the Corte d’appello di Bari any technical specifications, within the meaning of paragraph 1 of Annex III to Directive 93/97 or paragraph 1(a) of Annex VI to Directive 2004/18, nor any contract documents within the meaning of Article 10 of Directive 93/37 or Article 23 of Directive 2004/18, which confirms that its intention was not to enter into a public works contract but rather to have market investigation carried out, on a non-binding basis, in order to bring together private initiatives which it intended to evaluate entirely independently and without any obligation to take a decision. Pizzarotti and the Italian Government add that, in any event, the contract envisaged in the main proceedings is characterised by the absence of precise technical specifications concerning the type of works to be carried out like the specifications in *KölnMesse*.

50. The Comune di Bari and the Commission, for their part, consider that the contract envisaged in the main proceedings constitutes a public works contract, within the meaning of Article 1(a) of Directive 93/97, which should have been awarded in compliance with the rules concerning procedure and transparency laid down in that directive.

51. It must be pointed out that the arguments put forward by the parties to the main proceedings and by the other parties to the present procedure relate, essentially, to the question whether the conditions referred to and clarified by the Court, in particular in *KölnMesse*, for it to be concluded that there is a public works contract within the meaning of the rules of EU law are fulfilled in the main proceedings.

52. However, I would observe that *KölnMesse* related to an issue of the legal classification of the transaction at issue that is different from the issue raised in the first question in the present order for reference. In that case, the Court was called upon to determine whether the ‘lease’ aspect of the contract

between the City of Cologne and Grundstücksgesellschaft Köln Messe 8-11 GbR prevailed over the objective of building works. The exemption contained in Article 1(a)(iii) of Directive 92/50 and Article 16(a) of Directive 2004/18 was certainly not at issue.

53. In the main proceedings, having regard to the wording used by the referring court, the primary question is whether transactions concerning works yet to be completed can come within the exception to the application of the public contract rules that is laid down in those provisions. This implies that the referring court takes as a given that the contract envisaged concerned the public procurement of services and was liable, by reason of its specific characteristics, not to be caught by the rules on public procurement.

54. I will therefore initially set out the reasons why it is appropriate, in my view, to take the view that the exception at issue cannot in any event cover works which have not yet been started.

55. Since it could be held that it is appropriate, even beyond the scope of the question raised by the referring court, also to give a decision on the question whether the conditions are fulfilled, in the present case, for taking the view that a 'public works contract' exists rather than a public services contract, I will indicate the manner in which, in my view, it is appropriate, following on from the guidance laid down in *KölnMesse*, to approach the draft contract at issue in the main proceedings.

2. The provisions of Article 1(a)(iii) of Directive 92/50 necessarily refer to transactions relating to existing immovable property

56. I consider it appropriate to refer to a key factor which must be taken into account in determining whether or not a transaction falls within the scope of the directives coordinating procedures for the award of public contracts: the EU rules on public contracts pursue the primary objective of eliminating restrictions on fundamental freedoms and promoting effective competition. (12)

57. That aim is undermined where a contracting authority entrusts an undertaking with execution of works or services without having first followed the procedures for the award of contracts that are laid down by the rules of EU law, irrespective of the reasons and context for the performance of the works or services or the purpose to which they are to be put. (13)

58. The effective pursuit of that aim necessarily implies that a broad construction must be adopted for the purpose of classifying a given transaction as a works contract and, at the same time, that exceptions must for their part be viewed restrictively.

59. That is particularly so in the case of the exemptions specific to certain public service contracts laid down in Article 1(a) of Directive 92/50 (which are, essentially, repeated by Article 16 of Directive 2004/18). (14) As indicated in recital 24 in the preamble to Directive 2004/18, it is the 'particular characteristics' of certain contracts which make the application of public procurement rules inappropriate.

60. As regards the exemption concerning the acquisition or rental of immovable property, (15) taken in the broad sense, it cannot in my view refer to anything other than existing property. Open competition resulting from the application of the rules on public procurement has indeed little meaning where it concerns the letting or sale of a particular existing property which, because of its uniqueness, does not lend itself to comparison with other properties. Moreover, it is apparent from certain *travaux préparatoires* that the exemption of contracts for the leasing or acquisition of immovable property was originally explained by the local and non-cross-border nature of such contracts. (16) On the other hand, in so far as the activities in question involve the future construction of buildings and, therefore, the execution of works, the public tendering and transparency required by those rules certainly do not appear inappropriate and those rules fall to be applied. Furthermore, the reference made in the provisions in question to 'other immovable property' must, in my view, be understood as referring to property of a kind other than land and buildings and not to property yet to be built.

61. It follows that, without there being any need to give a precise decision as to the stage at which immovable property comes into existence, the exception concerning the purchase or leasing of 'land, existing buildings, or other immovable property' cannot in any circumstances refer to property of which

the construction has not yet started, as seems to be the case in the main proceedings. Where a public authority opts, when setting up certain services, for a formula of purchase or leasing of a building yet to be completed, it is necessary to subject the transaction to the procedures for the award of contracts laid down in the relevant regulations.

3. The conditions for the existence of a works contract are in any event fulfilled in circumstances such as those of the main proceedings

62. As the Court has consistently reiterated, classification as a public works contract is a matter of EU law and must be independent of the classification arrived at on the basis of national law. (17) Likewise, any classification of a contract given by the contracting parties is not decisive so far as concerns deciding whether an agreement or a transaction falls within the scope of a procurement directive. (18)

63. In the main proceedings, the formal classification of the contract at issue as a 'lease' is not therefore a decisive factor. Similarly, the fact that the envisaged contract displays, as contended by Pizzarotti and the Italian Government, certain characteristics of a lease, within the meaning of Article 1571 of the Italian Civil Code, of a property complex is entirely irrelevant.

64. In this context, a clarification is called for. It is not a question of contesting that the national public authorities have freedom in choosing the contractual procedure they consider appropriate for the execution of works or services or even of calling into question the legality of recourse to certain types of contracts; rather, it is a question of avoiding the risks of circumvention of the rules on public contracts by recourse to certain contractual terms. In other words, the EU rules on public contracts do not prejudge the legality of recourse to a lease, with a view to the construction of a building, provided that, prior to its conclusion, the rules on publicity and public tendering provided for by those rules have been complied with.

65. Moreover, the scope of the directive must be determined by reference only to the objective conditions expressly defined by the directives adopted in this area.

66. Clearly, that means that the actual or supposed aims that the public authorities seek to pursue are irrelevant in determining whether a contract must be classified as a works contract. Account cannot therefore be taken of the fact, assuming that it is recognised, that the Comune di Bari, from the outset, only intended to provide a single headquarters for the administration of justice in Bari, without this necessarily involving the execution of works.

67. The Court has thus emphasised that the definition of 'public works contract' contained in Article 1(a) of Directive 93/37 includes all transactions in which a contract for pecuniary interest is concluded between a contracting authority and a contractor and has as its object the execution by the latter of a 'work' within the meaning of Article 1(c) of the directive. The essential criterion in that respect is that the work should be executed in accordance with the requirements specified by the contracting authority, the means of that execution being immaterial.(19) In order for that to be possible, the contracting authority must have taken measures to define the characteristics of the work or, at the very least, have had a decisive influence on its design. (20)

68. Finally, according to case-law, where a contract contains elements relating to a public works contract and also elements relating to another type of public contract, it is the main purpose of the contract which determines the EU rules applicable. (21)

69. In this case, the information in the file prompts me to take the view that the transaction at issue in the main proceedings displays all the characteristics of a works contract, the latter certainly pursuing as its main object the execution in return for payment of a work meeting requirements specified by the contracting authority.

70. In the first place, that information demonstrates that the aim of the whole procedure at issue here, which commenced with publication of a market investigation notice on 14 August 2003, consisted in the construction, in accordance with the wishes expressed by the competent public authorities, of new premises which were intended to be used as a single headquarters for the courts in Bari.

71. That is apparent, first of all, from the public procurement notice ('Ricerca di mercato') of 14 August 2003, which states in particular that 'the tenderer, by drawing up its tender, undertakes to commence the construction works by 31 December this year'.

72. Next, it is clear from the document annexed to that market investigation notice, drawn up by the Corte d'appello di Bari and approved by the *Commissione di manutenzione* (document entitled 'Quadro esigenziale' (framework of requirements)), and the relevance of which for the purposes of examining the planned contract is not in question, (22) that the competent public authorities specified a number of structural, functional and organisational requirements to be met by the project for a single judicial centre, having regard to the applicable rules and to a set of statistical data relating to judicial activities in Bari. Those requirements, which are set out on several dozen pages, seem to me to far exceed the usual requirements of a tenant in relation to newly-constructed premises of a certain size. (23)

73. Finally, resolution No 1045/2003 of the municipal council of 18 December 2003, recording selection of the tender submitted by Pizzarotti, expressly refers to the 'construction of a single headquarters' for the courts.

74. More generally, I am of the opinion that, for the purposes of Directives 93/37 and 2004/18, the immediate — and therefore main — object of a contract for buildings whose construction has not yet begun cannot, in principle and on the basis of the guidance in *KölnMesse*, be seen as being the lease of a property, and that is so regardless of the contractual terms chosen under national law. The main purpose of such a contract can, logically, only be the construction of those buildings, which are subsequently required to be handed over to the contracting authority under the terms of a contractual relationship described as a 'lease'. (24)

75. Reverting to the main proceedings, it is clear that Pizzarotti could not in any case fulfil the obligation, envisaged in the draft undertaking to let, to make the specific buildings available in the specified area without first undertaking the construction work.

76. The numerous technical specifications contained in the reference documents show that the contracting authority took measures to determine the characteristics of the buildings or, at the very least, to exercise a decisive influence on their design. Those facts, together with the copious litigation deriving from the failure to conclude the contract envisaged in the main proceedings, clearly show, in my view, that Pizzarotti would not have been prepared to carry out the works in question in the absence of requirements specifically formulated by the Comune di Bari and the acceptance, by the latter, of the proposal for execution submitted in response to the public 'market investigation' notice.

77. In the second place, it seems fairly clear to me that, although it is to be distinguished on this point from the *KölnMesse* case, (25) the contract at issue in the main proceedings was concluded for a pecuniary interest.

78. Admittedly, it is true that the payment in the form of an annual rent which the Comune di Bari is supposed to pay over the 18 years of the contractual term falls far short of covering the costs of construction of the buildings.

79. That finding cannot, however, be relied on to negate the pecuniary nature of the contract in question.

80. In fact, in order to distinguish a public service contract from a public works contract (26) — and in contrast to what Pizzarotti and the Italian and German Governments appear to suggest (27) — no decisive importance can be attached to the amount of the financial consideration payable for the construction work. As the Court has held, the decisive element for the purposes of the classification of a public contract is the main object of that contract, not the amount paid to the contractor or the arrangements for payment. (28) The fact that payment of the annual rent for a period of 18 years, provided for in the envisaged contract, does not fully cover the costs of construction of the buildings cannot in any case change the fact that that there is a pecuniary interest underlying the contract and, therefore, rule out the existence of a public works contract. In that regard, the actual achievement of a profit by an economic operator cannot constitute a necessary precondition for classification of a contract as a public works contract. (29)

81. The condition linked to the existence of something that is of 'direct economic benefit to the contracting authority' does not necessarily mean that the latter should become the owner of the work and can be satisfied by a lease making the work available to the public authority concerned. (30)

82. In view of the foregoing considerations, I propose that the first question be answered to the effect that a lease for a work to be completed in the future, displaying the characteristics of the contract at issue in the main proceedings, must be classified as a public works contract within the meaning of Article 1(a) of Directive 93/37.

C – *The second question: requirements deriving from the principles of sincere cooperation and of respect for the status of res judicata in a situation presumed to be incompatible with EU law*

83. By its second question, the referring court asks whether it can set aside a decision that possibly has become *res judicata* in the case in question, in so far as it would have allowed a legal situation to arise which is incompatible with EU law regarding the award of public works contracts, and whether it is therefore possible to give effect to a decision having become *res judicata* which is incompatible with EU law.

84. I must, at the outset, express my puzzlement regarding the exact identification of what, in the eyes of the referring court, is covered by the principle of '*res judicata*', as regards both the *thema decidendum* (matter to be decided) and the *ratio decidendi*, and is seen as problematic from the standpoint of compliance with EU law.

85. Whilst fully aware that, ultimately, it is the responsibility of the national court alone to determine what in fact constitutes the judicial decision or decisions which would impede the full application of EU law, the need to give an answer that is as useful as possible to the referring court prompts me to make the following observations.

86. In this case, the only *res judicata* decision which the referring court mentions (31) is its judgment No 4267/2007, and more precisely the ruling in that judgment to the effect that the Comune di Bari, 'in compliance with the principles of reasonableness, good faith and the protection of legitimate expectations, must, lending cohesion to its actions, bring the procedure to a genuinely appropriate conclusion, examining, in the context of the proposals received, the possibility of the works being carried out within the constraints of the amended financial framework'.

87. If, as the Consiglio di Stato observes, that decision is 'open to numerous different possibilities of implementation', it is *a priori* difficult to understand the reasons why the implementation of that judgment should necessarily be considered contrary to EU law and, more specifically, to the application of the relevant rules on public works contracts.

88. In line with the views of the Comune di Bari, it appears that the only decision having become *res judicata* emanating from the Consiglio di Stato in judgment No 4267/2007 relates to the obligation incumbent upon it (and on the *Commissario ad acta*) to terminate the procedure commenced by the public market-investigation notice. There is no reason automatically to rule out the possibility that that procedure might be concluded, within the meaning of that judgment, by the launch of a new award procedure complying with the EU rules on public contracts.

89. However, it seems that the referring court has, in part at least, (32) associated itself with the interpretation advocated by Pizzarotti to the effect that that judgment and the judicial decisions subsequent to it should be interpreted as requiring the envisaged 'lease' with Pizzarotti to be entered into, and that is liable to engender a situation contrary to EU law. It would also seem that a degree of authority has been lent to the implementing decisions taken by the *Commissario ad acta* (see Decision No 8420/2010). However, according to my understanding of the Italian Code of Administrative Procedure, the court has jurisdiction over all matters relating to proper compliance, including those deriving from measures adopted by the *Commissario ad acta*, the latter acting as an auxiliary officer of the court.

90. Furthermore, if, as seems to follow from the provisions of the Code of Administrative Procedure, (33) as interpreted by the referring court, that court is empowered to amend the operative

part of judgment No 4267/2007, giving rise to what it describes as 'progressively formed *res judicata*', I find it difficult to conclude that the principle that decisions having become *res judicata* are untouchable is called into question. So long as the judicial authority is empowered to clarify or revisit a decision taken earlier, that possibility must be available under the same conditions with a view to ensuring the full application of EU law.

91. In such a situation, it is ultimately necessary for the national court, in implementing judicial decisions which lend themselves to several interpretations, to give preference to the one ensuring that the administrative authorities act in accordance with EU law.

92. On the other hand, if the referring court feels it necessary to conclude that the proper application of EU law on public works contracts necessarily conflicts with its decision that has become *res judicata* in its judgment No 4267/2007 or subsequent decisions, (34) which it alone is empowered to review, the arrangements for giving effect to *res judicata* fall within the procedural autonomy of the Member States, subject to compliance with the principles of equivalence and effectiveness.

93. In that regard, the Court has repeatedly referred to the importance attaching to the principle of *res judicata*, both in the legal order of the European Union and in national legal systems. Indeed, in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question. (35) Therefore, EU law does not require a national court to leave unapplied domestic rules of procedure rendering a decision *res judicata*, even if that would make it possible to remedy an infringement of EU law by the decision at issue. (36)

94. In the absence of EU legislation in this area, the rules for giving effect to the principle of *res judicata* are a matter for the domestic legal order of the Member States by virtue of the principle whereby the Member States enjoy procedural autonomy. However, such procedural rules must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness). (37)

95. The apparent disregard of the principle of *res judicata* that occurred in *Lucchini* was, (38) as stated by the Court itself, confined to the very particular area of State aid.

96. The Court made it clear in that judgment that since appraisal of the compatibility of aid measures or an aid scheme with the common market falls within the exclusive competence of the Commission acting subject to review by the EU judicature, EU law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of EU law which has been found to be incompatible with the common market in a decision of the Commission which has become final. (39)

97. The particular features of the *Lucchini* case were also emphasised in *Fallimento Olimpiclub*, (40) in which the Court made it clear that that case had concerned a clearly defined situation involving principles governing the division of powers between the Member States and the then Community in the area of State aid, the Commission having exclusive competence to assess the compatibility of a national State aid measure with the common market.

98. As regards the analogy drawn between the obligations — as referred to in particular in *Kühne & Heitz* (41) — of the administrative authorities by virtue of their duty of sincere cooperation and those incumbent, by virtue of that same duty, upon the national courts, I am far from persuaded by it.

99. Admittedly, observance both of the definitive nature of an administrative decision and of the authority attaching to a judicial decision is based on the need, having regard to the principle of legal certainty, to preserve the stability of legal situations. Also, the main proceedings are concerned with a special situation in which, according to the information provided by it, the Consiglio di Stato could supplement the operative part of one of those decisions which had become definitive and, if appropriate, revisit decisions adopted in pursuance of those decisions by the *Commissario ad acta*.

100. However, even if that possibility may be regarded as allowing the intangibility of a decision having become *res judicata* to be tempered somewhat — a matter that has not been clearly established (see point 90 of the present Opinion) — there is an important difference between the possibility of re-examining an administrative decision which has become final and the possibility of going back on a judicial decision which has become *res judicata*. The obligation incumbent, in certain circumstances, on the administrative authority to revisit an administrative decision which has become final, as determined by the *Kühne & Heitz* judgment, is based on the premiss that such a re-examination is not liable to cause harm to third parties. That condition does not appear to me to be fulfilled where judicial decisions with the status of *res judicata* are being reviewed. Moreover, I am of the opinion that that judgment may, in fact, be seen as an application of the principles of effectiveness and equivalence in the light of the possibility, recognised, in domestic law, of reversing, in certain conditions, administrative decisions that have become final.

101. It follows from the foregoing considerations that, where a judicial decision, in some instances by virtue of the effects of subsequent judicial enforcement decisions, has created a situation incompatible with EU law, it is not in principle open to the national court to overturn that decision.

102. Moreover, it is possible to remedy infringements of EU law. In circumstances where the force of *res judicata* makes it impossible to apply EU law, the possibility remains of an action to redress damage caused to individuals. (42)

103. Consequently, I propose that the second question be answered to the effect that it is for the national court alone to determine the exact terms of a judicial decision which has become *res judicata*. The arrangements for giving effect to a final judicial decision are a matter for the domestic law of the Member States, subject to compliance with the principles of equivalence and effectiveness. Where the national court is empowered, by virtue of national rules, to add to or indeed replace the terms of the judicial decision, it is incumbent upon that court to exercise its power in order to ensure due implementation of EU law.

IV – Conclusion

104. Having regard to the foregoing considerations, I propose that the Court give the following answers to the questions referred for a preliminary ruling by the Consiglio di Stato:

(1) A lease for a work to be completed in the future, displaying the characteristics of the contract envisaged in the main proceedings, must be classified as a ‘works contract’ within the meaning of Article 1(a) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts.

(2) It is for the national court alone to determine the exact terms of a judicial decision which has become *res judicata*. The arrangements for giving effect to a final judicial decision are a matter for the domestic law of the Member States, subject to compliance with the principles of equivalence and effectiveness. Where the national court is empowered, by virtue of national rules, to add to or indeed replace the terms of the judicial decision, it is incumbent upon that court to exercise its power in order to ensure due implementation of EU law.

---

1 – Original language: French.

---

2 – *Commission* v *Germany* (C-536/07, EU:C:2009:664) (‘*KölnMesse*’).

---

3 – Council Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p.1).

---

4 – Council Directive of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

---

5 – Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

6 – That notice was published, in particular, in the *Official Journal of the European Communities* of 23 August 2003 (OJ S 161).

---

7 – Pizzarotti refers to two decisions. The first is that of the Tribunale amministrativo regionale per la Puglia of 18 May 2004, which, deciding an appeal brought by an unsuccessful tenderer, held that the market investigation notice was of a purely exploratory nature, seeking appropriate solutions for the creation of the Bari judicial centre, and, consequently, did not involve any commitment by the municipal administration subsequently to award a works contract. The second is judgment No 4267/2007 of the Consiglio di Stato, which, it is said, required that administration to bring the procedure commenced to a satisfactory conclusion by entering into an off-plan lease with Pizzarotti.

---

8 – See, in particular, *Commission* v *Netherlands* (C-576/10, EU:C:2013:510, paragraph 52 and case-law cited).

---

9 – As the Consiglio di Stato indicated, the ‘market investigation carried out by the Comune di Bari, the choice on completion thereof of the plan drawn up by Pizzarotti, submission of that plan to the Minister of Justice and Note No 249 of 4 February 2004 from that authority also constitute stages of a complex procedure designed to bring about the creation of a new judicial centre’.

---

10 – In that regard, the Court has consistently noted that it has a duty to interpret all provisions of EU law which national courts need to rely on in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (see, in particular, *Fuß*, C-243/09, EU:C:2010:609, paragraph 39, and *Worten*, C-342/12, EU:C:2013:355, paragraph 30).

---

11 – See, to that effect, *Fish Legal and Shirley* (C-279/12, EU:C:2013:853, paragraph 30).

---

12 – See the second and tenth recitals in the preamble to Directive 93/37 and recital 2 in the preamble to Directive 2004/18.

---

13 – See, to that effect, the Opinion of Advocate General Kokott in *Auroux and Others* (C-220/05, EU:C:2006:410, point 43).

---

14 – See also Article 10(a) of the recent Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65).

---

15 – Article 1(a)(iii) of Directive 92/50 and Article 16(a) of Directive 2004/18.

---

16 – See, in particular, the explanatory memorandum to the proposal for a Council Directive relating to the coordination of procedures on the award of public service contracts, submitted on 6 December 1990 (COM(90) 372 final — SYN 293).

---

17 – See *Auroux and Others* (C-220/05, EU:C:2007:31, paragraph 40 and case-law cited).

---

18 – *KölnMesse*, paragraph 54.

19 – *KölnMesse*, paragraph 55.

20 – *Helmut Müller* (C-451/08, EU:C:2010:168, paragraph 67).

21 – See, in particular, *KölnMesse*, paragraph 57.

22 – The draft undertaking to let, dated May 2012, refers, in particular in recital 10 and Article 7, to that framework of requirements.

23 – *KölnMesse*, paragraph 58.

24 – Ibid., paragraph 56.

25 – In that case, reference was made by the German Government to the fact that the total amount to be paid to Grundstücksgesellschaft Köln Messe 8-11 GbR by way of rent, which ultimately amounted to around EUR 600 million, was well in excess of the cost of construction of the buildings, which amounted to around EUR 235 million.

26 – This contrasts with the distinction between a public service contract and a public supply contract (see, in particular, Article 2 of Directive 92/50 and Article 1(2)(d), second subparagraph, of Directive 2004/18).

27 – They refer, in particular, to the Opinion of Advocate General Trstenjak in *KölnMesse* (EU:C:2009:340, point 105), who suggested that there should also be a comparison of the respective costs.

28 – See *KölnMesse*, paragraph 61.

29 – *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817).

30 – See, to that effect, *Helmut Müller* (EU:C:2010:168, paragraphs 50 and 51).

31 – And that is so even though the parties seem to have demanded compliance with judgment No 8420/2010.

32 – See in that regard the details of the decisions taken by the Consiglio di Stato in response, in particular, to action taken by the *Commissario ad acta* of 27 May 2010 (points 23 to 25 of the present Opinion).

33 – Legislative Decree No 104 of 2 July 2010 (GURI No 156 of 7 July 2010).

34 – The Consiglio di Stato in fact gives the impression that it is its implementing decisions (of 15 April and 3 December 2010), relating to the activities of the *Commissario ad acta*, which led to a situation potentially conflicting with EU law, in so far as they ordered the adoption of the measures necessary for conclusion of a

lease for a future development which that undertaking had submitted to the administration as purporting to be the last proposal after the economic framework was completely changed in 2004.

---

35 – See, in particular, *Köbler* (C-224/01, EU:C:2003:513, paragraph 38); *Kapferer* (C-234/04, EU:C:2006:178, paragraph 20); and *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506, paragraph 22).

---

36 – *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 48); *Kapferer* (EU:C:2006:178, paragraph 21); and *Fallimento Olimpiclub* (EU:C:2009:506, paragraph 23).

---

37 – *Kapferer* (EU:C:2006:178, paragraph 22), and *Fallimento Olimpiclub* (EU:C:2009:506, paragraph 24).

---

38 – C-119/05, EU:C:2007:434.

---

39 – Ibid., paragraphs 62 and 63.

---

40 – *Fallimento Olimpiclub* (EU:C:2009:506, paragraph 25).

---

41 – *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraph 28). See also *i-21Germany and Arcor* (C-392/04 and C-422/04, EU:C:2006:586, paragraphs 51 to 55) and *Kempter* (C-2/06, EU:C:2008:78).

---

42 – See, to that effect, *Köbler* (C-224/01, EU:C:2003:513, paragraph 51 et seq.).

JUDGMENT OF THE COURT (Fifth Chamber)

8 May 2014 (*)

(Public procurement — Water sector — Directive 92/13/EEC — Effective and rapid review procedures — Time-limits for bringing an action — Date from which time begins to run)

In Case C-161/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Puglia (Italy), made by decision of 19 December 2012, received at the Court on 29 March 2013, in the proceedings

Idrodinamica Spurgo Velox srl,

Giovanni Putignano e figli srl,

Cogeir srl,

Splendor Sud srl,

Sceap srl

v

Acquedotto Pugliese SpA,

intervening parties:

Tundo srl,

Giovanni XXIII Soc. coop. arl,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a judge of the Fifth Chamber, E. Juhász (Rapporteur), A. Rosas and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 16 January 2014,

after considering the observations submitted on behalf of:

– Idrodinamica Spurgo Velox srl, by L. Quinto and P. Quinto, avvocati,

– Acquedotto Pugliese SpA, by E. Sticchi Damiani, M. Todino and G. Martellino, avvocati,

– Giovanni XXIII Soc. coop. arl, by C. Rella, and R. Rella, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli, avvocato dello Stato,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by L. Pignataro-Nolin and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 1, 2a, 2c and 2f of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 92/13’).

2 The request has been made in proceedings between Idrodinamica Spurgo Velox srl (‘Idrodinamica’) and four other applicants, on the one hand, and Acquedotto Pugliese SpA (‘Acquedotto Pugliese’), the contracting authority, on the other, concerning the lawfulness of the procedure for the award of a contract by that authority to the ad hoc tendering consortium led by the undertaking Giovanni XXIII Soc. coop. arl (‘Cooperativa Giovanni XXIII’).

Legal context

EU law

3 The contract at issue in the main proceedings, relating to the water sector, is governed by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), commonly referred to as the ‘sectoral directive’.

4 The third, fifth and sixth recitals in the preamble to Directive 92/13 state:

‘… the absence of effective remedies or the inadequacy of existing remedies could deter Community undertakings from submitting tenders; … therefore, the Member States must remedy this situation;

…

… the opening-up of procurement in the sectors concerned to Community competition implies that provisions must be adopted to ensure that appropriate review procedures are made available to suppliers or contractors in the event of infringement of the relevant Community law or national rules implementing that law;

… it is necessary to provide for a substantial increase in the guarantees of transparency and non-discrimination and … for it to have tangible effects, effective and rapid remedies must be available.’

5 Paragraphs 1 and 3 of Article 1 of that directive, which is entitled ‘Scope and availability of review procedures’, provides:

‘1. This Directive applies to contracts referred to in Directive [2004/17] …

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/17], decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

6 Article 2(1) of Directive 92/13 provides:

'The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity;

and

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both the above cases, to award damages to persons injured by the infringement. Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.'

7 Under the last subparagraph of Article 2a(2) of Directive 92/13:

'The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

– a summary of the relevant reasons as set out in Article 49(2) of Directive [2004/17], and,

– a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.'

8 Paragraphs 1 and 2 of Article 49 of Directive 2004/17, which is entitled 'Information to applicants for qualification, candidates and tenderers', provides:

'1. Contracting entities shall as soon as possible inform the economic operators involved of decisions reached concerning the conclusion of a framework agreement, the award of the contract, or admission to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to

recommence the procedure, or not to implement a dynamic purchasing system; this information shall be provided in writing if the contracting entities are requested to do so.

2. On request from the party concerned, contracting entities shall, as soon as possible, inform:

– any unsuccessful candidate of the reasons for the rejection of his application,

– any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 34(4) and (5), the reasons for their decision of non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements,

– any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken to do so may under no circumstances exceed 15 days from receipt of the written enquiry.

However, contracting entities may decide that certain information on the contract award or the conclusion of the framework agreement or on admission to a dynamic purchasing system, referred to in the paragraph 1, is to be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.'

Italian law

9 Legislative Decree No 163/2006 of 12 April 2006 (Ordinary Supplement to GURI No 100 of 2 May 2006) codifies the rules on public procurement.

10 Article 11 of that decree, which is entitled 'Phases of the procedures for the award of public contracts', provides:

'1. The procedures for the award of public contracts shall be carried out in compliance with the programming measures of the contracting entities, where they are provided for by this Code or by the legislation in force.

…

4. The award procedures shall select the best tender, according to one of the criteria provided for in this Code. On conclusion of the procedure, the contract is to be provisionally awarded to the "best" tenderer.

5. Once the provisional award within the meaning of Article 12(1) has been confirmed, the final award shall be made by the contracting entity.

…

8. The final award shall take effect once it has been established that the requirements have been satisfied.

9. Once the final award has taken effect and subject to the exercise of any powers of self-regulation in the cases provided for by the law [that is to say, the administration's power to withdraw, suspend or modify its own measures], the public contract or concession contract must be concluded within 60 days, unless a different deadline is laid down in the invitation to tender or agreed with the contracting authority. …

10. The contract shall not, in any event, be concluded within 35 days of the dispatch of the last communication of the final award within the meaning of Article 79.

…’

11 The relevant provisions of Article 79 of Legislative Decree No 163/2006 are summarised by the referring court as follows:

– Under paragraph 5, the contracting authority is automatically to inform all competitors admitted to the procedure, within a period of no more than five days, of the final award of the contract and of the conclusion of the contract with the successful contractor.

– Under paragraph 5a, the contract award decision and the statement of the reasons for it, setting out at least the characteristics and advantages of the selected tender and the name of the successful undertaking, must be appended to the communication, it being also possible for the contracting authority to satisfy that requirement by sending the minutes of the public opening of the tender.

– Under paragraph 5c, competitors are to be allowed, without needing to submit a written request, immediate access to the documentation relating to the tendering procedure, by consulting it and taking copies, within 10 days of the dispatch of the communication of the result of the tender, subject to the exercise by the authorities of the power to deny or delay access in those cases for which the law provides.

12 Article 120 of Legislative Decree No 104/2010 of 2 July 2010 establishing the Code of Administrative Procedure (Ordinary Supplement to GURI No 156 of 7 July 2010) provides that actions challenging the documents in procedures for the award of public contracts are to be brought within the shorter period of 30 days, as from receipt of the communication referred to in Article 79 of Legislative Decree No 163/2006.

13 Article 43 of Legislative Decree No 104/2010 provides that decisions of the contracting entity adopted after a candidate has submitted an application for review of the final award of the contract may be contested, in the context of that procedure, by bringing an ‘action adducing additional grounds’ within the deadline of 30 days laid down in Article 120 of that decree.

14 According to settled case-law, the Italian administrative courts consider that the communication of the award decision, provided for under Article 79(5) of Legislative Decree No 163/2006, is the sufficient condition for full knowledge of the harmful decision and is appropriate for triggering the time-limit, whether or not the undertaking concerned is entirely or to some extent unfamiliar with the internal procedural documents. That communication requires the undertaking concerned to apply immediately for a review of the tender within 30 days, without prejudice to the introduction of additional grounds concerning any irregularities which may emerge subsequently. The case-law has arrived at the same position as regards circumstances in which the contracting authority makes a definitive decision that is conditional, in terms of its effectiveness, on actively establishing that the undertaking to which the contract has been awarded satisfies the general and special conditions of the notice of contract, bearing in mind that additional grounds may be adduced within 30 days in that case also.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 Acquedotto Pugliese is a public undertaking wholly controlled by the Regiona Puglia (Puglia Region), its sole shareholder. It manages the integrated water and sewerage system for Puglia and for a number of municipalities in neighbouring regions. Pursuant to Annex VI-C to Legislative Decree No 163/2006, Acquedotto Pugliese is a contracting authority in the sector of the production, transport and distribution of drinking water, required to comply with the domestic legislation transposing into Italian law Directive 2004/17.

16 By notice published in the *Official Journal of the European Union* on 15 March 2011, Acquedotto Pugliese launched an open tendering procedure for the award of a four-year contract for cleaning and

disinfecting the sewerage system, for ordinary and extraordinary maintenance work on the water and sewerage systems and for the construction of water connections and pipe infrastructure, in dwellings in the district in question, with a basic contract value of EUR 17 615 739.07, to be awarded to the tenderer with the lowest price.

17 On conclusion of the public sittings of 17 and 30 May 2011, the preferred tenderer and first on the list was deemed to be the ad hoc tendering consortium led by Cooperativa Giovanni XXIII. Second on the list was the ad hoc tendering consortium led by Tundo srl ('Tundo') and third on the list was the ad hoc tendering consortium led by Idrodinamica. Consequently, by decision of 7 June 2011, the contracting authority decided to make a definitive award of the contract to the ad hoc tendering consortium led by Cooperativa Giovanni XXIII. That decision was communicated on 6 July 2011.

18 In that decision, it was also provided that, pending conclusion of the contract, early performance of the contract was permitted, that the definitive award of the contract would not take effect until it had been positively established that each of the member undertakings of the consortium to which the contract had been awarded and of the consortium awarded second place on the list satisfied the general and special requirements, and that all tenderers would be notified of the award of the contract.

19 Pending conclusion of the contract, the consortium to which the contract had been awarded, set up meantime by notarial act of 4 October 2011, informed the contracting authority by letter of 28 February 2012 that one of the associate undertakings had withdrawn from the consortium, but that it nevertheless intended to take on the contract and, even with its reduced membership (the leading undertaking and two associates), it was able to satisfy the technical and economic requirements under the notice of tender.

20 By decision of 28 March 2012, Acquedotto Pugliese authorised the withdrawal of the associate undertaking in question. The contract was concluded on 17 April 2012 with the ad hoc tendering consortium led by Cooperativa Giovanni XXIII in its new reduced composition.

21 Idrodinamica brought an action, notified on 17 May 2012, challenging the tender documentation of the contract award procedure in question and requesting specifically: (i) the annulment of the decision of 28 March 2012 by which Acquedotto Pugliese authorised the change in composition of the consortium to which the contract had been awarded; (ii) the annulment of the contract concluded on 17 April 2012; and (iii) the annulment of the decision of 7 June 2011 by which the contract was definitively awarded. Idrodinamica maintains that that procedure was unlawful on the ground that the contracting authority authorised the change in composition of the ad hoc consortium to which the contract had been awarded and, moreover, that that authority should have excluded the ad hoc tendering consortium led by Tundo srl, placed second on the list, in so far as the legal representative of one of the member undertakings of that consortium falsely declared that he had never been convicted of a criminal offence.

22 The referring court observes that, in accordance with national rules and case-law, the action brought by Idrodinamica should be declared inadmissible, since it was initiated well after the 30-day time-limit starting from the communication that the contract at issue in the main proceedings had been definitively awarded. However, the Court held in paragraph 40 of the judgment in Case C-406/08 *Uniplex (UK)* EU:C:2010:45, that the objective of rapidity pursued by legislation relating to review procedures to the award of public contracts does not permit Member States to disregard the principle of effective judicial protection, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Union law.

23 The referring court asks whether the national legislation in question is compatible with that principle of effective judicial protection, in so far as the information accompanying the communication of the definitive decision awarding the contract is not always sufficient to provide the unsuccessful candidates and tenderers with knowledge of the documentation and facts that are material to the decision on whether to apply for a review, inter alia, where an alleged breach of procedural rules occurs after the definitive decision awarding the contract has been adopted.

24 Moreover, the procedural rule which requires the persons concerned to apply for a review of the decision awarding the contract within the deadline of 30 days, without prejudice to the possibility of

introducing additional grounds on the basis of acts or facts which occur subsequently, appears to be incompatible with the principle of effective judicial protection, since the applicant must settle the fees of counsel and other experts appointed by the parties, and the fee in connection with the costs of the proceedings, in relation both to the application initiating proceedings and to the introduction of new grounds.

25 The referring court asks, therefore, whether on a proper construction of the relevant provisions of Union law the time allowed for submitting an application for review laid down by national legislation runs from the date on which the person concerned became aware — or, though the exercise of ordinary diligence, ought to have become aware — of the existence of an irregularity, rather than from the date of communication of the definitive decision awarding the contract.

26 In the light of those considerations, the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Articles 1, 2a, 2c and 2f of Directive [92/13] be interpreted as meaning that time for the purposes of bringing proceedings for a declaration that there has been an infringement of the rules governing the award of public procurements contracts runs from the date on which the applicant became aware — or, through the exercise of ordinary diligence, ought to have become aware — of the existence of that infringement?

(2) Do Articles 1, 2a, 2c and 2f of Directive [92/13] preclude provisions of national procedural law, or interpretative practices, such as those described in the main proceedings, which allow the court to declare inadmissible an action for a declaration that there has been an infringement of the rules governing the award of public contracts, where, as a result of the conduct of the contracting authority, the applicant became aware of the infringement after the formal communication of the essential elements of the decision definitively awarding the contract?’

Consideration of the questions referred

Admissibility

27 Cooperativa Giovanni XXIII and the Italian Government express concerns relating to the admissibility of the questions referred on the ground, inter alia, that Idrodinamica’s complaints put forward in the main proceedings are directed against the measure taken by the contracting authority authorising the change in composition of the consortium to which the contract had been awarded and that no complaint has been raised against the decision definitively awarding the contract.

28 Consequently, they submit that the possible annulment of that measure would merely result in the invalidity of the contract concluded with the consortium — in its reduced composition — to which the contract had been awarded, without its losing its status of successful tenderer. The questions referred by the referring court therefore have no direct link with the purpose of the case before it.

29 It should be borne in mind that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Case C-279/12 *Fish Legal and Shirley* EU:C:2013:853, paragraph 30 and the case-law cited).

30 That is not the case here and the concerns expressed by Cooperativa Giovanni XXIII and the Italian Government as to the admissibility of the questions are unfounded. The referring court seeks an interpretation of the relevant provisions of Directive 92/13 in order to assess whether Idrodinamica’s application for review is admissible. As is apparent from the file before the Court, that application

concerns, in essence, first, the annulment of the decision of the contracting authority by which it authorised the change in composition of the consortium to which the contract had been awarded and, second, the fact that that authority failed to exclude from the tender procedure a competing undertaking placed ahead of Idrodinamica on the list.

31 It must be found that, if the first complaint put forward by Idrodinamica in the context of the case before the referring court alleging, in essence, that the contracting authority unlawfully authorised the reduction in the number of undertakings belonging to the ad hoc tendering consortium, were upheld, the decision definitively awarding the contract could be annulled. If the second complaint, that the contracting authority should have excluded the ad hoc tendering consortium Tundo srl, placed second on the list, because the legal representative of one of the member undertakings of that consortium produced a false declaration, were also upheld, the chances of Idrodinamica's being awarded the contract in issue in the main proceedings would be significantly increased. Accordingly, Idrodinamica may rightly be considered to be a person 'having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement' within the meaning of Article 1(3) of Directive 92/13.

32 Consequently, the questions referred are admissible.

Substance

33 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether the time allowed for bringing an action for the annulment of the award decision starts to run again where the contracting authority adopts, after the expiry of that period, a decision which may affect the lawfulness of the award decision in question. It also asks whether, in the same situation, a tenderer may bring an action for the annulment of the award decision where it became aware of circumstances underlying that decision which may affect the lawfulness of the contract award procedure in question.

34 The amendment to Directive 92/13 by Directive 2007/66 and Article 49 of Directive 2004/17 has given rise to the requirement that an unsuccessful tenderer be informed of the outcome of the tender award procedure and the reasons therefor. On the basis of Article 49(2) of Directive 2004/17, the tenderer may request that it be provided with detailed information.

35 The principle of legal certainty requires that information thus obtained, and information that could have been obtained, can no longer serve as a basis for an action brought by the tenderer after the expiry of the period of time laid down by national law.

36 However, in the dispute in the main proceedings, the decision authorising the change in composition of the consortium to which the contract had been awarded concerns events which happened after the contract had been awarded and after the expiry of the 30-day period for bringing an action laid down by national law. It was not therefore possible to be aware of those events on the basis of either the communication of the award decision and the reasons underlying that decision, or the reply given to a potential request for detailed information submitted by the tenderer to the contracting authority.

37 In accordance with the case-law of the Court, effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (see, to that effect, *Uniplex (UK)* EU:C:2010:45, paragraph 32 and the case-law cited).

38 In addition, it is apparent from the decision making the reference that the decision authorising the change in composition of the consortium to which the contract had been awarded, which may affect the lawfulness of the decision awarding the contract, was adopted before the contract had been concluded between the contracting authority and that consortium. In such circumstances, it cannot be found that the principle of legal certainty precludes, as regards an action brought for the annulment of the award decision, the 30-day period from starting to run again.

39 In that regard, it must be held that the decision authorising the change in composition of the consortium to which the contract had been awarded necessitates an amendment of the award decision which may be regarded as substantial if, in the light of the particular features of the tender award procedure in question, it alters one of the essential elements that were decisive in the adoption of the award decision. In that situation, all relevant measures provided for by national law would have to be taken to remedy that irregularity, which might extend to a new award procedure (see, by analogy, Case C-91/08 *Wall* EU:C:2010:182, paragraphs 38, 39, 42 and 43).

40 Moreover, the Court points out that the possibility, such as that provided for in Article 43 of Legislative Decree No 104/2010, of adducing 'new grounds' in the context of an initial action against the award decision brought within the time-limit is not always a viable alternative of effective judicial protection. In a situation such as that in the main proceedings, the tenderers would be required to challenge *in abstracto* the decision awarding the contract, without knowing, at that stage, the grounds justifying that action.

41 Consequently, the 30-day period for bringing an action against the award decision laid down by national legislation must start to run again so as to permit the examination of the lawfulness of the contract authority's decision authorising the change in the composition of the consortium to which the contract had been awarded, which may affect the lawfulness of the decision awarding the contract. That period must start to run from the date on which the tenderer receives communication of the decision authorising the change in composition of the consortium or the date on which it became aware of that decision.

42 So far as concerns Idrodinamica's complaint alleging that the consortium placed second on the list should have been excluded because the legal representative of one of the member undertakings of that consortium produced a false declaration, it must be found that that alleged irregularity must have happened before the decision awarding the contract was adopted.

43 In those circumstances, the Court finds that the tenderer, on the basis of the information communicated to it pursuant to Article 2a of Directive 92/13 and Article 49 of Directive 2004/17, and on the basis of the information it could have obtained through the exercise of ordinary diligence, was in a position to submit an application for review of the possible infringements of Union law on public procurement and that, consequently, there is no reason for the period for bringing an action laid down by national legislation to start to run again.

44 The Court points out that, in the situation in the main proceedings, in the event of the annulment of the decision awarding the contract to the consortium placed first on the list adopted during the tender award procedure, a new action for the annulment of the new decision awarding the contract to another tenderer may be brought within the time-limit laid down by national legislation.

45 Consequently, it must be held that, pursuant to the principle of legal certainty, in the event of irregularities allegedly committed before the decision awarding the contract was adopted, a tenderer may bring an action for the annulment of the award decision only within the specific time-limit laid down in that regard by national law, unless such a right of action is explicitly provided for by national law in accordance with Union law.

46 On the other hand, a tenderer may bring an action for damages within the general limitation period provided for in that regard by national law.

47 In the light of the foregoing considerations, the answer to the questions referred is that Article 1(1) and (3) and the last subparagraph of Article 2a(2) of Directive 92/13 must be interpreted as meaning that the time allowed for bringing an action for the annulment of the decision awarding a contract starts to run again where the contracting authority adopts a new decision, after the award decision has been adopted but before that contract is signed, which may affect the lawfulness of that award decision. That period starts to run from the communication of the earlier decision to the tenderers or, in the absence thereof, from when they became aware of that decision.

48 When a tenderer becomes aware, after the expiry of the period for bringing an action laid down by national legislation, of an irregularity allegedly committed before the award decision was adopted, an

action for the annulment of that decision may be brought only within that period, unless such a right of action is explicitly provided for by national law in accordance with Union law.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 1(1) and (3) and the last subparagraph of Article 2a(2) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted as meaning that the time allowed for bringing an action for the annulment of the decision awarding a contract starts to run again where the contracting authority adopts a new decision, after the award decision has been adopted but before that contract is signed, which may affect the lawfulness of that award decision. That period starts to run from the communication of the earlier decision to the tenderers or, in the absence thereof, from when they became aware of that decision.

Where a tenderer becomes aware, after the expiry of the period for bringing an action laid down by national legislation, of an irregularity allegedly committed before the award decision was adopted, an action for the annulment of that decision may be brought only within that period, unless such a right is explicitly provided for by national law in accordance with Union law.

[Signatures]

---

* Language of the case: Italian.

EU:C:2014:2345

JUDGMENT OF THE COURT (Tenth Chamber)

6 November 2014 (*)

(Public procurement — Principles of equal treatment and transparency –Directive 2004/18/EC — Grounds for excluding a tenderer from participating — Article 45 — The personal situation of the candidate or tenderer — Compulsory statement concerning the person designated as ‘technical director’ — Statement not included with the tender — Exclusion from the contract without any possibility of remedying that omission)

In Case C-42/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 5 December 2012, received at the Court on 28 January 2013, in the proceedings

Cartiera dell’Adda SpA

v

CEM Ambiente SpA,

THE COURT (Tenth Chamber),

composed of C. Vajda (Rapporteur), President of the Chamber, E. Juhász and D. Šváby, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 15 May 2014,

after considering the observations submitted on behalf of:

– Cartiera dell’Adda SpA, by S. Soncini, avvocato,

– CEM Ambiente SpA, by E. Robaldo, P. Ferraris and F. Caliandro, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and S. Varone, avvocato dello Stato,

– the European Commission, by L. Pignataro-Nolin and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64) (‘Directive 2004/18’).

2 The request has been made in proceedings between Cartiera dell'Adda SpA ('Cartiera dell'Adda') and CEM Ambiente SpA ('CEM Ambiente') concerning a decision made by the latter, as contracting authority, to exclude the joint venture formed by Cartiera dell'Adda and Cartiera di Cologno Monzese SpA ('CCM') ('the joint venture') — the latter company acting as principal of the joint venture — from a selection procedure on the ground that a statement relating the person designated as CCM's technical director was not submitted with the joint venture's bid.

Legal context

European Union law

3 Article 1(2)(d) of Directive 2004/18 defines 'public service contracts', for the purpose of that directive, as public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II to the directive. In Annex IIA to that directive 'Sewage and refuse disposal services; sanitation and similar services' are listed as Category No 16.

4 Article 2 of Directive 2004/18, headed 'Principles of awarding contracts', provides as follows:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Article 45 of Directive 2004/18, headed 'Personal situation of the candidate or tenderer', provides in paragraphs 1 and 3 thereof as follows:

'1. Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

…

Member States shall specify, in accordance with their national law and having regard to Community law, the implementing conditions for this paragraph.

They may provide for a derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.

For the purposes of this paragraph, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in paragraph 3 and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. Where the information concerns a candidate or tenderer established in a State other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

…

3. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in paragraphs 1 or 2(a), (b), (c), (e) or (f) applies to the economic operator:

(a) as regards paragraph 1 and paragraph 2(a), (b) and (c), the production of an extract from the "judicial record" or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes, showing that these requirements have been met;

…

Where the country in question does not issue such documents or certificates, or where these do not cover all the cases specified in paragraphs 1 and 2(a), (b) and (c), they may be replaced by a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.'

6 Article 51 of Directive 2004/18, headed 'Additional documentation and information', is worded as follows:

'The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.'

Italian law

7 Article 38(1) and (2) of Legislative Decree No 163 establishing the Public Works Contracts, Public Supply Contracts and Public Service Contracts Code implementing Directives 2004/17/EC and 2004/18/EC (decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE) of 12 April 2006 (GURI No 100 of 2 May 2006, ordinary supplement) ('Legislative Decree No 163/2006') provides as follows:

'1. The following persons shall be excluded from participation in procedures for the award of concessions and public works contracts, supply contracts and service contracts and may not be awarded subcontracts or conclude any related contract:

…

(b) any person against whom proceedings for the imposition of one of the preventive measures referred to in Article 3 of Law No 1423 of 27 December 1956 or one of the grounds for refusal set out in Article 10 of Law No 575 of 31 May 1965 are pending; the exclusion and prohibition shall apply if the pending proceedings concern the owner or technical director, if the case involves a sole trader; …

(c) any person who has been the subject of a conviction that has the force of *res judicata* or a penal order against which no appeal lies, or who has been the subject of a judgment imposing a penalty at the specific request of the parties, as provided for in Article 444 of the Code of Criminal Procedure, in respect of the commission of serious professional conduct offences to the detriment of the State or the Community; the following constitute, in any event, grounds for exclusion: a conviction by a judgment which has the force of *res judicata* for one or more offences relating to participation in a criminal organisation, corruption, fraud or money laundering, as defined by the Community measures cited in Article 45(1) of Directive 2004/18/EC; the exclusion and prohibition shall apply if the judgment or order was made against: the owner or the technical director, in cases involving a sole trader; …

…

2. The candidate or tenderer shall certify that he satisfies the relevant requirements by producing a sworn statement, in accordance with the conditions laid down in the consolidated statutory and regulatory provisions relating to administrative documents, as required by Decree No 445 of the President of the Republic of 28 December 2000, and shall set out in that statement all his previous convictions, including those which have not been entered in the judicial record. …'

8 Article 46(1) of Legislative Decree No 163/2006 provides as follows:

'Within the limits laid down in Articles 38 to 45, the contracting authorities shall request the tenderers, where necessary, to expand upon or clarify the content of the certificates, documents or statements submitted.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 It is apparent from the order for reference that, by means of a public tender notice, CEM Ambiente launched a tendering procedure for the conclusion of a contract for the supply of paper and cardboard from separate municipal solid waste collections for the period running from 1 April 2011 to 31 March 2014. The contract was to be awarded to the tenderer offering to pay the highest price for removing the amounts of those materials specified, in accordance with the detailed requirements set out in the specifications for that procedure.

10 It should be noted that the specifications, a copy of which is included among the documents submitted to the Court, sets out, in Article 8 thereof, a series of grounds on which a tenderer may be excluded from participation in the procurement procedure. Those grounds include the fact that one of the documents and/or one of the sworn statements the purpose of which is to demonstrate that both the general and special requirements have been complied with is incomplete or irregular, except where any irregularity is of a purely formal nature and may be remedied but is not decisive for the assessment of the tender.

11 By decision of 21 December 2010, CEM Ambiente excluded the joint venture from the procurement procedure on the ground that its tender did not contain the statement relating to Mr Galbiati, described as CCM's technical director, and certifying that there were no criminal proceedings pending against him and that he had not been convicted of an offence by a judgment having the force of *res judicata*, as required under Article 38 of Legislative Decree No 163/2006. The only other tenderer having also been excluded from that selection procedure, CEM Ambiente declared the procedure void and launched a new tendering procedure.

12 Having learned of the decision to exclude the joint venture from the first selection procedure, CCM forwarded to CEM Ambiente a statement in which it indicated that none of the grounds for refusal laid down in Article 38 of Legislative Decree No 163/2006 applied to Mr Galbiati. Subsequently, the joint venture also indicated that Mr Galbiati had been identified as technical director in error, as he was simply a member of CCM's board of directors with no power of representation. As a consequence, no statement was required concerning Mr Galbiati under Article 38 of Legislative Decree No 163/2006.

13 In the absence of any reply from CEM Ambiente to that correspondence, Cartiera dell'Adda and CCM brought proceedings before the referring court seeking the annulment of the decision excluding the joint venture from the first award procedure and the withdrawal of the notice relating to the opening of a new procedure. By judgment of 25 May 2011, the referring court granted that application but rejected the request that the contract should be awarded to the joint venture.

14 On 23 June 2011, CEM Ambiente appealed against that judgment before the Consiglio di Stato (Council of State). The following day, Cartiera dell'Adda brought proceedings before the referring court seeking implementation of the judgment.

15 By judgment of 31 March 2012, the Consiglio di Stato upheld CEM Ambiente's appeal, taking the view that failure to produce a statement, such as that at issue, must lead to the exclusion of the tenderer from the selection procedure, at the very least where, as in the present case, the *lex specialis* provides that the penalty to be imposed for failure to produce such a statement is for the tenderer to be excluded from the procedure. The Consiglio di Stato considers that the central issue in the proceedings in question is not the requirement to expand upon or rectify a document that is incomplete or in some way defective, but the simple failure to product a compulsory statement.

16 In the proceedings relating to the application for implementation of its judgment before the referring court, Cartiera dell'Adda lodged a pleading, on 26 June 2012, in which, first, it expressed the view that the status of *res judicata* of the judgment of the Consiglio di Stato was at odds with Article 45 of Directive 2004/18 and, second, it requested that the case be referred to the Court of Justice for a preliminary ruling.

17 By order of 28 June 2012, noting that a claim had also been brought before it for compensation on the ground of delay in implementing its judgment of 25 May 2011, the referring court decided that the

proceedings were to be conducted in accordance with the rules of the ordinary procedure. The amount of damages claimed by Cartiera dell'Adda is in excess of EUR 9 million.

18 The Tribunale amministrativo regionale per la Lombardia entertains doubts, in essence, as to whether European Union law precludes an interpretation of a national provision intended to transpose Article 45 of Directive 2004/18 into domestic law to the effect that the contracting authority is obliged to exclude from an award procedure a tenderer who has failed to declare in his application for participation that a person designated as its technical director has not been the subject of criminal proceedings or convicted of an offence for the purpose of that national provision, even if the tenderer is in a position to prove, first, that that person had described as the technical director in error and, second, that that person fulfilled the conditions for making the statement required in any event.

19 In its order for reference, the referring court also points out that the possibility afforded the contracting authority in Article 46 of Legislative Decree No 163/2006 to seek, during the procedure, any clarifications or additional information it considers necessary is available only in the circumstances identified in that provision, so that the contracting authority in question does not have a free hand in conducting the procedure in cases in which statements are omitted.

20 Moreover, referring inter alia to the decisions in *Kühne & Heitz* (C-453/00, EU:C:2004:17), *Kapferer* (C-234/04, EU:C:2006:178), *Kempter* (C-2/06, EU:C:2008:78) and *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506), the referring court states that it is possible for a national decision which has the force of *res judicata*, such as the judgment of the Consiglio di Stato of 31 March 2012, not to be applied, in so far as it is contrary to European Union law. According to the Court of Justice's case-law, review of the conditions for participating in public procurement procedures must be based on the substance of the case — that is, it is necessary to verify that the conditions for participating in such procedures are fulfilled — not merely on whether the administrative documents accompanying the tenders submitted within the period prescribed are formally complete. In conclusion, the referring court raises the question whether Article 38(1)(b) and (c) of Legislative Decree No 163/2006 is consistent with Article 45 of Directive 2004/18.

21 In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is it contrary to [European Union] law, when an undertaking participating in a tendering procedure has failed to declare, in its request for participation, that its technical director has not been the subject of any of the proceedings or convictions referred to in Article 38(1)(b) and (c) of [Legislative Decree No 163/2006], for an interpretation of that article to be given to the effect that the contracting authority must order the exclusion of that undertaking even when the undertaking has provided sufficient evidence that the use of the term "technical director" in its request was due to a mere clerical error?

(2) Is it contrary to [European Union] law, when an undertaking participating in a tendering procedure has provided relevant, sufficient evidence that the persons required to make the statements referred to in Article 38(1)(b) and (c) [of Legislative Decree No 163/2006] have not been the subject of any of the proceedings or convictions referred to in that provision, for an interpretation of that article to be given to the effect that the contracting authority must order the exclusion of that undertaking as a consequence of the failure to comply with a provision of the *lex specialis* under which the tendering procedure was launched?'

22 By order of the President of the Court of Justice of 18 July 2013, the application for a ruling to be given in this case under the accelerated procedure provided for in Article 105(1) of the Court's Rules of Procedure was dismissed.

Consideration of the questions referred

Admissibility

23 CEM Ambiente and the Italian Government state that the request for a preliminary ruling has been made in the context of proceedings for implementation of a judgment of the referring court — and a claim seeking compensation for the delay in that implementation — which was, however, varied by decision of the Consiglio di Stato of 31 March 2012, a decision having the force of *res judicata*, so that the question as to whether the decision to exclude the joint venture from the selection procedure in question is lawful may no longer be addressed by the referring court when examining those applications. CEM Ambiente and the Italian Government infer from this that the questions put by the referring court are hypothetical and, therefore, inadmissible.

24 CEM Ambiente and the Italian Government also contend that the questions referred are based on a different factual background from that established by the Consiglio di Stato in its judgment of 31 March 2012. Accordingly, the factual situation on which the first question is based, namely that the description of Mr Galbiati as technical director was a clerical error, does not correspond to the facts as established by the Consiglio di Stato. With regard to the second question, the referring court omitted to mention that the evidence that it refers to was produced out of time.

25 Moreover, the Italian Government is of the view that the purpose of the questions referred is not to obtain an interpretation of European Union law but an examination of the factual background of the case before the referring court. Indeed, the Court would have to ascertain whether the conditions under which an incomplete document may be rectified were met, the Consiglio di Stato having ruled out any such possibility.

26 It must be borne in mind, first, that, in accordance with settled case-law, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case before them. National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate (judgment in *Bericap Záródástechnikai*, C-180/11, EU:C:2012:717, paragraph 53 and the case-law cited).

27 The Court has thus concluded that a rule of national law pursuant to which courts that are not adjudicating at final instance are bound by legal rulings of a higher court cannot take away from those courts the discretion to refer to the Court questions of interpretation of the point of European Union law to which such rulings relate. The Court has held that a court which is not ruling at final instance must be free, if it considers that a higher court's legal ruling could lead it to give a judgment contrary to European Union law, to refer to the Court questions which concern it (see judgments in *Elchinov*, C-173/09, EU:C:2010:581, paragraphs 25 and 27, and *Interedil*, C-396/09, EU:C:2011:671, paragraph 35).

28 It follows that, even though it has the force of *res judicata* under national law, the judgment of the Consiglio di Stato of 31 March 2012 cannot preclude the referring court from making a reference to the Court of Justice for a preliminary ruling if it considers that that judgment may be contrary to European Union law.

29 With regard, second, to claim that the questions referred are hypothetical, it should be recalled that questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, judgment in *Genil 48 and Comercial Hostelera de Grandes Vinos*, C-604/11, EU:C:2013:344, paragraph 26).

30 In the present case, it cannot be found that the questions referred are hypothetical. They have been submitted in proceedings in which Cartiera dell'Adda seeks, inter alia, compensation for the delay in implementing the judgment delivered by the referring court on 25 May 2011 annulling CEM Ambiente's decision to exclude the joint venture from the selection procedure at issue in the main

proceedings. It is therefore not apparent that those questions, which relate to whether such a decision to exclude a tenderer complies with European Union law, are irrelevant to the outcome of the dispute before the national court. Moreover, notwithstanding the existence of the judgment of the Consiglio di Stato of 31 March 2012, it cannot be concluded *a priori* that the dispute has become devoid of purpose.

31 Third, with regard to the claim that the summary of the facts in the main proceedings is inaccurate and deficient, it is sufficient to note, as is also apparent from paragraph 29 above, that it is for the national court alone to define the factual parameters of the dispute which gave rise to the questions and it is not the task of the Court of Justice to give a ruling on that court's assessment of the facts (see, to that effect, judgment in *van Delft and Others*, C-345/09, EU:C:2010:610, paragraph 114).

32 Finally, it is apparent from the very wording of the questions referred that the referring court is seeking from the Court of Justice not an examination of that factual background but an interpretation of EU law that will be of assistance in resolving the dispute before it.

33 It follows that the questions referred for a preliminary ruling are admissible.

Substance

34 As a preliminary observation, it should be noted, first, that while the referring court does not mention Article 45 of Directive 2004/18 in its questions, it is apparent from the order for reference itself, in particular the introductory paragraph of the questions referred, that that court is unsure whether Article 38(1)(b) and (c) of Legislative Decree No 163/2006 complies with Article 45 of that directive.

35 Second, only the second question refers to failure on the part of an economic operator participating in a tendering procedure to comply with a provision contained in the contract documentation, such as the contract notice or the specifications, relating to the award procedure at issue in the main proceedings. However, the ground for exclusion referred to in both questions is the same and is set out, as is apparent from paragraph 10 above, in Article 8 of the contract specifications.

36 Accordingly, the national court must be regarded as asking by its questions, which it is appropriate to examine together, whether Article 45 of Directive 2004/18 must be interpreted as precluding the exclusion of an economic operator from a tendering procedure on the ground that the operator has failed to comply with a requirement laid down in the contract documentation to annex to the tender, on pain of exclusion, a statement to the effect that the person designated in the tender as the operator's technical director has not been the subject of criminal proceedings or a conviction, where, at a date after the expiry of the deadline for submitting tenders, such a statement has been provided to the contracting authority or it is shown that the person in question was identified as the technical director in error.

37 As regards the question whether the contract at issue in the main proceedings falls within the scope of Directive 2004/18, the European Commission stated at the hearing that that contract is a public services contract, as defined in Article 1(2)(d) of the directive, and identified more specifically as Category 16 in Annex IIA to the directive.

38 On the other hand, CEM Ambiente is of the view that the object of the contract is an agreement for the sale and purchase of moveable goods or, in view of the requirement to process waste in the contract, that it is, at most, a service concession. Therefore, the contract does not, in any event, fall within the scope of Directive 2004/18.

39 In the first place, on the assumption that the contract at issue in the main proceedings falls within the scope of Directive 2004/18, which is a matter for the referring court to determine, it should be recalled that Article 45(1) and (2) of the directive sets out a series of grounds on which a tenderer may be excluded on the basis of his personal situation. Article 45(3) indicates which documents the contracting authorities are required to accept as sufficient evidence of the fact that none of the cases identified in Article 45(1) and (2) applies to the tenderer in question, with the exception of the situations referred to in Article 45(2)(d) and (g).

40 It is not apparent from the order for reference that the question whether the grounds for exclusion set out in Article 38(1)(b) and (c) of Legislative Decree No 163/2006 and the requirement to submit a 'sworn statement' laid down in Article 38(2) of that decree are compatible with those provisions of Directive 2004/18 is in issue in the main proceedings. Nor is it claimed in those proceedings that the exclusion of a tenderer from the contract on the ground that the tenderer has failed to comply with that requirement is, in itself, contrary to the directive. However, the referring court has doubts as to the compatibility with European Union law of the fact that it is impossible for such a tenderer, after submitting his bid, to remedy the fact that he failed to annex such a statement to his bid, whether by submitting such a statement to the contracting authority directly or by showing that the person concerned was identified as the technical director in error.

41 In that regard, it is common ground that it is apparent from the contract documentation in question in the main proceedings, first, that the 'sworn statement' referred to in Article 38 of Legislative Decree No 163/2006 concerning the person designated as technical director of the economic undertaking concerned had to be annexed to the bid submitted by the undertaking, on pain of exclusion from the tender procedure and, second, that it was possible to remedy *a posteriori* merely irregularities which were purely formal and not decisive for the assessment of the bid.

42 The Court has already held that the contracting authority must comply strictly with the criteria which it has itself established, so that it is required to exclude from the contract an economic operator who has failed to provide a document or information which he was required to produce under the terms laid down in the contract documentation, on pain of exclusion (see, to that effect, judgment in *Manova*, C-336/12, EU:C:2013:647, paragraph 40).

43 That strict requirement on the part of contracting authorities has its origins in the principle of equal treatment and the obligation of transparency deriving from that principle, to which those authorities are subject in accordance with Article 2 of Directive 2004/18.

44 First, the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their bids, which therefore implies that the bids of all tenderers must be subject to the same conditions. Second, the obligation of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question (see, to that effect, judgment in *Commission* v *CAS Succhi di frutta*, C-496/99 P, EU:C:2004:236, paragraphs 108 to 111).

45 It follows that, in circumstances such as those in the main proceedings, Article 45 of Directive 2004/18, read in conjunction with Article 2 of the directive, does not preclude the exclusion of a tenderer on the ground that he has omitted to annex to his bid a sworn statement relating to the person identified in the bid as technical director. In particular, in so far as the contracting authority takes the view that that omission is not a purely formal irregularity, it cannot allow the tenderer subsequently to remedy the omission in any way after the expiry of the deadline for submitting bids.

46 Furthermore, in such circumstances, Article 51 of Directive 2004/18, which provides that the contracting authority may invite operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50 of the directive, cannot be interpreted as permitting that authority to accept any rectification of omissions which, as expressly provided for in the contract documentation, must result in the exclusion of the bid.

47 In the second place, on the assumption that the contract in question in the proceedings before the national court is a services concession, it should be noted that, if, at the material time, service concession contracts were not governed by any of the directives by which the EU legislature regulated public procurement, the public authorities which concluded such contracts were nevertheless required to comply with the fundamental rules of the FEU Treaty, in particular the principles of equal treatment and transparency (see, to that effect, judgments in *Parking Brixen*, C-458/03, EU:C:2005:605, paragraphs 46 to 49, and *Wall*, C-91/08, EU:C:2010:182, paragraph 33), where the services concession

concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is carried out (see, to that effect, judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:187, paragraph 23 and the case-law cited).

48 In so far as the contract in question in the main proceedings has such an interest, which is a matter to be verified by the referring court, the principal of equal treatment and the obligation of transparency deriving from that principle require the contracting authority, as is apparent from paragraphs 42 and 44 above, to comply with the criteria which it has itself established, so that it will be required to exclude from the contract an economic operator who has failed to provide a document or information which he was under an obligation to produce under the terms laid down in the contract documentation, on pain of exclusion.

49 Accordingly, the exclusion of a tenderer such as Cartiera dell'Adda from a contract such as that at issue in the main proceedings must be regarded as consistent with the principle of equal treatment and the obligation of transparency, as fundamental rules of the FEU Treaty.

50 In the light of the foregoing, the answer to the questions referred is that Article 45 of Directive 2004/18, read in conjunction with Article 2 of the directive, and the principle of equal treatment and the obligation of transparency must be interpreted as not precluding the exclusion of an economic operator from a procurement procedure on the ground that the operator has failed to comply with the requirement laid down in the contract documentation to annex to his bid, on pain of exclusion, a statement to the effect that the person designated in the bid as the operator's technical director has not been the subject of criminal proceedings or a conviction, even where, at a date after the expiry of the deadline for submitting bids, such a statement has been provided to the contracting authority or it is shown that the person in question was identified as the technical director in error.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 45 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009, read in conjunction with Article 2 of the directive, and the principle of equal treatment and the obligation of transparency must be interpreted as not precluding the exclusion of an economic operator from a procurement procedure on the ground that the operator has failed to comply with the requirement laid down in the contract documentation to annex to his bid, on pain of exclusion, a statement to the effect that the person designated in the bid as the operator's technical director has not been the subject of criminal proceedings or a conviction, even where, at a date after the expiry of the deadline for submitting bids, such a statement has been provided to the contracting authority or it is shown that the person in question was identified as the technical director in error.

[Signatures]

---

* Language of the case: Italian.

JUDGMENT OF THE COURT (Fifth Chamber)

11 September 2014 (*)

(Reference for a preliminary ruling — Public procurement — Directive 89/665/EEC — Article 2d(4) — Interpretation and validity — Procedures for review of the award of public supply and public works contracts — Ineffectiveness of the contract — Exception)

In Case C-19/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 14 December 2012, received at the Court on 15 January 2013, in the proceedings

Ministero dell'Interno

v

Fastweb SpA,

Intervening party:

Telecom Italia SpA,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas, D. Šváby and C. Vajda (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 March 2014,

after considering the observations submitted on behalf of:

– Fastweb SpA, by P. Stella Richter and G.-L. Tosato, avvocati,

– Telecom Italia SpA, by F. Cardarelli, F. Lattanzi and F.S. Cantella, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Fiengo, avvocato dello Stato,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the Polish Government, by B. Majczyna and by M. Szwarc and E. Gromnicka, acting as Agents,

– the European Parliament, by J. Rodrigues and L. Visaggio, acting as Agents,

– the Council of the European Union, by P. Mahnič Bruni and A. Vitro, acting as Agents,

– the European Commission, by L. Pignataro-Nolin and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2d(4) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').

2 The request has been made in proceedings between the Ministero dell'Interno, Dipartimento di Pubblica Sicurezza (Ministry of the Interior, Department of Public Safety; 'the Ministry of the Interior') and Fastweb SpA, concerning the award to Telecom Italia SpA, under a negotiated procedure without prior publication of a contract notice, of a public contract for the supply of electronic communications services.

Legal context

EU Law

Directive 2007/66

3 Recitals 3, 13, 14, 21, 26 and 36 in the preamble to Directive 2007/66 state:

'(3) … the guarantees of transparency and non-discrimination sought by [Directive 89/665 and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14)] should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by [Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)] and [by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)]. Directives [89/665] and [92/13] should therefore be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.

...

(13) In order to combat the illegal direct award of contracts, which the Court of Justice has called the most serious breach of Community law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.

(14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete. Direct awards within the meaning of this Directive should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union* within the meaning of Directive [2004/18]. This corresponds to a procedure without prior call for competition within the meaning of Directive [2004/17].

...

(21) The objective to be achieved where Member States lay down the rules which ensure that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed. The consequences resulting from a contract being considered ineffective should be determined by national law. National law may therefore,

for example, provide for the retroactive cancellation of all contractual obligations (*ex tunc*) or conversely limit the scope of the cancellation to those obligations which would still have to be performed (*ex nunc*). This should not lead to the absence of forceful penalties if the obligations deriving from a contract have already been fulfilled either entirely or almost entirely. In such cases Member States should provide for alternative penalties as well, taking into account the extent to which a contract remains in force in accordance with national law. Similarly, the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law.

...

(26) In order to avoid legal uncertainty which may result from ineffectiveness, Member States should provide for an exemption from any finding of ineffectiveness in cases where the contracting authority or contracting entity considers that the direct award of any contract without prior publication of a contract notice in the [Official Journal] is permissible in accordance with Directives [2004/18] and [2004/17] and has applied a minimum standstill period allowing for effective remedies. The voluntary publication which triggers this standstill period does not imply any extension of obligations deriving from Directive [2004/18] or Directive [2004/17].

...

(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [('the Charter')]. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.'

Directive 89/665

4 The third recital in the preamble to Directive 89/665 is worded as follows:

'… the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; … for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law.'

5 Under the third subparagraph of Article 1(1) of Directive 89/665:

'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.'

6 Paragraph 1 of Article 2 of Directive 89/665, which is entitled 'Requirements for review procedures', provides:

'Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

7 The first subparagraph of Article 2(7) of Directive 89/665 provides:

‘Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.’

8 Article 2d of Directive 89/665, entitled ‘Ineffectiveness’, provides:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the [Official Journal] without this being permissible in accordance with Directive [2004/18];

...

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

...

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

– the contracting authority considers that the award of a contract without prior publication of a contract notice in the [Official Journal] is permissible in accordance with Directive [2004/18],

– the contracting authority has published in the [Official Journal] a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and

– the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

– …’.

9 Under Article 3a of Directive 89/665, which is entitled ‘Content of a notice for voluntary *ex ante* transparency’, the notice referred to in the second indent of Article 2d(4) is to state the name and contact details of the contracting authority; a description of the object of the contract; the justification for the contracting authority’s decision to award the contract without prior publication of a contract notice*;* the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and, where appropriate, any other information deemed useful by the contracting authority.

Directive 2004/18

10 Article 2 of Directive 2004/18, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

11 Under Article 31 of Directive 2004/18, entitled ‘Cases justifying use of the negotiated procedure without publication of a contract notice’:

‘Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:

(1) for public works contracts, public supply contracts and public service contracts:

...

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;

...'

Directive 2009/81/EC

12 Under Article 28 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 18, p. 216), entitled 'Cases justifying use of the negotiated procedure without publication of a contract notice':

'In the following cases, contracting authorities/entities may award contracts by a negotiated procedure without prior publication of a contract notice and shall justify the use of this procedure in the contract award notice as required in Article 30(3):

1. for works contracts, supply contracts and service contracts:

...

(e) when, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;

...'

13 Article 60 of that directive, entitled 'Ineffectiveness', provides:

'1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority/entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) where the contracting authority/entity has awarded a contract without prior publication of a contract notice in the [Official Journal] without this being permissible in accordance with this Directive;

...

4. Member States shall provide that paragraph 1(a) does not apply where:

– the contracting authority/entity considers that the award of a contract without prior publication of a contract notice in the [Official Journal] is permissible in accordance with this Directive;

– the contracting authority/entity has published in the [Official Journal] a notice as described in Article 64 expressing its intention to conclude the contract, and,

– the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

– …'

Italian law

14 Directive 2007/66 was transposed into Italian law by Legislative Decree No 53 of 20 March 2010, the content of which was subsequently incorporated into Articles 120 to 125 of Legislative Decree No 104/2010 of 2 July 2010 laying down the Code of Administrative Procedure (decreto legislativo n. 104 — Codice di procedura amministrativa; ordinary supplement to GURI No 158 of 7 July 2010, 'the Code of Administrative Procedure').

15 Under Article 121 of the Code of Administrative Procedure, in the event of serious infringements, such as the unauthorised award of a contract by means of a negotiated procedure without prior publication of a notice, it is necessary — save where otherwise provided and notwithstanding the discretion reserved to the administrative courts — to render ineffective the contract subsequently concluded.

16 Among the exceptions to that rule, Article 121(5) of the Code of Administrative Procedure, which transposes Article 2d(4) of Directive 89/665 into national law, provides that a contract is nevertheless to retain its effects if, by a reasoned decision adopted before the award procedure was initiated, the contracting authority had declared that it considered the award of a contract by negotiated procedure without prior publication of a contract notice to be permissible under the Code of Administrative Procedure, if it had published a notice for voluntary *ex ante* transparency and if it did not conclude the contract concerned before the expiry of a period of at least 10 calendar days with effect from the day following the date on which that notice was published.

17 Under Article 122 of the Code of Administrative Procedure, concerning the other cases of infringement, the national courts are to establish, within the limits laid down in that provision, whether to declare the contract ineffective.

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 The order for reference relates that, in 2003, the Ministero dell'Interno entered into an agreement with Telecom Italia for the management and development of telecommunications services.

19 As that agreement was due to expire on 31 December 2011, the Ministero dell'Interno appointed Telecom Italia, by decision of 15 December 2011, as its supplier and technological partner for the management and development of those services.

20 The Ministero dell'Interno considered it possible, for the purposes of awarding the electronic communications contract, to use the negotiated procedure without prior publication of a contract notice, provided for in Article 28(1)(e) of Directive 2009/81 and in Article 57(2)(b) of Legislative Decree No 163 of 12 April 2006 laying down the Code of public works, services and supply contracts in implementation of Directives 2004/17/EC and 2004/18/EC (decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE; ordinary supplement to GURI No 100 of 2 May 2006), as amended by Legislative Decree No 152 of 11 September 2008 (ordinary supplement to GURI No 231 of 2 October 2008) ('Legislative Decree No 163/2006').

21 Under Article 57(2)(b) of Legislative Decree No 163/2006, the contracting authority may award a contract by a negotiated procedure without prior publication of a contract notice, 'if, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator'.

22 In the circumstances, the Ministero dell'Interno formed the view that, for technical reasons and in order to protect certain exclusive rights, Telecom Italia was the only economic operator in a position to perform the contract at issue.

23 After the Avvocatura Generale (State Legal Advisory Service) had given a favourable opinion regarding the intended procedure on 20 December 2011, the Ministero dell'Interno published a notice in the Official Journal on the same day, announcing its intention of awarding the contract to Telecom Italia.

24 On 22 December 2011, the Ministero dell'Interno invited Telecom Italia to take part in the negotiations.

25 Following those negotiations, the parties signed a framework agreement on 31 December 2011 for the 'provision of electronic communications services, including voice telephony, mobile telephony and data transmission services, to the Civil Police and to the Armed Service of the Carabinieri'.

26 The contract award notice was published in the Official Journal on 16 February 2012.

27 Fastweb brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Lazio; 'the TAR') for annulment of the award of the contract, and a declaration that the contract was ineffective, on the ground that the conditions laid down in Article 28 of Directive 2009/81 and in Article 57 of Legislative Decree No 163/2006 for use of a negotiated procedure without prior publication of a contract notice were not satisfied.

28 The TAR upheld the action brought by Fastweb. It found that the reasons set out by the Ministero dell'Interno as justification for the use of that procedure did not constitute 'technical reasons' for the purposes of Article 57(2)(b) of Legislative Decree No 163/2006, by dint of which the contract could be awarded only to a particular economic operator, but rather reasons of expediency. However, although the TAR annulled the decision awarding the contract, it went on to hold that, pursuant to Article 121(5) of the Code of Administrative Procedure, it was unable to declare that the agreement concluded on 31 December 2011 was ineffective, since the conditions laid down in that provision for a derogation from the general rule were satisfied. Nevertheless, on the basis of Article 122 of the Code of Administrative Procedure, the TAR declared the contract to be ineffective as from 31 December 2013.

29 The Ministero dell'Interno and Telecom Italia each lodged an appeal against that judgment before the Consiglio di Stato.

30 By order of 8 January 2013, the Consiglio di Stato upheld the annulment of the award of the contract, on the ground that the Ministero dell'Interno had failed to demonstrate that the conditions for using a negotiated procedure without prior publication of a notice were satisfied. In fact, the Consiglio di Stato found that what the information in the file made clear was not the objective impossibility of entrusting the contract to different economic operators, but the inexpediency of such a choice, essentially because, in the Ministry's view, it involved changes and costs and necessitated a period of adjustment.

31 In that connection, although the Consiglio di Stato points out that the rules laid down in Directive 2009/81 concerning reviews are almost identical to those laid down in Directive 89/665, its observations are concentrated on Directive 89/665.

32 Being uncertain, however, as to the inferences properly to be drawn from that annulment in terms of the effects of the contract at issue in the light of the wording of Article 2d(4) of Directive 89/665, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 2d(4) of Directive [89/665] be construed as meaning that, if, before awarding the contract directly to a specific economic operator, selected without prior publication of a contract notice, a contracting authority published the notice for voluntary *ex ante* transparency in the [Official Journal] and waited at least 10 days before concluding the contract, the national court is — always and in any event — precluded from declaring the contract to be ineffective, even if it is established that there has been an infringement of the provisions permitting, subject to certain conditions, the award of a contract without a competitive tendering procedure?

(2) Is Article 2d(4) of Directive [89/665] — if interpreted as making it impossible to declare a contract ineffective, in accordance with national law (Article 122 of the Code [of Administrative Procedure]), even though the national court has established an infringement of the provisions permitting, subject to certain conditions, the award of a contract without a competitive tendering procedure — compatible with the principles of equality of the parties, of non-discrimination and of protecting competition, and does it guarantee the right to an effective remedy enshrined in Article 47 of the Charter …?'

Consideration of the questions referred

Question 1

33 By its first question, the referring court asks in essence whether, on a proper construction of Article 2d(4) of Directive 89/665, where a public contract is awarded without prior publication of a contract notice, but the conditions laid down in Directive 2004/18 for use of that procedure are not satisfied, the contract is not to be declared ineffective if the contracting authority had published in the Official Journal a notice to ensure *ex ante* transparency and, before concluding the contract, had allowed the 10-day minimum standstill period to elapse from the day following the date on which that notice was published.

34 At the outset, it should be borne in mind that the provisions of Directive 89/665, which are intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are designed to reinforce existing arrangements for ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (judgment in *Commission* v *Austria*, C-212/02, EU:C:2004:386, paragraph 20 and the case-law cited).

35 In addition, as can be seen from recitals 3 and 4 to Directive 2007/66, the aim of the directive is to strengthen the guarantees of transparency and non-discrimination that Directive 89/665 seeks to establish, in order to enhance the effectiveness of review proceedings brought in the Member States by persons with an interest in obtaining a public contract.

36 The third subparagraph of Article 1(1) of Directive 89/665 requires Member States to take measures to ensure that decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of that directive.

37 To that end, paragraph 1(b) of Article 2 of Directive 89/665, which is entitled ‘Requirements for review procedures’, provides that Member States are to ensure that bodies responsible for review procedures have the power to set aside or to ensure the setting aside of decisions taken unlawfully.

38 Article 2d(1)(a) of Directive 89/665 provides in that respect that the body responsible for review procedures is to declare the contract ineffective if the contracting authority has awarded the contract without prior publication of a contract notice in the Official Journal, if it was not permissible to do so under Directive 2004/18.

39 In Article 2d(4) of Directive 89/665, however, the EU legislature has laid down an exception to that rule regarding the ineffectiveness of a contract. Under that provision, the general rule does not apply if: (i) the contracting authority considers that the award of a contract without prior publication of a contract notice in the Official Journal is permissible in accordance with Directive 2004/18; (ii) the contracting authority has published in the Official Journal a notice as described in Article 3a of Directive 89/665 announcing that it intends to conclude the contract; and (iii) the contract was not concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of that notice.

40 Since Article 2d(4) of Directive 89/665 constitutes an exception to the rule regarding the ineffectiveness of contracts, laid down in Article 2d(1) of that directive, it must be interpreted strictly (see, by analogy, the judgment in *Commission* v *Germany*, C-275/08, EU:C:2009:632, paragraph 55 and the case-law cited). Nevertheless, the exception must be construed in a manner consistent with the objectives that it pursues. Thus, the principle of strict interpretation does not mean that the terms in which the exception is framed in Article 2d(4) of Directive 89/665 must be construed in such a way as to deprive that exception of its intended effect (see, by analogy, *Future Health Technologies*, C-86/09, EU:C:2010:334, paragraph 30 and the case-law cited).

41 Fastweb contends that, in accordance with the objectives of Directive 89/665 and the rules on the freedom of establishment and the competitive conditions to which EU public procurement law is intended to give effect, that exception is merely optional. In that regard, Fastweb contends that recitals 20 to 22 to Directive 2007/66 make it clear that Article 2d(4) of Directive 89/665 does not preclude the application of more severe penalties under national law or, therefore, the possibility for the national court to decide, after weighing the general and the individual interests involved, whether the contract must be declared ineffective.

42 In that regard, it should be noted that, under Article 2(7) of Directive 89/665, the effects of the exercise of the powers referred to in Article 2(1) of that directive on a contract concluded subsequent to its award are to be determined, save in the situations contemplated in Articles 2d, 2e and 2f of that directive, by national law. It follows that, in the situations contemplated, in particular, in Article 2d of Directive 89/665, the measures that may be taken for the purposes of actions brought against the contracting authorities are to be determined solely by the rules laid down in that directive. In that regard, it should be noted that, under Article 2(7) of Directive 89/665, the cases contemplated in Articles 2d, 2e and 2f of that directive do not fall under the general rule that the effects of an infringement of EU public procurement law are to be determined by national law. Consequently, it is not permissible for Member States to lay down in their national law provisions regarding the effects of infringements of EU public procurement law in circumstances such as those contemplated in Article 2d(4) of Directive 86/665.

43 Even though, according to recitals 13 and 14 to Directive 2007/66, the unlawful direct award of contracts is the most serious breach of EU law in the field of public procurement, which it is necessary to penalise, in principle, by a declaration that the contract is ineffective, recital 26 to that directive emphasises the need to avoid the legal uncertainty that could arise as a result of the contract being deprived of effects in the specific case contemplated in Article 2d(4) of Directive 89/665.

44 As the Advocate General noted in point 57 of his Opinion, the intention of the EU legislature in introducing, in Article 2d(4) of Directive 89/665, that exception to the general rule regarding the ineffectiveness of a contract, is to reconcile the various interests in play, that is to say, the interests of the undertaking that has been adversely affected, to which it is important to make available the remedies of pre-contractual interim relief and of annulment of the contract unlawfully concluded, and the interests of the contracting authority and the undertaking selected, which entails the need to prevent the legal uncertainty that might be engendered by the ineffectiveness of the contract.

45 Having regard to the foregoing, it should be noted that it would be contrary both to the wording and to the purpose of Article 2d(4) of Directive 89/665 to allow the national courts to declare that the contract is ineffective where the three conditions laid down in that provision are satisfied.

46 However, in order to attain the objectives referred to in the third subparagraph of Article 1(1) of Directive 89/665, including the availability of effective remedies against decisions taken by contracting authorities in breach of public procurement law, it is important that the body responsible for the review procedure should, when verifying whether the conditions laid down in Article 2d(4) of Directive 89/665 have been fulfilled, carry out an effective review.

47 Specifically, the condition laid down in the first indent of Article 2d(4) of Directive 89/665 relates to the need for the contracting authority to consider it permissible under Directive 2004/18 to award the contract without prior publication of a contract notice in the Official Journal. The condition laid down in the second indent of Article 2d(4) of Directive 89/665 relates to the additional need for the contracting authority to publish in the Official Journal a notice, as described in Article 3a of that directive, announcing its intention of concluding the contract. Under Article 3a(c) of Directive 89/665, the notice must state the justification for the contracting authority's decision to award the contract without prior publication of a contract notice.

48 On that last point, the 'justification' must disclose clearly and unequivocally the reasons that moved the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action before the review body and so that the review body is able to undertake an effective review.

49 As emerges from the order for reference, the contracting authority in the case before the referring court, acting on the basis of Article 31(1)(b) of Directive 2004/18, used the negotiated procedure without prior publication of a contract notice. In that regard, it should be borne in mind that the negotiated procedure may only be used in the circumstances precisely delimited in Articles 30 and 31 of Directive 2004/18 and that, as compared with open and restricted procedures, that procedure is exceptional (see judgment in *Commission* v *Belgium*, C-292/07, EU:C:2009:246, paragraph 106 and the case-law cited).

50 In its review, the review body is under a duty to determine whether, when the contracting authority took the decision to award a contract by means of a negotiated procedure without prior publication of a contract notice, it acted diligently and whether it could legitimately hold that the conditions laid down in Article 31(1)(b) of Directive 2004/18 were in fact satisfied.

51 Among the factors which the review body must take into consideration in that regard are the circumstances and the reasons, mentioned in the notice provided for in the second indent of Article 2d(4) of Directive 89/665, which led the contracting authority to use the negotiated procedure laid down in Article 31 of Directive 2004/18.

52 If, at the conclusion of its review, the review body finds that the conditions laid down in Article 2d(4) of Directive 89/665 are not satisfied, it must then declare that the contract is ineffective, in accordance with the rule laid down in Article 2d(1)(a) of that directive. It must determine, on the basis of national law, the consequences of the declaration of ineffectiveness under Article 2d(2) of Directive 89/665.

53 On the other hand, if the review body finds that those conditions are satisfied, it must maintain the effects of the contract, pursuant to Article 2d(4) of Directive 89/665.

54 Consequently, the answer to Question 1 is that, on a proper construction of Article 2d(4) of Directive 89/665, where a public contract is awarded without prior publication of a contract notice in the Official Journal, but that was not permissible under Directive 2004/18, the contract may not be declared ineffective if the conditions laid down in that provision are satisfied, which it is for the referring court to determine.

Question 2

55 By its second question, the referring court essentially asks — in the event that the answer to Question 1 is in the affirmative — whether Article 2d(4) of Directive 89/665 is valid in the light of the principle of non-discrimination and the right to an effective remedy under Article 47 of the Charter.

56 In that regard, Fastweb contends that the publication in the Official Journal of a notice for voluntary *ex ante* transparency and observance of the 10-day minimum standstill period between that publication and conclusion of the contract does not ensure consistency with the principle of effective judicial protection. Such publication does not guarantee that potential competitors are informed of the award of a contract to a particular economic operator, especially if publication takes place during a period when activities are reduced or suspended.

57 As regards the fundamental right to effective judicial protection, the first paragraph of Article 47 of the Charter states that ‘everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in [that] article’.

58 It is settled law that the setting of reasonable time-limits for bringing proceedings, in the interests of legal certainty and for the protection of both the individual and the administrative authority concerned, is compatible with the fundamental right to effective judicial protection. Such time-limits must not make it impossible in practice or excessively difficult to exercise the rights conferred by the EU legal order (see, to that effect, the judgment in *Pelati*, C-603/10, EU:C:2012:639, paragraph 30 and the case-law cited).

59 Furthermore, the provisions of Directive 89/665, which is intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are designed to reinforce existing arrangements for ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified. Such protection cannot be effective if the interested party is unable to rely on those rules *vis-à-vis* the contracting authority (see, to that effect, the judgment in *Commission* v *Austria*, EU:C:2004:386, paragraph 20).

60 Accordingly, effective legal protection requires that the interested parties be informed of an award decision a reasonable period before the contract is concluded so that they have a real possibility of bringing proceedings and, in particular, of applying for interim measures pending conclusion of the

contract (see, to that effect, judgments in *Commission* v *Spain*, C-444/06, EU:C:2008:190, paragraphs 38 and 39, and *Commission* v *Ireland*, C-456/08, EU:C:2010:46, paragraph 33).

61 In providing for the publication in the Official Journal of a notice, in accordance with Article 3a of Directive 89/665, announcing the intention of concluding a contract, the second indent of Article 2d(4) of Directive 89/665 guarantees the transparency of the award of a contract. Accordingly, that provision is designed to ensure that all the candidates potentially concerned are in a position to take cognisance of the contracting authority's decision to award the contract without prior publication of a contract notice. Moreover, in accordance with the third indent of that provision, the contracting authority must observe a 10-day standstill period. The interested parties are thus given an opportunity to challenge the award of a contract before the courts before the contract is concluded.

62 In addition, it should also be noted that, even when the standstill period of at least 10 calendar days, provided for in Article 2d(4) of Directive 89/665, has elapsed, operators adversely affected may bring an action for damages under Article 2(1)(c) of Directive 89/665.

63 In that regard, as was noted in paragraph 44 above, account must be taken of the fact that, by the exception laid down in Article 2d(4) of Directive 89/665, the EU legislature is seeking to accommodate divergent interests, namely, the interests of the undertaking adversely affected, by conferring upon it the right to bring pre-contractual proceedings for interim relief and the right to obtain annulment of a contract that has been concluded unlawfully, and the interests of the contracting authority and of the undertaking selected, limiting the legal uncertainty that may be engendered by the ineffectiveness of the contract.

64 In the light of the foregoing, it must be held that, in providing for the effects of a contract to be maintained, Article 2d(4) of Directive 89/665 is not contrary to the requirements flowing from Article 47 of the Charter.

65 The same holds true with regard to the principle of non-discrimination, which, in the field of public procurement, pursues the same objectives, including the free movement of services and the opening up of undistorted competition in all the Member States (see, inter alia, *Wall*, C-91/08, EU:C:2010:182, paragraph 48, and *Manova*, C-336/12, EU:C:2013:647, paragraph 28). As has already been stated in paragraph 61 above, the second indent of Article 2d(4) of Directive 89/665 is designed to ensure that all the candidates potentially concerned are in a position to take cognisance of the contracting authority's decision to award the contract without prior publication of a contract notice and accordingly to bring proceedings for a review of its legality.

66 In the light of the foregoing, the answer to Question 2 is that examination of that question has not revealed anything which might affect the validity of Article 2d(4) of Directive 89/665.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **On a proper construction of Article 2d(4) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, where a public contract is awarded without prior publication of a contract notice in the *Official Journal of the European Union*, but that was not permissible under Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, the contract may not be declared**

ineffective if the conditions laid down in that provision are in fact satisfied, which it is for the referring court to determine.

2. Examination of the second question has not revealed anything which might affect the validity of Article 2d(4) of Directive 89/665, as amended by Directive 2007/66.

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL
BOT
delivered on 10 April 2014 (1)

Case C-19/13

Ministero dell'Interno
v
Fastweb SpA

(Request for a preliminary ruling from the Consiglio di Stato (Italy))

(Public procurement — Directive 89/665/EEC– Procedures for review of the award of public procurement contracts — Situations where the conditions for the use of a negotiated procedure without publication of a contract notice were not satisfied — Power of the review body to declare the contract ineffective — Scope of the exception laid down in Article 2d(4) of Directive 89/665, under which the review body must maintain the effects of the contract — Principle of equal treatment — Right to an effective remedy)

1. By this reference for a preliminary ruling, the Court is asked to define the scope of the powers conferred on the national court under Article 2d of Directive 89/665/EEC, (2) in terms of annulment and imposition of penalties, if it is established that a public procurement contract has been awarded in infringement of the rules concerning advertising and competitive procedure laid down in Directive 2004/18/EC. (3)

2. The objective of Directive 89/665 is to guarantee effective application of the rules relating to the award of public procurement contracts, by ensuring that there are effective and rapid review procedures in all Member States. (4) Through the amendment introduced by Directive 2007/66, the EU legislature sought to improve the effectiveness of those procedures by strengthening the guarantees of transparency and non-discrimination. With that in mind, it introduced, in Article 2d of Directive 89/655, penalties designed to be effective and dissuasive (5) so as to afford potential tenderers and economic operators who have been adversely affected effective judicial protection and to combat the most serious infringement of the law on public procurement, that is to say, the unlawful direct award of contracts.

3. Accordingly, under Article 2d(1)(a) of Directive 89/665, Member States are to ensure that a contract is declared ineffective by a review body independent of the contracting authority if the contracting authority has awarded the contract without prior publication of a contract notice in the *Official Journal of the European Union* in circumstances where to do so is not permissible under Directive 2004/18.

4. However, an exception to that rule is allowed under Article 2d(4) of Directive 89/665, the implications of which must be examined here.

5. Article 2d(4) of Directive 89/665 is worded as follows:

‘The Member States shall provide that paragraph 1(a) of this Article does not apply where:

– the contracting authority considers that the award of a contract without prior publication of a contract notice in the [Official Journal] is permissible in accordance with Directive 2004/18 …,

– the contracting authority has published in the [Official Journal] a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and

– the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.’

6. Under Article 3a of Directive 89/665, the contracting authority must state, in the notice announcing its intention of concluding a contract, its name and contact details. It must also describe the object of the contract and give the justification for its decision to award it without prior publication of a contract notice in the Official Journal. In addition, the contracting authority must state the name and contact details of the economic operator in favour of whom a contract award decision has been taken and, where appropriate, any other relevant information that it may consider useful.

7. Article 2d(4) of Directive 89/665 is designed to facilitate pre-contractual remedies, since, if a notice announcing an intention to conclude a contract is published (6) and if signature of the contract is delayed for a minimum standstill period of 10 days, the court is able to correct the infringement of the public procurement rules in good time. (7)

8. By its reference, the Consiglio di Stato (Italy) is seeking a preliminary ruling by the Court on the interpretation and validity of Article 2d(4) of Directive 89/665 in the light of the principle of equal treatment, recognised by the case-law as a fundamental principle of EU law, and of the right to an effective remedy, which is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

9. The reference has been made in proceedings brought by Fastweb SpA against the Ministero dell’Interno (Ministry of the Interior). Those proceedings concern the award to Telecom Italia SpA of a public contract for the supply of electronic communications services for a duration of seven years and a value of EUR 521 500 000.

10. It is common ground in the present case that the Ministero dell’Interno failed to observe the public procurement rules in awarding the contract by means of a negotiated procedure without prior publication of a contract notice.

11. By decision of 8 January 2013, the Consiglio di Stato held that the award was unlawful and annulled it.

12. Nevertheless, the Consiglio di Stato noted that the Ministero dell’Interno had published in the Official Journal a notice announcing its intention of entering into the contract with Telecom Italia, in accordance with Article 3a of Directive 89/665. The Consiglio di Stato also acknowledged that the Ministero dell’Interno had observed the minimum standstill period of 10 days between the award of the contract and its signature. Under Article 2d(4) of that Directive, the national court is therefore required to maintain the effects of that contract, despite the illegality of its award.

13. It is against that background that the referring court has expressed its uncertainty as to the extent of the powers accorded to the national court to annul and to impose penalties.

14. The Consiglio di Stato has therefore stayed proceedings and referred the following questions to the Court for a preliminary ruling:

‘(1) Must Article 2d(4) of Directive [89/665] be construed as meaning that, if, before awarding the contract directly to a specific economic operator, selected without prior publication of a contract notice, a contracting authority published the notice for voluntary ex ante transparency in the [Official Journal] and waited at least 10 days before concluding the contract, the national court is — always and in any event — precluded from declaring the contract to be ineffective, even if

it is established that there has been an infringement of the provisions permitting, subject to certain conditions, the award of a contract without a competitive tendering procedure?

(2) Is Article 2d(4) of Directive [89/665] — if interpreted as making it impossible to declare a contract ineffective, in accordance with national law (Article 122 of the Code [of Administrative Procedure]), even though the national court has established an infringement of the provisions permitting, subject to certain conditions, the award of a contract without a competitive tendering procedure — compatible with the principles of equality of the parties, of non-discrimination and of protecting competition, and does it guarantee the right to an effective remedy enshrined in Article 47 of the Charter …?'

15. The parties to the main proceedings have lodged observations, as have the Italian, Austrian and Polish Governments and also the European Parliament, the Council of the European Union and the European Commission.

16. In the present Opinion, I shall conclude that neither the aims of Directive 89/655 nor the wording of Article 2d of that directive preclude a Member State from allowing the review body freedom to assess the extent to which a contract concluded without prior publication of a contract notice in the Official Journal must be declared ineffective, if that body finds that, despite having published a notice in the Official Journal announcing its intention of concluding the contract and despite having observed the 10-day minimum standstill period between the award of the contract and its signature, the contracting authority has deliberately and intentionally infringed the rules regarding advertising and competitive procedure laid down in Directive 2004/18.

I – Facts

17. In 2003, the Public Safety Department of the Ministero dell'Interno entered into an agreement with Telecom Italia for the management and development of communications services. That contract was due to expire on 31 December 2011.

18. In view of the imminent expiry of that agreement, the Ministero dell'Interno re-appointed Telecom Italia, by decision of 15 December 2011, as its supplier and technological partner for the management and development of those services.

19. With a view to awarding the contract, the Ministero dell'Interno believed it possible to use a negotiated procedure without prior publication of a contract notice, on the basis of Article 57(2)(b) of Legislative Decree No 163 of 12 April 2006 laying down the Code of public works, services and supply contracts in implementation of Directives 2004/17/EC and 2004/18/EC (decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE), (8) which transposes Article 28(1)(e) of Directive 2009/81/EC into Italian law. (9)

20. Under Article 28(1)(e) of Directive 2009/81/EC, the contracting authority may award a contract by a negotiated procedure without prior publication of a contract notice 'when, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator'.

21. In the circumstances, the Ministero dell'Interno considered Telecom Italia to be the only economic operator in a position to perform the service agreement, for technical reasons and in order to protect (certain) exclusive rights.

22. That decision was submitted to the Avvocatura Generale dello Stato (State Legal Advisory Service), which gave a favourable opinion on 20 December 2011 regarding the lawfulness of proceeding as planned.

23. On the same day, the Ministero dell'Interno published a notice in the Official Journal announcing its intention of awarding Telecom Italia the contract for 'the provision of electronic communications services, including voice telephony, mobile telephony and data transmission services,

to the Civil Police and the armed service of the Carabinieri, in accordance with all the conditions laid down in the interests of national security concerning the confidentiality and security of information'.

24. On 22 December 2011, the Ministero dell'Interno adopted the administrative decision inviting Telecom Italia to take part in the negotiations scheduled for 23 December 2011.

25. The parties signed the framework agreement on 31 December 2011 — that is to say, after 10 days had elapsed from the date on which the notice was published in the Official Journal — for a duration of seven years and a value of EUR 521 500 000.

26. The contract award notice was published in the Official Journal on 16 February 2012.

27. Fastweb brought an action for annulment of the award before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Lazio; 'the TAR'), which is the body responsible for hearing proceedings challenging the award of a public contract in Italy. Fastweb sought a declaration that the award was invalid and ineffective on the ground that the conditions laid down in Article 28(1)(e) of Directive 2009/81 for use of a negotiated procedure without publication of a contract notice had not been satisfied.

28. The TAR upheld the action. It found that the data and circumstances relied upon by the Ministero dell'Interno did not constitute 'technical reasons' for the purposes of Article 57(2)(b) of Legislative Decree 163/2006, but rather reasons relating to expediency and to difficulties that might arise if the contract were to be awarded to another economic operator. However, after annulling the award of the contract, the TAR held that it could not declare the contract to be ineffective as the Ministero dell'Interno had fulfilled the obligation of transparency and observed the minimum standstill period under Article 121(5) of the Code of Administrative Procedure, which transposes Article 2d(4) of Directive 89/665 into Italian law.

29. On the other hand, the TAR found that those provisions did not preclude it from declaring the contract ineffective as from 31 December 2013, on the basis of Article 122 of the Code of Administrative Procedure.

30. The Ministero dell'Interno and Telecom Italia each lodged an appeal against that judgment before the Consiglio di Stato.

31. The Consiglio di Stato upheld the annulment of the award. It also held that the contracting authority had not adequately demonstrated that the conditions for use of a negotiated procedure without prior publication of a contract notice had been satisfied. In that regard, it found that what came to light, on the basis of all the arguments set out and documentation produced, including the technical report, was not so much the objective impossibility of entrusting those services to different economic operators, but rather the inexpediency of such a solution, essentially because, in the Ministry's view, it would inevitably involve changes, costs and a period of adjustment.

32. On the other hand, the Consiglio di Stato is uncertain as to the inferences properly to be drawn from that annulment in terms of the effects of the contract at issue in the light of the rules laid down by the EU legislature in Article 2d(4) of Directive 89/665.

II – Italian law

33. Directive 89/665 was transposed into Italian law by Legislative Decree No 53 of 20 March 2010, the content of which was subsequently incorporated into Article 120 et seq. of the Code of Administrative Procedure.

34. Article 121(1) of the Code of Administrative Procedure transposes Article 2d(1) of Directive 89/665 into Italian law. It provides that, in the following cases, the court which annuls the final award is to declare the contract to be ineffective, stating, in the light of the pleadings of the parties and the assessment of the seriousness of the conduct of the contracting entity and of the factual circumstances, whether the declaration of ineffectiveness is limited to the services still to be supplied at the date of publication of the decision or whether it is retroactive:

– if the contract has been definitively awarded without prior publication of a contract notice in the Official Journal or in the *Gazzetta ufficiale della Repubblica italiana*, when such publication was required under Legislative Decree 163/2006;

– if the contract has been definitively awarded by a negotiated procedure without publication of a notice, or awarded directly, when that was not permissible and with the result that no notice was published in the Official Journal or the Gazzetta ufficiale, when such publication was required by Legislative Decree 163/2006.

35. Article 2d(4) of Directive 89/665 was transposed into Italian law by Article 121(5) of the Code of Administrative Procedure, under which the ineffectiveness of the contract for which Article 121(1) (a) and (b) provide does not apply in the following circumstances:

– if, by reasoned decision adopted before the award procedure was initiated, the awarding body declared that the procedure without prior publication of a contract notice in the Official Journal or the Gazzetta ufficiale was permissible under Legislative Decree 163/2006;

– if the awarding body, for contracts with a Community dimension and of a value under the threshold, published a notice for voluntary *ex ante* transparency in the Official Journal and the Gazzetta ufficiale, respectively, pursuant to Article 79a of Legislative decree 163/2006, stating its intention of concluding the contract;

– if the awarding body did not conclude the contract until at least 10 days had elapsed after the day following the date on which the notice referred to in Article 121(1)(b) was published.

36. Article 122 of the Code of Administrative Procedure adds that, with the exception of the cases contemplated in Article 121(1) of the Code, the court which annuls the final award is to decide whether the contract should be declared ineffective, indicating from what date and taking into account the following: the interests of the parties; the real possibility that, in view of the irregularities established, the applicant might be awarded the contract; the stage reached in the performance of the contract; and the possibility of resuming the contract, in situations in which the irregularity flawing the award does not entail the obligation to recommence the procedure and an application for resumption of the contract has been made.

37. Article 3a of Directive 89/665 relating to the content and form of the notice for voluntary *ex ante* transparency is transposed into Italian law by Article 79a of Legislative Decree 163/2006.

III – My analysis

38. I have chosen to examine together the two questions referred by the Consiglio di Stato.

39. By those questions, the Consiglio di Stato is asking the Court, in essence, whether, under Article 2d(4) of Directive 89/665, read in the light of the principle of equal treatment and the right to an effective remedy, the national court is required, whatever the circumstances, to maintain the effects of a contract concluded without prior publication of a contract notice where the contracting authority has published in the Official Journal a notice stating its intention of concluding the contract and has observed the minimum standstill period, laid down in that provision, of 10 days between the award of the contract and its signature.

40. I think not. To my way of thinking, Article 2d(4) of Directive 89/665 cannot introduce an automatic mechanism of that nature, at the risk of compromising the effectiveness of the provisions introduced by the EU legislature in Directive 2007/66 and of infringing some of the fundamental principles recognised by that legislature vis-à-vis the economic operator who has been adversely affected.

41. Article 2 of Directive 2004/18, which is entitled ‘Principles of awarding contracts’ provides that contracting authorities must treat economic operators equally and non-discriminatorily and must act in a transparent way.

42. In that connection, the Court has held that the principle of equal treatment of tenderers or candidates constitutes a fundamental principle of EU law in the context of public procurement. (10) Respect for that principle must ensure the free movement of services within the European Union and its objective is to promote the development of healthy and effective competition between the economic operators concerned in all Member States. (11) As the Court has pointed out, it therefore precludes any negotiation between the contracting authority and a tenderer during a public procurement procedure. Respect for the principle of equal treatment implies not only non-discrimination on grounds of nationality, but also a duty of transparency in public procurement procedures. (12) The essential aim of that transparency is to ensure, in respect of all potential tenderers, a sufficient degree of advertising of the procurement procedure, thereby making it possible for the market to be opened up to competition and for the impartiality of the procedure to be reviewed. (13) It therefore seeks to avoid the risk of favouritism or arbitrariness on the part of the contracting authority so as to afford equality of opportunity to all tenderers when formulating their tenders. (14)

43. By dint of such duties, economic operators acquire rights which must be afforded effective judicial protection by the national courts. The courts must therefore be in a position to ensure that their judgments are fully complied with and they must be able to impose effective, proportionate and deterrent penalties so as to ensure that the rules relating to the award of public contracts are fully effective.

44. It was in order to guarantee the effective application of those principles and effective judicial protection for the tenderers concerned against the risks of favouritism or arbitrary behaviour on the part of the contracting authority that the EU legislature chose, in Directive 2007/66, to strengthen the effectiveness of proceedings brought in the Member States by persons with an interest in obtaining a specific contract and adversely affected by an alleged infringement. (15)

45. In principle, Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law (16) and, according to recital 20 to that directive, Directive 89/665 does not preclude the application of stricter penalties under national law, thus respecting, in accordance with recital 34, the principle of the procedural autonomy of the Member States.

46. Article 1(1) of Directive 89/665 accordingly requires Member States to ensure that any economic operator who has been adversely affected has access to a remedy that is effective and as rapid as possible against unlawful decisions taken by contracting authorities, in accordance with the conditions set out in Articles 2 to 2f of that directive. (17)

47. To that end and in accordance with Article 2(1) of Directive 89/665, Member States are required to ensure that the review body has the following powers:

– the power to adopt interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned;

– the power to annul decisions taken unlawfully; and

– the power to award damages to persons who have been adversely affected.

48. By Article 2(7) of Directive 89/655, the EU legislature leaves Member States free to determine in their national law the effects to attach to the exercise of those powers as regards the contract at issue.

49. However, the EU legislature excludes from the ambit of that freedom the situations contemplated in Articles 2d, 2e and 2f of that directive and, in particular, in cases in which the national court has annulled the contract for infringement of the rules on advertising and competitive procedure laid down in Directive 2004/18. Accordingly, the EU legislature chose, in such cases, to restrict the powers of the review body by expressly establishing the effects to attach to the annulment of the contract.

50. Thus, paragraph 1(1) of Article 2d of Directive 89/665, which is entitled ‘Ineffectiveness’, requires the review body to consider the contract ineffective if the contracting authority has awarded a

contract without prior publication of a contract notice in the Official Journal, in circumstances in which it was not permissible under Directive 2004/18 to do so. The wording is clear and, in principle, Member States are left no discretion whatsoever.

51. The EU legislature gives reasons for that restriction in recital 13 to Directive 2007/66, stating that the unlawful direct award of contracts constitutes, according to the case-law of the Court of Justice, the most serious breach of EU law in the field of public procurement. (18) According to the EU legislature, it is therefore necessary to provide for effective, proportionate and dissuasive penalties, which means that such contracts should be considered to be ineffective.

52. That being so, if the review body finds that the award of a public contract by negotiated procedure without prior publication of a contract notice is unlawful, it must annul the contract and declare it ineffective so as to restore competition and to create new business opportunities for the economic operator who has been adversely affected. (19)

53. However, the stringency of that rule is relaxed in Article 2d(2) of Directive 89/665, since the EU legislature leaves Member States free to determine the consequences that must ensue following a declaration that a contract is ineffective.

54. What is more, an exception to the general rule is allowed under Article 2d(4) of Directive 89/665, the wording and scope of which I must now interpret here.

55. I note that, under that provision, 'Member States shall provide that paragraph 1(a) of [Article 2d] does not apply where':

– the contracting authority believed that conclusion of the contract without prior publication was permissible under Directive 2004/18;

– the contracting authority has met an obligation of transparency before the signature of the contract by publishing in the Official Journal a notice for voluntary *ex ante* transparency; and

– the contracting authority has observed the minimum standstill period of 10 days between publication in the Official Journal of the notice stating its intention of concluding the contract and the conclusion of the contract.

56. At the hearing, the Parliament and the Commission confirmed that those conditions are cumulative.

57. It is perfectly clear from recitals 13, 14 and 26 to Directive 2007/66 that, by introducing that exception to the general rule, the EU legislature is seeking to reconcile the various interests in play, that is to say, the interests of the undertaking that has been adversely affected, to which it is important to make available the remedies of pre-contractual interim relief and of annulment of the contract unlawfully concluded, and the interests of the contracting authority and the undertaking selected, which entails the need to prevent the legal uncertainty that might be engendered by the ineffectiveness of the contract.

58. The EU legislature couched Article 2d(4) of Directive 89/665 in mandatory terms and, save where otherwise provided in that instrument, that provision requires the review body to maintain the effects of a contract even though it has been annulled, if all three conditions are satisfied, in order to preserve the desired balance between the various parties concerned.

59. I believe that, by adding to Directive 89/665, in its initial version, a separate provision as specific as Article 2d(4), the EU legislature intended to lay down a common, mandatory rule for all Member States. By contrast with other provisions under which Member States are expressly left free to determine, within the framework of their procedural autonomy, the appropriate inferences to be drawn from the annulment of a contract and its ineffectiveness, (20) Article 2d(4) of Directive 89/665 does not appear to allow Member States to impose a stricter penalty in accordance with recital 20 to Directive 2007/66 and, in particular, to declare the contract ineffective.

60. Does that necessarily mean, as the referring court expressly asks, that the review body 'is — always and in any event — precluded' from declaring the contract to be ineffective?

61. To my mind, the discretion accruing to the review body is to be found in the review that it must undertake as to whether the conditions laid down in Article 2d(4) of Directive 89/665 — and, in particular, the first condition — were satisfied.

62. If the review body finds that the conditions laid down in Article 2d(4) of Directive 89/665 were met, it is then required to maintain the effects of the contract in accordance with the wording and objective of that provision. If, on the other hand, the review body finds upon completing its review that those conditions were not satisfied, it must then declare the contract to be ineffective in accordance with the rule laid down in Article 2d(1)(a) of Directive 89/665 and, in that connection, it enjoys the discretion conferred on it under Article 2d(2) of the directive.

63. The discretion enjoyed by the review body therefore depends on the outcome of its review.

64. I shall now dwell on the scope of that review. There are two reasons for doing so.

65. The first reason relates to the attainment of the objectives that the EU legislature seeks to pursue by means of Article 1(1) of Directive 89/665 and, in particular, through the establishment of effective legal remedies in respect of decisions taken by awarding authorities in infringement of procurement law.

66. Review by the courts is necessary in order to ensure observance of the principle of equal treatment and fulfilment of the attendant obligation of transparency and to impose, where appropriate, an effective and dissuasive penalty.

67. Such review is also necessary in order to ensure the effectiveness of an action brought, pursuant to Article 47 of the Charter, by an undertaking which has been adversely affected. It must be borne in mind that recital 36 to Directive 2007/66 expresses a commitment on the part of the EU legislature to the effect that the 'Directive respects fundamental rights and observes the principles recognised in particular by the Charter' and, in particular, seeks to ensure full respect for the right to an effective remedy as enshrined in Article 47 of the Charter. Respect for the right to an effective judicial remedy presupposes that the national court has discretion as regards the aspect of compliance with the applicable law and, in the present case, as regards the question whether the conditions laid down in Article 2d(4) of Directive 89/665 are satisfied.

68. The second reason relates to the wording used by the EU legislature to formulate the first condition, which is laid down in the first indent of Article 2d(4) of Directive 89/665.

69. I would point out that, under that provision, the national court is required to maintain the effects of the contract unlawfully concluded, if 'the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/18'. (21)

70. It seems to me, however, that it would be extremely difficult to attain the objectives mentioned above by allowing the contracting authority so ample a measure of discretion as it enjoys under that provision, without it being open to some sort of judicial scrutiny.

71. That being so, that condition is purely enabling and legal protection for economic operators who have been adversely affected is undermined. (22)

72. First, that condition is tantamount to an acknowledgment that, regardless of the wording, context and objective of the provisions of Directive 89/665, the contracting authority is free to decide whether or not to issue a call for tenders and, consequently, whether or not to observe the principles of transparency and non-discrimination enshrined in Article 2 of Directive 2004/18, while at the same time it means that the contracting authority can be sure that a contract concluded in infringement of the rules on advertising will not be declared ineffective, if it has nevertheless published in the Official Journal a notice stating its intention of concluding the contract and has observed the 10-day minimum

standstill period. The ousted economic operator will only be able to bring an action for damages, which will not make it possible to put the contract unlawfully awarded out to competition.

73. There is clearly a paradox here.

74. I note that Directive 89/665 is expressly intended to strengthen the guarantees of transparency and non-discrimination in the field of public procurement so as to ensure that economic operators who have been adversely affected have effective judicial protection. (23) Moreover, I also note that it was to combat the unlawful award of privately negotiated public contracts and to protect potential tenderers against arbitrary decisions by the contracting authority that the EU legislature chose, in Directive 2007/66, to enhance the effectiveness of the review procedures. (24)

75. Second, as things stand, that condition allows the contracting authority to award a public contract directly, contrary to the requirements laid down in Directive 2004/18, by completing minimum procedural requirements and risking minimum penalties, which means that it is able to abuse the rights conferred on it.

76. As Fastweb points out in its observations, it is thus easier for the contracting authority to conclude a public contract with the undertaking of its choosing than to issue a proper call for tenders in accordance with the rules on advertising and competitive procedure laid down in Directive 2004/18.

77. First of all, the schedule of the call for tenders is avoided and the public contract can be awarded more quickly. The present case illustrates this point perfectly, since the procedure for awarding the contract at issue, which is for a duration of seven years and a value of EUR 521 500 000, was launched on 15 December 2011 and completed on 31 December 2011, that is to say, 15 days later.

78. Next, the rules on advertising are different. In a proper tendering procedure, the contracting authority is required to publish a contract notice and to notify each of the tenderers of the decisions taken. Prior publication and the opening of a competitive procedure are therefore formal requirements. In a negotiated procedure without publication of a contract notice, the contracting authority is required merely to publish a notice in the Official Journal, and the undertaking concerned then has 10 days within which to bring pre-contractual proceedings. Obviously, that publication does not ensure that the party concerned is as informed as he would be by the publication of a call for tenders in the Official Journal or individual notification of the decisions adopted by the contracting authority: the review procedures are commensurately limited.

79. Lastly, if the award of the contract is unlawful, owing inter alia to an irregularity in the tendering procedure, the contract may be declared ineffective. On the other hand, under the procedure provided for in Article 2d(4) of Directive 89/665, the review body is required to maintain the effects of the contract concluded in infringement of the rules on advertising and competitive procedure if the contracting authority published a notice for voluntary *ex ante* transparency and observed the minimum standstill period of 10 days between that publication and conclusion of the contract. The review body may, it is true, award damages against the contracting authority. However, the grant of damages does not enable the contract unlawfully awarded to be put out to competition.

80. I therefore consider it essential that, in the course of its verification of the conditions laid down in Article 2d(4) of Directive 89/665, the review body assess the conduct of the contracting authority. In my view, it should, in particular, determine whether the contracting authority acted in good faith and with due diligence when concluding the contract and whether the reasons it has given for awarding the contract by a negotiated procedure without publishing a contract notice in the Official Journal are or were legitimate.

81. That also seems to be the opinion expressed in their observations by the Italian and Polish Governments, and by the Council and the Commission. (25)

82. We must not lose sight of the fact that the maintenance of the effects of the contract, as provided for under Article 2d(4) of Directive 89/665, depends on the good faith of the contracting authority and is designed to preserve legal certainty for the other parties to the contract. The EU legislature expressly recognises this in recital 26 to Directive 2007/66, emphasising the need to ‘avoid legal uncertainty

which may result from ineffectiveness' of the contract. Moreover, the Court expressly acknowledged this in *Commission* v *Germany*. (26)

83. However, there cannot be legal certainty or legitimate expectations where the contracting authority has acted in bad faith in the application of the rule of law and has deliberately and intentionally failed to comply with the public procurement rules.

84. At the hearing, Telecom Italia suggested that the first indent of Article 2d(4) of Directive 89/665 in no way placed the contracting authority under a duty to act in good faith and with due diligence, arguing that the only obligation incumbent upon that authority is to state reasons for its decisions. I refuse to countenance that interpretation, because good faith on the part of administrative authorities is as integral part of their duties and forms the basis for the trust that the persons administered must be able legitimately to place in their actions. That is to say, good faith is one of the fundamental principles that must inform the daily business of those authorities. It seems quite obvious to me, therefore, that the first indent of Article 2d(4) of Directive 89/665 presupposes, for the purposes of its application, that the contracting authority acted in good faith.

85. It is essential, therefore, for the national court to examine the reasons which could, reasonably and honestly, have led the contracting authority to believe that it was entitled to award a contract by negotiated procedure, without publication of a contract notice; and to distinguish between a mistake committed in good faith and an intentional infringement of the procurement rules. It is after that examination that the national court will be in a position to determine the most appropriate penalty.

86. There are thus two possible situations.

87. The first situation is where the national court finds that the error of law made by the contracting authority is excusable because it has shown good faith. In those circumstances, the national court is required to maintain the effects of the contract in accordance with Article 2d(4) of Directive 89/665 so as to preserve the desired balance between the interests of the various parties.

88. In that connection, there is nothing to suggest that the review body may then impose alternative penalties such as those provided for in Article 2e(2) of Directive 89/665.

89. First, the review body may not impose an alternative penalty if there is no penalty in respect of which it would serve as an alternative. In other words, there must be a legal basis for the imposition of a penalty. In a situation where all the conditions laid down in Article 2d(4) are met, the EU legislature requires the review body, as we have seen, to maintain the effects of the contract, thus preventing that body from being able to penalise the contracting authority by declaring the contract ineffective. No 'penalty' exists, therefore, for the purposes of the directive.

90. Secondly, as regards the alternative penalties under Article 2e of Directive 89/665, the EU legislature expressly refers to situations in which the review body may, instead of declaring the contract ineffective, impose a fine or shorten the duration of the contract, and no mention is made of the situation covered by Article 2d(4) of the directive. (27)

91. In those circumstances, it can reasonably be asked whether the material scope of Article 2e of Directive 89/665 should be construed more broadly. I do not think so. To do so would be to disregard the very terms of Article 2(7) of the directive and the intention of the EU legislature. In Article 2(7) of Directive 89/665, the EU legislature expressly excluded the situations referred to in Article 2e from the ambit of the freedom accorded to Member States to determine the effects that must attach to the exercise of their power to impose penalties.

92. The second situation is where the review body considers the error of law to be inexcusable, on the view that the contracting authority has deliberately and voluntarily infringed the rules on prior advertising and competitive procedure. In that situation, the infringement must, obviously, be penalised. There is no legitimate reason for maintaining the effects of a contract the conclusion of which constitutes, within the meaning of the case-law of the Court of Justice, the most serious breach of EU law in the field of public procurement.

93. In those circumstances, the review body is then required to declare the contract ineffective in accordance with the rule laid down in Article 2d(1)(a) of Directive 89/665 and to restore the rights of the economic operator adversely affected by that fraudulent act.

94. In that situation, Member States cannot be denied the power to declare the contract ineffective because, if they were, the contracting authority would then be free to infringe the rules of law on advertising and competitive procedure, subject to having to pay, depending on the circumstances, damages to the economic operator adversely affected. That interpretation would undoubtedly jeopardise the objectives that the EU legislature intended to pursue when adopting Directive 2007/66. (28)

95. It should not be forgotten that the whole point is to ensure that the penalty is effective. In a situation in which the contracting authority has clearly acted with the aim of circumventing the applicable rules, only the ineffectiveness of the contract ensures a dissuasive and effective penalty.

96. Nor should it be forgotten that the aim of Directive 89/665 is to ensure respect for the principle of equal treatment. Only by annulling the contract unlawfully concluded and divesting it of its effects is it possible to restore competition in the market and to create new business prospects for the economic operator who has been unlawfully denied the opportunity of participating in the tendering procedure.

97. That said, it is appropriate at this stage to point out that the review body remains free to assess the extent to which the contract is to be declared ineffective, in accordance with Article 2d(2) of Directive 89/665.

98. We have seen that Article 2d(2) of Directive 89/665 provides that Member States are to be free to determine in their national law the consequences of a contract being considered ineffective. According to the EU legislature, Member States may accordingly confer on the review body the power to cancel all the contractual obligations retroactively or to limit the scope of the cancellation of the contract to the obligations that have yet to be performed. Nevertheless, the EU legislature intends, in the latter case, to confer a broad measure of discretion on the review body. It refers expressly to the wording of Article 2e(2) of Directive 89/655. Under that provision, Member States may confer on the review body broad discretion to take into account all the relevant factors — including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2) of that directive, the extent to which the contract remains in force — in order to decide, depending on the circumstances, whether the duration of the contract should be shortened or whether financial penalties should be imposed.

99. And accordingly it is there that, upon reading Article 2d(2) and Article 2e(2) of Directive 89/665 together, that we can see at the point of interconnection the discretion enjoyed by the review body when it has to declare the ineffectiveness of a contract concluded unlawfully.

100. In the light of all those factors, I therefore feel that neither the aims of Directive 89/665 nor the wording of Article 2d thereof preclude a Member State from allowing the review body freedom to assess the extent to which a contract concluded without prior publication of a contract notice in the Official Journal must be declared ineffective, if it finds that, despite having published a notice in the Official Journal expressing its intention of concluding the contract and having observed the minimum standstill period of 10 days between the award of the contract and its signature, the contracting authority has deliberately and intentionally infringed the rules on advertising and competitive procedure laid down in Directive 2004/18.

101. On the contrary, it seems to me that that is the obvious interpretation if we wish to guarantee the effectiveness of Directive 89/665 and to ensure the protection of the fundamental rights accorded to the economic operator unlawfully denied the opportunity to participate in the tendering procedure.

102. In the context of the main proceedings, I think it will therefore be for the competent national court to assess the legitimacy of the reasons on which the Minister dell'Interno relied in order to award the contract at issue by negotiated procedure without prior publication of a contract notice in the Official Journal.

103. In that regard, I wish to make the following points.

104. In the present case, I reiterate that the Ministero dell'Interno considered it legitimate to use that procedure, basing its view on Article 57(2)(b) of Legislative Decree 163/2006, which transposes Article 28(1)(e) of Directive 2009/81/EC into Italian law.

105. I note that, under that provision, that procedure is permitted 'when, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator'.

106. In the circumstances, the Ministero dell'Interno believed that Telecom Italia was the only economic operator in a position to perform the service agreement, for technical reasons and in order to protect (certain) exclusive rights.

107. However, the TAR found that the data and circumstances relied upon by the Ministero dell'Interno did not constitute 'technical reasons' for the purposes of Article 57(2)(b) of Legislative Decree 163/2006, but were rather considerations relating to expediency and to the difficulties that could arise if the contract were awarded to another economic operator.

108. Similarly, the Consiglio di Stato held that the contracting authority had not proved to the requisite legal standard that the conditions for using a negotiated procedure without prior publication of a contract notice had been satisfied. In that regard, it found that what came to light, on the basis of all the arguments set out and documentation produced, including the technical report, was not so much the objective impossibility of entrusting those services to different economic operators, but rather the supposed inexpediency of such a solution, essentially because, in the Ministry's view, it would necessarily involve changes, costs and a period of adjustment.

109. It is true that, in the light of the information before the Court, the Ministero dell'Interno does not appear to put forward specific technical reasons or even requirements relating to the particular nature of the equipment at issue or to the sensitivity of the contract.

110. I understand that, in the field of public safety or defence, it may be legitimate to refrain from applying certain provisions of procurement law, since some contracts are so sensitive that it would be inappropriate to publicise them and open them up to competition between economic operators beforehand. That is the position in the case of contracts concluded by intelligence services or relating to counter-espionage activities, for example. It is also the case for particularly sensitive purchases, requiring an extremely high degree of confidentiality, such as those linked to anti-terrorism or related specifically to sensitive activities carried out by the forces of law and order.

111. In the present case, the Ministero dell'Interno does not appear to mention such circumstances. Admittedly, it states that the contract is for 'the provision of electronic communications services, including voice telephony, mobile telephony and data transmission services, to the Civil Police and the armed service of the Carabinieri, *in accordance with all the conditions laid down in the interests of national security concerning the confidentiality and security of information*'. (29) However, it appears — particularly in the light of the findings of the TAR and of the Consiglio di Stato — that the Ministero dell'Interno has not established the sensitive nature of the contract and the equipment at issue or even mentioned special requirements connected, for example, with information security or the protection of confidential or classified information which, in the interests of national security, might in fact require specific protection and involve a particular choice of candidate.

112. Moreover, I am surprised by the chronology of events, and particularly by the speed with which the contract was awarded. It is apparent from the papers before the Court that the Ministero dell'Interno decided to renew the telephony contract concluded in 2003 with Telecom Italia only 15 days before that agreement expired, that is to say, on 15 December 2011. Furthermore, it is also apparent from the documents before the Court that the contract was signed on 31 December 2011, that is to say, 15 days later. That conduct surprises me in view of the importance for the operation of the authorities concerned, the duration of the contract (seven years) and its value (EUR 521 500 000), unless it is considered that there was an understanding between the Ministero dell'Interno and Telecom Italia that the agreement would be renewed.

113. Lastly, I think that it is clearly necessary to take into account the fact that the Ministero dell'Interno is a public authority with legal advisers who have enough sense not to commit an error of assessment as regards the circumstances in which a public contract may be awarded without being advertised or put out to competition beforehand.

114. That said, it will be for the competent national court to determine, in the light of all the information at its disposal, whether such an error is excusable or whether it indicates a deliberate and intentional infringement of the rules on procurement.

115. Having regard to all those factors, I therefore believe that Article 2d(4) of Council Directive 89/665, read in the light of the principle of equal treatment and of the right to an effective remedy, is to be interpreted as not precluding a Member State from allowing the review body freedom to assess the extent to which a contract concluded without prior publication of a contract notice in the Official Journal must be declared ineffective, if it finds that, despite having published a notice in the Official Journal announcing its intention of concluding the contract and having observed the minimum standstill period of 10 days between the award of the contract and its signature, the contracting authority has deliberately and intentionally infringed the rules on advertising and competitive procedure laid down in Directive 2004/18.

IV – Conclusion

116. In the light of the foregoing considerations, I therefore propose that the Court give the following answer to the question referred by the Consiglio di Stato:

Article 2d(4) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, read in the light of the principle of equal treatment and of the right to an effective remedy, is to be interpreted as meaning that it does not preclude a Member State from allowing the review body freedom to assess the extent to which a contract concluded without prior publication of a contract notice in the *Official Journal of the European Union* must be declared ineffective, if it finds that, despite having published a notice in the Official Journal announcing its intention of concluding the contract and having observed the minimum standstill period of 10 days between the award of the contract and its signature, the contracting authority has deliberately and intentionally infringed the rules on advertising and competitive procedure laid down in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

---

1 – Original language: French.

---

2 – Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').

---

3 – Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

4 – See the third recital in the preamble to Directive 89/665 and the third subparagraph of Article 1(1) thereof. See also *Commission* v *Germany*, C-503/04, EU:C:2007:432, paragraph 35 and the case-law cited.

---

5 – See recitals 27 and 28 to Directive 2007/66.

---

6 – That notice is also called ‘notice for voluntary *ex ante* transparency’.

7 – See recital 28 to Directive 2007/66.

8 – Ordinary supplement to GURI No 100 of 2 May 2006. Decree as amended by Legislative Decree 152 of 11 September 2008 (ordinary supplement to GURI No 231 of 2 October 2008; ‘Legislative Decree 163/2006’).

9 – Directive of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76), as amended by Commission Regulation (EU) No 1251/2011 of 30 November 2011 (OJ 2011 L 319, p. 43) (‘Directive 2009/81’). Article 28(1)(e) of Directive 2009/81 reproduces, essentially *verbatim*, the terms of Article 31(1)(b) of Directive 2004/18.

10 – See the arguments concerning that principle in point 34 et seq. of my Opinion in *Wall* (C-91/08, EU:C:2009:659).

11 – See, inter alia, *Manova*, C-336/12, EU:C:2013:647, paragraph 28. See, also, *Wall*, EU:C:2010:182, in which the Court stated that ‘[Articles 43 EC and 49 EC] and the principles of equal treatment and non-discrimination on grounds of nationality, and the consequent obligation of transparency, pursue the same objectives as Council Directive [92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1)], in particular the free movement of services and their opening up to undistorted competition in the Member States’ (paragraph 48).

12 – See *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 109 and the case-law cited, and *Parking Brixen*, C-458/03, EU:C:2005:605, paragraph 49 and the case-law cited.

13 – See *Wall*, EU:C:2010:182, paragraph 36 and the case-law cited.

14 – *See Commission* v *Belgium*, C-87/94, EU:C:1996:161, paragraphs 54 to 56.

15 – See, inter alia, recitals 3 and 4 to that directive. See, also, *Commission* v *Austria*, C-212/02, EU:C:2004:386, paragraphs 20 to 22.

16 – See *Strabag and Others*, C-314/09, EU:C:2010:567, paragraph 33 and the case-law cited.

17 – See, also, *GAT*, C-315/01, EU:C:2003:360, paragraph 44 and the case-law cited.

18 – See *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2005:5, paragraph 37.

19 – Recital 14 to Directive 2007/66.

20 – See, inter alia, Article 2d(3) of Directive 89/665, which introduces a qualification of the general rule laid down in Article 2d(1) by stating that 'Member States may provide that the review body … may not consider a contract ineffective, even though it has been awarded illegally … if the review body finds … that overriding reasons relating to a general interest require that the effects of the contract should be maintained'. The wording of that provision is clear, the EU legislature plainly recognising that the national court has a discretion when determining the most appropriate penalty where there are overriding reasons relating to the general interest.

---

21 – Emphasis added. That wording reappears in Article 2e(2) of the **Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (**COM(2006) 195 final) and similar wording is to be found in Point 3 of the Explanatory Memorandum for that Proposal, which provides that '[w]hen an awarding authority *considers* that it has the right to directly award a contract …, it must … suspend the conclusion of the contract for a minimum period of ten calendar days, following sufficient publicity in the form of a simplified award notice' (emphasis added).

---

22 – A condition is 'enabling' if the origin or performance of the obligation depends solely on the intention of only one of the contracting parties.

---

23 – See recital 3 to that directive.

---

24 – *Commission* v *Austria*, EU:C:2004:386, paragraphs 20 to 22.

---

25 – See paragraphs 22 and 27 of the observations submitted by the Italian Government, paragraph 12 of those submitted by the Polish Government, point 33 of those submitted by the Council and point 48 of those submitted by the Commission.

---

26 – EU:C:2007:432, paragraph 33 and the case-law cited. See also, by analogy, *Strabag and Others*, EU:C:2010:567, in which the Court stated that time-barring rules are necessary 'so as to prevent the candidates and tenderers from being able, at any moment, to invoke infringements of that legislation, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements' (paragraph 37 and the case-law cited).

---

27 Those situations are the following: (i) the situation referred to in Article 1(5) of Directive 89/665, in which the contract is concluded even though the economic operator adversely affected has lodged a complaint with the contracting authority; (ii) the situation referred to in Article 2(3) of that directive, in which the contracting authority concludes the contract before the national court rules on the application for interim relief or on the action; (iii) the situation referred to in Article 2a(2) of that directive, in which the conclusion of the contract following the award decision takes place before the expiry of the 10-day minimum standstill period following notification of that decision to the tenderers or candidates; and (iv) the situation in which the contract has been declared ineffective for the reasons expressly laid down in Article 2(1) of that directive.

---

28 – According to settled case-law, in order to ensure the uniform interpretation and application of a provision, one EU language version of which differs from the other language versions, it must be interpreted by reference not only to the general scheme of the rules of which it forms part but also to the objective pursued by the EU legislature (see, inter alia, Endendijk, C-187/07, EU:C:2008:197, paragraph 22 et seq.).

---

29 – Emphasis added.

JUDGMENT OF THE COURT (Fifth Chamber)

8 May 2014 (*)

(Public supply contracts — Directive 2004/18/EC — Award of a contract without initiating a tendering procedure — In-house award — Contractor legally separate from the contracting authority — Condition of ‘similar control’ — Contracting authority and contractor not linked by a relationship of control — Third party public authority exercising partial control over the contracting authority and control over the contractor which could be qualified as ‘similar’ — ‘Horizontal in-house transaction’)

In Case C-15/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hanseatisches Oberlandesgericht Hamburg (Germany), made by decision of 6 November 2012, received at the Court on 10 January 2013, in the proceedings

Technische Universität Hamburg-Harburg,

Hochschul-Informations-System GmbH

v

Datenlotsen Informationssysteme GmbH,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 November 2013,

after considering the observations submitted on behalf of:

– the Technische Universität Hamburg-Harburg, by T. Noelle and I. Argyriadou, Rechtsanwälte,

– Hochschul-Informations-System GmbH, by K. Willenbruch and M. Kober, Rechtsanwälte,

– Datenlotsen Informationssysteme GmbH, by S. Görgens, Rechtsanwalt,

– the Czech Government, by M. Smolek, acting as Agent,

– the Spanish Government, by J. García-Valdecasas Dorrego, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

– the Hungarian Government, by M. Fehér, K. Szíjjártó and K. Molnár, acting as Agents,

– the European Commission, by A. Tokár and M. Noll-Ehlers, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 January 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between, on the one hand, the Technische Universität Hamburg-Harburg (the Polytechnic University of Hamburg; 'the University') and Hochschul-Informations-System GmbH ('HIS') and, on the other, Datenlotsen Informationssysteme GmbH concerning the lawfulness of the award of a contract by the University directly to HIS without applying the award procedures under Directive 2004/18.

Legal context

EU law

3 Directive 2004/18 establishes the regulatory framework for contracts awarded by contracting authorities.

4 Article 1(2)(a) of that directive, entitled 'Definitions' provides:

'"Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.'

5 Article 1(8) provides:

'The terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The terms "economic operator" shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interests of simplification.

...'

6 Article 1(9) of Directive 2004/18 defines in detail the entities which are regarded as contracting authorities and which must, for the purposes of concluding a contract for pecuniary interest with an economic operator, initiate a procedure for awarding the contract in accordance with the rules of that directive.

7 Article 7 of Directive 2004/18, entitled 'Threshold amounts for public contracts', sets the thresholds for the estimated values on the basis of which a contract must be awarded in accordance with the rules of that directive. Those thresholds are amended at regular intervals by Commission regulations and adapted to economic circumstances. At the material time, the threshold relating to supply contracts awarded by contracting authorities other than central government authorities was set at EUR 193 000 by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64).

Award of a public contract without applying the procedures laid down by Directive 2004/18 — In-house award

8 The conditions for making such an award have been established and developed by the case-law of the Court, which has held that a call for tenders through the initiation of a procedure under Directive 2004/18 is not mandatory in a case where the contracting authority exercises over a person, legally separate from that authority, a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities with the

controlling contracting authority or authorities (see, to that effect, Case C-107/98 *Teckal* EU:C:1999:562, paragraph 50).

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 The University is a public higher education establishment of the Bundesland (Federal State) of the Freie und Hansestadt Hamburg (Free and Hanseatic City of Hamburg) ('the City of Hamburg'). It is a body governed by public law for the purposes of Article 1(9) of Directive 2004/18, and therefore a contracting authority. With a view to purchasing an IT system for higher education management, the University carried out an assessment exercise in which it compared the IT systems developed by Datenlotsen Informationssysteme GmbH and HIS. At the end of that assessment, the University elected to purchase HIS's system, and on 7 April 2011 it concluded a supply contract by direct award with that company, without applying the tendering procedures laid down in Directive 2004/18. The estimated value of that contract was EUR 840 000.

10 It is apparent from the file before the Court that HIS is a limited company governed by private law, one third of its capital being owned by the Federal Republic of Germany and two thirds by the 16 German Länder, with the City of Hamburg's share corresponding to 4.16% of that capital. In accordance with Paragraph 2 of the company's articles of incorporation, the object of its business is to support higher education establishments and the competent authorities in their efforts to achieve the rational and effective fulfilment of their higher educational role. HIS's IT systems are used in more than 220 public and religious higher education establishments in Germany.

11 Under Paragraph 12(1) of HIS's articles of incorporation, its supervisory board is made up of ten members, seven of whom are appointed on a proposal from the Conference of Ministers of the Länder, two on a proposal from the Conference of Rectors of the higher education establishments, an association bringing together German universities and higher education establishments which are public or recognised by the State, and one on a proposal from the Federal authorities. Under Paragraph 15(1) of its articles of incorporation, HIS has a board of trustees (Kuratorium), and 19 of its 37 members come from the Conference of Ministers of the Länder. As regards the volume of its activities, 5.14% of HIS's turnover relates to activities on behalf of entities other than public higher education authorities.

12 The direct award of the contract by the University to HIS is, according to those contracting parties, justified on the ground that, although there is no relationship of control between the two entities, the condition of 'similar control', established by the above case-law of the Court, is satisfied because both those parties are under the control of the City of Hamburg.

13 Datenlotsen Informationssysteme GmbH challenged the decision to award the contract directly in an action brought before the Vergabekammer of the City of Hamburg, a body with jurisdiction at first instance in public procurement cases, which granted the application. The Vergabekammer found that the conditions required by the case-law of the Court for an in-house award were not satisfied in the present case. Specifically, the condition for 'similar control' was not satisfied since the University, as contracting authority, was not in a position to exercise control over HIS similar to that which it exercised over its own departments. It is true that the University was a legal person under public law emanating from the City of Hamburg and that that city had a 4.16% share in the capital of HIS. Nevertheless, the University and the City of Hamburg were separate legal entities.

14 Likewise, the consideration that the City of Hamburg controlled both the University and HIS was also insufficient to satisfy that condition as such a form of 'indirect control' had no basis in the case-law of the Court. The Vergabekammer also observed that the University was autonomous and that the city of Hamburg's power over it to monitor compliance and expediency in relation to the management of allotted funds was not the same as the managerial power which a contracting authority must have. Nor could there be any question of the City of Hamburg exercising control over HIS, since the city did not have a permanent representative on the supervisory board of that company.

15 HIS and the University challenged that decision of the Vergabekammer before the referring court.

16 The referring court observes that the issue, keenly debated in academic writings at national level, of whether the award of a contract within a relationship between three entities, known as a ‘horizontal in-house transaction’, is covered by the case-law stemming from *Teckal* (EU:C:1999:562) has not yet been addressed by the case-law of the Court. It considers that the spirit and the purpose of the exemption for in-house awards established by that judgment could allow horizontal in-house transactions, such as the one at issue in the main proceedings, to come within that exemption. However, it states that in the present case there is no municipal cooperation within the meaning of the case-law of the Court (Case C-480/06 *Commission v Germany* EU:C:2009:357, and Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* EU:C:2012:817), since neither the University nor HIS are public authorities, and HIS is not entrusted directly with the performance of a public service task.

17 The referring court states that, in accordance with their statutes, public higher education establishments have a large degree of autonomy in the areas of research and education, and that the exercise of those autonomous powers is subject only to supervision of legality. However, the contract at issue in the main proceedings falls within the management of funds allotted to the University, in which the competent authorities have a power of control which goes as far as allowing them to annul or amend decisions taken in relation to procurement.

18 The referring court considers that, in the area of procurement and supplies for public higher education establishments, the condition of ‘similar control’ is satisfied. However, it is unsure whether that condition requires that the control should concern all fields of activity of the subordinate entity, so that a restriction of that control to supply contracts does not permit the inference that that condition has been satisfied. This approach is also supported by the case-law of the Court according to which the contracting authority must be able to exercise decisive influence over both the strategic objectives and the important decisions of the subordinate entity.

19 As regards the control exercised by the City of Hamburg over HIS, the referring court states that the fact that the City of Hamburg owns only 4.16% of that company’s capital and does not have a permanent representative on its supervisory board could militate against the existence of control similar to that which it exercises over its own departments. As regards the second condition imposed by the case-law of the Court, relating to the carrying out of the essential part of the contractor’s activity, the referring court considers that that condition is satisfied in the present case, since HIS’s business is predominantly devoted to public higher education establishments and its other business activities are ancillary in nature.

20 In those circumstances, the Hanseatisches Oberlandesgericht Hamburg (Hamburg Higher Regional Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must a “public contract” within the meaning of Article 1(2)(a) of Directive 2004/18 … be interpreted as including a contract in the case of which, although the contracting authority does not exercise over the contractor a control similar to that which it exercises over its own departments, both the contracting authority and the contractor are controlled by the same body, which is itself a public contracting authority within the meaning of Directive 2004/18 and the contracting authority and the contractor carry out the essential part of their activities with that common body (horizontal in-house transaction)?

If the first question is answered in the affirmative:

(2) Must the control similar to that which the contracting authority exercises over its own departments extend to all aspects of the contractor’s activity or is it sufficient for it to be confined to the area of procurement?’

Consideration of the questions referred

21 By its questions, which it is appropriate to consider together, the national court asks, in essence, whether Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a contract for the supply of products concluded between (i) a university which is a contracting authority and whose

purchases of products and services are controlled by a German Federal State, and (ii) an undertaking under private law, owned by the Federation and by Federal States, including the abovementioned Federal State, constitutes a public contract for the purposes of that provision.

22 In accordance with the case-law of the Court, the principal objective of the EU rules in the field of public procurement is the opening-up to undistorted competition in all the Member States with regard to the execution of works, the supply of products or the provision of services; that entails an obligation on all contracting authorities to apply the relevant rules of EU law where the conditions for such application are satisfied (see, to that effect, Case C-26/03 *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraph 44).

23 Any exception to the application of that obligation must consequently be interpreted strictly (see *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraph 46).

24 The Court concluded that, in view of the application of the procedures for awarding public contracts laid down in Directive 2004/18, it suffices in principle, in accordance with Article 1(a) of that directive, if a contract for pecuniary interest was concluded between, on the one hand, a contracting authority and, on the other, a person legally distinct from that contracting authority (see, to that effect, *Teckal* EU:C:1999:562, paragraph 50).

25 The exception to the application of that principle, recognised by the Court in relation to in-house awards, is justified by the consideration that a public authority which is a contracting authority has the possibility of performing its public-interest tasks by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments, and that that exception may be extended to situations in which the other contracting party is an entity legally distinct from the contracting authority, where the latter exercises control over the contractor similar to that which it exercises over its own departments and that contractor carries out the essential part of its activities with the contracting authority or authorities which own it (see, to that effect, *Teckal* EU:C:1999:562, paragraph 50, and *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraphs 48 and 49). In such a situation, the contracting authority can be regarded as employing its own resources.

26 The Court has further clarified the meaning of the term ‘similar control’, stating that the contracting authority must have a power to exercise decisive influence over both the strategic objectives and the significant decisions of the contractor, and that the control exercised by the contracting authority must be genuine, structural and functional (see, to that effect, Joined Cases C-182/11 and C-183/11 *Econord* EU:C:2012:758, paragraph 27 and the case-law cited).

27 Furthermore, the Court has acknowledged that, under certain conditions, ‘similar control’ may be exercised jointly by a number of public authorities which are joint owners of the contractor (see, to that effect, *Econord* EU:C:2012:758, paragraphs 28 to 31 and the case-law cited).

28 In the action in the main proceedings, it is common ground that there is no relationship of control between the University, as the contracting authority, and HIS, the contractor. The University holds no share in the capital of that entity and has no legal representative in its management bodies.

29 Accordingly, the reason which justifies recognition of the exception for in-house awards, that is to say, the existence a specific internal link between the contracting authority and the contractor, is absent in a situation such as that in the main proceedings.

30 Therefore, such a situation cannot be covered by that exception otherwise the limits of its application, which have been clearly defined by the case-law of the Court, would be extended in such a way as to reduce significantly the scope of the principle set out in paragraph 24 above.

31 Furthermore, it should be noted that, in any event, on the basis of the evidence in the file before the Court and in the light of the case-law set out above, the City of Hamburg is not in a position to exercise ‘similar control’ over the University.

32 The control exercised by the City of Hamburg over the University extends only to part of its activity, that is to say, solely in matters of procurement, but not to education and research, in which the

University has a large degree of autonomy. Recognising the existence of ‘similar control’ in such a situation of partial control would run counter to the case-law cited in paragraph 26 above.

33 In those circumstances, there is no need to examine whether the exception concerning in-house awards is capable of applying to so-called ‘horizontal in-house transactions’, that is to say, a situation in which the same contracting authority or authorities exercise ‘similar control’ over two distinct economic operators, one of which awards a contract to the other.

34 As regards the applicability, in the main proceedings, of the case-law on inter-municipal cooperation resulting from *Commission* v *Germany* (EU:C:2009:357) and *Ordine degli Ingegneri della Provincia di Lecce and Others* (EU:C:2012:817), it must be noted, as the referring court did, that for the reasons set out in paragraph 16 above the conditions for the application of the exception provided for in that case-law have not been satisfied.

35 Thus, the cooperation between the University and HIS is not aimed at carrying out a public task which both of them have to perform, within the meaning of the case-law (see *Ordine degli Ingegneri della Provincia di Lecce and Others* EU:C:2012:817, paragraphs 34 and 37).

36 Having regard to the foregoing considerations, the answer to the questions referred is that Article 1(2)(a) of Directive 2004/18 must be interpreted as meaning that a contract for the supply of products concluded between (i) a university which is a contracting authority and whose purchases of products and services are controlled by a German Federal State, and (ii) an undertaking under private law, owned by the Federation and by Federal States, including the abovementioned Federal State, constitutes a public contract for the purposes of that provision, and must therefore be subject to the public procurement rules laid down in that directive.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that a contract for the supply of products concluded between (i) a university which is a contracting authority and whose purchases of products and services are controlled by a German Federal State, and (ii) an undertaking under private law, owned by the Federation and by Federal States, including the abovementioned Federal State, constitutes a public contract for the purposes of that provision, and must therefore be subject to the public procurement rules laid down in that directive.

[Signatures]

* Language of the case: German.

EU:C:2014:23

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 23 January 2014 (1)

Case C-15/13

Technische Universität Hamburg-Harburg,

Hochschul-Informations-System GmbH

v

Datenlotsen Informationssysteme GmbH

(Request for a preliminary ruling from the Hanseatisches Oberlandesgericht Hamburg (Germany))

(Public procurement — Directive 2004/18/EC — Conditions governing the applicability of the exemption for in-house transactions — Horizontal in-house transactions — Contracting authority and contractor which are legally distinct and are not linked by a relationship of control — Control exercised over the contracting authority and the contractor by a third party, itself a public authority — Scope of the ‘similar control’ requirement — Cooperation between public bodies)

1. The present request for a preliminary ruling, which has been submitted by the Hanseatisches Oberlandesgericht (Higher Regional Court) Hamburg, places before the Court a new type of case in the field of public procurement which will give it the opportunity to clarify the scope of the case-law according to which, subject to certain conditions, some public contracts may be exempt from the application of European Union (‘EU’) public procurement legislation.

2. More particularly, in the present case, the Court is asked to determine whether, and, if so, in what circumstances, so-called ‘horizontal in-house’ transactions may fall outside the scope of Directive 2004/18/EC (2) and be awarded directly, without putting into effect the public procurement procedures laid down under the directive. The term ‘horizontal in-house’ transaction signifies the conclusion of a contract between a contracting authority and a contractor which are not linked by any relationship of control, but are both subject to similar control by the same body, itself a contracting authority within the meaning of Directive 2004/18, and which carry out the essential part of their activities with that common body.

3. By its question to the Court, the national court seeks, in essence to establish whether this type of transaction may also be exempt from the applicability of public tendering procedures on the model of the exemptions established by the Court in its case-law and mentioned specifically by the national court.

4. The first of those exemptions, which originates in the judgment in *Teckal*, (3) concerns so-called ‘in-house’ transactions in regard to which it has been accepted in case-law that a contracting authority is not required to issue a call for tenders for the award of a public contract, provided that it exercises

over the contractor a control which is similar to that which it exercises over its own departments and, at the same time, that contractor carries out the essential part of its activities with the controlling contracting authority or authorities. (4) Although widely discussed in legal literature, the question whether that exemption applies to 'horizontal inhouse' transactions has yet to be considered by the Court which, in its existing and now copious case-law, has had occasion solely to consider in-house transactions in which the relationship between the contracting bodies and contractors was vertical in nature. (5)

5. The second exemption established in the Court's case-law (6) and referred to by the national court concerns the possibility of excluding from the scope of EU procurement law those public contracts which fall into the category of so-called cooperation between public bodies.

I – Legislative background

A – *EU law*

6. According to Article 1(2)(a) of Directive 2004/18, '"[p]ublic contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this directive'.

7. Article 7 of Directive 2004/18 determines the threshold amounts above which public contracts fall within the scope of the directive. At the time of the material facts in the main proceedings, that threshold stood at EUR 193 000. (7) Under Article 20 of Directive 2004/18, 'contracts which have as their object services listed in Annex II A are to be awarded in accordance with Articles 23 to 55'. Article 28 of the Directive provides that contracts are, without exception, to be awarded by applying the open procedure or the restricted procedure. Annex II A of the directive includes a Category No 7 concerning '[c]omputer and related services'.

B – *National law*

8. Article 5(3) of the German Basic Law provides that '[a]rts and sciences, research and teaching shall be free'.

9. Under Article 91c(1) of the German Basic Law, '[t]he Federation and the Länder may cooperate in planning, constructing and operating information technology systems needed to discharge their responsibilities'.

10. German national procurement legislation is contained in the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition), Article 99 of which sets out the definition of public contracts. (8)

11. The Hamburgisches Hochschulgesetz (Hamburg Law on higher education establishments: the 'HmbHSchG') lays down the rules applicable to the higher education establishments of the Freie und Hansestadt Hamburg (the Free and Hanseatic City of Hamburg: the 'City of Hamburg').

12. According to Article 2 of the HmbHSchG, '[t]he higher education establishments, which are bodies of the City of Hamburg, are legal entities governed by public law' which 'regulate the exercise of their administrative autonomy on the basis of a basic regulation and further rules'.

13. Pursuant to Article 5 of the HmbHSchG, headed 'Administrative autonomy', the higher education establishments independently discharge those responsibilities which are a matter of administrative autonomy, subject to a review of legality by the competent authorities. The responsibilities which are a matter of administrative autonomy are those responsibilities which are not devolved State functions.

14. Article 6 of the HmbHSchG governs the budget appropriations for the higher education establishments and, in paragraph 2, lists the delegated responsibilities discharged by these establishments, among them: management of the budget resources allocated to them, including the fees,

finance and accounting systems, the real property and equipment made available to them, matters relating to staff and their recruitment, as well as teaching capacity and proposals regarding the number of admissions. Pursuant to Article 6(3), the exercise of other responsibilities may be delegated to the higher education establishments. Lastly, pursuant to Article 6(4), the competent authorities exercise, by means of directives and general instructions, 'supervisory control' (9) over the establishments in relation to the discharge of devolved functions.

II – Facts, national procedure and questions referred

15. The Technische Universität Hamburg-Harburg (Technical University of Hamburg: the 'TUHH'), the applicant in the proceedings pending before the national court, is a public higher education establishment of the City of Hamburg. It is a contracting authority within the meaning of Directive 2004/18. (10)

16. The Hochschul-Informations-System GmbH ('HIS'), which, together with the TUHH, is also an applicant in the proceedings pending before the national court, is a limited company with wholly public capital, controlled one-third by the German Federal State and two-thirds by the 16 German Länder, including the City of Hamburg, which has a holding of 4.16% in the share capital of HIS. Pursuant to Article 2 of its articles of incorporation, the object of HIS is to assist public higher education establishments to achieve the rational and economic fulfilment of their mission of providing higher education by, among other things, developing procedures for rationalising the administration of higher education, as well as participating in the introduction and application of such procedures and organising exchanges of information. Pursuant to Article 3 of its articles of incorporation, HIS engages in public-interest activities exclusively and does not operate for profit.

17. Planning to introduce an IT system for higher education management, the TUHH evaluated two such systems, one developed by HIS and the other by Datenlotsen Informationssysteme GmbH ('Datenlotsen Informationssysteme'). After comparing the two IT systems, TUHH decided, on 7 April 2011, to sign a contract with HIS for the installation of the system which HIS had developed, and awarded the contract directly without implementing the public procurement tendering procedures laid down by Directive 2004/18.

18. Datenlotsen Informationssysteme considered the direct award of the contract to HIS to be unlawful, and challenged the decision awarding the contract before the Vergabekammer (Procurement Board) of the Finanzbehörde (Finance Authority) of the City of Hamburg — the court of first instance with jurisdiction in relation to public contracts — which upheld the application. The Vergabekammer found, in particular, that the requirements laid down by the Court's case-law in relation to an in-house transaction were not satisfied, since no relationship of control existed between the TUHH and HIS.

19. HIS and the TUHH appealed against the judgment at first instance before the referring court.

20. The referring court points out that the Court of Justice has not yet had occasion to clarify whether the case-law which provides for an exception to the applicability of the rules on public procurement procedures in circumstances in which the contract is awarded in house may apply to a 'horizontal in-house' transaction, as in the case in the main proceedings. It takes the view, however, that the spirit and purpose of the exemption for in-house awards, as developed through the Court's case-law, could permit the inclusion of such transactions within the scope of that exemption, thus freeing the contracting authorities of the obligation to issue calls for tender for contracts of that nature. According to the referring court, however, in the light of the fact that, in accordance with the case-law, the system of exemptions to the applicability of such procedures must be interpreted narrowly, it is for the Court of Justice to determine whether or not horizontal inhouse awards may be caught by that exemption.

21. The referring court also considers that the conditions for the applicability of the further exemption developed through the Court's case-law in regard to cooperation between public bodies are not satisfied since, on the one hand, HIS is set up in the form of a limited company under private law and, on the other, it is not directly tasked with carrying out a public- service mission.

22. The referring court further notes that, under the relevant legislation, the higher education establishments have extensive autonomy in the areas of research and teaching, and that the exercise of

those autonomous responsibilities is subject only to supervision of legality. However, the subject-matter of the dispute pending before the referring court falls within the sector of procurement, in which the competent authorities enjoy a power of control which includes the power to cancel or correct the decisions taken by the universities. The referring court therefore raises the question whether or not the requirement of 'similar control', set out in the case-law in *Teckal*, which it finds to be satisfied in relation to the area of procurement, must encompass all of the contractor's fields of activity.

23. In the light of those considerations, by order of 6 November 2012, the referring court deemed it necessary to stay the proceedings pending before it and refer to the Court the following questions for a preliminary ruling:

'(1) Must a "public contract" within the meaning of Article 1(2)(a) of Directive 2004/18 ... be interpreted as including a contract in the case of which, although the contracting authority does not exercise over the contractor a control similar to that which it exercises over its own departments, both the contracting authority and the contractor are controlled by the same body, which is itself a public contracting authority within the meaning of Directive 2004/18 and the contracting authority and the contractor carry out the essential part of their activities with that common body (horizontal in-house transaction)?

If the first question is answered in the affirmative:

(2) Must the control similar to that which the contracting authority exercises over its own departments extend to all aspects of the contractor's activity or is it sufficient for it to be confined to the area of procurement?'

III – Procedure before the Court

24. The order for reference was received at the Court Registry on 10 January 2013. Written observations were submitted by the TUHH, HIS, Datenlotsen Informationssysteme, the Czech, Italian, Spanish and Hungarian Governments and the European Commission. The TUHH, HIS, Datenlotsen Informationssysteme, the Spanish Government and the European Commission made oral submissions at the hearing on 21 November 2013.

IV – Legal analysis

A – *The first question referred*

25. By its first question, the referring court asks, in essence, whether a horizontal in-house transaction — that is to say the conclusion of a contract between a contracting authority and a contractor which are not linked by a relationship of control, but which are both controlled by the same body, itself a contracting authority within the meaning of Directive 2004/18, and with which both carry out the essential part of their activities — constitutes a public contract within the meaning of Directive 2004/18 and must therefore be subject to the procedures for the award of public contracts laid down by the directive.

26. As a preliminary point, it should be noted that the application of Directive 2004/18 to public contracts is subject to the condition that the estimated value of the contract reaches the threshold laid down in Article 7(b) of the directive, taking into consideration the usual value on the market of the works, supplies or services to which the public contract relates. If it does not reach the threshold, the fundamental rules and general principles of the FEU Treaty apply. (11) It is evident from the order for reference that the value of the contract at issue has been estimated at EUR 840 000 at least, clearly exceeding that threshold, (12) and the contract at issue therefore falls within the scope of Directive 2004/18.

27. In accordance with Article 1(2)(a) of Directive 2004/18, a contract for pecuniary interest concluded in writing between an economic operator and a contracting authority and having as its object the provision of services referred to in Annex II A to the directive, is a public contract. (13)

28. It is apparent from the documents before the Court that, on the one hand, the contract at issue in the main proceedings, which was directly awarded, was concluded between a contracting authority, the TUHH, and an economic operator, HIS, and, on the other, that the services forming the object of the contract at issue in the main proceedings fall within the concept of '[c]omputer and related services' as set out in Annex II A of Directive 2004/18.

29. It must be pointed out here that, according to the case-law, as far as the concept of public contract is concerned, it is immaterial that, as applies to HIS pursuant to Article 3 of its articles of incorporation, (14) the contractor is not primarily profit-making. (15) Furthermore, as regards the nature of the contract at issue as a contract for pecuniary interest, I must point out that, according to the case-law, a contract cannot fall outside the concept of public contract merely because the remuneration is limited to reimbursement of the expenditure incurred to provide the agreed service. (16) Therefore, even were the contract at issue in the main proceedings not to provide for the payment of a market price for the IT services provided by HIS to the TUHH, which it is a matter for the national court to establish, this would not be a determining factor as far as its classification as a contract is concerned. (17)

30. In the light of the foregoing considerations, and subject to the necessary checks which it is for the national court to make, I therefore consider that the contract at issue in the main proceedings exhibits the characteristics of a public contract and is therefore, in principle, subject to the tendering procedures under Directive 2004/18.

31. As set out in points 4 and 5 above, it is, however, clear from the Court's case-law that there are two kinds of public contract which fall outside the scope of EU procurement law (18) and in regard to which the contracting authority is not therefore required to issue a public call for tenders, as provided for by Directive 2004/18.

32. The two kinds of contract in question are, on the one hand, contracts falling under the exemption for so-called 'in-house' contracts and, on the other, contracts falling under the exemption provided for in the case of contracts establishing cooperation between public bodies. Given that, in its order for reference, the national court mentions both the exemptions developed in the Court's case-law, and that both were also discussed at the hearing, I consider it necessary to analyse each of them.

1. Applicability of the 'in-house' exemption to horizontal internal transactions

33. As I mentioned earlier, according to settled case-law originating in the judgment in *Teckal*, (19) a contracting authority is not required to issue a public call for tenders if two cumulative conditions are satisfied: first, the contracting authority must exercise over the contractor a control which is similar to that which it exercises over its own departments and, second, the contractor must carry out the essential part of its activities with the controlling contracting authority or authorities. (20)

34. As far as the first of those conditions is concerned, it must be pointed out that, according to settled case-law, there is similar control where the contractor in question is subject to control enabling the contracting authority to influence that entity's decisions. It must be a power of decisive influence over both strategic objectives and significant decisions of that entity. In other words, the contracting authority must be able to exercise structural and functional control over the entity. The Court also requires that the control be effective. (21)

35. According to the case-law, where use is made of an entity jointly owned by a number of public authorities, the 'similar control' may be exercised jointly by those authorities, without it being essential for such control to be exercised individually by each of them. (22)

36. Since one of the cumulative conditions governing the application of the exemption developed in case-law for in-house contracts is that there should be a relationship of control between the contracting authority and the contractor, that exemption clearly cannot, as such, apply in cases of horizontal in-house transactions in which by definition there can be no direct relationship of control between the bodies concerned. (23) It therefore follows that, as the law stands, such transactions must, in principle, be subject to the tendering procedures laid down by Directive 2004/18.

37. However, the national court takes the view that the spirit and purpose of the 'in-house exemption', as developed through the Court's case-law in relation to vertical internal transactions, could make it possible also to include horizontal internal transactions within the scope of that exemption. However, this would be feasible only if the scope of the exemption were extended to cover also transactions in which, although both the contracting authority and the contractor are subject to the similar control exercised by another public authority, the first condition laid down in case-law is not satisfied, as there is no relationship of direct control between the two parties to the contract. That, in my view, prompts a number of considerations.

38. First, it is necessary to draw attention to the fact that the Court has reiterated, on several occasions, that the primary objective of EU rules on public procurement is the free movement of services and the widest possible opening-up to competition in all of the Member States. (24) That entails an obligation on all contracting authorities to apply EU procurement law where the conditions for its application are satisfied, with the result that any derogation from the application of that obligation must be interpreted *strictly*. (25) It follows that any extension of the scope of an exemption to the applicability of EU procurement law must be very carefully scrutinised.

39. Second, it is necessary, however, to draw attention to the fact that the Court has recognised that a public authority, which is a contracting authority, has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. (26)

40. Based specifically on that premiss, the Court has recognised the derogation for in-house transactions from public tendering procedures. In fact, where an administrative authority performs tasks conferred on it in the public interest by using an entity which constitutes its own resource, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority, and there is therefore no need to apply the EU rules in the field of public procurement. (27)

41. Moreover, it is apparent from a careful reading of the case-law (28) that the basis for the exemption for in-house transactions resides specifically in the fact that, since the contractor does not enjoy a degree of independence such as to preclude the contracting authority from exercising over it control similar to that which it exercises over its own departments, there can be no contractual relationship in the strict sense, as there is no 'concordance of two autonomous wills representing separate legal interests'. (29)

42. It is my view that where a horizontal internal transaction takes place in the context of the fulfilment of public-interest tasks incumbent on a contracting authority, which carries out those tasks using two entities over which it exercises control similar to the control which it exercises over its own departments, the rationale behind the in-house exemption, as developed in case-law, may in principle apply. In point of fact, in accordance with the case-law cited at point 39 above, if the authority uses its own resources to perform the tasks conferred on it in the public interest, it is not compelled to call on outside entities not forming part of its own departments. I consider that this applies also in circumstances in which the authority's own resources consist of two entities over which it exercises control and, in order to perform those public-interest tasks, it is necessary to conclude a contract between those entities. Therefore, in a situation of that nature also, in certain conditions, the requirements for the application of EU procurement law might not be present.

43. It must, however, be pointed out that, as set out in points 40 and 41 above, the justification for the application of the in-house exemption lies in the fact that the conclusion of the contract at issue is not the result of the expression of the autonomous will of the parties to the contract, but the expression of a single will. It must be noted here that, in a horizontal internal transaction, the relationship existing between the contracting authority and the contractor is far more tenuous than the relationship that exists in a vertical in-house transaction. It is not in fact a relationship of direct control but merely an indirect link, the scope of which is contingent on the relationship that exists between each of the bodies and their common controlling authority.

44. From that perspective, the condition that the contract must be the expression of a single will seems to me to be capable of being satisfied if the two entities which enter into the contract are subject

to the *exclusive* control of the same authority. Only then is it, in my view, possible to conclude that the contract is the expression of a single act of will on the part of a public authority, which seeks thereby to perform the tasks conferred on it in the public interest by using its own resources. Indeed, where a contract is concluded between an entity over which several authorities exercise joint control and another entity which is controlled (exclusively or jointly with other authorities) by one of the authorities which exercise control over the first entity, it seems to me that the transaction can hardly be regarded as the expression of a single act of will.

45. From that point of view, I therefore consider that the exemption from the application of EU rules for horizontal internal transactions may be admissible only if the body which exercises over the two entities, that is to say the contracting authority and the contractor, control similar to the control which it exercises over its own departments is not just the same body but it exercises that similar control over both entities on an exclusive basis. I therefore consider it necessary to preclude the possibility of extending the in-house exemption to instances of horizontal transactions concluded between entities over which an authority exercises similar control, as defined in case-law, jointly with other contracting authorities.

46. A restrictive approach of that nature to the type of similar control which the controlling authority must necessarily exercise over the two entities entering into the procurement contract, if the derogation from EU procurement law for horizontal internal transactions is to be permissible, seems to me not only to be consistent with the rationale behind the in-house exemption and with the need set out by the Court, and referred to in point 38 above, to interpret that derogation strictly, but also to meet the need, referred to by a number of the parties which submitted observations, to avoid extending the derogations from the rules on public procurement beyond the limits of reasonableness, and thereby run the risk of abstracting significant economic sectors from the rules on public procurement and the objectives of opening up to competition (30) which, as I mentioned in point 38, those rules pursue. (31)

47. As far as the main proceedings are concerned, it is clear from the information set out in the documents before the Court that the City of Hamburg is possibly able to exercise over HIS only joint similar control together with the other Länder and the Federal Government, although this is disputed, among other things, by some of the interveners. (32) Consequently, even accepting that the City of Hamburg exercises over the TUHH similar control, and does so on an exclusive basis — which it will, in any event, be for the national court to determine, including on the basis of the second question which it has referred to the Court — the exemption as described in the points above in relation to horizontal internal transactions would not in any case apply.

48. In conclusion, it follows from the considerations set out above that, subject to the checks which are for the national court to make, a contract such as the contract at issue in the main proceedings constitutes a public contract within the meaning of Directive 2004/18, since it is a contract concluded in writing between a contracting authority and an economic operator having as its object the provision of services within the meaning of the directive. As such, it is in principle subject to the tendering procedures laid down under the directive. Regardless of the question whether a relationship of ‘control similar to the control exercised over its own departments’ exists between the City of Hamburg, on the one hand, and the TUHH and HIS, on the other, that contract cannot be caught by the exemption from those procedures under the *Teckal* case-law, as there is no relationship of control between the contracting authority, that is to say the TUHH, and the economic operator which is the contractor, namely HIS. Nor, in my view, does such a contract fall into the category of a horizontal internal transaction which may be eligible for exemption from the application of the public tendering procedures because it is a transaction designed to enable the authority which controls the two entities concluding the contract to perform the tasks conferred on it in the public interest, since, as I set out in points 44 to 46 above, that possibility must, in my view, be confined to cases in which the controlling authority exercises similar control over the two parties to the contract on an exclusive basis, which is certainly not true in the dispute pending before the national court.

2. Cooperation between public bodies

49. The referring court also considers the possibility that the contract at issue in the main proceedings may be caught by the second derogation, which has emerged in case-law, from the

application of public tendering procedures, namely the exemption referred to in point 5 above which is provided for in relation to cooperation between public bodies.

50. The case-law makes that exemption contingent on the fulfilment of five cumulative requirements, all of which must be satisfied for the contract at issue to be excluded from the scope of EU procurement law. (33) The Court has thus stipulated that contracts which, first, establish cooperation between public bodies and, second, establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out, may fall outside the scope of the public tendering procedures. Third, the contracts must be concluded exclusively by public bodies, without the participation of a private party. Fourth, no private operator must be placed in a position of advantage visàvis competitors, and, fifth and last, the cooperation established must be governed solely by considerations and requirements relating to the pursuit of objectives in the public interest. (34)

51. It is, however, for the national court to make the checks necessary to determine whether all of those criteria are satisfied in the specific case. The Court may none the less provide the national court with all guidance on the interpretation of EU law that could be useful for its decision. (35)

52. More specifically, the national court is uncertain on two counts as to the applicability to the present case of the derogation for cooperation between public bodies.

53. First, the national court rules out the possibility that that derogation may apply because HIS takes the form of a limited liability company organised under private law. That observation by the referring court raises the question of the personal scope of the derogation at issue.

54. In that connection, it must be pointed out that, in its abovementioned judgment in *Commission* v *Germany*, the Court employed the term ‘public authorities’ (36) to describe the entities which could take part in the cooperation, the cooperation at issue being entered into between the City of Hamburg and four neighbouring Landkreise. (37) The Court’s use of that term signalled that the derogation was not exclusively confined to cooperation between local authorities. (38) Subsequently, in its judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, the Court employed the concept of cooperation between ‘public entities’. (39)

55. Setting aside the terminological issue, it seems to me, however, that a functional rather than a formal approach is required here. (40) From that perspective, I consider that the private-law nature of one of the entities participating in the cooperation is not of itself a bar to the application of the derogation in question, always provided that it is established that, despite its private-law nature, the entity is in reality a public body, (41) which seems to me clearly to be the case when it comes to a company such as HIS with wholly public capital.

56. In my view, the third of the conditions set out in case-law, and mentioned in point 50 above, does not require that the entities establishing the cooperation should possess the formal nature of public-law bodies, but in fact requires that no private interests should participate in such entities. It may be added, in that regard, that the participation of private interests must be excluded for the duration of the contract at issue in the main proceedings. If, in fact, the capital of the contractor, which is of a private-law nature, were opened to private shareholders, the effect would be to award a public contract to a semi-public company without any call for competition, and that would interfere with the objective pursued by EU law. (42)

57. Second, the national court considers that the second condition laid down in case-law, namely that the cooperation must be designed to ensure the carrying out of a common public task, is not satisfied in the present case because, even though Articles 2 and 3 of the articles of incorporation of HIS provide that its business purpose is to assist higher education establishments and, consequently, it is pursuing objectives in the general interest, its task cannot be equated with a genuine public service mission which has been conferred on it.

58. I do not share the approach which the referring court appears to take, according to which it is absolutely necessary for each of the public entities taking part in the cooperation to *perform* the public task before it can be regarded as a task which is common to both of them.

59. Even if it is necessary that the cooperation serves to perform a *common* public task, and it is not therefore sufficient that the statutory duty to perform the public task in question concerns only one of the public authorities involved, whilst the other's role is limited to that of a vicarious agent which takes on the performance of this external task under a contract, (43) I still consider that there may also be cooperation designed to ensure that a common public task is carried out, if the public tasks performed by the public entities in question *specifically complement* each other and the cooperation itself concerns precisely those specifically complementary tasks. The notion of complementarity cannot, however, constitute the passport to the system of exemptions for cooperation involving activities which are in some way connected. In my opinion, it is not in fact sufficient for the public tasks to be complementary. They must complement each other in a specific way, in the sense that, with reference to all of the public entities concerned, the element of complementarity must relate specifically to the task which forms the object of the cooperation, as, for instance, seems to me to be the case for the teaching and research in the main proceedings.

60. In that regard, the information in the documents before the Court indicates that the specific task performed by HIS, a company with wholly public capital, is to assist higher education establishments to achieve the rational and economic fulfilment of their mission of providing higher education. That task seems to me specifically to complement the task of teaching and research performed by the universities, and thus may constitute, provided that all of the other conditions are satisfied, cooperation which is caught by the derogation in case-law for cooperation between public entities. I would add, in that connection, that, as far as I am concerned, it is far from unimportant in terms of the analysis, that the performance of that task is the expression of the will of the German constitutional legislature which provided, in Article 91c(1) of the German Basic Law, for forms of cooperation between the Federation and the Länder in constructing and operating the IT systems needed to discharge their responsibilities.

61. Having analysed the uncertainties expressed by the national court, a question raised by the Commission remains to be considered. At the hearing, the Commission maintained that the exemption at issue could not be applied to the present case, since cooperation between public entities concerning activities falling into the category of a public-service mission could not occur under a contract in which services are provided for remuneration.

62. In that regard, I would first point out that, in its abovementioned judgment in *Commission* v *Germany*, the Court established that EU law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. (44) In that case, moreover, the cooperation between the City of Hamburg and the Landkreise took specifically contractual form.

63. However, it must also be borne in mind that, in that judgment, the Court noted that the provision of the services in question, namely the supply of waste disposal services, gave rise to payment only to the operator of the facility, the other contracting party of the City of Hamburg, while the actual cooperation set in place by the contract between the authorities concerned, that is to say the City of Hamburg Cleansing Department and the Landkreise, did not give rise to any financial transfers between those entities. (45)

64. I therefore wonder whether it is necessary, in order for the exemption at issue to be applicable to the agreement establishing the cooperation, that the agreement should not give rise to any financial transfers between the public entities concerned.

65. I would, however, point out in that connection that, in its judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, in which the Court took up again in a more detailed and systematic manner, based on its earlier judgment in *Commission* v *Germany*, the five cumulative conditions which must be satisfied in order for the contract at issue to be eligible for exemption from EU procurement law, it made no mention of any criterion of that nature. I infer from the absence of any such reference that the Court did not intend to stipulate that there should be no financial transfers between the entities involved in the cooperation as a prerequisite for the application of the exemption.

66. However, I consider it essential in relation to an exemption of that nature that the remuneration provided by one entity to another entity for the performance of a specific service, in the context of their cooperation, cannot be equivalent to the market price, but must reflect the costs and financial expenditure actually incurred in providing the service, and that leads me to harbour doubts as to the

compatibility with that requirement of any provisions providing for the costs of supplying the service to be paid on a flatrate basis.

67. It will, in any event, be for the national court to make the necessary checks in that regard, and in relation to the fulfilment of all of the other conditions laid down in case-law for the application of the derogation for cooperation between public bodies.

B – *The second question referred*

68. By its second question, submitted to the Court in the event that the first question is answered in the affirmative, the referring court asks, in essence, whether the similar control required by the case-law in *Teckal* must extend to all aspects of the contractor's activity or it is sufficient if such control is confined to the area of procurement.

69. I would first point out that, in the light of the considerations set out in my analysis of the first question referred, if the Court were to adopt the approach which I have suggested, it would not be necessary to answer that question, since applicability of the in-house exemption would in any event be precluded in the case pending before the national court. I shall therefore set out the following considerations on the second question merely for the sake of completeness.

70. I have already drawn attention at point 34 to the essential features of similar control as defined in case-law. At points 39 to 41, I have, however, described the rationale underlying recognition of the in-house exemption, and that rationale also sheds light on the significance of the requirement concerning similar control.

71. In my view, it follows from those considerations, and particularly from the need for the control to be structural and functional, that, in principle, such control should extend to all aspects of the contractor's activity and not be confined to the procurement sector alone. The in-house entity must, in fact, in essence, act as an organ of the authority and the latter must exercise a power of decisive influence over both the strategic objectives and the significant decisions of the entity which it controls. (46)

72. It is, however, necessary to bear in mind that the Court has already had occasion to clarify that, while case-law requires that the control exercised over a contractor by a contracting authority must be similar to that which the authority exercises over its own departments, it need not be identical in every respect. (47)

73. It must be noted in that regard that the autonomy which the universities enjoy in relation to teaching and research is the expression of the freedom of teaching and research, a principle that is set out not only at constitutional level in Article 5(3) of the German Basic Law, but also in the Charter of Fundamental Rights of the European Union, Article 13 of which provides that arts and scientific research are to be free of constraint and that academic freedom must be respected. From that perspective, I therefore consider that in order for entities such as the universities to be eligible for the in-house exemption, it cannot be required that control should be exercised over their teaching and research activities also, since the autonomy of the universities in relation to those activities is an expression of values of a constitutional nature common to the legal systems of the Member States and enshrined in the Charter.

74. Moreover, it may also be noted in that regard that the Court has already had occasion to deal in its case-law with the special characteristics of university establishments in terms of procurement law. (48)

75. It follows from the foregoing considerations that should the Court consider it necessary to answer the second question referred by the national court also, the answer should, in my view, be that the similar control exercised must extend to all of the contractor's activities, except for the special rights and powers which the universities enjoy in the areas of teaching and research.

V – Conclusions

76. In the light of the foregoing, I propose that the Court reply as follows to the first question referred by the Hanseatisches Oberlandesgericht Hamburg:

A contract for the provision of services in relation to which the recipient of the services, which constitutes a contracting authority within the meaning of Directive 2004/18, does not exercise over the entity providing the services control similar to the control which it exercises over its own departments, but both are subject to the control of the same body, which may be classified as a contracting authority under the directive, and in which both the recipient of the services and the entity providing the services carry out the essential part of their activities with the body which controls them, constitutes a public contract if it is a contract concluded in writing between the recipient contracting authority and the economic operator providing the services, provided that the object of the contract is the provision of services which may be defined as the provision of services within the meaning of the directive.

A contract of that nature may be caught by the exemption from the application of the public tendering procedures required by EU procurement law only in circumstances in which the controlling authority exercises, on an exclusive basis, over both the recipient of the services and over the entity providing the services, similar control to the control which it exercises over its own departments, and both entities carry out the essential part of their activities for that controlling authority, or in circumstances in which the contract satisfies all of the prerequisites for the application of the derogation for cooperation between public bodies.

---

1 – Original language: Italian.

---

2 – Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004, L 134, p. 114).

---

3 – Case C-107/98 [1999] ECR I-8121.

---

4 – See, for example, *Teckal*, cited in footnote 3, paragraph 50; Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 62; Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 33; Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 55; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 27; Case C-573/07 *Sea* [2009] ECR I-8127, paragraph 40; and Joined Cases C-182/11 and C-183/11 *Econord* [2012] ECR, paragraph 25.

---

5 – See the cases cited in footnote 4.

---

6 – Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747, paragraphs 37, 44 and 47; *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] ECR, paragraphs 34 and 35; and Case C-352/12 *Consiglio Nazionale degli Ingegneri* [2013] ECR, paragraphs 43 et seq.

---

7 – See Article 7(b) of Directive 2004/18, as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64).

---

8 – According to Article 99 of the Law against restrictions on competition, ‘[p]ublic contracts are contracts concluded for pecuniary interest, between contracting authorities and undertakings, concerning the provision of services involving supplies, works or services, as well as works concessions and the procedures which result in the award of service contract’.

---

9 – According to the observations submitted to the Court, in German administrative law, ‘supervisory control’ is further-reaching than supervision limited to the legality of administrative activities (‘Rechtsaufsicht) and extends also to the appropriateness of the act or administrative action.

---

10 – See Article 1(9) of the directive.

---

11 – However, the fact that the contract at issue in the main proceedings is capable of falling, as the case may be, under either Directive 2004/18 or the fundamental rules and general principles of the FEU Treaty does not affect the answer to be given to the question raised. The criteria laid down in the case-law of the Court in order to determine whether an invitation to tender is mandatory or not are relevant both with regard to the interpretation of the directive and with regard to the interpretation of those rules and principles of the FEU Treaty. See, to that effect, *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraphs 23 and 24.

---

12 – See point 7 above.

---

13 – See, in that connection, *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 25.

---

14 – See point 16 above.

---

15 – See, to that effect, Case C-305/08 *CoNISMa* [2009] ECR I-12129, paragraphs 30 and 45, and *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 26.

---

16 – See, to that effect, *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 29.

---

17 – See, in that connection, the considerations set out by Advocate-General Trstenjak at points 30 to 34 of her Opinion in *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6.

---

18 – See *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 31, and the order in *Consiglio Nazionale degli Ingegneri*, cited in footnote 6, paragraph 40.

---

19 – Cited in footnote 3.

---

20 – See the case-law cited in footnote 4.

---

21 – See *Econord*, cited in footnote 4, paragraph 27 and the case-law cited.

---

22 – See *Econord*, cited in footnote 4, paragraph 28 and the case-law cited.

---

23 – See points 2 and 25 above.

---

24 – See, to that effect, *CoNISMa*, cited in footnote 15, and the case-law cited.

25 – See, among others, *Stadt Halle and RPL Lochau*, paragraphs 44 and 46, and *Parking Brixen*, paragraph 63, both cited in footnote 4, and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 26.

26 – See, among others, *Stadt Halle and RPL Lochau*, cited in footnote 4, paragraph 48, *Coditel Brabant*, cited in footnote 4, paragraph 48, *Commission* v *Germany*, cited in footnote 6, paragraph 45, and *Sea*, cited in footnote 4, paragraph 57.

27 – See, to that effect, *Stadt Halle and RPL Lochau*, cited in footnote 4, paragraph 48.

28 – See, in that connection, the analysis of case-law by Advocate-General Cruz Villalón at point 38 et seq of his Opinion in *Econord*, cited in footnote 4.

29 – See the Opinion of Advocate-General Cosmas in *Teckal*, cited in footnote 3, point 64, and the Opinion of Advocate-General Cruz Villalón in *Econord*, cited in footnote 28, point 43. See also paragraph 49 in conjunction with paragraph 50 of *Teckal*, cited in footnote 3.

30 – See in that regard also *Carbotermo and Consorzio Alisei*, cited in footnote 4, paragraphs 58 and 59.

31 – It is necessary, in passing, to point out that a similar solution appears to have been adopted in the final version of the Proposal for a Directive of the European Parliament and of the Council on public procurement currently under discussion within the Council (Council document No 11745/13; see, more specifically, Article 11(2) of that proposal).

32 – In particular, the Commission disputes the existence of a relationship of control between the City of Hamburg and HIS, as the City does not have a permanent representation on the HIS supervisory board. In the light of the answer given to the question referred, it is not, however, necessary, to take a view on that.

33 – *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 36 and the case-law cited, and order in *Consiglio Nazionale degli Ingegneri*, cited in footnote 6, paragraph 45.

34 – *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraphs 34 and 35 and case-law cited, and order in *Consiglio Nazionale degli Ingegneri*, cited in footnote 6, paragraphs 43 and 44.

35 – See Case C-418/11 *Texdata Software* [2013] ECR, paragraph 55 and the case-law cited.

36 – See paragraphs 34, 44, 45 and 47 of the judgment.

37 – The Landkreise, or rural districts, are administrative units in Germany which cover various municipalities located in the same geographical region.

38 – See point 69 of the Opinion of Advocate-General Trstenjak in *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6.

39 – See paragraphs 34 and 35 of the judgment.

---

40 – Corresponding, moreover, to the approach taken by the Court in defining the concept of contracting authority and body governed by public law pursuant to the second subparagraph of Article 1(9) of Directive 2004/18. See, in that connection, Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, paragraph 37, and Case C-393/06 *Ing. Aigner* [2008] ECR I-2339, paragraph 37.

---

41 – In that regard, I would point out in passing that, according to the case-law, an entity's private law status does not constitute a criterion for precluding its classification as a body governed by public law and thus a contracting authority (see Case C-214/00 *Commission* v *Spain* [2003] ECR I-4667, paragraph 55, and Case C-283/00 *Commission* v *Spain* [2003] ECR I-11697, paragraph 74, relating to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), Article 1(b) of which contains a definition of 'body governed by public law' identical to that contained in Directive 2004/18). It is merely necessary to ascertain, and this is a matter for the national court, whether, in the light of the relevant case-law, that entity fulfils the three cumulative conditions set out in the second subparagraph of Article 1(9) of Directive 2004/18, considering that the method in which the entity concerned has been set up is irrelevant in that regard. See the judgment in Case C-214/00, cited above, paragraph 54.

---

42 – See, by analogy, *ANAV*, cited in footnote 25, paragraph 30.

---

43 – See, to that effect, point 75 the Opinion of Advocate-General Trstenjak in the judgment in *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6.

---

44 – See paragraph 47 of the judgment, cited in footnote 6.

---

45 – See paragraph 43 of *Commission* v *Germany*, cited in footnote 6.

---

46 – See the case-law cited in footnote 21 and *Sea*, cited in footnote 4, paragraph 65.

---

47 – See, to that effect, *Coditel Brabant*, cited in footnote 4, paragraph 46.

---

48 – See *CoNISMa*, cited in footnote 15, paragraphs 48, 49 and 51, and *Ordine degli Ingegneri della Provincia di Lecce and Others*, cited in footnote 6, paragraph 27.

JUDGMENT OF THE COURT (Fifth Chamber)

19 June 2014 (*)

(Request for a preliminary ruling — Public service contracts — Directive 2004/18/EC — Award of the contract without a procurement procedure (in-house award) — Contractor legally separate from the awarding authority — Centre for hospital assistance and support services — Non-profit association operating in the public interest — Majority of the partners made up of awarding authorities — Minority of the partners made up of entities under private law, non-profit charitable associations — Activity carried out of at least 80% of the annual turnover for the partners' benefit)

In Case C-574/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Portugal), made by decision of 6 November 2012, received at the Court on 7 December 2012, in the proceedings

Centro Hospitalar de Setúbal EPE,

Serviço de Utilização Comum dos Hospitais (SUCH)

v

Eurest (Portugal) — Sociedade Europeia de Restaurantes Lda,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 November 2013,

after considering the observations submitted on behalf of:

– Centro Hospitalar de Setúbal EPE, by M. Real Martins and S. Alves Ribeiro, advogados,

– Serviço de Utilização Comum dos Hospitais (SUCH), by M. Claro, advogada,

– Eurest (Portugal) — Sociedade Europeia de Restaurantes Lda, by M. Lucas Rodrigues, advogada,

– the Portuguese Government, by L. Inez Fernandes and A. Navegas, acting as Agents,

– the Spanish Government, by J. García-Valdecasas Dorrego, acting as Agent,

– the European Commission, by M. Afonso, A. Tokár and M. Noll-Ehlers, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2014,

gives the following

Judgment

1 By the request for a preliminary ruling, the referring court asks the Court to make clear its case-law concerning the award of public contracts by direct in-house award without application of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in a dispute between the Centro Hospitalar de Setúbal EPE (Hospital of Setúbal; 'CHS') and the Serviço de Utilização Comum dos Hospitais (Joint Hospital Service Provision; 'SUCH') and Eurest (Portugal) — Sociedade Europeia de Restaurantes Lda ('Eurest') concerning the conformity of the award of a public contract awarded directly by the CHS to SUCH.

Legal context

EU law

Directive 2004/18

3 Directive 2004/18 establishes the rules applicable to public contracts awarded by awarding authorities.

4 Recital 4 in the preamble to that directive states:

'Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.'

5 Article 1 of that directive, entitled 'Definitions', provides in paragraph 2(a):

'"Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.'

6 Article 1(8) of that directive provides:

'The terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term "economic operator" shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interests of simplification.

…'

7 Article 1(9) defines in detail the entities which are regarded as awarding authorities and which must, when concluding a contract for pecuniary interest with an economic operator, undertake a procurement procedure following the rules laid down in Directive 2004/18.

8 Article 7 of Directive 2004/18, entitled 'Threshold amounts for public contracts', establishes the thresholds for the estimated values beyond which the award of a contract must be made in accordance with the rules in that directive. Those thresholds are changed at regular intervals by Commission regulations and are adapted to the economic circumstances. At the date of the facts in the main proceedings, the threshold concerning service contracts awarded by awarding authorities other than central governmental authorities was set at EUR 193 000 by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64).

9 Article 20 of Directive 2004/18, which forms part of Title II thereof, Chapter III, entitled 'Arrangements for public service contracts', provides:

'Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.'

10 Under Article 21 of that directive, which forms part of Chapter III thereof:

‘Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).’

11 In Annex II B to Directive 2004/18, under Category 17, are ‘Hotel and restaurant services’.

The award of a contract without application of the procedures laid down in Directive 2004/18 — in-house award

12 The conditions for such an award have been established and developed by the case-law of the Court, which has held that a contracting authority is exempted from initiating a procedure for the award of a public contract in accordance with Directive 2004/18 where it exercises over the contractor control similar to that which it exercises over its own departments and the tenderer carries out the essential part of its activities with the contracting authorities to which it belongs (see, to that effect, Case C-107/98 *Teckal* EU:C:1999:562, paragraph 50).

13 The Court has also held that the investment, however small, of a private undertaking in the capital of an undertaking of which the awarding authority also forms part prevents, in any event, the awarding authority from being able to exercise a control over it similar to that which it exercises over its own departments, given that any private capital investment in an undertaking follows considerations proper to private interests and pursues objectives of a different kind from those pursued by a public authority (see Case C-26/03 *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraphs 49 and 50).

Portuguese law

14 Directive 2004/18 was enacted in the Portuguese legal order by the Public Procurement Code, approved by Decree-Law No 18/2008 of 29 January 2008, as amended and republished as an annex to Decree-Law No 287/2009 of 2 October 2009 (*Diário da República*, 1st series, No 192, 2 October 2009).

15 Applying the case-law of the Court as referred to in paragraphs 12 and 13 of the present judgment, Article 5(2) of that code is worded as follows:

‘Section II to this Code shall also not apply to contracts, regardless of their purpose, concluded between contracting authorities and another entity, where:

(a) the contracting authority, on its own or in conjunction with other contracting authorities, exercises over the activity of that entity a control which is similar to that which it exercises over its own departments; and

(b) that entity carries on the essential part of its activities for the benefit of one or more contracting authorities which exercise control over the entity similar to that which is referred to in the preceding paragraph.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 On 27 July 2011, CHS, which is a public hospital, concluded with SUCH a contract concerning the supply by SUCH of meals to patients and staff of CHS (‘the 2011 contract’). That contract concerns a service contract awarded directly to SUCH, without application of the award procedures laid down in Directive 2004/18, in the light, according to the contracting parties, of the in-house relationship between SUCH and the public hospitals, which are the same in number as the partners of SUCH, and with a view to meeting the hospitals’ needs by internal means.

17 The contract was concluded for the period from 10 August 2011 to 9 August 2016 and is renewable. Its annual price is EUR 1 295 289, totalling EUR 6 476 455 over the five-year life of the contract.

18 As is apparent from the file provided to the Court, SUCH was created by Decree-Law No 46/668 of 24 November 1965. Its statutes were approved in October 2010 by the Secretary of State for Health. In

accordance with Article 2 of those statutes, SUCH is a non-profit organisation the aim of which is to carry out a public service mission. It is an instrument able internally to meet the needs of its partners and, to that end, it is required to take charge of initiatives that are capable of contributing to the better, more efficient functioning of its partners, providing them with economies of scale, and to contribute to the financial sustainability of the national social security service.

19 Under Article 7 of the statutes of SUCH, public sector and social sector entities may be its partners, that is to say, non-profit social support institutions, including the services and institutions of the Ministry of Health and of other ministries. In addition, SUCH is to ensure that the majority of the voting rights at the general meeting are held by its public entity partners which are subject to the management, supervision and guidance powers of the member of the Government responsible for health.

20 Article 5(3) of the statutes of SUCH provides that SUCH is also able to provide services under competitive market conditions to non-member public entities or private entities, be they national or foreign, provided that there is no harm to the interests of its partners, and that it is beneficial to them and to SUCH, whether economically or in terms of technical enhancement. However, the provision of those services must be accessory to the activity of SUCH and must not represent an invoice volume of more than 20% of its overall annual turnover for the previous financial year.

21 At the date on which the 2011 contract was concluded, SUCH had 88 partners, including 23 social support institutions, all of them non-profit organisations, of which 20 were charitable organisations (‘Misericórdias’).

22 Eurest, a company active in the sector of the provision of services such as those covered by the 2011 contract, brought an action before the Tribunal Administrativo e Fiscal de Almada (Administrative and Tax Court, Almada). By judgment of 30 January 2012, that court declared the 2011 contract to be null and void because of the lack of any relationship of control between CHS and SUCH which could justify the direct award of the contract in question.

23 That court based its finding in that regard on a judgment of the Tribunal de Contas (Court of Auditors) which held that, notwithstanding the changes to the statutes of SUCH, the number of its non-public partners, its broad autonomy and independence vis-à-vis public authorities, the particular working dynamics of its management board, and the fact that SUCH is a business organisation of considerable size and complexity, did not permit the view to be taken that the requirements under Article 5(2)(a) of the Public Procurement Code had been met. That decision was upheld by the Tribunal de Contas, in plenary session, in a judgment of 3 July 2012.

24 CHS and SUCH appealed against the judgment of the Tribunal Administrativo e Fiscal de Almada before the Tribunal Central Administrativo do Sul (Central Administrative Tribunal, South), which, by judgment of 26 April 2012, dismissed the appeal and upheld the judgment under appeal, basing its finding on the reasoning followed by the Tribunal de Contas in its abovementioned judgment. Following that decision, CHS and SUCH appealed on a point of law before the Supremo Tribunal Administrativo, repeating their line of argument regarding the existence of an internal relationship between SUCH and the public hospitals, which are its majority partners.

25 The Supremo Tribunal Administrativo points out that a public hospital such as CHS, being a legal person under public law, constitutes an awarding authority and that the contract for pecuniary interest entered into between CHS and SUCH, an entity distinct from the awarding authority, constitutes a public service contract within the meaning of Article 1(2)(a) of Directive 2004/18. In order to ascertain whether the contract could be awarded directly in-house, the referring court notes that the ‘similar control’, required to that end by the case-law of the Court, may be exercised over the contractor jointly by a number of awarding authorities and that that control implies an effective power of intervention by one or more of the awarding authorities not only in the strategic decisions of the contractor but also in its ordinary management.

26 However, the referring court points out that the particular legal nature of SUCH, having regard to the fact that its partners also include private social solidarity institutions, raises new questions in the light of the Court’s case-law resulting from the judgment in *Stadt Halle and RPL Lochau* EU:C:2005:5. It

therefore asks whether that case-law presupposes that a private undertaking participating in the capital of a company in which the awarding authority also participates must necessarily be profit making.

27 The referring court is also doubtful, in the light of the concerns expressed by the Tribunal de Contas, whether the requirement for ‘similar control’ is met in the present case, having regard to the number of non-public partners of SUCH, the nature of the guidance exercised over SUCH by the awarding authorities which are its partners and by the public authorities, its size and the complexity of its operation and the possibility of its acting autonomously as regards the public authorities.

28 With regard to the second condition established by the case-law of the Court, namely the requirement that the entity in question carry out the essential part of its activities with the controlling authority or authorities, the referring court notes that, in accordance with that case-law, the contractor must act as an operator whose activities are intended exclusively or almost exclusively to meet the needs of the awarding authority or authorities and any other activities are of only marginal significance. It asks whether that condition is met where an entity such as SUCH can provide services, under conditions of competition, to third party entities up to 20% of its overall annual turnover for the previous financial year.

29 Having regard to those considerations and taking account of the fact that it is called upon to rule at final instance, the Supremo Tribunal Administrativo has decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is it compatible with Community doctrine on in-house procurements that a public hospital, having dispensed with the procedure provided for by law for concluding the relevant contract, should award to a non-profit organisation, which it is in partnership with, and whose aim is to carry out a public service mission in the area of health with a view to enhancing the effectiveness and efficiency of its partners, a contract for the provision of hospital catering services within its area of competence, thereby transferring to that organisation responsibility for its functions in that area, if, under the provisions of its statutes, partners of that organisation may be, not only entities from the public sector, but also those from the social sector, given that on the date of the award, out of a total of 88 partners, there were 23 non-governmental organisations (IPSS) from the social sector, all of which were non-profit making and included charitable associations?

2. Can it be considered that the contractor is subordinate to the decisions of its public partners, in that the latter, on their own or as a whole, exercise a control which is similar to that which they exercise over their own departments, if, under the provisions of its statutes, the contractor must ensure that the majority of the voting rights are held by member partners and are subject to the management, supervision and guidance powers of the member of the Government responsible for health, given that the majority of the Management Board is also made up of public partners?

3. In the light of Community doctrine on in-house procurements, can it be considered that the requirement of “similar control” has been fulfilled, if, under the provisions of its statutes, the contractor is subject to the guidance powers of the member of the Government responsible for health who is in charge of appointing the President and Vice-President of the Management Board, approving the resolutions of the General Meeting on taking out loans involving a net debt equal to or greater than 75% of the equity recorded in the previous financial year, approving resolutions on amendments to the statutes, approving resolutions of the General Meeting on the dissolution of the contractor and determining how the assets are to be distributed in the event of a dissolution?

4. Does the fact that the contractor is a large and complex organisation, which operates throughout Portuguese territory, is in partnership with most departments and institutions of the SNS, including the majority of the country’s hospitals, has an estimated turnover in the order of EUR 90 000 000, has a business that includes varied and complex areas of activity, with very impressive activity indicators, and more than 3 300 workers, and participates in two additional enterprise groupings and in two commercial companies, mean that its relations with its public partners may be described as merely internal or in-house?

5. Does the fact that the contractor, under the provisions of its statutes, is able to provide services on a competitive basis to non-partner public entities or private entities, be they national or foreign (i) provided that there is no resulting loss or harm caused to the partners, and that it is beneficial to them and to the contractor, whether economically or in terms of enhancement or technical performance, and (ii) provided that the provision of those services does not represent a volume of invoicing that is greater than 20% of its overall annual turnover recorded in the previous financial period, mean that the requirement for in-house procurements, in particular the requirement for the "essential purpose of the activity" under Article 5(2)(b) of the CCP, has been fulfilled?

6. If the response to any of the above questions is not in itself sufficient to conclude whether or not the requirements under Article 5(2) of the CCP have been fulfilled having regard to Community doctrine on in-house procurements, does an overall assessment of these responses imply the existence of that type of procurement?'

Consideration of the questions referred

Preliminary observation

30 It must be observed as a preliminary point that, in accordance with the provisions of Chapter III, Title II, of the directive, the application of its provisions varies according to the categorisation of the services in question. According to the information contained in the file made available to the Court, it appears that the services covered by the 2011 contract fall within the scope of Annex II B to that directive.

31 Such an assessment is, however, for the referring court to make on the basis of the facts of the case before it and, in any event, it is not likely to affect either the application of Directive 2004/18 as such or the application of the exception concerning in-house operations where the conditions laid down in that regard by the case-law of the Court are met.

The first question

32 By this question, the referring court asks, in essence, whether the requirement for 'similar control', established by the case-law of the Court in order that the award of a public contract may be regarded as an in-house operation and may be made directly, without application of Directive 2004/18, is met where the contractor is a non-profit association operating in the public interest which, in accordance with its statutes, can have as partners not only public sector entities but also private social solidarity institutions carrying out non-profit activities and where, at the date of the award of the contract, the latter formed a large part, although a minority, of the number of partners of the contractor association.

33 In that regard, it must be borne in mind, firstly, that the fact that the contractor has the legal form of an association governed by private law and that it is non-profit is irrelevant as regards the application of the rules of EU law on public contracts and, in consequence, of the case-law of the Court concerning the exception for in-house operations. Such a fact does not preclude the contractor in question from carrying out an economic activity (see, to that effect, Case C-573/07 *Sea* EU:C:2009:532, paragraph 41, and Case C-305/08 *CoNISMa* EU:C:2009:807, paragraph 45).

34 Next, it must be noted that the question which arises, in essence, in the present case is whether the case-law resulting from the judgment in *Stadt Halle and RPL Lochau* EU:C:2005:5 applies, given that SUCH it is not established in the form of a company and does not therefore hold share capital and that its partners in the social sector are not undertakings in the terms used in that judgment.

35 In that regard, it must be pointed out that the exception concerning the in-house awards is based on an approach according to which, in such cases, the awarding public authority can be regarded as using its own resources in order to accomplish its tasks in the public interest.

36 One of the reasons which led the Court to the findings established in the judgment in *Stadt Halle and RPL Lochau* EU:C:2005:5 was based not on the legal form of the private entities forming part of the contractor or on their commercial purpose, but on the fact that those entities obeyed considerations particular to their private interests, which were different in nature from that of the objectives of public

interest pursued by the awarding authority. For that reason, that authority could not exercise control over the contractor similar to that which it exercised over its own services (see, to that effect, *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraphs 49 and 50).

37 Having regard to the fact, pointed out by the referring court, that SUCH is a non-profit association and the private partners which formed part of that association at the time of the award of the contract at issue in the main proceedings were private social solidarity institutions, all of them also non-profit, it must be noted that the fact that the Court referred, in the judgment in *Stadt Halle and RPL Lochau* EU:C:2005:5, to concepts such as that of 'undertaking' or 'share capital' is due to the specific facts of the case which gave rise to that judgment and does not mean that the Court intended to restrict its findings to those cases alone where commercial for-profit undertakings form part of the contractor.

38 Another reason which led the Court to the findings in the judgment in *Stadt Halle and RPL Lochau* EU:C:2005:5 is that the direct award of a contract would offer a private undertaking with a capital presence in that contractor an advantage over its competitors (see, to that effect, *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraph 51).

39 In the main proceedings, SUCH's private partners pursue interests and objectives which, however positive they may be from a social point of view, are different in nature from the public interest objectives pursued by the awarding authorities which are at the same time partners of SUCH.

40 In addition, as the Advocate General noted in point 37 of his Opinion, the private partners of SUCH, despite their status as social solidarity institutions carrying out non-profit activities, are not barred from engaging in economic activity in competition with other economic operators. In consequence, the direct award of a contract to SUCH is likely to offer an advantage for the private partners over their competitors.

41 Accordingly, the considerations which led the Court to the findings set out in paragraphs 36 and 38 of the present judgment are also valid in circumstances such as those of the main proceedings.

42 The fact that the participation of private partners in the contractor is merely as a minority is not sufficient to call those conclusions into question (see, to that effect, *Stadt Halle and RPL Lochau* EU:C:2005:5, paragraph 49).

43 Finally, it must be noted that the fact that, in accordance with its statutes, SUCH was able only to admit private entities as its partners is, in principle, irrelevant. The relevant factor in the present case is that, at the time of the award of the contract at issue in the main proceedings, SUCH was actually made up not only of public partners but also of entities from the private sector.

44 Having regard to the foregoing considerations, the answer to the first question is that, where the contractor under a public contract is a non-profit association which, at the time of the award of the contract, has as partners not only public sector entities but also private social solidarity institutions carrying out non-profit activities, the requirement for 'similar control', established by the case-law of the Court in order that the award of a public contract may be regarded as an in-house operation, is not met, so that Directive 2004/18 applies.

The second to sixth questions

45 In view of the answer given to the first question, there is no need to answer the other questions referred.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Where the contractor under a public contract is a non-profit association which, at the time of the award of the contract, has as partners not only public sector entities but also private social solidarity institutions carrying out non-profit activities, the requirement for 'similar control', established by the case-law of the Court in order that the award of a public contract may be regarded as an in-house operation, is not met, so that Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts applies.

[Signatures]

---

* Language of the case: Portuguese.

EU:C:2014:120

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 27 February 2014 (1)

Case C-574/12

Centro Hospitalar de Setúbal, EPE
Serviço de Utilização Comum dos Hospitais (SUCH)
v
Eurest Portugal — Sociedade Europeia de Restaurantes Lda

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Portugal))

(Public procurement — Directive 2004/18/EC — No obligation to initiate a tendering procedure pursuant to EU law (so-called 'inhouse award') — 'Similar control' requirement — Contractor which is legally distinct from the contracting authority and which is set up in the form of a non-profit organisation — Participation of private interests in the contractor — Requirement that the contractor must carry out the essential part of its activities with the contracting authorities which exercise 'similar control')

1. By the six questions for a preliminary ruling referred to it by the Supremo Tribunal Administrativo (Portugal) in the present case, the Court of Justice is again asked to clarify the scope of the conditions which must be satisfied if a contracting authority is to be able to make use of the exemption for so-called 'in-house' transactions. Pursuant to that exemption, first established by the Court in its judgment in *Teckal* (2) and now the subject of copious case-law, a contracting authority is exempted from initiating the procedure for the award of a public contract if two conditions are satisfied: (i) if the contracting authority exercises over the contractor 'control similar' to the control which it exercises over its own departments and (ii) if the contractor carries out the essential part of its activities with the controlling contracting authority or authorities. (3)

2. The present case raises a number of new issues which will allow the Court to clarify further the scope of the in-house exemption. First, the Court is asked to define the scope of its case-law, according to which the presence of private interests in the contractor precludes the possibility of the contracting authority exercising over that entity control similar to the control which it exercises over its own departments. (4) More specifically, the Court will need to clarify whether the strict approach taken in that case-law to private participation in the share capital of companies awarded contracts must also be applied in circumstances in which the contractor is a non-profit organisation whose partners include charitable organisations, in addition to the contracting authorities.

3. Second, the Court is asked to specify, in the present case, the parameters of the second '*Teckal* criterion', namely the condition that the contractor must carry out the essential part of its activities with the controlling contracting authority or authorities.

I – Legislative background

A – *EU law*

4. Article 1(2)(a) of Directive 2004/18/EC (5) provides that '"[p]ublic contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this directive'.

B – *National law*

5. According to Article 5(2) of the Portuguese Public Procurement Code (6) which transposed Directive 2004/18 into Portuguese law in the light of the Court's case-law, '[the rules on public contracts] shall also not apply to contracts, regardless of their purpose, concluded between contracting authorities and another entity, where:

(a) the contracting authority, on its own or in conjunction with other contracting authorities, exercises over the activity of that entity a control which is similar to that which it exercises over its own departments; and

(b) that entity carries on the essential part of its activities for the benefit of one or more contracting authorities which exercise control over the entity similar to that which is referred to in the preceding paragraph.'

II – Facts, national procedure and questions referred

6. The Centro Hospitalar de Setúbal ('CHS'), the first applicant in the proceedings pending before the national court, is a Portuguese public hospital.

7. The Serviço de Utilização Comum dos Hospitais ('SUCH'), the second applicant in the proceedings pending before the national court, is a non-profit organisation, set up by Legislative Decree No 46.668 of 24 November 1965, which has its own statutes. (7) Pursuant to Article 2 of its statutes, the aim of SUCH is to carry out a public service mission; it is an instrument for self-managing the needs of its partners and pursues the objective of helping them to function efficiently. It also contributes to the implementation of health policy by contributing significantly to the efficiency and financial sustainability of the Portuguese National Health Service.

8. Pursuant to Article 7(1) of the statutes of SUCH, its partners may only be entities from the public sector or from the social sector which provide health care or pursue activities related to the promotion and protection of health. Pursuant to Article 7(2), SUCH must, however, ensure that the majority of the voting rights in the General Meeting are held by entities subject to the management, supervision and guidance powers of the member of the government responsible for health. At the time of the material facts in the present case, SUCH had 88 partners, including CHS, as well as 23 non-governmental organisations, all of them non-profit organisations, including 20 charitable organisations (Misericórdias).

9. Pursuant to Article 3 of its statutes, SUCH is subject to the management, supervision and guidance powers of the member of the government responsible for the health sector, who is in charge of appointing the President and Vice-President of the Management Board, approving the resolutions of the General Meeting on taking out loans involving a net debt equal to or greater than 75% of the equity recorded in the previous financial year, on amendments to the statutes and on the dissolution of SUCH.

10. Pursuant to Article 5(3) of its statutes, SUCH is able to provide services under competitive market conditions to non-partner public entities or private entities, be they national or foreign, provided that there is no resulting loss or harm caused to its partners, and that it is beneficial to them and to SUCH, whether economically or in terms of enhancement or technical performance. According to Article 5(4), SUCH must ensure that at least 80% of its activity is carried out for the benefit of its partners.

11. On 27 July 2011, CHS concluded a contract with SUCH for the provision of catering services by SUCH to the patients and staff of CHS. The contract was concluded for a renewable five-year period

and provided for the payment of an annual price of EUR 1 295 289, totalling EUR 6 476 455 over the five-year life of the contract. The provision of the services forming the subject-matter of the contract was awarded directly to SUCH by CHS without initiating the tendering procedures provided for by Directive 2004/18, since, in the view of the parties to it contract, the contract was caught by the in-house relationship existing between SUCH and its hospital partners, including CHS.

12. Taking the view that the direct award to SUCH of the provision of the services forming the subject-matter of the contract entered into with CHS was unlawful, since it was awarded without initiating the procedure for the award of a public contract and thus in breach of national and EU procurement legislation, Eurest (Portugal) — Sociedade Europeia de Restaurantes Lda ('Eurest') — a company which also provides the services covered by the contract at issue and which was party to a contract with CHS for the provision of catering services, a contract which was terminated following the conclusion of the contract between CHS and SUCH, brought an action before the Tribunal Administrativo e Fiscal de Almada (Administrative and Tax Court, Almada) seeking, first, the annulment of the decision of the CHS Management Board to terminate its contract with that hospital and, second, the annulment of the contract concluded between CHS and SUCH.

13. By judgment of 30 January 2012, the Tribunal Administrativo e Fiscal de Almada upheld the application and declared to be null and void the contract concluded between CHS and SUCH. The Tribunal found that the conditions laid down under Article 5(2) of the Public Procurement Code had not been shown to be satisfied and that, consequently, the award of the services covered by the contract should be subject to a public tendering procedure. CHS and SUCH appealed against the judgment of the lower court before the Tribunal Central Administrativo do Sul (Central Administrative Tribunal, South) which dismissed their appeals by judgment of 26 April 2012. Both SUCH and CHS lodged appeals against that judgment before the referring court, the Supremo Tribunal Administrativo.

14. The referring court points out, first, that it is undisputed that, being a legal person under public law, a hospital such as CHS constitutes a contractor. Nor is it disputed that the contract entered into between CHS and SUCH, a distinct entity, constitutes a public service contract. The referring court also points out that, in order for the contract to form the subject of a direct in-house award, the two conditions laid down by Article 5(2) of the Public Procurement Code, codifying the *Teckal* case-law and set out in point 5 above, must be satisfied.

15. As regards, in particular, the first condition, namely the existence of 'similar control', the referring court notes that the particular legal nature of SUCH, whose partners include private social solidarity institutions (Instituições Particulares de Solidariedade Social — IPSS), raises new questions in the light of the Court's case-law, according to which the participation, even as a minority participation, of a private undertaking in the capital of a company excludes in any event the existence of similar control, (8) particularly given that, under EU law, an entity does not have to be profit-making before it can constitute an undertaking. Moreover, referring to a decision by which the Portuguese Court of Auditors refused to approve the contract at issue, the statement of reasons for which was set out in the judgment under appeal before it, the referring court asks whether the similar control requirement may be satisfied in the present case, bearing in mind the number of SUCH's non-public partners, its broad autonomy and independence vis-à-vis public authorities, its particular working dynamics, especially its Management Board, and its considerable size and complexity.

16. As regards the second condition governing in-house transactions, the referring court asks whether that condition may be satisfied where, under the provisions of the statutes of SUCH, it may obtain 20% of its turnover by providing services to third-party entities other than its partners.

17. In the light of those considerations, by order of 6 November 2012, the referring court deemed it necessary to stay the proceedings pending before it and to refer to the Court of Justice the following questions for a preliminary ruling:

'(1) Is it compatible with Community doctrine on in-house procurements that a public hospital, having dispensed with the procedure provided for by law for concluding the relevant contract, should award to a non-profit organisation, which it is in partnership with, and whose aim is to carry out a public service mission in the area of health with a view to enhancing the effectiveness and efficiency of its partners, a contract for the provision of hospital catering

services within its area of competence, thereby transferring to that organisation responsibility for its functions in that area, if, under the provisions of its statutes, partners of that organisation may be, not only entities from the public sector, but also those from the social sector, given that on the date of the award, out of a total of 88 partners, there were 23 non-governmental organisations (IPSS) from the social sector, all of which were non-profit making and included charitable associations?

(2) Can it be considered that the contractor is subordinate to the decisions of its public partners, in that the latter, on their own or as a whole, exercise a control which is similar to that which they exercise over their own departments, if, under the provisions of its statutes, the contractor must ensure that the majority of the voting rights are held by member partners and are subject to the management, supervision and guidance powers of the member of the Government responsible for health, given that the majority of the Management Board is also made up public partners?

(3) In the light of Community doctrine on in-house procurements, can it be considered that the requirement of "control which is similar" has been fulfilled, if, under the provisions of its statutes, the contractor is subject to the guidance powers of the member of the government responsible for health who is in charge of appointing the President and Vice-President of the Management Board, approving the resolutions of the General Meeting on taking out loans involving a net debt equal to or greater than 75% of the equity recorded in the previous financial year, approving resolutions on amendments to the statutes, approving resolutions of the General Meeting on the dissolution of the contractor and determining how the assets are to be distributed in the event of a dissolution?

(4) Does the fact that the contractor is a large and complex organisation, which operates throughout Portuguese territory, is in partnership with most departments and institutions of the SNS, including the majority of the country's hospitals, has an estimated turnover in the order of EUR 90 000 000, has a business that includes varied and complex areas of activity, with very impressive activity indicators, and more than 3 300 workers, and participates in two additional enterprise groupings and in two commercial companies, mean that its relations with its public partners may be described as merely internal or in-house?

(5) Does the fact that the contractor, under the provisions of its statutes, is able to provide services on a competitive basis to non-partner public entities or private entities, be they national or foreign (i) provided that there is no resulting loss or harm caused to the partners, and that it is beneficial to them and to the contractor, whether economically or in terms of enhancement or technical performance, and (ii) provided that the provision of those services does not represent a volume of invoicing that is greater than 20% of its overall annual turnover recorded in the previous financial period, mean that the requirement for in-house procurements, in particular the requirement for the "essential purpose of the activity" under Article 5(2)(b) of the CCP, has been fulfilled?

(6) If the response to any of the above questions is not in itself sufficient to conclude whether or not the requirements under Article 5(2) of the CCP have been fulfilled having regard to Community doctrine on in-house procurements, does an overall assessment of these responses imply the existence of that type of procurement?'

III – Procedure before the Court

18. The order for reference was received at the Court Registry on 7 December 2012. Written observations were submitted by CHS, SUCH, Eurest, the Portuguese and Spanish Governments and the European Commission, all of which made oral submissions at the hearing on 21 November 2013.

IV – Legal analysis

19. It should first be noted that it is clear from the order for reference that it is common ground that the contract entered into between CHS and SUCH constitutes a public contract and, as such, is in principle subject to EU public procurement law, and more specifically to the provisions of Directive 2004/18. (9)

20. However, the issue in the dispute before the national court, to which all of the questions for a preliminary ruling submitted to the Court of Justice by the national court relate, concerns the applicability to that procurement contract of the exemption for so-called in-house awards.

A – *The first question*

21. By its first question, the national court asks the Court of Justice, in essence, whether the exemption from the applicability of the provisions of Directive 2004/18, resulting from its case-law on in-house awards, may also take effect where the contractor is a non-profit organisation whose purpose is to perform a public-service mission and, under its statutes, its partners may be not only entities from the public sector but also those from the social sector, and where, at the time the contract was awarded, some, albeit a minority, of its partners did not belong to the public sector but were organisations from the social sector engaged in non-profit-making activities, in particular charitable activities.

22. That question relates to the first of the two criteria established in *Teckal*, namely the criterion that the contracting authority must exercise over the contractor 'control similar' to the control which it exercises over its own departments. (10) It is therefore appropriate to set out in brief, as a preliminary point, the scope of the 'similar control' requirement, as defined in the case-law.

23. In that regard, the Court has determined that similar control exists when the contractor in question is subject to the kind of control which enables the contracting authority to influence its decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that entity. In other words, the contracting authority must be able to exercise structural and functional control over the entity. The Court also requires that the control must be effective. (11)

24. Moreover, according to the case-law, where use is made of an entity jointly owned by a number of public authorities, the 'similar control' may be exercised jointly by those authorities, without it being essential for such control to be exercised individually by each of them. (12)

25. However, in accordance with settled case-law, the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments. (13)

26. That said, turning specifically to the question referred to the Court, it should first be pointed out that the fact that the contracting authority is set up in a form which is of a private-law nature, such as an organisation, in no way excludes per se the application of the inhouse exemption. (14) Indeed, the Court has on several occasions recognised that the exemption may apply to a contracting entity set up under private law, such as, a company limited by shares. (15)

27. The fact that the contractor to which the contract is directly awarded is non-profit-making is not significant for the purposes of applying the in-house exemption. In point of fact, the application of that exemption is based on the internal relationship which exists between the contracting authority and the contractor, as a result of which there is no concordance of two autonomous wills representing separate legal interests. (16) It is not therefore contingent on the legal nature of the contractor or on whether or not that entity is profit-making. It is, incidentally, clear from the case-law that the fact that an entity, and in particular an organisation, is non-profit making, does not in any way preclude it from engaging in economic activity and is not, consequently, of itself capable of exempting that entity from the application of EU procurement law. (17)

28. Moving on then to the inclusion among the contractor's partners of entities from not just the public but also from the social sector, it should be borne in mind that, as set out in points 2 and 25 above, the Court has established, in what is now settled case-law, that the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority, which is planning to make the in-house award, is also a participant in any event excludes the possibility of that contracting authority exercising the requisite similar control over the company in question.

29. As noted incidentally by the referring court itself, according to the case-law, it is not possible for the contracting authority to exercise similar control over the contractor, if private interests are present in the latter in the form of a shareholding by an *undertaking* in a *company's share capital.*

30. The situation of SUCH, however, differs from a case of that nature since, first, it is not established in the form of a company and does not therefore hold share capital, and, second, as the private social solidarity institutions which constitute its partners are not public in nature, they are not necessarily undertakings in the strict sense.

31. This, therefore, is the pivotal issue raised by the first question referred: is it necessary to apply to a situation such as that of SUCH the principle developed in the case-law, according to which the presence of private interests in the contractor precludes the possibility of the contracting authority exercising similar control over the contractor, thus ruling out the possibility of making direct awards to that contractor based on the in-house exemption?

32. In that regard, I would first draw attention to the fact that the Court has reiterated, on several occasions, that the primary objective of EU rules on public procurement is the free movement of services and the widest possible opening-up to competition in all of the Member States. (18) That involves an obligation on all contracting authorities to apply EU procurement law where the conditions for its application are satisfied, with the result that any derogation from the application of that obligation must be interpreted *strictly*. (19)

33. From that perspective, I would point out that, according to the case-law, there are two reasons for precluding the existence of an in-house relationship justifying the direct award of a contract where private interests have a capital presence in the contractor. As the Court has in fact stated, first, the relationship between a public authority which is a contracting authority and its own departments is governed by considerations and requirements proper to the pursuit of objectives in the public interest. Any private capital investment in an undertaking, on the other hand, follows considerations proper to private interests and pursues objectives of a different kind. (20)

34. Second, the Court has also stated that the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned, in particular in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors. (21)

35. I consider that both of the considerations set out by the Court in relation to the participation of a private undertaking in a company's share capital apply to the kind of situation which, based on the information in the documents before the Court, is that of SUCH.

36. In point of fact, first, the conclusion that the pursuit of private interests is underpinned by considerations different from the considerations that inform the pursuit of public interests is not, in my view, solely confined to cases in which private investment is present in a company. There is no question that the participation in a contracting entity of entities such as private social solidarity institutions is driven by reasons and interests of a private nature, such as, for instance, charitable interests whose objectives, although commendable, do not necessarily tally with the public interest. Indeed, although it may in some cases be possible to describe them as being in the general interest, such objectives exhibit features characteristic of private interests, having, for instance, religious (22) or voluntary connotations, and, while they may complement the public interest, they actually fall outside it.

37. Second, since non-profit organisations, such as the charitable organisations which are partners of SUCH, are not barred from engaging in economic activity in competition with other operators and may take part in calls for tender, (23) the direct award of a public contract under the in-house exemption is likely to offer here also, as in the case of companies, an advantage for those operators over their competitors.

38. In my view, in the light of the foregoing considerations, and at least as the law stands, (24) it cannot be accepted that a contracting authority is able to exercise control similar to the control which it exercises over its own departments over a non-profit organisation whose partners include, albeit as a

minority, non-public entities of a private-law nature which pursue private interests, such as non-profit organisations which pursue interests of a charitable and solidarity-based nature. It seems to me, consequently, that the direct award of a procurement contract by a contracting authority to an entity of that nature, on the basis of the in-house exemption, must be excluded. It will then, clearly, be for the national court to make, where appropriate, the necessary checks in that regard.

39. In those circumstances, it seems to me to be necessary to set out a number of additional considerations.

40. First, the fact that even the minority participation in a contractor of entities which pursue private interests, even if those entities are nonprofit-making, precludes, as the law stands, the existence of an in-house relationship between one or more contracting authorities and that entity, in no way implies that the objectives of organisations promoting social solidarity, or of voluntary or charitable organisations, may not be taken into consideration in the context of procurement law also. In that connection, I must point out, first, that solidarity is specifically recognised in Article 2 of the Treaty on European Union as one of the values underpinning the model of European society and that, consequently, entities actively promoting that value contribute to the construction of a European society in keeping with the spirit of the Treaties. (25) Second, and in line with that observation, it must be noted that social and solidarity-related considerations do not fall outside procurement law, as may be inferred, for example, from Article 26 of Directive 2004/18 which provides that the conditions governing the performance of a contract may concern social considerations. (26)

41. Second, it should be pointed out that the mere fact that the status of the non-profit organisation awarded the contract means that its partners may include entities from not only the public but also from the social sector is not of itself capable of precluding the existence of an inhouse relationship, in circumstances in which, at the time when the contract was awarded, that organisation's partners were public authorities exclusively. Indeed, it would not be consistent with the principle of legal certainty to allow the mere possibility that private parties may participate in an organisation, which is provided for under its statutes, to keep in indefinite suspense the determination of whether or not that organisation is entirely public in character. It follows that, in a situation in which public authorities only are members of the organisation in question at the time when the contract at issue is awarded, opening of participation in that organisation to private entities may be not taken into consideration unless there is, at that time, a real prospect, in the short term, of such an opening. The mere possibility that private persons may hold capital in an organisation is not, therefore, enough to support the conclusion that the condition relating to similar control by the public authority has not been satisfied. (27)

42. However, if a contract were to be attributed, without being put out to competitive tender, to an organisation all of whose members were public authorities and, during the period for which that contract was valid, private entities were admitted as members of that organisation, this would constitute the alteration of a fundamental condition of the contract, which would require the contract to be put out for competitive tender. (28)

43. In the light of all of the foregoing considerations, it is, in my view, necessary to answer the first question referred by the national court to the effect that the exemption from the applicability of EU procurement law provided for in relation to in-house awards may not take effect if the contractor to which the contracting authority plans directly to award the contract, without a competitive tender, is an entity governed by private law whose partners include, albeit as a minority, entities pursuing private interests.

B – *The second and third questions*

44. By its second and third questions, which I consider may be analysed together, the national court asks whether 'similar control' may be exercised over a contractor in circumstances in which certain provisions of its statutes confer particular powers, within the bodies established under its statutes, on its partners governed by public law or on the member of the government responsible for the sector.

45. More specifically, by its second question, the national court asks the Court of Justice, in essence, whether 'similar control' is exercised, on a contractor by its public-sector partners, on their own or as a whole, in a situation in which, under the provisions of its statutes, the contractor must ensure that the

majority of the voting rights are held by the partners which answer to and are subject to the management, supervision and guidance powers of the member of the government responsible for health, and in which the majority of the Management Board is also made up public partners.

46. By its third question, the national court asks, in essence, whether 'similar control' is exercised in a situation in which, under the provisions of its statutes, the contractor is subject to the guidance powers of the member of the government responsible for health who is in charge of appointing the President and Vice-President of the Management Board, and for approving certain resolutions of the General Meeting, such as those provided for by Article 3 of the statutes of SUCH. (29)

47. It is, however, clear from the answer to the first question referred that it is not possible for a contracting authority to exercise over a contractor control similar to the control which it exercises over its own departments, if entities that pursue private interests have even a minority participation in that contractor. It seems to me to follow logically from that finding, which reflects a strict interpretation of the exemption, in accordance with the case-law cited in point 32 above, that the participation of private interests in the contractor cannot be offset on the basis of provisions in that contractor's statutes which confer particular powers of supervision and guidance on its remaining public partners or on the member of the government responsible for the sector. Consequently, in my view, both the second and third questions must be answered in the negative.

48. I would also point out, incidentally, that the fact that the contractor is subject to powers of guidance of a direct (30) or indirect (31) nature, which are exercised by the member of the government responsible for the sector, does not necessarily mean that the contracting authorities exercise over the contractor, on their own or as a whole, control which is similar to the control which they exercise over their own departments.

49. It is in fact true that, depending on the specific circumstances of the individual case, the power of control over the decision-making bodies established under the company's statutes may be regarded as one of the factors enabling the contracting authorities which wield that control to exercise over the contractor control similar to that which they exercise over their own departments. (32) It is also in theory true that it may be possible that, in certain specific circumstances of a particular case, (33) supervision and guidance powers conferred on public authorities which control the contracting authorities, which in turn exercise control over the contractor, may contribute to curtailing the contractor's freedom of choice in a way that makes it possible to confirm the exercise of similar control by the contracting authorities over that contractor.

50. However, notwithstanding those considerations, the existence of similar control must be determined specifically by reference to the contracting authorities, which must exercise that control over the entity to which they intend directly awarding the contract, and not by reference to the State as such through the intermediary of the member of the government responsible for the sector.

51. In the light of the foregoing considerations, I consider that it is necessary to answer the second and third questions to the effect that, where there is even minority private participation in a contractor by entities which pursue private interests, provisions in that contractor's statutes which confer particular supervision or guidance powers on its remaining public partners, or the member of the government responsible for the sector, do not make it possible to confirm the exercise of similar control over that contractor, which is capable of justifying the application of the in-house exemption.

C – *The fourth question*

52. By the fourth question, the national court asks the Court of Justice, in essence, whether the fact that the contractor is a large and complex organisation, which operates throughout the national territory means that its relations with its public partners may be described as in-house, such as to justify directly awarding a contract to it.

53. That question, like the first three questions referred, concerns the first '*Teckal* criterion', namely the existence of 'similar control'. In point 23 above, I described the scope of that criterion, as defined in the case-law, namely that it is a form of control which is structural, functional and effective. In point 27

above, I set out, however, that according to the case-law, the basis for the in-house exemption is the contractor's lack of autonomy.

54. It is then clear from those considerations that the size and complex nature of an entity do not of themselves constitute factors which make it possible positively to confirm that an authority exercises structural and functional control effectively over an entity and, therefore, to describe the relationship which exists between them as 'similar control' within the meaning of the case-law.

55. That does not, however, mean that such factors are totally irrelevant to an analysis of whether similar control exists. The size and complex nature of an entity may, it seems to me, provide indicators and, as part of an overall assessment of all of the circumstances of the specific case, may be contributory factors in reaching the conclusion that the entity in question possesses a degree of autonomy which precludes the existence of similar control. I therefore consider that the answer to the fourth question must be to that effect.

D – *The fifth question*

56. By its fifth question, the national court asks the Court of Justice, in essence, whether the in-house exemption can apply if, under the provisions of its statutes, a contractor is able to provide services on a competitive basis to non-partner public entities or private entities, provided, first, that there is no resulting loss or harm caused to the partners, and that it is beneficial to them and to the contractor, and, second, that the provision of those services does not represent a volume of invoicing that is greater than 20% of its overall annual turnover recorded in the previous financial period.

57. While the first four questions all concerned the first *Teckal* criterion, namely the existence of 'similar control', the fifth question concerns the second criterion which must be satisfied in order for the inhouse exemption to apply, namely the condition that the contractor must carry out the essential part of its activities with the controlling contracting authority or authorities.

58. I must draw attention here to the fact that the Court has made clear that the second *Teckal* criterion is aimed precisely at ensuring that the rules on procurement remain applicable in the event that an undertaking controlled by one or more authorities is active in the market and therefore likely to be in competition with other undertakings. The Court has in fact pointed out that an undertaking is not necessarily deprived of freedom of action merely because the decisions concerning it are controlled by the controlling authority, if it can still carry out a large part of its economic activities with other operators. (34)

59. The Court has also made clear that the undertaking in question carries out the essential part of its activities with the controlling authority, within the meaning of *Teckal*, only if that undertaking's activities are intended *mostly* and *principally* for that authority alone, and any other activities are of only *marginal* significance. (35) Where several contracting authorities control an undertaking, the activities to be taken into account are those which that undertaking carries out with all of those contracting authorities together. (36)

60. Moreover, in its judgment in *Asociación Nacional de Empresas Forestales*, (37) the Court held that, subject to the necessary findings of fact by the national court, that condition was satisfied in a case in which the contractor carried out some 90% of its activities with the public authorities and bodies which controlled it. (38)

61. In those circumstances, as regards, first, the provision under its statutes according to which the contractor at issue is able to provide services on a competitive basis to third parties only provided that there is no resulting loss or harm caused to its partners and that it is beneficial to them, I consider that, since it acts as a brake on that contractor's pursuit of activities in the free market, that provision cannot constitute an obstacle to the application of the second *Teckal* criterion.

62. The question whether that condition is satisfied if the contractor obtains 20% of its overall annual turnover from non-partner public entities or private entities, that is to say from, third parties, appears, however, to be of greater significance. In that regard, it seems to me that it is necessary to adopt a strict approach to interpreting the exemption in question, as required by the case-law cited in

point 32 above. From that point of view, in a situation in which the contractor carries out 20% of its activity in the free market, and not with the controlling authorities, it does not seem to me to be possible to consider that, as required by the case-law cited in point 59 above, it is carrying out its activity *mostly* and *principally* for the controlling authorities alone, and that, consequently, any other activity is of only *marginal* significance. In effect, an activity which accounts for a fifth of an entity's total activity cannot, as far as I am concerned, be defined, purely in quantitative terms, as a *marginal* activity.

63. I therefore consider that, as the law stands, (39) it will be necessary to answer the fifth question to the effect that the in-house exemption cannot apply if, under the provisions of its statutes, a contractor is able to provide services on a competitive basis to non-partner public entities or private entities, up to the level of 20% of its overall annual turnover recorded in the previous financial period.

E – *The sixth question*

64. It will be necessary to answer the sixth question referred, as requested by the national court itself, only if the response to any of the first five questions is not in itself sufficient to conclude whether or not the requirements for the application of the in-house exemption have been fulfilled. In those circumstances, the national court asks whether an overall assessment of those responses implies that the in-house exemption applies in a case such as that pending before it.

65. In the light of the answers given to the first five questions, I consider that, should the Court adopt the approach which I have suggested, it need not answer that question. It is clear from those answers, and in particular the answers to the first and fifth questions, that in a case such as that pending before the national court, as the law stands, (40) that exemption may not apply, without there being any need to make an overall assessment of the responses. I therefore propose that the Court refrain from answering that question.

V – Conclusion

66. In the light of the above considerations I therefore propose that the Court should answer the questions referred by the Supremo Tribunal Administrativo in the following terms:

The exemption from the applicability of EU procurement law provided for in relation to in-house awards may not take effect if the contractor to which the contracting authority plans directly to award the contract, without a competitive tender, is an entity governed by private law whose partners include, albeit as a minority, entities pursuing private interests. In such a case, the existence of provisions in that contractor's statutes which confer particular supervision or guidance powers on its remaining public partners, or the member of the government responsible for the sector, do not make it possible to confirm the exercise of similar control over that contractor, which is capable of justifying the application of the in-house exemption.

The size and complex nature of an entity may provide indicators and, as part of an overall assessment of all of the circumstances of the specific case, may be contributory factors in reaching the conclusion that the entity in question possesses a degree of autonomy which precludes the existence of similar control.

The in-house exemption cannot apply if, under the provisions of its statutes, a contractor is able to provide services on a competitive basis to non-partner public entities or private entities, up to the level of 20% of its overall annual turnover recorded in the previous financial period.

---

1 – Original language: Italian.

---

2 – Case C-107/98 [1999] ECR I-8121.

---

3 – See, inter alia, Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 62; Case C-340/04 *Carbotermo and Consorio Alisei* [2006]

ECR I-4137, paragraph 33; Case C-295/05 *Asociación Nacional de Empresas Forestales* [2007] ECR I-2999, paragraph 55; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 27; Case C-573/07 *Sea* [2009] ECR I-8127, paragraph 40; Joined Cases C-182/11 and C-183/11 *Econord* [2012] ECR, paragraph 25; and Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] ECR, paragraph 32. In that connection, see also my recent Opinion in Case C-15/13 *Datenlotsen Informationssysteme*.

---

4 – See points 25 and 28 below.

---

5 – Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

6 – Approved by Decree-Law No 18/2008 of 29 January 2008.

---

7 – The statutes of SUCH have been amended on a number of occasions over time. The version in force at the time of the material facts was the version approved in October 2010.

---

8 – See *Stadt Halle and RPL Lochau*, cited in footnote 3, paragraphs 49 and 50.

---

9 – It is in fact common ground that, as mentioned at point 11 above, the value of the procurement contract in dispute before the national court clearly exceeds the threshold laid down in Article 7(b) of the directive, as amended.

---

10 – See point 1 above.

---

11 – See *Econord*, cited in footnote 3, paragraph 27 and the case-law cited.

---

12 – See *Econord*, paragraph 28 and the case-law cited.

---

13 – See the judgments in *Stadt Halle and RPL Lochau*, cited in footnote 3, paragraph 49; Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, paragraph 46; Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 31; Case C-337/05 *Commission* v *Italy* [2008] ECR I-2173, paragraph 38; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 30; Case C-573/07 *Sea* [2009] ECR I-8127, paragraph, 46; Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 53; and Case C-215/09 *Mehiläinen and Terveystalo Healthcare* [2010] ECR I-13749, paragraph 32.

---

14 – See, to that effect, the judgment in Case C-573/07 *Sea* [2009] ECR I-8127, paragraph 41. See also point 63 of the Opinion of Advocate General Stix-Hackl in *Stadt Halle and RPL Lochau*.

---

15 – As well as the judgment in *Sea*, cited in footnote 14, see, inter alia, the judgments in Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 33 and *Econord*, cited in footnote 3, paragraphs 29 and 32.

---

16 – In that connection, see in greater detail my recent Opinion in *Datenlotsen Informationssysteme*, cited in footnote 3, at point 41, where there are extensive references to case-law.

---

17 – See the judgments in Case C-119/06 *Commission* v *Italy* [2007] ECR I-168, paragraphs 37 and 41, and Case C-305/08 *CoNISMa* [2009] ECR I-12129, paragraph 45.

---

18 – See, to that effect, the judgments in *CoNISMa*, cited in footnote 17, paragraph 37 and the case-law cited, and in Case C-340/04 *Carbotermo and Consorio Alisei* [2006] ECR I-4137, paragraph 58.

---

19 – See, among others, the judgments in *Stadt Halle and RPL Lochau*, cited in footnote 3, paragraphs 44 and 46, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 63, as well as *ANAV*, cited in footnote 13, paragraph 26. See also point 38 of my recent Opinion in *Datenlotsen Informationssysteme*.

---

20 – See *Stadt Halle and RPL Lochau*, cited in footnote 3, paragraph 50, and *Commission* v *Austria*, cited in footnote 13, paragraph 47.

---

21 – See *Stadt Halle and RPL Lochau*, cited in footnote 3, paragraph 51.

---

22 – Which, subject to the necessary checks which it is for the national court to make, seems to apply to the ‘Misericordiàs’ associated with SUCH.

---

23 – *Commission* v *Italy*, cited in footnote 13, paragraphs 37 and 41, and CoNISMa, cited in footnote 17, paragraph 45.

---

24 – In that regard, it is in fact necessary to point out that the latest version of the Proposal for a Directive of the European Parliament and of the Council on public procurement, currently under discussion within the Council (Council document No 11745/13) and cited by the Commission at the hearing, lays down as a condition for in-house awards the absence of direct private participation in the capital of the legal person over which the contracting authority exercises similar control, with the exception, however, of participation that is non-controlling and non-blocking and does not confer a decisive influence on the decisions of the controlled person. It is entirely possible that, if that provision is retained in the final version of the new directive, it may, in certain specific cases, result in an interpretation different from the interpretation based on the current state of legislation.

---

25 – In that regard, it may, for example, be pointed out that the Court has accorded the Member States a power of discretion specifically in relation to the organisation of their social welfare systems, by recognising that they have the right to admit private operators to that system subject only to the condition that such operators are non-profit-making. See Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395, paragraph 32.

---

26 – See also, in that regard, recital 46 in the preamble to the directive.

---

27 – See, to that effect, *Sea*, cited in footnote 13, paragraphs 49, 50 and 51.

---

28 – See, to that effect, *Sea*, paragraph 53.

---

29 – See point 9 above.

---

30 – As in the case of the provision of the statutes at issue in the third question, namely Article 3 of the statutes of SUCH.

---

31 – As in the case of the provision of the statutes at issue in the second question, namely Article 7(2) of the statutes of SUCH.

---

32 – See the judgment in *Sea*, cited in footnote 13, paragraph 89; to that effect, see also the judgment in *Coditel Brabant*, cited in footnote 13, paragraph 34; however, see also the judgment in *Parking Brixen*, cited in footnote 3, paragraph 69.

---

33 – But a case in which there is no private participation in the contractor.

---

34 – See the judgment in *Carbotermo and Consorio Alisei*, cited in footnote 3, paragraphs 60 and 61.

---

35 – Ibid., paragraphs 62 and 63 (emphasis added).

---

36 – Ibid., paragraphs 70 and 71.

---

37 – Cited in footnote 3.

---

38 – Ibid., paragraph 63.

---

39 – It should be pointed out that, in the latest version of the Proposal for a Directive of the European Parliament and of the Council on public procurement, cited in footnote 24, it is explicitly provided that the in-house exemption may apply provided that more than 80% of the contractor's activities are carried out for the contracting authority or authorities which control it (see Article 11(1)(b)). It is clear that, if that threshold is confirmed in the directive, the legislature will have made a choice which will change the state of the law in the future. In my view, that does not, however, have any part to play in the interpretation of the law as it stands.

---

40 – See footnotes 24 and 38.

EU:C:2013:793

JUDGMENT OF THE COURT (Fourth Chamber)

5 December 2013 (*)

(Public procurement – Negotiated procedure with prior publication of a contract notice – Whether possible for the contracting authority to negotiate on tenders which do not comply with the mandatory requirements of the technical specifications relating to the contract)

In Case C-561/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Riigikohus (Estonia), made by decision of 23 November 2012, received at the Court on 5 December 2012, in the proceedings

Nordecon AS,

Ramboll Eesti AS

v

Rahandusministeerium,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, M. Safjan, J. Malenovský, A. Prechal and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Nordecon AS, by A. Ots,

– the Estonian Government, by M. Linntam and N. Grünberg, acting as Agents,

– the Czech Government, by M. Smolek and T. Müller, acting as Agents,

– the Spanish Government, by A. Rubio González, acting as Agent,

– the European Commission, by A. Tokár and L. Naaber-Kivisoo, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 30(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between Nordecon AS, the legal successor to Nordecon Infra AS, ('Nordecon') and Ramboll Eesti AS ('Ramboll Eesti'), on the one hand, and Rahandusministeerium (Ministry for Finance), on the other hand, concerning the annulment of a negotiated procedure for the award of a public contract with prior publication of a contract notice.

Legal context

European Union law

3 Article 1(11) of Directive 2004/18 provides:

'"Negotiated procedures" means those procedures whereby the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these.'

4 Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts', provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Article 23 of Directive 2004/18, entitled 'Technical specifications', provides at paragraphs 1 and 2 thereof:

'1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. …

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.'

6 Article 24 of Directive 2004/18, entitled 'Variants', provides at paragraphs 1 to 4 thereof:

'1. Where the criterion for award is that of the most economically advantageous tender, contracting authorities may authorise tenderers to submit variants.

2. Contracting authorities shall indicate in the contract notice whether or not they authorise variants: variants shall not be authorised without this indication.

3. Contracting authorities authorising variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation.

4. Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration.

...'

7 Article 30 of Directive 2004/18, entitled 'Cases justifying use of the negotiated procedure with prior publication of a contract notice', provides at paragraphs 1 to 3 thereof:

'1. Contracting authorities may award their public contracts by negotiated procedure, after publication of a contract notice, in the following cases:

(a) in the event of irregular tenders or the submission of tenders which are unacceptable under national provisions compatible with Articles 4, 24, 25, 27 and Chapter VII, in response to an open or restricted procedure or a competitive dialogue insofar as the original terms of the contract are not substantially altered.

...

(b) in exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing;

(c) in the case of services, inter alia services within category 6 of Annex II A, and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures;

...

2. In the cases referred to in paragraph 1, contracting authorities shall negotiate with tenderers the tenders submitted by them in order to adapt them to the requirements which they have set in the contract notice, the specifications and additional documents, if any, and to seek out the best tender in accordance with Article 53(1).

3. During the negotiation, the contracting authorities shall ensure equal treatment for all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.'

Estonian law

8 Article 27(1) Law on public procurement (riigihangete seadus; 'the RHS') provides:

'A negotiated procedure with publication of a contract notice is a procurement procedure in which any interested person may submit an application to take part in the procedure and in which the contracting authority makes a proposal to at least three applicants, to be chosen by the contracting authority on the basis of objective, non-discriminatory criteria, to submit tenders and negotiates the tenders with those applicants in order to adapt them to the requirements laid down in the specifications and choose the successful tender.'

9 Article 31(5) of the RHS provides:

'Where the contracting authority awards a contract to the tenderer who has submitted the most economically advantageous tender and the contract notice provides for the possibility of submitting in the tender, in addition to solutions corresponding to all the conditions laid down in the contract notice and the specifications, alternative solutions as well, it is to define in the specifications the conditions relating to the alternative solutions and the conditions under which they shall be submitted.'

10 Article 52(1) of the RHS provides:

'The contracting authority shall evaluate alternative solutions where it awards the contract to the tenderer who has submitted the most economically advantageous tender and where the contract notice permits alternative solutions to be submitted.'

11 Article 67(1) of the RHS provides:

'The contracting authority shall open all the tenders, except in the cases provided for in Article 65(4) herein, and negotiate with the tenderers the tenders submitted in order to adapt them, if necessary, to the requirements laid down in the contract notice and in the specifications and choose the successful tender.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 On 25 September 2008, the Maanteeamet (the Estonian Highways Office) launched a negotiated procedure with the publication of a contract notice entitled 'Planning and construction of the Aruvalla to Kose section of the E263 [road]'.

13 In accordance with points 4.3.1 and 4.7.1 of Annex III to the specifications relating to the contract at issue in the main proceedings, the central reservation of that section of road was to be 13.5 metres wide from the 26.6 kilometre mark to the 32 kilometre mark and 6 metres wide from the 32 kilometre mark to the 40 kilometre mark.

14 On 20 January 2010, the Maanteeamet declared that the four tenders submitted, namely, the tenders of the Lemminkäinen and Marko consortiums, the joint tender of Ehitusfirma Rand ja Tuulberg AS, Binders SIA and Insenierbuve SIA, and the tender of the Nordecon consortium, made up of Nordecon Infra AS and Ramboll Eesti, were admissible, even though the tender from the latter consortium proposed a central reservation 6 metres wide along the entire length of that section of road.

15 During the negotiations which followed the submission of those tenders, the Maanteeamet, by letter of 26 April 2010, invited the tenderers other than the Nordecon consortium to alter the width of the central reservation in their original tenders and to set it at 6 metres for the entire length of the section of road concerned, as the Nordecon consortium had proposed. After negotiations with all the tenderers, the latter submitted their offers by 27 May 2010, the date fixed by the contracting authority, after correcting the price because of the alteration requested.

16 By two decisions of 10 June 2010 the Maanteeamet first declared all the tenders admissible and secondly accepted the joint tender of the Lemminkäinen consortium, which was the lowest in price.

17 On 21 July 2010, in response to a complaint by Nordecon Infra AS, those two decisions were annulled by the Rahandusministeerium's complaints committee, which found that, in a negotiated procedure with prior publication of a contract notice, the negotiation conducted by the contracting authority could not relate to matters satisfying the requirements clearly and unambiguously laid down in the contract documents, such as those relating to the width of the central reservation. On 27 September 2010, the Maanteeamet's director general rejected the joint tender of the Lemminkäinen consortium and accepted the tender of the Nordecon consortium, that offer being the lowest in price after the tender of the Lemminkäinen consortium.

18 Following the Merko consortium's introducing an application for annulment, the Rahandusministeerium, by decision of 26 October 2010, annulled the procurement procedure at issue in the main proceedings on the grounds, in particular, that the contracting authority had unlawfully declared the tender of the Nordecon consortium admissible and declared that tender, which included an alternative solution not permitted under the contract notice, successful and that the negotiations conducted by the contracting authority could not concern matters satisfying the requirements clearly and unambiguously laid down in the contract documents, such as those relating to the width of the central reservation of the section of road concerned.

19 Nordecon, which in the meantime had become the legal successor to Nordecon Infra AS, and Ramboll Eesti brought an action against that decision before the Tallina halduskohus (Administrative Court, Tallinn), which dismissed the action by judgment of 2 March 2011. According to the Tallina halduskohus, the tender of the appellants in the main proceedings ought to have been declared inadmissible, for the contract notice concerned had, in breach of Article 31(5) and 52 of the RHS, provided, not for the possibility of submitting alternative solutions and of awarding the contract to be awarded to the tenderer offering the most economically advantageous tender, but for the lowest price to be taken into consideration. Moreover, in a negotiated procedure with prior publication of a contract notice, negotiations might relate only to aspects that were not defined at the time of the submission of the tender or that did not appear in the contract documents.

20 Nordecon and Ramboll Eesti brought an appeal against the Tallina halduskohuss's judgment before the Tallina ringkonnakohus (Regional Court, Tallinn). By judgment of 21 December 2011, the Tallina ringkonnakohus upheld the Tallina halduskohuss's judgment.

21 As regards point 8.1 of the tender specifications relating to the contract at issue in the main proceedings, under which the Maanteeamet had allowed alternative solutions, except for the construction of the surface structures of a main road (including access roads), the Tallina ringkonnakohus held that the contract notice did not provide for the possibility of submitting alternative solutions or for the award of the contract to the tenderer offering the most economically advantageous tender. The Maanteeamet therefore allowed, in infringement of Articles 31(5) and 52(1) of the RHS, alternative solutions to be submitted. Furthermore, the original tender of the appellants in the main proceedings ought to have been rejected.

22 Nordecon AS and Ramboll Eesti AS appealed on a point of law to the Riigikohus (Supreme Court), asking it to set aside the judgment of the Tallina ringkonnakohus, deliver a new judgment and declare the decision of the Rahandusministeerium of 26 October 2010 unlawful.

23 According to the referring court, it is not in dispute that the submission of alternative solutions was not allowed by the contract notice or that the evaluation of the tenders was not carried out by the yardstick of the most economically advantageous tender.

24 While granting that, in a negotiated procedure with prior publication of a contract notice, questions relating to the conditions under which a contract is awarded may, at least in part, be left open to negotiation, without its being necessary to consider alternative solutions, the referring court asks whether the contracting authority may also undertake negotiations when there are tenders that do not satisfy the mandatory requirements of the contract documents and whether the negotiations undertaken must, at the very least, lead to the successful tender's being consistent with those mandatory requirements.

25 In that regard, the referring court notes that Article 30(2) of Directive 2004/18 leaves open the question whether, during such negotiations, tenders may also be adapted to the mandatory requirements of the technical specifications. If such an adaptation is possible, the referring court asks whether it is also possible to conduct negotiations on the basis of tenders which, in their original form, do not fully satisfy the mandatory requirements. Nor, according to the referring court, does the directive clearly indicate whether the adaptation following from negotiations must result in the tender's fully complying with the technical specifications and whether, so as to achieve such compliance, the contracting authority may also alter the technical specifications.

26 It is on that basis that the Riigikohus decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Article 30(2) of Directive [2004/18] be interpreted as allowing the contracting authority to conduct negotiations with tenderers in respect of tenders which do not comply with the mandatory requirements laid down in the technical specifications relating to the contract?

2. If the answer to [the first question] is in the affirmative, must Article 30(2) of Directive 2004/18 then be interpreted as allowing the contracting authority during the negotiations, after the tenders have been opened, to alter the mandatory requirements of the technical specifications, provided that the subject-matter of the contract is not altered and equal treatment of all tenderers is ensured?

3. If the answer to [the second question] is in the affirmative, must Article 30(2) of Directive 2004/18 then be interpreted as precluding legislation which, after the tenders have been opened, excludes alteration of the mandatory requirements of the technical specifications during the negotiations?

4. If the answer to [the first question] is in the affirmative, must Article 30(2) of Directive 2004/18 then be interpreted as prohibiting the contracting authority from accepting as the best tender a tender which, at the end of the negotiations, does not comply with the mandatory requirements of the technical specifications?'

Admissibility of the request for a preliminary ruling

27 Nordecon, while not raising an objection of inadmissibility, contests the relevance of the questions referred for a preliminary ruling, claiming that resolution of the dispute in the main proceedings does not depend on any answer that may be given to those questions. In particular, it contends that the main question asked by the Riigikohus, that is to say, the first, to which all the other questions are connected, is not relevant, for the negotiations were not conducted with tenderers that had submitted irregular tenders. Accordingly, those questions are based on erroneous assumptions.

28 In that regard, it is settled case-law that, in proceedings under Article 267 TFEU, the Court is empowered to give rulings on the interpretation or the validity of a European Union provision only on the basis of the facts which the national court puts before it (see Case 104/77 *Oehlschlger* [1978] ECR-791, paragraph 4; Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 52; and Order of 8 November 2012 in Case C-433/11 *SKP* [2012], paragraph 24).

29 In the context of those proceedings, which are based on a clear separation of functions between the national courts and the Court, any assessment of the facts of the case is a matter for the national court. Similarly it is solely for the national court before which the dispute has been brought and which must assume responsibility for the forthcoming judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is, in principle, bound to give a ruling on the substance (see, to that effect, *Eckelkamp and Others*, paragraph 27).

30 The Court may refuse to give a substantive ruling on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the facts of the main action or its subject-matter, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Eckelkamp and Others*, paragraph 28).

31 In the present case, the referring court takes as its starting-point the finding that the contracting authority negotiated tenders that did not comply with the mandatory requirements of the specifications, which it is not for the Court to call in question. Moreover, none of the situations referred to in paragraph 30 of the present judgment that allow the Court to refuse to rule on a question referred for a preliminary ruling has, in the present case, been established.

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

Consideration of the questions referred

33 By its first question, the referring court asks whether Article 30(2) of Directive 2004/18 allows the contracting authority to negotiate with tenderers tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract.

34 In that regard, it must be recalled that, in certain cases, Article 30(2) of Directive 2004/18 allows the negotiated procedure to be used in order to adapt the tenders submitted by the tenderers to the requirements set in the contract notice, the specifications and additional documents, if any, and to seek out the best tender.

35 According to Article 2 of Directive 2004/18, contracting authorities are to treat economic operators equally and in a non-discriminatory manner and are to act in a transparent way.

36 The Court has stated that the obligation of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (Case C-599/10 *SAG ELV Slovensko and Others* [2012] ECR, paragraph 25).

37 Accordingly, even though the contracting authority has the power to negotiate in the context of a negotiated procedure, it is still bound to see to it that those requirements of the contract that it has made mandatory are complied with. Were that not the case, the principle that contracting authorities are to act transparently would be breached and the aim mentioned in paragraph 36 above could not be attained.

38 Moreover, allowing a tender that does not comply with the mandatory requirements to be admissible with a view to negotiations would entail the fixing of mandatory conditions in the call for tenders being deprived of useful effect and would not allow the contracting authority to negotiate with the tenderers on a basis, made up of those conditions, common to those tenderers and would not, therefore, allow it to treat them equally.

39 In the light of the foregoing considerations, the answer to the first question is that Article 30(2) of Directive 2004/18 does not allow the contracting authority to negotiate with tenderers tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract.

40 In the light of the answer to the first question, there is no need to reply to the second to fourth questions.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 30(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts does not allow the contracting authority to negotiate with tenderers tenders that do not comply with the mandatory requirements laid down in the technical specifications of the contract.

[Signatures]

---

* Language of the case: Estonian.

EU:C:2013:829

JUDGMENT OF THE COURT (Fifth Chamber)

12 December 2013 (*)

(Procedures for awarding public contracts in the water, energy, transport and telecommunications sectors – Directive 93/38/EEC – Directive not transposed into national law – Whether the State may rely on that directive against a body holding a public service concession in the case where that directive has not been transposed into national law)

In Case C-425/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Administrativo e Fiscal do Porto (Portugal), made by decision of 26 June 2012, received at the Court on 18 September 2012, in the proceedings

Portgás – Sociedade de Produção e Distribuição de Gás SA

v

Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território,

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 July 2013,

after considering the observations submitted on behalf of:

– Portgás – Sociedade de Produção e Distribuição de Gás SA, by J. Vieira Peres, advogado,

– the Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território, by M. Ferreira da Costa and M. Pires da Fonseca, acting as Agents,

– the European Commission, by M. Afonso and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1) (‘Directive 93/38’).

2 The request has been made in proceedings between Portgás – Sociedade de Produção e Distribuição de Gás SA (‘Portgás’) and the Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do

Território (Ministry of Agriculture, the Sea, the Environment and Town and Country Planning; 'the Ministério') concerning a decision ordering the recovery of financial aid which was granted to that company under the European Regional Development Fund, on the ground that, when it procured gas meters from another company, Portgás had not complied with the European Union law rules on public procurement.

Legal context

European Union law

3 Article 2(1) of Directive 93/38 provides:

'This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.'

4 Among the activities mentioned in Article 2(2) of Directive 93/38 is the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas.

5 Under Article 4(1) and (2) of that directive:

'1. When awarding supply, works or service contracts, or organising design contests, the contracting entities shall apply procedures which are adapted to the provisions of this Directive.

2. Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.'

6 Article 14(1)(c)(i) of Directive 93/38 provides that the directive applies to contracts awarded by contracting entities which carry out activities in the field of gas transport or distribution, provided that the estimated value of those contracts, net of value added tax, is not less than EUR 400 000.

7 Under Article 15 of Directive 93/38, supply and works contracts and contracts which have as their object services listed in Annex XVI A to that directive are to be awarded in accordance with the provisions of Titles III, IV and V thereof.

8 In accordance with Article 45(2) of Directive 93/38, the Portuguese Republic was required to adopt the measures necessary to comply with that directive and to apply them by 1 January 1998 at the latest. As regards the amendments made to Directive 93/38 by Directive 98/4, those amendments were to be transposed into the Portuguese domestic legal system by 16 February 2000 at the latest.

Portuguese law

9 Directive 93/38 was transposed into Portuguese law by Decree-Law No 223/2001 of 9 August 2001 (*Diário da República* I, series -A, No 184, of 9 August 2001, p. 5002). In accordance with Article 53(1) thereof, Decree-Law No 223/2001 entered into force 120 days after the date of its publication.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 Portgás is a company limited by shares under Portuguese law which is active in the natural gas production and distribution sector.

11 On 7 July 2001, Portgás concluded a contract for the supply of gas meters with Soporgás – Sociedade Portuguesa de Gás Lda. The value of that contract was EUR 532 736.92.

12 On 21 December 2001, Portgás submitted an application for Community co-financing under the European Regional Development Fund, which was approved. The contract awarding financial aid to cover the eligible expenditure of Project POR/3.2/007/DREN, which included the procurement of those gas meters, was signed on 11 October 2002.

13 Following an audit carried out by the Inspecção-Geral das Finanças (Inspectorate General of Finances), on 29 October 2009, the manager of the Programa Operacional Norte (Operational Programme North) ordered the recovery of the financial assistance which had been granted to Portgás in connection with that project, on the ground that, with regard to the procurement of those gas meters, Portgás had failed to comply with the rules of European Union law on public procurement, with the result that all expenditure that had been the subject of public co-financing was ineligible.

14 Portgás brought a special administrative action before the Tribunal Administrativo e Fiscal do Porto (Porto Administrative and Customs Court) by which it sought annulment of the decision ordering that recovery. Before that court, Portgás claimed that the Portuguese State could not require it, as a private undertaking, to comply with the provisions of Directive 93/38. According to Portgás, at the time when the contract was entered into with Soporgás – Sociedade Portuguesa de Gás Lda, the provisions of that directive had not yet been transposed into the Portuguese legal system and, therefore, they could not have direct effect in relation to Portgás.

15 The Ministério contended before the referring court that Directive 93/38 is addressed not only to the Member States but also to all contracting entities, as defined in that directive. According to the Ministério, in its capacity as the holder of the only public service concession in the area covered by the concession, Portgás was subject to the obligations arising from that directive.

16 Since it had doubts as to the interpretation of the provisions of European Union law invoked in the main proceedings, the Tribunal Administrativo e Fiscal do Porto decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘May Articles 4(1) and 14(1)(c)(i) of … Directive 93/38 …, and the other provisions of [that directive] and the general principles of Community law applicable, be interpreted as meaning that they create obligations for private persons who hold public service concessions – in particular an entity covered by Article 2(1)(b) of Directive 93/38 … – where that directive has not been transposed into national law by the Portuguese State, so that failure to comply with those obligations may be invoked against the entity holding the individual concession by the Portuguese State by means of an act attributable to one of its Ministries?’

The question referred for a preliminary ruling

17 By its question, the referring court is asking, in essence, whether Articles 4(1), 14(1)(c)(i) and 15 of Directive 93/38 may be relied on against a private undertaking solely on the ground that, in its capacity as the exclusive holder of a public service concession, that undertaking comes within the group of persons covered by that directive and, if so, whether the authorities of the Member State concerned may rely on those provisions in circumstances where Directive 93/38 has not yet been transposed into the domestic system of that Member State.

18 As a preliminary point, it should be recalled that, according to settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Case C-282/10 *Dominguez* [2012] ECR, paragraph 33 and the case-law cited).

19 So far as Articles 4(1), 14(1)(c)(i) and 15 of Directive 93/38 are concerned, it must be pointed out that those provisions require, in unconditional and precise terms, contracting entities carrying out activities in, inter alia, the gas transport and distribution sectors to award supply contracts, the estimated value of which is not less than EUR 400 000, in accordance with the provisions of Titles III, IV and V of that directive and to ensure that there is no discrimination between different suppliers, contractors or service providers.

20 It follows that those provisions of Directive 93/38 are unconditional and sufficiently precise to be relied on before national courts.

21 That being so, it is necessary to establish whether those provisions may be relied on, before national courts, against a private undertaking, such as Portgás, in its capacity as the exclusive holder of a public service concession.

22 In this connection, it should be recalled that, in accordance with the third paragraph of Article 288 TFEU, the binding nature of a directive, which constitutes the basis for the possibility of relying on it, exists only in relation to 'each Member State to which it is addressed'. It follows, according to settled case-law, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against such a person before a national court (Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 9; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; and *Dominguez*, paragraph 37 and the case-law cited).

23 So far as concerns the entities against which the provisions of a directive may be relied on, it is apparent from the Court's case-law that those provisions may be relied on against a State, regardless of the capacity in which the latter is acting, whether as employer or public authority. In either case, it is necessary to prevent the State from being able to take advantage of its own failure to comply with European Union law (see, to that effect, Case 152/84 *Marshall* [1986] ECR 723, paragraph 49; Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 17; and *Dominguez*, paragraph 38).

24 Thus, according to settled case-law, the entities against which reliance may be placed on the provisions of a directive that are capable of having direct effect include a body, whatever its legal form, which has been given responsibility, pursuant to a measure adopted by the State, for providing a public-interest service under the control of the State and which has, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals (*Foster and Others*, paragraph 20; Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 23; Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 24; Case C-356/05 *Farrell* [2007] ECR I-3067, paragraph 40; and *Dominguez*, paragraph 39).

25 It follows from that case-law that, even if a private party comes within the group of persons covered by a directive, the provisions of that directive may not be relied on as such against that person before the national courts. Consequently, as the Advocate General has noted in point 41 of his Opinion, the mere fact that a private undertaking which is the exclusive holder of a public service concession is among the entities expressly referred to as constituting the group of persons covered by Directive 93/38 does not mean that the provisions of that directive may be relied on against that undertaking.

26 Rather, it is necessary that that public service should be provided under the control of a public authority and that that undertaking should have special powers beyond those which result from the normal rules applicable in relations between individuals (see, to that effect, *Rieser Internationale Transporte*, paragraphs 25 to 27).

27 As regards the position of Portgás, it is apparent from the order for reference that that undertaking has been entrusted by the Portuguese State with providing, as holder of an exclusive concession, a public service, namely, the operation of the gas distribution network in the region of northern Portugal.

28 However, the information provided by the referring court does not enable the Court to determine whether, at the time of the facts at issue in the main proceedings, that public service was provided under the control of State authorities and whether Portgás had special powers going beyond those which result from the normal rules applicable in relations between individuals.

29 In this connection, it should be observed that, as regards the question whether that public-interest service was provided under the control of the Portuguese authorities, Portgás has argued, without being contradicted by the Portuguese Government, that the Portuguese State does not hold a majority or the entirety of its share capital and that the Portuguese State may neither appoint members to its management and supervisory bodies nor issue instructions concerning the operation of its public service activity. However, it is not clear from the documents before the Court whether those circumstances were satisfied at the time of the facts at issue in the main proceedings.

30 As to whether Portgás had special powers going beyond those which result from the normal rules applicable in relations between individuals, it should be observed that, although that undertaking enjoyed, pursuant to the concession contract, special and exclusive rights, that does not mean, as the Advocate General has noted in point 39 of his Opinion, that it had such special powers. The fact that Portgás could request that the expropriations necessary for the establishment and operation of the infrastructures be carried out, without, however, being able itself to do so, is not sufficient, in itself, for a finding that Portgás had special powers going beyond those which result from the normal rules applicable in relations between individuals.

31 In those circumstances, is for the referring court to establish whether, at the time of the facts at issue in the main proceedings, Portgás was a body which had been given responsibility for providing, under the control of a public authority, a public-interest service and whether that undertaking had, for that purpose, such special powers.

32 On the assumption that Portgás featured among the entities against which, pursuant to the case-law cited in paragraph 24, the provisions of Directive 93/38 may be relied on by an individual, it is necessary to examine whether those provisions could also be relied on against Portgás by the Portuguese authorities.

33 In this connection, it should be observed that, although the Court has held that unconditional and sufficiently precise provisions of a directive may be relied on by individuals against a body which has been given responsibility, under the control of the State, for a public-interest service and which has, for that purpose, special powers (see, to that effect, *Foster and Others*, paragraphs 18 and 20, and *Dominguez*, paragraphs 38 and 39 and the case-law cited), the case in the main proceedings has arisen in a context different from the context of that case-law.

34 In the context of the present case, it should be recalled that, according to the case-law of the Court, the obligation on a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 288 TFEU and by the directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of the Member States (see Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 40 and the case-law cited) as well as on bodies which, under the control of those authorities, have been given responsibility for a public-interest service and which have, for that purpose, special powers. It follows that the authorities of the Member States must be in a position to ensure that such bodies comply with the provisions of Directive 93/38.

35 It would be contradictory to rule that State authorities and bodies satisfying the conditions set out in paragraph 24 of the present judgment are required to apply Directive 93/38, while denying those authorities the possibility to ensure compliance, if necessary before national courts, with the provisions of that directive by a body satisfying those conditions when that body must itself also comply with Directive 93/38.

36 Furthermore, the Member States would be able to take advantage of their own failure to comply with European Union law in failing correctly to transpose a directive into national law if compliance with the provisions of Directive 93/38 by such bodies could not be ensured on the initiative of a State authority.

37 Lastly, that approach would make it possible for a private competitor to rely on the provisions of Directive 93/38 against a contracting entity which satisfies the criteria set out in paragraph 24 of the present judgment, whereas State authorities could not rely on the obligations flowing from that directive against such an entity. Consequently, whether or not such a contracting entity would be

required to comply with the provisions of Directive 93/38 would depend on the nature of the persons or bodies relying on Directive 93/38. In those circumstances, Directive 93/38 would no longer be applied in a uniform manner in the domestic legal system of the Member State concerned.

38 It follows that a private undertaking, which has been given responsibility, pursuant to a measure adopted by the State, for providing, under the control of the State, a public-interest service and which has, for that purpose, special powers going beyond those which result from the normal rules applicable in relations between individuals, is obliged to comply with the provisions of Directive 93/38 and the authorities of a Member State may therefore rely on those provisions against it.

39 In the light of all the foregoing considerations, the answer to the question referred is that:

– Articles 4(1), 14(1)(c)(i) and 15 of Directive 93/38 must be interpreted as meaning that they cannot be relied on against a private undertaking solely on the ground that, in its capacity as the exclusive holder of a public-interest service concession, that undertaking comes within the group of persons covered by Directive 93/38, in circumstances where that directive has not yet been transposed into the domestic system of the Member State concerned.

– Such an undertaking, which has been given responsibility, pursuant to a measure adopted by the State, for providing, under the control of the State, a public-interest service and which has, for that purpose, special powers going beyond those which result from the normal rules applicable in relations between individuals, is obliged to comply with the provisions of Directive 93/38 and the authorities of a Member State may therefore rely on those provisions against it.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Articles 4(1), 14(1)(c)(i) and 15 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998, must be interpreted as meaning that they cannot be relied on against a private undertaking solely on the ground that, in its capacity as the exclusive holder of a public-interest service concession, that undertaking comes within the group of persons covered by Directive 93/38, in circumstances where that directive has not yet been transposed into the domestic system of the Member State concerned.

Such an undertaking, which has been given responsibility, pursuant to a measure adopted by the State, for providing, under the control of the State, a public-interest service and which has, for that purpose, special powers going beyond those which result from the normal rules applicable in relations between individuals, is obliged to comply with the provisions of Directive 93/38, as amended by Directive 98/4, and the authorities of a Member State may therefore rely on those provisions against it.

[Signatures]

---

* Language of the case: Portuguese.

EU:C:2013:623

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 18 September 2013 (1)

Case C-425/12

Portgás - Sociedade de Produção e Distribuição de Gás, SA
v
Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território

(Request for a preliminary ruling from the Tribunal Administrativo e Fiscal do Porto (Portugal))

(Procedure for awarding public contracts in the water, energy, transport and telecommunications sectors – Directive 93/38/EEC – Directive not implemented in domestic law – Possibility for a State authority to rely on certain provisions of Directive 93/38/EEC against a body which is a public service concession-holder having the status of a contracting entity)

1. Although the Court has recently commemorated the fiftieth anniversary of its emblematic judgment in *van Gend & Loos*, (2) the discussions relating to the consequences of recognising the direct effect of EU law are far from closed. That is the case in particular with regard to the scope of the direct effect of directives. This is demonstrated in the present case, which presents the Court with a further opportunity to set out the requirements for being able to rely on a directive which has not been implemented in domestic law.

2. More specifically, the present case raises the question as to whether and, as the case may be, under what circumstances the State may, as against a body which is a public service concession-holder and also has the status of a contracting entity, rely on a number of provisions of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, (3) as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998, (4) where that measure has not been transposed into domestic law within the prescribed period.

I – Legal framework

A – *EU law*

3. Article 2(1) of Directive 93/38 is worded as follows:

‘This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or

exclusive rights granted by a competent authority of a Member State.'

4. The activities referred to in Article 2(2) of Directive 93/38 include the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas.

5. Article 4(1) and (2) of that directive provides:

'1. When awarding supply, works or service contracts, or organising design contests, the contracting entities shall apply procedures which are adapted to the provisions of this Directive.

2. Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.'

6. In accordance with Article 14(1)(c)(i) thereof, that directive applies to contracts awarded by contracting entities carrying out activities in connection with the transport or distribution of gas, provided that the estimated value, net of value added tax ('VAT'), is not less than EUR 400 000.

7. Pursuant to Article 45(2) of Directive 93/38, the Portuguese Republic was required to adopt the measures necessary to comply with that directive and to apply them by 1 January 1998 at the latest. The amendments made to that directive by Directive 98/4 had, pursuant to Article 2(2) thereof, to be implemented in the Portuguese domestic legal system by no later than 16 February 2000.

B – *Portuguese law*

8. Decree-Law No 223/2001 of 9 August 2001 (5) implemented Directive 93/38 in Portuguese law. Under Article 53(1) thereof, Decree-Law No 223/2001 entered into force 120 days after the date of its publication.

II – The case before the referring court, the question referred and the procedure before the Court

9. Portgás – Sociedade de Produção e Distribuição de Gás, SA ('Portgás') is a limited liability company governed by Portuguese law which is active in the natural gas production and distribution sector. (6)

10. On 7 July 2001, Portgás concluded with Soporgás – Sociedade Portuguesa de Gás Lda a contract relating to the supply of gas meters. The value of that contract was EUR 437 053.20 net of VAT (that is, EUR 532 736.92).

11. On 21 December 2001, Portgás submitted an application for Community co-financing under the European Regional Development Fund, which was approved. The contract awarding financial assistance to cover the eligible expenditure of Project POR/3.2/007/DREN, which included the acquisition of the gas meters, was signed on 11 October 2002.

12. On 29 October 2009, following a project audit carried out by the services of the Inspectorate General of Finance, the manager of Programa Operacional Norte (Operational Programme North) ordered recovery of the financial assistance which had been granted to Portgás in the context of Project POR/3.2/007/DREN on the ground that, since that company had failed to comply with the rules of EU law on public procurement, all the expenditure which had been co-financed through public funds had to be regarded as ineligible.

13. Portgás brought a special administrative action before the Tribunal Administrativo e Fiscal do Porto (Porto Administrative and Customs Court), seeking a declaration of nullity or the annulment of that decision on the ground that the Portuguese State could not require it, as a private undertaking, to comply with the provisions of Directive 93/38. Since that directive had not yet been transposed into Portuguese law at the material time, those provisions could not, it argued, have direct effect for it.

14. For its part, the Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território (the Ministry of Agriculture, the Sea, the Environment and Town and Country Planning, 'the Ministry'), which is the defendant in the main proceedings, pointed out before the referring court that Directive 93/38 is addressed not only to the Member States but also to all contracting entities, as defined by that directive. According to that ministry, Portgás was, in its capacity as sole public service concession-holder in the area covered by the concession, subject to the obligations arising under that directive.

15. Since it was uncertain as to the interpretation of the provisions of EU law relied on in the main proceedings, the Tribunal Administrativo e Fiscal do Porto decided on 26 June 2012 to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Can Articles 4(1) and 14(1)(c)(i) of … Directive 93/38 …, as amended by Directive 98/4 …, and the other provisions of those directives and the general principles of Community law applicable, be interpreted as meaning that they create obligations for private persons who hold public service concessions – in particular an entity covered by Article 2(1)(b) of Directive 93/38 – where that directive has not been transposed into national law by the Portuguese State, so that failure to comply with those obligations may be invoked against the entity holding the individual concession by the Portuguese State by means of an act attributable to one of its Ministries?'

16. Written observations have been submitted to the Court by the applicant in the main proceedings, by the Portuguese Government and by the Commission.

17. Written questions and a request for the focussing of oral arguments were addressed to the parties. The hearing was held on 4 July 2013.

III – Analysis

18. This request for a preliminary ruling arose from a dispute between Portgás and the Ministry concerning a decision ordering the recovery of financial assistance which had been granted to that company in the context of the European Regional Development Fund, on the ground that, at the time when it acquired gas meters from another company, Portgás had not complied with a number of rules of EU law applicable with respect to public contracts.

19. Portgás challenges that decision, pointing out that, in view of its status as a private undertaking, the provisions of Directive 93/38, which at the material time had not yet been implemented in domestic law, could not have direct vertical effect for it. Taking the view that Directive 93/38 is addressed not only to the Member States but also to any contracting entities, within the meaning of Article 2(1)(b) of that directive, the Ministry submits, for its part, that the directive contains obligations for all entities covered by that provision, in particular those operating on the basis of exclusive rights granted by a Member State. That, it submits, is precisely the case with regard to the applicant company as a public service concession-holder.

20. In essence, the referring court seeks to ascertain whether and under what circumstances the provisions of Directive 93/38 may be relied upon as against a public service concession-holder having the status of a contracting entity in circumstances where that directive has not been implemented in domestic law.

21. Although, as is clear from settled case-law, the issue of the possibility of relying on a directive as against an entity having the status of a public service concession-holder is by no means unprecedented, the case at hand presents a certain specific feature in that that possibility of relying on a directive is claimed by a State authority.

22. From the outset, I would point out that there is no dispute whatsoever as to the issue of whether the provisions of the directive for which interpretation is sought, that is to say, Articles 4(1) and 14(1)(c)(i) of Directive 93/38, fulfil the 'technical' requirements of being sufficiently precise, clear and unconditional so that they can be relied upon as against the State. (7)

23. Moreover, it seems to me that there can scarcely be any doubt that those provisions fulfil the necessary criteria. With regard to supply and service contracts the estimated value of which, net of VAT, is no less than EUR 400 000, those provisions impose, in particular, on contracting entities carrying out activities in the gas transport and distribution sectors a precise and unconditional obligation, according to which the award of those contracts must be in conformity with the provisions and procedures provided for by Directive 93/38 and must be carried out without discrimination between suppliers, contractors or service providers. No particular implementing measure appears to be necessary to ensure compliance with those requirements. That assessment has, in my view, firm support in the case-law on comparable provisions relating to the award of public contracts. (8)

24. By contrast, the point at issue here is whether those provisions may be relied upon as against Portgás purely in its capacity as a public service concession-holder having the status of a contracting entity within the meaning of Article 2(1) of Directive 93/38. Similarly, the question is raised as to whether, irrespective of the possibility of regarding Portgás as an emanation of the State within the meaning of the Court's case-law, it is possible for a State authority to rely directly on some of the provisions of that directive.

25. In the present case, I therefore consider that, in order to answer the question raised, it is first of all necessary to determine whether it is possible to rely on the provisions of Directive 93/38 against Portgás purely in its capacity as a public service concession-holder, and, if so, to establish whether the administrative authorities of a Member State may rely on provisions of that directive which, at the material time, had not been implemented in the national legal system.

26. In other words, after resolving the issue of *against whom* the provisions of a directive which has not been implemented or which has been improperly implemented can be invoked, it is still necessary to determine *who* may rely on those provisions and, where appropriate, *on what basis*.

A – *The possibility of invoking the provisions of Directive 93/38 against Portgás purely in its capacity as a public service concession-holder and contracting entity within the meaning of Article 2 of that directive*

27. In the present case, two conflicting views are represented.

28. On the one hand, the applicant in the main proceedings argues, in essence, that, since Directive 93/38 had not yet been implemented in domestic law on the date on which the supply contract at issue was entered into, the Portuguese administrative authorities could not invoke the provisions of that directive against it. It points out that, according to settled case-law, directives which have not been implemented cannot impose obligations on individuals. It claims that it has precisely the status of an individual, notwithstanding the fact that it has the status of a public service concession-holder. It points out, in that regard, that it does not have any rights or powers going beyond the general law.

29. On the other hand, the Portuguese Government and the Commission submit, in essence, that Portgás, in its capacity as sole public service concession-holder and contracting entity within the meaning of Article 2(1)(b) of Directive 93/38, was required to comply with the provisions of that directive, even though the latter had not yet been implemented in domestic law on the date on which the supply contract at issue was concluded.

30. It seems to me important to bear in mind that recognition of the direct effect of directives is based, ultimately, on two complementary objectives: the need effectively to guarantee the rights which individuals may derive from those measures and the desire to penalise national authorities which have failed to respect the binding effect of directives and to ensure their effective application. (9)

31. Considered from that point of view, and as the Court has consistently held, the binding nature of a directive, which constitutes the basis for the possibility of relying on that directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive cannot, of itself, impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. (10) A national authority may not rely, as against an individual, on a provision of a directive the necessary implementation of which in national law has not yet taken place. (11)

32. In other words, and notwithstanding the uncertainties which have reasonably arisen in that regard, (12) the direct effect of directives can be only 'vertical' and 'upwards', in that it can apply only in the case of an action brought by an individual against a State authority. The corollary of that rule consisting of the obligation of the national court to interpret the rules of its own national law in conformity with the provisions of a directive reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed. (13)

33. That limitation is, however, counterbalanced by the fact that the entities against which unconditional and sufficiently precise provisions of a European directive can be relied upon have many forms and qualities. It is also firmly established that the concept of 'Member State' against which the provisions of a directive may be relied upon is understood in a way which is both functional and extensive.

34. It covers, first, all organs of the public administration, including decentralised authorities. (14) Moreover, where a person involved in legal proceedings is able to rely on a directive against the State, he may do so regardless of the capacity in which the latter is acting, whether as an employer or as a public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with EU law. (15)

35. That concept covers, more broadly, all persons governed by public or private law who maintain special links with the State, that is to say, to reiterate the wording enshrined in *Foster and Others*, (16) and repeated many times since then, (17) bodies and undertakings, whatever their legal form, which have been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and have for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

36. The Court has thus held that the provisions of a directive capable of having direct effect could be relied upon against a legal person governed by private law where the State has entrusted to that legal person a particular task and where it has direct or indirect control of that legal person. (18)

37. However, it does not seem to me to follow from case-law that the mere fact that an entity has the status of a contracting authority, for the purposes of EU law, means that it must be regarded as forming part of the State.

38. Although, according to the case-law of the Court, the provisions of a directive may have direct effect against a body responsible for providing a public service under the control of the State, it is also necessary that that entity should have special powers going beyond those which result from the normal rules applicable in relations between individuals.

39. However, if, as the Commission stated, the status of contracting entity is, under Article 2(1)(b) of Directive 93/38, conferred only on private entities which 'operate on the basis of special or exclusive rights granted by a competent authority of a Member State', that status does not necessarily imply that those entities have 'special powers' within the meaning of the rule in *Foster and Others*, as clarified, in particular, in *Collino and Chiappero* (19) and *Rieser Internationale Transporte*. (20)

40. Moreover, I am far from convinced that it is necessary to extend the possibility of relying on directives by virtue of their direct effect as against such an entity.

41. First of all, it is necessary to point out that, in general, the fact that an entity comes within the personal scope of a directive is not a decisive factor in determining whether the provisions of that directive which have not been transposed may be relied on as against it, (21) since what is important is that, under the third paragraph of Article 288 TFEU, only the Member States are addressees of a directive. Accordingly, although Portgás is one of the entities expressly falling within the scope of the directive at issue, in its capacity as a company holding a public service concession which was entrusted to it by the State on an exclusive basis, it is difficult to argue that it was under an obligation to comply with the provisions of Directive 93/38 before the implementing legislative measure entered into force.

42. Next, in spite of the parallels which may reasonably be drawn, the concept of ‘contracting entity’ does not have the same scope as the concept of ‘State’, in the functional sense of the term, against which an individual can invoke the direct effect of a directive. (22)

43. Similarly, the fact that a private undertaking is entrusted with providing, as sole concession-holder, a service in the public interest is not sufficient for being able to invoke against it the provisions of a directive which has not been implemented in the domestic legal order. It is necessary to establish that that undertaking has special powers and is subject to the control of the public authorities. (23)

44. Returning to the case before the referring court, it appears at first sight from the evidence presented to the Court (24) that the relationship between Portgás and the Portuguese State authorities is not as close as that which existed in *Foster and Others*, between the entity at issue and the British authorities. The powers of control which the Portuguese authorities have in relation to Portgás are, it seems to me, much more limited. (25)

45. However, since the referring court has not provided sufficient information concerning Portgás to determine whether, at the material time, that undertaking had special powers and was subject to the control of the public authorities, in accordance with the rule established in *Foster and Others* (26) and the approach traditionally adopted by the Court in similar cases, (27) it is for the referring court to examine whether those requirements were fulfilled as regards the situation of Portgás at the material time.

46. In the absence of evidence that Portgás should be placed on the same footing as the State, the possibility of relying on the directive ought to be excluded, since, as is clear from the settled case-law of the Court referred to above, the provisions of a directive which has not been implemented cannot impose obligations on an individual or be relied upon as against that individual.

47. To decide otherwise would be tantamount to conferring a downward direct effect on the provisions of Directive 93/38 and, furthermore, to allowing the State, understood in a unitary manner, to rely, as against individuals, on its own failure to comply with EU law.

48. However, in the event that Portgás is to be treated as an undertaking having public-authority powers and therefore as falling within the functional concept of the State – or an emanation thereof – referred to above, it is still necessary to determine whether the ministry concerned in the present case is in a position to rely on the application of the unimplemented directive.

B – *The question whether the provisions of the directive at issue may be invoked by a State authority against an entity regarded as an ‘emanation of the State’*

49. As I stated above, there scarcely appears to be any doubt that the provisions of directives cannot be relied on by virtue of their direct effect as against individuals, since directives impose obligations only on the Member States to which they are addressed.

50. Having clarified that point, one question remains. Is a State prevented in any case from being able to rely on the provisions of a directive which has not been implemented or does that limitation cover only cases in which the possibility of invoking the provisions of a directive which has not been implemented is relied upon as against an individual? In the present case, in the event that Portgás should be regarded as being an ‘emanation of the State’ against which the provisions of the directive may be invoked, is it none the less necessary to prevent the Ministry from being able to rely on that directive?

51. I am of the view that that question must be answered in the negative.

52. However, for the reasons which I will set out below, in such a hypothetical situation, the possibility for a State authority to rely on a failure to comply with the provisions of a directive as against another subdivision of the State is, it seems to me, a problem which is unrelated to the traditional discussion concerning the vertical – and *a fortiori* horizontal – direct effect of directives, but has its origins in the obligation imposed on all State authorities to comply with the provisions of directives (third paragraph of third paragraph of Article 288 TFEU) as well as to adhere to the duty of

sincere cooperation and to ensure complete fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions (Article 4(3) TEU).

53. In the first place, the problem does not in my view appear to have any direct connection with the case-law on the kind of direct effect which must be accorded to the provisions of directives.

54. It follows from the terms used in the case-law and indeed from the reading of it which has been provided in the legal literature that the 'deux pôles du rapport vertical caractéristique de l'effet direct des directives' (two poles of the vertical relationship characteristic of the direct effect of directives) (28) consist, as I stated previously, in the existence, on the one hand, of a 'Member State' – or of one of its subdivisions or emanations – against which the provisions of a directive which has not been implemented, or has been improperly implemented, may be relied on and, on the other hand, of 'an individual', who alone is allowed to rely on such provisions, once the period set for implementation has expired. (29)

55. Although it is true that the Court has accepted that public authorities, which a priori may be treated as subdivisions of the State, could possibly, by virtue of the direct effect of directives, rely on the precise and unconditional provisions of a directive which was not implemented, those authorities or entities would have to be regarded as specific individuals in relation to the directive at issue. Thus, in *Comune di Carpaneto Piacentino and Others*, the Court pointed out that '[b]odies governed by public law, which, in this context, must be assimilated to individuals, are therefore entitled to rely on that rule in respect of activities engaged in as public authorities but not listed in Annex D to the directive'. (30)

56. Secondly, it seems to me important to point out that the argument based on the principle of estoppel or on the *nemo auditur propriam turpitudinem allegans* rule cannot have the same effect where it is a State entity which relies on the provisions of a directive as against another State entity or another subdivision of the State. Although that argument has some validity where the State wishes to bring an action against individuals for failure to fulfil obligations set out in a European directive, in that it seeks to prevent the State from being able to derive any advantage from its obligation of implementation, the same does not apply in the case where the dispute is between two subdivisions of the State.

57. Accordingly, to return to the case before the referring court, if it is assumed that Portgás must be regarded as being an emanation of the State within the meaning of the rule in *Foster and Others*, the Court is ultimately addressing two failings: on the one hand, the State has failed to fulfil its obligation under Article 288 TFEU to implement Directive 93/38 but, on the other hand, Portgás may be criticised, as a contracting authority, for failing to comply with the provisions of that directive.

58. In such a situation, I am of the view that that problem is not related to any discussion concerning the scope and intensity of the direct effect which must be attributed to the precise and unconditional provisions of directives, but arises within the context of the obligations imposed on State authorities by virtue of their duty of sincere cooperation and their obligation to ensure complete fulfilment of the obligations arising out of EU law.

59. It seems to me important to point out in this regard that, although the prime obligation imposed on the Member States in relation to the implementation of directives undeniably consists in ensuring that national law complies with the instruments through the adoption, within the prescribed period, of implementing measures which are in conformity in terms of both wording and purposes, their obligation is not limited to this. The binding effect conferred on directives requires that, quite apart from the obligation to transpose, all authorities and subdivisions of the State must guarantee the effective implementation of those measures.

60. Pursuant to the principle of sincere cooperation, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of their obligations under EU law. As the Court has pointed out, the obligation on Member States arising from a directive to achieve the result envisaged by the directive and their duty under the Treaties to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of Member States. (31)

61. The Court accordingly held that not only central State authorities, but also decentralised authorities, whatever their degree of autonomy, and the courts are subject to the obligation to take all appropriate measures to ensure the implementation of directives.

62. I take the view that it is not necessary to limit the imposition of that implementation obligation solely to those authorities and that it is appropriate, in the interest of consistency, to extend it to all bodies and entities which fulfil the conditions for classification as emanations of the State within the functional meaning of the term, the precise meaning of this classification having been laid down in *Foster and Others*.

63. Accordingly, to return to the case presently before the Court, if it is held that an entity, such as Portgás, which is a public service concession-holder and also has the status of contracting authority, may be treated in the same way as the State, I see no obstacle to the possibility of invoking the provisions of Directive 93/38 against such an entity. Quite to the contrary: not only may those provisions be invoked against the entity, but it would also be subject, in its capacity as a subdivision of the State, to the obligation to take all the measures necessary for the implementation of those provisions, irrespective, moreover, of whether they fulfil the technical requirements for being relied upon by virtue of direct effect. In these circumstances, it must be concluded that Portgás was subject to the obligations laid down by that directive from 1 January 1998 and it could also have been penalised for infringing those obligations either by decision of the competent supervisory authority or by decision of the national courts upon application by third parties harmed as a result of that infringement. Such penalties would constitute appropriate measures for implementing the directive in question, since they have the specific objective of favouring the adoption of decisions or procedures in accordance with that directive.

64. Moreover, by invoking the infringement of certain provisions of Directive 93/38 by Portgás, the Ministry, in its capacity as the supervisory authority, is merely complying with its implementation obligation and duty to sincere cooperation, regardless of whether that directive has been implemented. From that perspective, the Ministry cannot be criticised on the ground that it has secured any advantage from the failure to transpose.

65. That cooperation and compliance obligation appears to me, furthermore, to be strengthened where, as in the main proceedings, the State authority at issue is, as a supervisory authority, responsible for ensuring the proper functioning and conformity of operations financed by the Structural Funds. As the Commission pointed out in its written observations, the management authorities which were appointed by the Member States to manage the activities of those funds have a particular responsibility inasmuch as they must expressly ensure that those activities are in conformity with the provisions of the Treaty and with the instruments of secondary law, which include those instruments applicable to the award of public contracts. (32)

66. Accordingly, if the Court were to conclude that Portgás is to be considered a part of the State, I see no reason why it should not be possible to rely on the provisions of Directive 93/38 as against it, even if the directive is relied upon by another State authority. It is true that the case-law confers direct effect on directives which have not been transposed only where they are invoked by an individual against the State or a body which may be assimilated thereto, expressly excluding such direct effect where it is relied upon by the State as against an individual. However, this does not imply that the provisions of a directive cannot be relied upon in a dispute between the State and a body in which it is implicated. The issue is no longer one of direct effect, but of the requirement to implement a directive in view of the duty to fulfil the obligations arising from EU law and of sincere cooperation which is imposed on all authorities and emanations of the State.

IV – Conclusion

67. In light of the foregoing considerations, I propose that the Court of Justice reply to the question submitted by the Tribunal Administrativo e Fiscal do Porto as follows:

Articles 4(1) and 14(1)(c)(i) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 98/4/EC of the European Parliament and of the Council of

16 February 1998, cannot be relied upon by the authorities of a Member State against a private undertaking solely on the ground that that undertaking is the exclusive holder of a public-interest service concession falling within the personal scope of that directive, in circumstances where that directive has not yet been implemented in the domestic legal system of that Member State. It is for the national court to identify whether, in addition to its status as a public service concession-holder, the undertaking at issue has special powers.

---

1 – Original language: French.

---

2 – Case 26/62 [1963] ECR 1.

---

3 – OJ 1993 L 199, p. 84.

---

4 – OJ 1998 L 101, p. 1.

---

5 – *Diário da República* I, Series A, No 184, of 9 August 2001, p. 5002.

---

6 – According to the information provided by the applicant in the main proceedings, private shareholders have had a majority holding in Portgás since its formation.

---

7 – According to settled case-law, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Case C-282/10 *Dominguez* [2012] ECR, paragraph 33 and case-law cited.

---

8 – See, inter alia, Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 40 to 44; Case 103/88 *Costanzo* [1989] ECR 1839, paragraphs 29 to 31; Case C-76/97 *Tögel* [1998] ECR I-5357, paragraphs 42 to 47; Case C-258/97 *HI* [1999] ECR I-1405, paragraphs 34 to 39; Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, paragraphs 36 and 37, and Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 35 to 45.

---

9 – See, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 47.

---

10 – *Marshall*, cited above, paragraph 48; Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 9, and Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 36.

---

11 – See, inter alia, *Kolpinghuis Nijmegen*, cited above, paragraph 10.

---

12 – It is not possible to list here the many notes on case-law and contributions in academic legal writings dealing with the conditions under which directives may be relied on, in particular in horizontal disputes. I will, in that regard, merely cite the references made by Advocate General Cruz Villalón in point 75 (footnote 32) of his recent Opinion in Case C-176/12 *Association de médiation sociale*, at present pending before the Court.

---

13 – See, in particular, *Arcaro*, cited above, paragraph 42.

---

14 – See, inter alia, *Costanzo*, cited above, paragraph 32.

---

15 – See, inter alia, *Marshall*, cited above, paragraph 49.

---

16 – See Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 20.

---

17 – Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 23; Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 24; Case C-356/05 *Farrell* [2007] ECR I-3067, paragraph 40, *Dominguez*, cited above, paragraph 39.

---

18 – See *Rieser Internationale Transporte*, cited above, paragraph 29.

---

19 – See *Collino and Chiappero*, cited above, paragraph 23.

---

20 – See paragraphs 25 to 27 of the judgment. For the purposes of concluding that Asfinag was a body against which the provisions of a directive capable of having direct effect could be relied on, the Court established beforehand that that body, in addition to having been entrusted with a service in the public interest pursuant to an act adopted by the public authorities under the supervision of those public authorities, had special powers.

---

21 – See, inter alia, Case C-91/92 *Faccini Dori* [1994] ECR I-3325, with regard to Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31), and Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, with regard to the persons coming within the scope of Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (Fifth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1990 L 156, p. 14).

---

22 – As Advocate General Alber stated in his Opinion in *Rieser Internationale Transporte*, cited above, at point 35, ‘[i]t is true that the term “contracting authority” does not necessarily have the same meaning as the term “State” in the functional sense against which an individual can rely on the direct effect of a directive’.

---

23 – As Advocate General van Gerven pointed out in his Opinion in *Foster and Others*, cited above, at point 22, an undertaking against which an unconditional and sufficiently precise provision may be relied upon is one in respect of which the State ‘has assumed responsibilities which put it in a position to decisively influence the conduct of that person or body in any manner whatsoever (other than by means of general legislation) with regard to the matter in respect of which the relevant provision of a directive imposes an obligation which the Member State has failed to implement in national law’.

---

24 – That evidence consists of, inter alia, Decree-Law No 33/91 (*Diário da República* I, Series A – No 13, of 16 January 1991, p. 235) and the gas distribution award contract concluded in December 1993 between Portgás and the Portuguese State.

---

25 – In that regard, it appears that the State has neither the power to appoint the managers of the company nor the ability to issue general guidelines – and in certain cases binding directions – on various matters or even the power to determine the purpose to which certain funds are to be put, which would have placed it in a position to exert pressure on the management of the undertaking at issue.

---

26 – As is clear from paragraph 15 of the judgment in *Foster and Others*, cited above, although the Court has jurisdiction in proceedings for a preliminary ruling to determine the categories of persons against whom the provisions of a directive may be relied on, it is for the national courts, by contrast, to decide whether a party to the proceedings before them falls within one of the categories so defined.

---

27 – See, inter alia, *Collino and Chiappero*, paragraph 24; *Farrell*, paragraph 41; and *Dominguez*, paragraph 40.

---

28 – See Simon, D., *La directive européenne*, Dalloz, 1997, p. 73.

---

29 – Indeed, to reproduce the words originally used by the EU courts, direct effect was established on the basis of '[t]he vigilance of individuals concerned to protect their rights' (See *van Gend en Loos*, p. 13).

---

30 – Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino and Others* [1989] ECR 3233, paragraph 31.

---

31 – See, inter alia, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, and *Kolpinghuis Nijmegen*, cited above, paragraph 12.

---

32 – See, inter alia, Articles 12 and 38 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1), applicable to the facts in the main proceedings. In the present case, it may seem surprising that the discussion has focussed on the question of the possibility of relying on Directive 93/38, whereas, in any event, the competent national authorities were required to ensure full compliance with the provisions of the European regulation, which refers to the rules applicable to public contracts, the binding and directly applicable nature of which is not the subject of any doubt.

JUDGMENT OF THE COURT (Tenth Chamber)

10 July 2014 (*)

(Request for a preliminary ruling — Public procurement — Contracts falling below the threshold provided for in Directive 2004/18/EC — Articles 49 TFEU and 56 TFEU — Principle of proportionality — Conditions for exclusion from a tender procedure — Criteria for qualitative selection relating to the personal situation of the tenderer — Obligations relating to the payment of social security contributions — Definition of serious infringement — Difference between the sums owed and those paid which exceeds EUR 100 and is greater than 5% of the sums owed)

In Case C-358/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 15 March 2012, received at the Court on 30 July 2012, in the proceedings

Consorzio Stabile Libor Lavori Pubblici

v

Comune di Milano,

intervener:

Pascolo Srl,

THE COURT (Tenth Chamber),

composed of A. Rosas, acting as President of the Tenth Chamber, D. Šváby and C. Vajda (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 11 July 2013,

after considering the observations submitted on behalf of:

– Consorzio Stabile Libor Lavori Pubblici, by N. Seminara, R. Invernizzi and M. Falsanisi, avvocati,

– Comune di Milano, by M. Maffey and S. Pagano, avvocati,

– Pascolo Srl, by A. Tornitore, F. Femiano, G. Fuzier and G. Sorrentino, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and G. Aiello, avvocato dello Stato,

– the Czech Government, by M. Smolek, acting as Agent,

– the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

– the European Commission, by A. Tokár and L. Pignataro-Nolin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU, 56 TFEU and 101 TFEU.

2 The request has been made in proceedings between Consorzio Stabile Libor Lavori Pubblici (‘Libor’) and the Comune di Milano (Municipality of Milan) concerning the decision of the Comune di Milano to annul the definitive award of a public works contract to Libor on the ground that Libor had failed to fulfil its obligations relating to the payment of social security contributions in the amount of EUR 278.

Legal context

European Union law

3 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 (OJ 2009 L 314, p. 64) (‘Directive 2004/18’), states in recital 2 in its preamble:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.’

4 Article 7 of Directive 2004/18 sets the threshold amounts from which the measures for coordinating procedures for the award of public works contracts, public supply contracts and public service contracts which it lays down apply. For public works contracts, Article 7(c) of that directive sets the threshold at EUR 4 845 000.

5 Article 45 of Directive 2004/18 concerns the criteria for qualitative selection relating to the personal situation of the candidate or tenderer. Article 45(2) provides:

‘Any economic operator may be excluded from participation in a contract where that economic operator:

…

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

…

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.'

Italian law

6 Legislative Decree No 163 of 12 April 2006 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC (Decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE) (Ordinary Supplement to GURI No 100 of 2 May 2006), as amended by Decree-Law No 70 of 13 May 2011 (GURI No 110 of 13 May 2011, p. 1) converted into law by Law No 106 of 12 July 2011 ('Legislative Decree No 163/2006'), governs, in their entirety, the procedures in Italy for the award of public works contracts, public service contracts and public supply contracts.

7 Legislative Decree No 163/2006 contains, in Part II, among the provisions applicable regardless of the amount of the contract, Article 38 which lays down the general requirements for participation in procedures for the award of concessions and contracts for works, supplies and services. Article 38(1)(i) of the decree provides:

'1. Persons shall be excluded from participation in procedures for the award of concessions and contracts for works, supplies and services, cannot be awarded subcontracts and cannot enter into related contracts, if:

…

(i) they have committed serious infringements, definitively established, of the rules governing social security contributions, under Italian law or that of the State in which they are established'.

8 Article 38(2) of Legislative Decree No 163/2006 defines the concept of 'serious' infringement of the rules governing social security contributions. It provides, in essence, that, for the purposes of Article 38(1)(i) of the decree, failures are to be regarded as serious if they preclude the issue of a social security contributions payment certificate (documento unico di regolarità contributiva, 'DURC').

9 The infringements which preclude the issue of a DURC are identified by a Decree of the Ministry of Labour and Social Security of 24 October 2007 governing the social security contributions payment certificate (Decreto del ministero del lavoro e della previdenza sociale che disciplina il documento unico di regolarità contributiva) (GURI No 279 of 30 November 2007, p. 11). Article 8(3) of that Ministerial Decree provides:

'For the sole purposes of participation in the tender procedure, a non-serious difference between the sums owed and those paid with regard to each social security institution and each construction fund shall not preclude the issue of a DURC. A difference equal to or less than 5% between the sums owed and those paid in respect of each payment or contribution period or, in any event, a difference less than EUR 100, shall not be regarded as serious, without prejudice to the obligation to pay that amount within thirty days of the DURC being issued.'

The dispute in the main proceedings and the question referred for a preliminary ruling

10 By notice of 6 June 2011, the Comune di Milano issued an invitation to tender for the award of a contract for 'extraordinary maintenance and work to install intruder alarm systems in residential properties belonging to the Municipality of Milan', to be awarded on the basis of the largest discount, starting from a basic contract value of EUR 4 784 914.61.

11 The notice expressly required each tenderer to declare, on pain of exclusion, that it satisfied the general requirements for participation in the tender procedure laid down in Article 38 of Legislative Decree No 163/2006.

12 Libor submitted an application to participate in the tender procedure and declared, in the wording of Article 38(1)(i) of Legislative Decree No 163/2006, that it ‘had not committed any serious infringements, definitively established, of the rules governing social security contributions, under Italian law’.

13 On conclusion of the procedure, the Comune di Milano awarded the contract to Libor and notified it of that decision by note of 28 July 2011. It then checked the declaration given by the successful tenderer. To that end, it obtained the DURC from the competent administration, from which it was apparent that when Libor submitted its application to participate in the tender procedure it was not up to date with its social security contributions, since it had failed, within the time-limits laid down, to pay contributions in respect of May 2011 of EUR 278, which was the total amount of contributions due for that month. Libor paid that sum belatedly on 28 July 2011.

14 In the light of the infringement disclosed by the DURC, the Comune di Milano annulled the definitive award to Libor and excluded it from the procedure. The Comune di Milano identified Pascolo Srl as the new successful tenderer.

15 Libor brought an action in the Tribunale amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court) against the decision to annul the award, contending in particular that Article 38(2) of Legislative Decree No 163/2006 is incompatible with EU law.

16 The referring court states that the tender procedure in question does not fall under Directive 2004/18 as the value of the contract at issue in the main proceedings is below the threshold set by Article 7(c) of that directive. It considers, nevertheless, that that tender procedure has cross-border interest, so that, according to the case-law of the Court, the basic rules of the FEU Treaty must be complied with. In that regard, the referring court entertains doubts as to whether Article 38(2) of Legislative Decree No 163/2006 is compatible with the principle of proportionality and the principle of equal treatment under EU law.

17 According to the referring court, by introducing a purely legal concept of ‘seriousness’ of the infringement relating to contributions, that provision has the effect of removing any discretion of the contracting authority in determining whether the requirement for participation of not being in arrears with contributions has been satisfied. The court considers that that exclusion is compatible as such with EU law, in that it reinforces equal treatment between the various economic operators taking part in a tender procedure.

18 However, the referring court is uncertain whether the criteria drawn up by the national legislature are consistent with the principle of proportionality. It notes that the condition of an undertaking’s compliance with its obligation to pay social security contributions was introduced in order to ensure the reliability, diligence and responsibility of the tendering undertaking and its proper conduct in relation to its employees. The referring court asks whether, in relation to a specific tender procedure, failure to comply with that condition is really a significant indication of the unreliability of an undertaking. It is an abstract criterion which takes no account of the characteristics of an individual tender procedure, in relation to its subject-matter and actual value, or of the turnover and economic and financial capacity of the undertaking which committed the infringement. Moreover, the exclusion of an undertaking from the tender procedure is disproportionate where, as in the case in the main proceedings, the infringement relates to a modest sum.

19 In addition, the referring court has doubts as to the consistency of the conditions for exclusion from the tender procedure for failure to pay social security contributions with those relating to the non-payment of taxes, according to which only those infringements concerning sums exceeding EUR 10 000 are classified as serious.

20 In those circumstances, the Tribunale amministrativo regionale per la Lombardia decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do the principle of proportionality which arises from the right of establishment and the principles of non-discrimination and protection of competition laid down in Articles 49 [TFEU], 56 [TFEU] and 101 [TFEU], and the rule of reasonableness contained in that principle of proportionality, preclude national

legislation which, in relation to contracts both above and below the [European Union] threshold, classifies as serious an infringement relating to contribution obligations which has been definitively established, where its amount exceeds EUR 100 and is at the same time greater than 5% of the difference between the sums owed and those paid in respect of each payment or contribution period, with the consequent obligation on the contracting authority to exclude from the tender process any tenderer who has committed such an infringement, without assessing other aspects which objectively demonstrate the tenderer's reliability as a contractual partner?'

The question referred for a preliminary ruling

21 As a preliminary point, it should be noted that, although, as the question indicates, the national legislation in question in the main proceedings applies to tender procedures both above and below the thresholds laid down for public contracts in Article 7 of Directive 2004/18, the value of the public contract at issue in the main proceedings is less than the amount set in Article 7(c) of that directive.

22 In addition, it is apparent both from the wording of the question and the referring court's observations, as summarised in paragraph 18 above, that the referring court questions in particular whether the national legislation in question in the main proceedings is consistent with the principle of proportionality.

23 Therefore, by its question, the referring court is asking, in essence, whether Articles 49 TFEU, 56 TFEU and 101 TFEU and the principle of proportionality must be interpreted as precluding national legislation which, with regard to public works contracts the value of which is below the threshold laid down in Article 7(c) of Directive 2004/18, requires the contracting authorities to exclude from the award procedure for such a contract a tenderer who has committed an infringement relating to social security contributions where the difference between the sums owed and those paid exceeds EUR 100 and is greater than 5% of the sums owed.

24 It should be borne in mind at the outset that the application of Directive 2004/18 to a public contract is subject to the condition that the estimated value of the contract reaches the threshold laid down in Article 7 of that directive. Otherwise, the fundamental rules and the general principles of the Treaty apply, provided that the contract concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is performed (see, to that effect, *Ordine degli Ingegneri della Provincia di Lecce and Others*, C-159/11, EU:C:2012:817, paragraph 23 and the case-law cited). It is for the referring court to examine whether there is such an interest (see, to that effect, *Belgacom*, C-221/12, EU:C:2013:736, paragraph 30 and the case-law cited).

25 So, although the public works contract at issue in the main proceedings does not reach the threshold laid down in Article 7(c) of that directive, it must be concluded, in so far as the referring court considers that that contract has a certain cross-border interest, that those fundamental rules and general principles apply in the main proceedings.

26 As regards the provisions of the Treaty to which the referring court refers, exclusion from a procedure for the award of a public contract such as that at issue in the main proceedings is not an agreement between undertakings, a decision by associations of undertakings, or a concerted practice within the meaning of Article 101 TFEU. It is not therefore necessary to examine national legislation such as that at issue in the main proceedings in the light of Article 101 TFEU.

27 On the other hand, as is apparent from recital 2 in the preamble to Directive 2004/18, the principles of freedom of establishment and freedom to provide services and the principle of proportionality are among the principles of the Treaty which must be respected when awarding public contracts.

28 So far as concerns Articles 49 TFEU and 56 TFEU, according to settled case-law of the Court, those provisions preclude any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to prohibit, impede or render less attractive the exercise by nationals of the European Union of the freedom of establishment and the freedom to provide services guaranteed by those provisions of the Treaty (see, inter alia, *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, paragraph 41).

29 As regards public contracts, it is the concern of the European Union, in relation to the freedom of establishment and the freedom to provide services, to ensure the widest possible participation by tenderers in a call for tenders (see, to that effect, *CoNISMa*, C-305/08, EU:C:2009:807, paragraph 37). The application of a provision which excludes persons who have committed serious infringements of national rules governing social security contributions from participating in procedures for the award of public works contracts, such as Article 38(1)(i) of Legislative Decree No 163/2006, may compromise the widest possible participation by tenderers in a call for tenders.

30 Such a national provision which is capable of excluding tenderers from participating in a procurement procedure with a certain cross-border interest amounts to a restriction within the meaning of Articles 49 TFEU and 56 TFEU.

31 However, such a restriction may be justified in so far as it pursues a legitimate objective in the public interest, and to the extent that it complies with the principle of proportionality in that it is suitable for securing the attainment of that objective and does not go beyond what is necessary in order to attain it (see, to that effect, *Serrantoni and Consorzio stabile edili*, EU:C:2009:808, paragraph 44).

32 In that regard, first, it is apparent from the order for reference that the objective pursued by the ground for exclusion from a procurement procedure set out in Article 38(1)(i) of Legislative Decree No 163/2006 is to ensure the reliability, diligence and responsibility of the tenderer and its proper conduct in relation to its employees. It must be considered that to ensure that the tenderer possesses such qualities constitutes a legitimate objective in the public interest.

33 Next, it must be stated that a ground for exclusion such as that in Article 38(1)(i) of Legislative Decree No 163/2006 is suitable for securing the attainment of the objective pursued, in so far as the failure by an economic operator to pay social security contributions gives an indication of the lack of reliability, diligence and responsibility of that operator with regard to complying with its legal and social obligations.

34 Lastly, as regards the need for such a measure, it must be noted, in the first place, that the establishment, under national legislation, of a precise threshold for the exclusion from procurement procedures, namely a difference between the sums owed in respect of social security contributions and those paid which exceeds EUR 100 and is greater than 5% of the sums owed, ensures not only equal treatment of tenderers but also legal certainty, a principle which must be complied with for a restrictive measure to be proportionate (see, to that effect, *Itelcar*, C-282/12, EU:C:2013:629, paragraph 44).

35 In the second place, as regards the level of the exclusion threshold laid down in the national legislation, it should be borne in mind that, so far as concerns public contracts falling within the scope of Directive 2004/18, Article 45(2) of that directive leaves the application of the cases of exclusion mentioned to the assessment of the Member States, as evidenced by the phrase ‘may be excluded from participation in a contract’ which appears at the beginning of that provision and makes express reference, inter alia in subparagraphs (e) and (f), to the provisions of national law (see, as regards Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), *La Cascina and Others*, C-226/04 and C-228/04, EU:C:2006:94, paragraph 21). In addition, under the second subparagraph of Article 45(2), Member States are to specify, in accordance with their national law and having regard for EU law, the implementing conditions for that paragraph.

36 Accordingly, Article 45(2) of Directive 2004/18 does not provide for uniform application at EU level of the grounds of exclusion it mentions, since the Member States may choose not to apply those grounds of exclusion at all or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that context, the Member States have the power to make the criteria laid down in Article 45(2) less onerous or more flexible (see, as regards Article 29 of Directive 92/50, *La Cascina and Others*, EU:C:2006:94, paragraph 23).

37 Article 45(2)(e) of Directive 2004/18 allows Member States to exclude from participation in a public contract any economic operator which has failed to fulfil its obligations relating to the payment of social security contributions without any minimum amount of outstanding contributions being set. In

those circumstances, setting such a minimum amount in national law amounts to tempering the grounds for exclusion under that provision and cannot therefore be regarded as going beyond what is necessary. That is all the more true with regard to public contracts which fall below the threshold laid down in Article 7(c) of that directive and are thus not subject to the strict special procedures laid down in the directive.

38 In addition, the fact that the threshold for exclusion laid down in national law relating to the non-payment of taxes is, as the referring court has noted, considerably higher than the threshold for failure to pay social security contributions does not in itself have a bearing on whether the latter is proportionate. As is apparent from paragraph 36 above, Member States are free to incorporate the grounds of exclusion laid down inter alia in Article 45(2)(e) and (f) of Directive 2004/18 into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level.

39 Moreover, this situation can be distinguished from that in *Hartlauer* (C-169/07, EU:C:2009:141), in which the Court held that the national legislation in question was not appropriate for ensuring attainment of the objectives pursued in so far as it did not attain them in a consistent and systematic manner. By contrast with the legislation examined in *Hartlauer*, the measure at issue in the main proceedings is based, as follows from paragraph 34 above, on objective, non-discriminatory criteria known in advance (see, to that effect, *Hartlauer*, EU:C:2009:141, paragraph 64).

40 It follows that a national measure such as that at issue in the main proceedings cannot be regarded as going beyond what is necessary to attain the objective pursued.

41 In the light of all the foregoing considerations, the answer to the question referred is that Articles 49 TFEU and 56 TFEU and the principle of proportionality must be interpreted as not precluding national legislation which, with regard to public works contracts the value of which is below the threshold laid down in Article 7(c) of Directive 2004/18, requires the contracting authorities to exclude from the award procedure for such a contract a tenderer who has committed an infringement relating to social security contributions where the difference between the sums owed and those paid exceeds EUR 100 and is greater than 5% of the sums owed.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Articles 49 TFEU and 56 TFEU and the principle of proportionality must be interpreted as not precluding national legislation which, with regard to public works contracts the value of which is below the threshold laid down in Article 7(c) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009, requires the contracting authorities to exclude from the award procedure for such a contract a tenderer who has committed an infringement relating to social security contributions where the difference between the sums owed and those paid exceeds EUR 100 and is greater than 5% of the sums owed.

[Signatures]

* Language of the case: Italian.

EU:C:2013:416

ORDONNANCE DE LA COUR (dixième chambre)

20 juin 2013 (*)

«Article 99 du règlement de procédure – Marchés publics ? Directive 2004/18/CE ? Article 1er, paragraphe 2, sous a) et d) ? Services ? Activités de soutien relatives à l'élaboration du plan de reconstruction de certaines parties du territoire d'une commune endommagées par un séisme ? Contrat conclu entre deux entités publiques, dont une université ? Entité publique susceptible d'être qualifiée d'opérateur économique ? Circonstances extraordinaires»

Dans l'affaire C-352/12,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Tribunale amministrativo regionale per l'Abruzzo (Italie), par décision du 9 mai 2012, parvenue à la Cour le 25 juillet 2012, dans la procédure

Consiglio Nazionale degli Ingegneri

contre

Comune di Castelvecchio Subequo,

en présence de:

Università degli Studi Chieti Pescara – Dipartimento Scienze e Storia dell'Architettura,

et

Consiglio Nazionale degli Ingegneri

contre

Comune di Barisciano,

en présence de:

Scuola di Architettura e Design Vittoria (SAD) dell'Università degli Studi di Camerino,

LA COUR (dixième chambre),

composée de M. A. Rosas, président de chambre, MM. D. Šváby (rapporteur) et C. Vajda, juges,

avocat général: M. N. Wahl,

greffier: M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation des articles 1er, paragraphe 2, sous a) et d), 2 et 28 ainsi que de l'annexe II A, catégories 8 et 12, de la directive 2004/18/CE du Parlement

européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 114), telle que modifiée par le règlement (CE) n° 1177/2009 de la Commission, du 30 novembre 2009 (JO L 314, p. 64, ci-après la «directive 2004/18»).

2 Cette demande a été présentée dans le cadre de deux litiges opposant le Consiglio Nazionale degli Ingegneri (conseil national des ingénieurs), d'une part, au Comune di Castelvecchio Subequo et, d'autre part, au Comune di Barisciano, au sujet de conventions par lesquelles ces deux communes ont confié des missions portant sur des activités de soutien relatives à l'élaboration de plans de reconstruction de certaines parties de leurs territoires endommagées par le séisme survenu dans les environs de L'Aquila (Italie) le 6 avril 2009, respectivement, à l'Università degli Studi Chieti Pescara – Dipartimento Scienze e Storia dell'Architettura et à la Scuola di Architettura e Design Vittoria (SAD) dell'Università degli Studi di Camerino.

Le cadre juridique

Le droit de l'Union

3 L'article 1er de la directive 2004/18 dispose:

«[...]

2. a) Les 'marchés publics' sont des contrats à titre onéreux conclus par écrit entre un ou plusieurs opérateurs économiques et un ou plusieurs pouvoirs adjudicateurs et ayant pour objet l'exécution de travaux, la fourniture de produits ou la prestation de services au sens de la présente directive.

[...]

d) Les 'marchés publics de services' sont des marchés publics autres que les marchés publics de travaux ou de fournitures portant sur la prestation de services visés à l'annexe II.

[...]

8. Les termes 'entrepreneur', 'fournisseur' et 'prestataire de services' désignent toute personne physique ou morale ou entité publique ou groupement de ces personnes et/ou organismes qui offre, respectivement, la réalisation de travaux et/ou d'ouvrages, des produits ou des services sur le marché.

Le[s] terme[s] 'opérateur économique' couvre[nt] à la fois les notions d'entrepreneur, fournisseur et prestataire de services. Il[s sont] utilisé[s] uniquement dans un souci de simplification du texte.

[...]

9. Sont considérés comme 'pouvoirs adjudicateurs': l'État, les collectivités territoriales, les organismes de droit public et les associations formées par une ou plusieurs de ces collectivités ou un ou plusieurs de ces organismes de droit public.

[...]»

4 Aux termes de l'article 2 de cette directive, «[l]es pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité, de manière non discriminatoire et agissent avec transparence».

5 En vertu de l'article 7, sous b), de ladite directive, celle-ci s'applique notamment aux marchés de services passés par des pouvoirs adjudicateurs autres que les autorités gouvernementales centrales reprises à l'annexe IV de celle-ci, pour autant qu'il s'agisse de marchés non exclus en vertu des exceptions visées à cet article et que leur valeur estimée hors taxe sur la valeur ajoutée soit égale ou supérieure à 193 000 euros.

6 Conformément à l'article 9, paragraphes 1 et 2, de cette même directive, le calcul de la valeur estimée d'un marché public est fondé sur le montant total payable, hors taxe sur la valeur ajoutée, estimé par le pouvoir adjudicateur au moment de l'envoi de l'avis de marché ou, le cas échéant, au moment où la procédure d'attribution du marché est engagée.

7 L'article 20 de la directive 2004/18 prévoit que les marchés ayant pour objet des services figurant à l'annexe II A de cette directive sont passés conformément aux articles 23 à 55 de celle-ci, parmi lesquels l'article 28 dispose que, «[p]our passer leurs marchés publics, les pouvoirs adjudicateurs appliquent les procédures nationales, adaptées aux fins de [cette] directive».

8 Intitulé «Cas justifiant le recours à la procédure négociée sans publication d'un avis de marché», l'article 31 de ladite directive dispose:

«Les pouvoirs adjudicateurs peuvent passer leurs marchés publics en recourant à une procédure négociée sans publication préalable d'un avis de marché dans les cas suivants:

1) dans le cas des marchés publics de travaux, de fournitures et de services:

[...]

c) dans la mesure strictement nécessaire, lorsque l'urgence impérieuse, résultant d'événements imprévisibles pour les pouvoirs adjudicateurs en question, n'est pas compatible avec les délais exigés par les procédures ouvertes, restreintes ou négociées avec publication d'un avis de marché visées à l'article 30. Les circonstances invoquées pour justifier l'urgence impérieuse ne doivent en aucun cas être imputables aux pouvoirs adjudicateurs;

[...]»

9 L'article 38, paragraphe 8, de la directive 2004/18 prévoit la possibilité de mener une procédure accélérée dans les termes suivants:

«Dans les procédures restreintes et négociées avec publication d'un avis de marché visées à l'article 30, lorsque l'urgence rend impraticables les délais minimaux fixés au présent article, les pouvoirs adjudicateurs peuvent fixer:

a) un délai pour la réception des demandes de participation qui ne peut être inférieur à 15 jours à compter de la date d'envoi de l'avis de marché ou à 10 jours si l'avis est envoyé par moyens électroniques conformément au format et aux modalités de transmission indiquées à l'annexe VIII, point 3;

b) et, dans le cas des procédures restreintes, un délai pour la réception des offres qui ne peut être inférieur à 10 jours à compter de la date d'envoi de l'invitation à soumissionner.»

10 L'annexe II A de cette directive comporte notamment les catégories de services suivantes:

– catégorie 8, relative aux services de recherche et de développement, à l'exclusion des services de recherche et de développement autres que ceux dont les fruits appartiennent exclusivement au pouvoir adjudicateur et/ou à l'entité adjudicatrice pour son usage dans l'exercice de sa propre activité pour autant que la prestation du service soit entièrement rémunérée par le pouvoir adjudicateur et/ou l'entité adjudicatrice, et

– catégorie 12, relative aux services d'architecture, aux services d'ingénierie, aux services intégrés d'ingénierie, aux services d'aménagement urbain et d'architecture paysagère, aux services connexes de consultations scientifiques et techniques ainsi qu'aux services d'essais et d'analyses techniques.

Le droit italien

11 Aux termes de l'article 15, paragraphe 1, de la loi n° 241 du 7 août 1990, portant de nouvelles dispositions en matière de procédure administrative et de droit d'accès aux documents administratifs

(legge n. 241 – Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi, GURI n° 192, du 18 août 1990, p. 7), «les administrations publiques ont toujours la faculté de conclure entre elles des accords portant sur une coopération dans des activités présentant un intérêt commun».

12 Conformément à l'article 63 du décret du président de la République n° 382 du 11 juillet 1980, portant réorganisation de l'enseignement universitaire, concernant la formation ainsi que l'expérimentation organisationnelle et didactique (decreto del Presidente della Repubblica n. 382 – Riordinamento della docenza universitaria, relativa fascia di formazione nonché sperimentazione organizzativa e didattica, supplément ordinaire à la GURI n° 209, du 31 juillet 1980, ci-après le «décret n° 382/1980»), «[l]es universités sont les lieux privilégiés de la recherche scientifique».

13 L'article 66, premier alinéa, de ce décret dispose:

«Pour autant que cela n'entrave pas le déroulement de leur fonction scientifique de transmission des connaissances, les universités peuvent effectuer des activités de recherche et de conseil fixées au moyen de contrats et de conventions passés avec des entités publiques et privées. L'exécution de ces contrats et conventions sera confiée, en règle générale, aux départements [universitaires] et, lorsque ceux-ci n'auront pas été institués, aux institutions ou aux cliniques universitaires ou à des enseignants à temps plein.»

Le litige au principal et les questions préjudicielles

14 Le séisme survenu le 6 avril 2009 dans les environs de L'Aquila a engendré une situation d'urgence extraordinaire. Afin de faire face à celle-ci, des institutions spéciales, disposant d'un pouvoir réglementaire, ont été mises sur pied.

15 Le Comune di Castelvecchio Subequo et le Comune di Barisciano sont situés dans la région touchée par ce séisme, lequel a fortement endommagé le centre de ces deux communes, parmi d'autres. Il en est résulté la nécessité de redéfinir le contexte urbain et bâti des communes sinistrées dans des conditions qui, à la fois, soient innovantes et tiennent compte de l'ampleur ainsi que de la complexité des opérations à envisager.

16 C'est ainsi que le décret du Commissario delegato per la ricostruzione n° 3 du 9 mars 2010 prévoit que chaque commune concernée établit un plan de reconstruction. À cette fin, il y a lieu, tout d'abord, d'identifier et de délimiter les zones dans lesquelles le patrimoine bâti doit être reconstruit ou restauré et des travaux d'urbanisation doivent éventuellement être réalisés, et d'établir un état des lieux. Ensuite, un plan de reconstruction doit être élaboré en vue d'assurer le renouveau socio-économique, de promouvoir la réhabilitation de l'habitat en tenant compte de l'ensemble des données urbanistiques pertinentes et de faciliter le retour de la population, tout en identifiant les opérations de nature à renforcer la sécurité des constructions. Le plan de reconstruction doit également déterminer les opérations à réaliser, prévoir la mise en sécurité des secteurs concernés, contenir une évaluation économique de ces opérations, identifier les personnes concernées et programmer lesdites opérations en tenant compte des priorités. Ce plan doit, enfin, déterminer les modalités de l'interconnexion des différents secteurs, les domaines d'intervention, les travaux d'urbanisation à réaliser et établir une programmation coordonnée des ouvrages publics et privés.

17 Afin de remplir leurs obligations à cet égard, les communes et établissements universitaires en cause au principal ont établi des projets de convention similaires, visant à instaurer «une coopération scientifique entre des entités publiques dans le but d'assurer l'exécution d'une mission de service public d'intérêt commun». Dans le cadre de cette mission, chaque établissement universitaire concerné aurait pour tâche d'apporter à la commune cocontractante le soutien nécessaire pour l'élaboration du plan de reconstruction à établir par celle-ci, en réalisant l'étude préliminaire, l'analyse préalable et l'élaboration du projet de reconstruction.

18 Concrètement, outre l'assistance technique générale de l'administration communale, la mission confiée à chacun de ces établissements comporte les prestations suivantes:

– dans la phase préliminaire, relative à la délimitation des secteurs visés par le plan de reconstruction (phase 1), la mise en place du plan urbanistique et du programme de travaux publics, y compris la détermination des secteurs, l'identification des blocs de bâtiments concernés et des interventions publiques;

– dans la phase préparatoire, relative à la détermination des blocs de bâtiments concernés et des interventions publiques (phase 2), l'élaboration du projet préliminaire avec établissement d'une planimétrie, de coupes et de perspectives, l'étude de faisabilité, le plan d'évacuation des décombres;

– dans la phase d'élaboration et d'approbation du plan de reconstruction, relative à la définition des critères et des modalités d'intervention (phase 3), la rédaction du plan de reconstruction, y compris les critères et les modalités d'intervention et l'étude de faisabilité, ainsi que, à l'échelle de la zone globale, la voirie, le schéma structurel et le schéma directeur, et

– dans la phase de mise en œuvre du plan de reconstruction, relative à la coordination, à la vérification et au contrôle (phase 4), la finalisation du plan de reconstruction en adéquation avec les instruments de planification et de surveillance existants.

19 Par référence à la délibération du conseil municipal du Comune di Barisciano, le choix de s'adresser à cette fin à un établissement universitaire est justifié par la considération selon laquelle «la planification d'opérations sur le territoire, surtout à l'échelle supracommunale, vise un développement durable, cohérent et intelligent de la totalité de la zone concernée par les travaux et [...] la vision d'ensemble d'une université spécialisée [...] peut présenter des avantages techniques et des expertises dans l'intérêt exclusif de la collectivité».

20 Le projet de convention entre le Comune di Barisciano et la Scuola di Architettura e Design Vittoria (SAD) dell'Università degli Studi di Camerino prévoit une contrepartie globale de 450 000 euros, et le projet de convention entre le Comune di Castelvecchio Subequo et l'Università degli Studi Chieti Pescara – Dipartimento Scienze e Storia dell'Architettura, une contrepartie globale de 213 851,20 euros. Ces projets ont été approuvés par des délibérations des conseils municipaux concernés, respectivement, les 25 février et 14 avril 2011.

21 Le Consiglio Nazionale degli Ingegneri a introduit un recours contre chacune de ces délibérations et demande que les conventions concernées soient déclarées invalides pour contrariété avec le droit de l'Union.

22 Le Tribunale amministrativo regionale per l'Abruzzo (tribunal administratif régional des Abruzzes) considère que ce droit autorise, sous certaines conditions, un pouvoir adjudicateur à conclure un contrat à titre onéreux avec une autre administration publique sans recourir à une procédure d'appel d'offres public, se référant à cet égard, notamment, à l'arrêt du 9 juin 2009, Commission/Allemagne (C-480/06, Rec. p. I-4747), et que le droit italien reconnaît lui aussi cette possibilité par l'article 15 de la loi n° 241 du 7 août 1990, qui permet aux administrations publiques de conclure entre elles des accords afin de régir, de concert, l'accomplissement d'activités d'intérêt commun.

23 Cette juridiction souligne que les accords visés à cet article ont pour objectif la coordination de l'action des différents appareils administratifs, chacun porteur d'un intérêt public spécifique, dans le cadre d'une collaboration destinée à assurer la gestion des services publics la plus efficace et économe possible, et que la jurisprudence est actuellement fixée en ce sens que la notion d'intérêt commun est plutôt large, correspondant à la poursuite de l'intérêt public de la part des entités participant à l'accord conformément à leurs objectifs institutionnels, même en dehors de l'hypothèse de fonctions communes. Partant, il serait possible de recourir audit article dès lors qu'une administration publique confie, à titre onéreux ? pour autant toutefois que la contrepartie soit limitée au remboursement des coûts ?, à une autre administration publique, un service relevant des missions de cette dernière.

24 Ladite juridiction indique que, dans le même sens, les activités relatives au nouvel aménagement du territoire à mettre en œuvre à la suite du séisme du 6 avril 2009 sont normalement exécutées «en coopération avec les diverses personnes publiques et privées qui sont impliquées dans les processus de

reconstruction et visent à fournir le soutien technique et administratif nécessaire aux structures institutionnelles compliquées».

25 Sur ces bases, la juridiction de renvoi est amenée à constater que les accords en cause au principal paraissent réguliers. En effet, ils visent à la poursuite d'un intérêt commun, au sens de la législation italienne, puisque leur objet correspond, dans le chef des communes, aux obligations et aux objectifs énoncés dans la réglementation extraordinaire mentionnée au point 16 de la présente ordonnance et, dans le chef des établissements universitaires concernés, à la fonction de recherche et de conseil liée à leur mission scientifique et didactique de base, fonction autorisée par le décret n° 382/1980. Est spécialement visée, à cet égard, «l'extraordinaire unicité des activités à exécuter, qui intéressent entre autres la recherche scientifique appliquée», ce qui permettrait à ces établissements universitaires d'étudier la problématique scientifique liée à la planification et à la reconstruction d'un territoire touché par un séisme, en rapport étroit avec leur domaine de compétence. En outre, si la participation éventuelle de personnes privées aux activités visées par lesdits accords n'est pas exclue, cette participation supposerait que ces personnes soient désignées à l'issue de procédures de concours ordinaires.

26 Cette juridiction nourrit cependant des doutes quant à la compatibilité avec la directive 2004/18 de la conclusion de tels accords entre des administrations publiques dès lors que l'une d'elles est susceptible de revêtir en même temps la qualité d'opérateur économique, indépendamment du fait que ces accords puissent être caractérisés par des objectifs et des intérêts publics évidents, comme c'est le cas des conventions en cause au principal. Or, ladite juridiction relève, par référence à l'arrêt du 23 décembre 2009, CoNISMa (C-305/08, Rec. p. I-12129), que les universités publiques italiennes peuvent être considérées comme des opérateurs économiques et sont donc admises à prendre part à des appels d'offres, de sorte que les contrats qu'elles concluent avec des pouvoirs adjudicateurs auraient vocation à rentrer dans le champ d'application du droit de l'Union en matière de marchés publics.

27 À cet égard, elle constate que la contrepartie prévue dans les conventions en cause au principal ne semble pas objectivement en rapport avec les frais encourus, même si elle n'est pas de nature à procurer un profit substantiel aux établissements universitaires concernés. Il résulte par ailleurs de la décision de renvoi, en particulier des questions posées, qu'elle considère que les missions confiées à ces établissements par les conventions en cause au principal constituent des activités visées à l'annexe II A, catégories 8 ou 12, de la directive 2004/18.

28 La juridiction de renvoi souligne cependant le fait que ces missions présentent un intérêt public pour les administrations contractantes et s'inscrivent dans un contexte factuel et réglementaire extraordinaire.

29 Dans ces conditions, le Tribunale amministrativo regionale per l'Abruzzo a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes:

«1) La directive [2004/18], et en particulier son article 1er, paragraphe 2, sous a) et d), ses articles 2 et 28 ainsi que son annexe II[A], catégories 8 et 12, s'opposent-ils à une réglementation nationale qui autorise la passation sous une forme écrite, entre deux pouvoirs adjudicateurs, d'accords portant sur des activités de soutien aux communes concernant l'étude, l'analyse et [l'élaboration du] projet de reconstruction des centres historiques du Comune di Barisciano et du Comune di Castelvecchio Subequo, telles que précisées dans le chapitre technique annexé [aux conventions en cause au principal] et identifiées par la législation sectorielle, nationale et régionale, en échange d'une contrepartie dont le caractère de rémunération n'est pas évident, dès lors que l'administration [devant exécuter cette mission] est susceptible de revêtir la qualité d'opérateur économique?

2) La directive [2004/18], et en particulier [les dispositions susmentionnées de celle-ci,] s'opposent-[elles] à une réglementation nationale [telle que celle susmentionnée] dès lors que le recours à l'attribution directe est expressément justifié à l'aune des législations primaire et secondaire qui ont été adoptées à la suite [du séisme survenu à L'Aquila le 6 avril 2009] et compte tenu des intérêts publics spécifiques qui ont été décrits?»

Sur les questions préjudicielles

30 En vertu de l'article 99 du règlement de procédure de la Cour, lorsqu'une question posée à titre préjudiciel est identique à une question sur laquelle celle-ci a déjà statué, lorsque la réponse à une telle question peut être clairement déduite de la jurisprudence ou lorsque la réponse à la question posée à titre préjudiciel ne laisse place à aucun doute raisonnable, la Cour peut, à tout moment, sur proposition du juge rapporteur, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée.

31 Il y a lieu de faire application de cette disposition dans la présente affaire.

32 Par ses questions, qu'il y a lieu d'examiner ensemble, la juridiction de renvoi demande, en substance, si la directive 2004/18 doit être interprétée en ce sens qu'elle s'oppose à une réglementation nationale qui autorise la conclusion, sans appel à la concurrence, d'un contrat par lequel des entités publiques instituent entre elles une coopération telle que celles en cause au principal, eu égard, le cas échéant, à un contexte factuel et réglementaire extraordinaire, tel que l'endommagement important d'une partie significative des bâtiments de plusieurs localités à la suite d'un séisme et les dispositions exceptionnelles adoptées en vue de mettre en œuvre les mesures nécessaires pour parer aux conséquences de ce séisme.

33 À titre liminaire, il y a lieu de relever que, conformément à l'appréciation opérée par la juridiction de renvoi, les conventions en cause au principal portent sur des prestations dont la valeur excède le seuil d'application de la directive 2004/18.

34 Afin de répondre aux questions posées, il importe de relever que, conformément à l'article 1er, paragraphe 2, de la directive 2004/18, un contrat à titre onéreux conclu par écrit entre un opérateur économique et un pouvoir adjudicateur, et ayant pour objet la prestation de services visés à l'annexe II A de cette directive constitue un marché public.

35 À cet égard, premièrement, il est sans incidence, d'une part, que cet opérateur soit lui-même un pouvoir adjudicateur et, d'autre part, que l'entité concernée ne poursuive pas à titre principal une finalité lucrative, qu'elle n'ait pas une structure d'entreprise ou encore qu'elle n'assure pas une présence continue sur le marché (arrêt du 19 décembre 2012, Ordine degli Ingegneri della Provincia di Lecce e.a., C-159/11, non encore publié au Recueil, point 26).

36 Ainsi, s'agissant d'entités telles que des établissements universitaires publics, la Cour a jugé que de telles entités ont, en principe, la faculté de participer à une procédure d'attribution d'un marché public de services. Toutefois, les États membres peuvent réglementer les activités de ces entités, et notamment autoriser ou ne pas autoriser ces dernières à opérer sur le marché compte tenu de leurs objectifs institutionnels et statutaires. Pour autant, si, et dans la mesure où, lesdites entités sont habilitées à offrir certains services sur le marché, il ne peut pas leur être interdit de participer à un appel d'offres portant sur les services concernés (voir, notamment, arrêt Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 27 et jurisprudence citée). Or, en l'occurrence, la juridiction de renvoi a indiqué que l'article 66, premier alinéa, du décret n° 382/1980 autorise expressément les universités publiques à fournir des prestations de recherche et de conseil à des entités publiques ou privées dans la mesure où cette activité ne porte pas atteinte à leur mission d'enseignement.

37 Deuxièmement, des activités telles que celles faisant l'objet des contrats en cause au principal, nonobstant le fait, mentionné par la juridiction de renvoi, qu'elles sont susceptibles de relever des missions confiées aux universités, en particulier de la recherche scientifique, rentrent, selon ce qui constitue la nature effective de ces activités, soit dans le cadre des services de recherche et de développement visés à l'annexe II A, catégorie 8, de la directive 2004/18, soit dans le cadre des services d'aménagement urbain et des services connexes de consultations scientifiques et techniques visés à la catégorie 12 de cette annexe.

38 Troisièmement, tel qu'il ressort du sens normal et habituel des termes «à titre onéreux», un contrat ne saurait échapper à la notion de marché public du seul fait que sa rémunération reste limitée au remboursement des frais encourus pour fournir le service convenu (arrêt Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 29).

39 Sous réserve des vérifications qui incombent à la juridiction de renvoi, il apparaît que les contrats en cause au principal présentent l'ensemble des caractéristiques énoncées aux points 34 à 38 de la présente ordonnance.

40 Il résulte toutefois de la jurisprudence de la Cour que deux types de marchés conclus par des entités publiques ne rentrent pas dans le champ d'application du droit de l'Union en matière de marchés publics.

41 Il s'agit, en premier lieu, des marchés conclus par une entité publique avec une personne juridiquement distincte de celle-ci lorsque, à la fois, cette entité exerce sur cette personne un contrôle analogue à celui qu'elle exerce sur ses propres services et que ladite personne réalise l'essentiel de ses activités avec la ou les entités qui la détiennent (voir, en ce sens, arrêts du 18 novembre 1999, Teckal, C-107/98, Rec. p. I-8121, point 50, ainsi que Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 32).

42 Il est cependant constant que cette exception n'est pas applicable dans un contexte tel que celui des affaires au principal, dès lors qu'il ressort de la décision de renvoi que les communes concernées n'exercent pas de contrôle sur les établissements universitaires qui sont leur cocontractant respectif.

43 Il s'agit, en second lieu, des contrats qui instaurent une coopération entre des entités publiques ayant pour objet d'assurer la mise en œuvre d'une mission de service public qui est commune à celles-ci (arrêt Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 34 et jurisprudence citée).

44 Dans cette hypothèse, les règles du droit de l'Union en matière de marchés publics ne sont pas applicables pour autant que, en outre, de tels contrats soient conclus exclusivement par des entités publiques, sans la participation d'une partie privée, qu'aucun prestataire privé ne soit placé dans une situation privilégiée par rapport à ses concurrents et que la coopération qu'ils instaurent soit uniquement régie par des considérations et des exigences propres à la poursuite d'objectifs d'intérêt public (arrêt Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 35 et jurisprudence citée).

45 Si, comme l'a relevé la juridiction de renvoi, des contrats tels que ceux en cause au principal semblent satisfaire à certains des critères mentionnés aux deux points précédents de la présente ordonnance, ils ne sauraient toutefois sortir du champ d'application du droit de l'Union en matière de marchés publics que s'ils satisfont à tous ces critères.

46 À cet égard, il paraît résulter des indications contenues dans la décision de renvoi que ces contrats comportent un ensemble d'aspects matériels dont une partie importante, voire prépondérante, correspond à des activités généralement effectuées par des ingénieurs ou des architectes et qui, bien qu'elles soient basées sur un fondement scientifique, ne s'apparentent cependant pas à la recherche scientifique. Par conséquent, contrairement à ce que la Cour a pu constater au point 37 de l'arrêt Commission/Allemagne, précité, la mission de service public qui fait l'objet de la coopération entre des entités publiques instaurée par lesdits contrats ne paraît pas assurer la mise en œuvre d'une mission de service public qui est commune aux établissements universitaires et aux communes en cause au principal.

47 C'est toutefois à la juridiction de renvoi qu'il appartient d'effectuer les vérifications requises à cet égard.

48 S'agissant de la nature des faits dans le prolongement desquels se situent les marchés en cause au principal, il est évident que l'endommagement important d'une partie significative des bâtiments de plusieurs localités à la suite d'un séisme de grande ampleur constitue un événement extraordinaire et imprévisible.

49 Toutefois, il y a lieu de souligner que des circonstances extraordinaires et imprévisibles ne peuvent justifier l'attribution directe d'un marché devant normalement faire l'objet d'une procédure ouverte, d'une procédure restreinte ou d'une procédure négociée avec publication d'un avis de marché que dans les conditions prévues à l'article 31, point 1, sous c), de la directive 2004/18.

50 Il résulte d'une jurisprudence constante que le recours à cette dérogation est soumis à trois conditions cumulatives, à savoir l'existence, outre d'un événement imprévisible, d'une urgence impérieuse incompatible avec les délais exigés par d'autres procédures et d'un lien de causalité entre l'événement imprévisible et l'urgence impérieuse qui en résulte [voir notamment, s'agissant de la directive 93/38/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications (JO L 199, p. 84), arrêt du 2 juin 2005, Commission/Grèce, C-394/02, Rec. p. I-4713, point 40 et jurisprudence citée].

51 Eu égard à son caractère dérogatoire, cette disposition doit faire l'objet d'une interprétation stricte (voir notamment, s'agissant de la directive 93/38, arrêt du 4 juin 2009, Commission/Grèce, C-250/07, Rec. p. I-4369, point 34 et jurisprudence citée).

52 C'est ainsi, notamment, que, ne pouvant procéder à l'attribution directe d'un marché en cas d'urgence impérieuse que dans la mesure où cela est strictement nécessaire, un pouvoir adjudicateur ne saurait se prévaloir de la dérogation prévue à l'article 31, point 1, sous c), de la directive 2004/18 lorsqu'il lui aurait été matériellement possible de recourir à la procédure accélérée prévue à l'article 38, paragraphe 8, de celle-ci [voir notamment, s'agissant de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services (JO L 209, p. 1), arrêt du 18 novembre 2004, Commission/Allemagne, C-126/03, Rec. p. I-11197, point 23 et jurisprudence citée] et, a fortiori, à la procédure normale telle qu'organisée par les paragraphes 1 à 7 de cet article (voir, s'agissant de la directive 93/38, arrêt du 2 juin 2005, Commission/Grèce, précité, point 44).

53 Partant, une réglementation nationale ne saurait autoriser le recours à une attribution directe de marchés publics en cas d'urgence impérieuse que dans le respect des conditions prévues à l'article 31, point 1, sous c), de la directive 2004/18, telles qu'explicitées aux points 50 à 52 de la présente ordonnance (voir, par analogie, arrêt du 28 mars 1985, Commission/Italie, 274/83, Rec. p. 1077, points 34 et 35), cette réglementation fût-elle motivée par un événement extraordinaire et imprévisible.

54 Il incombe donc à la juridiction de renvoi de vérifier, le cas échéant, si ces conditions sont réunies dans les affaires au principal, étant précisé que la charge de la preuve incombe à la partie qui entend s'en prévaloir (voir notamment, s'agissant de la directive 93/38, arrêt du 2 juin 2005, Commission/Grèce, précité, point 33 et jurisprudence citée).

55 Il convient donc de répondre aux questions posées que la directive 2004/18 s'oppose à une réglementation nationale qui autorise la conclusion, sans appel à la concurrence, d'un contrat par lequel des entités publiques instituent entre elles une coopération lorsque – ce qu'il appartient à la juridiction de renvoi de vérifier – un tel contrat n'a pas pour objet d'assurer la mise en œuvre d'une mission de service public commune à ces entités, qu'il n'est pas exclusivement régi par des considérations et des exigences propres à la poursuite d'objectifs d'intérêt public ou qu'il est de nature à placer un prestataire privé dans une situation privilégiée par rapport à ses concurrents. Le fait qu'un tel contrat intervienne dans une situation extraordinaire ne peut être pris en considération que pour autant que le pouvoir adjudicateur établisse que sont réunies les conditions d'application de l'article 31, point 1, sous c), de cette directive.

Sur les dépens

56 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (dixième chambre) dit pour droit:

La directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services, telle que modifiée par le règlement (CE) n° 1177/2009 de la Commission, du 30 novembre 2009, s'oppose à une réglementation nationale qui autorise la conclusion, sans appel à

la concurrence, d’un contrat par lequel des entités publiques instituent entre elles une coopération lorsque – ce qu’il appartient à la juridiction de renvoi de vérifier – un tel contrat n’a pas pour objet d’assurer la mise en œuvre d’une mission de service public commune à ces entités, qu’il n’est pas exclusivement régi par des considérations et des exigences propres à la poursuite d’objectifs d’intérêt public ou qu’il est de nature à placer un prestataire privé dans une situation privilégiée par rapport à ses concurrents. Le fait qu’un tel contrat intervienne dans une situation extraordinaire ne peut être pris en considération que pour autant que le pouvoir adjudicateur établisse que sont réunies les conditions d’application de l’article 31, point 1, sous c), de cette directive.

Signatures

---

* Langue de procédure: l’italien.

JUDGMENT OF THE COURT (Tenth Chamber)

10 October 2013 (*)

(Request for a preliminary ruling – Public procurement – Directive 2004/18/EC – Principle of equal treatment – Restricted procedure – Contract notice – Requirement for a copy of the most recent published balance sheet to be enclosed with the application – Copies of balance sheets not enclosed with some candidates' applications – Right of the contracting authority to ask those candidates to provide copies of those balance sheets after the deadline for filing applications)

In Case C-336/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (Denmark), made by decision of 4 July 2012, received at the Court on 16 July 2012, in the proceedings

Ministeriet for Forskning, Innovation og Videregående Uddannelser

v

Manova A/S,

THE COURT (Tenth Chamber),

composed of E. Juhász, President of the Tenth Chamber, acting for the President of the Chamber, A. Rosas, and D. Šváby (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 6 June 2013,

after considering the observations submitted on behalf of:

– Manova A/S, by J. Munk Plum, advokat,

– the Danish Government, by V. Pasternak Jørgensen, acting as Agent, assisted by R. Holdgaard, advokat,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

– the Netherlands Government, by B. Koopman and C. Wissels, acting as Agents,

– the European Commission, by U. Nielsen and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principle of equal treatment.

2 The request has been made in proceedings between the Ministeriet for Forskning, Innovation og Videregående Uddannelser (Ministry of Science, Innovation and Higher Education) and Manova A/S

('Manova') concerning the lawfulness of a public procurement procedure organised by the Undervisningsministeriet (Education Ministry) ('the Ministry').

Legal context

European Union ('EU') law

3 According to recital 2 in the preamble to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114):

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the [EC] Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. …'

4 Article 2 of that directive, which concerns 'the principles of awarding contracts', provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Under Article 21 of Directive 2004/18, contracts which have as their object services listed in Annex IIB to that directive are to be subject solely to Article 23, which relates to technical specifications, and Article 35(4), which relates to the notice of the results of the award procedure. Category 24 of that annex covers education and vocational education services.

6 Under Article 51 of Directive 2004/18, '[t]he contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50'.

Danish law

7 Directive 2004/18 was transposed into Danish law by Order No 937 of 16 September 2004 ('Order No 937/2004'), which was in force at the time when the public procurement procedure at issue was organised. Under paragraph 1(1) of Order No 937/2004, contracting authorities were required to comply with Directive 2004/18, which was reproduced in the annex to the order.

8 Part II of the Law on obtaining tenders for certain public and publicly-supported contracts (lov om indhentning af tilbud på visse offentlige og offentlig støttede kontrakter), as published by Order No 1410 of 7 December 2007, lays down provisions on goods and services contracts. Under paragraph 15a(1) of that law, Part II applies to public service contracts which, like the contract at issue, relate to services listed in Annex IIB to Directive 2004/18 and have a value which exceeds DKK 500 000.

9 Under paragraph 15d(1) of that law, contracting authorities must ensure that, during the tendering procedure and award of the contract, '…the selection of tenderers is done on the basis of objective, factual and non-discriminatory criteria and that there is no discrimination as between tenderers'.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 By notice published on 12 September 2008, the Ministry launched a call for tenders in respect of services required for the operation of seven occupational guidance and advice centres ('guidance centres') starting from 1 August 2009. The value of the contract to be awarded was above the threshold which, under Article 7 of Directive 2004/18, triggers application of that directive.

11 The services in question, which essentially consist in the provision of guidance to people hoping to follow a higher educational or vocational training course, fall within Category 24 of Annex IIB to Directive 2004/18.

12 Since the Ministry took the view that the contract at issue related to complex services requiring negotiations, the procedure included a preliminary screening stage.

13 The section of the contract notice entitled ‘Qualitative selection criteria’ laid down the following provision:

‘Tenderers wishing to be considered must, as a basis for the assessment of their economic and technical qualifications, provide the following information and satisfy the minimum requirements set out:

…

(2) Submit a copy of the most recent balance sheet in so far as the tenderer is obliged to draw up such a document.

(3) Reference list …

(4) Information on the tenderer’s educational and technical qualifications …

If the [Ministry] receives more than three applications for each of the seven lots, all of which fulfil the above requirements, the candidates who will be invited to submit tenders and take part in the subsequent negotiation procedure shall be selected from among those who have demonstrated the best and most suitable experience in relation to the services put out for tender. References shall accordingly be accorded more weight than professional and technical qualifications.’

14 By 14 October 2008, the deadline for applications, 10 undertakings/institutions had lodged applications for screening, including the Syddansk Universitet (University of Southern Denmark) (‘the USD’), the Københavns Universitet (University of Copenhagen) (‘the UC’), and Manova.

15 The applications from the USD and the UC did not include copies of their balance sheets; in that connection, the UC referred to its website.

16 On 29 October 2008, the Ministry sent an email to each of those universities asking it to forward a copy of its balance sheet, a request which the UC met that same day and the USD on the following day.

17 On 4 November 2008, nine candidates – including Manova, the USD and the UC – were judged successful at the screening stage and invited to submit tenders, three candidates to tender for each guidance centre. For one of those centres, Manova found itself competing with the USD and for another, with the UC.

18 On 1 May 2009, following the final assessment of the tenders for those two guidance centres, the Ministry found that the tenders from the USD and the UC were economically more advantageous than the tenders submitted by Manova – which, ultimately, was the only other candidate to have submitted a competing tender for those centres – and concluded the contracts relating to those centres with those two universities. Those contracts are still in force.

19 Manova filed a complaint before the Klagenævnet for Udbud (Complaints Board for Public Procurement; ‘the Complaints Board’) against the decision to award those lots to those universities. By order of 10 March 2010, the Complaints Board found that the Ministry had acted in breach of the principle of equal treatment by not rejecting the candidature of the USD and the UC on the ground that copies of their most recent balance sheets had not been provided at the same time as their applications for admission to the screening stage. The Complaints Board accordingly annulled the contracts.

20 On 29 April 2010, the Ministry brought an action contesting that order. The case was referred to the Østre Landsret (Eastern Regional Court), the referring court.

21 The Østre Landsret observes that the approach consistently taken by the Complaints Board in its decision-making practice is that, under Article 51 of Directive 2004/18 and, more generally, the principle of equal treatment, a contracting authority may not, where certain information has not been provided, ask the tenderer to provide the information at a later stage, if the provision of that information

was a condition which had to be met in submitting an application or a tender, failing which the application or tender would be rejected.

22 The referring court also notes that, as a general rule, paragraph 12 of Order No 712 of 15 June 2011 (which replaced Order No 937/2004 with effect from 1 July 2011) allows a contracting authority which has received applications or tenders which do not meet the formal requirements set out in the contract documents – because, for example, information or documents are missing – not to reject those applications or tenders, provided that the awarding authority acts in accordance with the principle of equal treatment.

23 The Østre Landsret believes that there is uncertainty as to what steps a contracting authority may take if 'records' have not been included with an application and as to the implications of the principle of equal treatment in such a situation.

24 In those circumstances, the Østre Landsret decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the EU law principle of equal treatment mean that, after the deadline for applications to take part in a tendering procedure, a contracting authority may not ask a candidate to forward a copy of its most recent balance sheet, provision of which was required under the notice announcing a screening procedure, if the candidate did not provide such documents with its application?'

Consideration of the question referred

25 By its question, the referring court asks, in essence, whether the principle of equal treatment is to be interpreted as precluding a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation – such as a copy of its published balance sheet – which were called for in the contract notice, but were not included with that candidate's application.

26 As a preliminary point, it should be borne in mind that, although, under Article 21 of Directive 2004/18, public contracts concerning services listed in Annex IIB to that directive are to be subject solely to Articles 23 and 35(4) thereof, the fundamental rules of the Treaty and the general principles of EU law apply to such contracts where they are of certain cross-border interest. The Court has found that the system established by the EU legislature for public contracts relating to services falling within the ambit of that annex cannot be interpreted as precluding application of the principles deriving from Articles 43 EC and 49 EC (now, respectively, Articles 49 TFEU and 56 TFEU) (see to that effect, inter alia, Case C-226/09 *Commission* v *Ireland* [2010] ECR I-11807, paragraphs 29 and 31).

27 It appears from the observations submitted to the Court that, from the point of view of the contracting authority itself, that is the position in the case before the referring court since one of the requirements under the contract notice was for applicants to declare on their honour that they had fulfilled all their obligations concerning taxes and social security contributions, not only in Denmark but also – where appropriate – in their Member State of establishment. However, it is for the referring court to carry out the necessary assessments in that regard.

28 One of the principal objectives of the public procurement rules under EU law is to ensure the free movement of services and the opening up of undistorted competition in all the Member States. In order to pursue that twofold objective, EU law applies, inter alia, the principle of the equal treatment of tenderers and the corollary obligation of transparency.

29 Accordingly, the application of the principle of equal treatment to public procurement procedures does not constitute an end in itself, but must be viewed in the light of the aims that it is intended to achieve.

30 It is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way, unless such treatment is objectively justified (see Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, paragraph 27 and the case-law cited).

31 The principle of equal treatment and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, where the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification (see, to that effect, Case C-599/10 *SAG ELV Slovensko and Others* [2012] ECR, paragraphs 36 and 37).

32 However, the Court has explained that Article 2 of Directive 2004/18 does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors (*SAG ELV Slovensko and Others*, paragraph 40).

33 In *SAG ELV Slovensko and Others*, the Court laid down certain requirements to mark the bounds of the contracting authority's right to make a written request to the tenderer or tenderers concerned for clarification of their bid.

34 First of all, a request for clarification of a tender, which may not be made until after the contracting authority has looked at all the tenders, must, as a general rule, be sent in an equivalent manner to all tenderers in the same situation (see, to that effect, *SAG ELV Slovensko and Others*, paragraphs 42 and 43).

35 Next, the request must relate to all sections of the tender which require clarification (see, to that effect, *SAG ELV Slovensko and Others*, paragraph 44).

36 In addition, that request may not lead to the submission, by a tenderer, of what would appear in reality to be a new tender (see, to that effect, *SAG ELV Slovensko and Others*, paragraph 40).

37 Lastly, as a general rule, when exercising its right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome (*SAG ELV Slovensko and Others*, paragraph 41).

38 That guidance in relation to tenders can also be applied to applications filed at the screening stage for candidates in a restricted procedure.

39 Accordingly, a contracting authority may request the correction or amplification of details of such an application, on a limited and specific basis, so long as that request relates to particulars or information, such as a published balance sheet, which can be objectively shown to pre-date the deadline for applying to take part in the tendering procedure concerned.

40 However, it should be explained that this would not be the case if the contract documents required provision of the missing particulars or information, on pain of exclusion. It falls to the contracting authority to comply strictly with the criteria which it has itself laid down (see, to that effect, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 115).

41 In the present case, it appears that the conditions mentioned in paragraphs 39 and 40 above have been respected. Nevertheless, it is for the referring court to carry out the necessary assessments in that regard.

42 In the light of the foregoing, the answer to the question referred is that the principle of equal treatment must be interpreted as not precluding a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation – such as a copy of its published balance sheet – which can be objectively shown to pre-date that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected. That request must not unduly favour or disadvantage the candidate or candidates to which it is addressed.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

The principle of equal treatment must be interpreted as not precluding a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation – such as a copy of its published balance sheet – which can be objectively shown to pre-date that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected. That request must not unduly favour or disadvantage the candidate or candidates to which it is addressed.

[Signatures]

** Language of the case: Danish.

JUDGMENT OF THE COURT (Tenth Chamber)

4 July 2013 (*)

(Public procurement – Directive 89/665/EEC – Public procurement review – Action brought by an unsuccessful tenderer for review of a decision awarding a contract – Action for review based on the ground that the bid selected did not meet the technical specifications for the contract – Counterclaim made by the successful tenderer alleging that certain technical specifications for the contract were not respected in the bid submitted by the tenderer seeking review – Neither of those bids in compliance with the technical specifications for the contract – National case-law requiring that the counterclaim be examined first and, where such a counterclaim proves well founded, that the main action be declared inadmissible without any consideration of its merits – Whether compatible with European Union law)

In Case C-100/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Piemonte (Italy), made by decision of 25 January 2012, received at the Court on 24 February 2012, in the proceedings

Fastweb SpA

v

Azienda Sanitaria Locale di Alessandria,

intervening parties:

Telecom Italia SpA,

Path-Net SpA,

THE COURT (Tenth Chamber),

composed of A. Rosas, President of the Chamber, E. Juhász and D. Šváby (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2012,

after considering the observations submitted on behalf of:

– Telecom Italia SpA and Path-Net SpA, by A. Lirosi, M. Martinelli and L. Mastromatteo, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, Avvocato dello Stato,

– the European Commission, by A. Tokár and D. Recchia, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 89/665’).

2 The request has been made in proceedings between, on the one hand, Fastweb SpA (‘Fastweb’) and, on the other, Azienda Sanitaria Locale di Alessandria (ASL) (Alessandria Local Health Authority; ‘the ASL Alessandria’), Telecom Italia SpA (‘Telecom Italia’) and one of its subsidiaries, Path-Net SpA (‘Path-Net’), concerning the award of a public procurement contract to Path-Net.

Legal context

3 The second and third recitals in the preamble to Directive 89/665 state:

‘… the existing arrangements at both national and Community levels for ensuring the [effective application of directives on public procurement] are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected;

… the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; …, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law’.

4 Recital 3 to Directive 2007/66 states:

‘… The guarantees of transparency and non-discrimination sought by [a number of directives, including Directive 89/665] should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by [a number of directives, including Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)]. …’

5 Article 1 of Directive 89/665, entitled ‘Scope and availability of review procedures’, provides:

‘1. This Directive applies to contracts referred to in Directive [2004/18], unless such contracts are excluded in accordance with Articles 10 to 18 of that Directive.

Contracts within the meaning of this Directive include public contracts, framework agreements, public works concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

…’

6 Article 2(1) of Directive 89/665 provides:

‘Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

…

(b) either set aside or ensure the setting aside of decisions taken unlawfully …

…’

7 Recital 2 to Directive 2004/18 states:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty [on the Functioning of the European Union] and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the abovementioned rules and principles and with other rules of the Treaty.’

8 Under Article 2 of Directive 2004/18:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

9 Article 32 of Directive 2004/18 provides:

‘…

2. For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. …

Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. …

…

4. …

Contracts based on framework agreements concluded with several economic operators may be awarded either:

…

– where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;

…

(d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework

agreement.’

The dispute in the main proceedings and the question referred for a preliminary ruling

10 Under Legislative Decree No 82/2005 of 7 March 2005 establishing the Digital Administration Code (Decreto legislativo 7 marzo 2005, n. 82: Codice dell’amministrazione digitale; Ordinary Supplement to GURI No 112 of 16 May 2005), the Centro Nazionale per l’Informatica nella Pubblica Amministrazione (CNIPA) (National Centre for Public Administration Informatics) is empowered to conclude framework agreements with economic operators of its choosing. Non-State-owned authorities may award contracts which are based on those framework agreements but which take into account the authorities’ own requirements.

11 The CNIPA concluded such a framework agreement, inter alia, with Fastweb and Telecom Italia. On 18 June 2010, the ASL Alessandria invited those companies to submit a tender relating to voice and data telephony on the basis of tender specifications. By decision of 15 September 2010, it selected the bid submitted by Telecom Italia and concluded a contract on 27 September 2010 with Path-Net, that company’s subsidiary.

12 Fastweb brought an action for review of the decision awarding that contract before the Tribunale amministrativo regionale per il Piemonte (Regional Administrative Court, Piedmont; ‘the TAR Piemonte’); Telecom Italia and Path-Net intervened in those proceedings and filed a counterclaim. Each of those operators challenged the validity of the bid submitted by its sole competitor on grounds of failing to comply with certain technical requirements under the tender specifications.

13 Following a check, ordered by the TAR Piemonte, as to whether the bids submitted by the two companies met the tender specifications, it was found that neither of the bids complied with all the technical requirements under the tender specifications. Logically, according to the TAR Piemonte, that finding should mean that both actions for review should succeed, causing the public procurement procedure at issue before that court to be annulled, as no tenderer would have submitted a bid capable of winning the contract. That result would be in Fastweb’s interests, since the recommencement of the award procedure would provide it with another chance to win the contract.

14 However, the TAR Piemonte pointed out that, by Decision No 4 of 7 April 2011 made in Plenary Assembly, the Consiglio di Stato (Italian Council of State) had held – stating a key principle of law as regards actions for the review of public procurement procedures – that a counterclaim, challenging the *locus standi* of a party who has brought an action for review on the grounds that that party had been unlawfully admitted to the award procedure, must be examined before the main action is considered, even in cases where the applicant in the main action has a material interest in the recommencement of the award procedure in its entirety and irrespective of the number of participants competing in that procedure or the forms of order sought in the counterclaim or the needs of the authority concerned.

15 The Consiglio di Stato considers that only a party which has taken part lawfully in the award procedure has legal standing to challenge the decision awarding the public contract concerned. According to that court, a finding that the party seeking review of that decision had been unlawfully admitted to the procedure has full retroactive effect and the definitive exclusion of that party from the public procurement procedure would bar that party from challenging the outcome of the procedure.

16 In accordance with the case-law of the Consiglio di Stato, a practical interest in recommencement of the tendering procedure, as relied upon by the party which has brought an action challenging the decision awarding a public contract, does not confer on that party legal standing to do so. Such an interest is in no way different from the interest of any other economic operator in the sector which wishes to take part in a new award procedure. Consequently, the counterclaim contesting the *locus standi* of the party which has brought that action must always be examined first, even in cases where there were only two tenderers, namely the unsuccessful tenderer (the applicant in the main action) and the successful tenderer (the counterclaimant).

17 The TAR Piemonte is uncertain whether that case-law – specifically in so far as it provides that the counterclaim is unconditionally to be given priority over the main action – is consistent with the

principles of equality, non-discrimination, free competition and effective judicial protection, as reflected in Articles 1(1) and 2(1)(b) of Directive 89/665. According to that court, the fact that the counterclaim is to be the first claim examined – and, possibly, the only claim examined – confers on the successful tenderer an unjustified advantage over the other economic operators who participated in the award procedure where it is found that the contract has been unlawfully awarded.

18 In those circumstances, the TAR Piemonte decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do the principles of equality of the parties, of non-discrimination and of protection of competition in public tendering procedures, referred to in Directive [89/665] preclude the most recent case-law as laid down in Decision No 4 of 2011 of the Plenary Assembly of the Consiglio di Stato, according to which the counterclaim, by which it is sought to challenge the *locus standi* of the applicant in the main action by contesting its admission to the tendering procedure, must of necessity be heard before the main action and carry compelling implications for examination of the main action, even in cases where the applicant in the main action has an interest in the recommencement of the entire selection procedure (*interesse strumentale*) and irrespective of the number of competitors which took part in the procedure, with specific reference to cases where only two participants remained in play in that procedure (namely, the applicant in the main action and the counterclaimant, the latter being also the successful tenderer), each seeking to have the other excluded on the grounds that its bid failed to meet the minimum requirements for the bid to be considered suitable?’

Admissibility of the request for a preliminary ruling

19 Telecom Italia, Path-Net and the Italian Government challenge the admissibility of this request for a preliminary ruling on a number of grounds. The four preliminary pleas of inadmissibility thus raised cannot, however, be upheld.

20 First of all, this request for a preliminary ruling concerns a situation which falls squarely within the purview of Article 267 TFEU. In accordance with the first and second paragraphs of Article 267 TFEU, a court or tribunal of a Member State may request the Court to give a ruling on any question relating to the interpretation of the Treaties or of various instruments of secondary legislation where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in the case before it. In the present case, it is clear from the order for reference that the TAR Piemonte is uncertain as to the implications of Directive 89/665 in the procedural and factual context of the dispute before it, envisaging two possible responses which would entail two different outcomes.

21 Secondly, the order for reference adequately sets out the national legal context, since it describes and explains the case-law of the Consiglio di Stato, which is shaped by the way in which the Consiglio di Stato construes all the relevant rules and procedural principles of national law applicable to circumstances such as those under consideration in the main proceedings, and the inferences which can be drawn from the *dicta* of that court as regards the admissibility of the main action, brought by the unsuccessful tenderer.

22 Thirdly, even though the TAR Piemonte does not indicate which specific provision of European Union law it wishes to have interpreted, it refers explicitly, in the question itself, to Directive 89/665, and the order for reference gives sufficient information to enable the Court to establish the elements of European Union law that require interpretation, account being taken of the matters to which the dispute before the referring court relates (see, by analogy, Case C-346/05 *Chateignier* [2006] ECR I-10951, paragraph 19 and the case-law cited).

23 Fourthly and lastly, it does not appear that that dispute concerns a public procurement contract covered by one of the exemptions referred to in Article 1(1) of Directive 89/665. Accordingly, provided that the value of that contract reaches the threshold at which Directive 2004/18 becomes applicable, as provided for in Article 7 of that directive – a matter for the referring court to verify, although there is nothing to cast any doubt in that regard at this stage – Directives 89/665 and 2004/18 are applicable to a public contract such as the contract at issue in the main proceedings. In that regard, it should be borne in mind that the application of Directive 2004/18 is unaffected by the fact that a particular procedure for the

award of a public procurement contract involves only national undertakings (see, to that effect, Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraph 29 and the case-law cited).

Consideration of the question referred

24 By its question, the TAR Piemonte asks, in essence, whether the provisions of Directive 89/665 – and, in particular, Articles 1 and 2 thereof – must be interpreted to the effect that, if, in review proceedings, the successful tenderer raises a preliminary plea of inadmissibility on the grounds that the tenderer seeking review lacks standing to challenge the award because its bid should have been rejected by the contracting authority as not being in conformity with the technical requirements under the tender specifications, Article 1(3) of that directive precludes that action for review from being declared inadmissible as a consequence of the examination of that preliminary plea, where the applicant for review is itself contesting, on identical grounds, the validity of the bid submitted by the successful tenderer and where only those two economic operators submitted a bid.

25 It should be noted that, as is clear from Article 1 of Directive 89/665, the aim of that directive is to ensure that decisions made by contracting authorities in breach of European Union law can be effectively reviewed. Under Article 1(3) of the directive, Member States must ensure that review procedures are available, under detailed rules which they themselves may establish, at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.

26 In that regard, a decision by which the contracting authority rejects a bid even before the stage at which the winning bid is selected is a decision in respect of which it must be possible to seek review under Article 1(1) of Directive 89/665, since that provision applies to all decisions taken by contracting authorities which are subject to the rules of European Union law on public procurement and makes no provision for any limitation as regards the nature and content of those decisions (see, inter alia, Case C-249/01 *Hackermüller* [2003] ECR I-6319, paragraph 24 and the case-law cited).

27 Accordingly, in paragraph 26 of *Hackermüller*, the Court held that, if a review body were to refuse access to those procedures, on grounds of lack of *locus standi*, to a tenderer whose bid had been rejected even before the stage at which the winning bid is selected, the effect would be to deny that tenderer not only its right to seek review of the decision which it alleges to be unlawful, but also the right to challenge the validity of the ground for exclusion raised by that body to deny him the status of a person who has been or risks being harmed by the alleged unlawfulness.

28 Admittedly, if, in order to mitigate that situation, it is recognised that the tenderer has the right to challenge the validity of that ground of exclusion by means of an action for review which it brings in order to contest the lawfulness of the decision by which the contracting authority did not consider its bid as the best, it is conceivable that, at the end of that procedure, the review body may conclude that the bid actually should have been rejected at the outset and that the tenderer's action for review falls to be dismissed on the ground that, given that fact, it neither has been nor risks being harmed by the infringement alleged (see *Hackermüller*, paragraph 27).

29 In such a situation, the tenderer which has brought an action for review of the decision awarding a public contract must have the right to challenge before the review body, and in accordance with the review procedure, the validity of the grounds on which its bid was rejected (see, to that effect, *Hackermüller*, paragraphs 28 and 29).

30 That approach is also called for, as a rule, where the preliminary plea of inadmissibility is raised, not by the review body of its own motion, but in the context of a counterclaim brought by a party to the review procedure, such as the successful tenderer which has intervened lawfully in that procedure.

31 In the case before it, the TAR Piemonte, after checking whether the bids made by the two companies concerned were satisfactory, found that the bid submitted by Fastweb did not comply with all the technical rules under the tender specifications. It reached the same conclusion, however, with regard to the bid submitted by the other tenderer, Telecom Italia.

32 This situation can be distinguished from the facts in *Hackermüller*, inter alia because it has been found that the selected bid was, wrongly, not excluded at the stage of verification of the tenders, even though it did not comply with the technical requirements under the tender specifications.

33 In the presence of such a finding, a counterclaim filed by the successful tenderer cannot bring about the dismissal of an action for review brought by a tenderer where the validity of the bid submitted by each of the operators is challenged in the course of the same proceedings and on identical grounds. In such a situation, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid.

34 In the light of the foregoing, the answer to the question is that Article 1(3) of Directive 89/665 must be interpreted to the effect that, if, in review proceedings, the successful tenderer – having won the contract and filed a counterclaim – raises a preliminary plea of inadmissibility on the grounds that the tenderer seeking review lacks standing to challenge the award because its bid should have been rejected by the contracting authority by reason of its non-conformity with the technical requirements under the tender specifications, that provision precludes that action for review from being declared inadmissible as a consequence of the examination of that preliminary plea in the absence of a finding as to whether those technical requirements are met both by the bid submitted by the successful tenderer, which won the contract, and by the bid submitted by the tenderer which brought the main action for review.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, must be interpreted to the effect that, if, in review proceedings, the successful tenderer – having won the contract and filed a counterclaim – raises a preliminary plea of inadmissibility on the grounds that the tenderer seeking review lacks standing to challenge the award because its bid should have been rejected by the contracting authority by reason of its non-conformity with the technical requirements under the tender specifications, that provision precludes that action for review from being declared inadmissible as a consequence of the examination of that preliminary plea in the absence of a finding as to whether those technical requirements are met both by the bid submitted by the successful tenderer, which won the contract, and by the bid submitted by the tenderer which brought the main action for review.

[Signatures]

* Language of the case: Italian.

JUDGMENT OF THE COURT (Fifth Chamber)

10 October 2013 (*)

(Public contracts – Directive 2004/18/EC – Economic and financial standing – Technical and/or professional ability – Articles 47(2) and 48(3) – Right of an economic operator to rely on the capacities of other entities – Article 52 – Certification system – Public works contracts – National legislation requiring possession of a qualification certificate corresponding to the category and the value of the works covered by the contract – Prohibition on reliance on the certificates of more than one entity for works within the same category)

In Case C-94/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per le Marche (Italy), made by decision of 15 December 2011, received at the Court on 20 February 2012, in the proceedings

Swm Costruzioni 2 SpA,

Mannocchi Luigino DI

v

Provincia di Fermo,

intervening party:

Torelli Dottori SpA,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász, D. Šváby (Rapporteur) and C. Vajda, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Swm Costruzioni 2 SpA and Mannocchi Luigino DI, by C. Famiglini, avvocato,

– the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

– the European Commission, by C. Zadra and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 February 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 47(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of

procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and Corrigendum, OJ 2004 L 351, p. 44).

2 The request has been made in proceedings between (i) Swm Costruzioni 2 SpA (‘Swm’) and Mannocchi Luigino DI, undertakings which, together, have formed an ad hoc tendering consortium (Raggruppamento Temporaneo di Imprese, ‘the RTI’), and (ii) the Provincia di Fermo concerning the latter’s decision to exclude that RTI from a tendering procedure for the award of a public works contract.

Legal context

European Union law

3 Recital 32 in the preamble to Directive 2004/18 states as follows:

‘In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.’

4 Recital 45 in the preamble to that directive reads as follows:

‘This Directive allows Member States to establish official lists of contractors, suppliers or service providers or a system of certification by public or private bodies, and makes provision for the effects of such registration or such certification in a contract award procedure in another Member State. As regards official lists of approved economic operators, it is important to take into account Court of Justice case-law in cases where an economic operator belonging to a group claims the economic, financial or technical capabilities of other companies in the group in support of its application for registration. In this case, it is for the economic operator to prove that those resources will actually be available to it throughout the period of validity of the registration. For the purposes of that registration, a Member State may therefore determine the level of requirements to be met and in particular, for example where the operator lays claim to the financial standing of another company in the group, it may require that that company be held liable, if necessary jointly and severally.’

5 Article 1(2)(b) and the first subparagraph of Article 1(8) of Directive 2004/18 contain the following definitions:

‘2. ...

(b) “Public works contracts” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

...

8. The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.’

6 Article 4(2) of that directive provides as follows:

‘Groups of economic operators may submit tenders or put themselves forward as candidates. ...’

7 The first paragraph of Article 25 of the directive states as follows:

‘In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors.’

8 Article 44 of that directive states as follows:

‘1. Contracts shall be awarded ... after the suitability of the economic operators not excluded ... has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52 ...

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

...’

9 Article 47 of Directive 2004/18, entitled ‘Economic and financial standing’, reads as follows:

‘1. Proof of the economic operator’s economic and financial standing may, as a general rule, be furnished by one or more of the following references:

...

(c) a statement of the undertaking’s overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.

...’

10 Article 48 of that directive, entitled ‘Technical and/or professional ability’, states as follows:

‘1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of the economic operators’ technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:

(a) (i) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent authority shall submit these certificates to the contracting authority direct;

…

(b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator’s undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;

…

(h) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;

...

3. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

4. Under the same conditions a group of economic operators as referred to Article 4 may rely on the abilities of participants in the group or in other entities.

...'

11 Article 52 of Directive 2004/18, entitled 'Official lists of approved economic operators and certification by bodies established under public or private law', provides in paragraph 1 thereof:

'Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 45(1), Article 45(2)(a) to (d) and (g), Article 46, Article 47(1), (4) and (5), Article 48(1), (2), (5) and (6), Article 49 and, where appropriate, Article 50.

Member States shall also adapt them to Article 47(2) and Article 48(3) as regards applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group. In such case, these operators must prove to the authority establishing the official list that they will have these resources at their disposal throughout the period of validity of the certificate attesting to their being registered in the official list and that throughout the same period these companies continue to fulfil the qualitative selection requirements laid down in the Articles referred to in the second subparagraph on which operators rely for their registration.'

Italian Law

12 In accordance with Decree No 34 of the President of the Republic of 25 January 2000 introducing rules establishing the qualification system for persons who carry out public works in accordance with Article 8 of Law No 109 of 11 February 1994, as subsequently amended (decreto del Presidente della Repubblica n. 34 – Regolamento recante istituzione del sistema di qualificazione per gli esecutori di lavori pubblici, ai sensi dell'articolo 8 della legge 11 febbraio 1994, n. 109, e successive modificazioni, Ordinary Supplement to GURI No 49 of 29 February 2000), which is applicable in the main proceedings, public works contracts the value of which exceeds EUR 150 000 may be carried out only by undertakings in possession of 'SOA' certificates.

13 Those certificates correspond to qualification categories, depending on the nature of the works involved, and to classes, which determine the value of the contracts to which a certificate grants access.

14 Those certificates are issued by certification bodies – società organismi di attestazione – which are entrusted with the task, inter alia, of ensuring that each approved undertaking satisfies a set of general, economic, financial, technical and organisational criteria considered essential for the execution of public works.

15 It is apparent from the documents before the Court that appropriate economic and financial standing is established, inter alia, by works-related turnover equal to or greater than 100% of the amounts required for qualification in the various categories. As regards technical capacity, it is required, inter alia, for each category covered by an application for qualification, first, that works of a value equal to or greater than 90% of the amount of the class applied for have been carried out and, second, that one, two or

three contracts the value of which is equal to or greater than 40%, 55% or 65% of that amount, respectively, have been performed.

16 Article 49 of Legislative Decree No 163 of 12 April 2006 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC (decreto legislativo n. 163 – Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE, Ordinary Supplement to GURI No 100 of 2 May 2006), as amended by Legislative Decree No 152 of 11 September 2008 (Ordinary Supplement to GURI No 231 of 2 October 2008, 'Legislative Decree No 163/2006'), provides as follows:

'1. The tenderer, be it an individual or a member of a consortium or group within the meaning of Article 34, in a specific tendering procedure for a public works, services or supply contract, may fulfil the requirements relating to possession of economic, financial, technical and organisational capacity, or possession of a SOA certificate ..., by relying on the capacity of another entity or the SOA certificate of another entity.

…

6. For works contracts, the tenderer may rely on the capacities of only one auxiliary undertaking for each qualification category. The invitation to tender may permit reliance on the capacity of more than one auxiliary undertaking having regard to the value of the contract or the special nature of the services to be provided ...'

The dispute in the main proceedings and the question referred for a preliminary ruling

17 The Provincia di Fermo initiated a tendering procedure for a works contract for the modernisation and extension of a road, the estimated value of which exceeds the relevant threshold for the application of Directive 2004/18, as laid down in Article 7 thereof. Under that procedure, tenderers were required to demonstrate their technical and professional ability by presenting an SOA certificate corresponding to the nature and value of the works covered by the contract.

18 The RTI formed by Swm and Mannocchi Luigino DI participated in that procedure through Swm. In order to meet the requirement concerning the relevant class of SOA certificate, Swm relied on the SOA certificates of two third-party undertakings.

19 By decision of 2 August 2011, the RTI was excluded from the tendering procedure on the basis of the general prohibition on reliance on the capacities of more than one entity within the same qualification category laid down by Article 49(6) of Legislative Decree No 163/2006.

20 An action against that decision was brought before the Tribunale amministrativo regionale per le Marche (Marche Regional Administrative Court).

21 That court refers to decisions of the Consiglio di Stato (Council of State) on that subject. The Consiglio di Stato has held, on the one hand, that the prohibition is not applicable to undertakings forming an RTI where the RTI is itself a candidate or tenderer. That decision was based on the rationale behind the right to rely on the capacities of third-party entities, namely to promote the broadest possible participation by undertakings in tendering procedures. On the other hand, the Consiglio di Stato has also found that a tenderer may not combine its SOA certificate with that of a third-party entity in order to fall within the class required for a particular contract. That decision was based on the objective of the European Union rules on public procurement, namely that of attaining the maximum level of competitiveness in order to achieve at the same time the most efficient and reliable performance of public contracts.

22 In those circumstances the Tribunale amministrativo regionale per le Marche decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 47(2) of Directive [2004/18] be interpreted as precluding, in principle, the [rule] of a Member State, such as [that] set out in Article 49(6) of Legislative Decree No 163/2006, which prohibits, except in special circumstances, [economic operators participating in a tendering procedure for a public works contract] [from relying] on the capacities of more than one auxiliary undertaking ... for each qualification category [with the proviso that] [t]he invitation to tender may permit reliance on the capacities of more than one auxiliary undertaking having regard to the value of the contract or the special nature of the services to be provided ...?’

Consideration of the question referred

23 As a preliminary point, it must be noted that the national provision referred to in the question referred for a preliminary ruling applies both to the criteria of economic and financial standing and to the criteria of technical and organisational capacity. Article 47(2) of Directive 2004/18 – the only provision of that directive referred to in the question – concerns only the economic and financial standing of economic operators participating in a tendering procedure, while the text of paragraph 3 of Article 48 of that directive, which relates to the technical and/or professional ability of those operators, is in essence identical to that of Article 47(2).

24 The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference solely to certain provisions of European Union law does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions (see, to that effect, Case C-248/11 *Nilaş and Others* [2012] ECR, paragraph 31 and the case-law cited).

25 The national court must therefore be regarded as asking, in essence, whether Articles 47(2) and 48(3) of Directive 2004/18 must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which prohibits, as a general rule, economic operators participating in a tendering procedure for a public works contract from relying on the capacities of more than one undertaking for the same qualification category.

26 Under Article 44(1) of Directive 2004/18, it is for the contracting authorities to check the suitability of candidates or tenderers in accordance with the criteria referred to in Articles 47 to 52 of the directive.

27 In this respect, it must be noted, first, that Article 47(1)(c) provides that the contracting authority may, inter alia, require candidates or tenderers to prove their economic and financial standing by furnishing a statement of the undertaking’s overall turnover and of turnover in the area covered by the contract for a maximum of the last three financial years available. Second, Article 48(2)(a)(i) provides that economic operators may be requested to provide evidence of their technical abilities by furnishing a list of the works carried out over the past five years.

28 Under the first subparagraph of Article 44(2) of Directive 2004/18, a contracting authority may require candidates or tenderers to meet minimum levels of economic and financial standing and technical and professional ability in accordance with Articles 47 and 48 of that directive.

29 For that purpose, the contracting authority must take account of the right conferred on every economic operator by Articles 47(2) and 48(3) of Directive 2004/18 to rely on, for a particular contract, the capacities of other entities, regardless of the nature of the links which it has with them, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract.

30 It should be noted, as the Advocate General observed at point 18 of his Opinion, that the systematic use of the plural in those provisions indicates that they do not prohibit, in principle, candidates or tenderers from relying on the capacities of more than one third-party entity in order to prove that they meet a minimum capacity level. *A fortiori*, those provisions do not lay down any general prohibition regarding a candidate or tenderer’s reliance on the capacities of one or more third-party entities in addition to its own capacities in order to fulfil the criteria set by a contracting authority.

31 That finding is corroborated by several provisions in Directive 2004/18. Thus, Article 48(2)(b) thereof refers to reliance on technicians or technical bodies, whether or not they belong directly to the undertaking of the economic operator concerned, upon whom the contractor can call in order to carry out the work. Similarly, Article 48(2)(h) of the directive refers to the tools, plant or technical equipment available to the contractor for carrying out the contract, without imposing any limit on the number of entities who will provide them. To the same effect, Article 4(2) of the directive permits groups of economic operators to participate in public procurement procedures without imposing any limit on the combining of capacities, in the same way as Article 25 of the directive provides for the use of subcontractors without imposing any limit in that regard.

32 Finally, the Court has expressly referred to an economic operator's right to use resources belonging to one or more other entities, possibly in addition to its own resources, in order to carry out a contract (see, to that effect, Case C-176/98 *Holst Italia* [1999] ECR I-8607, paragraphs 26 and 27, and Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-2549, paragraph 43).

33 Therefore, it must be held that Directive 2004/18 permits the combining of the capacities of more than one economic operator for the purpose of satisfying the minimum capacity requirements set by the contracting authority, provided that the candidate or tenderer relying on the capacities of one or more other entities proves to that authority that it will actually have at its disposal the resources of those entities necessary for the execution of the contract.

34 Such an interpretation is consistent with the objective pursued by the directives in this area of attaining the widest possible opening-up of public contracts to competition to the benefit not only of economic operators but also contracting authorities (see, to that effect, Case C-305/08 *CoNISMa* [2009] ECR I-12129, paragraph 37 and the case-law cited). In addition, as the Advocate General noted at points 33 and 37 of his Opinion, that interpretation also facilitates the involvement of small- and medium-sized undertakings in the contracts procurement market, an aim also pursued by Directive 2004/18, as stated in recital 32 thereof.

35 It is true that there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate. In such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44(2) of Directive 2004/18, as long as that requirement is related and proportionate to the subject-matter of the contract at issue.

36 However, since those circumstances constitute an exception, Directive 2004/18 precludes that requirement being made a general rule under national law, which is the effect of a provision such as Article 49(6) of Legislative Decree No 163/2006.

37 The fact that, in the present case, the assessment of the capacity level of an economic operator, as regards the value of the public works contracts which are open to that operator, is broadly predetermined under a national certification system or a system entailing registration on lists is irrelevant in that regard. The right given to Member States by Article 52 of Directive 2004/18 to introduce such a system may be exercised only in a manner that is consistent with the other provisions of that directive, particularly Articles 44(2), 47(2) and 48(3) thereof.

38 In the light of all of the foregoing considerations, the answer to the question referred is that Articles 47(2) and 48(3) of Directive 2004/18, read in conjunction with Article 44(2) of that directive, must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which prohibits, as a general rule, economic operators participating in a tendering procedure for a public works contract from relying on the capacities of more than one undertaking for the same qualification category.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Articles 47(2) and 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read in conjunction with Article 44(2) of that directive, must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which prohibits, as a general rule, economic operators participating in a tendering procedure for a public works contract from relying on the capacities of more than one undertaking for the same qualification category.

[Signatures]

---

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL
Jääskinen
delivered on 28 February 2013 (1)

Case C-94/12

Swm Costruzioni 2 SpA
Mannocchi Luigino DI
v
Provincia di Fermo

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale per le Marche (Italy))

(Directive 2004/18/EC – Award of public works contracts – Economic and financial standing of an economic operator – Technical and/or professional ability of an economic operator – Reliance on the capacities of more than one auxiliary undertaking)

I – Introduction

1. Undertakings wishing to participate in a tendering procedure for a public works contract may be required to meet minimum levels relating to economic and financial standing or technical and/or professional ability in accordance with Articles 47 and 48 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ('Directive 2004/18'). (2) In addition to possessing such capacities itself, an economic operator may fulfil these requirements by reference to the reliance on the capacities of 'other entities, regardless of the legal nature of the links which it has with them'. (3)

2. This request for a preliminary ruling concerns the question whether national legislation which limits to one the number of entities on whose capacity an economic operator wishing to participate in a public works tendering procedure may rely is in line with Directive 2004/18, in particular with Articles 47(2) and 48(3) thereof. Answering this question requires the Court to define the extent of the discretion the Member States have in implementing the provisions codifying the case-law of the Court predating Directive 2004/18.

II – Legal framework

A – *European Union law*

3. Article 47(2) of Directive 2004/18 titled 'Economic and financial standing' provides that:

'An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.'

4. Article 48(3) of Directive 2004/18 titled ‘Technical and/or professional ability’ provides that:

‘An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.’

5. Article 52(1) of Directive 2004/18 titled ‘Official lists of approved economic operators and certification by bodies established under public or private law’ provides that:

‘Member States may introduce either official lists of approved contractors, suppliers or service providers or certification by certification bodies established in public or private law.

Member States shall adapt the conditions for registration on these lists and for the issue of certificates by certification bodies to the provisions of Article 45(1), Article 45(2)(a) to (d) and (g), Articles 46, Article 47(1), (4) and (5), Article 48(1), (2), (5) and (6), Article 49 and, where appropriate, Article 50.

Member States shall also adapt them to Article 47(2) and Article 48(3) as regards applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group. In such case, these operators must prove to the authority establishing the official list that they will have these resources at their disposal throughout the period of validity of the certificate attesting to their being registered in the official list and that throughout the same period these companies continue to fulfil the qualitative selection requirements laid down in the Articles referred to in the second subparagraph on which operators rely for their registration.’

B – *National law*

6. Article 49(6) of Legislative Decree No 163/2006 provides, with regard to participation in public tendering procedures, that ‘[f]or works contracts, the tenderer may rely on the capacities of only one auxiliary undertaking for each qualification category. The invitation to tender may permit reliance on the capacity of more than one auxiliary undertaking on account of the value of the contract or the special nature of the services to be provided, subject to the prohibition on the shared use by the tenderer of the individual economic, financial, technical and organisation capacities referred to in Article 40(3)(b), on the basis of which the certificate for that category was issued.’

III – The dispute in the main proceedings and the question referred

7. The applicant in the main proceedings, Raggruppamento Temporaneo Imprese (‘RTI’), an ad hoc tendering consortium consisting of Swm Costruzioni 2 SpA (head of the consortium) and Mannocchi Luigino DI, who are also applicants in the main proceedings, participated in the tendering procedure for a public works contract for the modernisation and extension of Strada Provinciale (Provincial Road) No 238 Valdaso.

8. For the purposes of satisfying the certification requirements of the Società Organismo di Attestazione (SOA), the certifying body authorised to verify whether undertakings have the necessary qualifications and fulfil the requirements for participation in public tendering procedures, the main applicant, Swm Costruzioni 2 relied on the capacities of two undertakings of the same qualification category concerning modernisation and extension works.

9. On 2 August 2011, the contracting authority, Provincia di Fermo sent to RTI its decision of the same date excluding RTI from the tendering procedure. The reason for that decision was the breach of the prohibition on reliance on the capacities of more than one undertaking within the same category laid down by Article 49(6) of Legislative Decree No 163/2006.

10. RTI challenged this decision by application lodged on 5 August 2011 before the referring court, the Tribunale Amministrativo Regionale per le Marche. RTI’s application was based on the argument that Article 49(6) of Legislative Decree No 163/2006 was not compatible with the relevant provisions

of Directive 2004/18. The Tribunale Amministrativo Regionale per le Marche decided to stay the proceedings and refer the following question for a preliminary ruling:

‘Must Article 47(2) of Directive 2004/18/EC be interpreted as precluding, in principle, the legislation of a Member State, such as the Italian legislation set out in Article 49(6) of Legislative Decree No 163/2006, which prohibits, except in special circumstances, reliance on the capacities of more than one auxiliary undertaking, and provides that “[f]or works contracts, the tenderer may rely on the capacities of only one auxiliary undertaking for each qualification category. The invitation to tender may permit reliance on the capacities of more than one auxiliary undertaking on account of the value of the contract or the special nature of the services to be provided …”?’

11. Swm Costruzioni 2 SpA and Mannocchi Luigino DI, the Italian Government and the Commission have presented written observations.

IV – The scope of the question referred

12. The Italian Government points out that the main proceedings concern the technical and professional ability of an undertaking, and not its economic and financial capacity, therefore making Article 48(3) of Directive 2004/18 the relevant article. The referring court however has referred solely to Article 47(2) of Directive 2004/18, which concerns the economic and financial capacity of participating undertakings.

13. Here I find it sufficient to refer to settled case-law which states that the order for reference from a national court provides the basis for determining the scope of the question of European Union law to be interpreted, but that the Court is not completely bound by the wording of the question(s) submitted. The Court may have to reformulate the question referred to it in order to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. (4)

14. Articles 47 and 48 of Directive 2004/18 are combined in Article 44(2) of Directive 2004/18 for purposes of allowing contracting authorities to ‘require candidates and tenderers to meet minimum capacity levels’. These two articles follow the same logic, and the same principles of interpretation are valid in the application of both. In *Strong Segurança* the Court noted *en passant* that Articles 48(3) and 47(2) of Directive 2004/18 are substantially identical. (5) Both provisions codify the legal principle developed in the Court’s case-law on earlier public procurement directives concerning the criteria for qualitative selection of candidates or tenderers. (6)

15. During the written procedure, the Court asked the parties to submit their views on the relevance to the present case of Article 44(2) of Directive 2004/18, which is the general provision on the verification of the suitability and choice of participants and award of contracts. (7) Only the Commission replied within the given deadline, concluding that an assessment of Article 44(2) was not relevant for the matter at hand.

16. Therefore, in order to provide Tribunale Amministrativo Regionale per le Marche with a useful answer in the main proceedings, I find that the Court’s preliminary ruling should focus on the interpretation of both Articles 47(2) and 48(3) of Directive 2004/18.

V – Assessment

17. In my view, a literal interpretation of Articles 47(2) and 48(3) of Directive 2004/18 does not support the view that national legislation such as Article 49(6) of Legislative Decree No 163/2006 complies with European Union law on public procurement.

18. Articles 47(2) and 48(3) of Directive 2004/18 expressly state that economic operators may rely on the capacities of other entities for the establishment of their economic, financial, technical and professional capacity requirements for a particular public works contract. In other words, those provisions refer to *other entities* in the plural. It is useful to observe that Articles 47(3) and 48(4) of Directive 2004/18 provide for the same possibility in regard to economic operators belonging to a group.

19. Article 52 of Directive 2004/18 provides for the same possibility in regard to inclusion on official lists of approved economic operators or the granting of certifications to participate in tendering procedures. The wording of Article 52(1) of Directive 2004/18 also indicates, by use of the plural form *other companies* that the European Union legislator had not intended to impose restrictions on the number of auxiliary undertakings on whose capacity a prospective tenderer could rely.

20. The wording of Articles 47(2), 48(3) and 52 of Directive 2004/18 codify settled case-law of the Court relating to earlier public procurement directives. In *Ballast Nedam Groep I*, the Court concluded that a holding company which does not itself execute works may not, because its subsidiaries which carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures if it could establish that it actually has available to it the resources of the subsidiaries necessary for carrying out the contract.

21. In *Ballast Nedam Groep II* the Court re-stated its position in *Ballast Nedam Groep I* and defined this further by concluding that when assessing a parent company's technical capacity, public authorities compiling lists of approved contractors are obliged to take into account the technical capacity of companies belonging to the same group.

22. In *Holst Italia* the Court applied the *Ballast* case-law to a situation in which the company wishing to participate in a tendering procedure was not the dominant legal person in the group of companies, and confirmed that such a company could rely on the capacities of other companies in the group, *regardless of the legal nature of links between them*. (8) The Court stated that a tenderer cannot be eliminated from a procedure solely on the ground that it proposes to use resources which are not its own but belong to *one or more other entities*. (9)

23. This position of the Court that European Union law does not require that, in order to be classified as an economic operator qualifying for tendering, a person wishing to enter into a contract with a contracting authority must be capable of direct performance using his own resources has been confirmed also in subsequent case-law. (10) The Court has emphasised that undertakings wishing to participate in a tendering procedure must prove that they actually have available to them the resources of the other entities necessary for the carrying-out of the contract in question. The onus rests on the tenderer who relies on the resources of others. (11)

24. Both Articles 47(2) and 48(3) of Directive 2004/18 provide in almost identical terms that 'an economic operator *may* … rely on the capacities of other entities'. The wording suggests the recognition of a *right* of economic operators to choose this method of fulfilling the selection criteria, provided that they can prove that they actually have at their disposal the resources of the other entities necessary for executing the contract.

25. Where the capacity of an undertaking to carry out a public works contract has been disputed in a particular case, the evaluation whether adequate proof has been produced is left to national courts. As I have already observed, this principle has been stated in the Court's case-law which now has been codified in Articles 47(2) and 48(3) of Directive 2004/18. (12)

26. In addition, there is nothing in Article 52 of Directive 2004/18 to suggest that it was intended to limit the scope of Articles 47(2) and 48(3) which relate to cooperation between economic operators in the context of tendering for *a particular contract*. To the contrary, Article 52(1) requires that the conditions for registration on lists of approved contractors, suppliers or service providers or for certification are adapted to the principle underlying Articles 47(2) and 48(3) as regards applications for registration submitted by economic operators belonging to a *group* and claiming resources made available to them by the other companies in the group.

27. Registration on an official list or certification in accordance with Article 52 of Directive 2004/18 constitutes a presumption of the suitability of the registered or certified undertakings, but only in relation to the conditions upon which the registration or certification is based. Contracting authorities have discretion to determine the level of financial and economic standing and technical knowledge and ability required in order to participate in a given contract and, if necessary, to demand proof beyond the presumption of registration or certification. (13)

28. Moreover, the Court has stated that Directive 92/50 (14) did not preclude a prohibition or a restriction on the use of subcontracting for the performance of essential parts of the contract precisely in the case where the contracting authority has not been in a position to verify the technical and economic capacities of the subcontractors when examining the tenders and selecting the lowest tenderer. (15)

29. This would suggest that a national provision excluding from tendering procedures economic operators relying on the capacities of more than one other entity would be contrary to the right of economic operators to choose this method of fulfilling the selection criteria and therefore would not be compatible with Directive 2004/18. Indeed, the Court has stated that a tenderer claiming to have at its disposal the technical and economic capacities of third parties on which it intends to rely if the contract is awarded to it may be excluded only if it fails to demonstrate that those capacities are in fact available to it. (16)

30. Therefore, a national provision such as Article 49(6) of Legislative Decree No 163/2006 which does not entirely prohibit reliance on the capacities of auxiliary undertakings in order to fulfil selection criteria, but which nevertheless imposes a quantitative restriction not provided in European Union law on that option cannot be compatible with Directive 2004/18.

31. This argument is further supported by analysis of the objectives of Articles 47(2) and 48(3) of Directive 2004/18. According to the Court, one of the primary objectives of the public procurement rules of the European Union is to attain the widest possible opening-up to competition, and that it is the concern of European Union law to ensure the widest possible participation by tenderers in a call for tenders. (17)

32. The objective of widest possible opening-up to competition is regarded not only from the interest in the free movement of goods and services, but also in regard to the interest of contracting authorities, who will thus have greater choice as to the most advantageous tender. (18) Exclusion of tenderers based on the number of other entities participating in the execution of the contract such as allowing only one auxiliary undertaking per qualitative criteria category does not allow for a case by case evaluation, thus actually reducing the choices of the contracting authority and affecting effective competition.

33. Another objective of the public procurement rules is to open up the public procurement market for all economic operators, regardless of their size. The inclusion of small and medium-sized enterprises (SMEs) is especially to be encouraged as SMEs are considered to form the backbone of European Union economy. (19) The chances of SMEs to participate in tendering procedures and to be awarded public works contracts are hindered, among other factors, by the size of the contracts. Because of this, the possibility for bidders to participate in groups relying on the capacities of auxiliary undertakings is particularly important in facilitating the access to markets of SMEs. (20)

34. As a final point, I shall address the issue of Member States' discretion in the implementation of Directive 2004/18. The Commission and the Italian Government are of the opinion that a national provision such as Article 49(6) of Legislative Decree No 163/2006 is within the discretion left to Member States in the implementation of the directive.

35. According to the Commission, it is sufficient for the proper implementation of the directive that the possibility to rely on capacity of an auxiliary undertaking in order to fulfil the economic and financial capacity, and technical and/or professional ability levels is not excluded, and that the principles expressed in Directive 2004/18 are applied in order to guarantee effective qualitative selection of tenderers based on transparent, objective and non-discriminatory criteria.

36. I do not dispute the fact that Member States have a relatively wide discretion in the implementation of the public procurement directives. However, this does not extend to issues expressly covered by the European Union legislator, which in my opinion is the case concerning the possibility to rely on third party capacities in the context of tendering for public contracts. As I have pointed out above, both case-law of the Court and Directive 2004/18 expressly permit reliance on capacities of other entities, regardless of the legal nature of the links which it has with them.

37. Excluding tenderers relying on the capacities of more than one auxiliary entity per qualitative selection criteria category favours larger undertakings at the expense of *ad hoc* consortia of SMEs. It is likely to privilege dominant local or regional players in relation to public works which fit their capacities but are too demanding for smaller operators acting alone and too small to interest bigger nationally or internationally operating companies. This cannot be regarded as non-discriminatory.

38. I agree with the Italian Government in that there may be a difference between the situations where an economic operator relies on the economic and financial capacity of another entity and where the reliance concerns technical and/or professional ability. In certain situations the necessary technical or professional ability must be possessed by a single entity. For example, whereas two undertakings with a capacity of 50 000 tonnes of asphalt may together fulfil the required capacity of 100 000 tonnes needed for the renovation of a highway, two enterprises having each the expertise level required for maintenance and repair of clocks in railway stations do not automatically fulfil the ability criteria required for reparation works of ancient clocks in medieval churches.

39. However, the problem relating to the possibilities of agglomerating certain types of technical and/or professional abilities is qualitatively independent from the number of entities on whose abilities an economic operator relies. The fact that economic operators may rely on the capacities of other entities for purposes of qualifying as prospective tenderers, does not do away with the realities of particular tendering procedures. Thus, regardless of whether an economic operator possesses the economic and financial capacity and technical and professional ability by itself or by means of reliance on the capacities of other operators, it will still have to prove that it fulfils the criteria established for the execution of a particular public works contract.

40. Moreover, Article 48(5) of Directive 2004/18 provides specific rules for the evaluation of abilities of economic operators with regard to their skills, efficiency, experience and reliability applicable for certain categories of public contracts. This provision is applicable also to economic operators which rely on the technical or professional abilities of other entities. In addition, as I have stated above, in cases of official lists or national certification, contracting authorities still have discretion to determine the level of financial and economic standing and technical knowledge and ability required in order to participate in a given contract.

VI – Conclusion

41. On the basis of the preceding reasons, I propose that the Court give the following answer to the Tribunale Amministrativo Regionale per le Marche:

Articles 47(2) and 48(3) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts preclude national legislation such as that at issue in the main proceedings which prohibits, except in special circumstances, reliance on the capacities of more than one auxiliary undertaking in order to fulfil the selection criteria concerning the economic and financial standing and/or technical and/or professional ability of an economic operator.

---

1 – Original language: English.

---

2 – OJ 2004 L 134, p. 114.

---

3 – Articles 47(2) and 48(3) of Directive 2004/18.

---

4 – See Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 32 and case-law cited. See also more recently Case C-503/09 *Stewart* [2011] ECR I-6497, paragraph 105.

---

5 – Case C-95/10 *Strong Segurança* [2011] ECR I-1865, paragraph 13.

---

6 – See for example Case C-389/92 *Ballast Nedam Groep I* [1994] ECR I-1289, Case C-5/97 *Ballast Nedam Groep II* [1997] ECR I-7549, and Case C-176/98 *Holst Italia* [1999] ECR I-8607.

---

7 – Article 44(2) of Directive 2004/18 provides that '[t]he contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48. The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject matter of the contract. These minimum levels shall be indicated in the contract notice.'

---

8 – *Holst Italia*, paragraph 31.

---

9 – *Holst Italia*, paragraph 26.

---

10 – See, inter alia, Case C-305/08 *CoNISMa* [2009] ECR I-12129*,* paragraph 41 and case-law cited.

---

11 – See Case C-314/01 *Siemens and ARGE* [2004] ECR I-2549, paragraph 44 and case-law cited.

---

12 – See *Ballast Nedam Groep I,* paragraph 17, and *Holst Italia*, paragraphs 29 and 30.

---

13 – See Joined Cases 27/86, 28/86 and 29/86 *CEI-Bellini* [1987] ECR 3347, paragraphs 25 to 27.

---

14 – Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, repealed by Directive 2004/18.

---

15 – *Siemens and ARGE*, paragraph 45.

---

16 – See, *Siemens and ARGE*, paragraph 46.

---

17 – See *CoNISMa,* paragraph 37 and case-law cited.

---

18 – See *CoNISMa,* paragraph 37 and case-law cited.

---

19 – See for example Commission Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market, COM(2011) 15 final.

---

20 – The Commission guidance document European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts recommends taking advantage of the possibility for economic operators to rely on their combined economic and financial standing and technical ability in the selection stage of tendering procedures. See Commission Staff Working Document European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts, SEC(2008) 2193.

EU:C:2013:307

ORDONNANCE DE LA COUR (dixième chambre)

16 mai 2013 (*)

«Article 99 du règlement de procédure – Marchés publics ? Directive 2004/18/CE ? Article 1er, paragraphe 2, sous a) et d) ? Services ? Mission d'étude et de conseil technique et scientifique pour l'établissement des actes constituant un plan d'aménagement d'un territoire communal ? Contrat conclu entre deux entités publiques dont une université ? Entité publique susceptible d'être qualifiée d'opérateur économique»

Dans l'affaire C-564/11,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Consiglio di Stato (Italie), par décision du 1er février 2011, parvenue à la Cour le 9 novembre 2011, dans la procédure

Consulta Regionale Ordine Ingegneri della Lombardia e.a.

contre

Comune di Pavia,

en présence de:

Università degli Studi di Pavia,

LA COUR (dixième chambre),

composée de M. A. Rosas, président de chambre, MM. D. Šváby (rapporteur) et C. Vajda, juges,

avocat général: M. N. Wahl,

greffier: M. A. Calot Escobar,

vu la décision prise, l'avocat général entendu, de statuer par voie d'ordonnance motivée, conformément à l'article 99 du règlement de procédure de la Cour,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation des articles 1er, paragraphe 2, sous a) et d), 2 et 28 ainsi que de l'annexe II A, catégories 8 et 12, de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 114), telle que modifiée par le règlement (CE) n° 1422/2007 de la Commission, du 4 décembre 2007 (JO L 317, p. 34, ci-après la «directive 2004/18»).

2 Cette demande a été présentée dans le cadre d'un litige opposant la Consulta Regionale Ordine Ingegneri della Lombardia (conseil régional de l'ordre des ingénieurs de Lombardie) e.a. au Comune di Pavia au sujet d'une convention par laquelle ce dernier a confié à l'Università degli Studi di Pavia (université de Pavie, ci-après l'«université») une mission d'étude et de conseil technique et scientifique en vue de l'élaboration des actes constituant le plan d'aménagement du territoire communal 1996.

Le cadre juridique

Le droit de l'Union

3 Aux termes du considérant 2 de la directive 2004/18:

«La passation de marchés conclus dans les États membres pour le compte de l'État, des collectivités territoriales et d'autres organismes de droit public doit respecter les principes du traité [CE], notamment les principes de la libre circulation des marchandises, de la liberté d'établissement et de la libre prestation de services, ainsi que les principes qui en découlent, comme l'égalité de traitement, la non-discrimination, la reconnaissance mutuelle, la proportionnalité et la transparence. Toutefois, en ce qui concerne les marchés publics dépassant un certain montant, il est recommandé d'élaborer des dispositions en matière de coordination communautaire des procédures nationales de passation de ces marchés qui soient fondées sur ces principes de manière à garantir leurs effets ainsi qu'une mise en concurrence effective des marchés publics. [...]»

4 L'article 1er de cette directive dispose:

«[...]

2. a) Les 'marchés publics' sont des contrats à titre onéreux conclus par écrit entre un ou plusieurs opérateurs économiques et un ou plusieurs pouvoirs adjudicateurs et ayant pour objet l'exécution de travaux, la fourniture de produits ou la prestation de services au sens de la présente directive.

[...]

d) Les 'marchés publics de services' sont des marchés publics autres que les marchés publics de travaux ou de fournitures portant sur la prestation de services visés à l'annexe II.

[...]

8. Les termes 'entrepreneur', 'fournisseur' et 'prestataire de services' désignent toute personne physique ou morale ou entité publique ou groupement de ces personnes et/ou organismes qui offre, respectivement, la réalisation de travaux et/ou d'ouvrages, des produits ou des services sur le marché.

Le[s] terme[s] 'opérateur économique' couvre[nt] à la fois les notions d'entrepreneur, fournisseur et prestataire de services. Il[s sont] utilisé[s] uniquement dans un souci de simplification du texte.

[...]

9. Sont considérés comme 'pouvoirs adjudicateurs': l'État, les collectivités territoriales, les organismes de droit public et les associations formées par une ou plusieurs de ces collectivités ou un ou plusieurs de ces organismes de droit public.

[...]»

5 Aux termes de l'article 2 de ladite directive, «[l]es pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité, de manière non discriminatoire et agissent avec transparence».

6 En vertu de l'article 7, sous b), de la directive 2004/18, celle-ci s'applique notamment aux marchés de services passés par des pouvoirs adjudicateurs autres que les autorités gouvernementales centrales reprises à l'annexe IV de cette directive, pour autant qu'il s'agisse de marchés non exclus en vertu des exceptions visées à cet article et que leur valeur estimée hors taxe sur la valeur ajoutée soit égale ou supérieure à 206 000 euros.

7 Conformément à l'article 9, paragraphes 1 et 2, de ladite directive, le calcul de la valeur estimée d'un marché public est fondé sur le montant total payable, hors taxe sur la valeur ajoutée, estimé par le

pouvoir adjudicateur au moment de l'envoi de l'avis de marché ou, le cas échéant, au moment où la procédure d'attribution du marché est engagée.

8 L'article 20 de la directive 2004/18 prévoit que les marchés ayant pour objet des services figurant à l'annexe II A de cette directive sont passés conformément aux articles 23 à 55 de celle-ci, parmi lesquels l'article 28 dispose que, «[p]our passer leurs marchés publics, les pouvoirs adjudicateurs appliquent les procédures nationales, adaptées aux fins de la[dite] directive».

9 L'annexe II A de la directive 2004/18 comporte notamment les catégories de services suivantes:

– catégorie 8, relative aux services de recherche et de développement, à l'exclusion des services de recherche et de développement autres que ceux dont les fruits appartiennent exclusivement au pouvoir adjudicateur et/ou à l'entité adjudicatrice pour son usage dans l'exercice de sa propre activité pour autant que la prestation du service soit entièrement rémunérée par le pouvoir adjudicateur et/ou l'entité adjudicatrice, et

– catégorie 12, relative aux services d'architecture, aux services d'ingénierie, aux services intégrés d'ingénierie, aux services d'aménagement urbain et d'architecture paysagère, aux services connexes de consultations scientifiques et techniques ainsi qu'aux services d'essais et d'analyses techniques.

Le droit italien

10 Aux termes de l'article 15, paragraphe 1, de la loi n° 241 du 7 août 1990, portant de nouvelles dispositions en matière de procédure administrative et de droit d'accès aux documents administratifs (legge n. 241 – Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi, GURI n° 192, du 18 août 1990, p. 7), «les administrations publiques ont toujours la faculté de conclure entre elles des accords portant sur une coopération dans des activités présentant un intérêt commun».

11 Conformément à la législation italienne, notamment l'article 63 du décret du président de la République n° 382 du 11 juillet 1980, portant réorganisation de l'enseignement universitaire, concernant la formation ainsi que l'expérimentation organisationnelle et didactique (decreto del Presidente della Repubblica n. 382 – Riordinamento della docenza universitaria, relativa fascia di formazione nonché sperimentazione organizzativa e didattica, supplément ordinaire à la GURI n° 209, du 31 juillet 1980), les universités sont les lieux privilégiés de la recherche scientifique.

12 L'article 66, premier alinéa, de ce décret dispose:

«Pour autant que cela n'entrave pas le déroulement de leur fonction scientifique de transmission des connaissances, les universités peuvent effectuer des activités de recherche et de conseil fixées au moyen de contrats et de conventions passés avec des entités publiques et privées. L'exécution de ces contrats et conventions sera confiée, en règle générale, aux départements [universitaires] et, lorsque ceux-ci n'auront pas été institués, aux institutions ou aux cliniques universitaires ou à des enseignants à temps plein.»

Le litige au principal et la question préjudicielle

13 Le 19 août 2009, le Comune di Pavia a publié un «avis de sélection» en vue de la conclusion d'un contrat relatif à une mission d'étude et de conseil technique et scientifique pour la rédaction des actes devant constituer le plan d'aménagement du territoire communal 1996. Cette mission devait consister dans une assistance pluridisciplinaire permettant d'assurer, pour le 31 mars 2010, l'élaboration de toute la documentation et la réalisation de l'ensemble des tâches légalement requises en rapport avec ce plan ainsi que dans la coordination d'un groupe de travail composé des membres concernés du personnel du Comune di Pavia et des consultants mis à disposition par le futur attributaire. La contrepartie pécuniaire était fixée à un montant maximal de 195 000 euros hors taxes, le montant définitif devant être déterminé à l'issue de négociations entre ce Comune et la personne présélectionnée en fonction du programme opérationnel d'étude et de conseil présenté par cette dernière.

14 Cet avis était destiné aux établissements universitaires publics et privés. Ce choix était motivé par la considération selon laquelle, en raison du caractère multidisciplinaire de leur organisation et de leur structure scientifique, ces établissements seraient plus aptes à garantir un niveau d'étude, de conseil et de coordination propre à permettre au Comune di Pavia de donner au futur plan un caractère innovant dans le respect des délais impartis. Par ailleurs, ledit avis qualifiait la mission concernée d'«activité de conseil intellectuel» et précisait qu'elle procédait d'un choix éminemment discrétionnaire, renvoyant à cet égard à la législation nationale en matière de création intellectuelle.

15 La mission concernée a été confiée à l'université.

16 Le recours introduit contre cet avis et la convention consécutive par la Consulta Regionale Ordine Ingegneri della Lombardia e.a. a été rejeté en première instance, au motif que le droit de l'Union laisserait aux pouvoirs adjudicateurs la faculté de conclure des contrats à titre onéreux avec d'autres administrations publiques sans recourir à une procédure d'adjudication publique, référence étant faite aux arrêts du 13 novembre 2008, Coditel Brabant (C-324/07, Rec. p. I-8457), et du 9 juin 2009, Commission/Allemagne (C-480/06, Rec. p. I-4747), ainsi qu'à la circonstance que l'article 15, paragraphe 1, de la loi n° 241, du 7 août 1990, permettrait de recourir à cette faculté pour l'accomplissement d'activités d'intérêt commun.

17 Saisi en degré d'appel, le Consiglio di Stato (Conseil d'État) souligne que les accords conclus entre des administrations publiques sur la base de cette disposition sont une forme de collaboration par laquelle ces administrations coordonnent l'action de leurs appareils administratifs, chacun porteur d'un intérêt public spécifique, en vue d'assurer une gestion des services publics la plus efficace et économe possible. Cette juridiction précise que, en l'état actuel de la jurisprudence nationale, la notion d'intérêt commun est large, correspondant, en substance, à la poursuite de l'intérêt public par les entités participant à l'accord conformément à leurs objectifs institutionnels. Ainsi est-il admis de recourir à ladite disposition lorsqu'une administration publique entend confier à une autre administration publique, à titre onéreux, un service relevant des missions de cette dernière, la nécessité d'un appel d'offre étant écartée au motif que l'administration attributaire n'est pas un opérateur économique et que la contrepartie financière consiste non pas dans une rémunération, mais dans un remboursement des coûts exposés.

18 Le Consiglio di Stato se demande toutefois si la conclusion d'un accord entre administrations publiques n'est pas contraire au principe de la libre concurrence lorsque l'une des administrations concernées est susceptible d'être considérée comme un opérateur économique, cette qualification s'attachant à toute entité publique qui propose des services sur le marché, indépendamment de la poursuite à titre principal d'un but lucratif, de l'existence d'une structure d'entreprise ou d'une présence continue sur le marché. La juridiction de renvoi se réfère, à cet égard, à l'arrêt du 23 décembre 2009, CoNISMa (C-305/08, Rec. p. I-12129). Dans cette optique, dès lors que l'université a la capacité de prendre part à un appel d'offres, les contrats que celle-ci conclut avec des pouvoirs adjudicateurs rentreraient dans le champ d'application des règles de l'Union en matière de marchés publics lorsque ces contrats portent, comme dans l'affaire au principal, sur des prestations d'étude et de conseil technique et scientifique qui ne semblent pas incompatibles avec les services mentionnés dans les catégories 8 et 12 de l'annexe II A de la directive 2004/18.

19 Dans ces conditions, le Consiglio di Stato a décidé de surseoir à statuer et de poser à la Cour la question préjudicielle suivante:

«La [directive 2004/18], et en particulier son article 1er, paragraphe 2, sous a) et d), ses articles 2 et 28 ainsi que son annexe II [A], catégories 8 et 12, s'oppose-t-elle à une réglementation nationale qui autorise la passation d'accords sous forme écrite entre deux pouvoirs adjudicateurs aux fins d'une mission d'étude et de conseil technique et scientifique, tendant à l'élaboration des actes constituant le plan d'aménagement du territoire communal, tels que définis par la réglementation sectorielle nationale et régionale, la contrepartie financière n'étant, par hypothèse, pas véritablement rémunératrice, dès lors que l'administration chargée d'exécuter la mission est susceptible de revêtir la qualité d'opérateur économique?»

Sur la question préjudicielle

20 En vertu de l'article 99 du règlement de procédure de la Cour, lorsqu'une question posée à titre préjudiciel est identique à une question sur laquelle celle-ci a déjà statué, lorsque la réponse à une telle question peut être clairement déduite de la jurisprudence ou lorsque la réponse à la question posée à titre préjudiciel ne laisse place à aucun doute raisonnable, la Cour peut, à tout moment, sur proposition du juge rapporteur, l'avocat général entendu, décider de statuer par voie d'ordonnance motivée.

21 Il y a lieu de faire application de cette disposition dans la présente affaire.

22 Par sa question, la juridiction de renvoi demande, en substance, si la directive 2004/18 doit être interprétée en ce sens qu'elle s'oppose à une réglementation nationale qui autorise la conclusion, sans appel à la concurrence, d'un contrat par lequel deux entités publiques instituent entre elles une coopération telle que celle en cause au principal.

23 À titre liminaire, il convient d'indiquer, tout d'abord, que, cette question ne portant pas sur les conséquences éventuelles, dans une situation telle que celle en cause au principal, de certaines particularités de celle-ci, telles que la publication d'un avis de sélection ou le fait que cet avis visait exclusivement les établissements universitaires publics et privés, il n'y a pas lieu, pour la Cour, d'aborder ces aspects.

24 Il s'impose de relever, ensuite, que l'application de la directive 2004/18 à un marché public est soumise à la condition que la valeur estimée de celui-ci atteigne le seuil fixé à l'article 7, sous b), de cette directive, en prenant en considération la valeur normale sur le marché des travaux, des fournitures ou des services sur lesquels portent ce marché public. Dans le cas contraire, les règles fondamentales et les principes généraux du traité FUE, en particulier les principes d'égalité de traitement et de non-discrimination en raison de la nationalité ainsi que l'obligation de transparence qui en découle, sont d'application, pour autant que le marché concerné présente un intérêt transfrontalier certain eu égard, notamment, à son importance et au lieu de son exécution (arrêt du 19 décembre 2012, Ordine degli Ingegneri della Provincia di Lecce e.a., C-159/11, non encore publié au Recueil, point 23 et jurisprudence citée).

25 Toutefois, la circonstance que le contrat en cause au principal puisse relever, le cas échéant, soit de la directive 2004/18, soit des règles fondamentales du traité FUE et des principes généraux du droit de l'Union n'influence pas la réponse à apporter à la question posée (arrêt Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 24).

26 Cela étant précisé, il importe de relever que, conformément à l'article 1er, paragraphe 2, de la directive 2004/18, un contrat à titre onéreux conclu par écrit entre un opérateur économique et un pouvoir adjudicateur, et ayant pour objet la prestation de services visés à l'annexe II A de cette directive constitue un marché public.

27 À cet égard, premièrement, il est sans incidence, d'une part, que cet opérateur soit lui-même un pouvoir adjudicateur et, d'autre part, que l'entité concernée ne poursuive pas à titre principal une finalité lucrative, qu'elle n'ait pas une structure d'entreprise ou encore qu'elle n'assure pas une présence continue sur le marché (arrêt Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 26).

28 Ainsi, s'agissant d'entités telles que des établissements universitaires publics, la Cour a jugé que de telles entités ont, en principe, la faculté de participer à une procédure d'attribution d'un marché public de services. Toutefois, les États membres peuvent réglementer les activités de ces entités, et notamment autoriser ou ne pas autoriser ces dernières à opérer sur le marché compte tenu de leurs objectifs institutionnels et statutaires. Pour autant, si et dans la mesure où lesdites entités sont habilitées à offrir certains services sur le marché, il ne peut pas leur être interdit de participer à un appel d'offres portant sur les services concernés (arrêt Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 27). Or, en l'occurrence, la juridiction de renvoi a indiqué que l'article 66, premier alinéa, du décret du président de la République n° 382 du 11 juillet 1980 autorise expressément les universités publiques à

fournir des prestations de recherche et de conseil à des entités publiques ou privées dans la mesure où cette activité ne porte pas atteinte à leur mission d'enseignement.

29 Deuxièmement, des activités telles que celles faisant l'objet du contrat en cause au principal, nonobstant le fait, mentionné par la juridiction de renvoi, qu'elles sont susceptibles de relever des missions confiées aux universités, en particulier de la recherche scientifique, rentrent, selon ce qui constitue la nature effective de ces activités, soit dans le cadre des services de recherche et de développement visés à l'annexe II A, catégorie 8, de la directive 2004/18, soit dans le cadre des services d'aménagement urbain et des services connexes de consultations scientifiques et techniques visés à la catégorie 12 de cette annexe.

30 Troisièmement, tel qu'il ressort du sens normal et habituel des termes «à titre onéreux», un contrat ne saurait échapper à la notion de marché public du seul fait que sa rémunération reste limitée au remboursement des frais encourus pour fournir le service convenu (arrêt Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 29).

31 Sous réserve des vérifications qui incombent à la juridiction de renvoi, il apparaît que le contrat en cause au principal présente l'ensemble des caractéristiques énoncées aux points 25 à 29 de la présente ordonnance.

32 Il résulte toutefois de la jurisprudence de la Cour que deux types de marchés conclus par des entités publiques ne rentrent pas dans le champ d'application du droit de l'Union en matière de marchés publics.

33 Il s'agit, en premier lieu, des marchés conclus par une entité publique avec une personne juridiquement distincte de celle-ci lorsque, à la fois, cette entité exerce sur cette personne un contrôle analogue à celui qu'elle exerce sur ses propres services et que ladite personne réalise l'essentiel de ses activités avec la ou les entités qui la détiennent (voir, en ce sens, arrêts du 18 novembre 1999, Teckal, C-107/98, Rec. p. I-812, point 50, et Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 32).

34 Il est cependant constant que cette exception n'est pas applicable dans un contexte tel que celui de l'affaire au principal, dès lors qu'il ressort de la décision de renvoi que le Comune di Pavia n'exerce pas de contrôle sur l'université.

35 Il s'agit, en second lieu, des contrats qui instaurent une coopération entre des entités publiques ayant pour objet d'assurer la mise en œuvre d'une mission de service public qui est commune à celles-ci (arrêt Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 34 et jurisprudence citée).

36 Dans cette hypothèse, les règles du droit de l'Union en matière de marchés publics ne sont pas applicables pour autant que, en outre, de tels contrats soient conclus exclusivement par des entités publiques, sans la participation d'une partie privée, qu'aucun prestataire privé ne soit placé dans une situation privilégiée par rapport à ses concurrents et que la coopération qu'ils instaurent soit uniquement régie par des considérations et des exigences propres à la poursuite d'objectifs d'intérêt public (arrêt Ordine degli Ingegneri della Provincia di Lecce e.a., précité, point 35 et jurisprudence citée).

37 Si, comme l'a relevé la juridiction de renvoi, un contrat tel que celui en cause au principal semble satisfaire à certains des critères mentionnés aux deux points précédents de la présente ordonnance, un tel contrat ne saurait toutefois sortir du champ d'application du droit de l'Union en matière de marchés publics que s'il satisfait à tous ces critères.

38 À cet égard, il paraît résulter des indications contenues dans la décision de renvoi que ce contrat comporte un ensemble d'aspects matériels dont une partie importante, voire prépondérante, correspond à des activités généralement effectuées par des ingénieurs ou des architectes et qui, bien qu'elles soient basées sur un fondement scientifique, ne s'apparentent cependant pas à la recherche scientifique. Par conséquent, contrairement à ce que la Cour a pu constater au point 37 de l'arrêt Commission/Allemagne, précité, la mission de service public qui fait l'objet de la coopération entre des entités publiques instaurée par ledit contrat ne paraît pas assurer la mise en œuvre d'une mission de service public qui est commune au Comune di Pavia et à l'université.

39 C’est toutefois à la juridiction de renvoi qu’il appartient d’effectuer les vérifications requises à cet égard.

40 Il convient donc de répondre à la question posée que le droit de l’Union en matière de marchés publics s’oppose à une réglementation nationale qui autorise la conclusion, sans appel à la concurrence, d’un contrat par lequel des entités publiques instituent entre elles une coopération lorsque – ce qu’il appartient à la juridiction de renvoi de vérifier – un tel contrat n’a pas pour objet d’assurer la mise en œuvre d’une mission de service public commune à ces entités, qu’il n’est pas exclusivement régi par des considérations et des exigences propres à la poursuite d’objectifs d’intérêt public ou qu’il est de nature à placer un prestataire privé dans une situation privilégiée par rapport à ses concurrents.

Sur les dépens

41 La procédure revêtant, à l’égard des parties au principal, le caractère d’un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l’objet d’un remboursement.

Par ces motifs, la Cour (dixième chambre) dit pour droit:

Le droit de l’Union en matière de marchés publics s’oppose à une réglementation nationale qui autorise la conclusion, sans appel à la concurrence, d’un contrat par lequel des entités publiques instituent entre elles une coopération lorsque – ce qu’il appartient à la juridiction de renvoi de vérifier – un tel contrat n’a pas pour objet d’assurer la mise en œuvre d’une mission de service public commune à ces entités, qu’il n’est pas exclusivement régi par des considérations et des exigences propres à la poursuite d’objectifs d’intérêt public ou qu’il est de nature à placer un prestataire privé dans une situation privilégiée par rapport à ses concurrents.

Signatures

---

* Langue de procédure: l’italien.

JUDGMENT OF THE COURT (Fifth Chamber)

12 September 2013 (*)

(Public procurement – Directive 2004/18/EC – Article 1(9), second subparagraph, point (c) – Concept of 'body governed by public law' – Condition relating to the financing of the activity, or to management supervision, or to supervision of the activity by the State, by regional or local authorities or other bodies governed by public law – Association of medical practitioners – Financing provided for by law by means of contributions paid by the members of that association – Amount of the contributions fixed by the assembly of that association – Independence of that association in determining the scope and the rules for the performance of its statutory duties)

In Case C-526/11,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Oberlandesgericht Düsseldorf (Germany), made by decision of 5 October 2011, received at the Court on 18 October 2011, in the proceedings

IVD GmbH & Co. KG

v

Ärztekammer Westfalen-Lippe,

intervening party:

WWF Druck + Medien GmbH,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász, D. Šváby (Rapporteur) and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 8 November 2012,

after considering the observations submitted on behalf of:

– IVD GmbH & Co. KG, by J. Eggers, Rechtsanwalt,

– the Ärztekammer Westfalen-Lippe, by S. Gesterkamp and T. Schneider-Lasogga, Rechtsanwälte,

– the Czech Government, by M. Smolek and T. Müller, acting as Agents,

– the European Commission, by M. Noll-Ehlers, A. Tokár and C. Zadra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 January 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(9), second subparagraph, point (c) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114; 'the Directive').

2 The reference has been made in proceedings between IVD GmbH & Co. KG ('IVD') and the Ärztekammer Westfalen-Lippe (the Medical Association of Westphalia-Lippe, 'the Ärztekammer'), concerning the latter's decision to award a contract to another undertaking following a call for tenders.

Legal context

Union law

3 Under the second and third subparagraphs of Article 1(9) of Directive 2004/18:

'A "body governed by public law" means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

(b) having legal personality, and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III.'

4 With regard to the Federal Republic of Germany, that annex mentions professional associations, in particular, associations representing medical practitioners, among the authorities, establishments and foundations created by Federal, State or local authorities.

German law

5 Under Paragraph 6(1)(1) to (5) of the Law on health professions of the Land of North Rhine-Westphalia (Heilberufsgesetz des Landes Nordrhein-Westfalen, 'the HeilBerG NRW'), the tasks of the Ärztekammer are, in particular:

1. to support the public health and public veterinary services in the performance of their tasks, and especially to draw up proposals for all questions concerning medicine and the health professions;

2. to give opinions at the supervisory authority's request, and also to produce experts' reports and to nominate experts at the competent authorities' request;

3. to guarantee an emergency medical and dental service outside consultation hours, to publicise it and to lay down the rules regulating its organisation;

4. to promote and carry out the continuing professional training of members of the association, in order to help ensure that the knowledge, skills and abilities necessary to the practice of their profession correspond throughout their whole working life to the latest state of practice and science, to make rules concerning continuing education in accordance with [this] law and to issue certificates relating to specialities;

5. to promote and carry out measures concerning the quality of health and veterinary services, in particular to establish certifications, in agreement with the interested parties.'

6 It is apparent from the order for reference and from the file before the Court that that law:

– also entrusts to the Ärztekammer, among others, the tasks of working to maintain the profession at a high level, of protecting the professional interests of its members, of watching over good relations between them, of setting up welfare associations for its members and their families, and of informing the public about its activities and topics related to the profession (Paragraph 6(1)(6) to (8), (10) and (12);

– awards membership of that association to all medical practitioners practising their profession in the Land of North Rhine-Westphalia or having a permanent place of residence there (Paragraph 2);

– in principle, confers the right to vote in the general assembly of that association on all its members (Paragraph 12(1));

– provides for the right for the Ärztekammer to raise contributions from its members in order to perform its tasks (Paragraph 6(4), first sentence);

– provides that the amount of those contributions must be fixed by a regulation adopted by the general assembly of that association (Paragraph 23(1));

– makes the regulation subject to the approval of a supervisory authority (Paragraph 23(2)), that approval being intended only to ensure that the association's budget is balanced; and

– provides that the supervisory body is to carry out, *ex post facto*, a general review in order to establish whether the manner in which the Ärztekammer carries out its tasks is compatible with the legislation (Paragraph 28(1)).

The dispute in the main proceedings and the question referred

7 The Ärztekammer launched an invitation to tender for the printing and distribution of its newsletter and for the placing of advertising and the sale of subscriptions, a contract notice having been published in the *Official Journal of the European Union* on 5 November 2010. After two other tenderers had been rejected, the choice was made between IVD and WWF Druck + Meien GmbH, and in the end the latter's tender was accepted.

8 IVD challenged that award by way of a complaint, then by an action before the Vergabekammer, the competent administrative body for hearing and determining disputes concerning public contracts, claiming that the successful tenderer had not submitted certain references required by the Ärztekammer. Its action was dismissed by that body, its claims being declared to be unfounded.

9 Hearing an action against the decision of the Vergabekammer, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided of its own motion to consider whether the Ärztekammer had the status of a contracting authority, a question on which the admissibility of the action brought by IVD depends.

10 The referring court considers that the tasks entrusted to that association by Paragraph 6(1)(1) to (5) of the HeilBerG NRW are tasks in the general interest not of an industrial or commercial character. Furthermore, it is apparent from the file before the Court that that association has legal personality. Therefore, it satisfies the criteria laid down in Article 1(9), second subparagraph, points (a) and (b) of Directive 2004/18.

11 On the other hand, the referring court wonders whether the Ärztekammer's right to raise contributions from its members constitutes indirect State financing satisfying the first condition in Article 1(9), second subparagraph, point (c) of the directive.

12 According to the referring court, it follows from Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173 and Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-4779, that such indirect State financing exists when the State either itself fixes the base and the amount of the contributions, or exercises such influence, by way of provisions setting out precisely those services that

the legal person concerned must supply and controlling the determination of the amount of contributions, that that legal person has no more than narrow discretion in fixing that amount.

13 The referring court notes that the applicable law does not lay down the amount of contributions collected by the Ärztekammer and does not determine the extent of, or the means of implementing, the tasks assigned to that body in such a way that it may set the amount of contributions only within narrow limits. On the contrary, enjoying broad discretion regarding the performance of its tasks, the association has similar latitude in the determining of its financing needs and, therefore, in setting the amount of contributions due from its members. That court points out too that, although there is a system for approval by the supervisory authority of the regulation fixing that amount, that approval is intended only to ensure that the association's budget is balanced.

14 Having regard to those specific factors, the referring court takes the view that the characteristic features of the Ärztekammer do not match those set out by the Court in the judgments mentioned in paragraph 12 above, and is uncertain whether they are necessary in all cases in order for the condition relating to public financing to be satisfied.

15 In those circumstances, the Oberlandesgericht Düsseldorf decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'Is a body … (here, a professional association) … "financed, for the most part, by the State" or "subject to management supervision" by the State, within the meaning of point (c) of the second subparagraph of Article 1(9) of Directive 2004/18/EC:

– if that body is entitled by law to raise contributions from its members but does not fix the amount of those contributions or the scope of the services to be financed by them;

– but the fees regulation requires approval by the State?'

The question referred for a preliminary ruling

16 By its question, the referring court asks, essentially, whether point (c) of the second subparagraph of Article 1(9) of Directive 2004/18 must be interpreted as meaning that a body, such as a professional association governed by public law, satisfies either the criterion concerning financing for the most part by the public authorities, if that association is financed mainly by contributions paid by its members, the amount of which it is authorised to fix and collect by the law applicable, if that law does not determine the scope of, and the detailed rules governing, the actions undertaken by that body in carrying out its statutory tasks, which those contributions are intended to finance, or the criterion relating to management supervision by the public authorities, if the decision by which that body fixes the amount of those contributions must be approved by a supervisory authority.

17 It must at the outset be observed, as the referring court has done, that the Ärztekammer is mentioned in Annex III to Directive 2004/18, in which the bodies governed by public law referred to in Article 1(9), second subparagraph are identified for each Member State. In Part III of that annex, which concerns the Federal Republic of Germany, Category 1.1, relating to 'Authorities, establishments and foundations governed by public law and created by Federal, State or local authorities' mentions in its second indent, as regards the subcategory 'professional associations', inter alia 'professional associations representing … medical practitioners'.

18 However, as the Advocate General observed in points 20 and 21 of his Opinion, the inclusion of a given body in that annex is only the application of the substantive rule laid down in Article 1(9), second subparagraph of Directive 2004/18, which does not give rise to an irrebuttable presumption that that body is a 'body governed by public law' within the meaning of that provision. Therefore, it is for the judicature of the European Union, when hearing a request reasoned to that effect by the national court, to satisfy itself that the directive is internally consistent by verifying whether the inclusion of a given body in the annex constitutes a correct application of the substantive criteria (see, to that effect, *Hans & Christophorus Oymanns*, paragraphs 42, 43 and 45).

19 In that connection, in accordance with Article 1(9), second subparagraph of Directive 2004/18, a body is a 'body governed by public law' within the meaning of that provision and is subject, on that basis, to the provisions of that directive when three cumulative conditions are satisfied, namely: that body was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (point (a)); it has legal personality (point b) and it is financed, for the most part, by public authorities or it is subject to management supervision by the latter or it has an administrative, managerial or supervisory board, more than half of whose members are appointed by the public authorities (point (c)).

20 The three alternative criteria laid down in point (c) of the second subparagraph of Article 1(9) of the directive all reflect close dependence vis-à-vis the public authorities. That dependence is likely to enable the latter to influence the decisions of the body concerned with respect to public contracts, which might lead to considerations other than economic ones guiding those decisions, and, in particular, to the risk that preference might be given to national tenderers or applicants, which would create barriers to the free movement of goods and services that the application of the directives on public procurement specifically seek to prevent (see, as regards similar provisions before Directive 2004/18, Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraphs 39, 41, 42, 44, 48 and the case-law cited).

21 In the light of those objectives, each of those criteria must be interpreted in functional terms (see, as regards similar provisions before Directive 2004/18 *Commission* v *France*, paragraph 43 and the case-law cited, and *Bayerischer Rundfunk and Others*, paragraph 40), that is to say, given an interpretation independent of the formal rules for its use (see, by analogy, Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraphs 62 and 63), and each criterion must be understood to create close dependence on the public authorities.

22 First of all, as regards the first criterion laid down in point (c) of the second subparagraph of Article 1(9) of Directive 2004/18 relating to financing for the most part by the public authorities, the concept of financing refers to a transfer of funds made without specific consideration with the aim of supporting the activities of the body concerned (see, as regards similar provisions before Directive 2004/18, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 21).

23 Since that concept must be interpreted in functional terms, the Court has held that the criterion relating to majority financing by the public authorities includes a method of indirect financing.

24 Such financing may be made by means of a fee provided for and imposed by statute as regards its principle and amount, and which does not constitute consideration for actual use of services provided by the body concerned by the persons liable to pay the fee and in respect of which the detailed rules for collection derive from the powers of a public authority (see, to that effect, *Bayerischer Rundfunk and Others*, paragraphs 41, 42, 44, 45 and 47 to 49).

25 The fact that, formally, a body itself fixes the amount of contributions which provide for the greater part of its financing does not make it impossible that indirect financing could satisfy that criterion. That is the case when bodies such as statutory sickness insurance funds are financed by contributions paid by or for their members without specific consideration, when membership of such a fund and the payment of those contributions are required by law, and when the amount of those contributions, although formally fixed by the funds themselves, is, on the one hand, laid down by statute, the law determining the services provided by those funds and the associated expenses and prohibiting them from operating on a profit-making basis, and must, on the other, be authorised by the supervisory authority, and when contributions are compulsorily recovered on the basis of the provisions of public law (see, to that effect, *Hans & Christophorus Oymanns*, paragraphs 53 to 56).

26 It must, however, be held that the situation of a body such as the Ärztekammer cannot be treated like that described in the preceding paragraph of this judgment.

27 Although the tasks of that body are set out in the HeilBerG NRW, it is nevertheless clear from the order for reference that a notable feature of its situation is the considerable degree of autonomy left to it by that law to determine the nature and scope of, and the procedures for, the actions it undertakes in order to perform its tasks and to set the budget necessary to that end and, consequently, the amount of

contributions that it will claim from its members. The fact that the regulation fixing that amount must be approved by a supervisory public authority is not decisive when that authority merely ascertains that the budget of the body concerned is balanced, that is to say, that the body is, by means of contributions from its members and from its other resources, sure of enough revenue to cover all the costs relating to its functioning according to the rules that it has itself adopted.

28 Furthermore, as the Advocate General observed, in points 65 and 66 of his Opinion, that independence in relation to the public authorities is further strengthened in the present case by the fact that that regulation is adopted by an assembly constituted by the contributors themselves.

29 Next, as regards the second criterion laid down in point (c) of the second subparagraph of Article 1(9) of Directive 2004/18, relating to management supervision by the public authorities, it must be recalled that, in principle, a review *ex post facto* does not satisfy that criterion, for such a review does not enable the public authorities to influence the decisions of the body in question in relation to public contracts (see, to that effect, Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 70). That is the case, in principle, of a general review of legality conducted *ex post facto* by a supervisory authority and, *a fortiori*, of an action taken by that authority in the form of approval of the body's decision fixing the amount of contributions which provide for the greater part of its financing, which is confined to ascertaining that the body's budget is balanced.

30 It appears therefore that, although the law determines its tasks and the manner in which the greater part of its financing must be organised, and provides that the decision by which it fixes the amount of the contributions payable by its members must be approved by a supervisory authority, a body such as the Ärztekammer has in fact organisational and budgetary independence which precludes its being considered to be in a state closely dependent on the public authorities. Therefore, the means of financing of such a body do not constitute financing for the most part by the public authorities and do not allow management supervision of that body by the public authorities.

31 Having regard to all the foregoing considerations, the answer to the question referred is that, on a proper construction of point (c) of the second subparagraph of Article 1(9) of Directive 2004/18, a body such as a professional association governed by public law satisfies neither the criterion relating to financing for the most part by the public authorities when it is financed for the most part by contributions paid by its members, in respect of which it is authorised by law to fix and collect the amount, if that law does not determine the scope of, and procedures for, the actions undertaken by that body in the performance of its statutory tasks, which those contributions are intended to finance, nor the criterion relating to management supervision by the public authorities simply because the decision by which that body fixes the amount of those contributions must be approved by a supervisory authority.

Costs

32 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

On a proper construction of point (c) of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, a body such as a professional association governed by public law satisfies neither the criterion relating to financing for the most part by the public authorities when that body is financed for the most part by contributions paid by its members, in respect of which it is authorised by law to fix and collect the amount, if that law does not determine the scope of, and procedures for, the actions undertaken by that body in the performance of its statutory tasks, which those contributions are intended to finance, nor the criterion relating to management

supervision by the public authorities simply because the decision by which that body sets the amount of those contributions must be approved by a supervisory authority.

[Signatures]

---

* Language of the case: German.

EU:C:2013:40

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 30 January 2013 (1)

Case C-526/11

IVD GmbH & Co. KG
v
Ärztekammer Westfalen-Lippe

(Request for a preliminary ruling from the Oberlandesgericht Düsseldorf – Vergabesenat (Germany))

(Public procurement – Directive 2004/18/EC – Article 1(9), second subparagraph, point (c) – Concepts of 'body governed by public law' and of financing and supervision by the State – Professional association having a statutory right to raise contributions from its members, but having broad discretion in determining the amount of the contributions)

I – Introduction

1. In this request for a preliminary ruling, the Oberlandesgericht Düsseldorf – Vergabesenat (the chamber having jurisdiction in public procurement matters of the Higher Regional Court of Düsseldorf) (Germany) asks the Court for an interpretation of second subparagraph, point (c) of Article 1(9) of Directive 2004/18/EC, (2) concerning the concept of 'body governed by public law'. The referring cout asks, in essence, whether the Ärztekammer Westfalen-Lippe (the association of doctors in Westphalia-Lippe ('the doctors' association')) is a body governed by public law and, consequently, a contracting authority within the meaning of that directive.

II – Legal framework

A – *EU law*

2. Under the second and third subparagraphs of Article 1(9) of Directive 2004/18:

'A "body governed by public law" means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Non-exhaustive lists of bodies and categories of bodies governed by public law which fulfil the criteria referred to in (a), (b) and (c) of the second subparagraph are set out in Annex III. …'

3. With regard to the Federal Republic of Germany, that annex refers to professional associations, and in particular professional associations representing medical practitioners, among the authorities created by Federal, State or local authorities (Part III, category 1.1, second indent).

B – *German law*

4. Paragraph 6(1)(1) to (5) of the Law on health professions of the Land of North Rhein-Westphalia (Heilberufsgesetz des Landes Nordrhein-Westfalen ('the HeilBerG NRW')) lays down in general terms the tasks of those professions, including those of the doctors' association.

5. According to that provision, the tasks of the doctors' association are, inter alia, to support the public health service and public veterinary service, to adopt an opinion at the request of the supervisory authority, to guarantee an emergency medical and dental service outside consultation hours, to publicise it and to issue an emergency service regulation; to promote and carry out the professional training of members and to promote and carry out measures concerning the quality of health and veterinary services.

6. Moreover, it is apparent from the documents before the Court that the HeilBerG NRW grants to the doctors' association, in order for it to fulfil the tasks conferred on it, the right to raise contributions from its members (first sentence of Paragraph 6(4)), provides that the amount of the contributions must be fixed by regulations adopted by the assembly of that association (Paragraph 23(1)) and makes those regulations subject to the approval of a supervisory authority (Paragraph 23(2)), that approval being intended only to ensure that that association has a balanced budget.

III – The main proceedings and the question referred

7. The doctors' association initiated a procedure for the award of a public contract for the printing and distribution of its newsletter and the placement of advertising and the sale of subscriptions, and a contract notice was published in the *Official Journal of the European Union* on 5 November 2010. After two other tenderers had been rejected, the choice was to be made between IVD GmbH & Co. KG ('IVD') and WWF Druck + Medien GmbH, and the tender of the latter was ultimately successful.

8. IVD challenged that award by means of a complaint and then an application for review before the Vergabekammer (the chamber with jurisdiction at first instance in public procurement matters), claiming that the successful tenderer had not submitted some of the references required by the contracting authority. Its application for review was dismissed by that authority which ruled that it was unfounded.

9. The referring court, that is to say the Oberlandesgericht Düsseldorf – Vergabesenat, before which the dispute was brought, decided of its own motion to make a reference to the Court on the issue of the doctors' association's status as a contracting authority, an issue on which the admissibility of the application for review brought by IVD depends.

10. That court considers that the tasks entrusted to that association by Paragraph 6(1)(1) to (5) by the HeilBerG NRW are tasks 'in the general interest, not having an industrial or commercial character'. It also notes that that asssociation has legal personality. Accordingly, the referring court considers that the conditions set out in points (a) and (b) of the second subparagraph of Article 1(9) of Directive 2004/18 are fulfilled.

11. However, it is unsure whether the right to raise contributions from its members, which is available to the doctors' association, constitutes indirect State financing which fulfils the condition set out in point (c) of the second subparagraph of Article 1(9) of Directive 2004/18.

12. The referring court notes that the HeilBerG NRW does not determine the amount of the contributions raised by the doctors' association and does not lay down the extent and method of fulfilment of the tasks conferred on it in such a way that that association could set the amount of the

contribution only within limited parameters. In fact, since it has broad discretion in fulfilling its tasks, that association has broad discretion in determining its financial requirements and thus in fixing the amount of the contributions. The referring court also points out that, althought there is a system of approval by the supervisory authority, that approval is intended only to ensure that the doctor's association has a balanced budget.

13. Having regard to those specific considerations and to *Bayerischer Rundfunk and Others* (3) and *Hans & Christophorus Oymanns*, (4) the referring Court asks whether the characteristics established by the Court in those judgments are necessary in order to fulfil the condition of indirect State financing.

14. In that context, the Oberlandesgericht Düsseldorf – Vergabesenat decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is a … professional association … within the meaning of Article 1(9) second subparagraph, point (c) of Directive 2004/18/EC … "financed, for the most part, by the State" or is it subject to "management supervision" by the State, if:

– the body has the right by law to raise contributions from its members but does not set the amount of those contributions or the extent of the services to be financed thereby;

– the fees regulations, however, require approval by the State?'

IV – The procedure before the Court

15. Observations were submitted by IVD, the doctors' association, the Czech Government and the the European Commission.

16. The doctors' association and the Commission presented argument at the hearing on 8 November 2012.

V – Legal analysis

A – *The scope of the question referred*

17. First of all, it should be recalled that Annex III to Directive 2004/18 lists German professional associations representing medical practitioners among the contracting authorities deemed to fulfil the substantive conditions of that directive. (5)

18. Accordingly, that listing includes the doctors' association at issue in the main proceedings.

19. Although the questioin raised by the referring court relates to the interpretation of point (c) of the second subparagraph of Article 1(9) of Directive 2004/18, it indirectly calls into question the validity of the inclusion of that association in Annex III to that directive.

20. As the Court has already had the opportunity to point out in *Hans & Christophorus Oymanns*, the inclusion of a body in Annex III to Directive 2004/18 constitutes only a simple or rebuttable presumption that that body is a contracting authority under that directive, so that the European Union judicature must make sure that the European Union measure in question is internally consistent by verifying whether that inclusion constitutes a correct application of the substantive criteria laid down in the second subparagraph of Article 1(9) of Directive 2004/18. (6) (7)

21. The Court has actually already had the opportunity to point out that Directive 2004/18 contains both substantive rules, such as those in the second subparagraph of Article 1(9) of that directive, which lays down the conditions which a body must fulfil if it is to be regarded as a contracting authority within the meaning of the directive, and measures implementing those substantive rules, such as the inclusion in Annex III to the same directive of a non-exhaustive list of public bodies deemed to fulfil those conditions. (8)

22. As a result, the answer to be given to the question referred will also make it possible to determine whether it was right to include German associations representing doctors, in so far as they

include the doctors' association at issue in the main proceedings, in Annex III to Directive 2004/18.

23. Accordingly, it is important to point out, first, that the three criteria laid down by Article 1(9) of Directive 2004/18 are cumulative. (9) An entity constitutes a body governed by public law,

– subject to the procedures for the award of public contracts, where that entity was point (a);

– established for the specific purpose of meeting needs in the general interest, not being of an industrial or commercial nature; point (b) has legal personality; and

– point (c) is financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or is subject to management supervision by those bodies; or has an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

24. As is clear from the order for reference, the conditions laid down in points (a) and (b) of the second subparagraph of Article 1(9) of Directive 2004/18 are fulfilled in the case in the main proceedings. (10)

25. Secondly, it is necessary to take into consideration the three *alternative* criteria laid down in point (c) of the second subparagraph of Article 1(9) of Directive 2004/18.

26. In that regard, the referring court seems to have considered that neither the last of those criteria, that is, in essence, the one linked to the appointment by the public authorities of the majority of members of one of the organs of the entity, nor the second, concerning the management supervision of the entity by those public authorities, is satisfied in the present case.

27. It should be noted, however, with regard to the criterion linked to the supervision by the public authorities of the management of the body, that, whilst the wording of the question referred to the Court mentions that criterion, the referring court provided no ground explaining its possible doubts as to its application in the present case.

28. That uncertainty should therefore reasonably lead to the assumption that the referring court seeks to exclude the application of that criterion in the case in the main proceedings. Moreover, as the doctors' association and the Commission pointed out in their respective written observations, in the light of the information provided by the referring court, it appears that the possibility that the management of that association is supervised must be rejected. Indeed, whereas the existence of such supervision must make it possible to influence the decisions in relation to public contracts of the body which is subject thereto, the Court has already held that the criterion of managerial supervision cannot be regarded as being satisfied in the case of mere review. (11) However, in all likelihood, this appears to be the nature of the review of legality, with a right to information, exercised over the doctors' association by the supervisory authority, pursuant to Paragraph 28(1) of the HeilBerG NRW. (12)

29. In the light of those observations, I consider that it is unnecessary further to dwell on the fulfilment of the criterion of managerial supervision by the public authorities of the body at issue in the main proceedings.

30. It is important, however, to verify whether the criterion concerning financing, for the most part, by the public authorities is fulfilled in the present case.

B – *The criterion of financing, for the most part, by the public authorities*

31. I would recall that the referring court asks whether the criterion of financing, for the most part, by the public authorities, provided for by point (c) of the second subparagraph of Article 1(9) of Directive 2004/18, is fulfilled if a professional association, such as that at issue in the main proceedings, is financed (for the most part) (13) by a contribution from its members, if it has the right by law to raise those contributions but does not set the amount of those contributions or the extent of the services to be financed thereby.

32. In their respective observations, the doctors' association and the Czech Republic propose that that question should be answered in the negative, whereas the Commission takes the opposite view.

33. As it explained at greater length at the hearing before the Court, the Commission's reasoning is based, in particular, on the argument that mere 'proximity' to the State authorities is sufficient for the purposes of fulfilling the criterion of financing, for the most part, by the public authorities.

34. It is true, and I fully concur, that, with regard, in particular, to the interpretation of that expression, it is appropriate to refer to the aim of the directives in relation to awarding public contracts, and in particular the aim of avoiding both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones. (14)

35. Accordingly, the concept of 'contracting authority', including a 'body governed by public law', must be interpreted in functional terms, with the objective of eliminating barriers to the freedom to provide services and goods and opening up markets in the Member States to competition which is undistorted and as wide as possible. (15)

36. The approach advocated by the Commission, based on the objectives pursued by Directive 2004/18, could therefore lead to a flexible or broad interpretation of the link between the public authorities and the body whose financing, and thus its status as a 'contracting authority', is at issue.

37. It is important, however, not to lose sight of the fact that it is also clear from the case-law that each of the alternative criteria set out in point (c) of the second subparagraph of Article 1(9) of Directive 2004/18 is presented as a variant of 'close dependency' on another contracting authority, the State, regional or local authorities or other bodies governed by public law. (16)

38. An excessively broad interpretation of the first of the three criteria listed by that provision might not only distort the need to demonstrate the existence of close dependency of the body at issue on the public authorities, but would also deprive the other two criteria referred to in that article of effectiveness.

39. Acccordingly, I cannot agree with the disproportionately broad interpretation of the criterion of financing, for the most part, by the public authorities which is advocated by the Commission and which seeks to treat 'close dependency' of the body at issue on the public authorities in the same way as mere 'proximity' to them.

40. I am of the opinion that excluding the excessively broad interpretation advocated by the Commission is particulary justified, since the present case, like *Bayerischer Rundfunk and Others* and *Hans & Christophorus Oymanns*, raises the delicate issue of *indirect* financing by the public authorities and the limits on the application of EU rules on the award of public contracts.

41. Following the finding that point (c) of the second subparagraph of Article 1(9) of Directive 2004/18 contains no details as to the procedures for delivering the financing in question, the Court, inter alia, held in those two judgments that that provision laid down no requirement that the activity of the bodies in question should be directly financed by the State or by another public body, and accordingly a method of indirect financing is sufficient. (17)

42. Although, in each of those judgments, the Court found that the bodies at issue were actually financed indirectly by the public authorities, the precise and relevant circumstances underlying that finding were the subject of fierce debate in the present case between the doctors' association and the Czech Republic, on the one hand, and the Commission, on the other hand.

43. Those circumstances warrant some attention.

44. In *Bayerischer Rundfunk and Others*, the Court was asked whether the public broadcasting bodies in Germany were contracting authorities, although their activity was financed, for the most part, by television licence fees for which individuals who possessed a receiver were liable.

45. In that case, the Court pointed out that the television licence fee had its origin in the State Treaty on broadcasting, in other words in a measure of the State, and was not the result of any contractual arrangement entered into by those bodies and the customers. (18) The amount of the fee was determined by formal decision of the Parliaments and Governments of the Länder, adopted on the basis of a report drawn up by an independent commission of experts responsible for examining estimates of the financial requirements declared by those bodies. The Parliaments and Governments could depart from those recommendations only on a limited number of grounds. (19)

46. However, the Court found that, even if the position were that the Parliaments and Governments of the Länder were obliged to follow without qualification those recommendations, it would remain the case that this mechanism for fixing the amount of the fee was established by the State, which has thereby transferred public authority powers to that commission of experts. (20)

47. As regards the procedures for the levying of the fee, the Court noted that it was clear from the State Treaty that the latter was recovered by an association governed by public law which had the task of invoicing and collecting the fee and, on behalf of the public broadcasting bodies, issued notices of liability to the charge. (21) Similarly, if payment was not made on time, notices of arrears were the subject of enforcement by administrative proceedings, through the possibility of having recourse to enforced collection following an application by the broadcasting organisation concerned, with the result that the bodies in question enjoyed the powers of a public authority. (22)

48. The Court concluded that, although the State granted to those bodies the right to collect the fee themselves, the fact that the financing was brought into being by a measure of the State, was guaranteed by the State and was secured by methods of charging and collection which fell within public authority powers satisfied the condition of ‘financing … by the State’ for the purposes of application of the Community rules on the awarding of public contracts. (23)

49. In the second of the judgments cited above, that is to say *Hans & Christophorus Oymanns*, which, furthermore, again related to the Federal Republic of Germany, the national court in essence asked, inter alia, whether, in view of their method of financing, statutory sickness insurance funds could be regarded as being financed, for the most part, by the State, within the meaning of point (c) of the second subparagraph of Article 1(9) de la Directive 2004/18.

50. The Court based its affirmative response on four considerations.

51. First, it pointed out, that the statutory sickness insurance funds were financed, for the most part, by compulsory contributions from members which were paid without any specific consideration in return, since membership of the funds, and payment of contributions, were both required by law. (24)

52. Secondly, and although, unlike in *Bayerischer Rundfunk and Others*, the contribution rate was fixed by the funds themselves, the Court endorsed the assessment of the national court that the funds had a very limited discretion in that regard inasmuch as their mission was to provide the benefits laid down in the social security legislation. According to the Court, therefore, since the benefits, and the expenditure connected with them, were imposed by law and the funds performed their functions on a non-profit-making basis, the contribution rate had to be set in such a way that the revenue accrued was no lower and no higher than expenditure. (25)

53. Thirdly, the Court noted that the setting of the contribution rate by the statutory sickness insurance funds required, in any event, the approval of the body which supervised each fund so that the amount of those contributions was to some extent, laid down by law, the other revenue (direct payments by the federal authorities) being, however, unquestionably direct financing by the State. (26)

54. Fourthly and finally, with regard to the the collection and recovery of contributions, the Court pointed out that contributions were collected without any possibility of intervention on the part of the insured person and were also compulsorily recovered on the basis of the provisions of public law. (27)

55. The Court concluded from this that the statutory sickness insurance funds were therefore, albeit essentially in an indirect manner, financed, for the most part, by the public authorities.

56. What can be inferred from those two judgments?

57. In the first place, it is perfectly clear that in order to find that a body is indirectly financed, for the most part, by the public authorities, the Court uses the ‘body of evidence’ method.

58. That evidence may, in my view, be listed as follows: first of all, the resource in question originates with the State and its payment is compulsory; next, its collection from those liable to pay it and the methods for determining it, and, where appropriate, the extent and degree of the control exercised over those methods by the supervisory public authorities, are authoritarian in nature, and; finally, public authority powers are granted to the bodies in question to ensure recovery of that resource.

59. In the second place, however, it remains unclear whether each element of that evidence must be found to exist in a given situation and what is the relative weight which the Court attaches to each element.

60. I consider that the answer to those questions lies in part in the need to find a ‘close dependency’ of the body in question on the public authorities.

61. However, it seems to me that, in the light of the evidence highlighted in point 58 of this Opinion, such a close dependency is absent in the case of the body at issue in the main proceedings.

62. First of all, it is true that it is the HeilBerG NRW, that is to say the law of a German Land, which grants the the doctors’ association the right to collect the contribution in order to ensure the financing of the tasks sets out in Paragraph 6(1) thereof. The imposition of that contribution has, as acknowledged by all the interested parties who submitted observations before the Court, a public origin, in this case at the infra-State level. Moreover, the contribution is paid without any specific consideration therefor.

63. However, as was rightly observed by the Czech Republic, it is important to point out that, unlike *Bayerischer Rundfunk and Others* and *Hans & Christophorus Oymanns*, that contribution is collected not from third parties (taxable persons or consumers), but from the members of the body at issue themselves.

64. In that regard, the power granted to the the doctors’ association does not seem very different from the powers vested in all ‘regulated’ professional associations in order to ensure the financing of their duties, which are, inter alia, to safeguard profession rules of conduct and ethics, a high level of expertise and vocational training for their members, and to secure relationships between those members. Moreover, those are also the types of tasks which are referred to in Paragraph 6 of the HeilBerG NRW and which must be financed by the contribution collected by the doctors’ association.

65. Furthermore, and based on similar reasoning, I cannot concur with the Commission’s argument that there is a transfer of public authority powers to the doctors’ association with regard to determining the amount of the contributions. Indeed, by definition, a public authority power is exercised on a person, whether natural or legal, who has no ability to influence the amount of the contribution demanded, like the taxable persons and consumers in *Bayerischer Rundfunk and Others* and *Hans & Christophorus Oymanns*.

66. However, it is common ground that, in the main proceedings, the amount of the contributions is decided by the General Assembly of the doctors’ association at which all members designate representatives who participate with a right to vote and that, accordingly, each member can, indirectly at least, influence it. If the Commission’s line of argument were to be followed, it would be tantamount to accepting that the members of the doctors’ association who form part of its assembly enjoy a transfer of public authority powers to be exercised, paradoxically, on themselves. (28)

67. Next, and this point is of course linked to the preceding one, I consider that the discretion available to the doctors’ association concerning the calculation of contributions is, contrary to what the Commission claims, important evidence as regards finding that there is a ‘close dependency’ of that body on the public authorities.

68. Indeed, to the extent that, as the Commission acknowledges, the tasks of the doctors' association are defined in a quite broad and vague manner, the autonomy enjoyed by that body in calculating the amount of the contribution also allows it considerable latitude in assessing the extent and method of fulfilment of the tasks which it will be in a position to finance. (29) Similarly, that entity may choose to favour or develop a particular task based on the amount of contributions that it has decided to set.

69. It also follows from the HeilBerG NRW and from the evidence adduced by the doctors' association at the hearing before the Court that the supervisory authority has no power to intervene in relation to the amount of the contribution determined by the assembly of that association. In fact, the only power that that authority has in that regard lies in the statutory control of the budgetary balance between revenues and expenses for which the doctors' association is responsible.

70. That situation therefore contrasts with that in *Hans & Christophorus Oymanns*, in which, I would recall, the Court found that there was a 'very limited' discretion on the part of the statutory sickness insurance funds in determining their contributions. That assessment must, in my view, be read in the light of paragraph 17 of that judgment, according to which those funds had to calculate the contributions in such a way as to cover, when combined with other resources, *the expenses stipulated by law* and to guarantee that the means of operating and statutory reserves were available.

71. However, it follows from the information provided by the referring court that the doctors' association has significant discretion as regards the extent of its expenditure which is determined on the basis of the methods chosen by that association to fulfil its tasks, which, moreover, are themselves laid down by the HeilBerG NRW in a quite broad and vague manner.

72. Moreover, in *Hans & Christophorus Oymanns*, for the purpose of finding that there was a close dependency of the statutory sickness insurance funds on the public authorities, the Court also pointed out that those funds were financed directly by the State, whereas, in the main proceedings, in no way is provision made for such financing for the benefit of the doctors' association.

73. Furthermore, it seems likely that, in the light of the broad discretion available to the doctors' association, the members of its assembly, that is to say the representatives of the contributors themselves, will be guided by essentially economic considerations in establishing the methods of fulfilling its tasks and, therefore, in determining the amount of contributions which the members of that association are willing to pay. (30)

74. Under those circumstances, it seems to me that such a body will not be led to bear higher financial costs than those imposed on it by purely economic considerations when deciding to have recourse to the market, with the result that it seems inconceivable to me that there could be a link of close dependency on the State, so long as it is the contributors themselves who determine the amount of the contributions which they must pay.

75. Finally, as regards the power of the doctors' association to adopt internal administrative provisions, to determine penalty payments against members who fail to comply with their legal or statutory obligations and to recover those penalty payments, (31) I consider that, once again, that power is not very different from that conferred on professional associations in relation to their members, by virtue of the need to allow them to self-regulate the profession for which they constitute 'the association'.

76. Under those circumstances, I suggest that the Court should answer the question referred to the effect that the fact that a State measure confers on a body such as the doctors' association the right to raise contributions from its members but does not set the amount of those contributions or the extent of the services to be financed thereby is not sufficient to create a link of close dependency on the public authorities within the meaning of point (c) of the second subparagraph of Article 1(9) of Directive 2004/18.

77. Therefore, the simple presumption of compliance with the substantive requirements laid down by that provision of Directive 2004/18, which stems from the inclusion of the doctors' association at issue in the main proceedings in Annex III to that directive may be regarded as being rebuttable.

VI – Conclusion

78. In the light of all the foregoing reasons, I suggest that the Court answer the question referred by the Oberlandesgericht Düsserdorf – Vergabesenat as follows:

Point (c) of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that a State measure which confers on a body, such as the Ärztekammer of Westphalia-Lippe at issue in the main proceedings, the right to raise contributions from its members but does not set the amount of those contributions or the extent of the services to be financed thereby is not sufficient to create a link of close dependency on the public authorities, which is necessary to fulfil the criterion of financing, for the most part, by the State, regional or local authorities, or other bodies governed by public law, as laid down in that article.

---

1 – Original language: French.

---

2 – Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 – Case C-337/06 [2007] ECR I-11173.

---

4 – Case C-300/07 [2009] ECR I-4779.

---

5 – Moreover, it must be pointed out in that regard that the Federal Republic of Germany is unique among the Member States in listing professional associations, including professional associations representing medical practitioners, under the category of ‘authority’.

---

6 – See, to that effect, *Hans & Christophorus Oymanns*, paragraphs 41 to 47. Moreover, as already pointed out by Advocate General Mazák in point 29 of his Opinion in that case, Member States may not unilaterally amend Annex III to Directive 2004/18. It follows from Article 79 of that directive that only the Commission is empowered to amend ‘the lists of bodies and categories of bodies governed by public law in Annex III, when, on the basis of the notifications from the Member States, these prove necessary’.

---

7 – That examination by the European Union judicature can also be understood in the light of the delimitation of jurisdiction between the national courts and the Court with regard to reviewing the validity of a European Union measure. Although the former may, in principle, be led to assume responsibility for carrying it out, the Court alone has jurisdiction to declare that such an act is invalid (see, to that effect, inter alia, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 17; Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 53; and Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraphs 47 and 48).

---

8 – *Hans & Christophorus Oymanns*, paragraph 45.

---

9 – Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 21; Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 29; Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraph 26; *Bayerischer Rundfunk and Others*, paragraph 48; and Case C-393/06 *Ing. Aigner* [2008] ECR I-2339, paragraph 36.

---

10 – In paragraphs 7 to 9 of its observations, the Czech Republic expressed doubts as to whether the condition laid down in point (a) of the second subparagraph of Article 1(9) of Directive 2004/18 is fulfilled, claiming, in particular, that the activities of the doctors' association are sectoral and therefore do not have general effect. That assessment, however, which is essentially factual in nature, is the responsibility of the referring court, which, as already stated, considers (correctly) that, in the light of the tasks of the doctors' association linked to public health, the condition set out in point (a) is fulfilled.

11– Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 70.

---

12 – The Commission points out in that regard that Paragraph 28(1) of the HeilBerG NRW must be read in conjunction with Paragraph 20(1) of the Law on the administrative organisation of the Land of North Rhine-Westphalia, according to which the supervision exercised over the authorities relates to the compliance of the tasks carried out by them with the legislation in force and with Paragraph 121 of the municipal code of the same Land, pursuant to which the supervisory authorities may at any time inquire into the affairs of the authorities.

---

13 – The fact that the doctors' association is financed 'for the most part' by those contributions was confirmed by that association's representative at the hearing before the Court. According to the case-law (see, to that effect, *Bayerischer Rundfunk and Others*, paragraph 33 and the case-law cited), that condition is satisfied if more than one half of the income comes from the resource in question.

14– *Bayerischer Rundfunk and Others*, paragraph 36 and case-law cited.

15– Ibid., paragraph 37.

---

16 – See, to that effect, in particular, *Mannesmann Anlagenbau Austria and Others*, paragraph 20; Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 20; and *Bayerischer Rundfunk and Others*, paragraph 53.

---

17 – *Bayerischer Rundfunk and Others*, paragraphs 34 and 49, and *Hans & Christophorus Oymanns*, paragraph 51.

18– *Bayerischer Rundfunk and Others*, paragraph 41.

19– Ibid., paragraph 42.

20– Ibid., paragraph 43.

21– Ibid., paragraph 44.

22– Ibid., paragraph 44.

23– Ibid., paragraphs 47 and 48.

---

24 – *Hans & Christophorus Oymanns*, paragraphs 52 and 53.

25– Ibid., paragraph 54.

26– Ibid., paragraph 55.

27– Ibid., paragraph 56.

28 – Unlike the situations giving rise to *Bayerischer Rundfunk and Others* and *Hans & Christophorus Oymanns*, the notices of contributions issued by the doctors' association in the present case, which, according to the Commission, are comparable to recovery orders, are addressed to the very members of that association who have determined the amount of the contributions in question and not to third parties who have no influence on setting that amount.

29 – In its observations, the doctors' association set out, using examples, the discretion available to it to carry out its tasks. Thus, with regard to the task of informing its members and the public on the activities of the doctors' association and on topics related to the profession, which forms part of the tasks of associations, the doctors' association established, along with the association of doctors' funds in Westphalia-Lippe, a 'patient advice centre' which has three doctors and three administrative staff. The list in Paragraph 6(1) of the HeilBerG NRW does not specifically provide for the establishment and making available of a patient advice centre. Therefore, the doctors' association has broad discretion as to the method of fulfilment of its tasks.

30 – In addition, the argument of the Commission that the territorial exclusivity enjoyed by the doctors' association should lead to its classification as a contracting authority in order to encourage the opening of the market does not seem relevant to me. Quite apart from the fact that it is not a criterion for the application of Directive 2004/18, the participation of members of the doctors' association in determining its tasks and in establishing the contribution that it collects leads those members and therefore the association itself to take decisions on the basis of principally economic considerations when deciding to have recourse to the market.

31 – Paragraph 58 of the HeilBerG NRW.

ORDONNANCE DE LA COUR (septième chambre)

4 octobre 2012 (*)

«Marchés publics de travaux – Directive 93/37/CEE – Article 6 – Principes d'égalité de traitement et de transparence – Admissibilité d'une réglementation limitant la participation aux procédures d'appel d'offres aux sociétés exerçant une activité commerciale, à l'exclusion des sociétés simples ('società semplici') – Objectifs institutionnels et statutaires – Entreprises agricoles»

Dans l'affaire C-502/11,

ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par le Consiglio di Stato (Italie), par décision du 21 septembre 2011, parvenue à la Cour le 30 septembre 2011, dans la procédure

Vivaio dei Molini Azienda Agricola Porro Savoldi

contre

Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture

en présence de:

SOA CQOP Costruttori Qualificati Opere Pubbliche SpA,

Unione Provinciale Agricoltori di Brescia,

LA COUR (septième chambre),

composée de M. J. Malenovský, président de chambre, MM. T. von Danwitz (rapporteur) et D. Šváby, juges,

avocat général: M. J. Mazák,

greffier: M. A. Calot Escobar,

la Cour se proposant de statuer par voie d'ordonnance motivée conformément à l'article 104, paragraphe 3, premier alinéa, de son règlement de procédure,

l'avocat général entendu,

rend la présente

Ordonnance

1 La demande de décision préjudicielle porte sur l'interprétation de l'article 6 de la directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux (JO L 199, p. 54), telle que modifiée par la directive 2001/78/CE de la Commission, du 13 septembre 2001 (JO L 285, p. 1, ci-après la «directive 93/37»).

2 Cette demande a été présentée dans le cadre d'un litige opposant la Vivaio dei Molini Azienda Agricola Porro Savoldi (ci-après «Savoldi»), société constituée sous la forme d'une société simple («società semplice»), à l'Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture (ci-après l'«Autorità») au sujet du retrait de l'agrément dont bénéficiait cette société afin de pouvoir participer aux procédures d'appel d'offres.

Le cadre juridique

La réglementation de l'Union

3 L'article 6 de la directive 93/37, qui figurait sous le titre premier de celle-ci, intitulé «Dispositions générales», comportait un paragraphe 6, qui énoncait:

«Les pouvoirs adjudicateurs veillent à ce qu'il n'y ait pas discrimination entre les différents entrepreneurs.»

4 Le titre IV de cette directive, consacré aux «[r]ègles communes de participation», comportait un chapitre 1, intitulé «Dispositions générales», sous lequel figurait l'article 21, qui prévoyait:

«Les groupements d'entrepreneurs sont autorisés à soumissionner. La transformation de tels groupements en une forme juridique déterminée ne peut être exigée pour la présentation de l'offre, mais le groupement retenu peut être contraint d'assurer cette transformation lorsque le marché lui a été attribué.»

5 L'article 24 de ladite directive qui figurait sous le chapitre 2 de ce titre, intitulé «Critères de sélection qualitative», disposait, à son premier alinéa:

«Peut être exclu de la participation au marché tout entrepreneur:

a) qui est en état de faillite, de liquidation, de cessation d'activités, de règlement judiciaire ou de concordat préventif ou dans toute situation analogue résultant d'une procédure de même nature existant dans les législations et réglementations nationales;

b) qui fait l'objet d'une procédure de déclaration de faillite, de règlement judiciaire, de liquidation, de concordat préventif ou de toute autre procédure de même nature existant dans les législations et réglementations nationales;

c) qui a fait l'objet d'une condamnation prononcée par un jugement ayant autorité de chose jugée pour tout délit affectant la moralité professionnelle de l'entrepreneur;

d) qui, en matière professionnelle, a commis une faute grave constatée par tout moyen dont les pouvoirs adjudicateurs pourront justifier;

e) qui n'est pas en règle avec ses obligations relatives au paiement des cotisations de sécurité sociale selon les dispositions légales du pays où il est établi ou celles du pays du pouvoir adjudicateur;

f) qui n'est pas en règle avec ses obligations relatives au paiement de ses impôts et taxes selon les dispositions légales du pays où il est établi ou celles du pays du pouvoir adjudicateur;

g) qui s'est rendu gravement coupable de fausses déclarations en fournissant les renseignements exigibles en application du présent chapitre.»

6 Aux termes de l'article 26 de la directive 93/37, contenu dans ce même chapitre:

«1. La justification de la capacité financière et économique de l'entrepreneur peut être fournie, en règle générale, par l'une ou l'autre ou plusieurs des références suivantes:

a) des déclarations bancaires appropriées;

b) la présentation des bilans ou d'extraits des bilans de l'entreprise dans le cas où la publication des bilans est prescrite par la législation du pays où l'entrepreneur est établi;

c) une déclaration concernant le chiffre d'affaires global et le chiffre d'affaires en travaux de l'entreprise au cours des trois derniers exercices.

2. Les pouvoirs adjudicateurs précisent, dans l'avis ou dans l'invitation à soumissionner, celle ou celles des références qu'ils ont choisies ainsi que les références probantes, autres que celles mentionnées au paragraphe 1 points a), b) et c), qu'ils entendent obtenir.

3. Si, pour une raison justifiée, l'entrepreneur n'est pas en mesure de fournir les références demandées par le pouvoir adjudicateur, il est admis à prouver sa capacité économique et financière par tout autre document considéré comme approprié par le pouvoir adjudicateur.»

La réglementation italienne

7 La loi-cadre n° 109 en matière de travaux publics (Legge quadro n. 109 in materia di lavori pubblici), du 11 février 1994 (supplément ordinaire à la GURI n° 41, du 19 février 1994, ci-après la «loi n° 109/1994»), prévoyait, comme il ressort de l'ordonnance de renvoi, à son article 10, intitulé «Sujets admis à participer aux procédures d'appel d'offres»:

«1. Sans préjudice des limites expressément indiquées, les personnes suivantes sont admises à participer aux procédures d'attribution des marchés publics:

a) les entrepreneurs individuels, y compris les artisans, les sociétés commerciales et les sociétés coopératives;

[…]»

8 Aux termes de l'article 2082 du code civil, intitulé «Entrepreneur»:

«L'‘entrepreneur' est la personne dont l'activité est une activité économique, exercée à titre professionnel, de façon organisée, aux fins de la production et de l'échange de produits ou de services».

9 L'article 2135 du même code, tel que résultant de l'article 1er du décret-législatif n° 228 du 18 mai 2001, dispose, sous l'intitulé «Entrepreneur agricole»:

«L'entrepreneur agricole est celui qui exerce une des activités suivantes: culture de l'exploitation, sylviculture, élevage d'animaux et activités connexes.

[…]»

10 L'article 2195 du code civil, intitulé «Entrepreneurs soumis à enregistrement», fournit l'indication des catégories d'entrepreneurs considérés comme exerçant des activités commerciales. Il énonce:

«Sont soumis à l'obligation de s'inscrire au registre des entreprises les entrepreneurs qui exercent:

1) une activité industrielle en vue de la production de biens ou de services;

2) une activité intermédiaire dans la circulation des biens;

3) une activité de transport par route, voie fluviale ou maritime ou aérienne;

4) une activité bancaire ou d'assurance;

5) d'autres activités accessoires aux précédentes.

Les dispositions de la loi qui font référence aux activités et aux entreprises commerciales s'appliquent, s'il n'en est pas disposé autrement, à toutes les activités citées dans le présent article et aux entreprises qui les exercent.»

11 L'article 2249 du code civil, intitulé «Types de sociétés», prévoit:

«Les sociétés qui ont pour objet l'exercice d'une activité commerciale doivent être constituées selon l'un des types réglementés aux chapitres III et suivants du présent titre.

Les sociétés qui ont pour objet d'exercer une activité autre sont régies par les dispositions sur la société simple, à moins que les associés n'aient voulu constituer la société selon l'un des autres types régis par les chapitres III et suivants de ce titre.

Cela vaut sans préjudice des dispositions concernant les sociétés coopératives et sans préjudice des dispositions des lois spéciales qui, pour l'exploitation de catégories particulières d'entreprises, imposent de constituer la société selon un type déterminé.»

12 Les articles 2251 à 2290 du code civil régissent la société simple. Selon une interprétation constante du droit interne, la société simple ne peut être constituée que pour exercer des activités non commerciales, c'est-à-dire des activités autres que celles mentionnées à l'article 2195 du code civil, cadre qui correspond traditionnellement à l'exercice des activités agricoles. Ainsi, dans la pratique nationale, la forme de la société simple vise habituellement, et ce même si ce n'est pas à titre exclusif, le cas de l'entrepreneur agricole mentionné à l'article 2135 de ce code.

Le litige au principal et les questions préjudicielles

13 Savoldi est un «entrepreneur agricole» au sens de l'article 2135 du code civil. Elle est constituée sous la forme d'une société simple, conformément aux articles 2251 et suivants du même code.

14 Durant la période pendant laquelle le droit italien prévoyait, aux fins de la participation aux procédures d'appel d'offres pour les marchés publiques de travaux, une inscription sur la liste nationale des constructeurs, en application de la loi n° 57 du 10 février 1962, Savoldi avait obtenu son inscription sur cette liste dans la catégorie S1, ayant pour objet les travaux de «déplacement de terre, démolitions, terrassements, aménagement agraire et forestier, espaces verts publics et décoration urbaine correspondante».

15 À la suite de la suppression, le 1er janvier 2000, du système fondé sur la liste, il a été institué un système généralisé d'agrément des entreprises qui entendent participer aux procédures d'appel d'offres publiques. La gestion de ce système a été confiée à des sociétés privées, les sociétés organismes d'attestation (ci-après les «SOA»), qui, notamment, vérifient ex ante pour chaque opérateur si les conditions requises pour participer aux procédures publiques d'appel d'offres sont remplies. Les SOA sont surveillées par l'Autorità.

16 Par la communication n° 42/04 du 24 novembre 2004, l'Autorità a interdit aux SOA d'accorder aux sociétés simples l'agrément en vue de participer aux procédures publiques d'appel d'offres.

17 Par acte du 3 août 2005, l'Autorità a demandé à la SOA CQOP Costruttori Qualificati Opere Pubbliche SpA les raisons pour lesquelles elle avait estimé pouvoir accorder à Savoldi un agrément en dépit du contenu de la communication n° 42/04, qui interdit de manière générale l'octroi d'un tel agrément à des sociétés constituées sous cette forme.

18 Par décision du 9 septembre 2005, la SOA CQOP Costruttori Qualificati Opere Pubbliche SpA a retiré l'agrément qu'elle avait délivré à Savoldi, qui a, en conséquence, formé un recours devant le Tribunale amministrativo regionale del Lazio (tribunal administratif régional du Latium).

19 Celui-ci a, par jugement n° 1206/06, rejeté ce recours, estimant que l'article 10 de la loi n° 109/1994 autorise uniquement les sociétés commerciales, et non pas les sociétés simples, qui n'exercent pas d'ordinaire et à titre prépondérant d'activités commerciales, à participer aux procédures publiques d'appel d'offres. En effet, ces dernières ne sauraient être considérées comme des «entreprises», dès lors qu'elles n'exercent pas, en général, les activités commerciales visées à l'article 2195 du code civil.

20 Savoldi a interjeté appel de ce jugement devant le Consiglio di Stato (Conseil d'État), en invoquant des arguments tirés de la méconnaissance du droit interne et du droit de l'Union.

21 Après avoir écarté les arguments tirés du droit interne, le Consiglio di Stato estime que l'issue du litige qui lui est soumis dépend de l'interprétation qu'il convient de donner à l'article 6, paragraphe 6, de la directive 93/37.

22 À cet égard, il estime que le droit de l'Union s'oppose, en principe, à une disposition telle que l'article 10 de la loi n° 109/1994, qui interdit à une personne juridique ayant la nature d'un «entrepreneur» au sens du droit de l'Union de participer aux procédures d'appel d'offres.

23 En revanche, le Consiglio di Stato se demande, en se référant à l'arrêt du 16 décembre 2008, Michaniki (C-213/07, Rec. p. I-9999), si l'exclusion en cause en l'espèce ne saurait être considérée comme conforme au droit de l'Union au vu de la jurisprudence de la Cour qui reconnaît aux États membres une certaine marge d'appréciation aux fins de l'adoption de mesures destinées à garantir le respect des principes d'égalité de traitement et de transparence.

24 À cet égard, le Consiglio di Stato rappelle que, selon la jurisprudence nationale, l'interdiction faite aux sociétés simples de participer aux procédures publiques d'appel d'offres est considérée comme raisonnable et non discriminatoire, dans la mesure où cette interdiction est justifiée par la nature et le régime particulier de ces sociétés.

25 En effet, selon cette juridiction, la réglementation nationale n'impose pas, tout d'abord, pour la société simple, la possession d'un capital ou d'un patrimoine minimum. Ensuite, face aux créanciers d'une telle société, seuls répondraient des dettes de celle-ci, d'une part, le patrimoine de la société, lequel peut toutefois être d'un montant très réduit et totalement insuffisant pour couvrir toutes les demandes des créanciers, et, d'autre part, sauf convention contraire, les associés qui ont agi au nom et pour le compte de la société. Enfin, le droit italien en matière de faillite exclurait en principe la société simple de la faillite dans la mesure où elle n'exerce pas d'activité commerciale.

26 Le Consiglio di Stato se demande également, en faisant référence à l'arrêt du 23 décembre 2009, CoNISMa (C-305/08, Rec. p. I-12129), si le législateur national peut limiter la capacité juridique de certains opérateurs, comme ceux constitués sous la forme d'une société simple, qui devraient être considérés comme des «entrepreneurs» au sens de la directive 93/37, en ne leur permettant pas de participer à des procédures d'appel d'offres portant sur diverses prestations, au motif que ces prestations seraient incompatibles avec les objectifs institutionnels et statutaires de ces opérateurs.

27 C'est dans ces conditions que le Consiglio di Stato a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes:

«1) Le droit communautaire, et notamment l'article 6 de la directive 93/37 […], s'oppose-t-il en principe à une règle nationale, telle que l'article 10, paragraphe 1, sous a), de la loi [n° 109/1994], […], qui réserve aux seules sociétés exerçant des activités commerciales la possibilité de participer aux procédures d'attribution des marchés publics, excluant ainsi certains entrepreneurs, tels que les 'società semplici', n'exerçant pas à titre habituel et de façon prépondérante ce type d'activités; ou l'interdiction en question est-elle raisonnable et non discriminatoire à la lumière de la réglementation particulière et du régime patrimonial spécifique des 'società semplici'?

2) En cas de réponse négative à la première question, le droit communautaire, et notamment l'article 6 de la directive 93/37 […] ainsi que le principe de la liberté des formes juridiques pour les sujets admis à participer aux procédures publiques d'appel d'offres, permet-il au législateur national de limiter la capacité juridique d'un entrepreneur […] en considération de la spécificité caractérisant le régime de ces entrepreneurs en droit national, empêchant celui-ci de participer aux procédures publiques d'appel d'offres, ou une telle limitation constitue-t-elle une violation des principes de proportionnalité et de non-discrimination?»

Sur les questions préjudicielles

28 En vertu de l'article 104, paragraphe 3, premier alinéa, de son règlement de procédure, lorsque la réponse à une question posée à titre préjudiciel peut être clairement déduite de la jurisprudence, la Cour peut, après avoir entendu l'avocat général, à tout moment statuer par voie d'ordonnance motivée.

29 Par ses questions, qu'il convient d'examiner ensemble, la juridiction de renvoi demande, en substance, si le droit de l'Union, et notamment l'article 6 de la directive 93/37, s'oppose à une législation nationale telle que celle en cause au principal, qui interdit à une société simple, qui a la qualité

d'«entrepreneur» au sens de la directive 93/37, de participer aux procédures d'appel d'offres du seul fait de sa forme juridique.

30 À cet égard, la juridiction de renvoi s'interroge plus précisément sur la question de savoir si une telle exclusion générale de la participation aux procédures d'appel d'offres peut être justifiée au regard des principes d'égalité de traitement et de transparence, ou en raison du fait que la participation aux procédures d'appel d'offres serait à considérer comme étant incompatible avec les objectifs institutionnels et statutaires d'une société simple.

31 Afin de répondre à ces interrogations, il convient de rappeler que la Cour a jugé que l'un des objectifs des règles de l'Union en matière de marchés publics est l'ouverture à la concurrence la plus large possible et qu'il est de l'intérêt du droit de l'Union que soit assurée la participation la plus large possible de soumissionnaires à un appel d'offres. Il importe d'ajouter, à cet égard, que cette ouverture à la concurrence la plus large possible est envisagée non pas uniquement au regard de l'intérêt de l'Union en matière de libre circulation des produits et des services, mais également dans l'intérêt propre du pouvoir adjudicateur impliqué, qui disposera ainsi d'un choix élargi quant à l'offre la plus avantageuse et la mieux adaptée aux besoins de la collectivité publique concernée (arrêt CoNISMa, précité, point 37 et jurisprudence citée).

32 De même, la Cour a jugé que les règles de l'Union s'opposent à toute réglementation nationale qui exclut des candidats ou des soumissionnaires habilités, en vertu de la législation de l'État membre où ils sont établis, à fournir le service en question de l'attribution des marchés publics de services dont la valeur dépasse le seuil d'application des directives, au seul motif que ces candidats ou ces soumissionnaires n'ont pas la forme juridique correspondant à une catégorie déterminée de personnes morales (arrêt CoNISMa, précité, point 39 et jurisprudence citée).

33 Enfin, conformément également à la jurisprudence de la Cour, les règles de l'Union n'exigent pas que la personne qui conclut un contrat avec un pouvoir adjudicateur soit en mesure de réaliser directement la prestation convenue avec ses propres ressources pour pouvoir être qualifiée d'entrepreneur, à savoir d'opérateur économique. Il suffit qu'elle soit à même de faire exécuter la prestation dont il s'agit, en fournissant les garanties nécessaires à cet effet (arrêt CoNISMa, précité, point 41 et jurisprudence citée).

34 Partant, il ressort tant des règles de l'Union que de la jurisprudence de la Cour qu'est admise à soumissionner ou à se porter candidate toute personne ou entité qui, au vu des conditions énoncées dans un avis de marché, se considère apte à assurer l'exécution de ce marché, directement ou en recourant à la sous-traitance, indépendamment de son statut ainsi que de la question de savoir si elle est systématiquement active sur le marché ou si elle n'intervient qu'à titre occasionnel. La capacité effective de cette entité à remplir les conditions fixées par l'avis de marché est appréciée lors d'une phase ultérieure de la procédure (voir arrêt CoNISMa, précité, point 42 et jurisprudence citée).

35 Il résulte de qui précède qu'il ne peut être interdit, par principe, à un «entrepreneur» au sens de la directive 93/37 de participer à des procédures d'appel d'offres du seul fait de sa forme juridique.

36 Or, la juridiction de renvoi se demande s'il résulte des arrêts précités Michaniki et CoNISMa que, par dérogation au principe selon lequel aucune forme juridique déterminée ne saurait être imposée, l'exclusion des sociétés simples de la participation aux procédures d'appel d'offres peut être admise. À cet égard, la juridiction de renvoi s'interroge, d'une part, sur la portée des principes d'égalité de traitement et de transparence et, d'autre part, sur l'importance des objectifs institutionnels et statutaires des sociétés simples pour déterminer leur capacité à participer aux procédures d'appel d'offres.

37 Quant aux principes d'égalité de traitement et de transparence, il est de jurisprudence constante que l'énumération exhaustive figurant à l'article 24, premier alinéa, de la directive 93/37 des causes d'exclusion de la participation d'un entrepreneur à un marché fondées sur des éléments objectifs, tenant aux qualités professionnelles de celui-ci, n'exclut pas la faculté des États membres de maintenir ou d'édicter des règles matérielles destinées, notamment, à garantir, en matière de marchés publics, le respect du principe d'égalité de traitement, ainsi que le principe de transparence que ce dernier implique, lesquels s'imposent aux pouvoirs adjudicateurs dans toute procédure de passation d'un tel marché (arrêt Michaniki, précité, point 44 et jurisprudence citée).

38 Lesdits principes, qui signifient, notamment, que les soumissionnaires doivent se trouver sur un pied d'égalité aussi bien au moment où ils préparent leurs offres qu'au moment où celles-ci sont évaluées par le pouvoir adjudicateur, constituent, en effet, la base des directives relatives aux procédures de passation des marchés publics, et le devoir des pouvoirs adjudicateurs d'en assurer le respect correspond à l'essence même de ces directives (arrêt Michaniki, précité, point 45 et jurisprudence citée).

39 L'article 6, paragraphe 6, de la directive 93/37 précise d'ailleurs que les pouvoirs adjudicateurs veillent à ce qu'il n'y ait pas discrimination entre les différents entrepreneurs (arrêt Michaniki, précité, point 46).

40 Il s'ensuit qu'un État membre est en droit de prévoir, en sus des causes d'exclusion fondées sur des considérations objectives de qualité professionnelle, limitativement énumérées à l'article 24, premier alinéa, de la directive 93/37, des mesures d'exclusion destinées à assurer le respect des principes d'égalité de traitement de l'ensemble des soumissionnaires, ainsi que de transparence, dans le cadre des procédures de passation des marchés publics (arrêt Michaniki, précité, point 47).

41 Ainsi, il convient de reconnaître, dans ce contexte, aux États membres une certaine marge d'appréciation aux fins de l'adoption de mesures destinées à garantir les principes d'égalité de traitement des soumissionnaires et de transparence (arrêt Michaniki, précité, point 55).

42 En effet, chaque État membre est le mieux à même d'identifier, à la lumière de considérations historiques, juridiques, économiques ou sociales qui lui sont propres, les situations propices à l'apparition de comportements susceptibles d'entraîner des entorses au respect de ces principes (arrêt Michaniki, précité, point 56).

43 Toutefois, les objectifs poursuivis en l'occurrence par le droit italien ne peuvent justifier, au titre des principes d'égalité de traitement et de transparence, l'exclusion, par principe, des sociétés simples de la participation aux procédures d'appel d'offres.

44 En effet, aucun élément du dossier ne permet de conclure que certaines caractéristiques des sociétés en cause au principal puissent être de nature à porter atteinte, lors de la procédure de passation des marchés publics, aux principes de transparence et de non-discrimination.

45 À cet égard, il y a lieu de souligner qu'il résulte de la décision de renvoi que les sociétés simples se caractérisent, par rapport aux sociétés commerciales, par l'absence d'un capital minimum, par la responsabilité, en principe, limitée aux associés qui ont agi au nom et pour le compte de la société ainsi que par l'exclusion des procédures de faillite. Or, il ne saurait être retenu que, en raison de ces caractéristiques, la participation des sociétés simples aux procédures de passation des marchés publics pourrait être de nature à porter atteinte aux principes de transparence et de non-discrimination.

46 S'agissant de la question de savoir si une dérogation au principe selon lequel aucune forme juridique déterminée ne saurait être imposée pour la participation aux procédures d'appel d'offres peut être admise en raison d'une incompatibilité éventuelle résultant des limites inhérentes aux objectifs institutionnels et statutaires de sociétés telles que les sociétés simples, il convient de rappeler la jurisprudence pertinente de la Cour.

47 Selon cette jurisprudence, les États membres peuvent, certes, réglementer les activités des entités, telles que les universités et les instituts de recherche, qui ne poursuivent pas un but lucratif et dont l'objet est orienté principalement vers l'enseignement et la recherche. Ils peuvent, notamment, autoriser ou ne pas autoriser de telles entités à opérer sur le marché en fonction de la circonstance que l'activité en question est compatible ou non avec leurs objectifs institutionnels et statutaires (arrêt CoNISMa, précité, point 48).

48 Toutefois, il importe de souligner que l'activité des entrepreneurs agricoles constitués en sociétés simples consiste, conformément à l'article 2135 du code civil, dans la «culture de l'exploitation, [la] sylviculture, [l']élevage d'animaux et [les] activités connexes». En outre, selon les observations écrites du gouvernement italien, les sociétés simples peuvent également poursuivre une activité

«commerciale» à condition qu'elle soit accessoire et complémentaire à l'activité principale, tel que cela ressort dudit article 2135.

49 Ainsi, de telles sociétés poursuivent incontestablement un but lucratif, de sorte qu'elles ne peuvent être assimilées aux entités telles que les universités et les instituts de recherche, visées dans l'arrêt CoNISMa, précité, et pour lesquelles la Cour a reconnu la faculté aux États membres d'autoriser ou de ne pas autoriser qu'elles opèrent sur le marché.

50 Dans de telles circonstances, la jurisprudence issue de l'arrêt CoNISMa, précité, ne saurait permettre de déroger, pour des sociétés telles que les sociétés simples, au principe selon lequel aucune forme juridique déterminée ne saurait être imposée aux fins de la participation aux procédures d'appel d'offres.

51 Eu égard à tout ce qui précède, il convient de répondre aux questions posées que le droit de l'Union, et notamment l'article 6 de la directive 93/37, s'oppose à une législation nationale, telle que celle en cause au principal, qui interdit à une société telle qu'une société simple qui a la qualité d'«entrepreneur», au sens de la directive 93/37, de participer aux procédures d'appel d'offres du seul fait de sa forme juridique.

Sur les dépens

52 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (septième chambre) dit pour droit:

Le droit de l'Union, et notamment l'article 6 de la directive 93/37/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de travaux, telle que modifiée par la directive 2001/78/CE de la Commission, du 13 septembre 2001, s'oppose à une législation nationale, telle que celle en cause au principal, qui interdit à une société telle qu'une société simple qui a la qualité d'«entrepreneur», au sens de la directive 93/37, de participer aux procédures d'appel d'offres du seul fait de sa forme juridique.

Signatures

---

* Langue de procédure: l'italien.

EU:C:2012:801

JUDGMENT OF THE COURT (Third Chamber)

13 December 2012 (*)

(Directive 2004/18/EC – Article 45(2), first subparagraph, point (d) –Directive 2004/17/EC – Articles 53(3) and 54(4) – Public procurement – Postal services sector – Exclusion criteria in relation to the procedure for the award of a contract – Grave professional misconduct – Protection of the public interest – Maintenance of fair competition)

In Case C-465/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Krajowa Izba Odwoławcza (Poland), made by decision of 30 August 2011, received at the Court on 9 September 2011, in the proceedings

Forposta SA,

ABC Direct Contact sp. z o.o.

v

Poczta Polska SA,

THE COURT (Third Chamber),

composed of K. Lenaerts, acting as President of the Third Chamber, E. Juhász (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Mazák,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 26 September 2012,

after considering the observations submitted on behalf of:

– Forposta SA and ABC Direct Contact sp. z o.o., by P. Gruszczyński and A. Starczewska-Galos, radcy prawni,

– Poczta Polska SA, by P. Burzyński and H. Kornacki, radcy prawni,

– the Polish Government, by M. Szpunar and B. Majczyna and by M. Laszuk and E. Gromnicka, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

– the European Commission, by K. Herrmann and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of point (d) of the first subparagraph of Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), read in conjunction with Articles 53(3) and 54(4) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

2 This reference has been made in the course of proceedings between, on the one hand, Forposta SA, formerly Praxis sp. z o.o., and ABC Direct Contact sp. z o.o. and, on the other, Poczta Polska SA ('Poczta Polska') concerning a decision of Poczta Polska to exclude Forposta SA and ABC Direct Contact sp. z o.o from the procedure for the award of a contract, for which the Poczta Polska issued a call for tender.

Legal context

European Union law

3 Section 2 of Chapter VII of Directive 2004/18, dealing with the 'Criteria for qualitative selection', contains Article 45, entitled 'Personal situation of the candidate or tenderer'. Paragraph 1 of that article sets out the criteria leading to the automatic exclusion of the candidate or tenderer from a contract, while paragraph 2 of the same article sets out the criteria which may lead to such exclusion. That latter paragraph reads as follows:

'Any economic operator may be excluded from participation in a contract where that economic operator:

(a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

(c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.'

4 Section 1 of Chapter VII of Directive 2004/17 is entitled 'Qualification and qualitative selection'. Article 53, which is part of that section, provides, under the heading 'Qualification systems':

‘1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

…

3. The criteria and rules for qualification referred to in paragraph 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), those criteria and rules shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.

…’

5 Article 54 of Directive 2004/17, which is part of Section 1 and is entitled ‘Criteria for qualitative selection’, states in paragraphs 1 and 4:

‘1. Contracting entities which establish selection criteria in an open procedure shall do so in accordance with objective rules and criteria which are available to interested economic operators.

…

4. The criteria set out in paragraphs 1 and 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), the criteria and rules referred to in paragraphs 1 and 2 of this Article shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.’

Polish law

6 The law of 29 January 2004 on public procurement (Dz. U. No 113, item 759, ‘the Law on public procurement’) lays down the principles and procedures for the award of public contracts and specifies the competent authorities. The amending law of 25 February 2011 (Dz. U. No 87, item 484), which came into force on 11 May 2011, inserted subparagraph (1a) under Article 24(1) of the Law on public procurement. That provision, as amended, reads as follows:

‘1. The following shall be excluded from procedures for the award of public contracts:

…

(1a) economic operators with which the contracting authority concerned annulled, terminated, or renounced a public contract owing to circumstances for which the economic operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract’s value;

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 Poczta Polska, a company belonging to the Polish Treasury, active in the postal services sector, is a contracting authority within the meaning of Directive 2004/17. Poczta Polska conducted an open procedure for the award of a public contract for ‘the delivery of postal packages, foreign and domestic, priority postal packages, cash-on-delivery items, and postal packages subject to special conditions’. According to the findings of fact in the reference for a preliminary ruling, the value of that contract exceeds the threshold above which European Union (‘EU’) public procurement rules are applicable.

8 Poczta Polska considered that the tenders made by Forposta SA and ABC Direct Contact sp. z o.o. were viewed as the most favourable in relation to certain tender lots and invited them to enter into a contract. That decision was not challenged by any of the participants to the procedure. However, on 21 July 2011, which was the deadline for the conclusion of the contract, Poczta Polska cancelled the tendering procedure on the grounds that the economic operators which had made the selected tenders were subject to compulsory exclusion from the procedure under Article 24(1)(1a) of the Law on public procurement.

9 The two companies concerned appealed that decision to the Krajowa Izba Odwoławcza (the Polish Public Procurement Office), claiming that that national provision was contrary to point (d) of the first subparagraph of Article 45(2) of Directive 2004/18. Specifically, in their view, the scope of the conditions laid down in that national provision was much broader than the condition laid down in EU law, which provides for only ‘grave professional misconduct’ as a ground for exclusion: such professional misconduct had not been committed in the case in the main proceedings.

10 The referring court observes that, at the time of the adoption of Article 24(1)(1a) of the Law on public procurement, the national legislature stated that it was based on point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 and that court expresses doubts about whether that national provision conforms with the provision of EU law on which it is based, doubts which it regards as justified in light of the following considerations.

11 In the first place, the ground for exclusion laid down in that provision in Directive 2004/18 is grave professional misconduct, a concept which, in legal terms, refers more to the breach of principles relating to ethics, dignity and professional conscientiousness. Such a breach gives rise to professional liability on the part of the person who committed it through, inter alia, the opening of disciplinary proceedings by the competent professional bodies. Accordingly, it is those bodies or courts which would decide whether there has been grave professional misconduct and not the contracting authority, as provided for in the national provision at issue.

12 In the second place, the concept of circumstances ‘for which that operator is responsible’, reproduced in Article 24(1)(1a), of the Law on public procurement, is significantly broader than the concept of grave misconduct ‘committed by the operator’, set out in point (d) of the first subparagraph of Article 45(2) of Directive 2004/18, and, therefore, it ought not to be used in provisions which are intended to impose a sanction.

13 In the third place, given that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 requires that misconduct be grave, it is doubtful that the non-performance of 5% of a contract’s value could be qualified as grave misconduct. The referring court points out, in this regard, that when the conditions laid down in the national provision at issue in the main proceedings are fulfilled, the contracting authority is obliged to exclude the economic operator concerned and it cannot take into consideration that operator’s individual situation, which could result in a breach of the principle of proportionality.

14 The referring court notes, lastly, that, according to the case-law of the Court of Justice (Case C-213/07 *Michaniki* [2008] ECR I-9999 and Case C-376/08 *Serrantoni and Consorzio stabile edili* [2009] ECR I-12169), Directive 2004/18 does not preclude a Member State from providing grounds for exclusion other than those provided in Article 45(2) therein, and which are not based on objective considerations of the professional qualities of economic operators, to the extent that they are proportionate to the objective pursued. However, in accordance with the case-law of the Court (Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559 and Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565), EU law precludes national rules which provide for the automatic exclusion of an operator from participation in a procedure for the award of a contract or the automatic rejection of tenders, and the application of measures which are disproportionate to the aim pursued. Not only does the national provision at issue apply automatically but, in addition, it goes beyond what is necessary to attain the aim of protecting the public interest, namely to eliminate contractors that are genuinely unreliable.

15 In the light of those considerations, the Krajowa Izba Odwoławcza decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Can Article 45(2), [first subparagraph], point (d) of Directive 2004/18 …, which states that any economic operator may be excluded from participation in a contract where that economic operator ... has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate, in conjunction with Articles 53(3) and 54(4) of Directive 2004/17 …, be interpreted as meaning that it is possible to regard as grave professional misconduct a situation in which the contracting authority concerned annulled, terminated or renounced a public contract with the economic operator concerned owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract’s value?

2 If Question 1 is answered in the negative – if a Member State is able to introduce grounds, other than those listed in Article 45 of Directive 2004/18 …, for excluding economic operators from participation in a procedure for the award of a public contract, which it considers to be essential for the protection of the public interest, the legitimate interests of the contracting authorities and the maintenance of fair competition between economic operators, is it possible to consider as consistent with that directive and the Treaty on the Functioning of the European Union a situation involving the exclusion of economic operators with which the contracting authority concerned annulled, terminated or renounced a public contract owing to circumstances for which that economic operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract’s value?’

The questions referred for a preliminary ruling

The jurisdiction of the Court

16 Poczta Polska claims that the Krajowa Izba Odwoławcza is not a court or tribunal within the meaning of Article 267 TFEU, given that it exercises both a judicial role and an advisory one.

17 On this point, it must be borne in mind that, according to settled case-law of the Court of Justice, in order to determine whether a body making a reference is a ‘court or tribunal’ within the meaning of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23, and Case C-443/09 *Grillo Star* [2012] ECR, paragraph 20 and case-law cited).

18 In the present case, it must be noted that, as is apparent from the documents before the Court, the Krajowa Izba Odwoławcza, which is a body established by the Law on public procurement, has been granted exclusive jurisdiction to hear and determine at first instance disputes between economic operators and competent authorities, and whose operation is governed by Articles 172 to 198 of that law, does constitute a court or tribunal, within the meaning of 267 TFEU, in the exercise of its jurisdiction in relation to those provisions, as is the case in the main proceedings. The fact that that body may be invested, by virtue of other provisions, with an advisory role is devoid of consequence in that regard.

Admissibility

19 The Polish Government submits that the reference for a preliminary ruling is inadmissible because it is hypothetical and because it aims, in essence, to determine whether national legislation at issue in the main principles is compatible with the provisions of Directive 2004/18, and not to obtain an interpretation of EU law in order to give guidance to the subject-matter of the dispute, which must be decided on the basis of national law. However, it is not for the Court of Justice, in proceedings for a preliminary ruling, to assess the compatibility of national law with EU law or interpret provisions of national law.

20 In that regard, it should be noted, first of all, that the referring court did not request the Court of Justice to assess the compatibility of the national legislation with EU law or to interpret that legislation. It merely requests the interpretation of EU public procurement rules for the purpose of assessing whether it is necessary to disapply, in the main proceedings, Article 24(1)(1a) of the Law of public procurement. Second, it must be noted that the questions referred are relevant for resolving that dispute, since Poczta Polska cancelled the tendering process of the contract at issue on the grounds that the economic operators which had put forward the tenders chosen were subject to compulsory exclusion from the procedure under that national provision.

21 In those circumstances, the reference for a preliminary ruling is admissible and the questions referred must be answered.

The first question

22 By that question, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 is to be interpreted as precluding national legislation which provides that a situation of grave professional misconduct, which leads to the automatic exclusion of the economic operator at issue from a procedure for the award of a public contract in progress, arises where the contracting authority concerned has annulled, terminated or renounced a previous public contract with that same economic operator owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value.

23 In the light of the observations submitted by the Polish Government at the hearing before the Court, according to which a case such as that in the main proceedings, concerning the *rationae materiae* of Directive 2004/17, should be assessed under that directive alone, it should be pointed out that, according to the findings of the referring court, the national legislature itself indicated that, when it adopted Article 24(1)(1a) of the Law on public procurement, on the basis of which the companies concerned were excluded from the procedure for the award of a contract, it did so on the basis of point (d) of the first subparagraph of Article 45(2) of Directive 2004/18. Moreover Articles 53(3) and 54(4) of Directive 2004/17 explicitly refer to Article 45 of Directive 2004/18.

24 It is therefore evident that the Republic of Poland made use of the option provided in those provisions of Directive 2004/17 and incorporated, into its domestic legislation, the ground for exclusion provided for in point (d) of the first subparagraph of Article 45(2) of Directive 2004/18.

25 It must be noted that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18, unlike the provisions relating to the grounds for exclusion in points (a), (b), (e) and (f) of the same subparagraph, does not refer to national legislation or rules, but that the second subparagraph of Article 45(2) provides that Member States shall specify, in accordance with their national law and having regard for EU law, its implementing conditions.

26 Consequently, the concepts of 'professional' 'grave' 'misconduct', in point (d) of the first subparagraph of Article 45(2) can be specified and explained in national law, provided that it has regard for EU law.

27 It must be observed, as the Polish Government rightly pointed out, that the concept of 'professional misconduct' covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards in the strict sense of the profession to which that operator belongs, which are established by the disciplinary body of that profession or by a judgment which has the force of res judicata.

28 Indeed, point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 allows the contracting authorities to prove professional misconduct by any demonstrable means. In addition, unlike point (c) of that subparagraph, a judgment which has the force of res judicata is not required in order to prove professional misconduct, within the meaning of point (d) of that subparagraph.

29 Consequently, the failure of an economic operator to abide by its contractual obligations can, in principle, be considered as professional misconduct.

30 Nevertheless, the concept of ‘grave misconduct’ must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part. Accordingly, any incorrect, imprecise or defective performance of a contract or a part thereof could potentially demonstrate the limited professional competence of the economic operator at issue, but does not automatically amount to grave misconduct.

31 In addition, in order to find whether ‘grave misconduct’ exists, a specific and individual assessment of the conduct of the economic operator concerned must, in principle, be carried out.

32 However, the rules at issue in the main proceedings oblige the contracting authority to exclude an economic operator from the procedure for the award of a contract when, owing to circumstances for which the economic operator is responsible, the contracting authority has annulled or terminated a contract with that economic operator in the framework of a previous public contract.

33 In this regard, it is important to note that, given the specific characteristics of national legal systems as regards civil liability, the concept of ‘circumstances for which the economic operator is responsible’ is very broad and could extend to situations beyond conduct which denotes a wrongful intent or negligence of a certain gravity by the economic operator at issue. Yet, the first subparagraph of Article 54(4) of Directive 2004/17 refers to a power to apply the exclusion criteria listed in Article 45 of Directive 2004/18 ‘on the terms and conditions set out therein’, meaning that the concept of ‘grave misconduct’, as referred to in paragraph 25 above, cannot be replaced by the concept of ‘circumstances for which the economic operator concerned is responsible’.

34 Furthermore, the national legislation at issue in the main proceedings itself establishes the parameters that require the contracting authority at issue to exclude an economic operator from a newly undertaken procedure for the award of a contract due to the previous conduct of that operator, without allowing the contracting authority the power to assess, on a case-by-case basis, the gravity of the allegedly wrongful conduct of that operator in the performance of the previous contract.

35 Consequently, it is clear that the national rules at issue in the main proceedings do not merely follow the general framework for applying point (d) of the first subparagraph of Article 45(2) of Directive 2004/18, but impose on the contracting authorities mandatory requirements and conclusions to be automatically drawn in certain circumstances, thus exceeding the discretion enjoyed by the Member States, pursuant to the second subparagraph of Article 45(2) of that directive, in specifying the implementing conditions for the ground for exclusion set out in point (d) of the first subparagraph of Article 45(2) with regard for EU law.

36 In the light of all the foregoing considerations, the answer to the first question is that point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 must be interpreted as precluding national legislation which provides that a situation of grave professional misconduct, which leads to the automatic exclusion of the economic operator at issue from a procedure for the award of a public contract in progress, arises where the contracting authority concerned has annulled, terminated or renounced a public contract with that same economic operator owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract’s value.

The second question

37 In essence, that question, raised in case the answer to the first question is in the negative, asks whether the principles and rules of EU public procurement law allow, on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, national legislation, such as that at issue in the main proceedings, requiring the contracting authorities to automatically exclude an economic operator from a procedure for the award of a public contract in a situation such as that referred to in the first question.

38 While it is indeed apparent from Article 54(4) of Directive 2004/17 that the contracting powers can lay down criteria for qualitative selection in addition to the grounds for exclusion set out in Article 45 of Directive 2004/18, the fact remains that, in accordance with settled case-law of the Court, Article 45(2) of Directive 2004/18 exhaustively lists the grounds capable of justifying the exclusion of a contractor from participation in a contract for reasons, based on objective factors, that relate to his professional qualities and therefore precludes Member States from adding to the list contained in that provision other grounds for exclusion based on criteria relating to professional qualities (see Joined Cases C-226/04 and C-228/04 *La Cascina and Others* [2006] ECR I-1347, paragraph 22; *Michaniki*, paragraph 43; and Case C-74/09 *Bâtiments et Ponts Construction and WISAG Produktionsservice*, [2010] ECR I-7271, paragraph 43).

39 It is only when the grounds for exclusion concerned do not relate to the professional qualities of economic operators, and, therefore, do not fall within that exhaustive list that it is possible to consider whether those grounds may be permissible under the principles or other rules of EU public procurement law (see, to this effect, *Fabricom*, paragraphs 25 to 36; *Michaniki*, paragraphs 44 to 69; and Case C-538/07 *Assitur* [2009] ECR I-4219, paragraphs 21 to 33).

40 However, in the present case, Article 24(1)(1a) of the Law on public procurement sets out a ground for exclusion relating to the professional quality of the economic operator concerned, as is borne out by the fact, pointed out in paragraphs 10 and 23 above, that the Polish legislature relied on point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 in support the adoption of that national provision. Such a ground for exclusion, which goes beyond the scope of the exhaustive list in that first subparagraph, as is apparent from the response to the first question, is not, therefore, permissible under the principles or other rules of EU public procurement law.

41 Consequently, the answer to the second question is that the principles or rules of EU public procurement law do not allow, on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, national legislation, such as that at issue in the main proceedings, requiring the contracting authorities to automatically exclude an economic operator from a procedure for the award of a public contract in a situation such as that referred to in the reply to the first question referred for a preliminary ruling.

The temporal effects of the present judgment

42 The Polish Government asked the Court, at the hearing, to limit the temporal effects of the present judgment in the event that the Court interpreted point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 as precluding national legislation of the kind at issue in the main proceedings.

43 In support of its application, the Polish Government relies on the alleged lack of clarity of that provision of EU law, not yet interpreted by the Court, as well as the risk of serious economic repercussions at national level that such an interpretation would entail.

44 In this regard, it should be borne in mind that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force and it is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith (see, inter alia, Joined Cases C-338/11 to C-347/11 *Santander Asset Management SGIIC and Others* [2012] ECR, paragraphs 58 and 59, and Case C-525/11 *Mednis* [2012] ECR, paragraphs 41 and 42).

45 More specifically, the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with EU law by reason of objective, significant uncertainty regarding the implications of EU provisions, to

which the conduct of other Member States or the European Commission may even have contributed (see, inter alia, *Santander Asset Management SGIIC and Others*, paragraph 60, and *Mednis*, paragraph 43).

46 The alleged existence of significant objective uncertainty regarding the implications of the relevant provisions of EU law cannot be accepted in the case in the main proceedings. First, the situation of 'grave professional misconduct' within the meaning of point (d) of the first subparagraph of Article 45(2) of Directive 2004/18 manifestly does not cover the ground for exclusion laid down by Article 24(1)(1a) of the Law on public procurement. Second, it is apparent from the case-law, which was well established at the moment of the adoption of the national provision at issue in the main proceedings, that such a ground for exclusion could not be justified by reference to the principles or other rules of EU public procurement law.

47 As regards the financial consequences which might ensue for a Member State in the context of a reference for a preliminary ruling, they do not in themselves justify limiting the temporal effects of the ruling (*Santander Asset Management SGIIC and Others*, paragraph 62, and *Mednis*, paragraph 44).

48 It must be noted that, in any event, the Polish Government has not provided any factual evidence allowing the Court to assess whether there exists, as a result of this judgment, a risk of serious economic repercussions for the Republic of Poland.

49 Accordingly, there is no need to limit the temporal effects of the present judgment.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Point (d) of the first subparagraph of Article 45(2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as precluding national legislation which provides that a situation of grave professional misconduct, which leads to the automatic exclusion of the economic operator at issue from a procedure for the award of a public contract in progress, arises where the contracting authority concerned has annulled, terminated or renounced a public contract with that same economic operator owing to circumstances for which that operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value.**

2. **The principles or rules of European Union public procurement law does not allow, on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, national legislation, such as that at issue in the main proceedings, requiring the contracting authorities to automatically exclude an economic operator from a procedure for the award of a public contract in a situation such as that referred to in the reply to the first question referred for a preliminary ruling.**

[Signatures]

* Language of the case: Polish.

EU:C:2013:385

JUDGMENT OF THE COURT (Fifth Chamber)

13 June 2013 (*)

(Public contracts – Directive 2004/18/EC – Definition of 'public contract' – Article 1(2)(a) – Contract concluded between two local authorities – Transfer by one entity of the responsibility for cleaning certain of its buildings to another entity in return for financial compensation)

In Case C-386/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Germany), made by decision of 6 July 2011, received at the Court on 20 July 2011, in the proceedings

Piepenbrock Dienstleistungen GmbH & Co. KG

v

Kreis Düren,

intervening party:

Stadt Düren,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász, D. Šváby (Rapporteur) and C. Vajda, Judges,

Advocate General: V. Trstenjak,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 7 February 2013,

after considering the observations submitted on behalf of:

– Piepenbrock Dienstleistungen GmbH & Co. KG, by L. Wionzeck, Rechtsanwalt,

– Kreis Düren, by R. Gruneberg and A. Wilden, Rechtsanwälte,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by A. Tokár, G. Wilms and C. Zadra, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of

procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The request has been made in proceedings between Piepenbrock Dienstleistungen GmbH & Co. KG (‘Piepenbrock’) and Kreis Düren (District of Düren, Germany) concerning a draft contract pursuant to which Kreis Düren is to transfer to Stadt Düren (City of Düren) the responsibility for cleaning buildings situated on the latter’s territory, but belonging to and used by Kreis Düren, in return for financial compensation.

Legal context

European Union law

3 Recital 2 in the preamble to Directive 2004/18 states:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the [EC] Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. ...’

4 Article 1 of Directive 2004/18 provides:

‘...

2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

...

(d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

...

8. The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term “economic operator” shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

...’

5 Building-cleaning services are services within the meaning of Directive 2004/18, in accordance with Annex II A, Category 14, thereto.

German law

6 Article 28(2) of the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) provides:

‘Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by legislation. Within the limits of their functions designated by legislation, associations of municipalities shall also have the right of self-government according to legislation. ...’

7 Paragraph 23 of the Law on work performed jointly by local authorities in the *Land* of North Rhine-Westphalia (Gesetz über kommunale Gemeinschaftsarbeit des Landes Nordrhein-Westfalen; ‘the GkG NRW’) is worded as follows:

‘1. Local authorities and associations of local authorities may agree that one of their number shall assume competence for individual tasks incumbent on the other participants or undertake to perform such tasks for the other participants.

2. If one participant assumes competence for a task incumbent on the others, the right and obligation to perform the task shall be transferred to that participant. If one of the participants undertakes to perform a task for the others, their rights and obligations as the parties on whom that task is incumbent shall remain unaffected.

3. The agreement may grant the other participants a right of involvement in the fulfilment or performance of the tasks; the same shall apply to the appointment of service personnel.

4. Provision shall be made in the agreement for appropriate compensation, which shall, as a rule, be so calculated as to cover the costs arising from the assumption or performance of tasks.

5. If the period of validity of the agreement is unlimited or exceeds 20 years, the agreement shall specify under what conditions and in what form it may be terminated by a participant.’

8 The order for reference notes that that the GkG NRW thus makes a distinction between ‘mandating’ agreements, pursuant to which one entity undertakes to perform certain tasks on behalf of another entity, and ‘delegating’ agreements, involving a transfer of competence, under which one entity performs a task incumbent on another. It also notes that, according to the national case-law, ‘mandating’ agreements are governed by public procurement law in so far as they involve a pecuniary interest.

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Kreis Düren is an association of local authorities which include Stadt Düren. Pursuant to a number of contracts, Piepenbrock carried out the cleaning of buildings owned by Kreis Düren.

10 Kreis Düren drew up a draft public contract with Stadt Düren whereby it would transfer responsibility for the cleaning of its office, administrative and school buildings, located within the territory of Stadt Düren, to the latter, initially for a two-year pilot phase.

11 Article 1 of the draft contract is worded as follows:

‘1. Kreis Düren shall assign the task incumbent on it of cleaning those buildings in its possession which are located in the municipal territory of Düren to Stadt Düren with the effect of discharging its obligations.

2. The task of cleaning shall comprise the cleaning of premises and glass in the office, administrative and school buildings of Kreis Düren.

3. Stadt Düren shall assume sole responsibility for the task described under subparagraphs 1 and 2. The right and obligation to perform this task shall be transferred to Stadt Düren (Paragraph 23(1), first option, and Paragraph 23(2), first sentence, GkG NRW). Stadt Düren shall assume the duties of the Kreis (District) and shall to that extent have sole responsibility.

4. Stadt Düren may avail itself of the services of third parties to perform the tasks assigned to it pursuant to subparagraph 1.’

12 That draft contract provides that Stadt Düren is to receive financial compensation for the costs which it incurs, in accordance with Paragraph 23(4) of the GkG NRW, established on the basis of an hourly rate.

13 It is also apparent from the file to which the Court has had access that that draft contract reserves to Kreis Düren the right unilaterally to terminate the contract in the event of improper implementation on the part of Stadt Düren.

14 Finally, it follows from the order for reference that the cleaning tasks concerned were to be carried out by Dürener Reinigungsgesellschaft mbH, a company owned by Stadt Düren.

15 Piepenbrock brought an action by which it sought an order prohibiting Kreis Düren from entering into that contract without carrying out a public procurement procedure, claiming that the accomplishment of those tasks in return for remuneration constitutes a commercial service that could also be furnished by private service providers. It further argued that the draft contract does not involve a type of in-house award to which public procurement law does not apply, in accordance with the judgment in Case C-107/98 *Teckal* [1999] ECR I-8121, since the conditions for the application of that exception are not met, while a reference to Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747 is not relevant, in the absence of 'horizontal cooperation' between the two public entities concerned.

16 Piepenbrock's action was dismissed at first instance on the ground that the draft contract is a 'delegating' agreement, in accordance with Paragraph 23 of the GkG NRW, which is not subject to public procurement law. Piepenbrock appealed against that decision to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), claiming that that description of the draft contract as a delegating agreement is meaningless in view of its characteristics.

17 Kreis Düren claims, on the contrary, that such a public-law delegation of tasks constitutes a decision on internal organisational matters, which is not subject to the law on public procurement.

18 The referring court draws attention to that characteristic of the draft contract, raising the question of the effect, as regards the application of the rules on public procurement, of the public-law nature of that contract.

19 It finds, first, that the task concerned does not involve the exercise of official authority, within the meaning of the first paragraph of Article 51 TFEU and Article 62 TFEU, and is therefore not exempt, on that basis, from the provisions of the TFEU relating to the freedom of establishment and the freedom to provide services or acts of secondary legislation implementing those freedoms, such as Directive 2004/18.

20 The referring court finds, secondly, that the exception demonstrated in *Teckal* does not apply to the draft contract at issue in the present proceedings, since Kreis Düren does not exercise over Stadt Düren – or over the company Dürener Reinigungsgesellschaft – a control similar to that which it exercises over its own departments.

21 The referring court points out, thirdly, that the context of the case before it differs from the circumstances of the case which gave rise to the judgment in Case C-480/06 *Commission* v *Germany*, inasmuch as the draft contract at issue in the present case is characterised by an absence of cooperation between the public entities concerned; one of them is purely and simply delegating one of its tasks to the other, something which is authorised by the GkG NRW.

22 However, the referring court is unsure whether, in the wake of the judgment in Case C-480/06 *Commission* v *Germany*, types of contracts between local authorities other than that at issue in that judgment are exempt from public procurement law. Thus, it raises the question of whether a distinction must be made between contracts concerning public service tasks as such, like waste disposal, and contracts which concern only indirectly the performance of those tasks, such as, in the present case, the cleaning of buildings used for the performance of such a task.

23 The referring court is also unsure whether the law on public procurement is generally inapplicable to agreements on cooperation between local authorities, as 'acts of internal administrative organisation'. It points out, in this regard, that the administrative organisation of the Member States is not a matter over

which the European Union has any power and, moreover, that the administrative autonomy of the municipalities, and thus the possibility of establishing voluntary cooperation between municipalities, is guaranteed by Article 28(2) of the Basic Law for the Federal Republic of Germany.

24 On the other hand, the referring court observes that the purpose of the draft contract is virtually identical to any contract governed by Directive 2004/18 under which Stadt Düren would be commissioned to provide cleaning services for pecuniary interest. It asks, in that respect, whether the distinction made by the GkG NRW between 'mandating' agreements and 'delegating' agreements – the contract concerned being in the second category – is conclusive, given that, when a contract relates to ancillary activities which do not directly concern the external activity of local authorities, the fact that a transfer of competence takes place by virtue of the contract is a purely technical point, as the choice of either type of contract in fact produces identical effects in economic terms. For that reason, the referring court considers that, in the circumstances of the main proceedings, the use of a 'delegating' agreement might amount to 'contriving to circumvent the rules on public procurement', as referred to in paragraph 48 of the judgment in Case C-480/06 *Commission* v *Germany*.

25 In that context, the Oberlandesgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is a "public contract" within the meaning of Article 1(2)(a) of Directive 2004/18/EC … to be understood as … meaning a contract between two local authorities whereby one of them assigns strictly limited competence to the other in return for the reimbursement of costs, in particular where the task assigned concerns only ancillary business, not official activities as such?'

The question referred for a preliminary ruling

26 By its question, the referring court asks, in essence, whether a contract such as that at issue in the present case – whereby one public entity assigns to another public entity the task of cleaning certain office, administrative and school buildings, the latter entity being authorised to avail of the services of third parties for the accomplishment of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task, while reserving the power to supervise the proper execution of that task – constitutes a public service contract within the meaning of Article 1(2)(d) of Directive 2004/18, and is, as such, subject to the provisions of that directive.

27 In that regard, it must be noted that, by the draft contract at issue in the main proceedings, Kreis Düren reserves to itself such a supervisory power, as that contract provides that Kreis Düren may terminate it unilaterally in the event of improper implementation on the part of Stadt Düren.

28 It should be noted that, in accordance with Article 1(2) of Directive 2004/18, a contract for pecuniary interest concluded in writing between an economic operator and a contracting authority, and having as its object the provision of services referred to in Annex II A to that directive, is a public contract.

29 In that regard, first, it is immaterial, on the one hand, whether that operator is itself a contracting authority and, on the other hand, whether the body concerned is primarily profit-making, whether it is structured as an undertaking or whether it has a continuous presence on the market (judgment of 19 December 2012 in Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] ECR, paragraph 26).

30 Secondly, activities such as those which are the subject of the draft contract are building-cleaning services referred to in Annex II A, Category 14, to Directive 2004/18.

31 Thirdly, a contract must be considered as being 'for pecuniary interest', within the meaning of Article 1(2)(a) of Directive 2004/18 even if the remuneration provided for remains limited to reimbursement of the expenditure incurred to provide the agreed service (see, to that effect, *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 29).

32 Subject to the checks which must be carried out by the referring court, a contract such as that envisaged in the case in the main proceedings does appear to have all the characteristics referred to

above, and therefore constitutes, in principle, a public contract.

33 Moreover, such a contract does not appear to be one of the two types of contracts which, although entered into by public entities, do not come within the scope of European Union public procurement law.

34 The first type of contracts are those concluded by a public entity with a person who is legally distinct from that entity where, at the same time, that entity exercises over the person concerned a control which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or with entities which control it (see, to that effect, *Teckal*, paragraph 50, and *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 32).

35 In that respect, it is common ground that none of those conditions is satisfied in the context of a contract such as that envisaged in the case before the referring court. It is clear from the order for reference that, in the context of the main proceedings, first of all, neither entity controls the other. Moreover, the entity which is assigning the execution of a task to another, while it reserves the right to supervise the proper execution of that task, does not exercise over the second entity a control capable of being classified as similar to that which it exercises over its own departments. Lastly, that second entity is not carrying out the essential part of its activities for the first entity.

36 The second type of contracts are those which establish cooperation between public entities with the aim of ensuring that a public task that all of them have to perform is carried out (*Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 34).

37 In those circumstances, the European Union rules on public procurement are not applicable in so far as such contracts are concluded exclusively by public entities, without the participation of a private party, no private provider of services is placed in a position of advantage vis-à-vis competitors and implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest (*Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 35).

38 All of the above criteria are cumulative, with the result that a contract between public entities can fall outside the scope of European Union public procurement rules by virtue of that exception only if that contract fulfils all of those criteria (see, to that effect, *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraph 36).

39 However, it follows from the findings of the referring court that the aim of the draft contract at issue in the main proceedings does not appear to be to establish cooperation between the two contracting public entities with a view to carrying out a public task that both of them have to perform.

40 Furthermore, it also follows from those findings that that contract authorises the use of the services of a third party for the accomplishment of that task, with the result that that third party might be placed in a position of advantage vis-à-vis other undertakings active on the same market.

41 In the light of the foregoing, the answer to the question referred is that a contract such as that at issue in the main proceedings – whereby, without establishing cooperation between the contracting public entities with a view to carrying out a public service task that both of them have to perform, one public entity assigns to another the task of cleaning certain office, administrative and school buildings, while reserving the power to supervise the proper execution of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task, the second entity being, moreover, authorised to avail of the services of third parties which might be capable of competing on the market for the accomplishment of that task – constitutes a public service contract within the meaning of Article 1(2)(d) of Directive 2004/18.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting

observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

A contract such as that at issue in the main proceedings – whereby, without establishing cooperation between the contracting public entities with a view to carrying out a public service task that both of them have to perform, one public entity assigns to another the task of cleaning certain office, administrative and school buildings, while reserving the power to supervise the proper execution of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task, the second entity being, moreover, authorised to avail of the services of third parties which might be capable of competing on the market for the accomplishment of that task – constitutes a public service contract within the meaning of Article 1(2)(d) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

[Signatures]

---

* Language of the case: German.

JUDGMENT OF THE COURT (Seventh Chamber)

18 October 2012 (*)

(Directive 2004/18/EC — Public works contracts, public supply contracts and public service contracts — Articles 44(2) and 47(1)(b), (2) and (5) — Economic and financial standing of tenderers — Minimum capacity established on the basis of a single accounting indicator — Accounting indicator liable to be influenced by divergences between national laws as regards annual company accounts)

In Case C-218/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from Fővárosi Ítélőtábla (Hungary), made by decision of 20 April 2011, received at the Court on 11 May 2011, in the proceedings

Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövízig),

Hochtief Construction AG Magyarországi Fióktelepe, now Hochtief Solutions AG Magyarországi Fióktelepe,

v

Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság,

intervening parties:

Vegyépszer Építő és Szerelő Zrt,

MÁVÉPCELL Kft,

THE COURT (Seventh Chamber),

composed of G. Arestis, acting for the President of the Chamber, J. Malenovský and D. Šváby (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 29 March 2012,

after considering the observations submitted on behalf of:

– Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövízig), by G. Buda, A. Cséza and D. Kuti, ügyvédek,

– Hochtief Construction AG Magyarországi Fióktelepe, now Hochtief Solutions AG Magyarországi Fióktelepe, by Z. Mucsányi, ügyvéd,

– the Hungarian Government, by Z. Fehér, K. Szíjjártó and G. Koós, acting as Agents,

– the Czech Government, by M. Smolek and T. Müller, acting as Agents,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the European Commission, by A. Tokár and A. Sipos, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 44(2) and 47(1)(b), (2) and (5) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference has been made by the Fővárosi Ítélőtábla (Budapest Court of Appeal) (Hungary), sitting in an appeal against a decision of the Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság (Public Procurement Arbitration Board of the Public Procurement Council), the administrative arbitration authority. The decision was made in a dispute between Hochtief Construction AG Magyarországi Fióktelepe, now Hochtief Solutions AG Magyarországi Fióktelepe ('Hochtief Hungary'), the Hungarian subsidiary of Hochtief Solutions AG, a company incorporated under German law, and Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövízig) (North Transdanubia Environmental Protection and Water Management Directorate, 'Édukövízig') regarding a restricted tendering procedure launched by the latter body. In those proceedings, brought by Hochtief Hungary, the arbitration authority is the defendant and Édukövízig is an applicant, together with Hochtief Hungary.

Legal context

European Union law

Directive 2004/18

3 Directive 2004/18 includes the following recitals:

'...

(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

...

(39) Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.

(40) A contracting authority may limit the number of candidates in the restricted and negotiated procedures with publication of a contract notice, and in the competitive dialogue. Such a reduction of candidates should be performed on the basis of objective criteria indicated in the contract notice. ...

...'

4 Under Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts':

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Article 44 of the Directive, entitled 'Verification of the suitability and choice of participants and award of contracts', provides:

'1. Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55 … after the suitability of the economic operators … has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

These minimum levels shall be indicated in the contract notice.

3. In restricted procedures, negotiated procedures with publication of a contract notice and in the competitive dialogue procedure, contracting authorities may limit the number of suitable candidates they will invite to tender, to negotiate or to conduct a dialogue with, provided a sufficient number of suitable candidates is available. The contracting authorities shall indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply …

...'

6 Article 47 of the Directive, entitled 'Economic and financial standing', provides:

'1. Proof of the economic operator's economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

2. An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

3. Under the same conditions, a group of economic operators as referred to in Article 4 may rely on the capacities of participants in the group or of other entities.

4. Contracting authorities shall specify, in the contract notice or in the invitation to tender, which reference or references mentioned in paragraph 1 they have chosen and which other references must be provided.

5. If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.'

Directive 78/660/EEC

7 As is apparent from its first recital, Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article [44(2)(g)] of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11) brought about the harmonisation of national provisions concerning, inter alia, the presentation and content of annual accounts and valuation methods and publication thereof in respect of certain companies with limited liability. Article 1(1) of that directive, which lists the types of companies concerned, includes, as regards the Federal Republic of Germany, the 'Aktiengesellschaft'.

8 However, the harmonisation brought about by that directive is only partial. Thus, it includes the provision, in Article 6, that the Member States may authorise or require adaptation of the layout of the balance sheet and profit and loss account in order to include the appropriation of profit.

German and Hungarian law

9 It is clear from the order for reference that both the German and the Hungarian legislation on the annual accounts of companies provide that the item on the balance sheet relating to profit or loss must take account of the distribution of dividends. However, while the Hungarian legislation authorises that practice only where it does not have the effect of making that item in the balance sheet negative, the German legislation does not provide for any such restriction, at least as regards the transfer of profits from a subsidiary to a parent company.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 By notice published in the *Official Journal of the European Union* of 25 July 2006, Édukövízig launched a restricted procedure for awarding a public contract for transport infrastructure works. According to the file, the estimated value of those works was between HUF 7.2 billion and HUF 7.5 billion or between EUR 23 300 000 and EUR 24 870 000 approximately.

11 As regards the economic and financial standing of the candidates, the awarding authority required the production of a uniform document, drawn up in accordance with the accounting rules, and fixed a minimum level in so far as it required requiring that the profit/loss item in the balance sheet should not have been negative for more than one of the last three completed financial years ('the economic requirement').

12 Hochtief AG is the parent company of the group to which Hochtief Solutions AG, a wholly owned subsidiary, belongs. They are companies incorporated under German law. Hochtief Hungary is the Hungarian subsidiary of Hochtief Solutions AG. According to the order for reference, Hochtief Hungary has, at the very least, the option of relying exclusively on the position of Hochtief Solutions AG as regards the economic requirement.

13 Under a profit transfer agreement, Hochtief Solutions AG must transfer any profit that it makes to its parent company every year, so that the profit recorded in the balance sheet of Hochtief Solutions AG is systematically zero or negative.

14 Hochtief Hungary questioned the lawfulness of the economic requirement on the ground that it was discriminatory and breached certain provisions of the Hungarian law implementing Directive 2004/18.

15 The referring court explained, in that connection, that, under the rules on annual accounts applicable to companies incorporated under German law, or at least to groups of companies incorporated under German law, it is possible for a company to show a positive profit/loss after tax but a negative profit/loss in the balance sheet because of a distribution of dividends or a transfer of profits exceeding the profit after tax, whereas the Hungarian legislation prohibits any distribution of dividends which would result in a negative profit/loss in the balance sheet.

16 Hochtief Hungary challenged the lawfulness of the economic requirement before the Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság. Hochtief Hungary brought an action against the decision of the latter before the court of first instance and subsequently appealed to the referring court.

17 Before the referring court, Hochtief Hungary argued that the economic requirement does not allow a non-discriminatory and objective comparison of the candidates to be made, since the rules on annual accounts of companies as regards the payment of dividends within groups of undertakings may vary from one Member State to another. That, in any event, was the case with regard to Hungary and the Federal Republic of Germany. The economic requirement was indirectly discriminatory because it disadvantaged candidates who were unable to fulfil it, or could do so only with difficulty, because they are subject, in the Member State where they are established, to different legislation from that which is applicable in the Member State of the awarding authority.

18 The referring court finds, first, that it is clear from Articles 44(2) and 47(1)(b) of Directive 2004/18 that a contracting authority may fix a minimum level of economic and financial standing with reference to the balance sheet and, second, that Article 47 takes account of the differences which may exist between national legislations relating to the annual accounts of companies. Therefore, it raises the question of how it is possible to define a minimum level of economic and financial standing which is comparable whatever the place of establishment of a company where that level must be proven by documents which constitute the references mentioned in Article 47(1)(b), but the content of and information provided by which may differ from one Member State to another.

19 Against that background, the Fővárosi Ítélőtábla decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is the requirement that the minimum capacity levels stipulated in Article 44(2) of Directive 2004/18 … be in accordance with Article 47(1)(b) of that Directive to be interpreted in such a way that the contracting authority is entitled to link the minimum capacity levels to a single indicator in an accounting document (balance sheet) that it selects to monitor economic and financial standing?

2. If the answer to the first question is yes, [is] the consistency requirement laid down by Article 44(2) of [that] Directive … fulfilled by data selected for assessment of the minimum capacity levels (profit/loss according to the balance sheet), where such data has different content pursuant to the accounting legislation of individual Member States?

3. Is it sufficient, for the purposes of correcting any discrepancies which doubtless exist between Member States, if the contracting authority ensures that there is an opportunity to employ external resources (Article 47[(2) of Directive 2004/18]), in addition to the documents selected as proof of economic and financial standing, or must the contracting authority, in order to meet the requirement of consistency as regards all the documents selected by it, ensure that that capacity can be demonstrated in another manner (Article 47(5) [of that Directive])?’

Admissibility of the question referred for a preliminary ruling

20 Édukövízig maintains, as a preliminary point, that the reference for a preliminary ruling is inadmissible on two grounds. First, it concerns legal matters which, as they were not discussed during the procedure prior to the proceedings pending before the referring court, have no relevance to the dispute which is actually before that court. Second, the economic requirement does not, it argues, raise any real difficulty since Hochtief Hungary could have either relied on its own balance sheet, which would have allowed it to meet that requirement, or acted on behalf of Hochtief Solutions AG, which, in the light of the profit transfer contract with its parent company, Hochtief AG, should, under the legislation

applicable to it, have relied on the economic and financial standing of the latter, which is legally liable, which would also have been sufficient to meet the economic requirement.

21 As regards the first ground of inadmissibility thus raised, it must be observed that it concerns the ambit of the case before the referring court as determined by the application of the national procedural rules, a question whose consideration does not fall within the jurisdiction of this Court.

22 As regards the second ground of inadmissibility, it is based on the alleged consequences of the assessment of factual matters which have to do either with Hungarian law, that is to say, the possibility that Hochtief Hungary could meet the economic requirement itself, or with German company law, that is to say, the possibility that Hochtief Solutions AG could meet that same requirement as a result of the obligation to rely on the economic standing of its parent company, which are matters which it is not for this Court to assess.

23 For the rest, it must be borne in mind that, within the framework of the cooperation between the Court of Justice and national courts and tribunals established by Article 267 TFEU, it is solely for the national court to determine, in the light of the particular circumstances of each case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The Court can refuse a request submitted by a national court only where it is quite obvious that the ruling sought by that court on the interpretation of European Union law bears no relation to the actual facts of the main action or its purpose or where the problem is general or hypothetical (see, inter alia, Case C-203/09 *Volvo Car Germany* [2010] ECR I-10721, paragraph 23 and the case-law cited).

24 As none of those situations arises here, the questions referred by the referring court must be answered.

The questions referred for a preliminary ruling

The first and second questions

25 By its first and second questions, which should be considered together, the referring court essentially asks whether Articles 44(2) and 47(1)(b) of Directive 2004/18 must be interpreted as meaning that a contracting authority may fix a minimum level of economic and financial standing with reference to a given item on the balance sheet, even if there may be differences as regards that item between the legislations of the various Member States and, as a result, in the balance sheets of companies, depending on the legislation to which they are subject as regards the preparation of their annual accounts.

26 Under the first subparagraph of Article 44(2) of Directive 2004/18, a contracting authority may require minimum levels of economic and financial standing in accordance with Article 47 of that directive. Article 47(1)(b) provides that a contracting authority may ask candidates and tenderers to provide proof of that standing through the presentation of their balance sheet.

27 However, it must be observed that a minimum level of economic and financial standing cannot be established by reference to the balance sheet in general. It follows that the option provided for in the first subparagraph of Article 44(2) of Directive 2004/18 can be implemented, as regards Article 47(1)(b), only by reference to one or more particular aspects of the balance sheet.

28 As to the choice of those aspects, Article 47 of Directive 2004/18 leaves a fair degree of freedom to the contracting authorities. Unlike Article 48 of the Directive which, as regards technical and professional capacity, establishes a closed system which limits the methods of assessment and verification available to those authorities and, therefore, limits their opportunities to lay down requirements (see, as regards the similar provisions in earlier directives than Directive 2004/18, Case 76/81 *Transporoute et travaux* [1982] ECR 417, paragraphs 8 to 10 and 15), Article 47(4) expressly authorises contracting authorities to choose the probative references which must be produced by candidates or tenderers to furnish proof of their economic and financial standing. As Article 44(2) of Directive 2004/18 refers to Article 47, the same freedom of choice exists as regards the minimum levels of economic and financial standing.

29 However, that freedom is not unlimited. Under the second subparagraph of Article 44(2) of Directive 2004/18 a minimum capacity level must be related and proportionate to the subject-matter of the contract. It follows that the aspect or aspects of the balance sheet chosen by a contracting authority to establish a minimum level of economic and financial standing must be objectively such as to provide information on such standing of an economic operator and that the threshold thus fixed must be adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose.

30 As the legislations of the Member States regarding the annual accounts of companies have not been the subject of full harmonisation, it cannot be ruled out that there may be differences between those legislations as regards a particular aspect of the balance sheet by reference to which a contracting authority established a minimum capacity level. However, it must be observed that, as is clear from the wording of Article 47(1)(b) and (c), and (5), Directive 2004/18 contains the idea that, as regards proof of the economic and financial standing of candidates or tenderers, a reference may legitimately be required by a contracting authority even if, objectively, not every candidate or tenderer is able to produce it, if only, in the case of Article 47(1)(b), because of a difference in legislation. Therefore, such a requirement cannot, in itself, be considered to constitute discrimination.

31 It follows that the requirement of a minimum level of economic and financial standing cannot, in principle, be disregarded solely because proof of that level has to be furnished by reference to an aspect of the balance sheet regarding which there may be differences between the laws of the different Member States.

32 Consequently, the answer to the first and second questions referred is that Article 44(2) and Article 47(1)(b) of Directive 2004/18 must be interpreted as meaning that a contracting authority may require a minimum level of economic and financial standing by reference to one or more particular aspects of the balance sheet, provided that those aspects are such as to provide information on such standing of an economic operator and that that level is adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose. The requirement of a minimum level of economic and financial standing cannot, in principle, be disregarded solely because that level relates to an aspect of the balance sheet regarding which there may be differences between the legislations of the different Member States.

The third question

33 By its third question, the referring court essentially asks whether Article 47 of Directive 2004/18 must be interpreted as meaning that, where an economic operator cannot meet a minimum level of economic and financial standing because of a difference between the legislations of the Member States in which it and the contracting authority respectively are established as regards the item in the balance sheet by reference to which that minimum capacity was defined, it is sufficient for that operator to rely on the capacities of another entity, in accordance with Article 47(2), or if it must be authorised to prove its economic and financial standing by any other appropriate document, in accordance with Article 47(5).

34 It must, however, be observed that, as is clear from the order for reference, the divergence of legislation at issue in the case in the main proceedings does not concern the scope of the item of the balance sheet covered by the economic requirement, that is to say the profit/loss recorded in the balance sheet. Both the German and Hungarian legislations provide that that item takes account of the profit or loss of the financial year and the distribution of dividends. However, those legislations differ in that the Hungarian law prohibits the distribution of dividends or the transfer of profits from having the consequence of making that item negative, whereas the German law does not prohibit that, in any event not in the situation of a subsidiary like Hochtief Solutions AG, which is linked to its parent company by a profit transfer agreement.

35 Therefore, that difference in legislation concerns the fact that, unlike the Hungarian law, the German law does not limit the possibility which a parent company has of deciding that the profits of its subsidiary will be transferred to it, even if that transfer has the effect of making the profit/loss in the balance sheet negative for that subsidiary, without, however, requiring such a transfer of profits.

36 Consequently, it must be held that, by its question, the referring court seeks to know whether Article 47 of Directive 2004/18 must be interpreted as meaning that, where an economic operator is unable to meet a minimum level of economic and financial standing such as the economic requirement because of an agreement under which that economic operator systematically transfers its profits to its parent company, it is sufficient for that operator to be able to rely on the capacities of another entity, in accordance with Article 47(2), or whether it must be authorised to prove its economic standing by any other appropriate document, in accordance with Article 47(5), having regard to the fact that such an agreement is authorised without limitation by the legislation of the Member State of establishment of that economic operator, whereas, under the legislation of the Member State of establishment of the contracting authority, it would only be authorised on condition that the transfer of profits does not have the effect of making the profit/loss in the balance sheet negative.

37 It appears that, in such a situation, the fact that a subsidiary is unable to meet a minimum level of economic and financial standing defined by reference to a particular aspect of the balance sheet is, in the final analysis, the result, not of a difference in legislation, but of a decision by its parent company which obliges that subsidiary to transfer all its profits systematically to it.

38 In that situation, that subsidiary has only the option provided for by Article 47(2) of Directive 2004/18, which allows it to rely on the economic and financial standing of another entity by producing the undertaking of that entity to make the necessary resources available to it. Clearly, that option is particularly suited to such a situation, since the parent company may thus itself remedy the fact that it has placed its subsidiary in a position in which it cannot meet the minimum capacity level.

39 The answer to the third question is therefore that Article 47 of Directive 2004/18 must be interpreted as meaning that where an economic operator cannot meet a minimum level of economic and financial standing consisting in a requirement that the profit/loss item in the balance sheet of candidates or tenderers should not be negative for more than one of the last three completed financial years, because of an agreement under which that economic operator systematically transfers its profits to its parent company, that operator has no other option, in order to meet that minimum capacity level, than to rely on the capacities of another entity, in accordance with Article 47(2). It is irrelevant in that regard that the legislation of the Member State of establishment of that economic operator and that of the Member State of establishment of the contracting authority differ in that such an agreement is authorised without limitation by the legislation of the first Member State whereas, under the legislation of the second, it would only be authorised on condition that the transfer of profits does not have the effect of making the profit/loss item in the balance sheet negative.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

1. **Articles 44(2) and 47(1)(b) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that a contracting authority may require a minimum level of economic and financial standing by reference to one or more particular aspects of the balance sheet, provided that those aspects are such as to provide information on such standing of an economic operator and that that level is adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose. The requirement of a minimum level of economic and financial standing cannot, in principle, be disregarded solely because that level relates to an aspect of the balance sheet regarding which there may be differences between the legislations of the different Member States.**

2. **Article 47 of Directive 2004/18 must be interpreted as meaning that where an economic operator cannot meet a minimum level of economic and financial standing consisting in a requirement that the profit/loss item in the balance sheet of candidates or tenderers should not be negative for more than one of the last three completed financial years, because of an agreement under which that economic operator systematically transfers its profits to its parent company, that operator has no other option, in order to meet that minimum capacity level, than to rely on the capacities of another entity, in accordance with Article 47(2). It is irrelevant in that regard that the legislation of the Member State of establishment of that economic operator and that of the Member State of establishment of the contracting authority differ in that such an agreement is authorised without limitation by the legislation of the first Member State whereas, under the legislation of the second, it would only be authorised on condition that the transfer of profits does not have the effect of making the profit/loss item in the balance sheet negative.**

[Signatures]

---

* Language of the case: Hungarian.

JUDGMENT OF THE COURT (First Chamber)

8 May 2013 (*)

(Fundamental freedoms – Restriction – Justification – State aid – Concept of 'public works contract' – Land and buildings located in certain communes – National legislation making the transfer of land and buildings subject to the condition that there exists a 'sufficient connection' between the prospective buyer or tenant and the target commune – Social obligation on subdividers and developers – Tax incentives and subsidy mechanisms)

In Joined Cases C-197/11 and C-203/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Belgium), made by decision of 6 April 2011, received at the Court on 28 April 2011, in the proceedings

Eric Libert,

Christian Van Eycken,

Max Bleeckx,

Syndicat national des propriétaires et copropriétaires ASBL,

Olivier de Clippele

v

Gouvernement flamand,

intervening parties:

Collège de la Commission communautaire française,

Gouvernement de la Communauté française,

Conseil des ministres (C-197/11),

and

All Projects & Developments NV and Others,

v

Vlaamse Regering,

intervening parties:

College van de Franse Gemeenschapscommissie,

Franse Gemeenschapsregering,

Ministerraad,

Immo Vilvo NV,

PSR Brownfield Developers NV (C-203/11),

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, M. Ilešič, E. Levits, J.-J. Kasel and M. Safjan, Judges,

Advocate General: J. Mazák,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 20 June 2012,

after considering the observations submitted on behalf of:

– Mr Libert, Mr Van Eycken and Mr Bleeckx, by F. Gosselin, avocat,

– the Syndicat national des propriétaires and copropriétaires ASBL, by C. Lesaffer and E. Desair, avocats,

– All Projects & Developments NV and Others, by P. de Bandt and J. Dewispelaere, advocaten,

– the Vlaamse Regering, by P. van Orshoven and A. Vandaele, advocaten,

– the Collège de la Commission communautaire française and the gouvernement de la Communauté française, by M. Uyttendaele and J. Sautois, avocats,

– Immo Vilvo NV, by P. Flamey and P.J. Vervoort, advocaten,

– the German Government, by T. Henze and A. Wiedmann, acting as Agents,

– the Netherlands Government, by C. Wissels, C. Schillemans and K. Bulterman, acting as Agents,

– the European Commission, by T. van Rijn, I. Rogalski, S. Thomas and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 October 2012,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

2 The requests have been made in two sets of proceedings brought against the Vlaamse Regering (Flemish Government) by, on the one hand, Mr Libert, Mr Van Eycken, Mr Bleeckx, the Syndicat national des propriétaires et copropriétaires ASBL and Mr de Clippele and, on the other, All Projects & Developments NV and 35 other companies concerning provisions which make the transfer of property located in certain communes selected by the Vlaamse Regering (‘the target communes’) subject to a ‘special condition’ that the property may be ‘transferred’, meaning sold, leased for more than nine years or subject to a grant of a right under a long-term lease or a building lease, only to persons who have, in the opinion of a provincial assessment committee, a ‘sufficient connection’ with the communes in question.

3 In addition, in Case C-203/11, the Grondwettelijk Hof (Constitutional Court) asks the Court whether Articles 49 TFEU, 56 TFEU, 63 TFEU, 107 TFEU and 108 TFEU, Directive 2006/123/EC of the

European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), as amended by Regulation (EC) No 596/2009 of the European Parliament and of the Council of 18 June 2009 (OJ 2009 L 188, p. 14) ('Directive 2004/18'), preclude provisions which impose, in certain situations, a 'social obligation' on persons who subdivide areas of land into plots (subdividers) and developers, which entails, in essence, the use of part of their building project for the development of social housing units or the payment of a social contribution, in return for which those operators may benefit from tax incentives and subsidy mechanisms.

Legal context

European Union law

4 Article 1 of Directive 2004/18 provides:

'(1) For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

(2) (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) "Public works contracts" are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A "work" means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

…'

5 Under Article 1 of Directive 2004/38:

'This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by [European] Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.'

6 Article 3(1) of Directive 2004/38 is worded as follows:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

7 Article 22 of Directive 2004/38, which is entitled 'Territorial scope', provides:

'The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.'

8 Article 24 of Directive 2004/38, which is entitled 'Equal treatment', provides in paragraph 1:

‘Subject to such specific provisions as are expressly provided for in the [EC] Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.’

9 Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) [EC] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2005 L 312, p. 67) (‘the SGEI Decision’), provides in Article 1:

‘This Decision sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is to be regarded as compatible with the common market and exempt from the requirement of notification laid down in Article 88(3) [EC].’

10 Article 3 of the SGEI Decision, which is entitled ‘Compatibility and exemption from notification’, provides:

‘State aid in the form of public service compensation that meets the conditions laid down in this Decision shall be compatible with the common market and shall be exempt from the obligation of prior notification provided for in Article 88(3) of the Treaty, without prejudice to the application of stricter provisions relating to public service obligations contained in sectoral Community legislation.’

11 Recital 9 in the preamble to Directive 2006/123 is worded as follows:

‘This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards …’

12 Article 2 of Directive 2006/123, which is entitled ‘Scope’, provides:

‘(1) This Directive shall apply to services supplied by providers established in a Member State.

(2) This Directive shall not apply to the following activities:

(a) non-economic services of general interest;

…

(j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;

…’

Belgian law

13 Book 4 of the Decree of the Flemish Region of 27 March 2009 on land and real estate policy (*Belgisch Staatsblad* of 15 May 2009, p. 37408) (‘the Flemish Decree’) on ‘Measures concerning affordable housing’ contains, in Chapter 3 of Title 1, which is entitled ‘Social obligations’, Article 4.1.16 which is worded as follows:

‘(1) Where a land subdivision project or building project is subject to a rule as defined under Chapter 2, Section 2, a social obligation shall be linked by operation of law to the land subdivision authorisation or, as the case may be, the planning permission.

A social obligation … shall require a subdivider or developer to take steps to ensure delivery of a supply of social housing units consistent with the percentage applicable to the land subdivision or building project.

…’

14 Article 4.1.17 in Chapter 3 of the Flemish Decree provides:

‘The subdivider or developer shall have the option of discharging a social obligation in one of the following ways:

1. in kind, in accordance with Articles 4.1.20 to 4.1.24;

2. by the sale to a social housing organisation of the land required for the prescribed supply of social housing, in accordance with Article 4.1.25;

3. by the leasing to a social rental agency of housing developed in the context of a land subdivision or building project, in accordance with Article 4.1.26;

4. by a combination of points 1, 2 and/or 3.’

15 Under Article 4.1.19 of the Flemish Decree:

‘The subdivider or developer may discharge in whole or in part a social obligation through payment of a social contribution to the commune in which the land subdivision project or building project is developed. The social contribution shall be calculated by multiplying the number of social housing units or social lots which are in principle to be developed by EUR 50 000 and by indexing that amount on the basis of the ABEX index, the reference index being that of December 2008. …’

16 Articles 4.1.20 to 4.1.24 of the Flemish Decree provide, for the benefit of private undertakings discharging the ‘social obligation’ in kind, tax incentives and subsidy mechanisms such as the application of a reduced rate of value added tax (VAT) and a reduced rate of stamp duty (Article 4.1.20(3), second subparagraph), a purchase guarantee in respect of the housing developed which no social housing organisation is prepared to purchase (Article 4.1.21) and infrastructure subsidies (Article 4.1.23).

17 Under Article 4.1.22 of the Flemish Decree:

‘Social housing units for purchase and social lots developed on the basis of the social obligation shall be offered in the name and on behalf of the subdivider or developer by a social housing organisation operating in the commune. The offer shall be made in accordance with the conditions established by the Flemish Government on the transfer of immovable property by the Vlaamse Maatschappij voor Sociaal Wonen and the social housing organisations. The subdivider or developer and the social housing organisation shall to that end conclude an administration agreement.

The social housing organisation shall, with regard to the social housing units for purchase and the social lots in question, exercise all the rights defined in or arising under the Flemish Housing Code, as if they had themselves developed the social housing units for purchase and the social lots.’

18 Book 3 of the Flemish Decree also provides for subsidies to be granted irrespective of whether any ‘social obligation’ is discharged. In particular, these are subsidies for ‘activation projects’ (Article 3.1.2 of that decree), a reduction in the tax on natural persons which is obtained on conclusion of renovation agreements (Articles 3.1.3 et seq. of that decree) and a flat-rate reduction of the taxable amount for stamp duty (Article 3.1.10 of that decree).

19 Book 5 of the Flemish Decree, which is entitled ‘Living in your own region’, provides in Article 5.2.1:

‘(1) A specific requirement shall apply to the transfer of land and buildings constructed thereon in regions which satisfy the two conditions referred to below:

1. the land and buildings constructed thereon are within a “residential extension area” laid down by the Royal Decree of 28 December 1972 on the presentation and implementation of draft plans and sector plans, as at the date of entry into force of this decree;

2. the land and buildings constructed thereon are, when the private transfer instrument is signed, located in the target communes which appear on the most recent list published in the *Belgisch Staatsblad*, as prescribed in Article 5.1.1, it being understood that the private transfer instrument shall be regarded for the application of this provision as having being signed six months before attribution of a fixed date, if more than six months have elapsed between the date of signature and the date of attribution of a fixed date.

The special transfer condition means that the land and buildings constructed thereon may be transferred only to persons who have, in the opinion of a provincial assessment committee, a sufficient connection with the commune. “Transfer” shall mean sale, leasing for more than nine years, or grant of a right under a long-term lease or a building lease.

…

The special transfer condition shall expire, definitively and without any right of renewal, twenty years after the date of attribution of a fixed date to the initial transfer subject to the condition.

…

(2) For the purposes of [Article 5.2.1, second subparagraph], a person shall have a sufficient connection with the commune if he satisfies one or more of the following conditions:

1. he has been continuously resident in the commune or in a neighbouring commune for at least six years, provided that that commune is also included on the list prescribed in Article 5.1.1;

2. on the date of transfer, he carries out activities in the commune, provided that those activities occupy on average at least half a working week;

3. he has established a professional, family, social or economic connection to the commune as a result of a significant circumstance of long duration.

…’

20 For the purposes of the application of those provisions, the ‘target communes’, in accordance with Article 5.1.1 of the Flemish Decree, are the communes in which the average price of land is highest per square metre and in which internal or external migration is highest. Under the Order of the Flemish Government of 19 June 2009 establishing a list of communes for the purposes of Article 5.1.1(1) of the Decree of 27 March 2009 on land and real estate policy (*Belgisch Staatsblad* of 22 September 2009, p. 63341) that there are 69 target communes.

21 Lastly, under Article 5.2.3 of the Flemish Decree, the provincial assessment committee and third parties who are adversely affected may apply for annulment of a transfer which has taken place in disregard of the special condition.

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-197/11

22 In Case C-197/11, Mr Libert, Mr Van Eycken and Mr Bleeckx, who are resident in Belgium, the Syndicat national des propriétaires et copropriétaires ASBL and Mr de Clippele, notary, applied to the Cour constitutionnelle (Constitutional Court) for annulment of the provisions of Book 5 of the Flemish Decree on the ground that they restrict the right to purchase or sell property in the target communes.

23 In its order for reference, the Constitutional Court states in that connection that the contested provisions limit the opportunities for people who are not considered to have a ‘sufficient connection’ with the target communes, within the meaning of Article 5.2.1(2) of the Flemish Decree, to acquire land or buildings thereon, to take out a lease of more than nine years or to acquire rights to a long lease or building lease, in those communes. Moreover, the contested provisions may have the effect of deterring citizens of the Union who own or rent a property in those communes from leaving them to

reside in another Member State or pursue a professional activity there since after a certain period of residence outside those communes, they would no longer have a ‘sufficient connection’ to them.

24 In that regard, the Constitutional Court considers that, according to the *travaux préparatoires* of the Flemish Decree, its purpose is to respond to the housing needs of the local population in certain Flemish communes where the high land prices lead to ‘gentrification’, whereby less affluent population groups are excluded from the property market due to the arrival of ‘financially stronger’ population groups from other communes. The Constitutional Court is therefore uncertain, first, whether such an objective can be regarded as being in the ‘public interest’ in the light of the Court’s case-law and thus as justifying the restrictive measures adopted by the Flemish Government and, second, whether those measures are necessary and proportionate to attain such an objective.

25 In those circumstances, the Constitutional Court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Are Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38 … to be interpreted as precluding the scheme established by Book 5 of the [Flemish] Decree which, in certain communes referred to as “target communes”, makes the transfer of land and buildings thereon conditional upon the purchaser or the lessee demonstrating a sufficient connection with those communes for the purposes of Article [5.2.1(2)] of the Decree?’

Case C-203/11

26 The dispute in the main proceedings concerns an application for annulment of several provisions of the Flemish Decree brought before the Constitutional Court by All Projects & Developments NV and 35 other companies governed by Belgian law and professionally active in the property sector in the Flemish Region.

27 Those companies claim that the social obligation imposed on them pursuant to Book 4 of the Flemish Decree is contrary to European Union (‘EU’) law, in particular the freedom of establishment, the freedom to provide services and the free movement of capital, and Directives 2006/123 and 2004/18, and that the tax incentives and subsidy mechanisms, provided for in Book 4, from which they benefit in return for discharging the social obligation, may constitute unlawful State aid which could be subject to a recovery order as they were not notified to the European Commission.

28 Moreover, those companies claim that the ‘special condition’ relating to the transfer of property, provided for in Book 5 of the Flemish Decree, constitutes an obstacle to the exercise of rights under EU law and fundamental freedoms under the FEU Treaty given that, as a result of the application of that condition, there has been a reduction in the number of potential buyers for the lots and housing units developed by those companies in the target communes.

29 In that context, having doubts as to the interpretation of the relevant provisions of EU law, the Constitutional Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Should Articles 107 [TFEU] and 108 [TFEU], whether or not read in conjunction with [the SGEI Decision], be interpreted as requiring that the measures contained in Articles 3.1.3, 3.1.10, 4.1.20(3)(2), 4.1.21 and 4.1.23 of the [Flemish Decree] should be notified to the European Commission before the adoption or entry into force of those provisions?

2. Should a scheme which by operation of law imposes on private actors whose land subdivision or building projects are of a certain minimum size, a “social obligation” amounting to a percentage of a minimum of 10% and a maximum of 20% of that land subdivision or that building project, which can be performed in kind or by the payment of a sum of [EUR] 50 000 for each social lot or dwelling not realised, be appraised against the freedom of establishment, against the freedom to provide services or against the free movement of capital, or should it be classified as a complex scheme which should be appraised against each of those freedoms?

3. Having regard to Article 2(2)(a) and (j) thereof, is Directive 2006/123 … applicable to a compulsory contribution by private actors to the delivery of social houses and apartments, which is imposed by operation of law as a "social obligation" linked to every building or land subdivision authorisation sought in respect of a project of a minimum size as determined by law, where the social housing units delivered are bought at predetermined capped prices by social housing companies to be rented out to a broad category of individuals, or, by substitution, are sold by the social housing company to individuals belonging to the same category?

4. If the third question referred is answered in the affirmative, should the concept of "requirement to be evaluated" in Article 15 of Directive 2006/123 … be interpreted as meaning that it covers an obligation on private actors to contribute, in addition to, or as part of their usual activity, to the construction of social housing, and to transfer the units developed at capped prices to semi-public authorities, or through substitution of the latter, even though those private actors then have no right of initiative in the social housing market?

5 If the third question referred is answered in the affirmative, should the national court apply a penalty, and if so, what penalty, to:

(a) the finding that a new requirement, subjected to evaluation in accordance with Article 15 of Directive 2006/123 …, was not specifically evaluated in accordance with Article 15(6) of that directive;

(b) the finding that no notification of that new requirement was given in accordance with Article 15(7) of that directive?

6. If the third question referred is answered in the affirmative, should the concept of "prohibited requirement" in Article 14 of Directive 2006/123 … be interpreted as precluding a national scheme, in the cases described in that article, not only if it makes access to a service activity or the exercise of it subject to compliance with a requirement, but also if that scheme merely provides that non-compliance with that requirement will cause the financial compensation for the performance of a service prescribed by law to lapse, and that the financial guarantee supplied in regard to the performance of the service will not be reimbursed?

7. If the third question referred is answered in the affirmative, should the concept of "competing operators" in Article 14(6) of Directive 2006/123 … be interpreted as meaning that it is also applicable to a public institution whose mandates can partially interfere with those of the service providers, if it takes the decisions referred to in Article 14(6) of that directive and it is also obliged, as the final step in a cascade system, to buy the social housing units developed by a service provider in the performance of the 'social obligation' imposed on him?

8. (a) If the third question referred is answered in the affirmative, should the concept "authorisation scheme" in Article 4(6) of Directive 2006/123 … be interpreted to mean that it is applicable to certificates issued by a public institution after the initial building or land subdivision authorisation has already been given, and which are necessary in order to qualify for certain of the compensations for the performance of a "social obligation" which was linked by law to the original authorisation and which are also necessary in order to claim the reimbursement of the financial guarantee imposed on the service provider in favour of the public institution?

(b) If the third question referred is answered in the affirmative, should the concept of "authorisation scheme" in Article 4(6) of Directive 2006/123 … be interpreted to mean that it is applicable to an agreement which a private actor concludes with a public institution pursuant to a legal rule in the context of the substitution of the public institution in respect of the sale of a social housing unit developed by the private actor in the performance, in kind, of a "social obligation" which is linked by law to a building or land subdivision authorisation, taking account of the fact that the conclusion of that agreement is a condition for the executability of the authorisation?

9. Should Articles 49 [TFEU] and 56 [TFEU] be interpreted as precluding a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a "social obligation" entailing the delivery of social housing units, amounting to a certain percentage of the project, which are subsequently to be sold at capped prices to a public institution, or with substitution by it?

10. Should Article 63 [TFEU] be interpreted as precluding a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a "social obligation" entailing the development of social housing units, amounting to a certain percentage of the project, which are subsequently to be sold at capped prices to a public institution, or with substitution by it?

11. Should the concept of "public works contracts" in Article 1(2)(b) of Directive 2004/18 … be interpreted to mean that it is applicable to a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a "social obligation" entailing the development of social housing units, amounting to a certain percentage of the project, which are subsequently to be sold at capped prices to a public institution, or with substitution by it?

12. Should Articles 21 [TFEU], 45 [TFEU], 49 [TFEU], 56 [TFEU] and 63 [TFEU] and Articles 22 and 24 of Directive 2004/38 … be interpreted as precluding the scheme introduced by Book 5 of the [Flemish Decree], namely the scheme whereby in certain so-called "target communes" the transfer of land and any buildings constructed thereon is made subject to the buyer or the tenant being able to demonstrate a sufficient connection with those communes within the meaning of Article 5.2.1(2) of that decree?'

30 By order of the President of the Court of 7 June 2011, Cases C-197/11 and C-203/11 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

The question in Case C-197/11 and the twelfth question in Case C-203/11

31 By those questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38 preclude legislation, such as Book 5 of the Flemish Decree, which makes the transfer of immovable property in the target communes subject to verification, by a provincial assessment committee, that there exists a 'sufficient connection' between the prospective buyer or tenant and those communes.

Preliminary observations

32 It must be noted at the outset that the Flemish Government claims that it is not necessary to answer those questions because, in its view, they concern only a purely internal situation quite unconnected to EU law. The actions in the main proceedings, which concern either Belgian nationals resident in Belgium or undertakings established under Belgian law, are confined within one single Member State so that the provisions of EU law relied upon are not applicable.

33 In that regard, it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by EU law and which are confined in all relevant respects within a single Member State (see Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 33, and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 45).

34 It is common ground that the applicants in the main proceedings are Belgian nationals and that all aspects of the main proceedings are confined within one Member State. However, it is by no means inconceivable that individuals or undertakings established in Member States other than the Kingdom of

Belgium have been or are interested in purchasing or leasing immovable property located in the target communes and are thus affected by the provisions of the Flemish Decree in question (see, to that effect, Case C-470/11 *Garkalns* [2012] ECR, paragraph 21 and the case-law cited).

35 Moreover, as the Advocate General has noted in point 23 of his Opinion, the referring court has made a request for a preliminary ruling to the Court specifically in proceedings for the annulment of those provisions, which apply not only to Belgian nationals but also to nationals of other Member States. Consequently, the decision of the referring court that will be adopted pursuant to the present judgment will also have effects on the nationals of other Member States.

36 In those circumstances, it is necessary for the Court to rule on those two questions.

The existence of a restriction of the fundamental freedoms guaranteed by the FEU Treaty

37 In that regard, it is necessary to establish whether, and to what extent, Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38 preclude legislation such as that at issue in the main proceedings.

38 It should be borne in mind, first, that Article 21 TFEU and, in their respective areas, Articles 45 TFEU and 49 TFEU, and Articles 22 and 24 of Directive 2004/38, prohibit national measures which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement within the European Union. Such measures, even if they apply without regard to the nationality of the individuals concerned, constitute restrictions on the fundamental freedoms guaranteed by those articles (see, to that effect, Case C-152/05 *Commission* v *Germany* [2008] ECR I-39, paragraphs 21 and 22; Case C-253/09 *Commission* v *Hungary* [2011] ECR I-12391, paragraphs 46, 47 and 86; and Case C-46/12 *L.N.* [2013] ECR, paragraph 28).

39 In the present case, as the Constitutional Court has stated in its orders for reference, the provisions of Book 5 of the Flemish Decree prevent persons without a ‘sufficient connection’ with a target commune, within the meaning of Article 5.2.1(2) of that decree, from purchasing land or buildings thereon, or from taking out a lease of more than nine years or from acquiring rights to a long lease or building lease.

40 In addition, those provisions deter Union citizens who own or rent a property in the target communes from leaving them to reside in another Member State or pursue a professional activity there. If they have not stayed in the commune for a certain period of time, those citizens will not necessarily have a ‘sufficient connection’ any more with the commune in question, as is required by Article 5.2.1(2) of the Flemish Decree for the purpose of exercising the rights referred to in the previous paragraph.

41 It follows that the provisions of Book 5 of the Flemish Decree undoubtedly constitute restrictions on the fundamental freedoms guaranteed by Articles 21 TFEU, 45 TFEU and 49 TFEU and Articles 22 and 24 of Directive 2004/38.

42 Next, as regards the freedom to provide services under Article 56 TFEU, the provisions of the Flemish Decree at issue may also hinder the business activities of undertakings active in the property sector, as regards both undertakings established in Belgium which offer their services to, inter alia, non-residents and undertakings established in other Member States.

43 By application of those provisions, immovable property located in a target commune cannot be sold or leased to just any Union citizen, but only to those demonstrating a ‘sufficient connection’ with the commune in question, which clearly restricts the freedom to provide services of the property undertakings in question.

44 Lastly, with regard to the free movement of capital, it should be borne in mind that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are likely to discourage residents of one Member State from making investments in immovable property in other Member States (see Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraph 21).

45 That is the case, in particular, of national measures which make investments in immovable property conditional upon a prior authorisation procedure and thus restrict, by their very purpose, the free movement of capital (see *Woningstichting Sint Servatius*, paragraph 22 and the case-law cited).

46 In the cases in the main proceedings, it is common ground that Book 5 of the Flemish Decree provides for such a prior authorisation procedure to verify the existence of a 'sufficient connection' between the prospective buyer or tenant of immovable property and the target commune in question.

47 It must thus be held that the obligation to submit to such a procedure is likely to discourage non-residents from making investments in immovable property in one of the target communes in the Flemish Region and that, therefore, such an obligation constitutes a restriction of the free movement of capital under Article 63 TFEU.

48 In those circumstances, the Court finds that the provisions of Book 5 of the Flemish Decree clearly constitute a restriction of the fundamental freedoms guaranteed by Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38.

Justification of the measures established by the Flemish Decree

49 It should be borne in mind that, according to well-established case-law, national measures which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the FEU Treaty may nevertheless be allowed provided that they pursue an objective in the public interest, are appropriate for attaining that objective and do not go beyond what is necessary to attain the objective pursued (see, inter alia, *Woningstichting Sint Servatius*, paragraph 25, and *Commission* v *Hungary*, paragraph 69).

50 In that regard, the Vlaamse Regering claims that the condition for the existence of a 'sufficient connection' between the prospective buyer or tenant and the commune in question is justified inter alia by the purpose of responding to the housing needs of the less affluent local population, in particular socially weak individuals and young families as well as single persons not yet in position to build up sufficient capital to purchase or rent immovable property in the target communes. That section of the local population is effectively excluded from the property market owing to the arrival of financially stronger population groups from other communes who can afford the high land and building costs in the target communes.

51 The objective of the regime set out in Book 5 of the Flemish Decree, as a regional planning measure, is thus to guarantee sufficient housing for the low-income or otherwise disadvantaged sections of the local population.

52 In that regard, it must be noted that such requirements relating to social housing policy in a Member State can constitute overriding reasons in the public interest and therefore justify restrictions such as those established by the Flemish Decree (see *Woningstichting Sint Servatius*, paragraphs 29 and 30, and Case C-400/08 *Commission* v *Spain* [2011] ECR I-1915, paragraph 74).

53 However, it is also important to establish whether the existence of a 'sufficient connection' with the target commune in question constitutes a necessary and appropriate measure to attain the objective put forward by the Vlaamse Regering, as referred to in paragraphs 50 and 51 above.

54 In that regard, it is relevant that Article 5.2.1(2) of the Flemish Decree sets out three conditions, any one of which is to be met and compliance with which must be verified as a matter of course by the provincial assessment committee in order to establish whether the requirement for a 'sufficient connection' between the prospective buyer or tenant and the target commune is satisfied. The first condition is the requirement that a person to whom the immovable property is to be transferred has been resident in the target commune or a neighbouring commune for at least six consecutive years prior to the transfer. In accordance with the second condition, the prospective buyer or tenant must, at the date of the transfer, carry out activities in the commune in question which occupy on average at least half a working week. The third condition requires the prospective buyer or tenant to have a professional, family, social or economic connection with the commune in question as a result of a significant circumstance of long duration.

55 However, as the Advocate General has noted in point 37 of his Opinion, none of those conditions directly reflects the socio-economic aspects relating to the objective put forward by the Vlaamse Regering of protecting exclusively the less affluent local population on the property market. Such conditions may be met not only by the less affluent local population but also by other persons with sufficient resources who, consequently, have no specific need for social protection on the property market. Those conditions thus go beyond what is necessary to attain the objective pursued.

56 In addition, it should be noted that less restrictive measures other than those set out in the Flemish Decree could meet the objective pursued without necessarily resulting in a *de facto* prohibition on purchasing or leasing by any prospective buyer or tenant who does not fulfil the aforementioned conditions. Provision could, for example, be made for subsidies for purchase or other subsidy mechanisms specifically designed to assist less affluent persons, in particular those who are able to prove that they have a low income, to purchase or rent immovable property in the target communes.

57 Lastly, it should be recalled, so far as concerns the third condition referred to in paragraph 54 above, requiring that the prospective buyer or tenant has a professional, family, social or economic connection with the commune in question as a result of a significant circumstance of long duration, that a prior administrative authorisation procedure cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EU law, in particular those relating to a fundamental freedom. Thus, if such a procedure is to be justified even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion (see, inter alia, *Woningstichting Sint Servatius*, paragraph 35 and the case-law cited).

58 However, in the light of the vague nature of that condition and in the absence of any specification of the situations in which it would be deemed to have been met in individual cases, the provisions of Article 5.2.1 of the Flemish Decree do not comply with such requirements.

59 Consequently, a prior administrative authorisation procedure, such as that at issue in the cases in the main proceedings, cannot be considered to be based on conditions capable of adequately circumscribing the exercise of the provincial assessment committee's discretion and such a procedure cannot therefore justify a derogation from a fundamental freedom guaranteed by EU law.

60 In the light of all the foregoing considerations, the answer to the question in Case C-197/11 and the twelfth question in Case C-203/11 is that Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38 preclude legislation, such as Book 5 of the Flemish Decree, which makes the transfer of immovable property in the target communes subject to verification, by a provincial assessment committee, that there exists a 'sufficient connection' between the prospective buyer or tenant and those communes.

The second, ninth and tenth questions in Case C-203/11

61 By these questions, the referring court asks, in essence, whether Articles 49 TFEU, 56 TFEU and 63 TFEU preclude legislation such as Book 4 of the Flemish Decree, according to which a 'social obligation' is imposed on some economic operators when a building or land subdivision authorisation is granted.

62 In order to reply to these questions, it should be observed as a preliminary point that, while that legislation may be within the ambit of the three fundamental freedoms alluded to by the referring court, the fact remains, as the Advocate General has noted in point 68 of his Opinion, that the restriction of the freedom of establishment and the freedom to provide services is, in the case in the main proceedings, an inevitable consequence of the restriction of the free movement of capital and, therefore, does not justify an independent examination of that legislation in the light of Articles 49 TFEU and 56 TFEU (see, to that effect, Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 51 and the case-law cited).

63 It follows that the scheme established by Book 4 of the Flemish Decree must be examined exclusively in the light of the free movement of capital.

64 In accordance with settled case-law, the measures prohibited by Article 63(1) TFEU include those which are likely to discourage residents of one Member State from making investments in immovable property in other Member States. That is the case, in particular, of national measures which make investments in immovable property conditional upon a prior authorisation procedure and thus restrict, by their very purpose, the free movement of capital (see *Woningstichting Sint Servatius*, paragraphs 21 and 22).

65 In the case in the main proceedings, it is common ground that, under Book 4 of the Flemish Decree, some subdividers or developers are required, for the grant of a building or land subdivision authorisation, to follow a procedure under which they must discharge a social obligation entailing the use of part of their building project for the development of social housing units or the payment of a financial contribution to the commune in which that project is developed.

66 In those circumstances, it must be concluded that, as stated by the referring court in its order for reference, since the investors in question cannot freely use the land for the purposes for which they wished to acquire it, the scheme established by Book 4 of the Flemish Decree constitutes a restriction of the free movement of capital.

67 However, it must be noted that, in accordance with the case-law referred to in paragraph 52 above, the obligation imposed on those economic operators to discharge the social obligation provided for by that decree, in so far as its purpose is to guarantee sufficient housing for the low-income or otherwise disadvantaged sections of the local population, may be justified by requirements relating to social housing policy in a Member State as an overriding reason in the public interest.

68 It is however for the referring court to assess, in the light of the circumstances of the case before it, whether such an obligation satisfies the principle of proportionality, that is to say, whether it is necessary and appropriate to attain the objective pursued.

69 In the light of all the foregoing considerations, the answer to the second, ninth and tenth questions in Case C-203/11 is that Article 63 TFEU must be interpreted as not precluding legislation such as Book 4 of the Flemish Decree, according to which a ‘social obligation’ is imposed on some economic operators when a building or land subdivision authorisation is granted, in so far as the referring court finds that that legislation is necessary and appropriate to attain the objective of guaranteeing sufficient housing for the low-income or otherwise disadvantaged sections of the local population.

The first question in Case C-203/11

70 By this question, the referring court asks, in essence, whether, in the light of Articles 107 TFEU and 108 TFEU, read in conjunction with the SGEI Decision, the tax incentives and subsidy mechanisms provided for in the Flemish Decree must be classified as State aid subject to the obligation to notify the Commission.

71 Some of the measures in question are designed specifically to compensate for the social obligation to which subdividers and developers are subject and consist in: (i) a reduced rate of VAT on the sale of housing and reduced stamp duty for the purchase of building land (Article 4.1.20(3), second subparagraph, of the Flemish Decree); (ii) a purchase guarantee in respect of the housing developed (Article 4.1.21 of that decree); and (iii) infrastructure subsidies (Article 4.1.23 of that decree).

72 Other measures aim to ‘reactivate’ the use of land and buildings and consist in a tax reduction applicable to natural persons who conclude a renovation agreement (Article 3.1.3 et seq. of the Flemish Decree) and reduction of the tax base for stamp duty (Article 3.1.10 of that decree). As the Constitutional Court has pointed out in its order for reference, while it is true that the beneficiary of those measures is a natural person, the fact remains that undertakings active in the property renovation sector nevertheless derive an advantage indirectly.

73 In order to answer the first question in Case C-203/11, it is necessary to provide the referring court with guidance on interpretation in order to enable it to determine whether the measures described in paragraphs 71 and 72 above may be classified as State aid in accordance with Article 107(1) TFEU (Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243, paragraphs 23 and 24).

74 It is settled case-law that classification as State aid requires all the conditions set out in Article 107(1) TFEU to be fulfilled. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (*Fallimento Traghetti del Mediterrane*, paragraph 31 and the case-law cited, and Case C-417/10 *3M Italia* [2012] ECR, paragraph 37).

75 In the case in the main proceedings, while the referring court considers that the measures established by the Flemish Decree fulfil the first and fourth conditions referred to in paragraph 74 above, it has doubts as to the second condition relating to the impact of the measures on trade between Member States and concerning the third condition relating to the selective nature of those measures.

76 So far as concerns the second condition, it should be borne in mind that for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 54, and Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 140).

77 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (see, inter alia, *Unicredito Italiano*, paragraph 56 and the case-law cited, and *Cassa di Risparmio di Firenze and Others*, paragraph 141).

78 In that regard, it is not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Where a Member State grants aid to an undertaking, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced. Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State (*Unicredito Italiano*, paragraph 58, and *Cassa di Risparmio di Firenze and Others*, paragraph 143).

79 In Case C-203/11, it cannot be ruled out that the measures established by the Flemish Decree strengthen the position of beneficiary undertakings compared with other undertakings competing in intra-Community trade. In addition, the advantage, in terms of competitiveness, conferred by the subsidies granted to the operators concerned may make it more difficult for undertakings established in other Member States to penetrate the Belgian market and indeed may make it easier for the Belgian undertakings in question to penetrate other markets.

80 It should also be borne in mind that the Court has previously held that a national measure by which the public authorities grant certain undertakings a tax exemption which, although it does not involve a transfer of State resources, places those to whom it applies in a more favourable financial position than other taxpayers constitutes State aid within the meaning of Article 107(1) TFEU (see Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 30 and the case-law cited).

81 It should however be noted that, in accordance with recital 8 in the preamble to, and Article 2 of, Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles [87 EC and 88 EC] to *de minimis* aid (OJ 2007 L 139, p. 5), aid not exceeding a ceiling of EUR 200 000 over any period of three years is deemed not to affect trade between Member States and not to distort or threaten to distort competition. Such measures are excluded from the concept of State aid and are thus exempt from the notification requirement of Article 108(3) TFEU.

82 In the case in the main proceedings, it is for the referring court to determine, in the light of the foregoing guidance on interpretation and by reference to all the relevant circumstances of the case, whether trade between Member States is liable to be affected by the measures established by the Flemish Decree and whether Regulation No 1998/2006 applies to the present case.

83 So far as concerns the third condition referred to in paragraph 74 above, relating to the beneficial nature of the measures in question, it must be observed that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as aid (see, inter alia, Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 59).

84 By contrast, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 107(1) TFEU (Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 87).

85 However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 88).

86 As the Advocate General has noted in point 50 of his Opinion, before analysing those conditions, it should be noted that the case-law cited in paragraph 85 above may be applied only in relation to the measures established by Book 4 of the Flemish Decree, referred to in paragraph 71 above, which alone are intended to compensate for the social obligation to which the subdividers and developers are subject.

87 As regards the conditions that must be satisfied for the measures in question to escape classification as State aid, it should be borne in mind that, first, the undertaking receiving such compensation must actually have public service obligations to discharge, and the obligations must be clearly defined (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 89).

88 In that regard, on account in particular of the wide discretion enjoyed by the Member States, it is not inconceivable that the social obligation may be regarded as a ‘public service’. In that context, the fact, alluded to by the referring court, that the social obligation does not directly benefit individuals – the applicants for social housing – but rather the social housing companies, is irrelevant with regard to the classification of the service in question.

89 Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 90).

90 In that regard, as the Advocate General has noted in point 53 of his Opinion, it appears that while the provisions of the Flemish Decree make it possible to identify the beneficiaries of the measures established by that decree, they do not however make it possible to identify, in a sufficiently objective and transparent manner, the parameters on the basis of which such compensation is calculated.

91 Third, the compensation paid cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 92).

92 Fourth, the compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the requisite means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 93).

93 The examination of the two latter conditions requires an appraisal of the facts in the main proceedings.

94 However, even if the Court had before it the information necessary to enable it to make such an appraisal, which is not the case here, it must be recalled that the Court has no jurisdiction to give a

ruling on the facts in an individual case or to apply the rules of EU law which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court (see *Servizi Ausiliari Dottori Commercialisti*, paragraph 69 and the case-law cited).

95 The Constitutional Court must therefore assess, in the light of the guidance on interpretation set out above, whether the measures at issue in the case in the main proceedings should be classified as State aid within the meaning of Article 107(1) TFEU.

96 If the referring court were to conclude that the measures compensating for the social obligation to which subdividers and developers are subject should be classified as State aid, it also asks the Court whether those measures may be exempt, pursuant to the SGEI Decision, from the obligation to notify the Commission under Article 108(3) TFEU.

97 In that regard, it should be borne in mind that, in accordance with Article 2(1)(b) of the SGEI Decision, that decision applies to inter alia State aid in the form of public service compensation granted to social housing undertakings carrying out activities qualified as services of economic interest by the Member State concerned.

98 As stated in recital 7 to the SGEI Decision, Member States have a wide margin of discretion with regard to the definition of services that could be classified as being services of general economic interest.

99 Article 3 of the SGEI Decision states that State aid in the form of public service compensation granted to undertakings responsible for the operation of such services of general economic interest is compatible with the common market and exempt from the obligation of prior notification provided that it meets the conditions laid down in Articles 4 to 6 of that decision.

100 As the Advocate General has noted in point 61 of his Opinion, those conditions are based on the conditions set out in *Altmark Trans and Regierungspräsidium Magdeburg*, in particular the first three conditions, on compliance with which the Court does not have jurisdiction to rule in the present judgment, as stated in paragraph 94 above.

101 Consequently, in order to establish whether the exception to the requirement for notification of the Commission, as provided for in the SGEI Decision, is applicable in circumstances such as those in the main proceedings, the referring court must verify whether those conditions are met with regard to the measures established by Book 4 of the Flemish Decree, referred to in paragraph 71 above.

102 The answer to the first question in Case C-203/11 is therefore that the tax incentives and subsidy mechanisms provided for in the Flemish Decree are liable to be classified as State aid within the meaning of Article 107(1) TFEU. It is for the referring court to determine whether the conditions relating to the existence of State aid are met and, if so, to ascertain whether, as regards the measures established in Book 4 of the Flemish Decree whereby compensation is provided for the social obligation to which subdividers and developers are subject, the SGEI Decision is nevertheless applicable to such measures.

The third to eighth questions in Case C-203/11

103 By these questions, the referring court asks, in essence, whether Directive 2006/123 is applicable in circumstances such as those in the main proceedings and, if so, it asks the Court to interpret several provisions of that directive.

104 In order to reply to these questions, it should be noted that, as stated in recital 9 to Directive 2006/123, that directive does not apply to, inter alia, ‘requirements, such as … rules concerning the development or use of land, town and country planning, building standards …’.

105 In addition, under Article 2(2)(j) of Directive 2006/123, that directive does not apply to services relating to social housing or to persons permanently or temporarily in need which are provided by the State or by providers mandated by the State.

106 As stated in paragraphs 50 and 51 above, the objectives of the Flemish Decree relate to land planning and social housing.

107 In those circumstances, the Court finds that Directive 2006/123 is not applicable to legislation such as the Flemish Decree and that, consequently, there is no need to answer the third to eighth questions referred in Case C-203/11.

The eleventh question in Case C-203/11

108 By this question, the referring court asks, in essence, whether the development of social housing units which are subsequently to be sold at capped prices to a public social housing institution, or with substitution of that institution for the service provider which developed those units, is covered by the concept of 'public works contract' contained in Article 1(2)(b) of Directive 2004/18.

109 In order to answer that question, it should be borne in mind that, in accordance with Article 1(2)(b) of Directive 2004/18, read in conjunction with Article 1(2)(a) thereof, public works contracts result where four criteria are fulfilled, that is to say, they are contracts for pecuniary interest, concluded in writing, between an economic operator and a contracting authority, which must have as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I to that directive or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

110 As the Court does not have sufficient information to allow it to verify whether those criteria are met in the case in the main proceedings, it will thus confine itself in this judgment to providing the referring court with some elements which may be of use to it in carrying out that assessment.

111 So far as concerns, in particular, the existence of a contract concluded in writing, it follows from the order for reference that the Constitutional Court is uncertain as to whether that criterion has been met in the present case, inasmuch as the social obligation entailing the development of social housing units is imposed in the absence of an agreement concluded between the housing authorities and the economic operator concerned. According to the order for reference, the social obligation is imposed directly on subdividers and developers by the Flemish Decree and is applicable to them merely because they own the land in relation to which they have applied for the grant of a building or land subdivision authorisation.

112 In that regard, it should be borne in mind that, in order to establish that some kind of contractual relationship existed between an entity which could be regarded as a contracting authority and a subdivider or developer, the case-law of the Court requires, as the Advocate General has noted in point 86 of his Opinion, a development agreement to be concluded between the housing authorities and the economic operator in question for the purpose of determining the work to be undertaken by the economic operator and the terms and conditions relating thereto.

113 Where such an agreement has been concluded, the fact that the development of social housing units is a requirement imposed directly by national legislation and that the party contracting with the authorities is necessarily the owner of the building land in question does not preclude the existence of a contractual relationship between the authorities and the developer in question (see, to that effect, Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraphs 69 and 71).

114 However, although it is true that Article 4.1.22, first subparagraph, of the Flemish Decree expressly requires an administration agreement to be concluded between the subdivider or developer and the social housing organisation, it is apparent from the order for reference that that agreement does not, in principle, regulate the relationship between the contracting authority and the economic operator concerned. In addition, such an agreement does not appear to concern the development of social housing units, but only the next stage which entails placing them on the market.

115 It is therefore for the referring court to determine, in the light of all the applicable legislation and the relevant circumstances of the case in the main proceedings, whether the development of social housing units at issue in the main proceedings is within the framework of a contractual relationship between a

contracting authority and an economic operator and whether the criteria referred to in paragraph 109 above have been met.

116 In that context, it is also important to note that, on the one hand, the application of Directive 2004/18 to public works contracts is nevertheless subject to the condition that the estimated value of the contract reaches the threshold set out in Article 7(c) of that directive and that, on the other, there are, as is apparent from the settled case-law of the Court, two types of contracts entered into by a public entity that do not fall within the scope of EU public procurement law.

117 The first type of contracts are those concluded by a public entity with a person who is legally distinct from that entity where, at the same time, that entity exercises over the person concerned a control which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or entities which control it (see Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] ECR, paragraph 32 and the case-law cited).

118 The second type of contracts are those which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out. In those circumstances, the EU rules on public procurement are not applicable in so far as, in addition, such contracts are concluded exclusively by public entities, without the participation of a private party, no private provider of services is placed in a position of advantage vis-à-vis competitors and implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest (see *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraphs 34 and 35).

119 In the light of all the foregoing considerations, the answer to the eleventh question in Case C-203/11 is that the development of social housing units which are subsequently to be sold at capped prices to a public social housing institution, or with substitution of that institution for the service provider which developed those units, is covered by the concept of ‘public works contract’ contained in Article 1(2)(b) of Directive 2004/18 where the criteria set out in that provision have been met, a matter which falls to be determined by the referring court.

Costs

120 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC preclude legislation, such as Book 5 of the Decree of the Flemish Region of 27 March 2009 on land and real estate policy, which makes the transfer of immovable property in the target communes designated by the Vlaamse Regering subject to verification, by a provincial assessment committee, that there exists a ‘sufficient connection’ between the prospective buyer or tenant and those communes.**

2. **Article 63 TFEU must be interpreted as not precluding legislation such as Book 4 of the Decree of the Flemish Region, according to which a ‘social obligation’ is imposed on some economic operators when a building or land subdivision authorisation is granted, in so far as the referring court finds that that legislation is necessary and appropriate to attain the objective of guaranteeing sufficient housing for the low-income or otherwise disadvantaged sections of the local population.**

3. **The tax incentives and subsidy mechanisms provided for in the Flemish Decree are liable to be classified as State aid within the meaning of Article 107(1) TFEU. It is for the referring court to determine whether the conditions relating to the existence of State aid are met and, if so, to ascertain whether, as regards the measures established in Book 4 of the Flemish Decree whereby compensation is provided for the social obligation to which subdividers and developers are subject, Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) [EC] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is nevertheless applicable to such measures.**

4. **The development of social housing units which are subsequently to be sold at capped prices to a public social housing institution, or with substitution of that institution for the service provider which developed those units, is covered by the concept of 'public works contract' contained in Article 1(2)(b) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Regulation (EC) No 596/2009 of the European Parliament and of the Council of 18 June 2009, where the criteria set out in that provision have been met, a matter which falls to be determined by the referring court.**

[Signatures]

---

* Languages of the case: French and Dutch.

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 4 October 2012 (1)

Joined Cases C-197/11 and C-203/11

Eric Libert,
Christian Van Eycken,
Max Bleeckx,
Syndicat national des propriétaires et copropriétaires (ASBL),
Olivier de Clippele
v
Gouvernement flamand (C-197/11)

and

All Projects & Developments NV,
Bouw- en Coördinatiekantoor Andries NV,
Belgische Gronden Reserve NV,
Bouwonderneming Ooms NV,
Bouwwerken Taelman NV,
Brummo NV,
Cordeel Zetel Temse NV,
DMI Vastgoed NV,
Dumobil NV,
Durabrik Bouwbedrijven NV,
Eijssen NV,
Elbeko NV,
Entro NV,
Extensa NV,
Flanders Immo JB NV,
Green Corner NV,
Huysman Bouw NV,
Imano BVBA,
Immpact Ontwikkeling NV,
Invest Group Dewaele NV,
Invimmo NV,
Kwadraat NV,
Liburni NV,
Lotinvest NV,
Matexi NV,
Novus NV,
Plan & Bouw NV,
7Senses Real Estate NV,
Sibomat NV,
Tradiplan NV,
Uma Invest NV,
Versluys Bouwgroep BVBA,
Villabouw Francis Bostoen NV,

Willemen General Contractor NV,
Wilma Project Development NV,
Woningbureau Paul Huyzentruyt NV
v
Vlaamse Regering (C-203/11)

(References for a preliminary ruling
from the Cour constitutionnelle (Belgium))

(National rules making the transfer of land and of buildings conditional upon the existence of a sufficient connection between the prospective buyer or tenant and the target commune – Social obligation imposed on subdividers and developers – Tax incentives and subsidy mechanisms – Restriction of fundamental freedoms – Justification – Principle of proportionality – State aid – Concept of 'public works contract')

I – Introduction

1. In the present cases, the Court has been called upon to rule on the interpretation of several articles of primary law and several provisions of secondary law of the European Union. The articles of primary law in question are Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU, 63 TFEU, 107 TFEU and 108 TFEU. The provisions of secondary law concerning which the questions have been referred are Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, (2) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, (3) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, (4) and Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest. (5)

2. The Court's answer should assist the Cour constitutionnelle/Grondwettelijk Hof (Constitutional Court, Belgium), which referred the questions for a preliminary ruling, in deciding on the actions for annulment of several provisions of the Decree of the Flemish Region of 27 March 2009 on land and real estate policy ('the land and real estate decree').

3. The applicants in the main proceedings in Case C-197/11 draw attention to the provisions of the land and real estate decree which link the transfer of land and of buildings constructed thereon in certain Flemish communes to the condition that there exists a sufficient connection between the prospective buyer or tenant and the relevant commune, which would limit the possibility of freely disposing of the immovable property.

4. The applicants in the main proceedings in Case C-203/11 consider that the ground for annulment of the land and real estate decree lies not only in the condition as to the existence of a sufficient connection between the prospective buyer or tenant and the relevant commune, but also in the social obligation to which persons dividing areas of land into plots (subdividers) and developers are subject and in the tax incentives and subsidy mechanisms which partially compensate for that social obligation.

II – Legal context

A – *European Union law*

1. Directive 2004/18

5. Article 1 of Directive 2004/18, entitled ‘Definitions’, provides:

‘1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) “Public works contracts” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

…’

2. Directive 2004/38

6. Article 22 of Directive 2004/38, entitled ‘Territorial scope’, is worded as follows:

‘The right of residence and the right of permanent residence shall cover the whole territory of the host Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals.’

7. Article 24 of that directive, entitled ‘Equal treatment’, provides in paragraph 1:

‘Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.’

3. Decision 2005/842

8. Article 1 of Decision 2005/842, entitled ‘Subject-matter’, provides:

‘This Decision sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is to be regarded as compatible with the common market and exempt from the requirement of notification laid down in Article 88(3) of the Treaty.’

9. Article 2 of that decision, entitled ‘Scope’, provides in paragraph 1:

‘This Decision applies to State aid in the form of public service compensation granted to undertakings in connection with services of general economic interest as referred to in Article 86(2) of the Treaty which falls within one of the following categories:

…

(b) public service compensation granted to hospitals and social housing undertakings carrying out activities qualified as services of general economic interest by the Member State concerned;

…’

10. Under Article 3 of Decision 2005/842, entitled ‘Compatibility and exemption from notification’:

‘State aid in the form of public service compensation that meets the conditions laid down in this Decision shall be compatible with the common market and shall be exempt from the obligation of prior notification provided for in Article 88(3) of the Treaty, without prejudice to the application of stricter provisions relating to public service obligations contained in sectoral Community legislation.’

B – *Belgian law*

11. Book 4 of the land and real estate decree, on ‘Measures concerning affordable housing’, contains, in Chapter 3, entitled ‘Social obligations’, Article 4.1.16, according to which:

‘(1) Where a land subdivision project or building project is subject to a rule as defined under Chapter 2, Section 2, a social obligation is linked by operation of law to a land subdivision authorisation or, as the case may be, the planning permission.

A social obligation … shall require a subdivider or developer to take steps to ensure delivery of a supply of social housing units consistent with the percentage applicable to the land subdivision or building project.’

12. Article 4.1.17 of the land and real estate decree provides that:

‘The subdivider or developer shall have the option of discharging a social obligation in one of the following ways:

1. in kind, in accordance with Articles 4.1.20 to 4.1.24;

2. by the sale to a social housing organisation of the land required for the prescribed supply of social housing, in accordance with Article 4.1.25;

3. by the leasing to a social rental agency of housing developed in the context of a land subdivision or building project, in accordance with Article 4.1.26;

4. by a combination of points 1, 2 and/or 3.’

13. Under Article 4.1.19 of the land and real estate decree:

‘The subdivider or developer may discharge in whole or in part a social obligation through payment of a social contribution to the commune in which the land subdivision project or building project is developed. The social contribution shall be calculated by multiplying the number of social housing units or social lots which are in principle to be developed by EUR 50 000 and by indexing that amount on the basis of the ABEX index, the reference index being that of December 2008.

…’

14. The land and real estate decree lays down, for the benefit of private undertakings discharging the ‘social obligation’ in kind, the following tax incentives and subsidy mechanisms: the application of a reduced rate of value added tax and of a reduced rate of stamp duty (Article 4.1.20(3), second subparagraph; infrastructure subsidies (Article 4.1.23), and a purchase guarantee for the housing built (Article 4.1.21).

15. Moreover, Book 3 of the land and real estate decree, entitled, ‘Activation of land and buildings’, provides for subsidies granted irrespective of whether any ‘social obligation’ is discharged. In particular, these are subsidies for ‘activation projects’ (Article 3.1.2 of that decree), a reduction in the tax on natural persons obtained on conclusion of renovation agreements (Article 3.1.3 et seq. of that decree) and a flat-rate reduction of the taxable amount for stamp duty (Article 3.1.10 of that decree).

16. Article 5.1.1 of the land and real estate decree, which forms part of Book 5 of the decree, entitled ‘Living in your own region’, provides:

‘The Flemish Government shall draw up every three years and for the first time during the calendar month in which this Decree enters into force a list of the communes which satisfy the two conditions set out below on the basis of the most recent statistics:

1. the commune is among the 40 per cent of Flemish communes in which the average price of land is highest per square metre;

2. the commune is among:

(a) either the 25 per cent of Flemish communes having the highest level of internal migration; or

(b) the 10 per cent of Flemish communes having the highest level of external migration.

The list, referred to in the first paragraph, shall be published in the *Moniteur Belge/Belgisch Staatsblad*.

…’

17. Article 5.2.1 of the land and real estate decree, which also forms part of Book 5, provides:

‘(1) A specific requirement applies to the transfer of land and buildings constructed thereon in regions which satisfy the two conditions referred to below:

1. the land and buildings constructed thereon are within a “residential extension area” laid down by the Royal Decree of 28 December 1972 on the presentation and implementation of draft plans and sector plans, as at the date of entry into force of this Decree;

2. the land and buildings constructed thereon are, when the private transfer instrument is signed, located in the target communes which appear on the most recent list published in the *Moniteur belge/Belgisch Staatsblad*, as prescribed in Article 5.1.1, it being understood that the private transfer instrument shall be regarded for the application of this provision as having being signed six months before the attribution of a fixed date, if more than six months have elapsed between the date of signature and the date of attribution of a fixed date.

The special transfer condition means that the land and buildings erected thereon may be transferred only to persons who have, in the opinion of a provincial assessment committee, a sufficient connection with the commune. “Transfer” shall mean sale, leasing for more than nine years, or grant of a right under a long-term lease or a building lease.

…

The special transfer condition shall expire, definitively and without any right of renewal, twenty years after the date of attribution of a fixed date to the initial transfer subject to the condition.

…

(2) For the purposes of [Article 5.2.1(1), second subparagraph] a person shall have a sufficient connection with the commune if he satisfies one or more of the following conditions:

1. he has been continuously resident in the commune or in a neighbouring commune for at least six years, provided that that commune is also included on the list prescribed in Article 5.1.1;

2. on the date of transfer, he carries out activities in the commune, provided that those activities occupy on average at least half a working week;

3. he has established a professional, family, social or economic connection to the commune as a result of a significant circumstance of long duration.

…’

18. Under Article 5.1.1 of the land and real estate decree, an order of the Flemish Government of 19 June 2009 drew up the list of 69 communes to which the special condition governing the transfer of ownership for the purposes of Article 5.2.1 of the land and real estate decree applies (‘the target communes’).

III – Questions referred

19. The single question in Case C-197/11 is worded as follows:

‘Are Articles 21 TFEU, 45 TFEU, 49 TFEU, 56 TFEU and 63 TFEU and Articles 22 and 24 of Directive 2004/38 … to be interpreted as precluding the scheme established by Book 5 of the [land and real estate decree] … entitled “Living in your own region”, which, in certain communes referred to as “target communes”, makes the transfer of land and buildings thereon conditional upon the purchaser or the lessee demonstrating a sufficient connection with those communes for the purposes of Article 5.2.1(2) of the decree?’

20. The questions in Case C-203/11 are worded as follows:

‘(1) Should Articles 107 [TFEU] and 108 [TFEU], whether or not read in conjunction with … Decision 2005/842 …, be interpreted as requiring that the measures contained in Articles 3.1.3, 3.1.10, 4.1.20(3)[, second subparagraph], 4.1.21 and 4.1.23 of the [land and real estate decree] should be notified to the European Commission before the adoption or entry into force of those provisions?

(2) Should a scheme which by operation of law imposes on private actors whose land subdivision or building projects are of a certain minimum size a “social obligation” amounting to a percentage of a minimum of 10% and a maximum of 20% of that land subdivision or that building project, which can be performed in kind or by the payment of a sum of [EUR] 50 000 for each social lot or dwelling not realised, be appraised against the freedom of establishment, against the freedom to provide services or against the free movement of capital, or should it be classified as a complex scheme which should be appraised against each of those freedoms?

(3) Having regard to Article 2(2)(a) and (j) thereof, is Directive 2006/123 … applicable to a compulsory contribution by private actors to the delivery of social houses and apartments, which is imposed by operation of law as a “social obligation” linked to every building or land subdivision authorisation sought in respect of a project of a minimum size as determined by law, where the social housing units delivered are bought at predetermined capped prices by social housing companies to be rented out to a broad category of individuals, or, by substitution, are sold by the social housing company to individuals belonging to the same category?

(4) If the third question referred is answered in the affirmative, should the concept of “requirement to be evaluated” in Article 15 of Directive 2006/123 … be interpreted as meaning that it covers an obligation on private actors to contribute, in addition to, or as part of their usual activity, to the construction of social housing, and to transfer the units developed at capped prices to semi-public authorities, or through substitution of the latter, even though those private actors then have no right of initiative in the social housing market?

(5) If the third question referred is answered in the affirmative, should the national court apply a penalty, and if so, what penalty, to:

(a) the finding that a new requirement, subjected to evaluation in accordance with Article 15 of Directive 2006/123 …, was not specifically evaluated in accordance with Article 15(6) of that directive;

(b) the finding that no notification of that new requirement was given in accordance with Article 15(7) of that directive?

(6) If the third question referred is answered in the affirmative, should the concept of "prohibited requirement" in Article 14 of Directive 2006/123 … be interpreted as precluding a national scheme, in the cases described in that article, not only if it makes access to a service activity or the exercise of it subject to compliance with a requirement, but also if that scheme merely provides that non-compliance with that requirement will cause the financial compensation for the performance of a service prescribed by law to lapse, and that the financial guarantee supplied in regard to the performance of the service will not be reimbursed?

(7) If the third question referred is answered in the affirmative, should the concept of "competing operators" in Article 14(6) of Directive 2006/123 … be interpreted as meaning that it is also applicable to a public institution whose mandates can partially interfere with those of the service providers, if it takes the decisions referred to in Article 14(6) of that directive and it is also obliged, as the final step in a cascade system, to buy the social housing units developed by a service provider in the performance of the "social obligation" imposed on him?

(8) (a) If the third question referred is answered in the affirmative, should the concept "authorisation scheme" in Article 4(6) of Directive 2006/123 … be interpreted to mean that it is applicable to certificates issued by a public institution after the initial building or land subdivision authorisation has already been given, and which are necessary in order to qualify for certain of the compensations for the performance of a "social obligation" which was linked by law to the original authorisation and which are also necessary in order to claim the reimbursement of the financial guarantee imposed on the service provider in favour of the public institution?

(b) If the third question referred is answered in the affirmative, should the concept of "authorisation scheme" in Article 4(6) of Directive 2006/123 … be interpreted to mean that it is applicable to an agreement which a private actor concludes with a public institution pursuant to a legal rule in the context of the substitution of the public institution in respect of the sale of a social housing unit developed by the private actor in the performance, in kind, of a "social obligation" which is linked by law to a building or land subdivision authorisation, taking account of the fact that the conclusion of that agreement is a condition for the executability of the authorisation?

(9) Should Articles 49 [TFEU] and 56 [TFEU] be interpreted as precluding a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a "social obligation" entailing the delivery of social housing units, amounting to a certain percentage of the project, which are subsequently to be sold at capped prices to a public institution, or with substitution by it?

(10) Should Article 63 [TFEU] be interpreted as precluding a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a "social obligation" entailing the development of social housing units, amounting to a certain percentage of the project, which are subsequently to be sold at capped prices to a public institution, or with substitution by it?

(11) Should the concept of "public works contracts" in Article 1(2)(b) of Directive 2004/18 … be interpreted to mean that it is applicable to a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a "social obligation" entailing the development of social housing units, amounting to a certain percentage of the project, which are subsequently to be sold at capped prices to a public institution, or with substitution by it?

(12) Should Articles 21 [TFEU], 45 [TFEU], 49 [TFEU], 56 [TFEU] and 63 [TFEU] and Articles 22 and 24 of Directive 2004/38 … be interpreted as precluding the scheme introduced by Book 5 of the [land and real estate decree], entitled "Living in your own region"), namely the scheme whereby in certain so-called "target communes" the transfer of land and any buildings constructed thereon is made subject to the buyer or the tenant being able to demonstrate a sufficient connection with those communes within the meaning of Article 5.2.1(2) of that decree?'

IV – Assessment

A – *The single question in Case C-197/11 and the twelfth question in Case C-203/11*

21. The single question in Case C-197/11 is identical to the twelfth question in Case C-203/11 and is concerned with whether the provisions of the Treaty on the Functioning of the European Union which prohibit restrictions on fundamental freedoms and Articles 22 and 24 of Directive 2004/38 preclude legislation of a Member State which makes the transfer of immovable property, in the target communes, that is to say, in the communes in which the average price of land is highest per square metre and in which internal or external migration is highest, subject to the condition that there exists a sufficient connection between the prospective buyer or tenant and the relevant commune.

22. With regard to this question, the Flemish Government draws attention to the fact that the disputes before the referring court are concerned with a purely internal situation, since all the applicants in the main proceedings are either established or resident in Belgium.

23. In that regard, it should be recognised that the disputes in the main proceedings contain no cross-border elements. Nevertheless, it must not be forgotten that the questions referred were raised in the specific proceedings before the referring court. That is to say, proceedings for the annulment of a legislative measure of national law which applies both to Belgian nationals and to those of other Member States. It is clear that the decision of the referring court in such a procedure will have *erga omnes* effects, including on nationals of other Member States.

24. The applicants in the main proceedings rely on European Union (EU) law and the Court is not in a position to assess whether the referring court, in proceedings for annulment, is able to review the legislative measure of national law at issue not only in relation to national law but also in relation to EU law. In the present cases, I am of the view that the Court should have trust in the referring court inasmuch as the question referred is necessary for the referring court to be able to deliver judgment (6) and, therefore, give the requested interpretation of the Treaty provisions on the fundamental freedoms of the internal market. (7)

25. The referring court regards the condition as to the existence of a sufficient connection with the target commune as a restriction on fundamental freedoms.

26. I concur with that view. Within the meaning of the case-law, access to housing and to other immovable property is a condition for the exercise of the fundamental freedoms. (8) The condition as to a sufficient connection with the target commune means, in reality, a prohibition imposed on certain persons, that is to say, those who do not satisfy that condition, on buying or leasing for more than nine years land and the buildings constructed thereon. There is no doubt that that condition is such as to deter citizens of the Union from exercising their fundamental freedoms enshrined in the Treaty.

27. I am of the view that the fact that the condition as to the existence of a sufficient connection with the target commune applies solely in a number of communes, which is presently 69, and that its application is limited to certain parts of those communes, is irrelevant to the issue of whether or not that condition represents a restriction on fundamental freedoms. The limited scope of the condition as to the existence of a sufficient connection with the target commune may be taken into consideration in the context of assessing the justification of that restriction on fundamental freedoms.

28. According to well-established case-law, national measures which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may nevertheless be allowed provided that they pursue an objective in the public interest, are appropriate for attaining that objective and do not go beyond what is necessary to attain the objective pursued. (9)

29. Accordingly, it is appropriate to examine, on the one hand, whether the land and real estate decree introducing the condition as to the existence of a sufficient connection with the target commune pursues an objective in the public interest and, on the other hand, whether the condition as to the existence of a sufficient connection with the target commune is appropriate for attaining the objective identified and whether that measure goes beyond what is necessary to attain the objective pursued.

30. As regards the objective pursued by the land and real estate decree, the referring court, on the basis of the *travaux préparatoires* relating to the land and real estate decree, refers to the objective of meeting the accommodation requirements of the endogenous population. It raises itself a question as to whether that objective can be regarded as an overriding reason in the public interest with a view to justifying a restriction on fundamental freedoms.

31. With a view to understanding better the objective of the land and real estate decree, the referring court cites its *travaux préparatoires*, which explain that 'the high land prices in some Flemish communes leads to gentrification. That finding means that less affluent population groups are excluded from the market due to the arrival of financially stronger population groups from other communes. The less affluent population groups are not only socially weak individuals but often also young families or single persons who have many expenses, but are not yet in a position to build up sufficient capital'.

32. The Flemish Government states that the national rules at issue are intended primarily to encourage housing for the endogenous population in residential extension areas, which the legislature passing the decree deemed necessary in order to guarantee the right to adequate housing and, by extension, social cohesion, by promoting regional planning and by not allowing the social and economic fabric to unravel.

33. If the land and real estate decree actually had the aim of encouraging residency by the less affluent endogenous population in the target communes, I am of the opinion that such an objective could be regarded as a social objective linked to regional planning policy. The Court has already ruled that such an objective constitutes an overriding reason in the public interest. (10)

34. However, it must be borne in mind that there are also other opinions on the objective pursued by the land and real estate decree. To that effect, the Government of the French Community argues that the actual objective of the decree is not to limit the effects of gentrification but rather to preserve the Flemish nature of the population of the target communes. It is clear that such an objective cannot be regarded as an overriding reason in the public interest. In that regard, I would like to point out that it is for the referring court to determine the precise objective of the land and real estate decree.

35. I will now examine whether the condition as to the existence of a sufficient connection with the target commune is appropriate for attaining the objective of meeting the accommodation requirements of the less affluent endogenous population and whether that measure goes beyond what is necessary to attain that objective.

36. Article 5.2.1(2) of the land and real estate decree sets out three conditions at least one of which must be met if the requirement for a sufficient connection with the target commune is to be met. The first condition is the requirement that a person to whom the immovable property is to be transferred has been resident in the target commune for at least six years before the transfer. In accordance with the second condition, the prospective buyer or tenant should, at the date of the transfer, carry out activities in the commune concerned. The third condition requires the prospective buyer or tenant to have a professional, family, social or economic connection with the commune in question as a result of a significant circumstance of long duration. It is the provincial evaluation committee which evaluates whether the prospective buyer or tenant of the immovable property meets one or more of the conditions set out.

37. It is noteworthy that none of those conditions reflects socio-economic aspects related to the objective of protecting the less affluent endogenous population on the property market. The conditions in question favour not only the less affluent endogenous population but also a section of the endogenous population which would have sufficient means and, therefore, would have no need of protection on the property market.

38. As I have already stated, the requirement as to a sufficient connection with the target commune means, in reality, prohibiting some people, that is to say, those who do not fulfil that condition, from buying or renting for more than nine years land and the buildings constructed thereon. I concur with the view put forward by the representative of the applicants in the main proceedings in Case C-197/11 in its written observations, that is to say, that other measures could meet the objective pursued by the land and real estate decree without necessarily resulting in a prohibition on purchasing or leasing by other

persons. There could be, for example, subsidies for purchase, price regulation in target communes or measures adopted by the authorities to assist the protected endogenous population.

39. It follows from the foregoing that the condition as to the existence of a sufficient connection between the prospective buyer or tenant of the immovable property and the target commune, which provides (i) that the prospective buyer or tenant must reside in the target commune for at least six years before the transfer, or (ii) that the prospective buyer or tenant must carry out activities in the commune, or (iii) that the prospective buyer or tenant must have a professional, family, social or economic connection as a result of a significant circumstance of long duration, does not constitute a measure which is appropriate for attaining the objective of meeting the property needs of the less affluent endogenous population. Even assuming that the condition as to the existence of a sufficient connection on the part of the prospective buyer or tenant of the immovable property might be appropriate for attaining the objective pursued by the land and real estate decree, that measure goes beyond what is necessary to attain the objective pursued.

40. As regards Articles 22 and 24 of Directive 2004/38, which aim to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States conferred directly on Union citizens by the Treaty and which aim in particular to strengthen that right, (11) I have doubts as to the need to examine the national legislation at issue in the light of those provisions, given that they contain no new specific reasons justifying a restriction on the right to move and reside freely within the territory of the Member States. As regards Article 24 of Directive 2004/38, it is a specific expression of the general prohibition on discrimination provided for in Article 18 TFEU.

41. With regard to Article 22 of Directive 2004/38, that article defines the territorial scope of the right to move and reside freely within the territory of the Member States. In that regard, certain doubts may be raised concerning the second sentence of that article, in accordance with which ‘Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals’. However, it cannot be inferred from that that territorial limitations are in general allowed provided that they apply also to nationals of the host Member State and that, accordingly, that provision introduces a new ground justifying a restriction on the right conferred on citizens of the Union by the Treaty. Indeed, as the Commission rightly claimed, the second sentence of Article 22 of Directive 2004/38 contains a supplementary condition which a restriction on the right of residence and the right of permanent residence must satisfy in order that it may be justified on grounds of public policy, public security or public health within the meaning of Article 27 of Directive 2004/38.

42. In view of the foregoing observations, I propose that the Court should answer that Articles 21 TFEU, 45 TFEU, 56 TFEU and 63 TFEU must be interpreted as meaning that they preclude national rules which make, in some communes, the transfer of land and buildings constructed thereon subject to the buyer or the tenant being able to demonstrate a sufficient connection with those communes where the existence of that connection is evaluated by reference to the following alternative conditions:

– the requirement that a person to whom the immovable property is to be transferred has been resident in the relevant commune for at least six years before the transfer;

– the requirement that the prospective buyer or tenant carries out, at the date of the transfer, activities in the commune; and

– the existence of a professional, family, social or economic connection as a result of a significant circumstance of long duration.

B – *The first question in Case C-203/11*

43. This question relates to the tax incentives and subsidy mechanisms provided for by the land and real estate decree. The measures at issue can be divided into two groups having separate aims. The measures forming part of the first group aim to reactivate the use of certain lands and buildings. They are the tax reduction granted to a lender who concludes a renewal agreement, referred to in Article 3.1.3 of the land and property decree, and the reduction of the tax base for stamp duty, referred to in Article 3.1.10 of the land and property decree. (12) The measures forming part of the second

group compensate for the social obligation to which subdividers and developers are subject. That group includes the reduced rate of value added tax on the sale of housing and the reduced stamp duty for the purchase of building land, referred to in the second subparagraph of Article 4.1.20(3) of the land and real estate decree, the infrastructure subsidies referred to in Article 4.1.23 of the land and real estate decree and the purchase guarantee by a social housing organisation of the social housing units developed, referred to in Article 4.1.21 of the land and real estate decree.

44. The referring court seeks to ascertain whether the measures at issue should be classified as State aid within the meaning of Article 107 TFEU and when, if so, they should be notified to the Commission or whether, in some circumstances, those measures are exempt from the requirement to notify State aid under Decision 2005/842.

1. Classification of the measures

45. As regards the classification of the measures at issue as State aid, the referring court rightly refers to the case-law of the Court which determines that State aid exists where the following conditions are fulfilled. First, there must be intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer an advantage on the recipient. Fourthly, it must distort or threaten to distort competition. (13)

46. It follows from the reasoning of the order for reference that the referring court has doubts concerning the second condition relating to the effect on intra-Community trade and concerning the third condition relating to the advantageous nature of the measures at issue.

47. Regarding the effect of the measures at issue on intra-Community trade, I should like to point out that it is for the referring court to assess, taking into consideration a number of matters of law or of fact relevant to the case in question, whether the specific measures are liable to affect intra-Community trade. I consider that the existing case-law provides a sufficient basis to enable the referring court to do so. (14)

48. For the purposes of that case-law, the referring court must examine whether the measures at issue strengthen the position of the recipient undertakings compared with other undertakings competing in intra-Community trade. (15) However, the recipient undertakings need not themselves be involved in intra-Community trade. Where a Member State grants aid to an undertaking, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced. (16) Even aid of a relatively small amount may also be liable to affect trade between Member States, in particular where there is strong competition in the sector in question. (17) Finally, it must not be forgotten that it is not necessary to establish that the measures at issue have a real effect on intra-Community trade or that competition is actually being distorted, but only to examine whether those measures are liable to affect such trade and distort competition. (18)

49. With regard to the advantageous nature of the measures at issue, I understand that part of the question referred as seeking, in essence, to obtain clarification of the case-law (19) within the meaning of which, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than competing undertakings, such a measure is not State aid within the meaning of EU law. (20) However, for particular measures to escape classification as State aid, four conditions, known as the '*Altmark* conditions', must be satisfied.

50. Before analysing those conditions, it should be noted that the case-law cited can be applied only in relation to the measures compensating for the social obligation to which the subdividers and developers are subject. The Flemish Government has itself stated in its written observations that the social obligation imposed on subdividers and developers also constitutes a fair price which they must pay for the right to act under the authorisation and for the significant economic benefits resulting therefrom.

51. According to the first *Altmark* condition, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. (21) It follows that it is necessary to consider whether the social obligation to which subdividers and developers are subject may be regarded as a public service obligation.

52. As the Flemish Government explained in its written observations, the social obligation is imposed on developers and subdividers in the context of a policy seeking to provide more equal access to social housing for groups of modest means and for socially disadvantaged groups, by means of a territorial allocation based on actual needs and not depending exclusively on the voluntary initiative and goodwill of operators. From that point of view, nothing prevents the social obligation defined by the land and real estate decree from being regarded as a public service obligation. The fact that that social obligation does not directly benefit individuals, the applicants for social housing, but the social housing companies (which are the embodiment of the public authorities) is irrelevant in that regard. As the German Government pointed out in its written observations, for it to be possible to make something available, the material basis must be created. The social housing companies are therefore involved only as administrative and technical intermediaries.

53. According to the second *Altmark* condition, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. (22) That condition seems to be problematic in particular in relation to the infrastructure subsidies and the social housing purchase guarantee. Even if the national rules cited by the referring court make it possible to identify the beneficiaries of those measures, they do not, however, make it possible to identify the parameters on the basis of which such compensation is calculated. Nevertheless, the Flemish Government in its written observations describes the method for calculating such compensation. It is therefore for the referring court to determine whether the parameters used to calculate the compensation referred to by the Flemish Government satisfy the second *Altmark* condition.

54. According to the third *Altmark* condition, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations. (23) It seems in this case that the measures compensating for the social obligation are not calculated by reference to the actual cost of discharging that obligation. For that reason, I consider that it is possible that the final cost of the combination of different measures compensating for the social obligation exceeds the amount of the costs related to discharging that obligation.

55. According to the fourth *Altmark* condition, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. (24) In this case, it is clear that the beneficiaries of the measures compensating for the social obligation have not been selected pursuant to a public procurement procedure. However, it does not appear from the documents before the Court that an analysis required under the fourth condition has been carried out or that the measures at issue were determined on the basis of the expenses which would be incurred by a typical and properly administered undertaking in discharging the social obligation.

2. Moment at which State aid is notified to the Commission

56. Article 108(3) TFEU requires that the Commission is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107 TFEU, it must without delay initiate the procedure provided for in Article 108(2) TFEU. The Member State concerned must not put its proposed measures into effect until that procedure has resulted in a final decision.

57. According to the Court’s case-law, the obligation to notify new State aid is one of the fundamental features of the system of control put in place by the Treaty in the field of State aid. Under

that system, Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid for the purposes of Article 107(1) TFEU and, secondly, in accordance with Article 108(3) TFEU, not to implement such a measure until the Commission has taken a final decision on the measure. (25) The purpose served by the provision introduced by Article 108(3) TFEU is not a mere obligation to notify but an obligation of prior notification which, as such, necessarily implies the suspensory effect required by the final sentence of Article 108(3). (26)

58. In that regard, the referring court seeks to ascertain whether it is Article 4.1.23 of the land and real estate decree, providing for the infrastructure subsidies, or rather the implementing order of the Flemish Government, defining the conditions under which such subsidies may be granted, which should have been notified to the Commission, inasmuch as the infrastructure subsidies might be classified as State aid.

59. I consider that the answer is quite clear. The measure in question was already provided for by the land and real estate decree, even if the details were specified by the implementing order. For that reason, with a view to fulfilling one of the obligations under Article 108(3) TFEU, the draft land and real estate decree should have been notified to the Commission.

3. Exemption from the obligation to notify new State aid to the Commission

60. The referring court seeks to ascertain whether the measures compensating for the social obligation to which subdividers and developers are subject, assuming that such measures must be classified as State aid, may be exempt from the obligation to notify the Commission for the purposes of Decision 2005/842.

61. Article 3 of Decision 2005/842 declares State aid in the form of public service compensation that meets the conditions laid down by Articles 4 to 6 of that decision compatible with the common market and exempt from the obligation to notify. I am of the same opinion as the referring court, which considers that those conditions seem to be based on the first three *Altmark* conditions.

62. As has already been argued, it is my view that the third *Altmark* condition, in particular, is not satisfied in this case. That condition, to the effect that the compensation cannot exceed what is necessary to cover the costs incurred in the discharge of the public service obligations, is also contained in Article 5 of Decision 2005/842. It follows that, as the measures compensating for the social obligation must be classified as State aid, since they do not satisfy the third *Altmark* condition, they are even less able to benefit from the exemption from the obligation to notify the Commission within the meaning of Decision 2005/842.

63. In view of the foregoing observations, I propose that the Court should answer that Articles 107 TFEU and 108 TFEU, read in conjunction with Decision 2005/842, must be interpreted as meaning that they require that the measures contained in Articles 3.1.3, 3.1.10, 4.1.20(3), second subparagraph, 4.1.21 and 4.1.23 of the land and real estate decree be notified to the Commission prior to the adoption of those provisions provided that it is established that those measures are liable to affect trade between Member States and that they do not satisfy the *Altmark* conditions.

C – *The second, ninth and tenth questions in Case C-203/11*

64. This series of questions relates to a social obligation which, in accordance with Article 4.1.16 of the land and real estate decree, requires subdividers and developers to take steps to ensure that a supply of social housing units is delivered.

65. It seems that the referring court has no doubt as to the classification of a social obligation as a non-discriminatory restriction on fundamental freedoms. Its doubts concern the issue of determining, first, in the light of which fundamental freedom that social obligation must be reviewed and, secondly, whether a social obligation as a restriction on fundamental freedoms may be justified by an overriding reason in the public interest.

66. As a preliminary point, it should be noted that, as with regard to the single question in Case C-197/11 and with regard to the second question in Case C-203/11, the Flemish Government draws

attention to the fact that the disputes before the referring court are concerned with a purely internal situation. In that regard, I refer to my previous considerations. (27)

67. As for the freedom in the light of which the scheme governing a social obligation should be reviewed, it is true that it is possible to identify the influence of a social obligation both on the freedom of establishment and on the freedom to provide services, as well as on the free movement of capital.

68. However, I share the Commission's view that, in the case of a social obligation, the free movement of capital prevails, since the restriction on the freedom of establishment and on the freedom to provide services is merely an inevitable consequence of the restriction on the free movement of capital.

69. The national rules provide that the social obligation may be discharged either in kind, that is to say, by delivering a social housing unit, or by the sale of land to a social housing organisation, or by renting the housing units delivered to a social rental agency or, lastly, through the payment of a social contribution. It should be recognised, as stated by the referring court, that such rules are likely to deter nationals of a Member State from investing in another Member State in the immovable property sector given the fact that they cannot freely use the land for the purposes for which they wished to acquire it. According to settled case-law, capital movements include investments in immovable property on the territory of a Member State by non-residents. In other words, the right to acquire, use or dispose of immovable property on the territory of another Member State generates capital movements when it is exercised. (28)

70. Even if a social obligation constitutes a restriction on the free movement of capital, it may be justified by an overriding reason in the public interest, provided that it is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary for that purpose. (29)

71. Therefore, it is necessary to determine the objective of the rules at issue and to determine whether that objective can be regarded as an overriding reason in the public interest.

72. According to the Flemish Government, the rules imposing a social obligation on subdividers and developers address a real problem, more precisely a critical shortage of affordable housing. Accordingly, it seems that the social obligation is related to public housing policy in a Member State and to the financing of that policy, which the Court has already recognised as an overriding reason in the public interest. (30) However, it is for the referring court to establish the precise objective of the rules at issue.

73. It is also for the referring court to determine whether a social obligation satisfies the principle of proportionality, in other words, whether it is suitable for securing an increase in the supply of social housing and whether or not the established objective could be pursued by less restrictive measures with regard to the free movement of capital.

74. For the purposes of that assessment, the statistics from the Flemish authorities cited at the hearing by the representative of the applicants in the main proceedings in Case C-203/11 could be helpful. It follows from those statistics that the land and real estate decree introducing the social obligation for subdividers and developers actually has a rather negative impact on the social housing sector.

75. In view of the foregoing observations, I propose that the Court should answer that Article 63 TFEU must be interpreted as precluding a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a 'social obligation' entailing the development of social housing units, amounting to a certain percentage of the project, which are subsequently to be sold at capped prices to a public institution, or with substitution by it, provided that it is established that that scheme does not satisfy the principle of proportionality.

D – *The third, fourth, fifth, sixth, seventh and eighth questions in Case C-203/11*

76. By this series of questions, the referring court seeks an interpretation of certain provisions of Directive 2006/123.

77. However, according to recital 9 in the preamble to Directive 2006/123, that directive applies neither to rules concerning the development or use of land nor to rules concerning town and country planning. Moreover Article 2(2)(j) of Directive 2006/123 expressly states that the directive is not to apply to social services relating to social housing.

78. I consider that the land and real estate decree amounts to rules concerning the development or use of land and rules concerning town and country planning.

79. For that reason, there is, to my mind, no need to answer the questions relating to Directive 2006/123.

E – *The eleventh question in Case C-203/11*

80. By this question, the referring court asks the Court to interpret the concept of 'public works contract' contained in Article 1(2)(b) of Directive 2004/18. More specifically, it seeks to ascertain whether a public works contract exists in the case of rules which make the granting of a building or land subdivision authorisation subject to a social obligation entailing the development of social housing units which are subsequently to be sold at capped prices to a public institution, or with substitution by it.

81. The land and real estate decree regards a social obligation as a condition for the granting of a building or land subdivision authorisation. Even though Article 4.1.17 of that decree sets out several options for discharging that obligation, the eleventh question is concerned solely with performance of the social obligation in kind, that is to say, performance in the form of the development of social housing units.

82. It should be recalled that the definition of a public works contract is a matter of EU law. (31) For the purposes of Article 1(2)(a) and (b) of Directive 2004/18, four characteristics are required for it to be possible to speak of a public works contract. First, it must be established that there is a contract concluded in writing. Secondly, it must be a contract for pecuniary interest. Thirdly, the parties to a contract must be one or more economic operators, on the one hand, and one or more contracting authorities, on the other hand. Fourthly, the object of a contract must be either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I to the directive or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

83. I consider that, in the present case, the first of the above characteristics, namely the existence of a contract concluded in writing, is problematic, since the social obligation is imposed on subdividers and developers by the land and real estate decree. As the referring court noted, the national rules provide for an administration agreement concluded between the developer or subdivider and the social housing company. However, it states at the same time that that administration agreement is concerned solely with placing the social housing units already developed on the market and not with their development.

84. Even though it is for the referring court to ascertain whether, in this case, there was a contract concluded in writing, I am able to cite some elements arising from the case-law of the Court which may be of assistance.

85. First of all, I should like to draw attention to the judgment in *Ordine degli Architetti and Others*. (32) In it, the Court ruled that the fact that the public authorities are not free to choose the contractor cannot in itself justify non-application of Directive 2004/18, since that would ultimately preclude from Community competition the execution of works to which the directive would otherwise apply. (33)

86. In the present case, the situation is similar, since the social obligation entailing the development of social housing units is linked by operation of law to a subdivision authorisation or a planning

authorisation. However, it must not be forgotten that in the case giving rise to *Ordine degli Architetti and Others*, the Court emphasised the fact that a development agreement must always be concluded between the municipal authorities and the economic operator. In the present case, I understand the national rules as not providing for the conclusion of a contract with a view to discharging a social obligation. It is for the referring court to examine whether that is actually the case.

87. I consider that it is relevant to refer to another finding set out in *Ordine degli Architetti and Others*. The Court stated therein that 'the basic aim of the Directive … is to open up public works contracts to competition. Exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism. (34)' In that regard, I entertain some doubts as to the issue of how the social obligation could favour subdividers and developers. The application in the main proceedings in Case C-203/11 shows that even the economic operators to which the social obligation applies consider that that obligation is detrimental to their situation. Similarly, the referring court itself has stated in the order for reference that a social obligation performed in kind always entails a loss for subdividers and developers.

88. The second judgment, to which I would also like to draw attention, is *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia.* (35) The Court ruled in that judgment that, with a view to holding that there is no contract within the meaning of the rules relating to public procurement, the referring court should consider whether the economic operator is able to negotiate with the contracting authority the actual content of the services it has to provide and the tariffs to be applied to those services and whether, as regards non-reserved services, that operator can free itself from obligations arising under the cooperation agreement, by giving notice as provided for in that agreement. (36)

89. As in *Ordine degli Architetti and Others* and, in my view, unlike the present case, in *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* some type of contract was concluded between the public authorities and the private operator. More precisely, it was a cooperation agreement. The question arises whether such an agreement is actually a contract within the meaning of the rules on public procurement, since an economic operator has no opportunity to refuse to conclude such an agreement.

90. It follows from *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* that if the referring court were to conclude, in this case, that some kind of contractual relationship existed between an entity which could be regarded as a contracting authority and a subdivider or developer in relation to the social obligation, the referring court should examine whether or not the contractual freedom of a subdivider or developer has been restricted in that it was not able to negotiate the actual content of the services it has to provide and the tariffs to be applied to those services.

91. Based on the way in which the national rules at issue may be construed, I consider that it is primarily the ability to negotiate the price to be applied for the works carried out that is limited. In this case, the price of the works carried out is the sales price of a social housing unit to a social housing company. That price is capped by the national rules and does not therefore represent the market price.

92. Having regard to the foregoing, I am of the opinion that the answer to the eleventh question should be that the concept of 'public contract' in Article 1(2)(b) of Directive 2004/18 must be interpreted as meaning that it is applicable to a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a social obligation entailing the development of social housing units which are subsequently to be sold at capped prices to a public institution, or with substitution by it, provided that, first, those rules provide for the existence of a contract concluded between a contracting authority and an economic operator and that, secondly, an economic operator has a real opportunity to negotiate with the contracting authority the content of that contract and the price to be applied to the works carried out.

V – Conclusion

93. In the light of the foregoing considerations, I propose that the Court should give the following answers to the questions referred by the Cour constitutionnelle:

(1) Articles 21 TFEU, 45 TFEU, 56 TFEU and 63 TFEU must be interpreted as meaning that they preclude national rules which make, in some communes, the transfer of land and buildings constructed thereon subject to the buyer or the tenant being able to demonstrate a sufficient connection with those communes where the existence of that connection is evaluated by reference to the following alternative conditions:

– the requirement that a person to whom the immovable property is to be transferred has been resident in the relevant commune for at least six years before the transfer;

– the requirement that the prospective buyer or tenant carries out, at the date of the transfer, activities in the commune; and

– the existence of a professional, family, social or economic connection as a result of a significant circumstance of long duration.

(2) Articles 107 TFEU and 108 TFEU, read in conjunction with Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, must be interpreted as meaning that they require that the measures contained in Articles 3.1.3, 3.1.10, 4.1.20(3), second subparagraph, 4.1.21 and 4.1.23 of the Decree of the Flemish Region of 27 March 2009 on land and real estate policy be notified to the European Commission prior to the adoption of those provisions provided that it is established that those measures are liable to affect trade between Member States and that they do not satisfy the conditions set out in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

(3) Article 63 TFEU must be interpreted as precluding a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a ‘social obligation’ entailing the development of social housing units, amounting to a certain percentage of the project, which are subsequently to be sold at capped prices to a public institution, or with substitution by it, provided that it is established that that scheme does not satisfy the principle of proportionality.

(4) The concept of ‘public contract’ in Article 1(2)(b) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that it is applicable to a scheme whereby, when a building or land subdivision authorisation is granted in respect of a project of a certain minimum size, it is linked by operation of law to a social obligation entailing the development of social housing units which are subsequently to be sold at capped prices to a public institution, or with substitution by it, provided that, first, those rules provide for the existence of a contract concluded between a contracting authority and an economic operator and that, secondly, an economic operator has a real opportunity to negotiate with the contracting authority the content of that contract and the price to be applied to the works carried out.

---

1 – Original language: French.

---

2 – OJ 2004 L 134, p. 114.

---

3 – OJ 2004 L 158, p. 77.

---

4 – OJ 2006 L 376, p. 36.

---

5 – OJ 2005 L 312, p. 67.

---

6 – In that regard, it should be noted that, at the hearing, the representative of the Government of the French Community pointed out that the referring court had, on several occasions, held that an applicant who proved his interest in an action was not obliged, in addition, to establish that he had a specific interest in any plea which might be raised therein.

---

7 – See, in that regard, Case C-470/11 *Garkalns* [2012] ECR, paragraph 17 and the case-law cited.

---

8 – See, to that effect, Case 63/86 *Commission* v *Italy* [1988] ECR 29, paragraph 15, and Case C-253/09 *Commission* v *Hungary* [2011] ECR I-12391, paragraph 67.

---

9 – See *Commission* v *Hungary*, cited in footnote 8, paragraph 69.

---

10 – See, to that effect, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 34; Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraphs 38 and 39; Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraph 30; and Case C-400/08 *Commission* v *Spain* [2011] ECR I-1915, paragraph 74.

---

11 – See Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 50 and the case-law cited.

---

12 – The claimants in the main proceedings have also challenged before the referring court the subsidies intended for activation projects referred to in Article 3.1.2 of the land and real estate decree. The referring court has already established that that measure constitutes *de minimis* aid within the meaning of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ 2006 L 379, p. 5), which is excluded from the concept of State aid.

---

13 – See Case C-417/10 *3M Italia* [2012] ECR, paragraph 37, and Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243, paragraph 31 and the case-law cited.

---

14 – The analysis contained in the order for reference demonstrates that the referring court is well aware of that case-law.

---

15 – See, to that effect, Case C-494/06 P *Commission* v *Italy and Wam* [2009] ECR I-3639, paragraph 52, and Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 141 and the case-law cited.

---

16 – See, to that effect, Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-7611, paragraph 80 and the case-law cited.

---

17 – See, to that effect, Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 27.

---

18 – See, to that effect, *Cassa di Risparmio di Firenze and Others*, cited in footnote 15, paragraph 140 and the case-law cited.

---

19 – Nevertheless, I am obliged to point out in that regard that the referring court does not request an interpretation of the provisions of EU law, but rather the application to a specific case of the interpretation already given. This is evidenced by the detailed analysis of the relevant case-law contained in the order for

reference. However, the Court has no jurisdiction either to give a ruling on the facts in an individual case or to apply to national measures or situations the rules of EU law which it has interpreted, since those questions are matters for the exclusive jurisdiction of the national court (*Fallimento Traghetti del Mediterraneo*, cited in footnote 13, paragraph 22).

---

20 – See Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 87, and *Fallimento Traghetti del Mediterraneo*, cited in footnote 13, paragraph 35 and the case-law cited.

---

21 – See *Fallimento Traghetti del Mediterraneo*, cited in footnote 13, paragraph 37.

---

22 – See *Fallimento Traghetti del Mediterraneo*, cited in footnote 13, paragraph 38.

---

23 – See *Fallimento Traghetti del Mediterraneo*, cited in footnote 13, paragraph 39.

---

24 – See *Altmark Trans and Regierungspräsidium Magdeburg*, cited in footnote 20, paragraph 93.

---

25 – See, to that effect, Case C-81/10 P *France Télécom* v *Commission* [2011] ECR I-12899, paragraph 58.

---

26 – See, to that effect, Case C-332/98 *France* v *Commission* [2000] ECR I-4833, paragraph 32.

---

27 – See points 23 and 24 of this Opinion.

---

28 – See *Woningstichting Sint Servatius*, cited in footnote 10, paragraph 20 and the case-law cited.

---

29 – Ibid., paragraph 25 and the case-law cited.

---

30 – See *Woningstichting Sint Servatius*, cited in footnote 10, paragraph 30.

---

31 – See, to that effect, Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 40.

---

32 – Case C-399/98 [2001] ECR I-5409.

---

33 – Ibid., paragraph 75.

---

34 – *Ordine degli Architetti and Others*, cited in footnote 32, paragraph 75.

---

35 – Case C-220/06 [2007] ECR I-12175.

---

36 – Ibid., paragraph 55.

JUDGMENT OF THE COURT (Grand Chamber)

19 December 2012 (*)

(Public contracts – Directive 2004/18/EC – Article 1(2)(a) and (d) – Services – Study and evaluation of the seismic vulnerability of hospital structures – Contract concluded between two public entities, one of which is a university – Public entity capable of being classified as an economic operator – Contract for pecuniary interest – Consideration not exceeding the costs incurred)

In Case C-159/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 9 November 2010, received at the Court on 1 April 2011, in the proceedings

Azienda Sanitaria Locale di Lecce,

Università del Salento

v

Ordine degli Ingegneri della Provincia di Lecce and Others,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, vice-President, A. Tizzano, M. Ilešič, L. Bay Larsen, J. Malenovský, Presidents of Chambers, U. Lõhmus, J.-C. Bonichot, A. Arabadjiev, C. Toader, J.-J. Kasel, M. Safjan and D. Šváby (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 27 March 2012,

after considering the observations submitted on behalf of:

– the Azienda Sanitaria Locale di Lecce, by M. de Stasio and V. Pappalepore, avvocati,

– the Università del Salento, by E. Sticchi Damiani and S. Sticchi Damiani, avvocati,

– the Consiglio Nazionale degli Ingegneri, by P. Quinto, avvocato,

– the Associazione delle Organizzazioni di Ingegneri, di Architettura e di Consultazione Tecnico Economica (OICE) and others, by A. Clarizia and P. Clarizia, avvocati,

– the Consiglio Nazionale degli Architetti, Pianificatori, Paesaggisti e Conservatori (CNAPPC), by F. Sciaudone, M. Sanino, R. Sciaudone and A. Neri, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by C. Colelli, avvocato dello Stato,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the Polish Government, by M. Szpunar and M. Laszuk, acting as Agents,

– the Swedish Government, by K. Petkovska, S. Johannesson and A. Falk, acting as Agents,

– the European Commission, by E. Kružiková and C. Zadra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 May 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(2)(a) and (d), Article 2 and Article 28 of, and of Categories 8 and 12 in Annex II A to, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, p. 114), as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ 2007 L 317, p. 34; 'Directive 2004/18').

2 The reference has been made in proceedings between the Azienda Sanitaria Locale di Lecce (Local Health Authority of Lecce; 'ASL') and the Università del Salento (University of Salento; 'the University'), on the one hand, and the Ordine degli Ingegneri della Provincia di Lecce (Order of Architects of the Province of Lecce) and others, on the other hand, concerning the consultancy contract concluded between the ASL and the University ('the consultancy contract') and relating to the study and the evaluation of the seismic vulnerability of hospital structures in the province of Lecce.

Legal context

European Union law

3 Pursuant to recital 2 in the preamble to Directive 2004/18:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other entities governed by public law is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition …'

4 Article 1 of Directive 2004/18 provides:

'...

(2) (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

...

(d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

...

(8) The terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or entities which offers on the market, respectively, the execution of works and/or a work, products or services.

The term “economic operator” shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

...

(9) “Contracting authorities” means the State, regional or local authorities, entities governed by public law, associations formed by one or several of such authorities or one or several of such entities governed by public law.

...’

5 Under Article 2 of Directive 2004/18, ‘[c]ontracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way’.

6 Pursuant to Article 7(b) of Directive 2004/18, the directive applies inter alia to public service contracts awarded by contracting authorities other than the central governmental authorities listed in Annex IV to that directive, in so far as they are contracts which are not excluded in accordance with the exceptions referred to in that article and their value exclusive of value-added tax (VAT) is equal to or greater than EUR 206 000.

7 According to Article 9(1) and (2) of that directive, the calculation of the estimated value of a public contract is based on the total amount payable, net of VAT, as estimated by the contracting authority at the moment at which the contract notice is sent or, as the case may be, at the moment at which the contract awarding procedure commences.

8 Article 20 of Directive 2004/18 provides that contracts which have as their object services listed in Annex II A thereto are to be awarded in accordance with Articles 23 to 55 of the directive, and Article 28 of the directive states that ‘[i]n awarding their public contracts, contracting authorities are to apply the national procedures adjusted for the purposes of th[at] Directive’.

9 Annex II A to Directive 2004/18 contains inter alia the following categories of services:

– Category 8, concerning research and development services, except research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs on condition that the service provided is wholly remunerated by the contracting authority;

– Category 12, concerning architectural services, engineering services and integrated engineering services, urban planning and landscape engineering services, related scientific and technical consulting services and technical testing and analysis services.

National law

10 Under Article 15(1) of Law No 241 of 7 August 1990 introducing new rules governing administrative procedure and relating to the right of access to administrative documents (nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi, GURI No 192 of 18 August 1990, p. 7), ‘public administrative authorities may at any time enter into agreements among themselves with a view to laying down rules governing cooperation in activities of common interest’.

11 Article 66 of the Decree of the President of the Republic No 382 of 11 July 1980 on the reorganisation of University education, concerning training and organisational and teaching methodology reforms (riordinamento della docenza universitaria, relativa fascia di formazione nonché sperimentazione organizzativa e didattica, standard supplement to GURI No 209 of 31 July 1980), provides:

‘Provided that the performance of their academic function of dissemination of knowledge is not thereby impaired, universities may carry out research and consultancy activities under contracts and agreements with public and private entities. The carrying out of those contracts and agreements shall, as a rule, be entrusted to [university] departments or, where such departments are not in place, to institutes or university clinics, or to individual full-time teachers.

The proceeds from the performance of the contracts and agreements referred to in the preceding paragraph shall be allocated in accordance with rules approved by the university's governing council on the basis of rules … laid down by the Ministry of Education.

The teaching and non-teaching staff cooperating in the provision of those services may be rewarded up to an annual sum not exceeding 30% of total remuneration. In each case, the sum so paid to staff may not exceed 50% of the overall proceeds from those services.

The rules referred to in the second paragraph shall determine the amount to be allocated for general expenditure incurred by the university and the criteria for the allocation to the staff of the sum referred to in the third paragraph. The remainder of the revenue shall be allocated to the purchase of teaching and research materials and to operating costs of departments, institutes or clinics which have carried out such contracts or agreements.

The expenditure incurred by the university in carrying out those services shall in any case be deducted beforehand from the proceeds of each service as allocated in accordance with the rules set out in the second paragraph.

The proceeds derived from the activities referred to in the preceding paragraph shall constitute revenue in the budget of the university.'

The dispute in the main proceedings and the question referred for a preliminary ruling

12 By decision of 7 October 2009, the Director-General of the ASL approved the specification for the university to carry out a study and evaluation of the seismic vulnerability of hospital structures in the Province of Lecce, in the light of the recent national legislation in relation to the safety of structures, in particular, of strategic buildings (hereafter, respectively, 'the specification' and 'the study').

13 In accordance with the specification, that study contains, in respect of each building concerned, the three following parts:

– identification of the structural typology of the materials used for construction and the methods of calculation adopted; brief verification of the state of affairs in the light of the project documentation made available;

– verification of the soundness of the structure; brief analysis of the overall seismic resistance of the building; where appropriate, on-site analysis of structural elements or subsystems that are significant for the purposes of identifying overall seismic resistance; and

– compilation of the results referred to in the previous indent, and drafting of technical data sheets on structural diagnosis; in particular: reports on the structural typology observed, on the materials and on the state of conservation of the structure, with particular reference to the aspects having a major effect on structural reactions in relation to the seismic risk of the site of the works; drawing up of technical data sheets for the classification of the seismic vulnerability of the hospitals; technical reports on the structural elements or subsystems identified as critical in relation to the verification of seismic vulnerability; preliminary suggestions and a brief description of works which may be needed to bring the buildings up to standard or to improve them, with regard to their seismic resistance, with particular reference to the advantages and limitations, in technical and economic terms, of the various possible technologies.

14 The consultancy contract of 22 October 2009 relating to the study project stipulates inter alia as follows:

– the maximum duration of that contract is laid down as sixteen months;

– the study project is to be entrusted to the technical constructions group, which may enlist the aid of highly qualified external collaborators;

– that project is to be carried out in the framework of close cooperation between the working groups set up by the ASL and by the University, in order to obtain the objectives set out in the third part of that project;

– academic responsibility is to be assigned to two persons appointed, respectively, by each party;

– ownership of all results produced by the experimental work is to lie with the ASL, which however undertakes to make express mention of the University Department in the event of publication of the results in a technical or academic context; the University has the right to use those results for publications or academic communications with ASL's approval;

– ASL is to pay the University an amount of EUR 200 000 exclusive of VAT for all the services, payable in four instalments. In the event, however, of early termination of the contract, the University is entitled to an amount dependent on the volume of work performed which corresponds to the expenditure incurred and the costs relating to the legal obligations assumed in the context of the implementation of the study project.

15 According to the file submitted to the Court, that sum of EUR 200 000 can be broken down as follows:

– acquisition and use of technical equipment: EUR 20 000;

– costs of staff missions: EUR 10 000;

– staff costs: EUR 144 000;

– general expenditure: EUR 26 000.

16 It is also apparent that the staff costs of EUR 143 999.58, rounded up to EUR 144 000, correspond to the following estimates:

– activation of three research grants of one year's duration: EUR 57 037.98;

– cost of an associate professor for 180 hours in 2009 (hourly cost of EUR 45.81) and for 641 hours in 2010 (hourly cost of EUR 48.93): EUR 39 609.93;

– cost of a senior researcher for 170 hours in 2009 (hourly cost EUR 25.91) and for 573 hours in 2010 (hourly cost EUR 32.23 euros): EUR 22 936.95;

– cost of a non-senior researcher for 170 hours in 2009 (hourly cost EUR 20.50) and for 584 hours in 2010 (hourly cost EUR 26.48): EUR 18 949.32;

– cost of a laboratory technician for 70 hours in 2009 (hourly cost EUR 20.48) and for 190 hours in 2010 (hourly cost EUR 21.22): EUR 5 465.40.

17 Various orders and professional associations and undertakings appealed against the decision approving the specification and against any preparatory measures related to or resulting from them before the Tribunale amministrativo regionale per la Puglia, sede di Lecce (Regional Administrative Court of Puglia, seat at Lecce), alleging inter alia the infringement of national and European Union public procurement legislation. By its judgment, that court upheld those appeals, considering that the study project constituted a contract for the provision of engineering services within the meaning of the Italian legislation.

18 In the appeals brought by them against that judgment, the ASL and the University argue in essence that, in accordance with Italian law, the consultancy contract constitutes a cooperation agreement between public administrations in respect of activities of general interest. The participation for pecuniary interest – but for remuneration limited to the costs incurred – of the University in such a contract falls under its institutional activities. There is in addition reliance on the fact that the study project is conferred on research bodies and the fact that it relates to research to be conducted by means of experiments and analyses to be carried out outside any standardised methodology or procedure

codified or established in academic literature. The lawfulness of such cooperation agreements between public authorities under European Union law results from the case-law of the Court.

19 The referring court explains that the agreements between public authorities provided for in Article 15 of Law No 241 of 7 August 1990 aim to coordinate the action of various administrative bodies each of which pursues a particular public interest, and constitute a form of cooperation the function of which is to make management of public services as effective and economical as possible. Such an agreement may be concluded where a public institution intends to confer, in return for a pecuniary interest, the provision of a service on another public body and where that service falls within the tasks of the authority, in accordance with the institutional objectives of the entities which are parties to the agreement.

20 The Consiglio di Stato nevertheless raises the question whether the conclusion of an agreement between public authorities is not contrary to the principle of free competition where one of the authorities concerned can be regarded as an economic operator, a classification which encompasses any public body proposing services on the market, regardless of whether it has a primarily profit-making objective, whether it is structured as an undertaking or whether it has a continuous presence on the market. The referring court refers, in that regard, to Case C-305/08 *CoNISMa* [2009] ECR I-12129. From that perspective, provided that the University has the capacity to take part in a procurement procedure, the contracts concluded with it by contracting authorities fall within the scope of European Union public procurement rules where they relate, as in the case in the main proceedings, to research services which do not appear to be incompatible with the services mentioned in categories 8 and 12 of Annex II A to Directive 2004/18.

21 In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer to the Court the following question:

‘Does [Directive 2004/18] and, in particular, Article 1(2)(a) and (d), Article 2 and Article 28 of that directive and Categories 8 and 12 in Annex II[A] thereto, preclude national legislation which permits written agreements to be entered into between two contracting authorities for the study of the seismic vulnerability of hospital structures and its evaluation in the light of national regulations on the safety of structures and in particular of strategic buildings, for a consideration not exceeding the costs incurred in the performance of the service, where the authority responsible for performance may act as an economic operator?’

The question referred for a preliminary ruling

22 By its question, the referring court asks, in essence, whether Directive 2004/18 must be interpreted as precluding national legislation which permits the conclusion, without an invitation to tender, of a contract by which two public entities set up between them a form of cooperation such as that at issue in the main proceedings.

23 As a preliminary point, it should be noted that the application of Directive 2004/18 to a public contract is subject to the condition that the estimated value thereof reaches the threshold laid down in Article 7(b) of that directive, taking into consideration the usual value on the market of the works, supplies or services to which that public contract relates. Otherwise, the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency apply, provided that the contract concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is carried out (see, to that effect, inter alia, Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraphs 20, 21 and 31 and the case-law cited).

24 However, the fact that the contract at issue in the main proceedings is capable of falling, as the case may be, either under Directive 2004/18 or the fundamental rules and general principles of the FEU Treaty does not affect the answer to be given to the question posed. The criteria laid down in the case-law of the Court in order to determine whether an invitation to tender is mandatory or not are relevant both with regard to the interpretation of that directive and with regard to the interpretation of

those rules and principles of the FEU Treaty (see, to that effect, Case C-573/07 *Sea* [2009] ECR I-8127, paragraphs 35 to 37).

25 That having been stated, it should be pointed out that, in accordance with Article 1(2) of Directive 2004/18, a contract for pecuniary interest concluded in writing between an economic operator and a contracting authority and having as its object the provision of services referred to in Annex II A to that directive, is a public contract.

26 In that regard, first, it is immaterial whether that operator is itself a contracting authority (see, to that effect, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 51). It is also immaterial whether the body concerned is primarily profit-making, whether it is structured as an undertaking or whether it has a continuous presence on the market (see, to that effect, *CoNISMa*, paragraphs 30 and 45).

27 Thus, with regard to entities such as public universities, the Court has held that such entities are, in principle, entitled to take part in a tendering procedure for the award of a public service contract. However, the Member States may regulate the activities of those entities and inter alia authorise or not authorise them to operate on the market, taking into account their objectives as an institution and those laid down in their statutes. None the less, if and to the extent that such entities are entitled to offer certain services on the market, they may not be prevented from participating in a tendering procedure for the services concerned (see, to that effect, *CoNISMa*, paragraphs 45, 48, 49 and 51). In the present case, the referring court stated that Article 66, first paragraph, of the Decree of the President of the Republic No 382 of 11 July 1980 on the reorganisation of University education, concerning training and organisational and teaching methodology reforms, expressly authorises public universities to supply research and consultancy services to public or private entities provided that that activity does not impair their educational role.

28 Second, activities such as those which are the subject-matter of the contract at issue in the main proceedings – notwithstanding the fact, referred to by the referring court, that they are capable of coming under academic research – fall, according to the actual nature of those activities, either within the framework of research and development services covered by Annex II A, category 8, of Directive 2004/18 or within the framework of engineering services and related scientific and technical consulting services covered by category 12 of that annex.

29 Third, as stated by the Advocate General in paragraphs 32 and 34 of her Opinion, and as is clear from the usual and ordinary meaning of the phrase ‘pecuniary interest’, a contract cannot fall outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service.

30 Subject to the checks which are for the referring court to carry out, the contract at issue in the main proceedings does appear to have all the characteristics referred to in paragraphs 26 to 29 of this judgment.

31 It follows however from the case-law of the Court that two types of contracts entered into by a public entity do not fall within the scope of European Union public procurement law.

32 The first type of contracts are those concluded by a public entity with a person who is legally distinct from that entity where, at the same time, that entity exercises over the person concerned a control which is similar to that which it exercises over its own departments and where that person carries out the essential part of its activities with the entity or entities which control it (see, to that effect, *Teckal*, paragraph 50).

33 It is however common ground that that exception is not applicable in a context such as that at issue in the main proceedings, because it is apparent from the order for reference that the ASL does not exercise any control over the University.

34 The second type of contracts are those which establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out (see, to that effect, Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747, paragraph 37).

35 In those circumstances, European Union rules on public procurement are not applicable in so far as, in addition, such contracts are concluded exclusively by public entities, without the participation of a private party, no private provider of services is placed in a position of advantage vis-à-vis competitors and implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest (see, to that effect, *Commission* v *Germany*, paragraphs 44 and 47).

36 While, as stated by the referring court, a contract such as that at issue in the main proceedings appears to satisfy some of the criteria referred to in the two preceding paragraphs of this judgment, such a contract can however fall outside the scope of European Union public procurement rules only if it fulfils all those criteria.

37 In that regard, it appears to follow from the information in the order for reference, first, that that contract contains a series of substantive aspects a significant or even major part of which corresponds to activities usually carried out by engineers and architects and which, even though they have an academic foundation, do not however constitute academic research. Consequently, contrary to the holding of the Court in paragraph 37 of *Commission* v *Germany*, the public task which is the subject-matter of the cooperation between the public entities established by the abovementioned contract does not appear to ensure the implementation of a public task which the ASL and the University both have to perform.

38 Second, the contract at issue in the main proceedings may bring about an advantage for private undertakings if the highly qualified external collaborators to whom it permits the University to have recourse for the carrying out of certain services include private service providers.

39 It is however for the referring court to carry out all the necessary checks in that regard.

40 The answer to the question referred is therefore that European Union public procurement law precludes national legislation which authorises the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other where – this being for the referring court to establish – the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

European Union public procurement law precludes national legislation which authorises the conclusion, without an invitation to tender, of a contract by which public entities establish cooperation among each other where – this being for the referring court to establish – the purpose of such a contract is not to ensure that a public task that those entities all have to perform is carried out, where that contract is not governed solely by considerations and requirements relating to the pursuit of objectives in the public interest or where it is such as to place a private provider of services in a position of advantage vis-à-vis his competitors.

[Signatures]

* Language of the case: Italian.

I - 28
I - 27

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 23 May 2012 (1)

Case C-15911

Azienda Sanitaria Locale di Lecce
v
Ordine degli Ingegneri della Provincia di Lecce,
Consiglio Nazionale degli Ingegneri,
Associazione delle Organizzazioni di Ingegneri, di Architettura e di Consultazione Tecnico-economica (OICE),
Etacons srl,
Ing. Vito Prato Engineering srl,
Barletti – Del Grosso e Associati srl,
Ordine degli Architetti della Provincia di Lecce,
Consiglio Nazionale degli Architetti, Pianificatori, Paesaggisti e Conservatori

(Reference for a preliminary ruling
from the Consiglio di Stato (Italy))

(Procurement law – Public-public partnership – Directive 2004/18/EC – Failure to conduct a public tendering procedure – Provision of a service consisting in the study and evaluation of the seismic vulnerability of certain hospitals – Contracts entered into between a contracting authority and a university constituted under public law – Contracts for pecuniary interest not exceeding the costs incurred – Capacity as an economic operator)

I – Introduction

1. In the present preliminary ruling proceedings under Article 267 TFEU, the Consiglio di Stato (Council of State; ‘the referring court’) asks the Court a question concerning the interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (2)

2. The reference for a preliminary ruling has been made in a dispute between Azienda Sanitaria Locale di Lecce (‘Lecce ASL’) and a number of associations of engineers and architects, in connection with an agreement entered into by Lecce ASL and the Università del Salento (‘the University’) for the study and evaluation, for consideration, of the seismic vulnerability of hospital buildings in the Province of Lecce. Those associations of engineers and architects, which were not involved in that project, allege that Lecce ASL awarded the contract to the University without conducting a public tendering procedure and thus unlawfully. Lecce ASL objects that the agreement comes under

cooperation and coordination between public authorities, since it was concluded in order to attain a public interest objective.

3. The present case gives the Court another opportunity to develop its case-law on procurement law. Proceeding from its judgment in *Commission* v *Germany*, (3) the Court must decide whether it appears justified to apply the rules of procurement law in a situation such as that in the main proceedings, where a public authority awards a contract for consultancy activities to a university constituted under public law. Account must be taken of various aspects, such as the power of the University to act as an economic operator and the cost-covering character of the consideration received.

II – Legislative framework

A – *EU law*

4. Article 1(2), (8) and (9) of Directive 2004/18 provides:

‘(2)(a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

(d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

…

(8) The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term “economic operator” shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

…

(9) “Contracting authorities” means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A “body governed by public law” means any body

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

…’

5. Under Article 7, the directive applies to public contracts which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than a threshold of EUR 206 000, provided the contracts are public supply and service contracts awarded by contracting authorities other than those listed in Annex IV. Under Article 9 of the directive, the calculation of the estimated value of a public contract is based on the total amount payable, net of VAT, as estimated by the contracting authority.

This calculation must take account of the estimated total amount, including any form of option and any renewals of the contract.

6. Under Article 16(f) of the directive, the directive does not apply to public service contracts for research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority.

7. Under Article 20 of the directive, contracts which have as their object services listed in Annex II A are to be awarded in accordance with Articles 23 to 55. Article 28 provides that in awarding their public contracts, contracting authorities must apply the national procedures adjusted for the purposes of the directive. Annex II A lists, inter alia, the following categories of services: 'Research and development services' (category 8) and 'Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services' (category 12).

B – *National law*

8. Article 15(1) of Law No 241 of 7 August 1990 introducing new rules governing administrative procedure and relating to the right of access to administrative documents (nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi) (4) provides that public administrative authorities may at any time enter into agreements among themselves with a view to laying down rules governing cooperation in activities of common interest.

9. Article 66 of Decree of the President of the Republic (Decreto del Presidente della Repubblica) No 382/1980 provides:

'Provided that the performance of their academic function of dissemination of knowledge is not thereby impaired, universities may carry out research and consultancy activities under contracts and agreements with public and private entities. The carrying out of those contracts and agreements shall, as a rule, be entrusted to [university] departments or, where such departments are not in place, to institutes or university clinics, or to individual full-time teachers.

The proceeds from the performance of the contracts and agreements referred to in the preceding paragraph shall be allocated in accordance with rules.

…

The teaching and non-teaching staff cooperating in the provision of those services may be rewarded up to an annual sum not exceeding 30% of total remuneration. In each case, the sum so paid to staff may not exceed 50% of the overall proceeds from those services.

The rules referred to in the second paragraph shall determine the amount to be allocated for general expenditure incurred by the university and the criteria for the allocation to the staff of the sum referred to in the third paragraph.

…

The proceeds derived from the activities referred to in the preceding paragraph shall constitute revenue in the budget of the university.'

10. The order for reference also states that, according to the specific legislation relating to their activity, the universities are primary centres for academic research.

III – Facts, main proceedings and question referred for a preliminary ruling

11. On the basis of the specification approved by decision of 7 October 2009 by the Director General of Lecce ASL and the subsequent agreement entitled 'Consultancy Contract', a written agreement was entered into between the abovementioned Lecce ASL and the University. That

agreement concerned the study and evaluation, for consideration, of the seismic vulnerability of hospital buildings in the Province of Lecce in the light of the most recent national legislation in relation to the safety of structures and, in particular, of strategic buildings.

12. The specification indicated in the following terms the services to be provided:

– identification of the structural typology of the materials used for construction and the methods of calculation adopted; brief verification of the actual state of affairs in the light of the project documentation made available;

– verification of the soundness of the structure; brief analysis of the overall seismic resistance of the building; where appropriate, on-site analysis of structural elements or subsystems that are significant for the purposes of identifying overall seismic resistance; and

– compilation of the results referred to in the previous indent, and drafting of technical data sheets on structural diagnosis; in particular: reports on the structural typology observed, on the materials and on the state of conservation of the structure, with particular reference to the aspects having a major effect on structural reactions in relation to the seismic risk of the site of the works; drawing up of technical data sheets for the classification of the seismic vulnerability of the hospitals; technical reports on the structural elements or subsystems identified as critical in relation to the verification of seismic vulnerability; preliminary suggestions and a brief description of works which may be needed to bring the buildings up to standard, or to improve them, with regard to their seismic resistance, with particular reference to the advantages and limitations, in technical and economic terms, of the various possible technologies.

13. Under the Consultancy Contract, the work was to be carried out through close collaboration between the Lecce ASL working group and the University working group, if necessary with the help of highly qualified external staff; academic responsibility was to be assigned to two persons appointed, respectively, by the contracting authority and by the University Department; ownership of any results produced by the experimental work was to lie with Lecce ASL, together with the commitment, however, to make express mention of the Department if the results appeared in technical-academic publications. Lecce ASL was to pay the University an amount of EUR 200 000 excluding VAT for the entire service, due in four instalments. If the contract were terminated early, the University was to be entitled to an amount equivalent to the volume of work performed up to that point and the costs incurred.

14. On three administrative appeals brought, respectively, by the Ordine degli Ingegneri della Provincia di Lecce, the Associazione delle Organizzazioni di Ingegneri, di Architettura e di Consultazione Tecnico-economica (OICE) – together with Etacons Srl, Vito Prato Engineering Srl, Barletti-del Grosso & Associati Srl – and the Ordine degli Architetti della Provincia di Lecce, the Puglia Regional Administrative Court declared the direct award to the University of the above contract unlawful for failure to apply public tendering procedures.

15. Lecce ASL and the University appealed to the referring court against the respective judgments. In its order for reference, that court expresses reservations that Directive 2004/18 could preclude the conclusion of a contract like the one at issue. Accordingly, it asks whether the contested agreement satisfies the legal requirements governing a public-public partnership, as developed in the Court's case-law. Whilst there are some grounds in support of this conclusion, it cannot be stated with any certainty, especially since other aspects suggest the contrary. Because, in its view, it is not possible to infer any guidance as to interpretation from the Court's case-law, the Consiglio di Stato stayed the proceedings and made reference to the Court for a preliminary ruling on the following question:

'Does Directive 2004/18, and, in particular, Article 1(2)(a) and (d), Article 2 and Article 28 of that directive and Categories 8 and 12 in Annex II [A] thereto, preclude national legislation which permits written agreements to be entered into between two contracting authorities for the study of the seismic vulnerability of hospital structures and its evaluation in the light of national regulations on the safety of structures and of strategic buildings in particular, for a consideration not exceeding the costs incurred in the performance of the service, where the authority responsible for performance may act as an economic operator?'

IV – Procedure before the Court

16. The order for reference dated 9 November 2010 was lodged at the Registry of the Court on 1 April 2011.

17. Written observations were submitted by Lecce ASL, the University, the Consiglio Nazionale degli Ingegneri (CNI), the Associazione delle Organizzazioni di Ingegneri, di Architettura e di Consultazione Tecnico-economica (OICE), the Consiglio Nazionale degli Architetti, Pianificatori, Paesaggisti e Conservatori (CNAPPC), the Italian, Czech, Polish and Swedish Governments and the European Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

18. At the hearing on 27 March 2012, oral argument was presented by the agents of Lecce ASL, the University, CNI, OICE, CNAPPC, the Italian, Polish and Swedish Governments, and the Commission.

V – Main arguments of the parties

19. The arguments of the parties will, in so far as they are relevant, be reproduced in my statements.

VI – Legal assessment

A – *General remarks*

20. According to the wording of the question, the referring court is essentially seeking to ascertain whether the applicable national legislation may be regarded as compatible with Directive 2004/18 in so far as it permits agreements such as that described in the question. If, however, we consider the legal problems raised in the present case in their overall context, it must be stated that the central question which the Court must address as a matter of priority concerns the compatibility of the agreement in question with Directive 2004/18. In order to give the national court an answer to its questions which is helpful with a view to the resolution of the main proceedings, it would appear reasonable to shift the focus of the analysis to this aspect. In my analysis I will therefore deal with the question whether there has been an infringement of Directive 2004/18 in the main proceedings. I do not consider it absolutely necessary to reformulate the question to that end, especially since the finding of a possible infringement will indirectly provide clarification whether the applicable national law is consistent with EU law. Should the analysis reveal that the agreement in question does not comply with Directive 2004/18, the legal position which exists in Italy likewise cannot be regarded as consistent with EU law.

21. Directive 2004/18 would preclude an agreement such as that entered into between Lecce ASL and the University if under European Union law the contract for the study and evaluation of the seismic vulnerability of certain hospitals required a tendering procedure, since no call for tenders was made in the main proceedings. According to the order for reference, the contract in question was instead awarded directly to the University. Should the requirement of a tendering procedure be confirmed, it would also have to be examined whether an exception might apply which allows no public tendering procedure to be conducted, in which connection consideration must be given in the main proceedings to both the exceptions codified in Directive 2004/18 itself and the legal concept, developed in the Court's case-law, of a partnership between public authorities for the performance of a public interest task.

B – *Applicability of Directive 2004/18*

22. However, that presupposes that the agreement in question actually falls within the scope of Directive 2004/18. This is the first point to be examined, to which I will turn immediately below.

(1) Existence of a public contract

(a) Provision of services

23. For the situation to fall within the material scope of the directive, a 'public contract' must exist. The agreement in question may possibly be classifiable as one of the types of public contract listed in Article 1(2) of the directive. In my view, in the light of the available factual information, classification

as a ‘public service contract’ within the meaning of the legal definition contained in Article 1(2)(d) is a possibility. In that provision, public service contracts are defined as ‘public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II’. According to its object, the work to be performed by the University under the agreement corresponds to the type of services listed under category 12 in Annex II A (‘Architectural services; engineering services and integrated engineering services; urban planning and landscape engineering services; related scientific and technical consulting services; technical testing and analysis services’). This is complex technical work consisting in analysis of both compliance with building regulations and the seismic exposure of buildings. It has an obvious link to architecture and envisages extensive consultancy activities in this field carried out by suitably qualified staff from the University.

(b) Contract between a contracting authority and an economic operator

24. In addition, the definition of ‘public service contract’ requires, in so far as it is based on the notion of public contract in Article 1(2)(a) of the directive, a written contract between a contracting authority and an economic operator.

25. The legal requirement of written form is satisfied because the ‘Consultancy Contract’ concluded on 29 October 2009 was laid down in writing.

26. Under Article 1(9) of the directive, ‘contracting authority’ means ‘the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law’. In its capacity as part of the public administration, Lecce ASL satisfies the conditions for classification as a contracting authority within the meaning of the directive.

27. As far as the potential classification of the University as an ‘economic operator’ is concerned, under Article 1(9) of the directive that term also covers ‘service provider’. This means ‘any natural or legal person or public entity or group of such persons and/or bodies which offers on the market ... services’. The Università del Salento itself is constituted under public law, as is clear from its written observations. (5) A relevant provision in this connection is Article 66 of Decree of the President of the Republic No 382/1980, because it authorises universities to enter into contracts and agreements with public and private bodies to carry out research and consultancy activities. Accordingly, under national law, universities are permitted not only to function as education and research centres, but also as economic operators within the meaning of the abovementioned definition.

28. Reference should be made here to *CoNISMa*, (6) in which the Court confirmed that universities may also take part in tendering procedures as economic operators. In that judgment, the Court stated that capacity as an economic operator is not necessarily reserved for service providers which are structured as a business. (7) Rather, any person or entity which is capable of carrying out the contract is eligible to put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis and whether or not it is subsidised by public funds. (8) The Court also found that the effect of a restrictive interpretation of the concept of economic operator would be that contracts concluded between contracting authorities and bodies which are primarily non-profit-making would not be regarded as ‘public contracts’, could be awarded by mutual agreement and would thus not be covered by EU rules on equal treatment and transparency, which would be inconsistent with the aim of those rules.

29. Consequently, the agreement entered into between Lecce ASL and the University must be regarded as a written contract between a contracting authority and an economic operator.

(c) Pecuniary interest of the service

30. A further condition for classification of an agreement as a ‘public contract’ within the meaning of Article 1(2)(a) of the directive is that it is for pecuniary interest. The notion of ‘pecuniary interest’ requires that the service provided by the tenderer is subject to a remuneration obligation on the part of the contractor. This means, in addition to participation by two persons, reciprocity in the form of the material exchange of consideration. Such reciprocity of the contractual relationship is necessary for the requirement of a tendering procedure to apply.

31. In the main proceedings, under the agreement in question Lecce ASL entered into a remuneration obligation vis-à-vis the University. However, in this particular case, the consideration promised was assessed in such a way that it did not exceed the costs incurred. Against that background, the question arises whether cost-covering remuneration also satisfies the definition of 'pecuniary interest'. In my view, certain arguments support a broad interpretation of this notion, to the effect that it covers any kind of remuneration which has monetary value.

32. As the referring court correctly explains in its order for reference, (9) the absence of profit alone does not render the contractual agreement gratuitous. It continues to be a contract for valuable consideration from an economic point of view, especially since the recipient is in any case given a non-cash benefit, (10) and could thus, in principle, come within the scope of Directive 2004/18. Notwithstanding the above, the view can be taken that only a broad understanding of the notion of 'pecuniary interest' is consistent with the purpose of the procurement directives, which is to open up the markets to genuine competition. (11) Only in this way is it possible to guarantee the effectiveness of the procurement directives and to prevent the circumvention of procurement law by agreeing other forms of remuneration which are not readily recognisable as profit-making, for example through swaps or the waiver of reciprocal claims existing between the contracting parties. (12)

33. Such an understanding of pecuniary interest is also in line with the broad definition adopted by the Court for freedom to provide services under Article 56 TFEU. (13) In view of the fact that, according to its legal basis in Article 95 EC (now Article 114 TFEU), Directive 2004/18 is intended to serve to attain the fundamental freedoms in the internal market, as expressed in recital 2 in the preamble, a broad understanding of the notion 'pecuniary interest' would seem logical. In accordance with that broad interpretation, the service provider may not be absolutely required to be profit-making. Rather, it should also be sufficient, for the pecuniary interest requirement to be satisfied, if the service provider merely receives cost-covering remuneration in the form of reimbursement of costs. The notion of pecuniary interest is thus also intended to cover simple reimbursement. (14)

34. Consequently, the agreement in question is for pecuniary interest and a 'public service contract' within the meaning of the definition contained in Article 1(2)(d) of the directive exists in the main proceedings.

(2) Attainment of the respective threshold

(a) Falling below the relevant threshold?

35. The procurement directives, with their strict procedural requirements, do not apply to every small contract. Rather, the monetary consideration of the contract in question must reach a certain threshold in order to come under the procurement rules. Considering only proportionality grounds, the sometimes very expensive procurement procedures do not have to be used for every small-scale contract. In addition, a low contract value does not suggest a serious cross-border commercial interest.

36. Thus, as a result of the thresholds, procurement law is divided into two classes. Above the thresholds it is necessary to comply with detailed stipulations under the directives. Below the thresholds, only EU primary procurement law, together with the unwritten principles stemming from the Court's case-law, is relevant. This division proves to be relevant in the present case because the contract in the main proceedings possibly falls below the threshold, which will have to be examined in detail.

37. Under Article 9(1) of Directive 2004/18, the calculation of the estimated value of a public contract is to be based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation must take account of the estimated total amount, including any form of option and any renewals of the contract. It is clear from the documents before the Court that Lecce ASL undertook to pay a consideration of EUR 200 000 net of VAT. If that amount is taken as the estimated value of the contractually agreed services, it is clear that it falls below the threshold of EUR 206 000 defined in Article 7(1)(b) of Directive 2004/18 in the version applicable on 29 October 2009, i.e. at the time the agreement in question was concluded. Consequently, the compatibility of the agreement in question with EU procurement law should also not be assessed on the basis of Directive 2004/18. The

sole basis for assessment should be primary law, and above all the provisions relating to the fundamental freedoms.

38. On the other hand, as the Commission points out in its written observations, (15) it should not be disregarded that a short time later the threshold was reduced to EUR 193 000, under Commission Regulation (EC) No 1177/2009 of 30 November 2009, with effect from 1 January 2010. (16) The estimated value of the services would thus be above the new threshold. The question therefore arises which threshold must be used in the main proceedings. This is in turn linked to the question which version of Directive 2004/18 is applicable in the main proceedings. In order to be able to answer this question, the relevant moment from which a procurement directive is applicable must be determined.

39. Directive 2004/18 contains a number of rules which are intended to help those applying the law to determine the relevant moment for the calculation of the contract value. For example, Article 9(2) of the directive provides that the relevant moment for the calculation is the moment at which the contract notice is sent or, where such notice is not required, the moment at which the procedure is commenced. It would therefore be conceivable, in principle, to have regard to those rules in order to determine the temporal applicability of the relevant version of Directive 2004/18. It must be stated, however, that those rules assume a situation where a tendering procedure has actually taken place. They do not state what action should be taken where – as in the main proceedings – no call for tenders has been made, for whatever reason. In the absence of express provisions governing this latter situation, it is necessary to make some fundamental observations in order to find a solution for this situation which takes sufficient account of it.

40. In my Opinion in *Commission* v *Germany*, (17) I had drawn attention to the fact that the thresholds defined in the procurement directives are regularly revised. Accordingly, clear rules are needed to determine the relevant thresholds. For that reason, I also suggested in that Opinion that, where there is no call for tenders, regard is to be had to the time of the contractual negotiations as the material time for determining the relevant threshold and, indirectly, also for the temporal applicability of a procurement directive. (18) This seems to be reasonable, especially since regard must be had to a time when there is sufficient certainty as to the overall contract volume and the estimated contract value. The abovementioned provisions in Article 9(2) of Directive 2004/18 are based on the same idea. Since it must be assumed that at the time the contract was concluded at the latest there was final certainty as to the estimated contract value, that must be the relevant moment in the main proceedings. This means that in the main proceedings the older version of Directive 2004/18 is applicable. Because the value of the contractually agreed service falls below the threshold laid down therein, the compatibility of the agreement in question with EU procurement law would, as has already been explained, have to be assessed, in principle, solely on the basis of primary law.

41. There are no explicit rules on procurement law in the treaties. (19) The Court has nevertheless inferred principles of procurement law from the fundamental freedoms, the prohibition on discrimination on grounds of nationality and the principle of equal treatment and, according to the individual case to be assessed, has laid down conditions of procurement law with which contracting authorities must comply. Thus, the principle of equal treatment under primary law in the field of public procurement is intended to afford equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality. (20) The principles of equal treatment and non-discrimination on grounds of nationality imply a duty of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the award of the contract to be opened up to competition and a review of the impartiality of the procurement procedures. (21)

42. However, the referring court has not provided the necessary descriptions of the facts and explanations for a detailed analysis of compliance with the principles governing procurement under primary law. This is not least due to the fact that the referring court has restricted its request for the interpretation of EU law to Directive 2004/18. The statements made by the referring court therefore relate solely to aspects which are relevant to an interpretation of that secondary legislation.

43. It should be borne in mind in this connection that, with regard to the admissibility of references, the Court has pointed to the requirement that the national court's decision should contain a sufficient description of the facts and law involved in the case. The purpose of that requirement is to enable the

Court, first, to provide an interpretation of EU law which will be of use to the national court, (22) and, second, to give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice. (23) However, account can be taken of both purposes, at least as far as the main proceedings are concerned, only if the referring court makes a suitable request for an interpretation of primary law to the Court and supplements its description of the facts and law involved in the case with relevant statements. The referring court should therefore be advised of the possibility of making a fresh reference.

44. However, a fresh reference would appear to be possible only if it is definitively confirmed that the contract actually falls below the relevant threshold. It is for the national court to make the necessary factual findings in order to rule out entirely that other amounts also do not have to be taken into consideration as part of the agreed consideration. Particular attention must be given to the method by which the contract value for Lecce ASL was calculated. The national court will have to review a number of aspects, including whether items might be underestimated, whether the contractual agreement provided for the subsequent adjustment of such items to the actual costs, and whether the contracting parties agreed to split up the contracts, including a separate calculation of items. (24) Since the contract falls only slightly below the threshold in the main proceedings, it appears that these aspects require particular clarification.

(b) Presumption that the question is relevant

45. Should the contract value actually fall below the threshold of EUR 206 000 which is relevant in the main proceedings, this fact would raise doubts whether the question referred is relevant to the decision, especially since it expressly seeks the interpretation of Directive 2004/18, rather than of the applicable primary law. The question referred could possibly prove to be irrelevant to the decision in so far as it is not entirely clear that it bears any relation to the actual facts of the main proceedings or to their purpose.

46. It should nevertheless be remembered that it is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. (25) Where the questions submitted by the national court concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling. (26)

47. It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of EU law referred to in the questions bears no relation to the actual facts of the main action or to its purpose. (27) This is not the case in the main proceedings, however, especially since it cannot be ruled out that, after assessing all the circumstances of the main proceedings, in particular the method by which the contract value for Lecce ASL was calculated, (28) the referring court will conclude that Directive 2004/18 should ultimately be applied in the main proceedings, because the relevant threshold has been exceeded.

48. Consequently, the Court is bound to comply with the request from the referring court and to interpret Directive 2004/18.

(3) Irrelevance of an exception

49. Whilst the thresholds narrow the limits of procurement law initially on a purely financial basis, the directives also contain explicit exceptions for specific areas. These must be distinguished from the unwritten exceptions which the Court has developed in its case-law and which mainly concern situations in which regional or local public authorities perform public interest tasks together. The purpose of the rules laying down the exceptions is to fine tune the procurement directives. In particular, the intention is to exclude from the scope of procurement law areas in which there is no specific procurement-related danger to competition, there is no cross-border commercial interest or an

application of procurement law would not be consistent with the characteristics and the particular needs of the areas covered by the exceptions. (29)

50. Irrespective of the kind of exception that is relevant in a certain case, it should be borne in mind that, because of the aim of the procurement directives, which is to make the award of public contracts in all Member States subject to common rules and to open up public procurement to competition in general, the rules laying down exceptions in the directives must be given a definitive and, in principle, a narrow interpretation. (30)

51. In the main proceedings, consideration must be given to both codified and unwritten exceptions, the applicability of which will be examined below in that schematic order.

(a) Codified exceptions

(i) Service contract on the basis of an‘exclusive right’

52. Consideration should first be given to the exception laid down in Article 18 of Directive 2004/18. Under that provision, the directive ‘shall not apply to public service contracts awarded by a contracting authority to another contracting authority … on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty’. This exception would thus be relevant only if it can be shown that the University has an exclusive right to provide services of the agreed kind.

53. It is sufficient to note that even though Italian law states in Article 6(4) of Law No 168/1989 that the universities are the ‘primary centres for academic research’ and, in Article 15(1) of Law No 241/1990, it authorises them to ‘enter into agreements among themselves with a view to laying down rules governing cooperation in activities of common interest’, it is not possible to infer from this any exclusive right in the abovementioned sense. A legally enshrined exclusive right for the universities to carry out the study and evaluation of the seismic vulnerability of hospital buildings on behalf of the public administration cannot be found in either the Italian legal order or in EU law. The Czech Government (31) is correct in its view that these activities should, by their nature, be regarded as ancillary research activities carried out by the University and do not serve to fulfil its fundamental function as a centre of academic learning, in respect of which the University enjoys an exclusive right in the context of the education system of each Member State.

54. The exception laid down in Article 18 of Directive 2004/18 is not therefore relevant in the main proceedings.

(ii) Special exception for research and development services

55. It must also be examined whether the special exception laid down in Article 16(f) of Directive 2004/18 is relevant in the main proceedings. Under that provision, the directive does not apply to service contracts for ‘research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority’.

56. This criterion is satisfied in so far as Lecce ASL has undertaken, by contract, to pay a consideration. However, it is unclear whether the other requirements are fulfilled. Even though under the consultancy contract ownership of any results produced by the experimental work was to lie with Lecce ASL, it was under a commitment to make express mention of the Department if the results appeared in academic publications. That raises the question of the extent to which the benefits of the research accrue exclusively to Lecce ASL. It cannot be ruled out entirely that that was the case. In the absence of more precise factual information on the content of the agreement and the associated legal consequences under national law, it is not possible to determine with any certainty whether that requirement of the exception in Article 16(f) of Directive 2004/18 is satisfied. To that end it would be necessary to ascertain and assess facts, which the Court however has no power to do in proceedings under Article 267 TFEU. (32) Instead, this falls within the jurisdiction of the national court. It must

therefore examine whether the exception laid down in Article 16(f) of Directive 2004/18 is relevant in the light of the overall circumstances in the main proceedings.

(b) Unwritten exceptions

57. As has already been intimated above, in its case-law the Court has developed two further exceptions, which relate to 'in-house operations' and various forms of inter-municipal cooperation. (33) A description should be given, with a view to an examination of whether they are applicable in the main proceedings, of their main characteristics.

(ii) In-house operations

58. In-house operations presuppose, by definition, an exchange of consideration which – from a legal point of view – takes place within a single legal entity. In-house operations are not therefore relevant for the purposes of the procurement rules because a contracting authority provides the services with its own resources. This is permissible under procurement law, as the Court found in *Stadt Halle and RPL Lochau*. (34) In that judgment, the Court stated that 'a public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments'. In the view of the Court, 'in such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority'. There is therefore no need to apply the EU rules in the field of public procurement to such a situation. (35)

59. The situation where a public corporation awards a contract to a legally autonomous person, but that person has special relations with it is also dealt with in connection with the same set of issues. (36) In this case too, the question is ultimately whether there is a contract which requires a tendering procedure to be conducted. The key question is whether the operation involves two different persons who may operate respectively as a contracting authority and as a tenderer. Whilst it can be ruled out that they are the same person in view of their legal autonomy, the question whether they each have the capacity of contracting authority and tenderer for a specific operation often causes difficulties. Both persons may possibly be linked to one another, in relation to a specific contract, in such a way that in the absence of a contract the tender requirement ceases to apply.

60. In the view of the Court, it is sufficient, for a tender requirement to apply, if the contract was concluded between, on the one hand, a contracting authority and, on the other, a person legally distinct from that contracting authority. Since the leading judgment in *Teckal*, (37) however, the Court considers that there is no need for a call for tenders and that, in the final analysis, there is a quasi in-house operation 'where a public authority which is a contracting authority exercises over the separate entity concerned control similar to that which it exercises over its own departments, provided that that entity carries out the essential part of its activity with the public authority or with other controlling local or regional authorities'. (38)

61. It should be stated, however, that neither of these two situations exists in the main proceedings. First, the contract at issue was concluded between two distinct legal entities. Second, according to the referring court, (39) the University is exempt from any kind of control by Lecce ASL. As a result, there can be no question of an in-house operation.

(ii) Inter-municipal cooperation

62. A further unwritten exception can be seen in *Commission* v *Germany* (40) in which the Court sets out certain principles. (41) That judgment shows under what circumstances and in what forms inter-municipal cooperation is to be excluded from the scope of procurement law. (42) For this reason in particular, the facts in that case and the broad lines of the Court's arguments should be summarised.

– The Court's arguments in *Commission* v *Germany*

63. Those treaty infringement proceedings concerned the assignment by four *Landkreise* in Lower Saxony, namely Rotenburg (Wümme), Harburg, Soltau-Fallingbostel and Stade, of the contract for the

disposal of their waste to Stadtreinigung Hamburg, a public undertaking operating in the form of a public-law institution (*Anstalt des öffentlichen Rechts*), without conducting a tendering procedure at European level. Provision was made for an annual fee with a price adjustment mechanism based on the volume of waste as remuneration. The contract was to run for 20 years. The parties had agreed to open negotiations five years at the latest before the end of that contract in order to make a decision as to whether a subsequent contract should be concluded.

64. The Court dismissed the action brought by the Commission, since it did not consider the conclusion of the contract on waste disposal services, without issuing a call for tenders or conducting a tendering procedure at European level, to be an infringement of Directive 92/50. The Court essentially rejected any requirement for a call for tender on the ground that the contract at issue established cooperation between local authorities with the aim of ensuring that a public task that they all have to perform, namely waste disposal, was carried out. (43) In order to ascertain this, it subjected the contract to a detailed analysis in which it highlighted the aspects which, in its view, typically characterised inter-municipal cooperation. As will be shown below, those aspects also constitute the criteria by which it can be determined whether a certain agreement between public authorities is covered by the unwritten exception of inter-municipal cooperation. In other words, they constitute the criteria for the exception.

65. It is striking that, in the view of the Court, inter-municipal cooperation is characterised by the efforts of all the participating local authorities to ensure jointly the effective performance of a public interest task. The legitimation for excluding that area from the scope of procurement law is the finding – as was held in *Coditel Brabant* (44) – that a public authority may perform the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments. The Court considers, however, that this autonomy also requires a contracting authority to have the freedom to cooperate with other contracting authorities and thereby to pool their respective resources. (45) On the basis of these arguments, the Court acknowledged that the public authorities also have the freedom to choose the legal form for their cooperation in order to carry out jointly their public service tasks, whether, as in the present case, by means of a simple contract or institutionalised (46) by means of a specifically created public body. It based this view, first, on the formal argument that EU law does not require any particular legal form. (47) Second, from a teleological point of view, it also saw no need for any such requirement that cooperation take a certain form, provided competition in the internal market for procurement is not distorted because a private undertaking is given preferential treatment and others are thus discriminated against. (48)

– The criteria defined by the Court

66. Unlike the case-law on in-house operations, where, in *Teckal*, the Court summarised the two relevant criteria in a succinct mnemonic, there is no comparable succinct formula in that leading decision as to the conditions under which, going beyond the case to be decided, inter-municipal cooperation to which the procurement rules are not applied may be regarded as lawful. Nevertheless, as has already been mentioned, it is possible to identify, from the line of argument pursued by the Court, a number of relevant criteria which must be satisfied cumulatively. Accordingly, the Court exempts inter-municipal cooperation from the scope of procurement law on the basis of the following criteria:

– performance of a common public interest task or tasks relating to the pursuit of objectives in the public interest;

– solely by public authorities, without the participation of any private party;

– on a contractual basis or in an institutionalised legal form, such as an association;

– no private undertaking is placed in a position of advantage vis-à-vis competitors in relation to the conclusion of the contract;

– the contract does not seek to circumvent procurement law.

67. It could, in principle, be argued, against the direct applicability of this case-law to the main proceedings, that the present case – unlike the situation in *Commission* v *Germany* – does not concern cooperation between local authorities. In fact, the present case relates to a contractual agreement

between a local authority and a public-law institution. Against this background, it is necessary to consider the extent to which it is possible, on the basis of this case-law, to assume the existence of an exception which covers forms of cooperation like the one at issue here.

(iii) Legal form of the ‘public-public partnership’

– Extension of the exception to various forms of cooperation between public authorities

68. A careful reading of the judgment in *Commission* v *Germany* nevertheless makes it clear that the exception developed by the Court does not, in principle, preclude such forms of cooperation.

69. An argument in support of this view is, first, that that case concerned a contract between Stadtreinigung Hamburg and four neighbouring Landkreisen, where Stadtreinigung Hamburg was a public-law institution and not a local authority. (49) Second, it should be borne in mind that in the judgment the Court often uses the neutral term ‘public authority’, (50) by which it intimates that cooperation, as a condition for the application of the unwritten exception, is open not only to municipalities. (51) To restrict the exceptions solely to cooperation by local authorities would also be excessively formalistic and difficult to comprehend in view of the different forms of administrative organisation in each of the Member States. Accordingly, it is more logical to give a broad understanding to the scope of that unwritten exception and talk about ‘cooperation between public authorities’.

70. This unwritten exception must therefore be considered, in principle, also to cover a situation in which a health authority and a university are parties to a contract.

– Satisfaction of the criteria in the main proceedings

71. In order for Lecce ASL and the University to be able to rely on this unwritten exception, the abovementioned criteria which distinguish cooperation between public authorities must be satisfied in the main proceedings. It is common ground that there is a contractual agreement solely between public authorities, without the participation of any private party in any form, and several criteria are therefore satisfied. Other criteria raise difficulties, on the other hand, and require closer examination.

Performance of a public interest task

72. One of the most contentious questions raised in the present case is whether the contract in question was concluded by both parties with the aim of performing a *public interest* task.

73. As has already been explained, the University was awarded a contract for the study and evaluation of the seismic vulnerability of hospital buildings in the Province of Lecce. That work had to be carried in accordance with the national regulations on the safety of structures and of strategic buildings in particular. As Lecce ASL (52) stated in its written observations, the results of that study were intended to serve as the basis for its own future projects to improve the resistance of the structures concerned. It follows that, by the contract to carry out the study, Lecce ASL actually intended to comply with an obligation imposed on it by national law with a view to guaranteeing the safety of hospitals. This is a public interest task which falls within the competence of the State.

74. Consequently, the contract in question was concluded by both parties with the aim of performing a public interest task.

Cooperation to perform a common public task

75. It must also be required that the cooperation serves to perform a *common* public task. (53) It is not therefore sufficient that the statutory duty to perform the public task in question concerns only one of the public authorities involved, whilst the other’s role is limited to that of a vicarious agent, which takes on the performance of this external task under a contract. This seems understandable if we consider the etymological meaning of the word ‘cooperation’; the essence of such cooperation consists precisely in a common strategy between partners which is based on the exchange and the coordination

of their respective interests. The unilateral pursuit of one participant's own interests cannot really be described as 'cooperation' in the above sense. (54)

76. Specific indications of such a requirement of genuine cooperation between public authorities are given by the Court's statements in *Commission* v *Germany*, (55) which relate to a particular form of cooperation between four local authorities and a public institution which enabled them jointly to perform a public task incumbent on them all, namely waste disposal. The Court made express reference to this aspect in its statements. As has already been mentioned, the relationship between the parties to the contract is distinguished by the recognition of reciprocal rights and duties. In addition, the parties to the contract were committed to mutual assistance and mutual consideration. This judgment is thus based on a relationship of exchange which goes beyond the provision of services for consideration. (56)

77. As the Polish Government, (57) CNI (58) and the Commission (59) rightly recognise, however, the main proceedings are fundamentally different from the situation described above, in so far as the specific aims of the public authorities are not the same. Whilst Lecce ASL alone is subject to a statutory duty to study and evaluate the seismic vulnerability of hospital buildings, the University's role, by law, consists in scientific research. This role is supplemented by the traditional function as a centre of academic learning, as has already been pointed out. (60) Against this background, it is clear that the study and evaluation of the seismic vulnerability of hospital buildings cannot be considered to fall within the primary competence of a university. If we consider the specific aspects of the main proceedings, it must be stated that the University does not have any such statutory duty. This has already been established in the context of the analysis of Article 18 of Directive 2004/18. (61) Nor are there any indications that the University would take on this task of its own motion. Nevertheless, it has both the necessary expertise and the staff and facilities to perform that task. Lecce ASL calls on those resources in order to carry out its public task. It is, to some extent, the beneficiary of the University's resources. Ultimately, however, only the interests of Lecce ASL are pursued.

78. Importance must be attached in this connection to the nature of the relationship between the two parties. Cooperation between public authorities may take different forms, as can be seen from *Commission* v *Germany*: either on an institutional basis by establishing a structure tailored to the needs of the participants, to which powers are transferred or through which powers are exercised jointly, or on a contractual basis by concluding a cooperation agreement or an agreement on the performance of a joint public task. (62) In the main proceedings there is nothing of the sort. The consultancy contract concluded between Lecce ASL and the University does not lay down either the basis or the legal framework for cooperation in the service of a common public task. Instead, it merely provides for a service in the form of specialist consultancy for a consideration. In the final analysis, Lecce ASL 'buys' a study from the University, especially since it acquires the sole right of ownership and may use it as it wishes. The University receives financial remuneration in return, in connection with which it must be pointed out that the cost-covering character of the consideration does not affect the pecuniary interest of the service. (63)

79. In addition, the consultancy contract at issue here, unlike the contractual agreement in *Commission* v *Germany*, does not provide for any reciprocal assistance obligations. This is notwithstanding the fact that the work was to be carried out through close collaboration between the Lecce ASL working group and the University working group, since external staff could also be used under the contract. The reciprocal assistance obligations were therefore limited and were clearly not intended to go beyond what was necessary to allow the University working group to carry out the study.

80. Irrespective of this, the written observations submitted by Lecce ASL (64) suggest that no genuine exchange took place between the two working groups appointed by it and the University to perform the supposedly common public task. Rather, on the basis of the findings, i.e. after the completion of the study by the University, the Lecce ASL working group was to formulate plans to improve the safety of the investigated structures. This fact confirms the view already expressed that in reality Lecce ASL commissioned and paid for a report.

81. In the light of the foregoing, it must be stated that the consultancy contract in question does not, in accordance with case-law, establish any genuine cooperation between the public authorities involved

which performs a common public task. It is in fact a contract for services which are provided for a consideration.

A private undertaking is not placed in a position of advantage vis-à-vis competitors

82. Furthermore, according to the criteria set out by the Court, a private undertaking should not be placed in a position of advantage vis-à-vis competitors with regard to the award of the contract to carry out the study.

83. As was stated earlier, the University acted as an 'economic operator' within the meaning of Article 1(9) of Directive 2004/18. (65) It therefore had the same legal status, from the point of view of procurement law, as a private undertaking. Because the University was awarded that contract without a public tendering procedure having taken place, it was placed in a position of advantage vis-à-vis the associations of engineers and architects which could possibly also have produced the study in question.

84. This criterion logically presupposes that potential competitors actually existed. It must be stated in this regard that in its written observations Lecce ASL did not expressly deny that other economic operators could also have carried out the study in question. The University's cost-effectiveness, material resources and competence are indeed praised, (66) but the basic capacity of other economic operators such as engineering or architect's firms to perform the task certainly cannot be denied. In view of the statements made by CNI (67) in support of the view that this kind of activity tends to fall within the primary competence of engineers and architects, such a claim is difficult to maintain. In so far as at the hearing Lecce ASL amended its position, to the effect that the complex terms of reference would have overstretched engineering or architect's firms, it could not deny, in response to a question asked by the Court, that other universities and private research institutes at home and aboard would possibly also have met the requirements of the terms of reference.

85. However, it is for the national court having jurisdiction to make the factual findings to give definitive clarification on this question. It must assess whether the necessary procedures for the study and evaluation of seismic vulnerability were actually so complex that, in the final analysis, only that University – and no other – could have carried out the study. For the purposes of the present preliminary ruling proceedings, it is sufficient to state that Lecce ASL would most probably have had a choice between various potential competitors if it had invited tenders for a public contract to carry out the study.

86. Consequently, the University was placed in a position of advantage vis-à-vis potential competitors with regard to the conclusion of the contract and a further condition for the application of the unwritten exception is not satisfied.

No circumvention of procurement law

87. As a further condition for the applicability of the unwritten exception in the main proceedings it must be required that the rules of procurement law were not circumvented through the conclusion of the contract.

88. As far as this condition is concerned, the Polish Government (68) is correct in its view that a distortion of competition stems from the fact that no call for tenders was made, even though the study in question could, in all likelihood, also have been carried out by associations of engineers and architects competing with the University. Mention should be made in this connection of the fact that it would have been in the specific interest of Lecce ASL as the contracting authority to open out the contract to the largest possible number of competitors. As the Court held in *CoNISMa*, (69) one of the primary objectives of EU rules on public procurement is to attain the widest possible opening-up to competition. Such opening-up is contemplated not only from the point of view of the EU interest in the free movement of goods and services, (70) but also the interest of the public authority concerned itself, which will thus have greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question. Lecce ASL prevented itself from utilising that option because it did not give potential tenderers an opportunity to submit tenders.

89. Against this background, the argument put forward by Lecce ASL (71) that the award of the contract to the University brought it considerable cost savings is not convincing, especially since, in the absence of a public tendering procedure, it did not have the opportunity to assess tenders from other potential competitors. Not only has Lecce ASL failed to provide evidence in support of this claim, it has not even been able to demonstrate conclusively how it arrived at an estimated amount of EUR 800 000 which, in its view, other competitors would have charged if they had been in a position to carry out the study. The assumption, which is not substantiated by facts, that only the University could have carried out the study in question at such a favourable price highlights a misunderstanding of the purpose of procurement law.

90. If contracting authorities were permitted – going beyond the scope of the public-public partnership – to have recourse to other public authorities in order to obtain services, without making them subject to the rules of procurement law, there would be grounds to fear that those rules could be circumvented in the long term, which would ultimately frustrate the Union's aim of guaranteeing freedom of establishment, freedom to provide services and unrestricted competition within the internal market. In order to prevent this, there is a need for strict monitoring of compliance with the criteria set out by the Court in *Commission* v *Germany*.

91. It can therefore be concluded that the contract concluded between Lecce ASL and the University sought to circumvent procurement law. That fact too militates against the application of the unwritten exception.

– Arguments against classification as a 'public-public partnership'

92. The above analysis has shown that a number of criteria for classification of the collaboration between public authorities as a 'public-public partnership' are not satisfied in the main proceedings. This holds, above all, for the requirement of cooperation to perform a joint public service task. (72) It is neither possible to identify genuine 'cooperation' in the conventional sense, nor do the participants pursue a common aim imposed on them by law. Rather, a public authority is using the resources of another public authority to limit costs. From a legal point of view, there is a contract for services which are provided for a consideration. Other arguments against excluding the operation at issue from the scope of procurement law are the fact that the University was placed in a position of advantage vis-à-vis potential competitors with regard to the conclusion of the contract (73) and the fact that the contract in question sought to circumvent procurement law. (74) In the light of this finding, there can be no question of a 'public-public partnership'.

(c) Interim conclusion

93. Consequently, there is no relevant exception which would preclude the applicability of Directive 2004/18.

2. Summary of conclusions

94. In summary, it must be stated that the contract at issue concerning the study and evaluation of the seismic vulnerability of certain hospitals requires a tendering procedure and Directive 2004/18 is applicable. Since no call for tenders was made in the main proceedings, there is an infringement of the directive. In view of the fact that national law permits agreements such as that between Lecce ASL and the University, national law is also not consistent with the directive.

95. Consequently, Directive 2004/18, and, in particular, Article 1(2)(a) and (d), Article 2 and Article 28 of that directive and Categories 8 and 12 in Annex II thereto, are to be interpreted as precluding national legislation which permits written agreements to be entered into between a contracting authority and a university constituted under public law for the study of the seismic vulnerability of hospital structures and its evaluation in the light of national regulations on the safety of structures and of strategic buildings in particular, for a consideration not exceeding the costs incurred in the performance of the service, where the university responsible for performance may act as an economic operator.

VII – Conclusion

96. In the light of the above considerations, I suggest that the Court answer the question asked by the Consiglio di Stato as follows:

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and, in particular, Article 1(2)(a) and (d), Article 2 and Article 28 of that directive and Categories 8 and 12 in Annex II thereto, are to be interpreted as precluding national legislation which permits written agreements to be entered into between a contracting authority and a university constituted under public law for the study of the seismic vulnerability of hospital structures and its evaluation in the light of national regulations on the safety of structures and of strategic buildings in particular, for a consideration not exceeding the costs incurred in the performance of the service, where the university responsible for performance may act as an economic operator.

---

1 – Original language of the Opinion: German

Language of the case: Italian

---

2 – OJ 2004 L 134, p. 114.

---

3 – Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747.

---

4 – GURI No 192 of 18 August 1990.

---

5 – P. 2 of the written observations submitted by the University.

---

6 – Case C-305/08 *CoNISMa* [2009] ECR I-12129.

---

7 – Ibid., paragraph 35.

---

8 – Ibid., paragraph 42.

---

9 – See p. 22, paragraph 34 of the order for reference.

---

10 – See Hailbronner, K., *Das Recht der Europäischen Union* (Eberhard Grabitz/Meinhard Hilf (eds.), part B5, paragraph 24, p. 4, in whose view the criterion of pecuniary interest is considered to be satisfied in principle in the case of any non-cash benefit. See also Eisner, C., ‘Interkommunale Kooperationen und Dienstleistungskonzessionen (Teil 1)’, *Zeitschrift für Vergaberecht und Beschaffungspraxis*, 2011, p. 190, according to whom, as soon as remuneration for the provision of a service is actually agreed, the operation in question must be assessed on the basis of the procurement rules.

---

11 – See Frenz, W., *Handbuch Europarecht*, Vol. 3 (Beihilfe- und Vergaberecht), Heidelberg 2007, p. 617, paragraph 2012.

---

12 – Ibid.

---

13 – See Case 263/86 *Humbel & Edel* [1988] ECR 5365, paragraph 18. Budischowsky, J., *Kommentar zu EU- und EG-Vertrag* (Heinz Mayer (ed.)), Vienna 2003, Article 49 EC, paragraph 8, p. 5, considers the

criterion of pecuniary interest to be satisfied on account of the cost-covering character of a consideration.

---

14 – See Frenz, W., loc. cit. (footnote 11), p. 618, paragraph 2013.

---

15 – See footnote 22 of the written observations submitted by the Commission.

---

16 – Commission Regulation (EC) No 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2009 L 314, p. 64).

---

17 – Opinion in Case C-271/08 *Commission* v *Germany* [2010] ECR I-6817, point 143.

---

18 – Ibid.

---

19 – See Frenz, W., loc. cit. (footnote 11), p. 533, paragraph 1721.

---

20 – Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 48.

---

21 – Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 49, and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 21. With regard to the relationship between the prohibition on discrimination and the transparency requirement, see Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 30 et seq.; Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 66; Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 17 et seq.; and Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60 et seq.

---

22 – See Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6.

---

23 – See Joined Cases C-480/00 to C-482/00, C-484/00, C-489/00 to C-491/00, C-497/00 to C-499/00 *Azienda Agricola Ettore Ribaldi and Others* [2004] ECR I-2943, paragraph 73, and Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 40.

---

24 – Connected with the calculation method are the prohibitions on circumvention expressly laid down in all the procurement directives. First, it is prohibited to split up contracts with the intention of circumventing the application of the relevant directive. Second, the directives prohibit circumvention through the choice of calculation method. Furthermore, it is possible to infer from the prohibitions of circumvention a general prohibition of deliberate or negligent under-calculation (see Frenz, W., loc. cit. (footnote 11), p. 209, paragraph 822; Trepte, P., *Public Procurement in the EU*, 2nd edition, Oxford 2007, p. 262 et seq.).

---

25 – Under that case-law, it is assumed that the national court alone has direct knowledge of the facts of the case and of the arguments put forward by the parties and is therefore in the best position to determine, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment (see Case C-425/98 *Marca Mode* [2000] ECR I-4861, paragraph 21).

---

26 – See, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; Case C-295/05 *Asemfo* [2007] ECR I-2999,

paragraph 30; and Case C-103/08 *Gottwald* [2009] ECR I-9117, paragraph 16.

---

27 – See, inter alia, Case C-415/93 Bosman [1995] ECR I-4921, paragraph 61; Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 29; and Case C-103/08 *Gottwald*, cited above in footnote 26, paragraph 17.

---

28 – See point 44 of the present Opinion.

---

29 – See Frenz, W., loc. cit. (footnote 11), p. 670, paragraph 2197.

---

30 – See Case 199/85 *Commission* v *Italy* [1987] ECR 1039, paragraph 14; Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 43; Case C-71/92 *Commission* v *Spain* [1993] ECR I-5923, paragraph 10; and Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraphs 48 and 58.

---

31 – See paragraphs 17 and 18 of the written observations submitted by the Czech Government.

---

32 – See Case 13/61 *Bosch* [1962] ECR 45 and Case 26/62 *Van Gend en Loos* [1963] ECR 1.

---

33 – See the *Commission Green Paper of 27 January 2011 on the modernisation of EU public procurement policy, Towards a more efficient European Procurement Market*, COM(2011) 15 final, p. 24, which mentions both situations developed in the Court's case-law. The Commission advocates, in connection with formulating legislative proposals, defining those forms of cooperation that are outside of the scope of application of the EU public procurement directives. Consideration should also be given in this regard to the findings made in the Court's case-law.

---

34 – Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1.

---

35 – Ibid., paragraph 48.

---

36 – See Holoubek, M., *EU-Kommentar* (Jürgen Schwarze (ed.)), 2nd edition., Article 49/50 EC, paragraph 151, p. 753, who points out that the Court's case-law has excluded from the scope of the procurement directives, and also from the scope of the fundamental freedoms, not only quasi-contractual internal relations within a legal person, but also contractual relationships between the public sector and spun-off bodies.

---

37 – Case C-107/98 *Teckal,* cited above in footnote 30.

---

38 – See Case C-107/98 *Teckal,* cited above in footnote 30, paragraph 50; Case C-26/03 *Stadt Halle and RPL Lochau*, cited above in footnote 34, paragraph 49; and Case C-480/06 *Commission* v *Germany,* cited above in footnote 3, paragraph 34.

---

39 – See paragraph 35 of the order for reference.

---

40 – Cited above in footnote 3.

---

41 – See Chaminade, A., 'Des possibilités de coopération accrues pour les collectivités territoriales', *La Semaine Juridique – édition générale*, 2010, No 363, p. 662, who discusses a further development in the Court's case-law since the judgments in relation to in-house operations. See Ferk, P./Ferk, B., 'Osebe javnega prava kot ponudniki', *Podjetje in delo*, 2011, No 4, p. 481 et seq., who state, in connection with *Commission* v *Germany*, that the previous legal theory on in-house operations was supplemented in so far as the judgment referred to a contractual and not an institutional relationship between the participants.

---

42 – See Pirker, B., 'La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. Arrêt Commission c/Allemagne', *Revue du droit de l'Union européenne*, 2009 No 3, p. 574; Broussy, E./Donnat, F./Lambert, C., *Chronique de jurisprudence communautaire, Droit administratif*, 2009, p. 1542, who take the view that *Commission* v *Germany* establishes a new exception in respect of procurement law.

---

43 – See Case C-480/06 *Commission* v *Germany,* cited above in footnote 3, paragraph 37.

---

44 – See Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 48.

---

45 – See Case C-480/06 *Commission* v *Germany,* cited above in footnote 3, paragraph 45.

---

46 – See Steiner, M., 'Ausschreibungsfreier Abfallentsorgungsvertrag: Ist das der Anfang vom Ende der sogenannten Teckal-Kriterien?', *European Law Reporter*, 2009, p. 283, who, with regard to the situation in *Commission* v *Germany*, talks about de facto 'institutionalised cooperation'.

---

47 – See Case C-480/06 *Commission* v *Germany,* cited above in footnote 3, paragraph 47.

---

48 – Ibid.

---

49 – See Wagner, S., 'Öffentliche Aufträge: Eine förmliche europaweite Ausschreibung ist nicht erforderlich, wenn öffentliche Stellen i.R. interkommunaler Zusammenarbeit einen Vertrag zur Erfüllung einer ihnen allen obliegenden öffentlichen Aufgabe (Abfallentsorgung) schließen', *Europäisches Wirtschafts- & Steuerrecht*, 2009, p. 328.

---

50 – See Case C-480/06 *Commission* v *Germany,* cited above in footnote 3, paragraphs 34, 44, 45 and 47.

---

51 – See Öhler, M./Gruber, C., '"Zusammenarbeit" iSd EuGH-Urteils Rs Stadtreinigung Hamburg nicht auf Kooperationen zwischen Gebietskörperschaften beschränkt', *Zeitschrift für Vergaberecht und Beschaffungspraxis*, 2011, p. 288.

---

52 – See p. 3 of the written observations submitted by ASL Lecce.

---

53 – See Struve, T., 'Durchbruch für interkommunale Zusammenarbeit', *Europäische Zeitschrift für Wirtschaftsrecht*, 2009, p. 807; Veldboer, W., 'Zur Entscheidung für interkommunale Zusammenarbeit durch das EuGH-Urteil "Hamburger Stadtreinigung"', *Die öffentliche Verwaltung*, 2009, p. 360.

---

54 – See Öhler, M./Gruber, C., loc. cit. (footnote 51), p. 289, who require the agreement between the public authorities to have 'cooperative character'.

55 – See Case C-480/06 *Commission* v *Germany*, cited above in footnote 3, paragraph 37.

56 – See Struve, T., loc. cit. (footnote 53).

57 – See paragraph 22 of the written observations submitted by the Polish Government.

58 – See p. 6 of the written observations submitted by the CNI, in which it even denies that the study and evaluation of the seismic vulnerability of hospital buildings is actually a statutory task of ASL Lecce.

59 – See paragraph 86 of the written observations submitted by the Commission.

60 – See point 53 of this Opinion.

61 – See point 53 of this Opinion.

62 – See Dreyfus, J.-D., Rodrigues, S., 'La coopération intercommunale confortée par la CJCE?', *L'actualité juridique; droit administratif*, 2009, p. 1720.

63 – See point 34 of this Opinion.

64 – See p. 3 of the written observations submitted by ASL Lecce.

65 – See points 27 and 28 of this Opinion.

66 – See p. 23 et seq. of the written observations submitted by ASL Lecce.

67 – See p. 2 of the written observations submitted by the CNI.

68 – See paragraph 23 of the written observations submitted by the Polish Government.

69 – Case C-305/08 *CoNISMa*, cited above in footnote 6, paragraph 37.

70 – Procurement law places limits on private autonomous action by public authorities, specifically as regards the choice of contractual partners, in the interest of competition. See, with regard to the influence of internal-market objectives on private law, Wendehorst, C., 'Methodenlehre und Privatrecht in Europa', *Vom praktischen Wert der Methode – Festschrift für Heinz Mayer zum 65. Geburtstag*, Vienna 2011, p. 829.

71 – See p. 15 of the written observations submitted by ASL Lecce.

72 – See point 81 of this Opinion.

73 – See point 86 of this Opinion.

---

74 – See point 91 of this Opinion.

JUDGMENT OF THE COURT (Fourth Chamber)

7 June 2012 (*)

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

In Case C-615/10,

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

Insinööritoimisto InsTiimi Oy,

party heard in the matter:

Puolustusvoimat,

THE COURT (Fourth Chamber),

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

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

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

after considering the observations submitted on behalf of:

– Insinööritoimisto InsTiimi Oy, by A.-M. Eskola, asianajaja, and T. Pekkala,

– the Puolustusvoimat, by J. Matinlassi, acting as Agent,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the Czech Government, by J. Očková, T. Müller and M. Smolek, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, acting as Agent,

– the European Commission, by E. Paasivirta and C. Zadra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 January 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 10 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of

procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), of Article 346(1)(b) TFEU and the list of arms, munitions and war material included in Council Decision 255/58 of 15 April 1958 (‘the Council list of 15 April 1958’) to which that provision of the TFEU applies.

2 The reference has been made in a dispute between Insinööritoimisto InsTiimi Oy (Engineering firm InsTiimi SA; ‘InsTiimi’) and the Suomen Puolustusvoimien Teknillinen Tutkimuslaitos (the Finnish Defence Forces Technical Research Centre) concerning the award by the latter, following a procedure differing from those provided for in Directive 2004/18, of a contract for the supply of tiltable turntable equipment intended to be used to support objects being subjected to electromagnetic measurements.

Legal context

European Union (‘EU’) law

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

‘This Directive shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article 296 of the [EC] Treaty.’

4 Article 296 EC, which was applicable at the time of the facts in the main proceedings and was replaced, in the same terms, by Article 346 TFEU following the entry into force of the Treaty of Lisbon on 1 December 2009, stated:

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

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

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

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.’

5 Council Decision 255/58 of 15 April 1958 established the list referred to in Article 296(2) EC, extracts of which are reproduced in Council document 14538/4/08 of 26 November 2008. The referring court refers to that list, in particular to points 11, 14 and 15 thereof, which read as follows:

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

...

11. Military electronic equipment.

...

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

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

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

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

Finnish law

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

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

‘This Law shall not apply to contracts

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

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

…’

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

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

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

The dispute in the main proceedings and the question referred

12 In the course of 2008, the Suomen Puolustusvoimien Teknillinen Tutkimuslaitos issued a call for tenders for tiltable turntable equipment to a value of EUR 1 650 000 without prior publication of a contract notice in the *Official Journal of the European Union.*

13 On 5 February 2008 it invited four economic operators, including InsTiimi, to submit tenders to it.

14 On 24 June 2008, pursuant to a ‘negotiated procedure’ which did not satisfy the requirements of one of the procurement procedures referred to in Directive 2004/18, the contract was awarded to a tenderer other than InsTiimi. On 25 June 2008, the subject-matter of the contract and the operation of the tiltable turntable equipment at issue in the main proceedings were described in a Finnish national daily newspaper.

15 As it took the view that the procedure ought to have complied with the rules set out in Directive 2004/18, InsTiimi brought an action before the Markkinaoikeus (Market Court) challenging the

decision to award the contract at issue in the main proceedings.

16 The Markkinaoikeus dismissed the action since it regarded it as settled that that tiltable turntable equipment was suited primarily to military purposes and that the contracting authority intended to use it solely for such purposes.

17 The Markkinaoikeus accordingly concluded that that contract came under the exception provided for in Paragraph 7(1)(2) of Law No 348/2007 on public procurement.

18 InsTiimi appealed against that decision to the Korkein hallinto-oikeus (Supreme Administrative Court).

19 Before that court, InsTiimi submitted that the tiltable turntable constitutes a technical innovation from the civilian sector and is not war material. The technical implementation of the tiltable turntable equipment at issue in the main proceedings is, it contended, based on a combination of freely available materials, components and assembly systems, and its design is solely a matter of the appropriate selection and attachment of structural components in order to fulfil the requirements of the invitation to tender.

20 The Puolustusvoimat (Defence Forces), represented by the Pääesikunta (General Staff), contended before the referring court that that tiltable turntable equipment had been purchased for specifically military purposes and was intended, in particular, for the purposes of simulating combat situations. The tiltable turntable, it was argued, is used to simulate and practise military countermeasures against aerial reconnaissance from a variety of angles and target ‘acquisition’.

21 According to the argument put forward by the Puolustusvoimat, that tiltable turntable equipment is the essential component of an open-space measurement track, intended for electronic warfare measurements, simulations and drills, and it is consequently designed for the study of weapons intended for military use.

22 That same tiltable turntable equipment, it is argued, is a product within the meaning of point M of the annex to Order No 76/1995.

23 The referring court expresses uncertainty as to whether Directive 2004/18 applies in the case where the material which forms the subject-matter of the contract has a specifically military purpose but where there are also technical applications of that material in the civilian sector that are fundamentally similar.

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

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

Admissibility of the question referred

25 While not raising an objection of inadmissibility, the Finnish Government states, in its written observations, that the reference for a preliminary ruling does not contain information with regard to the measures which the contracting authority considers necessary for ‘the protection of the essential interests of [the] security’ of the Republic of Finland, within the terms of Article 296(1)(b) EC, this being the reason why it took the view that it was unable to rule on that condition for the application of that provision.

26 In that regard, it is necessary to state that the fact that the referring court does not seek an interpretation of that condition for the application of Article 296(1)(b) EC is not, of itself, such as to call into question the admissibility of that reference.

27 In the context of the procedure laid down in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Case C-571/10 *Kamberaj* [2012] ECR, paragraph 40 and the case-law cited).

28 However, the Court must examine the circumstances in which cases are referred to it by the national court in order to assess whether it has jurisdiction (see *Kamberaj*, paragraph 41). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see Case C-450/06 *Varec* [2008] I-581, paragraph 24).

29 In that regard, it is necessary to note that the question raised in the present case could be regarded as hypothetical and, consequently, as inadmissible only if it appeared clearly that, in the case in the main proceedings, the application of the derogation provided for in Article 296(1)(b) EC, to which Article 10 of Directive 2004/18 refers, could not, in any case, be justified by the Republic of Finland's essential security interests.

30 In the order for reference, without definitively indicating that, in this case, the contracting authority claimed such essential interests, the Korkein hallinto-oikeus restricts itself to stating that the Puolustusvoimat did not specify, in the manner advocated by the Commission in the interpretative communication on the application of Article 296 EC in the field of defence procurement (COM(2006) 779 final) of 7 December 2006, the essential security interests which were affected by the acquisition of the tiltable turntable equipment at issue in the main proceedings or the reasons why it was necessary not to apply the rules set out in Directive 2004/18 in this specific case.

31 In those circumstances, it is not obvious that the question referred is hypothetical in nature.

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

The question referred for a preliminary ruling

33 By its question, the referring court asks, in essence, whether Article 10 of Directive 2004/18, read in conjunction with Article 296(1)(b) EC, must be interpreted as authorising a Member State to set aside the procedures laid down by that directive in the case of a public contract awarded by a contracting authority in the field of defence for the acquisition of material which, although intended for specifically military purposes, may also be used for largely identical civilian applications.

34 It follows from Article 10 of Directive 2004/18, read in conjunction with Article 296(1)(b) EC, that the Member States may, for contracts awarded in the field of defence, take measures derogating from that directive where, first, 'trade in arms, munitions and war material' is concerned and, second, those measures appear necessary for the 'protection of the essential interests' of the security of the Member State concerned.

35 In this respect, it should be borne in mind that those provisions must, in accordance with settled case-law in respect of derogations from fundamental freedoms, be interpreted strictly (see, inter alia, as regards the derogations provided for in Article 296 EC, Case C-284/05 *Commission* v *Finland* [2009] ECR I-11705, paragraph 46 and the case-law cited). Although Article 296(1)(b) EC refers to measures which a Member State may consider necessary for the protection of the essential interests of its security, that article cannot, however, be read in such a way as to confer on Member States a power to depart from the provisions of the EC Treaty based on no more than reliance on those interests (*Commission* v *Finland*, paragraph 47).

36 The types of products included in the Council list of 15 April 1958, to which Article 296(2) EC expressly refers, in principle come within the possibility of derogation provided for by Article 296(1)(b) EC.

37 It is for the referring court to determine whether a product such as the tiltable turntable equipment at issue in the main proceedings may be classified in one or other of the categories featuring in that list.

38 However, Article 296(1)(b) EC stipulates that measures which the Member States may thus take must not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

39 Consequently, it is necessary, first, to bear in mind that a contracting authority cannot invoke Article 296(1)(b) EC to justify a derogating measure when purchasing material which is certainly for civilian use and possibly for military use (see, to that effect, Case C-337/05 *Commission* v *Italy* [2008] ECR I-2173, paragraphs 48 and 49).

40 Second, even if a product comes within one or other of the categories of materials included in the Council list of 15 April 1958, that product can, if it has technical applications for civilian use which are largely identical, be considered to be intended for specifically military purposes, within the terms of Article 296 EC, only if such use is not solely that which the contracting authority intends to confer on it but also, as the Advocate General has noted in point 48 of her Opinion, that which results from the intrinsic characteristics of a piece of equipment specially designed, developed or modified significantly for those purposes.

41 In this regard, it must, indeed, be noted that the word ‘military’ used in point 11 of that list and the words ‘insofar as they are of a military nature’ and ‘exclusively designed’ used respectively in points 14 and 15 of that list indicate that the products referred to in those points must, in objective terms, have a specifically military nature.

42 Finally, it is necessary to reiterate that, recently, in recital 10 in the preamble to Directive 2009/81, the EU legislature stated that the term ‘military equipment’, as used in that directive, should cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material.

43 Material such as the tiltable turntable equipment at issue in the main proceedings is deemed, according to the information provided to the Court, to facilitate the carrying-out of electromagnetic measurements and the simulation of combat situations. It could, therefore, be characterised as a component of military equipment for the testing and control of arms, within the meaning of point 15 of the Council list of 15 April 1958, read together with points 11 and 14 of that list, this being a matter for the referring court to determine.

44 However, such tiltable turntable equipment, which the contracting authority intends to use only for military purposes, can be considered to be intended specifically for such purposes, within the terms of Article 296(1)(b) EC, only if it is established that, unlike the similar material intended for civilian uses invoked by the applicant in the main proceedings, that equipment, by virtue of its intrinsic characteristics, may be regarded as having been specially designed and developed, also as a result of substantial modifications, for such purposes, this also being a matter for the referring court to determine.

45 It should be added that if, in the light of the foregoing considerations, the referring court should find that the product at issue in the main proceedings comes within the material scope of Article 296(1)(b) EC, to which Article 10 of Directive 2004/18 refers, it would be for that court to determine whether the Member State which seeks to take advantage of that Treaty provision can show that it is necessary to have recourse to the derogation provided for in that provision in order to protect its essential security interests (see, to that effect, inter alia, *Commission* v *Finland*, paragraph 49) and whether the need to protect those essential interests could not have been addressed within a competitive tendering procedure such as that specified by Directive 2004/18 (see, to that effect, *Commission* v *Italy*, paragraph 53).

46 Having regard to the foregoing considerations, the answer to the question referred is that Article 10 of Directive 2004/18, read in conjunction with Article 296(1)(b) EC, must be interpreted as authorising a Member State to set aside the procedures laid down by that directive in the case of a public contract awarded by a contracting authority in the field of defence for the acquisition of material which, although intended for specifically military purposes, also presents possibilities for essentially identical civilian applications only if that material, by virtue of its intrinsic characteristics, may be regarded as having been specially designed and developed, also as a result of substantial modifications, for such purposes, this being a matter for the referring court to determine.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 10 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, read in conjunction with Article 296(1)(b) EC, must be interpreted as authorising a Member State to set aside the procedures laid down by that directive in the case of a public contract awarded by a contracting authority in the field of defence for the acquisition of material which, although intended for specifically military purposes, also presents possibilities for essentially identical civilian applications only if that material, by virtue of its intrinsic characteristics, may be regarded as having been specially designed and developed, also as a result of substantial modifications, for such purposes, this being a matter for the referring court to determine.

[Signatures]

---

*Language of the case: Finnish.

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 19 January 2012 (1)

Case C-615/10

Insinööritoimisto InsTiimi Oy

(Reference for a preliminary ruling from the Korkein hallinto-oikeus (Finland))

(Public supply contracts — Article 10 of Directive 2004/18/EC — Article 296 EC — Protection of a Member State's essential security interests — Trade in arms — Products which are procured by the contracting authorities specifically for military purposes, but for which there exists a largely identical civilian application — Turntable equipment for electromagnetic measurements)

I – Introduction

1. The conditions under which the Member States may derogate from European Union legislation in connection with their defence and their armed forces repeatedly give rise to legal disputes. (2)

2. In the present case, the Court is called upon to clarify under what conditions a Member State's armed forces may circumvent the rules of European procurement law in awarding public supply contracts for the procurement of products which are intended for military use.

3. In 2008, the Finnish Defence Forces awarded a contract for the supply of turntable equipment (3) for electromagnetic measurements, which was to be used for simulating and practising military situations in 'electronic warfare'. The procurement procedures prescribed in Directive 2004/18/EC (4) were not fully complied with.

4. A Finnish Court now raises the question of how the exception for public contracts in the field of defence, laid down in Article 10 of Directive 2004/18 in conjunction with Article 296 EC (now Article 346 TFEU), is to be construed. On the basis of its judgment in *Agusta*, (5) in answering this question referred for a preliminary ruling, the Court will be required, in particular, to clarify whether products may be regarded as 'intended for specifically military purposes' where, in addition to their military use, there is also a largely similar civilian application.

5. Unlike the helicopters in *Agusta*, the turntable equipment at issue here was purchased by the contracting authority for purely military purposes, with the result that it is not a 'dual-use item' in the stricter sense of the expression. However, according to the findings in the order for reference, it is perfectly conceivable that private organisations and undertakings could use such turntable equipment.

II – Legislative framework

6. The Union-law framework of this case is formed by Article 10 of Directive 2004/18 in conjunction with Article 296 EC.

7. Under the heading ‘Defence procurement’, Article 10 of Directive 2004/18 contained, in its original version, (6) this clarification of the scope of the rules governing public contracts:

‘This Directive shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article 296 of the Treaty.’

8. Until it was replaced by Article 346 TFEU following the entry into force of the Treaty of Lisbon, (7) Article 296 EC (formerly Article 223 of the EEC Treaty) was worded as follows:

‘1. The provisions of this Treaty shall not preclude the application of the following rules:

…

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

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.’

9. Council Decision 255/58 of 15 April 1958, which defined the list mentioned in Article 296(2) EC (also: ‘the 1958 list’), includes the following provisions: (8)

‘The list of the arms, munition and war materiel, including nuclear arms, to which the provisions of Article 223 paragraph 1(b) of the Treaty are applicable is given below:

…

5. Military fire control equipment:

(a) firing computers and guidance systems in infra-red and other night guidance devices;

(b) telemeters, position indicators, altimeters;

(c) electronic tracking components, gyroscopic, optical and acoustic;

(d) bomb sights and gun sights, periscopes for the equipment specified in this list.

…

11. Military electronic equipment.

…

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

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

10. Reference should also be made to recital 10 in the preamble to Directive 2009/81:

‘For the purposes of this Directive, military equipment should be understood in particular as the product types included in the list of arms, munitions and war material adopted by the Council in its Decision 255/58 of 15 April 1958, and Member States may limit themselves to this list only when transposing this Directive. This list includes only equipment which is designed, developed and produced for specifically military purposes. However, the list is generic and is to be interpreted in a

broad way in the light of the evolving character of technology, procurement policies and military requirements which lead to the development of new types of equipment, for instance on the basis of the Common Military List of the Union. For the purposes of this Directive, military equipment should also cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material.'

A – *National law*

11. In Finland Directive 2004/18 was implemented by Law No 348/2007 on public procurement (9) ('Law on public procurement'), the scope of which is subject to the following limitation under paragraph 7(1):

'This law shall not apply to contracts

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

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

12. Furthermore, according to an administrative instruction issued by the Finnish Ministry of Defence on 28 May 2008, until further notice, defence procurement contracts must comply with, inter alia, Order No 76 issued by the Ministry of Defence on 17 March 1995.

13. Paragraph 1 of Order No 76 defines products or services intended primarily for military purposes, to which the Law on public procurement is not applicable. This applies in particular to 'specialised equipment for military activities, training or military situation simulation drills, and components, additional apparatus and equipment specially designed for these', according to paragraph 1 in conjunction with point M of the Annex to that order.

III – Facts and main proceedings

14. In 2008, the Finnish Defence Forces Technical Research Centre (10) conducted a tender procedure for the procurement of turntable equipment for electromagnetic measurements, to a value of EUR 1 650 000. To that end, on 5 February 2008 it invited four undertakings to submit tenders, including the engineering firm Insinööritoimisto InsTiimi Oy (InsTiimi).

15. The contract was awarded in a 'negotiated procedure' which, according to the information provided in the order for reference, differs from the procurement procedures prescribed in Directive 2004/18. InsTiimi takes the view that the procurement procedure should have complied with the rules of Directive 2004/18 and has therefore brought the main proceedings before the Finnish courts. The Finnish Defence Forces, represented by the General Staff of the Finnish Defence Forces, (11) is also a party to those proceedings.

16. Before the Markkinaoikeus, (12) the court of first instance, the appeal lodged by InsTiimi was unsuccessful. The Markkinaoikeus regarded it as settled that the turntable equipment was suited primarily to military purposes and that the contracting authority intended it solely for military purposes. The Markkinaoikeus thus concluded that the contested contract came under the exception provided for in paragraph 7(1)(2) of the Law on public procurement.

17. Following an appeal lodged by InsTiimi, the case is now at second instance before the Korkein hallinto-oikeus, (13) the referring court.

18. Before that court, InsTiimi submitted that the turntable was a technical innovation from the civilian sector and is not designed to be war material. It is an item of general-purpose auxiliary equipment for examination and a base which does not in itself provide any new information on the object of examination. It also submits that the technical implementation of the contested contract is based entirely on combining freely available materials, components and assemblies, and that the design

involved is solely a matter of the appropriate selection and attachment of these structural components in order to fulfil the requirements of the invitation to tender.

19. The Defence Forces contended before the Korkein hallinto-oikeus that the turntable had been purchased for specifically military purposes and was also intended especially for purposes of simulation of military situations. The turntable would be used to simulate and practise military countermeasures against reconnaissance and target acquisition which takes place from overhead threat angles. A threat-emulating sensor can only be brought to the angle corresponding to the threat by tilting the target, for example a tank which is placed on the turntable, to the correct angle by means of the turntable.

20. According to the Defence Forces, the turntable is an essential part of the open space measurement track, intended for electronic warfare measurements, simulations and drills, which is being built for it, and it is therefore designed for the study of weapons intended for military use. The turntable is a product within the meaning of point M of the Annex to Order No 76 of the Ministry of Defence.

IV – Reference for a preliminary ruling and procedure before the Court

21. By interlocutory order of 13 December 2010, the Korkein hallinto-oikeus stayed its proceedings and referred the following question to the Court for a preliminary ruling:

Is Directive 2004/18/EC applicable, having regard to Article 10 of that directive and to Article 346(1)(b) of the Treaty on the Functioning of the European Union and to the list of arms, munitions and war material adopted by decision of the Council on 15 April 1958, to a procurement which otherwise falls within the scope of the directive, when according to the contracting entity the intended purpose of the object of procurement is specifically military, but there also exist largely identical technical applications of the object of procurement in the civilian market?

22. In the proceedings before the Court, in addition to the two parties to the main proceedings — InsTiimi and the Defence Forces — the Finnish, Czech and Portuguese Governments and the European Commission submitted written observations. With the exception of the Czech and Portuguese Governments, the same parties also took part in the hearing on 12 December 2011.

V – Assessment

23. The answer to the present reference for a preliminary ruling hinges on the interpretation of Article 296 EC (now Article 346 TFEU), to which reference is made in Article 10 of Directive 2004/18.

24. The first half of Article 296(1)(b) EC permits any Member State unilaterally (14) to take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material. Directive 2004/18 refers to that provision in Article 10 for the purpose of defining its own scope.

25. As the Commission rightly states and the Finnish Government also acknowledges, the first half of Article 296(1)(b) EC makes the adoption of unilateral national measures dependent on two cumulative conditions being satisfied:

– First, the measures must be connected with the production of or trade in arms, munitions and war material.

– Second, the measures to be taken must appear necessary for the protection of the essential security interests of the Member State concerned.

26. With its reference for a preliminary ruling, the referring court has the first of these two conditions specifically in view: it addresses only the notion of ‘products intended for specifically military purposes’. However, the second condition cannot be disregarded completely either in the assessment of the admissibility of the reference for a preliminary ruling (see immediately below under section A) or in the substantive appraisal of the question referred (see further below under section B). I

will therefore also consider this second condition below, in so far as is necessary, as several of the parties have done, not least at the hearing.

A – *Admissibility of the reference for a preliminary ruling*

27. The fact that in its order for reference the referring court addresses only the first criterion under Article 296(1)(b) EC — the notion of 'products intended for specifically military purposes' — cannot, in itself, call into question the admissibility of its reference for a preliminary ruling.

28. The question referred to the Court for a preliminary ruling would have to be regarded as hypothetical if it were established that in the present case the second cumulative criterion under Article 296(1)(b) EC was not satisfied in any event, i.e. if the derogation from the procurement rules laid down in Directive 2004/18 could not be justified by Finland's essential security interests. However, there is not sufficient evidence to that effect in the case before the Court.

29. The order for reference does not state definitively whether or not the contracting authority in the present case has relied on the protection of Finland's essential security interests in accordance with the second criterion. The referring court merely states that the Defence Forces had failed to specify, as recommended by the European Commission, (15) which essential security interest is connected with the procurement of the turntable equipment and why the non-application of Directive 2004/18 was necessary in this specific case. The Finnish Government and the General Staff of the Defence Forces nevertheless claim that such security interests were invoked in the national proceedings.

30. The referring court also states that the application made by InsTiimi would have to be dismissed as inadmissible if the public contract does not fall within the scope of Directive 2004/18 and of Law No 348/2007. In order to be able to assess this, it is also necessary to clarify the first criterion, the notion of 'products intended for specifically military purposes'.

31. Under these circumstances, it cannot be assumed that it would be *obvious* that the question referred has no relevance to the decision. (16) According to settled case-law, that question continues to enjoy a presumption of relevance. (17)

32. Consequently, there are no reservations to answering the question referred for a preliminary ruling.

B – *Substantive appraisal of the question*

33. By its question, the referring court is essentially seeking to ascertain whether the award of a public contract in the field of defence may disregard the rules laid down in Directive 2004/18 where the intended purpose of the object of procurement is specifically military, but there also exist largely similar civilian applications.

34. The background to this question is that turntable equipment like that procured in the present case is not, according to claims made by InsTiimi which have not been refuted, intended primarily for military purposes, but has predominantly civilian applications.

35. The parties disagree sharply. Whilst InsTiimi and the Commission take the view that the rules of Directive 2004/18 should have been complied with in the present case, the Defence Forces and all the Governments participating in the proceedings consider that a derogation from that directive was justified under Article 296(1)(b) EC.

36. In principle, the European Union legislation governing the award of public contracts also applies in the field of defence. This followed, at the time of the award of the contested contract, from Article 10 of Directive 2004/18. For the period after 21 August 2011, it is also confirmed in Directive 2009/81. (18) The application of the European Union legislation governing the award of public contracts will strengthen freedom of movement of goods, freedom of establishment and freedom to provide services within the Union and contribute to the realisation of the internal market. (19)

37. At the same time, however, European Union law recognises the legitimate interest of the Member States in the protection of their essential security interests, as expressed in particular in Article 296 EC. Article 10 of Directive 2004/18, which expressly refers to that Treaty provision, demonstrates the tension which can arise in public procurement between the principle of the internal market and national security interests.

38. Under Article 10 of Directive 2004/18 in conjunction with Article 296(1)(b) EC, a Member State may derogate from the European Union legislation on the award of public contracts where the measures are connected with trade in arms, munitions and war material (first criterion) and where a derogation from the European Union legislation governing the award of public contracts appears necessary for the protection of the essential security interests of that Member State (second criterion).

39. In view of the key importance of the fundamental freedoms and the principle of the internal market in the system of the Treaties, (20) these criteria must be given a strict interpretation in accordance with the case-law on Article 296 EC. (21)

1. First criterion: military products

40. The first half of Article 296(1)(b) EC is applicable to arms, munitions and war material, i.e. *military products*. The Council defined the specific categories of items covered in the 1958 list.

41. I share the view taken by the General Court of the European Union (then the Court of First Instance) (22) that the substantive scope of Article 296(1)(b) EC is regulated exhaustively by the 1958 list, to which express reference is made in Article 296(2) EC. (23) The General Court rightly pointed out that the exception contained in Article 296(1)(b) EC is not intended to apply to activities relating to products other than the military products identified on the 1958 list. (24)

42. A derogation from the procurement procedures prescribed in Directive 2004/18 on the basis of Article 296(1)(b) EC therefore requires, first of all, that a product like the contested turntable equipment can actually be classified in one of the categories of items included in the 1958 list. This will have to be examined and evaluated in detail by the referring court, which has exclusive jurisdiction to establish and evaluate the facts.

43. Because, according to the Finnish Defence Forces, the abovementioned turntable equipment allows electromagnetic measurements to be taken and is used for the simulation of military situations where target acquisition is practised, it could be a component of equipment for testing and control of arms (point 15 in conjunction with points 11 and 14 of the 1958 list). Theoretically, the turntable equipment could also be regarded as a part of a position indicator or a tracking component (point 5(b) and (c) in conjunction with point 14 of the 1958 list). (25)

44. However, the mere fact that the turntable equipment can possibly be classified in one of the categories of items in the 1958 list does not, as such, justify a derogation from the European Union legislation governing the award of public contracts. The mention of a certain item in the 1958 list is a necessary, but insufficient condition for reliance on Article 10 of Directive 2004/18 in conjunction with the first half of Article 296(1)(b) EC.

45. The application of the first half of Article 296(1)(b) EC also requires that the item in question be *intended for specifically military purposes*. (26) This follows *a contrario* from the second half of that provision, which mentions ‘products which are not intended for specifically military purposes’. The 1958 list likewise contains numerous wordings which suggest that a product within the meaning of Article 296(1)(b) EC must not only be classified generically in a certain category of items, but must also be intended for specifically military purposes. (27) This has also been recently confirmed by the Union legislature. (28)

46. It is not possible to infer whether a product is intended for specifically military purposes solely from the fact that a Member State’s armed forces are the purchaser or another public authority purchases the product for the armed forces. Otherwise, any pencil could become a military product merely because it is purchased for the military. This would run counter to the requirement of a strict interpretation of Article 296(1)(b) EC and impair the principle of the internal market excessively.

47. Nor is it sufficient that a product is merely *suited* to military use and thus will *possibly* be used for military purposes. The Court ruled in *Agusta* that the helicopters which had been purchased by the Italian State for a long time, without any competitive tendering procedure, did not come under Article 296(1)(b) EC because they were certainly for civilian use and only possibly for military use. (29)

48. The application of Article 296(1)(b) EC requires that a product, more than being merely suited to possible military use, has a *specifically military purpose*, both subjectively and objectively. Thus, the item in question must be intended for specifically military purposes not only according to its specific use defined by the contracting authority (30) (*subjectively*), but also according to its design and its characteristics (31) (*objectively*).

49. Such a specifically military purpose may be obvious in the case of many products. One need only think of the anti-tank guns, bombs and warships included in the 1958 list. (32) They are designed as purely military equipment (objective purpose) and purchased by the contracting authorities solely for military purposes (subjective purpose).

50. On the other hand, in the case of other products such as the vehicles, aircraft, explosives, ammunition and telemeters also included in the 1958 list, the specifically military purpose must be positively demonstrated (33) because a civilian use is also conceivable.

51. That is precisely the situation in the present case.

52. It is certainly clear that *subjectively* the contested turntable equipment had a specifically military use: according to the intentions of the contracting authority, it was to be used by the Finnish Defence Forces in the simulation of military situations and in practising target acquisition. In this respect the present case therefore differs from the *Agusta* case, in which no specifically military purpose could be established for the purchased products. (34)

53. However, there are serious doubts *objectively* as to the status of that turntable equipment as a product with a specifically military purpose. At the hearing the parties were not in agreement as to whether turntable equipment like that at issue here would find a buyer on the civilian market in the event of its subsequent sale by the Defence Forces. However, according to the information provided by the referring court, which alone is relevant in preliminary ruling proceedings, (35) there also exist largely similar technical applications for such turntable equipment on the civilian market. Similarly, InsTiimi makes the — unrefuted — argument that turntables could also be used in the civilian sector; indeed they were even initially designed for civilian use and only later were actually made useable for military purposes.

54. Such items which, although initially designed for civilian use, are later adapted to military purposes, are not intended in principle, according to the will of the Union legislature, (36) to fall outside the scope of the procedures for the award of public contracts under European Union law. (37)

55. It certainly cannot be ruled out that the turntable purchased in the present case was modified with a view to its military use in such essential respects that it became an entirely different product from the common product in the civilian sector. Such adaptation could have been made, for example, in connection with the installation of the turntable in a specially designed ‘open space measurement track’ intended for ‘electronic warfare’ measurements, simulations and drills.

56. Should there have there been such a fundamental modification — which the referring court will have to examine — the turntable in question would have acquired a specifically military purpose not only subjectively, but also objectively. Then (and only then) would the contracting authority have rightly classified it as a military product for the purposes of the first half of Article 296(1)(b) EC.

57. If, on the other hand, in the main proceedings the referring court’s current assumption were confirmed that, on the basis of its design and its characteristics — even as part of a specialist military installation for taking electromagnetic measurements and simulating operations — the contested turntable equipment is essentially no different from the turntables commonly used in the civilian sector,

it would objectively have no specifically military purpose, even though the contracting authority may have envisaged and purchased the turntable equipment for a specifically military use.

58. In the latter case, the procurement procedures prescribed by European Union law should have been applied in the procurement of the turntable in question.

59. In summary:

An item which, according to the contracting authority, is to be used for specifically military purposes, but which, viewed objectively, is essentially no different from similar items used in the civilian sector cannot, through reliance on Article 296(1)(b) EC in conjunction with Article 10 of Directive 2004/18, be excluded from the procurement procedures prescribed in that directive.

2. Second criterion: protection of essential security interests

60. Even if the contested turntable were to be classified as a military product (first criterion for the application of Article 296(1)(b) EC), the referring court would still have to examine whether in the present case a derogation from the procurement procedures prescribed by European Union law appeared necessary for the protection of Finland's essential security interests (second criterion for the application of Article 296(1)(b) EC).

61. In this regard, the Court has held that no more than reliance by a Member State on its security interests does not justify a derogation from European Union law. (38)

62. Certainly the relevant Member State is to be granted a wide discretion in the definition of its essential security interests; (39) this is shown by the use of the words 'as it considers necessary' in Article 296(1)(b) EC. Nevertheless, the national authorities bear the burden of proof to demonstrate that the conditions laid down by that provision are satisfied. (40)

63. As the Commission has rightly argued, the contracting authority should demonstrate in the present case that the derogation from the procurement procedures prescribed in Directive 2004/18 appeared necessary for the protection of Finland's essential security interests (41) and was proportionate. (42)

64. It should be noted that any confidentiality requirement in relation to certain military information does not, in itself, prevent the use of a competitive tendering procedure for the award of a contract. (43) It is also possible in a procurement procedure as laid down in European Union law to take the necessary precautions for the protection of sensitive information. (44)

65. In the present case, according to the unrefuted claims made by InsTiimi, the contracting authority is said to have reported in detail on the item purchased and the operation of the turntable equipment in a Finnish daily newspaper. Under these circumstances, it would seem unlikely that there could have been a legitimate confidentiality interest on the part of the Finnish State in the procurement procedure.

66. Certain derogations from the procurement procedures prescribed by European Union law may nevertheless be justified by the fact that a Member State does not wish simply to disclose security-related information to foreign undertakings or undertakings controlled by foreign nationals, in particular undertakings or persons from non-member countries. A Member State can also legitimately ensure that it does not become dependent on non-member countries or on undertakings from non-member countries for its arms supplies. Both points were rightly highlighted by the Czech Government.

67. However, in the present case there is likewise — as far as can be seen — absolutely no evidence of such security concerns on the part of the contracting authority. But all this will ultimately have to be assessed by the referring court in a full evaluation of all the circumstances of the individual case.

VI – Conclusion

68. In the light of the above arguments, I propose that the Court give the following answer to the question asked by the Korkein hallinto-oikeus:

An item which, according to the contracting authority, is to be used for specifically military purposes, but which, viewed objectively, is essentially no different from similar items used in the civilian sector cannot, through reliance on Article 296(1)(b) EC in conjunction with Article 10 of Directive 2004/18, be excluded from the procurement procedures prescribed in that directive.

---

1 – Original language: German.

---

2 – See, for example, the case-law on access for women to posts in the Member States' armed forces (Case C-273/97 *Sirdar* [1999] ECR I-7403, and Case C-285/98 *Kreil* [2000] ECR I-69), on compulsory military service for men (Case C-186/01 *Dory* [2003] ECR I-2479), on VAT liability for armaments (Case C-414/97 *Commission* v *Spain* [1999] ECR I-5585), and on customs handling of military equipment (Case C-284/05 *Commission* v *Finland* [2009] ECR I-11705; Case C-294/05 *Commission* v *Sweden* [2009] ECR I-11777; Case C-372/05 *Commission* v *Germany* [2009] ECR I-11801; Case C-387/05 *Commission* v *Italy* [2009] ECR I-11831; Case C-409/05 *Commission* v *Greece* [2009] ECR I-11859; Case C-461/05 *Commission* v *Denmark* [2009] ECR I-11887; Case C-239/06 *Commission* v *Italy* [2009] ECR I-11913; and Case C-38/06 *Commission* v *Portugal* [2010] ECR I-1569).

---

3 – Specifically: 'tiltable turntable'.

---

4 – Directive 2004/10/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

5 – Case C-337/05 *Commission* v *Italy* ('Agusta') [2008] ECR I-2173, paragraph 47.

---

6 – The wording of Article 10 of Directive 2004/18 has been amended by Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or authorities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76). However, this revised version only entered into force on 21 August 2009 and had to be transposed by the Member States by 21 August 2011 (cf. Article 72(1) and Article 74 of Directive 2009/81), with the result that it was not yet applicable to the present case.

---

7 – The Treaty of Lisbon entered into force on 1 December 2009.

---

8 – This decision was not published in the *Official Journal of the European Communities*, although an extract is reproduced in Document No 14538/4/08 of the Council of the European Union of 26 November 2008, which is publicly available on the Council's website at < http://register.consilium.europa.eu/ > (last visited on 12 December 2011). The content of the list is also reproduced in a Commission answer to a parliamentary question (Answer of 27 September 2001 to Written question E-1324/01 by Bart Staes MEP, OJ 2001 C 364 E, p. 85).

---

9 – Julkisista hankinnoista annettu laki.

---

10 – Suomen Puolustusvoimien Teknillinen Tutkimuslaitos.

---

11 – Pääesikunta.

---

12 – Market Court.

---

13 – Supreme Administrative Court.

---

14 – The Court established very early, in Case 6/64 *Costa* v *ENEL* [1964] ECR 585, that the measures are unilateral.

---

15 – The referring court mentions the Commission's Interpretative communication of 7 December 2006 on the application of Article 296 of the Treaty in the field of defence procurement (COM(2006) 779 final), 'the Commission Communication').

---

16 – With regard to the plea of inadmissibility that it is *obvious* that there is no relevance to the decision, see inter alia Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraphs 31 and 32; Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraphs 32 and 33; and Joined Cases C-509/09 and C-161/10 *eDate Advertising* [2011] ECR I-10269, paragraphs 32 and 33.

---

17 – Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraph 22; Case C-45/09 *Rosenbladt*, cited in footnote 16, paragraph 33; and Case C-119/09 *Société fiduciaire nationale d'expertise comptable* [2011] ECR I-2551, paragraph 21.

---

18 – See, in particular, Article 10 of Directive 2004/18 as amended by Directive 2009/81, Article 2 of Directive 2009/81, and the first sentence of recital 10 in the preamble to Directive 2009/81.

---

19 – Recital 2 in the preamble to Directive 2004/18; also the Court's settled case-law on the various directives coordinating public procurement law, see for example Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16; Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 27; and Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, paragraph 38.

---

20 – See, thus far, Article 2 EU and Article 3(1)(c) EC (now the first sentence of Article 3(3) TEU).

---

21 – Case C-414/97 *Commission* v *Spain*, paragraph 21; Case C-284/05 *Commission* v *Finland*, paragraph 46; Case C-294/05 *Commission* v *Sweden*, paragraph 44; Case C-372/05 *Commission* v *Germany*, paragraph 69; Case C-387/05 *Commission* v *Italy*, paragraph 46; Case C-409/05 *Commission* v *Greece*, paragraph 51; Case C-461/05 *Commission* v *Denmark*, paragraph 52; Case C-239/06 *Commission* v *Italy*, paragraph 47; and Case C-38/06 *Commission* v *Portugal*, paragraph 63, each cited in footnote 2.

---

22 – See Case T-26/01 *Fiocchi munizioni* v *Commission* [2003] ECR II-3951.

---

23 – Admittedly, this does not mean that the list cannot be given a contemporary interpretation and application in order to take account of current developments. According to recital 10 in the preamble to Directive 2009/81, 'the list is generic and is to be interpreted in a broad way in the light of the evolving character of technology, procurement policies and military requirements which lead to the development of new types of equipment … ' (see also the Commission Communication, cited in footnote 15, section 3). The list is thus applicable not only to the military products known in 1958, but also to those used today in the Member States' armed forces, provided they can be classified under the categories described in the list.

24 – Case T-26/01 *Fiocchi munizioni* v *Commission*, cited in footnote 22, paragraph 61.

25 – Classification in point 5 of the 1958 list requires the item to be ‘military fire control equipment’. A link to ‘fire control’ could, in principle, exist because the contested turntable equipment is used to simulate and practise ‘target acquisition’ in ‘electronic warfare’ and is ultimately intended to prepare ‘countermeasures against overhead reconnaissance’. However, no such connection with fire control was taken to exist by the parties at the hearing before the Court.

26 – Case C-337/05 *Commission* v *Italy* (‘Agusta’), cited in footnote 5, paragraph 47, and Case C-157/06 *Commission* v *Italy* [2008] ECR I-7313, paragraph 26.

27 – See, for example, points 5 and 11 (‘military’) and point 14 of the 1958 list (‘insofar as they are of a military nature’).

28 – ‘[The 1958 list] includes only equipment which is designed, developed and produced for specifically military purposes’ (second sentence of recital 10 in the preamble to Directive 2009/81).

29 – Case C-337/05 *Commission* v *Italy* (‘Agusta’), cited in footnote 5, in particular paragraphs 48 and 49; see also Case C-157/06 *Commission* v *Italy*, cited in footnote 26, paragraph 27.

30 – See Case C-337/05 *Commission* v *Italy* (‘Agusta’), cited in footnote 5, in particular paragraphs 48 and 49, where reference is made to the purpose defined by the contracting authority.

31 – See also recital 10 in the preamble to Directive 2009/81, according to which the 1958 list ‘includes only equipment which is *designed, developed and produced* for specifically military purposes’ (emphasis added); see also the Commission Communication (cited in footnote 15, section 3), which mentions ‘equipment which is of *purely military nature and purpose*’ (emphasis also in the original).

32 – Points 2(a), 4 and 9(a) of the 1958 list.

33 – Points 3, 5(a), 6, 8(b) and 10 of the 1958 list.

34 – Case C-337/05 *Commission* v *Italy* (‘Agusta’), cited in footnote 5, in particular paragraphs 48 and 49.

35 – Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42; and Case C-382/08 *Neukirchinger* [2011] ECR I-139, paragraph 41.

36 – Last sentence of recital 10 in the preamble to Directive 2009/81. Although this statement came from a legislative act which is not applicable to the present case *ratione temporis*, there is no obvious reason not to take account of the underlying evaluations in interpreting Directive 2004/18 in the relevant version for the main proceedings. In any case, recital 10 essentially makes clarifications regarding the meaning of the 1958 list, as it was to be understood until now.

37 – Similarly, the Court has held that a Member State may not rely on Article 296 EC in order to exempt from customs duties imports of dual-use material for both civilian and military use, 'whether or not such material was imported exclusively for military purposes' (see Case C-294/05 *Commission* v *Sweden*, paragraph 53, and Case C-387/05 *Commission* v *Italy*, paragraph 55, cited in footnote 2).

---

38 – Case C-284/05 *Commission* v *Finland*, paragraph 47; Case C-294/05 *Commission* v *Sweden*, paragraph 45; Case C-372/05 *Commission* v *Germany*, paragraph 70; Case C-387/05 *Commission* v *Italy*, paragraph 47; Case C-409/05 *Commission* v *Greece*, paragraph 52; Case C-461/05 *Commission* v *Denmark*, paragraph 53; Case C-239/06 *Commission* v *Italy*, paragraph 48; and Case C-38/06 *Commission* v *Portugal*, paragraph 64, each cited in footnote 2.

---

39 – Case T-26/01 *Fiocchi munizioni* v *Commission*, cited in footnote 22, paragraph 58; see also the Commission Communication (cited in footnote 15), according to which Article 296 EC 'has been acknowledged to grant to Member States a broad degree of discretion' in deciding how to protect their essential security interests (section 4 of the Communication) and 'it is the Member States' prerogative to define their essential security interests' (section 5 of the Communication).

---

40 – Case C-414/97 *Commission* v *Spain*, paragraphs 22 and 24; Case C-294/05 *Commission* v *Sweden*, paragraph 47; Case C-284/05 *Commission* v *Finland*, paragraph 49; Case C-372/05 *Commission* v *Germany*, paragraph 72; Case C-387/05 *Commission* v *Italy*, paragraph 49; Case C-409/05 *Commission* v *Greece*, paragraph 54; Case C-461/05 *Commission* v *Denmark*, paragraph 55; Case C-239/06 *Commission* v *Italy*, paragraph 50; and Case C-38/06 *Commission* v *Portugal*, paragraph 66, each cited in footnote 2.

---

41 – See also the Commission Communication (cited in footnote 15, section 3).

---

42 – Case C-337/05 *Commission* v *Italy* ('Agusta'), cited in footnote 5, in particular paragraph 53, and Case C-157/06 *Commission* v *Italy*, cited in footnote 26, paragraph 31; also the Commission Communication (cited in footnote 15, section 5), according to which it must be demonstrated why the non-application of the Public Procurement Directive in this specific case is *necessary* for the protection of an essential security interest.

---

43 – Case C-337/05 *Commission* v *Italy* ('Agusta'), cited in footnote 5, in particular paragraph 52, and Case C-157/06 *Commission* v *Italy*, cited in footnote 26, paragraph 30.

---

44 – With regard to the confidentiality of classified information of the contracting authority, see in particular Articles 7, 20 and 22 of Directive 2009/81; with regard to the confidentiality of information forwarded by tenderers, see for example Article 6 of Directive 2004/18 and Article 6 of Directive 2009/81 and Case C-450/06 *Varec* [2008] ECR I-581.

ARRÊT DE LA COUR (sixième chambre)

27 octobre 2011 (*)

«Manquement d'État – Directives 92/50/CEE et 2004/18/CE – Marchés publics de services – Services complémentaires de cadastrage et d'aménagement urbain – Procédure négociée sans publication préalable d'un avis de marché»

Dans l'affaire C-601/10,

ayant pour objet un recours en manquement au titre de l'article 258 TFUE, introduit le 17 décembre 2010,

Commission européenne, représentée par M^me^ M. Patakia et M. D. Kukovec, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République hellénique, représentée par M^mes^ S. Chala et D. Tsagkaraki, en qualité d'agents, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (sixième chambre),

composée de M. A. Rosas, faisant fonction de président de la sixième chambre, MM. A. Ó Caoimh (rapporteur) et A. Arabadjiev, juges,

avocat général: M. P. Cruz Villalón,

greffier: M. A. Calot Escobar,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission européenne demande à la Cour de constater que, en ayant passé, en recourant à une procédure négociée sans publication préalable d'un avis de marché, des marchés publics ayant pour objet des services complémentaires de cadastrage et d'aménagement urbain qui ne figuraient pas dans le contrat initial conclu par les communes de Vassilika, de Kassandra, d'Egnatia et d'Arethousa, la République hellénique a manqué aux obligations qui lui incombent en vertu des articles 8 et 11, paragraphe 3, de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services (JO L 209, p. 1), telle que modifiée par la directive 97/52/CE du Parlement européen et du Conseil, du 13 octobre 1997 (JO L 328, p. 1, ci-après la «directive 92/50»), ainsi que des articles 20 et 31, point 4, de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 14).

Le cadre juridique

La réglementation de l'Union

La directive 92/50

2 Selon l'article 1er, sous b), de la directive 92/50, sont considérées comme «pouvoirs adjudicateurs», notamment, les collectivités territoriales.

3 Aux termes de l'article 3, paragraphe 2, de cette directive:

«Les pouvoirs adjudicateurs veillent à ce qu'il n'y ait pas de discrimination entre les différents prestataires de services.»

4 Selon l'article 7 de la directive 92/50:

«1. a) La présente directive s'applique:

[...]

– aux marchés publics de services ayant pour objet des services figurant à l'annexe I A [...]

[...]

ii) passés par les pouvoirs adjudicateurs désignés à l'article 1er point b) autres que ceux mentionnés à l'annexe I de la directive 93/36/CEE [du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures (JO L 199, p. 1)] et dont la valeur estimée hors [taxe sur la valeur ajoutée] égale ou dépasse l'équivalent en écus de 200 000 [droits de tirage spéciaux (DTS)].

[...]»

5 Ladite annexe I A, intitulée «Services au sens de l'article 8», vise, notamment, sous la catégorie 12, les «services d'aménagement urbain» ainsi que les «services connexes de consultations scientifiques et techniques».

6 Il est constant que les collectivités territoriales grecques ne sont pas mentionnées à l'annexe I de la directive 93/36.

7 L'article 8 de la directive 92/50 dispose:

«Les marchés qui ont pour objet des services figurant à l'annexe I A sont passés conformément aux dispositions des titres III à VI.»

8 Figurant sous le titre III de cette même directive, intitulé «Choix des procédures de passation et règles applicables aux concours», l'article 11, paragraphe 3, de celle-ci prévoit:

«Les pouvoirs adjudicateurs peuvent passer leurs marchés publics de services en recourant à une procédure négociée sans publication préalable d'un avis de marché dans les cas suivants:

[...]

e) pour les services complémentaires ne figurant pas dans le projet initialement envisagé ou dans le premier contrat conclu, mais qui, à la suite d'une circonstance imprévue, sont devenus nécessaires à l'exécution du service tel qu'il y est décrit, à condition que l'attribution soit faite au prestataire qui exécute ce service:

– lorsque ces services complémentaires ne peuvent être techniquement ou économiquement séparés du marché principal sans inconvénient majeur pour les pouvoirs adjudicateurs,

ou

– lorsque ces services, quoiqu'ils soient séparables de l'exécution du marché initial, sont strictement nécessaires à son perfectionnement.

Toutefois, la valeur cumulée estimée des marchés passés pour les services complémentaires ne doit pas dépasser 50 % du montant du marché principal;

[...]»

La directive 2004/18

9 La directive 2004/18 a abrogé, notamment, les articles 3, 8 et 11 de la directive 92/50, avec effet à compter du 31 janvier 2006, date à laquelle les États membres devaient avoir mis en vigueur les dispositions législatives, réglementaires et administratives pour se conformer à la directive 2004/18.

10 Selon l'article 1er, paragraphe 9, de cette directive, sont considérées comme «pouvoirs adjudicateurs», notamment, les collectivités territoriales.

11 Aux termes de l'article 2 de ladite directive:

«Les pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité, de manière non discriminatoire et agissent avec transparence.»

12 En vertu de l'article 7 de la directive 2004/18, celle-ci s'applique aux marchés publics de services qui ne sont pas exclus en vertu des exceptions prévues par cette directive et dont la valeur estimée hors taxe sur la valeur ajoutée est égale ou supérieure à 249 000 euros lorsque les marchés sont passés par des pouvoirs adjudicateurs autres que ceux visés à l'annexe IV de ladite directive. Cette annexe, sous la rubrique «Grèce», ne mentionne pas les collectivités territoriales.

13 L'article 20 de la directive 2004/18 dispose:

«Les marchés qui ont pour objet des services figurant à l'annexe II A sont passés conformément aux articles 23 à 55.»

14 Ladite annexe vise, notamment, sous la catégorie 12, les «services d'aménagement urbain» ainsi que les «services connexes de consultations scientifiques et techniques».

15 L'article 31 de la directive 2004/18, intitulé «Cas justifiant le recours à la procédure négociée sans publication d'un avis de marché», prévoit:

«Les pouvoirs adjudicateurs peuvent passer leurs marchés publics en recourant à une procédure négociée sans publication préalable d'un avis de marché dans les cas suivants:

[...]

4) dans le cas des marchés publics de travaux et marchés publics de services:

a) pour les travaux ou services complémentaires qui ne figurent pas dans le projet initialement envisagé ni dans le contrat initial et qui sont devenus nécessaires, à la suite d'une circonstance imprévue, à l'exécution de l'ouvrage ou du service tel qu'il y est décrit, à condition que l'attribution soit faite à l'opérateur économique qui exécute cet ouvrage ou ce service:

– lorsque ces travaux ou services complémentaires ne peuvent être techniquement ou économiquement séparés du marché initial sans inconvénient majeur pour les pouvoirs adjudicateurs,

ou

– lorsque ces travaux ou services, quoiqu'ils soient séparables de l'exécution du marché initial, sont strictement nécessaires à son perfectionnement.

Toutefois, le montant cumulé des marchés passés pour les travaux ou services complémentaires ne doit pas dépasser 50 % du montant du marché initial.

[...]»

La réglementation nationale

16 La loi 3316/2005 relative à l'attribution et à l'exécution de marchés publics relatifs à l'élaboration d'études et à la prestation de services connexes et autres dispositions (FEK A' 42/22.2.2005) et le décret présidentiel 60/2007 (FEK A' 64/16.3.2007) ont adapté les procédures d'attribution et d'exécution des marchés publics relatifs à la réalisation d'études, prévues par le droit hellénique, aux dispositions de la directive 2004/18. Ils régissent l'attribution et l'exécution des marchés relatifs à la réalisation d'études et à la prestation de services connexes dont les résumés des avis de marché ont été publiés après le 23 février 2005.

17 Selon l'article 45, paragraphe 1, de la loi 3316/2005, l'attribution et l'exécution des marchés relatifs à l'élaboration d'études et à la prestation de services connexes dont les résumés des avis de marché ont été publiés avant le 23 février 2005 sont régies par les dispositions du cadre juridique antérieur, à savoir la loi 716/1977 relative au registre des experts et à l'attribution et à l'élaboration d'études (FEK A' 295/5.10.1977) et le décret présidentiel d'application 194/1979 (FEK A' 53/15.9.1979).

18 Conformément à la loi 716/1977, la rémunération de l'expert pour l'ensemble de l'étude est estimée au préalable mais ne correspond pas à la rémunération finale versée, la rémunération contractuelle étant déterminée par le devis soumis pour la première fois par le contractant, en ce qui concerne l'objet contractuel initial, et approuvé par le service du pouvoir adjudicateur. Les éventuels contrats complémentaires conclus dans le cadre du contrat initial doivent compléter l'étude en la délimitant mais ne peuvent en aucun cas l'étendre.

La procédure précontentieuse

19 Ayant été informée d'éléments faisant apparaître une infraction aux dispositions des directives 92/50 et 2004/18 commise par les communes de Vassilika, de Kassandra, d'Egnatia et d'Arethousa lors de la procédure d'attribution de marchés publics concernant des services complémentaires de cadastrage et d'aménagement urbain qui ne figuraient pas dans le contrat initial, la Commission a engagé la procédure prévue à l'article 258 TFUE.

20 Conformément à cette disposition, la Commission a adressé, le 2 février 2009, une lettre de mise en demeure à la République hellénique, dans laquelle elle constate que lesdites communes ont, en violation des articles 3, paragraphe 2, 8 et 11, paragraphe 3, sous e), de la directive 92/50 ainsi que des articles 2, 20 et 31, point 4, sous a), de la directive 2004/18, conclu des marchés publics de services en recourant à la procédure négociée sans publication préalable d'un avis de marché, alors que ces marchés, attribués chacun au même adjudicataire, étendent l'objet des marchés initiaux en prévoyant des services qui n'étaient pas couverts initialement.

21 Estimant la réponse fournie par la République hellénique insatisfaisante, la Commission a adressé, par lettre du 23 novembre 2009, un avis motivé à cet État membre.

22 Par lettre du 25 janvier 2010, la République hellénique a répondu audit avis motivé en reconnaissant que la passation de tous les marchés publics litigieux est contraire aux dispositions des directives 92/50 et 2004/18 et en annonçant l'adoption d'une série de mesures destinées à garantir le respect des exigences du droit de l'Union.

23 Constatant que les autorités administratives régionales refusent de procéder à l'application effective de ces mesures, alors qu'elles seraient suffisantes et appropriées pour mettre fin à l'infraction si elles

étaient contraignantes et si leur respect était garanti dans la pratique, la Commission a décidé d'introduire le présent recours.

Sur le recours

24 Par son recours, la Commission reproche à la République hellénique d'avoir enfreint les directives 92/50 et 2004/18 en ce que les communes de Vassilika, de Kassandra, d'Egnatia et d'Arethousa ont conclu des marchés publics concernant des services de cadastrage et d'aménagement urbain en recourant à la procédure négociée sans publication préalable d'un avis de marché, alors que ces marchés étendent l'objet des contrats initiaux en prévoyant des services qui n'étaient pas couverts par ceux-ci.

25 Tant dans son mémoire en défense que dans son mémoire en duplique, la République hellénique reconnaît que les marchés publics litigieux, dès lors qu'ils ont été attribués dans le cadre du régime juridique en vigueur antérieurement, tel qu'il résultait de la loi 716/1977, ont été conclus en violation des dispositions des directives 92/50 et 2004/18. En effet, dans le cadre de cette loi, il aurait été impossible de fixer dès l'origine le montant des frais contractuels liés aux études, de manière à ce qu'il soit connu dès le stade de l'attribution, ainsi que l'exigent ces directives. En adoptant la loi 3316/2005 et le décret présidentiel 60/2007, les procédures d'attribution et d'exécution des marchés publics d'études auraient cependant été adaptées au droit de l'Union, en prévoyant que l'élaboration des études serait désormais attribuée sur la base de l'offre financièrement la plus intéressante.

26 La République hellénique souligne avoir informé la Commission des mesures qu'elle a adoptées en vue de contraindre les communes concernées à retirer les marchés publics litigieux. En particulier, elle aurait demandé aux collectivités locales concernées, d'une part, de suspendre immédiatement toute nouvelle action visant à l'exécution des marchés complémentaires en cause et, d'autre part, de retirer toutes les décisions des conseils municipaux concernant la fixation des rémunérations contractuelles des études concernées. Par ailleurs, elle aurait demandé au corps des contrôleurs inspecteurs de l'administration d'effectuer le contrôle-inspection requis des marchés complémentaires passés. Or, les rapports élaborés à cette occasion feraient ressortir que tant l'objet contractuel des études que la fixation des rémunérations contractuelles étaient illégaux. Les communes concernées refuseraient cependant de retirer les marchés publics litigieux au motif que ceux-ci ont été conclus en conformité avec la loi 716/1977.

27 Étant donné l'autonomie administrative et financière des collectivités locales, consacrée par la Constitution hellénique, et les limites étroites auxquelles se heurte une intervention en matière d'administration locale, ledit État membre estime qu'il a déployé tous les efforts possibles pour mettre fin au manquement reproché par la Commission. Il continuerait, par ailleurs, à exercer toutes les pressions possibles sur les organismes impliqués de manière à obtenir le retrait des marchés publics litigieux.

28 Il importe de rappeler que, dans le cadre d'un recours en manquement, introduit en vertu de l'article 258 TFUE par la Commission et dont celle-ci apprécie seule l'opportunité, il appartient à la Cour de constater si le manquement reproché existe ou non, même si l'État concerné ne conteste pas ce manquement (voir, notamment, arrêts du 22 juin 1993, Commission/Danemark, C-243/89, Rec. p. I-3353, point 30; du 15 janvier 2002, Commission/Italie, C-439/99, Rec. p. I-305, point 20, et du 8 septembre 2005, Commission/Italie, C-462/04, point 7).

29 En l'espèce, il y a lieu, tout d'abord, de constater qu'il ressort du dossier soumis à la Cour que, tandis que les marchés publics litigieux attribués par la commune de Kassandra ont été conclus avant le 31 janvier 2006, ceux attribués par les communes de Vassilika, d'Egnatia et d'Arethousa ont été conclus après cette date. Il en résulte que, si les premiers marchés publics sont susceptibles de relever de la directive 92/50, les seconds sont, quant à eux, susceptibles d'être soumis aux dispositions de la directive 2004/18, cette dernière directive ayant abrogé et remplacé les dispositions pertinentes de la directive 92/50 à compter du 31 janvier 2006.

30 Par ailleurs, il est constant que les marchés publics litigieux relèvent du champ d'application des directives 92/50 et 2004/18. En effet, d'une part, ils ont été passés par des communes qui constituent,

en tant que collectivités territoriales, des pouvoirs adjudicateurs au sens des articles 1er, sous b), de la directive 92/50 ainsi que 1er, paragraphe 9, de la directive 2004/18, qui sont visés à l'article 7 de ces directives. D'autre part, la valeur estimée de chacun desdits marchés excède les seuils prévus audit article 7.

31 Or, en vertu de l'article 11, paragraphe 3, sous e), de la directive 92/50 et de l'article 31, point 4, sous a), de la directive 2004/18, les marchés publics de services, tels que ceux en cause dans la présente affaire, relatifs à des services d'aménagement urbain au sens, respectivement, de l'annexe I A de la première directive et de l'annexe II A de la seconde, peuvent être conclus par les pouvoirs adjudicateurs selon une procédure négociée sans publication d'un avis préalable de marché lorsqu'ils portent sur des services complémentaires ne figurant pas dans le contrat initial, à condition, notamment, d'une part, que, à la suite d'une circonstance imprévue, ils soient devenus nécessaires à l'exécution du service tel qu'il y est décrit et, d'autre part, que la valeur cumulée estimée des marchés passés pour ces services complémentaires ne dépasse pas 50 % du marché initial.

32 Selon la jurisprudence de la Cour, en tant que dérogations aux règles visant à garantir l'effectivité des droits reconnus par le traité FUE dans le secteur des marchés publics de services, l'article 11, paragraphe 3, sous e), de la directive 92/50 et l'article 31, point 4, sous a), de la directive 2004/18 doivent faire l'objet d'une interprétation stricte, et c'est à celui qui entend s'en prévaloir qu'incombe la charge de la preuve que les circonstances exceptionnelles justifiant la dérogation existent effectivement (voir arrêts du 10 avril 2003, Commission/Allemagne, C-20/01 et C-28/01, Rec. p. I-3609, point 58; du 18 novembre 2004, Commission/Allemagne, C-126/03, Rec. p. I-11197, point 23; du 11 janvier 2005, Stadt Halle et RPL Lochau, C-26/03, Rec. p. I-1, point 46, ainsi que du 8 avril 2008, Commission/Italie, C-337/05, Rec. p. I-2173, points 57 et 58).

33 Dans sa requête, la Commission soutient que rien n'indique en l'espèce qu'une circonstance imprévue soit ou puisse être intervenue après l'attribution des marchés publics litigieux, dès lors que les pouvoirs adjudicateurs en cause auraient pu, avant la passation des marchés initiaux, prévoir la nécessité d'inclure également les services complémentaires concernés, à savoir, en l'occurrence, l'extension des zones à urbaniser. Si le besoin d'une telle extension pour des raisons techniques ou économiques, ou liées à l'exécution des services prévus dans le marché initial, pouvait être considéré comme une circonstance imprévue, les pouvoirs adjudicateurs seraient en mesure d'invoquer leur propre échec à estimer et à déterminer précisément l'objet physique et la portée du marché initial pour procéder ensuite à l'attribution de services complémentaires par la conclusion de contrats distincts en violation des principes d'égalité de traitement et de transparence.

34 En tout état de cause, la Commission souligne que, selon les informations en sa possession, le montant des marchés complémentaires concernés dépasse, dans chaque cas, le seuil de 50 % du montant des marchés initiaux fixé par les directives 92/50 et 2004/18.

35 Force est de constater que la République hellénique, à laquelle incombe la charge de prouver que les conditions édictées par les articles 11, paragraphe 3, sous e), de la directive 92/50 et 31, point 4, sous a), de la directive 2004/18 sont remplies, n'a pas entrepris de réfuter ces affirmations.

36 Par ailleurs, cet État membre n'a pas davantage cherché à démontrer que les marchés publics litigieux étaient susceptibles de bénéficier des autres dérogations prévues à l'article 11, paragraphe 3, de la directive 92/50 et à l'article 31 de la directive 2004/18 quant au recours à la procédure négociée sans publication préalable d'un avis de marché.

37 La République hellénique fait certes valoir que la réglementation nationale en matière de marchés publics concernant la réalisation d'études est désormais conforme à la directive 2004/18, dès lors que la loi 3316/2005 et le décret présidentiel 60/2007 disposent que l'élaboration de telles études est attribuée sur la base de l'offre financièrement la plus intéressante et non plus sur la base de la rémunération estimée au préalable par l'expert, ainsi que le prévoyait la loi 716/1977.

38 Toutefois, ainsi que la Commission l'a observé à juste titre, une telle circonstance est sans pertinence dans le cadre du présent recours, dès lors que celui-ci porte sur la conformité des marchés publics

litigieux avec les directives 92/50 et 2004/18 et non sur celle de la réglementation nationale en cause avec ces dernières.

39 En outre, il ne ressort en rien de la requête que le manquement allégué dans le cadre du présent recours, tiré de la violation de l'article 11, paragraphe 3, de la directive 92/50 et de l'article 31, point 4, de la directive 2004/18, viserait également le mode de fixation de la rémunération des experts en charge des études relatives aux marchés publics litigieux. En effet, la Commission ne fait nullement valoir, dans son recours, que l'extension des marchés initiaux à des services complémentaires de cadastrage et d'aménagement urbain par les communes concernées dans le cadre de procédures négociées sans publication préalable d'un avis de marché résulterait également du mode de fixation de la rémunération des experts, mais fait valoir uniquement que cette extension résulte de l'adjudication de services supplémentaires après la conclusion des marchés initiaux.

40 Quant aux prétendues difficultés rencontrées par la République hellénique, après l'envoi de sa réponse à l'avis motivé, aux fins d'obtenir le retrait effectif des marchés publics litigieux par les communes concernées, il suffit de rappeler que, selon une jurisprudence constante, l'existence d'un manquement doit être appréciée en fonction de la situation de l'État membre telle qu'elle se présentait au terme du délai fixé dans l'avis motivé et que les changements intervenus par la suite ne sauraient être pris en compte par la Cour (voir, notamment, arrêts du 30 novembre 2006, Commission/Luxembourg, C-32/05, Rec. p. I-11323, point 22, et du 17 janvier 2008, Commission/Allemagne, C-152/05, Rec. p. I-39, point 15).

41 Par ailleurs, et en tout état de cause, un État membre ne saurait exciper de dispositions, pratiques ou situations de son ordre juridique interne pour justifier l'inobservation des obligations résultant du droit de l'Union (voir, notamment, arrêts du 10 avril 2003, Commission/France, C-114/02, Rec. p. I-3783, point 11, et du 23 avril 2009, Commission/Espagne, C-321/08, point 9).

42 Dans ces conditions, le recours introduit par la Commission doit être considéré comme fondé.

43 Par conséquent, il convient de constater que, en ayant passé, en recourant à une procédure négociée sans publication préalable d'un avis de marché, des marchés publics ayant pour objet des services complémentaires de cadastrage et d'aménagement urbain qui ne figuraient pas dans le contrat initial conclu par les communes de Vassilika, de Kassandra, d'Egnatia et d'Arethousa, la République hellénique a manqué aux obligations qui lui incombent en vertu des articles 8 et 11, paragraphe 3, de la directive 92/50 ainsi que des articles 20 et 31, point 4, de la directive 2004/18.

Sur les dépens

44 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la République hellénique et celle-ci ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (sixième chambre) déclare et arrête:

1) **En ayant passé, en recourant à une procédure négociée sans publication préalable d'un avis de marché, des marchés publics ayant pour objet des services complémentaires de cadastrage et d'aménagement urbain qui ne figuraient pas dans le contrat initial conclu par les communes de Vassilika, de Kassandra, d'Egnatia et d'Arethousa, la République hellénique a manqué aux obligations qui lui incombent en vertu des articles 8 et 11, paragraphe 3, de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services, telle que modifiée par la directive 97/52/CE du Parlement européen et du Conseil, du 13 octobre 1997, ainsi que des articles 20 et 31, point 4, de la directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services.**

2) La République hellénique est condamnée aux dépens.

Signatures

---

* Langue de procédure: le grec.

EU:C:2012:191

JUDGMENT OF THE COURT (Fourth Chamber)

29 March 2012 (*)

(Public procurement — Directive 2004/18/EC — Contract award procedures — Restricted call for tenders — Assessment of the tender — Requests by the contracting authority for clarification of the tender — Conditions)

In Case C-599/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Najvyšší súd Slovenskej republiky (Slovak Republic), made by decision of 9 November 2010, received at the Court on 17 December 2010, in the proceedings

SAG ELV Slovensko a.s.,

FELA Management AG,

ASCOM (Schweiz) AG,

Asseco Central Europe a.s.,

TESLA Stropkov a.s.,

Autostrade per l'Italia SpA,

EFKON AG,

Stalexport Autostrady SA

v

Úrad pre verejné obstarávanie,

intervening party:

Národná dial'ničná spoločnosť a.s.,

THE COURT (Fourth Chamber),

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

Advocate General: J. Kokott,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 14 December 2011,

after considering the observations submitted on behalf of:

– SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s. and TESLA Stropkov a.s., by R. Gorej, L. Vojčík and O. Gajdošech, avocats,

– Autostrade per l'Italia SpA, EFKON AG and Stalexport Autostrady SA, by L. Poloma and G.M. Roberti, avocats,

– the Úrad pre verejné obstarávanie, by B. Šimorová, acting as Agent,

– Národná diaľničná spoločnosť a.s., by D. Nemčíková and J. Čorba, advokát,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the European Commission, by C. Zadra and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2, 51 and 55 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference has been made in proceedings between the Úrad pre verejné obstarávanie (Public Procurement Office; 'the Úrad') and undertakings which were unsuccessful in a call for tenders launched during 2007 by Národná diaľničná spoločnosť a.s. ('NDS'), a commercial undertaking wholly controlled by the Slovak State, with a view to the supply of services relating to toll collection on motorways and certain roads.

Legal context

European Union law

3 Article 2 of Directive 2004/18 provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

4 Article 51 of that directive which, within Title II, Chapter VII, thereof, forms part of Section 2, entitled 'Criteria for qualitative selection', states:

'The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50.'

5 Article 55 of that directive, which forms part of Section 3, entitled 'Award of the contract', provides:

'1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

(a) the economics of the construction method, the manufacturing process or the services provided;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid.

2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

…’

National law

6 Article 42, entitled ‘Procedure for assessment of tenders’, of Law No 25/2006 on public procurement, in the version that the national court considers to be applicable to the main proceedings, provides:

‘1. Tenders shall be assessed by a committee *in camera*. The committee shall assess the tenders having regard to compliance with the requirements of the contracting authority or contracting entity concerning the object of the contract and shall exclude tenders which fail to meet those requirements specified in the contract notice or in the notice used as a means of calling for competition and in the tender specifications. …

In the evaluation of tenders with a variant, Article 37(3) shall be applied.

2. The committee may ask tenderers in writing to explain their tenders. However, it may not seek or accept a proposal from a tenderer to make a change that would give the tender an advantage.

3. Where a tender contains an abnormally low price, the committee shall ask the tenderer in writing to explain its price proposal. The request must be designed to obtain details of the basic characteristic parameters of the tender which the committee considers important and which apply in particular to:

(a) the economics of the construction methods, manufacturing processes or the services provided;

(b) the technical solution or particularly favourable conditions available to the tenderer for the delivery of supplies, performance of construction works, provision of service;

(c) the special nature of the supplies, the construction works or the services proposed by the tenderer;

(d) compliance with the laws relating to the protection of employment and labour conditions in force in the place of the supplies, construction works or services,

(e) whether the tenderer may be granted State aid.

(4) The committee shall take into consideration the clarification of a tender or of an abnormally low price and the evidence provided by a tenderer. The committee shall exclude a tender in the case where:

(a) the tenderer has failed to submit a written explanation within three working days from the date of receipt of a request for clarification, unless the committee has fixed a longer period, or

(b) the clarification submitted fails to comply with the requirement under paragraphs (2) or (3).

…

(7) The committee shall assess tenders which have not been excluded pursuant to the criteria specified in the contract notice or in the notice used as a means of calling for competition or in the tender specifications, and on the basis of the rules of their application, as specified in the tender documents, which are non-discriminatory and support fair competition.

…’

The actions in the main proceedings and the questions referred for a preliminary ruling

7 NDS launched a restricted call for tenders by notice published in the *Official Journal of the European Union* on 27 September 2007, with a view to concluding a public contract having an estimated value in

excess of EUR 600 million for the supply of toll collection services on motorways and certain roads.

8 In the course of that procedure, NDS sent requests for tender clarification to two groups of undertakings, including candidates. These were, firstly, SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s. and TESLA Stropkov a.s. ('SAG ELV and Others'), and, secondly, Autostrade per l'Italia SpA, EFKON AG and Stalexport Autostrady SA ('Slovakpass'). In addition to questions specific to each of the tenders relating to their technical aspects, those two groups were asked to provide clarification of the abnormally low prices which they had proposed. Answers were given to those questions.

9 Subsequently, SAG ELV and Others and Slovakpass were excluded from the procedure by decisions of 29 April 2008.

10 Those decisions were challenged before NDS, which upheld them, and subsequently before the competent administrative appeal body, the Úrad, which on 2 July 2008 in turn dismissed the appeals brought before it.

11 The Úrad took the view that, although one of the grounds put forward by NDS to justify the exclusion of the two groups concerned from the call for tender procedure, namely the failure to produce certificates for installations not yet approved, was unfounded, the other two grounds advanced did, however, justify that exclusion. Firstly, those two groups had failed to provide an adequate response to the request for clarification of the abnormally low price in their tenders. Secondly, those tenders failed to comply with certain conditions set out in the tender specifications, namely those in Article 11.1. P 1.20 as regards SAG ELV and Others, requiring, in essence, determination of the parameters enabling calculation of tolls as a function of the toll sections by season, days of the week, hours of the day, and those set out in Article 12. T. 1.5 as regards Slovakpass, requiring provision of a diesel-powered emergency electricity generator.

12 SAG ELV and Others and Slovakpass challenged those decisions before the Krajský súd Bratislava (Bratislava Regional Court) (Slovak Republic). By judgment of 6 May 2009, that court dismissed the action brought by SAG ELV and Others. Similarly, by judgment of 13 October 2009, it dismissed the actions brought by Slovakpass, which it had joined and which sought, first, annulment of the decision of the Úrad of 2 July 2008 and, second, annulment of the decision by which NDS had confirmed the soundness of its measure creating a tender assessment committee, also contested by Slovakpass.

13 Appeals against those two judgments were lodged before the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic). Having regard to the arguments raised by SAG ELV and Others and by Slovakpass, and in the light of the grounds relied on by the European Commission in the action for failure to fulfil obligations brought against the Slovak Republic because of irregularities in the public procurement procedure at issue in the main proceedings, the national court has doubts as to whether the NDS decisions concerned comply with the principles of European Union law on non-discrimination and transparency in the award of public contracts. In particular, it is unsure whether those principles preclude the contracting authority from being able to reject a tender on a ground alleging non-compliance with the tender specifications without first having asked the tenderer to clarify that failure to comply, or on a ground alleging that the price offered is abnormally low, without having questioned the tenderer sufficiently clearly on that point.

14 In those circumstances, the Najvyšší súd Slovenskej republiky decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the interpretation that, under Article 51, in conjunction with Article 2, of [Directive 2004/18], taking account of the principle[s] of non discrimination and transparency in the award of public contracts, the contracting authority is obliged to seek clarification of a tender, respecting the subjective procedural right of the individual to be requested to supplement or clarify certificates and documents submitted pursuant to Articles 45 to 50 of the Directive, if a disputable or unclear understanding of the tenderer's bid could result in the exclusion of that tenderer, in conformity with the above Directive in the wording in effect in the relevant period?

2. Is the interpretation that, under Article 51, in conjunction with Article 2, of [Directive 2004/18], taking account of the principle[s] of non discrimination and transparency in the award of public contracts, the contracting authority is not obliged to seek clarification of a tender if the contracting authority considers it established that the requirements regarding the subject matter of the contract have not been met, in conformity with the Directive in the wording in effect in the relevant period?

3. Is a provision of national law under which a committee established to evaluate tenders only may request tenderers in writing to clarify their bid in conformity with Article 51 and Article 2 of [Directive 2004/18] in the wording in effect in the relevant period?

Is a contracting authority's procedure, according to which it is not obliged to request a tenderer to clarify an abnormally low price, in conformity with Article 55 of [Directive 2004/18], and, on the formulation of the question put by the contracting authority to the applicants in connection with the abnormally low price, did [the applicants] have the opportunity to explain sufficiently the constituent features of the tender submitted?'

Admissibility of the questions referred

15 In accordance with settled case-law, questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27 and the case-law cited).

16 In the light of those principles, the Slovak Government has argued, in its written observations, that the reference for a preliminary ruling is inadmissible on the ground, first, that, in the dispute brought before the national court by SAG ELV and Others, no complaint was raised regarding clarification of the tenders made in the public procurement procedure by the tenderers.

17 It is, however, common ground that the Court has received one single reference for a preliminary ruling made by the national court concerning two disputes which were brought before that court at the same time and which have been joined. Accordingly, the situation referred to by the Slovak Government as regards the appeal lodged by SAG ELV and Others could in any event affect the admissibility of that reference only if it were established that no complaint relating to the clarification of the offer of tenderers in the public procurement procedure had been raised in the other dispute in the main proceedings either. Since such a situation has not been established or even alleged, the first objection to admissibility must be rejected.

18 Second, the Slovak Government submits that that part of the national court's third question, which concerns the request for clarification of the abnormally low tender, as formulated by the contracting authority, has no bearing on the action brought by Slovakpass, in which the challenge related to the assessment made of that request by the court at first instance.

19 Although the Slovak Government submits in that regard that, in accordance with national procedural law, the national court could not consider a plea other than that which had been raised before it, such a complaint, which is thus based on a rule of national law, does not necessarily mean that the question referred is manifestly unconnected with the facts or subject-matter of the disputes in question.

20 Finally, it is common ground that, in the main proceedings, the unsuccessful tenderers were declared unsuccessful after the contracting authority had assessed the answers to the requests for clarification of the tenders which they had submitted. In those circumstances, the questions referred by the national court, which relate to the conditions in which such requests must or may be made, having regard to the

requirements of European Union law, do not appear to be manifestly unconnected with the facts or subject-matter of the disputes in question.

21 Accordingly, it is appropriate for the Court to give a ruling.

Consideration of the questions referred

Preliminary observations

22 As the Slovak Government and the Commission have pointed out, it is necessary to note, firstly, that Article 51 of Directive 2004/18 is among the provisions which form part of Section 2 relating to the criteria for qualitative selection of tenderers. The provisions of that article are therefore irrelevant to the assessment which the Court must make in order to answer the questions which have been referred and which relate, having regard to the facts of the cases in the main proceedings, solely to that stage of the restricted call for tenders procedure in which, following selection of the tenderers entitled to submit a tender, it is for the contracting authority to assess those tenders. There is therefore no need for the Court to rule on the interpretation of Article 51 of Directive 2004/18.

23 Secondly, the fact that the contracting authority has, in the present proceedings, set up a committee responsible for assessing, on its behalf, the tenders submitted by the tenderers does not relieve that authority of its responsibility to comply with the requirements of European Union law in the field of public procurement. Thus, although the national court asks whether a provision of national law providing that the committee set up to assess the tenders can only ask the tenderers in writing to clarify the tender is compatible with European Union law, that question must be understood as being asked generally as if the contracting authority itself were placed in that position.

24 In those circumstances, the Court must understand the questions referred to it, taken as a whole, as seeking to ascertain to what extent contracting authorities, when they take the view, in a restricted public procurement procedure, that the tender submitted by a tenderer is abnormally low or imprecise or does not meet the technical requirements of the tender specifications, may or must seek clarification from the tenderer concerned, having regard to Articles 2 and 55 of Directive 2004/18.

25 With regard to Article 2 of Directive 2004/18, it must be borne in mind that the principal objectives of the European Union rules in the field of public procurement include that of ensuring the free movement of services and the opening-up to undistorted competition in all the Member States. In order to pursue that twofold objective, European Union law applies, inter alia, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom (see, to that effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraphs 31 and 32 and the case-law cited). The obligation of transparency, for its part, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (see, to that effect, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 111). As regards the award of contracts, Article 2 of Directive 2004/18 requires contracting authorities to comply with the same principles and obligations.

26 It is in the light of those considerations that the questions referred to the Court must be answered, by examining in turn the situation in which the contracting authority considers the tender to be abnormally low and that in which it takes the view that the tender is imprecise or does not meet the technical requirements of the tender specifications.

An abnormally low tender

27 It must be borne in mind that, under Article 55 of Directive 2004/18, if, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority must, before it may reject those tenders, ‘request in writing details of the constituent elements of the tender which it considers relevant’.

28 It follows clearly from those provisions, which are stated in a mandatory manner, that the European Union legislature intended to require the awarding authority to examine the details of tenders which are

abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine (see, to that effect, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraphs 46 to 49).

29 Accordingly, the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer, to enable the latter to demonstrate that its tender is genuine, constitutes a fundamental requirement of Directive 2004/18, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings (see, to that effect, *Lombardini and Mantovani*, paragraph 57).

30 In that regard, it must be borne in mind, firstly, that although the list in the second subparagraph of Article 55(1) of Directive 2004/18 is not exhaustive, it is also not purely indicative, and therefore does not leave contracting authorities free to determine which are the relevant factors to be taken into consideration before rejecting a tender which appears to be abnormally low (judgment of 23 April 2009 in Case C-292/07 *Commission* v *Belgium*, paragraph 159).

31 Secondly, in order for Article 55(1) of Directive 2004/18 to be effective, the contracting authority must set out clearly the request sent to the tenderers concerned so that they are in a position fully and effectively to show that their tenders are genuine.

32 It is, however, for the national court alone to ascertain, having regard to all the documents in the file placed before it, whether the request for clarification enabled the tenderers concerned to provide a sufficient explanation of the composition of their tender.

33 Furthermore, Article 55 of Directive 2004/18, far from precluding a provision of national legislation such as Article 42(3) of Law No 25/2006, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal, requires the inclusion of such a provision in the national legislation on public procurement (see, to that effect, *Commission* v *Belgium*, paragraph 161).

34 Accordingly, Article 55 of Directive 2004/18 does preclude, in particular, a contracting authority from claiming, as the national court states in its third question, that it is not obliged to request a tenderer to clarify an abnormally low price.

An imprecise tender or one which does not meet the technical requirements of the tender specifications

35 In this regard, it must be noted that, in contrast to the situation concerning abnormally low prices, Directive 2004/18 does not contain any provision which expressly sets out the procedure to be followed in the event that the contracting authority finds, in a restricted public procurement procedure, that the tender submitted by a tenderer is imprecise or does not meet the technical requirements of the tender specifications.

36 By its very nature, the restricted public procurement procedure means that, once the tenderers have been selected and once their respective tenders have been submitted, in principle those tenders can no longer be amended either at the request of the contracting authority or at the request of the tenderers. The principle of equal treatment of tenderers and the obligation of transparency resulting therefrom preclude, in that procedure, any negotiation between the contracting authority and one or other of the tenderers.

37 To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment.

38 In any event, it does not follow from Article 2 or from any other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned. Those tenderers cannot, moreover, complain that there is no such obligation on the contracting authority since the lack of clarity of their

tender is attributable solely to their failure to exercise due diligence in the drafting of their tender, to which they, like other tenderers, are subject.

39 Article 2 of Directive 2004/18 does not therefore preclude the absence, in national legislation, of a provision which would oblige the contracting authority to request tenderers, in a restricted public procurement procedure, to clarify their tenders in the light of the technical requirements of the tender specifications before rejecting them because they are imprecise or do not meet those requirements.

40 None the less, Article 2 of that directive does not preclude, in particular, the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender. Nor does that article preclude a provision of national legislation such as Article 42(2) of Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tender without, however, requesting or accepting any amendment to the tender.

41 In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.

42 In order to provide a useful answer to the national court, it must be added that a request for clarification of a tender may be made only after the contracting authority has looked at all the tenders (see, to that effect, *Lombardini and Mantovani*, paragraphs 51 and 53).

43 Furthermore, that request must be sent in an equivalent manner to all undertakings which are in the same situation, unless there is an objectively verifiable ground capable of justifying different treatment of the tenderers in that regard, in particular where the tender must, in any event, in the light of other factors, be rejected.

44 In addition, that request must relate to all sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications, without the contracting authority being entitled to reject a tender because of the lack of clarity of a part thereof which was not covered in that request.

45 Having regard to all of the foregoing considerations, the answer to the questions referred is that:

– Article 55 of Directive 2004/18 must be interpreted as requiring the inclusion in national legislation of a provision such as Article 42(3) of Law No 25/2006 on public procurement, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal. It is for the national court to ascertain, having regard to all the documents in the file placed before it, whether the request for clarification enabled the tenderer concerned to provide a sufficient explanation of the composition of its tender;

– Article 55 of Directive 2004/18 precludes a contracting authority from taking the view that it is not required to ask a tenderer to clarify an abnormally low price;

– Article 2 of Directive 2004/18 does not preclude a provision of national law, such as Article 42(2) of Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.

The application for suspension of the effects of the judgment

46 The Slovak Government has requested the Court to limit in time the effects of the present judgment should it interpret the general principles referred to in Article 2 of Directive 2004/18 in such a way as to deduce from them an obligation on the part of the contracting authority to request a tenderer, in the context of the assessment of the conformity of a tender with the requirements relating to the subject-matter of the contract as defined in the tender specifications, to clarify its tender.

47 However, the interpretation of Article 2 of Directive 2004/18 arrived at in the present judgment does not lead to such a finding. The request of the Slovak Government is, accordingly and in any event, devoid of purpose.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 55 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as requiring the inclusion in national legislation of a provision such as Article 42(3) of Slovak Law No 25/2006 on public procurement, in the version applicable in the main proceedings, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal. It is for the national court to ascertain, having regard to all the documents in the file placed before it, whether the request for clarification enabled the tenderer concerned to provide a sufficient explanation of the composition of its tender.

Article 55 of Directive 2004/18 precludes a contracting authority from taking the view that it is not required to ask a tenderer to clarify an abnormally low price.

Article 2 of Directive 2004/18 does not preclude a provision of national law, such as Article 42(2) of the abovementioned Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.

[Signatures]

---

* Language of the case: Slovak.

JUDGMENT OF THE COURT (Second Chamber)

11 July 2013 (*)

(Failure of a Member State to fulfil obligations – Directive 2004/18/EC – Scope ratione temporis – Public works concession – Sale of land by a public body – Construction project established by that body for the redevelopment of public spaces)

In Case C-576/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 9 December 2010,

European Commission, represented by M. van Beek, A. Tokár and C. Zadra acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by C. Wissels and J. Langer, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by T. Henze, J. Möller, and A. Wiedmann, acting as Agents,

intervener,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis, J.-C. Bonichot, A. Arabadjiev and J.L. da Cruz Vilaça (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 31 January 2013,

after hearing the Opinion of the Advocate General at the sitting on 11 April 2013

gives the following

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by having infringed EU public procurement law and in particular Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), in connection with the award of a public works concession by the municipality of Eindhoven, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 2 and Title III of that directive.

Legal context

2 Article 1(2) and (3) of Directive 2004/18 provides:

‘2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) “Public works contracts” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

…

3. “Public works concession” is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.’

3 Pursuant to Article 2 of that directive, contracting authorities are to treat economic operators equally and non-discriminatorily and to act in a transparent way.

4 Title III of Directive 2004/18 sets out the rules on public works concessions.

5 Article 80(1) of Directive 2004/18, which is part of Title V thereof, provides:

‘The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 January 2006. They shall forthwith inform the Commission thereof. …’

Factual background to the dispute

6 The present dispute stems from the realisation of a construction project in the municipality of Eindhoven (‘the municipality’) in an area located between the existing district of Doornakkers and the new residential district of Tongelresche Akkers, owned by that municipality (‘the Doornakkers centre’).

7 On 7 August 2001, the Eindhoven municipal council (‘the municipal council’) approved the opinion on the Doornakkers centre. That document described the plans for the creation of a community centre (including a healthcare centre and a play, integration and learning centre, ‘the SPILcentrum’) and a commercial centre in which there would also be apartments. On 12 September 2001, the municipal council approved an urban development plan for the Doornakkers centre project. That plan contained the planning guidelines for the district and provided for infrastructure and facilities with a view to integrating the districts of Doornakkers and Tongelresche Akkers.

8 On 23 April 2002, the municipal council approved the opinion entitled ‘Selection of a promoter for the Doornakkers centre’ (‘the opinion of 23 April 2002’), which had been drafted by the municipality’s staff on 11 April 2002. That opinion set out the criteria to be applied in selecting the purchaser of the land on which the Doornakkers centre project would be carried out. It stated that the sale contract should comply with ‘the framework conditions and guidelines set by the municipality, namely the specifications’, and that it should ‘meet the … wishes of the purchasers/ end users’. It was also stated that ‘the fact that the municipality opts for a sale subject to conditions means that there will be no tender procedure and that the public procurement rules are not applicable’.

9 The framework conditions and guidelines mentioned in the preceding paragraph set out, inter alia, the functions and the heights of the buildings in accordance with the urban development plan. They

envisage the construction of apartments and housing, the extension of the existing healthcare centre, a connecting area between the two main sites, good accessibility, an underground car park in accordance with municipal parking regulations, conservation of valuable green spaces and the creation of a square and a new district park.

10 Pursuant to the opinion of 23 April 2002, the companies Hurks Bouw en Vastgoed BV ('Hurks') and Haagdijk BV were requested to submit plans.

11 By decision of 15 July 2003, the municipality chose Hurks as the promoter of the Doornakkers centre and contractual partner approached.

12 From July 2003 to October 2005, Hurks fleshed out its construction plans into a master plan which was approved by the municipality on 14 February 2006. With a view to implementing the plan, the municipality and Hurks concluded a contract of cooperation, which was signed by Hurks on 12 June 2007 and by the municipality on 16 July 2007 ('the cooperation contract').

13 It is apparent from recital F in the preamble to that contract that the municipality and Hurks reached an agreement on the development and realisation of the SPILcentrum. The parties to that agreement decided that the SPILcentrum would consist of apartments, an extension of an existing health centre and an underground car park, a commercial centre also including housing, another underground car park and apartments. It was provided that Hurks would carry out those works at its own risk and for its own account. With a view to the successful realisation of those projects, the municipality and Hurks also reached an agreement on the sale of land by the municipality to Hurks.

14 In parallel to those negotiations, the municipality, on 13 February 2007, chose the Woonbedrijf foundation to be the owner of the SPILcentrum. To that end, a cooperation contract was signed by the municipality and the Woonbedrijf foundation on 15 April 2008.

The pre-litigation procedure and the proceedings before the Court

15 Following a complaint relating to the circumstances of the award of the Doornakkers centre project, the Commission, by letter of 2 July 2008, requested the Kingdom of the Netherlands for information on that project. That Member State replied by letter of 19 December 2008.

16 On 24 February 2009, the Commission sent that Member State a letter of formal notice based on an infringement of EU public procurement law, specifically of Directive 2004/18. The Kingdom of the Netherlands replied by letter of 30 June 2009, claiming, inter alia, that Directive 2004/18 was not applicable *ratione temporis*.

17 On 9 October 2009, the Commission issued a reasoned opinion, in which it confirmed, in essence, the position expressed in its letter of formal notice and put forward arguments with a view to demonstrating that Directive 2004/18 was applicable in the present case. The Commission also asked the Kingdom of the Netherlands to take the necessary measures within two months of receipt of that opinion.

18 That Member State replied to the reasoned opinion by letter of 8 December 2009. In its response, it challenged the position adopted by the Commission relating to the infringement of Directive 2004/18 and reasserted, on the basis of Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraphs 36 and 37, that, rather than Directive 2004/18, it was Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) that was applicable to the facts of the present case.

19 In those circumstances the Commission decided to bring the present action.

20 By order of the President of the Court of 17 May 2011, the Federal Republic of Germany was given leave to intervene in support of the form of order sought by the Kingdom of the Netherlands.

The action

Admissibility

Arguments of the parties

21 The Kingdom of the Netherlands raises two pleas of inadmissibility.

22 Firstly, it claims that the Commission's action is inadmissible in so far as the Commission used documents on which the Kingdom of the Netherlands was unable to give its opinion during the pre-litigation stage, in breach of its rights of defence.

23 After the reply of the Kingdom of the Netherlands to the reasoned opinion, the Commission, by letter of 12 May 2010, called on that Member State to produce a number of documents, including the protocol agreement of 15 January 2010 on the SPILcentrum and the resulting cooperation contract between the municipality and the Woonbedrijf foundation. That contract was sent to the Commission by letter of 11 June 2010 from the Minister for Foreign Affairs, with a note that the Commission should not use that information in the present proceedings.

24 Furthermore, the Kingdom of the Netherlands alleges that the Commission introduced into the proceedings three documents which were not annexed to the letter of 11 June 2010 or discussed during the pre-litigation procedure. These are an information letter of 18 March 2008 from the Eindhoven municipal council on housing development initiated by the municipality in respect of the period 2005-2010, the administrative regulation of 6 October 2009 entitled 'Temporary incentive scheme for housing construction projects for 2009' and a statement taken from the website of the Ministry of Housing, Spatial Planning and the Environment.

25 Secondly, according to the Kingdom of the Netherlands, the Commission has extended the subject-matter of the proceedings in relation to the pre-litigation stage.

26 It was only in its application that the Commission claimed for the first time, in order to show that there was a contract for pecuniary interest, that the municipality received a 'service'. During the pre-litigation stage, the Commission focused exclusively on the existence of a 'consideration' provided by the municipality to Hurks to prove that there was such a contract. The Commission therefore set out a new complaint in its application, in breach of the Court's case-law (Case C-458/08 *Commission* v *Portugal* [2010] ECR I-11599, paragraph 43).

27 The Commission claims that the Court should reject all those claims.

Findings of the Court

28 So far as concerns the first plea of inadmissibility, it must be recalled that, in accordance with settled case-law, the letter of formal notice sent by the Commission to the Member State and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to be able to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the action brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure (Case C-186/06 *Commission* v *Spain* [2007] ECR I-12093, paragraph 15, and Case C-535/07 *Commission* v *Austria* [2010] ECR I-9483, paragraph 41).

29 Furthermore, the Court has also held that the production by the Commission of additional evidence intended, at the stage of proceedings before the Court, to support the proposition that the failure thus alleged is general and consistent cannot be ruled out in principle (Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 37, and judgment of 22 December 2008 in Case C-189/07 *Commission* v *Spain*, paragraph 29).

30 According to the Kingdom of the Netherlands, the four documents submitted for the first time in the application were used by the Commission in order to establish that the realisation of the Doornakkers centre project was of immediate economic benefit to the municipality and, consequently, that the contract concluded between the municipality and Hurks was for pecuniary interest.

31 However, and as the Advocate General observed in point 31 of his Opinion, the documents produced by the Commission, whose use is being challenged by the Netherlands Government, concern only the factual situation which was the subject-matter of the pre-litigation procedure and merely illustrate the complaint made in that procedure.

32 In those circumstances, the Commission was entitled to use those documents to support the complaint, set out from the time of the letter of formal notice, relating to the existence of a contract for a public works concession, one of whose conditions was that it was for pecuniary interest (see, to that effect, *Commission* v *Ireland*, paragraph 36).

33 Consequently, the first plea of inadmissibility must be rejected.

34 As regards the second plea of inadmissibility, admittedly, the subject-matter of proceedings brought under Article 258 TFEU is circumscribed by the pre-litigation procedure provided for in that provision and, consequently, the Commission's reasoned opinion and the application must be based on the same complaints, however that requirement cannot go so far as to mean that in every case exactly the same wording must be used in each, where the subject-matter of the proceedings has not been extended or altered (Case C-229/00 *Commission* v *Finland* [2003] ECR I-5727, paragraphs 44 and 46; Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 28; and Case C-195/04 *Commission* v *Finland* [2007] ECR I-3351, paragraph 18).

35 Thus, in its application the Commission may clarify its initial complaints provided, however, that it does not alter the subject-matter of the proceedings (*Commission* v *Ireland*, paragraph 38, and Case C-195/04 *Commission* v *Finland*, paragraph 18).

36 In the present case, it can be seen by simply reading the letter of formal notice, the reasoned opinion and the application lodged before the Court that the subject-matter of the proceedings was not altered by the Commission in the course of the present proceedings for failure to fulfil obligations.

37 Those documents expressly show that the Commission seeks a declaration that 'the Kingdom of the Netherlands has not complied with its obligations under Article 2 and Title III of Directive 2004/18'.

38 Specifically, in its reasoned opinion, the Commission alleged that the municipality did not conclude a cooperation contract with Hurks, but a contract for a public works concession, whose existence was dependent, inter alia, on the fact that that contract was for pecuniary interest.

39 In the application, while repeating the same claim, the Commission referred to Case C-451/08 *Helmut Müller* [2010] ECR I-2673, in which the Court defined the concept of a contract for pecuniary interest. That definition, which indeed forms part of the case-law on that concept, concerned the services received by the contracting authority pursuant to a public contract in return for consideration.

40 In doing so, the Commission merely set out in detail the arguments supporting its conclusion as to the fact that the contract concluded between the municipality and Hurks was for pecuniary interest, arguments which had already been put forward in more general terms in the letter of formal notice and the reasoned opinion, and therefore did not alter the subject-matter of the proceedings (see, to that effect, *Commission* v *Germany*, paragraph 29, and *Commission* v *Portugal*, paragraph 47).

41 Since the second plea of inadmissibility put forward by the Kingdom of the Netherlands must also be rejected, the Commission's action must be declared admissible.

Substance

Arguments of the parties

42 In its application, the Commission first of all analysed the issue of the scope *ratione temporis* of Directive 2004/18 which had been raised by the Kingdom of the Netherlands during the pre-litigation stage.

43 While pointing out that the Member States were required to have implemented Directive 2004/18 into national law by 31 January 2006 at the latest, the Commission observes that the cooperation contract was not signed by the two parties until 16 July 2007, that is approximately 18 months after the expiry of the time-limit set for that implementation.

44 In the Commission's view, although, admittedly, the municipality had already taken some decisions before that date, including the choice of Hurks as promoter and contractual partner, the fact remains that it was only after 14 February 2006, the date on which the municipality adopted the master plan submitted by Hurks, that the negotiations on the essential aspects of the cooperation contract began.

45 It is apparent from a letter from the municipality dated 22 May 2007 that it carried out negotiations with Hurks for over a year regarding the content of the cooperation contract. The negotiations covered the issue of whether the municipality should purchase from Hurks part of the works completed, in particular the SPILcentrum, to prevent Hurks from having to bear the financial risk of the entire project alone, in addition to the apportionment of the financial burden concerning the construction of public spaces such as an esplanade and a park.

46 In this connection, the Commission submits that the Court's case-law according to which public contracts must be re-awarded if one of the essential terms of the contract is amended and results in the conclusion of a new contract (see, to that effect, *Commission* v *France*, paragraph 44) applies *a fortiori* in a situation such as that in the present case.

47 The Commission adds that, when the municipality decided, on 23 April 2002, to request two operators to draw up plans, it had not laid down any of the essential characteristics of the contract to be concluded and had not even established at that time whether it was a public contract or a concession.

48 According to the Commission, the negotiations between the municipality and Hurks concerning all or at least the most important of the conditions of the cooperation contract were not started effectively until after the date on which Directive 2004/18 was required to have been implemented. Therefore, and in the light of the Court's case law in *Commission* v *France*, the Commission submits that that directive is applicable in the present case.

49 The Kingdom of the Netherlands submits, in essence, that it is the decision approving the opinion of 23 April 2002, in which the municipal council envisaged merely selling the land and entrusting a promoter with the task of developing it, which constitutes the decisive element in order to ascertain whether Directive 2004/18 is applicable *ratione temporis*.

50 The Kingdom of the Netherlands concludes that the proceedings originated before the deadline for implementation of Directive 2004/18. It follows from the Court's case-law that it is not the date the contract was awarded which is decisive, but that of the decision which is alleged to have infringed EU law.

51 The position adopted by the Commission, according to which the decisive moment is that 'at which all or at least the most important of the conditions of the [cooperation] contract' actually existed, is derived from an incorrect interpretation of *Commission* v *France*.

Findings of the Court

52 As the Advocate General pointed out in point 56 of his Opinion, the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract (see, to that effect, *Commission* v *France*, paragraphs 36 and 37).

53 It would be contrary to the principle of legal certainty to determine the applicable law by reference to the date of the award of the contract since that date marks the end of the procedure, while the decision

of the contracting authority to proceed with or without a prior call for competition is normally taken at the initial stage of that procedure (*Commission* v *France*, paragraph 40).

54 Nevertheless, in that judgment the Court also stated that, where the negotiations opened after that decision are substantially different in character from those already conducted and are, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, the application of the provisions of a directive with a time-limit for implementation which expired after the date of that decision, might be justified (see, to that effect, *Commission* v *France*, paragraph 44).

55 In the present case, it must be stated that the decision to realise the Doornakkers centre construction project without a prior call for competition took place when the municipal council approved the opinion of 23 April 2002.

56 It is apparent from the actual wording of point 2.5 of that opinion that the fact that the municipality chose the method of a sale of the land subject to conditions 'means that there will be no tender procedure and that the public procurement rules are not applicable'.

57 In those circumstances, the Commission's argument that, when the municipality decided, in accordance with the opinion of 23 April 2002, to request two operators to draw up plans, it had not yet determined whether the project was to be a public contract or a concession, must be rejected.

58 The decision approving the opinion of 23 April 2002 thus constitutes, in principle, the decision which is alleged to have infringed EU law and whose date determines the law applicable to such a claim (see, to that effect, Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] ECR I-9889, paragraph 29).

59 Moreover, concerning the Commission's argument alleging that the municipality did not establish in a binding form at the beginning of the 'procedure' the conditions and essential characteristics of the concession, but made the content of the contract and its essential conditions dependent on the progress of the negotiations with Hurks, it is important to point out, firstly, that the Commission itself asserted, at point 76 of the application, that it is apparent from an information document sent in June 2002 to the candidate promoters by the municipality that the latter 'already had a relatively clear idea of the expected result'. According to the Commission, that document contained 'details concerning the number of plots, the maximum height of the construction, the general direction the commercial development was to take, the location of the entrances to the health centre and the reintroduction of certain functions in the district park'.

60 Secondly, at point 77 of the application, the Commission acknowledged that a comparison between Article 1.1 of the cooperation contract and that information document 'shows that, for the most part, the assignment of the buildings to be constructed had been defined by the municipality as early as 2002'.

61 Thirdly, as the Advocate General observed in points 70 and 71 of his Opinion, the fact that the allocation of the financial risks for certain parts of the SPILcentrum project and responsibility for the development of public spaces could have been finally decided after the opinion of 23 April 2002 is not crucial. In the light of the Court's case-law, neither of those two specific features of the Doornakkers centre project can be regarded as substantially different in character from those initially envisaged (see, to that effect, *Commission* v *France*, paragraph 44, and Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraphs 34 to 37).

62 Therefore, the premises on which the Court's case-law relied on by the Commission in paragraph 46 above is based, namely the amendment of one of the essential terms of the contract and, consequently, the requirement that a new contract be concluded, are not established in the present case.

63 Given that both the municipality's decision not to conduct a prior call for competition for the Doornakkers centre project and the choice of the essential characteristics of that project are evident from the opinion of 23 April 2002, that is to say, at a time when Directive 2004/18 had not yet been adopted, it must be held that that directive is not applicable *ratione temporis*.

64 Since the Commission's action seeks quite specifically to prove that the Kingdom of the Netherlands failed to fulfil its obligations under Article 2 and Title III of Directive 2004/18, the inevitable

conclusion is that the action must be dismissed.

Costs

65 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of the Netherlands has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

66 Pursuant to Article 140(1) of the Rules of Procedure, the Federal Republic of Germany must bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the European Commission to pay the costs;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

[Signatures]

---

* Language of the case: Dutch.

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 11 April 2013 (1)

Case C-576/10

European Commission
v
Kingdom of the Netherlands

(Failure of a Member State to fulfil obligations – Directive 2004/18/EC – Temporal application – Public works concession – Principles for award of contracts – Contract for pecuniary interest – Immediate economic benefit – Concession of indefinite duration – Ownership of the work – Municipality of Eindhoven)

I – Introduction: factual and procedural background

A – *Summary of the facts*

1. By the present action for failure to fulfil obligations, the European Commission alleges that the Kingdom of the Netherlands infringed EU public procurement law since, in connection with the award of a purported public works concession by the municipality of Eindhoven, it failed to fulfil its obligations under Article 2 and Title III of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (2)

2. The dispute stems from the decision taken by the municipality of Eindhoven ('the municipality') on 7 August 2001 to carry out, within its territory, a construction project in an area located between the existing district of Doornakkers and the new residential district of Tongelresche Akkers. (3) The municipality's aim was to redevelop that area ('the Doornakkers centre'), which it owned, by, among other things, giving residents of the two districts access to certain social and cultural services (a healthcare centre, a play, integration and learning centre ('the SPILcentrum') and a commercial centre with apartments and housing).

3. On 12 September 2001, the municipal council approved the urban development plans drawn up by the municipality's staff for the Doornakkers centre project (Annex 2 to the defence). Those plans contain the planning guidelines for the district in the form of a plan and provide for infrastructure and facilities with a view to joining the existing district of Doornakkers and the new residential district of Tongelresche Akkers. The former would have a healthcare centre, commercial premises and apartments. The latter would be home to accommodation and leisure infrastructure, including sports facilities.

4. On 11 April 2002, the municipality's staff drafted an opinion entitled 'Selection of a promoter for the Doornakkers district centre'. (4) That opinion informed the municipal council of the criteria to be applied in selecting the purchaser of the land on which the Doornakkers centre project would be carried out. In that opinion it was also stated that the contract for the sale of the plots offered to the

contractual partner approached should comply with ‘the framework conditions and guidelines set by the municipality, namely the specifications’, and should ‘meet the … wishes of the purchasers/end users’. (5)

5. These framework conditions and guidelines set out, inter alia, the functions and the heights of the buildings in accordance with the urban development plan. They envisage the construction of apartments and housing, the extension of the existing healthcare centre, a connecting area between the two main sites, good accessibility, an underground car park in accordance with municipal parking regulations, conservation of valuable green spaces, and the creation of a square and a new district park.

6. According to the opinion entitled ‘Selection of a promoter for the Doornakkers district centre’, it was proposed to invite the promoters approached for the project, Hurks and Haagdijk BV, to a discussion. By decision of 23 April 2002, the municipal council decided to follow that opinion.

7. Thus, in mid-May 2002, the municipality invited Hurks and Haagdijk BV by telephone to a meeting scheduled for 11 June 2002.

8. The main topics of that discussion were the abovementioned framework conditions and guidelines and a document entitled ‘Information for prospective promoters participating in a selection process’.

9. On 15 July 2003, the municipality finally selected Hurks as the contractual partner approached for the conclusion of a contract for the sale of the plots concerned. (6)

10. From July 2003 to October 2005, Hurks fleshed out its construction plans into a master plan produced with the assistance of an architects practice. That master plan included numerous drawings specifying the dimensions, locations and spreads of the buildings to be constructed in accordance with the municipality’s framework conditions and guidelines. It was completed on 26 October 2005 and approved by the municipality on 14 February 2006.

11. With a view to implementing the plan, the municipality and Hurks concluded a ‘cooperation contract’ signed by Hurks on 12 June 2007 and by the municipality on 16 July 2007.

12. Alongside these negotiations, on 13 February 2007, the municipality chose Woonbedrijf as the owner of the SPILcentrum. A cooperation contract was signed by the municipality and Woonbedrijf on 15 April 2008.

B – *Pre-litigation procedure*

13. Following a complaint relating to an infringement of EU public procurement law allegedly committed by the municipality in connection with the Doornakkers centre project, on 2 July 2008 the Commission sent the Netherlands Government a letter in which it requested from it information on that centre. The Netherlands Government replied by letter of 19 December 2008.

14. Since the Commission considered these responses to be insufficient, on 24 February 2009 it sent the Netherlands Government a letter of formal notice based on an infringement of EU public procurement law, and specifically Directive 2004/18. The Netherlands Government replied by letter of 30 June 2009. As the Commission was not satisfied by the responses provided by the Netherlands Government, it issued a reasoned opinion on 9 October 2009.

15. Because the Netherlands Government had not changed its position upon the expiry of the time-limit laid down in the reasoned opinion, the Commission instituted the present proceedings.

II – Legislative framework

16. Article 1(2) and (3) of Directive 2004/18 stipulates:

‘2.(a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the

execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) "Public works contracts" are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A "work" means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

…

3. "Public works concession" is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.'

17. Article 2 sets out the principles of awarding contracts, according to which '[c]ontracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way'.

18. Article 16 provides that Directive 2004/18 'shall not apply to public service contracts for: (a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon'.

19. Lastly, Title III of Directive 2004/18 contains the rules specifically applicable to public works concessions.

III – Analysis

A – *The legal problems to be examined*

20. Before examining the substance of the case, the Court will have to consider three arguments raised by the Netherlands Government in connection with the admissibility of the action:

– the Commission's use of documents which it received or discovered after the reasoned opinion had been issued;

– an extension, in the Commission's application, of the subject-matter of the dispute;

– the application *ratione temporis* of Directive 2004/18.

21. According to the Commission, whose view I share, this latter argument concerns the substance and not the admissibility of the action. I will therefore examine, first of all, the two issues which relate to the admissibility of the action and then consider the temporal application of Directive 2004/18 and the other substantive issues.

22. As far as the substance is concerned, the parties essentially disagree on the notion of 'public works concession' within the meaning of Directive 2004/18. According to the Netherlands Government, the Commission does not demonstrate the existence of a public works contract or, *a fortiori*, the existence of a public works concession.

B – *Admissibility*

23. In accordance with settled case-law, the proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the TFEU not only in order to protect the rights of the Member State concerned, but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter. (7)

24. It should be borne in mind in this regard that 'in accordance with settled case-law, the letter of formal notice sent by the Commission to the Member State and then the reasoned opinion issued by the

Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. *Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure'.* (8)

1. The contested documents

25. According to the Netherlands Government, the Commission is seeking to prove the alleged failure to fulfil obligations on the basis of documents which it communicated to the Commission or which the Commission produced after the reasoned opinion had been issued. Since the Netherlands Government did not have the opportunity to comment on those documents during the pre-litigation stage, the Commission violated its rights of defence.

(a) What are these contested documents?

26. As was stated above, the letter of formal notice dates from 24 February 2009. The Netherlands Government replied to it on 30 June 2009. The Commission notified its reasoned opinion on 9 October 2009.

27. However, by letter of 12 May 2010, the Commission sent a fresh request for information to the Kingdom of the Netherlands. The Netherlands Government replied to that request by communicating a number of documents on 11 June 2010. In his reply, the Minister for Foreign Affairs stated that the Commission could not use this information in the present proceedings.

28. One of those documents was nevertheless used by the Commission, together with three other documents which it obtained in the course of its own research after the reasoned opinion had been sent and which it claims are available 'to the general public'. The four contested documents are therefore, respectively:

– the cooperation contract between Woonbedrijf – which will be the owner of the SPILcentrum – and the municipality dated 15 April 2008 (Annex 5 to the application);

– an information letter from the municipal council dated 18 March 2008 (Annex 18 to the application);

– a regulation adopted by the Minister for Housing, Communities and Integration on 6 October 2009, entitled 'Temporary incentive scheme for housing construction projects for 2009' and published in *Staatscourant* on 12 October 2009 (Annex 19 to the application);

– a statement taken from the website of the Ministry of Housing, Spatial Planning and the Environment, dated 14 December 2009 (Annex 20 to the application).

(b) The effect of the Commission's use of these documents on the proper conduct of the procedure?

29. As I stated in point 24 of this Opinion, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure.

30. Thus, 'the Commission cannot seek a declaration of a specific failure … regarding a particular factual situation that was not referred to in the course of the pre-litigation procedure'. (9) Any specific ground of complaint of that kind must necessarily have been relied on at the pre-litigation stage, in order that the Member State concerned has the opportunity to remedy the particular situation complained of or to avail itself of its right to defend itself in that regard; such defence may in particular prompt the Commission to withdraw the ground of complaint and/or help to delimit the subject-matter of the dispute that the Court will subsequently have before it. (10)

31. However, it should be pointed out that, in the present case, the documents produced by the Commission, whose use is being challenged by the Netherlands Government, regard exclusively the single factual situation which was the subject-matter of the pre-litigation procedure. They do not seek to support a new complaint, but only to illustrate the complaint made in the pre-litigation procedure.

32. More specifically, I note that the first two documents date from March and April 2008 and therefore predate the formal notice. They have a clear link with the factual situation described in that notice and, by their nature, were not unknown to the Netherlands authorities.

33. The first is the cooperation contract signed between Woonbedrijf and the municipality on 15 April 2008. Woonbedrijf had been chosen by the municipality as the owner of the SPILcentrum on 13 February 2007. Furthermore, when the municipality decided, on 14 February 2006, to approve the master plan proposed by Hurks, it stated in its decision that the plan had been prepared by a project unit which included representatives of the municipality and Woonbedrijf. The Netherlands Government could not therefore have been unaware that the relations established between Woonbedrijf and the municipality were part of the dispute.

34. The second is an information letter from the municipal authorities concerning housing developments initiated by the municipality for the period 2005 to 2010. The project relating to the Tongelresche Akkers district and the Doornakkers centre is expressly mentioned several times. As with the cooperation contract between Woonbedrijf and the municipality, the Netherlands Government could not have been unaware of the possible effect of that document on the proceedings in so far as, for the municipality, the development of housing was directly linked to securing government subsidies and the Doornakkers centre was part of that dynamic.

35. The other two documents are public documents, one of which is an administrative regulation published in *Staatscourant* and the other an information notice published on the website of a public authority. The first regulates the conditions for obtaining aid for the housing development programme and the second is a related general information notice.

36. The documents therefore simply make it possible to understand the factual situation and do not develop a new complaint. On the contrary, they merely illustrate the complaint made in the formal notice and the reasoned opinion.

37. Lastly, it should be borne in mind that, whilst the Commission must, of course, respect the rights of defence of the Netherlands Government, it must, in accordance with its duty of sincere cooperation under Article 4(3) of the EU Treaty, facilitate the achievement of the Commission's tasks. 'Where it is a question of checking that the national provisions intended to ensure effective implementation of the directive are applied correctly in practice, the Commission … does not have investigative powers of its own in the matter, [it] is [therefore] largely reliant on the information provided by any complainants and by the Member State concerned … In such circumstances, it is indeed primarily for the national authorities to conduct the necessary on-the-spot investigations, in a spirit of genuine cooperation and mindful of each Member State's duty, recalled in paragraph 42 of the present judgment, to facilitate the general task of the Commission …'. (11)

38. Consequently, the Commission's action cannot, in my view, be declared inadmissible by reason of the Commission's use of the abovementioned documents.

2. New complaint and extension of the subject-matter of the dispute

39. The Netherlands Government also alleges that the Commission claimed for the first time in the application that the municipality received a 'service' in order to show that there was a contract for pecuniary interest whereas, in the course of the pre-litigation stage, the Commission focused exclusively on the existence of a 'consideration' provided by the municipality to Hurks. This constitutes a new complaint concerning the existence of a service allegedly received by the municipality, which extends the subject-matter of the dispute.

40. In this connection, the Court stated in *Commission* v *Portugal* (12) that the fact that, 'in its application, the Commission set out in detail the arguments supporting its conclusion as to the alleged

failure to fulfil obligations, arguments which had already been put forward in more general terms in the letter of formal notice and the reasoned opinion, and merely explained further why it takes the view that that scheme is incompatible with the freedom to provide services, did not alter the subject of that infringement and has thus had no effect on the scope of the proceedings'.

41. I do not concur with the Netherlands Government's opinion that this dictum is not applicable in the present case. Both in the letter of formal notice and in the reasoned opinion, the Commission alleges that the Kingdom of the Netherlands infringed EU public procurement rules and, more specifically, Directive 2004/18. From the outset, the Commission has taken the view that the contract between the municipality and Hurks was a public works concession within the meaning of Article 1(3) of Directive 2004/18 which requires a contract for pecuniary interest. That condition was expressly analysed by the Commission in its reasoned opinion (pp. 7 to 9).

42. In its application, (13) the Commission does not introduce a new complaint. It updates its arguments so as to take account of recent developments in the Court's case-law on the subject of the notion of 'contract for pecuniary interest', which requires a service to be provided by the contractor which is of 'immediate economic benefit' to the contracting authority. (14) In my view, in doing so, the Commission merely sets out in detail the arguments in support of its claim relating to the alleged failure to fulfil obligations which had already been put forward in more general terms in the letter of formal notice and in the reasoned opinion. (15)

43. The Commission's action thus seems to be admissible.

C – *Applicability ratione temporis of Directive 2004/18*

44. As a preliminary point, as I have already explained, I consider this question to relate not to the admissibility of the action, but to the substance of the dispute. (16)

45. Under Article 80 of Directive 2004/18, the directive had to be transposed no later than 31 January 2006.

46. According to the Commission, negotiations did not really begin until after the adoption of the master plan on 14 February 2006, i.e. after the entry into force of Directive 2004/18. The Netherlands Government, on the other hand, considers that it is the municipality's decision of 23 April 2002 that determines the applicable directive, as that was when the municipality decided not to follow the European tender procedure, but to choose just two candidates. The choice to proceed with Hurks was made on 15 July 2003.

47. The key dates are therefore as follows:

– 7 August 2001: decision taken by the municipality of Eindhoven to carry out, within its territory, a construction project in an area located between the existing district of Doornakkers and the new residential district of Tongelresche Akkers; (17)

– 12 September 2001: approval by the municipal council of the urban development plans for the Doornakkers centre project drawn up by the municipality. (18) Those plans contain the planning guidelines for the district in the form of a plan. They also provide for infrastructure and facilities with a view to joining the existing district of Doornakkers and the new residential district of Tongelresche Akkers. The former would have a healthcare centre, commercial premises and apartments. The latter would be home to accommodation and leisure infrastructure, including sports facilities;

– 11 April 2002: opinion entitled 'Selection of a promoter for the Doornakkers district centre'. (19) That opinion, drafted by the municipality's internal services, informs the municipal council of the criteria to be applied in selecting the purchaser of the land on which the Doornakkers centre project will be carried out. The opinion also states that the contract for the sale of plots offered to the contractual partner approached should comply with 'the framework conditions and guidelines set by the municipality, namely the specifications', and should 'meet the … wishes of the purchasers/end users'. (20) These framework conditions and guidelines set out, inter alia, the

functions and the heights of the buildings in accordance with the urban development plan. They envisage the construction of apartments and housing, the extension of the existing healthcare centre, a connecting area between the two main sites, good accessibility, an underground car park in accordance with municipal parking regulations, conservation of valuable green spaces, and the creation of a square and a new district park. It proposes the selection of two companies, Hurks and Haagdijk;

– 23 April 2002: adoption by the municipal council of the opinion of 11 April 2002;

– 11 June 2002: meeting between the municipality and the two promoters approached to carry out the project. The topics of that discussion are the abovementioned framework conditions and guidelines and a document entitled ‘Information for prospective promoters participating in a selection process’; (21)

– 15 July 2003: selection by the municipality of Hurks as the contractual partner for carrying out the project; (22)

– July 2003 to October 2005, production by Hurks (with the assistance of an architects’ practice) of a master plan in which it fleshes out its construction plans. That master plan includes numerous drawings specifying the dimensions, locations and spreads of the buildings to be constructed in accordance with the municipality’s framework conditions and guidelines;

– *31 January 2006: time-limit for the transposition of Directive 2004/18;*

– 14 February 2006: approval by the municipality of the master plan drawn up by Hurks;

– 12 June and 16 July 2007: signature of the ‘cooperation contract’.

1. Principle and exception

48. Each of the parties relies upon the judgments delivered by the Court in *Commission* v *France* (23) and *pressetext Nachrichtenagentur*. (24)

49. In *Commission* v *France*, the Court clarified the question of the application *ratione temporis* of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84) by identifying a principle and an exception.

50. As regards the principle, ‘the decision by a contracting entity concerning the type of procedure to be followed and whether it is necessary for a prior call for competition to be issued for the award of a public contract constitutes a distinct stage in the procedure, a stage during which the essential characteristics of the execution of the procedure are defined and which may, as a rule, *take place only at the point when that procedure is initiated*. Accordingly, in determining whether [the directive] … is applicable to such a decision …, *account must be taken, as a rule, of the point in time at which that decision was adopted’*. (25) This is because ‘it would be contrary to the principle of legal certainty to determine the applicable law by reference to the date of the award of the contract since that date marks the end of the procedure, while the decision of the contracting entity to proceed with or without a prior call for competition is normally taken at the initial stage of that procedure’. (26)

51. Nevertheless – and herein lies the exception – if negotiations opened subsequently ‘were substantially different in character from those already conducted and were, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, … the application [of the provisions of a subsequent directive] might be justified’. (27)

52. The notions of ‘materially different in character’ and ‘essential terms of the contract’ were developed in *pressetext Nachrichtenagentur*. The amendment necessary in order to be covered by the exception must affect a material aspect of the contract, such as:

– conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted; (28)

– the extension of the scope of the contract considerably to encompass services not initially covered; (29)

– an amendment which gives rise to a change in the economic balance of the contract in favour of the contractor in a manner which was not provided for initially; (30)

– the substitution, not provided for in the initial contract, of a new contractual partner for the one to which the contracting authority had initially awarded the contract; (31)

– the price.

2. Application in the present case

53. The exception identified by the Court in *Commission* v *France*, does not seem, prima facie, to be applicable as such in the present case. The exception covers situations in which a contract has been materially amended. However, it seems that the only contract signed between the municipality and Hurks dates from summer 2007.

54. It is nevertheless clear from the documents before the Court that the parties had already agreed on the essential points before the cooperation contract was signed. Moreover, the Commission does not, strictly speaking, claim the existence of fresh negotiations between the parties. It does, however, consider that certain essential aspects of the contract were determined only after the time-limit for the transposition of Directive 2004/18 had expired. According to the Commission, the dictum of *Commission* v *France*, should therefore be applied by analogy. (32)

55. I do not agree with that conclusion.

(a) The principle

56. In the view of the Court, the applicable directive is the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. This rule is founded on the principle of legal certainty which does not permit the applicable law to be determined by reference to the date of the award of the contract since that date marks the end of the procedure, while the decision of the contracting entity to proceed with or without a prior call for competition is normally taken at the initial stage of that procedure. (33)

57. I do not therefore think that it is a question of the existence of a contract in the formal sense of the term, but of identifying, in the development of the matter over time, the time when the public authority takes ‘the decision … concerning the type of procedure to be followed and whether it is necessary for a prior call for competition to be issued for the award of a public contract’. (34)

58. This interpretation is confirmed in *Hochtief and Linde-Kca-Dresden*. In that judgment, the Court reaffirmed that where ‘the contracting authority’s decision to exclude the bid from the consortium set up by the applicants in the main proceedings and to continue the procedure with the two candidates who were considered to be suitable was taken before the date on which the period for transposition of Directive 2004/18 expired …, it would … be contrary to the principle of legal certainty to determine the law applicable … by reference to the date of the award of the contract, when the decision which in the present case is alleged to have infringed Community law was taken before the date [of expiry of the time-limit for transposition]’. (35)

59. In the present case, the decision within the meaning of the cited case-law was unquestionably taken by the municipality on 23 April 2002.

60. The urban development plan for the Doornakkers centre project had already been approved by the municipality on 12 September 2001. On that date, the project guidelines were known (infrastructure and facilities necessary for joining the existing district and the new district, types of buildings to be constructed, etc.).

61. On 23 April 2002, it is the method of selecting the promoter to carry out the project that is defined. On that date the municipality approved the opinion drafted by its services entitled 'Selection of a promoter for the Doornakkers district centre'. In that document, the role of the promoter and the selection method are expressly defined (see Articles 1.3 and 2). The two shortlisted candidates were already presented and the application of the public procurement rules was expressly rejected: 'at the end of the selection process, the municipality shall designate a prospective promoter to which it can award the promotion agreement. This will be, for the municipality, the contractual partner sought for a contract for the sale of land subject to conditions. These conditions must ensure that the planned district centre is constructed in accordance with the requirements and the wishes of the municipality and with the specifications and meets the wishes of the purchasers/end users. The fact that the municipality opts for a sale subject to conditions means that there will be no tender procedure and that the public procurement rules are not applicable'. (36)

62. This is certainly 'the decision by [the] contracting entity concerning the type of procedure to be followed and whether it is necessary for a prior call for competition to be issued for the award of a public contract'. (37)

(b) The exception

63. The question still remaining is therefore whether the abovementioned exception applies. In this respect, it is for the Commission, in the context of its action for failure to fulfil obligations, to show that essential aspects were amended after 31 January 2006, the date on which the time-limit for the transposition of Directive 2004/18 expired and which is considered to be the 'key' date by the parties.

64. The Commission relies on two aspects: the allocation of the financial risks for certain parts of the SPILcentrum project and responsibility for the development of public spaces.

(i) The SPILcentrum

65. In the project as a whole, the SPILcentrum was the infrastructure whose profitability was most uncertain. For that reason, Hurks did not wish to bear the financial risk alone. However, the municipality systematically refused to share the risk. Consequently, Hurks eventually agreed to proceed with the construction of the centre for its own account and at its own risk. In exchange, the municipality chose a housing corporation – Woonbedrijf – as the future owner of the SPILcentrum. In return Woonbedrijf received a one-off subsidy of EUR 2.41 million.

66. According to the Commission, this is an essential aspect of the collaboration between Hurks and the municipality. However, it could not be finalised until Woonbedrijf had been designated as owner on 13 February 2007.

(ii) Development of public spaces

67. In the opinion of the municipality adopted on 23 April 2002, it is stated, in Article 4.2, that 'the promoter shall also be responsible for the development of public spaces'. However, under the cooperation contract signed by the parties, public spaces remain in the ownership of the municipality, which is responsible, for its own account and at its own risk, for making the planning area (with the exception of the plot earmarked for the commercial centre) suitable for construction and habitation (Articles 8.1 and 8.2 of the cooperation contract).

68. Under Article 1.1 of the cooperation contract, the notion of 'making suitable for habitation' means 'inter alia the improvement of roads and their foundations, squares, pavements, green spaces and public spaces, including green compensation, urban furniture and urban facilities'.

69. According to the Commission, this is also an essential aspect of the collaboration which was agreed between the parties after the time-limit for the transposition of Directive 2004/18 had expired.

(c) Assessment

70. I do not think that the fact that the allocation of the financial risks for certain parts of the SPILcentrum project and responsibility for the development of public spaces could have been finally decided after the decision taken on 23 April 2002 is crucial.

71. Taking, for example, the aspects highlighted by the Court in *pressetext Nachrichtenagentur*, it would appear that neither of the two points identified by the Commission would have justified a new tender procedure:

– in the project as a whole, these two points would not have been sufficient to result in 'the admission of tenderers other than those [who could have been] initially admitted'; (38)

– the scope of the contract is, in any case, not extended considerably to encompass services not initially covered; (39)

– the amendment relating to the development of public spaces does not give rise to a notable change in the economic balance of the contract in favour of the contractor in a manner which was not provided for initially; (40)

– there is no substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract; (41)

– the price had already been fixed, as the Commission itself acknowledges. (42)

72. On the other hand, as the Commission itself pleads in order to prove the existence of a public works contract (which is paradoxical), 'a comparison between Article 1.1 of the cooperation contract and the information document communicated by the municipality to the prospective promoters in June 2002 shows that, *for the most part*, the assignment of the buildings to be constructed had been defined by the municipality *as early as* 2002'. (43)

73. In paragraph 43 of its application, it goes as far as to describe as 'details' the aspects which will be determined in the course of the negotiations subsequent to the decision of 23 April 2002. In paragraph 67 of its application, it also disputes that the object of the cooperation contract is merely the sale of land in view of the obligations imposed on the promoters during the 'informal' selection process. According to the Commission, 'the promoters were required to devise their plans on the basis of a specific concept, stipulated by the municipality, namely the "dumbbell" model, each of the two extremities forming a hub with facilities. If this represented merely the sale of land, no such obligation would have been provided for'.

74. At this point in my analysis, I therefore consider that the Commission has not provided the necessary and sufficient evidence to establish the application of Directive 2004/18, which is invoked in support of its action. In proceedings based on Article 258 TFEU, it is for the Commission to prove the existence of the failure. (44)

75. Furthermore, to take the Commission's view would lead to an absurd situation which is contrary to the objective pursued by the legislature. Following the Commission's reasoning, the date which should be used to determine the applicable directive would be the date on which the municipality adopted the master plan, i.e. 14 February 2006. However, that plan, produced by Hurks, is presented as a fully-fledged construction plan. Article 2 of the cooperation contract, which defines the object of the contract, expressly provides that it seeks to govern 'the terms and conditions for exclusive cooperation between the parties in order to carry out the project *in accordance with the master plan* and the other planning documents'. (45)

76. If the adoption of the master plan were the decision which determines the applicable directive, this would mean that the possible call for candidates would be based on the plans of a contractual

partner selected outside a tender procedure which might not be successful at the end of the selection process. What promoter would agree to produce such a master plan without the guarantee of carrying out the project? What promoter would permit a competitor to use its plans?

77. It is certain that, just as the principle of legal certainty prevents the applicable law being determined by reference to the date of the award of the contract, (46) it prevents it being determined by reference to the date on which the plans of the pre-selected promoter are adopted by the public authority.

78. In addition, the rule identified by the Court in *Commission* v *France*, also safeguards the interests of competitors. To determine the applicable directive by reference to the decision whether to open a call for tenders makes it possible to give practical effect to possible recourse by competitors which have been rejected, *de facto*, by the decision of the public authority not to put the contract out to competitive tender.

79. By rejecting the view that the applicable law is determined by the contracting authority's decision to award the contract, the rule has the fortunate consequence of preserving an appropriate date for challenges by injured parties of decisions taken by the contracting authorities.

80. Consequently, since the Commission has not provided evidence to prove that Directive 2004/18, which is invoked in support of its action, was applicable and it confirmed at the hearing that it was restricting the basis of its action to that directive alone (even though the applicable definitions and principles were, in its view, identical in Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (47)), I consider that the action must be dismissed.

81. Nevertheless, in case the Court does not concur with my reasoning and considers Directive 2004/18 to be applicable, I will also examine below the substantive questions raised by the present case.

D – *Substance*

82. In order to find that the Kingdom of the Netherlands has failed to fulfil its obligations, it is necessary to determine the nature of the contract concluded between the municipality, on the one hand, and Hurks, on the other, with a view to the redevelopment of the Doornakkers centre: does it represent merely the sale of land or a public works concession within the meaning of Directive 2004/18? (48)

1. Assessment

83. The three conditions required for the existence of a public works concession follow from the definitions of 'public works contracts' and 'public works concession' in Article 1(2)(a) and (b) and in Article 1(3) of Directive 2004/18 respectively. There must be:

– a *written* contract between a contracting authority and an economic operator [Article 1(2)(a)];

– a contract whose object is *either the execution, or both the design and execution, of works* related to one of the activities within the meaning of Annex I to Directive 2004/18 or a work, *or the realisation*, by whatever means, *of a work corresponding to the requirements specified by the contracting authority* [Article 1(2)(b)];

– a *contract concluded for pecuniary interest*, where the consideration must consist either solely in the right to exploit the work or in this right together with payment (Article 1(3)).

84. As the existence of a written contract between the municipality and Hurks has not been called into question, only the second and third conditions will be examined.

(a) A public works contract

85. The existence of a public works concession necessarily implies, first and foremost, the existence of a public works contract. Three scenarios are provided for in Article 1(2)(b) of Directive 2004/18. The contract must have as its object:

– either the execution of works related to one of the activities within the meaning of Annex I of Directive 2004/18 or of a work (a work meaning the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function);

– or both the design and execution of works related to one of the activities within the meaning of Annex I of Directive 2004/18 or a work;

– or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

86. According to the Netherlands Government, the contract concluded between the municipality and Hurks does not come in any of these three categories in so far as it covers merely the sale of land. Article 16 of Directive 2004/18 expressly excludes this kind of transaction from its scope.

87. It is true that the agreements between the municipality and Hurks relate to the sale of several plots of land owned by the municipality. However, it is clear from reading the 'cooperation contract' and from all the legal and economic relations established between Hurks and the municipality that this can be only an accessory element of the contract. Furthermore, the Court has held that it was prudent not to exclude the application of Directive 2004/18 where an award procedure provided for the sale of land which would subsequently form the subject of a works contract. (49) This reasoning may be applied, *a fortiori*, where the two transactions are provided for in the same agreement, as in the present case.

88. According to the recitals in the preamble to the cooperation contract signed by the municipality and Hurks:

– '[t]he parties wish to develop and construct a new centre for the new residential district of Tongelresche Akkers and the existing district of Doornakkers …' (recital B);

– '[t]he municipality and Hurks have reached an agreement on the development and the implementation of the functions set out in recital B of the present …' – i.e. a healthcare centre, a play, integration and learning centre with apartments, an extension of an existing healthcare centre with an underground car park, a commercial centre with housing, and an underground car park, housing (recital F).

89. The object of the contract is itself defined without any reference to the sale of land. Under Article 2 of the cooperation contract, it seeks to govern 'the terms and conditions for exclusive cooperation between the parties in order to carry out the project in accordance with the master plan and the other planning documents'. The project in question is itself defined by the contract as the 'redevelopment of the planning area', which includes making that area 'suitable for construction and habitation' under the conditions laid down in the contract (Article 1.1 of the cooperation contract).

90. That contract also provides for the creation of a 'project team' composed of a 'project group' and several 'working groups', whose role is to devise the planning documents – that is to say the final draft of the urban development plan, the local area development plan, the specifications, the relevant demolition documents, the development plan for public spaces, etc. (Article 5 of the cooperation contract) – and to prepare the decisions taken by the parties, it being understood that the project group is chaired by the municipality's project manager (Article 3 of the cooperation contract).

91. Lastly, Article 7.5 of that contract, which concerns the sale of land, expressly makes the supply of the land subject to an undertaking given by Hurks to 'construct buildings on the plots in accordance with the planning documents and the schedule', which is the subject of Article 6.

92. In addition, according to the procedural documents, the price of the land is EUR 5 616 024, (50) whilst the construction of the project is evaluated at EUR 28 186 000 (Annex 7 to the application).

93. It can therefore be inferred from the cooperation contract that its object was not primarily the sale of land, but above all the execution of works related to one of the activities within the meaning of Annex I to Directive 2004/18, namely, to mention just one example, general construction of buildings and civil engineering works or a work within the meaning of that directive. (51)

94. I think that the project covered by the cooperation contract in question also comes under the third scenario mentioned in Article 1(2)(b) of Directive 2004/18, namely 'the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority'.

95. If reference is made to the clarifications given in *Helmut Müller*, cited above, which is relied on by the Commission and the Netherlands Government, 'in order for it to be possible to establish that a contracting authority has specified its requirements within the meaning of [Article 1(2)(b) of Directive 2004/18], the authority must have taken measures to define the type of the work or, at the very least, *have had a decisive influence on its design'*. (52) This means that 'the mere fact that a public authority, in the exercise of its urban-planning powers, examines certain building plans presented to it, or takes a decision applying its powers in that sphere, does not satisfy the obligation that there be "requirements specified by the contracting authority" within the meaning of that provision'. (53)

96. In this regard, I share the Commission's opinion. It is clear from the cooperation contract signed by the two parties, the other documents referred to in that contract (master plan, planning documents, etc.) and the information document published by the municipality in June 2002 – i.e. at the very beginning of the project – for the two prospective promoters that it was the municipality that decided not only on the relevant land-use planning, but also on the assignment of the buildings to be constructed.

97. It is apparent, inter alia, from the document entitled 'Doornakkers Centre – Programme' (54) that the number of buildings to be constructed is specified precisely, but also the number of rooms, the function allocated to each of them, and even their surface area. The number of parking spaces to be provided for each building is also indicated. (55)

98. The Court has already had occasion to point out that specifications 'relating to a precise description of the buildings to be constructed, their quality and their fixtures and fittings, far exceed the usual requirements of a tenant in relation to newly-constructed premises of a certain size'. (56) According to the Court, a contract containing such specifications therefore has 'as its main object the construction [of a building] in accordance with the requirements specified by [the contracting authority]'. (57)

99. In those circumstances, which are similar to those in the present case, the Court held that, in so far as those constructions constituted a 'work' within the meaning of the applicable directive, they were sufficient of themselves to fulfil an economic function, their value was higher than the threshold laid down under Directive 93/37 concerning the coordination of procedures for the award of public works contracts and the contract had been concluded for pecuniary interest, the contract had to be classified as a 'public works contract'. The same findings must be made in the present case.

100. Lastly, the composition and the tasks entrusted to the 'project team' defined in Article 3 of the cooperation contract also reflect the municipality's desire to maintain a pro-active role as the project progresses, going beyond simply examining the building plans presented to it or taking a decision in the exercise of its regulatory urban-planning powers. It is this 'team', led by the municipality's project manager, which must devise and draw up the planning documents, which include not only the urban development plan and the local area development plan, but also the provisional and final proposal for the various functions, the specifications and the drawings of the various functions, and the construction and communication schedules (see Articles 5.1 to 5.3 of the cooperation contract). Furthermore, any departures from the master plan identified by the project group must be submitted to the municipality for approval (Article 5.4 of the contract).

Interim conclusion

101. I consider that the first condition laid down by Directive 2004/18 for the existence of a public works concession, namely the existence of a public works contract, is satisfied and that the

Commission provides sufficient proof thereof. The project in question comes at least under the first and third scenarios referred to in Article 1(2)(b) of Directive 2004/18. It concerns the execution of works related to one of the activities within the meaning of Annex I of Directive 2004/18 and/or of a work within the meaning of that directive, and the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

102. I wish to point out, in so far as it is relevant, that the Netherlands Government is incorrect in its claim that the three situations covered by Article 1(2)(b) of Directive 2004/18 are mutually exclusive.

103. As the Commission points out, the Court has already had occasion to state that 'infrastructure works of the kind listed in Article 4 of Law No 847/64 constitute either building or civil engineering works, hence activities of the kind referred to in Annex II to ?Directive 2004/18], or works sufficient in themselves to fulfil an economic and technical function. They thus satisfy, at the very least, the criteria laid down in the first and second indents ?of Article 1(2)(b) of Directive 2004/18]'. (58)

104. The fact that the works planned by the municipality in the present case come under more than one of the cases envisaged by the directive cannot therefore result in the dismissal of its application.

(b) A contract concluded for pecuniary interest

105. The third condition that must be met by a contract in order to satisfy the definition of 'public works concession' is to be concluded for pecuniary interest.

106. It is settled case-law that the pecuniary nature of the concession contract means that the contracting authority which has concluded a public contract receives a service pursuant to that contract in return for consideration paid by it to the contractor. (59) That service, for the contracting authority, consists in the realisation of works from which it intends to benefit. (60)

(i) A service and an immediate economic benefit

107. In the present case, the obligation to execute the works in question is expressly laid down in Article 7.5 of the cooperation contract, under which 'Hurks gives an undertaking to the municipality to construct buildings on the plots in accordance with the planning documents and the schedule'.

108. However, the Court stated in *Helmut Müller*, that such a service had to 'be of direct economic benefit to the contracting authority'. (61)

109. Rather than talking about immediate economic benefit, in his Opinion in *Helmut Müller*, Advocate General Mengozzi developed the requirement that 'there be a direct link between the public authority and the work or works to be executed' so as to 'reconcile the potential contradiction between the need to prevent abuses on the one hand and the need to avoid extending the scope of [Directive 2004/18] indefinitely on the other'. (62)

110. According to Advocate General Mengozzi, the existence of a direct link can be found:

– where the public authority immediately acquires ownership of the property or the works to be produced. This case covered situations in which the authority does not procure the property, but obtains an immediate economic benefit as a result of it, such as the right to make use of the property; (63)

– where public funds, or more generally public resources (such as making land available free of charge), are employed for the execution of the work and/or works; (64)

– where the work or works to be carried out are the result of an initiative taken by the authority in question. (65) However, this residual category must be distinguished from 'the mere pursuit of the public interest through recourse to ordinary town planning powers' for Directive 2004/18 to apply. (66)

111. As I have already stated, in point 108 of this Opinion, the Court did not adopt as such the criterion of a direct link in *Helmut Müller*. On the contrary, it opted to refer only to the notion of 'immediate economic benefit'. In doing so, the Court seems to have excluded the abovementioned residual category – that is, the scenario of an initiative taken by the contracting authority – and therefore restricted the scope of Directive 2004/18.

112. This interpretation nevertheless allows the public authorities a certain margin of discretion. In *Helmut Müller*, the Court only excluded from the concept of immediate economic benefit the mere exercise of urban-planning powers intended to give effect to the public interest. Otherwise, the Court simply illustrated its remarks by giving five non-exhaustive examples. Relevant situations were cases where:

– the public authority becomes owner of the works or work which is the subject of the contract; (67)

– the contracting authority holds a legal right over the use of the works which are the subject of the contract, in order that they can be made available to the public; (68)

– the contracting authority benefits from economic advantages derived from the future use or transfer of the work; (69)

– the contracting authority contributed financially to the realisation of the work; (70)

– the contracting authority assumes risks were the work to be an economic failure. (71)

113. The Court does not mention the case referred to by Advocate General Mengozzi in which the work or works to be carried out are the result of an initiative taken by the authority in question. (72) On the other hand, like him it excludes the case where that public authority merely exercises urban-planning powers, intended to give effect to the public interest. (73)

What does this mean for the present case?

114. In the present case, the municipality has certainly not become the owner of the constructed properties and that was not its intention.

115. However, the relations established by it for the purposes of the Doornakkers centre, whether with Hurks or with other actors such as Woonbedrijf, (74) tend to show an intervention by the municipality which goes beyond coherent planning of the development of part of an urban district. (75)

116. It should not be ignored that the functions to be fulfilled by the project were defined precisely by the municipality and include a healthcare centre, a play, integration and learning centre (SPILcentrum) with apartments, an extension of the existing healthcare centre with an underground car park, a commercial centre with housing and an underground car park and more housing (recital B of the cooperation contract).

117. The contracts relating to the use and the financing of the SPILcentrum also demonstrate that the project is of immediate economic benefit to the municipality.

118. As I have already explained above, (76) Hurks did not wish to bear the financial risk of the SPILcentrum alone on account of its uncertain profitability. It eventually agreed to construct it for its own account and at its own risk, as, in exchange, the municipality had approved the housing corporation Woonbedrijf as the future owner of the SPILcentrum, as early as 13 February 2007. (77) Hurks was therefore certain that the least profitable building would be used.

119. Woonbedrijf received a one-off operating subsidy of EUR 2.41 million from the municipality for the three unprofitable functions of the SPILcentrum: the sports hall, the meeting space and the youth space. (78)

120. The Netherlands Government confirms that the sports hall and the meeting space are used by the Sportbedrijf De Karpen association. It also explains that the association ‘belongs’ to the municipality. (79)

121. With the designation of Woonbedrijf as owner of the SPILcentrum, the agreement signed by that housing corporation and the municipality on 15 April 2008 and the use of the sports hall and the meeting space by the Sportbedrijf De Karpen association, the municipality guaranteed that the SPILcentrum is made available to the public.

122. This is a second illustration of the immediate economic benefit mentioned by the Court in *Helmut Müller*. Immediate economic benefit ‘may also be held to exist where it is provided that the contracting authority is to hold a legal right over the use of the works which are the subject of the contract, in order that they can be made available to the public’. (80)

123. Admittedly, it is not the municipality itself that is the user of the properties, but an association which ‘belongs’ to it (in the words of the Netherlands Government). However, the Court has already held that the State could take the form of bodies other than its own structures. Thus, for State aid, ‘[w]ith regard to the [condition connected with an intervention by the State or through State resources], it is clear from established case-law that there is no need to draw any distinction according to whether the aid is granted directly by the State or by public or private bodies established or appointed by that State’. (81) The same reasoning may be applied *mutatis mutandis* in the present case.

124. Second, I consider that the municipality can also be considered to have contributed financially to the project (fourth example given by the Court in *Helmut Müller*, cited above, point 52) in so far as Hurks did not agreed to build the SPILcentrum at its own risk until the municipality had given it an assurance that Woonbedrijf would be the owner of the centre. In exchange, Woonbedrijf received from the municipality an operating subsidy in excess of EUR 2 million.

125. It can also be seen that the transaction represents financial gain for the municipality in so far as the infrastructure promoter is required to pay for something which, in the absence of the cooperation contract, the municipality itself would have to build and finance. It should be noted that the extension of the healthcare centre is evaluated at EUR 8 400 000 and the construction of the SPILcentrum at EUR 7 386 500, including EUR 3 738 500 for functions likely to be used by the municipality (the school, the sports hall and the youth centre). (82)

126. Lastly, going beyond their contribution to the general interest or good urban planning, several of those functions (in particular the healthcare centre and the commercial centre) relate to economic activities which can bring in revenue for the municipality through taxes and other expenditure. In other words, to paraphrase the Court, the contracting authority, which is the municipality, will enjoy economic advantages derived from the use (or future transfer) of the work (third example given by the Court in paragraph 52 of the judgment in *Helmut Müller*).

127. I therefore take the view that, in the present case, having regard to the material in the file, the existence of an immediate economic benefit for the municipality is proven to the required legal standard: the municipality has gone well beyond simply achieving the objective of ‘the development or coherent planning of part of an urban district’. (83)

(ii) A consideration

128. As I have already stated, the pecuniary nature of a concession contract means that the contracting authority which has concluded a public contract receives a service pursuant to that contract in return for *consideration*.

129. Whilst, for the contracting authority, the service resides in the execution of the works, for the contractor, the consideration consists either in the right to exploit the work or in this right together with payment (Article 1(3) of Directive 2004/18).

130. In view of the legal relations established between the municipality and Hurks, I have doubts, above all, as to the very existence of the ‘right of exploitation’ conferred on Hurks when it is the owner

of the land and the properties to be constructed. As the Netherlands Government explained at the hearing, to exploit means to benefit from the advantages and to tolerate the disadvantages of the work of a third party. That is not the situation in the present case.

131. Nevertheless, if there had to be 'exploitation' within the meaning of Directive 2004/18, the present case would raise a further two questions. First, is the grant of a public works concession – and of the right to exploit the work – for an indefinite duration compatible with EU law? Second, does the consideration exist where the concessionaire is or becomes the owner of the land and/or the finished works?

– Public works concession and indefinite duration?

132. First of all, I concur with the Commission's observation that Directive 2004/18 does not give the slightest indication that a concession should have a limited duration.

133. The Court has already had occasion to consider this question. I am referring to the abovementioned judgments in *pressetext Nachrichtenagentur* and *Helmut Müller*. According to the Netherlands Government, it is clear from paragraph 79 of the judgment in *Helmut Müller* that a concession contract of indefinite duration is contrary, per se, to EU law.

134. I must point out, however, that the Court has not given a clear statement in so far as it opted to use the conditional [in the French], explaining that 'in any event, with regard to the duration of concessions, there are serious grounds, including the need to guarantee competition, for holding the grant of concessions of unlimited duration to be contrary to the European Union legal order'. (84)

135. In addition, the Court refers to paragraph 73 of the judgment in *pressetext Nachrichtenagentur*, in which it asserted that 'the practice of concluding a public services contract for an indefinite period is in itself at odds with the scheme and purpose of the Community rules governing public contracts'. However, this paragraph of the judgment cannot be dissociated from the following paragraph, which forms the conclusion of the Court's reasoning. In that paragraph it ruled that '[n]evertheless, Community law, as it currently stands, does not prohibit the conclusion of public service contracts for an indefinite period'. (85)

136. EU law has not changed since that judgment was delivered. Unlike framework agreements, the European legislature has still not set a time-limit for concession contracts. (86) However, such a limit does appear in the Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (87) which is currently under discussion. If that amendment is adopted, EU law will then impose a time-limit. The text itself will no longer leave any room for doubt as to the interpretation of what the Court has called 'the scheme and purpose of the Community rules governing public contracts'. (88)

137. Second, it is true that the practice of concluding a public contract for an indefinite period might, over time, impede free competition between potential service providers and hinder the application of the provisions of European Union directives guaranteeing advertising of procedures for the award of public contracts. (89) However, simply to exclude contracts of indefinite duration from the scope of Directive 2004/18 seems to run an even greater risk, as it is more common: the risk of the same rules being circumvented.

138. As the Commission points out in its application, if such concession contracts of indefinite duration fell outside the scope of Directive 2004/18, the parties would need only conclude a written contract for pecuniary interest which is of indefinite duration to avoid the rules on equality, transparency and non-discrimination which form the basis for the public procurement rules.

139. Lastly, it must be ascertained exactly what is covered by the notion of 'indefinite duration'. In my view, this must be distinguished from 'infinite duration' which, alone, is limitless. On the other hand, a contract of indefinite duration is a contract whose duration has not been fixed at the beginning, but which may be terminated for certain reasons provided for in the contract, with or without notice and with or without penalty.

140. For these various reasons, I therefore believe that a concession of indefinite duration as defined in the preceding point may be covered by Directive 2004/18.

141. However, that is not the situation in the present case, as a concession of indefinite duration has not been awarded to Hurks, but ownership of the land and the future works. Consequently, Hurks does not enjoy a right of indefinite duration, but a right of 'infinite duration'. Conversely, for the municipality, the duration of the contract is clearly identified. Once the buildings provided for in the cooperation contract are constructed, the contract has been performed and the parties' rights and obligations come to an end. Before then, the only grounds for termination of the cooperation contract relate to the essential conditions for carrying out the project, such as obtaining a valid building permit (90) or the solvency of the contractor. (91)

142. In fact, the only question arising in the present case in analysing the consideration required for the concession contract to be a contract for pecuniary interest is the ownership of the site as a whole.

– Public works concession and ownership?

143. According to the Commission, the transfer of ownership of the land to Hurks was accompanied by the concurrent transfer of a right of exploitation of an indefinite duration, since the sale of the land to Hurks alone would not have permitted the works provided for in the cooperation contract to be executed.

144. Under Article 7.2 and 7.3 of the cooperation contract, the existence of a building permit to execute the works constituted a suspensive or resolutive condition for the sale of the land having regard to the relevant aspects. The execution of works was therefore made possible only by the undertaking given by the municipality in Article 6 of the cooperation contract to collaborate fully.

145. According to the Netherlands Government, a distinction should be drawn between exploitation as the owner and exploitation as the concessionaire. In the first case, exploitation is based on the owner's right of ownership. In the second case, exploitation is based on a concession granted by the owner to the concessionaire. In the present case, since the municipality transferred ownership of the land to Hurks, the Netherlands Government considers that Hurks exploits it as the owner and not by virtue of a concession. In support of its arguments, it again invokes *Helmut Müller*.

146. In the Opinion in *Helmut Müller*, Advocate General Mengozzi took the view that, if the words 'right to exploit' used by Directive 2004/18 in its definition of public works concessions could be interpreted broadly, one possibility which 'ought to be excluded, in view of the meaning and the general system of the measure in question, is the possibility of a public works concession in which the concessionaire has a right of ownership in the finished works'. (92)

147. The Court has taken a more nuanced position. It is true that 'in order for a contracting authority to be able to transfer to the other contracting party the right to exploit a work within the terms of [Article 1(3) of Directive 2004/18], that contracting authority must be in a position to exploit that work'. (93) However, according to the Court, 'that will *normally* not be the case where the only basis for the right of exploitation is the right of ownership of the economic operator concerned', since 'as long as an economic operator enjoys the right to exploit the land which he owns, it is *in principle* impossible for a public authority to grant a concession relating to that exploitation'. (94)

148. Accordingly, if the principle is to exclude a concession where the 'builder' is the owner of the land, the use of the words 'normally' and 'in principle' gives rise to the possibility of an exception.

149. The Court has not, however, given any indication as to the conceivable exceptions. The only clue lies in the explanation of the rule: the contracting authority may not exploit the work 'where *the only basis* for the right of exploitation is the right of ownership of the economic operator concerned'. (95)

150. It must be acknowledged that, in the light of this wording, opinion in legal literature has also been divided.

151. For some, the answer was clear: if the public authority does not remain or does not become the owner of the work forming the object of the contract, there is no concession in so far as the authority cannot grant a concession for a property to which it has no right. (96) As I have already explained, Directive 2004/18 requires the contracting authority to grant the concessionaire, as a consideration for realising the work, the right to exploit it or this right together with payment (Article 1(3) of Directive 2004/18). The right of ownership includes the right to exploit. Consequently, if the former is transferred, the latter can no longer be.

152. For proponents of this view, which I will describe as strict, the concessionaire must necessarily leave ownership with the contracting authority and retain the management of the property in order, inter alia, to make it available to the public and to receive a payment in exchange for this. (97)

153. Nevertheless, for others, Directive 2004/18 promotes a broader understanding of concessions. (98) According to these writers, exploitation of the work implies the right to derive profit from it even if this does not necessarily happen through the levying of fees paid by users. According to this interpretation, the right to exploit may be passed on by the promoter in the price at which the land, housing or other works are sold. In that case, ownership of the property does not remain with or revert to the contracting authority, but its contractual partner was nevertheless able to exploit the property it built by selling it.

154. This interpretation would be consistent with the definitions laid down in Directive 2004/18, as public works concession is defined by reference to the notion of 'public works'. It is true that the definition of public works contracts does not require the contracting authority to remain or become the owner of the property. In the view of the writers who support a broad interpretation of concession, a distinction should not therefore be drawn between the two kinds of contract depending on the holder of the right of ownership. (99)

155. For others still, the question has not been resolved and clarification on this point would be welcome. (100)

156. I share the latter opinion.

157. If we wish to adopt the framework outlined by the Court in *Helmut Müller* – the contracting authority may not exploit the work where '*the only basis* for the right of exploitation is the right of ownership of the economic operator concerned' (101) – it must be asked what could be the basis for the right of exploitation but not the right of ownership.

158. In the present case, what would be the other basis for the right of exploitation?

159. Aside from the right of ownership exercised over the land and the buildings – whether that right is acquired prior to or concurrently with the transactions and whether the promoter has acquired it from a third party or from a public authority – I can possibly see only the acquisition of the permits required for the execution of works covered by the cooperation contract.

160. It should not be forgotten, however, that in *Helmut Müller*, the Court rejected the view that the economic risk inherent in concession lies in the uncertainty over obtaining the necessary urban planning authorisations. For the Court, in this case, the risk would not be the risk linked to exploitation, but to the contracting authority's powers in respect of urban planning. (102) Furthermore, in the present case, the risk does not exist for the promoter since the cooperation contract expressly provides that 'the contracts for the sale of the plots in question shall mention that the supply [of the land] was subject to the resolutive condition that a valid building permit has been issued on the date of commencement of the construction works as provided for in Article 9.1' (103) and that 'the supply of the plot for the commercial centre and for the housing shall take place no later than four weeks after a valid building permit is available for the fulfilment of the function concerned'. (104)

161. By analogy, I therefore consider that it is not possible to infer a basis for the right to exploit the works from the resolutive condition relating to the acquisition of permits. If permits are not obtained, the works will simply not be constructed and the sale of the land possibly cancelled (see Article 7.2 to 7.4 of the cooperation contract).

162. It is true that Hurks needs the municipality to help it to obtain the necessary permits and exemptions for the execution of the works. However, it seems that it is not the municipality that issues the permits. Consequently, it cannot be regarded as the 'basis' for the right of exploitation.

163. More generally, I have doubts as to the very existence of cases where the only basis for the right of exploitation is the right of ownership of the contracting authority or of the operator.

164. A priori, the different conventional forms taken by the right which permit the use of an object without having ownership of it always result from breaking up that ownership (whether that be, for example, servitudes, emphyteutic leases or usufruct). If the concessionaire derives its right to exploit from one of these forms (servitude, emphyteutic lease, usufruct), it is not therefore the owner and the question of the impossibility of a concession does not arise.

165. If that right is granted by the contracting authority, the concessionaire is not the owner, but it only benefits from a limited right of exploitation and derives that right from the authorisation to exploit the works granted by the contracting authority.

166. Conversely, if it grants a servitude, a usufruct or an emphyteutic lease, it does so as the owner and any exploitation that it retains stems from its right of ownership.

167. The uncertainty stemming from the wording of *Helmut Müller*, with regard to the effect of ownership of the work by the operator seems to be very small and restricted to situations which do not appear to arise in the present case.

168. Like Advocates General Mengozzi and Jääskinen, I would be in favour of the Court simply ruling out the possibility of a public works concession where a right of ownership of the finished works is granted to the (purported) concessionaire. (105)

169. Whatever the case, if the Court were to remove, either way, the uncertainty over the effect of ownership of the work by the operator which stems from *Helmut Müller*, I consider that, in the circumstances of the present case, the Commission does not demonstrate to the required legal standard the actual existence of a consideration – namely the right to exploit or this right together with payment – for Hurks, the owner of the land and the finished works. Consequently, there can be no question of a public works concession contract.

170. In the light of this last observation, I suggest that the Court dismiss the Commission's action.

171. It is true that my conclusion allows the risk of the circumvention of public procurement rules to persist, through contracts of sale with the transmission of the right of ownership. As a result, the situation is certainly not satisfactory. However, this is a consideration *de lege ferenda*.

172. In the present case, the Court is required to rule within the strict framework of an action for failure to fulfil obligations having regard to the law as it stands and the evidence provided by the Commission. If the Commission considers the risk described above to be considerable and harmful to the European Union, it is for it to exercise its right of legislative initiative in order to amend Directive 2004/18.

2. Summary

173. The applicable directive is the one in force when the contracting authority chooses the type of procedure to be followed and assesses whether it is necessary for a prior call for competition to be issued for the award of a public contract.

174. In the present case, I consider that the municipality took that decision on 23 April 2002. In my view, Directive 2004/18 was not therefore applicable. However, it is the basis for the Commission's action.

175. The conditions required for the existence of a public works concession follow from the definitions of 'public works contracts' and 'public works concession' in Article 1(2)(a) and (b) and in Article 1(3) of Directive 2004/18 respectively. There are three. There must be:

– a *written contract* between a contracting authority and an economic operator;

– a contract whose object is *either the execution, or both the design and execution, of works* related to one of the activities within the meaning of Annex I to Directive 2004/18 or a work, *or the realisation*, by whatever means, *of a work corresponding to the requirements specified by the contracting authority*;

– a *contract concluded for pecuniary interest*, where the consideration must consist either solely in the right to exploit the work or in this right together with payment (Article 1(3)).

176. In my view, the pecuniary nature of the contract requires, first, the realisation of a work by the concessionaire which is of immediate economic benefit to the contracting authority and, second, a consideration for the concessionaire, namely the right to exploit the work or this right together with payment to the concessionaire. To satisfy this condition, as the applicable legislation stands at present, the concession may be granted for an indefinite duration, but not infinitely, in particular in the form of a transfer of the contractual partner's right of ownership.

177. Consequently, since Hurks derives its right of exploitation from ownership of the land purchased from the municipality and has not therefore obtained it through a public works concession contract, I consider the Commission's action to be unfounded.

IV – Costs

178. Under Article 138 of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission must therefore be ordered to pay the costs incurred by the Kingdom of the Netherlands, since it has applied for costs.

179. In accordance with Article 140 of the Rules of Procedure, the Federal Republic of Germany is ordered to bear its own costs.

V – Conclusion

180. In the light of the foregoing considerations, I propose that the Court:

– dismiss the action brought by the European Commission, since Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts is not applicable *ratione temporis*;

– in the alternative, dismiss the Commission's action, since Directive 2004/18 is not applicable because the contract at issue is not a public works concession contract;

– in any event, order the Commission to pay the costs incurred by the Kingdom of the Netherlands and order the Federal Republic of Germany to bear its own costs.

---

1 – Original language: French.

---

2 – OJ 2004 L 134, p. 114.

---

3 – See the opinion of the municipality's internal services of 26 July 2001, approved by the municipal council on 7 August 2001 (Annex 1 to the defence).

---

4 – See Annex 3 to the defence.

---

5 – See the opinion of the municipality's internal services of 11 April 2002, approved by the municipal council on 23 April 2002 (Annex 3 to the defence, p. 5).

---

6 – See Annex 5 to the defence.

---

7 – See, to that effect, Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 35; Case C-392/99 *Commission* v *Portugal* [2003] ECR I-3373, paragraph 133; and Case C-38/10 *Commission* v *Portugal* [2012] ECR, paragraph 16.

---

8 – Case C-535/07 *Commission* v *Austria* [2010] ECR I-9483, paragraph 41 (my emphasis).

---

9 – Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 36.

---

10 – I do not concur with the view taken by the Netherlands Government to the effect that the situation envisaged by the Court in *Commission* v *Ireland*, is limited to the case of a 'failure of a general nature' merely concerning 'systemic and consistent tolerance'. On the contrary, in that same case, what the Commission intended to prove through the production of additional evidence was precisely 'to support the proposition that the failure thus alleged is general and consistent'. See the judgment cited above, paragraph 37.

---

11 – *Commission* v *Ireland*, cited above, paragraphs 42 to 45.

---

12 – Case C-458/08 *Commission* v *Portugal* [2010] ECR I-11599, paragraph 47 and cited case-law.

---

13 – See paragraphs 156 to 160.

---

14 – Case C-451/08 *Helmut Müller* [2010] ECR I-2673.

---

15 – With regard to reliance by the Commission, in the application, on case-law not cited in the pre-litigation procedure for an action for failure to fulfil obligations, the Court ruled that '[b]y referring to the Open Skies judgments in its originating application the Commission merely intended to set out the most recent case-law relating to the principles governing the exclusive external competence of the Community, without extending, modifying or even limiting the subject-matter of the dispute, as defined in the reasoned opinion' (Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 29).

---

16 – See, to that effect, Case C-337/98 *Commission* v *France* [2000] ECR I-8377.

---

17 – See the opinion of the municipality's internal services of 26 July 2001, approved by the municipal council on 7 August 2001 (Annex 1 to the defence).

---

18 – See Annex 2 to the defence.

---

19 – See Annex 4 to the defence.

---

20 – See the opinion of the municipality's internal services of 11 April 2002, approved by the municipal council on 23 April 2002 (Annex 4 to the defence, p. 5).

21 – See Annex 4 to the defence.

22 – See Annex 5 to the defence.

23 – Judgment cited above.

24 – Case C-454/06 [2008] ECR I-4401.

25 – *Commission* v *France*, cited above, paragraphs 36 and 37 (my emphasis).

26 – Ibid., paragraph 40.

27 – Ibid., paragraph 44.

28 – *pressetext Nachrichtenagentur*, cited above, paragraph 35.

29 – Ibid., paragraph 36.

30 – Ibid., paragraph 37.

31 – Ibid., paragraph 40.

32 – See paragraph 46 of the Commission's reply: 'It must be *inferred* from the Court's case-law that, on the basis of the principles of equal treatment and transparency of procurement procedures (see Article 2 of Directive 2004/18), public contracts must be re-awarded if one of the essential terms of the contract is amended and thus results in the conclusion of a new contract, *but this does not mean that this position cannot be applied by analogy to other situations*' (my emphasis).

33 – *Commission* v *France*, cited above, paragraph 40.

34 – Ibid., paragraph 36.

35 – Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] ECR I-8991, paragraphs 28 and 29.

36 – Article 2.5 of the opinion entitled 'Selection of a promoter for the Doornakkers district centre' (Annex 4 to the application).

37 – Wording used by the Court in paragraph 36 of the judgment in *Commission* v *France*.

38 – *pressetext Nachrichtenagentur*, cited above, paragraph 35.

39 – Ibid., paragraph 36.

40 – Ibid., paragraph 37.

41 – Ibid., paragraph 40.

42 – ‘Even though Hurks and the municipality had agreed on the price and on the sale of the land by the municipality …’ (paragraph 46 of the Commission’s application).

43 – Commission’s application, paragraphs 77 and 78 (my emphasis).

44 – To that effect, see, inter alia, Case C-306/08 *Commission* v *Spain* [2011] ECR I-4541, paragraph 94.

45 – My emphasis.

46 – *Commission* v *France*, cited above, paragraph 40.

47 – OJ 1993 L 199, p. 54.

48 – It could not be a public works contract in the strict sense in so far as there is no financial consideration from the municipality (with regard to this notion, see Opinion of Advocate General Jääskinen in *Commission* v *Spain*).

49 – *Helmut Müller*, cited above, paragraph 82.

50 – At the hearing, the Netherlands Government confirmed that the price of the land had been assessed beforehand by an independent expert and that it did not take into account any increase in value subsequently realised by the promoter. Hurks was not granted any reduction in consideration of the advantages that the municipality would derive from the execution of the project.

51 – With regard to this latter category – a work – reference can usefully be made to *Auroux and Others*, which also concerned a project to revitalise a district through the creation of a leisure centre consisting of, inter alia, a multiplex cinema and commercial premises. According to the Court, ‘[i]t is clear from Article 1(c) of [Directive 2004/18] that the existence of a work must be determined in relation to the economic or technical function of the result of the works undertaken (see Joined Cases C-187/04 and C-188/04 *Commission* v *Italy*, … paragraph 26). As is apparent from a number of clauses in the agreement, the construction of the leisure centre is intended to accommodate commercial and service activities, so that the agreement must be regarded as fulfilling an economic function’ (Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 41). In the present case, it cannot be disputed that several buildings are intended to accommodate commercial and service activities (healthcare, SPILcentrum, etc.) and therefore fulfil an economic function.

52 – *Helmut Müller*, cited above, paragraph 67 (my emphasis).

53 – *Helmut Müller*, cited above, paragraph 68.

54 – Annex to the information notice for prospective promoters participating in a selection process drafted by the municipality with a view to the meeting of 11 June 2002.

55 – See Annex 4 to the defence.

56 – Case C-536/07 *Commission* v *Germany* [2009] ECR I-10355, paragraph 58.

57 – Ibid., paragraph 59.

58 – Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 59.

59 – For the company to which the contract is awarded, the consideration consists either in the right to exploit the work or in this right together with payment (Article 1(3) of Directive 2004/18). This requirement will be examined later.

60 – See *Helmut Müller*, cited above, paragraph 48.

61 – Ibid., paragraph 49.

62 – Point 54 of the Opinion.

63 – Ibid., point 55.

64 – Ibid., points 56 to 58.

65 – Ibid., point 59.

66 – Ibid., point 61.

67 – *Helmut Müller*, cited above, paragraph 50.

68 – Ibid., paragraph 51.

69 – Ibid., paragraph 52.

70 – Ibid., paragraph 52.

71 – Ibid., paragraph 52.

72 – Point 59 of the Opinion of Advocate General Mengozzi in *Helmut Müller*.

---

73 – *Helmut Müller*, cited above, paragraph 57.

---

74 – See below, points 118 to 121.

---

75 – *Helmut Müller*, cited above, paragraph 55.

---

76 – See points 12, 33 and 66 of this Opinion.

---

77 – See the recitals in the preamble to the cooperation contract of 15 April 2008 between Woonbedrijf and the municipality (p. 2) (Annex 5 to the Commission's application).

---

78 – Convention signed between Woonbedrijf and the municipality on 15 April 2008.

---

79 – Paragraphs 17 to 20 of the rejoinder.

---

80 – *Helmut Müller*, cited above, paragraph 51.

---

81 – Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 34 and cited case-law.

---

82 – According to figures communicated by the Netherlands Government in its response to the Commission of 19 December 2008 (Annex 7 to the application).

---

83 – *Helmut Müller*, cited above, paragraph 55.

---

84 – *Helmut Müller*, cited above, paragraph 79.

---

85 – *pressetext Nachrichtenagentur*, cited above, paragraph 74. Whilst that case concerned a service contract, this would not seem to prevent the reasoning being applied to public works contracts. Furthermore, *Helmut Müller*, concerned a public works contract.

---

86 – See the fourth subparagraph of Article 32(2) of Directive 2004/18.

---

87 – See Article 16 of the Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (COM(2011) 897 final) and the amendment proposed by the Council (18007/12) (2011/0437 (COD)).

---

88 – *pressetext Nachrichtenagentur*, cited above, paragraph 73.

---

89 – To that effect, *pressetext Nachrichtenagentur*, cited above, paragraph 73.

---

90 – See Articles 7.2 and 7.3 of the cooperation contract signed by the municipality and Hurks.

91 – See Article 12.2 of the cooperation contract.

92 – Point 90 of the Opinion.

93 – *Helmut Müller*, cited above, paragraph 72.

94 – Ibid., paragraphs 73 and 74 (my emphasis).

95 – Ibid., paragraph 73 (my emphasis).

96 – '*Helmut Müller*[, cited above,] taught us that there could be a concession only if the contracting authority retained ownership of the works in question, the idea being that it is not possible to grant a concession for something that you do not possess or that you no longer possess' (Llorens, F., and Soler-Couteaux, P., 'Marchés, DSP, concession de travaux ou d'aménagement: de quelques problèmes de frontière', *Contrats et marchés publics,* Les revues Jurisclasseur, November 2011, indicator 10). The same writers expressed a similar view in an initial commentary on *Helmut Müller*: 'One thing is sure: the sale of land cannot be treated in the same way as a works concession if the work to be constructed remains in the (definitive) ownership of the purchaser. … This closes the debate on whether the exploitation by a purchaser of land of the buildings which he expects to construct there as owner cannot be treated in the same way as the right of exploitation, which is a characteristic of concession'. However, the writers are uncertain about the situation – similar to the present case – where the contracting authority contributes to the financing of the buildings or if it took the initiative for them. Nevertheless, in this case, 'the contract can no longer be treated in the same way as a concession if the exploitation by the purchaser relates solely to the works of which it is the owner' (Llorens, F., and Soler-Couteaux, P., 'La vente de terrains, la concession de travaux publics et le marché public de travaux: la vision de la CJUE (à propos de l'arrêt Helmut Müller)', *Contrats et marchés publics,* Les revues Jurisclasseur, May 2010, indicator 5). For a criticism of this view, see Durviaux, A.-L., 'Droit européen des marchés publics et autres contrats publics', *RTD eur.*, 2011, p. 423 to 447, sp. n° 13. For a strict interpretation, see also Fatôme, E., and Richer, L., 'Concession de travaux et droit d'exploitation', *AJDA,* 2012, p. 682: 'Therefore, as the right to exploit a property constitutes an attribute of the right of ownership of that property, it seems logical that, for a contract to be regarded as a works concession, that contract must provide that once completed by the contractual partner, the work becomes the property of the contracting authority'. See also Meister, M., 'Champ d'application de la directive 2004/18 et notion de "travaux"', *Europe,* May 2010, p. 29.

97 – See, to that effect, Fatôme, E., and Richer, L., 'Concession de travaux et droit d'exploitation', op. cit. These writers refer to the Opinion delivered by Advocate General Jääskinen in *Commission* v *Spain*.

98 – Fatôme, E., and Richer, L., 'Concession de travaux et droit d'exploitation', op. cit.

99 – To that effect, see Llorens, F., and Soler-Couteaux, P., 'Marchés, DSP, concession de travaux ou d'aménagement: de quelques problèmes de frontière', *Contrats et marchés publics,* Les revues Jurisclasseur, November 2011, indicator 10.

100 – Brown, A., 'Helmut Müller GmbH v Bundesanstalt fur Immobilienaufgaben (C-451/08): clarification on the application of the EU procurement rules to land sales and development agreements' *P.P.L.R.*, 2010, 4, NA 125 to 130.

101 – Paragraph 73 (my emphasis).

---

102 – Ibid., paragraph 78.

---

103 – Article 7.2 of the cooperation contract signed between the municipality and Hurks.

---

104 – Article 7.3 of the cooperation contract.

---

105 – See Opinion of Mr Mengozzi in *Helmut Müller*, cited above, point 90. Mr Jääskinen wrote in his Opinion in *Commission* v *Spain*, cited above (point 97 of the Opinion): ‘However, even assuming that the ownership of land that the developer receives could be said to amount to a right to exploitation being granted, *which is not my view*, such a right is granted for an indefinite period and is thus contrary to the definition given to a concession by the Court in *Helmut Müller* and *pressetext Nachrichtenagentur*’ (my emphasis). As was explained above, I do not, on the other hand, share the view taken by Mr Jääskinen regarding the effect of the indefinite duration of the contract on the classification of the transaction.

JUDGMENT OF THE COURT (Fourth Chamber)

21 December 2011 (*)

(Reference for a preliminary ruling – Protection of the European Union's financial interests – Regulation (EC, Euratom) No 2988/95 – Article 3 – Structural Funds – Regulation (EEC) No 2052/88 – Regulation (EEC) No 4253/88 – Contracting authority in receipt of a subsidy from the Structural Funds – Failure to comply with public procurement rules by the recipient of an ERDF subsidy – Basis for the obligation to recover European Union subsidies in the case of an irregularity – Concept of 'irregularity' – Concept of 'continuous irregularity' – Conditions for recovery – Limitation period – Longer national limitation periods – Principle of proportionality)

In Case C-465/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 5 July 2010, received at the Court on 27 September 2010, in the proceedings

Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration

v

Chambre de commerce et d'industrie de l'Indre,

THE COURT (Fourth Chamber),

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

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the French Government, by G. de Bergues and B. Cabouat, acting as Agents,

– the Polish Government, by M. Szpunar, acting as Agent,

– the European Commission, by A. Steiblytė and J.-P. Keppenne, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling essentially concerns the interpretation of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1) and Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1998 L 374, p. 1), as

amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20) (‘Regulation No 4253/88’).

2 The reference has been made in proceedings between the Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration (Ministry for the interior, overseas territories, local authorities and immigration) and the Chambre de commerce et d’industrie de l’Indre (Chamber of Commerce and Industry for the Indre département) (‘the CCI de l’Indre’) concerning, inter alia, the reimbursement by the latter of a subsidy which it received from the European Regional Development Fund (ERDF) (‘the ERDF subsidy’).

Legal context

Legislation governing the Structural Funds

3 Article 7(1) of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9), as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5) (‘Regulation No 2052/88’) provides:

‘Compatibility and checks

1. Measures financed by the Structural Funds or receiving assistance from the [European Investment Bank (EIB)] or from another existing financial instrument shall be in conformity with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning … the award of public contracts …’

4 Article 23 of Regulation No 4253/88 provides:

‘Financial control

‘1. In order to guarantee completion of operations carried out by public or private promoters, Member States shall take the necessary measures in implementing the operations:

– to verify on a regular basis that operations financed by the Community have been properly carried out,

– to prevent and to take action against irregularities,

– to recover any amounts lost as a result of an irregularity or negligence. Except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member States shall be liable in the alternative for reimbursement of any sums unduly paid …

Member States shall inform the Commission of the measures taken for those purposes and, in particular, shall notify the Commission of the description of the management and control systems established to ensure the efficient implementation of operations. They shall regularly inform the Commission of the progress of administrative and judicial proceedings.

…’

5 Article 8 of Commission Decision 94/1060/EC of 16 December 1994 on the approval of the Single Programming Document for Community structural assistance in the region of Centre concerned by Objective 2 in France (OJ 1994 L 384, p. 83) provides:

‘The Single Programming Document shall be implemented in accordance with Community law, and in particular … the Community Directives on the coordination of procedures for the award of contracts.’

Directive 92/50/EEC

6 Article 1(a)(i) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as amended by Council Directive 93/36/EEC of 14 June 1993 (OJ 1993 L 199, p. 1) ('Directive 92/50'), defines 'public service contracts' as being in principle contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, while the first subparagraph of Article 1(b) of the directive states that the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law are regarded in principle as 'contracting authorities'.

7 Article 7(1) of Directive 92/50 provides that the directive is to apply to public service contracts, the estimated value of which, net of VAT, is not less than EUR 200 000.

Regulation No 2988/95

8 According to the third and fifth recitals in the preamble to Regulation No 2988/95, 'acts detrimental to the Communities' financial interests must … be countered in all areas', and, in that regard, 'irregular conduct, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with this Regulation'.

9 Article 1 of Regulation No 2988/95 provides:

'1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. "Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.'

10 Article 3 of Regulation No 2988/95 provides:

'1. The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1(1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. In the case of multiannual programmes, the limitation period shall in any case run until the programme is definitively terminated.

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.

…

3. Member States shall retain the possibility of applying a period which is longer than that provided for in [paragraph] 1 …'

11 Article 4(1) and (4) of the Regulation states:

1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

– by an obligation to pay or repay the amounts due or wrongly received,

…

4. The measures provided for in this Article shall not be regarded as penalties.'

The facts in the main proceedings and the questions referred for a preliminary ruling

12 On 5 December 1995, the CCI de l'Indre applied for an ERDF subsidy from the préfet de l'Indre (prefect of Indre) in order to implement an operation entitled 'Objectif Entreprises' designed to search for French and foreign investors who might be inclined to move to the *Département* of Indre.

13 That application led to the signing on 20 December 1996 of an agreement between the préfet de l'Indre and the CCI de l'Indre allocating an ERDF subsidy totalling FRF 400 000 (EUR 60 979.60). The agreement included, inter alia, references to Regulations Nos 2081/93 and 2082/93. The aid was paid in two instalments, the first, of FRF 100 000 on 17 December 1997, and, the second, of FRF 300 000 on 8 December 1998.

14 It is also apparent from the order for reference that the CCI de l'Indre received two national subsidies for that same operation. Other local authorities also provided additional funding for the operation.

15 The execution of operation 'Objectif Entreprises' led to an audit pursuant to a letter of engagement from the préfet de le région Centre (prefect of the Centre region) on 9 May 2000. That audit, carried out at the CCI's premises on 14 June 2000, resulted in the adoption of a report dated 14 March 2001, which was communicated to the CCI de l'Indre on 18 July 2001. That report, entitled 'Audit sur l'utilisation des Fonds structurels européens' (Audit on the use of European Structural Funds) concluded, in particular, that the CCI de l'Indre had not complied with public procurement legislation when it awarded the contract for implementation of the operation to the company DDB-Needham.

16 In that regard, the report stated that the CCI de l'Indre had organised a tendering procedure which was published in the *Bulletin officiel des annonces des marchés publics* (BOAMP) of 4 November 1995. It is also apparent from the report that the CCI de l'Indre's Public Procurement Board, meeting on 8 December 1995, decided to award the contract in question to DDB-Needham, stating that its tender was to be chosen in preference to the only other admissible tender because the content of the project was good and because of the lower cost proposed by that company.

17 However, the report found, first, that the contract concluded between the CCI de l'Indre and DDB-Needham did not include a date of signature and, secondly, that a note summarising the project case-file had been addressed to the préfet de l'Indre by the CCI de l'Indre on 27 September 1995 stating that 'the [CCI] has chosen the agency DDB-Needham'.

18 The report thus concluded that 'those factors suggest that the subsequent tendering procedure had the sole purpose of putting on a formal footing the legal situation already existing under the (undated) contract'. Since the discrepancies between the dates entailed, de facto, an irregularity, the report stated that had the public procurement rules been complied with, in particular regarding publication in the *Official Journal of the European Communities*, it might have been possible to elicit a tender at a lower price. Consequently, the authors of the report considered that that possibility gave grounds for demanding repayment of the total amount of the ERDF subsidy.

19 By decision of 23 January 2002 the préfet de l'Indre told the CCI de l'Indre that, given that the public procurement rules had not been complied with when recruiting the service provider responsible for implementing the operation 'Objectif Entreprises', the subsidies, in particular those obtained from the ERDF, had to be reimbursed.

20 The CCI de l'Indre applied to have set aside the orders for payment made by the préfet de l'Indre which corresponded to the amounts claimed. That application was dismissed by an implied decision of the Trésorier-payeur general (paymaster).

21 The CCI de l'Indre therefore brought actions seeking, inter alia, annulment of the préfet de l'Indre's decision of 23 January 2002 before the Tribunal administratif de Limoges (Administrative Court, Limoges), which rejected the actions by judgments of 3 June 2004.

22 On appeal by the CCI de l'Indre, the Cour administrative d'appel de Bordeaux (Administrative Court of Appeal, Bordeaux), by a judgment of 12 June 2007, annulled the judgments and, inter alia, the préfet de l'Indre's decision of 23 January 2002 and the orders for payment made by him. In that regard, that

court found that the prefect's department had been informed, by a letter addressed to it on 27 September 1995 by the CCI de l'Indre, that the CCI had chosen to engage the services of DDB-Needham. That department would therefore have known of that choice before the tendering procedure was launched since, first, the Public Procurement Board that proposed that DDB-Needham's tender be accepted had met on 8 December 1995 and, secondly, the contract had been signed on 26 May 1996 in the presence of the prefect.

23 While recognising that the CCI de l'Indre had failed to comply with the tendering rules applicable to it when awarding the contract, which had, moreover, not been published in the *Official Journal of the European Communities*, the Cour administrative d'appel de Bordeaux nevertheless found that the agreement concluded between the préfet de l'Indre and the CCI de l'Indre allocating the ERDF subsidy made no reference to awarding a contract, that the agreement did not require all documents to be submitted so that there could be verification of whether the public procurement rules had been complied with, and, lastly, that Article 4 of Regulation No 2988/95 had as neither its object nor effect to allow national authorities to withdraw aid financed by Community funds outside the situations provided for by national law.

24 The Cour administrative d'appel de Bordeaux therefore concluded, first, that none of the provisions relied upon by the defendant authority, nor any of the terms of the agreement of 20 December 1996 on the ERDF subsidy, made the granting of the subsidy subject to a condition that any contract that might be concluded by the CCI de l'Indre to implement the operation should comply with the public procurement rules. Secondly, the court held that, since the public authorities had known from 27 September 1995 that DDB-Needham had been chosen, in this instance before the tendering procedure was launched, the subsidies that were subsequently granted cannot be considered to have been implicitly conditional upon compliance with such a condition.

25 By application brought on 16 August 2007 before the Conseil d'État, the ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration appealed against the judgment of 12 June 2007 of the Cour administrative d'appel de Bordeaux.

26 In those circumstances, the Conseil d'État decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Concerning the existence of a legal basis creating an obligation to recover the aid paid to the CCI:

Where a contracting authority that receives subsidies paid from the ERDF has failed to comply with one or more public procurement rules in the implementation of the subsidised operation, when it is not otherwise disputed that that operation is eligible for that fund and that it has been implemented, is there a provision of Community law, in particular in [Regulation] (EEC) No 2052/88 … and [Regulation] (EEC) No 4253/88 …, that creates an obligation to recover subsidies? If such an obligation exists does it apply to any failure to comply with the public procurement rules, or only to some of them? In the latter case, which?

2. If the answer to the first question is at least partly affirmative, then so far as the procedures for recovering unduly paid aid are concerned:

(a) Does the failure, by a contracting authority that receives aid from the ERDF, to observe one or more rules relating to public procurement for the choice of a service provider responsible for implementing the subsidised operation constitute an irregularity within the meaning of Regulation No 2988/95? Does the fact that the competent national authority could not have been unaware, at the time when it decided to grant the aid applied for from the ERDF, that the recipient operator had failed to comply with the public procurement rules in recruiting, before the aid had even been allocated, the provider responsible for implementing the operation financed by the authority affect the characterisation as an irregularity within the meaning of Regulation No 2988/95?

(b) In case of an affirmative answer to question 2(a), and, given that, as the Court of Justice held in Joined Cases C-278/07 to C-280/07 *Josef Vosding Schlacht, Kühl- und*

Zerlegebetrieb and Others [2009] ECR I-457, the limitation period referred to in Article 3 of Regulation No 2988/95 is applicable to administrative measures such as the recovery of aid unduly paid to an operator as a result of irregularities it committed:

– should the starting point for the limitation period be set at the date of payment of the aid to the recipient or at that of the recipient's use of the subsidy received to pay the provider recruited in disregard of one or more of the public procurement rules?

– should that period be regarded as interrupted by the transmission, by the competent national authority to the recipient of the subsidy, of an audit report finding that there was a failure to comply with the public procurement rules and recommending, as a result, that the national authority obtain repayment of the sums paid?

– When a Member State makes use of the possibility afforded by Article 3(3) of Regulation No 2988/95 to apply a longer limitation period for proceedings, in particular where, in France, the ordinary limitation period at the material time is applicable, as set out at Article 2262 of the Civil Code which provides that "all actions, both in rem and in personam, are time-barred after 30 years …", must the compatibility of such a limitation period with Community law, in particular with the principle of proportionality, be determined in the light of the maximum limitation period for proceedings according to the national legislation providing the legal basis for the national administration's demand for recovery or in the light of the period in fact applied in the particular case?

(c) In the case of a negative answer to question 2(a), with regard to payment of aid such as that at issue in the main proceedings, do the financial interests of the Community prevent the court from applying the national rules relating to the withdrawal of decisions creating rights, according to which, except in cases of non-existence, acquisition by fraud or the recipient's request, the administration may withdraw an individual decision creating rights, if it is illegal, only within a period of four months following the date that decision was taken, an administrative decision being none the less capable, in particular when it concerns payment of aid, of being coupled with conditions subsequent, the fulfilment of which allows the withdrawal of the aid in question without any limitation condition – the Conseil d'État having held that that national rule must be interpreted to the effect that it could not be relied on by the recipient of an aid wrongly attributed in application of Community legislation unless it was in good faith?'

Consideration of the questions referred

Question 1

27 By its first question the referring court asks, in essence, whether, in circumstances such as those at issue in the case in the main proceedings, the third indent of Article 23(1) of Regulation No 4253/88, read in conjunction with Article 7(1) of Regulation No 2052/88, constitutes a legal basis allowing national authorities to recover, from the recipient, the whole of a subsidy granted from the ERDF on the ground that, in its capacity as 'contracting authority' within the meaning of Directive 92/50, the recipient has not complied with the requirements of that directive so far as concerns the award of a public service contract, the purpose of which was the implementation of the operation for which the recipient was granted the subsidy.

28 It should be noted that, in the case in the main proceedings, it is common ground that the CCI de l'Indre was a contracting authority, that the value of the public service contract in question exceeded the EUR 200 000 threshold laid down by Article 7 of Directive 92/50 and that, when awarding the contract, the CCI de l'Indre did not comply with the public procurement rules for that type of contract laid down by Directive 92/50, in particular since it had already chosen the contractor before the publication of the contract notice and since, in addition, the notice was not published in the *Official Journal of the European Communities*.

29 In that regard, Community funding of a project is, under Article 7(1) of Regulation No 2052/88, conditional upon the recipient complying with procedures for the award of 'public service contracts', within the meaning of Directive 92/50, when that recipient is a 'contracting authority', within the meaning of that directive, and the public contract through which the recipient intends to implement the project exceeds the threshold laid down in Article 7 of Directive 92/50 (see, to that effect, Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraphs 48 and 49).

30 Pursuant to Article 23(1) of Regulation No 4253/88, the Member States are to take, in order to guarantee completion of operations carried out by public or private promoters, the necessary measures in implementing the operations to verify on a regular basis that operations financed by the European Union have been properly carried out, to prevent and to take action against irregularities and to recover any amounts lost as a result of an irregularity or negligence (see Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others* [2008] ECR I-1561, paragraph 37).

31 Since it is clear from Article 7(1) of Regulation No 2052/88 that measures financed from the European Union budget must be carried out in full compliance with the directives on public procurement, the infringement by the recipient of a European Union subsidy, in its capacity as contracting authority, of the rules laid down in Directive 92/50 for the purpose of implementing the subsidised operation constitutes an irregularity as referred to in Article 23(1) of Regulation No 4253/88 and the behaviour of the recipient must be classified, as the case may be, as 'an irregularity' or 'negligence', within the meaning of that provision.

32 Pursuant to the first subparagraph of Article 23(1) of Regulation No 4253/88, read in conjunction with Article 7(1) of Regulation No 2052/88, where an examination of an operation financed by the ERDF reveals a breach of the conditions laid down for the implementation of that operation, in the present case the condition that European Union legislation on public procurement be complied with when the recipient of the funding is a contracting authority, the Member State which has granted financial assistance from the ERDF may, in order to prevent and to take action against irregularities, revoke that assistance and require repayment thereof from the recipient (see, to that effect, Case C-271/01 *COPPI* [2004] ECR I-1029, paragraph 48).

33 In that regard, Regulation No 4253/88 is the relevant legal basis for recovery and not Regulation No 2988/95 which merely lays down general rules for supervision and penalties for the purpose of safeguarding the European Union's financial interests. Recovery must therefore be carried out on the basis of Article 23(1) of Regulation No 4253/88 (see *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, paragraph 39).

34 It must however be recalled that the exercise of any discretion, by the Member State in question, to decide whether or not it would be expedient to demand repayment of European Union funds unduly or irregularly granted would be inconsistent with the duty imposed on its authorities by the first subparagraph of Article 23(1) of Regulation No 4253/88 to recover any amounts unduly or irregularly paid (see *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, paragraph 38).

35 It follows that Article 23(1) of Regulation No 4253/88 requires the Member States to recover any amounts lost as a result of an irregularity or negligence without there being any need for authority to do so under national law (see *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*, paragraph 40).

36 On that point, it should be noted, as the French Government has pointed out, that, because of such an irregularity, the wrongly received amounts can be considered to be 'lost as a result of an irregularity or negligence' by the recipient, within the meaning of that provision. While referring to the obligation to recover any 'amounts lost as a result of an irregularity or negligence', Article 23(1) of Regulation No 4253/88 goes on to state that, except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member State shall be liable in the alternative for reimbursement of 'any sums unduly paid'. That provision thus equates those two concepts.

37 In the case in the main proceedings, the question also arises whether, where, in the context of implementing an operation, the recipient of a subsidy, in its capacity as contracting authority, has failed to comply with the rules applicable to public procurement, the national authority may, on the basis of the third indent of Article 23(1) of Regulation No 4253/88, request repayment of the whole of the subsidy even though the operation, partially financed by the ERDF, has already been implemented.

38 In that regard, it must be noted, first, that the infringement of obligations whose observance is of fundamental importance to the proper functioning of a Community system, such as the obligations resulting from Directive 92/50 concerning the implementation of projects financed by the ERDF, may be penalised by forfeiture of a right conferred by European Union legislation (see, to that effect, Case C-104/94 *Cereol Italia* [1995] ECR I-2983, paragraph 25; Case C-500/99 P *Conserve Italia* v *Commission* [2002] ECR I-867, paragraphs 100 to 102; and order of 16 December 2004 in Case C-222/03 P *AIPO* v *Commission*, paragraph 53).

39 Secondly, the recovery of sums lost as a result of an irregularity or negligence does not apply only where the operation being financed by Structural Funds has not been carried out in whole or in part (see, to that effect, Case C-240/03 P *Comunità montana della Valnerina* v *Commission* [2006] ECR I-731, paragraph 77).

40 Although it certainly cannot be ruled out, as the Commission has stated, that, in accordance with the principle of proportionality, the finding of a minor irregularity should lead only to a partial reimbursement of the amounts paid, it must nevertheless be made clear that, in any event, where, in the context of a project financed by the ERDF, the recipient is found to have infringed one of the fundamental obligations laid down by Directive 92/50, for example by having decided to award a public service contract before the launch of the tendering procedure and by having, in addition, failed to publish a notice in the *Official Journal of the European Union*, only the possibility that such an irregularity may be penalised by the complete cancellation of the aid can produce the deterrent effect required to ensure the proper management of Structural Funds (see, by analogy, *Conserve Italia* v *Commission*, paragraph 101).

41 In the light of the foregoing, the answer to the first question is that, in circumstances such as those at issue in the case in the main proceedings, the third indent of Article 23(1) of Regulation No 4253/88, read in conjunction with Article 7(1) of Regulation No 2052/88, constitutes a legal basis enabling national authorities to recover from the recipient – without there being any need for authority to do so under national law – the whole of a subsidy granted from the ERDF on the ground that, in its capacity as ‘contracting authority’, within the meaning of Directive 92/50, the recipient has not complied with the requirements of that directive so far as concerns the award of a public service contract whose purpose was the implementation of the operation for which the recipient was granted the subsidy.

Question 2(a)

42 By question 2(a), the referring court asks, in essence, whether the failure, by a contracting authority entitled to an ERDF subsidy, to observe the public procurement rules laid down by Directive 92/50 when awarding the contract whose purpose is to implement the subsidised operation constitutes an ‘irregularity’, within the meaning of Article 1 of Regulation No 2988/95 and, if so, whether the fact that the competent national authority could not have been unaware, when the subsidy was granted, that the recipient had already decided which provider it would entrust with the implementation of the subsidised operation influences that classification.

43 Under Article 1 of Regulation No 2988/95, ‘irregularity’ means any infringement of a provision of European Union law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the European Union or budgets managed by it, either by reducing or losing revenue accruing from own resources collected directly on behalf of the European Union, or by an unjustified item of expenditure.

44 The concept of ‘irregularity’, within the meaning of Regulation No 2988/95, refers to the infringement of a provision of European Union law resulting from an act or omission by an economic operator; consequently the rule concerning the limitation period laid down in the first subparagraph of Article 3(1) of that regulation is not intended to apply to proceedings in respect of irregularities resulting from

errors on the part of the national authorities granting a financial advantage in the name and on behalf of the European Union budget (see, to that effect, Case C-281/07 *Bayerische Hypotheken- und Vereinsbank* [2009] ECR I-91, paragraphs 20 to 22).

45 In circumstances such as those at issue in the case in the main proceedings, notwithstanding its status as a legal person governed by public law, the CCI de l'Indre, as a recipient of a subsidy from the European Union budget, can be treated, for the purposes of applying Regulation No 2988/95, as an economic operator which is alleged to have infringed a provision of European Union law. In that regard, it is common ground that the alleged infringement of the public procurement rules laid down by Directive 92/50 results from an act of the CCI de l'Indre and not of the authority that granted it the ERDF subsidy in the name and on behalf of the European Union budget.

46 Since, as is clear, in particular, from Article 7(1) of Regulation No 2052/88, the Structural Funds cannot be used to finance operations carried out in breach of Directive 92/50, the breach by the recipient of an ERDF subsidy, in its capacity as contracting authority, of procurement rules on public service contracts for the purpose of implementing a subsidised operation involves an unjustified item of expenditure and thus prejudices the European Union budget.

47 Indeed, it should be noted that even irregularities having no specific financial impact may be seriously prejudicial to the financial interests of the European Union (see Case C-199/03 *Ireland* v *Commission* [2005] ECR I-8027, paragraph 31).

48 As regards the fact that the competent authorities were informed by the recipient of the subsidy of its choice of contractor even before the launch of the tendering procedure for awarding the public contract in question, it does not, as such, have any effect on the classification of 'irregularity', within the meaning of Article 1, second subparagraph, of Regulation No 2988/95 (see, by analogy, Case C-94/05 *Emsland-Stärke* [2006] ECR I-2619, paragraph 62).

49 In the light of the foregoing, the answer to question 2(a) is that the failure, by a contracting authority that receives an ERDF subsidy, to comply with the public procurement rules laid down by Directive 92/50 when awarding the contract whose purpose is to implement the subsidised operation constitutes an 'irregularity', within the meaning of Article 1 of Regulation No 2988/95, even if the competent national authority could not have been unaware, when the subsidy was granted, that the recipient had already decided which provider it would entrust with the implementation of the subsidised operation.

Question 2(b), first and second indents

50 By the first and second indents of question 2(b), the referring court seeks, in essence, to ascertain, in circumstances where, in its capacity as contracting authority, the recipient of an ERDF subsidy has not complied with the public procurement rules of Directive 92/50 when awarding the contract whose purpose is to implement the subsidised operation, from what point the limitation period laid down by the first subparagraph of Article 3(1) of Regulation No 2988/95 begins to run and whether that limitation period is interrupted, for the purposes of the third subparagraph of Article 3(1), by the transmission to the recipient of the subsidy of an audit report finding there to have been a failure to comply with the public procurement rules and recommending, as a result, that the national authority demand repayment of the sums paid.

51 It should be recalled that Article 1(1) of Regulation No 2988/95 introduces general rules 'relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law', in order, as is clear from the third recital in the preamble to the regulation, to counter in all areas 'acts detrimental to the Communities' financial interests'.

52 By adopting Regulation No 2988/95, and in particular the first subparagraph of Article 3(1) thereof, the European Union legislature intended to establish a general rule on limitation which was applicable in that area and by which it intended, first, to define a minimum period applied in all the Member States and, secondly, to waive the possibility of recovering sums wrongly received from the European Union budget after the expiry of a four-year period after the irregularity affecting the payments at issue was committed (Case C-131/10 *Corman* [2010] ECR I-0000, paragraph 39, and Joined Cases C-201/10 and C-202/10 *Ze Fu Fleischhandel and Vion Trading* [2011] ECR I-0000, paragraph 24).

53 That limitation rule is applicable to the irregularities referred to in Article 4 of Regulation No 2988/95 which are detrimental to the European Union's financial interests (see Case C-278/02 *Handlbauer* [2004] ECR I-6171, paragraph 34, and *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, paragraph 22).

54 In the case in the main proceedings and in the light of the circumstances of that case, the referring court seeks to ascertain, as regards the determination of the point at which the limitation period begins to run, whether it is the date on which the aid was paid to the recipient or the date on which the recipient used the subsidy to pay the provider recruited in disregard of the rules governing the award of public service contracts laid down by Directive 92/50.

55 In that regard, since funds from the European Union budget cannot be used for operations carried out in breach of the provisions of Directive 92/50, it must be held that, in circumstances such as those at issue in the case in the main proceedings, the funds granted to the recipient are unduly received from the point when the recipient breaches those provisions.

56 In respect of such a breach of the tendering rules laid down by Directive 92/50, which was adopted in order to eliminate barriers to the freedom to provide services and to protect the interests of traders established in a Member State who wish to offer services to contracting authorities established in another Member State (see, in particular, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 32), it should be recalled that the adverse effect on the freedom to provide services arising from the infringement of Directive 92/50 must be found to subsist throughout the entire performance of the contracts concluded in breach of the directive (see Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 36, and Case C-503/04 *Commission* v *Germany* [2007] ECR I-6153, paragraph 29).

57 Indeed, although it is true that certain provisions of the public procurement directives permit the Member States to preserve the effects of contracts concluded in breach of those directives and thus seek to protect the legitimate expectations of the parties to such contracts, the effect of those provisions nevertheless cannot be, unless the scope of the FEU Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis the European Union budget is regarded as in conformity with European Union law following the conclusion of such contracts (see, to that effect, Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, paragraph 39, and Case C-503/04 *Commission* v *Germany*, paragraph 33).

58 It follows that, in circumstances such as those at issue in the case in the main proceedings, the infringement by a recipient of an ERDF subsidy of the rules laid down by Directive 92/50 for the purpose of implementing the subsidised operation, which infringement involves an unjustified item of expenditure and thus prejudices the European Union budget, continues throughout the entire period of performance of the contract unlawfully concluded between the provider and the recipient of the subsidy, with the result that such an irregularity must be considered to be a 'continuous irregularity', within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95.

59 In accordance with that provision, the limitation period applicable to the recovery of a subsidy wrongly paid to the recipient runs from the day on which the irregularity ceased. Consequently, in circumstances such as those at issue in the case in the main proceedings, since the contract to implement the operation subsidised by the ERDF was not rescinded but was performed, the limitation of four years laid down by the first subparagraph of Article 3(1) of Regulation No 2988/95 begins to run from the day on which the performance of the unlawfully awarded public contract is completed.

60 As regards the issue of whether the transmission of an audit report finding that public procurement rules were infringed constitutes an act of investigation or legal proceedings concerning the irregularity such as to interrupt the limitation period pursuant to the third subparagraph of Article 3(1) of Regulation No 2988/95, it should be recalled that, in general, limitation periods fulfil the function of ensuring legal certainty and that such a function would not be wholly fulfilled if the limitation period referred to in Article 3(1) of Regulation No 2988/95 could be interrupted by any act relating to a general check by the national authorities which bears no relation to any suspicion concerning the existence of irregularities regarding sufficiently precisely circumscribed transactions (*Handlbauer*, paragraph 40).

61 However, when the national authorities send a person a report drawing attention to an irregularity in which that person is said to have played a part in connection with a specific operation, ask the person for further information concerning that operation or apply a penalty to the person in connection with that operation, those authorities adopt acts relating to investigation or legal proceedings concerning the irregularity which are sufficiently specific for the purposes of the third subparagraph of Article 3(1) of Regulation No 2988/95 (Case C-367/09 *SGS Belgium and Others* [2010] ECR I-0000, paragraph 69).

62 In the light of the foregoing, the answer to question 2(b), first and second indents, is that, in circumstances such as those at issue in the main proceedings, where, in its capacity as contracting authority, the recipient of an ERDF subsidy has not complied with the public procurement rules of Directive 92/50 when awarding the contract whose purpose is to implement the subsidised operation:

– the irregularity in question must be considered to be a ‘continuous irregularity’, within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95, and, consequently, the limitation period of four years laid down by that provision to recover the subsidy wrongly paid to the recipient begins to run from the day on which the performance of the unlawfully awarded public contract is completed;

– the transmission to the recipient of the subsidy of an audit report finding there to have been a failure to comply with the public procurement rules and recommending, as a result, that the national authority demand repayment of the sums paid constitutes a sufficiently specific act relating to investigation or legal proceedings concerning the ‘irregularity’, within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95.

Question 2(b), third indent

63 By question 2(b), third indent, the referring court asks, in essence, whether, in the light of the principle of proportionality, a Member State may apply a limitation period of 30 years to the recovery of an advantage wrongly obtained from the European Union budget as a longer limitation period for the purposes of Article 3(3) of Regulation No 2988/95.

64 Under the possibility provided for in that provision, the Member States retain wide discretion with regard to the fixing of longer limitation periods which they intend to apply in cases involving an irregularity that is detrimental to the European Union’s financial interests (*Corman*, paragraph 54).

65 However, in light of the objective of protecting the European Union’s financial interests, an objective for which the European Union legislature considered that a limitation period of four, or indeed even three, years was already in itself sufficient to enable the national authorities to bring proceedings in respect of an irregularity detrimental to those financial interests and capable of leading to the adoption of a measure such as recovery of a wrongly obtained advantage, it is apparent that to grant those authorities a period of 30 years goes beyond what is necessary for a diligent public service (*Ze Fu Fleischhandel and Vion Trading*, paragraph 43).

66 The answer to the third indent of question 2(b) is therefore that, where the Member States exercise the right afforded them by Article 3(3) of Regulation No 2988/95, the principle of proportionality precludes application of a 30-year limitation period to the recovery of an advantage wrongly obtained from the European Union budget.

Question 2(c)

67 This question was referred only in the event that question 2(a) was answered in the negative.

68 In view of the answer given to question 2(a), it is not necessary to answer question 2(c) referred by the national court.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **In circumstances such as those at issue in the case in the main proceedings, the third indent of Article 23(1) of Council Regulation (EEC) No 4253/88 of 19 December 1998 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993, read in conjunction with Article 7(1) of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993, constitutes a legal basis enabling national authorities to recover from the recipient – without there being any need for authority to do so under national law – the whole of a subsidy granted from the European Regional Development Fund (ERDF) on the ground that, in its capacity as 'contracting authority', within the meaning of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by Council Directive 93/36/EEC of 14 June 1993, the recipient has not complied with the requirements of that directive so far as concerns the award of a public service contract whose purpose was the implementation of the operation for which the recipient was granted the subsidy.**

2. **The failure, by a contracting authority that receives an ERDF subsidy, to comply with the public procurement rules laid down by Directive 92/50 when awarding the contract whose purpose is to implement the subsidised operation constitutes an 'irregularity', within the meaning of Article 1 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests, even if the competent national authority could not have been unaware, when the subsidy was granted, that the recipient had already decided which provider it would entrust with the implementation of the subsidised operation.**

3. **In circumstances such as those at issue in the main proceedings, where, in its capacity as contracting authority, the recipient of an ERDF subsidy has not complied with the public procurement rules of Directive 92/50 when awarding the contract whose purpose is to implement the subsidised operation:**

   – **the irregularity in question must be considered to be a 'continuous irregularity', within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95, and, consequently, the limitation period of four years laid down by that provision to recover the subsidy wrongly paid to the recipient begins to run from the day on which the performance of the unlawfully awarded public contract is completed;**

   – **the transmission to the recipient of the subsidy of an audit report finding there to have been a failure to comply with the public procurement rules and recommending, as a result, that the national authority demand repayment of the sums paid constitutes a sufficiently specific act relating to investigation or legal proceedings concerning the 'irregularity', within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95.**

4. **Where the Member States exercise the right afforded them by Article 3(3) of Regulation No 2988/95, the principle of proportionality precludes application of a 30-year limitation period to the recovery of an advantage wrongly obtained from the European Union budget.**

[Signatures]

---

* Language of the case: French.

OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 15 September 2011 (1)

Case C-465/10

Ministre de l'Intérieur, de l'Outre-mer et des Collectivités territoriales
v
Chambre de commerce et d'industrie de l'Indre

(Reference for a preliminary ruling from the Conseil d'État (France))

(Protection of the financial interests of the European Union – Subsidies awarded under the European Regional Development Fund – Failure of the recipient to comply with public procurement procedures – Obligation to recover subsidies in the case of an irregularity – Limitation periods)

1. This reference for a preliminary ruling from the French Conseil d'État (Council of State) concerns the interpretation of Regulation No 2052/88, (2) Regulation No 4253/88 (3) and Regulation No 2988/95. (4) At the material time those instruments ('the applicable regulations') were among those governing the European Union's Structural Funds. (5) The Structural Funds (6) are the European Union's main instruments for supporting social and economic development in the Member States. They account for over one third of the EU budget.

2. The referring court asks, first, whether EU law requires the recovery of sums awarded from the ERDF where the recipient (which is a contracting authority (7)) uses the subsidy to carry out an assisted operation in breach of the EU public procurement procedures. Second, it requests guidance on the application of the limitation period in Article 3 of Regulation No 2988/95 in respect of such recovery.

Legal Framework

Regulation No 2052/88

3. Amongst the stated objectives of Regulation No 2052/88 is that of increasing the efficiency of the Structural Funds and coordinating their activities. (8)

4. Article 3(5) requires the Council to adopt the provisions necessary for ensuring coordination between the different Funds on the one hand, and between them and the European Investment Bank ('the EIB') and the other existing financial instruments, on the other.

5. Article 7 is entitled 'Compatibility and checks'. It states, in so far as is relevant:

'1. Measures financed by the Structural Funds … shall be in conformity with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning … the award of public contracts ...

2. Without prejudice to the Financial Regulation, the provisions referred to in Article 3(4) and (5) shall lay down harmonised rules for strengthening checks on structural operations ...'

Regulation No 4253/88

6. Council Regulation No 4253/88 lays down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the Funds.

7. The sixth recital in the preamble to Regulation No 2082/93, (9) which amended Regulation No 4253/88, states that:

'… in application of the principle of subsidiarity, and without prejudice to the Commission's powers, particularly its responsibility for the management of the Community's financial resources, implementation of the forms of assistance contained in the Community support frameworks should be primarily the responsibility of the Member States at the appropriate territorial level according to the specific needs of each Member State'.

8. Article 23(1) of Regulation No 4253/88 provides as follows:

'1. In order to guarantee completion of operations carried out by public or private promoters, Member States shall take the necessary measures in implementing the operations:

– to verify on a regular basis that operations financed by the Community have been properly carried out,

– to prevent and to take action against irregularities,

– to recover any amounts lost as a result of an irregularity or negligence. Except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member States shall be liable in the alternative for reimbursement of any sums unduly paid. For global loans, the intermediary may, with the agreement of the Member State and the Commission, take up a bank guarantee or other insurance covering this risk.

Member States shall inform the Commission of the measures taken for those purposes and, in particular, shall notify the Commission of the description of the management and control systems established to ensure the efficient implementation of operations. They shall regularly inform the Commission of the progress of administrative and judicial proceedings.

…'

9. Article 24 states:

'Reduction, suspension and cancellation of assistance

1. If an operation or measure appears to justify neither part nor the whole of the assistance allocated, the Commission shall conduct a suitable examination of the case in the framework of the partnership, in particular requesting that the Member State or authorities designated by it to implement the operation submit their comments within a specified period of time.

2. Following this examination, the Commission may reduce or suspend assistance in respect of the operation or a measure concerned if the examination reveals an irregularity or a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission's approval has not been sought.

3. Any sum received unduly and to be recovered shall be repaid to the Commission. Interest on account of late payment shall be charged on sums not repaid ...'

Regulation No 2988/95

10. Regulation No 2988/95 sets out a number of general rules regarding checks, administrative measures and penalties for irregularities where payments are made to recipients under Community policies. Previously there were no common rules defining such irregularities.

11. The third, fourth and fifth recitals in the preamble to Regulation No 2988/95 are particularly relevant. The third recital indicates that detailed rules governing the administration and monitoring of Community expenditure are the subject of differing detailed provisions according to the Community policies concerned, but that acts detrimental to the Communities' financial interests must be countered in all areas. (10) The fourth recital states that a common set of legal rules for all areas covered by Community policies is needed in order effectively to combat fraud committed against the Communities' financial interests. The fifth recital recalls that irregularities, and the administrative measures and penalties relating thereto, are provided for in sectoral rules in accordance with Regulation No 2988/95. Finally, as is clear from the 14th recital, Regulation No 2988/95 is sufficiently broad in its horizontal scope for it to require to be based on Article 235 EC and Article 203 EAEC.

12. Article 1 of Regulation No 2988/95 states:

'1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. "Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.'

13. The relevant provisions of Article 2 are the following:

'1. Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of Community law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities' financial interests.

…

3. Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.

4. Subject to the Community law applicable, the procedures for the application of Community checks, measures and penalties shall be governed by the laws of the Member States.'

14. Article 3 provides, inter alia:

'1. The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1(1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. In the case of multiannual programmes, the limitation period shall in any case run until the programme is definitively terminated.

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.

However, limitation shall become effective at the latest on the day on which a period equal to twice the limitation period expires without the competent authority having imposed a penalty, except where the administrative procedure has been suspended in accordance with Article 6(1). [(11)]

…

3. Member States shall retain the possibility of applying a period which is longer than that provided for in paragraphs 1 and 2 respectively.'

15. Article 4 provides that, as a general rule, where an economic operator has wrongly obtained an advantage through an irregularity, that advantage is to be withdrawn (either by way of payment or repayment of the amounts due or wrongly received or through total or partial forfeiture of a security).

16. Article 5 provides for the possibility of applying administrative penalties in cases of intentional irregularities or those caused by negligence.

Regulation No 1083/2006

17. Article 2(7) of Regulation No 1083/2006, (12) which has also been referred to in the written observations to the Court, (13) defines an 'irregularity' as '… any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget'.

National legislation

18. At the material time, Article 2262 of the French Civil Code provided: 'All actions, whether in *rem* or in *personam*, shall be time-barred after 30 years …'.

Facts, procedure and questions referred

19. It appears from the national file that on 5 December 1995 the Chambre de commerce et d'industrie du département de l'Indre (Chamber of Commerce and Industry for the Indre département, 'the CCI') submitted a request for financial assistance to the prefect of that département ('the prefect') to fund an operation known as 'Objectif Entreprises' ('the operation'). The purpose of the operation was to conduct research to ascertain whether French and foreign undertakings might wish to invest and establish themselves in the Indre département. The CCI decided to engage a firm to carry out the operation on its behalf.

20. In answer to written questions put by the Court pursuant to Article 54a of its Rules of Procedure, the French Government made further information and certain documents available. It thus appears that the CCI informed the prefect by letter of 27 September 1995 that it wished to employ the firm DDB-Needham to carry out the operation. That letter was sent before a call for tenders was published in the national official journal (the *Bulletin officiel des annonces des marchés publics*) on 4 November 1995.

21. Following examination of the tenders submitted, DDB-Needham was selected on 8 December 1995, on the ground that the quality of the services offered was higher, and the cost lower, than those of competing firms.

22. On 29 May 1996 the CCI entered into a contract with DDB-Needham for services to be provided over a three-year period. The fees were FF 3 895 380 (EUR 600 000) for 1996 and approximately FF 2 725 560 (EUR 420 000) for 1997 and for 1998.

23. Under an agreement signed on 20 December 1996 (which refers to Regulation No 2081/93 and Regulation No 2082/93 (14)) the CCI received FF 400 000 (EUR 60 979.60) from the ERDF in support of the operation. Two amounts from national funds were also awarded to the CCI for the same purpose. However, it is only the subsidy from the ERDF that is in issue in the current proceedings.

24. The CCI was informed by letter of 9 May 2000 that the operation was to be the subject of an audit conducted by the prefect of the Centre region ('the prefect of the region'). The report, entitled *Audit sur l'utilisation des fonds structurels européens* ('the audit report'), was signed by the prefect of the region and the regional trésorerie générale (finance department) on 14 March 2001. It was communicated to the CCI on 18 July 2001.

25. The following irregularities were identified in the audit report. First, the contract had been awarded to DDB-Needham in breach of the EU public procurement procedures. In particular, the CCI had communicated its choice of DDB-Needham to the prefect before the call for tenders was published. Furthermore, there was nothing indicating that notice of the qualifying contracts relating to the operation had been published in the *Official Journal of the European Communities* (as it was at that time). Second, the contract was signed but not dated.

26. On 23 January 2002 the prefect of the region notified the CCI that an order had been issued requiring, inter alia, repayment of the ERDF subsidy as a result of its failure to comply with the EU public procurement procedures in respect of the implementation of the operation.

27. The CCI's challenge to that order was dismissed by implied decision of the regional Trésorier-payeur général (paymaster).

28. On 3 June 2004 the CCI's application to the tribunal administratif de Limoges (Administrative Court, Limoges) for annulment of the order of the prefect of the region and the decision of the Trésorier-payeur général was rejected.

29. The cour administrative d'appel de Bordeaux (Adminstrative Court of Appeal, Bordeaux) annulled the judgment of the tribunal administratif de Limoges on 12 June 2007. It considered that there was no express provision in the agreement confirming that the CCI was subject to the EU public procurement procedures, nor was there any provision of EU law providing a legal basis for recovery of the funds in question.

30. The ministre de l'Intérieur, de l'Outre-mer et des Collectivités territoriales (Ministry for the interior overseas territories and local authorities) appealed against that ruling to the Conseil d'État, which has stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Concerning the existence of a legal basis creating an obligation to recover the aid paid to the CCI:

Where a recipient of subsidies paid from the ERDF has failed to comply with one or more public procurement procedures in the implementation of the subsidised operation, when it is not otherwise disputed that the project is eligible for that fund and that it has been implemented, is there a provision of European Union law, in particular in [Regulation No 2052/88] and [Regulation No 4253/88], that creates an obligation to recover those subsidies? If such an obligation exists does it apply to any failure to comply with the public procurement procedures, or only to some of them? In the latter case, which?

2. If the answer to the first question is at least partly affirmative:

(a) Does the failure, by a recipient entitled to aid from the ERDF, to observe one or more rules relating to public procurement for the choice of a service provider responsible for implementing the subsidised operation constitute an irregularity within the meaning of Regulation No 2988/95? Does the fact that the competent national authority could not have been unaware, at the time when it decided to grant the aid applied for from the ERDF, that the recipient had failed to comply with the public procurement procedures in recruiting, before the aid had even been allocated, the provider responsible for implementing the operation financed by the recipient affect the characterisation as an irregularity within the meaning of Regulation No 2988/95?

(b) In case of an affirmative answer to question 2(a), and, given that, as the Court of Justice held in *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others* [(15)], the limitation period referred to in Article 3 of Regulation No 2988/95 is applicable to administrative measures such as the recovery of unduly paid subsidies to a recipient as a result of irregularities it committed:

– Should the starting point for the limitation period be set at the date of payment of the aid to the recipient or at the date on which he used the subsidy received to pay the provider recruited in disregard of one or more of the public procurement procedures?

– Should that period be regarded as interrupted by the transmission, by the competent national authority to the recipient of the subsidy, of an auditor's report finding that there was a failure to comply with the public procurement procedures and recommending, as a result, that the national authority obtain repayment of the sums paid?

– When a Member State makes use of the possibility afforded by Article 3(3) of Regulation No 2988/95 to apply a longer limitation period for proceedings, in particular where, in France, [the ordinary limitation period at the material time is 30 years], must the compatibility of such a limitation period with European Union law, in particular with the principle of proportionality, be determined in the light of the maximum limitation period for proceedings according to the national legislation providing the legal basis for the national administration's demand for recovery or in the light of the period in fact applied in the particular case?

(c) In case of a negative answer to question 2(a), with regard to payment of aid such as that at issue in the main proceedings, do the financial interests of the European Union prevent the court from applying the national rules relating to the withdrawal of decisions creating rights, according to which, except in cases of non-existence, acquisition by fraud or the recipient's request, the administration may withdraw an individual decision creating rights, if it is illegal, only within a period of four months following the date that decision was taken, an administrative decision being none the less capable, in particular when it concerns payment of aid, of being coupled with conditions subsequent, the fulfilment of which allows the withdrawal of the aid in question without any limitation condition – the Conseil d'État having held that that national rule must be interpreted to the effect that it could not be relied on by the recipient of an aid wrongly attributed in application of EU legislation unless it was in good faith?'

31. Written observations have been submitted by the French and Polish Governments and the Commission. No hearing was requested and none has been held.

Assessment

Preliminary observations

32. Before commencing the analysis certain preliminary remarks are in order.

33. First, it is common ground in the main proceedings that the operation was eligible for financial support from the ERDF.

34. Second, there is no dispute before the national court that the contract between the CCI and DDB-Needham falls within the scope of Directive 92/50/EEC. (16) Its value is above the threshold of EUR 200 000 laid down in Article 7 of that directive and it covers services listed in Annex IA. Consequently the CCI, as a contracting authority for the purposes of Directive 92/50/EEC, should have published the requisite notice in the *Official Journal of the European Communities*. (17)

35. Third, as regards the applicable regulations, Regulation No 2988/95 introduced a general framework for administrative measures and penalties concerning irregularities with regard to EU law, in order to counter 'acts detrimental to the [Union's] financial interests … in all areas.' (18) That Regulation is to be read in conjunction with the specific EU legislation which applies in the present matter, namely Regulation No 2052/88 (19) and Regulation No 4253/88. (20)

36. Article 4(1) of Regulation No 2988/95 provides, as a general rule, that any irregularity shall 'involve' (that is, as I understand it, 'lead to' (21)) withdrawal of the wrongly obtained advantage. More specifically, Article 23(1) of Regulation No 4253/88 requires the Member States to take the necessary measures to verify that operations financed by the Structural Funds have been properly carried out, to prevent and to take action against irregularities and to recover any amounts lost as the result of an irregularity or negligence. (22)

37. Fourth, shared management – that is, cooperation between the Member States and the Commission – is the method that the EU legislator has chosen to implement the budget in respect of the

Structural Funds. However, implementation of assistance under the Funds is primarily the responsibility of the Member States.

38. Furthermore, as is clear from Article 280 EC (now Article 325 TFEU), both the European Union and the Member States are obliged to take measures to counter fraud and any other illegal activities that affect the EU's financial interests.

39. Moreover, the Court has held that, in carrying out their obligations, the Member States do not have any discretion to decide whether it would be expedient to demand repayment of European Union funds unduly or irregularly paid. (23)

40. Fifth, the Court has ruled that Article 23(1) of Regulation No 4253/88 requires the Member States to recover any amounts 'lost' as the result of an irregularity, without there being any need for authority to do so under national law. (24)

41. Sixth, for the purposes of Article 24 of Regulation No 4253/88, no distinction of a quantitative or qualitative nature is to be drawn concerning the irregularities which may give rise to reductions in assistance. (25) Whether an irregularity causes major loss, or whether an irregularity is of a 'technical nature' are alike immaterial. An irregularity is an irregularity. (26)

42. Finally, in the present case, it is not disputed that the operation (Objectif Entreprises) was actually carried out. On that basis, the parties submitting observations to the Court agree that the subsidy in question cannot, strictly speaking, be regarded as 'lost' within the meaning of the third indent of Article 23(1) of Regulation No 4253/88.

Questions 1 and 2a

43. It is appropriate to consider questions 1 and 2a together. Both concern the meaning of an 'irregularity' and whether the applicable regulations require Member States to recover sums paid from the Funds.

44. In question 1, the referring court asks in essence whether Member States are obliged to recover sums awarded from the ERDF where the recipient failed to respect the EU public procurement procedures when it engaged a firm to carry out the subsidised operation. The national court asks also whether such an obligation, if it exists, applies to every failure to comply with those rules. If so, it then asks whether such a failure constitutes an irregularity for the purposes of Regulation No 2988/95.

45. The French Government submits that Article 23(1) of Regulation No 4253/88 should be interpreted consistently with both Regulation No 2052/88 and Regulation No 2988/95.

46. France contends further that the basis for recovery of the subsidy is not the third indent of Article 23(1) of Regulation No 4253/88, because the funds at issue cannot be considered as 'lost' for the purposes of that provision. Rather, the legal basis for recovery should be deemed to be the second indent of Article 23(1) ('to prevent and to take action against irregularities'). France submits further that the Court's case-law concerning Article 24 of Regulation No 4253/88 should apply by analogy: therefore, the funds at issue should be considered as unduly paid.

47. Poland submits that, in cases such as the present, it is necessary to take account of the objective of Article 23(1) of Regulation No 4253/88, namely to guarantee completion of operations which receive financial assistance from the Funds. Each case should be assessed on its merits. Poland contends that Article 2(7) of Regulation No 1083/2006 (27) should apply by analogy to the interpretation of Article 23(1) of Regulation No 4253/88. Thus, in order for an irregularity to arise as the result of an infringement of EU law, that infringement must have the effect of prejudicing the European Union's budget by charging an unjustified item of expenditure to it.

48. Poland argues that a public procurement procedure in which there is no call for tenders has such an effect; and the Member State should therefore take action to recover the sums paid. However, Poland considers that an infringement of the EU public procurement procedures which has no effect on the European Union's budget does not result in an irregularity for the purposes of Article 2(7) of

Regulation No 1083/2006. Consequently, such an infringement cannot be an irregularity for the purposes of Article 23(1) of Regulation No 4253/88.

49. The Commission takes the view that the applicable regulations should be interpreted in conjunction with each other. The fact that the sums at issue were not 'lost' is irrelevant to the question whether Article 23(1) of Regulation No 4253/88 provides a legal basis for recovery of the ERDF subsidy.

50. Like the French Government and the Commission, I consider that the applicable regulations should be construed together.

51. Since Article 2(7) of Regulation No 1083/2006 did not apply at the material time, it may be disregarded for present purposes.

52. The term 'irregularity' is not defined in Regulation No 2052/88 or Regulation No 4253/88.

53. However, if the applicable regulations are to be interpreted in conjunction with each other, 'irregularity' must be construed consistently – that is, in the same way in each regulation.

54. Article 7(1) of Regulation No 2052/88 provides that measures financed by the Structural Funds must be in conformity with the Treaties and with Community policies, in particular those concerning the award of public contracts.

55. Article 1(2) of Regulation No 2988/95 states that an irregularity is 'any infringement of a provision of Community law resulting from an act or omission by an economic operator' which has '… the effect of prejudicing the general budget of the Communities or budgets managed by them' … 'by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure'.

56. In the present matter the infringement of Community law (now EU law) is not in dispute. It is acknowledged that the CCI (an 'economic operator' for the purposes of Article 1(2) of Regulation No 2988/95 and a 'contracting authority' within the meaning of Directive 92/50/EEC) failed to respect the EU public procurement procedures in awarding the contract to carry out the operation 'Objectif Entreprises'.

57. It follows that the operation financed by the ERDF subsidy failed to comply with Article 7(1) of Regulation No 2052/88.

58. Does that infringement of EU law have the effect of prejudicing the general budget of the European Union or the budgets (such as the Structural Funds) managed by the EU for the purposes of Article 1(2) of Regulation No 2988/95?

59. The legislature's intention in enacting Article 7(1) of Regulation No 2052/88 seems to have been to ensure that expenditure incurred by the European Union in the context of the Structural Funds is strictly limited to operators who comply with the rules of EU law and is not used to finance conduct that is contrary thereto. (28)

60. It follows that expenditure incurred in contravention of EU law would naturally be regarded as prejudicial to the EU budget.

61. In *Commission* v *Ireland* (29) the Court considered the Commission's powers under Article 24 of Regulation No 4253/88 to recover sums awarded to Ireland under the European Social Fund ('the ESF'). The Irish authorities conceded that an irregularity (albeit unintentional) had occurred in so far as the audit trail regarding the funds in issue was not in accordance with the ESF best practice. (30) The irregularity had not led to any undue financing or over-financing by the Community in that case. None the less the Commission sought, pursuant to Article 24 of Regulation No 4253/88, to reduce the amount of financial assistance originally granted.

62. The Court rejected Ireland's contention that irregularities of a 'technical' nature were not prejudicial to the EU budget. The Court held that even irregularities having no specific financial impact could be seriously prejudicial to the financial interests of the European Union and to compliance with EU law and for that reason justify the application of financial corrections on the part of the Commission. (31)

63. In *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, (32) the Court emphasised that Articles 23 and 24 of Regulation No 4253/88 should be construed together.

64. I therefore consider that the Court's approach in *Commission* v *Ireland* should apply by analogy to the interpretation of Article 23 of Regulation No 4253/88.

65. Thus, even irregularities that have no specific financial impact and are not quantifiable as such are none the less to be considered to be seriously prejudicial to the financial interests of the EU.

66. Does the prejudice to the EU budget (or budgets managed by the EU) here result in a loss of revenue or in charging an unjustified item of expenditure?

67. In the present matter there are no details of the specific financial cost of the irregularity. It may in fact be impossible to assess. (33)

68. None the less it may reasonably be supposed that, had the CCI as the contracting authority complied with the EU public procurement procedures, the overall cost of financing the operation might perhaps have been less. To that extent, payment of the ERDF subsidy could be regarded as having resulted in an unjustified item of expenditure under Article 1(2) of Regulation No 2988/95.

69. Thus, in my view, it follows both from the language and the purpose of the applicable regulations and from the Court's judgment in *Commission* v *Ireland*, applied by analogy, that a failure to comply with Article 7(1) of Regulation No 2052/88 has the effect of prejudicing the budget of the European Union or the budgets of the Structural Funds by permitting an unjustified item of expenditure and is therefore an irregularity for the purposes of Article 1(2) of Regulation No 2988/95 and Article 23 of Regulation No 4253/88.

70. In such circumstances Member States are obliged to take action for recovery of the sums unduly paid.

71. Does that mean that they must pursue the recipient for the full amount of the subsidy?

72. Article 2(1) of Regulation No 2988/95 requires Member States to introduce administrative measures '… in so far as they are necessary to ensure the proper application of Community law …'. Such measures must be 'effective, proportionate and dissuasive' in order to provide adequate protection for the European Union's financial interests. Article 2(3) states that EU law 'shall determine the nature and scope of administrative measures necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility'. (34)

73. In order to safeguard the EU budget (and the individual budgets managed by the European Union, such as the Structural Funds) the Member States are under an obligation to recover sums paid in the event of an irregularity. Under Article 4(1) of Regulation No 2988/95, the general rule is that any irregularity shall lead to the withdrawal of the wrongly obtained advantage. (35) In discharging that obligation, Member States should therefore proceed to seek recovery of the sum that represents 'the wrongly obtained advantage'. That may require repayment of the full subsidy originally granted; or it may only require partial repayment, involving a lesser amount. (36)

74. The facts found by the national court show that all the relevant steps in selecting the service provider to carry out Objectif Entreprises took place before the subsidy was awarded. (37) The particular nature of the irregularity that arose (failure to run a tendering process in accordance with the relevant EU rules) means, however, that it is impossible to identify and calculate a specific loss 'caused' by the irregularity. The service provider initially identified and subsequently selected appears

to have been the one offering the best value for money within the national tendering procedure that *was* carried out. However, had the contract been duly advertised under the EU public procurement procedures, service providers from other Member States might have been interested and might perhaps have put in tenders that represented better value for money. How much (if at all) better, no one can say. Moreover, since the operation was financed partly from the ERDF and partly from national funds, it is not possible to say how much of any (hypothetical) resulting saving would have been credited to the EU budget and how much to the national budget.

75. All that can be said with certainty is that the operation for which the advantage was afforded did indeed take place; but that it might perhaps have cost less if the EU public procurement procedures had been respected; that the service provider selected might not have been the same; and that there might have been a corresponding reduction in the amounts chargeable to the national budget and to the EU budget.

76. In such circumstances, what is the national court to do?

77. In theory, there are three possibilities: to recover nothing, to recover the subsidy in full, or to recover some intermediate amount that is commensurate with the loss caused to the EU budget by the failure to respect the EU public procurement procedures.

78. For the reasons that I have just given, I would rule out the third option in the present case.

79. That leaves nil recovery or recovery in full.

80. Nil recovery seems to me to be incompatible with the principles underpinning the Court's case-law thus far. (38) It would send entirely the wrong message, in terms of the obligation for recipients of EU funds to respect the rules governing the grant of such funds.

81. It is true that recovery in full may seem, in the circumstances of this case, a harsh result. There may, in reality, have been little or no actual detriment to the EU budget. However, it seems to me that there are nevertheless at least three cogent reasons for concluding that the subsidy should indeed be recovered in full.

82. First, under Article 2(3) of Regulation No 2988/95 the national authorities in executing their obligation to recover the sums in question are required to have regard, inter alia, to the nature and seriousness of the irregularity and the degree of responsibility involved. In the present case, the prior information communicated to the prefect indicating a total failure to respect the EU public procurement procedures must, it seems to me, be a very significant factor to be taken into account.

83. Second, the EU public procurement procedures are intended to be applied to all contracts above the threshold value precisely in order to open up those contracts to potential service providers from other Member States. It is of course to be hoped that that process will (often) result in better value for money than would be the case were a purely national tendering procedure to take place. But that is only part of the story. An equally important element is that following the procedures enhances the proper functioning of the single market.

84. Third, in the circumstances of this case a choice between nil recovery and full recovery is unavoidable. Applying Article 2(1) of Regulation No 2988/95 (which requires that the measures to ensure the proper application of [EU] law should be 'effective, proportionate and dissuasive'), nil recovery would be neither effective nor dissuasive. Recovery in full is both effective and dissuasive. Since partial recovery is here not an option, recovery in full is also proportionate.

85. The referring court wonders, however, whether classification as an irregularity could be affected by the fact that the prefect must have been aware, when he granted the ERDF subsidy to the CCI, that there had been a failure to comply with the EU public procurement procedures in selecting the service provider.

86. In *Emsland-Stärke* (39) the Court held that the fact that the competent national authority was informed of an irregularity does not in itself mean that the irregularity in question cannot be described

as an irregularity ‘caused by negligence’ or ‘intentional’ within the meaning of Article 5(1) of Regulation No 2988/95. By the same token, therefore, such a circumstance cannot alter the classification of the conduct in question as an irregularity for the purposes of Article 23(1) of Regulation No 4253/88.

87. In my view, the answer to the first question and question 2a should therefore be that where a recipient of subsidies from the Structural Funds which is a contracting authority for the purposes of the EU public procurement procedures, fails to comply with those procedures in selecting a service provider to conduct an operation funded in whole or in part from those Funds, the second indent of Article 23(1) of Regulation No 4253/88 requires Member States to take action for recovery of the subsidies in question. In such circumstances the conduct of the recipient constitutes an irregularity within the meaning of Article 1(2) of Regulation No 2988/95.

Question 2b

88. Question 2b concerns the interpretation of Article 3 of Regulation No 2988/95.

89. The referring court asks three questions concerning the limitation period applicable in the circumstances of the main proceedings. First, when did it start? Second, was it interrupted by the communication of the audit report to the CCI by the prefect of the region? Third, what are the criteria for determining the maximum length of the limitation period for the purposes of Article 3(3) of Regulation No 2988/95?

90. The Commission submits that the limitation period started when the CCI decided to award the contract to DDB-Needham in breach of the EU public procurement procedures or, in the alternative, when it decided which type of procedure to follow and whether to call for tenders.

91. France contends that the period started when the CCI paid DDB-Needham under the contract. That payment constituted the irregularity for the purposes of the legislation in issue, since the CCI could have chosen to run a proper procurement procedure at any point up until then.

92. The Polish Government submits that the limitation period started from the date of payment of the ERDF subsidy to the CCI. Poland argues that an infringement of the EU public procurement procedures becomes an irregularity within the meaning of Article 1(2) of Regulation No 2988/95 only at the point when the EU budget is prejudiced. Such a prejudice occurs when funds are paid out under the budget. Poland contends further that the amount to be recovered is equivalent to the difference between the amount paid following the non-compliant procedure and the amount that would have been paid if the service provider had been chosen in conformity with the EU public procurement procedures. (40)

93. Regulation No 4253/88 does not lay down any rules concerning the limitation period applicable to an action for the recovery of sums unduly awarded. In my view, the period set out in Article 3(1) of Regulation No 2988/95 must therefore apply. (41)

94. According to that provision, read in conjunction with Article 1(1) and (2) of the same regulation, the limitation period starts when the irregularity resulting from the act or omission of the recipient of the subsidy has the effect of prejudicing the European Union’s budget (or budgets managed by the EU, such as the Structural Funds) by, inter alia, incurring unjustified expenditure.

95. That happened when the ERDF subsidy was awarded to the CCI. The date of the agreement to award the subsidy (20 December 1996) thus marked the beginning of the limitation period for the purposes of Article 3(1) of Regulation No 2988/95. That was the point at which expenditure by the ERDF was committed. At that stage, the irregularities in the procurement procedure – namely, the fact that the CCI had chosen DDB-Needham without publishing a call for tenders in the *Official Journal of the European Communities* and had indicated its intention to choose that firm even before publishing any call for tenders – had already arisen. (42)

96. As to the second question – whether the limitation period was interrupted by the communication of the auditor’s report by the prefect of the region to the CCI – it is clear from the third subparagraph of

Article 3(1) of Regulation No 2988/95 that the limitation period is interrupted by any act of the competent national authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity, and starts again following each interrupting act. (43)

97. The communication of the audit report constituted an act of a competent national authority concerning the investigation of an irregularity. (44) The audit report was, in my view, sufficiently specific and precise to interrupt the limitation period for proceedings within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95. (45)

98. The third question is: what criteria determine the maximum length of the limitation period?

99. As the Court acknowledged in *Ze Fu Fleischhandel*, (46) the Member States enjoy a discretion under Article 3(3) of Regulation No 2988/95 to fix a longer limitation period than the four years provided for in Article 3(1) of that regulation.

100. However, the Court went on to hold that 'in light of the objective of protecting the European Union's financial interests, an objective for which the European Union legislature considered that a limitation period of four, or indeed even three, years was already in itself sufficient to enable the national authorities to bring proceedings in respect of an irregularity detrimental to those financial interests and capable of leading to the adoption of a measure such as recovery of a wrongly received advantage, it is apparent that to grant those authorities a period of 30 years goes beyond what is necessary for a diligent public service'. (47)

101. In my view the Court's reasoning in *Ze Fu Fleischhandel* should apply by analogy to the present matter.

102. It follows that, if the Member State concerned exercises the discretion which it enjoys under Article 3(3) of Regulation No 2988/95, the principle of proportionality nevertheless precludes application of a 30-year limitation period to proceedings relating to the repayment of wrongly received funds.

Question 2c

103. Question 2c asks essentially whether, where there is no irregularity for the purposes of Article 1(2) of Regulation No 2988/95, any issue of recovery should be governed by national law or whether the European Union's financial interest in recovering funds precludes the national judge from applying national rules on the withdrawal of decisions creating rights.

104. Since I am of the view that the issue is governed by European Union law, it follows that national law does not apply, and there is no need to answer this part of the question.

Conclusion

105. Accordingly, I am of the opinion that, in answer to the questions referred by the French Conseil d'État, the Court should rule as follows:

Where a recipient of subsidies from the Structural Funds which is a contracting authority for the purposes of the EU public procurement procedures, fails to comply with those procedures in selecting a service provider to conduct an operation funded in whole or in part from those Funds:

– The second indent of Article 23(1) of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993, requires Member States to take action for recovery of the subsidies in question.

– The conduct of the recipient constitutes an irregularity within the meaning of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the

European Communities' financial interests.

– The fact that the competent national authority could not have been unaware of the irregularity cannot alter the classification of the conduct in question as an irregularity for the purposes of Article 23(1) of Regulation No 4253/88.

– The limitation period starts on the date that the ERDF subsidy was awarded to the recipient for the purposes of Article 3(1) of Regulation No 2988/95.

– An audit report communicated by the competent national authority is sufficiently specific and precise to interrupt the limitation period for the purposes of Article 3(1) of Regulation No 2988/95.

– If the Member State concerned exercises the discretion which it enjoys under Article 3(3) of Regulation No 2988/95, the principle of proportionality nevertheless precludes application of a 30-year limitation period to proceedings relating to repayment of wrongly received refunds.

---

1 – Original language: English.

---

2 – Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on the coordination of their activities between themselves and with the operations of the European Investment Bank and other existing financial instruments (OJ 1988 L 185, p. 9, as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993, OJ 1993 L 193, p. 5).

---

3 – Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1, as amended by Council Regulation No 2082/93 of 20 July 1993, OJ 1993 L 193, p. 20).

---

4 – Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

---

5 – Regulation No 2052/88 and Regulation No 4253/88 were subsequently repealed by Council Regulation (EC) No 1260/1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1), which was in turn replaced by Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).

---

6 – The three main Structural Funds are the European Regional Development Fund ('ERDF'), the European Social Fund and the Cohesion Fund. I shall refer to them as 'the Structural Funds' or 'the Funds'.

---

7 – As laid down in Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) ('Directive 92/50/EEC'). A 'contracting authority' is defined in Article 1(b) of that Directive.

---

8 – See the third recital in the preamble, referring to Article 130d of the EEC Treaty (now, after several amendments, Article 177 TFEU). The current text of Articles 1 to 19 of Regulation No 2052/88 appears in Regulation No 2081/93, cited in footnote 2 above.

---

9 – Cited in footnote 3 above. The text of Articles 1 to 33 of Regulation No 4253/88 now appears in Regulation No 2082/93.

---

10 – See point 35 and footnote 18 below.

---

11 – Article 6(1) provides for the possibility of suspension if criminal proceedings are initiated.

---

12 – Cited in footnote 5 above.

---

13 – See point 47 below.

---

14 – See respectively footnotes 2 and 3 above.

---

15 – Joined Cases C-278/07 to C-280/07 [2009] ECR I-457.

---

16 – Cited in footnote 7 above.

---

17 – Article 15(2) of Directive 92/50/EEC.

---

18 – *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, cited in footnote 15 above, at paragraphs 25 to 28. See also the third recital to the preamble to Regulation No 2988/95, summarised in point 11 above.

---

19 – Cited in footnote 2 above. See further the Commission's Proposal for a Council Regulation amending that regulation, 10 March 1993 (COM (1993) 67 final, p. 3).

---

20 – Cited in footnote 3 above. See further the Proposal cited in footnote 19 above, p. 3.

---

21 – Thus, for example, the French says, 'Toute irrégularité entraîne, en règle générale, le retrait de l'avantage indûment obtenu …'

---

22 – Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* [2008] ECR I-1561, paragraph 37.

---

23 – *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, paragraph 38.

---

24 – *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, paragraph 40.

---

25 – Case C-199/03 *Commission* v *Ireland* [2005] ECR I-8027, paragraph 30.

---

26 – One may perhaps recall the (no doubt apocryphal) exchange between the Victorian mistress of the house and the housemaid: 'Mary, what is this? I find that you have had a baby!' 'Please, ma'am, it's only a little one.'

---

27 – The wording of Article 2(7) of Regulation No 1083/2006 is similar to that of Article 1(2) of Regulation No 2988/95. See point 17 above.

28 – See the Opinion of Advocate General Léger in Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73 at point 108; see also *Commission* v *Ireland*, cited in footnote 25 above, paragraph 26.

29 – Cited in footnote 25 above.

30 – *Commission* v *Ireland*, paragraphs 15 and 16.

31 – *Commission* v *Ireland*, paragraphs 29 to 31.

32 – Cited in footnote 22 above, paragraph 54.

33 – See point 21 above.

34 – See point 13 above.

35 – See point 15 above.

36 – See, for example, Case C-271/01 *COPPI* [2004] ECR I-1029, which concerned revocation of assistance from the European Agricultural Guidance and Guarantee Fund (EAGGF) and partial repayment of that assistance under Article 23(1) of Regulation No 4253/88. That article provides for the recovery of 'any amounts lost as a result of an irregularity or negligence' (see point 8 above). Paragraphs 16, 22, 29, 42, 45 and 48 of the judgment all refer to, and implicitly endorse, partial rather than full repayment.

37 – See points 20 to 23 above.

38 – See points 38 and 39 above.

39 – Case C-94/05 [2006] ECR I-2619, paragraph 62.

40 – See points 70 to 84 above.

41 – See, by analogy, Case C-367/09 *SGS Belgium* [2010] ECR I-0000, paragraph 66 and case-law cited.

42 – See points 20 and 25 above.

43 – *SGS Belgium*, cited in footnote 41 above, paragraph 67.

44 – See point 24 above.

45 – See, by analogy, *SGSBelgium*, cited in footnote 41 above, paragraphs 67 to 70.

---

46 – Joined Cases C-201/10 and C-202/10 *Ze Fu Fleischhandel and Vion Trading* [2011] ECR I-0000, paragraphs 41 and 42.

---

47 – Paragraph 43 of the judgment; see also paragraphs 44 to 46.

JUDGMENT OF THE COURT (Third Chamber)

10 May 2012 (*)

(Failure of a Member State to fulfil obligations — Directive 2004/18/EC — Procedures for the award of public works contracts, public supply contracts and public service contracts — Contract for the supply, installation and maintenance of dispensing machines for hot drinks, and the supply of tea, coffee and other ingredients — Article 23(6) and 23(8) — Technical specifications — Article 26 — Conditions for performance of the contract — Article 53(1) — Criteria for award of the contracts — Most economically advantageous tender — Products derived from organic agriculture and fair trade — Use of labels in the formulation of the technical specifications and the award criteria — Article 39(2) — Concept of 'additional information' — Article 2 — Principles for award of contracts — Principle of transparency — Articles 44(2) and 48 — Verification of the suitability and choice of participants — Minimum level of technical or professional abilities — Compliance with 'criteria of sustainability of purchases and socially responsible business')

In Case C-368/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 22 July 2010,

European Commission, represented by C. Zadra and F. Wilman, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by C. Wissels and M. de Ree, acting as Agents,

defendant,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, G. Arestis and D. Šváby (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 October 2011,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2011

gives the following

Judgment

1 By its application, the European Commission requests the Court to find that, because in a tendering procedure for a public contract for the supply and management of automatic coffee machines which was the subject of a contract notice published in the *Official Journal of the European Union* on 16 August 2008, the province of North Holland:

– inserted in the technical specifications a condition requiring the Max Havelaar and EKO labels or in any event labels based on similar or the same criteria;

– included, for appraising the ability of operators, criteria and evidence concerning sustainable purchasing and socially responsible business, and

– included, when formulating award criteria, a reference to the Max Havelaar and/or EKO labels, or in any event labels based on the same criteria,

the Kingdom of the Netherlands failed to fulfil its obligations under, respectively, Article 23(6) and (8), Articles 2, 44(2) and 48(1) and (2) and Article 53(1) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigendum OJ 2004 L 351, p. 44), as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ 2007 L 317, p. 34) (‘Directive 2004/18’).

I – Legal context

2 Directive 2004/18 contains inter alia the following recitals in its preamble:

‘(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

...

(5) Under Article 6 of the [EC] Treaty [corresponding to Article 11 TFEU], environmental protection conditions are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that [EC] Treaty [corresponding, in essence, to Article 3 TFEU to Article 6 TFEU and Article 8 TFEU], in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.

...

(29) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and conditions, and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting authorities must be able to provide a reason for any decision that equivalence does not exist in a given case. Contracting authorities that wish to define environmental conditions for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. They can use, but are not obliged to use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-)national eco-labels or any other eco-label providing the conditions for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and

environmental organisations can participate, and providing the label is accessible and available to all interested parties. … The technical specifications should be clearly indicated, so that all tenderers know what the conditions established by the contracting authority cover.

...

(33) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the conditions — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

...

(39) Verification of the suitability of tenderers, in open procedures, and of candidates, in restricted and negotiated procedures with publication of a contract notice and in the competitive dialogue, and the selection thereof, should be carried out in transparent conditions. For this purpose, non-discriminatory criteria should be indicated which the contracting authorities may use when selecting competitors and the means which economic operators may use to prove they have satisfied those criteria. In the same spirit of transparency, the contracting authority should be required, as soon as a contract is put out to competition, to indicate the selection criteria it will use and the level of specific competence it may or may not demand of the economic operators before admitting them to the procurement procedure.

...

(46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: “the lowest price” and “the most economically advantageous tender”.

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. ...

Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications and the value for money of each tender to be measured.

In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental conditions, may enable the contracting authority to meet the needs of the public concerned, as expressed in the

specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social conditions, in response in particular to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.’

3 According to Article 1(2)(c) of Directive 2004/18, public supply contracts are public contracts other than those referred to in point (b) of that subparagraph, having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products, and a public contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations is to be considered a public supply contract. Under Article 7 of that directive, the directive is applicable to such a contract, unless it has been awarded in the defence field or by a central purchasing body, the value of which exclusive of value added tax is estimated to be equal to or greater than EUR 206 000 when it is awarded by a contracting authority not covered by Annex IV to the directive. That annex does not refer to provinces in relation to the Kingdom of the Netherlands.

4 Article 2 of Directive 2004/18 provides:

‘Principles of awarding contracts

Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

5 Paragraph 1(b) of Annex VI to Directive 2004/18 defines the concept of ‘technical specification’, in relation to public supply contracts, as ‘a specification in a document defining the required characteristics of a product … such as quality levels, environmental performance levels, design for all conditions … and conformity assessment, performance, use of the product, safety or dimensions, including conditions relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures.’

6 Article 23 of that directive provides:

‘1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation …

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. ... the technical specifications shall be formulated:

...

b) or in terms of performance or functional conditions; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

...

6. Where contracting authorities lay down environmental characteristics in terms of performance or functional conditions as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by and any other eco-label, provided that:

– those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,

– the conditions for the label are drawn up on the basis of scientific information,

– the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and,

– they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

...

8. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words "or equivalent".'

7 Article 26 of Directive 2004/18 provides:

'Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

8 Article 39(2) of Directive 2004/18 states:

'Provided that it has been requested in good time, additional information relating to the specifications and any supporting documents shall be supplied by the contracting authorities or competent departments not later than six days before the deadline fixed for the receipt of tenders.'

9 Article 44(1) of Directive 2004/18, under the heading 'Verification of the suitability and choice of participants and award of contracts', provides that contracting authorities, after checking the suitability of the tenderers not excluded, in accordance with the criteria concerning, inter alia, professional and technical knowledge or ability referred to in Article 48 of the directive, are to award the contracts on the basis of the criteria referred to, in essence, in Article 53 of that directive. Pursuant to Article 44(2) of the directive:

'The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

...'

10 Article 48(1) of Directive 2004/18, entitled 'Technical and/or professional ability':

'The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.'

11 Pursuant to Article 48(2), evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services. With regard to public supply contracts, points (a)(ii), (b) to (d) and (j) of that provision refer to the following elements:

– the submission of a list of the principal deliveries effected in the past three years;

– an indication of the technicians or technical bodies involved, which may not directly belong to the undertaking, especially those responsible for quality control;

– a description of the technical facilities and measures used by the supplier for ensuring quality and the undertaking's study and research facilities;

– where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by or on behalf of the contracting authorities on the production capacities of the supplier and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate;

– with regard to the products to be supplied, samples, descriptions and/or photographs, or certificates attesting the conformity of products to certain specifications or norms.

12 Under the aforementioned Article 48(6), the contracting authority is to specify, in the notice or in the invitation to tender, which references under paragraph 2 it wishes to receive.

13 Article 53 of Directive 2004/18 provides:

'Contract award criteria

1. ... [T]he criteria on which the contracting authorities shall base the award of public contracts shall be either:

a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion;

...'

II – The background to the action

A – The contract notice

14 On 16 August 2008, at the request of the province of Noord Holland in the Netherlands, a contract notice was published in the *Official Journal of the European Union* for the supply and management of automatic coffee machines as from 1 January 2009 ('the contract notice').

15 Section II, point 1.5 of that notice describes the contract as follows:

'The province of North Holland has a contract for the management of automatic coffee machines. The contract expires on 1 January 2009. The province intends to enter into a new contract from 1 January 2009 by means of a European tender procedure. An important aspect is the desire of the province of North Holland to increase the use of organic and fair trade products in automatic coffee machines.'

16 Section III, point 1 of the contract notice deals with the conditions relating to the contract. Following information concerning the deposits and guarantees, the main terms concerning financing and payment and the legal form of recourse to sub-contractors, point 1.4 of that section contains the word 'no' under the heading 'Other particular conditions to which the performance of the contract is subject'.

17 Section IV, point 2.1 of the contract notice states that the contract will be awarded to the most economically advantageous tender. It follows from paragraph 3.4 of the same section that the time-limit for receipt of tenders was set as 26 September 2008 at 12 noon.

B – The specifications

18 The contract notice referred to specifications, entitled ‘Call for tenders’, dated 11 August 2008 (‘the specifications’).

19 Under the heading ‘Context of the contract’ sub-chapter 1.3 of the specifications reproduces, in its first paragraph, the content of point 1.5 of section II of the contract notice. The second paragraph of that sub-chapter states as follows:

‘The tenders shall be evaluated both on the basis of qualitative and environmental criteria and on the basis of price.’

20 Sub-chapter 1.4 of the specifications describes the content of the contract, in summary form, as follows:

‘The province of North Holland places an order for the supply, installation and maintenance of semi-automatic (full-operational) machines for the dispensing of hot and cold drinks, on a hire basis. The province of North Holland also places an order for the supply of ingredients for the dispensing machines … Sustainability and functionality constitute important aspects.’

21 According to section 1.5 of the specifications, the contract concerned was to be of three years’ duration, capable of being extended by one year.

22 In accordance with sub-chapter 3.4 of the specifications, concerning the conditions for registration, the presentation of alternatives was not authorised. Interested parties and tenderers were obliged to carry out research concerning the relevant market conditions, inter alia by asking questions of the contracting authority which should produce responses in an information notice.

23 The information notice was defined in section 5 of sub-chapter 2.3 of the specifications as a document containing the replies to the questions posed by interested parties in addition to possible amendments to the specifications or to other contract documents, forming part of the specifications and taking precedence over the other parts thereof including the annexes. It was also laid down, in sections 3 and 5 of that sub-chapter, that the information notice would be published online on the province of North Holland’s tender procedure website, with all interested parties receiving notice by email as soon as replies were published on the site.

24 Sub-chapter 4.4 of the specifications was entitled ‘Suitability conditions/minimum conditions’. Those conditions were defined, in the introductory part of the specifications, as conditions to be satisfied by a tenderer in order that his tender could be taken into consideration, expressed either as grounds for exclusion or minimum conditions.

25 Sections 1 to 5 of the aforementioned sub-chapter 4.4 concerned, respectively, turnover, professional risk indemnity insurance, the tenderer’s experience, quality conditions and the evaluation of customer satisfaction.

26 Section 4 of the aforementioned sub-chapter 4.4, headed ‘Quality conditions’ contained a point 2, drafted as follows:

‘In the context of sustainable purchasing and socially responsible business the Province of North Holland requires that the supplier fulfil the criteria concerning sustainable purchasing and socially responsible business. In what way do you fulfil the criteria concerning sustainable purchasing and socially responsible business? It is also necessary to state in what way the supplier contributes to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production …’

27 That condition was reiterated in section 6, the last point of that same sub-chapter 4.4, which contained a summary, inter alia of ‘Quality standards’ in the following terms:

‘11. Sustainability of purchases and [socially responsible business: knock-out criterion]’.

28 Headed ‘Minimum condition 1: Schedule of conditions’, section 1 of sub-chapter 5.2 of the specifications referred back to a separate annex and laid down that the tenderers had to comply with the schedule of conditions as set out therein.

29 Annex A to the specifications, headed ‘Schedule of conditions’ contained inter alia the following points:

‘31 The province of North Holland uses the Max Havelaar and EKO labels for coffee and tea consumption. … [Assessment:] condition [.]

...

35 If possible, the ingredients should comply with the EKO and/or Max Havelaar labels. … [Maximum] 15 [points. Assessment:] preferred[.]’

30 According to the annexes and the general scheme of the specifications that point 35 relates to certain ingredients used for the preparation of drinks with the exception of tea and coffee, such as milk, sugar and cocoa (‘the ingredients’).

C – The information notice

31 On 9 September 2008, the province of North Holland published points 11 and 12 of the information notice provided for under sub-chapter 2.3 of the specifications. Those points relate to a question concerning points 31 and 35 of Annex A to the specifications, worded as follows: ‘Can we assume in respect of the stated labels “or equivalent” applies[?]’ The contracting authority replied as follows:

‘00011 ... [point] 31 ...

...

In so far as the criteria are equivalent or identical.

00012 ... [point] 35 ...

...

The ingredients may bear a label based on the same criteria.’

32 According to the notice published in the *Official Journal of the European Union* on 24 December 2008, the contract was awarded to the Netherlands company Maas International.

D – The EKO and MAX HAVELAAR labels

33 According to the Commission’s arguments, which are not disputed in that regard by the Kingdom of the Netherlands, the EKO and MAX HAVELAAR labels have the following characteristics.

1. The EKO label

34 The private Netherlands label EKO is granted to products made up of at least 95% of ingredients from organic agricultural production. It is administered by a foundation established under Netherlands private law which has the objective of promoting organic agriculture such as that covered, at the time of the facts in the main proceedings, by Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ 1991 L 198, p. 1), as amended by Council Regulation (EC) No 392/2004 of 24 February 2004 (OJ 2004 L 65, p. 1) (‘Regulation No 2092/91’) and to combat fraud. That foundation was designated as the competent authority responsible for checking compliance with the obligations laid down by that regulation.

35 EKO is a trade mark registered at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).

2. The MAX HAVELAAR label

36 The MAX HAVELAAR label is also a private label administered by a foundation established under Netherlands private law, in conformity with the rules laid down by an international umbrella organisation, the Fairtrade Labelling Organisation (FLO). It is used in a number of countries, including the Netherlands.

37 The label is intended to promote the marketing of fair trade products and certifies that the products in respect of which it is granted are purchased at a fair price and under fair conditions from organisations made up of small-scale producers in developing countries. In that regard, the grant of that label is based on compliance with four criteria: the price must cover all the costs; it must contain a premium compared to the market price; production must be subject to pre-financing and the importer must have long-term trading relationships with the producers. The FLO carries out both the audit and the certification.

38 MAX HAVELAAR is also a trade mark registered at OHIM.

III – The pre-litigation procedure and the procedure before the Court of Justice

39 The Commission sent a letter of formal notice to the Kingdom of the Netherlands on 15 May 2009. According to that letter, the specifications stipulated by the province of North Holland in the context of the contract at issue infringed Directive 2004/18 by imposing the MAX HAVELAAR and EKO labels, or labels based on comparable or identical criteria, in respect of the tea or coffee to be supplied, by using those labels as an award criterion for the ingredients and evaluating the technical and professional abilities of tenderers on the basis of suitability criteria which do not form part of the complete system provided for in that regard by that directive.

40 By letter of 17 August 2009, the Kingdom of the Netherlands admitted that the contract at issue contained lacunae with regard to that directive, which however did not have effect of disadvantaging certain economic operators who may be interested, while disputing a number of the Commission's complaints.

41 On 3 November 2009, the Commission sent the Netherlands a reasoned opinion in which it repeated the complaints already made, calling upon the Netherlands to take all the measures necessary to comply with that opinion within the period of two months from receipt thereof.

42 By letter of 31 December 2009, that Member State argued that there was no foundation for the position supported by the Commission.

43 Consequently, the Commission decided to bring the present action.

44 By order of the President of the Court of 11 February 2011, the Kingdom of Denmark was granted leave to intervene in support of the form of order sought by the Kingdom of the Netherlands. Note was taken of the withdrawal of that intervention by order of the Third Chamber of the Court of 14 November 2011.

IV – The action

45 The Commission submits three pleas in law in support of its action.

46 The first and third pleas concern the use of the labels EKO and MAX HAVELAAR in the context, first, of the technical specifications of the contract at issue concerning the coffee and tea to be supplied and, second, of the award criteria concerning the ingredients to be supplied. The first plea contains two parts, alleging, first, infringement of Article 23(6) of Directive 2004/18, regarding the use of the EKO label and, second, Article 23(8) of that directive regarding the use of the MAX HAVELAAR label. The third plea relates to the infringement of Article 53(1) of that directive and is based on two complaints,

the Commission claiming that the latter provision precludes the use of labels and that the abovementioned labels were not linked to the subject-matter of the contract at issue.

47 The second plea refers to the compliance, by the tenderers, with the ‘criteria of sustainable purchasing and socially responsible business’. It is subdivided into three parts alleging the infringement, respectively, of Articles 44(2), first subparagraph, and 48 of Directive 2004/18, since that condition does not correspond to one of those linked to the subject-matter of the contract, and of the transparency obligation provided for in Article 2 of that directive, since the concepts ‘sustainable purchasing’ and ‘socially responsible business’ lacked sufficient clarity.

A – Preliminary observations

1. Applicability of Directive 2004/18

48 It must be noted, first, that the contract at issue, which consists in the making available, in the context of a hire contract, and in the maintenance of drinks dispensers and the supply of the products required for them to function, constitutes a public supply contract within the meaning of Article 1(2)(c) of Directive 2004/18.

49 Second, the estimate made by the Commission concerning the estimated value of the contract, that is EUR 760 000, is not disputed by the Kingdom of the Netherlands. It must therefore be held that the directive applies to that contract in the light of the thresholds laid down in Article 7 thereof.

2. Consideration of the scope of the conditions and of the preference referred to in the context of the first and third pleas

50 The parties disagree with regard to the meaning of the condition and of the preference mentioned, respectively, in points 31 and 35 of Annex A to the specifications. The Commission submits, with reference to those points, that that condition and preference refer to the fact that the products concerned are to bear the EKO and/or MAX HAVELAAR labels, or at least labels based on equivalent or identical criteria, if points 11 and 12 of the information notice are taken into consideration. According to the Kingdom of the Netherlands, it is apparent on the contrary from section II, point 1.5 of the contract notice and sub-chapter 1.3 of the specifications that the contracting authority required or expressed the preference that products of organic agricultural production and fair trade be supplied, the mentioning of those labels or of equivalent labels being only illustrative of the criteria to be complied with.

51 It must, first, be held that the specifications cannot be interpreted as proposed by the Kingdom of the Netherlands.

52 In that regard, it must be recalled that the meaning of the specifications must be determined by adopting the perspective of potential tenderers since the aim of the procedures for the award of public works contracts laid down in Directive 2004/18 is precisely to guarantee to potential tenderers established in the European Union access to public contracts of interest to them (see Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 53). Thus, in the present case, the specifications could be understood by the potential tenderers only as referring to the possession of the labels mentioned in the context of the requirement or preference in question.

53 That requirement and preference were stated in the annex to the specifications containing the ‘Requirements Schedule’ with which, in conformity with sub-chapter 5.2, section 1 of the specifications, the tenders had to comply, as it was drafted. Points 31 and 35 of that schedule referred explicitly and without reservation to the EKO and MAX HAVELAAR labels, to the exclusion of all alternatives, the submission of which was in any case prohibited under sub-chapter 3.4 of the specifications. In those circumstances, it cannot be conceded that the reference, which is lacking in clarity, to the effect that ‘[a]n important aspect is the desire of the province of North Holland to increase the use of organic and fair trade products in automatic coffee machines’ contained in section II, point 1.5, of the contract notice and sub-chapter 1.3 of the specifications, that is to say, not in the parts of the contract documents dealing with conditions or preferences of the contracting authority, was such as to show that the requirement and preference in question alluded in a generic fashion to the fact that the products concerned were organic or fair trade produce.

54 Second, the later clarifications in points 11 and 12 of the information notice, according to which the reference to the EKO and MAX HAVELAAR labels in the condition and preference also covered equivalent labels, that is to say based on identical or comparable award criteria, cannot be taken into consideration under Article 39(2) of Directive 2004/18.

55 While, as the Advocate General states in paragraph 71 of her Opinion, additional information relating to the specifications and any supporting documents, referred to in that provision, may clarify certain points or supply certain information, they cannot change, even by means of corrections, the meaning of the essential contractual conditions, to which category the technical specifications and the award criteria belong, as those conditions were formulated in the specifications, upon which the economic operators concerned legitimately relied in taking the decision to prepare to submit a tender or, on the other hand, not to participate in the procurement procedure concerned. That is apparent both from the very use, in Article 39(2), of the expression 'additional information' and from the brief period of time, that is to say six days, allowed between the communication of such information and the deadline for receipt of the tenders, in accordance with that provision.

56 In that regard, both the principle of equal treatment and the obligation of transparency which flows from it require the subject-matter of each contract and the criteria governing its award to be clearly defined from the beginning of the award procedure (see, to that effect, Case C-299/08 *Commission* v *France* [2009] ECR I-11587, paragraphs 41 and 43).

57 It must therefore be held that the contractual documents which determine the subject-matter and criteria governing the award of the contract required, first, that the coffee and tea to be supplied were to bear the EKO and MAX HAVELAAR labels and, second, expressed the preference that the ingredients to be supplied should bear the same labels.

B – The first plea in law, alleging infringement of Article 23(6) and (8) of Directive 2004/18 concerning the technical specifications concerning the coffee and tea to be supplied

58 The first plea relied upon by the Commission concerns the requirement mentioned in point 31 of Annex A to the specifications, which states that 'The province of North Holland uses the MAX HAVELAAR and EKO labels for consumption of coffee and tea'.

1. The first plea relied on by the Commission alleging the infringement of Article 23(6) of Directive 2004/18 concerning the use of the EKO label in the context of the technical specifications relating to the coffee and tea to be supplied.

a) Arguments of the parties

59 By the first branch of the first plea, the Commission submits, in essence, that the requirement that the coffee and tea to be supplied must bear the EKO label or equivalent, that is to say certifying that they are products of organic agriculture, constitutes a description of the required characteristics of the products concerned, and therefore a technical specification subject to Article 23 of Directive 2004/18. Article 23(6) of the directive which authorises, subject to certain conditions, use of an eco-label, in order to describe environmental characteristics, does not however allow an eco-label as such to be prescribed.

60 For the Kingdom of the Netherlands, given that it is well known to economic operators active in the sector of activity concerned, the EKO label refers unequivocally, in the mind of such operators, to products of organic agriculture, by reference, at the time when the contractual documents were drafted, to Regulation No 2092/91. In any case, an economic operator concerned displaying ordinary care would have discovered without difficulty on the internet the description of the criteria referring to that label or could have asked the contracting authority about it. It would therefore be unrealistic to consider that the reference to the EKO label ran the risk of undermining the principle of equal treatment on the ground that a potential tenderer who did not understand that reference would have lost interest in the contract at issue or decisively delayed his actions.

b) Findings of the Court

61 As a preliminary point, it should be pointed out that, under Article 23(3)(b) of Directive 2004/18, the technical specifications may be formulated in terms of performance or functional requirements which may include environmental characteristics. According to recital 29 in the preamble to that directive, a given production method may constitute such an environmental characteristic. Therefore, as is agreed by the parties, the EKO label, in so far as it is based on environmental characteristics and fulfils the conditions listed in Article 23(6) of Directive 2004/18, constitutes an 'eco-label' within the meaning of that provision. Second, by laying down a requirement with regard to a characteristic of the tea and coffee to be supplied in connection with that label, the Province of North Holland has established, in that regard, a technical specification. It is therefore in the light of that last mentioned provision that this part of the first plea must be considered.

62 It must be recalled that under Article 2 of Directive 2004/18, which lays down the principles of awarding contracts, contracting authorities are to treat economic operators equally and non-discriminatorily and are to act in a transparent way. Those principles are of crucial importance with regard to the technical specifications, in the light of the risks of discrimination linked to the choice of those specifications or the manner in which they are formulated. Thus, Article 23(2) and (3)(b) and the last sentence of recital 29 in the preamble to Directive 2004/18 state that the technical specifications must afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition and be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contracts, being clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover. It is therefore in the light of those considerations that Article 23(6) of Directive 2004/18 must be interpreted.

63 The text of the first subparagraph of that provision, with regard to the requirements concerning environmental characteristics, confers on contracting authorities the option to use the detailed specifications of an eco-label, but not the eco-label as such. The requirement to be precise, laid down in Article 23(3)(b) of Directive 2004/18 — to which Article 23(6) of the directive refers — and expressly stated in the last sentence of recital 29 in the preamble to the directive, precludes an extensive interpretation of that provision.

64 Admittedly, in order to facilitate compliance with such a requirement, the second sub-paragraph of Article 23(6) also authorises the contracting authorities to indicate that the products bearing the eco-label, the detailed specifications of which they used, are presumed to comply with the specifications concerned. That second sub-paragraph does not however extend the scope of Article 23(6) because it permits recourse to the eco-label itself only indirectly, as proof of compliance with 'the technical specifications laid down in the contract documents'.

65 According to that second sub-paragraph of Article 23(6) of Directive 2004/18, the contracting authorities must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

66 As to the remainder, it should be noted that while, as is also pointed out by the Kingdom of the Netherlands, the contracting authority has the right to expect that the economic operators concerned are informed and reasonably aware, such a legitimate expectation nevertheless assumes that the contracting authority itself formulated its requirements clearly (see, to that effect, Case C-423/07 *Commission* v *Spain* [2010] ECR I-3429, paragraph 58). *A fortiori*, that expectation cannot be relied upon to relieve the contracting authorities of the obligations imposed on them by Directive 2004/18.

67 Moreover, far from constituting an excessive regard for formalities, the obligation of the contracting authority to mention expressly the detailed environmental characteristics it intends to impose even where it refers to the characteristics defined by an eco-label, is indispensable in order to allow potential tenderers to refer to a single official document, coming from the contracting authority itself and thus without being subject to the uncertainties of searching for information and the possible temporal variations in the criteria applicable to a particular eco-label.

68 In addition, it must be noted that the objection of the Kingdom of the Netherlands that, since the EKO label provides information relating to the organic origin of products bearing that label, the reference to detailed characteristics would have required it to list all the requirements of Regulation No 2092/91,

which would have been much less clear than referring to that label, is irrelevant. Directive 2004/18 does not preclude, in principle, a reference, in the contract notice or contract documents, to legislative or regulatory provisions for certain technical specifications where such a reference is, in practice, unavoidable, provided that it is accompanied by all the additional information required by that directive (see, by analogy, *Commission* v *Spain*, paragraphs 64 and 65). Thus, since the marketing, in the European Union, of products obtained from organic agriculture and presented as such must comply with relevant European Union legislation, a contracting party may, if appropriate, without disregarding the concept of 'technical specification' within the meaning of point 1(b) of Annex VI to Directive 2004/18 or Article 23(3) thereof, state in the contract documents that the product to be supplied must comply with Regulation No 2092/91 or with any other subsequent regulation replacing that regulation.

69 With regard to the later clarification made to point 11 of the information notice, according to which the reference to the EKO label also covered an equivalent label, it must be stated, in addition to what has been stated in points 54 to 56 above, that such a clarification cannot, in any event, compensate for the failure to identify the detailed technical specifications corresponding to the label concerned.

70 It follows from the foregoing considerations that by requiring, in the contract documents, that certain products to be supplied were to bear a specific eco-label, rather than using the detailed specifications defined by that eco-label, the province of North Holland established a technical specification which was incompatible with Article 23(6) of Directive 2004/18. Therefore, the first part of the first plea is well founded.

2. The second part of the first plea, alleging infringement of Article 23(8) of Directive 2004/18 concerning use of the MAX HAVELAAR label in relation to the technical specifications concerning the coffee and tea to be supplied

a) Arguments of the parties

71 By the second part of its first plea, the Commission submits, in essence, that the requirement that the coffee and tea to be supplied should bear the MAX HAVELAAR label or another equivalent label, that is to say showing that they are fair trade products, is a description of the required characteristics of the products concerned and therefore a technical specification subject to Article 23 of Directive 2004/18. That requirement would infringe Article 23(8) which prohibits, in principle, technical specifications from 'refer[ring] to a specific … source, or a particular process, or to trade marks … or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products': the abovementioned label, which corresponds to a registered mark, falls within each of those categories.

72 First, the Kingdom of the Netherlands disputes that the criteria on which the MAX HAVELAAR label is based may be construed as requirements relating to a process or method of production, submitting that they are social conditions applicable to the acquisition of the products to be supplied in the context of the performance of the contract in question, covered by the concept of 'conditions for performance of the contract' within the meaning of Article 26 of Directive 2004/18. In the alternative, supposing that the requirement concerning the label were to be regarded as a technical specification, it rejects the proposition that Article 23(8) applies.

b) Findings of the Court

73 As stated in paragraph 37 above, the MAX HAVELAAR label describes products of fair trade origin purchased at a price and under conditions more favourable than those determined by market forces from organisations made up of small-scale producers in developing countries. According to the file, that label is based on four criteria, that is to say: the price must cover all the costs; it must contain a supplementary premium compared to the market price; production must be subject to pre-financing and the importer must have long-term trading relationships with the producers.

74 Such criteria do not correspond to the definition of the concept of technical specification in paragraph 1(b) of Annex VI to Directive 2004/18, given that that definition applies exclusively to the characteristics of the products themselves, their manufacture, packaging or use, and not to the conditions under which the supplier acquired them from the manufacturer.

75 By contrast, compliance with those criteria does fall under the concept of ‘conditions for performance of contracts’ within the meaning of Article 26 of that directive.

76 Pursuant to the article, the conditions governing the performance of a contract may, in particular, refer to social considerations. Thus, to require that the tea and coffee to be supplied must come from small-scale producers in developing countries, subject to trading conditions favourable to them, falls within those considerations. Accordingly, the lawfulness of such a requirement must be examined in the light of the aforesaid Article 26.

77 It must however be noted that, in the context of the pre-litigation procedure and also in the application initiating proceedings, the Commission criticised the clause concerning the specifications on the basis of Article 23(8) of that directive alone, claiming only at the stage of its rejoinder that the arguments developed in that regard applied *mutatis mutandis* to a condition for performance governed by Article 26 thereof.

78 Since the subject-matter of the proceedings under Article 258 TFEU is delimited by the pre-litigation procedure provided for in that provision, those proceedings must be based on the same grounds and pleas as the reasoned opinion, meaning that if a complaint was not included in the reasoned opinion, it is inadmissible at the stage of proceedings before the Court (see, to that effect, Case C-305/03 *Commission* v *United Kingdom* [2006] ECR I-1213, paragraph 22 and case-law cited).

79 Accordingly, the second part of the first plea must be rejected as inadmissible.

C – The third plea, alleging infringement of Article 53(1) of Directive 2004/18 concerning the award criteria relating to the ingredients to the supplied

80 The third plea is linked to the first, since the Commission refers therein to the resort, in the contract documents, to the EKO and MAX HAVELAAR labels, but as an award criterion within the meaning of Article 53 of Directive 2004/18.

81 As a preliminary point, it must be noted that, as held in paragraphs 51 to 57 above, by reference to the contract documents which determine the award criteria for the contract, the province of North Holland established an award criterion which consists in the fact that the ingredients to be supplied are to bear the EKO and/or MAX HAVELAAR labels.

1. Arguments of the parties

82 The Commission submits, in essence, that such an award criterion infringes Article 53 of Directive 2004/18 in two respects. First, it is not linked to the subject-matter of the contract, in so far as the criteria underlying the EKO and MAX HAVELAAR labels do not concern the products to be supplied themselves, but the general policy of the tenderers, especially in the case of the MAX HAVELAAR label. Second, that award criterion is not compatible with the requirements regarding equal access, non-discrimination and transparency, having the effect inter alia of disadvantaging potential tenderers who are not from the Netherlands or who do not hold the EKO and/or MAX HAVELAAR labels for their products.

83 According to the Kingdom of the Netherlands, the award criterion in question is transparent, objective and non-discriminatory. Those labels are well-known to the economic operators in the sector of activity concerned, they are based on underlying criteria derived from the European Union legislation concerning organic production of agricultural products (with regard to the EKO label), or determined by the body which grants the label and potentially accessible to all the economic operators concerned (with regard to the MAX HAVELAAR label) and a potential tenderer exercising ordinary care can in any case easily inform himself about those underlying criteria. In addition, Directive 2004/18 does not impose, with regard to the award criteria, the same requirements as for the technical specifications, as provided for in Article 23 of that directive, and logically so, since it is not necessary that all the tenderers should be able to fulfil an award criterion. Finally, the award criterion at issue is linked to the subject-matter of contract, which concerns inter alia the supply of organic fair trade products, compliance with that criterion providing an indication of the quality of the tenders so making it possible to assess their value for money.

2. Findings of the Court

84 It must be pointed out, first, that under Article 53(1)(a) of Directive 2004/18, where, as in the present case, a contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender from the point of view of that authority, the authority must base its decision on various criteria which are for it to determine in compliance with the requirements of the directive, that provision containing, as follows from the use of the phrase 'for example', a non-exhaustive list of the possible criteria.

85 Article 53 of Directive 2004/18 is further elucidated by recital 46 in the preamble to the directive, the third and fourth paragraphs of which lay down that the award criteria may, in principle, be not only economic but also qualitative. Thus, among the examples referred to in Article 53(1)(a) of the directive, are environmental characteristics. As the Advocate General points out in point 103 of her Opinion, the fourth paragraph of that recital also indicates that 'a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong'. It must therefore be accepted that contracting authorities are also authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons.

86 Second, Article 53(1)(a) of Directive 2004/18 requires that the award criteria be linked to the subject-matter of the contract. In that regard, recital 46 in the preamble lays down, in its third paragraph, that 'the determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured', the 'most economically advantageous tender' being '[that] which … offers the best value for money'.

87 Third, as follows from the first and fourth paragraphs of that recital, compliance with the principles of equality, non-discrimination and transparency requires that the award criteria are objective, ensuring that tenders are compared and assessed objectively and thus in conditions of effective competition. That would not be the case for criteria having the effect of conferring on the contracting authority an unrestricted freedom of choice (see, with regard to similar provisions of the predecessor directives to Directive 2004/18, Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 61 and case-law cited).

88 Fourth and finally, as noted in the second paragraph of that recital, the same principles require the contracting authority to ensure the procedure for awarding a public contract complies at every stage with both the principle of the equal treatment of potential tenderers and the principle of transparency of the award criteria, the formulation of the award criteria being such as to allow all reasonably well-informed tenderers exercising ordinary care to know the exact scope thereof and thus to interpret them in the same way (see, inter alia, with regard to the provisions of the predecessor directives to Directive 2004/18, Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraphs 56 to 58).

89 In order to assess the validity of the claim that there is an insufficient link between the award criterion at issue and the subject-matter of the contract, it is necessary, first, to take into consideration the criteria underlying the EKO and MAX HAVELAAR labels. As is clear from paragraphs 34 and 37 above, those underlying criteria characterise the products derived from, respectively, organic agriculture and fair trade. With regard to the method of organic production subject to European Union legislation, that is, at the relevant time, Regulation No 2092/91, recitals (2) and (9) in the preamble to that regulation state that that method of production promotes environmental protection, inter alia because it implies significant restrictions on the use of fertilisers and pesticides. With regard to fair trade, it is clear from paragraph 37 above that the criteria laid down by the foundation which grants the MAX HAVELAAR label seek to promote the interests of small-scale producers in developing countries while maintaining trading relations with them which take into account the actual need of those producers, and not only the dictates of the market. It follows from those statements that the award criterion at issue concerned environmental and social characteristics falling within the scope of Article 53(1)(a) of Directive 2004/18.

90 Second, it must be held that, in accordance with the description of the contract in sub-chapter 1.4 of the specifications, that contract concerned in particular the supply of coffee, tea and the other ingredients required for the manufacture of the drinks available in the dispensers. It also follows from the drafting of the award criterion at issue that it covered only the ingredients to be supplied in the framework of that contract, without any bearing on the general purchasing policy of the tenderers. Therefore, those criteria related to products the supply of which constituted part of the subject-matter of that contract.

91 Finally, as is apparent from point 110 of the Advocate General's Opinion, there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof. The Court held thus, in paragraph 34 of *EVN and Wienstrom,* that European Union legislation on public procurement does not preclude, in the context of a contract for the supply of electricity, a contracting authority from applying an award criterion requiring that the electricity supplied be produced from renewable energy sources. There is therefore nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of fair trade origin.

92 It must therefore be held that the award criterion at issue is linked — as required by Article 53(1)(a) of Directive 2004/18 — to the subject-matter of the contract concerned, meaning that the Commission's claim in that regard is unfounded.

93 With regard to the complaint that the province of North Holland required the possession of specific labels in its award criterion, it must be noted that, under point 35 in Annex A to the specifications, the contracting authority provided that where the ingredients to be supplied bore the EKO and/or MAX HAVELAAR labels that would result in the award of a certain number of points in the classification of the competing tenders for the purposes of the award of the contract. That condition must be examined in the light of the requirements of precision and objectivity which apply to contracting authorities in that regard.

94 With regard to the specific issue of the use of labels, the European Union legislature gave certain precise indications concerning the implications of those requirements in the context of the technical specifications. As is evident from paragraphs 62 to 65 above, after having stated, in Article 23(3)(b) of Directive 2004/18, that those specifications must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract, in Article 23(6) of the directive the legislature authorised the contracting authorities to have recourse to the criteria underlying an eco-label in order to establish certain characteristics of a product, but not to make an eco-label a technical specification, use of such a label being allowed only in order to create a presumption that the products bearing that label comply with the characteristics thus defined, expressly subject to any other appropriate means of proof being allowed.

95 Contrary to what is argued by the Kingdom of the Netherlands, there is no reason to consider that the consequences of the principles of equality, non-discrimination and transparency are different where award criteria are concerned, such criteria also being essential conditions of a public contract, since they will determine the choice of the successful tender from among those which satisfy the requirements expressed by the contracting authority in the technical specifications.

96 With regard to the clarification subsequently made to paragraph 12 of the information notice, according to which the reference to the EKO and MAX HAVELAAR labels also covered equivalent labels, it must be stated, in addition to what is said in paragraphs 54 to 56 above, that such a clarification cannot, in any event, compensate for the lack of precision regarding the criteria underlying the labels concerned.

97 It follows from all the foregoing considerations that by providing, in the specifications, that the fact that certain products to be supplied bore specific labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means, the province of North Holland established an award criterion that was incompatible with Article 53(1)(a) of Directive 2004/18. Therefore, to that extent, the third plea in law is well founded.

D – The second plea in law, alleging infringement of Articles 2, 44(2) and 48 of Directive 2004/18 concerning the requirement of compliance with the criteria of 'sustainability of purchases' and 'socially responsible business'

98 The second plea, which is made up of four parts, refers to the requirement, laid down in point 2 of section 4 of sub-chapter 4.4. of the specifications, that the contracting authority, in essence, comply with the 'criteria of sustainability of purchases and socially responsible business', inter alia by contributing to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production, the tenderers having been asked to state how they meet those criteria.

1. Arguments of the parties

99 By the first part of this plea, the Commission submits that the requirement in question constitutes a minimum level of technical ability contrary to the first paragraph of Article 44(2) and to Article 48 of Directive 2004/18, in so far as it falls outside the criteria provided for in that article, which establishes a complete system. The Kingdom of the Netherlands contends, first, that that requirement amounts in reality to a condition for the performance of the contract governed by Article 26 of the directive. In the alternative, it considers that that requirement is part of the system established in Article 48 of Directive 2004/18, by reference to Article 48(2)(c) thereof, which refers to a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities. By the same requirement, the tenderers could have shown that they were capable of performing the contract by meeting the necessary qualitative criteria.

100 The second part of this plea, alleging infringement of the second paragraph of Article 44(2) of Directive 2004/18 refers to the absence of a link, at least a sufficient one, between the requirement at issue and the subject-matter of the contract at issue, which is disputed by the defendant Member State since, in its view, the sustainability of purchases and socially responsible business are consistent with a market relating, inter alia, to the supply of coffee and tea derived from organic agriculture and fair trade.

101 By the third part of the second plea, the Commission claims that Article 2 of Directive 2004/18 has been infringed because the terms 'sustainability of purchases' and 'socially responsible business' lack sufficient clarity. That is not so, according to the Kingdom of the Netherlands since, inter alia, those expressions are understood by all reasonably informed undertakings and extensive information is available about them on the internet.

2. Findings of the Court

a) Classification of the clause concerned in the specifications

102 The parties disagree regarding the classification of the requirement at issue, according to which the tenderers must comply with the 'criteria of sustainability of purchases and socially responsible business', inter alia by contributing to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production. The Commission submits that that requirement concerned the tenderers' general policy and therefore related to their technical and professional ability within the meaning of Article 48 of Directive 2004/18. By contrast, according to the Kingdom of the Netherlands, that requirement applied to the contract at issue, meaning that it was a condition for performance of the contract within the meaning of Article 26 of that directive.

103 The last mentioned argument cannot be accepted. The clause at issue appears in section 4 of sub-chapter 4.4 of the specifications, entitled 'Suitability requirements/minimum levels', which corresponds to the terminology used inter alia in the title and Article 44(2) of Directive 2004/18, which refers to Articles 47 and 48 thereof, entitled respectively 'Economic and financial standing' and 'Technical and/or professional ability'. Furthermore, the first three sections of that sub-chapter concerned the minimum levels required by the contracting authority with regard to turnover, professional risk indemnity insurance and the experience of the tenderers, that is to say factors to which reference is made expressly in those Articles 47 and 48. In addition, the 'suitability requirements' were defined in the introductory part of the specifications as requirements expressed either as grounds for

exclusion or minimum levels to be satisfied by a tenderer so that his tender could be taken into consideration, being thus distinct from the tender as such. Finally, the requirement at issue was formulated in a general way and not specifically in relation to the contract at issue.

104 It follows from those considerations that potential tenderers could have considered that requirement as referring only to a minimum level of professional capacity required by the contracting authority within the meaning of Articles 44(2) and 48 of Directive 2004/18. It is therefore in the light of those provisions that the lawfulness of that requirement must be assessed.

b) The alleged infringement of Articles 44(2) and 48 of Directive 2004/18

105 As Article 48(1) to 48(6) render apparent, Article 48 exhaustively lists the factors on the basis of which the contracting authority may evaluate and assess the technical and professional abilities of the tenderers. Moreover, while Article 44(2) authorises the contracting authority to establish minimum capacity levels which tenderers must satisfy in order that their tender can be taken into consideration for the award of the contract, those levels can be fixed only, pursuant to the first paragraph of Article 44(2), by reference to the factors listed in Article 48 of the directive, concerning technical and professional ability.

106 Contrary to what is argued by the Kingdom of the Netherlands, the requirement of respect for the ‘criteria of sustainable purchasing and socially responsible business’ is not connected to any of those factors.

107 In particular, the information requested pursuant to that requirement, that is to say the statement of ‘[in what way the tenderer] fulfils the criteria of sustainable purchasing and socially responsible business [and] contributes to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’ cannot be assimilated to ‘a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking’s study and research facilities’ referred to in Article 48(2)(c) of Directive 2004/18. The term ‘quality’ which is used not only in that provision but also in subparagraphs (b), (d) and (j) of that paragraph must, in the context of that Article 48, be understood as the technical quality of the services provided or supplies of a kind similar to that of the services or supplies which constitute the subject-matter of the contract concerned, the contracting authority being entitled to require that the tenderers inform it how they check and guarantee the quality of those services or supplies, to the extent provided for in those subparagraphs.

108 It follows from those foregoing considerations that by requiring, on the basis of suitability requirements and minimum capacity levels stated in the specifications, that tenderers comply with the criteria of sustainable purchasing and socially responsible business and state how they comply with those criteria and contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production, the province of North Holland established a minimum level of technical ability not authorised by Articles 44(2) and 48 of Directive 2004/18. Therefore, the first branch of the second plea is well founded.

c) Alleged infringement of Article 2 of Directive 2004/18

109 The principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract (see, inter alia, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801).

110 As the Advocate General stated in paragraph 146 of her Opinion, it must be held that the requirements relating to compliance with the ‘criteria of sustainability of purchases and socially responsible business’ and the obligation to ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’ are not so clear, precise and unequivocal as to enable all reasonably informed tenderers exercising ordinary care to be completely sure what the criteria governing those requirements are. The same applies, and all the more so, in

relation to the requirement addressed to tenderers that they state in their tender ‘in what way [they] fulfil’ those criteria or ‘in what way [they] contribute’ to the goals sought by the contracting authority with regard to the contract and to coffee production, without precisely indicating to them what information they must provide.

111 Therefore, by requiring tenderers, in the specifications at issue, to comply with ‘the criteria of sustainable purchasing and socially responsible business’, to ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’ and to state in their tender ‘in what way [they] fulfil’ those criteria or ‘in what way [they] contribute’ to the goals sought by the contracting authority with regard to the contract and to coffee production, the province of North Holland established a clause which does not comply with the obligation of transparency provided for in Article 2 of Directive 2004/18.

112 Accordingly, it follows from all of the foregoing considerations that because, in the tendering procedure for a public contract for the supply and management of coffee machines, which was the subject of a contract notice published in the *Official Journal of the European Union* on 16 August 2008, the province of North Holland:

– established a technical specification incompatible with Article 23(6) of Directive 2004/18 by requiring that certain products to be supplied were to bear a specific eco-label, rather than using detailed specifications;

– established award criteria incompatible with Article 53(1)(a) of that directive by providing that the fact that certain products to be supplied bore specific labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means;

– established a minimum level of technical ability not authorised by Articles 44(2) and 48 of that directive by requiring, on the basis of suitability requirements and minimum capacity levels stated in the specifications, that tenderers comply with the ‘criteria of sustainable purchasing and socially responsible business’ and state how they comply with those criteria and ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’, and

– prescribed a clause contrary to the obligation of transparency provided for in Article 2 of that directive by requiring that tenderers comply with ‘the criteria of sustainable purchasing and socially responsible business’ and state how they comply with those criteria and ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’,

the Kingdom of the Netherlands has failed to fulfil its obligations under the aforementioned provisions. Those considerations also mean that the action must be dismissed as to the remainder.

V – Costs

113 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful in its pleas, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Declares that, on account of the fact that, in the tendering procedure for a public contract for the supply and management of coffee machines, which was the subject of a contract notice published in the *Official Journal of the European Union* on 16 August 2008, the province of North Holland:**

– **established a technical specification incompatible with Article 23(6) of Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007, by requiring that certain products to be supplied were to bear a specific eco-label, rather than using detailed specifications;**

– **established award criteria incompatible with Article 53(1)(a) of Directive 2004/18 by providing that the fact that certain products to be supplied bore specific labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means;**

– **established a minimum level of technical ability not authorised by Articles 44(2) and 48 of Directive 2004/18 by requiring, on the basis of suitability requirements and minimum capacity levels stated in the specifications applicable in the context of that contract, that tenderers comply with the 'criteria of sustainable purchasing and socially responsible business' and state how they comply with those criteria and 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production', and**

– **prescribed a clause contrary to the obligation of transparency provided for in Article 2 of Directive 2004/18 by requiring that tenderers comply with 'the criteria of sustainable purchasing and socially responsible business' and state how they comply with those criteria and 'contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production',**

the Kingdom of the Netherlands has failed to fulfil its obligations under the aforementioned provisions;

2. Dismisses the action as to the remainder;

3. Orders the Kingdom of the Netherlands to pay the costs.

[Signatures]

---

* Language of the case: Dutch.

EU:C:2011:840

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 15 December 2011 (1)

Case C-368/10

European Commission
v
Kingdom of the Netherlands

(Public supply contracts — Organic productsFair trade — Environmental and social sustainability of products — Sustainable agriculture — ‘Max Havelaar’ and ‘EKO’ labels — Procurement principles — Technical specifications — Environmental characteristics — Suitability and selection of participants — Technical and professional ability — Award criteria — Most economically advantageous tender — Articles 2, 23, 26, 44, 48 and 53 of Directive 2004/18/EC)

Table of contents

I — Introduction

II — Legal framework

III — Facts and pre-litigation procedure

A — Procurement procedure

1. Notice of the procurement procedure

2. Specifications

3. Information notice

4. Award of the contract

B — Labels referred to in the conditions of the contract

C — Pre-litigation procedure

IV — Forms of order sought by the parties and procedure before the Court

V — Assessment

A — First plea: reference to the ‘Max Havelaar’ and ‘EKO’ labels in the technical specifications for the coffee and tea to be supplied

1. First part of the first plea: reference to the ‘EKO’ label in respect of the coffee and tea to be supplied (Article 23(6) of Directive 2004/18)

(a) Applicability of Article 23 of Directive 2004/18

(b) No general prohibition on reference to environment labels when laying down the environmental characteristics of a product

(c) Prohibition on making use of a particular eco-label mandatory

(d) Interim conclusion

2. Second part of the first plea: reference to the ‘Max Havelaar’ label in respect of the coffee and tea to be supplied (Article 23(8) of Directive 2004/18)

(a) Applicability of 23(8) of Directive 2004/18

(b) In the alternative: compatibility of the reference to the ‘Max Havelaar’ label with Directive 2004/18

(i) Applicable provision: Article 26 of Directive 2004/18

(ii) Examination of the reference to the ‘Max Havelaar’ label in the light of Article 26 of Directive 2004/18

3. Summary of the first plea

B — Third plea: reference in the award criteria to the ‘Max Havelaar’ and ‘EKO’ labels with regard to the ingredients to be supplied

1. Preliminary remark

2. First argument in support of the third plea: purported absence of a link between the subject-matter of the contract and the two labels

3. Second argument supporting the third plea: reference to the labels instead of the underlying criteria

C — Second plea: purported reference to sustainable purchasing and socially responsible conduct as a suitability criterion

1. First part of the second plea: purported unlawful requirements relating to evidence of tenderers’ technical ability (Article 48(1) of Directive 2004/18, in conjunction with Article 48(2) thereof)

2. Second part of the second plea: purported lack of a connection between the suitability requirements on tenderers and the subject-matter of the contract (Article 44(2) of Directive 2004/18)

3. Third part of the second plea: purported infringement of the general transparency rule (Article 2 of Directive 2004/18)

D — Summary

VI — Costs

VII — Conclusion

I – Introduction

1. Not only consumers, but also undertakings and public authorities are attaching increasing importance to the sustainability of their consumption. The question at the heart of the present infringement proceedings is the extent to which contracting authorities can, in procurement procedures, make the environmental and social sustainability of the products to be supplied a condition for the award of a contract.

2. In 2008, a Netherlands regional body referred to the ‘Max Havelaar’ and ‘EKO’ quality labels in connection with the procedure for the award of a public contract for the supply and management of automatic coffee machines. This was intended to ensure that the successful tenderer supplied ‘sustainable’ products characterised in particular by their environmental and social sustainability. The European Commission complains that in using the two labels and various formulations in the tender documents the Kingdom of the Netherlands has failed to comply with the requirements of European Union law on public procurement.

3. Whether and to what extent environmental and social considerations may be taken into account and, in particular, reference may be made to environmental and fair trade labels, is a question of fundamental importance for the further development of the public procurement law. In giving its answer, the Court is faced with the challenge of finding an equitable balance between the requirements of the internal market and environmental and social concerns, without, however, ignoring the practical requirements of award procedures. On the one hand, there can be no discrimination between potential tenderers or partitioning of markets. On the other hand, contracting authorities must be allowed to procure environmentally friendly, organic and fair trade products without excessive administrative burdens.

II – Legal framework

4. The legal framework of this case is formed by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (2)

5. Article 2 of this directive, which appears in Title I under the heading ‘Definitions and General Principles’, lays down the following ‘Principles of awarding contracts’:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

6. Among the ‘procurement rules’ in Title II of Directive 2004/18, Chapter IV contains a number of ‘specific rules governing specifications and contract documents’, of which Article 23 in conjunction with Annex VI, on the one hand, and Article 26, on the other, are of interest in the present case.

7. As is clear from Article 23 of Directive 2004/18, in conjunction with point 1(b) of Annex VI thereto, the expression ‘technical specifications’ means, in the case of public supply contracts,

‘a specification in a document defining the required characteristics of a product …, such as quality levels, environmental performance levels, design for all requirements … and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures’.

8. With reference to this definition, Article 23 of Directive 2004/18 contains a rule on technical specifications which is worded as follows (extracts):

‘1. The technical specifications as defined in point 1 of Annex VI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents.

…

2. Technical specifications shall afford equal access for candidates and tenderers and not have the effect of creating unjustified obstacles to competitive tendering.

3. Without prejudice to legally binding national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

(a) either by reference to technical specifications defined in Annex VI … Each reference shall be accompanied by the words “or equivalent”;

(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

…

6. Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by and any other eco-label, provided that:

– the specifications used are appropriate to define the characteristics of the supplies or services that are the object of the contract,

– the requirements for the label are drawn up on the basis of scientific information,

– the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and,

– they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

…

8. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words “or equivalent”.’

9. Article 26 of Directive 2004/18 also provides, as regards the ‘Conditions for performance of contracts’:

‘Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.’

10. Directive 2004/18 contains provisions on ‘Conduct of the procedure’ in Title II, Chapter VII; Articles 44, 48 and 53 thereof are relevant.

11. Article 44 of Directive 2004/18 is one of the general provisions on the conduct of the procedure and provides, under the heading ‘Verification of the suitability and choice of participants and award of contracts’, inter alia, as follows:

‘1. Contracts shall be awarded …, after the suitability of the economic operators … has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52 …

2. The contracting authorities may require candidates and tenderers to meet minimum capacity levels in accordance with Articles 47 and 48.

The extent of the information referred to in Articles 47 and 48 and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract.

These minimum levels shall be indicated in the contract notice.’

12. Article 48 of Directive 2004/18 contains rules on the ‘Technical and/or professional ability’ of economic operators, which are worded, in extract, as follows:

‘1. The technical and/or professional abilities of the economic operators shall be assessed and examined in accordance with paragraphs 2 and 3.

2. Evidence of economic operators’ technical abilities may, as a general rule, be furnished by one or more of the following means, according to the nature, quantity or importance and use of the works, supplies or services:

…

(c) a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking’s study and research facilities;

…

6. The contracting authority shall specify, in the notice or in the invitation to tender, which references under paragraph 2 it wishes to receive.’

13. Finally, Article 53(1) of Directive 2004/18 provides as follows under the heading ‘Contract award criteria’:

‘Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or

(b) the lowest price only.’

III – Facts and pre-litigation procedure

A – *Procurement procedure*

14. In January 2008, the Netherlands province of Noord-Holland conducted a procurement procedure for a contract for the supply and management of automatic coffee machines. The contract was to be entered into for a period of three years with the possibility of a one-year extension.

1. Notice of the procurement procedure

15. The notice of the procurement procedure, which was published in the *Official Journal of the European Union* on 16 August 2008, (3) contained inter alia the following text which was headed 'Short description of the contract or purchase(s)':

'The Province of Noord-Holland has entered into a contract for the management of automatic coffee machines. The contract expires on 1 January 2009. The province intends to enter into a new contract from 1 January 2009 by means of a European tender procedure. An important aspect is the desire of the Province of Noord-Holland to increase the use of organic and fair trade products in automatic coffee machines.' (4)

16. Under the heading 'Other particular conditions to which the performance of the contract is subject' the notice stated 'No'. (5) The contract was to be awarded to the economically most advantageous tender. (6)

2. Specifications

17. The specifications, (7) which were available on request to any interested parties, stated inter alia that not only price but also quality and environmental criteria would be relevant in assessing tenders. In that respect, emphasis was placed on the desire of the Province of Noord-Holland to use more organic and fair trade products in its automatic coffee machines.

18. The specifications contained both the suitability criteria to be satisfied by the tenderers and the award criteria for assessing the economically most advantageous tender. In addition, they made it clear that only tenders which met the suitability criteria would be assessed on the basis of the award criteria.

19. Sub-chapter 4.4 of the specifications, which was entitled 'Suitability requirements/Minimum requirements', contained the following wording under heading 4.4.4, which was entitled 'Quality requirements':

'In the context of sustainable purchasing and socially responsible conduct the Province of Noord-Holland requires that the supplier fulfil the criteria concerning sustainable purchasing and socially responsible conduct. In what way do you fulfil the criteria concerning sustainable purchasing and socially responsible conduct? It is also necessary to state in what way the supplier contributes to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production.'

The same quality requirement was also classified as a 'knock-out criterion' in summary heading 4.4.6 of the contract documents entitled 'Summary of minimum requirements'.

20. Attached as Annex A to the specifications was a 'Requirements Profile', with which each tenderer had to declare its agreement. The profile contained both 'requirements' and 'preferences' of the contracting authority, the former being minimum requirements to be satisfied to avoid the tenderer being excluded from the award procedure, and the latter being award criteria, compliance with which by the individual tenderers was to be assessed on the basis of a points system.

21. Point 31 of the Requirements Profile set out the following 'requirement' relating to the coffee and tea to be supplied:

'The Province of Noord-Holland uses the Max Havelaar and EKO labels in relation to the consumption of coffee and tea.'

22. Furthermore, point 35 of the Requirements Profile concerning the 'ingredients' to be supplied — in particular sugar, milk powder and cocoa — contained the following 'preference' of the contracting authority, fulfilment of which could be rewarded with up to 15 points:

'If possible, the ingredients should comply with the EKO and/or Max Havelaar label.'

23. According to the specifications, the submission of alternative tenders was not permitted. Similarly, conditional tenders were not allowed.

3. Information notice

24. According to the specifications, potential tenderers had the possibility of putting questions to the province, as the contracting authority, to which they would receive answers in the form of an information notice. This downloadable notice was to form part of the specifications and take precedence over other parts thereof.

25. On 9 September 2008 the Province of Noord-Holland did in fact issue such an information notice which contained inter alia two answers to questions submitted by potential tenderers concerning the 'Max Havelaar' and 'EKO' labels used in the specifications.

– As regards point 31 of the Requirements Profile, the province responded to the question 'Can it be assumed that "or equivalent" applies in respect of the prescribed labels?' as follows: 'provided that they are based on the same or similar criteria' (point 11 of the information notice).

– As regards point 35 of the Requirements Profile, the province responded to the question 'Can it be assumed that "or equivalent" applies in respect of the prescribed labels?' as follows: 'The ingredients may bear a label which is based on the same criteria' (point 12 of the information notice).

4. Award of the contract

26. According to the notice of 24 December 2008, at the end of the procurement procedure the contract was awarded to the Netherlands undertaking Maas International B.V., established in Eindhoven. (8)

B – *Labels referred to in the conditions of the contract*

27. The 'Max Havelaar' (9) label has been awarded by the Stichting Max Havelaar, a foundation incorporated under Netherlands private law, since 1988. Products bearing this label have been purchased at a fair price and under fair terms of trade from organisations made up of small groups of farmers in developing countries. Four criteria are applied for awarding the label: a break-even minimum price, a premium on the world market price, pre-financing and long-term trading relationships between producer and importer. The setting of standards, auditing and certification are carried out by an international umbrella organisation, the Fairtrade Labelling Organization (FLO), (10) with its headquarters in Bonn, Germany.

28. The 'EKO' label is also a label established under Netherlands private law. It has been issued since 1985 by the Stichting Skal, a foundation incorporated under Netherlands private law, to products made up of at least 95% organic ingredients. The Stichting Skal works in collaboration with the Netherlands Ministry of Agriculture, Nature Management and Fisheries.

29. Both 'Max Havelaar' and 'EKO' are registered as Community trade marks with the Office for Harmonisation in the Internal Market (Trade Marks and Designs).

C – *Pre-litigation procedure*

30. Following receipt of a complaint, the Commission initiated the present proceedings for failure to fulfil obligations. Both in its letter of formal notice of 14 May 2009 and its reasoned opinion of 29 October 2009 the Commission essentially raised the same pleas on which the present action is based. It alleges that the Netherlands conducted the procurement procedure in breach of Directive 2004/18.

31. Both in its response of 17 August 2009 to the letter of formal notice and its written observations of 31 December 2009 on the Commission's reasoned opinion, the Netherlands contests the claim that it failed to fulfil its obligations. (11)

IV – Forms of order sought by the parties and procedure before the Court

32. By application of 20 July 2010, received at the Court on 22 July 2010, the Commission brought the present action against the Netherlands under the second paragraph of Article 258 TFEU.

33. The Commission asks the Court to:

1. Declare that, by virtue of the fact that in the tender procedure for a public contract for the supply and management of automatic coffee machines, published under No 2008/S 158-213630, the contracting authority,

   – inserted in the technical specifications a requirement for the Max Havelaar and EKO labels, or in any event labels based on similar or the same criteria, contrary to Article 23(6) and (8) of Directive 2004/18/EC,

   – included, for appraising the ability of operators, criteria and evidence concerning sustainable purchasing and socially responsible conduct, contrary to Article 48(1) and (2), Article 44(2), and in any event Article 2, of Directive 2004/18/EC and

   – included, when formulating the award criteria, a reference to the Max Havelaar and/or EKO labels, or in any event labels based on the same criteria, contrary to Article 53(1) of Directive 2004/18/EC,

   the Kingdom of the Netherlands failed to fulfil its obligations under the abovementioned articles of Directive 2004/18/EC;

2. Order the Kingdom of the Netherlands to pay the costs.

34. The Netherlands contends for its part that the Court should,

1. Dismiss the action; and

2. Order the Commission to pay the costs.

35. The Court received written submissions on the Commission's action, followed by oral argument, on 26 October 2011. The Kingdom of Denmark, which was granted leave to intervene in support of the Netherlands' submissions by an order of the President of the Court of 11 February 2011, took no further part in the procedure and withdrew from it by letter of 17 October 2001.

V – Assessment

36. For a long time the pursuit of environmental and social objectives was disapproved of in public procurement law, as was manifested not least in the use of the phase 'objectives irrelevant to the contract'. However, it is now generally recognised that contracting authorities may also take account of environmental and social factors when awarding contracts, (12) and the Commission has not challenged this in principle. On the one hand, this is clear generally from its public statements on this matter. (13) On the other, in the present case the Commission expressly recognised — not least at the hearing — that contracting authorities may in particular make the purchase of organic and fair trade products the subject-matter of public supply contracts.

37. In practical terms, however, the conditions under which, and the form in which, the contracting authorities' environmental and social views may affect a specific award procedure is fiercely disputed. In the present case, the Commission considers that Directive 2004/18 has been infringed. It objects to the action of the Province of Noord-Holland in three respects, each of which it covers with a separate plea in its application. They relate principally to the reference to the 'Max Havelaar' and 'EKO' labels in the tender documents.

38. The Netherlands does not challenge the applicability of Directive 2004/18 to the public supply contract at issue, but does dispute the claim that the Province of Noord-Holland infringed that directive.

A – *First plea: reference to the 'Max Havelaar' and 'EKO' labels in the technical specifications for the coffee and tea to be supplied*

39. By its first plea, the Commission alleges that the Netherlands infringed Article 23(6) and (8) of Directive 2004/18, which set out how the contracting authority can define product characteristics (‘technical specifications’).

40. As the Commission made clear at the hearing, it does not consider that the decision of the Province of Noord-Holland to purchase organic and fair trade products (14) is contrary to European Union law per se. The alleged infringement of Article 23 of Directive 2004/18 is claimed to lie instead in the fact that in laying down the technical specifications for the coffee and tea to be supplied to it the Province of Noord-Holland made reference to the ‘Max Havelaar’ and ‘EKO’ labels, or at least to labels with the same or similar criteria.

41. This plea relates specifically to paragraph 31 of the Requirements Profile in which suppliers were informed by way of a ‘requirement’ that the Province of Noord-Holland ‘uses’ the ‘Max Havelaar’ and ‘EKO’ labels in relation to the consumption of coffee and tea. Note should also be taken of point 11 of the information notice in which the contracting authority made it clear that it would also accept ‘equivalent’ labels ‘provided that they are based on the same or similar criteria’.

42. The first part of the first plea deals with the ‘EKO’ label (see also in this regard Section 1), whilst the second part concerns the ‘Max Havelaar’ label (see Section 2 below).

1. First part of the first plea: reference to the ‘EKO’ label in respect of the coffee and tea to be supplied (Article 23(6) of Directive 2004/18)

43. The first part of the first plea concerns the ‘EKO’ label, the inclusion of which in point 31 of the Requirements Profile infringes, in the view of the Commission, Article 23(6) of Directive 2004/18.

44. It must be observed in that regard that contracting authorities are free to determine themselves what products they wish to procure. However, in laying down product characteristics, including environmental characteristics, they must comply with certain provisions of European Union law which are intended to ensure that the relevant contract procedure is transparent, that there is no discrimination amongst potential suppliers, and that no unjustified obstacles are created to the opening-up of public procurement to competition. These provisions include Article 23 of Directive 2004/18.

(a) Applicability of Article 23 of Directive 2004/18

45. Article 23 of Directive 2004/18 contains detailed provisions on the use of technical specifications by contracting authorities in the contract documents. According to point 1(b) of Annex VI to this directive, ‘technical specification’, in the case of public supply contracts, means a specification in a document defining the required characteristics of a product. As examples of technical specifications, point 1(b) of Annex VI refers inter alia to environmental performance levels, symbols, packaging, marking and labelling, and production processes and methods.

46. The reference by a contracting authority to an eco-label such as the ‘EKO’ label certainly meets this definition of technical specification since this label indicates a particular production method and provides information on particular environmental characteristics of this coffee and tea.

47. Consequently, the use of the EKO label in the Requirements Profile of the Province of Noord-Holland must be assessed in the light of Article 23 of Directive 2004/18.

(b) No general prohibition on reference to environment labels when laying down the environmental characteristics of a product

48. Under Article 23(3)(b) of Directive 2004/18, contracting authorities may lay down in relation to the product to be supplied environmental characteristics in terms of performance or functional requirements. To this end, they may, under Article 23(6) of Directive 2004/18, use the detailed specifications, or, if necessary, parts thereof, as defined by European, (multi-) national or other eco-labels.

49. The Commission appears to construe these rules as meaning that contracting authorities may refer, when setting out their requirements on potential tenderers, only to concrete specifications — as it were, to the ‘small print’ — whilst they are prohibited from making any direct reference to eco-labels.

50. However, contrary to the view of the Commission, no such categorical prohibition on the use of eco-labels can be construed from the wording of Article 23(6) of Directive 2004/18 or appears justified in the light of the purpose of this provision or the context in which it is used.

51. Article 23(6) of Directive 2004/18 indeed emphasises the ‘detailed specifications’ which the contracting authorities are to use to describe the environmental characteristics of products.

52. However, that does not mean necessarily that contracting authorities must list separately in their contract documents every individual specification which forms part of an eco-label. Rather, the contracting authorities are free to refer in the contract documents, by a simple reference to eco-labels, in general to all the specifications on which those labels are based. The fact that Article 23(6) of Directive 2004/18 allows contracting authorities to use ‘detailed specifications’ ‘as defined … by eco-labels’ must be construed in this way.

53. According to the clear wording of the rules, such a general reference is allowed not only with regard to ‘European’ eco-labels — for example ‘EU ecolabels’ within the meaning of Regulation (EC) No 1980/2000 (15) or Regulation (EC) No 66/2010 (16) — but also with regard to ‘national’, ‘plurinational’ and ‘other’ eco-labels, where they satisfy the criteria laid down in the fourth indent of Article 23(6) of Directive 2004/18. (17)

54. Contrary to the Commission’s view, moreover, the general reference to all specifications on which an eco-label is based is normally entirely compatible with the principle of transparency, which is one of the fundamental principles of European public procurement law. (18)

55. The principle of transparency merely requires that technical specifications afford *equal access* for tenderers (Article 23(2) of Directive 2004/18) and that the environmental characteristics of the products to be supplied be sufficiently precise to allow tenderers *to determine the subject-matter of the contract* (Article 23(3)(b) of Directive 2004/18). (19)

56. A general reference to the specifications on which an eco-label is based is normally entirely sufficient in this regard since a reasonably well-informed tenderer of normal diligence (20) can indeed be expected to be familiar with the eco-labels used on the relevant market or at least to obtain information on such labels from the bodies certifying them.

57. Furthermore, the administrative burden involved in laying down the requirements on contracting authorities cannot be overlooked. That burden should always be proportionate to the objectives pursued in public procurement law. If the environmental characteristics of a product can be described with sufficient precision from the point of view of a reasonably well-informed tenderer solely by means of a general reference to the specifications underlying an eco-label, it would be excessively formalistic nevertheless to require the contracting authority to list all these specifications individually.

58. A glance at the final subparagraph of Article 23(6) of Directive 2004/18 also shows that a direct reference to eco-labels is not prohibited in principle. This provision expressly permits contracting authorities to presume that products and services bearing a particular eco-label comply with the technical specifications laid down in the contract documents. That rule would be pointless if the contracting authorities were allowed only to mention individual specifications but not also to refer to the associated eco-label.

59. Therefore, the fact that in the present case the Province of Noord-Holland referred to an eco-label in the contract documents without listing in detail the technical specifications underlying it does not in itself constitute an infringement of Article 23(6) of Directive 2004/18.

(c) Prohibition on making use of a particular eco-label mandatory

60. It must still be examined, however, whether an infringement of Article 23(6) of Directive 2004/18 arises from the way in which the Province of Noord-Holland referred in the present case to the 'EKO' label at point 31 of the Requirements Profile.

61. The parties interpret the facts of the case differently in that regard. Whilst the Commission considers that the 'EKO' label was made mandatory in respect of the coffee and tea to be supplied, the Netherlands takes the view that the Province of Noord-Holland merely wished to order organically produced tea and coffee and the reference to the 'EKO' label in the Requirements Profile was intended only to illustrate that product requirement.

62. The better arguments support the Commission's view.

63. Although the Province of Noord-Holland did in fact stress both in the notice of its plan in the *Official Journal of the European Union* and in the specifications its desire to use more organic and fair trade products in its automatic coffee machines, in the Requirements Profile it stated merely under the heading 'requirements' that it 'uses' coffee and tea bearing the 'EKO' label. At the same time it defined 'requirement' in terms of mandatory minimum conditions which must be satisfied to prevent a tenderer from being excluded from the award procedure. (21)

64. Potential tenders, whose understanding is decisive in interpreting the conditions of the contract, (22) could construe all this only as meaning that they were required to supply coffee and tea with the 'EKO' label and that they would be excluded from the award procedure if their products did not bear precisely that label.

65. Such a requirement is contrary to the principle of non-discrimination and the principle of opening-up of public procurement to competition (Article 23(2) of Directive 2004/18, in conjunction with Article 2 thereof), which must also be observed under Article 23(6) of Directive 2004/18. First, undertakings — in particular those from other Member States — whose tea and coffee bears a label other than the 'EKO' label used in the Netherlands, are disadvantaged. Second, undertakings which have organically produced coffee and tea in their product range, without having a label for them, are placed in a less favourable position.

66. Consequently, the Province of Noord-Holland went beyond what it is permitted to do by Article 23(6) of Directive 2004/18, in conjunction with Article 23(3)(b) thereof, in laying down the environmental characteristics of the products to be supplied. It did not merely refer generally to the 'detailed specifications' underlying the 'EKO' label (first paragraph of Article 23(6)) and did not simply presume that products bearing the 'EKO' label complied with the tender conditions (final subparagraph of Article 23(6)). Rather, it made the 'EKO' label compulsory per se and thus only coffee and tea bearing that specific label could be supplied, to the exclusion of all other coffees and teas.

67. That finding is not altered by the fact that, in its information notice concerning the two signs it used for coffee and tea, the contracting authority subsequently accepted, when requested, the additional words 'or equivalent'.

68. There are no concerns in principle over the use of the additional words 'or equivalent'. After all, the European Union legislature has itself expressly made similar provision, albeit in a different context (see the final sentence of Article 23(3)(a) and Article 23(8) of Directive 2004/18). In particular, contrary to the Commission's view, the additional words 'or equivalent' cannot be rejected on grounds of the legal uncertainty purportedly created. It is an inherent feature of every public contract for the contracting authority to assess the compatibility of the tenders submitted to it with the conditions of the contract and, where necessary, to carry out an examination of equivalence. (23)

69. However, as the Commission rightly points out, in the present case the clarification 'or equivalent' was not made in the information notice until several weeks after the contract documents had been distributed to interested parties. In these circumstances it cannot be ruled out that in the meantime one or more potential tenders were deterred from submitting a tender by the more restrictive formulations in the contract documents which seem to indicate that the 'EKO' label is compulsory, without any examination of equivalence.

70. The Netherlands objects that the Province of Noord-Holland produced its information notice containing the clarification ‘or equivalent’ within the time-limit laid down by Article 39(2) of Directive 2004/18, that is to say at least six days before the deadline fixed for the receipt of tenders.

71. However, that objection cannot be accepted. The six-day time-limit under Article 39(2) of Directive 2004/18 applies only to ‘additional information relating to the specifications and any supporting documents’ which the contracting authority supplies to potential tenderers on request. Such information may indeed be used to provide certain clarifications and information. However, fundamental defects in the conditions of the contract cannot be remedied in this way since the contract documents must satisfy all legal requirements from the time at which they are made available to potential tenders and cannot be substantially corrected just a few days before the deadline fixed for the receipt of tenders.

(d) Interim conclusion

72. All in all, therefore, it must be found that there has been an infringement of Article 23(6) of Directive 2004/18 in that the Province of Noord-Holland made a particular eco-label — the ‘EKO’ label — compulsory in respect of the coffee and tea to be supplied. Consequently, the first part of the Commission’s first plea is well founded.

2. Second part of the first plea: reference to the ‘Max Havelaar’ label in respect of the coffee and tea to be supplied (Article 23(8) of Directive 2004/18)

73. The second part of the Commission’s first plea concerns the ‘Max Havelaar’ label the use of which in point 31 of the Requirements Profile, subsequently supplemented by point 11 of the information notice, infringes, in the view of the Commission, Article 23(8) of Directive 2004/18.

(a) Applicability of 23(8) of Directive 2004/18

74. It is necessary first to examine whether Article 23(8) of Directive 2004/18 is applicable at all in a case such as this.

75. The Commission appears to consider that it is, merely because in the course of the proceedings the Netherlands submitted observations on the substance of Article 23(8) of Directive 2004/18. However, the Commission overlooks the fact that the Netherlands commented only in the alternative on Article 23(8), the applicability of which to the ‘Max Havelaar’ label it continues vehemently to dispute. Nevertheless, even if the Netherlands had entered into discussion of Article 23(8) without making any objection, it would still be for the Court to examine whether or not this provision is applicable. That is because, in an action for failure to fulfil obligations, it is for the Court to determine whether or not the alleged breach of obligations exists, even if the State concerned does not deny, or no longer denies, the breach. (24) Accordingly, the Court cannot look on while an incorrect provision is applied, even though the parties agree on its applicability. (25) As Advocate General Léger rightly stated, the role of the Court is not a passive one and it cannot be expected to be merely ‘the mouthpiece of the parties’. (26)

76. Article 23(8) of Directive 2004/18, the provision at issue, concerns — like all the preceding parts of this provision — technical specifications by which the contracting authority sets out the subject-matter of the contract. What therefore has to be examined is whether, by referring to the ‘Max Havelaar’ label, the Province of Noord laid down a technical specification in relation to the coffee and tea to be supplied.

77. As already mentioned, technical specifications within the meaning of Directive 2004/18 are, according to point 1(b) of Annex VI thereto, a specification in a document defining the required characteristics of a product. Therefore, they must be information which defines the properties of a product. That assessment is confirmed by the list contained in point 1(b) of Annex VI to Directive 2004/18: all the technical specifications given as examples therein concern the product itself, its packaging and its performance.

78. The ‘Max Havelaar’ label, on the other hand, does not concern the characteristics of the product, but rather the terms of trade granted to the producers of agricultural products in developing countries.

The label provides no information on how a product is produced, but rather whether it was traded fairly, in particular with regard to the prices and terms of trade granted to the farmers concerned.

79. In the context of the present case, this means that the 'Max Havelaar' label says nothing about the characteristics or method of production of the coffee or tea to be supplied — such as its taste, caffeine content or the use of pesticides — but merely permits inferences to be drawn as to the conditions under which this coffee or tea was purchased from the relevant producers. As the parties correctly pointed out, it relates to the purchasing policy of potential tenderers.

80. Therefore, the contracting authority did not, by referring to the 'Max Havelaar' label, lay down technical specifications within the meaning of Directive 2004/18, but rather brought social considerations into the award procedure.

81. Consequently, Article 23(8) of Directive 2004/18 is not applicable to the present case. As I will explain below, (27) the contracting authority's reference to a fair trade label such as 'Max Havelaar' should properly have been assessed in the light of Article 26 of Directive 2004/18.

82. It follows that the second part of the Commission's first plea must be dismissed as unfounded.

83. Contrary to what the Commission appears to suggest, its plea based on Article 23(8) of Directive 2004/18 cannot simply be reinterpreted as a plea pursuant to Article 26 of that directive since, according to settled case-law, (28) the subject-matter of an action for failure to fulfil obligations is circumscribed by the pre-litigation procedure. The Commission may not expand its scope in the proceedings before the Court. Therefore, if the Commission pleads an infringement of Article 23(8) of Directive 2004/18 in the pre-litigation procedure, it cannot be found in subsequent proceedings that there has been an infringement of Article 26 of Directive 2004/18. Furthermore, a plea to that effect would also be inadmissible under Article 42(2) of the Rules of Procedure of the Court of Justice since it was first raised in the Commission's rejoinder without any sound reasons for the delay being evident.

(b) In the alternative: compatibility of the reference to the 'Max Havelaar' label with Directive 2004/18

84. For the sake of completeness, I now wish briefly to address, in the alternative, the question whether the reference by the Province of Noord-Holland to the 'Max Havelaar' label was compatible with Directive 2004/18.

(i) Applicable provision: Article 26 of Directive 2004/18

85. As the Netherlands correctly pointed out, the lawfulness of a contracting authority's references to a fair trade label must be assessed not in the light of Article 23(8) of Directive 2004/18, but Article 26 thereof. Under the latter provision, 'contracting authorities may lay down special conditions relating to the performance of a contract' which 'may, in particular, concern social and environmental considerations.'

86. Part of the performance of a contract is not least the purchase by the contractor of the products to be supplied to the contracting party. Whether or not a product such as coffee or tea which is to be supplied to a contracting authority is fair trade depends on the contractor's purchasing policy based on social criteria.

87. The truth is therefore that by referring to the 'Max Havelaar' label in connection with the performance of the public supply contract at issue the Province of Noord-Holland laid down a condition based on social considerations within the meaning of Article 26 of Directive 2004/18, even though the province itself may have considered that no such conditions were contained in the contract documents. (29)

(ii) Examination of the reference to the 'Max Havelaar' label in the light of Article 26 of Directive 2004/18

88. As to the substance, I agree with the Commission that Article 26 of Directive 2004/18 does not permit the contracting authority to exercise unlimited influence over the purchasing policy of its future contractor. Its requirements in respect of that purchasing policy must relate specifically to the subject-matter of the public supply contract (30) and may not concern, for example, the contractor's purchasing policy in general. The contracting authority cannot therefore require that potential tenders have only fair trade products in their product range, but merely that the products to be supplied to it specifically under a public contract be fair trade. The Province of Noord-Holland has laid down no other requirement in the present case.

89. Having regard to the transparency rule, which must be complied with under Article 26 of Directive 2004/18, (31) there is likewise in principle no reason why a contracting authority should not refer to a fair trade label to clarify the social conditions which it has laid down for the performance of the contract and at the same time opt not to list in detail the criteria underlying that label, since, as already stated above in connection with eco-labels, (32) a reasonably well-informed tenderer of normal diligence can be expected to be familiar with the fair trade labels used on the relevant market or at least to obtain information on such labels from the bodies certifying them.

90. Conducting the procurement procedure and also performing the contract subsequently can even be made considerably easier if the undertakings concerned are permitted to prove that they have satisfied the social conditions laid down by the contracting party with reference to fair trade labels. The administrative burden on the contracting authority, potential tenderers, and the subsequent contractor is thereby minimised.

91. Contrary to the Commission's assertion at the hearing, contracting authorities absolutely cannot in any event be required to set out in their tender conditions their own ideas on fair trade. Most of them would probably not have the technical knowledge necessary to do so. Furthermore, the contracting authorities' different ideas of what constitutes fair trade (for example, as regards the price level, the appropriate length of the supply relationship between the traders and producers in developing countries, and the nature and extent of pre-financing of production (33)) would lead to a serious risk of fragmenting the market. Therefore, it is in the interests of both potential tenderers and contracting authorities for reference to fair trade labels to be permitted when awarding public supply contracts.

92. None the less, the social conditions relating to the performance of a contract laid down by the contracting authority pursuant to Article 26 of Directive 2004/18 must be compatible with European Union law. That means in particular that there must be no direct or indirect discrimination. (34)

93. That requirement is not satisfied in the present case since the Province of Noord-Holland did not use the 'Max Havelaar' label merely to explain its social ideas about fair trade. Nor did it simply establish a presumption that products bearing the 'Max Havelaar' label satisfied its social requirements for performance of the contract. Instead, it made the 'Max Havelaar' label compulsory per se and thus only coffee and tea bearing this specific label could be supplied, to the exclusion of all other coffees and teas. (35)

94. Therefore, firstly, it disadvantaged undertakings — in particular those from other Member States — whose tea and coffee bears a label other than the 'Max Havelaar' label used primarily in the Netherlands and Belgium. Secondly, it placed undertakings which have fair trade coffee and tea in their product range, without having a label for them, in a less favourable position. (36)

95. In the light of the foregoing, it can be concluded that the action of the Province of Noord-Holland in making a specific fair trade label — the 'Max Havelaar' label — compulsory in respect of the coffee and tea to be supplied was not compatible with Article 26 of Directive 2004/18.

96. As stated above, (37) that assessment is not altered by the subsequent clarification on the part of the contracting authority in point 11 of its information notice, which states that the reference to the 'Max Havelaar' label is to be read with the additional words 'or equivalent'.

97. I would point out merely in passing that the considerations set out above in respect of Article 26 of Directive 2004/18 also apply to Article 23(8) of that directive, should the Court find, contrary to my comments above, (38) that that provision is applicable.

3. Summary of the first plea

98. The Commission's first plea is only partly well founded. It must be upheld in so far as it claims an infringement of Article 23(6) of Directive 2004/18, whilst it must be rejected in so far as it is based on an infringement of Article 23(8) of that directive.

B – *Third plea: reference in the award criteria to the 'Max Havelaar' and 'EKO' labels with regard to the ingredients to be supplied*

99. On account of its closely connected subject-matter, it is appropriate to examine the Commission's third plea directly after its first. The third plea alleges infringement of Article 53(1)(a) of Directive 2004/18, which sets out which award criteria contracting authorities may lay down with regard to the award of a contract. That provision is said to have been infringed because in formulating its award criteria the Province of Noord-Holland referred to the 'Max Havelaar' 'and/or' 'EKO' labels, or at any rate to labels with the same criteria.

100. This plea relates specifically to point 35 of the Requirements Profile in which tenderers were informed of the 'preference' of the Province of Noord-Holland that the supplied 'ingredients' (in particular sugar, milk powder and cocoa) should 'where possible' comply with the 'EKO' and/or 'Max Havelaar' labels. Fulfilment of that 'preference' could be rewarded with up to 15 points in the award procedure. In point 12 of the information notice the contracting authority further made it clear that it would also accept 'equivalent' labels, adding that the ingredients may 'bear a label which is based on the same criteria' as the 'EKO' and 'Max Havelaar' labels.

1. Preliminary remark

101. Article 53(1)(a) of Directive 2004/18 applies where the contracting authority has decided — as it has in this case — to award the contract to the economically most advantageous tender. (39) As is clear from the wording of that provision, in particular the use of the expression 'for example' ('e.g.'), Directive 2004/18 itself does not lay down an exhaustive list of criteria for determining the economically most advantageous tender. (40)

102. Those criteria do not necessarily have to be of a purely economic nature. Factors which go beyond purely economic considerations may also influence the value of a tender from the point of view of the contracting authority. That is already evident from the wording of Article 53(1)(a) of Directive 2004/18, under which inter alia aesthetic, functional and environmental characteristics can be relevant in determining the economically most advantageous tender. (41)

103. Against that background, there is nothing to prevent a contracting authority from also taking into consideration environmental and social factors in determining the economically most advantageous tender. (42)

104. However, that does not mean that any criterion of that nature may be taken into consideration by the contracting authority. Rather, according to case-law, choice is limited to criteria aimed at identifying the tender which is in fact economically the most advantageous. (43)

105. The contracting authority does not have unrestricted freedom of choice in that regard. (44) As is clear from the wording of Article 53(1)(a) of Directive 2004/18, the criteria which it takes as a basis must be linked to the subject-matter of the contract. (45) They must be capable of establishing the tender which offers best value for money. (46) Furthermore, they must be objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. (47)

106. In the view of the Commission, in the present case these principles were infringed in two respects: one, the 'Max Havelaar' and 'EKO' labels have no link with the subject-matter of the contract (see Section 2 below), and two, the Province of Noord-Holland elevated both labels as such to the status of award criteria rather than merely taking account of the substantive requirements underlying them (see Section 3 below). I will examine these two arguments put forward by the Commission in greater detail below.

2. First argument in support of the third plea: purported absence of a link between the subject-matter of the contract and the two labels

107. Firstly, the Commission claims that there is no link between the subject-matter of the contract and the two ‘EKO’ and ‘Max Havelaar’ labels which the Province of Noord-Holland took as a basis because those labels relate solely to the general purchasing policy of potential tenderers.

108. That argument is unconvincing and, moreover, contradicts what the Commission itself stated in its first plea. (48) Contrary to the view of the Commission, both labels at issue have a sufficient link with the subject-matter of the contract.

109. For example, the ‘EKO’ label directly concerns the product characteristics — more precisely the environmental characteristics — of the ingredients to be supplied. A label which the Commission itself classified as a technical specification to determine functional performance and requirements under Article 23(6) of Directive 2004/18, in conjunction with Article 23(3) thereof, cannot be denied any link with the subject-matter of the contract under Article 53(1) of Directive 2004/18.

110. As regards the ‘Max Havelaar’ label, it is true it does not define any product characteristics in the strict sense, such as those relevant to the technical specifications (Article 23 of Directive 2004/18). (49) That label does, however, provide information on whether or not the goods to be supplied were traded fairly. Such a factor can be taken into consideration in connection with conditions relating to performance of a contract (Article 26 of Directive 2004/18). (50) It cannot therefore be denied at the outset that it lacks any connection with the subject-matter of the contract (in this case, the supply of ‘ingredients’ such as sugar, milk powder and cocoa). From the point of view of a contracting authority which, as the contract documents show, attaches importance to socially responsible trade, the question whether or not the goods to be supplied were purchased from the producer thereof on fair conditions can indeed be relevant in determining best value for money. Of course the taste of sugar does not vary depending on whether it was traded fairly or unfairly. A product placed on the market on unfair conditions does however leave a bitter taste in the mouth of a socially responsible customer.

111. It would certainly be going too far for a contracting authority, in determining the economically most advantageous tender, to want to assess the general purchasing policy of potential tenderers and to take into consideration whether all the goods in its product range were fair trade, irrespective whether or not they are the subject-matter of the contract. (51)

112. However, in the present case there is certainly no such extensive consideration of the fair trade factor. As the Netherlands has correctly pointed out, in point 35 of the Requirements Profile the Province of Noord-Holland merely took into account whether the ‘ingredients’ to be supplied to it bore a label capable of certifying their fair trade origin. Accordingly, the use of the ‘Max Havelaar’ label in the contract documents at issue had a clear and specific connection with the subject-matter of the contract.

113. Consequently, the Commission’s first argument in support of its third plea must be dismissed.

3. Second argument supporting the third plea: reference to the labels instead of the underlying criteria

114. It remains to be considered whether an infringement of Article 53(1)(a) of Directive 2004/18 arises from the way in which the Province of Noord-Holland referred in the present case to the ‘EKO’ and ‘Max Havelaar’ labels in point 35 of the Requirements Profile.

115. The parties interpret the facts of the case differently in this regard. Whereas the Commission considers that the contracting authority made the ‘EKO’ and ‘Max Havelaar’ labels as such the award criterion in respect of the ‘ingredients’ to be supplied (in particular sugar, milk powder and cocoa), the Netherlands takes the view that the Province of Noord-Holland merely intended to refer to the substantive requirements underlying the two labels.

116. The better arguments support the Commission’s view.

117. Although the Province of Noord-Holland did stress in general terms both in the notice of its plan in the *Official Journal of the European Union* and in the specifications that it wished to use more organic and fair trade products in its automatic coffee machines, in point 35 of the Requirements Profile it expressed its 'preference' that the ingredients should 'where possible' comply with the 'EKO' 'and/or' the 'Max Havelaar' labels. In point 12 of the information notice it clarified that statement as meaning that the ingredients could bear another label which was based on the same criteria as the 'EKO' and 'Max Havelaar' labels. However, there was no mention in either the Requirements Profile or the information notice of organic and fair trade ingredients *without labels*.

118. The potential tenderers, whose understanding is decisive in interpreting the tender conditions, (52) could understand this only as meaning that the ingredients to be supplied by them had to bear the 'EKO' and/or 'Max Havelaar' label, or at least equivalent labels, in order to gain the most points in the award procedure.

119. Such action by the contracting authority does not comply with the legal requirements applicable to the formulation of award criteria under Article 53(1)(a) of Directive 2004/18.

120. Contrary to the view expressed by the Commission, that is not because of a purported lack of transparency (53) in the reference to the two labels since, as stated above, (54) a reasonably well-informed tenderer of normal diligence can be expected to be familiar with the labels used on the relevant market or at least to obtain from the bodies certifying those labels information on the criteria applied by them.

121. It was also entirely possible that potential tenders offered goods with other labels based on the same criteria as the 'EKO' and 'Max Havelaar' labels since, according to the submissions made by the Netherlands Government, which are undisputed in that regard, the 'EKO' label (55) is based exclusively on the criteria laid down in the so-called 'EC organic regulation', (56) and the 'Max Havelaar' label is identical in content to the international 'Fairtrade' label which is awarded in numerous States by bodies brought together under the Fairtrade Labelling Organisation. (57)

122. However, it is contrary to the principle of non-discrimination (58) and the principle of opening-up of public procurement to competition, (59) which must be observed under Article 53(1)(a) of Directive 2004/18, (60) for a contracting authority — such as the Province of Noord-Holland in this case — to award in connection with award criteria extra points for the fact that products bear organic and fair-trade labels. Undertakings which have organically produced goods in their product range, without having a label for them, are thereby placed in a less favourable position. Potential tenderers must retain the possibility of proving that their goods satisfy fully the award criteria drawn up by the contracting authority, even if they bear labels other than those mentioned by the contracting party or bear no label at all.

123. In this connection, the objection raised by the Netherlands that the 'EKO' and 'Max Havelaar' labels were not mandatory requirements in respect of the 'ingredients' to be supplied, but merely non-binding 'preferences' of the contracting authority which were rewarded by a negligible number of points, must be rejected. On the one hand, just a few points can in some circumstances make the difference between success and failure in an award procedure with a points-based evaluation system, and, on the other, all award criteria — including those to which the contracting authority attaches little importance — must comply, without any reservation, with the fundamental procurement law principles of equal treatment and non-discrimination. According to settled case-law, those principles are to be observed at every stage of the award procedure. (61)

124. All in all, it must therefore be found that there has been an infringement of Article 53(1)(a) of Directive 2004/18. The Commission's third plea is well founded.

C – *Second plea: purported reference to sustainable purchasing and socially responsible conduct as a suitability criterion*

125. The Commission's second plea is based on Articles 2, 44(2) and 48(1) and (2) of Directive 2004/18 which lay down the principle of transparency under procurement law (Article 2) and conditions relating to the assessment by the contracting authority of undertakings' ability (Articles 44

and 48). The Commission considers that those provisions were infringed in that the Province of Noord-Holland laid down criteria and required evidence which — in the view of the Commission — concerned quite generally the sustainable purchasing and socially responsible conduct of potential tenderers.

126. More specifically, this plea relates to heading 4.4.4 of the specifications in which the Province of Noord-Holland requires that potential tenderers fulfil 'the criteria concerning sustainable purchasing and socially responsible undertakings'. In that heading it also asks tenderers to explain how they fulfil 'the criteria concerning sustainable purchasing and socially responsible undertakings' and to state the extent to which they contribute 'to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production'. (62)

1. First part of the second plea: purported unlawful requirements relating to evidence of tenderers' technical ability (Article 48(1) of Directive 2004/18, in conjunction with Article 48(2) thereof)

127. The first part of the second plea specifically concerns the requirements relating to evidence of tenderers' technical ability. In the view of the Commission, the Province of Noord-Holland, by its statements on sustainable purchasing and the socially responsible conduct of potential tenderers in the contract documents, went beyond the narrow confines laid down by Article 48 of Directive 2004/18 in respect of the assessment and examination of the technical and professional abilities of economic operators.

128. However, as the Netherlands correctly points out, that part of the second plea is based on a misinterpretation of heading 4.4.4 of the specifications. The requirements placed therein on potential tenderers do not relate at all to their technical and professional abilities. It is apparent from the title of heading 4.4.4 that they are instead 'quality requirements' in relation to the services to be provided.

129. The overall context of heading 4.4.4 of the contract documents also confirms this impression. For example, sub-chapter 4.4 of the contract documents is headed 'Suitability requirements/Minimum requirements', which suggests that it relates not only to the suitability of potential tenderers (or their abilities) — such as heading 4.4.3, which concerns the tenderers' experience — but other aspects too. Those other aspects include, for example, the answer to the question at issue in the present case, namely how the tenderer concerned intends to meet the requirements relating to sustainability and socially responsible undertakings (heading 4.4.4 of the specifications).

130. Consequently, heading 4.4.4, the heading of the specifications at issue, does not, contrary to the view of the Commission, fall at all within the scope of Article 48(1) and (2) of Directive 2004/18 and cannot therefore be assessed in the light of that provision

131. If, however, the Court were nevertheless to apply that provision of the directive, it would not preclude a contract condition such as heading 4.4.4 of the specifications.

132. It is indeed undisputed that Article 48 of Directive 2004/18 contains an exhaustive list of the evidence of technical ability which contracting authorities may require from economic operators. (63)

133. However, by its 'quality requirements' in heading 4.4.4 of the specifications the Province of Noord-Holland was able to rely on one of the clauses in Article 48(2) of Directive 2004/18, that is to say, subparagraph (c) which provides specifically for a 'description of the … measures used … for ensuring quality'. The Netherlands rightly drew attention to this.

134. Consequently, the allegation of infringement of Article 48 of Directive 2004/18 is unfounded.

2. Second part of the second plea: purported lack of a connection between the suitability requirements on tenderers and the subject-matter of the contract (Article 44(2) of Directive 2004/18)

135. The second part of the second plea is based on Article 44(2) of Directive 2004/18. That provision essentially provides that the contracting authority may set minimum levels of ability required of potential tenderers, provided that they are related and proportionate to the subject-matter of the contract. (64)

136. The Commission considers that Article 44(2) of Directive 2004/18 has been infringed because the statements in the specifications concerning the sustainable purchasing and socially responsible conduct of potential tenderers has, in its view, no connection with the subject-matter of the public procurement contract at issue in this case, but instead concerns the general purchasing policy of economic operators.

137. The Netherlands cannot be regarded as accepting that allegation simply because it mounted a relatively half-hearted defence to it in the pre-litigation procedure, (65) since according to settled case-law there is no rule of procedure which requires a Member State to put forward during the pre-litigation phase of an infringement procedure under Article 258 TFEU all the arguments in its defence. (66) In the court proceedings at any rate the Netherlands defended itself strenuously against the allegation of an infringement of Article 44(2) of Directive 2004/18.

138. However, the plea alleging infringement of Article 44(2) of Directive 2004/18 is also unfounded as to the substance since, as stated above, heading 4.4.4 of the specifications at issue in this case is not a requirement concerning the suitability or technical ability of potential tenderers, (67) meaning Article 44 of Directive 2004/18 does not apply at all and, secondly, there is no question of heading 4.4.4 of the specifications lacking a sufficient connection with the subject-matter of the contract.

139. The subject-matter of the contract was — in so far as it is relevant in this context — the supply of coffee, tea and other ‘ingredients’ for automatic coffee machines, with the contracting authority expressly attaching importance to ‘sustainable’ products which were to be both organic and fair trade. As explained in connection with the first plea, these requirements serve partly to describe the product characteristics of the goods to be supplied (environmental characteristics within the meaning of Article 23 of Directive 2004/18), and partly to describe the other conditions governing performance of the contract (social considerations within the meaning of Article 26 of Directive 2004/18).

140. Accordingly, since sustainability and environmental impact played an important role in the performance of the public contract at issue, the contracting party could not be barred from asking potential tenderers how they fulfilled the ‘criteria concerning sustainable purchasing and socially responsible undertakings’ and to state the extent to which they contributed ‘to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’.

141. It is entirely legitimate for a contracting authority to ask potential tenderers for information on how they intend to meet the aims of the contract which it has laid down. Contrary to the view expressed by the Commission, this is not aimed primarily at the general purchasing policy of potential tenderers, but rather at their procurement of the goods specifically to be supplied, that is to say coffee, tea and other ‘ingredients’. (68)

142. Consequently, the allegation of an infringement of Article 44(2) of Directive 2004/18 is likewise unfounded.

3. Third part of the second plea: purported infringement of the general transparency rule (Article 2 of Directive 2004/18)

143. Finally, in the third part of its second plea the Commission raises, in the alternative, an allegation of infringement of the general transparency rule, as contained in Article 2 of Directive 2004/18. (69)

144. That fundamental principle of European public procurement law is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract. (70)

145. The Commission complains that the requirements in heading 4.4.4 of the specifications are couched in excessively general and imprecise terms.

146. I agree. The passage of the specifications at issue does not show with sufficient clarity what kind of explanations and what kind of evidence the contracting authorities require from potential tenderers. Moreover, the wording chosen by the Province of Noord-Holland provides no certainty as to what is meant precisely by ‘sustainable purchasing and socially responsible undertakings’ and a contribution ‘to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’.

147. A more precise description of what the Province of Noord-Holland expected from potential tenderers would have been helpful. For example, the Province of Noord-Holland could have asked about any contractual agreements concerning fair trade or organic products which the potential tenderers might have entered into with their relevant suppliers. The province could also have required potential tenderers to state what measures they had taken to monitor compliance with such agreements.

148. The Netherlands’ objection that several international organisations had defined the concept of sustainability is in any event not sufficiently substantiated to invalidate the plea alleging lack of transparency.

149. Consequently, it must be found that there has been an infringement of Article 2 of Directive 2004/18. The third part of the Commission’s third plea is therefore well founded.

D – *Summary*

150. All in all it can be found that Directive 2004/18 does indeed allow contracting authorities to take account of environmental and social considerations in procurement procedures, expressly including a reference in the tender conditions to environmental and fair trade labels.

151. However, the contracting authority cannot require that the goods to be supplied to it bear a particular label, but must permit other labels and also goods with no labels, provided that their environmental characteristics and the conditions under which they are produced and traded are equivalent to the requirements laid down by the contracting authority.

152. Furthermore, when awarding its contract the contracting authority may not take account of the tenderers’ general purchasing policy, but only their purchasing in relation to the goods specifically to be supplied. Where the contracting authority requires from tenderers information or evidence relating to the sustainability of their products and their business policy, that requirement must have a sufficient connection with the subject-matter of the contract and be couched in specific terms.

153. In the present case, the Province of Noord-Holland only partially complied with those rules. In its conditions of contract governing the 2008 public supply contract at issue it infringed three provisions of European Union law: Article 2, Article 23(6) and Article 53(1)(a) of Directive 2004/18. On the other hand, it is not possible to find that there has been an infringement of the other provisions claimed by the Commission, in particular Article 23(8), Article 44(2) and Article 48(1) and (2) of Directive 2004/18.

VI – Costs

154. According to Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs. That rule applies inter alia where each party succeeds on some and fails on other heads.

155. On the basis of my previous observations, in the present case the Commission is successful in respect of the first part of its first plea, the third part of its second plea and its third plea, but unsuccessful in respect of the second part of its first plea and the first and second parts of its second plea.

156. Against that background, it appears to me reasonable to order each party to bear its own costs. (71)

VII – Conclusion

157. On the basis of the foregoing I propose that the Court rule as follows:

(1) By virtue of the fact that in the tender procedure for a public contract for the supply and management of automatic coffee machines in 2008, the Province of Noord-Holland,

– made it compulsory for the coffee and tea to be supplied to bear the Max Havelaar and EKO labels, or labels with a similar basis, thus contrary to Article 23(6) of Directive 2004/18,

– formulated in the tender conditions unclear 'quality requirements' for potential tenderers as regards 'sustainable purchasing and socially responsible conduct', thus contrary to Article 2 of Directive 2004/18, and

– provided, as part of the award criteria, for extra points if the 'ingredients' to be supplied bore the Max Havelaar and/or EKO labels, or labels with a similar basis, thus contrary to Article 53(1)(a) of Directive 2004/18,

the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty.

(2) The remainder of the application is dismissed.

(3) Each party is ordered to bear its own costs.

---

1 – Original language: German.

---

2 – OJ 2004 L 134, p. 114.

---

3 – OJ 2008, S 158-213630.

---

4 – Section II.1.5 of the notice.

---

5 – Section III.1.4 of the notice.

---

6 – Section IV.2.1 of the notice.

---

7 – 'Offerteaanvraag, Koffieautomaten' of 11 August 2008 (reference: PNH-45096).

---

8 – Contract notice, OJ 2008, S 250-333033.

---

9 – According to the information provided by the Netherlands Government, the name 'Max Havelaar' is borrowed from the title of a well-known book of Netherlands literature: *Max Havelaar of de koffieveilingen der Nederlandsche Handelsmaatschappij* (**Max Havelaar or the coffee auctions of the Dutch Trading Company**). The author of this 1859 book is Multatuli (a pseudonym for Eduard Douwes Dekker). It is about the social injustices in coffee cultivation in the former Dutch East Indies (present-day Indonesia) resulting from Netherlands colonial policy.

---

10 – See, in this regard, the website www.fairtrade.net (viewed most recently on 25 October 2011).

---

11 – In its response to the letter of formal notice, the Netherlands Government at least acknowledged that Articles 2, 23(6) and 53 of Directive 2004/18 'had not been fully complied with to the letter'. However, no such statement is to be found in the response to the reasoned opinion.

---

12 – See the leading cases in this regard: Case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 28 to 30; Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraphs 53 to 69; and recitals (1), (5), (29), (33), (44) and (46) in the preamble to Directive 2004/18.

---

13 – Commission interpretative communication of 4 July 2001 on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement (COM(2001) 274 final, OJ 2001, C 333, p. 12); Interpretative communication of the Commission of 15 October 2001 on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement (COM(2001) 566 final, OJ 2001, C 333, p. 27); Communication from the Commission of 16 July 2008 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Public procurement for a better environment (COM(2008) 400 final); Communication from the Commission of 5 May 2009 to the Council, the European Parliament and the European Economic and Social Committee – Contributing to Sustainable Development: the role of Fair Trade and non-governmental trade-related sustainability assurance schemes (COM(2009) 215 final, p. 10); Communication from the Commission of 3 March 2010: EUROPE 2020 A strategy for smart, sustainable and inclusive growth (COM(2010) 2020 final, p. 18 and 19).

---

14 – See, to that effect, the general contract specifications in the notice and in the contract documents (reproduced in extract in points 15 and 17 of this Opinion).

---

15 – Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community eco-label award scheme (OJ 2000 L 237, p. 1).

---

16 – Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel (OJ 2010 L 27, p. 1). This regulation replaced Regulation No 1980/2000 with effect from 19 February 2010.

---

17 – See, to that effect, the explanations given by the Commission on Amendment 45 in Amended proposal for a European Parliament and Council Directive concerning the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, COM(2002) 236 final (OJ 2002 C 203 E, p. 210, 215, right-hand column). When the Court raised this point at the hearing, it was not disputed by the parties.

---

18 – Article 2 of Directive 2004/18 and recital (2) in the preamble thereto.

---

19 – See also the final sentence of recital (29) in the preamble to Directive 2004/18; see, to the same effect, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 111.

---

20 – As regards the criterion relating to a reasonably well-informed tenderer of normal diligence, see Case C-448/01 *EVN andWienstrom* [2003] ECR I-14527, paragraph 57, and *Commission* v *CAS Succhi di Frutta*, cited in footnote 19, paragraph 111.

---

21 – See, to that effect, point 20 above.

---

22 – See, to that effect, in relation to determination of the value of a public works contract, Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 53.

---

23 – See also, to that effect, the second half of the last sentence of Article 23(6) of Directive 2004/18 and recital (29) (in particular the fifth sentence thereof) in the preamble thereto.

---

24 – Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 30, and Case C-438/07 *Commission* v *Sweden* [2009] ECR I-9517, paragraph 53.

---

25 – See, to that effect, order of 27 September 2004 in Case C-470/02 P *UER* v *M6 and Others*, paragraph 69, and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden* v *API and Commission* [2010] ECR I-8533, paragraph 65.

---

26 – Opinion of Advocate General Léger in Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] I-7421, paragraph 36.

---

27 – See points 85 to 87 below.

---

28 – See, inter alia, Case C-34/04 *Commission* v *Netherlands* [2007] ECR I-1387, paragraph 49, and Case C-211/08 *Commission* v *Spain* [2010] ECR I-5267, paragraph 33.

---

29 – See, to that effect, point 16 above.

---

30 – See, to that effect, albeit in relation to environmental award criteria, *Concordia Bus Finland*, cited in footnote 12, paragraph 59, final sentence, and 64, and *EVN and Wienstrom*, cited in footnote 20, paragraph 66.

---

31 – See Article 2 of Directive 2004/18 and recital (33) in the preamble thereto.

---

32 – See point 56 above.

---

33 – Moreover, what terms of trade are appropriate can vary enormously from product to product and from producer country to producer country. In cases of doubt, the certifying body awarding a fair trade label is able to make a better and more objective assessment than a supplier or a contracting authority.

---

34 – Recital (29) in the preamble to Directive 2004/18; see, to that effect, *Beentjes*, cited in footnote 12, paragraph 30.

---

35 – See also, to that effect, point 66 above regarding the ‘EKO’ label.

---

36 – See also, to that effect, point 65 above regarding the ‘EKO’ label.

---

37 – See, to that effect, point 67 above.

---

38 – See points 74 to 81 above.

39 – See point 16 above.

40 – See, to that effect, in relation to the predecessor provisions of Article 53(1)(a) of Directive 2004/18, *Concordia Bus Finland*, cited in footnote 12, paragraph 54; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 35; Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 63; and Case C-532/06 *Lianakis and Others* [2008] ECR I-251, paragraph 29.

41 – See, to that effect, already, *Concordia Bus Finland*, cited in footnote 12, paragraph 55.

42 – See also the fourth paragraph of recital (46) in the preamble to Directive 2004/18.

43 – *Beentjes*, cited in footnote 12, paragraph 19; *SIAC Construction*, cited in footnote 40, paragraph 36; *Concordia Bus Finland*, cited in footnote 12, paragraph 59; *GAT*, cited in footnote 40, paragraph 64; and *Lianakis and Others*, cited in footnote 40, paragraphs 29 and 30.

44 – *Beentjes*, cited in footnote 12, paragraph 26; *SIAC Construction*, cited in footnote 40, paragraph 37; *Concordia Bus Finland*, cited in footnote 12, paragraphs 61 and 64; and Case C-331/04 *ATI EAC e Viaggi di Maio and Others* ('ATI EAC') [2005] ECR I-10109, paragraph 21.

45 – See, to the same effect, back in *Concordia Bus Finland*, cited in footnote 12, paragraph 59, final sentence, and paragraph 64; *EVN and Wienstrom*, cited in footnote 20, paragraph 66; and *ATI EAC*, cited in footnote 44, paragraph 21.

46 – Third paragraph of recital (46) in the preamble to Directive 2004/18; see also recital (5) in the preamble to that directive.

47 – First paragraph of recital (46) and recital (2) in the preamble to Directive 2004/18; see, to the same effect, *Concordia Bus Finland*, cited in footnote 12, and *ATI EAC*, cited in footnote 44, paragraph 21.

48 – In its first plea the Commission regarded both the 'EKO' label and the 'Max Havelaar' label as technical specifications and examined them in the light of Article 23(6) and (8) of Directive 2004/18.

49 – See points 74 to 81 above.

50 – See points 85 to 87 above.

51 – Similarly — albeit in a different context — *Beentjes*, cited in footnote 12, paragraph 28, on the general capacity of tenderers to employ long-term unemployed persons, and *EVN and Wienstrom*, cited in footnote 20, paragraphs 70 to 72, on the capacity of tenderers to provide the largest amount of electricity possible in excess of the amount laid down in the invitation to tender. See also point 88 above.

52 – See, to that effect, paragraph 64 above.

53 – First and second paragraph of recital (46) in the preamble to Directive 2004/18.

54 – See, to that effect, paragraph 56 above.

55 – See paragraph 28 above.

56 – Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ 1991 L 198, p. 1), which was subsequently replaced by Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (OJ 2007 L 189, p. 1), was in force at the time the public supply contract at issue was being awarded.

57 – See paragraph 27 above

58 – First and fourth paragraph of recital (46) in the preamble to Directive 2004/18.

59 – Recital (2) in the preamble to Directive 2004/18.

60 – See, to that effect, *Beentjes*, cited in footnote 12, paragraph 29; Case C-225/98 *Commission* v *France* [2000] ECR I-7445, paragraph 50; *Concordia Bus Finland*, cited in footnote 12, paragraphs 63 and 64; and *EVN and Wienstrom*, cited in footnote 20, paragraph 69.

61 – See, to that effect, in various fields of public procurement law, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 54; Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 93; *EVN and Wienstrom*, cited in footnote 20, paragraph 56; and *ATI EAC*, cited in footnote 44, paragraph 22.

62 – See paragraph 19 above.

63 – See also, to that effect, Case 76/81 *Transporoute* [1982] ECR 417, paragraphs 8, 9 and 15; Joined Cases 27/86 to 29/86 *CEI* [1987] ECR 3347, paragraph 9; and Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409, paragraph 35, all in relation to rules similar to Article 48 of Directive 2004/18.

64 – See, in particular, the second subparagraph of Article 44(2) of Directive 2004/18.

65 – The Commission cites p. 6 of the Netherlands' response to the letter of formal notice in which the Netherlands purportedly conceded that the tender conditions at issue 'were not connected solely with the subject-matter of the contract'.

66 – Case C-414/97 *Commission* v *Spain* [1999] ECR I-5585, paragraph 19, and *Commission* v *Netherlands*, cited in footnote 28, paragraph 49 *in fine*.

67 – See also, in that respect, points 128 to 130 of this Opinion.

68 – See, to that effect, my comments on the first and third pleas (in particular points 88 and 109 to 112 of this Opinion).

---

69 – See also recitals (2) and (39) in the preamble to Directive 2004/18.

---

70 – *Commission* v *CAS Succhi di Frutta*, cited in footnote 19, paragraph 111; similarly, see Case C-340/02 *Commission* v *France* [2004] ECR I-9845, paragraph 34, and Case C-299/08 *Commission* v *France* [2009] ECR I-11587, paragraph 41, according to which the principle of transparency requires the subject-matter of a public contract and the criteria governing its award to be clearly defined.

---

71 – See, to the same effect, for example Case C-160/08 *Commission* v *Germany* [2010] ECR I-3713, paragraph 133.

JUDGMENT OF THE COURT (Second Chamber)

10 November 2011 (*)

(Public procurement – Directive 2004/17/EC – Article 1(3)(b) – Directive 92/13/EEC – Article 2d(1)(b) – Concept of 'service concession' – Provision of public bus services – Right to operate the services and compensation of the service provider for losses – Risk associated with operation of the service limited by national law and the contract – Appeal procedures in the field of public contracts – Direct applicability of Article 2d(1)(b) of Directive 92/13/EEC to contracts concluded before the expiry of the period for the transposition of Directive 2007/66/EC)

In Case C-348/10,

REFERENCE for a preliminary ruling under Article 267 TFUE from the Augstākās tiesas Senāts (Latvia), made by decision of 2 July 2010, received at the Court on 9 July 2010, in the proceedings

Norma-A SIA,

Dekom SIA

v

Latgales plānošanas reģions, successor to the rights of Ludzas novada dome,

THE COURT (Second Chamber),

composed of J. N. Cunha Rodrigues (Rapporteur), President of the Chamber, U. Lõhmus, A. Rosas, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 18 May 2011,

after considering the observations submitted on behalf of:

– Norma-A SIA, by L. Krastiņa and I. Azanda, advokāte,

– Latgales plānošanas reģions, successor to the rights of Ludzas novada dome, by J. Pļuta,

– the Latvian Government, by M. Borkoveca and K. Krasovska, acting as Agents,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by C. Zadra and A. Sauka, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2011

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(3)(b) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

(OJ 2004 L 134, p. 1) and Article 2d(1)(b) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31, 'Directive 92/13').

2 The reference has been made in proceedings between Norma-A SIA and Dekom SIA and Latgales plānošanas reģions [Latgale planning region (Latvia)], successor to the rights of Ludzas novada dome [Ludza Municipal Council (Latvia)] concerning the award to Ludzas autotransporta uzņēmums SIA of a 'concession' for the operation of public bus services in the city and district of Ludza.

Legal context

European Union legislation

3 Article 1(2)(a) and (d) and 3(b) of Directive 2004/17 provides:

'2. (a) 'Supply, works and service contracts' are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers.

…

(d) 'Service contracts' are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.

…

3. …

(b) A 'service concession' is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.'

4 Article 2 of the abovementioned directive states:

'1. For the purposes of this Directive,

(a) 'Contracting authorities' are State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.

…

2. This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

…'

5 Article 5 of Directive 2004/17 provides:

'1. This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

…

2. This Directive shall not apply to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof.'

6 Article 1(2)(a) and (4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) states:

'2. (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

4. "Service concession" is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.'

7 In accordance with Article 1(1) of Directive 92/13:

'This Directive applies to contracts referred to in Directive 2004/17 …, unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive.

…'

8 Article 2d(1) of Directive 92/13 states:

'1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

…

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/17 …, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

…'

9 According to Article 2f(1)(b) of Directive 92/13:

'1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:

…

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.'

10 Article 3(1) of Directive 2007/66, which inserted into Directive 92/13 the provisions referred to in paragraphs 7 to 9 of the present judgment, provides:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 20 December 2009…'

National legislation

11 Under Article 1(7) of the Law on collaboration between the public and private sectors (Publiskās un privātās partnerības likums, *Latvijas Vēstnesis*, 2009, No 107, p. 4093), which entered into force on 1 October 2009, a service concession contract is a contract under which, at the request of a public partner, the private partner provides the services listed in Annex 2 to the Law on public contracts (Publisko iepirkumu likums) and the consideration, or an essential component of the consideration, for the provision of those services, is that it obtains the right to operate those services whilst at the same time bearing the risks associated with the operation of the services or else a substantial proportion of those risks.

12 Under Article 1(8) of that Law, the right to operate a facility or a service includes the right to receive payment from the users of the facility or the service or to obtain payment from the public partner, the amount of which depends on user demand or the right to obtain payment both from users and from the public partner.

13 Under Article 1(9) of the abovementioned Law, there are risks associated with operating a facility or services (economic risks) where the income of the private partner depends on user demand for the facility or the services (demand risk) and/or on whether the services offered to users meet the requirements laid down in the concession contract (availability risk) or when revenue depends on both the demand risk and the availability risk.

14 Article 6(3) of the Law on public transport services (Sabiedriskā transporta pakalpojumu likums, *Latvijas Vēstnesis*, 2007, No 106, p. 3682) provides, inter alia, that public transport services are to be organised according to the demand for such services, taking account of the necessary density and frequency of transport in the context of the network, the extent and quality of services, the economic viability of transport services and determining the form of organisation of passenger transport.

15 The first paragraph of Article 10 of that Law provides that the carrier will be compensated for losses and expenditure associated with the provision of the services in accordance with Articles 11 and 12 of the said Law.

16 Under Article 11(1) of the same Law:

‘… the carrier is to be compensated for losses associated with the provision of public transport services:

(1) for the entire amount of such losses, out of funds provided for that purpose in the State budget, as regards the interurban routes of a regional transport network.

(1^1) out of the funds provided for that purpose in the State budget, in the case of routes which belong to a regional transport network providing local services;

(1^2) out of local budgets, in the case of routes which belong to a regional transport network providing local services, in relation to the part of the public transport services covered by the concession which exceeds the limit of the funds provided for in the State budget in order to secure the provision of those services.

…’

17 Under Article 12 of the Law on public transport services:

‘(1) If the State lays down minimum quality requirements which a profit-making carrier would not have to comply with, and where compliance gives rise to additional costs, the carrier shall be entitled to apply for compensation from the State for all such additional costs.

(2) Compensation shall be provided, by means of the payment referred to in the first paragraph, to carriers who provide public transport services under a public transport concession if the minimum quality requirements were laid down after the commencement of the provision of public transport services.

(3) The rules governing the definition of, calculation of and compensation for the costs mentioned in the first paragraph, the allocation to local authorities of the appropriation from the national budget intended to cover those costs, as well as review of the legality and conformity of the appropriation shall be determined by the Council of Ministers.'

18 Decree No 672 of the Council of Ministers of 2 October 2007 concerning compensation for expenditure and losses incurred in providing public transport services and concerning the establishment of public transport service tariffs (Sabiedriskā transporta pakalpojumu sniegšanā radušos zaudējumu un izdevumu kompensēšanas un sabiedriskā transporta pakalpojuma tarifa noteikšanas kārtība, *Latvijas Vēstnesis*, 2007, No 175, p. 3751), of 2 October 2007, which was in force until 20 November 2009, and Decree No 1226 of the Council of Ministers of 26 October 2009 (*Latvijas Vēstnesis*, 2009, No 183, p. 4169, 'Decree No 2009/1226'), which replaced it from 21 November 2009, are both based on the Law on public transport services.

19 Article 2 of Decree No 2009/1226 provides that:

'… the carrier will be compensated for the following losses, associated with performance of the public transport service contract:

2.1 the part of essential costs associated with performance of the public transport service contract which exceeds the income obtained;

2.2 costs incurred through application of the tariffs laid down by the mandating authority;

2.3 loss of income due to the fact that the mandating authority applies a reduction of the transport price for certain categories of passenger.'

20 Article 3 of that decree provides that the carrier is entitled to request compensation for costs incurred in fulfilling the minimum quality requirements laid down by the mandating authority or by the legislation after the public transport services began to be provided, if compliance therewith involves additional costs.

21 Article 38 of Decree 2009/1226 requires the mandating authority to determine the extent of the losses for which the carrier is to be compensated on the basis of the report referred to in point 32.2 of the abovementioned decree and the information referred to in points 32.3 and 32.4 thereof, taking account also of whether it had or had not fixed the fares (tickets).

22 Under Article 39 of the abovementioned decree, the mandating authority is to determine the actual losses having regard to the total income obtained through performance of the public transport service contract, excluding justified costs that are attributable to the provision of public transport services. Within the meaning of the same decree, 'income' means income from the sale of tickets, including season tickets and similar income obtained through performance of the public transport service contract.

23 Article 40 of Decree No 2009/1226 provides that the mandating authority is to determine the amount of compensation which is to be paid by aggregating the volume of losses set in accordance with Article 39 thereof with the total profits obtained. The latter figure is to be determined by multiplying the income by a profit percentage, calculated by adding 2.5% to the average Euro Interbank Offered Rate (EURIBOR) for the 12 months of the reference year.

24 The national court points out that, under Article 49 of the said decree, the amount of the compensation for losses may not exceed the volume of actual losses that has been calculated, if the carrier has applied the tariffs laid down by the mandating authority (transport price).

25 According to Article 50 of the same decree, if the right to provide public transport services is awarded in accordance with the Law on public contracts, the amount of the compensation is to be determined on the basis of the difference between the price of the public transport service laid down in the contract and the income actually obtained.

26 According to Article 57 of Decree No 2009/1226:

‘… if the public transport service contract is terminated:

(1) the carrier shall repay the mandating authority the funds paid in excess if, during the provision of the public transport service, the volume of compensation for losses exceeds the real amount calculated for the compensation and the mandating authority shall use those funds to compensate for losses of other carriers;

(2) the mandating authority shall pay compensation for losses if during the provision of public transport services the amount of the compensation for losses has fallen short of the amount calculated as the real amount of compensation due.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

27 On 17 July 2009, the Ludzas rajona padome (Ludza District Council) published an invitation to tender for public bus services in the city and district of Ludza. The applicants in the main proceedings submitted their offer on 6 August 2009.

28 On 31 August 2009, the award was made to Ludzas autotransporta uzņēmums SIA and, consequently, on 2 September 2009, the Ludzas novada dome decided to conclude a concession contract for public transport services with that undertaking.

29 On 16 September 2009, the applicants in the main proceedings brought an action before the Administratīvā rajona tiesa (Administrative Court of First Instance) for annulment of the decision of the Ludzas novada dome of 2 September 2009 and applied for operation of the decision to be suspended. That application was granted by the court on 16 October 2009 and confirmed on 14 December 2009 by the Administratīvā apgabaltiesa (Regional Administrative Court).

30 The national court observes that the national legislation in force gives the applicants in the main proceedings the right to challenge the decision of Ludzas novada dome of 2 September 2009 before the Contract Supervision Office and that such a challenge would have prevented the mandating authority from awarding the contract until after the Office had ruled.

31 On 9 October 2009, the Ludzas rajona padome and Ludzas autotransporta uzņēmums SIA entered into a concession contract for the provision of the public transport services concerned.

32 The applicants in the main proceedings thereupon brought an action before the Administratīvā rajona tiesa for annulment of that contract. On 3 December 2009, that action was dismissed on the ground that the contract was governed by private law and that, therefore, the administrative courts did not have jurisdiction to hear the action.

33 On 11 May 2010, the Administratīva apgabaltiesa set aside the judgment at first instance, while dismissing the action for annulment as inadmissible on the ground that, since the contract had been concluded before the expiry of the time-limit for the transposition of Directive 2007/66, the applicants in the main proceedings did not have a right to bring such an action before the courts.

34 On 21 May 2010, the said applicants brought an appeal against the decision of the Administratīva apgabaltiesa before the court making the reference. They argue, inter alia, that Directive 2007/66 grants them a right to apply for annulment of the contract at issue and that that right flows from the purpose of the directive, which is to grant third parties the right to apply to have contracts concluded by State bodies or local authorities declared ineffective.

35 In those circumstances the Augstākās tiesas Senāta decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 1(3)(b) of Directive 2004/17 … be interpreted as meaning that it is necessary to treat as a public service concession a contract under which the successful tenderer is granted the

right to provide public bus services, in cases where part of the consideration consists in the right to operate the public transport services but where, at the same time, the contracting authority compensates the service provider for losses arising as a result of the provision of services, and in addition the public law provisions governing the provision of the service and the contractual provisions limit the risk associated with operation of the service?

(2) If the first question is answered in the negative, has Article 2d(1)(b) of Directive 92/13 … been directly applicable in Latvia since 21 December 2009?

(3) If the second question is answered in the affirmative, must Article 2d(1)(b) of Directive 92/13 … be interpreted as being applicable to public contracts entered into before the end of the period prescribed for domestic law to be brought into conformity with Directive 2007/66 …?'

Consideration of the questions referred

The first question

36 As a preliminary point, it must be observed that, according to Article 2(2)(a) of Directive 2004/17, that directive applies to contracting entities which are 'contracting authorities' within the meaning of Article 2(1)(a) of the directive, among which are 'regional or local authorities' which 'pursue one of the activities referred to in Articles 3 to 7' of the directive.

37 According to the national court, the main proceedings are subject to Directive 2004/17 inasmuch as the contracting entity pursues an activity in the field of transport by bus within the meaning of Article 5(1) of the directive.

38 On the other hand, according to the Latvian Government, since that entity does not itself provide public transport services to the population, Directive 2004/18 is applicable to the main proceedings.

39 In that regard, it is sufficient to note that Articles 1(2)(a) and 4 of Directive 2004/18 contain definitions of 'public contracts' and 'service concession' which are substantially similar to the corresponding definitions in Article 1(2)(a) and (3)(b) of Directive 2004/17. The fact that the definitions are substantially similar means that the same considerations are applicable to an interpretation of the concepts of service contract and service concession within the respective spheres of application of those two directives (Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraphs 42 and 43). Thus, the interpretation of Article 1(2)(a) and (3)(b) of Directive 2004/17 is directly transposable to the corresponding provisions of Directive 2004/18 as, indeed, the Latvian Government admits.

40 The question whether an operation is to be classified as a 'service concession' or a 'public service contract' must be considered exclusively in the light of European Union law (see, inter alia, Case C-274/09 *Privater Rettungsdienst und Krankentransport Stadler* [2011] ECR I-0000, paragraph 23 and the case-law cited).

41 It is clear from the definitions of service contract and service concession, contained in Article 1(2)(a) and (d) and Article 1(3) of Directive 2004/17 respectively, that the difference between a service contract and a service concession lies in the consideration for the provision of services. A service contract involves consideration which is paid directly by the contracting authority to the service provider while, for a service concession, the consideration for the provision of services consists in the right to exploit the service, either alone, or together with payment (see, to that effect, *Eurawasser*, cited above in paragraph 39, paragraph 51).

42 In the case of a contract for the supply of services, the fact that the supplier is not remunerated directly by the contracting authority, but is entitled to collect payment from third parties, meets the requirement of consideration laid down in Article 1(3)(b) of Directive 2004/17 (see, inter alia, *Eurawasser*, cited above in paragraph 39, paragraph 57).

43 That is the case where, as in the main proceedings, the provider of public bus services is given the right to operate such services and is paid by the users of those services in accordance with a fixed fare

scale.

44 While the method of remuneration is one of the determining factors for the classification of a service concession, it also follows from the case-law that the service concession implies that the service supplier takes the risk of operating the services in question. The absence of a transfer to the service provider of the risk connected with operating the service shows that the transaction concerned is a public service contract and not a service concession (see, inter alia, *Privater Rettungsdienst und Krankentransport Stadler*, cited above in paragraph 40, paragraph 26).

45 It is thus necessary to establish whether the service provider takes the risk of operating the service. While that risk may, at the outset, be very limited, it is necessary for classification as a service concession that the contracting authority transfer to the concession holder all or, at least, a significant share of the risk which it faces (see, to that effect, *Privater Rettungsdienst und Krankentransport Stadler*, cited above in paragraph 40, paragraph 29).

46 It is not unusual that certain sectors of activity, in particular sectors involving public service utilities, such as those at issue in the main proceedings, are subject to rules which may have the effect of limiting the financial risks entailed. First, the detailed rules of public law, to which the economic and financial operation of the service is subject, facilitate the supervision of how that service is operated, and scale down the factors which may threaten transparency and distort competition. Second, it must remain open to the contracting authorities, acting in all good faith, to ensure the supply of services by way of a concession, if they consider that to be the best method of ensuring the public service in question, even if the risk linked to such an operation is limited (*Eurawasser*, paragraphs 72 to 74).

47 In such circumstances, as the contracting authority has no influence on the detailed rules of public law governing the service, it is impossible for it to introduce and, therefore, to transfer risk factors which are excluded by those rules. Moreover, it would not be reasonable to expect a public authority granting a concession to create conditions which were more competitive and involved greater financial risk than those which, on account of the rules governing the sector in question, exist in that sector (*Eurawasser*, paragraphs 75 and 76).

48 The risk linked to such an operation must be understood as the risk of exposure to the vagaries of the market (see, to that effect, *Eurawasser*, paragraphs 66 and 67), which may, in particular, consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not be met by revenue or also the risk of liability for harm or damage resulting from an inadequacy of the service (see, to that effect, *Privater Rettungsdienst und Krankentransport Stadler*, paragraph 37).

49 By contrast, risks such as those linked to bad management or errors of judgment by the economic operator are not decisive for the purposes of classification as a public service contract or a service concession, since those risks are inherent in every contract, whether it be a public service contract or a service concession (*Privater Rettungsdienst und Krankentransport Stadler*, paragraph 38).

50 Although, as was stated in paragraph 45 of the present judgment, the risk of operating the service may, at the outset, be very limited by reason of the public law arrangements governing the organisation of the service, it is necessary for classification as a service concession that the contracting authority transfer to the concession holder all or, at least, a significant share of the operating risk which it faces.

51 The information provided by the national court shows that the legislation applicable in the main proceedings provides that the adjudicating authority is to reimburse the service provider for operating losses and, in addition, by reason of the rules of public law and the contractual terms governing the provision of those services, the provider does not bear ‘a significant share of the operating risk’.

52 The national court notes, in particular, that, pursuant to the terms of the contract, the mandating authority is to compensate, within the limit of the funds allocated to the State budget, for the losses related to the provision of transport services, engendered by such provision and for related costs once the operating receipts from the transport services have been deducted.

53 Furthermore, pursuant to Articles 2 and 3 of Decree No 2009/1226, the service provider is compensated for losses associated with performance of the contract as regards essential costs associated with performance of the public transport service contract which exceed the income obtained, costs incurred through application of the tariffs laid down by the mandating authority, lost revenue because the mandating authority has applied a reduction of the transport price for certain categories of passenger, and costs incurred in fulfilling the minimum quality requirements laid down after the public transport services began to be provided, if compliance therewith involves additional costs compared to the quality requirements previously laid down.

54 Moreover, Article 40 of Decree No 2009/1226 provides that the successful tenderer is to be paid an amount by way of profit determined by multiplying the income by a profit percentage, calculated by adding 2.5% to the average Euro Interbank Offered Rate (EURIBOR) for the 12 months of the reference year.

55 Having regard to those terms and national law provisions, it cannot be concluded that a significant part of the exposure to the vagaries of the market is borne by the successful tenderer. Therefore, such an operation should be regarded as a ‘service contract’ within the meaning of Article 1(2)(d) of Directive 2004/17 and not a ‘service concession’ within the meaning of Article 1(3)(b) thereof.

56 It is true that, at the hearing before the Court, the parties disagreed as to the extent of the risk actually borne by the successful tenderer. Thus, unlike the applicants in the main proceedings and the European Commission, the Latvian Government and the defendant in the main proceedings argue that various factors, such as the reduction of public resources available to cover possible losses, the lack of cover for certain kinds of expenses and losses, linked in particular to route and journey changes or uncertainty in regard to user demand, increase the risk to such an extent that a significant part thereof is in fact born by the successful tenderer, all the more so as the contract is for a period of eight years. Consequently, they state, the transaction is undoubtedly a service concession.

57 It is not for the Court to classify specifically the transaction at issue in the main proceedings. That is within the jurisdiction of the national court alone. The Court’s role is confined to providing the national court with an interpretation of European Union law which will be useful for the decision which it has to take in the dispute before it (see, inter alia, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 32).

58 Only the national court is in a position, on the one hand, to interpret the provisions of its national law and, on the other hand, to assess the part of the risk which is actually borne by the contractor in the light of national law and the contractual terms at issue. Nonetheless, consideration of the transaction at issue in the light of the legislative provisions and contractual terms as set out in the order for reference leads, at first sight, to the conclusion that that transaction has the characteristics of a service contract.

59 In the light of the foregoing considerations, the answer to the first question is that Directive 2004/17 must be interpreted as meaning that a contract by which a contracting party, pursuant to the rules of public law and the terms of the contract which govern the provision of the services in question, does not bear a significant share of the risk run by the contracting authority is to be regarded as a ‘service contract’ within the meaning of Article 1(2)(d) of that directive. It is for the national court to assess whether the transaction at issue in the main proceedings must be regarded as a service concession or a public service contract by taking account of all the characteristics of that transaction.

Second and third questions

60 By its questions, which it is appropriate to examine together, the national court is asking whether, if the contract at issue in the main proceedings is regarded as a ‘public service contract’ within the meaning of Directive 2004/17, Article 2d(1)(b) of Directive 92/13 which, pursuant to Article 1 thereof, applies to the contracts referred to in Directive 2004/17, is applicable to the above contract even though it was concluded before the expiry of the time-limit for the transposition of Directive 2007/66, which inserted Article 2d(1)(b) into Directive 92/13, and if the answer to that question is in the affirmative, whether that provision is directly applicable.

61 If, as the Latvian Government argues, Directive 2004/18 is applicable, which it is for the national court to ascertain, it must be pointed out that Article 1 of Directive 2007/66 inserted into Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1), provisions identical to Article 2d and 2f of Directive 92/13, with the result that the interpretation of the latter provisions is directly transposable to the corresponding provisions of Directive 89/665, as amended.

62 According to Article 2d(1)(b) of Directive 92/13, Member States are to ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body, inter alia, where the contract has been concluded even though, pursuant to Article 2(3) of that directive, a body of first instance, which is independent of the contracting authority, is reviewing a contract award decision or if it was concluded before the expiry of the standstill period referred to in Article 2a(2) of that directive.

63 Without there being any need to consider whether, after the expiry of the time-limit for transposing Directive 2007/66, an individual can rely on Article 2d(1)(b) of Directive 92/13 before the national courts against a contracting authority such as the defendant in the main proceedings, it is sufficient to point out that that provision does not apply in any event to contracts which, as in the main proceedings, were concluded before the expiry on 20 December 2009 of the time-limit for transposition of Directive 2007/66, since such transposition did not take place before the expiry of that time-limit.

64 It is common ground that the decision to award the contract at issue was made on 2 September 2009 and that the contract was concluded on 9 October 2009.

65 The fact that, in accordance with Article 2f(1)(b) of Directive 92/13, Member States may provide that the application for review in accordance with Article 2d(1) of that directive must be made in any case before the expiry of ‘a period of at least six months with effect from the day following the date of the conclusion of the contract’ does not lead to the conclusion that contracts which, like the one in the main proceedings, were concluded in the six months preceding the expiry of the time-limit for transposition of Directive 2007/66 could come within the scope of Article 2d(1)(b).

66 In the absence of any indication in Directive 2007/66 as to the retroactive effect of the provision at issue, it would be contrary to the principle of legal certainty to consider that that provision is applicable to contracts which were concluded before the expiry of the time-limit for transposition of that directive.

67 In the light of the foregoing considerations, the answer to the second and third questions is that Article 2f(1)(b) of Directive 92/13 does not apply to public contracts concluded before the expiry of the time-limit for transposition of Directive 2007/66.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as meaning that a contract by which a contracting party, pursuant to the rules of public law and the terms of the contract which govern the provision of the services in question, does not bear a significant share of the risk run by the contracting authority is to be regarded as a ‘service contract’ within the meaning of Article 1(2)(d) of that directive. It is for the national court to assess whether the**

transaction at issue in the main proceedings must be regarded as a service concession or a public service contract by taking account of all the characteristics of that transaction.

2. **Article 2d(1)(b) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, does not apply to public contracts concluded before the expiry of the time-limit for transposition of Directive 2007/66.**

[Signatures]

---

* Language of the case: Latvian.

EU:C:2011:468

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 7 July 2011 (1)

Case C-348/10

Norma-A SIA,
Dekom SIA
v
Latgales plānošanas reģions, successor to the rights of Ludzas novada dome

(Reference for a preliminary ruling from the Latvijas Republikas Augstākās tiesas Senāta Administratīvo lietu departaments (Supreme Court, Administrative Cases Department (Latvia))

(Distinction between 'public service contract' and 'service concession' – Public bus transport – Review procedures for the award of contracts – Direct effect and retroactive application of directives)

Table of contents

I – Legal context

A – EU law

B – National law

II – Facts

III – The questions referred for a preliminary ruling

IV – Procedure before the Court of Justice

V – Submissions

VI – Evaluation

A – The first question: the service contract/concession dilemma

B – The second question: direct effect of Directive 92/13, as amended by Directive 2007/66

C – The third question: the potential retroactive effect of Directive 92/13

VII – Conclusion

1. This request for a preliminary ruling may provide an opportunity for the Court of Justice to develop its thinking on the criteria for distinguishing between a public service contract and a service concession under European Union (EU) law and also to define the circumstances in which a directive which has not been transposed within the period prescribed should be regarded as having direct effect. It may also illustrate, once again, the need for judicial cooperation between the European Union and the Member States in applying EU law.

I – Legal context

A – *EU law*

2. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (2) ('Directive 2004/18') and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (3) ('Directive 2004/17') recast the legislation on public procurement in force at the time, (4) seeking to set out the coordinating measures introduced by the Community legislature in a logical manner in the interests of clarity. To that effect, and in relation to the definitions of the categories and concepts used, Article 1(2) of Directive 2004/17 (5) provides as follows:

'… the following definitions shall apply:

(a) "Supply, works and service contracts" are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers.

…

(d) "Service contracts" are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.'

3. Article 1(3)(b) of Directive 2004/17 provides that a 'service concession' is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.

4. By virtue of Article 2(2)(a), Directive 2004/17 applies 'to contracting entities which … are contracting authorities or public undertakings and pursue one of the activities referred to in Articles 3 to 7'.

5. Likewise, Article 5(1) of Directive 2004/17 provides that the directive applies 'to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable'.

6. Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (6) ('Directive 92/13'), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, (7) aims to ensure the effective application of both Directive 2004/17 and Directive 2004/18, and, to that end, Article 2d(1)(b) thereof provides as follows:

'Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

…

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/17/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract'.

7. By virtue of Article 2f(1)(b) of Directive 92/13, as amended by Directive 2007/66:

'Member States may provide that the application for review in accordance with Article 2d(1) must be made:

…

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.'

B – *National law*

8. The following provisions of national law are relevant. First is the likums 'Par pašvaldībām' (Law on municipalities), (8) Article 15 of which provides that the organisation of public transport services falls within the autonomous powers of municipalities.

9. Second, under Article 1(7) of the Publiskās un privātās partnerības likums (Law on collaboration between the public and private sectors), (9) a service concession contract is a contract under which, at the request of a public partner, the private partner provides the services listed in Annex 2 to the Publisko iepirkumu likums (Law on public contracts; 'LPC') and the consideration, or an essential component of the consideration, for the provision of those services, is that it obtains the right to operate them whilst at the same time bearing the risks associated with the operation of the services or else a substantial proportion of those risks.

10. Under Article 1(8) of that law, the right to operate the services means the right to receive payment from the end-users of the services or to obtain consideration from the public partner, the amount of which depends on the demand for such services from end-users, or even to obtain both a payment from the end-users of the services and consideration from the public partner.

11. Under Article 1(9), the risk associated with operating the services means the financial risks, where the income of the private partner depends either on the demand for such services from end-users (demand risk) or else on whether the services offered to the end-users meet the requirements laid down in the concession contract (availability risk) or even on both the demand risk and the availability risk.

12. Also relevant in the context of these proceedings is the second paragraph of Article 8 of the Sabiedriskā transporta pakalpojumu likums (Law on public transport services; 'LPTS'), (10) which provides that, unless otherwise provided in the Law, the mandating authority will organise public transport services in accordance with the LPC or with the Law governing the award of concessions.

13. The first paragraph of Article 10 of the LPTS provides that the carrier will be compensated for losses and expenses associated with the provision of public transport services, in accordance with Articles 11 and 12 of that law; furthermore, the third paragraph of that article provides that payment for the services will also constitute losses within the meaning of the Law if the mandating authority has organised the public transport service in accordance with the LPC.

14. Under the first paragraph of Article 11 of the LPTS, the carrier is to be compensated for losses associated with the provision of public transport services:

'…

(1^1) out of the funds provided for that purpose in the State budget, in the case of routes which belong to a regional transport network providing local services;

(1[2]) out of local budgets, in the case of routes which belong to a regional transport network providing local services, in relation to the part of the public transport services covered by the concession which exceeds the limit of the funds provided for in the State budget in order to secure the provision of those services …'.

15. Under the first paragraph of Article 12 of the LPTS, if the State lays down minimum quality requirements for public transport services, which a profit-making carrier would not have to comply with, and where compliance gives rise to additional costs, the carrier is entitled to receive compensation from the State for all such costs. Furthermore, the second paragraph of that article provides that compensation will be provided, by means of the payment referred to in the first paragraph, to carriers who provide public transport services in the context of a public transport service concession if the minimum quality requirements were laid down after the commencement of the provision of public transport services.

16. Finally, Article 2 of Ministru Kabineta noteikum No 1226, Sabiedriskā transporta pakalpojumu sniegšanā radušos zaudējumu un izdevumu kompensēšanas un sabiedriskā transporta pakalpojuma tarifa noteikšanas kārtība (Decree of the Council of Ministers No 1226 concerning compensation for expenditure and losses incurred in providing public transport services and concerning the establishment of public transport service tariffs; 'Decree No 1226'), (11) issued on the basis of the LPTS, provides that the carrier will be compensated for the following losses, associated with performance of the public transport service contract:

(1) essential costs associated with performance of the public transport service contract which exceeded the income obtained;

(2) costs incurred through application of the tariffs laid down by the mandating authority;

(3) costs arising in the event that the mandating authority applies a reduction of the transport price for certain categories of passenger.

17. Article 3 of Decree No 1226 provides that the carrier is entitled to seek compensation for costs incurred in fulfilling the minimum quality requirements laid down by the mandating authority or by legislation after commencement of the provision of public transport services, if compliance therewith involves costs in excess of those linked to the quality requirements previously laid down.

18. Under Article 39 of Decree No 1226, the mandating authority will determine the actual losses having regard to the total income obtained through performance of the public transport service contract, excluding justified costs that are attributable to the provision of public transport services. Within the meaning of that provision, 'income' means income from the sale of tickets, including season tickets, and similar income obtained through performance of the public transport service contract.

19. The mandating authority will determine the amount of compensation which is to be paid by aggregating the volume of losses set in accordance with Article 39 of Decree No 1226 with the total profits obtained. The latter figure will be determined by multiplying the income by a profit percentage, calculated by adding 2.5% to the average Euro Interbank Offered Rate (Euribor) for the 12 months of the reference year (Article 40).

20. The amount of the compensation for losses must not exceed the volume of actual losses that has been calculated, if the carrier has applied the tariffs laid down by the mandating authority (transport price) (Article 49).

21. If the right to provide public transport services is awarded in accordance with the LPC, the amount of the compensation will be determined on the basis of the difference between the price of the public transport service laid down in the contract and the income actually obtained (Article 50).

22. Under Article 57 of Decree No 1226, if the public transport service contract is terminated:

(1) the carrier shall repay the mandating authority the funds overpaid if, during the provision of the public transport service, the volume of compensation for losses exceeds the actual amount calculated

for the compensation and the mandating authority shall use those funds to compensate the losses of other carriers;

(2) the mandating authority shall pay compensation for losses if during the provision of public transport services the amount of compensation for losses has fallen short of the amount calculated as the actual amount of compensation due.

II – Facts

23. The order for reference in relation to this request for a preliminary ruling shows that on 17 June 2009 the Ludzas rajona padome (Ludza District Council) published an invitation to tender for public bus services in the city of Ludza and on regional routes in the district of Ludza. The appellants in the main proceedings submitted a tender on 6 August 2009.

24. By a decision of 31 August 2009, the award was made to the undertaking Ludzas autotransporta uzņēmums SIA ('Ludzas ATU SIA') and on 2 September 2009 the Ludzas novada dome (Ludza Municipal Council) (12) resolved to conclude a concession contract with this undertaking.

25. The applicants contested this decision before the courts on 16 September 2009 and also applied for the implementation of the decision to be suspended. The interim suspension was granted by a decision of the Administratīvā rajona tiesa (Administrative Court of First Instance) of 16 October 2009, which was confirmed, on appeal, by the Administratīvā apgabaltiesa (Regional Administrative Court) in a decision of 14 December 2009.

26. Notwithstanding this, by 9 October 2009 the Ludza District Council and Ludzas ATU SIA had in fact entered into a concession contract and the applicants therefore applied to the Administrative Court of First Instance on 26 November 2009 seeking a declaration that the contract was void.

27. By a decision of 3 December 2009, the Administrative Court of First Instance dismissed the claim for a declaration that the contract was void on the basis that, being governed by civil law, it did not fall within the jurisdiction of the administrative courts.

28. This decision was reversed by the Regional Administrative Court in a decision of 11 May 2010, which nevertheless dismissed the applicants' appeal on the substantive issue, maintaining that they 'had no subjective right to seek a decision annulling the contract', as stated in the order for reference of this application for a preliminary ruling.

29. The applicants lodged an appeal before the Latvian Supreme Court, arguing that Directive 2007/66 grants them a subjective right to seek annulment of the contract. They concede that at the time the contract was concluded the period for transposing the directive had not expired, but contend that this could not deprive them of a right which derives from the very purpose of the directive.

III – The questions referred for a preliminary ruling

30. It is against this background that the Latvian Supreme Court has referred the following three questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 1(3)(b) of Directive 2004/17/EC be interpreted as meaning that it is necessary to treat as a public service concession a contract under which the successful tenderer is granted the right to provide public bus services, in cases where part of the consideration consists in the right to operate the public transport services but where, at the same time, the contracting authority compensates the service provider for losses arising as a result of the provision of services, and in addition the public law provisions governing the provision of the service and the contractual provisions limit the risk associated with operation of the service?

(2) If the first question is answered in the negative, has Article 2[d](1)(b) of Directive 92/13/EEC, as amended by Directive 2007/66/EC, been directly applicable in Latvia since 21 December 2009?

(3) If the second question is answered in the affirmative, must Article 2[d](1)(b) of Directive 92/13/EEC be interpreted as being applicable to public contracts entered into before the end of the period prescribed for domestic law to be brought into conformity with Directive 2007/66/EC?'

31. It is worth mentioning at this point that, according to the order for reference, the referring court's primary doubt concerns the classification of the contract for the provision of public transport services as a 'service concession', within the meaning of Article 1(3)(b) of Directive 2004/17, where the following circumstances pertain:

(1) part of the consideration consists in the right to operate the public transport service (the service provider receives the consideration via payments from third persons, the transport users);

(2) the contracting authority, in accordance with the legislation of the Member State, compensates the service provider when it incurs losses as a result of providing services;

(3) the risk of operating the public transport services is limited by the legislation governing the way those services are provided and by the terms of the contract.

32. Regarding the second question, the Latvian Supreme Court raises the issue of whether, taking into account the fact that during the period between 21 December 2009 and 14 June 2010 Latvia had not fulfilled its obligations under Directive 2007/66, Article 2d(1)(b) of Directive 92/13 should be interpreted as meaning that it also applies to the contracts referred to in Directive 2004/17 which were entered into before the expiry of the period for bringing domestic law into conformity with Directive 2007/66. In this respect, it notes that, under Article 2f(1)(b) of Directive 92/13, a person is entitled to challenge the contract within a period of six months following the date of its signature. Therefore, in the case at issue in the main proceedings, taking into account the date on which the contract was concluded (9 October 2009), the applicants were also vested with that right on 21 December 2009 (once the period for transposing the directive into national law had expired).

33. In short, the Latvian Supreme Court considers that there is doubt as to the interpretation of Article 1(3)(b) of Directive 2004/17 and of Article 2d(1)(b) of Directive 92/13, and that this plays a critical role in the decision to be reached regarding the applicants' right to apply to the courts for annulment of the contract.

IV – Procedure before the Court of Justice

34. The order for reference was lodged at the Court on 9 July 2010.

35. Submissions have been made by Norma-A and Dekom, by the Austrian and Latvian Governments and by the European Commission.

36. At the hearing on 18 May 2011, the legal representatives of Norma-A and Dekom, the Latgales plānošanas reģions (Latgale planning region), (13) the Latvian Government and the Commission presented their oral submissions.

V – Submissions

37. Regarding the classification of the contract at issue in the main proceedings, Norma-A and Dekom, the Austrian Government and the Commission maintain, essentially, that it is a service contract within the meaning of Directive 2004/17, whilst the Latvian Government argues that it is a concession. While the former consider that the level of risk assumed by the service provider is not sufficient to justify the conclusion that the characteristics of a concession are present, the Latvian Government and the Latgales plānošanas reģions conclude that the financial risk at stake is considerable and, in any event, sufficient to enable it to be regarded as a service concession.

38. In relation to the second and third questions, the Commission, the Austrian and Latvian Governments and the Latgales plānošanas reģions maintain that Directive 2007/66 is not applicable to contracts concluded prior to expiry of the period prescribed for transposing it, with the Austrian

Government arguing that it does not have the requisite unconditionality and precision to have direct effect, although this point is, in its view, entirely hypothetical since the proceedings in the present case were already under way before the transposition period expired and there is nothing to suggest that the directive contemplates a retroactive effect which would require the contracts entered into prior to such expiry to be declared void. The Latvian Government also maintains that any other solution would run counter to the principle of legal certainty. The Commission, in its joint reply to the two final questions, considers that the conditions traditionally required for the directive in question to have direct effect are met, although it is inapplicable to contracts entered into prior to the expiry of the transposition period.

39. Finally, Norma-A and Dekom argue that under Article 2f(1)(b) of Directive 2007/66, a party is entitled to seek the annulment of a contract in the courts for a period of six months from the date of the conclusion of the contract. Since in the present case that period had not expired on the date when the directive should have been transposed, Article 2d would be applicable even if the contract had been concluded earlier. In their view, in the same way that Member States must refrain from adopting measures which might compromise the result laid down in the directive, they are also required to interpret national law in accordance with the directive. In a situation such as that in the present case, the subjective right to a review of this nature by an independent body stems from the result sought by the directive.

VI – Evaluation

A – *The first question: the service contract/concession dilemma*

40. The classification of the legal transaction at issue in the main proceedings is a matter for the referring court alone and it can look to the Court only to give an interpretation of EU law which may be of use in deciding the case before it (Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 32, amongst others).

41. For these purposes, the question of whether we are dealing with a ‘service concession’ or a ‘public service contract’ must be considered in the light of EU law alone (see Case C-382/05 *Commission* v *Italy* [2007] ECR I-6657, paragraph 31, and Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 38).

42. It follows from subparagraph (a) in conjunction with subparagraph (d) of Article 1(2) of Directive 2004/17 that service contracts are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers, having as their object the provision of services referred to in Annex XVII to that directive, which include, as far as is relevant here, land transport services.

43. Under Article 1(3)(b) of that directive, a ‘service concession’ is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists ‘either solely in the right to exploit the service or in that right together with payment’.

44. The difference between the two legal transactions is essentially in the consideration for the provision of services in each case (Case C-274/09 *Privater Rettungsdienst und Krankentransport Stadler* [2011] ECR I-1335, paragraph 24).

45. The directive does not specify of what the consideration for a service provided pursuant to a contract must be. In so far as it states that where such consideration consists of the right to exploit the service the transaction in question is a service concession, the Court of Justice has concluded that, broadly speaking, the fundamental difference between the two legal transactions lies in whether the remuneration for the service provided comes directly from the contracting entity or is borne by third parties (*Eurawasser*, paragraph 51). Ultimately, however, this difference comes down to the question of assumption of the risk associated with the uncertain outcome of a legal transaction which was entered into by each of the parties in their own interests.

46. The fact that the remuneration for the service comes from third parties has been the decisive feature for classifying a legal transaction as a service concession in that it presupposes that the risk associated with the operation of the service is assumed by the service provider. As Advocate General

Mazák pointed out in his Opinion in the *Privater Rettungsdienst und Krankentransport Stadler* case, (14) even remuneration of an indirect nature has sufficed, in itself, for the Court of Justice to hold that the legal transaction under consideration was a service concession. (15)

47. Even so, in my view, the really decisive factor is the assumption of risk. This may be inferred from the fact that the direct payment by the contracting entity of the remuneration for the service does not necessarily mean in every case that the transaction in question is a service contract. This is because, as Advocate General Mazák noted in his previously cited Opinion (at points 28 and 29), the Court of Justice has established 'subsidiary criteria' which, in cases of direct remuneration, can lead to the conclusion that the service provider has assumed the risk of operating the service, and it is this assumption which ultimately causes the legal transaction to be classified as a concession, in spite of the direct remuneration. (16)

48. In short, as risk is an inherent part of the economic operation of a service (*Eurawasser*, paragraph 66), the Court of Justice considers that where the service provider assumes it, the contract with the contracting entity can be taken to satisfy the definition of a service concession.

49. According to the case-law, the risk of the economic operation of the service must be understood as the risk of exposure to the vagaries of the market (*Eurawasser*, paragraphs 66 and 67, and *Privater Rettungsdienst und Krankentransport Stadler*, paragraph 37), which 'may consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not fully be met by revenue or for example also the risk of liability for harm or damage resulting from an inadequacy of the service' (*Privater Rettungsdienst und Krankentransport Stadler*, paragraph 37, citing *Contse and Others*, paragraph 22, and *Hans & Christophorus Oymanns*, paragraph 74).

50. On the other hand, risks linked to bad management or errors of judgement by the economic operator are not, however, decisive in classifying a contract as a public service contract or a service concession, since those are risks which are inherent in any contract (*Privater Rettungsdienst und Krankentransport Stadler*, paragraph 38). Risks relating to variables which may or may not materialise, depending exclusively on the economic operator in question are therefore irrelevant for these purposes.

51. For the contract to be regarded as a concession, it is not necessary that the risk assumed by the service provider be 'considerable in absolute terms', only that it be at least a 'significant share' of the risk which the contracting entity would anyway be assuming if it were to provide the service in question itself. (17)

52. Effectively, the Court of Justice has stated that in circumstances where the detailed rules of public law governing the economic and financial operation of the service reduce the financial risk to a minimum, it should remain open to contracting entities to ensure the provision of the service by means of a concession if they consider this to be the best contractual form for ensuring the public service. It would therefore be ridiculous to expect conditions to be created which involved greater financial risk than those existing in the sector by virtue of the applicable legislation for the sole purpose of having sufficient volume of transferable risk to enable the public contract to be classified as a service concession (*Eurawasser*, paragraphs 72 to 76). On the contrary, the decisive factor is that there should be a significant transfer of the risk inherent in the operation of the service, whatever that risk may be in absolute terms, that is, when considered alone.

53. That said, the first question referred by Latvian Supreme Court relates to a contract 'where part of the consideration consists in the right to operate the public transport services', while, at the same time, the contracting authority 'compensates the service provider for losses arising as a result of the provision of services' and, furthermore, 'the public law provisions governing the provision of the service and the contractual provisions limit the risk associated with operation of the service'.

54. As stated by the referring court, the service provider receives the consideration for the services by means of payment by third parties, the transport users. From that point of view, therefore, it would be a classic case of a service concession under Article 1(2)(a) and (d) of Directive 2004/17.

55. However, the risk inherent in the economic operation of the service is limited by the domestic rules governing the provision of the service, in this case the LPTS; in other words, it is not typical of the risk associated with the provision of a service in an entirely free market. Furthermore, even within the scope of the reduced risk resulting from the detailed public law rules governing the economic and financial operation of the service, the contracting authority compensates the service provider for certain losses.

56. As I have already mentioned, the relevant risk is that resulting from the detailed rules governing the provision of the service (see points 51 and 52). It is important that this specific risk is assumed to a significant extent by the service provider, since, as pointed out in footnote 17, the level of risk assumed is ultimately a more decisive criterion than the type of consideration for the service when it comes to classifying the legal transaction as a service contract or service concession.

57. The referring court has already pointed out that, in this case, the operating risk of the service is not borne by the service provider. In fact, it states that the latter does not even assume a substantial part of it (paragraph 13 of the order for reference).

58. Effectively, the regulatory provisions and the terms of the contract, taken together, indicate that the service provider can be sure of receiving compensation for the following losses associated with the provision of the service: (a) costs which are essential for the performance of the contract which exceed the income obtained; (b) costs incurred through application of the tariffs laid down by the mandating authority; (c) costs arising in the event that the mandating authority applies a reduction of the price of transport for certain categories of passenger; (d) costs incurred in fulfilling the minimum quality requirements laid down after the commencement of the provision of the service, if compliance therewith involves costs in excess of those linked to the quality requirements previously laid down.

59. On the other hand, the figure for compensation for these losses must be aggregated with the figure for profits, which is determined by multiplying income by a profit percentage, calculated by adding 2.5% to the average Euro Interbank Offered Rate for the 12 months of the reference year.

60. In other words, there is provision for compensation for both losses associated with providing the service by way of operating expenses and loss of profits.

61. This information, which was provided by the Latvian Supreme Court, is, in principle, sufficient to allow the referring court to conclude that the legal transaction at issue in the main proceedings is a service contract. In my view, it is clear from the legislative provisions and contractual terms which define the context and content of the legal transaction under consideration that there is enough evidence to conclude that it can quite correctly be regarded as a true service contract.

62. Nevertheless, both the Latvian Government and the Latgales plānošanas reģions put forward a number of reasons why the risk should not be regarded as having been assumed by the contracting authority and hence why it should not be regarded as a contract: essentially these are the high level of demand risk, the reduction in State budget allocations intended to cover any potential losses, the expenditure incurred by way of unrecoverable investments, the extension or reduction of routes and journeys.

63. It should be reiterated at this point that it is not for the Court of Justice to evaluate the various evidence submitted at the hearing by the Latvian Government and the Latgales plānošanas reģions, and still less to look into the debate regarding the magnitude and scope of the presumably considerable differences between the business forecasts discussed at the time of the award and those actually implemented as a result of a less favourable or benign economic situation.

64. Nevertheless, as I have already noted at point 39, since ultimately the referring court has the jurisdiction to classify the transaction, I am bound to make it absolutely clear that it is the Latvian Supreme Court which must determine to what extent the considerations put forward by the Latvian Government and the Latgales plānošanas reģions can invalidate the natural conclusion to which a reading of the applicable legislation and the contract terms would, nevertheless, lead. This is all the more so because the Latvian Supreme Court, in its first question states, first, that the contracting authority compensates the service provider for losses arising as a result of the provision of services and,

then, that the applicable domestic legislation and the contractual provisions 'limit' the operating risk. The task of deciding whether this holds true to the extent that the relevant risk for the purposes of classifying the legal transaction in question is assumed by one or other of the parties can only fall to the referring court, as it alone is in a position to assess fully and completely the circumstances and variables of the case.

65. In conclusion, although it is for the national court to classify the legal transaction under discussion and the role of the Court of Justice is merely to provide the national court with an interpretation which may be of use in this task, the relevant legislative and contractual provisions lead me to conclude that this transaction bears the characteristics of a service contract. Notwithstanding this, in the light of what has been said about the referring court's competence, it is that court which must determine, having examined the considerations put forward by the parties to the main proceedings, whether or not this conclusion is the most applicable or appropriate under EU law.

B – *The second question: direct effect of Directive 92/13, as amended by Directive 2007/66*

66. Working on the assumption that this is a service contract, Directive 92/13 would be applicable by virtue of its substantive scope. The next question is therefore whether Article 2d(1)(b) of Directive 92/13, as amended by Directive 2007/66, had direct effect in Latvia from 20 December 2009, when the period for transposing the latter directive expired, and, if so, whether by virtue of Article 2f(1)(b) of Directive 92/13, that provision was also applicable to contracts entered into before the expiry of the transposition period.

67. These two questions correspond to the second and third questions referred by the Latvian Supreme Court. In my view, and contrary to the approach taken by the Austrian Government, the third question can only be answered once the second question has been decided, since in order to determine whether Article 2f(1)(b) of Directive 92/13 permits Article 2d(1)(b) to apply retrospectively, it is first necessary to determine whether the latter was applicable at all from 21 December 2009. Only once it has been determined whether Directive 92/13 had direct effect from that date can we start to analyse whether the provision which supposedly gives Article 2d(1)(b) of the directive some retroactive effect also had direct effect.

68. It is common ground between the parties that the Republic of Latvia did not 'bring into force the laws, regulations and administrative provisions necessary to comply with … Directive [2007/66] by 20 December 2009', as required by Article 3(1) of Directive 2007/66. This measure was incorporated into domestic law only with effect from 15 June 2010, and the first question to be decided is therefore whether, during the period from 21 December 2009 to 14 June 2010, Article 2d(1)(b) of Directive 92/13, requiring Member States to ensure that in cases where the suspensory effect of applications for review of decisions awarding a service contract has not been respected, 'a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body' had direct effect in Latvia despite not having been transposed.

69. Expiry of the period prescribed for transposing the directive, or failure to transpose it correctly, is only one of the conditions required by the case-law for an untransposed directive to be considered to have potential direct effect (see, inter alia, Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, paragraph 12). There is also, first, the requirement that it confer subjective rights which individuals are able to assert before the courts (Case 8/81 *Becker* [1982] ECR 3301, paragraph 25) and, second, the requirement that its provisions be unconditional and sufficiently precise (to this effect, see the recent Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* [2011] ECR I-3673, paragraph 54). (18)

70. It is clear that in the case which gives rise to the question referred in these proceedings the first of these requirements is satisfied, and it is equally clear that the second is also met, since the requirement imposed on the Member States by Article 2d(1)(b) of Directive 92/13 must translate into the right of individuals to guaranteed effectiveness of any review which they might seek against decisions awarding public service contracts. As it is a requirement imposed on Member States for the purpose of improving 'the effectiveness of review procedures concerning the award of contracts', in the words of recital 34 in the preamble to Directive 2007/66, it is clear that it constitutes a means of safeguarding the right of citizens to an effective legal remedy in the field of public procurement.

71. The close connection between Article 2d(1)(b) of Directive 92/13 and the right to a legal remedy invites the question, already raised at the hearing, of whether, given that it concerns the effectiveness of a right vis-à-vis the Member States which is based on primary EU law, access to the review sought by the appellants in the main proceedings should really have been granted in any event. This would therefore be quite independent of the directive itself and, of course, of any domestic legislation transposing it. I think that this must, in principle, be correct, although the fact that the right to a review is typically in the nature of a right to receive a service of some kind means that, for it to be effectively exercised, legislative intervention is inevitable. This leads me to examine the extent to which such intervention has occurred in this case. (19)

72. Regarding what is effectively the third requirement for a directive which has not been transposed within the time-limit to have direct effect, namely that the rules contained in Article 2d(1)(b) of Directive 92/13 should be unconditional and adequate, I must agree with the Commission when it notes that the provision in question is substantially the same as the provisions of Article 2(1)(b) of Directive 89/665/EEC, (20) which were held in Case C-15/04 *Koppensteiner* [2005] ECR I-4855, paragraph 38, to be 'unconditional and sufficiently clear to create rights for individuals'.

73. Article 2(1)(b) of Directive 89/665 effectively requires Member States to ensure that the measures taken concerning the review procedures relating to the award of public supply and public works contracts include provision for the powers to either set aside or ensure the setting-aside of decisions taken unlawfully. By virtue of Article 1(1) of that directive, decisions must be capable of being reviewed effectively and promptly in accordance with the conditions set out in the directive.

74. If these provisions of Directive 89/665 have been held to be 'unconditional and sufficiently clear', those contained in Article 2d(1)(b) of Directive 92/13 can be no less so, subject to the exception which I will go on to mention, since they lay down with perfect clarity the conditions under which an independent review body must consider the contract ineffective, namely, in so far as is relevant here: (a) first, that there is shown to have been an infringement of Article 1(5), Article 2(3) or Article 2a(2) of the directive, which require certain standstill periods to be observed during the course of the procurement procedures; (b) second, that the infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies; (c) third, that the infringement of these provisions is combined with an infringement of Directive 2004/18; (d) finally, that the infringement has affected the chances of the tenderer applying for a review to obtain the contract.

75. In fact, there is one aspect in respect of which Directive 92/13 can, however, be accused of the lack of clarity indicated by the Austrian Government, since it does not state which 'review body independent of the contracting authority' must take the decision regarding the effectiveness of the contract. This aspect would therefore require the legislative intervention at the minimum level necessary to which I referred at point 70 when I indicated that the right of review, being in the nature of a right to receive a service of some kind, makes the involvement of domestic law unavoidable.

76. This does not, in my opinion, mean that Article 2d(1)(b) of Directive 92/13 cannot be regarded as having direct effect in Latvia from 21 December 2009. The reason for this is that, as the Austrian Government itself observes, the requirement to interpret national law in accordance with EU law, together with the duty effectively to protect the rights of citizens, should lead the referring court, in line with the solution provided in Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, to investigate whether, under the applicable domestic jurisdictional rules, it is possible to identify a court which has jurisdiction to hear the reviews to which Directive 92/13 refers. This might be because under national law that court already has jurisdiction to oversee public procurement procedures, or due to the operation of certain general systems for attributing jurisdiction. (21)

C – *The third question: the potential retroactive effect of Directive 92/13*

77. Having reached the conclusion that Article 2d(1)(b) of Directive 92/13, as amended by Directive 2007/66, may be applicable in Latvia from the date of expiry of the transposition period, it remains to be established whether the period of six months following the date of the conclusion of the contract which Article 2f(1)(b) of Directive 92/13 lays down as the time-limit for seeking the review referred to in that provision is applicable in a case such that in the main proceedings. In other words, whether the possibility of review under Directive 92/13 extends to contracts entered into during the six months prior

to the date on which the directive took direct effect. If so, it would apply to the present case, since the disputed contract was entered into on 9 October 2009.

78. My initial view is that, in the interests of improving the effectiveness of the directive, it can perhaps be argued that it should apply to all contracts entered into six months prior to the final date for transposition. Amongst other reasons, this is because it would avoid the risk of contracts being hurriedly signed in order to avoid the directive applying and would also avoid an extended period of time during which the legal situation is not conducive to the effective exercise by citizens of their right to a remedy. This approach would also be in the spirit of the rule laid down by the Court of Justice in Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, cited by Norma-A and Dekom, to the effect that, during the period until expiry of the time-limit for incorporation into domestic law, Member States are required to refrain from compromising the result sought by a directive.

79. Notwithstanding this, and aside from the fact it cannot be ignored that any retrospective application of the law is prejudicial to legal certainty, the structure and content of the directive make such a retroactive effect impossible, over and above the absence of any explicit reference in the directive to retroactivity.

80. Only contracts concluded within the legal framework laid down in Directive 92/13 are susceptible to review thereunder, since the grounds for contesting them must relate to the requirements imposed by the directive in respect of procurement procedures. Consequently, no contract entered into prior to the entry into force of the directive could have complied with the procedural requirements contained in it, and, in particular, with the standstill periods whose infringement is sanctioned in Article 2d(1)(b).

81. It would therefore be illogical retrospectively to allow a challenge which could only be brought on the grounds of failure to comply with requirements which did not exist at the time the contract subject to review was entered into.

VII – Conclusion

82. In the light of the above, I propose that the Court reply to the questions referred by the Latvian Supreme Court as follows:

(1) Article 1(3)(b) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as meaning that, for the purposes of that directive, it is, in principle, necessary to treat as a public service contract a contract under which the successful tenderer obtains, as part of the consideration, the right to operate public transport services and where the contracting authority compensates the service provider for losses arising as a result of the provision of services and the public law provisions governing the provision of the service and the contractual provisions limit the risk associated with operation of the service. It is, in any event, for the referring court to determine the extent to which the circumstances of the case require a different classification in the light of European Union law.

(2) Article 2d(1)(b) of Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, may have had direct effect in Latvia since 21 December 2009, depending on whether or not there is a court which has jurisdiction to hear the reviews to which that directive refers, this being a matter to be determined by the referring court.

(3) Article 2d(1)(b) of Directive 92/13 must be interpreted as being inapplicable to public contracts entered into before the end of the period prescribed for domestic law to be brought into conformity with Directive 2007/66.

---

1 – Original language: Spanish.

2 – OJ 2004 L 134, p. 114.

3 – OJ 2004 L 134, p. 1.

4 – Directive 2004/18 brings together in a kind of unified code the sectoral regimes contained in Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), while Directive 2004/17 did likewise in relation to the provisions of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

5 – As is common knowledge, conceptual considerations relating to the categories defined in Directive 2004/17 can be applied, by extension, to Article 1(2) and (4) of Directive 2004/18 due to their similarity. In this regard, see, for example, Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraph 43. On the development of the two directives, see Jan M. Hebly's publications *European Public Procurement: Legislative History of the 'Utilities' Directive 2004/17/EC*, Wolters Kluwer, Alphen aan den Rijn, 2008, and *European Public Procurement: Legislative History of the 'Classic' Directive 2004/18/EC*, Wolters Kluwer, Alphen aan den Rijn, 2007.

6 – OJ 1992 L 76, p. 14.

7 – OJ 2007 L 335, p. 31.

8 – *Latvijas Vēstnesis* (Latvian Official Journal) No 61 of 24 May 1994, p. 192.

9 – *Latvijas Vēstnesis* No 107 of 9 July 2009, p. 4093, in force from 1 October 2009. Until 30 September 2009, the Koncesiju likums (Law on concessions) applied, defining a concession, under Article 1(2), as 'the grant for a specified period of rights to provide services or exclusive rights to operate the facilities under concession by means of a written contract between the grantor of the concession and the concession holder'.

10 – *Latvijas Vēstnesis* No 106 of 4 July 2007, p. 3682.

11 – *Latvijas Vēstnesis* No 183 of 20 November 2009, p. 4169. This came into force on 21 November 2009, replacing Decree of the Council of Ministers No 672 of 2 October 2007 (*Latvijas Vēstnesis* No 175 of 31 October 2007, p. 3751).

12 – The body which, in the meantime, had taken over the functions of the Ludza District Council, although the two institutions appear to have coexisted for a period.

13 – The body replacing the Ludzas novada pašvaldība (Ludza Municipal Council) as defendant in the main proceedings.

14 – Point 25, footnote 14.

15 – For example, Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 16, and Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 24.

---

16 – Case C-234/03 *Contse and Others* [2005] ECR I-9315; Case C-382/05 *Commission* v *Italy* [2007] ECR I-6657; and Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-4779. These criteria include the delegation of liability for harm suffered on account of a failure of the service at issue and the existence of a certain economic freedom to determine the conditions under which the service is exploited.

---

17 – Incidentally, in my view, this is where the fact that, by virtue of Article 1(3)(b) of Directive 2004/17, the consideration for a service concession can consist either solely in the right to exploit the service or in that right 'together with payment' becomes relevant. The existence of two combined elements in the consideration for a service which, in legal terms, can only be a contract or a concession, means that the specific weight to be given to each of them must be assessed. For this, in my view, the only possible criterion is the level of risk ultimately assumed by the service provider, and to determine that it is necessary to look at the extent to which the payment which accompanies the right to exploit implies a significant reduction in the risk inherent in the business activity.

---

18 – For the academic thinking on the subject, see, for example, Lenaerts, K. and van Nuffel, P., *European Union Law*, Third edition, Sweet & Maxwell, London, 2011 (22-080 et seq.).

---

19 – Although there is no need to address here the question of whether or not there is a right to a remedy, which, as part of the heritage of the European Union as a community based on law, would be fundamental to the whole Community legal order, it must nevertheless be recognised that Directive 92/13 in its original form already protected the right to challenge the decisions of contracting authorities and Directive 2007/66 therefore improved the effectiveness of already existing review procedures concerning the award of public contracts. Bringing about this improvement by introducing the sanction of declaring contracts ineffective in certain circumstances, thus going further than simply recognising the right to compensation, is another matter. It should be borne in mind that reparation for the infringement of a right in the form of compensation is a legitimate, albeit 'secondary', form of legal remedy. In this regard, see Erbguth, W., 'Primär- und Sekundärrechtsschutz im öffentlichen Recht', *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, Vol. 61, Berlin, 2002, p. 221 et seq.

---

20 – Council directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

---

21 – In this respect it should be pointed out that, according to the submissions of Norma-A and Dekom (pp. 6 and 7 of the French version), there has existed in Latvia since 1 February 2004 an administrative court to which Article 184 of the Administrative Procedure Code gives jurisdiction to hear actions relating to the validity of public law contracts.

JUDGMENT OF THE COURT (Third Chamber)

17 March 2011 (*)

(Public service contracts – Directive 2004/18/EC – Article 47(2) – Direct effect – Whether applicable to the services referred to in Annex II B to that directive)

In Case C-95/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Portugal), made by decision of 20 January 2010, received at the Court on 22 February 2010, in the proceedings

Strong Segurança SA

v

Município de Sintra,

Securitas-Serviços e Tecnologia de Segurança,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Mazák,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Strong Segurança SA, by C. Varela Pinto and J. Oliveira e Carmo, advogadas,

– Município de Sintra, by N. Cárcomo Lobo and M. Vaz Loureiro, advogados,

– Securitas-Serviços e Tecnologia de Segurança, by A. Calapez, advogada,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by G. Aiello, avvocato dello Stato,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by D. Kukovec and G. Braga da Cruz, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The present reference for a preliminary ruling concerns the interpretation of the relevant provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the

coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference has been made in the context of a dispute between Strong Segurança SA (‘Strong Segurança’) and Município de Sintra (Sintra Municipal Council, Portugal) concerning the award of a contract for surveillance and security services for the installations of that municipality.

Legal context

The relevant provisions of Directive 2004/18

3 Recitals 18 and 19 in the preamble to Directive 2004/18 state:

‘(18) The field of services is best delineated, for the purpose of applying the procedural rules of this Directive and for monitoring purposes, by subdividing it into categories corresponding to particular headings of a common classification and by bringing them together in two Annexes, II A and II B, according to the regime to which they are subject. As regards services in Annex II B, the relevant provisions of this Directive should be without prejudice to the application of Community rules specific to the services in question.

(19) As regards public service contracts, full application of this Directive should be limited, for a transitional period, to contracts where its provisions will permit the full potential for increased cross-frontier trade to be realised. Contracts for other services need to be monitored during this transitional period before a decision is taken on the full application of this Directive. In this respect, the mechanism for such monitoring needs to be defined. This mechanism should, at the same time, enable interested parties to have access to the relevant information.’

4 Under the terms of the first subparagraph of Article (1)(2)(d):

‘“Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.’

5 Article 2, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

6 Article 4, entitled ‘Economic operators’, provides in paragraph 2:

‘Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.’

7 Chapter III of Title II, entitled ‘Arrangements for public service contracts’, contains Articles 20 to 22.

8 Article 20, entitled ‘Service contracts listed in Annex II A’, provides:

‘Contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55.’

9 Article 21, entitled ‘Service contracts listed in Annex II B’, is worded as follows:

‘Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).’

10 Article 23, which features in Chapter IV entitled ‘Specific rules governing specifications and contract documents’, relates to the technical specifications that must be set out in contract documentation in

order to afford equal access for tenderers and not to create unjustified obstacles to the opening-up of public procurement to competition, while Article 35(4), which features in Chapter VI entitled ‘Rules on advertising and transparency’, refers to the contracting authorities’ obligations to give notice of the results of the contract award procedure.

11 The subject of Annex II B, Category 23, is ‘Investigation and security services, …’.

12 Article 47, entitled ‘Economic and financial standing’, provides in paragraph 2:

‘An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.’

13 Article 48, entitled ‘Technical and/or professional ability’, includes a paragraph 3, the content of which is substantially identical to that of Article 47(2).

14 Under Article 80(1), the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2004/18 no later than 31 January 2006 and forthwith to inform the European Commission thereof.

National legislation

15 Directive 2004/18 was transposed into Portuguese law by Decree-Law No 18/2008 of 29 January 2008 approving the Public Procurement Code (*Código dos Contratos Públicos*), which entered into force six months after its publication on that date.

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 By a notice published in the *Official Journal of the European Union* of 15 July 2008, the Sintra Municipal Council issued an international open invitation to tender for the procurement of surveillance and security services for the municipal installations for 2009 and 2010. That invitation to tender was subject to the terms of the specifications and the contract documents, and the contract was to be awarded on the basis of the criterion of the generally most economically advantageous tender.

17 Strong Segurança participated in this invitation to tender and submitted the documents necessary for that purpose. Furthermore, it annexed to its tender a comfort letter from the company Trivalor (SGPS) SA (‘Trivalor’) in which that company made the following declaration:

‘By virtue of the relationship of total direct control (100%) between Trivalor and [Strong Segurança], Trivalor is responsible for the latter’s obligations, in accordance with the Commercial Companies Code (*Código das Sociedades Comerciais*).

To that effect, we declare that we undertake:

– to guarantee that [Strong Segurança] has the necessary technical and financial means for the proper performance of the contractual obligations;

– to indemnify Sintra Municipal Council in full for any loss or damage suffered as a result of any impediment that may occur to prevent the proper performance of the contract, should it be awarded.’

18 The selection board initially favoured awarding the contract to Strong Segurança, as its tender had obtained the highest weighting. However, following the complaint made by a competitor, the selection board, basing itself on the contention that Strong Segurança was not authorised to report on the economic and financial standing of a third company such as Trivalor, revised its assessment and proposed that the contract be awarded to the competitor which had lodged the complaint. Sintra Municipal Council, at its meeting of 11 February 2009, approved this proposal and decided to award to that competitor the services for 2009 and 2010 covered by the invitation to tender.

19 The appeal by Strong Segurança against that decision was dismissed by the Tribunal Administrativo e Fiscal de Sintra (Administrative and Tax Court of Sintra), the ruling of which was upheld by a judgment of the Tribunal Central Administrativo Sul (Administrative Court of Appeal, South) of 10 September 2009. Strong Segurança thereupon brought an appeal against that judgment before the Supremo Tribunal Administrativo (Supreme Administrative Court).

20 The Supremo Tribunal Administrativo states that the central question which arises in this case is whether or not Article 47(2) of Directive 2004/18 is also applicable to the services referred to in Annex II B to that directive, such as those to which the procedure in the main proceedings relates. It points out, first, that that procedure had begun before the entry into force of Decree-Law No 18/2008 of 29 January 2008 and, second, that the period for transposition of the directive had already expired when the invitation to tender was issued.

21 Thus, the first issue that arises in this regard is that of the direct effect of Article 47(2) of Directive 2004/18. The national court takes the view that the first part of that provision is, in accordance with the case-law of the Court, sufficiently clear, precise and unconditional and, as such, leaves the Member States no option with regard to compliance. However, as to the second part of that provision, the national court expresses doubts, in so far as that part appears to leave the Member States with some discretionary power as to what is to be proved and as to what evidence may be required for the economic operator to demonstrate its economic and financial capacity to the contracting authority when it relies on the capacities of other entities.

22 The second issue raised in this case is that of the interpretation of Article 47(2) of Directive 2004/18, in relation to which the case-law of the Court provides no answer. The national court notes that a strictly literal interpretation of that provision would lead to the conclusion that it applies only to the service contracts referred to in Annex II A. It points out, however, that that would exclude, for service contracts referred to in Annex II B, the application of essential provisions of Directive 2004/18 such as, for example, those specifying the criteria for qualitative selection of candidates (Articles 45 to 52) and the contract award criteria (Articles 53 to 55).

23 Since it had doubts as to whether such an interpretation is indeed correct, and aware that it was ruling on the matter at final instance, the Supremo Tribunal Administrativo decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is Article 47 of Directive 2004/18 … directly applicable in the domestic legal order as from 31 January 2006, in the sense that it confers on individuals a right on which they can rely in proceedings against organs of the Portuguese authorities?

2. If so, is that principle applicable, despite the provision contained in Article 21 of that directive, to contracts which have as their object services referred to in Annex II B [to Directive 2004/18]?’

The questions referred to the Court

The second question

24 By this question, which it is appropriate to consider first, the national court is asking whether Article 47(2) of Directive 2004/18 is also applicable to contracts which have as their object services referred to in Annex II B to that directive, notwithstanding the fact that such applicability is not apparent from the wording of the other relevant provisions of that directive, in particular Article 21 thereof.

25 In order to answer that question, it should be observed, at the outset, that the distinction between service contracts according to their classification into two separate categories was not introduced for the first time by Directive 2004/18. It already existed under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), as codified and recast by Directive 2004/18.

26 It should be observed, next, that the distinction that must be made between service contracts depending on whether they are referred to in Annex II A or in Annex II B to Directive 2004/18 was already

unambiguously referred to in the recitals to that directive.

27 Thus, recital 18 in the preamble to Directive 2004/18 states that, for the purpose of applying its rules, it is appropriate to subdivide the services into categories and to bring them together in two Annexes, II A and II B, according to the regime to which they are subject.

28 For its part, recital 19 in the preamble to Directive 2004/188 reflects the legislature's intention to limit the full application of that directive, for a transitional period, to service contracts where its provisions will permit the full potential for increased cross-frontier trade to be realised, those contracts being for the services referred to in Annex II A, and to monitor the other contracts, that is, those for services referred to in Annex II B, during that transitional period and before a decision is taken on the full application of Directive 2004/18 to those contracts.

29 That subdivision of the service contracts, referred to in the abovementioned recitals, is set out in greater detail in the provisions of Directive 2004/18.

30 Thus, Article 20 provides, for contracts having as their object the provision of services referred to in Annex II A, the practically full application of the provisions of that directive, whereas Article 21 refers to Articles 23 and 35(4) only and thus imposes, with regard to the contracts for services referred to in Annex II B, 'solely' the obligation of the contracting authorities concerning the technical specifications of such contracts, as well as their obligation to inform the Commission of the results of their procurement procedures.

31 Contrary to what Strong Segurança maintains, there is no indication from the wording of the provisions of Directive 2004/18, or from its spirit and general scheme, that the subdivision of the services into two categories is based on a distinction between the 'substantive' and 'procedural' provisions of that directive. Furthermore, as the Commission rightly points out, such a distinction would risk creating legal uncertainty with regard to the scope of the various provisions of that directive.

32 The division of arrangements for public service contracts into two separate categories according to the classification of services, brought about by the relevant rules of European Union law, is corroborated by the case-law of the Court.

33 Thus, the Court has held that the classification of the services in Annexes I A and I B to Directive 92/50 (which correspond, respectively, to Annexes II A and II B to Directive 2004/18) is in accordance with the system laid down by that directive, which envisages the application of the provisions of that directive on two levels (see, to that effect, Case C-411/00 *Felix Swoboda* [2002] ECR I-10567, paragraph 55).

34 The Court has also held, in the context of Directive 92/50, that, where the contracts concern services which fall under Annex I B, the contracting authorities are bound only by the obligations to define the technical specifications by reference to national standards implementing European standards, which must be given in the general or contractual documents relating to each contract, and to send a notice of the results of the award procedure to the OPOCE (Office for Official Publications of the European Communities) (see Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 24).

35 The Court has stated that the European Union legislature based itself on the assumption that contracts for the services referred to in Annex I B to Directive 92/50 are, in principle, in the light of their specific nature, not of sufficient cross-border interest to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender (see, to that effect, *Commission* v *Ireland*, paragraph 25). However, the Court has held that even such contracts, where they have a certain cross-border interest, are subject to the general principles of transparency and equal treatment resulting from Articles 49 TFEU and 56 TFEU (see, to that effect, *Commission* v *Ireland*, paragraphs 26 and 29 to 31).

36 In light of the foregoing, it must be concluded that the system established by Directive 2004/18 does not directly create, for the Member States, the obligation to apply Article 47(2) of that directive also to the public service contracts referred to in Annex II B to that directive.

37 With regard to the Commission's contention that the general principle of 'effective competition' specific to Directive 2004/18 could lead to such an obligation, it must be noted that, whereas effective competition constitutes the essential objective of that directive, that objective, as important as it is, cannot lead to an interpretation that is contrary to the clear terms of the directive, which do not mention Article 47(2) thereof as being among the provisions which the contracting authorities are obliged to apply when awarding contracts concerning the services referred to in Annex II B to that directive.

38 However, in accordance with the abovementioned case-law, it remains to be considered whether, where such a contract has a certain cross-border interest – this being a matter which it is for the national court to determine –, particularly having regard to the fact that, in the main proceedings, an invitation to tender had been published in the *Official Journal of the European Union*, an obligation such as that set out in Article 47(2) of Directive 2004/18 may result from the application of the general principles of transparency and equal treatment.

39 With regard, firstly, to the principle of transparency, it must be stated that this principle is not infringed if an obligation such as that laid down by Article 47(2) of Directive 2004/18 is not imposed on the contracting authority in respect of a contract which has as its object services referred to in Annex II B to that directive. Indeed, the fact that an economic operator cannot rely on the economic and financial capacities of other entities has no connection with the transparency of the contract award procedure. It should be observed, moreover, that the application of Articles 23 and 35(4) of Directive 2004/18 during the contract award procedures relating to such 'non-priority' services is also intended to ensure the degree of transparency that corresponds to the specific nature of those contracts.

40 Nor, it should be noted, can the principle of equal treatment lead to the imposition of an obligation, such as that laid down by Article 47(2) of Directive 2004/18, at the time of the award of the service contracts listed in Annex II B, notwithstanding the distinction drawn by that directive.

41 The absence of such an obligation cannot give rise to any discrimination, direct or indirect, on the basis of nationality or place of establishment.

42 It should be noted that such a broad approach to the applicability of the principle of equal treatment could lead to the application, to the service contracts referred to in Annex II B to Directive 2004/18, of other essential provisions of that directive, for example, as the national court observes, provisions which establish the qualitative criteria for the selection of candidates (Articles 45 to 52) as well as the contract award criteria (Articles 53 to 55). That would involve the risk of rendering entirely ineffective the distinction drawn by Directive 2004/18 between the services of Annexes II A and II B, as well as the application of that directive on two levels, under the terms used by the case-law of the Court.

43 Furthermore, according to the case-law of the Court, the contracts relating to the services listed in Annex II B to Directive 2004/18 are specific in nature (*Commission* v *Ireland*, paragraph 25). Thus, at least some of those services have particular characteristics that would justify the contracting authority taking into account, on a personalised and specific basis, the individual bid presented by the candidates. This is the case, for example, for 'legal services', 'personnel placement and supply services', 'education and vocational education services' or 'investigation and security services'.

44 Consequently, the general principles of transparency and equal treatment do not impose on the contracting authorities an obligation, such as that laid down by Article 47(2) of Directive 2004/18, for contracts concerning the services set out in Annex II B to that directive.

45 However, the scope of Directive 2004/18 is determined, as is clear from recital 19 in its preamble, by a progressive approach taken by the European Union legislature which, admittedly, during the transition period mentioned in that recital does not require the application of Article 47(2) when awarding contracts such as those at issue in the main proceedings, but which does not prohibit a Member State and, possibly, a contracting authority, from requiring the application of the abovementioned provision to such contracts in, respectively, its legislation and the documents relating to the contract.

46 In the light of the foregoing, the answer to the second question is that Directive 2004/18 does not create the obligation, for Member States, to apply Article 47(2) of that directive also to contracts which have as their object services referred to in Annex II B thereto. However, that directive does not

preclude Member States and, possibly, contracting authorities from providing for such application in, respectively, their legislation and the documents relating to the contract.

The first question

47 In the light of the answer given to the second question, there is no need to answer the first question.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts does not create the obligation, for Member States, to apply Article 47(2) of that directive also to contracts which have as their object services referred to in Annex II B thereto. However, that directive does not preclude Member States and, possibly, contracting authorities from providing for such application in, respectively, their legislation and the documents relating to the contract.

[Signatures]

---

* Language of the case: Portuguese.

EU:C:2010:567

JUDGMENT OF THE COURT (Third Chamber)

30 September 2010 (*)

(Directive 89/665/EEC – Public procurement – Review procedures – Actions for damages – Unlawful award – National rule on liability based on a presumption that the contracting authority is at fault)

In Case C-314/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberster Gerichtshof (Austria), made by decision of 2 July 2009, received at the Court on 7 August 2009, in the proceedings

Stadt Graz

v

Strabag AG,

Teerag-Asdag AG,

Bauunternehmung Granit GesmbH,

intervening party:

Land Steiermark,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, E. Juhász, G. Arestis, T. von Danwitz and D. Šváby, Judges,

Advocate General: V. Trstenjak,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 24 June 2010,

after considering the observations submitted on behalf of:

– Stadt Graz, by K. Kocher, Rechtsanwalt,

– Strabag AG, Teerag-Asdag AG and Bauunternehmung Granit GesmbH, by W. Mecenovic, Rechtsanwalt,

– Land Steiermark, by A.R. Lerchbaumer, Rechtsanwalt,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by B. Schima and C. Zadra, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 1(1) and 2(1)(c) and (7) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1) ('Directive 89/665').

2 The reference has been made in the course of proceedings between Stadt Graz (City of Graz, Austria) and Strabag AG, Teerag-Asdag AG and Bauunternehmung Granit GesmbH (collectively, 'Strabag and Others'), following the unlawful award of a public procurement contract by Stadt Graz.

Legal context

European Union ('EU') law

3 The third and sixth recitals in the preamble to Directive 89/665 state:

'… the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; … for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

…

… it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement'.

4 Article 1(1) of that directive provides:

'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

5 Article 2(1) and (5) to (7) of Directive 89/665 provides:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

…

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.'

National law

6 EU law on public procurement was transposed, in Land Steiermark (Styria, Austria), by the Law of 1998 on public procurement (Steiermärkisches Vergabegesetz 1998, 'the StVergG').

7 Paragraph 115(1) of the StVergG provides:

'In the event of the culpable infringement of this law or its implementing regulations by organs of a contracting authority, an unsuccessful candidate or tenderer may claim a right to be refunded the costs incurred in preparing its application or tender and other costs borne as a result of its participation in the tender procedure against the contracting authority, which is answerable for the conduct of the organs of the contracting entity. A claim for damages, including compensation for loss of profit, should be made before the ordinary courts.'

8 Paragraph 1298 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, 'the ABGB') provides:

'The party that claims to have been prevented from fulfilling its contractual or statutory obligations without being at fault has the burden of proving this. Where, as a result of a contractual agreement, it is liable only for gross negligence, it must also prove that that condition is not fulfilled.'

9 Paragraph 1299 of the ABGB provides:

'The party which publicly performs a function, art, profession or occupation or the party which voluntarily assumes a task requiring artistic knowledge or an unusual level of dedication thereby demonstrates that he has the necessary dedication and the requisite unusual knowledge; he must therefore be answerable where such dedication or knowledge is lacking. However, where the party which assigned the task was aware of his inexperience or could have been so aware by taking normal care, the assigning party is liable for the latter's shortcomings.'

The factual background to the dispute in the main proceedings and the questions referred for a preliminary ruling

10 In 1998, Stadt Graz announced an EU-wide invitation to tender by open procedure for the manufacture and supply of bituminous hot mix asphalt, in accordance with the StVergG. The notice of invitation to tender, published in the *Official Journal of the European Communities* and in the *Grazer Zeitung*, named 'Graz, Austria' as the place of performance and specified, under a heading entitled 'Brief description (type of performance, general features, purpose of the building or construction)', the supply of bituminous hot mix asphalt for 1999. It also specified, under the heading 'period for performance', 'start: 1 March 1999; end: 20 December 1999'.

11 Fourteen tenders were submitted. The best bidder was Held & Frank Bau GmbH ('HFB'), a construction undertaking. According to the order for reference, if that undertaking had been excluded, the joint-tender submitted by Strabag and Others would have been successful.

12 HFB had enclosed with its tender a letter in which it stated, 'by way of supplement', that its new asphalt mixing plant, which was to be constructed in the coming weeks in the municipality of

Großwilfersdorf, would be operational from 17 May 1999. Strabag and Others were unaware of that letter.

13 On 5 May 1999, Strabag and Others brought review proceedings before the Vergabekontrollsenat des Landes Steiermark (the procurement review body of Land Steiermark) in which they stated that HFB did not possess a hot mix asphalt plant in Land Steiermark, which made it technically impossible for it to perform the contract at issue. They claimed that HFB's tender should therefore be excluded.

14 At the same time, Strabag and Others submitted an application for interim measures, which was granted by the Vergabekontrollsenat des Landes Steiermark by Order of 10 May 1999 prohibiting Stadt Graz from awarding the contract pending the decision on the substance.

15 By decision of 10 June 1999, the Vergabekontrollsenat des Landes Steiermark dismissed the action brought by Strabag and Others in its entirety, including the applications for review proceedings and for the exclusion of HFB from the contract. It stated that HFB was authorised to manufacture asphalt and that the requirement that the hot mix plant exist at the time of the opening of the tenders would be disproportionate to the subject-matter of the contract and contrary to commercial practice.

16 On 14 June 1999, Stadt Graz awarded the contract to HFB.

17 By decision of 9 October 2002, following an action brought by Strabag and Others, the Verwaltungsgerichtshof annulled the decision of the Vergabekontrollsenat des Landes Steiermark on the ground that HFB's tender did not conform to the invitation to tender because, although the performance period ran from 1 March to 20 December 1999, HFB was unable to make use of its new asphalt mixing plant until 17 May 1999.

18 The Unabhängiger Verwaltungssenat für die Steiermark (Independent Administrative Tribunal of Land Steiermark) which, in 2002, took over the powers of the Vergabekontrollsenat des Landes Steiermark, held, by a decision of 23 April 2003, that, as a result of an infringement of the StVergG, the award of the contract by Stadt Graz had not been lawful.

19 Strabag and Others have brought an action against Stadt Graz before the ordinary courts for damages in the amount of EUR 300 000. In support of their action, they claim that HFB's tender should have been excluded on the ground of an irreparable defect and that their tender should consequently have been accepted. Stadt Graz erred by failing to hold that HFB's tender was incompatible with the terms of the invitation to tender. According to Strabag and Others, the decision of the Vergabekontrollsenat des Landes Steiermark cannot exonerate Stadt Graz, which acted at its own risk.

20 Stadt Graz claims, for its part, that it was bound by the decision of the Vergabekontrollsenat des Landes Steiermark and that, if that decision is unlawful, such unlawfulness is attributable to Land Steiermark, which is responsible for the Vergabekontrollsenat des Landes Steiermark. Its own organs, by contrast, were not at fault.

21 The court at first instance held, by an interlocutory decision, that the action for damages brought by Strabag and Others was well founded, concluding that Stadt Graz had erred by not carrying out a review of the tenders and by awarding the contract to HFB, despite the clear defect in the latter's tender, during the period allowed for bringing an appeal against the decision of the Vergabekontrollsenat des Landes Steiermark.

22 That decision was upheld on appeal. The appeal court stated, however, that its decision was amenable to an ordinary appeal on a point of law, given the lack of case-law from the Oberster Gerichtshof concerning the contracting authority's liability for fault where, as in the present case, at the date of the award of the contract to the best bidder, the contracting authority's position is upheld by a decision of the Vergabekontrollsenat des Landes Steiermark.

23 The appeal court held that, although the ordinary courts are bound by the decision of the Unabhängiger Verwaltungssenat für die Steiermark of 23 April 2003 finding the award unlawful and a causal link had been established between the unlawful behaviour of Stadt Graz and the damage suffered by Strabag and Others, it was still necessary to examine whether Stadt Graz was at fault concerning its decision to

award the contract, on 14 June 1999, to HFB without taking into consideration the fact, which was not referred to in the decision of the Vergabekontrollsenat des Landes Steiermark of 10 June 1999, that the letter accompanying HFB's tender indicated that it was unable to comply with the performance periods of the contract at issue.

24 Stadt Graz lodged before the Oberster Gerichtshof a review on a point of law against the judgment given on appeal.

25 First, the Oberster Gerichtshof has doubts as to the conformity of Paragraph 115(1) of the StVergG with Directive 89/665. Referring to the judgments in Case C-275/03 *Commission* v *Portugal* [2004] and Case C-70/06 *Commission* v *Portugal* [2008] ECR I-1, it is uncertain whether all national legislation which, in any way, makes the tenderer's right to damages conditional on a finding that the contracting authority is at fault must be held to be incompatible with that directive, or only national legislation which imposes on the tenderer the burden of proving that fault.

26 The Oberster Gerichtshof points out, in that regard, that Paragraph 1298 of the ABGB reverses the burden of proof, with the effect that the contracting authority as a body is presumed to be at fault. Furthermore, the contracting authority is not entitled to rely on a lack of individual abilities, since its liability is equated with that of an expert, as provided for under Paragraph 1299 of the ABGB. Nevertheless, if Stadt Graz was indeed bound, actually and extensively, by the procedurally final decision of the Vergabekontrollsenat des Landes Steiermark, it would be able to discharge the burden of proof to the required legal standard.

27 Secondly, on the assumption that Directive 89/665 does not preclude national legislation such as that at issue in the main proceedings, the referring court, which – like the Verwaltungsgerichtshof and the appeal court in the present case – disputes the view that the contracting authority is bound by a decision such as that given by the Vergabekontrollsenat des Landes Steiermark on 10 June 1999, wonders, however, whether the assumption that the contracting authority is not bound by such a decision and could have – or even should have – awarded the contract to another tenderer is not inconsistent with the objective, stated in Article 2(7) of that directive, of ensuring that decisions taken by bodies responsible for review procedures are effectively enforced.

28 Thirdly, on the assumption that that second question is answered in the affirmative, the referring court states that Strabag and Others complain, as does the appeal court, that Stadt Graz awarded the contract to HFB without taking into account the fact, which was not mentioned by the Vergabekontrollsenat des Landes Steiermark in its decision of 10 June 1999, that, according to information provided by HFB itself, HFB was unable to perform that contract within the period fixed by the invitation to tender. In those circumstances, the referring court is uncertain, in the light of Article 2(7) of Directive 89/665, whether, even if the contracting authority was bound by the decision taken by a body such as the Vergabekontrollsenat des Landes Steiermark, it could have – or even should have – determined whether that decision was correct and/or whether it was based on an exhaustive assessment.

29 In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Do Articles 1(1) and 2(1)(c) of … [Directive 89/665] … or other provisions of that directive preclude a national rule under which claims for damages for the contracting authority's infringement of Community procurement law are subject to the requirement of fault, including where that rule is applied in accordance with a presumption that fault lies with the contracting authority as a body and its reliance on a lack of individual abilities, hence on a lack of personal fault, is excluded?

2. If Question 1 is answered in the negative:

Is Article 2(7) of … [Directive 89/665] … to be interpreted as meaning that, for the purposes of the obligation thereunder to ensure the effective enforcement of decisions taken in review procedures, the decision of a procurement review body binds all parties to the procedure, thus also including the contracting authority?

3. If Question 2 is answered in the affirmative:

Is it permissible under Article 2(7) of … [Directive 89/665] … for the contracting authority to disregard a final decision of a procurement review body, or is it even obliged to disregard it and, if so, under what conditions?'

The questions referred

Question 1

30 By Question 1, the referring court asks, in essence, whether Directive 89/665 must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement.

31 In that regard, it should first of all be noted that Article 1(1) of Directive 89/665 requires the Member States to take the measures necessary to ensure the existence of procedures which are effective, and, in particular, as rapid as possible, for the review of decisions of contracting authorities which have 'infringed' EU law in the field of public procurement or national rules implementing that law. The third recital in the preamble to that directive notes, for its part, the need for the existence of effective and rapid remedies in the case of 'infringements' of those laws.

32 With regard, in particular, to the award of damages by way of legal remedy, Article 2(1)(c) of Directive 89/665 provides that the Member States are to ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to award such damages to persons harmed by an infringement.

33 However, Directive 89/665 lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement (see, inter alia, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 47, and Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 45). If there is no specific provision governing the matter, it is therefore for the domestic law of each Member State to determine the measures necessary to ensure that the review procedures effectively award damages to persons harmed by an infringement of the law on public contracts (see, by analogy, *GAT*, paragraph 46).

34 Although, therefore, the implementation of Article 2(1)(c) of Directive 89/665 in principle comes under the procedural autonomy of the Member States, limited by the principles of equivalence and effectiveness, it is necessary to examine whether that provision, interpreted in the light of the general context and aim of the judicial remedy of damages, precludes a national provision such as that at issue in the main proceedings from making the award of damages conditional, in the circumstances set out in paragraph 30 of this judgment, on a finding that the contracting authority's infringement of the law on public contracts is culpable.

35 In that regard, it should first be noted that the wording of Article 1(1), Article 2(1), (5) and (6), and the sixth recital in the preamble to Directive 89/665 in no way indicates that the infringement of the public procurement legislation liable to give rise to a right to damages in favour of the person harmed should have specific features, such as being connected to fault – proved or presumed – on the part of the contracting authority, or not being covered by any ground for exemption from liability.

36 That assessment is supported by the general context and aim of the judicial remedy of damages, as provided for in Directive 89/665.

37 According to settled case-law, while the Member States are required to provide legal remedies enabling the annulment of a decision of a contracting authority which infringes the law relating to public contracts, they are entitled in the light of the objective of rapidity pursued by Directive 89/665 to couple that type of review with reasonable limitation periods for bringing proceedings, so as to prevent

the candidates and tenderers from being able, at any moment, to invoke infringements of that legislation, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements (see, to that effect, inter alia, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 74 to 78; *Santex*, paragraphs 51 and 52; Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, paragraphs 50 and 51; and Case C-406/08 *Uniplex (UK)* [2010] ECR I-0000, paragraph 38).

38 Furthermore, the second subparagraph of Article 2(6) of Directive 89/665 reserves to the Member States the right to limit the powers of the body responsible for the review procedures, after the conclusion of a contract following its award, to the award of damages.

39 Against that background, the remedy of damages provided for in Article 2(1)(c) of Directive 89/665 can constitute, where appropriate, a procedural alternative which is compatible with the principle of effectiveness underlying the objective pursued by that directive of ensuring effective review procedures (see, to that effect, inter alia, *Uniplex (UK)*, paragraph 40) only where the possibility of damages being awarded in the event of infringement of the public procurement rules is no more dependent than the other legal remedies provided for in Article 2(1) of Directive 89/665 on a finding that the contracting authority is at fault.

40 As the European Commission states, it makes little difference in that regard that, by contrast with the national legislation referred to in *Commission* v *Portugal*, the legislation at issue in the main proceedings does not impose on the person harmed the burden of proving that the contracting authority is at fault, but requires the latter to rebut the presumption that it is at fault, while limiting the grounds on which it can rely for that purpose.

41 The reason is that that legislation, too, creates the risk that the tenderer who has been harmed by an unlawful decision of a contracting authority is nevertheless deprived of the right to damages in respect of the damage caused by that decision, where the contracting authority is able to rebut the presumption that it is at fault. However, as emerges from the present order for reference and as was confirmed at the hearing, such a possibility is not excluded in the present case, given that Stadt Graz is able to rely on the fact that the legal error it is alleged to have made is excusable, on account of the intervention of the decision of the Vergabekontrollsenat des Landes Steiermark of 10 June 1999 which dismissed the action brought by Strabag and Others.

42 At the very least, that tenderer runs the risk, under that legislation, of only belatedly being able to obtain damages, in view of the possible duration of civil proceedings seeking a finding that the alleged infringement is culpable.

43 However, in both cases, the situation would be contrary to the aim of Directive 89/665, set out in Article 1(1) thereof and in the third recital in the preamble thereto, which is to guarantee judicial remedies which are effective and as rapid as possible against decisions taken by contracting authorities in infringement of the law on public contracts.

44 It should also be noted that, even allowing for the possibility that, in the present case, Stadt Graz might have taken the view in June 1999 that it was required, because of the objective of efficiency relating to procedures for the award of public contracts, to take immediate steps to comply with the decision of the Vergabekontrollsenat des Landes Steiermark of 10 June 1999 without awaiting the expiry of the period for bringing an appeal against that decision, the fact remains – as the Commission noted at the hearing – that a declaration that an application for damages, brought by the unsuccessful tenderer following the annulment of that decision by an administrative court, is well founded cannot – contrary to the wording, context and objective of the provisions of Directive 89/665 which establish the right to such damages – depend, for its part, on a finding that the contracting authority involved is at fault.

45 In the light of the foregoing considerations, the reply to Question 1 is that Directive 89/665 must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement.

Questions 2 and 3

46 In the light of the answer to Question 1, there is no need to answer the other two questions referred.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement.

[Signatures]

---

* Language of the case: German.

EU:C:2011:130

JUDGMENT OF THE COURT (Third Chamber)

10 March 2011 (*)

(Public procurement – Directive 2004/18/EC – Public service concession – Rescue service – Distinction between 'public service contract' and 'service concession')

In Case C-274/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht München (Germany), made by decision of 2 July 2009, received at the Court on 20 July 2009, in the proceedings

Privater Rettungsdienst und Krankentransport Stadler

v

Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau,

interveners:

Malteser Hilfdienst eV,

Bayerisches Rotes Kreuz,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, E. Juhász (Rapporteur), G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Mazák,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 24 June 2010,

after considering the observations submitted on behalf of:

– Privater Rettungsdienst und Krankentransport Stadler, by B. Stolz and P. Kraus, Rechtsanwälte,

– the Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau, by M. Kuffer and D. Bens, Rechtsanwälte,

– Malteser Hilfsdienst eV, by W. Schmitz-Rode, Rechtsanwalt,

– the Bayerisches Rotes Kreuz, by E. Rindtorff, Rechtsanwalt,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– the Czech Government, by M. Smolek, acting as Agent,

– the Swedish Government, by S. Johannesson, acting as Agent,

– the European Commission, by C. Zadra and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(2)(a) and (d) and Article 1(4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference has been made in proceedings between Privater Rettungsdienst und Krankentransport Stadler (‘Stadler’) and the Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau (Municipal Association for the Rescue Service and Fire Alarm, Passau; ‘Passau municipal association’) regarding the award of service contracts in the field of rescue services. The parties are in dispute, in particular, concerning the classification of those contracts as ‘public service contracts’ or ‘service concessions’.

Legal context

European Union legislation

3 Article 1 of Directive 2004/18 provides:

‘…

2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

(d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

…

4. “Service concession” is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

…’

National legislation

4 The Bavarian law on rescue services (Bayerisches Rettungsdienstgesetz; ‘the Bavarian law’) entered into force on 1 January 2009. The relevant provisions of that law for the purposes of the present case are as follows.

‘Article 1 Subject-matter and aim

This Law governs emergency rescue, transport of patients accompanied by a doctor, transport of the sick, mountain and cave rescue and water rescue (rescue service). The area-wide supply of rescue services is a public task and shall be ensured by a public rescue service …

…

Article 4 Bodies entrusted with the task

(1) Districts and municipalities not forming part of a district shall have the task of ensuring provision of the public rescue service in rescue service areas in accordance with this Law …

(2) The highest-level rescue service authority shall, after consulting the municipal umbrella organisations involved, determine by regulation the rescue service areas in such a way that the rescue service can be run in an effective and economic manner.

(3) The districts and the municipalities not forming part of a district that are within the same rescue service area shall perform their tasks under this Law in conjunction with a municipal association for the rescue service and fire alarm.

…

Article 13 Award of emergency rescue, of transport of patients accompanied by a doctor and of transport of the sick

(1) The municipal association for the rescue service and fire alarm shall entrust the carrying out on land of emergency rescue, of transport of patients accompanied by a doctor and of transport of the sick to

1. the Bayerisches Rotes Kreuz (Bavarian Red Cross)

2. the Arbeiter-Samariter-Bund (Workers' Samaritan Federation)

3. the Malteser-Hilfsdienst (Maltese Aid Service),

4. the Johanniter-Unfall-Hilfe (St. John's Accident Assistance) or

5. comparable aid organisations.

…

(2) In so far as the aid organisations are not prepared or in a position to take on the task, the municipal association for the rescue service and fire alarm shall entrust the carrying out of rescue services on land to third parties or shall carry them out itself or through its members.

(3) The municipal association for the rescue service and fire alarm shall make a decision in its discretion, after due assessment of the circumstances, as to the selection of the operator and as to the scope of the award. The selection decision shall be made transparently and in accordance with objective criteria. The municipal association for the rescue service and fire alarm shall publicise the forthcoming selection decision in an appropriate manner, so that interested service providers can apply.

(4) The legal relationship between the municipal association for the rescue service and fire alarm and the person entrusted with running the rescue service shall be governed by a public law contract.

…

Article 21 Requirement for authorisation

(1) Any person who engages in emergency rescue, transport of patients accompanied by a doctor or transport of the sick requires authorisation.

…

Article 24 Conditions for authorisation

…

(2) Authorisation for emergency rescue, the transport of patients accompanied by a doctor or transport of the sick in the public rescue service shall be granted if … a public law contract pursuant to Article 13(4) … is submitted …

…

(4) Authorisation for transport of the sick outside the public rescue service shall be refused if it is to be anticipated that the public interest in an efficient rescue service … will be compromised by exercise of the authorisation …

…

Article 32 Charging and basis of usage fees

Usage fees shall be charged for the provision of rescue services, including the involvement of doctors. The usage fees shall be based on the costs that can be estimated in accordance with economic principles applicable to undertakings and are consistent with proper provision of services, economical and cost-efficient management and efficient organisation …

…

Article 34 Usage fees of operators for emergency rescue, the transport of patients accompanied by a doctor and transport of the sick

…

(2) The social security institutions shall agree the usage fees to be paid by them for emergency rescue, the transport of patients accompanied by a doctor and transport of the sick in a uniform manner with the persons running the rescue service or their Land federations ...

(3) The usage fee agreement shall be concluded annually in advance.

(4) The costs of emergency rescue, of the transport of patients accompanied by a doctor and of transport of the sick shall be allocated in accordance with uniform standards to the users. The usage fees agreed with the social security institutions shall also be charged by the operators to all other persons and bodies which call upon the services of the public rescue service.

(5) The usage fees shall in each case be based on the estimated allowable costs under the second sentence of Article 32 of providing the services in the service areas of emergency rescue, transport of patients accompanied by a doctor and transport of the sick and on the estimated operation numbers in the operational period. The costs of providing the services shall also include in particular the costs of the involvement of doctors in the rescue service, … and the costs in respect of the activity of the Central Settlement Office for the Rescue Service in Bavaria in accordance with paragraph 8. The social security institutions shall agree in each case separately with the individual operators, with the operators of the integrated head offices and with the Central Settlement Office for the Rescue Service in Bavaria their estimated costs in the fee period. The costs can be agreed as a budget.

(6) If a usage fee agreement under paragraph 2 or an agreement under paragraph 5 does not materialise by 30 November in the financial year preceding the fee period, arbitration proceedings before the fee arbitration board … shall be held regarding the amount of the estimated costs and of the usage fees … Usage fees shall not be adjusted retroactively.

(7) The estimated costs agreed with the social security institutions or determined with binding force shall be met from the fees received for emergency rescue, for transport of patients accompanied by a doctor and in transporting the sick (revenue settlement). After a fee period has ended, every operator, every operator of an integrated head office and the Central Settlement Office for the Rescue Service in Bavaria shall prove the costs actually incurred in a final statement of account and compare them with those in the costs agreement (rendering of accounts). If a difference arises between the actual costs and the estimated costs recognised by the social security institutions for the costs agreement, the result of the rendering of accounts shall be dealt with at the next possible fee negotiations; this carrying forward is precluded if the costs of the operator … or the Central Settlement Office … have been agreed as a budget.

(8) In implementing paragraphs 2 to 7 and Article 35, the services of a Central Settlement Office for the Rescue Service in Bavaria shall be called upon, which shall in particular:

1. participate as an adviser in relation to agreeing the usage fees pursuant to paragraph 2 and in relation to the agreements under paragraph 5;

2. on the basis of the estimated costs of the parties involved and of the number of public rescue service operations to be anticipated, calculate the necessary usage fees and propose them for agreement to the parties involved; this shall also apply to the necessary adjustment of usage fees in the course of the current financial year;

3. collect the usage fees for the services of the public rescue service … from the persons liable to pay the costs …;

4. conduct the revenue settlement;

5. make [payments in respect of the] costs of providing the services to the operator of the service …;

6. examine the operators' … rendering of accounts with regard to plausibility and the correctness of the calculations;

7. draw up an audited overall final statement of account for the public rescue service.

The Central Settlement Office for the Rescue Service in Bavaria shall provide its services in this regard on a non-profit-making basis. All parties involved shall be obliged to support the Central Settlement Office for the Rescue Service in Bavaria in the performance of its tasks and to give to it the information and written documentation necessary for that purpose.

…

Article 48 Arbitration boards

…

(3) The fee arbitration board shall comprise, in addition to the chairman:

1. in disputes concerning land rescue usage fees three members for the land rescue operators and three members for the social security institutions …

…

(5) The chairman of the fee arbitration board and his proxy shall be appointed jointly by the operators of the public rescue service, the Bavarian Association of Health-Insurance Doctors, the persons responsible for ensuring the presence of doctors to accompany transported patients, and the social security institutions.

Article 49 Rescue service authorities

(1) The authorities for implementing this Law … shall be:

1. the Bavarian Ministry of Internal Affairs as the highest-level rescue service authority, …

…

Article 53 Regulations and administrative provisions

(1) The highest-level rescue service authority may by regulation:

…

11. set up the Central Settlement Office for the Rescue Service in Bavaria …

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

5 Stadler provided rescue services to the Passau municipal association, in Bavaria, until 31 December 2008, when their contract with the association was terminated. It contested the validity of that termination before the Verwaltungsgericht (Administrative Court) (Germany) and applied for an interim order allowing it to implement the contract pending a ruling in the main proceedings. All its claims were dismissed.

6 In the course of those proceedings, the Passau municipal association stated that it intended, without first putting the services out to tender, to entrust other undertakings with the carrying out of rescue services, initially on the basis of temporary contracts, before then awarding the final contract in the course of a procedure based on the selection procedure provided for under Article 13(3) of the Bavarian law.

7 The Passau municipal association drew up temporary contracts with the Malteser Hilfsdienst eV and the Bayerisches Rotes Kreuz.

8 Stadler, by letter of 17 December 2008, contested the procedure conducted by the Passau municipal association and brought an action before the Vergabekammer (Public Procurement Board), which dismissed it as inadmissible.

9 Stadler then appealed against that decision to the Oberlandesgericht München (Higher Regional Court, Munich) (Germany).

10 According to the referring court, the purpose of the proceedings is to determine whether the provision of the disputed services in Bavaria must be classified as a ‘service concession’ or a ‘service contract’ and what the legal consequences of that classification are. That classification depends on the interpretation of Article 1(4) of Directive 2004/18 which defines the concept of ‘service concession’.

11 In Passau, contracts concerning the provision of rescue services to the public are concluded according to a so-called ‘concession model’ between a contracting authority, the Passau municipal authority, and a service provider.

12 The amount of the usage fees for those rescue services is agreed between the social security institution and the selected service provider. According to Article 32, second sentence, of the Bavarian law, the usage fees must be calculated on the basis of the costs that can be estimated in accordance with economic principles applicable to undertakings and are consistent with proper provision of services, economical and cost-efficient management and efficient organisation. The estimated costs agreed are met by the fees received for emergency rescue, for transport of patients accompanied by a doctor and for transporting the sick. Where the social security institution and the service provider differ as to the amount of those fees, the matter may be brought before an arbitration board, the decisions of which can be contested before the administrative courts.

13 The service provider selected receives his fees from a central settlement office set up by the Bavarian Minister for Internal Affairs, the services of which it is legally bound to use. That office transfers payments on account, on a weekly or monthly basis, to that service provider on the basis of an overall annual amount of remuneration calculated in advance independently of the number of rescues actually carried out. If a deficit appears at the end of the year, it will be the subject of subsequent negotiations.

14 Privately-insured and uninsured persons who, according to the referring court, represent 10% of debtors, are obliged to pay the same usage fee as persons insured under the compulsory statutory scheme.

15 The referring court notes that, in Germany, there is an alternative method of rescue service provision, known as the ‘tender model’. In certain *Länder*, including Saxony, the contracting authority responsible for rescue services pays the service providers directly. The public bodies responsible for rescue services agree that remuneration in negotiations with the social security institutions and then pay it to the service providers. That model has already been classified by the Bundesgerichtshof (German Federal Court of Justice) as a ‘service contract’.

16 The differences between the ‘tender model’ of *Länder* such as Saxony and the ‘concession model’ of *Länder* such as Bavaria are that, in the first case, the usage fees provided for by law are negotiated between the contracting authority responsible for rescue services and another contracting authority (the social security institution) and that the service provider is bound by that agreement, whereas, in the second case, the service provider agrees the amount of the usage fee with another contracting authority (the social security institution).

17 Therefore, for the referring court, the question arises whether simply choosing another negotiating method can mean that, in one case, the rescue service must be put out to tender as a ‘service contract’ pursuant to Directive 2004/18 and, in the other case, the application of the rules governing the award of public service contracts could be ruled out on the ground that the contract constitutes a ‘service concession’.

18 In addition, the referring court is of the opinion that it can be inferred from the case-law of the Court of Justice that characterisation as a public service concession requires, where the remuneration is paid by a third party, that the contractor take the risk of operating the services in question. Thus, if the criterion for differentiating between a ‘service concession’ and a ‘service contract’ that is actually decisive is considered to be the assumption of the economic risk by the contractor, the question arises as to whether the assumption of a risk in any form suffices, so long as the entire risk otherwise falling on the contracting authority is assumed.

19 That distinction is all the more fine because, as the referring court emphasises, under the ‘concession’ model the service provider has to bear only a limited economic risk.

20 In those circumstances, the Oberlandesgericht München decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is a contract relating to the supply of services (here, rescue services) under the terms of which the contracting authority does not make a direct payment of consideration to the contractor, but:

(a) the usage fee for the services to be provided is set by negotiation between the contractor and third parties who are contracting authorities (here, social security institutions),

(b) if agreement is not reached provision is made for a decision by an arbitration board established to this end, whose decision is subject to review by State courts, and,

(c) the fee is paid to the contractor not directly by the users, but in regular payments on account by a central settlement office whose services the contractor is statutorily required to call upon,

to be regarded for that reason alone as a service concession within the meaning of Article 1(4) of the Directive as distinct from a service contract for the purposes of Article 1(2)(a) and (d) of the Directive?

(2) If the first question referred is to be answered in the negative, is there a service concession where the operating risk connected with the public services is limited because:

(a) under a statutory provision, the usage fees for the provision of the services are to be based on the costs that can be estimated in accordance with economic principles applicable to undertakings and that are consistent with proper provision of services, economical and cost-efficient management and efficient organisation,

(b) the usage fees are due from solvent social security institutions,

(c) a certain exclusivity of exploitation is guaranteed in the contractually stipulated area,

but the contractor assumes this limited risk entirely?’

The questions referred for a preliminary ruling

21 As the two questions posed by the referring court are connected, it is appropriate to examine them together.

22 As a preliminary point, it must be noted that contracts concerning the provision of rescue services to the public, awarded by the Passau municipal association, are concluded in the form of the so-called ‘concession model’. That procurement model can be distinguished from the ‘tender’ model, which is a method of awarding a public service contract (see, to that effect, Case C-160/08 *Commission* v *Germany* [2010] ECR I-0000, paragraph 131), by the fact that, under the concession model, remuneration does not come from the contracting authority but from the sums collected from the users of the service by a central settlement office. The usage fees applicable to the service are agreed between the social security institution and the service provider selected by the Passau municipal authority.

23 In that regard, it must be recalled at the outset that the question whether an operation is to be classified as a ‘service concession’ or a ‘public service contract’ must be considered exclusively in the light of European Union law (see, inter alia, Case C-382/05 *Commission* v *Italy* [2007] ECR I-6657, paragraph 31, and Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 38).

24 It follows from a comparison of the definitions of a public service contract and a service concession provided, respectively, by Article 1(2)(a) and (d) and by Article 1(4) of Directive 2004/18, that the difference between a public service contract and a service concession lies in the consideration for the provision of services. A service contract involves consideration which, although it is not the only consideration, is paid directly by the contracting authority to the service provider (see, to that effect, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 39, and *Commission* v *Italy*, paragraphs 33 and 40), while, for a service concession, the consideration for the provision of services consists in the right to exploit the service, either alone, or together with payment (see, to that effect, Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraph 51).

25 In the case of a contract for the supply of services, the fact that the supplier is not remunerated directly by the contracting authority, but is entitled to collect payment from third parties, meets the requirement of consideration laid down in Article 1(4) of Directive 2004/18 (see *Eurawasser*, paragraph 57).

26 While the method of remuneration is, therefore, one of the determining factors for the classification of a service concession, it also follows from the case-law that the service concession implies that the service supplier takes the risk of operating the services in question and that the absence of a transfer to the service provider of the risk connected with operating the service shows that the transaction concerned is a public service contract and not a service concession (*Eurawasser*, paragraphs 59 and 68, and the case-law cited).

27 In the main proceedings, it is apparent from the order for reference that the provider of the rescue services also does not receive remuneration from the contracting authority which awarded the contract in question but from the usage fees which it is entitled to obtain, under the Bavarian law, from the social security institutions from which the insured persons received rescue services or even from the privately-insured or non-insured persons who received such services.

28 The fact that the amount of the usage fees is not determined unilaterally by the provider of the rescue services, but by agreement with the social security institutions which themselves have the status of a contracting authority (see, to that effect, Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-4779, paragraphs 40 to 59), and that those fees are not paid directly by the users of those services to the selected provider but through a central settlement office which is in charge of collecting and remitting those fees, by regular payments on account, does not affect that finding. The fact remains that all the remuneration obtained by the provider of the services comes from persons other than the contracting authority which awarded it the contract.

29 In a case such as that in the main proceedings, in order to find that there is a service concession within the meaning of Article 1(4) of Directive 2004/18, it is still necessary to establish whether the agreed method of remuneration takes the form of the right of the service provider to exploit the service and entails that it takes the risk of operating the service in question. While that risk may, at the outset, be very limited, it is necessary for classification as a service concession that the contracting authority

transfer to the concession holder all or, at least, a significant share of the risk which it faces (see, to that effect, *Eurawasser*, paragraphs 77 and 80).

30 In the main proceedings, the Passau municipal authority conferred on the selected providers, over a number of years, the complete technical, administrative and financial implementation of the rescue services, for which it was responsible, in accordance with Article 4(1) of the Bavarian law.

31 The service providers selected are thus responsible for carrying out the rescue service, in accordance with the conditions laid down in the contract and in the Bavarian law, in the administrative district of Passau municipal authority.

32 Stadler contests the claim that, by that transaction, the Passau municipal authority also transferred a risk of operating the services in question to the selected service providers.

33 In that regard, it must be noted that, where the remuneration of the provider comes exclusively from a third party, the transfer by the contracting authority of a 'very limited' operating risk will suffice in order for a service concession to be found (see *Eurawasser*, paragraph 77).

34 It is not unusual that certain sectors of activity, in particular sectors involving public service utilities, such as those at issue in the main proceedings, are subject to rules which may have the effect of limiting the financial risks entailed. It must in particular remain open to the contracting authorities, acting in all good faith, to ensure the supply of services by way of a concession, if they consider that to be the best method of ensuring the public service in question, even if the risk linked to such an operation is very limited (*Eurawasser*, paragraphs 72 and 74).

35 In such sectors, the contracting authority has no influence on the detailed rules of public law governing the service, and thus on the level of the risk to transfer, and it would not, moreover, be reasonable to expect a public authority granting a concession to create conditions which were more competitive and involved greater financial risk than those which, on account of the rules governing the sector in question, exist in that sector (see *Eurawasser*, paragraphs 75 and 76).

36 It must also be stated that it is not for the Court of Justice to classify specifically the transactions at issue in the main proceedings. The Court's role is confined to providing the national court with an interpretation of European Union law which will be useful for the decision which it has to take in the dispute before it (see *Parking Brixen*, paragraph 32). The specific classification of the contract falls within the jurisdiction of the national court which must determine whether the established facts satisfy the general criteria laid down by the Court.

37 In that regard, it must be stated that the risk of the economic operation of the service must be understood as the risk of exposure to the vagaries of the market (see, to that effect, *Eurawasser*, paragraphs 66 and 67), which may consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not fully be met by revenue or for example also the risk of liability for harm or damage resulting from an inadequacy of the service (see, to that effect, Case C-234/03 *Contse and Others* [2005] ECR I-9315, paragraph 22, and *Hans & Christophorus Oymanns*, paragraph 74).

38 By contrast, risks such as those linked to bad management or errors of judgment by the economic operator are not decisive for the purposes of classification as a public service contract or a service concession, since those risks are inherent in every contract, whether it be a public service contract or a service concession.

39 In the case in the main proceedings, it must be observed, first, that the usage fees are not determined unilaterally by the provider of the rescue services but by agreement with the social security institutions on the basis of negotiations which must take place annually. Those negotiations, the results of which cannot fully be foreseen, involve the risk that the provider of the services must face constraints imposed throughout the duration of the contract. Those constraints may result inter alia from the need to make compromises during the negotiations or from the arbitration proceedings regarding the level of the usage fees.

40 Considering that – as stated by the referring court itself – the social security institutions with which the service provider is obliged to hold negotiations attach importance, with regard to their legal obligations, to fixing the usage fees at the lowest possible level, that service provider also runs the risk that those fees will not suffice to cover all operating expenses.

41 The service provider cannot guard against such eventualities by ceasing its activity since, first, it would not recoup the investments made by it and, second, it may face legal consequences as a result of its decision to terminate the contract early. In any case, an undertaking specialising in rescue services has only limited flexibility on the transport market.

42 Second, it is apparent from the Bavarian law that it does not guarantee full coverage of the operator's costs.

43 If the operator's actual costs exceed, in a given period, the estimated costs which serve as a basis for calculation of the usage fees, that operator may face a deficit and would have to ensure pre-financing of those costs from its own resources. It is a fact that the demand for rescue services can fluctuate.

44 In addition, if a difference arises between the actual costs and the estimated costs recognised by the social security institutions, the result of the rendering of accounts will be dealt with only at the next negotiations, which does not oblige the social security institutions to make good a possible deficit in the course of the following year and thus does not offer a guarantee of full compensation.

45 It should be added that if the costs are provided for in a budget, it is not possible for the undertaking to carry forward a surplus or deficit to the next financial year.

46 Third, the service provider selected is exposed, to a certain degree, to the risk of default by those liable for the usage fees. While a large majority of users of the services are insured by social security institutions, a not insignificant number of users is not insured or is privately insured. While the central settlement office is responsible for the technical recovery of their debts, it is not liable for the debts of non-insured or privately-insured persons and does not guarantee actual payment by those persons of usage fees. According to information provided to the Court, that central office does not enjoy the powers of a public authority.

47 Finally, it must be noted that, according to the statements of the referring court, the Bavarian law does not exclude the possibility that several operators may provide their services in the same area. Thus, in the main proceedings, Passau municipal authority concluded contracts with two service providers.

48 The answer to the questions posed must therefore be that, where the economic operator selected is fully remunerated by persons other than the contracting authority which awarded the contract concerning rescue services, where it runs an operating risk, albeit a very limited one, by reason inter alia of the fact that the amount of the usage fees in question depends on the result of annual negotiations with third parties, and where it is not assured full coverage of the costs incurred in managing its activities in compliance with the principles laid down by national law, that contract must be classified as a 'service concession' within the meaning of Article 1(4) of Directive 2004/18.

49 It should be added that while, as European Union law now stands, service concession contracts are not governed by any of the directives by which the European Union legislature has regulated the field of public procurement, the public authorities concluding them are bound to comply with the fundamental rules of the Treaty on the Functioning of the European Union, including Articles 49 TFEU and 56 TFEU, and with the consequent obligation of transparency, where – that being a matter for the referring court to determine – the contract concerned has a certain transnational dimension (see, to that effect, Case C-91/08 *Wall* [2010] ECR I-0000, paragraphs 33 and 34, and case-law cited).

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 1(2)(d) and (4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as meaning that, where the economic operator selected is fully remunerated by persons other than the contracting authority which awarded the contract concerning rescue services, where it runs an operating risk, albeit a very limited one, by reason inter alia of the fact that the amount of the usage fees in question depends on the result of annual negotiations with third parties, and where it is not assured full coverage of the costs incurred in managing its activities in compliance with the principles laid down by national law, that contract must be classified as a 'service concession' within the meaning of Article 1(4) of that directive.

[Signatures]

---

* Language of the case: German.

EU:C:2010:509

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 9 September 2010 (1)

Case C-274/09

Privater Rettungsdienst und Krankentransport Stadler
v
Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau

(Reference for a preliminary ruling from the Oberlandesgericht München (Germany))

(Rescue service – Criteria for distinguishing between a public service contract and a service concession – Method of remuneration – Transfer of the risk connected with operating the services)

1. In the present case, the Court is once again called upon to rule on the criteria for distinguishing a service concession from a public service contract.

2. The questions referred for a preliminary ruling by the Oberlandesgericht München (Higher Regional Court, Munich) (Germany) are worded as follows:

‘1. Is a contract relating to the supply of services (here, rescue services) under the terms of which the contracting authority does not make a direct payment of consideration to the contractor, but:

(a) the usage fee for the services to be provided is set by negotiation between the contractor and third parties who are contracting authorities (here, social security institutions),

(b) if agreement is not reached provision is made for a decision by an arbitration board established to this end, whose decision is subject to review by State courts, and

(c) the fee is paid to the contractor not directly by the users, but in regular payments on account by a central settlement office whose services the contractor is statutorily required to call upon,

to be regarded for that reason alone as a service concession within the meaning of Article 1(4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, (2)as distinct from a service contract for the purposes of Article 1(2)(a) and (d) of the Directive?

2. If the first question referred is to be answered in the negative, is there a service concession where the operating risk connected with the public services is limited because

(a) under a statutory provision, the usage fees for the provision of the services are to be based on the costs that can be estimated in accordance with economic principles applicable to

undertakings and that are consistent with proper provision of services, economical and cost-efficient management and efficient organisation,

(b) the usage fees are due from solvent social security institutions,

(c) a certain exclusivity of exploitation is guaranteed in the contractually stipulated area,

but the contractor assumes this limited risk entirely?'

3. The Court's answers to the questions referred should assist the referring court to rule on an appeal brought by Privater Rettungsdienst und Krankentransport Stadler ('Stadler') against a decision of the Vergabekammer Südbayern (Public Procurement Board, Southern Bavaria) by which the latter dismissed an action brought by Stadler relating to the procedure for the award of service contracts in the field of rescue services followed by the Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau (Municipal Association for the Rescue Service and Fire Alarm, Passau; 'Passau municipal association') in accordance with the Bavarian Law on Rescue Services (Bayerisches Rettungsdienstgesetz; 'the BayRDG') as inadmissible on the ground that the task of supplying rescue services constitutes a service concession which is not covered by public procurement legislation.

4. According to Stadler, which carried out rescue services for the Passau municipal association until 31 December 2008, (3) the contract at issue constitutes not a service concession within the meaning of Article 1(4) of Directive 2004/18, but a public service contract within the meaning of Article 1(2)(a) and (d) of that directive.

5. By contrast, the Passau municipal association, as defendant in the main proceedings, and two parties intervening in the main proceedings, namely the Malteser Hilfsdienst e.V. and the Bayerisches Rotes Kreuz (the Bavarian Red Cross), (4) consider that the contracts at issue constitute service concessions.

6. Written observations were submitted to the Court not only by the parties to the main proceedings, but also by the Federal Republic of Germany, the Czech Republic and the Commission of the European Communities. The Kingdom of Sweden and the latter, with the exception of the Czech Republic, presented oral argument at the hearing on 24 June 2010.

National legislation

7. In Germany, in the field of public rescue services, the local authorities, in their capacity as the authorities responsible for organising those services, conclude contracts with providers for the provision of such services to the entire population of the area within their remit.

8. With regard to the remuneration for the services in question, there are two different models in the various *Länder*. According to the first, so-called 'tender' model, remuneration is paid directly by the local municipality. (5) According to the second, so-called 'concession' model, the remuneration of the provider of the rescue services takes the form of the collection by it of payment from the patients or social security institutions.

9. The *Land* of Bavaria, in which the main proceedings take place, chose the concession model. The rescue services, covering emergency rescue, transport of patients accompanied by a doctor, transport of the sick, mountain and cave rescue and water rescue, are governed in Bavaria by the BayRDG, which entered into force on 1 January 2009.

10. With regard to emergency rescue services, transport of patients accompanied by a doctor and transport of the sick, Article 13(1) and (2) of the BayRDG provide that the municipal association for the rescue service and fire alarm is to entrust their implementation to aid organisations, such as the Bayerisches Rotes Kreuz, the Arbeiter-Samariter-Bund (Workers' Samaritan Federation), the Malteser-Hilfsdienst (Maltese Aid Service), or the Johanniter-Unfall-Hilfe (St. John's Accident Assistance). It is only where the aid organisations are not prepared or in a position to take on the task that the municipal association for the rescue service and fire alarm entrusts the carrying out on land of the services at issue to third parties or carries them out itself or through its members.

11. Under Article 13(4) of the BayRDG, the legal relationship between the municipal association for the rescue service and fire alarm and the person entrusted with running the rescue service is to be governed by a public law contract.

12. Article 21 of the BayRDG provides that any person who engages in emergency rescue, transport of patients accompanied by a doctor or transport of the sick requires authorisation. Under Article 24(2) of the BayRDG, that authorisation must be granted if a public law contract pursuant to Article 13(4) of that law is submitted.

13. Article 32 of the BayRDG provides that usage fees must be charged for the provision of rescue services, including the involvement of doctors, which must be based on the costs that can be estimated in accordance with economic principles applicable to undertakings and are consistent with proper provision of services, economical and cost-efficient management and efficient organisation.

14. Usage fees of operators for emergency rescue, the transport of patients accompanied by a doctor and transport of the sick are governed by Article 34 of the BayRDG, which is worded as follows:

‘…

(2) The social security institutions shall agree the usage fees to be paid by them for emergency rescue, the transport of patients accompanied by a doctor and transport of the sick in a uniform manner with the persons running the rescue service or their *Land* federations ...

(3) The usage fee agreement shall be concluded annually in advance.

(4) The costs of emergency rescue, of the transport of patients accompanied by a doctor and of transport of the sick shall be allocated in accordance with uniform standards to the users. The usage fees agreed with the social security institutions shall also be charged by the operators to all other persons and bodies which call upon the services of the public rescue service.

(5) The usage fees shall in each case be based on the estimated allowable costs under the second sentence of Article 32 of providing the services in the service areas of emergency rescue, transport of patients accompanied by a doctor and transport of the sick and on the estimated operation numbers in the operational period. The costs of providing the services shall also include in particular the costs of the involvement of doctors in the rescue service, … and the costs in respect of the activity of the Central Settlement Office for the Rescue Service in Bavaria in accordance with paragraph 8. The social security institutions shall agree in each case separately with the individual operators, with the operators of the integrated head offices and with the Central Settlement Office for the Rescue Service in Bavaria their estimated costs in the fee period. The costs can be agreed as a budget.

(6) If a usage fee agreement under paragraph 2 or an agreement under paragraph 5 does not materialise by 30 November in the financial year preceding the fee period, arbitration proceedings before the fee arbitration board … shall be held regarding the amount of the estimated costs and of the usage fees … Usage fees shall not be adjusted retroactively.

(7) The estimated costs agreed with the social security institutions or determined with binding force shall be met from the fees received for emergency rescue, for transport of patients accompanied by a doctor and in transporting the sick (revenue settlement). After a fee period has ended, every operator, every operator of an integrated head office and the Central Settlement Office for the Rescue Service in Bavaria shall prove the costs actually incurred in a final statement of account and compare them with those in the costs agreement (rendering of accounts). If a difference arises between the actual costs and the estimated costs recognised by the social security institutions for the costs agreement, the result of the rendering of accounts shall be dealt with at the next possible fee negotiations; this carrying forward is precluded if the costs of the operator … or the Central Settlement Office … have been agreed as a budget.

(8) In implementing paragraphs 2 to 7 and Article 35 the services of a Central Settlement Office for the Rescue Service in Bavaria shall be called upon, which shall in particular:

1. participate as an adviser in relation to agreeing the usage fees pursuant to paragraph 2 and in relation to the agreements under paragraph 5;

2. on the basis of the estimated costs of the parties involved and of the number of public rescue service operations to be anticipated, calculate the necessary usage fees and propose them for agreement to the parties involved; this shall also apply to the necessary adjustment of usage fees in the course of the current financial year;

3. collect the usage fees for the services of the public rescue service … from the persons liable to pay the costs;

4. conduct the revenue settlement …;

5. make [payments in respect of the] costs of providing the services to the operator of the service …;

6. examine the operators' … rendering of accounts with regard to plausibility and the correctness of the calculations;

7. draw up an audited overall final statement of account for the public rescue service.

The Central Settlement Office for the Rescue Service in Bavaria shall provide its services in this regard on a non-profit-making basis. All parties involved shall be obliged to support the Central Settlement Office for the Rescue Service in Bavaria in the performance of its tasks and to give to it the information and written documentation necessary for that purpose.'

15. The composition of the fee arbitration board with jurisdiction concerning usage fees is set out in Article 48 of the BayRDG. According to that article, in disputes concerning land rescue usage fees, it comprises three members for the land rescue operators and three members for the social security institutions together with the chairman who is appointed jointly by the operators of the public rescue service, the Bavarian Association of Health-Insurance Doctors, the persons responsible for ensuring the presence of doctors to accompany transported patients and the social security institutions.

16. With regard to the Central Settlement Office for the Rescue Service in Bavaria, Article 53 of the BayRDG authorises the highest-level rescue service authority, namely the Bavarian Ministry of Internal Affairs, to establish it by regulation.

Assessment

17. The referring court is called upon to determine whether the contracts concluded according to the concession model must be classified as a service concession or, notwithstanding the name of the model in question, as a service contract. In that regard, it should be noted that that question must be considered exclusively in the light of European Union law, (6) in this case, in the light of the definitions of the concepts 'public contracts', 'public service contracts' and 'service concession' set out in Article 1(2)(a) and (d) and (4) of Directive 2004/18, and in the light of the relevant case-law of the Court.

18. Since Article 17 of Directive 2004/18 precludes the application of that directive to service concessions, the classification of the contracts at issue influences the procedure for the conclusion thereof. None the less, even though, as European Union law now stands, service concession contracts are not governed by any of the directives by which the European Union legislature has regulated the field of public procurement, the public authorities concluding them are nevertheless bound to comply with the fundamental rules of the EC Treaty, including Articles 43 EC and 49 EC, and with the consequent obligation of transparency. (7)

19. In that regard, it should be pointed out that it is not for the Court in preliminary ruling proceedings, but for the national court, to classify contracts concluded according to the concession model. The task of the Court, in response to the two questions referred for a preliminary ruling, which are closely connected and which should, in my opinion, be examined together, is to explain and clarify the criteria which are useful for the purposes of that classification. (8)

20. It should be noted at the outset that the questions referred in the present case are similar to those referred in *Eurawasser*. (9) In both cases, the referring courts raised the question, in essence, whether, first, the fact that the service provider is not remunerated directly by the public authority with which it has a contractual relationship means, in itself, that the contract must be classified as a service concession and, second, whether, for the purposes of that classification, it is decisive that the operating risk connected with the service which is the subject of the contract at issue and is borne by the service provider be limited from the outset, that is to say even where the service is provided by the public authority concerned.

21. The questions referred for a preliminary ruling therefore relate to the two criteria which the Court uses to distinguish a service concession from a service contract. At issue are, first, the 'lack of direct remuneration' of a service provider, that is to say the situation where the remuneration is paid not by the public authority assigning the service in question but by third parties, and, second, the 'assumption of the risk of operating the service at issue'.

22. The Court explained the relationship between those two criteria in *Parking Brixen* (10) by holding that the fact that the service provider is not paid directly means that the provider assumes the risk of operating the services in question and is characteristic, therefore, of a public service concession.

23. In *Commission* v *Italy*, (11) the Court, in accordance with the definition of the concept 'service concession' given by Directive 2004/18, replaced the criterion of lack of direct remuneration with that of 'remuneration consisting of the right of the provider to exploit its own service'. In application of that criterion, the Court then held that a service concession exists where the agreed method of remuneration consists in the right to exploit the service and the provider assumes the risk of operating the services in question. The Court subsequently confirmed that judgment in *Acoset*. (12)

24. In *Eurawasser*, (13) the Court returned to the criterion of lack of direct remuneration by explaining that the fact that the service provider is remunerated by payments from third parties is one means of exercising the right, granted to the provider, to exploit the service.

25. In my view, the Court's findings cited above allow it to be concluded that the criterion of lack of direct remuneration is decisive for the purposes of classifying a contract relating to the supply of services as a service concession, since, according to the Court, the lack of direct remuneration of the service provider is one means of exercising the right, granted to the provider, to exploit the service and at the same time means that the provider assumes the risk of operating the services in question. (14)

26. I come to the same conclusion if I take into consideration the relationship between the definition of the concept of public service contract and of service concession set out in Directive 2004/18. Those definitions cover all contracts relating to services concluded by public authorities. It follows that if the contract at issue is not a public service contract, it must necessarily be a service concession, and vice-versa. Consequently, since the Court has repeatedly held that consideration paid directly by the contracting authority to the service provider constitutes the criterion for the definition of a public service contract, (15) the lack of such a method of remuneration necessarily means that a service concession is at issue.

27. In summary, as is shown by the case-law cited above, the lack of direct remuneration of the service provider means that the service contract at issue should be classified as a service concession.

28. However, the existence of direct remuneration of the service provider by the public authority concerned does not necessarily imply that there is a public service contract. It follows from the finding of the Court that indirect remuneration is 'one means of' exercising the right, granted to the provider, to exploit the service, (16) that there are also other means of exercising that right. That explains why, in *Contse and Others,* (17)*Commission* v *Italy* (18) and *Hans & Christophorus Oymanns*, (19) the Court examined whether the contracts at issue could constitute service concessions, even though the service providers had been remunerated directly by the public authorities concerned.

29. In those judgments, the Court established 'subsidiary criteria' allowing it to be concluded, where there is direct remuneration, that the service provider assumed the risk of exploiting the service at issue, such as the criterion of the delegation of liability for all harm suffered on account of a failure of the

service at issue, (20) or the criterion of the existence of a certain economic freedom to determine the conditions under which a particular service is exploited. (21) Furthermore, the Court has also set out, evidently without claiming that they are exhaustive, the characteristics which are not decisive for the purposes of classifying the agreements at issue, such as the length of the agreements at issue, the significant initial investment for which the service provider is responsible, or a large degree of independence of performance on the part of the service provider. (22)

30. It must nevertheless be noted that the 'subsidiary criteria' were used only where the service provider was remunerated directly. That could establish that the lack of direct remuneration of the service provider is a sufficient criterion for classifying a contract at issue as a service concession.

31. In the present case, it is clear that the provider of the rescue service at issue is remunerated not by the public authority which assigned to it the service in question, but by third parties, namely by social security institutions, privately insured persons and uninsured persons. (23)

32. Subject to verification by the referring court, it seems to me that, even if the social security institutions themselves could be considered as the contracting authority within the meaning of the definition in Article 1(9) of Directive 2004/18, they represent persons who are sufficiently distinct from and independent of the public authority which assigned the service in question in order to justify the finding that the service provider was remunerated 'by third parties'. (24)

33. The peculiar feature of the present case is that the entities which enjoy the right of use, namely the social security institutions, privately insured persons and uninsured persons, pay for that right not the rescue service provider directly, but the Central Settlement Office for the Rescue Service in Bavaria. It remains therefore to be established whether that fact can affect the finding that the lack of direct remuneration of the service provider constitutes a sufficient criterion for the purposes of classifying the contract at issue as a service concession.

34. In my opinion, that question should be answered in the negative. The fact that some 'intermediary' comes between the service provider and the party paying for that service in no way calls into question the other finding, namely that the service provider is not remunerated directly by the public authority which assigned to it the service in question, in particular where the public authority concerned has no influence over the remuneration.

35. That leads me to the conclusion that the lack of direct remuneration of the service provider by the public authority which assigned to it the service in question represents a sufficient criterion for the purposes of classifying the contract at issue as a service concession. In that regard, it is not important to know, first, who pays the remuneration due in respect of the services provided, assuming that it is a body which is sufficiently distinct from and independent of the public authority which assigned the service in question, or, second, what the procedures for collection of the remuneration are.

36. With regard to the question whether it is decisive, for the purposes of classifying such a service contract as a service concession, that the operating risk connected with the service at issue assumed by the service provider be limited from the outset, that is even where the service is provided by the contracting authority, I consider that the answer should be based on *Eurawasser*. (25)

37. It is true that, in the present case, the question of the degree of operating risk connected with the rescue service is open to debate. However, those are findings of fact which, so far as necessary, are to be undertaken by the referring court.

38. The degree of operating risk connected with the service in question is not decisive. What is decisive is the transfer to the service provider of the risk to which the public authority assigning the service in question would itself be exposed if it had to perform the service itself. (26)

Conclusion

39. In the light of the foregoing considerations, I propose that the Court should answer as follows the questions referred by the Oberlandesgericht München:

The lack of direct remuneration of the service provider by the public authority which assigned to it the service in question constitutes a sufficient criterion for the purposes of classifying a contract as a service concession within the meaning of Article 1(4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. In that regard, it is not important to know, first, who pays the remuneration due in respect of the services provided, assuming that it is a body which is sufficiently distinct from and independent of the public authority which assigned the service in question, second, what the procedures for collection of the remuneration are or, third, whether the operating risk connected with the service at issue is limited from the outset.

---

1 – Original language: French.

---

2 – OJ 2004 L 134, p. 114.

---

3 – The contracts concluded between Stadler, on the one hand, and Passau municipal association, on the other hand, were terminated on the initiative of Passau municipal association. It appears that the termination of the contracts was connected with the BayRDG, which entered into force on 1 January 2009, and, more specifically, with Article 13(1) thereof, containing a list of organisations which must be given priority in the assignment of the rescue services.

---

4 – These are the organisations with which, after the termination of the contracts concluded with Stadler, Passau municipal association concluded contracts for the provision of rescue services.

---

5 – It is clear from the order for reference that the Bundesgerichtshof (the Federal Court of Justice) has already held the tender model to be a service contract. In the light of Case C-160/08 *Commission* v *Germany* [2010] ECR I-0000, it can be concluded that the Court is of the same opinion.

---

6 – See Case C-382/05 *Commission* v *Italy* [2007] ECR I-6657, paragraph 31, and Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 38.

---

7 – See Case C-91/08 *Wall* [2010] ECR I-0000, paragraph 33 and case-law cited.

---

8 – See, to that effect, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 32.

---

9 – Case C-206/08 *Eurawasser* [2009] ECR I-8377.

---

10 – Cited in footnote 8 above, paragraph 40.

---

11 – Cited in footnote 6 above, paragraph 34.

---

12 – Cited in footnote 6 above, paragraph 39.

---

13 – Cited in footnote 9 above, paragraph 53.

---

14 – In the Court's case-law, there are also judgments in which the indirect nature of the remuneration has sufficed, in itself, for the Court to hold that the contract at issue was a service concession. That was the case, for example, in Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 16, and in Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 24.

---

15 – See, to that effect, *Parking Brixen* (cited in footnote 8 above, paragraph 39); *Eurawasser* (cited in footnote 9 above, paragraph 51) and *Acoset* (cited in footnote 6 above, paragraph 39).

---

16 – *Eurawasser* (cited in footnote 9 above, paragraph 53).

---

17 – Case C-234/03 *Contse and Others* [2005] ECR I-9315.

---

18 – Cited in footnote 6 above.

---

19 – Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-4779.

---

20 – *Contse and Others* (cited in footnote 17 above, paragraph 22).

---

21 – *Hans & Christophorus Oymanns* (cited in footnote 19 above, paragraph 71).

---

22 – *Commission* v *Italy* (cited in footnote 6 above, paragraphs 42 and 44).

---

23 – The parties to the main proceedings agree that approximately 10% of the usage fees are due to be paid by privately insured persons and uninsured persons.

---

24 – Social security institutions were also central to the case leading to the judgment in *Hans & Christophorus Oymanns* (cited in footnote 19 above). Although in that case they were characterised as public authorities which assigned the service in question while having paid the remuneration due for that service, they restrict themselves, in the present case, to paying the remuneration due for the services provided.

---

25 – Cited in footnote 9 above.

---

26 – In her Opinion of 29 October 2009 in the case leading to the judgment in Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others* [2010] ECR I-0000, Advocate General Sharpston reached a similar conclusion, considering the decisive factor to be not the fact that the operating risk is itself significant, but that the operating risk, whatever it is, previously assumed by the contracting authority, be transferred to the successful tenderer, fully or to a significant extent.

ARRÊT DE LA COUR (deuxième chambre)

17 février 2011 (*)

«Marchés publics de fournitures et de travaux – Secteur de l'eau, de l'énergie, des transports et des télécommunications – Directive 93/38/CEE – Avis de marché – Critères d'attribution – Égalité de traitement entre les soumissionnaires – Principe de transparence – Directive 92/13/CEE – Procédure de recours – Obligation de motiver une décision d'écarter un soumissionnaire»

Dans l'affaire C-251/09,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 7 juillet 2009,

Commission européenne, représentée par MM. C. Zadra, I. Chatzigiannis et M^me^ M. Patakia, en qualité d'agents,

partie requérante,

contre

République de Chypre, représentée par M. K. Likourgos et M^me^ A. Pantazi-Lamprou, en qualité d'agents,

partie défenderesse,

LA COUR (deuxième chambre),

composée de M. J. N. Cunha Rodrigues (rapporteur), président de chambre, MM. A. Rosas, U. Lõhmus, A. Ó Caoimh et M^me^ P. Lindh, juges,

avocat général: M. P. Mengozzi,

greffier: M^me^ L. Hewlett, administrateur principal,

vu la procédure écrite et à la suite de l'audience du 18 novembre 2010,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, en n'appliquant pas uniformément, au cours d'une procédure de passation de marché public, les dispositions de l'avis de marché et, notamment, en rejetant une offre sur le fondement d'un critère qui n'était pas clairement mentionné dans l'avis de marché ainsi que, en ne fournissant pas au plaignant les informations nécessaires quant aux motifs de son rejet afin qu'il puisse bénéficier pleinement de la protection procédurale, la République de Chypre a manqué aux obligations qui lui incombent en vertu de l'article 4, paragraphe 2 et des principes généraux connexes de transparence et d'égalité de traitement des candidats visés à l'article 31, paragraphe 1, de la directive 93/38/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications (JO L 199, p. 84) ainsi que de l'article 1^er^, paragraphe 1, de la directive 92/13/CEE du Conseil, du 25 février 1992, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des règles

communautaires sur les procédures de passation des marchés des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications (JO L 76, p. 14).

Le cadre juridique

2 Aux termes de l'article 4, paragraphe 2, de la directive 93/38:

«Les entités adjudicatrices veillent à ce qu'il n'y ait pas de discrimination entre fournisseurs, entrepreneurs ou prestataires de services.»

3 L'article 31, paragraphe 1, de ladite directive prévoit:

«Les entités adjudicatrices qui sélectionnent les candidats à une procédure de passation de marchés restreinte ou négociée doivent le faire en accord avec les règles et les critères objectifs qu'elles ont définis et qui sont à la disposition des fournisseurs, des entrepreneurs ou des prestataires de services intéressés.»

4 L'article 1er, paragraphe 1, de la directive 92/13 dispose:

«Les États membres prennent les mesures nécessaires pour assurer que les décisions prises par les entités adjudicatrices peuvent faire l'objet de recours efficaces et, en particulier, aussi rapides que possible, [...]»

Les antécédents du litige et la procédure précontentieuse

5 Archi Ilektrsimou Kyprou (ci-après «AIK») est une entreprise publique dont l'activité consiste à mettre à disposition ou à exploiter des réseaux fixes destinés à la fourniture de services publics dans le domaine de la production, du transport et de la distribution d'électricité.

6 AIK a lancé un appel d'offres dans le cadre d'une procédure ouverte de passation de marché portant sur la conception, la livraison et la construction de la quatrième unité de la centrale thermoélectrique de Vassilikos, de type cycle combiné, ainsi que sur un contrat de maintenance à long terme du système des turbines, pour une valeur estimée à 170 000 000 euros.

7 Deux groupes ont soumis des offres dans le cadre de cette procédure, le groupe Babcock Hitachi Europe/Itochu Corporation & J&P Avax ainsi que le groupe Ansaldo Energia SpA & METKA SA. L'offre du groupe Ansaldo Energia SpA & METKA SA a été rejetée lors de la deuxième phase de la procédure d'évaluation des offres techniques.

8 Estimant que tant le rejet de son offre que l'acceptation de l'offre de l'autre soumissionnaire étaient contraires au droit communautaire, le groupe Ansaldo Energia SpA & METKA SA a déposé une plainte auprès de la Commission.

9 La Commission a adressée une lettre de mise en demeure, le 18 octobre 2006, aux autorités chypriotes, lesquelles ont répondu, selon la Commission, le 14 mai 2007, et, selon le gouvernement chypriote, le 29 janvier 2007.

10 N'ayant pas été convaincue par les explications fournies, la Commission a adressé, le 26 juin 2008, à la République de Chypre un avis motivé et a invité cet État membre à prendre les mesures nécessaires pour se conformer à cet avis dans un délai de deux mois à compter de la réception de celui-ci. Les autorités chypriotes ont répondu par lettre du 8 août 2008.

11 Non satisfaite de cette réponse, la Commission a décidé d'introduire le présent recours.

Sur le recours

Sur la recevabilité

12 La République de Chypre soulève une exception d'irrecevabilité fondée sur deux moyens.

13 La République de Chypre argue, en premier lieu, que la Commission n'a pas démontré que le principe de collégialité a été respecté lors de l'adoption des décisions relatives à l'émission de l'avis motivé et à l'introduction du recours en manquement. Cet État membre reproche notamment à la Commission de ne pas lui avoir transmis, à la suite d'une demande écrite formée le 15 septembre 2009, une copie des décisions du collège des commissaires d'émettre un avis motivé.

14 L'article 1er du règlement intérieur de la Commission (JO 2005, L 347, p. 83) établit que «la Commission agit en collège conformément aux dispositions du présent règlement».

15 Selon la Commission, les décisions d'envoyer l'avis motivé et d'introduire un recours dans la présente affaire ont été prises dans le cadre d'une procédure écrite, conformément à ce règlement intérieur. Cette procédure, qui est la procédure habituelle de prise de décision du collège, prévoit que le projet de décision est soumis à tous les membres de la Commission, puis réputé adopté si, dans un délai déterminé, aucun membre n'a formulé d'observations ou de réserves.

16 La Commission a précisé que, aux fins de la décision d'envoyer un avis motivé ou d'introduire un recours en manquement, une «fiche d'infraction», qui résume les faits, la procédure précontentieuse, les principaux griefs émis à l'encontre de l'État membre, les arguments de défense de ce dernier ainsi que la base juridique de l'avis motivé ou du recours envisagé, est communiquée aux membres du collège.

17 Au regard des éléments produits par la Commission et notamment de la «fiche d'infraction» sur le fondement de laquelle a été décidé d'envoyer l'avis motivé, de la lettre du secrétariat général de la Commission attestant de la clôture de la procédure écrite qui a conduit à envoyer cet avis, de la «fiche d'infraction» sur le fondement de laquelle a été décidé d'introduire le recours ainsi que de la lettre du secrétariat général de la Commission attestant de la clôture de la procédure écrite qui a conduit à l'introduction du recours, il y a lieu de considérer que ces décisions ont été adoptées dans le respect du principe de collégialité, tel que prévu à l'article 1er du règlement intérieur de la Commission.

18 La République de Chypre soutient, en second lieu, que la Commission n'a pas respecté la règle selon laquelle l'objet du recours en manquement est délimité par l'avis motivé. En effet, la violation de l'article 31, paragraphe 1, sous a), de la directive 93/38 ne figurerait pas dans le dispositif de l'avis motivé du 26 juin 2008.

19 À cet égard, il y a lieu de relever que, en vertu d'une jurisprudence constante, l'objet du recours introduit en vertu de l'article 226 CE est circonscrit par la procédure précontentieuse prévue par cette disposition et que, par conséquent, l'avis motivé de la Commission et le recours doivent être fondés sur des griefs identiques (voir arrêts du 17 novembre 1992, Commission/Grèce, C-105/91, Rec. p. I-5871, point 12; du 18 juillet 2007, Commission/Allemagne, C-490/04, Rec. p. I-6095, point 36, et du 22 janvier 2009, Commission/Portugal, C-150/07, point 20).

20 Cette exigence répond à la finalité de la procédure précontentieuse qui, selon une jurisprudence établie, consiste à donner à l'État membre concerné l'occasion, d'une part, de se conformer à ses obligations découlant du droit de l'Union et, d'autre part, de faire utilement valoir ses moyens de défense à l'encontre des griefs formulés par la Commission (voir arrêts du 15 janvier 2002, Commission/Italie, C-439/99, Rec. p. I-305, point 10, et Commission/Portugal, précité, point 20).

21 En l'espèce, la Commission a admis que la mention, dans le dispositif de l'avis motivé, de l'article 33 de la directive 93/38 au lieu de l'article 31 de celle-ci était due à une erreur de frappe. Elle a toutefois précisé que tant la lettre de mise en demeure que l'argumentation qui précède le dispositif de l'avis motivé font clairement référence à l'article 31, paragraphe 1, sous a), de ladite directive.

22 La Commission a également ajouté, ce que la Cour a pu constater, que la République de Chypre a présenté, dans sa réponse à l'avis motivé, des observations relatives à la violation qui lui était reprochée sur le fondement de l'article 31, paragraphe 1, sous a), de la directive 93/38 et non sur celui de l'article 33 de celle-ci.

23 Il résulte de ces éléments que la République de Chypre a été en mesure de faire valoir utilement ses moyens de défense à l'encontre des griefs formulés par la Commission.

24 L'exception d'irrecevabilité doit, par conséquent, être rejetée.

Sur le fond

Sur le premier grief de la Commission

– Argumentation des parties

25 La Commission fait valoir que AIK, en rejetant l'offre du plaignant, au motif qu'il n'a pas fourni de rendements garantis dans des conditions de fréquence variable, alors que ce critère n'apparaissait pas expressément et incontestablement comme tel dans le dossier d'appel d'offres, a violé les articles 4, paragraphe 2, et 31, paragraphe 1, de la directive 93/38.

26 La Commission considère, notamment, que AIK a violé les principes d'égalité de traitement entre les soumissionnaires et de transparence, tels que garantis par les dispositions susmentionnées et la jurisprudence de la Cour, en modifiant, après la procédure d'attribution, les critères d'attribution du marché.

27 À titre subsidiaire, la Commission allègue que AIK a violé le principe d'égalité de traitement entre les soumissionnaires, dès lors que le soumissionnaire retenu n'a mentionné les rendements qu'il pouvait garantir dans des conditions de fréquence variable que lors des réponses données aux demandes de précisions orales formulées par l'entité adjudicatrice et qu'il a subordonné les valeurs fournies à certaines conditions, elles-mêmes contraires aux modalités prévues par le pouvoir adjudicateur dans les documents contractuels. La Commission reproche également le fait que AIK a retenu un soumissionnaire qui ne satisfaisait pas à la condition de participation à la procédure tenant à l'expérience demandée en matière de construction.

28 La République de Chypre estime que l'exigence des rendements garantis a été formulée de manière claire.

29 Cet État membre aurait fourni à la Commission, dans sa réponse à la lettre de mise en demeure, des avis d'experts attestant que, dans la procédure de passation de marché litigieuse, l'existence d'une telle condition allait de soi pour un soumissionnaire expérimenté. L'offre proposée par le soumissionnaire retenu contenait, d'ailleurs, les rendements garantis.

30 La République de Chypre conteste également l'appréciation de l'expérience acquise par le soumissionnaire retenu à laquelle se livre la Commission.

31 Selon cet État membre, la Commission n'a pas démontré que AIK avait traité différemment les deux soumissionnaires, en violation de l'article 4, paragraphe 2, de la directive 93/38.

32 La Commission rétorque que la République de Chypre confond les connaissances requises pour l'exécution du marché et l'exigence préalable de clarté dans la formulation dont doit faire preuve le pouvoir adjudicateur, particulièrement lorsqu'il est question d'un critère décisif pour l'attribution du marché.

33 Pour la Commission, l'obligation de fournir des rendements garantis dans des conditions de variations de fréquence du réseau est apparue, a posteriori, lors des demandes de précisions orales formulées par l'entité adjudicatrice. La question posée par le pouvoir adjudicateur ainsi que la réponse donnée par le soumissionnaire retenu démontreraient que ce dernier n'avait pas compris qu'il devait donner des valeurs garanties en mode de fonctionnement adapté aux variations de fréquence.

34 La Commission disposerait de quatre avis élaborés par des experts internationaux concluant que l'avis de marché ne prévoyait pas l'obligation de fournir des valeurs garanties dans des conditions de variations de fréquence du réseau. Pour cette institution, en admettant que cette obligation était prévue par l'avis de marché, elle n'y figurait pas clairement, même pour des personnes expérimentées.

– Appréciation de la Cour

35 À titre liminaire et concernant l'applicabilité de l'article 31 de la directive 93/38 à la procédure de passation de marché public en cause, il importe de prendre en compte le fait que cette dernière était une procédure ouverte. Or, ainsi que l'a souligné la République de Chypre, ledit article vise explicitement les procédures restreintes ou négociées et non les procédures ouvertes.

36 La Commission a indiqué, lors de l'audience, qu'elle renonçait à invoquer la violation de l'article 31 de la directive 93/38.

37 Dans ces conditions, il y a lieu de conclure que la Commission ne fonde son premier grief que sur la violation du principe d'égalité de traitement entre les soumissionnaires, tel que garanti par l'article 4, paragraphe 2, de la directive 93/38.

38 Ce principe, qui constitue la base des directives relatives aux procédures de passation des marchés publics, implique une obligation de transparence, afin de permettre de vérifier son respect (voir, notamment, arrêts du 7 décembre 2000, Telaustria et Telefonadress, C-324/98, Rec. p. I-10745, point 61; du 12 décembre 2002, Universale-Bau e.a., C-470/99, Rec. p. I-11617, point 91, ainsi que du 29 avril 2004, Commission/CAS Succhi di Frutta, C-496/99 P, Rec. p. I-3801, point 109).

39 Les principes d'égalité de traitement et de transparence signifient, notamment, que les soumissionnaires doivent se trouver sur un pied d'égalité aussi bien au moment où ils préparent leurs offres qu'au moment où celles-ci sont évaluées par le pouvoir adjudicateur (voir, notamment, arrêts du 18 octobre 2001, SIAC Construction, C-19/00, Rec. p. I-7725, point 34; du 16 décembre 2008, Michaniki, C-213/07, Rec. p. I-9999, point 45, et du 12 novembre 2009, Commission/Grèce, C-199/07, Rec. p. I-10669, point 37).

40 Cela implique, plus particulièrement, que les critères d'attribution doivent être formulés, dans le cahier des charges ou dans l'avis de marché, de manière à permettre à tous les soumissionnaires raisonnablement informés et normalement diligents de les interpréter de la même manière (arrêts SIAC Construction, précité, point 42, ainsi que du 4 décembre 2003, EVN et Wienstrom, C-448/01, Rec. p. I-14527, point 57) et que, lors d'une évaluation des offres, ces critères doivent être appliqués de manière objective et uniforme à tous les soumissionnaires (arrêt SIAC Construction, précité, point 44).

41 Il ressort des éléments du dossier que l'unité de la centrale thermoélectrique de Vassilikos devrait pouvoir fonctionner selon deux choix principaux de fonction, à savoir en «fonction de réponse fréquence» et en «fonction de contrôle de charge».

42 Si la Commission n'a nullement remis en cause la clarté de l'exigence tenant à ce que cette unité de la centrale thermoélectrique soit capable de répondre à des variations de fréquence réseau, elle affirme cependant que l'obligation de fournir des valeurs garanties dans de telles conditions n'apparaissait pas explicitement dans le cahier des charges. Selon la Commission, cette obligation n'est apparue que lors des demandes de précisions orales formulées par l'entité adjudicatrice.

43 À ce propos, le volume III du cahier des charges indiquait que les rendements garantis devaient être fournis dans des conditions de réseaux de fréquence de 50 Hertz sans qu'il soit précisé que ces quantités garanties concernaient un mode de fonctionnement donné. Toutefois, le volume II dudit cahier, notamment les articles relatifs au «Plant design criteria», mettait l'accent sur la spécificité du réseau chypriote, eu égard à la nécessité de maintenir une fréquence stable et précisait que toute variation de la courbe de la température de combustion, dont dépend le rendement de l'unité de la centrale thermoélectrique de Vassilikos, devait être précisée par le soumissionnaire.

44 Il ne résulte pas des éléments figurant au dossier sur les quantités garanties en «fonction de réponse en fréquence» que AIK ait modifié postérieurement les critères d'attribution du marché.

45 En outre, à supposer même que l'exigence tenant à la fourniture de quantités garanties en «fonction de réponse en fréquence» aurait pu être énoncée avec davantage de clarté dans les documents contractuels, il ne peut être présumé que ce prétendu manque de clarté est à l'origine d'une inégalité de traitement entre les soumissionnaires.

46 Conformément à une jurisprudence constante, dans le cadre d'une procédure en manquement en vertu de l'article 226 CE, il incombe à la Commission, qui a la charge d'établir l'existence du manquement allégué, d'apporter à la Cour les éléments nécessaires à la vérification par celle-ci de l'existence dudit manquement, sans pouvoir se fonder sur une présomption quelconque (voir, notamment arrêts du 25 mai 1982, Commission/Pays-Bas, 96/81, Rec. p. 1791, point 6, et du 8 juillet 2010, Commission/Portugal, C-171/08, non encore publié au Recueil, point 19).

47 Or, en l'espèce, la Commission n'est pas parvenue à établir que le prétendu manque de clarté dans l'énoncé de ce critère d'attribution a abouti à une violation du principe d'égalité de traitement entre les soumissionnaires.

48 Il n'est, notamment, pas contesté que, lors des demandes de précisions orales formulées par l'entité adjudicatrice, tous les soumissionnaires ont été interrogés sur les quantités garanties en «fonction de réponse en fréquence». AIK a, ainsi, mis les deux soumissionnaires en mesure de préciser leur offre sur ce point.

49 La Commission n'a, par ailleurs, pas établi que les éléments contenus dans la lettre adressée par le soumissionnaire retenu à AIK, afin de compléter les réponses apportées aux demandes de précisions orales formulées par le pouvoir adjudicateur, ne respectaient pas les modalités prévues dans le dossier d'appel d'offres.

50 En outre, la Commission n'a pas démontré que le soumissionnaire retenu ne remplissait pas le critère relatif à l'expérience professionnelle dans le domaine de la construction.

51 Dès lors, il ne ressort pas des éléments présentés à la Cour que le pouvoir adjudicateur a violé le principe d'égalité de traitement entre les soumissionnaires tel que garanti par l'article 4, paragraphe 2, de la directive 93/38.

52 Le premier grief doit, en conséquence, être rejeté.

Sur le second grief de la Commission

– Argumentation des parties

53 La Commission estime que AIK a violé le droit à un recours effectif garanti par l'article 1er, paragraphe 1, de la directive 92/13, tel qu'interprété par la jurisprudence de la Cour. L'entité adjudicatrice n'aurait pas communiqué, en temps utile, les motifs de rejet de son offre – à tout le moins, n'aurait pas précisé en quoi consistait la violation des conditions contractuelles – empêchant, par voie de conséquence, le soumissionnaire évincé d'exercer un recours efficace contre cette décision de rejet.

54 La République de Chypre soutient que AIK a communiqué à ce soumissionnaire les motifs de rejet de son offre, à savoir la violation des conditions contractuelles.

55 L'entité adjudicatrice n'aurait pas exposé plus en détails les motifs de rejet de l'offre, car ledit soumissionnaire avait connaissance de ces motifs. En tout état de cause, l'ouverture d'une procédure de recours hiérarchique aurait assuré au candidat évincé un accès à l'ensemble du dossier d'AIK, lui permettant ainsi de prendre connaissance des motifs de la décision de rejet.

– Appréciation de la Cour

56 L'objectif de la directive 92/13 est de garantir que les décisions illégales des pouvoirs adjudicateurs peuvent faire l'objet de recours efficaces et aussi rapides que possible (voir, en ce sens, arrêts Universale-Bau e.a., précité, point 74, ainsi que du 23 décembre 2009, Commission/Irlande, C-455/08, point 26).

57 Certes, la directive 92/13, dans sa version en vigueur au moment des faits, ne contenait pas de dispositions relatives au contenu de la motivation devant accompagner la notification de la décision de rejet d'une offre aux soumissionnaires exclus.

58 Néanmoins, la motivation de la décision de rejet d'une offre doit être communiquée aux soumissionnaires concernés, en temps utile, afin que les soumissionnaires évincés aient la possibilité d'introduire efficacement un recours (voir, en ce sens, arrêt Commission/Irlande, précité, point 34).

59 En l'espèce, le pouvoir adjudicateur a communiqué sa décision de rejet au soumissionnaire évincé par une lettre, en date du 1er février 2006, sur laquelle figuraient les délais et voies de recours qui lui étaient ouverts. Ce dernier a, conformément à la législation nationale, demandé au pouvoir adjudicateur les motifs de la décision de rejet, par une lettre du 3 février 2006. AIK a répondu par une lettre du 8 février 2006. Il est constant que, selon la législation chypriote, ce n'est qu'à compter de la réception de cette dernière que le délai de recours a commencé à courir.

60 Il est également constant que la lettre, en date du 8 février 2006, faisait référence aux dispositions du cahier des charges qui n'avaient pas été respectées. Ces dispositions concernaient des clauses techniques, à savoir le volume II dudit cahier relatif au «Plant design criteria», telles que mentionnées au point 43 du présent arrêt.

61 Les raisons ayant conduit AIK à rejeter l'offre du soumissionnaire évincé ont ainsi été portées à la connaissance de celui-ci.

62 La Commission n'ayant pas démontré que le pouvoir adjudicateur a violé le droit à un recours effectif, tel que garanti à l'article 1er, paragraphe 1, de la directive 92/13, le second grief doit être également rejeté.

63 Au vu de ce qui précède, il y a lieu de rejeter le recours de la Commission.

Sur les dépens

64 En vertu de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La République de Chypre ayant conclu à la condamnation de la Commission et cette dernière ayant succombé en ces moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (deuxième chambre) déclare et arrête:

1) Le recours est rejeté.

2) La Commission européenne est condamnée aux dépens.

Signatures

---

* Langue de procédure: le grec.

EU:C:2010:697

JUDGMENT OF THE COURT (Fourth Chamber)

18 November 2010 (*)

(Failure of a Member State to fulfil obligations – Directive 2004/18/EC – Public procurement procedures – Award of a contract for interpretation and translation services – Services falling within the ambit of Annex II B of the Directive – Services not subject to all the requirements of the Directive – Weighting of the award criteria determined after tenders have been submitted – Weighting altered following an initial review of the tenders submitted – Compliance with the principle of equal treatment and the obligation of transparency)

In Case C-226/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 19 June 2009,

European Commission, represented by M. Konstantinidis and A.-A. Gilly, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, and A.M. Collins, SC, with an address for service in Luxembourg,

defendant,

THE COURT (Fourth Chamber),

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

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 29 June 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by attributing weightings to the criteria for the award of a contract for the provision of interpretation and translation services after the closing date for the submission of tenders and by altering those weightings following an initial review of the tenders submitted, Ireland has failed to fulfil its obligations under the principles of equal treatment and transparency, as interpreted by the Court of Justice of the European Union.

Legal context

2 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) ('the Directive') provides, in Chapter III of Title II thereof, for a 'two-tier' approach to public service contracts.

3 Article 20 of the Directive provides that contracts which have as their object services listed in Annex II A to the Directive are to be awarded in accordance with the provisions laid down in Articles 23 to 55 of the Directive.

4 Those articles set out the specific rules governing specifications and contract documents (Articles 23 to 27), procedures (Articles 28 to 34), advertising and transparency (Articles 35 to 43) and the conduct of the procedure (Articles 44 to 55).

5 Article 21 of the Directive, on the other hand, provides that '[c]ontracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4)'.

6 Since interpretation and translation services are not listed in Annex II A to the Directive, they fall within Category 27, entitled 'Other services', of Annex II B.

7 Article 23 of the Directive lays down rules governing the technical specifications to be set out in the contract documentation.

8 Article 35(4) of the Directive provides that, after a contract has been awarded, the contracting authorities which have awarded the contract are to send the Commission a notice of the results of the award procedure.

9 Article 37 of the Directive provides as follows:

'Contracting authorities may publish in accordance with Article 36 notices of public contracts which are not subject to the publication requirement laid down in this Directive.'

10 Article 53 of the Directive, entitled 'Contract award criteria', which does not apply to the award of contracts listed in Annex II B to the Directive, provides in paragraph 2 thereof as follows:

'Without prejudice to the provisions of the third subparagraph, in the case [where the award is made to the most economically advantageous tender] the contracting authority shall specify in the contract notice or in the contract documents … the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

…

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents … the criteria in descending order of importance.'

The factual background to the case and the pre-litigation procedure

11 On 16 May 2006, the Irish Department of Justice, Equality and Law Reform ('the contracting authority') published contract notice No 2006/S 92-098663 in the *Official Journal of the European Union* (OJ 2006 S 92) for the award of a contract for the provision of interpretation and translation services to a number of competent institutions dealing with asylum matters ('the contract at issue').

12 Section IV.2.1 of the contract notice stated that the contract would be awarded to the most economically advantageous tender on the basis of the following seven criteria:

'1. Completeness of tender documentation.

2. Stated ability to meet requirements.

3. Range of lots [the contract was subdivided into several lots], services and languages.

4. Qualifications, relevant experience.

5. Cost.

6. Suitability of proposed arrangements.

7. Reference sites.’

13 Section VI.3 of the notice stated that the seven criteria were not listed in descending order of importance.

14 The invitation to tender document set out the criteria in a similar manner and they were numbered 1 to 7. However, unlike the contract notice, that document did not expressly state that the criteria were not listed in descending order of importance.

15 Accordingly, the relative weighting to be attributed to each of the seven criteria selected to determine the most economically advantageous tender from the point of view of the contracting authority was not specified either in the contract notice or in the invitation to tender document. Nor was it stated in those documents whether relative weightings would subsequently be attributed to those criteria.

16 Twelve companies, three of which are established outside Ireland, submitted a tender before the closing date set for that purpose, which was 9 June 2006.

17 On that day, the members of the evaluation committee received an evaluation matrix suggesting that the following relative weightings should be applied to the seven criteria in question:

‘1. Completeness of tender documentation: 0%.

2. Stated ability to meet requirements: 7%.

3. Range of lots, services and languages: 25%.

4. Qualifications, relevant experience: 30%.

5. Cost: 20%.

6. Suitability of proposed arrangements: 10%.

7. Reference sites: 8%.’

18 The purpose of the evaluation matrix was to enable each member of the evaluation committee to carry out an initial review, on an individual basis, of the tenders submitted.

19 On 13 June 2006, after examining some of the tenders in that manner, one of the members of the committee sent an email to the member of the contracting authority’s services who had drawn up the evaluation matrix and communicated the tenders received to the committee, in which he proposed varying the weightings attributed to the award criteria.

20 On 22 June 2006, at its first meeting, the evaluation committee decided, before evaluating, collectively, the tenders submitted, to alter the relative weighting of the criteria by reducing to 25% the weighting to be attributed to the fourth criterion (previously set at 30%), and by raising to 15% the weighting to be attributed to the sixth criterion (previously set at 10%). The weighting attributed to the remaining evaluation criteria remained unchanged.

21 The committee then went on to evaluate the tenders and to award the contract, applying to the seven criteria the new weightings which had just been approved.

22 After receiving a complaint, the Commission exchanged correspondence with Ireland during May 2007.

23 In the light, inter alia, of Ireland's replies to both the letter of formal notice of 17 October 2007 and the reasoned opinion of 18 September 2008, the Commission took the view that the procedure for the award of the contract at issue had been conducted in breach of the principle of equal treatment and the consequent obligation of transparency and it therefore decided to bring the present action.

The action

24 First, it is not disputed that the contract at issue comes within the scope of the Directive and that the interpretation and translation services in question belong to the category of non-priority services listed in Annex II B thereto.

25 It should be recalled that Article 21 of the Directive provides that '[c]ontracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4)'.

26 It is clear from a reading of Article 21 in conjunction with Articles 23 and 35(4) of the Directive that where, as in the present case, the contracts relate to services falling within the ambit of Annex II B to the Directive, the contracting authorities are required to comply only with the rules governing technical specifications and to send the Commission a notice setting out the results of the award procedure for those contracts.

27 By contrast, the other rules laid down by the Directive in relation to the coordination of procedures, in particular those applicable to the requirements to put out contracts to competition by means of prior advertising and those laid down in Article 53 of the Directive relating to the contract award criteria, are not applicable to such contracts.

28 As far as concerns the services listed in Annex II B to the Directive, full application of the Directive should, as stated in recital 19 in the preamble thereto, be limited for a transitional period to contracts where its provisions will permit the full potential for increased cross-frontier trade to be realised.

29 However, even though contracting authorities which conclude contracts listed in Annex II B to the Directive are not subject to the rules laid down in the Directive relating to the requirements to put contracts out to competition by means of prior advertising, they nevertheless remain subject to the fundamental rules of the European Union, in particular to the principles laid down by the Treaty on the Functioning of the European Union (TFEU) on the right of establishment and the freedom to provide services (Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 26).

30 According to settled case-law, the purpose of coordinating at European Union level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in another Member State (*Commission* v *Ireland*, paragraph 27 and the case-law cited).

31 It follows that the system established by the European Union legislature for contracts relating to services falling within the ambit of Annex II B to the Directive cannot be interpreted as precluding application of the principles deriving from Articles 49 TFEU and 56 TFEU, in the event that such contracts are nevertheless of certain cross-border interest (see, to that effect, *Commission* v *Ireland*, paragraph 29) or, therefore, of the requirements designed to ensure transparency of procedures and equal treatment of tenderers (see, to that effect, Case C-91/08 *Wall* [2010] ECR I-0000, paragraph 37).

32 The obligation of transparency applies where the contract for the provision of services in question may be of interest to an undertaking located in a Member State other than that in which the contract is to be awarded (see, to that effect, *Commission* v *Ireland*, paragraph 29).

33 That the contract at issue in the present case may have been of interest to undertakings located in a Member State other than Ireland is apparent both from the publication of a notice for that contract in

the *Official Journal of the European Union* and from the fact that three of the tenderers were undertakings established in a Member State other than Ireland (see, to that effect, *Wall*, paragraph 35).

34 It is in the light of those considerations that it is necessary to examine the merits of the two complaints raised by the Commission, which do not refer to either of the two provisions of the Directive laying down the rules governing the award of a contract falling within the ambit of Annex II B thereto, namely Articles 23 and 35(4), but are based on two requirements under European Union primary law, namely respect for the principle of equal treatment and the consequent obligation of transparency.

The first complaint: weightings were attributed to the award criteria after the closing date for the submission of tenders

Arguments of the parties

35 The Commission submits that Ireland has infringed the principles of equal treatment and transparency by not attributing relative weightings to the seven award criteria for the contract at issue until after the closing date for the submission of tenders.

36 According to the Commission, the belated weighting significantly altered the relative importance of the criteria by comparison with that attached to the criteria as originally published and with the weighting which tenderers could reasonably have expected on the basis of the contract documents.

37 In that connection, Ireland submits, first, that, contrary to what the Commission stated in its application initiating proceedings, at no time prior to the submission of the tenders did the contracting authority state, either impliedly or expressly, that the award criteria set out in the contract notice and the invitation to tender were listed in descending order of importance.

38 To the contrary, the contract notice stated that the award criteria were not listed in descending order of importance and at no time did the contracting authority subsequently give any indication to suggest that that position had changed.

39 Moreover, while it acknowledges that the evaluation committee appointed by the contracting authority attributed relative weighting to the award criteria after the closing date for the submission of tenders, Ireland disputes that that determination of the relative weighting of the various criteria infringed the principles of equal treatment and transparency.

Findings of the Court

40 First, the fact that Ireland requested the publication of the relevant notice in the *Official Journal of the European Union*, as permitted under Article 36 of the Directive, does not mean that that Member State is under any obligation to award that contract in accordance with the provisions of the Directive which are applicable to public contracts falling within the ambit of Annex II A thereto (see, by analogy, concerning a public contract outside the scope of a directive, Case 45/87 *Commission* v *Ireland* [1988] ECR I-4929, paragraphs 9 and 10).

41 In order for it to be accepted that the first complaint is well founded, it would be necessary for the specific rule governing the prior weighting of the award criteria for a contract falling within the ambit of Annex II A to the Directive to be regarded as constituting a direct consequence of the fact that the contracting authorities are required to comply with the principle of equal treatment and the consequent obligation of transparency.

42 It is true that, according to the Court’s case-law relating to public contracts awarded in accordance with all the provisions of the various public procurement directives which preceded the adoption of the Directive, the purpose of the requirement to inform tenderers in advance of the award criteria and, where possible, of their relative weighting, is to ensure that the principles of equal treatment and transparency are complied with (see, inter alia, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 98, and Case C-331/04 *ATI EAC and Viaggi di Maio and Others* [2005] ECR I-10109, paragraphs 22 to 24).

43 However, while the requirement to state the relative weighting for each of the award criteria at the stage of publication of the contract notice, as now provided for under Article 53(2) of the Directive, meets the requirement of ensuring compliance with the principle of equal treatment and the consequent obligation of transparency, it cannot legitimately be argued that the scope of that principle and that obligation extends, in the absence of a specific provision to that effect in the Directive, to requiring that, in the context of contracts not subject to a provision such as Article 53 of the Directive, the relative weighting of criteria used by the contracting authority is to be determined in advance and notified to potential tenderers when they are invited to submit their bids. Indeed, as the Court indicated by the use of the phrase 'where possible' in the case-law referred to in the paragraph 42 above, the reference to the weighting of the award criteria in the case of a contract that is not subject to a provision such as Article 53(2) of the Directive does not constitute an obligation for the contracting authority.

44 It follows that Ireland, which had granted potential tenderers access to appropriate information concerning the contract at issue prior to the closing date for the submission of tenders, did not infringe the principle of equal treatment or the consequent obligation of transparency by attributing weightings to the award criteria without granting the tenderers access to those weightings before the closing date for the submission of tenders.

45 Specifically, in the call for tenders at the origin of this case, the contracting authority provided more information than is required by the Directive and the award criteria for the contract at issue were not formulated in the contract documentation in such a way that there could be held to be a difference in treatment to the detriment of undertakings located in a Member State other than Ireland which might have been interested in the contract.

46 By attributing weightings to those criteria, the contracting authority simply set out the terms on which the tenders submitted were to be evaluated, without in any way infringing the obligation to interpret the award criteria in the same way, since they were not listed in descending order of importance.

47 It cannot be assumed from the fact that the award criteria have been listed without any indication of a relative weighting for each individual criterion that they are necessarily listed in descending order of importance or that the award criteria have the same weighting.

48 Moreover, the relative weighting of the award criteria communicated to the members of the evaluation committee in the form of a matrix would not have provided potential tenderers, had they been aware of that weighting at the time the bids were prepared, with information which could have had a significant effect on that preparation and did not constitute an alteration of those criteria (see, to that effect, *ATI EAC and Viaggi di Maio and Others*, paragraph 32).

49 It should be added that there is no evidence in the present action, as presented before the Court, that the relative weighting of the award criteria was fixed after the envelopes containing the tenders submitted were opened.

50 Accordingly, the first complaint relied on by the Commission in support of its action must be rejected as unfounded.

The second complaint: the weighting of the criteria was altered after an initial review

Arguments of the parties

51 The Commission submits that, by altering the relative weighting of the award criteria for the contract at issue, as set out in the evaluation matrix, after the initial review of the tenders submitted, Ireland infringed the principles of equal treatment and transparency.

52 It states that such an alteration, made after an initial review of the tenders, constitutes an infringement of the principle of equal treatment, without there being any need to ascertain whether the initial review of the tenders was carried out on an individual basis by the various members of the evaluation committee or collectively by all the committee members.

53 Ireland maintains that the weighting was altered only once and before the committee had even carried out a collective evaluation of a single tender.

54 Consequently, in its view, the weighting thus attributed to the criteria was applied consistently throughout the procedure for the award of the contract at issue and the procedure did not therefore infringe the principle of equal treatment.

55 Moreover, Ireland states that there was only a minor alteration of the relative weighting of the award criteria and that could not have given rise to discrimination against any of the tenderers. A retrospective analysis demonstrated that the successful tenderer would have won the contract even if it had been awarded on the basis of the criteria as originally weighted.

Findings of the Court

56 The Commission claims that the Court should declare that the alteration of the relative weighting of the award criteria infringes the principle of equal treatment deriving from the provisions of the TFEU.

57 With regard, first, to the conduct of the procedure for the award of the contract at issue, it should be noted that the weighting of the award criteria for that contract was indeed altered after the contracting authority had communicated the relative weighting of the criteria in the form an evaluation matrix to the members of the evaluation committee in order to enable them to carry out an initial review of the tenders submitted.

58 Not only did the members of the evaluation committee have the opportunity to review the tenders, on an individual basis, before the committee first met as a collective body, but they were also encouraged to carry out such an initial review in order to facilitate the collective evaluation within the committee.

59 Next, it should be noted that, in such a factual context, as the Court has already held, the principles of equal treatment and transparency of tender procedures imply an obligation on the part of contracting authorities to interpret the award criteria in the same way throughout the procedure (see, by analogy, Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 92).

60 As far as the award criteria themselves are concerned, it is *a fortiori* clear that they must not be amended in any way during the tender procedure (see, by analogy, *EVN and Wienstrom*, paragraph 93).

61 A stage during which the tenders submitted are reviewed by the members of the evaluation committee, on an individual basis, before the committee meets, forms an integral part of the procedure for the award of the contract in question.

62 In those circumstances, if the award criteria are altered after that stage, during which the tenders were reviewed for the first time, the criteria on the basis of which the initial review was carried out would effectively be altered. Such conduct is not consistent with the principle of equal treatment or the consequent obligation of transparency.

63 Lastly, it should be noted, first, that, contrary to Ireland’s submissions, the second complaint relied on by the Commission can be held to be well founded without there being any need to demonstrate that the alteration of the relative weighting discriminated against one of the tenderers. It is sufficient for that purpose that it cannot be ruled out that, at the time the alteration was made, it might have had such an effect.

64 Second, as the finding of a failure by a Member State to fulfil its obligations is not bound up with a finding as to the damage flowing therefrom (Case C-263//96 *Commission* v *Belgium* [1997] ECR I-7453, paragraph 30), Ireland cannot rely on the fact that no tenderer suffered damage, arguing that, even if the initial weighting of the award criteria had been used, the contract at issue would not have been awarded to a contractor other than the one who was chosen at the conclusion of the procedure.

65 The second complaint relied on by the Commission in support of its action must therefore be upheld.

66 In the light of all the foregoing considerations, it must be held that, by altering the weighting of the award criteria for the contract at issue following an initial review of the tenders submitted, Ireland has failed to fulfil its obligations under the principle of equal treatment and the consequent obligation of transparency, as interpreted by the Court.

67 The action is dismissed as to the remainder.

Costs

68 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of those rules, the Court may order that the costs should be shared or that the parties are to bear their own costs where each party succeeds on some and fails on other heads.

69 Since the Commission's application has been upheld only in part, each party must be ordered to bear its own costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that, by altering the weighting of the award criteria for a contract for the provision of interpretation and translation services following an initial review of the tenders submitted, Ireland has failed to fulfil its obligations under the principle of equal treatment and the consequent obligation of transparency, as interpreted by the Court of Justice of the European Union;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission and Ireland to bear their own costs.**

[Signatures]

---

* Language of the case: English.

EU:C:2010:380

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 29 June 2010 [1](1)

Case C-226/09

European Commission
v
Ireland

(Public works contracts – Annex II B of Directive 2004/18/EC – Weighting of the award criteria determined after the closing date for the submission of bids and modified after an initial review of those same bids)

1. In the context of this action for failure to fulfil an obligation, the Court is asked to clarify the extent to which European Union law is applicable to a public works contract in respect of which the relevant directives require that only certain minimum provisions be applied. At issue in this case is a contract for the provision of translation services, in regard to which Directive 2004/18/EC (2) requires only that the technical specifications of the service be set out and a notice of the results of the award procedure be published. The Commission, however, takes the view that, in the light of the Court's case-law, the Irish [contracting] authority ought to have complied with a number of other obligations, and it is the failure to fulfil those obligations that has given rise to the current application.

I – Legislative background

2. The European Union law that constitutes the basic reference framework in this case comprises both the Treaties and the abovementioned Directive 2004/18 ('the directive').

3. It is common ground between the parties that the services at issue in this case are among those listed in Annex II B of the directive. Translation services constitute '[o]ther services' included in category 27 of that annex.

4. Article 21 of the directive, entitled '[s]ervice contracts listed in Annex II B' stipulates that:

'Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4)'.

5. Article 23 of the directive, entitled '[t]echnical specifications', is not the subject of dispute, and it is therefore unnecessary to cite the full text of that article here. It is a very lengthy and detailed provision which requires bodies awarding public works contracts to furnish a clear and exact definition of the requirements of the service put out to tender, in order to prevent any difference in the treatment of persons interested in entering into the contract with the authority.

6. Article 35(4) of the directive requires contracting authorities which have awarded a public contract to send a notice of the results of the award procedure. The Commission does not allege that Ireland infringed that provision either.

II – Facts and pre-litigation procedure

7. On 16 May 2006, the Irish Government published a notice (3) in the Supplement to the *Official Journal of the European Union* concerning a contract for the provision of interpretation and translation services for the office responsible for matters relating to refugees.

8. The contract notice specified the category of services called for and set a closing date (9 June 2006) for the submission of requests to participate in the tendering procedure. As regards the procedure for the award of the contract, it was stated that the most economically advantageous tender would be selected on the basis of the following criteria:

(1) completeness of tender documentation;

(2) stated ability to meet requirements;

(3) range of lots, (4) services and languages;

(4) qualifications, relevant experience;

(5) cost;

(6) suitability of proposed arrangements; and

(7) reference sites.

9. The contract notice further stated that the award criteria should not be construed as being listed in descending order of importance.

10. Twelve companies submitted requests to participate in the procedure, and three of them were established outside Ireland.

11. Immediately after the closing date for submitting tenders, the members of the evaluation team were given an evaluation matrix indicating the relative weightings to be attributed to the award criteria. The weightings ranged from 0% (for criterion No 1 concerning the completeness of the documentation) to 30% (for criterion No 4). As regards the remaining criteria, the matrix attributed a weighting of 7% to criterion No 2, of 25% to criterion No 3, of 20% to criterion No 5, of 10% to criterion No 6 and of 8% to criterion No 7.

12. In the days that followed, the members of the evaluation team individually undertook an initial review of the various bids submitted.

13. On 22 June 2006, the evaluation team met for the first time. Before reviewing the various bids, it decided to alter the weightings attributed to the criteria, reducing to 25% the weighting for criterion No 4 (originally 30%) and increasing to 15% the weighting for criterion No 6 (originally 10%). The weighting attributed to the other criteria remained unchanged. The evaluation team then moved on to evaluate the bids and award the contract, applying the new, recently approved weightings.

14. The Commission received a complaint from an unsuccessful tenderer. Following an exchange of information with Ireland, it issued a letter of formal notice on 23 October 2007 and, after receiving, from the Irish Government, a reply which it considered to be insufficient, the Commission issued a reasoned opinion on 23 September 2008.

III – Procedure before the Court and forms of order sought

15. The Commission was not satisfied with the Irish authorities' response to the reasoned opinion and, as a result, brought the present action for failure to fulfil an obligation on 19 June 2009.

16. The Commission asks the Court:

– to declare that, by attributing weightings to the award criteria following the closing date for the submission of the bids and by modifying them after an initial review of the submitted bids, Ireland has failed to fulfil its obligations under the principles of equal treatment and transparency as interpreted by the Court of Justice; and

– to order Ireland to pay the costs.

17. Ireland asks the Court:

– to dismiss the application; and

– to order the Commission to pay the costs.

IV – The failure to fulfil an obligation

A – *The legal nature of the contract at issue*

18. Before considering the alleged failure to fulfil an obligation, it is necessary, as a preliminary issue, to clarify the nature of the invitation to tender published by the Irish authorities, in order to determine the legal regime applicable to it.

19. As I mentioned earlier, it is common ground between the parties that the services awarded by the Irish Government in the context of this dispute fall within Annex II B of the directive. Consequently, the only obligations explicitly imposed by the directive related to the technical specifications (Article 23 of the directive) and the notice of the results of the award procedure (Article 35(4)), the Commission has not, however, made any complaint against Ireland in either regard.

20. It is, however, well known that the European Union law applicable to public procurement consists of more than the specific provisions laid down in the relevant directives. In particular, in its case-law, the Court has always emphasised the need to take account, in that context, of the importance of primary law.

21. It must be pointed out that the Court has consistently held that the purpose of coordinating, at Community level, the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State. (5)

22. Consequently, if a public contract involves a cross-border interest, even if merely a potential cross-border interest, the rules that arise from the Treaty must apply. (6) Clearly, those rules apply in addition to any formal requirements laid down by the applicable legislation: in this case, for example, the obligations concerning the technical specifications and the notice of the results of the award procedure.

23. There are, in essence, two obligations that derive, in this regard, from primary law and from the principles of freedom of establishment and the freedom to provide services more particularly. First, the authorities must respect the principles of non-discrimination on grounds of nationality and of equal treatment. Second, they must observe a duty of transparency in order to make it possible to verify compliance with those principles. (7)

24. The parties do not appear actually to disagree about the existence of the obligations set out in the preceding paragraphs or, indeed, about the fact that the contract at issue involved a cross-border interest, as demonstrated both by the decision to advertise it in the Supplement to the *Official Journal of the European Union*, and the fact that some of the tenderers were undertakings established outside Ireland. (8) What is a matter of dispute is whether, in the particular circumstances of the case, the conduct of the Irish authority met the standards set out above.

B – *Arguments of the parties*

25. In its brief application, the Commission contends that the Irish authority was in breach of the obligations laid down by European Union law in two separate respects, in both instances breaching the principles of equal treatment and transparency imposed by the Court's case-law.

26. In the first place, according to the Commission, the Irish authorities acted unlawfully by failing to weight the criteria for the award of the contract until after the closing date for the submission of bids.

27. Secondly, again according to the Commission, the fact that the weighting was modified after an initial review of the submitted bids is also unlawful.

28. The Commission further points out that the invitation to tender sent to the undertakings after the notice had been published in the Official Journal no longer stated that the award criteria were not listed in descending order of importance, with the result that undertakings taking part in the tender could reasonably have expected that this was the order in which the criteria were ranked. However, since the weighting did not attribute to the criteria the importance that their position in the list implied, the Irish authorities had misled tenderers. In its reply, however, the Commission explained that the question of the specific order in which the criteria were listed was not the basis of its application which is, therefore, founded solely on the two elements described: the fact that the relative weighting to be attributed to the criteria was not decided until after the closing date for the submission of bids and the fact that the weighting was modified after an initial review of the bids by the individual members of the evaluation team.

29. Ireland, for its part, essentially accepts the facts as set out by the Commission, (9) but denies that they constitute a breach of European Union law.

30. More specifically, the Irish Government points out that the modification made to the criteria on 22 June was insignificant (a reduction of 5% in the weighting attributed to criterion No 4 and a corresponding increase of 5% in the weighting attributed to criterion No 6), and entirely incapable of advantaging or disadvantaging any given tenderer compared with another. Indeed, a retrospective analysis would demonstrate that the successful tenderer would also have won the contract on the basis of the criteria as originally weighted.

31. Since, according to the Irish Government there has, consequently, been no breach of the principle of equal treatment of tenderers, it is also unnecessary to evaluate compliance with the principle of transparency, as the Court's case-law treats the latter principle as merely ancillary to the principle of equal treatment.

C – *Analysis*

32. For reasons of logic and clarity of argument, I shall begin my analysis of the legal aspects of this case with some observations concerning the principle of transparency in relation to public procurement. I shall then move on to analyse the Commission's two complaints and, finally, briefly discuss an aspect which, it seems to me, the parties have mistakenly overlooked.

1. The principle of transparency

33. Ireland, as we have seen, maintains that the principle of transparency in relation to public procurement is subsidiary to the principles of equal treatment and non-discrimination; consequently, in Ireland's view, once it has been established that there has been no infringement of the latter two principles, an assessment of compliance with the principle of transparency becomes superfluous.

34. Ireland's argument cannot be upheld.

35. It is true that, in terms of the rationale underlying the settled case-law in this field, the principle of transparency has an ancillary role compared with the principles of equal treatment and non-discrimination. However, the fact that it is ancillary does not make it subordinate, as envisaged by the Irish Government. Quite the reverse, the duty of transparency is ancillary in the sense that *its observance makes it possible to ascertain whether the other two 'main' obligations have been complied*

with. If the authority fails to act transparently, it becomes difficult, if not impossible, to ascertain whether or not it may have failed to fulfil the requirements of equal treatment and non-discrimination.

36. Moreover, observance of the duty of transparency is a vital precondition for guaranteeing that all potential tenderers are properly informed of the tendering procedure, thereby ensuring equality of treatment. (10)

37. Consequently, if the conditions laid down in case-law for the application to a public contract of the principles derived from primary European Union law are met, it will always be necessary to confirm that the principle of transparency has been respected. In fact, logic would suggest that an assessment of compliance with the principle of transparency must *precede* any assessment of respect for the principles of equal treatment and non-discrimination.

2. The Commission's first complaint

38. By its first complaint, the Commission criticises Ireland, as we have seen, for having determined the weighting to be attributed to the various award criteria only after the closing date for the submission of bids. According to the Commission, that late determination of the weightings breached the principles of equal treatment and transparency.

39. It seems to me that it is not possible to uphold this first complaint, for the following reasons.

40. Firstly, it is indisputable that the directive did not require that the importance attaching to the award criteria should be set out in advance. As the Commission itself in fact acknowledges in its application, Article 40 of the directive, which provides for an obligation of this nature in Article 40(5)(e), was not applicable to the contract at issue. Indeed, to be precise, in this case, the directive did not even require that the award criteria be stated in advance, although the Irish authorities did indicate them.

41. Secondly, an obligation of that nature cannot be derived from case-law either. In particular, we may cite, by analogy, a judgment in which, in a case which fell completely within the ambit of the public procurement directives, the Court recognised the legitimacy of the conduct of an authority that had weighted the subheadings of an award criterion *after* bids had been submitted but *before* the envelopes containing the bids had been opened. (11)

42. It is, of course, necessary to consider whether the obligation to set out in the notice itself the weighting attributed to the various award criteria may be regarded as a natural consequence of the duty to observe the principles of equal treatment, non-discrimination and transparency. However, in the light of the Court's case-law in particular, I do not consider that this can be the case.

43. The case-law concerning tenders caught by all of the provisions of the various public procurement directives in fact regards the obligation to inform tenderers of the award criteria in advance as an expression of the principles of equal treatment and transparency (that obligation, it is worth pointing out, is specifically provided for by the rules in such cases). (12) Again, according to that case-law, the abovementioned principles give rise to the obligation to interpret the award criteria in the same way throughout the entire procedure (13) and to the prohibition on amending them during the tender procedure. (14)

44. It is clear that, in Directive 2004/18, the obligation to set out in advance the weighting attributed to the award criteria for contracts coming entirely within the ambit of the directive itself also reflects the need to guarantee respect for the principles of equal treatment and transparency. In my view, however, it is necessary to steer clear of the automatic assumption that the principles in question have the same scope in relation to both contracts subject to the directive and contracts not subject to the directive (or, as in this instance, subject to the directive in part only). If, in fact, the transparency required in relation to contracts excluded from the scope of the directive were regarded as necessarily the same as that required in relation to contracts coming within the ambit of the directive, this would open the way for the directive to be covertly applied to a whole range of circumstances to which the legislature *explicitly* considered that it should not apply. To some degree, in fact, the purpose of the whole directive is to put into effect the fundamental principles of the Treaty: (15) if the procedure under

the directive were the only way of achieving those principles in relation to public contracts, it would have to be applied to all cases with a cross-border interest.

45. Generally speaking, the practical methods of guaranteeing observance of the principles of the Treaty where the directive does not apply, or applies in part only, cannot be laid down once and for all, and must be assessed on a case-by-case basis. (16)

46. In the case in point, the Irish authority published a notice that set out the award criteria, but without indicating the relative weightings attributed to those criteria. I consider that, in the light of the considerations set out in the preceding points, there has been no breach of the principle of non-discrimination, the principle of equal treatment or the principle of transparency. The contracting authority provided more information than the directive required, and did not discriminate between potential tenderers.

47. As the case-law has made clear, the purpose of the transparency requirement is, in principle, to ensure for any potential tenderer a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of procurement procedures to be reviewed. (17) In this case, the decision to use the Supplement to the *Official Journal of the European Union* must clearly be regarded as appropriate sufficiently to advertise the competitive procedure for the award of the contract.

48. Moving on to the principles of non-discrimination and equal treatment, the fact that weightings were not attributed to the criteria until after the bids had been submitted did not, of itself, create any difference in treatment between tenderers, who were placed on an equal footing.

49. It must be pointed out that the Commission's first complaint would have had to be assessed differently, had the contracting authority set out the award criteria in the contract notice, listing them in descending order of importance. Had it done so, then the authority would have modified the importance attributed to the criteria during the course of the procedure, since, as we saw earlier, in this case, the importance attributed to the criteria has no bearing on the order in which they are listed in the notice, with the most important criteria for the award of the contract being listed in third and fourth position.

50. However, even though the Commission suggested, in its application, that the list of criteria contained in the notice and subsequent invitation to tender implied a listing in descending order of importance, various factors contradict that claim.

51. Firstly, the notice published in the Official Journal expressly stated that the order in which the criteria were listed did not reflect their relative weighting.

52. Secondly, the first criterion listed related to the completeness of the documentation supplied. Not even the least astute of tenderers could have regarded this as the main award criterion; in point of fact, it seems more in the nature of a condition of admission to the tender than an award criterion, and it is no coincidence that it was subsequently attributed a 0% weighting. (18)

53. Thirdly, in its reply, the Commission itself appears, if not to have abandoned, then certainly to have revised, its position on the descending order of importance of the award criteria. That decision by the Commission seems to me to be entirely proper but, at the same time, it deprives the first complaint of the only sustainable ground on which it could be based.

54. I therefore consider that the Commission's first complaint must be rejected.

3. The Commission's second complaint

55. As we have seen, by its second complaint, the Commission claims that, by modifying the weighting attributed to the award criteria after an initial brief review of the bids submitted, Ireland was in breach of the principles of equal treatment and transparency.

56. As I stated above, the facts are clear and undisputed. The weighting of the criteria was in fact modified a few days after it had initially been determined. At the time it was modified, the evaluation

team had yet to begin its work, but the members of the team had, individually, been able to view the tenders submitted.

57. The second complaint, unlike the first, must be upheld.

58. I pointed out earlier that Community law, as interpreted by the Court, considers any modification of the award criteria that takes place during the procedure to be incompatible with the principles of equal treatment and non-discrimination. (19) That is exactly what happened in this case.

59. That finding is unaffected by the fact that the evaluation team did not start work collectively until after the award criteria had been finally modified. The principle according to which the criteria must not be modified during the procedure would be deprived of all effectiveness, if a stage at which the members of the evaluation team had sight of the bids submitted by tenderers before the team itself met were not, to all intents and purposes, regarded as a part of the procedure.

60. Even though the original weighting of the criteria was not an official act but simply a kind of 'preliminary proposal', that does not make the conduct of the authority any less unlawful. In my view, in order to guarantee that tenders are treated equally, it is crucial that the weighting attributed to the award criteria should be determined *before the bids are reviewed*, even if only by the members of the evaluation team acting individually. There has to be a clear separation between the process of weighting the criteria and the process of evaluating the bids. To be legitimate, 'joint consideration' by the members of the evaluation team of the weighting of the various criteria should have taken place before there was any review of the bids.

61. It is also necessary to reject the arguments of the Irish Government according to which the same tenderer would have been successful even if the weighting as originally determined had been attributed to the various criteria, instead of the weighting consequent on the subsequent modification.

62. In that regard, it must be pointed out that, according to settled case-law, in the context of actions for failure to fulfil an obligation, there is no condition regarding the interest in bringing an action. (20) The purpose of the procedure is to establish whether there has been a breach of the law of the Union, and not to consider the consequences that flow from that breach. It follows that the fact that the outcome of the procedure would have been the same if the award criteria had been attributed the importance originally attached to them is immaterial for the purposes of determining whether or not there has been a failure to fulfil an obligation.

63. In conclusion, the second of the Commission's complaints is well founded and must be upheld.

4. The possible illegality of attributing zero weighting to a criterion

64. A final point worth considering, although the parties have not paid particular attention to it, relates to the possibility of regarding as incompatible with European Union law the fact that, when weighting the various award criteria, the Irish authority accorded one of them zero weighting (0%). I am, obviously, referring to the criterion of the 'completeness of tender documentation'.

65. In my view, to list an award criterion in the contract notice and then attribute to it, after the closing date for the submission of bids, a weighting equivalent to 0% is, to all intents and purposes, tantamount to modifying the criteria. The practical outcome is, in fact, the same as it would be if the criterion were deleted from the list: a criterion that was set out in the notice is not subsequently applied for the award of the contract. In other words, the Irish authorities probably infringed European Union law by attributing zero weighting to the criterion of the completeness of tender documentation.

66. In this case, the Court cannot, however, give a ruling condemning that infringement.

67. Firstly, the question arises, as I pointed out earlier, of whether the 'award criterion' relating to the completeness of tender documentation ought not, in reality, to be regarded simply as a condition for participation in the tender. By definition, either the documentation is complete, that is to say meets the requirements set out in the contract notice, or it is not. It is hard to envisage any middle way. But the fact remains that, even if the completeness of tender documentation was not to be regarded as an award

criterion, it was presented as such in the contract notice, and could therefore raise doubts concerning compatibility with the principles of the Treaty.

68. Secondly, however, the fact remains that the Commission does not cite this failure. It is not explicitly stated, nor can it be considered to be in any way implied, in the application, which, as we have seen, merely criticises the fact that the weighting of the criteria was not determined until after the closing date for submitting bids and that the weightings were modified after the members of the evaluation team individually had reviewed the bids. The Irish Government thus did not have the opportunity to state a view on this issue.

V – Conclusions

69. On the basis of my analysis, I therefore propose that the Court uphold the second of the Commission's two complaints. As regards the costs, since Ireland has been unsuccessful in part only, I propose that it be ordered, pursuant to Article 69(3) of the Court's Rules of Procedure, to pay half of the Commission's costs.

70. On the basis of the foregoing considerations, I propose that the Court should rule as follows:

– by modifying the weightings attributed to the award criteria for a contract after an initial review of the submitted bids, Ireland has failed to fulfil its obligations under the principles of equal treatment, non-discrimination and transparency;

– the application is dismissed as to the remainder;

– Ireland is order to pay half of the costs;

– the Commission is ordered to bear half of its own costs.

---

1 – Original language: Italian.

---

2 – Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

3 – OJ 2006 S 92. The reference number of the contract notice is S 92-098663.

---

4 – The contract notice provided for the contract to be subdivided into several lots.

---

5 – See, for example, Case C-92/00 *HI* [2002] ECR I-5553, paragraph 43, and Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 27.

---

6 – The requirement of a cross-border interest is not always clearly stated in the Court's case-law which sometimes contains statements that seem to imply that the principles that arise from the Treaty apply unconditionally: see, for example, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60, and Case C-59/00 *Vestergaard* [2001] ECR I-9505, paragraph 20. In other judgments, however, that requirement is explicitly set out: see, for example, in regard to concessions, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 20, and Case C-91/08 *Wall* [2010] ECR I-0000, paragraph 34. As regards services that are not of priority interest (in other words, services coming within the ambit of Annex II B of Directive 2004/18), see *Commission* v *Ireland*, cited in footnote 5 (paragraph 29)). The Commission itself acknowledged the need for there to be a cross-border interest in its Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006, C 179, p. 2, paragraph 1.3).

---

7 – The case-law in this regard is consistent: see, for example, Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 47-49.

---

8 – The Commission has set out more extensive arguments seeking to demonstrate the existence of a cross-border interest in relation to the contract at issue, and has clearly done so in order to respect the principle that, in this regard, it bears the burden of proof. See *Commission* v *Ireland*, cited in footnote 5 (paragraph 32).

---

9 – The Irish Government's particular insistence on the fact that the weighting attributed to the criteria was modified *before* the evaluation team began its review of the bids does not, however, cast doubt on the fact that the individual members of that team had, in the meantime, already made an initial review of those bids *on an individual basis*. That is in fact clearly shown in the documents annexed by the Commission to its application.

---

10 – See *Coname*, cited in footnote 6 (paragraph 17).

---

11 – Case C-331/04 *ATI EAC and Others* [2005] ECR I-10109, paragraph 32.

---

12 – Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 88, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 98. It is also interesting to note that in the directives applicable in the judgments that I have just cited, the authorities are merely asked to set out in advance the weighting attributed to the award criteria only 'where possible', listing them in the order of importance attributed to them (see Article 30(2) of Directive 93/37/EEC and Article 27(2) of Directive 90/531/EEC).

---

13 – Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 43.

---

14 – Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 93.

---

15 – See, by analogy, Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 33.

---

16 – See, for example, *Telaustria and Telefonadress*, cited in footnote 6 (paragraph 63), and *Parking Brixen*, cited in footnote 7 (paragraph 50).

---

17 – See, for example, *Telaustria and Telefonadress*, cited in footnote 6 (paragraph 62); see also, by analogy, in relation to the concession of services, Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 25, and Case C-203/08 *Sporting Exchange* [2010] ECR I-0000, paragraph 41 and the case-law cited therein.

---

18 – See, also in that connection, point 64 et seq below.

---

19 – See point 43 above.

---

20 – See, for example, Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraphs 14 to 16 and the case-law cited therein.

JUDGMENT OF THE COURT (Third Chamber)

22 December 2010 (*)

(Public service contracts – Directive 2004/18/EC – Mixed contract – Contract concluded between a contracting authority and a private company independent of it – Establishment, on an equal basis, of a joint venture to provide health care services – Undertaking by the partners to purchase health care services for their staff from the joint venture for a transitional period of four years)

In Case C-215/09,

REFERENCE for a preliminary ruling under Article 234 EC, made by the Markkinaoikeus (Finland), by decision of 12 June 2009, received at the Court on 15 June 2009, in the proceedings

Mehiläinen Oy,

Terveystalo Healthcare Oy, formerly Suomen Terveystalo Oyj,

v

Oulun kaupunki,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Mazák,

Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 17 June 2010,

after considering the observations submitted on behalf of:

– Mehiläinen Oy and Terveystalo Healthcare Oy (formerly Suomen Terveystalo Oyj), by A. Laine and A. Kuusniemi-Laine, asianajaja,

– Oulun kaupunki, by S. Rasinkangas and I. Korpinen, asianajaja,

– the Finnish Government, by A. Guimaraes-Purokoski and M. Pere, acting as Agents,

– the Czech Government, by M. Smolek, acting as Agent,

– the European Commission, by E. Paasivirta, C. Zadra and D. Kukovec, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the relevant provisions, in the light of the circumstances of the dispute in the main proceedings, of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the

award of public works contracts, public supply contracts and public service contracts (OJ 2001 L 134, p. 114).

2 The reference was made in the course of proceedings between Mehiläinen Oy and Terveystalo Healthcare Oy, formerly Suomen Terveystalo Oyj, limited companies incorporated under Finnish law, and Oulun kaupunki (City of Oulu), concerning the legal classification, from the point of view of the European Union rules on public procurement, of a contract concluded between Oulun kaupunki and ODL Terveys Oy, a private company independent of Oulun kaupunki ('the private partner'), concerning the creation of a joint enterprise, ODL Oulun Työterveys Oy ('the joint enterprise').

Legal context

European Union legislation

3 In accordance with the definitions contained in Article 1(2) of Directive 2004/18:

'(a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

(d) "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

…'

4 Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts', provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Pursuant to Article 7 of that directive, entitled 'Threshold amounts for public contracts', as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2007 L 317, p. 34), Directive 2004/18 applies to public service contracts awarded by contracting authorities other than central government authorities, which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than EUR 206 000.

6 In accordance with Annex II B of Directive 2004/18, health care services fall within Category 25 thereof entitled 'Health and social services'.

7 Under Article 21 of Directive 2004/18:

'Contracts which have as their object services listed in Annex II B shall be subject solely to Article 23 and Article 35(4).'

8 Article 23 of Directive 2004/18, in Chapter IV thereof, entitled 'Specific rules governing specifications and contract documents' relates to technical specifications in contract documentation, and Article 35(4), which appears in Chapter VI of that directive, entitled 'Rules on advertising and transparency', refers to the contracting authorities' obligations to give notice of the results of the award procedure.

National legislation

9 Finnish law 1383/2001 on occupational health care (Työterveyshuoltolaki) requires public and private employers to protect the health of their employees at work.

10 According to the first subparagraph of paragraph 3 of that law, occupational health care is the activity, carried out on the responsibility of the employer, by which occupational health professionals and experts promote the prevention of work-related illness and accidents, ensure that work-stations do not imperil workers' health or safety, promote an adequate working environment and the correct functioning of the staff as a group and the workers' health, efficiency and performance.

11 Under the first subparagraph of Paragraph 4 of that law, the employer must arrange occupational health care at his own expense in order to prevent and control impairment of health and health risks caused by work and working conditions and to protect and ensure the safety, working capacity and health of his staff.

12 Under Paragraph 7 of Law 1383/2001, an employer may organise occupational health care services within the meaning of that law by acquiring the services he needs from a 'health centre', within the meaning of Law 66/1972 on Public Health (Kansanterveyslaki), arranging, himself or together with other employers, the occupational health care services needed or by acquiring the services in question from another entity or person entitled to provide occupational health care services.

13 In accordance with the first subparagraph of Paragraph 87a of Finnish Law 365/1995 on local government (Kuntalaki), as amended by Law 519/2007, which entered into force on 15 May 2007, a local authority or association of local authorities may set up a municipal entity for the purposes of business or a task to be discharged according to commercial principles. Such municipal entities are not independent legal persons, but are components of the local authority organisation and legislation on the activities of local authorities applies to the activity of a municipal entity.

14 Directive 2004/18 was transposed into Finnish law by Law 348/2007 on public procurement (Hankintalaki), the first subparagraph of Paragraph 5 thereof contains a definition of 'public contract' which corresponds to that in Article 1(2)(a) of that directive.

15 In accordance with the preparatory materials which led to the adoption of that law (Government Proposal 50/2006 vp), a public contract is normally a private-law contract between two separate legal persons. That is why, contracts within an organisation are not generally to be regarded as public contracts. A contract is not to be regarded as a public contract if its main object is other than the award of a contract. What needs to be examined in particular is whether the arrangement or bundle of agreements constitutes or constitute an indivisible whole, from which the contract in question cannot be separated.

16 Under Paragraph 10 of the law, the latter does not apply to contracts awarded by a contracting authority to an entity distinct from it in form and independent of it in terms of decision making, but over which it exercises, alone or with other contracting authorities, a control similar to that which it exercises over its own departments so long as that distinct entity carries out the essential part of its activities with those contracting authorities. That provision constitutes the adaptation of the national rules to the case-law of the Court (Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50).

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 On 21 April 2008, Oulu City Council decided to set up a joint venture with its private partner, to be governed by Law 624/2006 on limited companies, and to commence its activities on 1 June 2008. The capital of the joint venture is divided equally between the two partners and its management is shared.

18 The joint venture's activity was to consist in providing occupational heath care and welfare services and the two partners intended its activities to be chiefly and increasingly, focused on private clients. However, for a transitional period of four years ('the transitional period'), they undertook to purchase from the joint venture the health services they are required, as employers, to provide for their staff in accordance with national law.

19 According to Oulun kaupunki, the joint venture's estimated turnover was approximately EUR 90 million during the transitional period, EUR 18 million of which represented the value of services that it was to provide to its staff.

20 The two partners were to transfer to the joint venture, as a capital contribution, their respective units responsible internally for providing occupational health care services to their employees in accordance with the applicable national law. Thus, Oulun kaupunki transferred to the joint venture the municipal entity Oulun Työterveys ('the municipal entity'), responsible internally for the supply of occupational health care services, the value of which was between EUR 2.5 and 3.4 million, while the private partner transferred its corresponding unit of an estimated value of between EUR 2.2 and 3 million.

21 According to Oulun kaupunki, the occupational health care services supplied to the city's employees represent about 38% of the municipal entity's turnover. The remainder of the turnover is obtained by the supply of services to private clients.

22 The minutes of the Oulun kaupunki City Council meeting which led to the decision of 21 April 2008 state as follows:

'The parties have furthermore agreed to purchase occupational health and welfare services from the newly founded company over a four year transitional period. The City shall purchase these services on the same scale as it has from the current Oulun Työterveys municipal entity. … The [Law on public procurement] requires the City to put out to tender its occupational health services once they have become the responsibility of the [joint venture]. During the transitional stage, however, the City is justified in continuing its customer relationship with the [joint venture] on account of at least the following:

– the arrangement will safeguard the position of staff transferring from the City

– the City's current contract is favourable and competitive

– the joint venture will begin its operations in favourable conditions.'

23 In accordance with those minutes, on 24 April 2008 Oulun kaupunki signed an agreement with the private partner, according to which it undertook to entrust to the future joint venture the task of providing municipal employees with occupational health and welfare services during the transitional period. When that transitional period expired, Oulun kaupunki intended, according to its statement, to make the award of the services concerned subject to a procedure for the award of a procurement contract.

24 Thus, it is clear from those minutes that Oulun kaupunki, as the contracting authority, failed to invite tenders during the transitional period for the provision of occupational health care and welfare services which it had a duty to provide for its employees in accordance with national law. It is also common ground that the choice of private partner was not made following a competitive procedure.

25 The referring court, hearing an action brought by competing undertakings interested in providing occupational health care and welfare services for the employees of Oulun kaupunki temporarily restrained the latter, on pain of a EUR 200 000 fine, from implementing, in any way whatsoever, the City Council's decision of 21 April 2008 in so far as it concerns the occupational health care and welfare services for the City's staff. Pending the final decision of the court hearing the proceedings, on 26 August 2008 Oulun kaupunki decided to transfer the municipal entity's activities to the joint venture, excluding, however, from that transfer the occupational health care services provided to its staff.

26 Having regard to the arguments put forward by the parties to the main proceedings concerning the nature of the contested transaction, in the light of European Union law on public procurement, the Markkinaoikeus decided to stay its proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is an arrangement by which a municipal contracting authority concludes with a private undertaking in the form of a company which is separate from it a contract establishing a new undertaking in the form of a share company, on an equal share basis both in terms of ownership and of power of control, from which the municipal contracting authority commits itself, when setting up the company, to purchasing occupational health and welfare services for its own staff,

on an overall assessment, an arrangement which must be put out to tender, on the ground that the bundle of agreements amounts to the award of a public service contract for the purposes of Directive 2004/18/EC … or is the arrangement to be regarded as the establishment of a joint venture and the transfer of the business activity of a municipal entity to which that directive and the consequent obligation to put out to tender are not applicable?

2. Should any significance in this case also be attached:

(a) to the fact that Oulun kaupunki, as a municipal contracting authority, has undertaken to acquire in return for consideration the services referred to above over a four-year transitional period, after which the municipal contracting authority intends, according to its decision, once again to put out to tender the occupational health care services it requires;

(b) to the fact that, prior to the arrangement in question, most of the turnover of the municipal enterprise that was part of Oulun kaupunki's organisation came from occupational health care services other than those produced for the City's own employees;

(c) to the fact that the new undertaking has been created by the transfer, by way to a contribution in kind, of the activity of the municipal entity, which comprises the production of occupational health care services both for the City's employees and for private customers?'

The questions referred for a preliminary ruling

27 By its two questions, which it is appropriate to examine together, the national court asks essentially whether Directive 2004/18 must be interpreted as meaning that it applies to an arrangement by which a municipal contracting authority concludes with a private undertaking independent of it, a contract establishing a joint venture in the form of a share company, from which the municipal contracting authority commits itself, when setting up the company, to purchasing occupational health and welfare services for its own staff.

28 It is clear from the wording of those questions and the context in which they arise that they relate more specifically to the supply by the joint venture, to Oulun kaupunki of occupational health care and welfare services for its staff, since that supply corresponds to the undertaking entered into by the City to purchase from the joint venture, during a transitional period of four years, such services which were previously provided to it by a municipal entity which is a component of its organisation.

29 As a preliminary point, it must be noted that it is common ground in the case in the main proceedings that Oulun kaupunki has the status of a contracting authority within the meaning of Article 1(9) of Directive 2004/18, and that the services concerned fall within the definition of 'health care … services' for the purpose of Category 25 of Annex II B to that directive. The undertaking by Oulun kaupunki to purchase the services concerned for its staff from the joint venture implies the existence of a contract for pecuniary interest between the City and that joint venture. Moreover, it is clear from the information provided by the national court that the estimated value of the contract of EUR 18 million exceeds the relevant threshold for the application of Directive 2004/18.

30 It should also be recalled that Directive 2004/18 makes no distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting of public interest needs and those which are unrelated to that task, such as the need to fulfil an obligation imposed on it, as in the present case, as an employer with respect to its employees (see, in particular, Case C-271/08 *Commission* v *Germany* [2010] ECR I-0000, paragraph 73 and the case-law cited).

31 After making that point clear, it should be recalled that a public authority may perform the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments, and that it may do so in cooperation with other public authorities (see Case C-480/06 *Commission* v *Germany* [2009] ECR I-4747, paragraph 45). Similarly, as stated in point 1 of the Commission's Interpretative Communication on the Application of Community law on Public Procurement and Concessions to Institutionalised (PPPI) (OJ 2008 C 91,

p. 4), public authorities are free to pursue economic activities themselves or to assign them to third parties, such as mixed capital entities founded in the context of a public-private partnership.

32 Furthermore, the application of European Union law on public procurement is excluded if the control exercised by the contracting authority over the contracting entity is similar to that exercised by the contracting authority over its own departments and if, at the same time, that entity carries out the essential part of its activities with the controlling local authority (see *Teckal*, paragraph 50). However, the holding, even a minority holding, of a private undertaking in the capital of a company in which the contracting authority in question also has a holding too means that, on any view, it is impossible for that contracting authority to exercise over that company control similar to that which it exercises over its own departments (see, in particular, Case C-573/07 *Sea* [2009] ECR I-8127, paragraph 46, and Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 53).

33 As regards, more specifically, the national court's question whether or not Oulun kaupunki's undertaking to purchase health care and welfare services for its staff from the joint venture during the transitional period falls outside the scope of the rules in Directive 2004/18 on account of the fact that that undertaking forms part of a contract setting up a joint venture, it must be observed that the creation of a joint venture by a contracting authority and a private economic operator is not covered as such by Directive 2004/18. That finding is also set out in point 66 of the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final).

34 However it should be observed, as is clear from point 69 of that Green Paper, that it is necessary to ensure that such a capital transaction does not in reality conceal the award to a private partner of contracts which might be considered to be public contracts or concessions. Furthermore, as stated at paragraph 2.1 of the Commission Interpretative Communication, the fact that a private entity and a contracting entity cooperate within a mixed-capital entity cannot justify failure to observe the provisions on public procurement when awarding such a contract to that private entity or to that mixed capital entity (see, to that effect, *Acoset*, paragraph 57).

35 Having regard to those general guidelines, it must be established whether, and to what extent, Directive 2004/18 may be applicable in the case in the main proceedings.

36 In that connection, it is clear from the case-law of the Court that, as regards a mixed contract, the different aspects of which are inseparably linked and thus form an indivisible whole, that contract must be examined as a whole for the purposes of its legal classification in the light of the rules on public contracts, and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract (Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others* [2010] ECR I-0000, paragraphs 48 and 49 and the case-law cited).

37 It follows that, for the purposes of the application of Directive 2004/18, it must be ascertained whether the aspect constituted by the health care services for Oulun kaupunki's staff, which fall in principle within the scope of that directive, is severable from that contract.

38 In that connection, reference should be made to the minutes of the municipal council meeting of Oulun kaupunki of 21 April 2008, which sets out the reasons for the undertaking entered into by it when the joint venture was set up. Furthermore, it is clear from the explanations provided by Oulun kaupunki at the hearing that it regards that aspect of the contract as indivisible, on account of the fact that the value of the undertaking to purchase health care services from the joint venture during the transitional period was part of its capital contribution to that venture and that that contribution was, economically, a condition of the creation of that venture.

39 It should be pointed out that the expressed or presumed intentions of the contracting parties to regard the various aspects making up a mixed contract as indivisible are not sufficient, but must be supported by objective evidence capable of justifying them and of establishing the need to conclude a single contract.

40 As far as concerns Oulun kaupunki's argument that the situation of the City Council's employees transferred to the joint venture is guaranteed by the undertaking entered into, it must be observed that such a guarantee could also have been made under a procedure for the award of a public contract in

accordance with the principles of non-discrimination and transparency, in which the requirement relating to that guarantee would be part of the conditions to which the award of the contract would be subject.

41 As regards Oulun kaupunki's arguments that 'the current contract is advantageous and competitive' and that, by that undertaking, 'the joint venture will commence its activities in favourable conditions', it must be recalled that, according to the case-law of the Court, the award of a public contract to a semi-public company without a call for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment, in that such a procedure would offer a private undertaking with a capital holding in that company an advantage over its competitors (*Acoset*, paragraph 56 and the case-law cited). Such arguments do not support the conclusion that the aspect constituted by the health care services for the staff of Oulun kaupunki is indissociable from the rest of the contract.

42 Furthermore, it must be held that the alleged but unsubstantiated inclusion of the value of the undertaking entered into by Oulun kaupunki with respect to its capital contribution to the joint venture constitutes, in those circumstances, a legal technicality which does not justify the view that that aspect of the mixed contract is indivisible from the latter.

43 In addition, as the Czech Government and the Commission argue, the fact that, in the case in the main proceedings, the contracting authority expressed its intentions to launch a call for tenders for the purchase of health care services for its staff at the end of the transitional period also constitutes evidence to support the severable nature of that aspect from the remainder of the mixed contract.

44 Similarly, the fact that the joint venture has operated since August 2008 without that aspect tends to show that the two partners appear to be in a position to deal with any impact that that absence might have on the financial position of that venture, which is further relevant evidence as the divisible nature of that aspect.

45 Accordingly, unlike the circumstances which gave rise to the judgment in *Loutraki and Others*, the abovementioned findings fail to demonstrate objectively the need to conclude that mixed contract with a single partner (see, to that effect, *Loutraki and Others*, paragraph 53).

46 Since the component of the mixed contract consisting in the undertaking by Oulun kaupunki to purchase health care services for its staff from the joint venture is severable from that contract, it follows that in a context such as that in the main proceedings, the relevant provisions of Directive 2004/18 are applicable to the award of that aspect.

47 In the light of the foregoing considerations, the answer to the questions referred is that Directive 2004/18 must be interpreted as meaning that, where a contracting authority concludes with a private company independent of it a contract establishing a joint venture in the form of a share company, the purpose of which is to provide occupational health care and welfare services, the award by the contracting authority of the contract relating to the services for its own staff, the value of which exceeds the threshold laid down by that directive, and which is severable from the contract establishing that company, must be made in accordance with the provisions of that directive applicable to the services in Annex II B thereof.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and

public service contracts must be interpreted as meaning that, where a contracting authority concludes with a private company independent of it a contract establishing a joint venture in the form of a share company, the purpose of which is to provide occupational health care and welfare services, the award by the contracting authority of the contract relating to the services for its own staff, the value of which exceeds the threshold laid down by that directive, and which is severable from the contract establishing that company, must be made in accordance with the provisions of that directive applicable to the services in Annex II B thereof.

[Signatures]

---

* Language of the case: Finnish.

JUDGMENT OF THE COURT (Third Chamber)

15 July 2010 (*)

(Public works contracts – Directive 93/37/EEC – Article 24 – Grounds for exclusion – Obligations relating to the payment of social security contributions and taxes – Tenderers' registration obligation, on pain of exclusion – 'Registration Committee' and its powers – Examination of the validity of certificates issued by the competent authorities of the Member State in which a foreign tenderer is established)

In Case C-74/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de Cassation (Belgium), made by decision of 22 January 2009, received at the Court on 18 February 2009, in the proceedings

Bâtiments et Ponts Construction SA,

WISAG Produktionsservice GmbH, formerly ThyssenKrupp Industrieservice GmbH,

v

Berlaymont 2000 SA,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: J. Kokott,

Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 4 March 2010,

after considering the observations submitted on behalf of:

– Bâtiments et Ponts Construction SA and WISAG Produktionsservice GmbH, formerly ThyssenKrupp Industrieservice GmbH, by D. Lagasse and E. van Nuffel, avocats,

– Berlaymont 2000 SA, by X. Dieux, J.-P. Gunther, J.-Q. De Cuyper, C. Breuvart and S. Bartholomeeusen, avocats,

– the Belgian Government, by J.-C. Halleux and C. Pochet, acting as Agents,

– the Czech Government, by M. Smolek, acting as Agent,

– the European Commission, by M. Konstantinidis and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 49 EC and 50 EC and of the relevant provisions, particularly Article 24, of Council Directive 93/37/EEC of 14 June 1993

concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

2 The reference was made in the course of proceedings between, on the one hand, Bâtiments et Ponts Construction SA ('BPC'), a company incorporated under Belgian law, and WISAG Produktionsservice GmbH ('WIG'), formerly ThyssenKrupp Industrieservice GmbH, formerly WIG Industrieinstandhaltung GmbH, a company incorporated under German law, and, on the other, Berlaymont 2000 SA ('Berlaymont 2000'), a company incorporated under Belgian law, concerning the exclusion by the latter, in its capacity as contracting authority, from participation in a public works contract of the consortium formed for that purpose by the two former companies.

Legal context

Legislation of the Union

3 The provisions, relevant to the main proceedings, of Directive 93/37, which, in the meantime, has been replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), are those of Article 6 of Directive 93/37 and those in Title IV thereof, and more particularly in Chapter 2, entitled 'Criteria for qualitative selection', of Title IV, which chapter contains Articles 24 to 29.

4 Article 6(6) of Directive 93/37 was in the following terms:

'Contracting authorities shall ensure that there is no discrimination between the various contractors.'

5 Article 24 of Directive 93/37 provided as follows:

'Any contractor may be excluded from participation in the contract who:

(a) is bankrupt or is being wound up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations;

(c) has been convicted of an offence concerning his professional conduct by a judgment which has the force of *res judicata*;

(d) has been guilty of grave professional misconduct proved by any means which the contracting authorities can justify;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Chapter.

Where the contracting authority requires of the contractor proof that none of the cases quoted in (a), (b), (c), (e) or (f) applies to him, it shall accept as sufficient evidence:

– for points (a), (b) or (c), the production of an extract from the "judicial record" or, failing this, of an equivalent document issued by a competent judicial or administrative authority in the country

of origin [or] in the country whence that person comes showing that these requirements have been met;

– for points (e) or (f), a certificate issued by the competent authority in the Member State concerned.

Where the country concerned does not issue such documents or certificates, they may be replaced [by] a declaration on oath or, in Member States where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a judicial or administrative authority, a notary or a competent professional or trade body, in the country of origin or in the country whence that person comes.

Member States shall designate the authorities and bodies competent to issue these documents and shall forthwith inform the other Member States and the Commission thereof.'

6 The first and third indents of Article 25 of Directive 93/37 provided:

'Any contractor wishing to take part in a public works contract may be requested to prove his enrolment in the professional or trade register under the conditions laid down by the laws of the Member State in which he is established:

– in Belgium the "Registre du Commerce – Handelsregister",

…

– in Germany, the "Handelsregister" and the "Handwerksrolle"'.

7 Article 26 of Directive 93/37 provided:

'1. Evidence of the contractor's financial and economic standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from bankers;

(b) the presentation of the firm's balance sheets or extracts from the balance sheets, where publication of the balance sheet is required under the law of the country in which the contractor is established;

(c) a statement of the firm's overall turnover and the turnover on construction works for the three previous financial years.

2. The contracting authorities shall specify in the notice or in the invitation to tender which reference or references they have chosen and what references other than those mentioned under paragraph 1(a), (b) or (c) are to be produced.

3. If, for any valid reason, the contractor is unable to supply the references requested by the contracting authorities, he may prove his economic and financial standing by any other document which the contracting authorities consider appropriate.'

8 Article 27 of Directive 93/37 was worded as follows:

'1. Evidence of the contractor's technical capability may be furnished by:

(a) the contractor's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for carrying out the works;

(b) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade

and properly completed. Where necessary, the competent authority shall submit these certificates to the contracting authority direct;

(c) a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;

(d) a statement of the firm's average annual manpower and the number of managerial staff for the last three years;

(e) a statement of the technicians or technical bodies which the contractor can call upon for carrying out the work, whether or not they belong to the firm.

2. The contracting authorities shall specify in the invitation to tender which of these references are to be produced.'

9 Article 28 of Directive 93/37 was in the following terms:

'Within the limits of Articles 24 to 27, the contracting authority may invite the contractor to supplement the certificates and documents submitted or to clarify them.'

10 Article 29 of Directive 93/37 provided:

'1. Member States who have official lists of recognized contractors must adapt them to the provisions of Article 24(a) to (d) and (g) and of Articles 25, 26 and 27.

2. Contractors registered in the official lists may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority. This certificate shall state the reference which enabled them to be registered in the list and the classification given in this list.

3. Certified registration in the official lists by the competent bodies shall, for the contracting authorities of other Member States, constitute a presumption of suitability for works corresponding to the contractor's classification only as regards Articles 24(a) to (d) and (g), 25, 26(b) and (c) and 27(b) and (d).

Information which can be deduced from registration in official lists may not be questioned. However, with regard to the payment of social security contributions, an additional certificate may be required of any registered contractor whenever a contract is offered.

The contracting authorities of other Member States shall apply the above provisions only in favour of contractors who are established in the country holding the official list.

4. For the registration of contractors of other Member States in an official list, no further proofs and statements may be required other than those requested of nationals and, in any event, only those provided for under Articles 24 to 27.

5. Member States holding an official list shall communicate to other Member States the address of the body to which requests for registration may be made.'

National legislation

11 The market in question in the main proceedings was governed, in particular, by the Royal Decree of 22 April 1977 concerning public works, supply and service contracts (*Moniteur belge* of 26 July 1977, p. 9539). Article 15 thereof, in Section 2, entitled 'Drawing up the tender', provided:

'…

3. A Belgian tenderer which employs staff to whom the Law of 27 June 1969 amending the Decree-Law of 28 December 1944 on social security for workers applies must, for its tender to be regarded as valid, attach thereto a certificate of the National Social Security Office stating that it has paid social

security and subsistence protection contributions or present such a certificate to the administration before the opening of tenders …

4. A foreign tenderer must, for its tender to be regarded as valid, attach thereto or present to the administration before the opening of tenders:

(a) a certificate issued by the competent authority stating that the tenderer has complied with its obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which it is established …

…

7. A tenderer must, for its tender to be regarded as valid, be registered as a contractor pursuant to Article 299a of the Income Tax Code and Article 30a of the Law of 27 June 1969 amending the Decree-Law of 28 December 1944 on social security for workers.'

12 The detailed rules of that registration obligation are governed by the Royal Decree of 5 October 1978 (*Moniteur belge* of 7 October 1978, p. 11707; 'the Royal Decree of 1978').

13 Article 2 of the Royal Decree of 1978, in Section 1 entitled 'Conditions to be satisfied in order to be registered as a contractor', provides in its paragraph 1:

'Registration as a contractor … shall be granted only to contractors which satisfy the following conditions:

…

2. in respect of an activity referred to in Article 1, they must be registered in the companies' register or professional register in accordance with the requirements laid down in the legal provisions of the Member State in which they are established;

…

7. where a company is involved, the directors, managers or persons empowered to enter into obligations on behalf of the company may not include any persons who are prohibited from performing such tasks under Royal Decree No 22 of 24 October 1934 referred to in subparagraph 6;

…

10. they must not have committed, during the five year period preceding the application for registration, any repeated or serious infringements relating to tax obligations …

11. they must not, at the time of the application for registration, be in arrears with the payment of taxes, contributions levied by the National Social Security Office or contributions levied by the Subsistence Protection Fund or on its behalf; …;

12. they must possess sufficient financial, administrative and technical resources to ensure fulfilment of their tax and social security obligations.'

14 Under Article 8 of the Royal Decree of 1978, an application to be registered as a contractor must be submitted to the Chairman of the 'Registration Committee' of the province in which the applicant has its principal place of business. In the case of applicants not established in Belgium, the committee of the province in which the construction site in question is situated is to be competent.

15 Article 10 of the Royal Decree of 1978 is in the following terms:

'(1) For it not to be inadmissible, the following documents must be attached to the application:

…

3. from each applicant: a copy of the entry in the professional register on the conditions laid down in the legal provisions of the country in which it is established …;

…

5. from a [foreign] applicant: certificates issued by the competent authority in the Member State in which it is established confirming that it is not in arrears with the payment of taxes or social security contributions in that Member State.

…

2. The registration committee referred to in Section 4 below can require the applicant to provide further documents or information which it deems necessary to determine whether or not the conditions laid down in Article 2(1) have been fulfilled.

…'

16 Article 16 of the Royal Decree of 1978, in Section 4, entitled 'Registration Committee', provides:

'(1) Each registration committee shall be composed of nine members appointed by Us in accordance with the procedures set out below:

1. three members who shall be officials appointed on the proposal of, respectively,

(a) the Minister for Social Security;

(b) the Minister for Finance;

(c) the Minister for Employment and Work;

2. three members shall be appointed on the proposal of the organisations representing employers in the construction industry;

3. three members shall be appointed on the proposal of the organisations representing employees in the construction industry; …

(2) Each committee shall be chaired by one of the officials referred to in Paragraph (1)(1)(a) and (b) appointed by Us for this purpose on the proposal of the two ministers referred to therein …'

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 On 18 September 1990, Berlaymont 2000 was formed by the Régie des Bâtiments (Buildings Agency), a legal person established under Belgian public law, and three banking institutions. Berlaymont 2000's main purpose was the renovation of the Berlaymont Building and the drawing up of the contract documents, work schedule and budget associated with that renovation. That building had been constructed on land acquired by the Belgian State in 1960 and occupied by the Commission's services until 1991. It has again been occupied by the Commission's services since the completion of the renovation works in 2004.

18 In 1994, Berlaymont 2000 invited tenders for the renovation works, the value of which was estimated at around BEF 1.4 billion. It drew up, to that end, special contract conditions and had a contract notice published in the *Official Journal of the European Communities* on 23 December 1994. Article 1.G of the special contract conditions stated: 'As regards the works which form the subject-matter of the present contract, the contractor must be registered in Belgium'.

19 On 16 February 1995, Berlaymont 2000 published an amended notice in the *Official Journal of the European Communities* which provided certain additional information regarding the registration requirements for tenderers.

20 That notice stated that:

‘As regards the works which form the subject-matter of the present contract, the contractor must furnish proof that it is regarded as having fulfilled its obligations relating to social security contributions, tax and VAT; this proof must be contained in a registration.

The application for registration is to be made in accordance with the Royal Decree of 3 October 1978.

As regards the validity of the tender (at the time it is submitted), it will be sufficient for a copy of the application for registration to be attached to the tender. No decision to award the contract will be taken before the competent authority has ruled on the application.’

21 The special conditions were also consequentially amended and state that ‘[i]n its tender, the tenderer will confirm that it has taken account of this amendment notice No 1, failing which its tender will be void’.

22 In order to participate in the tender proceedings, BPC and WIG formed a consortium named BPC-WIG (‘BPC-WIG’). On 16 March 1995, BPC-WIG submitted a tender for the contract in question. WIG had attached to that tender two certificates issued by the German tax and social security authorities dated 4 August 1994 and 3 February 1995 according to which ‘the tax administration has no objection to WIG’s participation in a public works contract’ and ‘all social security contributions have always been paid punctually by WIG’. However neither WIG not BPC-WIG attached to their tender evidence of their registration or of their applications for registration as required, however, by the Belgian legislation. Applications for registration were not submitted by those two entities until after the expiry of the time-limit for submitting tenders, that is to say by BPC-WIG on 28 April 1995 and by WIG on 3 May 1995 and the registrations were not granted until July 1995, which was after the contract was awarded. BPC, as a company incorporated under Belgian law, was already registered in Belgium.

23 By decision of 20 June 1995, Berlaymont 2000’s Board of Directors awarded the contract to another consortium.

24 BPC and WIG brought an action for annulment of that award decision before the Conseil d’État (Council of State). By judgment of 10 March 1999 a Chamber of the Council of State dismissed the proceedings before it on the grounds that WIG was not, at the time its tender was submitted, registered as a contractor in accordance with Article 15(7) of the Royal Decree of 22 April 1977 concerning public works, supply and service contacts, and held that at the date of the decision to award the contract, the applicants were ineligible for such award and rejected their claim.

25 Meanwhile, on 18 June 1996, BPC and WIG brought before the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) an action for damages for the loss caused by their exclusion from the contract. By judgment of 5 November 2002, that court dismissed the action as inadmissible. By application of 15 April 2003, BPC and WIG brought an appeal against that decision. By judgment of 14 March 2007, the Cour d’appel de Bruxelles (Court of Appeal, Brussels) upheld the decision at first instance.

26 The referring court has set out, in its decision, the reasoning followed by the Cour d’appel de Bruxelles. It points out that the applicants had not attached to their tender the applications for registration which were, however, necessary for WIG and BPC-WIG. The tax and social security certificates issued by the competent German authorities and attached to the tenders of WIG and BPC-WIG did not amount to registration but met a different production requirement, whilst also being necessary to obtain registration. Thus, the applicants failed to satisfy an essential requirement of the Belgian legislation and, therefore, their tender was null and void, which excluded them automatically and at the outset from the award procedure.

27 As regards the additional registration obligation, the Cour d’appel de Bruxelles accepted that the first paragraph of Article 24 of Directive 93/37 does not include failure to register among the grounds referred to therein for exclusion from participation in a contract. It accepted also that, under the second paragraph of Article 24 of that directive, where the contracting authority requires of the contractor proof that the cases referred to in points (e) and (f) of the first paragraph do not apply to it, the authority

is to accept as sufficient evidence a certificate issued by the competent authority in the Member State concerned. However, that court considered that other provisions of Directive 93/37 led to the conclusion that the registration obligation, on pain of exclusion from the contract, was not prohibited.

28 It points out, in that regard, that the logical reason for the registration procedure was to enable the Belgian authorities to satisfy themselves that a contractor possessed sufficient financial, administrative and technical resources to ensure fulfilment of its tax and social security obligations. Consequently, the certificates emanating from the German authorities would not suffice to provide such a guarantee. The Cour d'appel de Bruxelles refers in that regard to Articles 26, 27 and 29(4) of Directive 93/37, which, in its view, confer on the contracting authority the right to require from contractors additional evidence and declarations. Consequently, that court considered that a reference to the Court of Justice for a preliminary ruling would be irrelevant.

29 Their appeal dismissed, BPC and WIG, on 28 September 2007, appealed on a point of law to the Cour de cassation (Court of Cassation).

30 Harbouring doubts as regards the compliance of the legislation in question in the main proceedings with the provisions of the EC Treaty in respect of the free movement of services and the provisions of Article 24 of Directive 93/37, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is the obligation to hold a registration in order to be awarded a public contract in Belgium, such as that imposed by Article 1.G of the special conditions, applicable in the present case, contrary to the principle of freedom of movement within the European Union and to the second paragraph of Article 24 of Directive 93/37 … if it had to be interpreted as permitting the Belgian contracting authority to exclude from the tender procedure a foreign contractor who does not hold a registration but has produced equivalent certificates from his national authorities?

2. Is it contrary to the principle of freedom of movement within the European Union and to the second paragraph of Article 24 of Directive 93/37 to grant a Belgian contracting authority the power to require foreign tenderers to submit to a Belgian authority – the committee for the registration of contractors – for assessment of the validity of the certificates which have been issued to them by the tax and social security authorities of their State, attesting that they have fulfilled the obligations imposed on them relating to tax and social security?'

The questions referred for a preliminary ruling

Admissibility of the reference for a preliminary ruling

31 The Commission expresses doubts as regards the admissibility of the request for a preliminary ruling, because the referring court confines itself, in the order for reference, to reproducing the reasoning in the judgment of the Cour d'appel de Bruxelles, does not define sufficiently the factual and legislative context of the dispute in the main proceedings and does not give sufficient explanation of the reasons for selecting the provisions of the law of the Union, the interpretation of which it seeks.

32 Those doubts are unfounded.

33 First of all, the referring court cannot be accused of merely repeating, in its decision, the judgment of the Cour d'appel de Bruxelles which forms the subject matter of the appeal on a point of law before it. The referring court expresses, by such repeat, its doubts as regards the compliance of the conclusions reached in that judgment with the relevant provisions of the law of the Union, namely those of the Treaty in respect of free movement of services and those of Article 24 of Directive 93/37.

34 As the Advocate General noted in paragraph 33 of her Opinion, the order for reference explains sufficiently what is at issue in the main proceedings and the factual and legislative context in which the questions referred arose, matters which have, moreover, enabled the parties concerned, for the purposes of the second paragraph of Article 23 of the Statute of the Court of Justice of the European Union, properly to submit their observations.

35 Finally, the relationship between the context thus described of what is at issue in the main proceedings and the provisions of Union law, the interpretation of which is sought, is abundantly clear from the contents of the Court file and needs no particular explanation.

36 Therefore, the information thus provided is sufficient to meet the requirements of the Court's settled case-law (see, to that effect, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 40 and the case-law cited) and to enable the Court to provide helpful replies to the referring court. Accordingly, the reference for a preliminary ruling is admissible.

The first question

37 By this question, the national court is asking, in essence, whether the general principles of the law of the Union on public procurement and the second paragraph of Article 24 of Directive 93/37 are to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes on a contractor established in another Member State an obligation to hold a registration, in the contracting authority's Member State, in order to be awarded a contract in the latter Member State, notwithstanding the fact that the contractor has produced certificates issued by the authorities of its Member State of establishment which attest, in particular, that it has fulfilled, in that State, its obligations relating to the payment of social security contributions and taxes.

38 At the outset, it is important to make clear that the registration at issue in the main proceedings is not covered by the provisions of Article 25 or 29 of Directive 93/37.

39 It is apparent, indeed, from the contents of the file submitted to the Court that the objective of that registration obligation is to establish contractors' professional qualities, for the purposes of the first paragraph of Article 24 of Directive 93/37, more particularly as regards their position in respect of the payment of social security contributions and taxes.

40 It is appropriate to point out, first, that the fact that a contractor established in another Member State has produced certificates issued by the competent authorities of that State is not sufficient to confirm, conclusively, that it has fulfilled its obligations in that regard. Indeed, first, points (e) and (f) of the first paragraph of Article 24 of Directive 93/37 provide that the contractor must have fulfilled its social security and tax obligations in the contracting authority's Member State also. Secondly, by referring to certificates issued by the competent authority in the Member State concerned, the second indent in the second paragraph of Article 24 permits a separate check on such a contractor in the Member State in which the public contract in question is to be awarded.

41 It is conceivable that the contractor in question may have carried on an economic activity in the contracting authority's Member State capable of giving rise to debts for social security contributions and tax in that Member State. Such debts could arise not only from economic activities carried on in the course of performing public contracts, but also from activities outside that framework. In addition, even if that contractor has not carried on any economic activity in the contracting authority's Member State, it is legitimate for that State's authorities to wish to be able to satisfy themselves of that fact.

42 Consequently, national legislation cannot be regarded as being contrary to the rules of the Union solely because it lays down a registration obligation for the purposes of such a check also for contractors established in a Member State other than that in which the public contract is to be awarded.

43 It is appropriate to point out, secondly, that according to the Court's settled case-law, the first paragraph of Article 24 of Directive 93/37 lists, exhaustively, the grounds capable of justifying the exclusion of a contractor from participation in a contract which relate solely to its professional qualities. Moreover, the Court also added that Member States have the right to provide, in addition to the grounds for exclusion expressly referred to in that provision, for grounds for exclusion designed to ensure observance of the principles of equal treatment and transparency (see, to that effect, Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraphs 43, 44 and 47, and Case C-538/07 *Assitur* [2009] ECR I-4219, paragraphs 20 and 21).

44 A registration obligation such as that in question in the main proceedings cannot be regarded as an additional ground for exclusion, in addition to those exhaustively listed in the first paragraph of Article 24 of Directive 93/37, if it is designed as a means of implementing that provision, solely to check the evidence that a contractor wishing to participate in a public contract does not fall fowl of one of those grounds for exclusion, particularly those relating to the payment of social security contributions and taxes.

45 In this case, for the purposes of the registration in question, commonly referred to as ‘registration for tax purposes’ in the documents in the Court file, the contractor concerned must submit, to the authority competent for that purpose, an application, accompanied by the certificates provided for in the second paragraph of Article 24 of Directive 93/37 and required by the applicable national legislation which lays down the corresponding grounds for exclusion.

46 Thus, a contractor established in another Member State must produce to that authority the certificates issued by the authorities of its Member State of establishment which it should usually submit, under the above provision of Directive 93/37, to the contracting authority concerned. Also, if such a contractor had already carried on an economic activity in the contracting authority’s Member State, it should be able to submit the certificates issued by the competent authorities of that State or else, if it had not carried on such an activity, be in a position to declare that fact. The authority in question must, for its part, certify the absence of grounds for exclusion by granting a registration certificate which will, subsequently, have to be submitted to the contracting authority for the purposes of participation in the public contract in question.

47 Under the second paragraph of Article 24 of Directive 93/37, where the contracting authority requires of the contractor proof that the cases referred to in points (e) and (f) of that provision do not apply to it, the authority is to accept as sufficient evidence a certificate issued by the competent authority in the Member State concerned.

48 That provision does not preclude a check being made, before the tenders are opened, of the certificates submitted by a contractor or of the absence, in its case, of grounds for exclusion in general.

49 None the less, that check must be confined to the professional qualities of contractors, for the purposes of the first paragraph of Article 24 of Directive 93/37, particularly as regards the fulfilment of their obligations in respect of social security contributions and taxes. In addition, as the Advocate General points out in paragraph 52 of her Opinion, it may not complicate or delay the participation of the contractor concerned in the procedure for the award of the public contract or give rise to excessive administrative charges.

50 It is for the referring court to determine whether the registration obligation in question in the main proceedings satisfies those criteria.

51 The referring court must, in particular, examine whether the requirements laid down in Article 2(1)(7) of the Royal Decree of 1978, under which a company is excluded from participating in a public contract if among its directors, managers or persons empowered to enter into obligations on its behalf are persons who are prohibited from performing such tasks under the national legislation, and in Article 2(1)(12) of the Royal Decree of 1978, under which the participation of a contractor in a procedure for the award of a public contract is precluded if it does not possess ‘sufficient financial, administrative and technical resources to ensure fulfilment of [its] tax and social security obligations’, on which points the contents of the court file do not provide sufficient materials for their determination, may be authorised by the first paragraph of Article 24 of Directive 93/37.

52 It is, however, apparent from the contents of the Court file that the mere production, to the contracting authority, of the application for registration accompanied by the submission of the tender constituted sufficient compliance, in the case in the main proceedings, to admit the contractors concerned to participate in the contract at issue, since the decision to award the contract could not be made before the conclusion of the registration procedure.

53 In view of the foregoing, the reply to the first question is that the law of the Union is to be interpreted as not precluding national legislation which imposes on a contractor established in another Member

State, in order to be awarded a contract in the contracting authority's Member State, an obligation to hold a registration, in the latter Member State, certifying that none of the grounds for exclusion listed in the first paragraph of Article 24 of Directive 93/37 applies to the contractor, provided that such obligation does not hinder or delay the contractor's participation in the public contract in question or give rise to excessive administrative charges, and provided that its sole objective is to check the professional qualities of the contractor concerned, for the purposes of that provision.

The second question

54 By this question, the national court is asking, in essence, whether the general principles of the law of the Union on public procurement and the second paragraph of Article 24 of Directive 93/37 are to be interpreted as precluding national legislation which provides for a check, by an authority such as that in question in the main proceedings, of certificates issued by the tax and social security authorities of other Member States attesting that contractors established in those Member States have fulfilled their obligations in the areas concerned.

55 In that regard, it is appropriate to point out that the provisions of Directive 93/37 do not, as a matter of principle, preclude national law from entrusting a check of the absence of grounds for exclusion, for the purposes of the first paragraph of Article 24 of that directive, to an authority other than the contracting authority.

56 As the Advocate General points out in paragraph 69 of her Opinion, such a check, prior to the opening of tenders, may be appropriate for the purposes of the proper conduct of a public contract. Indeed, in view of the possibly insufficient technical expertise and limited organisational capacities of certain contracting authorities, such as, for example, a local authority of modest size or an organisation with few staff, it may be appropriate to entrust to a specialist authority, with powers at the national or local level, the administrative treatment and the centralised checking of the evidence concerning the professional qualities of the candidates for different public contracts.

57 It is appropriate to add that the Court, in its judgment in *Michaniki*, has already accepted, under well defined conditions, the possibility that an authority other than the contracting authority may adopt a decision leading to the exclusion of a contractor from a procedure for the award of a public works contract. In that regard, it is irrelevant that the subject matter of the case which led to that judgment was not a ground for exclusion under Directive 93/37, but a ground for exclusion established in addition to those defined by that directive and intended to ensure compliance with the principles of equal treatment and transparency.

58 The Court must also consider whether the composition and powers of the authority to which, under the national legislation at issue in the main proceedings, that check is entrusted can be reconciled with the objective of ensuring compliance with the law of the Union on public procurement.

59 In that regard, it is clear, first, from the contents of the Court file that, under that legislation, the competent authorities in respect of registration, 'Registration Committees', are established at provincial level with tripartite composition. Under Article 16 of the Royal Decree of 1978, they are composed of three officials appointed by the public authorities, one of whom assumes the chairmanship, and six persons, three of whom are appointed on the proposal of the organisations representing employers and three on the proposal of the organisations representing workers in the construction sector in the province in question.

60 The majority on those authorities is composed of persons representing private interests and nothing in the Court file indicates that their participation in them is purely consultative.

61 Such authorities, in view of their composition, cannot be regarded as impartial and neutral. Indeed, that majority participation of representatives of private interests could lead those representatives to obstruct the access of other operators to the market concerned and, in any event, because such operators are obliged to submit to the determination of their potential competitors as regards their personal and professional qualities, such an authority involves a situation of unequal conditions of competition and lack of objectivity and impartiality, inconsistent with a system of undistorted competition, such as that laid down by the law of the Union (see, by analogy, Case C-49/07 *MOTOE* [2008] ECR I-4863,

paragraphs 51 and 52 and the case-law cited, and Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 51 and case-law cited).

62 It is appropriate, secondly, to draw attention to the fact that, as seems to be clear from the referring court's question, the legislation at issue in the main proceedings confers on registration committees power to examine the validity of the certificates issued by the competent authority of the Member State concerned as regards contractors' fulfilment of their social security and tax obligations.

63 The Royal Decree of 1978 contains no provision expressly conferring such power on registration committees, and the scope of such power is not set out in the referring court's request. If that power must involve the exercise of a check as regards the substance of the requirements which underlie the issue of certificates by the competent authorities of the Member States concerned, it would be clearly incompatible with the first paragraph of Article 24 of Directive 93/37, which does not provide for such a ground for exclusion, and with the second indent of the second paragraph of that article, which unequivocally requires the acceptance of those certificates as sufficient evidence of the fulfilment of contractors' social security and tax obligations. Moreover, a ground for exclusion founded on a check as regards the substance of those certificates would not be justified on the basis of the result reached by the Court in *Michaniki*.

64 Therefore, as the Advocate General points out in paragraphs 82 to 84 of her Opinion, the authority responsible for examining those certificates has no discretion of its own as regards their substance and must confine itself to a summary check of their formal elements. It may thus check only the authenticity of the certificates, whether they were established on a sufficiently recent date and whether the authority which issued them manifestly lacked the power to do so.

65 It is for the referring court to determine the situation of the appellants in the main proceedings in the light of the rulings on interpretation set forth above. However, it does not appear that the composition of the Registration Committee and the extent of the check it carried out could have affected that situation, since, as is clear from the contents of the Court file, the appellants obtained their registration without difficulty. The reason why they were not admitted to participate in the contract in question in the main proceedings is based on the fact that their respective applications for registration had been submitted late, that is to say after the expiry of the time-limit for submitting tenders, in circumstances in which the requirement to hold a registration is not regarded, in itself, as being contrary to the law of the Union.

66 In the light of the foregoing considerations, the reply to the second question is that the law of the Union is to be interpreted as precluding national legislation under which the checking of the certificates issued to a contractor of another Member State by the tax and social security authorities of that Member State is entrusted to an authority other than the contracting authority where:

– the majority on that other authority is composed of persons appointed by the employers' and workers' organisations in the construction sector of the province in which the public contract in question is to be awarded, and

– that power extends to a check on the substance of the validity of those certificates.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. The law of the Union is to be interpreted as not precluding national legislation which imposes on a contractor established in another Member State, in order to be awarded a contract in the contracting authority's Member State, an obligation to hold a registration,

in the latter Member State, certifying that none of the grounds for exclusion listed in the first paragraph of Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts applies to the contractor, provided that such obligation does not hinder or delay the contractor's participation in the public contract in question or give rise to excessive administrative charges, and provided that its sole objective is to check the professional qualities of the contractor concerned, for the purposes of that provision.

2. The law of the Union is to be interpreted as precluding national legislation under which the checking of the certificates issued to a contractor of another Member State by the tax and social security authorities of that Member State is entrusted to an authority other than the contracting authority where:

– **the majority on that other authority is composed of persons appointed by the employers' and workers' organisations in the construction sector of the province in which the public contract in question is to be awarded, and**

– **that power extends to a check on the substance of the validity of those certificates.**

[Signatures]

---

* Language of the case: French.

EU:C:2010:198

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 15 April 2010 [1](1)

Case C-74/09

Bâtiments et Ponts Construction SA and Others

(Reference for a preliminary ruling from the Cour de cassation (Belgium))

(Freedom to provide services – Public works contracts – Qualitative criteria – Professional quality – Grounds for exclusion – Proof of due payment of taxes and social security contributions – Requirement that contractors be registered in national territory – Application of the registration requirement also to foreign tenderers – Recognition of certificates issued by the authorities of the country of origin – Directive 93/37/EEC)

I – Introduction

1. Like the *Rüffert* case, (2) these preliminary-ruling proceedings concern the social components of public procurement law. They raise the question of the means by which the authorities of the Member State in which a public works contract is to be awarded may verify whether the building contractors party to the public procurement procedure fulfil their obligations relating to the payment of taxes and social security contributions.

2. The background to this case is formed by the procurement law section of the refurbishment and renovation of the famous Berlaymont Building in Brussels in which the European Commission has its principal administrative headquarters. (3) A consortium whose member companies were not all registered in Belgium for tax purposes was among those party to the procedure for awarding the work. However, at that time such registration for tax purposes was provided for in Belgian procurement law and was also one of the tender conditions in the present case. It served primarily to ensure that tenderers for public works contracts had duly fulfilled, and would duly fulfil, their obligations relating to the payment of taxes and social security contributions.

3. The Court is asked to clarify whether such a registration requirement can be applied also to tenderers established in other Member States or whether the contracting authority must be content with the submission of certificates issued by the authorities of the land of origin attesting to the due payment of taxes and social security contributions.

II – Legal framework

A – *EU law background*

4. The EU law background to this case is defined by Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (4) – now no longer

in force –, in particular by Articles 24 to 29 thereof concerning the qualitative criteria (Title IV, Chapter 2, of Directive 93/37).

5. Article 24 of Directive 93/37 was worded as follows:

‘Any contractor may be excluded from participation in the contract who:

…

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or those of the country of the contracting authority;

…

Where the contracting authority requires of the contractor proof that none of the cases quoted in (a), (b), (c), (e) or (f) applies to him, it shall accept as sufficient evidence:

– …

– for points (e) or (f), a certificate issued by the competent authority in the Member State concerned.

…’

6. Article 28 of Directive 93/37 provided:

‘Within the limits of Articles 24 to 27, the contracting authority may invite the contractor to supplement the certificates and documents submitted or to clarify them.’

7. Article 29 of Directive 93/37 contained the following rules:

‘(1) Member States who have official lists of recognised contractors must adapt them to the provisions of Article 24(a) to (d) and (g) and of Articles 25, 26 and 27.

(2) Contractors registered in the official lists may, for each contract, submit to the contracting authority a certificate of registration issued by the competent authority. This certificate shall state the reference which enabled them to be registered in the list and the classification given in this list.

(3) Certified registration in the official lists by the competent bodies shall, for the contracting authorities of other Member States, constitute a presumption of suitability for works corresponding to the contractor’s classification only as regards Articles 24(a) to (d) and (g), 25, 26(b) and (c) and 27(b) and (d).

Information which can be deduced from registration in official lists may not be questioned. However, with regard to the payment of social security contributions, an additional certificate may be required of any registered contractor whenever a contract is offered.

The contracting authorities of other Member States shall apply the above provisions only in favour of contractors who are established in the country holding the official list.

(4) For the registration of contractors of other Member States in an official list, no further proofs and statements may be required other than those requested of nationals and, in any event, only those provided for under Articles 24 to 27.

(5) Member States holding an official list shall communicate to other Member States the address of the body to which requests for registration may be made.'

8. Since the award procedure at issue was carried out before 31 January 2006, Directive 2004/18/EC (5) is of no relevance to the present case.

9. In addition, reference should be made to the provisions on freedom to provide services. However, contrary to what is taken as a basis in the order for reference and some of the documents submitted to the Court, recourse in that regard must be had not to Articles 49 and 50 EC, but to Articles 59 and 60 of the EC Treaty. (6) That is because the facts in the main proceedings took place before 1 May 1999, the date on which the Amsterdam Treaty entered into force. (7)

B – *National law*

The Royal Decree of 1977

10. As regards Belgian law, the Royal Decree of 22 April 1977 concerning public works, supply and service contracts (8) is relevant. Section 2 of this decree, which is headed 'Drawing up the tender' contains an Article 15 which provides, in extract, as follows:

'…

(3) A Belgian tenderer which employs staff to whom the Law of 27 June 1969 amending the Decree-Law of 28 December 1944 on social security for workers applies must, for his tender to be regarded as valid, attach thereto a certificate of the National Social Security Office stating that he has paid social security and subsistence protection contributions or present such a certificate to the administration before the opening of tenders …

(4) A foreign tenderer must, for his tender to be regarded as valid, attach thereto or present to the administration before the opening of tenders:

(a) a certificate issued by the competent authority stating that the tenderer has complied with its obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which it is established …

…

(7) A tenderer must, for his tender to be regarded as valid, be registered as a contractor pursuant to Article 299bis of the Income Tax Code and Article 30bis of the Law of 27 June 1969 amending the Decree-Law of 28 December 1944 on social security for workers.'

The Royal Decree of 1978

11. The detailed rules on registration for tax purposes provided for in Article 15(7) of the Royal Decree of 1977 are laid down in the Royal Decree of 5 October 1978. (9) Section 1 of this decree lays down the 'Conditions to be satisfied in order to be registered as a contractor' and contains an Article 2 which provides as follows:

'Registration as a contractor … shall be granted only to contractors which satisfy the following conditions:

…

2. in respect of an activity within the meaning of Article 1, they must be registered in the companies' register or professional register in accordance with the requirements laid down in the legal provisions of the Member State in which they are established;

…

7. where a company is involved, the directors, managers or persons empowered to enter into obligations on behalf of the company may not include any persons who are prohibited for performing such tasks under Royal Decree No 22 of 24 October 1934 referred to in subparagraph 6;

…

10. they may not have committed, during the five year period preceding the application for registration, any repeated or serious infringements relating to tax obligations …;

11. they may not, at the time of registration, be in arrears with the payment of taxes, contributions to be levied by the National Social Security Office or contributions levied by the Subsistence Protection Fund or on its behalf; …;

12. they must possess sufficient financial, administrative and technical resources to ensure fulfilment of their tax and social security obligations.'

12. Under Article 8 of the Royal Decree of 1978, in order to register as a contractor it is necessary to submit an application to the Chairman of the Registration Committee (10) of the province in which the applicant has its principal place of business. In the case of applicants which are not established in Belgium, the committee of the province in which the construction site in question is situated is to be competent.

13. Article 10 of the Royal Decree of 1978 provides as follows:

'(1) For it not to be inadmissible, the following documents must be attached to the application:

…

3. from each applicant: a copy of the entry in the professional register on the conditions laid down in the legal provisions of the country in which it is established …

…

5. from a [foreign] applicant: certificates issued by the competent authority in the Member State concerned stating and confirming that it is not in arrears with the payment of taxes or social security contributions in that Member State.

…

(2) The registration committee within the meaning of Section 4 below can require the applicant to provide further documents or information which it deems necessary to determine whether or not the conditions laid down in Article 2(1) have been fulfilled.

…'

14. The composition of the registration committee is governed by Article 16 of the Royal Decree of 1978:

'(1) Each registration committee shall be composed of nine members which We shall appointed in accordance with the procedures set out below:

1. three official members shall be appointed at the proposal of, respectively,

(a) the Minister for Social Security;

(b) the Minister for Finance;

(c) the Minister for Employment and Work;

2. three members shall be appointed at the proposal of the organisations representing employers in the construction industry;

3. three members shall be appointed at the proposal of the organisations representing employees in the construction industry;

…

(2) Each committee shall be chaired by one of the officials within the meaning of Article 1(1)(a) and (b) who shall be appointed by Us for this purpose at the proposal of the two ministers referred to therein …'

III – Facts and main proceedings

15. The Berlaymont Building was constructed between 1963 and 1967 on land in Brussels acquired by the Belgian State in 1960 and has served ever since as the principal administrative headquarters of the European Commission. (11) However, between 1992 and 2004 the Commission was unable to use the building as it had to be renovated and have its asbestos removed from it.

16. On 18 September 1990 Berlaymont 2000 SA, (12) a limited company incorporated under Belgium law, was set up for the purpose of this refurbishment and renovation work. Three credit institutions had a holding in the company in addition to Régie des Bâtiments, (13) a Belgian legal person established under public law. Berlaymont 2000's responsibilities included drawing up the relevant conditions, a programme of work, and the budget for the construction work necessary for the refurbishment and renovation. The company was granted permission to build on the Berlaymont site.

17. On 23 December 1994 Berlaymont 2000 invited tenders for the refurbishment and renovation work on the Berlaymont Building, (14) the value of which was estimated at around BEF 1.4 billion. (15) In respect of this invitation to tender special conditions were drawn up and a contract notice was published in the *Official Journal of the European Communities*. (16) Article 1.G of the special conditions stated: 'As regards the works which form the subject-matter of the present contract, the contractor must be registered in Belgium.'

18. An amendment to the award notice appeared in the Official Journal (17) on 16 February 1995; it provided additional information, inter alia with regard to the registration requirement on tenderers. In particular Article 1.G of the special conditions was reworded as follows:

'As regards the works which form the subject-matter of the present contract, the contractor must furnish proof that it is regarded as having fulfilled its obligations relating to social security contributions, tax and VAT; this proof must be contained in a "registration".

The application for registration is to be made in accordance with the [Royal Decree of 1978].

As regards the validity of the tender (at the time it is submitted), it will be sufficient for a copy of the application for registration to be attached to the tender. No decision to award the contract will be taken before the competent authority has ruled on the application (for registration).'

Finally, the amendment notice stated:

'In its tender, the tenderer will confirm that it has taken account of this amendment notice No 1, failing which its tender will be void.'

19. 16 March 1995 was set as the time-limit for submitting tenders.

20. The Belgium-registered undertaking Bâtiments et Ponts Construction SA (BPC) and the German undertaking WIG Industrieinstandhaltung GmbH (WIG), which did not hold a registration in Belgium at that time, established the consortium BPC-WIG in order to participate in the Berlaymont tender proceedings. WIG subsequently traded under the name Thyssenkrupp Industrieservice GmbH; during

the preliminary-ruling proceedings before the Court it changed its name for a second time to WISAG Produktionsservice GmbH (WISAG).

21. On 16 March 1995 the BPC-WIG consortium submitted a tender for the Berlaymont construction contract. It did not attach to this tender confirmation of either its own registration or that of its member undertaking WIG in Belgium. The applications for registration in Belgium were not submitted until after the expiry of the time-limit for submitting tenders for the Berlaymont contract, that is to say by BPC-WIG on 28 April 1995 and by WIG on 3 May 1995. These registrations were not granted until July 1995, which was after the Berlaymont contract was awarded. (18)

22. However, a certificate issued by the German tax authorities (19) dated 4 August 1994 and a certificate issued by the German social security body (20) dated 3 February 1995 were attached to the tender submitted by BPC-WIG. They showed that the German tax administration had no objections to WIG's participation in a public works contract; for its part, the German social security administration confirmed that all social security contributions had always been paid punctually by WIG.

23. On 20 June 2005 the board of directors of Berlaymont 2000 awarded the contract to a rival consortium. BPC and WIG brought administrative proceedings against this decision before the Belgian Council of State. (21) On 10 March 1999 the Council of State dismissed the proceedings brought by them on the grounds that WIG could not demonstrate registration in Belgium at the time the tender was submitted and had not submitted a relevant application, and therefore BPC-WIG was ineligible as a contractor from the outset. (22)

24. In parallel with the administrative proceedings before the Belgian Council of State BPC and WIG brought before the Tribunal de première instance de Bruxelles (23) on 18 June 1996 a civil action for damages for the detriment caused to them by their exclusion from the award procedure. By judgment of 5 November 2002 that action was dismissed as inadmissible since at the time they participated in the invitation to tender the applicants had failed to furnish the required proof of their registration in Belgium, and thus failed to submit a valid tender, and consequently had no legal interest in bringing an action for damages.

25. On 15 April 2003 BPC and WIG brought an appeal against the judgment of the Tribunal de première instance de Bruxelles before the Cour d'appel de Bruxelles (24) which, however, upheld the decision at first instance by judgment of 14 March 2007. (25) As grounds, the Cour d'appel pointed out that the applicants had not attached to the tender any proof that a registration application had been made by WIG and BPC-WIG. Although the certificates issued by the German tax and social security authorities in respect of WIG were also necessary for participation in the award procedure for other reasons, they could not have substituted for registration in Belgium, which was also necessary. Since the applicants had thus failed to satisfy an essential procedural requirement, their tender was invalid and that justified their immediate exclusion from the award procedure.

26. In consequence of an appeal on a point of law brought by BPC and WIG on 28 September 2007, the civil action is now pending before the Belgian Court of Cassation, the referring court. (26)

IV – Order for reference and procedure before the Court

27. By judgment of 22 January 2009, received at the Court on 18 February 2009, the Belgian Court of Cassation stayed its proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is the obligation to hold a registration in order to be awarded a public contract in Belgium, such as that imposed by Article 1.G of the special conditions applicable in the present case, contrary to the principle of freedom of movement within the European Union and to the second paragraph of Article 24 of Directive 93/37/EEC, of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, if it had to be interpreted as permitting the Belgian contracting authority to exclude from the tender procedure a foreign contractor who does not hold a registration but has produced equivalent certificates from his national authorities?

(2) Is it contrary to the principle of freedom of movement within the European Union and to the second paragraph of Article 24 of Directive 93/37 to grant a Belgian contracting authority the power to require foreign tenderers to submit to a Belgian authority – the committee for the registration of contractors – for assessment of the validity of the certificates which have been issued to them by the tax and social security authorities of their State, attesting that they have fulfilled the obligations imposed on them relating to tax and social security?'

28. In the proceedings before the Court, in addition to BPC and WIG as the applicants and Berlaymont 2000 as the defendant in the main proceedings, the Kingdom of Belgium and the European Commission made written and oral observations. (27) The Czech Republic also took part in the written procedure.

V – Assessment

A – *Admissibility of the request for a preliminary ruling*

29. The Commission expresses doubts in two respects as to the admissibility of the request for a preliminary ruling, which Berlaymont 2000 shared at the hearing before the Court. Firstly, the order for reference does not contain the necessary information concerning the factual and legislative context of the dispute in the main proceedings, and, secondly, the Court of Cassation does not comment on the reasons which led it to make a reference to the Court.

30. According to case-law, if the Court is to be in a position to give helpful answers to the questions referred to it, it is necessary for the national court to define the factual and legislative context of the questions it asks or, at the very least, to explain the factual circumstances on which those questions are based. (28) Furthermore, it is essential that the national court should give at the very least some explanation of the reasons for the choice of the provisions of European law of which it requests an interpretation and on the link it establishes between those provisions and the national legislation applicable to the dispute.(29) In this context it should be borne in mind that the information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice. (30)

31. The order for reference from the Belgian Court of Cassation is certainly not a textbook example of a request for a preliminary ruling. It lacks structure and a clear and complete account of the facts, the legal framework and the referring court's considerations on the relevance of its questions. Our Court's Information Note on references from national courts for a preliminary ruling (31) would appear to have been disregarded in the present case.

32. None the less, the deficiencies in the order for reference are not so serious as to render inadmissible the request for a preliminary ruling.

33. Firstly, as regards the *factual and legislative context*, although the Court of Cassation does not provide a specific account of the facts in the main proceedings and makes very few observations on the provisions of national and European law which it considers to be relevant, a reading of the order for reference shows what is at issue in the main proceedings and the context in which the questions have arisen. The relevant explanations are evident in particular from the lengthy section in which the Court of Cassation quotes verbatim from the grounds of the Cour d'appel judgment which is contested before it; if they are read with a degree of indulgence the most important elements of the factual and legislative context of the main proceedings can be reconstructed. The technique of referring to the judgment of the court below can probably be explained by the role of the Court of Cassation as a court of judicial review.

34. Furthermore, the parties to the main proceedings made additional comments in their written and oral statements which made it easier for the Court to understand the context in which the questions were referred. At the same time, the observations made by these parties show that the information in the order for reference enabled them themselves effectively to adopt a position on those questions. (32)

35. Secondly, as regards the *relevance* of the questions referred, although the referring court provides no separate information thereon, this deficiency does not warrant a declaration that the request for a preliminary ruling is admissible. In relation to questions which national courts refer to it for a preliminary ruling, the Court presumes, according to constant case-law, that they are relevant. (33) It considers that this presumption may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of Community law referred to in the questions bears no relation to the actual facts of the main action or to its purpose; (34) therefore, in other words the lack of relevance must be obvious.

36. However, it cannot be concluded in the present case that the questions referred are obviously irrelevant to the resolution of the dispute in the main proceedings. On the contrary, this resolution depends crucially on the Court's answers to the questions. By their appeal on a point of law the applicants in the main proceedings allege that there has been an infringement of Directive 93/37 and Articles 49 and 50 EC. A glance at the passages of the Cour d'appel judgment cited in the order for reference shows that the entire national dispute revolves around the interpretation of those provisions of European Union law.

37. Finally, the Commission further alleges that the referring court made no observations on the applicability of Directive 93/37. However, in the case of construction work on a scale such as that covered by the Berlaymont contract, it seems obvious to me that the subject-matter in question falls within the scope of the provisions of European Union law on the award of public works contracts. Moreover, the parties to the proceedings agree on this point.

38. Altogether, I see no adequate grounds for declaring inadmissible the present request for a preliminary ruling.

B – *Substantive assessment of the questions referred*

39. The Belgian rules on the registration of contractors in force (35) at the time the Berlaymont contract was granted are to be considered in the light of European Union law in two respects. Firstly, it is asked whether it is compatible with Directive 93/37 and the 'principle of freedom of movement' for registration for tax purposes in national territory to be made a prerequisite also for foreign contractors taking part in award procedures. Secondly, the issue is whether it infringes the abovementioned provisions of European Union law to entrust examination of tax and social security certificates from other Member States to an authority other than the contracting authority.

40. The opinions of the parties to the proceedings are divided on these two issues: whilst the applicants in the main proceedings, the Czech Government and the Commission consider that provisions such as those at issue in this case are incompatible with the requirements of European Union law, the defendant in the main proceedings and the Belgian Government take the opposite view. However, in that respect the Belgian Government limits its observations to the second question referred. (36)

1. Compatibility of a registration requirement with European Union law (first question referred)

41. By its first question the referring court essentially seeks to ascertain whether a requirement relating to registration for tax purposes laid down in national law and the tendering conditions can be relied on also as against contractors from other Member States as a condition for their participation in procedures for the award of public contacts. The Court is requested to consider this question with regard to the 'principle of freedom of movement within the European Union' and to the second paragraph of Article 24 of Directive 93/37.

42. In this case only the provisions on freedom to provide services (Article 59 and 60 of the EC Treaty) (37) are to be taken into account among the fundamental freedoms of the European single market.

43. However, it should be noted that, in a field which has been exhaustively harmonised at European Union level, a national measure must be assessed in the light of the provisions of that harmonising measure and not of those of primary law. (38) Although Directive 93/37 does not lay down

comprehensive rules of European Union law in relation to public works contracts, but aims simply to coordinate national procedures for the award of such contracts, (39) the first paragraph of Article 24 of Directive 93/37 at issue in this case specifically contains, in connection with the contractors' professional quality, an exhaustive list of possible reasons why a participant may be excluded from the award procedure. (40)

44. Therefore, with regard to the professional qualitative criteria Directive 93/37 provides within its scope for exhaustive harmonisation. Consequently, the first question must be considered solely with regard to Directive 93/37, but its provisions must be interpreted and applied so as to render them consistent with the fundamental freedom to provide services which it serves to realise. (41)

45. It should first be noted that registration for tax purposes under the Royal Decree of 1978 should not be confused with registration in an official list of recognised contractors within the meaning of Article 29 of Directive 93/37. The parties to the proceedings agree that the registration requirement at issue in this case does not fall within the scope of Article 29. In any event, Article 29 would not be capable of justifying a mandatory registration requirement such as that in Belgium. The provision is merely intended to make it easier for foreign building contractors to take part in award procedures by providing for recognition of their registration in the lists of eligible contractors held in the relevant countries of origin. (42)

46. Nor is the fact that a contractor has failed to register for tax purposes in national territory included among the grounds for exclusion laid down expressly in the first paragraph of Article 24 of Directive 93/37. (43)

47. However, it remains to be examined whether the registration procedure at issue in this case ultimately constitutes a procedure for the application of one of the exclusion criteria listed in the first paragraph of Article 24 of Directive 93/37. It is conceivable that this registration serves officially to determine and certify the professional quality of contractors for the purposes of Article 24, in particular their reliability with regard to the payment of taxes and social security contributions *in the Member States in which the service is provided* (subparagraphs (e) and (f) of the first paragraph of Article 24). (44) Not least Article 2(1)(10) and (11) of the Royal Decree of 1978, which appears to refer to the fulfilment of tax and social security obligations *in Belgium*, militates in favour of this view. (45)

48. The request for a preliminary ruling is not, however, explicit as regards the subject-matter and purposes of the registration procedure and the observations by the parties to the proceedings before the Court do not give a clear picture in this regard. It will therefore be for the referring court, which alone has jurisdiction to interpret national law, (46) to make the necessary findings on the subject-matter and purposes of the registration procedure.

49. In the event that a registration procedure such as that provided for in the Royal Decree of 1978 does in fact prove to be a procedure to determine and certify the reliability of contractors, it is in principle consistent with the objectives of Directive 93/37, which include equal treatment of all tenderers (47) and establishment of the conditions for effective and undistorted competition amongst them. (48)

50. To precisely that end, the first paragraph of Article 24 of Directive 93/37 permits contractors who have not fulfilled obligations relating to the payment of social security contributions or taxes, or otherwise lack the professional quality to participate in the contract, in particular professional honesty, solvency and economic and financial capacity, to be excluded from participation in it. (49) Their exclusion is intended to prevent distortions of competition: it is necessary to avoid 'black sheep', who do not pay their taxes and social security contributions, for example, submitting, ultimately at the public's expense, more favourable tenders than their competitors and thus obtaining contracts by unfair methods, particular since those contracts are normally funded by taxes.

51. Article 24 of Directive 93/37 is, however, based on the idea that the reliability of tenderers can be assessed in the award procedure itself and there is no need for any preventative control in a separate procedure ahead of the award procedure. This provision expresses a fundamental value inherent in the freedom to provide services: A system of preventative control on contractors by a prior authorisation or registration procedure renders the provision of services less attractive and is justified only where

subsequent control must be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued. (50)

52. Accordingly, registration of contractors can be made a prerequisite for their admission to award procedures only where it does not in fact prove to be a prior control and either complicate or delay the participation of the contractors in question in that award procedure, and where it does not impose additional administrative costs on them. (51)

53. It is for the referring court to examine whether or not the registration procedure provided for in Belgian law, which is at issue in this case, satisfies these requirements. According to the information before the Court, that procedure at least entails no additional administrative costs and merely requires the submission of documents which had to be available in any event under the first and second paragraphs of Article 24 of Directive 93/37. Furthermore, the registration procedure in the present case does not result in any loss of time since it was expressly provided that the mere submission of an application for registration was sufficient to submit a tender in the Berlaymont award procedure and no award would be made until the registration procedure had been concluded (see Article 1.G of the special conditions, as amended). (52)

54. Therefore, on closer examination the registration procedure in the present case does not necessarily constitute a preventative authorisation procedure prior to the award procedure. Instead, the assessment of the foreign contractors' reliability with regard to tax and social security contributions could be carried out in parallel with the award procedure, without entailing any additional time and costs. In these circumstances there are no fundamental doubts as to the compatibility of this registration procedure with Article 24 of Directive 93/37 and the values of the freedom to provide services which lie behind it.

55. Nor does anything to the contrary follow from the judgment in *Commission* v *Belgium*. (53) Although the infringement proceedings at that time had as their subject-matter provisions of Belgian law which also related to the registration of building contractors for tax purposes which is at issue in this case, in that case the Court did not examine the registration requirement per se in terms of its compatibility with European Union law, (54) but merely the substantial tax and social security disadvantages which Belgian law placed on building contractors and their contracting authorities for failure to register. (55) The present case does not raise such problems.

56. The Commission also objects that the assessment of a contractor as part of the registration procedure goes, in terms of its scope, beyond what is permitted under the first paragraph of Article 24 of Directive 93/37. In that respect it refers to Article 2(1) of the Royal Decree of 1978, or more specifically to subparagraphs (7) and (12) thereof.

57. That objection is not convincing in my view. Although it is true that subparagraphs (7) and (12) of Article 2(1) of the Royal Decree of 1978 have no verbatim equivalent in the first paragraph of Article 24 of Directive 93/37, both provisions pursue the same objective as that underlying the first paragraph of Article 24, namely to determine the reliability of contractors.

58. For example, the first provision (Article 2(1)(7) of the Royal Decree of 1978) permits registration to be denied to companies whose management is prohibited from carrying on a commercial activity on account of a previous bankruptcy or criminal conviction. This provision has the same objective as subparagraphs (a) to (d) of the first paragraph of Article 24 of Directive 93/37: the aim is to ensure that only contractors whose solvency and professional honesty is not questionable on account of previous misdemeanours take part in award procedures. Naturally, that also means that the management of a company must provide a complete guarantee of professional honesty, otherwise it would be easy to circumvent the criterion relating to professional quality by founding a company.

59. The second provision (Article 2(1)(12) of the Royal Decree of 1978) permits registration to be denied to contractors who do not possess sufficient financial, administrative and technical resources to ensure fulfilment of their tax and social security obligations. Subparagraphs (e) and (f) of the first paragraph of Article 24 of Directive 93/37 have no other purpose. Although the provisions of the directive deal, in terms of their wording, only with establishing any tax or social security negligence of a contractor *in the past*, subparagraphs (e) and (f) of the first paragraph of Article 24 of Directive 93/37

seek, in terms of their sense and purpose, to make it possible to pursue precisely the objective sought by Article 2(1)(12) of the Royal Decree of 1978: the aim is to *predict* whether or not a participant in a procedure for the award of a public works contract can be expected to pay his taxes and social security contributions in accordance with his statutory obligations. If this question cannot be answered in the affirmative, it must be feared that there will be the abovementioned distortion of competition in the award procedure. (56)

60. Finally, some of the parties to the proceedings (57) submit that the examination to which a contractor is subject as part of the registration procedure goes beyond what is necessary and is therefore disproportionate. The Belgian authorities had to be content with certificates issued by the competent authorities of a contractor's country of origin, such as those produced by WIG in the present case.

61. This objection also falls short. Subparagraphs (e) and (f) of the first paragraph of Article 24 of Directive 93/37 expressly permit controls on the reliability of a contractor with regard to the payment of tax and social security contributions, not only in respect of his country of origin but also in respect of the country of the contracting authority, that is to say the Member State in which the contractor would like to tender for a public works contract.

62. As the Czech Government points out, the implication is that contractors can operate as service providers in several Member States. Accordingly, the same contractor may have failed to fulfil his tax or social security obligations in several Member States, and not only in his country of origin. Therefore, the mere submission of clearance certificates from his country of origin does not permit any definitive conclusion to be reached as to his reliability with regard to the payment of tax and social security contributions. The Commission also acknowledged this fact at the hearing.

63. Consequently, it must be possible for the authorities in the country of the contracting authority to subject contractors to a separate examination for fulfilment of obligations in relation to tax and social security contributions *in national territory*. Accordingly, the second indent of the second paragraph of Article 24 of Directive 93/37 – unlike the first indent – permits not only the examination of certificates from the country of origin, but also the examination generally of certificates 'issued by the competent authority in the Member State concerned'.

64. To summarise, therefore:

The freedom to provide services and Directive 93/37 do not preclude a requirement, laid down in national law or tender conditions, relating to the registration for tax purposes of contractors from other Member States as a condition for their participation in a procedure for the award of public contracts, provided that the registration procedure

– does not complicate or delay the participation of those contractors in an award procedure and does not impose additional administrative costs on them, and

– is limited, in terms of its subject-matter, to establishing and certifying the professional quality and reliability of those contractors for the purpose of the first paragraph of Article 24 of Directive 93/37.

2. Compatibility with European Union law of the examination of foreign proof by an authority other than the contracting authority (second question referred)

65. By its second question the referring court essentially seeks to ascertain whether foreign contractors can be obliged, as a condition for their participation in an award procedure, to submit certificates issued by the authorities of their country of origin attesting to the due payment of taxes and social security contributions to an authority other than the contracting authority – in the present case the registration committee – for an assessment of their validity. The Court is again asked to examine this question having regard to the 'principle of freedom of movement within the European Union' and to the second paragraph of Article 24 of Directive 93/37.

66. As mentioned above, (58) the answer to this question turns solely on Directive 93/37, which, however, must for its part be interpreted and applied solely in the light of the principles relating to the

freedom to provide services.

67. On closer inspection, the question gives rise to two problems which I will consider in turn. First, it is necessary to establish whether examination of certificates within the meaning of the second paragraph of Article 24 of Directive 93/37 may be given over to an authority other than the contracting authority (see section (a) immediately below). Secondly, it is necessary to determine to what this examination may extend (see section (b) below).

(a) The possibility of giving the examination of certificates over to an authority other than the contracting authority

68. In the provisions of Directive 93/37 on the qualitative criteria it is assumed a matter of course that the examination thereof will be carried by the contracting authority itself. For example, the second paragraph of Article 24 of the directive refers to the proof that the contracting authority can require from the contractor and a similar wording is used in related provisions such as Article 26(2) and (3) and Article 27(2). Furthermore, under Article 28 of the directive the contracting authority may invite the contractor to supplement the certificates and documents submitted or to clarify them.

69. However, none of this rules out the possibility of national provisions giving the examination of certain qualitative criteria over to a specialised authority at national, regional or local level or of the contracting authority calling in such an authority in a particular case on its own initiative. This may be appropriate not only where it is necessary to assess particularly complex questions concerning the financial and economic standing and technical capacity of a contractor in relation to a particular public contract (Articles 26 and 27 of Directive 93/37) but also where, for example, the burden on contracting authorities can be eased by the centralised examination of contractors' professional quality (Article 24 of Directive 93/37).

70. Bodies such as the Belgian registration committees are such specialised authorities. They examine centrally the professional quality of contractors who may wish to participate in award procedures. They can thus relieve the burden on the contracting authority and also ensure a certain uniformity in the assessment of contractors.

71. However, where specialised authorities such as registration committees deal with the examination of the professional quality of contractors with regard to their participation in award procedures, there must be an assurance that the contractors concerned are not disadvantaged as a result.

– On the one hand, this means that contractors may not have their participation in an award procedure complicated or delayed and that they may not be burdened with additional administrative costs. (59)

– On the other, the specialised authority itself must provide a guarantee that it will examine the contractors' qualification in conformity with the requirements of the relevant procurement directives and the principles relating to freedom to provide services which lie behind them.

72. As regards the first point, although in the present case the registration committee was not given a time-limit to rule on an application for registration, the conditions relating to the Berlaymont invitation to tender did ensure that the undertakings concerned would not be disadvantaged as a result: as mentioned above, mere proof that registration had been applied for was sufficient for the submission of a tender and Berlaymont 2000 had, as the contracting authority, undertaken not to award the contract before the registration procedure had been concluded (Article 1.G of the special conditions, as amended). (60)

73. However, the second point, that is to say guaranteeing the registration committee's compliance with the requirements of European Union law, is more problematic.

74. In this connection the Commission rightly pointed to the rules on the composition of the Belgian registration committees. The majority of the members are appointed at the proposal of the employers and employees of the local construction industry at the level of a Belgian province (Article 16(1) of the Royal Decree of 1978). Although a member appointed by the State chairs the registration committee

(Article 16(2) of the decree), there is no assurance that the member appointed by the State will be able to prevent decisions contrary to European Union law by exercising a right of veto, for example.

75. Even if it is assumed that their respective members have the best of intentions, this composition and working method of the registration committees gives an appearance of partiality. (61) Foreign undertakings faced with the requirement of having their qualification assessed and determined by representatives of their potential competitors and their employees could be seriously deterred from taking part in procedures for the award of public works contracts in Belgium.

76. Contrary to the view of the Belgian Government, this appearance of partiality cannot be dispelled solely by the fact that the registration committees' decisions are reasoned and may be challenged in the courts. If a foreign contractor requires registration to take part in a particular award procedure, as WIG and BPC-WIG did in relation to the Berlaymont contract, he cannot be expected to go to court to obtain such registration with the considerable time and costs that that entails. In any event, a judgment granting the remedy sought would normally come too late to enable the contractor to take part in the award procedure.

77. Therefore, overall the registration committees do not provide, by their composition and working method as provided for in the Royal Decree of 1978, a sufficient guarantee of compliance with the requirements of European Union law. The determination of the professional qualification of contractors from other Member States pursuant to Article 24 of Directive 93/37 with regard to their participation in award procedures cannot be given over to such authorities.

(b) Scope of the examination of certificates from the country of origin

78. It is still necessary to consider what scope the examination of tax and social security clearance certificates issued in the country of origin, such as those produced by WIG in the present case, may have. In the wording of its question the referring court speaks of the registration committees assessing the 'validity' of foreign certificates without, however, specifying precisely what is meant by that.

79. The parties to the proceedings disagree as to the precise extent of the Belgian registration committees' powers of assessment. Whilst Berlaymont 2000 considers that these powers are consistent with Directive 93/37, the Commission considers that they are clearly more extensive than Directive 93/37 allows. In this respect the Commission points to Article 10(2) of the Royal Decree of 1978, under which the registration committee may require the applicant to provide further documents or information which it deems necessary to determine whether or not the conditions for registration have been fulfilled.

80. In this respect it should be noted that the powers of a public authority entrusted with the assessment of contractors' professional qualifications with regard to their participation in award procedures must be interpreted and applied so as to render them consistent with the requirements of European Union law. Under Article 28 of Directive 93/37, a contractor may be invited to supplement the certificates and documents submitted or to clarify them only 'within the limits of Articles 24 to 27'. In so far as national law is to allow Belgian registration committees to require from the contractor information and documents which are not provided for in Directive 93/37, no use may be made of such a power as against a contractor from another Member State.(62)

81. Under the second indent of the second paragraph of Article 24 of Directive 93/37, the contracting authority (or other authority to which assessment of professional qualification may have been given over) is also to 'accept as sufficient evidence' of a contractor's reliability with regard to the payment of taxes and social security contributions a certificate issued by the competent authority in the Member State concerned.

82. The stringent wording 'accept as sufficient evidence' indicates that there is to be no specific margin of discretion where such a certificate is submitted to the contracting authority in the Member State in which the award procedure is being conducted. Consequently, the contracting authority or other authority entrusted with the assessment is barred from carrying out substantive checks on the accuracy of what the authority of the country of origin is certifying.

83. This is confirmed when one looks at the values relating to the freedom to provide services underlying Directive 93/37 which, as is known, must be taken into account in interpreting and applying this directive. It is incompatible in principle with the freedom to provide services to make a provider subject to restrictions for safeguarding the public interest in so far as that interest is already safeguarded by the rules to which the provider is subject in the Member State where he is established. (63) The authorities of the country of origin have examined whether a contractor has duly paid his taxes and social security contributions in his country of origin when they issue their certificate; accordingly, the freedom to provide services, which Article 24 of Directive 93/37 serves to implement, prohibits the same issue – that is to say reliability in terms of tax and social security contributions in the country of origin – from being re-examined substantively by the authorities of the host Member State.

84. Ultimately, therefore, the contracting authority or authority entrusted with the determination of contractors' reliability, must restrict itself to examining whether a certificate originating from the country of origin is in date, whether it is genuine, and whether or not it was issued by an authority which is clearly not competent to do so. More than such a summary examination may not be carried out because the authorities of the host Member State are not entitled to assess detailed matters concerning competence or the procedure for issuing such certificates in the contractor's country of origin.

85. Naturally, this does not effect the power of the authorities of the host Member State to examine whether the relevant contractor has met in their country – the Member State in which the service is to be provided – his obligations relating to the payment of taxes and social security contributions, and to predict whether he can also meet these obligations in relation to forthcoming public contracts.

86. To summarise:

The second indent of the second paragraph of Article 24 of Directive 93/37 does not prohibit foreign contractors from being required, as a condition for their participation in an award procedure, to submit certificates concerning the due payment of taxes and social security contributions issued by the authorities of their country of origin to an authority other than the contracting authority for examination, provided that that authority

– offers, in terms of its composition and working method, a sufficient guarantee of compliance with the requirements of European Union law, and

– restricts itself, in a summary examination, to ensuring that the relevant certificate is in date, that it is genuine, and that it was not issued by an authority which is clearly not competent to do so.

In so far as national law allows this authority to require from the contractor information and documents which are not provided for in Directive 93/37, no use may be made of such a power as against a contractor from another Member State.

VI – Conclusion

87. On the basis of the above considerations, I propose that the Court should answer the questions referred by the Belgian Cour de cassation as follows:

(1) The freedom to provide services and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts do not preclude a requirement, laid down in national law or tender conditions, relating to the registration for tax purposes of contractors from other Member States as a condition for their participation in a procedure for the award of public contracts, provided that the registration procedure

– does not complicate or delay the participation of those contractors in an award procedure and does not impose additional administrative costs on them, and

– is limited, in terms of its subject-matter, to establishing and certifying the professional quality and reliability of those contractors for the purpose of the first paragraph of Article 24 of Directive 93/37.

(2) The second indent of the second paragraph of Article 24 of Directive 93/37 does not prohibit foreign contractors from being required, as a condition for their participation in an award procedure, to submit certificates concerning the due payment of taxes and social security contributions issued by the authorities of their country of origin to an authority other than the contracting authority for examination, provided that that authority

– offers, in terms of its composition and working method, a sufficient guarantee of compliance with the requirements of European Union law, and

– restricts itself, in a summary examination, to ensuring that the relevant certificate is in date, that it is genuine, and that it was not issued by an authority which is clearly not competent to do so.

In so far as national law allows this authority to require from the contractor information and documents which are not provided for in Directive 93/37, no use may be made of such a power as against a contractor from another Member State.

---

1 – Original language: German.

---

2 – Case C-346/06 [2008] ECR I-1989; that case related to whether contractors party to procedures for the award of public works contracts can be required to pay the wage provided for in the collective agreement in force at the place where the building services are performed.

---

3 – The name ‘Berlaymont’ has its origins in an Augustinian convent. An approximately two-hectare park, together with the convent of the ‘Ladies of Berlaymont’ (Dames du Berlaymont), previously occupied the site of the present Commission building.

---

4 – OJ 1993 L 199, p. 54, hereinafter: ‘Directive 93/37’.

---

5 – Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114, and corrigenda OJ 2004 L 351, p. 44).

---

6 – Treaty establishing the European Community, as amended by the Maastricht Treaty.

---

7 – The provisions on freedom to provide services are now contained in Articles 56 and 57 TFEU, the wording of which is almost identical.

---

8 – Published in *Moniteur belge* of 26 July 1977, p. 9539 (‘Royal Decree of 1977’). The relevant provisions were in force until 23 February 1997.

---

9 – Published in *Moniteur belge* of 7 October 1978, p. 11707 (‘Royal Decree of 1978’). The decree was in force in the version relevant to this case until 1 August 1996.

---

10 – Commission d’enregistrement.

---

11 – At that time: Commission of the European Communities.

---

12 – Hereinafter: ‘Berlaymont 2000’.

13 – Building management.

14 – Hereinafter also: ‘Berlaymont invitation to tender’.

15 – That is equivalent to approximately EUR 34.7 million.

16 – OJ 1994 S 247, p. 107.

17 – OJ 1995 S 32, p. 13.

18 – WIG was registered on 24 July 1995 and BPC-WIG on 28 July 1995.

19 – Finanzamt Köln-Mitte.

20 – ‘Clearance certificate’ issued by AOK-Bundesverband.

21 – Conseil d’État.

22 – Judgment No 79.191 of the Fourth Chamber of the Belgian Council of State.

23 – Brussels Court of First Instance, file reference 1996/7808/A.

24 – Brussels Court of Appeal.

25 – Judgment No 2007/2058.

26 – Cour de cassation.

27 – Belgium’s observations were limited to the second question.

28 – Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 22; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 45; and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* (‘*Liga Portuguesa*’) [2009] ECR I-0000, paragraph 40.

29 – Order in Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 9; *ABNA and Others*, cited in footnote 28, paragraph 46; and *Liga Portuguesa*, cited in footnote 28, paragraph 40.

30 – Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 20; and the order in Case C-9/98 *Agostini* [1998]

ECR I-4261, paragraph 5.

---

31 – At that time the Information Note applied in the version published in OJ 2005, C 143, p. 1. The version of the Information Note which now applies is published in OJ 2009, C 297, p. 1. The current edition is also available on the Court website http://curia.europa.eu under Court of Justice / Procedure.

---

32 – To the same effect, Case C-345/06 *Heinrich* [2009] ECR I-0000, paragraph 35, and *Liga Portuguesa*, cited in footnote 28, paragraphs 41 and 42.

---

33 – Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraph 22; Case C-333/07 *Régie Networks* [2008] ECR I-10807, paragraph 46; and Case C-478/07 *Budějovický Budvar* [2009] ECR I-0000, paragraph 63.

---

34 – Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 29; see also the case-law cited in footnote 33.

---

35 – According to the information provided by the Commission, which the Belgian Government confirmed at the hearing before the Court, the registration requirement was terminated by Royal Decree of 31 July 2008 amending certain royal decrees implementing the Law of 24 December 1993 on public procurement and certain contracts for works, supplies and services (*Moniteur belge* of 18 August 2008, p. 43572).

---

36 – This is probably because a registration requirement such as that which forms the subject-matter of the first question no longer applies in Belgium (see footnote 35).

---

37 – Now Articles 56 and 57 TFEU.

---

38 – Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 81; and Case C-569/07 *HSBC Holdings and Vidacos Nominees* [2009] ECR I-0000, paragraph 26.

---

39 – Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 33; Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 88; and Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraph 38.

---

40 – *Michaniki*, cited in footnote 39, paragraph 43; to the same effect, Joined Cases C-226/04 and C-228/04 *La Cascina and Others* [2006] ECR I-1347, paragraph 22, and Case C-538/07 *Assitur* [2009] ECR I-0000, paragraph 20, both concerning Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), the contents of which are the same.

---

41 – The Court has consistently held that the provisions of European law concerning public procurement serve, inter alia, to realise freedom to provide services (see Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 43; *Michaniki*, cited in footnote 39, paragraph 39; and Case C-480/06 *Commission* v *Germany* [2009] ECR I-0000, paragraph 47); it has also consistently held that the provisions of secondary law must be interpreted and applied so as to render them consistent with primary law (see Case 218/82 *Commission* v *Council* [1983] ECR 4063, paragraph 15; Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28; and Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-0000, paragraph 48).

42 – To this effect, Case 76/81 *Transporoute et travaux* ('*Transporoute*') [1982] ECR 417, paragraphs 12 and 13, on Article 28 of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), a predecessor directive to Directive 93/37.

43 – See *Transporoute*, cited in footnote 42, paragraph 15, and Case C-225/98 *Commission* v *France* [2000] ECR I-7445, paragraph 87, both of which relate to Directive 71/305.

44 – Similarly, *Transporoute*, cited in footnote 42, paragraph 10, in which the Court examined briefly whether the establishment permit at issue in that case could be used to assess the financial and economic standing of undertakings with regard to their participation in public contracts, a criterion permitted under Directive 71/305.

45 – The wording of Article 2(1)(11) of the Royal Decree of 1978, where reference is made to the contributions to be levied by the (Belgian) National Social Security Office and the contributions to the (Belgian) Subsistence Protection Fund, is particularly significant in this regard. On the other hand, the fulfilment of tax and social security obligations *in the country of origin* forms the subject-matter of Article 15(4)(a) of the Royal Decree of 1977.

46 – See, instead of many cases, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 33; Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 24; and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-0000, paragraph 48.

47 – *Michaniki*, cited in footnote 39, paragraphs 44, 45, 47, 55 and 63, with further references.

48 – *Michaniki*, cited in footnote 39, paragraphs 39, 53, 60 and 63, with further references.

49 – *Michaniki*, cited in footnote 39, paragraph 41; to the same effect, *Transporoute*, cited in footnote 42, paragraph 9, and *La Cascina*, cited in footnote 40, paragraph 21.

50 – Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 39;

51 – To that effect, *Corsten*, cited in footnote 46, paragraphs 47 and 48, and Case C-215/01 *Schnitzer* [2003] ECR I-14847, paragraphs 36 and 37, both concerning the requirement relating to entry in the skilled trades register of the Member State in which the service is provided.

52 – The present case differs in this respect from *Corsten*, cited in footnote 46, and *Schnitzer*, cited in footnote 51, in which the requirement relating to entry in the German skilled trades register gave rise to considerable delays in the provision of cross-border services.

53 – Case C-433/04 *Commission* v *Belgium [*2006] ECR I-10653.

54 – *Commission* v *Belgium*, cited in footnote 53, paragraphs 13 and 14.

55 – In the event of failure to register, provision was made for, one, withholding of a sum equivalent to 15% of the price charged, and, two, joint liability to the principal for any tax debts of the contractor at the rate of 35% of the price of the work to be carried out (*Commission* v *Belgium*, cited in footnote 53, paragraphs 30 and 31).

---

56 – See point 49 above.

---

57 – The applicants in the main proceedings, the Czech Government and the Commission.

---

58 – See points 43 and 44 above.

---

59 – See my comments on the first question, in particular point 52.

---

60 – See point 18 above.

---

61 – As regards the requirement relating to the impartial conduct of an authorisation procedure see, for example, Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, paragraph 85; concerns about the participation of potential competitors in a public body's authorisations are expressed, for example, in Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraphs 51 and 52, and Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 69; see also Case C-506/04 *Wilson* [2006] ECR I-8613, paragraphs 54 to 58, concerning the participation of potential competitors in professional disciplinary and administrative appeals committees.

---

62 – As regards the applicability to national authorities of the primacy of European Union law, see Case 103/88 *Costanzo* [1989] ECR 1839, paragraphs 29 to 33, and Case C-341/08 *Petersen* [2010] ECR I-0000, paragraph 80.

---

63 – Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; *Canal Satélite Digital*, cited in footnote 50, paragraph 38; and *Commission* v *Belgium*, cited in footnote 53, paragraph 37.

ARRÊT DE LA COUR (quatrième chambre)

21 janvier 2010 (*)

«Marchés publics de services – Services d'élimination de déchets biodégradables et végétaux – Attribution sans procédures ouvertes de passation des marchés publics»

Dans l'affaire C-17/09,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 14 janvier 2009,

Commission européenne, représentée par MM. B. Schima et C. Zadra, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République fédérale d'Allemagne, représentée par MM. M. Lumma et B. Klein, en qualité d'agents, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (quatrième chambre),

composée de M. J.-C. Bonichot (rapporteur), président de chambre, MM. C. W. A. Timmermans, K. Schiemann, P. Kūris et L. Bay Larsen, juges,

avocat général: M^me^ V. Trstenjak,

greffier: M. R. Grass,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que la République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de l'article 8 et des titres III à VI de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services (JO L 209, p. 1), au motif que la municipalité de Bonn et Müllverwertungsanlage Bonn GmbH (ci-après «MVA») ont passé un marché public de services relatif à l'élimination de biodéchets et de déchets verts sans recourir à une procédure de passation avec appel d'offres européen.

Le cadre juridique

2 L'article 1^er^, sous a), de la directive 92/50 énonce:

«les 'marchés publics de services' sont des contrats à titre onéreux, conclus par écrit entre un prestataire de services et un pouvoir adjudicateur […]»

3 L'article 8 de cette directive dispose:

«Les marchés qui ont pour objet des services figurant à l'annexe I A sont passés conformément aux dispositions des titres III à VI.»

4 L'article 15, paragraphe 2, de ladite directive prévoit:

«Les pouvoirs adjudicateurs désireux de passer un marché public de services en recourant à une procédure ouverte, restreinte ou, dans les conditions prévues à l'article 11, à une procédure négociée font connaître leur intention au moyen d'un avis.»

5 L'annexe I A de la directive 92/50, intitulée «Services au sens de l'article 8», comporte notamment la catégorie 16, dénommée «Services de voirie et d'enlèvement des ordures: services d'assainissement et services analogues», à laquelle correspond le numéro de référence CPC 94.

Les faits et la procédure précontentieuse

6 Le 26 mars 1997, la municipalité de Bonn et MVA, société municipale dont le capital est détenu par la municipalité de Bonn, ont conclu avec l'entreprise privée d'élimination de déchets EVB Entsorgung und Verwertung Bonn GmbH & Co. KG (ci-après «EVB») un contrat portant sur des services d'élimination de déchets. Par ce contrat, EVB s'engage, d'une part, à rassembler des ordures ménagères et à effectuer leur tri préalable, avant de les livrer, en vue de leur élimination, à MVA. EVB verse une somme fixe à MVA pour l'élimination des ordures ménagères qu'elle lui livre. D'autre part, EVB s'engage à traiter jusqu'à 15 000 Mg/an de biodéchets et jusqu'à 10 000 Mg/an de déchets verts provenant de l'agglomération de Bonn dans ses centres de compostage. Pour le traitement des biodéchets et des déchets verts, la municipalité verse quant à elle à EVB un montant fixe de 290 DEM/Mg pour les biodéchets et de 160 DEM/Mg pour les déchets verts. Ces montants sont soumis à une clause d'adaptation.

7 Par lettre de mise en demeure du 23 mars 2007 et conformément à la procédure prévue à l'article 226 CE, la Commission a fait valoir à la République fédérale d'Allemagne que la conclusion du contrat du 26 mars 1997 sans procédure de passation de marché avec appel d'offres européen pourrait avoir enfreint l'article 8 de la directive 92/50, en liaison avec les titres III à VI de celle-ci.

8 La République fédérale d'Allemagne a répondu à cette mise en demeure par lettre du 18 juillet 2007. Cette réponse a conduit la Commission à adresser, le 1er février 2008, un avis motivé à cet État membre, par lequel elle l'a invité à mettre un terme à l'infraction alléguée. La République fédérale d'Allemagne a répondu à cet avis motivé par lettre du 1er avril 2008, indiquant que des négociations étaient en cours entre la municipalité de Bonn et le nouveau propriétaire de MVA et que ces négociations pourraient déboucher sur un résultat sur la base duquel la procédure d'infraction pourrait être close.

9 N'étant pas satisfaite de cette réponse, la Commission a introduit le présent recours.

Sur le recours

Argumentation des parties

10 La Commission soutient en substance que le contrat à titre onéreux conclu par écrit entre, d'une part, la municipalité de Bonn et MVA, en qualité de pouvoirs adjudicateurs et, d'autre part, l'entreprise privée EVB portant sur l'élimination de biodéchets et de déchets verts par celle-ci est un marché public de services qui ne pouvait être passé sans recourir à une procédure de passation avec appel d'offres européen.

11 La République fédérale d'Allemagne fait valoir qu'elle s'engage à trouver avec l'ensemble des parties au contrat litigieux une solution pour l'invalidation de celui-ci.

12 Elle soutient par ailleurs que l'articulation entre le droit des marchés publics et le droit des déchets est problématique et que l'application du droit des marchés publics ne doit pas conduire à une utilisation des capacités d'élimination trop inefficace et préjudiciable d'un point de vue écologique. Notamment, le droit des marchés publics ferait obstacle à ce que le traitement et l'élimination des déchets aient lieu aussi près que possible du lieu de leur production.

13 La République fédérale d'Allemagne soutient également que la plainte à la suite de laquelle la Commission est intervenue a été introduite dix ans après la mise en œuvre du contrat litigieux alors même que le plaignant avait eu connaissance, bien avant, de ce contrat et des irrégularités commises au cours de sa passation et qu'il a volontairement omis d'utiliser la voie d'une procédure nationale de recours. Si un manquement de la République fédérale d'Allemagne était constaté après une aussi longue période, un concurrent aurait alors la possibilité de contourner, dans le cadre de la procédure nationale de recours, les délais résultant notamment de la directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO L 395, p. 33), et destinés à assurer la sécurité juridique, et il pourrait ainsi faire échec à un besoin légitime des parties.

Appréciation de la Cour

14 D'emblée, il convient de relever que la République fédérale d'Allemagne reconnaît qu'elle s'engage à trouver avec l'ensemble des parties au contrat litigieux une solution pour son invalidation et ne conteste pas au fond le manquement.

15 L'argument en défense tiré de ce que le droit des marchés publics irait à l'encontre de certains principes régissant le droit des déchets ne saurait prospérer.

16 Il est certes vrai que, ainsi que l'a rappelé la Cour dans son arrêt du 9 juillet 1992, Commission/Belgique (C-2/90, Rec. p. I-4431, point 34), la particularité des déchets et le principe de la correction, par priorité à la source, des atteintes à l'environnement impliquent qu'il appartient à chaque région, commune ou autre entité locale de prendre les mesures appropriées afin d'assurer la réception, le traitement et l'élimination de ses propres déchets, et que ceux-ci doivent donc être éliminés aussi près que possible du lieu de leur production, en vue de limiter leur transport autant que faire se peut.

17 De telles considérations ne sont toutefois pas de nature à soustraire la République fédérale d'Allemagne aux obligations qui découlent pour elle de la directive 92/50. Celle-ci ne fait en effet pas, par elle-même, obstacle à ce que le pouvoir adjudicateur contracte avec des soumissionnaires capables de traiter les déchets aussi près que possible du lieu de leur production.

18 La question de l'articulation entre le droit des marchés publics et le droit des déchets ne saurait par suite justifier le fait, pour la municipalité de Bonn et MVA, d'avoir passé un marché public de services relatifs à l'élimination de biodéchets et de déchets verts sans recourir à une procédure de passation avec appel d'offres européen.

19 S'agissant du second argument en défense soulevé par la République fédérale d'Allemagne, il convient de rappeler que, selon une jurisprudence constante, dans le cadre de l'exercice des compétences qu'elle tient de l'article 226 CE, la Commission, dans l'intérêt général communautaire, a pour mission de veiller d'office à l'application, par les États membres, du traité CE et des dispositions prises par les institutions en vertu de celui-ci et de faire constater, en vue de leur cessation, l'existence de manquements éventuels aux obligations qui en dérivent (arrêt du 4 avril 1974, Commission/France, 167/73, Rec. p. 359, point 15).

20 Eu égard à son rôle de gardienne du traité, la Commission est dès lors seule compétente pour décider s'il est opportun d'engager une procédure en constatation de manquement et en raison de quel agissement ou omission imputable à l'État membre concerné cette procédure doit être introduite.

21 Ce principe vaut également en matière de marchés publics dans une situation dans laquelle sont en cause des contrats à l'encontre desquels il n'est plus possible de former un recours contentieux en raison de l'expiration des délais de recours.

22 Il est vrai que la Cour a jugé que la fixation de délais de recours raisonnables à peine de forclusion satisfait, en principe, à l'exigence d'effectivité découlant de la directive 89/665, dans la mesure où elle constitue une application du principe fondamental de sécurité juridique (arrêt du 12 décembre 2002, Universale-Bau e.a., C-470/99, Rec. p. I-11617, point 76), et que la directive 89/665 ne s'oppose par suite pas à une réglementation nationale qui prévoit que tout recours contre une décision du pouvoir adjudicateur doit être formé dans un délai prévu à cet effet et que toute irrégularité de la procédure d'adjudication invoquée à l'appui de ce recours doit être soulevée dans le même délai, sous peine de forclusion, de sorte que, passé ce délai, il n'est plus possible de contester une telle décision ou de soulever une telle irrégularité, pour autant que le délai en question soit raisonnable (arrêt Universale-Bau e.a., précité, point 79).

23 La République fédérale d'Allemagne ne saurait toutefois en déduire que le fait, pour la Commission, d'engager une procédure en constatation de manquement en raison d'un contrat à l'encontre duquel il n'est plus possible de former un recours contentieux serait contraire au principe de sécurité juridique.

24 La Cour a ainsi jugé que l'article 2, paragraphe 6, de la directive 89/665 ne saurait avoir d'incidence sur un recours exercé au titre de l'article 226 CE ou de l'article 228 CE (voir arrêt du 18 juillet 2007, Commission/Allemagne, C-503/04, Rec. p. I-6153, point 34) et que cette conclusion vaut également pour la directive 89/665 envisagée dans son ensemble (arrêt du 15 octobre 2009, Commission/Allemagne, C-275/08, point 33).

25 Eu égard à son économie, ladite directive ne saurait être considérée comme réglant également la relation entre un État membre et la Communauté européenne, relation dont il s'agit dans le contexte de l'article 226 CE (arrêt du 15 octobre 2009, Commission/Allemagne, précité, point 35).

26 En effet, les procédures de recours nationales, au sens de la directive 89/665, et le recours en manquement, au titre de l'article 226 CE, divergent tant par les parties au litige que par leur finalité, la procédure de recours nationale servant à protéger les intérêts des soumissionnaires écartés, tandis que la procédure en manquement assure le respect du droit communautaire dans l'intérêt général (arrêt du 15 octobre 2009, Commission/Allemagne, précité, point 36).

27 Ainsi, tout en obligeant, à son article 1er, paragraphe 1, les États membres à prendre, en ce qui concerne les procédures de passation des marchés publics, les mesures nécessaires pour assurer que les décisions prises par les pouvoirs adjudicateurs puissent faire l'objet de recours efficaces, la directive 89/665 ne saurait, sans réduire la portée des dispositions du traité, affecter l'application de l'article 226 CE (arrêt du 15 octobre 2009, Commission/Allemagne, précité, point 37).

28 Cette appréciation ne saurait être remise en cause par le risque éventuel que les soumissionnaires écartés contournent les délais prévus dans le cadre des procédures de recours nationales, au sens de la directive 89/665, en saisissant la Commission d'une plainte en vue d'un recours sur le fondement de l'article 226 CE, ainsi que l'avance la République fédérale d'Allemagne (arrêt du 15 octobre 2009, Commission/Allemagne, précité, point 38).

29 En effet, ainsi qu'il ressort des points 19 et 20 du présent arrêt, c'est à la seule Commission qu'il appartient, dans l'intérêt général, de décider d'agir sur le fondement de l'article 226 CE (arrêt du 15 octobre 2009, Commission/Allemagne, précité, point 39).

30 Eu égard à l'ensemble des considérations qui précèdent, il y a lieu de constater que la République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de l'article 8 et des titres III à VI de la directive 92/50 au motif que la municipalité de Bonn et MVA ont passé un marché public de services relatif à l'élimination de biodéchets et de déchets verts sans recourir à une procédure de passation avec appel d'offres européen.

Sur les dépens

31 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la

République fédérale d'Allemagne et celle-ci ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (quatrième chambre) déclare et arrête:

1) **La République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de l'article 8 et des titres III à VI de la directive 92/50/CEE du Conseil, du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services, au motif que la municipalité de Bonn et Müllverwertungsanlage Bonn GmbH ont passé un marché public de services relatif à l'élimination de biodéchets et de déchets verts sans recourir à une procédure de passation avec appel d'offres européen.**

2) **La République fédérale d'Allemagne est condamnée aux dépens.**

Signatures

---

* Langue de procédure: l'allemand.

JUDGMENT OF THE COURT (Third Chamber)

21 October 2010 (*)

(Public contracts – Directive 89/665/EEC – Article 2(8) – Body responsible for review procedures that is not judicial in character – Annulment of the contracting authority's decision to accept a tender – Possibility for the contracting authority to appeal against that annulment before a judicial body)

In Case C-570/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Anotato Dikastirio tis Kipriakis Dimokratias (Cyprus), made by decision of 27 November 2008, received at the Court on 22 December 2008, in the proceedings

Simvoulio Apokhetefseon Lefkosias

v

Anatheoritiki Arkhi Prosforon,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász (Rapporteur) and J. Malenovský, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 March 2010,

after considering the observations submitted on behalf of:

– the Simvoulio Apokhetefseon Lefkosias, by A. Aimilianidis and P. Khristofidis, dikigori,

– the Anatheoritiki Arkhi Prosforon, by K. Likourgos, A. Pantazi-Lamprou and M. Theoklitou, acting as Agents,

– the Czech Government, by M. Smolek, acting as Agent,

– the European Commission, by M. Konstantinidis and I. Chatzigiannis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 June 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 2(8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1) ('Directive 89/665').

2 The reference has been made in proceedings between the Simvoulio Apokhetefseon Lefkosias (Nicosia Sewage Council) (‘the Simvoulio’), a legal body governed by public law acting as contracting authority, and the Anatheoritiki Arkhi Prosforon (Tenders Review Authority), an administrative body which examines appeals brought against decisions taken by the contracting authorities in procurement matters, concerning the right of the Simvoulio to appeal to a judicial body against a decision adopted by the Anatheoritiki Arkhi Prosforon.

Legal context

European Union legislation

3 In the first recital in the preamble to Directive 89/665, it is stated that the directives on public procurement do not contain any specific provisions ensuring their effective application.

4 According to the third recital in the preamble to that directive:

‘… the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; … for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law’.

5 The fourth recital in the preamble to that directive states:

‘… in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; … therefore, the Member States concerned must remedy this situation’.

6 The seventh recital in the preamble to that directive is worded as follows:

‘… when undertakings do not seek review, certain infringements may not be corrected unless a specific mechanism is put in place’.

7 The eighth recital in the preamble to Directive 89/665 states:

‘… accordingly, the Commission, when it considers that a clear and manifest infringement has been committed during a contract award procedure, should be able to bring it to the attention of the competent authorities of the Member State and of the contracting authority concerned so that appropriate steps are taken for the rapid correction of any alleged infringement’.

8 Article 1 of that directive provides:

‘1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

…

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works [or service] contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.’

9 Article 2(7) and the first subparagraph of Article 2(8) of Directive 89/665 are worded as follows:

‘7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU] and independent of both the contracting authority and the review body.’

10 Article 3 of that directive provides that the Commission has a power to intervene when, prior to a contract being concluded, it considers that, during a public contract award procedure, a clear and manifest infringement of relevant European Union provisions has been committed.

National legislation

11 Article 146(1) of the Constitution of Cyprus (‘the Constitution’) grants the Anotato Dikastirio tis Kipriakis Dimokratias (Supreme Court of the Republic of Cyprus) exclusive jurisdiction to review the lawfulness of the decisions or omissions of the administration.

12 Article 146(2) of the Constitution provides:

‘The request for judicial review may be made by any person whose existing legitimate interests, as an individual or as a member of a community, are adversely and directly affected by the decision, act or omission.’

13 Law No 101 (I)/2003 on the award of contracts (supply, works and services) seeks to ensure the compatibility of the Cypriot legislation with the relevant European Union legislation, including Directive 89/665. Article 60 of that law, as amended by Law No 181 (I)/2004, provides:

‘Interested parties who believe that they have been wronged by the decision of the Anatheoritiki Arkhi Prosforon shall be entitled to seek a review by the Anotato Dikastirio [tis Kipriakis Dimokratias] in accordance with Article 146 of the Constitution. The contracting authority shall also be entitled to seek a review by the Anotato Dikastirio pursuant to Article 146 of the Constitution where, on the basis of adequate documentary evidence, the decision of the Anatheoritiki Arkhi Prosforon can be regarded as unfair to the aforementioned authority.’

The dispute in the main proceedings and the question referred for a preliminary ruling

14 The Simvoulio acts as a contracting authority in the context of award procedures for public contracts, within the meaning of Law No 101 (I)/2003.

15 The Anatheoritiki Arkhi Prosforon was created in the context of ensuring the compatibility of Cypriot law with European Union legislation on public contracts and, in particular, with Directive 89/665. It is therefore a body responsible for review procedures within the meaning of Article 2(8) of Directive 89/665, is not judicial in character, and exercises its powers on the basis of the abovementioned law.

16 On 14 February 2006, following an action brought by an undertaking, the Anatheoritiki Arkhi Prosforon annulled the decision by which the Simvoulio had accepted the tender submitted by a competing undertaking. By an appeal brought before the competent chamber of the Anotato Dikastirio tis Kipriakis Dimokratias on 31 March 2006, the Simvoulio sought the annulment of the abovementioned decision of the Anatheoritiki Arkhi Prosforon.

17 During the proceedings, the plenary formation of the Anotato Dikastirio tis Kipriakis Dimokratias gave judgment on 17 December 2007 in the context of another case concerning public contracts, holding that Article 146 of the Constitution should be interpreted as meaning that it does not grant a legitimate interest to the contracting authorities to seek the review of an annulment decision adopted by the Anatheoritiki Arkhi Prosforon, and that Article 60 of Law No 101 (I)/2003 should be not be applied.

18 The view of the Anotato Dikastirio tis Kipriakis Dimokratias, which now constitutes settled case-law, is based on the consideration that the decision of the Anatheoritiki Arkhi Prosforon does not constitute a decision of the administration, independent of the proceedings in which the contracting authority concerned is itself involved. That decision does not therefore concern an interest evoked by the contracting authority, but the public interest in the lawful conduct of the general procedures governing public contracts. The contracting authority and the Anatheoritiki Arkhi Prosforon are, for the purposes of the proceedings in question, elements of the same administration, so that it is appropriate to apply the general principle that an administrative body cannot claim a legitimate interest against another body of the same administration and, in essence, bring proceedings against it.

19 The chamber of the Anotato Dikastirio tis Kipriakis Dimokratias, before which the main proceedings were brought by the Simvoulio, observes that the abovementioned view of the plenary formation of that court was adopted solely on the basis of Article 146 of the Constitution, without the question of the application and interpretation of European Union law having been raised.

20 However, that chamber notes that Article 60 of Law No 101 (I)/2003, which transposes into national law the European Union legislation on public contracts, applies independently of the interpretation of Article 146 of the Constitution, which must consequently be interpreted consistently with European Union law. In light of the fact that an interpretation of the first subparagraph of Article 2(8) of Directive 89/665 for the purposes of answering the question raised in the main proceedings has not yet been the subject of the Court's case-law, the chamber considers that it is essential, in order to ensure uniform interpretation and application of European Union law, to make a reference to the Court for a preliminary ruling.

21 That chamber also points out that, in accordance with the Court's case-law, the existence of the abovementioned decision of the plenary formation of the Anotato Dikastirio tis Kipriakis Dimokratias does not prevent it from exercising a discretionary power to assess the need to make a reference to the Court for a preliminary ruling (Case 166/73 *Rheinmühlen Düsseldorf* [1974] ECR 33, paragraph 4).

22 In the light of those considerations, the chamber of the Anotato Dikastirio tis Kipriakis Dimokratias seised of the main proceedings decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Does Article 2(8) of Directive 89/665 … recognise contracting authorities as having a right to judicial review of cancellation decisions by bodies responsible for review procedures which are not judicial bodies?'

Consideration of the question referred for a preliminary ruling

23 By its question, the referring court asks, in essence, whether Article 2(8) of Directive 89/665 must be interpreted as meaning that it requires the Member States to provide, also for contracting authorities, a right to seek judicial review of the decisions of non-judicial bodies responsible for review procedures concerning the award of public contracts.

24 In the light of a – first of all – literal examination of the provisions of Directive 89/665, it should, for the purposes of answering that question, be noted, first, that, in the fourth and seventh recitals in the preamble to that directive, 'Community undertakings' are explicitly referred to as parties for the purposes of seeking a review of the procedures for the award of public contracts.

25 It should be noted, secondly, that Article 1(3) of Directive 89/665, which states that review procedures are available 'at least to any person having or having had an interest in obtaining a public contract', defines the class of persons which must be allowed a right of review on the basis of that directive.

26 Thirdly, it should be noted, in support of the considerations in paragraph 25 of this judgment, that, as is apparent from the seventh recital in the preamble to Directive 89/665, the European Union legislature was aware of the possibility that certain infringements may not be corrected when undertakings do not seek review of unlawful or erroneous decisions, it being understood that such decisions might also be adopted by bodies responsible for the review procedures that were not judicial bodies. However, in

order to remedy such a situation, Article 3 of Directive 89/665 provides for the Commission to have a general power to intervene in accordance with the procedure established in that provision.

27 Therefore, the wording of the provisions of Directive 89/665 does not suggest that the European Union legislature intended the contracting authorities to be regarded as parties for the purposes of seeking a review in the context of the procedures for awarding public contracts. Article 2(8) of that directive must, therefore, be considered as constituting a specific requirement, including specific guarantees, imposed on the Member States where the authorities responsible for review procedures are not judicial bodies and it does not amend the class of persons who have a right of review on the basis of that directive.

28 That finding is confirmed by the objective of Directive 89/665.

29 The first and third recitals in the preamble to that directive set out the directive's objective, upon its adoption, by reference to the objective of the directives containing substantive provisions on public contracts. Since the objective of the latter directives is the opening-up of public contracts to competition within the European Union under conditions of transparency and non-discrimination, and those directives do not contain specific provisions allowing their effective application to be guaranteed, Directive 89/665 fulfils that role by requiring the Member States to establish effective and rapid review procedures.

30 Therefore, the rationale of Directive 89/665 is to allow, by the establishment of appropriate review procedures, the effective application of the substantive provisions of European Union law on public contracts, which seek to ensure, for traders established in the Member States, the opening-up to competition which is undistorted and as wide as possible (see, to that effect, Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, paragraphs 38 and 39 and case-law cited).

31 The considerations set out in paragraph 29 of this judgment are, moreover, supported by the provisions of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31). That directive, although not applicable ratione temporis to the facts of the main proceedings, nevertheless contains elements which are useful for the interpretation of the system established by Directive 89/665, in so far as it does not amend that system, but seeks, in the words of the third recital in the preamble thereto, to provide for that directive 'the essential clarifications which will allow the results intended by the Community legislature to be attained'.

32 Therefore, the 'tenderers concerned' and the 'economic operators' are referred to, in particular in the 4th, 6th, 7th, 14th and 27th recitals in the preamble to Directive 2007/66, as persons covered by the effective judicial protection intended by that directive and as parties who may bring review proceedings.

33 Furthermore, it should be noted that Article 1 of Directive 89/665, as amended by Directive 2007/66, is now entitled 'Scope and availability of review procedures', whereas Article 2 thereof is entitled 'Requirements for review procedures'. This therefore confirms the conclusion that the obligation imposed on the Member States under Article 2(8), now Article 2(9), of Directive 89/665, to provide for judicial review of decisions of bodies responsible for review procedures that are not judicial in character, constitutes a specific requirement of that directive and does not bring the contracting authorities within its scope of application.

34 In addition, Article 3 of Directive 89/665, as amended by Directive 2007/66, is now entitled 'Corrective mechanism' and confirms the Commission's general power to intervene in cases of serious infringements of European Union law.

35 It follows that Article 2(8) of Directive 89/665 does not require Member States to provide a procedure for judicial review also for contracting authorities.

36 In the light, however, of the obligation imposed on the Member States by Article 1(3) of Directive 89/665 to ensure the right to review is available 'at least' to all the persons defined in that article, and in

the light also of the procedural independence enjoyed by the Member States, it should be held that the Member States are not prevented from including contracting authorities within the class of persons to whom the review procedures within the meaning of the abovementioned provision are available, in cases where contracting authorities' decisions are annulled by non-judicial bodies.

37 The argument that such an interpretation would be likely to lead to a lack of uniformity in the application of European Union law cannot be accepted, in so far as Directive 89/665, as is apparent, in particular, from Article 1(3) thereof, does not seek to completely harmonise the relevant national legislation.

38 Consequently, the answer to the question referred is that Article 2(8) of Directive 89/665 must be interpreted as not requiring the Member States to provide, also for contracting authorities, a right to seek judicial review of the decisions of non-judicial bodies responsible for review procedures concerning the award of public contracts. However, that provision does not prevent the Member States from providing, in their legal systems, for such a legal remedy for contracting authorities.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 2(8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, must be interpreted as not requiring the Member States to provide, also for contracting authorities, a right to seek judicial review of the decisions of non-judicial bodies responsible for review procedures concerning the award of public contracts. However, that provision does not prevent the Member States from providing, in their legal systems, such a review procedure in favour of contracting authorities.

[Signatures]

---

* Language of the case: Greek.

EU:C:2010:301

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 1 June 2010 [1](1)

Case C-570/08

Simvoulio Apokhetevseon Lefkosias
v
Anatheoritiki Arkhi Prosforon

(Reference for a preliminary ruling from the Anotato Dikastirio Kiprou (Supreme Court of Cyprus))

(Public works and public supply contracts – Review procedures for awards – Interpretation of Article 2(8) of Council Directive 89/665/EEC – Right of the contracting authority to challenge before the courts the decisions of the body, not judicial in character, responsible for review procedures)

I – Introduction

1. The Anotato Dikastirio Kiprou (Supreme Court of Cyprus), acting as a court of first instance, (2) asks the Court of Justice whether it can be inferred from Article 2(8) of Directive 89/665/EEC (3) ('Directive 89/665' or 'the Directive') that the contracting authority for a public contract has a right to challenge before the courts the annulment of its decision by the administrative body responsible for the supervision of review procedures.

II – Legal framework

A – *Directive 89/665*

2. Pursuant to Article 1(1), 'Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.' (4)

3. Article 1(3) states:

'The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

4. Article 2(8) provides:

‘Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

…’ (5)

B – *Cypriot law*

5. Under Article 146.2 of the Constitution of the Republic of Cyprus, a request for judicial review of the acts or omissions of the Administration ‘may be made by any person whose existing legitimate interests, as an individual or as a member of a community, are adversely and directly affected by the decision, act or omission’.

6. Law No 101(I)/2003 on the Award of Contracts (supply, works and services), as amended by Law No 181(I)/2004, was enacted in order to bring Cypriot legislation into line with European Union law, including Directive 89/665 and, to that end, Article 55 created the Anatheoritiki Arkhi Prosforon (tenders review authority, ‘the review authority’) and Article 56 gave it jurisdiction to hear ‘hierarchical appeals’ against the decisions of contracting authorities. Article 60 of that law, as amended by Law No 181(I)/2004, provides: ‘Interested parties who believe that they have been wronged by the decision of the [the review authority] shall be entitled to seek a review by the Anotato Dikastirio in accordance with Article 146 of the Constitution. The contracting authority shall also be entitled to seek a review by the Anotato Dikastirio pursuant to Article 146 initially of the Constitution where, on the basis of adequate documentary evidence, the decision of the review authority can be regarded as unfair to the aforementioned authority.’

7. As will be seen, this provision has been the subject of a declaration by the Anotato Dikastirio which is particularly relevant to this case.

III – Background to the national proceedings and the question referred

8. In June 2003, the Simvoulio Apokhetevseon Levkosias (Nicosia sewerage board, ‘the Simvoulio’), (6) acting as a contracting authority, published a tender notice for the design, construction, operation and maintenance, for a period of 10 years, of a wastewater treatment plant in Anthoupolis.

9. Among the preselected tenderers were the Degremont SA & Atlas Pantou Co Ltd consortium (‘Degremont’) and the WTE BAMAG consortium.

10. The respective tenders having been submitted, the Simvoulio informed Degremont of its decision to award the contract to the WTE BAMAG consortium.

11. On 7 October 2005 Degremont appealed against that decision to the review authority, and sought an interim measure suspending the operation of the Simvoulio’s decision, given that the latter would entail the definitive award of the contract. The date of 13 October 2005 was set for the interim hearing but, as merely applying for the interim measure did not (at the time the events took place) give rise to any suspension of operation, the Simvoulio in fact awarded the contract to the WTE BAMAG consortium before the review authority gave its decision on the application for suspension.

12. On 14 February 2006, the review authority gave its decision in the substantive case, annulling the Simvoulio’s decision. (7)

13. WTE BAMAG did not bring legal proceedings challenging that decision before the Anotato Dikastirio. The Simvoulio, by contrast, did so (8) on 31 March 2006, relying on Article 146.2 of the Constitution and Article 60 of Law No 101(I) /2003 on the Award of Contracts for the purposes of *locus standi*.

14. While this case was still pending, the Anotato Dikastirio, sitting in full court, delivered its judgment of 10 December 2007 in another case (9) involving the same parties. In it, the Anotato Dikastirio rejected the argument that the Simvoulio, as a contracting authority, had a legitimate interest in calling for review of the annulment decision of the review authority because, in summary, (1) the latter decision forms part of a complex award procedure, (2) the review authority is a second-instance administrative body (of higher instance) in relation to the Simvoulio, for which reason one part of the administration cannot have a legitimate interest as against another part of the administration, (3) contracting authorities protect the public interest but have no interests of their own and, (4) Article 60 of Law No 101(I) /2003 cannot grant a right to review to the contracting authority if such a right is not recognised by Article 146.2 of the Constitution.

15. The Anotato Dikastirio (in case 629/2006), as court of first instance, mindful of the case-law laid down by the full court and in view of the fact that that case-law contained no analysis of the Cypriot legislation in the light of Directive 89/665, stayed the proceedings and referred the matter to the Court of Justice for a preliminary ruling in the following terms:

‘To what extent does Article 2(8) of Directive 89/665/EC recognise contracting authorities as having a right to judicial review of annulment decisions by bodies responsible for review procedures, when those bodies are not judicial in character?’

IV – The proceedings before the Court of Justice

16. The order for reference was lodged with the Court Registry on 22 December 2008.

17. The Simvoulio, the Czech Government and the Commission call for a positive response from the Court of Justice to the question referred by the Anotato Dikastirio, to the effect that Article 2(8) of Directive 89/665 does recognise the right of contracting authorities to judicial review of decisions by bodies responsible for review procedures.

18. In the view of the review authority, Directive 89/665 provides protection for undertakings but not for contracting authorities, for they cannot be regarded as having separate interests for the purposes of taking judicial action against the bodies responsible for reviewing their decisions.

19. At the hearing on 25 March 2010, the representatives of the Simvoulio, the review authority and the Commission presented their oral submissions.

V – The substance of the case

20. The reference for a preliminary ruling from the Anotato Dikastirio raises the question, for the first time in the case-law of the Court of Justice, whether, on the basis of Directive 89/665, a contracting authority must have the right to contest the decisions of another public body charged with the review of that authority’s decisions, when, without prejudice to the public nature of both bodies, they have separate legal personalities, belong, in addition, to different branches of administration and, in terms of function, perform different tasks.

21. The answer to this question must be prefaced by some thoughts on the structure of the actions for review contemplated by Directive 89/665, before going on to analyse the scope of Article 2(8) of the Directive, which is relied on here.

22. As early as in the third recital in the preamble to the directive, it is pointed out that ‘the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; … for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law’, and this statement is consistent with the ‘substantive’ measures (10) coordinating public procurement procedures within the Community.

23. The Member States enjoy a wide discretion when it comes to implementing the review systems contained in the directive, which ‘lays down only the minimum conditions to be satisfied by the review

procedures established in domestic law to ensure compliance with the requirements of Community law concerning public contracts'. (11)

24. That is why, to take but one example, the directive contains no provision specifically covering time-limits for the applications for review which it seeks to establish. (12)

25. In particular, and most significantly for our present purposes, with regard to the point made above, the directive ensures only that the review procedures provided for by the Directive are available 'at least' to any person having or having had an interest in obtaining a particular public contract and who has been, or risks being, harmed by an alleged infringement of the Community law concerning public contracts or of the national rules transposing that law. (13)

26. In any event, the European Union directive intended the final review of legality in the field of public procurement to rest with a judicial body, (14) either directly, where the first review body is a court or judge, or indirectly, where the courts have the power to hear and determine an action brought against the decision of any administrative review body which may have been created. The latter is the model used in Cyprus, where jurisdiction to hear actions contesting the acts of the administrative body created there (the review authority) is conferred on the Anotato Dikastirio (Supreme Court).

27. However, as soon as the Directive makes it possible for an intermediate body to be responsible for ruling on the merits of actions challenging decisions of the contracting authority, it obviously gives rise to the possibility that the *raison d'être* of judicial review, necessarily subsequent, may to a certain extent be altered. In such a case, in judicial review proceedings, what is reviewed is the correctness of the decision of the administrative body, whether upholding or annulling the award in question, at the request of whoever is entitled to call for review in each particular case.

28. This consideration demonstrates that the issue raised in this reference for a preliminary ruling would, by definition, not exist in those national legal systems which have not opted for administrative review bodies but have instead chosen judicial review as the direct and only route. In that situation, contracting authorities can only be defendants. By contrast, when judicial proceedings are taken against the annulment decision of an administrative review body, there is the possibility that, apart from the undertakings detrimentally affected by the annulment decision, contracting authorities may seek to appear as applicants.

29. That is why, in the present case, the Simvoulio, possibly in an attempt to prevent a potential claim for damages against it, seeks judicial review of the review authority's annulment of the award of the contract to a particular tenderer.

30. It is therefore necessary to examine whether, on the basis of this approach, the Simvoulio is entitled to the right of review it has claimed.

31. In my view, the *locus standi* of the contracting authority to bring an action before a judicial body to contest the act of an administrative review body annulling its decision is not required by Directive 89/665 and cannot be inferred from it.

32. First of all, the seventh and eighth recitals in the preamble, taken together, do not exactly militate in favour of construing access to of judicial review for contracting authorities as a requirement of the directive. Those recitals make express provision for review only for undertakings, and include the remark that when undertakings do not seek review, 'certain infringements may not be corrected'.

33. Secondly, by stating that it is necessary for the decisions of contracting authorities to be effectively reviewed, Article 1(1) of Directive 89/665 specifically recognises that contracting authorities can be defendants, but it is not possible to infer from any other provision of the directive that they have any *locus standi* to bring an action.

34. Finally, this rather restrictive approach is confirmed by Article 1(3) of the directive, since the relevant review may be sought by 'at least', any person 'having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement', which would seem to at least leave open the possibility that contracting authorities are

excluded. Furthermore, the provision does not appear to have contracting authorities in view, given that it authorises the Member States to introduce a duty on the person seeking the review to give prior notice to 'the contracting authority of the alleged infringement and of his intention to seek review'.

35. However, it is true to say that, by the time we reach Article 2(8), the language of the directive appears more open and, unlike in other parts of the directive, there is no express reference to tenderers (that is, to the person having an interest in obtaining a contract), which seemingly is the basis for the Simvoulio's argument that, as a contracting authority, it has a right to review.

36. The representative of the Simvoulio in fact claimed at the hearing that, comparing Article 1(3) with Article 2(8) of Directive 89/665, the two provisions are not contradictory. In his view, while the latter refers only to reviews sought before a judicial body (or a body which is judicial for the purposes of Article 267 TFEU), the former also contemplates the possibility of seeking review before a non-judicial body which is responsible in this respect, relating exclusively to the decision of the contracting authority. The reason is that it would be inconceivable for a contracting authority to seek review of its own decision, in contrast to the situation covered by Article 2(8).

37. However, this element of ambiguity in Article 2(8) of the Directive is not enough, in my view, to alter the foregoing considerations. Article 2(8) merely creates the possibility that an administrative body might, initially, be responsible for the review and, in any event, it introduces the requirement, in the terms already mentioned, that in these circumstances there must be a review of its decisions, either of a strictly judicial nature or before a body which is equivalent for the purposes of Article 267 TFEU to a judicial body, without specifying once again which persons have *locus standi* to seek such review.

38. Finally, it is necessary to dismiss the argument raised by the Simvoulio, and supported by the Commission, to the effect that if it is not accepted that the Simvoulio has capacity to bring proceedings, the opportunity to apply European Union law directly and uniformly could be blocked because the chance to refer a question for a preliminary ruling would be lost in situations, such as the present case, where no undertaking seeks judicial review of the decision.

39. On the one hand, the possible further opportunity to clarify European Union law cannot directly determine how the specific question of *locus standi* is to be settled, for this falls within the realm of the procedural autonomy of Member States. Moreover, it is to be expected that, in normal circumstances, when annulments appear to have no basis in law, it would be the tenderers which contested them, thereby creating an opportunity for a reference for a preliminary ruling.

40. In any event, by way of safeguard, Article 3 of the Directive itself provides the Commission with a 'specific mechanism' where it considers that a clear and manifest infringement has been committed during a contract award procedure. To that end, the provision authorises appropriate steps to be taken for the rapid correction of any alleged infringement.

41. The foregoing considerations lead me to conclude that Directive 89/665 makes no statement, either directly or indirectly, regarding the legal remedies which must be made available to contracting authorities. That should be sufficient, in my view, to give a negative response to the question raised by the Anotato Dikastirio. In my opinion, however, this conclusion should be supported by some further points.

42. At point 18 of its observations, the Simvoulio argues that being restricted in this way is seriously detrimental to it, inasmuch as, on the one hand, the contract would be awarded to a legal person other than the tenderer that it considers the most suitable, and as, on the other hand, it cannot rule out the possibility that it will face a claim for liability in respect of the losses incurred as a result of the award which was subsequently annulled by the review authority. Then, of course, there is the obvious fact that the Simvoulio is a public entity with its own administrative powers, specifically, to manage wastewater, (15) in which context it has the status of a contracting authority and is in a position which is at any rate different from that of the review authority. (16)

43. In this regard, and although the Court of Justice cannot rule on the position of the Simvoulio as an organ of the Cypriot system or on its relationship to the review authority, (17) the hearing provided

sufficient clarification to find unconvincing the review authority's argument that the acts of both bodies form part of a single award procedure, and that on that basis they are not in reality separate bodies.

44. Against this, however, would be the logic behind the review described in Article 2(8) of Directive 89/665, as the claims of tenderers seeking to have the award revoked aside would be genuinely compromised if a certain amount of independence between the review body and the contracting authority were not accepted. This view is supported by Article 2(3) of Directive 2007/66, which, in connection with the review of a contract award decision, refers to 'a body of first instance, which is independent of the contracting authority'.

45. However, irrespective of the foregoing, the following point must be made. Having established that Directive 89/665 contains no reference to the effect that legal remedies may be available to contracting authorities, even against annulment decisions taken by an administrative review body, it is clear that the detrimental effects claimed by the Simvoulio, in so far as they can be substantiated, exist, in principle, only in the sphere of the procedural autonomy of Member States, and that it is in that context of the relevant national legal systems that they must be addressed.

46. Nevertheless, one final point should be made, which is that the procedural autonomy of the Member States is clearly not absolute. In fact, when that autonomy is exercised in the field of European Union law, it meets its furthest limits in the general principles of that law and, in particular here, both in the value that is the 'rule of law' (18) and in observance of fundamental rights, specifically the right to an effective remedy pursuant to Article 47 of the Charter. (19)

47. However, for the purposes of this case, suffice it to say, in this regard, that the nature of legal persons governed by public law possessed by such contracting authorities makes it very difficult for them to rely on Article 47 of the Charter (20) which, moreover, has not been expressly pleaded in these proceedings.

48. Finally, attempting to infer from the rule of law that the contracting authority has capacity to bring legal proceedings is even more problematic in the circumstances of the case. Of course, it is beyond doubt that a balanced procedural structure forms part of the image of the rule of law and, from that point of view, it might seem surprising that the contracting authority is denied access to judicial review of the annulment by the administrative body of its decision to award a contract.

49. However, in this respect, we must be mindful of the fact that, in the first place, it is primarily the tendering undertakings which were awarded the contract by the decision subsequently annulled that would naturally be inclined to seek judicial review of that annulment, in the exercise of a capacity to bring proceedings which has obviously never been in dispute.

50. Furthermore, we would do well to remember that, by virtue of Article 2(7) of Directive 89/665, the Member States 'shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced'. The provision makes no distinction between judicial and non-judicial bodies and consequently this mandate to optimise enforcement must not be interfered with more than is absolutely necessary by prolonging the dispute and the lack of legal certainty beyond what is envisaged in the directive.

51. The foregoing should be sufficient, in my opinion, to conclude that the restriction of the contracting authority's capacity to bring proceedings is, in the circumstances of the case, proportionate, viewed from a perspective as broad as the rule of law undoubtedly is. Nor, in conclusion, should it therefore be assumed from this last observation that the procedural autonomy exercised by the Member State within the context of Directive 89/665 was exercised in disregard of the general principles of European Union law or of the values or fundamental rights proclaimed therein.

VI – Conclusion

52. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the question referred for a preliminary ruling:

Article 2(8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts does not preclude an interpretation whereby a contracting authority is prevented from exercising the right to challenge before the courts the annulment of its decision by the administrative body responsible for review procedures.

---

1 – Original language: Spanish.

---

2 – Its judgments are subject to appeal before the same court sitting in plenary session.

---

3 – Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

---

4 – Provision drafted in accordance with Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). Pursuant to Article 33 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), Article 36 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and the second paragraph of Article 82 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), and in accordance with the correlation tables in the annexes to the above directives, the references to Directive 71/305/EEC, Directive 77/62/EEC and Directive 92/50/EEC appearing in Article 1(1) of Directive 89/665 shall be construed as references to Directive 2004/18.

---

5 – Since Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), which is not applicable to the present case for chronological reasons, the provision contained in Article 2(8) has now become Article 2(9), with the substance remaining unchanged, although the reference in the Spanish version of Article 2(8) to the *organismo de base* (original body) is replaced by the less ambiguous *órgano de recurso* (review body).

---

6 – It transpired at the hearing that the geographical area of the Simvoulio covers the Nicosia metropolitan area and that its president is the mayor of Nicosia.

---

7 – All the parties involved in these preliminary ruling proceedings have avoided specifying the precise grounds on which the review authority revoked the decision of the Simvoulio.

---

8 – Giving rise to the case registered under No 629/2006.

---

9 – No 106/2006.

---

10 – Which currently comprise, basically, Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Directive 2004/18).

---

11 – Judgment in Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 45 and Order of 4 October 2007 in Case C-492/06 *Consorzio Elisoccorso San Raffaele* [2007] ECR I-8189, paragraph 21.

12 – According to the judgments of the Court of Justice in Case C-470/99 *Universale-Bau and others* [2002] ECR I-11617, paragraph 71 and in Case C-406/08 *Uniplex (UK) Ltd* [2010] ECR I-0000, paragraph 26, '[i]t is therefore for the internal legal order of each Member State to establish such time-limits'.

13 – Order of the Court of Justice of 4 October 2007, cited, paragraph 20.

14 – A concept which, for these purposes, includes not only a judicial body recognised as such from the organisational perspective of the Member State, and whose protection is invoked by means of a 'judicial review', but also a 'body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty … independent of both the contracting authority and the review body', since Article 2(8) of Directive 89/665 also permits the decisions of the contracting authority or administrative body responsible for review to be examined by such a body.

15 – In point of fact, the Simvoulio also represents the interest of the community in wastewater being correctly managed, a function for which it alone has full responsibility, as was confirmed at the hearing, and which covers wastewater distribution and treatment in the Nicosia metropolitan area, thus extending beyond the city limits.

16 – From the submissions of all those participating in these preliminary ruling proceedings it is clear that the Simvoulio is a 'contracting authority' and the review authority 'a non-judicial body responsible for the review procedure', and it is therefore only necessary to look to Directive 89/665 to conclude that the two administrative bodies, perform different roles, at least from a functional perspective.

17 – It is not for the Court of Justice to analyse national law because the mechanism for seeking preliminary rulings is based on a clear separation of functions between the national courts and the Court of Justice, which is empowered only to rule on the interpretation or, as the case may be, the validity of European Union provisions on the basis of the facts which the national court puts before it: see the judgments of the Court of Justice in Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraph 16; Case C-352/95 *Phytheron International* [1997] ECR I-1729, paragraph 11; and Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraphs 25 to 27.

18 – Article 2 TEU treats 'the rule of law' as a 'value' common to the Member States. However, the preamble to the Charter of Fundamental Rights of the European Union of 7 December 2000 (OJ 2000 C 364, p. 1), as adapted in Strasbourg on 12 December 2007 (OJ C 303, p. 1) ('the Charter') refers to it as a 'principle'. For its part, the second paragraph of Article 19(1) TEU declares that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

19 – Judgments in Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18 and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 65 et seq.

20 – Article 34 of the Rome Convention prevents public bodies from relying on the rights set forth therein before the European Court of Human Rights; however, the Strasbourg Court has, in particular circumstances, extended the protection of Article 6(1) of the European Convention on Human Rights to certain public law bodies: see, for example, its judgment of 9 December 1994, *The Holy Monasteries* v *Greece*, Series A No 301-A, pp. 34-35, paragraph 49, which requires that such bodies should not exercise governmental powers, which is obviously not the case in relation to the Simvoulio.

EU:C:2010:751

JUDGMENT OF THE COURT (Second Chamber)

9 December 2010 (*)

(Public contracts – Procedures for reviewing the award of public works contracts – Directive 89/665/EEC – Duty of Member States to make provision for a review procedure – National legislation permitting a court hearing an application for interim measures to authorise a decision awarding a public contract which may subsequently be held contrary to European Union legal rules by the court hearing the substance of the case – Compatibility with the directive – Award of damages to the tenderers harmed – Conditions)

In Case C-568/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Rechtbank Assen (Netherlands), made by decision of 17 December 2008, received at the Court on 22 December 2008, in the proceedings

Combinatie Spijker Infrabouw/De Jonge Konstruktie,

Van Spijker Infrabouw BV,

De Jonge Konstruktie BV

v

Provincie Drenthe,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, A. Arabadjiev, A. Rosas, A. Ó Caoimh and P. Lindh, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Combinatie Spijker Infrabouw/De Jonge Konstruktie, Van Spijker Infrabouw BV and De Jonge Konstruktie BV, by H. Hoogwout, advocaat,

– the Provincie Drenthe, by M. Mutsaers and A. Hoekstra-Borzymowska, advocaten,

– the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,

– the Commission of the European Communities, by M. Konstantinidis and S. Noë, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 1(1) and (3) and 2(1) and (6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1; 'Directive 89/665').

2 The reference has been made in the context of a dispute between Combinatie Spijker Infrabouw/De Jonge Konstruktie, Van Spijker Infrabouw BV and De Jonge Konstruktie BV ('Combinatie and others') and Provincie Drenthe (Province of Drenthe; 'Provincie'), concerning the award of a public works contract.

Legal context

Union legislation

3 The fifth recital of Directive 89/665 states:

'Whereas, since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorised to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority; whereas the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently'.

4 Article 1(1) and (3) of Directive 89/665 provide:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.

...

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

5 Article 2(1) and (6) of Directive 89/665 read:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

6 By virtue, respectively, of Article 36 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Article 33 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), have been repealed.

7 Article 82 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) provides that Directive 92/50, save for Article 41 thereof, and Directives 93/36 and 93/37 are repealed. References to those repealed directives as a whole are to be construed as references to Directive 2004/18.

8 According to Article 7(c) of Directive 2004/18, as amended by Commission Regulation (EC) No 2083/2005 of 19 December 2005 (OJ 2005 L 333, p. 28), that directive was applicable, between 1 January 2006 and 31 December 2007, to public works contracts with a value exclusive of value added tax (VAT) estimated to be equal to or greater than EUR 5 278 000.

9 Article 9(5)(a) of Directive 2004/18 provides:

'Where a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

[…]'

National legislation

10 At the time of the facts giving rise to the dispute in the main proceedings, the Kingdom of the Netherlands had not adopted specific measures for transposing Directive 89/665 into national law, taking the view that Netherlands legislation in force already met the requirements of that directive.

11 According to the information in the Court's file, the award of public contracts is a matter for private law, the award of a public contract constitutes an act of private law, and decisions preliminary to the award of a public contract taken by administrative bodies are regarded as preparatory acts of private

law. The civil courts have jurisdiction to hear disputes on the award of public contracts as regards both the adoption of protective measures and the procedure on the substance. The administrative courts do not have jurisdiction, unless a law provides otherwise.

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 According to the order for reference, the Provincie decided to renew two bascule bridges on the Erica-Ter Apel navigable waterway in the Commune of Emmen (Netherlands). That navigable waterway is stated to be of great importance at the international level. The European Union granted a subsidy in support of that project, on condition that the works were carried out within a certain time-limit, fixed at 1 July 2008.

13 The contract for the renewal of the bascule bridges was made the subject-matter of a public call for tenders at European level. The contract notice of 13 July 2007 was published in the supplement to the *Official Journal of the European Union*.

14 The tenderers were subjected to certain conditions, particularly as regards technical capacity, integrity and solvency. Other conditions concerned the tenders themselves, particularly as regards the evidence which had to accompany them. The criterion for award of the contract was the lowest price.

15 The contract notice was amended by a notice of 23 July 2007.

16 The tenders, which had to be lodged before 19 September 2007, were opened on that date, and the Provincie issued a report at the conclusion of that operation. It was stated therein, amongst other things, that four tenderers had submitted a tender, and that the lowest tender, of EUR 1 117 200, was that of Machinefabriek Emmen BV (‘MFE’), whilst Combinatie’s tender, of EUR 1 123 400, came second.

17 By letter of 2 October 2007, the Provincie informed Combinatie and others that it intended to award the contract to MFE because its tender was the lowest, without further explanations.

18 Combinatie and others objected to that decision, by letter of 9 October 2007, arguing that there was serious evidence to cast doubt as to whether MFE did in fact meet the criteria for the award of the contract. That letter gave rise to a telephone conversation with the staff of the Provincie, during which the question was raised whether a successor undertaking might use the references of its predecessor.

19 On 18 October 2007, Combinatie and others brought an application for interim measures against the Provincie before the Rechtbank Assen, from which it sought a ruling that MFE had submitted an invalid tender, that Combinatie had submitted the lowest tender, and that the Provincie should award the contract to the latter.

20 By letter of 1 November 2007, the Provincie informed all tenderers that it had decided to withdraw its call for tenders because, following an analysis by its award procedure staff, it had become apparent that the procedure was vitiated by such flaws that it was no longer possible to continue. According to that letter, the main flaws were as follows: (a) the requirement concerning experience had been reduced from 60 to 50 % of the market in question, and the requirement concerning turnover had been reduced from 150 to 125% of that amount; (b) the reference period for calculation of turnover had been extended from 3 to 5 years; (c) the criterion of experience had been modified in such a way that it no longer fully corresponded to the criterion initially laid down; (d) those modifications had been communicated on the website www.aanbestedingskalender.nl, but not on the website on which the call for tenders had been published, namely www.ted.europa.eu. In that same letter, the Provincie indicated that it was considering the possibility of making a fresh call for tenders.

21 Combinatie and others took the view that the letter of 1 November 2007 was not a factor sufficient to enable it to withdraw its application for interim measures, but it nevertheless modified the claims made therein.

22 On 9 November 2007, MFE intervened in the interim proceedings on the advice of the Provincie, claiming that the court hearing those proceedings should award the contract to MFE.

23 By judgment of 28 November 2007, the judge hearing the application for interim measures at the Rechtbank Assen took the view that MFE had convincingly argued, by means of documents lodged during the award procedure and commented upon at the hearing, that the works which had been carried out in the past by Machinefabriek Hidding BV, which during 2005 became Synmet Engineering & Production BV, could be attributed to it. The judge hearing the application for interim measures also found that MFE had met the conditions laid down by the Provincie in the call for tenders and provided the necessary information in time, that the signature of the model K declaration lodged by MFE's representative should be regarded as sufficient, and that MFE had submitted the lowest tender.

24 The judge hearing the application for interim measures ruled that the Provincie had not acted consistently when it defined the turnover and experience criteria, and that substantive changes had been introduced into the call for tenders. Nevertheless, the court found that the changes had been made at an early stage of the award procedure, that those changes did not appear to have been introduced in order to favour one of the tenderers, and that neither did it appear that third parties had submitted a tender after the project was modified. In those circumstances, the court held that the changes were not of sufficient importance to permit the conclusion that the call for tender procedure had not been sufficiently transparent.

25 The court considered that, having regard to the principles of equality and legitimate expectations, and by reason of pre-contractual good faith, it was no longer permissible for the Provincie, at that stage of the award procedure, to award, following a second call for tenders, the same works contract to an undertaking other than that which fulfilled the conditions laid down at the time of the first call for tenders.

26 The court therefore prohibited the Provincie from awarding the contract to an undertaking other than MFE, and declared that decision immediately enforceable.

27 On 3 December 2007, the Provincie awarded the contract to MFE.

28 On 11 December 2007, Combinatie and others brought an interlocutory action before the Gerechsthof Leeuwarden, claiming that the judgment of the Rechtbank Assen of 28 November 1997 should be set aside.

29 By interlocutory judgment of 30 January 2008, the Gerechsthof Leeuwarden dismissed that application on the ground that MFE had a protected interest in the execution of the judgment of the Rechtbank Assen.

30 The Gerechtshof Leeuwarden held that the contract concluded meanwhile between the Provincie and MFE should be regarded as having been concluded in a legally valid manner and that, apart from individual cases, the mere fact that the call for tenders procedure was vitiated by defects did not render that validity open to challenge. The Gerechtshof concluded that the only action remaining open to Combinatie and others, were an infringement of the law on public contracts to be established, was an action for damages.

31 On 19 December 2007, Combinatie and others lodged a further appeal against the interim judgment, seeking the annulment of that judgment and the award of the contract. It desisted from that appeal after becoming aware of the interlocutory judgment of the Gerechtshof Leeuwarden of 30 January 2008 and decided to sue the Provincie for damages before the Rechtbank Assen. The writ was issued on 29 February 2008.

32 In the context of that action, the Rechtbank Assen considers that the decision of 1 November 2007, whereby the Provincie decided to withdraw its award decision of 2 October 2007 and make a fresh call for tenders, is the only correct application of the law on public contracts. It considers that the Provincie could not reduce the experience requirement from 60 to 50% and the turnover requirement from 150 to 125%, that it could not extend the reference period for calculation of turnover from 3 to 5 years, and that it should have published the changes which it thus made to the call for tenders on the same internet site as that on which it had published that call. The Rechtbank Assen states that, for those reasons, it intends to give a definitive judgment in substitution for the interim judgment. The Rechtbank considers

that, since the contract has been awarded and the works already begun, or perhaps even finished, the only issue is whether to award damages to Combinatie and others.

33 The Rechtbank Assen questions whether that unlawful act falls to be ascribed to the Provincie, given the circumstances and the statutory structure of legal protection within which it took place. The major social interests to which the Provincie refers and the decision of the court hearing the application for interim measures, along with the Netherlands legislature's choice of legal protection system, might serve as justification.

34 In those circumstances, the Rechtbank Assen decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Must Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665 be interpreted as meaning that they have not been complied with if the legal protection to be afforded by national courts in disputes relating to tendering procedures governed by European law is impeded by the fact that conflicting decisions may arise under a system in which both administrative courts and civil courts may have jurisdiction with respect to the same decision and its consequences?

(b) Is it permissible in this context for the administrative courts to be confined to forming an opinion and ruling on the tendering decision, and if so, why and/or under what conditions?

(c) Is it permissible in this context for the Algemene wet bestuursrecht (Netherlands General Law on Administrative Law), which, as a rule, governs applications for access to the administrative courts, to exclude such applications in the case of decisions concerning the conclusion of a contract by the contracting authority with one of the tenderers, and if so, why and/or under what conditions?

(d) Is the answer to Question 2 of relevance in this context?

(2) (a) Must Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665 be interpreted as meaning that they have not been complied with if the only procedure for obtaining a rapid decision is characterised by the fact that it is in principle geared to a rapid mandatory measure, that lawyers have no right to exchange views, that [no] evidence is, as a rule, presented in other than written form and that statutory rules on evidence are not applicable?

(b) If not, does this also apply if the decision does not lead to the final determination of the legal situation and does not form part of a decision-making process leading to such a final decision?

(c) Does it make a difference in this context if the decision is binding only on the parties to the proceedings, even though other parties may have an interest?

(3) Is it compatible with Directive 89/665 for a court, in interim relief proceedings, to order the contracting public authority to take a tendering decision which is subsequently deemed, in proceedings on the substance, to be contrary to tendering rules under European law?

(4) (a) If the answer to the previous question is in the negative, must the contracting public authority be deemed liable in that regard, and if so, in what sense?

(b) Does the same apply if the answer to that question is in the affirmative?

(c) If that authority is required to pay damages, does Community law set criteria for determining and estimating those damages, and if so, what are they?

(d) If the contracting public authority cannot be deemed liable, is it possible, under Community law, for some other person to be shown to be liable, and on what basis?

(5) If it in fact appears to be impossible, or extremely difficult, under national law and/or with the aid of the answers to the above questions to attribute liability, what must the national court do?'

The questions referred

Preliminary observation

35 Pursuant to Article 1(1) thereof, Directive 89/665 applies as regards contract award procedures falling within the scope of Directive 71/305, that latter directive having been replaced by Directive 93/37, itself replaced by Directive 2004/18.

36 According to Article 7(c) thereof, Directive 2004/18 applied, both at the date of publication of the contract notice and at the date of the award of the contract at issue in the main proceedings, to public works contracts the value of which, excluding VAT, was equal to, or higher than, EUR 5 278 000.

37 According to the order for reference, the amount of the successful tender in the procedure giving rise to the dispute in the main proceedings was EUR 1 117 200, including VAT.

38 The question therefore arises whether or not the contract at issue in the main proceedings falls within the scope of Directive 2004/18.

39 On 8 December 2009, the Court sent the referring court a request for clarification pursuant to Article 104(5) of the Rules of Procedure, with a view to determining the estimated value of the contract at issue in the main proceedings and, in particular, to determine whether that contract formed part of an aggregate whole for the purposes of Article 9(5)(a) of that directive, with the result that account would need to be taken of the estimated overall value of that aggregate whole.

40 By letter of 28 January 2010, which reached the Registry of the Court of Justice on 2 February 2010, the referring court indicated that the contract at issue in the main proceedings concerned works forming part of a more extensive project, namely the renewal of the Erica-Ter Apel navigable waterway, of an amount estimated at EUR 6 100 000.

41 It is possible to infer from that answer that the contract at issue in the main proceedings forms part of an aggregate whole for the purposes of Article 9(5)(a) of Directive 2004/18, the overall amount of which exceeds the threshold for the application of the latter. The Court therefore considers that that contract falls within the scope of that directive, and thus within the scope of Directive 89/665.

The first question

42 According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-459/07 *Elshani* [2009] ECR I-2759, paragraph 40).

43 Nevertheless, the Court has held that it cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of European Union (EU) law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Bosman*, paragraph 61; *Elshani*, paragraph 41).

44 As is apparent from the order for reference, the first question is based on the premiss that, in the context of national law, both the administrative courts and the civil courts may have jurisdiction in relation to the same decision taken in the context of the award of a public contract, which might lead to the adoption of contradictory court decisions.

45 However, the observations submitted to the Court by the Kingdom of the Netherlands and the Commission show that, under Netherlands law, the civil courts generally have exclusive jurisdiction to hear disputes on the award of public contracts. According to those observations, the administrative courts have jurisdiction in the matter if a particular law so provides. In that case, they would have exclusive jurisdiction. It would therefore be impossible, under Netherlands law, for an administrative court and a civil court both to have jurisdiction concerning the same dispute on the award of public works contracts.

46 It is true that, when ruling in the context of a reference for a preliminary ruling, the Court of Justice may not rule on the interpretation of national laws or regulations (Case 32/76 *Saieva* [1976] ECR 1523, paragraph 7; Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* [1984] ECR 3435, paragraph 10; and Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 13).

47 However, it is undisputed that, in the dispute in the main proceedings, there is no risk of contradictory decisions through the intervention of an administrative court, since all the proceedings have taken place before civil courts.

48 According to the Court's information, therefore, the interpretation of EU law requested in the first question bears no relation to the subject-matter of the dispute in the main proceedings.

49 Therefore, the first question must be regarded as inadmissible.

The second question

50 By its second question, part (a), the referring court asks, in essence, whether Directive 89/665 precludes a system in which, in order to obtain a rapid decision, the only procedure available is characterised by the fact that it is geared to a rapid mandatory measure, that lawyers have no right to exchange views, that no evidence is, as a rule, presented other than in written form and that statutory rules on evidence are not applicable.

51 It should be remembered, as is stated in the fifth recital of Directive 89/665, that the short duration of procedures for the award of public contracts means that infringements of provisions of EU law need to be dealt with urgently.

52 In view of that objective, Article 1(1) of Directive 89/665 provides for the establishment in the Member States of review procedures which are effective, and in particular as rapid as possible, against decisions which may have infringed EU law on public procurement or national rules implementing that law.

53 More specifically, Article 2(1)(a) of that directive requires Member States to make provision for the powers to 'take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned'.

54 Since Article 2(2) of the same directive provides that the powers specified in Article 2(1) may be conferred on separate bodies responsible for different aspects of the review procedure, it follows in particular that Member States may confer the power to take provisional measures and the power to award damages on separate bodies.

55 Article 2(3) of Directive 89/665 provides that review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate. It follows that this directive allows Member States to provide, in their national legislation, that suspensive measures may be applied for, in appropriate cases, in proceedings which are separate from those concerning the substance of the procedures for the award of public contracts.

56 Article 2(4) of the said directive, which provides that a decision not to grant interim measures shall not prejudice any other claim of the person seeking those measures, also allows for the possibility of a procedure on the substance separate from the procedure seeking the grant of interim measures.

57 Thus, it may be concluded that Directive 89/665 leaves Member States a discretion in the choice of the procedural guarantees for which it provides, and the formalities relating thereto.

58 It should be noted that, since the characteristics of the interim procedure at issue in the main proceedings are inherent in procedures seeking the quickest possible adoption of interim measures, they comply, as such, with the requirements of Articles 1(1) and 2(1)(a) of Directive 89/665.

59 It follows from the above that Directive 89/665 does not preclude a system in which, in order to obtain a rapid decision, the only procedure available is characterised by the fact that it is geared to a rapid mandatory measure, that lawyers have no right to exchange views, that no evidence is, as a rule, presented other than in written form and that statutory rules on evidence are not applicable.

60 By part (b) of its second question, the national court asks whether the above analysis also applies where the interim judgment does not lead to the final determination of the legal situation and does not form part of a decision-making process leading to such a final decision.

61 By its nature, an interim measure does not finally determine the legal situation. Moreover, the effects produced by the decision-making process of which that measure forms part follow from the internal legal order of the State concerned. Therefore, Directive 89/665 does not preclude the adoption of such a measure.

62 By part (c) of its second question, the referring court asks whether it makes a difference that the interim judgment is binding only on the parties, even though other parties may have an interest.

63 That part of the question is based on a hypothesis that does not obtain in the main dispute. In that dispute, the interim proceedings were not limited to the applicant and the defendant, namely Combinatie and others and the Provincie. On the contrary, a third interested party, namely MFE, was able to intervene to defend its interests, and moreover to do so with success.

64 Consequently, there is no need to reply to that part of the question.

65 Having regard to the above considerations, the answer to the second question is that Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665 do not preclude a system in which, in order to obtain a rapid decision, the only procedure available is characterised by the fact that it is geared to a rapid mandatory measure, that lawyers have no right to exchange views, that no evidence is, as a rule, presented in other than written form, that statutory rules on evidence are not applicable and that the judgment does not lead to the final determination of the legal situation and does not form part of a decision-making process leading to such a final decision.

The third question

66 By its third question, the referring court asks in essence whether Directive 89/665 must be interpreted as precluding a court hearing an application for interim measures from ordering an awarding authority to adopt a decision to award a public contract which, in the course of a subsequent procedure on the substance, will be declared incompatible with Directive 2004/18.

67 As stated in paragraph 42, it is for the national court to assess, having regard to the particular features of the case, the relevance of the questions which it puts to the Court.

68 The third question of the referring court is based on the premiss that, in the main proceedings, the court hearing the application for interim measures has ordered the awarding authority to award the contract in question to MFE.

69 According to the findings contained in the order for reference, that premiss in inaccurate. As the referring court finds, the court hearing the application for interim measures has prohibited the Provincie from awarding the contract to an undertaking other than MFE. It is not, however, apparent from the information on file that the court hearing the application for interim measures required the Provincie to award the contract to MFE.

70 In that respect, in reply to a question put by the Court, Combinatie and others, the Kingdom of the Netherlands and the Commission argued that the Provincie could have pursued a number of courses of action following the interim judgment of 28 November 2007 other than awarding the contract at issue in the main proceedings to MFE.

71 It is, moreover, apparent from the replies received by the Court that the Provincie could have refrained from awarding the contract or brought court action on the substance, or appealed against the interim judgment of 28 November 2007 or, finally, have waited, before awarding the contract, for a possible appeal to be made by Combinatie and others against that interim judgment.

72 Concerning that fourth possibility, the documents before the Court show that Combinatie and others did in fact bring an appeal, on 11 December 2007, against the interim judgment, whereas the Provincie awarded the contract to MFE on 3 December 2007.

73 It follows that the hypothesis that a court hearing an interim application required an awarding authority to adopt a decision awarding a public contract does not obtain in the dispute in the main proceedings.

74 In order to give a useful answer to the referring court, it is thus necessary to reformulate the third question. By that question, the national court is actually asking whether Directive 89/665 must be interpreted as precluding a court hearing an application for interim measures, in order to adopt a provisional measure, from carrying out an interpretation of Directive 2004/18 which is subsequently classified as erroneous by the court dealing with the substance.

75 As has been emphasised in paragraphs 52 to 54 of this judgment, Directive 89/665 requires Member States to establish review procedures against decisions which may have infringed EU law on public procurement or national rules implementing that law.

76 Article 2(2) of that directive provides that such procedures may be handled by separate bodies from those responsible for actions on the substance, such as actions for damages.

77 Given the possibility of making provision for such a system, the possibility cannot be excluded that the court hearing an application for interim measures and the court dealing with the substance, called upon successively to deal with the same dispute, might give a divergent interpretation of the relevant EU legal rules. On the one hand, the court hearing an application for interim measures is called upon to give a decision in the context of an urgent procedure in which both the gathering of evidence and the examination of the pleas of the parties is necessarily more cursory than in the context of the proceedings on the substance. On the other hand, the intervention of the court hearing an application for interim measures is not designed, like that of the court hearing the substance, to rule definitively on the claims presented to it but to protect provisionally the interests at stake, possibly by balancing them.

78 The EU legislature has recognised the specific nature of the mission of the court hearing an application for interim measures in Article 2(1)(a) and (4) of Directive 89/665, by emphasising in particular the provisional nature of the measures taken by such a court.

79 It is inherent in the review system established by that directive that the court hearing the substance may adopt an interpretation of EU law, and of Directive 2004/18 in particular, which is different from that of the court hearing an application for interim measures. Such a divergence in assessment does not imply that a court system such as that at issue in the main proceedings does not comply with the requirements of Directive 89/665.

80 Therefore, the answer to the third question is that Directive 89/665 must be interpreted as not precluding a court hearing an application for interim measures, for the purposes of adopting a provisional measure, from carrying out an interpretation of Directive 2004/18 which is, subsequently, classified as erroneous by the court hearing the substance of the case.

The fourth question

81 By its fourth question, parts (a) and (b), the referring court asks, in essence, whether an awarding authority may be held liable where it makes a decision to award a public contract following a direction

to that effect by a court hearing an application for interim measures, and that decision is, during subsequent proceedings on the substance, declared incompatible with EU rules on the award of public contracts.

82 Those questions are based on the hypothesis that, in the dispute in the main proceedings, the court hearing the application for interim measures directed the awarding authority to award the contract in question to a certain operator.

83 As explained in paragraphs 69 to 73 of this judgment, that is not the case in the dispute in the main proceedings.

84 Under those circumstances, it is not necessary to answer the fourth question, parts (a) and (b).

85 By its fourth question, part (c), the referring court asks, in essence, whether, if the awarding authority has to make good the damage arising from an infringement of EU law on the award of public contracts, EU law provides criteria on the basis of which the damage may be determined and estimated and, if so, what those criteria are.

86 Article 2(1)(c) of Directive 89/665 clearly indicates that Member States must make provision for the possibility of awarding damages in the case of infringement of EU law on the award of public contracts, but contains no detailed statement either as to the conditions under which an awarding authority may be held liable or as to the determination of the amount of the damages which it may be ordered to pay.

87 That provision gives concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible. According to case-law developed since the adoption of Directive 89/665, but which is now consistent, that principle is inherent in the legal order of the Union. The Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals (Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraphs 31 and 51; and Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraphs 19 and 20).

88 As matters stand at present, the case-law of the Court of Justice has not yet set out, as regards review of the award of public contracts, more detailed criteria on the basis of which damage must be determined and estimated.

89 As regards EU legislation, it should be noted that Directive 89/665 has been largely amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC (OJ 2007 L 335, p. 31), adopted after the date of the facts which gave rise to the dispute in the main proceedings. However, on that occasion, the EU legislature refrained from adopting any provisions on that point.

90 In the absence of EU provisions in that area, it is for the legal order of each Member State to determine the criteria on the basis of which damage arising from an infringement of EU law on the award of public contracts must be determined and estimated (see, by analogy, Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 46; and Case C 314/09 *Strabag and Others* [2010] ECR I-0000, paragraph 33) provided the principles of equivalence and effectiveness are complied with (see, to that effect, Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 98).

91 It is apparent from well-established case-law that the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see, in particular, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 43; Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 46; and Case C-246/09 *Bulicke* [2010] ECR I-0000, paragraph 25).

92 Therefore, the answer to the fourth question, part (c) is that, as regards State liability for damage caused to individuals by infringements of EU law for which the State may be held responsible, the individuals harmed have a right to redress where the rule of EU law which has been infringed is intended to confer rights on them, the breach of that rule is sufficiently serious, and there is a direct causal link between the breach and the loss or damage sustained by the individuals. In the absence of any provisions of EU law in that area, it is for the internal legal order of each Member State, once those conditions have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of public contracts must be determined and estimated, provided the principles of equivalence and effectiveness are complied with.

93 In view of that answer, there is no need to reply to part (d) of the fourth question.

The fifth question

94 By the fifth question, the referring court asks what the national court must do if it proves impossible or extremely difficult in practice to attribute liability.

95 Given the answers to the previous questions and having regard to the Court's file on the case, there is nothing to indicate that that is so in the case in the main proceedings.

96 Therefore, this question does not require an answer.

Costs

97 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 1(1) and (3) and Article 2(1) and (6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, do not preclude a system in which, in order to obtain a rapid decision, the only procedure available is characterised by the fact that it is geared to a rapid mandatory measure, that lawyers have no right to exchange views, that no evidence is, as a rule, presented other than in written form, that statutory rules on evidence are not applicable, and that the judgment does not lead to the final determination of the legal situation and does not form part of a decision-making process leading to such a final decision.**

2. **Directive 89/665, as amended by Directive 92/50, must be interpreted as not precluding a court hearing an application for interim measures, for the purposes of adopting a provisional measure, from carrying out an interpretation of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts which is, subsequently, classified as erroneous by the court hearing the substance of the case.**

3. **As regards State liability for damage caused to individuals by infringements of European Union (EU) law for which the State may be held responsible, the individuals harmed have a right to redress where the rule of EU law which has been infringed is intended to confer rights on them, the breach of that rule is sufficiently serious, and there is a direct causal link between the breach and the loss or damage sustained by the individuals. In the absence of any provisions of EU law in that area, it is for the internal legal order of each Member State, once those conditions have been complied with, to determine the criteria on the basis**

of which the damage arising from an infringement of EU law on the award of public contracts must be determined and estimated, provided the principles of equivalence and effectiveness are complied with.

[Signatures]

---

* Language of the case: Dutch.

EU:C:2010:515

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 14 September 2010 (1)

Case C-568/08

**Combinatie Spijker Infrabouw/De Jonge Konstruktie
van Spijker Infrabouw BV
de Jonge Konstruktie BV
v
Provincie Drenthe**

(Reference for a preliminary ruling from the Rechtbank Assen (Netherlands))

(Public procurement – Review procedures in matters relating to the award of public works and supply contracts – Provisional measures adopted in interim proceedings – Damages resulting from the infringement of European Union law – Criteria for attributing liability and quantifying damage)

1. The reference for a preliminary ruling from the Rechtbank Assen ('the Rechtbank') concerns the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, (2) as amended by Council Directive 92/50/EEC of 18 June 1992 (3) ('Directive 89/665').

2. By its five questions, most of which are in turn subdivided into several more, the Rechtbank asks the Court to give a ruling on two distinctly separate matters.

3. First, the matter of whether the review procedures introduced by Directive 89/665, and in particular Articles 1(1) and (3) and 2(1) and (6) thereof, preclude a national procedural rule on interim measures such as that of the Netherlands, which, in the field of public procurement, as a general rule, confers jurisdiction on the civil courts while laying down limits on the presentation of submissions and evidence and, finally, formulates those measures as independent of the substantive proceedings on the main issue leading to the final determination of the legal relationship, thereby conferring on those interim measures a certain degree of permanence.

4. Secondly, the Rechtbank asks whether, for the purposes of Article 2(1)(c) of Directive 89/665, that is, to 'award damages to persons harmed by an infringement', European Union law sets criteria for attributing that liability and for determining and estimating the damage.

5. In those terms, the present case provides the opportunity to clarify certain points of Directive 89/665 which are of great significance for the purpose of upholding the legality which European Union law requires in the context of public procurement.

I – The facts

6. With a view to renovating, in the commune of Emmen, two bascule bridges on the waterway link of the Erica-Ter Apel network of canals, the Provincie Drenthe ('the Provincie') initiated a public call for tenders for the award of a works contract, published in the *Official Journal of the European Union* on 18 July 2007. (4)

7. The European Union granted a subsidy to the project on condition that the works were completed within a given period, which expired on 1 July 2008.

8. Four tenderers submitted bids, the lowest tender being that of the undertaking Machinefabriek Emmen BV ('MFE') and the second lowest that of Combinatie Spijker Infrabouw ('the Combinatie').

9. On 2 October 2007 the Provincie informed the Combinatie that it intended to award the contract to MFE because the latter had submitted the lowest tender.

10. On 18 October 2007, the Combinatie reacted to the tendering decision by requesting that the judge dealing with interim relief proceedings at the Rechtbank Assen ('the judge dealing with interim relief proceedings') order that the tender submitted by MFE was invalid and that the Combinatie was therefore the undertaking which had tendered the lowest price and also that the Combinatie should be awarded the contract in the event that the Provincie should proceed to make the award.

11. However, pending those interim proceedings, on 1 November 2007, the Provincie informed all the tenderers that it was withdrawing the call for tenders, thereby revoking its tendering decision notified on 2 October 2007, on the basis of what it regarded as a number of breaches of essential procedural requirements. (5)

12. This did not induce the Combinatie to withdraw its application for interim measures. On 9 November 2007, MFE, the undertaking initially awarded the contract, requested that the judge dealing with interim relief proceedings award the contract to it. At the hearing, the provincie argued that it did not wish to award the contract to any of the tenderers.

13. On 28 November 2007, the judge dealing with interim relief proceedings issued a – provisionally enforceable – order, whose decisive passage, for our purposes, reads as follows: taking into account that 'the Provincie stated by letter of 2 October 2007 that it intended to award the contract to Machinefabriek Emmen, although proceedings for an interim order were not brought within 15 days, the Provincie cannot, at this stage of the tendering procedure and in accordance with the principles of equal treatment, the protection of legitimate expectations and the principle of pre-contractual good faith, award the contract by means of a second tendering procedure for the same contract to a person other than the person entitled to be awarded the contract on the basis of the first tendering procedure', (6) which, according to the operative part of the order, 'prevents the award of the contract to a third party other than Machinefabriek'.

14. Five days later, on 3 December 2007, the Provincie awarded the contract to MFE.

15. On 11 December 2007 the Combinatie brought an appeal before the Gerechtshof Leeuwarden, applying for suspension of enforcement of the decision of the judge dealing with interim relief proceedings.

16. By interlocutory decision of 30 January 2008, the Gerechtshof Leeuwarden dismissed the application for suspension of enforcement, considering that MFE had a reasonable interest in enforcement of the decision of the judge dealing with interim relief proceedings. Although the appeal could continue in respect of the remaining claims for the order of the judge dealing with interim relief proceedings to be set aside or upheld, (7) the Combinatie withdrew its appeal.

17. The Combinatie subsequently brought an action before the Rechtbank seeking compensation from the Provincie for the damage caused as a consequence of the outcome of the invitation to tender for public works. The application was lodged on 29 February 2008. On 22 December 2008, the Rechtbank submitted this reference for a preliminary ruling.

II – The questions referred for a preliminary ruling

18. In its order for reference, the Rechtbank takes the view, and this point will prove particularly relevant, that the decision of the Provincie to revoke its tendering decision of 2 October 2007 and to repeat the tendering procedure was the only option which is consistent with the proper application of the law on public procurement.

19. On the basis of that premiss, the Rechtbank stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 267 TFEU:

‘1(a) Must Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665/EEC be interpreted as meaning that they have not been complied with if the legal protection to be afforded by national courts in disputes relating to tendering procedures governed by European law is impeded by the fact that conflicting decisions may arise under a system in which both administrative courts and civil courts may have jurisdiction with respect to the same decision and its consequences?

1(b) Is it permissible in this context for the administrative courts to be confined to forming an opinion and ruling on the tendering decision, and if so, why and/or under what conditions?

1(c) Is it permissible in this context for the Algemene wet bestuursrecht (Netherlands General Law on Administrative Law), which, as a rule, governs applications for access to the administrative courts, to exclude such applications in the case of decisions concerning the conclusion of a contract by the contracting authority with one of the tenderers, and if so, why and/or under what conditions?

1(d) Is the answer to Question 2 of relevance in this context?

2(a) Must Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665 be interpreted as meaning that they have not been complied with if the only procedure for obtaining a rapid decision is characterised by the fact that it is in principle geared to a rapid mandatory measure, that lawyers have no right to exchange views, that [no] evidence is, as a rule, presented in other than written form and that statutory rules on evidence are not applicable?

2(b) If not, does this also apply if the decision does not lead to the final determination of the legal situation and does not form part of a decision-making process leading to such a final decision?

2(c) Does it make a difference in this context if the decision is binding only on the parties to the proceedings, even though other parties may have an interest?

3. Is it compatible with Directive 89/665 for a court, in interim relief proceedings, to order the contracting public authority to take a tendering decision which is subsequently deemed, in proceedings on the substance, to be contrary to tendering rules under European law?

4(a) If the answer to the previous question is in the negative, must the contracting public authority be deemed liable in that regard, and if so, in what sense?

4(b) Does the same apply if the answer to that question is in the affirmative?

4(c) If that authority is required to pay damages, does Community law set criteria for determining and estimating those damages, and if so, what are they?

4(d) If the contracting public authority cannot be deemed liable, is it possible, under Community law, for some other person to be shown to be liable, and on what basis?

5. If it in fact appears to be impossible, or extremely difficult, under national law and/or with the aid of the answers to the above questions to attribute liability, what must the national court do?’

III – Procedure before the Court

20. The decision which resulted in this reference for a preliminary ruling was registered at the Registry of the Court of Justice on 22 December 2008.

21. Observations were submitted, within the period prescribed by Article 23 of the EC Statute of the Court of Justice, by the Combinatie, the Provincie, the Government of the Netherlands and the Commission.

22. After its general meeting of 1 December 2009, the Court decided, pursuant to Article 104(5) of its Rules of Procedure, to request a series of clarifications from the Rechtbank concerning the economic value of the contract tendered by the Provincie. By its response lodged at the Registry of the Court on 2 February 2010, the Rechtbank explained that that contract formed part of more general works, those relating to the Erica-Ter Apel navigable link, whose overall value, excluding VAT, is estimated at EUR 6 100 000.

23. When the case was again discussed at the general meeting of 23 March 2010, the decision was made to send a series of written questions to the parties involved in the reference for a preliminary ruling, concerning the enforcement of interim measures in Netherlands law, the possibilities it provides for annulling the contract and the options available to the Provincie after the interim order.

24. The final responses translated into French were received on 7 June 2010, since when this Opinion has been in preparation, as none of the parties requested that a hearing be held.

IV – Relevant law

A – *European Union law*

1. Directive 2004/18/EC (8)

25. Article 7(c) sets the financial threshold for public works contracts:

‘This Directive shall apply to public contracts which are not excluded … and which have a value exclusive of value added tax (VAT) estimated to be equal to or greater than the following thresholds:

…

EUR 5 278 000 for public works contracts.’ (9)

2. Directive 89/665

26. Pursuant to Article 1(1) of Directive 89/665 ‘[t]he Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law’. (10)

27. Article 1(3) states:

‘The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.’

28. Article 2(1), (5) and (6) provide:

‘1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests

concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

…

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

…’

3. Article 2(7) of Directive 92/13/EEC (11)

29. Under this provision ‘[w]here a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.’

B – *Netherlands law*

30. The Netherlands did not adopt specific measures to transpose Directive 89/665, since it considered that its legislation complied with the requirements laid down by that directive. (12)

31. In the Netherlands, a particular organisational feature in this respect is that the conclusion of a public contract is governed by private law, (13) since the preceding decisions adopted by administrative authorities in the course of a tendering procedure (14) are regarded merely as decisions preliminary to a private legal act.

32. As a result, in the Netherlands the civil courts (15) have sole jurisdiction to settle disputes concerning the award of public contracts, both as regards the adoption of interim measures and the substantive proceedings, which are limited to obtaining compensation for the damage caused.

33. The administrative courts have no jurisdiction, (16) unless a special law provides otherwise. (17)

34. Articles 254 to 260 of the Nederlands Wetboek van Burgerlijke Rechtsvordering (the Netherlands Code of Civil Procedure, ‘the Code of Civil Procedure’) govern proceedings for interim measures which, since they are restricted to cases of urgency, are intended to be rapid and are entirely dominated by oral procedure and subject to specific provisions concerning evidence unlike those governing ordinary proceedings.

V – Issues of admissibility

A – *A preliminary matter: the amount of the project*

35. The Commission and the Netherlands Government submit in their observations that the order for reference does not disclose the amount of the planned works contract, which requires a preliminary clarification.

36. It is a prerequisite for the application of Directive 89/665 in this case that the tender of the Provincie was above the minimum financial threshold laid down by Directive 2004/18, which, as stated above, at the time was EUR 5 278 000 in the case of public works contracts.

37. Moreover, pursuant to Article 9 of Directive 2004/18, the calculation of the estimated value of the public contract must be based on the total amount payable, net of VAT, as estimated by the contracting authority (paragraph 1), and no works project may be subdivided 'to prevent its coming within the scope of this Directive' (paragraph 3). In cases where the proposed work might result in contracts being awarded at the same time in the form of separate lots, 'account shall be taken of the total estimated value of all such lots' (paragraph 5(a)).

38. In the light of the Rechtbank's clarifications in that regard, the works comprising the subject-matter of the main dispute form part of a huge project for the construction of a navigable international tourist link between Germany and the Netherlands. Those works were distributed over various stages, but pursue the same objective from a functional point of view, so that, pursuant to the above provisions, the project as a whole must not be divided for the purpose of valuing it. For all the foregoing reasons, as the national court states, and in view of the fact that the competent authority responsible for implementation determined the eligible costs at EUR 6 100 000, the amount of all the projects must be regarded as far exceeding that financial threshold.

39. Accordingly, the public works contract for the renovation of the two bascule bridges on the waterway link of the Erica-Ter Apel network of canals, on the basis of its amount, is governed by Directive 2004/18 and, consequently, is subject to the review guarantees established by Directive 89/665.

B – *The hypothetical nature of the first question*

40. The Rechtbank put to the Court a detailed set of questions, the first of which, as will be seen below and as is evident, is merely hypothetical in nature and, therefore, inadmissible.

41. It must be remembered from the outset that the national dispute in which this question arises consists in civil proceedings seeking compensation for damage caused by the unlawful award of a public contract which, as has been stated, is governed in the Netherlands by private law. However, the Rechtbank introduces in the first question a series of questions which are not (or are only distantly) related to the actual nature of the proceedings or to the main action underlying it, thereby making it possible to raise an objection of inadmissibility against those questions. (18)

42. The Rechtbank starts from the premiss (Question 1(a)) that certain provisions of Directive 89/665 may be infringed where legal protection is impeded (incorporating a value judgment in the actual wording of the question), since, in the Netherlands legal system, it is possible that 'conflicting decisions may arise' in civil and administrative courts. In the following three sections of Question 1, the Rechtbank essentially maintains that premiss, as evidenced by the expression 'in this context', which is used in each of them, and asks whether it is permissible, on the one hand, for the administrative courts to be confined to forming an opinion and ruling on the tendering decision (Question 1(b)) and, on the other hand, for the General Law on Administrative Law to exclude such applications in the case of decisions of the administration concerning the award (Question 1(c)), (19) and seeks to ascertain, finally, (Question 1(d)), whether the answers to that first question depend on whether, in the light of the second question, the Court finds that there has been an infringement of European Union law on account of the way in which interim measures are provided for in the Netherlands legal system.

43. There is no doubt that all the sections of Question 1 are hypothetical in nature. In that regard, it is sufficient to point out that the court of the judge dealing with interim relief proceedings, the Gerechtshof Leeuwarden (First Civil Section, acting as an appeal court) and the Rechtbank (the referring court, before which the claim for damages is being brought), that is to say all the courts

involved since the dispute arose following the Combinatie's application, form part of the civil court system.

44. Irrespective of whether, as the parties state as regards the Netherlands legislation, (20) simultaneous jurisdiction by the civil and administrative courts might arise on an exceptional basis, that has not occurred in this case, in any event, and it may be inferred from the order of the Rechtbank that the opposite is true. Indeed, the latter makes no reference, in the present case, to the involvement of an administrative court, since the actual wording of Question 1(a), referring to the fact that they 'may have jurisdiction', appears to be merely hypothetical; nor does it identify the 'same decision' over which both court systems may have jurisdiction, where, in addition, there is a distinction between the subject-matter of the actions before the judge dealing with interim relief proceedings (the decision to award the contract to MFE) and the Rechtbank, which rules only on the claim for compensation for damages, from which it should be concluded that no conflicting decisions concerning the same decision were – ever in this case – taken, since the subject-matters under dispute and the claims put forward differ substantially.

45. Given the manifest absence of involvement of the administrative courts in this case, on which the sub-questions in Question 1 hinge, and taking into consideration that Article 267 TFEU does not allow the Court to deliver a mere advisory opinion on general or hypothetical questions, (21) I am of the opinion that it should be declared inadmissible.

VI – The substance

46. The analyses of the four remaining questions raised by the Rechtbank, quite apart from a certain obscurity as to their meaning, may be grouped together according to a threefold perspective, for the purposes of their examination in relation to Directive 89/665: (A) the organisation of interim judicial protection, (B) the absence of substantive justice other than that related to obtaining compensation and (C) the determination of liability and its translation into compensation for damages.

A – *The organisation of interim judicial protection: answer to Question 2*

47. In general, in Question 2 the Rechtbank asks whether a summary procedure for interim measures which, independent as regards any proceedings as to the substance, is geared to their rapid adoption, making no provision for oral argument or for evidence other than documentary evidence and not subject to application of the general rules on evidence, is compatible with Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665, where, in addition, the judicial decision approving those interim measures does not lead to the final resolution of the legal situation or have *erga omnes* effect, since it binds only the parties to the proceedings.

48. Perhaps because of the pre-eminence that the Netherlands legal system confers on interim measures, of which the referring court is fully aware, the latter calls into question the procedural organisation of the system of interim judicial protection from the perspective of European Union law, exclusively on the basis of the reasons set out in the preceding paragraph.

49. From the outset, it must be pointed out that Directive 89/665 confers on the Member States broad discretion both as regards the choice of courts having jurisdiction to uphold the procedural guarantees conferred by it, and as regards their procedural organisation.

50. Accordingly, it is for the domestic legal system of each Member State, in the absence of European Union rules, to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the European Union, (22) subject always to the requirement to protect those rights in a manner consistent with the principles of effectiveness (23) and equivalence. (24)

51. It must be emphasised that the only conflicting criterion provided by the Rechtbank is that of Directive 89/665, which makes no provision in that respect, and accordingly there is no reason for censure, since the order for reference does not describe how that special procedural organisation has an adverse effect on the fundamental rights of individuals, in particular, on effective judicial protection, as a consequence, where appropriate, of infringement of the principles of equivalence and effectiveness.

52. Moreover, without examining the particular features of the evidence, the way in which the adversarial principle is formulated or the effects of the interim measures, (25) it seems logical that, because of its purpose and nature, the procedure for their adoption should differ from the procedure for ordinary proceedings, but it is also true that Directive 89/665 specifically encourages rapid interim judicial protection. That directive coordinates the laws of the Member States with the aim, inter alia, of securing the adoption of measures '*at the earliest opportunity* and by way of *interlocutory* procedures'. (26)

53. Moreover, Question 2(b) recalls the fact that 'the decision [adopting the interim measures] does not form part of a decision-making process leading to such a final [legal] decision'.

54. This qualification is concerned with the autonomous nature of interim proceedings within the framework for legal actions in the Netherlands which, far from being put forward as a ground for criticism for European Union law on public procurement, constitutes a requirement for the case-law which interprets it. In particular, by regarding proceedings for interim measures as merely ancillary to the substantive proceedings instead of actually regarding them as autonomous proceedings, the Court has allowed some actions for failure to fulfil obligations brought by the Commission. (27)

55. Similarly, the fact that the measures are adopted as interim measures reflects a provisional function, as is expressly illustrated by Article 2(1)(a) of the Directive, which refers to *interim measures*, (28) which implies that, in principle, the legal relationships to which they apply are not affected definitively.

56. In summary, some of those characteristics, described almost as abnormalities by the national court in Question 2, appear, instead, as characteristics inherent to interim measures.

57. I therefore suggest that the Court's answer to Question 2 should be that, to the extent that it has not been established that the effectiveness of European Union law has been adversely affected, Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665 do not preclude national legislation providing for only one procedure for obtaining an interim measure, characterised by the fact that it is geared to their rapid adoption, that lawyers have no right to exchange views, that evidence is, as a rule, presented solely in written form and that statutory rules on evidence are not applicable (Question 2(a)), irrespective of whether the judicial decision adopting that interim measure does not lead to the final determination of the legal situation and does not form part of the process in which that legal situation is finally determined (Question 2(b)) or whether that decision is binding only on the parties to the proceedings (Question 2(c)).

B – *The tension between interim and substantive judicial protection: answer to Question 3*

1. Preliminary considerations

58. In Question 3, the Court is asked to rule on whether it is compatible with Directive 89/665 for a court, in proceedings for interim relief, to order the contracting authority to take a contract award decision which is subsequently deemed, in proceedings on the substance, to be contrary to tendering rules under European Union law.

59. The parties involved in this reference for a preliminary ruling – apart from the Provincie – maintain that the interim order of 28 November 2007 did not in fact order the Provincie to award the contract to MFE, from which they conclude that that question must be reformulated, (29) since they consider that the Rechtbank's wording is based on an incorrect premiss.

60. In this question, proceeding as the Commission and the Netherlands suggest would run the risk of distorting the national court's intended meaning, since, that court, in reality, seeks an examination of what I have called the tension between interim and substantive judicial protection.

61. Since Article 267 TFEU is based on a clear separation of functions between the national courts and the Court of Justice, when ruling on the interpretation or validity of European Union provisions, the latter is empowered to do so only on the basis of the facts which the national court puts before it

and it is for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver. (30)

62. I therefore consider that the Court cannot substitute its assessment for that of the Rechtbank, which would be the case if the Court reworded the question because it considered that the Rechtbank's order for reference misinterpreted a previous judicial decision, (31) which, moreover, it had itself issued (as the court of the judge dealing with interim relief proceedings). Instead, it must limit itself to providing a helpful answer, comprehensively appraising the facts of the case. (32)

2. The differing views expressed in the interim measure and the substantive proceedings

63. The Rechtbank, in its view, in contrast to the order of the judge dealing with interim relief proceedings, considers in paragraph 4.18 of its order that 'the decision taken by the Provinc[i]e to withdraw the contract award decision of 2 October 2007 and to call for fresh tenders [was] the only correct application of the law on public procurement'.

64. Accordingly, analysed from a literal perspective, Question 3 does not seem to raise too many uncertainties.

65. No matter how autonomous interim proceedings may be, decisions adopted in the course of such proceedings, in so far as they are merely temporary (ultimately they are provisional), may be revoked, amended or upheld in any substantive proceedings, provided that the person entitled to bring them does so, (33) and therefore any conflict should not raise problems.

66. This approach seems to be embodied in the order for reference itself (paragraph 4.18 *in fine*), where it states that the (final) judgment 'will replace the view expressed by the judge dealing with interim relief proceedings'.

67. That being the case, it is then necessary to ask where the problem lies. The keys are provided by the order of the Rechtbank itself, which states that, where the interim measure and the court dealing with the substance express differing views, '[p]roblems arise [because t]here will … be two separate and distinct judicial decisions which differ, or may differ, in their effect on the parties to the proceedings and on third parties' (paragraph 4.8), and because at the time of the final judgment 'the contract will already have been awarded, the work may even have been completed, and all that will remain is the possible award of damages to the Combinatie' (also paragraph 4.18 *in fine*).

68. To sum up, those concerns implicitly suggest another aspect which could operate as a limit to a negative response to Question 3: Directive 89/665 does not prevent a court, in interim relief proceedings, from ordering the contracting authority to take a contract award decision which is subsequently deemed, in proceedings on the substance, to be contrary to European Union law on public procurement, provided that the effects of that interim measure may be replaced by the new situation stemming from the decision on the substance.

69. In the final analysis, I cannot avoid concluding that in the Netherlands, during the period between communication of the award decision and the contract, interim measures seem to be the only remedy which would be effective in preventing conclusion of the contract, since there is no possibility of applying for the award decision to be set aside either before or after it is issued, as the Netherlands Government confirms. (34) On the contrary, under European Union law, the conclusion of the contract is, temporally and functionally, the key point for bringing an action to set aside the award decision, since, although European Union law does not require proceedings to set it aside once the contract has been concluded, it nevertheless requires that, prior to that moment, the Member States provide the injured party with the opportunity to bring proceedings to set aside the award decision. (35)

70. However, the fact that in the Netherlands, before the contract is concluded, the award decision is not subject to review – whether administrative or judicial – in the form of an annulment claim (36) is not particularly relevant in the circumstances of this case. (37)

71. This is because, first, it must be remembered that the Combinatie voluntarily withdrew its appeal before the Gerechtshof Leeuwarden and preferred to bring substantive proceedings for the award of

damages, (38) and because, secondly, after applying for damages and in so far as the contract had already been concluded (on 3 December 2007), the action to set aside could not yet be required under Article 2(5) and (6) of Directive 89/665. The latter consideration also shows the insignificance of the views set out by the Rechtbank in paragraph 4.14 of its order, based on the appropriateness of ordering the setting aside of the award decision prior to the award of damages. (39)

72. However, it must be made clear that the two previous arguments are valid because, in this case and because of the way in which the Rechtbank worded its questions, there has been no breach of the principles of effectiveness and equivalence, the basic limits of the procedural autonomy of the States, hence the lack of provision for an action to set aside is not fundamental for the purposes of an answer.

73. In the light of all those considerations, I suggest that the Court should answer Question 3 to the effect that Directive 89/665 does not prevent the judge dealing with interim relief proceedings from taking a differing view to that of the court dealing with the substantive proceedings on the main issue, provided that this does not prejudice the results required by Directive 89/665 and, in particular, the three guarantees provided for in Article 2(1), as they have been interpreted in Community case-law.

C – *Determination of liability and its translation into an award of damages: answers to Question 4 and Question 5*

1. The Court's lack of jurisdiction to attribute liability in the dispute before the national courts

74. In Question 4, the Rechtbank asks the Court to rule on who may be deemed to be liable for any injury caused to the Combinatie, raising further questions on the possibility of declaring the contracting authority liable – both in the event that the answer to Question 3 is that the Netherlands system of interim measures is incompatible with Directive 89/665 (Question 4(a)) and in the event that it is found to be compatible (Question 4(b)) – and also raising the possibility of other parties being liable '[i]f the contracting public authority cannot be deemed liable' (Question 4(d)). Question 4(c) is, at the outset, based on the premiss that 'that authority is required to pay damages' and goes on to request clarification concerning any criteria set by European Union law for determining and estimating those damages.

75. Question 5 functions as a type of conclusion to the preceding questions, since it seeks to ascertain 'what … the national court [must] do' where, in the light of the possible answers and pursuant to national law, 'it … appears to be impossible, or extremely difficult … to attribute liability'.

76. I am of the view that the Court is unable to provide guidance to the Rechtbank concerning who is liable for any injury caused to the Combinatie by infringement of the tendering rules, since that constitutes the essence of the main proceedings. The reasons I gave above for rejecting the rewording of Question 3, which are based on the national court's jurisdiction to assess the actual facts and circumstances of the dispute before it, now militate against the Court's having jurisdiction to rule on the liability of the various operators involved in the tendering procedure for the works in Emmen.

77. In my view, it is solely for the Rechtbank to assess (40) points such as whether there was any liability and whether, where appropriate, it must be attributed to the Provincie, to the State – on account of the actions of the judge dealing with interim relief proceedings – or to any other person taking into consideration the evidence which has been shown to be relevant: the fact that the Provincie did not wait before making the award or appeal against the interim measures; the possible alternatives (if any) to making the award to MFE; the circumstances surrounding the provisional enforcement of the order of the judge dealing with interim relief proceedings, and; the Combinatie's voluntary withdrawal of the appeal lodged against that order.

78. Moreover, in so far as the action in the national proceedings may be based on infringement of European Union law, whether that is established (41) – which is most relevant in this case – is a matter solely for the Member State in the context of its national law on liability for financial loss. (42)

79. Accordingly, I consider that the Court should not answer the sections of Questions 4 and 5 which request a ruling on who must be deemed liable in the dispute before the national courts.

2. The criteria governing the attribution and the extension of the damage

80. Notwithstanding the foregoing, the Court must clarify for the Rechtbank whether European Union law provides criteria for determining, attributing and, finally, quantifying the damage.

a) Some preliminary considerations

81. It is necessary to clarify, from the outset, what the Rechtbank means when it asks the Court in Question 4(c) whether, '[i]f [the contracting public] authority is required to pay damages', European Union law sets criteria for determining and estimating the damages.

82. In principle, it may be concluded that the Rechtbank assumes that the answer the Question 4(c) will be in the affirmative and that the contracting body is liable.

83. None the less, that approach should not prevail, in so far as, although the Rechtbank limits Question 4(c) to the premiss that the Provincie may be liable, it remains true that its considerations do not rule out the possibility that liability may lie with other operators who, in one way or another, have been involved in the tendering procedure, and accordingly it is actually possible to interpret the national court's question as seeking to ascertain, generally, the criteria established in European Union law on public procurement for the award of compensation in connection with liability.

84. It must not be forgotten that the proper determination of liability for financial loss requires an assessment as to the existence of the damage as a prerequisite for any other steps: without the existence of damage, no mechanism for non-contractual liability should be triggered. At that stage, issues relating to the determination of the extent of the damage and its quantification come to the fore.

85. Clearly, in public procurement cases, those steps are very difficult, since, even assuming that rules of European Union law have been infringed, it is actually necessary to make a probability assessment in order to reach the conclusion that the excluded tenderer (in this case, the Combinatie) would finally have been awarded the contract if the tendering procedure had been conducted lawfully.

86. Nevertheless, the complexity I describe is not exclusive to this case in particular, but is inherent in a large number of cases concerning liability in tort, (43) which requires a court dealing with the substance of a case to apply abstract formulae based on the evidence available to it to enable it to assert, with a level of probability close to certainty, that the excluded tenderer would have been awarded the contract had the rules on contracting been complied with.

87. Another problem to be considered is that of what to incorporate in the damages which, for the purposes of compensation, may vary according to whether account is taken of only the objective costs which the tenderer incurred as a result of taking part in the public tender (actual loss) or other items, more difficult to establish, such as profits which were not earned (loss of profit) as a result of the unlawful exclusion.

88. However, that said, a clear distinction must be drawn between three areas connected with Directive 89/665:

– First: that of Directive 89/665 itself, which is intended to strengthen existing arrangements, at both the national and Union level, for ensuring the effective application of the directives on procurement, (44) to which end it imposes on the Member States the obligation to ensure that unlawful decisions of contracting authorities may be reviewed effectively and as rapidly as possible and expressly includes in Article 2(1)(c) the award of damages to persons harmed by an infringement.

– Second: that of the more specific rules which govern the various proceedings in the Member States. Given that the provisions of Directive 89/665 merely form part of the approximation of national procedural instruments for ensuring compliance with European Union rules on public procurement, it is obvious that it is for the Member States to determine the formalities and inherent characteristics of the proceedings intended to render the requirements of Article 2(1)(c) of Directive 89/665 effective, procedural specifications which fall outside its scope.

– Third: that of the aspects of substantive law which allow clarification of that liability, which are also obviously outside the scope of Directive 89/665.

b) The application of Article 2(7) of Directive 92/13

89. This perfectly defined framework, upon which European Union law has a bearing not in a direct way but by means of the principles of effectiveness and equivalence, may be understood as having been amended by Directive 92/13, if Article 2(7) thereof is regarded as incorporating certain guidelines for determining injury and its extent.

90. As we shall see, that is not quite true.

91. That provision raises the question whether it is possible to relate it to the requirements for the determination and extent of the damage for which Directive 89/665 guarantees compensation: in short, what is the significance to Directive 89/665 of that additional article in Directive 92/13?

92. To date, the Court has not ruled on that question.

93. Article 2(7) contains three elements which may be examined individually: first, a certain type of damage, that of the costs incurred in preparing a bid; second, the element of proof, limited to showing that there was, on the one hand, an infringement of European Union law and, on the other hand, a real chance of winning the contract, and; third, causation, meaning that, as a consequence of that infringement, that real chance of winning the contract was adversely affected.

94. Although public contracts in special sectors (water, energy, transport and postal services, governed by Directive 2004/17 (45)) differ, as regards their case-by-case approach and their nature, from contracts which may be concluded generally (governed by Directive 2004/18), it is difficult to identify reasons which justified regulation of compensation for damages, such as that being undertaken in this case, only in respect of the first and not for the second.

95. It must be pointed out that those two directives were amended by Directive 2007/66/EC (46) but that the Union legislature did not – taking advantage of that amendment – introduce in Directive 89/665 a provision similar to that in Article 2(7) of Directive 92/13, from which it may implicitly be inferred that the legislature did not wish to adopt such a provision with regard to the award of damages guaranteed by Directive 89/665, thereby intentionally leaving open the question of their determination.

96. As regards the extent of the damage to be compensated, it is obvious that Directive 89/665 leaves open that question, which, from the outset, presupposes that the Member States are free to incorporate both actual loss and loss of profit; however, it is equally true that Directive 92/13 does not restrict the autonomy of the States, since it governs only certain criteria on causation and proof for the purposes of facilitating compensation of the expenses incurred by a tenderer, but gives no guidance on the extent of the harm or the compensation or on the attribution of liability. The provision is limited to laying down a requirement for a legal line of argument – in the event that the European Union legislation is infringed – and more or less comprehensive proof concerning the probability of winning the contract. (47)

97. Accordingly, I am of the view that the relevance of Article 2(7) of Directive 92/13 must be qualified in this case. However, I consider that, neither legal certainty nor respect for the institutional balance would be adversely affected by the application to Directive 89/665, for interpretative purposes, of the elements of Article 2(7) of Directive 92/13 concerning causality and proof as regards the objective damage comprising the cost of participating in the tendering procedure, without thereby diminishing the freedom which, through procedural autonomy, European Union law confers on the Member States as to whether or not to require proof of causality (48) as regards any type of harm or its extent, or to consider harm other than that of costs alone, such as loss of profit.

c) Determination of the damage

98. Accordingly, the keys to Question 4(c), as regards the determination of damage, should be sought in the principle of the procedural autonomy of the Member States, which are responsible for

determining the criteria for awarding the compensation provided for in Article 2(1)(c) of Directive 89/665.

99. Directive 89/665 does not provide attribution criteria for the determination of injury; however, the Union must not remain absolutely detached, in so far as it must always ensure respect for the limits which I have described throughout this Opinion, represented by the needs of the principles of equivalence and effectiveness, as adequate safeguards of the right to effective protection by national courts of rights conferred by European Union law.

100. Thus, by way of an example, the parameter of effectiveness formed the basis of a ruling by the Court censuring the Portuguese Republic, (49) on account of the fact that, in its domestic legislation, it made the award of compensation for an infringement of European Union law in the field of public procurement or national rules implementing that law subject to a requirement to show the existence of fault or fraud, a requirement which, according to the Court, did not represent an adequate system of judicial protection, because it created a risk that tenderers who had suffered injury might be deprived of the right to claim compensation or that there might be a delay in granting it. (50)

101. In another field, in *T-Mobile Netherlands and Others*, (51) the Court addressed the question of whether, in the context of Article 81(1) EC and in relation to 'examining whether there is a causal connection' between the concerted practice and the market conduct of the undertakings, the national court is required to apply the presumption that there is a causal connection in certain circumstances, (52) or whether, as regards the burden of proof, the national court was free to apply the rules of its national law: the Court supported the view that Article 81(1) EC contains a presumption of a causal connection which 'consequently forms an integral part of applicable Community law'.

102. The ruling in *T-Mobile Netherlands and Others*, which establishes at the level of European Union (competition) law the fact that a causal connection may be presumed to exist, contrasts with the judgment in *ERG and Others*, (53) which, for the purposes of the obligation to award compensation resulting from Directive 2004/35/EC, (54) after laying down proof of causation as a requirement for such an award, (55) none the less allows the Member States to introduce a presumption of a causal connection which must be based, it is true, on elements of plausible evidence set out in the actual judgment.

103. As has been seen, outside the field of public procurement, *T-Mobile Netherlands and Others* confirms the relevance of European Union law for the purposes of establishing the causal connection, despite the fact that, in accordance with the requirements of procedural autonomy it should be a matter for the Member States. There is no shortage of reasons for such a position, since Article 81 EC, that is to say a provision of primary law, is directly involved in the field of competition. (56) However, the nature of Article 81 EC differs profoundly from the provisions in a directive, hence, at the level of secondary law, the Court has shown that it is reluctant (in *ERG and Others*, for example) so directly to impinge upon such an inherently procedural issue.

104. However, on the basis of Directive 89/665, by means of the rule on the limits of procedural autonomy, the Court has, in the *Commission* v *Portugal* cases, inferred that a national rule on the attribution of liability, one which requires proof of fault or fraud, is unlawful, and therefore, from that perspective, I can see no obstacle to extending that idea to other national rules, such as, generally, those concerning evidence or determination of damage.

105. From the foregoing, and for the purpose of answering the sections of Questions 4 and 5 relating to the criteria for determining damage, it is possible to extract a principle, a specific reflection of the requirement of the effectiveness of European Union law: the principle that the burden of proof in respect of injury, for the purposes of Article 2(1)(c) of Directive 89/665, cannot be so strict that it makes substantiating injury so difficult that the effectiveness of the provision is undermined.

d) The extent of the injury

106. Directive 89/665 also provides no guidelines on the elements which may be included in the concept of damage, so that all issues relating to the extent of the damage must be understood within the limits of national law.

107. Nevertheless, in certain circumstances, the Court has also laid down specific obligations, in particular in the field of competition, relating to the award of damages, so as to protect interests harmed by an infringement of European Union law.

108. For example, in *Courage and Crehan*, (57) the Court stated that the full effectiveness of Article 85 of the Treaty (now Article 101 TFEU) requires the award of damages for loss caused by a contract or by conduct liable to restrict or distort competition, and, in *Manfredi and Others*, held that, in view of the absence of relevant provisions of European Union law, 'it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused … provided that the principles of equivalence and effectiveness are observed' (paragraph 98).

109. In *Manfredi and Others*, the Court considered that it is the 'right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition', and made it clear that 'injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest' (paragraph 95).

110. Since it must, in practice, be possible to make reparation of damage in the case of a breach of European Union law, the total exclusion of loss of profit as a head of damage cannot be accepted. (58)

111. Even more obvious, in my view, is the need to include, in accordance with the applicable national rules, and for the purpose of effective compensation, the corresponding interest, since, as may be inferred from *Marshall*, (59) 'it constitutes an essential component of compensation.'

112. With a view to answering Questions 4 and 5, I suggest that the Court declare that, for the purposes of Article 2(1)(c) of Directive 89/665, the criteria governing the determination and the extent of the damage to be made good, resulting from the infringement of European Union law on public procurement, must be determined under national law, although the principle of the effectiveness of European Union law requires that proof of injury should not be so strict that it makes substantiating injury so difficult that the effectiveness of that provision is undermined, that the corresponding interest must be included and, finally, that the possibility of taking into consideration loss of profit as a head of damage cannot be excluded.

VII – Conclusion

113. In view of the foregoing considerations, I suggest that the Court should:

(1) declare Question 1 inadmissible, and

(2) provide the following answer to the remaining questions raised by the Rechtbank:

(a) For the purposes of Question 2, Article 1(1) and (3) and Article 2(1) and (6) of Directive 89/665/EEC, to the extent that it has not been established that the effectiveness of that provision has been adversely affected, do not preclude national legislation providing for only one procedure for obtaining an interim measure, characterised by the fact that it is geared to their rapid adoption, that lawyers have no right to exchange views, that evidence is, as a rule, presented solely in written form and that statutory rules on evidence are not applicable (Question 2(a)), irrespective of whether the judicial decision adopting that interim measure does not lead to the final determination of the legal situation and does not form part of the process in which that legal situation is finally determined (Question 2(b)) or whether that decision is binding only on the parties to the proceedings (Question 2(c)).

(b) For the purposes of Question 3, Directive 89/665 does not prevent the judge dealing with interim relief proceedings from taking a differing view to that of the court dealing with the substantive proceedings on the main issue, provided that the national procedural system secures the results required by Directive 89/665 and, in particular, the coexistence of the three guarantees provided for in Article 2(1), as they have been interpreted in Community case-law.

(c) For the purposes of Questions 4 and 5:

– the Court should declare that it has no jurisdiction to give a ruling on who must be deemed liable in the national dispute.

– for the purposes of Article 2(1)(c) of Directive 89/665, the criteria governing the determination and the extent of the damage to be made good, resulting from the infringement of European Union law on public procurement, must be determined under national law, although the principle of the effectiveness of European Union law requires that proof of injury should not be so strict that it makes substantiating it so difficult that the effectiveness of that provision is undermined, the corresponding interest must be included and, finally, the possibility of taking into consideration loss of profit cannot be excluded.

---

1 – Original language: Spanish.

---

2 – OJ 1989 L 395, p. 33.

---

3 – OJ 1992 L 209, p. 1.

---

4 – For the purposes of the national administrative case, the contract was identified as Project 1382.

---

5 – According to the Provincie, the principle irregularities consisted in significant alterations – made during the procedure – to criteria relating to the tenderers' suitability, experience and turnover. Similarly, the Combinatie was notified that, following a thorough re-examination of MFE's tender, the conclusion had been reached that the contract could not be awarded to it and that the possibility of a fresh call for tenders was therefore under consideration.

---

6 – Paragraph 4.13 of the Order of 27 November 2007.

---

7 – The hearing had been set for 13 February.

---

8 – Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ('the Directive', OJ 2004 L 134, p. 114).

---

9 – This amount, applicable at the time when the invitation to tender was published, was set by Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2005 L 333 p. 28).

---

10 – Provision worded in accordance with Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). Pursuant to Article 33 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), to Article 36 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and to the second paragraph of Article 82 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), and in accordance with the correlation tables annexed to those directives, references to Directives 71/305/EEC, 77/62/EEC and

92/50/EEC contained in Article 1(1) of Directive 89/665 are to be construed as references to Directive 2004/18.

---

11 – Council Directive of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

---

12 – The explanatory memorandum to the Raamwet EEG-voorschriften aanbestedingen, een kaderwet voor de implementatie van communautaire aanbestedingsregels (Framework law for the application of Community rules on public procurement ('the Raamwet') confirms that view by stating that 'the implementation of [Directive 89/665/EEC] does not require changes to the regulations. … The review procedures which must be available to interested parties under the directive already exist within the Netherlands legal system'.

---

13 – This may be inferred from the case-law of the Raad van State (Council of State).

---

14 – Inter alia, the decision to award the contract to a given tenderer.

---

15 – As follows from the Raamwet and Article 8(3) of the Algemene Wet Bestuursrecht ('General Law on Administrative Law'), it is not possible to appeal to an (administrative) court against prior decisions taken by a public authority in preparation for a legal act governed by private law.

---

16 – Not even in the case of contracting authorities' preliminary decisions, such as the award decision.

---

17 – According to the observations of the Netherlands Government, the administrative courts may, however, have jurisdiction where, exceptionally, specific legislation confers jurisdiction on them, as occurs in the case of concessions on the basis of the Wet Personenvervoer of 2000 (Law of 2000 on the transport of persons).

---

18 – Case C-429/05 *Rampion and Godard* [2007] ECR I-8017, paragraphs 23 and 24; Case C-387/07 *MI.VER and Antonelli* [2008] ECR I-9597, paragraph 15; Case C-206/08 *Eurawasser* [2009] I-8377, paragraphs 33 and 34; and Case C-314/08 *Fikipiak* [2009] ECR I-0000, paragraphs 40 to 42.

---

19 – From the outset, Question 1(b) and (c) are somewhat contradictory, since although section (b) states that 'the administrative courts [are] confined to forming an opinion and ruling on the tendering decision' section (c) states that the General Law on Administrative Law excludes 'such applications in the case of decisions concerning the conclusion of a contract by the contracting authority with one of the tenderers'.

---

20 – In the Netherlands the administrative court has no jurisdiction over aspects concerning public procurement. Powers of review extend only to certain public concessions, which generally fall within the scope of administrative law and are very common in the sphere of public property and services. That exception is referred to in the explanatory memorandum to the General Law on Administrative Law, as pointed out by the Netherlands Government, which, in order to prevent undesired conflicts opposed the parallel jurisdiction of the two systems of courts.

---

21 – Case C-244/80 *Foglia* [1981] ECR 3045, paragraph 18.

---

22 – Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case C-312/93 *Peterbroeck*, [1995] ECR I-4599, paragraph 12; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 39; Joined Cases C-222/05 to C-225/05

Van der Weerd and Others [2007] ECR I-4233, paragraph 28; and Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 44.

---

23 – *Peterbroeck*, paragraph 14, and Case C-2/08 *Fallimento Olimpiclub* [2009] ECR I-7501, paragraph 27.

---

24 – Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 36; Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 41; and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 62.

---

25 – Aspects in respect of which the Court must not rule *in abstracto.*

---

26 – Article 2(1)(a). Emphasis added. Moreover, Article 2(4) of Directive 89/665 provides that a Member State, at the time it authorises those measures, may strike a balance between 'the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits.' Furthermore, although the same paragraph states that '[a] decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures', it does not establish the procedural means whereby they may be upheld.

---

27 – For example, in Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459, paragraph 11, and Case C-214/00 *Commission* v *Spain* [2003] ECR I-4667, paragraph 98, from which it is clear that it must be possible to take interim measures, independently of any prior action.

---

28 – Emphasis added.

---

29 – The reformulations of that question proposed by the Commission and the Netherlands, namely whether Directive 89/665 is infringed where the judge dealing with proceedings for interim relief applies European Union law in a way which, subsequently, the court dealing with the substance regards as incorrect, would be easy to answer, since, clearly, on the basis of distinguishing between the procedural rules contained in Directive 89/665 – concerning review guarantees – and the substantive rules on public procurement, an interim measure which is based on a misinterpretation of the applicable substantive law does not in itself entail infringement of Directive 89/665.

---

30 – Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305, paragraphs 16 and 17, and Case C-107/98 *Teckal* [1999] ECR I-8121, paragraphs 29 and 30.

---

31 – In order to establish that 'misinterpretation' the Court would have to unravel elements which it is solely for the national court to assess.

---

32 – Case C-320/88 *Shipping and Forwarding Enterprise Safe* [1990] ECR I-285, paragraph 11.

---

33 – There are procedural systems, such as the Spanish system, in which those changes are made automatically, the issue of a final judgment sufficing in that regard.

---

34 – In particular in its clarifications (paragraph 18 et seq.) to the questions put by the Court. After explaining that the Netherlands legal system draws a distinction between, first, the decision – of administrative law – to award the contract and, secondly, the act of private law whereby that award is effected – the conclusion of the

contract –, it emphatically states that neither the first nor the second may be the subject-matter of an action to set it aside.

---

35 – Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraphs 35, 37, 38 and 43.

---

36 – The Netherlands Government has emphasised throughout its observations that – as already stated – the administrative court has no jurisdiction to set aside the contract award decision, since that decision is merely an element prior to the private act. However, the civil court is also unable to set aside the award decision, since it was taken by a public authority. Nevertheless, the fact is that even the civil courts are unable to hear any action to set aside the conclusion of the contract (an act governed by private law): as is clear from paragraph 20 of its clarifications, the case-law of the Hoge Raad precludes such review and, except in special circumstances, a contract cannot be challenged on the ground that it is incompatible with the legislation on public procurement, on the basis that no legal standing is conferred on any person who might challenge legal defects in the contract or the prior procedure, that is an excluded tenderer, since he is not a party to the contract from the point of view of private law.

---

37 – Moreover, none of the parties has raised this issue.

---

38 – Although it would have been difficult for it to 'revoke, uphold or amend' the interim measures, because, as I have stated above, the objectives and claims in the two proceedings were different and could also affect different parties.

---

39 – According to the Rechtbank, the above problem would not arise 'if the decision could be contested in only one specific tendering procedure before one court and if, for damages to be awarded, it were to be determined that the contested decision must first be set aside by the competent authority'.

---

40 – In order to do so, it must take into account all the factors which characterise the situation which has been brought before it, 'in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under … Article [267 TFEU]' (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 55), a sufficiently serious infringement of European Union law occurring 'where the decision concerned was made in manifest breach of the case-law of the Court in the matter' (Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 57, and *Köbler*, paragraph 56.)

---

41 – Provided that the requirements set out in the settled case-law of the Court have been fulfilled: that the rule of European Union law infringed is intended to confer rights upon them, that the breach of that rule is sufficiently serious and that there is a direct causal link between that breach and the damage sustained.

---

42 – Which cannot, for these purposes, make less favourable provision for infringements of European Union law than for infringements of domestic rules (principle of equivalence) nor be so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of equivalence) (see *Köbler*, paragraph 58, and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 123).

---

43 – It is sufficient to refer, for example, to cases of liability for damage caused in the course of medical treatment deemed to fall short of the state of the art.

---

44 – Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551, paragraph 3, and the judgment of 14 October 2004 in Case C-275/03 *Commission* v *Portugal*, not published in the ECR, paragraph 28.

---

45 – Directive of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

---

46 – Directive of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

---

47 – However, as regards the criteria for determining the damage, the underlying simplicity of Article 2(7) makes it similar to the Court's finding in the judgment in *Commission* v *Portugal* in which, although the Court did not actually give a ruling as to the existence of strict liability, the manner in which it sets out the criteria for determining damage seems from a practical point of view, effectively to boil down to a finding of infringement of European Union.

---

48 – In that regard, on the basis of the principle of equivalence – albeit in the field of competition – in Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 99, the Court stated that 'if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community … rules, it must also be possible to award such damages in actions founded on Community rules', although that does not prevent 'national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them'.

---

49 – *Commission* v *Portugal*.

---

50 – In Case C-70/06 *Commission* v *Portugal* [2008] ECR I-1, the second of the series, in which the Portuguese Republic was censured for failing to take the measures necessary to comply with the judgment of 14 October 2004 in Case C-275/03, the Court further warned that the furnishing of proof of fault or fraud, although it does not render it impossible for individuals to bring judicial actions, 'would appear, none the less … to render those actions more difficult and costly, so impairing the full effectiveness of the Community's public procurement policy', paragraph 42.

---

51 – Case C-8/08 [2009] ECR I-4529.

---

52 – Specifically, where the undertakings remain active on the market and take into account the information exchanged with their competitors.

---

53 – Case C-378/08 [2010] ECR I-0000.

---

54 – Directive of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56).

---

55 – Between the actions of the economic operators and the pollution caused.

---

56 – Moreover, since it is concerned with public policy, that provision produces direct effects for individuals and must be automatically applied by national courts, *T-Mobile Netherlands and Others*, paragraphs 44 to 53.

---

57 – Case C-453/99 [2001] ECR I-6297, paragraph 26.

---

58 – *Brasserie du pêcheur and Factortame*, paragraph 87; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 91; and *Manfredi and Others*, paragraph 96.

---

59 – Case C-271/91 *Marshall* [1993] ECR I-4367, paragraph 31, from which it may be inferred that the need for effective reparation for loss or damage also constitutes a requirement in fields other than competition, since *Marshall* was concerned with damage suffered as a result of discriminatory dismissal.

EU:C:2010:46

JUDGMENT OF THE COURT (Third Chamber)

28 January 2010 (*)

(Failure of a Member State to fulfil obligations – Directive 93/37/EEC – Public works contracts – Notification to candidates and tenderers of decisions awarding contracts – Directive 89/665/EEC – Procedures for review of the award of public contracts – Period within which actions for review must be brought – Date from which the period for bringing an action starts to run)

In Case C-456/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 October 2008,

European Commission, represented by G. Zavvos, M. Konstantinidis and E. White, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, and by A. Collins SC, with an address for service in Luxembourg,

defendant,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Second Chamber, acting for the President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 24 September 2009,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by reason of the rules on time-limits in the national legislation regulating the exercise of the right of tenderers to judicial review in public procurement procedures and by failing to notify the award decision to the complainant in the procurement procedure in question, Ireland has failed to fulfil its obligations, concerning the applicable time-limits, under Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1) ('Directive 89/665'), as interpreted by the Court, and, concerning the lack of notification, under Article 1(1) of Directive 89/665, as interpreted by the Court, and Article 8(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 (OJ 1997 L 328, p. 1) ('Directive 93/37').

Legal context

Community legislation

2 Article 1(1) of Directive 89/665 provides:

‘The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of [Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682)], [Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1)], and [Directive] 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.’

3 Under Article 2(1) of Directive 89/665:

‘The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.’

4 Article 8(2) of Directive 93/37 provides:

‘Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not to award a contract for which there has been an invitation to tender or to start the procedure again, and shall do so in writing if requested. They shall also inform the *Office for Official Publications of the European Communities* of such decisions.’

National legislation

5 Order 84A(4) of the Rules of the Superior Courts, in the version resulting from Statutory Instrument N° 374 of 1998 (‘the RSC’), provides that:

‘An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period.’

Background to the dispute and pre-litigation procedure

6 The National Roads Authority (‘the NRA’) is a public authority responsible for the construction and maintenance of roads in Ireland.

7 SIAC Construction Limited (‘SIAC’) is a limited liability company established in Ireland, which carries on business in the construction sector.

8 The NRA published a call for interest in the *Official Journal of the European Communities* on 10 July 2001 to design, build, finance and operate the Dundalk Western Bypass. The contractor was required to establish a public-private partnership with the NRA and to operate that section of motorway for approximately 30 years.

9 In December 2001, four candidates were invited to proceed to negotiations.

10 Of those four candidates, two were selected in April 2003 to proceed to more intensive negotiations: these were a consortium called EuroLink, of which SIAC formed part, and a consortium called Celtic Roads Group ('CRG').

11 On 8 August 2003, the NRA invited EuroLink and CRG to submit a best and final offer.

12 By letter of 14 October 2003, EuroLink was informed that the NRA had decided to designate CRG as the preferred tenderer. That letter from the NRA pointed out that this was not a rejection of the offer submitted by EuroLink. The letter explained that the NRA would proceed with discussions with CRG, potentially leading to the award of the contract for the project in question. However, if such discussions were to terminate without a contract being awarded, the NRA reserved the right to invite EuroLink to enter into discussions with it in place of CRG.

13 On 9 December 2003, the NRA decided to award the contract in question to CRG.

14 On 5 February 2004, the NRA signed the contract with CRG. A notice to that effect was displayed on the NRA website on 9 February 2004. The contract award notice was published in the *Official Journal of the European Union* on 3 April 2004.

15 On 8 April 2004, SIAC brought an action for damages before the High Court of Ireland. It complained, inter alia, first, of the selection of the negotiated procedure and, secondly, of certain irregularities which, in its view, had occurred at the stage of introducing and evaluating the best and final offers. With regard to limitation periods, SIAC claimed that the date on which the period for bringing an action began to run was the date on which the contract with CRG was signed, that is to say, 5 February 2004.

16 The High Court took the view that the relevant grounds for bringing the action arose on the date on which the consortium to which SIAC belonged was informed of the identity of the preferred tenderer, namely 14 October 2003. SIAC, it ruled, ought to have brought its action no later than three months after that date, in accordance with Order 84A of the RSC. The High Court, by its judgment of 16 July 2004, accordingly dismissed SIAC's action as being out of time.

17 SIAC submitted a complaint to the Commission. The latter sent a letter of formal notice to Ireland on 10 April 2006, to which that Member State replied on 30 May 2006.

18 On 15 December 2006, the Commission sent an additional letter of formal notice to Ireland, which replied on 21 February 2007.

19 As it was not satisfied by the explanations which it had received, the Commission sent Ireland a reasoned opinion on 1 February 2008, inviting that Member State to take the measures necessary for compliance within a period of two months. Ireland replied to that reasoned opinion on 25 June 2008.

20 As it considered that reply to be unsatisfactory, the Commission brought the present action.

The action

The first head of claim

21 By its first head of claim, the Commission alleges that the NRA did not inform the unsuccessful tenderer of its decision awarding the contract for the design, construction, financing and operation of the Dundalk Western Bypass.

Arguments of the parties

22 The Commission submits that notification of the public contract award decision to the unsuccessful candidates and tenderers is required under Article 8(2) of Directive 93/37. It also submits that, in the context of Directive 89/665, complete legal protection presupposes an obligation to inform candidates and tenderers of the award decision.

23 The communication to EuroLink, by letter from the NRA of 14 October 2003, of the fact that CRG had been designated as the preferred tenderer was not, the Commission contends, tantamount to a rejection of the offer submitted by EuroLink. That letter cannot therefore be regarded as constituting the notification of the award decision provided for in Directive 89/665 and in Article 8(2) of Directive 93/37.

24 Since it is common ground that SIAC did not receive notification of the final award of the contract at issue, the requirements of those provisions were not complied with.

25 Ireland accepts the obligation on Member States to ensure prompt notification to candidates and tenderers of decisions taken on contract awards. It argues that it has faithfully transposed Article 8(2) of Directive 93/37, which lays down that obligation, into its domestic legal order. The Commission, moreover, is not claiming that the relevant Irish legislation does not comply with the requirements of Community law.

26 With regard to the contract relating to the Dundalk motorway bypass, Ireland accepts that communication of the preferred tenderer to EuroLink on 14 October 2003 does not constitute notification of the decision to award the contract.

27 Ireland claims, however, that, as is apparent from the judgment of the High Court of Ireland of 16 July 2004, it was, as of 14 October 2003, clear to SIAC that a decision had been taken to award the contract. SIAC must have been aware that the NRA was engaged in the process necessary to conclude a contract with CRG. In Ireland's view it follows that, in the circumstances of the present case, no injustice was caused by the lack of notification of the final decision to award the contract.

28 Ireland submits that, as its national law faithfully transposes the Community rules on notification of decisions concerning the award of public contracts, Ireland cannot be considered to have failed in its obligations under Community law on the basis of a single incident of non-notification.

Findings of the Court

29 Article 8(2) of Directive 93/37 requires contracting authorities to inform candidates and tenderers promptly of the decisions taken on contract awards. Notification to unsuccessful candidates and tenderers of the public contract award decision is mandatory under that provision.

30 That same obligation also arises under Article 1(1) of Directive 89/665, inasmuch as the possibility of bringing an effective action against award decisions can be ensured only if all candidates or tenderers are informed in good time of those decisions (see, to that effect, judgment of 24 June 2004 in Case C-212/02 *Commission* v *Austria*, paragraph 21, and Case C-444/06 *Commission* v *Spain* [2008] ECR I-2045, paragraph 38).

31 It is not disputed that in the present case the NRA never officially informed EuroLink of its decision to award the contract in question to CRG.

32 The announcement of the award on the NRA's website on 9 February 2004 and the publication thereof on 3 April 2004 in the *Official Journal of the European Union* cannot adequately rectify that failure.

33 That information was released into the public domain after the signature of the contract on 5 February 2004. In order to make effective legal protection possible for the candidates or tenderers, however, they ought to have been informed of the NRA's award decision in good time before the contract was concluded (see, to that effect, *Commission* v *Austria*, paragraph 21, and *Commission* v *Spain*, paragraph 38).

34 The NRA thus failed in its obligations under Article 8(2) of Directive 93/37 and Article 1(1) of Directive 89/665 to provide information in regard to the contract in question.

35 Referring in this connection to the NRA's letter of 14 October 2003, Ireland submits that in the present case SIAC nevertheless did not suffer any injustice. In its view, after that date, SIAC must have been aware that the NRA was in the process of signing a contract with CRG.

36 That argument cannot be accepted.

37 First of all, the NRA did not, by its letter of 14 October 2003, notify the definitive decision to award the contract in question. It merely indicated that it had selected CRG as the preferred tenderer. The NRA even stated that, in the event that the discussions between it and CRG did not lead to the award of a contract, it reserved the right to enter into discussions with EuroLink in place of CRG. At that stage, Eurolink had not been definitively ruled out as a potential candidate for the contract and could legitimately take the view that the procedure for the award of that contract had not been completed.

38 Secondly, and in any event, the finding that a Member State has failed to fulfil its obligations is not bound up with a finding as to the damage flowing from that failure (Case C-263/96 *Commission* v *Belgium* [1997] ECR I-7453, paragraph 30, and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 42).

39 Lastly, Ireland argues that the national legislation at issue satisfies the information obligations which are imposed by the Community legislation. In those circumstances, a single incident of failure to notify a decision concerning the award of a public contract cannot justify a finding that the Member State in question has failed to fulfil its obligations under Community law.

40 That argument also cannot be accepted.

41 Without its being necessary to rule on the assertion that the national legislation at issue transposes adequately the relevant requirements of Community law, suffice it to recall that, according to settled case-law, an action for failure to fulfil obligations makes possible not only an examination of the compatibility of a Member State's laws, regulations and administrative provisions with Community law but also a determination that there has been an infringement of Community law by the national bodies in a specific individual case (see, concerning the award of public contracts, Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, paragraph 30, and judgment of 15 October 2009 in Case C-275/08 *Commission* v *Germany*, paragraph 27).

42 It follows that the first head of claim is well founded.

The second head of claim

43 The Commission's second head of claim consists of two parts. First, the Commission argues that the national legislation in question gives rise to uncertainty as to which decision must be challenged through legal proceedings. It maintains, secondly, that that legislation is unclear on how periods within which proceedings must be brought are to be determined.

The first part of the second head of claim

– Arguments of the parties

44 The Commission states that it is difficult for tenderers to know which decision by the contracting authority they have to challenge and on which date the period for challenging that decision begins to run. The Commission argues that that uncertainty is attributable to the wording of Order 84A(4) of the RSC and its uncertain interpretation.

45 The Commission asserts that the expression 'a decision to award or the award of a public contract' used in Order 84A(4) of the RSC refers to decisions which may be challenged and that that provision makes no reference to earlier interim decisions taken by the contracting authority. In its judgment of 16 July 2004, the High Court took the view that that provision applies not only to the decision to award a

contract or to the award of such a contract, but also to decisions taken by contracting authorities in respect of public procurement procedures.

46 In the Commission's view, the national legislation in question appears not to be in line with the fundamental principle of legal certainty and the requirement of effectiveness envisaged by Directive 89/665, which is an application of that principle, since tenderers are left in uncertainty as to their situation when they intend to bring an action against an award decision taken by a contracting authority in a two-stage procedure in which the final award decision is taken after a tenderer has been selected.

47 The Commission argues that it must be made clear to tenderers whether Order 84A(4) of the RSC applies not only to decisions to award contracts, but also to interim decisions taken by a contracting authority during the tendering procedure, including those concerning the selection of the preferred tenderer.

48 Ireland points out that Article 1 of Directive 89/665 requires Member States to ensure that there are effective legal remedies against all decisions taken by contracting authorities in public procurement procedures and not only against decisions to award contracts in those procedures. In Ireland's view, the Irish courts interpret and apply Order 84A(4) of the RSC in accordance with those requirements. The High Court's judgment of 16 July 2004 in particular states clearly that that provision allows proceedings to be brought against any decision taken by contracting authorities in a public procurement procedure, which is entirely consistent with Article 1 of Directive 89/665.

49 With regard to the date from which the period for challenging an interim decision by a contracting authority begins to run, Ireland observes that Directive 89/665 requires that it be possible for decisions taken by contracting authorities to be reviewed rapidly. An application can be examined expeditiously only if both parties to the dispute are obliged to act quickly in the relevant proceedings. That objective could not be attained if the parties were allowed to await formal notification of the award decision before bringing proceedings, even though they have all the elements of fact and law necessary for bringing such an action.

50 Ireland submits that, if a tenderer could simply await notification of a formal decision not to award it the contract in question, despite knowing that it was not going to be awarded the contract, as found by the High Court in the case which gave rise to its judgment of 16 July 2004, significant delay would ensue for the review of all decisions by contracting authorities.

– Findings of the Court

51 The Court has already held that Directive 89/665 does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a period laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the period in question is reasonable (Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, paragraph 50 and case-law cited).

52 That case-law is based on the consideration that the full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thereby obliging the contracting authority to restart the entire procedure in order to correct such infringements (*Lämmerzahl*, paragraph 51).

53 On the other hand, national limitation periods, including the detailed rules for their application, should not in themselves be such as to render virtually impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law (*Lämmerzahl*, paragraph 52).

54 Order 84A(4) of the RSC provides that 'an application for the review of a decision to award or the award of a public contract' must be made within a specified period.

55 However, as occurred in the dispute which gave rise to the High Court's judgment of 16 July 2004, the Irish courts may interpret that provision as applying not only to the final decision to award a public contract but also to interim decisions taken by a contracting authority during the course of that public procurement procedure. If the final decision to award a contract is taken after expiry of the period laid down for challenging the relevant interim decision, the possibility cannot be excluded that an interested candidate or tenderer might find itself out of time and thus prevented from bringing an action challenging the award of the contract in question.

56 According to the Court's settled case-law, the application of a national limitation period must not lead to the exercise of the right to review of decisions to award public contracts being deprived of its practical effectiveness (see, to that effect, Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 72; Case C-327/00 *Santex* [2003] ECR I-1877, paragraphs 51 and 57; and *Lämmerzahl*, paragraph 52).

57 As observed by the Advocate General in point 51 of her Opinion, only if it is clear beyond doubt from the national legislation that even preparatory acts or interim decisions of contracting authorities at issue in public procurement cases start the limitation period running can tenderers and candidates take the necessary precautions to have possible breaches of procurement law reviewed effectively within the meaning of Article 1(1) of Directive 89/665 and to avoid their challenges being statute-barred.

58 Accordingly, it is not compatible with the requirements of Article 1(1) of that directive if the scope of the period laid down in Order 84A(4) of the RSC is extended to cover the review of interim decisions taken by contracting authorities in public procurement procedures without that being clearly expressed in the wording thereof.

59 Ireland disagrees with this finding, contending that the application of such a period for challenging interim decisions corresponds to the objectives of Directive 89/665, in particular the requirement of rapid action.

60 It is true that Article 1(1) of Directive 89/665 requires Member States to ensure that decisions taken by contracting authorities may be reviewed effectively and as rapidly as possible. In order to attain the objective of rapidity pursued by that directive, Member States may impose limitation periods for actions in order to require traders to challenge promptly preliminary measures or interim decisions taken in public procurement procedures (see, to that effect, *Universale-Bau and Others*, paragraphs 75 to 79; Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraphs 30 and 36 to 39; and *Lämmerzahl*, paragraphs 50 and 51).

61 However, the objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to create a legal situation that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations (see, to that effect, Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 24, and Case C-221/94 *Commission* v *Luxembourg* [1996] ECR I-5669, paragraph 22).

62 The abovementioned objective of rapidity does not permit Member States to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of ensuring effective review proceedings laid down in Article 1(1) of Directive 89/665.

63 The extension of the limitation period under Order 84A(4) of the RSC to interim decisions taken by contracting authorities in public procurement procedures in a manner which deprives the parties concerned of their right of review satisfies neither the requirements of legal certainty nor the objective of effective review. Interested parties must be informed of the application of limitation periods to interim decisions with sufficient clarity to enable them effectively to bring proceedings within the periods laid down. The failure to provide such information cannot be justified on grounds of procedural rapidity.

64 Ireland submits that the Irish courts interpret and apply Order 84A(4) of the RSC in conformity with the requirements of Directive 89/665. This argument refers to the significant role played by case-law in common-law countries such as Ireland.

65 It should be noted in this regard that, according to the Court's settled case-law, although the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be reproduced in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient, it is nevertheless necessary that that legal context be sufficiently clear and precise as to enable the parties concerned to be fully informed of their rights and, if necessary, avail themselves of those rights before the national courts (judgment of 29 October 2009 in Case C-474/08 *Commission* v *Belgium*, paragraph 19 and case-law cited).

66 Order 84A(4) of the RSC, however, does not satisfy those requirements inasmuch as it allows national courts to apply, by analogy, the limitation period which it provides for challenges to public contract award decisions to challenges to interim decisions taken by contracting authorities in the course of those procurement procedures, in respect of which no express provision was made by the legislature for that limitation period to apply. The resulting legal situation is not sufficiently clear and precise to exclude the risk that concerned candidates and tenderers may be deprived of their right to challenge decisions in public procurement matters handed down by a national court on the basis of its own interpretation of that provision.

67 It follows that the first part of the second head of claim is well founded.

The second part of the second head of claim

– Arguments of the parties

68 The Commission points out that Order 84A(4) of the RSC requires actions to be brought 'at the earliest opportunity and in any event within three months'. The Commission takes the view that that formulation leaves tenderers in uncertainty when they consider exercising their right under Community law to bring proceedings against a decision of a contracting authority. Indeed, tenderers would discover what interpretation will be given to the formulation 'at the earliest opportunity' only after their action has been brought and the competent court has exercised its discretion in interpreting that provision. Such a situation runs counter to the principle of legal certainty.

69 That provision, it continues, also creates a further uncertainty as to the question of the cases in which the three-month limitation period will be applied, and as to that of the other cases in which that period will be shorter because it was possible to bring an action at an earlier opportunity.

70 The Commission accordingly submits that Order 84A(4) of the RSC lacks clarity and gives rise to legal uncertainty. The Commission considers that, in view of the obligation to respect the principle of legal certainty, the applicable period has to be a fixed one which can be interpreted in a clear and foreseeable manner by all tenderers.

71 Ireland replies that, to date, no Irish court has dismissed, as being out of time, any action challenging a decision of a contracting authority made in the course of a public contract award procedure which was brought within the three-month limitation period but not at the earliest opportunity. Ireland takes the view that any such interpretation could not be upheld, since the expression 'in any event' indicates that any action brought within three months will be within time. Moreover the High Court of Ireland has expressly held that, where appropriate, the three-month limitation period will be extended.

72 Ireland observes that Order 84A(4) of the RSC gives the Irish courts the discretion to extend the period within which proceedings must be brought. The grant of discretion to a court by a legislative provision is a legitimate option available to the Member States when regulating periods for bringing proceedings. The Member States are not obliged to establish immutable limitation periods.

– Findings of the Court

73 Since Directive 89/665 pursues an objective of rapid action, it is legitimate for a Member State, in implementing that directive, to require interested parties to be diligent in bringing actions for review.

74 However, the wording of Order 84A(4) of the RSC, which provides that all relevant applications 'shall be made at the earliest opportunity and in any event within three months' gives rise to uncertainty. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made 'at the earliest opportunity' within the terms of that provision.

75 It is not possible for parties concerned to predict what the limitation period will be if this is left to the discretion of the competent court. It follows that a national provision providing for such a period does not ensure effective transposition of Directive 89/665.

76 Ireland asserts, by way of reply to such a inference, that no Irish court has dismissed an action relating to public procurement as being out of time on the ground that it was not brought 'at the earliest opportunity'.

77 Suffice it to point out in this regard that, in order to determine whether a directive has been adequately transposed, it is not always necessary to establish the actual effects of the legislation transposing it into national law; the situation is different if the legislation itself harbours the insufficiencies of transposition (see, to that effect, Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 60).

78 Ireland explains that Order 84A(4) of the RSC confers discretion on the Irish courts to extend the periods for bringing proceedings.

79 That provision provides for the application of the period laid down therein 'unless the Court considers that there is good reason for extending such period'.

80 Admittedly, such a provision in itself, independently of its context, must be recognised as a valid implementation of Directive 89/665. In a field such as public procurement, in which procedures can be complex and the facts may vary widely, the opportunity granted by the national legislature to national courts to extend, on grounds of fairness, the periods within which actions must be brought may be in the interests of the proper administration of justice.

81 However, the possibility for national courts to extend periods for bringing actions, as provided for in Order 84A(4) of the RSC, is not such as to compensate for the shortcomings in that provision, having regard to the clarity and precision which Directive 89/665 requires in respect of the system of limitation periods. Even if the candidate or tenderer concerned takes into account the possibility that periods may be extended, it will still not be able to predict with certainty which period will be accorded to it for the purpose of bringing proceedings, in view of the reference to the obligation to bring an action at the earliest opportunity.

82 Consequently, the second part of the second head of claim is well founded.

83 In the light of the foregoing, it must be held that,

– by reason of the fact that the NRA did not inform the unsuccessful tenderer of its decision to award the contract for the design, construction, financing and operation of the Dundalk Western Bypass, and

– by maintaining in force Order 84A(4) of the RSC, in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined,

Ireland has failed – as regards the first head of claim – to fulfil its obligations under Article 1(1) of Directive 89/665 and Article 8(2) of Directive 93/37 and – as regards the second head of claim – to fulfil its obligations under Article 1(1) of Directive 89/665.

Costs

84 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against Ireland and the latter has been unsuccessful, Ireland must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Declares that:

– **by reason of the fact that the National Roads Authority did not inform the unsuccessful tenderer of its decision to award the contract for the design, construction, financing and operation of the Dundalk Western Bypass, and**

– **by maintaining in force Order 84A(4) of the Rules of the Superior Courts, in the version resulting from Statutory Instrument N° 374 of 1998, in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined,**

Ireland has failed – as regards the first head of claim – to fulfil its obligations under Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, and Article 8(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 and – as regards the second head of claim – to fulfil its obligations under Article 1(1) of Directive 89/665, as amended by Directive 92/50;

2. Orders Ireland to pay the costs.

[Signatures]

---

* Language of the case: English.

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 29 October 2009 [1](1)

Case C-456/08

Commission of the European Communities
v
Ireland

(Failure of a Member State to fulfil obligations – Public works contracts – Directives 93/37/EEC and 89/665/EEC – Obligation of the contracting authority to inform an unsuccessful tenderer of the award decision – Review procedures under national law – Effective legal protection – Decisions open to challenge – Limitation periods – Length of the period – Requirement to bring proceedings 'at the earliest opportunity')

I – Introduction

1. This action for failure to fulfil obligations gives the Court an opportunity to develop its case-law on the remedies available to unsuccessful tenderers in public procurement procedures.

2. First, the Commission criticises Ireland on the ground that in a specific individual case an Irish authority, awarding a road construction project, did not inform the unsuccessful consortium of tenderers of the final award decision.

3. Second, the Commission and Ireland dispute whether the time-limits laid down in Irish procedural law are formulated sufficiently clearly, precisely and predictably to enable effective review of the decisions of contracting authorities.

4. As regards the second issue, the present case has points of contact with Case C-406/08 *Uniplex (UK)*, in which I also deliver my Opinion today.

II – Legal context

A – *Community law*

5. The Community law context of the present case is defined by Directives 93/37/EEC (2) and 89/665/EEC. (3)

6. Article 8(2) of Directive 93/37, as amended by Directive 97/52/EC, (4) contains the following provision:

'Contracting authorities shall promptly inform candidates and tenderers of the decisions taken on contract awards, including the reasons why they have decided not to award a contract for which there has been an invitation to tender or to start the procedure again, and shall do so in writing if requested. They shall also inform the Office for Official Publications of the European Communities of such decisions.'

7. Article 1 of Directive 89/665, as amended by Directive 92/50/EEC, (5) (6) provides:

‘1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC … decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.’ (7)

B – *National law*

8. As regards national law, first the Irish European Communities (Award of Public Authorities’ Contracts) Regulations 2006 (8) (‘the APAC Regulations’) and second the Irish Rules of the Superior Courts (9) (‘the RSC’) are relevant to the present case.

9. Regulation 49 of the APAC Regulations reads, in extract, as follows:

‘(1) As soon as practicable after reaching a decision about entering into a public contract or framework agreement or admission to a dynamic purchasing system, a contracting authority shall inform candidates and tenderers of the decision by the most rapid means of communication possible (such as by electronic mail or by telefax). …

…

(5) A contracting authority shall not enter into a public contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed of the contract award decision in accordance with paragraph (1).

…’

10. Order 84A(4) of the RSC (10) provides as follows:

‘An application for the review of a decision to award or the award of a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period.’

III – Facts and pre-litigation procedure

11. The Irish National Roads Authority (‘NRA’) is an authority responsible for the construction and maintenance of roads in Ireland.

12. On 10 July 2001 the NRA published in the *Official Journal of the European Communities* a call for interest in the design, building, financing and operation of the Dundalk Western Bypass motorway. The contractor was to establish a public-private partnership (11) with the NRA and operate the motorway for a period expected to be 30 years.

13. In December 2001 the NRA invited four interested parties to proceed to negotiations. In April 2003 the NRA selected two of them to proceed to more intensive negotiations, namely the EuroLink

consortium and the Celtic Roads Group consortium. On 8 August 2003 the NRA invited those consortia to submit a ‘best and final offer’.

14. By letter of 14 October 2003, EuroLink was informed by the NRA that it had decided to select Celtic Roads Group as the preferred tenderer. The letter pointed out, however, that EuroLink’s offer had not been rejected. If the further discussions with Celtic Roads Group did not lead to the award of a contract, the NRA reserved the right to invite EuroLink to enter into discussions with it in place of Celtic Roads Group.

15. On 9 December 2003 the NRA decided to award the contract to Celtic Roads Group. The contract was signed on 5 February 2004. From 9 February 2004 a notice to that effect was displayed on the NRA website, and a notice of the award was also published in the *Official Journal of the European Union* on 3 April 2004.

16. On 8 April 2004 SIAC Construction Limited (‘SIAC’), an undertaking which belonged to the unsuccessful EuroLink consortium, brought an action for compensation in the High Court of Ireland, based on various alleged defects in the award procedure.

17. By judgment of 16 July 2004, (12) the High Court dismissed the action as out of time. Contrary to the view taken by SIAC, the High Court considered that SIAC must have known the grounds for its claim at the latest by 14 October 2003, when EuroLink was informed by the NRA of the identity of its preferred tenderer. In accordance with Order 84A(4) of the RSC, SIAC should have brought its action at the latest three months from that date.

18. SIAC thereupon complained to the Commission. In its complaint it alleged inter alia that it had not been informed at any time by the NRA of its award decision.

19. Following that complaint, the Commission first sent the Irish authorities an administrative letter on 15 November 2004, asking for further information on the facts. Ireland’s answer of 25 April 2005 was not capable of dispelling the Commission’s doubts. A letter of formal notice was thereupon sent by the Commission to Ireland on 10 April 2006, and a supplementary letter of formal notice on 15 December 2006, to which Ireland replied by letters of 30 May 2006 and 21 February 2007 respectively.

20. Since, however, Ireland’s explanations still failed to satisfy the Commission, it issued a reasoned opinion within the meaning of the first paragraph of Article 226 EC on 1 February 2008, and required Ireland to take the necessary steps to comply with the reasoned opinion within two months. On 25 June 2008 Ireland replied to the reasoned opinion, stating inter alia that an amendment to the national laws, regulations and administrative provisions was being considered in the course of the transposition of Directive 2007/66. However, that answer too did not appear to the Commission to be adequate.

IV – Forms of order sought by the parties and procedure before the Court

21. By a pleading of 14 October 2008, received at the Court on 20 October 2008, the Commission brought the present action against Ireland under the second paragraph of Article 226 EC.

22. The Commission asks the Court to:

– declare that, by way of the rules on time-limits in the national legislation regulating the exercise of the right of tenderers to judicial review in public procurement procedures and by failing to notify the award decision to the complainant against that award decision, Ireland has failed to fulfil its obligations, concerning the applicable time-limits, under Article 1(1) of Directive 89/665 as interpreted by the Court and, concerning the lack of notification, under Article 1(1) of Directive 89/665 as interpreted by the Court and Article 8(2) of Directive 93/37; and

– order Ireland to pay the costs.

23. Ireland contends for its part that the Court should:

– dismiss the action; and

– order the Commission to pay the costs.

24. The Court received written submissions on the Commission's action, followed by oral argument, on 24 September 2009. (13)

V – Assessment

25. The Commission's action will be well founded if Ireland has failed to fulfil one of its obligations under the EC Treaty. Those obligations include, in accordance with the third paragraph of Article 249 EC and Article 10 EC, the duty to achieve the results aimed at by Community directives.

26. In the present case the Commission bases its action on two pleas. The first plea concerns an individual case: it relates to the alleged failure to inform the unsuccessful consortium of tenderers of the award decision for the Dundalk Western Bypass motorway construction project. The second plea goes beyond that individual case: it denounces as contrary to Community law the provision of Irish law on the time-limits for seeking remedies, as laid down in Order 84A(4) of the RSC.

A – *First plea: failure to notify the award decision*

27. By its first plea, the Commission accuses Ireland of a failure to fulfil its obligations under Article 1(1) of Directive 89/665 and Article 8(2) of Directive 93/37, consisting in the fact that the NRA did not inform the unsuccessful tenderer, in accordance with those provisions, of its award decision concerning the Dundalk Western Bypass motorway construction project.

28. Both the Commission and Ireland tacitly assume that the Dundalk Western Bypass motorway construction project put out to tender by the NRA was a public works contract for the purposes of Directive 93/37.

29. The NRA as the contracting authority was therefore obliged under Article 8(2) of Directive 93/37 to inform tenderers or candidates promptly of its decision on the award of that contract.

30. The same obligation also arises under Article 1(1) of Directive 89/665, because effective legal protection against award decisions can only be ensured if all candidates or tenderers are informed in good time and in detail of precisely those decisions. (14)

31. It is not disputed, however, that in the present case the NRA never formally informed EuroLink, the unsuccessful consortium of tenderers to which SIAC belonged, of its decision to award the road construction project in question to the competing consortium Celtic Roads Group.

32. Nor could the announcement of 9 February 2004 on the NRA's website and the notice of 3 April 2004 in the *Official Journal of the European Union* provide an adequate substitute. They merely informed the public of the final conclusion of the contract between the NRA and Celtic Roads Group. But in order to make effective legal protection possible for the unsuccessful candidates or tenderers, they should have been informed in good time before the contract was concluded – instead of being informed only after the creation of a fait accompli – about the NRA's award decision. (15)

33. The NRA thus failed to comply with its obligations to provide information under Article 8(2) of Directive 93/37 and Article 1(1) of Directive 89/665 with respect to the Dundalk Western Bypass motorway construction project.

34. Ireland objects that in the present case SIAC none the less suffered no injustice. In view of the circumstances of the particular case, at no time was there any uncertainty for SIAC as to the tenderer to which the NRA would award the contract. Ireland refers here to the NRA's letter of 14 October 2003, in which the EuroLink consortium was informed of the selection of Celtic Roads Group as the preferred tenderer. From that time at the latest, SIAC must in Ireland's view have been aware that – 'except in very exceptional circumstances' (16) – an award decision would be made in favour of Celtic Roads Group. On this point, Ireland expressly adopts the reasoning of the High Court of Ireland in the national review proceedings. (17)

35. This objection fails, however. In its letter of 14 October 2003 the NRA did not notify any final award decision; it even expressly informed EuroLink that its offer had not been rejected. The selection of a 'preferred tenderer' by NRA may already have been an important decision as to the direction to take, but it did not involve a definitive determination of a tenderer. The NRA expressly reserved the right to invite EuroLink to enter into discussions in the place of Celtic Roads Group at a later date if appropriate. EuroLink could therefore assume for the time being that it was not yet completely out of the running.

36. Apart from that, in an action under Article 226 EC for failure to fulfil obligations, which is objective in nature, it is in any case irrelevant whether actual damage or other adverse effects have occurred as a result of the conduct of official bodies of a Member State. (18)

37. Ireland stresses, finally, that its national law is in harmony with the obligations under Community law to provide information; these are correctly transposed in Article 49(1) of the APAC Regulations. In those circumstances, an individual case in which no information was given on the award decision cannot be stigmatised as a breach of Community law.

38. This argument of Ireland is also unconvincing, however. First, it is by no means undisputed whether Article 49(1) of the APAC Regulations in fact correctly transposes the obligations under Community law to provide information; separate proceedings for failure to fulfil obligations are pending against Ireland on this point. (19) Second, it is settled case-law that, in an action for failure to fulfil obligations, not only can the compatibility of a Member State's laws, regulations and administrative provisions with Community law be examined, an infringement of Community law by the national bodies in a specific individual case can also be ascertained. (20)

39. Altogether, I therefore conclude that the Commission's first plea is well founded.

B – *Second plea: rules on time-limits for legal remedies in Irish procedural law that are contrary to Community law*

40. By its second plea, the Commission accuses Ireland of an infringement of Article 1(1) of Directive 89/665, consisting in the fact that Order 84A(4) of the RSC regulates the limitation period for applications in review procedures in a way which conflicts with the requirements of Community law.

41. Directive 89/665 makes no express provision on the time-limits that apply to review procedures under Article 1 of the directive. (21) However, the Court has consistently held that the Member States may in the exercise of their procedural autonomy introduce reasonable limitation periods for bringing proceedings, provided that they comply with the principles of equivalence and effectiveness. (22) Those two principles are also reflected in Article 1 of Directive 89/665, the principle of equivalence in Article 1(2) and the principle of effectiveness in Article 1(1). (23)

42. In the present case it is the principle of effectiveness that is the focus of interest. *That* Ireland can lay down limitation periods for applications for the review of decisions of contracting authorities is not in dispute. (24) The dispute between the parties concerns merely certain details of the national rules on limitation. The essential issue is whether those rules are sufficiently clear to make *effective review* within the meaning of Article 1(1) of Directive 89/665 possible. The Commission denies this. It refers to lack of clarity in connection with determining the kinds of decisions against which challenges must be brought within the period laid down by Order 84A(4) of the RSC, and to lack of clarity as regards the duration of that period.

1. Determination of the kinds of decisions to which the limitation period applies (first part of the second plea)

43. By the first part of its second plea, the Commission complains that there is legal uncertainty as to the kind of procurement law decisions against which challenges must be brought within the period laid down by Order 84A(4) of the RSC. According to its wording, Order 84A(4) of the RSC applies only to the review of 'a decision to award or the award of a public contract'. In practice, however, according to the Commission, the scope of that provision is extended also to interim decisions, so that

applications for their review can likewise be brought only within the period laid down by Order 84A(4) of the RSC.

44. The facts relied on by the Commission in this respect are not in dispute. Both the submissions of Ireland in the present proceedings for failure to fulfil obligations and the judgment of the High Court of Ireland on the Dundalk Western Bypass motorway construction project (25) confirm that the period laid down in Order 84A(4) of the RSC is in practice applied by the competent Irish authorities not only to challenges to final decisions ('a decision to award or the award of a public contract') but also to challenges to interim decisions taken by contracting authorities. (26)

45. It is very much in dispute between the parties, however, whether Order 84A(4) of the RSC, as interpreted and applied by the national authorities, complies with the requirements of Article 1(1) of Directive 89/665.

46. Article 1(1) of Directive 89/665 requires that decisions of contracting authorities may be reviewed 'effectively and, in particular, as rapidly as possible' for breaches of procurement law.

47. To achieve that objective of the directive, the Member States must, in accordance with the third paragraph of Article 249 EC in conjunction with Article 10 EC, take all appropriate measures, both general and particular. According to settled case-law, they must establish a specific legal framework in the area in question. (27) They must make the situation in national law sufficiently precise, clear and transparent for individuals to be able to ascertain their rights and obligations. (28)

48. Moreover, the same follows from the principle of legal certainty, which is a general legal principle forming part of the Community legal order, and must be observed by the Member States when they exercise their powers within the scope of Community law. (29) According to settled case-law, one of the requirements of legal certainty is that rules of law must be clear, precise and predictable in their effects, especially where they may have negative consequences for individuals and undertakings. (30)

49. For a limitation rule such as that in Order 84A(4) of the RSC, the requirements of clarity, precision and predictability apply especially. An unclear limitation provision is liable to entail substantial negative consequences for individuals and undertakings. If a tenderer or candidate misses a deadline for bringing proceedings under Order 84A(4) of the RSC, he is barred from complaining of possible breaches of procurement law and loses the possibility of subjecting the award decision in question to a review. He is no longer entitled to go to court to obtain the public contract as such or at least compensation for the public contract he has lost. (31)

50. Yet the application of a limitation period must precisely not lead to the exercise of the right to review of award decisions being deprived of its practical effectiveness. (32)

51. Only if it is clear beyond doubt that even preparatory acts of contracting authorities or the interim decisions at issue in the present case start the limitation period under Order 84A(4) of the RSC running can tenderers and candidates take the necessary precautions to have possible breaches of procurement law reviewed effectively within the meaning of Article 1(1) of Directive 89/665 and to avoid their challenges being statute-barred.

52. In this context, I regard it as incompatible with the requirements of Article 1(1) of Directive 89/665 for the scope of the limitation period under Order 84A(4) of the RSC to be extended in Ireland to the review of interim decisions, without that being clearly expressed in the wording of the provision. This is because the effects of the limitation rule, in particular the extent of its preclusive effect, cannot be predicted with sufficient certainty by tenderers and candidates in award procedures. The objective of effective review of decisions taken by contracting authorities, prescribed by Article 1(1) of Directive 89/665, is thereby undermined.

– Ireland's objection that a time-limit for challenging interim decisions corresponds to the objectives of Directive 89/665, in particular the requirement to act rapidly

53. Ireland contends that under Directive 89/665 and the case-law on that directive all decisions taken by contracting authorities are open to challenge. The extension of the limitation rule in Order

84A(4) of the RSC to interim decisions is in harmony with the requirements of Community law. Moreover, Directive 89/665 is based on a requirement to act rapidly. Article 1(1) demands not only effective review but also review that is carried out as rapidly as possible of decisions of contracting authorities. The review of all decisions taken by contracting authorities must therefore be subject to the time-limit laid down by Order 84A(4) of the RSC. If it were permissible for unsuccessful tenderers to wait until the issue of the final award decision and make all their complaints then, there would be a risk of lengthy legal uncertainty and a considerable loss of time in connection with the award of public contracts. Furthermore, in Ireland's view, it would become impossible to remedy possible infringements of procurement law while an award procedure was still under way.

54. In this connection, it must be observed that Ireland is of course free to provide for limitation periods for procurement law review of preparatory acts and interim decisions of contracting authorities, for example the drawing-up of a shortlist or the choice of a preferred tenderer. As already mentioned, (33) the determination of appropriate limitation periods is compatible with Community law, provided that the principles of equivalence and effectiveness are observed in so doing. Such limitation periods – even comparatively short ones – may in particular be legitimate and appropriate if Community law lays down a requirement of rapid action in a certain field, by insisting – as in the case of procurement law – on action being taken 'as rapidly as possible' (34) (Article 1(1) of Directive 89/665). (35)

55. It is therefore entirely correct that, by extending the limitation rule in Order 84A(4) of the RSC to interim decisions, Ireland is pursuing a legitimate aim in harmony with the directive. (36) That aim must, however, be achieved in national law in conformity with the requirements of legal certainty. The limitation rule must be clearly and precisely worded and predictable in its effects. The existence of a national practice which serves the aims of a directive does not release the Member State from the obligation to create a legal situation that is sufficiently precise, clear and transparent for individuals to be able to ascertain their rights and obligations. (37)

56. In the present case, moreover, it should be borne in mind that Directive 89/665 imposes on the Member States not only the aim of *rapid review* but also the aim of *effective review* of award decisions (see Article 1(1) of Directive 89/665). A national practice which achieves only one of those aims at the expense of the other is not in harmony with the directive. The extension of the limitation period under Order 84A(4) of the RSC to interim decisions may indeed serve the aim of rapid review; without this also being made clear in the wording of Order 84A(4) of the RSC, however, the practice of the Irish authorities operates at the expense of legal certainty, and thus ultimately jeopardises the achievement of the aim of effective review. (38)

57. There is moreover no fundamental contradiction between the requirement of legal certainty and the requirement of rapid action in procurement law. (39) On the contrary, reviewing the decisions of contracting authorities as rapidly as possible helps to create legal certainty, provided that the applicable procedure, including limitation periods, is regulated in national law as clearly, precisely and predictably as possible.

58. Ireland's first objection must therefore be rejected.

– Ireland's objection that its national law is a common law system

59. Ireland further objects that its national law is a common law system. It says that in such a system not only statutory provisions but also decisions of the courts are determinative. Tenderers and candidates should obtain legal advice if necessary.

60. On this point, it must be observed that a directive leaves it to the national authorities to choose the form and methods for achieving the desired result (third paragraph of Article 249 EC). The transposition of a directive into national law therefore does not necessarily require the adoption of express and specific legal provisions, and a general legal context may also suffice in this respect. What matters, however, is that with such a method of proceeding the full application of the directive actually is ensured with sufficient clarity and precision. (40)

61. If the position in national law derives from the interplay of statutory provisions and 'judge-made' law, that must not take place at the expense of the clarity and precision of the provisions and rules concerned. That applies all the more where a directive is intended to confer rights on the individual (41) and an unclear or complex legal position with respect to limitation periods could lead to the loss of rights – in the present case the loss of the right to review of decisions taken by contracting authorities. Foreign tenderers and candidates in particular could be deterred from seeking public contracts in Ireland by a complex and non-transparent legal situation.

62. National courts are obliged to interpret and apply the provisions of national law consistently with directives. (42) Specifically with respect to procurement review procedures, they must interpret the national provisions laying down a limitation period, as far as is at all possible, in such a way as to ensure observance of the principle of effectiveness deriving from Directive 89/665. (43)

63. It is not compatible with those requirements for a national court to apply the limitation period laid down by law for the right to apply for review – in this case Order 84A(4) of the RSC – by going beyond its wording and applying it by analogy also to the review of decisions for which the legislature has not prescribed such a limitation period. The legal position is thereby made less transparent. The tenderers and candidates affected run the risk, in view of the preclusive effect of the limitation period, of losing their right to the review of certain decisions. The objective laid down in Article 1(1) of Directive 89/665 of effective review of the decisions of contracting authorities is thereby undermined. (44)

64. In this context, Ireland's second objection must also be rejected.

– Interim conclusion

65. Altogether, therefore, I conclude that the first part of the Commission's second plea should be upheld.

2. Length of the limitation period (second part of the second plea)

66. By the second part of its second plea, the Commission objects to the phraseology of Order 84A(4) of the RSC, according to which applications for review must be made 'at the earliest opportunity and in any event within three months'. It says that this provision leaves the tenderers and candidates in question uncertain as to the precise length of the limitation period, and makes it disproportionately difficult for them to bring an application for review. Moreover, according to the Commission, there is no indication of when an application within three months suffices and when the application must be brought earlier, before the expiry of three months.

67. It should be noted, first, that there need not necessarily be two independent limitation periods if a provision combines an indication of time expressed in days, weeks, months or years with the words 'at the earliest opportunity' or a similar expression. Many provisions use such additions simply in order to emphasise the need for rapidity and to remind applicants of their responsibility, in their own interests, for taking the necessary steps as early as possible, in order best to protect their interests.

68. In the latter sense, for example, the Court itself formerly used the words 'as soon as possible' in relation to possible applications by the parties for an extension of speaking time at the hearing. (45) Members of the temporary staff of the Community who become unemployed must comply with certain formalities 'as soon as possible and no later than [within certain defined time-limits]'. (46) Similar wording may also be found where the intention is to state that public authorities handling certain applications or procedures are subject to a duty to act expeditiously. (47) In procurement law too, the concept of a 'duty of diligence, which falls to be categorised more as an obligation as to means than an obligation as to results' is not unknown. (48)

69. In relation to the limitation rule in Order 84A(4) of the RSC at issue in this case, however, it cannot be presumed with certainty that the words 'at the earliest opportunity' are merely intended to express the principle of acting expeditiously. Rather, according to Ireland's submissions in the procedure before the Court, it cannot be ruled out that the expression 'at the earliest opportunity' in Order 84A(4) of the RSC has a wider meaning, and is to be understood as an independent limitation

period which may make applications for review inadmissible even before the expiry of the three-month period which exists ‘in any event’.

70. It is true that Ireland appears to assume that an application for review will normally be in time if it is made ‘in any event within three months from the date when grounds for the application first arose’. At the same time, however, Ireland emphasises, referring to a judgment of its Supreme Court, (49) that the ‘primary obligation’ (50) of an applicant in the context of Order 84A(4) of the RSC is to bring his action ‘at the earliest opportunity’. In certain circumstances this could lead to an application for review being dismissed as out of time even if it was made within the three-month period. (51) It is thus at least not excluded that the words ‘at the earliest opportunity’ in Order 84A(4) of the RSC are understood by the Irish courts as an independent limitation period. (52)

71. If it is the case that the expression ‘at the earliest opportunity’ in Order 84A(4) of the RSC really gives the Irish courts power, at their discretion, to dismiss applications for review as inadmissible even before expiry of the three-month period, then it does not satisfy the requirements of Community law. A limitation period whose duration is at the discretion of the competent court is not predictable in its effects. The tenderers and candidates concerned are uncertain as to how much time they have to prepare their applications for review properly, and they are scarcely able to estimate the prospects of success of such applications. The objective imposed by Article 1(1) of Directive 89/665 of effective review of decisions taken by the contracting authorities is thereby missed. (53)

72. Since it cannot be ruled out that the words ‘at the earliest opportunity’ in Order 84A(4) of the RSC are understood by the national courts as an independent limitation period, that provision is furthermore not sufficiently clear to ensure that it is applied in a manner consistent with Community law. (54) For this reason too, Order 84A(4) of the RSC is not an adequate transposition of Directive 89/665.

– Ireland’s objection that the national courts could if necessary extend the limitation period at their discretion

73. Ireland contends that Order 84A(4) of the RSC gives the national courts a discretion to extend the period for bringing applications for review; as an example, Ireland cites a judgment of the High Court of Ireland of 2006. (55)

74. Such a possibility of extending time may indeed make it easier for the courts to do justice in the individual case. It is not capable, however, of curing the shortcomings described above of Order 84A(4) of the RSC with respect to the requirements of clarity, precision and predictability of the limitation rule. For the tenderers and candidates concerned, it is not predictable in advance, even taking into account this possibility of extending time, how much time they will have to prepare an application for review properly or whether such a remedy has a prospect of success. On the contrary, a limitation rule which is already unclear in any case is thereby endowed with a further element of uncertainty.

75. Article 1(1) in conjunction with Article 1(3) of Directive 89/665 gives any person who has or had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement an *individual right* to review of the decisions of the contracting authority. (56) As I also explain in Case C-406/08 *Uniplex (UK)*, the effective assertion of such a claim cannot be made to depend on the absolute discretion of a national body, not even the discretion of an independent court. (57)

76. Ireland’s first objection must therefore be rejected.

– Ireland’s objection that no action has yet been dismissed as out of time on the ground of non-compliance with the ‘at the earliest opportunity’ rule

77. Ireland additionally argues that no Irish court has yet dismissed an application for review as out of time because it was brought within three months but not ‘at the earliest opportunity’.

78. This second objection also fails. To prove that a directive has not been adequately or properly transposed, it is not necessary to establish the actual effects of the national transposition measures.

Whether the transposition is inadequate or defective appears rather from the wording of the relevant legislation itself. (58) An action seeking a declaration of a failure to fulfil obligations is objective in nature, and can be brought even before any actual damage has been incurred or other harmful effects produced. (59)

– Ireland's objection that the national legal position is about to be altered

79. Finally, Ireland defended itself in the pre-litigation procedure with the argument that national law would in any case be amended in connection with the transposition of Directive 2007/66, which would make it possible to clarify Order 84A(4) of the RSC.

80. On this point, it suffices to point out that, according to settled case-law, the question whether there is a failure to fulfil obligations must be determined by reference to the situation obtaining in the relevant Member State at the end of the period laid down by the reasoned opinion; subsequent changes cannot be taken into account by the Court. (60) Still less can amendments to national law be taken into account if they are still in the planning or drafting stage.

– Interim conclusion

81. Altogether, I conclude that the second part of the second plea is also well founded, and that the Commission's action must therefore succeed in its entirety.

VI – Costs

82. In accordance with Article 69(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has made such an application and Ireland has been unsuccessful, Ireland must be ordered to pay the costs.

VII – Conclusion

83. On the above basis, I propose that the Court should:

(1) declare that Ireland has failed to fulfil its obligations under the EC Treaty, in that

(a) the Irish National Roads Authority did not inform the unsuccessful tenderer of its award decision concerning the Dundalk Western Bypass motorway construction project, contrary to the requirements of Article 8(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts and Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and

(b) it is not sufficiently clear from Order 84A(4) of the Rules of the Superior Courts, contrary to the requirements of Article 1(1) of Directive 89/665/EEC, how long the limitation period is for an application for review of an award decision, and which decisions of the contracting authority are affected by that period;

(2) order Ireland to pay the costs of the proceedings.

---

1 – Original language: German.

---

2 – Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54). Since the award procedure at issue was carried out before 31 January 2006, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public

service contracts (OJ 2004 L 134, p. 114; and corrigendum OJ 2004 L 351, p. 44) is of no relevance in the present case.

---

3 – Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

---

4 – European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L 328, p. 1).

---

5 – Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

---

6 – The latest amendments to Directive 89/665 made by Directive 2007/66 are not relevant to the present case, as the period for their transposition lasts until 20 December 2009 (Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31); see, in particular, Article 3(1)).

---

7 – The reference in Article 1(1) of Directive 89/665 to Directive 71/305 is to be read as a reference to Directive 93/37 (see Article 36(2) of Directive 93/37).

---

8 – SI No 329 of 2006.

---

9 – Footnote not relevant to the English text.

---

10 – This provision goes back to an amendment to the rules of procedure of the High Court of Ireland which was made by the Rules of the Superior Courts (No 4) (Review of the Award of Public Contracts) (SI No 374 of 1998) and came into force on 19 October 1998.

---

11 – Footnote not relevant to the English text.

---

12 – Judgment of the High Court of Ireland (Kelly J) in *SIAC Construction Limited* v *National Roads Authority* [2004] IEHC 128 (‘*SIAC* v *NRA*’).

---

13 – The hearing took place immediately after the hearing in Case C-406/08 *Uniplex (UK)*.

---

14 – Judgment of 24 June 2004 in Case C-212/02 *Commission* v *Austria*, paragraph 21, and Case C-444/06 *Commission* v *Spain* [2008] ECR I-2045, paragraph 38; to the same effect, the earlier decision in Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, paragraph 43.

---

15 – To that effect, *Commission* v *Austria*, cited in footnote 14, paragraph 21.

---

16 – Footnote not relevant to the English text.

17 – See, in that regard, *SIAC* v *NRA*, cited above in point 17 and footnote 12.

18 – Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 61; Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 62; Case C-177/04 *Commission* v *France* [2006] ECR I-2461, paragraph 52; and Case C-36/05 *Commission* v *Spain* [2006] ECR I-10313, paragraph 38.

19 – Case C-455/08 *Commission* v *Ireland*.

20 – See, instead of many cases, Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, and – in relation to the award of public contracts – Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, Case C-358/02 *Commission* v *Italy* [2004] ECR I-8121, Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705, Case C-250/07 *Commission* v *Greece* [2009] ECR I-0000, and Case C-275/06 *Commission* v *Germany* [2009] ECR I-0000.

21 – See also my Opinion in Case C-454/06 *pressetextNachrichtenagentur* [2008] ECR I-4401, point 154. In future, however, Article 2c of Directive 89/665, as amended by Directive 2007/66, will define basic Community law requirements for national time-limits for applications for review.

22 – See, for example, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case C-231/96 *Edis* [1998] ECR I-4951, paragraphs 20 and 35; Case C-30/02 *Recheio – Cash & Carry* [2004] ECR I-6051, paragraph 18; and Case C-40/08 *AsturcomTelecomunicaciones* [2009] ECR I-0000, paragraph 41.

23 – See my Opinion in *pressetextNachrichtenagentur*, cited in footnote 21, point 155.

24 – See on this point Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, in particular paragraphs 71 and 76; Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 52; and Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, paragraph 50.

25 – *SIAC* v *NRA*, cited in footnote 12.

26 – The meaning of national laws, regulations and administrative provisions is to be ascertained in the light of the interpretation given to them by the national courts: see Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, paragraph 36; Case C-129/00 *Commission* v *Italy* [2003] ECR I-14637, paragraph 30; and Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 49.

27 – Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, paragraph 25; Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 24; Case C-366/89 *Commission* v *Italy* [1993] ECR I-4201, paragraph 17; Case C-410/03 *Commission* v *Italy* [2005] ECR I-3507, paragraph 32; and Case C-507/04 *Commission* v *Austria* [2007] ECR I-5939, paragraph 298.

28 – *Commission* v *Germany*, cited in footnote 27, paragraph 24; Case C-366/89 *Commission* v *Italy*, cited in footnote 27, paragraph 17; Case C-221/94 *Commission* v *Luxembourg* [1996] ECR I-5669, paragraph 22; Case C-417/99 *Commission* v *Spain* [2001] ECR I-6015, paragraph 38; and Case C-427/07 *Commission* v *Ireland* [2009] ECR I-0000, paragraph 55.

29 – Case C-376/02 *'Goed Wonen'* [2005] ECR I-3445, paragraph 32; Case C-288/07 *Isle of Wight Council and Others* [2008] ECR I-7203, paragraph 48; and Case C-201/08 *Plantanol* [2009] ECR I-0000, paragraph 43.

---

30 – Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80; Case C-347/06 *ASMBrescia* [2008] ECR I-5641, paragraph 69; Case C-158/07 *Förster* [2008] ECR I-0000, paragraph 67; and *Plantanol*, cited in footnote 29, paragraph 46.

---

31 – The Dundalk Western Bypass motorway construction project, which gave rise to the present proceedings for failure to fulfil obligations, is a clear example of the preclusionary effect of Order 84A(4) of the RSC: in Ireland's view, SIAC should already have challenged the NRA's interim decision on the selection of the preferred tenderer within the period laid down by Order 84A(4) of the RSC and already put forward its complaints as to the choice of the Celtic Roads Group consortium at that stage. When it made its subsequent challenge to the final decision, SIAC, as the judgment of the High Court of Ireland in *SIAC* v *NRA*, cited in footnote 12, found, was already out of time with its application.

---

32 – To that effect, *Universale-Bau and Others*, in particular paragraph 72, *Santex*, paragraphs 51 and 57, and *Lämmerzahl*, paragraphs 52, all cited in footnote 24; on procedural rules generally, see Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, paragraph 42.

---

33 – See point 41 above.

---

34 – *Universale-Bau and Others*, paragraph 76, *Santex*, paragraph 52, and *Lämmerzahl*, paragraphs 50 and 51, all cited in footnote 24; see also my Opinion in *pressetextNachrichtenagentur*, cited in footnote 21, point 157.

---

35 – See also the third and fifth recitals in the preamble to Directive 89/665, which speak of 'rapid remedies' and the need for 'infringements … to be dealt with urgently' respectively. In future, moreover, Article 2c of Directive 89/665 (inserted by Directive 2007/66) makes clear that national provisions under which 'any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/18/EC must be made before the expiry of a specified period' are permissible.

---

36 – To that effect, *Universale-Bau and Others*, cited in footnote 24, paragraphs 75 to 79; *Lämmerzahl*, cited in footnote 24, paragraphs 50 and 51; and Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraphs 30 and 36 to 39.

---

37 – *Commission* v *Germany*, cited in footnote 27, paragraph 24; Case C-366/89 *Commission* v *Italy*, cited in footnote 27, paragraph 17; and *Commission* v *Luxembourg*, cited in footnote 28, paragraph 22.

---

38 – See points 49 and 50 above.

---

39 – See once more *Universale-Bau and Others*, cited in footnote 24, paragraphs 76 to 78.

---

40 – Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23; Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7; Case C-144/99 *Commission* v *Netherlands* [2001] ECR I-3541, paragraph 17; Case C-6/04 *Commission* v *UnitedKingdom* [2005] ECR I-9017, paragraph 21; Case C-32/05

Commission v *Luxembourg* [2006] ECR I-11323, paragraph 34; and *Commission* v *Ireland*, cited in footnote 28, paragraphs 54 and 55.

---

41 – See again *Commission* v *Ireland*, cited in footnote 28, paragraph 55.

---

42 – On the principle of interpretation in conformity with directives generally, see Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 26, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113, and Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 98; on Directive 89/665 specifically, see also *Santex*, paragraph 63, and *Lämmerzahl*, paragraph 62, both cited in footnote 24.

---

43 – *Santex*, cited in footnote 24, paragraph 62.

---

44 – See also points 49 to 52 above.

---

45 – See Direction 50(2) of the Practice Directions relating to direct actions and appeals, in the version of 15 October 2004 (OJ 2004 L 361, p. 15). Under that rule, an application to extend the length of speaking time at the hearing had to 'reach the Court as soon as possible' and could only be taken into consideration if it was received 'at the latest two weeks before the date of the hearing'.

---

46 – Article 1(2)(a) and (b) of Commission Regulation (EC) No 780/2009 of 27 August 2009 laying down provisions for implementing the third subparagraph of Article 28a(2) and the third subparagraph of Article 96(2) of the Conditions of Employment of Other Servants of the European Communities (CEOS) (OJ 2009 L 226, p. 3).

---

47 – See for instance Article 3(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 141, p. 26), and also – on the predecessor provisions – my Opinion in Case C-186/04 *Housieaux* [2005] ECR I-3299, point 23.

---

48 – *Commission* v *Greece*, cited in footnote 20, paragraph 68. Compare also Article 2(1)(a) of Directive 89/665 and Article 41(1) and (2) of Directive 2004/18.

---

49 – Judgment of the Supreme Court of Ireland of 4 April 2003 in *Dekra Éireann Teoranta* v *Minister for the Environment and Local Government* [2003] IESC 25, [2003] 2 IR 270 (Ireland refers in particular to paragraph 14(a) of the decision of Denham J).

---

50 – Footnote not relevant to the English text.

---

51 – Quoting an *obiter dictum* from the judgment of the Supreme Court of Ireland in *Dekra Éireann Teoranta*, cited in footnote 49, Ireland states that 'in certain circumstances a court could refuse an application under Order 84A, rule 4, brought within three months where the prejudice to the public or a party could be such that the application should be refused'.

---

52 – In this connection, the observations of Denham J in *Dekra Éireann Teoranta*, cited in footnote 49, are particularly illuminating. Denham J states to begin with, on the essentially identical limitation provision in Order 84(21)(1) of the RSC: 'Whilst there is a discretion in the court to extend this time, there is also a discretion to refuse the application even within the months specified in the Rules of the Superior Courts'

([2003] 2 IR 270, at 285). Denham J then addresses the question of the interpretation of the limitation provision in Order 84A(4) of the RSC, at issue in the present case, and interprets it as follows: '… in all the circumstances of a case a court may determine in its discretion that the prejudice to the public or a party could be such that … the application should be refused. Since urgency and rapidity is an underpinning policy of applications regarding public contracts, the test requires that such applications be made rapidly and an applicant must explain reasonably any delay' ([2003] 2 IR 270, at 286).

---

53 – On this point, see also my Opinion of today's date in Case C-406/08 *Uniplex (UK)*, point 69.

---

54 – *Commission* v *Italy*, cited in footnote 26, paragraph 33.

---

55 – Judgment of the High Court of Ireland (Clarke J) of 2 May 2006 in *Veolia Water UK* v *Fingal County Council (No 1)* [2006] IEHC 137, [2007] 1 IR 690, paragraphs 28 to 54.

---

56 – To that effect, Case C-15/04 *Koppensteiner* [2005] ECR I-4855, paragraph 38, and *Lämmerzahl*, cited in footnote 24, second sentence of paragraph 63.

---

57 – See my Opinion of today's date in Case C-406/08 *Uniplex (UK)*, points 48 to 50.

---

58 – *Commission* v *Ireland*, cited in footnote 18, paragraph 60.

---

59 – *Commission* v *Ireland*, paragraph 61; Case C-233/00 *Commission* v *France*, paragraph 62; Case C-177/04 *Commission* v *France*, paragraph 52; and *Commission* v *Spain*, paragraph 38 (all cited in footnote 18).

---

60 – See, instead of many cases, *Commission* v *UnitedKingdom*, cited in footnote 40, paragraph 49; *Commission* v *Spain*, cited in footnote 28, paragraph 34; *Commission* v *Luxembourg*, cited in footnote 40, paragraph 22; and *Commission* v *Ireland*, cited in footnote 28, paragraphs 64 and 65. Specifically on the argument that transposition of Directive 2007/66 is imminent, see Case C-327/08 *Commission* v *France* [2009] ECR I-0000, paragraphs 21 to 26.

EU:C:2009:809

JUDGMENT OF THE COURT (Second Chamber)

23 December 2009 (*)

(Failure of a Member State to fulfil obligations – Directives 89/665/EEC and 92/13/EEC – Public supply and public works contracts – Review procedure against a contract award decision – Guarantee of effective review – Minimum period to be ensured between notification to the unsuccessful tenderers of the decision to award a contract and the signature of the contract concerned)

In Case C-455/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 17 October 2008,

European Commission, represented by G. Zavvos and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent,

defendant,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission sought a declaration from the Court that, by adopting Article 49 of Statutory Instrument No 329 of 2006 ('S.I. No 329 of 2006') and Article 51 of Statutory Instrument No 50 of 2007 ('S.I. No 50 of 2007'), Ireland established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way that by the time tenderers are fully informed of the reasons for the rejection of their offer, the standstill period for the conclusion of the contract has already expired, and that, by so doing, Ireland has failed to fulfil its obligations under Articles 1(1) and 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1), and Articles 1(1) and 2(1) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as interpreted by the Court in its judgment in

Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671 and its judgment of 24 June 2004 in Case C-212/02 *Commission* v *Austria*.

Legal context

Community legislation

2 Article 1(1) of Directive 89/665 provides:

‘The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC and 92/50/EEC … , decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.’

3 Article 2(1) of Directive 89/665 provides:

‘The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.’

4 Article 1(1) of Directive 92/13 provides:

‘The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(8), on the grounds that such decisions have infringed Community law in the field [of] procurement or national rules implementing that law as regards:

(a) contract award procedures falling within the scope of Council Directive 90/531/EEC; and

(b) compliance with Article 3(2)(a) of that Directive in the case of the contracting entities to which that provision applies.’

5 Article 2(1) of that directive provides:

‘The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity; and

(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.'

6 The above provisions of Directives 89/665 and 92/13 were amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), which entered into force on 9 January 2008 and the time-limit for the transposition of which expired on 20 December 2009.

National legislation

S.I. No 329 of 2006

7 Article 49 of S.I. No 329 of 2006, which, Ireland submits, transposes into Irish law Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), states:

'(1) As soon as practicable after reaching a decision about entering into a public contract or framework agreement or admission to a dynamic purchasing system, a contracting authority shall inform candidates and tenderers of the decision by the most rapid means of communication possible (such as by electronic mail or by telefax). If the authority notifies its decision by electronic mail or telefax, it shall confirm the decision in writing if a candidate or tenderer so requests.

…

(3) As soon as possible, and in any event no later than 15 days after the date on which a contracting authority receives a request to do so, the authority shall inform:

(a) a candidate whose application is rejected of the reasons for the rejection, or

(b) a tenderer whose tender is rejected of the reasons for the rejection (including, in a case referred to in Regulation 23(9) or (10), the reasons for the authority's decision of non-equivalence or that the works, supplies or service do not meet the authority's performance or functional requirements), or

(c) a tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework

agreement.

…

(5) A contracting authority shall not enter into a public contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed of the contract award decision in accordance with paragraph (1).'

S.I. No 50 of 2007

8 Article 51 of S.I. No 50 of 2007, the purpose of which, Ireland submits, is to transpose into Irish law Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), provides:

'(1) As soon as possible after reaching a decision about

(a) entering into a framework agreement or awarding a regulated contract, or

(b) admission to a dynamic purchase system,

a contracting entity shall notify candidates and tenderers of the decision by the most rapid available means of communication, such as electronic mail or fax.

…

(4) A contracting entity that has rejected a candidate's application shall, as soon as practicable and in any case within 15 days after receiving a request to do so, inform the candidate of the reasons for the rejection.

(5) A contracting entity that has rejected a tenderer's tender shall

(a) when notifying the tenderer in accordance with paragraph (1), indicate the principal reason, or reasons, why the tender is not the selected tender;

(b) as soon as practicable, and in any case within 15 days after receiving a request from a tenderer that has made an admissible tender, inform that tenderer of

(i) the characteristics and relative advantages of the selected tender, and

(ii) the name of the successful tenderer or parties to the framework agreement.

…

(8) A contracting entity may not enter into a regulated contract with a successful tenderer unless at least 14 days have elapsed since the date on which tenderers were informed, in accordance with paragraph (1), of the decision to award the contract to that tenderer.'

Pre-litigation procedure

9 It is clear from the contents of the file submitted to the Court that Directives 89/665 and 92/13 were transposed into Irish law by Statutory Instrument No 309 of 1994 ('S.I. No 309 of 1994') and by Statutory Instrument No 104 of 1993, respectively.

10 By letter of 17 May 2001, the Commission asked the Irish authorities for information relating to the implementation of Directive 89/665 which, according to the judgment in *Alcatel Austria and Others*, requires the Member States to establish effective review procedures that are as rapid as possible to ensure the setting aside of any decision taken unlawfully by a contracting authority at the stage where infringements can still be rectified.

11 The Irish authorities replied, by letter of 27 July 2001, that the body designated to review appeals against contracting authorities' unlawful decisions was the High Court, which had the power, among others, to declare the disputed contract void. According to those authorities, although S.I. No 309 of 1994 lacks a specific provision concerning the notification of the contract award decision, there is a 'general policy' to notify the unsuccessful tenderers of that decision at the same time as the successful tenderer is notified of it. Despite the voluntary nature of that notification and the lack of a standstill period between that notification and the conclusion of the contract, unsuccessful tenderers have ample time to initiate appropriate review procedures.

12 By letter of 18 October 2002, the Commission gave Ireland formal notice to submit, within two months, its observations with regard to the three specific obligations arising from the judgment in *Alcatel Austria and Others*, that, first, the contract award decision must be distinct from the conclusion of the contract and amenable to review by a court, second, that decision must be notified to all the participants in the procedure and, third, a reasonable period must be prescribed between that decision and the conclusion of the contract so as to allow tenderers to commence proceedings concerning the decision.

13 Since the Commission considered the Irish authorities' reply of 7 January 2004 to be unsatisfactory, it issued, by letter of 1 April 2004, a reasoned opinion in which it invited Ireland to take the measures necessary to comply with the opinion within two months from its notification.

14 In its reply of 6 August 2004, Ireland stated that it envisaged amending its law in accordance with the arguments set out in the reasoned opinion and, at a meeting held on 5 November 2004, specified that it would do so as part of the transposition of Directives 2004/17 and 2004/18.

15 The final draft of the legislation envisaged, in so far as it concerned the transposition of Directive 2004/18, was communicated to the Commission on 22 September 2005. On 17 July 2006, Ireland notified the Commission of S.I. No 329 of 2006 as legislation transposing Directive 2004/18.

16 Since it considered that those measures did not comply with the requirements of the judgment in *Alcatel Austria and Others*, and that no measures had been adopted to give effect to the same requirements arising from *Commission* v *Austria* regarding the special sectors covered by Directive 2004/17, the Commission sent Ireland an additional letter of formal notice on 15 December 2006.

17 Ireland replied to the additional letter of formal notice on 13 March 2007. That reply was considered unsatisfactory by the Commission, inasmuch as the Irish authorities acknowledged the need to amend their legislation but referred to no concrete measures which they intended to take or any timetable for adopting such measures.

18 By letter of 1 February 2008, the Commission served Ireland with an additional reasoned opinion, in which it concluded that Ireland had failed to fulfil its obligations in the terms of the action, as set out in paragraph 1 of the present judgment.

19 Ireland replied to the additional reasoned opinion by a letter of 17 March 2008, in which it stated that, as the matters at issue were thenceforth dealt with in Directive 2007/66, it would comply with the reasoned opinion by making the necessary revisions to its legislation prior to the time-limit for transposing that directive, namely 20 December 2009.

20 Since it was not satisfied with that response, the Commission decided to bring the present action.

The action

Arguments of the parties

21 The Commission submits that it follows from paragraphs 34 and 43 of the judgment in *Alcatel Austria and Others* that Articles 1(1) and 2(1)(a) and (b) of Directive 89/665 require the Member States to establish effective review procedures that are as rapid as possible to enable unsuccessful tenderers to

have any decision taken unlawfully by the contracting authority set aside at the stage where infringements can still be rectified. Similar obligations arise from the corresponding articles of Directive 92/13 (see *Commission* v *Austria*, paragraph 23). It follows that a reasonable period must elapse between the time when the contract award decision is communicated to unsuccessful tenderers and the conclusion of the contract with the successful tenderer, in order, in particular, to allow an application to be made for interim measures prior to such conclusion.

22 However, neither Article 49 of S.I. No 329 of 2006 nor Article 51 of S.I. No 50 of 2007 satisfies those requirements. Those provisions do not ensure that tenderers are fully informed of the reasons for the refusal of their tender so as to put them in a position, in sufficient time before the expiry of the standstill period for the conclusion of the contract with the successful tenderer, to consider whether the decision awarding the contract is valid.

23 Whilst it is true that Directive 2007/66 deals with those questions by codifying and detailing the requirements in the field, that is irrelevant because the Irish legislation covered by the present action does not comply with Directives 89/665 and 92/13. Those directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty, which demand that where a directive is intended to create rights for individuals, the beneficiaries of those rights can ascertain their full extent.

24 Ireland admits that the requirements arising from Directives 89/665 and 92/13, as interpreted by the Court in *Alcatel Austria and Others* and *Commission* v *Austria*, have not been incorporated into its national law. It submits, however, that it would not be appropriate to declare that it has failed to fulfil its obligations in the manner alleged, since the precise extent of those obligations had not been clearly defined at the time when it adopted the measures necessary for the transposition of Directives 2004/17 and 2004/18 into Irish law. In addition, Ireland submits that Directive 2007/66 deals directly with the questions raised in the present action, and it proposed to adopt the measures necessary to transpose the latter directive into Irish law prior to 20 December 2009.

25 Ireland adds that it has taken steps to ensure that the measures required by the Commission are henceforth carried out in practice. It observes that it informed the Commission that all public purchasers are registered on the national public procurement website. All those purchasers, as well as members of a wide network of public procurement managers and other procurement officials have been reminded of the need to have award decisions reasoned with sufficient information to enable a tenderer to decide within the standstill period preceding the conclusion of the contract whether an award appears valid or there are justifiable grounds for seeking a review. That information was notified to the Commission by letter of 14 March 2008.

Findings of the Court

26 As is clear from the Court's case-law, the provisions of Directives 89/665 and 92/13, which are intended to protect tenderers against arbitrary decisions by the contracting authority, seek to reinforce existing arrangements for ensuring effective application of the Community rules on the award of public contracts, in particular where infringements can still be rectified (see, particularly, *Commission* v *Austria*, paragraph 20). The objective of those directives is to ensure that unlawful decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible (see, particularly, Case C-444/06 *Commission* v *Spain* [2008] ECR I-2045, paragraph 44).

27 The Court has held, in particular, that the Member States are required to ensure that the contracting authority's decision, prior to the conclusion of the contract in a tender procedure, as to the bidder with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages (see, particularly, *Alcatel Austria and Others*, paragraph 43).

28 The complete legal protection which must be ensured before the conclusion of the contract presupposes, in particular, the duty to inform the tenderers of the award decision before such conclusion so that they may have a real possibility of initiating review proceedings. That same protection requires provision to be made for the unsuccessful tenderer to examine in sufficient time the

question of whether the award decision is valid, which means that a reasonable period must pass between the moment when the contract award decision is notified to the unsuccessful tenderers and the conclusion of the contract, in order to allow them, in particular, to bring an application for interim measures until the conclusion of the contract (see to that effect, particularly, *Commission* v *Austria*, paragraphs 21 and 23; *Commission* v *Spain*, paragraphs 38 and 39; and the judgment of 11 June 2009 in Case C-327/08 *Commission* v *France*, paragraphs 41 and 56). Therefore, the fact that there is the option of bringing proceedings for the annulment of the contract itself is not such as to compensate for the impossibility of challenging the mere act of awarding the contract concerned, before the contract is concluded (*Commission* v *Spain*, paragraph 45).

29 However, as Ireland admits, S.I. No 329 of 2006 and S.I. No 50 of 2007 do not meet those requirements.

30 First, Article 49 of S.I. No 329 of 2006 provides that tenderers must be informed of the decision to award a public contract by the most rapid means of communication possible, as soon as practicable after the contracting authority has made its decision. From the date of such information, the standstill period which must elapse before the conclusion of the contract must be at least 14 days. However, under the terms of the same provision, the contracting authority is required to state the reasons for the rejection of a tender only if it receives an express request to do so, and then only 'as soon as possible, and in any event no later than 15 days' after its receipt of the request.

31 As Ireland accepts, it follows that the standstill period may already have expired when an unsuccessful tenderer is fully informed of the reasons for the rejection of its tender. Yet, as the Commission maintains, the reasons for the decision to reject the tender must be communicated at the time of the notification of that decision to the tenderers concerned and, in all cases, in sufficient time before the conclusion of the contract, in order to allow the unsuccessful tenderers to bring, in particular, an application for interim measures until such conclusion.

32 Secondly, Article 51 of S.I. No 50 of 2007 provides that the unsuccessful tenderers are to be informed, at the time when the award decision is notified, of 'the principal reason, or reasons, why [their] tender is not the selected tender'. However, as the Commission maintains, the discretion which that provision allows the contracting authority is such that unsuccessful tenderers are at risk of receiving incomplete information and very generally formulated explanations concerning the rejection of their tender, so that they are prevented from examining the validity of the award decision in sufficient time.

33 Indeed, since the standstill period preceding the conclusion of the contract with the successful tenderer is 14 days, whereas the period allowed the contracting authority to inform the unsuccessful tenderers of the 'characteristics and relative advantages of the selected tender' is 15 days after receiving a request to do so, by the time that tenderers are fully informed of the reasons for the rejection of their tender, the standstill period preceding the conclusion of the contract may already have expired.

34 As is clear from paragraph 31 of the present judgment, the reasons for the decision to reject their tender must be communicated to the tenderers concerned in sufficient time before the conclusion of the contract, in order to allow the unsuccessful tenderers to bring, in particular, an application for interim measures until such conclusion.

35 Ireland observes that it will comply with the requirements arising from Articles 1 and 2 of Directives 89/665 and 92/13 as part of the implementation of Directive 2007/66, which must be effected by 20 December 2009 at the latest, that meanwhile it has taken steps to ensure that those requirements are carried out in practice and that it would be inappropriate for the Court to uphold the present action, since the precise extent of the requirements in question was not clearly defined before delivery of the judgment in *Alcatel Austria and Others*.

36 However, none of those arguments can lead to the dismissal of the present action.

37 In response to the argument based on the transposition of Directive 2007/66 into Irish law, it is sufficient to point out that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State at the end of the period laid down in

the reasoned opinion. The Court cannot take account of any subsequent changes (see, particularly, *Commission* v *Austria*, paragraph 28).

38 As regards the argument based on the steps undertaken by Ireland so that the requirements under Directives 89/665 and 92/13 are carried out in practice, it need merely be recalled that, according to established case-law, the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (see, particularly, Case C-225/97 *Commission* v *France* [1999] ECR I-3011, paragraph 37), that the incompatibility of national legislation with Community provisions can be remedied for good only by means of binding national provisions having the same legal force as those which must be amended (see, particularly, Case C-160/99 *Commission* v *France* [2000] ECR I-6137, paragraph 23), and that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting fulfilment of the obligations owed by the Member States in the context of transposition of a directive (see, particularly, Case C-508/04 *Commission* v *Austria* [2007] ECR I-3787, paragraph 80).

39 As for the argument that the relevant Community legislation lacked clarity before delivery of the judgment in *Alcatel Austria and Others*, it is appropriate to point out that, according to settled case-law, the interpretation which the Court gives to a rule of Community law clarifies and defines, where necessary, the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force (see, particularly, Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paragraph 21). In other words, a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force (see, particularly, Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 35).

40 Furthermore, the objective of the pre-litigation procedure provided for in Article 226 EC is precisely to give the Member State concerned an opportunity to comply, as appropriate, with its obligations under Community law (see, particularly, Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 25).

41 As Ireland admits, when the period laid down in the reasoned opinion expired, Irish law still did not satisfy the requirements arising from Articles 1(1) and 2(1) of Directives 89/665 and 92/13, as interpreted by the Court in its judgments in *Alcatel Austria and Others* and in Case C-212/02 *Commission* v *Austria*.

42 Having regard to the foregoing considerations, it must be held that, by adopting Article 49 of S.I. No 329 of 2006 and Article 51 of S.I. No 50 of 2007, Ireland established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way that by the time that tenderers are fully informed of the reasons for the rejection of their offer, the standstill period preceding the conclusion of the contract may already have expired, and that, by so doing, Ireland has failed to fulfil its obligations under Articles 1(1) and 2(1) of Directives 89/665 and 92/13.

Costs

43 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ireland has been unsuccessful, Ireland must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by adopting Article 49 of Statutory Instrument No 329 of 2006 and Article 51 of Statutory Instrument No 50 of 2007, Ireland established the rules governing the notification of contracting authorities' and entities' award decisions and their reasoning to tenderers in such a way that by the time that tenderers are fully informed of the reasons for the rejection of their offer, the standstill period preceding the conclusion of the contract may already have expired, and that, by so doing, Ireland has failed to fulfil its obligations**

under Articles 1(1) and 2(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, and Articles 1(1) and 2(1) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;

2. Orders Ireland to pay the costs.

[Signatures]

---

* Language of the case: English.

JUDGMENT OF THE COURT (Third Chamber)

25 March 2010 (*)

(Procedures for the award of public works contracts – Public works contracts – Concept – Sale by a public body of land on which the purchaser intends subsequently to carry out works – Works corresponding to a municipal authority's urban-planning objectives)

In Case C-451/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht Düsseldorf (Germany), made by decision of 2 October 2008, received at the Court on 16 October 2008, in the proceedings

Helmut Müller GmbH

v

Bundesanstalt für Immobilienaufgaben,

intervening parties:

Gut Spascher Sand Immobilien GmbH,

municipality of Wildeshausen,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Second Chamber, acting for the President of the Third Chamber, P. Lindh, A. Rosas, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 23 September 2009,

after considering the observations submitted on behalf of:

– Helmut Müller GmbH, by O. Grübbel, Rechtsanwalt,

– The Bundesanstalt für Immobilienaufgaben, by S. Hertwig, Rechtsanwalt,

– the municipality of Wildeshausen, by J. Lauenroth, Rechtsanwalt,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– the French Government, by G. de Bergues and J.-S. Pilczer, acting as Agents,

– the Italian Government, by G. Fiengo, avvocato dello Stato,

– the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,

– the Austrian Government, by E. Riedl and M. Fruhmann, acting as Agents,

– the Commission of the European Communities, by G. Wilms and C. Zadra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the concept of ‘public works contracts’ within the meaning of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference has been made in the context of proceedings between Helmut Müller GmbH (‘Helmut Müller’) and the Bundesanstalt für Immobilienaufgaben (the federal agency responsible for managing public property; ‘the Bundesanstalt’) concerning the sale by the latter of land on which the purchaser was subsequently to carry out works corresponding to the urban-planning objectives of a local authority, in the present case the municipality of Wildeshausen.

Legal framework

European Union legislation

3 Under recital 2 in the preamble to Directive 2004/18:

‘The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the [EC] Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.’

4 Article 1(2) and (3) of the directive provides as follows:

‘2. (a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) “Public works contracts” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

…

3. “Public works concession” is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.’

5 Article 16(a) of Directive 2004/18 states:

‘This Directive shall not apply to public service contracts for:

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; …’

National legislation

6 Paragraph 10(1) of the Building Code (Baugesetzbuch) of 23 September 2004 (BGBl. 2004 I, p. 2414; ‘the BauGB’) provides:

‘The municipality shall adopt the development plan by means of a by-law.’

7 Paragraph 12 of the BauGB provides as follows:

‘1. The municipality may decide, by means of a building plan for the works, on the admissibility of a project where, on the basis of a plan drawn up in agreement with the municipality for the execution of the works and for the supply of utilities (works and utilities plan), the contractor is ready and able to execute the works and, before the decision under Paragraph 10(1), undertakes to execute them within a prescribed period and to bear the planning costs and the costs relating to the supply of utilities in full or in part (contract to execute works) …

…

3. (a) Where, by determining a zone for construction of the works or by other means, a building plan for the works lays down … a building use … , it must … be provided, with regard to the specified uses, that the only projects which are authorised are those which the contractor undertook to execute in the contract for execution of the works …

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 The Bundesanstalt was owner of a property known as the ‘Wittekind barracks’, occupying an area of just under 24 hectares in Wildeshausen, Germany.

9 In October 2005, Wildeshausen town council decided, with a view to returning the land concerned – which covers approximately 3% of developed and non-developed areas of the town – to civilian use, to undertake feasibility studies for an urban planning project.

10 In October 2006, the Bundesanstalt indicated in statements made on the internet and in the press that it intended to sell Wittekind barracks.

11 On 2 November 2006, Helmut Müller, a property development company, offered to buy the land for EUR 4 million, subject, however, to the condition that an urban development plan be drawn up on the basis of its project for use of the land.

12 Wittekind barracks were closed at the beginning of 2007.

13 In January 2007 the Bundesanstalt launched a call for tenders with a view to selling the property, in its condition at the time, as quickly as possible.

14 On 9 January 2007, Helmut Müller submitted a tender offer of EUR 400 000, which it increased to EUR 1 million on 15 January 2007.

15 Another property development company, Gut Spascher Sand Immobilien GmbH (‘GSSI’), which was at that time in the process of being set up, submitted a tender offer of EUR 2.5 million**.**

16 Two other tender offers were submitted.

17 According to an experts’ report produced by the Bundesanstalt before the national court, the value of the land concerned, on 1 May 2007, was EUR 2.33 million.

18 The order for reference indicates that the tenderers' plans were submitted to and discussed with the Wildeshausen municipal authorities, in the presence of the Bundesanstalt.

19 In the meantime, the Bundesanstalt had assessed the plans submitted by Helmut Müller and GSSI and expressed a preference for GSSI's project on urban-development grounds, taking the view that it would make Wildeshausen more attractive as a town. It informed the municipal authorities accordingly.

20 It was then agreed that the property should not be sold until after Wildeshausen town council had approved the project. The Bundesanstalt confirmed that it would respect the town council's decision.

21 As is further apparent from the order for reference, Wildeshausen town council decided in favour of GSSI's project and, on 24 May 2007, decided inter alia as follows:

'Wildeshausen town council is prepared to examine the project submitted by Mr R. [GSSI's managing director] and to embark on the procedure of drawing up a corresponding building plan for the area ...

There is no statutory right to obtain a (possibly project-related) building plan.

It is unlawful [for the municipality of Wildeshausen] to give binding undertakings on building use or to restrict its discretion (which is, furthermore, subject to legal constraints) before appropriate urban planning procedures have been concluded.

The abovementioned decisions are therefore in no way binding with respect to any land-use plan of [the municipality of Wildeshausen].

The contractor and the other persons involved in the project are liable in respect of the risks associated with planning and other costs.'

22 Immediately after that decision of 24 May 2007, Wildeshausen town council revoked its decision of October 2005 to undertake preliminary urban planning studies.

23 By notarial deed of 6 June 2007, the Bundesanstalt, with the concurrence of the municipality of Wildeshausen, sold Wittekind barracks to GSSI. It informed Helmut Müller of that sale on 7 June 2007. In January 2008, GSSI was entered in the land register as owner of the property. By notarial deed of 15 May 2008, the Bundesanstalt and GSSI confirmed the sales contract of 6 June 2007.

24 Helmut Müller brought an action before the Vergabekammer (body with jurisdiction at first instance in public procurement cases), arguing that public procurement rules had not been followed even though the sale of the barracks was subject to public procurement law. Helmut Müller claimed that the sales contract was void because it, Helmut Müller, had not been kept properly informed in its capacity as potential purchaser of the land.

25 The Vergabekammer dismissed the action as inadmissible on the ground, essentially, that GSSI had not been awarded a works contract.

26 Helmut Müller appealed against that decision to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), claiming that, in the light of the circumstances, GSSI was to be regarded as being about to obtain a works contract in the form of a works concession. According to Helmut Müller, the relevant decisions had been taken jointly by the Bundesanstalt and the municipality of Wildeshausen.

27 The Oberlandesgericht Düsseldorf is inclined to agree with that argument. It takes the view that, at some point in the relatively near future – which cannot yet be determined with precision – the municipality of Wildeshausen will exercise its discretion and draw up a building plan for the works in accordance with Paragraph 12 of the BauGB and award GSSI a contract for execution of works within the meaning of that paragraph, and thus a public works contract.

28 Since the municipality of Wildeshausen is not permitted to pay any remuneration, the Oberlandesgericht Düsseldorf is of the opinion that that public works contract ought to be awarded in the legal form of a public works concession, and that GSSI should bear the economic risk inherent in

that transaction. The Oberlandesgericht Düsseldorf also regards the transfer of ownership of the land and the award of a public works contract as forming a whole from the point of view of public procurement law. The steps taken by the Bundesanstalt and by the municipality of Wildeshausen merely occurred at different times.

29 The Oberlandesgericht Düsseldorf adds that it has adopted the same point of view in other cases before it, in particular in its judgment of 13 June 2007 concerning the airport in Ahlhorn (Germany). Its analysis has not, however, met with unanimous approval; German case-law is predominantly at odds with its interpretation. In addition, according to the order for reference, the German Federal Government was about to amend German public-procurement legislation in a manner which runs counter to the position advocated by the Oberlandesgericht.

30 The draft legislation mentioned by the Oberlandesgericht sought to clarify the definition of the concept of 'public works contracts' in Paragraph 99(3) of the Law against restraints on competition (Gesetz gegen Wettbewerbsbeschränkungen) of 15 July 2005 (BGBl. 2005 I, p. 2114) as follows (the proposed amendments being shown in italics):

'Works contracts are contracts relating to either the execution, or both the design and execution, *for the contracting authority*, of works or of a work which is the outcome of building or civil engineering works and is intended itself to fulfil an economic or technical function, or of a work *which is of immediate economic benefit to the contracting authority* and is carried out by third parties in accordance with the requirements specified by that authority.'

31 Paragraph 99 was also to be extended by insertion of a new subparagraph 6, containing the following definition of a public works concession:

'A works concession is a contract relating to the execution of a works contract in which the consideration for the works does not consist in payment but in the right to exploit the building concerned for a fixed period or, as the case may be, in that right together with payment.'

32 Shortly after the present reference for a preliminary ruling had been made, amendments in those terms were introduced by the Law on the modernisation of public procurement law (Gesetz zur Modernisierung des Vergaberechts) of 20 April 2009 (BGBl. 2009 I, p. 790).

33 In those circumstances, the Oberlandesgericht Düsseldorf decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is it a requirement, in order for there to be a public works contract under Article 1(2)(b) of … Directive [2004/18] …, that the works be physically carried out for the public contracting authority and bring it an immediate economic benefit?

2. In so far as, according to the definition of a public works contract in Article 1(2)(b) of Directive [2004/18], the element of procurement is indispensable, is procurement to be regarded as having taken place, in accordance with the second variant of the provision, if the intended works for the public contracting authority fulfil a particular public purpose (for example, the development of part of a town) and the public contracting authority has the legal right under the contract to ensure that the public purpose is achieved and that the necessary works will be available?

3. Does the concept of a public works contract in accordance with the first and second variants of Article 1(2)(b) of Directive [2004/18] require that the contractor be directly or indirectly obliged to provide the works? If so, must there be a legally enforceable obligation?

4. Does the concept of a public works contract in accordance with the third variant of Article 1(2)(b) of Directive [2004/18] require that the contractor be obliged to carry out works, or that works form the subject-matter of the contract?

5. Do contracts by which, through the requirements specified by the public contracting authority, it is intended to ensure that the works to be carried out for a particular public purpose be available, and by which (by contractual stipulation) the contracting body is given the legal power to ensure

(in its own indirect interest) the availability of the works for the public purpose, fall within the third variant of Article 1(2)(b) of Directive [2004/18]?

6. Is the concept of "requirements specified by the contracting authority" in Article 1(2)(b) of Directive [2004/18] fulfilled if the works are to be carried out in accordance with plans examined and approved by the public contracting authority?

7. Must there be held to be no public works concession under Article 1(3) of Directive [2004/18] if the concessionaire is, or will become, the owner of the land on which the works are to be carried out, or the concession is granted for an indeterminate period?

8. Does Directive [2004/18] – with the legal consequence of an obligation on the public contracting authority to invite tenders – apply if a sale of land by a third party and the award of a public works contract take place at different times and on the conclusion of the land sale the public works contract has not yet been awarded, but at the last-mentioned time there was, on the part of the public authority, the intention to award such a contract?

9. Are separate but related transactions concerning a sale of land and [the award of] a public works contract to be regarded from the point of view of the law on the awarding of contracts as a unity, if at the time the land sale contract was entered into the award of a public works contract was intended and the participants deliberately created a close connection between the contracts from a substantive – and possibly also temporal – point of view (see Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705)?'

Questions referred for a preliminary ruling

Preliminary observations

34 In most of the language versions of Directive 2004/18, there are three variants to the concept of 'public works contracts' provided for in Article 1(2)(b) of the directive. The first consists in the execution, which may be accompanied by the design, of building works falling within one of the categories listed in Annex I to the directive. The second concerns the execution, which may be accompanied by the design, of a work. The third variant is the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

35 A 'work', within the meaning of that provision, is defined as the 'outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function'.

36 While the majority of the language versions use the term 'work' for both the second and the third variants, the German version uses two different terms, that is to say, 'Bauwerk' (work) for the second variant and 'Bauleistung' (building activity) for the third.

37 In addition, the German version of Article 1(2)(b) is the only one which provides that the activity referred to in the third variant must be realised not only 'by whatever means' but also 'by third parties' ('durch Dritte').

38 It is settled case-law that the wording used in one language version of a provision of European Union law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement for uniform application of European Union law. Where there is divergence between the various language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraphs 18 and 19; Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16; and Case C-239/07 *Sabatauskas and Others* [2008] ECR I-7523, paragraphs 38 and 39).

39 The questions submitted by the referring court must be answered in the light of those considerations.

First and second questions

40 By its first two questions, which it is appropriate to consider together, the referring court asks, in essence, whether the concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the works which are the subject of the contract be physically carried out for the contracting authority in its immediate economic interest or whether it is sufficient if the works fulfil a public purpose, such as the development of part of a town.

41 It should be noted at the outset that the sale to an undertaking, by a public authority, of undeveloped land or land which has already been built upon does not constitute a public works contract within the meaning of Article 1(2)(b) of Directive 2004/18. First, such a contract requires that the public authority assume the position of purchaser and not seller. Second, the objective of such a contract must be the execution of works.

42 The provisions of Article 16(a) of Directive 2004/18 confirm that analysis.

43 Consequently, a sale, such as the sale in the main proceedings of Wittekind barracks by the Bundesanstalt to GSSI, cannot of itself constitute a public works contract within the meaning Article 1(2)(b) of Directive 2004/18.

44 Those questions submitted by the referring court do not, however, refer to that seller-purchaser relationship, but are directed rather at the relationship between the municipality of Wildeshausen and GSSI, that is to say, to the relationship between the public authority with town-planning powers and the purchaser of Wittekind barracks. The referring court wishes to know whether that relationship may constitute a public works contract within the meaning of that provision.

45 In that regard, it should be pointed out that, under Article 1(2)(a) of Directive 2004/18, 'public contracts' are contracts for pecuniary interest concluded in writing.

46 The concept of a contract is essential for the purpose of defining the scope of Directive 2004/18. As stated in recital 2 in the preamble to that directive, its purpose is to apply the rules of European Union law to the award of contracts concluded on behalf of the State, regional or local authorities and other bodies governed by public law entities. The directive does not refer to other types of activities for which public authorities are responsible.

47 In addition, only a contract concluded for pecuniary interest may constitute a public contract coming within the scope of Directive 2004/18.

48 The pecuniary nature of the contract means that the contracting authority which has concluded a public works contract receives a service pursuant to that contract in return for consideration. That service consists in the realisation of works from which the contracting authority intends to benefit (see Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 77, and Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 45).

49 Such a service, by its nature and in view of the scheme and objectives of Directive 2004/18, must be of direct economic benefit to the contracting authority.

50 That economic benefit is clearly established where it is provided that the public authority is to become owner of the works or work which is the subject of the contract.

51 Such an economic benefit may also be held to exist where it is provided that the contracting authority is to hold a legal right over the use of the works which are the subject of the contract, in order that they can be made available to the public (see, to that effect, *Ordine degli Architetti and Others*, paragraphs 67, 71 and 77).

52 The economic benefit may also lie in the economic advantages which the contracting authority may derive from the future use or transfer of the work, in the fact that it contributed financially to the realisation of the work, or in the assumption of the risks were the work to be an economic failure (see, to that effect, *Auroux and Others*, paragraphs 13, 17, 18 and 45).

53 The Court has already held that an agreement by which a first contracting authority entrusts a second contracting authority with the execution of a work may constitute a public works contract, regardless of whether or not it is anticipated that the first contracting authority is, or will become, the owner of all or part of that work (*Auroux and Others*, paragraph 47).

54 It follows from the foregoing that the concept of 'public works contracts' within the meaning of Article 1(2)(b) of Directive 2004/18 requires that the works which are the subject of the contract be carried out for the contracting authority's immediate economic benefit; it is not, however, necessary that the service should take the form of the acquisition of a material or physical object.

55 The question arises as to whether those conditions are satisfied where the purpose of the intended works is to fulfil an objective in the public interest, the achievement of which is incumbent on the contracting authority, such as the development or coherent planning of part of an urban district.

56 In the Member States of the European Union, the execution of building projects, at least those of a certain size, is normally subject to prior authorisation by the public authority having urban-planning powers. That authority must assess, in the exercise of its regulatory powers, whether the execution of the works is in the public interest.

57 However, it is not the purpose of the mere exercise of urban-planning powers, intended to give effect to the public interest, to obtain a contractual service or immediate economic benefit for the contracting authority, as is required under Article 1(2)(a) of Directive 2004/18.

58 Consequently, the answer to the first and second questions is that the concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, does not require that the works which are the subject of the contract be materially or physically carried out for the contracting authority, provided that they are carried out for that authority's immediate economic benefit. The latter condition is not satisfied through the exercise by that contracting authority of regulatory urban-planning powers.

Third and fourth questions

59 By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor be under a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable.

60 As has been pointed out in paragraphs 45 and 47 of the present judgment, Article 1(2)(a) of Directive 2004/18 defines a public works contract as a contract for pecuniary interest. That concept is based on the premise that the contractor undertakes to carry out the service which is the subject of the contract in return for consideration. By concluding a public works contract, the contractor therefore undertakes to carry out, or to have carried out, the works which form the subject of that contract.

61 It is irrelevant whether the contractor carries out the works itself or uses subcontractors for that purpose (see, to that effect, *Ordine degli Architetti and Others*, paragraph 90, and *Auroux and Others*, paragraph 44).

62 Since the obligations under the contract are legally binding, their execution must be legally enforceable. In the absence of rules provided for under European Union law, and in accordance with the principle of procedural autonomy, the detailed rules governing implementation of those obligations are a matter for national law.

63 Consequently, the answer to the third and fourth questions is that the concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor assume a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable in accordance with the procedural rules laid down by national law.

Fifth and sixth questions

64 By its fifth and sixth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the ‘requirements specified by the public contracting authority’, within the meaning of Article 1(2)(b) of Directive 2004/18, may consist either in the contracting authority’s exercise of the power to ensure that the work to be carried out addresses a public interest or in the exercise of the power which it is recognised as having to examine and approve building plans.

65 Those questions arise from the fact that, in the case in the main proceedings, the presumed contracting authority, that is to say, the municipality of Wildeshausen, did not draw up a list of requirements relating to work to be carried out on the land occupied by Wittekind barracks. According to the order for reference, that municipality merely decided that it was minded to examine the project presented by GSSI and to embark on the procedure of drawing up a corresponding building plan.

66 However, the third variant set out in Article 1(2)(b) of Directive 2004/18 provides that the objective of public works contracts is the realisation of a ‘work corresponding to the requirements specified by the contracting authority’.

67 In order for it to be possible to establish that a contracting authority has specified its requirements within the meaning of that provision, the authority must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design.

68 The mere fact that a public authority, in the exercise of its urban-planning powers, examines certain building plans presented to it, or takes a decision applying its powers in that sphere, does not satisfy the obligation that there be ‘requirements specified by the contracting authority’, within the meaning of that provision.

69 The answer to the fifth and sixth questions is, therefore, that the ‘requirements specified by the contracting authority’, within the meaning of the third variant set out in Article 1(2)(b) of Directive 2004/18, cannot consist in the mere fact that a public authority examines certain building plans submitted to it or takes a decision in the exercise of its regulatory urban-planning powers.

Seventh question

70 By its seventh question, the referring court asks, in essence, whether a public works concession, within the meaning of Article 1(3) of Directive 2004/18, is excluded in the case where the sole economic operator to which the concession can be granted already owns the land on which the work is to be carried out, or where the concession was granted for an indeterminate period.

71 Under Article 1(3) of Directive 2004/18, a public works concession ‘is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment’.

72 In order for a contracting authority to be able to transfer to the other contracting party the right to exploit a work within the terms of that provision, that contracting authority must be in a position to exploit that work.

73 That will normally not be the case where the only basis for the right of exploitation is the right of ownership of the economic operator concerned.

74 The owner of land has the right to exploit that land in compliance with the applicable statutory rules. As long as an economic operator enjoys the right to exploit the land which he owns, it is in principle impossible for a public authority to grant a concession relating to that exploitation.

75 It should, in addition, be pointed out that the essential characteristic of the concession is that it is the concessionaire himself who bears the main, or at least the substantial, operating risk (see to that effect, with regard to concessions relating to public services, Case C-206/08 *Eurawasser* [2009] ECR I-0000, paragraphs 59 and 77).

76 The Commission of the European Communities submits that that risk may lie in the concessionaire’s uncertainty as to whether the urban-planning service of the local authority concerned will, or will not,

approve its plans.

77 That argument cannot be accepted.

78 In the type of scenario referred to by the Commission, the risk would be linked to the contracting authority's regulatory powers in respect of urban planning and not to the contractual relationship arising from the concession. Consequently, the risk is not linked to exploitation.

79 In any event, with regard to the duration of concessions, there are serious grounds, including the need to guarantee competition, for holding the grant of concessions of unlimited duration to be contrary to the European Union legal order, as stated by the Advocate General in points 96 and 97 of his Opinion (see, to the same effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 73).

80 Consequently, the answer to the seventh question is that, in circumstances such as those of the case in the main proceedings, there is no public works concession within the meaning of Article 1(3) of Directive 2004/18.

Eighth and ninth questions

81 The eighth and ninth questions submitted by the referring court should be examined together. By its eighth question, the referring court asks, in essence, whether the provisions of Directive 2004/18 apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land without yet having formally decided to award that contract. The ninth question concerns the possibility of regarding as a unity, from a legal point of view, the sale of the land and the subsequent award of a works contract in respect of that land.

82 In that regard, it is prudent not to exclude from the outset the application of Directive 2004/18 to a two-phase award procedure in the form of the sale of land which will subsequently form the subject of a works contract, by considering those transactions as a unity.

83 However, there is nothing in the circumstances of the case in the main proceedings to confirm that the prerequisites for such an application of that directive exist.

84 As submitted by the French Government in its written observations, the parties to the main proceedings did not assume any legally binding contractual obligations.

85 First, the municipality of Wildeshausen and GSSI did not assume any obligations of such a nature.

86 Second, GSSI did not give any undertaking to carry out the plans for the economic development of the land which it had purchased.

87 Finally, there is no evidence in the notarial deeds of sale to indicate that the award of a public works contract was imminent.

88 The intentions revealed by the documents in the case-file do not constitute binding obligations and cannot in any way satisfy the requirement of a written contract which is inherent in the very concept of a public contract set out in Article 1(2)(a) of Directive 2004/18.

89 The answer to the eighth and ninth questions is therefore that, in circumstances such as those of the case in the main proceedings, the provisions of Directive 2004/18 do not apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land but has not yet formally decided to award that contract.

Costs

90 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **The concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, does not require that the works which are the subject of the contract be materially or physically carried out for the contracting authority, provided that they are carried out for that authority's immediate economic benefit. The latter condition is not satisfied by the exercise by that contracting authority of regulatory urban-planning powers.**

2. **The concept of 'public works contracts', within the meaning of Article 1(2)(b) of Directive 2004/18, requires that the contractor assume a direct or indirect obligation to carry out the works which are the subject of the contract and that that obligation be legally enforceable in accordance with the procedural rules laid down by national law.**

3. **The 'requirements specified by the contracting authority', within the meaning of the third variant set out in Article 1(2)(b) of Directive 2004/18, cannot consist in the mere fact that a public authority examines certain building plans submitted to it or takes a decision in the exercise of its regulatory urban-planning powers.**

4. **In circumstances such as those of the case in the main proceedings, there is no public works concession within the meaning of Article 1(3) of Directive 2004/18.**

5. **In circumstances such as those of the case in the main proceedings, the provisions of Directive 2004/18 do not apply to a situation in which one public authority sells land to an undertaking, even though another public authority intends to award a works contract in respect of that land but has not yet formally decided to award that contract.**

[Signatures]

---

* Language of the case: German.

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 17 November 2009 [1](1)

Case C-451/08

Helmut Müller GmbH
v
Bundesanstalt für Immobilienaufgaben

(Reference for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany))

(Public works contracts – Public works concessions – Sale of land by a public authority – Works to be carried out subsequently)

1. The present case, arising from a number of questions referred by the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) for a preliminary ruling, allows the Court to address once again the problem of the distinction between public works contracts and public authorities' town planning activities.

2. To be more precise, the central point at issue in the case on which the referring court is required to rule is the sale of land by a public authority to a private person. Typically, a case of this kind may raise the question of possible State aid. (2) In the present case, however, that question does not seem to arise. On the contrary, the specific point at issue is the fact that the public authority decided to sell the land to the prospective buyer who, in the opinion of the local authorities responsible for town planning, presented the best and most interesting plans for the use of the land and the erection of buildings. The referring court asks whether the rules on public contracts and, more specifically, the rules on public works concessions apply in these circumstances.

I – Legislative context

3. The provisions on which the Court is asked to deliver a ruling are contained in Directive 2004/18/EC (3) (hereinafter also referred to as 'the Directive').

4. Article 1 of the Directive provides:

'1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

2. (a) "Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) “Public works contracts” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

…

3. “Public works concession” is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

…’

II – The facts, the main proceedings, and the questions referred for a preliminary ruling

5. In October 2006, the Bundesanstalt für Immobilienaufgaben (the federal agency responsible for managing public property; ‘the Bundesanstalt’) published notices in the press and on the internet announcing its intention to sell land comprising approximately 24 hectares in the municipality of Wildeshausen. The land was occupied, inter alia, by barracks which were decommissioned early in 2007.

6. The notice published by the Bundesanstalt stated that the proposed use of the land must be agreed in advance with the municipality of Wildeshausen.

7. In May 2007, a survey commissioned by the Bundesanstalt estimated the value of the land to be EUR 2.33 million.

8. One company, Helmut Müller GmbH (‘Helmut Müller’), made an offer in November 2006 to buy the land for EUR 4 million on condition that the building plans for the area were drawn up in accordance with its designs. That proposal was not pursued.

9. In January 2007, the Bundesanstalt asked interested parties to make offers for the land without any definite building plan. In that context, Helmut Müller made an offer to buy the land for EUR 1 million. Another company, Gut Spascher Sand Immobilien GmbH (‘GSSI’), made an offer to buy the land for EUR 2.5 million.

10. The municipality of Wildeshausen subsequently asked the prospective buyers to submit their own plans for the use of the area. Those plans were then discussed with the municipal authorities in the presence of the Bundesanstalt. On 24 May 2007, the Wildeshausen town council expressed its own preference for the plan submitted by GSSI and said it was prepared to embark on the formal procedure of drawing up the building plans for the area on the basis of that plan. The town council explicitly stated in its decision that its preference was not to be regarded as binding with respect to local planning powers, which the town council reserved the right to exercise at its discretion.

11. On 6 June 2007, the Bundesanstalt sold the land to GSSI. The contract of sale does not mention the future use of the land.

12. Helmut Müller brought proceedings before the national courts, contesting the sale of the land and claiming in particular that the sale should have been conducted in accordance with the rules on public procurement.

13. The dispute is before the referring court, which has referred the following questions for a preliminary ruling:

‘(1) Is it a requirement, in order for there to be a public works contract under Article 1(2)(b) of … Directive 2004/18/EC …, that the works be physically carried out for the public contracting authority and bring it an immediate economic benefit?

(2) In so far as, according to the definition of a public works contract in Article 1(2)(b) of Directive 2004/18/EC, the element of procurement is indispensable, is procurement to be regarded as having taken place, in accordance with the second variant of the provision, if the intended works for the public contracting authority fulfil a particular public purpose (for example the development of part of a town) and the public contracting authority has the legal right under the contract to ensure that the public purpose is achieved and that the necessary works will be available?

(3) Does the concept of a public works contract in accordance with the first and second variants of Article 1(2)(b) of Directive 2004/18/EC require that the contractor be directly or indirectly obliged to provide the works. If so, must there be a legally enforceable obligation?

(4) Does the concept of a public works contract in accordance with the third variant of Article 1(2)(b) of Directive 2004/18/EC require that the contractor be obliged to carry out works, or that works form the subject-matter of the contract?

(5) Do contracts by which, through the requirements specified by the public contracting authority, it is intended to ensure that the works to be carried out for a particular public purpose be available, and by which (by contractual stipulation) the contracting body is given the legal power to ensure (in its own indirect interest) the availability of the works for the public purpose, fall within the third variant of Article 1(2)(b) of Directive 2004/18/EC?

(6) Is the concept of "requirements specified by the contracting authority" in Article 1(2)(b) of Directive 2004/18/EC fulfilled, if the works are to be carried out in accordance with plans examined and approved by the public contracting authority?

(7) Must there be held to be no public works concession under Article 1(3) of Directive 2004/18/EC, if the concessionaire is or will become the owner of the land on which the works are to be carried out, or the concession is granted for an indeterminate period?

(8) Does Directive 2004/18/EC – with the legal consequence of an obligation on the public contracting authority to invite tenders – apply if a sale of land by a third party and the award of a public works contract take place at different times and on the conclusion of the land sale the public works contract has not yet been awarded, but at the last-mentioned time there was, on the part of the public authority, the intention to award such a contract?

(9) Are separate but related transactions concerning a sale of land and a public works contract to be regarded from the point of view of the law on the awarding of contracts as a unity, if at the time the land sale contract was entered into the award of a public works contract was intended and the participants deliberately created a close connection between the contracts from a substantive – and possibly also temporal – point of view (see Case C-29/04 *Commission* v *Austria* [2005] ECR I-9705)?'

III – Preliminary observations

A – *The case-law of the referring court*

14. Some clarification is required in order to understand the questions raised by the referring court. In particular, it should be observed that the national court itself makes it clear in the order for reference that the current case-law of the referring court (the Oberlandesgericht Düsseldorf) differs in some respects from most of the case-law and the legal literature on the law relating to the award of public contracts.

15. In particular, the referring court's position is based on the assumption that the fact that a procedure is essentially a town planning procedure does not in principle preclude the application of the Community rules on public contracts. The national court refers in this connection to the Court's judgments in *Ordine degli Architetti and Others* (4) and *Commission* v *France*. (5)

16. Secondly, the referring court deduces from the judgment in *Auroux and Others* (6) the principle that the application of the Community rules on public contracts is completely independent of whether the contracting authority intends to become the owner of the works to be constructed, or to take possession and make use of them at all. In other words, the Community rules on public contracts may apply regardless of whether there is an element of procurement of property by the contracting authority. In particular, the benefit pursued by the contracting authority may also be immaterial, consisting for example, as in the present case, in achieving specific urban development aims in respect of municipal land. (7)

17. On the basis of that case-law, the situation that is the subject of the main proceedings is interpreted by the referring court in the following terms. In its view, GSSI was awarded a public works concession, (8) to which the relevant provisions of Community law were applicable. (9) The fact that GSSI acquired a right of ownership in the property in question is not, in its view, inconsistent with that interpretation, since the concept of a 'concession' as defined in the Directive does not exclude concessions of indefinite duration or recognition of the concessionaire's right to own the property that is the subject of the concession.

18. According to the referring court, the fact that the municipality of Wildeshausen, although it had expressed its own preference for the development scheme proposed by GSSI, was not formally bound to authorise that scheme does not call into question its interpretation of the events. In particular, the national court cites the Court's judgment in *Commission* v *Austria* ('*Mödling*') (10) to support the claim that even an event which occurred after the award may, if it was actually decisive for the purposes of the award, have to be taken into account for the purposes of a legal assessment of the facts. Any other course might well compromise the effectiveness of provisions of Community law.

19. However, as I pointed out earlier, the referring court itself recognises that its interpretation of Community law, in the parts that are applicable in the present case, is by no means unanimously accepted. By its questions, the Oberlandesgericht Düsseldorf is therefore essentially asking the Court to determine whether or not that interpretation is correct.

B – *The differences between the various language versions of Article 1 of the Directive*

20. In most of the languages, (11) Article 1 of the Directive identifies three different types of 'public works contract'. These are, in particular:

– the execution, possibly accompanied by the design, of building *works* (12) of the type specified in Annex I to the Directive (first variant);

– the execution, possibly accompanied by the design, of *awork* (13) (second variant);

– the realisation, by whatever means, of *a work* (14) corresponding to the requirements specified by the contracting authority (third variant).

21. The Directive adds that a 'work' (15) means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

22. It should be noted at once that there are some important differences between the language versions.

23. First, there are differences resulting from occasional inconsistencies in the terminology used in the three variants mentioned above: this is clear, in particular, when one looks at the terms employed in some of the language versions as indicated in the footnotes on the variants in question.

24. In addition, the German version exhibits two other significant differences. First, the third variant specifies that the activity in question is to be executed 'by third parties' (durch Dritte): that provision does not appear in the other language versions. (16) Secondly, the activity referred to in the third variant is not described as 'a work' (Bauwerk) but as 'building activity' (Bauleistung), with the result that the subsequent definition of 'a work' appears, in the German version, to apply only to the second variant and not to the third. (17)

25. The existence of these textual problems is a strong incentive for not attempting to find the ‘correct’ interpretation of provisions through a strictly literal analysis of the provisions in question, especially if that analysis is confined to a single language version. In fact, the only possible guides in seeking the meaning to be attributed to the provisions are systematic interpretation and teleological interpretation, combined with a good sense of interpretation.

IV – Legal analysis

A – Introduction: the concept of a public works contract

26. In order to give the fullest possible reply to the questions raised by the referring court, it is necessary, first, to identify the essential characteristics of a works contract.

27. It should be noted, first of all, that the concept is peculiar to Community law and the classification of a specific contract in the national law of a Member State is consequently irrelevant in this connection. (18)

28. As to the object of the contract, as we saw earlier, Directive 2004/18 identifies three basic types of contract. To summarise, it may be said that, under Article 1 of that Directive, the concept of a public works contract includes, on the one hand, the execution of specific works of the types listed in Annex I to the Directive and, on the other, the realisation of a work. In other words, the concept includes both construction activities, regardless of whether the outcome of the works constitutes a definite and/or finished property, and activities connected with the realisation, possibly by third parties, of specific ‘complete’ properties. Such a property, the ‘complete’ nature of which is identified by the Directive in the statement that it fulfils ‘an economic or technical function’, is normally defined as ‘a work’.

29. As regards the particular situations to be assessed, the question whether or not they fall within the ambit of Directive 2004/18 will naturally have to be examined case by case. However, I think that, generally speaking, the problem of whether the objective requirements for the application of the Directive are satisfied can be solved in most cases by adopting a flexible approach, based not on the threefold definition reflected in most language versions of Article 1 but rather on a twofold definition of works as expounded in the preceding point.

30. Regardless of the approach that is adopted, it must not however be forgotten that a characteristic element of all public works contracts is the element of construction. In other words, the activities in question must include the production of property. Indeed, the mere sale of existing property is explicitly excluded from the ambit of the Directive. (19)

31. Article 1 of the Directive explicitly defines other essential characteristics of a works contract. It is established that a works contract is *a contract* concluded *in writing* and *for pecuniary interest*. This entails a service provided by the contractor for the public authority for consideration, not necessarily in cash but certainly in terms of economic value. (20)

32. However, as we know, the Directive itself provides for an alternative to the ‘typical’ model in which the public authority pays (in the broad sense of the term, as we have seen) the builder for a work. In that alternative model, the public works concession model, ‘the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment’. According to the referring court, the provisions on the award of public works concessions are applicable in the present case, since the public authority simply allows the person who is to carry out certain building works to enjoy the full benefit of the outcome of the building activity, in accordance with the provisions on the right of ownership. That problem will be discussed in detail later, notably in connection with the analysis of the seventh question.

33. A further observation is also required concerning the aim pursued by the public authorities in the works and/or work which they intend to execute. As the Court has had occasion to rule, the aim is irrelevant for the purposes of the applicability of the provisions of the Directive. (21) Thus, the only thing that matters is whether the objective requirements specified in the measure are satisfied.

34. Clearly, the reason why the Community rules pay no attention to the aims pursued by the public authorities in specific individual cases is that, as the recitals in the preamble to the Directive suggest, the principal objective of the Community rules on public contracts is to abolish restrictions on fundamental freedoms and to encourage genuine competition. (22) Thus, the point of view is that of the persons who may be interested in carrying out the works and, for those persons, the aim that the public authority intends to pursue is irrelevant.

35. These broad and ambitious aims must be borne in mind when interpreting the Directive but it should not be assumed that, by appealing to the purpose of the measure, its scope can be extended indefinitely. In particular, it should be noted that certain specific sectors in which it does not apply are mentioned in the Directive itself, notably in Articles 10 to 16. A purely 'functional' interpretation, based exclusively on the fundamental objectives of the Directive, is therefore not permissible.

36. A 'functional' interpretation, which the Commission in particular appears to support, raises the crucial problem of identifying the parameters on the basis of which the Directive is to apply. However, the Commission itself has stated that its principal concern is that certain persons may acquire a benefit without first being placed on an equal footing with other persons who may be interested in acquiring the benefit in question. In cases such as the present one, the benefit consists in the increase in the value of land resulting from the fact that the public authority has given permission for certain building activities to be carried out on it. So, on the Commission's interpretation, any 'increase in value' of immovable property that is attributable to an activity of the public authorities should be subject to the provisions of the Directive. It is therefore clear that, if one takes that position, one may have to accept the hypothesis, however absurd, that *all town planning activities* are subject to the Directive since, by definition, provisions on the possible execution of building works substantially alter the value of the land in question.

37. In fact, no one actually takes that extreme position. However, it must be noted that it is the logical consequence of a purely functional interpretation of the Directive.

38. It is true, as we know, that in some areas the Court has adopted an openly 'functional' interpretation of the provisions of Community law. It has done so, in particular, in the context of the law on the award of public contracts, in connection with the concepts of a 'contracting authority' and a 'body governed by public law'. (23) However, it should be noted in this connection, first, that on those occasions the functional interpretation was used to clarify the meaning of a specific concept, not to determine the general scope of the entire body of legislation on public contracts. Moreover, in the cases cited, the purpose of adopting the functional interpretation was essentially to avoid creating enormous gaps that would have provided wide scope for abuse: I refer, for example, to a case where the typical function of a body governed by public law was subsequently incorporated in the establishment of a company without affecting its status, (24) or where a public service (a broadcasting body, in this case) was not financed directly out of public resources but through fees payable by persons who possessed a receiver. (25)

39. I therefore consider that, on the contrary, the scope of the Directive should be identified by reference, first, to the objective requirements specified in the Directive itself. That does not, of course, mean that all 'functional' considerations are to be avoided. In fact, the objectives pursued by the Directive are clearly among the principal points of reference for the purposes of interpretation. (26) They cannot however constitute the only reference parameter, nor can they escape the legislature's desire to define the scope of the measure.

40. I shall now proceed to examine the questions. In view of the logical connections between them, I shall start with the first, second, fifth and sixth questions.

B – The first and second questions

41. By the first two questions, which can be taken together, the referring court asks the Court whether, in general, in order for there to be a public works contract within the meaning of Directive 2004/18, it is necessary that the object of the contract constitute property procured by the public authority, which is of immediate economic benefit to that authority. If the answer is in the affirmative, that is to say, if, in the words of the referring court, 'the element of procurement is indispensable', it seeks to ascertain

whether or not that element can be discerned in the general pursuit of a public purpose alone, for example in a specific scheme for the urban development of municipal land.

1. The positions of the parties

42. The positions taken by the parties which submitted observations in the present proceedings cover a fairly wide spectrum.

43. On the one hand, the German Government, supported on this point by the Bundesanstalt and to a large extent by the Austrian Government, firmly maintains that the presence of the element of procurement is essential to a public works contract. Indeed, it affirms that the procurement need not necessarily be material and that an economic benefit to the public authority may suffice. In its view, however, the general pursuit of a public purpose, as in the present case, is not in itself sufficient. As to the Court's judgment in *Auroux and Others* which, as we have seen, is a cornerstone of the position the national court is inclined to favour, the German Government observes that, in the case in which that decision was delivered, the question of immediate economic benefit to the public authority did not arise, so the Court did not consider it necessary to concentrate its attention on that point. However, in the German Government's view, that should certainly not be interpreted as meaning that the economic benefit requirement is unnecessary: that requirement, although not explicitly stated, is implicit in the general system of the Directive. As to the arguments based on the need to ensure that the Directive is effective and to prevent the risk of abuse, according to the German Government, those considerations cannot justify applying the Directive covertly in areas other than those to which it normally applies. The need to prevent abuses in areas other than public contracts should be addressed by employing other legislative instruments, not Directive 2004/18.

44. The position adopted by the Commission, on the other hand, is diametrically opposed to that of the German Government. In particular, according to the Commission, the only decisive element for the purpose of the answer to be given to the referring court is the fact that the wording of the Directive does not require the public authority to procure anything from any other person in order for there to be a public works contract. In its view, therefore, to insist on the presence of the element of procurement would mean introducing a condition that is not required by the wording of the measure in question.

45. Lastly, the position taken by the Netherlands Government is midway between the two. In its view, although it is not essential – even in the light of the Court's case-law – that the public authority procure the work, it must nevertheless have a direct economic interest in order for there to be a public works contract. In particular, that direct economic interest may, depending on the case, consist either in an economic benefit to the public authority or in what the Netherlands Government describes as a 'risk of loss' borne by that authority. In the Netherlands Government's view, there is no such economic interest in the case submitted to the referring court for examination, or at least no interest that can be detected on the basis of the information supplied by the national court.

2. Assessment

46. In my view, the correct interpretation of Directive 2004/18 is midway between the two 'extreme' positions taken by the German Government and the Commission respectively. On the other hand, I do not fully share the Netherlands Government's position, which seems to me to rely excessively on an economic element for the purpose of defining the concept of a public works contract.

47. It is important, in my view, for the purpose of replying to the question referred to the Court, to consider first the way in which the judgment in *Auroux and Others* should be interpreted. (27) As we know, in the case in which that decision was delivered, a municipal authority, without issuing an invitation to tender, had entrusted a second contracting authority with the execution of an urban development project. In that context, the second contracting authority, using funds provided in part by the municipality, was required to execute various building works, some of which were to be sold to third parties and some transferred to the municipal authority. The Court held that that transaction constituted a public works contract, regardless of whether or not it was anticipated that the first contracting authority, that is to say, the municipality, was or would become the owner of all or part of that work. (28)

48. It is true that, as the German Government observes, in that case there was no doubt that at least some of the works to be executed were of direct benefit to the municipal authority. However, it is also true that the somewhat broad wording that the Court chose to employ means, in my view, that there is no need to regard direct procurement for a public authority as a condition of a public works contract.

49. On the other hand, however, attention must be drawn to another feature of the facts at issue in that case: on that occasion, the municipal authority had paid a substantial sum of money and had been directly involved with the second contracting authority in securing the execution of the required works.

50. However necessary it may be to interpret the concept of a public works contract broadly in order to prevent possible abuses, the scope of that concept cannot, as I observed earlier, be extended indefinitely. (29) A 'functional' interpretation of this kind cannot completely disregard the limits to the scope of the Directive. While it is certainly true that the principal objective of the Directive on the award of public contracts is to encourage competition between undertakings and to open markets, it is also true that, in areas that are not within the scope of the Directive, that objective must be pursued by employing other appropriate legislative instruments, not by unduly extending the scope of the provisions on the award of public contracts.

51. It is therefore necessary to identify with some precision the limits to the scope of those provisions, which must represent absolute limits for the purpose of applying the provisions of the Directive.

52. In my view, it is possible from a full examination of the measure, bearing in mind the meaning that the Court has so far attributed to it, to deduce the fundamental principle that for a given activity to fall within the ambit of the law on public works contracts there must be a strong and *direct link* between the public authority and the work or works to be executed. That link normally follows from the fact that the work or works are executed on the public authority's initiative.

53. Contrary to the view taken by the referring court, non-material and indirect benefit alone is not sufficient. Nor is the mere fact that the activity to be assessed is, generally, in the public interest sufficient. It should be noted that, in cases where a permit for the activity has to be issued by a public authority (which is normally the case with all building activities), the activity must obviously be in the public interest in order to obtain a permit, since the public interest is the reference parameter on which the public authorities grant permission. Unless the scope of the Directive is extended indefinitely, the general existence of a public interest which justifies permission to pursue the activity cannot therefore constitute the decisive criterion for determining which cases are to fall within it. In particular, it must be borne in mind that a building permit, that is to say, the typical expression of the authorities' powers in the *objective* area of town planning, is usually confined to removing restrictions on a private initiative, not a public initiative.

54. I therefore take the view that by requiring that there be a direct link between the public authority and the work or works to be executed it is possible to reconcile the potential contradiction between the need to prevent abuses on the one hand and the need to avoid extending the scope of the Directive indefinitely on the other. In particular, that formula is completely consistent with the Court's finding in *Auroux and Others* that the procurement of the works by the authority is not a necessary condition for the application of the provisions on public contracts. That judgment cannot however be used to justify an approach that dispenses altogether with a strong connection between the public authorities and the works to be executed: the very criterion of a direct link may, in my view, constitute an appropriate expression of that necessary connection.

55. That direct link is clearly discernible, first, in situations where the public authority immediately acquires ownership of the property to be produced. This is obviously the most typical case and most of the cases in which the Directive is applicable are covered by this reference model. There are also situations, similar to that typical situation, where the property to be produced is not procured by the public authority but is nevertheless of *immediate economic benefit* to that authority. This may be the case, for example, where the public authorities acquire a right in building property which, although not a right of ownership, nevertheless enables them to make use of the property, at least to some extent.

56. A second example of a direct link between the public authority and the work or works to be executed may, in my view, be identified in cases where the public authority employs public resources

for the execution of the work and/or works. In most cases, these situations are clearly covered by the first example mentioned in the preceding point since, in the classic model of the use of public resources for the execution of work or works, that is to say, the contract model, the public authorities pay in order to acquire ownership of the property to be produced. Moreover, as we have seen, public resources may be used in the concession model too, though not to cover the whole value of the work or works to be executed.

57. However, the second example also covers situations where the public authority disburses money or other public resources but does not acquire ownership of the property to be produced. As the Court held in *Auroux and Others*, ownership is not an essential element. Moreover, it appears to be perfectly consistent with the requirements of equity and compliance with the fundamental principles of the Directive that, when the public authorities intend to employ public resources, the selection of the persons who are to receive those resources should be accompanied by the guarantees provided by the Directive.

58. It goes without saying that that example also includes situations where the public resources that are employed are not of a pecuniary nature: I am thinking, for example, of cases where, for the purpose of carrying out the work or works, public land is made available to the contractor or concessionaire free of charge or at a price below the market price.

59. A third and last example of a direct link between the public authority and the work or works to be carried out concerns cases where the work and/or works, whether or not they are examples of the first or second kind, are in any case the result of an initiative taken by the authority in question. This is the case, in particular, where the public authorities start, on their own initiative, a procedure which leads to the execution or realisation of the work or works. An example of this kind of situation is the situation assessed by the Court in *Auroux and Others*. (30)

60. However, the third and last example calls for clarification in an important respect. The activity pursued by the public authority in that context must extend beyond mere exercise of the general powers vested in that authority with respect to town planning. That is the only way to draw a clear line between activities which fall within the scope of the Directive and ‘normal’ town planning activities which, as such, do not. To be precise, the type of activity pursued by the public authority in specific individual cases must be assessed by the national court on a case-by-case basis.

61. Within that framework, the possibility cannot be ruled out that the realisation of a certain scheme for the development of land may be the subject of a contract that falls within the scope of the Directive. Such a possibility requires, however, that there be a direct link, in the sense indicated in the preceding points, between the public authority and the work or works to be carried out. The mere pursuit of the public interest through recourse to ordinary town planning powers is not sufficient cause to apply the Community rules on contracts and concessions.

62. In this case, it is naturally for the referring court to determine whether or not that direct link exists. I should point out however that, on the basis of the information supplied to the Court by the national court, it seems to me difficult to maintain that the direct link exists. On the one hand, it appears to be common ground that the public authority will not acquire any property in this case and will not obtain any immediate economic benefit. Nor does this appear to be an instance of any of the other situations in which a direct link could be detected, since the municipality of Wildeshausen did not take a specific initiative in connection with the execution of the works, confining itself on the contrary to assessing the various projects that were submitted to it, nor did it have to meet any expenses in connection with the construction work. No connections of this kind appear to be discernible in the case of the Bundesanstalt either.

C – The fifth and sixth questions

63. The fifth and sixth questions relate only to the third ‘variant’ of the concept of a public works contract (31) and to some extent they restate, with reference to that variant, the problems raised in connection with the first two questions, particularly the second question.

64. To be precise, by the fifth question the referring court seeks to ascertain whether the ‘requirements specified by the public contracting authority’ referred to in the said variant consist simply in the fact that the public authority has the power to ensure that the works to be executed correspond to a public interest.

65. By the sixth question, on the other hand, the Court is asked to determine whether the said ‘requirements specified by the contracting authority’ may in fact consist in the power vested in the public authority to examine and approve building plans.

1. Arguments of the parties

66. With the sole and obvious exception of Helmut Müller, all the parties which submitted observations agree in principle that, in a situation such as that at issue in the main proceedings, the conditions required for there to be a public works contract within the meaning of the third variant are not met.

67. To be precise, the Commission and the Netherlands and French Governments stress the need to distinguish between an ‘active’ role, in which the public authorities take the initiative or exercise a decisive influence on the execution of the work, and a purely ‘passive’ role, in which they confine themselves to the functions of approving and monitoring projects promoted by private persons. This, it is suggested, does not constitute a public contract but represents at the very most a case of the public authorities exercising their normal functions of planning, approval, monitoring, and so forth.

68. The German Government, for its part, takes a position based on the view that the conditions which it considers to be essential in the case of both the first two variants of the concept of a public works contract, including in particular the requirement of an immediate economic benefit for the public authority, are also essential in the case of the third variant of that concept.

2. Assessment

69. The referring court’s decision, when framing the questions to be put to the Court, to separate the issues connected with the first two variants of the concept of a public works contract, which are the subject of the second question in particular, from the issues connected with the third variant, which are at the centre of the fifth and sixth questions, is based, in my view, on the wish to infer from the wording of the third variant that the scope of the Directive is very wide.

70. There is no doubt, as the Commission has emphasised in its observations, that the third variant of the concept of a public works contract was in fact designed to prevent avoidance of the application of the legislation by including in the concept cases of various kinds which could not be exhaustively identified in advance.

71. However, as I observed earlier, the wording of the measure cannot be used to extend its scope indefinitely. In particular, if the ‘requirements specified by the contracting authority’ were to include all the public authorities’ approval and planning functions in the area of urban development, the scope of the Directive would be unduly extended.

72. In fact, the considerations which I advanced earlier in connection with the first two questions also apply to the third variant. There is no reason to suppose, with reference to the third variant, that it is possible to dispense with the requirement, for the purposes of Directive 2004/18, of a direct link between the public authority and the works to be executed.

D – Partial conclusions

73. Concluding my analysis of the first, second, fifth and sixth questions, I therefore suggest that the Court’s answer to these questions should be that, in order for there to be a public works contract or a public works concession within the meaning of Directive 2004/18, there must be a direct link between the public contracting authority and the work or works to be carried out. That direct link may consist, in particular, in the fact that the works are to be carried out for the public contracting authority or that they

bring it an immediate economic benefit, or in the fact that the public contracting authority has taken the initiative for the execution of the works or bears at least some of the costs in that connection.

E – The third and fourth questions

74. By the third and fourth questions, the Oberlandesgericht Düsseldorf essentially asks whether the concept of a public works contract necessarily implies that the contractor is obliged to carry out the work or works. The reason for these apparently singular questions is that, in the case at issue before the national court, it is common ground that the purchaser of the land was not under any obligation to build on it.

75. Almost all the parties which have submitted observations are generally agreed that the answer to these questions should be in the affirmative, and there appear to be no substantial differences between their respective positions. Only Helmut Müller, the plaintiff in the main proceedings, suggests for obvious reasons that, on the contrary, the Court should accept the referring court's approach, according to which the obligation in question is not essential.

76. In my view, however, it is clear that the answer to the questions should be in the affirmative and that the obligation to carry out the work and/or works constitutes an essential element in order for there to be a public works contract or a public works concession.

77. This follows, first and foremost, from the provisions of Directive 2004/18 itself which, as we have seen, defines public works contracts as contracts for pecuniary interest. The concept is therefore based on the idea of an exchange of services between the contracting authority, which pays a price (or, alternatively, grants a right of use), and the contractor, who is required to execute a work or works. Thus, public contracts are clearly mutually binding. It would obviously be inconsistent with that characteristic to accept that, after being awarded a contract, a contractor could, without any repercussions, simply decide unilaterally not to carry out the specified work. Otherwise, it would mean that contractors were entitled to exercise discretion with regard to the requirements and needs of the contracting authority.

78. A different and conceptually separate question that is also raised by the referring court is whether or not, in order for there to be a public works contract, any obligation assumed by the contractor vis-à-vis the public authority must be legally enforceable. That is to say, the national court is asking whether, if the work is not done, the contracting authority can institute legal proceedings to oblige the contractor to do it.

79. If, by putting the question in this form, the referring court's intention is to ask the Court whether, in connection with works contracts within the meaning of Directive 2004/18, the national legal order must necessarily provide mechanisms to oblige contractors to carry out the work or works specified in the contract, I consider that the answer should be in the negative, since it is impossible to find any indication to that effect in the Directive.

80. However, that does not mean that the contractor's failure to fulfil obligations is irrelevant. It should not be forgotten that, as I pointed out earlier, a public works contract is to all intents and purposes a contract, that is to say, a legal document which, in all the variety of national legal systems, is by nature binding at all times and in all circumstances. As the German Government rightly points out in its observations, in order for there to be a public works contract, the contractor must be under a contractual obligation to provide the specified service. However, the consequences of any failure to fulfil obligations are a matter of national law: for example, in the event of a contractor failing to fulfil obligations, there is nothing to prevent the national law of a State from providing that the contract is to be terminated, that it is to be awarded to another contractor, and that the public authority is entitled simply to require the first contractor to compensate for any loss or damage.

81. I therefore propose that the Court's answer to the third and fourth questions should be that the concepts of a public works contract and a public works concession within the meaning of Directive 2004/18 presuppose that the contractor is under a contractual obligation to the public authority to provide the agreed service. It is for national law to determine the consequences of any failure by the contractor to fulfil obligations.

F – The seventh question

82. By the seventh question, the referring court ask whether there can be a public works concession within the meaning of Directive 2004/18 if the 'concessionaire' holds a right of ownership which by definition confers the right to use the property that is the object of the concession. (32) More generally, the question concerns the admissibility under Community law of a concession of unlimited duration.

1. The positions of the parties

83. The clearest position on the problem is that of the German Government, which generally rules out the possibility of the institution of concessions being compatible with the existence of a right of ownership. The reason for this is that a concession implies, by definition, that the grantor owns the rights which are transferred to the concessionaire.

84. The Netherlands and Austrian Governments, for their part, while not absolutely excluding the possibility of concessions being compatible with a right of ownership, consider that in the present case the public authority's role is too limited for there to be a concession. For there to be a concession, the public authorities would, in their view, have at the very least to give the concessionaire precise instructions concerning the work and/or works to be carried out.

85. The Commission is the only party to take a more open position. In particular, on the ground that the characteristic element of a works concession is the fact that the concessionaire bears the economic risk connected with the execution of the work or works, the Commission considers that the economic risk in the present case is to be detected in the concessionaire's uncertainty as to whether the public authority would accept the building plans, for which the land had to be purchased in advance.

2. Assessment

86. The seventh question is in some ways the most difficult, at least in one important respect. The problem of compatibility between public works concessions and the right of ownership has significant theoretical and practical implications.

87. There are various reasons why a public authority may opt for a public works concession. In some cases, the decision may be prompted by a desire to take advantage of specific experience available in the private sector or to construct building works more efficiently. However, there is no doubt that, in most cases, the choice of a concession meets financial requirements. By employing that arrangement, it is possible to carry out works of public interest without placing a burden on the public purse. (33)

88. By its very definition, a concession is a way of allowing a person to exploit property to which that person could not otherwise claim any right.

89. Directive 2004/18, for its part, simply speaks in the definition of public works concessions of 'the right to exploit the work' by way of consideration for the person responsible for constructing it.

90. However, in so far as the 'right to exploit' may be interpreted broadly, one possibility which I consider ought to be excluded, in view of the meaning and the general system of the measure in question, is the possibility of a public works concession in which the concessionaire has a right of ownership in the finished works.

91. In the first place, as the German Government in particular has observed, the fact that the Directive speaks of the concessionaire's right to exploit the works would logically seem to imply that the concessionaire cannot have a more extensive right, such as the right of ownership, in the property.

92. Moreover, apart from being difficult to reconcile with the wording of the provision concerned, such a situation would deprive the public authorities of what seems to me to be one of the essential characteristics of public works concessions: the opportunity for the public authority eventually to take possession of the finished works, even if only to reassign the right to exploit them.

93. In other words, the problem arises not so much from the objective characteristics of the right of ownership in connection with the possibility of exploiting the property, as from the potentially unlimited duration of that right. Consequently, the exploitation entrusted to the concessionaire can never be granted for an unlimited period of time, regardless of the legal title by virtue of which it may be exercised.

94. It must also be borne in mind that, in the typical model of concessions under Community law, the crucial distinctive element which serves in particular to distinguish concessions from public contracts is that there is an economic risk to be borne by the concessionaire in the case of concessions whereas there is no such risk in the case of public contracts. (34) In the present case, in order to determine that there is a risk of this kind, the Commission has to attribute it to the fact that, after the persons concerned have purchased the land, the public authorities in the exercise of their town planning functions may refuse to grant building permits for the proposed works. However, the 'chance' of that happening appears to be not so much a risk associated with the economic exploitation of the works as the normal uncertainty attendant on any private person who depends on a decision to be taken by the public authority at its discretion.

95. Moreover, the economic risk that is a characteristic of the public works concessions covered by the Directive is clearly a direct consequence of the limited duration of concessions. A right of unlimited duration in the property to be constructed, on the contrary, would in principle always exclude the possibility of there being any economic risk because any difficulties that may occur in the exploitation of the property can always be remedied in the course of time.

96. Lastly, there is another argument for the generally limited duration of concessions within the ambit of Community law. It has already been observed several times in this Opinion that the fundamental objective of the Community rules on public contracts is, generally, to encourage competition to the greatest possible extent by abolishing all restrictions on fundamental freedoms. In that context, to admit the possibility of concessions of unlimited duration would be to preclude, to the detriment of competition and efficiency, the possibility of the works being exploited in the future by other persons employing more efficient methods based on more effective criteria.

97. These considerations have two consequences. On the one hand, concessions of unlimited duration cannot generally be granted. (35) On the other hand, a person cannot be granted a concession for property of which that person is already the owner, except where, under national law, the public authority acquires a right of ownership or a similar right in the property after a certain period of time.

98. In conclusion, I propose that the Court's answer to the seventh question should be that a public works concession within the meaning of Directive 2004/18 can never provide for the concessionaire to have a right of unlimited duration in the property that is the object of the concession.

G – The eighth and ninth questions

99. The eighth and ninth questions can also be taken together, in view of their subject-matter. By the eighth question, the referring court seeks to ascertain whether the rules contained in Directive 2004/18 apply from the time when a public authority, although it has not yet formally decided to award a public contract, sells land with the intention of subsequently awarding a contract in that connection. The ninth question, on the other hand, concerns the possibility of regarding the sale of the land and the subsequent award of the contract as one and the same from a legal point of view.

100. Both questions, as we see, concern the possibility of dealing with a possible abuse of rights for the purpose of evading the Community provisions on public contracts, by applying those provisions in a way that does not take into account the typical chronological order considered in the Directive.

101. It should be noted that, in view of the answers I propose to give to the preceding questions, particularly the seventh question, it is probably unnecessary to provide the referring court with an answer to the eighth and ninth questions, since the possibility that a public works contract or a public works concession within the meaning of Community law is compatible with the presumed contractor/concessionaire having a right of ownership in the property concerned must be excluded.

However, for the sake of completeness and in the event of the Court not sharing my approach on the preceding questions, I shall offer some brief considerations on the matter.

102. Of the parties which submitted observations in the present case, only the Commission appeared to be willing to consider the approach favoured by the referring court. While noting that it is for the national courts to make the assessment in each specific case, the Commission admits that in a situation such as that at issue in the main proceedings Directive 2004/18 could in principle apply from the time when the authority decides to sell the land. All the other parties, albeit with various nuances, consider that the public authority's intention alone is irrelevant.

103. As the referring court points out, the answer to the eighth and ninth questions must undoubtedly take the Court's ruling in *Mödling* (36) into account. In that case, the Court was faced with a situation in which an Austrian municipality entrusted direct responsibility for the waste collection service to a company wholly controlled by the municipality and then proceeded, a few days later, to transfer 49% of the shares in that company to a private undertaking. The Court consequently held that where there is a clearly 'artificial construction', (37) the result of which is essentially to prejudice the effectiveness of the Directive on the award of contracts, the legal assessment of the case may be made 'taking into account all those stages as well as their purpose and not on the basis of their strictly chronological order'. (38)

104. In my view, the Court's ruling in *Mödling* is clearly based on two principal grounds. The first, explicitly stated, is the need to maintain the effectiveness of the Directive. (39) The second, implicit but basically the other side of the same coin, is the wish to deal with an abuse of rights.

105. The Court's ruling in *Mödling* certainly applies generally and it can therefore be stated that, in order to avoid an abuse of rights and ensure the effectiveness of the Community rules on public contracts, two formally and chronologically separate acts may be regarded as contemporaneous or as constituting a single legal act.

106. The assessment is naturally a matter for the national court, which alone has all the necessary elements of fact and of law at its disposal. However, for obvious reasons connected with the need to ensure legal certainty, a number of strict conditions must be met. In particular, there must be a reasonably short space of time between the sale of the land and the award of the contract, and there must be convincing evidence that the authority already intended to award the contract when the land was sold. Except in cases of major abuse where the intention to evade the rules is quite clear from the outset, only *ex post facto* assessment can take due account of all these elements.

107. I therefore propose that, if necessary, the answer to the eighth and ninth questions should be that, in cases where there is clear evidence of an intention to evade the Community provisions on public contracts and concessions, the legal assessment may regard the two formally and chronologically separate acts of a sale of land and the award of a contract or a concession in that connection as constituting a single legal act. It is for the national court to determine, on the basis of all the circumstances in the case, whether there was an intention to evade the rules.

V – Conclusion

108. I therefore propose that the Court give the following answers to the questions submitted by the Oberlandesgericht Düsseldorf:

In order for there to be a public works contract or a public works concession within the meaning of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, there must be a direct link between the public contracting authority and the work or works to be carried out. That direct link may consist, in particular, in the fact that the works are to be carried out for the public contracting authority or that they bring it an immediate economic benefit, or in the fact that the public contracting authority has taken the initiative for the execution of the works or bears at least some of the costs in that connection.

The concepts of a public works contract and a public works concession within the meaning of Directive 2004/18 presuppose that the contractor is under a contractual obligation to the public authority to provide the agreed service. It is for national law to determine the consequences of any failure by the contractor to fulfil obligations.

A public works concession within the meaning of Directive 2004/18 can never provide for the concessionaire to have a right of unlimited duration in the property that is the object of the concession.

In cases where there is clear evidence of an intention to evade the Community provisions on public contracts and concessions, the legal assessment may regard the two formally and chronologically separate acts of a sale of land and the award of a contract or a concession in that connection as constituting a single legal act. It is for the national court to determine, on the basis of all the circumstances in the case, whether there was an intention to evade the rules.

---

1 – Original language: Italian.

---

2 – Clearly, a form of State aid may exist where public property is sold at a price below the market value. See, in this connection, the Commission communication on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3).

---

3 – Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

4 – Case C-399/98 [2001] ECR I-5409.

---

5 – Case C-264/03 [2005] ECR I-8831.

---

6 – Case C-220/05 [2007] ECR I-385.

---

7 – The German legislation was altered, after the order for reference was made, by the Law of 20 April 2009 modernising the Law on contracts (Gesetz zur Modernisierung des Vergaberechts, BGBl. I, p. 790), which amended Paragraph 99 of the GWB (the Law on protecting competition), specifying inter alia that, in the case referred to in the third variant of the definition of a public works contract, the contracting authority must obtain a direct economic benefit. See also footnote 35 below.

---

8 – However, it is not entirely clear which body awarded the concession. The Commission itself, although inclined to accept the referring court's position on this point, was obliged to recognise at the hearing that both the Bundesanstalt and the municipality of Wildeshausen exhibited some of the typical characteristics associated with that role but that it was impossible to recognise either as bearing the main responsibility in this connection.

---

9 – On the basis of the order for reference, there is no doubt that the specified thresholds for the application of the Directive are amply exceeded in the present case. In fact, since the value of the land does not in itself exceed the thresholds, clearly the national court's arguments are to some extent hypothetical. On the other hand, in the light of the settled case-law, according to which it is for the national court to determine whether the questions are relevant for the purpose of ruling on the dispute, I consider that in the present case the Court should reply to the questions referred by the Oberlandesgericht Düsseldorf. See in this connection, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraph 22; Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22; and Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785, paragraph 23.

10 – Case C-29/04 [2005] ECR I-9705.

11 – Not in all, however: for example, there is no equivalent for the second variant in the Portuguese version.

12 – German: ‘von Bauvorhaben’; French: ‘de travaux’; Spanish: ‘de obras’; Dutch: ‘van werken’; Portuguese: ‘de trabalhos’; Greek: ‘εργασιων’; Italian: ‘di lavori’.

13 – German: ‘eines Bauwerks’; French: ‘d’un ouvrage’; Spanish: ‘de una obra’; Dutch: ‘van een werk’; Greek: ‘ενός έργου’; Italian: ‘di un’opera’.

14 – German: ‘einer Bauleistung’; French: ‘d’un ouvrage’; Spanish: ‘de una obra’; Dutch: ‘van een werk’; Portuguese: ‘de uma obra’; Greek: ‘ενός έργου’; Italian: ‘di un’opera’.

15 – German: ‘Bauwerk’; French: ‘ouvrage’; Spanish: ‘obra’; Dutch: ‘werk’; Portuguese: ‘obra’; Greek: ‘έργο’; Italian: ‘opera’.

16 – I note however that, as the Austrian Government in particular pointed out at the hearing, the additional detail contained in the German text, although divergent, in fact simply makes it ‘more specific’ than the other language versions. In view of the structure of the provision in question, it is hardly possible, even with reference to the other language versions, to identify a case falling within the third variant in which the works are not carried out by a ‘third party’. In any event, it should be noted that it is settled case-law that the wording used in one language version of a Community provision cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions in that regard. See in this connection, inter alia, Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraph 18, and Case C-455/05 *Velvet & Steel Immobilien* [2007] ECR I-3225, paragraph 19.

17 – That specific feature of the German version is based on Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of the procedures for the award of public works contracts (OJ 1989 L 210, p. 1). Directive 89/440 introduced the current ‘threefold’ definition of public works contracts into the Community legal order for the first time.

18 – See *Auroux and Others*, cited in footnote 6 above, paragraph 40.

19 – See Article 16 of the Directive.

20 – For example, in addition to paying a sum in cash, the public authority may exempt a person from payment of certain taxes (see *Ordine degli Architetti and Others*, cited in footnote 4 above, paragraphs 76 to 86).

21 – Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraph 32. See also Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraph 18, and Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 26.

22 – See, in particular, recital 2 in the preamble to Directive 2004/18 and, earlier, the 2nd and 10th recitals in the preamble to Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), now repealed. See also, on this point, *Ordine*

degli Architetti and Others, cited in footnote 4 above, paragraph 52, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 51 and the case-law cited therein.

---

23 – See, for example, *Universale-Bau and Others*, cited in footnote 22 above, paragraph 53; Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173, paragraph 37; and Case C-393/06 *Ing. Aigner* [2008] ECR I-2339, paragraph 37.

---

24 – *Universale-Bau and Others*, cited in footnote 22 above.

---

25 – *Bayerischer Rundfunk and Others*, cited in footnote 23 above. See also, in connection with a similar situation, Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-0000, paragraph 57.

---

26 – See, for example, Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 23; and Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 41.

---

27 – Cited in footnote 6 above.

---

28 – *Ibidem*, paragraph 47.

---

29 – See point 35 et seq. above.

---

30 – Cited in footnote 6 above, paragraph 42.

---

31 – See point 20 above.

---

32 – To be precise, in the formulation of the question, the referring court actually speaks of ownership of *the land* on which the works are to be carried out. However, as the court observes in the grounds for the reference, under German law, the right to use a building is a direct consequence of the right of ownership with respect to the land on which the building is erected. Thus, the real problem underlying this question is precisely the problem of the relationship between a concession and the right of ownership.

---

33 – On this *ratio legis*, see the Commission interpretative communication on concessions under Community law (OJ 2000 C 121, p. 2, paragraph 1.2) and the more recent communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on public-private partnerships and Community law on public procurement and concessions of 15 November 2005 (COM(2005) 569 final, paragraph 1).

---

34 – See Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 40, and the judgment of 13 November 2008 in Case C-437/07 *Commission* v *Italy*, paragraphs 29 to 31. The risk need not necessarily be very great, as there are activities in which the risk is intrinsically limited: but it must represent all or at least a significant share of the risk to which the public authority would be exposed if it were to carry out the activities directly (Case C-206/08 *Eurawasser* [2009] ECR I-0000, paragraphs 69 to 77).

---

35 – In my view, the new German law cited in footnote 7 above, which introduced inter alia a definition of public works concessions explicitly stating that the rights conferred on the concessionaire are of limited duration, is therefore correct and consistent with Community law.

36 – Cited in footnote 10 above.

37 – *Ibidem*, paragraph 40.

38 – *Ibidem*, paragraph 41.

39 – *Ibidem*, paragraph 42.

EU:C:2010:45

JUDGMENT OF THE COURT (Third Chamber)

28 January 2010 (*)

(Directive 89/665/EEC – Procedures for review of the award of public contracts – Period within which proceedings must be brought – Date from which the period for bringing proceedings starts to run)

In Case C-406/08,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice (England and Wales), Queen's Bench Division (United Kingdom), made by decision of 30 July 2008, received at the Court on 18 September 2008, in the proceedings

Uniplex (UK) Ltd

v

NHS Business Services Authority,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Second Chamber, acting for the President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: J. Kokott,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 24 September 2009,

after considering the observations submitted on behalf of:

– Uniplex (UK) Ltd, by M. Sheridan, Barrister, and A. Stanic, Solicitor,

– NHS Business Services Authority, by R. Williams, Barrister,

– the United Kingdom Government, by I. Rao, acting as Agent, and K. Smith, Barrister,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– Ireland, by D. O'Hagan, acting as Agent, and A. Collins SC,

– the Commission of the European Communities, by E. White and M. Konstantinidis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Council Directive 92/50/EEC of 18 June 1992 (OJ 1992 L 209, p. 1)

('Directive 89/665'), with regard to the date from which the period for bringing proceedings starts to run in public procurement cases.

2 The reference has been made in the context of a dispute between Uniplex (UK) Ltd ('Uniplex') and NHS Business Services Authority ('NHS') concerning the conclusion of a framework agreement.

Legal context

Community legislation

3 Article 1(1) of Directive 89/665 provides:

'The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of [Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682)], [Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1)], and [Directive] 92/50/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7), on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.'

4 Under Article 2(1) of Directive 89/665:

'The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

5 Article 41(1) and (2) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) provides:

'1. Contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system; that information shall be given in writing upon request to the contracting authorities.

2. On request from the party concerned, the contracting authority shall as quickly as possible inform:

– any unsuccessful candidate of the reasons for the rejection of his application,

– any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 23, paragraphs 4 and 5, the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,

– any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken may in no circumstances exceed 15 days from receipt of the written request.'

National legislation

6 Regulation 47(7)(b) of the Public Contracts Regulations 2006 ('the 2006 Regulations'), adopted in order to implement Directive 89/665 into domestic law, provides:

'Proceedings under this regulation must not be brought unless –

…

(b) those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 Uniplex, a company established in the United Kingdom, is the sole distributor in that Member State of haemostats manufactured by Gelita Medical BV, a company established in the Netherlands.

8 NHS is part of the National Health Service, the State-owned and -operated public health service in the United Kingdom. It is a contracting authority for the purposes of Directive 2004/18.

9 On 26 March 2007 NHS launched a restricted tendering procedure for the conclusion of a framework agreement for the supply of haemostats. A notice to that effect was published in the *Official Journal of the European Union* on 28 March 2007.

10 On 13 June 2007, NHS issued an invitation to tender to five suppliers, including Uniplex, which had expressed interest in that framework agreement. Tenders were to be submitted by 19 July 2007.

11 The award criteria, with the relevant weighting to be given to each, set out in the tendering documentation sent to the tenderers, were as follows: price and other cost effectiveness factors (30%); quality and clinical acceptability (30%); product support and training (20%); delivery performance and capability (10%); product range/development (5%); and environmental/sustainability (5%).

12 Uniplex submitted its tender on 18 July 2007.

13 On 22 November 2007, NHS sent to Uniplex a letter indicating that it had decided to conclude a framework agreement with three tenderers. Uniplex was notified that it would not be awarded a framework agreement, as it had obtained the lowest marks of the five tenderers which had been invited to submit, and which had submitted, bids. That letter set out the award criteria, with the corresponding weighting, and indicated the names of the successful tenderers, the range of the successful scores and Uniplex's evaluated score.

14 According to that letter, the range of the successful scores was between 905.5 and 971.5, whereas Uniplex had obtained a score of 568.

15 The letter of 22 November 2007 also informed Uniplex of its right to challenge the decision to conclude the framework agreement in question, of the mandatory 10-day standstill period that would apply from the date of notification of that decision to conclusion of the framework agreement, and of Uniplex's entitlement to seek an additional debriefing.

16 Uniplex requested a debriefing by e-mail dated 23 November 2007.

17 NHS replied on 13 December 2007 by providing details of its approach to the evaluation of the award criteria as to characteristics and relative advantages of the successful tenders in relation to Uniplex's tender.

18 That letter stated, inter alia, first, that Uniplex had been given a score of zero for price and other cost effectiveness factors because it had submitted its list prices. All the other tenderers had offered discounts on their list prices. Secondly, with respect to the delivery performance and capability criterion, all tenderers which were new to the haemostats market in the United Kingdom received a score of zero for the sub-criterion relating to customer base in the United Kingdom.

19 On 28 January 2008, Uniplex sent NHS a letter before action alleging a number of breaches of the 2006 Regulations. Uniplex claimed in that letter that time did not start to run for the bringing of proceedings until 13 December 2007. Uniplex requested a reply from NHS by 13 February 2008, but added that if NHS took the view that time did not run from that date, it should reply by 6 February 2008.

20 By letter dated 11 February 2008, NHS notified Uniplex that there had been a change of circumstances. It had been discovered that the bid of Assut (UK) Ltd was non-compliant and that B. Braun UK Ltd, which had been placed fourth under the evaluation of tenders, had been awarded a position on the framework agreement in place of Assut (UK) Ltd.

21 NHS responded to Uniplex's letter before action by letter dated 13 February 2008, denying the various allegations made by Uniplex. In that letter, NHS also asserted, as a preliminary point, that the events giving rise to Uniplex's complaints had occurred no later than 22 November 2007, which was the date on which the decision not to include Uniplex in the framework agreement had been communicated to it. NHS asserted that 22 November 2007 was the latest date from which time began to run for the purposes of Regulation 47(7)(b) of the 2006 Regulations.

22 Uniplex responded by letter on 26 February 2008. In that letter, it continued to maintain that the period for bringing proceedings under the 2006 Regulations did not begin to run until 13 December 2007.

23 On 12 March 2008, Uniplex brought proceedings before the High Court of Justice (England and Wales), Queen's Bench Division, inter alia seeking, first, a declaration that NHS had breached the applicable public procurement rules and, second, damages.

24 The High Court of Justice (England and Wales), Queen's Bench Division, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'Where an economic operator is challenging in national proceedings the award of a framework agreement by a contracting authority following a public procurement exercise in which he was a tenderer and which was required to be conducted in accordance with Directive 2004/18/EC (and applicable implementing national provisions), and is in those proceedings seeking declarations and damages for breach of applicable public procurement provisions as regards that exercise and award:

(a) is a national provision such as Regulation 47(7)(b) of the Public Contracts Regulations 2006 which states that those proceedings are to be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period, to be interpreted, in light of Directive 89/665/EEC, Articles 1 and 2, and the Community-law principle of equivalence and the Community-law requirement for effective legal protection, and/or the principle of effectiveness, and having regard to any other relevant principles of EC law, as conferring an individual and unconditional right upon the tenderer against the contracting authority such that the time for the bringing of proceedings challenging such a tender exercise and award starts running as from the date when the tenderer knew or ought to have known that the procurement procedure and award infringed EC public procurement law or as from the date of breach of the applicable public procurement provisions; and

(b) in either event how is a national court then to apply (i) any requirement for proceedings to be brought promptly and (ii) any discretion as to extending the national limitation period for the

bringing of such proceedings?’

The questions referred

The first question

25 By its first question, the national court asks, in essence, whether Article 1 of Directive 89/665 requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules starts to run from the date of the infringement of those rules or from the date on which the claimant knew, or ought to have known, of that infringement.

26 The objective of Directive 89/665 is to guarantee the existence of effective remedies for infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the directives on the coordination of public procurement procedures. However, Directive 89/665 contains no provision specifically covering time-limits for the applications for review which it seeks to establish. It is therefore for the internal legal order of each Member State to establish such time-limits (Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 71).

27 The detailed procedural rules governing the remedies intended to protect rights conferred by Community law on candidates and tenderers harmed by decisions of contracting authorities must not compromise the effectiveness of Directive 89/665 (*Universale-Bau and Others*, paragraph 72).

28 It is for that reason appropriate to determine whether, in the light of the purpose of Directive 89/665, national legislation such as that at issue in the main proceedings does not adversely affect rights conferred on individuals by Community law (*Universale-Bau and Others*, paragraph 73).

29 In that regard, it should be recalled that Article 1(1) of Directive 89/665 requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible (*Universale-Bau and Others*, paragraph 74).

30 However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.

31 It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings.

32 It follows that the objective laid down in Article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (see, to that effect, *Universale-Bau and Others*, paragraph 78).

33 This conclusion is supported by the fact that Article 41(1) and (2) of Directive 2004/18, which was in force at the time of the facts in the main proceedings, requires contracting authorities to notify unsuccessful candidates and tenderers of the reasons for the decision concerning them. Such provisions are consistent with a system of limitation periods under which those periods start to run from the date on which the claimant knew, or ought to have known, of the alleged infringement of the provisions applicable in the field of public procurement.

34 The same conclusion is also supported by the amendments made to Directive 89/665 by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review

procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), even though the period for transposition of that directive did not expire until after the facts in the main proceedings had occurred. Article 2c of Directive 89/665, introduced by Directive 2007/66, provides that the decision of the contracting authority is to be communicated to each candidate or tenderer, accompanied by a summary of the relevant reasons, and that the period for making an application for review expires only after a specified number of days following that communication.

35 The answer to the first question accordingly is that Article 1(1) of Directive 89/665 requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

The second question

36 The second question consists of two parts. The first concerns the interpretation of Directive 89/665 in relation to a requirement under national law that proceedings be brought promptly. The second relates to the effects which that directive has on the discretion conferred on the national court to extend periods within which proceedings must be brought.

The first part of the second question

37 By the first part of the second question, the national court asks, in essence, whether Directive 89/665 is to be interpreted as precluding a provision, such as Regulation 47(7)(b) of the 2006 Regulations, which requires that proceedings be brought promptly.

38 As observed in paragraph 29 of this judgment, Article 1(1) of Directive 89/665 requires Member States to guarantee that decisions of contracting authorities can be subjected to effective review which is as swift as possible. In order to attain the objective of rapidity pursued by that directive, Member States may impose limitation periods for actions in order to require traders to challenge promptly preliminary measures or interim decisions taken in public procurement procedures (see, to that effect, *Universale-Bau and Others*, paragraphs 75 to 79; Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraphs 30 and 36 to 39; and Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, paragraphs 50 and 51).

39 The objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations (see, to that effect, Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 24, and Case C-221/94 *Commission* v *Luxembourg* [1996] ECR I-5669, paragraph 22).

40 Furthermore, the objective of rapidity pursued by Directive 89/665 does not permit Member States to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of effective review proceedings laid down in Article 1(1) of that directive.

41 A national provision such as Regulation 47(7)(b) of the 2006 Regulations, under which proceedings must not be brought ‘unless … those proceedings are brought promptly and in any event within three months’, gives rise to uncertainty. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made ‘promptly’ within the terms of that provision.

42 As the Advocate General observed in point 69 of her Opinion, a limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of Directive 89/665.

43 It follows that the answer to the first part of the second question is that Article 1(1) of Directive 89/665 precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.

The second part of the second question

44 By the second part of the second question, the national court asks, in essence, which effects follow from Directive 89/665 in respect of the discretion conferred on the national court to extend periods within which proceedings must be brought.

45 In the case of national provisions transposing a directive, national courts are bound to interpret national law, so far as possible, in the light of the wording and purpose of the directive concerned in order to achieve the result sought by that directive (see Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26, and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113).

46 In the present case, it is for the national court, as far as is at all possible, to interpret the domestic provisions establishing the limitation period in a manner which accords with the objective of Directive 89/665 (see, to that effect, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 63, and *Lämmerzahl*, paragraph 62).

47 In order to satisfy the requirements in the answer given to the first question, the national court dealing with the case must, as far as is at all possible, interpret the national provisions governing the limitation period in such a way as to ensure that that period begins to run only from the date on which the claimant knew, or ought to have known, of the infringement of the rules applicable to the public procurement procedure in question.

48 If the national provisions at issue do not lend themselves to such an interpretation, that court is bound, in exercise of the discretion conferred on it, to extend the period for bringing proceedings in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules.

49 In any event, if the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying those provisions, in order to apply Community law fully and to protect the rights conferred thereby on individuals (see, to that effect, *Santex*, paragraph 64, and *Lämmerzahl*, paragraph 63).

50 The answer to the second part of the second question is accordingly that Directive 89/665 requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.**

2. **Article 1(1) of Directive 89/665, as amended by Directive 92/50, precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.**

3. **Directive 89/665, as amended by Directive 92/50, requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, as amended by Directive 92/50, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals.**

[Signatures]

---

* Language of the case: English.

EU:C:2009:676

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 29 October 2009 [1](1)

Case C-406/08

Uniplex (UK) Ltd
v
NHS Business Services Authority

(Reference for a preliminary ruling from the High Court of Justice of England and Wales, Queen's Bench Division, Leeds District Registry (United Kingdom))

(Public procurement – Directive 89/665/EEC – Review procedure under national law – Effective legal protection – Limitation periods – Point at which time starts running – Whether the applicant knew or 'ought to have' known of the breach of procurement law – Requirement that proceedings be brought 'promptly')

I – Introduction

1. This reference for a preliminary ruling from the High Court of Justice of England and Wales (2) gives the Court of Justice of the European Communities an opportunity to develop its case-law on the remedies available to unsuccessful tenderers in public procurement procedures.

2. It is acknowledged that the Member States may lay down appropriate limitation periods for remedies of this kind. Clarification is required, however, in particular on the question of the time from which those limitation periods may start to run: the time at which the alleged breach of procurement law occurred, or the time at which the unsuccessful tenderer knew or should have known of the breach. This problem, whose practical effects should not be underestimated, arises in the context of a provision of English law under which the period for bringing applications for review starts to run regardless of the unsuccessful tenderer's knowledge of the breach of procurement law, and any extension of the period is at the discretion of the national court.

3. As regards the legal issues raised, the present case has certain points of contact with Case C-456/08 *Commission* v *Ireland*, in which I also deliver my Opinion today.

II – Legal context

A – *Community law*

4. The Community law context of the present case is defined by Directive 89/665/EEC, (3) as amended by Directive 92/50/EEC. (4) (5)

5. Article 1 of Directive 89/665 provides as follows:

‘1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC, 77/62/EEC, and 92/50/EEC … decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.’ (6)

6. In addition, Article 2(1) of Directive 89/665 contains the following provision:

‘The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

…

(b) either set aside or ensure the setting-aside of decisions taken unlawfully …

(c) award damages to persons harmed by an infringement.’

B – *National law*

7. For England, Wales and Northern Ireland, Directive 89/665 was transposed by Part 9 of the Public Contracts Regulations 2006 (‘the PCR 2006’), (7) Regulation 47 of which provides, in extract, as follows:

‘(1) The obligation on –

(a) a contracting authority to comply with the provisions of these Regulations, other than regulations …, and with any enforceable Community obligation in respect of a public contract, framework agreement or design contest …

…

is a duty owed to an economic operator.

…

(6) A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings shall be brought in the High Court.

(7) Proceedings under this regulation must not be brought unless –

(a) the economic operator bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2) by that contracting authority or concessionaire and of its intention to bring proceedings under this regulation in respect of it; and

(b) those proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that

there is good reason for extending the period within which proceedings may be brought.

…

(9) In proceedings under this regulation the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty owed in accordance with paragraph (1) or (2) if the contract in relation to which the breach occurred has been entered into.'

III – Facts and main proceedings

8. Uniplex (UK) Ltd (8) is a company established in the United Kingdom and an economic operator for the purposes of Directive 2004/18 and the PCR 2006. It is the sole distributor in the United Kingdom of haemostats manufactured by the Netherlands company Gelita Medical BV.

9. NHS Business Services Authority (9) is part of the public health service of the United Kingdom, the National Health Service, which is owned and operated by the State. It is a contracting authority for the purposes of Directive 2004/18 and the PCR 2006.

10. On 26 March 2007 NHS Business Services invited tenders, in a restricted procedure, for a framework agreement for the supply of haemostats to National Health Service institutions. (10) A notice to that effect was published in the *Official Journal of the European Union* on 28 March 2007.

11. By letter of 13 June 2007, NHS Business Services addressed an invitation to tender to five interested parties, including Uniplex. The deadline for the submission of tenders was 19 July 2007. Uniplex submitted its tender on 18 July 2007.

12. On 22 November 2007 Uniplex was informed by NHS Business Services in writing that awards had finally been made to three tenderers, but that Uniplex would not be awarded a framework agreement. The letter also set out the award criteria, the names of the successful tenderers, the evaluated score of Uniplex, and the range of the evaluated scores achieved by the successful tenderers. According to the criteria applied by NHS Business Services, Uniplex had achieved the lowest evaluated score of the five tenderers which had been invited to submit and had submitted bids. In the letter Uniplex was also informed of its right to challenge the award decision and to seek further information.

13. In reply to a separate request by Uniplex of 23 November 2007, NHS Business Services on 13 December 2007 gave details of its method of evaluation with reference to its award criteria, and also of the characteristics and relative advantages of the bids of the successful tenderers compared with the Uniplex tender.

14. On 28 January 2008 Uniplex sent NHS Business Services a letter before action alleging various breaches of the public procurement rules.

15. By letter of 11 February 2008, NHS Business Services informed Uniplex that the situation had changed. It had been found that the tender by Assut (UK) Ltd did not comply with the requirements, and B. Braun (UK) Ltd, which had been placed fourth in the evaluation of the tenders, had been included in the framework agreement instead of Assut (UK) Ltd.

16. After a further exchange of correspondence between Uniplex and NHS Business Services, in which inter alia the starting point of the period for bringing proceedings was disputed, Uniplex on 12 March 2008 commenced proceedings in the High Court, the court making the present reference. It seeks inter alia a declaration of the alleged breaches of procurement law, damages from NHS Business Services in respect of those breaches, and – if the court has jurisdiction to make such an order – an order that NHS Business Services award Uniplex a framework agreement.

17. The referring court is uncertain whether Uniplex brought its action in time and, if not, whether it should exercise its discretion to extend the period for bringing proceedings under Regulation 47(7)(b) of the PCR 2006.

IV – Order for reference and procedure before the Court

18. By order of 30 July 2008, received at the Court on 18 September 2008, the High Court stayed the proceedings before it and referred the following questions to the Court for a preliminary ruling:

Where an economic operator is challenging in national proceedings the award of a framework agreement by a contracting authority following a public procurement exercise in which he was a tenderer and which was required to be conducted in accordance with Directive 2004/18 (and applicable implementing national provisions), and is in those proceedings seeking declarations and damages for breach of applicable public procurement provisions as regards that exercise and award:

(a) is a national provision such as Regulation 47(7)(b) of the PCR 2006 which states that those proceedings are to be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose, unless the court considers that there is good reason for extending the period, to be interpreted, in light of Articles 1 and 2 of Directive 89/665 and the Community law principle of equivalence and the Community law requirement for effective legal protection, and/or the principle of effectiveness, and having regard to any other relevant principles of EC law, as conferring an individual and unconditional right upon the tenderer against the contracting authority such that the time for the bringing of proceedings challenging such a tender exercise and award starts running as from the date when the tenderer knew or ought to have known that the procurement procedure and award infringed EC public procurement law or as from the date of breach of the applicable public procurement provisions; and

(b) in either event how is a national court then to apply

(i) any requirement for proceedings to be brought promptly and

(ii) any discretion as to extending the national limitation period for the bringing of such proceedings?

19. In the procedure before the Court, in addition to Uniplex and NHS Business Services, the United Kingdom Government, Ireland and the Commission of the European Communities made written and oral observations. (11) The German Government also took part in the hearing.

V – Assessment

20. By its two questions, the High Court seeks essentially to know what requirements derive from Community law for the interpretation and application of limitation periods in the public procurement review procedure.

21. Directive 89/665 makes no express provision on the time-limits that apply to review procedures under Article 1 of the directive. (12) However, the Court has consistently held that the Member States may in the exercise of their procedural autonomy introduce reasonable limitation periods for bringing proceedings, provided that they comply with the principles of equivalence and effectiveness. (13) Those two principles are also reflected in Article 1 of Directive 89/665, the principle of equivalence in Article 1(2) and the principle of effectiveness in Article 1(1). (14)

22. In the present case it is the principle of effectiveness that is the focus of interest. *That* the United Kingdom can lay down limitation periods for applications for the review of decisions of contracting authorities is not in dispute. (15) The dispute between the parties concerns merely certain details of the interpretation and application of the national rules on limitation. They disagree on whether a limitation provision such as that in Regulation 47(7)(b) of the PCR 2006 has due regard to the requirements of Community law. In this connection the referring court wishes to know

– whether it may take as the point when time starts running the date of the breach of procurement law, or must take the date when the applicant knew or ought to have known of the breach (first question),

– whether in a review procedure it may dismiss an action as inadmissible if it has not been brought ‘promptly’ (first part of the second question), and

– how it should exercise its discretion with respect to a possible extension of time (second part of the second question).

23. It depends on the answers to those questions whether or not the referring court must regard the application brought by Uniplex in the main proceedings as brought in time within the meaning of Regulation 47(7)(b) of the PCR 2006.

24. I shall start by addressing the first question (see Section A below) and the second part of the second question (see Section B below), which are closely connected, before turning to the first part of the second question (see Section C below).

25. Contrary to the oral submissions of NHS Business Services, the United Kingdom and Ireland, it cannot be decisive for the answer to those questions that a provision such as Regulation 47(7)(b) of the PCR 2006 may reflect a long tradition in the Member State concerned.

26. Certainly, when requirements of Community law are being interpreted, attention should indeed always be paid to whether they can be fitted into national law with as little friction as possible. For all that, the Court's primary function is to ensure that in the interpretation and application of European Community law the law is observed (first paragraph of Article 220 EC) and – working together with the national courts – to give effect to the rights that individuals derive from Community law.

A – *Relevance of knowledge of the breach of procurement law for determining when time starts running (first question)*

27. By its first question, the referring court seeks essentially to know whether it may take as the point when the limitation period starts running in review procedures under procurement law the date of the breach of procurement law, or must take the date when the applicant knew or ought to have known of the breach.

28. The opinions of the parties differ on this point. Uniplex, the German Government and the Commission take the view that, at least with reference to legal remedies that do not affect the validity of contracts, no limitation period may start before the applicant knew or ought to have known of the alleged breach of procurement law. By contrast, NHS Business Services, the United Kingdom Government and Ireland insist that the running of time cannot depend on whether the applicant knew or ought to have known of a breach of procurement law; it suffices to give the national courts a discretion to extend the limitation period.

29. The latter view is reflected in the practice of both the English courts (16) and the Irish courts. (17) According to that case-law, the period for review of a procurement decision starts to run, in accordance with Regulation 47(7)(b) of the PCR 2006, (18) regardless of whether the tenderer or candidate concerned knew or ought to have known of the breach of procurement law complained of. The applicant's lack of knowledge of the breach of procurement law may at most be relevant to extending the period, and in that respect is one of a number of aspects which the national court takes into account when exercising its discretion. (19)

30. Against the background of this dominant practice of the English courts, (20) it will be discussed below whether it is compatible with the requirements of Community law for a limitation period such as that in Regulation 47(7)(b) of the PCR 2006 to start running regardless of whether the applicant knew or ought to have known of the breach of procurement law in question.

31. Article 1(1) of Directive 89/665 requires it to be possible for decisions taken by contracting authorities to be reviewed for infringements of procurement law 'effectively and, in particular, as rapidly as possible'. That is an expression both of the principle of effectiveness ('effectively') and of the requirement of rapid action ('as rapidly as possible'). Neither of those concerns may be put into practice at the expense of the other. (21) A fair balance between them must instead be struck, and this is to be assessed in the light of the type and consequences of the particular legal remedy and the rights and interests of all parties concerned.

32. In my Opinion in *pressetext Nachrichtenagentur* I have previously suggested a solution based on a differentiation between primary and secondary legal protection. (22)

– The difference between primary and secondary legal protection

33. If a remedy is aimed at having a contract already concluded with a successful tenderer declared void (*primary legal protection*), it is reasonable to lay down an absolute limitation period of comparatively short duration. The particularly severe legal consequence of the invalidity of an already concluded contract is justification for laying down a period that also runs regardless of whether the applicant knew, or at least ought to have known, that the award of the contract was contrary to procurement law. Both for the contracting authority and for its contractual partner, there is a clear need, deserving of protection, for legal certainty with respect to the validity of the contract that has been concluded. (23) The requirement of review 'as rapidly as possible' within the meaning of Article 1(1) of Directive 89/665 therefore carries particular weight in the field of primary legal protection.

34. It is otherwise if a remedy is directed merely at a declaration of an infringement of procurement law and possibly an award of compensation (*secondary legal protection*). Such a remedy does not affect the existence of a contract already concluded with a successful tenderer. The contractual partners' need for certainty of planning and their interest in performing the public contract swiftly are not affected. Accordingly, there is no occasion to subject applications for secondary legal protection to the same strict limitation periods as applications for primary legal protection. On the contrary, the aim of effective review which Article 1(1) of Directive 89/665 imposes on the Member States argues in favour of giving more weight to the legal protection interests of the unsuccessful tenderer or candidate, and hence in favour of more generous limitation periods which do not start running until the person concerned knows or ought to know of the alleged breach of procurement law. (24)

35. Contrary to the view taken by NHS Business Services and the United Kingdom Government, such a differentiation between primary and secondary legal protection does not lead to 'lack of transparency' and 'legal uncertainty'. Nor is it suitable only for cases such as *pressetext Nachrichtenagentur* in which a contracting authority makes a 'direct award' with no prior notice of the award.

36. The distinction between primary and secondary legal protection is, rather, of general validity. It makes it possible to strike a fair balance between 'effective review' and 'review as rapidly as possible', and is sketched out in Directive 89/665 itself. Even in the original version of the directive, a distinction is drawn in Article 2(1)(b) and (c) between the setting-aside of unlawful decisions on the one hand and the awarding of compensation on the other. In future, Articles 2d, 2e and 2f of Directive 89/665, as amended by Directive 2007/66, will show more plainly this distinction between primary and secondary legal protection, also and particularly with respect to limitation periods. (25)

37. The present case concerns not primary but only secondary legal protection. That becomes especially clear if one looks at the introductory words to the questions formulated by the High Court. That passage speaks exclusively of applications for a declaration of a breach of procurement law and for the award of compensation. That is the context of the questions referred. (26)

38. There is therefore no reason to subject the applications brought by Uniplex in the main proceedings to the same strict limitation periods that might perhaps apply to applications for a declaration of the invalidity of a contract or indeed for a contracting authority to be ordered to enter into a contract.

– Time running from when the applicant knew or 'ought to have' known of the breach of procurement law

39. The principle of effectiveness, as expressed in Article 1(1) of Directive 89/665, requires that a limitation period for claims for compensation and applications for declarations of breaches of procurement law may not start to run until the time when the applicant knew or ought to have known of the alleged breach of procurement law. (27)

40. The Court has also expressed this in *Universale-Bau and Others*: (28) it considers that the spirit and purpose of rules on limitation are to ensure that unlawful decisions of contracting authorities, *from the moment they become known to those concerned*, (29) are challenged and corrected as soon as possible. (30)

41. It is of course for the referring court to ascertain the time from which the person concerned knew or ought to have known of a breach of procurement law. (31) In order to give a useful answer, however, the Court may, in a spirit of cooperation with national courts, provide all the guidance that it regards as necessary. (32)

42. The mere fact that a tenderer or candidate has learnt that his tender has been unsuccessful does not yet mean that he knows of any breach of procurement law. Consequently, that fact on its own cannot yet set any limitation periods running for applications for secondary legal protection. As Uniplex correctly submits, an unsuccessful tenderer or candidate for his part could also not rely, in an application for review, on the mere statement that his tender had not been accepted.

43. Only once the unsuccessful tenderer or candidate has been informed of the essential reasons for his being unsuccessful in the award procedure may it generally be presumed that he knew or in any case ought to have known of the alleged breach of procurement law. (33) Only from then on is it possible for him sensibly to prepare a possible application for review and to estimate its chances of success. (34) Before receiving such reasons, on the other hand, the person concerned cannot as a rule effectively exercise his right to a review. (35)

44. Directive 2004/18 accordingly lays down already today, in Article 41(1) and (2), that contracting authorities must inform unsuccessful tenderers and candidates of the reasons for their rejection. To the same effect, Article 2c of Directive 89/665, inserted by Directive 2007/66, provides for future cases that the communication of the contracting authority's decision to each tenderer or candidate must be accompanied by a summary of the relevant reasons, and that any limitation periods for applications for review may not expire until a certain number of calendar days after that communication.

45. Merely for the sake of completeness, it may be mentioned that the time when the period starts running for bringing a claim for compensation must not be made to depend on the fact that the applicant knew or ought to have known of the *damage* incurred by him. (36) The damage that follows from a breach of duty sometimes comes to light only after some delay. Waiting for knowledge of the damage would thus run counter to the principle of review 'as rapidly as possible' within the meaning of Article 1(1) of Directive 89/665. In return, however, it must be made possible for the tenderer or candidate concerned, if necessary, first to make an application for a declaration of a breach of procurement law and then to quantify the damage and claim compensation in subsequent proceedings.

– The national court's discretion to grant an extension of the limitation period

46. NHS Business Services, the United Kingdom and Ireland object that effective legal protection does not necessarily require, however, that the limitation periods for seeking remedies in review proceedings run only from the time when the tenderer or candidate concerned knew or ought to have known of the alleged infringement of procurement law. They submit that a provision such as Regulation 47(7)(b) of the PCR 2006 ensures effective legal protection by giving the national court a discretion to extend, if appropriate, the period for bringing proceedings.

47. That argument does not convince me.

48. Article 1(1) in conjunction with Article 1(3) of Directive 89/665 gives any person who has or had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement an *individual right* to review of the decisions of the contracting authority. (37) As I explain in the parallel case of *Commission* v *Ireland*, the effective assertion of such a claim cannot be made to depend on the discretion of a national body, not even the discretion of an independent court. (38)

49. Regulation 47(7)(b) of the PCR 2006 does not give the national court any legal criteria for the exercise of its discretion as regards a possible extension of time. At the hearing before the Court, all the

parties moreover agreed in submitting that the applicant's lack of knowledge of a breach of procurement law is only one of several aspects which influence the national court's assessment. Thus lack of knowledge *may* lead to an extension of the period, but this is not mandatory. Furthermore, the national court may, as Ireland observes, limit an extension of time to specific complaints and refuse it for others, so that an action by the unsuccessful tenderer or candidate may well be only partially admissible.

50. It thus becomes unpredictable for the person concerned in the individual case whether it will be worth his while to claim a legal remedy. Such a legal position may deter unsuccessful tenderers or candidates – especially those from other Member States – from asserting their legal right to review of the decisions of contracting authorities. The objective of effective review, as prescribed by Article 1(1) of Directive 89/665, cannot be achieved with certainty in those circumstances.

– Practical problems in determining whether an applicant 'knows' or 'ought to know'

51. NHS Business Services and the United Kingdom further assert that it will lead to considerable practical problems if a limitation period does not start running until the date on which the unsuccessful tenderer or candidate knew or ought to have known of the alleged breach of procurement law. It is not easy, for example, to assess what the knowledge must relate to in the particular case or at what time it was acquired or from when it must be presumed.

52. It suffices to point out here that the same practical problems also arise if a court, when exercising its discretion as to a possible extension of time, has to consider the time from which the applicant knew or ought to have known of the breach of procurement law he complains of. A provision such as Regulation 47(7)(b) of the PCR 2006 cannot avoid such practical problems; it merely treats them from a different point of view.

– The deterrent effect of actions for compensation

53. Ireland also objects that an overgenerous approach to time-limits for bringing actions for compensation may have a highly deterrent effect on contracting authorities (a 'chilling effect') and cause considerable delay to award procedures. This submission was adopted at the hearing by NHS Business Services and the United Kingdom.

54. This argument is also unconvincing, however.

55. Successful actions for compensation by unsuccessful tenderers or candidates may undoubtedly entail a substantial financial burden for the contracting authority. This risk is, however, the price to be paid by a contracting authority so that effective legal protection in connection with the award of public contracts can be provided. Any attempt to minimise the attendant financial risks for the contracting authority will necessarily be at the expense of effective legal protection.

56. A too restrictive approach to the conditions for obtaining secondary legal protection would ultimately also jeopardise the achievement of the objectives of the review procedure. Those objectives do not only include the provision of legal protection for the tenderers and candidates concerned. The review procedure is in fact also intended to have a disciplinary effect on contracting authorities, by ensuring that the rules of European procurement law – in particular the requirement of transparency and the prohibition of discrimination – are observed and any infringements penalised.

57. Merely in passing, it may be observed that not even a limitation rule such as Regulation 47(7)(b) of the PCR 2006 is capable of excluding the chilling effect mentioned. As already noted, that provision leaves it in the discretion of the national court to extend the limitation periods for unsuccessful tenderers or candidates, especially where they had no previous knowledge of the alleged infringement of procurement law. This possibility of an extension of time may thus lead to the contracting authority, long after the contract has been concluded with the successful tenderer or candidate, still being exposed to the risk of claims for compensation. Because of the unpredictability of the exercise of judicial discretion, this risk is if anything more difficult for the contracting authority to calculate in the context of Regulation 47(7)(b) of the PCR 2006 than with a rule under which the limitation period starts to run as soon as the person concerned knows or ought to know of the alleged breach of procurement law.

B – *The national court's discretion to grant an extension of time (second part of the second question)*

58. The second part of the second question is closely connected with the first question. The referring court essentially wishes to know what steps it should take if an unsuccessful tenderer or candidate did not initially know of the alleged breach of procurement law, and was not in a position in which he ought to have known of it, so that he could not make an application for review within the three-month period under Regulation 47(7)(b) of the PCR 2006.

59. According to settled case-law, the courts of the Member States are required to interpret and apply national law consistently with directives. (39) Specifically with respect to procurement review procedures, they must interpret the national provisions laying down a limitation period, as far as is at all possible, in such a way as to ensure observance of the principle of effectiveness deriving from Directive 89/665. (40)

60. As I have explained in connection with the first question, (41) limitation periods for actions for declarations and compensation in connection with public contracts may not start to run until the time when the applicant knew or ought to have known of the alleged breach of procurement law. The referring court must therefore do whatever lies within its jurisdiction to achieve that objective. (42)

61. Consequently, the referring court is required above all to deal with the limitation period under Regulation 47(7)(b) of the PCR 2006, in harmony with the directive, in such a way that in the case of proceedings for declarations and compensation it does not already start to run from the time of the breach of procurement law, but only from the time at which the applicant knew or ought to have known of that breach of procurement law.

62. Should Regulation 47(7)(b) of the PCR 2006 not be amenable to such an interpretation, then the referring court would *as an alternative* have to look, in the context of its discretion to extend the time-limit, for a solution that was compliant with the directive. The aim of effective review as prescribed by Article 1(1) of Directive 89/665 would then lead to the national court's discretion being as it were 'reduced to zero'. It would thus be *obliged* to grant an extension of time to an applicant such as Uniplex.

63. That extension of time would have to be at least long enough for the applicant to have available for the preparation and submission of his claim, from the point at which he knew or ought to have known of the alleged infringement of procurement law, the three months mentioned in Regulation 47(7)(b) of the PCR 2006. In addition, the national court of course remains free to grant, in the exercise of its discretion, having regard to the circumstances of the individual case, a more generous extension of time, if it considers this necessary in order to arrive at a fair solution.

C – *The requirement to apply for review promptly (first part of the second question)*

64. By the first part of its second question, the referring court wishes essentially to know whether in review proceedings it can dismiss an action as inadmissible if it has not been submitted 'promptly'.

65. According to the limitation provision in Regulation 47(7)(b) of the PCR 2006, an application for review is only admissible if it is brought 'promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose'. This requirement to initiate the review procedure promptly apparently allows the English court, in its discretion, to dismiss applications for review as inadmissible even before the expiry of the three-month period. At the hearing before the Court, the parties to the main proceedings and the United Kingdom Government agreed (43) that in their practice the English courts do in fact make use of this possibility of dismissing an application on the ground of 'lack of promptness'. (44)

66. The application of a limitation period must not, however, lead to the exercise of the right to review of award decisions being deprived of its practical effectiveness. (45)

67. Article 1(1) of Directive 89/665 requires that it must be possible for decisions of contracting authorities to be reviewed 'effectively and, in particular, as rapidly as possible'. As I explain in more detail in my Opinion in Case C-456/08 *Commission* v *Ireland*, (46) in order to achieve that aim of the

directive the Member States must create a clear legal framework in the field in question. They are obliged to establish a sufficiently precise, clear and transparent legal position, so that individuals can know what their rights and obligations are.

68. For a limitation rule such as Regulation 47(7)(b) of the PCR 2006, the requirements of clarity, precision and predictability apply to a special degree. Lack of clarity with respect to the applicable time-limits is liable, in view of the threat of an action being time-barred, to entail serious harmful consequences for individuals and undertakings.

69. A limitation period such as that under Regulation 47(7)(b) of the PCR 2006, the duration of which is placed at the discretion of the competent court by the criterion 'promptly', is not predictable in its effects. The tenderers and candidates concerned are uncertain as to how much time they have to prepare their applications for review properly, and they are scarcely able to estimate the prospects of success of such applications. The objective imposed by Article 1(1) of Directive 89/665 of effective review of decisions taken by the contracting authorities is thereby missed. (47)

70. In consequence, the national courts may not declare an application for review, brought within the three-month period under Regulation 47(7)(b) of the PCR 2006, inadmissible on the ground of 'lack of promptness'. They are obliged to interpret and apply the provisions of national law in a manner consistent with the directive. (48) With regard specifically to review procedures under procurement law, they must – as already mentioned – interpret the national rules laying down a limitation period, as far as is at all possible, in such a way as to ensure observance of the principle of effectiveness deriving from Directive 89/665. (49)

71. In this connection I may point out that a criterion of promptness need not necessarily be understood in the sense of an independent limitation period. If a provision combines an indication of time expressed in days, weeks, months or years with the word 'promptly' or a similar expression, that addition can also be interpreted as emphasising the need for rapid action and reminding applicants of their responsibility, in their own interests, for taking the necessary steps as early as possible, in order best to protect their interests. (50)

72. Against that background, the referring court will have to examine whether the criterion of acting 'promptly' in Regulation 47(7)(b) of the PCR 2006 can be interpreted to the effect that it does not constitute an independent barrier to admissibility but merely contains a reference to the need for rapidity.

73. Should it not be possible to interpret Regulation 47(7)(b) of the PCR 2006 to that effect, in compliance with the directive, the national court is obliged to apply Community law to its full extent and to protect the rights it confers on individuals, if necessary by disapplying any provision whose application would in the particular case lead to a result contrary to Community law. (51)

VI – Conclusion

74. On the basis of the above considerations, I propose that the Court give the following answers to the reference for a preliminary ruling from the High Court of Justice:

(1) Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts requires that a limitation period for applications for a declaration of an infringement of procurement law and for actions for compensation does not start to run until the time at which the applicant knew or ought to have known of the alleged infringement of procurement law.

(2) Article 1(1) of Directive 89/665/EEC precludes a limitation provision which allows the national court in its discretion to dismiss applications for a declaration of an infringement of procurement law and actions for damages as inadmissible by reference to a requirement to bring proceedings promptly.

(3) The national court is obliged to do whatever lies within its jurisdiction to achieve a result compatible with the aim of Directive 89/665/EEC. If such a result cannot be achieved by way of interpreting and applying the limitation rule in a manner consistent with the directive, the national court is obliged to leave that rule unapplied.

---

1 – Original language: German.

---

2 – High Court of Justice of England and Wales, Queen's Bench Division, Leeds District Registry.

---

3 – Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

---

4 – Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

---

5 – The latest amendments to Directive 89/665 made by Directive 2007/66 are not relevant to the present case, as the period for their transposition lasts until 20 December 2009 (Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31); see in particular Article 3(1)).

---

6 – The reference in Article 1(1) of Directive 89/665 to Directive 77/62 is to be read as a reference to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114; corrigendum at OJ 2004 L 351, p. 44). This follows from Article 82(2) of Directive 2004/18 in conjunction with Article 33(2) of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1).

---

7 – SI 2006 No 5, in force from 31 January 2006.

---

8 – 'Uniplex'.

---

9 – 'NHS Business Services'.

---

10 – The award procedure was carried out by an authorised agent of NHS Business Services, known as NHS Supply Chain.

---

11 – The hearing in the present case took place on the same day as that in Case C-456/08 *Commission* v *Ireland*.

---

12 – See also my Opinion in Case C-454/06 *pressetextNachrichtenagentur* [2008] ECR I-4401, point 154. In future, however, Article 2c of Directive 89/665, as amended by Directive 2007/66, will define basic Community law requirements for national time-limits for applications for review.

---

13 – See, for example, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case C-231/96 *Edis* [1998] ECR I-4951, paragraphs 20 and 35; Case C-30/02 *Recheio – Cash & Carry*

[2004] ECR I-6051, paragraph 18; and Case C-40/08 *AsturcomTelecomunicaciones* [2009] ECR I-0000, paragraph 41.

---

14 – See my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, point 155.

---

15 – See on this point Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, in particular paragraphs 71 and 76; Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 52; and Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, paragraph 50.

---

16 – The referring court cites the judgment of the Court of Appeal of England and Wales (Dyson LJ) of 13 July 2001 in *JobsinCoUKplc* v *Department of Health* [2001] EWCA Civ 1241, [2001] EuLR 685, paragraphs 23 and 28 (that judgment related to the predecessor to Regulation 47(7)(b) of the PCR 2006, whose content was identical); see also the judgment of the High Court of Justice of England and Wales, Queen's Bench Division, (Langley J) of 17 November 1997 in *KeymedLtd* v *Forest Healthcare NHSTrust* [1998] EuLR 71, at p. 92.

---

17 – Ireland refers in its written observations to the judgment of the High Court of Ireland (Clarke J) of 2 May 2006 in *Veolia Water UK* v *Fingal County Council (No 1)* [2006] IEHC 137, [2007] 1 IR 690, paragraphs 28 to 54.

---

18 – In Ireland there is an essentially similar rule on limitation periods under Order 84A(4) of the Rules of the Superior Courts (SI No 374 of 1998). That rule is the subject of the action by the Commission for failure to fulfil obligations in Case C-456/08 *Commission* v *Ireland*, in which I am also delivering my Opinion today.

---

19 – The observations of Dyson LJ in *Jobsin Co UK plc* v *Department of Health*, cited in footnote 16, which are quoted in the order for reference, are illuminating in this respect: 'A service provider's knowledge is plainly irrelevant to the question whether he has suffered or risks suffering loss or damage as a result of a breach of duty owed to him by a contracting authority. … Knowledge will often be relevant to whether there is good reason for extending time within which proceedings may be brought, but it cannot be relevant to the prior question of when the right of action first arises' (paragraphs 23 to 28 of the judgment). At the hearing before the Court, the parties were in agreement that the national court is not obliged to grant such an extension of time.

---

20 – There appear also to be judges in England who differ from this approach. At the hearing before the Court, the judgment of the High Court of Justice of England and Wales, Queen's Bench Division, (Coulson J) of 8 May 2009 in *AmaryllisLtd* v *HMTreasury* [2009] EWHC 962 (TCC) was mentioned in this connection.

---

21 – See also my Opinion of today's date in Case C-456/08 *Commission* v *Ireland*, point 56.

---

22 – See, on this and the following, my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, points 161 to 171.

---

23 – See my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, point 162.

---

24 – See my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, points 163 to 167.

---

25 – If a contract is to be declared invalid, Articles 2d and 2f(1) of Directive 89/665, as amended by Directive 2007/66, are relevant. If, on the other hand, compensation is to be awarded, Articles 2e and 2f(2) in conjunction with Article 2c of Directive 89/665, as amended by Directive 2007/66, apply.

---

26 – That is also supported by Regulation 47(9) of the PCR 2006. NHS Business Services admittedly points out that in the main proceedings Uniplex made more extensive claims. However, in relation to the factual and legal context of references for preliminary rulings, the Court must proceed from the statements made by the referring court (settled case-law; see Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42, and Case C-244/06 *DynamicMedien* [2008] ECR I-505, paragraph 19).

---

27 – See my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, point 171.

---

28 – Cited in footnote 15, paragraph 78.

---

29 – This is also clear in the French version of *Universale-Bau and Others*, French being the language in which the judgment was drafted and deliberated on: *dès qu'elles sont connues des intéressés* (judgment cited in footnote 15, paragraph 78).

---

30 – Interestingly, NHS Business Services leaves out precisely this paragraph 78 of the judgment in *Universale-Bau and Others*, although it otherwise cites the full text of the relevant passage of the Court's reasoning (paragraphs 74 to 79).

---

31 – The parties to the main proceedings disagree as to whether Uniplex ought to have known of the alleged infringements of procurement law from the letter of 22 November 2007 or only from the letter of NHS Business Services of 13 December 2007 (see points 12 and 13 above). After reading those two letters, it seems to me that the first of them confines itself to extremely general statements from which an unsuccessful tenderer can hardly work out why he was unsuccessful and whether procurement law was applied correctly. The second letter, on the other hand, contains at least two statements which arouse the suspicion that infringements of procurement law were committed. First, Uniplex is given a zero mark in the category 'Price and other cost-effectiveness factors' because it offered only its list price; the contracting authority appears to have completely ignored the fact that one tenderer's list price may be lower than another's discount price, and that what ultimately matters is the comparison of the prices actually offered. Second, all tenderers who had not previously been active in the market for haemostats in the United Kingdom were apparently marked at zero in the category 'UK customer base', which suggests covert discrimination against tenderers from other countries. In the end, however, it will be the task of the referring court to make the necessary findings in this respect.

---

32 – Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 30, and Case C-142/05 *Mickelsson and Roos* [2009] ECR I-0000, paragraph 41; to the same effect, Case C-328/91 *Thomas and Others* [1993] ECR I-1247, paragraph 13.

---

33 – The same may apply if a tenderer or candidate complains of a breach of procurement law and his complaint is rejected by the contracting authority with reasons being given.

---

34 – To that effect, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and Case C-75/08 *Mellor* [2009] ECR I-0000, paragraph 59; see also my Opinion in Case C-186/04 *Housieaux* [2005] ECR I-3299, point 32, and my Opinion in *Mellor*, especially point 31.

---

35 – Opinion of Advocate General Poiares Maduro in Case C-250/07 *Commission* v *Greece* [2009] ECR I-0000, point 28.

---

36 – That the term ‘occurrence of the damage’ was used in the first sentence of point 167 of my Opinion in *pressetextNachrichtenagentur*, cited in footnote 12, is an editing mistake. The correct version is that it suffices that the person concerned knew or ought to have known of the alleged *infringement of procurement law*, as follows from points 169 and 171 of that Opinion.

---

37 – To that effect, Case C-15/04 *Koppensteiner* [2005] ECR I-4855, paragraph 38, and *Lämmerzahl*, cited in footnote 15, second sentence of paragraph 63.

---

38 – See my Opinion of today’s date in Case C-456/08 *Commission* v *Ireland*, point 75.

---

39 – On the principle of interpretation in conformity with directives generally, see Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 26, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113, and Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 98; on Directive 89/665 specifically, see also *Santex*, paragraph 63, and *Lämmerzahl*, paragraph 62, both cited in footnote 15.

---

40 – *Santex*, cited in footnote 15, paragraph 62.

---

41 – See points 31 to 46 above.

---

42 – See *Pfeiffer and Others*, paragraphs 118 and 119, and *Impact*, paragraph 101, both cited in footnote 39.

---

43 – Ireland submitted in the present proceedings for a preliminary ruling that the essentially identical limitation rule in Irish law (in accordance with Order 84A(4) of the Rules of the Superior Courts, an application for review must be made ‘at the earliest opportunity and in any event within three months’) does not produce any such effects. Nevertheless, in the proceedings for failure to fulfil obligations which are being heard in parallel to the present case, Ireland indicated that in certain circumstances an application for review may under Irish law be dismissed as out of time even if it has been made within the three-month period (see on this point my Opinion of today’s date in Case C-456/08 *Commission* v *Ireland*, point 70).

---

44 – At the hearing before the Court, the parties mentioned in this connection inter alia the judgment of the High Court of Justice of England and Wales, Queen’s Bench Division, (Cooke J) of 4 November 2004 in *M Holleran Ltd* v *Severn Trent Water Ltd* [2004] EWHC 2508 (Comm), [2005] EuLR 364.

---

45 – To that effect, *Universale-Bau and Others*, in particular paragraph 72, *Santex*, paragraphs 51 and 57, and *Lämmerzahl*, paragraphs 52, all cited in footnote 15; on procedural rules generally, see Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, paragraph 42.

---

46 – See points 47 to 49 of that Opinion, with references to the case-law.

---

47 – See my Opinion of today’s date in Case C-456/08 *Commission* v *Ireland*, point 71.

---

48 – See on this point the case-law cited in footnote 39.

---

49 – *Santex*, cited in footnote 15, paragraph 62.

---

50 – See the examples in my Opinion in Case C-456/08 *Commission* v *Ireland*, point 68. In procurement law too, the concept of a ‘duty of diligence, which falls to be categorised more as an obligation as to means than an obligation as to results’, is not unknown (Case C-250/07 *Commission* v *Greece* [2009] ECR I-0000, paragraph 68).

---

51 – Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24; *Santex*, cited in footnote 15, paragraph 64; and *Lämmerzahl*, cited in footnote 15, paragraph 63.

JUDGMENT OF THE COURT (Fourth Chamber)

23 December 2009 (*)

(Public works contracts – Directive 2004/18/EC – Articles 43 EC and 49 EC – Principle of equal treatment – Groups of undertakings – Prohibition on competing participation in the same tendering procedure by a 'consorzio stabile' ('permanent consortium') and one of its member companies)

In Case C-376/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Lombardia (Italy), made by decision of 2 April 2008, received at the Court on 18 August 2008, in the proceedings

Serrantoni Srl,

Consorzio stabile edili Scrl

v

Comune di Milano,

intervening parties:

Bora Srl Construzioni edili,

Unione consorzi stabili Italia (UCSI),

Associazione nazionale imprese edili (ANIEM),

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as the President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Commission of the European Communities, by C. Zadra and D. Recchia, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), Articles 39 EC, 43 EC, 49 EC and 81 EC, and the general principles of equal treatment and proportionality.

2 The reference was made in the course of proceedings between the construction company Serrantoni Srl ('Serrantoni') and the Comune di Milano (Municipality of Milan), regarding the decision of the Comune di Milano to exclude Serrantoni from participating in a procedure for the award of a public works contract.

Legal context

Community legislation

3 Recital 2 in the preamble to Directive 2004/18 states:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the [EC] Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.'

4 Article 2 of that directive provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Article 4 of the directive, under the heading 'Economic operators', provides:

'1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

…

2. Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.'

6 In accordance with the version of Article 7(c) of Directive 2004/18 in force at the material time as a result of the adaptation effected by Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2005 L 333, p. 28), Directive 2004/18 applied to public works contracts which had a value exclusive of value added tax estimated to be equal to or greater than EUR 5 278 000.

7 Article 45 of that directive, headed 'Personal situation of the candidate or tenderer', provides in paragraph 2:

'Any economic operator may be excluded from participation in a contract where that economic operator:

(a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in

any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

(c) has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(g) is guilty of serious misrepresentation in supplying the information required under this Section or has not supplied such information.

Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph.'

National legislation

8 Legislative Decree No 163 of 12 April 2006 establishing the Code on public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC (Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE) (Ordinary Supplement to GURI No 100 of 2 May 2006, 'Legislative Decree No 163/2006'), governs, in their entirety, the procedures in Italy for the award of public works contracts, public service contracts and public supply contracts. Article 34 of that legislative decree, as amended by Legislative Decree No 113 of 31 July 2007, entitled 'Entities to which public contracts may be awarded', provides in paragraph 1:

'1. Without prejudice to the restrictions expressly provided for, the following entities are entitled to participate in the procedures for the award of public procurement contracts:

…

(b) consortia of producers' and workers' cooperatives … and consortia of artisan/handicraft businesses …;

(c) permanent consortia, constituted as joint venture companies ..., between individual contractors (including artisans), commercial companies or partnerships or producers' and workers' cooperatives, in accordance with the provisions of Article 36;

…

(f) entities which have entered into a European Economic Interest Group [EEIG] …;

(f a) economic operators … established in other Member States and constituted according to the applicable legislation of the Member State concerned.'

9 Article 36(1) of Legislative Decree No 163/2006 provides:

'"Permanent consortia" ("consorzi stabili") mean those … which, by a decision of their respective management, have agreed to participate jointly in public works contracts, public service contracts and

public supply contracts, for a period of not less than five years, creating a joint undertaking structure for that purpose.'

10 Article 36(5) of Legislative Decree No 163/2006, in the version in force at the material time, provided:

'… a permanent consortium may not participate in the same award procedure as members of that consortium; in the event of failure to comply with this provision, Article 353 of the Criminal Code shall apply ...'.

11 Article 37(7) of that legislative decree, in the version in force at the material time, provided:

'… The consortia referred to in Article 34(1)(b) are required to specify in the tender the members for which the consortium is competing: those members are precluded from participating, in any other form, in the same tendering procedure; in the event of infringement, both the consortium and the member shall be excluded from the procedure; in the event of failure to comply with this provision, Article 353 of the Criminal Code shall apply …'

12 Under Article 353 of the Criminal Code, the failure to comply with the above prohibition is punishable by up to two years' imprisonment and, in certain circumstances by up to five years' imprisonment, and by a fine.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 In 2007 the Comune di Milano issued a call for tenders relating to the award of a works contract concerning 'emergency and rationalisation measures for district registry offices, lot V'. On 27 September 2007, the Comune di Milano decided to exclude Serrantoni, a member of the permanent consortium Consorzio stabile edili Scrl, as well as the permanent consortium itself, from the tendering procedure for breach of Article 36(5) of Legislative Decree No 163/2006. On the basis of the same provision, the Comune di Milano also ordered the documents to be forwarded to the Public Prosecutor's office for the application of Article 353 of the Criminal Code, and awarded the contract to another company.

14 Serrantoni and the permanent consortium to which it belongs brought an appeal before the referring court against that decision of the contracting authority, submitting that Article 36(5) of Legislative Decree No 163/2006 is incompatible with Article 4 of Directive 2004/18, Articles 39 EC, 43 EC, 49 EC and 81 EC, and with the principle of non-discrimination.

15 The referring court points out, first of all, that the national legislation at issue in the main proceedings makes a distinction between permanent consortia, on the one hand, and consortia of producers' and workers' cooperatives and consortia of artisan/handicraft businesses, on the other. As regards permanent consortia, there is an absolute prohibition on the consortium and the companies forming part thereof participating in the same procedure simultaneously by separate tenders, on pain of automatic exclusion from the procedure and criminal sanctions. As regards the consortia of producers' and workers' cooperatives and consortia of artisan/handicraft businesses, that prohibition applies only to the consortium and the company in whose interests that consortium submitted a tender in the tendering procedure in question. That court observes that, in the case at issue in the main proceedings, the permanent consortium in question did not participate in the call for tenders in Serrantoni's interests.

16 The referring court notes, next, that the different forms of consortium referred to above do not exhibit any differences in respect of their aims and organisation that would justify such unequal treatment. All those forms of consortium are characterised by a common organisation for the purposes of instituting cooperation between the member companies in order to reduce management costs, to optimise their respective economic results and to increase their competitiveness in relation to public contracts. The referring court therefore asks whether the difference in treatment in question is compatible with the principle of non-discrimination and with the Community requirement to ensure the widest possible participation in public tendering procedures.

17 The referring court also asks whether that difference in treatment is compatible with Article 4 of Directive 2004/18, to the extent that the exclusion in question is based solely on the fact that the entity takes the legal form of a permanent consortium, and with Articles 39 EC, 43 EC, 49 EC and 81 EC. That discrimination is moreover of particular importance since the institution of consortia has been amply provided for in the legal systems of the other Member States and finds expression at the Community level in the form of European Economic Interest Groupings (EEIGs).

18 Lastly, the referring court points out that the absolute prohibition in question is based exclusively on a formal aspect, that is to say whether a company forms part of a particular type of group. The legislation in question makes no call for a specific assessment of the mutual influence exerted between consortium and member company but, on the contrary, posits an abstract presumption of mutual interference. Thus, that court notes, even if the consortium is not participating in the tendering procedure in the interests of the company concerned, is not using the company for the execution of the contract, and therefore has no agreement with that company concerning the submission of the tender, the absolute prohibition is applicable. It therefore asks whether that absolute prohibition may be justified by an overriding requirement in the general interest relating to the need to ensure that public tendering procedures are properly conducted, and whether it does not go far beyond its objective.

19 In the light of those considerations, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Is the correct application of Article 4 of Directive 2004/18 … impeded by the provisions of national law laid down in Article 36(5) of Legislative Decree No 163/2006 …, under which:

– where a member of a consortium participates in a tendering procedure for a public contract, the consortium itself is automatically excluded from participation solely on the ground that it has a particular legal form (that of a permanent consortium) rather than another, essentially identical, legal form (that of a consortium of producers’ and workers’ cooperatives or a consortium of artisan/handicraft businesses); and

– where a permanent consortium participates in a tendering procedure for a public contract, and where it has declared that it is competing on behalf of other companies and that it will entrust the works to other companies if it is awarded the contract, a company is automatically excluded from participation solely on the formal ground that it is a member of that consortium?

(2) Is the correct application of Articles 39 EC, 43 EC, 49 EC and 81 EC impeded by the provisions of national law laid down in Article 36(5) of Legislative Decree No 163/2006 …, under which:

– where a member of a consortium participates in a tendering procedure for a public contract, the consortium itself is automatically excluded from participation solely on the ground that it has a particular legal form (that of a permanent consortium) rather than another, essentially identical, legal form (a consortium of producers’ and workers’ cooperatives or a consortium of artisan/handicraft businesses), and

– where a permanent consortium participates in a tendering procedure for a public contract, and where it has declared that it is competing on behalf of other companies and that it will entrust the works to other companies if it is awarded the contract, a company is automatically excluded from participation solely on the formal ground that it is a member of that consortium?’

The questions referred for a preliminary ruling

20 First of all, it should be observed that, as is clear from the file submitted to the Court, the value of the contract to which the award procedure at issue in the main proceedings relates is considerably lower than the threshold laid down in Article 7(c) of Directive 2004/18. Consequently, that contract does not fall within the scope of the procedures laid down in that directive.

21 None the less, it should be recalled that the fact that the value of a contract is below the threshold set by the Community rules does not, however, mean that that contract is not subject at all to the application of Community law.

22 It is clear from the Court's settled case-law that, in the context of the award of a contract with a value below that threshold, the fundamental rules of the Treaty and in particular the principle of equal treatment must be complied with. The distinguishing feature in relation to contracts with a value above the threshold prescribed by the provisions of Directive 2004/18 is that only the latter are subject to the strict special procedures laid down in those provisions (see, to that effect, Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraphs 19 and 20).

23 That interpretation is confirmed by recital 2 in the preamble to Directive 2004/18, which states that the award of all contracts concluded in the Member States on behalf of bodies with the status of a contracting authority must comply with the basic rules of the Treaty, and in particular with those concerning freedom of movement of goods and services, the right of establishment and the fundamental principles deriving therefrom, such as the principles of equal treatment, proportionality and transparency.

24 However, according to the case-law of the Court, the application of the fundamental rules and general principles of the Treaty to procedures for the award of contracts below the threshold for the application of Community provisions is based on the premiss that the contracts in question are of certain cross-border interest (*SECAP and Santorso*, paragraph 21 and case-law cited).

25 In that connection, the Court has already pointed out that it is for the referring court to carry out a detailed assessment of all the relevant facts concerning the contract in question in order to determine whether there is certain cross-border interest (*SECAP and Santorso*, paragraph 34). In the present case, the answers to the questions referred take as their premiss that it is none the less for the referring court to ascertain whether the contract in question involves certain cross-border interest.

The first question

26 By this question, the referring court asks whether Article 4 of Directive 2004/18 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that both a permanent consortium and its member companies are automatically excluded from participating in a procedure for the award of a public contract and face criminal sanctions where the member companies have submitted tenders in competition with that consortium's tender in the context of the procedure in question, even if the consortium's tender was not submitted on behalf and in the interests of those companies.

27 In that connection, as has been noted in paragraph 20 of this judgment, the contract at issue in the main proceedings does not fall within the scope of the procedures laid down in that directive, since its value is below the threshold laid down in Article 7(c) of Directive 2004/18.

28 Accordingly, there is no need to answer the question referred by the national court.

The second question

29 By this question, considered in the light of the reference for a preliminary ruling taken as a whole, the referring court asks whether the general principles of equal treatment and proportionality deriving from Articles 43 EC and 49 EC and Articles 39 EC and 81 EC must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that both a permanent consortium and its member companies are automatically excluded from participating in a procedure for the award of a public contract and face criminal sanctions where the member companies have submitted tenders in competition with the consortium's tender in the context of the same procedure, even if that consortium's tender was not submitted on behalf and in the interests of those companies.

30 As regards the Treaty articles to which the national court refers, it should be noted, first of all, that the exclusion at issue in the main proceedings has no connection with freedom of movement for workers, or with agreements between undertakings or decisions by associations of undertakings, within the

meaning of Articles 39 EC and 81 EC. There is therefore no need for the Court to give an answer with regard to those articles.

31 As regards the principles of equal treatment and transparency, the Member States must be recognised as having a certain amount of discretion for the purpose of adopting measures intended to ensure compliance with those principles, which are binding on contracting authorities in any procedure for the award of a public contract (see, to that effect, Case C-213/07 *Michaniki* [2008] ECR I-0000, paragraph 44).

32 Each Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it, situations propitious to conduct liable to bring about breaches of those principles (see *Michaniki*, paragraph 56).

33 However, in accordance with the principle of proportionality, which constitutes a general principle of Community law (see, inter alia, Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 47), the measures adopted by the Member States must not go beyond what is necessary to achieve that objective (see, to that effect, *Michaniki*, paragraphs 48 and 61, and Case C-538/07 *Assitur* [2009] ECR I-0000, paragraphs 21 and 23).

34 First, as regards the principles of equal treatment and of proportionality, it should be noted that the legislation at issue in the main proceedings provides for the automatic exclusion from participation in a public tendering procedure in the event of simultaneous and competing tenders submitted by a permanent consortium and by one or more companies forming part thereof.

35 In that connection, it must be pointed out that the automatic exclusion at issue in the main proceedings is only applicable to permanent consortia and the companies of which they are composed, and not to other forms of consortium, such as consortia of producers' and workers' cooperatives and consortia of artisan/handicraft businesses. As regards the latter forms of consortium, the exclusion is applicable, in accordance with Article 37(7) of Legislative Decree No 163/2006, only where competing tenders are submitted by the consortium in question and by those of its member companies on whose behalf the consortium itself has submitted a tender.

36 In that connection, the referring court notes that all those forms of consortium are essentially identical and do not exhibit any differences in respect of their aims and organisation that would justify such unequal treatment.

37 It must therefore be found that the automatic exclusion measure at issue in the main proceedings, which concerns only the permanent consortium form and its member companies and is applicable in the event of competing tenders, regardless of whether the consortium concerned participates in the public tendering procedure in question on behalf and in the interests of the companies which have submitted a tender, constitutes discrimination against that form of consortium, and does not therefore comply with the principle of equal treatment.

38 It should be added that, even if the treatment in question applied without distinction to all forms of consortium, or the national court found that there were objective elements which distinguished the situation of permanent consortia from that of other forms of consortium, a rule requiring automatic exclusion, such as the rule at issue in the main proceedings, would not in any event be compatible with the principle of proportionality.

39 A rule of that kind involves an irrebutable presumption of mutual interference in cases in which a consortium and one or more of its member companies have submitted competing tenders in the same procedure for the award of a public contract, even where the consortium in question has not participated in the procedure on behalf and in the interests of those companies, without either the consortium or the companies concerned being afforded the possibility of showing that their tenders were drawn up completely independently and that there is therefore no risk of influencing competition between tenderers (see, to that effect, *Michaniki*, paragraph 67, and *Assitur*, paragraph 30, in relation to the public contracts falling within the scope of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199,

p. 54) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

40 A systematic rule of exclusion, which also entails an absolute obligation on the contracting authorities to exclude the entities concerned, even in cases in which the relationship between those entities has no effect on their conduct in the context of the procedures in which they have participated, is contrary to the Community interest in ensuring the widest possible participation by tenderers in a call for tenders, and goes beyond what is necessary to achieve the objective of ensuring the application of the principles of equal treatment and transparency (see, to that effect, *Assitur*, paragraphs 26 to 29, with regard to public contracts falling within the scope of Directive 92/50).

41 Second, it should be noted that, in accordance with the settled case-law of the Court, Articles 43 EC and 49 EC preclude any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to prohibit, impede or render less attractive the exercise by Community nationals of the freedom of establishment and the freedom to provide services guaranteed by those provisions of the Treaty (see, to that effect, Case C-299/02 *Commission* v *Netherlands* [2004] ECR I-9761, paragraph 15, and Case C-433/04 *Commission* v *Belgium* [2006] ECR I-10653, paragraph 28).

42 As the Commission of the European Communities rightly observes, a national rule such as that at issue in the main proceedings, which provides that permanent consortia and their member companies may be automatically excluded, is likely to have a dissuasive effect on economic operators established in other Member States, that it so to say, first, on operators wishing to establish themselves in the Member State concerned through the establishment of a permanent consortium, possibly composed of national and foreign companies, and, second, on operators intending to join consortia of that kind already in existence, in order to be able to participate more easily in public tendering procedures launched by the contracting authorities of that Member State and thereby be able to offer their services more easily.

43 A national measure of that kind which is likely to have a dissuasive effect on economic operators established in other Member States constitutes a restriction within the meaning of Articles 43 EC and 49 EC (see, to that effect, *Commission* v *Belgium*, paragraph 29), all the more so as that dissuasive effect is heightened by the risk of criminal sanctions which are laid down in the national legislation at issue in the main proceedings.

44 However, a restriction such as that at issue in the main proceedings may possibly be justified in so far as it pursues a legitimate objective in the public interest, and to the extent that it is suitable for securing the attainment of the objective and does not go beyond what is necessary in order to attain it.

45 In the present case, it must be found that, notwithstanding its legitimate objective of combating possible collusion between the consortium concerned and its member companies, the restriction in question cannot be justified since, as is clear from paragraphs 38 to 40 of this judgment, it goes beyond what is necessary to achieve that objective.

46 The answer to the second question must therefore be that Community law must be interpreted as precluding national legislation, such at that at issue in the main proceedings, which provides that, when a public contract is being awarded, with a value below the threshold laid down in Article 7(c) of Directive 2004/18 but of certain cross-border interest, both a permanent consortium and its member companies are automatically excluded from participating in that procedure and face criminal sanctions where those companies have submitted tenders in competition with the consortium's tender in the context of the same procedure, even if the consortium's tender was not submitted on behalf and in the interests of those companies.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Community law must be interpreted as precluding national legislation, such at that at issue in the main proceedings, which provides that, when a public contract is being awarded, with a value below the threshold laid down in Article 7(c) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, but of certain cross-border interest, both a permanent consortium and its member companies are automatically excluded from participating in that procedure and face criminal sanctions where those companies have submitted tenders in competition with the consortium's tender in the context of the same procedure, even if the consortium's tender was not submitted on behalf and in the interests of those companies.

[Signatures]

---

* Language of the case: Italian.

ARRÊT DE LA COUR (troisième chambre)

11 juin 2009 (*)

«Manquement d'État – Directives 89/665/CEE et 92/13/CEE – Procédures de recours en matière de passation de marchés publics – Garantie d'un recours efficace – Délai minimal à respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la signature du contrat relatif à ce marché»

Dans l'affaire C-327/08,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 17 juillet 2008,

Commission des Communautés européennes, représentée initialement par MM. D. Kukovec et G. Rozet, puis par ce dernier et M. M. Konstantinidis, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République française, représentée par MM. G. de Bergues et J.-C. Gracia, en qualité d'agents,

partie défenderesse,

LA COUR (troisième chambre),

composée de M. A. Rosas, président de chambre, MM. J. N. Cunha Rodrigues (rapporteur), J. Klučka, M^me^ P. Lindh et M. A. Arabadjiev, juges,

avocat général: M. P. Mengozzi,

greffier: M. R. Grass,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que:

– en adoptant et en maintenant en vigueur l'article 44-I du décret n° 2005-1308, du 20 octobre 2005, relatif aux marchés passés par les entités adjudicatrices mentionnées à l'article 4 de l'ordonnance n° 2005-649 du 6 juin 2005 relative aux marchés passés par certaines personnes publiques ou privées non soumises au code des marchés publics (JORF du 22 octobre 2005, p. 16752), l'article 46-I du décret n° 2005-1742, du 30 décembre 2005, fixant les règles applicables aux marchés passés par les pouvoirs adjudicateurs mentionnés à l'article 3 de l'ordonnance n° 2005-649 (JORF du 31 décembre 2005, p. 20782), et l'article 80-I-1° du décret n° 2006-975, du 1^er^ août 2006, portant code des marchés publics (JORF du 4 août 2006, p. 11627, ci-après le «code des marchés publics»), dans la mesure où ces dispositions prévoient la possibilité pour les pouvoirs adjudicateurs et/ou entités adjudicatrices de réduire le délai raisonnable à respecter entre la notification de la décision d'attribution du marché aux

soumissionnaires et la signature du marché sans aucune limite de temps et sans aucune condition objective fixée préalablement par la réglementation nationale, et

– en adoptant et en maintenant en vigueur l'article 1441-1 du nouveau code de procédure civile, tel que modifié par le décret n° 2005-1308, dans la mesure où cette disposition prévoit un délai de dix jours pour la réponse du pouvoir adjudicateur et/ou de l'entité adjudicatrice concernés interdisant tout référé précontractuel avant ladite réponse et sans que ce délai suspende le délai à respecter entre la notification de la décision d'attribution du marché aux soumissionnaires et la signature du marché,

la République française a manqué aux obligations qui lui incombent en vertu des directives 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO L 395, p. 33), telle que modifiée par la directive 92/50/CEE du Conseil, du 18 juin 1992 (JO L 209, p. 1, ci-après la «directive 89/665»), et 92/13/CEE du Conseil, du 25 février 1992, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des règles communautaires sur les procédures de passation des marchés des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications (JO L 76, p. 14), telles qu'interprétées par la Cour dans ses arrêts du 28 octobre 1999, Alcatel Austria e.a. (C-81/98, Rec. p. I-7671), et du 24 juin 2004, Commission/Autriche (C-212/02), et plus particulièrement en vertu des articles 2, paragraphe 1, de la directive 89/665 et 2, paragraphe 1, de la directive 92/13.

Le cadre juridique

La réglementation communautaire

2 L'article 1er de la directive 89/665 prévoit:

«1. Les États membres prennent, en ce qui concerne les procédures de passation des marchés publics relevant du champ d'application des directives 71/305/CEE, 77/62/CEE et 92/50/CEE […], les mesures nécessaires pour garantir que les décisions prises par les pouvoirs adjudicateurs peuvent faire l'objet de recours efficaces et, en particulier, aussi rapides que possible, dans les conditions énoncées aux articles suivants, et notamment à l'article 2 paragraphe 7, au motif que ces décisions ont violé le droit communautaire en matière de marchés publics ou les règles nationales transposant ce droit.

[…]

3. Les États membres assurent que les procédures de recours sont accessibles, selon des modalités que les États membres peuvent déterminer, au moins à toute personne ayant ou ayant eu un intérêt à obtenir un marché public de fournitures ou de travaux déterminé et ayant été ou [risquant] d'être lésée par une violation alléguée. En particulier, ils peuvent exiger que la personne qui souhaite utiliser une telle procédure ait préalablement informé le pouvoir adjudicateur de la violation alléguée et de son intention d'introduire un recours.»

3 L'article 2, paragraphe 1, de la même directive dispose:

«Les États membres veillent à ce que les mesures prises aux fins des recours visés à l'article 1er prévoient les pouvoirs permettant:

a) de prendre, dans les délais les plus brefs et par voie de référé, des mesures provisoires ayant pour but de corriger la violation alléguée ou d'empêcher d'autres dommages d'être causés aux intérêts concernés, y compris des mesures destinées à suspendre ou à faire suspendre la procédure de passation de marché public en cause ou de l'exécution de toute décision prise par les pouvoirs adjudicateurs;

[...]»

4 L'article 1er de la directive 92/13 est libellé comme suit:

«1. Les États membres prennent les mesures nécessaires pour assurer que les décisions prises par les entités adjudicatrices peuvent faire l'objet de recours efficaces et, en particulier, aussi rapides que possible, dans les conditions énoncées aux articles suivants, et notamment à l'article 2 paragraphe 8, au motif que ces décisions ont violé le droit communautaire en matière de passation des marchés ou les règles nationales transposant ce droit en ce qui concerne:

a) les procédures de passation des marchés relevant de la directive 90/531/CEE

et

b) le respect de l'article 3 paragraphe 2 point a) de ladite directive, dans le cas des entités adjudicatrices auxquelles cette disposition s'applique.

[…]

3. Les États membres veillent à ce que les procédures de recours soient accessibles, selon des modalités que les États membres peuvent déterminer, au moins à toute personne ayant ou ayant eu un intérêt à obtenir un marché déterminé et ayant été ou risquant d'être lésée par une violation alléguée. En particulier, ils peuvent exiger que la personne qui souhaite l'application d'une telle procédure ait préalablement informé l'entité adjudicatrice de la violation alléguée et de son intention d'introduire un recours.»

5 L'article 2, paragraphe 1, de la même directive dispose:

«Les États membres veillent à ce que les mesures prises aux fins des recours visés à l'article 1er prévoient les pouvoirs permettant:

soit

a) de prendre, dans les délais les plus brefs et par voie de référé, des mesures provisoires ayant pour but de corriger la violation alléguée ou d'empêcher que d'autres préjudices soient causés aux intérêts concernés, y compris des mesures destinées à suspendre ou à faire suspendre la procédure de passation de marché en cause ou l'exécution de toute décision prise par l'entité adjudicatrice

[…]

soit

c) de prendre, dans les délais les plus brefs, si possible par voie de référé et, si nécessaire, par une procédure définitive quant au fond, d'autres mesures que celles prévues aux points a) et b), ayant pour but de corriger la violation constatée et d'empêcher que des préjudices soient causés aux intérêts concernés; notamment d'émettre un ordre de paiement d'une somme déterminée dans le cas où l'infraction n'est pas corrigée ou évitée.

[…]»

6 Les troisième, quatrième et huitième considérants de la directive 2007/66/CE du Parlement européen et du Conseil, du 11 décembre 2007, modifiant les directives 89/665 et 92/13 (JO L 335, p. 31), précisent:

«(3) Les consultations des parties concernées ainsi que la jurisprudence de la Cour de justice ont révélé un certain nombre de faiblesses dans les mécanismes de recours existant dans les États membres. En raison de ces faiblesses, les mécanismes visés par les directives 89/665/CEE et 92/13/CEE ne permettent pas toujours de veiller au respect des dispositions communautaires, en particulier à un stade où les violations peuvent encore être corrigées. Ainsi, il conviendrait de renforcer les garanties de transparence et de non-discrimination que ces directives cherchent à assurer afin que la Communauté dans son ensemble puisse bénéficier pleinement des effets positifs de la modernisation et de la simplification des règles relatives à la passation des marchés

publics auxquelles ont abouti les directives 2004/18/CE [du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134, p. 114)] et 2004/17/CE [du Parlement européen et du Conseil, du 31 mars 2004, portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des services postaux (JO L 134, p. 1)]. Il convient donc d'apporter aux directives 89/665/CEE et 92/13/CEE les précisions indispensables pour atteindre les résultats recherchés par le législateur communautaire.

(4) Parmi les faiblesses relevées figure notamment l'absence, entre la décision d'attribution d'un marché et la conclusion dudit marché, d'un délai permettant un recours efficace. Cela conduit parfois les pouvoirs adjudicateurs et les entités adjudicatrices désireux de rendre irréversibles les conséquences de la décision d'attribution contestée à précipiter la signature du contrat. Afin de remédier à cette faiblesse, qui compromet gravement la protection juridictionnelle effective des soumissionnaires concernés, c'est-à-dire les soumissionnaires qui n'ont pas encore été définitivement exclus, il y a lieu de prévoir un délai de suspension minimal, pendant lequel la conclusion du contrat concerné est suspendue, que celle-ci intervienne ou non au moment de la signature du contrat.

[…]

(8) De tels délais de suspension minimaux n'ont pas vocation à s'appliquer si la directive 2004/18/CE ou la directive 2004/17/CE n'impose pas la publication préalable d'un avis de marché au *Journal officiel de l'Union européenne,* plus particulièrement dans les cas d'urgence impérieuse visés à l'article 31, paragraphe 1, point c), de la directive 2004/18/CE ou à l'article 40, paragraphe 3, point d), de la directive 2004/17/CE. Dans de tels cas, il suffit de prévoir des procédures de recours efficaces après la conclusion du contrat. De même, un délai de suspension n'est pas nécessaire si le seul soumissionnaire concerné est celui auquel le marché est attribué et en l'absence de candidats concernés. Dans ce cas de figure, il n'y a plus d'autre partie prenante à la procédure de passation de marché qui aurait intérêt à recevoir la notification et à bénéficier d'un délai de suspension lui permettant d'exercer un recours efficace.»

7 L'article 1er de la directive 2007/66 remplace les articles 1er et 2 de la directive 89/665 par le texte suivant:

«*Article premier*

[…]

4. Les États membres peuvent exiger que la personne qui souhaite faire usage d'une procédure de recours ait informé le pouvoir adjudicateur de la violation alléguée et de son intention d'introduire un recours, pour autant que cela n'ait pas d'incidence sur le délai de suspension visé à l'article 2 *bis*, paragraphe 2, ou sur tout autre délai d'introduction d'un recours visé à l'article 2 *quater*.

5. Les États membres peuvent exiger que la personne concernée introduise en premier lieu un recours auprès du pouvoir adjudicateur. Dans ce cas, les États membres veillent à ce que l'introduction dudit recours entraîne la suspension immédiate de la possibilité de conclure le marché.

Les États membres décident des moyens de communication adéquats, y compris les télécopieurs ou les moyens électroniques, qu'il convient d'utiliser pour introduire un recours conformément au premier alinéa.

La suspension visée au premier alinéa ne prend pas fin avant l'expiration d'un délai d'au moins dix jours calendaires à compter du lendemain du jour où le pouvoir adjudicateur a envoyé une réponse si un télécopieur ou un moyen électronique est utilisé, ou, si un autre moyen de communication est utilisé, avant l'expiration d'un délai d'au moins quinze jours calendaires à compter du lendemain du jour où le pouvoir adjudicateur a envoyé une réponse, ou d'au moins dix jours calendaires à compter du lendemain du jour de réception d'une réponse.

[…]

Article 2 bis

[…]

2. La conclusion du contrat qui suit la décision d'attribution d'un marché relevant du champ d'application de la directive 2004/18/CE ne peut avoir lieu avant l'expiration d'un délai d'au moins dix jours calendaires à compter du lendemain du jour où la décision d'attribution du marché a été envoyée aux soumissionnaires et candidats concernés si un télécopieur ou un moyen électronique est utilisé ou, si d'autres moyens de communication sont utilisés, avant l'expiration d'un délai d'au moins quinze jours calendaires à compter du lendemain du jour où la décision d'attribution du marché est envoyée aux soumissionnaires et candidats concernés, ou d'au moins dix jours calendaires à compter du lendemain du jour de réception de la décision d'attribution du marché.

[…]»

8 L'article 2 de la directive 2007/66 apporte au texte de la directive 92/13 des modifications analogues à celles mentionnées au point précédent.

9 En vertu de son article 4, la directive 2007/66 est entrée en vigueur le 9 janvier 2008. Aux termes de l'article 3, paragraphe 1, premier alinéa, de cette directive, les États membres doivent mettre en vigueur les dispositions législatives, administratives et réglementaires nécessaires pour se conformer à celle-ci au plus tard le 20 décembre 2009.

La réglementation nationale

10 L'article 44-I du décret n° 2005-1308 prévoit:

«Pour les marchés et accords-cadres passés selon une des procédures formalisées, l'entité adjudicatrice avise, dès qu'elle a fait son choix sur les candidatures ou sur les offres, tous les autres candidats du rejet de leurs candidatures ou de leurs offres, en indiquant succinctement les motifs de ce rejet.

Un délai d'au moins dix jours est respecté entre la date à laquelle la décision de rejet est notifiée aux candidats dont l'offre n'a pas été retenue et la date de signature du marché ou de l'accord-cadre.

En cas d'urgence ne permettant pas de respecter ce délai de dix jours, ce délai est réduit dans des proportions adaptées à la situation.»

11 L'article 46-I du décret n° 2005-1742 dispose:

«Pour les marchés et accords-cadres passés selon une des procédures formalisées, le pouvoir adjudicateur avise, dès qu'il a fait son choix sur les candidatures ou sur les offres, tous les autres candidats du rejet de leurs candidatures ou de leurs offres, en indiquant succinctement les motifs de ce rejet.

Un délai d'au moins dix jours est respecté entre la date à laquelle la décision de rejet est notifiée aux candidats dont l'offre n'a pas été retenue et la date de signature du marché ou de l'accord-cadre.

En cas d'urgence ne permettant pas de respecter ce délai de dix jours, ce délai est réduit dans des proportions adaptées à la situation.»

12 L'article 80-I-1° du code des marchés publics est libellé comme suit:

«Pour les marchés et accords-cadres passés selon une des procédures formalisées, le pouvoir adjudicateur avise, dès qu'il a fait son choix sur les candidatures ou sur les offres, tous les autres candidats du rejet de leurs candidatures ou de leurs offres, en indiquant les motifs de ce rejet.

Un délai d'au moins dix jours est respecté entre la date à laquelle la décision de rejet est notifiée aux candidats dont l'offre n'a pas été retenue et la date de signature du marché ou de l'accord-cadre.

En cas d'urgence ne permettant pas de respecter ce délai de dix jours, il est réduit dans des proportions adaptées à la situation.»

13 L'article 1441-1 du nouveau code de procédure civile, tel que modifié par l'article 48-1° du décret n° 2005-1308 (ci-après l'«article 1441-1 du code de procédure civile»), dispose:

«Toute personne habilitée à introduire un recours dans les conditions prévues au 1° de l'article 24 et au 1° de l'article 33 de l'ordonnance n° 2005-649 du 6 juin 2005 relative aux marchés passés par les personnes publiques ou privées non soumises au code des marchés publics doit, si elle entend engager une telle action, mettre préalablement en demeure, par lettre recommandée avec demande d'avis de réception, la personne morale tenue aux obligations de publicité et de mise en concurrence auxquelles est soumise la passation du contrat de s'y conformer.

En cas de refus ou d'absence de réponse dans un délai de dix jours, l'auteur de la mise en demeure peut saisir le président de la juridiction compétente ou son délégué, qui statue dans un délai de vingt jours.»

La procédure précontentieuse

14 Le 21 mars 2005, la Commission a adressé une lettre de mise en demeure à la République française par laquelle elle attirait l'attention de cette dernière sur le problème de la conformité avec le droit communautaire de certaines dispositions de la réglementation nationale relative à la protection juridictionnelle des soumissionnaires en matière de passation de marchés publics. Le 15 décembre 2006, la Commission a adressé au même État membre une lettre de mise en demeure complémentaire. Les autorités françaises ont répondu à celle-ci par lettre du 8 mars 2007.

15 N'étant pas convaincue par cette réponse, la Commission a, le 1er février 2008, émis un avis motivé invitant la République française à prendre les mesures nécessaires pour s'y conformer dans un délai de deux mois à compter de la réception de celui-ci.

16 La République française a répondu à cet avis motivé par lettre du 29 avril 2008. N'étant pas satisfaite de cette réponse, la Commission a décidé d'introduire le présent recours.

Sur le recours

17 Sans soulever formellement une exception d'irrecevabilité, la République française invoque des arguments qui laissent entendre que le présent recours serait dépourvu d'objet. Il convient d'examiner cette question en premier lieu.

Sur la question de savoir si le recours est dépourvu d'objet

Argumentation des parties

18 La République française relève que la directive 2007/66 a créé pour les États membres de nouvelles obligations en matière de suspension de la conclusion du marché et de recours précontractuels visant précisément à régler les situations qui font l'objet du présent recours. Dès lors, la transposition de cette directive dans l'ordre juridique français aurait pour effet de rendre ce recours sans objet.

19 Ledit État membre indique que la procédure de transposition de la directive 2007/66 en droit français est en cours. Le nouveau régime des recours instauré par cette directive serait complexe et nécessiterait une approche globale, comprenant également les matières faisant l'objet du présent recours.

20 La Commission soutient que la transposition de la directive 2007/66 est dépourvue de pertinence au regard du présent recours. Elle fait valoir que le délai imparti dans l'avis motivé pour mettre la réglementation nationale en conformité avec les directives 89/665 et 92/13 a expiré le 1er avril 2008 et que cette réglementation, qui met en cause l'effet utile de ces directives, demeurera en vigueur jusqu'à l'adoption des mesures nécessaires à la transposition de la directive 2007/66, à savoir jusqu'au 20 décembre 2009 au plus tard.

Appréciation de la Cour

21 La République française suggère que la mise en œuvre imminente de la directive 2007/66 prive d'objet le présent recours qui reproche à cet État membre de ne pas avoir transposé dans son ordre juridique les directives 89/665 et 92/13.

22 Selon une jurisprudence constante, l'existence d'un manquement doit être appréciée en fonction de la situation de l'État membre en cause telle qu'elle se présentait au terme du délai fixé dans l'avis motivé (voir, notamment, arrêt du 21 février 2008, Commission/Italie, C-412/04, Rec. p. I-619, point 42 et jurisprudence citée).

23 À cet égard, il est constant que, à la date à laquelle le délai fixé dans l'avis motivé est venu à expiration, les directives 89/665 et 92/13 ainsi que la législation française y afférente trouvaient encore à s'appliquer et, partant, un recours fondé sur le défaut de transposition de ces directives n'était pas dépourvu d'objet.

24 La République française laisse en outre entendre que le présent recours n'a aucune utilité pratique dans la mesure où, même si les griefs soulevés par la Commission étaient retenus par la Cour, les mesures d'exécution conséquentes ne pourraient être prises que dans le cadre global de la mise en œuvre de la directive 2007/66.

25 Ces considérations concernent l'opportunité de l'introduction du présent recours.

26 Selon une jurisprudence constante de la Cour, c'est à la Commission qu'il incombe d'apprécier l'opportunité d'agir contre un État membre, les considérations qui déterminent ce choix ne pouvant affecter la recevabilité du recours (arrêt du 8 décembre 2005, Commission/Luxembourg, C-33/04, Rec. p. I-10629, point 66 et jurisprudence citée).

27 Par conséquent, il convient d'examiner le recours de la Commission au fond.

Sur le premier grief

Argumentation des parties

28 Le troisième alinéa des articles 44-I du décret n° 2005-1308, 46-I du décret n° 2005-1742 et 80-I-1° du code des marchés publics (ci-après les «dispositions litigieuses») prévoient en des termes identiques que, «[e]n cas d'urgence ne permettant pas de respecter ce délai de dix jours, ce délai est réduit dans des proportions adaptées à la situation».

29 La Commission fait valoir que la notion d'urgence mentionnée dans les dispositions litigieuses n'est pas définie, mais est au contraire laissée à l'appréciation discrétionnaire du pouvoir adjudicateur ou de l'entité adjudicatrice sans qu'aucune condition objective soit requise. S'il semble résulter du libellé de ces dispositions que le pouvoir adjudicateur ou l'entité adjudicatrice ne saurait aller jusqu'à supprimer purement et simplement le délai en question, rien ne semblerait en revanche interdire de réduire celui-ci à une durée minimale.

30 La Commission soutient en outre qu'il n'existe aucune garantie réglementaire que le nombre de jours de réduction dudit délai sera porté à la connaissance des soumissionnaires, ces derniers pouvant ne pas être informés de la durée exacte de ce délai.

31 Selon la Commission, les dispositions litigieuses introduisent un important degré d'insécurité juridique pour les soumissionnaires et compromettent l'objectif des directives 89/665 et 92/13 qui est, comme cela ressort du point 38 de l'arrêt Alcatel Austria e.a., précité, de mettre en place des recours efficaces et rapides ayant pour objet les décisions illégales du pouvoir adjudicateur à un stade où les violations peuvent encore être corrigées.

32 Pour la Commission, le délai de dix jours à respecter entre la notification de la décision d'attribution du marché aux soumissionnaires et la signature du marché est un délai minimal pour l'introduction

d’un recours utile, raison pour laquelle il n’est envisageable de raccourcir ce délai que dans des circonstances objectives exceptionnelles.

33 La République française argue que les dispositions litigieuses encadrent strictement les possibilités de réduction du délai à respecter entre la notification des soumissionnaires et la signature du marché. Dès lors que ces dispositions prévoient que le délai en question ne peut être réduit que dans des proportions adaptées à la situation, cette réduction ne serait pas laissée à l’entière discrétion des pouvoirs adjudicateurs, ces derniers pouvant être appelés à justifier, devant le juge, du caractère raisonnable de la réduction.

34 Selon ledit État membre, les dispositions litigieuses sont conformes aux exigences des arrêts précités Alcatel Austria e.a. ainsi que Commission/Autriche. Étant donné que ces dispositions ne permettent la réduction dudit délai que dans des proportions adaptées à la situation, cette réduction serait raisonnable au sens de ces arrêts.

35 La République française considère que la conformité au droit communautaire des dispositions litigieuses est confirmée a contrario par les dispositions de la directive 2007/66. En effet, les directives 89/665 et 92/13 ne contiendraient aucune disposition relative à la durée du délai à respecter par le pouvoir adjudicateur entre la notification des soumissionnaires et la signature du contrat, le délai minimal obligatoire de dix jours n’ayant été institué que par la directive 2007/66. Dès lors, les pouvoirs adjudicateurs ne seraient soumis, jusqu’à l’expiration du délai accordé aux États membres pour la transposition de cette dernière directive, qu’à la règle posée par la Cour dans les arrêts précités Alcatel Austria e.a. ainsi que Commission/Autriche.

Appréciation de la Cour

36 Il convient de relever d’emblée qu’aucune disposition des directives 89/665 ou 92/13 ne précise un délai que le pouvoir adjudicateur ou l’entité adjudicatrice seraient tenus de respecter entre la notification de la décision d’attribution du marché aux candidats et soumissionnaires évincés et la conclusion du contrat relatif à ce marché.

37 La précision d’un tel délai a été introduite pour la première fois par la directive 2007/66, dans le but exprès de remédier à l’absence de disposition à cet égard dans les directives 89/665 et 92/13, comme cela ressort du quatrième considérant de la directive 2007/66.

38 Par conséquent, contrairement à ce qu’affirme la Commission, l’existence d’un délai minimal de dix jours à respecter entre la notification des candidats et soumissionnaires et la conclusion du marché ne peut pas être déduite des termes des directives 89/665 et 92/13.

39 Les directives 89/665 et 92/13 n’interdisent pas explicitement que le délai à respecter entre la notification de la décision d’attribution du marché aux candidats et soumissionnaires évincés et la signature du contrat soit réduit en cas d’urgence. Il ne découle pas non plus du système et de l’objectif des directives 89/665 et 92/13 que celles-ci interdisent par principe toute réduction dudit délai en cas d’urgence.

40 Cette conclusion est confirmée par le fait que la directive 2007/66 ne prévoit pas de délai de suspension minimal dans les cas d’urgence impérieuse visés aux articles 31, point 1, sous c), de la directive 2004/18 et 40, paragraphe 3, sous d), de la directive 2004/17, comme cela est précisé au huitième considérant de la directive 2007/66.

41 En tenant compte de l’effet utile des directives 89/665 et 92/13, la Cour a précisé qu’un délai raisonnable doit s’écouler entre le moment où la décision d’attribution du marché est notifiée aux soumissionnaires évincés et la conclusion du contrat, afin de permettre à ces derniers, notamment, d’introduire une demande de mesures provisoires jusqu’à ladite conclusion (arrêts Commission/Autriche, précité, point 23, et du 3 avril 2008, Commission/Espagne, C-444/06, Rec. p. I-2045, point 39).

42 Selon les termes des dispositions litigieuses, le délai de suspension visé par celles-ci ne peut être réduit, en cas d’urgence, que «dans des proportions adaptées à la situation».

43 Il ressort de cette formulation que l'éventuelle réduction dudit délai doit être conforme au principe de proportionnalité et doit pouvoir être justifiée au regard de la situation à laquelle font face le pouvoir adjudicateur ou l'entité adjudicatrice. Ceux-ci sont donc tenus d'adapter la réduction du délai à l'intensité de l'urgence à laquelle ils sont confrontés.

44 Les dispositions litigieuses prévoient, en substance, que, en effectuant une réduction du délai de recours en cas d'urgence, le pouvoir adjudicateur ou l'entité adjudicatrice doivent néanmoins laisser un délai raisonnable aux opérateurs évincés pour leur permettre de présenter un recours.

45 Dans ces conditions, la Commission n'a pas démontré que les dispositions litigieuses portent atteinte aux exigences des directives 89/665 et 92/13.

46 Dès lors, il y a lieu de rejeter le premier grief de la Commission.

Sur le second grief

Argumentation des parties

47 La Commission fait valoir que l'article 1441-1 du code de procédure civile, dans la mesure où il instaure une phase préalable de mise en demeure obligatoire et non suspensive du délai à respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la signature du marché, revient à priver ce délai de tout effet utile.

48 Le délai de dix jours prévu audit article 1441-1 pour répondre à la mise en demeure ne serait pas conforme aux directives 89/665 et 92/13, dans la mesure où il interdit tout référé précontractuel avant cette réponse et court en même temps que le délai de suspension de la signature du marché, qui est, lui aussi, de dix jours. Il en résulterait l'impossibilité pour les candidats et soumissionnaires évincés de faire usage du référé précontractuel dans les cas où la réponse ou l'absence de réponse ne serait connue qu'à la date de l'expiration de ce délai de dix jours et où le contrat serait signé à cette date.

49 La République française rappelle que les articles 1er, paragraphe 3, des directives 89/665 et 92/13 permettent aux États membres d'exiger qu'une personne qui souhaite introduire un recours informe préalablement le pouvoir adjudicateur ou l'entité adjudicatrice de la violation alléguée et de son intention d'introduire un recours. En revanche, ces dispositions ne prévoiraient pas qu'une telle information préalable doit avoir un effet suspensif.

50 La jurisprudence de la Cour n'imposerait pas non plus un tel effet suspensif. Les arrêts précités Alcatel Austria e.a. ainsi que Commission/Autriche seraient sans pertinence au regard du présent grief puisqu'ils ne concerneraient pas l'obligation pour les États membres de prévoir le caractère suspensif des recours gracieux adressés aux pouvoirs adjudicateurs ou aux entités adjudicatrices.

51 Ledit État membre soutient également que les pouvoirs adjudicateurs et les entités adjudicatrices sont tenus par les dispositions nationales de respecter le droit des candidats et soumissionnaires évincés d'exercer un recours sous la forme du référé précontractuel. Toute tentative pour priver les opérateurs économiques de leur droit au recours pourrait donner lieu à la censure du juge, bien que le contrôle de celui-ci n'intervienne qu'après la conclusion du contrat.

Appréciation de la Cour

52 Les articles 1er, paragraphe 3, des directives 89/665 et 92/13 autorisent les États membres à exiger qu'une personne souhaitant introduire un recours contre un pouvoir adjudicateur ou une entité adjudicatrice informe préalablement ceux-ci de la violation alléguée et de son intention d'introduire un recours, sans prévoir qu'une telle démarche a un effet suspensif.

53 Il n'est pas contesté que l'article 1441-1 du code de procédure civile est conforme auxdites dispositions dans la mesure où il prévoit que le candidat ou soumissionnaire auquel a été notifié le rejet de sa candidature ou de son offre doit, s'il entend introduire un référé précontractuel, préalablement mettre en demeure le pouvoir adjudicateur ou l'entité adjudicatrice.

54 La Commission critique l'article 1441-1 du code de procédure civile dans la mesure seulement où il assortit cette mise en demeure obligatoire d'un délai de réponse de dix jours pendant lequel le délai, également fixé à dix jours, que le pouvoir adjudicateur ou l'entité adjudicatrice sont tenus de respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la conclusion du contrat n'est pas suspendu. Selon la Commission, cette réglementation a pour effet de priver ce dernier délai de son effet utile.

55 Il convient de constater que, tout en prévoyant un délai de dix jours pour répondre à une mise en demeure, l'article 1441-1 du code de procédure civile exclut tout référé précontractuel avant que n'intervienne la réponse à cette mise en demeure et que ce délai court en même temps que le délai de suspension de la signature du contrat prévu par la législation française, délai qui est lui aussi de dix jours. Il en résulte l'impossibilité pour les candidats et soumissionnaires évincés d'introduire un référé précontractuel dans les cas où, d'une part, la réponse à la mise en demeure n'est donnée qu'après l'expiration dudit délai de dix jours et où, d'autre part, le contrat a été signé entre-temps.

56 Ainsi qu'il résulte du point 41 du présent arrêt, il découle des directives 89/665 et 92/13 qu'un délai raisonnable doit s'écouler entre le moment où la décision d'attribution du marché est notifiée aux candidats et soumissionnaires évincés et la conclusion du contrat, afin de permettre à ces derniers d'introduire une demande de mesures provisoires avant la conclusion du contrat.

57 Or, l'article 1441-1 du code de procédure civile n'est pas compatible avec les directives 89/665 et 92/13 ainsi interprétées, dans la mesure où il peut avoir pour effet, dans certaines circonstances, de ne laisser, entre la notification de ladite décision aux candidats et soumissionnaires évincés et la conclusion du contrat, aucun délai permettant à ceux-ci d'introduire un recours juridictionnel.

58 Contrairement à ce que fait valoir la République française, la possibilité de présenter une demande de référé précontractuel n'est pas suffisamment garantie par l'existence d'un contrôle juridictionnel a posteriori. L'effet utile des directives 89/665 et 92/13 est mis en cause dès lors que le seul recours possible est celui devant les juges du fond. En effet, dans le cas où le contrat a déjà été signé, le fait que le seul contrôle juridictionnel prévu soit un contrôle a posteriori revient à exclure la possibilité d'introduire un recours à un stade où les violations peuvent encore être corrigées, conformément à la jurisprudence de la Cour (voir arrêt Alcatel Austria e.a., précité, point 38).

59 Dans ces conditions, il y a lieu de conclure que le second grief est fondé.

60 Par conséquent, il convient de constater que, en adoptant et en maintenant en vigueur l'article 1441-1 du code de procédure civile, dans la mesure où cette disposition prévoit, pour la réponse du pouvoir adjudicateur ou de l'entité adjudicatrice à une mise en demeure, un délai de dix jours excluant tout référé précontractuel avant ladite réponse et sans que ce délai suspende le délai à respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la signature du contrat, la République française a manqué aux obligations qui lui incombent en vertu des directives 89/665 et 92/13.

Sur les dépens

61 En vertu de l'article 69, paragraphe 3, du règlement de procédure, la Cour peut répartir les dépens ou décider que chaque partie supporte ses propres dépens si les parties succombent respectivement sur un ou plusieurs chefs. La Commission et la République française ayant chacune succombé en l'un des griefs faisant l'objet du présent recours, il convient de condamner chaque partie à supporter ses propres dépens.

Par ces motifs, la Cour (troisième chambre) déclare et arrête:

1) En adoptant et en maintenant en vigueur l'article 1441-1 du nouveau code de procédure civile, tel que modifié par l'article 48-1° du décret n° 2005-1308, du 20 octobre 2005, relatif aux marchés passés par les entités adjudicatrices mentionnées à l'article 4 de l'ordonnance n° 2005-649 du 6 juin 2005 relative aux marchés passés par certaines personnes publiques

ou privées non soumises au code des marchés publics, dans la mesure où cette disposition prévoit, pour la réponse du pouvoir adjudicateur ou de l'entité adjudicatrice à une mise en demeure, un délai de dix jours excluant tout référé précontractuel avant ladite réponse et sans que ce délai suspende le délai à respecter entre la notification de la décision d'attribution du marché aux candidats et soumissionnaires évincés et la signature du contrat, la République française a manqué aux obligations qui lui incombent en vertu des directives 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux, telle que modifiée par la directive 92/50/CEE du Conseil, du 18 juin 1992, et 92/13/CEE du Conseil, du 25 février 1992, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des règles communautaires sur les procédures de passation des marchés des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications.

2) Le recours est rejeté pour le surplus.

3) La Commission des Communautés européennes et la République française supportent chacune leurs propres dépens.

Signatures

---

* Langue de procédure: le français.

EU:C:2011:347

JUDGMENT OF THE COURT (Third Chamber)

26 May 2011 (*)

(Failure of a Member State to fulfil obligations – Directives 93/37/EEC and 2004/18/EC – Procedures for the award of public works contracts – Urban development legislation of the Autonomous Community of Valencia)

In Case C-306/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 9 July 2008,

European Commission, represented by A. Alcover San Pedro, D. Kukovec and M. Konstantinidis, acting as Agents,

applicant,

v

Kingdom of Spain, represented by M. Muñoz Pérez, acting as Agent,

defendant,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby (Rapporteur), R. Silva de Lapuerta, E. Juhász and T. von Danwitz, Judges,

Advocate General: N. Jääskinen,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 6 May 2010,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2010,

gives the following

Judgment

1 By its action, the European Commission seeks a declaration that by awarding ‘integrated action programmes’ (‘IAPs’) pursuant, successively, to Law 6/1994 of 15 November 1994 regulating urban development activities in the Valencian Community (Ley 6/1994, de 15 de noviembre, Reguladora de la Actividad Urbanística de la Communidad Valenciana (‘the LRAU’)) and to Valencian Urban Development Law 16/2005 of 30 December 2005 (Ley 16/2005, de 30 de diciembre, Urbanística Valenciana (‘the LUV’)), the Kingdom of Spain has failed to fulfil its obligations under Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by Commission Directive 2001/78/EC of 13 September 2001 (OJ 2001 L 285, p. 1; ‘Directive 93/37’), and under Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), respectively.

Legal context

European Union legislation

Directive 92/50/EEC

2 The 16th recital in the preamble to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) states:

‘… public service contracts, particularly in the field of property management, may from time to time include some works; … it results from Directive 71/305/EEC that, for a contract to be a public works contract, its object must be the achievement of a work; …, in so far as these works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract’.

3 Article 8 of Directive 92/50 provides:

‘Contracts which have as their object services listed in Annex IA shall be awarded in accordance with the provisions of Titles III to VI.’

4 Category No 12 in Annex IA to Directive 92/50 mentions, among others, ‘[a]rchitectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services’.

Directive 93/37

5 Article 1 of Directive 93/37 provides:

‘For the purpose of this Directive:

(a) “public works contracts” are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority as defined in (b), which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority;

…

(c) a “work” means the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfil an economic and technical function;

(d) “public works concession” is a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment;

…’

6 Article 6(6) of Directive 93/37 requires contracting authorities to observe the principle of non-discrimination.

7 Articles 11 and 12 of Directive 93/37 set forth the common advertising rules and provide, in particular, for the publication in full of contract notices in the *Official Journal of the European Communities* and the time-limits for the receipt of tenders and for the dispatch of the contract documents and additional information.

8 Articles 24 to 29 of Directive 93/37 lay down the qualitative selection criteria applicable to contractors among which are criteria concerning the evaluation of the technical abilities of contractors.

Directive 2004/18

9 Recital 10 in the preamble to Directive 2004/18 is in the following terms:

‘A contract shall be deemed to be a public works contract only if its subject-matter specifically covers the execution of activities listed in Annex I, even if the contract covers the provision of other services necessary for the execution of such activities. Public service contracts, in particular in the sphere of property management services, may, in certain circumstances, include works. However, in so far as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the contract as a public works contract.’

10 Article 1 of Directive 2004/18 provides:

‘1. For the purposes of this Directive, the definitions set out in paragraphs 2 to 15 shall apply.

2(a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

(b) “Public works contracts” are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A “work” means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

…

(d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

…

3. “Public works concession” is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment.

4. “Service concession” is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment.

…’

11 Article 2 of Directive 2004/18 requires contracting authorities to observe the principles of non-discrimination, equal treatment and transparency.

12 Article 6 of Directive 2004/18 prohibits the disclosure of information which economic operators have forwarded to contracting authorities confidentially.

13 Article 17 of Directive 2004/18 provides that ‘[w]ithout prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4)’.

14 Article 24 of Directive 2004/18 lays down the rules applicable to the submission of variants by tenderers where the criterion for award is that of the most economically advantageous tender.

15 Article 53 of Directive 2004/18 sets out the contract award criteria and requires the contracting authority to specify, where the award is made to the most economically advantageous tender, the relative weighting which it gives to each of the criteria chosen.

16 Category No 12 in Annex IIA to Directive 2004/18 mentions, among others, ‘[a]rchitectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services’.

Legislation of the Autonomous Community of Valencia

IAPs

17 The LRAU and the LUV provide for two regimes for implementing urban planning, namely isolated action, in cases of single parcels of land involving their being built upon, and integrated action, which covers joint development of two or more parcels in accordance with a single programme converting those parcels into plots for construction (Article 6(2) and (3) of the LRAU and Articles 14 and 15 of the LUV).

18 The IAP is the planning instrument which governs the implementation of integrated action (Article 12G of the LRAU and Article 39(a) of the LUV). Its purpose is to determine the scope of the integrated action and the works which are to be executed, to fix the time-limits applicable, to establish the technical and financial conditions governing its management, to regulate the undertakings and obligations of the agent of urban development ('the developer') by defining its relations with the owners concerned and with the administration and to determine the guarantees to ensure the observance of those obligations and the penalties applicable (Article 29(2) of the LRAU and Article 117(1) of the LUV).

19 In particular, IAPs must make specific provision to attain the following necessary objectives: urban development of all the plots; connection of the plots concerned to and their integration with the existing infrastructure, energy, communications and public services networks; obtaining, for the administration free of charge, plots for public services; obtaining, for the administration free of charge, the legally applicable right to build for the public land bank; management of the legal conversion of the plots concerned and the equitable division of the costs and benefits between the parties concerned (Article 30 of the LRAU and Article 124 of the LUV).

20 Although the implementation of isolated action may be public or private, that of IAPs is always public, and the administration is entitled to decide whether their management will be direct or indirect (Article 7(1) and (2) of the LRAU and Article 117(4) of the LUV). Management is direct when all the works and investments are financed by public funds and managed by the administration, its bodies, entities, or public undertakings (Article 7(2) of the LRAU and Article 117(4) of the LUV) without the right to receive any commercial profit (Article 128(4) of the LUV). On the other hand, in cases of indirect management, the administration delegates the status of developer to an individual, whether or not he is the owner of the plots, selected by a competitive public tendering procedure (Article 7(2) of the LRAU and Article 117(4) of the LUV).

Indirect management

21 Within the framework of indirect management of IAPs, the developer is the public agent responsible for the development and for the execution of the urban planning activities designated by the IAP, which include, in any event, the preparation of the technical documents established in the bases, the proposal for and management of the corresponding land consolidation project, as well as the recourse to the building contractor responsible for the implementation of the planning project, in the cases and according to the conditions laid down by law. The developer will have to finance the cost of the investments, works, installations, and compensation necessary for the execution of the programme, which will have to be guaranteed in and according to sufficient proportions, the cost of which can be passed on to the ownership of the building plots arising therefrom either by compensation in developed plots or by payment in cash by the owners of the developed plots resulting from the integrated action (Article 29(9A) of the LRAU and Articles 19 and 162(1) of the LUV). Those costs include, in particular, the costs of the urban development works and the developer's commercial profit, which is limited, under the LUV, to 10% of the development costs (Article 67(1) of the LRAU and Article 168 of the LUV).

22 The owners concerned by integrated action may cooperate in it, by contributing their undeveloped plots and receiving, in exchange, developed plots. They may, in particular, either participate proportionally in the development costs by granting a part of their plots to the developer, or by paying in cash, as consideration to the developer, their proportion of the development costs (Article 29(9B) of the LRAU and Article 162(2) of the LUV).

23 Owners who expressly decline to cooperate may seek expropriation on the basis of the original value of the plots concerned (Article 29(9C) of the LRAU and Article 162(3) of the LUV).

24 The administration exercises, of its own motion or at the developer's request, its public rights and powers such as expropriation or compulsory consolidation where they are necessary to implement an IAP (Articles 29(10), 66 and 68 of the LRAU and Articles 162(3) and 169 of the LUV).

The award and approval procedure

– The LRAU

25 Under Article 44 of the LRAU, the procedure may be commenced on the initiative of a public body or of an individual, whether or not he owns the plots to be developed.

26 Under Article 45(1) of the LRAU, any individual may request the administration to make public a technical tender for an IAP which must contain a copy of the development certificate issued by the competent administration or of its request covering the minimum conditions for connection and integration of the proposal for integrated action, as well as the preliminary draft of the development with descriptions of the development works to be carried out.

27 Under the terms of Article 45(2) of the LRAU, the administration may either reject that request or submit it to a public inquiry, if appropriate with observations or alternatives.

28 Article 46 of the LRAU provides that publication of the proposal for an IAP drawn up by an individual or, in the case of a public initiative, by the competent administration, is to be in a general information journal and in the Official Journal of the Autonomous Community of Valencia. In accordance with the same provision, during the public information phase, observations or technical tenders are accepted. At the conclusion of the public information phase, tenderers may submit legal and financial tenders. Observations and technical tenders are to be submitted, in open envelopes, within a period of 20 days from the publication of the proposal for the IAP and legal and financial tenders, in closed envelopes, within five days following the expiry of the previous period, which may be extended by 20 days.

29 Article 46(2) of the LRAU mentions the documents which are to form part, first, of the technical tender, namely, in particular, the description of the development works, and, second, of the legal and financial tender including the detailed rules concerning relations between the developer and the owners, any agreements already existing with the latter, an estimate, even if preliminary and approximate, of the costs of the development works and the developer's consideration with reference to correction indices in relation to the estimate of the costs of the development works.

30 Under Article 47 of the LRAU, the administration may either reject all the tenders and, if appropriate, decide to manage the IAP directly, or approve the IAP defining its content by the selection of a technical tender and a legal and financial tender from those submitted, making the partial amendments to them which it considers expedient. Concurrently, the administration may award the IAP to the tenderer of a legal and financial tender relating to the most appropriate technical tender. That award is to be made according to the award criteria which are mentioned in it, including the guarantees or possibilities of collaboration of the owners concerned to facilitate or ensure the implementation of the integrated action.

31 The administration and the developer are to execute an urban development agreement containing, in accordance with Article 32(c) of the LRAU, their respective undertakings, the time-limits, the guarantees provided by the developer, as well as the penalties laid down for the developer's breach of its obligations.

32 Article 48 of the LRAU provides for a simplified procedure on the initiative of an individual.

33 Under Article 67(3) of the LRAU, the costs initially provided for in the IAP may be re-evaluated during the approval of the development project for objective reasons which were not foreseeable by the developer.

– The LUV

34 Under Article 130 of the LUV, the procedure for the award and approval of an IAP may be commenced on the initiative of a public body or of an individual, whether or not they are owners of the plots.

35 Under Article 130(2) of the LUV, individuals may accompany their request with a planning document specifying the detailed or structural arrangement of the development which is proposed as well as documents referred to in Article 131(2)(a) to (e) of the LUV.

36 Under Article 130(3) of the LUV, the administration may reject the individual's request, commence the procedure for indirect management, or decide to have recourse to direct management.

37 Under the terms of Article 130(5) of the LUV, the administration's failure to respond is taken to be agreement, if the tender submitted by the first tenderer involves execution of the structural planning directives in force and the administration does not reply to the request within a period of three months.

38 Under Article 131(2) of the LUV, the decision to commence the procedure for indirect management of an IAP also implies approval of the particular specifications governing the procedure for the award of the IAP. They must state whether variants are accepted, define the aspects for which tenderers may propose variants and lay down the minimum conditions which they must fulfil.

39 According to the terms of Article 132(2) and (4) of the LUV, the public competition for the award of an IAP must be published, at least, in the *Official Journal of the European Union* and in the Official Journal of the Autonomous Community of Valencia, irrespective of the IAP's estimated value.

40 Under Article 133 of the LUV, tenderers' tenders are to contain the documents relating to the capacities required, to the technical tender and to the legal and financial tender.

41 The criteria for evaluating the technical and professional capacity of tenderers are set out in Article 123 of the LUV.

42 The content of the technical tender is specified in Article 126 of the LUV.

43 The content of the legal and financial tender is, for its part, specified in Article 127 of the LUV, under which it must contain terms governing relations between the developer and the owners concerned and, in particular, the detailed rules concerning the consideration for it as well as sufficient information to enable the owners to ascertain the financial consequences which the tender in question involves for them. The financial and legal tender must establish, in particular, the expected development costs, the developer's profit and the exchange coefficient applicable in case of payment in plots.

44 Article 135(3) of the LUV sets out the criteria for the award of the IAP which will have to be evaluated as regards the technical tender.

45 Article 135(4) of the LUV sets out the criteria for the award of the IAP which will have to be evaluated as regards the legal and financial tender, particularly the amount of the development costs as well as the lowest proportion of building plots or rights to build made available to the developer by compulsory consolidation or the highest proportion of its own or its associates' plots which must be used to comply with the special obligations to build arising from approval of the IAP.

46 Article 137 of the LUV contains provisions applicable to the award and approval of the IAP. Under Article 137(5) of the LUV, if the IAP amends structural planning, approval by the administration is conditional on the final authorisation of the regional government.

47 Article 138 of the LUV requires the contract with the developer to be executed in the form of an administrative document within a month following the date of the award of the contract. That article lists the matters which must be included in the contract.

48 Under Article 143(4)(d) of the LUV, in the event of termination of the contract with the developer, the administration may request tenderers who submitted legal and financial tenders relating to the technical

tender which was accepted to pursue the execution of the programme, and, alternatively, launch a call for tenders on the basis of the technical tender accepted at the conclusion of the first call for tenders.

49 Under Article 155(6) and (7) of the LUV, the administration may make amendments to the development project contained in the tender accepted on the award of an IAP where the changes thus made represent an increase not exceeding 20% of the cost of the development works.

50 According to Article 168(3) of the LUV, the maximum amount of the development costs may not be increased unless they are re-evaluated, which may not involve an increase of the part of the development costs corresponding to the developer's profit.

51 As regards the execution of the development works, the LUV requires that it be entrusted to a building contractor selected by the developer within the framework of a public competition, in accordance with the rules for the award of public contracts. Neither the developer concerned nor undertakings linked to it may participate in that public competition.

52 Under the first transitional provision of the LUV, IAPs commenced before its entry into force, which was on 1 February 2006, are governed by the LRAU provided that, before that date, they were the object of municipal approval or the maximum period for making an express decision on that approval had expired.

The pre-litigation procedure and the Commission's action

53 Following complaints, the Commission, by a letter of formal notice of 21 March 2005, informed the Kingdom of Spain that several provisions of the LRAU relating to the award of IAPs were, in its view, contrary to Directives 93/37 and 92/50. The Kingdom of Spain replied to that letter of formal notice by a letter of 31 March 2005, claiming that the award of IAPs did not constitute a contract governed by those directives. It referred, also, to the draft adoption of the LUV, which also gave rise to contacts and an exchange of letters between it and the Commission.

54 Since it was not satisfied by the Kingdom of Spain's explanations and since it considered the award of IAPs under the LRAU constituted a failure to fulfil its obligation under those directives, the Commission, on 15 December 2005, issued a reasoned opinion with which that Member State had to comply within a period of three weeks expiring on 6 January 2006.

55 In its reply dated 26 January 2006 to the reasoned opinion, the Kingdom of Spain referred to the adoption of the LUV repealing the LRAU, the entry into force of the LUV being envisaged for 1 February 2006. Following exchanges with the Commission, that Member State, by letter of 17 March 2006, made some additional observations.

56 In the light of the persistence of the alleged infringement and the expiry of the time-limit laid down for the transposition of Directive 2004/18, the Commission, on 10 April 2006, sent the Kingdom of Spain an additional letter of formal notice to which the latter replied by letter of 7 July 2006.

57 Since it considered, first, that the LUV and, second, the award of IAPs under the LRAU between 21 March 2005 and 31 January 2006 constituted breach, in particular, of Directive 2004/18, the Commission issued an additional reasoned opinion dated 12 October 2006.

58 Since the Kingdom of Spain maintained its position in its reply, dated 11 January 2007, to the additional reasoned opinion, the Commission brought the present action, seeking from the Court a declaration that the Kingdom of Spain has:

– by awarding IAPs pursuant to the LRAU, failed to fulfil its obligations under Articles 1, 6(6), 11, 12 and 24 to 29 of Directive 93/37; and

– by awarding IAPs pursuant to the LUV, failed to fulfil its obligations under Articles 2, 6, 24, 30, 31(4)(a) and 53 of Directive 2004/18.

The application to reopen the oral procedure

59 By letter dated 22 November 2010, the Commission requested that the oral procedure be reopened, submitting, in essence, that the issue of the competent administration's financial participation, as analysed by the Advocate General in his Opinion, constitutes an essential element of the dispute and requires additional clarification.

60 In that regard, it is appropriate to note that the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, in particular, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 31 and the case-law cited).

61 However, neither the Statute of the Court of Justice of the European Union nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (see *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 32).

62 The Court considers, having heard the Advocate General, that it has all the material necessary for it to decide the dispute before it and that the case does not have to be examined in the light of arguments that have not been the subject of discussion before it. Therefore, there is no need to order the reopening of the oral procedure.

The action

Admissibility

63 The Kingdom of Spain raises the partial inadmissibility of the action so far as it concerns breach of Directive 93/37 by the LRAU. In that regard, the Kingdom of Spain considers that the fact that the first reasoned opinion could require that the LRAU be adapted to Directive 93/37 instead of referring to Directive 2004/18, the time-limit for the transposition of which into domestic law was on the point of expiring, can be criticised.

64 In the Kingdom of Spain's submission, the LRAU ceased to be applied on the entry into force of the LUV and the Commission has not established the approval of a significant number of IAPs under the LRAU during the period prior to the LUV coming into effect. Furthermore, the Kingdom of Spain submits that, where national and Community legislation was repealed, as in this case, more than two years before the bringing of proceedings, there is no longer any point in pursuing the proceedings.

65 In that respect, it is with regard to the legislation in force on 6 January 2006, the date on which the period prescribed in the first reasoned opinion of 15 December 2005 expired, that it must be decided whether the alleged infringement occurred. On that date both the LRAU and Directive 93/37 were in force.

66 As regards the time at which the Commission chose to bring the proceedings against the Kingdom of Spain, it is sufficient to observe that it is for the Commission, in performing the task conferred upon it by Article 211 EC, to ensure that the provisions of the Treaty are applied and verify whether the Member States have acted in accordance with those provisions. If the Commission considers that a Member State has infringed provisions of the Treaty, it is for it to determine whether it is expedient to take action against that State and what provisions the State has infringed, and to choose the time at which it will initiate infringement proceedings; the considerations which determine its choice of time cannot affect the admissibility of its action (see Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 27; Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 66; and Case C-531/06 *Commission* v *Italy* [2009] ECR I-4103, paragraph 23).

67 In the light of the foregoing, the plea of inadmissibility submitted by the Kingdom of Spain must be rejected.

Substance

Arguments of the parties

68 The Commission submits that several aspects of the procedure for awarding and approving IAPs in indirect management under the LRAU and the LUV are, respectively, contrary to Articles 1, 6(6), 11, 12 and 24 to 29 of Directive 93/37 and to Articles 2, 6, 24, 30, 31(4)(a) and 53 of Directive 2004/18.

69 The Commission submits that the relationship between the administration and the developer constitutes, under Directives 93/37 and 2004/18, a public contract the principal object of which, as is clear from the description of integrated action, is the execution of public infrastructure and urban development works.

70 The fact that the physical execution of those works must, within the framework of the LUV, be entrusted by the developer to a building contractor does not in the least alter the classification of the contract as a works contract since it is the developer which undertakes to the administration to carry them out.

71 As regards the pecuniary interest of the award and the approval of IAPs, the Commission observes that the LRAU and the LUV put in place a system in which there is a bilateral contract between the developer and the local authority under which the consideration moving to the local authority relates directly to the execution of public works and the supply of certain connected services. In addition, the developer receives from the landowners a sum of money or its equivalent in plots.

72 The Commission submits that the pecuniary interest of the contract finds expression in the administration's decision to approve the IAP and to select the developer as well as in its exercise of its public rights and powers to guarantee compliance with the provisions of the approved IAP.

73 The Commission adds that, if the administration decides to manage the IAP directly, it must carry out the projects itself and expend the sums necessary for the works. In that case, it incurs costs which it then passes on to the owners whereas, if it opts for indirect management, the administration expends nothing, but nor does it receive anything. The Commission concludes that, by opting for indirect management, the administration ceases entirely to receive certain monies, and the fact that it also does not bear certain expenses in no way qualifies that statement.

74 Lastly, the Commission submits, as is clear particularly from Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraphs 77 and 84, and Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraphs 45 and 57, that payments by third parties are indicative of pecuniary interest.

75 In its reply, the Commission observes that the Tribunal Supremo (Supreme Court, Spain) has made an interpretation which is diametrically opposed to that maintained in this case by the Kingdom of Spain and which essentially mirrors the Commission's analysis.

76 The Kingdom of Spain submits, for its part, that the relationship between the administration and the developer constitutes, having regard to the method of remunerating the developer, not a public works contract but a public service concession which does not come within the scope of Directives 93/37 and 2004/18, and that, therefore, the award of IAPs is subject to the principles of primary European Union law.

77 The Kingdom of Spain submits that the Commission is confusing IAPs with planning projects, when the execution of public works does not constitute the exclusive, or even fundamental, purpose of IAPs. Approval of an IAP, by means of an award, also involves the financing and management of land consolidation as well as the assignment of development works to service providers. The developer is therefore also financially responsible for the execution of the works and is liable to carry out the necessary administrative procedures in order to guarantee that the operations are free of charge for the administration and that the land-related costs and profits from them are fairly divided between the owners.

78 The Kingdom of Spain also contends that there is no pecuniary interest bearing on the administration since the developer's remuneration is provided exclusively by the owners.

79 First of all, the owner's obligation to finance the costs of planning and, therefore, to remunerate the developer does not arise from a unilateral decision of the administration, but from its voluntary decision to participate in the land consolidation and thus to obtain the benefit of new plots for building.

80 Next, the LRAU and the LUV do not provide for any guarantee of payment from public funds from which a contract for consideration arises between the administration and the developer, which is responsible to the administration even if the building contractor or the owners do not comply with their respective obligations.

81 Finally, the choice of indirect management in place of direct management does not involve consideration, any more than the exercise by the administration of its public rights and powers for the purposes of land consolidation or expropriation.

82 In the light of those considerations, the Kingdom of Spain contends that the developer must be regarded not as a 'successful tenderer' for a contract in the strict sense, but as a 'concessionaire', since the developer's remuneration depends on the exploitation on the market of building plots and not on a fixed price guaranteed by the administration. In particular, it assumes the characteristics of a service concessionaire, since the financial management of the land consolidation is the most relevant function from the economic point of view.

83 The Kingdom of Spain contends, also, that the Commission's argument is contrary to the effectiveness of Directives 93/37 and 2004/18.

Findings of the Court

84 As a preliminary point, it should be noted that the present action relates only to the award of contracts for urban development under laws adopted successively by the Autonomous Community of Valencia on the basis of its regional powers in respect of urban development, land use and town and country planning.

85 More particularly, the Commission criticises the Kingdom of Spain for awarding IAPs, that is to say integrated action programmes for the joint urban development of several parcels in accordance with a single programme converting those parcels into building plots, pursuant, first, to the LRAU and, second, to the LUV, in breach of Directives 93/37 and 2004/18 respectively.

86 The Commission's complaints concern only the procedure for approving IAPs in indirect management, which, under the legislation in question, involves the delegation, by the competent contracting authority to an individual, of the status of developer, selected according to a competitive public procedure whether or not the developer owns the plots concerned.

87 In that regard, the Commission submits that the urban development contracts in question must be classified as 'public works contracts' and must on that basis comply with the requirements laid down by Directive 93/37 and, later, Directive 2004/18. That follows, as regards the complaints in respect of the LRAU, from the legal basis of the action limited to breach of Directive 93/37 alone and, as regards the complaints in respect of the LUV, from the additional reasoned opinion, as the Commission notes in its application and as it confirmed at the hearing.

88 As regards the concept of 'public works contracts' within the meaning of Article 1(a) of Directive 93/37 and of Article 1(2)(b) of Directive 2004/18, it must be observed that it covers contracts for pecuniary interest, concluded in writing between one or more economic operators and one or more contracting authorities and having as their object either the execution, or both the design and execution, of works related to one of the activities referred to in Annex II to Directive 93/37 or Annex I to Directive 2004/18 or of a work defined in Article 1(c) of Directive 93/37 or Article 1(2)(b) of Directive 2004/18, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

89 In addition, it is clear from the 16th recital in the preamble to Directive 92/50 and from recital 10 in the preamble to Directive 2004/18, in conjunction with Article 1(a) of Directive 93/37 and Article 1(2)(b) of Directive 2004/18 respectively, that a contract can be deemed to be a 'public works contract' only if its subject-matter corresponds to the definition given in the preceding paragraph and that works which are incidental to, and not the subject-matter of, the contract do not justify the contract's qualification as a public works contract.

90 It is clear, moreover, from the case-law of the Court that, where a contract contains elements relating both to a public works contract and another type of contract, it is the main object of the contract which determines which body of European Union rules on public contracts is to be applied in principle (see, to that effect, *Auroux and Others*, paragraph 37).

91 That determination must be made in the light of the essential obligations which predominate and which, as such, characterise the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very object of the contract (Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 49).

92 In this case, it must be observed that the Commission confines itself to putting forward the argument that the urban development contracts at issue must be classified as 'public works contracts' on the ground that the main object of IAPs is, for the purposes of Articles 1(c) of Directive 93/37 and 1(2)(b) of Directive 2004/18, a 'work' of urban development of two or more parcels leading to the construction of highway access by a paved road, the distribution of drinking water and electricity, the evacuation of waste water from gutters and public lighting. In that regard, the Commission observes that the services provided by the developer, such as the preparation of technical documents, the drawing-up and management of the development project or even, under the LUV, the selection of the contractor which will carry out the works, are instrumental and ancillary.

93 It is also appropriate to observe that the Kingdom of Spain rejects the Commission's assessment that IAPs should be classified as a 'work', in the sense of Directives 93/37 and 2004/18, and contends that the execution of such a work does not constitute its exclusive or even fundamental purpose. To that effect, that Member State contends that the developer is also financially liable for the execution of the works and is likewise responsible for taking the necessary steps to guarantee that the operations are free of charge for the administration, and that the costs relating to them and the corresponding land-related profits are fairly divided between the owners of the building plots who finance them. In addition, that Member State contends that the contracts at issue must be classified as 'service concessions', within the meaning of Article 1(4) of Directive 2004/18.

94 According to settled case-law, in proceedings under Article 226 EC for failure to fulfil obligations, it is for the Commission to prove that failure. It is the Commission, indeed, which must place before the Court all the information needed to enable the Court to establish that failure, and in so doing the Commission may not rely on any presumptions (Case C-490/09 *Commission* v *Luxembourg* [2011] ECR I-0000, paragraph 49 and the case-law cited).

95 In that regard and as regards the nature of the activities for which the developer is responsible, notwithstanding the Kingdom of Spain's analysis, the Commission has not sought to substantiate its own allegations or to refute those of the defendant Member State by detailed examination of that information.

96 Indeed, it has not been established that the works consisting of the connection and integration of the plots concerned to the existing infrastructure, energy, communications and public services networks constitute the main object of the contract concluded between the community and the developer within the framework of an IAP in indirect management. In fact, the execution of the IAP by the developer includes, as is clear particularly from paragraphs 21 and 23 of the present judgment, activities which cannot be classified as 'works', within the meaning of the directives relied on by the Commission in its application, namely the preparation of the development plan, the proposal and management of the corresponding land consolidation project, obtaining for the administration free of charge plots for public ownership and for the community's public land bank, management of the legal conversion of the plots concerned or even the equitable division of the costs and profits between the parties concerned as well as the transactions for financing and guaranteeing the cost of the investments, works, installations

and compensation necessary for the execution of the IAP. Such is also the case where the developer, as stated in Article 119(1) of the LUV, must organise the public competition for the appointment of the building contractor to which the execution of the urban development works is to be entrusted.

97 In addition, some of the activities which IAPs involve, under both the LRAU and the LUV as stated in the preceding paragraph, seem to correspond, by their nature, to the activities referred to in Category No 12 in Annexes IA to Directive 92/50 and IIA to Directive 2004/18, relating to the services referred to, respectively, in Article 1(a) of Directive 92/50 and Article 1(2)(d) of Directive 2004/18.

98 It follows that the Commission has not proved that the main object of the contract concluded between the local authority and the developer is a public works contract within the meaning of Directive 93/37 or Directive 2004/18, which is a condition precedent to a declaration of the alleged failure to fulfil obligations.

99 It follows from the foregoing that the Commission's action must be dismissed.

Costs

100 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Spain has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]

---

* Language of the case: Spanish.

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 16 September 2010 (1)

Case C-306/08

European Commission
v
Kingdom of Spain

(Infringement proceedings – Failure of a Member State to fulfil obligations – Directive 93/37/EEC – Directive 2004/18/EC – Public works contracts – Public service contracts – Public service concession – Public works concession – Land development – Urban planning and development laws in the Valencia region)

1. In the present infringement action the Commission requests the Court to hold that in awarding the Integrated Action Programmes ('IAPs'), an urban development measure in the region of Valencia, established by the LRAU (2) and its successor the LUV, (3) Spain has failed to fulfil its obligations in respect of public procurement Directives 93/37/EEC (4) and 2004/18/EC. (5)

2. This action enables the Court to consider once again the treatment of urban development measures within the scope of the public procurement rules, as well as to further clarify the meaning of 'pecuniary interest' and 'concessions' in the public procurement directives in question.

3. The present infringement action has been the result of a large number of petitions to the European Parliament, complaining about various aspects of the LRAU including the geographical location of the development projects and their impact on the environment, the expropriation of land without fair compensation, and the obligation of landowners to pay for infrastructure works they did not want or need. (6) The Commission investigated the various objections and found that the only avenue that could be pursued was the public procurement one since the Commission either did not have the competence, (7) or because the legal case was not strong. (8) Since the main grievances of the petitioners concerned issues other than compliance with the public procurement rules, (9) the Commission's present action and the outcome of the case will do little to console them.

I – Legal framework

A – *EU law (10)*

1. Directive 93/37

4. Directive 93/37 applies to public works contracts and concessions.

5. Public works contracts are defined as 'contracts for pecuniary interest concluded in writing between a contractor and a contracting authority…which have as their object either the execution, or both the execution and design of works related to one of the activities referred to in Annex II or a work … or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority'. (11)

6. Public works concessions are defined as ‘a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment’. (12)

7. Article 6(6) contains a general non-discrimination requirement.

8. Article 11 requires notices to be published in full in the *Official Journal of the European Communities* and in the TED data bank.

9. Article 12 concerns the time-limits for the receipt of tenders. It provides for a period of 52 days from the publication of the notice in cases where the open procedure is used.

10. Chapter II of Title IV, that is, Articles 24 to 29, concerns the criteria for qualitative selection. Article 24 lists situations when a contractor may be excluded from participation in a contract, and includes things such as a contractor who is bankrupt or has been convicted of an offence concerning professional conduct. Articles 25 to 29 deal with evidence that may be asked of a contractor concerning his enrolment in the professional or trade register, financial standing, technical capability, as well as addressing the situation of Member States who have official lists of recognised contractors.

2. Directive 2004/18

11. Directive 2004/18 recast, amongst others, Directive 93/37. The former covers all public contracts, defined as ‘contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this directive’. (13)

12. Public works contracts are further defined as ‘public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority’. (14)

13. Public service contracts are further defined as ‘public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II’. (15)

14. A public works concession is further defined as ‘a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment’. (16)

15. A service concession is further defined as ‘a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment’, (17) and is excluded from the directive. (18)

16. Directive 2004/18 does not apply to public service contracts for the acquisition or rental by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon. (19)

17. Article 2 states that in awarding contracts contracting authorities shall treat economic operators equally and non-discriminatorily, and shall act in a transparent way.

18. Article 6 relates to the confidentiality of technical and trade secrets as well as other confidential aspects of tenders, and requires the contracting authority not to disclose information forwarded to it by economic operators which they have designated as confidential.

19. Article 24 states that contracting authorities shall indicate in the contract notice whether or not they authorise variants and that they shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation. Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration.

20. Article 30 is about cases justifying use of the negotiated procedure with prior publication of a contract notice. It outlines the way in which such negotiated procedures shall be conducted.

21. Article 31(4)(a) deals with cases justifying use of the negotiated procedure without publication of a contract notice and more specifically, in case additional works or services not included in the project initially considered are required, the way in which this must be carried out.

22. Article 48(2) lists evidence that may be provided in order to indicate the economic operator's technical abilities.

23. Article 53 states that the criteria on which the contracting authorities shall base the award of public contracts shall be either that which is the most economically advantageous from the point of view of the contracting authority (which can involve various criteria linked to the subject-matter of the contract in question such as environmental characteristics, quality, price and cost-effectiveness, amongst other things), or that with the lowest price. It also refers to the obligation on the contracting authority to specify, if possible, the relative weighting attached to each criterion to determine the most economically advantageous tender, or the criteria in descending order of importance.

B – *National law*

1. State legislation

24. In Spain, public procurement belongs to the legislative competence of the State. The State competence also covers expropriation and the right to ownership. On the other hand, planning and land-use belong to the regional legislative remit, within the framework provided by the Constitution and the State law. (20) The LRAU and the LUV have been issued on the basis of the regional competences to regulate the planning, use and development of land.

25. The Spanish Constitution recognises the right to private property and inheritance limited, however, by their social function in accordance with laws. (21) According to it: all persons are entitled to appropriate housing; the public powers contribute to the creation of the necessary conditions for the exercise of this right through adequate regulation of the use of land in the general interest so as to prevent speculation; the community shall benefit from the increase in the value of land following the urban development measures adopted by the public authorities. (22)

26. The Spanish State legislation on planning and land-use has undergone several changes after the adoption of the LRAU, the present legislative framework being incorporated in the TRLS. (23) It is useful to explain certain basic principles of this legislation that were also included in the preceding legislative acts applicable during the pre-litigation period.

27. According to the TRLS, land planning and urban development are non-commercial public services aimed at organising the use of land in accordance with the general interest and fixing the rights and obligations relating to ownership with regard to the objectives ascribed for the use of land. The categorisation of these objectives for each piece of land does not entail a right to compensation unless expressly provided by law. The planning and land-use legislation must ensure that the public authorities regulate and control the land development during its various phases from occupation, through building of infrastructures and building and construction activities, to use by any public or private person. In addition, the community must benefit from the increase of value generated by measures adopted by public authorities. (24)

28. Private parties, landowners and others may, within the framework of free enterprise, execute works relating to urban development when they are not executed by the competent authority. The authorisation to execute such works must be subject to public competitive award procedures that enable the local community to benefit in an appropriate manner as a result of the increase in value generated by the urban development. (25)

29. Actions promoting urban development may require: (1) the free transfer of the areas reserved for streets, green spaces and other communal areas as well as, with certain limits corresponding to building opportunities created by the action, territories reserved for public purposes to the local authority; (2) the

financing and execution of all the works relating to the urban development in accordance with the action and to build up the necessary infrastructures; and (3) the transfer of the infrastructures and work, together with the accompanying territories, to the competent authority. (26)

2. Regional legislation

a) Definition of the IAP

30. According to the LRAU and the LUV, urban development (27) in the autonomous region of Valencia can take place according to the isolated action regime (in cases of a single piece of land) or integrated action regime (in cases of two or more pieces of land when there is a need to link the building land to a network of services). (28)

31. Integrated actions are always public, (29) and can be carried out directly or indirectly. The local authority which wishes to develop the land in question by integrated action can choose which of those procedures to engage. (30) If it chooses the direct management procedure the works and investments are financed through public funds (31) and managed by the contracting authority. (32) If it decides on the indirect management procedure the local authority chooses a developer, and the landowners must compensate the developer for the costs of development, proportionally to the land they contribute to the project.

b) IAP procedure

32. One of the ways of carrying out an integrated action is by engaging the IAP procedure. (33) In both the case of the LRAU and the LUV the IAP procedure consists of four steps: initiative, selection, land readjustment and infrastructure provision. (34)

33. The engagement of the IAP procedure can be initiated by the local authority or at anyone's request, whether they own the land concerned or not. (35) A detailed development plan must be approved by the local authority. (36) The IAP entails a definitive choice between the land-use alternatives for the area enabled by the plan in force.

34. Under the LRAU, the IAP procedure is engaged when a request is made to make public a technical alternative for an IAP. (37) This document identifies the area to be developed, indicates the detailed or structural plans to be implemented by the IAP and includes a proposal for land use and its integration to the surrounding areas.(38) The local authority can either reject the demand, or make the information public by publishing it in the regional official journals, (39) with or without observations. (40) During the public consultations anyone can make observations or submit alternative technical offers. At this time financial offers can also be made. (41) The financial offers determine the legal, economic and financial conditions of the IAP. (42) The local authority then approves an IAP by choosing a technical offer and a financial offer (though not necessarily from the same person). (43) Under the LRAU there is also a simplified procedure where the approval by the local authority of the first technical offer presented by the initiator of the IAP is not necessary, formalisation before a notary being the only requirement in such a case. (44)

35. Under the LUV, the IAP is initiated by a person submitting any of the documents listed in the LUV. (45) Those documents become part of the specifications concerning the award of the IAP, (46) upon which subsequent tenders are judged. (47) When the documents are submitted the contracting authority decides whether it will opt for the direct or the indirect management procedure. (48) The choice of an indirect management procedure entails the approval of the specifications in the documents as submitted, (49) either implicitly (50) or explicitly, and the process for the awarding of the IAP begins with the publication of a notice in the Official Journal of the EU as well as in the regional official journals. (51) If the IAP modifies the structural development, the approval of the IAP by the contracting authority is conditional upon the definitive approval by the regional government. (52)

c) The aims of the IAP

36. The aim of the IAP is to identify the scope of the integrated action by defining the works to be carried out, the deadlines, and the technical and economic base for the management of the action. (53)

Its aim is to develop two or more parcels by transforming them into developed land and attaching them to existing service networks. (54)

37. According to both the LRAU and the LUV the IAP *must* achieve the following: (55)

– attachment of the new (developed) lots to a network of infrastructures, communications and existing public services;

– construction of new infrastructures and public spaces;

– complete development of the space and the carrying out of necessary complementary public works;

– the obtaining of land for the purposes of the IAP;

– the obtaining of a right to develop;

– obtaining the costs necessary to see the IAP through.

38. In addition to these obligations, the regional legislation outlines the following which *may* also be achieved through the IAP: (56)

– contribution for the benefit of the local authority (57)

– carrying out other works

– construction of social housing.

d) Division of powers pursuant to the IAP

39. The local authority controls and oversees the IAP procedure. It is responsible for choosing a developer in indirect action cases, (58) as well for approving the IAP and suggesting modifications if necessary. (59) At the end of the IAP the works pass to the local authority three months after being formally offered to the local council without receiving a reply, or from the date when they are open to the public. (60) After receipt the local authority assumes the maintenance obligations. The contracting authority may agree to receive a monetary payment instead of the land corresponding to their entitled development profit of 10%. (61)

40. The developer is the local authority in direct action cases, but is chosen by the local authority through public tender in indirect action cases. He is defined in the regional legislation as the public agent responsible for the development and execution of the IAP. (62)

41. The developer is responsible for writing technical documents as required by the specifications, and developing and managing the re-allotment of the land, (63) as well as choosing a sub-contractor to carry out the works. (64) The developer is the person whose financial offer has been approved as a result of the IAP procedure, and he is responsible for implementing the technical offer which has been approved, which might not necessarily have been his own. Under the LUV the developer is obliged to sub-contract in accordance with public procurement rules the execution of public works entailed by the IAP unless the thresholds are not exceeded, if there is only one landowner or, in the case of several landowners, they unanimously agree with the developer that he can himself execute the works. The developer is paid by receiving from the landowners a part of the developed land and/or cash payments. (65)

42. The landowner can choose between expropriation and participation in the IAP. If he chooses expropriation he will receive a price on the basis of the original value of the land concerned. (66) In such a situation the local authority will be responsible for the expropriation and the developer obliged to pay the compensation. (67) If he chooses to participate he will be obliged to pay a proportion of the costs of development either by giving the developer a portion of his land, or by paying him directly in money. (68) In return he receives developed land.

43. The landowner is obliged to pay the following costs, in proportion to the area of the land which he has given to the project: (69)

– costs of development works and indemnities in respect of necessary investment in order to achieve the IAP objectives;

– the developer's profit as a result of the IAP (capped at 10% under the LUV but not under the LRAU);

– the associated management costs.

II – Pre-litigation procedure

44. On 21 March 2005 the Commission sent Spain a letter of formal notice considering that various provisions of the LRAU relating to the attribution of IAPs were contrary to Directive 93/37. The Spanish authorities replied to that letter contesting that the IAP was a public contract within the meaning of the directive, and referring to the proposed adoption of the new law, the LUV.

45. On 15 December 2005, following an exchange of letters between the Commission and the Spanish authorities, and unsatisfied with Spain's replies, the Commission sent a reasoned opinion requesting that Spain take the necessary measures within three weeks, that is by 6 January 2006, to ensure that the LRAU complied with Directive 93/37.

46. The reasoned opinion stated that the awarding of IAPs in accordance with the LRAU was contrary to (1) Directive 93/37 'and particularly Articles 1, 11 to 13 (and in the alternative Articles 3 and 15), as well as Chapter 2 of Title IV'; (2) Directive 92/50 (70) 'and in particular Articles 1, 15 to 19 and Chapter II of Title VI'; and (3) 'Articles 43 to 55 of the Treaty and general principles as stated by the Court'.

47. On 26 January 2006 Spain replied that the LUV, entering into force on 1 February 2006, was to replace the LRAU.

48. On 10 April 2006 the Commission sent an additional letter of formal notice in view of the continued infringement and as a result of the expiration of the deadline for transposition of Directive 2004/18, following another exchange of letters.

49. On 12 October 2006 the Commission sent Spain an additional reasoned opinion, considering that the attribution of IAPs under (1) the LUV was contrary to Directive 2004/18 and 'certain general principles of EU law derived from the EC Treaty'; and (2) the LRAU (for the period 21 March 2005 to 31 January 2006) was contrary to Articles 2, 6, 24, 30, 31(4)(a), 36, 48(2) and 53 of Directive 2004/18 and 'the principle of equal treatment and non-discrimination, as derived from the EC Treaty and case-law of the Court, Articles 10 and 49 EC' and in the alternative Title III of Directive 2004/18, dealing with works concessions.

50. Not being satisfied with Spain's response to the additional reasoned opinion, the Commission decided to bring the present action where it asks the Court to declare that, (1) in awarding IAPs in accordance with the LRAU, Spain 'has failed to fulfil its obligations under [Directive 93/37] and particularly Articles 1, 6(6), 11, 12 and Chapter 2 of Title IV thereof (Articles 24 to 29)'; and (2) in awarding IAPs in accordance with the LUV (as implemented by Decree 67/2006 of the Region of Valencia of 12 May, establishing the Regulation of Town Planning and Management (71)), Spain 'has failed to fulfil its obligations under Articles 2, 6, 24, 30, 31(4)(a), 48(2) and 53(2) of Directive 2004/18'.

III – Scope of the case

51. During the pre-litigation proceedings as well as in its written pleadings before the Court the Commission has touched upon a lot of issues that are outside the scope of the infringement action as defined in the form of order sought. Therefore it is important to set out the exact ambit of the present infringement action.

52. Even though the Commission has not explicitly excluded direct management IAPs from the form of order sought, this infringement action must be interpreted as concerning only the indirect management IAP since the complaints it raises, which relate to the way that the developer is chosen, can only logically concern the indirect management procedure. (72) Therefore, the Court is required to analyse whether this relationship falls within the scope of the directives in question, and if so whether it breaches them.

53. If the award of the contract to the developer is not considered as falling within the scope of the directives in question the Court should not, in my opinion, analyse whether the indirect management IAP breaches the Treaty since the Commission has not asked the Court to declare the incompatibility of the IAP with the Treaty or with any general principles in particular. (73) While the Commission raised the potential incompatibility with the Treaty and the general principles as derived from the case-law of the Court in the reasoned opinions, it has not done so before the Court.

54. The Commission is of course permitted to restrict the ambit of its case before the Court. When that occurs, however, the Court cannot rule on issues that are outside the scope of the infringement action as set by the Commission. (74) The Court must observe the principle *ne eat iudex ultra petita partium*. A meticulous reading of the Commission's form of order sought is particularly important in the present infringement action since the pre-litigation procedure has been relatively long and complicated, the file is extensive and the pleadings of the parties cover a wider range of problems than those formulated in the form of order sought.

55. Since the Commission has only raised the issue of compatibility of the LRAU with Directive 93/37 and the LUV with Directive 2004/18, the compatibility of the LRAU with Directive 92/50 (75) is *ultra vires* in the present infringement action, as is the compatibility with the Treaty.

56. It should also be noted that the wording of the first plea relating to the LRAU and Directive 93/37 is open-ended, whereas the list in the second plea relating to the LUV and Directive 2004/18 is exhaustive. Therefore, as to the second plea, the Court can examine the alleged infringement only in relation to the articles of Directive 2004/18 expressly mentioned.

IV – Admissibility

57. Spain submits that the first claim is inadmissible for two main reasons: (1) the fact that the Commission started infringement proceedings when it knew that Directive 93/37 was about to expire and be replaced by Directive 2004/18, which had already been published at the time that the formal letter was sent. Since the regional law was repealed two years before the action was brought, there is no interest in pursuing the analysis; and (2) that the Commission had over ten years to bring the infringement proceedings and it chose to do it just before the expiration of Directive 93/37.

58. These complaints can be dismissed quite briefly. It is settled case-law that the Commission does not need to have a specific interest in bringing an infringement action, and it can choose to bring that action at any time it deems appropriate. (76)

59. Furthermore, according to settled case-law, the question of whether a Member State has failed to fulfil its obligations must be determined by reference to the situation persisting in the Member State at the end of the period laid down in the reasoned opinion. (77) The adoption of laws, regulations or administrative provisions after the date on which that period expired cannot usually be taken into account.

60. It is therefore with regard to the legislation in force on 6 January 2006, the date on which the period prescribed in the reasoned opinion of 15 December 2005 expired, that it must be decided whether Spain committed the infringement alleged in this complaint. At that date both the LRAU and Directive 93/37 were in force, even if they were to expire soon after. (78)

61. In its defence Spain raises another interesting point, however: that of the abnormally short three-week deadline over the Christmas period within which it was required to reply to the first reasoned opinion. (79)

62. However, the time-limit set by the Commission in its reasoned opinion must be reasonable. (80) The reasonableness must be decided on a case-by-case basis, taking into account all the circumstances. (81) Shorter periods may sometimes be allowed where there is an urgent need to remedy the breach. The Commission in the present infringement action has established no such urgency.

63. The period of three weeks (82) does not seem to me to be a reasonable time period. The Commission cannot have expected Spain to adapt the LRAU to Directive 93/37 in that time, or to stop awarding new IAPs pursuant to the LRAU, which would have been required in order to comply with the reasoned opinion. Indeed, it seems to me, that the only plausible explanation for the Commission to set such a short time-limit for compliance was because it knew that both directive 93/37 and the LRAU were about to expire, and it wanted to catch them within the scope of the infringement action.

64. The Court's case-law states that very short deadlines may be justified in particular situations, such as when the Member State concerned has knowledge of the Commission's complaints well in advance of the procedure in question. (83) In the present infringement action Spain had known of the Commission's position for almost nine months, since the formal letter was sent on 21 March 2005.

65. In any case, the short deadline does not seem to have had any negative consequences for Spain. They sent their reply to the reasoned opinion on 26 January 2006, and even though this was later than the date stated in the reasoned opinion, the Commission took their defence into account. Spain also had the opportunity of submitting additional observations in a letter of 17 March 2006. In the absence of negative consequences the case-law of the Court considers such cases admissible, even if the deadlines are not considered reasonable. (84)

66. Therefore, the case must be held to be fully admissible.

V – Do the relevant directives on public procurement apply to IAPs?

A – *Land-use agreements and public procurement*

67. Before analysing the legal classification of IAPs under Directive 2004/18 it is important to note their specific nature as public-private partnerships whose purpose is to enable the public authority to carry out its obligations in an efficient way. They do so by encouraging private development with the corresponding obligation to provide public infrastructures while doing so. (85)

68. Land-use and urban planning belong mainly to the competence of the Member States. In the Member States planning and zoning, land-use and urban development are usually public prerogatives. However, landowners, real property investors and building enterprises may often have an interest in developing areas that have not undergone a detailed planning process, in order to be able to exploit potential building rights pertaining to the land. In such cases the public authorities may also benefit since they do not have to commit their own scarce capital and administrative resources. This situation has lead to the development of various forms of cooperative arrangements ('land-use agreements') between the local government and private economic operators.

69. The aim of land-use agreements is to enable building activities to be carried out in a specified area. In such an agreement the local authorities give guarantees regarding the use of public prerogatives concerning planning (such as promising to define building rights in a certain way), in exchange for commitments by the economic operators in question. In other words, the adoption of a detailed plan with certain specified contents as to the amount, location and planned usage of building rights is exchanged (86) for a commitment to finance and execute the infrastructures contained in the detailed plan and, possibly, also buildings needed for public purposes such as public services or social housing.

70. The IAP is an example of a land-use agreement. The problem that arises in relation to it, however, is that its logic is based on a relationship where the initiative comes from a private person. (87) The purpose of the LRAU and the LUV has been to overcome the stagnation in urbanisation (and thus the stagnation in constructing public infrastructures which accompany such projects in Spain) by putting the emphasis on private initiative in the form of the developer's activity, which is distinct both from land ownership and public administrative activity. Hence, the IAPs

constitute essentially a system for the selection of a land-use development alternative (88) as well as a developer to implement it in the most efficient way.

71. The effect of this in the public procurement sphere, and especially in relation to the execution of the related public works, however, as the Commission points out, is that such a system is inherently discriminatory due to the privileged position of the private initiator compared to subsequent tenderers. (89)

72. This is why the IAP system is very difficult to fit into the frame of public procurement rules.

73. In considering what fits the public procurement frame the Court's case-law to date has adopted a relatively broad, public procurement-friendly approach. (90) This has given rise to a debate as to whether land-use agreements are or should be classified as public contracts or more precisely as public works contracts as they often involve, directly or indirectly, the execution of public works by the developer or the landowners. (91) Especially problematic has been the question of pecuniary interest, more precisely, whether the attribution of new building rights by the public authority can be considered as financial consideration in exchange for the infrastructures the developer is obliged to build for the public authority. (92)

74. Recently, however, in *Helmut Müller*, (93) the Court declined to follow the functional interpretation proposed by the Commission in that case, which might have subjected a considerable part of the powers and activities traditionally reserved for local authorities in the field of planning and construction law, to the public works provisions. The Court stated that the purpose of the public procurement rules was to apply the rules of EU law to the award of contracts concluded on behalf of the State, regional or local authorities and other bodies governed by public law entities. (94) It is not the purpose of the mere exercise of urban planning powers, intended to give effect to the public interest, to obtain a contractual service or immediate economic benefit for the contracting authority as required by Directive 2004/18. (95)

75. The notion of a public works contract is an autonomous and objective concept of EU law. (96) However, in my opinion the Court should exercise a certain restraint if a broad interpretation of an EU law concept seems to lead, in practice, to an instrument of national law loosing its *raison d'être* or a detailed EU legislative act becoming applicable to phenomena that have not been considered by the EU legislature during the legislative process.

76. In the present infringement action a classification of the IAP as a public works contract would have the practical consequence of discouraging private initiatives in the field of planning and land development since, if considered to be within the scope of the public procurement directives, the IAP appears to be against the central aim of public procurement, namely the equal treatment of all participants. The only option left in planning law would then be the classical model where the public authorities draw up and adopt all documents relating to planning and land-use, finance and organise their execution and implementation directly and from the public purse.

77. Therefore, in considering whether this case raises any issues of public procurement, that is, in considering whether the present rules are covered by the directives in question, the Court should be careful not to over-stretch the meaning of certain criteria within the public procurement directives for the sake of fitting the present arrangement within the scope of the public procurement rules. To do so would amount to a Procrustean solution. (97)

B – *The requirements for the application of the directives*

78. It is uncontested that in the present case the municipalities awarding the IAPs are contracting authorities, that the developers are economic operators and that a written contract is concluded between the two, within the meaning of Directives 93/37 and 2004/18. Furthermore the Commission's case only concerns IAPs above the relevant monetary thresholds set out in Directives 93/37 and 2004/18.

79. What is in dispute however, is whether the contract in question gives rise to pecuniary interest within the meaning of the relevant directives.

1. Is there pecuniary interest originating from the contracting authority?

80. Pecuniary interest has been given a wide meaning by the Court, in view of the aims of the public procurement directives, namely, the opening up of national procurement markets to competition and the avoidance of barriers to the exercise of fundamental freedoms recognised in the Treaty. (98)

81. Although pecuniary interest does not therefore just include money, (99) the question is whether such pecuniary interest has to come from the contracting authority itself, or whether it is sufficient that pecuniary interest exists independently of who provides it. The latter interpretation would imply that the public works contract provisions would be applicable also in the case where a private party finances and executes public works on his own land, in agreement with and authorised by the contracting authority without any corresponding economic benefit to itself, and without the contracting authority having any legal obligation as to their execution. (100)

82. In *La Scala* the Court considered that there was pecuniary interest in that case, even though it was the owner-developer of the land who had to bear the development costs, because the municipality had an obligation to execute the necessary infrastructure works.

83. In my view that case is distinguishable from the present case. By waiving the planning development fee that was usually chargeable in such situations, the contracting authority suffered economic detriment which is not the case in the present proceedings.

84. In *Parking Brixen* the Court was of the view that consideration had to be paid directly by the contracting authority to the service providers for the contract to amount to a public service contract. (101) The Court was thus of the opinion that the service in question (the management of a public car park) was not a public service contract because the remuneration did not come from the public authority concerned, but from sums paid by third parties for the use of the car park in question. (102)

85. Recently, in *Helmut Muller,* Advocate General Mengozzi was of the opinion that the concept of pecuniary interest is based on the idea of an exchange of services between the contracting authority, which pays a price, and the contractor, who is required to execute a work or works. Thus, according to him, public contracts are clearly *mutually binding*. (103)

86. I agree with that view. In my opinion, for pecuniary interest to exist it is necessary that the contracting authority bears the economic detriment either positively in the form of a payment obligation towards the economic operator, or negatively as a loss of income or resources otherwise due.

87. Mere power of the contracting authority to require a third party to pay for the works or services cannot, contrary to the Commission's submissions, be sufficient since there is no mutually binding relationship in the nature of an exchange of performance with a tangible economic value between the contracting authority and the economic operators executing the works or services in question.

88. This is supported by the fact that one of the aims of the public procurement directives is to ensure that when contracting authorities spend money in public markets there is no distortion of competition. (104) It follows that where the contracting authority is not spending any public funds there is no danger of distorting competition within the meaning of Directives 93/37 and 2004/18. (105)

89. Thus, the pecuniary interest requirement implies that the contracting authority needs to use its own funds either directly or indirectly. (106) Direct financing will occur when the contracting authority uses public funds to pay for the works or services in question. Indirect financing will occur when the contracting authority suffers economic detriment as a result of the method of financing the works or services.

90. In the present infringement action it is the land developer that is responsible for financing the costs of the development in the indirect IAP procedure, but he is entitled to reimburse those from landowners. Thus it is the landowner who pays for the public works necessitated by the development.

91. As a result of the requirement for pecuniary interest not being met in this infringement action, the only way that Directives 93/37 and 2004/18 can apply to the regional legislation is if it can be said to amount to a public works concession, since public service concessions are excluded from those directives. (107)

2. Is there a public works concession?

92. In the present infringement action there is a great debate as to whether the principal purpose of the IAP is a service or the execution of public works, as it is uncontested that both elements are present. (108) We do not need to consider that question, however, since the present situation does not, in my view, amount to a public works concession, and the infringement action does not concern public service concessions.

93. A public works concession is a contract of the same type as a public works contract except for the fact that the consideration for the works consists either solely in the right to exploit the work or in this right together with payment. (109) In the present situation the developer (who is the *concessionaire* in this situation) does not have a right to exploit the resulting work.

94. In the IAP all the public works defined in the contract (that is the construction of roads and pavements, parking places, road signs, water, gas and electricity distribution networks, disposal of residual water, and the construction of green spaces including parks and trees) become the property of the contracting authority upon completion. (110) As such they may be used for free (streets, parks, public buildings) or against payments set by the contracting authority or the body that has been attributed the management and maintenance of the structures. The developers do not receive a right to exploit these public works because they do not have the possibility of recovering the charges from the user of the structures in those cases. Instead they receive remuneration in cash or as plots of land from the landowners. However, receiving the plots of land cannot be said to be exploitation of the public works since the public works defined by an IAP consist of the construction of infrastructure as well as the necessary connections to existing networks. (111) These plots are their property. They can of course exploit them but they do so as owner and not as concessionaire.

95. Therefore, there is no right to exploit the works resulting from the IAP and the contract cannot amount to a works concession even if it were held that the principal aim of the contract is the execution of works.

96. If the principal purpose of the IAP were to be classified as a service, the question arises of whether the developer has the right to exploit his own service. (112) The answer to this question is not decisive in resolving the present infringement action, however, since if it were to amount to a service concession it would be outside the scope of the pertinent provisions of the directives mentioned in the form of order sought in the Commission's application.

97. However, even assuming that the ownership of land that the developer receives could be said to amount to a right to exploitation being granted (which is not my view), such a right is granted for an indefinite period and is thus contrary to the definition given to a concession by the Court in *Helmut Muller* and *Pressetext*. (113)

98. Therefore, in my view, Directives 93/37 and 2004/18 do not apply to the present situation, and thus the Commission's case should be dismissed.

VI – Conclusion

99. I propose that the action be dismissed and the Commission be condemned to pay the costs.

---

1 – Original language: English.

---

2 – Ley 6/1994, de 15 de noviembre, Reguladora de la Actividad Urbanística de la Comunidad Valenciana ('LRAU') (Law 6/1994 of 15 November, regulating development activities in the Valencian Community).

---

3 – The LRAU was repealed with effect from 1 February 2006 by Ley 16/2005, de 30 de diciembre, Urbanística Valenciana ('LUV') (Law 16/2005 of 30 December, Valencian development Law).

---

4 – Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) ('Directive 93/37'), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1) and Directive 2001/78/EC of the Commission of 13 September 2001 (OJ 2001 L 285, p. 1).

---

5 – Directive 93/37 was replaced with effect from 31 January 2006 by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) ('Directive 2004/18').

---

6 – European Parliament Committee on Petitions, Notice to Members, 25 January 2007, CM\650375, PE341.524/REVII ('EP Report').

---

7 – For example in relation to the fairness of the expropriation or to the landowners' obligations to pay for infrastructures since this was within the Member States' competences under Article 295 EC (EP Report pages 7 and 14).

---

8 – For example in relation to the environmental damage since the Commission considered that the Spanish authorities were carrying out environmental impact assessments for all general plans as required by Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) (EP Report pages 7 and 12 to 14).

---

9 – European Parliament Report entitled: 'On the alleged abuse of the Valencian Land Law known as the LRAU and its effect on European citizens' (Fourtou), A6-0382/2005, page 5, paragraph 'I' (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2005-0382+0+DOC+PDF+V0//EN&language=EN).

---

10 – Since the present infringement action was made prior to the entry into force of the Treaty on the Functioning of the European Union (OJ 2008 C 115, p. 47), references to articles of the Treaty establishing the European Community (OJ 2002 C 325, p. 33) are retained throughout.

---

11 – Article 1(a) of Directive 93/37.

---

12 – Article 1(d) of Directive 93/37.

---

13 – Article 1(2)(a) of Directive 2004/18.

---

14 – Article 1(2)(b) of Directive 2004/18.

---

15 – Article 1(2)(d) of Directive 2004/18.

---

16 – Article 1(3) of Directive 2004/18.

---

17 – Article 1(4) of Directive 2004/18.

18 – Article 17 of Directive 2004/18. Article 17 is without prejudice to Article 3 dealing with special or exclusive rights to carry out a public service activity. However, Article 3 is not relevant for the purposes of the present case.

19 – Article 16(a) of Directive 2004/18.

20 – Article 148(1) of the Spanish Constitution of 1978.

21 – Article 33 of the Spanish Constitution of 1978.

22 – Article 47 of the Spanish Constitution of 1978.

23 – Real Decreto Legislativo 2/2008 por el que se aprueba el texto refundido de la ley del suelo ('TRLS') BOE No 154, 26 June 2008 (Royal Legislative Decree 2/2008 approving the consolidated text of the Land Use Law).

24 – Article 3 TRLS.

25 – Article 6(a) TRLS.

26 – Article 16 TRLS.

27 – This entails a General Land Use Plan (Plan General de Ordenacion Urbana) which categorises the entire municipal territory into three types of land: existing urban land, land to be developed in the future and non-developable land or rural area. See Muñoz Gielen, D., and Korthals Altes, W., 'Lessons from Valencia: Separating infrastructure provision from land ownership', Town and Planning Review 2007, Vol. 78(1), at page 61 to 62. Urban development entails the transfer from the second to the first category. Urbanisation (urbanización), involves planning, land readjustment, engineering and infrastructure provision. (Muñoz Gielen, D., and Korthals Altes, cited ibid., at page 62).

28 – Article 6(2) LRAU; Articles 14 and 15 LUV.

29 – Article 7(2) LRAU; Article 3 LUV and Article 117(4) LUV.

30 – Article 7(2) LRAU; Art 130(3) LUV.

31 – The landowners bear the economic responsibility in the form of special development taxes in these cases too.

32 – Article 7 LRAU; Article 117(4) LUV.

33 – Article 12 LRAU lists various urban development plans. The IAP is listed at Article 12(g) LRAU.

34 – Muñoz Gielen and Korthals Altes, cited in footnote 27, at page 67.

35 – Article 44 LRAU; Articles 118 and 130 LUV.

36 – Article 29 LRAU, Article 151 LUV.

37 – Articles 45(1) and 32 LRAU.

38 – Article 125(2) LUV corresponding to Article 32 LRAU. A list of subjects that must be included in the technical offer is in Article 126 LUV.

39 – Any general information journal edited in the region of Valencia as well as the *Diario Oficial de la Generalidad Valenciana* (Official Journal of the Valencia Community).

40 – Article 45(2) LRAU.

41 – Article 46 LRAU.

42 – Article 125(3) LUV corresponding to Article 32 LRAU. A list of subjects that must be included in the financial offer is in Article 127 LUV. The financial offer determines, for example, the development costs, the coefficient determining the proportion between land before development and how much building rights the landowners will receive, as well as the modes of financing the IAP.

43 – Article 47(1) LRAU.

44 – Article 48 LRAU.

45 – Article 130 LUV. The documents that must be submitted are listed in Article 131(2) LUV.

46 – Article 131(2) LUV.

47 – Article 135 LUV.

48 – Article 130(3) LUV.

49 – Art 131(2) LUV.

50 – By administrative silence: Article 130(5) LUV.

51 – Article 132(2) LUV.

52 – Article 137(5) LUV.

53 – Article 29(2) LRAU; Article 117 LUV.

54 – Article 6(3) LRAU; Article 14 LUV.

55 – Article 30 LRAU; Article 124(1) LUV.

56 – Article 30(2) LRAU; Article 124(2) LUV.

57 – According to Muñoz Gielen and Korthals Altes, cited in footnote 27, at page 67, this may include the construction of public buildings (e.g. swimming pools and sports installations). These costs cannot be included in the urbanisation costs, and they must be paid out of the developer's profit margins.

58 – Article 47 LRAU.

59 – Article 47 LRAU; Article 137 LUV.

60 – Article 188(2) LUV.

61 – Article 23 LUV.

62 – Article 29(6) LRAU; Article 119 LUV.

63 – This entails that the developer under the LUV divide the whole land that is to be developed and re-distribute it to the landowners and the municipality when the works are finished so that the landowners get developed land in the same ratio (compared to the other landowners) as the amount they contributed to the development, by giving land or land together with cash.

64 – Article 119 LUV.

65 – Article 71 LRAU.

66 – Article 29(9)C LRAU. Articles 28(2), 32 and 162(3) LUV.

67 – Muñoz Gielen and Korthals Altes, cited in footnote 27, at page 68.

68 – Article 29(9)B LRAU; Article 162 LUV.

69 – Article 67 LRAU; Article 168 LUV – development works and other works necessary; restoration of buildings; writing and management of technical projects; management costs; professional fees incurred for technical reports etc.

70 – Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

---

71 – It appears to me that the text of Decree 67/2006 is not included in the file.

---

72 – The Court can infer that a particular form of order is sought from the wording of the application. See Case 8/56 *ALMA* v *High Authority* [1957 and 1958] ECR 95, at 99 and 100; Case 80/63 *Degreef* v *Commission* [1964] ECR 391, at 408.

---

73 – Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995.

---

74 – The Court is bound by the subject matter of the case as stated in the application (Case 232/78 *Commission* v *France* [1979] ECR I-2729, paragraph 3). The Court must be able to define the subject-matter of the action precisely on the basis of the application (Case 168/78 *Commission* v *France* [1980] ECR I-347, paragraphs 17 to 25; Case 270/83 *Commission* v *France* [1986] ECR 273, paragraphs 7 to 10).

---

75 – Cited in footnote 70.

---

76 – Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 29 and case-law cited; Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraph 16.

---

77 – Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 9; Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 32.

---

78 – Directive 2004/18 was adopted on 31 March 2004. Its implementation period ended on 31 January 2006, and Directive 93/37 was repealed on the same date. The LUV, adopted by the regional parliament of Valencia on 22 December 2005, entered into force on 31 January 2006 as well.

---

79 – According to the copy of the LUV included in the file, the LUV was meant to enter into force on 12 January 2006. The file does not contain information on when and why that date was postponed to 31 January 2006.

---

80 – Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paragraph 14.

---

81 – *Commission* v *Belgium*, ibid., paragraph 14.

---

82 – It is also interesting to note that until February 2005 the Commission's Manual of Procedures (an internal Commissio document) stated that during holiday periods, including Christmas, any deadline set should be extended by one month. It appears that this unofficial rule was erased from a subsequent Manual of Procedures that was adopted in February 2005. See Eberhard and Riedl in Mayer (ed.), *Kommentar zu EU- und EG-Vertrag*, EGV Article 226, paragraphs 42 and 52.

---

83 – *Commission* v *Belgium*, cited in footnote 80, paragraph 14.

---

84 – Case 74/82 *Commission* v *Ireland* [1984] ECR 317, paragraphs 12 and 13.

85 – On how private initiatives can help provide cost-efficient public services see: Bovis, C., *EC Public Procurement: Case Law and Regulation*, OUP, 2006 (reprint 2009), Chapter 10: 'Public Procurement and Public-Private Partnerships'. On details of how private initiatives have helped the stagnation in the development process in Valencia see Muñoz Gielen and Korthals Altes, cited in footnote 27.

86 – However, in many legal systems the building rights are not understood as being created by the planning decisions of public authorities but they somehow pre-exist as property rights of the landowners of non-developed land even if they can't be exercised before adoption of a detailed plan. This seems to be the point of departure of the Spanish law as well. (Muñoz Gielen and Korthals Altes, cited in footnote 27, at pages 61 to 62). Legally it is also often the case that the possible content of a detailed plan is subject to a public law framework, which legally restricts the local government's possibilities to commit itself to the adoption of a certain plan in exchange for commitments by a private undertaking.

87 – Even though technically both the local authority and the private person can initiate an IAP, the reason for the model adopted in the LRAU in the 1990s, which emphasises the central role of the developer was to increase private initiatives in urbanisation projects. For more information on this see Muñoz Gielen and Korthals Altes, cited in footnote 27, at page 65.

88 – Spain has explained that the selection of an IAP initiative may entail, for example, a choice between building a shopping mall or a housing area.

89 – However, the LUV has introduced a distinction between the developer and the constructor of public works by obliging him, with some exceptions, to appoint a constructor in accordance with the EU public procurement rules.

90 – Case C-399/98 *La Scala* [2001] ECR I- 5409, further applied in Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraphs 70 to 75; Case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraphs 56 to 58; and Case C-220/05 *Auroux* [2007] ECR I-385.

91 – On the debate see Hakkola, Esa: Hankintalainsäädäntö ja maankäyttösopimukset, 'Public procurement legislation and land-use agreements', Lakimies 5/2007 pages 723 to 745, and Paradissis, J., 'Planning agreements and EC public procurement law', *Journal of Planning & Environment Law*, 2003, pages 666 to 677.

92 – Hakkola, Esa, ibid., page 741; Paradissis, ibid., pages 669 to 672.

93 – Case C-451/08 *Helmut Müller* [2010] ECR I-0000.

94 – Cited ibid., paragraph 46.

95 – Cited ibid., paragraph 57.

96 – The Court has applied the public procurement directives in question to various planning schemes when they have been held to fulfil the objective requirements of the Directive (*La Scala*, cited in footnote 90, *Auroux*, cited in footnote 90, Case C-264/03 *Commission* v *France***,** cited in footnote 90). The previous case-law has considered that the aims pursued by the authorities are irrelevant (*La Scala*, cited in footnote 90;

Commission v *Italy*, cited in footnote 90, paragraph 70) focusing instead on whether the criteria for the existence of the public contract are fulfilled.

---

97 – In Greek mythology Procrustes was a rogue smith and bandit from Attica who physically attacked people, stretching them, or cutting off their legs so as to make them fit an iron bed's size.

---

98 – Recital 2, Directive 2004/18; Advocate General Kokott in *Auroux*, cited in footnote 90, point 57.

---

99 – This is what the Court's case-law has dealt with so far in relation to 'pecuniary interest'.

---

100 – This would be the case under Article 120(7) LUV which frees the developer from the obligation to have a tender procedure for the selection of the constructor of the public works included in the IAP where the land is owned only by a single person or where there is a unanimous agreement between the landowners and the developer.

---

101 – Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 39.

---

102 – Cited ibid., paragraph 40.

---

103 – Advocate General Mengozzi in *Helmut Muller*, cited in footnote 93, point 77.

---

104 – This can be deduced from the general aim of preventing the distortion of competition in recital 2. See also Bovis, cited in footnote 85, pages 14 to 22.

---

105 – This situation is analogous to those where the EU State aid law provisions do not apply because of an absence of burden on public resources corresponding to the advantage created by the relevant national rules as the advantage is funded through private means. See for example: Joined Cases C-72/91 and C-73/91 *Slomann Neptun* [1993] ECR 887, paragraphs 19 and 21; C-379/98 *PresussenElektra* [2001] ECR 2099, paragraphs 59 to 61.

---

106 – In Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraph 20, the Court stated that use of public resources is not a factor that determines whether or not there is a public contract for the purposes of Articles 8 and 11 of Directive 92/50, cited in footnote 70. In that case the public authority (City of Munich) was awarded a public service contract from another contracting authority, and the issue was whether it had been legal for the city to entrust in advance a private undertaking with the responsibility for a service stemming from the first mentioned contract without invitation to tender under the directive in question. In that context there was clearly an economic exchange between the city and the private undertaking even if it was obviously financed with 'private' income of the city resulting from the award of public service contract to it. I don't think that the Court intended to declare that the notion of a pecuniary interest would not be an essential element of a public contract or that such pecuniary interest must not directly or indirectly originate from the resources of the contracting authority. The whole *ratio* of EU public procurement legislation is to create competitive, transparent and non-discriminatory conditions of economic exchanges between public authorities and undertakings, and not to regulate the economic relations between undertakings procuring goods or services from each other.

---

107 – Directive 93/37 only applies to works, and Article 17 of Directive 2004/18 excludes the application of that directive to services. Article 17 is without prejudice to Article 3 of the Directive 2004/18, but that article is not pertinent for the purposes of this case.

108 – In this case the answer to the question on the principal purpose of the contract depends on whether emphasis is put on the structure of development costs or on the development gain generated by an IAP. According to the scattered information included in the file, the public works component is obviously much bigger than the service component in the development costs. However, Spain emphasises the character of IAPs as services relating to immovable property investment with reference to the fact that the public works are only incidental to the overall objective of an IAP which is to create building plots for private building activities. Hence, economically the IAP has to generate for the landowners economic opportunities whose value exceeds the costs of public works and other development costs including the remuneration of the developer. In the two referred IAPs described in Muñoz Gielen and Korthals Altes, cited in footnote 27, at page 69, the development costs per square meter of building rights were EUR 89 and EUR 54, and the market price of developed land per square meter of building rights was respectively EUR 512 and about EUR 500. This may support the claim that the economic and legal purpose of an IAP is that of a public service provided by the developer to the landowners, not execution of public works for the contracting authority.

---

109 – Article 1(3) of Directive 2004/18; Article 1(d) of Directive 93/37.

---

110 – According to Article 16 TRLS, the landowners are obliged to give to the competent authorities the land needed for roads, green spaces and other common areas, as well as between 5 and 15 per cent of their lands for public purposes. That article is implemented by Article 23 LUV specifying the obligation on landowners to cede for free land for public purposes as a part of development. (It should be recalled that the building plots the landowners get are not necessarily situated on the lands they owned before the IAP.) According to Article 180(2) LUV re-distribution (*reparcelacion forzosa)* entails transferring these areas to the local authority concerned. Article 188(2) LUV provides when the urbanisation works will be deemed to have been received by the administration and the cession of maintenance obligation of them. From all this it follows that if the IAPs were classified as public service contracts, they would be excluded from the scope of Directive 2004/18 as they concern acquisition of land and other immovable property.

---

111 – According to Article 11 LUV urban plots (*solares*) are plots which have been developed and have at least the following services: (i) access by one or more roads open to the public, (ii) supply of drinking water and electricity at a level sufficient to meet the expected demand, (iii) a sewage network, (iv) pedestrian access with paved and lit streets. In addition, urban plots must have been linked with the necessary infrastructure, to public utilities in the surrounding land.

---

112 – Spain submits that the IAP should be classified as a service concession where the developer gets the right to provide and exploit a public service.

---

113 – The Court has held that the granting of a concession for an indefinite period of time might impede competition over time and would thus be contrary to the central aim of the public procurement rules. See Case C-454/06 *Pressetext* [2008] ECR I-4401, paragraph 74; *Helmut Muller*, cited in footnote 93, paragraph 79.

JUDGMENT OF THE COURT (Fourth Chamber)

23 December 2009 (*)

(Public service contracts – Directive 2004/18 – Concepts of 'contractor', 'supplier' and 'service provider' – Concept of 'economic operator' – Universities and research institutes – Group ('consorzio') of universities and public authorities – Where the primary object under the statutes is non-profit-making – Admission to a procedure for the award of a public contract)

In Case C-305/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 23 June 2008, received at the Court on 4 July 2008, in the proceedings

Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)

v

Regione Marche,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting for the President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: J. Mazák,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

– the Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa), by I. Deluigi, avvocato,

– the Czech Government, by M. Smolek, acting as Agent,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the Commission of the European Communities, by C. Zadra and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 1(2)(a) and (8), first and second subparagraphs, of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference was made in proceedings between the Consorzio Nazionale Interuniversitario per le Scienze del Mare (National Inter-University Marine Sciences Consortium, 'CoNISMa') and the Regione Marche (the Marche Region) relating to the latter's decision not to admit the consortium to a procedure for the award of a public services contract.

Legal context

Community legislation

3 Recital 4 in the preamble to Directive 2004/18 states as follows:

‘Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.’

4 Article 1(2)(a) of Directive 2004/18 is worded as follows:

‘“Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.’

5 Article 1(8) of Directive 2004/18 provides as follows:

‘The terms “contractor”, “supplier” and “service provider” mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term “economic operator” shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

…’

6 Article 1(9) of Directive 2004/18 is worded as follows:

‘“Contracting authorities” means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

A “body governed by public law” means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

…’

7 Article 4 of Directive 2004/18, entitled ‘Economic Operators’, provides as follows:

‘1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

…

2. Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when

it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.'

8 Article 44 of Directive 2004/18, entitled 'Verification of the suitability and choice of participants and award of contracts', provides in the first paragraph thereof as follows:

'Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.'

9 Article 55 of Directive 2004/18, entitled 'Abnormally low tenders', is worded as follows:

'1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

(a) the economics of the construction method, the manufacturing process or the services provided;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid.

2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.'

National legislation

10 Article 3(19) and (22) of Legislative Decree No 163 of 12 April 2006 establishing the Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Public Works Contracts, Public Supply Contracts and Public Service Contracts Code implementing Directives 2004/17/EC and 2004/18/EC) (GURI No 100 of 2 May 2006, ordinary supplement) ('Legislative Decree No 163/2006') provides as follows:

'19. The terms "contractor", "supplier" and "service provider" mean a natural or legal person, or body without legal personality, including a European Economic Interest Group (EEIG) formed pursuant to Legislative Decree No 240 of 23 July 1991, which offers on the market, respectively, the execution of works or a work, the supply of products or the provision of services.

…

22. The term "economic operator" shall include a contractor, a supplier, a service provider or a group or consortium of these.'

11 Article 34 of Legislative Decree No 163/2006 provides, under the heading ‘Entities to which public contracts may be awarded (Articles 4 and 5 of Directive 2004/18)’, as follows:

‘1. Without prejudice to the restrictions expressly provided for, the following entities are entitled to participate in procedures for the award of public procurement contracts:

(a) individual commercial operators, including artisans, commercial companies and partnerships and cooperatives;

(b) consortia of production- and labour-cooperatives … and … consortia of artisans …;

(c) permanent consortia, constituted inter alia as joint venture companies for the purpose of Article 2615b of the Civil Code, between individual contractors (including artisans), commercial companies or partnerships or production- and labour-cooperatives, in accordance with the provision in Article 36;

(d) special purpose groupings of competitors, whose members include the entities referred to in subparagraphs (a), (b) and (c) …;

(e) ordinary consortia of competitors referred to in Article 2602 of the Civil Code whose members include the entities referred to in subparagraphs (a), (b) and (c) of the present paragraph, including those constituted as companies or partnerships …;

(f) entities who have entered into a European Economic Interest Group (EEIG) contract …;

…’

12 After the material events of the main proceedings had occurred, Legislative Decree No 152 of 11 September 2008 (GURI No 231 of 2 October 2008) added the following subparagraph (f bis) to the above list:

‘economic operators within the meaning of Article 3(22), established in other Member States and constituted according to the applicable legislation of the Member State concerned.’

13 Lastly, Article 2082 of the Italian Civil Code provides that a ‘commercial operator’ (*imprenditore*) is any person who, in a professional capacity, engages in economic activity on an organised basis in order to produce or exchange goods or services.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 It is apparent from the order for reference that the Regione Marche organised a public tendering procedure for the award of a service contract entailing the acquisition of marine and seismic stratigraphic data and the taking of core borings and samples from the sea along the coastline between Pesaro and Civitanova Marche.

15 CoNISMa applied to participate in that procedure. After expressing reservations as to whether CoNISMa was eligible to participate in the tendering procedure in question, the contracting authority decided to exclude it by Decisions 4, 18 and 23 of 23 April 2007.

16 CoNISMa challenged its exclusion by way of an extraordinary petition to the President of the Italian Republic, a special procedure provided for by the Italian legal system, arguing that if Article 34 of Legislative Decree 163/2006 were interpreted as meaning that it contains an exhaustive list, not including universities and research institutes, and that such bodies are therefore not eligible to participate in a procedure for the award of a public contract, such an interpretation would be incompatible with Directive 2004/18. In the framework of that extraordinary petition, the Ministero dell’ambiente e della tutela del territorio (Italian Ministry of the Environment and Protection of the Territory) requested an opinion of the Consiglio di Stato (Council of State), for which provision is made under the relevant national legislation.

17 The Consiglio di Stato observes that, in order to deliver its opinion, it must establish whether an inter-university group, such as CoNISMa, can be regarded as an ‘economic operator’ within the meaning of Directive 2004/18 and, accordingly, whether it may take part in a tendering procedure for the award of a public service contract such as that at issue in the main proceedings. The referring court expresses reservations in that connection, on the basis of the following considerations.

18 The Consiglio di Stato states, as a preliminary point, that CoNISMa is a group (‘consorzio’) of 24 Italian universities and three ministries. According to its statute, it is non-profit-making and its object is to promote and coordinate research and other scientific activities and their applications in the field of marine sciences among the member universities. It can take part in tendering procedures and other procedures for competitive tendering organised by public authorities and by companies operating in the public and private sphere. Its activities are financed primarily by grants awarded by the Ministry for Universities and Research and other public authorities as well as by Italian or foreign public and private bodies.

19 The Consiglio di Stato refers, first, to Article 1(c) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) — to which Directive 2004/18 was the successor — which provides that ‘service provider shall mean any natural or legal person, including a public body, which offers services’ and observes that that wording appears to indicate an intention to restrict the possibility of concluding contracts with contracting authorities to entities which are engaged ‘in an institutional capacity’ in the activity corresponding to the service to be provided under the contract in question. If that approach is adopted, with the exception of private economic operators, tendering procedures are open only to public bodies which provide, for pecuniary gain, the services covered by that contract, in accordance with the function ascribed to them by the legal system, university bodies thus being excluded. That approach would appear to have been confirmed by the Court in Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 44, which held that Community legislation on public contracts applied to the person concerned ‘as an economic operator active on the market’. That approach also appears to have been followed in Article 3(19) of Legislative Decree No 163/2006, which provides that a service provider is an economic operator ‘which offers’ services ‘on the market’.

20 Second, the Consiglio di Stato points out that the position adopted on this question in Italian case-law is not without ambiguity. Certain courts have taken the view that public tendering procedures are open to natural and legal persons operating as a business and to public bodies which offer, in accordance with their institutional organisation, services similar to those covered by the tendering procedure. From that perspective, universities cannot be included in such categories of private and public undertakings, since their institutional remit is to develop teaching and research activities. Following a different approach, it has been held that public universities and consortia of such universities can take part in procedures for the award of public service contracts, provided that the provision of services in question is compatible with their institutional objectives and the provisions laid down in their statutes.

21 The Consiglio di Stato refers, thirdly, to the position adopted by the regulatory authority for public contracts, which distinguishes between economic operators and entities, such as non-economic public bodies, universities and university departments, which do not fall into the former category because their purpose is not to carry out economic activity, which is characterised by the creation of wealth. Such entities cannot therefore take part in public tendering procedures unless they set up companies expressly for that purpose by exercising the autonomy granted to universities under national legislation. That view is confirmed by Article 34 of Legislative Decree No 163/2006, which contains an exhaustive list of the entities authorised to take part in public tendering procedures.

22 By way of justification of its reservations, the Consiglio di Stato refers, lastly, to the Court’s case-law, according to which Community public procurement rules must be interpreted by reference to a criterion of a functional nature, so that the fundamental principle of effective competition is not circumvented (Case C-337/06 *Bayerischer Rundfunk and Others* [2007] ECR I-11173). With regard in particular to public service contracts, the Court has drawn attention to the principal objective of the Community rules in this field, namely the free movement of services and the opening-up to the widest possible undistorted competition in all the Member States (Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraphs 44 and 47).

23 In the light of that case-law, the Consiglio di Stato states that the admission of universities, research institutes and consortia of those bodies to public tendering procedures may infringe the principle of free competition in two respects. First, it could potentially remove from the open market a number of public contracts, to which ease of access would in practice be hampered for a not inconsiderable proportion of ordinary undertakings. Second, it would place the contractor in a position of unfair advantage, guaranteeing it economic security provided by the constant and predictable flow of public finance, which is not available to other economic operators. However, the Consiglio di Stato takes the view that a restrictive interpretation of the concept of 'economic operator', which is dependent on the stable presence of such an operator 'on the market', thus precluding universities, research institutes and consortia of such bodies from taking part in public tendering procedures, would seriously undermine cooperation between public and private entities and between researchers and commercial operators and ultimately constitute a restriction on free competition.

24 In the light of the foregoing, the Consiglio decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the provisions of Directive 2004/18/EC ... be interpreted as precluding a consortium made up solely of Italian universities and State bodies … from taking part in a tendering procedure for the award of a service contract such as that for the acquisition of geophysical data and marine samples?

(2) Are the provisions of Italian law contained in Article 3(22) and (19) and Article 34 of Legislative Decree No 163/2006, which provide, respectively: that "the term 'economic operator' shall include a contractor, supplier, service provider or a group or consortium of these" and "the terms 'contractor', 'supplier' and 'service provider' shall mean any natural or legal person, or body without legal personality, including a European Economic Interest Group (EEIG) ..., which 'offers on the market', respectively, the execution of works or a work, the supply of products or the provision of services", contrary to Directive 2004/18/EC … if interpreted as restricting participation in tendering procedures to professional providers of such services and excluding entities whose primary objects are non-profit-making, such as research?'

The questions referred

25 It should be noted, first, that, according to the Court's case-law, when it issues an opinion in the context of an extraordinary petition, such as that in the main proceedings, the Consiglio di Stato constitutes a court or tribunal for the purposes of Article 234 EC (Joined Cases C-69/96 to C-79/96 *Garofalo and Others* [1997] ECR I-5603, paragraph 27).

Question 1

26 By this question, the Consiglio di Stato asks, in essence, whether Directive 2004/18 must be interpreted as precluding a consortium made up solely of universities and public authorities from taking part in a public tendering procedure for the award of a service contract.

27 As is apparent from the order for reference, the provisions of Directive 2004/18 considered to be relevant by the national court are, in particular, those in Article 1(2)(a) and (8), first and second subparagraphs, because those provisions refer to the concept of 'economic operator'. Moreover, according to the order, the consortium in question is, for the most part, non-profit-making and does not have the organisational structure of an undertaking or a regular presence on the market.

28 For the purposes of answering that question, it should be pointed out, first, that the provisions of Directive 2004/18 do not contain a definition of 'economic operator' and, second, do not distinguish between tenderers on the basis of whether they are primarily profit-making and nor do they expressly preclude entities such as that in question in the main proceedings. However, considered in the light of the Court's case-law, those provisions contain sufficient indications for it to be possible to give a useful answer to the referring court.

29 For instance, recital 4 in the preamble to Directive 2004/18 makes it clear that ‘a body governed by public law’ can participate as a tenderer in a procedure for the award of a public contract.

30 Similarly, the first and second subparagraphs of Article 1(8) of the directive grant the status of ‘economic operator’ not only to any natural or legal person but also, expressly, to any ‘public entity’ or group consisting of such entities offering services on the market. The concept of ‘public entity’ may also, therefore, include bodies which are not primarily profit-making, are not structured as an undertaking and do not have a continuous presence on the market.

31 Moreover, paragraph 1 of Article 4 of Directive 2004/18, which is entitled ‘Economic operators’, prohibits Member States from providing that candidates or tenderers who, under the rules of the Member State in which they are established, are entitled to provide the services covered by the contract notice, are to be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they are required to be either natural or legal persons. Nor does that provision distinguish between candidates and tenderers on the basis of whether they are governed by public or private law.

32 As regards the question raised by the referring court concerning a possible distortion of competition due to the participation in a public tendering procedure by entities, such as the applicant in the main proceedings, which enjoy a position of unfair advantage vis-à-vis private economic operators on account of the public finance which they receive, it should be noted that recital 4 in the preamble to Directive 2004/18 imposes an obligation on Member States to ensure that the participation of a body governed by public law in a public tendering procedure does not cause such a distortion. That obligation also applies with regard to entities such as the applicant.

33 Reference should be made in that connection to the obligations upon and options available to contracting authorities under Article 55(3) of Directive 2004/18 in cases involving abnormally low tenders where the tenderer has obtained State aid. The Court has also recognised that, in certain specific circumstances, the contracting authorities are required, or at the very least permitted, to take into account the existence of subsidies, and in particular of aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid (see, to that effect, Case C-94/99 *ARGE* [2000] ECR I-11037, paragraph 29).

34 However, the fact that an economic operator may enjoy an unfair advantage because it receives public finance or State aid cannot justify the exclusion of entities, such as the applicant in the main proceedings, from a public tendering procedure a priori and without further consideration.

35 It follows from the above considerations that the Community legislature did not intend to restrict the concept of ‘economic operator which offers services on the market’ solely to operators which are structured as a business or to impose specific conditions which can restrict access to tendering procedures, from the outset, on the basis of the legal form and internal organisation of the economic operator.

36 That interpretation finds support in the Court’s case-law.

37 The Court has thus held that one of the primary objectives of Community rules on public procurement is to attain the widest possible opening-up to competition (see, inter alia, to that effect *Bayerischer Rundfunk and Others*, paragraph 39) and that it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders (Case C-538/07 *Assitur* [2009] ECR I-0000, paragraph 26). It should be added that the widest possible opening-up to competition is contemplated not only from the point of view of the Community interest in the free movement of goods and services but also the interest of the contracting authority concerned itself, which will thus have greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question (see, to that effect, with regard to abnormally low tenders, Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraph 29).

38 In that spirit of opening up public contracts to the widest possible competition, the Court has also held that Community rules governing that field are applicable when the entity with which a contracting authority plans to conclude a contract for pecuniary interest is itself also a contracting authority (see, to

that effect, *Stadt Halle and RPL Lochau*, paragraph 47 and the case-law cited). According to Article 1(9) of Directive 2004/18, a contracting authority is an entity not having an industrial or commercial character which performs a task in the general interest. As a general rule, such a body does not pursue gainful activity on the market.

39 Similarly, the Court has held that Community rules preclude any national legislation which excludes candidates or tenderers entitled under the law of the Member State in which they are established to provide the services in question from the award of public service contracts with a value greater than the threshold for the application of the relevant directives, solely on the ground that those candidates or tenderers do not have the legal form corresponding to a specific category of legal persons (see, to that effect, Case C-357/06 *Frigerio Luigi and C.* [2007] ECR I-12311, paragraph 22).

40 Moreover, it should be noted that, according to the Court's case-law, first, the mere fact that contracting authorities allow bodies which receive subsidies enabling them to submit tenders at prices appreciably lower than those of competing, unsubsidised, tenderers to take part in a procedure for the award of a public contract does not amount to a breach of the principle of equal treatment and, second, if the Community legislature had intended to require contracting authorities to exclude such tenderers, it would have stated this explicitly (*ARGE,* paragraphs 25 and 26).

41 Finally, the Court's case-law also provides that Community rules do not require that, in order to be classed as a contractor – that is, an economic operator – a person who enters into a contract with a contracting authority must be capable of direct performance using his own resources. The person in question need only be able to arrange for execution of the works in question and to furnish the necessary guarantees in that connection (see, to that effect, Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 90).

42 It therefore follows from both Community rules and the Court's case-law that any person or entity which, in the light of the conditions laid down in a contract notice, believes that it is capable of carrying out the contract, either directly or by using subcontractors, is eligible to submit a tender or put itself forward as a candidate, regardless of whether it is governed by public law or private law, whether it is active as a matter of course on the market or only on an occasional basis and whether or not it is subsidised by public funds. As the Czech Government correctly observed, whether such an entity is actually able to satisfy the conditions laid down in the contract notice must be assessed at a later stage in the procedure, by applying the criteria set out in Articles 44 to 52 of Directive 2004/18.

43 It should be added that the effect of a restrictive interpretation of the concept of 'economic operator' would be that contracts concluded between contracting authorities and bodies which are primarily non-profit-making would not be regarded as 'public contracts', could be awarded by mutual agreement and would thus not be covered by Community rules on equal treatment and transparency, which would be inconsistent with the aim of those rules.

44 Moreover, as the Consiglio di Stato stated, such an interpretation would undermine cooperation between public and private entities and between researchers and commercial operators and constitute a restriction of competition.

45 In the light of the foregoing, the answer to the first question must be that the provisions of Directive 2004/18, in particular those in Article 1(2)(a) and (8), first and second subparagraphs, which refer to the concept of 'economic operator', must be interpreted as permitting entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market – such as universities and research institutes and consortia made up of universities and public authorities – to take part in a public tendering procedure for the award of a service contract.

Question 2

46 By this question, the Consiglio di Stato asks, in essence, whether the provisions of Directive 2004/18, in particular those in Article 1(2)(a) and (8), first and second subparagraphs, preclude national legislation transposing that directive into national law where such legislation is interpreted as restricting participation in public procurement procedures to service providers who offer services on the market on

a systematic and commercial basis and excluding entities, such as universities and research institutes, which are primarily non-profit-making.

47 It should be noted, as is apparent from the wording of Article 4(1) of Directive 2004/18, that the Member States have a discretion as to whether or not to allow certain categories of economic operators to provide certain services.

48 Accordingly, as the Commission correctly observed, the Member States can regulate the activities of entities, such as universities and research institutes, which are non-profit-making and whose primary object is teaching and research. They can, inter alia, determine whether or not such entities are authorised to operate on the market, according to whether the activity in question is compatible with their objectives as an institution and those laid down in their statutes.

49 However, if and to the extent that such entities are entitled to offer certain services on the market, the national legislation transposing Directive 2004/18 into domestic law cannot prevent them from taking part in public procedures for the award of contracts for the provision of those services. Such a prohibition would be incompatible with the provisions of Directive 2004/18, as interpreted in connection with the examination of the first question referred.

50 In such a situation, it is for the national court to interpret domestic law, so far as possible, in the light of the wording and the purpose of Directive 2004/18 with a view to achieving the results sought by the latter, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive, setting aside, if necessary, any contrary provision of national law (see Case C-414/07 *Magoora* [2008] ECR I-0000, paragraph 44).

51 The answer to the second question must therefore be that Directive 2004/18 must be construed as precluding an interpretation of national legislation, such as that at issue in the main proceedings, which prohibits entities, such as universities and research institutes, which are primarily non-profit-making from taking part in a procedure for the award of a public contract, even though such entities are entitled under national law to offer the services covered by the contract in question.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **The provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in particular those in Article 1(2)(a) and (8), first and second subparagraphs, which refer to the concept of 'economic operator', must be interpreted as permitting entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market – such as universities and research institutes and consortia made up of universities and public authorities – to take part in a public tendering procedure for the award of a service contract.**

2. **Directive 2004/18 must be construed as precluding an interpretation of national legislation, such as that at issue in the main proceedings, which prohibits entities, such as universities and research institutes, which are primarily non-profit-making from taking part in a procedure for the award of a public contract, even though such entities are entitled under national law to offer the services covered by the contract in question.**

[Signatures]

* Language of the case: Italian.

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 3 September 2009 (1)

Case C-305/08

Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa)
v
Regione Marche

(Reference for a preliminary ruling from the Consiglio di Stato (Italy))

(Public service contracts – Directive 2004/18/EC – Procedure for the award of public procurement contracts – Concept of 'economic operator' – Exclusion of non-profit-making entities whose objects include research, such as universities)

1. The present reference for a preliminary ruling from the Consiglio di Stato (Council of State) (Italy) concerns the interpretation of the concept of 'economic operator', set out in particular in the second paragraph of Article 1(8) of Directive 2004/18/EC. (2) The referring court seeks to know whether non-profit-making entities which are not necessarily present on the market on a regular basis, in particular universities and research institutes as well as groups (consortia) of those universities and research institutes and State bodies, are allowed to participate in a public service tendering procedure in relation to the acquisition of geophysical data and marine samples. In addition, the referring court asks whether a restrictive interpretation of the national legislation, which provides that the above entities are excluded from such participation, is contrary to the Directive.

I – Legal framework

A – *Community law*

2. Article 1(2)(a) of the Directive provides that '"Public contracts" are contracts for pecuniary interest concluded in writing between one or more *economic operators* and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive'. (3)

3. According to Article 1(8) of the Directive:

'the terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services.

The term "*economic operator*" shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.

...' (4)

4. Article 4 of the Directive is entitled '*Economic operators*' and states:

'1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

...

2. Groups of *economic operators* may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.' (5)

5. Finally, Article 44(1) of the Directive provides under the heading 'verification of the suitability and choice of participants and award of contracts' that 'contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the *economic operators* not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3'. (6)

B – *National law*

6. Article 3(19) and (22) of the Public Contracts Code, enacted by Legislative Decree No 163 of 12 April 2006, (7) provides, respectively that 'the terms "contractor", "supplier" and "service provider" shall mean any natural or legal person, or body without legal personality, including a European Economic Interest Group (EEIG) formed pursuant to Legislative Decree No 240 of 23 July 1991, which "offers on the market", respectively, the execution of works or a work, the supply of products, or the provision of services' and that 'the term "*economic operator*" shall include a contractor, supplier, service provider or a group or consortium of these'. (8)

7. Article 34 of Legislative Decree No 163/2006 provides, under the heading 'Entities to which public contracts may be awarded …':

'1. Without prejudice to the restrictions expressly provided for, the following entities are entitled to participate in the procedure for the award of public procurement contracts:

(a) individual commercial operators, including artisans, commercial companies and partnerships and cooperatives;

(b) consortia of production- and labour-cooperatives … and … consortia of artisans …;

(c) permanent consortia, constituted inter alia as joint venture companies ..., between individual contractors (including artisans), commercial companies or partnerships or production- and labour-cooperatives, …;

(d) special purpose groupings of competitors, whose members include the entities referred to in subparagraphs (a), (b) and (c) …;

(e) ordinary consortia of competitors ..., whose members include the entities referred to in subparagraphs (a), (b) and (c) of the present paragraph, including those constituted as companies or partnerships…;

(f) entities who have entered into an [EEIG] …;

…'

8. It was only after the material events of the main proceedings had occurred, and therefore also after the adoption of the order of the referring court on 23 April 2008, that Legislative Decree No 152 of 11 September 2008 (9) added the following subparagraph to the above list: '(f bis) economic operators within the meaning of Article 3(22), established in other Member States and constituted according to the applicable legislation of the Member State concerned'.

II – Factual and procedural background and the questions referred

9. The Regione Marche (the Marche Region), in its capacity as a contracting authority, organised a public service tendering procedure in relation to the acquisition of geophysical data and marine samples. The Consorzio Nazionale Interuniversitario per le Scienze del Mare (National Inter-University Marine Sciences Consortium, 'CoNISMa') applied to participate, but was ultimately excluded from that procedure.

10. CoNISMa challenged its exclusion by way of an extraordinary petition to the President of the Italian Republic. In the framework of that extraordinary petition, the Ministero dell'ambiente e della tutela del territorio (Italian Ministry of the Environment and Protection of the Territory) requested an opinion of the Consiglio di Stato. The referring court needs to establish whether an inter-university group, such as CoNISMa, constitutes an 'economic operator' within the meaning of the Directive and, if so, whether it may take part in a tendering procedure such as the one at issue in the main proceedings. In that regard, the referring court expresses doubts on the basis of the following considerations.

11. The Consiglio di Stato states that CoNISMa is a group (consortium) of 24 universities and three ministries. According to its statute, the consortium is non-profit-making and seeks to promote and coordinate research and other scientific activities and their applications in the field of marine sciences between the member universities. However, its statute provides that it may participate in public tendering procedures. The consortium is financed primarily from funds provided by the Ministry for Universities and Research. In the referring court's view, the tendering procedures in question are open only to public bodies that supply the services which are the subject of the contract in accordance with their official functions and in a manner which is consistent with the profit-making functions they are assigned by the rules governing them.

12. Thus the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the provisions of Directive 2004/18/EC ... be interpreted as precluding a consortium made up solely of Italian universities and State bodies, [such as CoNISMa], from taking part in a tendering procedure for the award of a service contract such as that for the acquisition of geophysical data and marine samples?

(2) Are the provisions of Italian law contained in Article 3(22) and (19) and Article 34 of the Public Contracts Code, enacted by Legislative Decree No 163/2006, which provide, respectively: that "the term 'economic operator' shall include a contractor, supplier, service provider or a group or consortium of these" and "the terms 'contractor', 'supplier' and 'service provider' shall mean any natural or legal person, or body without legal personality, including [an EEIG] ..., which 'offers on the market', respectively, the execution of works or a work, the supply of products or the provision of services", contrary to Directive 2004/18/EC if interpreted as restricting participation in tendering procedures to professional providers of such services and excluding entities whose primary objects are non-profit-making, such as research?'

III – Assessment

A – *Principal arguments of the parties*

13. According to CoNISMa, the applicant in the main proceedings, the national legislation, which excludes entities that are not 'contractors' according to an exhaustive list contained in Article 34 of Legislative Decree No 163/2006, must be interpreted in the light of the Directive. Article 1(8) of the Directive expressly includes 'public entities' among contractors, suppliers or service providers. Article

4 of the Directive provides that candidates entitled to provide the relevant service are not to be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons. A fortiori, a candidate should not be rejected on the ground that he is not a 'contractor'. CoNISMa states that that approach is confirmed by the fact that after the Commission of the European Communities had taken action in the form of opening administrative procedure No 2007/2309 (10) against the Italian Republic concerning a failure to fulfil obligations, the Italian Government inserted in Article 34(1) of Legislative Decree No 163/2006 the new subparagraph (f bis) referred to above. In CoNISMa's view, this reform expressly abolished the requirement that economic operators established in other Member States be a 'contractor'. Furthermore, that reform replaced the term 'undertakings' used in the Legislative Decree with the term 'economic operators'.

14. The Czech Government argues, in essence, that if the Directive intended to establish a distinction between economic public bodies, which carry out a certain economic activity, and non-economic ones, it would have included a statement to that effect. Therefore, the Czech Government proposes that the first question should be answered in the negative.

15. The Austrian Government contends inter alia that the Community rules on public procurement are applicable where a contracting authority intends to award a contract for pecuniary interest to a legally distinct entity, whether the latter is itself a contracting authority or not. It follows that contracting authorities may take part in public tendering procedures both as tenderers or as candidates, a point which should apply a fortiori to tenderers who are not contracting authorities but whose objects are non-profit-making and which do not act exclusively in accordance with market forces.

16. The Commission submits essentially that according to Article 1(8) of the Directive and the Court's case-law, public bodies and contracting authorities in general may take part in a public tendering procedure as tenderers and may therefore be considered as economic operators within the meaning of the Directive. Furthermore, no provision of the Directive precludes universities and consortia of universities from being considered economic operators and from accessing Community tender procedures.

17. As regards the second question, all the above parties argue, in substance, that it should be answered in the affirmative.

B – *Appraisal*

18. By its two questions, which should be considered together, the referring court asks essentially whether non-profit-making entities which are not necessarily present on the market on a regular basis, (11) such as CoNISMa – that is to say, universities and research institutes as well as groups (consortia) of those universities and research institutes and State bodies (12) – are entitled to participate in a public service tendering procedure and may be considered to constitute an 'economic operator' within the meaning of the Directive. Should the national legislation be interpreted restrictively as precluding the above entities from participating, the referring court asks whether such interpretation is contrary to the Directive. In that respect, it is sufficient to point out that the Court interprets Community law and not national law. (13)

19. I shall first consider the wording of the relevant provisions.

20. Despite the reference to 'economic operators' in, inter alia, Article 1(2)(a), the Directive does not contain a precise definition of that concept. Article 1(8) of the Directive provides only that that term 'is used merely in the interest of simplification' and means 'any natural or legal person or *public entity* or group of such persons and/or bodies which offers on the market … works[,] products or services'. (14)

21. In that regard, I consider that the fact that Article 1(8) of the Directive refers to those who 'offer services on the market' does not signify an intention to restrict the category of public bodies eligible to conclude contracts with contracting authorities solely to those bodies which are engaged (as an undertaking) in the activity involved in the service to be provided by the selected contractor and whose objects are profit-making. In order to be considered an economic operator it is not essential to offer services on the market on a continuous and systematic basis.

22. In my view, the Directive clearly does not require any particular legal form and it contains no requirement to the effect that an economic operator qualify as an undertaking or needs to have profit-making objects or a stable or regular presence on the market.

23. The Directive merely provides that an 'economic operator' means inter alia any public entity which offers on the market the execution of works, products or services. It says nothing more.

24. In that connection, as the Commission has pointed out, by not providing any indications as to the required characteristics and/or legal form of economic operators allowed to participate in tendering procedures, the Community legislature did not wish to define that concept in a way which would introduce particular conditions and thus limit access to tender procedures in such a way.

25. In addition, it should be pointed out that Article 4(1) of the Directive provides that 'candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons'. Then, as regards groups of economic operators, Article 4(2) of the Directive continues that 'in order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form …'.

26. It follows from the foregoing considerations, and not least from the wording of Article 1(8) of the Directive in particular, that public entities, such as the entity involved in the main proceedings, constitute 'economic operators' and may, in principle, participate in public service tendering procedures.

27. The above approach is confirmed by the *travaux préparatoires* to the Directive. (15)

28. Here, one may perhaps draw a parallel with the well-established concept of an undertaking under Community competition law.

29. This may also be opportune due to the fact that the Directive stresses that the concept of 'economic operator' is used merely in the interest of simplification. In addition, it is obvious that competition law and rules guaranteeing fair competition in tendering procedures are related.

30. Therefore it is instructive to recall the *Höfner and Elser* (16) line of case-law on the concept of 'undertaking', in the context of competition law, which 'encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. Furthermore, the Court has held that 'any activity consisting in offering goods or services on a given market is an economic activity'. (17) Here, the remark of Advocate General Jacobs that 'an activity does not necessarily cease to be economic simply because there is no aim to make a profit' is particularly apt. (18)

31. My interpretation of the concept of 'economic operator' is also confirmed by the Court's case-law relating to public procurement.

32. First of all, there is case-law (19) where the Court has stated that the Community rules on public contracts apply to 'an economic operator [who is] active on the market'. However, I consider that one should not infer from that statement that an economic operator must have a stable or regular presence on the market.

33. On the contrary, in my view, the concept of 'economic operator' must be interpreted broadly in order to include any person who offers services on the market, whether he does so for the first time or merely on an isolated or occasional basis.

34. Indeed, as the Commission has pointed out, the above is not prejudicial to the quality of the service provided since Article 44 of the Directive provides that contracts are to be awarded only after the contracting authorities have checked the economic operators' economic and financial standing as well as their professional and technical knowledge or ability.

35. A broad interpretation of the concept of ‘economic operator’ is also in line with the Court’s case-law to the effect that it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders. (20)

36. Regard should also be had in this context to the judgments in *Teckal*, (21) *ARGE*, (22)*Stadt Halle and RPL Lochau*, (23) and *Auroux and Others*, (24) where the Court ruled, inter alia, that Community legislation on public procurement is applicable even in cases where the contractor is itself a contracting authority. (25) Therefore, a contracting authority may also be considered to constitute an ‘economic operator’ within the meaning of the Directive. This also supports my broad interpretation of that concept in the present case.

37. The referring court expressed concerns specifically with regard to CoNISMa’s non-profit-making objects. In that connection, in *Commission* v *Italy*, (26) the Court ruled, first, that the fact that an association is non-profit-making does not exclude it from carrying out an activity of an economic nature and from constituting an undertaking under the Treaty provisions relating to competition.

38. Next, the Court recalled the ruling in *ARGE* (27) and held that the fact that, as their employees work on a voluntary basis, such bodies tend to be able to submit tenders at prices appreciably lower than those of other tenderers does not preclude them from participating in an award procedure for a public service contract covered by Directive 92/50. Therefore, the Court concluded that the contract at issue in that case was not excluded from the concept of public service contracts within the meaning of Article 1(a) of Directive 92/50, by reason of the fact that the associations at issue were of a non-profit-making nature. (28)

39. Furthermore, in order to address the referring court’s concerns that the consortium would allegedly not be able to offer the professionalism and capability of a typical business as well as the sophisticated machinery and highly-skilled operators required for the service concerned, it is sufficient to recall the case-law where the Court held that it makes no difference if the tenderer himself cannot or does not intend to carry out the contract itself provided that it can demonstrate that it actually has available to it the resources, of subsidiaries or third parties and whatever the nature of its legal link with those companies, (29) which are necessary for carrying out the contract.

40. In that connection, the Directive does not allow a contracting authority to exclude a public body, such as CoNISMa, from taking part in a tendering procedure, the reason being that the question whether an economic operator is entitled to take part in such a procedure is to be examined in the framework of Articles 44 to 52 of the Directive. In other words, as the Czech Government has argued, the possibility of taking part in a tendering procedure by way of submitting a bid should be distinguished from the assessment of that bid in the framework of a subsequent qualification phase of the procedure.

41. In addition, the referring court considers that participation in tendering procedures by consortia of public bodies, such as CoNISMa, may infringe the principle of free competition in two respects. First, such participation could potentially remove from the open market a number of public contracts, to which ease of access would be at least hampered for a not inconsiderable proportion of ordinary undertakings due to the consortium’s widespread network of business-referral points. Secondly, it would place the contractor in a position of unfair advantage because of the economic security provided by the constant and predictable flow of public finance which is not available to other economic operators, who must rely solely on their ability to earn revenue from their offering on the market.

42. First, as regards the alleged widespread network of business-referral points, I do not consider that argument particularly decisive, not least since CoNISMa explained in its observations that its only seat is in Rome and the offices of its various members do not play any role in public tendering procedures.

43. Secondly, with regard to the argument that CoNISMa would be placed in a position of unfair advantage because of the public finance available to it – quite apart from CoNISMa’s explanation that its commercial activity is self-funding – I agree with the Czech Government and the Commission that it is sufficient to refer to the Court’s case-law to the effect that that element is not an obstacle to participation in tendering procedures. (30) In particular, the Court has held that public bodies,

specifically bodies receiving subsidies from the State which might enable them to submit tenders at prices appreciably lower than those of other, unsubsidised, tenderers, are expressly authorised (31) to participate in a procedure for the award of a public procurement contract. Indeed, the Directive which is pertinent in the case in the main proceedings also expressly authorises public bodies, funded in some cases out of the public purse, to participate in procedures for the award of public procurement contracts.

44. It may be noted here that Article 55(3) of the Directive concerning 'abnormally low tenders' provides that 'where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time-limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact'. (32)

45. In that regard, the Directive states, in the fourth recital in the preamble, that 'Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers'.

46. To conclude, Article 1(8) of the Directive, and in particular the concept of 'economic operator', should be interpreted as not precluding a consortium such as the one in the main proceedings from taking part in a public service tendering procedure. (33) It follows that the Directive precludes national legislation which excludes such entities from participation, provided that they are otherwise entitled under the relevant national legislation to offer products, services or works on the market.

47. In that regard, it is for the national court to determine, taking into account all the relevant circumstances of the case before it, whether the relevant national legislation is compatible with the Directive, disapplying, if necessary, any contrary provision of domestic law. (34)

IV – Conclusion

48. Therefore, I suggest that the Court answer the questions of the Consiglio di Stato as follows:

(1) Article 1(8) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and in particular the concept of 'economic operator', should be interpreted as not precluding a consortium, such as the one in the main proceedings, from taking part in a tendering procedure for the award of a service contract pertaining to services the consortium is entitled to carry out under the relevant national legislation.

(2) Directive 2004/18 precludes national legislation which excludes entities whose primary objects are non-profit-making, such as research, from participating in tendering procedures, provided that those entities are entitled under the relevant national legislation to offer works, products or services on the market.

---

1 – Original language: English.

---

2 – Directive of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) ('the Directive').

---

3 – Emphasis added.

---

4 – Idem.

---

5 – Idem.

---

6 – Idem.

---

7 – GURI No 100 of 2 May 2006, ordinary supplement, (‘Legislative Decree No 163/2006’). Procedures for the award of public works contracts, public supply contracts and public service contracts are currently governed, in their entirety, by this decree.

---

8 – Emphasis added.

---

9 – GURI No 231 of 2 October 2008.

---

10 – CoNISMa claims that the Commission criticised the list in Article 34 of Legislative Decree No 163/2006, stating that it ‘does not appear to allow the participation in tendering procedures of operators with a legal form different to those mentioned in the list. In particular, this article does not appear to allow the participation of other public entities or bodies governed by public law in the sense of the public procurement directives’.

---

11 – The Consiglio di Stato refers in this respect to CoNISMa’s presence on the market as not being on a ‘regular’ or ‘stable’ basis. However, CoNISMa’s statute expressly provides that it may participate in tendering procedures and that is why I qualify the statement with the inclusion of ‘necessarily’. In fact, CoNISMa argues that it regularly participates in public tendering procedures.

---

12 – I would note here that CoNISMa disputes the fact that it is also composed of State bodies. However, suffice it to say that the questions referred for a preliminary ruling are considered within the factual and legal context as set out by the referring court. The Court does not take account of observations from interested parties within the meaning of Article 23 of the Statute of the Court which take issue with that context. See Case C-153/02 *Neri* [2003] ECR I-13555, paragraphs 33 to 36; see also Case C-145/03 *Keller* [2005] ECR I-2529, paragraphs 32 to 34. In any event, my conclusion in the present opinion applies whether or not the consortium is also composed of State bodies.

---

13 – As regards the wording of the second question, it is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of national law with Community law or to interpret national law. The Court is, however, competent to give the national court full guidance on the interpretation of Community law in order to enable it to determine the issue of compatibility for the purposes of the case before it (see Case C-213/07 *Michaniki* [2008] ECR I-0000, paragraphs 51 and 52 and the case-law cited).

---

14 – Emphasis added.

---

15 – The proposal for the Directive explained, under ‘justification’ for the wording of what eventually became Article 1(8), that the ‘new concept [of an economic operator] has become necessary because of the insertion of the three public sector Directives into a single text’. The *travaux préparatoires* to the Directive also state that ‘the only purpose of [that] term is for conciseness’ and that it stands for ‘opérateur économique’ in French or ‘ondernemer’ in Dutch and that in English it effectively means ‘undertaking’. They continue by stating that ‘in the event of serious transcription problems, systematic use could be made, despite the ponderous style, of “supplier, provider of services and contractor”’.

---

16 – Case C-41/90 [1991] ECR I-1979, paragraph 21. See, inter alia, also Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, paragraph 25; and, more recently, Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 38 and the case-law cited.

---

17 – See Case C-113/07 P *Selex Sistemi Integrati* v *Commission and Eurocontrol* [2009] ECR I-0000, paragraph 69. See also Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 47; Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 108; Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 29; and *FENIN* v *Commission*, cited in footnote 16, paragraph 25.

---

18 – Case C-5/05 *Joustra* [2006] ECR I-11075, point 84. See also the Opinion of Advocate General Poiares Maduro in *FENIN* v *Commission*, cited in footnote 16, 'even if no profit-making activity is carried on, there may be participation in the market capable of undermining the objectives of competition law' (point 14). Concerning the relevance of the fact that an organisation is non-profit-making in assessing the economic nature of an activity, see Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 10; Case C-35/96 *Commission* v *Italy*, cited in footnote 17, paragraph 37; and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 76 and 77.

---

19 – See Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 44.

---

20 – See, to that effect, *Michaniki*, cited in footnote 13, paragraph 39; and Case C-538/07 *Assitur* [2009] ECR I-0000, paragraph 26. See also Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 47.

---

21 – Case C-107/98 [1999] ECR I-8121, paragraph 50 et seq.

---

22 – Case C-94/99 [2000] ECR I-11037, paragraph 40.

---

23 – Cited in footnote 20, paragraph 47.

---

24 – Cited in footnote 19.

---

25 – Concerning a case where a university is potentially a contracting authority, see Case C-380/98 *The University of Cambridge* [2000] ECR I-8035. With regard to the concept of a contracting authority, see Tizzano, A., 'La notion de "pouvoir adjudicateur" dans la jurisprudence communautaire', in Monti, M., Prinz Nikolaus von und zu Liechtenstein, Vesterdorf, B., Westbrook, J., Wildhaber, L. (Eds.), *Economic Law and Justice in Times of Globalisation*, Nomos, Baden-Baden, 2007, pp. 659-669.

---

26 – Judgment of 29 November 2007 in Case C-119/06, paragraphs 37 to 41 and the case-law cited. The judgment concerned Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

---

27 – Cited in footnote 22, paragraphs 32 and 38.

---

28 – Concerning the non-profit-making argument, see also Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraphs 18 and 19; and Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraphs

38 to 40; as well as the Opinion of Advocate General Kokott in *Auroux and Others*, cited in footnote 19, point 54.

---

29 – See Case C-389/92 *Ballast Nedam Groep* [1994] ECR I-1289 (‘*Ballast Nedam Groep I*’), paragraph 11 et seq.; Case C-176/98 *Holst Italia* [1999] ECR I-8607, paragraph 25 et seq.; and Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409 (‘*La Scala*’), paragraphs 88 to 96.

---

30 – See *ARGE*, cited in footnote 22, paragraph 24 et seq.

---

31 – At the time, by Directive 92/50.

---

32 – In this respect, see also *ARGE*, cited in footnote 22.

---

33 – In that connection, as the Commission has pointed out, a Member State may of course govern the activities of non-profit-making persons whose primary object is research and, if necessary, may limit the possibility for such persons to offer services on the market. None the less, the Member State in question must recognise persons established in other Member States entitled under the law of the Member States concerned to carry out the relevant service activity as constituting ‘economic operators’, whether they be universities, research institutes or groups made up of these, acting with or without a profit-making purpose. The referring court does not refer to any Italian legislation which would establish the above limitations for entities such as the one in the main proceedings.

---

34 – See, to that effect, Case C-357/06 *Frigerio Luigi & C.* [2007] ECR I-12311, paragraph 28, which refers to Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11, and Case C-208/05 *ITC* [2007] ECR I-181, paragraphs 68 and 69.

JUDGMENT OF THE COURT (Third Chamber)

10 December 2009 (*)

(Failure of a Member State to fulfil obligations – Directive 2004/18/EC – Procedures for the award of public contracts – National legislation providing for a single procedure for the award of the contract defining needs and of the ensuing marché d'exécution – Compatibility with that directive)

In Case C-299/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 July 2008,

European Commission, represented initially by D. Kukovec and G. Rozet, and subsequently by G. Rozet and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues, J.-C. Gracia and J.-S. Pilczer, acting as Agents,

defendant,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Second Chamber, acting as President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Arabadjiev, Judges,

Advocate General: J. Mazák,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2009,

after hearing the Opinion of the Advocate General at the sitting on 22 September 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities is asking the Court to declare that, by adopting and keeping in force Articles 73 and 74-IV of the Code des marchés publics (the Public Procurement Code) adopted by Decree No 2006-975 of 1 August 2006 (Official Journal of the French Republic of 4 August 2006, p. 11627), inasmuch as those provisions lay down a procedure for the award of so-called *marchés de definition* (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the contracting authority to award a *marché d'exécution* (a public works, supply or service contract) to one of the holders of the initial *marchés de définition* without opening it afresh to competition or, at most, by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2, 28 and 31 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

Legal context

Community legislation

2 Recital 3 in the preamble to Directive 2004/18 states:

‘Such [Community] coordinating provisions [of national procedures for the award of contracts] should comply as far as possible with current procedures and practices in each of the Member States.’

3 Article 2 of the Directive provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

4 According to Article 28 of the Directive:

‘In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.’

5 Article 29 of Directive 2004/18, entitled ‘Competitive dialogue’, provides:

‘1. In the case of particularly complex contracts, Member States may provide that where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, the latter may make use of the competitive dialogue in accordance with this Article.

A public contract shall be awarded on the sole basis of the award criterion for the most economically advantageous tender.

2. Contracting authorities shall publish a contract notice setting out their needs and requirements, which they shall define in that notice and/or in a descriptive document.

3. Contracting authorities shall open, with the candidates selected in accordance with the relevant provisions of Articles 44 to 52, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue.

During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

Contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement.

4. Contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contract notice or the descriptive document shall indicate that recourse may be had to this option.

5. The contracting authority shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs.

6. Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project.

These tenders may be clarified, specified and fine-tuned at the request of the contracting authority. However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect.

7. Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or the descriptive document and shall choose the most economically advantageous tender in accordance with Article 53.

At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.

8. The contracting authorities may specify prices or payments to the participants in the dialogue.'

6 Article 31 of Directive 2004/18 states:

'Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:

…

(3) for public service contracts, when the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates[;] in the latter case, all successful candidates must be invited to participate in the negotiations;

…'

7 The first subparagraph of Article 80(1) of the Directive is worded as follows:

'The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 January 2006. They shall forthwith inform the Commission thereof.'

National legislation

8 The code des marchés publics (Public Procurement Code), in the version thereof resulting from Decree No 2004-15 of 7 January 2004 (Official Journal of the French Republic of 8 January 2004, p. 703), which entered into force on 10 January 2004, provided in the third paragraph of Article 73 as follows:

'Provisions supplied under several *marchés de définitions* having the same subject-matter, concluded upon completion of a single procedure and awarded simultaneously, may be awarded, without a further tendering process, to the supplier of the chosen solution. In such cases, the amount of the provisions to be compared with the thresholds takes account of the cost of the definition studies and the estimated amount of the *marché d'exécution*.'

9 The Public Procurement Code, as adopted by Decree No 2006-975, which entered into force on 1 September 2006, contains inter alia the following provisions:

'Article 73

If the public entity is unable to specify the aims and performances which the contract must meet, the techniques to be used, and the human and material resources required, it may resort to *marchés de definition*.

The purpose of such contracts is to explore the possibilities and conditions for establishing a contract subsequently, if necessary through production of a model or demonstrator. They must also enable the

price level of the provisions to be estimated and calculated, as well as the different phases of the performance schedule.

In the framework of a single procedure, contracts for the performance of services following several *marchés de définition* having the same subject-matter and awarded simultaneously are awarded after being opened to competition limited to the holders of the initial *marchés de définition*, in accordance with the following provisions:

1. The public contract notice defines the subject-matter of the *marchés de définition* awarded simultaneously and the subject-matter of the subsequent *marché d'exécution*;

2. The public contract notice defines the criteria for the selection of applications. Those criteria take into account the capacities and competences required of the candidates both for the *marchés de définition* and for the subsequent *marché d'exécution*;

3. The public contract notice defines the criteria for the selection of offers for the *marchés de définition* awarded simultaneously and the criteria for the selection of offers for the subsequent *marché d'exécution*;

4. The amount of the provisions to be compared with the thresholds takes account of the cost of the definition studies and the estimated amount of the *marché d'exécution*;

5. The number of *marchés de définition* awarded simultaneously in the framework of the present procedure may not be lower than three, subject to a sufficient number of candidates.

The contract or framework agreement is awarded by the tenders committee for the local authorities or after the opinion of the tenders committee for the State, for the public health bodies and the public social or medical-social bodies.'

Article 74

…

IV. In the framework of a single procedure, the contract or framework agreement of project-management following several *marchés de définition* having the same subject-matter and awarded simultaneously may be awarded after being opened to competition limited to the holders of the initial *marchés de définition*, under the conditions laid down in the third paragraph of Article 73.

…'

The pre-litigation procedure

10 By letter of 18 October 2004, the Commission sent the French Republic a first letter of formal notice concerning Articles 73 and 74-III of the Public Procurement Code, as amended by Decree No 2004-15. Following the amendment of those provisions by Decree No 2006-975, the Commission sent an additional letter of formal notice to that Member State on 15 December 2006.

11 As it was not satisfied with the French Republic's replies, on 29 June 2007 the Commission sent a reasoned opinion to the French Republic, calling on it to take the measures necessary to comply with that opinion within two months of its receipt.

12 Taking the view that that Member State's replies to the reasoned opinion were not satisfactory, the Commission decided to bring the present action.

The action

Arguments of the parties

13 The Commission claims that Articles 73 and 74-IV of the Public Procurement Code, as adopted by Decree No 2006-975, allow a contracting authority to award a *marché d'exécution* (a public works, supply or service contract) to one of the holders of the initial *marchés de définition* without opening it afresh to competition or, at most, by opening it to competition limited to those holders as soon as the conditions provided for in the third paragraph of Article 73 have been met. Those articles of the Public Procurement Code infringe the provisions of Directive 2004/18 by allowing a contract to be awarded on the basis of mutual agreement, or with limited competition, in situations not provided for by the Directive.

14 The Commission maintains that *marchés de définition* as provided for by those national provisions do not make it possible, as a general rule, to establish at the outset, with sufficient precision, the subject-matter of the *marché d'exécution*, the criteria for selecting tenderers or those for awarding the contract in question. It follows that the procedure for the award of *marchés de définition* resulting from those provisions runs counter to the principle of transparency laid down in Article 2 of Directive 2004/18. That procedure creates a situation of legal uncertainty for both contracting authorities and operators.

15 According to the Commission, the procedure for the award of *marchés de définition* is neither a competitive dialogue nor a framework agreement within the meaning of Articles 29 and 32 of Directive 2004/18. Nor is such a procedure a design contest under which it is possible, under certain conditions, to award the ensuing service contract on the basis of mutual agreement in accordance with Article 31(3) of the Directive.

16 The French Republic claims that the national provisions in issue are not incompatible with Articles 2, 28 or 31 of Directive 2004/18. The latter, it argues, is a coordinating directive and does not lay down a uniform and exhaustive body of Community rules. Consequently, the fact that competition may be limited when the *marchés d'exécution* are being awarded is compatible with that directive. The procedure for the award of *marchés de définition* complies with the principles on the right of establishment and the freedom to provide services laid down by the EC Treaty and set out in Article 2 of that directive, since the Member States remain free to maintain or adopt substantive and procedural rules in regard to public contracts.

17 The French Republic argues that it is possible for the subject-matter and criteria of the subsequent *marché d'exécution* to be established from the launch of the procedure for the award of the *marchés de définition*. There are many situations, such as those involving certain urban development contracts, in which the subject-matter and criteria for the award of the *marché d'exécution* are sufficiently independent of the *marchés de définition* that they can already be determined at the initial stage of the *marchés de définition*.

18 The French Republic adds that Directive 2004/18 sets out two procedures with characteristics which are analogous to those of the procedure for the award of *marchés de definition* provided for by the Public Procurement Code, as adopted by Decree No 2006-975, namely the framework agreement and the competitive dialogue. By those two procedures, the Community legislature itself established complex procedures by which contracts are opened to competition in two stages. Since that directive does not lay down a uniform and exhaustive body of Community rules, the national legislature can also establish specific provisions providing for contracts to be opened to competition in two stages, provided that those provisions comply with the principle of transparency laid down in Article 2 of that directive.

19 If the Court were to take the view that the body of rules established by that directive is exhaustive, the French Republic submits, in the alternative, that the procedure for the award of *marchés de definition* set out in the Public Procurement Code can be regarded as constituting a variation on the competitive dialogue procedure.

Findings of the Court

20 By its form of order, the Commission is asking the Court to declare that the French Republic has failed to fulfil its obligations under Articles 2, 28 and 31 of Directive 2004/18 by adopting and keeping in force Articles 73 and 74-IV of the Public Procurement Code adopted by Decree No 2006-975, inasmuch as those provisions lay down a procedure for the award of *marchés de definition* under which

it is possible for a contracting authority to award a *marché d'exécution* to one of the holders of the initial *marchés de définition* 'without opening it afresh to competition' or, at most, by opening it to competition limited to those holders.

21 It is appropriate to examine the alleged failure to fulfil obligations under Article 31 of Directive 2004/18. According to the Commission, that failure stems from the fact that the procedure for the award of *marchés de définition* allows contracts to be awarded on the basis of mutual agreement in circumstances which are not provided for by point 3 of Article 31 of the Directive.

22 In this respect, it is settled case-law that the question whether a Member State has failed to fulfil obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-64/01 *Commission* v *Greece* [2002] ECR I-2523, paragraph 7, and Case C-456/05 *Commission* v *Germany* [2007] ECR I-10517, paragraph 15).

23 It is common ground that the version of Article 73 of the Public Procurement Code resulting from Decree No 2004-15 which allowed *marchés d'exécution* to be awarded 'without a further tendering process' was no longer in force on the date of expiry of the two-month period laid down in the reasoned opinion. On that date, that version of Article 73 had been replaced by a new version resulting from Decree No 2006-975.

24 It is clear from the wording of the third paragraph of Article 73 of the Public Procurement Code, as adopted by Decree No 2006-975, that *marchés d'exécution* are awarded solely 'after being opened to competition limited to the holders of the initial *marchés de définition*'. On the date on which the period laid down in the reasoned opinion expired, *marchés d'exécution* were thus not awarded by means of the negotiated procedure within the meaning of point 3 of Article 31 of Directive 2004/18.

25 It follows that the Commission's action must be dismissed in so far as it seeks a declaration by the Court that the procedure for the award of *marchés de définition* allows a contracting authority to award a *marché d'exécution* to one of the holders of the *marchés de définition* 'without opening it afresh to competition' and in so far as it claims that there has been a failure to fulfil obligations under Article 31 of that directive.

26 The action does, however, retain a purpose in so far as the Commission complains that the French Republic has failed in its obligations under Articles 2 and 28 of Directive 2004/18 by adopting and keeping in force Articles 73 and 74-IV of the Public Procurement Code adopted by Decree No 2006-975, inasmuch as those provisions lay down a procedure for the award of *marchés de definition* under which it is possible for the contracting authority to award a *marché d'exécution* to one of the holders of the initial *marchés de définition* by opening it to competition limited to those holders.

27 In its statement in defence, the French Republic submits that Directive 2004/18 is only a coordinating directive, which leaves Member States free to maintain or adopt rules in regard to public contracts other than those provided for by that directive.

28 That line of argument cannot be accepted. Whilst it is true that Directive 2004/18 does not seek to establish complete harmonisation of the rules governing public procurement in the Member States, the fact remains that the procedures for the award of public contracts that the Member States are permitted to use are listed exhaustively in Article 28 of that directive.

29 Under Article 28, contracting authorities are required to award their public contracts by applying either the open or restricted procedure, or, in the specific circumstances expressly provided for in Article 29 of Directive 2004/18, the competitive dialogue or, in the further alternative, in the specific circumstances referred to expressly in Articles 30 and 31 thereof, a negotiated procedure. The award of public contracts by means of other procedures is not permitted by that directive.

30 A different conclusion cannot be inferred from Joined Cases 27/86 to 29/86 *CEI and Bellini* [1987] ECR 3347.

31 Admittedly, in the first sentence of paragraph 15 of that judgment, the Court held that Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) did not lay down a uniform and exhaustive body of Community rules. However, in the following sentence of that paragraph 15, the Court stated that, although Member States remained free to maintain or adopt substantive and procedural rules in regard to public contracts, they had to do so within the framework of the common rules contained in that directive.

32 Furthermore, in paragraph 17 of *CEI and Bellini*, the Court made it clear that it was ruling in the light of the state of harmonisation of Community law at the time of delivery of its judgment. However, the second paragraph of Article 28 of Directive 2004/18, which had no equivalent in Directive 71/305, specifically lists the procedures which contracting authorities must apply in awarding their contracts.

33 It follows that, in the framework of the common rules currently in force, Member States are no longer free to adopt award procedures other than those specified by Directive 2004/18.

34 Accordingly, the French Republic's arguments that it is possible for a Member State to adopt contract award procedures which are not provided for by Directive 2004/18, but which exhibit characteristics analogous to those of certain procedures referred to by that directive, must be rejected.

35 However, it is necessary to examine the argument, put forward by the French Republic in the alternative, that the procedure for the award of *marchés de definition* provided for by the Public Procurement Code, as adopted by Decree No 2006-975, constitutes a form of implementation of the competitive dialogue procedure provided for in Article 29 of Directive 2004/18.

36 It must be acknowledged that there is a degree of proximity between the objectives pursued by the competitive dialogue procedure and those of the procedure for the award of *marchés de definition*. Each of those procedures was designed to enable the contracting authority to define initially the specific subject-matter of a contract and the technical means for performing it.

37 However, there is a fundamental difference between those two procedures. The difference is that the competitive dialogue is a procedure for the award of one single contract, whereas the procedure for the award of *marchés de définition* relates to the award of several contracts of different natures, namely *marchés de définition*, on the one hand, and one or more *marché d'exécution*, on the other.

38 That difference by itself makes it impossible for the procedure for the award of *marchés de definition* to be interpreted as a form of implementation of the competitive dialogue procedure.

39 The Commission also pleads a failure to fulfil obligations under Article 2 of Directive 2004/18, which requires contracting authorities to treat economic operators equally and non-discriminatorily and to act in a transparent way.

40 In this respect, the Court notes that the purpose of the procedure for the award of *marchés de definition*, as adopted by Decree No 2006-975, is to award two types of contracts, namely *marchés de définition* and *marchés d'exécution*, the latter being awarded after being opened to competition limited to the holders of the former alone. Accordingly, economic operators who might be interested in participating in *marchés d'exécution*, but who are not holders of one of the *marchés de définition*, are discriminated against in comparison with those holders, contrary to the principle of equality, which is laid down as a principle for the award of contracts in Article 2 of Directive 2004/18.

41 Moreover, both the principle of equal treatment and the obligation of transparency which flows from it require the subject-matter of each contract and the criteria governing its award to be clearly defined (see, to that effect, Case C-340/02 *Commission* v *France* [2004] ECR I-9845, paragraph 34).

42 The French Republic has put forward a number of examples of procedures for the award of *marchés de definition* in which, in its view, the subject-matter of the *marché d'exécution* could be defined with a certain degree of precision already at the stage of the launch of the procedure for the award of the *marchés de définition*.

43 However, *marchés de définition* and *marchés d'exécution* appear by their nature to have different subject-matters, namely, first, a study and design project in which the needs of the contracting authority are defined and, second, the actual provision of supplies, services or works defined in advance. The national provisions the subject of complaint are not, however, capable of ensuring that, in all cases, the subject-matter and award criteria of both *marchés de définition* and the *marché d'exécution* can be defined from the beginning of the procedure.

44 It follows that the procedure for the award of *marchés de définition* laid down by Articles 73 and 74-IV of the Public Procurement Code, as adopted by Decree No 2006-975, is not consistent with Article 2 of Directive 2004/18.

45 Consequently, by adopting and keeping in force Articles 73 and 74-IV of the Public Procurement Code, adopted by Decree No 2006-975 of 1 August 2006, inasmuch as those provisions lay down a procedure for the award of *marchés de definition* under which it is possible for the contracting authority to award a *marché d'exécution* (a public works, supply or service contract) to one of the holders of the initial *marchés de définition* by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2 and 28 of Directive 2004/18.

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the French Republic and the latter has, in essence, been unsuccessful, the French Republic must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Declares that, by adopting and keeping in force Articles 73 and 74-IV of the Public Procurement Code, adopted by Decree No 2006-975 of 1 August 2006, inasmuch as those provisions lay down a procedure for the award of marchés de definition (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the contracting authority to award a marché d'exécution (a public works, supply or service contract) to one of the holders of the initial marchés de définition by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2 and 28 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;**

2. **Dismisses the remainder of the action;**

3. **Orders the French Republic to pay the costs.**

[Signatures]

* Language of the case: French.

OPINION OF ADVOCATE GENERAL
Mazák
delivered on 22 September 2009 (1)

Case C-299/08

Commission of the European Communities
v
French Republic

(Failure of a Member State to fulfil its obligations – Directive 2004/18/EC – Public procurement – Use of the negotiated procedure without publication of a contract notice in situations not provided for in the directive – Distinction between marchés de définition and public works, supply or service contracts)

1. By its present action, brought under Article 226 EC, the Commission is asking the Court to declare that, by adopting and keeping in force Articles 73 and 74-IV of the Code des marchés publics (2) ('the contested provisions'), inasmuch as those provisions lay down a procedure for the award of so-called *marchés de définition* (3) under which it is possible for the contracting authority to award an ulterior *marché d'exécution* (a public works, supply or service contract) to one of the holders of the initial *marchés de définition* without opening it afresh to competition or, at most, by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2, 28 and 31 of Directive 2004/18/EC. (4)

I – Legal context

A – *Community law*

2. Article 2 of the Directive provides under 'Principles of awarding contracts' that 'contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way'.

3. Article 28 of the Directive, under 'Use of open, restricted and negotiated procedures and of competitive dialogue', provides:

'In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.'

4. The Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than 31 January 2006.

B – *National law*

5. The CMP 2006, which entered into force on 1 September 2006, provides inter alia as follows:

‘Article 73

If the public entity is unable to specify the aims and performances the contract must meet, the techniques to be used, and the human and material resources required, it may resort to *marchés de définition*.

The purpose of such contracts is to explore the possibilities and conditions for establishing a contract subsequently, if necessary through production of a model or demonstrator. They must also enable the price level of the provisions to be estimated and calculated, as well as the different phases of the performance schedule.

In the framework of a single procedure, the performance of the contract following several *marchés de définition* having the same subject-matter and awarded simultaneously are awarded after being opened to competition limited to the holders of the initial *marchés de définition*, in accordance with the following provisions:

1 The public contract notice defines the subject-matter of the *marchés de définition* awarded simultaneously and the subject-matter of the subsequent *marché d’exécution*;

2 The public contract notice defines the criteria for the selection of applications. Those criteria take into account the capacities and competences required of the candidates both for the *marchés de définition* and for the subsequent *marché d’exécution*;

3 The public contract notice defines the criteria for the selection of offers for the *marchés de définition* awarded simultaneously and the criteria for the selection of offers for the subsequent *marché d’exécution*;

4 The amount of the provisions to be compared with the thresholds takes account of the cost of the definition studies and the estimated amount of the fulfilment contract;

5 The number of *marchés de définition* awarded simultaneously in the framework of the present procedure may not be lower than three, subject to a sufficient number of candidates.

The contract or framework agreement is awarded by the tenders committee for the local authorities or after the opinion of the tenders committee for the State, for the public health bodies and the public social or medical-social bodies.’

‘Article 74

IV. In the framework of a single procedure, the contract or framework agreement of project-management following several *marchés de définition* having the same subject-matter and awarded simultaneously may be awarded after being opened to competition limited to the holders of the initial *marchés de définition*, under the conditions laid down in the third paragraph of Article 73.’

II – Procedure

6. On 18 October 2004, the Commission sent the French Republic a first letter of formal notice and on 12 December 2006, it sent an additional letter of formal notice. As the Commission was not satisfied with the French Republic’s replies, it issued a reasoned opinion on 27 June 2007. Since the Commission considered that the failure to fulfil obligations was persisting and it was not satisfied with the replies it received, the Commission decided to bring this action. Both parties submitted oral argument at the hearing, which took place on 10 June 2009.

III – Assessment

A – *Principal arguments of the parties*

7. The Commission submits that France permits the award of contracts on the basis of mutual agreement, or with limited competition, in situations not provided for by the Directive. In the Commission's view, it is impossible by definition for the subject-matter and criteria for the award of a public procurement contract to be known precisely at a moment where the project has not yet been defined and where the *marchés de définition* have not yet been executed. The *marché de définition* and the *marché d'exécution* are two entirely distinct types of public procurement contract and may not be awarded by way of a single procedure. According to the Commission, the procedure for the award of *marchés de définition* comes neither under the competitive dialogue nor under the framework agreement within the meaning of Articles 29 and 32 of the Directive and it cannot be analysed as a derivation of the competitive dialogue.

8. The French Government submits that the contested provisions are not incompatible with the Directive, which is merely a coordinating directive. In its view, it is possible for the subject-matter and criteria of the ulterior *marché d'exécution* to be established from the launch of the *marchés de définition*. Furthermore, the French Government submits that the Directive has foreseen two procedures with characteristics analogous to those of the French procedure for the award of *marchés de définition* – the framework agreement and the competitive dialogue. Thus the Community legislature itself instituted complex procedures where contracts are opened to competition in two stages, without however being exhaustive.

B – *Appraisal*

1. General remarks

9. The Commission argues that, by drawing a distinction between *marchés de définition* and *marchés d'exécution* and by allowing, in certain circumstances, the award of the latter to one of the holders of the initial *marchés de définition* without again opening them to competition or, at the very least, by opening them to competition limited only to those holders, the French legislation disregards the fundamental principles of equality and transparency inherent to the Directive. Here it should be pointed out that the argument concerning the *marchés de définition* not being opened to any competition would appear to pertain to the wording of the provisions in the CMP 2004. (5) Thus, I will consider the Commission's argument as it pertains to the contested provisions – that is to say the CMP 2006 which was meant to transpose the Directive into national law – to the effect that these open the *marchés d'exécution* to competition limited only to holders of the initial *marchés de définition* and that in situations not provided for by the Directive.

2. On the exhaustive nature of Article 28 of the Directive

10. In that regard, in their submissions the parties have discussed at length whether or not the list of procedures for the award of public contracts, contained in Article 28 of the Directive, is exhaustive in nature since it clearly does not make provision for the *marchés de définition*.

11. Here the French Government argues that, in view of the third recital in the preamble to the Directive and Article 28, the Directive did not mean to abolish all the specific national procedures. Referring to the Court's ruling in *CEI and Others*, (6) concerning Council Directive 71/305/EEC, (7) the French Government claims that 'the Member States remain free to maintain or adopt substantive and procedural rules in regard to public … contracts on condition that they comply with all the relevant provisions of Community law and, in particular, the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services'. (8)

12. Indeed, it is quite clear from the title of the Directive and from the second and third recitals in its preamble that the Directive's aim is to coordinate national procedures for the award of public contracts. Therefore, it does not lay down a uniform and exhaustive body of Community rules on the matter. Hence, within the framework of the common rules which it contains, the Member States remain free to maintain or adopt substantive and procedural rules in regard to public contracts on condition that they comply with all the relevant provisions of Community law. However, the fact that the Directive has not brought about a complete harmonisation of the rules governing procedures for the award of public contracts does not mean that some of its provisions should not be understood as having exhaustively regulated certain matters.

13. First, suffice it to note that the French Government cannot rely on the *CEI and Others* case-law because Article 28 of Directive 2004/18 substantially differs from Article 2 of Directive 71/305 – the Community legislature has complemented Article 28 of the Directive with a completely new second paragraph which plays a decisive role for the case at hand.

14. Secondly, there are certain factors which convincingly suggest that the procedures referred to in Article 28 of the Directive are to be regarded as exhaustive. In general, the wording of that paragraph exhibits none of the features to be observed in what is commonly known as an open list. On the contrary, that paragraph enumerates not only the two standard procedures but also two exceptional procedures thus leaving no room for another kind of interpretative completion of the list of procedures. Nor does the Directive as a whole contain any provision which would allow such a completion.

15. As I will explain below, the procedure for the award of *marchés de définition* clearly differs from the procedures set out in the Directive and cannot be assimilated to any provision of the Directive. In fact, the French Government explicitly recognised in its defence and in its rejoinder that the *marchés de définition* have not been provided for in the Directive.

16. The procedures which the Directive does provide for are the following. As is clear from the second paragraph of Article 28 of the Directive, the Community legislature has set out two procedures which should, as a general rule, be followed by contracting authorities. These are the open and the restricted procedures and they may be referred to as standard or normal procedures. Next, the competitive dialogue may be considered to constitute a special or exceptional procedure whose implementation and conditions are specified in Article 29 of the Directive. (9) Likewise, the negotiated procedure, with or without publication of the contract notice, may be considered as special or exceptional in nature with conditions specified in Articles 30 and 31 of the Directive. (10)

17. However, the French Government submits that, in fact, there are certain specific award procedures provided for by the Directive in Chapter V under ‘Procedures’ which are not mentioned in Article 28 of the Directive. The French Government refers to framework agreements, dynamic purchasing systems and public works contracts: particular rules on subsidised housing schemes. These are provided for in Articles 32, 33 and 34 of the Directive respectively.

18. In that regard, first, framework agreements and dynamic purchasing systems constitute specific forms of contracts or variations of existing procedures. They are not distinct new forms of award procedures for public contracts which are, as such, provided for in Article 28 of the Directive. In addition, it follows from the wording of Articles 32(2) and 33(2) of the Directive that the contracting authorities are obliged to follow the rules of procedure referred to in Article 28 of the Directive. Secondly, with regard to the rules on subsidised housing schemes, the title of Article 34 clearly shows it concerns ‘particular rules’ and not rules of procedure as such. Rather, it constitutes an exception to the provisions pertaining to the general procedure. Indeed, the very existence of Article 34 of the Directive and of the particular rules which it sets out would militate in favour of the view that the list of award procedures in Chapter V of the Directive should be considered to be exhaustive.

19. In this context it may be noted in passing that in its submissions the French Government also argues the merits and the *raison d’être* of the procedure for the award of *marchés de définition* notably with regard to complex contracts where contracting authorities are ‘unable to specify the aims and performances the contract must meet, the techniques to be used, and the ... resources required’. (11) It is apparent from the *travaux préparatoires* for the Directive that the Community legislature was aware of such concerns. (12) As a result, the Community legislature did include among the award procedures for public contracts a new procedure in the form of the competitive dialogue but it did not decide to include the procedure for the award of *marchés de définition*. (13)

20. In addition, the French Government also tries to defend its case by arguing that the *marchés de définition* should be considered analogous to two procedures which are provided for in the Directive – the framework agreement and the competitive dialogue. As regards the former, its opening to competition may be divided into two stages where the last stage is open to competition limited to the successful holders of the first contract and which allows it to further specify the terms of the second contract. As regards the latter, the procedure for the award of *marchés de définition* allows a contracting authority to draw up the conditions of a contract whose selection criteria had been established. Thus,

according to the French Government, the Community legislature instituted complex procedures where contracts are opened to competition in two stages, without however being exhaustive.

21. That argumentation shall not prosper. Suffice it to point out that it is not disputed by the French Government that the procedure for the award of *marchés de définition* comes neither under the competitive dialogue nor under the framework agreement within the meaning of Articles 29 and 32 of the Directive. Competitive dialogue and framework agreements are forms of contracts subject to specific provisions. Recognising their specificity, the Community legislature provided for rules which guarantee that principles set out in Article 2 of the Directive remain respected.

22. Should the list in Article 28 of the Directive be held to be exhaustive, the French Government submits, in the alternative, that the procedure for the award of *marchés de définition* should be analysed as a derivation of the competitive dialogue procedure. It would appear that the French Government raised this argument in the alternative for the first time in its defence before the Court. Prior to that that government had defended the opposite thesis to the effect that *marchés de définition* did not come under the competitive dialogue procedure and were not provided for by the Directive. Indeed, those very submissions have raised numerous differences between the two procedures. In any event, I consider that that argument is not helpful to the French Government's case. Suffice it to point out that the two procedures differ in important aspects, not least because the competitive dialogue is a procedure for the award of a single contract, while the procedure for the award of *marchés de définition* is aimed at awarding two contracts where the second is awarded after being opened to competition limited to the holders of the initial contract.

3. Treating economic operators equally and non-discriminatorily and in a transparent way

23. In any event, even if we were to accept the consideration that one may, under certain conditions, adjust the procedures enumerated in Article 28 of the Directive, having regard to the nature and functioning of the procedure for the award of *marchés de définition*, it is to be noted that this procedure not only cannot be classified under Article 28 of the Directive but is contrary to the principles referred to in the second recital in the preamble to the Directive and in Article 2 of the Directive. (14)

24. Contrary to what the French Government argues, in my view the Commission is correct when it submits that it is virtually impossible by definition for the subject-matter and criteria for the award of a public procurement contract (*marché d'exécution*) to be known precisely at a moment where the project has not yet been defined and where the *marchés de définition* have not yet been executed. The *marchés de définition* and the *marché d'exécution* are two entirely distinct types of public procurement contract, which, it would appear, has never been contested by the French Government. Each has its own subject-matter and award criteria and, on those grounds, both contracts must comply with the stipulations of the Directive and may not be awarded by way of a single procedure. In other words, since the *marché d'exécution* has its own subject-matter and award criteria it should be subjected to competition and not simply reserved for the holders of the initial *marchés de définition*.

25. The Court held in *Commission* v *France* ('*Le Mans*') (15) that 'the French Government submits … that the option, set out in the notice …, of awarding the contract relating to the second phase to the successful candidate in the design contest releases the contracting authority from the obligation to publish another notice prior to the award of that contract'. The Court then stated that 'that argument cannot be accepted. The principle of equal treatment of service providers … and the principle of transparency which flows from it ... *require the subject-matter of each contract and the criteria governing its award to be clearly defined*'. (16)

26. In the same judgment, the Court continued: 'that obligation exists where the subject-matter of a contract and the criteria selected for its award must be regarded as decisive for the purposes of determining which of the procedures provided for in the Directive is to be implemented and assessing whether the requirements related to that procedure have been observed.' Thus the Court concluded that 'in the present case the mere option of awarding the contract relating to the second phase according to criteria laid down in respect of a different contract, that is the one related to the first phase, does not amount to awarding the contract in accordance with one of the procedures laid down in the Directive.'

27. In the case which concerns us here, in its defence before the Court, the French Government has recognised itself that in the above judgment 'the Court gave a negative verdict on a procedure which is analogous [to the *marchés de définition*]'. In my view, it is clear that the *marchés de définition* do not, as a general rule, allow the second contract's (i.e. *marché d'exécution*) subject-matter, criteria for the selection and award to be initially established with sufficient precision in order to meet the requirements specified in the above judgment. The reason for that is the fact that the aim of the initial *marchés de définition* is in fact precisely to define the subject-matter and the tender conditions of the ulterior *marché d'exécution*.

28. Therefore, the procedure for the award of *marchés de définition*, pursuant to the contested provisions, runs counter to the principle of transparency laid down in Article 2 of the Directive. This procedure creates a situation of legal uncertainty both for contracting authorities and for economic operators, because of the risk of litigation which is inherent to it.

29. The French Government contests the argument in point 27 above and submits that the aim of the *marchés de définition* is to only define all the technical specifications of the ulterior contract and not its subject-matter. However, suffice it to state that the very wording of Article 73 of the CMP 2006 does not support that: its second paragraph provides that 'the purpose of such contracts is to explore the possibilities and conditions for establishing a contract subsequently, if necessary through production of a model or demonstrator'. Moreover, even though it may be the case in certain situations that the *marchés de définition* merely define the technical specifications, the procedure in question in fact certainly allows the tender conditions of the *marché d'exécution* to be completed or even drawn up in their entirety.

30. Furthermore, the French Government insists that it is possible for the subject-matter and criteria of the ulterior *marché d'exécution* to be established from the launch of the *marchés de définition*. The argument goes, there are many cases where the criteria for selection of candidatures for *marché d'exécution* are sufficiently independent from the *marchés de définition* in order for the former to be defined already at the stage of the *marchés de définition*. In its submissions to the Court, the French Government has furnished three examples of such cases.

31. In any event, it should be pointed out, first, that the French Government has accepted at the hearing that in fact problems do arise – clearly there are cases where the *marchés de définition* do not merely serve to define technical specifications but are instead used to complete or draw up the tender conditions of the *marché d'exécution*. Three examples of such cases were provided by the Commission before the Court. I consider that the French Government has failed to prove that the contested provisions allow in all cases and at all times transparency and sufficient clarity to be guaranteed to the effect that 'the subject-matter of [the *marché d'exécution*] and the criteria governing its award [are] clearly defined'. (17) In any event, a mere general definition such as 'urban development of city district X' – which it would appear is very often the only possible definition that may be given at the stage of invitations for tenders for the *marchés de définition* – most certainly does not meet the standard required by the Court in *Commission* v *France* ('*Le Mans*'). (18)

32. Last but not least, I consider it important to point out that the procedure for the award of *marchés de définition* is based on a bias. While the whole tenor of the Directive is that the promotion of competition between economic operators should be protected, the *marchés de définition* address only a certain type of economic operators – those and only those that have both design and construction capabilities. By its nature, the procedure for the award of *marchés de définition* makes such a pre-selection among all the potential economic operators. I consider that to be contrary to the spirit of Community public procurement rules. It is clear that regardless of how the *marchés de définition* develop in a particular case, the solution provided by the procedure will always result in a tender that is limited in nature.

33. It follows from the above considerations that the contested provisions permit the award of contracts with limited competition in situations not provided for by the Directive and they cannot be justified by any of the exceptions laid down by the Directive.

IV – Costs

34. Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

V – Conclusion

35. In the light of the foregoing considerations, I propose that the Court:

(1) declare that, by adopting and keeping in force Articles 73 and 74-IV of the Code des marchés publics (Public Procurement Code) adopted by Decree No 2006-975 of 1 August 2006, inasmuch as those provisions lay down a procedure for the award of *marchés de définition* (public contracts for designing the parameters, including the purpose, of a public works, supply or service contract) under which it is possible for the contracting authority to award a public works, supply or service contract to one of the holders of the initial *marchés de définition* by opening it to competition limited to those holders, the French Republic has failed to fulfil its obligations under Articles 2, 28 and 31 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;

(2) order the French Republic to pay the costs.

---

1 – Original language: English.

---

2 – Public Procurement Code as adopted by Decree No 2006-975 of 1 August 2006 (*Official Journal of the French Republic* No 179 of 4 August 2006, p. 11627) and which entered into force on 1 September 2006 ('the CMP 2006').

---

3 – These are public contracts for designing the parameters, including the purpose, of a public works, supply or service contract, and are also referred to as 'design solutions tenders' or 'project definition contracts'. I note that only a procedure with several *marchés de définition* is at issue here – applicable where the conditions in Article 73(3) of the CMP 2006 are met – and not one where a single *marché de définition* is awarded.

---

4 – Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) ('the Directive' or 'Directive 2004/18').

---

5 – The Public Procurement Code as adopted by Decree No 2004-15 of 7 January 2004 (*Official Journal of the French Republic* No 6 of 8 January 2004, p. 703) ('the CMP 2004') which since has been replaced by the CMP 2006.

---

6 – Joined Cases 27/86 to 29/86 [1987] ECR 3347.

---

7 – Directive of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682).

---

8 – *CEI and Others*, cited in footnote 6, paragraph 15. See also Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 20. The French Government submits that that case-law may be transposed to Directive 2004/18 notably because the second recital in the preamble to Directive 71/305 has become the third recital in the preamble to Directive 2004/18 and Article 2 of Directive 71/305 has become Article 28 of Directive 2004/18.

---

9 – Cf. Trepte, P., *Public procurement in the EU. A Practitioner's Guide*, 2nd edition, Oxford 2007, p. 427, footnote 187.

---

10 – That reading is confirmed by the *travaux préparatoires* for the Directive. The proposal for the Directive explained, to justify the wording of Article 28 of the Directive, that 'a new paragraph 2 has been added, which explicitly states the principle that the open procedure and the restricted procedure are the standard procedures. A new paragraph 3 [which was eventually merged with paragraph 2] describes the exception, which is that contracting authorities may only use the negotiated procedure in the specific cases and under the specific conditions listed in Articles 29, 30 and 31'.

---

11 – See Article 73 of the CMP 2006.

---

12 – The proposal for the Directive, page 6, stated that 'in the case of particularly complex contracts … purchasers are well aware of their needs but do not know in advance what … the best technical solution for satisfying those needs [is]. Discussion of the contract and dialogue between purchasers and suppliers is therefore necessary in such cases. But the standard procedures laid down by the public sector Directives … leave very little scope for discussion during the award of contracts and are therefore regarded as lacking in flexibility in situations of this type.'

---

13 – One of the reasons for that could be that the inclusion of *marchés de définition* was considered as not necessary since that procedure is similar in nature to the new competitive dialogue procedure – transposed into French law in Article 67 of the CMP 2006 as a completely autonomous procedure – which appears to address the same concerns.

---

14 – My position would appear to be supported by the French legal doctrine. See, most recently, for instance, Monjal, P.-Y., 'Le droit communautaire applicable aux marchés publics locaux français: quelques interrogations en forme d'inquiétude', *Revue du Droit de l'Union européenne*, No 4, 2008, pp. 729-738. For a case pertaining to *marchés de définition*, see also, for instance, judgment of the French Conseil d'État of 3 March 2004, No 258272, in 'Société Mak System'.

---

15 – Case C-340/02 [2004] ECR I-9845, also referred to as the '*La Chauvinière*' case, paragraphs 33 to 36 and the case-law cited.

---

16 – Emphasis added.

---

17 – Cited in footnote 15, paragraph 34.

---

18 – Case cited in footnote 15. Cf. Arrowsmith, S., *The Law of Public and Utilities Procurement*, Thomson, Sweet & Maxwell, London, 2005, p. 448: 'the current directives … contain no express requirement for precise specifications in open or restricted procedures. However, the transparency principle may imply such a requirement. For example, it is probably not acceptable simply to state a requirement for tenders for "a school" without giving a clear indication of, for example, the number of pupils and the main type of facilities required. Reasonable precision needs to be established at the latest at the time of invitation to tenders'.

ARRÊT DE LA COUR (quatrième chambre)

15 octobre 2009 (*)

«Manquement d'État – Directive 93/36/CEE – Marchés publics de fournitures – Fourniture d'un logiciel pour la gestion de l'immatriculation de véhicules automobiles – Procédure négociée sans publication préalable d'un avis de marché»

Dans l'affaire C-275/08,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 24 juin 2008,

Commission des Communautés européennes, représentée par MM. G. Wilms et D. Kukovec, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République fédérale d'Allemagne, représentée par MM. M. Lumma et N. Graf Vitzthum, en qualité d'agents, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (quatrième chambre),

composée de M. K. Lenaerts (rapporteur), président de la troisième chambre, faisant fonction de président de la quatrième chambre, M^me^ R. Silva de Lapuerta, MM. E. Juhász, J. Malenovský et T. von Danwitz, juges,

avocat général: M^me^ V. Trstenjak,

greffier: M. B. Fülöp, administrateur,

vu la procédure écrite et à la suite de l'audience du 25 juin 2009,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, la Datenzentrale Baden-Württemberg (ci-après la «DZBW») ayant attribué un marché de fourniture d'un logiciel pour la gestion de l'immatriculation de véhicules automobiles par une procédure négociée sans publication d'un avis de marché, la République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de la directive 93/36/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures (JO L 199, p. 1).

Le cadre juridique

La directive 89/665

2 Il ressort des deuxième et troisième considérants de la directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO L 395, p. 33), que la finalité de cette directive est d'assurer l'application des règles communautaires en matière de marchés publics par des moyens de recours efficaces et rapides, en particulier à un stade où les violations peuvent encore être corrigées.

3 À cette fin, l'article 1er, paragraphe 1, de la directive 89/665 dispose:

«1. les États membres prennent, en ce qui concerne les procédures de passation des marchés publics relevant du champ d'application des directives […], les mesures nécessaires pour assurer que les décisions prises par les pouvoirs adjudicateurs peuvent faire l'objet de recours efficaces et, en particulier, aussi rapides que possible, dans les conditions énoncées aux articles suivants, et notamment à l'article 2, paragraphe 7, au motif que ces décisions ont violé le droit communautaire en matière de marchés publics ou les règles nationales transposant ce droit.»

4 Aux termes de l'article 2 de la directive 89/665:

«1. Les États membres veillent à ce que les mesures prises aux fins des recours visés à l'article 1er prévoient les pouvoirs permettant:

a) de prendre, dans les délais les plus brefs et par voie de référé, des mesures provisoires ayant pour but de corriger la violation alléguée ou d'empêcher d'autres dommages d'être causés aux intérêts concernés […]

[…]

6. Les effets de l'exercice des pouvoirs visés au paragraphe 1 sur le contrat qui suit l'attribution d'un marché sont déterminés par le droit national.

En outre, sauf si une décision doit être annulée préalablement à l'octroi de dommages-intérêts, un État membre peut prévoir que, après la conclusion du contrat qui suit l'attribution d'un marché, les pouvoirs de l'instance responsable des procédures de recours se limitent à l'octroi des dommages-intérêts à toute personne lésée par une violation.

7. Les États membres veillent à ce que les décisions prises par les instances responsables des procédures de recours puissent être exécutées de manière efficace.»

La directive 93/36

5 La directive 93/36 prévoit à son article 6, paragraphes 2 à 4:

«2. Les pouvoirs adjudicateurs peuvent passer leurs marchés de fournitures en recourant à la procédure négociée en cas de dépôt de soumissions irrégulières en réponse à une procédure ouverte ou restreinte ou en cas de dépôt de soumissions inacceptables en vertu des dispositions nationales conformes au titre IV, pour autant que les conditions initiales du marché ne soient pas substantiellement modifiées. Les pouvoirs adjudicateurs publient dans ces cas un avis d'adjudication, à moins qu'ils n'incluent dans ces procédures négociées toutes les entreprises qui satisfont aux critères visés aux articles 20 à 24 et qui, lors de la procédure ouverte ou restreinte antérieure, ont soumis des offres conformes aux exigences formelles de la procédure d'adjudication.

3. Les pouvoirs adjudicateurs peuvent passer leurs marchés de fournitures en recourant à la procédure négociée sans publication préalable d'un avis d'adjudication dans les cas suivants:

[…]

c) lorsque, en raison de leur spécificité technique, artistique ou pour des raisons tenant à la protection des droits d'exclusivité, la fabrication ou la livraison des produits ne peut être confiée qu'à un fournisseur déterminé;

d) dans la mesure strictement nécessaire, lorsque l'urgence impérieuse, résultant d'événements imprévisibles pour les pouvoirs adjudicateurs en question n'est pas compatible avec les délais exigés par les procédures ouvertes, restreintes ou négociées visées au paragraphe 2. Les circonstances invoquées pour justifier l'urgence impérieuse ne doivent en aucun cas être imputables aux pouvoirs adjudicateurs;

[…]

4. Dans tous les autres cas, les pouvoirs adjudicateurs passent leurs marchés de fournitures en recourant à la procédure ouverte ou à la procédure restreinte.»

6 Aux termes de l'article 9 de la directive 93/36:

«1. Les pouvoirs adjudicateurs font connaître, le plus rapidement possible après le début de leur exercice budgétaire, au moyen d'un avis indicatif, l'ensemble des marchés par groupes de produits qu'ils envisagent de passer au cours des douze mois suivants, lorsque le montant total estimé […] est égal ou supérieur à 750 000 écus.

[…]

2. Les pouvoirs adjudicateurs désireux de passer un marché public de fournitures par procédure ouverte ou restreinte ou par procédure négociée dans les cas visés à l'article 6 paragraphe 2 font connaître leur intention au moyen d'un avis.

[…]»

7 L'article 11, paragraphe 1, de la directive 93/36 dispose:

«1. Dans les procédures restreintes et les procédures négociées au sens de l'article 6 paragraphe 2, le délai de réception des demandes de participation, fixé par les pouvoirs adjudicateurs, ne peut être inférieur à trente-sept jours à compter de la date d'envoi de l'avis.»

8 Aux termes de l'article 12, paragraphe 1, de ladite directive:

«1. Dans le cas où l'urgence rend impraticables les délais prévus à l'article 11, les pouvoirs adjudicateurs peuvent fixer les délais suivants:

a) un délai de réception des demandes de participation qui ne peut être inférieur à quinze jours à compter de la date d'envoi de l'avis;

b) un délai de réception des offres qui ne peut être inférieur à dix jours à compter de la date de l'invitation.»

Les faits et la procédure précontentieuse

9 Au printemps 2005, la DZBW, organisme de droit public allemand qui, sur une base législative, fournit à des communes du Land de Bade-Wurtemberg des logiciels destinés à la gestion de l'immatriculation de véhicules automobiles, a décidé de remplacer le logiciel qui était utilisé jusqu'alors pour l'immatriculation de tels véhicules.

10 Il ressort des pièces du dossier que cette décision était motivée par l'apparition de problèmes techniques au début de l'année 2005, des pannes totales étant survenues au mois de mai de la même année.

11 La DZBW a, au cours dudit mois, engagé des négociations avec l'Anstalt für Kommunale Datenverarbeitung in Bayern (ci-après l'«AKDB»), avec lequel un contrat de fourniture du logiciel en question a été conclu en décembre 2005, pour une durée de six ans.

12 À la suite d'une plainte, la Commission a, en application de l'article 226 CE, informé la République fédérale d'Allemagne, par une lettre de mise en demeure du 15 décembre 2006, que, à son avis, la conclusion de ce contrat entre la DZBW et l'AKDB, sans procédure de passation de marché public et sans appel d'offres au niveau européen, était contraire, notamment, à l'article 6 de la directive 93/36, lu en combinaison avec l'article 9 de celle-ci.

13 Par une communication du 5 mars 2007, la République fédérale d'Allemagne a indiqué à la Commission que la conclusion du contrat en cause avait fait l'objet, au niveau national, d'une procédure de recours, au sens de la directive 89/665, et que cette procédure avait été close de manière définitive par une décision de l'Oberlandesgericht Karlsruhe du 6 février 2007, de sorte qu'il n'y avait plus lieu, pour la Commission, de poursuivre la procédure en manquement, à défaut d'intérêt à agir.

14 Par une lettre du 29 juin 2007, la Commission a émis un avis motivé à l'encontre de la République fédérale d'Allemagne, dans lequel elle a indiqué que, dès lors que la procédure de recours, au sens de la directive 89/665, n'avait pas le même objet que la procédure en manquement engagée au titre de l'article 226 CE, ladite procédure de recours ne pouvait affecter la recevabilité d'un recours en manquement.

15 Par une lettre du 28 août 2007, la République fédérale d'Allemagne a maintenu la position exprimée dans sa communication du 5 mars 2007 en ce qui concerne la recevabilité du recours en manquement, et a ajouté, à titre subsidiaire, sur le fond, qu'il n'y avait pas lieu, en application de l'article 6, paragraphe 3, sous c) et d), de la directive 93/36, de procéder à la publication d'un avis de marché.

16 N'étant pas satisfaite de cette réponse, la Commission a introduit le présent recours.

Sur le recours

Sur la recevabilité

Argumentation des parties

17 La République fédérale d'Allemagne invoque l'irrecevabilité du recours de la Commission, tirée de ce que la clôture définitive, devant les juridictions d'un État membre, d'une procédure de recours nationale, au sens de la directive 89/665, prive la Commission d'un intérêt à agir dans le cadre d'un recours en manquement dirigé contre cet État membre au titre de l'article 226 CE.

18 Selon la République fédérale d'Allemagne, la procédure de recours, au sens de la directive 89/665, repose sur une pondération des intérêts en jeu, la possibilité même d'un recours, en vue de vérifier la conformité au droit communautaire du marché en cause, protégeant les soumissionnaires non retenus et l'intérêt général.

19 Cette possibilité serait toutefois limitée dans le temps, dans l'intérêt du pouvoir adjudicateur et du soumissionnaire retenu, conformément au principe de sécurité juridique.

20 Or, si la Commission pouvait, sans limitation dans le temps, remettre en cause, par un recours en manquement, une attribution de marché dont l'examen a été définitivement clos au terme d'une procédure de recours au sens de la directive 89/665, cette pondération des intérêts en jeu serait remise en cause, au détriment des principes de sécurité juridique et d'autonomie procédurale.

21 Une telle possibilité de recours inciterait également les soumissionnaires non retenus à ne pas respecter les délais de recours nationaux et à s'adresser à la Commission, en violation des exigences de célérité qu'énonce la directive 89/665, de même qu'elle irait à l'encontre de l'exigence d'efficacité énoncée à l'article 2, paragraphe 7, de la directive 89/665.

22 Ainsi, le règlement définitif d'une procédure de recours nationale sur le fondement de la directive 89/665 produirait nécessairement des effets sur la procédure de recours en manquement au titre de l'article 226 CE, et cela sans que soit affectée la hiérarchie des normes, dès lors que ces effets seraient conformes aux principes de protection de la confiance légitime et de sécurité juridique.

23 Cette analyse ne serait pas remise en cause par l'arrêt du 18 juillet 2007, Commission/Allemagne (C-503/04, Rec. p. I-6153), dans lequel l'appréciation de la Cour aurait été limitée aux effets, sur le recours en manquement, de l'article 2, paragraphe 6, deuxième alinéa, de la directive 89/665. Cet arrêt ne concernerait donc pas la question de savoir si une procédure nationale de recours définitivement close fait obstacle à un recours en manquement, notamment en vertu du principe de l'autorité de la chose jugée.

24 La Commission considère que l'issue d'une procédure de recours au sens de la directive 89/665 en matière de passation de marchés publics, définitive au regard de la législation nationale, n'a aucune influence sur la recevabilité d'un recours en manquement exercé au titre de l'article 226 CE.

25 Elle soutient que la thèse de la République fédérale d'Allemagne méconnaît la portée essentielle de la procédure d'infraction prévue à l'article 226 CE, telle qu'elle ressort de la jurisprudence de la Cour, qui se distinguerait de la procédure de recours dans le cadre de la directive 89/665, notamment en termes de finalité et d'intérêts protégés (arrêt du 18 juillet 2007, Commission/Allemagne, précité, points 33 à 35).

Appréciation de la Cour

26 Il convient de rappeler que, selon une jurisprudence constante, dans le cadre de l'exercice des compétences qu'elle tient de l'article 226 CE, la Commission n'a pas à démontrer l'existence d'un intérêt spécifique à agir. Ladite disposition ne vise pas, en effet, à protéger les droits propres de la Commission. Celle-ci, dans l'intérêt général communautaire, a pour mission de veiller d'office à l'application, par les États membres, du traité CE et des dispositions prises par les institutions en vertu de celui-ci et de faire constater, en vue de leur cessation, l'existence de manquements éventuels aux obligations qui en dérivent (arrêts du 4 avril 1974, Commission/France, 167/73, Rec. p. 359, point 15; du 11 août 1995, Commission/Allemagne, C-431/92, Rec. p. I-2189, point 21; du 5 novembre 2002, Commission/Allemagne, C-476/98, Rec. p. I-9855, point 38, et du 10 avril 2003, Commission/Allemagne, C-20/01 et C-28/01, Rec. p. I-3609, point 29).

27 Eu égard à son rôle de gardienne du traité, la Commission est dès lors seule compétente pour décider s'il est opportun d'engager une procédure en constatation de manquement et en raison de quel agissement ou omission imputable à l'État membre concerné cette procédure doit être introduite. Elle peut donc demander à la Cour de constater un manquement qui consisterait à ne pas avoir atteint, dans un cas déterminé, le résultat visé par une directive (arrêts du 11 août 1995, Commission/Allemagne, précité, point 22; du 5 novembre 2002, Commission/Belgique, C-471/98, Rec. p. I-9681, point 39, et du 10 avril 2003, Commission/Allemagne, précité, point 30).

28 Ce principe vaut également en matière de marchés publics dans une situation dans laquelle les procédures de passation des marchés se sont entièrement déroulées avant la date d'expiration du délai fixé dans l'avis motivé, mais dans laquelle les contrats en cause n'ont pas été entièrement exécutés avant ladite date (voir, en ce sens, arrêt du 28 octobre 1999, Commission/Autriche, C-328/96, Rec. p. I-7479, points 43 à 45).

29 En l'espèce, il est constant que l'exécution du contrat en cause n'a pas encore cessé, puisque ce contrat a été conclu, en décembre 2005, pour une durée de six ans.

30 La République fédérale d'Allemagne soutient toutefois que la Commission ne saurait avoir d'intérêt à agir dans le cadre d'un recours en manquement exercé sur le fondement de l'article 226 CE, dès lors que l'attribution du marché en cause a fait l'objet d'une procédure de recours nationale, au sens de la directive 89/665, qui a été close par une décision juridictionnelle devenue définitive.

31 À cet égard, il convient de rappeler que la Cour a déjà précisé que l'article 2, paragraphe 6, de la directive 89/665, lequel autorise les États membres à maintenir les effets de contrats conclus en violation des directives en matière de passation des marchés publics et protège ainsi la confiance légitime des cocontractants, ne saurait, sans réduire la portée des dispositions du traité établissant le marché intérieur, avoir pour conséquence que le comportement du pouvoir adjudicateur à l'égard des tiers doive être considéré comme conforme au droit communautaire postérieurement à la conclusion de

tels contrats (arrêts du 10 avril 2003, Commission/Allemagne, précité, point 39, et du 18 juillet 2007, Commission/Allemagne, précité, point 33).

32 La Cour a ainsi jugé que l'article 2, paragraphe 6, de la directive 89/665 ne saurait avoir d'incidence sur un recours exercé au titre de l'article 226 CE ou de l'article 228 CE (voir arrêt du 18 juillet 2007, Commission/Allemagne, précité, point 34).

33 Quand bien même cette appréciation de la Cour a été limitée à l'article 2, paragraphe 6, de la directive 89/665, ainsi que l'a relevé à juste titre la République fédérale d'Allemagne, il n'en demeure pas moins qu'une telle conclusion vaut également pour la directive 89/665 envisagée dans son ensemble.

34 Ainsi qu'il ressort de ses deuxième et troisième considérants, cette directive a en effet pour objet de garantir l'existence, dans tous les États membres, de moyens de recours efficaces en cas de violation du droit communautaire en matière de marchés publics ou des règles nationales transposant ce droit, afin de garantir l'application effective des directives portant coordination des procédures de passation des marchés publics (arrêts du 12 décembre 2002, Universale-Bau e.a., C-470/99, Rec. p. I-11617, point 71, et du 18 juillet 2007, Commission/Allemagne, précité, point 35).

35 Eu égard à son économie, ladite directive ne saurait être considérée comme réglant également la relation entre un État membre et la Communauté européenne, relation dont il s'agit dans le contexte de l'article 226 CE.

36 En effet, les procédures de recours nationales, au sens de la directive 89/665, et le recours en manquement, au titre de l'article 226 CE, divergent tant par les parties au litige que par leur finalité, la procédure de recours nationale servant à protéger les intérêts des soumissionnaires écartés, tandis que la procédure en manquement assure le respect du droit communautaire dans l'intérêt général.

37 Ainsi, tout en obligeant, à son article 1er, paragraphe 1, les États membres à prendre, en ce qui concerne les procédures de passation des marchés publics, les mesures nécessaires pour assurer que les décisions prises par les pouvoirs adjudicateurs puissent faire l'objet de recours efficaces, la directive 89/665 ne saurait, sans réduire la portée des dispositions du traité, affecter l'application de l'article 226 CE.

38 Cette appréciation ne saurait être remise en cause par le risque éventuel que les soumissionnaires écartés contournent les délais prévus dans le cadre des procédures de recours nationales, au sens de la directive 89/665, en saisissant la Commission d'une plainte en vue d'un recours sur le fondement de l'article 226 CE, ainsi que l'avance la République fédérale d'Allemagne.

39 En effet, ainsi qu'il ressort des points 26 et 27 du présent arrêt, c'est à la seule Commission qu'il appartient, dans l'intérêt général, de décider d'agir sur le fondement de l'article 226 CE.

40 Cette appréciation ne saurait non plus être remise en cause par les arguments que la République fédérale d'Allemagne tire des principes de sécurité juridique, de confiance légitime et de l'autorité de la chose jugée.

41 En effet, à supposer même que les pouvoirs adjudicateurs puissent se voir opposer ces principes par le soumissionnaire retenu en cas de résiliation du contrat, un État membre ne saurait, en tout état de cause, s'en prévaloir pour justifier un manquement au titre de l'article 226 CE et, de ce fait, échapper à sa propre responsabilité en droit communautaire (voir, par analogie, arrêts du 17 avril 2007, AGM-COS.MET, C-470/03, Rec. p. I-2749, point 72, et du 18 juillet 2007, Commission/Allemagne, précité, point 36).

42 Il résulte de l'ensemble des considérations qui précèdent que le recours est recevable.

Sur le fond

Argumentation des parties

43 Au soutien de son recours, la Commission fait valoir que le contrat en cause relève du champ d'application de la directive 93/36 et que la DZBW ne pouvait attribuer le marché par voie de procédure négociée sans invitation publique à participer, dès lors que n'étaient pas réunies, en l'espèce, les conditions auxquelles sont soumises les exceptions prévues à l'article 6, paragraphes 2 et 3, de ladite directive.

44 À cet égard, la Commission soutient que ces exceptions doivent faire l'objet d'une interprétation stricte et que c'est à l'État membre qui entend se prévaloir d'une dérogation qu'incombe la charge de la preuve que les circonstances exceptionnelles les justifiant existent effectivement. Or, la Commission considère que, en l'espèce, la République fédérale d'Allemagne n'a pas rapporté cette preuve, mais qu'elle s'est limitée à de simples allégations, sans fournir d'éléments concrets.

45 De surcroît, certaines allégations de la République fédérale d'Allemagne seraient contradictoires. Ainsi, la Commission constate que, dans sa réponse à l'avis motivé, cet État membre affirme, d'une part, que le logiciel retenu est le seul produit capable de traiter d'importantes quantités de données de la manière requise et, d'autre part, que le temps manquait pour recourir à des installations-tests. Or, une telle étape n'aurait logiquement été possible que s'il existait des produits de remplacement, ce qui était le cas dans les circonstances de l'espèce.

46 Pour ce qui est de l'urgence, la Commission fait observer que le temps écoulé entre l'apparition des premiers problèmes techniques affectant le logiciel à remplacer ou les premières pannes totales et la conclusion du contrat, à savoir presque une année, permettait largement de mettre en œuvre la procédure d'urgence prévue à l'article 12, paragraphe 1, de la directive 93/36. Or, la République fédérale d'Allemagne n'aurait pas démontré qu'il n'était pas même possible de respecter les délais très brefs, à savoir moins d'un mois, prévus par cette procédure.

47 La République fédérale d'Allemagne soutient, à titre subsidiaire sur le fond, que les conditions énoncées à l'article 6, paragraphe 3, sous c) et d), de la directive 93/36 sont réunies, dès lors que, au moment de l'attribution du marché, un seul logiciel déterminé pouvait remplacer immédiatement le logiciel utilisé, en raison de spécificités techniques et de l'urgence imprévue.

48 Cet État membre fait valoir à cet égard que la charge de la preuve que les spécifications techniques sont remplies incombe au soumissionnaire et non au pouvoir adjudicateur, lequel n'est tenu qu'à une obligation de contrôle avec une attention et une précision adaptées aux circonstances.

49 Il était donc, selon ledit État membre, dénué de pertinence de savoir si un producteur concurrent aurait pu, dans le cadre d'une installation-test, apporter la preuve que son procédé répondait aux spécifications techniques en cause. Au contraire, le fait qu'une installation-test était inappropriée eu égard à l'urgence qu'il y avait de remplacer le logiciel en question aurait été décisif. Une installation-test aurait en effet conduit à un retard important, alors que la compatibilité avec les spécifications techniques du produit sélectionné avait été établie.

50 La République fédérale d'Allemagne rejette l'argument de la Commission tiré d'une contradiction sur l'existence d'éventuels produits de remplacement, de même qu'elle écarte celui tiré de la durée écoulée entre la décision de procéder au remplacement du logiciel et la conclusion du contrat en cause. En effet, le fait que sept mois s'écouleraient jusqu'à ce que l'installation du nouveau logiciel puisse débuter n'était pas prévisible lorsqu'il a été décidé de procéder au remplacement du logiciel utilisé.

51 Cet État membre conteste également la possibilité de respecter les délais d'urgence prévus à l'article 12, paragraphe 1, de la directive 93/36, en ce sens que c'est la perte de temps qui aurait résulté de l'établissement du cahier des charges et, en particulier, des installations-tests, et non les délais de publication, qui aurait posé un problème. En effet, la fiabilité d'autres produits dans les centres de calcul n'aurait pu être établie qu'après recours à une installation-test coûteuse pendant environ six mois.

Appréciation de la Cour

52 À titre liminaire, il y a lieu de constater que la République fédérale d'Allemagne ne conteste pas que le marché en cause relève du champ d'application de la directive 93/36, de sorte que la conclusion de

celui-ci était en principe soumise à une procédure de passation de marché public conforme à ladite directive, notamment à l'article 6, paragraphe 2, de cette dernière.

53 Cet État membre soutient toutefois qu'il était possible d'appliquer la procédure négociée et qu'il n'y avait pas lieu, en application de l'article 6, paragraphe 3, sous c) et d), de la directive 93/36, de procéder à la publication d'un avis de marché.

54 D'emblée, il convient de rappeler que la procédure négociée revêt un caractère exceptionnel, l'article 6, paragraphes 2 et 3, de la directive 93/36 énumérant limitativement et expressément les seules exceptions pour lesquelles le recours à la procédure négociée est permis (arrêt du 8 avril 2008, Commission/Italie, C-337/05, Rec. p. I-2173, point 56 et jurisprudence citée).

55 Il convient également de rappeler qu'il est de jurisprudence constante que ces dispositions, en tant que dérogations aux règles visant à garantir l'effectivité des droits reconnus par le droit communautaire dans le secteur des marchés publics, doivent faire l'objet d'une interprétation stricte (voir, en ce sens, arrêts du 17 novembre 1993, Commission/Espagne, C-71/92, Rec. p. I-5923, point 36; du 18 mai 1995, Commission/Italie, C-57/94, Rec. p. I-1249, point 23; du 10 avril 2003, Commission/Allemagne, précité, point 58; du 14 septembre 2004, Commission/Italie, C-385/02, Rec. p. I-8121, point 19, et du 2 octobre 2008, Commission/Italie, C-157/06, non encore publié au Recueil, point 23).

56 Il faut souligner, en outre, que c'est à celui qui entend se prévaloir desdites dérogations qu'incombe la charge de la preuve que les circonstances exceptionnelles les justifiant existent effectivement (voir, en ce sens, arrêts du 3 mai 1994, Commission/Espagne, C-328/92, Rec. p. I-1569, points 15 et 16; du 18 mai 1995, Commission/Italie, précité, point 23; du 10 avril 2003, Commission/Allemagne, précité, point 58; du 14 septembre 2004, Commission/Italie, précité, point 19, et du 2 octobre 2008, Commission/Italie, précité, point 23).

57 Il importe donc, en l'espèce, de vérifier si la République fédérale d'Allemagne a rapporté la preuve que le marché en cause pouvait, en application de l'article 6, paragraphe 3, sous c) ou d), de la directive 93/36, faire l'objet d'une procédure négociée sans publication préalable d'un avis de marché.

58 À cet égard, il convient, en premier lieu, de rappeler que, en vertu de l'article 6, paragraphe 3, sous c), de la directive 93/36, les pouvoirs adjudicateurs peuvent passer leurs marchés de fournitures en recourant à la procédure négociée, sans publication préalable d'un avis de marché, lorsque, en raison de leur spécificité technique, la fabrication ou la livraison des produits ne peut être confiée qu'à un fournisseur déterminé.

59 Selon la République fédérale d'Allemagne, en raison de la spécificité technique de l'objet du marché de fourniture en cause, à savoir un logiciel pour la gestion centralisée de l'immatriculation de véhicules automobiles, ce marché ne pouvait être confié qu'à un fournisseur déterminé.

60 Cette argumentation ne saurait prospérer.

61 En effet, il importe de relever que, loin de faire état de recherches sérieuses que la DZBW aurait menées au niveau européen, après avoir décidé de remplacer le logiciel en question, pour identifier des entreprises à même de fournir un logiciel adapté, la République fédérale d'Allemagne s'est bornée à rejeter la fonctionnalité du produit d'une entreprise concurrente de l'AKDB au niveau national.

62 Or, le simple fait d'affirmer que la fourniture en cause ne pouvait être confiée qu'à un fournisseur déterminé puisque le concurrent présent sur le marché national n'offrait pas un produit satisfaisant aux exigences techniques requises ne saurait suffire à établir que les circonstances exceptionnelles justifiant les dérogations prévues à l'article 6, paragraphe 3, sous c), de la directive 93/36 existaient effectivement.

63 Il ne saurait, en effet, être exclu que, si des recherches sérieuses avaient été menées au niveau européen, des entreprises à même de fournir un logiciel adapté auraient pu être identifiées.

64 Par conséquent, l'article 6, paragraphe 3, sous c), de la directive 93/36 ne peut être utilement invoqué par la République fédérale d'Allemagne pour justifier, en ce qui concerne le marché en cause, le

recours à la procédure négociée sans publication préalable d'un avis de marché.

65 En second lieu, il convient de rappeler que, en vertu de l'article 6, paragraphe 3, sous d), de la directive 93/36, les pouvoirs adjudicateurs peuvent passer leurs marchés de fournitures en recourant à la procédure négociée sans publication préalable d'un avis de marché, dans la mesure strictement nécessaire, lorsque l'urgence impérieuse, résultant d'événements imprévisibles pour les pouvoirs adjudicateurs en question, n'est pas compatible avec les délais exigés par les procédures ouvertes, restreintes ou négociées visées à cet article 6, paragraphe 2, les circonstances invoquées pour justifier l'urgence impérieuse ne devant en aucun cas être imputables aux pouvoirs adjudicateurs.

66 Selon la République fédérale d'Allemagne, les problèmes techniques affectant le logiciel alors utilisé ne pouvaient être éliminés rapidement, ce qui rendait inévitable une décision en vue de l'introduction d'un produit de remplacement immédiatement disponible sur le marché et conforme aux exigences techniques applicables. Il s'agirait là d'une urgence impérieuse justifiant que les pouvoirs adjudicateurs procèdent à l'attribution du marché en cause sans publication préalable d'un avis.

67 Cette argumentation ne saurait non plus prospérer.

68 D'emblée, il importe en effet de rappeler qu'il résulte de la jurisprudence de la Cour que la dérogation énoncée à l'article 6, paragraphe 3, sous d), de la directive 93/36 est subordonnée à trois conditions cumulatives.

69 Elle suppose l'existence d'un événement imprévisible, d'une urgence impérieuse incompatible avec les délais exigés par d'autres procédures et d'un lien de causalité entre l'événement imprévisible et l'urgence impérieuse qui en résulte (voir, en ce sens, arrêts du 2 août 1993, Commission/Italie, C-107/92, Rec. p. I-4655, point 12; du 28 mars 1996, Commission/Allemagne, C-318/94, Rec. p. I-1949, point 14, et du 18 novembre 2004, Commission/Allemagne, C-126/03, Rec. p. I-11197, point 23).

70 Or, dans les circonstances de la présente affaire, il importe, tout d'abord, de relever que la République fédérale d'Allemagne ne conteste pas que plusieurs mois se sont écoulés entre la décision de procéder au remplacement du logiciel utilisé, l'ouverture de négociations et la conclusion du contrat en cause.

71 Dans de telles circonstances, il n'a pas été établi par cet État membre que le remplacement dudit logiciel relevait d'une situation d'urgence impérieuse justifiant le recours à une procédure négociée sans publication préalable d'avis de marché.

72 Il convient, ensuite, de considérer que, dès lors que des pannes étaient apparues dès le début de l'année 2005, le pouvoir adjudicateur aurait pu, dès cette période, lancer une procédure d'appel d'offres. Dans ces conditions, l'urgence éventuelle, à la supposer établie au cours du mois de mai 2005, lors des pannes générales et au début des négociations engagées avec l'AKDB, doit être considérée comme étant, au moins en partie, imputable au pouvoir adjudicateur.

73 Il y a lieu, enfin, de rappeler que, selon le libellé même de l'article 6, paragraphe 3, sous d), de la directive 93/36, ce n'est que «dans la mesure strictement nécessaire» que les pouvoirs adjudicateurs peuvent, en cas d'urgence impérieuse, conclure un marché de fourniture par une procédure négociée sans publication d'un avis préalable.

74 Or, dans les circonstances de la présente affaire, force est de considérer que cette exigence n'a pas été respectée par le pouvoir adjudicateur.

75 En effet, dès lors que plusieurs mois se sont écoulés entre la décision de remplacer le logiciel et la conclusion du marché en cause, ainsi qu'il a été rappelé aux points 9 à 11 et 70 du présent arrêt, il est manifeste qu'il était possible, pour le moins, de conduire une procédure restreinte accélérée, en application de l'article 12, paragraphe 1, de la directive 93/36 (voir, en ce sens, arrêts du 18 mars 1992, Commission/Espagne, C-24/91, Rec. p. I-1989, point 14; du 2 août 1993, Commission/Italie, précité, point 13, et du 18 novembre 2004, Commission/Allemagne, précité, point 23).

76 Il s'ensuit que la République fédérale d'Allemagne n'a pas démontré qu'il existait, en l'espèce, une situation d'urgence impérieuse.

77 Par conséquent, l'article 6, paragraphe 3, sous d), de la directive 93/36 ne peut non plus être utilement invoqué par la République fédérale d'Allemagne pour justifier, en ce qui concerne le marché en cause, le recours à la procédure négociée sans publication préalable d'un avis de marché.

78 Eu égard à l'ensemble des considérations qui précèdent, il convient de constater que, la DZBW ayant attribué un marché de fourniture d'un logiciel pour la gestion de l'immatriculation de véhicules automobiles par une procédure négociée sans publication d'un avis de marché, la République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de la directive 93/36.

Sur les dépens

79 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la République fédérale d'Allemagne et celle-ci ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (quatrième chambre) déclare et arrête:

1) **La Datenzentrale Baden-Württemberg ayant attribué un marché de fourniture d'un logiciel pour la gestion de l'immatriculation de véhicules automobiles par une procédure négociée sans publication d'un avis de marché, la République fédérale d'Allemagne a manqué aux obligations qui lui incombent en vertu de la directive 93/36/CEE du Conseil, du 14 juin 1993, portant coordination des procédures de passation des marchés publics de fournitures.**

2) **La République fédérale d'Allemagne est condamnée aux dépens.**

Signatures

---

* Langue de procédure: l'allemand.

JUDGMENT OF THE COURT (Grand Chamber)

15 July 2010 (*)

(Failure of a Member State to fulfil obligations – Directives 92/50/EEC and 2004/18/EC – Public service contracts – Occupational old-age pensions of local authority employees – Direct award of contracts, without a call for tenders at European Union level, to pension providers designated in a collective agreement concluded between management and labour)

In Case C-271/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 24 June 2008,

European Commission, represented by G. Wilms and D. Kukovec, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and N. Graf Vitzthum, acting as Agents,

defendant,

supported by:

Kingdom of Denmark, represented by B. Weis Fogh and C. Pilgaard Zinglersen, acting as Agents,

Kingdom of Sweden, represented by A. Falk and A. Engman, acting as Agents,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts (Rapporteur), J.-C. Bonichot and C. Toader, Presidents of Chambers, K. Schiemann, P. Kūris, E. Juhász, G. Arestis, T. von Danwitz, A. Arabadjiev and J.-J. Kasel, Judges,

Advocate General: V. Trstenjak,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2010,

after hearing the Opinion of the Advocate General at the sitting on 14 April 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, because local authorities and local authority undertakings having more than 1 218 employees have awarded service contracts in respect of occupational old-age pensions directly, without a call for tenders at European Union level, to bodies and undertakings referred to in Paragraph 6 of the Collective agreement on the conversion, for local authority employees, of earnings into pension savings

(Tarifvertrag zur Entgeltungwandlung für Arbeitnehmer im kommunalen öffentlichen Dienst; 'the TV-EUmw/VKA'), the Federal Republic of Germany has failed to fulfil its obligations, until 31 January 2006 under Article 8, in conjunction with Titles III to VI, of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and since 1 February 2006 under Article 20, in conjunction with Articles 23 to 55, of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 In its reply, the Commission redefined the subject-matter of its action by requesting the Court to find a failure to fulfil those obligations because local authorities and local authority undertakings which had more than 2 044 employees, in 2004 and 2005, more than 1 827 employees, in 2006 and 2007, and more than 1 783 employees, in the period from 2008, awarded such contracts directly, without a call for tenders at European Union level, to bodies and undertakings referred to in Paragraph 6 of the TV-EUmw/VKA.

3 At the hearing, the Commission redefined the subject-matter of its action by requesting the Court to find the failure to fulfil its obligations because local authorities and local authority undertakings which had more than 2 697 employees, in 2004 and 2005, and more than 2 402 employees, in 2006 and 2007, had awarded such contracts.

Legal context

European Union law

Directive 92/50

4 The eighth recital in the preamble to Directive 92/50 states that 'the provision of services is covered by this Directive only in so far as it is based on contracts; … the provision of services on other bases, such as law or regulations, or employment contracts, is not covered'.

5 Under Article 1(a)(viii) of Directive 92/50, 'public service contracts' is to mean, for the purposes of the directive, 'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority', to the exclusion, inter alia, of 'employment contracts'.

6 Article 1(b) of Directive 92/50 provides:

'*contracting authorities* shall mean the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law.

Body governed by public law means any body:

– established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and

– having legal personality and

– financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

…'

7 Article 7(1), (4) and (5) of Directive 92/50 provides:

'1. (a) This Directive shall apply to:

…

– public service contracts concerning the services referred to in Annex I A …:

…

(ii) awarded by the contracting authorities listed in Article 1(b) other than those referred to in Annex I to [Council] Directive 93/36/EEC [of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1)] and where the estimated value net of VAT is not less than the equivalent in ecus of 200 000 [special drawing rights (SDRs)].

…

4. For the purposes of calculating the estimated contract value for the following types of services, account shall be taken, where appropriate:

– as regards insurance services, of the premium payable,

…

5. In the case of contracts which do not specify a total price, the basis for calculating the estimated contract value shall be:

– in the case of fixed-term contracts, where their term is 48 months or less, the total contract value for its duration;

– in the case of contracts of indefinite duration or with a term of more than 48 months, the monthly instalment multiplied by 48.’

8 German local authorities and local authority undertakings are not referred to in Annex I to Directive 93/36.

9 Under Article 8 of Directive 92/50, ‘contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI’.

10 The titles referred to in Article 8 of Directive 92/50 concern the choice of award procedures and rules governing design contests (Title III), common rules in the technical field (Title IV), common advertising rules (Title V) and common rules on participation, criteria for qualitative selection and criteria for the award of contracts (Title VI).

11 The ‘services within the meaning of Article 8’ that are listed in Annex I A to Directive 92/50 include, in Category No 6, ‘financial services’, which comprise, in Category No 6(a), ‘insurance services’ and, in Category No 6(b), ‘banking and investment services’.

Directive 2004/18

12 Recital 28 in the preamble to Directive 2004/18 states:

‘Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for public contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes.’

13 Article 1(2)(a) and (d) of Directive 2004/18 defines ‘public contracts’ as ‘contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive’, and ‘public service contracts’ as ‘public contracts other

than public works or supply contracts having as their object the provision of services referred to in Annex II'.

14 Article 1(5) of Directive 2004/18 defines 'framework agreement' as 'an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged'.

15 Directive 2004/18 includes, in Article 1(9), a definition of 'contracting authorities' largely corresponding to the definition in Article 1(b) of Directive 92/50.

16 Article 7(b) of Directive 2004/18 states that the directive is to apply to public service contracts which have a value exclusive of value added tax ('VAT') estimated to be equal to or greater than EUR 249 000. This amount was successively reduced to EUR 236 000 by Commission Regulation (EC) No 1874/2004 of 28 October 2004 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2004 L 326, p. 17) and then to EUR 211 000 by Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2005 L 333, p. 28).

17 Article 9(1), (8) and (9) of Directive 2004/18 provides:

'1. The calculation of the estimated value of a public contract shall be based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

…

8. With regard to public service contracts, the value to be taken as a basis for calculating the estimated contract value shall, where appropriate, be the following:

(a) for the following types of services:

(i) insurance services: the premium payable and other forms of remuneration;

…

(b) for service contracts which do not indicate a total price:

(i) in the case of fixed-term contracts, if that term is less than or equal to 48 months: the total value for their full term;

(ii) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

9. With regard to framework agreements …, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement ...'

18 By virtue of Article 16(e), Directive 2004/18 is not to apply 'to public service contracts for … employment contracts'.

19 As provided in Article 20 of Directive 2004/18, 'contracts which have as their object services listed in Annex II A shall be awarded in accordance with Articles 23 to 55'.

20 Articles 23 to 55 of Directive 2004/18 set out, in turn, specific rules governing specifications and contract documents (Articles 23 to 27), rules relating to the procedures (Articles 28 to 34), rules on advertising and transparency (Articles 35 to 43) and rules relating to the conduct of the procedure (Articles 44 to 55).

21 The services listed in Annex II A to Directive 2004/18 include, in Category No 6, ‘financial services’, which comprise, in Category No 6(a), ‘insurance services’ and, in Category No 6(b), ‘banking and investment services’.

22 The list of bodies and categories of bodies governed by public law as referred to in the second subparagraph of Article 1(9) of Directive 2004/18, which is set out in Annex III to that directive, refers, in section III which is devoted to the Federal Republic of Germany, to ‘authorities, establishments and foundations governed by public law and created by Federal, State or local authorities’.

National law

23 The Law on the enhancement of occupational old-age pensions (Gesetz zur Verbesserung der betrieblichen Altersversorgung) of 19 December 1974 (BGBl. I, p. 3610), as amended by Article 5 of the Law of 21 December 2008 (BGBl. I, p. 2940) (‘the BetrAVG’), provides in Paragraph 1, headed ‘Employer’s guarantee concerning an occupational old-age pension’:

‘(1) If an employee is given by his employer a guarantee of old-age, invalidity or survivor’s pension benefits on grounds of his employment relationship (occupational old-age pension), the provisions of this Law shall apply. A scheme for occupational old-age pensions may be implemented directly by an employer or through the conduit of one of the pension providers mentioned in Paragraph 1b(2) to (4). An employer shall be responsible for ensuring the provision of the benefits he has guaranteed even where he does not implement the scheme directly.

(2) Occupational old-age pension schemes shall also be deemed to exist where:

…

3. future entitlement to earnings is converted into an inchoate right, of equal value, to pension benefits (conversion of earnings), or

4. the employee pays contributions from his pay to a pension fund or into a life assurance policy in order to fund occupational old-age pension benefits and the employer’s guarantee also covers the benefits resulting from those contributions; the provisions relating to the conversion of earnings shall be applied in this regard mutatis mutandis, in so far as the guaranteed benefits resulting from those contributions are funded by capitalisation.

24 Paragraph 1a(1) of the BetrAVG, headed ‘Right to an occupational old-age pension funded through conversion of earnings’, provides:

‘An employee shall have the right to demand from his employer that the future earnings to which he is entitled, to a maximum of 4% of the relevant ceiling for the assessment of contributions to the statutory pension fund, are paid into an occupational old-age pension scheme on the basis of conversion of earnings. The scheme for the implementation of an employee’s right shall be determined by agreement. If an employer is willing to allow for implementation through the conduit of a pension fund (Paragraph 1b(3)), the occupational old-age pension scheme shall be implemented by that body; otherwise an employee shall have the right to demand that his employer concludes a life assurance contract in his favour (Paragraph 1b(2)). In so far as this right is exercised, the employee shall apply annually an amount corresponding to at least a hundred and sixtieth of the basic amount under Paragraph 18(1) of the Fourth Book of the Code of Social Law to his occupational old-age pension. In so far as the employee applies part of his regular earnings to an occupational old-age pension, the employer can require that over a calendar year the monthly amount applied remains the same.’

25 Paragraph 17 of the BetrAVG, headed ‘Personal scope and derogation by way of collective agreement’, provides:

‘…

(3) Derogations from the provisions of Paragraphs 1a … may be effected by collective agreement. The derogating provisions shall apply between employers and employees not bound by a collective

agreement if they agree that the relevant provisions of the collective agreement are to apply between them. As to the remainder, the provisions of this Law cannot be derogated from to the employee's disadvantage.

…

(5) To the extent that entitlement to earnings is based on a collective agreement, conversion of earnings may be effected in respect of that entitlement only to the extent that a collective agreement provides for or permits such conversion.'

26 On 18 February 2003, the TV-EUmw/VKA was concluded between the Vereinigung der kommunalen Arbeitgeberverbände (Federation of Local Authority Employer Associations; 'the VKA') and the Vereinte Dienstleistungsgewerkschaft eV (ver.di) (United Service Sector Union). The VKA concluded a similar collective agreement with another union, namely dbb tarifunion.

27 Paragraphs 2 and 3 of the TV-EUmw/VKA grant employees covered by one of the collective agreements referred to in Paragraph 1 thereof the right to demand from their employer the partial conversion, within the limits laid down by the BetrAVG, of their future entitlement to earnings into pension savings. Under Paragraph 5 of the TV-EUmw/VKA, such a request must be made to the employer in writing. Paragraph 5 also provides that the employee is to be bound for a period of at least a year by his agreement with his employer concerning the partial conversion of his future earnings.

28 Paragraph 6 of the TV-EUmw/VKA, headed 'Implementation methods', provides:

'Subject to the second and third sentences of this paragraph, conversion of earnings within the framework of the implementation methods provided for by the [BetrAVG] shall be implemented with public bodies offering supplementary pension schemes.

In the case of occupational old-age pension provision referred to in the first sentence, an employer may also adopt implementation methods offered by the Sparkassen finance group or local authority insurance companies.

Should the need arise, a collective agreement at district level may provide for derogations from the first and second sentence of this paragraph.'

29 Under Paragraph 7(1), the TV-EUmw/VKA entered into force on 1 January 2003. Paragraph 7(2) provides that the TV-EUmw/VKA may be terminated, on giving three months' notice, at the end of a calendar year, on 31 December 2008 at the earliest.

Pre-litigation procedure

30 Following receipt of a complaint, the Commission informed the Federal Republic of Germany by letter of formal notice dated 18 October 2005 that, on account of the award, by a number of local authorities and local authority undertakings, of contracts in respect of occupational old-age pensions (pension insurance contracts) to bodies and undertakings referred to in Paragraph 6 of the TV-EUmw/VKA without a call for tenders at European Union level, it could have infringed Article 8, in conjunction with Titles III to VI, of Directive 92/50 and, in any event, the principles of freedom of establishment and freedom to provide services.

31 By letter of 29 March 2006, the Federal Republic of Germany disputed the fact that local authorities and local authority undertakings act as 'contracting authorities' within the meaning of Directive 92/50 when they perform their function of employer in the field of occupational old-age pensions. It also submitted that the pension insurance contracts at issue fall within the employment relationships and do not therefore constitute public contracts, as the local authority employers merely assume the function of a payments office for the purposes of an exchange of consideration between the employees who have opted for partial conversion of their earnings into pension savings and the pension providers. It asserted too that application of public procurement law to the award of the contracts at issue would be contrary

to the autonomy of management and labour protected in Article 9(3) of the German Basic Law (Grundgesetz).

32 Since the Commission was not satisfied by this response, it sent the Federal Republic of Germany a reasoned opinion dated 4 July 2006, in which it explained that its complaints had to be understood as concerning also, from 1 February 2006, breach of Article 20, in conjunction with Articles 23 to 55, of Directive 2004/18, which essentially reproduced the provisions of Directive 92/50 relied upon in the letter of formal notice.

33 In its response of 15 November 2006 to the reasoned opinion, the Federal Republic of Germany adhered to its position, while annexing to the response an expert's report designed to show that the salary conversion measure at issue falls within the concept of earnings. It also maintained that the thresholds for application of European Union public procurement legislation are not reached in the present case, given the need to have regard to each separate contract in itself. Finally, it stated that it would not in any event be able to remedy any breach of European Union law given that it does not have the power to issue instructions to management and labour.

34 By letter of 30 January 2007, the Commission sent the Federal Republic of Germany a request for information for the purpose of determining, in particular, whether grounds of social policy could justify in this instance an exception to European Union public procurement law.

35 Since the Commission took the view that the Federal Republic of Germany did not provide any appropriate justification in its response of 1 March 2007 to that request, it decided to bring the present action.

The action

Applicability of Directives 92/50 and 2004/18 to the awarding of contracts to bodies or undertakings referred to in Paragraph 6 of the TV-EUmw/VKA

36 It is appropriate to examine at the outset whether, as is asserted by the Federal Republic of Germany as well as the Kingdom of Denmark and the Kingdom of Sweden, the awards of contracts to bodies or undertakings referred to in Paragraph 6 of the TV-EUmw/VKA ('the contract awards at issue') fall, because of their nature and subject-matter, outside the field of application of Directives 92/50 and 2004/18. Advocating that the Court's reasoning in Case C-67/96 *Albany* [1999] ECR I-5751 and Case C-222/98 *van der Woude* [2000] ECR I-7111 should be applied to the present context, these Member States base their arguments on the fact that those awards implemented a collective agreement negotiated between management and labour, more specifically Paragraph 6 of the TV-EUmw/VKA.

37 In that regard, it should be noted, first, that the right to bargain collectively, which the signatories of the TV-EUmw/VKA have exercised in the present case, is recognised both by the provisions of various international instruments which the Member States have cooperated in or signed, such as Article 6 of the European Social Charter, signed at Turin on 18 October 1961 and revised at Strasbourg on 3 May 1996, and by the provisions of instruments drawn up by the Member States at Community level or in the context of the European Union, such as Article 12 of the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, and Article 28 of the Charter of Fundamental Rights of the European Union ('the Charter'), an instrument to which Article 6 TEU accords the same legal value as the Treaties.

38 It is apparent from Article 28 of the Charter, read in conjunction with Article 52(6) thereof, that protection of the fundamental right to bargain collectively must take full account, in particular, of national laws and practices.

39 Furthermore, by virtue of Article 152 TFEU the European Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems.

40 It is to be noted, second, that, as is common ground between the parties to the dispute, the TV-EUmw/VKA meets, in a general way, a social objective. It is intended to enhance the level of the

retirement pensions of the workers concerned, by promoting, in accordance with the BetrAVG, the development of pension saving by means of partial conversion of employees' earnings.

41 However, the fact that the right to bargain collectively is a fundamental right, and the TV-EUmw/VKA's social objective perceived as a whole, cannot, in themselves, mean that local authority employers are automatically excluded from the obligation to comply with the requirements stemming from Directives 92/50 and 2004/18, which implement freedom of establishment and the freedom to provide services in the field of public procurement.

42 The Court has already held that the terms of collective agreements are not excluded from the scope of the provisions on freedom of movement for persons (see Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, '*Viking Line*', [2007] ECR I-10779, paragraph 54 and the case-law cited).

43 Furthermore, exercise of a fundamental right such as the right to bargain collectively may be subject to certain restrictions (see, to this effect, *Viking Line*, paragraph 44, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 91). In particular, while it is true that the right to bargain collectively enjoys in Germany the constitutional protection conferred, generally, by Article 9(3) of the German Basic Law upon the right to form associations to safeguard and promote working and economic conditions, the fact remains that, as provided in Article 28 of the Charter, that right must be exercised in accordance with European Union law.

44 Exercise of the fundamental right to bargain collectively must therefore be reconciled with the requirements stemming from the freedoms protected by the FEU Treaty, which in the present instance Directives 92/50 and 2004/18 are intended to implement, and be in accordance with the principle of proportionality (see, to this effect, *Viking Line*, paragraph 46, and *Laval un Partneri*, paragraph 94).

45 It is admittedly true that, in particular in *Albany* and *van der Woude*, the Court has held that, despite the restrictions of competition inherent in it, a collective agreement between the organisations representing employers and workers which sets up in a particular sector a supplementary pension scheme managed by a pension fund to which affiliation is compulsory does not fall within Article 101(1) TFEU.

46 However, such reasoning does not in any way prejudge the separate question, specific to the present case, of compliance, when designating the pension providers entrusted with implementing the salary conversion measure at issue, with the European Union rules relating to application of freedom of establishment and the freedom to provide services in the field of public procurement, in the context of a collective employment agreement concerning public-sector employers.

47 In that regard, it cannot be considered that it is inherent in the very exercise of the freedom of management and labour and of the right to bargain collectively that the directives which implement freedom of establishment and the freedom to provide services in the field of public procurement will be prejudiced (see, to this effect, *Viking Line*, paragraph 52).

48 Furthermore, the fact that an agreement or an activity is excluded from the scope of the provisions of the Treaty on competition does not automatically mean that that agreement or activity is also excluded from the obligation to comply with the requirements stemming from the provisions of those directives since those two sets of provisions are to be applied in different circumstances (see, to this effect, *Viking Line*, paragraph 53 and the case-law cited).

49 Finally, unlike the objective, agreed between management and labour, of enhancing the level of the pensions of local authority employees, the designation of bodies and undertakings in a collective agreement such as that at issue here does not affect the essence of the right to bargain collectively.

50 In light of the foregoing, the fact that the contract awards at issue follow from the application of a collective agreement does not, in itself, result in the present instance being excluded from the scope of Directives 92/50 and 2004/18.

51 The question therefore arises of reconciliation of the requirements related to attainment of the social objective pursued here by the parties to the collective bargaining with the requirements stemming from Directives 92/50 and 2004/18.

52 Answering this question entails verification, in the light of the material in the file, as to whether, when establishing the content of Paragraph 6 of TV-EUmw/VKA, which is referred to by the Commission in its action inasmuch as that paragraph served as the basis for the contract awards at issue, a fair balance was struck in the account taken of the respective interests involved, namely enhancement of the level of the retirement pensions of the workers concerned, on the one hand, and attainment of freedom of establishment and of the freedom to provide services, and opening-up to competition at European Union level, on the other (see, by analogy, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraphs 81 and 82).

53 While it is true that Paragraph 6 of the TV-EUmw/VKA forms part of a collective agreement which, as noted in paragraph 40 of the present judgment, pursues, in a general way, a social objective, it must however be stated, as the Advocate General has found in point 176 of her Opinion, that that paragraph effectively disapplies the rules stemming from Directives 92/50 and 2004/18 completely, and for an indefinite period, in the field of local authority employees' pension saving, a fact which the Federal Republic of Germany has not denied.

54 The Federal Republic of Germany submits however, first, that Paragraph 6 of the TV-EUmw/VKA reflects a joint solution that takes account of the respective interests of the signatories of that collective agreement. It states that the designation, in the agreement, of the only bodies and undertakings which provide pensions that can be entrusted with implementation of the salary conversion measure introduced in local authorities enables workers to be involved, and their interests to be taken into account, in a better manner than if the pension provider, or providers, were selected by each local authority employer in a procurement procedure.

55 It must nevertheless be stated that it is possible to reconcile application of the procurement procedures with the application of mechanisms, stemming, in particular, from German social law, which ensure that workers or their representatives participate, in the local authority or the local authority undertaking concerned, in the taking of the decision concerning selection of the body or bodies to which implementation of the salary conversion measure will be entrusted, a fact which the Federal Republic of Germany did not contest at the hearing.

56 Nor can application of the procurement procedures preclude the call for tenders from imposing upon interested tenderers conditions reflecting the interests of the workers concerned.

57 Second, the Federal Republic of Germany, supported on this point by the Kingdom of Denmark, submits that the tenders of the bodies and undertakings referred to in Paragraph 6 of the TV-EUmw/VKA are based on the principle of solidarity. At the hearing, emphasis was placed on the fact that, because of the pooling of risks, an insurance contract enables the 'good' and the 'bad' risks to be offset, in particular where occupational old-age pension benefits are in the form of an annuity paid until the recipient's death. It was also stressed that those bodies and undertakings do not engage in any form of selection of interested applicants based on medical criteria.

58 However, preservation of those elements of solidarity is not inherently irreconcilable with the application of a procurement procedure. The pooling of risks, upon which any insurance activity is based, can be ensured by a body or undertaking that provides pensions which is selected following a call for tenders at European Union level. Nor is there anything in the public procurement directives to preclude a local authority employer from specifying, in the terms of the call for tenders, the conditions to be complied with by tenderers in order to prevent, or place limits on, workers interested in salary conversion being selected on the basis of medical grounds.

59 Third, the Federal Republic of Germany stresses the experience and the financial soundness of the bodies and undertakings referred to in Paragraph 6 of the TV-EUmw/VKA. It adds that the choice made of those bodies and undertakings is such as to ensure that the salary conversion measure is attractive to local authority employees.

60 However, apart from the fact that the European Union public procurement directives contain rules enabling contracting authorities to satisfy themselves as to the professional ability and financial standing of tenderers, it cannot be presumed that these factors of experience and financial soundness are generally lacking in the case of bodies and undertakings providing pensions other than those referred to in Paragraph 6 of the TV-EUmw/VKA.

61 In particular, under Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1), private undertakings engaging in group insurance are subject to prudential supervision rules coordinated at European Union level, which are intended, in particular, to guarantee their financial soundness.

62 Institutions for occupational retirement provision are subject to rules of the same kind by virtue of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10). These rules, coordinated at European Union level, are designed to ensure a high degree of security for future pensioners who are to enjoy the benefits of those institutions (see, to this effect, Case C-343/08 *Commission* v *Czech Republic* [2010] ECR I-0000, paragraph 45).

63 Also, according to the particulars provided by the Federal Republic of Germany, pension insurance contracts have, on the basis of the third sentence of Paragraph 6 of the TV-EUmw/VKA, been awarded directly by local authority employers to bodies other than those referred to in the first and second sentences of that paragraph. It has not in any way been established, or even asserted, in the course of the present proceedings that that solution reduced the interest of the workers concerned in the salary conversion measure.

64 Fourth, the Federal Republic of Germany states that Paragraph 6 of the TV-EUmw/VKA enables local authority employers to do without an individual procedure for selecting the body or bodies to be entrusted with implementing the salary conversion measure at the level of their own authority or undertaking. Furthermore, the management costs charged by the bodies and undertakings referred to in Paragraph 6 are low.

65 However, such considerations cannot justify not applying provisions and procedures that are supposed to guarantee, in the interest of local authority employers and their employees, access to a broadened offer of services at European Union level.

66 In light of the considerations set out in paragraphs 53 to 65 of the present judgment, it is to be concluded that compliance with the directives concerning public service contracts does not prove irreconcilable with attainment of the social objective pursued by the signatories of the TV-EUmw/VKA in the exercise of their right to bargain collectively.

67 It must therefore be examined whether the contract awards at issue fall within the conditions for application of Directives 92/50 and 2004/18.

Classification of the contracts at issue as public service contracts within the meaning of Directives 92/50 and 2004/18

68 It should be noted first of all that it is common ground between the parties to the present proceedings that the contracts at issue concern insurance services within the meaning of Category No 6(a) of Annex I A to Directive 92/50 or Annex II A to Directive 2004/18.

69 It is also common ground between those parties that the contracts were concluded in writing within the meaning of Article 1(a) of Directive 92/50 or Article 1(2)(a) of Directive 2004/18.

70 On the other hand, the Federal Republic of Germany, supported by the Kingdom of Sweden, contests, first, that the other conditions required by those provisions for classification as ‘public contracts’ within the meaning of Directives 92/50 and 2004/18 are met in the present case.

71 The Federal Republic of Germany asserts that local authority employers do not act as contracting authorities when they merely implement, in the field of occupational old-age pensions, a choice

predetermined by a collective agreement, without having any decision-making autonomy which may lead them to prefer, of their own accord, such or such a tenderer.

72 It further contends that the contracts at issue are not contracts for pecuniary interest. A relationship of economic exchange exists only between the pension provider and the worker who has opted for salary conversion. The employer merely forwards to the pension provider, on the worker's behalf, the premiums deducted for the purposes of conversion from his earnings. Those contracts concern implementation of a measure benefiting the employees and not the award of a contract to the benefit of the public authorities.

73 As to those submissions, first of all, neither Article 1(b) of Directive 92/50 nor Article 1(9) of Directive 2004/18 makes a distinction between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those which are unrelated to that task. The fact that no such distinction is made is explained by the aim of those directives to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities (see, by analogy, Case C-44/96 *Mannesmann Anlagenbau Austria and Others* [1998] ECR I-73, paragraphs 32 and 33).

74 Next, the TV-EUmw/VKA, in particular Paragraph 6, was negotiated by, amongst others, representatives of the local authority employers. Those employers consequently exerted influence, at least indirectly, on the content of that paragraph.

75 Finally, the condition requiring the contracts at issue to be for pecuniary interest entails determining whether those contracts are of direct economic benefit to the local authority employers which conclude them (see, by analogy, Case C-451/08 *Helmut Müller* [2010] ECR I-0000, paragraphs 48 and 49).

76 In that regard, it should be noted that, in the field of local authority employment, it is apparent from Paragraph 6 of the TV-EUmw/VKA that the employer must implement the salary conversion measure with the public bodies referred to in the first sentence of that paragraph or, failing that, adopt methods for implementing that measure that are proposed by undertakings referred to in the second sentence thereof.

77 According to Paragraph 1(1) of the BetrAVG, an employer 'shall be responsible for ensuring the provision of the benefits he has guaranteed even where he does not implement the scheme directly'.

78 Thus, the local authority employer negotiates the terms of a group insurance contract with a professional insurer that is subject to specific prudential constraints guaranteeing its financial soundness. The services supplied by it enable the employer to take on its obligation of being responsible for the proper execution of this form of deferred earnings resulting from the salary conversion measure. The services also relieve the employer of management of that measure.

79 Under such a contract, the local authority employer pays to the body or undertaking at issue premiums deducted from the earnings to which the persons concerned are entitled from it, in return for receiving services that are inherent in its obligation, laid down in Paragraph 1(1) of the BetrAVG, of being responsible for ensuring the provision of the retirement benefits in favour of the workers who have opted, with its guarantee, for the salary conversion measure.

80 The fact that the ultimate recipients of the retirement benefits are the workers who have participated in that measure cannot call into question the fact that such a contract is for pecuniary interest.

81 The Federal Republic of Germany, supported on this point by the Kingdom of Denmark and the Kingdom of Sweden, submits, second, that the exception laid down for employment contracts in Article 1(a)(viii) of Directive 92/50 and Article 16(e) of Directive 2004/18 extends to any provision of services the basis of which lies, as here, in a contract of that nature or in a collective agreement forming an integral part thereof and which, by its subject-matter, is covered by labour law.

82 However, having regard to the statements set out in paragraphs 4 and 12 of the present judgment, this exception, which as a derogation from application of the directives concerning public service contracts must be interpreted strictly, cannot extend to a provision of services which, as in the present case, is

founded not on an employment contract but on a contract between an employer and an undertaking providing pensions and which is, moreover, unrelated to the particular concern expressed by the European Union legislature in recital 28 in the preamble to Directive 2004/18.

Determination of the value of the contract and exceeding of the application thresholds for Directives 92/50 and 2004/18

83 A preliminary point to note is that the Federal Republic of Germany has not contested the correctness of the thresholds of EUR 236 000 and EUR 211 000 applied by the Commission for the period of 2004 and 2005 and the period of 2006 and 2007 respectively for the purpose of defining, in the present case, the contracts which, because of their value, fall within the scope of Directive 92/50 or Directive 2004/18.

84 The Federal Republic of Germany contests, on the other hand, the correctness of the method of calculation adopted by the Commission in order to determine the critical size, in terms of the number of employees, beyond which local authority employers are considered to have concluded pension insurance contracts whose value equals or exceeds the relevant threshold for the purposes of the application of Directive 92/50 or of Directive 2004/18.

85 First, the Federal Republic of Germany maintains that the calculation of the value of the contract, within the meaning of those directives, must, in the present instance, be based exclusively on the amount of the management costs claimed by the undertaking in respect of payment for the services provided, and not on the total amount of the premiums paid in the context of salary conversion, as the latter amount is impossible to determine precisely at the time when the pension insurance contract is concluded.

86 However, in the case of contracts concerning insurance services within the meaning of Category No 6(a) of Annex I A to Directive 92/50 or Annex II A to Directive 2004/18, both the first indent of Article 7(4) of Directive 92/50 and Article 9(8)(a)(i) of Directive 2004/18 refer to the ‘premium payable’ as the element forming the basis for calculation of the estimated value of the contract in question.

87 In the case of occupational old-age pension services, the ‘estimated contract value’, within the meaning of the provisions referred to in the preceding paragraph of the present judgment, consequently corresponds, as the Commission has correctly considered, to the estimated value of the premiums, in the present instance, the estimated value of the contributions deducted, under salary conversion, from the earnings of the relevant workers in the local authority or local authority undertaking concerned and used to finance the ultimate occupational old-age pension benefits. Those premiums constitute, in the present instance, the principal consideration for the services provided by the body or undertaking concerned to the local authority employer in the context of the provision of those benefits.

88 In a context, such as that here, where it is not possible to indicate the total value of those premiums precisely at the time when the contract in question is awarded because of the choice left to each employee as to whether to participate in the salary conversion measure, and in the light of the duration of such a contract, which is long, or even indefinite, as the submissions at the hearing have confirmed, the second indent of Article 7(5) of Directive 92/50 and Article 9(8)(b)(ii) of Directive 2004/18 respectively require ‘the monthly [instalment/value] multiplied by 48’ to be taken as the basis for calculating the estimated value of that contract.

89 As the Advocate General has stated in point 150 of her Opinion, in the present case the Commission therefore acted correctly in – as the local authority employers concerned should have done – first basing its calculation on an estimate of the average monthly amount subject to earnings conversion per employee, multiplied by 48, then determining, in the light of the result of that multiplication, the number of employees individually participating in salary conversion needed in order to reach the relevant threshold for application of the European Union public procurement rules, and finally – on the basis of an estimate of the percentage of local authority employees participating in the salary conversion measure – defining the critical size, in terms of the number of employees, beyond which local authority employers awarded contracts reaching or exceeding that threshold.

90 Second, the Federal Republic of Germany contends that the Commission wrongly omitted in its calculations to take account of the fact, already highlighted at the stage of the pre-litigation procedure, that a number of local authority employers concluded, in implementing the salary conversion measure at the level of their own authority or undertaking, a number of contracts with separate bodies or undertakings. In its submission, this fact should have led the Commission to calculate the estimated contract value on the basis of each separate pension insurance contract entered into by the local authority employer.

91 However, whatever the grounds may be that led local authority employers to have recourse to that practice, and irrespective of whether the separate contracts at issue constitute – as the Commission asserts but the Federal Republic of Germany denies – framework agreements within the meaning of Article 1(5) of Directive 2004/18, it is apparent from the very wording of Article 9(1) of that directive, which lays down the general rule for calculating the estimated value of a public contract, that that calculation is based on the 'total amount' of the contract, as estimated by the contracting authority.

92 In the present instance, the relevant calculation must, therefore, be based on the estimated total amount of the contract for occupational old-age pensions at the level of the authority or undertaking concerned, calculated in terms of premiums connected with salary conversion.

93 As the Commission has submitted, in the case of such a contract, which inherently concerns a single matter, a calculation that depends, as the Federal Republic of Germany advocates, on the number of separate pension insurance contracts concluded by the local authority employer concerned would result in an artificial splitting of the contract, liable to remove it from the field of application of European Union public procurement legislation even though its total estimated value would be equal to or above the relevant threshold for application of that legislation.

94 Furthermore, such a calculation would fail to observe the principle of legal certainty as, at the time when these various potential separate contracts are concluded, their individual value cannot even be estimated, in light of the impossibility of forecasting, even approximately, the proportion of employees wishing to participate in the salary conversion measure who will subsequently choose each of the undertakings concerned. Such a calculation, based on a purely mathematical division of the estimated total value of the contract by the number of separate pension insurance contracts envisaged, might thus result in all of those pension insurance contracts being removed from the field of application of European Union public procurement rules whilst it would subsequently turn out that the value of some of them reaches or exceeds the relevant application threshold because of the number of participating employees and the amount of the premiums paid to the undertaking concerned.

95 Third, throughout the proceedings before the Court the Federal Republic of Germany has contested the correctness of the figures adopted by the Commission relating to the participation rate of local authority employees in the salary conversion measure.

96 At each stage of the proceedings before the Court, the Commission has sought to base its calculation on the most reliable figures provided by the Federal Republic of Germany so far as concerns the participation rate of local authority employees in the salary conversion measure, and this led it ultimately to restrict the subject-matter of its action to the effect indicated in paragraph 3 of the present judgment in relation to the period covering 2004 to 2007.

97 It should be stated first of all that the subject-matter of the present dispute may be extended to contract awards at issue that occurred after the date upon which the time-limit set in the reasoned opinion expired, namely 4 September 2006, given that those awards stem from conduct of the same kind as the awards referred to in the reasoned opinion (see, to this effect, Case 42/82 *Commission* v *France* [1983] ECR 1013, paragraph 20; Case 113/86 *Commission* v *Italy* [1988] ECR 607, paragraph 11; and Case C-236/05 *Commission* v *United Kingdom* [2006] ECR I-10819, paragraph 12).

98 On the other hand, the choice on the part of the Commission, in the calculations made by it in the present proceedings, to apply to the entire period concerned by its action the figures relating to 2006, the year in the course of which the time-limit set in the reasoned opinion expired, fails to have regard to the fact that the local authority employers which awarded disputed contracts in 2004 and 2005 could themselves have assessed the contract in question only on the basis of estimates relating to one or other

of those two years. It was therefore incumbent upon the Commission to take account, in its calculations concerning, respectively, 2004 and 2005, of the figures relating to the corresponding year.

99 It is apparent from the particulars provided by the Federal Republic of Germany in its rejoinder that those figures are as follows, as regards, respectively, the average monthly amount subject to earnings conversion per employee and the percentage of local authority employees participating in the salary conversion measure:

– for 2004: EUR 77.95 and 1.4%;

– for 2005: EUR 89.14 and 1.76%.

100 In light of these data and having regard to the method of calculation which, as has been stated in paragraph 89 of the present judgment, is applicable in the context of the present case, it must be found that the Federal Republic of Germany has failed to fulfil its obligations as alleged in so far as pension insurance contracts were awarded directly, without a call for tenders at European Union level, to bodies or undertakings referred to in Paragraph 6 of the TV-EUmw/VKA:

– in 2004 by local authorities or local authority undertakings which then had more than 4 505 employees;

– in 2005 by local authorities or local authority undertakings which then had more than 3 133 employees; and

– in 2006 and in 2007 by local authorities or local authority undertakings which then had more than 2 402 employees.

101 Fourth, the Federal Republic of Germany contends that the cities of Berlin, Bremen and Hamburg were wrongly considered to be members of a regional association of the VKA and, therefore, included within the field of application of the TV-EUmw/VKA.

102 In that regard, it is to be noted that, following explanations provided by the Federal Republic of Germany in the course of the present proceedings, the Commission withdrew the city of Berlin from the subject-matter of its action.

103 On the other hand, in the case of the cities of Bremen and Hamburg, the Federal Republic of Germany accepted that, as was apparent from the particulars provided by the Commission in its reply, these two cities were members, respectively, of the Kommunaler Arbeitgeberverband Bremen eV (Bremen Association of Local Authority Employers) and the Arbeitsrechtliche Vereinigung Hamburg eV (Hamburg Labour Law Association), which are members of the VKA.

104 Nor has the Federal Republic of Germany supported with any specific details the assertion in its rejoinder that the public service employees of those two cities do not fall within the field of application of TV-EUmw/VKA because of the special status of the members of each of the two regional associations referred to in the previous paragraph of the present judgment.

105 In view of all the foregoing considerations, it must be held that, in so far as service contracts in respect of occupational old-age pensions were awarded directly, without a call for tenders at European Union level, to bodies or undertakings referred to in Paragraph 6 of the TV-EUmw/VKA, in 2004 by local authorities or local authority undertakings which then had more than 4 505 employees, in 2005 by local authorities or local authority undertakings which then had more than 3 133 employees and in 2006 and in 2007 by local authorities or local authority undertakings which then had more than 2 402 employees, the Federal Republic of Germany failed to fulfil its obligations, until 31 January 2006 under Article 8, in conjunction with Titles III to VI, of Directive 92/50 and from 1 February 2006 under Article 20, in conjunction with Articles 23 to 55, of Directive 2004/18.

106 The action is dismissed as to the remainder.

Costs

107 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of those rules, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. In the present case, since the Commission and the Federal Republic of Germany have each been unsuccessful in respect of certain complaints, they must bear their own costs.

108 In accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Denmark and the Kingdom of Sweden, which have intervened in the present proceedings, must bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that, in so far as service contracts in respect of occupational old-age pensions were awarded directly, without a call for tenders at European Union level, to bodies or undertakings referred to in Paragraph 6 of the Collective agreement on the conversion, for local authority employees, of earnings into pension savings (Tarifvertrag zur Entgeltungwandlung für Arbeitnehmer im kommunalen öffentlichen Dienst), in 2004 by local authorities or local authority undertakings which then had more than 4 505 employees, in 2005 by local authorities or local authority undertakings which then had more than 3 133 employees and in 2006 and in 2007 by local authorities or local authority undertakings which then had more than 2 402 employees, the Federal Republic of Germany failed to fulfil its obligations, until 31 January 2006 under Article 8, in conjunction with Titles III to VI, of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and from 1 February 2006 under Article 20, in conjunction with Articles 23 to 55, of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission, the Federal Republic of Germany, the Kingdom of Denmark and the Kingdom of Sweden to bear their own costs.**

[Signatures]

---

* Language of the case: German.

EU:C:2010:67

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 14 April 2010 [1](1)

Case C-271/08

European Commission
v
Federal Republic of Germany

(Failure of a Member State to fulfil obligations – Article 226 EC – Public procurement – Award of service contracts for occupational pension schemes for local authority workers – Framework agreements – Directive 92/50/EEC – Directive 2004/18/EC – Preliminary selection made by collective agreement in favour of certain pension scheme providers – Autonomy in collective bargaining – Fundamental right to bargain collectively – Relationship between fundamental rights and fundamental freedoms)

Table of contents

I – Introduction

II – Legal framework

A – Community law

1. Directive 92/50

2. Directive 2004/18

B – National law

1. Gesetz zur Verbesserung der betrieblichen Altersversorgung (Law on the enhancement of occupational old-age pensions)

2. Tarifvertrag zur Entgeltumwandlung für Arbeitnehmer/-innen im kommunalen öffentlichen Dienst (Collective agreement on the conversion of earnings for local authority employees)

III – Facts

IV – Pre-litigation procedure

V – Procedure before the Court and forms of order sought by the parties

VI – Main arguments of the parties

VII – Legal appraisal

A – Applicability of Directives 92/50 and 2004/18 to collectively agreed framework agreements

1. Whether or not collective agreements are excluded from the scope of primary law competition rules and, if so, the applicability of such an exclusion to the fundamental freedoms

(a) No exclusion from primary law competition rules for collective agreements

(b) No general concordance between the scope of the primary law on competition and that of freedom of establishment and freedom to provide services

2. The limited horizontal effects of fundamental freedoms

3. Categorisation of the rights to bargain collectively and to autonomy in collective bargaining as fundamental social rights and their relationship to fundamental freedoms

4. Interim conclusion

B – Compatibility of the framework agreements at issue with Directives 92/50 and 2004/18

1. Categorisation of the cities as contracting authorities

2. Categorisation of the framework agreements as contracts for pecuniary interest within the scope of the procurement directives

(a) Observations on the duty to substantiate and the burden of proof

(b) Applicability of Directives 92/50 and 2004/18 to framework agreements

(c) Whether the framework agreements are for pecuniary interest

(d) Non-applicability of the exclusion for employment contracts

(e) Thresholds under Directives 92/50 and 2004/18

(i) Determination of the relevant thresholds

(ii) Absence of proof that the framework agreements exceed the relevant threshold

3. Interim conclusion

C – In the alternative: resolution of a conflict between the procurement directives and the fundamental rights to bargain collectively and to autonomy in collective bargaining

1. Resolution of conflicts between fundamental freedoms and fundamental rights: Viking Line and Laval un Partneri

2. Equal ranking for fundamental rights and fundamental freedoms and resolution of conflicts on the basis of the principle of proportionality

3. Resolution of the conflict between Directives 92/50 and 2004/18 and the fundamental rights to bargain collectively and to autonomy in collective bargaining

4. Interim conclusion

VIII – Summary

IX – Conclusion

I – Introduction

1. The present case is a Treaty infringement action under Article 226 EC whereby the Commission seeks a declaration from the Court of Justice that, by reason of the fact that numerous large cities have concluded directly with pension scheme providers nominated by collective agreement framework agreements for occupational pension schemes for their employees without a European call for tenders, the Federal Republic of Germany had until 31 January 2006 failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (2) and, since 1 February 2006, has failed to fulfil its obligations under Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (3)

2. The present proceedings are characterised in particular by the Commission's tactical decision not to focus, by way of example, on the contested contract awards of individual cities but to challenge, across the board, the award practice of all cities of a particular size. That procedural approach results necessarily in a particular emphasis attaching to evidential questions on the burden of proof and the Commission's duty to substantiate.

3. The present proceedings raise also numerous legal questions. Without doubt, the most difficult is that concerning the relationship between the rights to bargain collectively and to autonomy in collective bargaining, on the one hand, and Directives 92/50 and 2004/18 which give effect to freedom of establishment and freedom to provide services, on the other. As the alleged infringement of the procurement directives can be traced back, ultimately, to criteria established in collective agreements with the cities concerned, it may be questioned, in fact, whether the interplay between obligations based on fundamental freedoms, on the one hand, and the rights to bargain collectively and to autonomy in collective bargaining, on the other, gives rise to a conflict, and, if so, what are the consequences.

4. As I will propose in this Opinion, the rights to bargain collectively and to autonomy in collective bargaining must be regarded as elements of the general principles of Community law and accordingly as fundamental social rights. If in formal terms there is a finding of non-compliance with the procurement directives, clarification will thus be needed on how the obligation to respect the procurement directives may be reconciled with the fundamental rights to bargain collectively and to autonomy in collective bargaining.

II – Legal framework

A – *Community law*

1. Directive 92/50

5. According to Article 1(a)(viii) of Directive 92/50, employment contracts do not constitute public service contracts.

6. According to Article 8 of Directive 92/50, contracts which have as their object services listed in Annex I A must be awarded in accordance with the provisions of Titles III to VI.

7. Title III of Directive 92/50 concerns the choice of award procedures and the rules governing design contests, Title IV contains common rules in the technical field, Title V common advertising rules and Title VI common rules on participation, criteria for qualitative selection and criteria for the award of contracts.

8. Annex I A to Directive 92/50 groups services within the meaning of Article 8 in 16 categories. The sixth category covers 'financial services', in particular 'insurance services' and 'banking services and securities dealing'.

2. Directive 2004/18

9. By reason of Article 16(e) of Directive 2004/18, the directive does not apply to public service contracts which concern employment contracts.

10. According to Article 20 of Directive 2004/18, contracts which have as their object services listed in Annex II A must be awarded in accordance with Articles 23 to 55. Those articles contain rules on specifications and contract documents (Articles 23 to 27), on the different award procedures (Articles 28 to 34), on advertising and transparency (Articles 35 to 43) and on the conduct of the procedure (Articles 44 to 55).

11. Annex II A to Directive 2004/18 groups services in 16 categories. The sixth category covers ‘financial services’, in particular, ‘insurance services’ and ‘banking and investment services’.

B – *National law*

1. Gesetz zur Verbesserung der betrieblichen Altersversorgung (Law on the enhancement of occupational old-age pensions)

12. Paragraph 1 of the Gesetz zur Verbesserung der betrieblichen Altersversorgung of 19 December 1974 (4) (‘BetrAVG’) is worded:

‘Employer’s guarantee concerning an occupational old-age pension

(1) If an employee is given by his employer a guarantee of old-age, invalidity or survivor’s pension benefits on grounds of his employment relationship (occupational old-age pension), the provisions of this Law shall apply. A scheme for occupational old-age pensions may be implemented directly by an employer or through the conduit of one of the pension providers mentioned in Paragraph 1b(2) to (4). An employer shall be responsible for ensuring the provision of the benefits he has guaranteed even where he does not implement the scheme directly.

(2) Occupational old-age pension schemes shall also be deemed to exist where:

…

3. future entitlement to earnings is converted into an inchoate right, of equal value, to pension benefits (conversion of earnings), or

…’

13. Paragraph 1a of the BetrAVG provides as follows:

‘Right to an occupational old-age pension funded through conversion of earnings

(1) An employee shall have the right to demand from his employer that the future earnings to which he is entitled, to a maximum of 4% of the relevant ceiling for the assessment of contributions to the statutory pension fund, are paid into an occupational old-age pension scheme on the basis of conversion of earnings. The scheme for the implementation of an employee’s right shall be determined by agreement. If an employer is willing to allow for implementation through the conduit of a pension fund (Paragraph 1b(3)), the occupational old-age pension scheme shall be implemented by that body; otherwise an employee shall have the right to demand that his employer concludes a life assurance contract in his favour (Paragraph 1b(2)). …’

14. Paragraph 17 of the BetrAVG provides:

‘Personal scope and derogation by way of collective agreement

…

(3) Derogations from the provisions of Paragraphs 1a, 2 to 5, 16, the first sentence of Paragraph 18a, and Paragraphs 27 and 28 may be effected by collective agreement.

…

(5) To the extent that entitlement to earnings is based on a collective agreement, conversion of earnings may be effected in respect of that entitlement only to the extent that a collective agreement provides for or permits such conversion.'

2. Tarifvertrag zur Entgeltumwandlung für Arbeitnehmer/-innen im kommunalen öffentlichen Dienst (Collective agreement on the conversion of earnings for local authority employees)

15. Paragraph 2 of the Tarifvertrag zur Entgeltumwandlung für Arbeitnehmer/-innen im kommunalen öffentlichen Dienst of 18 February 2003 ('TV-EUmw/VKA') is worded as follows:

'Principle of conversion of earnings

As a supplement to the collectively agreed rules on occupational old-age pensions (ATV/ATV-K), the present collective agreement establishes principles governing the conversion of earnings components determined by collective agreement for the purposes of occupational old-age pensions.'

16. Paragraph 5 of the TV-EUmw/VKA provides:

'Exercise of the right to conversion of earnings

(1) An employee wishing to exercise his right to conversion of earnings shall serve on his employer, in a timely manner, written notice to that effect. An employee shall be bound by the agreement with his employer on the conversion of earnings for a period of no less than one year.

…'

17. Paragraph 6 of the TV-EUmw/VKA provides:

'Implementation methods

Subject to the second and third sentences of this paragraph, conversion of earnings within the framework of the implementation methods provided for by the Gesetz zur Verbesserung der betrieblichen Altersversorgung (Law on the enhancement of occupational old-age pensions) shall be implemented with public bodies offering supplementary pension schemes. In the case of occupational old-age pension provision referred to in the first sentence, an employer may also adopt implementation methods offered by the Sparkassen finance group or local authority insurance companies. Should the need arise, a collective agreement at district level may provide for derogations from the first and second sentences of this paragraph.'

III – Facts

18. In the framework of efforts by the Federal Republic of Germany to encourage the development of funded occupational old-age pensions for employees, the BetrAVG includes provision for the conversion of earnings. In substance, that principle of conversion of earnings means that, at an employee's request, part of his future salary is used to fund an occupational old-age pension through the conversion of future entitlement to earnings into a right, of equal value, to pension benefits.

19. Although Paragraph 1a of the BetrAVG provides, in general, that employees have a right to an occupational old-age pension funded through the conversion of earnings within the limits provided by law, Paragraph 17(5) of the BetrAVG includes an extensive derogation from that principle. According to Paragraph 17(5), in relation to earnings which are based on a collective agreement, the conversion thereof may be effected only to the extent that a collective agreement provides for or permits such.

20. In that context, on 18 February 2003, the Vereinigung der kommunalen Arbeitgeberverbände (Federation of Local Authority Employer Associations; the 'VKA') and the service sector trade union ver.di – Vereinte Dienstleistungsgewerkschaft e.V. concluded the TV-EUmw/VKA, granting workers in municipal public sector employment a right to conversion of earnings. At the same time, the TV-EUmw/VKA established several features of that scheme for conversion of earnings which derogate

from the provisions of the BetrAVG. The VKA concluded a collective agreement on the same terms with the civil service trade union dbb Tarifunion.

21. In contrast to the BetrAVG, the TV-EUmw/VKA expressly identifies the pension scheme providers with which occupational pension contributions may be accumulated by way of conversion of earnings. In that regard, Paragraph 6 of the TV-EUmw/VKA provides, in particular, that conversion of earnings must be implemented, as a rule, with public bodies offering supplementary pensions. However, notwithstanding that general determination, according to Paragraph 6 of the TV-EUmw/VKA, local authority employers may decide also to cooperate with the Sparkassen finance group or local authority insurance companies. In addition, Paragraph 6 of the TV-EUmw/VKA provides expressly for the possibility that collective agreements at district level may adopt derogating provisions.

22. Taking account of the preliminary selection adopted in the TV-EUmw/VKA in favour of certain pension scheme providers with which conversion of earnings must be implemented, in simple terms, that conversion of earnings is effected, as a rule, in two steps. In order to facilitate conversion of earnings for individual local authority workers, as a first step, local authority employers conclude framework agreements with one or more pension scheme providers nominated by collective agreement. Typically, those framework agreements include the conditions on which local authority workers may opt, as a second step, for conversion of earnings.

IV – Pre-litigation procedure

23. Having become aware of the TV-EUmw/VKA as a result of a complaint, by letter of 12 October 2005, the Commission informed the Federal Republic of Germany that, by reason of the acts of local authorities and local authority undertakings in awarding service contracts for the provision of occupational old-age pension schemes directly to the organisations and undertakings mentioned in Paragraph 6 of the TV-EUmw/VKA without a European call for tenders, it might have contravened Article 8 in conjunction with Titles III to VI of Directive 92/50 and the principles of freedom of establishment and freedom to provide services established in Articles 43 EC and 49 EC and, in particular, the prohibition on discrimination inherent in those principles. The Government of the Federal Republic of Germany was called upon, in accordance with Article 226 EC, to respond within a period of two months.

24. By its reply of 29 March 2006, the Federal Republic of Germany indicated that local authority bodies, in their capacity as employers, could not be regarded in functional terms, in the context of commitments made by collective agreement, as contracting authorities within the meaning of procurement law. In addition, the scheme for conversion of earnings and pension provision resulting from collective agreement and individual contracts of employment did not constitute a public contract. Moreover, the rules contested by the Commission were protected by the principle of the autonomy of collective bargaining.

25. By letter of 4 July 2006, the Commission delivered to the Federal Republic of Germany a reasoned opinion in accordance with the first paragraph of Article 226 EC. In order to take account of the amendment to Community law which had meanwhile been effected and, in particular, to take account of the fact that Directive 2004/18 had entered into force, the Commission supplemented its complaint by the allegation that on grounds of the contested conduct the Federal Republic of Germany had infringed, until 31 January 2006, the abovementioned provisions of Directive 92/50 and, since 1 February 2006, has infringed the corresponding provisions of Directive 2004/18. In addition, the Commission adhered to its view that the conduct contravened also the principles of freedom of establishment and freedom to provide services established in Articles 43 EC and 49 EC and, in particular, the prohibition on discrimination inherent in those principles.

26. In reply to the reasoned opinion, by letter of 15 November 2006, the Federal Republic of Germany reasserted its position. Moreover, it stressed that the implementing agreements concluded with pension providers could not be viewed in isolation. Instead, those agreements constituted part of employment law or, alternatively, were overlaid by such. However, in accordance with Article 16(e) of Directive 2004/18, employment contracts were excluded from the scope of that directive. In addition, the Federal Republic of Germany annexed a legal opinion written by Professor Koenig and Mr Pfromm

in response to the Commission's reasoned opinion in which those authors concluded that in the cases at issue here, having regard to the principle of autonomy in collective bargaining, there could be no obligation to invite tenders and that, in any event, neither the personal nor the material scope of the procurement directives was triggered. In that context, it was argued also that in individual cases the thresholds laid down in those directives were not satisfied.

27. In order to determine whether in the present case exclusion of the procurement rules was objectively justified and reasonable in order to attain the social policy objectives linked to the conversion of earnings, the Commission then sent to the Federal Republic of Germany a set of questions. As, in the Commission's view, the reply of the Federal Republic of Germany of 1 March 2007 was unconvincing, it moved to commence proceedings.

V – Procedure before the Court and forms of order sought by the parties

28. In its application, which was received at the Registry of the Court on 24 June 2008, the Commission claims that the Court should:

– declare that by reason of the fact that local authorities and local authority undertakings with more than 1 218 employees awarded public service contracts concerning occupational pension schemes without a European call for tenders directly to the organisations and undertakings mentioned in Paragraph 6 of the TV-EUmw/VKA, the Federal Republic of Germany had, until 31 January 2006, infringed Article 8 in conjunction with Titles III to VI of Directive 92/50 and, since 1 February 2006, has infringed Article 20 in conjunction with Articles 23 to 55 of Directive 2004/18;

– order the Federal Republic of Germany to pay the costs.

29. In its defence received on 16 September 2008, the Federal Republic of Germany contends that the Court should:

– dismiss the action;

– order the Commission to pay the costs.

30. In its reply received on 27 October 2008, the Commission narrowed the scope of its action. In that regard, it contended, in particular, that the Court should declare that by reason of the fact that local authorities and local authority undertakings which had, in 2004 and 2005, more than 2 044 employees, in 2006 and 2007, more than 1 827 employees and, for awards since 2008, more than 1 783 employees, awarded public service contracts concerning occupational pension schemes without a European call for tenders directly to the organisations and undertakings mentioned in Paragraph 6 of the TV-EUmw/VKA, the Federal Republic of Germany had, until 31 January 2006, infringed Article 8 in conjunction with Titles III to VI of Directive 92/50 and, since 1 February 2006, has infringed Article 20 in conjunction with Articles 23 to 55 of Directive 2004/18.

31. In its rejoinder of 12 December 2008, the Federal Republic of Germany repeated its contention that the Court should dismiss the action.

32. By order of the President of the Court of 5 December 2008, the Kingdom of Denmark and the Kingdom of Sweden were granted leave to intervene in support of the forms of order sought by the Federal Republic of Germany. They submitted written observations on 14 and 15 April 2009 to which the Commission responded with observations received on 30 June 2009.

33. At the hearing on 12 January 2010, the representatives of the Commission, the Federal Republic of Germany, the Kingdom of Denmark and the Kingdom of Sweden presented their oral arguments.

VI – Main arguments of the parties

34. Essentially, the Commission contests the compatibility with Directives 92/50 and 2004/18 of the preliminary selection made in Paragraph 6 of the TV-EUmw/VKA in favour of certain pension scheme

providers. In the Commission's view, that provision of the collective agreement restricts local authority employers, in contravention of the directives, in their choice of pension scheme providers with which to implement conversion of earnings. Accordingly, to the extent that the relevant thresholds are satisfied, the award of an individual contract results necessarily in an infringement of those procurement directives.

35. In that regard, the Commission starts from the premiss that Directives 92/50 and 2004/18 apply to the framework agreements which local authority employers conclude with the selected pension scheme providers. More specifically, according to the Commission, those framework agreements must be categorised as public service contracts within the meaning of Directives 92/50 and 2004/18, whose value, in the case of numerous German cities, exceeds the relevant thresholds. Therefore, on awarding such public service contracts, the provisions of those directives must be observed.

36. In the Commission's view, such assessment is not precluded by the fact that the preliminary selection in favour of certain pension scheme providers was established by collective agreement resulting from negotiations between the VKA and the trade unions. Community law, so it argues, does not accord any general privilege to the autonomy of collective bargaining. Moreover, the obligation to call for tenders does not depend on the characteristics of the individual employment relationships of local authority workers.

37. The German Government contests the Commission's action primarily with the argument that Community procurement law does not apply to a case such as the present. In its view, what is decisive is the fact that the selection procedure challenged by the Commission was adopted by the social partners and, accordingly, must be evaluated in the light of the principle of autonomy in collective bargaining. From that standpoint, it follows that the preliminary selection by collective agreement in favour of certain pension scheme providers contested in the present case and the implementation of such in the individual framework agreements, in fact, falls outside the scope of the procurement directives. To that extent, the German Government favours a corresponding application of the principles established in *Albany* (5) and *Van der Woude*. (6) Moreover, application of the procurement directives places public sector employers and their employees at a considerable disadvantage in comparison with private sector employers and their employees as this deprives the former group of the possibility to select pension scheme providers by way of collective agreement.

38. In relation to the facts, the German Government emphasises in that connection how collective agreements constitute the basis for and shape the right to conversion of earnings for workers in municipal public sector employment. In that regard, it stresses in particular that under the first sentence of Paragraph 1a(1) of the BetrAVG employees have a statutory right to the conversion of such earnings as are not based on a collective agreement. In that connection, in implementing the conversion of earnings, following a request by an employee, the choice of the pension scheme provider is, in principle, a matter for the employer. However, in relation to earnings which are based on a collective agreement, under Paragraph 17(5) of the BetrAVG, conversion may be effected only if, and, to the extent that, collective agreement provides for or permits such conversion. As the TV-EUmw/VKA provides for such possibility, in the view of the German Government, the scheme for the conversion of earnings at issue here is based entirely on collective agreement.

39. Moreover, it points out that the parties to the collective agreement took advantage of the possibility provided for in Paragraph 17(3) of the BetrAVG to derogate from various provisions of that law. In those circumstances, the preliminary selection – challenged by the Commission – in favour of certain pension scheme providers with which conversion of earnings must be implemented constitutes a restriction on the freedom of choice available to employers under Paragraph 1a(1) of the BetrAVG. Thus, employers are deprived of their authority to select and this is replaced by a consensual solution arrived at by the social partners. In that regard, selection of the pension scheme providers, in itself, reflects employee concerns.

40. Even if, in principle, the procurement directives apply to a case such as the present, in the view of the German Government, the framework agreements challenged by the Commission necessarily fall outside the material scope of Directives 92/50 and 2004/18.

41. Having regard to the fact that on the basis of a collective agreement local authority employers have been deprived of the authority to select pension scheme providers, according to the German Government, it would run contrary to the system to categorise those employers as contracting authorities within the meaning of the procurement directives. Moreover, so it argues the framework agreements concluded by local authority employers with pension scheme providers do not of themselves establish insurance relationships; instead, they establish simply the conditions on which employees may establish individual insurance contracts with pension scheme providers. In addition, employers generally conclude several such framework agreements with different pension scheme providers. Moreover, in its view, those framework agreements are not for pecuniary interest, the exclusion established in Article 16(e) of Directive 2004/18 applies to the framework agreements and in calculating the value of the individual agreements the Commission relied on incorrect presumptions.

42. The Kingdom of Denmark and the Kingdom of Sweden support Germany's contention that the action for failure to fulfil Treaty obligations should be dismissed.

43. The Kingdom of Denmark considers in particular the Danish system of occupational old-age pensions to be at risk if the Court were to conclude that agreements of a certain size concluded between public employers and trade unions concerning the investment of funds earmarked for the pensions of public sector employees must be subject to a compulsory call for tenders.

44. In their legal observations, both the Kingdom of Denmark and the Kingdom of Sweden stress the relevance of the abovementioned judgments in *Albany* and *Van der Woude*. In their view, even if, in principle, the procurement directives must be presumed to apply in situations such as those at issue here, account must be taken of the fact that the rules governing occupational old-age pensions derive directly from collective agreements. Moreover, all that has been agreed is which pension scheme provider should manage the pension savings. The funds, however, belong to employees alone and, as a result, no question arises of a contract for the provision of services to public sector employers. Moreover, Article 16(e) of Directive 2004/18 applies, according to which the directive does not apply to employment contracts.

VII – Legal appraisal

A – *Applicability of Directives 92/50 and 2004/18 to collectively agreed framework agreements*

45. The first question of principle which has to be answered in the present proceedings is whether the procurement directives may apply to collectively agreed framework agreements.

46. In that connection, there is considerable dispute on whether the framework agreements in question may fall within the primary law provisions on freedom of establishment and freedom to provide services.

47. As Directives 92/50 and 2004/18 were adopted on the basis of powers included in the title of the EC Treaty on freedom of establishment and freedom to provide services, if those fundamental freedoms are not applicable to the framework agreements in question, on an interpretation of the procurement directives in conformity with primary law, it follows that those framework agreements necessarily are excluded also from the scope of the procurement directives.

48. The pleas advanced to counter the application of the fundamental freedoms to the framework agreements in question can be summarised in three lines of argument.

49. The first line of argument starts from the presumption that collective agreements – and, correspondingly, also framework agreements established by collective agreement – are excluded from the scope of competition rules under primary law. That exception in the field of competition law – according to such argument – can be applied in relation to fundamental freedoms and, as a result, collectively agreed framework agreements are excluded from the scope of fundamental freedoms.

50. A second line of argument, which, although not advanced systematically by the German Government, can be recognised as the underlying motive in some of its arguments, starts from the principle that fundamental freedoms do not apply to horizontal relations. In that connection, it may be

queried in particular whether, having regard to the participation of worker representatives in collectively agreed accords, application of fundamental freedoms to collectively agreed framework agreements conflicts with the principle that fundamental freedoms do not apply to horizontal relations.

51. A third line of argument, advanced in the alternative, starts from the categorisation of the principle of autonomy in collective bargaining as a fundamental social right and the relationship between fundamental rights and fundamental freedoms. In that context, the argument is advanced in particular that collectively agreed framework agreements enjoy fundamental rights protection and, as a result, the substance of those agreements can no longer be measured against fundamental freedoms.

52. I will consider those three lines of argument in the following section.

1. Whether or not collective agreements are excluded from the scope of primary law competition rules and, if so, the applicability of such an exclusion to the fundamental freedoms

53. This first line of argument presumes, in my view, incorrectly, that, in principle, collectively agreed rules do not fall within the scope of primary law competition rules and that the exclusions from the scope of competition rules under primary law apply without more to the fundamental freedoms. Thus, that line of argument cannot be accepted.

(a) No exclusion from primary law competition rules for collective agreements

54. In three landmark judgments delivered on the same day in *Albany*, (7)*Brentjens'* (8) and *Drijvende Bokken*, (9) the Court ruled on the applicability of primary law competition rules to collective agreements and collectively agreed schemes.

55. Those cases concerned the compatibility of a national system of occupational pensions with the competition rules under primary law. The central question was whether the introduction of compulsory affiliation – at the request of employer and worker representatives in a given sector – to an occupational pension scheme for all undertakings in that sector could constitute an infringement of Article 10 EC in conjunction with Article 81 EC or an infringement of Article 86(1) EC in conjunction with Article 82 EC. In that connection, it was necessary to clarify whether, if at all, and, if so, under what conditions, a collective agreement between employers and workers in a given sector introducing a sectoral occupational pension scheme could fall within the scope of Article 81(1) EC.

56. In order to clarify the relationship between the competition rules of the EC Treaty and the collectively agreed scheme, the Court referred, first, to the objectives of a policy in the social sphere and social protection provided for in Article 2 EC and Article 3(1)(j) EC (10) and, in that connection, stressed that both the right of association and collective bargaining have been given express consideration in primary law and in the agreement on social policy. (11)

57. The Court then stated that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 81(1) EC when seeking jointly to adopt measures to improve conditions of work and employment. (12) As a consequence of those considerations, the Court concluded that, from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent, it follows that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) EC. (13)

58. Accordingly, in those judgments, the Court held that collective agreements – and, thus, also collectively agreed schemes and decisions – are excluded from the scope of Article 81 EC on satisfying a dual condition; that is, the agreement must (1) have been concluded in the framework of collective negotiations (14) and (2) with a view to improving conditions of work and employment. (15)

59. As the non-applicability of the competition rules in relation to collectively agreed accords does not follow automatically, but must be determined in an individual case, the Court did not recognise in those judgments any exclusion from the competition rules under primary law for collective agreements.

Instead, having regard to the primary law consideration given to collective agreements in the field of employment law and, accordingly, in the framework of an interpretation taking account of the Treaty's scheme, the Court held Article 81 EC to be subject to an inherent limitation in relation to collective agreements with a given purpose. (16)

60. Such assessment is not precluded by the fact that both in *Albany*, *Brentjens'* and *Drijvende Bokken* and in the later case of *Van der Woude* (17) the Court examined only cursorily whether the collective agreements were concluded with a view to improving conditions of work and employment. Naturally, to eliminate all suspicion of abuse of the freedom granted to the social partners in the area of competition law, a more rigorous analysis on the substance of the collectively agreed provisions in question would have been advisable in those cases, too. (18) None the less, in the framework of an overall assessment of the scheme of those judgments, the conclusion remains that only collective agreements with a given purpose were excluded from the scope of Article 81(1) EC. (19)

61. Against that background, Advocate General Fennelly was correct, in my view, to observe in his Opinion in *Van der Woude* that, as an exclusion from the general field of application of Article 81 EC, the scope of the '*Albany* exclusion' must be narrowly construed. Consequently, collective agreements which appreciably affect competition may always be challenged on the basis that the agreement does not pursue a genuine social objective because the restrictions resulting from it, or from its application, go beyond what is required by the pursuit of its objective. (20) Naturally, that necessarily presupposes a substantive examination of the criterion of whether the collective agreements concerned or the individual provisions of such were, in fact, concluded with a view to improving conditions of work and employment.

62. In the light of the foregoing, I conclude that in *Albany*, *Brentjens'* and *Drijvende Bokken* the Court did not establish a general exception from the competition rules under primary law for collective agreements. Instead, those judgments must be interpreted as determining that Article 81 EC is subject to an inherent primary law limitation in relation to collective agreements with a given purpose.

(b) No general concordance between the scope of the primary law on competition and that of freedom of establishment and freedom to provide services

63. In its argument, the Federal Republic of Germany presupposes that the limitations and exceptions established in competition law apply, as a rule, to the fundamental freedoms. Against that background, it contends in particular that the Court should apply to the present case *per analogiam* – and, accordingly, without any assessment taking account of the particular features of freedom of establishment and freedom to provide services – the reasoning and principles of *Albany*, *Brentjens'* and *Drijvende Bokken*.

64. In my opinion, that view put forward by the German Government cannot be accepted.

65. Although both the rules within the field of freedom of establishment and freedom to provides services and the rules in the field of freedom of competition take account of the objective of completing the internal market, the fact that an agreement or activity is excluded from the scope of the competition rules does not necessarily mean that it is excluded also from the scope of the rules on freedom of movement. (21)

66. In consistent case-law, the Court has held that although an agreement or an activity may be included within the scope of the provisions on free movement at the same time it may fall outside the scope of the provisions on competition and vice versa. (22)

67. Therefore, according to the case-law of the Court, there is no mandatory concordance between the scope of the competition rules under primary law and that of the fundamental freedoms. The fact that collectively agreed rules aimed at improving the conditions of work and employment, in accordance with *Albany*, *Brentjens'* and *Drijvende Bokken*, do not fall within the scope of Article 81 EC, thus, does not imply necessarily that such collectively agreed rules are excluded also from the scope of freedom of establishment and freedom to provide services.

68. Simply in the alternative, I wish to add that, even if the relationship between the principle of autonomy in collective bargaining and the fundamental freedoms must be structured similarly to the relationship between the principle of autonomy in collective bargaining and competition law as established by primary law, this would not imply that the requirements laid down in *Albany*, *Brentjens'* and *Drijvende Bokken* could be applied without more to the present case. Instead, giving due regard to the recognition of the principle of autonomy in collective bargaining as a fundamental right, (23) the criteria and reasoning set out in those judgments in relation to competition law would need to be evaluated. (24)

2. The limited horizontal effects of fundamental freedoms

69. Nor is the applicability of freedom to provide services and freedom of establishment in the field of collective bargaining precluded by the argument – conceivable in the present case – that fundamental freedoms do not apply to horizontal relations.

70. According to that line of argument, the framework agreements in question result, ultimately, from a collective agreement negotiated between public sector employers and worker representatives. Taking account of the fact that the principles of freedom to provide services and freedom of establishment do not apply to horizontal relations, the participation of workers in the conclusion of the collective agreements precludes, in principle, so it is argued, the application of provisions concerning those fundamental freedoms to collective agreements and implementing agreements subordinated thereto.

71. That line of argument must be countered, first, by stating that the TV-EUmw/VKA was concluded between the VKA and trade unions. Given the fact that local authority employers, that is, public bodies subject to the requirements of the fundamental freedoms participated in the conclusion of the collective agreement, one could describe the effects produced by the fundamental freedoms, here, as having, at the most, an indirectly horizontal character to the disadvantage of the trade unions also participating in the collective bargaining process.

72. In addition, in that connection, regard must be had to the settled case-law of the Court, according to which Articles 39 EC, 43 EC and 49 EC do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services. (25)

73. That inclusion of collective rules on employment within the scope of the fundamental freedoms is justified by the fact that working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons. Exclusion of collective rules on employment from the scope of the fundamental freedoms would carry with it the risk that application of obligations based on one of the fundamental freedoms established under primary law would result in inequalities. (26)

74. In the light of those considerations, I conclude that no arguments can be derived from the principle by which fundamental freedoms do not apply to horizontal relations which preclude the application of provisions on freedom of establishment and freedom to provide services to collectively agreed framework agreements.

3. Categorisation of the rights to bargain collectively and to autonomy in collective bargaining as fundamental social rights and their relationship to fundamental freedoms

75. Nor am I persuaded by the argument that because the fundamental right to autonomy in collective bargaining serves as the basis for the specification of the conditions of employment of local authority workers in the TV-EUmw/VKA the substance of such collective agreement and its subordinate agreements falls outside the scope of freedom of establishment and freedom to provide services.

76. It is settled case-law that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. (27) In determining those fundamental rights, the Court draws inspiration from the constitutional traditions common to the Member States and from the

guidelines supplied by international instruments for the protection of fundamental rights on which the Member States have collaborated or to which they are signatories.

77. The right to bargain collectively is recognised both by various international instruments which the Member States have signed or cooperated in – such as the European Social Charter signed in Turin on 18 October 1961, (28) to which, moreover, express reference is made in Article 136 EC – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, (29) which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000. (30)

78. Against that background, it is beyond question that the right to bargain collectively and the autonomy, accorded to the parties to that process, inherent in that right must be recognised also in the Community legal order as fundamental rights which form an integral part of the general principles of Community law. (31)

79. Moreover, by the Treaty of Lisbon – not relevant, *ratione temporis*, in the present case – the primary law enshrinement of the right to bargain collectively was strengthened by the fact that Article 6 TEU declares the Charter of Fundamental Rights of the European Union to have binding legal force. By that general reference to the charter, the right to bargain collectively, described in Article 28 of that charter, is now expressly incorporated in primary law. (32)

80. However, the fact that the right to bargain collectively and of the parties to autonomy in that connection are recognised as fundamental rights does not permit the conclusion, without more, that the substance of the collective agreements, made in exercise of those fundamental rights, and the agreements subordinate thereto automatically fall outside the scope of the fundamental freedoms.

81. In the case of a conflict between a fundamental right and a fundamental freedom, both legal positions must be presumed to have equal status. That general equality in status implies, first, that, in the interests of fundamental rights, fundamental freedoms may be restricted. However, second, it implies also that the exercise of fundamental freedoms may justify a restriction on fundamental rights. (33)

82. Consequently, categorisation of the rights to bargain collectively and to autonomy in collective bargaining as fundamental rights does not result in the automatic or complete exclusion from the scope of the provisions on freedom of establishment and freedom to provide services either for the collective agreements concluded in the exercise of those rights or for the subordinate agreements concluded in the implementation thereof.

83. From that, it inexorably follows that the argument according to which both collective agreements, negotiated through the exercise of the fundamental right to bargain collectively and the fundamental right to autonomy in such a process, and subordinate agreements thereto, *eo ipso*, fall outside the scope of freedom of establishment and freedom to provide services and secondary law based thereupon is unpersuasive.

84. Instead, if a conflict between such fundamental freedoms and fundamental rights is established, it must be determined whether, having regard to all the circumstances of the case, fundamental freedoms may justify a restriction on the fundamental right to bargain collectively and the fundamental right to autonomy in that process or, conversely, whether those fundamental rights demand that the scope of those fundamental freedoms and the secondary law based thereupon must be limited.

4. Interim conclusion

85. In the light of my observations above, I conclude that, in principle, collectively agreed framework agreements fall within the scope of freedom of establishment and freedom to provide services. Thus, in principle, the framework agreements in question fall also within the scope of procurement directives based on those fundamental freedoms, naturally, subject always to the proviso that the conditions for applying such directives are satisfied.

86. If it is established that Directive 92/50 or Directive 2004/18 has been contravened as a result of a collectively agreed framework agreement, regard must be had, however, to the special status of the rights to bargain collectively and to autonomy in collective bargaining as fundamental social rights. In that regard, it must be determined in the circumstances of the individual case whether that non-observance of the procurement directives results from exercising the fundamental social rights to bargain collectively and to autonomy in collective bargaining, and, if so, whether restricting the exercise of such fundamental social rights as a result of obligations established by the procurement directives may be regarded as justified having regard to the fundamental freedoms.

87. In the light of those considerations, in the following analysis I will examine, first, whether the collectively agreed framework agreements at issue are compatible with Directives 92/50 and 2004/18. Thereafter, I will examine how a conflict between obligations resulting from the procurement directives and the freedom to exercise the fundamental right to bargain collectively and the fundamental right to autonomy in collective bargaining may be resolved.

B – *Compatibility of the framework agreements at issue with Directives 92/50 and 2004/18*

88. The Commission alleges an infringement of Directive 92/50 and of Directive 2004/18 said to result from the fact that numerous local authorities and local authority undertakings awarded service contracts concerning occupational pension schemes for their employees without a European call for tenders directly to the bodies and undertakings mentioned in Paragraph 6 of the TV-EUmw/VKA.

89. For the purposes of Directives 92/50 and 2004/18, public service contracts are contracts for pecuniary interest concluded in writing between a contracting authority and an economic operator and having as their principal object the provision of services.

90. In the present case, the parties disagree, in particular, on whether, in implementing the preliminary selection established by collective agreement, local authorities acted as contracting authorities within the meaning of the procurement directives. In addition, there is disagreement on whether the agreements concluded between local authorities and pension scheme providers may be classified as contracts for pecuniary interest which have as their object the provision of services and which exceed the relevant thresholds.

91. I will examine both of those main issues in the following analysis.

1. Categorisation of the cities as contracting authorities

92. The Federal Republic of Germany rejects the categorisation of the cities concerned as contracting authorities for the purposes of the procurement directives with the argument that in selecting pension scheme providers those cities merely implement the requirements of the collective agreement and, hence, do not take an ‘independent’ decision. In addition, so they argue, the element of procurement to the benefit of public authorities is absent because in terms of its legal consequences and economic effects the conversion of earnings must be classified as pertaining to the employee sphere.

93. By that argument, the Federal Republic of Germany calls, in essence, for a functional interpretation of the concept of a public authority with the objective – as a result of a restrictive interpretation of that element – of narrowing the scope of the procurement directives in cases such as the present. That argument cannot be accepted.

94. At the outset, it must be recalled that the Community rules on public procurement were adopted in pursuance of the establishment of the internal market, in which freedom of movement is ensured and restrictions on competition are eliminated. (34) In that connection, the Court has identified that the widest possible opening-up to competition in all Member States for public procurement constitutes one of the primary objectives of the procurement directives. (35)

95. Although it is correct to assert that in consistent case-law the Court has held that the concept of a contracting authority must be interpreted not in formal but in functional terms, (36) it must be stressed in that context that such case-law testifies to the efforts of the Court to break up closed national

procurement markets and – in accordance with the objectives stated in the recitals in the preambles to the procurement directives – to open them to the common market. (37)

96. Accordingly, by its functional interpretation of the concept of a contracting authority, the objective pursued by the Court is to ensure the effective attainment of freedom of establishment and freedom to provide services in the field of public contracts. To that end, the Court has broadly interpreted the material scope of the procurement directives, and, in that regard, for the purposes of classifying a national body (in functional terms) as a contracting authority for the purposes of the procurement rules it is irrelevant whether under relevant national rules that characteristic is linked to certain institutional features. (38)

97. Consequently, case-law on the 'functional' notion of a contracting authority facilitates the general purpose of the procurement directives, that is, in coordinating the procedures for awarding public contracts, to eliminate barriers to the freedom to provide services and goods and, as a result, also to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State. (39) In so doing, both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones may be avoided. (40)

98. Although the functional interpretation of the concept of a contracting authority in those terms results, on the whole, in an extension of the material scope of the procurement directives, in exceptional cases it may result also in the non-applicability of those directives to contracts notwithstanding the fact that in formal terms these were awarded by a contracting authority and the remaining requirements for the application of the procurement directives also appear to be fulfilled.

99. A clear example of this is to be found in *Mannesmann Anlagenbau Austria* in which the Court held that a contract awarded by a contracting authority, which in principle falls within the scope of the procurement directives, ceases to be regarded as a public contract if it is established that, from the outset, the whole of the project at issue fell within the objects of an undertaking not subject to procurement law and the works contracts relating to that project were entered into by the contracting authority on behalf of that undertaking. (41)

100. The criterion for the non-applicability of the procurement rules applied in *Mannesmann Anlagenbau Austria* implies, therefore, that the award decision demonstrably must be taken by a private awarding body acting on its own behalf and on condition that it bears the entire cost. Given that in such a configuration, although in formal terms the contracting authority awards the contract, but neither took nor influenced the decisions on which that contract is based, that precludes the risk that in awarding the contract such contracting authority gives preference to national tenderers or applicants or is guided by considerations other than economic ones. (42)

101. In the light of the considerations above, I am unpersuaded by the argument advanced by the Federal Republic of Germany, namely that in their selection of pension scheme providers local authorities merely implement the requirements of the collective agreement and, accordingly, do not act as contracting authorities.

102. First, it must be observed that the collective agreement was concluded between the VKA and the trade unions. In that process, as the umbrella association for local authorities and local authority undertakings in Germany, the VKA represented the interests of local authority employers for collective bargaining and employment relations purposes. That implies necessarily that local authority employers participated, at least, indirectly, in establishing the negotiating positions for which, subsequently, in the framework of collective bargaining with the trade unions, the VKA sought to find acceptance and which contributed, ultimately, to the basis for the collectively bargained consensus. Against that background, local authority employers could influence, at least, indirectly, the preliminary selection in favour of certain pension scheme providers agreed in the TV-EUmw/VKA.

103. In the light of the fact that local authority employers could influence, at least, indirectly, the negotiations on the collective agreement and, thus, also the outcomes achieved in the TV-EUmw/VKA,

their categorisation as contracting authorities for the purposes of the procurement directives cannot be questioned by pointing to the requirements and obligations established by the collective agreement.

104. Nor is the argument convincing that in the present case, from a functional point of view, local authorities may not be regarded as contracting authorities for the purposes of the procurement directives because in terms of its legal consequences and economic effects the conversion of earnings must be classified as pertaining to the employee sphere.

105. Even if it is correct that local authority employers make no contributions whatsoever to occupational pension savings accumulated through conversion of earnings, such finding would not of itself suffice to remove the contracts made between local authority employers and pension scheme providers from the scope of the procurement directives.

106. Admittedly, the risk of preference being given by contracting authorities to national firms and bidders may be diminished when conclusion of the contract by the contracting authority constitutes the outcome of negotiations between the public sector employer and one or more workers and only those workers bear the economic consequences of the conclusion of the contract. In such a case, workers have, as a rule, a particular interest in ensuring that the most economically advantageous outcome is achieved. Regardless of the question whether that factor alone eliminates the risk that the outcome of the negotiations gives preference to national firms, for the purposes of assessing the present case it suffices to observe that the negotiations on the collective agreement were conducted on the workers' side by trade unions. Although those trade unions represent the workers and, thus, may act as a counterweight to the natural tendency of contracting authorities to favour national firms, (43) trade unions do not bear in a personal sense the financial consequences of the conversion of earnings requested by local authority workers. Simply for that reason, the fact that trade unions participated in the negotiations resulting in the conclusion of the TV-EUmw/VKA is insufficient to place the selection decisions – predetermined by collective agreement – taken by contracting authorities outside the scope of the procurement directives.

107. In the light of those considerations, I conclude that the local authorities which in implementation of the TV-EUmw/VKA concluded contracts with one or more of the pension scheme providers mentioned therein acted as contracting authorities for the purposes of the procurement directives.

2. Categorisation of the framework agreements as contracts for pecuniary interest within the scope of the procurement directives

(a) Observations on the duty to substantiate and the burden of proof

108. By means of a multiplicity of arguments, the German Government contests the categorisation of the framework agreements concluded between local authorities and pension scheme providers as contracts for pecuniary interest within the scope of the procurement directives. In that regard, it stresses in particular that the framework agreements establish merely the conditions on which workers may subsequently conclude individual insurance contracts with pension scheme providers. In that connection, the German Government emphasises also that consideration is provided not by local authorities but by employees. In its view, in the absence of an economic exchange between pension scheme providers and local authorities the framework agreement is not for pecuniary interest. And even if there were to be pecuniary interest, the Commission has not adduced proof that the thresholds are satisfied. In addition, so it argues, the exception for employment contracts provided for in Article 16(e) of Directive 2004/18 extends to the framework agreements in question.

109. In the present proceedings, analysis and assessment of those arguments is considerably hampered by the fact that very little specific information on the actual framework agreements concluded by individual local authorities has been produced to the Court. Particularly problematic, in that respect, is the approach taken by the Commission in relation to evidential matters. In wording its action, the Commission limited itself to a generalised challenge, on the basis of statistical information, to the award practice of all German cities of a certain size.

110. None of the framework agreements concluded by those cities were attached to the application. Instead, the Commission limited its evidence to the production of some general information sheets, information to members and specimen application forms issued by various pension scheme providers.

111. Against that background, in the present proceedings it remains unresolved, inter alia, on what date each of the framework agreements at issue was concluded. Accordingly, it is uncertain whether those framework agreements must be assessed in the light of Directive 92/50 or, instead, in the light of Directive 2004/18. The determining factor is always the legal position at the time when the operations with procurement law relevance took place. (44) As in the absence of detailed information on the conclusion of the framework agreements in question that time cannot be determined, in the present proceedings, a finding that the procurement rules have been infringed may be reached only where conduct would constitute an infringement both of Directive 92/50 and Directive 2004/18.

112. In that regard, according to settled case-law it falls to the Commission to prove, in fact, the alleged failure to fulfil Treaty obligations. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled. In so doing, the Commission may not rely on any presumptions. (45)

113. Against that background, it is for the Commission to produce sufficient evidence to discern an infringement. When that has been done, it is incumbent on the Member State to contest substantively and in detail the information produced and the consequences thereof. (46)

114. In the light of those considerations, in the following analysis, I will examine the Commission's argument and the counterarguments advanced by the German Government.

(b) Applicability of Directives 92/50 and 2004/18 to framework agreements

115. Although not one single framework agreement at issue between a city and a pension scheme provider has been produced, the German Government and the Commission agree on the fact that such framework agreements have been concluded by German cities. However, the German Government argues that the conclusion of those agreements cannot be regarded as the award of public contracts because the contractual relationship relevant for the purposes of the procurement rules is established only in the framework of an individual employee's participation in conversion of earnings.

116. By this argument, the German Government emphasises the two-step construction of the conversion of earnings procedure. That procedure is particularly characterised by the fact that, as a first step, local authority employers conclude framework agreements with one or more pension scheme providers selected in accordance with Paragraph 6 of the TV-EUmw/VKA. Such framework agreements typically include the conditions on which, as a second step, local authority employees may opt for conversion of earnings.

117. To the extent that the material and personal conditions for application are satisfied, both under Directive 92/50 and under Directive 2004/18 framework agreements constitute contracts which are subject to a compulsory call for tenders.

118. Directive 92/50 does not govern expressly the conclusion of framework agreements. However, it must be observed that in *Commission* v *Greece* (47) the Court confirmed the applicability of Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (48) to framework agreements. In the light of that judgment, it must be presumed that, in principle, framework agreements fall also within the scope of Directive 92/50. Directive 2004/18 expressly provides for and governs the conclusion of framework agreements in Article 32.

119. Although framework agreements fall, in principle, within the scope of the procurement directives, both the Court in *Commission* v *Greece* (49) and the legislature in formulating that principle in Directive 2004/18 focused primarily on framework agreements which include the terms for subsequent contracts between the contracting authority and the economic operators concerned. (50) However, the present proceedings concern framework agreements establishing the terms for the subsequent conversion of earnings by employees of the contracting authorities.

120. Thus, it may be questioned whether Directives 92/50 and 2004/18 must be interpreted as meaning that they include also the framework agreements at issue, although in substance these establish terms for insurance contracts which may be entered into by local authority employees.

121. In my view, in the specific context of the present proceedings, that question must be answered in the affirmative.

122. The crucial element in that regard is the fact that the conversion of earnings procedure is structured such that the framework agreements establish not only the terms for any conversion of earnings by local authority employees but determine also the organisations with which local authority employees may implement conversion of earnings.

123. As I have already stated, the free movement of goods and services and the widest possible opening-up to competition in all Member States constitute the primary objectives of Community legislation on public procurement. (51) In that connection, both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones may be avoided. (52)

124. In the light of those objectives, in analysing the framework agreements in question for procurement law purposes, the crucial factor is that in concluding a framework agreement a local authority employer determines with which pension scheme provider its employees may, as a second step, implement the conversion of earnings. Accordingly, the selection – relevant for procurement law purposes – of one or more economic operators is effected on the conclusion of the framework agreement between the local authority employer and the pension scheme provider concerned.

125. Against that background, I conclude that the risk of preference being given to national tenderers or applicants clearly arises on conclusion of the framework agreements at issue. Because local authority employees are bound by decisions of local authority employers taken in favour of a pension scheme provider, they are limited to electing *whether* to establish an insurance relationship on the basis of the framework agreement and may not determine *with whom*. That latter decision was taken by local authority employers on the conclusion of the framework agreement and, as a result, in the specific context of the present proceedings, those framework agreements, too, must be included within the scope of Directives 92/50 and 2004/18.

126. As a final argument contesting the applicability of Directive 2004/18 to the framework agreements at issue, the Federal Republic of Germany contends, in the alternative, that the limitation on the term of framework agreements subject to a compulsory call for tenders to a maximum of four years, provided for in Article 32(2) of that directive, is inappropriate for the creation of collective insurance schemes. However, that objection must be rejected as unfounded simply by reason of the fact that under that provision that maximum term of four years does not apply if such term is incompatible with the object of the framework agreement.

(c) Whether the framework agreements are for pecuniary interest

127. According to the German Government, conversion of earnings is funded, ultimately, by employees alone. Against that background, it argues that the framework agreements are not for pecuniary interest within the meaning of Directives 92/50 and 2004/18.

128. Regardless of how, in the context of occupational pensions funded by conversion of earnings, in practical terms, the transfer of contributions or premiums is effected, it is certain that by such scheme, ultimately, an employee's future earnings are used for the purposes of his occupational pension. Thus, from an economic point of view, employees, and not contracting authorities, bear the costs of occupational pensions. (53) Therefore, from the perspective of procurement law, a scheme of third-party funding must be presumed, in which not the contracting authority but the local authority employee concerned confers an economic benefit on the pension scheme provider and, in return, acquires to the same value entitlements to future pension.

129. In my view, the fact that the monetary benefit, ultimately, is conferred not by contracting authorities but by local authority employees does not conclusively preclude the categorisation of the framework agreements concluded by contracting authorities as being for pecuniary interest.

130. The purpose of requiring a pecuniary interest is to ensure that those arrangements which do not concern economic activities such as, for example, charitable provision are excluded from the scope of the procurement directives. (54) If, on the other hand, it is clear that an arrangement has an inherent economic purpose, Community procurement law, in principle, applies.

131. In that connection, the Court has already clarified that for the purposes of categorisation as a public contract within the meaning of the procurement directives it is irrelevant whether the contracting authority uses public resources to pay the contractor. (55)

132. In addition, in *Carbotermo and Consorzio Alisei*, in identifying the conditions under which an in-house award falls outside the scope of Community procurement law, the Court emphasised that in determining whether an undertaking's activities are devoted primarily to a contracting authority it is irrelevant who pays the undertaking in question, whether it be that authority or third parties. (56) If, according to that line of case-law, payments by third parties can be relevant in determining the applicability of a derogation from procurement law, that must apply a fortiori in determining the applicability of procurement law itself. (57)

133. In the light of the above considerations, I conclude that the benefit conferred by local authority employees in the framework of the conversion of earnings suffices to classify the framework agreements concluded by contracting authorities with the pension scheme providers concerned as being for pecuniary interest within the meaning of the procurement directives. (58) Consequently, it is unnecessary for contracting authorities to constitute, in economic terms, the ultimate supplier of the pecuniary consideration.

(d) Non-applicability of the exclusion for employment contracts

134. According to Article 1(a)(viii) of Directive 92/50, employment contracts do not constitute public service contracts. Article 16(e) of Directive 2004/18 provides, similarly, that that directive does not apply to public service contracts which concern employment contracts.

135. In the view of the German Government, those exclusions extend to the framework agreements in question. It contends that the framework agreements are based on employment relationships with the consequence that their object concerns to that extent employment contracts.

136. I am unpersuaded by that argument.

137. By Article 1(a)(viii) of Directive 92/50 and Article 16(e) of Directive 2004/18, the legislature has stated that provision of services may fall within Community procurement law only where this is effected on the basis of contracts. If, on the other hand, services are provided in fulfilment of an employment contract, these are not intended to be covered by procurement law. (59)

138. That explicit exclusion of employment contracts from the scope of the procurement directives can be explained by the fact that conclusion of an employment contract establishes a considerably more narrow legal relationship than the conclusion of a contract for the general provision of services. Against that background, employers should not be precluded by the procurement rules from taking account of subjective matters and impressions when taking hiring decisions. (60)

139. Although there is no single definition of the concept of a worker – nor, consequently, of an employment contract – in Community law, with that definition varying according to the area in which it is to be applied, (61) in my view, the consistent case-law of the Court defining the concept of a worker for the purposes of Article 39 EC may serve as the basis for the definition of an employment contract for the purposes of Directives 92/50 and 2004/18. (62) According to that case-law, a relationship governed by a contract of employment may be considered to exist only where a person undertakes, for a certain period of time, to perform services for and under the direction of another person in return for which he receives remuneration. (63)

140. Against that background, an agreement between an awarding body and a service provider may be categorised as an employment contract for the purposes of Directives 92/50 and 2004/18 only if the service provider undertakes, for a certain period of time, to perform services for and under the direction of an awarding body in return for which it receives remuneration.

141. It is beyond dispute that such a situation does not apply in the case of the framework agreements in question. Thus, in the present proceedings, it is immediately apparent that the exclusion for employment contracts established in Article 1(a)(viii) of Directive 92/50 and Article 16(e) of Directive 2004/18 does not apply.

(e) Thresholds under Directives 92/50 and 2004/18

(i) Determination of the relevant thresholds

142. Both Directive 92/50 and Directive 2004/18 apply only to public service contracts the estimated value of which net of value added tax (VAT) is in excess of certain thresholds established in those directives.

143. As those thresholds are regularly revised, first of all, it must be clarified which threshold was relevant in relation to the framework agreements in question. For those purposes, the threshold must be established which applied at the time of the contractual negotiations. (64)

144. The case-file does not include any information on the dates at which the individual local authority employers commenced negotiations with the relevant pension scheme providers or the dates on which framework agreements were concluded. Having regard to the fact that the TV-EUmw/VKA has been in force since 1 January 2003 and, thus, starting from the first half of 2003 negotiations could be held with a view to concluding framework agreements in accordance with that collective agreement, (65) for the purposes of the present proceedings, all the thresholds which applied from 1 January 2003 to 4 September 2006 (the date on which the period for compliance with the reasoned opinion expired) must be considered relevant. These are:

(1) the threshold according to Article 7(1)(a) of Directive 92/50, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively: (66)*the equivalent value in ecus of 200 000 SDR*;

(2) the threshold according to Article 7(b) of Directive 2004/18: *EUR 249 000*;

(3) the threshold according to Article 7(b) of Directive 2004/18, as amended by Commission Regulation (EC) No 1874/2004 of 28 October 2004 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts: (67)*EUR 236 000*;

(4) the threshold according to Article 7(b) of Directive 2004/18, as amended by Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts: (68)*EUR 211 000*.

145. In its application, the Commission attempted to circumvent the problem of determining the relevant thresholds by referring to the date on which the period of two months for compliance with the reasoned opinion expired. As the reasoned opinion was received by the Federal Republic of Germany on 4 July 2006, on the Commission's argument, the threshold in force on 4 September 2006 of EUR 211 000 applied. (69)

146. That approach taken by the Commission is not supported by the procurement directives and ignores the essence of procurement law. Consequently, such approach cannot be followed. (70) Instead,

in determining the applicable threshold, in a case such as the present, reference must be had to the date of the contractual negotiations. (71)

147. As in the present case that date cannot be determined, in assessing whether the framework agreements in question satisfy the relevant thresholds, the highest threshold applicable in the period at issue must be presumed. That is EUR 249 000.

(ii) Absence of proof that the framework agreements exceed the relevant threshold

148. The framework agreements at issue are characterised by the fact that at the time of the negotiations leading to their conclusion it was impossible to ascertain how many local authority employees would opt, ultimately, for conversion of earnings and, in the event of such option, the conditions under which conversion would be effected. Against that background, the procurement directives provide that the value of such framework agreements must be determined on the basis of an estimate of the expected contract value at the date of the contractual negotiations. (72)

149. In relation to public service contracts without a fixed term or with a term greater than 48 months for which a total price is not indicated, Article 9(8)(b) of Directive 2004/18 provides, in addition, for a restriction on the period to be taken into account for the purposes of calculating the total price. According to that provision, in the case of such contracts total value is to be calculated by multiplying the monthly value by 48. Such a restriction, limiting the calculation period to four years, is included also in Article 7(5) of Directive 92/50 which may apply also to framework agreements. (73)

150. Even if, according to the procurement directives, in relation to a framework agreement for which a total price is not indicated, the total value to be taken into account must be determined, in principle, thus, on the basis of an *ex ante* estimate, in the present proceedings the Commission has based its calculations primarily on statistics concerning the participation of local authority employees in the conversion of earnings in 2006. Having regard to the fact that the Federal Republic of Germany has not put forward any real alternative to that *ex post* method of calculation, it must be presumed that the readiness of public service employees to take advantage of the option for conversion of earnings in 2006 corresponded to the estimates. Accordingly, the participation by public service employees in the conversion of earnings system in 2006 constitutes a legitimate starting point for determining whether or not the framework agreements in question satisfy the threshold.

151. According to consistent case-law, it is for the Commission to prove the allegation that the Treaty obligation has not been fulfilled. Having regard to the observations I made above, in the present infringement proceedings it is incumbent on the Commission, therefore, to prove that on the basis of the information available concerning the conversion of earnings in 2006 it may be presumed that the value of each of the framework agreements in question exceeded the threshold of EUR 249 000.

152. In my opinion, in the present case, the Commission has failed to adduce that proof.

153. In determining which local authority employers have concluded with pension scheme providers framework agreements exceeding the threshold relevant for procurement law purposes the Commission relies on a series of statistical data which it combines with a set of presumptions.

154. In its application, the Commission presumed that every large German city concluded for an unlimited term a framework agreement with a pension scheme provider. Moreover, according to research by TNS Infratest, (74) attached as an annex to the application, it followed that in December 2006 2.3% of employees in the public service sector made use of the facility for the conversion of earnings and that in 2006 the monthly amount converted was approximately EUR 158 per month.

155. The Commission then used that statistical information as the basis on which to calculate, in accordance with Article 9(8) of Directive 2004/18, the value of each insurance contract entered into by a local authority employee within the scope of a framework agreement concluded by his employer as follows: EUR 158 x 48 months = EUR 7 584. According to the Commission, it follows from that calculation that every framework agreement which results in the conclusion of 28 or more individual insurance contracts has a value of EUR 212 352 or greater and, accordingly, exceeds the threshold – considered by the Commission as decisive – of EUR 211 000.

156. In order to determine in which cities no less than 28 local authority employees had applied or were likely to apply for conversion of earnings, the Commission combined the abovementioned rate of participation of local authority employees in the conversion of earnings procedure of 2.3% with a further academic study in this case on the relationship between the population figures for cities and municipalities and the number of local authority workers. (75) The Commission derived from the latter study in particular the fact that in 2000/01 for every 1 000 inhabitants there were 17.8 local authority workers. According to the Commission, from that figure, for 2006, an employee figure of 16 local authority workers for every 1 000 inhabitants can be deduced. From that, in turn, according to its argument, it can be extrapolated for 2006/07 that every German city whose population exceeds 76 125 inhabitants concluded a framework agreement in excess of the threshold – considered by the Commission as decisive – of EUR 211 000.

157. To identify the cities which are alleged, in fact, to have infringed the procurement directives, the Commission produced a list of the largest cities in Germany together with their population figures and, in that regard, showed in its application that the 110 largest cities have populations in excess of 76 125 inhabitants and, consequently, concluded the framework agreements in question in contravention of procurement law.

158. After the Federal Republic of Germany in its defence – setting out detailed information in substantiation – rejected as incorrect the rate of participation of local authority employees in the conversion of earnings procedure of 2.3%, the mean conversion amount of EUR 158 per month, the employment figure of 16 local authority workers for every 1 000 inhabitants, the assumption that local authority employers conclude a framework agreement with only one pension scheme provider and the assumption that every large German city falls within the scope of the TV-EUmw/VKA, the Commission made minor revisions to its calculations.

159. On the basis of a legal opinion of 25 November 2005, (76) in its reply, the Commission now stated the mean amount converted as EUR 106.77 per month and reduced the mean employment figure from 16 to 15 local authority workers for every 1 000 inhabitants. In addition, the Commission removed the city of Berlin from its calculations. However, it adhered to the estimated rate of participation of local authority employees in the conversion of earnings procedure of 2.3% and rejected as inconsequential the argument that individual local authority employers had concluded framework agreements with several pension scheme providers.

160. On the basis of those new parameters, according to the Commission, it can be extrapolated that German cities with a population in 2004/05 in excess of 136 267 inhabitants, in 2006/07 in excess of 121 800 inhabitants and in 2008/09 in excess of 118 867 inhabitants concluded framework agreements which exceeded the threshold applicable for the period concerned.

161. To identify the cities which are alleged, in fact, to have infringed the procurement directives, the Commission again referred to a list of the largest German cities, now excluding Berlin. Consequently, according to that argument, for 2004/05 the smallest city in population terms exceeding the threshold was Darmstadt with a population of 141 257 inhabitants. For 2006/07, it was Ingolstadt with a population of 122 167 inhabitants and for 2008/09 Bottrop with a population of 118 975 inhabitants.

162. In its rejoinder, the German Government in reply to that recalculation again stressed the fact that numerous employers concluded framework agreements with several pension scheme providers. Moreover, it argued that the mean employment figure advanced by the Commission of 15 local authority workers for every 1 000 inhabitants is not meaningful in the present proceedings as that employment figure includes also local authority civil servants who, in fact, fall outside the scope of the TV-EUmw/VKA. Only 85.6% of local authority workers constitute employees who can participate in the conversion of earnings and, as a result, so it argued, the statistically relevant mean employment figure is at the most 12.84 local authority workers for every 1 000 inhabitants. In addition, Germany again contested the estimated rate of participation of local authority employees in the conversion of earnings procedure of 2.3% and the estimated monthly amount converted of EUR 106.77 and submitted on the basis of the latest information that the mean proportion of local authority employees who took part in conversion of earnings in 2006 was 2.04% with a mean monthly contribution to conversion of earnings of EUR 89.92. (77)

163. On the basis of that information included in the rejoinder, following the method of calculation adopted by the Commission, it may be extrapolated that German cities with a population in excess of 217 610 may have concluded framework agreements with an estimated value in excess of EUR 249 000. Consequently, on the basis of a list of the largest German cities it may be concluded – in accordance with the argument pursued by the Commission – that in concluding framework agreements on the conversion of earnings 33 cities (78) may have contravened Directives 92/50 and 2004/18.

164. That conclusion presupposes, however, that those 33 cities each concluded only one framework agreement with a pension scheme provider. However, precisely that assumption was contested by the German Government in the pre-litigation procedure and in the subsequent proceedings, too, it remains contested.

165. The resulting uncertainty is of particular significance in the present case. Neither Directive 92/50 nor Directive 2004/18 precludes contracting authorities from splitting their procurement requirements for services. Such splitting may be regarded as contrary to the directives only where this is effected with the intention of avoiding their application. (79) Consequently, what is prohibited is an artificial split of a single contract. Although the Court is decidedly strict in its examination of that prohibition, (80) such intention to circumvent cannot be presumed without more. Each individual case in which a contract was split for the purposes of an award must be examined according to its context and specificities and, in that regard, particular attention must be given to whether there are good reasons pointing in favour of or, on the contrary, against the split in question.

166. In that connection, it is evident from the case-file that in a set of questions of 30 January 2007 addressed to the German Government (81) the Commission itself stated that, as a result of earlier answers given by the Federal Republic of Germany, it deduced that local authority employers concluded public contracts with different groups of insurers. Against that background, in its set of questions the Commission inquired, inter alia, whether between an employer and service provider, generally speaking, framework agreements covering all employees or, instead, individual contracts for each employee were concluded. In addition, it requested information on whether there were employers which had concluded contracts with several different service providers.

167. In its reply of 1 March 2007, the Federal Republic of Germany clarified that there are different approaches to the implementation of conversion of earnings; there are cases in which individual contracts are concluded in respect of each worker and also the conclusion of framework agreements between an employer and one or more provider. In that regard, according to the Federal Republic of Germany, an employer is not obliged by reason of the collective agreement to opt for one of the three implementation methods. It may offer its employees different implementation methods. In practice, according to the Federal Republic of Germany, it is not uncommon for employers to conclude framework contracts with several different providers. (82)

168. Notwithstanding that clear answer that the arrangements for the conversion of earnings by local authority employers can differ considerably, without further questioning, the Commission commenced proceedings. In the framework of the judicial proceedings, it has subsequently remained unresolved whether and, if so, which German cities have concluded framework agreements with several pension scheme providers. Also unresolved has remained the question whether, taking account of the specific circumstances applying to the case of each city and its employees, good substantive reasons pointed in favour of, or, on the contrary, against the conclusion of several framework agreements with different pension scheme providers.

169. In determining whether the Federal Republic of Germany is proven to have infringed the directives, ultimately, in the present proceedings, the decisive issue is which party is responsible for the uncertainty whether, and, if so, the grounds on which, the largest cities in Germany with the exception of Berlin concluded framework agreements with several pension scheme providers. If that uncertainty must be attributed to the defective adduction of evidence on the part of the Commission, it has failed to satisfy the burden of proof imposed on it and the action must be dismissed as insufficiently substantiated. However, if that uncertainty must be attributed to a failure to cooperate by the Federal Republic of Germany in the proper investigation of the facts, the action must be held to be sufficiently substantiated and, consequently, also well founded.

170. Having regard to the particular circumstances of the case, in my view, that uncertainty must be attributed to a defective adduction of evidence on the part of the Commission.

171. In that regard, I wish to stress that by its action the Commission originally sought a declaration that by reason of the fact that the 110 largest German cities have concluded directly with the bodies and undertakings mentioned in Paragraph 6 of the TV-EUmw/VKA framework agreements on conversion of earnings, the Federal Republic of Germany has failed to fulfil its obligations under Directives 92/50 and 2004/18. Already in the pre-litigation procedure the Federal Republic of Germany countered that argument by stating that it was common practice for cities and municipalities to conclude framework agreements with several pension scheme providers and that, therefore, it was necessary to differentiate in the calculation whether the thresholds were satisfied. However, the Commission ignored such statement and, without requesting the Federal Republic of Germany to provide further clarification, commenced proceedings.

172. Having regard to the complexity of the present proceedings raising a multiplicity of legal and factual questions, the Federal Republic of Germany cannot be criticised for the fact that neither in the pre-litigation procedure nor in the judicial proceedings has it provided of its own accord a summary of all the framework agreements concluded by Germany's largest cities and explained the background thereto. Having regard to the multiplicity of unresolved legal and factual questions which characterise the present proceedings in which the Commission questioned the award practice of over 100 German cities throughout the *Bundesländer*, in the pre-litigation procedure the German Government was obliged, first, to highlight in general terms the factual omissions in the Commission's account. In my view, the Commission should have taken those observations of the German Government as grounds for resolving the factual omissions by way of detailed questions. Instead, the Commission commenced proceedings prematurely and, as a result, in the judicial phase the German Government considered itself obliged, first, on a factual level to contradict in substance the statistical data of the Commission. Here, too, I cannot discern any grounds why the Federal Republic of Germany should be blamed for the fact that the Court has not been provided with any explanation whether, and, if so, on what grounds, the cities in question concluded framework agreements with several pension scheme providers.

173. In summary, it must be concluded, therefore, that the Commission has not adduced proof that the estimated value of the framework agreements at issue satisfies the relevant threshold for the application of Directives 92/50 and 2004/18. Against that background, the Commission's action must be dismissed as insufficiently substantiated and, thus, unfounded.

3. Interim conclusion

174. In the light of my observations above, I conclude that the Commission has not adduced proof that by reason of the fact that local authorities and local authority undertakings awarded directly to the bodies and undertakings mentioned in Paragraph 6 of the TV-EUmw/VKA service contracts concerning occupational old-age pensions the Federal Republic of Germany has failed to fulfil its obligations under Directives 92/50 and 2004/18.

C – *In the alternative: resolution of a conflict between the procurement directives and the fundamental rights to bargain collectively and to autonomy in collective bargaining*

175. If, contrary to the view taken here, the Court concludes that the Commission has adduced proof that one or more local authority or local authority undertaking awarded directly to bodies and undertakings mentioned in Paragraph 6 of the TV-EUmw/VKA service contracts concerning occupational old-age pensions in contravention of Directive 92/50 or Directive 2004/18, it must be examined, in addition, whether, in the light of the fundamental rights to bargain collectively and to autonomy in collective bargaining, that incompatibility of the framework agreements concerned vis-à-vis the procurement directives must be regarded as contrary to Community law.

176. In that regard, it must be noted, first, that the preliminary selection made in the TV-EUmw/VKA in favour of certain pension scheme providers with which conversion of earnings must be implemented is of a restrictive nature. According to Paragraph 6 of that collective agreement, in principle, conversion of earnings may be implemented only with public bodies offering supplementary pensions, savings banks or local authority insurance companies. As a result of those requirements established by

collective agreement, local authorities are restricted in their ultimate choice of a pension scheme provider such that they can no longer freely call for tenders for a framework agreement on the conversion of earnings without also infringing the collective agreement.

177. Thus, a conflict exists between the fundamental rights to bargain collectively and to autonomy in collective bargaining and Directives 92/50 and 2004/18. As those procurement directives give effect to freedom of establishment and to freedom to provide services, that conflict must be resolved first at a primary law level treating the conflict as one between the fundamental rights to bargain collectively and to autonomy in collective bargaining, on the one hand, and freedom of establishment and to provide services, on the other. Subsequently, that resolution achieved at a primary law level must implemented at the level of secondary law through an interpretation of the procurement directives in accordance with primary law.

178. Against that background, in the following section, first, I shall address the question of the criteria and yardsticks according to which a conflict between fundamental freedoms and fundamental rights must be resolved. On the basis of those criteria and yardsticks, I shall subsequently demonstrate how a conflict between freedom of establishment and freedom to provide services and the fundamental rights to bargain collectively and to autonomy in collective bargaining may be resolved in the present case. That examination allows finally for a determination whether or not the incompatibility of the framework agreements concerned vis-à-vis Directives 92/50 and 2004/18, taking account of the obligation to interpret those directives in line with primary law, permits a finding that the directives have been infringed.

1. Resolution of conflicts between fundamental freedoms and fundamental rights: *Viking Line* and *Laval un Partneri*

179. In its recent case-law, the Court tends to resolve conflicts between the exercise of fundamental rights and fundamental freedoms by reference to the ‘written’ grounds included in the EC Treaty and the ‘unwritten’ grounds recognised in case-law justifying a restriction on fundamental freedoms.

180. Exemplary in that regard is the judgment in *Viking Line*. (83) In those proceedings for a preliminary ruling, the Court was required to rule, inter alia, whether a restriction on freedom of establishment resulting from collective action initiated by trade unions against a private undertaking was permitted. In that regard, the Court held, first, that although the right to take collective action, including the right to strike, must be recognised as a fundamental right, (84) the collective action at issue had to be regarded in formal terms as a restriction on freedom of establishment. (85) Then, the Court turned to the question of justification for that restriction. In so doing, it stressed, first, the ‘unwritten’ justification of ‘overriding reasons in the public interest’, according to which a restriction on freedom of establishment may be accepted if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest on condition that the restriction also must be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it. (86) Then the Court confirmed that protection of workers counts as one of the overriding reasons in the public interest recognised by the Court, (87) subject to the proviso that, naturally, it was for the national court to ascertain whether the objectives pursued by means of the collective action concerned the protection of workers. (88) If that were the case, the national court would then have to ascertain if the collective action at issue was suitable for ensuring the attainment of the objective pursued and did not go beyond what was necessary to attain that objective. (89)

181. Although in the framework of analysing the justification for restrictions on freedom of establishment the Court referred also to the tasks and objectives of the Community in the social policy sphere, (90) ultimately, it did not examine whether, having regard to the principle of proportionality, the exercise as such of the fundamental social right to take collective action was apt to justify a restriction on freedom of establishment. Instead, it subsumed the fundamental social right to take collective action within the traditional scheme of analysis of the unwritten justification of ‘overriding reasons in the public interest’. (91) In that regard, particular emphasis was placed on the notion – inherent in that fundamental right – of protection of workers which had already been recognised in consistent case-law as an overriding reason in the public interest. (92)

182. A similar scheme of analysis was employed by the Court in *Laval un Partneri*, (93) in which, first, it recognised the right to take collective action as a fundamental right; in the subsequent analysis of justification for the impairment of the freedom to provide services arising in the scope of the collective action, however, it again made reference to the protection of workers as an overriding reason in the public interest.

2. Equal ranking for fundamental rights and fundamental freedoms and resolution of conflicts on the basis of the principle of proportionality

183. The approach adopted in *Viking Line* and *Laval un Partneri*, according to which Community fundamental social rights as such may not justify – having due regard to the principle of proportionality – a restriction on a fundamental freedom but that a written or unwritten ground of justification incorporated within that fundamental right must, in addition, always be found, sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms.

184. Such an analytical approach suggests, in fact, the existence of a hierarchical relationship between fundamental freedoms and fundamental rights in which fundamental rights are subordinated to fundamental freedoms (94) and, consequently, may restrict fundamental freedoms only with the assistance of a written or unwritten ground of justification. (95)

185. In that connection, it must be noted also that the unwritten justification of 'overriding reasons in the public interest' may not apply to justify discriminatory restrictions on fundamental freedoms. (96) Consequently, if the exercise of a fundamental Community right results in a discriminatory restriction on a fundamental freedom, under the scheme of analysis adopted in *Viking Line* and *Laval un Partneri*, it would have to be examined whether an express justification for restrictions on the fundamental freedom concerned established in the EC Treaty applies. That additional limitation on the possibility to justify a restriction on the fundamental freedoms would accentuate the existence of a hierarchical relationship between fundamental rights and fundamental freedoms.

186. In my view, there is no such hierarchical relationship between fundamental freedoms and fundamental rights. (97)

187. In addition, the relationship between fundamental freedoms and fundamental rights is characterised by a broad convergence both in terms of structure and content. Thus, it is possible, for example, to formulate the substantive guarantee inherent in fundamental freedoms in terms of fundamental rights, in particular, using fundamental rights which protect economic activity. In the light of that convergence, it would be a mistake to seek to construct a generally conflictual or hierarchical relationship between fundamental rights and fundamental freedoms. (98)

188. Therefore, if in an individual case, as a result of exercising a fundamental right, a fundamental freedom is restricted, a fair balance between both of those legal positions must be sought. (99) In that regard, it must be presumed that the realisation of a fundamental freedom constitutes a legitimate objective which may limit a fundamental right. Conversely, however, the realisation of a fundamental right must be recognised also as a legitimate objective which may restrict a fundamental freedom.

189. For the purposes of drawing an exact boundary between fundamental freedoms and fundamental rights, the principle of proportionality is of particular importance. In that context, for the purposes of evaluating proportionality, in particular, a three-stage scheme of analysis must be deployed where (1) the appropriateness, (2) the necessity and (3) the reasonableness of the measure in question must be reviewed. (100)

190. A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom. (101)

191. Having regard to the broad convergence between fundamental freedoms and fundamental rights, in the event of a conflict, only this analysis based on the principle of proportionality is capable of

producing an outcome which ensures the optimum effectiveness of fundamental rights and fundamental freedoms.

192. In the light of my observations above, I conclude that a restriction on a fundamental freedom must be regarded as justified if that restriction arose in the exercise of a Community fundamental right and was appropriate, necessary and reasonable for the attainment of the interests protected by that fundamental right. Conversely, a restriction on a fundamental right must be regarded also as justified if that restriction arose in the exercise of a fundamental freedom and was appropriate, necessary and reasonable for the attainment of the interests protected by that fundamental freedom.

193. Moreover, confirmation of this approach characterised by an equal ranking of fundamental rights and fundamental freedoms in which the principle of proportionality serves as the basis for the resolution of conflicts between the exercise of fundamental freedoms and the exercise of fundamental rights would not constitute a fundamental reorientation in the case-law. Instead, this analysis implies a return to the values already inherent in *Schmidberger*. (102) In addition, in *Rüffert* (103) one can detect the first signs of a need to qualify the approach taken in *Viking Line* and *Laval un Partneri*.

194. In *Schmidberger*, on a reference for a preliminary ruling, the Court had to rule, inter alia, whether a restriction on the free movement of goods resulting from a 30-hour blockade of the Brenner motorway could be justified having regard to the fact that such blockade constituted the legitimate exercise of the fundamental rights to freedom of expression and freedom of assembly. In order to resolve that conflict between the fundamental rights at issue and the free movement of goods, in essence, the Court examined whether the impairments to intra-Community trade arising through the exercise of fundamental rights were proportionate to the protection of those rights. (104) Conversely, it was examined also whether strict enforcement of the free movement of goods would have resulted in an excessive interference in the exercise of the fundamental rights. (105) As both questions were answered in the affirmative, the restriction on the free movement of goods arising through the exercise of the fundamental rights at issue, ultimately, had to be regarded as justified.

195. Accordingly, central to *Schmidberger* was the idea of equal ranking for conflicting fundamental rights and fundamental freedoms which, ultimately, by an examination of the proportionality of the opposing restrictions in question, were brought fairly into balance.

196. At this point, finally, *Rüffert* (106) should not go unmentioned, in which on a reference for a preliminary ruling the Court ruled, inter alia, on the compatibility with Article 49 EC of the Niedersächsisches Landesvergabegesetz (Law of Land Niedersachsen on the award of public contracts).

197. In that regard, the Court held, first, that requirements established by that law obliging contracting authorities to designate as contractors for public works contracts only contractors which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the wage provided for in the collective agreement in force at the place where those services are performed, even where that collective agreement is not capable of being treated as universally applicable, are capable of constituting a restriction within the meaning of Article 49 EC. In the framework of its examination whether such restriction could be considered to be justified, the Court examined subsequently three ‘unwritten’ grounds of justification. In particular, it was examined whether the restriction could be justified (1) by the objective of ensuring the protection of workers, (2) by the objective of ensuring protection for independence in the organisation of working life by trade unions, or (3) by the objective of ensuring the financial stability of social security systems.

198. Although, ultimately, the Court held the restriction on the freedom to provide services not to be justified, above all, the examination of justification from the perspective of ensuring ‘protection for independence in the organisation of working life by trade unions’ appears to me to be particularly important. Whilst in the concepts of the ‘objective of ensuring protection of workers’ and the ‘objective of ensuring the financial stability of social security systems’ reference was had to two overriding reasons in the public interest recognised in settled case-law, (107) in examining the ‘protection for independence in the organisation of working life by trade unions’ the Court considered, at least, implicitly, the possibility that the fundamental social right to freedom of association, in itself, could justify a restriction on fundamental freedoms.

199. In the light of the foregoing, I conclude that a restriction on a fundamental freedom is justified, when that restriction arose in the exercise of a fundamental right and was appropriate, necessary and reasonable for the attainment of interests protected by that fundamental right. As a mirror image thereof, a restriction on a fundamental right is justified, when that restriction arose in the exercise of a fundamental freedom and was appropriate, necessary and reasonable for the attainment of interests protected by that fundamental freedom.

3. Resolution of the conflict between Directives 92/50 and 2004/18 and the fundamental rights to bargain collectively and to autonomy in collective bargaining

200. If the Court were to conclude that one or more local authority or local authority undertaking awarded directly to bodies and undertakings mentioned in Paragraph 6 of the TV-EUmw/VKA service contracts concerning occupational old-age pensions contrary to the provisions of Directive 92/50 or Directive 2004/18, it would be clear that, in formal terms, those procurement directives preclude the manner in which, in fact, the fundamental rights to bargain collectively and to autonomy in collective bargaining were exercised. In that sense, there would be an impairment of those fundamental social rights as a result of the procurement directives because the social partners would no longer be capable of freely exercising those fundamental social rights but would be tied – from a procurement law perspective – to certain requirements.

201. The conflict thus produced between Directives 92/50 and 2004/18 and those fundamental social rights must be resolved, first, in examining at the level of primary law whether freedom of establishment and freedom to provide services allow for such a restriction of those fundamental social rights. If that question must be answered in the affirmative, there is nothing to preclude the finding that the framework agreements in question contravene Directives 92/50 and 2004/18 which give effect to freedom of establishment and freedom to provide services. If, however, that question must be answered in the negative, it would have to be ensured through an interpretation of those directives in conformity with primary law that the framework agreements in question fall outside the scope of Directives 92/50 and 2004/18.

202. For the purposes of ascertaining whether freedom of establishment and freedom to provide services allow for such restriction on the fundamental rights to bargain collectively and to autonomy in collective bargaining as is provided for in the procurement directives, in principle, it must be examined whether in order to attain the objectives pursued by the fundamental freedoms such a restriction is appropriate, necessary and reasonable.

203. However, in the present proceedings, the German Government advanced, above all, arguments seeking to justify a restriction on freedom of establishment and freedom to provide services by fundamental social rights.

204. The assessment of whether freedom of establishment and freedom to provide services may justify a restriction on the fundamental rights to bargain collectively and to autonomy in collective bargaining constitutes, ultimately, the mirror image of the assessment of whether those fundamental social rights may justify a restriction on freedom of establishment and freedom to provide services. As the latter option for analysis facilitates a thorough evaluation of the arguments advanced by the German Government, in the following section I will examine whether for the attainment of the objectives pursued by the fundamental rights to bargain collectively and to autonomy in collective bargaining it was necessary to restrict fundamental freedoms in the manner contested by the Commission.

205. By their nature, the fundamental rights to bargain collectively and to autonomy in collective bargaining are intended to ensure that employers or employers' organisations, on the one hand, and workers' organisations, on the other, in the framework of voluntary negotiations and in complete independence, respecting certain limits and requirements, may negotiate and subsequently record in an appropriate form workers' terms and conditions of employment. (108)

206. Thus, having regard to the principle of proportionality, the restriction on freedom of establishment and freedom to provide services arising as a result of the preliminary selection in Paragraph 6 of the TV-EUmw/VKA in favour of certain pension scheme providers would have to be considered justified by the fundamental rights to bargain collectively and to autonomy in collective bargaining, if that

preliminary selection of pension scheme providers was appropriate and necessary to permit voluntary and independent negotiations on terms and conditions of employment with a view to the conclusion of a collective agreement and the infringement of fundamental freedoms thereby occasioned was proportionate to the attainment of those objectives.

207. A measure is *appropriate* to ensuring the attainment of the objective in question if it genuinely reflects a concern to attain it in a consistent and systematic manner. (109)

208. Having regard to the fact that the principle of concentrating the conversion of earnings to a limited number of pension scheme providers was incorporated in the TV-EUmw/VKA, it must be presumed that such principle constitutes part of a compromise reached in the framework of voluntary and independent negotiations between the representatives of employers and those of workers. At any rate, the case-file does not include any information to permit an alternative conclusion. Against that background, the preliminary selection in Paragraph 6 of the TV-EUmw/VKA in favour of certain pension scheme providers must be considered a measure which is appropriate to ensure the attainment of the interests protected by the fundamental rights to bargain collectively and to autonomy in collective bargaining.

209. A measure is *necessary* if, from among several measures which are appropriate for meeting the objective pursued, it is the least onerous for the interest or legal right in question. (110)

210. Having regard to the peculiarities of the present case, evaluation of the necessity of the preliminary selection in Paragraph 6 of the TV-EUmw/VKA in favour of certain pension scheme providers logically presupposes the verification of whether, in the framework of collective bargaining, an alternative consensus on the implementation of conversion of earnings could conceivably have been achieved. Only if the social partners could have achieved an alternative consensus, conforming more closely to Community law, could the preliminary selection at issue in favour of certain pension scheme providers be rejected as unnecessary.

211. In answering the question whether in the framework of voluntary and independent negotiations the social partners could have achieved an alternative consensus on the implementation of conversion of earnings, the Court must proceed with great caution. Although for the purposes of resolving a conflict between fundamental freedoms and the fundamental rights to bargain collectively and to autonomy in collective bargaining an examination of the substance of collective agreements may – as in the present case – also be required, in that regard, the Court must respect as far as possible the social partners' scope for assessment and action. (111)

212. Thus, in the present case, the assessment of necessity must be limited to evaluating whether an implementation measure, conforming more closely to Community law, could have been achieved and if the social partners could have achieved such evident consensus on that measure that no substantive arguments would have countered its adoption. Should those questions be answered in the affirmative, the preliminary selection in Paragraph 6 of the TV-EUmw/VKA in favour of certain pension scheme providers would have to be rejected as unnecessary and, thus, disproportionate.

213. In my view, it would have been possible without more to have structured the agreements on the implementation of conversion of earnings in conformity with Community law.

214. In that connection, it must be stressed that the action brought by the Commission does not contest the principle of conversion of earnings in itself but simply the fact that the collective agreement imposes on local authority employers a selection of pension scheme providers for the purposes of implementing the conversion of earnings notwithstanding the fact – assuming that the procurement directives apply – that such employers in their capacity as contracting authorities are required, in accordance with those directives, to launch an invitation to tender.

215. In those circumstances, it is possible to conceive of an alternative scheme compliant with Community law in which, within the framework of the implementation methods provided for the BetrAVG, conversion of earnings would have to be implemented through one or more pension scheme providers selected by local authority employers in accordance with the primary law obligation of

transparency (112) or, where the conditions for their application are satisfied, with the procurement law directives.

216. The question whether in the present proceedings substantive arguments have been advanced to counter such a provision of a collective agreement on the implementation of conversion of earnings in conformity with Community law must, in my view, be answered in the negative.

217. For the purposes of justifying the preliminary selection in Paragraph 6 of the TV-EUmw/VKA in favour of certain pension scheme providers, the German Government stresses that under the BetrAVG it is, in principle, for the employer to select the pension scheme provider to implement the conversion of earnings not based on a collective agreement. By way of derogation, in relation to earnings based on a collective agreement, Paragraph 17(5) of the BetrAVG provides that conversion of such necessitates a collectively agreed scheme, thereby ensuring, in the view of the German Government, in particular, that workers are granted a greater influence over the arrangements for their occupational old-age pensions. In that regard, Paragraph 17(3) of the BetrAVG grants to the social partners the possibility, inter alia, to determine by mutual agreement the selection of the pension scheme provider for the purposes of implementing the conversion of earnings based on a collective agreement, as has been effected, in fact, in Paragraph 6 of the TV-EUmw/VKA. That preliminary selection, reached by common accord, in favour of certain pension scheme providers serves, in the view of the German Government, both the interests of workers in the establishment of a transparent scheme for the implementation of conversion of earnings and the interests of employers in an old-age pension scheme which requires little administrative effort. Ultimately, so they argue, shifting that decision into the realm of the social partners thereby contributes to ensuring the broadest possible acceptance and take-up of that form of occupational old-age pension.

218. In addition, the German Government argues that, according to the view of the social partners, limiting the pool from which an employer may select providers for the conversion of earnings is intended to improve the transparency and popularity of supplementary occupational old-age pensions. Moreover, Paragraph 6 of the TV-EUmw/VKA simplifies matters for an individual employer as a comparison between pension scheme providers is no longer necessarily required. In addition, argues the German Government, an individual local authority employer may presume that the social partners' selection of pension scheme providers was not arbitrary and that, as a rule, the social partners had a better overview of the market situation. Conversely, workers could rely on the fact that in the selection of pension scheme providers the trade unions adequately represented their interests. Accordingly, so the German Government argues, Paragraph 6 of the TV-EUmw/VKA protects workers against an 'unsatisfactory' and unilateral selection by the employer of the pension scheme provider.

219. As specific justification for the selection made in Paragraph 6 of the TV-EUmw/VKA in favour of public bodies offering supplementary pensions, the Sparkassen finance group and local authority insurance companies, the German Government argues, in addition, that these were nominated for good reasons such as, for example, positive experience, particular confidence and reduced administrative costs resulting from the particular structure of those pension scheme providers. In addition, the employers' interest in limiting the risk of their liability for default also influenced that decision.

220. In the light of those observations, the substantive arguments advanced by the German Government in justification of the scheme provided for in Paragraph 6 of the TV-EUmw/VKA may be summarised in four categories, that is (1) transparency in the selection of pension scheme providers, (2) greater acceptance amongst workers as a result of the participation of worker representatives in the preliminary selection in favour of certain pension scheme providers, (3) the greater expertise of the parties involved in negotiating the collective agreement and (4) particular characteristics of the chosen pension scheme providers.

221. Those arguments are, however, wholly unsuited to be invoked as substantive grounds with which to counter the adoption by collective agreement of an implementation scheme in conformity with Community law in which individual local authority employers must select pension scheme providers in accordance with the primary law requirement of transparency or, where the conditions for their application are satisfied, with the procurement law directives.

222. The argument concerning the transparency of the choice of the pension scheme providers does not point against but in favour of an obligation on local authority employers to respect Community law requirements. The primary law obligation of transparency and the procurement directives are intended precisely to ensure sufficient transparency in the selection of the pension scheme providers with which conversion of earnings must be effected.

223. Nor does the argument of greater interest amongst workers resulting from the participation of worker representatives in the preliminary selection in favour of certain pension scheme providers imply a substantive reason opposing an implementation scheme in conformity with Community law. In fact, the obligation to respect the primary law obligation of transparency and the procurement law directives would trigger more intensive Community-scale competition between pension scheme providers and, hence, would constitute a particular guarantee that, ultimately, the most advantageous scheme for the implementation of conversion of earnings would be offered to workers. It is not apparent how this could result in a reduced level of interest amongst workers. (113)

224. The third main argument of the German Government concerns local authority employers for which the preliminary selection in Paragraph 6 of the TV-EUmw/VKA simplifies the ultimate decision in favour of one or more pension scheme provider and, in that regard, allows those employers to rely also on the expertise of the social partners.

225. Even if, as a result of the preliminary selection established in Paragraph 6 of the TV-EUmw/VKA, local authority employers are spared, in fact, the task of launching a separate invitation to tender, that does not constitute a reliable argument with which to counter an obligation to respect the primary law obligation of transparency and the procurement directives. Even if, as a result of the obligation to respect Community law, employers were less interested in the determination of a collectively agreed scheme for the implementation of conversion of earnings – an argument not advanced by the German Government – that could not be invoked as substantive grounds on which to oppose the determination of such obligation by way of collective agreement. Such an argument, in fact, would result in the situation that local authority employers could exploit the right to autonomy in collective bargaining in order to circumvent mandatory requirements of Community law.

226. By its fourth main argument, the German Government refers finally to special features of the selected pension scheme providers. In its view, factors in favour of the selection of those pension scheme providers are, in particular, the positive experiences had with those bodies, the particular confidence thereby resulting, low administrative costs deriving from their particular structure and the reduced risk of default. However, the German Government has in no way substantiated those arguments such that for that reason alone they must be rejected as unfounded. (114)

227. In the light of those observations, I conclude that the restriction on pension scheme providers established in Paragraph 6 of the TV-EUmw/VKA was unnecessary to facilitate voluntary and independent negotiations between the social partners on terms and conditions of employment with a view to the conclusion of a collective agreement.

228. In addition, the preliminary selection adopted by the social partners in Paragraph 6 of the TV-EUmw/VKA in favour of certain pension scheme providers results, in my view, in an unreasonable restriction on fundamental freedoms.

229. In the context of the *assessment of reasonableness* in the present case, it must be observed in particular that the action brought by the Commission does not contest the principle of conversion of earnings in itself but simply the fact that for local authority employers collective agreement prescribes their choice of pension scheme provider for the implementation of conversion of earnings notwithstanding the fact that such employers, in their capacity as contracting authorities, must respect the requirements resulting from the principles of freedom of establishment and freedom to provide services.

230. Consequently, the present proceedings do not concern the fundamental decision taken by collective agreement to allow for conversion of earnings but the seemingly technical question – from the point of view of the law on collective agreements – of how to select the pension scheme providers with which conversion of earnings must be implemented. However, in adopting the preliminary

selection of Paragraph 6 of the TV-EUmw/VKA in regulation of that seemingly technical question, the social partners have attempted to exclude in their entirety the requirements resulting from the principles of freedom of establishment and freedom to provide services.

231. Having regard to the fact that the requirements included in Paragraph 6 of the TV-EUmw/VKA must be regarded as technical implementing provisions hardly touching on terms and conditions of employment whilst at the same time their effect is to exclude in their entirety the requirements resulting from the principles of freedom of establishment and freedom to provide services, the restriction on the fundamental freedoms resulting from Paragraph 6 of the TV-EUmw/VKA must be categorised as unreasonable. (115)

232. Thus, in the light of the foregoing, it must be concluded that the preliminary selection of pension scheme providers in Paragraph 6 of the TV-EUmw/VKA was neither necessary nor reasonable for ensuring the attainment of the objectives protected by the fundamental rights to bargain collectively and to autonomy in collective bargaining.

233. In the light of those considerations, I conclude that the fundamental rights to bargain collectively and to autonomy in collective bargaining are incapable of justifying the restriction on freedom of establishment and freedom to provide services resulting from the preliminary selection adopted by the social partners in Paragraph 6 of the TV-EUmw/VKA in favour of certain pension scheme providers because such restriction is not proportionate. Consequently, nor do those fundamental rights preclude the finding that the framework agreements in question concluded in implementation of that collective agreement may infringe Directives 92/50 and 2004/18.

4. Interim conclusion

234. If, contrary to the view I have taken, the Court concludes that in concluding framework agreements on the conversion of earnings with one or more of the bodies and undertakings mentioned in Paragraph 6 of the TV-EUmw/VKA one or more local authority or local authority undertaking contravened Directive 92/50 or Directive 2004/18, it would have to be presumed, having regard to the above analysis, that, owing to an absence of proportionality, the fundamental rights to bargain collectively and to autonomy in collective bargaining do not preclude a finding of such an infringement of those directives.

VIII – Summary

235. In summary, I conclude that in concluding the framework agreements in question on occupational pension provision for their employees German local authorities were obliged to respect the provisions of Directive 92/50 or Directive 2004/18 to the extent that the material and personal requirements of those directives were satisfied. However, it is incumbent on the Commission to prove that the scope of the procurement directives was triggered and, in doing so, it may not rely on presumptions.

236. For the purposes of reaching a decision in the present proceedings, ultimately, the crucial fact is that in its calculations on the value of each individual framework agreement and on meeting the relevant thresholds for the application of the procurement directives the Commission relied on the presumption that each city of a certain size concluded only one framework agreement. As already in the pre-litigation procedure the German Government contested the correctness of that presumption and, in that connection, it cannot be alleged in any way that it failed to cooperate in the proper investigation of the facts, ultimately, the Commission's action must be dismissed as insufficiently substantiated and, thus, unfounded.

IX – Conclusion

237. In the light of the foregoing conclusions, I propose that the Court should:

(1) dismiss the action;

(2) order the Commission to pay the costs, with the exception of the costs incurred by the Kingdom of Denmark and the Kingdom of Sweden. The Kingdom of Denmark and the Kingdom of

Sweden shall pay their own costs.

---

1 – Original language: German.

---

2 – OJ 1992 L 209, p. 1.

---

3 – OJ 2006 L 134, p. 114.

---

4 – BGBl. I, p. 3610, last amended by Article 5 of the Law of 21 December 2008 (BGBl. I, p. 2940).

---

5 – Case C-67/96 [1999] ECR I-5751.

---

6 – Case C-222/98 [2000] ECR I-7111.

---

7 – Cited above in footnote 5.

---

8 – Joined Cases C-115/97 to C-117/97 [1999] ECR I-6025.

---

9 – Case C-219/97 [1999] ECR I-6121.

---

10 – *Albany*, cited above in footnote 5 paragraph 54; *Brentjens'*, cited above in footnote 8, paragraph 51; and *Drijvende Bokken*, cited above in footnote 9, paragraph 41.

---

11 – *Albany*, cited above in footnote 5, paragraphs 55 to 58; *Brentjens'*, cited above in footnote 8, paragraphs 52 to 55; and *Drijvende Bokken*, cited above in footnote 9, paragraphs 42 to 45.

---

12 – *Albany*, cited above in footnote 5, paragraph 59; *Brentjens'*, cited above in footnote 8, paragraph 56; and *Drijvende Bokken*, cited above in footnote 9, paragraph 46.

---

13 – *Albany*, cited above in footnote 5, paragraph 60, *Brentjens'*, cited above in footnote 8, paragraph 57, und *Drijvende Bokken*, cited above in footnote 9, paragraph 47.

---

14 – See Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 67 et seq., in which the Court emphasised that the exclusion of collective agreements from the scope of Article 81(1) EC cannot be extended to an agreement which, whilst being intended to guarantee a certain level of pension to all the members of a profession and thus to improve one aspect of their working conditions, namely their remuneration, is not concluded in the context of collective bargaining between employers and workers.

---

15 – Expressly confirmed in *Van der Woude*, cited above in footnote 6, paragraph 22 et seq.

---

16 – In the same vein, see Aicher, J. and Schumacher, F., in Grabitz, E. and Hilf, M., *Das Recht der Europäischen Union*, Volume II, Article 81 EC, point 28 (40th update: October 2009).

---

17 – Cited above in footnote6.

---

18 – This substantive control of collective agreements was proposed by Advocate General Jacobs in his Joined Opinion in Case C-67/96 *Albany*, Joined Cases C-115/97 to C-117/97 *Brentjens'* and Case C-219/97 *Drijvende Bokken* [1999] ECR I-5751, point 190 et seq., to avoid collective negotiations being used as a framework for agreements between employers with seriously anti-competitive effects on third parties or third markets. According to Advocate General Jacobs, the outcome of collective negotiations should be regarded as falling outside the scope of competition rules only if (1) the agreement was made in the formal framework of collective bargaining and (2) was concluded by the social partners in good faith. In addition, as a third criterion, Advocate General Jacobs proposed that collective agreements must deal with the core subjects of collective bargaining such as wages and working conditions and not directly affect third parties or markets.

---

19 – In that connection, it should be especially observed that the virtual absence of any substantive examination of the provisions of the collective agreements concerned has to be viewed in the context of the Court's subsequent assessment of whether the pension funds mentioned by the social partners constituted undertakings for the purposes of Article 81 EC. Given the Court's ultimate finding in *Albany*, *Brentjens'* and *Drijvende Bokken* that those funds displayed the characteristics of undertakings, that allowed for a separate assessment of the anti-competitive effects resulting from the funds concerned. In so doing, ultimately, this qualified the limitation on the scope of competition law in relation to the collective agreements in question.

---

20 – Opinion of Advocate General Fennelly in Case C-222/98 *Van der Woude* [2000] ECR I-7111, point 32.

---

21 – See, to that effect, the Opinion of Advocate General Poiares Maduro in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779 ('*Viking Line*'), point 26.

---

22 – Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779 ('*Viking Line*'), paragraph 53, and Case C-519/04 P *Meca-Medina* [2006] ECR I-6991, paragraphs 31 to 34.

---

23 – See point 75 et seq. of this Opinion.

---

24 – See on that point also Novitz, T., 'Taking collective action', *Competition Law Insight* 2008, Volume 7(4), p. 10, who takes the view that non-application of the '*Albany* exclusion' in *Viking Line*, cited above in footnote 22, can be explained precisely by the Court's decision to recognise the right to take collective action as a fundamental social right. In the view of Azoulai, L., 'The Court of Justice and the social market economy: the emergence of an ideal and the conditions for its realisation', *CMLR* 2008, p. 1335, at p. 1347 et seq., there is, in fact, a fundamental difference between the relationship between fundamental freedoms and fundamental rights as expressed in *Albany* and that same relationship as expressed in *Viking Line*.

---

25 – *Viking Line*, cited above in footnote 22, paragraph 33; Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 31; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 82; and Case 36/74 *Walrave* [1974] ECR 1405, paragraph 17. See on that point Junker, A., 'Europa und das deutsche Tarifrecht – Was bewirkt der EuGH', *ZfA* 2009, p. 281, at p. 282 et seq.

---

26 – *Viking Line*, cited above in footnote 22, paragraph 34; *Angonese*, cited above in footnote 25, paragraph 33; *Bosman*, cited above in footnote 25, paragraph 84; and *Walrave*, cited above in footnote 25, paragraph 19.

---

27 – See, for example, Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 33, and Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71.

---

28 – Article 6 of the European Social Charter, adopted verbatim in Article 6 of the revised European Social Charter signed in Strasbourg on 3 May 1996, with a view to ensuring the effective exercise of the right to bargain collectively obliges the signatory parties, inter alia, to promote joint consultation between workers and employers and to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

---

29 – According to point 12 of the Community Charter of the Fundamental Social Rights of Workers, employers or employers' organisations, on the one hand, and workers' organisations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice.

---

30 – According to Article 28 of the Charter of Fundamental Rights of the European Union, workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

---

31 – On that point, see, for example, Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraphs 90 and 91, and *Viking Line*, cited above in footnote 22, paragraphs 43 and 44, in which having regard to its recognition in the European Social Charter, Convention No 87 of the International Labour Organisation concerning Freedom of Association and the Right to Organise, the Community Charter of the Fundamental Social Rights of Workers and the Charter of Fundamental Rights of the European Union, the right to take collective action, closely connected to the right to bargain collectively, was recognised as a fundamental right.

---

32 – On that point, see, for example, Schwarze, J., 'Der Reformvertrag von Lissabon – Wesentliche Elemente des Reformvertrags', *EuR* 2009 (Supplement No 1), p. 9, at p. 17, who points out, in my view, correctly, that the fact that Article 6 TEU includes simply a general reference to the charter is not relevant in legal terms and cannot be used as an argument to contest the incorporation of the Charter of Fundamental Rights in primary law. However, Protocol No 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom provides for a derogation for Poland and the United Kingdom.

---

33 – It is now settled case-law of the Court that protection of fundamental rights constitutes a legitimate interest which, in principle, justifies a restriction of the obligations imposed by a fundamental freedom guaranteed in primary law; see *Laval un Partneri*, cited above in footnote 31, paragraph 93; *Viking Line*, cited above in footnote 22, paragraph 45; *Omega*, cited above in footnote 27, paragraph 35; and *Schmidberger*, cited above in footnote 27, paragraph 74. However, that does not imply that acts which must be regarded as the exercise of a fundamental right, *eo ipso*, fall outside the scope of the fundamental freedoms. Instead, fundamental rights must be exercised, as far as possible, in accordance with the rights and freedoms protected by the Treaty, and, in that regard, every conflict between fundamental rights and obligations resulting from the fundamental freedoms must be resolved having regard to the specific features of the fundamental rights and fundamental freedoms concerned in accordance with the principle of proportionality. See point 183 et seq. of this Opinion.

---

34 – Case C-538/07 *Assitur* [2009] ECR I-4219, paragraph 25, and Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 2.

---

35 – Case C-305/08 *CoNISMa* [2009] ECR I-0000, paragraph 37, and the case-law cited therein.

36 – Case C-337/06 *Bayerischer Rundfunkand Others* [2007] ECR I-11173, paragraph 37; Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraph 43; and Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 11.

37 – See Marx, F. and Prieß, H., in Jestaedt, T., Kemper, K., Marx, F. and Prieß, H., *Das Recht der Auftragsvergabe*, Neuwied, 1999, pp. 16 and 17.

38 – See, for example, *Beentjes*, cited above in footnote 36, in which the Court approved the applicability of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) to the award of public contracts by a body not formally part of the State administration such as the 'local land consolidation committee'.

39 – See *Bayerischer Rundfunk and Others*, cited above in footnote 36, paragraph 38; *Commission* v *France*, cited above in footnote 36, paragraph 41; and Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16.

40 – *Bayerischer Rundfunk and Others*, cited above in footnote 36, paragraph 36; *Commission* v *France*, cited above in footnote 36, paragraph 42; and *University of Cambridge*, cited above in footnote 39, paragraph 17.

41 – Case C-44/96 *Mannesmann Anlagenbau Austria* [1998] ECR I-73, paragraph 42 et seq. On that issue, see also Bovis, C., 'Case C-44/96, *Mannesmann Anlagenbau Austria AG*', *CMLR* 1999, p. 205, at p. 212.

42 – On the other hand, if a contracting authority seeks in a capacity as a provider of services itself to exercise an independent economic activity subject to competition and in that connection enters into competition with private economic actors, the possibility cannot be precluded that its decision to subcontract a part of the activities to a particular third party is guided by considerations other than economic ones. Consequently, in such a case the procurement directives apply without limitation. See Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraph 16 et seq.

43 – On that issue, see the Opinion of Advocate General Léger in Case C-44/96 *Mannesmann Anlagenbau Austria* [1998] ECR I-73, point 46.

44 – Egger, A., *Europäisches Vergaberecht*, Baden-Baden, 2008, paragraph 416. See also Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraph 37 et seq.

45 – Case C-246/08 *Commission* v *Finland* [2009] ECR I-0000, paragraph 52; Case C-438/07 *Commission* v *Sweden* [2009] ECR I-0000, paragraph 49; and Case C-401/06 *Commission* v *Germany* [2007] ECR I-10609, paragraph 27.

46 – See, for example, Case 272/86 *Commission* v *Greece* [1988] ECR 4875, paragraph 21.

47 – Case C-79/94 [1995] ECR I-1071.

48 – OJ 1977 L 13, p. 1.

49 – Cited above in footnote 47.

---

50 – Article 1(5) of Directive 2004/18 paraphrases a framework agreement as ‘an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged’. Although that general formulation does not state directly that those framework agreements usually contain the terms for future contracts awarded by the contracting authority, it clearly follows from recital 11 in the preamble that the legislature started from that premiss.

---

51 – See point 94 of this Opinion.

---

52 – See point 97 of this Opinion.

---

53 – On that point, see Meyer, H., Janko, M. and Hinrichs, L, ‘Arbeitgeberseitige Gestaltungsmöglichkeiten bei der Entgeltumwandlung’, *DB* 2009, p. 1533, who highlight its funding by employees as a characteristic of the conversion of earnings scheme.

---

54 – See Dreher, M., in Immenga, U. and Mestmäcker, E.J., *Wettbewerbsrecht*, Volume 2, Munich, 4th edition 2007, § 99, points 20 and 21. The Community procurement rules incorporate, thus, a requirement which is mentioned expressly in Article 50 EC in the scope of freedom to provide services but which, ultimately, is inherent also in all other fundamental freedoms.

---

55 – *Commission* v *Germany*, cited above in footnote 42, paragraph 20.

---

56 – Case C-340/04 *Carbotermo and Consorzio Alisei* [2006] ECR I-4137, paragraph 63 et seq.

---

57 – See the argument advanced, in my view, correctly, by Dreher, M., cited above in footnote 54, § 99, point 21.

---

58 – To the same effect, see also Schmidt, J., ‘Betriebliche Altersvorsorge im öffentlichen Dienst durch private Versicherungsunternehmen’, *VersR.* 2007, p. 760, at p. 765, who argues, in my view, correctly, that in the case of conversion of earnings a teleological interpretation of the procurement directives points in favour of the application of procurement law. In addition, that author discusses the possibility to treat the fact that the employer introduces its employees to a pension scheme provider as supplying a pecuniary interest.

---

59 – On that point, see, in particular, the eighth recital in the preamble to Directive 92/50.

---

60 – Jochum, G., in Grabitz, E. and Hilf, M., *Das Recht der Europäischen Union*, Volume IV, Section B 7, point 53 (40th update: October 2009).

---

61 – Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-0000, paragraph 68; Case C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-5049, paragraph 27; and Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 31.

---

62 – The same conclusion is reached also by Jochum, G., cited above in footnote 60, point 53; Dreher, M., cited above in footnote 54, § 100, point 25; Bungenberg, M., in Loewenheim, U., Meessen, K. and

Riesenkampff, A., *Kartellrecht*, Volume 2 – GWB, Munich, 2006, § 100, point 20; and Schmidt, J., cited above in footnote 58, p. 766.

---

63 – See, for example, *von Chamier-Glisczinski*, cited above in footnote 61, paragraph 69; Case C-228/07 *Petersen* [2008] ECR I-6989, paragraph 45; and Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 17.

---

64 – On that point, see Article 9(2) of Directive 2004/18, according to which the estimate of the value of the public contract must be valid at the moment at which the contract notice is sent, as provided for in Article 35(2) or, in cases in which such notice is not required, at the moment at which the contracting authority commences the contract awarding procedure.

---

65 – From a survey of 18 November 2008 by the Arbeitsgemeinschaft Kommunale und Kirchliche Altersversorgung (AKA) e.V. of local authority providers of supplementary pensions concerning the conversion of earnings, the results of which are attached as Annex 2 to the rejoinder of the German Government, it follows that the average proportion of local authority workers who in 2003 had already exercised the option to convert earnings was 0.61%, each contributing by way of earnings conversion an average of EUR 61.28 monthly. That presupposes, naturally, that in 2003 local authority employers had concluded framework agreements with pension scheme providers.

---

66 – OJ 1997 L 328, p. 1.

---

67 – OJ 2004 L 326, p. 17.

---

68 – OJ 2005 L 333, p. 28.

---

69 – Point 34 of the Commission’s application of 19 June 2008.

---

70 – In its reply of 27 October 2008, the Commission appears, without further explanation, to have abandoned that position. In its reply, making reference to a threshold of EUR 236 000 for 2004/05, EUR 211 000 for 2006/07 and EUR 206 000 for 2007/08, the Commission reformulated and narrowed its action. At the hearing, in reply to questioning, the Commission conceded that in determining the threshold reference must be had to the date of each contract.

---

71 – See point 143 of this Opinion.

---

72 – See Article 9(2) and (9) of Directive 2004/18. On Directive 92/50, see Haak, S., ‘Abschluss von Rahmenvereinbarungen’, in Pitschas, R. and Ziekow, J. (eds), *Vergaberecht im Wandel*, Berlin, 2006, p. 99, at p. 102.

---

73 – See Haak, S., cited above in footnote 72, p. 103.

---

74 – Research by TNS Infratest Sozialforschung on behalf of the Federal Ministry of Labour and Social Affairs published on 22 June 2007 entitled ‘Situation und Entwicklung der betrieblichen Altersversorgung in Privatwirtschaft und öffentlichem Dienst 2001-2006. Endbericht mit Tabellen’, attached to the Commission’s application as Annex A-11.

---

75 – Kuhlmann, S., ‘Kommunen zwischen Staat und Markt: Lokalmodelle und -reformen im internationalen Vergleich’, *Deutsche Zeitschrift für Kommunalwissenschaft, Themenheft II/2006 ‘Kommunalpolitik und Kommunalverwaltung’*, attached to the Commission’s application as Annex A-12.

---

76 – Legal opinion of 25 November 2005 assessing Paragraph 6 of the Tarifvertrag zur Entgeltumwandlung für Arbeitnehmer/-innen im kommunalen öffentlichen Dienst (TV-EUmw/VKA) in the light of EU procurement law, compiled by Professor Koenig on behalf of the Arbeitsgemeinschaft Kommunale und Kirchliche Altersversorgung (AKA) e.V., Munich, attached to the Commission’s reply as Annex C-1.

---

77 – That percentage and mean contribution rate are determined by reference to a survey of 18 November 2008 by the Arbeitsgemeinschaft Kommunale und Kirchliche Altersversorgung (AKA) e.V. of local authority providers of supplementary pensions concerning the conversion of earnings, attached as Annex 2 to the rejoinder of the Federal Republic of Germany.

---

78 – According to the list of German cities attached as an annex to the Commission’s application, in 2006 there were 34 cities with a population in excess of 217 610 inhabitants. However, the parties are agreed that Germany’s largest city, Berlin, is excluded from the scope of the TV-EUmw/VKA.

---

79 – See Article 7(3) of Directive 92/50 and Article 9(3) of Directive 2004/18.

---

80 – See, for example, Case C-16/98 *Commission* v *France* [2000] ECR I-8315.

---

81 – Commission letter of 30 January 2007, attached to the application as Annex A-5.

---

82 – Communication by the Government of the Federal Republic of Germany to the Commission of the European Communities of 1 March 2007 (p. 9), attached to the Commission’s application as Annex A-6. In that communication, in the scope of its answer to the question on the criteria used in selecting the pension scheme providers mentioned in Paragraph 6 of the TV-EUmw/VKA (p. 8), the German Government stressed also that ‘to the extent that employers do not make available to their employees every implementation method’, a decision in favour of a pension scheme provider is based on the performance of the provider.

---

83 – Cited above in footnote 22.

---

84 – Ibid., paragraph 42 et seq.

---

85 – Ibid., paragraph 68 et seq.

---

86 – Ibid., paragraph 75.

---

87 – Ibid., paragraph 77.

---

88 – Ibid., paragraph 80.

---

89 – Ibid., paragraph 84.

---

90 – Ibid., paragraph 77 et seq.

---

91 – For a critical response, see Thomas, S., 'La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. Arrêt Viking', *Revue du droit de l'Union européenne* 2008, p. 193, at p. 199. On the same issue, see also Davies, A.C.L., 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', *Industrial Law Journal* 2008, p. 126, at pp. 141 and 142; Bücker, A., 'Die Rosella-Entscheidung des EuGH zu gewerkschaftlichen Maßnahmen gegen Standortverlagerungen: der Vorhang zu und viele Fragen offen', *NZA* 2008, p. 212, at pp. 215 and 216.

---

92 – On that issue, see Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33, and Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36. On the recognition of protection of workers as a concern of general interest, see also Eichenhofer, E., 'Dienstleistungsfreiheit und Arbeitnehmerschutz', *JZ* 2007, p. 425, at pp. 427 and 428.

---

93 – Cited above in footnote 31.

---

94 – See in that connection Rebhahn, R., 'Grundfreiheit vor Arbeitskampf – der Fall Viking', *ZESAR* 2008, p. 109, at p. 115, who in his analysis of *Viking Line* and *Laval un Partneri* concludes that for the Court of Justice fundamental freedoms, at any rate, in substance, have held hitherto a higher status than fundamental rights. See Vigneau, C., 'Encadrement par la Cour de l'action collective au regard du Traité de Rome', *La Semaine Juridique – éd. gén* 2008, II 10060, p. 33, at pp. 34 and 35, who argues that in those judgments the Court of Justice recognised the right to take collective action as a 'secondary fundamental right'. Zwanziger, B, 'Arbeitskampf- und Tarifrecht nach den EuGH-Entscheidungen "Laval" und "Viking"', *DB* 2008, p. 294, at p. 295, argues that in comparison with the approach to reconciling fundamental rights and fundamental freedoms adopted in *Schmidberger*, cited above in footnote 27, in *Viking Line* and *Laval un Partneri* a shift of emphasis in favour of fundamental freedoms was effected.

---

95 – In that connection, academic writings stress, in addition, that in accordance with consistent case-law of the Court – which holds that Articles 39 EC, 43 EC and 49 EC extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services (see on that issue point 66 of this Opinion) – under certain conditions, trade unions and other non-governmental associations and bodies may be alleged also to have infringed fundamental freedoms, but that the case-law concerning written and unwritten grounds of justification was developed primarily in connection with Member State infringements of fundamental freedoms. As a result, so the argument goes, for such non-governmental associations it is generally difficult to adduce proof of justification; see Davies, A.C.L., cited above in footnote 91, p. 142. This could be regarded as an asymmetrical development of Community law.

---

96 – Confirmed most recently in Case C-153/08 *Commission* v *Spain* [2009] ECR I-0000, paragraph 36.

---

97 – See also the Opinion of Advocate General Mengozzi in Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, point 84, and his Joined Opinion in Case C-354/04 P *Gestoras Pro Amnistía and Others* v *Council* [2007] ECR I-1579, point 177, and Case C-355/04 P *Segi and Others* v *Council* [2007] ECR I-1657, point 177.

---

98 – Skouris, V., 'Das Verhältnis von Grundfreiheiten und Grundrechten im europäischen Gemeinschaftsrecht', *DÖV* 2006, p. 89, at p. 93 et seq. See also Prechal, S. and De Vries, S.A., 'Viking/Laval en de grondslagen van het internemarktrecht', *S.E.W.* 2008, p. 425, at pp. 434 and 435, who point to the fact that a conflict between fundamental rights and fundamental freedoms can often be reformulated as a conflict between two fundamental rights.

---

99 – See, for example, Rengeling, H.W. and Szczekalla, P., *Grundrechte in der Europäischen Union*, Cologne, 2004, point 1008, who emphasise in relation to the right to take collective action – now recognised as a Community fundamental right and closely connected to the fundamental right to autonomy in collective bargaining – that any conflicts between fundamental freedoms and that right to take collective action must be resolved by a process of reconciliation.

---

100 – On that three-stage test governing the principle of proportionality, see my Opinion of 21 January 2010 in Case C-365/08 *Agrana Zucker*, point 59 et seq.

---

101 – That assessment accords with the principles incorporated in Article 52(1) of the Charter of Fundamental Rights of the European Union. According to Article 52(1) of the Charter of Fundamental Rights, any limitation on the exercise of the rights and freedoms recognised by that charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

---

102 – Cited above in footnote 27.

---

103 – Case C-346/06 [2008] ECR I-1989.

---

104 – *Schmidberger*, cited above in footnote 27, paragraph 82 et seq.

---

105 – Ibid., paragraph 89 et seq.

---

106 Cited above in footnote 103.

---

107 – On the recognition of ensuring protection of workers as an overriding reason in the public interest, see the case-law cited in footnote 92. On the recognition of ensuring the financial stability of social security systems as an overriding reason in the public interest, see Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 103 and the case-law cited therein.

---

108 – On that point, see, in particular, the wording of Article 6 of the European Social Charter, Article 6 of the revised European Social Charter, point 12 of the Community Charter of Fundamental Social Rights of Workers and Article 28 of the Charter of Fundamental Rights of the European Union.

---

109 – See Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-0000, paragraph 42.

---

110 – Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21.

---

111 – Naturally, at this point it should be recalled that in consistent case-law the Court has examined the substance of collective agreements with regard to compliance with the prohibition on discrimination established in Article 39 EC and in Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475). Such substantive control of collective agreements is expressly provided for in Article 7(4) of that regulation. See Case C-400/02 *Merida* [2004] ECR I-8471; Case C-35/97 *Commission* v *France* [1998] ECR I-5325; and Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47.

---

112 – According to consistent case-law, the primary law obligation of transparency requires a sufficient degree of advertising to be ensured for the benefit of any potential contractor. However, it does not necessarily imply an obligation to launch an invitation to tender; see Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 25, and Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 21.

---

113 – See also Hanau, P., 'Tarifvertragliche Beschränkungen der Entgeltumwandlung', *DB* 2004, p. 2266, at p. 2268, who, drawing attention to one of the general principles of German law on collective agreements, that is, the principle that derogations which are more favourable to workers are permitted (*Günstigkeitsprinzip*), in a particularly pertinent manner, questions the restriction on pension scheme providers established by Paragraph 6 of the TV-EUmw/VKA. In his view, it would be quite simply absurd to presuppose that a collective agreement might preclude local authority employers from concluding agreements on conversion of earnings more favourable to workers and, in particular, regardless of whether such alternative scheme is more favourable in terms of the direct contributions made by the employer or in terms of the benefits offered by the pension scheme provider. As he points out, the purpose of collective agreements is worker protection.

---

114 – In that connection, it must be noted that leading academic commentators are highly critical of the preliminary selection of pension scheme providers established by Paragraph 6 of the TV-EUmw/VKA. See, in particular, Hanau, P., cited above in footnote 113, p. 2269, who takes the view that the restrictions in the TV-EUmw/VKA on the pension scheme providers authorised to implement conversion schemes appear to favour only the interests of pension scheme providers and not those of workers.

---

115 – On that point, see Jarass, D., *EU-Grundrechte*, Munich, 2005, p. 344, who takes the view that restrictions on the rights to bargain collectively and to take collective action are possible in particular in those areas in which collective bargaining does not concern terms and conditions of employment.

JUDGMENT OF THE COURT (Third Chamber)

10 September 2009 (*)

(Procurement procedures of entities operating in the water, energy, transport and postal services sectors – Public service for the distribution of drinking water and the treatment of sewage – Service concession – Definition – Transfer to the supplier of the risk connected with operating the service in question)

In Case C-206/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Thüringer Oberlandesgericht (Germany), made by decision of 8 May 2008, received at the Court on 19 May 2008, in the proceedings

Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha)

v

Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH,

intervening parties:

Stadtwirtschaft Gotha GmbH,

Wasserverband Lausitz Betriebsführungs GmbH (WAL),

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. N. Cunha Rodrigues (Rapporteur), J. Klučka, P. Lindh, and A. Arabadjiev, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 23 April 2009,

after considering the observations submitted on behalf of:

– Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha), by S. Wellmann and P. Hermisson, Rechtsanwälte,

– Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH, by U.-D. Pape, Rechtsanwalt,

– Stadtwirtschaft Gotha GmbH, by E. Glahs, Rechtsanwältin,

– Wasserverband Lausitz Betriebsführungs GmbH (WAL), by S. Gesterkamp and S. Sieme, Rechtsanwälte,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– the Czech Government, by M. Smolek, acting as Agent,

– the Commission of the European Communities, by P. Oliver, D. Kukovec and C. Zadra, acting as Agents, and by B. Wägenbaur, Rechtsanwalt,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the term ‘service concession’ within the meaning of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

2 The reference was made in the course of proceedings between Wasser- und Abwasserzweckverband Gotha und Landeskreisgemeinden (Association for the distribution of water and the disposal of sewage in Gotha and the municipalities within its administrative district; ‘WAZV Gotha’) and Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH (Water treatment and disposal company; ‘Eurawasser’) concerning the procurement procedure in respect of the public service for the distribution of drinking water and the disposal of sewage.

Legal context

3 Article 1(2)(a) and (d) of Directive 2004/17 provides:

‘2. (a) “Supply, works and service contracts” are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers.

…

(d) “Service contracts” are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.

…’

4 Article 1(3)(b) of that directive states:

‘A “service concession” is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.’

5 Article 2 of that directive states:

‘1. For the purposes of this Directive:

(a) “Contracting authorities” are State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.

…

2. This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

…’

6 Article 4 of Directive 2004/17 provides:

‘1. This Directive shall apply to the following activities:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; or

(b) the supply of drinking water to such networks.

2. This Directive shall also apply to contracts or design contests awarded or organised by entities which pursue an activity referred to in paragraph 1 and which:

…

(b) are connected with the disposal or treatment of sewage.'

…'

7 Article 18 of that directive provides:

'This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.'

8 Article 31 of that directive states:

'Contracts which have as their object services listed in Annex XVII A shall be awarded in accordance with Articles 34 to 59.'

9 Article 32 of that directive states:

'Contracts which have as their object services listed in Annex XVII B shall be governed solely by Articles 34 and 43.'

10 Under Article 71 of Directive 2004/17, the Member States were to bring into force the measures necessary to comply with that directive by 31 January 2006 at the latest.

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 It is apparent from the case file that WAZV Gotha is an association of municipalities which is responsible, pursuant to specific provisions of German law, for ensuring the distribution of drinking water and the disposal of sewage for the population resident on its territory.

12 Under a business management contract concluded in 1994, WAZV Gotha entrusted to Stadtwirtschaft Gotha GmbH (municipal undertaking from the town of Gotha; 'Stadtwirtschaft') all the technical, business and administrative services in the water distribution sector. Given that that contract was due to expire in 2008, WAZV Gotha intended to allow Stadtwirtschaft to join it, as a member, so that it could continue to grant it the management contract. However, the supervising authorities, relying on public procurement provisions, refused to authorise Stadtwirtschaft's admission to WAZV Gotha.

13 In order to continue having its business managed by third parties, WAZV Gotha decided to grant a concession in respect of the service for the distribution of drinking water and the disposal of sewage. To that end, it launched, in September 2007, an informal bidding procedure, rather than the formal public procurement procedure referred to in Paragraph 97 et seq. of the Law against Restrictions on Competition (Gesetz gegen Wettbewerbsbeschränkungen; 'the GWB'). WAZV Gotha nevertheless published a notice in the *Official Journal of the European Union* on 19 September 2007, under reference 2007/S 180-220518.

14 The tender notice announced that a service concession was to be awarded for the distribution of water and the disposal of sewage on the territory covered by WAZV Gotha for a period of 20 years, and invited interested undertakings to apply.

15 The tender notice and the related draft contracts provided that the concession holder would supply the services referred to, on the basis of private law contracts concluded in its own name and on its own account, to users resident in the territory covered by WAZV Gotha, and that it would receive, in consideration, payment from those users.

16 It was provided that the concession holder was competent to calculate at its own discretion, and on an equitable basis, the payment due for the services supplied, and to set that amount on its own responsibility. That competence was, however, limited in so far as the concession holder had, up until 31 December 2009, to apply the rates in force at the time of the publication of the tender notice and, thereafter, the rates had to comply with the provisions of the Law of Thuringia on municipal taxes (Thüringer Kommunlabgabengesetz).

17 The tender notice and the draft contracts provided also that the technical installations for water distribution and disposal of sewage were to remain the property of WAZV Gotha, and that those installations were to be leased by the concession holder, who was to be entitled to include the corresponding rent in the payment sought from users in consideration for the services supplied. The maintenance of those installations was to be the responsibility of the concession holder.

18 WAZV Gotha undertook to make compulsory, by regulation, connection to the public networks of water distribution and disposal of sewage and use of those networks. The concession holder could not, however, require that obligation to be respected in each individual case.

19 Lastly, WAZV Gotha undertook, as far as legally possible, to forward the amount of public subsidies received by it to the concession holder.

20 The closing date for receipt of requests to participate in the procedure was given in the tender notice as 8 October 2007. By letter of 4 October 2007, Eurawasser objected to WAZV Gotha's intention to award the abovementioned services not by a formal tender procedure for the award of a service contract, but by way of a service concession.

21 Eurawasser submitted its request to participate on 8 October 2007. Stadtwirtschaft and Wasserverband Lausitz Betriebsführungs GmbH (management company answerable to the intra-community association for water in the Lausitz region; 'WAL') also participated in the competitive bidding procedure and were invited by WAZV Gotha to submit a bid. In total, at the end of the period laid down in the tender notice, eight requests to participate had been submitted.

22 WAVZ Gotha rejected Eurawasser's complaint by letter of 9 October 2007. After making further complaints, unsuccessfully, on 19 October and 23 November 2007, Eurawasser brought an action before the appropriate Vergabekammer (Public Procurement Board) on the ground that WAZV Gotha had not chosen the appropriate award procedure.

23 By decision of 24 January 2008, the Vergabekammer held that the operation in fact amounted to a service contract, that WAZV Gotha ought to have initiated a formal tender procedure and that the procedure should be re-established from the stage prior to the publication of the tender notice.

24 WAZV Gotha appealed against that decision to the Thüringer Oberlandesgericht (Higher Regional Court of Thuringia).

25 Stadtwirtschaft and WAL were granted leave to intervene in that appeal.

26 It was in those circumstances that the Thüringer Oberlandesgericht decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a contract for the supply of services (here, the supply of water and treatment of waste water), the content of which does not provide for the contracting authority to make a direct payment of consideration to the supplier but for the supplier to be afforded the right to collect payment under private law from third parties, to be classified for that reason alone as a "service concession" within the meaning of Article 1(3)(b) of Directive [2004/17] as distinct from a service contract for pecuniary interest within the meaning of Article 1(2)(a) and (d) of the Directive?

2. If the first question is answered in the negative, does a contract of the kind described in the first question constitute a service concession if the risk connected with operating the service in question, because of the rules of public law governing it (compulsory connection and usage; prices calculated on a break-even basis), is significantly limited from the outset – that is to say,

even if the contracting authority were to provide the service itself – but the supplier assumes that limited risk in full or at least to a predominant extent?

3. If the second question is also answered in the negative, is Article 1(3)(b) of Directive [2004/17] to be interpreted as meaning that the degree of risk connected with operating the service, particularly the marketing risk, must in qualitative terms be comparable to that which normally exists under conditions in a free market with more than one competing tenderer?'

Admissibility

27 WAZV Gotha argues that the reference for a preliminary ruling is inadmissible on the ground that the reply to the first question is clearly apparent from the definition of a service concession in Article 1(3)(b) of Directive 2004/17 and from the case-law of the Court. Therefore, the interpretation requested is unnecessary. WAL submits arguments which are, in essence, similar.

28 Stadtwirtschaft maintains that the questions referred for a preliminary ruling are not relevant for the purposes of the judgment which the referring court must deliver, given that the dispute in the main proceedings can be decided upon without an answer to those questions. WAZV Gotha organised a proper award procedure, even if it transpires that the contracts at issue in the main proceedings must be categorised as service contracts within the scope of Directive 2004/17.

29 On the other hand, the Commission of the European Communities submits that the reference for a preliminary ruling is admissible. As is apparent from the order for reference, the national court takes the view that the questions referred, concerning the difference between the concepts of service contract and service concession, need to be answered to enable it to decide on the admissibility of the appeal before it.

30 Following the lodging of the order for reference, WAZV Gotha decided, on 4 September 2008, to cancel the bidding procedure which is the subject matter of the dispute in the main proceedings.

31 Following that cancellation, Eurawasser amended its application but did not withdraw it. Eurawasser now seeks a decision declaring that, in the cancelled procedure, its rights were infringed in respect of the rules of public procurement laid down in Paragraph 97 et seq. of the GWB.

32 By letter of 24 December 2008, the referring court informed the Court that it wished to continue with its request for a preliminary ruling. It took the view that, for it to be able to give judgment on the action as amended, it remained necessary to receive a reply to the questions referred, if only because service concessions are from the outset outside the scope of Paragraph 97 et seq. of the GWB and, consequently, the amendment of the action in the main proceedings does not affect the fact that proceedings before bodies with jurisdiction to review procurement procedures, that is to say, the Vergabekammer and the Vergabesenat, would be inadmissible in the event that the contract at issue in the main proceedings were categorised as a service concession.

33 In that regard, the Court has held that, in the context of the cooperation between the Court and the national courts established by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-544/07 *Rüffler* [2009] ECR I-0000, paragraph 36, and the case law cited).

34 The Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have

before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Rüffler*, paragraphs 37 and 38, and the case law cited).

35 In its order for reference, and in its letter of 24 December 2008, the referring court explained clearly the reasons why it considered the questions it has referred to be relevant, and why it considered a reply to those questions to be necessary to decide the dispute before it. In the light of those explanations, the questions referred appear neither hypothetical nor to have no relation with the subject matter of the dispute in the main proceedings.

36 Therefore, the questions referred for a preliminary ruling are admissible.

The questions referred for a preliminary ruling

Preliminary observations

37 As a preliminary point, it should be stated that, according to the information in the case file, WAZV Gotha falls within the definition of contracting authority in Article 2(1)(a) of Directive 2004/17; that contracting authority is one of the types of contracting entities to which that directive applies pursuant to Article 2(2)(a) thereof.

38 The case in the main proceedings, in addition, falls within Directive 2004/17 under Article 4 thereof, inasmuch as the contracting authority concerned, namely WAZV Gotha, is pursuing an activity in the sector of distribution of drinking water and disposal of sewage.

39 The dispute in the main proceedings falls within the temporal scope of Directive 2004/17, since the period laid down in Article 71 of that directive for its implementation expired on 31 January 2006, and the bidding procedure at issue in the main proceedings was launched in September 2007.

40 It should be borne in mind that a definition of service concession was introduced into Community legislation by Article 1(2)(a) of Directive 2004/17. It did not appear in the earlier directives in that area, in particular, Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

41 In Article 18 of Directive 2004/17, the Community legislature states that the directive does not apply to service concessions which are awarded by contracting authorities carrying out activities, inter alia, in the water sector.

42 In addition, it should be recalled that, in relation to its own sphere of application, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), includes, in Article 1(2)(a) and (4) thereof, definitions of ‘public contracts’ and of ‘service concession’ which are substantially the same as the corresponding definitions in Article 1(2)(a) and (3)(b) of Directive 2004/17.

43 The fact that the definitions are substantially the same means that the same considerations are applicable to an interpretation of the concepts of service contract and service concession within the respective spheres of application of those two directives.

44 It follows that, if the transaction at issue in the main proceedings is categorised as a ‘service contract’ within the meaning of Directive 2004/17, such a contract must, in principle, be concluded in accordance with the procedures laid down in Articles 31 and 32 thereof. On the other hand, under Article 18 of that directive, if that transaction is categorised as a service concession, the directive is not applicable to it. In such circumstances, the awarding of the concession remains subject to the fundamental rules of the Treaty, in general, and to the principles of equal treatment and of non-discrimination on the ground of nationality, and the concomitant obligation of transparency, in particular (see, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 to 62; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 to 19; Case C-458/03

Parking Brixen [2005] ECR I-8585, paragraphs 46 to 49; and Case C-324/07 *Coditel Brabant* [2008] ECR I-0000, paragraph 25).

45 That is the context in which the referring court seeks to clarify the criteria which allow a distinction to be established between a service contract and a service concession.

The first and second questions

46 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether, in a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient, in itself, for the contract in question to be categorised as a service concession, within the meaning of Article 1(3)(b) of Directive 2004/17. If that question is answered in the negative, the referring court asks whether such a contract must be categorised as a service concession where the supplier assumes all, or at least to a predominant extent, the risk which the contracting authority runs in operating the service, even if that risk is significantly limited from the outset on account of the rules of public law governing the service.

47 Advocating a reply in the affirmative to the first question, WAZV Gotha, Stadtwirtschaft and WAL, and the German and Czech Governments, maintain that the fact that the supplier is remunerated by way of a payment collected from the users of the service in question is sufficient for the transaction to be categorised as a service concession.

48 By contrast, Eurawasser and the Commission contend that it is necessary, in addition, that the supplier assume the financial risk of operating the service in question.

49 It must be noted, in that regard, that Article 1(2)(a) of Directive 2004/17 provides that ‘supply, works and service contracts’ are contracts for pecuniary interest concluded in writing between one or more contracting entities referred to in Article 2(2) of that directive, and one or more contractors, suppliers, or service providers.

50 Under Article 1(3) of Directive 2004/17, a ‘service concession’ is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service, or in that right together with payment.

51 It is clear from a comparison of those two definitions that the difference between a service contract and a service concession lies in the consideration for the provision of services. A service contract involves consideration which is paid directly by the contracting authority to the service provider (see, to that effect, *Parking Brixen*, paragraph 39) while, for a service concession, the consideration for the provision of services consists in the right to exploit the service, either alone, or together with payment.

52 The questions referred take, explicitly, as their starting point the fact that the contract in question provides that the supplier does not receive consideration directly from the contracting authority, but receives payment under private law, which it is authorised by the contracting authority to collect from third parties.

53 In the light of the criterion set out in paragraph 51 of this judgment, the fact that the service provider is remunerated by payments from third parties, in this case from users of the service in question, is one means of exercising the right, granted to the provider, to exploit the service.

54 That criterion had already been established by the case-law of the Court prior to the entry into force of Directive 2004/17. According to that case-law, a service concession existed where the agreed method of remuneration consisted in the right of the service provider to exploit for payment his own service (see, to that effect, *Telaustria and Telefonadress*, paragraph 58; order in Case C-358/00 *Buchhändler-Vereinigung* [2002] ECR I-4685, paragraphs 27 and 28; Case C-382/05 *Commission* v *Italy* [2007] ECR I-6657, paragraph 34; and Case C-437/07 *Commission* v *Italy* [2008] not published in the ECR, paragraph 29).

55 It is irrelevant, in that regard, whether the remuneration is governed by private or public law.

56 The Court has recognised the existence of a service concession, inter alia, where the service provider's remuneration came from payments made by users of a public car park, of public service transport and of a teledistribution network (see *Parking Brixen*, paragraph 40; Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 16; and *Coditel Brabant*, paragraph 24).

57 It follows therefrom that, in the case of a contract for the supply of services, the fact that the supplier is not remunerated directly by the contracting authority, but is entitled to collect payment from third parties, meets the requirement of consideration laid down in Article 1(3)(b) of Directive 2004/17.

58 That finding means, however, that the concepts of 'the right to exploit' and 'consideration for the provision [of services]', which appear in Article 1(3)(b) of Directive 2004/17, need to be explained.

59 It is clear from the case law of the Court that, when the agreed method of remuneration consists in the right for the provider to exploit the service it is providing, that method of remuneration means that the provider takes the risk of operating the services in question (see, to that effect, *Parking Brixen*, paragraph 40; Case C-382/05 *Commission* v *Italy*, paragraph 34; and Case C-437/07 *Commission* v *Italy*, paragraph 29).

60 On that issue, the parties which have submitted observations have presented, either as their primary argument, or in the alternative, diverging views.

61 WAZV Gotha claims that the fact that the supplier assumes the risk of operating the service, in circumstances such as those in the case in the main proceedings, is sufficient for it to be categorised as a service concession.

62 Stadtwirtschaft, WAL and the Czech Government contend that the supplier is not required to assume all of that risk. It would suffice were it to assume a predominant share of that risk.

63 The German Government submits that a service concession exists, since the risk assumed by the supplier in connection with the operation of the service is not marginal.

64 Eurawasser takes the view that, in the transaction at issue in the main proceedings, there is no significant risk which can be transferred to the supplier by the contracting authority. Therefore, the transaction should be categorised as a service contract and not a concession.

65 The Commission submits that there must be a significant risk in operating the service, which, however, does not necessarily have to correspond to the financial risk usually run on an open market. A service contract in which the financial risk is reduced to a minimum by the public authorities cannot be categorised as a service concession.

66 In that regard, it must be stated that risk is inherent in the economic operation of the service.

67 If the contracting authority continues to bear all of the risk by not exposing the supplier to the vagaries of the market, the awarding of the right to operate the service requires that the formalities provided for in Directive 2004/17 be applied, with a view to safeguarding transparency and competition.

68 In the complete absence of a transfer to the service provider of the risk connected with operating the service, the transaction concerned is a service contract (see, to that effect, Case C-234/03 *Contse and Others* [2005] ECR I-9315, paragraph 22; Case C-382/05 *Commission* v *Italy*, paragraphs 35 to 37; and, by analogy, in relation to a works concession, Case C-437/07 *Commission* v *Italy*, paragraphs 30 and 32 to 35). As was stated in paragraph 51 of this judgment, in the case of a service contract, the consideration does not consist in the right to exploit the service.

69 The questions referred start from the premise that the supply of the service in question in the main proceedings involves very limited financial risks, even in the event that that service is provided by the contracting authority, on account of the application of the rules governing the sector of activity concerned.

70 According to some of the arguments submitted to the Court, for the transaction in question to constitute a concession in such circumstances, it is necessary that the risk transferred to the concession holder be a significant risk.

71 Those arguments cannot be accepted unreservedly.

72 It is not unusual that certain sectors of activity, in particular sectors involving public service utilities, such as the distribution of water and the disposal of sewage, are subject to rules which may have the effect of limiting the financial risks entailed.

73 First, the detailed rules of public law, to which the economic and financial operation of the service is subject, facilitate the supervision of how that service is operated, and scale down the factors which may threaten transparency and distort competition.

74 Second, it must remain open to the contracting authorities, acting in all good faith, to ensure the supply of services by way of a concession, if they consider that to be the best method of ensuring the public service in question, even if the risk linked to such an operation is limited.

75 Moreover, it would not be reasonable to expect a public authority granting a concession to create conditions which were more competitive and involved greater financial risk than those which, on account of the rules governing the sector in question, exist in that sector.

76 In such circumstances, as the contracting authority has no influence on the detailed rules of public law governing the service, it is impossible for it to introduce and, therefore, to transfer risk factors which are excluded by those rules.

77 In any event, even if the risk run by the contracting authority is very limited, it is necessary that the contracting authority transfer to the concession holder all, or at least a significant share, of the operating risk which it faces, in order for a service concession to be found to exist.

78 It is for the national court to assess whether there has been a transfer of all, or a significant share, of the risk faced by the contracting authority.

79 To that end, the general risks resulting from amendments to the rules, made in the course of performance of the contract, cannot be taken into account.

80 Therefore, the answer to the first and second questions is that, in relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for that contract to be categorised as a ‘service concession’ within the meaning of Article 1(3)(b) of Directive 2004/17, where the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service.

The third question

81 In the light of the reply given to the first and second questions, it is not necessary to reply to the third question.

Costs

82 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

In relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for the contract in question to be categorised as a 'service concession' within the meaning of Article 1(3)(b) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, where the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service.

[Signatures]

---

* Language of the case: German.

JUDGMENT OF THE COURT (Third Chamber)

29 April 2010 (*)

(Failure of a Member State to fulfil obligations – Public service contracts – Articles 43 EC and 49 EC – Directives 92/50/EEC and 2004/18/EC – Public emergency services – Emergency ambulance and qualified patient transport services – Obligation of transparency – Article 45 EC – Activities connected with the exercise of official authority – Article 86(2) EC – Services of general economic interest)

In Case C-160/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 April 2008,

European Commission, represented by M. Kellerbauer and D. Kukovec, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and J. Möller, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by:

Kingdom of the Netherlands, represented by C.M. Wissels and Y. de Vries, acting as Agents,

intervener,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, E. Juhász, G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: V. Trstenjak,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 11 February 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests that the Court declare that, by failing to make a public call for tenders or to award contracts in the field of emergency ambulance and qualified patient transport services (‘public ambulance services’) transparently and by failing to publish notices of contracts awarded, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for

the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) and to observe the principles of the freedom of establishment and the freedom to provide services laid down by Articles 43 EC and 49 EC.

Legal context

Directive 92/50

2 According to Article 1(a) of Directive 92/50, 'public service contracts' are to mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority.

3 Article 3(2) of Directive 92/50 states:

'Contracting authorities shall ensure that there is no discrimination between different service providers.'

4 Article 7(1) provides that the directive is to apply to public service contracts where the estimated value, net of value added tax, is not less than EUR 200 000.

5 Article 10 of Directive 92/50 states:

'Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.'

6 The Titles referred to in Article 10 of Directive 92/50, which apply in their entirety in the circumstances referred to in the first sentence of Article 10, concern, respectively, the choice of award procedures and the rules governing design contests (Title III; Articles 11 to 13), common rules in the technical field (Title IV; Article 14), common advertising rules (Title V; Articles 15 to 22) and common rules on participation, criteria for qualitative selection and criteria for the award of contracts (Title VI; Articles 23 to 37).

7 Article 14 of Directive 92/50 concerns the technical specifications which must be given in the documents relating to the contract.

8 Article 16 of Directive 92/50 provides:

'1. Contracting authorities who have awarded a public contract or have held a design contest shall send a notice of the results of the award procedure to the Office for Official Publications of the European Communities.

2. The notices shall be published:

– in the case of public contracts for services listed in Annex I A, in accordance with Articles 17 to 20,

– in the case of design contests, in accordance with Article 17.

3. In the case of public contracts for services listed in Annex I B, the contracting authorities shall indicate in the notice whether they agree on its publication.

…'

9 The services listed in Annex I A to Directive 92/50 include, under category 2, '[l]and transport services …, including armoured car services, and courier services, except transport of mail' and, under category 3, '[a]ir transport services of passengers and freight, except transport of mail'. The services listed in Annex I B to Directive 92/50 include, under category 25, '[h]ealth and social services'.

Directive 2004/18

10 Article 1(2)(a) and (d) of Directive 2004/18 includes the following definitions:

‘(a) “Public contracts” are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.

…

(d) “Public service contracts” are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II.

…’

11 Article 2 of Directive 2004/18 provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

12 According to Article 7(b) of Directive 2004/18, the directive is to apply to public service contracts which have a value exclusive of value added tax estimated to be equal to or greater than EUR 249 000. That figure was successively reduced to EUR 236 000 by Commission Regulation (EC) No 1874/2004 of 28 October 2004 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2004 L 326, p. 17) and then to EUR 211 000 by Commission Regulation (EC) No 2083/2005 of 19 December 2005 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2005 L 333, p. 28).

13 Directive 2004/18 includes a provision, Article 22, under Title II headed ‘Rules on public contracts’, which states:

‘Contracts which have as their object services listed both in Annex II A and in Annex II B shall be awarded in accordance with Articles 23 to 55 where the value of the services listed in Annex II A is greater than the value of the services listed in Annex II B. In other cases, contracts shall be awarded in accordance with Article 23 and Article 35(4).’

14 Articles 23 to 55 of Directive 2004/18, which apply in their entirety in the circumstances referred to in the first sentence of Article 22 of that directive, set out, in order, the specific rules governing specifications and contract documents (Articles 23 to 27), the rules of procedure (Articles 28 to 34), the rules on advertising and transparency (Articles 35 to 43) and the rules relating to the conduct of the procedure (Articles 44 to 55).

15 Article 23 of Directive 2004/18 concerns the technical specifications which must be set out in the contract documentation.

16 Article 35(4) of Directive 2004/18 provides:

‘Contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

…

In the case of public contracts for services listed in Annex II B, the contracting authorities shall indicate in the notice whether they agree to its publication. …

…’

17 The services referred to under categories 2 and 3 of Annex II A and under category 25 of Annex II B to Directive 2004/18 respectively are identical to those referred to under the corresponding categories of Annexes I A and I B to Directive 92/50.

Facts

18 The Commission received a number of complaints from, inter alia, undertakings established in Member States other than the Federal Republic of Germany concerning the award of contracts for public ambulance services in the Federal Republic of Germany.

General background

19 In Germany, the organisation of the emergency services falls within the competence of the *Länder*.

20 In most *Länder*, emergency services are provided using a 'dual' system ('duales System'), also known as the 'separation model' ('Trennungsmodell'). This is based on a distinction between public emergency services, which account for approximately 70% of all emergency services, and the provision of emergency services on the basis of authorisations granted under the relevant laws of the *Länder*, which account for approximately 30% of all such services.

21 Public emergency services normally cover emergency ambulance and qualified patient transport services. Emergency ambulance services consist in the conveyance in an emergency vehicle or ambulance, with appropriate medical care, of persons with life-threatening injuries or conditions. Qualified patient transport consists in the conveyance in a patient transport ambulance, with appropriate medical care, of persons who are ill, injured or otherwise in need of help but who are not emergency patients. These two types of service are generally available to the population 24 hours a day throughout the whole of the area concerned and, more often than not, involve the operation of an ambulance station with personnel and response vehicles permanently available.

22 Medical services are available in the case of emergency ambulance services as well as, to a lesser extent, in the case of qualified patient transport. However, the majority of incidents involving emergency ambulance services and all incidents involving qualified patient transport proceed without a doctor being in attendance. In the case of emergency ambulance services, medical services are provided mainly by ambulance personnel. The services of emergency doctors are normally governed by separate agreements with hospitals.

23 In the field of public emergency services, the local authorities, in their capacity as the authorities responsible for organising those services, conclude contracts with providers for the provision of such services to the entire population of the area within their remit. Payment for the services in question is made either directly by the contracting authority in accordance with the 'tender' model, the only one to which the present action relates, or in the form of charges levied directly by the contractor on patients or sickness funds, in accordance with the 'concession' model.

24 The complainants to the Commission claimed that, in Germany, contracts for public ambulance services are not, as a rule, covered by contract notices published at European Union level, nor are they awarded in a transparent way. Some complainants stated that the circumstances leading to the lodging of their complaint reflect general practice in Germany.

25 The Commission's investigations revealed that, between 2001 and 2006, only 13 contract notices from 11 different local authorities were published in the *Official Journal of the European Communities* or in the *Official Journal of the European Union* in relation to the provision of emergency ambulance or qualified patient transport services. In that same period, the number of notices of the results of the award of a contract was also very limited, only two such notices having been published.

Circumstances of the present action

26 The cases complained of to the Commission and which the latter submits as examples of the practice to which the present action relates concern the *Länder* of Saxony-Anhalt, North Rhine-Westphalia,

Lower Saxony and Saxony.

Land of Saxony-Anhalt

27 According to the Commission, the city of Magdeburg has used an authorisation procedure ('Genehmigungsverfahren') for the award of contracts for pecuniary interest for public ambulance services since October 2005. The services cover the provision of personnel and vehicles for emergency ambulance or qualified patient transport services for the period 2007 to 2011. The contract has a total annual value of EUR 7.84 million. No contract notice was published at European Union level.

Land of North Rhine-Westphalia

28 According to the Commission, in 2004 the city of Bonn awarded a contract for public ambulance services for the period from 1 January 2005 to 31 December 2008. The object of the contract concerned was, inter alia, the operation of four ambulance stations. The total value of the contract was at least EUR 5.28 million. A contract notice was published, but at national, not European Union level. At least one tenderer was unsuccessful following the submission of his expression of interest, and the procurement procedure was eventually suspended for lack of an economic outcome. The contract in question was ultimately awarded to the incumbent service provider.

29 Again according to the Commission, in 1998 an undertaking submitted an expression of interest to the town of Witten in relation to taking over the operation of the Witten-Herbede ambulance station. However, the operation of that ambulance station, representing a contract with an annual value of EUR 945 753, was awarded to the Deutsche Rote Kreuz (German Red Cross; 'DRK'). No contract notice was published at European Union level.

Land of Lower Saxony

30 According to the Commission, in 2004 the Region of Hanover organised, for the first time, a procurement procedure for the provision of public ambulance services within its area. Only operators who were already responsible for such services at that time, namely the Arbeiter-Samariter-Bund ('ASB'), the DRK, the Johanniter-Unfall-Hilfe ('JUH') and RKT GmbH, were authorised to participate in that procedure. The value of the contract, covering the period between 1 January 2005 and 31 December 2009, was in the region of EUR 65 million.

31 Again according to the Commission, in 1993 the administrative district of Hamelin-Pyrmont made the district association of the DRK responsible for the provision of public ambulance services within its territory. The contract, which had an initial duration of 10 years, was not terminated. In 2003 it was renewed for 10 years without any contract notice being published. In addition, a new ambulance station was established in 1999 in the municipality of Emmerthal, the operation of which was also entrusted to the DRK without any prior publication of a contract notice. The total value of those contracts was EUR 7.2 million per year.

32 The Commission obtained information that the district association of the DRK had been providing public ambulance services in the administrative district of Uelzen since 1992. The contract awarded by that district to the district association of the DRK was extended in 2002 to encompass the operation of the ambulance station at Bad Bevensen without a contract notice being published. It has a total value of EUR 4.45 million per year.

Land of Saxony

33 According to information obtained by the Commission, the contracts between the Rettungszweckverband Westsachsen and the ASB, DRK, JUH and the Zwickau fire service had an initial duration of four years and cover the administrative districts of Chemnitzer Land, Aue-Schwarzenberg, Zwickauer Land and the town of Zwickau. In 2003 those contracts, representing a total value of EUR 7.9 million per year, were renewed for four years without a contract notice being published. On their expiry they were renewed until 31 December 2008.

34 The contracts between the Rettungszweckverband Chemnitz/Stollberg and the ASB, DRK, JUH and the Chemnitz fire service had an initial duration of four years and cover the administrative district of Stollberg and the city of Chemnitz. On 1 September 2002 those contracts, representing a total value of EUR 3.3 million per year, were renewed for a further four years without a contract notice being published. On their expiry they were renewed until 31 December 2008.

35 The contracts between the Rettungszweckverband Vogtland and the ASB, DRK, JUH, the private Plauen ambulance service and the Plauen fire service had an initial duration of four years and cover the administrative district of Vogtland and the town of Plauen. Those contracts, with a total annual value of EUR 3.9 million, were concluded without a contract notice being published and came into effect on 1 January 2002 or 1 January 2004. On their expiry they were renewed until 31 December 2008.

The pre-litigation procedure

36 In a letter of formal notice dated 10 April 2006, the Commission notified the Federal Republic of Germany that:

– with regard to the award of contracts for pecuniary interest relating to the emergency services in which transport services within the meaning of categories 2 or 3 of Annex I A to Directive 92/50 or Annex II A to Directive 2004/18 are predominant, the Federal Republic of Germany may have infringed, until 31 January 2006, Article 10 of Directive 92/50 in conjunction with Titles III to VI thereof and, from 1 February 2006, Article 22 of Directive 2004/18 in conjunction with Articles 23 to 55 thereof; and

– with regard to the award of contracts for pecuniary interest relating to the emergency services in which health services within the meaning of category 25 of Annex I B to Directive 92/50 or Annex II B to Directive 2004/18 are predominant, the Federal Republic of Germany may have infringed, until 31 January 2006, Article 10 of Directive 92/50 in conjunction with Article 16 thereof and, from 1 February 2006, Article 22 of Directive 2004/18 in conjunction with Article 35(4) thereof, and may, in any event, have infringed the principles of the freedom of establishment and of the freedom to provide services contained in Articles 43 EC and 49 EC, in particular the prohibition of discrimination that is inherent in those principles.

37 The Federal Republic of Germany replied to that letter of formal notice by a letter of 10 July 2006 in which it contended, inter alia, that the tasks which are delegated to the public emergency services are organised in accordance with public-law rules and that their implementation is a matter of State sovereignty. According to the defendant, agreements relating to ambulance services cannot, therefore, be categorised as ‘public service contracts’.

38 The Commission was not satisfied with that response and, on 15 December 2006, sent a reasoned opinion to the Federal Republic of Germany in which it maintained as they stood the complaints set out in the letter of formal notice and called on the Federal Republic of Germany to adopt the measures necessary to end that infringement within a period of two months from receipt of the opinion.

39 The Federal Republic of Germany having maintained its position in its letter of reply to the reasoned opinion dated 22 February 2007, the Commission decided to bring the present action.

The action

Admissibility

40 Since the conditions for admissibility of an action and of the complaints set out therein are a matter of public policy, the Court may consider them of its own motion in accordance with Article 92(2) of its Rules of Procedure. Furthermore, it is entitled to ascertain of its own motion whether the procedural safeguards conferred by the European Union’s legal order have been complied with (see, to that effect, Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraphs 14 and 15).

41 It should be pointed out that, in an action for failure to fulfil obligations, the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with obligations under European Union law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission (Case C-350/02 *Commission* v *Netherlands* [2004] ECR I-6213, paragraph 18).

42 The proper conduct of that procedure constitutes an essential guarantee required by the EC Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see, to that effect, *Commission* v *Netherlands*, paragraph 19).

43 It follows that the subject-matter of proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision and cannot, therefore, be extended during the judicial procedure. The Commission's reasoned opinion and the application must be based on the same grounds and pleas, with the result that the Court cannot examine a ground of complaint which was not formulated in the reasoned opinion, which for its part must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty (see *Commission* v *Netherlands*, paragraph 20, and Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraphs 59 and 60).

44 On that basis, it is incumbent on the Commission, during the pre-litigation procedure, to indicate the specific provision or provisions which define the obligation with which the Member State is alleged to have failed to comply (see Case C-437/04 *Commission* v *Belgium* [2007] ECR I-2513, paragraph 39).

45 In the present case it should be noted, on the one hand, that, both in the letter of formal notice and in the reasoned opinion, the Commission limited the complaint alleging an infringement of Articles 43 EC and 49 EC to the award of contracts for public ambulance services characterised by the predominance of the value of health services within the meaning of Annex I B to Directive 92/50 or Annex II B to Directive 2004/18 over the value of transport services within the meaning of Annex I A to Directive 92/50 or Annex II A to Directive 2004/18.

46 With regard to the award of contracts of such services characterised, conversely, by the predominance of the value of transport services over the value of health services, the Commission's complaints during the pre-litigation procedure related to an infringement of Directives 92/50 and 2004/18. By contrast, no mention was made in the letter of formal notice or in the reasoned opinion of a complaint alleging an infringement of Articles 43 EC and 49 EC in connection with the award of those contracts.

47 However, in its application, the Commission now puts forward a complaint also alleging an infringement of Articles 43 EC and 49 EC with regard to the award of the contracts referred to in the previous paragraph, which constitutes an unlawful extension of the scope of the alleged infringement, as defined at the stage of the pre-litigation procedure. Therefore, the complaint alleging an infringement of those articles must be held inadmissible in so far as it relates to the award of those contracts.

48 On the other hand, in so far as the present action must be understood, on the basis of certain passages in the application, to include a complaint alleging an infringement in the relevant procurement procedures of Article 3(2) of Directive 92/50 or of Article 2 of Directive 2004/18, it must be noted that there was no mention at all of those two provisions as being the object of an infringement alleged by the Commission at the stage of the pre-litigation procedure. The complaint alleging an infringement of those provisions is, therefore, also inadmissible.

49 Finally, it must be pointed out that, under Article 38(1) in conjunction with Article 42(2) of the Rules of Procedure, the subject-matter of the claim must be defined in the application, and that a claim put forward for the first time in the reply modifies the original subject-matter of the application and must therefore be regarded as a new claim and, accordingly, be rejected as inadmissible.

50 In the present case, it must be observed that the Commission expressly stated in its application that, although the procurement practice at issue also exists in other *Länder*, the present action is confined to procurement in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony.

51 In those circumstances, the Commission's request, contained in its reply, that the Court should hold that the practice at issue exists throughout the whole of the Federal Republic of Germany constitutes an unlawful extension of the original scope of the application. Therefore, the complaints put forward by the Commission must be held inadmissible in so far as they refer to *Länder* other than those identified in the previous paragraph.

52 It follows from this that the action must be declared inadmissible in so far as the applicant claims that the Court should find:

– an infringement of Articles 43 EC and 49 EC as regards the award of contracts for public ambulance services characterised by the predominance of the value of transport services within the meaning of Annex I A to Directive 92/50 or Annex II A to Directive 2004/18 over the value of health services within the meaning of Annex I B to Directive 92/50 or Annex II B to Directive 2004/18;

– an infringement of Article 3(2) of Directive 92/50 or of Article 2 of Directive 2004/18; and

– the existence of a practice of awarding contracts for public emergency services that is contrary to European Union law in *Länder* other than the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony.

Substance

Arguments of the parties

53 The Commission alleges, first, that there has been an infringement of Articles 10 and 16 of Directive 92/50 and of Articles 22 and 35(4) of Directive 2004/18. It submits that, irrespective of the relative importance in the various contracts referred to in its action of the value of transport services and of health services, the results of the award of those contracts were not published in any way.

54 The Commission also alleges a breach of the principle of non-discrimination contained in Articles 43 EC and 49 EC, which imposes obligations on contracting authorities over and above those arising under Directives 92/50 and 2004/18. In that respect, the condition relating to the existence of a certain cross-border interest, established in Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraphs 29 and 30, is satisfied in the present case, in view of the origin of the complaints sent to the Commission and the significant economic value of the services in question.

55 The Commission submits that the cases complained of reveal a general practice of granting contracts for public ambulance services without adhering to provisions of European Union law which are designed to ensure that such contracts are transparent and subject to competition. The very limited number of procurement procedures launched at European level by local authorities – 13 contract notices published by 11 of over 400 administrative and urban districts in Germany in a period of 6 years – confirms the existence of such a practice.

56 Second, the Commission states that the failure by the German regional authorities to observe European Union rules on public service contracts cannot be justified by considerations relating to the exercise of State sovereignty.

57 It maintains that the services at issue in the present case do not fall within the scope of Articles 45 EC and 55 EC, given that they are not, as such, directly and specifically connected with the exercise of official authority. It states, in particular, that those services do involve a specific power of coercion or special powers of intervention on the part of their providers.

58 Neither the use of flashing blue lights and sirens, nor the recognition that providers of such services have right of way under the German Highway Code, nor the fact that emergency rescue measures can be taken without the injured person's consent or by ambulance staff who are not fully medically trained, constitutes a manifestation of such powers of coercion or of intervention.

59 Even if, as the Federal Republic of Germany maintains, public emergency services constitute for the public bodies responsible for them a task that involves the direct and specific exercise of official authority, the functional integration into the planning, organisation and administration of those services of auxiliary staff responsible for providing ambulance services does not mean that such staff have official rights or powers of coercion.

60 Third, the Commission denies that Article 86(2) EC can reasonably be relied on in the present case. It claims that Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089 is irrelevant for the purpose of assessing whether the practice at issue is in conformity with European Union law on public contracts and that, in order for that provision to be applicable, it would have to be demonstrated that the application of the rules of the internal market precludes the provision of a high-quality, efficient and profitable emergency service, which the Federal Republic of Germany has never actually claimed.

61 In the first place, the Federal Republic of Germany challenges some of the facts alleged by the Commission.

62 As regards, first of all, the procurement procedure organised by the city of Bonn, it claims that the unsuccessful tenderer was rejected on the ground that, owing to a lack of professional reliability, the tenderer in question had been refused renewal of the authorisation required under the law of the *Land* of North Rhine-Westphalia for the operation of private emergency services, which the authorities of that city had to take into account when awarding a public contract.

63 With regard, second, to the Bad Bevensen ambulance station, the defendant states that the sole object of the process documented by a contract concluded in April 2004 was the transfer or assignment to the district association of the DRK of the activities, staff and equipment of the joint municipality of Bevensen and of the July 1984 contract connecting that body with the administrative district of Uelzen. That April 2004 contract was a continuation of the original contract which, having been concluded in July 1984, did not fall within the scope of Directive 92/50. The April 2004 contract did not substantively modify the original contract, either in terms of its object, the geographic scope of the contract, the services provided or the method of financing.

64 Third, as regards the *Land* of Saxony, the Federal Republic of Germany states that the alleged infringement ended when the contracts renewed between 2002 and 2004 expired and when new rules of the *Land* entered into force in January 2005 requiring, from then on, the adoption of a transparent procedure for the procurement of public ambulance services.

65 In the second place, the Federal Republic of Germany, supported in that respect by the Kingdom of the Netherlands, contends that, as elements of public policy in respect of risk prevention and health protection, public ambulance services are covered by the exception under Articles 45 EC and 55 EC, which takes them outside the scope of European Union law on public contracts.

66 It states that the categorisation of the activity concerned under national law determines the assessment of its association with the exercise of official authority. In the present case, the organisation of public ambulance services, including contracts awarded to providers of those services, is governed by public-law rules. In addition, and above all, the activity entrusted to those providers is connected with the exercise of official authority, as evidenced by emergency vehicle drivers' right of way and associated features, namely the use of flashing blue lights and sirens.

67 The Federal Republic of Germany adds that activities associated with public ambulance services generally presuppose the existence of special powers, namely the planning, organisation and administration of services, the imposition of information and notification obligations on third parties, as well as decisions on the deployment of other specialist services and involvement in the appointment of members of staff of those services as civil service administrators. Those activities are based on close coordination between the various human and technical links in the 'emergency chain', which only an official authority is in a position to undertake on a permanent basis throughout the whole of the territory concerned.

68 The Federal Republic of Germany and the Kingdom of the Netherlands maintain that the fact that public emergency services are, as such, an official function of the public body responsible for them also

militates in favour of a functional connection between the providers of those services and the exercise of official authority. The same applies to the collaboration between those providers and other operators also involved in the planning, organisation and administration of those services, such as the police, civil protection and fire services, which are responsible for prevention or protection and which can implement evacuation or security measures and roadblocks and provide assistance with admissions, for example of persons suffering mental illness, since such tasks and measures are typical of such an official function.

69 In the third place, the Federal Republic of Germany, again supported in this respect by the Kingdom of the Netherlands, puts forward in the alternative the argument that ambulance services fall within the definition of 'service of general economic interest' within the meaning of Article 86(2) EC, which entails authority to derogate not only from the competition rules (see *Ambulanz Glöckner*) but also from the fundamental freedoms and from the rules relating to public contracts.

70 It contends that a derogation from those freedoms and rules is necessary to enable cross-subsidisation between densely-populated geographic areas, where the provision of ambulance services is profitable, and areas of low population density, which are far less profitable in that regard.

71 The link that exists between the emergency and civil protection services also militates in favour of a derogation from the rules of European Union law relating to public contracts. The State's obligation to provide civil protection in major emergencies requires the protection of national health organisations which are obliged to provide assistance in such cases and effectively guarantee the availability of a large number of volunteers living in the vicinity of the emergency.

Findings of the Court

72 In view of the consequences arising from the application of the first paragraph of Article 45 EC and Article 55 EC, it is necessary to determine at the outset whether those provisions apply in the present case (see, to that effect, Case C-465/05 *Commission* v *Italy* [2007] ECR I-11091, paragraph 31).

– The exception under the first paragraph of Article 45 EC, in conjunction with Article 55 EC

73 According to the first paragraph of Article 45 EC, in conjunction with Article 55 EC, the provisions relating to the freedom of establishment and the freedom to provide services do not extend to activities which in a Member State are connected, even occasionally, with the exercise of official authority.

74 As the Advocate General stated at point 51 of her Opinion, such activities are also excluded from the scope of directives which, like Directives 92/50 and 2004/18, are designed to implement the provisions of the Treaty relating to the freedom of establishment and the freedom to provide services.

75 It is necessary, therefore, to determine whether the ambulance service activities at issue in the present case are among the activities referred to in the first paragraph of Article 45 EC.

76 In that regard, it must be borne in mind that, as derogations from the fundamental rules of freedom of establishment and freedom to provide services, Articles 45 EC and 55 EC must be interpreted in a manner which limits their scope to what is strictly necessary in order to safeguard the interests which they allow the Member States to protect (see, in particular, Case 147/86 *Commission* v *Greece* [1988] ECR 1637, paragraph 7; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 45; and Case C-438/08 *Commission* v *Portugal* [2009] ECR I-0000, paragraph 34).

77 Moreover, it has consistently been held that the review of the possible application of the exceptions laid down in Articles 45 EC and 55 EC must take into account the fact that the limits imposed by those articles on the exceptions referred to fall within European Union law (see, in particular, Case 2/74 *Reyners*, [1974] ECR 631, paragraph 50, and *Commission* v *Portugal*, paragraph 35).

78 According to settled case-law, the derogation provided for under those articles must be restricted to activities which, in themselves, are directly and specifically connected with the exercise of official authority (see *Reyners*, paragraph 45; Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 8; and *Commission* v *Portugal*, paragraph 36).

79 As the Advocate General noted at point 58 of her Opinion, such a connection requires a sufficiently qualified exercise of prerogatives outside the general law, privileges of official power or powers of coercion.

80 In the present case, it must first be observed that a contribution to the protection of public health, which any individual may be called upon to make, in particular by assisting a person whose life or health are in danger, is not sufficient for there to be a connection with the exercise of official authority (see, to that effect, Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraph 37, and *Commission* v *Italy*, paragraph 38).

81 As regards the right of ambulance service providers to use equipment such as flashing blue lights or sirens, and their acknowledged right of way with priority under the German Highway Code, they certainly reflect the overriding importance which the national legislature attaches to public health as against general road traffic rules.

82 However, such rights cannot, as such, be regarded as having a direct and specific connection with the exercise of official authority in the absence, on the part of the providers concerned, of official powers or of powers of coercion falling outside the scope of the general law for the purposes of ensuring that those rights are observed, which, as the parties agree, is within the competence of the police and judicial authorities (see, to that effect, *Commission* v *Italy*, paragraph 39, and *Commission* v *Portugal*, paragraph 44).

83 Nor can matters such as those raised by the Federal Republic of Germany – concerning special organisational powers in the field of the services delivered, the power to request information from third parties and the deployment of other specialist services, or even involvement in the appointment of civil service administrators in connection with the services at issue – be regarded as reflecting a sufficiently qualified exercise of official powers or of powers falling outside the scope of the general law.

84 As the Federal Republic of Germany also asserted, the fact that the provision of public ambulance services entails collaboration with the public authorities and with professional staff on whom official powers have been conferred, such as members of the police force, does not constitute evidence that the activities of those services have a connection with the exercise of official authority either (see, to that effect, *Reyners*, paragraph 51).

85 The same applies to the fact, also maintained by the Federal Republic of Germany, that agreements relating to the service contracts at issue come within the scope of public law and that the activities concerned are carried out on behalf of those public-law bodies which take on responsibility for public emergency services (see, to that effect, Case C-281/06 *Jundt* [2007] ECR I-12231, paragraphs 36 to 39).

86 It follows from this that the Court cannot accept that Articles 45 EC and 55 EC are applicable to the activities at issue in the present case.

87 It is, therefore, necessary to consider whether the infringement alleged by the Commission has been established.

– The infringement alleged by the Commission

88 As a preliminary point it must be noted, first of all, that it is clear from the particulars provided by the Commission in the written pleadings which it lodged with the Court that the present action is limited to the ‘tender’ model, just one of the various methods of providing public ambulance services that exist in the Federal Republic of Germany, under which the provider to whom a contract is awarded is paid directly by the contracting authority with which it concluded the contract or by a funding body connected with that contracting authority.

89 Second, the Federal Republic of Germany did not challenge the Commission’s assertion that the local authorities which awarded the various contracts identified in the action are contracting authorities within the meaning of Article 1(b) of Directive 92/50 or Article 1(9) of Directive 2004/18 (see, to that effect, Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraph 18).

90 Third, the fact, as maintained by the Federal Republic of Germany, that the agreements by which those contracts were awarded are governed by public law cannot eclipse the existence of the contract required by Article 1(a) of Directive 92/50 or Article 1(2)(a) of Directive 2004/18. As the Commission argued, on the contrary, it militates in favour of the existence of such a contract (see, to that effect, Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 73).

91 The fact that those contracts are in writing and for pecuniary interest is not in any way denied by the Federal Republic of Germany, which, moreover, does not dispute the Commission's statistics showing that the respective value of the various contracts at issue is considerably higher than the thresholds set under Article 7 of Directive 92/50 or of Directive 2004/18.

92 Fourth, it is also common ground between the parties that the emergency ambulance or qualified patient transport services at issue in the present case are within category 2 or 3 of Annex I A to Directive 92/50 or of Annex II A to Directive 2004/18 as well as category 25 of Annex I B to Directive 92/50 or of Annex II B to Directive 2004/18, and that, therefore, the contracts for such services fall within the scope of Article 10 of Directive 92/50 or of Article 22 of Directive 2004/18 (see, to that effect, Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 40).

93 On the other hand, the Federal Republic of Germany denies certain facts alleged by the Commission. It also challenges the Commission's assertion that those facts reveal a general practice in the award of contracts for public ambulance services.

(i) The facts alleged

94 It is settled case-law that, where the Commission relies on detailed complaints revealing repeated failures to comply with European Union law, it is incumbent on the Member State concerned to contest specifically the facts alleged in those complaints (see Case C-489/06 *Commission* v *Greece* [2009] ECR I-0000, paragraph 40 and the case-law cited).

95 In the present case, the Federal Republic of Germany does not deny the veracity of the facts claimed by the Commission in respect of the contract awarded by the city of Magdeburg in the *Land* of Saxony-Anhalt, the contract associated with the operation of the Witten-Herbede ambulance station in the *Land* of North Rhine-Westphalia and the contracts awarded by the Hanover Region and by the administrative district of Hamelin-Pyrmont in the *Land* of Lower Saxony, these being the contracts at issue which are referred to in paragraphs 27 and 29 to 31 of the present judgment.

96 By contrast, the Federal Republic of Germany objects to the Commission's factual claims in respect of the contracts awarded by the city of Bonn, by the administrative district of Uelzen and by the various public authorities of the *Land* of Saxony.

97 As regards, first of all, the contract awarded by the city of Bonn, referred to in paragraph 28 of the present judgment, the information given by the Federal Republic of Germany concerning the reasons for the rejection of a German tenderer cannot eclipse the Commission's allegations – unchallenged by the Federal Republic of Germany – concerning the failure, in connection with that contract, to observe European Union rules on transparency in relation to public contracts.

98 Next, as regards the contract awarded by the administrative district of Uelzen, referred to in paragraph 32 of the present judgment, it is apparent from the parties' exchanges before the Court that the Commission's complaint relates to the fact that the object of the contract concluded between that district and the district association of the DRK in 1984 was extended in 2004 to encompass the operation of the ambulance station at Bad Bevensen, contrary to European Union law on public contracts.

99 In that regard, it must be observed that an amendment to the initial contract may be regarded as being material and, therefore, as constituting the new award of a contract for the purposes of Directive 92/50 or of Directive 2004/18, inter alia, when it extends the scope of the contract considerably to encompass services not initially covered (see, to that effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 36).

100 In this instance, it is apparent from the information in the documents before the Court that the value of the contract relating to the operation of the ambulance station at Bad Bevensen amounts to EUR 673 719.92, which is considerably higher than the thresholds set under Article 7 of Directive 92/50 and of Directive 2004/18.

101 In those circumstances, the extension of the contract referred to in paragraph 98 of the present judgment must, as maintained by the Commission, be regarded as a material amendment of the original contract, which would have required compliance with the relevant provisions of European Union law on public contracts.

102 Finally, as regards the contracts awarded in the *Land* of Saxony, referred to in paragraphs 33 to 35 of the present judgment, the Federal Republic of Germany's claim that the infringement complained of ended on the expiry of the contracts renewed between 2002 and 2004 and the entry into force in January 2005 of new rules of the *Land* introducing a transparent procedure for the procurement of public ambulance services does not mean that the Court can dismiss the Commission's allegations – unchallenged by the defendant – that there was no transparency at European Union level in the renewal under the previous rules of those contracts until 31 December 2008.

103 The situation complained of by the Commission in respect of the various contracts of the *Land* of Saxony was therefore ongoing as at the date on which the period prescribed in the reasoned opinion expired, namely 16 February 2007, which is the relevant date for assessing the existence of the alleged infringement (see, to that effect, Case C-562/07 *Commission* v *Spain* [2009] ECR I-0000, paragraph 23).

104 It follows that all the facts alleged by the Commission must be deemed to have been established.

(ii) The practice alleged

105 The Federal Republic of Germany complains that the Commission relied on individual cases in order to plead the existence of a general practice of awarding contracts for public ambulance services contrary to European Union law.

106 In that regard, it must be noted that the Commission may seek a finding that European Union law has not been complied with because a general practice contrary thereto has been adopted by the authorities of a Member State, using particular situations to shed light on that practice (see, to that effect, Case C-248/05 *Commission* v *Ireland* [2007] ECR I-9261, paragraph 64 and the case-law cited).

107 A finding that there has been a failure to fulfil obligations on the basis of the administrative practice followed in a Member State none the less involves production by the Commission of sufficiently documented and detailed proof of the alleged practice. It must be apparent from such proof that that administrative practice is, to some degree, of a consistent and general nature. The Commission may not rely on any presumption for that purpose (see Case C-156/04 *Commission* v *Greece* [2007] ECR I-4129, paragraph 50 and the case-law cited, and Case C-489/06 *Commission* v *Greece*, paragraph 48).

108 When the Commission has adduced sufficient evidence to show that the authorities of the defendant Member State have developed a repeated and persistent practice which is contrary to European Union law, it is incumbent on that Member State to challenge in substance and in detail the information produced and the consequences flowing therefrom (see Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 47, and Case C-248/05 *Commission* v *Ireland*, paragraph 69).

109 In the present case, faced with the Commission's factual assertions concerning repeated instances of a failure to comply with European Union law in relation to the award of contracts for public ambulance services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony, it is apparent from paragraphs 95 to 104 of the present judgment that the Federal Republic of Germany has been unable to disprove the facts complained of. Moreover, it has produced no evidence that other contracts awarded on the basis of the tender model in those *Länder* were so awarded in accordance with European Union law on public contracts.

110 On the contrary, as the Advocate General noted at point 150 of her Opinion, the Commission's statements – which were not challenged by the Federal Republic of Germany – attesting to the very limited number of cases in which contracts for public ambulance services were awarded in accordance with European Union law, corroborate the existence in the four *Länder* concerned of a practice that goes beyond the individual cases highlighted by the Commission in the present action.

111 It follows from the foregoing that the practice alleged by the Commission must be deemed to have been established as regards the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony.

112 It is therefore necessary to determine whether there have been infringements of Directives 92/50 and 2004/18 and of Articles 43 EC and 49 EC as alleged by the Commission.

(iii) Infringements relating to failure to comply with Directive 92/50 or with Directive 2004/18, and with Articles 43 EC and 49 EC

113 In its application the Commission submits that, where contracts awarded for public ambulance services are characterised by the predominance of the value of transport services as compared with the value of health services, the practice in question constitutes an infringement of Article 10 of Directive 92/50 in conjunction with Titles III to VI thereof or, since 1 February 2006, of Article 22 of Directive 2004/18 in conjunction with Articles 23 to 55 thereof. In accordance with those various titles or provisions, it is, inter alia, incumbent on the contracting authority to publish a contract notice at European Union level for the purposes of awarding the contract in question and to ensure that the results of the award of that contract are published.

114 Where contracts awarded for public ambulance services are characterised by the predominance of the value of health services as compared with the value of transport services, the Commission claims that the practice in question constitutes an infringement of Article 10 of Directive 92/50 in conjunction with Article 16 thereof or, since 1 February 2006, of Article 22 of Directive 2004/18 in conjunction with Article 35(4) thereof. Those provisions, in essence, require the contracting authority to ensure that the results of the award of the contract concerned are published.

115 The Commission also raises a complaint concerning an infringement of Articles 43 EC and 49 EC, which, however, as is apparent from paragraphs 45 to 47 and 52 of the present judgment, is admissible only in so far as it relates to the award of contracts in the circumstances referred to in the preceding paragraph.

116 In that regard, it must be borne in mind that, according to settled case-law, in proceedings under Article 226 EC for failure to fulfil obligations, it is for the Commission to prove the alleged failure by placing before the Court all the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumptions (see Case C-246/08 *Commission* v *Finland* [2009] ECR I-0000, paragraph 52 and the case-law cited).

117 As the Advocate General stated at point 113 of her Opinion, the Commission's obligation to establish precisely the specific object of the alleged failure is critical if the defendant Member State is to have an accurate understanding of the measures it is required to adopt, in the event of such a failure being determined, in order to ensure that the situation complained of is restored to full conformity with European Union law.

118 In the present case, it follows from the documents before the Court that, having stated in the reasoned opinion that it did not have sufficient information available to be able to assess whether it is the value of transport or of health services which is predominant in the contracts identified, the Commission, as the Advocate General noted at point 96 of her Opinion, deliberately refrained from addressing that aspect in the context of the present action, although the documents before the Court do not indicate that that decision was dictated by any alleged lack of cooperation on the part of the German authorities during the pre-litigation procedure.

119 In its application, the Commission stated in general terms that the value of health services may be considerable, both in contracts relating to qualified patient transport services and in those relating to

emergency ambulance transport services, and that, since the contracts at issue generally cover both types of service, the respective values of those services will vary from one contract to the next, although contracts in which the value of transport services is predominant as against the value of health services and contracts in which the converse is the case are equally conceivable.

120 Having opted for an approach based on those suppositions, the Commission deliberately refrained from establishing that the contracts at issue, or at least some of them, were characterised by the predominance of the value of transport services over the value of health services.

121 On the contrary, with regard to Directives 92/50 and 2004/18, the Commission's complaints were focused on the fact that, irrespective of the legal distinction made in Article 10 of Directive 92/50 or in Article 22 of Directive 2004/18, there had been a failure when awarding each of those contracts to comply with Article 16 of Directive 92/50 or Article 35(4) of Directive 2004/18 given that the results of the award of those contracts were not published, which was not denied by the Federal Republic of Germany in respect of any of the contracts referred to.

122 In such circumstances, where, in the absence of the production by the Commission of sufficiently specific evidence, it is conceivable that none of the contracts identified in the action is characterised by the predominance of the value of transport services over the value of health services, the finding of a failure to comply with Directives 92/50 and 2004/18 must be limited to an infringement of Article 10 of Directive 92/50 in conjunction with Article 16 thereof or, since 1 February 2006, of Article 22 of Directive 2004/18 in conjunction with Article 35(4) thereof, since those provisions are applicable in any event to contracts which, like those at issue in the present case, cover both transport and health services, regardless of the respective value of those services in the contract concerned.

123 As the Advocate General stated at point 93 of her Opinion, the Commission, moreover, has not sought to establish that the contracts identified in its action, or at least some of them, were characterised by the predominance of the value of health services over the value of transport services. In those circumstances, where, in the absence of sufficient specific information, it is conceivable that none of the contracts identified in the action is characterised by such predominance, the Court is not in a position to find that there has been a failure to comply with Articles 43 EC and 49 EC as alleged. The same conclusion applies as regards the question whether the contracts identified by the Commission have a certain cross-border interest.

124 The Court will also examine the merits of the arguments of the Federal Republic of Germany and of the Kingdom of the Netherlands in relation to the reasoning based on Article 86(2) EC.

– The reasoning based on Article 86(2) EC

125 In paragraphs 55 and 60 of the judgment in *Ambulanz Glöckner*, the Court categorised emergency transport services as services of general economic interest within the meaning of Article 86(2) EC.

126 However, it is apparent from settled case-law that it is incumbent upon a Member State which invokes Article 86(2) EC to show that all the conditions for application of that provision are fulfilled (see, in particular, Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 101).

127 In the present case, the Federal Republic of Germany pointed to the need to ensure cross-subsidisation of ambulance services between profitable and less profitable geographic areas on the basis of population density. It also emphasised the importance of a service that is in close proximity to and collaborates with other services involved in emergency work, which entails having staff living in the vicinity of incidents available who can be readily mobilised in the event of an emergency or a major disaster.

128 However, such considerations could, as the Commission pointed out, justify the adoption by the contracting authority responsible of specific measures designed to ensure the provision by the other party to the contract, on economically acceptable terms, of a high-quality ambulance service that is efficient and available throughout the whole of the area concerned – inter alia by means of payment arrangements adapted to the specific nature of the area covered or by means of an obligation to have sufficient human and technical resources available on the ground.

129 By contrast, such considerations do not clarify how the obligation to ensure that the results of the award of the contract concerned are published is liable to prevent the accomplishment of that task of general economic interest.

130 It follows from this that the arguments based on Article 86(2) EC must be rejected.

131 Having regard to all of the foregoing considerations, it must be held that, by failing to publish notices of the results of the procedure for the award of contracts, the Federal Republic of Germany has failed to fulfil its obligations under Article 10 of Directive 92/50 in conjunction with Article 16 thereof or, since 1 February 2006, under Article 22 of Directive 2004/18 in conjunction with Article 35(4) thereof in relation to the award in accordance with the tender model of contracts for public emergency ambulance and qualified patient transport services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony.

132 The application must be dismissed as to the remainder.

Costs

133 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of those rules, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. In the present case, since the Commission and the Federal Republic of Germany have each been unsuccessful in certain claims, they shall each bear their own costs.

134 Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Member State which has intervened in the proceedings is to be ordered to bear its own costs. The Kingdom of the Netherlands shall therefore bear its own costs.

On those grounds, the Court (Third Chamber) hereby:

1. Declares that, by failing to publish notices of the results of the procedure for the award of contracts, the Federal Republic of Germany has failed to fulfil its obligations under Article 10 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, in conjunction with Article 16 thereof or, since 1 February 2006, under Article 22 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in conjunction with Article 35(4) thereof in relation to the award in accordance with the tender model of contracts for public emergency ambulance and qualified patient transport services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony;

2. Dismisses the action as to the remainder;

3. Orders the European Commission, the Federal Republic of Germany and the Kingdom of the Netherlands to bear their own costs.

[Signatures]

---

* Language of the case: German.

EU:C:2010:67

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 11 February 2010 (1)

Case C-160/08

European Commission
v
Federal Republic of Germany

(Failure of a Member State to fulfil obligations – Article 226 EC – Activities connected with the exercise of official authority – Article 45 EC – Services of general economic interest – Article 86(2) EC – Service contracts in the field of public ambulance services – Directive 92/50/EEC – Directive 2004/18/EC – Principle of non-discrimination – Requirement of transparency)

Table of contents

I – Introduction

II – Legislative framework

A – Directive 92/50

B – Directive 2004/18

III – Facts of the case

IV – Pre-litigation procedure

V – Procedure before the Court of Justice and forms of order sought

VI – Main submissions of the parties

VII – Legal assessment

A – Admissibility

1. Ambulance services as mixed services in the system of the procurement directives

2. Reformulation of the claims made in the application

3. Conclusion

B – Merits

1. Non-applicability of the exception under the first paragraph of Article 45 EC

2. No justification under Article 86(2) EC

3. Analysis of the nine contested procurement procedures

a) Award of contracts by the City of Magdeburg (Saxony-Anhalt)

i) Infringement of Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18

ii) No breach of the principle of non-discrimination laid down in primary law or the requirement of transparency laid down by primary law

– Consideration of the merits on the assumption that the plea of an infringement of primary law is partially inadmissible

– In the alternative: Consideration of the merits in the event that the plea of an infringement of primary law should be declared admissible in its entirety

iii) Conclusion

b) The cases of procurement by the City of Bonn (North Rhine-Westphalia), the municipality of Witten (North Rhine-Westphalia), the Region of Hanover (Lower Saxony) and the administrative district of Hameln-Pyrmont (Lower Saxony)

c) Award of contracts by the administrative district of Uelzen (Lower Saxony)

d) The cases of the award of contracts by the Westsachsen (Saxony), Chemnitz/Stollberg (Saxony) and Vogtland (Saxony) joint ambulance associations

e) Conclusion

4. Unlawful procurement practice in the Federal Republic of Germany

VIII – Costs

IX – Conclusion

I – Introduction

1. The present case originates in an action for failure to fulfil obligations brought by the Commission pursuant to Article 226 EC by which the Commission seeks a declaration from the Court of Justice that, by failing to make a public call for tenders or failing transparently to award service contracts in the field of public ambulance services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony, and by failing to publish notices of contracts awarded, the Federal Republic of Germany has failed to fulfil its obligations under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (2) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (3) and breached the principles of freedom of establishment and freedom to provide services (Articles 43 EC and 49 EC).

II – Legislative framework

A – *Directive 92/50*

2. Under Article 3(2) of Directive 92/50, contracting authorities must ensure that there is no discrimination between different service providers.

3. Article 10 of Directive 92/50 provides:

‘Contracts which have as their object services listed in both Annexes I A and I B shall be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of the services listed in Annex I B. Where this is not the case, they shall be awarded in accordance with Articles 14 and 16.’

4. Article 16 of Directive 92/50 states:

‘1. Contracting authorities who have awarded a public contract or have held a design contest shall send a notice of the results of the award procedure to the Office for Official Publication of the European Communities.

2. The notices shall be published:

…’

B – *Directive 2004/18*

5. Under Article 2 of Directive 2004/18, contracting authorities must treat economic operators equally and non-discriminatorily and act in a transparent way.

6. Article 22 of Directive 2004/18 provides:

‘Contracts which have as their object services listed both in Annex II A and in Annex II B shall be awarded in accordance with Articles 23 to 55 where the value of the services listed in Annex II A is greater than the value of the services listed in Annex II B. In other cases, contracts shall be awarded in accordance with Article 23 and Article 35(4).’

7. Article 35(4) of Directive 2004/18 states:

‘Contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement.

…

In the case of public contracts for services listed in Annex II B, the contracting authorities shall indicate in the notice whether they agree to its publication. For such services contracts the Commission shall draw up the rules for establishing statistical reports on the basis of such notices and for the publication of such reports in accordance with the procedure laid down in Article 77(2).

…’

III – Facts of the case

8. In the Federal Republic of Germany, the law governing ambulance services falls within the legislative competence of the *Länder*, which have exercised their legislative discretion in different ways.

9. In most German *Länder*, ambulance services are provided using a dual system which distinguishes between public ambulance services and the provision of ambulance services on the basis of authorisations granted under the regional laws on ambulance services.

10. Public ambulance services normally cover both emergency transport services and qualified patient transport services. Emergency transport consists in the conveyance, with appropriate medical care, of persons with life-threatening injuries or conditions by means of emergency doctor's car or ambulance. Qualified patient transport consists in the conveyance of persons who are ill, injured or otherwise in need of help but who are not emergency patients; they are conveyed, with appropriate medical care, by patient transport ambulance.

11. Several *Länder* have decided to leave it to the individual towns and cities, administrative districts, joint ambulance associations etc. to select service providers for public ambulance services. To that end, those local authorities generally conclude contracts with individual service providers for the area-wide provision of ambulance services for the public. Where the local authority pays for the services directly, the relevant contract model is known as the 'submission model'. On the other hand, where remuneration takes the form of charges levied directly by the contractor on patients or sickness funds, the 'concession model' is employed.

12. By its action, the Commission objects to the award of service contracts in the field of public ambulance services in the *Länder* of Lower Saxony, North Rhine-Westphalia, Saxony and Saxony-Anhalt, where the submission model is used throughout. In particular, the Commission alleges that in those *Länder* calls for tenders were not, as a rule, made for contracts in the field of public ambulance services which are covered by the procurement directives and that they were not awarded transparently.

IV – Pre-litigation procedure

13. After several complaints had been received by the Commission, it informed the Federal Republic of Germany by letter of 10 April 2006 that it might have infringed the procurement directives and primary law in awarding contracts for pecuniary interest in respect of ambulance services in the *Länder* of North Rhine-Westphalia, Lower Saxony, Saxony and Saxony-Anhalt. At the same time, the Commission informed the Federal Republic of Germany that it might have breached the principles of freedom of establishment and freedom to provide services in awarding service concessions for ambulance services. The Government of the Federal Republic of Germany was therefore invited, pursuant to Article 226 EC, to submit observations on the Commission's position within two months.

14. In its letter of 10 July 2006, the Federal Republic of Germany denied the alleged infringements of Community law. Furthermore, it claimed that in 2005 the law had been amended in Saxony, with the result that from 1 January 2009 at the latest contracts for ambulance services in Saxony would be awarded on the basis of a selection procedure having due regard to the principles of non-discriminatory competition.

15. By letter of 15 December 2006, the Commission sent the Federal Republic of Germany the reasoned opinion. In that opinion it concluded that the Federal Republic of Germany had failed to fulfil and continued to fail to fulfil its obligations under Directive 92/50 and Directive 2004/18 and had breached the principles of freedom of establishment and freedom to provide services. The Commission therefore called on the Federal Republic of Germany to take the necessary measures to comply with the reasoned opinion within two months of receipt.

16. In its letter of 22 February 2007, the Federal Republic of Germany once again rejected the Commission's legal opinion. It claimed that there were no infringements of Community law in any of the specific cases cited by the Commission.

V – Procedure before the Court of Justice and forms of order sought

17. Because the Federal Republic of Germany failed to comply with the reasoned opinion, the Commission brought an action under Article 226 EC on 15 April 2008.

18. The Commission claims that the Court should:

– declare that, by failing to publish notices of contracts awarded and by failing to make a public call for tenders or failing transparently to award service contracts in the field of public ambulance services, the Federal Republic of Germany has failed to fulfil its obligations under

Directives 92/50/EEC and 2004/18/EC and breached the principles of freedom of establishment and freedom to provide services (Articles 43 EC and 49 EC);

– order the Federal Republic of Germany to pay the costs.

19. The Federal Republic of Germany contends that the Court should dismiss the application and order the Commission to pay the costs.

20. By order of the President of the Court of 16 December 2008, the Kingdom of the Netherlands was granted leave to intervene in support of the form of order sought by the Federal Republic of Germany. The Kingdom of the Netherlands claims, in support of the Federal Republic of Germany, that the Commission's application should be dismissed.

VI – Main submissions of the parties

21. In the view of the Commission, it has become the established practice in various German *Länder*, in awarding contracts in the field of public emergency and qualified patient transport services, to award contracts to local providers in contravention of procurement law without making a Europe-wide call for tenders and without ensuring proper transparency.

22. With reference to nine specific examples of contracts awarded in the *Länder* of Lower Saxony, North Rhine-Westphalia, Saxony and Saxony-Anhalt, the Commission stresses, first of all, that the towns and cities, administrative districts and joint ambulance associations responsible for the individual awards are to be regarded as contracting authorities within the meaning of the procurement directives. Furthermore, the contracts awarded in the field of public ambulance services are to be classified as public contracts for pecuniary interest, whose contract value in the cases in question is well above the financial thresholds which are relevant for the applicability of Directives 92/50 and 2004/18.

23. Where those public contracts were concluded before 31 January 2006, they are subject to Directive 92/50. Because those contracts relate to mixed services, they should have been awarded in accordance with the provisions of Titles III to IV or Articles 14 and 16 of Directive 92/50, depending on whether the value of the transport services or the value of the medical services is greater. That directive contains a provision covering the contracts which were concluded after the expiry of the transposition period for Directive 2004/18.

24. Since all the examples cited concern contracts with a cross-border interest, the Federal Republic of Germany has also breached the principle of non-discrimination and the requirement of transparency contained within freedom of establishment and freedom to provide services.

25. In the Commission's view, the alleged infringements do not represent isolated cases, but are evidence of a general procurement practice which is contrary to Community law. The Commission believes that its view is confirmed by the extremely low number of Europe-wide calls for tenders for ambulance services and notices of contracts awarded.

26. In the view of the German Government, the Commission's attempt to obtain a comprehensive declaration that procurement practice in the Federal Republic of Germany is unlawful by making claims in relation to individual procurement procedures in four out of the sixteen *Länder* is not acceptable. In addition, various factual assertions made by the Commission are incorrect.

27. The German Government also relies on the exception under the first paragraph of Article 45 EC in conjunction with Article 55 EC, under which the chapters of the EC Treaty on freedom of establishment and freedom to provide services do not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority; that is the case with the contested ambulance services. Because the procurement directives have their legal basis in those two chapters of the EC Treaty, they are also not applicable in the present case.

28. In the alternative, the German Government claims that the contested ambulance services meet the conditions for preferential treatment under Article 86(2) EC. Because Article 86(2) EC contains an

exception not only to the rules on competition, but also to all the other rules contained in the EC Treaty, the action brought by the Commission is also unfounded from this perspective. Lastly, the German Government refers to two orders of the Bundesgerichtshof (Federal Court of Justice) of 1 December 2008, according to which procurement law must now also apply to the award of contracts for ambulance services.

29. The Netherlands Government takes the view that the Federal Republic of Germany has infringed neither the procurement directives nor Article 43 EC and Article 49 EC. The contested public ambulance services should be regarded as services of general economic interest within the meaning of Article 86(2) EC. In this regard, it should be borne in mind that the exception under Article 86(2) EC also applies to the fundamental freedoms. Lastly, the Netherlands Government considers the possibility that the exception under Articles 45 EC and 55 EC applies. The Netherlands Government tends towards the view that the conditions governing the application of these exceptions could be met in the case of the contested ambulance services.

VII – Legal assessment

A – *Admissibility*

30. A particular characteristic of treaty infringement proceedings under Article 226 EC is that the definition of the subject-matter in the pre-litigation procedure delimits the admissible subject-matter of the subsequent judicial proceedings. It is settled case-law that the reasoned opinion and the subsequent action for a declaration of failure to fulfil obligations must be based on the same grounds and pleas, with the result that the Court cannot examine a ground of complaint which was not formulated in the reasoned opinion. (4)

31. This condition governing admissibility, which prohibits the grounds of complaint in the action being extended from the submissions made in the reasoned opinion, helps to protect the rights of defence of the Member State concerned, which is to be given an opportunity to comply with its obligations under Community law and to defend itself effectively against the charges formulated by the Commission. At the same time, that condition reflects the general procedural principle that any contentious procedure must have a clearly defined dispute as its subject-matter. (5)

32. In my opinion, in formulating its claims in the present case the Commission has inadmissibly gone beyond the grounds of complaint raised in the reasoned opinion. In order in clarify and define this inadmissible extension of the action, I will first examine the classification of the contested ambulance services in the system of the procurement directives. I will then explain how the Commission has reformulated its claims from the reasoned opinion in the application and the way in which that reformulation has also modified the subject-matter of the proceedings.

33. The fact that Federal Republic of Germany has not expressly raised a plea of inadmissibility against the extension of the action is not relevant, however. Because the prohibition on extending the subject-matter of the dispute constitutes an essential guarantee intended by the EC Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations, (6) the Court may decide this of its own motion even without a complaint being raised by the Federal Republic of Germany. (7)

1. Ambulance services as mixed services in the system of the procurement directives

34. Both Directive 92/50 and Directive 2004/18 distinguish between ‘priority’ and ‘non-priority’ services. Priority services are listed in Annex I A to Directive 92/50 and in the identical Annex II A to Directive 2004/18 and include land transport services. Non-priority services are listed in Annex I B to Directive 92/50 and in the identical Annex II B to Directive 2004/18 and include health services. The most important distinction, for the purposes of procurement law, between priority services under Annexes I A and II A and non-priority services under Annexes I B and II B is that only priority services are subject to the full application of the relevant procurement directive. (8) For non-priority services, on the other hand, it is merely provided that the rules on technical specifications apply and that contracting authorities must notify the Commission of contracts awarded. (9)

35. It is common ground in the present case that the contested ambulance services are to be classified as mixed services containing components of both priority and non-priority services. That classification follows directly from *Tögel*, (10) in which ambulance and patient transport services with a nurse in attendance were regarded as mixed services for the purposes of Article 10 of Directive 92/50. (11) The conveyance of persons is to be classified as a priority service and medical care during transportation as a non-priority service.

36. Under Article 10 of Directive 92/50 and under Article 22 of Directive 2004/18, mixed contracts for priority and non-priority services are subject to the full application of the relevant procurement directive where the value of the priority services is greater than the value of the non-priority services. If that is not the case, mixed contracts are to be treated as contracts for non-priority services.

2. Reformulation of the claims made in the application

37. In the reasoned opinion, the Commission expressly considered the mixed nature of the contested ambulance services both in its legal assessment and in formulating the individual grounds of complaint.

38. In the reasoned opinion, the Commission argued in particular that in the contested ambulance services the transport services within the meaning of Annex I A to Directive 92/50 and Annex II A to Directive 2004/18 predominate, with the result that, in awarding those contracts, the Federal Republic of Germany has infringed Article 10 in conjunction with Titles III to IV of Directive 92/50 and, since 1 February 2006, Article 22 in conjunction with Articles 23 to 55 of Directive 2004/18/EC. In the event that in individual cases among those cited the medical services within the meaning of Annex I B to Directive 92/50 and Annex II B to Directive 2004/18 should predominate, the Commission alleges in the alternative an infringement of Article 10 in conjunction with Article 16 of Directive 92/50 and, since 1 February 2006, Article 22 in conjunction with Article 35(4) of Directive 2004/18, and in any case a breach of the principles of freedom of establishment and freedom to provide services under Article 43 EC and Article 49 EC and the principle of non-discrimination contained within those principles.

39. In its application, the Commission deliberately refrained from answering the question whether the contested ambulance services have their emphasis on the transportation of persons or on medical care. There is now no need to answer the question, according to the Commission, because in any case the contested procurement procedures infringed the rules on the duty to notify contracts awarded under Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18 and also breached the principle of non-discrimination contained within freedom of establishment and freedom to provide services.

40. By reformulating the claim in this way, the Commission has inadmissibly modified the subject-matter of the proceedings.

41. While in its reasoned opinion the Commission took the position that the procurement of ambulance services breached the principle of non-discrimination laid down in primary law and the requirement of transparency laid down in primary law only in cases where the aspect of medical care predominated, in its action it takes a different position, according to which regard must always be had to the principle of non-discrimination and the requirement of transparency in the award of the contested contracts. However, this must presuppose that the principle of non-discrimination and the requirement of transparency can also be directly breached in the case of procurement of ambulance services where the transport character predominates, which was not alleged either explicitly or implicitly in the reasoned opinion.

42. The extension of the subject-matter of the proceedings therefore lies in the fact that a breach of the principle of non-discrimination and the requirement of transparency, which stem from freedom of establishment and freedom to provide services, is now also being alleged in connection with the award of mixed ambulance services where the transport character predominates. In this respect the present action must be declared inadmissible.

43. This conclusion cannot be affected by the fact that the duties to make calls for tender and to give notice under the procurement directives are ultimately expressions in secondary law of the principle of non-discrimination laid down in primary law and the requirement of transparency laid down in primary

law, or that in its application which is now founded on primary law the Commission did not therefore go substantively beyond the grounds of complaint raised in the reasoned opinion. The crucial factor is that in its application the Commission alleges an infringement of primary law in relation to priority mixed services, even though it claimed in the reasoned opinion that those services were fully subject to the procurement directives and consequently alleged only an infringement of those directives. Therefore, in the pre-litigation procedure the Federal Republic of Germany was not able to address the question whether the award of contracts for the provision of ambulance services which have their emphasis on transport of persons and are therefore fully subject to the procurement directives may actually be assessed directly on the primary-law basis of the principle of non-discrimination and the requirement of transparency. (12)

44. If this modification of the basis of the action were to be declared admissible, this would result in an unacceptable infringement of the rights of the defence enjoyed by the Federal Republic of Germany, because it would be deprived of the opportunity in the pre-litigation procedure to address the essential question of whether and to what extent the Commission was permitted to base its claims regarding the award of priority mixed services directly on primary law.

45. It should also be pointed out at this point that in its application the Commission appears in places to claim an infringement of Article 2 of Directive 2004/18 and a declaration against the Federal Republic of Germany to that effect. (13) In so far as the claims were to be interpreted in that way, that claim is also to be rejected as inadmissible because the complaint of an infringement of Article 2 of Directive 2004/18 was not expressly raised in the reasoned opinion.

3. Conclusion

46. In the light of these considerations, I conclude that the present action for failure to fulfil obligations should be dismissed as inadmissible in so far as it also alleges a breach of the principle of non-discrimination and the requirement of transparency, which stem from freedom of establishment and freedom to provide services, in respect of the procurement of ambulance services where the transport character predominates.

47. Should the Court conclude that by its action the Commission is also seeking a declaration of an infringement of Article 2 of Directive 2004/18, that claim is likewise to be rejected as inadmissible.

B – *Merits*

48. The Federal Republic of Germany counters the action for failure to fulfil obligations brought by the Commission with three lines of argument. The German Government relies, first, on the exception under Article 45 EC and, in the alternative, on the justification under Article 86(2) EC. Second, the German Government disputes some of the factual assertions made by the Commission. Third, the German Government objects to the Commission's application for a declaration that a practice contrary to procurement law exists.

49. Against this background, I will first consider below the issue of the award of contracts for ambulance services in the light of the first paragraph of Article 45 EC in conjunction with Article 55 EC and, later, in the light of Article 86(2) EC. I will then examine in detail the nine procurement procedures to which the Commission objects. Lastly, I will address the question whether the results of that examination justify a declaration that there is a practice contrary to procurement law.

1. Non-applicability of the exception under the first paragraph of Article 45 EC

50. Under the first paragraph of Article 45 EC in conjunction with Article 55 EC, the rules of primary law on the right of establishment and on freedom to provide services do not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority. If an activity is connected with the exercise of official authority in a Member State, it is therefore excluded from the application of freedom of establishment and freedom to provide services.

51. The same must hold for the secondary legislation adopted to implement the chapters on the right of establishment and freedom to provide services. In so far as such secondary legislation also governs an activity connected with the exercise of official authority, it must be found, by way of an interpretation of the secondary legislation in a manner in conformity with the Treaty, that those activities are excluded from the application of that legislation in the Member States concerned. (14)

52. If the emergency and patient transport services to which the contested contracts relate were connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC, the breach of the principles of freedom of establishment and freedom to provide services alleged by the Commission would have to be rejected as unfounded. Because, moreover, both Directive 92/50 and Directive 2004/18 were adopted on the basis of Article 47(2) EC and Article 55 EC and therefore pursuant to the primary-law rules on competences in the chapters on the right of establishment and on freedom to provide services, the claim that those procurement directives have been infringed would also have to be rejected as unfounded in that case.

53. However, it is unclear to me whether the operation of emergency and patient transport services may be classified as an activity within the meaning of the first paragraph of Article 45 EC connected, even occasionally, with the exercise of official authority.

54. It should be pointed out, first, that the interpretation of the expression ‘exercise of official authority’ within the meaning of the first paragraph of Article 45 EC falls within the scope of Community law. The Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect. (15)

55. The question whether an activity has a connection with the exercise of official authority within the meaning of the first paragraph of Article 45 EC must therefore be answered on the basis of the Community-law definition of official authority under that provision.

56. A condition for assuming the existence of – a connection with – the exercise of official authority within the meaning of Article 45 EC is the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens. (16)

57. In view of the basic importance of the fundamental freedoms for the single market, the first paragraph of Article 45 EC – if applicable, in conjunction with Article 55 EC – is to be given a narrow interpretation as an exception to the principles of freedom of establishment and freedom to provide services. (17) The exception under the first paragraph of Article 45 EC is not therefore applicable to any activity in which prerogatives outside the general law, privileges of official power and powers of coercion may be enjoyed over citizens. Rather, it is necessary for such a connection with the exercise of official authority to be sufficiently intense and direct.

58. In other words, the criterion of the ‘exercise of official authority’ within the meaning of the first paragraph of Article 45 EC requires a sufficiently qualified exercise of prerogatives outside the general law, privileges of official power or powers of coercion. The Court has summarised this qualitative assessment of the connection with official functions in the requirement that the application of the first paragraph of Article 45 EC – if applicable, in conjunction with Article 55 EC – requires a ‘direct’ and ‘specific’ connection with the exercise of official authority. (18)

59. Thus, in its judgment of 29 October 1998 in *Commission* v *Spain*, (19) in examining the question whether the activities of private security undertakings in Spain were connected with the exercise of official authority, the Court stressed that even where in specific situations such private security forces are called upon to assist public security forces, the functions they perform are only auxiliary functions. It follows that private security undertakings are not ‘directly and specifically’ involved in the exercise of official authority. Advocate General Alber had proposed this approach in his Opinion in that case, pointing out that the distinction between main and auxiliary functions must be understood not as a quantitative criterion, but as a qualitative one and that there is a difference of degree between the powers of the public security forces and those of the private security forces. (20)

60. Recently, the Court was similarly strict in its judgment of 22 October 2009 in *Commission* v *Portugal*, (21) in which it ruled that the activities of the private vehicle roadworthiness testing bodies

did not fall within the exception provided for in Article 45 EC, even though such organisations issued certifications of the technical inspections carried out by them and also exercised official powers in this respect. However, the exercise of those official powers did not fulfil the qualitative criterion of a 'direct and specific' connection with the exercise of official authority within the meaning of Article 45 EC. In this connection, the Court pointed out that the certification drew only the legally envisaged conclusions from the relevant roadworthiness test, without the technical inspection bodies having real decision-making independence. Furthermore, the decisions whether or not to certify roadworthiness were taken in the context of direct State supervision. (22)

61. The Court had already ruled, in examining the applicability of the exception under Article 45 EC with regard to commissioners with insurance undertakings and private provident associations, that the performance of purely auxiliary and preparatory functions for an institution which actually exercises official authority by taking the final decision cannot be regarded as having a connection with the exercise of official authority within the meaning of that exception. (23)

62. In summary, it is now settled case-law that the 'exercise of official authority' within the meaning of the first paragraph of Article 45 EC is subject to high qualitative requirements, which have thus far frustrated reliance on Article 45 EC almost without exception. (24)

63. In the present case too, it would appear that the providers of emergency and patient transport services have a connection with the exercise of official authority to a limited extent, but without displaying the necessary qualitative characteristics for the application of Article 45 EC.

64. The Federal Republic of Germany considers that there are grounds for a connection with the exercise of official authority, first, because the agreements in question are to be regarded under German law as public-law agreements. Second, the Federal Republic of Germany points out the special prerogatives enjoyed by the ambulance services under the law on roads and on road transport, which consist in particular in giving instructions to other road users through the use of flashing blue lights and sirens which must be observed and with regard to which non-compliance may be penalised by a fine. Third, the Federal Republic of Germany states that the ambulance services are often involved in organising the ambulance service and in performing the official functions in the fields of fire protection and civil protection and support police security protection through the provision of emergency vehicles within the framework of public safety measures. Fourth, the Federal Republic of Germany stresses the appointment of ambulance service personnel as administrative enforcement officers which is often provided for under regional law.

65. These arguments are not convincing.

66. With its first argument, the Federal Republic of Germany disregards the principle that the Community legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems. (25) The fact that under German law the contested ambulance services are to be organised on a public-law basis is irrelevant to the question whether those ambulance services fall within the scope of Article 45 EC.

67. Even though the Federal Republic of Germany then rightly takes the view that the use of flashing blue lights and sirens by the ambulance services is to be regarded as the exercise of a special prerogative, the specific expression of this special prerogative does not seem to have the intensity which, according to settled case-law, is required for the application of Article 45 EC. The special prerogatives claimed simply amount to, on the one hand, specially fitting out ambulance service vehicles and equipping them with flashing blue lights and siren and, on the other, claiming traffic priority over other road users with those vehicles under certain conditions, whereby failure by other road users to comply with those special prerogatives is punishable by a fine. In my opinion, these relatively weak special prerogatives do not meet the abovementioned high qualitative requirements for the exercise of official authority within the meaning of Article 45 EC.

68. In this connection, the involvement by the ambulance services, cited by the German Government, in organising the ambulance service and in fire protection and civil protection and in providing emergency vehicles in support of security authorities and fire services is not convincing either. It should be pointed out, first of all, that the provision of emergency vehicles in support of

security authorities is generally to be regarded as a purely auxiliary and preparatory activity which cannot, according to the abovementioned case-law, have a direct connection with the exercise of official authority. Even if the examples cited by the Federal Republic of Germany of the ambulance services' involvement in organising the ambulance service and in fire and civil protection (26) went beyond purely auxiliary and preparatory activities, those activities too do not meet the abovementioned high qualitative requirements for the exercise of official authority within the meaning of Article 45 EC.

69. Lastly, the argument of the possibility, often provided for under the law of the *Länder*, of appointing ambulance service personnel as administrative enforcement officers cannot be accepted because it is clear from the Court's case-law that the extension of the exception allowed by Articles 45 EC and 55 EC to an entire profession is not possible when the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole. (27)

70. In the light of the foregoing, I conclude that the contested activity of providing ambulance services does not as such imply any direct and specific connection with the exercise of official authority. In the present case the exception under Article 45 EC is not therefore relevant.

2. No justification under Article 86(2) EC

71. Relying on *Ambulanz Glöckner*, (28) the Federal Republic of Germany claims, in the alternative, that ambulance services are to be classified as services of general economic interest within the meaning of Article 86(2) EC, the justification contained in that provision being applicable without reservation to the field of freedom of establishment and freedom to provide services.

72. These arguments are not convincing.

73. The Federal Republic of Germany is correct in so far as it argues that in the judgments of 23 October 1997 in *Commission* v *Netherlands* (29) and of 18 June 1998 in *Corsica Ferries France*, (30) the Court declared the justification under Article 86(2) EC also to be applicable to State measures which were incompatible with the provisions of the EC Treaty on free movement of goods and freedom to provide services, and thereby confirmed that Article 86(2) EC may be relied on to justify infringements of Article 86(1) EC in conjunction with the fundamental freedoms. (31)

74. In the light of recent developments in the case-law of the Court of Justice, however, the question arises, first of all, whether *Commission* v *Netherlands* and *Corsica Ferries France* may still be applicable without reservation in this respect. According to the most recent case-law, the fact that an activity falls outside the scope of the rules on competition, having regard to its specific form, does not necessarily mean that it also falls outside the scope of the provisions on free movement. (32)

75. Against this background, the question arises whether this line of case-law following from *Commission* v *Netherlands* and *Corsica Ferries France* on the applicability of Article 86(2) EC in the field of the fundamental freedoms should be re-examined, especially as the Court appeared to rule out such applicability in its earlier case-law. (33)

76. Nevertheless, in the present case there is no need to consider this question any further, since the Federal Republic of Germany has not even shown that the conditions governing the application of Article 86(2) EC as such are met.

77. It is incumbent upon the Member State which invokes Article 86(2) to demonstrate that the conditions laid down in that provision are met. (34)

78. In the present case, Article 86(2) EC requires the following elements to be demonstrated: that the contested ambulance services are to be classified as services of general economic interest, that a modification of the contested procurement practice in accordance with Community law would obstruct or jeopardise the performance, in law or in fact, of those services, and that the development of trade has not been affected to such an extent as is incompatible with the interests of the Community.

79. Whilst it would appear to be common ground that emergency transport services are to be classified as services of general economic interest within the meaning of Article 86(2) EC, (35) the

Federal Republic of Germany has failed to demonstrate in the present case that the contested procurement practice is absolutely necessary and that the performance of the task of providing the contested ambulance services cannot therefore be guaranteed by other means which are more commensurate with Community law.

80. In this respect, the Federal Republic of Germany merely argues that the integration of new ambulance service providers in a region's ambulance service system could hinder or prevent cross-subsidies between densely built-up areas, where the provision of ambulance services is more profitable, and a large number of less profitable areas with a low population density. In addition, it claims that the protection, inherent in current procurement practice, of membership-based assistance organisations operating in Germany is necessary because those organisations have a duty to provide assistance in the event of an emergency. Only those organisations therefore guarantee that in an emergency there can be recourse to a large number of locally based voluntary workers, and such workers must have the option to gain regular practical experience in the ambulance service.

81. In its reply, the Commission responded to the cross-subsidy argument by stating that the claim that ambulance service organisations required cross-subsidies in order to make provision for less profitable areas was not an argument against a call for tender for ambulance services in accordance with Community law. Allowances could be made for differences in profitability of certain districts by paying a higher amount for less profitable districts. Another option was the combined procurement of emergency ambulance services and patient transport services for geographically defined areas which cover both more profitable and less profitable districts.

82. In its rejoinder, the Federal Republic of Germany did not claim that, in the light of the relevant factual and legal circumstances, these procurement alternatives put forward by the Commission would hinder or even render impossible the performance of the task of providing emergency transport services. Against this background, the argument of the necessity of the contested procurement practice on account of the ensuing cross-subsidies must be rejected because it has not been sufficiently substantiated.

83. The same holds for the argument regarding the large number of local voluntary workers. In this respect, the Commission pointed out, as an alternative which is consistent with procurement law, the possibility of a call for tenders where local availability was taken into consideration as a selection criterion. The Federal Republic of Germany did not provide sufficient evidence to refute this possibility in its rejoinder either.

84. In the light of these considerations, I conclude that the Federal Republic of Germany has not provided the evidence incumbent on it that the contested procurement practice for ambulance services meets the criteria laid down in Article 86(2) EC. Its reliance on Article 86(2) EC must therefore be rejected as unfounded for that reason.

3. Analysis of the nine contested procurement procedures

85. The Commission objects to nine procurement procedures for the provision of ambulance services in four *Länder*. On that basis, it seeks a declaration that the procurement practice in the Federal Republic of Germany is unlawful. Because an unlawful practice can exist only in so far as Community law has actually been infringed in the implementation of the individual contested procurement procedures, I will first examine whether and to what extent infringements of the rules and principles cited by the Commission may be established in connection with the implementation of the individual procurement procedures.

a) Award of contracts by the City of Magdeburg (Saxony-Anhalt)

86. According to the Commission, the City of Magdeburg (Stadt Magdeburg), as the contracting authority, conducted a so-called 'authorisation procedure' for the award of contracts for pecuniary interest in relation to ambulance services from October 2005. The service purportedly covered the provision of vehicles and personnel for emergency ambulance services and qualified patient transport services for the period 2007 to 2011, with a contract value of more than EUR 7 000 000 per year. There was apparently no Europe-wide call for tenders.

87. This description of the facts is not disputed by the Federal Republic of Germany.

88. In the view of the Commission, this procurement procedure constitutes an infringement by the Federal Republic of Germany of Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18. Furthermore, the procurement procedure also breached the principle of non-discrimination and the requirement of transparency contained within freedom of establishment and freedom to provide services.

i) Infringement of Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18

89. I concur with the Commission in so far as in any case the award of the contested contracts by the City of Magdeburg infringed Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18.

90. According to the undisputed description given by the Commission, the City of Magdeburg, as the contracting authority within the meaning of the procurement directives, concluded with a service provider a written contract for pecuniary interest in respect of the provision of ambulance services, whose estimated contract value was greater than the thresholds laid down in Directive 92/50 and Directive 2004/18. Even though it has not been established precisely at what time certain events which are relevant for procurement law purposes took place – according to the Commission the procedure was conducted from October 2005 – and it is not therefore clear whether the award of the contested contracts is to be examined completely or partially on the basis of Directive 92/50 or completely or partially on the basis of Directive 2004/18, (36) the absence of more precise information on the chronology of the procurement procedure in the present case cannot lead to a finding that there was no infringement of procurement law. Both under Directive 92/50 and under Directive 2004/18 the City of Magdeburg was required to comply with the duty to give notice of contracts awarded (Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18), irrespective of whether the transport component or the medical care component of the ambulance services was larger.

ii) No breach of the principle of non-discrimination laid down in primary law or the requirement of transparency laid down by primary law

– Consideration of the merits on the assumption that the plea of an infringement of primary law is partially inadmissible

91. As I have already mentioned in the examination of admissibility, the present action should be dismissed as inadmissible in so far as it seeks a declaration that the award of contracts for the provision of ambulance services which have their emphasis on the transport of persons breached the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services. (37)

92. The plea of an infringement of those principles of primary law is therefore admissible only in so far as it finds fault with the procurement of ambulance services which have their emphasis on medical care.

93. For this plea – restricted in that way – to be well-founded, the Commission would have to prove first of all that the procurement procedure challenged by it concerned ambulance services which had their emphasis on medical care. However, the Commission has not made any submissions on this, let alone proven it, in the present case. Rather, in the Commission's view there is no need to answer the question whether the contested services have their emphasis on transport of persons or on medical care.

94. Because in proceedings under Article 226 EC for failure to fulfil obligations it falls to the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information needed to assess the case (38) and, in view of the above findings, the Commission has failed to comply with that duty to produce evidence and burden of proof, the plea of a breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, in so far as it is admissible, should be rejected as unfounded.

– In the alternative: Consideration of the merits in the event that the plea of an infringement of primary law should be declared admissible in its entirety

95. If, contrary to my view, the Court were to declare as admissible in its entirety the plea of a breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, the merits of that plea would also have to be considered in its entirety.

96. In that scenario, the starting point for the consideration of the merits is the finding that the Commission deliberately left open the question whether the contested ambulance services have their emphasis on transport of persons or on medical care. As a result, it is not possible to determine whether those ambulance services – as mixed services for the purposes of Directive 92/50 and Directive 2004/18 – are subject to the full application of the procurement directives (39) and whether calls for tender should therefore have been made in compliance with the procurement procedures laid down in those directives. The Commission has attempted to circumvent this problem in its action by alleging a general breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services.

97. Because of this tactical decision by the Commission, however, the basic question arises in the present case whether, if the Commission establishes that a Member State's behaviour might infringe both primary law and, fully, Directives 92/50 and 2004/18, it is free to decide, in proceedings under Article 226 EC, whether to bring its claims on the basis of primary law or on the basis of the procurement directives. I will examine this question below with reference to the principle of the priority of application of secondary law and having regard to the spirit and purpose of proceedings under Article 226 EC.

98. I will then consider the strict conditions of primary law which, according to recent case-law, apply to proof of a cross-border interest in the procurement of non-priority services and examine what conclusion may be drawn from that case-law for the assessment of the present case.

Principle of the priority of application of secondary law

99. According to settled case-law, the principle of the priority of application of secondary law states that the exhaustive harmonisation of secondary law in a certain sphere at Community level means that each national measure in that sphere must be assessed in the light of the provisions of the secondary measure and not those of the EC Treaty. (40)

100. In the present case, at the level of primary law the Commission essentially alleges a breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services.

101. It is settled case-law that the principle of equal treatment under primary law in the field of public procurement is intended to afford equality of opportunity to all tenderers when formulating their tenders, regardless of their nationality. (41) The principles of equal treatment and non-discrimination on grounds of nationality imply a duty of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the award of the contract to be opened up to competition and a review of the impartiality of the procurement procedures. (42)

102. These requirements of equal treatment laid down in primary law and of the establishment of sufficient transparency have been extensively harmonised in Directive 92/50 and in Directive 2004/18 on the basis of extremely detailed rules on various duties relating to information, communication and giving notice. These duties of transparency under secondary law are characterised by detailed harmonisation, which is to be regarded as full harmonisation in relation to various points. (43)

103. In the light of the priority of application of secondary law, the question therefore arises in the present case whether the Commission can allege a breach of the principle of non-discrimination laid down in primary law and of the resulting requirement of transparency, even though the award of the contested contracts would be fully covered by the procurement directives if the transport element was predominant in value terms (44) and although the principle of non-discrimination and the requirement

of transparency which stem from freedom of establishment and freedom to provide services have been harmonised in detail and in some areas even exhaustively in those procurement directives.

104. This question has not yet been answered definitively in the Court's case-law.

105. It is clear that the priority of application of secondary law precludes reliance on justifications, established in primary law, of infringements of fundamental freedoms, in so far as the infringement concerns an area in which the justifications have been fully harmonised. (45) Conversely, a national rule whereby a Member State discharges its obligations under secondary legislation cannot be characterised as a breach of a fundamental freedom. (46) It would call into question the validity of secondary legislation if an authorisation under primary law could be played off against a prohibition under secondary law, or a requirement under secondary law against a prohibition under primary law. (47)

106. Even though it has also been confirmed in several preliminary rulings that national measures may no longer be assessed on the basis of the fundamental freedoms if and to the extent that there is exhaustive secondary legislation, (48) thus far it has largely not been clarified whether in Treaty infringement proceedings too complaints may no longer be raised directly against failure to observe the fundamental freedoms if the contested conduct at the same time constitutes or could constitute an infringement of secondary legislation by which an area coming under one of those fundamental freedoms has been fully harmonised. (49)

107. In my opinion, complaints may no longer be raised in treaty infringement proceedings directly against failure to observe the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services if the contested conduct at the same time constitutes an infringement of secondary legislation which effects full harmonisation. If, on the other hand, the Commission were given the option in such a case to raise a complaint of either a breach of the fundamental freedom or an infringement of the fully-harmonised secondary legislation, this would seriously undermine the validity of the secondary legislation.

108. The distinctive feature of fully harmonising secondary legislation is that the Member States may neither surpass nor fall short of the relevant stipulations of Community law. Against this background, the fully harmonising rules are generally very specific. If, therefore, an area which is covered by a fundamental freedom is made the subject of full secondary-law harmonisation, it is almost ruled out that primary law and secondary law will impose exactly the same obligations on the Member States. The secondary legislation elaborates and shapes the provisions on the fundamental freedoms as specific rights and duties. The stipulations of primary law, on the other hand, are much more general and can therefore, in principle, be complied with in different ways. These different depths of regulation inevitably lead to a substantive tension between primary law and fully harmonising secondary law, in particular between an 'authorisation under primary law' and a 'prohibition under secondary law' or vice versa.

109. In the abovementioned rulings on the non-applicability of justifications under primary law, if and in so far as these are subject to full harmonisation, this tension between an 'authorisation under primary law' and a 'prohibition under secondary law' is resolved in favour of the prohibition under secondary law, which is thus accorded priority of application. On the basis of the same balancing of interests, the general tension between the substantively more abstract and less shaped fundamental freedom under primary law and substantively highly specific and shaped secondary legislation which effects full harmonisation and is based on that freedom must also be eliminated in favour of that secondary legislation, (50) as the Court has now confirmed in settled case-law in the preliminary ruling procedure. (51)

110. In the light of the above considerations, if the Commission finds that a Member State's behaviour might infringe both rules of primary law and fully harmonising secondary legislation based on that primary law, it cannot simply raise a general objection of an infringement of primary law in Treaty infringement proceedings.

111. The same must be true in a case like the present one, where a complaint is raised against a breach of the principle of non-discrimination and the consequent requirement of transparency which stem from

freedom of establishment and freedom to provide services, even though the procurement directives might be fully applicable and precisely the requirement of transparency has been regulated in detail – and in some respects exhaustively – in those directives. On account of the extremely detailed clarification in secondary law of the transparency requirements in the procurement directives, there is a problem here too of a tension between an 'authorisation under primary law' and a 'prohibition under secondary law' and vice versa, which, in the light of the above assessment, must be eliminated in favour of the secondary legislation. (52)

112. In the light of these considerations, in a case like the present one, the Commission cannot simply raise a general objection to a breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services.

113. This finding is confirmed on a closer examination of the spirit and purpose of treaty infringement proceedings under Article 226 EC. Those proceedings essentially have an objective function, namely the uniform enforcement and safeguarding of Community law. (53) The aim of treaty infringement proceedings under Article 226 EC is not therefore to punish a Member State. A finding that a certain procedure or state of affairs is contrary to Community law is not an end in itself, but is intended, primarily, to establish certainty as to whether and to what extent a state of affairs contrary to Community law exists. A judicial finding of a failure by a Member State to fulfil its obligations under the Treaties is also intended to make it possible to ascertain what measures are necessary from the point of view of Community law to create or restore the state of affairs consistent with Community law. (54)

114. If, in a case like the present one, a general finding were to be made that, by the award of the contested contracts, the Federal Republic of Germany has breached the principle of non-discrimination laid down in primary law and the requirement of transparency laid down in primary law, without clarifying whether the contested mixed services have their emphasis on priority service elements and whether the procurement directives are therefore fully applicable, it would not be possible subsequently to ascertain with certainty what measures were necessary from the point of view of Community law to create or restore the state of affairs consistent with Community law. If the ambulance services were fully covered by the procurement directives, compliance with the substantively less shaped and specific requirement of transparency laid down in primary law would not be sufficient to satisfy the extremely detailed stipulations of the procurement directives. (55)

115. On the basis of these considerations, I conclude that, having regard to the priority of application of secondary law and the purpose of Treaty infringement proceedings under Article 226 EC, the award of the contracts by City of Magdeburg which is contested by the Commission may not be assessed on the basis of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services.

Proof of a cross-border interest in the procurement of non-priority services

116. Purely national situations do not, in principle, fall within the scope of the fundamental freedoms. Consequently, if the Commission alleges a breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, it must prove a cross-border interest in the award of the contracts in question.

117. In its judgment in Case C-507/03 *Commission* v *Ireland*, (56) the Court stated with regard to the procurement of services under Annex I B to Directive 92/50 that such services are in principle subject to the principles of the EC Treaty in the field of freedom of establishment and freedom to provide services, but that the Commission must always prove that the contract in question is of certain cross-border interest. In this connection, a mere statement by the Commission that a complaint was made to it in relation to the contract in question is not sufficient to establish that the contract was of certain cross-border interest and that there was therefore a failure to fulfil obligations. (57)

118. This strict examination of the existence of a cross-border interest in the procurement of non-priority services can be explained, at least partially, by the fact that, in the opinion of the Community legislature, contracts for services under Annex I B to Directive 92/50 and Annex II B to Directive 2004/18 are not, in the light of their specific nature, of cross-border interest. Against this background,

Directive 92/50 and Directive 2004/18 merely impose a requirement of publicity after the fact for that category of services. (58)

119. Because in proceedings for failure to fulfil obligations it falls to the Commission to place before the Court the information needed to assess the case, it cannot circumvent the stricter requirements of primary law relating to proof of a cross-border interest which apply to the procurement of mixed services with predominantly non-priority service components by deliberately leaving open the question of the classification of the contested mixed services for the purposes of procurement law. In a case like the present one, the Commission must therefore also prove a cross-border interest in the procurement of the contested services in accordance with the strict conditions which the Court laid down with regard to non-priority services in its judgment in Case C-507/03 *Commission* v *Ireland*.

120. As proof of the existence of a cross-border interest in the award of contracts by the City of Magdeburg, the Commission merely refers to a general complaint regarding the procurement of ambulance services in Germany and to the economic importance of the services in question, it being assumed that there is inevitably a keen interest from foreign service providers on account of the large volume of the contracts. These general statements by the Commission, which do not make any reference to the award of contracts by the City of Magdeburg and which, moreover, are based to some extent on presumptions, do not meet the high requirements governing proof of a cross-border interest in the procurement of non-priority services.

121. In the absence of proof of the cross-border connection, the Commission's claim that the award of contracts by the City of Magdeburg also breached the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services is to be rejected as unfounded.

iii) Conclusion

122. In the light of the above considerations, I conclude that in the award of the contested contracts by the City of Magdeburg, the Federal Republic of Germany has infringed Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18. In other respects, the Commission's submissions regarding the award of contracts by the City of Magdeburg should be rejected as inadmissible, or at least as unfounded.

b) The cases of procurement by the City of Bonn (North Rhine-Westphalia), the municipality of Witten (North Rhine-Westphalia), the Region of Hanover (Lower Saxony) and the administrative district of Hameln-Pyrmont (Lower Saxony)

123. With regard to the contested cases of procurement by the City of Bonn (Stadt Bonn), the municipality of Witten (Stadt Witten), the Region of Hanover (Region Hannover) and the administrative district of Hameln-Pyrmont (Landkreis Hameln-Pyrmont), the Commission puts forward the following arguments.

124. In 2004 the City of Bonn, as the contracting authority, awarded a contract for ambulance services for the period from 1 January 2005 to 31 December 2008, without making a Europe-wide call for tenders. The contract concerned inter alia the operation of four ambulance stations. The value of the contract was estimated to be at least EUR 5.28 million.

125. Since 2005 at least, the municipality of Witten, as the contracting authority, has awarded contracts for ambulance services to the value of EUR 945 753 per year without making Europe-wide calls for tender. The contracts concern the operation of one ambulance station.

126. In 2004, the Region of Hanover, as the contracting authority, launched a call for tenders for the provision of ambulance services in its territory, in which only the previous providers – Arbeiter-Samariter-Bund (ASB), Deutsches Rotes Kreuz (DRK), Johanniter-Unfallhilfe (JUH) and RKT GmbH – were permitted to participate. The contract awarded related to the period from 1 January 2005 to 31 December 2009 and had a total value of approximately EUR 65 million.

127. In 1993, the administrative district of Hameln-Pyrmont awarded the district association of the DRK a contract for the provision of ambulance services in its territory. The term, which had an original duration of ten years, was not terminated, but in 2003 was renewed for a further ten years without a call for tenders. In addition, in 1999 a new ambulance station was built in the municipality of Emmerthal, with the operation of which the DRK was also entrusted without any call for tenders. The total value of these procurement procedures amounts to EUR 7.2 million per year.

128. This description of the facts is not disputed by the Federal Republic of Germany.

129. In all these cases, the Commission alleges an infringement of the rules on the notification duty for awarded contracts (Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18). The existence of those infringements is not disputed.

130. On the other hand, I do not consider the breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, which is also alleged by the Commission in all these cases, to have been proved. This plea cannot be accepted because of the same jurisprudential and evidential reservations which I have already set out in examining the award of contracts by the City of Magdeburg. (59)

c) Award of contracts by the administrative district of Uelzen (Lower Saxony)

131. With regard to the award of contracts by the administrative district of Uelzen (Landkreis Uelzen), the Commission claimed that on the basis of a contract of 10 July 1984 the DRK provided ambulance services within the administrative district of Uelzen with the exception of the Bevensen-Bienenbüttel area. In 2004 material amendments were made to this contract, which should be regarded as a new contract. The award of this new contract did not comply with Article 16 of Directive 92/50. In addition, the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services were breached in connection with the award of that new contract.

132. The Federal Republic of Germany claims that the reason for the amendment of the contract was that in 1984 the administrative district of Uelzen entrusted the joint municipality of Bevensen (Samtgemeinde Bevensen) with ambulance services in the Bevensen-Bienenbüttel area. In 2002, the DRK took over the entire ambulance service of the Samtgemeinde Bevensen. This explains the contractual amendments negotiated between the administrative district of Uelzen and the DRK in 2004, which are not so material as to constitute a new procurement procedure which is relevant for the purposes of procurement law. It argues that because the award of the contested contract originated from 1984 and therefore took place before the expiry of the transposition period for Directive 92/50, the complaint of non-compliance with that directive can no longer be raised.

133. The Court has answered the question of the conditions under which amendments to an existing contract are to be regarded as a separate award of a contract for the purposes of the procurement directives in *pressetext Nachrichtenagentur*. (60) It stressed in particular that amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract. (61) An amendment may be regarded as being material inter alia when it extends the scope of the contract considerably to encompass services not initially covered. (62)

134. It is clear from the documents submitted by the German Government and from its observations that in 2004 the public contract was extended to include the provision of public ambulance services in the area of the Bevensen ambulance station, which accounts for around one quarter of the total area of the administrative district. Furthermore, the Federal Republic of Germany acknowledges that the value of the contract for the entire administrative district of Uelzen amounts to around EUR 4 450 000 per year and that the value of the ambulance services to be provided in the area of operation of Bevensen ambulance station amounts to at least EUR 670 000 per year. (63)

135. The contractual amendments negotiated between the Administrative District of Uelzen and the DRK in 2004 have therefore meant that the contract for the provision of ambulance services has been

extended to an additional area in the administrative district, as a result of which the total area of operation increased by around 25% and the total value of the contract rose by at least 15%. The amendments to the contract negotiated in 2004 are therefore to be regarded as material, with the result that this process is to be seen as a new award of public ambulance contracts in the entire administrative district which was subject to Directive 92/50. This assessment is not affected by the – undocumented – information provided by the Federal Republic of Germany regarding the takeover of the ambulance service operated by another service provider.

136. It is not disputed in this connection that the new award of the contract in 2004 did not comply with Article 16 of Directive 92/50. An infringement of that provision by the Federal Republic of Germany has therefore been proved in the present case.

137. On the other hand, I do not consider the breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, which is also alleged by the Commission, to have been proved. This plea cannot be accepted because of the same jurisprudential and evidential reservations which I have already set out in examining the award of contracts by the City of Magdeburg. (64)

d) The cases of the award of contracts by the Westsachsen (Saxony), Chemnitz/Stollberg (Saxony) and Vogtland (Saxony) joint ambulance associations

138. With regard to the contested cases of the award of contracts by the Westsachsen, Chemnitz/Stollberg and Vogtland joint ambulance associations, the Commission makes the following submissions.

139. The Westsachsen joint ambulance association, as the contracting authority, concluded with ASB, the DRK, JUH and Zwickau fire service contracts for the provision of ambulance services each with a duration of four years and a total contract value of EUR 7.9 million per year. In 2003 those contracts were renewed for four years without making a call for tenders. Upon their expiry, those contracts were renewed until 31 December 2008.

140. The Chemnitz/Stollberg joint ambulance association, as the contracting authority, concluded with ASB, the DRK, JUH and Chemnitz fire service contracts for the provision of ambulance services each with a duration of four years and a total contract value of EUR 3.3 million per year. In 2002 those contracts were renewed for four years without making a call for tenders. Upon their expiry, those contracts were renewed until 31 December 2008.

141. In 2002 and 2004, the Vogtland joint ambulance association, as the contracting authority, concluded with ASB, the DRK, JUH, a Plauen private ambulance company and Plauen fire service contracts for the provision of ambulance services each with a duration of four years and a total contract value of EUR 3.9 million per year, without making a call for tenders. Those contracts had a duration of four years and upon their expiry were renewed, without making a call for tenders, until 31 December 2008.

142. In all these cases, the Commission alleges an infringement of the rules on the notification duty for awarded contracts (Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18). Those infringements do exist.

143. This finding is not precluded by the arguments put forward by the Federal Republic of Germany to the effect that, since the entry into force in Saxony of the Gesetz über den Brandschutz, Rettungsdienst und Katastrophenschutz (Law on fire protection, ambulance services and civil protection) of 1 January 2005, the award of a contract in the field of ambulance services must be preceded by a selection procedure. In particular, the Federal Republic of Germany has not refuted the Commission's finding that in all the contested cases the award of the contracts was renewed under the old rules up to 31 December 2008.

144. It is settled case-law that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period

laid down in the reasoned opinion. (65) The position on 16 February 2007 is therefore relevant in the present case. At that time, the alleged infringement of the procurement directives did exist.

145. On the other hand, I do not consider the breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services, which is also alleged by the Commission in all these cases, to have been proved. This plea cannot be accepted because of the same jurisprudential and evidential reservations which I have already set out in examining the award of contracts by the City of Magdeburg. (66)

e) Conclusion

146. In the light of my above considerations, I conclude that in the contested cases of the award of contracts by the 'Cities of Magdeburg and Bonn, the municipality of Witten, the Region of Hanover, the administrative districts of Uelzen and Hameln-Pyrmont and the Westsachsen, Chemnitz/Stollberg and Vogtland joint ambulance associations there is an infringement by the Federal Republic of Germany of Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18. On the other hand, a further-reaching breach of the principle of non-discrimination and the requirement of transparency which stem from freedom of establishment and freedom to provide services has not been proved by the Commission.

4. Unlawful procurement practice in the Federal Republic of Germany

147. In the present case, the Commission claims that the procurement procedures with which it finds fault indicate the existence of a consistent and general procurement practice. Against this background, it seeks a declaration that the Federal Republic of Germany has infringed Community law on account of unlawful procurement practice.

148. If the existence of a practice in a Member State which is contrary to procurement law is proven, a complaint may be raised against that practice as such in proceedings under Article 226 EC. (67) In this connection, in a first phase the Commission must make detailed allegations of repeated failures to comply which indicate the existence of a practice. It is then for the Member State concerned to refute specifically the alleged infringements. In a second phase, it must be ascertained whether the proven infringements may be regarded as sufficiently documented and detailed proof of the existence of the alleged practice. (68)

149. In the present case, the Commission has proved that, in awarding contracts for ambulance services, the City of Magdeburg (Saxony-Anhalt), the City of Bonn (North Rhine-Westphalia), the municipality of Witten (North Rhine-Westphalia), the Region of Hanover (Lower Saxony), the administrative district of Uelzen (Lower Saxony), the administrative district of Pyrmont-Hameln (Lower Saxony) and the Westsachsen (Saxony), Chemnitz/Stollberg (Saxony) and Vogtland (Saxony) joint ambulance associations have failed to comply with the rules on the notification duty under Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18.

150. Furthermore, the Commission has argued that its research reveals that in the period from 2001 to 2006, in the entire Federal Republic of Germany, only two notices of contracts awarded were published. The Federal Republic of Germany has not disputed this factual finding.

151. On the basis of the foregoing, it can therefore be stated that in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony there exists a consistent and general procurement practice for ambulance services which fails to comply with the rules on the notification duty under Article 16 of Directive 92/50 and Article 35(4) of Directive 2004/18.

152. The finding of such a practice in those *Länder*, in contravention of procurement law, is also not precluded by the argument put forward by the Federal Republic of Germany that in the light of two orders of the Bundesgerichtshof of 1 December 2008 (69) the *Länder* must review their existing procedures for the procurement of ambulance services and reorganise them having due regard to procurement law.

153. As I have already discussed, it is settled case-law that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion. (70) The position on 16 February 2007 is therefore relevant in the present case. At that time, the alleged infringement of the procurement directives did exist.

154. For the same reason, the arguments put forward by the Federal Republic of Germany regarding the modification of the legal position in the *Land* of Saxony, whereby the submission model was abandoned as from 1 January 2009, have no further relevance in the present case.

155. However, it is disputed whether the Commission found fault only with the procurement practice in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony or whether it put forward the procurement practice in those four *Länder* as an example of a consistent and general procurement practice in all the *Länder*.

156. The Commission's submissions in this respect are contradictory in so far as in its application it expressly stated that the present action was confined to the procurement practice in Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony, even though the contested procurement practice could also be found in other German *Länder*. (71) In its reply, however, the Commission sought a declaration that that practice is contrary to procurement law for the entire territory of the Federal Republic of Germany. (72)

157. In this connection it should be borne in mind that new pleas in law introduced in the course of proceedings are inadmissible in principle. (73) Against this background, it must be assumed in the present case that the Commission is making the geographically limited claim contained in the application, by which it raises complaints only against the contested procurement practice in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony.

158. In the light of the above considerations, I therefore conclude that in awarding contracts for pecuniary interest in respect of the provision of ambulance services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony, the Federal Republic of Germany has infringed, up to 31 January 2006, Article 10 in conjunction with Article 16 of Council Directive 92/50 and, since 1 February 2006, Article 22 in conjunction with Article 35(4) of Directive 2004/18.

VIII – Costs

159. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may order the parties to bear their own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

160. In this case, the Commission's action has been only partially successful, and I therefore suggest that the Court should order that the Commission and the Federal Republic of Germany bear their own costs.

IX – Conclusion

161. In the light of all the foregoing considerations, I suggest that the Court should:

(1) declare that, in awarding contracts for pecuniary interest in respect of the provision of ambulance services in the *Länder* of Saxony-Anhalt, North Rhine-Westphalia, Lower Saxony and Saxony, the Federal Republic of Germany has infringed, up to 31 January 2006, Article 10 in conjunction with Article 16 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts and, since 1 February 2006, Article 22 in conjunction with Article 35(4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts;

(2) dismiss the remainder of the action;

(3) order the Commission and the Federal Republic of Germany to bear their own costs.

---

1 – Original language: German.

---

2 – OJ 1992 L 209, p. 1.

---

3 – OJ 2004 L 134, p. 114.

---

4 – See Case C-326/07 *Commission* v *Italy* [2009] ECR I-0000, paragraph 29; Case C-350/02 *Commission* v *Netherlands* [2004] ECR I-6213, paragraph 20; Case 76/86 *Commission* v *Germany* [1989] ECR 1021, paragraph 8; and Case 186/85 *Commission* v *Belgium* [1987] ECR 2029, paragraph 13.

---

5 – See Case C-437/04 *Commission* v *Belgium* [2007] ECR I-2513, paragraph 39, and Case C-350/02 *Commission* v *Netherlands*, cited in footnote 4, paragraphs 18 and 19.

---

6 – See Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 59.

---

7 – The *a fortiori* argument follows from Article 92(1) of the Rules of Procedure of the Court of Justice. See also Karpenstein/Karpenstein, in: Grabitz/Hilf, *Das Recht der Europäischen Union*, Article 226 EC, section 82 (Supplement 39, July 2009).

---

8 – Article 8 of Directive 92/50 and Article 20 of Directive 2004/18.

---

9 – Article 9 of Directive 92/50 and Article 21 of Directive 2004/18.

---

10 – Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 40.

---

11 – The conveyance of persons comes under the subject ‘land transport’ within the meaning of Annex I A, Category 2 of Directive 92/50 and Annex II A, Category 2 of Directive 2004/18. Medical care comes under the subject ‘health services’ within the meaning of Annex I B, Category 25 of Directive 92/50 and Annex II B, Category 25 of Directive 2004/18.

---

12 – In this connection, the question arises in particular whether an examination of the award of the contested contracts on the basis of the principle of non-discrimination laid down in primary law and the requirement of transparency laid down in primary law is compatible with the principle of the priority of application of secondary law and with the spirit and purpose of Treaty infringement proceedings under Article 226 EC. See point 95 et seq. of this Opinion.

---

13 – Under the heading ‘The infringement of Article 16 of Directive 92/50/EEC and Article 35(4) of Directive 2004/18/EC’ the Commission states, in point 39 of its application of 15 April 2008, that Articles 14 and 16 of Directive 92/50 and Articles 23 and 35(4) of Directive 2004/18 are applicable at any rate in the present case. In point 40, it then alleges an infringement of Article 16 of Directive 92/50 and of Article 35(4) of Directive 2004/18. In point 41, the Commission states that Article 3(2) of Directive 92/50 and Article 2 of Directive 2004/18 are likewise applicable in the present case, but without expressly claiming an infringement of those provisions or putting forward further arguments on those two articles. In the summary of its claims

in point 72, however, the Commission alleges an infringement of Article 10 in conjunction with Article 16 of Directive 92/50 and of Articles 2 and 22 in conjunction with Article 35(4) of Directive 2004/18.

---

14 – See the Opinion of Advocate General Lenz in Case C-306/89 *Commission* v *Greece* [1991] ECR I-5863, point 28. See also Randelzhofer/Forsthoff, in Grabitz/Hilf, *Das Recht der Europäischen Union*, Article 45 EC, section 14 (Supplement 39, July 2009).

---

15 – See Case C-314/06 *Société Pipeline Méditerranée et Rhône* [2007] ECR I-12273, paragraph 21; Case C-103/01 *Commission* v *Germany* [2003] ECR I-5369, paragraph 33; and Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 30.

---

16 – Opinion of Advocate General Mayras in Case 2/74 *Reyners* [1974] ECR 631, at 664.

---

17 – The Court has confirmed this restrictive approach in what is now settled case-law, stating that the review of exceptions to the freedom of establishment laid down in Article 45 EC must take into account the Community character of the limits imposed by that article on the exceptions to that freedom. See Case C-438/08 *Commission* v *Portugal* [2009] ECR I-0000, paragraph 35.

---

18 – See Case C-438/08 *Commission* v *Portugal*, cited in footnote 17, paragraph 36; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 46; and Case C-42/92 *Thijssen* [1993] ECR I-4047, paragraph 22.

---

19 – Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraphs 38 and 39.

---

20 – Opinion of Advocate General Alber in Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, points 27 and 28. The finding that the activities of undertakings providing surveillance and protection services are not normally directly and specifically connected with the exercise of official authority was confirmed in Case C-465/05 *Commission* v *Italy* [2007] ECR I-11091, paragraph 31 et seq., Case C-283/99 *Commission* v *Italy* [2001] ECR I-4363, paragraph 20 et seq., and Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraphs 25 and 26.

---

21 – Case C-438/08 *Commission* v *Portugal*, cited in footnote 17.

---

22 – The Court had already reached a similar conclusion in Case C-404/05 *Commission* v *Germany* [2007] ECR I-10239, paragraph 39 et seq., and Case C-393/05 *Commission* v *Austria* [2007] ECR I-10195, paragraph 37 et seq., when examining the activities of private inspection bodies of organically farmed products.

---

23 – Case C-42/92 *Thijssen*, cited in footnote 18, paragraph 17 et seq. See also Case C-451/03 *Servizi Ausiliari Dottori Commercialisti*, cited in footnote 18, paragraph 44 et seq., with regard to certain tax advice and assistance activities by Centri di Assistenza Fiscale in Italy.

---

24 – In addition to the judgments already cited, see Case C-281/06 *Jundt* [2007] ECR I-12231, paragraph 35 et seq., with regard to university teaching activities.

---

25 – See points 54 and 55 of this Opinion.

---

26 – As examples of public functions performed by ambulance personnel, the Federal Republic of Germany refers to clearing, securing and cordoning-off in emergencies and, in general, to the involvement of ambulance personnel in planning, organising and administering the ambulance service, as part of which they have the right, for example, to impose information and notification duties on third parties, or can make decisions on the deployment of other specialist services.

---

27 – Case C-404/05 *Commission* v *Germany*, cited in footnote 22, paragraph 47, and Case C-393/05 *Commission* v *Austria*, cited in footnote 22, paragraph 45.

---

28 – Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

---

29 – Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 27 et seq.

---

30 – Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 59.

---

31 – See also Mestmäcker/Schweitzer, in Immenga/Mestmäcker, *Wettbewerbsrecht. Kommentar zum Europäischen Kartellrecht*, 4th edition, Munich 2007, Article 86(2) EC, section 42; Pernice/Wernicke, in Grabitz/Hilf, loc. cit. (footnote 14), Article 86 EC, section 53.

---

32 – Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, 'Viking Line', [2007] ECR I-10779, paragraph 53. See also Case C-519/04 P *Meca-Medina* [2006] ECR I-6991, paragraphs 31 to 34.

---

33 – Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraph 19.

---

34 – See Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 101.

---

35 – See Case C-475/99 *Ambulanz Glöckner*, cited in footnote 28, paragraph 55.

---

36 – It is the legal situation at time of the alleged action or failure to act that is relevant. See Egger, A., *Europäisches Vergaberecht*, Baden-Baden 2008, section 416. See also Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraph 38 et seq.

---

37 – See point 30 et seq. of this Opinion.

---

38 – See Case C-246/08 *Commission* v *Finland* [2009] ECR I-0000, paragraph 52; Case C-438/07 *Commission* v *Sweden* [2009] ECR I-0000, paragraph 49; and Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 33.

---

39 – See point 34 et seq. of this Opinion.

---

40 – See Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64.

---

41 – Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 48.

42 – Case C-196/08 *Acoset* [2009] ECR I-0000, paragraph 49, and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 21. With regard to this relationship between the principle of non-discrimination and the requirement of transparency, see C-507/03 *Commission* v *Ireland*, cited in footnote 38, paragraphs 30 and 31; Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 66; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 17 and 18; and Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60 et seq.

---

43 – It must be assumed in general that Directive 92/50 and Directive 2004/18 were not as such intended to harmonise fully the award of public contracts which fall within their respective scopes. This is clear from the titles of those directives, which mention the 'coordination' of procedures for the award of contracts. The fact that those directives sought minimum harmonisation does not, however, rule out exhaustive harmonisation in certain areas. In view of the extremely detailed rules which those directives contain with regard to the duties relating to information, communication and giving notice in the individual procurement procedures, it is extremely difficult in this area to distinguish between – very detailed – minimum harmonisation and exhaustive full harmonisation. As Advocate General Mazák rightly stated in his Opinion of 22 September 2009 in Case C-299/08 *Commission* v *France* (point 12 et seq.) and the Court confirmed in its judgment of 10 December 2009 in Case C-299/08 *Commission* v *France* [2009] ECR I-0000, paragraph 28 et seq., the individual procurement procedures referred to in Article 28 et seq. of Directive 2004/18 are to be regarded as exhaustive. It follows directly that at least some of these provisions concerning those procedures are to be regarded as an expression of full harmonisation.

---

44 – If, on the other hand, the Commission had proved that the ambulance services should be treated as contracts for non-priority services and were therefore only partially covered by the procurement directives, according to consistent case-law it would be possible – if there were a clear cross-border interest – that the principles under Articles 43 EC and 49 EC would apply. See Case C-507/03 *Commission* v *Ireland*, cited in footnote 38, paragraphs 29 and 30.

---

45 – Case C-445/06 *Danske Slagterier* [2009] ECR I-0000, paragraph 25; Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* [1996] ECR I-3457, paragraph 25; Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 35; and Case 5/77 *Tedeschi* [1977] ECR 1555, paragraph 33 et seq.

---

46 – See Case C-322/01 *Deutscher Apothekerverband*, cited in footnote 40, paragraph 52 et seq.

---

47 – See to that effect Randelzhofer/Forsthoff, in Grabitz/Hilf, loc. cit. (footnote 14), Articles 39-55 EC, section 149.

---

48 – As a leading judgment reference can be made to Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947. See also Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749, paragraph 50 et seq.; Case C-145/02 *Denkavit* [2005] ECR I-51, paragraph 22 et seq.; Case C-309/02 *Radlberger Getränkegesellschaft* [2004] ECR I-11763, paragraph 52 et seq.; and Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32 et seq.

---

49 – For a restriction of the scope of the fundamental freedoms by fully harmonising secondary legislation, see Kingreen, T., *Kommentar zu EUV/EGV* (ed. Calliess, C./Ruffert, M.), 3rd edition, 2007, Articles 28-30 EC, section 18.

---

50 – Even though in *Danske Slagterier*, cited in footnote 45, paragraph 18 et seq., the possibility of the public relying on free movement of goods despite the existence of two harmonising directives was confirmed, in that judgment the Court did not rule against the priority of application of secondary law in the sense suggested here. As I stated in my Opinion of 4 September 2008 in that case (point 82), there is nothing to

suggest that the Community legislature in adopting the directives intended also to elaborate the rights of citizens of the Union and thus remove the possibility for them to rely on the right to the free movement of goods established by Article 28 EC.

---

51 – See the judgments cited in footnote 48.

---

52 – It should be born in mind in this connection that in the case of minimum harmonisation the minimum standards to be achieved by the Member States are established. If such minimum standards lay down strict rules on procedures and time-limits which must be observed in order to safeguard the requirements of equal treatment and transparency, a tension may arise with the requirements of primary law which is no less marked than in the case of full harmonisation.

---

53 – Gaitanides, C., in: von der Groeben, H., Schwarze, J. (ed.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, 6th edition, Baden-Baden 2003, Article 226 EC, section 2. See also Rengeling, H.W./Middeke, A./Gellermann, M., *Handbuch des Rechtsschutzes in der Europäischen Union*, 2nd edition, Munich 2003, § 6 paragraph 2.

---

54 – See Gaitanides, C., loc. cit. (footnote 53), paragraph 12, according to whom proceedings under Article 226 EC relate neither to the liability of the Member States for the purposes of general international law nor to a condemnation, but an objective finding of a state of affairs. The proceedings have a purely organisational function and have the sole purpose of compelling the Member States to rectify current Treaty infringements. The holding up to obloquy of the infringing State may possibly be a side-effect, but is never the aim of the proceedings.

---

55 – Thus, it is settled case-law that the obligation of transparency requires the authority to ensure, for the benefit of any potential contractor, a sufficient degree of advertising, but does not necessarily imply an obligation to launch an invitation to tender; see Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 25, and *Coname*, cited in footnote 42, paragraph 21. In this connection, Egger, A., loc. cit. (footnote 36), paragraph 147 et seq., points out that the requirements of primary law allow the Member States a broader margin of discretion than the procurement directives. He rightly points out that not only does a different intensity of examination apply, but also the requirements of primary law are more general and therefore by and large less strict and detailed. See I.J. van den Berge, 'De reikwijdte van het transparantiebeginsel bij de verlening van dienstenconcessies', *NTER* 2005, p. 241, 243, in whose view Articles 28 EC, 43 EC and 49 EC do not really allow generally applicable statements to be made regarding the duties of transparency to be observed.

---

56 – *Commission* v *Ireland*, cited in footnote 38, paragraph 29 et seq.

---

57 – Ibid., paragraph 34.

---

58 – Ibid., paragraph 25. See also Frenz, W., *Handbuch Europarecht. Bd. III. Beihilfe- und Vergaberecht*, Berlin et al. 2007, section 2116.

---

59 – See point 91 et seq. of this Opinion.

---

60 – Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 28 et seq.

---

61 – Ibid., paragraph 34.

62 – Ibid., paragraph 36.

63 – Defence of the Federal Republic of Germany of 4 September 2008, point 22.

64 – See point 91 et seq. of this Opinion.

65 – Case C-562/07 *Commission* v *Spain* [2009] ECR I-0000, paragraph 23; Case C-531/06 *Commission* v *Italy* [2009] ECR I-0000, paragraph 98; and Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, paragraph 72.

66 – See point 91 et seq. of this Opinion.

67 – In this connection, reference is made to settled case-law, according to which a failure to fulfil obligations under Community law may arise from an administrative practice, even if the applicable national legislation complies with Community law. See Case C-416/07 *Commission* v *Greece* [2009] ECR I-0000, paragraph 24 with further references.

68 – See Case C-489/06 *Commission* v *Greece* [2009] ECR I-0000, paragraph 40 et seq.

69 – Order of the Bundesgerichtshof of 1 December 2008, X ZB 31/08. See point 28 of this Opinion.

70 – See point 144 of this Opinion.

71 – See point 10 of the Commission's application of 15 April 2008. In point 5 of the application, the Commission had already stated that its action was restricted to the procurement practice for ambulance services according to the submission model, which applies in the majority of the German *Länder*.

72 – See point 17 et seq. of the Commission's reply of 21 November 2008.

73 – See Article 42(2) of the Rules of Procedure of the Court of Justice.

JUDGMENT OF THE COURT (Fourth Chamber)

6 May 2010 (*)

(Directive 92/50/EEC – Public service contracts – Service concessions – Mixed contract – Contract including the transfer of a block of shares in a public casino business – Contract under which the contracting authority entrusts to the contracting undertaking the management of a casino business and the execution of a development plan consisting in upgrading the casino premises and improving the surrounding area – Directive 89/665/EEC – Decision of the contracting authority – Effective and rapid remedies – National procedural law – Criteria for the award of damages – Prior annulment of the unlawful act or omission or a finding of its nullity by the competent court – Members of a consortium in a public procurement procedure – Decision adopted in the context of that procedure by an authority other than the contracting authority – Action brought, individually, by some members of the consortium – Admissibility)

In Joined Cases C-145/08 and C-149/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Simvoulio tis Epikratias (Greece), made by decision of 15 February 2008, received at the Court on 9 April 2008, in the proceedings

Club Hotel Loutraki AE,

Athinaïki Techniki AE,

Evangelos Marinakis

v

Ethniko Simvoulio Radiotileorasis,

Ipourgos Epikratias,

intervening parties:

Athens Resort Casino AE Simmetokhon,

Ellaktor AE, formerly Elliniki Tekhnodomiki TEV AE,

Regency Entertainment Psikhagogiki kai Touristiki AE, formerly Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE,

Leonidas Bompolas (C-145/08)

and

Aktor Anonimi Tekhniki Etairia (Aktor ATE)

v

Ethniko Simvoulio Radiotileorasis,

intervening party:

Mikhaniki AE (C-149/08)**,**

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as President of the Fourth Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 June 2009,

after considering the observations submitted on behalf of:

– Club Hotel Loutraki AE, by I.K. Theodoropoulos and S.A. Pappas, dikigoroi,

– Athens Resort Casino AE Simmetokhon and Regency Entertainment Psikhagogiki kai Touristiki AE, formerly Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE, by P. Spiropoulos, K. Spiropoulos and I. Drillerakis, dikigoroi,

– Ellaktor AE, formerly Elliniki Tekhnodomiki TEV AE by V. Niatsou, dikigoros,

– Aktor ATE, by K. Giannakopoulos, dikigoros,

– the Greek Government, by A. Samoni-Rantou, E.-M. Mamouna and I. Dionisopoulos, acting as Agents,

– the Commission of the European Communities, by M. Patakia and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 October 2009,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of the relevant provisions, in the light of the facts of the disputes in the main proceedings, of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 92/50 (‘Directive 89/665’), and general principles of European Union law on public contracts and, in particular, the principle of effective judicial protection.

2 The references have been made in proceedings between private undertakings and natural persons and Ethniko Simvoulio Radiotileorasis (National Radio and Television Council; ‘ESR’), an authority which, in accordance with national legislation, has the power and the obligation to check whether persons having the status of owner, partner, main shareholder, member of an administrative organ or management executive of an undertaking tendering in a public procurement procedure present certain aspects of incompatibility as provided for in that legislation and, therefore, must automatically be excluded from the procedure.

Legal context

European Union legislation

3 Pursuant to Article 1(a) of Directive 92/50:

‘[P]ublic service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority …

…’

4 Article 2 thereof provides:

‘If a public contract is intended to cover both products within the meaning of [Council] Directive 77/62/EEC [of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1)] and services within the meaning of Annexes I A and I B to this Directive, it shall fall within the scope of this Directive if the value of the services in question exceeds that of the products covered by the contract.’

5 Article 3 of that directive provides:

‘1. In awarding public service contracts or in organising design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive.

2. Contracting authorities shall ensure that there is no discrimination between different service providers.

…’

6 Under Article 8 of Directive 92/50:

‘Contracts which have as their object services listed in Annex I A shall be awarded in accordance with the provisions of Titles III to VI.’

7 Article 9 of that directive provides:

‘Contracts which have as their object services listed in Annex I B shall be awarded in accordance with Articles 14 and 16.’

8 Article 14 forms part of Title IV of that directive, which concerns the common rules in the technical field and deals with the technical specifications which are to be given in the general documents or the contractual documents relating to each contract, and Article 16 forms part of Title V, which governs the common advertising rules.

9 Annex IB to Directive 92/50, entitled ‘Services within the meaning of Article 9’, includes:

‘…

17 Hotel and restaurant services

…

26 Recreational, cultural and sporting services

27 Other services’.

10 Finally, Article 26(1) of that directive provides:

‘Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.’

11 Article 1 of Directive 89/665 provides:

‘1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of [Council] Directives 71/305/EEC [of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682)], 77/62 … and 92/50 …, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out

in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation rules implementing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

12 Under Article 2 of that directive:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

…

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

…'

National legislation

13 Directive 89/665 was transposed into Greek law by Law 2522/1997 providing judicial protection during the phase preceding the award of public supply, public works and public services contracts (FEK A' 178).

14 Article 2 of that Law, entitled 'Extent of judicial protection', provides:

'1. Every person concerned who has or had an interest in being awarded a particular public works, supply or services contract and has suffered or may suffer damage through the infringement of Community or domestic legislation shall be entitled to seek, as more specifically laid down in the following articles, interim judicial protection, the annulment, or a finding of invalidity, of the unlawful act of the contracting authority and the award of damages.

…’

15 Article 4 of that Law, entitled ‘Annulment or a finding of invalidity’, provides:

‘1. The person concerned shall be entitled to seek the annulment, or a finding of invalidity, of every act or omission of the contracting authority which infringes a rule of Community or domestic law on the procedure that precedes the award of the contract. …

2. If the court declares an act or omission of the contracting authority void after the contract is awarded, and unless the award procedure has been suspended as a measure of interim relief, the contract itself is not affected. In that case the applicant may seek damages in accordance with the provisions of the following article.’

16 Article 5 of Law 2522/1997, entitled ‘Claim for damages’, provides:

‘1. A person concerned who has been excluded from participation or from the award of public works, supplies or services, in breach of a rule of Community or domestic law, shall be entitled to claim damages from the contracting authority, pursuant to Articles 197 and 198 of the Civil Code. Any provision that excludes or restricts that claim shall be inapplicable.

2. In order for damages to be awarded, it is necessary that the unlawful act or omission first be annulled, or found invalid, by the court having jurisdiction. An action for a finding of invalidity and an action for damages may be combined in accordance with the generally applicable rules.’

17 Articles 197 and 198 of the Civil Code, to which the abovementioned provision refers, provide for liability ‘arising from negotiations’, that is to say the obligation to pay damages in the event that the parties incur unwarranted expense in the course of a procedure with a view to conclusion of a contract.

18 Presidential Decree 18/1989 codifies the laws relating to the Simvoulio tis Epikratias (FEK A’ 8). Article 47 thereof, entitled ‘Legitimate interest’, provides:

‘1. An individual or a legal person who is affected by an administrative act, or whose legitimate interests, including non-financial interests, are affected by that act, has the right to bring an action for annulment.

…’

19 Law 2206/1994 governs the ‘Creation, organisation, operation, control of casinos, etc.’ (FEK A’ 62). Under Article 1(7) of that Law, entitled ‘Grant of casino licences’:

‘Casino licences are to be granted by decision of the Minister for Tourism following a public international tendering procedure organised by a seven-member commission.’

20 Article 3 of that Law, entitled ‘Operation of casinos’, provides:

‘Casinos are subject to State control.

…’

21 Article 14(9) of the Greek Constitution and Implementing Law 3021/2002 (FEK A’ 143) institute a system of restrictions applicable to the conclusion of public contracts with persons who are active or who have holdings in the media sector. That system establishes a presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract. That incompatibility also extends to natural persons who are related to a certain degree.

22 Law 3021/2002 provides, in essence, that, before issuing acceptance of a tender for or awarding a public contract and, in any event, before the public contract is signed, the contracting authority must

apply to ESR for a certificate attesting that the conditions of incompatibility laid down in that law are not fulfilled. The decision of ESR is binding on the contracting authority, but may be subject to an action for annulment by persons having *locus standi*, including public authorities.

23 In its judgment in Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraphs 1 and 2 of the operative part, the Court held that, although European Union law does not preclude legislation which pursues the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts, it does preclude, from the point of view of the principle of proportionality, the setting up of an irrebuttable presumption of incompatibility such as that laid down in the national legislation at issue.

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-145/08

24 It is apparent from the order for reference that, by decision of 10 October 2001, the competent interministerial committee decided to privatise Elliniko Kazino Parnithas AE (‘EKP’), a subsidiary of Ellinika Touristika Akinita AE (‘ETA’), an undertaking wholly owned by the Greek State. The contract notice published in October 2001 provided for an initial preselection stage to determine which tenderers met the conditions set out in that notice. The highest bidder, which would be invited to sign the contract, was to be selected at a subsequent stage. In the course of the first stage, the Koinopraxia Kazino Attikis consortium and the Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE – Elliniki Tekhnodomiki AE consortium were preselected.

25 Following an additional notice published in April 2002, the terms of the contract to be signed were settled as follows:

The contract is a mixed contract and includes:

– an agreement under which ETA would sell 49% of the shares in EKP to a ‘single purpose limited company’ (‘AEAS’), to be set up by the successful tenderer;

– an agreement under which AEAS would undertake to implement a development plan, to be completed within 750 days of obtaining the necessary planning permission. That development plan was to comprise refurbishing the casino and enhancing the facilities offered by its operating licence, refurbishing and improving two adjoining hotel units and developing stretches of surrounding land of a surface area of approximately 280 hectares. Performance of that work constitutes part of the price payable for the acquisition of 49% of the shares in EKP;

– an agreement between ETA and AEAS under which the latter would acquire the right to appoint the majority of EKP’s board of directors and thus to administer the company in accordance with the terms of the contract;

– an agreement under which AEAS would take over management of the casino business, in return for payment, which will be paid by ETA. As that remuneration, AEAS would receive a sum no greater than a scaled percentage of the annual operating profits (decreasing from 20% of profits up to EUR 30 million to 5% of profits over EUR 90 million) and 2% of turnover;

– as manager, AEAS would manage the casino business in such a way as constantly to maintain a luxurious environment offering high-level services and in a manner profitable for EKP. In concrete terms, the management profit before tax should not be less than a total of EUR 105 million for the first five financial years following entry into force of the contract. The net profit was to be shared between ETA and AEAS according to the percentage of the capital in EKP they each hold;

– Since EKP is the only casino business currently operating in the province of Attica, the contract provides that, in the event that another casino were lawfully established within that geographical area within 10 years from the date of entry into force of the contract, it would have to compensate

AEAS by paying, as damages, a sum equal to 70% of the price of the transaction. The amount of the compensation would be reduced by one tenth each year with effect from the entry into force of the contract;

– with regard to management of the casino business, the contract would terminate at the end of the 10th year from taking effect.

26 Since the Hyatt Regency Xenodokhiaki kai Touristiki (Ellas) AE – Elliniki Tekhnodomiki AE consortium was the highest bidder in the procedure in question, it was designated the successful tenderer. Before signature of the contract, ETA informed ESR of the identity of the owners, partners, major shareholders and management executives of the successful tenderer in order to obtain a certificate that none of them fell within one of the cases of incompatibility as provided for in Article 3 of Law 3021/2002. By certificate issued on 27 September 2002, ESR confirmed that none of those persons fell within such a case of incompatibility.

27 That act of the ESR constitutes the subject-matter of an action for annulment brought by only three of the seven members comprising the consortium ‘Koinopraxia Kazino Attikis’, which was not awarded the contract. The applicants have submitted that a member of the consortium to which the contract was awarded fell within one of the cases of incompatibility laid down in the national legislation and that, accordingly, the award of the contract should be annulled.

28 The national court points out that the contract at issue is a mixed contract, containing, on the one hand, one aspect relating to the sale of shares by ETA to the highest bidding tenderer, which aspect, as such, is not covered by the European Union rules on public contracts, and, on the other, one aspect relating to a service contract to be concluded with the highest bidding tenderer, which assumes the obligations of managing the casino business. The aspect which concerns the transfer of shares is, according to the national court, the most important of the mixed contract. In addition, that contract also includes an aspect relating to a works contract, since the successful tenderer assumes the obligation of performing the works referred to in the order for reference, for the transferred shares as part payment. The national court notes that that aspect is entirely ancillary to the ‘services’ aspect of the contract.

29 In that context, the national court asks whether the view can be taken that the ‘services’ aspect of the contract at issue constitutes a public service concession contract, which is not subject to the European Union rules. In that regard, it is necessary to ascertain to what extent the successful tenderer bears the risks of organising and operating the services in question, having regard also to the fact that those services relate to activities which, in accordance with the national rules by which they are governed, can be subject to exclusive and special rights.

30 In the event that the Court were to hold that the part of the disputed contract concerning the management of the casino constitutes a public service contract, the national court asks whether an action for annulment brought at national level is covered by the guarantees provided for in Directive 89/665, having regard to the fact that the main object of the contract, that is to say, the sale of shares in EKP, does not fall within the scope of Community rules on public contracts and that contracts having such services as their objects, which fall within Annex I B to Directive 92/50, must be awarded in accordance with Articles 14 and 16 of that directive, which solely include obligations of a procedural nature. Nevertheless, the national court asks whether, despite that restricted aspect of the obligations, the principle of equal treatment of participants in a contract award procedure, the safeguarding of which is the objective of Directive 89/665, also applies in such cases.

31 If the Court were to consider that an action for annulment such as that in the main proceedings does fall within the scope of Directive 89/665, the national court asks whether European Union law precludes a national procedural rule, such as that in Article 47(1) of Presidential Decree 18/1989, as interpreted by that court, under which those who participate in a public procurement procedure as a consortium can bring an action for annulment against acts in the context of that procedure only together and jointly, failing which the action is dismissed as inadmissible.

32 The national court refers in that regard to the judgment of the Court in Case C-129/04 *Espace Trianon and Sofibail* [2005] ECR I-7805, paragraph 22, pursuant to which a national procedural rule which requires an action for annulment of a contracting authority’s decision awarding a public contract to be

brought by all the members of a tendering consortium does not limit the availability of such an action in a way contrary to Article 1(3) of Directive 89/665.

33 The national court asks, however, whether that conclusion which, in that judgment, concerned an action for annulment against the decision of a contracting authority to award a public contract, is also valid in respect of all forms of judicial protection guaranteed by the directive, in particular of claims for damages. That issue is connected with the fact that, in the present case, the national legislature, exercising the power conferred on the Member States by Article 5(2) of Directive 89/665, by adopting Article 5(2) of Law 2522/1997, made the award of damages subject to the prior annulment of the allegedly unlawful act.

34 The combination of that provision with the procedural rule in Article 47(1) of Presidential Decree 18/1989, as interpreted by the national court, makes it impossible for any individual member of a consortium which unsuccessfully participated in a contract award procedure not only to seek annulment of the act adversely affecting them jointly but also to apply to the competent court to obtain compensation for any damage they have suffered individually. In the present case, the competent court in respect of actions for annulment is the Simvoulio tis Epikratias (Council of State), while in respect of damages, a different court has jurisdiction.

35 In that context, the national court points out that whether each member of a consortium can apply to the competent court for damages therefore depends on whether all other members of the consortium wish to bring an action for annulment, when the loss suffered by the members of the consortium individually as a result of its failure to win the contract may differ in accordance with the degree to which the members incurred expenses for the purposes of participating in that contract. Consequently, the interest of each member of the consortium in seeking annulment of a decision can also be different. Thus, it is permissible to ask whether, in such a procedural context, the principle of effective judicial protection laid down by Directive 89/665 is upheld.

36 The national court notes finally that, in accordance with the national procedural rules concerning the general right to compensation for losses caused by unlawful acts of the State or public legal persons, it is the court having jurisdiction for the award of damages which also reviews, as an incidental matter, the legality of the administrative act, and not a different court as is the case of actions for annulment brought in respect of public procurement procedures. It therefore asks whether the procedures intended to ensure that rights derived from European Union law are upheld are less favourable than those which ensure that similar or analogous rights derived from national law are upheld.

37 Lastly, the national court states that its current interpretation of Article 47(1) of Presidential Decree 18/1989, that only all members of a consortium, acting jointly, have *locus standi* to seek annulment of an act forming part of a procedure for the award of a public contract, constitutes a reversal of its settled case-law, in accordance with which the members could bring individual actions.

38 In parallel, it points out the particular context of the main proceedings, that is to say that, initially, the action at issue was brought by the consortium as a whole and by its seven members before the Fourth Chamber of the Simvoulio tis Epikratias. That Chamber declared the action inadmissible with regard to the consortium and four of its members on the ground that they had not properly authorised their lawyer to act and, with regard to the three remaining members of the consortium, it referred the case, in the light of its importance, to the full court. Thus, the Fourth Chamber applied the case-law still valid at that time, in accordance with which an action brought by some members of a consortium was also admissible.

39 Nevertheless, the decision on inadmissibility made by the Fourth Chamber with regard to the action brought by the consortium as a whole and by four of its members was definitive, such that there is no remedy available from the proceedings pending before the full court of the national court. That court therefore asks whether that reversal of its case-law is compatible with the principle of a right to a fair hearing, which is a general principle of European Union law and also set out in Article 6 of the European Convention on Human Rights, signed in Rome on 4 November 1950 (‘ECHR’), and with the principle of protection of legitimate expectations.

40 Having regard to the foregoing considerations, the Simvoulio tis Epikratias, sitting as a full court, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Does a contract by which the contracting authority entrusts to the contracting undertaking the management of a casino business and the execution of a development plan consisting in the upgrading of the casino premises and the commercial exploitation of the possibilities offered by the casino’s licence, and which contains a term under which the contracting authority is obliged to pay the contracting undertaking compensation should another casino lawfully operate in the wider area in which the casino in question operates, constitute a concession, not governed by … Directive 92/50 …?

2. If the first question is answered in the negative, does a legal action which is brought by persons who have participated in the procedure for the award of a public contract of mixed form providing inter alia for the supply of services subject to Annex I B to … [Directive 92/50] …, and in which they plead breach of the principle of equal treatment of participants in tender procedures (a principle affirmed by Article 3(2) of that directive), fall within the field of application of … [Directive 89/665] …, or is its application precluded inasmuch as, in accordance with Article 9 of … [Directive 92/50], only Articles 14 and 16 of the latter apply to the procedure for the award of the abovementioned contract for the supply of services?

3. If the second question is answered in the affirmative, accepting that a national provision in accordance with which only all the members of a consortium without legal personality which has participated unsuccessfully in a public procurement procedure can bring a legal action against the act awarding the contract, and not consortium members individually, is not in principle contrary to Community law and specifically to … [Directive 89/665] …, and that that still applies where the legal action has initially been brought by all the members of the consortium jointly but ultimately proves, as regards some of them, to be inadmissible, is it in addition necessary, from the viewpoint of application of that directive, to examine, in order to make a declaration of inadmissibility, whether those individual members thereafter retain the right to claim before another national court any damages which may be envisaged by a provision of national law?

4. When it has been held by settled case-law of a national court that an individual member of a consortium may also bring an admissible legal action against an act falling within a public procurement procedure, is it compatible with … [Directive 89/665] …, interpreted in the light of Article 6 of the [ECHR] as a general principle of Community law, to dismiss a legal action as inadmissible, because of a change to that settled case-law, without the person who has brought that legal action first being given either the opportunity to cure the inadmissibility or, in any event, the opportunity to set out, pursuant to the adversarial principle, his views relating to that issue?’

Case C-149/08

41 The city of Thessaloniki decided to organise a public procurement procedure for the award of a contract entitled ‘Construction of Thessaloniki town hall and an underground car park’. By decision of the municipal committee of 1 July 2004, the contract was awarded to the consortium of Aktor ATE, Themeliodomi AE and Domotekhniki AE. With a view to conclusion of the contract, the contracting authority informed ESR, in accordance with the national legislation in force, of the identity of the persons having the status of owner, partner, main shareholder or management executive of the companies forming the abovementioned consortium to obtain a certificate that none of them fell within any case of incompatibility as provided for in Article 3 of Law 3021/2002.

42 After having found that a member of the board of directors of Aktor ATE did fall within a case of incompatibility as set out in the national legislation, ESR, by document of 1 November 2004, refused to issue the certificate necessary for signature of the contract. The appeal brought by Aktor ATE against that refusal by ESR was dismissed by decision of that body of 9 November 2004. It is against those two negative decisions that, of the three companies comprising the consortium to which the contract was awarded, only Aktor ATE has brought an action for annulment before the national court, on the basis of

the existing case-law of that court which regarded actions brought individually by members of a temporary association as admissible.

43 In those circumstances, the Simvoulio tis Epikratias, sitting as a full court, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Accepting that a national provision in accordance with which only all the members of a consortium without legal personality which has participated unsuccessfully in a public procurement procedure can bring a legal action against the act awarding the contract, and not consortium members individually, is not in principle contrary to Community law and specifically to … Directive 89/665 …, and that that still applies where the legal action has initially been brought by all the members of the consortium but ultimately proves, as regards some of them, to be inadmissible, is it in addition necessary, from the viewpoint of application of that directive, to examine, in order to make a declaration of inadmissibility, whether those individual members thereafter retain the right to claim before another national court any damages which may be envisaged by a provision of national law?

2. When it has been held by settled case-law of a national court that an individual member of a consortium may also bring an admissible legal action against an act falling within a public procurement procedure, is it compatible with … Directive 89/665 … , interpreted in the light of Article 6 of the [ECHR] as a general principle of Community law, to dismiss a legal action as inadmissible, because of a change to that settled case-law, without the person who has brought that legal action first being given either the opportunity to cure the inadmissibility or, in any event, the opportunity to set out, pursuant to the adversarial principle, his views relating to that issue?’

44 By order of the President of the Court of 22 May 2008, Cases C-145/08 and C-149/08 were joined for the purposes of the written and oral procedure and the judgment.

The questions referred

The questions referred in Case C-145/08

45 By its questions concerning the application of Directive 92/50 to a contract such as that at issue in the main proceedings, the national court asks whether Directive 89/665 applies to the present case, given that its application presupposes that one of the directives on public contracts referred to in Article 1 of Directive 89/665 is applicable. Thus, it is appropriate to consider those questions together and to ascertain whether such a contract falls within the scope of one of the directives referred to in that article.

46 It is apparent from both the detailed points in the order for reference and the classification of the transaction at issue in the main proceedings by the national court that that transaction is a mixed contract.

47 That contract comprises, essentially, an agreement under which ETA would sell 49% of the shares in EKP to AEAS (‘the “sale of shares” aspect’), an agreement under which AEAS would take over management of the casino business, in return for payment (‘the “services” aspect’) and an agreement under which AEAS would undertake to implement a development plan, comprising refurbishment of the casino and two adjoining hotel units and development of stretches of surrounding land (‘the “works” aspect’).

48 It follows from the case-law of the Court that, in the case of a mixed contract, the different aspects of which are, in accordance with the contract notice, inseparably linked and thus form an indivisible whole, the transaction at issue must be examined as a whole for the purposes of its legal classification and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract (see, to that effect, Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 19; Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329, paragraphs 23 to 26; Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraphs 36 and 37; Case

C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 47; and Case C-536/07 *Commission* v *Germany* [2009] ECR I-0000, paragraphs 28, 29, 57 and 61).

49 That conclusion is valid irrespective of whether or not the aspect constituting the main object of a mixed contract falls within the scope of the directives on public contracts.

50 Consequently, it is appropriate to consider whether the mixed contract at issue in the main proceedings constitutes an indivisible whole and, if so, whether, because of its main object, as a whole it falls within the scope of one of the directives referred to in Article 1 of Directive 89/665 which govern public contracts.

51 Firstly, that contract forms part of a partial privatisation of a public casino business, which was decided upon at a national level by the competent interministerial committee and was launched by a single invitation to tender.

52 It is apparent from the case file, in particular from the conditions in the additional notice published in April 2002, that the mixed contract at issue in the main proceedings is in the form of a single contract relating jointly to the sale of shares in EKP, the acquisition of the right to nominate the majority of the members of the board of directors of EKP, the obligation to assume management of the casino business and to offer high-level services in a profitable manner, and the obligation to refurbish and improve the sites concerned and surrounding land.

53 Those findings demonstrate the need to conclude that mixed contract with a single partner which has both the financial capacity necessary to purchase the shares in question and professional experience in operating a casino.

54 It follows that the various aspects of that contract must be understood as constituting an indivisible whole.

55 Secondly, it is apparent from the findings made by the national court that the main object of the mixed contract was the sale, to the highest bidder, of 49% of the shares in EKP and that the ‘works’ aspect of that transaction and the ‘services’ aspect, irrespective of whether the latter constitutes a public service contract or a service concession, were ancillary to the main object of the contract. The national court has also pointed out that the ‘works’ aspect was entirely ancillary to the ‘services’ aspect.

56 That assessment is confirmed by the documents submitted to the Court.

57 There can be no doubt that, where there is a purchase of 49% of the shares of a public undertaking such as EKP, that operation constitutes the main object of the contract. The point must be made that the income which AEAS would obtain as a shareholder appears to be significantly greater than the remuneration which it would obtain as a service provider. In addition, AEAS would receive that income for an unlimited time, while the management activity would cease after 10 years.

58 It follows from the foregoing considerations that the different aspects of the mixed contract at issue in the main proceedings constitute an indivisible whole, of which the aspect relating to the transfer of shares constitutes the main object.

59 The transfer of shares to a tenderer in the context of a privatisation of a public undertaking does not fall within the scope of the directives on public contracts.

60 Moreover, that is rightly pointed out in point 66 of the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final).

61 In point 69 of its abovementioned Green Paper on public-private partnerships, the Commission points out that it is necessary to ensure that such a capital transaction does not in reality conceal the award to a private partner of contracts which might be termed public contracts or concessions. Nevertheless, in the present case, there is nothing in the documents to cast doubt on the nature of the transaction at issue in the main proceedings, as categorised by the national court.

62 Having regard to the foregoing considerations, the conclusion must be that a mixed contract of which the main object is the acquisition by an undertaking of 49% of the capital of a public undertaking and the ancillary object, indivisibly linked with that main object, is the supply of services and the performance of works does not, as a whole, fall within the scope of the directives on public contracts.

63 That conclusion does not preclude the fact that such a contract must observe the basic rules and general principles of the Treaty, in particular those on the freedom of establishment and the free movement of capital. However, there is no reason in the present case to consider the question of observance of those rules and principles, given that the result of such an examination could in no way lead to a finding that Directive 89/665 applies.

64 In the light of the foregoing, there is no need to answer the other questions referred in Case C-145/08.

The first question referred in Case C-149/08

65 By this question, the national court wishes to know, in essence, whether Directive 89/665 precludes a national rule, as interpreted by that court, under which only all members of a tendering consortium may bring an action against a decision of a contracting authority to award a contract, such that the members of that consortium, individually, are deprived not only of the possibility of having a decision of the contracting authority annulled, but also of the possibility of seeking compensation for individual damage suffered as a result of irregularities in the contract award procedure in question.

66 In order to answer that question, it must be noted that the act of which annulment is sought before the national court emanates from ESR, that is to say, an authority other than the contracting authority which organised the public procurement procedure at issue in the main proceedings.

67 It is apparent from the terms of Directive 89/665, commonly referred to as the ‘Remedies Directive’, that the protection granted by that directive covers the acts or omissions of contracting authorities.

68 Thus, it is clear from the wording of the fifth recital in the preamble to the directive and Article 1(1) thereof that they refer to measures to be taken in respect of decisions of contracting authorities. Similarly, under Article 1(3), Member States may require that a person seeking a review must have previously notified the contracting authority of the alleged infringement, so that that authority may remedy it. Furthermore, Article 3(2) of that directive gives the Commission the power to notify the contracting authority concerned of the reasons which have led it to conclude that, in a public procurement procedure, an infringement has been committed and to request its correction.

69 Accordingly, the conclusion must be that disputes relating to decisions of an authority such as ESR are not governed by the review system laid down by Directive 89/665.

70 However, the decisions of ESR are liable to have a certain effect on the conduct, or even the outcome, of a public procurement procedure, since they can lead to the exclusion of a tenderer, even a successful tenderer, who individually is characterised by one or another of the incompatibilities as laid down in the relevant national rules. Thus, those decisions are not devoid of interest in respect of the proper application of European Union law in that area.

71 In the present case, it is apparent from the information supplied by the national court that ESR’s decision, which led to the applicant in the main proceedings being deprived of the award of the public contract at issue when it had been designated as the successful tenderer, was, in that applicant’s opinion, adopted in breach of the provisions of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and of the principles arising under the primary legislation of the European Union.

72 The applicant in the main proceedings submits that, by the application of the contested national rules, it was prevented not only from seeking annulment of ESR’s allegedly unlawful decision, which led to its exclusion from the procedure at issue in the main proceedings, but also from seeking damages for the loss caused by that decision. Thus it was deprived of its right to effective judicial protection.

73 In that regard, it is important to note that the principle of effective judicial protection is a general principle of European Union law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37 and the case-law cited).

74 The Court has consistently held that, in the absence of Community rules governing the matter, it is for each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness) (see, to that effect, Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 44 and 46 and the case-law cited).

75 With regard to the principle of equivalence, it is apparent from the information supplied by the national court that, in accordance with the domestic law governing in general compensation for losses caused by unlawful acts of the State or public legal persons, it is the court having jurisdiction for the award of damages which also reviews, as an incidental matter, the legality of the administrative act complained of, which can lead, from an action brought individually by a natural person, to an award of compensation if the basic conditions laid down to that effect are met.

76 However, so far as concerns public contracts, an area covered by European Union law, those two types of jurisdiction, that is to say, on the one hand, the jurisdiction to annul or find the invalidity of an administrative act and, on the other, the jurisdiction to award compensation for the loss suffered, are, in the national law at issue in the main proceedings, held by two different courts.

77 Thus, in the area of public contracts, the combination of Article 5(2) of Law 2522/1997, which makes the award of damages subject to the prior annulment of the allegedly unlawful act, and Article 47(1) of Presidential Decree 18/1989, in accordance with which only all members of a consortium have *locus standi* to seek annulment of an act forming part of a procedure for the award of a public contract, means, as the national court points out, that it is impossible for any member of a consortium, acting individually, not only to seek annulment of the act adversely affecting it but also to apply to the competent court to obtain compensation for any damage it has suffered individually, whereas that does not appear to be impossible in other areas, by virtue of the rules of domestic law applicable to applications for compensation for loss caused by an unlawful act of a public authority.

78 With regard to the principle of effectiveness, it must be held that, by the application of the contested national rules, a tenderer such as the applicant in the main proceedings is deprived of any opportunity to claim, before the competent court, compensation for any damage it has suffered by reason of a breach of European Union law by an administrative act likely to have influenced the conduct and even the outcome of a public procurement procedure. Such a tenderer is thus deprived of effective judicial protection of the rights in that area of the law which it has under European Union law.

79 As the Advocate General observed in points 107 to 116 of her Opinion, it is important to note, in that regard, that the present situation differs from that which gave rise to the judgment in *Espace Trianon and Sofibail*. While that case concerned an action for annulment against a contract award decision which deprived the tendering consortium as a whole of the contract, the present case concerns an application for compensation for loss allegedly caused by an unlawful decision of an administrative authority which found that such an incompatibility existed, under the relevant national rules, in the case of the only applicant tenderer.

80 Having regard to the foregoing, the answer to the first question referred in Case C-149/08 is that European Union law, in particular the right to effective judicial protection, precludes a national rule, such as that at issue in the main proceedings, interpreted as meaning that the members of a temporary association, tenderer in a public procurement procedure, are deprived of the possibility of seeking, individually, compensation for the loss which they suffered individually as a result of a decision adopted by an authority, other than the contracting authority, involved in that procedure in accordance with the applicable national rules, which is such as to influence the conduct of that procedure.

81 In the light of that answer, there is no need to answer the second question referred in Case C-149/08.

Costs

82 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **A mixed contract of which the main object is the acquisition by an undertaking of 49% of the capital of a public undertaking and the ancillary object, indivisibly linked with that main object, is the supply of services and the performance of works does not, as a whole, fall within the scope of the directives on public contracts.**

2. **European Union law, in particular the right to effective judicial protection, precludes a national rule, such as that at issue in the main proceedings, interpreted as meaning that the members of a temporary association, tenderer in a public procurement procedure, are deprived of the possibility of seeking, individually, compensation for the loss which they suffered individually as a result of a decision adopted by an authority, other than the contracting authority, involved in that procedure in accordance with the applicable national rules, which is such as to influence the conduct of that procedure.**

[Signatures]

---

* Language of the case: Greek.

EU:C:2009:668

OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 29 October 2009 (1)

Joined Cases C-145/08 and C-149/08

Club Hotel Loutraki AE
Athinaïki Techniki AE
Evangelos Marinakis
v
Ethniko Simvoulio Radiotileorasis
Ipourgos Epikratías

and

Aktor ATE
v
Ethniko Simvoulio Radiotileorasis

(References for a preliminary ruling from the Simvoulio tis Epikratias (Greece))

(Public procurement – Contract comprising a transfer of shares and a service element – Classification – Review procedures for the award of contracts – National rule precluding individual appeals by members of an ad hoc consortium lacking legal personality – Change in case-law)

Introduction

1. These two factually and procedurally complex cases, which have been joined by the Court, raise questions of Community public procurement law concerning, in particular, the Remedies Directive (2) and the Services Directive. (3)

2. The ultimate issue in both cases concerns the admissibility of an action, brought by an individual member of an ad hoc consortium without legal personality which was unsuccessful in its bid for a contract, seeking annulment of a decision taken in the course of an award procedure.

3. The Court has already held that the Remedies Directive does not preclude a national rule to the effect that, where the members of such a consortium wish to bring an action against the decision awarding the contract, they must all act together and the action must be admissible in respect of each of them individually. (4)

4. However, the situation in the present cases has the added features that the decision challenged is not the final award but a preliminary decision on eligibility to be awarded the contract, taken not by the

contracting authority but by a distinct regulatory authority, and that the decision is of specific relevance to only one member of the consortium and/or its annulment is sought with a view not to obtaining the final award but to being able to seek damages in respect of alleged irregularities in the decision. The issue is further complicated by the fact that national case-law has changed during the course of the proceedings, so that an action which might initially have been admissible can no longer be admissible.

5. Those issues are raised in relation to the Remedies Directive. The applicability of that directive is dependent on a contract's falling within the scope of, inter alia, the Services Directive or the Works Directive. (5) Its applicability is not in doubt in the second case, where the contract is agreed to be subject to the Works Directive. It is, however, less certain in the first case, where the Services Directive may or may not be applicable, depending on whether the award in question is classified as a service contract or a service concession (which would not fall within its scope).

6. A prior question in the first case is therefore how to classify the contract in issue, namely, a mixed contract in which: a public authority sells 49% of the shares in a public casino at a price offered by the highest bidder, to whom it hands over management of the casino and the right to appoint the majority of its directors; that management is remunerated by a percentage of the operating profits; the successful bidder undertakes to implement an improvement and modernisation plan; and the public authority, if it operates any other casino in future within the region concerned, undertakes to compensate the successful bidder.

7. A further issue concerns the extent to which the availability of the remedy in question may be required by fundamental rules and principles of Community law, even if the Remedies Directive does not apply.

Legislative background

Community legislation

The Services Directive (92/50)

8. Article 1(a) defines public service contracts as

'contracts for pecuniary interest concluded in writing between a service provider and a contracting authority'

to the exclusion of, in particular, public supply contracts and public works contracts, and contracts awarded in the water, energy, transport and telecommunications sectors, all of which are governed by other directives. A number of other types of contract, defined by their subject-matter, are also excluded, but they do not appear relevant for present purposes. Under Article 1(b), contracting authorities are defined as

'the State, regional or local authorities, bodies governed by public law, associations formed by one or more of such authorities or bodies governed by public law'

and, under Article 1(c), a service provider is

'any natural or legal person, including a public body, which offers services'.

9. Article 2 provides that, if a public contract is intended to cover both supplies and services, it is to fall within the scope of the directive if the value of the services exceeds that of the products.

10. Article 3(1) requires contracting authorities to apply procedures adapted to the provisions of the directive, and Article 3(2) requires them to ensure that there is no discrimination between service providers.

11. Article 8 stipulates that contracts for services listed in Annex I A (6) are to be awarded in accordance with the provisions of Titles III to VI, (7) while, under Article 9, contracts for services

listed in Annex I B are to be awarded in accordance with Articles 14 and 16, which are in Titles IV and V respectively. Under Article 10, contracts for services listed in both annexes are to be awarded in accordance with the provisions of Titles III to VI where the value of the services listed in Annex I A is greater than the value of those listed in Annex I B and, in other cases, in accordance with Articles 14 and 16.

12. Article 14 concerns, essentially, technical specifications to be included in the general or contractual documents in each case, and Article 16 concerns publication of a notice of the award of a contract.

13. None of the services listed in Annex I A appears relevant to the question of classification raised in the first of the present cases. Annex I B, however (to which only Articles 14 and 16 apply), includes (17) 'Hotel and restaurant services', (26) 'Recreational, cultural and sporting services' and (27) 'Other services'. It is common ground that the services in issue fall within one or more of those categories.

14. Article 26(1) provides: 'Tenders may be submitted by groups of service providers. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract.' (8)

The Remedies Directive (89/665)

15. Although the title of the Remedies Directive still refers only to public supply and public works contracts, it was none the less amended by the Services Directive to cover contracts falling within the scope of the latter.

16. Following that amendment, (9) Article 1 provides:

'1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of [inter alia, the Works and Services Directives], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2(7) on the grounds that such decisions have infringed Community law in the field of public procurement or nation[al] rules implementing that law.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.'

17. Article 2 provides, in particular:

'1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.

…

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

…’

National law

Casino licences

18. Under Article 1(7) of Law 2206/1994 governing casinos, (10) casino licences are to be granted following a public international tendering procedure organised by a seven-member commission. In accordance with Article 3, casinos are subject to State control.

Ineligibility for award of public contracts

19. Law 3021/2002, implementing Article 14(9) of the Greek Constitution, provides for restrictions on the award of public contracts to persons having active interests in the news media sector. It establishes an irrebuttable presumption of incompatibility as between the status of owner, partner, major shareholder or management executive of an undertaking active in that sector and that of owner, partner, major shareholder or management executive of an undertaking which is awarded a works, supply or services contract by the State or by a legal entity in the public sector (the presumption extending also to certain family members). (11)

20. Before awarding or signing the contract, the contracting authority must obtain from the Ethniko Simvoulio Radiotileorasis (National Council for Radio and Television, the ‘ESR’) a certificate that there is no such incompatibility. Failure to do so renders the contract null and void. The ESR’s decision is binding, but may be challenged in the courts by any person with an interest.

21. In its recent judgment in *Michaniki*, (12) the Court held that such an irrebuttable presumption was precluded by Community law, even if it pursued the legitimate objectives of equal treatment of tenderers and of transparency in award procedures. The Court did not, however, state that Community law would preclude a rebuttable presumption of the kind described.

Remedies in procurement procedures

22. The Remedies Directive is transposed in Greece by Law 2522/1997, Article 2(1) of which provides that any person having an interest in the award of a public works, supply or services contract and liable to be adversely affected by a breach of Community or national law may, in accordance with certain detailed rules, apply to the courts for interim relief, for annulment, or a finding of invalidity, of the unlawful act, and for damages.

23. Article 4(1) of the same law specifies that the right to seek annulment or a finding of invalidity applies when the alleged breach of Community or national law concerns any step in the procedure leading up to the award. Article 4(2) provides that, if an act or omission of the contracting authority is declared void after the contract is awarded, and unless the award procedure has been suspended as a measure of interim relief, the contract itself is not affected; in that case the applicant may seek damages in accordance with Article 5.

24. Article 5(1) specifies that the right to seek damages is governed by Articles 197 and 198 of the Civil Code (providing for liability in damages arising out of negotiations) and that any provision excluding or restricting that right is inapplicable. Article 5(2) provides (in accordance with Article 2(5) of the Remedies Directive) that damages cannot be awarded unless the competent court has first annulled the unlawful act or omission in question or made a finding of invalidity, but allows an action for a finding of invalidity and an action for damages to be combined in accordance with the generally applicable rules.

25. Article 47(1) of Presidential Decree 18/1989, codifying the laws relating to the Simvoulio tis Epikratias (Council of State) allows any natural or legal person whose legitimate interests are affected by an administrative act to seek its annulment.

26. In a line of chamber decisions dating from 1992, that court (which appears to have sole jurisdiction to rule on the validity of public procurement procedures) consistently interpreted that provision in such a way as to allow an action for annulment of the award of a public contract to be brought by individual members of a consortium taking part in the procedure. In the course of the main proceedings in the present two cases, however, the court in plenary formation has decided that such an action is inadmissible unless brought jointly by all the members of the consortium (on the ground, essentially, that only the consortium as constituted for the purposes of the procedure could be awarded the contract if the original award were annulled). That interpretation, in conjunction with Article 5(2) of Law 2522/1997, has implications for the availability of an action for damages in respect of an irregularity in the procedure brought by an individual member of the consortium.

Facts, procedure and questions referred

Case C-145/08

27. In October 2001, the competent interministerial committee decided to privatise Elliniko Kazino Parnithas AE (‘EKP’, a subsidiary of Ellinika Touristika Akinita AE, ‘ETA’), a casino undertaking wholly owned by the Greek State. The notice of invitation to tender provided for an initial preselection stage to determine which tenderers met the conditions set out. The successful tenderer was to be selected at a subsequent stage. Two consortia were preselected.

28. The terms were set out in detail in a draft contract annexed to a supplementary notice in April 2002. (13)

29. Article 3 of those terms stated that the contract was to be a ‘mixed’ contract comprising, in summary, four agreements under which, respectively:

– ETA would sell (49% of the) shares in EKP to ‘AEAS’ (a ‘single purpose limited company’ to be set up by the successful tenderer); (14)

– AEAS would acquire the right to appoint the majority of EKP’s board of directors and thus to administer the company in accordance with the terms of the contract;

– AEAS would take over the management of the casino business, in return for payment;

– AEAS, as administrator of EKP and as manager of the casino business, would undertake vis-à-vis ETA to implement a development plan to be approved by EKP's board of directors.

30. The development plan was to comprise refurbishing the casino and enhancing the facilities offered, refurbishing and improving two adjoining hotel units and developing stretches of surrounding land, all to be completed within 750 days of obtaining planning permission.

31. Article 14 of the draft contract concerned AEAS's management of the casino and remuneration thereof. Essentially, the management was to be prudent, entirely in accordance with the law and financially profitable for EKP (Article 13(7) specified in addition that EKP was to be administered in such a way as to achieve an annual pre-tax profit of at least EUR 105 000 000 in the first five years). In return, AEAS would receive a sum no greater than a scaled percentage of the annual operating profits (decreasing from 20% of profits up to EUR 30 000 000 to 5% of profits over EUR 90 000 000) and 2% of turnover.

32. Under Article 21(1) of the draft contract, if ETA were to operate lawfully any other casino in the same region (Attica) within 10 years from the date of effect of the contract, it would have to pay AEAS compensation equal to 70% of the price of the shares acquired in EKP by AEAS, reduced by one tenth each year.

33. Under Article 23(1), the contract would terminate at the end of the 10th year from taking effect. (15)

34. The contract was awarded to a group led by Hyatt Regency Xenodocheiaki kai Touristiki (Thessaloniki) AE (now renamed Regency Entertainment Psychagogiki Touristiki AE) ('Regency'). ETA therefore sought and obtained from the ESR a certificate that none of the owners, partners, major shareholders or management executives of the undertakings in the consortium presented any incompatibility as provided for in Law 3021/2002.

35. An action for annulment of the ESR's decision, in which it is alleged that a management executive of one member of the Regency consortium did have an incompatible connection with the news media sector (being the son of a major shareholder in a Greek media group), is now before the Simvoulio tis Epikratias.

36. The action was lodged in the name of the unsuccessful tendering consortium and all seven of its members. A chamber of the Simvoulio tis Epikratias dismissed it in so far as it was brought by the consortium as a whole and by four of its members, because they did not appear and the lawyer had not been duly authorised to act on their behalf. In so far as the action was brought by the remaining three members, including Club Hotel Loutraki ('Loutraki'), the chamber referred the case to the plenary court in view of its importance. In doing so, the chamber applied the then settled case-law under which an action brought by certain members of a consortium could be admissible. Its ruling of inadmissibility as regards the other applicants is now irrevocable and cannot be reviewed in the procedure before the plenary court, which has – in the meantime – reversed the previously settled case-law. (16)

37. As regards the substance of the action, the Simvoulio tis Epikratias points out that the contract is mixed, in that it comprises (i) a sale of shares to the successful tenderer which, as such, is not subject to Community procurement rules, (ii) a service contract to be concluded with that tenderer, who undertakes the management of the casino premises and (iii) an undertaking to carry out certain works. Of the three parts, according to the referring court, (i) is the main purpose of the contract, (ii) is ancillary and (iii) is the least important.

38. The referring court wonders whether part (ii) of the contract can be classified as a public service *concession*, not subject to Community directives. That might depend on the extent to which the successful tenderer bears the risk in operating the services concerned, bearing in mind that they relate to activities which, under national law, may be subject to exclusive or special rights. It could also be relevant that running a casino has never in any way constituted a *public* service in Greek law – although the term 'public service' might have to be defined as a concept of Community law.

39. If the Court should consider that part (ii) of the contract is a public service contract, the national court then wonders whether the action for annulment of the ESR's decision falls within the scope of the Remedies Directive. The services concerned fall within Annex I B to the Services Directive, and contracts for such services are subject only to Articles 14 and 16 of the directive, which impose procedural obligations. The referring court none the less wonders whether the principle of equal treatment of tenderers, which the Remedies Directive is designed to protect, applies also in such cases.

40. If the Remedies Directive does apply, the national court notes that, according to *Espace Trianon and Sofibail*, (17) a national rule which requires an action for annulment of a decision awarding a public contract to be brought by all the members of a tendering consortium is not contrary to that directive. However, it wonders whether that applies to all types of judicial protection guaranteed by the directive, in particular to claims for damages. The combination of the various national rules means that individual members of an unsuccessful tendering consortium are prevented not only from seeking annulment of the act adversely affecting them jointly but also from obtaining compensation for any damage they have suffered individually. Their ability to seek redress is thus dependent on the will of the other members of the consortium, whose interest in obtaining reparation may be different.

41. The issue is complicated by the fact that, pursuant to Article 2(5) of the Remedies Directive, Greece has made a claim for damages in the field of public procurement conditional on prior annulment of the unlawful act, with different courts having jurisdiction over the two matters – the Simvoulio tis Epikratias is competent as regards validity, whereas the ordinary courts are competent in damages. That is in contrast to the general situation concerning reparation for damage caused by unlawful acts of the State or of public bodies, where the court hearing the claim for damages also reviews the legality of the administrative act.

42. It might therefore be considered that a procedure intended to safeguard rights deriving from Community law was less favourable than a procedure to safeguard comparable rights deriving from national law.

43. Finally, the Simvoulio tis Epikratias wonders whether the procedural situation, in which the current case-law requires an action of the kind in question to be brought jointly by all members of a consortium but the action as brought by only three members had been declared admissible under previous case-law, is compatible with the right to a fair hearing, as a fundamental principle of Community law and as set out in Article 6 of the European Convention on Human Rights, and with the principle of protection of legitimate expectations.

44. The Simvoulio tis Epikratias therefore seeks a preliminary ruling on the following questions:

'(1) Does a contract by which the contracting authority entrusts to the contracting undertaking the management of a casino business and the execution of a development plan consisting in the upgrading of the casino premises and the commercial exploitation of the possibilities offered by the casino's licence, and which contains a term under which the contracting authority is obliged to pay the contracting undertaking compensation should another casino lawfully operate in the wider area in which the casino in question operates, constitute a concession, not governed by [the Services Directive]?

(2) If [question 1] is answered in the negative: does a legal action which is brought by persons who have participated in the procedure for the award of a public contract of mixed form providing inter alia for the supply of services subject to Annex I B to [the Services Directive], and in which they plead breach of the principle of equal treatment of participants in tender procedures (a principle affirmed by Article 3(2) of that directive), fall within the field of application of [the Remedies Directive], or is its application precluded inasmuch as, in accordance with Article 9 of [the Services Directive], only Articles 14 and 16 of the latter apply to the procedure for the award of the abovementioned contract for the supply of services?

(3) If [question 2] is answered in the affirmative: [(18)] accepting that a national provision in accordance with which only all the members of a consortium without legal personality which has participated unsuccessfully in a public procurement procedure can bring a legal action against the act awarding the contract, and not consortium members individually, is not in

principle contrary to Community law and specifically to [the Remedies Directive], and that that still applies where the legal action has initially been brought by all the members of the consortium jointly but ultimately proves, as regards some of them, to be inadmissible, is it in addition necessary, from the viewpoint of application of that directive, to examine, in order to make a declaration of inadmissibility, whether those individual members thereafter retain the right to claim before another national court any damages which may be envisaged by a provision of national law?

(4) When it has been held by settled case-law of a national court that an individual member of a consortium may also bring an admissible legal action against an act falling within a public procurement procedure, is it compatible with [the Remedies Directive], interpreted in the light of Article 6 of the European Convention on Human Rights as a general principle of Community law, to dismiss a legal action as inadmissible, because of a change to that settled case-law, without the person who has brought that legal action first being given either the opportunity to cure the inadmissibility or, in any event, the opportunity to set out, pursuant to the adversarial principle, his views relating to that issue?'

Case C-149/08

45. In 2004, in the context of a public works procurement procedure for the construction of a town hall and underground car park, (19) the city of Thessaloniki awarded the contract to a consortium comprising the companies Aktor ATE ('Aktor'), Themeliodomi AE and Domotechniki AE. The ESR, consulted on the existence of a possible incompatibility within the meaning of Law 3021/2002, found that a major shareholder of a company which was one of Aktor's major shareholders did have an incompatible connection with the news media sector (being the son of a major shareholder in a Greek media group (20)), and refused to issue a certificate for the consortium. Aktor, alone of the members of the consortium, requested the ESR to reconsider its decision and has now applied to the Simvoulio tis Epikratias for review of the ESR's dismissal of that request. It did so on the basis of the existing case-law allowing such actions to be brought by individual members of a consortium. However, the plenary court, in the course of its consideration of both this and the *Loutraki* case, has overturned that case-law, with the effect that it is no longer possible for Aktor to seek to resolve the problem.

46. In that regard, the case thus raises similar issues to those in Case C-145/08. The Simvoulio tis Epikratias therefore seeks a preliminary ruling on two questions, identical to questions 3 (with the exception of the introductory phrase) and 4 in Case C-145/08.

Procedure before the Court of Justice

47. By order of 22 May 2008, the two cases were joined for the purposes of the written and oral procedure and the judgment.

48. Written observations have been submitted to the Court by Loutraki, by three members of the successful tendering consortium in Case C-145/08 – namely, Athens Resort Casino AE ('Athens Resort') jointly with Regency, and Ellaktor AE ('Ellaktor') – by Aktor (the applicant in the main proceedings in Case C-149/08), by the Greek Government and by the Commission.

49. At the hearing on 11 June 2009, Loutraki, Athens Resort, Aktor, the Greek Government and the Commission presented oral argument.

Assessment

50. The two questions in Case C-149/08 are identical to the last two questions in Case C-145/08. For the sake of simplicity, I shall refer to all the questions by their numbering in the latter case – that is to

say, as I have set them out above.

Question 1

51. The essential issue that the national court must determine is whether the contract in issue is one to which the Remedies Directive applies specifically, or whether it is simply subject, more generally, to the fundamental rules of Community law and the principles of the Treaty – which apply, in any event, to Member States' public procurement procedures as long as they present a certain cross-border interest. (21)

52. That task is, however, complicated by the fact that the contract incorporates a number of disparate elements, of unequal importance in the whole. They are, essentially, a transfer of shares, an undertaking to provide a service for remuneration and an undertaking to implement a programme of works. Moreover, the service element might be viewed as a service contract (in which case it could be, taken in isolation, subject to at least two of the provisions of the Services Directive) or as a service concession (in which case it would fall outside the scope of that directive but would remain subject to the fundamental rules and principles of the EC Treaty (22)). I shall deal with those two issues in turn.

Mixed contracts

53. It may be helpful to begin by recalling briefly (23) the approach of Community law to mixed contracts – bearing in mind always that the actual classification of the contract is a matter solely for the national court on the basis of the facts before it.

54. When faced with a public award procedure comprising disparate elements which would, if treated separately, be subject to different sets of rules, the first step is to enquire whether such separate treatment would indeed have been possible. If so, any element which, taken on its own, falls within the scope of a particular procurement directive must be awarded in compliance with the provisions of that directive. (24) If not, it must be decided which rules apply to the whole.

55. In *Gestión Hotelera Internacional*, (25) the Court held that, where a mixed contract relates to both a transaction within the scope of a procurement directive (in that case, a public works contract) and a transaction otherwise outside the scope of Community procurement law (in that case, an assignment of property in the form of a lease), the contract as a whole will not fall within the scope of the directive if the former is merely incidental to the latter.

56. In the same vein, if a contract contains elements relating to different types of public contract, it is the main purpose or object which determines which directive is to be applied. (26)

57. That case-law coincides with the approach expressed by the legislature in the 16th recital in the preamble to the Services Directive: '… public service contracts, particularly in the field of property management, may from time to time include some works; … for a contract to be a public works contract, its object must be the achievement of a work; … in so far as these works are incidental rather than the object of the contract, they do not justify treating the contract as a public works contract'.

58. Pursuant to Article 2 of that directive, a mixed supply and service contract is to be categorised according to which part has the greater value and, pursuant to Article 10, the same principle applies where contracts cover services listed in both Annex I A and Annex I B.

59. Clearly, relative value is a simple and objective criterion for determining whether a particular aspect is the principal object of a contract or merely incidental. However, since the application of the Community directives is triggered at different value thresholds for different types of contract, it cannot be the only criterion, or there could be a danger of manipulation in order to remove certain contracts from the scope of the procurement rules. (27)

60. From the order for reference, and from the wording of question 1, it seems that the referring court has performed the analysis I have outlined, and has reached the view that: (i) the transfer of shares is the main purpose of the procedure and falls outside the scope of Community procurement rules; (ii) the service and works elements can be treated together, but separately from the sale of shares, and subjected to the rules of such directives as are applicable to them; (iii) the works element is merely incidental to the service element, so that the decisive factor is whether the service element is a service contract or a service concession.

61. That analysis is, of course, fully within the competence of the national court rather than this Court, and I shall therefore proceed on the same basis, even though several parties expressed at the hearing the view that the whole contract was indivisible and dominated by the sale of shares in EKP (a partial privatisation).

62. My only comment, with regard to that sale, is that I would agree with the position set out in the Commission's Green Paper on public-private partnerships and Community law on public contracts and concessions, (28) that:

'the provisions on freedom of establishment within the meaning of Article 43 of the Treaty must be applied when a public authority decides, by means of a capital transaction, to cede to a third party a holding conferring a definite influence in a public entity providing economic services normally falling within the responsibility of the State.

In particular, when the public authorities grant an economic operator a definite influence in a business under a transaction involving a capital transfer, and when this transaction has the effect of entrusting to this operator tasks falling within the scope of the law on public contracts which had been previously exercised, directly or indirectly, by the public authorities, the provisions on freedom of establishment require compliance with the principles of transparency and equality of treatment, in order to ensure that every potential operator has equal access to performing those activities which had hitherto been reserved.'

63. Consequently, the fundamental rules and principles of the Treaty will apply in any event to the whole contract, even if it transpires that the more detailed rules of the Remedies Directive apply only to the service element and its incidental works contract.

64. In that regard, the question is whether the service element on the basis of which the contract is to be classified is a service contract or a service concession.

65. Before addressing that point, however, I would rule out the suggestion that, independently of any other ground, the contract could be excluded from the scope of the Services Directive because the service involved – operating a casino – is not a *public* service in national law. The definition of a service within the meaning of the directive is a matter for Community law. (29) The definitions in Article 1 are broad, (30) and clearly intended to catch all service contracts awarded by public authorities. And, true though it may be that the State has no responsibility to make gaming facilities available to the public, the fact remains that, in many countries, there is considerable State involvement in gaming (often with a view, inter alia, to protecting the public from less scrupulous operators).

Service concessions

66. First of all, it is clear that, while public service concessions are indeed excluded from the scope of the Services Directive, (31) the directive contains no definition of a service concession.

67. None the less, at the material time in Case C-145/08, a Community legislative definition did exist, in the Works Directive, (32) of a public works concession, and that definition has since served as a basis for parallel definitions of service concessions in Directives 2004/17 (33) and 2004/18. (34) Also at the material time, the Commission had sought to define service concessions in a non-binding communication, (35) drawing on the Court's then existing case-law. (36) In *Parking Brixen*, (37) the Court referred to the definition in Directive 2004/18 as relevant to its conclusion on the definition of

the contract in issue, even though – as is the case here – that directive did not formally apply at the material time. And, much more recently, in *Eurawasser*, (38) the Court has referred to its pre-2004 case-law in order to refine and complete the definition of a service concession in Directive 2004/17. The definition of a service concession in Community law derives, thus, from an interlacement of legislation, case-law and guidance which appears stable over time.

68. The essence of the definition in the 2004 directives is that a service concession is a contract which meets the definition of a service contract 'except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in [that] right together with payment'. (39) That corresponds to the Court's criterion of 'remuneration [which] comes not from the public authority concerned, but from sums paid by third parties'. (40)

69. Such a criterion does appear to be met in the case of the award in issue. According to the terms of the contract as set out in the order for reference, the successful tenderer (or AEAS) is remunerated essentially by a proportion of the profits and/or turnover derived from the operation of the casino under its own management. That remuneration comes therefore from 'sums paid by third parties', even if it does not represent the whole of those sums.

70. However, in addition, the Court has stressed that an essential feature of a public service concession is that the concession holder assumes the risk of operating the services in question. (41)

71. That aspect has been the subject of debate in the present context, particularly with regard to the extent of local competition and the compensation to which AEAS is entitled if another casino is opened in the same administrative region. Athens Resort, Ellaktor and the Greek Government argue that the risk assumed by the successful tenderer is real and justifies classification as a service concession, whereas Loutraki takes the opposite view. The Commission also inclines towards the view that it is not a concession but – rightly – points out that the actual degree of risk transferred by the contracting authority and assumed by the successful tenderer can be assessed only by the national court.

72. Since the hearing in the present case, the Court has given some further guidance on what kind and degree of transfer of risk is required for a contract to be categorised as a service concession. In *Eurawasser*, (42) it ruled that 'in relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for that contract to be categorised as a "service concession" …, where the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service'.

73. The Court thus took the view that what matters is not that the operating risk should be significant in itself but that whatever risk is already assumed by the contracting authority should be transferred, either fully or to a significant extent, to the successful tenderer.

74. It is true that in that case the Court expressly had regard to the fact that the limitation of the risk in issue derived from public regulations (common in the utilities sector) which were, on the one hand, beyond the control of the contracting authority and, on the other hand, such as to reduce the likelihood of any adverse effect on transparency or competition. (43)

75. However, I do not think that such a criterion can be decisive. The Court also stated that 'it must remain open to the contracting authorities, acting in all good faith, to ensure the supply of services by way of a concession, if they consider that to be the best method of ensuring the public service in question, even if the risk linked to such an operation is limited'. (44) It seems to me that the notion of a service concession cannot depend on there being a risk of actual failure but must include all cases where the operation of the service will be subject to the normal fluctuations of economic activity, which the operator must absorb.

76. The assessment is of course a matter for the national court in each case. However, from the details given in the order for reference, it seems plausible that such a condition is met in the case of the contract in the present case.

77. Like many other businesses, a casino (even a State-run casino), involves a degree of risk. (45) Gaming and ancillary facilities can only be run at a certain cost, following a certain investment, and there are no guaranteed takings or clientele. Demand for gaming services may vary, even widely, depending on many factors, including, but not limited to, competition. And the mere fact that a service can be predicted with some assurance to be profitable cannot affect its ability to be provided in the form of a concession.

78. In the present case, the risk already borne by the State in running the casino appears, under the terms of the contract, to have been transferred to a sufficient extent to AEAS. The latter has had to invest a considerable sum of money in the purchase of shares, has had to assume various obligations to redevelop the premises (apparently at its own expense), and receives remuneration the precise amount of which appears to be dependent on the way in which it runs the casino (for which it is responsible not only vis-à-vis itself but also vis-à-vis the contracting authority). It is true that some of the risk (the return on investment) remains with the State body ETA which retains 51% of the shares in the casino. None the less, AEAS does appear to assume a proportion of the risk commensurate with its own involvement.

79. The factor which has been raised by the Simvoulio tis Epikratias as possibly affecting the assumption of risk by the successful tenderer is the condition to the effect that, if ETA were to operate any other casino in the same region within 10 years from the date of effect of the contract, it would have to pay AEAS compensation based on the price of the shares transferred. That, clearly, protects AEAS rather effectively from the worst excesses of possible competition.

80. However, it does not, it seems to me, affect in any way the classification of the award as a service concession. Service contracts and service concessions are distinct concepts, the essence of one being easily distinguished from the essence of the other. In a service contract, the service provider receives agreed consideration (the amount of its tender) from the contracting authority which, if the service is intended for third parties who pay for it, takes any profits or covers any losses. The amount of the tender will be based on the predicted cost of providing the service. In a service concession, it is the service provider which takes the profits or covers the losses and pays an agreed sum (the amount of its tender) to the contracting authority. (46) The amount of the tender will be based on the predicted profits. Clearly, the probable extent of competition will affect that prediction, and thus the amount of the tender submitted (and, indeed, the willingness of any party to participate in the procedure at all), but I do not see that it can affect the nature of the transaction and turn a service concession into a service contract.

81. If I have correctly understood the circumstances of the case in the main proceedings, the amount of each tender was the amount the tenderer was willing to pay for the shares in EKP, calculated by taking into account, inter alia, the obligation to carry out certain works and the amounts which could be expected to accrue from the successful tenderer's share of the operating profits of the casino. If that is so, the compensation clause giving protection against competition for 10 years would certainly affect each tenderer's calculations, but would not change the nature of the award, which appears to be that of a service concession (albeit to an extent in partnership with the contracting authority) rather than a service contract.

82. I have taken that view on the basis of the terms of the contract as I understand them from the order for reference, and in particular from the wording of the question on which the Simvoulio tis Epikratias seeks guidance, but it is of course possible that other factors, to be assessed by that court, may reveal a rather different picture of the actual extent of the transfer of risk.

83. In any event, I suggest that the Court should indicate that a contract for services under which the contractor's remuneration comes from third parties is to be classed as a service concession, (47) and thus as falling outside the scope of the Services Directive, when the contractor assumes all or at least a significant part of the operating risks incurred by the contracting authority, even if that risk is limited from the outset, and that such classification is not affected by the fact that the contracting authority guarantees compensation in the event of subsequent competition, provided that such a guarantee does not significantly affect the extent of the *transfer* of risk (as opposed to the degree of risk on the basis of

which each potential tenderer will assess his interest in participating and the amount which he is prepared to tender).

84. However, it must not be forgotten that, notwithstanding the fact that service concessions fall outside the scope of the Services Directive, the authorities concluding them are bound to comply with the fundamental rules and principles of the EC Treaty. (48)

Question 2

85. If, on the basis of the answer to question 1, the national court decides that the contract falls within the scope of the Services Directive, the question then arises whether the fact that the services concerned fall exclusively within the list in Annex I B to that directive affects the applicability of the Remedies Directive in the circumstances of the case.

86. In my view, it does not.

87. It is true that, as the Court pointed out in *Commission* v *Ireland*, (49) the directive is based on the assumption that contracts for services listed in Annex I B do not normally arouse such cross-border interest as to justify imposing rules to ensure that undertakings from other Member States can examine the contract notice and submit a tender, and that is why only minimal requirements are imposed for such contracts.

88. However (quite apart from the fact that the contract in the present case is undoubtedly of sufficient value to arouse cross-border interest), I agree here with the Commission that the Remedies Directive explicitly applies to all award procedures 'falling within the scope' (50) of the Services Directive, and that the services listed in Annex I B fall just as much within that scope as do those listed in Annex I A, no matter how limited the obligations actually imposed on them by the directive.

89. I thus do not accept the Greek Government's view that the Remedies Directive applies only to decisions alleged to be in breach of Articles 14 and 16 of the Services Directive, which are the only provisions to regulate contracts for services listed in Annex I B.

90. There is simply nothing in the wording of the Remedies Directive to indicate any intention to limit its application to proceedings in respect of the specific provisions of the substantive directive which apply to a particular procurement procedure. The aim is, on the contrary, to put an end to 'the absence of effective remedies or inadequacy of existing remedies [which] deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established'. (51) That aim could not be adequately achieved if the Greek Government's approach were to be followed.

91. Moreover, as the national court points out in its question, in the main proceedings in Case C-145/08 the applicants are invoking the principle of equal treatment, which is specifically enshrined in Article 3(2) of the Services Directive. Article 3(2) is one of the general provisions in Title I of the directive and, on any normal reading, applies to all public service contracts within the meaning of Article 1(a). It is only with regard to Titles III to VI that a distinction is drawn between services listed in Annex I A and those listed in Annex I B.

92. If, however, on the basis of the answer to question 1, the national court considers that the contract is for a public service concession, then it clearly will not be subject to the specific provisions of the Remedies Directive. None the less, the fundamental rules and principles of the Treaty – including, of course, the principle of equal treatment – will still apply.

93. In *Telaustria*, (52) the Court stressed that those principles mean that it must be possible for the impartiality of procurement procedures to be reviewed, and it is settled case-law that individuals are entitled to effective judicial protection of the rights they derive from the Community legal order. (53)

94. What those requirements actually involve for the present cases is a matter to be addressed in the context of questions 3 and 4.

Question 3

95. As I understand it, by question 3 the national court wishes to know, in essence, whether the *Espace Trianon and Sofibail* case-law (54) (to the effect that the Remedies Directive does not preclude a national rule under which only the members of a tendering consortium acting together may bring an action against the decision awarding the contract, even if all the members act together but the application of one member is held inadmissible) might have to be nuanced if its application entailed depriving individual members not only of the possibility of having a decision of the contracting authority set aside, but also of the possibility of seeking compensation for individual damage suffered as a result of irregularities in the procedure.

96. The answer to that question therefore calls for an examination of the Court's reasoning in *Espace Trianon and Sofibail*.

97. I note that the legal background to the two cases is strikingly similar. In *Espace Trianon and Sofibail*, the legislative rule in issue was also embodied in a law governing the supreme administrative court, under which actions for annulment could be brought by any party establishing harm or an interest, and that rule had been interpreted as requiring the members of a consortium without legal personality which had participated unsuccessfully in a public procurement procedure to act together in order to bring an action against the decision awarding the contract. (55) The case concerned an action brought by both members of an unsuccessful tendering consortium, which was held inadmissible in respect of one of them because the decision to bring proceedings had not been taken by the competent organ of the company. (56)

98. The question was whether Article 1 of the Remedies Directive precluded a rule such as that in issue, either in general or in the circumstances of the case. (57)

99. The Court considered that the reference in Article 1(3) to 'any person having or having had an interest in obtaining a public contract' was to a person who, in tendering for a public contract, had demonstrated his interest in obtaining it. All the members of a consortium tendering as such would be obliged to sign the contract and carry out the work if the tender were accepted. In the main proceedings, nothing had prevented the members of the consortium from bringing a joint action for annulment of the decision awarding the contract. (58)

100. Therefore, a national rule requiring an action for annulment of a contracting authority's award to be brought by all the members of a tendering consortium did not limit the availability of such an action in a way contrary to Article 1(3) of the Remedies Directive, particularly because under Belgian law the members of a consortium could settle the issue of its capacity to bring legal proceedings by internal agreement. (59)

101. Nor did the rule require that a group of contractors must assume a specific legal form in order to submit a tender – only that, for the purpose of bringing proceedings, a consortium must be represented in accordance with the rules applying to the legal form which its members themselves assumed in order to be able to tender. Moreover, the rule applied in the same way to all actions brought by members of consortia, whether the claims were founded on a breach of Community law or of national law, or were related to public contracts or to other operations. (60)

102. Consequently, such a rule could not undermine the requirement for effective review laid down in Article 1(1) of the Remedies Directive. That principle did not require an action to be held admissible when the provisions relating to representation in legal proceedings, which stem from the legal form assumed, had not been adhered to as far as concerns the person bringing the proceedings. (61)

103. Finally, there was no reason to distinguish between an action brought from the outset by only some of the members of the consortium and one initially brought by all those members but in which the

application of one of them was subsequently considered inadmissible. In both cases, admissibility was determined by national rules requiring only that applicants comply with the conditions relating to representation in legal proceedings in accordance with the legal form which the members had themselves chosen. Such general requirements did not limit the efficacy and availability of review procedures to tenderers in a manner contrary to the Remedies Directive. Furthermore, the inadmissibility of the application of one of the members of a consortium might be justified by circumstances showing that no intention to bring legal proceedings had been validly established for the member concerned. (62)

104. The Court has also made clear, however, in *Consorzio Elisoccorso San Raffaele*, (63) that a national rule which does allow members of a consortium to bring proceedings individually is in no way contrary to the Remedies Directive. Article 1(3) lays down a minimum requirement that the review procedures provided for must be available 'at least' to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement of the applicable law. A rule allowing individual actions, therefore, far from undermining the aim of the directive, appears likely to help attain it.

105. Consequently, the Simvoulio tis Epikratias is in no way precluded by the Remedies Directive from finding the actions in the main proceedings admissible.

106. The question is rather whether, in the circumstances of those proceedings, the current interpretation of the national legislation, leading to a finding of inadmissibility, (64) falls within the *Espace Trianon and Sofibail* case-law (in which case the Simvoulio tis Epikratias is not precluded from applying it) or whether the circumstances are so different as to render that interpretation incompatible with the directive.

107. Two differences in particular might be relevant in that regard. First, in *Espace Trianon and Sofibail*, the Court took account of the fact that it would have been possible, under Belgian law, for the members of the consortium to agree that it should be represented in proceedings by one of its members. That possibility does not appear to be available under Greek law, although that is of course a matter for the national court. Second, it took account of the fact that the rule applied to all actions brought by consortia, whether the claims were founded on a breach of Community law or of national law, or were related to public contracts or to other operations. In the present cases, however, it appears that the difficulty might not have arisen if the claim had been based on national law. (65)

108. I note moreover that, in her Opinion in *Espace Trianon and Sofibail*, Advocate General Stix-Hackl considered that the Court's ruling should be restricted to circumstances in which the action seeks annulment of the award made, and that 'it is perfectly conceivable that as regards a simple declaration of illegality and the availability of damages there might be other obligations under Community law'. (66)

109. Finally, the acts at issue in the present cases are not decisions of the contracting authority awarding or declining to award the contract to a consortium. They are, rather, decisions of another administrative body, concerning the eligibility of individual consortium members to be awarded a contract, which none the less bind the contracting authority.

110. Taking all those considerations into account, I think the Court would be justified in examining the requirements of the Remedies Directive afresh in the context of the present cases.

111. It is clear that, as a general rule, national law may provide that, where the person having or having had an interest in obtaining a contract is a consortium, a challenge to the decision awarding the contract must be brought by all the members of the consortium acting together (*Espace Trianon and Sofibail*). Likewise, it may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside (Article 2(5) of the Remedies Directive).

112. It could therefore be inferred that, where national law makes such provision in both regards, Community law does not preclude the consequence that a claim for damages brought by a single member of a tendering consortium will always be inadmissible.

113. I do not, however, take that view.

114. The Court's reasoning in *Espace Trianon and Sofibail* (and, apparently, that of the Simvoulio tis Epikratias in its revised interpretation of national law) is based on the premiss that an unsuccessful tenderer's interest in having an award annulled lies in the opportunity of being again able to take part in the procedure as resumed after annulment of an unlawful decision, and that, where the tenderer is a consortium, only the consortium as such can legitimately have that interest. Individual members, not having submitted a tender in their own name (and often not in a position to do so, or they would not have formed a consortium with others), lack that interest.

115. That premiss, and the conclusions drawn from it, seem entirely justified. As regards the award of a contract, the members of a consortium must all act together. United they stand, divided they fall. Their interests are as inseparable as is the award of the contract.

116. However, that does not necessarily hold true where a claim for damages is concerned. A decision taken in the course of an award procedure may cause specific harm to one member of a consortium but not to others. Although it is not clear from the order for reference to what extent that may be so in Case C-145/08, Case C-149/08 illustrates such a situation. The finding of incompatibility concerned Aktor alone among the members of the consortium. Whilst all those members may have been adversely affected by not being awarded the contract, Aktor was individually stigmatised as a company ineligible for an award. Even if, as the Greek Government asserted at the hearing, decisions on eligibility are taken afresh in the context of each new procedure, (67) the contested decision is likely to have an adverse effect on Aktor's acceptability, in the eyes of other undertakings, as a member of future consortia.

117. But even when (as may be the case for Loutraki and its fellow applicants) the harm is spread among the members of the consortium – in proportion, for example, to the loss of opportunity suffered by each of them – individual claims for damages could be dealt with separately. Provided that the claim is solely for such apportionable damages, and there is no question of annulling the award so that the consortium as a whole can be reinstated in the procedure, it is of no decisive importance whether the action is brought by one, some or all of the members of the consortium.

118. In line with the Court's statement in *Consorzio Elisoccorso San Raffaele*, (68) the availability of an individual action in such circumstances would tend to further rather than hinder the Remedies Directive's aim of ensuring that Member States provide effective remedies and adequate procedures for compensating those harmed by an infringement of Community law. (69) By contrast, a rule which limits such availability would hinder rather than further that aim.

119. It must also be recalled that, in accordance with consistent case-law, where there are no applicable Community rules, it is for each Member State to lay down detailed procedural rules governing actions for safeguarding rights derived from Community law. Member States must ensure that those rights are effectively protected, and the procedural rules must be no less favourable than those governing similar domestic actions (in accordance with the principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (in accordance with the principle of effectiveness). (70)

120. As the Commission has pointed out, it is for the national court to determine whether either of those principles is affected by the domestic rules applicable in the present cases. To the extent necessary and possible, it must interpret those rules in conformity with Community law, and thus in such a way as to ensure that the two principles are respected.

121. In that regard, it seems that an interpretation and application of the rules in the manner currently envisaged by the Simvoulio tis Epikratias would render it impossible for a member of a consortium to pursue an individual claim for damages. That right is derived from Article 2(1)(c) of the Remedies Directive and is not, in my view, affected by the circumstance that other members of the same consortium have no individual interest of their own in pursuing such a claim.

122. Moreover, the national court itself points out, in its order for reference, that, as regards the general right under national law to obtain compensation for damage caused by a State or public body, the court

hearing the action for damages examines at the same time the legality of the act alleged to have given rise to the damage whereas, in the present context, annulment must be obtained first from a different court. It thus appears, therefore, that the principles of effectiveness and equivalence would not be respected if an action for damages were not available to the applicants in the main proceedings because different courts have jurisdiction over the two remedies.

123. It has been suggested that the applicants enjoy sufficient judicial protection because they could claim damages against the other consortium members whose inaction has caused the proceedings to be dismissed. That does not appear to me to be a valid alternative. It seems both inequitable that compensation for any damage caused by a decision of the ESR should come from partners in the consortium and unlikely that the amount of compensation would be comparable, since the type of damage would be different and would stem from different conduct by different parties.

124. Consequently, I would answer question 3 to the effect that, even if under national law an action for annulment of a decision taken in the course of a procurement procedure is not available to individual members of a tendering consortium, it is necessary, before finding such an action inadmissible, to examine whether those individual members thereafter retain the right to claim damages before another court as a result of an alleged infringement of Community law. Such a right must remain available to them under conditions which are no less favourable than those governing similar domestic actions (in accordance with the principle of equivalence) and which do not render its exercise practically impossible or excessively difficult (in accordance with the principle of effectiveness).

125. I would add, with regard to Case C-145/08, that, in so far as the claim for damages is based on an infringement of one of the fundamental rules and principles of the Treaty which apply to the procurement procedure in question, then the right to effective judicial protection and the requirements of the principles of equivalence and effectiveness will still apply, even if the procedure itself is found to fall outside the scope of the Services Directive, and thus of the Remedies Directive.

Question 4

126. This question concerns a situation in which (i) one or more applicants have brought an action against a decision taken in the course of a procurement procedure, (ii) that action was admissible on the basis of settled case-law at the time it was brought and (iii) the court hearing the case has concluded, in a reversal of its previous case-law, that the action is in fact inadmissible.

127. The Simvoulio tis Epikratias wishes to know, essentially, whether in such circumstances the Remedies Directive and the right to a fair hearing require the applicant(s) to be given an opportunity either to cure the defect in admissibility (which does not appear to be possible, under the normal rules, at the current stage of the procedure) or at least to express a view on the issue (which does not appear to have been the case prior to the reversal of the case-law).

128. In the light of my proposed answers to the earlier questions, in particular question 3, that question arises only if it transpires, on a final analysis, that the inadmissibility of an action brought by individual members of a tendering consortium against a decision taken in the course of the procurement procedure *does not* deprive those individual members of their right to claim damages before another court as a result of an alleged infringement of Community law and if that right *does remain* available to them under conditions which are no less favourable than those governing similar domestic actions and which do not render its exercise practically impossible or excessively difficult. In other words, it arises only if the new interpretation of the national procedural rules proves to be fully compatible with Community law. Although that might seem doubtful on the information available, I shall respond to question 4 on the basis that it is so.

129. First, I would agree with Loutraki that, as a general rule, where a court reverses its previous case-law, that reversal must apply in the case in which it is decided (although there are of course situations in which the temporal effects of a ruling of principle may be limited to situations arising after a particular date (71)).

130. However, the specific issue in the present case is that the reversal appears to have been decided without the parties concerned having had an opportunity even to put their views, still less to correct such procedural defects as have emerged.

131. In the latter regard, the Simvoulio tis Epikratias itself and Aktor both state that, in previous cases where a comparable situation has arisen under national law, that court has consistently cited the principles of legitimate expectation and effective judicial protection in order to give parties the opportunity to cure any defect in admissibility which arises as a result of a reversal of case-law. If that is so, it seems clear to me that, as Aktor submits, the principle of equivalence requires the same approach to be followed where the procedure seeks to assert a right derived from Community law.

132. In that regard, it does not seem to me necessary to take account, as the Greek Government and a minority of the Simvoulio tis Epikratias suggest, of whether the proceedings were initially brought in conscious reliance on the previous case-law or not – unless that is a factor which is also taken into account in the other situations governed by national law.

133. More generally, I would agree with the Commission's submission that, here again, the national court must verify that, to the extent that the procedure falls within the scope of Community law, the fundamental principles of that law are observed. Those principles include legal certainty, legitimate expectation and the right to a fair trial within the meaning of Article 6 of the European Convention of Human Rights.

134. As regards the opportunity to present submissions on a reversal of case-law, the Commission recalls that this Court has noted, in proceedings relating to public procurement, that the European Court of Human Rights has consistently held the adversarial nature of proceedings to be a factor which enables their fairness to be assessed, even if it may be balanced against other rights and interests. The adversarial principle means, as a rule, that the parties have a right to inspect and comment on evidence and observations submitted to the court. (72)

135. In the present cases, as far as I can ascertain from the documents, the case-law appears to have been reversed at the initiative of the Simvoulio tis Epikratias. In such circumstances, it seems to me particularly important that the parties should be heard before a case is dismissed on unprecedented procedural grounds.

136. Several parties have pointed out that, at the present stage of the proceedings, which commenced several years ago, and in the interests of procedural efficiency, it may be unnecessary for the Simvoulio tis Epikratias to organise a further opportunity for the parties to be heard, since they have now had such an opportunity before this Court. In my view, that will be so only if the procedural rules of the Simvoulio tis Epikratias make provision for the arguments advanced before this Court during the reference to be taken fully into account when the matter returns before the national court after this Court has given judgment.

Conclusion

137. In the light of all the above considerations, I propose that the Court should reply as follows to the questions raised by the Simvoulio tis Epikratias.

In answer to the first question in Case C-145/08:

An award by which a contracting authority entrusts a contractor with the management and commercial exploitation of a casino business (service element) and the contractor undertakes to implement a development plan consisting in the upgrading of the casino premises (works element) may be classed as a service contract for the purposes of the Community public procurement directives if the works element is merely incidental to the service element. Such an award is, however, to be classed as a service concession, and thus as falling outside the scope of the Services Directive, when the contractor

assumes all or at least a significant part of the operating risks incurred by the contracting authority, even if that risk is limited from the outset. Such classification is not affected by the fact that the contracting authority guarantees compensation in the event of subsequent competition, provided that such a guarantee does not significantly affect the extent of the transfer of risk, as opposed to the degree of risk on the basis of which each potential tenderer will assess his interest in participating and the amount which he is prepared to tender.

None the less, the award of a service concession must comply with the fundamental rules and principles of the EC Treaty.

In answer to the second question in Case C-145/08:

A legal action brought by persons who have participated in the procedure for the award of a public contract of mixed form providing inter alia for the supply of services subject to Annex I B to the Services Directive, and in which they plead breach of the principle of equal treatment of participants in tender procedures, affirmed by Article 3(2) of that directive, falls within the field of application of the Remedies Directive.

In answer to the third question in Case C-145/08 and the first question in Case C-149/08:

Even if under national law an action for annulment of a decision taken in the course of a procurement procedure is not available to individual members of a tendering consortium, it is necessary, before finding such an action inadmissible, to examine whether those individual members thereafter retain the right to claim damages before another court as a result of an alleged infringement of Community law. Such a right must remain available to them under conditions which are no less favourable than those governing similar domestic actions (in accordance with the principle of equivalence) and which do not render its exercise practically impossible or excessively difficult (in accordance with the principle of effectiveness).

In so far as the claim for damages is based on an infringement of one of the fundamental rules and principles of the Treaty which apply to the procurement procedure in question, then the right to judicial protection and the requirements of the principles of equivalence and effectiveness will still apply, even if the procedure itself is found to fall outside the scope of the Community procurement directives.

In answer to the fourth question in Case C-145/08 and the second question in Case C-149/08:

When it has been held by settled case-law of a national court that an individual member of a tendering consortium may bring an action against an act falling within a public procurement procedure, it is not compatible with the general principles of Community law to dismiss such an action as inadmissible because of a change to that settled case-law, unless the person who has brought that action has first been given either the opportunity to cure the inadmissibility or, in any event, to set out his views relating to that issue.

---

1 – Original language: English.

---

2 – Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

---

3 – Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). After the material time in the present cases, this directive was

repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

---

4 – Case C-129/04 *Espace Trianon and Sofibail* [2005] ECR I-7805.

---

5 – Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

---

6 – See point 13 below.

---

7 – Title III is headed ‘Choice of award procedures and rules governing design contests’, Title IV ‘Common rules in the technical field’ and Title V ‘Common advertising rules’, while Title VI covers ‘Common rules on participation’, ‘Criteria for qualitative selection’ and ‘Criteria for the award of contracts’.

---

8 – I note that this provision is in Title VI and thus appears, formally at least, not to be applicable where the contract is for services listed in Annex I B. However, the point does not seem relevant in the present context, in so far as there is no suggestion that any specific legal form was required of the consortia concerned, whether such a requirement would have been prohibited by the directive or not.

---

9 – Since the material time in the present cases, Articles 1 and 2 in particular have been further amended, and further detailed rules introduced, by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

---

10 – This provision is not cited in the order for reference, but the Greek Government has cited the text in its written observations.

---

11 – It appears that Law 3021/2003 has since been replaced by Law 3310/2005, amended by Law 3414/2005. Under the new measures, it appears that incompatibility derives from certain criminal convictions rather than from shareholdings.

---

12 – Case C-213/07 [2008] ECR I-0000, especially at paragraph 50 et seq. That judgment was delivered after the orders for reference had been made in the present cases, and after the written observations had been submitted.

---

13 – The relevant parts of the contract document are transcribed or summarised in the order for reference. I do not propose to take account of the partly conflicting version which the Greek Government appeared to put forward at one stage in the procedure. Such matters are in any event for the national court to determine.

---

14 – From the Greek Government’s reply to a written question put by the Court, it appears that the successful tenderer paid EUR 110 000 000 for the shares.

---

15 – I presume, although it is not spelt out in the order for reference, that this refers to the various undertakings relating to the management of the casino, and that the transfer of shares will not be affected.

---

16 – See point 25 above.

---

17 – Cited in footnote 4, paragraph 22.

---

18 – Since question 2 is in fact posed as an alternative, I take this to mean: ‘If such an action does fall within the field of application of the Remedies Directive, …’.

---

19 – It is not disputed that this contract, with an estimated value of EUR 46 700 000, falls fully within the scope of the Works Directive, and thus of the Remedies Directive.

---

20 – It is curious to note that the person in question appears to be the same as the person in respect of whom Loutraki alleges an incompatibility in the context of its case, but in respect of whom the ESR has confirmed its finding that there was no incompatibility in that case.

---

21 – See, for example, Case C-92/00 *HI* [2002] ECR I-5553, paragraph 42, and Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 26. See also the Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ 2006 C 179, p. 2), especially at points 1.1 and 2.3.

---

22 – Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 to 62; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 9 and 16 et seq.; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 42 and 61; Case C-324/07 *Coditel Brabant* [2008] ECR I-0000, paragraph 25.

---

23 – For a slightly fuller account, see the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, points 29 to 39 and 70 to 76.

---

24 – Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraphs 17 to 19; see also, by analogy, the Commission’s Guide to the Community rules on public supply contracts other than in the water, energy, transport and telecommunications sectors (http://ec.europa.eu/internal_market/publicprocurement/docs/guidelines/supply_en.pdf), point 1.5, Identification of contracts.

---

25 – Case C-331/92 [1994] ECR I-1329, especially at paragraph 29. That judgment appears particularly apposite in relation to the present case, as it concerned a mixed contract combining an undertaking to carry out a series of works, an undertaking to operate a hotel business and a concession for the installation and opening of a gaming establishment.

---

26 – Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 37; Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 47.

---

27 – See Case C-412/04 *Commission* v *Italy*, cited in footnote 26, especially at paragraphs 50 and 51.

---

28 – COM(2004) 327 final, points 67 and 68, referred to by Ellaktor in its submissions.

---

29 – See, for example, Case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraph 36; Case C-382/05 *Commission* v *Italy* [2007] ECR I-6657, paragraph 30.

30 – See point 8 above.

31 – See *Telaustria*, cited in footnote 22, paragraph 43 et seq., in particular paragraph 58; order in Case C-358/00 *Buchhändler-Vereinigung* [2002] ECR I-4685, paragraph 28; *Parking Brixen*, cited in footnote 22, paragraph 42.

32 – Cited in footnote 5.

33 – Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

34 – Cited in footnote 3.

35 – Commission interpretative communication on concessions under Community law (OJ 2000 C 121, p. 2), especially point 2.2.

36 – In particular Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409, Case C-360/96 *Arnhem* [1998] ECR I-6821 and Case C-108/98 *RI.SAN* [1999] ECR I-5219.

37 – Cited in footnote 22, paragraph 41.

38 – Case C-206/08 [2009] ECR I-0000 (judgment delivered after the hearing in the present cases).

39 – Directive 2004/17, Article 1(3)(b); Directive 2004/18, Article 1(4).

40 – *Parking Brixen*, paragraph 40.

41 – See, for example, Case C-382/05 *Commission* v *Italy* [2007] ECR I-6657, paragraph 34, and Case C-437/07 *Commission* v *Italy* [2008] ECR I-0000, paragraph 29; see also the Commission's interpretative communication, cited in footnote 35.

42 – Cited in footnote 38, paragraph 80 and operative part.

43 – Paragraphs 72 and 73.

44 – Paragraph 74.

45 – Indeed, the very concept is based on risk, even if it is normally far greater for customers than it is for the operator.

46 – Or, if the service is predicted to be loss-making, the tender may take the form of a subsidy to be paid by the contracting authority to the service provider. (Such a subsidy may protect the service provider from an

inevitable outright loss, but will still leave him open to the normal fluctuations of business.)

47 – See in particular points 68 and 71 above.

48 – See point 52 and the references in footnote 22 above.

49 – Case C-507/03, cited in footnote 21, paragraph 25; see also the 21st recital in the preamble to the directive.

50 – Article 1(1) of the Remedies Directive, cited in point 16 above.

51 – Fourth recital in the preamble to the Remedies Directive.

52 – Cited in footnote 22, paragraph 62.

53 – See, for example, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39; most recently, Case C-12/08 *Mono Car Styling* [2009] ECR I-0000, paragraphs 47 to 49.

54 – See point 3 and footnote 4 above.

55 – See in particular paragraphs 7 and 15 of the judgment.

56 – Paragraphs 13 and 14.

57 – Paragraph 16.

58 – Paragraphs 19 to 21. The Court contrasted Case C-230/02 *Grossmann Air Service* [2004] ECR I-1829, paragraph 28, and Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 41. However, those cases did not concern consortia.

59 – Paragraphs 22 and 23.

60 – Paragraphs 24 and 25.

61 – Paragraph 26.

62 – Paragraphs 27 and 28.

63 – Order in Case C-492/06 [2007] ECR I-8189, in particular at paragraphs 20, 21 and 30.

64 – See point 40 above.

65 – See point 41 above.

66 – Points 23 and 24 of the Opinion.

67 – An assertion apparently borne out by the circumstance that the decisions contested in the two sets of national proceedings do not appear to be concordant (see footnote 20 above).

68 – At paragraph 30 of the order (see point 104 above).

69 – As regards the aim itself, see in particular, in addition to the substantive provisions of the directive, the fourth to sixth recitals in the preamble. As regards the possible harm caused by an infringement of Community law, it must also be borne in mind that the Court has held the irrebuttable presumption applied in the cases in the main proceedings to be incompatible with Community law (see point 21 above) – a factor which may have divergent repercussions in the two sets of proceedings, since in one case what is challenged is a finding of ineligibility in the light of that presumption, whereas in the other it is a failure to find ineligibility.

70 – See, for a recent example, Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 44 to 46 and the case-law cited there.

71 – For an overview, see the Opinion of Advocate General Stix-Hackl in Case C-475/03 *Banca Popolare di Cremona* [2006] ECR I-9373, at point 130 et seq.

72 – See Case C-450/06 *Varec* [2008] ECR I-581, paragraphs 46 and 47 and the case-law cited there.

JUDGMENT OF THE COURT (Fourth Chamber)

15 October 2009 (*)

(Procedures for the award of public works contracts – Procedures initiated after the entry into force of Directive 2004/18/EC and before the expiry of the period for transposition of that directive – Negotiated procedures with publication of a contract notice – Obligation to admit a minimum number of suitable candidates – Obligation to ensure genuine competition)

In Case C-138/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Fővárosi Ítélőtábla (Hungary), made by decision of 13 February 2008, received at the Court on 7 April 2008, in the proceedings

Hochtief AG,

Linde-Kca-Dresden GmbH

v

Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság,

intervening parties:

Budapest Főváros Önkormányzata,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting as President of the Fourth Chamber, R. Silva de Lapuerta (Rapporteur), E. Juhász, G. Arestis and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 12 March 2009,

after considering the observations submitted on behalf of:

– Hochtief AG and Linde-Kca-Dresden GmbH, by A. László and E. Kiss, ügyvédek,

– the Budapest Főváros Önkormányzata, by J. Molnár and G. Birkás, ügyvédek,

– the Hungarian Government, by J. Fazekas, R. Somssich, K. Borvölgyi and K. Mocsári-Gál, acting as Agents,

– the Czech Government, by M. Smolek, acting as Agent,

– the Italian Government, by I. Bruni, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

– the Commission of the European Communities, by D. Kukovec, A. Sipos, B. Simon and M. Konstantinidis, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 22 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997 (OJ 1997 L 328, p. 1) (‘Directive 93/37’), and the transitional legal relationship between that directive and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

2 The reference was made in the course of proceedings brought by Hochtief AG and Linde-Kca-Dresden GmbH against the Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság (Arbitration Committee of the Public Procurement Council, ‘the KTKD’) relating to a negotiated procedure with publication of a contract notice.

Legal framework

Community law

3 Article 1 of Directive 93/37 provides:

‘For the purposes of this Directive:

…

(g) “negotiated procedures” are those national procedures whereby contracting authorities consult contractors of their choice and negotiate the terms of the contract with one or more of them;

(h) a contractor who submits a tender shall be designated by the term “tenderer” and one who has sought an invitation to take part in a restricted or negotiated procedure by the term “candidate”.’

4 Article 7(2) of Directive 93/37 states:

‘The contracting authorities may award their public works contracts by negotiated procedure, with prior publication of a contract notice and after having selected the candidates according to publicly known qualitative criteria, in the following cases:

(a) in the event of irregular tenders in response to an open or restricted procedure or in the case of tenders which are unacceptable under national provisions that are in accordance with the provisions of Title IV, in so far as the original terms of the contract are not substantially altered. The contracting authorities shall not, in these cases, publish a contract notice where they include in such negotiated procedure all the enterprises satisfying the criteria of Articles 24 to 29 which, during the prior open or restricted procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure;

(b) when the works involved are carried out purely for the purpose of research, experiment or development, and not to establish commercial viability or to recover research and development costs;

(c) in exceptional cases, when the nature of the works or the risks attaching thereto do not permit prior overall pricing.’

5 Article 18(1) of Directive 93/37 states:

‘Contracts shall be awarded on the basis of the criteria laid down in Chapter 3 of this Title, taking into account Article 19, after the suitability of the contractors not excluded under Article 24 has been checked by contracting authorities in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29.’

6 Article 22 of that directive provides:

‘1. In restricted and negotiated procedures the contracting authorities shall, on the basis of information given relating to the contractor’s personal position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him, select from among the candidates with the qualifications required by Articles 24 to 29 those whom they will invite to submit a tender or to negotiate.

2. Where the contracting authorities award a contract by restricted procedure, they may prescribe the range within which the number of undertakings which they intend to invite will fall. In this case the range shall be indicated in the contract notice. … The range shall be determined in the light of the natur[e] of the work to be carried out. The range must number at least 5 undertakings and may be up to 20.

In any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition.

3. Where the contracting authorities award a contract by negotiated procedure as referred to in Article 7(2), the number of candidates admitted to negotiate may not be less than three provided that there is a sufficient number of suitable candidates.

4. Each Member State shall ensure that contracting authorities issue invitations without discriminations to those nationals of other Member States who satisfy the necessary requirements and under the same conditions as to its own nationals.’

7 Article 80(1) of Directive 2004/18 provides:

‘1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 31 January 2006. They shall forthwith inform the Commission thereof.

...’

8 Article 82 of that directive, under the heading ‘[r]epeals’ states:

‘Directive 92/50/EEC, except for Article 41 thereof, and Directives 93/36/EEC and 93/37 … shall be repealed with effect from the date shown in Article 80, without prejudice to the obligations of the Member States concerning the deadlines for transposition and application set out in Annex XI.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex XII.’

9 Directive 2004/18 entered into force on 30 April 2004.

National law

10 Directive 93/37 was transposed into Hungarian law by Law CXXIX of 2003 on the award of public contracts (a közbeszerzésekről szóló 2003 évi CXXIX. törvény, *Magyar Közlöny* 2003/157, ‘the Kbt’).

11 Article 130(1), (2) and (7) of the Kbt, which applies to negotiated procedures with publication of a contract notice, provides:

‘(1) The contracting authority shall, in that procedure, prescribe either the number of tenderers, or a range for the number of tenderers, so as to produce invitations to tender from a number of suitable candidates; a number which, if those candidates have submitted valid applications, may reach the upper limit of the range provided or, at the very least, a sufficient number of those candidates.

(2) The minimum number of participants or the lower limit of the range shall not be lower than three. That number or that range must be adapted to the nature of the contract and must, in any event, ensure genuine competition.

…

(7) The contracting authority shall, individually, directly and in writing, invite the selected candidates, the number of whom will tally with the prescribed number or come within the prescribed range – on the basis of their financial and economic capacity and their fulfilment of the technical and professional requirements – to submit their tenders, provided that there is a suitable number of candidates. If the contracting authority did not specify that number or range, it shall invite all suitable candidates to submit tenders. Candidates invited to submit a tender cannot submit a collective tender.'

12 At the date of the facts in the main proceedings, Directive 2004/18 had not yet been transposed into Hungarian law.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 The dispute in the main proceedings relates to a negotiated procedure for the award of a public works contract for an amount in excess of the Community threshold. The dispute is between two commercial undertakings established in Germany, Hochtief AG and Linde-Kca-Dresden GmbH, and the KTKD. The contracting authority for that contract, namely the Budapest Főváros Önkormányzata (Local Government for Budapest), intervened in the dispute in support of the KTKD.

14 On 5 February 2005, the Budapest Főváros Önkormányzata published, in the *Official Journal of the European Union*, a contract notice for the tender procedure at issue in the main proceedings. The prescribed range for the number of candidates who could be invited to submit a tender was three to five.

15 At the expiry of the period for the submission of applications, five candidates, including the consortium set up by the applicants in the main proceedings, had come forward. In the light of the applications submitted, the Budapest Főváros Önkormányzata, first, excluded the application of that consortium as inadmissible on the grounds of 'incompatibility' and, second, decided to continue with the procedure with the two candidates regarded as 'suitable', by issuing to them invitations to submit a tender.

16 The applicants in the main proceedings challenged the decision of the Budapest Főváros Önkormányzata before the KTKD, claiming, inter alia, that, under Article 130 of the Kbt, since the number of suitable candidates was below the prescribed minimum, the procedure could not continue. The KTKD rejected that challenge.

17 Thereafter, the applicants in the main proceedings brought legal proceedings against the KTKD's decision, relying, inter alia, on Article 22(2) and (3) of Directive 93/37. As the court seised of the matter at first instance also dismissed the action, the applicants in the main proceedings lodged an appeal before the referring court.

18 It is in those circumstances that the Fővárosi Ítélőtábla decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the procedure laid down in Article 44(3) of Directive 2004/18 …, which replaced Article 22 of … Directive 93/37 … applicable where the procurement procedure was initiated at a time when Directive 2004/18 … had already entered into force, but the time-limit granted to Member States for implementing that directive had not yet expired, so that the directive had not been incorporated into national law?

2. If the answer to the first question is in the affirmative, this court further asks whether in the case of negotiated procedures with publication of a contract notice – having regard to the fact that Article 44(3) of Directive 2004/18 … provides that "[i]n any event the number of candidates invited shall be sufficient to ensure genuine competition" – the limitation of the number of suitable candidates should be interpreted as meaning that in the second stage – that of awarding the contract – there must invariably be a minimum number of candidates (three)?

3. If the answer to the first question is in the negative, this court further asks … whether the requirement that "there be a sufficient number of suitable candidates", under Article 22(3) of Council Directive 93/37 …, should be interpreted as meaning that where the minimum number of suitable candidates invited to take part is not reached (three), the procedure cannot continue to the stage of invitation to tender?

4. If the Court … replies to the third question in the negative, this court further asks whether the second [sub]paragraph of Article 22(2) of Directive 93/37 – in the rules on restricted procedures, according to which "[i]n any event, the number of candidates invited to tender shall be sufficient to ensure genuine competition" – is applicable to two-stage negotiated procedures, governed by Article 22(3)?'

The questions referred

Preliminary observations

19 According to the applicants in the main proceedings, the referring court ought to have referred another question in addition to those referred, concerning the Hungarian legislation's failure to respect the principles of equal treatment, non-discrimination and proportionality, in that that legislation automatically excludes persons or entities which have taken part in the preparatory work for a public contract from the procedures for the awards of public contracts, without giving them the opportunity to prove that there is no threat to competition. According to the applicants, analogous measures contained in the national law of other Member States have been held to be incompatible with Community law in Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, and in Case C-213/07 *Michaniki* [2008] ECR I-0000.

20 In that regard, the Court notes that, in the context of the cooperation between the Court and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, Case C-306/99 *BIAO* [2003] ECR I-1, paragraph 88; Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 16; and Case C-260/07 *Pedro IV Servicios* [2009] ECR I-0000, paragraph 28).

21 The right to determine the questions to be put to the Court thus devolves upon the national court alone and the parties may not change their tenor (see, inter alia, Case 44/65 *Singer* [1965] ECR 1191, 1198; Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraph 23; and Case C-402/98 *ATB and Others* [2000] ECR I-5501, paragraph 29).

22 In addition, to alter the substance of the questions referred for a preliminary ruling, or to answer the additional questions mentioned by the applicants in the main proceedings in their observations, would be incompatible with the Court's function under Article 234 EC and with its duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 23 of the Statute of the Court of Justice, bearing in mind that under that provision only the order of the referring court is notified to the interested parties (see, to that effect, inter alia, Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6; Case C-178/95 *Wiljo* [1997] ECR I-585, paragraph 30; Case C-352/95 *Phytheron International* [1997] ECR I-1729, paragraph 14; and *Kainuun Liikenne and Pohjohlan Liikenne*, paragraph 24).

23 In the present case, since the referring court has accepted neither the need nor the relevance of a question concerning the grounds for, or the circumstances of, the exclusion of the applicants in the main proceedings from the procedure for the award of the public contract in question, the Court cannot carry out an analysis in that regard.

The first question

24 By its first question, the referring court asks, in essence, whether Directive 2004/18 is applicable to a procedure for the award of a public contract initiated after the entry into force of that directive, but before the expiry of the period for transposition of it, and as a result that directive had not yet been incorporated into the national law.

25 At the outset, it should be borne in mind that, before the period for transposition of a directive has expired, Member States cannot be reproached for not having yet adopted measures implementing it in national law (see Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 43 and Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 114).

26 Thus, in the case in the main proceedings, at the time of the initiation of the procedure for the award of the contract at issue, Directive 2004/18 had not been transposed into Hungarian national law, as the deadline for transposition had not yet passed, so that Directive 93/37 remained applicable at that stage of the procedure.

27 To the extent that the procedure at issue in the main proceedings was still on-going at the date on which the period for transposition of Directive 2004/18 expired, the question also arises whether that directive may be applicable in the main proceedings.

28 In that regard, it is apparent from the information provided by the Hungarian government at the hearing that the contracting authority's decision – to exclude the bid from the consortium set up by the applicants in the main proceedings and to continue the procedure with the two candidates who were considered to be suitable – was taken before the date on which the period for transposition of Directive 2004/18 expired.

29 It would, in those circumstances, be contrary to the principle of legal certainty to determine the law applicable to the case in the main proceedings by reference to the date of the award of the contract, when the decision which in the present case is alleged to have infringed Community law was taken before the date referred to in the previous paragraph of this judgment (see, by analogy, Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraph 40).

30 Therefore, the answer to the first question is that Directive 2004/18 is not applicable to a decision taken by a contracting authority when awarding a public works contract before the period for transposition of that directive has expired.

The second question

31 In the light of the answer given to the first question, it is not necessary to reply to the second question.

The third question

32 By its third question, the referring court asks, in essence, whether Article 22(3) of Directive 93/37 must be interpreted as meaning that a negotiated procedure for the award of a public contract cannot be continued in the absence of a sufficient number of candidates to reach the lower limit of three candidates laid down by that provision.

33 In that regard, it should be recalled that Directive 93/37 contains, among its provisions, rules on the procedure to be followed.

34 Thus, as regards the procedure for the award of a public works contract, at least two different stages are provided for in Article 18 of Directive 93/37, that is to say, first, the possible exclusion of tenderers or candidates under Article 24 of that directive, and the verification of the suitability of the tenderers or candidates who were not excluded, in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in Articles 26 to 29 of that directive and prescribed for the procedure in question, and, second, the award of the contract on the basis of the criteria prescribed for that procedure as laid down in Title IV, Chapter 3 of Directive 93/37 and taking into account Article 19 of that directive.

35 In the negotiated procedure, negotiations between the contracting authority and the candidates admitted to negotiate take place between the first stage referred to and the stage of awarding the contract.

36 Pursuant to Article 22(3) of Directive 93/37, where a contract is to be awarded by negotiated procedure, the number of candidates admitted to negotiate may not be less than three provided that there is a sufficient number of suitable candidates.

37 It is, therefore, apparent from the wording of that provision that the contracting authorities are, at the very least, bound – as regards the number of candidates admitted to negotiations – to respect the lower limit laid down in that provision, in so far as the number of suitable candidates so allows.

38 In that regard, any contractor who has sought an invitation to take part in the procedure in question and who, among those with the qualifications required under Articles 24 to 29 of that directive, meets the conditions of an economic and technical nature prescribed for the procedure in question, must be considered to be a 'suitable candidate' within the meaning of Article 22(3) of Directive 93/37.

39 On the one hand, a 'candidate' is defined in Article 1(h) of Directive 93/37 as a contractor who has sought an invitation to take part in a restricted or negotiated procedure.

40 On the other hand, in accordance with Article 22(1) of Directive 93/37, in negotiated procedures, the contracting authorities are – on the basis of information given relating to the contractor's personal position as well as to the information and formalities necessary for the evaluation of the minimum conditions of an economic and technical nature to be fulfilled by him – to select from among the candidates with the qualifications required under Articles 24 to 29 those whom they will invite to negotiate.

41 It follows that Article 22(3) of Directive 93/37 must be interpreted as meaning that, where a contract is to be awarded by negotiated procedure, the number of candidates invited to negotiate may not be lower than three, provided that a sufficient number of contractors have sought an invitation to take part in the procedure in question and they, among the candidates with the qualifications required under Articles 24 to 29 of that directive, meet the conditions of an economic and technical nature prescribed for the procedure in question.

42 Thus, where a contract is awarded by a negotiated procedure and the number of suitable candidates is below the lower limit prescribed for the procedure in question, a limit which cannot be less than three, the contracting authority may, nevertheless, continue with the procedure by inviting the suitable candidate or candidates to negotiate the terms of the contract.

43 As the Commission has correctly pointed out, if it were otherwise, the social need which the contracting authority has stated and defined and intended to meet by awarding the contract in question could not be satisfied, not because of a lack of suitable candidates, but on account of the fact that the number of suitable candidates was below that lower limit.

44 In the light of the foregoing, the answer to the third question is that Article 22(3) of Directive 93/37 must be interpreted as meaning that where a contract is awarded by a negotiated procedure and the number of suitable candidates is below the lower limit prescribed for the procedure in question, the contracting authority may, nevertheless, continue with the procedure by inviting the suitable candidate or candidates to negotiate the terms of that contract.

The fourth question

45 By its fourth question, the referring court asks whether the second subparagraph of Article 22(2) of Directive 93/37 is applicable to the negotiated procedure for the award of public works contracts.

46 In that regard, it should be noted that, as is apparent from the broad logic of Article 22 of Directive 93/37, the second subparagraph Article 22(2) of that provision refers only to contracts awarded by restricted procedure.

47 However, it should be observed, as is apparent from the 10th recital in the preamble to Directive 93/37, that the purpose of that directive is to develop effective competition in the field of public works contracts (see Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, paragraph 26; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 34; Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 89; and Case C-247/02 *Sintesi* [2004] ECR I-9215, paragraph 35).

48 Thus, in order to meet the objective of developing effective competition, Directive 93/37 seeks to organise the award of contracts in such a way that the contracting authority is able to compare the different tenders and to accept the most advantageous on the basis of objective criteria (*Fracasso and Leitschutz*, paragraph 31 and *Sintesi*, paragraph 37).

49 Accordingly, although the second subparagraph of Article 22(2) of Directive 93/37 provides that, where the contracting authorities award a contract by restricted procedure, the number of candidates invited to tender is in any event to be sufficient to ensure genuine competition, that provision merely refers specifically to one of the general objectives of that directive (see, to that effect, *Sinesti*, paragraph 36).

50 It follows that, even though Directive 93/37 does not contain a provision analogous to the second subparagraph of Article 22(2) in relation to negotiated procedures, a contracting authority which has recourse to such procedures, in the cases referred to in Article 7(2) of that directive, must none the less take care to ensure there is genuine competition.

51 In that regard, it should, first, be pointed out that, in those cases, recourse to the negotiated procedure requires the prior publication of a contract notice, intended to encourage applications. Therefore, as was stated in paragraph 14 of this judgment, that measure has been complied with in the case in the main proceedings.

52 Next, as regards the stage of negotiating for the contract, Article 22(3) of Directive 93/37 requires the contracting authority to invite a sufficient number of candidates to that stage. Whether the number is sufficient to ensure genuine competition must be assessed on the basis of the characteristics and the nature of the contract in question.

53 Lastly, if, in such a procedure, the number of suitable candidates is below the lower limit prescribed for the procedure in question – a limit which, in accordance with Directive 93/37, cannot be less than three – it must be accepted that, in so far as the conditions of an economic and technical nature for that procedure have been correctly prescribed and applied, the contracting authority has, nevertheless, ensured that there is genuine competition.

54 It follows from all of the foregoing that the answer to the fourth question is that Directive 93/37 must be interpreted as meaning that the obligation to ensure that there is genuine competition is satisfied where the contracting authority has recourse to the negotiated procedure under the conditions referred to in Article 7(2) of that directive.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts is not applicable to a decision taken by a contracting authority when awarding a public works contract before the period for transposition of that directive has expired.**

2. **Article 22(3) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by Directive 97/52/EC of the European Parliament and of the Council of 13 October 1997, must be interpreted as meaning that where a contract is awarded by a negotiated procedure and the number of suitable candidates is below the lower limit prescribed for the procedure in question, the contracting authority may, nevertheless, continue with the procedure by inviting the suitable candidate or candidates to negotiate the terms of that contract.**

3. **Council Directive 93/37, as amended by Directive 97/52, must be interpreted as meaning that the obligation to ensure that there is genuine competition is satisfied where the contracting authority has recourse to the negotiated procedure under the conditions referred to in Article 7(2) of that directive.**

[Signatures]

---

* Language of the case: Hungarian.